A TREATISE OF THE PLEAS OF THE CROWN,

OR,

A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS.

IN TWO BOOKS.

BY

WILLIAM HAWKINS,
SERJEANT AT LAW.

BOOK THE SECOND.

THE SIXTH EDITION.

In which the Text is carefully collated with the original Work; the marginal References corrected; new References from the modern Reporters added; a Variety of *Manuscript Cases* inserted; and the whole enlarged by an Incorporation of the several Statutes upon Subjects of Criminal Law, to the TWENTY-SEVENTH YEAR OF GEORGE THE THIRD. To which an Explanatory Preface is prefixed, and new and copious Indexes are subjoined.

BY

THOMAS LEACH, ESQ.
OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

LONDON:
PRINTED BY HIS MAJESTY'S LAW-PRINTERS.
PUBLISHED FOR THE EDITOR:
And sold by THOMAS WHIELDON, Bookseller, No. 43, Fleet-street.
Price One Pound Eight Shillings in Boards.
M,DCC,LXXXVII.

C+W
H393.8
.6
London

Rec. May 21, 1903.

Jno. Tracy 1813

TO THE RIGHT HONOURABLE

THOMAS LORD PARKER,

BARON OF MACCLESFIELD,

AND

LORD HIGH CHANCELLOR OF GREAT BRITAIN.

MY LORD,

THE Experience I have ſo often had of your Lordſhip's Goodneſs, cannot but encourage me to hope for the Continuance of it: And the Succeſs of my former Endeavours under the Protection of your Lordſhip's Name, is a ſufficient Aſſurance, That if I can be ſo happy as to have your Lordſhip's Approbation and Encouragement, I need not deſire any other.

NOR is my Application to your Lordſhip in Behalf of a Common Law Treatiſe, any way diſcouraged by your Lordſhip's Removal to the Station you at preſent adorn; for though the Publick Good, and his Majeſty's Service, have put you under a Neceſſity of leaving the Common Law Courts, yet nothing can ever make you ceaſe from being the moſt aſſured Friend and Patron, as well as the moſt exquiſite Maſter of the Common Law. And the Greateſt Lovers of it have the leſs Regret for the Loſs of your Lordſhip's Preſence among them, from the Honour the Law itſelf has received by your Lordſhip's Advancement, whereby the World has been effectually convinced, That nothing ſo much conduces to make a con-

ſummate Chancellor as the moſt perfect Skill and Experience in the Common Law.

It is with the utmoſt Pleaſure we obſerve your Lordſhip with ſo much Steadineſs adhere to thoſe ſtated Boundaries of Property, which our Anceſtors have always had in ſuch high Veneration, and which your Lordſhip never departs from, but in ſuch Caſes, wherein evident Equity, Common Senſe, and Natural Juſtice, undeniably point out an Exception.

It is to your Lordſhip we are obliged for the Removal of that vulgar Prejudice, That the Rules of Law and Equity could not poſſibly be reconciled: As your Lordſhip had formerly convinced us, That there is nothing in the Common Law rightly underſtood, that is any way repugnant to Equity; you have now given us the like Satisfaction, That there is no Rule of Equity ſkilfully applied, that in the leaſt contradicts the true Reaſon of the Common Law.

I am,

My Lord,

With the greateſt Reſpect,

Your Lordſhip's moſt dutiful,

and moſt obliged Servant,

WILLIAM HAWKINS.

AN

ANALYSIS

OF

THE SECOND BOOK

OF THE

PLEAS OF THE CROWN.

ALL courts of criminal juriſdiction are courts of record, ch. 1. ſect. 14.

And derive their authority from the crown, ch. 1. ſect. 1, &c.

The principal courts of this kind, are,

1. The court of the lord high ſteward, ch. 2.
2. The court of king's bench, ch. 3.
3. The court of the conſtable and marſhal, ch. 4.
4. The court of the juſtices of *oyer* and *terminer*, ch. 5.
5. The court of juſtices of gaol-delivery, ch. 6.
6. The court of the juſtices of aſſize and *niſi prius*, ch. 7.
7. The court of ſeſſions of juſtices of peace, ch. 8.
8. The court of the coroner, ch. 9.
9. The ſheriff's tourn, ch. 10.
10. The court leet, ch. 11.

The firſt thing to be done in order to the bringing a criminal to juſtice is to arreſt him.

Arreſts are either without proceſs from a court of record, or by virtue of ſuch proceſs.

And firſt, arreſts without ſuch proceſs, are either,

1. By private perſons, or,
2. By publick officers.

Arreſts of this kind by private perſons are either,

1. Such as are commanded and enjoined by law, ch. 12. ſect. 1 to 8.
2. Such as are permitted by law, ch. 12. ſect. 8 to 18.

3. Such as are awarded by law, ch. 12. ſect. 22, &c.

Arreſts of this kind by publick officers, are either,

1. By watchmen, c. 13. ſ. 1 to 7.
2. By conſtables, c. 13. ſ. 7 to 12.
3. By bailiffs of towns, c. 13. ſ. 12.
4. By juſtices of peace, which are either,
   1. By parol, c. 13. ſ. 14.
   2. By warrant, c. 13. ſ. 15. *to the end of the chapter.*

Perſons arreſted are either to be bailed, c. 15.

Or committed, c. 16.

Perſons may be criminal, in preventing the bringing of offenders to publick juſtice, ſeveral ways.

1. Before any arreſt made,
2. After an arreſt.

Perſons may be ſo guilty before any arreſt made,

1. By oppoſing an arreſt, c. 17. ſect. 1.
2. By ſuffering a criminal to eſcape, c. 17. ſ. 2. 4.
3. By flying from an arreſt, c. 17. ſ. 3. c. 49. ſ. 14, 15, 16.

Perſons may be ſo guilty after an an arreſt, either in reſpect of an arreſt of themſelves or of others.

Their offence in reſpect of an arreſt of themſelves, if without force, is called an eſcape, c. 17. ſ. 5.

If with force, is called a breach of priſon, c. 18.

Their offence in reſpect of the arreſt of others, is either,

1. Without force, or,
2. With force.

Such offences, without force, come under the notion of eſcapes, and are either,

1. By officers (c. 19.) or,
2. By private perſons, c. 20.

Such offences with force come under the notion of reſcous, c. 21.

Secondly, arreſts by proceſs from a court of record may be made by virtue of two kinds of proceſs,

1. Upon ſuch as is awarded by the diſcretion of the court, upon a bare ſuggeſtion, or the knowledge of the juſtices.
2. Upon ſuch as is awarded on an appeal, indictment, or information.

Proceſs of the firſt kind is generally called an attachment (ch. 22.), and lies either againſt,

1. The officers of the court, as,
   1. Sheriffs and bailiffs, ch. 22. ſect. 2 to 6.
   2. Attornies, ch. 22. ſect. 6 to 12.
   3. Other officers of the court, ch. 22. ſect. 12.
   4. Jurors, ch. 22. ſect. 14 to 25. or,
2. Againſt other, as,
   1. Inferior judges, ch. 22. ſect. 25 to 30.
   2. Counſellors, ch. 22. ſect. 30.
   3. Gaolers, ch. 22. ſect. 31.
   4. Any other perſons whatſoever, ch. 22. ſect. 33. *to the end of the chapter.*

Proceſs on an appeal, indictment, or information, ſuppoſes ſuch appeal, indictment, or information to be firſt exhibited.

An appeal is either,

1. By an innocent perſon, which may either be by writ or by bill, ch. 23.
2. By an offender confeſſing himſelf guilty, who is commonly called an approver, c. 24.

Indictments (ch. 25.) are of two kinds,

1. Such as are grounded on the common

common law, ch. 25. ſect. 55 to 99.
2. Such as are grounded on ſtatute, ch. 25. ſect. 99 to 118.

Informations are of two kinds,
1. Such as are merely the ſuit of the king. ch. 26. ſect. 1 to 17.
2. Such as are partly the ſuit of the king, and partly the ſuit of the party, ch. 26. ſect. 17. *to the end of the chapter.*

Proceſs on an appeal, indictment, or information, may be either conſidered,
1. In general, without any particular regard to proceſs of outlawry, ch. 27. ſect. 1 to 113.
2. In particular, with regard to ſuch proceſs only, ch. 27. ſ. 113. *to the end of the chapter.*

A criminal being brought into court is to be arraigned, or put upon his trial, the manner whereof may be conſidered,
1. As it relates to all criminals in general, ch. 28.
2. As it relates to principals and acceſſaries in particular, c. 29.

The party being arraigned, either,
1. Stands mute, (c. 30.) or,
2. Confeſſes, (c. 31.) or,
3. Pleads.

Pleas are either,
1. Dilatory, or,
2. In chief.

The dilatory are either,
1. Declinatory, or,
2. In abatement, c. 34.

The declinatory are either,
1. Of the privilege of ſanctuary, (c. 32.) or,
2. Of the benefit of clergy, c. 33.

Pleas in chief are either,
1. In bar, or,
2. The general iſſue, c. 38.

The principal pleas in bar are,
1. That *of autrefoits acquit*, c. 35.
2. That of *autrefoits attaint* or *convict*, c. 36.
3. That of pardon, c. 37.

The plea of not guilty is triable either,
1. By the country, or,
2. By the peers, (c. 44.) or,
3. By battle, c. 45.

In order for a trial by the country a jury muſt be returned,
1. From the proper county, c. 40.
2. By proper proceſs, c. 41.
3. Before a proper court, c. 42.

The jurors being returned into court may in many caſes be challenged.

Such challenges may be conſidered either,
1. Without any particular regard to aliens, or,
2. As they particularly relate to aliens, c. 43. ſ. 34. *to the end of the chapter.*

Thoſe of the firſt kind, are either,
1. Such as may be taken on the part of the king (c. 43. ſ. 2, 3.) or,
2. Such as may be taken on the part of the priſoner.

A challenge may be taken on the part of the priſoner, either,
1. Peremptory, (c. 43. ſ. 5 to 10.) or,
2. For cauſe, c. 43. ſ. 10 to 34.

The jury being ſworn, are to be guided by their evidence, c. 46.

Whereupon they muſt give ſome verdict, either general or ſpecial, c. 47.

Judgments in criminal caſes are of two kinds,

1. Such

1. Such as expreſsly ſentence the party to the puniſhment proper for his crime.
2. Such as give no ſuch expreſs ſentence.

Of judgments by ſuch expreſs ſentence there are two kinds,

1. Such as are fixed and ſtated, and always the ſame for the ſame ſpecies of crimes, c. 48. ſ. 2 to 14.
2. Such are diſcretionary and variable according to the different circumſtances of each caſe, c. 48. 14 to 21.

Of judgments which give no ſuch expreſs ſentence, there are alſo two kinds,

1. Outlawry, c. 48. ſ. 21, 22, 23.
2. Abjuration, c. 48. ſ. 24.

The moſt conſiderable conſequences of an attainder, &c. are,

1. The forfeiture of lands and goods, c. 49. ſ. 1 to 42.
2. The loſs of the wife's dower, c. 49. ſ. 42 to 47.
3. The corruption of blood, c. 49. ſ. 47. *to the end of the chapter.*

Forfeitures of lands and goods are either,

1. By the common law (c. 49. ſ. 1 to 18.) or,
2. By ſtatute, c. 49. ſ. 18 to 30.

Judgments may be avoided either,

1. Without writ of error, (c. 50. ſ. 10 to 17.) or,
2. By writ of error.

They may be avoided by writ of error, either,

1. For faults apparent in the record, (c. 50. ſ. 1.) or,
2. For matters *dehors* the record, (c. 50. ſ. 2 to 10.)

The party condemned is either to be,

1. Reprieved, (c. 51. ſ. 8, 9.) or,
2. Executed, c. 51. ſ. 1 to 8.

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289	—	409	37	—	411	41	338	—	474	ſ. 3	—	475	7
290	—	411	41	—	412	46	339	—	475	7	—	476	12
291	—	412	46	—	414	—	340	—	476	12	—	477	16
292	—	414	—	—	415	58	341	—	477	16	—	479	21
293	—	415	58	—	418	64	342	—	479	21	—	480	26
294	—	418	64	—	419	72	343	—	480	26	—	482	32
295	—	419	72	—	421	78	344	—	482	32	—	483	37
296	—	421	78	—	423	—	345	—	483	37	—	485	—
297	—	423	—	—	424	—	346	—	485	—	—	486	—
298	—	424	—	—	425	98	347	—	486	—	—	487	47
299	—	425	98	—	426	106	348	—	487	47	—	488	53
300	—	426	106	—	428	—	349	—	488	53	—	490	60
301	—	428	—	—	429	—	350	—	490	60	—	492	70
302	—	429	—	—	430	114	351	—	492	70	—	494	77
303	—	430	114	—	431	118	352	—	494	77	—	496	82
304	—	431	118	—	433	123	353	—	496	82	—	497	88
305	—	433	123	—	434	126	354	—	497	88	—	498	92
306	—	434	126	—	435	131	355	—	498	92	—	500	95
307	—	435	131	—	436	1	356	—	500	95	—	501	99
308	—	436	1	—	438	—	357	—	501	99	—	502	106
309	—	438	—	—	439	—	358	—	502	106	—	504	111
310	—	439	—	—	440	—	359	—	504	111	—	506	—
311	—	440	—	—	441	7	360	—	506	—	—	507	117
312	—	441	7	—	442	9	361	—	507	117	—	508	120
313	—	442	9	—	443	13	362	—	508	120	—	509	124
314	—	443	13	—	445	15	363	—	509	124	—	511	—
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397	—	560	61	— 561	66	446	—	633	15	— 634	23
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401	—	565	—	— 566	10	450	—	638	9	— 640	—
402	—	566	10	— 568	c. 40	451	—	640	—	— 641	20
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405	—	570	7	— 572	—	454	—	644	—	— 645	34
406	—	572	—	— 573	7	455	—	645	34	— 646	41
407	—	573	7	— 575	—	456	—	646	41	— 648	49
408	—	575	—	— 575	14	457	—	648	49	— 649	51
409	—	575	—	— 577	20	458	—	649	51	— 651	—
410	—	577	20	— 578	—	459	—	651	—	— 652	5
411	—	578	—	— 579	—	460	—	652	5	— 654	—
412	—	579	—	— 580	3	461	—	654	—	— 655	15
413	—	580	3	— 581	8	462	—	655	15	— 656	2
414	—	581	8	— 583	11	463	—	656	2	— 658	9
415	—	583	11	— 584	14	464	—	658	9	— 659	—

ERRATA ET ADDENDA.

Page 58, line 37, instead of "2 *Rich.* 3. *c.* 9." read "2 *Rich.* 3. *pl.* 9."

—— 69, last line of the note after "*Strange* 40" dele *the remainder of the note.*

—— 71, sect. 7, in margin, instead of "*S. P.* 49." read "*S. P. C.* 49."

—— 94, sect. 19 in margin, instead of "*Keilwood,*" read "*Keilway.*"

—— 102, note (3) after "*argument,*" read "vide the case determined, index tit. CONSTABLE *and Term Rep.* 679."

—— 142, sect. 9, line 3, instead of "*goods,*" read "*gaols*"

—— 152, line 6, instead of "*is repleviſable,*" read "*is not repleviſable*"

—— 157, line 11 & 12, instead of "*principles,*" read "*principals*"

—— 188, Sect. 22. line 19, after "*groundleſs,*" read "*vide* 14 *Geo.* 3. c. 20. *page* 628."

—— 203, sect. 17, instead of "*firſt point,*" read "*firſt particular*"

—— 235, sect. 15, line 3, instead of "*the former of,*" read "*the latter of*"

—— 246, sect. 44, line 26, instead of "*lords,*" read "*lord*"

—— 262, sect. 87, line 15. instead of "*aiſſieſſary,*" read "*acceſſary*"

—— 263, line 33, instead of "*and if,*" read "*as if*"

—— 278, line 18, instead of "7 *Hen.* 4. c. 27." read "7 *Hen.* 4. *pl.* 27."

—— 299, in margin dele, "*vide the caſe of, &c. &c.*"

—— 324, line 30, instead of, "*alleged,*" read "*alledged*"

—— 362, note 22, line 5, dele the *parentheſis*

—— 382, sect. 27, line 10, instead of "*wiſe of,* read "*wiſe out of*"

—— 393, after sect. 68, read "*thirdly*"

—— 413 line 32, place the parenthesis after "*officer)*"

—— 424, sect. 90, line 3, dele "*which*"

—— 432, sect. 120, line 2, instead of "*by,*" read "*be*"

—— 432, sect. 121, line 2, instead of "*by the which,*" read "*by which*"

—— 480, line 28, instead of "*an order,*" read "*in order*"

—— 559, sect. 54, line 5, instead of "*proceed,*" read "*proceeding*"

—— 620, line 4. read "*ſhould produce their indenture*"

—— 658, line 8, dele, "*and in the king's bench*"

A TREATISE OF THE PLEAS OF THE CROWN.

BOOK THE SECOND.

CHAPTER THE FIRST.

OF COURTS OF CRIMINAL JURISDICTION IN GENERAL.

HAVING in the first book endeavoured to shew the nature of criminal offences, I am now to shew, in what manner the offenders are to be brought to punishment.

And in order hereto I shall consider, First, The nature of the courts which have jurisdiction over such offences. Secondly, In what manner the offenders are to be proceeded against by such courts.

And first, for the better understanding of the nature of such courts, I shall premise some considerations concerning them in general, and then consider the nature of the principal of them in particular.

As to the nature of such courts in general, I shall consider, *First*, What is requisite to the constitution of their authority. *Secondly*, What is incidental to all such courts in general.

Sect. 1. As to the first point, I shall take it for granted, That the king, being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatsoever can have any such jurisdiction, unless it some way or other derive it from the crown. S. P. C. 54. 55. 1 Roll. Ab. 361.

Sect. 2. Yet it seems, that the king himself cannot sit in judgment upon any indictment, because he is one of the parties to the suit; and therefore where it is said in some of our ancient histories, that our kings have sometimes sate in person with the justices at the arraignment of great offenders, probably it ought not to be intended that they came as judges, but as spectators only, for the greater solemnity of the proceeding. Dalt. c. 1. S. P. C. 54. 4 Inst. 71. 2 R. 3. 11. Speed 521. 524. 1 R. Ab. 535. 12 Co. 64. Dyer 187.

(a) 4 Inſt. 70, 71. 103. 8 H. 4. 13. 2 R. 3. 11.

Sect. 3. And it is ſaid by (*a*) Sir Edward Coke, that the king has committed and diſtributed all his power of judicature to ſeveral courts of juſtice; and though it may be argued, with the higheſt probability, both from the nature of the thing, and the conſtant tenor of our (*b*) ancient records and hiſtories ſince the conqueſt, and alſo from the form of all proceſs in the king's bench and chancery, which is always made returnable before the (*c*) king himſelf, that in old time our kings in perſon often determined cauſes between party and party, proper for thoſe courts; yet at this day, by the long, conſtant, and uninterrupted uſage of many ages, our (*d*) kings ſeem to have delegated their whole judicial power to the judges of their ſeveral courts, which by the ſame immemorial uſage have gained a known and ſtated juriſdiction, regulated by certain and eſtabliſhed rules, which our kings themſelves cannot alter without an act of parliament.

(b) Madox 5 to 17. and 56 to 85. Dalt. 1.

(c) 28 Aſſ. 52.

(d) 4 Inſt 73. 1 Comm. 268.

6 H. 7. 4. B Pat. 53. 4 Inſt. 125, 127. 6 Co. 11. 2 Hale 105. Skin. 273.

Sect. 4. For it ſeems to be clearly agreed, that the king cannot give any addition of juriſdiction to an ancient court, but that all ſuch courts muſt be holden in ſuch manner, and proceed by ſuch rules, and in ſuch caſes only, as their known uſage has limited and preſcribed; and from hence it followeth, that, as the court of king's bench cannot be authoriſed to determine a mere real action between ſubject and ſubject, ſo neither can the court of common pleas to inquire of felony or treaſon.

4 Inſt. 87. 1 Sid. 338. The king cannot grant a mere ſpiritual juriſdiction, a to ordain, inſtitute, laws by biſhops,

Sect. 5. Nay, it is ſaid by ſome, that the king is ſo far reſtrained by the ancient forms in all caſes of this nature, that his grant of a judicial office for life, which has been accuſtomed to be granted only at will, is void.

&c. to a lay perſon, nor can he exerciſe them himſelf; but muſt adminiſter thoſe as he does the common law, by judges. Cro. Eliz. 259. 314.

42 Aſſ. 12, 13. 4 Inſt. 164. B. Commiſſ. 15. F. N. B. 110. B. Indict. 22. 38. 12 Co. 31.

Sect. 6. And the law is ſo jealous of any kind of innovation, in a matter ſo highly concerning the ſafety of the ſubject, as not to endure any the leaſt deviation from the old known ſtated forms, however immaterial it may ſeem; as will be more fully ſhewn, ch. 5. ſect. 2.

42 Aſſ. 5. B. Commiſſ. 3. 15, 16. 2 Inſt. 54. 478. 12 Co. 30, 31.

Sect. 7. And from the like reaſon it follows, that commiſſions to ſeize the goods and impriſon the bodies of all perſons, who ſhall be notoriouſly ſuſpected of felonies or treſpaſſes, without any indictment or other legal proceſs againſt them, are illegal and void.

(e) 4 Inſt. 163. 245. 28 E. 3. 14. (f) 2 Inſt. 4, 8.

Sect. 8. And it is ſaid, that the king cannot grant any new commiſſion whatſoever, that is not warranted by ancient precedents, however neceſſary it may ſeem, and conducive to the publick good; and therefore (*e*) commiſſions to aſſay weights and meaſures, being of a new invention, were condemned by parliament; and it is ſaid by (*f*) Sir Edward Coke, that the king could not authorize perſons to take care of rivers and the fiſhery therein,

therein, according to the method preſcribed by the ſtatute of Weſtm. 2. c. 47. before the making of that ſtatute.

Sect. 9. As all judges muſt derive their authority from the crown, by ſome commiſſion warranted by law, they muſt alſo exerciſe it in a legal manner, and hold their courts in their proper perſons; for they cannot act by (*a*) deputy, nor any way tranſfer their power to another, as the (*b*) judges of eccleſiaſtical courts may.

(*a*) 1 R. Abr. 382. 6 Modern 87. 9 E. 4. 30. 31. B. Judg. 11. (*b*) Latch 7.

Sect. 10. (*c*) But it ſeems, that regularly where there are divers judges of a court of record, the act of any one of them is effectual, eſpecially if their (*d*) commiſſion do not expreſsly require more.

(*c*) B. Cor. 201. 14 H. 4. 34. 35. 23 Aſſ. 7. 39 H. 6. 41. S. P. C. 53. Con. Daliſ. 24. Hob. 70. 2 R. Ab. 673. Crom. 121. (*d*) 27 Aſſ. 23. 2 R. Abr. 677.

Sect. 11. It hath been (*e*) reſolved, that, by the common law, all patents of the juſtices of either bench, barons of the exchequer, ſheriffs eſcheators, commiſſioners of oyer and terminer, gaol-delivery, and of the peace, are determined by the death of the king who made them. Alſo it ſeems (*f*) certain, that at the common law (before 1 Edw. 6. c. 7. ſet forth more at large, ch. 6.) if one had been convicted of any offence before any ſuch commiſſioners, and the king had died before judgment, no judgment at all could have been given, becauſe the king was dead for whom the judgment was to have been given, and becauſe the authority of the judges was determined. Alſo it is ſaid, that at (*g*) common law a perſon attainted in the time of a former king, could not have been executed without a new warrant. Yet it hath been adjudged, that the authority of (*h*) a coroner or verderor ceaſes not by the demiſe of the king in whoſe reign they were choſen; and that the office of a (*i*) ſheriff, in ſuch places where he is choſen by a corporation, having by its charter the inheritance of the office, does not determine by the demiſe of the king; from whence it ſeems alſo to follow, that no other corporation-officer, who by the charter is inveſted with any judicial authority, loſes it by ſuch demiſe.

(*e*) Daliſ. 15. Benl. 79. Dy. 165. 1 And. 44. 4 E. 4. 44. B. Judg. 32. 1 E. 5. 1. Crom. Jur. 126. (*f*) 7 Co. 31. (*g*) 1 Aſſ. 8. B. Cor. 66. (*h*) Daliſ. 15. Dy. 165. 2 Inſt. 175. 1 Lev. 120. B. Cor. 201. Commiſſ. 19. Crom. Jur. 126. Qu. 4 E. 4. 44. B. Officer, 25. denied in S. P. C. 49. (*i*) 7 Co. 30.

Sect. 12. And to prevent the diſorders and other inconveniences, which may happen upon the death of a king, from the want of perſons armed with competent authority to execute the laws, before the ſucceſſor can have time to appoint others, it was enacted by 7 & 8 Will. 3. c. 27. ſ. 21. "That no commiſſion, either civil or military, ſhall ceaſe, determine, or "be void, by reaſon of the death and demiſe of his ſaid majeſty, or of any of his heirs or ſucceſſors, kings or queens of "this realm; but that every ſuch commiſſion ſhall be, continue, "and remain in full force and virtue, for the ſpace of ſix "months next after any ſuch death or demiſe, unleſs in the "mean time ſuperſeded, determined, or made void by the

L. Raym. 747.

" next and immediate ſucceſſor, to whom the imperial crown " of this realm, according to the act of ſettlement in the ſaid " ſtatute before mentioned, is limited and appointed to go, " remain, or deſcend."

S. 13. And it is farther enacted by 1 Annæ, ſtat. 1. c. 8. par. 2. " That no patent or grant of any office or imployment, " either civil or military, hereafter to be made, ſhall ceaſe, " determine, or be void, by reaſon of the death or demiſe of " any king or queen of this realm; but that every ſuch patent " or grant ſhall be, continue, and remain in full force for ſix " months next after any ſuch death or demiſe, unleſs in the " mean time ſuperſeded, determined, or made void by the next " immediate ſucceſſor, to whom the crown is limited and ap- " pointed to go, remain, or deſcend."

The proceedings on an information in the nature of *quo warranto* are not abated by the demiſe of the crown, Stra. 782.: but the king's writ of error in a *quare impedit* abates by his death, Stra. 843.

And it is farther enacted, par. 5. " That no commiſſion of " aſſize, oyer and terminer, general gaol-delivery, or of aſſo- " ciation, writ of admittance, writ of *ſi non omnes*, writ of aſ- " ſiſtance, or commiſſion of the peace, ſhall be determined by " the death of any king or queen of this realm; but every ſuch " commiſſion and writ ſhall be and continue in full force for " ſix months next enſuing, notwithſtanding ſuch demiſe, un- " leſs ſuperſeded and determined by the next ſucceſſor: And " alſo no original writ, writ of *niſi prius* commiſſion, proceſs or " proceedings whatſoever, in, or iſſuing out of, any court of " equity, nor any proceſs or proceedings upon any office or " inquiſition, nor any writ of *certiorari*, or *habeas corpus*, in " any matter or cauſe, either criminal or civil, nor any writ of " attachment or proceſs for contempt, &c. ſhall be determined, " abated, or diſcontinued, by the demiſe of any king or queen " of this realm; but every ſuch writ, &c. ſhall remain in full " force, to be proceeded upon, as if ſuch king or queen had " lived."

Originally judges were appointed *durante bene placito*, 4 Inſt. 75.

† It is alſo enacted by 12 & 13 Will. 3. c. 2. (which limits the crown to the princeſs Sophia), " That after the ſaid " limitation ſhall take effect, in the manner mentioned in the " act, judges commiſſions ſhall be made *quamdiu ſi bene* " *geſſerint*, and their ſalaries aſcertained and eſtabliſhed; but " upon the addreſs of both houſes of parliament it may be " lawful to remove them."

This act was paſſed at the earneſt recommendation of the king himſelf from the throne, declaring that he conſidered the independence of the judges as eſſential to the impartial adminiſtration of juſtice; as one of the beſt ſecurities of the rights and liberties of his ſubjects; and as moſt conducive to the honour of the crown. Commons Journals, 3d March 1761.

† And for the purpoſe of rendering more effectual the proviſions of the above ſtatute, it is enacted by 1 Geo. 3.

c. 23. "That the commiſſions of judges for the time being "ſhall be, continue, and remain in full force, during their "good behaviour, notwithſtanding the demiſe of his majeſty, "or of any of his heirs and ſucceſſors.—Provided always, "that it may be lawful to remove any judge or judges upon "the addreſs of both houſes of parliament."

† It is alſo further enacted by the above ſtatute, par. 3. "That ſuch ſalaries as are ſettled upon judges for the time "being, or any of them, by act of parliament; and alſo ſuch "ſalaries as have been or ſhall be granted by his majeſty, his "heirs and ſucceſſors, to any judge or judges, ſhall, in all "time coming, be paid and payable to every ſuch judge and "judges for the time being, ſo long as the patents or com-"miſſions of them, or any of them reſpectively ſhall continue "and remain in force.—Alſo, that ſuch ſalaries of the judges "as are now, or ſhall be charged upon and paid out of the "duties and revenues granted for the uſes of the civil govern-"ment."

Vide 32 Geo. 2. c. 35. an augmentation to their ſalaries. Alſo 2 Geo. 3. c. 4. the 5 Geo. 3. c. 47. and 19 Geo. 3. c. 65.

As to the ſecond point, *viz.* What is incidental to all ſuch courts in general, I ſhall only take notice of the following particulars:

Sect. 14. Firſt, That all courts of this kind muſt be courts of (*a*) record; for a court which is not of record, cannot impoſe any fine on an offender, nor award a *capias* againſt him, nor even hold plea of a common treſpaſs *vi & armis*. From hence it clearly follows, That no proceedings of any court of criminal juriſdiction can be removed into a ſuperior, but by writ of error or *certiorari*; and that no averment can be taken againſt the truth of any thing recorded in any ſuch court (*b*); and that all courts of common law, that have power given them to fine and impriſon, are thereby made courts of record.

(*a*) 2 Inſt. 311. Farrerſ. 128. Reg. 111. F. N. B. 85. 16. 239. 1 R. Abr. 543. Co. Lit. 117. 2. Lev. 93. 1 Mod. 215. 3 Lev. 205. 8 Co. 38.
(*b*) Salk. 200.

Sect. 15. Secondly, That (*c*) all ſuch courts may injoin the people to keep ſilence under a pain, and impoſe reaſonable fines, not only on ſuch as ſhall be convicted before them of any crime on a formal proſecution, but alſo on all ſuch as ſhall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obſtinately refuſing to do their duty as officers of the court; and it is ſaid, That all ſuch courts, except the court-leet, may alſo impriſon all ſuch offenders: Alſo it ſeems (*d*), That even a court-leet is ſo far intruſted with the keeping of the peace within its own precinct, that the ſteward of it may by recognizance bind any perſon to the peace, who ſhall make an affray in his preſence, ſitting the court, or may commit him to ward, either for want of ſureties, or by way of puniſhment, without demanding any ſureties of him; in which caſe he may afterwards impoſe a

(*c*) 11 H. 6. 12. 1 R. Abr. 219. 8 Co. 38. 11 Co. 43. C. Eliz. 581. 1 Sid. 145. B. Leet, 12, 36.

(*d*) F. N. B. 82. Dalt. c. 1. Lamb. c. 3. 10 H. 6. 10. Crom. 7. 11 Co. 43. ſeems con.

fine according to his diſcretion; from whence it follows *à fortiori*, that other ſuperior courts of record have the like power.

1 H. 7. 26.
3 Inſt. 29.

Sect. 16. Thirdly, That no judge of any ſuch court is compellable to deliver his opinion before-hand, in relation to any queſtion which may after come judicially before him.

27 Aſſ. 23.
2 R. Ab. 77.
B. Indict. 17.
Cromp. 121, 122.
Salk. 201.

Sect. 17. That no ſuch judge is any way puniſhable for a mere error of judgment, as hath been more fully ſhewn in the firſt book, chap. 17. ſect. 6.

Lamb. 403.
Qu 2 K. b. 845.
1 Lev. 159.
1 Brown. 15.
Raym. 100.
B Priv. 35.
Crom. 180.
Gilb. Caſ. 308.

Sect. 18. It is queſtioned, whether all courts of record may not diſcharge any perſon 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 Stra. 987. 6 Mod. 66. 10 Mod. 333. 1 Bar. K. B. 251. Cooke's Bank. Laws, 291. 2 Black 1113. 1 Black 410.

CHAPTER THE SECOND.

OF THE COURT OF THE HIGH STEWARD OF ENGLAND.

13 H. 8. 11.
Prynne on the 4 Inſtitute 46.

AND now I am to conſider the nature of the principal courts of criminal juriſdiction in particular; and, Firſt, Of the court of the high ſteward of England. Secondly, The court of king's bench. Thirdly, The court of the conſtable and marſhal. Fourthly, The court of the juſtices of oyer and terminer. Fifthly, The court of the juſtices of gaol-delivery. Sixthly, The court of the juſtices of aſſize and *niſi prius*. Seventhly, The court of the ſeſſions of the juſtices of the peace. Eighthly, The court of the coroners. Ninthly, The ſheriff's tourn. Tenthly, The court leet.

4 Inſt. 58, 59.
Madox 33.
1 Comm. 269.
4 Comm. 259.
Barr. 234.
Kely. 56.
Crom. of Courts 84.
Fleta, l. 2, C. 2. 3.
2 Hale 7.
1 Hale 350.
Foſter 142.

The office of high ſteward of England, which anciently was hereditary, not having been granted to any one ſince the reign of king Henry the Fourth, but only *pro hac vice*, either for the trial of a peer on an indictment for a capital offence, or for the determination of the pretenſions of thoſe who claim to hold by grand ſerjeanty, to do certain honourable ſervices to the king at his coronation: it ſeems needleſs to make a particular inquiry concerning the authority of the court of this high officer, of which very little mention is made in our ancient records or law-books; and therefore I ſhall content myſelf with remarking,

marking, in this place, in general, that anciently the duty of this office conſiſted in ſuperviſing and regulating, next under the king, the adminiſtration of juſtice, and all other affairs of the realm, whether civil or military, and that no one under the degree of nobility is capable of ſo honourable a poſt; and for the particular manner of executing this office, in the trial of a peer, I ſhall refer the reader to the chapter concerning the trial of peers.

Lords Journ. 12th May 1679. Com. Journ. 15th May 1679. 3 Inſt. 28. 13 H. 8. 11. 4 Inſt. 59. S. P. C. 152. poſt 421.

THERE are two diſtinct and independant courts, in which a lord high ſteward is occaſionally appointed to preſide. Firſt, the court of the lord high ſteward. Secondly, the court of our lord the king in parliament. The firſt court is inſtituted, by commiſſion, for the trial of peers, indicted for treaſon, felony, or miſpriſion thereof during the receſs of parliament; in which the high ſteward ſits as ſole judge in matters of law; and the lords triors as judges in matters of fact. They cannot, therefore, interfere with him in regulating the modes of proceeding, nor ought he to intermix with them upon the deciſion of facts. Foſter 233. 4 Comm. 260.—The ſecond court is the houſe of peers acting in its judicial capacity, founded in immemorial uſage and the law and cuſtom of parliament: And all proceedings, whether upon a writ of error, impeachment, or indictment removed by *certiorari*, are in contemplation of law proceedings before the king. In the trial of a peer, indeed, for a capital offence, it hath been uſual to appoint a lord high ſteward during the trial, and until judgment is given, for the ſake of order, regularity, and dignity; but this appointment does not alter the nature and conſtitution of the court: And in this court every temporal peer hath a right to be preſent during every part of the proceeding, and to vote upon every queſtion both of law and fact; the deciſion of which is guided by the majority, and in which deciſion the lord high ſteward mixes merely as a peer, and in no other right. Foſter 141, 142, 143.

CHAPTER THE THIRD.

OF THE COURT OF KING's BENCH.

THE whole juriſdiction which is now diſtributed among the ſeveral courts of *Weſtminſter-Hall*, ſeems in the firſt reigns after the conqueſt, to have been lodged in one court, commonly called the King's Court, wherein juſtice is ſaid to have been adminiſtered ſometimes by the king himſelf in perſon, and ſometimes by the high juſticier, who was an officer of very great authority, and uſed in the king's abſence beyond ſea to govern the realm as vice-roy.

Ante 2. Mad. 19. 21. 135. 2 Hale. 6. 1 R. A. 94, 95. 2 Inſt. 24. Vide Introduction to Cromp. Pract. paſſim. 3 Comm. 41. 4 Comm. 262.

Sect. 2. Out of this court the courts of common pleas and exchequer ſeem to have been derived, ſometime before the making of the ſtatute of Magna Charta; the former of which courts properly determines pleas merely civil, and the latter thoſe relating to the revenue of the crown. And after the erection of theſe courts, the ſupreme court ſeems by degrees to have obtained the name of the court of king's bench, and hath always retained a ſupreme juriſdiction in all criminal matters, and alſo in certain perſonal cauſes, and is ſtill ſuppoſed to have always the king himſelf in perſon ſitting in it.

Madox 543. Co. Lit. 71. 2 Inſt. 21, 22, 23. Dyer 187. Cromp. C. 78. 12 Co. 64.

For the better understanding the nature of this court, I shall consider the following particulars:—First, In what manner it corrects all kinds of misdemeanors of all persons in general.—Secondly, How far it reforms inferior courts.—Thirdly, How far its presence suspends the power of all other courts.—Fourthly, What rules are to be observed in the form of its proceedings.

2 Hale c. 1. 13. 11 Co. 98. Ray. 103. 1 Roll. 225. 4 Inst. 71. 1 Sid. 211. 4 Comm. 262.

Sect. 3. As to the first point, it is certain, That this court is intrusted with the highest jurisdiction, not only over all capital offences, but also all other misdemeanors whatsoever of a publick nature, tending either to a breach of the peace, or to the oppression of the subject, or to the raising of faction, controversy, or debate, or to any manner of misgovernment; so that whatsoever crime is manifestly against the publick good, it comes within the conusance of this court, though it do not directly injure any particular person; neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty, or possessions, from any person whatsoever, without a proper remedy from this court, not only for satisfaction of the private damage, but also for the exemplary punishment of the offender.

2 Sid. 168. 3 Ruff. S. 133.

Sect. 4. Neither is it necessary in a prosecution of any such offence in this court, to shew a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances; for this court being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the publick, if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it.

So they may direct their warrant to all the constables of England. The king v. White, B. R. H. 37. Moor 666. 1 Sid. 145.

Sect. 5. And so high a trust doth the law repose in the justice and integrity of this court, as generally to leave it to the discretion of its judges to inflict such fine and imprisonment, and even infamous punishment on offenders, as the nature of the crime, considered in all its circumstances, shall require; neither doth it confine them to make use of their own prison, but leaves them at liberty to commit offenders to any prison in the kingdom, which they shall think most proper, and doth not suffer any other court to remove or bail any persons condemned to imprisonment by them.

Dalis. 25. Carth. 6. 2 Hale 3. 1 Mod. 35. 44 E. 3. 31. Cromp. Jur. 131.

Sect. 6. Also this court hath such a sovereign jurisdiction in criminal matters, that it may proceed as well on indictments found before other courts, and removed into this by *certiorari*, as on indictments or informations originally commenced in it, whether the courts before whom such indictments

ments were found be determined or ſuſpended, or ſtill *in eſſe*, and whether the proceedings be grounded on the common law, or on ſome ſtatute making a new law concerning an old offence, and appointing certain juſtices to execute it, as the ſtatutes of (*a*) forcible entries, and the (*b*) ſtatute of Philip and Mary, againſt perſons taking away females under the age of ſixteen years from their (*c*) guardians, &c. neither doth a ſtatute which appoints, That all crimes of a certain denomination ſhall be tried before certain judges, exclude the juriſdiction of this court without expreſs negative words; upon which ground it hath been reſolved, That (*d*) 33 Hen. 8. c. 12. which enacts, That all treaſons, &c. within the king's houſe, ſhall be determined before the lord ſteward of the king's houſe, &c. doth not reſtrain this court from proceeding againſt ſuch offences: but where a ſtatute creates a (*e*) new offence, which was not taken notice of by the common law, and erects a new juriſdiction for the puniſhment of it, and preſcribes a certain method of proceeding, it ſeems queſtionable, how far this court has an implied juriſdiction in ſuch a caſe.

(*a*) 9 Co. 118. B. 1. c. 64. S. 51.
(*b*) C. Car. 465. 2 Lev. 179. 2 Mod. 128, 129, 130.
(*c*) 3 Keb. 75. 94. 106. 273.
(*d*) 2 Inſt. 549. 2 Jones 53. 1 Mod. 45. Burr. 1042. 1 Vent. 66. Strange 302. 2 Hale 5. 9. 10 Rep. 73. 11 Rep. 64. 1 Rol. 92.
(*e*) 1 Sid. 296. 2 Hale 5. Cro. Jac. 643.

Sect. 7. But it is certain, That the law has ſo high a regard to this court, that it will not ſuffer a (*f*) record regularly removed into it from an inferior one, to be remanded (*g*) after the term in which it came in (except in ſome few (*h*) ſpecial caſes); yet if the juſtices perceive, that there is any practice in endeavouring to remove any ſuch record, or that the ſole intention of ſuch removals is the delay of juſtice, they may on their diſcretion refuſe to receive ſuch record, and may before it is filed remand it back again, for the expedition of juſtice; and upon this (*i*) ground, as I ſuppoſe, where one who had pleaded not guilty to an appeal below, and at his trial had challenged ſo many of his jury, that the inqueſt could not be taken for want of jurors, whereupon a new *diſtringas* was awarded, removed himſelf in the court of King's Bench, he was ordered to be remanded: alſo by the conſtruction of the ſtatutes, which impower the common law courts of Weſtminſter, to grant a (*k*) niſi prius for the trial of iſſues joined in thoſe courts, the juſtices of the King's Bench may grant ſuch trial, as well in caſes of treaſon and felony as in other common caſes; becauſe, for ſuch trial, not the record itſelf is ſent down, but only the tranſcript of it.

(*f*) 22 E. 3. 6. 2 Hale 3. 29 Aſſ. 43. 40 Aſſ. 29. 1 R. Ab. 534. 492. 4 Inſt. 73. S. P. C. 158.
(*g*) 1 Rol. 85.
(*h*) C. Car. 297. 1 Saund. 97, 99. 1 Lev. 223. 1 Sid. 329.
(*i*) 4 Inſt. 74, 75. Strange 440. 5 Com. Dig. 397. 16 E. 4, 5. B. Com. 161. 231.
(*k*) 4 Inſt. 74. Ray. 364.

Sect. 8. And it is recited by 6 Hen. 8. c. 6. "That divers felons and murderers, upon feigned and untrue ſurmiſes, had oftentimes removed as well their bodies as their indictments, by writ and otherwiſe, before the king in his bench, and could not by the order of the law be remitted and ſent down to the juſtices of gaol delivery, or of the peace, nor other juſtices, nor commiſſioners, to proceed upon them after the courſe of the common law:" And thereupon it is enacted,

Crom. Jur. 213. 2 Hale 3, 4. 41.

enacted, "That the juſtices of the King's Bench have full "authority by their diſcretions, to remand and ſend down, as "well the bodies of all felons and murderers, brought or re- "moved before the king in his bench, as their indictments, "into the counties where the ſame murders or felonies have "been committed and done; and to command all juſtices of "gaol-delivery, juſtices of peace, and all other juſtices and "commiſſioners, and every of them, to proceed and deter- "mine, upon all the aforeſaid bodies and indictments ſo re- "moved, after the courſe of the common law, in ſuch man- "ner as the ſame juſtices of gaol delivery, juſtices of peace, "and other commiſſioners or any of them, might or ſhould "have done, if the ſaid priſoners or indictments had never "been brought into the ſaid King's Bench."

Ray. 367.

Sect. 9. In the conſtruction of the ſtatute it ſeems to have been holden, That it ſhall not be extended by equity to high treaſon.

Sayer 26, 217. 243. 267. 1 Salk. 396. Burr. 556. 785. 1162. Loft 55.

Sect. 10. As to the ſecond point, *viz.* How far the court of King's Bench reforms inferior courts; There is no doubt, but that this court, being the higheſt court of common law, hath not only power to reverſe erroneous judgments given by inferior courts, but alſo to puniſh all inferior magiſtrates, and all officers of juſtice, for all wilful and corrupt abuſes of their authority, againſt the known, obvious, and common principles of natural juſtice, but not for mere miſtakes, which an honeſt-well meaning man may innocently fall into.

Sect. 11. As to the third point, *viz.* How far the preſence of this court ſuſpends the power of all other courts, it is certain, That this being the (*a*) ſupreme court of Oyer and Terminer, Gaol-delivery, and Eyre, doth ſo far ſuſpend the power of all other juſtices of this kind, in the county wherein it ſits, during the time of its ſitting in it (if ſuch juſtices have (*b*) notice of its ſitting there, and even without ſuch notice (*c*), as ſome ſay), that all proceedings commenced before any ſuch juſtices during ſuch time are void; yet it (*d*) ſeems, That ſuch juſtices may proceed upon indictments taken in a foreign county and removed before them, becauſe the court of King's Bench hath nothing to do with ſuch indictments, unleſs they be removed into it. Alſo there ſeems to be the ſame reaſon, that ſuch juſtices may proceed upon indictments taken before them, of offences in the ſame county before the term; for it is ſaid in (*e*) *Keilway*, That if an appeal be commenced before juſtices in Eyre, and afterwards another appeal be brought in the King's Bench, it will be a good plea that another appeal is depending; which ſhews that the King's Bench ought not without a *certiorari*, &c. to intermeddle in an appeal, whereof another court is legally poſſeſſed before; and the reaſon ſeems

(*a*) Sum. 156. 2 Hale C. 4. 9 Co. 118. 27 Aſſ. 1. 3 Inſt. 27. 4 Inſt. 73.
(*b*) 21 H. 7. 29. B. Commiſ. 10. Port 16.
(*c*) Inſt. 73.
(*d*) 4 Inſt. 73. Dy. 286.
(*e*) Keilw. 152.

to be the ſame as to indictments; and it is ſaid in the ſame book, That if the King's Bench and juſtices in Eyre are in one county, yet this ſhall not change the power of the juſtices in Eyre, but that if the king will make proceſs for any thing not commenced before the juſtices of Eyre, as to ſuch thing their power is ceaſed; by which it ſeems to be implied, that as to what was commenced before them, their power continues: however, it is certainly the ſafeſt way for any of the juſtices above mentioned proceeding on any ſuch indictment, to have a ſpecial commiſſion for that purpoſe, and itis moſt adviſable that ſuch commiſſion bear *teſte* in the term.

3 Inſt. 24. 4 Inſt. 73. Sum. 156, 157.

† But it is enacted by 25 Geo. 3. c. 18. "That "when any ſeſſion of oyer and terminer and gaol-de- "livery of *Newgate*, *in the county of Middleſex*, ſhall have "been begun to be holden before the eſſoin day of any term, "the ſame ſeſſion ſhall and may be continued to be holden, "and the buſineſs thereof finally concluded, notwithſtanding "the happening of ſuch eſſoin day of any term, or the ſitting "of the ſaid court of King's Bench at Weſtminſter, or elſe- "where in the ſaid county of Middleſex, and that all trials, "judgments, proceedings, acts, deeds, matters, and things "whatſoever, and all proceedings, acts, deeds, matters, and "things in purſuance of ſuch judgments had, made, and "done at ſuch ſeſſion, ſo continued to be holden after the "eſſoin day of any term, or the ſitting of the ſaid court of "King's Bench at Weſtminſter, or elſewhere in the ſaid "county of Middleſex, ſhall be good, valid, and effectual in "law, and deemed, reputed, and taken to be ſo, to all in- "tents and purpoſes whatſoever."

N. B. This is declared to be a publick act.

Sect. 12. As to the fourth point, What rules are to be obſerved in the form of the proceedings of this court, it ſeemeth, That all proceſs upon (*a*) writs of appeal, and alſo all proceſs upon (*b*) indictments removed hither by *certiorari* from a foreign county, ought to be made returnable *coram nobis ubicunque fuerimus*, but that all proceſs upon (*c*) bills of appeal againſt one *in cuſtodia Mareſchalli*, and perhaps alſo upon (*d*) indictments commenced in the King's Bench, ought to be returnable *coram nobis apud Weſtmonaſterium:* alſo it has been (*e*) reſolved, That where the court proceeds on an offence committed in the ſame county wherein it ſits, the proceſs may be made returnable immediately; but that where it proceeds on an offence removed by *certiorari* from another, there muſt be fifteen days between the *teſte* and return of every proceſs.

(*a*) Co. Ent. 575 58. 60.
(*b*) Co. Ent. 354, 355, 356. 358.
(*c*) Co. Ent. 52. 58. 60.
(*d*) Co. Ent. 352, 353. 361. Con. Co. En. 360. 363.
(*e*) 9 Co. 118. Co. Lit. 134. 1 Lev. 61. 1 Sid. 72. 2 R. Abr. 616. 4, 5. 2 Inſt. 550. 568.

THE JUSTICES of this court are the ſovereign judges of Gaol-delivery and of Oyer and Terminer, 9 Co. 118. and therefore, where proceedings are limited to juſtices of Oyer and Terminer, the court of King's Bench has an implied juriſdiction, 2 Hale 4. They are alſo conſervators of the peace, 4 Inſt. 73. throughout the whole realm, 2 Rol. Abr. 558. and ſupreme coroners of all England, 4 Co. 57.: and, therefore, where the ſheriff or coroners may receive appeals by bill, this court may, *a fortiori*, do the ſame, 4 Inſt. 73. 4 Co. 57. This court during the term, and any

any Judge thereof during vacation, may admit perſons committed for any crime, to bail according to their diſcretion. Skin. 683. Salk. 105. Strange 911. 1 Com. Digeſt. 497. be it treaſon, murder, or any other offence, 2 Inſt. 189. Latch. 12. Vaughan 157. Comb. 111. 298. 1 Com. Digeſt. 495. except perſons committed by either houſe of parliament during the ſeſſions. Wilſon 299. and perſons committed for contempts by any of the king's ſupreme courts of juſtice. 4 Comm. 300. Alſo where the body of an offender, attainted in the country, is removed by *habeas corpus*, and the record by *certiorari*, into this court, it may award execution, Cro. Con. 176. to be done by the marſhal, 2 Hale 5. or it may iſſue a mandate to the ſheriff to perform it as the marſhal's aſſiſtant, 1 Hale 464. And where perſons put in feigned bail, ſo as not to be reached by 21 Jac. 1. this court may order all the parties concerned to be ſet in the pillory, Strange 384. This court alſo has power to compel the production of examinations, papers, books, &c. and to do whatever may be neceſſary to the attainment of juſtice. Strange 384. 954. So alſo it may order one not a party to attend the maſter. Strange 477.

CHAPTER THE FOURTH.

OF THE COURT OF THE CONSTABLE AND MARSHAL.

2 Com. Digeſt 599.

FOR the better underſtanding the nature of this court, it may not be improper to premiſe ſome general conſiderations concerning the ancient juriſdiction of thoſe high officers before whom it is holden.

Dyer, 285. 4 Inſt. 127. Farreſley 125. Spel. Gloſſ. 146. Madox 27, 28, 29.

Sect. 1. As to the office of high conſtable of England, which anciently was hereditary, the ſame being eſteemed of too high authority to be ſafely intruſted with any ſubject, but only *pro hac vice*, ſince the reign of king Henry the Eighth, and there being very little to be found in our ancient records and hiſtories, concerning the particular power or authority of this high office, our moſt learned antiquaries ſeem to be able to give us little more than their own conjectures concerning this matter. However, there is no doubt, but that he was an officer of very great power both in war and peace; and indeed his very name imports no leſs; for the word conſtable ſignifying in general a commander or officer, he who was called conſtable of England, or the king's conſtable, or ſometimes by the way of eminency, the conſtable, without any other addition, cannot but be thought to have been a perſon of the higheſt command and authority; and the ſtatute of 13 Rich. 2. (which is at large ſet forth in the following part of this chapter), reſtraining his juriſdiction to things touching war, not determinable by the common law, in relation to which it requires him to proceed according to ancient uſage, clearly ſuppoſes him to have an ancient eſtabliſhed authority concerning theſe matters: And it ſeems to have been ſomewhat doubtful, before the making of the ſaid ſtatute, whether the conſtable and marſhal had not a general juriſdiction over all contracts whatſoever made beyond ſea.

48 E. 3. 3. 13 H. 4. 4, 5.

Sect. 2.

Sect. 2. Neither do there ſeem to be any greater footſteps in antiquity, of the original inſtitution of the office of the lord marſhal, or of his power or authority; for anciently there were ſeveral officers of the king's houſehold who were called marſhals, as the marſhals of his horſes, of his birds (*a*), and of his meaſures, who had certain ſalaries allotted them, for the management or well ordering of the things committed to their charge. And in the ancient records relating to thoſe officers, there ſeems no more to be meant by having the marſhalſy of a thing, than to have the overſight, or charge, or ordering of it: alſo in our old records, there are ſome officers taken notice of by the name of marſhals, who are mentioned only in general to have been ſervants of the king's houſehold, without any farther account of the nature of their office or duty in particular. However, we find that in the 22d year of king Edw. 3. the parliament granted fifteenths on divers conditions, one of which was, That there ſhall be no mareſchalſy in England, except the mareſchalſy of the king, and of the guardian of England, when the king ſhall be out of England. And it ſeems clear, that there was one marſhal ſuperior to the reſt, who was ſometimes called the maſter-marſhal, at other time the king's marſhal, the marſhal of England, or the earl marſhal, being an officer of very great authority both in war and peace, whoſe principal office in time of war (*b*), was to regulate the incampments of the army, and to aſſign to the troops their reſpective poſts in the day of battle; and in time of peace (*c*) to provide for the ſecurity of the king's perſon in his palace, to diſtribute the lodgings there, and to preſerve peace and order in the king's houſehold, and to be aſſiſtant to the conſtable in determining cauſes, and alſo to execute the (*d*) orders both of the court of the conſtable, wherein he himſelf ſate as judge, and of the court of the high ſteward (*e*), to which he ſeems to have been only an officer.

(*a*) Madox 30.

Madox 30, 31.

Madox 20. 30. 1 R. Ab. 527.

Madox 31, 32, 33.

(*b*) Fleta L. 2 c. 4. Co. Lit. 74.

(*c*) Madox 33.

(*d*) 4 Inſt. 123. Caſ. in Parl. 60.

(*e*) Fleta L. 2. C. 3.

Sect. 3. But whatever might be the original inſtitution of theſe officers, or the nature of their authority, it is certain their juriſdiction is at preſent declared, limited and reſtrained by certain acts of parliament, before the making whereof, we have ſcarce any thing memorable on record concerning this matter.

Madox 29.

Sect. 4. And firſt it is enacted by 8 Rich. 2. c. 5. as followeth: "Becauſe divers pleas concerning the common law, and which by the common law ought to be examined and diſcuſſed, are of late drawn before the conſtable and marſhal of England, to the great damage and diſquietneſs of the people:" It is agreed and ordained, "That all pleas and "ſuits touching the common law, and which ought to be "examined and diſcuſſed at the common law, ſhall not hereafter

"be

" be drawn or holden by any means before the aforeſaid con-
" ſtable and marſhal, but that the court of the ſame conſtable
" and marſhal ſhall have that which belongeth to the ſame
" court, and that the common law ſhall be executed and uſed,
" and have that which to it belongeth, and the ſame ſhall be
" executed and uſed, as it was accuſtomed to be uſed in the
" time of king Edward."

Sect. 5. And it is farther declared by 13 Rich. 2. c. 2. in the following words: " Becauſe that the commons do make a grievous complaint, that the court of the conſtable and marſhal hath incroached to him and daily doth incroach contracts, covenants, treſpaſſes, debts, and detinues, and many other actions pleadable at the common law in great prejudice of the king, and of his courts, and to the great grievance and oppreſſion of the people." Our lord the king, willing to ordain a remedy againſt the prejudices and grievances aforeſaid, hath declared in this parliament, by the advice and aſſent of the lords ſpiritual and temporal, the power and juriſdiction of the ſaid conſtable, in the form that followeth: " To the conſtable it per-
" taineth to have cognizance of contracts touching deeds of
" arms and of war out of the realm, and alſo of things that
" touch war within the realm which cannot be determined nor
" diſcuſſed by the common law, with other uſages and cuſtoms
" to the ſame matters pertaining, which other conſtables here-
" tofore have duly and reaſonably uſed in their time. Joining
" to the ſame, that every plaintiff ſhall declare plainly his
" matter in his petition, before that any man be ſent for to
" anſwer thereunto. And if any will complain, that any plea
" be commenced before the conſtable and marſhal, that might
" be tried by the common law of the land, the ſame plaintiff
" ſhall have a privy ſeal of the king without difficulty, directed
" to the ſaid conſtable and marſhal, to ſurceaſe in that plea,
" until it be diſcuſſed by the king's council, if that matter
" ought of right to pertain to that court, or otherwiſe to be
" tried by the common law of the realm of England, and alſo
" that they ſurceaſe in the mean time."

Co. Lit. 391. 4 Inſt. 193.

Sect. 6. And it is farther enacted by 1 Hen. 4. c. 14. as followeth, " For many great inconveniencies and miſchiefs, that often have happened, by many appeals made within the realm of England before this time;" it is ordained and eſtabliſhed from henceforth, " That all the appeals to be made
" of things done within the realm, ſhall be tried and de-
" termined by the good laws of the realm, made and uſed in
" the time of the king's noble progenitors; and that all the
" appeals to be made of things done out of the realm, ſhall be
" tried and determined before the conſtable and marſhal of
" England for the time being: and moreover, it is accorded
" and

" and aſſented, that no appeal be from henceforth made " or in any wiſe purſued in parliament in time to come."

For the better underſtanding of the conſtruction of theſe ſtatutes, and the nature of this court, I ſhall examine the following particulars:—Firſt, How far the ſaid court hath conuſance of points of honour in general.—Secondly, Whether it can puniſh private perſons for marſhalling funerals.—Thirdly, Whether it can be holden by a lord marſhal alone without a conſtable.—Fourthly, Whether its power as to appeals of treaſon be ſuperſeded by 26 or 35 Hen. 8. or 5 & 6 Edw. 6. c. 11. or 1 & 2 Ph. and Mary c. 16.—Fifthly, By what law, and in what manner its proceeds.—Sixthly, Whether it may be prohibited if it exceeds its juriſdiction.—Seventhly, Whether it can be holden by commiſſion.

Sect. 7. As to the firſt point it is obſervable, That the above mentioned ſtatute of 13 Rich. 2. c. 2. declares the juriſdiction of this court, in relation to things done within the realm in theſe words, " To the conſtable pertaineth conuſ- 1 Hale 500.
" ance, &c. of things that touch war within the realm, " which cannot be determined nor diſcuſſed by the common " law :"—From whence it ſeems to follow, that this court has nothing to do with a mere civil matter, no way relating to war; and therefore the proceedings of the court of the lord marſhal, in the time of king Charles the Firſt, for bare ſcandalous words reflecting on the (*a*) honour or gentility of families, (*a*) 7 Mod. 128. Salk. 55. 2 Ruſhworth 1055, 1056.
ſeem no way to be maintained. Yet it ſeems to be taken for granted in ſome (*b*) books, That diſputes concerning precedency, and points of honour, and ſatisfaction therein, are (*b*) Hob. 121. 1 Rol. 87. 2 Lev. 134. Shower 353. 1 Sid. 353. 1 Lev. 230.
proper for this court. Neither do I find, That the proceedings therein againſt perſons for falſely aſſuming the name and arms of honourable families, were cenſured or diſallowed by the (*c*) learned members of the committee of the Houſe of Commons in the year 1639, who were appointed to inquire into the abuſes of this court. And it ſeems to be (*d*) admitted in the argument of *Oldis*'s caſe, That all matters of this nature are proper for this court, yet it ſeems to be a large interpretation to make theſe things relate to war, ſo as to come within the declaration above mentioned; and the rule laid down in (*e*) *Rolle*'s Reports, that the marſhal has power given him where the common law gives no remedy, ſeems no way maintainable from the ſtatute; for it doth not ſay in general, That to the conſtable pertaineth conuſance of things which cannot be determined by the common law, but of things of war, &c. which cannot be thereby determined (*f*); neither is it a concluſive argument, that a matter which is remedileſs by the common law, muſt have a remedy from ſome other law; yet inaſmuch as by the preamble of the ſaid ſtatute, its chief

(*c*) 2 Ruſhworth 1055, 1056.
(*d*) Parl. Caſ. 64, 65.
(*e*) 1 Rol. 87.
(*f*) 13 H. 4. 6. 5.

intention

intention appears to be to prevent incroachments on the common law; and ſuch proceedings in matters whereof the common law hath no conuſance, cannot be ſaid any way to incroach upon it. And inaſmuch as the ſaid ſtatute is wholly declarative, and hath no negative words; and the conſtant practice, which is the beſt interpreter of laws, and the general opinion of lawyers, ſeem to countenance ſuch proceedings, I ſhall not take upon me to determine how far they may be warrantable.

1 Lev. 230. 1 Sid. 353. Shower 353. 7 Mod. 128.

Sect. 8. As to the ſecond point, *viz.* Whether this court can puniſh private perſons for marſhalling funerals. Though it ſhould be granted, That the marſhalling of publick funerals belongs to the heralds, who are attendants on this court, and that no other perſons without their licence can lawfully intermeddle therein; yet it does by no means follow, That the marſhal has power to puniſh thoſe who ſhall be guilty of any ſuch incroachment; but the proper remedy ſeems to be by action on the caſe at common law, and not by a ſuit in this court, which by the above mentioned ſtatute of 8 and 13 Rich. 2. has cognizance only of ſuch matters which cannot be determined nor diſcuſſed by the common law. And this ſeems to be the principal reaſon of Dr. *Oldis*'s Caſe, wherein a ſuit in the marſhal's court againſt one *Donmille*, for taking upon him without licence to paint arms and eſcutcheons, and cauſing them to be fixed to herſes, and providing and lending palls for funerals, and painting arms for one who had no right to their uſe at the funeral, and marſhalling ſeveral funerals, &c. was prohibited by the court of Exchequer, upon great deliberation, with the advice of the reſt of the judges, and the judgment was afterwards confirmed by the Houſe of Lords.

Caſes in Parl. 58, &c.

In Hill v. Ann. Lord Holt ſaid, "The miniſters of this court would have the words of 13 Rich. "2. to mean coats of arms and eſcutcheons, matters which they very well underſtand, and if "they find people aſſume arms to whom arms do not belong, or at leaſt, that thoſe they aſſume do "not belong to them, their way is to poſt them up, but by what law or juſtice they do this I can-"not tell." 7 Mod. 128.

(*a*) Caſes in Parl. 65, 66. 8. Far. 127, 128. (*b*) 2 Ruſhw. 1056. (*c*) S. P. C. 65. Crom. Jur. 82. 2 Inſt. 51. 4 Inſt. 123. Co. Lit. 261. 391. (*d*) 13 H. 4. 46. 37 H. 3. 5. 48 E. 3. 3. 37 H. 6. 20, 21. (*e*) 30 H. 6. 6. 13 H. 4. 5.

Sect. 9. As to the third point, *viz.* Whether this court can be holden by the lord marſhal alone without the conſtable. It was ſtrongly inſiſted in the (*a*) arguments made uſe of in Dr. *Oldis*'s Caſe, That the lord marſhal cannot hold this court without the conſtable; and this was alſo the opinion of the (*b*) above mentioned learned committee of the Houſe of Commons in the year 1639. And it is certain, That all our ancient (*c*) law-books and (*d*) reports which ſpeak of this court, ſpeak of it either as the court of the conſtable and marſhal, or of the conſtable (*e*) only; and it is obſervable, that the above mentioned ſtatute of 13 Rich. 2. which in the preamble ſpeaks of this court, as the court of the conſtable and marſhal, in the body of

of the act mentions the conſtable only. And it is farther remarkable, That wherever the conſtable is mentioned together with the marſhal, as judge of this court, he is always put before him; which ſeems to intimate, that he is looked upon as the principal judge of it: And it is agreed by (*a*) all, That the marſhal cannot determine an appeal of death, or treaſon, without a conſtable; but on the other ſide it may be argued, That the reaſon why an appeal of a capital matter neceſſarily requires a conſtable as well as marſhal, is, becauſe 1 Hen. 4. which orders how ſuch an appeal ſhall be brought, is expreſs, That it ſhall be tried and determined before the conſtable and marſhal of England for the time being; whereas the other ſtatutes only provide againſt the incroachments of this court, and do not mention in what manner, or before whom it ſhall be holden; but they ſeem to refer ſuch queſtions to ancient uſage; ſo that if (*b*) before theſe ſtatutes the court was uſually holden before the conſtable and marſhal jointly and ſeverally, (*c*) according to the common uſage of other courts, which generally may be holden before one judge in the abſence of the reſt, it ſeems a reaſonable conſtruction of the ſaid ſtatutes to allow this court ſtill to be ſo holden; neither is it probable, That the lord marſhal, upon the extinguiſhment of the hereditary office of the conſtable, ſhould from time to time in the (*d*) reigns of king Henry the eighth, queen Elizabeth, and king James the firſt, hold this court by himſelf without any conſtable, and alſo often be aſſiſted therein by the judges of the common law, unleſs it were then well known, that ſuch his proceeding was warranted by the ancient and eſtabliſhed uſage of his court; and it is very extraordinary, That our judges and lawyers ſhould (*e*) generally take it as a thing granted, that the marſhal is at this day the proper judge of points of honour, &c. if it were imagined that he has no power to act without the concurrence of a conſtable.

(*a*) 1 Inſt. 74. Ruſhw. 107. 112, &c. Caſes in Parl. 61. 1 Lev. 230. Hutton 3.

(*b*) Caſes in Parl. 60. 61.

(*c*) See Ch. 1. S. 10.

(*d*) Caſes in Parl. 60, 61. Far. 126. 4 Inſt. 126. 4 Comm. 264.

(*e*) Hob. 121. 1 Roll 87. 2 Lev. 134. Shower 354. 1 Sid. 353. 1 Lev. 230.

Sect. 10. As to the fourth point, *viz.* whether the power of this court as to appeals of treaſon, be ſuperſeded by the ſtatutes of 26 Hen. 8. c. 13. or 35 Hen. 8. c. 2. or 5 & 6 Edw. 6. c. 11. or 1 & 2 Ph. and Mary, c. 10. it is obſervable that it is enacted by the ſaid ſtatutes of Hen. 8. and Edw. 6. "That all manner of treaſons, &c. done out of this realm ſhall from thenceforth be inquired, heard, and determined before the juſtices of the King's Bench, or before commiſſioners, &c. in like manner to all intent and purpoſes, as if they had been done in the ſame ſhire wherein they ſhall be inquired of, &c." And it is enacted by the ſaid ſtatute of 1 & 2 Ph. and Mary c. 10. "That from thenceforth all trials for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common law." Yet it hath been adjudged,

2 Hale 163.

Caſes in Parl. 62. Ruſhw. 107. 4 Inſt. 124.

adjudged, That none of theſe ſtatutes take away the juriſdiction of this court in relation to ſuch treaſon: For the ſaid ſtatutes of Hen. 8. and Edw. 6. being wholly in the affirmative, and it being their chief intention to ſupply a defect in the common law, which had provided no method for the trial of ſuch offences by jury, they ſhall not without expreſs words be conſtrued to take away the authority of an ancient court, confirmed by parliament; and therefore the above mentioned expreſſion, That all ſuch treaſons ſhall be tried by the king's bench, &c. ſhall be taken to purport no more than that the king's bench, &c. ſhall have authority to try them; and as to the 1 & 2 Ph. and Mary, the plain import thereof ſeems to be, to reſtore the ancient manner of trial by the courſe of the common law to all treaſons within its juriſdiction, which had been much altered by ſome ſtatutes in the former reigns; and this is fully ſatisfied by aboliſhing all innovations in the proceedings at common law, and has no relation to caſes no way within its conuſance.

Ruſhw. 107.
Dyer 131.
3 Inſt. 24.
4 Inſt. 124.

Sect. 11. As to the fifth point, *viz.* By what law and in what manner this court proceeds, there is no doubt but that it ought to follow its own cuſtoms and uſages ſo far as they go, and in caſes omitted the rules of the (*a*) civil law: And becauſe this is not a court of common law, a (*b*) condemnation in it for a capital offence cauſes neither forfeiture of lands nor corruption of blood; neither can an error in its proceedings be remedied by writ of error, but only by appeal to the king: And yet the judges of the common law take notice of the juriſdiction of this court, and give credit to a certificate of its judges, for the trial of an (*c*) iſſue concerning its proceedings; (*d*) for the civil law is as much the law of the land, in ſuch caſes wherein it has been always uſed, as the common law is in others.

(*a*) 4 Inſt. 125. 2 Inſt. 51. 1 Inſt. 261. 37 H. 6. 3. 20.
(*b*) 4 Inſt. 125. Ruſhw. 107. 113, &c. Caſes in Parl. 62. 2 Inſt. 51.
(*c*) 4 Inſt. 125. 341. Caſes in Parl. 62.
(*d*) 30 H. 6. 6. 37 H. 6. 3. 20. b. 21.

Sect. 12. It is queſtioned, Whether the king hath any remedy in this court againſt an offender, by way of indictment or information by the attorney general.

Hutton 3.

Sect. 13. As to the ſixth point, *viz.* Whether this court may be prohibited, if it exceeds its juriſdiction, it is expreſsly reſolved in *Oldis*'s caſe, That the ſaid court being holden before the lord marſhal only, may be prohibited by the courts of common law, if it exceed its juriſdiction, and it is ſtrongly inſiſted on in the argument of that caſe, That the court of the conſtable and marſhal may alſo be prohibited; but there having been no court holden before a conſtable and marſhal for theſe many years, and there ſeeming to be ſmall likelihood of its being revived, I ſhall refer the reader for the farther examination

mination of this matter to the learned Sir *Bartholomew Shower's* report of the ſaid caſe. Caſes in Parl. 61, 66.

In Hill. 1 Ann. Holt doubted of the poſſible exiſtence of the court of honour; and after a ſearch of precedents, granted a prohibition to a libel brought forwards, in ſuch pretended juriſdiction. Salk. 553.

Sect. 14. As to the ſeventh point, *viz.* Whether the ſaid court can be holden by commiſſion; it ſeems to be the better opinion of the court in *Parker's* caſe, That during the lunacy of an earl marſhal, it may well be holden before commiſſioners deputed to exerciſe his office; and it ſeems hard to ſay, That ſuch commiſſions, founded on the plain neceſſity of the caſe, and intended to prevent a failure of juſtice, as to caſes of which no other court hath conuſance, are againſt the purview of the petition of right, made in the third year of the reign of king Charles the firſt; which, complaining that commiſſions had been granted for the trial of certain capital offences and other outrages, by the martial law, under pretence whereof divers of the king's ſubjects had been put to death, prays that from thenceforth no commiſſions of like nature might iſſue forth to be executed as aforeſaid. 1 Lev. 230. 1 Sid. 353.

CHAPTER THE FIFTH.

OF THE COURT OF THE JUSTICES OF OYER AND TERMINER.

FOR better underſtanding of the nature of the courts of the juſtices of *Oyer* and *Terminer* and gaol-delivery, I ſhall premiſe ſome conſiderations concerning them in general, and then conſider the nature of each of them in particular. 4 Comm. 266.

Sect. 1. But in the firſt place, it may not be improper to remark, That the prerogative authorizing thoſe or any other juſtices, is inſeparably united to the crown, not only by the common law, but alſo by ſtatute; to which purpoſe it is enacted by 27 Hen. 8. c. 24. "That no perſon or perſons, of "what eſtate, degree or condition ſoever they be, ſhall have "any power or authority to make any juſtices of eyre, juſti-"ces of aſſize, juſtices of peace, or juſtices of gaol-delivery: "But that all ſuch officers and miniſters ſhall be made by "letters patent under the king's great ſeal, in the name "and by the authority of the king's highneſs in all ſhires, "counties palatine, Wales, &c. or any other his dominions, "&c. any grants, uſages, allowance, or act of parliament to "contrary notwithſtanding." Lamb. B. 1. 5. Co. Lit. 114. 1 Lev. 219. Bac. El. of Law 15. 16.

As to what belongs to juſtices of oyer and terminer, and gaol-delivery in general, I ſhall examine—Firſt, By what kind

of inſtruments they muſt be conſtituted.—Secondly, How their authority may be ſuſpended, revived, or determined.—Thirdly, How far the preciſe letter of their commiſſions muſt be obſerved by ſuch juſtices.——Fourthly, What form is to be obſerved in the adjournment of ſuch commiſſions.——Fifthly, How far the power given by them may be extended by other commiſſions to other juſtices, or committed to fewer than were appointed by the former.——Sixthly, Whether ſuch juſtices can ſit in one county to try offences in another.——Seventhly, Where their records are to be kept after they are determined.——Eighthly, Whether the ſame juſtices at the ſame time may execute both commiſſions.

Sect. 2. As to the firſt point, *viz.* By what kind of inſtrument ſuch juſtices muſt be conſtituted. It ſeems to be laid down as a general rule in ſome of the old books, That though a juſtice may be diſcharged by writ under the great ſeal, yet that he cannot be made a juſtice by ſuch writ, but only by (*a*) commiſſion. And it ſeems to be holden, both by (*b*) Sir *Edward Coke* and Sir (*c*) *Matthew Hale*, If any ſuch juſtices have their authority by writ, though made in the ſame form and words that a legal commiſſion ought to have, yet their proceedings are void; and yet it ſeems, that nothing more is meant by theſe expreſſions, if ſtrictly examined, than that all ſuch juſtices muſt derive their authority from ſuch inſtruments as are of a known, ſtated, and allowed form, warranted by ancient precedents; and it is only a diſpute of words whether ſuch inſtruments are to be called writs or commiſſions; for if you take the import of the word writ from (*d*) *Finch*'s definition of it, who ſays, That it is a Latin letter of the king's, from his higher courts of record, in parchment, ſealed with his ſeal, and *teſted* by him, it ſeemeth that the moſt approved forms of commiſſions of oyer and terminer, &c. may well enough come under the general notion of writs, which by the laſt mentioned (*e*) author are divided into writs original and commiſſional: And accordingly we find, That commiſſions of oyer and terminer, aſſociation, and *ſi non omnes*, granted upon ſpecial occaſions, are called writs both both by the (*f*) regiſter, and alſo by (*g*) *Fitzherbert*, who yet ſeems not to approve of this general notion of the word writ, and ſays, That theſe commiſſions ſhould not properly be called writs. Alſo it is ſaid by Sir *Edward Coke* in his comment upon the ſtatute of Weſtminſter the ſecond, Ch. 32. which mentions the writ of oyer and terminer, that commiſſions were anciently granted by writ, by which he ſeems to imply, That they are otherwiſe granted at this day; but he doth not tell us the diſtinction between a writ and commiſſion; neither can I find that the modern precedents differ from the old ones; but on the contrary, that it hath always been agreed, That it is the ſafeſt way to follow the old ones: But I muſt confeſs, that I cannot find

(*a*) L. quinto Ed. 4. 13. 27. 42 Aſſ. 12. 13. B. Aſſ 384, Commiſſi. 16, 18. Indict. 22. 38, 39. Finch 247.

(*b*) 4 Inſt. 164.

(*c*) Summary 161. 1 Hale 23.

(*d*) Finch 237. Theobal's Digeſt of Writs 1, 2.

(*e*) Finch 12. 318. Theob. 2.

(*f*) Regi. 123. 124.

(*g*) F. N. B. 110, 111. Crom. Jur. 131.

find a certain inſtance from any book of authority, wherein general commiſſions of oyer and terminer are called writs. However, as to the reſolutions of the judges in 42 Aſſ. pl. 12, 13. which are but briefly and obſcurely reported, and yet ſeem to be the chief foundation of what is ſaid in the later books relating to this matter; the authority thereof ſeems to amount to no more than theſe two following points:—Firſt, That juſtices appointed by commiſſion to hear and determine certain offences, cannot receive an additional power by writ directing them to inquire of other offences; and this ſeems to be the ſenſe of (*a*) *Staunford* and (*b*) *Fitzherbert* in relation to this matter.—(*c*) Secondly, That writs impowering perſons to inquire of offences, without authorizing them alſo to determine them, are illegal, except in ſuch caſes wherein they are allowed by ancient uſage, as were (*d*) writs of this kind to ſheriffs before the ſtatute of 28 Edw. 3. c. 9. And therefore where it is generally ſaid in ſome (*e*) books, That commiſſions have been directed to certain perſons to inquire of certain offences, in order to have them afterwards tried before other juſtices, it ſeems that it ought to be underſtood, That ſuch commiſſions were in the common form of commiſſions of oyer and terminer, though they be ſpoken of only as commiſſions of inquiry. As to the reſolution in the *Long* (*f*) *Quinto* of Edward the fourth, which is the other principal authority concerning this matter, the import thereof ſeems to be no more than this, That a perſon cannot legally be aſſociated to juſtices of aſſize by a writ directed to ſuch juſtices, reciting a commiſſion of aſſociation to ſuch perſon, and commanding the juſtices to receive him, unleſs there be alſo produced a commiſſion of aſſociation directed to ſuch perſon; for that the king cannot make a juſtice by ſuch writ directed to others; by which it ſeems to be implied, That by a proper writ he may do it. And it is certain, That the commiſſion of aſſociation directed to the party himſelf, is called a writ both by the (*g*) regiſter, (*h*) *Fitzherbert*, and (*i*) *Finch*, and alſo by (*k*) Sir *Edward Coke*, as well as the writ of admittance directed to the other juſtices. However, it ſeems clearly to be agreed by all theſe books, That the beſt rule of judging of the validity of any ſuch commiſſions is their conformity to known and ancient precedents; and this ſeems to be the beſt reaſon of the reſolution in 1 *Anderſon* 296. wherein it is adjudged, That a commiſſion to a corporation, appointing ſome of its principal members to be juſtices of gaol-delivery, together with thoſe whom the king ſhould appoint from time to time, was void: For ſuch an authority depending on the precarious appointment of other juſtices, is not agreeable to the known forms of ſuch commiſſions; but the other reaſon given in that book, for ſuch newly appointed juſtices not joining with the former, becauſe their authority commences at ſeveral times, ſeems not concluſive; for the authority of juſtices, appointed by writ of aſſociation,

Vide infra, ſect. 34.

(*a*) S. P. C. 94.
(*b*) Indict. 7. B. Commiſſ. 16, 18.
Indict. 22. 38, 39.
12 Co. 31.
(*c*) 12 Co. 31.
(*d*) Reg. 121. S. P. C. 84.
(*e*) 1 And. 106. Vide Plow. 390.
(*f*) Fol. 111, 112. 29. 137, 138.
(*g*) Regi. 124.
(*h*) F. N. B. 111.
(*i*) Finch 318.
(*k*) 4 Inſt. 107.
Popham 16.

association, is of a subsequent commencement from that of the justices in the first commission; and yet it is certain, That such may act jointly together, as will more fully appear in the following chapter.

2 Hale 24, 25.

Sect. 3. As to the second point, viz. How the authority of such justices may be suspended, revived, or determined, there is no doubt but that their power is wholly suspended by the court of king's bench sitting in the same county for which they are commissioned, during the time of such sitting, especially if they have notice thereof, as hath been more fully shewn, chapter 3. section 10.; and it seems that their jurisdiction is revived of course, when the said court no longer sits there, without any writ of *procedendo*, &c. Also it is certain, that their (*a*) authority may be suspended by a writ of *supersedeas*, which is grantable on proof that their commission was unduly granted; in which case their power may be restored by a writ of *procedendo*, without any new commission. But a commission once determined, cannot be revived by any writ of *procedendo*, nor the justices authorized a-new without another commission.

(*a*) Reg. 124, 125. 22 Ass. 21. 4 Inst. 163. Sum. 162. Strange 832. 865.

4 Inst. 163.

Sect. 4. Such commissions may be determined expresly or impliedly. Expresly, by an absolute repeal or countermand from the king. Impliedly, several ways.

Sect. 5. First, by the demise of the king by whom they were granted. But this mischief is in a great measure obviated by late statutes, as hath been more fully shewn, chapter the first, sections 11, 12, 13.

B. Commiss. 4. 22.

Sect. 6. Secondly, according to some opinions, by the justice's acceptance of any new name of dignity, as that of duke, knight, or serjeant, &c. But this is remedied by 1 Edw. 6. c. 7. by which it is enacted, "That if any person being in any "of the king's commissions whatsoever, shall fortune to be "made or created duke, archbishop, marques, earl, viscount, "baron, bishop, knight, justice of the one bench or of the "other, or serjeant at law, or sheriff, yet that notwithstanding he shall remain commissioner," &c. But it hath been questioned, whether the dignity of a baronet, which has been created since that statute, be within the equity of it?

Cro. Car. 104. Lit. Rep. 81.

Crom. Jur. 122. b. Summary 161. 4 Inst. 165. B. Commiss. 12. Dalis. 24, 25. Dyer 305 4 Inst. 165. 1 Leon. 270. 10 Ed. 4. 7.

Sect. 7. Thirdly, by holding a session without adjourning it, if the commission have no time limited for its continuance; as where it is appointed *pro hac vice* only; but if it be granted for a certain time, or *quamdiu nobis placuerit*, it does not necessarily require any adjournment; and therefore, if the court holden by virtue of such commission, break up without any adjournment, or upon a void one, as being made without the consent of the majority of the commissioners, yet it may be holden again on a new summons.

Sect. 8. Fourthly, by granting a new commiſſion to other perſons of the ſame nature with the former, though but for part of the diſtrict for which the former was granted, as ſome ſay: And whether (*a*) ſuch new commiſſion be for a certain time, or *pro hac vice* only; yet the former commiſſions ſhall remain (*b*) in force, ſo far as they are conſiſtent with the latter; and therefore it ſeems certain, that a commiſſion of the peace is not determined, as to its authority relating to the peace, by a new commiſſion to hear and determine felonies. But it hath been (*c*) holden, that it is determined as to its authority relating to felonies; but this ſeems juſtly queſtionable, not only as being contrary to common practice, but alſo becauſe juſtices of peace, as ſuch, ſeem to have authority by 34 Edw. 3. to hear and determine felonies, without any ſpecial clauſe in their commiſſion for that purpoſe, as will more fully be ſhewn, chapter the eighth. But it ſeems certain, that a commiſſion of (*d*) gaol-delivery ſhall not be determined by a new commiſſion of oyer and terminer, becauſe they are of different natures. (*e*) Alſo it ſeems to be clear, not only from 2 & 3 Ph. and Mary, c. 18. ſet forth more at large, ſection twelfth, but alſo in caſes not within the ſtatute, that a commiſſion of peace for a certain town determines not the authority of the corporation, having a grant from the king, that the mayor and his ſucceſſors ſhall be juſtices of the peace within its limits, becauſe ſuch a grant is irrevocable. (*f*) Alſo it ſeems certain, that no new commiſſion doth determine an old one, unleſs the former commiſſioners have notice of it.

(*a*) Brooke Commiſſion pl. 7.
(*b*) Ibid. 8. 24.
(*c*) Ibid. 8.
(*d*) Ibid. 24.
(*e*) Ibid. 5
(*f*) Summary 162. 1 Hale 499. 2 Hale 25. 4 Inſt. 165. 34 Aſſ. 8. B. Commiſſ. 6, 14.

Sect. 9. Such notice may be given expreſsly or implied. Expreſsly, by (*g*) ſhewing the new commiſſion to the former commiſſioners, which certainly determines the power of all thoſe, to whom it is ſhewn. Impliedly, two manner of ways.

(*g*) Summary 162. 4 Inſt. 165. Keilw. 116. Crom. Jur. 125.

Sect. 10. Firſt, by (*h*) holding a ſeſſion by force of the new commiſſion, which ſeemeth to be agreed to be a matter ſo notorious, that the firſt juſtices ſhall be preſumed to have notice of it.

(*h*) 34 Aſſ 8. B. Commiſſ. 14. Moor 186. Summary 162. 2 Hale 25. Dyer 355.

Sect. 11. Secondly, according to the general opinion, by proclaiming the new commiſſion in the county.

Summary 162. 4 Inſt. 165. B. Commiſſ. 6. Keilw. 116.

Sect. 12. As the authority of the juſtices appointed by any former commiſſion, is determined by a grant of a new one in the manner above mentioned, ſo likewiſe were all proceedings before ſuch juſtices diſcontinued at the common law. To remedy which inconvenience it was enacted by 1 Edw. 6. c. 7. ſ. 6. "That no manner of proceſs or ſuit made, ſued, or had "before any juſtices of aſſize, gaol-delivery, oyer and termi-"ner, juſtices of the peace, or other of the king's commiſ-"ſioners, ſhall not in any wiſe be diſcontinued by the making "and publiſhing of any new commiſſion or aſſociation, or by

1 Sid. 348. 2 Keb. 292. B. Cor. 178.

" altering the names of the juſtices of aſſize, gaol-delivery, " oyer and terminer, juſtices of peace, or other the king's " commiſſioners, but that the new juſtices of aſſize, gaol-deli- " very, and of the peace, and other commiſſioners, may pro- " ceed in every behalf, as if the old commiſſions, juſtices, and " commiſſioners, had ſtill remained and continued not al- " tered."

Sect. 13. And it is farther enacted by 2 & 3 Ph. and Mary, c. 18. " That all and ſingular commiſſions granted to any " city or town-corporate, not being a county in itſelf, for the " keeping of their peace and delivery of the priſoners remain- " ing in the gaols of any ſuch city or town-corporate, ſhall " ſtand, remain, and be good and available and effectual in " the law, to all intents, conſtructions and purpoſes; the " granting of any like commiſſion of peace or gaol-delivery, " to any commiſſioner or commiſſioners for the conſervation of " the peace, or delivery of the priſoners remaining in the gaol " of any ſhire, lathe, rape, riding, or wapentake within the " realm of England, bearing date after the ſaid commiſſion " or commiſſions granted as is aforeſaid, to any ſuch city " or town-corporate, not being, as aforeſaid, a county in it- " ſelf, to the contrary notwithſtanding."

Sect. 14. As to the third point, viz. How far the preciſe letter of ſuch commiſſions muſt be obſerved by the juſtices, it is ſaid to be agreed, That if a commiſſion of oyer and terminer, &c. be awarded to certain perſons to inquire at ſuch a place, they can neither open their commiſſion at another, nor adjourn it thither, nor give judgment there; and that if they do, all their proceedings ſhall be eſteemed as *coram non judice*: Yet it is agreed, that juſtices appointed by commiſſion *pro hac vice*, may adjourn their commiſſion from one day to another, though there be no words in their commiſſion to ſuch purpoſe; for nothing can be more reaſonable, than to intend that a general commiſſion, authorizing perſons to do a thing, does implicitly allow them convenient time for the doing of it.

12 Aſſ. 21. Crom, Jur. 126. L. quinto E. 4. 133. Daliſ. 25. 3 Inſt. 31. 2 Hale 24. Summary 160. B. Commiſſ. 18. Kelynge 57.

Sect. 15. As to the fourth point, *viz.* What form is to be obſerved in the adjournment of ſuch commiſſions, having already, in the foregoing part of this chapter, in the 6th and 13th ſections, incidentally treated of the principal queſtions relating to this matter, I ſhall only take notice in this place, that it ſeems moſt proper (*a*) to enter all ſuch adjournments in the preſent tenſe; yet it is ſaid, that the entry of them in the preter tenſe, is made good by the multitude of precedents: (*b*) However, it is ſaid, that this court will never intend that there was an adjournment, if no entry at all were made of it.

(*a*) Raym. 115.

(*b*) 1 Sid. 148. 2 Keb, 284, 292.

Sect. 16. As to the fifth point, *viz.* How far the power given by ſuch commiſſions may be extended by new ones to other

2d Hale 23.

other juſtices, or committed by fewer than were appointed by the former; it is certain, that new commiſſioners of this kind may be added to the former by a writ or commiſſion of aſſociation, which ſetting forth the purport of the former commiſſion, declares the king's pleaſure to aſſociate to the perſons, appointed by the firſt, thoſe to whom ſuch new writ or commiſſion is directed, provided that ſuch new juſtices attend at the times and places appointed by former; and it is uſual to direct another writ to the former juſtices, commanding them to admit ſuch new juſtices as their aſſociates, with the proviſo above mentioned; and the writ to the perſons ſo aſſociated is always patent, and that to the other juſtices to admit them is cloſe. But it hath been (*a*) reſolved, that the firſt juſtices are not bound by ſuch writ to admit the perſons named in it as their aſſociates, unleſs they produce ſuch patent of aſſociation as is above mentioned directed to themſelves, as hath been more fully ſhewn in the firſt ſection of this chapter. And it hath been (*b*) queſtioned, whether a ſpecial commiſſion of aſſociation, relating only to a particular cauſe, can aſſociate the perſons named in it to juſtices appointed by a general commiſſion? Alſo it hath been holden, That the king can grant but one patent of aſſociation to one commiſſion.

Reg. 124. F. N. B. 111. Finch 318, 319. Sum. 159. 162. 4 Inſt. 165.

(*a*) L. quinto E. 4. 137.

(*b*) L. quinto E. 4. 111, 112, 130, 131. F. Aſſize, 17. 32 H. 6. 10.

Sect. 17. If after juſtices have ſat by virtue of a commiſſion, and taken divers indictments, and awarded proceſs thereon, they ſhall all, or ſome of them, die, the king may grant a new commiſſion to thoſe who are living only, or to others, commanding them to continue the proceedings begun, and to proceed upon ſuch proceſs, and to hear and determine all the offences in the former commiſſion: And thereupon the king ſhall ſend a writ unto the executors of the juſtices who are dead, to ſend the rolls, records, and proceſſes touching the premiſſes, before the new commiſſioners, *&c.*

Reg. 128. F. N. B. 111, 113, 114.

Sect. 18. After a writ of aſſociation, it is uſual to make out a writ of *ſi non omnes*, directed both to the firſt juſtices, and alſo to thoſe who are ſo aſſociated to them, which reciting the purport of the two former commiſſions, commands the juſtices, that if all of them cannot cannot conveniently be preſent, ſuch a number of them may proceed, *&c.*

Reg. 124. F. N. B. 111. 2 Hale 23.

Sect. 19. As to the ſixth point, *viz.* Whether ſuch juſtices may ſit in one county to try offences in another? It ſeems agreed, that regularly all offences are to be inquired of, heard, and determined in the county wherein they were committed, and that the king cannot authorize the taking of them in another. Yet it was adjudged in the caſe of the city of Glouceſter, that if the king grant to a city the privilege of being a county of itſelf, diſtinct from the county within which it lies, with a ſalvo or reſervation, that the juſtices of oyer and terminer, *&c.*

2 Hale 21, 22. 3 Inſt. 27. Sum. 162, 163. Dyer 286. Pop. 16, 17. 1 And. 291, 292. Douglas 793, 796.

for

for the county at large, may ſtill ſit in ſuch city, ſuch reſervation makes the city ſtill remain part of the county for ſuch purpoſe, and conſequently that an indictment found within ſuch city, of an offence in the county at large, is good (†). Alſo it is certain, That, by a ſpecial cuſtom, indictments of offences within a county may be taken in a place out of it; as they are in fact taken both for Middleſex and London at the Seſſions-hall at Newgate, which ſtands in London; for it ſhall be intended, that, at the original diviſion of London from Middleſex, there was a ſpecial proviſion made for this purpoſe. Alſo it is certain, That the king may grant a ſpecial commiſſion of oyer and terminer, to ſit in one county for hearing and determining offences, whereof indictments have been found in another: But it is agreed, that the trial muſt be by the jurors of the proper county.

(†) Rex and Gough, Trin. 23 Geo. 3. Dougl. 760. Raym. 193. Vaugh. 140. Wood 619.

Cro. Eliz. 137. poſt. 22. 220. Plow. 390.

2 Hale 31. 36. 14 H. 7. 15.

Sect. 20. As to the ſeventh point, *viz.* Where the records of ſuch juſtices are to be kept after they are determined, it is enacted by 9 Edw. 3. c. 5. "That juſtices of aſſize, gaol-de-"livery, and of oyer and terminer, ſhall ſend all their records "and proceſſes determined and put in execution, to the ex-"chequer at Michaelmas, every year once, to be delivered "there; and the treaſurer and chamberlains, which for the "time ſhall be, having the ſight of the commiſſions of ſuch "juſtices, ſhall receive the ſame records and proceſſes of the "ſaid juſtices under their ſeals, and keep them in the trea-"ſury, as the manner is; ſo that the juſtices always do firſt "take out the eſtreats of the ſaid records and proceſſes againſt "them, to ſend to the exchequer as they were wont before."

9 H. 7. 9. B. Commiſſ. 17, 24. Crom. Jur. 126, b. 2 Hale 34, 166. Summary 160. F. Cor. 47. 9 H. 7. 9.

Sect. 21. As to the eighth point, *viz.* Whether the ſame juſtices at the ſame time may execute both the commiſſion of oyer and terminer, and alſo that of gaol-delivery? It ſeems certain at this day, that the ſame perſons being authorized by both theſe commiſſions, may proceed by virtue of the one in thoſe caſes, wherein they have no juriſdiction by the other, and execute both at the ſame time, and make up their records accordingly. But this doth not ſeem to have been clearly agreed in former times.

AND now I am to conſider the nature of each of the above mentioned commiſſions in particular; and firſt of that of oyer and terminer, concerning which I ſhall endeavour to ſhew, Firſt, Its ſeveral kinds. Secondly, To what caſes the juriſdiction given by it doth extend. Thirdly, To whom, and on what occaſions it is grantable.

As to the firſt point, theſe commiſſions are of two kinds: Firſt, General. Secondly, Special.

Sect

Sect. 22. At this day the common form of ſuch a general commiſſion is, to authorize the perſons to whom it is directed, or three or four of them, of which number either ſuch or ſuch particular perſons among them are ſpecially appointed to be, to inquire by the oaths of lawful men, and by other means, of all treaſons, felonies, and miſdemeanors, being ſpecially mentioned, and of all others, in ſuch and ſuch counties, and to hear and determine the ſame at certain days and places to be appointed by them, *&c.* For which purpoſe the king acquaints them, that he hath ſent a writ to the ſheriffs of ſuch counties, commanding them to return a jury before them, at ſuch days and places as ſhall be notified by them, in order to make inquiries of ſuch offences, *&c.*

4 Inſt. 162. 163. Crom. Jur. 131. Flow. 384. 2 Inſt. 419. 2 Hale 22, 23. Reg. 123.

Sect. 23. It is obſervable, That the above mentioned commiſſion makes no mention of the ſuit of the party; but it ſeems to have been anciently the moſt common form of ſuch commiſſion to direct the juſtices to hear and determine offences, as well at the ſuit of the party as of the king.

34. Aſſ. 8. 42 Aſſ. 5. 2 Inſt. 419.

Of ſpecial commiſſions of oyer and terminer, there are many precedents in our ancient law books; as,

2 Hale 10 to 22.

Sect. 24. Firſt, (*a*) For the inquiring and determining of ſome particular enormous violence done to the party at whoſe complaint the commiſſion is ſued.

(*a*) Reg. 123. F. N. B. 110.

Sect. 25. Secondly, (*b*) Or for inquiring and determining of treſpaſſes done to the poſſeſſions of a biſhoprick while the temporalties were in the king's hands.

(*b*) Reg. 125. 127. F. N. B. 112, 113.

Sect. 26. Thirdly, (*c*) Or for inquiring and determining of injuries offered to merchants, *&c.* under pretence that their ſhips were wrecked.

(*c*) Reg. 126. F. N. B. 112.

Sect. 27. Fourthly, Or for inquiring and determining of oppreſſions of under-ſheriffs and bailiffs and other officers; after which the king may ſend a writ to the high ſheriff, commanding him, as far as in him lies, to remove ſuch perſons from their offices till ſuch inquiries be made.

Reg. 126. F. N. B. 112.

Sect. 28. Fifthly, Or for inquiring into the want of reparations of ſea-walls, ditches, gutters, ſewers, bridges, &c.

Reg. 127, 128. 4 Burn 196. F. N B. 113. 1 Bac. Ab. 654.

Sect. 29. Sixthly, For hearing and determining the right and title of certain perſons claiming an office, &c. Yet we find in *Dyer*, That the defendant, ſued before ſuch commiſſioners, demurred to the juriſdiction of the court; and it ſeems not to be clearly ſettled there whether ſuch commiſſion be good.

Crom. Jur. 132. Dyer 175.

Sect. 30. It is obſervable, That ſome of theſe ſpecial commiſſions are mentioned to be granted at the complaint of the particular perſons ſuppoſed to be aggrieved; others at the complaint

2 Inſt. 419. Reg. 123. 125. 127.

plaint of divers perſons in general without naming them, and others without any complaint at all.

Vide the appendix to 4 Comm. ſ. 1. for the form of the commiſſions now uſed —N.B. All acts done by commiſſioners muſt be ſigned during their ſitting. Strange 568.

Sect. 31. Alſo there are precedents of other commiſſions of like nature, granted on particular occaſions; but ſuch ſpecial commiſſions having been of late much diſuſed, I ſhall refer the reader for a more exact knowledge of them to the Regiſter, and *Fitzherbert's Natura Brevium.*

B. Commiſſ. 24. 4 Inſt. 164. Summary 161. 12 Co. 32. 2 Hale 21. 27. Skin. 32.

Sect. 32. As to the ſecond point, *viz.* To what caſes the juriſdiction given by the commiſſion of oyer and terminer doth extend; it is generally ſaid, That the juſtices have no power from it to proceed againſt any perſons, but thoſe who are indicted before themſelves, becauſe the words of it are, That they ſhall inquire, hear and determine; by which it ſeems to be implied, That they muſt inquire of an offence before they proceed to hear and determine it: But this reaſoning depending wholly on the wording of general commiſſions, which are made in ſuch form, doth by no means prove that a ſpecial commiſſion of oyer and terminer, reciting an indictment of a particular perſon, and authorizing the juſtices to ſend for and proceed upon it to try the offender, is not good; and accordingly we find, That the attainder of *Dudley*, afterwards earl of *Leiceſter*, by virtue of ſuch a commiſſion, was not objected againſt on this account, in the arguments concerning it, reported in *Plowden's Commentaries.*

Crom. Jur. 131, 132. Plow. 385, 386, &c.

(*a*) Dy. 236. Crom. Jur. 382. 4 Inſt. 164.

Sect. 33. It ſeems to be (*a*) agreed, That where a ſtatute prohibits a thing, and doth not appoint in what court it ſhall be puniſhed, the offender may be indicted before juſtices of oyer and terminer, becauſe the king hath a prerogative of ſuing in what court he will. But it hath been (*b*) adjudged, That if ſuch ſtatute appoint that the offence ſhall be determined in any of the king's courts of record, it can be proceeded againſt only in one of the courts of Weſtminſter-hall; becauſe thoſe being the higheſt courts of record, ſhall be intended to be only ſpoken of *ſecundum excellentiam*; and if the act ſhould be taken literally to intend any court of record whatſoever, the ſheriff's turn, court-leet, and pie-powders, and all other inferior courts of record, would be within the purview of it: and it is farther reaſonable to conſtrue the ſtatute to extend to the ſaid courts of Weſtminſter only, becauſe the king's attorney always attends there, whoſe office it is, if the defendant plead a ſpecial plea, to make a replication; yet both Sir *Edward Coke* and Sir *Matthew Hale* ſeem to be of opinion, That on a ſtatute ſo worded, the proſecution may be in any court of oyer and terminer. And indeed ſeeing the above mentioned limitation of ſuch ſuits to courts of record, is no more than the law would have implied, if it had not been expreſſed: and it is agreed, That if it had not been expreſſed, the ſuit might

(*b*) Dy. 236. 6 Co. 19. 30. C. Jac. 538. Cro. El. 737. C. Car. 146. Salk. 178.

4 Inſt. 164, 165. Summary 161. 2 Hale 29, 30. contra.

might be in any court of oyer and terminer, it may be reaſonably argued, that it may be brought in any ſuch court notwithſtanding ſuch limitation, according to the common maxim, *quod expreſſio eorum quæ tacitè inſunt nihil operatur*; eſpecially conſidering that the court holden before juſtices of oyer, &c. is a court of record of a very high nature, and much regarded by the law. And as to the objection, that the conſtruction contended for, would extend ſuch ſuits to all inferior courts of record, it may be anſwered, that it would only extend them to ſuch courts of a general juriſdiction, wherein ſuits of like nature may properly be brought, and not to courts of a limited authority, inſtituted for a ſpecial purpoſes, and confined either to offences at the common law, as the court-leet and ſheriff's turn are, or to contracts of a ſpecial nature, as the court of pie-powders is: As to the objection, That it is moſt reaſonable to conſtrue the ſtatute, to intend only ſuch courts wherein the king's attorney attends, the ſame may be ſaid in relation to proſecutions on ſtatutes which mention no court at all wherein they ſhall be brought; and yet it ſeems to be certain, That ſuch proſecutions may be brought in any court of oyer and terminer: Neither do I find any reaſon aſſigned, why the king's prerogative, of chooſing in what court he will commence a ſuit, ſhould be reſtrained without expreſs words in this caſe, where courts are mentioned in general, more than in the others where they are not mentioned at all. Beſides, it ought to be conſidered, That if ſuch proſecutions are to be confined to the courts of Weſtminſter, no offence againſt any ſuch ſtatute in any county, but that wherein the king's bench ſits, could be indicted at all; for it is certain, that no offence can be inquired of out of the county wherein it was committed: Alſo ſince 21 Jac. 1. c. 4. ſet forth more at large in the chapter concerning Informations, which reſtrains all proſecutions whatſoever on penal ſtatutes to their proper counties (as the conſtruction of the ſaid ſtatute is now ſettled), if ſuits on ſuch ſtatutes could be brought only in Weſtminſter-hall, no offences out of Middleſex could be proſecuted at all.

F. Eſſoin 173.

Dyo 236.

Sect. 34. As to the third point, *viz.* To what perſons, and on what occaſions, commiſſions of oyer and terminer are grantable, it is enacted by the ſtatute of Weſtminſter 2. c. 29. "That a writ of treſpaſs *(ad audiendum & terminandum)* "from henceforth ſhall not be granted before any juſtices, "except juſtices of either bench, and juſtices in eyre, unleſs "it be for an heinous treſpaſs, where it is neceſſary to provide "ſpeedy remedy, and our lord the king of his ſpecial grace "hath thought it good to be granted."

Sect. 35. And it is farther enacted by 2 Edw. 3. c. 2. "That oyers and terminers ſhall not be granted but before "juſtices

" juſtices of the one bench or the other, or the juſtices er-
" rants, and that for great hurt or horrible treſpaſſes,
" and of the king's ſpecial grace, after the form of the ſtatute
" above mentioned."

Sect. 36. Alſo it is enacted by 34 Edw. 3. c. 1. " That
" writs of oyer and terminer be granted according to the
" ſtatute thereof made, and that the juſtices which ſhall be
" thereto aſſigned, be named by the court, and not by the
" party."

Sect. 37. It may perhaps be argued from the general words of theſe ſtatutes, That no commiſſion of oyer and terminer ought to be granted to any, but ſuch juſtices as therein
2 Inſt. 418. mentioned, and on ſuch ſpecial occaſions. And Sir *Edward Coke*, in his comment on the ſaid ſtatute of Weſtminſter 2. does not ſhew whether all ſuch commiſſions in general are meant to be reſtrained by it, or ſuch only as are of a particular nature; yet if the intention of the ſaid ſtatutes be fully examined, it ſeems reaſonable to confine the purview of them to ſpecial commiſſions of oyer and terminer, granted at the complaint of particular perſons, upon ſome great injury ſuggeſted to have been done to them; not only for that ſuch ſpecial
Thel. Dig. 1, 2. ante ſ. 1. 2 Inſt. 419. commiſſions, for redreſſing of a particular grievance at the ſuit of the party, ſeem to come more properly and generally under the notion of writs, than general commiſſions iſſued by the king as the common diſpenſer of juſtice to his people, without any particular application from, or regard to any particular perſon; but alſo becauſe there may be a miſchief to the ſubject from ſuch ſpecial commiſſions, which cannot be feared from the general ones; for the party who ſues out ſuch a ſpecial commiſſion, may thereupon take out a writ to the ſheriff, commanding him to arreſt the goods ſuppoſed to be
Reg. 126, 177. 2 Inſt. 419. F. N. B. 112. wrongfully taken away, and to keep them in ſafe cuſtody till ſome order be made concerning them, by the juſtices aſſigned to determine the matter, which may be very inconvenient to the perſon complained of. Neither can it be imagined, that the ſtatute intended to reſtrain general commiſſions to enormous treſpaſſes, which could not but hinder the due execution of juſtice, which requires the puniſhment of all kinds of miſdemeanors, of which ſuch commiſſioners are the uſual and proper judges. But it is reaſonable indeed, that ſuch ſpecial commiſſions ſhould not be granted but upon urgent occaſions;
Reg. 124, 125. 22 Aſſ. 21. and accordingly we find precedents for the ſuperſeding of them, where the king has been informed, that he was impoſed upon in granting them on a ſuggeſtion, that the injury complained of was of a heinous nature, where in truth it was but a ſlight inconſiderable treſpaſs.

For

For other particulars concerning the proceedings of juſtices of oyer and terminer, ſee the chapter concerning Approver, and the chapter concerning Proceſs againſt the Jury.

CHAPTER THE SIXTH.

OF THE COURT OF GAOL DELIVERY.

FOR the better underſtanding of the nature of the commiſſion of gaol-delivery, I ſhall conſider—Firſt, What ought to be the form of it.—Secondly, What juriſdiction the juſtices authorized by it have by the common law.—Thirdly, What by ſtatute.—Fourthly, In what place they ought to hold their ſeſſions. 4 Comm. 267.

Sect. 1. As to the firſt point, having already ſhewn that all judicial commiſſions muſt be agreeable to ancient precedents, I ſhall only ſhew in this place, the purport of the moſt uſual commiſſion of gaol-delivery, which is a patent in nature of a letter from the king to certain perſons, appointing them his juſtices, or two or three of them, of which number either ſuch or ſuch a particular perſon among them is eſpecially required to be, and authorizing them to deliver his gaol, at ſuch a place, of the priſoners in it; for which purpoſe it commands them to meet at ſuch place, at the time which they themſelves ſhall appoint, and informs them, that for the ſame purpoſe the king hath commanded his ſheriff of the ſame county, to bring all the priſoners of the gaol, and their attachments, before them, at ſuch day to be appointed by them. Ch. 1. Ch. 5. 4 Inſt. 168. Crom. Jur. 125. 2 Hale 32. For the form of the commiſſion of gaol-delivery, vide appendix to 4th commentary. Sect. 1.

Sect. 2. As to the ſecond point, *viz.* What juriſdiction juſtices of gaol-delivery have by the common law; it ſeems to be clear, That they may by common law proceed upon any indictment of felony or treſpaſs, found before other juſtices, againſt any perſon in the priſon mentioned in their commiſſion, and not determined; and therefore theſe words in the ſtatute of 4 Edw. 3. c. 2. "That the juſtices aſſigned to deliver the "gaols ſhall have power to deliver the ſame gaols of thoſe "that ſhall be indicted before the juſtices of peace," ſeem only to be in affirmance of the common law. And herein the authority of theſe juſtices differs from that of juſtices of oyer and terminer; who regularly can proceed only againſt perſons indicted before themſelves, as hath been more fully ſhewn in the precedent chapter, ſection thirty-two. Sum. 158. 2 Hale, 32. 33. 4 Inſt. 168. 169. B. Cor. 179. 12 Co. 32.

Sect. 3. But it is ſaid in ſome (*a*) books, That juſtices of gaol-delivery, as ſuch, have no power to take any indictment; but (*a*) Cro. Eliz. 90. 179. B. Commiſſ. 24. 1 And. 111. F. Cor. 47.

but the common opinion, that they have ſuch power, ſeems much more agreeable to reaſon; for (*a*) ſurely it cannot but be implied in their commiſſion to deliver priſons of their priſoners, that they muſt have authority to make ſuch deliverance by due courſe of law, which cannot be without a proclamation, if there be no proſecution, or a proper trial, if there be one, in order to which there muſt be an accuſation of record, without which the priſoner cannot be arraigned or tried.

(*a*) 1 And. 111, 112. Sum. 158. 2 Hale 34. 4 Inſt. 168.

Sect. 4. Alſo it hath been (*b*) holden, That juſtices of gaol-delivery, as ſuch, have no power to deliver the gaol of perſons committed for high treaſon, perhaps for this reaſon, becauſe this being a crime of ſo high a nature, and againſt the king himſelf, ſhall not be included in the general words of a commiſſion, nor tried without the king's ſpecial direction. And this opinion ſeems to be much favoured by the preamble of the ſtatute of 3 Hen. 5. c. 7. wherein it is recited, That the puniſhment of counterfeiting money (which is a ſpecies of treaſon) pertaineth not to any judges of the realm, but to the king's juſtices before himſelf, or to ſpecial commiſſioners thereto aſſigned; and thereupon it is enacted, "That juſtices of "aſſize ſhall have power by the king's commiſſion to hear and "determine the offence abovementioned." Yet the contrary opinion is not only warranted by very great (*c*) authorities, but alſo it ſeems more agreeable to reaſon; for ſince the words of the commiſſion are general, and include all priſoners alike without any exception, why ſhould thoſe who are accuſed of treaſon, be conſtrued to be out of the meaning of them more than others? Eſpecially conſidering, that the greater the crime is for which a man is impriſoned, the greater hardſhip it is for him to lie under the terror of a proſecution for it, without being admitted to an opportunity of clearing his innocence. And the ſtatute of 1 Edw. 6. c. 7. which authorizes ſubſequent commiſſioners of gaol-delivery, to give judgment of death againſt ſuch as were found guilty before other commiſſioners of gaol delivery, of treaſon, &c. and reprieved before judgment, clearly ſuppoſes ſuch juſtices to have power in treaſon as well as in other caſes.

(*b*) S. P. C. 183. 2 Roll 12. Crom. Jur. 28. F. Cor. 47. 2 And. 111.

(*c*) 4 Inſt. 169. Sum. 159. 2 Hale 35. 1 And. 112. Part ſect. 4.

Sect. 5. It ſeems clear from the words of the commiſſion, that theſe juſtices have nothing to do with any perſons not in cuſtody of the priſon mentioned in it, except in ſome ſpecial caſes; for if part only of thoſe who were accomplices to the ſame felony be in ſuch priſon, and other part of them out of it; ſuch juſtices, for the neceſſity of the caſe, may receive an appeal againſt thoſe who are out of the priſon, as well as thoſe who are in it; which appeal after the trial of ſuch priſoners ſhall be removed into the king's bench, and proceſs ſhall iſſue from thence againſt the reſt. But if thoſe out of priſon ſhould be omitted in ſuch appeal, they could never be put into any other,

F. Cor. 77.

9 H. 4 1. 4 Co. 47. 2. P. C. 64.

other, becauſe there can be but one appeal for one felony. Alſo it is ſaid both by (a) *Staunford*, and (b) *Hale*, That ſuch juſtices may receive an appeal by bill againſt one let to bail. But I cannot find any authority in the (c) books cited by them for that purpoſe, to warrant this opinion (1); for though it be true, That the court of king's bench may receive an appeal by bill, againſt one for whom bail is filed, as being *in cuſtodia mareſchalli*; yet this ſeems to depend on the particular uſage of that court. And I do not find it ſaid in any book, That thoſe who are bailed by any other court, are looked upon as priſoners in the priſon belonging to ſuch court, but only in the cuſtody of their ſureties, who may detain them wherever they pleaſe. However, it ſeems to be agreed by all the books abovementioned, that ſuch juſtices have no more to do with one let to mainprize, than if he were at large, becauſe ſuch perſon can in no ſenſe be ſaid to be a priſoner, ſince it is not in the power of his ſureties to detain him in their cuſtody, as will be more fully ſhewn in the chapter concerning Bail.

(a) S. P. C. 64. 65. 159, 160.
(b) Sum 179. Dyer 201. Qu. 4 Inſt. 169.
(c) 32 H. 6. 4. 39 H. 6. 27. 9 H. 4. 2. 13 H. 4. 10. 21 H 7. 33. F. Mainp. 12. 13. Dyer 99. B. App. 11. 191. 51. 123. Hale 35.

(1) It is ſaid, 2 Hale 35. That juſtices of gaol-delivery may receive an *appeal by bill* againſt a perſon being in cuſtody; and take an *indictment* againſt one admitted to bail, for which 21 Hen. 7. 33. *a.* 9 Edw. 4. 2. *a.* 39 Hen. 6. 27. *b.* are cited as authorities.

Sect. 6. It ſeems clear, That ſuch juſtices have not only power to diſcharge ſuch priſoners, as upon their trial ſhall be acquitted; but alſo all ſuch againſt whom, upon proclamation made, no evidence ſhall appear to indict them; which neither juſtices of peace, nor juſtices of oyer and terminer can do.

4 Inſt. 167. F. Cor. 47. Sum. 158. 2 Hale 34.

By 14 Geo 3. c. 20. He ſhall pay no fee for ſuch diſcharge, but the gaoler ſhall receive 13 *s.* 4 *d.* from the county.

Sect. 7. Alſo there ſeems to be no doubt, but that the juſtices of gaol-delivery may award execution againſt ſuch priſoners as have been out-lawed for felony before juſtices of peace.

15 H. 7. 5. 4 Inſt. 169. Sum. 158. 2 Hale 35.

Sect. 8. Alſo notwithſtanding the commiſſion of juſtices of gaol-delivery be in ſtrictneſs determined after the end of their ſeſſion, yet it ſeems to be ſettled at this day, That they have power either to order the execution or reprieve of the perſons who have been condemned before them.

Dyer 205. Sum. 160. 2 Hale 35.

Sect. 9. Alſo it is ſaid by ſome, That the juſtices of gaol-delivery may by the common law puniſh thoſe who unduly bail priſoners, as being guilty of a negligent eſcape; but it ſeems needleſs ſtrictly to examine this matter, ſince they have certainly ſuch power by ſtatute, as will be more fully ſhewn in the following part of this chapter.

Con. Crom. Jur. 126. Quære S. P. C. 132. 77. 25 E. 3. 39.

As to the third point, *viz.* What juriſdiction juſtices of gaol-delivery have by ſtatute, I ſhall conſider the ſame.—

Firſt, In relation to appellees. Secondly, To irregular bailment of priſoners. Thirdly, To ſheriffs, &c. refuſing to receive priſoners. Fourthly, To perſons convicted before former juſtices. Fifthly, To offences created by ſtatute.

2 Hale 36. *Sect.* 10. As to the firſt particluar, is is enacted by 28 Edw. 1. "That they may award proceſs into a foreign "county againſt thoſe who ſhall be appealed before them by "an approver;" as ſhall be more fully ſhewed in the chapter concerning Approvers.

Sect. 11. As to the ſecond particular, *viz.* The power of ſuch juſtices in relation to the bailment of priſoners, it is enacted by 27 Edw. 1. c. 3. commonly called the ſtatute *de finibus*, "That juſtices of aſſize ſhall deliver the gaols of "counties where they take aſſizes, &c. and inquire if ſheriffs, "or any other, have let out by replevin priſoners not repleviable, or have offended in any thing contrary to the form of "the ſtatute of Weſtminſter the firſt, c. 15. and whom they "ſhall find guilty, they ſhall chaſten and puniſh in all things "according to the form of the ſtatute aforeſaid."

F. N. B. 251. Sum. 158. 4 Inſt. 169. *Sect* 12. But this ſtatute mentioning only juſtices of aſſize, it may perhaps be queſtioned, whether it is to be extended by equity to juſtices of gaol-delivery by ſpecial commiſſion, not being juſtices of aſſize.

Sect. 13. However, it is enacted by 4 Edw. 3. c. 2. "That juſtices aſſigned to deliver gaols, ſhall have power to "enquire of ſheriffs, gaolers, and others in whoſe ward perſons indicted before wardens of the peace ſhall be, if "they make deliverance, or let to mainprize any ſo "indicted, which be not mainpernable, and to puniſh the "ſaid ſheriffs, gaolers and others, if they do any thing againſt "this act."

Sect. 14. It is obſervable, that this ſtatute ſaith only in general, That ſuch juſtices ſhall have power to puniſh the offenders therein mentioned, without ſaying, That they ſhall puniſh them according to the form of the ſtatute of Weſtminſter the firſt, as the above mentioned ſtatute *de finibus* does; yet it is ſaid, That they may puniſh them according to the form of the ſaid ſtatute of Weſtminſter, as much as if it had been expreſſed.

S. P. C. 77.

Sect. 15. Alſo it is enacted by 1 & 2 Ph. & Mary c. 13, "That if any juſtice of the peace of the *quorum*, or coroner, "ſhall offend againſt the purview of the ſaid ſtatute, either as "to bailing priſoners, or taking their examinations, or the in-

" formation of thoſe that bring them before them, or not " putting the ſame in writ, or not certifying them to the next " gaol-delivery, or not putting in writing the evidence " given to a jury on a coroner's inqueſt, of murder or man- " ſlaughter, or not binding over material witneſſes againſt " perſons accuſed of felony, to give evidence at the next " general gaol-delivery, or not certifying ſuch evidence and " alſo ſuch recogniſances, &c. the juſtices of gaol-delivery of " the place where ſuch offence ſhall be committed, upon due " proof thereof by examination before them, ſhall for every " ſuch offence ſet ſuch fine as they ſhall think meet, " &c." 3 Bulſ. 113.

Sect. 16. As to the third particular, *viz.* The power of ſuch juſtices in relation to ſheriffs, &c. refuſing to receive priſoners, it is enacted by 4 Edw. 3. c. 10. " That juſtices " of gaol delivery ſhall puniſh ſheriffs and gaolers, refuſing to " take felons into their cuſtody from conſtables and townſhips, " without being paid for ſuch receipt."

Sect. 17. As to the fourth particular, *viz.* The power of ſuch juſtices, in relation to perſons convicted before former juſtices, it is enacted by 1 Edw. 6. c. 7. " That where " any perſon or perſons ſhall be found guilty of any treaſon " or felony, for the which judgment of death ſhould or may " enſue, and ſhall be reprieved to priſon without judgment " at that time given againſt him, her, or them ſo found " guilty, thoſe perſons that at any time hereafter ſhall by " the king's letters patent be aſſigned juſtices to deliver the " gaol, where any ſuch perſon or perſons found guilty " ſhall remain, ſhall have full power and authority to give " judgment of death againſt ſuch perſon ſo found guilty, " and reprieved, as the ſame juſtices (before whom ſuch " perſon or perſons was or were found guilty) might have " done, if their commiſſion of gaol-delivery had remained " and continued in full force and ſtrength." 4 Inſt. 691,

Sect. 18. It hath been holden that this ſtatute extends not to convictions before juſtices of oyer and terminer, not only becauſe convictions before juſtices of gaol-delivery only are mentioned, but becauſe the proceedings before juſtices of oyer and terminer, after the oyer determined, ought to remain in the king's bench, and the records before the juſtices of gaol-delivery with the *cuſtos rotulorum*. 12 Co. 33. B. Oy. & Ter.

Sect. 19. Alſo it ſeemeth, That ſince the ſtatute ſpeaks only of perſons reprieved before judgment, it gives ſubſequent commiſſioners no manner of power over perſons condemned by former juſtices; and therefore it hath been holden, That if a perſon condemned by former juſtices, plead a Dalſon 20.

pardon before their ſucceſſors, they have no power to allow it, but that the record ought to be removed by *certiorari* into the king's bench, and the priſoner alſo by *habeas corpus*, and that there the pardon ſhall be allowed or diſallowed. And from the ſame reaſon it ſeems to follow, That ſubſequent juſtices have no (*a*) power from this ſtatute to award the execution of perſons condemned by former juſtices and reprieved by them. But if judgment had not been given by the former juſtices, there is no doubt but that the ſubſequent ones might by force of this ſtatute have allowed the pardon, or given judgment, and awarded execution, &c. as the firſt might have done. Alſo it hath been adjudged, That not only ſuch ſubſequent juſtices as are authoriſed by the ſame king, by whom the former were commiſſioned, but alſo that the juſtices of the next king may have the like power by virtue of this ſtatute.

Quære Dyer 165.
(*a*) 2 Hale 35. contra.
Vide 8 Geo. 3. c. 15.
7 Co. 31. Daliſon 20.

Sect. 20. As to the fifth particular, *viz.* The juriſdiction of juſtices of gaol-delivery in relation to offences created by ſtatute. By 33 Hen. 8. c. 9. ſ. 20. They may puniſh thoſe who keep unlawful gaming houſes, or uſe unlawful games. By 5 Eliz. c. 9. ſ. 9. They have juriſdiction over perjury and ſubornation of perjury againſt the form of that ſtatute. By 8 Eliz. c. 3. They may puniſh thoſe who tranſport ſheep alive. By 23 Eliz. c. 1. ſ. 9. They may enquire of, hear, and determine offences againſt that ſtatute in not coming to church; and generally they have the like power in other ſtatutes, creating new offences, which it would be too tedious particularly to ſet down in this place.

Sect. 21. As to the fourth general point of this chapter, *viz.* In what place juſtices of gaol-delivery ought to hold their ſeſſions, it is enacted by 6 Rich. 2. c. 5. "That "juſtices aſſigned to take aſſizes and deliver gaols, ſhall hold "their ſeſſions in the principal and chief towns of every of "the counties where the ſhire courts of the ſame counties "were then holden, or hereafter ſhould be holden." For other matters relating to theſe juſtices, ſee chapter 7. concerning juſtices of aſſize and niſi prius, and the chapter concerning proceſs.

Vide 19 Geo. 3. c. 74. ſ. 70.
Poſt, c. 7. ſ. 20.

CHAPTER

CHAPTER THE SEVENTH.

OF THE COURT OF ASSIZE AND NISI PRIUS.

THE power of juſtices of aſſize, whether as ſuch, or as juſtices of niſi prius, in relation to criminal matters, depending wholly on ſtatute, I ſhall only take notice of the principal branches of their juriſdiction of this kind, given them by ſeveral acts of parliament: and for more particular inquiries concerning their authority in other caſes, and the nature, extent, and end of their commiſſion, ſhall refer the reader to Sir *Edward Coke*'s Fourth Inſtitute, (*a*) to his Twelfth Report, (*b*) and to Mr. *Crompton*'s Treatiſe concerning the Juriſdiction of Courts (*c*).

4 Inſt. 158. Co. Lit. 153. Cromp. 204. 3 Comm. 60. Douglas 195.

(*a*) fo. 158. (*b*) fo. 32. (*c*) fo. 204.

The moſt conſiderable parts of their juriſdiction in criminal matters, proper to be conſidered in this place, are ſuch as relate—To the delivery of gaols. To counterfeiters of money. To appellees. To conſpirators, maintainers, and other offenders of the like nature. To offences of ſheriffs, gaolers, and other officers. To capital offences tried by writ of niſi prius. To the counties for which ſuch juſtices of aſſize may be commiſſioned.

Sect. 2. As to the firſt of theſe particulars, it is enacted by 27 Edw. 1. c. 3. commonly called the ſtatute *de finibus*, "That "juſtices aſſigned to take aſſizes, in every county where they "do take aſſizes, as they be appointed incontinent after "the aſſizes taken in the ſhires, ſhall remain both to-"gether if they be lay; and if one of them be a clerk then "one of the moſt diſcreet knights of the ſhire being aſſociate "to him that is a layman by the king's writ, ſhall deliver the "gaols of the ſhires, as well within liberties as without, of "all manner of priſoners, after the form of the gaol-deliveries "of thoſe ſhires before times uſed. And the ſame juſtices "ſhall inquire then, if ſheriffs or any other have let out by "replevin perſons not repleviable, *&c.*"

Sect. 3. Alſo it is recited by 2 Edw. 3. c. 2. "That of-"fenders had been greatly encouraged, becauſe the juſtices of "gaol-delivery and of oyer and terminer had been procured by "great men againſt the form of the ſaid ſtatute of 27 Edw. "1." and thereupon it is enacted, "That ſuch juſtices ſhall "not be made againſt the form of the ſaid ſtatute."

1 P. C. 57. Keym. 375. Summary 164. 12 Co. 32.

Sect. 4. It ſeems to have been the moſt general opinion in the conſtruction of the above mentioned ſtatute of 27 Edw. 1. That the purview of it extends only to caſes of felony; and this is farther confirmed by the recital of the ſtatute of 3 Hen. 5. ſet forth more at large in the following part of this chapter, by which it is declared, That no judges but thoſe of the king's bench, or ſpecial commiſſioners, have power to puniſh counterfeiters of money. Alſo it is argued, That the purview of the ſaid ſtatute of 3 Hen. 5. impowering juſtices of aſſize, having the king's commiſſion for ſuch purpoſe, to hear and determine the offences of ſuch perſons, would be vain and to no purpoſe, if ſuch juſtices, as ſuch, had power over ſuch offences before, by virtue of the ſaid former ſtatute. And yet perhaps the contrary opinion is the more plauſible; for ſince the ſaid ſtatute is intended for the greater expedition of juſtice, and the words of it expreſly extend to all manner of priſoners, why ſhould they be reſtrained by a violent interpretation, inconſiſtent with the natural and obvious ſenſe of them? And ſince juſtices of gaol-delivery, armed only with a general commiſſion to deliver gaols of the priſoners in them, are, according to the better opinion at this day, authoriſed to deliver ſuch gaols of perſons accuſed of treaſon, as well as of others committed for crimes of an inferior nature, why ſhould not the ſaid ſtatute, the intent whereof is to give juſtices of aſſize like power with juſtices of gaol-delivery, be conſtrued to give them as large a power? And as to the arguments drawn from the opinion of the makers of the above mentioned ſtatute of 3 Hen. 5. it may be anſwered, that perhaps the purport of the ſaid recital may amount to no more than this, that no other judges but thoſe therein mentioned, would venture to take upon them a power to try ſuch offences, becauſe it was not clearly ſettled that they had authority to do it.

1 P. C. 57, 58.

Infra, ſect. 9.

Supra, cap. 6. ſect. 4.

Summary 164. 2 Hale 40. 403. 40. 203. 1 P. C. 57. Com. Jur. 126. 4 Inſt. 159. Vide upon this point, 2 Hale 403.

Sect. 5. It ſeems to be the general opinion, That juſtices of aſſize, as ſuch, by force of the ſaid ſtatute of the twenty-ſeventh of Edward the firſt, may deliver gaols without any ſpecial commiſſion for that purpoſe; and this ſeems to be the moſt agreeable to the purview of the ſaid ſtatute, if ſuch juſtices be laymen; for ſeeing the act provides only, That if one of them be a clerk, then one of the knights of the county being aſſociate by writ to him that is a layman, ſhall deliver the gaols; and makes no mention of any ſuch writ where both are laymen; but only ſays in general, That in ſuch caſe they ſhall remain both together, it ſeems to imply that laymen being juſtices of aſſize, ſhall have ſuch power of courſe.

See the preceding chap. ſect. 4. and the 15th ſect. of this chapter.

Sect. 6. As to the ſecond particular, *viz.* The power of theſe juſtices in relation to counterfeiters of money, it is recited by the ſtatute of 3 Hen. 5. c. 7. "That counterfeiting, clipping, waſhing, and other falſity of money, had then of late abounded,

abounded, for that the puniſhment of the ſame pertaineth not to any judges of the realm, but to the king's juſtices before himſelf, or ſpecial commiſſioners thereto aſſigned, *&c.*" and thereupon it is enacted, "That the king's juſtices aſ-"ſigned to take aſſizes in all the counties of England, ſhall "have power, by the king's commiſſions, to hear and deter-"mine their ſeſſions, as well of the counterfeiting and of the "bringing ſuch falſe money into the realm, as of clipping, "waſhing, and every other falſity of the ſaid money."

Sect. 7. It ſeems clear from the manifeſt purport of this ſtatute, That juſtices of aſſize can claim no power from it over any of the offences therein mentioned, without a ſpecial commiſſion for ſuch purpoſe; but this ſtatute being wholly in the affirmative, and no way intended to abridge but enlarge the juriſdiction of ſuch juſtices; it ſeems clear, That if they had authority as juſtices of gaol-delivery, by virtue of the above mentioned ſtatute *de finibus*, without any ſpecial commiſſion to deliver perſons in priſon for ſuch crimes (which queſtion is more fully handled in the precedent part of this chapter), they may ſtill lawfully proceed upon the ſaid ſtatute in the ſame manner as before. S. P. C. 5^v. Summary 164.

Sect. 8. As to the third particular, *viz.* The power of juſtices of aſſize in relation to appellees, it is enacted by the 28 Edw. 1. commonly called the ſtatute *de appellatis*, "That ſuch "juſtices may award proceſs into any foreign county againſt "perſons appealed by approvers, and proceed againſt them, "*&c.*" Supra, Sect. 4. Crom. Jur. 126.

Sect. 9. It is made a doubt in *Dyer*'s Reports, by what warrant juſtices of aſſize hold plea of an appeal of robbery: and it is there holden, That they do it by virtue of the commiſſion of gaol-delivery. But it ſeems, that it ought not to be intended to be the meaning of this report, That juſtices of aſſize have no juriſdiction as to an appeal of robbery, without an expreſs commiſſion of gaol-delivery; for ſince juſtices of aſſize, as ſuch, have power by the above mentioned ſtatute *de finibus* to deliver gaols of all manner of priſoners, after the form of the gaol-deliveries of the ſhires wherein they ſit, why ſhould they not by force of thoſe general words, deliver ſuch gaols of perſons proceeded againſt by way of appeal commenced before them, as well as of thoſe proceeded againſt by way of indictment, as it ſeems to be taken for granted in other books that they may? And therefore it ſeems to be reaſonable to take the above mentioned report of *Dyer* in this ſenſe, That juſtices of aſſize may hold plea of appeals of robbery by the commiſſion of gaol-delivery, given them implicitly by the ſaid ſtatute *de finibus*, in reſpect whereof they ſeem to have all the power of juſtices of gaol-delivery, whether given them by the com- Dyer 99. Pl. 62. 12 Co. 32. 22 Ed. 4. 19. a. B. appeal, 113. 4 Inſt. 159.

2 P. C. 57. Keym. 375. Summary 164. 12 Co. 32.

Sect. 4. It ſeems to have been the moſt general opinion in the conſtruction of the above mentioned ſtatute of 27 Edw. 1. That the purview of it extends only to caſes of felony; and this is farther confirmed by the recital of the ſtatute of 3 Hen. 5. ſet forth more at large in the following part of this chapter, by which it is declared, That no judges but thoſe of the king's bench, or ſpecial commiſſioners, have power to puniſh counterfeiters of money. Alſo it is argued, That the purview of the ſaid ſtatute of 3 Hen. 5. impowering juſtices of aſſize, having the king's commiſſion for ſuch purpoſe, to hear and determine the offences of ſuch perſons, would be vain and to no purpoſe, if ſuch juſtices, as ſuch, had power over ſuch offences before, by virtue of the ſaid former ſtatute. And yet perhaps the contrary opinion is the more plauſible; for ſince the ſaid ſtatute is intended for the greater expedition of juſtice, and the words of it expreſly extend to all manner of priſoners, why ſhould they be reſtrained by a violent interpretation, inconſiſtent with the natural and obvious ſenſe of them? And ſince juſtices of gaol-delivery, armed only with a general commiſſion to deliver gaols of the priſoners in them, are, according to the better opinion at this day, authoriſed to deliver ſuch gaols of perſons accuſed of treaſon, as well as of others committed for crimes of an inferior nature, why ſhould not the ſaid ſtatute, the intent whereof is to give juſtices of aſſize like power with juſtices of gaol-delivery, be conſtrued to give them as large a power? And as to the arguments drawn from the opinion of the makers of the above mentioned ſtatute of 3 Hen. 5. it may be anſwered, that perhaps the purport of the ſaid recital may amount to no more than this, that no other judges but thoſe therein mentioned, would venture to take upon them a power to try ſuch offences, becauſe it was not clearly ſettled that they had authority to do it.

S. P. C. 57, 58.

Infra, ſect. 9.

Supra, cap. 6. ſect. 4.

Summary 164. 2 Hale 40. 403. 40. 203. 2 P. C. 57. Com. Jur. 126. Ver. 19. Vide upon this point, 2 Hale 403.

Sect. 5. It ſeems to be the general opinion, That juſtices of aſſize, as ſuch, by force of the ſaid ſtatute of the twenty-ſeventh of Edward the firſt, may deliver gaols without any ſpecial commiſſion for that purpoſe; and this ſeems to be the moſt agreeable to the purview of the ſaid ſtatute, if ſuch juſtices be laymen; for ſeeing the act provides only, That if one of them be a clerk, then one of the knights of the county being aſſociate by writ to him that is a layman, ſhall deliver the gaols; and makes no mention of any ſuch writ where both are laymen; but only ſays in general, That in ſuch caſe they ſhall remain both together, it ſeems to imply that laymen being juſtices of aſſize, ſhall have ſuch power of courſe.

See the precedent chap. ſect. 4. and the 15th ſect. of this chapter.

Sect. 6. As to the ſecond particular, *viz.* The power of theſe juſtices in relation to counterfeiters of money, it is recited by the ſtatute of 3 Hen. 5. c. 7. "That counterfeiting, clipping, waſhing, and other falſity of money, had then of late abounded,

abounded, for that the puniſhment of the ſame pertaineth not to any judges of the realm, but to the king's juſtices before himſelf, or ſpecial commiſſioners thereto aſſigned, *&c.*" and thereupon it is enacted, "That the king's juſtices aſ-"ſigned to take aſſizes in all the counties of England, ſhall "have power, by the king's commiſſions, to hear and deter-"mine their ſeſſions, as well of the counterfeiting and of the "bringing ſuch falſe money into the realm, as of clipping, "waſhing, and every other falſity of the ſaid money."

Sect. 7. It ſeems clear from the manifeſt purport of this ſtatute, That juſtices of aſſize can claim no power from it over any of the offences therein mentioned, without a ſpecial commiſſion for ſuch purpoſe; but this ſtatute being wholly in the affirmative, and no way intended to abridge but enlarge the juriſdiction of ſuch juſtices; it ſeems clear, That if they had authority as juſtices of gaol-delivery, by virtue of the above mentioned ſtatute *de finibus*, without any ſpecial commiſſion to deliver perſons in priſon for ſuch crimes (which queſtion is more fully handled in the precedent part of this chapter), they may ſtill lawfully proceed upon the ſaid ſtatute in the ſame manner as before. S. P. C. 5°. Summary 164.

Sect. 8. As to the third particular, *viz.* The power of juſtices of aſſize in relation to appellees, it is enacted by the 28 Edw. 1. commonly called the ſtatute *de appellatis*, "That ſuch "juſtices may award proceſs into any foreign county againſt "perſons appealed by approvers, and proceed againſt them, "*&c.*" Supra, Sect. 4. Crom. Jur. 126.

Sect. 9. It is made a doubt in *Dyer*'s Reports, by what warrant juſtices of aſſize hold plea of an appeal of robbery: and it is there holden, That they do it by virtue of the commiſſion of gaol-delivery. But it ſeems, that it ought not to be intended to be the meaning of this report, That juſtices of aſſize have no juriſdiction as to an appeal of robbery, without an expreſs commiſſion of gaol-delivery; for ſince juſtices of aſſize, as ſuch, have power by the above mentioned ſtatute *de finibus* to deliver gaols of all manner of priſoners, after the form of the gaol-deliveries of the ſhires wherein they ſit, why ſhould they not by force of thoſe general words, deliver ſuch gaols of perſons proceeded againſt by way of appeal commenced before them, as well as of thoſe proceeded againſt by way of indictment, as it ſeems to be taken for granted in other books that they may? And therefore it ſeems to be reaſonable to take the above mentioned report of *Dyer* in this ſenſe, That juſtices of aſſize may hold plea of appeals of robbery by the commiſſion of gaol-delivery, given them implicitly by the ſaid ſtatute *de finibus*, in reſpect whereof they ſeem to have all the power of juſtices of gaol-delivery, whether given them by the com- Dyer 99. Pl. 62. 12 Co. 32. 22 Ed. 4. 19. a B. appeal, 113. 4 Inſt. 159.

mon law or by ſtatute, as fully appears from what immediately follows the above mentioned paſſage in the ſaid report, wherein it is ſaid, That the ſtatute of 2 or 3 Hen. 7. gives juſtices of aſſize the power by expreſs words as to appeals of death; but it is certain, that the ſaid ſtatute of Hen. 7. does not expreſly mention juſtices of aſſize, but ſaith only, That the wife, *&c.* may commence an appeal before the ſheriff and coroners, or before the king in his bench, or juſtices of gaol-delivery; and yet it is holden in the ſaid report, That this ſtatute expreſly extends to juſtices of aſſize; from which it ſeems manifeſtly to follow, That ſuch juſtices are taken to be included under the general notion of juſtices of gaol-delivery.

Dyer 99.
3 H. 7. ch. 1.
13 Co. 32.
4 Inſt. 159.

Sect. 10. As to the fourth particular, *viz.* The power of juſtices of aſſize in relation to conſpirators, maintainers, and other offenders of the like nature, it is enacted by 28 Edw. 1. c. 10. commonly called *Articuli ſuper chartas*, "That juſtices "aſſigned to take aſſizes, when they come into the county to "do their office, ſhall upon every plaint made unto them of "conſpirators, falſe informers, and evil procurers of dozens, "aſſiſes, inqueſts and juries, award inqueſt thereupon without "writ, and ſhall do right to the plaintiffs without delay."— And it is further enacted by 4 Edw. 3. c. 11. "That the juſtices "of aſſize, whenſoever they come to hold their ſeſſions or to take "inqueſt upon niſi prius, ſhall inquire, hear, and determine, "as well at the ſuit of the king as at the ſuit of the party of "maintainers, bearors, conſpirators, *&c.*" And the like is ordained by 20 Edw. 3. c. 6. by which it is enacted, "That "ſuch juſtices ſhall have commiſſions to inquire of maintainers "and common embraceors, *&c.*"

Sect. 11. Alſo it is enacted by 5 Edw. 3. c. 10. "That the "juſtices before whom any aſſize, inqueſt, or jury ſhall paſs, "may inquire and determine the offence of any juror in taking "money of either party, *&c.*"

Regiſter 188.

Sect. 12. But it is ordained by 38 Edw. 3. c. 12. "That "no juſtice, *&c.* inquire of offices of the ſaid offence, but "only at the ſuit of the party, or of other, *&c.*"

Sect. 13. And it is farther enacted by 32 Hen. 8. c. 9. "That the juſtices of aſſize of every circuit within this realm, "and elſewhere within the king's dominions, ſhall in every "county within their circuits, twice in the year cauſe open "proclamation to be made, as well of the ſaid ſtatute as of "all others made againſt unlawful maintenance, champerty, "embracery, *&c.*"

Sect. 14. As to the fifth particular, *viz.* The power of juſtices of aſſize in relation to the offences of ſheriffs, gaolers, and

and other officers, it is enacted by 20 Edw. 3. c. 6. "That "juſtices of aſſize ſhall have commiſſions ſufficient to enquire of "ſheriffs, eſcheators, bailiffs of franchiſes and their miniſters, "and of the gifts which they take to execute their office, "&c."

Sect. 15. Alſo it is enacted by 23 Hen. 6 c. 10. "That "juſtices of aſſizes in their ſeſſions, ſhall have power to inquire, "hear, and determine of office without ſpecial commiſſion, of and "upon all ſheriffs, under-ſheriffs, clerks, bailiffs, gaolers, coroners, "ſtewards, bailiffs of franchiſes, or any other officer or miniſter "doing contrary to the ſaid ſtatute, as by extorting money for "the omitting of an arreſt, or ſhewing eaſe or favour to thoſe "who ſhall be arreſted, or by admitting perſons to bail, or "denying them the benefit of it, contrary to the form of the "ſaid ſtatute."

Sect. 16. Alſo it is enacted by 1 Hen. 8. c. 7. "That "juſtices of aſſize and of the peace, ſhall have authority to in- "quire of and determine, as well by examination as by pre- "ſentment, the default of coroners, in not taking an inqueſt "without fee or reward, on the view of the body of any per- "ſon ſlain by miſadventure."

Sect. 17. As to the ſixth particular, *viz.* the power of juſtices of aſſiſe, in relation to capital offences tried by writ of niſi prius, it is enacted by 14 Hen. 6. c. 1. "That the juſtices "before whom inquiſitions, inqueſts, and juries, ſhall be taken "by the king's writ of niſi prius, ſhall have power in all the "caſes of felony and treaſon, to give their judgments, as well "where a man is acquit of felony or of treaſon, as where he is "thereof attainted, the day and place where the ſaid inquiſi- "tions, inqueſts, and juries be ſo taken, and then from thence- "forth to award execution to be made by force of the ſame "judgments." 1 Hale 350. 2 Hale 403. Raym. 67.

Sect. 18. In the conſtruction of this ſtatute it hath been holden, That if the plaintiff in appeal be nonſuited, before juſtices of niſi prius, they have no power to arraign the defendant at the ſuit of the king on the declaration in the appeal, as juſtices before whom an appeal is originally commenced may do. And the reaſon of this conſtruction ſeems to be this, becauſe the ſtatute only mentioning that juſtices of niſi prius ſhall give judgment where the defendant is acquitted or attainted, leaves their juriſdiction upon a nonſuit as it was before. But it ſeems certain, That on the acquittal of an appellee ſuch juſtices have power to inquire of the abettors, and alſo of the ſufficiency of the plaintiff to anſwer the damages; for ſince the ſtatute of Weſtminſter 2. ch. 12. gives ſuch power to the juſtices, before whom an appeal ſhall be heard and determined; and now by force 21 Ed. 4. 19. a. 2 Hale 41. 403. Dyer 120. Crom. Jur. 212.

4 Inſt. 16e. 22 Ed. 4. 19. 30 Ed. 4. 14. 2 Inſt. 386. Bro. Niſi Prius, 27. 2 Hale 32.

force of 14 Hen. 6. it may be heard and determined before juſtices of niſi prius, it ſeems neceſſarily to follow, That juſtices of niſi prius ſhall have ſuch power ſince the ſame ſtatute of 14 Hen. 6. And from the ſame reaſoning it ſeems alſo to follow, That ſuch juſtices may give judgment for the damages; but conſtant experience hath over-ruled it to the contrary.

Sect. 19. As to the ſeventh particular, *viz.* For what counties juſtices of aſſize may be commiſſioned, it is enacted by 8 Rich. 2. c. 2. "That no man of law ſhall be from thence-"forth juſtice of aſſizes, or of the common deliverance of gaols, "in his own country."

Sect. 20. Alſo it is enacted by 33 Hen. 8. ch. 24. "That "no juſtice, nor other man learned in the laws of this realm, "ſhall uſe, nor exerciſe the office of juſtice of aſſize within "any county where the ſaid juſtice was born, or doth inhabit; "on pain of 100 l. *&c.* Provided that the ſaid act ſhall "not extend to any perſon who ſhall be clerk of aſſizes, "and aſſociate to any juſtice of aſſize, nor to any mayor, "ſheriff, recorder, ſteward, bailiff, ſewter, or other officer "being born or dwelling within any city, borough or "town within this realm of England, &c. nor to juſtices of "either bench for taking, hearing, or determining aſſizes in "the one bench or the other, nor to the juſtices, juſtice-"clerk or clerks, of aſſizes, in the duchy and county palatine "of Lancaſter."

4 Comm. 268.

† *Sect.* 21. Theſe two acts of Rich. 2. and Henry 8. are explained and amended by 12 Geo. 2. c. 27. by which it is enacted, "That the juſtices of either bench, the barons of the "exchequer, or any other perſons learned in the law, who "ſhall be appointed juſtices of oyer and terminer or gaol-de-"livery in any county in England, may uſe and exerciſe the "ſaid offices of oyer and terminer and gaol-delivery in ſuch "county, notwithſtanding they or any of them ſhall have "been born and do inhabit within any ſuch county, without "incurring the penalty of 100 l. impoſed by 33 Hen. 8."

† *Sect.* 22. And by 19 Geo. 3. c. 74. *ſ.* 70. It is further enacted, "That wherever the courts of aſſize, niſi prius, oyer "and terminer, or gaol-delivery, for any county at large in "England, ſhall be held in or near any city or town that is "alſo a county of itſelf; and at the ſame time with "the like or any of the like courts for the ſaid city or town, "the lodgings of the judge or judges ſhall be conſtrued and "taken to be ſituate both within the county at large, and alſo "within the county of ſuch city or town, for the purpoſe of "tranſacting the buſineſs of the aſſizes for ſuch county at large, "and for the county of ſuch city or town, during the time ſuch "judges

"judges ſhall continue therein for the execution of their ſeve-
"ral commiſſions."

Vide 14 Hen. 6. c. 3. For a holding aſſizes at Carliſle for the county of Cumberland. The 1 Geo. 1, c. 45. for Cornwall, and 21 Geo. 2. c. for Buckingham.

CHAPTER THE EIGHTH.

OF THE COURT OF SESSIONS OF JUSTICES OF PEACE.

BEFORE I come to conſider the nature of the court of ſeſſions of juſtices of peace, I ſhall premiſe, Firſt, In what manner conſervators of the peace were provided by the common law. Secondly, In what manner juſtices of peace have been ordained by the ſeveral ſtatutes concerning them. Thirdly, How they are to be commiſſioned in purſuance of thoſe ſtatutes. Fourthly, What is moſt obſervable from the ſaid ſtatutes and commiſſions.

As to the firſt point it ſeems, that conſervators of the peace, by the common law, were of two ſorts.—1. Thoſe who in reſpect of their offices had power to keep the peace, but were not ſimply called by the name of conſervators of the peace, but by the name of ſuch offices.—2. Thoſe who were conſtituted for this purpoſe only, and were ſimply called by the name of conſervators or wardens of the peace. 10 St. Tr. 317.

Sect. 1. And firſt of thoſe of the firſt ſort, of which the king's (*a*) majeſty is certainly the principal, from whom all authority of this kind was originally derived, and who ſtill continues to have the ſame in his own perſon. Yet it is ſaid, (*b*) That he cannot take a recognizance for the keeping the peace, becauſe it is a rule in law, That no one can take any recognizance, who is not either a juſtice of record, or by commiſſion. Alſo it ſeems certain, That (*c*) no duke, earl, or baron, as ſuch, have any greater authority to keep the peace than mere private perſons.

(*a*) Lamb. B. 1. c. 3. Dalt C. 1.
(*b*) B. Recog. 14. 19. Dalt. C. 1.
(*c*) Lamb. B. 1, C. 3.

Sect. 2. The (*d*) lord chancellor or lord keeper of the great ſeal, the lord high ſteward of England, the lord marſhal, and lord high conſtable of England, and every juſtice of the king's bench, and, as ſome ſay, the lord treaſurer, 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. And the maſter of the rolls hath alſo the like power, either as incident to his office, or at leaſt by preſcription (1).

(*d*) Dalt. C. 1. Lamb. B. 1. C. 3. Crom. 6. 1 Leon. 70. 71. 2 Wilſ. 289.

(1) But neither privy counſellors nor ſecretaries of ſtate are conſervators of the peace. 11 State Trials 320.

Sect.

39 H. 6. 7. Lamb. B. 1. c. 3.

Sect. 3. Alſo every court of record, as ſuch, hath power to keep the peace within its own precinct, as hath been more fully ſhewn, ch. 1. ſect. 15. And the juſtices of gaol-delivery may take ſurety of the peace from a priſoner before them, who was committed for not finding ſuch ſurety.

(*a*) Lamb. b. 1. C. 3. 12 H. 7. 17. B. Peace 13. C. Car. 26. (*b*) Recog. 5. F. N. B. 81. 82. Dalt. c. 11. Lamb. b. 1. C. 13. Qu. B. Recog. 5. 14. 16. 18. (*c*) See the books above cited. 9 E. 4. 30. 31.

Sect. 4. Alſo every ſheriff is a principal (*a*) conſervator of the peace within his county, and may without doubt, *ex officio*, award proceſs of the peace, and take ſurety for it. And it ſeems the better (*b*) 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, or matter *in pais* only; for that it is taken by him by virtue of the king's commiſſion, by which he is intruſted with the cuſtody of the county, and conſequently has by it an implied power of keeping the peace within ſuch county; and it is a general (*c*) rule, That whatſoever is done by virtue of the king's commiſſion ought to be taken as a matter of record.

(*d*) Crom. 6. Lamb. b. 1. c. 3.

Sect. 5. Alſo every (*d*) coroner is another principal conſervator of the peace within the county of which he is a coroner, and may certainly bind any perſon to the peace who makes an affray in the preſence. But it ſeems the better opinion, That he hath no authority to grant proceſs for the peace; and it ſeems clear, That the ſecurity taken by him for the keeping of 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; becauſe it is not taken by one who acts as a judge of record, or by the king's commiſſion, as all (*e*) recognizances ought to be.

(*e*) See the Books cited S. 1. Letter b. and S. 4. Letter b.

Crom. 6.

Sect. 6. Alſo every high and petit conſtable are by the common law conſervators of the peace within their ſeveral limits, and may take ſuch order for the keeping of the ſame, as hath been more fully ſhewn, *book* 1. cha. 63. ſect. 13, 14, *&c.*

1 Comm. 34. 9 4 St. Tr. 562. 11 St. Tr. 319.

Secondly, conſervators of the peace by the common law who were conſtituted for that purpoſe only, and were ſimply called by the name of conſervators or keepers of the peace, were of two kinds—Ordinary, and Extraordinary.

Thoſe of the firſt kind were either by tenure, or by election; or by preſcription.

Co. Lit. 106. Lamb B. 1. C. 3. 12.

Sect. 7. Conſervators of the peace by tenure were thoſe who held lands of the kings by this ſervice, among others, of being conſervators of the peace, within ſuch a diſtrict.

Sect.

Sect. 8. Conſervators of the peace by election, were thoſe who were choſen to ſuch office in purſuance of the king's writ to ſuch purpoſe (as all ſheriffs anciently were, and as coroners ſtill are), by the freeholders of a county in the county-court; after which election it was uſual for the king to ſend another writ to the perſons ſo choſen, commanding them diligently to attend their ſaid office, till they ſhould receive a command from the king to the contrary. 49 H. 3. 2 Inſt. 174.

Sect. 9. Conſervators of the peace by preſcription, were thoſe who claimed ſuch power from an immemorial uſage in themſelves and their predeceſſors or anceſtors, or thoſe whoſe eſtate they had in certain lands, to exerciſe the like power, which wholly depended upon ſuch uſage, both as to its extent and the manner in which it was to be exerciſed. B. Peace 18. Preſcrip. 79. 22 Ed. 4. 35. Lamb. b. 1. c. 3.

Sect. 10. It is (*a*) queſtioned indeed by ſome, whether any ſuch power can be claimed by uſage? Yet if the power of holding pleas, and even courts of record, which are of ſo high a nature, and imply a power of keeping the peace within their own precincts, may be claimed by uſage, as it ſeems to be (*b*) certain that they may: It ſeems ſtrange that the bare authority of keeping the peace in a certain diſtrict may not as well be claimed by ſuch uſage. (*a*) 21 Ed. 4. 67. Bro. Pea. 18. 3 Bac. Ab. 286. 4 Leo. 149. (*b*) Co. Lit. 114. D. S. 1. c. 7.

Sect. 11. It (*c*) ſeems, That the power of ſuch conſervators of the peace, whether by tenure, election, or preſcription, was no greater than that of conſtables at this day, unleſs it were enlarged by ſome ſpecial grant or preſcription. (*c*) Dalt. b. 1. ſ. 3. Crom. 6.

Sect. 12. The extraordinary conſervators of the peace were perſons ſpecially commiſſioned, in times of imminent danger either from rebels or foreign invaders, to take care of and defend ſuch a particular diſtrict committed to their charge, and to preſerve the peace within the limits of it; and theſe had power to command the ſheriff with his whole *poſſe* to aid and aſſiſt them. Lamb. b. 1. c. 3.

Sect. 13. AND now I am in the ſecond place to ſhew, in what manner juſtices of peace have been ordained by the ſeveral ſtatutes concerning them, the firſt whereof is 2 Edw. 3. c. 16. which is in the following words:—"For the better keeping and maintenance of the peace, the king willeth that in every county, good men and lawful, which be no maintainers of evil, or barrators in the country, ſhall be aſſigned to keep the peace." 2 Hale 4. Lamb. 20. 4 Comm. 179. Salk. 406. 4 St. Tr. 562.

Sect. 14. And it is farther enacted by 4 Edw. 3. c. 2. "That there ſhall be aſſigned good and lawful men in every county to keep the peace; and at the time of the aſſignments mention

" mention ſhall be made, that ſuch as ſhall be indicted or taken " by the ſaid keepers of the peace, ſhall not be let to mainpriſe " by the ſheriffs, nor by none other miniſters, if they be not " mainpernable by the law; nor that ſuch as ſhall be indicted, " ſhall not be delivered but at the common law. And the " juſtices aſſigned to deliver the gaols, ſhall have power to de- " liver the ſame gaols of thoſe that ſhall be indicted before the " keepers of the peace; and that the ſaid keepers ſhall ſend their " indictments before the juſtices, &c."

Sect. 15. And it is farther enacted by 18 Edw. 3. cap. 2.
2 Roll. Ab. 95. Infra 38. " That two or three of the beſt reputation in the counties, " ſhall be aſſigned keepers of the peace by the king's commiſ- " ſion. And at what time need ſhall be, the ſame with other " wiſe and learned in the law ſhall be aſſigned by the king's " commiſſion, to hear and determine felonies and treſpaſſes done " againſt the peace in the ſame counties, and to inflict puniſh- " ment reaſonably according to the law and reaſon, and the " manner of the deed."

10 St. Tr. 92, App. *Sect.* 16. And it is farther enacted by 34 Edw. 3. c. 1. " That in every county of England, 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 laws and cuſtoms of the realm, and according to " that which to them ſhall ſeem beſt to do by their diſcre- " tion and good adviſement; and alſo to inform them, and to " inquire of all thoſe who have been pillors and robbers in the " parts beyond the ſea, and be now come again, and go wan- " dering, and will not labour as they were wont in times paſt; " and to take and arreſt all thoſe that they may find by indict- " ment, 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 mainpriſe of their good behaviour " towards the king and his people, and the other duly to pu- " niſh, 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 di- " ſturbed, nor put in the peril which may happen of ſuch offen- " ders; and alſo to hear and determine at the king's ſuit, all " manner of felonies and treſpaſſes done in the ſame county, " according to the laws and cuſtoms aforeſaid."

12 Rich. 2. 2. 13 Rich. 27. *Sect.* 17. And it is enacted by 17 Rich. 2. c. 10. " That " in every commiſſion of the peace through the realm, where " need ſhall be, two men of law of the ſame county where ſuch " commiſſion

" commiſſion ſhall be made, ſhall be aſſigned to go and proceed " to the deliverance of thieves and felons, as often as they ſhall " think it expedient."

Sect. 18. And it is farther enacted by 2 Hen. 5. ſt. 1. c. 4. " That the juſtices of peace in every ſhire named of the *quo-* " *rum* (except lords and the juſtices of either bench, and the " chief baron, and ſerjeants at law, and the king's attorney for " the time that they ſhall be occupied in the king's ſervice), " ſhall be reſiant in the ſame ſhire, and ſhall make their ſeſſions " four times by the year, *viz.* in the firſt week after Michael- " mas, Epiphany, Eaſter, and the tranſlation of St. Thomas the " Martyr, and oftener if need be, and that the ſame juſtices " hold their ſeſſions throughout England in the ſame weeks " every year."

36 Ed. 3 12. Lamb. b. 4. c. 31. Crom. 123. If the feaſt day fall upon the Sunday, it is ſaid the ſeſſions ſhall be held in week following, and not the ſame week. 2 Hale 49. ſed vide 4 Burn 178. and 2 Hale 50.

† But by 14 Hen. 6. c. 4. it is enacted, " That the juſtices of " the peace for the county of Middleſex ſhall keep, obſerve, and " execute the court of the ſeſſions of the peace two times in " the year at leaſt, and more often if need be."

And becauſe of the great buſineſs of this county, it is uſual to hold four general, and four general quarter ſeſſions in the year. Cron. Cir. 30.

Sect. 19. Alſo it is enacted by 2 Hen. 5. ſt. 2. c. 1. " That " juſtices of peace ſhall be made in the counties of England, of " moſt ſufficient perſons dwelling in the ſame counties, by the " advice of the chancellor (*a*) and of the king's counſel, without " taking other perſons dwelling in foreign counties to execute " ſuch office, except the lords and the juſtices of aſſizes to be " named by the king and his counſel; and except all the king's " chief ſtewards of the lands and ſeigniories of the duchy of " Lancaſter, in the north parts, and in the ſouth for the time " being."

(*a*) The power of chancery extends only to putting them in, but has no right to puniſh them afterwards for miſbehaviour; the redreſs is to move the king's bench for an information, and afterwards the complainant may apply to chancery to turn them out of the commiſſion. 2 Atk. 2. 4 St. Tr. 705.

Sect. 20. Alſo it is enacted by 1 Mary, ſeſ. 2. c. 8. " That " no perſon having or uſing the office of a ſheriff of any county, " ſhall uſe or exerciſe the office of a juſtice of peace, by force " of any commiſſion or otherwiſe, in any county where he ſhall " be ſheriff, during the time only that he ſhall exerciſe the ſaid " office, or ſheriffwick: And that all acts done by ſuch ſheriff " by authority of any commiſſion of the peace, during the time " aboveſaid, ſhall be void."

18 H. 6 11. Crom. 121. Dalt. c. 3.

† Alſo it is enacted by 5 Geo. 2. c. 18. " That no attorney, " ſolicitor, or proctor in any court whatſoever, ſhall be capable " to be a juſtice of the peace within any county of Eng- " land or Wales, during the time he ſhall practiſe in ſuch " character."

By 15 Car. 2. c. 11 ſ. 8. no commiſſioner of the exciſe ſhall act as a juſtice of the peace in matters relating to the exciſe.

It

† It is alſo enacted by the ſaid ſtatute 5 Geo. 2. c. 18. amended by 18 Geo. 2. c. 20. "That no perſon ſhall be capable of being a juſtice of the peace, or of acting as ſuch for any county, riding, or diviſion within England or Wales, who ſhall not have, either in law or equity, to and for his own uſe and benefit, in poſſeſſion, a freehold, copyhold, or cuſtomary eſtate for life, or for ſome greater eſtate, or an eſtate for ſome long term of years, determinable upon one or more life or lives, or for a certain term originally created for twenty-one years, or more, in lands, tenements, or hereditaments, in England or Wales, of the clear yearly value of one hundred pounds, over and above what will ſatisfy and diſcharge all incumbrances that affect the ſame, and over and above all rents and charges payable out of, or in reſpect of the ſame; or who ſhall not be ſeiſed of, or intitled unto in law or equity, to and for his own uſe and benefit, the immediate reverſion or remainder of and in lands, tenements, or hereditaments, lying or being as aforeſaid, which are leaſed for one, two, or three lives, or for any term of years determinable upon the death of one, two, or three lives, upon reſerved rents, and which are of the clear yearly value of three hundred pounds; and who ſhall not, before he takes upon himſelf to act as a juſtice of the peace, firſt take and ſubſcribe the oath in the act mentioned at ſome general or quarter ſeſſions for the county, riding, or diviſion, for which he does or ſhall intend to act, on penalty of one hundred pounds for every ſuch offence, half to the poor of the pariſh where he uſually reſides, and half to the proſecutor;" but this act doth not extend to any city or town being a county of itſelf, or having juſtices by charter, commiſſion, or otherwiſe.

By 14 Geo. 2. c. 40. ſ. 22. & 26 Geo. 2. c. 13. ſ. 12. no common brewer of ale or beer, innkeeper, or diſtiller, or any perſon intereſted in the ſaid trades, ſhall be capable to grant any licence, or of acting as a juſtice of peace in matters which ſhall any way concern the laws of diſtillers, or the duty on ſpirituous liquors. By 31 Geo. 2 c. 29. ſ. 33. no perſon concerned in the buſineſs of a miller, mealman, or baker, ſhall act as a magiſtrate in the execution of the act, on pain of 50 *l.*

† Alſo, "That in every proſecution the proof of his qualification ſhall lie upon the defendant; and, if he ſhall intend to inſiſt upon any other lands not contained in ſuch oath (1) as aforeſaid, as his qualification, he ſhall before his pleading deliver to the plaintiff a notice in writing ſpecifying ſuch other lands, and the place and county where they lie, or if offices and benefices, deſcribing them by their uſual names; and if the plaintiff thereupon ſhall not proceed, he may diſcontinue upon payment of coſts. But no lands not contained in ſuch oath or notice ſhall be allowed as part of the qualification upon any trial, *&c. &c.*"

(1) The oath is to be kept among the records of the ſeſſions, and the clerk of the peace, on demand, ſhall deliver an atteſted copy thereof to any perſon applying, which, being proved, ſhall be admitted in evidence.

† And by 1 Geo. 3. c. 13. which was made to amend the ſtatute of 18 Geo. 2. c. 20. it is enacted, "That all perſons who are juſtices of the peace at the time of any demiſe of the crown, and ſhall afterwards be appointed juſtices of the peace by any commiſſion granted by the ſucceeding ſovereign, who ſhall take the oaths of office of a juſtice of the peace before the clerk of the peace or his deputy for the reſpective county or place for

" for which he ſhall act, or intend to act, and who ſhall have " taken and ſubſcribed at ſome general or quarter ſeſſion of the " peace, the oath directed by 18 Geo. 2. c. 20. ſhall and may " act as a juſtice of the peace for ſuch county or place, without " being obliged to take and ſubſcribe again the ſaid oath, and " without incurring any penalty or forfeiture for the not taking " and ſubſcribing thereof."

† And it is further enacted by par. 2. " That no perſon who " hath taken the oaths uſually taken by a juſtice of the peace " under a *dedimus poteſtatem*, ſhall be obliged to have any other " *dedimus poteſtatem* from the clerk of the crown, to authoriſe " any perſon or perſons, therein to be named, to adminiſter " again to any ſuch juſtice, on any new commiſſion of the " peace, the oaths uſually annexed to ſuch *dedimus*, and taken " by a juſtice of the peace:—But that the clerk of the peace, " or his deputy, ſhall, on any new commiſſion being iſſued, " prepare a parchment roll, with the oaths uſually taken un- " der the *dedimus poteſtatem*, annexed to and ingroſſed on ſuch " roll, and ſhall adminiſter, without fee, the oaths in ſuch " roll ſpecified, to every ſuch juſtice of the peace within the " reſpective counties or places for which he ſhall act or intend " to act, who ſhall deſire to take the ſame; and that every " juſtice after taking the oaths contained in the ſaid roll, ſhall " ſubſcribe his name on the ſame; and the roll, with the oaths ſo " taken and ſubſcribed, ſhall be kept by the reſpective clerks of " the peace of the reſpective counties or places among the re- " cords of the ſeſſions." And ſome doubts having ariſen upon this act, the meaning of it is declared to be by 7 Geo. 3. c. 9. " That juſtices are exempted from the neceſſity of taking and " ſubſcribing the oaths above mentioned more than once in " any reign (2)." The oaths to be only once taken.

(2) In general there is an indemnifying clauſe in ſome act of every ſeſſion of parliament, provided the juſtices qualify according to the injunctions of the 10 Geo. 2. within the time which in ſuch act is uſually limited.

† It is alſo enacted by 9 Geo. 3. c. 30. ſ. 5. " That it ſhall " and may be lawful to and for the treaſurer, comptroller, ſur- " veyor, clerk of the acts, or any commiſſioner of the navy for " the time being, from time to time, *in all places whatſoever*, to do, " perform, exerciſe, and execute the office and duty of a juſtice " or juſtices of the peace to all intents and purpoſes whatſo- " ever, in cauſing any perſon or perſons who ſhall be charged " with counterfeiting, or procuring to be counterfeited any let- " ter of attorney, bill, ticket, certificate, aſſignment, laſt-will, " or other power or authority; or with uttering or publiſhing " the ſame as true, in order to receive any wages, pay, or other " allowance due to any officer, ſeaman, or other perſon in the " ſervice of his majeſty; or with taking or procuring falſe " oaths For the acts relating to naval ſtores, vide book firſt, c. 18. ſ. 18.

(a) By 17 Geo. 2. c. 40. ſ. 10. the quarter ſeſſions has juriſdiction over this offence, and may inflict a penalty of 200 *l.* and impriſonment, &c. upon the offender.

"oaths to be taken for any of the purpoſes aforeſaid; or to obtain the probat of any writ or letter of adminiſtration in order to receive ſuch wages, pay, or other allowance; or with ſtealing or embezzelling any naval ſtores (*a*) the property of the king, to be apprehended, committed, and proſecuted for the ſame."

Sect. 21. Alſo there are many other ſtatutes concerning the power of juſtices of peace (3), all of which it would be endleſs to enumerate; therefore I have only taken notice of thoſe which concern their authority in general; and for thoſe which concern the particular branches of it, I ſhall refer the reader to the books which treat principally of this ſubject.

(3) Juſtices of the peace, at this day, are of three ſorts; Firſt, By act of parliament; as the biſhop of Ely and his ſucceſſors, and the archbiſhop of York, and the biſhop of Durham. 27 H. 8. c. 24. Secondly, By charter, or grant, made by the king under the great ſeal; as mayors and the chief officers in divers corporate towns. Thirdly, By commiſſion.

2 Hale 42, 43. 4 Inſt. 171. Lamb. b. 1. c. 9. 3 Burn 7. Dalt. 5.

Sect. 22. As to the third point, *viz.* In what manner juſtices of the peace are to be commiſſioned in purſuance of the ſeveral ſtatutes concerning them; it is obſervable, That the commiſſion of the peace hath often been altered in ſeveral reigns, and that the preſent form of it was ſettled by the judges about the thirty-third year of queen Elizabeth, and is in ſubſtance as followeth:

For the precedent of a modern commiſſion of the peace, vide 3 Burn's Juſtice, 7.

Sect. 23. Beginning with a ſalutation from the king to the ſeveral perſons named in it, it afterwards aſſigns them and every one of them, jointly and ſeverally, the king's juſtices, to keep the peace in ſuch a county; and to cauſe to be kept all ſtatutes made for the good of the peace and quiet government of the people, as well within liberties as without; and to puniſh all thoſe who ſhall offend againſt any of the ſaid ſtatutes; and to cauſe all thoſe to come before them, or ſome of them, who ſhall threaten any of the people as to their perſons, or the burning of their houſes, in order to compel them to find ſurety for the peace of good behaviour; and if they ſhall refuſe to find ſuch ſurety, to cauſe them to be kept ſafely in priſon till they ſhall find it.

Vide Dalton c. 6. 3 Burn 9. 2 Hale 46.

Sect. 24. Then it goes on and aſſigns them, and every two or more of them (of which number either ſuch or ſuch a particular perſon among them is ſpecially required to be), juſtices to inquire by the oath of good and lawful men of the ſame county, of all felonies, witchcrafts, inchantments, ſorceries, magick art, treſpaſſes, foreſtallers, regrators, ingroſſers, and extortions whatſoever, and of all other offences of which juſtices of the peace may lawfully inquire; alſo of all thoſe who ſhall go or ride armed, &c. or in companies, to the diſturbance of the peace; and alſo of all innholders and others

who

who ſhall offend in the abuſe of weights or meaſures, or ſelling of victuals, &c. and alſo of all ſheriffs, bailiffs, ſtewards, conſtables, gaolers, and other officers, who ſhall be faulty in the execution of their offices; and to inſpect all indictments taken before them, or any of them, or other former juſtices of the peace for the ſame county; and to make and continue proceſs againſt all the perſons ſo indicted, till they ſhall be taken, or render themſelves, or be outlawed; and to hear and determine all the felonies, and other offences aforeſaid: Provided, that if a caſe of difficulty ſhall ariſe, they ſhall not proceed to give judgment, except in the preſence of ſome juſtice of one of the benches or of aſſize.

Sect. 25. And then it commands them to make inquiries of the premiſſes, and to hear and determine the ſame at certain days and places, which they or any ſuch two or more of them ſhall appoint.

Sect. 26. And then it goes on and commands the ſheriff of the county to return before them at certain days and places, to be made known to him by them, ſuch and ſo many lawful men of his bailiwick, by whom the truth of the premiſſes may be beſt known and inquired.

Sect. 27. And then concludes, by aſſigning ſome one of them keeper of the rolls of the peace in the ſame county; and commanding him to cauſe to be brought before himſelf and his fellows, at the ſaid days and places, the writs, precepts, proceſſes, and indictments aforeſaid.

AND NOW I am in the fourth place to ſhew, what is moſt obſervable from the ſaid ſtatutes and commiſſions.

In order to which I ſhall endeavour to ſhew—Firſt, What ſtatutes concerning the peace may be executed by ſuch juſtices.—Secondly, How far the juſtices of peace for a county may act out of it, or within a liberty.—Thirdly, What commiſſions of this kind require a ſpecial ſuit to the king for the granting of them.—Fourthly, How far ſuch juſtices have power to proceed on indictments not taken before themſelves.—Fifthly, By what name they are to be deſcribed.—Sixthly, What authority they have in relation to felonies.—Seventhly, What in relation to treaſon, *præmunire*, and miſpriſion of treaſon.—Eighthly, What in relation to inferior offences.

Sect. 28. As to the firſt point, *viz.* What ſtatutes concerning the peace may be executed by ſuch juſtices. It ſeems certain, That by virtue of the ſaid commiſſion they may execute all ſtatutes whatſoever, made for the better keeping of the peace, and conſequently thoſe of Wincheſter and Weſtminſter, and

Lamb. b. 1. c. 9. Dalt. c. 5. Com. 7. 8.

and all others concerning the peace, made before the reign of Edward the third, in whoſe time juſtices of 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 the general words of the preſent commiſſion; and yet none of the ſtatutes which ordain the office of juſtices of peace, ſay any thing concerning the execution of the ſaid former ſtatutes, ſo that the power of juſtices of peace in relation to thoſe ſtatutes, ſeems intirely 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.

† And it is recited by 16 Geo. 2. c. 18. "That doubts had ariſen whether, according to the laws and ſtatutes now in force, juſtices of the peace may lawfully act in any caſe relating to pariſhes or places, to the rates and taxes of which ſuch juſtices reſpectively are rated or chargeable." It is therefore enacted, "That it ſhall and may be lawful to and for "all and every juſtice or juſtices of the peace for any county, "riding, city, liberty, franchiſe, borough, or town corporate, "within their reſpective juriſdictions, to make, do, and "execute all and every act or acts, matter or matters, thing "or things, appertaining to their office as juſtice or juſtices "of the peace, ſo far as the ſame relates to the laws for the "relief, ſettlement, and maintenance of poor perſons; for "paſſing and puniſhing vagrants; for repair of the highways; "or to any other laws concerning parochial taxes, levies, or "rates; notwithſtanding any ſuch juſtice or juſtices of the "peace is or are rated to or chargeable with the taxes, levies, "or rates within any ſuch pariſh, townſhip, or place affected "by any ſuch act or acts of ſuch juſtice or juſtices as afore-"ſaid."—But this act ſhall not authoriſe any juſtice for any county or riding at large to act in the determination of any appeal to the quarter ſeſſions for any ſuch county or riding from any order, matter, or thing, relating to any ſuch pariſh, townſhip, or place, where ſuch juſtice or juſtices is or are ſo charged, taxed, or chargeable as aforeſaid (4).

(4) This ſtatute was made in conſequence of the deciſion in Great Chart v. Kennington, Burr. S. C. 194. Strange 1173. The general law certainly is, that juſtices of the peace ought not to execute their office in their own caſe, 1 Salk. 396. 607.; even in caſes where ſuch proceeding ſeems indiſpenſably neceſſary, as in being publickly aſſaulted, or perſonally abuſed, or their authority otherwiſe contemned while in the execution of their duty; yet if another juſtice be preſent, his aſſiſtance ſhould be required to puniſh the offender, Strange 240.; and it is ſaid that in ſeſſions no attachment for a contempt can be awarded, 2 Seſſ. Caſ. 176. They are indeed ſo ſtrongly protected in the juſt execution of their office, that they generally find the power of the law the beſt avenger of their injuries, 3 Burn 29. Str. 617. 1157. 1660. Ld. Raym. 1396. Burr. 719. 785. 1162. For while they act with a pure heart and upright intention, however erroneous their judgment may be, they cannot be criminally puniſhed, Lord Mansfield, Burr. 556. Douglas 427. Sayer 26. 2 Barnard. K. B. 249.

Black,

Black. 432. But on the contrary every corrupt or careleſs abuſe of the power with which they are inveſted, will receive the ſevereſt puniſhment, Strange 413. 678. 1088. Seſſ. Caſ. 353. Ld. Raym. 1407 1 Salk. 181.

† It is alſo enacted by 15 Geo. 3. c. 39. "That in all "caſes where any penalty is directed to be levied, or diſtreſs "to be made, by any act of parliament now in force, or "hereafter to be made, it ſhall and may be lawful for any "juſtice or juſtices acting under the authority of ſuch acts "reſpectively, and he and they is and are hereby authoriſed "and empowered to adminiſter an oath or oaths, affirmation "or affirmations, to any perſon or perſons, for the purpoſe "of levying ſuch penalties or making ſuch diſtreſſes reſpectively."

Vide 3 Burn's Juſtice for many judicious obſervations upon the ſubject of this ſtatute.

Sect. 29. As to the ſecond point, *viz.* How far the juſtices of peace for a county may act out of it or within a liberty; it is ſaid, That they 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.

C. Car. 211, 212. 2 Hale 51. C. Car. 248.

† And for the greater eaſe of juſtices of the peace for any county of this realm, it is enacted by 9 Geo. 1. c. 7. ſ. 3. "That if any ſuch juſtice of the peace ſhall happen to dwell "in any city or other precinct that is a county of itſelf, ſituate "within the county at large, for which he ſhall be appointed "juſtice of peace although not within the ſame county, it ſhall "and may be lawful for any ſuch juſtice of peace to grant "warrants, take examinations, and make orders for any "matters which any one or more juſtice or juſtices of the "peace may act in at his own dwelling-houſe, although ſuch "dwelling-houſe be out of the county where he is authoriſed to act as a juſtice of peace, and in ſome city, or other "precinct adjoining, that is a county of itſelf; and that "all ſuch warrants, orders, and other act or acts of any "juſtice of the peace, and the act or acts of any conſtable, "tithingman, headborough, overſeer of the poor, ſurveyor "of the highways, or other officer, in obedience to any ſuch "warrant or order, ſhall be as valid, good, and effectual in "the law, although it happen to be out of the limits of the "proper precinct or authority.—Provided that nothing in this "act ſhall impower juſtices for counties at large, to hold "their general quarter ſeſſions in the cities or towns which "are counties of themſelves, nor to empower juſtices of "peace, ſheriffs, bailiffs, conſtables, headboroughs, tythingmen, "borough-holders, or any other peace officers of the coun-

" ties at large, to act or intermeddle in any matters or things " arising within cities or towns which are counties of them- " ſelves, but that all ſuch actings and doings ſhall be of the " ſame force as if this act had not been made."

Vide 2 & 3 P. & M. c. 18. 2 Hale 47, 48. Lamb. b. 1. c. 9. Con. Crom. 8. 20 H. 7. 6, 7, 8.

And it is to be obſerved, That the juſtices of peace for a county have, by their commiſſion, an expreſs authority as well within liberties as without; from whence it ſeems clearly to follow, That they may execute their office within a town which has a ſpecial commiſſion of the peace for its own limits, unleſs ſuch commiſſion have a clauſe, that no other juſtices, except thoſe named in it, ſhall any way concern themſelves in the keeping of the peace within the liberties of ſuch town; and it may be queſtioned, whether ſuch a ſpecial clauſe in ſuch a commiſſion, do abſolutely make void the act of any county-juſtice within ſuch town? ſince the commiſſion for the county ſeems as fully to give thoſe named in it a juriſdiction over all ſuch towns within the precinct of it, as ſuch commiſſion for a town doth exclude them. And the juſtices for the county ſeem to be under no neceſſity of informing themſelves of the contents of a commiſſion, which they have nothing to do with; yet if they have expreſs notice given them of ſuch a reſtraining clauſe, and proceed to act within ſuch town in defiance of it, they may perhaps be puniſhable for their contempt of the king's prohibition, and yet perhaps it may be queſtioned whether their acts be void, for the reaſons above-mentioned (5).

Keb. 559.

(5) In Talbot v. Hubble, it was reſolved that the crown might grant to any city to have juſtices of their own within themſelves, and exclude the county juſtices from intermeddling in the *ordinary* buſineſs of a juſtice of the peace. Bro. Lett. Pat. 111. Dalt. 24. 2 Inſt. 71. That, in ſuch caſe the act of the county juſtices would be void, and not to be conſidered only as a breach of the franchiſe. 2 Inſt. 557. And that where they are generally named, as in the 12 Car. 2. c. 23. which gives the juriſdiction in exciſe matters to juſtices of the peace reſiding near the place where the forfeiture ſhall be made, or offence committed, they have concurrent juriſdiction as their locality may chance to be. Strange 1154. Douglas 555.

† But doubts and queſtions having ariſen, touching the commitment of offenders by juſtices of the peace of liberties and corporations, to the houſes of correction of counties, ridings, or diviſions, in which ſuch liberties and corporations are ſituate, though the inhabitants of ſuch liberties and corporations contribute to the maintenance and ſupport of ſuch houſes of correction: It is enacted by 15 Geo. 2. c. 24. " That in " all caſes where any perſon liable by law to be committed " to the houſe of correction, ſhall be apprehended within any " liberty, city, or town corporate, whoſe inhabitants are " contributing to the ſupport and maintenance of the houſe " or houſes of correction in the county, riding, or diviſion, " in which ſuch liberty, city, or town corporate, is ſituate; " it ſhall and may be lawful for the juſtices of the peace of " ſuch

" ſuch liberty, city, or town corporate, to commit ſuch per-
" ſon to the houſe of correction of the county, riding, or
" diviſion, in which ſuch liberty, city, or town corporate, is
" ſituate, and ſuch perſon ſo committed ſhall be dealt with,
" &c. to all intents and purpoſes as if committed by the
" county, &c."

† And it is recited by 23 Geo. 2. c. 26. ſ. 11. That it frequently happens that perſons againſt whom warrants are granted by the juſtices of the peace for the ſeveral counties within this kingdom, eſcape into other counties or places out of the juriſdiction of the juſtices of the peace granting ſuch warrants, and thereby avoid being puniſhed for the offences wherewith they are charged. It is therefore enacted by 24 Geo. 2. c. 55. " That in caſe any perſon, againſt whom a
" warrant ſhall be iſſued by *any* juſtice of the peace for *any*
" county or place within this kingdom, ſhall eſcape, go into,
" reſide, or be in any other county or place out of the juriſ-
" diction of the juſtice granting ſuch warrant as aforeſaid, it
" ſhall and may be lawful for any juſtice of the peace of the
" county or place where ſuch perſon ſhall eſcape, go into,
" reſide, or be, and ſuch juſtice is hereby required, upon
" proof being made upon oath of the hand-writing of the
" juſtice granting ſuch warrant, to indorſe his name on ſuch
" warrant, which ſhall be a ſufficient authority to the perſon
" bringing ſuch warrant, and to all other perſons to whom
" ſuch warrant was originally directed, to execute ſuch war-
" rant in ſuch other county or place out of the juriſdiction of
" the juſtice granting ſuch warrant as aforeſaid, and to appre-
" hend and carry ſuch offender before the juſtice who indorſed
" ſuch warrant, or ſome other juſtice of ſuch other county or
" place where ſuch warrant was indorſed, in caſe the offence,
" for which the offender ſhall be ſo apprehended in ſuch other
" county or place as aforeſaid, ſhall be bailable in law, and
" ſuch offender ſhall be ready and willing to give bail for his
" appearance at the next aſſizes or general gaol-delivery, or
" next general quarter ſeſſions of the peace to be held in and
" for the county or place where the offence was committed,
" in the ſame manner as the juſtices of the peace of the proper
" county or place ſhould or might have done in ſuch proper
" county or place; and the juſtice of ſuch other county or
" place ſo taking bail as aforeſaid, ſhall deliver the recogniz-
" ance, together with the examination or confeſſion of ſuch
" offender, and all other proceedings relating thereto, to the
" conſtable, tithingman, or other perſon or perſons ſo appre-
" hending ſuch offender as aforeſaid, who are hereby required
" to receive the ſame, and to deliver them over to the clerk
" of the aſſizes, or clerk of the peace of the county or place
" where ſuch offender is required to appear by virtue of ſuch

N. B. This ſection of the act is repealed by 24 Geo. 2. c. 55. but the preamble is retained by way of introduction.

Perſon is to be taken in the plural as well as the ſingular number.

" recognizance; and on default ſo to deliver over the ſame, " the perſon neglecting ſhall forfeit 10 *l.*—And in caſe the " offence for which ſuch offender ſhall be apprehended and " taken in any other county or place ſhall not be bailable in " law; or ſuch offender ſhall not give bail to appear as aforeſaid " to the ſatisfaction of the juſtice before whom ſuch offender " ſhall be brought in ſuch other county or place; then, and " in that caſe, the perſon apprehending ſuch offender ſhall " carry and convey ſuch offender before one of the juſtices of " the peace for the proper county or place where ſuch offence " was committed, there to be dealt with according to law.— " No proſecution ſhall be brought againſt the juſtice for or " by reaſon of his indorſing ſuch warrant. But the juſtice, " who originally granted the warrant, may be proſecuted in " the ſame manner as he might have been, if this act had not " been made."

Lamb. b. 1. c. 5. B. Commiſ. 5. Dalt. c. 3. 1 Lev. 219. Roll. 135. Ld. Raym. 1030. 3 Burn 8.

Sect. 30. As to the third point, *viz.* What commiſſions of this kind require a ſpecial ſuit to the king for granting of them. It ſeems agreed, That notwithſtanding all ſuch commiſſions muſt be in the king's name, as hath been more fully ſhewn, chapter 5. ſection 1. yet there is not any need of a ſpecial ſuit or application to, or warrant from the king, for the granting of them. For this is only requiſite for ſuch as are of a particular nature, as conſtituting the mayor of ſuch a town, and his ſucceſſors, perpetual juſtices of the peace within their liberties, &c. which commiſſions are neither revocable by the king, nor determinable by his death, as the common commiſſion for the peace is, which is made of courſe by the lord chancellor according to his diſcretion.

Crom. 2. 9. 2 Hale 46. 3 Burn 22.

Sect. 31. As to the fourth point, *viz.* How far juſtices of peace have power to proceed on indictments not taken before themſelves, it is certain, That ſubſequent juſtices of peace may proceed upon indictments taken before their predeceſſors; but this ſeems chiefly to depend upon 11 Hen. 6. c. 6. which, reciting the inconvenience that pleas and proceſſes upon indictments before juſtices of the peace had often been diſcontinued by making of new commiſſions of the peace, to the greateſt loſs of the king, &c. ordains, " That ſuch pleas, " ſuits, and proceſſes before juſtices of the peace, ſhall not be " diſcontinued by new commiſſions of the peace, but ſtand in " force. And that the new juſtices, after that they have the " records of the ſame pleas and proceſſes before them, may " continue, and finally hear and determine the ſame, &c." And this is farther confirmed by 1 Edw. 6. c. 7. ſ. 6. But it is certain that they cannot proceed on an indictment taken before a coroner, or juſtices of oyer and terminer, or gaol-delivery, nor deliver perſons ſuſpected by proclamation. But

Crom. 9. Sum. 166.

by

by 1 Edw. 4. c. 2. they are enabled to proceed on indictments taken before the ſheriff at his torn.

Sect. 32. As to the fifth point, By what name ſuch juſtices are to be deſcribed, it is obſervable, That they are expreſsly commiſſioned by the name of juſtices of peace; and in no part of their commiſſion are called by the name of keepers of the peace; yet, inaſmuch as by 18 Edw. 3. c. 2. which is one of the firſt ſtatutes made concerning their inſtitution, they are expreſsly called keepers of the peace; and the principal end of their office is for the keeping of the peace; and their uſual deſcription in *certiorari*'s is by the name of keepers of the peace; it hath been adjudged, That the caption of an indictment (whereof juſtices of peace have conuſance), *coram* A. B. & C. D. *cuſtodibus pacis & juſticiariis domini regis*, in ſuch a place, is good, without expreſsly naming them juſtices of peace. Alſo it hath been reſolved, that the deſcription of juſtices of peace by the name of *juſticiarii domini regis ad pacem conſervandam*, &c. is good without ſaying, *ad pacem domini regis*, for that it is neceſſarily implied (6). 2 R. Abr. 95. The King and Hawkins, Mich. 3 Geo. 1.

(6) Alſo by the words "our peace," when the king dies the ſurety of the peace is diſcharged, for the party is not bound to keep the peace of the ſucceeding ſovereign. Cromp. 124.

† And it is recited by 26 Geo. 2. c. 17. "That whereas authority is given by many acts of parliament to two or more juſtices of the peace, whereof one or more are to be of the *quorum*, and that divers acts, orders, adjudications, warrants, confirmations of indentures, and other inſtruments done, made, and executed by two or more juſtices of the peace, without expreſſing that they are, or that one of them is, of the *quorum*, have been and may be for that reaſon only, impeached, ſet aſide, and vacated." It is therefore enacted, "That no act, order, adjudication, warrant, indenture of "apprenticeſhip, or other inſtrument already made, done, or "executed, or hereafter to be made, done, or executed by "two or more juſtices of the peace, which doth not expreſs "that one or more of the juſtices is or are of the *quorum*, ſhall "be impeached, ſet aſide, or vacated for that defect only." Juſtices may act though not of the quorum.

† And it is alſo enacted by 7 Geo. 3. c. 21. "That all "acts, orders, adjudications, warrants, indentures of ap-"prenticeſhip, or other inſtruments which ſhall be made, "done, or executed, by virtue of any act or acts of parlia-"ment, made or to be made by two or more juſtices of the "peace qualified to act within ſuch cities, boroughs, towns "corporate, franchiſes and liberties, as have only one juſtice "of the peace of the *quorum* qualified to act within the ſame, "though neither of the ſaid juſtices are of the *quorum*, ſhall be "valid

" valid and effectual in law as if one of the ſaid juſtices had " been of the *quorum*."

Com. Dig. 45. *Sect.* 33. As to the ſixth point, *viz.* What authority juſtices of peace have in relation to felonies, it is obſervable, That ſuch of the ſaid juſtices as are of the *quorum* only, are expreſsly authoriſed to inquire of, and hear and determine felonies and treſpaſſes, and that the above-mentioned ſtatute of 18 Edw. 3. after it hath ordained, " That ſome perſon ſhall " be aſſigned keepers of the peace by the king's commiſſion," ſaith in another diſtinct clauſe, " That at what time need ſhall " be, the ſame ſhall be aſſigned by the king's commiſſions to " hear and determine felonies and treſpaſſes, &c." From whence it is inferred, That juſtices of peace have no power to hear and (*a*) determine felonies, unleſs they be authoriſed ſo to do by the expreſs words of their commiſſion. And this opinion is farther confirmed by the authority of the year books of (*b*) 2 Rich. 3. c. 9. *a. b.* and 12 Hen. 7. c. 25. *a.* wherein it is adjudged, That a *certiorari* to remove certain indictments taken before juſtices of peace was not good, becauſe it named them only juſtices of peace, without adding that they were alſo aſſigned to hear and determine felonies, &c. Yet it ſeems, That it may probably be argued for the contrary opinion, that the ſtatute of 34 Edw. 3. c. 1. is expreſs, that the perſons aſſigned for the keeping of the peace, ſhall have power among other things to hear and determine felonies and treſpaſſes, &c. And this ſeems to be the principal ground of the reſolution in the caſe of *Barnes* and *Conſtantine*, wherein it is adjudged, That the ſetting forth of an indictment in a declaration as taken before juſtices of peace, being alſo aſſigned to hear and determine felonies, &c. was well juſtified upon oyer of the record, wherein it was entered as taken before juſtices of peace, without adding, That they were aſſigned to hear and determine felonies, &c. And as to the authority of *Staunford* and *Hale*, it may be anſwered, That their opinion is expreſsly grounded on the wording of the ſtatute of 18 Edw. 3. And it does not appear that they conſidered the purport of 34 Edw. 3. As to the authority of 2 Rich. 3. c. 9. it may be anſwered, That the *certiorari* therein mentioned, was for the removal of an indictment for counterfeiting coin, and that the power of juſtices of peace to take ſuch an indictment, depends wholly upon the ſtatute of 3 Hen. 5. c. 7. whereby it is enacted, " That the juſtices of peace throughout the realm, " ſhall have power by the king's commiſſions to inquire of the " ſaid offence." And as to what is ſaid in 12 Hen. 7. c. 25. it may be anſwered, That the *certiorari* therein mentioned was to remove certain indictments, but it doth not appear from the book what thoſe indictments were; ſo that it is poſſible they

(*a*) Crom. 120. 8 P. C. 53. 58. 96. Sum. 165. 207. 2 Hale 43, 44.

(*b*) B. Indict. 32. 50. Co. Litt. 391.

Co. Jac. 32. Yelv. 46. 2 Roll. 151. Dyer 69.

they might be of a ſpecial nature, not within the general purview of 34 Edw. 3. *ſed quære.*

However it is certain, That ſuch a clauſe in the commiſſion of juſtices to hear and determine felonies, &c. gives them no juriſdiction over an offence, which by ſtatute is ſpecially appointed to be determined by juſtices of oyer and terminer, becauſe ſuch juſtices ſhall be intended to mean ſuch juſtices of oyer and terminer only, which properly and uſually are ſo called, and not thoſe who are diſtinctly known by another name. And from hence it follows, That juſtices of peace have no power to take an indictment upon the ſtatute of 5 Eliz. c. 14. concerning forgery, nor on the 2 & 3 Edw. 6. c. 24. againſt acceſſaries in one county to felonies in another, nor on any other ſtatute which ſpecially limits the juriſdiction of determining any other felony to other juſtices of a particular denomination. Yet inaſmuch as all felonies include in them a breach of the peace, and 2 & 3 Ph. and Mary, c. 10. which directs juſtices of peace to take the examinations of all ſuch perſons as ſhall be committed by them for felony, ſeems to ſuppoſe them to have a general power of committing all perſons accuſed of any kind of felony; and the general practice has always been agreeable hereto; it is ſaid, That juſtices of peace may take the examination of perſons brought before them for any kind of felony, and commit them to priſon; and alſo take the information of the proſecutors upon oath, and bind them over to proſecute; and to commit thoſe who ſhall refuſe to be ſo bound, if it appear that they can give material evidence. Alſo inaſmuch as the ſaid ſtatute of 2 & 3 Ph. and Mary, c. 10. and alſo 1 & 2 Ph. and Mary, c. 13. direct juſtices of peace, in caſe of homicide and other felonies, to take the examination of the offenders, and the information of others, and to certify the ſame to the juſtices of gaol-delivery; it hath been generally thought adviſable for juſtices of peace to proceed no farther in relation to any felonies though within their commiſſion, except only petit larcenies (7).

Summary 165. 2 Hale 44. 9 Co. 118. C. Eliz. 87. 603. 697. 2 R. Abr. 96.

Kely. 1. Dalt. c. 20. Summary c. 167, 168. 2 Hale 44.

Summary 169. 2 Hale 46. Strange 848.

1 Hale 414. ſays they may take an inquiſition of ſelf murder if the body cannot be found.

(7) Juſtices of the peace in England may commit an offender againſt the Iriſh law for felony in order to be tranſmitted to Ireland to be tried, the offence being committed there, Strange 848. Barnard. K. B. 225. Fitzgibb. 111. 14 Viner Abr. 569. pl. 7. But a juſtice cannot take a perſon from the cuſtody of the king's bench, and ſend him to the county gaol, but he may, by his warrant, charge him criminally, where he is in cuſtody. Strange 828. Two juſtices may take a recognizance for the appearance of one charged with felony on the high ſeas at the ſeſſions of admiralty, and the recognizance may be eſtreated into the exchequer. Parker 241.

Sect. 34. As to the ſeventh point, *viz.* What authority juſtices of peace have in relation to treaſon, *præmunire*, and miſpriſion of treaſon. It ſeems to be agreed, That notwithſtanding none of theſe offences are within the letter of their commiſſion; yet inaſmuch as they are againſt the peace of the king, and of the realm, any juſtice of peace may, either upon his own knowledge, or the complaint of others, cauſe any

4 Com. D. 44. Comb. 405. Lamb. 226.

Dalt. c. 90. 212. 460. Summary 168. 2 Hale 44. 1 Hale 580.

perſon to be apprehended for any ſuch offence. And it is the opinion both of *Dalton* and Sir *Matthew Hale*, That ſuch juſtice may take the examination of the perſon ſo apprehended and the information of all thoſe who can give 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 the ſame court to which he ſhall bind over ſuch informers. And this opinion ſeems to be agreeable to conſtant practice, eſpecially ſince the ſtatutes of 1 & 2 Ph. and Mary, c. 13. and 2 & 3 Ph. and Mary, c. 10. which, directing juſtices of peace to proceed in this manner againſt perſons brought before them for felony, ſeem to give them a diſcretionary power of proceeding in like manner againſt perſons accuſed of the above mentioned offences.

Sect. 35. Alſo by 3 Hen. 5. c. 7. "Juſtices of peace "ſhall have power by the king's commiſſions to inquire of "counterfeiting, clipping, waſhing, and other falſity of mo- "ney of the land, and thereupon to make proceſs by capias "only, againſt thoſe who before them ſhall be thereof indicted."

Sect. 36. And by 5 Eliz. c. 1. ſect. 3. "Juſtices of "peace may inquire of the offence of maintaining the pope's "power, and ſhall certify every preſentment made before "them of any ſuch offence, into the king's bench, within "forty days after it ſhall be made, &c."

1 Leon. 239.

Sect. 37. And by 23 Edw. 1. ſect. 8. "They may in- "quire of all offences againſt that act, or againſt the acts of "the firſt, fifth, or thirteenth years of the ſaid queen's reign, "touching acknowledging of the king's ſupreme government "in cauſes eccleſiaſtical, or other matters touching the ſervice "of God, or coming to church, or eſtabliſhment of true reli- "gion in this realm, within one year and a day after every ſuch "offence committed."

Vide 3 Burn's Juſtice 17. and 4 Comyns Dig. title juſtice of the peace, in which all theſe inferior offences are treated of at large and ſucceſſively.

Sect. 38. As to the eighth point, *viz.* What authority juſtices of peace have in relation to inferior offences. It would be endleſs to enumerate all the offences within their juriſdiction, concerning which there have been ſuch great numbers of ſtatutes; and therefore I ſhall content myſelf in this place with obſerving, that by the above mentioned ſtatutes of 34 Edw. 3. c. 1. and alſo by the expreſs words of their commiſſion, they are impowered to hear and determine all treſpaſſes, which is a word 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 (*a*) ſaid to be. Yet it hath been of late ſettled, that juſtices of peace have no juriſdiction over

(*a*) 6 Mod. 128.

over (*b*) forgery or perjury at the common law, the principal reaſon of which reſolution, as I apprehend, 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; (*c*) as libels, and ſuch like, which on this account have been adjudged indictable before juſtices of peace. And for this reaſon, principally as I apprehend, the court of king's bench in the caſe of one *Pitt*, ſince the above mentioned reſolution concerning perjury and forgery, refuſed to quaſh an indictment found at a ſeſſion of the peace for a libel, but ordered the defendant to demur to it, if he thought fit. (*d*) And upon the like reaſon perhaps the former opinion, That one may be indicted before juſtices of peace for being a common night-walker and haunter of bawdy-houſes, may not be thought to contradict the above mentioned reſolution.

(*b*) Salk. 406. Crom. 120. Lamb. b. 1. c. 12. 2 Stra. 1088. Sayer 278. 6 Mod. 379.

(*c*) 1 Lev. 139. 1 Sid. 271. 2 Wilſ. 160. 1 Keb. 559. 772. 788. 931. 2 Keb. 138. Con. C. Jac. 421. Tr. 13 Annæ.

(*d*) Latch. 173. Pop. 208.

Sect. 39. And juſtices of peace by virtue of the above mentioned ſtatute of 34 Edw. 3. c. 1. ſeem to have a juriſdiction over barrators, and ſuch like offenders, whether they be mentioned in their commiſſion or not. And it ſeems clear, That juſtices of 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 as I apprehend, it was lately reſolved, That they may take an indictment of extortion.

C. Jac. 32. Yelv. 46. Con. 2 Roll. 151.

King and Loggain. 3 Burn. 17. Crompton 8.

† *Sect.* 40. It is enacted by 7 Jac. 1. c. 5. made perpetual by 21 Jac. 1. c. 12. "That if any action upon the caſe, treſpaſs, "battery, or falſe impriſonment ſhall be brought againſt any "juſtice of the peace, mayor, or bailiff of city or town corporate, "headborough, portreve, conſtable, tithingman, or (1) collector, for or concerning any matter, cauſe or thing, by them or "any of them done by virtue or reaſon of their or any of their "office or offices, it ſhall be lawful for ſuch officers or any of "them, and all others which in their aid or aſſiſtance, or by "their commandment ſhall do any thing touching or concerning his or their office or offices, to plead the general iſſue, "not guilty, and give the ſpecial matter in evidence to the "jury which ſhall try the ſame; and if the verdict ſhall paſs "with

Cro. Car. 275. 285. 467. Vaughan 213. Noy 32. 1 Roll 274. Moor 845. 1 Mod. 184. 1 Burr. 602. 2 Burr. 1162.

(1) It has been determined that ſecretaries of ſtate, and privy counſellors, are not magiſtrates; and that the king's meſſengers are not officers within the protection of this and the following ſtatutes. Entick v. Carrington, 11 State Trials 321.

3 Bulſt. 77. Strange 49, 974. (a) But it muſt firſt be certified, that the defendant acted by virtue or reaſon of his office. Douglas 307, 308. Unleſs, in the caſe of a ſpecial verdict, it ſo appears by the facts found; for double coſts do not entirely depend upon the certificate of the judge. Ran v. Pickins. M. 23 Geo. 3.

" with the defendant in ſuch action, or the plaintiff become non-
" ſuit, or ſuffer a diſcontinuance, in every ſuch caſe the juſtices
" or juſtice, or ſuch other judge before whom the ſaid matter
" ſhall be tried, ſhall allow to the defendant his double coſts (a).

4 Inſt. 174. 1 Inſt. 283. Vaughan 113. 115. 117.

† *Sect.* 41. And it is further enacted by 21 Jac. 1. c. 12. (which extends the above act to churchwardens and overſeers of the poor), " That the ſaid ſuit ſhall be laid within the county
" where the treſpaſs or fact ſhall be done and committed, and
" not elſewhere; and that upon the trial, if the plaintiff ſhall
" not prove to the jury that it was ſo done and committed,
" the jury ſhall find the defendant not guilty, without having
" any regard or reſpect to any evidence given by the plaintiff
" touching the cauſe of action (8)."

(8) No action of treſpaſs will lie againſt juſtices making a warrant of diſtreſs upon a poors rate if it has never been appealed from; nor upon the warrant if not void *ab initio*; for the juſtices cannot be treſpaſſers by what the officers afterwards do. 1 Burr. 581—587. But if a juſtice commit on conviction, for non-payment of the penalty, without attempting to diſtrain for it, an action will lie againſt him, 1 Strange 711.

On actions againſt juſtices they are obliged to ſhew the regularity of their conviction: And the informations and other documents upon which the convictions are grounded muſt be produced and proved in court. 1 Strange 711.

† *Sect.* 42. And it is further enacted by 24 Geo. 2. c. 44. " That no writ ſhall be ſued out againſt, nor any copy of any
" proceſs, at the ſuit of a ſubject, ſhall be ſerved on any juſtice
" of the peace for any thing by him done in the execution of
" his office, until notice in writing of ſuch intended writ or
" proceſs ſhall have been delivered to him or left at the uſual
" place of his abode, by the attorney or agent for the party
" who intends to ſue or cauſe the ſame to be ſued out or
" ſerved, at leaſt one calendar month before the ſuing out or
" ſerving the ſame; in which notice ſhall be clearly and ex-
" plicitly contained the cauſe of action which ſuch party
" hath, or claimeth to have againſt ſuch juſtice of the peace;
" on the back of which notice ſhall be indorſed the name of
" ſuch attorney or agent, together with the place of his abode,
" who ſhall be intitled to have the fee of twenty ſhillings for
" the preparing and ſerving ſuch notice, and no more."

N. B. By 30 Geo. 2. c. 24. ſ. 23. this clauſe is extended to juſtices acting under that act.

† *Sect.* 43. And it is further enacted by the ſaid ſtatute, par. 2. " That it ſhall and may be lawful to and for ſuch juſtice of
" the peace, at any time within one calendar month after ſuch
" notice given as aforeſaid, to tender amends to the party
" complaining, or to his or her agent or attorney; and, in
" caſe the ſame is not accepted, to plead ſuch tender in bar
" to any action to be brought againſt him, grounded on ſuch
" writ or proceſs, together with the plea of not guilty, and
" any other plea, with the leave of the court; and if upon
" iſſue

" iſſue joined thereon the jury ſhall find the amends ſo ten- Douglas 307.
" dered to have been ſufficient, then they ſhall give a verdict
" for the defendant; and in ſuch caſe, or in caſe the plaintiff
" ſhall become nonſuit, or ſhall diſcontinue his or her action,
" or in caſe judgment ſhall be given for ſuch defendant or
" defendants upon demurrer, ſuch juſtice ſhall be entitled to
" the like coſts as he would have been entitled unto, in caſe
" he had pleaded the general iſſue only; and if upon iſſue ſo
" joined the jury ſhall find that no amends were tendered, or
" that the ſame were not ſufficient, and alſo againſt the de-
" fendant or defendants or ſuch other plea or pleas, then they
" ſhall give a verdict for the plaintiff and ſuch damages as
" they ſhall think proper, which he or ſhe ſhall recover to-
" gether with his or her coſts of ſuit.—But no ſuch plaintiff
" ſhall recover any verdict againſt ſuch juſtice in any caſe
" where the action ſhall be grounded on any act of the defend-
" ant, as juſtice of the peace, unleſs it is proved upon the
" trial of ſuch action, that ſuch notice was given as aforeſaid;
" but in default thereof ſuch juſtice ſhall recover a verdict and
" coſts as aforeſaid."

† *Sect.* 44. And it is further enacted by the ſaid ſtatute, par. 4 and 5. " That in caſe ſuch juſtice ſhall neglect to tender
" any amends, or ſhall have tendered inſufficient amends, be-
" fore the action brought, it ſhall and may be lawful for him,
" by leave of the court where ſuch action ſhall depend, at any
" time before iſſue joined to pay into court ſuch ſum of money
" as he ſhall ſee fit (9); whereupon ſuch proceedings, orders,
" and judgments ſhall be had, made, and given in and by ſuch
" court, as in other actions where the defendant is allowed
" to pay money into court.—And no evidence ſhall be per-
" mitted to be given by the plaintiff on the trial of any ſuch ac-
" tion as aforeſaid, of any cauſe of action, except ſuch as is
" contained in the notice hereby directed to be given."

(9) But it muſt appear that the action was for ſomething done in the execution of his duty; if not, the court will fix a time for him to plead. But if it appear upon the production of the notice of action, it is ſufficient. 2 Black. 859.

† *Sect.* 45. And it is alſo further enacted by par. 6. " That
" no action ſhall be brought againſt any conſtable, headbo-
" rough or other officer, or againſt any perſon or perſons act-
" ing by his order and in his aid, for any thing done in obedi-
" ence to any warrant under the hand or ſeal of any juſtice of
" the peace, until demand hath been made or left at the uſual
" place of his abode, by the party or parties intending to bring
" ſuch action, or by his, her, or their attorney or agent, in
" writing, ſigned by the party demanding the ſame, of the
" peruſal and copy of ſuch warrant, and the ſame hath been
" refuſed or neglected for the ſpace of ſix days after ſuch de-
" mand; and in caſe after ſuch demand and compliance there-
" with, by ſhewing the ſaid warrant to, and permitting a copy
" to be taken thereof by the party demanding the ſame, any
" action ſhall be brought againſt ſuch conſtable, headborough
" or

Cro. Car. 394. 10 Co. 76. Wood b. 1. c. 7. If a juſtice of peace makes a warrant in a caſe which is plainly out of his juriſdiction, ſuch warrant is no juſtification to a conſtable. 1 Strange 711. Wood b. 1. c. 7. 2 Strange 1002. But if the juſtice exceed his authority in granting a warrant, yet the officer muſt execute it, and is

indemnified for so doing, Cro. Car. 394. 10 Co. 76.

" or other officer, or againſt ſuch perſon or perſons acting in his " aid for any ſuch cauſe as aforeſaid, without making the juſ- " tice or juſtices who ſigned or ſealed the ſaid warrant defend- " ant or defendants, that on producing or proving ſuch war- " rant at the trial of ſuch action, the jury ſhall give their ver- " dict for the defendant or defendants, notwithſtanding any " defect of juriſdiction in ſuch juſtice or juſtices; and if ſuch " action be brought jointly againſt ſuch juſtice or juſtices, " and alſo againſt ſuch conſtable, headborough, or other officer, " or perſon or perſons acting in his or their aid as aforeſaid, " then, on proof of ſuch warrant, the jury ſhall find for " ſuch conſtable, headborough, or other officer, and for " ſuch perſon or perſons ſo acting as aforeſaid, notwith- " ſtanding ſuch defect of juriſdiction as aforeſaid; and if " the verdict ſhall be given againſt the juſtice or juſtices, " that in ſuch caſe the plaintiff or plaintiffs ſhall recover his, " her, or their coſts againſt him or them, to be taxed in ſuch " manner by the proper officer as to include ſuch coſts as ſuch " plaintiff or plaintiffs are liable to pay ſuch defendant or de- " fendants for whom ſuch verdict ſhall be found as aforeſaid."

‡ Ventris 45. Ran v. Pickins. Mich. 23 Geo. 3.

† *Sect.* 46. But it is provided by par. 7. " That where the " plaintiff in any ſuch action againſt any juſtice of the peace, " ſhall obtain a verdict, in caſe the judge before whom the cauſe " ſhall be tried, ſhall in open court certify on the back of the " record, that the injury for which ſuch action was brought, was " wilfully and maliciouſly committed, the plaintiff ſhall be in- " titled to have and receive double coſts of ſuit.—And no " action ſhall be brought unleſs commenced within ſix calen- " dar months after the act committed."

† *Sect.* 47. It is alſo enacted by 18 Geo. 3. c. 19. " That where " any complaint ſhall be made before any juſtice of the peace, " and any warrant or ſummons ſhall iſſue in conſequence of ſuch " complaint, it ſhall be lawful to and for any juſtice or juſtices " of the peace who ſhall have heard and determined the matter " of the ſaid complaint, to award ſuch coſts to be paid by either " of the parties, and in manner and form as to him or them " ſhall ſeem fit, to the party injured; and if they ſhall not pay " down or give ſatisfactory ſecurity for the ſame, the ſaid juſ- " tice or juſtices ſhall, by warrant under hand and ſeal, levy " the ſaid ſum or ſums by diſtreſs and ſale, and where goods " and chattels of ſuch perſon cannot be found, ſhall commit " ſuch perſon to the houſe of correction for the county or place " where ſuch perſon ſhall reſide, there to be kept to hard " labour not exceeding one month, nor leſs than ten days, or " until ſuch ſum or ſums of money, together with the expences " of the commitment, be firſt paid."

† But it is provided by the ſaid ſtatute, " That upon the " conviction of any perſon or perſons, upon any penal ſtatute " where

" where the penalty ſhall amount to, or exceed five pounds, " the ſaid coſts ſhall be deducted by the ſaid juſtice or juſtices, " according to his or their diſcretion, out of the ſaid penalty " or penalties, ſo that the ſaid deduction ſhall not exceed one- " fifth part of the penalty or penalties aforeſaid; and the re- " mainder ſhall be paid to, or divided among, the perſon or " perſons who would have been intitled to the whole in caſe " this act had not been made."

Where a ſpecial authority is given to juſtices out of ſeſſions, it ought to appear in their ord rs that that authority was exactly purſued, 2 Salk. 475. And lord Hale ſays (contrary to the opinion of lord Coke) that the juſtices out of ſeſſions may iſſue their warrant 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 Hale 579. Sed vide 2 Hale 113. contra and 3 Burn's Juſtice, 28.

For the fees to be taken by juſtices clerks, and how they are to be regulated, vide 26 Geo. 2. c. 14. and how the table of ſuch fees ſhall be confirmed in the county of Middleſex, 27 Geo. 2. c. 16. ſect. 4.

Sect. 48. And now I am to conſider the nature of the court of theſe juſtices ſeſſions, by which we underſtand an aſſembly of two or more of them, whereof one is of the *quorum*, at a certain day and place before appointed, in order to inquire, hear, and determine in purſuance of their commiſſion, of any cauſes or matters therein contained.

And for the better underſtanding hereof, I ſhall conſider the following particulars.—Firſt, By whom, and in what manner ſuch court is to be ſummoned and appointed.—Secondly, What perſons are bound to give their attendance at it.—Thirdly, Whether it have any power over its own members.—Fourthly, The difference between general and ſpecial, and quarter ſeſſions.

Sect. 49. As to the firſt point, It ſeems clear from the expreſs words of the commiſſion, That any two ſuch juſtices, whereof one is of the *quorum*, may hold ſuch court at ſuch days and places as ſhall be appointed by them, and that the ſheriff is bound to return proper juries, and that the *cuſtos rotulorum* ought to bring the rolls of the peace before them, *&c.* C. C. C. 29. Lamb. b. 4. c. 4. & 20. Dalt. ch. 185.

Sect. 50. And from hence it ſeems to follow, That any two ſuch juſtices may direct their precept (*a*) under their *teſte* to the ſheriff for the ſummons or the ſeſſions of the peace, thereby commanding him to return a grand jury before them, or their fellow juſtices at a certain day and place, and to give notice to all ſtewards, conſtables, and bailiffs of liberties, to be preſent and do their duties at ſuch day and place, and to proclaim in proper places throughout his bailiwick, that ſuch ſeſſions will be holden at ſuch day and place, and to attend there himſelf to his duty, *&c.*

(*a*) Which ſhould bear teſte 15 days before the return. Lamb. b. 4. c. 20.

2 Hale 41. Lamb. b. 4 c. 2. Crom. jur. 122.

Sect. 51. And it is ſaid, That ſuch a precept by any two ſuch juſtices, cannot be ſuperſeded by any of their fellows, but only by writ out of chancery.

Vide 4 Burn 181. Lamb. 380.

Sect. 52. It is ſaid, That ſuch juſtices may hold ſuch a ſeſſion without any ſuch ſummons (1), which ſeems to be a well-grounded opinion, as to their proceeding on indictments before taken before themſelves or others, or on other particular occaſions, for which there is no need either for the attendance of the grand jurors, or officers, *&c.*

(1) Mr. Burn is of opinion, that a ſummons is not, indiſpenſably, neceſſary; and that if a ſufficient number of juſtices do not appear, thoſe juſtices who do appear may adjourn the ſeſſions to any future and convenient day within the period of the twelve following weeks, 4 Burn 191. 19 Viner 358. and iſſue their precept to the ſheriff for that purpoſe accordingly, 4 Burn 178. But a juſtice, if his attendance is neceſſary, is liable to an information for voluntary abſence, Strange 81.

Vide 4 Burn 183. 4 Com. Dig. 153 D. 4. For the mode of proceeding at ſeſſions vide 4 Burn 185 to 191. & Cro. Cir. Com. 28 to 79. Lamb. 402. D. It. ch. 185. See the ſtatute of Winchester, and b. 1. c. 78. ſ. 22. and c. 76. ſ. 45

Sect. 53. As to the ſecond point, *viz.* What perſons are bound to give their attendance at the court of ſeſſions, there is no doubt but that the ſheriff (who is bound both to return his precept, and alſo to take the charge of all the priſoners who ſhall be committed to him), and alſo all conſtables of hundreds, who are to make their preſentments required by ſeveral ſtatutes (as that of hue and cry, and thoſe relating to highways and alehouſes, *&c.*), and alſo all bailiffs of franchiſes, and all perſons returned on a jury, and the (*a*) keeper of the houſe of correction, *&c.* are bound to attend on every ſuch ſummons as is above mentioned; on pain of being amerced for their default at the diſcretion of the court, *&c.*

(*a*) 7 Jac. 1. c. 4.

† *Sect.* 54. It is enacted by 22 Geo. 2. c. 46. ſ. 12. "That "no perſon whatſoever ſhall act as ſolicitor, attorney, or agent, "or ſue out any proceſs at any general or quarter ſeſſions of the "peace for any county or place within this kingdom, either with "reſpect to matters of a criminal or civil nature, unleſs ſuch "perſon ſhall have been admitted and continued an attorney of "one of his Majeſty's courts of record at Weſtminſter, and "duly enrolled purſuant to 2 Geo. 2. c. .; or ſuch other "laws as may relate thereto, upon a penalty of fifty pounds, to "be recovered by action of debt, bill, plaint, or information, "in any of the courts of record at Weſtminſter, by any perſon "or perſons who ſhall ſue for the ſame within twelve months "after the offence committed, with treble coſts of ſuit."

† *Sect.* 55. And it is farther enacted, "That if any attorney "or attornies ſhall permit and ſuffer any perſon or perſons what-"ſoever, not being admitted and inrolled as aforeſaid, to make "uſe of his or their name or names reſpectively, in the courts "of general or quarter ſeſſions aforeſaid, he ſhall be liable to "a like penalty of fifty pounds, to be recovered in manner "aforeſaid. But this ſhall not deprive the attornies of the "dutchy

" dutchy of Lancaſter, or of the great ſeſſions in Wales, or of " the counties palatine of Cheſter, Lancaſter, and Durham, " from acting within their reſpective juriſdictions."

† *Sect.* 56. And to the end that juſtice may be more impartially adminiſtered, it is farther enacted by the ſaid ſtatute, par. 14. " That no clerk of the peace (*a*) or his deputy, nor any under " ſheriff or his deputy, ſhall act as a ſolicitor, attorney, or " agent, or ſue out any proceſs at any general or quarter ſeſ- " ſions of the peace, to be held for ſuch county or place where " he ſhall execute the office of clerk of the peace (2), or deputy " clerk of the peace, under ſheriff or deputy, on any pretence " whatſoever, upon the like penalty of fifty pounds, to be re- " covered in manner aforeſaid."

(*a*) By 3 & 4 Edw 6. c. 1. 37 Hen. 8. c. 2. and 1 Will. & Mary, c. 21. ſ. 4.

(2) The lord chancellor is to appoint a *cuſtos rotulorum*, who ſhall appoint a clerk of the peace, able, and reſiding in the ſame county, to execute the office. Vide Shower 528. By this appointment he has the office *quamdiu ſe bene geſſerit*, Shower 556. 4 Mod. 167. He is bound to attend the ſeſſions, and upon his behaviour, he may, by the mere order of the juſtices, be ſuſpended or diſcharged. 1 Shower 427. 506. 516. 536. Mod. Caſes 192. 4 Mod. 32. Strange 996.

Sect. 57. As to the third point, *viz.* Whether the court of ſeſſions have any power over its own members. It ſeems certain, That it hath no authority to amerce any juſtice of peace for his non-attendance at any ſuch court, as the juſtices of aſſize may for the abſence of any ſuch juſtice at the gaol-delivery; Lamb. 402. for it is a general rule, That *inter pares non eſt poteſtas*, 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 Cro. 122. if a juſtice of peace at the ſeſſions, who is not of the *quorum*, F. Juſ. de peace, ſhall uſe ſuch expreſſions towards another who is of the *quorum*, 3. for which, if he were a private perſon, he might be committed or bound to his good behaviour; yet the ſeſſions have no authority to commit him, or to bind him to his good behaviour: And yet it ſeems to be agreed, that if a juſtice of peace 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, as hath been ſhewn in the firſt book: For the C. 60. ſ. 5. public peace requires an immediate remedy in all ſuch caſes.

Sect. 58. As to the fourth point, *viz.* The difference between general and ſpecial and quarter ſeſſions. Mr. *Lambard* ſeems to Lamb. b. 4. c. make no diſtinction between general and quarter ſeſſions, but to 19, 20. take them as ſynonymous terms. But it ſeems the better opinion, That quarter-ſeſſions are a ſpecies only of general ſeſſions, 2 Hale 49, 50. 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 above-mentioned ſtatute of 2 Hen. 5. c. 4. ſet forth more Salk. 474. 476. at large in the eighteenth ſection of this chapter; and that any 480. 482. other ſeſſions holden at any other time for the general execution 5 Mod. 389. of the authority of juſtices of peace, which by the above-men-

Comb. 448. Carth. 222. Lut. 911.

tioned ſtatute, juſtices of the peace are authoriſed to hold oftener than at the times therein ſpecified, if need be, may be properly 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.

OFFENCES at the ſeſſions ſhall be proſecuted by preſentment, information, or indictment, 4 Com. Dig. 155. And when the juſtices are once legally convened, they cannot adjourn any matter depending before them without expreſsly adjourning the ſeſſions alſo, B. R. H. 80. which adjournment muſt ſhew when the original ſeſſions commenced, Strange 832. 865.; but there is no neceſſity to ſet out all the particular adjournments, Andr. 101.; yet where they iſſue a warrant for taking any one, it muſt be ſhewn that the ſeſſions continued by adjournment till the taking, 2 Lev. 219. Neither can the juſtices refer any ſubject of their enquiry to the determination of the judges of aſſize, unleſs the parties conſent to the reference, L. Mansfield, 4 Burn 184. for they are bound to make a final judgment themſelves, B. R. H. 81. So alſo when they proceed upon indictments, as a court of record at common law, their proceedings muſt contain the formal and regular continuances, B. R. H. 79. for the court of quarter ſeſſions once dropped cannot be reſumed, 2 Strange 1263.: But in orders this ſtrictneſs is not neceſſary, Andr. 101. Upon appeals, their diſcretion is coextenſive with that of the two juſtices, and they need not give the reaſons upon which their opinion is founded, 1 Burr. 245. 2 Salk. 477. 2 Seſ. Caſ. 176. But the ſeſſions being conſidered as one day, they may alter their judgments during the continuance of it, 2 Salk. 606. If they refuſe to do what their duty requires, they may be compelled by *mandamus*, Sayer 138. 2 Seſ. Caſ. 193; but they are not obliged to proceed after their juriſdiction is repealed by act of parliament, although fully attached before, 3 Burr. 1457; and where they have not an original juriſdiction, the conſent of parties cannot give it to them, 2 Burr. 745. Strange 143. 48, 442. —Whether the juſtices in ſeſſions are obliged to receive a bill of exceptions in criminal caſes, not capital, vide B. R. H. 169.

V de 43 Eliz. c 2. 17 Geo. 2. c. 38. ſ. 6, 7.

† *Sect.* 59. It is enacted by 8 and 9 Will. 3. c. 30. ſ. 3. "That the quarter ſeſſions, upon any appeal concerning the ſettlement of any poor perſon, or upon proof of notice of any ſuch appeal, though not afterwards proſecuted, ſhall award and order ſuch coſts and charges, as they think reaſonable to be paid by thoſe againſt whom ſuch appeal ſhall be determined, or by the perſon who gave the notice as aforeſaid; and if ſuch perſon live without the juriſdiction of the court, every juſtice where ſuch perſon ſhall inhabit, upon requeſt, and a copy of the order produced and proved upon oath, by warrant under his hand and ſeal, ſhall cauſe the ſame to be levied by diſtreſs, and if no diſtreſs, commit the party for twenty days."

4 Comm. 269.

† *Sect.* 60. Alſo it is enacted by the ſaid ſtatute, par. 6. "That the appeal againſt any order for the removal of any poor perſon from out of any pariſh, townſhip, or place, ſhall be had, proſecuted, and determined at the general or quarter ſeſſions for the county, for the place from whence ſuch removal ſhall lie, and not elſewhere."

1 Burn 246, 247. *N. B.* The ſeſſions of particular liberties ſhall have the determination of appeals about the poor, and not the county ſeſſions.

† *Sect.* 61. It is enacted by 5 Geo. 2. c. 19. "That upon all appeals to be made to the juſtices of the peace at their reſpective general or quarter ſeſſions in England, againſt judgments or orders given or made by any juſtices of the peace, ſuch juſtices ſo aſſembled at any general or quarter ſeſſions ſhall, and they are hereby required from time to time, within their reſpective juriſdiction, upon all and every

"ſuch

" ſuch appeals ſo made to them, to cauſe any defect or defects 2 Strange 1222.
" of form that ſhall be found in any ſuch original judgments or
" orders, to be rectified and amended without any coſt or
" charge to the parties concerned, and after ſuch amend-
" ment made ſhall proceed to hear, examine, and con- For the conditions upon which the *certiorari* is allowed to remove theſe proceedings. Vide tit. e "Proceſs."
" ſider the truth and merits of all matters concerning
" ſuch original judgments or orders, and likewiſe to examine
" all witneſſes upon oath, and hear all other proofs relating
" thereto, and to make ſuch determinations thereupon as by
" law they ſhould or ought to have done in caſe there had
" not been ſuch defect or want of form in the original pro-
" ceeding."

WHERE authority is given to two juſtices to do any act, the ſeſſions may do it in all caſes, except where an appeal is directed to the ſeſſions. L. Raym. 426.—But in new created offences, neither juſtices individually, or in ſeſſion, have any authority, unleſs by expreſs words. Strange 1256. Mod. Rep. 379. Savil 134.—The ſeſſions have no power over the bailiff of a corporation for not qualifying. Sayer 138. They are bound to receive appeal againſt an order of removal, if offered at the next ſeſſions, though no notice of appeal has been given. Douglas 191. And if from the diſtance between the pariſh to which a pauper has been removed, and the place where the ſeſſions are held, there is not time to lodge an appeal at the ſeſſions held immediately ſubſequent to the removal, the ſeſſions next enſuing are to be conſidered as the *next* ſeſſions. Douglas 193.—An original order of baſtardy may be made at the quarter ſeſſions. 1 Strange 475. Douglas 613 — No appeal lies from an order for the relief of a pauper. Douglas 331 —They may proceed by information on the 5 Eliz. for exerciſing a trade, &c. Cowper 369.—But they cannot make an original order for late overſeers to pay over monies to their ſucceſſors. 3 Burr. 1366. Nor a new ſcavengers rate. 3 Burr. 1460. Nor can they ſet aſide aſſignment of an apprentice bound out by the juſtices. Strange 40. Nor have they any cogniſance over the bailiff of a corporation for not qualifying. Sayer 138.

† *Sect.* 51. It is alſo enacted by 9 Geo. 3. c. 20. " That Where ſudden repairs are wanted, not exceeding 30 l. two juſtices may make an order therein —But ſhire-halls, repaired by any particular perſon or diſtrict, ſhall ſtill be at their expence.
" the juſtices of the peace, or the major part of them, in
" their reſpective general or quarter ſeſſions aſſembled, upon
" preſentment of the grand jury, of the ill ſtate and condi-
" tion of the ſhire hall, or other building, and the neceſſity
" of repairing the ſame, ſhall order and direct the ſame to be
" repaired in ſuch manner as they in their diſcretions ſhall
" think fit, and ſhall aſſeſs and levy the neceſſary ſums of
" money for this purpoſe upon the ſeveral diviſions of the
" county, according to the directions of the 12 Geo. 2. c. 29.
" and 13 Geo. 2. c. 18."

WHETHER when the ſeſſions ſtate facts fully, and infer fraud, the king's bench can draw their own concluſion from thoſe facts, vide Rex v. Jn. Woodland. Durnford and Eaſt, E. 26 Geo. 3.—AND where the caption of the indictment ſtates the court of quarter ſeſſions, where ſuch indictment was found, to have been held on an impoſſible day, it is fatal, Rex v. Fearnly, Trin. 26 Geo. 3.

CHAPTER THE NINTH,

OF THE COURT OF THE CORONER.

(a) 2 Inſt. 31. S. P. C. 48, 49. He is of equal antiquity with the ſheriff, and was ordained with him to keep the peace when the earls gave up the wardſhip of the county. Mirror c. 1. ſ. 3 1 Comm. 347. (b) 4 Inſt. 73 271. 2 Inſt. 31. (c) C. 8 ſ. 3. (d) F. N. B. 397. 4 Inſt. 73. 271. 2 Inſt. 175. 2 Hale 5. 53. 1 Comm. 346. 4 Comm. 406. 2 Hale 53.

CORONERS are (a) ancient officers by the common law ſo (b) called, becauſe they deal principally with the pleas of the crown, and (c) were of old time the principal conſervators of the peace within their county; and there ſtill ought to be a certain number of them in every county; in (d) ſome more, in others leſs, according as the uſage hath been.

CORONERS are of three kinds. 1. By virtue of an office. 2. By charter or commiſſion. 3. By election. 1. The lord chief juſtice of the king's bench is, by virtue of his office, principal coroner in the kingdom, and may, if he pleaſes, exerciſe the juriſdiction of coroner in any part of the realm. 2. The lord mayor of London is, by charter of 18 Edw. 4. coroner of London. The biſhop of Ely alſo hath power to make coroners, by the charter of Henry 7. and there are coroners of particular lords of franchiſes and liberties, who, by charter, have power to create their own coroners, or to be coroners themſelves, eſpecially the juriſdiction of the admiralty and the verge. 3. The general coroners of counties elected by virtue of ſtatute Weſtminſter the firſt, c. 18. and 28 Edw. 3. c. 6. 1 Hale 52. 4 Rep. 57. 1 Comm. 348.

Before I come to the particular conſideration of their duty and authority, it may not be improper to premiſe the following particulars:—Firſt, What perſons are qualified to be coroners.—Secondly, In what manner they are to be placed in their office.—Thirdly, How they may be diſcharged.

Sect. 2. As to the firſt point, it is enacted by the ſtatute of Weſtminſter 1. c. 10. in the following words, "Foraſmuch "as mean perſons and indiſcreet, now of late are commonly "choſen to the office of coroners, where it is requiſite that "perſons honeſt, loyal and wiſe, ſhall occupy ſuch offices: "It is provided, That through all ſhires ſufficient men ſhall "be choſen to be coroners of the moſt loyal and moſt wiſe "knights, which know, will, and may beſt attend upon "ſuch offices, and which lawfully ſhall attach and preſent "pleas of the crown."

Sect. 3. It is obſervable, That this ſtatute ſeems expreſsly to require, that none under the degree of knighthood ſhall be choſen a coroner, and that the ſtatute of Merton, chapter the third, which was made near forty years before, ſeems to ſuppoſe, That all coroners were knights. And it is farther remarkable, that in the writ *de coronatore exonerando*, it is mentioned as a ſufficient cauſe for the diſcharge of a coroner, that he

29 Aſſ. 7. 4 Inſt. 271. Reg. 177. F. N. B. 164.

he is not a knight. Yet in as much as the principal intent of putting thoſe words into the ſtatute, was to prevent the chooſing of perſons of mean ability, which is ſufficiently anſwered, by chooſing men of good ſubſtance and credit, and as it has been generally found impracticable to find knights enough in any county willing to undertake this office; and the conſtant uſage of many late ages, which is the beſt interpreter of laws, hath ſuffered perſons of good ability, under the degree of knights, to be choſen and continue coroners, without any objection againſt them on this account; it ſeems certain, That at this day it is no good cauſe to remove a coroner, that he is not a knight. For why ſhould not ſuch uſage be as well allowed to make ſuch an explanation of the law concerning coroners, as it unqueſtionably hath done of that relating to the repreſentatives of a county in parliament, who by the writ for their election are expreſsly required to be *duo milites gladio cincti*, and yet may certainly be well choſen in purſuance of that writ, though they be under the degree of knights?

S. P. C. 48. a. 2 Leon. 160, 161. F. N. B. 164. 4 Inſt. 176. 2 Hale 55. Co. Lit. 109.

Sect. 4. It is farther enacted by 14 Edw. 3. c. 8. "That "no coroner be choſen, unleſs he have land in fee ſufficient "in the ſame county, whereof he may anſwer to all manner "of people."

2 Inſt. 175.

Sect. 5. As to the ſecond point, *viz.* In what manner coroners are to be placed in their office. It is obſervable, That they do not receive their authority from the king's commiſſion, but from the election of the county in purſuance of the king's writ, iſſuing out of and afterwards returned into the chancery. And this is the reaſon why their authority does not determine by the demiſe of the king (*a*), as that of all judges, acting by the king's commiſſion only, regularly does, as hath been more fully ſhewn, chapter the firſt, ſection the eleventh.

2 Hale 55. 4 Inſt. 271. (*a*) 2 Inſt. 175. 1 Lev. 120.

Sect. 6. The above mentioned writ for the election of a coroner is in this form: Firſt, it recites the death or diſcharge of one or more former coroners, and then commands the ſheriff to cauſe one other or more, as the caſe is, to be choſen, in a full county court, by the aſſent of the county, according to the form of the ſtatute in that caſe made and provided; who having taken his oath in the uſual manner, may do all things which belong to the office of a coroner, &c. and then it concludes with commanding the ſheriff to certify to the court the name of the perſon choſen, &c.

1 Comm. 347. See the form of ſuch certificate in Raſtal's Entries 133.

Sect. 7. (*b*) A coroner, being choſen by virtue of ſuch writ, ſhall be ſworn by the ſheriff, that he will lawfully do what belongs to the office of a coroner, &c.

(*b*) S. P. 49. 2 Hale 55. F. N. B. 163. 4 Inſt. 271.

(a) 2 Inſt. 174, 175. 2 Hale 56.

Sect. 8. (*a*) And inaſmuch as he is choſen 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.

Sect. 9. And it is enacted by 28 Edw. 3. c. 6. "That "all coroners of the counties ſhall be choſen in the full "counties by the commons of the ſame counties, of the moſt "meet and lawful people, that ſhall be found in the ſame "counties, to execute the ſaid office: Saved always to the "king and other lords, who ought to make ſuch coroners, "their ſeigniories and franchiſes."

F. N. B. 164. S. P. C. 49.

(*b*) 2 Inſt. 99. 2 R. Ab. 121.

Sect. 10. From this ſtatute the two following points are obſervable. Firſt, That all ſuch elections are appointed by it to be made by the commons of the counties, without mentioning freeholders; and yet inaſmuch as the ſaid ſtatute was made in affirmance of the common law, and (*b*) none but freeholders are ſuitors to the county-court, and that uſage hath always been, both before and ſince the ſaid ſtatute, for ſuch only to vote, it is certain, that none but freeholders have a voice at any ſuch election.

2 Fine 37, 54. Co. Lit. 114.

Sect. 11. Secondly, That it is clearly ſuppoſed by the ſaid ſtatute, that not only the king, but alſo other lords, have the franchiſe of making coroners. From whence it ſeems reaſonable to infer, That the king may lawfully claim ſuch franchiſe by preſcription, and that other lords may claim it by grant from the crown (*c*), but it is a privilege of ſo high a nature, that no ſubject can well intitle himſelf to it by preſcription only.

(*c*) Vide note to ſection 1.

Reg. 177. F. N. B. 163, 164. S. P. C. 48. 8 Co. 41.

Sect. 12. As to the third point, *viz.* In what manner coroners may be diſcharged from their office. It is certain, That if any of them be ſo far engaged in any other publick buſineſs in the county, that he cannot have leiſure enough to attend the office of a coroner; or if he be choſen verderor of a foreſt, or if he have not ſufficient lands in the ſame county, whereon to live according to his ſtate and degree, or if he be diſabled either by old age, or any inveterate diſeaſe, as the palſy, or the like, to execute his office, as he ought, and as ſome ſay, if he follow any common trade, he may be diſcharged by the writ *de coronatore exonerando* (1), which being directed to the ſheriff, after a recital of the particular cauſe of the diſcharge of ſuch coroner, commands him to cauſe another to be choſen in his room.

2 Inſt. 32. 3 Comm. 348.

(1) But as it is an office of freehold, the court of chancery, with whom the power of granting this writ reſides, will not ſuffer it to iſſue unleſs on affidavit that the defendant has been ſerved with notice of the petition for it. 3 Atk. 184. And on an election of a new coroner, by a majority of freeholders (for the court cannot appoint a new one), the power and authority of the old coroner is *ipſo facto* extinguiſhed. Godb. 305.

Sect.

Sect. 13. But if any writ of this kind be grounded on an untrue ſuggeſtion, the coroner may procure a commiſſion from the chancery to inquire of the truth of it, and to return the inquiry before the king into the chancery; and if upon ſuch commiſſion the ſuggeſtion be diſproved, the king may make a *ſuperſed as* to the ſheriff, that he do not remove ſuch coroner; or if he have removed him, that he ſuffer him to execute the office as he did before. Reg. 177. 178. F. N. B. 164. 2. P. C. 49.

AND NOW I am particularly to conſider the duty and authority of a coroner. For the better underſtanding whereof, I ſhall examine the following points:—Firſt, In what places he hath a juriſdiction.—Secondly, How far he is impowered, and in what manner he ought to take an inquiſition.—Thirdly, How far to receive and proceed on a bill of appeal.—Fourthly, How far to receive and proceed on the appeal of an approver.—Fifthly, How far to take the abjuration of a felon.—Sixthly, How far the act of any one of them ſhall be as effectual as if it had been done by all.—Seventhly, In what caſes he may lawfully take a fee for the execution of his office.—Eighthly, In what caſes a matter recorded by or found before him, admits of no traverſe.

As to the firſt point, *viz.* In what places a coroner hath juriſdiction, I ſhall conſider, How far he hath a juriſdiction of offences committed on the ſea; and How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice verſa*.

Sect. 14. As to the firſt particular, it is laid down as a general rule by (*a*) ſome, That he may inquire of a felony committed on the arms of the ſea, where a man may ſee from the one ſide to the other; but by others, who ſeem to be more accurate, his (*b*) power is confined to ſuch parts of the ſea, where a man ſtanding on the one ſide, may ſee what is done on the other. But it ſeems to be (*c*) agreed, That he hath no juriſdiction of offences committed in the open ſea, between the high and low water-mark when the tide is *in*; but that he hath an authority over offences committed in ſuch places when the tide is *out*.

(*a*) Owen 122. Moor 892. 2 Hale 54. S. P. C. 51. Summary 151.
(*b*) F. Cor. 398. 4 Inſt. 140. 2 R. Ab. 169. 7.
(*c*) 3 Inſt. 113. 5 Co. 107.

(z) The coroner of Portſmouth has juriſdiction on board a man of war lying in Portſmouth harbour; and the court granted an information againſt the captain for refuſing to let him come on board; for though the admiralty have a coroner of their own, he never takes inquiſitions *felo de ſe*. Strange 1097. Andr. 231.

Sect. 15. As to the ſecond particular, &c. How far a coroner of the county may intermeddle with offences done within

2 Leon. 160. 4 Co. 46. 2 Hale 54, 55.

within the verge of the court, and *vice verſa*, it is ſaid, That at the common law, as the coroner of the king's houſe had nothing to do with an offence committed in the county out of the verge; ſo neither had the coroner of the county any thing to do with an offence committed within the verge (*a*). And therefore it ſeems, That before the ſtatute of *articuli ſuper chartas*, if a perſon had been killed any where within the verge of the court, and the king had removed his court before the coroner of the king's houſe had taken an indictment, no coroner at all had any juriſdiction of the fact; not the coroner of the county, becauſe he had nothing to do with what happened within the verge of the court; not the coroner of the king's houſe, becauſe his authority ceaſed when the place where the matter happened, ceaſed to be within the verge of the court. And this ſeems to be confirmed by the ſtatute of *articuli ſuper chartas*, c. 3. whereby it is recited, that before the making of that act, "Many felonies committed within the verge had been unpuniſhed, becauſe the coroners of the county had not been authoriſed to inquire of felonies done within the verge, but the coroner of the king's houſe, which never continued in one place, by reaſon whereof there can be no trial made in due manner, nor the felons put in exigent, nor outlawed, nor any thing preſented in the circuit, the which had been to the great damage of the king, and nothing to the preſervation of the peace:" And thereupon it is ordained, "That from thenceforth in caſes of the "death of men whereof the coroner's office is to make view "and inqueſt, it ſhall be commanded to the coroner of the "county, that he, with the coroner of the king's houſe, ſhall "do as belongeth to his office, and enroll it, &c." It is ſaid indeed by Sir *Edward Coke*, That if a murder had been committed within the verge, and the king had removed before any indictment taken by the coroner of the verge, the coroner of the county might have inquired of the ſame at the common law, *ne maleficia remanerent impunita*. But ſince no authority is cited by him for the maintenance of this opinion, and the argument brought to prove it is founded on a miſtaken ſuppoſition, in as much as it doth by no means follow, That ſuch offences would be diſpuniſhable if they could not be inquired of by the coroner of the county, ſince they might certainly be indicted before juſtices of oyer and terminer, or of the peace, who have a general juriſdiction throughout the whole county; the contrary opinion ſeems rather the more plauſible, as being more agreeable to the purport of the ſaid ſtatute, and the general tenor of our law books.

(*a*) The coroner of the verge was anciently appointed by the king's letters patent.

3 Inſt. 550.

2 Inſt. 549. 4 Co. 46, 47. 4 Co. 47.

4 Co. 47. 2 Inſt. 550.

Sect. 16. But it is certain, That an indictment taken before the coroner of the county, and the coroner of the king's houſe, of an offence not appearing by the indictment itſelf

itſelf to have happened within the verge of the court, is inſufficient; for that every material part of an indictment ought to be found by the oaths of the indictors, and cannot be ſupplied with any averment; and it doth not appear by the indictment, that the coroner of the king's houſe had any authority to take it, and it ſhall not be ſaid to be void, and *coram non judice*, as to the coroner of the king's houſe, and good as to the coroner of the county, inaſmuch as the record is entire, and the indictment was taken entirely before both; and peradventure the jury was directed principally by the coroner of the houſe, and the witneſſes examined and ſworn by him.

Sect. 17. It hath been reſolved, That if the ſame perſon be coroner of the county, and alſo of the king's houſe, an indictment of death taken before him as coroner both of the king's houſe and of the county, is good, becauſe the miſchief expreſſed in the ſtatute is remedied as well when both offices are in the ſame perſon as when they are in divers.

2 Hale 55. 4 Co. 46. 3 Inſt. 134. 2 Leon. 160. the ſame Caſe, but no reſolution.

Sect. 18. Alſo it is enacted by 33 Hen. 8. c. 12. ſ. 1. 3. "That all inquiſitions upon the view of perſons ſlain within "any of the king's palaces or houſes, or any other houſe or "houſes, at ſuch time as his majeſty ſhall happen to be there "demurrant or abiding in his royal perſon, ſhall be taken by "the coroner for the time being of the king's houſehold, "without any adjoining or aſſiſting of another coroner of "any ſhire within this realm, by the oath of twelve or "more of the yeomen, officers of the king's houſehold returned by the two clerks controllers, the clerks of the "check, and the clerks marſhals, or one of them, for the "time being, of the ſaid houſehold, to whom the ſaid coroner "of the ſame houſehold ſhall direct his precept, which "coroner ſhall be from time to time appointed by the lord "great maſter, or lord ſteward for the time being; and that "the ſaid coroner ſhall certify under his ſeal, and the ſeals of "ſuch perſons as ſhall be ſworn before him, all ſuch inquiſitions before the ſaid lord maſter or lord ſteward, &c."

2 Hale 54.

As to the ſecond general point, *viz.* How far a coroner is impowered, and in what manner he ought to take an inquiſition, I ſhall conſider his authority of this kind—Firſt, In relation to death.—Secondly, In relation to other matters.

As to his authority to take an inquiſition of death, I ſhall examine—Firſt, In what caſes and in what manner he ought to take ſuch inquiſition.—Secondly, What farther care muſt be taken by him for the proſecution of the offender, after taking the inquiſition.—Thirdly, What high credit the law gives to it.

Sect. 19. As to the firſt of theſe particulars, it is enacted by 4 Edw. 1. commonly called the ſtatute *de officio coronatoris*,

Bract. 121. Fleta b. 1. c. 25. 2 Hale 59. Wood B. 4. c. 1.

"That

"That the coroner upon information ſhall go to the places "where any be ſlain, or ſuddenly dead or wounded, and ſhall "forthwith command four of the next towns, or five or ſix, "to appear before him in ſuch a place; and when they are "come thither, the coroner upon the oath of them ſhall in- "quire (*a*) in this manner; that is to wit, if they know "where the perſon was ſlain, whether it were in any houſe, "field, bed, tavern, or company, and who were there. "Likewiſe it is to be inquired who were 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 by inquiſition in any of the manners aforeſaid, "they ſhall be taken and delivered to the ſheriff, and ſhall be "committed to the gaol: And ſuch as be founden, and be "not culpable, ſhall be attached until the coming of the "juſtices, and their names ſhall be written in the coroners "rolls. 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 as 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 inquired alſo, if the dead perſon were known, or "elſe a ſtranger, and where he lay the night before; and if any "be found culpable of the murder, the coroner ſhall imme- "diately go unto his houſe, and ſhall inquire what goods he "hath, and what corn he hath in his grange; 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 when they have thus inquired upon "every thing, they ſhall cauſe all the land, corn, and goods, "to be valued, in like manner as if they ſhould be ſold in- "continently, and thereupon they ſhall be delivered to the "whole townſhip, which ſhall be anſwerable before the "juſtices for all. And likewiſe of his freehold, how much it "is worth yearly over and above the ſervice due to the lords "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 im- "mediately upon theſe things being inquired, the bodies of "ſuch perſons being dead or ſlain ſhall be buried.—In like "manner it is to be inquired of them that be drowned, or "ſuddenly dead, and after ſuch bodies are to be ſeen, whether "they were ſo drowned or ſlain, or ſtrangled by the ſign of a "cord tied ſtrait about their necks, or about any of their "members, or upon any other hurt found upon their bodies, "whereupon they ſhall proceed in the form aboveſaid; and if "they were not ſlain, then ought the coroner to attach the "finders, and all other in company."

(*a*) If in an inquiſition *ſuper viſum corporis*, the year of our Lord, in the caption, is in common figures, it ſhall be quaſhed. It ſhould be in words at length, or at leaſt in Roman numerals. Strange 265.

Sect.

Sect. 20. "Alſo 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 wounds; all which things muſt be inrolled in "the roll of the coroners. Alſo horſes, boats, carts, &c. "whereby any are ſlain, that properly are called deodands, "ſhall be valued and delivered unto the towns as before is "ſaid."

Sect. 21. It is obſervable, That this 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; and from hence it follows, That though the ſtatute mention only his taking inquiries of the death of perſons ſlain or drowned or ſuddenly dead, yet he may and ought to inquire of the death of all perſons whatſoever who die in priſon (4), to the end that the public may be ſatisfied, whether ſuch perſons came to their end by the common courſe of nature, or by ſome unlawful violence, or unreaſonable hardſhips put on them by thoſe under whoſe power they were confined.

F. Cor. 421.
3 Inſt. 52. 91.
B. Cor. 168.
S. P. C. 51.
1 Hale 432.
2 Hale 57.
(4) And this inqueſt upon priſoners ought to conſiſt of a party jury, *viz.* ſix of the priſoners, and ſix of the next vill or pariſh, Umfreville 212.

Sect. 22. And the like reaſon alſo ſeems to be the beſt ground of the reſolution which we find in ſome (*a*) books, 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 ſaid ſtatute, which is wholly declaratory, muſt needs be ſo ſtill. But it (*b*) 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, and that the reaſon given in ſome books that ſuch inqueſts ſhall be intended to have been taken by the men of the next towns ſeems very harſh, if it be ſuppoſed neceſſary to be taken by ſuch perſons; for that ſuch intendment would be contrary to the general rule of the law, which will not ſuffer any material part of an indictment to be taken by intendment.

(*a*) 1 Sid. 204.
1 Hale 416.
1 Keb. 723. 744. 745.
Con. Latch. 166.
Pop. 210.
Co. Ent. 354.
(*b*) C. Eliz. 31.

Sect. 23. Alſo it is farther remarkable, that the ſtatute doth not expreſly ſay, That the coroner ſhall take his inqueſt on the view of the dead body, and that an inqueſt otherwiſe taken by him, ſhall be void. And yet it is clearly agreed by all the (*c*) books, That a coroner has no manner of power to take an inquiſition of death without a view of the body; and that any ſuch inqueſt taken by him without ſuch view, is merely void. And for this reaſon it hath been (*d*) adjudged, That if a dead body, in a priſon, or other place, whereupon an inqueſt ought to

(*c*) F. Cor. 107.
2 Hale 58.
S. P. C. 51.
2 Lev. 141.
Lat. 166.
Noy 87.
2 R. 3. 2.
21 Ed. 4. 70.
Summary 170.
Pop. 209.
(*d*) F. Cor. 329. 339. 421.
S. P. C. 51.
1 Keb. 278.

to be taken, be interred, or ſuffered to lie ſo long, that it putrify before the coroner hath viewed it, the gaoler or townſhip ſhall be amerced. (3) Alſo it hath been (*b*) reſolved, that a coroner may lawfully within convenient time, as the ſpace of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inqueſt where none hath been taken before; but alſo for the taking of a good one, where an inſufficient one hath been taken before. (4) But if the body cannot be (*c*) found, or have lain ſo long before the coroner hath viewed it, that he can be no way aſſiſted from the view in the taking of his inqueſt; or if there be danger of infecting people in digging of it up, the inqueſt ought not to be taken by the coroner (unleſs he have a ſpecial writ or commiſſion for that purpoſe), but by juſtices of peace, or other juſtices authorized to inquire of, hear, and determine felonies, *&c.* who ſhall take the inqueſt on the teſtimony of witneſſes. But none can take an inqueſt on view in any caſe, but the coroner.

(*b*) 21 Ed. 4. 70. 2 R. 3. 2. 2 Hale 58, 59. S. P. C. 51. Summary 170. Holt 167. B. Cor. 167, 173.

(*c*) S. P. C. 51. Summary 170. 2 Lev. 141. Lat. 166. 1 Vent. 352. Pop. 209. Salk. 190. 1 Bac. Ab. Noy 87. 2 R. Ab. 96. 1 Roll 217.

(3) It is indictable as a miſdemeanor, Salk. 377. to bury one who dies a violent death before the coroner has ſat upon him, 7 Mod. 10.

(4) So alſo he may dig up the body if the firſt inquiſition be quaſhed, Str. 533. But it muſt be by order on motion of the king's bench, Str. 167. And the judges will exerciſe their diſcretion according to the time and circumſtances, whether he ſhall or ſhall not do it, Salk. 377. Strange 22. 533. 2 Mod. 16.

(*d*) Rex v. Cauſey, Hilary 3 Geo. 1. Strange 22.

Sect. 24. If a (*d*) coroner take an inqueſt after a body hath been ſo long buried, that it may reaſonably be preſumed that the view of it could be of no manner of uſe for the information of the jurors, the court into which the inquiſition is returned will in diſcretion refuſe to receive or file it, upon affidavit of the whole circumſtances of the proceeding.

(*e*) Lat. 166. See Pop. 209.

Sect. 25. (*e*) Yet it is not neceſſary, That the inquiſition be taken in the very ſame place where the body was viewed; for it hath been reſolved, That an inquiſition taken at *D.* on the view of a body lying dead at *L.* may be good.

Sect. 26. As the coroner hath no power from the ſaid ſtatute, nor from 3 Hen. 7. c. 1. to inquire of any acceſſaries to a felony after the fact; ſo neither hath he any ſuch power by the (*f*) common law; for he has nothing to do with any but thoſe who ſome way or other cauſed the party's death: And therefore it hath been reſolved, That an indictment of *J. S.* before a coroner for having received and comforted one who had been guilty of a murder, is void.

(*f*) 4 H. 7. 18. F. Forfeit. 10. 1 Hale 416. 2 Hale 63. S. P. C. 183. Keilw. 67. Daliſ. 32. Moor 29.

(*g*) S. P. C. 183. 2 Lev. 141, 152. 2 Hale 63, 65. Keilw. 68. Summary 170. B. Cor. 151. 8 Ed. 4. 4. poſt. f. 51.

Sect. 27. But it is certain, That a coroner may inquire of the acceſſaries before the fact, as well as of the principals; and that he (*g*) alſo may inquire, whether in any ſuch manner

found to have been guilty, did fly for the offence; for which flight they forfeit all their goods and chattels.

Sect. 28. Alſo it is (*a*) certain, That a coroner may and ought to inquire of all the circumſtances of the party's death, and alſo of all things which occaſioned it; and (*b*) therefore it is ſaid, That if it be found by his inqueſt, that the perſon deceaſed was killed by a fall from a bridge into a river, and that the bridge was out of repair by the default of the inhabitants of ſuch a town, and that thoſe inhabitants are bound to repair it, the townſhip ſhall be amerced (5).

(*a*) Keilw. 67. 1 Hale 422. 2 Hale 62.
(*b*) Alcyn 51.

(5) So if the townſhip bury the body, before the coroner is ſent for, the townſhip ſhall be amerced, Hale 424.

Sect. 29. Alſo it is agreed, That if a coroner be remiſs (6) in coming to do his office when he is ſent for, &c. he ſhall be amerced (7) by virtue of the above mentioned ſtatute *de coronatoribus*. Alſo it is farther enacted by 3 Hen. 7. c. 1. "That "if any perſon be ſlain or murdered in the day, and the mur- "derer eſcape untaken, the townſhip where the ſaid deed is ſo "done, ſhall be amerced for the ſaid eſcape, and that the "coroner have authority to inquire thereof upon the view of "the body dead: And that if any coroner be remiſs and make "not inquiſitions upon the view of the body dead, he ſhall "forfeit for every default an hundred ſhillings."

S. P. C. 52. Salk. 377. Str. 69. F. Cor. 292. Summary 170. 1 Hale 424. 2 Hale 58.

(6) If the coroner omits to take an inquiſition upon an untimely death, it may be done by juſtices of gaol-delivery, oyer and terminer, or of the peace, but it muſt be done openly: and if it be done ſecretly it may be quaſhed. 1 Burr. 17.

(7) And if he impoſe an improper inquiſition upon the jury, he may be committed. Strange 99. Vide poſt ſect. 58. Where by 25 Geo. 2. c. 29. If he be convicted of extortion, wilful neglect, or miſdemeanor, he may be puniſhed and removed from his office. Vide alſo note to ſection 12.

Sect. 30. As to the ſecond particular, *viz.* What farther care muſt be taken by a coroner for the proſecution of the offender, after taking inquiſition of death againſt him, it is farther enacted by the ſaid ſtatute of 3 Hen. 7. 1. "That "after the felony found, the coroners deliver their inquiſition "afore the juſtices of the next general gaol-delivery, in the "ſhire where the inquiſition is taken, the ſame juſtices to pro- "ceed againſt ſuch murderers if they be in the gaol, or elſe "the ſame juſtices to put the ſame inquiſitions afore the king "in his bench. And if any coroner do not in ſuch manner "certify his inquiſition he ſhall forfeit an hundred ſhillings."

Sect 31. Alſo it is enacted by 1 and 2 Ph. and Mary, c. 13. "That every coroner, upon any inquiſition before him found, "whereby any perſon or perſons ſhall be indicted for murder "or manſlaughter, or as acceſſary or acceſſaries to the ſame,

"before

" before the murder or manſlaughter committed, ſhall put " in writing the effect of the evidence given to the jury be- " fore him, being material. And ſhall bind all ſuch by re- " cognizance or obligation, as do declare any thing material " to prove the ſame, to appear at the next general gaol-de- " livery to be holden within the county, city, or town-cor- " porate where the trial thereof ſhall be, then and there to " give evidence againſt the party ſo indicted at the time of the " trial, and ſhall certify as well the ſame evidence, as ſuch " bond or bonds in writing, as he ſhall take, together with " the inquiſition or indictment before him taken and found, at " or before the time of his ſaid trial thereof to be had or made. " And in caſe any coroner ſhall offend in any thing contrary " to the true intent and meaning of this act, the juſtices of " gaol-delivery of the ſhire, city, town, or place where ſuch " offence ſhall happen to be committed, upon due proof there- " of, by examination before them, ſhall for every ſuch offence " ſet ſuch fine on every ſuch coroner, as they ſhall think meet, " and eſtreat the ſame as other fines and amerciaments aſſeſſ- " ed before juſtices of gaol-delivery ought to be."

Sect. 32. And it is enacted by 1 Hen. 8. c. 7. " That if " any coroner ſhall not endeavour himſelf to do his office " upon any perſon dead by miſadventure, he ſhall forfeit forty " ſhillings."

† And it is further enacted by 25 Geo. 2. c. 29. ſect. 6. " That if any coroner who is not appointed by virtue
Vide ante ſ. 29. " of an annual election or nomination, or whoſe office of " coroner is not annexed to any other office, ſhall be lawfully " convicted of extortion, or wilful neglect of his duty, or " miſdemeanor in his office, it ſhall be lawful for the court " before whom he ſhall be ſo convicted, to adjudge that he " ſhall be removed from his office; and thereupon if ſuch co- " roner ſhall have been elected by the freeholders of any " county, a writ ſhall iſſue for the amercing him from his " office, and electing another coroner in his ſtead, in ſuch " manner as already directed by law; and if the coroner ſo " convicted ſhall have been appointed by lord or lords of " any franchiſe or liberty, or in any other manner than by the " election of the freeholders of any county, the lord or lords " of ſuch liberty or franchiſe, or the perſon or perſons intitled " to the nomination or appointment of any ſuch coroner, ſhall, " upon notice of ſuch judgment of amercal, nominate and ap- " point another perſon to be coroner in his ſtead."

(*a*) 13 E. 4. 5. 37 Aſſ. 13. 21 H. 4 93. 14 H. 7 2. F. Cor. 213. K ilw. 686.

Sect. 33. As to the third particular, *viz.* What high credit the law gives to an inquiſition of death found before a coroner, it ſeems (*a*) certain, That anciently the judges would not receive a verdict, acquitting a perſon of the death of a man found

found againſt him by a coroner's inqueſt, unleſs the jury ſo acquitting the defendant, had found at the ſame time what other perſon (8) did the fact, or by what other means the party came to his death; becauſe it appeared by the coroner's view upon record, that a perſon was killed. But it is (*b*) agreed, That the judges cannot compel a jury to make ſuch farther inquiry on an acquittal of a defendant from any other indictment, becauſe it doth not in ſuch manner appear of record by any ſuch inquiſition, that a perſon is dead. And it ſeems hard to reconcile the ſaid practice of compelling a jury to find ſuch farther matter with reaſon in any caſe, unleſs it appear in the courſe of the evidence by what other means, not mentioned in the indictment, the party loſt his life. For it ſeems ſtrange, That a jury ſhould be in any caſe compelled to find a matter upon their oaths, which they have no evidence to ſupport; and therefore if it no way appear to them, by what other means the death in queſtion was occaſioned, it ſeems difficult to maintain that it ſhall not be ſufficient for them to declare ſo to the court.

S. P. C. 181. 2 Hale 301. Finch 415. B. Appeal 42, 122. B. Indict. 10. 35. B. Cor. 32, 39, 52, 117.

(*b*) See the books above cited.

(8) This is commonly a buſineſs of form; and if the fact be not known, the jurors uſually ſay, that it was done by perſons unknown. 2 Hale 301.

Sect. 34. How high a credit is given by the law to a coroner's inquiſition of ſelf-murder, or of the flight of a perſon indicted for the death of another, will be more fully ſhewn in the three laſt ſections of this chapter.

Sect. 35. As to the ſecond general point, *viz.* What authority a coroner hath to take an indictment of other matters, it is expreſly ſaid in ſome (*a*) books, That a coroner hath no power *ex officio* to inquire of any felony, but only of the death of a man upon view. And both (*b*) *Staunford* and (*c*) *Hale* (9) ſeem to ſpeak doubtfully of this matter upon the authority of thoſe books; and (*d*) Sir *Edward Coke* ſeems expreſly to declare his opinion, That a coroner hath no power to take an indictment in any other caſe. Yet ſince it is expreſly declared by the above-mentioned (*e*) ſtatute *de officio coronatoris*, That a coroner ought to inquire of the breakers of houſes; and it is ſaid by (*f*) *Britton*, That he may inquire of rape, and of the breach of a priſon; and ſuch power hath never been expreſly taken from him; it ſeems hard to ſay, That he may not ſtill make ſuch inquiries if he pleaſe; for as to the authority of 27 Aſſ. 55. and 35 H. 6. 27. b. which are cited for the maintenance of the contrary opinion, it may be anſwered, That this point is not reſolved in either of thoſe books, but only ſpoken of incidentally; for the very point reſolved in 27 of Aſſizes, ſeems to be no more than this, That a coroner hath no power to take an indictment of an acceſſary after the fact; and that which is ſaid in 35 Hen. 6. concerning this

(*a*) 35 H. 6. 27. 27 Aſſ. 55. F. Cor. 206. B. App. 111.

(*b*) S. P. C. 51.

(*c*) Summary 171.

(*d*) 4 Inſt. 271. 2 Inſt. 147.

(*e*) See the ſtatute at large.

(*f*) Britton 3.

matter is only brought in by way of argument concerning a point of a quite different nature.

(9) In Northumberland the coroner, by cuſtom, may enquire of other felonies, 35 H. 6. 27. But without cuſtom no coroner is authorized to take any inquiſition other than on death, 2 Hale 65.

Bracton book 3. chapter 6.

Sect. 36. However there ſeems to be no doubt but that the coroner may and ought to inquire of treaſure-trove, concerning which it is enacted by the ſaid ſtatute of 4 Edw. 1. *De officio coronatoris*, "That a coroner, being certified by the "king's bailiffs, or other honeſt men of the county, ſhall go "to the places where treaſure is ſaid to be found." And it is farther enacted in the following part of the ſame ſtatute in theſe words, "A coroner ought alſo to inquire of treaſure that "is found, who were the finders, and likewiſe who is ſuſ-"pected 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 this ſuſ-"picion by four or ſix, or more pledges, if he may be "found."

S. P. C. 51. Bracton 120.

Sect. 37. It is alſo ſaid, That a coroner may inquire of royal fiſhes, as ſturgeons, whales.

2 Hale 66.

Sect. 38. As to the third general point, *viz.* How far a coroner is impowered to receive and proceed on a bill of appeal, I ſhall endeavour to ſhew—How far he is authorized to receive ſuch appeal.—How far to proceed upon it; and In what manner it may be removed by *certiorari*.

(a) See the ſtatute at large.
(b) Brac. 122. 147. Fleta 1. c. 25. Britton 5. S. P. C. 64. 22 Aſſ. 97, 98. Finch 321.
(c) Con. 17 Aſſ. 5. B. Appeal 56. Summary. 171. S. P. C. 52. 64.
(d) 4 Inſt. 176. 4 H. 6. 16. B. Appeal 44.
(e) Summ. 172. 2 Hale 67.
(f) 39 H. 6. 41. 4 H. 6. 16. Con. B. App. 44.

Sect. 39. As to the firſt of theſe particulars, it appears clearly from the above-mentioned (*a*) ſtatute of 4 Edw. 1. *De officio coronatoris*, and alſo from our ancient (*b*) law-books, That a coroner in the county-court may receive an appeal of any felony or mayhem, upon the plaintiff's finding ſufficient pledges to the ſheriff for the proſecution of the ſuit. And it is obſervable, That the ſaid books generally mention the coroner as the perſon before whom ſuch (*c*) appeal is to be commenced, without joining any other with him; from whence it ſeems clearly to be intimated, That the coroner is the (*d*) only perſon who hath a juriſdiction in this matter; and that at common law he might (*e*) receive ſuch appeal without the concurrence of any other, as he certainly may the appeal of an approver, &c. But it being provided by the ſtatute of Weſtminſter 1. c. 10. That the ſheriff ſhall have counter-rolls with the coroners, it ſeems, That no appeal ſince that ſtatute is well commenced before the coroner, (*f*) unleſs the ſheriff be

be alſo preſent, in order to take a counter-roll of the proceeding. But it ſeems, That the ſheriff, by virtue of this ſtatute, is no more a judge of the matter than he was before; and therefore, where it is ſaid by the ſtatute of 3 Hen. 7. c. 1. That an appeal of felony may be commenced before the ſheriff and coroners of the county where it was done, it ſeems reaſonable to intend the meaning of the ſtatute to be, that it may be commenced before them in the ſame manner as before, and not without expreſs (*a*) words to make any alteration of the juriſdiction given them by the common law.

(*a*) Qu. Staunford's Pleas of the Crown, 64.

Sect. 40. But it is (*b*) certain, That a coroner hath no power to receive a bill of appeal of any offence done out of the county whereof he is coroner, becauſe the offender cannot be tried by the county. But it is agreed, That he may receive the appeal of an approver, or take the abjuration of one who acknowledges a felony done by him in any county, becauſe that after ſuch confeſſions there is no need of any trial.

(*b*) Summary 171, 172. 2 Hale 67. S. P. C. 52. 53. F. Corone 437.

Sect. 41. As to the ſecond particular, *viz.* How far a coroner may proceed upon ſuch appeal, it ſeems (*c*) probable, That before the ſtatute of *Magna Charta*, c. 17. coroners might try offenders as well as receive accuſations againſt them; but it is (*d*) agreed, That they cannot proceed ſo far ſince that ſtatute, by which it is enacted, "That no ſheriff, conſtable, "coroner, or other bailiff of the king ſhall hold pleas of the "crown."—Alſo it is agreed, (*e*) That proceſs may be awarded in the county-court on ſuch appeals till the exigent; but (*f*) it ſeems queſtionable, whether ſuch proceſs may properly be ſaid to be awarded by the ſheriff and coroner jointly, ſince the coroner being the only judge, as I have endeavoured to prove, ſect. 39. it ſeems to be moſt proper that the proceſs be awarded by him only. Neither doth it ſeem clear, That the above-mentioned ſtatute of *Magna Charta* doth reſtrain the coroner from awarding an exigent, and thereon outlawing an appellee. For ſince, as it is agreed by all, an offender might become attainted by an abjuration of a felony made before a coroner; why not as well by an outlawry pronounced by him? And accordingly we find it taken for granted in ſome of the old (*g*) books of the beſt authority ſince this ſtatute, that appellees may be outlawed for not appearing on proceſs before the coroner.

(*c*) See Dalt. Sh. c. 106. 2 Hale 56.
(*d*) 22 Aſſ. 97. 98. Bracton 147. Fleta. c. 25. 2 Inſt. 30, 31. 32. 2 Hale 67. B. App. 56, 62. B. Corone 82.
(*e*) S. P. C. 64. Summary 171.
(*f*) Con. S. P. C. 64. Summary 171. 27 Aſſize 47.
(*g*) 22 Aſſ. 97. F. Cor. 184. Con. B. App. 82. Qu. B. App. 109. S. P. C. 64. Summary 171. 2 Hale 67.

Sect. 42. As to the third particular, *viz.* In what manner an appeal before the coroner may be removed by *certiorari*, there (*h*) is no doubt but that it may be removed either into the king's bench or chancery, by *certiorari* directed to the coroners and ſheriff. But it hath been (*i*) reſolved, That it cannot be removed by ſuch writ directed to the ſheriff only, becauſe the coroner is the judge, and the ſheriff hath only a counter-

(*h*) S. P. C. 64. Summary 171. 2 Inſt. 176.
(*i*) 14 H. 4. 15 b. 16. B. Appeal 44. 2 Inſt. 176. S. P. C. 64. 2 Hale 67. 70.

counter-roll by virtue of the above-mentioned ſtatute of Weſtminſter, chapter the tenth.

Sect. 43. As to the fourth general point, *viz.* How far a coroner is authorized to receive and proceed on the appeal of an approver, there is no doubt but that the coroner alone may receive ſuch appeal, (*a*) whether the offence were committed in the ſame or in any other county, and may alſo award proceſs to the ſheriff againſt the appellee, being in the ſame county, till it come to the exigent; and it (*b*) ſeems, That it may be probably argued, that he may award proceſs even to an outlawry, as hath been more fully ſhewn in the forty-firſt ſection of this chapter. But it is certain, That he cannot award any proceſs againſt an appellee in a foreign county, but muſt leave it to the (*c*) juſtices of gaol-delivery, or others, before whom the appeal is afterwards recorded, who ſhall award proceſs againſt ſuch appellees in ſuch manner as ſhall be more fully ſet forth in the chapter concerning approvers, ſect. 22.

(*a*) Summary 172. 2 Hale 67, 68. S. P. C. 53. Ante ſect. 40.

(*b*) S. P. C. 73. Summary 172.

(*c*) S. P. C. 53. 73. Summary 172. F. Cor. 462. 29 Ed. 3. 42.

Sect. 44. As to the fifth general point, *viz.* How far a coroner is authorized to take the confeſſion and abjuration of a felon, there ſeems to be no doubt but that he may record the confeſſion of the breach of priſon by any felon, &c. and alſo the (*d*) confeſſion of any felony by an approver; but the law relating to theſe matters being in a great meaſure obſolete, it ſeems needleſs over-nicely to inquire into it. Alſo it is certain that he might take an abjuration: but this not having been in uſe ſince 21 Jac. 1. c. 28. ſ. 6, 7. by which it is enacted, "That no ſanctuary, or privilege of ſanctuary, ſhall be "admitted or allowed in any caſe," I ſhall only touch upon it, and take notice, That at the common law, if a perſon accuſed of any felony except (*e*) ſacrilege, (*f*) whether in the ſame or any other county, for which he was liable to judgment of (*g*) death, and not charged with (*h*) high treaſon, nor as (*i*) ſome ſay with petit treaſon, had fled to any (*k*) church or church-yard, and within (*l*) forty days confeſſed himſelf guilty before the coroner, and declared all the particular (*m*) circumſtances of the offence, and thereupon taken the oath in that caſe provided (the (*n*) ſubſtance whereof was, that he abjured the realm, and would depart as ſoon as poſſible, at the port which ſhould be aſſigned him, and never return without leave from the king, &c.), he ſaved his life, if he obſerved the terms of the oath, by going with all (*o*) convenient ſpeed the neareſt way to the port aſſigned, &c. but he was (*p*) attainted of the felony by ſuch abjuration without more, and conſequently forfeited his lands and goods, &c.

(*d*) Vid. S. 36. & 49.

(*e*) F Cor. 420. S. P. C. 117. 3 Inſt. 115.

(*f*) S. ſect. 40.

(*g*) B. Cor. 183. S. P. C. 123. Finch 388.

(*h*) B. Cor. 181. S. P. C. 116. Finch 389.

(*i*) S P. C. 116. 117. B. Cor. 181. Finch 388.

(*k*) S. P. C. 116. 3 Inſt. 115. Finch 388.

(*l*) S. P. C. 118. 3 Inſt. 117.

(*m*) S. P. C. 117. F. Cor. 54. S. P. C. 121.

3 H. 7. 12. (*n*) S P. C. 119, 120. Finch 389. (*o*) 7 H. 7. 7. B. Cor. 145. (*p*) F. Cor. 425. S. P. C. 122. Finch 389. 3 Inſt. 217.

Sect.

Sect. 45. As to the ſixth general point, *viz.* How far the act of any one coroner is as effectual as if it were done by all, it ſeems clear, That (*a*) wherever coroners are authorized to act as judges, as in the taking of an (*b*) inquiſition of death, or receiving an appeal of felony, *&c.* the act of any one of them, who firſt proceeds in the matter, is of the ſame force as if all had joined in it: But it is ſaid, That after ſuch proceeding by one of them, the act of any other will be void (*c*). Alſo it ſeems certain, That where coroners are impowered only to act (10) miniſterially, as in the execution of proceſs directed to them upon the default or incapacity of the ſheriff, all their acts will be void wherein they do not all join.

(*a*) S. P. C. 53. 14 H. 4. 34.
(*b*) 2 Hale 56 58. Vid. c. 1. ſ. 10.
(*c*) 2 Hale 59. 67. F. Corone 107. S. P. C. 52. Summary 172. S. P. C. 53. 14 H. 4. 34, 35. 39 H. 6. 40. b. 41, 42.

(10) One coroner may execute the writ, as in caſe of an exigent; but if there be more coroners than one for the county, the return muſt be in the name of all. 2 Hale 56.

Sect. 46. As to the ſeventh general point, *viz.* In what caſes a coroner may lawfully take a fee for the execution of his office, it is enacted by the ſtatute of Weſtm. 1. c. 10. which was made in affirmance of the common law, 2 Inſt. 176. "That no coroner demand or take any thing of any man to "do his office, upon pain of great forfeiture to the king." Book 1. c. 68.

Sect. 47. But is enacted by 3 Hen. 7. c. 1. "That a coro- "ner have for his fee upon every inquiſition taken upon the "view of a body ſlain 13*s.* 4*d.* of the goods and chattels of "the ſlayer and murderer, if he have any goods; and if he have "no goods, of ſuch amerciaments as ſhall fortune any townſhip "to be amerced for the eſcape of the murderer, *&c.* Vid. 2 Inſt. 210.

Sect. 48. But the coroners endeavouring to extend this ſtatute to perſons ſlain by miſadventure, it is enacted by 1 Hen. 8. c. 7. "That upon a requeſt made to a coroner to come and in- "quire upon the view of any perſon ſlain, drowned, or other- "wiſe dead by miſadventure, the ſaid coroner ſhall diligently "do his office, without taking any thing therefor, upon pain "to every coroner that will not endeavour himſelf to do his "office (as afore is ſaid), or that taketh any thing for doing of "his office, upon every perſon dead by miſadventure, for "every time forty ſhillings."

† *Sect.* 49. To the intent, however, that coroners may be encouraged to execute their office with diligence and integrity, it is enacted by 25 Geo. 2. c. 29. "That for every inquiſition, "not taken upon the view of a body, dying in a gaol or pri- "ſon, which ſhall be duly taken in England by any coroner "or coroners in any townſhip or place, contributing to the "rates directed to be levied by 12 Geo. 2. c. . the ſum of "twenty ſhillings; and for every mile which he or they ſhall "be compelled to travel, from the uſual place of his or their

" abode, to take ſuch inquiſition, the further ſum of ninepence " over and above the ſaid ſum of twenty ſhillings, ſhall be paid " to him or them out of the monies ariſing from the rates be- " fore mentioned, by order of the juſtices of the peace in their " general or quarter ſeſſions aſſembled for the county, riding, " diviſion, or liberty where ſuch inquiſition ſhall have been " taken, or the major part of them; and which order they are " hereby directed to make without fee or reward."

† *Sect.* 50. And it is further enacted by the ſaid ſtatute, par. 2. " That for every inquiſition which ſhall be duly taken " upon the view of a body dying in any gaol or priſon in " England, by any coroner or coroners of a county, ſo much " money not exceeding the ſum of twenty ſhillings ſhall be " paid to him or them, as the juſtices of the peace in their ge- " neral or quarter ſeſſions aſſembled for the county, riding, or " diviſion, wherein ſuch gaol or priſon is ſituate, or the major " part of them, ſhall think fit to allow as a recompence for his " or their labour, pains and charges in taking ſuch inquiſition, " to be paid in like manner, by order of the ſaid juſtices, or " the major part of them, out of the monies as aforeſaid."

† *Sect.* 51. And it is provided by the ſaid ſtatute, p. 3, 4, 5. " That over and above the recompence hereby limited and " appointed, the coroner or coroners ſhall alſo have the fee of " 13 *s.* 4 *d.* payable by virtue of 3 Hen. 7. c. 1."—" That no " coroner to whom any benefit is given by this act ſhall by " colour of his office, or upon any pretext whatſoever, take for " his office, doing as aforeſaid, other than the ſaid fee of 13 *s.* " 4 *d.* and the recompence hereby limited and appointed, upon " pain of being deemed guilty of extortion."—" That no " coroner of the king's houſehold, and of the verge of the king's " palaces, nor any coroner of the admiralty, county palatine of " Durham, city of London, and borough of Southwark, or of " any franchiſes belonging to the ſaid city; nor any coroner " of any city, borough, town, liberty, or franchiſe, which is " not contributing to the rates directed by 12 Geo. 2. c. " or within which ſuch rates have not been uſually aſſeſſed, " ſhall be intitled to any fee, recompence, or benefit given to, " or provided for, coroners by this act."

As to the eighth general point, *viz.* In what caſes a matter recorded by, or found before a coroner, admits of no traverſe:

I ſhall conſider the ſame in relation, To abjurations or confeſſions made before him. To eſcapes. To flights; and To ſelf-murders.

Sect.

Sect. 52. As to the firſt particular it is ſaid, That his record of an (*a*) abjuration, or of the confeſſion of (*b*) breaking priſon, or of the confeſſion of a felony by an (*c*) approver, is of ſo great authority, as not only to eſtop the party from taking any traverſe to his having made ſuch confeſſion, but alſo from alledging that what was ſaid by him was extorted by dureſs, or other unfair means. Alſo it ſeems, that if the party plead, That he is not the ſame perſon who abjured, *&c.* and the (*d*) coroner record that he is the ſame perſon, ſuch record is concluſive, *&c.* But in theſe (*e*) caſes it ſeems, That the judge, for the better information of his conſcience, may in his diſcretion, if he think fit, take an inquiry from the people living next to the place, of the whole circumſtances of the matter, *&c.*

(*a*) Sym. 171. F. Cor. 124. S. P. C. 52.
(*b*) S P. C. 32. 25 E. 3. 42. pl. 35. F. Corone 134.
(*c*) F. Cor. 118. 169. 12 Aſſize 29.
(*d*) F. Cor. 124. S. P. C. 52.
(*e*) F. Cor. 118, 124, 169. 12 Aſſize 29. B. Corone 75.

Sect. 53. As to the ſecond particular, *viz.* That relating to eſcapes found before a coroner, it is (*f*) ſaid, That if it be found by a coroner's inqueſt, that a murder was committed in ſuch a town, and that the murderer eſcaped untaken, the townſhip cannot traverſe ſuch eſcape, becauſe it makes them only liable to an amerciament, *et de minimis non curat lex.*

(*f*) S. P. C. 34. 35. 183.

Sect. 54. As to the third particular, *viz.* That relating to a flight found before a coroner, it ſeems, That if a perſon indicted of a murder by a coroner's inqueſt, be alſo found to have fled for it, and afterwards upon his trial be (*g*) acquitted of the murder, and alſo found not to have fled for it; yet he ſhall forfeit his goods, becauſe ſuch a finding that he did not fly by a jury, who, as ſome ſay, had nothing to do with it, and ought not to have been charged with ſuch inquiry, ſhall not controul the coroner's inqueſt, which is of ſuch authority, that immediately upon the flight, the party's goods ſhall be delivered to the townſhip, which ſhall be anſwerable for them. Alſo it ſeems (*h*) generally to be taken for granted, That the party has no remedy whatſoever to traverſe ſuch flight found againſt him by a coroner's inqueſt; for that ſuch inqueſt is of very great authority, (*i*) inaſmuch as all perſons of the neighbouring towns, above the age of twelve years, are bound to attend at the taking of it; and yet I cannot find any direct reſolution ſettling this point; but on the contrary it is certain, That Sir William Staundford makes a quære of it, and the reaſon above mentioned, which is brought to ſupport the great credit of ſuch inqueſts, holds as ſtrongly againſt the traverſing them as to the point of the offence, in which reſpect it is at this day generally holden that they may be traverſed, as will be more fully ſhewn in the next ſection. And ſurely the other reaſon which is given for this opinion, That the party only forfeits his chattels by ſuch finding, and therefore ſhall not traverſe it, becauſe the law reckons chattels among thoſe *minima de quibus non curat lex*, is very harſh and unaccountable; and it is very hard to ſay,

(*g*) 13 H. 4. 13. 6. F. Forfeit. 29, 32, 35. 1 Hale 363. 5 Co. 109. Dyer 238. Summary 271. 1 Hale 363. 2 Hale 154.
(*h*) B. Cor. 151. 8 E. 4. 4 2 Levinz 141. B. Trav. 229. 3 Keb. 564, 566. 1 Hale 363. 414. 415 417. 2 Hale 63, 64, 301.
(*i*) 2 Inſt. 147, 148. 3 Keb. 366. 1 Hale 363.

That a man ſhall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an (*a*) inqueſt taken in his abſence, without either hearing him, or giving him an opportunity of defending himſelf.

(*a*) 3 Inſt. 55. 2 Levinz 141. Summary 29. 1 Vent. 181. 182.

Sect. 55. As to the fourth particular, *viz.* That relating to ſelf-murder found before a coroner, it is ſtrongly holden in ſome (*b*) books, That no inqueſt of this kind admits of any traverſe. But the contrary opinion being alſo holden by (*b*) 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 being moved into the king's bench by *certiorari*, may be there traverſed by the executor or adminiſtrator of the perſon deceaſed, and perhaps alſo (*c*) by the king or the lord of the manor, *&c.* (11)

(*b*) 8 Ed. 4. 4. B. 1. c. 27. ſect. 11, and the books there cited. B. Cor. 151. 2 Lev. 141, 152. 2 Keb. 859. 2 Sid. 90. 101. 144. 2 Jon. 198. 1 Ven. 278. 3 Keb. 564, 566. 604. 800.

(*c*) See the books above cited.

(11) But if no matter be depending before the court to make it neceſſary, the king's bench will not order the coroner to return the depoſitions he has taken upon an inquiſition of ſelo de ſe. Strange 1073.

THE CORONER alſo poſſeſſes a miniſterial office as the ſheriff's ſubſtitute. For when juſt exception can be taken to the ſheriff, for ſuſpicion of partiality (as that he is intereſted in the ſuit, or of kindred to either of the parties), the proceſs muſt then be awarded to the coroner, inſtead of the ſheriff, for execution of the king's writs, 4 Inſt. 271. 1 Comm. 349.

Sect. 56. Alſo if it (*d*) appear, That a coroner hath been guilty of any corrupt practice in the taking of an inquiſition, it ſeems that a *melius inquirendum* ſhall be awarded for the taking of a new one by ſpecial commiſſioners, who ſhall not proceed on the view of the body, but on the teſtimony of witneſſes; and the coroner ſhall have nothing to do in the taking ſuch new inqueſt, becauſe it appears from his former miſbehaviour, that he is not fit to be truſted. But (*e*) where his inquiſition is quaſhed for a defect in point of form only, he may and ought to take a new one, in like manner as if he had not taken any before.

(*d*) C. Eliz. 371. 3 Keb. 800, 856. 1 Modern 82. Salkeld 190. Carthew 72. 2 Keb. 859. 1 Ven. 181, 182. 352. 3 Mod. 80, 100, 238. Con. 2 Jones 198.

(*e*) 2 R. Ab. 32. Ed. 4. 70. b. Salk. 190. 2 Hale 59. 69. 1 Hale 415. 2 Anderſon 204. Strange 69.

CHAPTER

CHAPTER THE TENTH.

OF THE SHERIFF's TORN.

THE ſheriff's torn is the king's court of record, holden before the ſheriff for redreſſing of common grievances within the county. Finch 241. F. N. B. 82. 2 Hale 70.

For the better underſtanding the nature whereof I ſhall examine the following points,—Firſt, The original inſtitution of this court.—Secondly, At what time and in what place it muſt be holden.—Thirdly, What perſons owe ſuit to it.—Fourthly, What authority the ſheriff (or his ſteward) hath as judge of it.—Fifthly, What kind of offences are inquirable in it.—Sixthly, Within what place ſuch offences muſt ariſe.—Seventhly, By what jurors and in what manner indictments in it ought to be found.—Eighthly, In what manner they are to be proceeded upon.—Ninthly, In what manner they are to be traverſed and determined.

Sect. 2. As to the firſt point it is obſervable, That by the *(a)* common law, every ſheriff ought to make his torn or circuit throughout every hundred in his county twice in the year, in order to hold a court in every ſuch hundred for the reformation of common grievances, and the preſervation of the peace and good government of the kingdom. For which purpoſe all the (*b*) inhabitants of ſuch hundreds, being above the age of twelve years, and not ſpecially privileged, in ſuch manner as ſhall be more fully ſet forth under the third point, are bound to attend at ſuch courts, in order to make inquiries of all ſuch offences; and alſo to give ſecurity to the publick for their good behaviour, by taking an oath to be faithful to the king, and to obſerve his laws, and alſo by incorporating themſelves into ſome free-pledge or tithing, which formerly ſignified a certain number of families living together in the ſame precinct, the maſters whereof were every one of them mutually bound for each other, and puniſhable for the default of any member of any ſuch family, in not appearing to anſwer for himſelf, on any accuſation made againſt him.

(*a*) 9 Co. Preface. Dalt. Sher. 385. Mag. Char. 35. 2 Inſt. 70. 71. 73. 122. B. Leet, 42. Britton 71.

(*b*) See the books above cited. Fleta B. 1. c. 27. Bracton 124. 2 Inſt. 121. Lamb. of conſtables 8 Keil. 141. 4 Inſt. 259. 2 Hale 69. 4 Comm. 270.

Sect. 3. And the better inforcing of this order ſeems anciently to have been the principal end of holding this court, the ſtyle whereof even to this day muſt be *curia viſus franci plegii domini regis tenta apud C. coram vicecomite in turno ſuo tali die, &c.*

2 Inſt. 71. 72. Dalt. Sher. 385, 129. F. Leet. 11. Mirror c. 1. ſ. 13. & 16.

&c. But it hath been reſolved that the law doth not take notice of any ſuch court, under the ſtyle of *Turn' Vicecom' tent' tali die*; for the word torn, properly taken, doth not ſignify the ſheriff's court, but his perambulation.

6 H. 7. 2. Dalt. Sher. 390. Con. Coke Lit. 115. Kitchen 44. Dalt. Sher. 390.

Sect. 4. As to the ſecond point, *viz.* At what time and in what place this court is to be holden, it is ſaid, That at the common law, it might be holden at any place within the hundred, and as often as the ſheriff thought fit. But this having been found to give the ſheriff too great a power of oppreſſing the people, by holding his court at ſuch times and places at which they could not conveniently attend, in order thereby for his own advantage to increaſe the number of his amercements, it was enacted by the ſtatute of Magna Charta, 35. "That "no ſheriff or his bailiff, ſhall make his torn through a "hundred but twice in a year, and at the place accuſtomed, "*viz.* once after Eaſter, and again after the feaſt of St. "Michael; and that the view of frank-pledge ſhall be at the "term of St. Michael."

Sect. 5. And it is farther enacted by 31 Edw. 3. c. 15. "That every ſheriff ſhall make his torn yearly, one time "within the month after Eaſter, and another time within the "month after St. Michael; and if they hold them in other "manner, that then they ſhall loſe their torn for the time."

(*a*) Dyer 151. Keilw. 192. Dalt. Sher. 390.

Sect. 6. And it ſeems (*a*) certain, That ſince theſe ſtatutes, the ſheriff is indictable for holding this court at another time than what is therein limited, or at an unuſual place.

(*b*) 38 H. 6. 7. 6 H. 7. 2. b. 3. S. P. C. 84. 2 Hale 70. 2 Danv. Abr. 256. 2 Inſt. 71. 2 Saund. 290.

Sect. 7. Alſo it hath been (*b*) reſolved, That an indictment found at a ſheriff's torn, appearing to have been holden at another time, is void.

(*c*) B. Leet. 23. 2 Leon. 74. 1 Roll 201. (*d*) 8 H. 7. 4 Kitchen 44. Owen 35. Daliſon 61. (*e*) Co. Lit. 115. Kitch. 8. 44. C. Eliz. 125. 245. 1 Roll 201.

Sect. 8. But it is obſervable, That neither of theſe ſtatutes do expreſly mention a court-leet, and therefore it is ſaid in ſome (*c*) books, That they do not extend to it; neither do I find any reſolution, That an ancient court-leet holden at any other time, or at an unuſual place, is void. But on the contrary it is (*d*) ſaid, That a court-leet may be holden at any place within the precinct which the lord thinks fitting. And it ſeems to be (*e*) agreed, That a preſcription to hold ſuch court oftner than twice in the year is good; which ſeems hardly reconcilable with the general rule of law, That no preſcription can ſtand good againſt a ſtatute which has negative words, if a court leet be conſtrued to be within the purview of the above mentioned ſtatutes. It is true indeed, That both Sir *Edward Coke* and *Kitchen* endeavour to ſolve this difficulty, by offering a diſtinction that the ſaid rule extends not to ſtatutes made in affirmance of the common law; but it is queſtionable how far

this will amount to a good anſwer, ſince it ſeems to be holden by (a) others of good authority, That the ſaid ſtatutes were not made in affirmance of the old law, but are introductory of a new one; yet it is certainly ſafeſt to hold a court-leet at the times accuſtomed, for it is (b) ſaid, that if it be holden at an unuſual time it is void. And it (c) ſeems, That no court-leet granted ſince the ſtatute, can be holden at any other time than what is limited by it, becauſe every ſuch court is derived out of the torn, to which the ſtatute certainly did extend.

(a) Dalt. Sher. 390. 6 H. 7. pl. 2.
(b) 38 H. 6. 7. F. Leet. 2. B. Leet. 32. 2 Saund. 291.
(c) C. Eliz. 245. Con. 2 Inſt. 72. 2 Saund. 291.

Sect. 9. It hath been (d) holden, That in every caption of an indictment taken in a ſheriff's torn, or court-leet, the day whereon it was taken ought to be ſet forth, that it may appear not to have been on a Sunday.

(d) 2 Keb. 731. 1 Ven. 107. 2 Saund. 290.

Sect. 10. As to the third point, *viz.* What (e) perſons owe ſuit to the ſheriff's torn, it is certain, That regularly all perſons above the age of twelve years, are by the common law bound to appear at this court in their proper perſons, and that no perſons ſo bound to appear, are within the benefit of the ſtatute of (f) *Merton*, c. 10. which allows ſuit-ſervice to be performed by attorney. And that not only maſters of families, but alſo all their ſervants, are bound to pay ſuch ſuit, and that every (g) maſter may be amerced for ſuffering a ſervant to continue with him a year and a day, without being put into the decennary, &c.

(e) See ſect. 2.
(f) 2 Inſt. 99.
(g) 41 E. 3. 26. 45 E. pl. 26.

Sect. 11. But (h) tenants in ancient demeſne are privileged by the common law from coming to this court, unleſs they and their anceſtors have time out of mind uſed to come to it. Alſo (i) parſons of churches have the like privilege by the common law; and all (k) peers of the realm and women have the ſame privilege by the ſtatute of *Marlebridge*, c. 10. (and perhaps by the common law), unleſs their preſence be eſpecially required for ſome particular cauſe.

(h) F.N.B. 161. Dalt. Sher. 387. 2 Inſt. 121. Qu. B. Leet 38.
(i) F. N. B. 160. 2 Inſt. 121. Regiſter 175.
(k) 2 Inſt. 120. 121. Regiſter 175. F. N. B. 160. 161. Dalt. Sher. 186. Bracton 124.

Sect. 12. Alſo it ſeems (l) clear, That by the common law, as well as the ſaid ſtatute of *Marlebridge*, c. 10. no man can be obliged to do ſuit to any ſuch court, within the precincts whereof he doth not reſide, in reſpect of any lands which he may have within the juriſdiction of it; for that no ſuit of this kind is due in reſpect of the tenure of any lands, but only in reſpect of the perſonal reſidence of the party. And (m) if a man have a houſe which ſtands upon the precincts of two leets, it is ſaid, That he ſhall do his ſuit to the court within the juriſdiction of which his bed-chamber lies. And if (n) one have a houſe and family in two leets, it ſeems that he ought to do his ſuit to that, wherein for the moſt part he perſonally reſides, but no man can be of two leets; and therefore one who lives within a (o) private leet, cannot be obliged

(l) Reg. 175. F. N. B. 160. Dalt. Sher. 387.
(m) 2 Inſt. 122. Dalt. Sher. 387.
(n) 2 Inſt. 122. Dalt. Sher. 387.
(o) 2 Inſt. 122. See 19 H. 6. 1. 33 H. 6. pl. 9.

(a) C. Ja. 584. Finch 246. Dalt. Sher. 388. 2 Hale 70. Douglas 537.

obliged to do ſuit to the ſheriff's torn, or to any other grand leet, unleſs ſuch private leet, for ſome default of the lord, be ſeized into the king's hands, or (a) unleſs the lord of the leet neglect to hold his court.

As to the fourth point, *viz.* What authority the ſheriff (or his ſteward) hath as judge of this court, I ſhall conſider the ſame in relation, To indictments; To fines and amercements in general; and, To the appointment of conſtables.

(b) Dalt. Sher. 400. 2 Hale 69.

Sect. 13. As to the firſt of theſe points, it ſeems, That by the common law he might proceed to (b) hear and determine any offence within his juriſdiction, being indicted before him and requiring a trial. But it is clear, that he is reſtrained from this power by the ſtatute of Magna Charta, c. 17. By which it is enacted, "That no ſheriff, conſtable, or other "bailiff of the king, ſhall hold pleas of the crown." And it ſeems, That this ſtatute alſo extends to the (c) ſtewards of courts-leet, who cannot deliver any perſons indicted before them of felony, but muſt refer them to the juſtices of gaol-delivery; neither can they try any perſon indicted before them of any other offence, and therefore there is no remedy to avoid ſuch preſentments before them as are traverſable, but (d) by removing them into the king's bench, &c. as will be more fully ſhewn under the ninth point.

(c) 2 Inſt. 32. Dalt. Sher. 400. 2 Hale 71.

(d) 8 H. 4. 17. B. Leet. 11. 27 H. 8. 2. Kitch. 22, 23. Summary 175. 1 Ed. 3. c. 17.

Sect. 14. But it is certain, That the above-mentioned ſtatute of Magna Charta, c. 17. doth neither reſtrain the ſheriff's torn, nor the court-leet, from taking (e) indictments or preſentments, or awarding proceſs thereon in the ſame manner as before; but this power of awarding ſuch proceſs, having been abuſed by the ſheriffs in their torns, (f) was taken from all of them (except thoſe of London), but not from any court-leet, by 1 Edw. 4. c. 2. which is more fully ſet forth under the eighth general point of this chapter.

(e) Kitch. 42. Finch 386. 1 Ed. 3. c. 17. 2 Hale 69.

(f) Dalt. Sher. 400, 401. 2 Hale 71.

As to the ſecond point, *viz.* The ſheriff's authority in his torn in relation to fines and amercements, I ſhall conſider,—Firſt, In what caſes he may, and in what manner he ought to impoſe a fine.—Secondly, In what caſes he ought to award an amercement.—Thirdly, In what manner ſuch amercement is to be awarded and affeered.—Fourthly, In what manner ſuch fine or amercement is to be recovered.—Fifthly, What farther penalty may be added to ſuch fine or amercement.

Sect. 15. As to the firſt particular, it ſeems clear, That the ſheriff's power in this court is ſtill the ſame as anciently it was, in all caſes not within either of the above-mentioned ſtatutes

ſtatutes of Magna Charta, or 1 Edw. 4. from whence it follows, That he ſtill continues a judge of record, and may impoſe a fine on all ſuch as are guilty of (*a*) any contempt in the face of the court; alſo there ſeems to be no doubt, but that he may impoſe what reaſonable fine he ſhall think fitting, upon a (*b*) ſuitor refuſing to be ſworn, or upon a (*c*) bailiff refuſing to make a panel, &c. or upon a (*d*) tithingman neglecting to make his preſentment, or upon one of the jury (*e*) refuſing to preſent the articles wherewith they are charged, or upon a perſon duly choſen (*f*) conſtable refuſing to be ſworn.

(*a*) Book 2. ſect. 11. Ante 4 f. 15.
(*b*) F. Leet. 11. Dalt. Sher. 400. 2 Inſt. 142, 143. 44 E. 3. 19.
(*c*) 7 H. 6. 12.
(*d*) 10 H. 6. 7. 8 Co. 38.
(*e*) See 8 Co. 38. b. 39.
(*f*) 8 Co. 38. Dalt. Sher. 400. Dyer 211. Dalt. Sher. 401.

Sect. 16. But it hath been (*g*) reſolved, That all ſuch fines ought to be ſeverally impoſed on each particular offender, and not jointly upon all of them, except where a whole vill is to be fined; in which caſe, for the neceſſity of the thing, a joint fine upon all is good.

(*g*) 1 Roll 33. 73. 11 Co. 42. 43. Dyer 211.

Sect. 17. As to the ſecond particular, *viz.* In what caſes the ſheriff in his torn ought to award an amercement; it ſeems that he hath a diſcretionary power (*h*) either to award a fine or amercement for contempts to the court, as for a ſuitor's refuſing to be ſworn, &c. Alſo there ſeems to be no doubt, but that at the common law he might, as the ſteward of a court-leet ſtill may, award an (*i*) amercement of any perſon indicted for an offence not capital within his juriſdiction, without any farther proceeding or trial. And it ſeems to be taken for granted in (*k*) ſome books, That he might in ſuch caſes impoſe a fine on the offender, if he thought fit; and the ſtatute of 1 Edw. 4. c. 2. which reſtrains him from levying any fines or amercements on indictments found before him, clearly ſuppoſes him to have had a power of impoſing ſuch fines; from all which it ſeems probable, that in ſuch caſes he had, and that the ſteward of a court-leet ſtill hath a power, either to amerce or fine the offender, eſpecially if the (*l*) crime were any way enormous, as an affray accompanied with wounding, &c.

(*b*) Dalt. Sher. 400. F. Leet. 11. 8 Co. 39. 40. Kitchen 43.
(*i*) B. Leet. Keilw. 66. Skinner 392. Finch 468. Kitchen 51. 52.
(*k*) F. Torn, 4. 8 E. 4. 5. Dalt. Sher. 401.
(*l*) 8 Ed. 4. 5.

Sect. 18. As to the third particular, *viz.* In what manner ſuch amercement is to be awarded and affeered, it ſeems, That if by an amercement be meant the judgment, that the party ſhall be *in miſericordia domini regis*, this being a (*m*) judicial act, ought to be the act of the court only, and requires not the concurrence or aſſent of the jury or any other, as appears from the conſtant form of all entries. Neither do I ſee any reaſon why ſuch an award of a *miſericordia* by a judge of a court-leet, ſhould expreſs any certain ſum for which the party ſhould be *in miſericordia*, except in ſuch caſes only where no other perſon is afterwards to affeer it; for in other caſes the award of a *miſericordia* is only in order to authorize others to fix the ſum which the party is to pay to the king for his default; and

(*m*) 1 Jones 301. C. Car. 275. 8 Co. 38. 40.

and in ſuch (*a*) caſes the courts of Weſtminſter-hall never do more than award that the party be *in miſericordia*, without mentioning any ſum in certain; and there ſeems no reaſon why the judge of a court-leet ſhould not follow the ſame rule; and accordingly I find the opinion of the lord chief juſtice (*b*) *Hobart*, which is the chief ground of a reſolution in (*c*) *Levinz*'s third report, That every ſuch award of an amercement muſt expreſs a certain ſum, (*d*) over-ruled of late by court of king's bench.

(*a*) 8 Co. 40. Raſt. Ent. 553. 606. F. N. B. 76.
(*b*) Hob. 129. 1 R. Abr. 542.
(*c*) 3 Lev. 206. 3 Mod. 138.
(*d*) Salkeld 56. Vide 3 Burr. 1860.

Sect. 19. But if by an amercement be meant, the taxing, or reducing to a certainty, the ſum to be paid by the party to the king, upon the award of his being *in miſericordia*; it (*e*) ſeems, That if it be for an offence indicted, it ought to be done by certain officers called Affeerors, being ſpecially choſen and ſworn for this purpoſe. It is true (*f*) indeed, That the common entry of an amercement upon a preſentment in a court-leet is, that the party is amerced, or *in miſericordia* to ſuch a ſum; without diſtinguiſhing between the award of the *miſericordia* and the aſſeſſment of the amercement, or ſhewing by whom they are made; yet in judgment of law the award of the *miſericordia* is the act of the court only, and the aſſeſſment of the ſum to be paid, the act of the affeerors, and ſo it ought to be pleaded. But if the (*g*) amercement be for a contempt of the court, it may be ſettled by the judge himſelf, and needs no other affeerment; for the (*h*) judge of every court of record is the moſt proper judge of all contempts offered to ſuch court; and an amercement of this kind is in (*i*) nature of a fine, and called ſo in ſome (*k*) books; and it ſeems to be a general (*l*) rule, That no fine for a contempt is within the ſtatutes which require that amercements be affeered.

(*e*) 8 Co. 40. 3 Lev. 206. Raſt. Ent. 606. Kitchen 46. Keilwood 66. 3 Keble 362.
(*f*) Kitchen 51. 52. 53.
(*g*) Raſt. Ent. 151. 7 H. 6. 12. 10 H. 6. 7.
(*h*) 8 Co. 40, 41. 2 Leon. 242. 3 Mod. 138.
(*i*) B. Amer. 50.
(*k*) Sav. 93. Co. Ent. 572. 8 Co. 38. Raſtal 553. 8 Co. 38, &c. 2 Inſt. 196.
(*l*) Magna Charta 14. W. 1. 18.

Sect. 20. As to the fourth particular, *viz.* In what manner ſuch (*m*) fines and amercements are to be recovered; it ſeems that the king or lord have an election of common right, either to diſtrain for them, or to bring an action of debt.

(*m*) Raſt. 151. 553. 606. 2 H. 4. 24. 10 H. 6. 7. C. Eliz. 581. Raym. 68. Sav. 93, 94.

For the better underſtanding of the nature of which remedies, I ſhall firſt lay down ſome rules concerning both of them in common, and then deſcend to each of them in particular.

As to what concerns the ſaid remedies in common, I ſhall lay down the following rules:—

Sect. 21. Firſt, That it is ſafeſt in every avowry, or declaration of this kind, expreſsly to (*n*) ſhew, that the offence was committed within the juriſdiction of the court. For if it were not, all the proceedings were *coram non judice*; and a court ſhall not be preſumed to have a juriſdiction, where it doth not appear to have one. But perhaps it is not neceſſary to alledge in the preſent-

(*n*) Hobart 129. Raſt. 553. Co. Ent. 572. 573.

preſentment itſelf, that (*a*) the offence aroſe within the juriſdiction of the court; yet it is certainly adviſable to have ſuch an allegation, and that (*b*) perhaps may ſupply the want of the averment of juriſdiction in pleadings.

(*a*) Hob. 129.
(*b*) Raſt. 606,

Sect. 22. Secondly, That it is (*c*) adviſable expreſsly to alledge, that the offence was committed as well as that it was preſented, &c.; yet I cannot find any expreſs opinion to this purpoſe; but on the contrary, it is obſervable, that the (*d*) precedents of pleadings of this kind in the beſt authors, do not expreſsly aver that the offence was committed, but only that it was preſented, and that it aroſe in ſuch a place within the juriſdiction of the court, &c. It is true indeed, that it hath been generally (*e*) holden, That in an avowry or declaration for an amercement in a court-baron, it is as neceſſary to alledge that the offence was committed, as that it was preſented. But to this it may be anſwered, that a court-baron is not a court of record, and conſequently not of ſo high authority as the ſheriff's torn or a court-leet; neither are preſentments in a court baron, nor even in any other court whatſoever, ſo highly credited by the law as thoſe made in a torn or leet, which admit of no traverſe to the truth of them, except in ſome ſpecial caſes, as will be more fully ſhewn under the ninth general point of this chapter.

(*c*) 2 Roll 40. Raym. 337. Salkeld 107.
(*d*) Raſt. 151. 553. 606. Co. Ent. 573.
(*e*) Moor 75. C. Jac. 582. C. Eliz. 748. 885, 886. 3 Leon. 7, 8. 1 Leon. 242. 3 Mod. 137.

Sect. 23. Thirdly, That it is ſafeſt in (*f*) ſetting forth a preſentment, or an affeerment of an amercement, to ſhew the names of the preſentors and affeerors; yet I cannot find this done in any of (*g*) *Raſtal*'s precedents; and ſome have ſaid, That it is neceſſary to ſet forth the names of the preſentors in an action of debt, but not in replevin.

(*f*) Keil'w. 66. 3 Keb. 362. Co. Ent. 572. 773.
(*g*) Raſt. 553. 606. 9 E. 4. 40.

Sect. 24. Fourthly, That it is adviſable to ſhew that proper (*h*) notice was given of the holding of this court, yet this I find omitted in ſome (*i*) precedents; and perhaps the contrary opinion may be the better, for that every court of record ſhall be preſumed to obſerve all neceſſary previous incidents for the holding of it, and all perſons within its juriſdiction ſhall be intended to have notice of it. And for the like reaſon perhaps, it is not neceſſary in an avowry for a (*k*) diſtreſs for ſuch fine or amercement, to ſhew that the party had previous notice what it was.

(*b*) 10 H. 7. 15. 1 Ven. 105. Raym. 204. Co. Ent. 572, 573. Raſt. 553, 606. 1 R. Abr. 365. 468. 2 R Abr. 136. 1 Roll 201.
(*i*) Co. Ent. 572 573. Raſt. 553. 606.
(*k*) 45 E. 3 9. Raſt. 553, 606.

As to the recovery of ſuch fines and amercements by way of diſtreſs, I ſhall obſerve,

Sect. 25. Firſt, That it ſeems to be (*l*) ſettled at this day, That a diſtreſs is incident of common right to every fine and amercement in a ſheriff's torn or court-leet, whether the ſame belong

(*l*) 1 R. Abr. 665. 666. 1 Roll 201. 11 Co. 45. 8 Co. 41. C. Jac. 382.

10 H. 7. 15. 10 H. 6. 7. Con. 11 H. 7. 14. 21 H. 7. 40. (a) 1 Ven. 105. Raym. 204. 2 Keb. 701. 739, 745. (b) 1 Roll 76. 11 Co. 44.

belong to the king or a ſubject, if the offence for which they were impoſed be of common right incident to the juriſdiction of ſuch courts; but (a) if ſuch offence were only the neglect of a duty created by cuſtom, it is queſtionable whether it do not require the like cuſtom for a diſtreſs, though the duty be of a public nature; but if it be for the (b) private benefit of a ſubject, it ſeems clear, That no diſtreſs is incident to it without a ſpecial cuſtom.

(c) 2 H. 4. 24. 47 E. 3. 13. B. Leet. 28, 41. F. Avow. 194. 1 R. Abr. 670. 2 Inſt. 104. (d) 47 Ed. 3. 12, 13. F. Diſtr. 15. 1 R. Abr. 670.

Sect. 26. Secondly, That the ſheriff, or lord of a leet, may for ſuch fines and amercements diſtrain the goods of the offender in (c) any lands within the county or precinct of the leet, of whomſoever they ſhall be holden, except (d) only in ſuch lands which ſhall be in the king's hands; for that all ſuch lands, while they continue in the king's poſſeſſion, are wholly out of the juriſdiction of ſuch courts.

(e) 2 Inſt. 131. 47 E. 3. 13. 1 And. 72.

Sect. 27. Thirdly, That ſuch a diſtreſs may lawfully be taken in the (e) highway; for that the ſtatute of Marlebridge, c. 15. which prohibits the taking of a diſtreſs there, is to be intended only of diſtreſſes taken for ſervices due by way of tenure of lands.

(f) 47 E. 3. 13. 41 E. 3. 26. B. Diſtr. 3. F. N. B. 100. Owen 146. Noy 20. Con. 1. R. Abr. 669.

Sect. 28. Fourthly, That ſuch fines and amercements, being for a perſonal offence, no (f) ſtranger's beaſts can lawfully be deſtrained for them, though they have been levant and couchant on the lands of the offender.

(g) Het. 62. Finch 476. (h) Het. 62. (i) 3 H. 7. 4. 6. 8 Co. 41. 1 Roll 76. Noy 17. Qu. Het. 62. 1 Buſſ. 53. 11 H. 7. 14. 21 H. 7. 40.

Sect. 29. Fifthly, That it ſeems to be (g) agreed, That where any ſuch court is in the king's hands, the goods diſtrained for ſuch fines and amercements may lawfully be ſold, after they have been kept a reaſonable time, as the ſpace of ſixteen (h) days; and it ſeems the better (i) opinion, That where any ſuch court is in the hands of a common perſon, if the goods were diſtrained for an offence of a public nature, they may be ſold of common right, without any ſpecial cuſtom for that purpoſe.

(k) 3 Mod. 138. C. Eliz. 698. 748. Moor 574, 607. 2 Keb. 745. Salk. 108.

Sect. 30. Sixthly, That no bailiff can lawfully diſtrain for any ſuch fine or amercement, without a ſpecial (k) warrant for ſo doing, which muſt be ſet forth by him in an avowry or juſtification of ſuch a diſtreſs (1).

(1) And in replevin it muſt be averred, "That the defendant was guilty," but in treſpaſs the conviction is ſufficient to juſtify the officer. The amercement alſo muſt appear to have been by the court and not by the jury. Strange 847.

Sect.

Sect. 31. As to the recovery of ſuch fines and amercements by action of debt, being ſcarce able to find any thing remarkable concerning this matter, except what hath been already taken notice of, I ſhall content myſelf with this one obſervation, That the defendant ſhall (*a*) not be ſuffered to wage his law in any ſuch action, becauſe it is grounded on the act of a court of record.

Ld Raym. 1173. 3 Burrow 1861. (*a*) 10 H. 6. 7. Co. Lit. 295. F. Lev. 5. 43. 2 R. Abr. 106.

Sect. 32. As to the fifth particular, *viz.* What farther penalty may be added to ſuch fines and amercements, there ſeems to be no doubt, but that upon a preſentment of a common nuſance in a torn or leet, the ſheriff or ſteward may either amerce the perſon preſented, and (*b*) alſo order him to remove the nuſance by ſuch a day, under pain of forfeiting a certain ſum, or may order him to remove it under ſuch a pain (*c*) without amercing him at all. But it ſeems doubtful, Whether ſuch perſon be bound at his peril, to take notice of and obey ſuch order, being made in his (*d*) abſence, unleſs expreſs notice be given him of it; but if he have ſuch notice, it ſeems clear, That he ſhall forfeit the pain upon a preſentment at another court, that he hath not removed ſuch nuſance, (*e*) without any farther proceeding: Alſo it ſeems, That no ſuch pain can be aſſeered to any (*f*) leſſer ſum than what is at firſt ſet; and it is ſaid, That every ſuch pain when forfeited, may be recovered (*g*) either by diſtreſs or action of debt, in the ſame manner as a fine or amercement may be: And this point ſeeming to be agreed by moſt of the books cited in the margent, it ſeems probable, That the reaſon of the judgment is miſtaken in Fletcher and Ingram's caſe, as reported by Mr. Serjeant (*h*) Salkeld, wherein the contrary opinion is ſaid to have been holden.

(*b*) See Kitchen 51, 52, 53, 54. (*c*) Co. Ent. 573. 1 R. Abr. 468. Cro. Jac. 382. (*d*) 1 R. Abr. 468. 2 R. Abr 136. 1 Roll 20. Aleyn 78. 5 Mod. 130. 131. (*e*) Co. Ent. 573. (*f*) 3 Leon 7, 8. Moor 75. Co. Ent. 573. B. Leet 37. (*g*) 8 Co. 41. Keilwood 66. C. Jac. 382. 1 Roll. 201 1 R. Abr. 468. Con. B. Leet 37. (*h*) Salk. 175. See 5 Mod. 96. 130, 131. Carthew 73. Barnard K. B. 128, 214. Fitzg. 46, 109.

BEFORE I come to the third point, *viz.* The authority of the ſheriff as judge of the torn, in relation to the appointment of conſtables, I ſhall in brief premiſe ſome conſiderations concerning the antiquity and nature of the office of a conſtable.

Sect. 33. And firſt, as to the antiquity of the office of a conſtable. It ſeems to be the (*i*) better opinion, That both conſtables of hundreds, which are commonly called high conſtables, and alſo conſtables of tithings, which are at this day commonly called petit conſtables or tithingmen, and were anciently called chief pledges, were by the common law, and not firſt ordained by the ſtatute of Wincheſter, c. 6. as it is holden by (*k*) ſome that they were; 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.

(*i*) Salkeld 175. 381. 1 H. 7. 108. Owen 105. Finch. 336. Kitchen 47, 48. 4 Inſt. 265. Popham 13. C. Eliz. 375, 376. Lamb. Conſtable 5, 9, 10. 6 Co. 77. Ld Raym. 1193.

(*k*) Lamb. Conſtable, 5. 1 Burn. 394. 4 Inſt. 267. 2 Comm. 115. 35[illegible]

(a) See the books cited, ſection 33.
(b) See c. 12.
(c) Kitch. 48.
13 H. 7. 10.
2 Hale 88.
4 Comm. 289.
(d) B. 1. c. 63.
(e) Lamb. Conſtable 5, 6, &c.
45 E. 3. 27.
(f) Raſt. En. 151.
Crompton 212.
Dalt. Sher. 388.
Kitchen 47.
Ld Raym. 1299 1301.

Sect. 34. As to the nature of this office, there ſeems to be no doubt but that the (a) original inſtitution of it was for the better preſervation of the peace; for which purpoſe a conſtable is ſaid to be authoriſed by the common law to (b) arreſt felons, and alſo all ſuſpicious (c) perſons that go abroad in the night, and ſleep by day, or reſort to bawdy-houſes, or keep ſuſpicious company, and to ſuppreſs (d) affrays. And to the ſame end alſo it (e) ſeems, That he ought by the ancient common law, to preſent at the torn or leet all thoſe within his precinct, who have not been admitted into ſome tithing and ſworn to the king's allegiance; and it ſeems that he ſtill ought by the law in (f) uſe at this day, to preſent all offences inquirable in the torn or leet; yet in the oath ſet down by Kitchen, he only ſwears to preſent all bloodſheds, outcries, affrays, and reſcouſes done within his office.

(g) Salk. 380.

Sect. 35. Alſo it is (g) ſaid, That a conſtable was at the common law a ſubordinate officer to the conſervators of the peace; and conſequently ſince the office of ſuch conſervators hath been diſuſed, and juſtices of peace conſtituted in their ſtead, it hath been always holden, That the conſtable is the proper officer to a juſtice of peace, and bound to execute his warrants; and therefore it hath been (h) reſolved, That where a ſtatute authoriſes a juſtice of 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 (i) officer to ſerve ſuch warrant, and indictable for diſobeying it.

(h) 5 Mod. 130. 446.
Salkeld 175.
Carthew 508.
Ld Ray. 545.
(i) Salk. 381.
2 Roll 78.
1 Hale 581.
2 Hale 88.

(k) 1 R. Abr. 591.
Moor 845.
Crom. 222.
3 Bulſt 77.
Dalt. c. 1.
1 Roll 274.
1 Sid. 355.
1 Levinz 233.
March 30.
2 Keble 309.
1 Sid. 355.
Moor 845.
1 Hale 581.

Sect. 36. Yet in as much as the office of a conſtable is wholly miniſterial and no way judicial, it ſeems, That he may appoint a deputy to execute a (k) warrant directed to him, when, by reaſon of ſickneſs, abſence, or otherwiſe, he cannot do it himſelf. For the public good requires, That there ſhould be always ſome officer ready at hand to execute ſuch warrants, and the too rigorous reſtraint of the ſervice of them to the proper officer, could not but ſometimes cauſe a failure of juſtice; yet I do not find it ſettled, That a conſtable can make a deputy without ſome ſuch ſpecial cauſe.

2 Hale 88. Wood b. 1. c. 7. Burr. 1259. 1262. Strange 943.

† And it is enacted by 1 Will. and Mary, c. 18. ſ. 7. "That "if any perſon diſſenting from the church of England ſhall "hereafter be choſen, or otherwiſe appointed to bear the office "of high conſtable or petit conſtable, or any other parochial "or ward office, and ſhall ſcruple to take upon him any of the "ſaid offices, in regard of the oaths of any other matter or "thing required by the law to be taken or done in reſpect of "ſuch office, he may provide a ſufficient deputy to execute the "ſame for him."

FOR the better underſtanding of the authority of the ſheriff, as judge of the torn, in relation to the appointment of conſtables, I ſhall conſider the following particulars:—Firſt, Whether the ſheriff in his torn hath power to make or remove a conſtable.—Secondly, What perſons are privileged from being conſtables.—Thirdly, In what manner perſons duly choſen conſtables, may be puniſhed for refuſing to be ſworn.—Fourthly, What remedy perſons having a right to this office, or to be diſcharged, may have to be admitted into, or reſtored to it, or diſcharged of it.—Fifthly, What power juſtices of peace have in relation to theſe matters.

Sect. 37. As to the firſt particular, *viz.* Whether the ſheriff in his torn hath power to make or remove a conſtable. It being ſaid in ſome (*a*) books, That both high and petit conſtables are to be choſen and appointed by the ſheriff in his torn; and by (*b*) others, that they are to be choſen by the decennary, it ſeems difficult to determine to whom this power doth of common right belong; yet it ſeems clear, That whether a conſtable be to be choſen by the ſheriff or decennary, yet he is to be ſworn and placed in his office by the ſheriff, as being judge of the court. Alſo it ſeems certain, That a cuſtom for chooſing a conſtable either way, is good; and it ſeems to have been the opinion of the makers of 13 and 14 Car. 2. c. 12. That the lords of the courts-leet have this power of common right; for the ſaid ſtatute, on the neglect of ſuch lords to appoint a conſtable, gives to juſtices of peace the ſole power of making one; from whence it ſeems probable, That the makers of that ſtatute thought that the like power did originally belong of common right to ſuch lords, and conſequently to the ſheriff in his torn, where there is no court-leet: But (*c*) it hath been ſaid, That a cuſtom in a town that the inhabitants ſhall ſerve the office of a 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 later books, and it ſeems, That the conſequence of the reaſoning above-mentioned may well be denied, ſince ſuch woman in ſuch caſe may procure another to ſerve for her.

(*a*) Dalt. Sher. 400. 1 Roll 34.
(*b*) 2 Jones 212. Lamb. Conſtable 8. Salkeld 175. Holt 152. Ld Raym. 70. 138. Cowp. 13, 16. 11 Modern 125. Douglas 537.
(*c*) C. Car. 389. 2 Keb. 309, 578. 1 Lev. 266. 1 Sid. 355. Strange 943.

Sect. 38. However, it ſeems clear, That the ſheriff or ſteward having power to place a (*d*) conſtable in his office, have by conſequence a power of removing him,

(*d*) Bulſt. 174.

Sect. 39. As to the ſecond particular, *viz.* What perſons are privileged from being conſtables, it (*e*) ſeems certain, That if a ſworn attorney, or other officer of any of the courts of Weſtminſter-Hall be choſen into this office, he may have a writ of privilege for his diſcharge; for that all ſuch officers, being

(*e*) Noy 112. 113. March 30. C. Car. 389. 2 Keb. 477 Douglas 538.

bound to give their perſonal attendance to ſuch courts, ſhall be privileged from all ſuch inferior offices, which it is apparent that for the moſt part they cannot perſonally execute. 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 (*a*) 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: And upon the like reaſons I find it (*b*) taken for granted, That practiſing barriſters at law, and the ſervants of members of parliament, have the ſame privilege, but I know not of any reſolution to this purpoſe.

(*a*) 2 Keb. 508. C. Car. 389. 1 Lev. 265. 266.
(*b*) 1 Mod. 22. 2 Keb. 578. 1 Modern 13.

Sect. 40. Alſo it hath been reſolved, That an (*c*) alderman of London is not compellable to be a conſtable, for that as an alderman he is bound to be preſent in the city for the good government of it.

(*c*) 1 Jon. 462. C. Car. 585 Douglas 538.

Sect. 41. But (*d*) 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 be 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.

(*d*) See 3 Keb. 309. 1 Sid. 272. 355. 3 Levinz 233. 1 Keble 933.

† But it is enacted by 2 Geo. 3. c. 20. ſ. 76. "That no ſer-
" jeant or private man ſerving in the militia ſhall, during the
" time of ſuch ſervice, be appointed to ſerve as a peace officer,
" or a *pariſh officer*, unleſs he ſhall conſent thereto."

Alſo it (*e*) 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; yet if ſuch an officer, or a (*f*) gentleman of quality who hath no ſuch office, or a practiſing phyſician, be choſen conſtable of a town, which has 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 (*g*) 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. Yet theſe points ſeem not to be ſettled, as appears by the various opinions in the books concerning this matter, which are very differently reported.

(*e*) 2 Keb. 578. 1 Modern 22.
(*f*) 1 Keb. 439. Con. 2 Keble 578.
(*g*) Sid. 272. See 1 Keble 933. 2 Shower 75.

A tenant in ancient demeſne is liable to the office. Vent. 344.

Sect. 42. It is alledged in the petition of the London ſurgeons, whereon the ſtatute of 5 Hen. 8. c. 6. is made, "That the wardens and fellowſhip of the craft and myſtery of ſurgeons infranchiſed in the city of London, not paſſing in number twelve perſons, for the continual ſervice and attendance that they

they at all hours and times give to the king's people, have been exempted and discharged from all offices and business, wherein they should use or bear any manner of armour or weapon, &c." And thereupon it is enacted and established, "That from "thenceforth the said wardens and fellowship be discharged, "and not chargeable of constableship, watch, and all manner "of office bearing any armour, &c. and also that the said act "extend to all barber-surgeons, admitted and approved to "exercise the said mystery of surgeons, according to the form "of the statute made in that behalf, so that they exceed not, "nor be at any time above the number of twelve persons."

Sect. 43. And it seems, That by the equity of this statute, and the ancient custom of the realm, all surgeons have been allowed the like privilege. 2 Keble 578. 1 Burn 387.

† And by 18 Geo. 2. c. 15. s. 10. "For making the *surgeons* of London and the *barbers* of London two separate and distinct corporations." It is enacted, "That all freemen of the "corporation of surgeons, (a) for so long time as they shall use "and exercise the art or science of surgery, and no longer, shall "be exempted from the several offices of constable, scavenger, "overseer, and all other parish, leet, and ward offices, and "from serving upon juries."

(a) On an indictment against a surgeon for refusing the office of constable, it may be moved to the attorney general that a noli prosequi be granted, unless cause be shewn by the opposite party against it. Comyns 312.

Sect. 44. Also it is enacted by 32 Hen. 8. c. 40. "That "the president of the commonalty and fellowship of the science "and faculty of physic in London, and the commons and fel-"lows of the same, shall not be chosen constables in the city "of London, or suburbs of the same, &c." Yet it seems to have been holden, That the equity of this act doth not extend to other physicians not mentioned in it; perhaps for this reason, because physicians have no such special custom for their discharge as surgeons are said to have. Vide sup. s. 43.

Sect. 45. Also it is enacted 6 Will. 3. c. 4. which hath been continued by subsequent statutes, "That all persons using "the art of an apothecary, who have been brought up and "served as apprentices in the said art for seven years, accord-"ing to the statute of 5 Eliz. shall be freed and exempted from "the office of constable, in the counties and places where they "live, for so long as they use and exercise the said art."

† Also it is enacted by 1 Will. and Mary, c. 18. s. 11. "That every teacher or preacher in holy orders, or pre-"tended holy orders, that is a minister, teacher, or preacher "of a congregation, that shall take the oaths, make and "subscribe the declaration, and also subscribe such of the

" articles of the church of England as the act requires, ſhall " be thenceforth exempted from ſerving upon any jury, or " from being choſen or appointed to bear any parochial office, " ward-office, or other office in any hundred of any ſhire or " place."

N. B. This certificate may be once aſſigned over, provided it has never been uſed.—But it will not exempt from an office, the functions of which are to be exerciſed out of the pariſh. Ld Manſfield. Burrow 1182.

† Alſo it is enacted by 10 and 11 Will. 3. c. 23. " That all " and every perſon or perſons who ſhall apprehend and take " any perſon guilty of burglary, or of privately ſtealing goods " to the value of five ſhillings in any ſhop, warehouſe, coach-" houſe, or ſtable, or who ſhall aſſiſt, hire, or command any " perſon or perſons to commit ſuch offence, and proſecute him " to conviction, ſhall have a certificate in the manner directed " by the act, by virtue whereof he ſhall and may be diſcharged " of and from all and all manner of pariſh and ward-offices " within the pariſh or ward wherein ſuch felony ſhall be com-" mitted."

† Alſo it is enacted by 31 Geo. 2. c. 17. ſ. 13. " That no " perſon within the city or liberty of Weſtminſter ſhall be " liable or compelled to ſerve as a conſtable, or to find a per-" ſon to ſerve in his ſtead, who is of the age of ſixty-three " years or upwards."

(3) It hath been determined that a naturalized foreigner, excluded by the act of parliament from " taking any civil office of truſt," is thereby rendered ineligible to the office of conſtable. 5 Burrow 2790. So alſo a college barber of Oxford, although he reſides in the city of the univerſity and out of the precincts of the college, ſeems exempted from this office. Douglas 531. And in Eaſter and Trinity terms, 26 Geo. 3. the queſtion was agitated, whether a brother of the Trinity houſe is not alſo exempted from the office by the charters of the fraternity: But the court ordered it to ſtand over for further argument.

Sect. 46. As to the third particular, *viz.* In what manner perſons duly choſen conſtables may be puniſhed for refuſing to be ſworn, it ſeems that no perſon can lawfully be committed for ſuch refuſal without more; but it is ſaid, That if the party be preſent in the court he may be fined, and that if he be abſent, and have a certain time and place appointed him for the taking of the oath before a juſtice of peace, and have alſo expreſs notice of ſuch appointment, and be preſented at the next court, for having refuſed to take it accordingly, he may be amerced. Alſo it ſeems, That in either caſe he may be indicted either at the ſeſſions of the peace, or before juſtices of oyer and terminer. And it is adviſable in all pleadings in any action concerning ſuch a fine or amercement, and in all indictments for ſuch refuſal, eſpecially and expreſly to ſet forth the manner of every ſuch election, appointment, notice, and refuſal, and (*a*) before whom the court was holden. And it hath been adjudged, That it is inſufficient to ſay in general, that the party was (*b*) *debito modo electus*, or *legitime electus*,

C. Car. 567. Co. Ent. 572. 5 Mod 130. Salk. 175. 8 Coke 38. Ld Raym. 69. 138.

(*a*) 1 Mod. 24. (*b*) 5 Mod. 96. 229.

electus, or that he had (*a*) notice thereof, without ſetting forth the ſpecial circumſtances of ſuch notice, &c. Alſo it is (*b*) ſaid to have been adjudged, That an indictment for not finding a ſufficient perſon to ſerve the office of conſtable, without ſhewing that the party refuſed to ſerve it himſelf, is ſufficient, and it is ſaid not to be ſufficient to ſhew, That a man was preſented and returned to be a chief pledge, without ſhewing that there were other inferior pledges.

(*a*) Aleyn 78. 5 Mod. 96. 129, 130, 131. 1 Keb. 418 Vide ſup. f. 66.
(*b*) 1 Keb. 416. 6 Co. 77. Vide alſo 2 Strange, 920. Fitzg. 192. Barnard, K. B. 413. 11 Mod. 215. 12 Mod. 280. Seſſ. caſe, 480. Saund. 290.

Sect. 47. As to the fourth particular, *viz.* What remedy perſons having a right to be conſtables, or to be diſcharged, may have to be admitted into or reſtored to their office or diſcharged of it; it ſeems clear at this day, That the court of king's bench, having the ſupreme control of all inferior juriſdictions, may upon the complaint of any perſon apprehending himſelf to be unjuſtly aggrieved in any ſuch reſpect, award a writ to the judge of the court, thereby commanding him to ſwear, reſtore, or diſcharge the party as the caſe ſhall be; whereupon, if ſuch judge do not obey ſuch writ, nor an *alias* and *pluries* to the ſame purpoſe, or return a ſufficient cauſe to the court to juſtify his not obeying it, the court will at laſt award a preremptory *mandamus*.

1 R. Ab. 535 541. 2 Roll 82. Con. 1 Bulſt. 174.

Sect. 48. Alſo it hath been holden, That a perſon duly choſen conſtable at a court-leet, and refuſed to be ſworn by the ſteward, may be relieved by the ſeſſions of the peace. But this point ſhall be more fully conſidered in the next ſection.

2 Jones 212.

Sect. 49. As to the fifth particular, *viz.* What power juſtices of peace have in relation to theſe matters, it is obſervable, That the 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 peace have, ever ſince the inſtitution of their office, taken upon them as conſervators of the peace, not only to ſwear 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. Alſo it ſeems, That ſuch juſtices have always uſed for good cauſe to diſplace ſuch officers which have been ſo choſen and ſworn by them, and this power of juſtices of 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

Salkeld 175. 176. 1 Modern 13. 2 Jones 212. 1 Bulſt. 174. Aleyn 78. Dalt. f. 366, 367. 12 Mod. 280. Strange 798. 1050. 2 Hale 88. Con. 1 Bulſt. 174.

choſen at the leet, and unduly rejected by the ſteward, who had ſworn another in his place (4).

(4) A conſtable was choſen at a court-leet, and afterwards ſworn in before a ſingle juſtice of the peace. Upon motion for an information, the court held it to be a good ſwearing. Strange 1149. 2 Hale 88. Juſtices of the peace may appoint a conſtable even in a privileged place, where there has been none for fifty years before, and proceed againſt him for not taking the oath. In the hamlets about the Tower they choſe five where there was formerly but one, and it was held they might do ſo. For though originally conſtables were choſen in leets, yet being officers whoſe duty it is to keep the peace, the juſtices may chuſe them *in caſes of neceſſity*. Caſe of the conſtable of Holmly. 1 Bac. Ab. 439.

Strange 446. and the books cited in the precedent ſection. For the caſes in which a conſtable, &c. is exempted from actions, Vide 1 Jac. 1. c. 5. 21 Jac. 1. c. 12. 24 Geo. 2. c. 44 Ante p. 61, 62. Concerning the expences of his office, Vide 27 Geo. 2. c. 20. For his reimburſment, Vide 18 Geo. 3. c. 19. And for his account and removal, Vide 32 Geo. 2. c. 29. ſ. 8.

Sect. 50. However it is certain, That juſtices of peace had power to nominate and ſwear conſtables on the default of the torn or leet, before the ſtatute of 13 & 14 Car. 2. c. 12. ſ. 15. and therefore, that they have ſuch authority in ſome caſes not mentioned in that ſtatute, which reciting, "That the laws and ſtatutes for apprehending rogues and vagabonds had not been duly executed, ſometimes for want of officers, by reaſon lords of manors do not keep court-leets every year for the making of them," doth enact, "That in caſe any "conſtable, headborough, or tithingman, ſhall die or go out "of the pariſh, any two juſtices of peace may make and ſwear "a new conſtable, headborough, or tithingman, until the ſaid "lord ſhall hold a court, or until next quarter ſeſſions, who "ſhall approve of the ſaid officers ſo made and ſworn as afore-"ſaid, or appoint others, as they ſhall think fit; and if any "officer ſhall continue above a year in his or their office, "that then in ſuch caſe the juſtices of peace in their quarter "ſeſſions may diſcharge ſuch officers, and may put another fit "perſon in his or their place until the lord of the ſaid manor "ſhall hold a court as aforeſaid (5)."

(5) But juſtices even in ſeſſions are not empowered, by the force of this ſtatute, to diſcharge conſtables choſen and ſworn in at the court-leet. Strange 798. and the ſtatute muſt be ſtrictly purſued by the ſeſſions, and therefore an appointment in the diſjunctive "for a year, or until others were choſen," was quaſhed. Strange 1050. So alſo the court will grant a quo warranto againſt a conſtable elected at a veſtry and ſworn in at the ſeſſions under this ſtatute; for *prima facie* the right of appointing is in the leet, and the ſeſſions have no power if there has been no default. Strange 1213. Douglas 536. Fitzgibbon 192.

4 Inſt. 261. Crom. 213.

As TO the fifth general point of this chapter, *viz.* What kind of offences are inquirable in the ſheriff's torn, I ſhall premiſe the following obſervations.—Firſt, That it is no certain rule, that ſuch offences as are omitted in 18 Edw. 2. concerning the view of frank-pledge are not within the juriſdiction of the torn or leet.—Secondly, That offences made treaſon or felony, or in any other manner, having a reſtraint by ſtatute ſuper-added to that of the common law, are not inquirable here in reſpect of any ſuch ſtatute, but only as offences at the common law; for that the juriſdiction of theſe courts is wholly confined to offences at common law.—Thirdly, That no offence whatſoever is cogniſable in any ſuch court, unleſs it aroſe ſince the holding of the laſt court.

F. Torn, 5. Infra ſ. 52.

Keilwood 66.

OFFENCES

OFFENCES inquirable in this court are either, Capital; or Not capital. The capital offences are either Treaſons or Felonies.

Sect. 51. And firſt as to treaſons. It is ſaid in (*a*) ſome books, That the ſheriff in his torn may inquire of them all in general, and in (*b*) others, that he may inquire of all which are not againſt the king's perſon; but I can find no reaſon given for this diſtinction; and ſince it is a general rule, That offences are inquirable in this court, in reſpect of their being of a publick nature, on which account the loweſt offences againſt the king, as (*c*) mortmains and purpreſtures, and ſuch like, are inquirable in it, it ſeems ſtrange, That the higheſt ſhould be exempted. However, it is (*d*) clear, That the ſheriff has no power to inquire of any offence made treaſon by ſtatute, as of a treaſon, but only as it was an offence at common law.

(*a*) Crom. 212. Dalt. Sher. 392. 7 H. 6. 12. 10 H. 6. 7. Qu. Bro. Leet, 26.
(*b*) 9 H. 6. 44.
(*c*) Inf. f. 58.
(*d*) Kitchen, 8, 9, 22. Summary 173. 6 H. 7. 4. 5.

Sect. 52. Secondly, As to felonies. It is alſo generally ſaid in (*e*) ſome books, That the ſheriff in his torn may inquire of all kinds of felonies, and in (*f*) others, That he may inquire of all except of the death of a man, or rape. Of the firſt of which it is ſaid, That he cannot inquire, becauſe it is not a common nuſance, but only a wrong to a ſingle perſon. But if this reaſoning be the only foundation for this opinion, it ſeems difficult to maintain it; for if an aſſault and battery of a ſingle perſon being accompanied with bloodſhed or robbery, be inquirable in this court, in reſpect of the enormity of the offence, and the danger to the publick from ſuffering ſuch offenders to go unreſtrained, it ſeems ſtrange, if ſuch an aſſault proceed to murder, that it ſhould not be inquirable in it alſo. But it is (*g*) ſaid, That the ſheriff cannot inquire of rape as of a felony, becauſe it is made a felony by the ſtatute of Weſtminſter 2. c. 34. by which it is enacted, "That he who "raviſhes a woman, ſhall have judgment of life and member." But if this ſtatute had only repealed the 13th of Weſtminſter 1. (by which this offence, which was a felony at common law, was made a treſpaſs only), it ſeems that it would have reſtored the juriſdiction of the ſheriff's torn over it as a felony, becauſe then it would have been a felony by the common law again; but now it being a felony only by the ſtatute, it is inquirable as a treſpaſs only in this court.

(*e*) 10 H. 6. 7. Kitchen 9, 10. Crompton 212. Dalt. Sher. 392.
(*f*) 9 H. 6. 44. 22 E. 4. 22. 7 H. 6. 12. F. Torn, 5. 40 Aſſize 30. B. Leet, 18, 26. Finch 241. Kitchen 22.
(*g*) Kitchen 23. 18 E. 2. View of Frankpledge 2 Inſt. 181. 22 E. 4. 22. 6 H. 7. 4. 5. F. Torn, 5. F. Leet, 3. 1 Hale 632. 2 Hale 69. 71.

OFFENCES not capital inquirable in the ſheriff's torn; are either, Such as amount to an actual treſpaſs; or Such as do not amount to ſuch a treſpaſs.

Sect. 53. And firſt, as to ſuch offences amounting to an actual treſpaſs, it is agreed, (*a*) That an aſſault and battery is inquirable

(*a*) 8 E. 4. 5. Dyer 233. 1 R. 3. 1. 4 H. 6. 18.

18 E. 2. View of Frankpledge. Kitch. 37. 38.

inquirable here if there be any bloodſhed in it, but otherwiſe not; becauſe in ſuch caſe it is not looked on as a common grievance, but as an injury to a particular perſon.

(a) 4 H. 6. 10, 1 R. 3. 1. B. Leet, 15.

Sect. 54. Secondly, That all (*a*) affrays are alſo inquirable here, for that they are *in terrorem populi*.

(b) Kitch. 11. B. Leet, 26. 22 E. 4, 23. Finch 241.

Sect. 55. Thirdly, That the common (*b*) breaking of hedges, walls, or dykes, may alſo be inquired of in this court, but not the breaking of any particular hedge, for that it is no common grievance.

(c) Dalt. Sher. 394. Kitch. 11, 37. Con. 4 Leon. 12.

Sect. 56. Fourthly, Alſo it is commonly ſaid, that all (*c*) pound breaches may be inquired of in this court, as being common grievances, in direct contempt of the authority of the law, by which pounds are provided for the legal detainment of diſtreſſes till they ſhall be delivered by due courſe of law.

OFFENCES under the degree of capital, not amounting to an actual treſpaſs, and inquirable in this court, either immediately concern the king's intereſt, or do not.

Sect. 57. As to thoſe which immediately concern the king's intereſt, it ſeems to be agreed, That all (*d*) purpreſtures or incroachments upon the king, and (*e*) alienations in mortmain, and (*f*) ſeiſures of treaſure-trove, or of (*g*) waifs or (*g*) eſtrays, or goods (*g*) wrecked, belonging to the king, may be inquired of in this court. But it ſeems (*h*) queſtionable, Whether a preſcription in a court-leet to inquire of the ſeiſure of ſuch things belonging to the lord of it, being a ſubject, be good or not, ſince it is againſt the general (*i*) rule of the law, for the court-leet to take conuſance of treſpaſſes done to the private damage of the lord, becauſe that would make him his own judge.

(d) Dalt. Sher. 393.
(e) Kitch. 23, 38, 39.
(f) Kitch. 40.
18 Ed. 2. View of Frankpledge.
(g) Kitchen 12. 23, 23, 40. Dalt. Sher. 393. Crom. 213.
(h) 44 E. 3, 19.
(i) 1 Saund. 135. Raym. 160. 12 H. 4. 8.

Sect. 58. As to offences of this kind, which do not immediately concern the king's intereſt, it ſeems to be a general (*k*) rule, That all common nuſances are indictable in this court; as all annoyances to common bridges or highways, (*l*) bawdy-houſes, &c. and alſo all other ſuch like offences, as (*m*) ſelling corrupt victuals, or expoſing them to ſale, (*n*) breaking the aſſize of beer and ale, neglecting to hold a (*o*) fair or market in purſuance of a grant or preſcription. Alſo it ſeems that the keeping of (*p*) falſe weights or meaſures is indictable in this court, whether it appear that they were actually made uſe of or not: Alſo it is ſaid, That all common diſturbers of the peace may be here indicted, as (*q*) barrators, common (*q*) ſcolds, (*q*) eves-droppers, and alſo all common oppreſſors, as

(k) 1 R. 3. 1. 4 H. 6. 10. 22 E. 4. 22, 23. 1 R. Ab. 541. 542, 543.
(l) Kitch. 11.
(m) 1 R. 3. 1. B. Leet, 1. 4 Inſt. 261. Kitch. 11, 23.
(n) 2 Inſt. 72. 4 E. 4. 24. 4 Inſt. 262. R. Abr. 543.
(o) Crom. 212.
(p) 18 E. 2. View of Frankpledge. Con.

(q) Kitchen 11, Dalt. Sher. 395. Kitchen, 11. Hobart, 246.

uſurers,

uſurers (*a*), &c. and alſo all (*b*) dangerous and ſuſpicious perſons, as vagabonds; or thoſe who go abroad in the night, and ſleep in the day, or thoſe who inordinately haunt taverns, having no viſible means to live by, &c. And alſo all (*c*) ſuitors to the court who ſhall make default, &c. And (*d*) alſo all thoſe who ſhall levy a hue and cry without cauſe, or ſhall neglect to levy one where they ought, or to purſue one rightly levied.

(*a*) Crom. 212. Dalt. Sher. 394.
(*b*) 18 E. 2. View of Frankpledge.
Kitchen 11.
(*c*) Kitchen, 10.
(*d*) Dalt. Sher. 394. 18 E. 2. View of Frankpledge.

Sect. 59. Alſo (*e*) it is ſaid, That every vill within the precinct of a torn, is indictable in it for not having a pair of ſtocks, and ſhall forfeit five pounds.

(*e*) Kitchen 13. See the next chapter.

Sect. 60. Alſo by (*f*) ſtatute, many other offences are inquirable in this court, which it would be too long to enumerate in this place (6).

(*f*) Kitchen 12. 2 Danv. Abr. 291.

(6) The aſſize of bread, under 3 Geo. 3. is not within this juriſdiction, 4 Burr. 1861.

Sect. 61. But it hath been (*g*) reſolved, That a man cannot be amerced in a court-leet for ſurcharging a common, becauſe this only concerns the private intereſt of the inhabitants.

(*g*) 1 R Abr. 51. 2 R. Abr. 83.

Sect. 62. Yet it hath been (*h*) holden, That if there be a by-law made in a court-leet, in purſuance of a cuſtom to make by-laws, that no one ſhall receive a poor man to be his tenant, who ſhall be chargeable to the town, under a certain penalty; and afterwards an inhabitant offend againſt ſuch by-law, he may be preſented at the court-leet and compelled to pay ſuch penalty. But if ſuch by-laws be valid, it ſeems clear, That they depend entirely on the cuſtom; and are not binding of common right; for that the court-leet, as ſuch, hath nothing to do with ſuch matters of a private nature: And how far any ſuch court may receive from a ſpecial cuſtom, a new collateral power of a different nature from what naturally belongs to it, may deſerve to be conſidered; but it (*i*) ſeems, That of common right any court-leet with the aſſent of the tenants, may make by-laws under certain penalties, in relation to matters properly within the conuſance of ſuch court, as the reparation of the highways, &c. Alſo there (*k*) ſeems to be no doubt, but that by cuſtom, a court-baron may make by-laws, for the well regulating of commons and ſuch like private matters; and therefore where a court-leet and baron are holden together at the ſame place, as they uſually are, it ſeems, That what is tranſacted therein in relation to publick matters, ſhall be applied to the (*l*) juriſdiction of the court-leet, and what is done in relation to private matters, ſhall be intended to be done by the court-baron.

(*h*) 1 R. Abr. 542. Lane 55, 56.
(*i*) 11 H. 7. 14. 21 H. 7. 40. 5 Co. 63. Hobart 212. Kitchen 45.
(*k*) 1 Danv. 735. 737. Kitchen 78.
(*l*) Chap. 11. ſect. 6.

Sect. 63. As to the ſixth general point of this chapter, *viz.* Within what place offences indictable in the ſheriff's torn muſt ariſe,

arise, it seemeth that it is not material, whether such (*a*) offences did arise within the hundred in which the torn is holden, or not; for though the sheriff ought to hold his torn in every particular hundred, yet it seems, That in each of them he holds it for the whole county; and it is certain, That he hath a general jurisdiction throughout the whole; yet it seems, That the jurors shall not be charged on their (*b*) oaths to present any offences, but those arising within their particular hundreds. Also it is provided by the statute of *Marlbridge*, c. 10. That those who have tenements in different (*c*) hundreds, shall not be compelled to come to any torn, but only in the bailiwick wherein they shall be conversant: Also it (*d*) seems clear, That no offence arising within the precincts of a leet, is inquirable in the torn, unless there hath been a neglect to present it in the leet: But after such a neglect it seems the better (*e*) opinion, That it is inquirable in the torn, lest otherwise there should be a failure of justice. Yet it seems certain, That in pleading you (*f*) cannot justify the proceedings of the sheriff's torn against any offence arising within a leet, without expressly alledging that the leet had neglected to inquire of it; for that such a neglect is not to be presumed, where it doth not appear.

(*a*) Dalt Sher. 285. Finch 241, 242. Con. C. Jac. 551.

(*b*) Crom. 212. Dalt. Sher. 388.

(*c*) 2 Inst. 120. 122.

(*d*) 1 R. Abr. 543. Crom. 212. Co. Lit. 168. B. Present. 1. Dalt. Sher. 395, 396. 3 Keb. 230.

(*e*) 10 H 4. 4. 12 H. 7. 18. Moor 607. Finch 246. C. Jac. 584, 551. Con. 4 Inst. 261.

(*f*) C. Jac. 551.

Sect. 64. As to the seventh general point of this chapter, *viz.* By what jurors, and in what manner, indictments in the sheriff's torn ought to be found, it is enacted by the statute (7) of Westminster 2. c. 13. "That the sheriff shall take no inquest "either *ex officio*, or by virtue of the king's writ, but by "twelve lawful men at the least, who shall put their seals to "such inquisitions;" and the same is also provided as to bailiffs of franchises.

2 Inst. 387. 2 Hale 70, 152.

(7) This act respects only such inquisitions as are a foundation for imprisonment, and not inquisitions for offences where the party cannot be apprehended. 4 Burr. 1861.

Sect. 65. In the construction of this statute it hath been holden, That if there be more than twelve jurors, and all agree to the inquisition, all must set their seals to it; but that it is sufficient, if twelve of them only agree, for those twelve to set their seals.

Dalton's office of sheriff 389.

Sect. 66. And it is farther enacted by 1 Rich. 3. c. 4. "That no officer return or impanel any person to be taken "or put in any inquiry in any sheriff's torn, but such as "be of good name and fame, and having freehold to the "yearly value of 20*s.* or copyhold to the yearly value of "26*s.* 8*d.* on pain of 40*s.* &c. And that every such in-"dictment before any sheriff in his torn otherwise taken, shall "be void."

Sect.

Sect. 67. And note, That courts-leet ſeem to be within the letter of the ſaid ſtatute of Weſtminſter the ſecond, and are ſaid by ſome to be within the equity of the ſaid ſtatute of 1 Rich. 3. but this ſeems queſtionable; for it is ſaid, by ſome books, That any perſon happening to be preſent at a court-leet, or to be riding by the place where it is holden, may for the want of jurors be compelled by the ſteward to be ſworn, whether he be reſident within the precincts of the leet or not; by which it ſeems to be implied, That any perſon whatſoever is capable of being put upon the jury in a court-leet.

2 Inſt. 388. S. P. C. 85.

7 H. 6. 13. 12 H. 7. 18. B. Leet, 14. 3 H. 7. 4.

Sect. 68. And to prevent the altering or imbezzling of any ſuch indictment, it is enacted by (8) 1 Edw. 3. ſt. 2. c. 17. "That the ſheriffs and bailiffs of franchiſes, and all other "that do take indictments in their torns or elſewhere, where "indictments ought to be made, ſhall take ſuch indictment "by roll indented, whereof the one part ſhall remain with "the indictors, and the other part with him that taketh the in-"queſt; ſo that the indictments ſhall not be imbezzled, as "they have been in times paſt; and ſo that one of the inqueſts "may ſhew the one part of the indenture to the juſtices, when "they come to make deliverance."

2 Inſt. 388. S. P. C. 85. 12 Co. 43.

(8) This act only relates to ſuch indictments as were to be delivered over to the juſtices; preſentments are not within the meaning of it, and therefore not neceſſary to be indented;

nor is it neceſſary that they ſhould be ſealed. 4 Burrow 1861.

Sect. 69. And there is no doubt, but that this ſtatute extends as well to courts-leet, as the ſheriff's torn.

2 Hale 71.

Sect. 70. Alſo there are many particular cuſtoms and uſages in relation to the taking of indictments in theſe courts; but it ſeems to have been anciently the moſt general courſe, to impanel not only a grand jury, but alſo a jury of twelve men, which was commonly called the petit jury; and that all offences were firſt preſented by the headboroughs, and the preſentments affirmed by the petit jury, before they were brought to the grand jury: However it ſeems, That no exception can be taken to any ſuch indictment, in reſpect of the non-obſervance of any ſuch cuſtom or uſage; for that no averment lies againſt the acts of a court of record, and every judge of ſuch court ſhall be preſumed to act according to the rules of it.

Keilw. 141. 148. Dalt. Sher. 388, 389. Crom. 212. 213. Keilwood 66. 9 H. 6. 44.

Sect. 71. What is above ſaid concerning indictments taken before the ſheriff in his torn, is to be intended of ſuch only as are taken before him *ex officio*; for that he is reſtrained to take any ſuch indictment, by virtue of any writ or commiſſion by 28 Edw. 3. c. 9. Which reciting that the people had ſuffered many miſchiefs, for that ſheriffs of divers counties, by virtue of commiſſions and general writs granted to them at their own ſuit, for their ſingular profit to gain of the people, had made and taken divers inqueſts, to cauſe to indict the people at their will,

2 Hale 69. C. Eliz. 371.

will, and had taken fine and ranſom of them to their own uſe, and had delivered them; whereas ſuch perſons indicted were not brought before the king's juſtices to have deliverance; doth thereupon enact, for to eſchew all ſuch miſchief, "That "all ſuch commiſſions and writs before made, be utterly re- "pealed, and that from thenceforth no ſuch commiſſions nor "writs ſhall be granted."

F. N. B. 92. 144. 250. C. Eliz. 371. Salkeld 190. 2 Inſt. 388.

Sect. 72. Yet it ſeemeth not to be clearly ſettled, Whether by virtue of this ſtatute, all ſuch writs and commiſſions, and the proceedings thereon, be made wholly void or not.

Summary 173. S. P. C. 77. 84. Dalt. Sher. 388, 389. 3 Mod. 238, Book the firſt, ch. 29. ſect. 20, 24.

Sect. 73. As to the eighth general point of this chapter, *viz.* In what manner indictments in the ſheriff's torn are to be proceeded upon, it is recited by 1 Edw. 4. c. 2. "That many of the king's people by inordinate and infinite indict- ments and preſentments of felonies and other offences, taken before ſheriffs at their torns, or law-days (which were often- times affirmed by jurors having no conſcience, nor any free- hold, and often by the ſheriff's menial ſervants), had been arreſted and impriſoned, and conſtrained to make grievous fines and ranſoms, after which they had been enlarged out of priſon, and the ſaid indictments and preſentments imbezzled and withdrawn." And thereupon it is enacted, "That all in- "dictments and preſentments before any of the king's ſheriffs "in his counties, except in London, their under-ſheriffs, "clerks, bailiffs, or miniſters at their torns or law-days, "they, nor any of them, ſhall have power to attach, arreſt, "or put in priſon, or to levy or take any fine or amerciament "of any perſon ſo indicted or preſented, by reaſon of any "ſuch indictment or preſentment, but that the ſaid ſheriffs and "under-ſheriffs, clerks or bailiffs, and their miniſters, ſhall "deliver all ſuch indictments and preſentments to the juſtices "of peace at their next county ſeſſions, on pain of 40 *l.* And "that the ſaid juſtices of peace ſhall have power to award "proceſs upon all ſuch indictments and preſentments as the "law doth require, and in like form as if the ſaid indictments "and preſentments were taken before the ſaid juſtices of "peace; and alſo to arraign and deliver all ſuch perſons ſo "indicted and preſented before the ſaid ſheriffs, &c. And "ſuch perſons which ſhall be indicted or preſented of treſpaſs, "ſhall make ſuch a fine as ſhall ſeem lawful by their diſcre- "tions. And the eſtreats of the ſaid fines and amerciaments "ſhall be inrolled, and by indenture be delivered to the ſaid "ſheriffs, under-ſheriffs, their clerks, bailiffs, or miniſters, "or ſome of them, to the uſe and profit of him that was "ſheriff at the time of ſuch indictments or preſentments "taken. And if any of the ſaid ſheriffs, their under-ſheriffs, "clerks, bailiffs, or their miniſters, do arreſt, attach, or put

"in

" in priſon, or cauſe any fine or ranſom to be taken, or levy " any amerciament, of any perſon or perſons ſo indicted or " preſented, by reaſon or colour of any ſuch indictment or " preſentment taken before them, at their torns or law-days " above rehearſed, before that they have proceſs from the ſaid " juſtices of peace, or eſtreats delivered out, of the ſaid in- " dictments or preſentments ſo brought, delivered, and pre- " ſented to them, that then the theriffs which ſo do, ſhall for- " feit an hundred pounds."

Sect. 74. It is obſervable, That by the words of this ſtatute, juſtices of peace may award proceſs on any ſuch indictments, in like manner as if they had been taken before themſelves; and yet it is clear, That if the ſheriff's torn had no authority to take the indictment removed before ſuch juſtices, they have no power to proceed upon it, as they might have done, if it had been taken before themſelves; for the ſtatute in giving them ſuch power to proceed upon indictments in the ſheriff's torn, muſt be intended to mean ſuch only as were there lawfully taken, not thoſe which were void *ab initio*, as being taken *coram non judice*; nor is there the leaſt intimation in the ſtatute of an intent to enlarge the ſheriff's power in taking indictments, but the whole purport of it is to reſtrain him from proceeding on them. And to this purpoſe it hath been ſo largely conſtrued, That not only the judge of the court is puniſhable for awarding ſuch proceſs, but alſo the officer for obeying it.

2 Hale 70, 71. 142. S. P. C. 87. 4 E. 4. 31. F. Torn, 3

1 Jones 301. C. Car. 275.

Sect. 75. As to the ninth general point of this chapter, *viz.* In what manner indictments in the ſheriff's torn are to be traverſed and determined; it ſeems to be (*a*) agreed, That a preſentment by (*b*) twelve or more in a torn or leet, of any offence within the juriſdiction of the court, being neither capital nor concerning any freehold, ſubjects the party to a fine or amerciament without any farther proceeding, and binds him for ever after the day on which it is found, and admits of no traverſe (6) to the truth of it; but (*c*) ſome ſay, That the party may have a writ of falſe preſentment againſt the jurors, the ſame day on which the indictment is found; yet it ſeems agreed, That no inſtance can be ſhewn of any ſuch writ being actually brought. But if the preſentment concern the party's life or (*d*) freehold, as if it charge him with not repairing ſuch a highway, which he is charged to be bound to repair by the tenure of his land; it ſeems clear, That he may remove it into the king's bench and traverſe it; but not if it barely charge his perſon, as for digging a ditch in the highway, or not cutting the branches of his trees hanging over it, &c. Alſo it (*e*) ſeems, That a man may in like manner traverſe an indict-

(*a*) Finch 386. Keilw. 52. 66. 3 Modern 138. Dyer 13.

(*b*) Keilw. 141. 45 E. 3. 26. 27.

(*c*) F. Bar. 271. Keilw. 66. 41 Ed. 3. 28.

(*d*) 5 H. 7. 4. B. Trav. 183. Keilw. 52, 66. Dyer 13.

(*e*) Keilw. 66. 41 E. 3. 27.

indictment of an offence wholly out of the juriſdiction of a court-leet; as of an affray or nuſance done out of the precinct of it, or of the non-appearance of a perſon at a leet, who lives out of the precinct of it. But if the affray or nuſance were within the precinct of the leet, it ſeems, That no one can traverſe it in reſpect of his own not living in it; and that a perſon who lives within the precinct of a leet, ſhall have no traverſe to a preſentment for not appearing at it (9).

(9) Sed qu. If it may not be removed and traverſed, or if an action may not be ſupported for levying any fine or amercement, where the party has not been ſummoned nor had any opportunity of anſwering?—If a fine in a court leet be unreaſonable, it may be avoided by plea and judgment of the court; for the judges are to determine the reaſonableneſs of the fine. 11 Co. 44.

Vide the caſe of Sir George Colebrooke *verſus* Elliot, 3 Burrow 1859, *paſſim*.

Sect. 76. But it ſeems certain, That at this day neither the torn nor leet have any power to try any traverſe whatſoever, as hath been more fully ſhewn, *Sect.* 13. But it is certain, that the juſtices of peace may by force of the abovementioned ſtatute of 1 Edw. 4. try a man indicted of felony before the ſheriff in his torn: Alſo it ſeems, That they may try a perſon upon any other indictment in the torn, which is traverſable at common law; but that they have no power to take any traverſe of any other indictment in the torn; for that the words of the ſtatute are only that they may award proceſs on any ſuch indictments, as if they had been taken before themſelves, and alſo arraign and deliver the perſons indicted, which muſt be intended of thoſe indicted of felony, who only are ſaid to be arraigned, and that perſons indicted of treſpaſs ſhall make fines, &c. by their diſcretion, without ſaying, that they ſhall be tried; by which it ſeems to be implied, That perſons ſo indicted ſhall be fined, as they uſually were before in the torn, and ſtill are in the leet, and that in ſome caſes without any farther trial, as is more fully ſhewn in the precedent ſection.

For the ſheriff's oath of office, vide 3 Geo. 1. c. 15. For the manner of paſſing his accounts, 3 Geo. 2. c. 15, 16. And for further particulars, vide Impey's Office of Sheriff.

CHAPTER THE ELEVENTH.

OF THE COURT-LEET.

4 Comm. 270. Finch 246.

A Court-leet is a court of record, having the ſame juriſdiction within ſome particular precinct, which the ſheriff's torn hath in the county. And therefore ſince it hath (*a*) Sect. 45, &c. been ſhewn in the precedent chapter, at what (*a*) time and in what place the ſheriff's torn is to be holden, and what per- (*b*) Sect. 10, &c. ſons owe ſuit to it, and what (*b*) authority the judge of it hath (*c*) Sect. 13, &c. in relation to his proceeding on (*c*) indictments, and alſo in relation

relation to (*a*) fines and amerciaments, and the (*b*) appointment of conſtables; and having alſo ſhewn what (*c*) kind of offences are inquirable in this court, and within what (*d*) place ſuch offences muſt ariſe, and by what (*e*) jurors, and in what manner indictments in it are to be found, and in what manner they are to be (*f*) proceeded upon, traverſed and determined; and ſince the court-leet hath regularly the very ſame juriſdiction with the ſheriff's torn as to all theſe points, except in ſome ſpecial caſes, which have been already taken notice of in the chapter concerning the ſheriff's torn; I ſhall refer the reader to the ſaid chapter for all theſe particulars.

(*a*) Sect. 17, &c.
(*b*) Sect. 33, &c.
(*c*) Sect. 51, &c.
(*d*) Sect. 64, &c.
(*e*) Sect. 65, &c.
(*f*) Sect. 74, &c.

And I ſhall only conſider in this place,—Firſt, The end of inſtituting the court-leet.—Secondly, How far it exempts thoſe who live within its precincts from the torn.—Thirdly, How far it is ſubject to the overſight of the torn.—Fourthly, For what cauſes it may be forfeited.—Fifthly, What ought to be the form of a caption of an indictment in it.

2 Inſt 71, 72.
22 Ed. 4. 22.

Sect. 2. As to the firſt point it ſeems, That anciently all people who now owe ſuit to any court-leet were bound to come to the ſheriff's torn, in order there to take the oath of allegiance to the king, and to be incorporated into ſome tything, and for ſuch other purpoſes as are ſet forth more at large in the precedent chapter, *Sect.* 2. But it being more for the eaſe of the people, to have courts of this kind holden in their own townſhips or manors; by degrees, grants of ſuch courts were obtained from the king for moſt manors and towns, not only by the lords of manors, but alſo by other perſons, who had no lands in the places for which they obtained ſuch grants. And for a recompence to ſuch grantees, for the charge and trouble they were ſuppoſed to have been at in procuring ſuch grants, it was uſual for the inhabitants, who had the benefit of them, to agree to pay a certain ſum of money, called Capitage, or *certum letæ*, &c. at every ſuch court-leet; and for the non-payment of this duty or refuſal to preſent it, ſuch grantees may preſcribe to amerce the defaulters, and to diſtrain for the amercement; but no ſuch preſcription ſhall be allowed for any other matter whatſoever of a private nature.

12 H. 7. 18.
2 Inſt. 71, 72.
1 Jones 283.
6 Coke 77.
Dyer 30.
13 H. 4. 9.
11 Coke 42.
1 Roll 32, 73.
1 R. Abr. 211.
4 Burrow 1861.

Sect. 3. As to the ſecond point, *viz.* How far a court-leet exempts thoſe who live within the precincts of it from the torn, it ſeems to be a general (*g*) rule, That no man can be within two leets at the ſame time, and in the ſame reſpect; from whence it follows, That he who reſides within the precincts of a leet, the lord whereof doth duly hold his court, cannot be compelled to come to the torn, or any other ſuperior leet, for the taking the oath of allegiance, or any other ſuch like purpoſe, which may be as well anſwered by his attendance at

(*g*) Dalt. Sher. 402, 403.
1 Jones 283.
6 Coke 77.
18 H. 6. 13.
F. Leet, 1.
C. Jac. 584.
Poſt c. 10. Sect. 12.
Con. Kitchen 34.
1 R. Abr. 542.

at his own leet. Yet if ſuch private leet have not the general juriſdiction of the torn, but be (*a*) ſpecially granted for two or three articles of it only; it ſeems, That the inhabitants within its precinct muſt attend the ſheriff's torn for all ſuch matters of which ſuch private leet hath no juriſdiction. Alſo it (*b*) ſeems to be a good preſcription for a grand leet (to which other inferior leets may be ſubordinate in the ſame manner as that is to the torn) to oblige the chief pledges, and a certain number of the inhabitants of every town within its precinct, to appear at every ſuch grand leet, to inquire of ſuch offences as have not been inquired of in the inferior leets.

(*a*) Keilw. 141. 142. 2 R. Abr. 203.

(*b*) C. Jac. 583. Raymond 204. C. Car. 75. 76. See chap. 10. ſect. 12, 64.

Sect. 4. As to the third point, *viz.* How far the court-leet is ſubject to the overſight of the torn. It is ſaid, That the ſheriff's torn as an (*c*) overſeer of this court, is to inquire whether the tithings be whole or no, and to preſent defaults that are not redreſſed in the leet, and it ſeems alſo, That it may of common right inquire of the concealment of offences inquirable in leets, and of the defaults of the lords of ſuch courts: However it (*d*) ſeems clear, That a preſcription to this purpoſe is good. And there is no doubt, but that if a leet be (*e*) ſeiſed into the king's hands, all thoſe who owed ſuit to it ought to come to the torn.

(*c*) Finch 246. See c. 10. ſect. 64. Dalt. Sher. 387. 391.

(*d*) C. Jac. 584.

(*e*) 2 R. Abr. 203. Finch 246.

Sect. 5. As to the fourth point, *viz.* For what cauſes a court-leet may be forfeited, it ſeems, That this being a franchiſe not intended to be granted for the private benefit of the grantee, but for the good of the publick, from the more eaſy and convenient adminiſtration of juſtice, ſhall not only be forfeited by acts of groſs and palpable oppreſſion and injuſtice, (*f*) but alſo by bare omiſſions, in not making it anſwer the end of its inſtitution; as in the not (*g*) puniſhing offenders in the ſame manner as the law requires, or in (*h*) neglecting to hold a court when it ought to be holden (at leaſt if ſuch neglects be often repeated, and without a reaſonable excuſe), or in not (*i*) providing an able ſteward to diſcharge the office, or in not taking care to have ſuch other officers, or other things as are neceſſary for the execution of juſtice, as conſtables and ale-taſters, &c. and (*k*) pillory and tumbrel; but it is (*l*) ſaid, That a vill may be bound by preſcription to provide a pillory and tumbrel, and (*m*) that every vill is bound of common right to provide a pair of ſtocks. *Quære.*

(*f*) Co. Lit. 233. Kitchen 33. C. Jac. 155. 9 Co. 50. 2 R. Abr. 155. 11 Ed. 4 1. 2 H. 7. 11.

(*g*) 1 Jon. 283. Keilw. 148. 152.

(*h*) Kitchen 73.

(*i*) 1 Jones 283.

(*k*) F. Leet, 12. C. Eliz. 125. 698. Mo. 573, 574, 607. 1 Jones 283.

(*l*) C. Eliz. 698. Moor 607.

(*m*) Kitchen 13. Carter 29. Con. Moor 573, 574. 1 Jon. 283.

Sect. 6. As to the fifth point, *viz.* What ought to be the form of the caption of an indictment in a court-leet, it hath been (*n*) reſolved, 1. That the caption of an indictment, *ad cur. viſ. frant. pleg. cum cur. baron. &c.* is good; for that the words *cum cur. baron.* ſhall be rejected; and it cannot but be intended

(*n*) Vide ſup. c. 10 ſect. 9. Salkeld 195.

intended that the indictment was taken by that court, which alone hath the colour of authority to take it.

Sect. 7. 2. That the not setting forth in the caption, whether such court be holden by grant or prescription, is helped by the multitude of precedents. Salkeld 200. Vide 4 Burrow 1860.

THE business of both the Torn and Leet hath of late years declined, and fallen, in general, upon the quarter sessions. Sir W. Blackstone. These courts indeed were very properly adapted to the customs, manners, genius, and policy of a people upon their first settlement: But like all other human jurisdictions, vary in the course and progress of time, as the government and manners of a people take a different turn and fall under different circumstances. Ld. Mansfield.

CHAPTER THE TWELFTH.

OF ARRESTS BY PRIVATE PERSONS.

HAVING thus endeavoured to shew the nature of the courts which have jurisdiction over criminal offences, I am now to shew in what manner offenders are to be proceeded against by such courts.

And in order hereto I shall consider, First, How they are to be apprehended. Secondly, In what manner and in what cases they are to be bailed. Thirdly, In what cases and in what manner they are to be committed to prison. Fourthly, How far they and their assistants are punishable for an hindrance in bringing them to publick justice.

As to the first of these points I shall consider, In what manner such offenders are to be apprehended by private persons. In what manner by publick officers; and In what cases it is lawful to break open doors in order to apprehend them.

As to arrests of such offenders by private persons, I shall examine, Where arrests of this kind are commanded and injoined by law. Where they are permitted by law; and Where they are rewarded.

Sect. 1. As to the first point it seems clear, That (*a*) all persons whatsoever 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, (*b*) unless they were under age at the time.

(*a*) 3 Inst. 53. 139, 152. Summary 89, 90. 1 Hale 448. 3 H. 7. c. 1. 2 Inst. 52. F. Cor. 293.

(*b*) F. Cor. 395. 2 Hale 75, 76. 1 Black. 561.

Sect. 2. And for this (*c*) cause, by the common law, if any homicide be committed, or dangerous wound given, whether

(*c*) Summ. 90. 2 Hale 73. 75, 76. 3 H. 7. c. 1. 3 Inst. 53.

4 Inst. 183. C. Car. 252. 3 Leon. 207. F. Cor. 238, 293. 299. 358, 425. Con. 1 Leon. 107.

with or without malice, or even by (a) misadventure or self-defence, in any town or in the (b) lanes or fields thereof, in the day-time, and the offender escape, the town shall be amerced, and if out of a town, the (c) hundred shall be amerced.

(a) 2 Inst. 315. F. Cor. 302.
(b) Dyer 210.
(c) S. P. C. 34.

Sect. 3. And since the statute of Winchester, c. 5. which ordains that (d) walled towns shall be kept shut from sun-setting to sun-rising, if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced.

(d) S. P. C. 34. 3 Inst 53. 7 Coke 6. 7.

Sect. 4. And as all (e) private persons are bound to apprehend all those, who shall be guilty of any of the crimes abovementioned in their view, so also are they with the utmost diligence to pursue, and endeavour to take all those who shall be guilty thereof out of their view, upon a hue and cry levied against them.

(e) Summary 90. 1 Hale 448, 484, 592. 2 Hale 75, 76. 3 Institute 117. 2 Institute 172.

Sect. 5. (f) HUE AND CRY is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are, by the common law as well as by statute, bound to raise against the offenders who escape; on pain of fine and imprisonment. Also it (g) seems certain, That a man may lawfully raise it against one who sets upon him in the highway to rob him. It is also enacted by the statute of Winchester, 13 Edw. 1. c. 4. (h) That hue and cry shall be levied upon any stranger who shall not obey the arrest of the watch in the night-time; and (i) 21 Edw. 1. st. 2. which was made against trespassers in forests, chases, parks and warrens, seems to allow the levying thereof upon any such offenders. But if a man take upon him to levy a hue and cry without sufficient cause, he shall be punished as a disturber of the peace.

(f) 3 Inst. 116, 117. 1 Hale 538. 2 Hale 99, 102. Dalton 109. 2 Institute 172. F. Corone 395. C. Eliz. 654. Crom. 178. 179. Bracton 3. c. 1.
(g) 9 E. 4. 26.
(h) Cro. Eli. 204. Savil. 83. Vide also 4 Edw. 1. stat. 2. De officio coronatoris.
(i) 29 E. 3 39. F. Trespass. 252. Crompton 179. 2 Hale 100, 01. 21 H. 7. 28.

Sect. 6. In order rightly to raise a hue and cry, you ought to go to the constable of the next town, and declare the fact, and (k) describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make a search for the offender: And upon the not finding him, to send the like notice, with the utmost expedition, by horsemen as well as footmen, to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found.

(k) 3 Inst. 116. Dalton 109. Summary 91. Crompton 178.

Sect. 7. Also every (l) private person is bound to assist an officer demanding his help for the taking of a felon, or the suppressing an affray, or apprehending the affrayers, &c.

(l) B. 1. c. 63. sect. 13.

† Also by the statutes of Winton, (m) 13 Edw. 1. st. 2. c. 1. & 2. and 28 Edw. 3. c. 11. it is enacted, "That "immediately upon robberies and felonies committed, fresh "suit

(m) This is not a penal law within the statutes of Jeofail. Cro. Jac. 496. 12 Mod. 242.

" ſuit ſhall be made from town to town; and if the country " will not anſwer for the bodies of ſuch offenders within the " ſpace of forty days (*a*), the inhabitants of the whole hundred, " where the robbery (*b*) ſhall be done, with the franchiſes, " being within precinct of the ſame, ſhall be anſwerable for " the robberies done (*c*), and alſo the damages."

Raſtal 406. Latch 127. Cro. Eliz. 142, 270, 753. Brook Debt 103. Godbolt 58. 7 Co. 6. 2 Inſt. 569. 1 Sid. 11.

(*a*) 3 Lev. 320. Herne 215. Theſaurus Brevium 141. 2 Saund. 376. (*b*) Cro. Jac. 187. 118. Yelv. 116. Noy 125. Shower 94. Andr. 115, 117. Comb. 160. 161.

(*c*) The robbery muſt be done openly, and with force and violence, 7 Co. 6. 7. Salkeld 614. Styles 427. and not in any houſe. Moor 620. 3 Leon. 262. Cro. Jac. 496. Cro. Eliz. 753. Sed vide 7 Mod. 160. 157. But it is not neceſſary to be in a highway. 7 Mod. 159, in a private way or in a coppice is ſufficient, 2 Salk. 614. Carth. 71. Wilſon 412, 437. Ld. Raymond 828. 11 Modern 8. Strange 1011. or on Sunday. Cro. Jac. 496. Strange 406.

† But theſe ſtatutes being thought oppreſſive in ſubjecting the hundred to an action notwithſtanding its utmoſt exertions to apprehend the offender; and alſo to force the ſurrounding hundreds as well as the party robbed, to contribute their aſſiſtance for the ends of public juſtice; it is enacted by the 27 Eliz. c. 18. " That the inhabitants of every hundred " wherein negligence, fault, or defect of purſuit and freſh ſuit, " after hue and cry made, ſhall happen to be, ſhall anſwer and " ſatisfy by the one moiety of the damages, as ſhall by force " of the ſaid ſtatutes be recovered againſt the hundred in " which any robbery or felony ſhall be committed (*d*)."— " That no hue and cry, or purſuit by the country, or inhabitants " of any hundred, ſhall be allowed and taken to be a lawful " hue and cry upon, or purſuit after any the ſaid felons or offend- " ers, except the ſame be done and made by horſemen and " footmen."—" That no perſon robbed ſhall maintain any " action upon theſe ſtatutes, unleſs he ſhall, with as much " convenient ſpeed as may be, give intelligence of the felony " to ſome of the inhabitants of ſome town, village, or hamlet, " near unto the place where ſuch robbery ſhall be committed; " and alſo, firſt, within twenty days next before ſuch action " brought, be examined upon oath, before ſome juſtice of the " peace of the county, inhabiting in the hundred where the rob- " bery was committed, or near the ſame, whether he knew the " felons or robbers, or any of them; and if upon ſuch examin- " ation it be confeſſed that he does know them, he ſhall, be- " fore action brought, enter into bond before the ſaid juſtice, " effectually to proſecute the ſaid robbers by indictment or " otherwiſe."

2 Vent. 215.

(*d*) To be recovered at Weſtminſter, in the name of the clerk of the peace, and for the uſe of the hundred where the offence is committed; which ſuit ſhall not abate by his death or removal.

Dyer 370. Cro. Jac. 675. 3 Mod. 287. Co. Ent. 348, Clift 378. Raſtal 406. Cro. Eliz. 142. C. Car. 26 37. 2 Salkeld 614.

† To remedy alſo ſome inconveniencies in proceedings upon the above mentioned ſtatutes, it is enacted by 8 Geo. 2. c. 16. " That no perſon ſhall maintain any action " upon them, unleſs he ſhall, over and above the intelligence " required to be given by the ſtatute of Elizabeth, give notice " of the robbery committed on him to one of the conſtables of

" the hundred, or to ſome conſtable or officer of ſome town,
" pariſh, hamlet, village, or tithing, near unto the place where
" ſuch robbery ſhall happen, or ſhall leave notice (*a*) in writing
" of ſuch robbery at the dwelling-houſe (*b*) of ſuch conſtable
" or officer, deſcribing in ſuch notice, the felon or felons, and
" the time and place of the robbery; and alſo ſhall within the
" ſpace of twenty days (*c*) next after the robbery committed,
" cauſe public notice to be given thereof in the London Gazette,
" therein likewiſe deſcribing the felon or felons (*d*), and the time
" and place of ſuch robbery, together with the goods (*e*) and
" effects whereof he was robbed; and ſhall alſo before any ſuch
" action commenced, go before the chief clerk, ſecondary, or
" filazer of the county where the robbery happened, or the
" clerk (*f*) of the pleas wherein ſuch action is intended to be
" brought, or their reſpective deputies, or before the ſheriff of
" the county where the robbery ſhall happen, and enter into a
" bond *(gratis)* to the high conſtable, who is authoriſed to
" ſupport or defend ſuch action of the hundred, in the penal
" ſum of 100 *l.* with two ſufficient ſureties for ſecuring the
" due payment of his coſts in caſe he ſhould be nonſuited, &c."

(*a*) Strange 406, 1170. Comyns 345.
(*b*) Wilſon 105 109.
(*c*) March. 11. Cro. Car. 211. Noy 21. 3 Lev. 328. Sid. 45, 209.
(*d*) 2 Will. 105. 109, 113.
(*e*) 2 Barnes 371, 458.
(*f*) Andr. 116.

† It is alſo enacted, par. 3. " That no hundred or
" franchiſe therein ſhall be chargeable by virtue of theſe
" ſtatutes, if one or more of the felons be apprehended within
" 40 days (*g*) next after ſuch public notice given in the Lon-
" don Gazette."

March. 10, 11. 1 Sid. 11.
(*g*) Douglas 704.

† It is alſo enacted by the ſaid ſtatute, par. 11. That
" every conſtable or officer to whom notice ſhall be given
" as aforeſaid, and every conſtable of the hundred, and every
" conſtable, batholder, headborough, or tithingman, of any
" town, pariſh, village, hamlet, or tithing within the hundred,
" or the franchiſes within the precinct thereof, wherein ſuch
" robbery ſhall happen, ſhall, with the utmoſt expedition, make
" and cauſe to be made freſh ſuit, and hue and cry after the
" felon or felons, on pain of forfeiting five pounds."

† But no action, ſuit, or information, ſhall be brought but within ſix months next after the matter or thing done, and in which an inhabitant of any hundred may be a witneſs.

10 Modern 193. Hobart 139. Moor 878. Brownlow 156. Siderfin 139.

† Alſo by 22 Geo. 2. c. 24. no perſon whatever ſhall recover againſt any hundred, more than 200 *l.* unleſs the perſon ſo robbed ſhall at the time of the robbery be together in company, and be in number two at leaſt, to atteſt the truth of the ſame; nor by 30 Geo. 2. c. 3. and 4 Geo. 3. c. 2. ſ. 118. unleſs three perſons be preſent, if the plaintiff is receiver of the land-tax.

ARRESTS of offenders by private perſons permitted by law, are either, By their own authority; or, By a warrant from a juſtice of peace.—Arreſts of this kind by their own authority, are either, In reſpect of treaſon or felony: or, In reſpect of in-

ferior offences.—Arreſts of this kind in reſpect of Treaſon or Felony, are either, for the ſuſpicion of ſuch crimes already done, or ſuppoſed to have been done: or, To prevent their being done.

As to ſuch arreſts for ſuch ſuſpicion, I ſhall endeavour to ſhew, 1. What are ſufficient cauſes of ſuſpicion. 2. By whom the perſon arreſted muſt be ſuſpected. 3. Whether any ſuch cauſe will juſtify an arreſt, where no treaſon or felony at all hath been committed, &c. 4. In what manner an arreſt for ſuch ſuſpicion is to be juſtified in pleading.

Sect. 8. As to the firſt particular, *viz.* What are ſufficient cauſes of ſuſpicion, I ſhall take notice of ſome of the principal of them, which are generally agreed to juſtify the arreſt of an innocent perſon for felony.

Sect. 9. Firſt, The common (*a*) fame of the country. But it (*b*) ſeems, That it ought to appear upon evidence, in an action brought for ſuch an arreſt, that ſuch fame had ſome probable ground.

(*a*) 2 H. 7. 15. 1 Hale 588. 2 Hale 81. 5 H. 7 4, 5. 11 E. 4. 4. Dyer 236.

Bridg. 62. 7 E. 4. 20. Summary 91. Keilw. 81. Pulton 13. (*b*) 2 Inſt. 52. Crom. 98, 99. S. P. C. 97. Bracton 143.

Sect. 10. Secondly, The (*c*) living a vagrant, idle and diſorderly life, without having any viſible means to ſupport it.

(*c*) 7 E. 4. 20. 17 E. 4. 5. Summary 91. Pulton 13.

Sect. 11. Thirdly, The being in (*d*) company with one known to be an offender, at the time of the offence; or (*e*) generally at other times keeping company with perſons of ſcandalous reputations.

(*d*) 7 E. 4. 20. Keilwood 71. Pulton 3. Summary 91.
(*e*) 2 Inſt. 52. Crom. 98.

Sect. 12. Fourthly, The being found in ſuch circumſtances as induce a ſtrong preſumption of guilt; as (*f*) coming out of a houſe wherein murder has been committed, with a bloody knife in one's hand; or being found in (*g*) poſſeſſion of any part of goods ſtolen, without being able to give a probable account of coming honeſtly by them.

(*f*) 11 E. 4. 4. 12 Co. 92.
(*g*) 7 E. 4. 20. C. Eliz. 901. C Jac. 190. Pulton 36. Summary 91. Moor 600.

Sect. 13. Fifthly, The behaving one's ſelf in ſuch manner as betrays a conſciouſneſs of guilt; as (*h*) where a man being charged with a treaſon or felony, ſays nothing to it, but ſeems tacitly by his ſilence to own himſelf guilty; or where a man accuſed of any ſuch crime, upon hearing that a warrant is taken out againſt him, doth abſcond.

(*h*) Crom. 98, 99. F. Cor. 24.

Sect. 14. Sixthly, The being (*i*) purſued by an hue and cry.

(*i*) 29 El. 871. Summary 91.

29 E. 3. 39. F. Treſ. 252. 5 H. 7. 5. 21 H. 7. 28.

Sect. 15. As to the ſecond particular, *viz.* By whom the perſon muſt be ſuſpected, upon ſuch an arreſt for ſuſpicion. It ſeems to be (*k*) agreed, That the law hath ſo tender a regard to the liberty and reputation of every perſon, That no cauſes of ſuſpicion whatſoever, let the number and probability of them be ever ſo great, will juſtify the arreſt of an innocent man, by one

(*k*) 10 H. 7. 17. 2 Hale 79. 2 H. 7. 15. 7 Ed. 4. 20. 20 E. 4. 6. 11 E. 4. 4. C. Eliz. 871. 12 Co. 92.

17 E. 4. 5. who is not himſelf induced by them to ſuſpect him to be guilty, whether he make ſuch arreſt of his own head, or in obedience to the commands of a private perſon, or even of a conſtable (*a*).

(*a*) It appears to be decided by the caſe of *Samuel v. Payne and others*, on a motion for a new trial in Eaſter term, 20 Geo. 3. That conſtables and their aſſiſtants are juſtified in arreſting a man upon a given charge of felony, even although the goods charged to have been ſtolen are not found by them upon the ſearch warrant, and the jury find that no felony was committed. The ſtrict rule of law, "That if a felony has *actually* been committed, any man upon reaſonable probable grounds of ſuſpicion may juſtify apprehending the ſuſpected perſon to carry him before a magiſtrate, but that if "no felony has been committed, the apprehenſion of a perſon cannot be juſtified by any body," was conſidered as inconvenient and narrow; becauſe if a man charges another with felony, and requires an officer to take him into cuſtody and carry him before a magiſtrate, it would be moſt miſchievous that the officer ſhould be bound firſt to try, and at his peril exerciſe his judgment on the truth of the charge. He that makes the charge ſhould alone be anſwerable. The officer does his duty in carrying the accuſed before a magiſtrate, who is authoriſed to examine, and commit or diſcharge. The authorities cited were, Ward's Caſe. Clayton 44. pl. 76. 2 Hale 84. 89. 91. 2 Hawkins, c. 12, and 13.—But the learned reporter adds, that none of them come up to the preſent caſe; and that it is, therefore, the firſt determination of the point. Douglas 359, 360. B. R. Eaſt. 23 Geo. 3. In the caſe of Ledwick and Catchpole, which was an action of aſſault and falſe impriſonment, the defendant, who was a conſtable, arreſted the plaintiff in a very violent manner and without any *poſitive* charge of felony, and on verdict for the plaintiff, a new trial was granted.—MS.

(*b*) 2 Inſt. 173. C. Jac. 194. 2 Hale 78. Summary 91. 2 H. 7. 3. 27 H. 8. 23. 8 E. 4. 3. 3 Inſt. 118. F. Treſ. 252. 29 E. 3. c. 39. 2 R. A. 559. Douglas 360.

Sect. 16. As to the third particular, *viz.* Whether any ſuch cauſe of ſuſpicion will juſtify an arreſt where no treaſon or felony at all hath been committed, or dangerous wound given. It is holden in ſome (*b*) books, That none of the above mentioned cauſes will in any caſe juſtify the arreſting a man for the ſuſpicion of a crime, where in truth no ſuch crime hath been committed either by him or any other perſon whatſoever. But howſoever this rule may in general be true, it ſeems very hardly maintainable in the caſe of an arreſt of an innocent perſon upon a hue and cry levied againſt him, in ſuch a place where his character is unknown, and with ſuch other circumſtances, that the people of the county have no reaſon to preſume it groundleſs; for in ſuch caſes, it would be a great inconvenience to diſcourage perſons from following a hue and cry, with that vigour and diligence, which the law expects, and the public good requires, by making them liable to an action if it ſhould in the event prove to have been levied without ſufficient cauſe, which they cannot take time to examine without delaying their purſuit: And ſince the perſon injured by ſuch an ill-grounded hue and cry, has a good action againſt him that raiſed it, there ſeems to be no neceſſity, that he ſhould alſo have a remedy againſt another. And this opinion ſeems to be the more plauſible, for that among the (*c*) books (*d*) cited to maintain the contrary, (*e*) that which alone doth directly affirm it, ſeems to go upon an argument manifeſtly inconcluſive; for it ſays, That an hue and cry is not a ſufficient authority to arreſt a man unleſs a felony be done, becauſe the words of the ſtatute of Weſtminſter 1. c. 9. are, "That all men ſhall be ready upon hue and cry to arreſt felons," but where no felony is done, there can be no felon, &c. To which it may be replied, That this

(*c*) 29 E. 3. c. 39. 11 E. 4 c 4. 2 H. 7. c. 15. (*d*) 2 Inſt. 173 (*e*) 5 H. 7. c. 5.

argument,

argument, if it prove any thing, proves that none but felons can be arreſted on a hue and cry, which ſeems to be manifeſtly falſe; for it is agreed by all the books, That if a felony be actually committed, an innocent perſon, on whom a hue and cry for it is levied, may lawfully be arreſted: Alſo there ſeems to be no doubt, but that he who barely attempts to rob a man, or who dangerouſly wounds him, may ſafely be purſued and taken by a hue and cry, and yet there is no pretence to call ſuch a perſon a felon (*a*).

(*a*) Now by 7 Geo. 2. c. 21. an aſſault with intent to rob is felony. Vide Book 1. p. 148.

Sect. 17. And if it be granted lawful to arreſt a man on an hue and cry where no felony hath been committed; from the like grounds it ſeems alſo to follow, That it is lawful to arreſt a man on the warrant of a juſtice of peace, where no felony hath been committed. But this point ſhall be more fully conſidered in the next chapter.

Sect. 18. As to the fourth particular, *viz.* In what manner an arreſt for ſuch ſuſpicion is to be juſtified in pleading. It ſeems to be certain, That whoever would juſtify the arreſt of an innocent perſon, by reaſon of any ſuch ſuſpicion, muſt not only ſhew that he ſuſpected the party (*b*) himſelf, but muſt alſo ſet forth the (*c*) cauſe which induced him to have ſuch a ſuſpicion, that it may appear to the court to have been a ſufficient ground for his proceeding (*d*). Alſo it ſeems (*e*) certain, That regularly he ought expreſsly to ſhew, that the very ſame crime for which he made the arreſt, was actually committed. But (*f*) if a man have ſeveral cauſes of ſuch ſuſpicion, he is not bound to inſiſt upon ſome one of them only, but may alledge them all; for that the replication *de ſon tort demeſne*, anſwers the whole. As (*g*) where a man arreſts another, who is actually guilty of the crime for which he is arreſted, it ſeems, That he needs not, in juſtifying it, ſet forth any ſpecial cauſe of his ſuſpicion, but may ſay in general, that the party feloniouſly did ſuch a fact, for which he arreſted him, &c.

(*b*) Ante ſect. 15.
(*c*) 2 Inſt. 52. Finch 340. 17 E. 4. 5. 1 E. 4. 20. Bridgman 62. 2 Hale 78. 7 H. 4 35.
(*d*) But by 24 Geo. 2. c. 44. officers are now admitted to plead the general iſſue and to give the ſpecial matter in evidence.
(*e*) 8 E. 4. 3. 27 H. 8. 23. C. Jac. 194. Finch 340.
(*f*) 7 E. 4. 20. 2 Hale 81. 17 E. 4. 5.
(*g*) 10 E. 4. 17. F. Faux Impriſ. 5.

Bridgman 62. Finch 394. 4 H. 7. 1. 2.

Sect. 19. As to the arreſting of offenders by private perſons of their own authority, permitted by law for the prevention of treaſon or felony only intended to be done; it (*h*) ſeems, that any one may lawfully lay hold on another, whom he ſhall ſee upon the point of committing a treaſon or felony, or doing any act which would manifeſtly endanger the life of another, and may detain him ſo long till it may reaſonably be preſumed that he hath changed his purpoſe. And upon this ground it (*i*) ſeemeth to be the better opinion, That not only a conſtable, but any private perſon, who ſhall ſee another expoſe an infant in the ſtreet, and refuſe to take it away, may lawfully apprehend and detain him, till he ſhall conſent to take care of it.

(*h*) 9 E. 4. 26. See B. 1. c. 60. 23.
(*i*) Pop. 12, 13. Owen 98. Moor 284. 2 Hale 88.

Sect. 20. As to the arreſt of offenders by private perſons of their own authority, permitted by law, for inferior offences; it (*k*) ſeems clear, That regularly no private perſon can of his

(*k*) See B. 1. c. 63. ſect. 13, 14. 17.

own

own authority arreſt another for a bare breach of the peace after it is over. For if an officer cannot juſtify ſuch an arreſt, without a warrant from a magiſtrate, ſurely *à fortiori* a private perſon cannot. Yet it is holden by (*a*) ſome, That any private perſon may lawfully arreſt a ſuſpicious night-walker, and detain *him* till he make it appear, that he is a perſon of good reputation. Alſo it hath been (*b*) adjudged, That any one may apprehend a common notorious cheat, going about the country with falſe dice, and being *actually caught playing with them*, in order to have him before a juſtice of peace: For the public good requires the utmoſt diſcouragement of all ſuch perſons; and the reſtraining of private perſons from arreſting them without a warrant from a magiſtrate, would often give them an opportunity of eſcaping. And from the reaſon of this caſe it ſeems to follow, That the arreſt of any other offenders by private perſons, for offences in like manner ſcandalous and prejudicial to the public, may be juſtified.

(*a*) Latch 173. Vide the caſe of the Queen v Tooley. Ld Ray. 1296. 4 H. 7. 18. Popham 208. 2 Hale 89. Qu. 4 H. 7. 1 b. 3. 5 H. 7. 5. 2 Inſt. 52.

(*b*) 1 Jon. 249. C. Car. 234. 2 R. Abr. 546.

Sect. 21. As to arreſts of ſuch offenders by private perſons, having a warrant from a juſtice of peace permitted by law, there is no doubt but that where the law authoriſes juſtices of peace to direct their warrants to ſuch perſons, it doth implicitly authoriſe the execution of them by them.

Crom. 147. 14 H. 8. 16. But the warrant of a juſtice, where he has not power to grant one, it is ſaid, will not juſtify any one in the execution of it. Strange 1002.

As to the third general point of this chapter, *viz.* In what caſes the arreſts of offenders by private perſons are rewarded by law, I ſhall give a ſhort account of the ſtatutes concerning this matter, in relation,—To robbers in highways.—To counterfeiters and clippers of the coin.—To ſhoplifters and other offenders of like nature.—To burglars and felonious breakers of houſes. To offenders on the black act.—To diſcharging the hundred.—To ſtealing ſheep, &c.—To felons convict.—To ſmugglers; and To theft-booters.

Sect. 22. And firſt, As to robbers in highways, it is enacted by 4 & 5 Will. & Mary, c. 8. "That whoever ſhall apprehend and take one or more thief or robber in any highway "or road in England or Wales, and proſecute him or them till "he or they be convicted of any robbery, committed in or "upon any highway (1), paſſage, field, or open place, ſhall receive from the ſheriff of the county where ſuch robbery and "conviction ſhall be, without paying any fee for the ſame, "for every ſuch offender ſo convicted 40 *l.* within one month "after ſuch conviction and demand thereof made, by tendering a certificate to the ſaid ſheriff under the hand or hands "of the judge or juſtices before whom ſuch felon or felons "ſhall be convicted; and in caſe any diſpute ſhall ariſe, between the perſons ſo apprehending any the ſaid thieves and "robbers touching their right to the ſaid reward, That then "the

(1) By 6 Geo. 1. c. 23. ſect. 8. the ſtreets of London and Weſtminſter, and other cities, towns and places ſhall be deemed and taken to be highways to all intents and purpoſes, within the intent and meaning of this act.

" the ſaid judge or juſtices ſo reſpectively certifying, ſhall by their ſaid certificate direct and appoint the ſaid reward to be paid in ſuch ſhares and proportions as to them ſhall ſeem juſt and reaſonable. And if any ſuch ſheriff ſhall die or be removed before the expiration of one month after ſuch conviction and demand made, That then the next ſheriff ſhall pay the ſame within one month after demand and certificate brought as aforeſaid: And the ſheriff making default in paying the ſaid ſum, ſhall forfeit double as much." Reward for apprehending robbers.

Sect. 23. And it is farther enacted, " That if any perſon ſhall be killed by any ſuch robber in endeavouring to apprehend, or making purſuit after him, the executors or adminiſtrators, &c. of ſuch perſon, ſhall receive 40 *l.* from the ſheriff, &c. upon certificate delivered under the hands and ſeals of the judge or juſtices of aſſize for the county where the fact was done, or the two next juſtices of the peace, of ſuch perſon being ſo killed, which certificate the ſaid judge or juſtices, upon ſufficient proof before them made, are immediately required to give without fee or reward." Gratuity in caſe of death.

Sect. 24. And it is farther enacted, " That every perſon who ſhall ſo take, apprehend, proſecute, or convict ſuch robber as aforeſaid, ſhall have, as a farther reward, the horſe, furniture, and arms, money and other goods of ſuch robber, that ſhall be taken with him; any their majeſties right or title, bodies politic or corporate, or the right or title thereunto of the lord of any manor or franchiſe, or of him or them lending or letting the ſame to hire to any ſuch robber notwithſtanding: Provided that this ſhall not be extended to take away the right of any perſon to ſuch horſes, furniture and arms, money or other goods, from whom the ſame were before felonioufly taken." A further reward.

Sect. 25. Secondly, As to counterfeiters and clippers of the coin, it is enacted by 6 & 7 Will. 3. c. 17. " That whoever ſhall apprehend any perſon who ſhall counterfeit any of the current coin of this realm, or for lucre clip, waſh, file, or otherwiſe diminiſh the ſame, or ſhall cauſe to be brought into the kingdom any clipt, falſe, or counterfeit coin, and proſecute ſuch perſon to conviction, ſhall have from the ſheriff of the county where ſuch conviction ſhall be, forty pounds upon the judge's certificate, &c." Reward for apprehending coiners.

† It is alſo enacted by 15 Geo. 2. c. 28. ſ. 7. (for preventing the counterfeiting the coin), " That whoever ſhall apprehend any perſon or perſons who have committed any of the offences hereby made high treaſon (*a*) or felony (*b*), or who ſhall have made or counterfeited any of the copper-money as mentioned in the act (*c*), and ſhall proſecute ſuch offenders until he, ſhe, or they ſhall be thereof convicted, ſuch proſecutor and proſecutors ſhall have and receive from " the

(*a*) Vide Bk. 1. ch. 17. ſect. 64.
(*b*) Vide Bk. 1. ch. 18. ſect. 4.
(*c*) Vide Bk. 1. page 71 & 72.

" the ſheriff or ſheriffs of the county or city where ſuch con-
" viction ſhall be made, for every ſuch offender ſo convicted
" of treaſon or felony, the ſum of forty pounds; and for
" every perſon ſo convicted of counterfeiting any of the copper-
" money, the ſum of ten pounds, without paying any fee for
" the ſame, within one month after ſuch conviction and de-
" mand thereof made upon the judge's certificate, &c."

Shoplifters.

Sect. 26. Thirdly, As to ſhoplifters, &c. it is enacted by 10 & 11 Will. 3. c. 23. " That whoſoever ſhall take and pro-
" ſecute to conviction any perſon who by night or day ſhall
" in any ſhop, warehouſe, coach-houſe, or ſtable, privately and
" feloniouſly ſteal any goods, wares, or merchandizes, of the
" value of 5*s.* (though ſuch ſhop, &c. were not broken, and
" though no perſon were in ſuch ſhop, &c.), or ſhall aſſiſt,
" hire, or command any perſon to commit ſuch offence, ſhall
" have a certificate thereof *gratis* from the judge or juſtices,
" expreſſing the pariſh or place where ſuch felony was com-
" mitted; and if any diſpute ſhall happen about the right to
" ſuch certificate, the judge or juſtices ſhall direct and appoint
" the ſaid certificate into ſo many ſhares, to be divided among
" the perſons therein concerned, as to the ſaid judge, &c. ſhall
" ſeem reaſonable, which certificate (before any benefit has
" been made of it) may be once aſſigned over, and no more,
" and the original proprietor or aſſignee ſhall by virtue thereof
" be diſcharged from all pariſh and ward offices, within the
" pariſh or ward wherein the felony was committed; and the
" ſaid certificate ſhall be inrolled by the clerk of the peace of
" the county, for the fee of one ſhilling: And in caſe any per-
" ſon happen to be ſlain by any ſuch felons by endeavouring
" to apprehend them, his executors, &c. ſhall have the like
" reward, &c."

N. B. If a horſe be ſtolen out of the ſtable or other curtelage in the night time, it is *burglary*; if in the day time, it is *larceny from the houſe*, and in this way, whoever convicts an offender in horſe-ſtealing, is intitled to the reward.

Houſebreakers.

Sect. 27. Fourthly, As to burglars and felonious breakers of houſes, it is enacted by 5 Annæ, c. 31. " That every per-
" ſon who ſhall take any one guilty of burglary, or the felonious
" breaking and entering any houſe in the day-time, and pro-
" ſecute them to conviction, ſhall receive, above the reward
" given by the above-mentioned ſtatute of 10 and 11 Will. 3.
" the ſum of 40 *l.* within one month after ſuch conviction;"
concerning which the ſame rules in effect are preſcribed, as are provided by the above-mentioned ſtatute of 4 & 5 Will. & Mary, 8. concerning the reward of 40 *l.* to be paid to thoſe who ſhall apprehend a highwayman.

Offenders on the black act.

† *Sect.* 28. Fifthly, As to offenders on the black act. It is enacted by 9 Geo. 1. c. 22. ſ. 12. " That if any per-
" ſon or perſons ſhall apprehend or cauſe to be convicted, any
" of the offenders mentioned in the act, and ſhall be killed, or
" wounded ſo as to loſe an eye, or the uſe of any limb, in ap-
" prehending

" prehending or ſecuring, or endeavouring to apprehend or ſe-
" cure any of the ſaid offenders, upon proof thereof made at
" the general quarter ſeſſions of the peace for the county or place
" where the offence was or ſhall be committed, or the party killed,
" or receive ſuch wound, by the perſon or perſons ſo apprehend-
" ing and cauſing the ſaid offender to be convicted, or the perſon
" or perſons ſo wounded, or the executors or adminiſtrators of the
" party killed, the juſtices of the ſaid ſeſſions ſhall give a cer-
" tificate thereof to ſuch perſon or perſons ſo wounded, or to
" the executors or adminiſtrators of the party ſo killed, by which
" he or they ſhall be entitled to receive of the ſheriff of the ſaid
" county the ſum of 50 *l.* to be allowed the ſaid ſheriff in paſ-
" ſing his accounts in the Exchequer; which ſum of 50 *l.*
" the ſaid ſheriff is hereby required to pay within thirty days
" from the day on which the ſaid certificate ſhall be produced
" and ſhewn to him, under the penalty of forfeiting the ſum
" of 10 *l.* to the ſaid perſon or perſons to whom ſuch certificate
" is given, for which ſum of 10 *l.* as well as the ſaid ſum of
" 50 *l.* ſuch perſon may bring an action upon the caſe againſt
" the ſheriff, as for money had and received to his or their
" uſe."

By 10 Geo. 2. c. 32, ſect. 4. All the proviſions of this act, " for making ſatisfaction and amends, and for the encouragement of perſons to apprehend offenders," are extended to the deſtroyers of ſea-banks, &c. cutting hop-binds; and ſetting fire to coal-pits. Vide b. 1. p. 199. 238. 224.

† *Sect.* 29. Sixthly, As to diſcharging the hundred upon
" hue and cry. It is enacted by 8 Geo. 2. c. 16. ſ. 9.
" That whoever ſhall apprehend ſuch felon or felons, as
" deſcribed by, and within the time limited in, the act,
" whereby the hundred is actually diſcharged, ſhall on due
" proof thereof upon oath before two juſtices, be entitled to a
" reward of 10 *l.*"

Reward for diſcharging the hundred.

† *Sect.* 30. Seventhly, As to ſtealing ſheep or other cattle. It is enacted by 14 Geo. 2. c. 6. explained by 15 Geo. 2. c. 34.
" That all and every perſon and perſons who ſhall apprehend
" and proſecute to conviction, any offender or offenders guilty of
" any of the offences mentioned in theſe acts, ſhall have the
" ſum of ten pounds, to be paid within one month after ſuch
" conviction, by the ſheriff where the offence was committed,
" without any deduction whatſoever, he or they tendering a
" certificate, ſigned by the judge, before the end of the ſeſſions
" or aſſizes, certifying ſuch conviction, and where the of-
" fence was committed, and that ſuch offender was appre-
" hended and proſecuted by the perſon or perſons claiming the
" ſaid reward; and on default of payment within one month,
" the ſheriff ſhall forfeit double the ſum to the party or his
" repreſentatives."

Stealing cattle.

† *Sect.* 31. Eighthly, As to felons convict. It is enacted by 16 Geo. 2. c. 15. 8 Geo. 3. c. 15. and 24 Geo. 3. c. 56. and 25 Geo. 3. c. 46. " That whoever ſhall diſcover, apprehend,
" and proſecute to conviction of felony without benefit of clergy,
" any felon or other offender, ordered for tranſportation, or who
" ſhall

Reward for apprehending thoſe who return from tranſportation.

" ſhall have agreed to tranſport himſelf, who ſhall be afterwards " found at large in Great Britain, without ſome lawful excuſe, " before the expiration of his or their term, ſhall be intitled to a " reward of 20 *l.* for every ſuch offender ſo convicted as afore- " ſaid, and ſhall have the like certificate and like payments, as " any perſon may be entitled to for apprehending, proſecuting, " and convicting of highwaymen (1)."

(1) Vide ſupra, ſection 22.

† *Sect.* 32. Ninthly, As to ſmugglers. It is enacted by 19 Geo. 2. c. 34. ſ. 6. " That if any officer or officers of his " Majeſty's revenue, or other perſons being employed in the " ſeizing, conveying or ſecuring any wool, or other goods for- " feited on account of their being prohibited or accuſtomed " goods, or on account of the duties chargeable thereon not " having been paid or ſecured, or by virtue of any law made " to prevent the exportation of wool or other goods, or in en- " deavouring to apprehend any offender againſt this act, ſhall " be beat, wounded, maimed, or killed, by any offender againſt " this act, or the ſaid wool or other goods ſo ſeized, ſhall be " reſcued by perſons ſo armed as the act deſcribes; in all ſuch " caſes reſpectively, the inhabitants of every rape or lath, in " ſuch counties as are divided into rapes or laths, and in every " other county the inhabitants of every hundred where ſuch " facts ſhall be committed, in England, ſhall make full ſatiſ- " faction and amends for all the damages which ſuch officers or " perſons ſhall reſpectively ſuffer by ſuch beating, wounding " and maiming reſpectively, and by the loſs of ſuch goods ſo " ſeized and reſcued; and ſhall alſo pay the ſum of 100 *l.* for " each perſon ſo killed, to the executors or adminiſtrators of ſuch " officer or other perſons ſo killed as aforeſaid; and that ſuch re- " ſpective officers and other perſons, and their executors or ad- " miniſtrators, ſhall be, and are hereby enabled to ſue for and " recover ſuch their damages, ſo as the ſum to be recovered for " any ſuch beating, wounding, or maiming, ſhall not exceed " 40 *l.* nor for the loſs of the goods 200 *l.* againſt the inhabit- " ants of the ſaid rape or lath in ſuch counties as are divided " into rapes and laths; and in every other county the inhabit- " ants of every hundred who by this act ſhall be made liable " to anſwer all or any part thereof."—Notice of the offence muſt be given to two or more inhabitants near to the place where it happens; and, within eight days, the party muſt declare, by examination upon oath, before a juſtice of the peace, whether he knows the offender, purſuant to the directions of 8 Geo. 2.; and if the offender be apprehended and convicted within ſix months, no ſatisfaction ſhall be made.

Reward for apprehending ſmugglers. Vide 8 Geo. 2. c. 18. ſect. 8. 9 Geo. 2. c. 35. ſect. 16.

Actions to be brought within a year, ſect. 9.

Theſe damages are to be rateably taxed upon the inhabitants, and levied as by 8 Geo. 2. c. 16.

† *Sect.* 33. And it is alſo further enacted by the ſaid ſtatute, par. 10. " That all and every perſon and perſons who ſhall " apprehend and take, or diſcover ſo that he may be taken, " any perſon in England who ſhall have been advertiſed in " the manner the act directs, and ſhall not have ſurrendered

" him

" him or themſelves within the forty days (*a*), and cauſe him " to be brought before the lord chief juſtice of the king's " bench, or before any one of the juſtices of the ſaid court, or " any one of his Majeſty's juſtices of the peace for London or " Middleſex (who is hereby required to commit ſuch perſon to " the priſon of Newgate for ſuch felony), ſhall have and re- " ceive, for every ſuch perſon who ſhall be ſo apprehended, the " ſum of 500 *l.* to be paid within one month after execution " ſhall be awarded againſt ſuch offender ſo apprehended and " committed as aforeſaid by the commiſſioners of the cuſtoms " or exciſe reſpectively, who are hereby required to receive " the applications of all ſuch who are concerned in ſuch diſ- " covering, or apprehending ſuch offender, and determine who " are entitled to the ſaid reward, and their reſpective ſhares and " proportions thereof; and the ſame ſhall be divided amongſt " ſuch perſons as aforeſaid, in ſuch ſhares and proportions as " to the ſaid commiſſioners reſpectively, or to the major part of " them ſhall ſeem reaſonable."

(*a*) Vide the ſecond ſection of the act recited, Bk. 1. ch. 58. app. 6. ſect. 2.

† *Sect.* 34. And it is alſo further enacted, " That if any " ſuch offender againſt whom no ſuch order of council ſhall " have been made, ſhall himſelf ſo diſcover or apprehend any " other offender, againſt whom ſuch order ſhall have been " made, he ſhall be diſcharged and acquitted of ſuch his own " offence, and all other the like offences then before com- " mitted, and for which no proſecution ſhall have been then " commenced, and ſhall alſo have his ſhare of the reward."

Offender diſcovering.

† *Sect.* 35. And it is further enacted, " That if any perſon " or perſons ſhall happen to loſe a limb, or an eye, or be " otherwiſe grievouſly maimed or wounded in the apprehend- " ing or endeavouring to apprehend, or making purſuit after " ſuch offender or offenders, all and every perſon or perſons ſo " wounded and maimed as aforeſaid, ſhall, upon application " to the commiſſioners of the cuſtoms or exciſe reſpectively as " aforeſaid, have and receive the ſum of fifty pounds, over " and above any other reward that he or they may be intitled " to as an apprehender by virtue of this act; and in caſe any " perſon or perſons ſhall happen to be killed in the taking or " apprehending, or endeavouring to apprehend, or in making " purſuit after any ſuch offender or offenders, that then the " executors or adminiſtrators of ſuch perſon or perſons ſo " killed as aforeſaid, upon application to the commiſſioners as " aforeſaid, and laying ſufficient proof before them of ſuch " perſon being killed as aforeſaid, ſhall have and receive the " ſum of one hundred pounds. All which rewards before " mentioned ſhall be paid to the ſeveral and reſpective perſons " who ſhall become intitled thereto as aforeſaid, by the re- " ceiver general of the cuſtoms, or caſhier of the exciſe re- " ſpectively, upon an order directed to them for that purpoſe " by the commiſſioners of the cuſtoms or exciſe."

Gratuity in caſe of death or hurt.

Sect.

† *Sect.* 36. And it is further enacted by the ſaid ſtatute, par. 11. "That if any of the ſaid offender or offenders in "England, at any time before order in council made as by "the act is directed (*a*), ſhall diſcover two or more accom- "plices therein to the commiſſioners of the cuſtoms or exciſe "reſpectively, and apprehend them, or cauſe them to be ap- "prehended, ſo as they, or two of them at leaſt, may be "brought to juſtice, and convicted of ſuch offence, he or "they ſhall have and receive fifty pounds for every offender, "and ſhall be clearly acquitted and diſcharged of his, her, "or their offence, and all other the like offences before com- "mitted for which no proſecution ſhall have been then "commenced."

(*a*) Vide the ſecond ſection of the act recited Bk. 1. ch. 58. app. 7. ſect. 2.

Reward for apprehending theft-booters.

† *Sect.* 37. Tenthly, As to taking money to help perſons to ſtolen goods, it is enacted by 6 Geo. 1. c. 23. ſ. 9 & 10. "That whoever ſhall diſcover, apprehend, and proſecute to "conviction of felony without benefit of clergy, any perſon "or perſons for the ſaid offence of taking money or other "reward directly or indirectly to help any perſon to their "ſtolen goods (ſuch offender not having apprehended the "felon who ſtole the ſame, and brought him or her to trial for "the ſame, and given evidence againſt him or her as required "by law), ſhall be intitled to a reward of fifty pounds for "every ſuch offender ſo convicted as aforeſaid, and ſhall have "a like certificate, and like payments made without fee or re- "ward, as any perſon may be intitled unto for apprehending "and convicting highwaymen."

By 25 Geo. 3. c. 57. whoever ſhall apprehend a counterfeitor of lottery tickets is intitled to a reward of 50 l. Vide Bk. 1. p. 209. ſect. 13.

Certificates to be granted without fee.

† *Sect.* 38. And it is further enacted by par. 8. "That all "certificates ſigned upon conviction for robbery, ſhall be "ſigned and paid without any deduction, fee, or reward, "excepting any ſum not exceeding five ſhillings for the writ- "ing and drawing thereof, upon pain of forfeiting the ſum "of forty pounds to the uſe of the perſon intitled to the certi- "ficate, on the account of which ſuch fee or reward was "taken as aforeſaid."

CHAPTER THE THIRTEENTH.

OF ARRESTS BY PUBLICK OFFICERS.

4 Comm. 286.

ARRESTS of offenders by publick officers, are either by virtue of proceſs from ſome court of record, or without ſuch proceſs.

Arreſts of this kind by virtue of ſuch proceſs, ſhall be conſidered hereafter in their proper place.

Arreſts,

Arreſts by publick officers without ſuch proceſs, are either, By watchmen. By conſtables. By bailiffs of towns; or, By juſtices of peace.

Sect. 1. But before I conſider the nature of each of theſe in particular, I ſhall take it for granted, That wherever any ſuch arreſt may be juſtified by a private perſon, in every ſuch caſe *à fortiori* it may be juſtified by any ſuch officer.

As to arreſts by watchmen, I ſhall firſt premiſe in what manner watch is to be kept in every town, and then ſhall ſhew the power of the watchmen.

Sect. 2. And firſt, As to the keeping watch in every town, it is enacted by the ſtatute of Wincheſter, c. 4. "That "from thenceforth all towns be kept as it had been uſed in "times paſſed, that is to wit, from the day of Aſcenſion unto "the day of St. Michael, in every city ſix men ſhall keep at "every gate, in every borough twelve men, in every town "ſix or four, according to the number of inhabitants of the "town, and ſhall watch the town continually all night, from "the ſun-ſetting to the ſun-riſing."

Sect. 3. And it is farther enacted by 5 Hen. 4. c. 3. "That the watch to be made upon the ſea-coaſts through the "realm, ſhall be made by the number of the people in the places, "and in manner and form, as they were wont to be made in "times paſt, and that in the ſame caſe the ſtatute of Win-"cheſter be obſerved and kept; and that in the commiſſions "of the peace this article be put in, That the juſtices of "peace have power thereof to make inquiry in their ſeſſions "from time to time, and to puniſh them which be found in "default after the tenor of the ſaid ſtatute."

Sect. 4. It hath been reſolved, That a ſtranger who is not an inhabitant of a town, (*a*) cannot be compelled by virtue of the ſaid ſtatute of Wincheſter to keep watch in it. But it ſeems to be agreed, That every inhabitant is bound to keep it in his turn, or to (*b*) find another ſufficient perſon to keep it for him; from whence it follows, That he is indictable for a refuſal: But it is (*c*) not agreed, That he may be committed by the conſtable till he conſent to do his duty.

(*a*) C. Eliz. 204.

(*b*) Vide Coke Littleton 70.

(*c*) C. Eliz. 204.

Sect. 5. As to the power of watchmen, it is farther enacted by the ſaid ſtatute of Wincheſter, c. 4. "That if any "ſtranger do paſs by the watch, he ſhall be arreſted until "morning. And if no ſuſpicion be found, he ſhall go quit; "and if they find cauſe of ſuſpicion, they ſhall forthwith "deliver him to the ſheriff (1), and the ſheriff may receive "him without damage, and ſhall keep him ſafely until he be "acquitted in due manner. And if they will not obey the "arreſt, they ſhall levy hue and cry upon them, and ſuch as "keep the town ſhall follow with hue and cry with all the "town and the towns near, and ſo hue and cry ſhall be made

2 Hale 96. 98.

(1) That is, to the common gaol.

" from town to town, until that they be taken, and delivered " to the ſheriff as before is ſaid: And for the arreſtments of " ſuch ſtrangers none ſhall be puniſhed."

Popham 208. Latch 173. 2 Hale 97. Dalton 104. 4 Comm. 289. Comb. 243. By 5 Ann c. 31. If a watchman be killed in apprehending a burglar, his repreſentatives are intitled to 40 l.

Sect. 6. It is holden, That this ſtatute was made in affirmance of the common law, and that every private perſon may by the common law arreſt any ſuſpicious night-walker, and detain him till he give a good account of himſelf, as hath been more fully ſhewn in the precedent chapter, ſection twenty.

Secondly, As to ſuch arreſts by conſtables, I ſhall endeavour to ſhew, How far they may be juſtified by their own authority; and, How far by virtue of a warrant from a juſtice of peace.

Ante ſect. 15.

Sect. 7. And firſt, as to the juſtifying of ſuch arreſts by the conſtable's own authority; it ſeems difficult to find any caſe, wherein a conſtable is impowered to arreſt a man for a felony committed or attempted, in which a private perſon might not as well be juſtified in doing it: But the chief difference between the power and duty of a conſtable and a private perſon, in reſpect of ſuch arreſts, ſeems to be this, That the (*a*) former has the greater authority to demand the aſſiſtance of others, and is liable to the ſeverer fine for any neglect of this kind, and has no ſure way to diſcharge himſelf of the arreſt of any perſon apprehended by him for felony, (*b*) without bringing him before a juſtice of peace in order to be examined, as ſhall be more fully ſhewn in the 16th chapter; whereas a private perſon having made ſuch an arreſt, needs only to deliver his priſoner into the hands of the conſtable.

(*a*) 3 Inſt. 158. Lamb. Conſtable, 12. 17 E. 4. 5. a. b. 3 H. 7. 1. a. 2 H. 7. 15. b.

(*b*) Summary 91. 112. 10 E. 4. 17. 6. 2 Hale 81. Douglas 360.

Sect. 8. But it is ſaid, That a conſtable hath authority not only to arreſt thoſe whom he ſhall ſee actually engaged in an affray, but alſo to detain them till they find ſureties of the peace, as hath been more fully ſhewn in the (*c*) firſt book; whereas a private perſon ſeems to have no other power in a bare affray, not attended with the danger of life, but only to ſtay the (*d*) affrayers till the heat be over, and then deliver them to the conſtable, and alſo to ſtop thoſe whom he ſhall ſee coming to join either party: But it is difficult to find any inſtance wherein a conſtable hath any greater power than a private perſon over a breach of the peace out of his view; and it ſeems clear, That he cannot juſtify an arreſt for any ſuch offence, without a warrant from a juſtice of peace, &c.

(*c*) Ch. 63. ſect. 14, 17.

(*d*) B. 1. c. 63. ſect. 11, 12.

Sect. 9. As to the juſtifying ſuch arreſts by conſtables, by virtue of a warrant from a juſtice of peace, it ſeems (*e*) clear, That ſuch an arreſt unlawfully made by a conſtable without a warrant, cannot be made good by a warrant taken out afterwards. Alſo it hath been (*f*) holden, That if a conſtable, after he hath arreſted the party by force of any ſuch warrant, ſuffer

(*e*) Dyer 244. Fitz. Bar. 248. Crompton 149. 2 Keble 705. Dalton c. 117.

(*f*) Crom. 148. 2 Keble 206. Dalton c. 117. 13 E. 4. 9. a.

ſuffer him to go at large, upon his promiſe to come again at ſuch a time 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 the warrant; for if a perſon taken by virtue of a civil proceſs, and voluntarily ſuffered by the ſheriff to eſcape, may afterwards upon his return to the priſon be kept by the ſheriff by virtue of the ſame proceſs, unleſs the plaintiff rather chuſe to take advantage of the eſcape againſt the ſheriff; ſurely *à fortiori* upon an arreſt for a crime, in which caſe it is to be preſumed, That the publick good requires that the party be brought to juſtice, it ſhall likewiſe be lawful to detain a perſon returning to the officer after ſuch an eſcape: However as the law ſeems (*a*) not to be ſettled in relation to ſuch an eſcape after an arreſt by virtue of a civil proceſs; ſo neither doth it ſeem to be clear in relation to an eſcape after an arreſt by force of ſuch a warrant from a juſtice of peace.

(*a*) 1 Dan. Abr. 633. 635. Hobart 202. 1 Levinz 21. C. Car. 75. 2 Keble 206.

Sect. 10. But it ſeems clear, That a conſtable cannot juſtify any arreſt by (*b*) force of a warrant from a juſtice of peace, which expreſsly appears in the face of it, to be for an offence whereof a juſtice of peace hath no juriſdiction, or to bring the (*c*) party before him at a place out of the county for which he is a juſtice.—But it ſeems, That he both may and ought to execute a general warrant (2) to bring a perſon before a juſtice of peace, to anſwer ſuch matters as ſhall be objected againſt him on the part of the king; for that the officer ought to preſume, That the juſtice hath a juriſdiction of the matter, which he takes (*d*) conuſance of, unleſs the contrary appear; and it may often endanger the eſcape of the party to make known the crime he is accuſed of.

(*b*) 14 H. 8. 16. Crompton 147. 148.

(*c*) Cromp. 149. Strange 1002. 4 Comm. 288.

(*d*) Dalton c. 117. 1 Hale 577. 2 Hale 111. Crom. 147, 148. 4 Burrow 1763. Cro. Jac. 81.

But

(2) Mich. term 1763, Wilkes v. Wood, in treſpaſs for aſſiſting the king's meſſengers to enter and ranſack the houſe of the plaintiff, by virtue of *a general warrant* from the ſecretary of ſtate. Lord Camden, in his charge to the jury, appears to have explicitly avowed *his* opinion of the illegality of general warrants. The plaintiff obtained a verdict; but whether any meaſures were taken to elude the effect of it, is not reported. Loft 18. 11 State Trials 323.—In Eaſter 1764, the ſame learned judge confeſſed a bill of exceptions which had been filed againſt his opinion, in the caſe of Money v. Leach. Upon the argument Mich. 1765, Lord Mansfield and the whole court declared that general warrants *to ſeize the perſon*, unleſs in the caſes ſpecially authoriſed by acts of parliament, are illegal and void; that the magiſtrate alone ſhould exerciſe *his* diſcretion and give *certain directions* in the warrant to the officer; that the few inſtances in which they had been iſſued, aroſe from the practice of a particular office, not authoriſed by general uſage; and that even antiquity itſelf could not ſanctify a uſage which was fundamentally bad. 1 Black. 562. 3 Burr. 1692. 1742. 11 State Trials 307. 321. But this cauſe went off upon another ground; and no deciſion was pointedly made upon the queſtion, 11 State Trials 312. On 22d April 1766, however, the Houſe of Commons paſſed a reſolution condemning general warrants, *in the caſe of libels*; and leſt this limitation ſhould implicitly authoriſe the uſe of them upon other occaſions, the houſe, three days afterwards, paſſed another vote, by which they were declared to be *univerſally* illegal. Subſequent to theſe reſolutions, Mr. Wilkes commenced an action againſt the earl of Halifax, who had iſſued a warrant to ſeize the "*authors* of a periodical paper called the North Briton, No. 45;" and upon which Mr. Wilkes had been apprehended and confined. He obtained a verdict

with conſiderable damages; and ſince that event the courts of law have been ſilent upon this important ſubject. 11 State Trials 323.

Summary 93. 3 Inſt. 177. 4 Comm. 288. 10 St. Tr. 426. Yet ſee a precedent of this kind, Dalt. 114.

But it ſeems to be very queſtionable, Whether a conſtable can juſtify the execution of a general warrant to ſearch for felons, or ſtolen goods, becauſe ſuch warrant ſeems to be illegal in the very face of it; for that 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.

Dalton c. 117. Crompton 147, 148. Dalton c 118. 14 H. 8. 16. See c. 12. ſ. 15. Cont. 4 Inſt 177. Summary 93, 94. Skinner 568. Strange 1002.

Sect. 11. Yet perhaps it is the better opinion at this day, That any conſtable, or even private perſon, to whom a warran ſhall be directed from a juſtice of peace to arreſt a particular perſon for felony, or any other miſdemeanor *within his juriſdiction*, may lawfully execute it, whether the perſon mentioned in it be in truth guilty or innocent, and whether he were before indicted of the ſame offence or not, and whether any felony were in truth committed or not. For however the juſtice himſelf may be puniſhable for granting ſuch a warrant without ſufficient grounds, it is reaſonable that he alone be anſwerable for it, and not the officer, who is not to examine or diſpute the reaſonableneſs of his proceeding; and therefore it ſeems that the old books (cited in the foregoing chapter, ſect. 15, 16.) which ſay generally, That no one can juſtify an arreſt upon a ſuſpicion of felony, unleſs he himſelf ſuſpect the party, and unleſs the felony were in truth committed, ought to be intended only of arreſts made by a perſon of his own head, or in obedience to the command of a conſtable, or other ſuch like miniſterial officer, and not of ſuch as are made in purſuance of the warrant of a juſtice of peace. For inaſmuch as it ſeems to have been the conſtant and allowed practice of late, (*a*) to make out warrants on the ſuſpicion of felony, before any indictment hath been found againſt the perſon ſuſpected; and the ſame ſeems to be countenanced by 1 & 2 Ph. and Mary, c. 13. and 2 & 3 Ph. and Mary, c. 10. which direct in what manner perſons brought before juſtices of peace upon ſuſpicion, ſhall be examined in order to their being committed or bailed; and ſince the ancient (*b*) opinion, That a juſtice of peace cannot make out a warrant againſt a man for felony, who has not been indicted before, hath been (*c*) contradicted by conſtant experience; and ſince in the very ſame (*d*) report in which this rule is laid down, That a juſtice of peace, cannot make a warrant againſt a perſon who has not been indicted; it ſeems nevertheleſs to be agreed, That ſuch a warrant is a good juſtification for the officer (1), and ſince none

(*a*) Dalton ſays this power is derived to the juſtices by virtue of the firſt aſſignavimus in their commiſſion and by force, 5 Edw. 3. c. 14 Dalton 118. 121. 4 Inſt. 576. 6 Modern 179. Cro. Eliz. 130. 1 Leon. 187.
(*b*) 4 Inſt. 177. 14 H. 8. 16.
(*c*) 6 Mod. 179.

(*d*) 4 H. 8. 16. 1 Hale 149. B. Faux Impriſ. 33.

Vid. 2 Hale 159. ante ſect. 15.

of

of the (*a*) books cited by Sir *Edward Coke* to maintain the contrary opinion, mention the case of an arrest by force of a warrant from a justice of peace, but generally relate only to arrests by private persons of their own authority, or by the command of a constable; and since too, the (*b*) case, which is fullest to the purpose, wherein it is resolved, That an arrest of a person by the command of a bishop for saying, That he was not bound to pay tithes, could not be justified by force of the (*c*) statute, which authorised bishops to arrest persons for heresy, for which this reason is given among others, That the bishop himself could not justify such an arrest, and consequently could not authorise another to make it; it may be answered, That the resolution in that case doth not wholly depend upon this reason, but rather perhaps upon these, that the bishop's command was by parol only, and not by writing, and that the statute gave him no jurisdiction over points not heretical; and that the power of imprisoning persons for mere matters of opinion ought to be strictly construed.

(*a*) 2 H. 7. 3. 15. 1 Hale 579. 583 2 Hale 79. 107. 110 4 H. 7. 2 a 5 H. 7. 4, 5. 10 H. 7 17. 20. H. 7. 12. 7 E. 4. 20. 8 E. 4. 3. b 9 E. 4. 26. b 10 E. 4. 17. b 11 F. 4. 4 b 13 E. 4. 9. a 17 E. 4. 5. 7 E. 4. 35. Dyer 230.
(*b*) 10 H. 7. 17.
(*c*) 2 H. 4 c. 15.

And farther, since the person injured by an arrest on a justice's warrant, hath a good action against the justice who granted it, if he did it maliciously of his own head, in order to oppress or defame the party without any probable ground of suspicion, and therefore there is no necessity of giving a farther remedy against the officer who obeys the warrant.

Cro. Eliz. 130. 1 Leonard 187. Vide 24 Geo. 2. c. 44.

And farther, since it is in general a great discouragement to officers, to subject them to actions for endeavouring to serve the publick, by paying obedience to the precepts of those whose officers they are; it would certainly be very difficult at this day to maintain an action against them for any arrest of this kind, unless the warrant appear to be for a matter whereof the justice has no jurisdiction (3).

C. Jac. 81.

(3) A warrant, properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by 24 Geo. 2. c. 44. at all events indemnify the officer who executes it ministerially. 4 Comm. 288.

It seems indeed to be holden in *Broucher*'s case in *Croke*'s second report, That where an officer arrests a man by force of a warrant from a magistrate, *pro certis causis*, without shewing any cause in particular (4), he cannot justify himself in an action brought against him for such arrest, without setting forth the particular cause in his plea, and yet in this very report it seems to be allowed, That such a general warrant is good; and if so, it seems strange, That the officer should not be justified (5) by setting forth the truth of his case; since if there were no good cause to justify the granting of the warrant, the magistrate ought to answer for it, not the officer.

(4) A warrant to apprehend *all persons* guilty of a crime therein specified, will not justify the officer who acts under it. 4 Comm. 288.

(5) If a ground of justification is found in a special verdict, the defendant has no right to avail himself of that finding, unless such ground is avowed in the plea. Lord Camden. 11 St. Tr. 321.

Sect. 12. Thirdly, As to ſuch arreſts by bailiffs of towns, it is enacted by the abovementioned ſtatute of Wincheſter, c. 4. "That in great towns being walled, the gates ſhall be "cloſed from the ſun-ſetting until the ſun-riſing, and that no "man do lodge in the ſuburbs, nor in any place out of the "town, from nine of the clock until day, without his hoſt "will anſwer for him: And the bailiffs of towns every week, "or at the leaſt every fifteenth day, ſhall make inquiry of all "perſons being lodged in the ſuburbs, or in foreign places of "the towns; and if they do find any that have lodged or re-"ceived any ſtrangers or ſuſpicious perſons againſt the peace, "the bailiffs ſhall do right therein." And ſurely it cannot be doubted, but that by force hereof ſuch bailiffs may lawfully arreſt and detain any ſuch ſtranger, being found under probable circumſtances of ſuſpicion, till he ſhall give a good account of himſelf.

Sect. 13. Fourthly, As to ſuch arreſts by juſtices of peace, I ſhall firſt take it for granted, That wherever an arreſt of this kind by a private perſon, or inferior officer acting of their own authority, is either permitted or injoined by the law, in every ſuch caſe, *à fortiori*, ſuch an arreſt by a juſtice of peace in perſon, is alſo permitted or injoined.

Summary 93.

Arreſts by the command of juſtices of peace, as ſuch, are either, By parol; or, By warrant.

Sect. 14. And firſt, As to ſuch arreſts by parol, it ſeems, That any ſuch juſtice may lawfully, by word of mouth, authoriſe any one to arreſt another, who ſhall be guilty of any actual breach of the peace in his preſence, or ſhall be engaged in a riot in his abſence, as hath been more fully ſhewn in the firſt book, chapter 65. ſection 16.

Moor 408, Dalton c. 117. 4 Comm. 289.

As to ſuch arreſts by the warrant of a juſtice of peace, I ſhall endeavour to ſhew, In what caſes a warrant for ſuch an arreſt may lawfully be made by ſuch a juſtice. In what form it ought to be made; and, How it is to be executed.

4 Comm. 287.

As to the firſt point, I ſhall conſider, For what offences ſuch a warrant may be granted; and, Upon what evidence.

Sect. 15. And firſt, as to the offences for which ſuch a warrant may be granted, there ſeems to be no doubt, but that it may be lawfully granted by any juſtice of peace for treaſon, felony, or præmunire, or any other offence againſt the peace, as hath been more fully ſhewn in the chapter concerning Juſtices of Peace: Alſo it ſeems clear, That wherever a ſtatute gives to any one juſtice of peace a juriſdiction over any offence,

Sup. c. 8. ſect. 33, 34.

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. And it would be to little purpoſe to authoriſe a man to require another to do a thing, if it it were to be underſtood that the perſon authoriſed had no power to compel the party to come before him.

Dalton c. 117. 12Co. 130, 131. 4 Comm. 287.

Sect. 16. But it ſeems, That anciently no one juſtice of peace could legally make out a warrant for an offence againſt a penal ſtatute, or other miſdemeanor, cogniſable only by a ſeſſions of two or more juſtices; for that one ſingle juſtice of peace 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 uncontrolled practice of juſtices of peace ſeems to have altered the law in this particular, and to have given them an authority in relation to ſuch arreſts, not now to be diſputed.

Dalton c. 117. B. Peace, 6.

6 Modern 179.

Sect. 17. But 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 (6), as hath been more fully ſhewn, in the tenth ſection.

Summary 39. 10 St. Tr. 428. 11 St. Tr. 307. 326.

(6) In November 1762, the earl of Halifax, ſecretary of ſtate, iſſued a warrant "to ſearch for John "Entick the author, or one concerned in writing the Monitor." The meſſengers ſeized Mr. Entick and his papers. On treſpaſs the jurors found a ſpecial verdict, and in Mich. 6 Geo. 3. Lord Camden delivered the judgment of the court; that a warrant to ſeize and carry away *papers* in the caſe of a ſeditious libel is illegal and void.—His Lordſhip ſaid, that warrants to ſearch for ſtolen goods had crept into the law by imperceptible practice, that it is the only caſe of the kind to be met with, and that the law proceeds in it with great caution. For 1ſt, There muſt be a full charge upon oath of a theft committed. 2dly, The owner muſt ſwear that the goods are lodged in ſuch a place. 3dly, He muſt attend at the execution of the warrant to ſhew them to the officer, who muſt ſee that they anſwer the deſcription. And laſtly, the owner muſt abide the event at his peril; for if the goods are not found, *he* is a treſpaſſer; and the officer being an innocent perſon will be always a ready and convenient witneſs againſt him. 11 State Trials 321. Vide alſo 2 Hale 113. 151.

Sect. 18. Secondly, As to the evidence on which ſuch a warrant is to be granted, it ſeems probable, That the practice of juſtices of peace in relation to this matter alſo, is now become a law, and that any juſtice of peace 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 of peace 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 of peace 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

2 Hale 108, 109. 6 Modern 179. Qu. Dalt. 117. Con. 14 H. 8. 16. 4 Comm. 287.

Cro. Eliz. 130. 1 Leonard 18 1 Black. 562.

party grieved; if he grant any ſuch warrant groundleſly and maliciouſly, without ſuch a probable cauſe, as might induce a candid and impartial man to ſuſpect the party to be guilty.

4 Inſt. 177. Summary 93. Sup. ſect. 10. c. 12. ſect. 15.

Sect. 19. And ſince both *Coke* and *Hale* ſeem to diſapprove of ſuch warrants granted upon ſuſpicion, and the old books ſeem generally to diſallow all arreſt for the ſuſpicion of felony made by any other perſon whatſoever, except the very perſon who hath the ſuſpicion; it is certainly a ſafe way of proceeding for him, who hath the ſuſpicion, to make the arreſt in his proper perſon, and to get a warrant from a juſtice of peace to the conſtable to keep the peace.

Sect. 20. And perhaps there may be this difference between the warrant of a juſtice of peace, for ſuch cauſes which he has not authority to hear and determine as judge without the concurrence of others, and ſuch warrant for an offence which he may ſo determine, without the concurrence of any other; that in the former caſe, inaſmuch as he rather proceeds miniſterially than judicially, if he act 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: But in the latter caſe he is puniſhable only at the ſuit of the king, for that regularly no man is liable to an action for what he doth as judge.

C. Eli. 130. 1 Leonard 187. 1 D. Abr. 179. Carthew 492.

4 Burn 382. (*a*) 1 Hale 577. 2 Hale 111. Dalt. c. 117. 3 Inſt. 76. 14 H. 8. 16.

Sect. 21. As to the ſecond point, *viz.* In what form ſuch a warrant is to be made; I ſhall lay down the following rules: Firſt, That (*a*) it ought to be under the hand and ſeal of the juſtice who makes it out.

(*b*) Dalton c. 117, 121.

Sect. 22. Secondly, That it (*b*) ought to ſet forth the year and day wherein it is made, That in an action brought upon an arreſt made by virtue of it, it may appear to have been prior to ſuch arreſt.

(*c*) Dalton c. 117. 221. Lamb. 85, 86. Crompton 147, 232, &c.

Sect. 23. Thirdly, That it is (*c*) 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.

4 Burn 383.

Sect. 24. Fourthly, That it may be made either in the name of the king, or of the juſtice himſelf, as appears from the precedents above referred to.

(*d*) Dalt c. 117. Sup. ſect. 10. 2 Hale 111.

Sect. 25. Fifthly, (*d*) That if it be for the peace or good behaviour, it is adviſable to ſet forth the ſpecial cauſe upon which it is granted; but if it be for treaſon or felony, or other offence of an enormous nature, it is ſaid, That it is not neceſſary to ſet it forth; and it ſeems to be rather diſcretionary than neceſſary to ſet it forth in any caſe.

Sect.

Sect. 26. Sixthly, (*a*) That ſuch a warrant may be either general, to bring the party before any juſtice of peace of the county, or ſpecial, to bring him before the juſtice only who granted it.

(*a*) Dalt. c. 117. 1 Roll 375. 5 Coke 59. B. Peace 9.

Sect. 27. Seventhly, (*b*) That it may be directed to the ſheriff, bailiff, conſtable, or to any indifferent perſon by name, who is no officer; for that the juſtice may authoriſe any one to be his officer, whom he pleaſes to make ſuch, yet it is moſt adviſable to direct it to the conſtable of the precinct wherein it is to be executed; (*c*) for that no other conſtable, and *à fortiori* no private perſon, is compellable to ſerve it.

(*b*) Dalt. c. 117. Crompton 147. 14 H. 8. 16. B. Peace 6. Salk. 176. 381. Ld Ray. 1192. (*c*) Salk. 176. 1 Hale 582. 2 Hale 110.

Sect. 28. As to the third point; *viz.* In what manner ſuch warrant is to be executed, I ſhall lay down the following rules: Firſt, That a bailiff, or a conſtable, if they be ſworn and commonly known to be officers, and act within their own precincts, need not ſhew their warrant to the party, notwithſtanding he demand the ſight of it; but that theſe and all other perſons whatſoever making an arreſt, ought to acquaint the party with the ſubſtance of their warrants, and that all private perſons to whom ſuch warrants ſhall be directed, and even officers, if they be not ſworn and commonly known, and even theſe, if they act out of their own precincts, muſt ſhew their warrants, if demanded. † And therefore it is enacted by 27 Geo. 2. c. 20. "That in all caſes where any juſtice of the peace is required or impowered by any ſtatute to iſſue a warrant of diſtreſs for the levying any penalty inflicted, a ſum of money thereby directed to be paid," "The officer executing ſuch "warrant, if required, ſhall ſhew the ſame to the perſon whoſe "goods and chattels are diſtrained, and ſhall ſuffer a copy "thereof to be taken."

8 E. 4. 14. 14 H. 7. 9. 6 Coke 54. 9 Coke 69. 1 Hale 583. 2 Hale 116. Vide alſo 24 Geo. 2. c. 44.

Sect. 29. Secondly, That the ſheriff having ſuch warrant directed to him, may authoriſe others to execute it; but that every other perſon to whom it is directed, muſt perſonally execute it; yet it ſeems, That any one may lawfully aſſiſt him.

Dalton c. 117. 8 E. 4. 14.

Sect. 30. Thirdly, That if a warrant be generally directed to all conſtables, no one can execute it out of his own precinct; but if it be directed to a particular conſtable by name, he may execute it any where within the juriſdiction of the juſtice.

Carthew 508. Salkeld 176. 1 Hale 581. 2 Hale 110. Ld Raym. 546. 4 Comm. 288.

† *Sect.* 31. Fourthly, That the execution of a warrant muſt be purſuant to the directions of it. Therefore, where a warrant was directed to the officer, "To take up a diſorderly woman, and he took up a woman who was not ſo," the arreſt was held to be illegal, and the officer liable to an action for

for the injury (6).—So alſo where a warrant was directed by a ſecretary of ſtate to the king's meſſengers, "To take up the author, printer, or publiſher of a libel;" and the meſſengers took up a perſon who was neither author, printer, nor publiſher, it was determined to be unjuſtifiable, and the meſſengers liable to an action of treſpaſs and falſe impriſonment (7), for in neither of the caſes had the officers acted in obedience to their warrants.

(6) Vide a caſe in Middleſex before Lord Mansfield, and Dawſon or Lawſon, v. Clarke, by the ſame learned judge at Norwich Summer aſſizes, 1761, upon the ſame principle.

(7) Vide Money v. Leach. Trin. 8 November 1765. 11 State Trials 312.

CHAPTER THE FOURTEENTH.

WHERE DOORS MAY BE BROKEN OPEN IN ORDER TO MAKE AN ARREST.

AND now I am to conſider in what caſes it is lawful to break open doors, in order to apprehend offenders; and to this purpoſe I ſhall premiſe, That the law doth never allow of ſuch (a) extremities but in caſes of neceſſity; and therefore, That no one can juſtify the breaking open another's doors to make an arreſt, unleſs he firſt ſignify (1) to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance.

(a) 27 Aſſ. 35. 4 Inſt. 177. 5 Co. 91, 92. Dalton c. 78. 2 Hale 103, 116, 117. Summary 90. F. Execu. 25. 2. Foſter 320.

(1) No preciſe form of words is required to be uſed in giving notice. It is ſufficient if the party is made acquainted that the officer does not come as a mere treſpaſſer, but claims to act under a proper authority, provided that the officer had in fact a legal warrant. Foſter 137, and where the magiſtrate hath juriſdiction, the legality of his warrant will never depend upon the truth of the information whereon it is grounded, Foſter 136.

Foſter 321. 2 Hale 117.

Sect. 2. 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.

(b) 27 Aſſ. 35. 12 Co. 131. 4 Inſt. 131. (c) Moor 606, 668. (d) Dalton c. 78. Crompton 170. Foſter 136.

Sect. 3. Firſt, Upon a (b) *capias* grounded on an indictment for any crime whatſoever: Or upon a (c) *capias* from the (d) king's bench or chancery, to compel a man to find ſureties for the peace or good behaviour: Or even upon a warrant from a juſtice of peace for ſuch purpoſe.

(e) Moor 606, 668. C. Eli. 908. Yelverton 28. Dalton c. 78.

Sect. 4. Secondly, Upon a (e) *capias utlagatum*, or *capias pro fine*, in any action whatſoever.

(f) 2 Jones 233, 234.

Sect. 5. Thirdly, Upon the (f) warrant of a juſtice of peace, for the levying of a forfeiture in execution of a judgment

ment or conviction for it grounded on any ſtatute which gives the whole, or but part of ſuch forfeiture to the king, and authoriſes the juſtice of peace to give ſuch judgment or conviction for it.

But in this caſe the officer muſt ſhew the warrant if required. Vide c. 13. ſect. 28.

Sect. 6. Fourthly, Where a (*a*) forcible entry or detainer is either found by inquiſition before juſtices of peace, or appears upon their view.

(*a*) Dalt. c. 22. and 78.

Sect. 7. Fifthly, (*b*) Where one known to have committed a treaſon or felony, or to (*c*) 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 (*d*) opinion at this day, That no one can juſtify the breaking open doors in order to apprehend him.

B. Cor. 159. Dalt. c. 78. F. Bar. 110. Foſter 321. Vide 1 Hale 583. contra.

(*b*) Summary 90, 93. 1 Hale 588, 589. Dalton c. 78. 13 E. 4. 9.
(*c*) 13 E. 3. 7.
(*d*) Summ. 91. 4 Inſt. 117. Con. 13 E. 4. 9.

Sect. 8. Sixthly, Where an (*e*) affray is made in a houſe in the view or hearing of a conſtable; or where thoſe who have made an affray in his preſence fly to a houſe, and are immediately purſued by him, and he is not ſuffered to enter; in order to ſuppreſs the affray in the firſt caſe, or to apprehend the affrayers in either caſe.

(*e*) Sum. 134. 2 Hale 95. Crompton 170. Dalton c. 78. B. F. Impriſon. 6.

Sect. 9. Seventhly, Wherever a (*f*) perſon is lawfully arreſted for any cauſe and afterwards eſcapes, and ſhelters him in a houſe.

1 Hale 459. 2 Roll 138. Ld Raym. 1028.

(*f*) 6 Mod. 173. 174. 211. Skinner 8. Salkeld 79. Forſter 320.

Sect. 10. Alſo it is enacted by 3 & 4 Jac. 1. ſ. 35. "That "upon any lawful writ, warrant, or proceſs awarded to any "ſheriff or other officer, for the taking of any popiſh re- "cuſant, ſtanding excommunicated for ſuch recuſancy, it "ſhall be lawful, if need be, to break open any houſe."

Sect. 11. But it hath been reſolved, That where juſtices of peace are, by virtue of a ſtatute, authoriſed to require perſons to come before them, to take certain oaths preſcribed by ſuch ſtatute, the officer cannot lawfully break open the doors of the perſons who ſhall be named in any warrant made in purſuance of ſuch ſtatute, in order to be brought before the juſtices to take ſuch oath, becauſe ſuch warrant is not grounded on a precedent offence; neither doth it appear, That the party either is or will be guilty of any: But it ſeems clear, That if an officer enter into any houſe to ſerve any ſuch warrant, and the doors of the houſe be locked upon him, being in ſuch houſe, he or his friends may juſtify breaking them open, in order to regain his liberty; for that even in the execution of civil proceſs, the law allows of the breaking open doors in the like circumſtances.

Palm. 52. 63. Cro. Jac. 555. Foſter 319.

CHAPTER

CHAPTER THE FIFTEENTH.

OF BAIL.

Summary 98. Crompton 154. 2 Hale 120, 121.

AND now I am to conſider in what manner, and in what caſes offenders are to be bailed. As to which it is to be obſerved, That wherever a perſon is brought before a juſtice of peace upon an accuſation of treaſon or felony, he muſt be either bailed or committed, unleſs it manifeſtly appear that no ſuch crime was committed, or that the cauſe for which alone the party was ſuſpected, was totally groundleſs; in which caſes *only* it is lawful to diſcharge him without bail.

For the better underſtanding of the nature of bail, I ſhall conſider the following points.—Firſt, The nature of bail and mainpriſe in general.—Secondly, What ſhall be ſaid to be ſufficient bail.—Thirdly, The offence of taking inſufficient bail.—Fourthly, The offence of granting it where it ought to be denied.—Fifthly, The offence of denying, delaying, or obſtructing it where it ought to be granted.—Sixthly, In what caſes it is grantable.—Seventhly, In what form it is to be taken.—Eighthly, What ſhall forfeit the recognizance.

And firſt, As to the nature of bail and mainpriſe in general I ſhall endeavour to ſhew, In what reſpects they agree; and, In what they differ.

(*a*) 2 Hale 124. Dalton c. 114. Lambard 340. 4 Inſt. 180. (*b*) 1 Rich. 3. 3. 3 H. 7. 3. 1 & 2 Ph. & Mar. 13. (*c*) Summary 96. Dalton c. 114.

Sect. 2. As to the firſt particular it ſeems, That the words bail and mainpriſe, are often uſed promiſcuouſly in our (*a*) law-books and (*b*) acts of parliament, as ſignifying one and the ſame thing. And it is (*c*) certain, That bail and mainpriſe agree in this notion, that they ſave a man from impriſonment in the common gaol, by his friends undertaking for him before certain perſons for that purpoſe authoriſed, that he ſhall appear at a certain day, and anſwer the crime with which he is charged, and be juſtified by law.

(*d*) 4 Inſt. 179, 180. (*e*) F. Mainp. 12, 13. B. Mainp. 89. Coke, B. & Mainp. c. 3. and the books cited under letters f. g. h. Con. 4. Summary 98. 39 H. 6. 27. pl. 39. 32 H. 6. 4. pl. 3. Sup. c. 6. ſect. 4.

Sect. 3. As to the ſecond particular, The chief, if not the (*d*) only, difference between bail and mainpriſe ſeems to be this, That a man's mainpernors are (*e*) barely his ſureties, and cannot juſtify the detaining or impriſoning of him themſelves, in order to ſecure his appearance: But that a man's bail are looked upon as his (*f*) gaolers of his own chooſing, and that the (*g*) perſon bailed is in the eye of the law, for many pur-

(*f*) 1 Hale 325. 2 Hale 35, 124. 125. (*g*) S. P. C. 64. 21 H. 7. 33. pl. 26. 22 H. 6. 59. pl. 13.

poſes,

poſes, eſteemed to be as much in the priſon of the court by which he is bailed, as if he were in the actual cuſtody of the proper gaoler. But I do not find this point clearly ſettled in relation to any other court beſides the king's bench, as hath been more fully ſhewn chapter 6. ſection 4. However it ſeems certain in every bailment, That if the party bailed be (*a*) ſuſpected by his bail as likely to deceive them, he may be detained by them, and enforced to appear according to the condition of the recogniſance, or may be (*b*) brought by them before the juſtice of peace, by whom he ſhall be committed, unleſs he find new ſureties.

(*a*) F. Mainp. 12, 13. Dalton c. 114. B. Mainp. 99. 6 Modern 231, 247. 2 Hale 127.

(*b*) Summary 96. Dalton c. 114.

Sect. 4. As to the ſecond point, *viz.* What ſhall be ſaid to be ſufficient bail, it ſeems to be (*c*) agreed, That no perſon ought in any caſe to be bailed for felony by leſs than two; and it is (*d*) ſaid to be the practice of the king's bench, not to admit any perſon to bail upon a *habeas corpus* on a commitment for treaſon or felony without four ſureties (1): Alſo (*e*) it ſeems to have been anciently an eſtabliſhed rule, That none under the degree of ſubſidy-men, ſhould be admitted to bail any perſon for a capital crime: But the manner of granting taxes by way of ſubſidy having been of late for many years diſuſed, this rule at preſent ſeems to be of little uſe: But the only ſure way of proceeding in this caſe, is to take care that every one of the bail be of ability ſufficient to anſwer the ſum in which they are bound, which (*f*) ought never to be leſs than *forty pounds* for a capital crime, but may be as much higher as the juſtices in diſcretion ſhall think fit to require, upon conſideration of the ability and quality of the priſoner, and the nature of the offence: And if it ſhall ſeem doubtful, whether the perſons who offer themſelves to be ſureties, be able to anſwer ſuch ſum; it is (*g*) ſaid, That the perſon who is to take the bail, may examine them on their oaths concerning their ſufficiency: 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 recogniſance with them, and may commit him on his refuſal, for that inſufficient ſureties are as no ſureties.

(*c*) 2 Hale 125. Summary 97. Dalton c. 114. 10 Coke 101.

(*d*) Sty. Reg. 110. 2 Strange 854.

(*e*) Dalton c. 70 & 114. Summary 97.

(*f*) Dalt. c. 114. Summary 97.

(*g*) Dalt. c. 114. Crompton 194. 2 Hale 125.

Summary 96. Dalt. c. 70. & 114.

(1) In felony four perſons are required for bail; but for any inferior offence two are ſufficient. In both caſes the number of the bail muſt be mentioned in the notice, otherwiſe the court will reject the whole. Ld Mansfield, Rex v. Bolton, Mich. 23 Geo. 3. MS.

Sect. 5. But juſtices muſt take care, That under pretence of demanding ſufficient ſurety, they do not make ſo exceſſive a demand, as in effect amounts to a denial of bail; for this is looked on as a great grievance, and is complained of as ſuch

ſuch by 1 Will. and Mary, ſeſſ. 2. by which it is declared, "That exceſſive bail ought not to be required."

Sect. 6. As to the third point, *viz.* The offence of taking inſufficient bail, it ſeems clear, That wherever a ſheriff, in purſuance of the ſtatute of Weſtminſter, c. 15. Or juſtices of peace in purſuance of the ſubſequent ſtatutes, grounded on the ſaid ſtatute of Weſtminſter 1. and ſet forth more at large in the following part of this chapter, ſhall admit any perſon to bail for felony, with inſufficient ſureties, who ſhall not afterwards appear according to the condition of the recogniſance, the juſtices of aſſize may, by force of 27 Edw. 1. c. 3. commonly called the ſtatute *de finibus levatis*, impoſe ſuch fine on ſuch ſheriff or juſtices of peace, as to ſuch juſtices of aſſize in their diſcretion ſhall ſeem proper. But if a priſoner, who is bailed by inſufficient ſureties, do appear according to the condition of the recogniſance, it ſeems that thoſe who admitted him to bail are ſafe, inaſmuch as the end of the law is anſwered, and the appearance of the priſoner as effectually procured by ſuch ſureties, as if they had been never ſo ſufficient.

Vide ſup. c. 6. ſect. 10. 11. &c. Dalton c. 114. Summary 97.

Sect. 7. As to the fourth point, *viz.* The offence of granting bail where it ought to be denied: There is no doubt but that the bailing of a perſon who is not bailable by law, is puniſhable either at common law, as a negligent eſcape, as ſhall be more fully ſhewn in the chapter concerning Eſcapes, or as an offence againſt the ſeveral ſtatutes concerning bail.

S. P. C. 33. 77. 25 E. 3. 39. F. Eſcape 4. F. Corone 246. Summary 97, 113. 2 Hale 596, 597.

Sect. 8. And firſt it is enacted by the ſtatute of Weſtminſter 1. c. 15. "That if the ſheriff, or any other, let any "go at large by ſurety, that is not repleviſable, if he be "ſheriff, or conſtable, or any other bailiff of fee, which "hath keeping of priſons, and be thereof attainted, he ſhall "loſe his fee and office for ever. And if the under-ſheriff, "conſtable, or bailiff of ſuch as have fee for keeping of "priſons, do it contrary to the will of his lord, or any other "bailiff being not of fee, they ſhall have three years impriſonment, and make fine at the king's pleaſure."

Sect. 9. Alſo it is enacted by 27 Edw. 1. commonly called the ſtatute *de finibus levatis*, c. 3. "That the juſtices aſſigned "to take aſſizes, &c. when they deliver the goods, &c. ſhall "inquire if ſheriffs, or any other, have let out by replevin "priſoners not repleviſable, or have offended in any thing "contrary to the form of the ſaid ſtatute of Weſtminſter 1. "and whom they ſhall find guilty they ſhall chaſten and "puniſh in all things, according to the form of the ſaid "ſtatute."

Vide ſup. c. 6. ſect. 11, 12, &c.

Sect. 10. And it is farther enacted by 4 Edw. 3. c. 2. "That at the time of the aſſignment of keepers of the peace, "mention ſhall be made, That ſuch as ſhall be indicted, or "taken

" taken by them, ſhall not be let to mainprize by the ſheriffs, " nor by none other miniſters, if they be not mainpernable " by law; nor that none who are indicted ſhall be delivered " but by the common law. And that the juſtices aſſigned to " deliver the gaols, ſhall have power to inquire of ſheriffs, " gaolers, and others, in whoſe ward ſuch perſons indicted " ſhall be, if they make deliverance, or let to mainprize, " any ſo indicted, which be not mainpernable; and to puniſh " the ſaid ſheriffs, gaolers, and others, if they do any thing " againſt the ſaid act."

Vide ſupra c. 6. ſect. 13, 14.

Sect. 11. And it is enacted by 1 & 2 Ph. and Mary, c. 13. " That no juſtice or juſtices of peace ſhall let to bail or " mainprize any perſon or perſons, which for any offence or " offences, by them, or any of them committed, be declared " not be repleviſed or bailed, or be forbidden to be repleviſed " or bailed, by the above mentioned ſtatute of Weſtminſter 1. " c. 15. And that the juſtices of gaol-delivery of the place " where ſuch juſtices of the peace ſhall be guilty of ſuch of- " fence, upon due proof thereof, by examination before " them, ſhall for every ſuch offence ſet ſuch fine on every " ſuch juſtice, as the ſame juſtices of gaol-delivery ſhall think " meet, &c."

Sect. 12. It hath been reſolved, That it is no excuſe for juſtices of peace admitting a perſon to bail, who was in truth committed for a cauſe not bailable by law, that they did not know that he was committed for ſuch cauſe; and that no other cauſe of his commitment was mentioned in his mittimus but the ſuſpicion of felony; for that they ought, at their peril, to have informed themſelves of the cauſe for which the party was committed, that they might be ſatisfied that he was bailable by law.

2 Strange 1216.

Popham 96. Dalton c. 114.

Sect. 13. As to the fifth point, *viz.* The offence of denying, delaying, or obſtructing bail, where it ought to be granted. This ſeems to be a miſdemeanor, not only by the ſtatute, but alſo by the common law, and puniſhable thereby as an offence againſt the liberty of the ſubject, not only by action at the ſuit of the party wrongfully impriſoned, but alſo by indictment at the ſuit of the king.

Vide 14 H. 7. 7. Summary 97. Dalt. c. 114.

Sect. 14. But it ſeems clear, That he who has power to bail another is not bound to demand of him to find ſureties, and to forbear committing him till he ſhall refuſe to find them; but may well juſtify his commitment, unleſs the party himſelf ſhall offer his ſureties.

Summary 97. Dalt. c. 114. 14 H. 7. 10. B. Peace 7, B. Mainp. 29.

Sect. 15. The principal ſtatutes relating to this offence, are the above-mentioned ſtatute of Weſtminſter 1. c. 15.; the ſtatute *de finibus*, c. 3.; and 31 Car. 2. c. 2. commonly called the *Habeas Corpus* Act. By the firſt whereof it is enacted, " That if any with-hold priſoners repleviſable, after

" that

" that they have offered ſufficient ſurety, he ſhall pay a griev-
" ous amerciament to the king. And if he take any reward
" for the deliverance of ſuch, he ſhall pay double to the
" priſoner, and alſo ſhall be in the great mercy of the king."
And by the latter of the ſaid ſtatutes it is enacted, " That
" juſtices of aſſize ſhall inquire if ſheriffs, or any other, have
" offended in any thing contrary to the ſaid ſtatute of
" Weſtminſter, and whom they ſhall find guilty they ſhall
" puniſh in all things according to the form of the ſaid
" ſtatute."

3 Comm. 136.

Sect. 16. Alſo it is recited by the above-mentioned ſtatute of 31 Car. 2. That great delays have been uſed by ſheriffs, gaolers, and other officers, to whoſe cuſtody the king's ſubjects had been committed for criminal, or ſuppoſed criminal matters; in making return of writs of *habeas corpus*, by ſtanding out an *alias* and *pluries*, and ſometimes more, and by other ſhifts to avoid their yielding obedience to ſuch writs, contrary to their duty, and the known laws of the land, whereby many ſubjects have been long detained in priſon, in ſuch caſes where by law they were bailable, &c. And thereupon it is enacted, " That whenſoever any perſon ſhall bring any *habeas corpus*
" directed unto any perſon whatſoever, for any perſon in his
" cuſtody, and the ſaid writ ſhall be ſerved upon the ſaid of-
" ficer, or left at the gaol or priſon with any of the under-
" officers, under-keepers, or deputy of the ſaid officers or
" keepers, that the ſaid officer or officers, his or their under-
" officers, under-keepers, or deputies, ſhall, within three
" days after ſuch ſervice thereof (unleſs the commitment were
" for treaſon or felony plainly and ſpecially (2) expreſſed in
" the warrant of commitment), upon payment or tender of
" the charges of bringing the ſaid priſoner, to be aſcertained
" by the judge or court that awarded the ſame, and endorſed
" on the ſaid writ, not exceeding 12 d. per mile, and on
" ſecurity given by his own bond, to pay the charges of carry-
" ing back the priſoner, if he ſhould be remanded, and that
" he will not make any eſcape by the way, make return of
" ſuch writ, and bring, or cauſe to be brought, the body of
" the party ſo committed, or reſtrained, unto or before the
" lord chancellor, or lord keeper, or the judges or barons of
" the court from which the ſaid writ ſhall iſſue, or ſuch other
" perſons before whom the ſaid writ is made returnable, ac-
" cording to the command thereof; and ſhall then likewiſe
" certify the true cauſes of his detainer or impriſonment, un-
" leſs the commitment be in a place beyond twenty miles
" diſtance, &c. and if beyond the diſtance of twenty, and
" not above one hundred miles, then within the ſpace of ten
" days, and if beyond the diſtance of one hundred miles, then
" within the ſpace of twenty days."

(2) Not for treaſon or felony in general, but treaſon *for counterfeiting the king's coin* or felony *for ſtealing the goods of ſuch a one to ſuch an amount*, and the like.—Therefore if a conſtable, upon his own authority carry an offender to gaol, which he may do by 4 Edw. 3. c. 10. without any warrant of commitment from a juſtice of peace, he would have a right to be bailed upon this act, whatever the offence may be. 1 Burn 151.—But in Lord Montgomery's caſe, 10 Mod. 334. it is ſaid, that a commitment for treaſon generally is good.

N.B. the king's bench may bail though the habeas corpus act is ſuſpended. Vide 3 Modern 93. Salkeld 103. 2 St. Tr. 386.

Sect.

Sect. 17. And it is farther enacted, par. 3. "That all such writs shall be marked in this manner, *per statutum tricesimo primo Caroli secundi regis*; and shall be signed (1) by the person that awards the same. And if any person shall be, or stand committed or detained as aforesaid, for any crime, unless for treason or felony, plainly expressed in the warrant (2) of commitment, in the vacation time, it shall be lawful for such person so committed or detained (other than persons convict, or in execution by legal process), or any one on his behalf, to complain to the lord chancellor, or lord keeper, or any justice of either bench, or baron of the exchequer of the degree of the coif; and the said lord chancellor, &c. justice or baron, on view of the copy of the warrant of the commitment, or otherwise on oath that it was denied, or authorized and required, on request in writing by such person, or any in his behalf, attested and subscribed by two witnesses (3), who were present at the delivery of the same, to grant an *habeas corpus* under the seal of the court whereof he shall be one of the judges, to be directed to the officer in whose custody the party shall be returnable *immediate* before the said lord chancellor, &c. justice or baron; and on service thereof as aforesaid, the officer, &c. in whose custody the party is, shall within the times respectively before limited, bring him before the said lord chancellor, justice or baron before whom the said writ is returnable; and in case of his absence, before any other of them, with the return of such writ, and the true causes of the commitment and detainer. (4) And thereupon, within two days after the party shall be brought before them, (5) the said lord chancellor, justice or baron, before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his recognizance, with one or more sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his appearance in the king's bench the term following, or in such other court wherein the offence is properly cognizable, as the case shall require; and then shall certify the said writ with the return thereof, and the recognizance, into such court; unless it be made appear to the said lord chancellor, &c. that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters; or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences, for the which by law the prisoner is not bailable (6)."

3 Comm. 136.

(1) If the writ is not signed, it need not be obeyed. Rex v. Roddam. Cowper 672.

(2) 10 Modern 429. Strange 142. 308. 2 Burrow 765.

(3) One witness and an affidavit that the other is sick is sufficient. Comb. 6.

(4) For the certainty required in the return, Douglas 159. Wilson 154. Ld Raym. 586. 618. Fort. 272. Strange 404. 915. Andrews 281.

(5) If a person is too infirm to be brought into court, the court will order the party to be attended, &c. Vide 2 Burrow 1099. 3 Burrow 1363.

(6) 2 Inst. 55. 2 Hale 143. Vaugh. 156. 3 Com. Dig. 458. 1 Wilson 254.

3 Wils. 188. Strange 444. 794. 982. Ld Raym. 1354. Burr. 460. 606. 2991. 1115. 1434.

Sect. 18. But it is provided, par. 4. "That if any person shall have wilfully neglected, by the space of two whole terms

" after his impriſonment, to pray a *habeas corpus* for his en-
" largement, he ſhall not have a *habeas corpus* to be granted in
" vacation time, in purſuance of this act."

No privilege will excuſe a peer from obeying the writ. 1 Burrow 633. Vide alſo Strange 167. 915. 339 Ld Raym. 580. 603.

Sect. 19. And it is farther enacted, par. 5. " That if any of-
" ficer, &c. ſhall neglect or refuſe to make the returns afore-
" ſaid, or to bring the body of the priſoner according to the
" command of the ſaid writ, within the reſpective times afore-
" ſaid, or ſhall not, within ſix hours after demand, deliver a
" true copy of the commitment, &c. he ſhall forfeit for the
" firſt offence 100 *l.* for the ſecond 200 *l.* and be made in-
" capable to hold his office, &c."

Sect. 20. And it is farther enacted, par. 6. " That no
" perſon who ſhall be ſet at large upon any *habeas corpus*, ſhall
" be again impriſoned for the ſame offence by any perſon
" whatſoever, other than by the legal order and proceſs of
" ſuch court wherein he ſhall be bound by recognizance to ap-
" pear, or other court having juriſdiction of the cauſe, on pain
" of 500 *l.*"

Salkeld 103. Comber 6. 3 Com. Dig 455.

Sect. 21. And it is farther enacted, par. 7. " That if any
" perſon who ſhall be committed for treaſon or felony, plainly
" and ſpecially expreſſed in the warrant of commitment, upon
" his prayer or petition in open court, the firſt week of the
" term, or the firſt day of the ſeſſions of oyer and terminer, or
" general gaol-delivery, to be brought to his trial, ſhall not be
" indicted ſome time in the next term, ſeſſions of oyer and ter-
" miner, or general gaol-delivery after ſuch commitment, the
" juſtices of the ſaid court ſhall, upon motion in open court,
" the laſt day of the term, or ſeſſions, ſet at liberty the priſoner
" upon bail; unleſs it appear upon oath, that the witneſſes for the
" king could not be produced the ſame term, &c. And if ſuch
" priſoner, upon his prayer, &c. ſhall not be indicted and tried
" the ſecond term, or ſeſſions, he ſhall be diſcharged from his
" impriſonment."

(7) A notion prevailed, that all writs of habeas corpus granted in vacation expired on the commencement of the term. But Lord Mansfield, Hill. 32 Geo. 2. declared the unanimous opinion of the court, that ſuch notion was ill founded, that a perſon require a new utility. 1 Burrow

Sect. 22. And it is farther enacted, par. 10. " That it ſhall
" be lawful for any priſoner, as aforeſaid, to move and obtain
" his *habeas corpus*, as well out of the chancery or exchequer,
" as the king's bench or common pleas: And if the ſaid lord
" chancellor or lord keeper, or any judge or judges, baron or
" barons for the time being, of the degree of the coif, of any
" of the courts aforeſaid, in the vacation time (7), upon view
" of the copy of a warrant of commitment or detainer, or on
" oath made that ſuch copy was denied, ſhall deny any writ of
" *habeas corpus*, by this act required to be granted, being
" moved for as aforeſaid, they ſhall ſeverally forfeit to the
" party grieved, the ſum of 500 *l.*"

might be brought into court upon a habeas corpus iſſued in vacation, and that to writ, would be attended with delay and expence without the leaſt reaſon or 460. 542. 606. 608.

Sect. 23. But it is provided, par. 18. " That after the aſſizes
" proclaimed for that county where the priſoner is detained,
" no

"no perſon ſhall be removed from the common gaol upon any "*habeas corpus* granted in purſuance of this act; but upon ſuch "*habeas corpus* ſhall be brought before the judge of aſſize in "open court, who thereupon ſhall do what to juſtice ſhall ap- "pertain." But it is provided nevertheleſs, par. 19. "That "after the aſſizes are ended, any perſon detained may have his "*habeas corpus* according to the direction of this act."

Sect. 24. It is obſervable, that this ſtatute makes the judges liable to an action at the ſuit of the party grieved in one caſe only, which is the refuſing to award a *habeas corpus* in vacation time; and ſeems to leave it to their diſcretion in all other caſes, to purſue its directions in the ſame manner as they ought to execute all other laws, without making them ſubject to the action of the party, or to any other expreſs penalty or forfeiture: And this is moſt agreeable to the general reaſon of the law, which regularly will not ſuffer a judge to be liable to an action for what he does as judge.

4 Comm. 137. Burrow 856. 1437.

B. 1. c. 72, ſect. 6. & B. 2, c. 1. ſect. 17.

As to the ſixth point, *viz.* In what caſes bail is grantable, I ſhall endeavour to ſhew,—Where it is grantable by a ſheriff.—Where by a juſtice of peace.—Where by juſtices of gaol-delivery.—Where by the courts of Weſtminſter-Hall.

As to the firſt point, I ſhall conſider, Where bail is grantable by a ſheriff *ex officio*; and, Where by virtue of *a writ*.

Sect. 25. As to the firſt particular, it is holden by (*a*) ſome, That by the common law the ſheriff might, by virtue of his office, as principal conſervator of the peace, bail any perſon arreſted on ſuſpicion of felony, or for any other offence which is bailable.

(*a*) Daliſ. 11. Preamble to 13 Edw. 1. c. 15. Reg. 83. 169. S. P. C. 74. F. Corone 297. 2 Inſt. 190.

cont.

Sect. 26. Alſo it hath been holden, (*b*) that a conſtable had the like power by the common law: And it may (*c*) probably be inferred from the recitals of the writs of mainpriſe in the regiſter, that by the common law the ſheriff had power to bail perſons indicted of larceny in a (*d*) court-leet, and alſo perſons indicted as (*d*) acceſſaries to a felon, and perſons appealed by (*e*) approvers, after the death of the approvers, &c. But it ſeems that the ſheriff (*f*) had no power *ex officio*, to bail any perſon indicted of any crime before juſtices of peace. And it is certain, (*g*) that neither the ſheriff nor conſtable could, in any of the caſes above mentioned, take bail by recognizance but only by obligation. And ſome (*h*) have holden, That the ſtatutes which impower juſtices of peace to admit perſons to bail, on an accuſation of felony, and particularly preſcribe in what manner they ſhall do it, have taken away all power of this kind from the ſheriff and conſtable; yet others ſeem to be of another

(*b*) Daliſ. 11. Con. 2 Inſt. 190.
(*c*) Reg. 269.
(*d*) Reg. 270.
(*e*) Reg. 269.
(*f*) Reg. 133. 270. 272.
(*g*) Sup. 8. ſect. 4, 5. Daliſon 11.
(*h*) Daliſon 11.

another opinion, becauſe the ſaid ſtatutes are wholly in the affirmative.

(a) Sum. 106. 2 Hale 148, 149. 2 Inſt. 190. Regiſter 269. (b) Lamb. 342. 348. S. P. C. 74. 2 Inſt. 190. (c) Sum. 106. C. Eliz. 77. 2 Hale 141 to 149.

Sect. 27. But it ſeems certain, (*a*) That by the common law, the ſheriff might bail any perſon who was indicted before him at his torn, for felony, or any other crime that is bailable; becauſe he might both award proceſs and alſo give judgment againſt the perſon ſo indicted: And it is a general (*b*) rule, That *whoſoever is judge of the offence, may bail the offender.* But it is holden, That at this day the ſheriff has loſt his power (8), by reaſon of 1 Edw. 4. c. 2. ſet forth more at large c. 10. ſ. 74. by which it is enacted, "That the ſheriff ſhall not proceed on "any ſuch indictment, but ſhall remove it to the next ſeſſions "of peace."

(8) Vide Strange 479.

Sect. 28. As to the ſecond particular, it ſeems, That bail is grantable by a ſheriff by virtue of the following writs, *viz.* That of *odio* and *atia.* That of *mainpriſe*; and, That of *homine replegiando.*

But having already, in Book 1. c. 29. ſ. 20 & 24. incidently ſhewn the nature of the firſt of theſe writs, which ſeems to be in great meaſure obſolete at this day, I ſhall refer the reader to what is there ſaid concerning it.

(d) Reg. 269, 270. (e) F. N. B. 250. 3 Comm. 128. 1 Hale 141. Regiſter 269. Coke on Bail and Mainpriſe, ch. 3 & 10. (f) F. N. B. 250. Regiſter 269. 4 Inſt. 179. 2 Inſt. 290. (g) F. N. B. 250. 251.

Sect. 29. Secondly, Of the writ of *mainpriſe* little notice is taken in the late books; yet the law relating to it ſeems to be ſtill in force in many caſes; and conſequently in ſuch caſes, thoſe who are bailable, and have been refuſed the benefit of bail, may ſtill by virtue thereof be delivered out of priſon (upon their finding ſureties (*d*) to the ſheriff that they will appear and anſwer to the crimes alledged againſt them, before the juſtices in the writ mentioned, &c.) as thoſe (*e*) who are impriſoned for a ſlight ſuſpicion of felony, or indicted of larceny (*f*) before the ſteward of a leet, or of treſpaſs (*g*) before juſtices of peace, and many other (*h*) perſons, all which it will be needleſs to enumerate.

Regiſter 133. 270, 271. (*h*) F. N. B. 250, 251. Regiſter 269, &c.

(i) Sum. 104. (k) 2 Inſt. 193. (l) F. N. B. 250. 4 Inſt. 182. Coke, B. and Mainp. c. 10. Vide ſup. 10. ſect. 74, 75.

Sect. 30. But as to that which is ſaid in general, both by Sir Matthew Hale (*i*) and Sir Edward Coke, (*k*) in relation to this matter, from which it may ſeem to have been the opinion of thoſe authors, That no writ of mainpriſe is grantable at this day; it may be anſwered, That this is to be underſtood (*l*) only of the writ of mainpriſe for perſons indicted before the ſheriff in his torn, in relation to whom he has no judicial power at this day, and conſequently no power to bail them *ex officio*; from whence it follows, That the writ of mainpriſe for ſuch perſons, being grounded on a ſuggeſtion that the ſheriff had unjuſtly refuſed before to admit them to bail, cannot now be proper,

per, becauſe he cannot be ſaid to have unjuſtly refuſed to do a thing which he had no power to do. But this can be no manner of reaſon why the writ of mainpriſe ſhould not be ſtill grantable in other caſes. 2 Hale 142.

Sect. 31. Thirdly, As to the writ of *homine replegiando*, there ſeems to be no doubt but that at the common law the ſheriff might deliver any perſons out of priſon by virtue of this writ, except in thoſe ſpecial caſes mentioned in the ſtatute of Weſtminſter 1. c. 15. which is ſet forth more at large in the next ſection: And if he had returned, that the plantiff had been eloigned out of the county by the defendant, he might afterward, by virtue of a *capias in withernam* againſt ſuch defendant, whether he were a peer or commoner, have taken and impriſoned him till the plaintiff ſhould be replevied. But the writ of *homine replegiando* has been much diſuſed of late, in ſuch caſes wherein juſtices of peace have been authorized to admit perſons to bail; yet whether the ſtatutes which gave ſuch authority to juſtices of peace, being wholly in the affirmative, do take away the ſheriff's power in the caſes mentioned in thoſe ſtatutes, may deſerve to be conſidered. However there can be no doubt but that in other caſes the writ of *homine replegiando*, (*a*) and *capias in withernam*, are very proper and effectual remedies. F. N. B. 66, 67, 68. Reg. 78, 79. F. N. B. 68. 2 Hale 141. Vide ſup. ſect. 26. (*a*) 1 Sid. 210. Skin 61, 76, 227, 337, Carth. 286, 287. Farreſley 9. 3 Comm. 129. 4 Modern 183.

Sect. 32. But for the better underſtanding the ſheriff's power in this particular, I ſhall ſet down, and endeavour to explain ſo much of the ſaid ſtatute of Weſtminſter 1. c. 15. as relates to it, which is enacted as followeth:—"Foraſmuch "as ſheriffs, and others who have taken and kept in priſon "perſons detected of felony, and incontinent have let out by "replevin ſuch as were not repleviſable, and have kept in "priſon ſuch as were repleviſable, becauſe they would gain of "the one party, and grieve the other: And foraſmuch as be"fore this time it was not determined which perſons were re"pleviſable, and which not; but only thoſe that were taken "for the death of a man, or by commandment of the king, or "of the juſtices, or for the foreſt: It is provided, and by the "king commanded, that ſuch priſoners as before were out"lawed, and they which have abjured the realm, provers, and "ſuch as be taken with the manner, (*b*) and thoſe which have "broken the king's priſon, thieves openly defamed and known, "and ſuch as be appealed by provers, ſo long as the provers "be living (if they be not of good name), and ſuch as be taken "for houſe-burning felonioufly done, or for falſe money, or "for counterfeiting the king's ſeal, or perſons excommuni"cate, taken at the requeſt of the biſhop, or for manifeſt of"fences, or for treaſon touching the king himſelf, ſhall be in "no wiſe repleviſable by the common writ, nor without writ: "But ſuch as be indicted of larceny by enqueſts taken before "ſheriffs, or bailiffs by their office, or of light ſuſpicion, or "for petit larceny, that amounteth not above the value of 2 Hale 127 to 136. (*b*, See ſect. 41.

2 Inſt. 190.

" twelvepence, if they were not accuſed of ſome other larceny " aforetime, or accuſed of receipt of thieves or felons, or of " commandment, or force, or of aid in felony done, or accuſed " of ſome other treſpaſs, for which one ought not to loſe life " or member, and a man approved by a prover after the death " of the prover (if he be no common thief, nor defamed), ſhall " be henceforth let out by ſufficient ſurety, whereof the ſheriff " will be anſwerable, and that without giving ought of their " goods."

For the better expoſition hereof, I ſhall diſtinctly conſider,—That part of the preamble which declares, what perſons had always been agreed not to be repleviſable. — That part of the purview which ſhews what other perſons ſhall not be repleviſable; and, That which ſhews what perſons ſhall be repleviſable.

2 Hale 129 to 132.

Of thoſe who by the preamble are declared to have always been agreed to be irrepleviſable, there are four kinds.—1. Thoſe who are taken for the death of a man.—2. Thoſe who are taken by the commandment of the king.—3. Thoſe who are taken by the commandment of the juſtices.—4. Thoſe who are taken for the foreſt.

Sect. 33. As to the firſt of theſe particulars. It is obſervable that the ſtatute declares generally, That thoſe impriſoned for the death of a man have always been taken to be irrepleviſable, without making any diſtinction between ſuch homicide as is malicious, and that which happens by miſadventure, or in ſelf-defence. And it is further to be obſerved, that the ſtatute of Gloceſter, c. 9. provides, " That where a man kills another " by misfortune, or in his defence, or in other manner without " felony, he ſhall be put in priſon till the next coming of the " juſtices in eyre, or juſtices aſſigned to the gaol-delivery, &c." And agreeably hereto we find, That all perſons in general, who are taken for the death of a man, are excepted out of the writ (*a*) *de homine replegiando:* And that even the ſuperior (*b*) courts, which are not reſtrained by theſe ſtatutes, have yet been always cautious of bailing perſons impriſoned for any homicide, except in ſuch ſpecial caſes as ſhall be ſet forth more at large in the following part of this chapter.

2 Hale 129.
2 Inſt. 186.
2 Inſt. 315.
2 Hale 138.
(*a*) Reg. 77. F. N. B. 66.
(*b*) 25 Ed. 3. 42.
41 Aſſize pl. 14.
37 Aſſize pl. 12.
29 Aſſize pl. 44.
1 Roll 268.
44 Ed. 3. 38.
21 Ed. 4. 71.

Sect. 34. Alſo it ſeems agreed, That juſtices of peace who have power at this day 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, as ſhall be ſhewn more at large in the following part of this chapter (*c*).

(*c*) Sect. 63.

Sect. 35. And it is enacted by 3 Hen. 7. c. 1. " That if it " happen, that any perſon named as principal or acceſſory, be " acquitted

" acquitted of any murder at the king's ſuit, within the year " and day, that then the ſame juſtices before whom he is ac- " quitted, ſhall not ſuffer him to go at large, but either remit " him to priſon, or bail him, after their diſcretion, till the year " and day be paſſed."

Sect. 36. As to the ſecond particular, *viz.* That concerning thoſe who are taken by the commandment of the king, it ſeems, That the words of the ſtatute concerning them are to be underſtood of ſuch only as are impriſoned either by the king's perſonal command, or by the command of his privy council, which is looked upon to be as it were incorporated with him and to ſpeak with his mouth; and accordingly we find the exception in the writ of *homine replegiando*, relating to perſons impriſoned by the king, thus expreſſed in the regiſter, *niſi capti ſunt per ſpeciale præceptum noſtrum*; by which it ſeems to be implied, That this exception is not to be applied generally to every command whatſoever of the king. To which it may be added, That if it were to be underſtood in ſo large a ſenſe, it would extend even to thoſe who are taken by a *capias* in a perſonal action, for that every ſuch *capias* is the commandment of the king; but it ſeems certain, That a defendant taken by ſuch a *capias* is repleviſable by the common law. But perſons impriſoned by the ſpecial command of the king, or of his privy council, are ſo far from being repleviſable by the ſheriff, that they have formerly (*a*) been adjudged not to be bailable even by the court of king's bench. However at this day the law is otherwiſe declared and ſettled by parliament, as ſhall be ſhewn more at large in the following part of this chapter.

2 Inſt. 186, 187. S. P. C. 72. 1 R II 134. Dalton c. 114. Regiſter 77.

S. P. C. 72.

(*a*) 1 And. 298, 1 Roll 134, 192, 219. 1 Leonard 70. B. Mainpr. 37. 2 Hale 131. Con. Moor 839. 1 And. 158.

Sect. 37. As to the third particular, *viz.* That concerning perſons impriſoned by the command of the juſtices, it is obſervable, That the exception in the writ of *homine replegiando*, in the regiſter, (*b*) concerning perſons ſo impriſoned, is reſtrained to thoſe who are taken by the ſpecial command of the king's chief juſtice. But by Fitzherbert (*c*) and Staunford (*d*), Coke (*e*) and Dalton (*f*), the words of the ſtatute relating to perſons ſo impriſoned, ſeem to be underſtood in a large ſenſe of any of the king's juſtices in general, as of thoſe of aſſize, as well as of thoſe of the courts of Weſtminſter-Hall. But it ſeems that they are not to be underſtood generally of perſons impriſoned by any command whatſoever of ſuch juſtices, for that thoſe who are impriſoned by their ordinary command, not by way of puniſhment, but in order only to be ſafely kept, are ſaid to be repleviſable by the ſheriff, in caſes not prohibited by the ſtatute; and therefore it ſeems, That they muſt be taken in a more reſtrained ſenſe of thoſe only who are impriſoned by the abſolute command of ſuch juſtices by way of puniſhment, as for a miſde-

(*b*) Reg. 77. (*c*) F N. B. 65. (*d*) S P. C. 73. (*e*) 2 Inſt. 187. (*f*) Dalt. c. 114.

S. P. C 73. Dalt. c. 114. F. N. B. 251.

S. P. C. 73. Dalt. c. 114. 24 Ed. 3. 33.

meanor done in their preſence, or for other contempts, or ſuch like matters, which lie rather in their diſcretion than in their ordinary power; and it ſeems, that a commitment by the chief juſtice, without ſhewing any cauſe whatſoever, ſhall be intended to be for ſome ſuch matter; and there can be no doubt but that a perſon under ſuch a commitment is repleviſable by the ſheriff. Alſo it hath been holden, That a perſon ſo committed is not bailable upon a *habeas corpus:* But how far perſons committed by the abſolute command of one court, are bailable by another, ſhall be more fully conſidered in the following part of this chapter.

1 Roll 131.

Sect. 38. As to the fourth particular, *viz.* That concerning thoſe who are impriſoned for the foreſt, who alſo are excepted out of the writ (*a*) of *homine replegiando*; it ſeems, that the ſaid exception is to be underſtood as well of foreſts in the hands of ſubjects, (*b*) as of thoſe in the hands of the king; but it ſeems, that it is to be underſtood ſtrictly of proper foreſts only, and not to be extended (*c*) by equity to chaſes or parks. And as to impriſonments for offences in foreſts, the law has been much mitigated by later ſtatutes; for it is recited by 1 Edw. 3. c. 8. "That divers perſons had been undone by the chief keepers of foreſts, &c. againſt the form of the great charter (*d*) of the foreſt, and againſt the declaration (*e*) made by king Edward 1. by which he granted, That treſpaſſes done in his foreſt, of vert and veniſon, ſhould be preſented at the next ſwainmote, before the foreſters, &c. and that ſuch preſentments made before ſuch foreſters, &c. ſhould by the oaths of knights, and other diſcreet and lawful men, &c. by the common aſſent of all the ſaid miniſters, be ſolemnly written, and with their ſeals enſealed: And that if any indictment ſhould be in any other manner made, that the ſame ſhould be void." And thereupon it is ordained, "That from thenceforth no man ſhall be taken "nor impriſoned for vert or veniſon, unleſs he be taken with "*the manner*, or elſe indicted after the form before ſpecified: "And then the chief warden ſhall let him to mainpriſe till the "eyre of the foreſt, without any thing taken for his deliver- "ance. And if the ſaid warden will not ſo do, he ſhall have "a (*f*) writ out of the chancery, &c. to be at mainpriſe till the "eyre. And if the warden ſhall not obey ſuch writ, the plain- "tiff ſhall have a (*g*) writ to the ſheriff to attach the ſaid war- "den before the king, at a certain day, &c. And the ſheriff "(the verders being called to him) ſhall deliver him that is ſo "taken, by good mainpriſe, in the preſence of the verders, "and ſhall deliver the names of the mainpernors to the "ſame verders, to anſwer in the eyre before the juſtices, "&c." And it is farther enacted, by 7 Rich. 2. c. 4. "That "no man ſhall be impriſoned by any officer of the foreſt with- "out

(*a*) Reg. 77. 4 Inſt. 314.
(*b*) 1 Inſt. 2. 233.
(*c*) Reg. 80. F. N. B. 67. Plowden 124.
(*d*) 9 H. 3. 10. & 16.
(*e*) 34 Ed. 1. commonly called, ordinatio Foreſtæ.
(*f*) F. N. B. 67. Regiſter 80.
(*g*) F. N. B. 67. Regiſter 80.

" out due indictment, or being taken *with the manner*, or tref-
" paſſing in the foreſt, &c."

Sect. 39. And *note*, That perſons ſo indicted, or taken *with the manner*, being impriſoned by ſuch officers, have their election either to be mainpriſed by twelve mainpernors, by virtue of the writ of *homine replegiando*, given by the ſaid ſtatute of 1 Edw. 3. c. 8. or to be bailed upon a *habeas corpus*, by the judges of Weſtminſter-Hall, &c. And if a perſon be impriſoned for any offence relating to the foreſt, without having been firſt indicted for it, or taken *with the manner*, there ſeems to be no doubt but that he may have an action of falſe impriſonment, and may alſo be mainpriſed or bailed in the manner above-mentioned.

4 Inſt. 290. Regiſter 80. F. N. B. 67. 45 Ed. 3. 7. 2 Hale 132 to 135.

AND NOW I am to conſider that part of the purview of the above recited ſtatute of Weſtminſter 1. c. 15. which ſhews what other perſons are not repleviſable, of which there are two ſorts.—Firſt, Such as are excluded from the benefit of a replevin, in reſpect of the notoriety of their offence.—Secondly, Such as are excluded from it in reſpect of the heinouſneſs of the crime alledged againſt them.

Perſons excluded from the benefit of a replevin, in reſpect of the notoriety of their offence, are of two kinds.—Firſt, Thoſe who, by an expreſs or implied judgment, ſentence or conviction, or their own confeſſion, appear to be guilty.—Secondly, Thoſe who are under violent preſumptions of guilt.

Sect. 40. And firſt, Of thoſe who by judgment, ſentence, conviction or confeſſion, appear to be guilty, ſome are excluded from the benefit of a replevin by the expreſs words of the ſtatute; as " Thoſe who are outlawed, or have abjured the " realm; perſons excommunicate, taken at the requeſt of the " biſhop, and provers." And all other (*a*) perſons who are condemned, or convicted of felony, or any other (*b*) heinous crime whatſoever, whether by their own confeſſion, or by verdict general or ſpecial; (*c*) and alſo all thoſe (*d*) who on their examination own themſelves guilty of a felony alledged againſt them, *and are charged in their* MITTIMUS *with the felony ſo confeſſed*, ſeem to be excluded from it by parity of reaſon, and the manifeſt intent of the ſtatute; for (*e*) bail is only proper where it ſtands indifferent whether the party be guilty or innocent of the accuſation againſt him, as it often does before his trial; but where that indifferency is removed, it would, generally ſpeaking, be abſurd to bail him: And agreeably hereto the ſtatute of 2 Hen. 5. c. 2. provides, even as to civil cauſes, " That if " upon a writ of *certiorari*, or *corpus cum cauſa*, out of chan-
" cery, it ſhall be returned that the priſoner is condemned by
" judgment given againſt him, he ſhall be remanded, &c."

(*a*) S. P. C. 74. Summary 101. Dalton c. 114. 1 Roll 268. 15 H. 7. 9. Kelynge 90. 3 Bulſt. 113, 114.
(*b*) Vide infra, Sect. 44.
(*c*) Dyer 179. 1 Bulſt. 87, 88. 15 H. 7. 9.
(*d*) 3 Bulſt. 114. 1 Roll 268. 4 Inſt. 178.
(*e*) 2 Inſt. 188. Dyer 179. Summary 100.

Alſo

Alſo 23 Hen. 6. c. 10. which ordains, That ſheriffs, &c. ſhall let out of priſon perſons in their cuſtody by force of any writ, &c. in perſonal actions, or on indictments of treſpaſs, by ſufficient ſureties, &c. expreſsly excepts "All ſuch as ſhall be in their "ward by condemnation, execution, &c." And therefore it cannot be but reaſonable to intend, That the ſaid ſtatute of Weſtminſter 1. put the caſes of perſons outlawed and excommunicate as examples only; meaning thereby to intimate, That all other perſons under the like circumſtances ſhould be in like manner irrepleviſable: Yet it is certain, That the court of king's bench may, in their diſcretion, in ſome ſpecial caſes, bail a perſon upon an outlawry of felony; as (*a*) where he pleads that he is not of the ſame name, and therefore not the ſame perſon with him that was outlawed; or alledges (*b*) any other error in the proceedings. Alſo it ſeems, That the court of king's bench, or juſtices of gaol-delivery, may bail (*c*) a perſon convicted of man-ſlaughter, or, as ſome ſay, of any other felony, for which he afterwards gets the king's pardon. And (*d*) there ſeems to be no doubt at this day, but that they may alſo bail any perſon who is guilty before them of homicide in ſelf defence, or by miſadventure. Alſo it is certain, That if a perſon appear to be impriſoned for an excommunication, in a cauſe of which the ſpiritual court hath no conuſance, he may be delivered either upon a *habeas corpus*, or by quaſhing or ſuperſeding the writ of *excommunicato capiendo*.

See the books above cited. Summary 101. S. P. C. 74. 2 Inſt. 188.

(*a*) 5 H. 7. 16. (*b*) 19 H. 6. 2. (*c*) B. Mainp. 94. Summary 101. 105. (*d*) Summary 101. 105. F. N. B. 246. F. Corone 297. 354 *contra*, & S. P. C. 74. Quere.

Secondly, Of thoſe who are under violent preſumptions of guilt, and in that reſpect are excluded by the ſtatute from the benefit of a replevin, there are ſeveral kinds.

Sect. 41. Firſt, *Thoſe who are taken with the manner* (or rather the mainer, that is, with the thing ſtolen, as it were in their hands), and by parity of reaſon, thoſe who are taken freſhly upon a hue and cry.

Sum. 101, 102. Carthew 79. 2 Inſt. 188. 1 Hale 187, 348. 2 Hale 133. 156. Vide c. 18. ſ. 1 & 4.

Sect. 42. Secondly, *Thoſe who have broken the king's priſon*, and by the ſame reaſon thoſe who have broken any other priſon, which the law preſumes that no innocent perſon will do.

Sect. 43. Thirdly, *Thoſe who are appealed by provers*, who regularly are not bailable, becauſe the approver, by confeſſing his own guilt, induces a ſtrong preſumption againſt thoſe whom he accuſes of the ſame crime of which he owns himſelf guilty; yet by the expreſs words of the ſtatute, "If the perſon appealed "by an approver be of good reputation, he may be bailed, even "in the life of the approver; and, unleſs he be a notorious "felon, he may be bailed after his death." And by parity of reaſon, he may alſo be bailed, if the approver wave (*e*) his appeal, or be vanquiſhed, (*f*) unleſs there be ſome other cauſe to detain

Summary 102, 2 Inſt. 188. Regiſter 269.

(*e*) 25 Ed. 3. 42. Summary 102. F Mainp. 1. 2 Inſt. 188. (*f*) 25 Ed. 3. 42. pl. 27. F. Mainp. 2.

detain him in prison, as the appeal of some other approver, &c. And if a person disabled by law to become an approver, as one attainted, (a) &c. appeal another of high treason, it seems that the person so appealed ought to be bound (b) to his good behaviour towards the king: But (c) if such person had appealed him of felony only, it seems that he ought to have been wholly discharged, if there had been no other accusation against him.

(a) Sum. 192.
(b) F. Cor. 387.
(c) B. Cor. 81, 211.
17 Assize 4.
11 Assize 27.

Sect. 44. Fourthly, *Thieves openly known and notorious*, who, as it seems, ought not to be bailed for any fresh felony, whereof there is probable evidence against them. But how far persons accused of any crime shall be so far esteemed likely to have committed it, from their former scandalous behaviour, as to be presumed guilty upon slight evidence, seems in great measure to be left to the discretion (d) of the person who hath power to bail them; who, upon consideration of the circumstances of the whole matter, and the probabilities of both sides, if he find it reasonable strongly to presume them to be guilty, ought not to bail but commit them.

(d) Sum. 193.

Sect. 45. Fifthly, Persons taken for open and manifest offences, which seems to be understood of inferior crimes of an enormous nature, under the degree of felony, as dangerous riots, (e) favouring of high treason, (f) scandalous extortions, conspiracies, (g) by justices, &c. violent and exorbitant rescouses (h) of persons arrested by virtue of the king's writs, misprision (i) of treason, præmunire, (k) maim, and such like heinous offences, whereof no one who is notoriously guilty, seems to be bailable by the intent of this statute; for notwithstanding, in the latter part of it, it be said generally, That those who are accused of a trespass, for which a man shall not lose life or member, are repleviable; yet upon the construction of the whole it seems reasonable to qualify the generality of that expression with this limitation, that such accusation ought to be either on a light suspicion; or if it be on plain and unquestionable evidence, that the offence ought to be inconsiderable, for if all persons whatsoever shall be repleviable for offences not touching life or member, let their guilt be never so notorious, the above-mentioned general unlimited clause, that those who are taken for open offences shall be irrepleviable, must be restrained to felonies and offences touching member, which seems contrary to the most obvious reasonable purport of it, and also to common practice, and that allowed general rule, That bail is only then proper where it stands indifferent whether the party were guilty or innocent; *sed quære.* Yet it seems to be in great measure left to the discretion of the person who has power to admit others to bail, to judge in what cases their crime is so flagrant and enormous, that they ought not to have the benefit of it.

(e) Dal. c. 114.
(f) B. Mainp. 62.
42 Assize 5.
(g) Coke B. & Mainp. c. 5.
27 Assize 12.
(h) Keilw. 165. F. Execu 147.
13 H. 7. 21.
Rastal 380.
(i) Summ. 168.
(k) 6 H. 7. 1.

Sup. sect. 44.

Of

Of thoſe who are excluded by the purview of the ſaid ſtatute, from the benefit of a replevin, in reſpect of the heinouſneſs of the crime alleged againſt them, there are four kinds. 1. Thoſe who are taken for arſon. 2. Thoſe who are taken for falſe money. 3. Thoſe who are taken for falſifying the king's ſeal. 4. Thoſe who are taken for treaſon, which touches the king himſelf.

Sect. 46. And all ſuch perſons being expreſsly declared to be irrepleviſable, it ſeems clear, That they can in no caſe be delivered out of priſon by the ſheriff, either by virtue of the ſaid writ of *homine replegiando*, or without it: Yet if a perſon at large be accuſed before a ſheriff, on a light ſuſpicion of any of theſe, or of any other of the above-mentioned crimes, which always have been agreed to be irrepleviſable, as of homicide, &c. it ſeems by no means to follow either from the words or intention of the ſtatute, That the ſheriff is bound to keep him in priſon till he be delivered by due courſe of law; but in ſuch a caſe it ſeems to be more reaſonable, that he take ſurety of him to appear in a proper court to anſwer ſuch accuſation; for it ſeems extremely harſh, and contrary to the firſt principles of the law, which favours nothing more than the liberty of the ſubject, to put an officer under a neceſſity of depriving a man of his liberty upon every accuſation of ſuch a crime, be it never ſo weakly grounded. And the words of the ſtatute, declaring perſons to be irrepleviſable for ſuch crimes, ſeem clearly applicable to ſuch only as are under an actual impriſonment, and not to thoſe who are barely accuſed; for that none can be properly ſaid to be replevied, but thoſe who, being actually impriſoned, are, upon finding pledges, delivered out of cuſtody; from which it follows, That perſons not impriſoned are not within the ſtatute: Nay, the law is ſo far from obliging a ſheriff to impriſon a man on every accuſation whatſoever of ſuch crimes, that it ſubjects him, as well as any other perſon, to an action of falſe impriſonment, if he does it without a reaſonable ground; as hath been more fully ſhewn in the chapters concerning Arreſts. But if a perſon be actually under an arreſt, either of a magiſtrate or private perſon, for any of the above-mentioned crimes, it ſeems clear from the expreſs words of the ſtatute, that the ſheriff cannot replevy him; and it ſeems, that at the common law he ought to have ſafely detained the party ſo arreſted till he could have obtained his legal deliverance. and that the perſon ſo arreſted had no remedy but by indictment or action of falſe impriſonment againſt thoſe who arreſted and delivered him to the ſheriff, on a groundleſs ſuſpicion. But how far the law may at this day be altered in this point, by the univerſal and allowed practice of ſheriffs receiving no perſon into their cuſtody, for any crime,

crime, without the warrant of ſome magiſtrate, ſhall be more fully conſidered in the next chapter.

Sect. 47. It is certain, That the court of king's bench ſtill may, and always might, bail perſons in cuſtody for any of theſe crimes, notwithſtanding this ſtatute; yet in diſcretion it ſeldom uſes this power but in very ſpecial caſes, as ſhall be ſhewn in the following part of this chapter. 2 Inſt. 189. 40 Aſſize 33. 2 Hale 129, 134, 148. 5 Modern 323.

And now I am to conſider that part of the purview of the ſaid ſtatute, which ſhews what perſons are repleviſable. 2 Hale 134, 135.

For the better underſtanding whereof, I ſhall endeavour to explain, The branch relating to perſons accuſed as principles.—That which concerns thoſe who are charged as acceſſaries.

Sect. 48. As to the firſt branch, Firſt, Thoſe who are indicted of larceny by inqueſts taken before ſheriffs, or bailiffs, by their office, that is, before ſheriffs in their torns, and lords in their leets, are expreſsly declared to be repleviſable; and according to ſome opinions, thoſe who are indicted or appealed in any other court, of any other felony, not expreſsly declared by the ſtatute to be irrepleviſable, as robbery or burglary, &c. are repleviſable by the ſheriff *ex officio*, without writ, within the equity of this clauſe: Yet the authorities which are brought to warrant this opinion, relate only to the bailment of perſons by ſuperior courts, upon indictments of appeals of ſuch crimes before ſuch courts, and do by no means prove that ſuch perſons are repleviſable by the ſheriff *ex officio*, without writ; And it is obſervable, that the writs of mainpriſe in the regiſter, for perſons indicted only of treſpaſs, before juſtices of peace, expreſsly declare, That ſuch perſons cannot be delivered out of priſon without the king's ſpecial command; from whence it ſeems to follow, That ſuch perſons are not within the common benefit of a replevin by the ſheriff, without ſome ſuch ſpecial command. And if perſons indicted of treſpaſs only, before juſtices of peace, are not within the ordinary remedy of a replevin by the ſheriff without a writ, ſurely it cannot be thought, that perſons indicted of higher crimes, and before ſuperior courts, can be any way intitled to it: However, inaſmuch as the ſaid ſtatute of Weſtminſter 1. expreſsly allows perſons indicted of larceny before the ſheriff the ordinary remedy of a replevin, and expreſsly excludes ſome other particular felonies, and ſays nothing of others, it ſeems a reaſonable conſtruction of the ſtatute, That the ſheriff might by virtue of it, either with or without writ, replevy thoſe who were indicted before himſelf, or at a court-leet, of thoſe other felonies not expreſsly exceped, as well as thoſe indicted of larceny only. And the ſtatute leaving ſuch a latitude to the ſheriff in relation to the perſons ſo indicted before himſelf, or 2 Inſt. 190. S. P. C. 74. Summary 106. Dalt. c. 114. 29 Aſſize 44. 16 Ed. 4. 5. Coke B. & Mainp. c. 5. Reg. 270. 271.

at

at a court-leet, it hath been uſual for ſuperior courts (who, though they be not within the ſtatute, have yet always had a great regard to the rules preſcribed by it) to uſe the ſame liberty in relation to ſuch crimes, and ſometimes greater, for ſuch ſpecial reaſons, and in ſuch ſpecial caſes, as ſhall be ſet forth more at large in the following part of this chapter. Yet notwithſtanding the ſtatute ſeems generally to allow the benefit of a replevin to all thoſe who are indicted of larceny, &c. without any limitation; yet it hath been always conſtrued to intend only, that ſuch perſons indicted of a grand larceny, as are of a good reputation, ſhall be repleviſable; and therefore if there be ſtrong preſumptions of their guilt, it ſeems that they ought not to be bailed; but this is in great meaſure to be left to diſcretion.

Regiſter 269. 2 Inſt. 190. Summary 100. 16 Ed. 4. 5. S. P. C. 74.

Sect. 49. Secondly, Thoſe who are impriſoned for a light ſuſpicion, are likewiſe declared by the ſtatute to be repleviſable. Yet, notwithſtanding the words are general, it hath always been taken to be the intent of them, That the perſons ſo impriſoned ought to be of a good reputation. Alſo it ſeems clear, That the ſtatute means only ſuch perſons as are impriſoned for crimes not expreſsly excepted by it from the benefit of a replevin; and therefore that this branch cannot extend to perſons impriſoned for the treaſons mentioned in the ſtatute, arſon, or homicide, but only to thoſe taken for larceny, robbery, burglary, and ſuch like felonies, &c.

Reg. 83. 269. F. N. B. 250. 2 Inſt. 190.

Sect. 50. Thirdly, Thoſe who are impriſoned for petit larceny, which does not amount to above the value of 12*d.* are alſo declared by the ſtatute to be repleviſable, "If they "have not been accuſed of ſome other larceny before:" And it ſeems to be agreed, That there is no neceſſity that ſuch perſons be of good reputation; yet upon the conſtruction of the whole ſtatute, if ſuch perſons be taken with the manner, or confeſs the fact, &c. or their crime be otherwiſe open and manifeſt, it ſeems that they ought not to be bailed; but if there be any colour or probability for their innocence, it ſeems moſt agreeable to the intention of the ſtatute to bail them.

2 Inſt. 190. Regiſter 269. F. N. B. 250. Vide ſup. ſect. 45.

Sect. 51. Fourthly, Perſons accuſed of other treſpaſs, for which a man ought not to loſe life or member, are declared by the ſtatute to be repleviſable; yet perhaps the generality of this clauſe is reſtrained by that other clauſe which declares, That perſons taken for open and manifeſt offences ſhall not be replevied, as hath been more fully ſhewn, Sect. 45.

Sect. 52. Fifthly, The appellee of an approver is alſo expreſsly declared to be bailable after the death of the approver, unleſs he be a notorious felon. But having already incidentally ſhewn, Sect. 43. in what caſes ſuch an appellee is repleviſable,

ſable, I ſhall refer the reader, for this matter, to what is there ſaid concerning it.

Sect. 53. Secondly, As to the branch concerning thoſe who are charged as acceſſaries, which is in the following words, "Thoſe who are accuſed of the receipt of thieves or felons, "or of commandment, or of force, or of aid of felony done, "ſhall be repleviſable, &c.", it is obſervable, That notwithſtanding the ſtatute mentions only thoſe who are acceſſary by receiving felons, or by commandment, force or aid, yet all thoſe who are acceſſary to a felony any (*a*) other way, as by perſuaſion or any other procurement, or abetment, have always been taken to be within the equity of it; and moſt (*b*) of the books relating to this matter ſeem generally to hold, That all acceſſaries, whether to homicide or any other felony, are bailable till the principal be convicted, or attainted; and that they are bailable even after ſuch conviction or attainder, upon their (*c*) pleading to the indictment, and do not expreſs any limitation or reſtriction, that they be of good fame, or but ſlightly ſuſpected, &c. And in the caſe (*d*) of 25 Edw. 3. 44. pl. 14. wherein a perſon appealed of murder, as having holden the deceaſed in his arms while the other killed him, was not let to mainpriſe; the reaſon given for it by the reporter is, becauſe the defendant was in a manner a principal; for that otherwiſe being an acceſſary only, he ought to have been let to mainpriſe by the intent of the ſtatute. Yet I find it made a *quære* in the year-book of 21 (*e*) Edw. 4. Whether acceſſaries are to be let to bail of courſe? And perhaps it may be more reaſonable to intend, in the above cited caſe of 25 Edw. 3. That ſuch perſon was denied the benefit of mainpriſe by reaſon of the notoriety of his guilt; for it ſeems clear, both from the (*f*) *Regiſter*, (*g*) *Fitzherbert*, and (*h*) *Dalton*, That acceſſaries to felonies are not to be bailed unleſs they be of good reputation; and if the want of a good reputation, which is at moſt but a very ſlight inducement to preſume them guilty of a particular crime, be a good cauſe to exclude them from the benefit of mainpriſe, which is given them by the general words of the ſtatute, it ſeems ſtrange, the ſtrong and unqueſtionable evidence of their guilt ſhould not much more exclude them from it; eſpecially conſidering, that it is an allowed rule, (*i*) That bail is only proper where it ſtands indifferent whether the perſon accuſed were guilty or innocent. And ſince latter ſtatutes have, in many caſes, excluded acceſſaries before the fact from the benefit of clergy, it ſeems abſurd to ſay, That perſons notoriouſly guilty of being acceſſary to the crimes which exclude them from the benefit of clergy, ſhall be admitted to bail; whereas if they had been committed to priſon on the like evidence of guilt, as principals, for felonies within the benefit of clergy, or even for inferior of-

(*a*) Reg. 270. S. P. C. 71. F. N. B. 250. Summary 100.
(*b*) S. P. C. 71. B. Mainp. 6, 11, 22, 54, 58. Summary 100. 2 Hale 135. Coke, B & Mainp. c. 5. Dyer 120. 25 Ed. 3. 42. 40 Ed. 3 42. 50 Ed. 3. 15. 29 Aſſize 44. 40 Aſſize 8.
(*c*) S. P. C. 71. Summary 100. 2 Hale 135. B. Mainp. 58, 64. 40 Ed. 3. 42. 43 Ed. 3. 17. 40 Aſſize 8. Cont. 27 Ed. 3. 94.
(*d*) F. Cor. 135.
(*e*) 21 Ed. 4. 71. B. Mainp. 78.
(*f*) Reg. 270.
(*g*) F. N. B. 250.
(*h*) Dalt. c. 124.
(*i*) Sup. f. 40.

fences of an enormous nature, they could not have had the like privilege: And therefore ſince the general words of the ſtatute concerning the repleviſing of acceſſaries, are agreed to receive the above-mentioned limitations, That they ought to be of a good reputation, and alſo to plead firſt to the indictment, if the principal be attainted; why ſhould it not be reaſonable to admit this farther reſtriction, That their guilt be not notorious? Which ſeems admitted to be implied in moſt of the other clauſes of the ſtatute, which yet are penned in as general words as that relating to acceſſaries. But this matter ſeems at this day to be put beyond all queſtion, by 31 Car. 2. c. 2. ſ. 21. By which it is recited, "That many times perſons charged with petit treaſon, or felony, or as acceſſaries thereunto, are committed on ſuſpicion only, whereupon they are bailable or not, according as the circumſtances making out that ſuſpicion, are more or leſs weighty, &c." And thereupon it is enacted, "That no perſon ſo charged, ſhall "be removed or bailed by virtue of that act, in other manner "than he might before." From which it ſeems clearly to follow, That where there are ſtrong preſumptions of guilt againſt a perſon ſo charged, he neither was bailable before that ſtatute, nor is now bailable by virtue of it.

As to the ſecond point, *viz.*. In what caſes bail is grantable by a juſtice of peace, I ſhall endeavour to ſhew, How far it is grantable by conſtruction of the ſtatutes and commiſſion, which gives juſtices of peace a juriſdiction over certain crimes, without ſaying any thing concerning the power of granting bail; and, How far it is grantable by the ſtatutes ſpecially relating to the power of granting bail.

Sect. 54. As to the firſt point it ſeems, That wherever juſtices of peace have juriſdiction of a crime, they may bail the perſon indicted before them of ſuch crime, upon ſuch circumſtances for which other courts may bail the perſon ſo indicted before them; for that it ſeems to be a good 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 crime. And, upon this ground, it ſeems clear, That any two juſtices of peace, whereof one is of the *quorum*, may of common right bail perſons indicted before the ſeſſions of juſtices of peace, for that any two ſuch juſtices may hear and determine the indictment. (a) Alſo it hath been holden, That any one juſtice of peace hath the like power in relation to perſons ſo indicted, becauſe every ſuch juſtice, being a judge of the court which is to determine the offence, ſeems conſequently to have a diſcretionary power of judging whether it be bailable, and of admitting the party to bail. And this ſeems to be implied by the ſtatute of 1 Rich. 3. c. 3. which giving one juſtice of peace power

Summary 105. 106. Coke, B. & Mainp. 6. Lamb. 347, 348.

(a) See the books above cited. Crompton 197, 234, 235. Summary 105.

power of bailing perſons arreſted for felony, "In like form as if ſuch perſons had been indicted at ſeſſions," clearly ſuppoſes, that if ſuch perſons had been indicted at ſeſſions, they might have been bailed by any one juſtice: And if any one juſtice of peace had ſuch power of bailing the perſons ſo indicted at ſeſſions, before the ſtatutes ſpecially relating to the power of juſtices of peace in granting bail, it ſeems, That he ſtill has 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. Alſo it ſeems to be agreed, That any one juſtice of peace 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 Hale 137. B. 1. c. 63. ſect. 19.

Sect. 55. As to the ſecond point, *viz.* How far bail is grantable by juſtices of peace, by virtue of the ſtatutes ſpecially relating to their power of granting bail, it is recited by 1 Rich. 3. c. 3. "That divers perſons had been daily arreſted and impriſoned for ſuſpicion of felony, ſometime of malice, and ſometime of a light ſuſpicion, and ſo kept in priſon, without bail or mainprize, to their great vexation and trouble:" And thereupon it is enacted, "That every juſtice of peace in "every ſhire, city or town, may, by his or their diſcretion, "let ſuch priſoners and perſons ſo arreſted to bail or main-"prize, in like form as though the ſame priſoners, or perſons, "were indicted thereof of record, before the ſame juſtices at "their ſeſſions." 2 Hale 137.

Sect. 56. But it is recited by 3 Hen. 7. c. 3. "That by colour of the ſaid ſtatute of 1 Rich. 3. divers perſons which were not mainpernable, were oftentimes let to bail and mainprize by juſtices of peace, againſt the due form of law, whereby many felons had eſcaped, to the great diſpleaſure of the king, and annoyance of his liege people;" and thereupon it is enacted, "That the juſtices of peace in every ſhire, city, "and town, or two of them at leaſt, whereof one to be of "the *quorum*, have authority and power to let any ſuch "priſoners, or perſons mainpernable by law, that have been "impriſoned within their ſeveral counties, city, or town, to "bail or mainprize, unto their next general ſeſſions, or unto "their next general gaol-delivery of the ſame gaols, in every "ſhire, city, or town, as well within franchiſes as without, "where any gaols be or hereafter ſhall be: And that the ſaid "juſtices of peace, or one of them, ſo taking any ſuch bail or 2 Hale 137.

" mainprize, do certify the ſame at the next general ſeſſions " of the peace, or the next general gaol-delivery of any ſuch " gaol, in every ſuch county, city, or town, next following " after any ſuch bail or mainprize ſo taken; on pain to forfeit " to the king for every default thereupon recorded, 10 *l.* And " that the aforeſaid act, giving authority and power in the " premiſſes, to any juſtice of the peace by himſelf, be in that " behalf utterly void, and of none effect."

2 Hale 137. *Sect.* 57. And it is recited by 1 & 2 Ph. and Mary, c. 13. " That ſince the ſaid ſtatute of 3 Hen. 7. one juſtice of peace, in the name of himſelf, and one other of the juſtices his companion, not making the ſaid juſtice party nor privy unto the caſe wherefore the priſoner ſhould be bailed, had oftentimes by ſiniſter labour and means, ſet at large the greateſt and notableſt offenders, ſuch as be not repleviſable by the laws of this realm; and yet the rather to hide their affections in that behalf, had ſignified the cauſe of their apprehenſion to be only for ſuſpicion of felony; whereby the ſaid offenders had and did daily eſcape puniſhment, &c." And thereupon it is enacted, " That from the firſt day of April then " next coming, no juſtice or juſtices of peace ſhall let to bail " or mainprize any ſuch perſon or perſons, who for any of- " fence or offences, by them or any of them committed, be " declared not to be repleviſed, or be forbidden to be repleviſed " or bailed by the above-mentioned ſtatute of Weſtminſter 1."

Sect. 58. And it is further enacted, par. 3. " That any " perſon or perſons arreſted for manſlaughter or felony, or " ſuſpicion of manſlaughter or felony, being bailable by the " law, ſhall not be let to bail or mainprize by any juſtices of " peace, if it be not in open ſeſſions, except it be by two " juſtices of peace at the leaſt, whereof one to be of the " *quorum*, and the ſame juſtices to be preſent together at the " time of the ſaid bailment or mainprize; which bailment or " mainprize 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 ſaid perſon or perſons " ſhall be arreſted or ſuſpected."

Sect. 59. And it is farther enacted, par. 4. " That the " ſaid juſtices, or one of them, being of the *quorum*, when " any ſuch priſoner is brought before them for any man- " ſlaughter or felony, before any bailment or mainprize, 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 ſame bailment; which ſaid examination, to- " gether with the ſaid bailment, the ſaid juſtices ſhall certify " at the next general gaol-delivery to be holden within the " limits of their commiſſion."

Sect.

Sect. 60. And it is farther enacted, par. 5. "That the "ſaid juſtices ſhall have authority to bind all ſuch by recog- "nizance or obligation, as do declare any thing material to "prove the ſaid offences or felonies, to appear at the next "general gaol-delivery to be holden within the county, city, "or town corporate, where the trial thereof ſhall be, and "then and there to give evidence againſt the party at the time "of his trial, and ſhall certify as well the ſame evidence, as "ſuch bond or bonds in writing as he ſhall take, at or before "the time of his ſaid trial thereof to be had or made. And "in caſe any juſtice of peace of *quorum* ſhall offend in any "thing, contrary to the true intent and meaning of this act; "the juſtices of gaol-delivery, where ſuch offence ſhall hap- "pen to be committed, upon due proof thereof, by examina- "tion before them, ſhall for every ſuch offence ſet ſuch fine "on every of the ſame juſtices, as the ſame juſtices of gaol- "delivery ſhall think meet, &c."

Sect. 61. But it is provided, par. 6. "That juſtices of "peace, and coroners, within the city of London, and the "county of Middleſex, and in other cities, boroughs, and "towns corporate, ſhall, within their ſeveral juriſdictions, "have authority to let to bail felons and priſoners, in ſuch "manner and form as they had been before accuſtomed; and "alſo ſhall take examinations and bonds, as is aforeſaid, "upon every bailment by them made, and certify every ſuch "bailment, bond and examination, at the next general gaol- "delivery, &c."

From theſe ſtatutes the following particulars appear moſt obſervable.

Sect. 62. Firſt, That it ſeems clearly to be implied by the above mentioned ſtatute of 1 Rich. 3. c. 3. which authoriſed any one juſtice of peace to bail a perſon on a ſlight ſuſpicion of felony, in like manner as if ſuch perſon had been indicted at ſeſſions, That before that ſtatute juſtices of peace could bail thoſe only for felony, who had been indicted of it before them. And by parity of reaſon it ſeems alſo to follow, That they had no power to bail perſons for any other crime before ſuch indictment, unleſs it were 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: And therefore it ſeems difficult to maintain the power of one juſtice of the peace to bail a perſon for any other crime, unleſs it be by ſome ſtatute limited to the conuſance of one juſtice, or the party have been indicted for it at ſeſſions, becauſe the commiſſion in giving a juſtice a general juriſdiction over any crime, ſhall be conſtrued ſo far only to give him a power to bail a perſon accuſed of it, as it makes him a judge

Coke, bail and mainp. c. 6. 2 Hale 137, 138.

Supra ſect. 54.

of it, which he cannot be till it come regularly before him by indictment; and the ſtatutes above-mentioned ſpecially relating to the power of juſtices of peace, in granting bail, expreſsly require the conuſance of two juſtices.

Sect. 63. Secondly, That juſtices of peace have no power to bail any perſon not repleviſable by the above mentioned ſtatute of Weſtminſter 1. c. 15. from whence it ſeems to follow, That a perſon under the actual commitment or arreſt of any other magiſtrate, or even of a private perſon, for any crime declared to be irrepleviſable by that ſtatute, as treaſon againſt the king's perſon, arſon, &c. cannot be delivered from his impriſonment by the bailment of any juſtice of peace. Yet if a perſon at large be only accuſed of any ſuch crime, on a ſlight ſuſpicion, before a juſtice of peace, it ſeems that the juſtice ought not to commit him, but to take ſurety of him to appear before a proper court, as hath been more fully ſhewn in relation to the ſheriff, ſection 46. And inaſmuch as the above mentioned ſtatute of 1 & 2 Ph. and Mary, c. 13. expreſsly mentions the bailing of perſons for manſlaughter, as well as for other felonies, there can be no doubt, but that juſtices of peace may, by force thereof, ſafely bail any perſon impriſoned on a ſlight ſuſpicion of a fact, clearly appearing to be no higher an offence than manſlaughter, and much more if it appear to amount to no more than homicide by miſadventure, or in ſelf-defence. Yet it ſeems to be agreed, That ſuch juſtices muſt, at their peril, take care that the offence in truth amounted not to murder; and that they ought in no caſe to bail any perſon who manifeſtly appears to have been guilty of any of the homicides above mentioned, either by his own confeſſion, or the notoriety of the fact, not only becauſe the above mentioned ſtatute of Weſtminſter 1. c. 15. which is the pattern preſcribed by 1 & 2 Ph. and Mary, for the direction of juſtices of peace in relation to bail, expreſsly excludes all perſons from the benefit of it which are guilty of open and manifeſt offences; but alſo becauſe the ſtatute of Glouceſter, c. 9. is expreſs, That all perſons who are guilty of homicide, by miſadventure or in ſelf-defence, ſhall be kept in priſon till the next coming of the juſtices itinerant, or of gaol-delivery.

2 Hale 138, 139, 140.

Vide ſup. f. 33, 34.
Sed vide 2 Hale 138.

1 Roll 268. Dalton c. 114. Summary 99. Lambard 346, 347.

Sup. ſect. 44, 45.
2 Inſt. 314, 315.

Sect. 64. Thirdly, That the chief import of theſe ſtatutes is to ſhew in what manner perſons are to be bailed by juſtices of peace, and not to declare what perſons are bailable by them; in relation to which matter, the old rules of the ſtatute of Weſtminſter 1. are generally ſtill to be followed, which extending only to criminal offences puniſhable in the ordinary way by indictment before the ſheriff, &c. give no power to bail perſons taken on proceſs in civil actions, or for contempts to ſuperior courts, as by proceſs of rebellion out of chancery.

chancery. And therefore by a reaſonable conſtruction of all theſe ſtatutes, juſtices of peace have no power in any ſuch caſes to admit any perſon to bail.

Dalton c. 114. Crompton 152. Summary 105.

Sect. 65. As to the third point, *viz.* Where bail is grantable by the juſtices of gaol-delivery. It ſeems to be clearly ſettled (*a*) at this day, That ſuch juſtices may bail any perſon convicted before them of homicide by miſadventure, or in ſelf-defence, the better to enable him to purchaſe his pardon. And if a perſon convicted of manſlaughter before ſuch juſtices, purchaſe his pardon, it ſeems, that they may (*b*) bail him, even after their ſeſſions is determined, till the next ſeſſions of gaol-delivery, that he may come in then and plead his pardon, for that the power of ſuch juſtices ſeems (*c*) to continue for ſuch purpoſes after their ſeſſions. Alſo (*d*) if a man be convicted of manſlaughter before ſuch juſtices, againſt plain evidence, it is ſaid that they may bail him till the next ſeſſions of gaol delivery, in order to purchaſe his pardon in the mean time. But it ſeems, (*e*) That juſtices of peace have no power to bail a man in any of theſe caſes, becauſe they are tied up for the moſt part to the rules preſcribed by the above-mentioned ſtatute of Weſtminſter 1. But this ſtatute not (*f*) extending to juſtices of gaol-delivery, ſeems to leave them a diſcretionary power in thoſe caſes wherein it reſtrains the ſheriff from admitting perſons to bail. And therefore if a defendant in an appeal of death, plead an excommunication in diſability of the plaintiff, it ſeems to be holden by Staundford, (*g*) That ſuch juſtices may bail the defendant from day to day, till the plaintiff ſhall be abſolved, for that otherwiſe the defendant might lie in priſon for ever, without any opportunity of coming to his trial. But it is obſervable, That the books (*h*) which are cited for the maintenance of this opinion, ſpeak only of an appeal of robbery: Yet if juſtices of gaol-delivery have ſuch power of bailing perſons in the caſe of death, on the circumſtances above mentioned, as it ſeems agreed in the caſes above-cited that they have, I do not find any reaſon why they may not, as well upon other ſuch like circumſtances, bail perſons indicted or appealed before them of any other crime, in ſuch manner as the court of king's bench may do, as ſhall be more fully ſhewn under the next point.

(*a*) Crom. 154. 2 Hale 129, 131. Summary 101, 104. 105. F. Corone 361. Dalton c. 114. F. N. B. 246. S. P. C. 15, 16. Con. 25 Ed. 3 42. S. P. C. 74. F. Corone 354. B. Mainp. 1.

(*b*) Crom. 153. B. Mainp. 94. Summary 101.

(*c*) Vide ſup. c. 6. ſect. 7.

(*d*) Crom. 154.

(*e*) Summary 104. 105. Vide ſup. ſect. 63. Cont. Dalton c. 114.

(*f*) 2 Inſt. 185. 186.

(*g*) S. P. C. 72.

(*h*) F. Mainp. 6. 3 Aſſize 12. Salkeld 61. ſeems contrary.

As to the fourth point, *viz.* Where bail is grantable by the courts of Weſtminſter-hall, I ſhall endeavour to ſhew, Firſt, Where it is grantable by the court of king's bench. Secondly, Where by the other courts of Weſtminſter-hall.

As to the firſt of theſe points I ſhall conſider, Firſt, Where bail is grantable by the court of king's bench, to a perſon impriſoned by the king's ſpecial command, or by the order of his

privy council. Secondly, Where to a perſon committed by either houſe of parliament. Thirdly, Where to one committed by the court of chancery. Fourthly, Where to one committed by an inferior court of record. Fifthly, Where to one expreſsly excluded by the above-mentioned ſtatute of Weſtminſter 1. c. 15. from the common benefit of a replevin by the ſheriff.

Sect. 66. As to the firſt of theſe particulars, *viz.* Where bail is grantable by the court of king's bench to a perſon impriſoned by the king's ſpecial command, or by the order of the privy council. I do not find but that wherever (*a*) a commitment by the privy council hath ſpecially expreſſed the crime for which the party hath been committed, this court has always admitted him to bail, on the like circumſtances on which, in diſcretion, it will grant bail on other commitments. (*b*) And wherever it has appeared, that perſons have been impriſoned by colour of an uſurped authority, pretended to be derived from any patent whatſoever, contrary to law, it ſeems that the ſaid court hath always diſcharged the perſons ſo impriſoned, without bail. But there have been formerly many opinions, (*c*) That perſons committed by the ſpecial command of the king, or of his privy council, without expreſſing any other cauſe of the commitment, were not bailable by any court whatſoever, without ſome intimation of the king's conſent to ſuch bailment, by letter from the privy council, or otherwiſe. And a diſtinction (*d*) was taken by ſome between a commitment by one of the privy council, and a commitment by the whole body; and that the former ought indeed to ſet forth ſome other cauſe of the commitment beſides the command of the perſon who made it; but that the latter needed not any.

(*a*) 5 Mod. 78. 3 Sid. 143. 1 And. 297. 2 Leonard 70. 1 Burrow 460. Shebbear's caſe. Palmer 559.

(*b*) 1 Leon. 70. 1 And. 297. 2 Wilſon 151. Wilkes' caſe

(*c*) 33 H. 6 28. 1 And. 298. 3 Roll 134. 392. 219. Cro. Mo. 839. 1 And. 158. See the arguments on the habeas corpus concerning loans 81, 82, &c.

(*d*) 1 Leon. 70, 71.

Sect. 67. But this matter came afterwards to be very ſolemnly debated in the famous caſe (*e*) of Sir John Corbet and others, who being impriſoned by a warrant from the privy council, about the third year of the reign of king Charles the Firſt, moved the court of king's bench to admit them to bail upon their *habeas corpus*; whereupon it was returned, that they were detained in the priſon of the Fleet by the ſpecial command of the king, ſignified to the warden by a warrant of ſome of the members of the privy council, in which warrant no other cauſe of the impriſonment was contained but ſuch ſpecial command: And it was ſtrongly urged on the behalf of the priſoners, That ſuch impriſonment is againſt the ſtatute of Magna Charta, c. 29. which provides, "That no freeman "ſhall be taken or impriſoned, and that the king will not paſs "upon him, nor condemn him, but by the judgment of his "peers, or the law of the land;" and alſo againſt many other ſtatutes (*f*) made in affirmance of Magna Charta, by which it is ordained, "That no man ſhall be taken by petition,

(*e*) See the arguments on the habeas corpus concerning loans, and Ruſhworth's col. F. 458, &c.

(*f*) 25 Ed. 3. 4. 28 Ed. 3. 3. 42 Ed. 3. 3.

" tion, or ſuggeſtion, made to the king or to his council, " unleſs it be by indictment or preſentment, or by proceſs by " original writ; and that no man ſhall be impriſoned, &c. " without being brought to anſwer by due proceſs of law; " nor be put to anſwer without preſentment before juſtices, or " matter of record, or by due proceſs, and writ original." And it was argued, That the liberty of the ſubject would be precarious, and lie at the king's mercy, if perſons who happen to incur his diſpleaſure, for what perhaps the law eſteems no crime, ſhould by means of ſuch a commitment be liable to be for ever impriſoned, without any poſſibility of redreſs; and that it ſeems inconſiſtent with natural juſtice to expoſe a man to ſo ſevere a puniſhment for a ſuppoſed crime, alleged againſt him, without giving him an opportunity of clearing himſelf by a lawful trial. And it was farther urged, That according to the opinion of Sir John Markham, in the time of king Edward the Fourth, the king could not ſo much as arreſt a man upon ſuſpicion of treaſon or felony, as any of his ſubjects may; for that if the king ſhould do wrong, the party could have no action againſt him. Alſo it was inſiſted, That the preamble of the ſtatute of Weſtminſter 1. c. 5. which declares, " That perſons impriſoned by the king's command have al- " ways been taken to be irrepleviſable;" muſt be intended only of a replevin by the common writ *de homine replegiando*, or by the ſheriff *ex officio* without writ, for that it ſpeaks only of a replevin by ſheriffs and others; and therefore ſhall not be taken to extend to ſuperior courts. And it was never thought, that the court of king's bench was reſtrained by it from bailing perſons impriſoned for homicide; and yet all ſuch are equally declared by the ſtatute to be irrepleviſable. Many precedents, alſo, were alleged, whereby it appeared, That perſons committed by the king's ſpecial command had been diſcharged upon writs of *habeas corpus*.

1 H. 7. 4. 2 Hale 131.

Sect. 68. But on the other ſide it was argued, That ſuch commitment could not reaſonably be intended to be againſt the purview of the ſtatutes above-cited, inaſmuch as the ſaid ſtatute of Weſtminſter 1. c 15. which was made in the very next reign after that in which the ſtatute of Magna Charta was made, it was declared to be a ſettled and undoubted point, That perſons committed by the command of the king, which, as it ſeems to be agreed, is to be underſtood of the king's ſpecial, abſolute, and extrajudicial command, are not repleviſable: And it cannot be imagined that ſo high a regard ſhould be paid to ſuch a commitment, if it were thought to be illegal, and contrary to Magna Charta. And it was inſiſted, That commitments of this kind have often been allowed by the courts (*a*) of juſtice, and are mentioned by authors (*b*) of the beſt credit ſince the above-cited ſtatutes, without any the leaſt objection to their legality, and as depriving the party im-

Vide ſup. ſect. 36.

(*a*) Vide ſup. ſect. 66.
(*b*) S. P. C. 72. 7. F. N. B. 63

priſoned by them from the common benefit of the writ of replevin. And it was alſo ſtrongly urged, That there are often ſecret cauſes not fit to be divulged, which may make it neceſſary for the ſafety of the ſtate, in ſome particular circumſtances, to reſtrain ſome perſons from their liberty for a certain time, and that the king, who is entirely entruſted with the management of ſtate-affairs, ſhall be preſumed always to act for the publick good; and that it is immodeſt for any of his courts to queſtion the juſtice of his proceedings of this kind, which the law ſeems wholly to have left to his wiſdom, or to ſuffer a ſuggeſtion that he abuſes his prerogative to cover oppreſſion; and that the ſubject is in no danger of perpetual impriſonment on this account, for that the court of king's bench hath always uſed a diſcretionary power over ſuch commitments, as well as all others, and therefore upon ſpecial circumſtances of hardſhip, may admit perſons under ſuch commitments to bail; but that where there was nothing extraordinary in the caſe, it hath been the general courſe of the court not to do it without a ſpecial order from the council for it, as appeared from the examination of moſt of the precedents relating to this matter. And therefore in the caſe above-mentioned the court of king's bench was unanimous in opinion, That Sir John Corbet, and the other gentlemen ſo committed by the king's ſpecial command, as is above-mentioned, had no right, *prima facie*, to demand the benefit of bail, without the conſent of the council, and therefore remanded them.

Rush. Col. part 1. fol. 510.

7 Roll 219. See the arguments on the habeas corpus above mentioned, page 81.

Sect. 69. But this matter being afterwards conſidered in parliament, and it being the general opinion, That the chief reaſon why thoſe gentlemen incurred the king's diſpleaſure was their refuſal to pay the loans, which, as they inſiſted, were demanded of them without ſufficient authority; and it being evident, That if there were no certain legal remedy for the liberty of the ſubject againſt ſuch a ſtrain of the prerogative, no man could be ſafe in maintaining his property, either in parliament, or out of it, againſt a diſputed demand from the crown, but would be liable to a diſcretionary impriſonment, and that under colour of law, without any certain redreſs from the law; it was thought neceſſary on this occaſion to draw up the famous petition of right, which was afterwards aſſented to by the king, wherein, among other things, the lords and commons complain to the king, "That againſt the tenor of the above (*a*) cited ſtatutes, divers ſubjects had then of late been impriſoned, without any cauſe ſhewed; and when for their deliverance they had been brought before juſtices by writs of *habeas corpus*, there to undergo and receive as the court ſhould order; and their keepers commanded to certify the cauſes of their detainer, no cauſe had been certified, but that they were detained by his majeſty's ſpecial command ſignified by the lords of his privy council, and yet were returned

Rush. Col. 3. 428. 473. 499, &c.

Rush. Col. par. 1. fol. 613.

(*a*) Supra ſec. 66.

turned back to ſeveral priſons, without being charged with any thing to which they might make anſwer according to the law: And thereupon the ſaid lords and commons, among other things, humbly pray, That no freeman, in any ſuch manner as is before mentioned, be impriſoned, or detained, &c."

Sect. 70. And it ſeems to have been generally agreed, ſince the time of this petition, That wherever any commitment by the privy council hath not expreſſed, with ſome convenient certainty, the crime alleged againſt the party, he ought to be bailed upon his *habeas corpus*.

Vid. C. Car. 507. 579. 593. 2 Hale 144, 145. Vide ſ. 16. notes.

Sect. 71. And for the greater ſecurity of the liberty of the ſubject, againſt commitments by the command of the king, or of his privy council, it is farther provided and enacted, by 16 Car. 1. c. 10. ſ. 8. "That if any perſon ſhall be committed, reſtrained of his liberty, or ſuffer impriſonment by "the command or warrant of the king's majeſty, in his own "perſon, or by the command or warrant of the council-"board, or of any of the lords or others of his majeſty's "privy council; That in every ſuch caſe, every ſuch perſon "upon demand or motion to the judges of the king's bench "or common pleas, in open court, ſhall without delay, upon "any pretence whatſoever, for the ordinary fees uſually paid "for the ſame, have forthwith granted unto him a writ of "*habeas corpus*, to be directed generally unto all and every "ſheriff, gaoler, miniſter, officer, or other perſon in whoſe "cuſtody the party committed or reſtrained ſhall be, and ſuch "ſheriff, &c. ſhall, at the return of the ſaid writ, and ac-"cording to the command thereof, on due and convenient "notice thereof given unto him, at the charge of the party "who requires or procures ſuch writ, and on ſecurity by his "own bond given, to pay the charges of carrying back the "priſoner, if he ſhall be remanded by the court, &c. which "charges ſhall be ordered by the court, bring or cauſe to be "brought the body of the party before the judges of the court, "from whence the ſame writ ſhall iſſue, in open court, and "ſhall then likewiſe certify the true cauſe of ſuch his detainer "or impriſonment, and thereupon the court within three "court-days after ſuch return made and delivered (*a*) in open "court ſhall proceed to examine and determine whether the "cauſe of ſuch commitment, appearing upon the ſaid return, "be juſt and legal or not, and ſhall thereupon do what to "juſtice ſhall appertain, either by delivering, bailing, or re-"manding the priſoner: And if any thing ſhall be otherwiſe "wilfully done, or omitted to be done by any judge, juſtice, "officer, or other perſon aforementioned, contrary to the true "meaning hereof, That then ſuch perſon ſo offending ſhall "forfeit to the party grieved, his treble damages, &c."

See Lord Camden's opinion upon the effect of this ſtatute, as to its giving an implied power to ſecretaries of ſtate and privy counſellors to commit, &c. 11 State Trials 319.

(*a*) See 1 Sid. 78. 1 Keble 305.

Sect. 72. But it is provided, par. 9. "That the above-"recited clauſe ſhall extend only to the warrants and direc-

"tions

" tions of the council-board, and to the commitments, re-
" ſtraints, and impriſonments of any perſon or perſons, made,
" commanded or awarded, by the king's majeſty, his heirs or
" ſucceſſors, in their own perſon, or by the lords and others
" of the privy council, and every one of them."

Regina v. Paty, Ld Ray. 1105. Chancey's Caſe, 12 Rep. 83. Buſhell's Caſe, Ld Vaugh. 135. Ld Shaftſbury's Caſe, 1 Mod. 144. Dr. Shebbear's Caſe, 1 Burrow 460. and the caſes cited in the following note.

Sect. 73. As to the ſecond particular, *viz.* Where bail is grantable by the court of king's bench, to a perſon impriſoned by either houſe of parliament, There can be no doubt but that the higheſt regard is to be paid to all the proceedings of either of thoſe houſes, and that wherever the contrary does not plainly and expreſsly appear, it ſhall be preſumed that they act within their juriſdiction, and agreeably to the uſages of parliament, and the rules of law and juſtice: And therefore, wherever it ſtands indifferent upon the return of a *habeas corpus*, whether a commitment by either of thoſe houſes were ſtrictly legal or not, and the parliament be ſtill ſitting, I can find no precedent that the priſoner hath been bailed by the court of king's bench. And it cannot but be expected, that thoſe houſes would be apt to reſent an attempt of this kind, which might ſeem to carry with it an implicit reflection on their honour, as unjuſtly depriving a ſubject of his liberty, and putting him under a neceſſity of demanding juſtice from another court, by unreaſonably refuſing to reſtore him to it; which ſurely ſhall never be intended, where their proceedings are capable of a more favourable conſtruction. And therefore in the Lord Shaftſbury's caſe, who, upon his *habeas corpus* in the king's bench, was returned to have been committed by the houſe of lords for his high contempt committed againſt that houſe, the court would not take notice of any exceptions againſt the form of the commitment, as that it was too general, and did not expreſs the nature of the contempt, or in what place it was committed, &c. for that it ſhall be preſumed, That it was ſuch for which the lords might lawfully make ſuch an order, and no other court ſhall preſcribe to them in what form they ought to make it. But if it be demanded, in caſe a ſubject ſhould be committed by either of thoſe houſes, for a matter manifeſtly out of their juriſdiction, what remedy can he have? I anſwer, That it cannot well be imagined that the law, which favours nothing more than the liberty of the ſubject, ſhould give us a remedy againſt commitments by the king himſelf, appearing to be illegal, and yet give us no manner of redreſs againſt a commitment by our fellow ſubjects, equally appearing to be unwarranted. But as this is a caſe, which, I am perſuaded, will never happen, it ſeems needleſs over nicely to examine it.

THE doctrine contained in this ſection has been confirmed in ſeveral memorable inſtances. In Eaſter Term, 24 Geo. 2. the Honourable Alexander Murray was committed to Newgate, by the houſe

houſe of commons for a contempt of priviledge. A habeas corpus iſſued; and Wright, Deniſon, and Foſter were clear that the court of king's bench had no juriſdiction in the caſe; for that both houſes of parliament, in concurrence with every court of record, even the loweſt, has an excluſive right to commit for a contempt. Lord Holt alſo thought the right exiſted for contempts committed *in the face* of the houſe. 1 Wilſon 299.—In Eaſter Term, 3 Geo. 3. C. B. on Mr. Wilkes's caſe (vide infra c. 16.) Pratt, C. J. and the whole court, declared they had no power to decide upon the priviledges of parliament.—Lord Camden, in the caſe of Entick v. Carrington, Mich. 6 Geo. 3. 11 St. Tr. 317. ſays, the rights of that aſſembly (viz. houſe of commons) are original and ſelf-created; they are paramount to our juriſdiction, and above the reach of injunction, prohibition, or error.—And in Eaſter Term, 11 Geo. 3. Braſs Croſby, eſq; lord mayor of London and a member of parliament was brought to the common pleas, on a habeas corpus at common law, to be releaſed from a commitment by virtue of the ſpeaker's warrant for a contempt. De Grey C. J. delivered the unanimous opinion of the court, that the houſe of commons are the excluſive arbiters of their own peculiar priviledges, 4 Inſt. 47. Dyer 59. that their power of committing is inherent from the very nature of their inſtitution. 3 Jac. 1. c. 13. Aſhby and White, 8 St. Tr. 90. Ld Raymond 938. that their adjudication is tantamount to a conviction and their commitment equal to an execution, and that no court can diſcharge a priſoner committed in execution by another court, Cro. Car. 168. His Lordſhip was accordingly remanded, 2 Black. 755. 3 Wilſon 188.

Sect. 74. However it ſeems agreed, That a perſon committed for a contempt, by the order of either houſe of parliament, may be diſcharged by the court of king's bench after a diſſolution or prorogation of the parliament, whether he were committed during the ſeſſions, or afterwards; for that all the orders of parliament are determined by a diſſolution, or prorogation; and all matters before either houſe muſt be commenced a-new at the next parliament, except only in the caſe of a writ of error: And if the ſubject ſhould be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could ſay when his impriſonment would end.

Skinner 56, 163. 527.

1 Keb. 871, 887, 888. 1 Sid. 245. 1 Levinz 165. 1 Modern 155. 157.

Sect. 75. But it is holden in Shower's Reports, that a lord committed by the houſe of lords, on an impeachment of treaſon, and afterwards pardoned, cannot be diſcharged by the court of king's bench, becauſe the impeachment being in a ſuperior court, the pardon muſt be pleaded there; and the commitment being by the lords, the king's bench cannot take conuſance of it. Yet it ſeems to have been taken for granted in the Lord Stafford's caſe, That the court of king's bench may, in their diſcretion, bail a lord upon an impeachment of high treaſon, which in that caſe they refuſed to do, not as a matter out of their power, but as a thing which they were not bound to do, and improper on conſideration of the whole circumſtances. And though the reaſons above cited from Shower's Reports ſeem proper to prove, That the court of king's bench cannot diſcharge a priſoner from any impeachment in parliament whatſoever; yet they ſeem by no means to prove, that they cannot bail him. But it is obſervable, That it doth not clearly appear, from either of the above-mentioned reports, whether any parliament were ſitting at the times of the motion, for ſuch diſcharge and bailment, or not; but it is certainly moſt likely to prevail in ſuch a motion, when no parliament is ſitting,

Shower 109.

Raym. 381. Skinner 56, 162, 163. Carthew 132, 133. Salkeld 503. The Earl of Caſtlemain was committed by the Commons, 1 W. & M. for high treaſon, and bailed by the King's Bench. 4 State Trials 397.

ſitting, nor likely ſoon to ſit, and after the party hath been long in priſon; becauſe, in ſuch a caſe, if he ſhould not be bailed, he might be perpetually impriſoned for a crime, without any opportunity of making his defence.

Sect. 76. As to the third particular, *viz.* Where bail is grantable by the king's bench, to a perſon committed by the court of chancery, little is ſaid in the books, except in the reign of king James the Firſt, at the time when Sir Edward Coke was chief juſtice, when this matter was very much litigated, and occaſioned great heats between the two courts, and ſeveral perſons committed to the Fleet by the chancellor, were bailed by the court of king's bench, upon exceptions to the generality of the form of the commitments, as (*a*) not ſhewing the time of the commitment, or ſetting (*b*) forth only the command of the lord chancellor as the ground of the impriſonment, without mentioning any crime at all, or mentioning the crime in (*c*) general terms, as for a contempt to the court of chancery, without ſhewing what the contempt was, or at what time committed: And one (*d*) Glanvil, who was generally committed by the command of the lord chancellor, without ſetting forth any cauſe of ſuch command, ſeems to have been bailed upon examination of the merits of the decree, for diſobeying whereof he was in truth committed; whereby it appeared that the decree related to a matter before adjudged at the common law, which was thought contrary to the purport of the (*e*) ſtatutes of 27 Edw. 3. c. 1. and 4 Hen. 4. c. 23. But this proceeding being reſented by the lord chancellor, the ſaid Glanvil was afterwards recommitted by him for the ſame matter, and yet was afterwards, on another *habeas corpus*, bailed the ſecond time by the court of king's bench: But I have not met with any precedent of this kind of late years; and how far the long diſuſe of ſuch like proceedings may have leſſened the authority of the caſes above-mentioned, may deſerve to be conſidered. However, it cannot but be expected, That the ſuperior courts will pay the higheſt regard to one another's proceedings, and be ready to preſume, That they are agreeable to law, unleſs the contrary appear, or the caſe be very particular and extraordinary, which may perhaps reaſonably induce them, in ſome circumſtances, to make exceptions from thoſe general rules, which in common caſes uſually govern their diſcretion. But what caſe in particular may be ſaid to be of ſo extraordinary a nature, it would be needleſs and preſumptuous for me to endeavour to examine. But as to the caſe above-mentioned, which was formerly ſo much litigated, concerning the chancery's giving relief againſt a judgment at law, ſince it ſeems to be ſettled at this day, that the chancery may, in ſome caſes, give relief againſt the unequitable uſe of ſuch a judgment, eſpecially as to

(*a*) 1 Roll 192. 218.
(*b*) Moor 839. 1 Roll 219.
(*c*) 1 Roll 192. 218. 219.
(*d*) 1 Roll 111, 219. Moor 838. 2 Bulſt. 301. C. Jac. 343. like Caſe. 3 Bulſt. 115. 1 Roll 277.
(*e*) Vide 1 Roll 277. 3 Bulſt. 115. Daliſon 81. 3 Leonard 18.

Vaughan 130. 340. ſeems contrary.

to a point not relievable by law; whenever it ſtands indifferent whether the matter examined by chancery, after a judgment at law, be of ſuch a nature as is proper for relief in chancery, or not; it is not probable, That any other court of Weſtminſter-hall will eaſily preſume that it is not, when the chancellor, who is the proper judge, hath determined that it is: And agreeably hereto it hath been adjudged, That a commitment from chancery, for diſobedience to a decree, is good, without ſhewing what the decree was.

Vide B. 1. c. 19. ſ. 17.

1 Modern 155. Moor 840.

Sect. 77. As to the fourth particular, *viz.* Where bail is grantable by the court of king's bench to one committed by an inferior court of record. It ſeems, That this court, having the ſupreme controul of all inferior courts, may, in diſcretion, on conſideration of the whole circumſtances of any caſe whatſoever, bail any perſon who ſhall appear to have been unjuſtly or hardly deprived of his liberty by any inferior court. And therefore, wherever it ſhall clearly and expreſsly appear, that a perſon hath been committed by any ſuch court, for a matter which either is in truth no crime at all, or if it be a crime, is not within the juriſdiction of ſuch court, there can be no doubt but that it is a proper motion to the king's bench to bail him. But in what other caſes in particular one may hope for the like ſucceſs in a motion of this kind, it ſeems difficult to determine (1); for that every ſuch caſe depends upon its particular circumſtances, which have great weight with the court in its determinations of this kind, in which it is in great meaſure left to its diſcretion. And therefore, though perhaps it may bail a man on a commitment by a mayor of a town, or juſtice of peace, or other inferior magiſtrate, for a contempt, without ſhewing the particular nature of it; yet it cannot be expected, that it will with the like readineſs bail a man on ſuch a general commitment by a court of higher (*a*) dignity, as a court of oyer and terminer, or any other court of Weſtminſter-hall; to the honour of whoſe proceedings the greateſt regard is always to be given; and on this ground chiefly, as I ſuppoſe, where a perſon on a *habeas corpus*, was returned to have been committed by an order of the exchequer, for not paying a fine of 50 *l.* by the eccleſiaſtical commiſſioners impoſed upon him, the court of king's bench (*b*) refuſed to bail him, though it was not ſhewn wherefore the ſaid fine was impoſed. And as a great regard is always paid to the dignity of the court by which the party is committed; ſo is it likewiſe to the notoriety of the offence; and therefore, where a perſon convicted of buying and ſelling old money, before juſtices of oyer and terminer, was committed in execution for the fine, by an order of the court, not ſtrictly formal, yet the court of king's bench refuſed (*c*) to bail him, for this reaſon chiefly, becauſe he was in

Holt 590. 3 Salk. 91. 284. Vaughan 157. 6 Modern 73. Raymond 381. 2 Ld Raym. 978. 12 Modern 102. 155. 2 Hale 112.

See Buſhel's caſe in Vaughan's Reports.

(1) In the caſe of an impreſſed apprentice the king's bench may iſſue a warrant to bring him up, without putting him to the circuity of a *habeas corpus*. Ld Mansfield, 3d May 1779. 2 Bulſt. 139, 140.

(*a*) See the precedent ſection, and C. Jac. 219. and Vaugh. 139. 140.

(*b*) C. Car. 579.

(*c*) 1 Sid. 144, 286, 320.

Salkeld 348. 5 Mod. 19, 20, &c. March 52, 53. 1 Sid. 288, 289. 320.

in execution, and his commitment was defective only in point of form. Alſo where perſons taken in execution for their fines to the king, ſet on them by a ſeſſions of juſtices of peace, have not only brought their *habeas corpus*, but alſo their writ of error in the king's bench, and aſſigned errors, yet the court has refuſed to bail them. But I take it for granted, in thoſe caſes which are but briefly reported, That it appeared upon the whole record, That ſuch fines were legally impoſed. Alſo it ſeems, That the ſaid court has ſometimes been induced to deny perſons committed by other courts, by warrants not ſtrictly formal, the benefit of bail, for the enormity, dangerous tendency, or obſtinacy (*a*) of their offence, which if it had been attended with leſs aggravating circumſtances might not have excluded them from it. Alſo the ſaid court, in determining whether it be proper to bail a man committed by another court, uſually conſiders all the other circumſtances of the caſe, as the length (*b*) and hardſhip (*c*) of the impriſonment, and ſuch like, in order to give ſuch a determination upon the whole, as may be moſt agreeable to the honour and prerogative of the crown, and the liberty and ſafety of the ſubject.

(*a*) 1 Bulſtrode 48. to 54. 1 Roll 220 337. 411.

(*b*) 1 Roll 218. 337. 2 Bulſt. 140.

(*c*) Latch 12.

Sect. 78. But it ſeems to be agreed, That no one can in any caſe controvert the truth of the return to a *habeas corpus*, or plead or ſuggeſt any matter repugnant to it. Yet it hath been holden, That a man may confeſs and avoid ſuch a return, by admitting the truth of the matters contained in it, and ſuggeſting others not repugnant, which take off the effect of them. And upon this ground, where one Swallow, a citizen of London, was committed for refuſing to accept the office of an alderman of the ſaid city to which he had been elected, and the cuſtom of the city juſtifying a commitment for ſuch a refuſal, and the election and refuſal were ſet forth in the return to the *habeas corpus*; he filed a ſuggeſtion in the crown-office, That he was an officer of the king's mint, and that all ſuch officers were exempted from all city-offices, both by preſcription and by the king's charter: and thereupon the patent of the grant of his office, and alſo the patent of the exemption being inrolled in the court, he was diſcharged.

2 Sid. 287, 288.

Sect. 79. Alſo the court will ſometimes examine by affidavit, the circumſtances of a fact on which a priſoner brought before them by an *habeas corpus* hath been indicted, in order to inform themſelves, on examination of the whole matter, whether it be reaſonable to bail him or not. And agreeably hereto, where one Jackſon, who had been indicted of piracy before the ſeſſions of admiralty (1) on a malicious proſecution, brought his *habeas corpus* in the ſaid court in order to be bailed; the court examined the whole circumſtances of

5 Mod. 323, 454, 455. 2 Jones 222.

(1) In Trinity term, 4 Geo. 2.

the fact by affidavits, upon which it appeared, That the profecutor himſelf, if any one, was guilty, and carried on the preſent proſecution to ſkreen himſelf; and thereupon the court, in conſideration of the unreaſonableneſs of the proſecution, and the uncertainty of the time when another ſeſſions of admiralty might be holden, admitted the ſaid Jackſon to bail, and committed the proſecutor till he ſhould find bail to anſwer the facts contained in the affidavits.

Sect. 80. As to the fifth particular, *viz.* Where bail is grantable by the court of king's bench, to one excluded by the above-mentioned ſtatute of Weſtminſter 1. c. 15. from the common benefit of a replevin by the ſheriff. It cannot be doubted, but that notwithſtanding neither (*a*) the judges of this, nor of any other ſuperior court of juſtice, are ſtrictly within the purview of that ſtatute; yet (*b*) they will always, in their diſcretion, pay a due regard to the rules preſcribed by it, and not admit a perſon to bail who is expreſsly declared by it to be irrepleviſable, without ſome particular circumſtance in his favour. And therefore it ſeems difficult to find an inſtance where perſons attainted (*c*) of felony, or but convicted thereof by verdict general or (*d*) ſpecial, or notoriouſly (*e*) guilty of treaſon or manſlaughter, &c. by their own confeſſion or otherwiſe; have been admitted to the benefit of bail, without ſome ſpecial motive to induce the court to grant it: As where (*f*) a perſon taken by a *capias utlagatum*, on an appeal of felony by the name of J. S. gentleman, pleads that his name is J. S. yeoman, and not gentleman, and ſo he is not the ſame perſon who was outlawed, in which caſe the court in diſcretion may bail him; for until the plea is determined, it appears not whether he were the perſon intended, or not. Or where (*g*) a perſon outlawed alleges an error in the record, in which caſe alſo the court, *ex gratia*, may bail him, eſpecially if the error be apparent. Or where a man is convicted (*h*) of felony, upon evidence by which it plainly appears to the court that he is not guilty of it; in which caſe even the juſtices of gaol-delivery may bail him. Or where (*i*) it appears to the court that the proſecutor of an indictment, or the plaintiff in an appeal, hath unreaſonably delayed his proſecution; as where two *nihils* are returned upon two writs of *ſcire facias*, awarded againſt a plaintiff in an appeal removed by *certiorari* into the king's bench, and the priſoner hath lain a long time under confinement. Or where (*k*) the defendant in an appeal hath pleaded an excommunication in diſability of the plaintiff: In which caſe it is apparent that the plaintiff cannot proceed at preſent; and if the defendant ſhould be kept in priſon till the plaintiff be abſolved, he might be a priſoner for life. Or where (*l*) it appears to the court, That the defendant may be in danger of loſing

(*a*) 2 Inſt. 185, 186. 189. 2 Hale 129, 148. Summary 104. Salkeld 61.
(*b*) 3 Bulſt. 113. Roll 168. Sup. ſ. 33. Latch. 12. S. P. C. 74. 75. Skinner 683. 5 Mod. 454, 455.
(*c*) Kelynge 90.
(*d*) Dyer 179. 1 Bulſt. 87, 88.
(*e*) 1 Roll 268. Raym. 381. 3 Bulſt. 113, 114. 5 Mod. 455. Vide ſup. ſect. 33. 1 Salkeld 103.
(*f*) 5 H. 7. 16. 2 Inſt. 188. Summary 101. S. P. C. 74.
(*g*) 19 H. 6. 2. S. P. C. 74. 2 Inſt. 188. 1 Sid. 316.
(*h*) Crom. 154.
(*i*) 5 Modern 454, 455. 1 Sid. 78. 1 Bulſt. 85. Palmer 558, 559. 1 Keble 305, 306.
(*k*) 3 Aſſ. 12. 13 Ed. 4. 8. B. Mainp. 48. 73. S. P. C. 72.
(*l*) Latch 12. Cro. Jac. 356. Co. Lit. 289.

loſing his life, either by famine (1), or a dangerous diſtemper, &c. if he continue longer in priſon.

(1) The fact of indiſpoſition, upon which the court will bail, muſt be a preſent indiſpoſition, ariſing from the confinement, and not from any conſtitutional or family diſtemper, or from the act of the priſoner, 10 Modern 334. Vide alſo Strange 49. 543. Cowper 333. Holt 85.

The Court of king's bench has power to bail in all caſes whatſoever. Lord Mansfield, Cowper 333; and the judges will in general exerciſe it in favour of a priſoner in every caſe not capital; in capital caſes where there is any circumſtance to induce the court to ſuppoſe he may be innocent; and in every caſe where the charge is not alledged with ſufficient certainty. 1 Bac. Abr. 222. notes. —The court, therefore, will bail a perſon committed for high treaſon generally, if four terms have elapſed and no proſecution commenced. Strange 5. Or for treaſon done upon the high ſeas. Holt 83. So alſo a man and his wife committed for felony, if the aſſizes have intervened and they have endeavoured to bring on the trial. And. 64. So alſo a perſon convicted upon an appeal of murder, ſubject to an argument on a plea in abatement, (three years having elapſed without either ſide bringing it on) provided the appellant will actually conſent. Strange 403. So alſo a perſon who was convicted of keeping an alehouſe, &c. he having brought a *certiorari*. Strange 531. So a perſon acquitted on an indictment of murder, and afterwards in cuſtody on an appeal, unleſs the judge certifies a diſſatisfaction at the verdict. Strange 854. So alſo a perſon appealed of murder who has not been indicted, provided there is any delay on the part of the appellant. Strange 856, 859.—So alſo a perſon committed for manſlaughter, if it appear to be no more upon the depoſitions before the coroner. Strange 911. 1242. So alſo in murder and pardon pleaded and allowed, the defendant ſhall not give even bail to anſwer the appeal though the heir is beyond ſea, for this is not within 3 Hen. 7. Strange 1203. So alſo in rape both principal and acceſſary will be bailed, if it appear they do not mean to abſcond. 4 Burr. 2179. And the court is bound *ex debito juſtitiæ* to bail an accomplice intitled to the king's pardon. Cowper 334.

But this court will not look into the coroners depoſitions to bail a gaoler committed for murder. Strange 851. Nor will they bail an appellee for murder unleſs circumſtances of delay appear on the part of the appellant. Strange 854. Nor a perſon charged with a highway robbery, if the proſecutor attend and ſwears he is the man, notwithſtanding a number of affidavits are produced to the contrary. Strange 1138. Nor for aſſiſting in the running of contraband goods, &c. Bunb. 143. Nor will the court order at the inſtance of the priſoner a medical man to attend the perſon wounded by the priſoner, in order to ſtate his ſituation for the purpoſe of bail. Strange 547. Nor will they bail after an indictment of murder upon an affidavit of the fact. 1 Salkeld 104. Skinner 683.

As to the ſecond point, *viz.* In what caſes bail is grantable by the other courts of Weſtminſter-hall; I ſhall conſider, Firſt, How far it is grantable by ſuch courts, to perſons committed for cauſes under the degree of treaſon or felony. Secondly, How far to perſons committed for treaſon or felony.

Sect. 81. As to the firſt point, *viz.* How far bail is grantable by the ſaid courts, to perſons committed for cauſes under the degree of treaſon or felony; it ſeems, (*a*) That the courts of common pleas and exchequer, at any time during term, and the court of chancery, either in term or vacation, may award a *habeas corpus* by the common law, for any perſon committed for any ſuch cauſe, and thereupon diſcharge him, if it ſhall clearly appear by the return, That the commitment was againſt law (as being made by one who had no juriſdiction of the cauſe, or for a matter for which by law no man ought to be puniſhed), or bail him, if it ſhall be doubtful whether the commitment were legal or not, &c. However it is certain at this day, That by force of the *habeas corpus* act, par. 3 & 10,

(*a*) 2 Inſt. 53. 55. 615. 4 Inſt. 290. 2 Hale 147. Vaughan 154, 155, 156, 157. 2 And. 197. Daliſon 81. 3 Leonard 18. 2 Jones 13, 14. 17. 2 Modern 198. 306.

10. ſet forth more at large Sect. 17 and 22. any of the ſaid courts, in term-time, and any judge of either bench, or baron of the exchequer, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any priſoner whatſoever, who is bailable by the intent of that act, and thereupon bail him.

Sect. 82. As to the ſecond point, *viz.* How far bail is grantable by the ſaid courts to perſons committed for treaſon or felony. It is obſervable, That the above-mentioned clauſes of the ſaid *habeas corpus* act extend not to perſons committed for treaſon, or felony, plainly and ſpecially expreſſed in the warrant of commitment. Neither do I find any printed caſe, wherein perſons committed for ſuch crimes have been bailed either by the courts of common pleas or exchequer. However it is certain, That in ſome caſes perſons committed for felony are bailable by the court of chancery. But our lawbooks being generally ſilent in relation to theſe matters, I ſhall refer the reader for the more accurate knowledge of them, to obſervation and experience.

See Vaughan 156, 157. 2 Jones 14. Regiſter 271.

Sect. 83. As to the ſeventh general point of this chapter, *viz.* In what form bail is to be taken; it ſeems to be the practice of the court of king's bench in admitting a perſon to bail, who is actually (*a*) preſent in court, upon an indictment or appeal (*b*) of felony, or other crime, puniſhable with loſs (*c*) of member, to take (*d*) a ſeveral recognizance to the king in a certain ſum from each of the bail, that the priſoner ſhall appear at a certain day, &c. and alſo, That the bail ſhall be liable for the default of ſuch appearance, &c. body for body. And it ſeems (*e*) to be left to the diſcretion of juſtices of peace, in admitting any perſon to bail for felony, to take the recognizance either in a certain ſum, or elſe body for body. But (*f*) where a perſon is bailed by the court of king's bench, before the return of a *capias* awarded againſt him for felony, or (as it ſeems to be implied in the book cited in the margin that he may be), in any court for a crime of an inferior nature, it ſeems, That the recognizance ought to be only in a certain ſum of money, and not body for body. However it is certain (*g*) at this day, That perſons bound body for body, are not liable on the forfeiture of the recognizance, to ſuch puniſhment to which the principal is to be adjudged, if found guilty, but only to be fined, &c.

2 Hale 126, 127.
(*a*) 1 Bulſt. 45.
(*b*) 2 Jon. 210.
(*c*) Levins 106. Con. 1 Sid. 211.
(*d*) 4 Inſt. 178. 1 Bulſt. 45. 21 H. 7. 20. Con. 1 Sid 210. Vide 2 Jo. 222.
(*e*) Sum. 97. Crom. 135. 2 Inſt. 178. Dalt. c. 127. ſeems contrary.
(*f*) 2 Bulſt. 45.
(*g*) 4 Inſt. 178. S. P. C. 65. F. Mainp. 23. 21 H. 7. 20. Summary 97. 2 Hale 125. Con. F. Mainp. 12. 1 Black. 648. Strange 921.

Sect. 84. As to the eighth general point of this chapter, *viz.* What ſhall forfeit the recognizance. If on a bailment for felony, the uſual (*h*) form, *ad ſtandum recto de felonia prædicta & ad reſpondendum domino regi*, be made uſe of, and at

(*d*) Dalt. c. 127. S. P. C. 77. 4 Inſt. 178.

the trial the party ſtand obſtinately mute, it may reaſonably be argued, that in ſtrictneſs the recognizance is forfeited, for (*a*) that the expreſſions above-mentioned ſeem to import at leaſt thus much, That the priſoner ſhall make ſome anſwer; and at the common law, before the ſtatute (*b*) of *Marlebridge*, c. 28. if a perſon under bail had inſiſted on his privilege as a clerk, and refuſed to anſwer to the crime alleged againſt him, his ſureties were to be amerced; and though the ſaid ſtatute have in that caſe excuſed the bail, yet an obſtinate refuſal to anſwer in other caſes may perhaps remain as it was at the common law. Mr. Dalton (*c*) indeed ſeems to be of another opinion, becauſe the words above-mentioned are always uſed of courſe: but it ſeems ſtrange, That words ſhould be looked on as idle and inſignificant becauſe they are moſt uſual and proper. However, if late practice and experience have been agreeable to the above-mentioned opinion of Mr. Dalton, as I apprehend that they have, they will certainly be of great force to maintain it: And indeed it muſt be confeſſed, That if a man's bail, who are his gaolers of his own chooſing, do as effectually ſecure his appearance, and put him as much under the power of the court as if he had been in the cuſtody of the proper officer, they ſeem to have anſwered the end of the law, and to have done all that can be reaſonably required of them: But howſoever the law may ſtand in relation to this caſe, it is certain, That if perſons be bound by recognizance, that J. S. ſhall appear in the king's bench the firſt day of ſuch a term, to anſwer to ſuch an information againſt him, and not depart till he ſhall be diſcharged by the court, and afterwards the attorney general enter a *nolle proſequi* as to that information, and exhibit another, on which the defendant is convicted, and refuſes to appear in court after perſonal notice, the recognizance is forfeited; for being expreſs that the party ſhall not depart till he be diſcharged by the court, it cannot be ſatisfied unleſs he be forthcoming, and ready to anſwer to any other information exhibited againſt him while he continues not diſcharged, as much as to that which he was particularly bound to anſwer to. But in ſuch caſe it ſeems, That the recognizance ſhall not be forfeited by the party's not appearing in court the firſt day of every term, after he hath pleaded to the information, as it may be before he hath pleaded.

† *Sect.* 85. But it is recited by 4 Geo. 3. c. 10. That many recognizances have been eſtreated into the court of exchequer, againſt perſons for not appearing as parties or witneſſes, or for not proſecuting indictments, or for otherwiſe not performing the conditions of ſuch recognizances, many of which neglects have happened from the inattention of ignorant people, whereupon it is enacted, "That it ſhall be lawful for the barons of "the exchequer, upon affidavit and petition to be preſented

"to

(*a*) S. P. C. 77.

(*b*) 2 Inſt. 150. 4 Inſt 178. 2 Hale 126.

(*c*) Dalt. c. 127. Vide 4 Burr. 75. N. B. A feme covert cannot be bound by recognizance becauſe it cannot be eſtreated. Styles. 369.

Queen and Redpath, Eaſter 11 Ann. 10 Mod. 152. Fort 358.

1 Burrow 10. 54. 398, 431. 3 Burrow 1461. 4 Burrow 2119. 2126.

" to them, by or on the behalf of the perſon or perſons im-
" priſoned or liable to be impriſoned on the forfeiture of any
" ſuch recognizances, to diſcharge ſuch perſon or perſons, by
" order from the ſaid barons, without any quietus (*a*) to be
" ſued out for that purpoſe, for which order no more than one
" pound and one ſhilling ſhall be taken by the officer appointed
" to give out the ſame.—Provided that no diſcharge ſhall be
" given on ſuch petition where any debt is due to the crown,
" other than by the recognizances ſo prayed to be diſcharged;
" nor in any caſes of defrauding his majeſty's revenue by con-
" traband trade, or aſſaulting the officers of the cuſtoms or
" exciſe in the execution of their duty, or any perſon or
" perſons lawfully aſſiſting them therein."

(*a*) For the form and method of obtaining a quietus, Vide Cro. Cir. Com. 61, 62.

On a recognizance eſtreated for not being punctually complied with, if the party takes his trial the next ſeſſion, he may compound for a very ſmall matter in the court of exchequer, becauſe the effect, though not the exact form, of the recognizance is complied with. 10 Modern 278.—And if the money be levied, the court will order the proſecutors coſts to be paid, and the ſurplus returned. 4 Burrow 2118.

Recognizances in caſes of felony are to be certified to the general gaol delivery. 1 & 2 Phil. and Mary, c. 13.—If a defendant, indicted for perjury, is acquitted, the bail ſhall be diſcharged from their recognizance, on motion, though the acquittal is not entered on record, for the acquittal appears on the poſtea. 1 Wilſon 315.——Neither the defendant nor his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear, B. R. H. 237. And if the defendant do not appear upon that day, the court will not diſcharge the recognizance, although the attorney general conſents to it, but they will reſpite it till the next term. 11 Modern 200. For the judges of oyer and terminer are the proper judges whether recognizances ought to be eſtreated or ſpared. 10 Modern 278.—On conviction, if the offender be pardoned on condition of tranſportation, yet he may be ſurrendered in diſcharge of bail, Strange 1217. by writ of habeas corpus on the crown ſide. But if he is actually on board the tranſport the court will not iſſue the writ. 4 Burrow 2034.

CHAPTER THE SIXTEENTH.

OF COMMITMENTS.

AND now I am to conſider in what caſes, and in what manner, offenders are to be committed.

For the better underſtanding whereof I ſhall examine, Firſt, What kinds of offenders are to be committed. Secondly, By whom. Thirdly, To what priſon. Fourthly, What is to be done previous to their commitment. Fifthly, What ought to be the form of it. Sixthly, At whoſe charges they are to be ſent to priſon. Seventhly, To what court the com-

mitment is to be certified. Eighthly, By what means the party may be diſcharged from ſuch commitment.

2 Hale 123, 124. 1 Burrow 460.

Sect. 1. As to the firſt point, 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 (1).

(1) A priſoner in the cuſtody of the king's meſſenger, on a warrant from the ſecretary of ſtate, who is brought into the king's bench by habeas corpus to be bailed, but has not his bail ready, cannot be committed to the ſame cuſtody he came in, but muſt be committed to the cuſtody of the marſhal, which will prevent the neceſſity of ſuing out a new habeas corpus as he may be brought up from the priſon of the court, by a rule of court, whenever he ſhall be prepared to give bail. 1 Burrow 460.

Sect. 2. And it is ſaid, That whereſoever a juſtice of peace 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 goal, to remain there till he ſhall comply.

Sect. 3. As to the ſecond point, *viz.* by whom ſuch perſons are to be committed, it ſeems to be agreed by all the old (*a*) books, That whereſoever a conſtable, or private perſon, may juſtify the arreſting another for a felony or treaſon, he may alſo juſtify the ſending or bringing him to the common gaol, and that every private perſon has as much authority in caſes of this kind as the ſheriff, or any other officer, and may juſtify ſuch impriſonment by his (*b*) own authority, but not by the command of another. But (*c*) inaſmuch as it is certain, That a perſon lawfully making ſuch an arreſt may juſtify bringing the party to the conſtable, in order to be carried by him before a juſtice of peace; and inaſmuch as the ſtatutes of 1 & 2 Ph. and Mary, c. 13. and 2 & 3 Ph. and Mary, c. 10. which direct in what manner perſons brought before a juſtice of peace for felony ſhall be examined by him in order to their being committed or bailed, ſeem clearly to ſuppoſe, That all ſuch perſons are to be brought before ſuch juſtice for ſuch purpoſe; and inaſmuch as the ſtatute of 31 Car. 2. commonly called the *habeas corpus* act, ſeems to ſuppoſe, That all perſons who are committed to priſon, are there detained by virtue of ſome warrant in writing, which ſeems to be intended of a commitment by ſome magiſtrate; and the conſtant tenor of the late books, practice, and opinions, are agreeable hereto: It is certainly moſt adviſeable at this day, for any private perſon who arreſts another for felony, to cauſe him to be brought, as ſoon as conveniently he may, before ſome juſtice of peace, that he may be committed or bailed by him.

(*a*) 10 H. 4. 7. 7 Ed. 4. 20. 3 Ed. 4. 26. 27. 20 Ed. 4. 6. 10 Ed. 4. 17. 18. 5 H. 7. 4. 5. 2 H. 7. 3. 11 Ed. 4. 4.

(*b*) 5 H. 7. 4, 5. 2 Hale 81. F. F. Impriſ. 8.

(*c*) 9 Ed. 4. 26, 27. 10 Ed. 4. 17. Summary 91, 112. 2 Hale 120. 1 Burn's Juſtice 369.

Dalt. c. 118.

Sect.

Sect. 4. But it is certain, That the privy council (2) or any one or two of them, or a ſecretary of ſtate, (3) may lawfully commit perſons for treaſon, *and for other offences againſt the ſtate*, as in all ages (4) they have done.

(2) The two caſes in Leonard (vide infra, note 4.) preſuppoſe ſome power for this purpoſe, without ſaying what; and the caſe in Anderſon plainly recognizes ſuch a power in *high treaſon*. But as to the juriſdiction of privy counſellors in *other* offences, it does not appear to have been either claimed or exerciſed. The deciſions, however, in the caſes of the Queen v. Derby, Fortes 141 (infra 4. 8.) and Rex v. Earbury, 8 Modern 177. infra 11. (even though it ſhould be admitted that the practice which has ſubſiſted ſince the revolution had been erroneous in its commencement), are eſtabliſhed; and the court has no right to overturn them. Lord Camden. 11 State Trials 323.

(3) In Entick v. Carrington, C. B. Mich. 6 Geo. 3. upon a ſpecial verdict, reſpecting the validity of a ſecretary of ſtate's warrant to ſeize perſons and papers in the caſe of libels, Lord Camden enquired very critically into the ſource of this power to commit *for libels and other ſtate crimes*—By the common law, ſays his Lordſhip, neither ſecretaries of ſtate nor privy counſellors are conſervators of the peace, nor has any ſtatute ever conferred any *ſuch* juriſdiction upon them. The office neither implies nor requires the authority of a magiſtrate; nor is it conſiſtent with the wiſdom or analogy of our law to give a power to commit, without a power to examine upon oath, which to this day the ſecretary of ſtate doth not preſume to exerciſe. (Vide 5 Modern 78.) The king is indeed the principal conſervator of the realm; and the ſecretary appears by ſome means to have obtained this transfer of the royal authority to himſelf, but the common law of England knows of no ſuch committing magiſtrate. 11 St. Tr. 317. 319.

(4) 1. Howell was committed 28th, and Hellyard, 30 Eliz. by ſecretary Walſingham privy counſellor, and it was determined that where the commitment is not by the whole council, the cauſe muſt be expreſſed in the warrant. 1 Leonard 71. 2 Leonard 175. Sed vide 31 Car. 2. c. 2. and Ld Raym. 65. 2 In 34 Eliz. the judges remonſtrate againſt the exerciſe of this power, and declare that all priſoners may be diſcharged unleſs committed by the queen's command, or by her whole council, or by one or two of them, for *high treaſon*. 1 And. 297.—3. Melvin was committed, 4 Car. 1. by ſecretary Conway, for ſuſpicion of high treaſon, but the court thought the cauſe of the ſuſpicion ſhould have been expreſſed. Palm. 558.—4. Crofton was committed by the council, 14 Car. 2 for high treaſon generally. Vaughan 142. 1 Sid. 78. 1 Keble 305.—5. Fitzpatrick was committed by privy council, 7 Will. 3. for high treaſon in aiding an eſcape, and bailed for neglect of proſecution. 1 Salk. 103.—6. Yaxley was committed, 5 Will & Mary, by the earl of Nottingham, ſecretary of ſtate, for refuſing to declare if he was a jeſuit. Carth. 291. Skinner 369.—7. Kendal and Roe were committed, 7 Will. 3. by ſecretary Trumbal, for high treaſon in aſſiſting the eſcape of Montgomery, and by Holt, C. J. held good, but the priſoners were bailed. 4 State Trials 559. 5 Modern 78. Skinner 596. Holt 144. Ld Raym. 61. 65. Comb. 343. 12 Modern 82. 1 Salkeld 347.—8. Derby was committed, 10 Anne, for publiſhing a libel (Quære for felony, 11 State Trials 311) called the Obſervator, and the court held the warrant good and legal. Fortes 140. 11 State Trials 309.—9 Sir W. Windham was committed, 4 Geo. 1. by ſecretary Stanhope, for high treaſon, and by Parker C. J. held good. Strange 3. 3 Viner 516.—10 Lord Scarſdale and Duplin, and Mr. Harvey of Comb, were committed, 2 Geo. 1. by Lord Townſend, ſecretary of ſtate, for treaſonable practices, and admitted to bail. 3 Viner 534.—11. Doctor Earbury was arreſted and committed by warrant from the ſecretary of ſtate, for being the author of a ſeditious libel, and his papers ſeized, and he was continued on his recognizance, 7 Geo. 2. 8 Mod. 177. 11 State Trials 309. 12. Florence Henſey was committed, 31 Geo. 2. by the earl of Holderneſs, ſecretary of ſtate, for high treaſon in adhering to the king's enemies. 1 Burr. 642. Doctor Shebbear was committed, 31 Geo. 2. on two warrants from the ſecretary of ſtate, for a libel. 1 Burr. 460.—14. John Wilkes, eſq. was committed, 3 Geo. 3. by warrant from the earl of Halifax, ſecretary of ſtate, for a libel; but being a member of parliament, he was protected by his priviledge, and on that account diſcharged. 2 Wilſon 150. 11 State Trials 302. Sayer was apprehended, 18 Geo. 3. by warrant from the earl of Rochford, ſecretary of ſtate, for high treaſon, and bailed by Lord Mansfield. Black. 1165. Vide the caſe of Entick v. Carrington, upon a ſpecial verdict for apprehending the plaintiff under the warrant of a ſecretary of ſtate, *for a libel*, 11 State Trials 327.

As to the third point, *viz.* To what priſon ſuch offenders are to be committed, I ſhall obſerve, First, That the priſon ought

to be in the realm of England. Secondly, That regularly it ought to be a common priſon.

Sect. 5. As to the firſt of theſe particulars, it is enacted by 31 Car. 2. c. 12. "That no ſubject of this realm, being an "inhabitant or reſiant of this kingdom of England, dominion "of Wales, or town of Berwick upon Tweed, ſhall or may "be ſent priſoner into Scotland, Ireland, Jerſey, Guernſey, "Tangier, or into parts, garriſons, iſlands, or places beyond "the ſeas, which then were, or at any time hereafter ſhould "be, within or without the dominions of his majeſty, his "heirs or ſucceſſors; and that every ſuch impriſonment is by "the ſaid ſtatute enacted and adjudged to be illegal, and that "every ſubject ſo impriſoned, ſhall have an action of falſe "impriſoment, &c. and recover treble coſts, and no leſs "damages than five hundred pounds againſt the perſon making "ſuch warrant, who ſhall alſo incur a præmunire."

Sect. 6. As to the ſecond of the above-mentioned particulars, It is enacted by 14 Edw. 3. c. 10. as followeth, "In "the right of the gaols which were wont to be in ward of "the ſheriffs, and annexed to their bailiwicks; it is aſſented "and accorded, That they ſhall be rejoined to the ſheriffs, "and the ſheriffs ſhall have the cuſtody of the ſame gaols, as "before this time they were wont to have; and they ſhall "put in ſuch under-keepers for whom they will anſwer." And this is confirmed by 19 Hen. 7. c. 10.

Alſo it is recited by 5 Hen. 4. c. 10. "That divers conſtables of caſtles within the realm, being aſſigned juſtices of peace by the king's commiſſion, had by colour of ſuch commiſſion, uſed to take people to whom they bore evil will, and impriſon them within the ſaid caſtles, till they had made fine and ranſom with the ſaid conſtables for their deliverance." And thereupon it is enacted, "That none be impriſoned by any "juſtice of the peace, but only in the common gaol; ſaving "to lords and others which have gaols their franchiſe in this "caſe."

Vide 11 & 12 Will. 3. c. 19. ſect. 3. made perpetual by 6 Geo. 1. c. 19. to enable juſtices of peace to build and repair gaols in their reſpective counties where the ſame clauſe is enacted.

Sect. 7. And it (*a*) ſeems, That the king's grant ſince this ſtatute to private perſons to have the cuſtody of priſoners committed by juſtices of peace, is void. And it is ſaid, That none can claim a priſon as a franchiſe, unleſs he have alſo a gaol-delivery.

(*a*) See 1 And. 345. C. Eliz. 829, 830. 9 Co. 119. Salkeld 343. Farres 31. 2 Ld Raymond 767. 879.

† And whereas vagrants and other criminals, offenders, and perſons charged with ſmall offences, are for ſuch offences, or for want of ſureties, to be committed to the county gaol, it being adjudged by law that the juſtices of the peace cannot

not commit them to any other priſon for ſafe cuſtody, which by experience hath been found to be very prejudicial and expenſive. It is therefore enacted by 6 Geo. 1. c. 19. "That "it ſhall and may be lawful to and for the juſtices of the "peace within their reſpective juriſdictions to commit ſuch "vagrants and other criminals, offenders, perſon and perſons, "either to the common gaol or houſe of correction, as they "in their judgment ſhall think proper."

Sect. 8. It ſeems to be (*b*) agreed, That if a perſon be arreſted in one county, for a crime done in it, and fly into another, and be re-taken there, he may be brought before a juſtice of the county where the offence was done, and be committed by him to the gaol of ſuch county. But it ſeems to be the ſtronger (*c*) opinion, That if one who hath committed an offence in one county, fly into another before he be taken, and be purſued and arreſted in ſuch county, he ought to be brought before a juſtice of the county where he is taken, and be committed by him to the common gaol of the ſame county, (*d*) whether it lie in ſuch county or another; (*e*) unleſs there be ſome ſpecial reaſon to the contrary, as an apparent danger that the party may be reſcued from ſuch priſon by rebels, &c. And it ſeems to be laid down as a rule, by ſome books, (*f*) That any offender may be committed to the gaol next to the place where he was taken, whether it lie in the ſame county or not.

(*b*) Summary 93. 1 Hale 580. 2 Hale 94. 115. Dalton c. 118. Crom. 172. 173.
(*c*) Dalton c. 118. Crompton 72. Summary 92, 93. 11 E. 4. 4. 5. 13 E. 4. 8. 9. Plowden 37. Keilwood 45. Con. 2 Bulſt. 264. 11 E. 4. 7.
(*d*) Keilw. 45. 11 E. 4. 5.
(*e*) 11 Ed. 4. 4, 5. 7
(*f*) Keilw. 45. 22 Ed. 4. 34.

† By 23 Geo. 2. c. 26. ſ. 11. and 24 Geo. 2. c. 55. If an offender, againſt whom a warrant ſhall be iſſued by any juſtice of peace of one county, ſhall eſcape into another, he may be apprehended (by virtue of the warrant being indorſed by any juſtice of the county into which he ſhall ſo eſcape), and bailed in the county in which he is apprehended, if the offence be bailable; if not, or he cannot find bail, he ſhall be carried back into the county from which the warrant was granted, and be there committed or bailed.

Sect. 9. It is (*g*) ſaid, That if a conſtable bring a felon to gaol, and the gaoler refuſe to receive him, the town where he is conſtable ought to keep him till the next gaol-delivery. But (*h*) 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 (*i*) ſick that it would apparently hazard his life to ſend him to the gaol, (*k*) or there be evident danger of a reſcous from rebels, &c. Yet conſtant practice ſeems to authorize a commitment to a meſſenger; and it is (*l*) ſaid, That it ſhall be intended to have been made in order for the carrying of the party to gaol.

(*g*) Sum. 114. 10 H. 4. 7. F. Eſcape, 8. Dalton c. 118. B. F. Impriſon. 25.
(*h*) 2 Hale 123. 20 Ed. 4. 6. B. F. Impriſon. 21, 27. 11 Ed. 4. 7. 2 Ed. 4. 8.
(*i*) 2 Hale 96. 119, 120.
(*k*) 2 Hale 81. 11 Ed. 4. 4. 5. Skinner 599.
(*l*) Salkeld 347. 5 Modern 78 to 85.

Priſoners not to be removed but by *habeas corpus*, &c.

Sect. 10. As priſoners ought to be committed at firſt to the proper priſon, ſo ought they not to be removed from thence, except in ſome ſpecial caſes. And to this purpoſe it is enacted by 31 Car. 2. c. 2. ſ. 9. "That if any ſubject of this realm "ſhall be committed to any priſon, or in cuſtody of any "officer or officers whatſoever, for any criminal, or ſuppoſed "criminal matter; that the ſaid perſon ſhall not be removed "from the ſaid priſon and cuſtody, into the cuſtody of any "other officer or officers, unleſs it be by *habeas corpus*, or "ſome other legal writ; or where the priſoner is delivered to "the conſtable, or other inferior officer, to carry ſuch "priſoner to ſome common gaol; or where any perſon is ſent "by order of any judge of aſſize, or juſtice of the peace, to "any common workhouſe, or houſe of correction; or where "the priſoner is removed from one priſon or place to another, "within the ſame county, or ordered to a trial, or diſcharged by "due courſe of law; or in caſe of ſudden fire, or infection, "or other neceſſity; upon pain that he who makes out, ſigns "or counterſigns, or obeys or executes ſuch warrant, ſhall "forfeit to the party grieved one hundred pounds for the firſt "offence, two hundred pounds for the ſecond, &c."

Magiſtrates muſt take examinations in writing, &c.

Sect. 11. As to the fourth point, *viz.* What ought to be done previous to the commitment of ſuch offenders, it is enacted by 2 & 3 Ph. and Mary, c. 10. "That every juſtice or "juſtices before whom any perſon ſhall be brought for man-"ſlaughter, or felony, or for ſuſpicion thereof, before he or "they ſhall commit or ſend ſuch priſoner to ward, ſhall take "the examination of ſuch priſoner, and information of thoſe "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 within two days after the "ſaid examination, and the ſame ſhall certify in ſuch manner "and form, and at ſuch time, as they ſhould and ought to "do, if ſuch priſoner, ſo committed or ſent to ward, had "been bailed, or let to mainpriſe; upon ſuch pain as in "1 & 2 Ph. and Mary, c. 13. is limited and appointed, for "not taking or not certifying ſuch examinations, &c."

Viz. fine at the diſcretion of the juſtices of gaol-delivery. Ante p. 105.

And it is farther enacted, "That the ſaid juſtices ſhall "have authority to bind all ſuch by recognizance or obliga-"tion, as do declare any thing material to prove the ſaid "manſlaughter, or felony, to appear at the next general "gaol-delivery to be holden within the county, city, or "town corporate, where the trial of the ſaid manſlaughter, or "felony, ſhall be, then and there to give evidence againſt the "party; and that the ſaid juſtices ſhall certify the ſaid bonds "taken before them, in like manner as they ought to certify "the bonds mentioned in the ſaid former act, &c."

Sect.

Sect. 12. It ſeems that a juſtice of peace ought not to detain a priſoner by virtue of this ſtatute, in order to examine him, any longer than is neceſſary for ſuch purpoſe, for which it is ſaid, That the ſpace of three days is a reaſonable time.

C. Eliz. 829, 830. 1 Hale 586. 2 Hale 120, 121.

As to the fourth point, *viz.* What ought to be the form of a commitment the following rules are to be obſerved.

Sect. 13. Firſt, It muſt be in writing, under the hand and ſeal of the perſon by whom it is made, and expreſſing his office, or authority, and the time and place at which it is made. and muſt be directed to the gaoler, or the keeper of the priſon.

2 Inſt. 52. 591. 2 Hale 122. Dalton c. 125. 1 Hale 157. 577. Summary 94. 5 Burrow 2686.

Sect. 14. Secondly, It may be made either in the name of the king, and only teſted by the perſon who makes it, or it may be made by ſuch perſon in his own name.

Dalton c. 125.

Sect. 15. Thirdly, It may command the gaoler to keep the party in ſafe and cloſe cuſtody (*a*); for if every gaoler be bound (*b*) by the law to keep his priſoner in ſuch cuſtody, ſurely it can be no fault in a *mittimus* to command him ſo to do.

(*a*) Windham's Caſe. Strange 3. where theſe words were held admonitory to the officer to put him in mind of his duty and puniſhment in caſe of an eſcape.

(*b*) 8 Co. 100. 9 Co. 87. 5 Modern 21. Dalton c. 118.

Sect. 16. Fourthly, It ought to ſet forth the crime alledged againſt the party with convenient (*c*) certainty, whether the commitment be by the privy (*d*) council, or any other authority; otherwiſe the officer (*e*) is not puniſhable, by reaſon of ſuch *mittimus*, for ſuffering the party to eſcape. And the court before whom he is removed by *habeas corpus*, ought to diſcharge or bail him. And this doth not only hold where (*f*) no cauſe at all is expreſſed in the commitment, but alſo where it is ſo looſely ſet forth, that the court cannot adjudge whether it were a reaſonable ground of impriſonment; as (*g*) where one was committed for manifold contumacy to the high commiſſion court, or for (*h*) refuſing to anſwer before them to certain articles, or (*i*) for inſolent behaviour and words ſpoken at the council-table, &c. And it is holden by Sir (*k*) *Edward Coke*, in his ſecond inſtitute, That a commitment for high treaſon, or felony in general, without ſhewing the ſpecies of the offence, is not good: Yet in (*l*) another part of the ſame book, ſuch general commitments ſeem to be allowed by him to be good; and there are precedents of commitments for felony in general, in good (*m*) authors. And (*n*) it hath been reſolved, That commitments for *high treaſon* in general are good.

(*c*) Sum. 94. Dalton c. 125. 2 Inſt. 52, 591. Strange 934. (*d*) 16 Car. 1. c. 10. C. Car. 133, 507. 579. 593. 2 And. 298. Con. 1 Roll 134. 1 Leonard 71. C. 15. ſect. 66 to 73. Vide Money v. Leach, 1 Black. 561. (*e*) 2 Inſt. 591. Summary 109. Infra c. 17. Palm. 558. (*f*) C. Car. 507. 579. 593. Barkham & Lawſon, Palm. 558. (*g*) 1 Roll 245. (*h*) 1 Roll 220. 245. (*i*) C. Car. 133. 52. (*m*) 1 Hale 298. 1 Keble 579. 2 Bulſt. 139. 140. (*k*) 2 Inſt. 591. 5 Modern 85. 1 Burn 155. (*l*) 2 Inſt. 595. 609. 2 Hale 123. Crom. 233. Dalton c. 125. (*n*) 1 Sid. 78. 1 And. 303. Palm. 558. Strange 2. 10 Modern 234. 1 Hale 595. 2 Hale 123. confirmed by Pratt, C. J. in Wilkes' Caſe, 2 Wilſon 158.

Sect.

Sect. 17. Fifthly, It is ſafe to ſet forth, That the party is charged upon oath; but this is not neceſſary, for it hath been reſolved, (5) That a commitment for treaſon, or for ſuſpicion of it, without ſetting forth any particular accuſation, or ground of the ſuſpicion, is good.

(5) This reſolution was in the caſe of Sir W. Windham, 2 Geo. 1, who was committed by the ſecretary of ſtate for high treaſon generally. Strange 2. and 3 Viner's Abr. 515. at large. It is confirmed by Pratt C. J. 3 Geo. 3. in Mr. Wilkes' Caſe, committed by a ſimilar warrant for a libel, 2 Wilſon 158. 11 St. Trials 304, and Mr. Juſtice Foſter ſays, in caſes wherein *the juſtice of the peace hath juriſdiction*, the legality of his warrant will never depend on the truth of the information whereon it is grounded. Curtis's Caſe 136 ——See alſo Dalton c. 125. Crompton 233. 2 Inſt. 52. Palmer 558. 1 Salkeld 347. 5 Modern 78. 10 Modern 334. 1 Hale 582.

Sect. 18. Sixthly, Every ſuch *mittimus* ought to have a lawful concluſion, (*a*) *viz.* That the party be ſafely kept till he be delivered by law, or by order of law, or by due courſe of law;—Or that he be kept till farther (*b*) order (which ſhall be intended of the order of law), or to the like effect. And if the party be committed only for want of bail, it ſeems (*c*) to be a good concluſion of the commitment, that he be kept till he find bail. But a commitment, (*d*) till the perſon who makes it ſhall take further order, ſeems not to be good. And it ſeems, that the party committed by ſuch, or any other irregular *mittimus*, may be bailed.

(*a*) 2 Inſt. 52. 591. Summary 94. Crompton 233. Dalton c. 124.
(*b*) 1 Lev. 230. Con. C. Car. 558.
(*c*) 6 Mod. 73, 4.
(*d*) 1 Hale 584, 595, 609. 2 Inſt. 52, 591. 1 Roll 220. 1 Lev. 230.

Cro. Car. 579. con. 3 Bulſt. 48, 49. 1 Roll 410. Vide alſo 3 Keble 531. 2 Ld Raym. 851. 978. 3 Salkeld 91. Holt 590. Carth. 152. 291. Salkeld 48. 348. Ld Raymond 99. 153. 200. 213. 323. Comber 390. 3 Com. Dig. 496. Strange 1005. 917. 5 Modern 308. 1 Bac. Abr. 382. Ser. & Rem. 236. 2 Black. Rep. 805. Sayer 44.—N. B. Commitments grounded upon acts of parliament muſt purſue the concluſions which the ſtatutes preſcribe—And where a man is committed as a criminal, the concluſion muſt be "until he be delivered by due courſe of law;" if he be committed for contumacy, it ſhould be "until he comply."

Sect. 19. As to the ſixth point, *viz.* At whoſe charge offenders are to be ſent to priſon, it is enacted by 3 Jac. 1. c. 10. "That every perſon and perſons, that ſhall be committed to the common or uſual gaol within any county or "liberty within this realm, by any juſtice or juſtices of the "peace, for any offence or miſdemeanor, having means or "ability thereunto, ſhall bear their own reaſonable charges, "for ſo conveying or ſending them to the ſaid gaol, and the "charges alſo of ſuch as ſhall be appointed to guard them to "ſuch gaol, and ſhall ſo guard them thither. And if any "ſuch perſon or perſons ſo to be committed, ſhall refuſe at "the time of their commitment and ſending to the ſaid gaol, "to defray the ſaid charges, or ſhall not then pay or bear the "ſame, and then ſuch juſtice or juſtices of the peace ſhall "and may by writing under his or their hand and ſeal, or "hands and ſeals, give warrant to the conſtable or conſtables "of the hundred, or conſtable or tythingman of the tything "or townſhip where ſuch perſon or perſons ſhall be dwelling "and inhabit, or from whence he or they ſhall be committed,

"or

" or where he or they ſhall have any goods within the county " or liberty, to ſell ſuch, and ſo much of the goods and " chattels of the ſaid perſons, as by the diſcretion of the ſaid " juſtice or juſtices of the peace, ſhall ſatisfy and pay the " charges of ſuch his or their conveying or ſending to the " ſaid gaol; the appraiſment to be made by four of the honeſt " inhabitants of the pariſh or tything where ſuch goods or " chattels ſhall remain and be; and the overplus of the money " which ſhall be made thereof, to be delivered to the party to " whom the ſaid goods ſhall belong."

Sect. 20. And it is further enacted by 27 Geo. 2. c. 3. ſ. 1. " That when any not having goods or money within the " county where he is taken, ſufficient to bear the charges of " himſelf, and of thoſe who convey him, is committed to " gaol or the houſe of correction by warrant from any juſtice " of the peace, then on application by any conſtable or other " officer who conveyed him, to any juſtice of the peace for " the ſame county or place, ſhall upon oath examine into and " aſcertain the reaſonable expences to be allowed ſuch con- " ſtable or other officer, and ſhall forthwith, without fee or " reward, by warrant under his hand and ſeal, order the trea- " ſurer of the county or place to pay the ſame; which the " ſaid treaſurer is hereby required to do, as ſoon as he receives " ſuch warrant; and any ſum ſo paid ſhall be allowed in his " accounts. Except in Middleſex, in which county the ex- " pences of the conſtable or other officer occaſioned by his " conveying any perſon to gaol by virtue of a warrant from a " juſtice of the peace ſhall (after ſuch expences have been " examined into upon oath, and allowed by ſuch juſtice, and " for which no fee or reward ſhall be taken) be paid by the " overſeer or overſeers of the poor of the pariſh or place " where the perſon was apprehended."

The ſecond ſect. of the above act of 3 Jac. 1. c. 10. which was here recited in the former edition of this work, is repealed by 27 Geo. 2. c. 3. ſect. 2.

Vide ante 91. 1 Burn's Juſtice 374.

Sect. 21. As to the ſeventh point, *viz.* To what court ſuch commitments are to be certified, it is enacted by 3 Hen. 7. c. 3. " That every ſheriff, bailiff of franchiſe, and every " other perſon, having authority or power of keeping of gaol, " or of priſoners for felony, do certify the names of every " ſuch priſoner in their keeping, and of every priſoner to them " committed for any ſuch cauſe, at the next general gaol- " delivery, in every county or franchiſe where any ſuch gaol " ſhall be, there to be calendared before the juſtices of the " deliverance of the ſame gaol, whereby they may, as well " for the king as for the party, proceed to make deliverance of " ſuch priſoners according to law; on pain to forfeit to the " king, for every default there recorded, one hundred ſhil- " lings."

Sect.

Keilwood 34.
3 Inſt. 209, 210.
Sum. 94, 95. 114.
1 Hale 583.

Sect. 22. As to the eighth point, *viz.* By what means a perſon under ſuch a commitment may be 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 but by the king, 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 gaol-delivery. But if a perſon be committed on a bare ſuſpicion, without any appeal or 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 farther 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.

CHAPTER THE SEVENTEENTH.

OF HINDRANCES IN BRINGING OFFENDERS TO PUBLICK JUSTICE, &c.

HAVING ſhewn in what manner criminals are to be arreſted, bailed, or committed, I am now to conſider in what manner they and their aſſiſtants are puniſhable for an hindrance in bringing them to publick juſtice.

And in order hereto I ſhall examine, How far they are puniſhable for an offence of this kind, before an arreſt made; and, How far after an arreſt.

(*a*) Sum. 116.
(*b*) S. P. C. 31. Crompton 38. 26 Aſſize 47. F. Juſt. of peace, 114. 231. Con. Sum. 116. 1 Hale 606. F. Cor. 333. 2 Inſt. 590.
(*c*) Sum. 218, 219. 2 Inſt. 183. Moor 8. S. P. C. 41.

Sect. 1. As to the firſt point; It is (*a*) certainly an offence of a very high nature to oppoſe one who lawfully endeavours to arreſt another for treaſon, or felony. And ſome (*b*) have ſaid, 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. And if it be a general (*c*) rule, That whoever knowing a perſon to have committed any ſuch crime, receives and comforts him, and endeavours to favour and aid him in the making his eſcape, thereby becomes a prin-

a principal in the caſe of treaſon, and an acceſſary in the caſe of felony, though he uſe no force in giving ſuch aſſiſtance to the offender; it ſeems ſtrange that he who ſo far takes part with him as to fight in his defence from juſtice, ſhould not be at leaſt equally guilty. And therefore it ſeems reaſonable to underſtand the books above cited, which ſeem to contradict this opinion, to intend no more than that it is not felony in the party himſelf, who is attacked in order to be arreſted, to ſave himſelf from the arreſt by ſuch reſiſtance.

S. P. C. 32. 9 H. 4. 1. 26 Aſſize 47.

Sect. 2. But if a perſon, knowing another to have been guilty of ſuch a crime, barely receive him, and permit him to eſcape, without giving him any manner of advice, aſſiſtance, or encouragement in it, as by directing him how to do it in the ſafeſt manner, or furniſhing him with money, proviſions, or other neceſſaries, it ſeems he is guilty of a high miſdemeanor only, but no capital offence.

Sum. 111, 271.

Sect. 3. Alſo it is certain, That the party himſelf who flies from ſuch an arreſt, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when ſuch flight is found againſt him, in ſuch manner as hath been already ſhewn, chapter 9. ſect. 51. and ſhall be alſo more fully conſidered hereafter.

Sect. 4. How far a vill, which ſuffers one who has been guilty of homicide to eſcape, is liable to be amerced, hath been already ſhewn, chap. 12. ſect. 2, 3.

Offences of this kind, after an arreſt made, may be conſidered in relation either, To the party under ſuch an arreſt: Or, To others.—And ſuch offences by the party himſelf are either without or with force.

Sect. 5. And firſt, As to ſuch offences by the party himſelf, without force, which ſeem properly to come under the notion of eſcapes, there is little remarkable in the books; and therefore I ſhall content myſelf with taking notice, That 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. And if it be ſo great a crime for one not arreſted to fly, in order to ſave himſelf from impriſonment for a capital offence, ſurely it muſt be at leaſt as great a crime, for one who is actually under the cuſtody of the law for any ſuch crime, by any indirect means to free himſelf from it. And ſome (*a*) have holden, That ſuch an eſcape amounts to felony: But this opinion ſeems to be over ſevere, and not to be maintained by the (*b*) book cited to prove it.

Summary 108. 2 Inſt. 589, 590.

C. Car. 210.

1 Aſſize 6.

(*a*) S. P. C. 37.
(*b*) 2 Ed. 3 2. F. Cor. 149.

CHAP-

CHAPTER THE EIGHTEENTH.

OF BREAKING PRISON.

SUCH offences by the party himſelf, accompanied with force, come under the notion of priſon-breaches; which I ſhall conſider, Firſt, As they ſtand by the common law. Secondly, On the ſtatute *de frangentibus priſonam*, which was made in the firſt year of king Edward the ſecond.

(*a*) Bract. l. 3. c. 9. Britton f. 17. S. P. C 30. 2 Inſt. 589. Summary 87. 1 Hale 607. Cont. S. P. C. 31. 33. 1 H. 7. 6. B. Corone 130. C. Car. 210. 2 Inſt. 589. (*b*) Vide infra ſ. 4.

Sect. 1. And firſt as to priſon-breaches, as they ſtood by the common law; it ſeems the better opinion, (*a*) That all ſuch offences were felonies, if the party were lawfully in priſon for any cauſe whatſoever, whether criminal or civil, and whether he were actually in the walls of a priſon, or only in the ſtocks, or in the cuſtody of any perſon who had lawfully arreſted him; and it ſeems not to have been any way material whether the priſon did belong to the king, or to the lord of a franchiſe; not only for that every perſon who is under a lawful impriſonment, may properly enough be called the king's priſoner; but alſo becauſe it is allowed, (*b*) That whoever breaks from any ſuch impriſonment, ſince the ſtatute 1 Edw. 2. *de frangentibus priſonam*, is guilty of felony: From whence it ſeems clearly to follow, That he muſt have been in like manner guilty before that ſtatute, the purport whereof is not to make any offences felonies which were not ſo before; but only to reſtrain ſome of thoſe which were. And it (*c*) ſeems alſo to be clear, That the confeſſion of ſuch offence before the coroner is not traverſable by the common law; which is not altered as to this point by the ſtatute.

(*c*) Vid. ſupra c. 9. ſ. 49.

Sect. 2. AND now I am to conſider theſe offences, as they ſtand by the ſaid ſtatute, for the better underſtanding whereof I ſhall firſt ſet down the words of the ſtatute, and then endeavour to ſhew in what manner they are to be underſtood.

2 Inſt. 589. 1 Hale 608.

Sect. 3. And firſt, the words of the ſtatute are as follows, "De priſonariis priſonam frangentibus, dominus rex vult & præcipit, quod nullus de cætero, qui priſonam fregerit, ſubeat judicium vitæ vel membrorum pro fractione priſonæ tantum, niſi cauſa, pro qua captus & impriſonatus fuerit, tale judicium requirat, ſi de illa ſecundum legem & conſuetudinem terræ fuiſſet convictus, licet temporibus præteritis aliter fieri conſuevit."

For

For the better underſtanding of the conſtruction whereof, I ſhall conſider the following points. Firſt, What ſhall be ſaid to be a priſon, within the meaning of this ſtatute. Secondly, How far the impriſonment ought to be well grounded. Thirdly, What ſhall be ſaid to be a breaking of priſon. Fourthly, For what crime the party ought to be impriſoned, to make the offence of breaking the priſon felony, within the intent of the ſtatute. Fifthly, Whether the offence of breaking priſon can ever amount to high treaſon. Sixthly, At what time, and in what manner, the offender is to be proceeded againſt. Seventhly, In what manner he is to be indicted. Eightaly, In what manner thoſe are to be puniſhed for a breach of priſon, who are within the benefit of the ſtatute.

Sect. 4. As to the firſt point, *viz.* What ſhall be ſaid to be a priſon (*a*) within the meaning of the ſtatute; 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, or the priſon of the ordinary, is properly a priſon within the ſtatute; for impriſonment (*b*) is nothing elſe but a reſtraint of liberty.

(*a*) F. Cor. 158. 290. 312. 48. 164. 250. 419. 22 Aſſize 85. C. Car. 210. 2 Inſt. 589, 590. Sum. 107. 1 Hale 608. 610. Dyer 99. Crom. 38, 39.
(*b*) S. P. C. 30.

Sect. 5. As to the ſecond point, *viz.* How far the impriſonment ought to be well grounded, it is clear, (*c*) That if a perſon be taken upon a *capias* awarded on an indictment or appeal againſt him, for a ſuppoſed treaſon, or felony, he is within the ſtatute if he break the priſon, whether any ſuch crime were in truth committed by him or any other perſon or not; for that there is an accuſation againſt him on record, which makes his commitment lawful, be he never ſo innocent, and the proſecution never ſo groundleſs.

(*c*) 2 Inſt. 590. Summary 109. 1 Hale 610. B. Eſcape, 29. See B. 1. c. 28. ſ. 11, 12.

Sect. 6. Alſo if an innocent perſon be committed by a lawful *mittimus* on ſuch a ſuſpicion of a felony, actually done by ſome other, as will juſtify his impriſonment though he be neither indicted nor appealed, he is certainly (*d*) within the ſtatute if he break the priſon, for that he was legally in cuſtody, and ought to have ſubmitted to it till he had been diſcharged by due courſe of law.

(*d*) Sum. 109. 1 Hale 610, 611. 2 Inſt. 590. Dyer 99. Crompton 38.

Sect. 7. But if no (*e*) felony at all were done, and the party be neither indicted nor appealed, it ſeems clear, That no *mittimus* for ſuch a ſuppoſed crime will make him guilty within the ſtatute by breaking the priſon, for that his impriſonment was unjuſtifiable.

(*e*) Sum. 109. 2 Inſt. 590, 591. Con. 2 Leon. 166.

Sect. 8. Alſo if a felony were done, yet if there were no juſt cauſe of ſuſpicion, either to arreſt or commit the party, it ſeems clear, That if his *mittimus* be not in ſuch form (*f*) as the law requires, his breaking of the priſon cannot be felony, becauſe the lawfulneſs of his impriſonment in ſuch caſe depends wholly

(*f*) Vide c. 16. ſ. 13, 14, 15, 16 17, 18.

wholly on the *mittimus*; which if it be not according to law, the impriſonment will have nothing to ſupport it. But if the party were taken up for ſuch ſtrong (*a*) cauſes of ſuſpicion as will be a good juſtification both of his arreſt and commitment, but happen to be committed by an informal warrant, it ſeems, that it may be probably argued, That it will be felony (*b*) in him to break the priſon; for if by the ancient common law, any private perſon might, of his own authority, juſtify both an arreſt and commitment, for treaſon or felony, on a reaſonable cauſe of ſuſpicion, as it ſeems probable (*c*) from the tenor of all the old books that he might; and if the neceſſity of a *mittimus* (*d*) from a magiſtrate, depend rather on the conſtant ſettled practice of juſtices of peace than any direct law, it ſeems difficult to maintain that a ſlip in want of form of ſuch a *mittimus* ſhould make it lawful for the priſoner to break the priſon, whereas by the old law it would have been felony in ſuch a caſe to have broken it without any ſuch *mittimus* at all. And on the other ſide, if the party be taken up for ſuch ſlight cauſes of ſuſpicion of a felony actually done, as will not in ſtrictneſs juſtify the arreſt, yet if the juſtice before whom he is brought think them of ſuch weight as to require a commitment, and do accordingly ſend the party to gaol by a regular *mittimus*, it ſeems very dangerous for him to break the priſon; for the practice of juſtices of peace in making ſuch commitments, being now grown into ſettled law, it ſeems reaſonable, that their *mittimus* be a good juſtification of the impriſonment which it commands, for a crime within their juriſdiction regularly brought before them; from whence it follows, That to break from ſuch impriſonment muſt be unlawful. And therefore, ſince it doth not appear, that there hath been any direct reſolution of theſe points, perhaps it may be reaſonable to underſtand, what is more generally ſaid by Sir (*e*) Edward Coke, and Sir (*f*) Matthew Hale, in relation to this matter, according to the above-mentioned diſtinctions.

(*a*) Vide ſup. c. 12. ſ. 8, 9, &c.

(*b*) B. Eſcape, 29. 42 Aſſize 5. 2 Hale 609.

(*c*) Vide ſup. c. 12. & c. 16. ſ. 3.

(*d*) 5 Mod. 80.

Vide inf. ſ. 15.

(*e*) 2 Inſt. 391.

(*f*) Sum. 109. 1 Hale 609. 2 Hale 610.

As to the third point, *viz.* What ſhall be ſaid to be a breaking of priſon, within the meaning of this ſtatute, the following rules are to be obſerved.

Sect. 9. Firſt, There muſt be an actual (*g*) breaking; for every indictment for this offence, as a felony, muſt have the words *felonice fregit priſonam*, which ſeem neceſſarily to import the uſe of ſome real force or violence, and not ſuch only as may be implied by the conſtruction of law, in any act done in contempt of it; and therefore, if without any obſtruction a priſoner go out of the priſon doors, being opened by the conſent or negligence of the gaoler, or otherwiſe eſcape without uſing any kind of force or violence, he is guilty of a miſdemeanor only, but not of felony, and the gaoler is puniſhable

(*g*) 2 Inſt. 590. Summary 108. S. P. C. 31. Rex v. Burridge, 3 P. Will. 439.

2 Hale 611.

able in ſuch manner as ſhall be ſet forth more at large in the next chapter.

Sect. 10. Secondly, Such breaking muſt be either by the priſoner himſelf, or by others through his procurement, or at leaſt with his privity; for if the priſon be broken by others, without his procurement or conſent, and he eſcape through the breach ſo made, it ſeems the better (*a*) opinion that he cannot be indicted for the breaking, but only for the eſcape.

(*a*) 2 Inſt. 589. Summary 108. S. P. C. 30. 31. 1 Hale 611. F. Corone 48. 1 H. 7. 6.

Sect. 11. Thirdly, Such breaking muſt not be neceſſitated by an inevitable accident, happening without any fault of the priſoner; as where (*b*) the priſon is fired by lightning, or otherwiſe, without his privity, and he breaks it open to ſave his life.

(*b*) 15 H. 7. 1, 2. Plowden 136. 2 Inſt. 590. Summary 108; 1 Hale 611.

Sect. 12. Fourthly, It ſeems, That no breach of priſon will amount to felony, unleſs the priſoner eſcape. For if the breaking of a priſon by a ſtranger, in order to free the priſoners who are in it, be not felony, unleſs the priſoners go out of it, as it is ſaid (*c*) that it is not, it ſeems *à fortiori*, That ſuch a breach by the priſoner himſelf, who lies under ſo much ſtronger a temptation to it, cannot be felony unleſs he do eſcape.

(*c*) Keilw. 48.

As to the fourth point, *viz.* For what crime the party muſt be impriſoned, to make his breaking the priſon felony within the meaning of the ſtatute, the following rules are to be obſerved.

Sect. 13. Firſt, It is not material, whether the offence for which he was impriſoned were capital at the time of this ſtatute, or were made ſo by ſubſequent ſtatutes; for ſince all breaches of priſon were felonies by the common law which is reſtrained by the 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.

Summary 108. 1 Hale 611.

Sect. 14. Secondly, The offence for which the party was impriſoned muſt be a capital one at the time of the offence, and not become ſuch by matter ſubſequent, as where (*d*) A. is committed to a priſon for a dangerous wound given to B. and breaks the priſon, and then B. dies: For though to ſome intents ſuch offence be eſteemed capital from the time of the firſt act, yet inaſmuch as it was in truth but a treſpaſs at the time of the breaking of the priſon, and it was then uncertain whether it would ever become capital; and it becomes ſuch afterwards *ab initio*, by fiction only, for ſome ſpecial purpoſes; and fictions of law are never carried farther than the neceſſity of thoſe particular caſes, which were the cauſe of the inventing them, doth require; they ſhall never be conſtrued to exempt a perſon from the advantage of a beneficial law made in favour of life, who is clearly within the letter, and doth not

(*d*) Sum. 108. 219. 2 Inſt. 591. Plow. 258. 401. 11 H. 4. 12. S. P. C. 33. 1 Hale 427. 591.

not plainly appear to be out of the meaning of it. However it ſeems certain, That ſuch an offender breaking priſon, while it is uncertain whether his offence will become capital, is highly puniſhable for his contempt by fine and impriſonment.

11 H. 4. 12. S. P. C. 35.

Sect. 15. Thirdly, If the party be only arreſted for, and in his *mittimus* charged with a crime which does not require judgment of life or member, as petit larceny or homicide *ſe defendendo*, or by miſadventure, and the offence, in truth, be 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. And 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 on a commitment for it can be felony; for the words of the ſtatute are *niſi cauſa pro qua captus & impriſonatus fuerit, tale judicium requirit*; and here it appears, That the offence, which is the cauſe of his impriſonment, doth not require ſuch a judgment; and it is hard to ſay, That a miſtake of the nature of the crime, by the perſon who makes the arreſt or *mittimus*, ſhould ſo far prejudice the party, as to make his eſcape amount to felony by reaſon of ſuch miſtake, which otherwiſe would have been but a treſpaſs. Alſo it ſeems to be agreed, That if a perſon be committed for a ſuppoſed felony, where no felony hath been done, he is not guilty of felony for breaking the priſon; from whence it clearly appears, That in that caſe the law doth not ſo far regard the charge contained in the *mittimus*, where there is no good ground to ſupport it, as in reſpect thereof to exclude the party from the benefit of the ſtatute; and yet in that caſe the party is as much accuſed of a capital offence as in the caſe in queſtion; ſo that it is clear, That the law doth not ſo much reſpect the heinouſneſs of the charge againſt the party, as of the very crime which is the ſubject of the charge: And this will farther appear, if it be conſidered, That the accuſation cannot be ſaid to be the cauſe which requires judgment of life or member, but the offence which ſupports the accuſation; and if there be no ſuch offence, there is, in truth, no cauſe which requires ſuch a judgment. On the other ſide, if the offence, which was the cauſe of the commitment, be in truth of ſuch a nature as requires a capital judgment, but in the *mittimus* be ſuppoſed to be of an inferior degree; it may probably be argued, That the parties breaking of the priſon is felony within the meaning of the ſtatute; for the cauſe of his arreſt and commitment is the fact for which he was arreſted and committed, and that does in truth require judgment of life, though the nature of it be miſtaken in the *mittimus*, which does no way alter the judgment of law in relation of the guilt

1 Hale 609. Summary 110. 2 Inſt. 590.

of

of it. But there appearing no expreſs reſolution of theſe points, and the (*a*) authors who have expounded this ſtatute ſeeming rather to incline to a different opinion, I ſhall leave theſe matters to the judgment of the reader.

(*a*) 2 Inſt. 590. 591. Summary 109. 110. 1 Hale 609.

Sect. 16. Fourthly, It is not material, Whether the party who breaks his priſon, were under an accuſation only, or actually attainted of the crime charged againſt him; and yet the words of the ſtatute are *ſi cauſa tale judicium requirit:* And it cannot be properly ſaid, That the offence of one attainted doth require ſuch a judgment (for that there ought not to be a ſecond judgment againſt one already condemned), but only that it did require it; and it is a ſettled rule, That all ſtatutes are to be conſtrued ſtrictly in favour of life, and that no parallel caſe, which comes within the ſame miſchief, ſhall be conſtrued to be within the purview of it, unleſs it can be brought within the meaning of the words: Yet conſidering that the manifeſt purport and meaning of the words of the ſtatute, taken altogether, is no more than this, That the breaking of priſon ſhall not be a capital offence; unleſs the crime for which the party was in priſon be alſo a capital offence; and it is frequent, in the conſtruction of penal laws, to bring perſons within the purview of them by being within the meaning of the words, though not in ſtrict grammar properly within the very letter; and it would be extremely harſh to imagine, that the makers of the ſtatute could intend a greater favour to perſons appearing to be guilty, and actually under the condemnation of the law, than to perſons under an accuſation only: There can be no doubt, but that the perſons attainted, breaking priſon, are as much guilty within the meaning of the above mentioned exception as any others.

S. P. C. 32.

See B. 1. c. 32. ſect. 2, 3, 4.

Sect. 17. As to the fifth point, *viz.* Whether the offence of breaking priſon can ever amount to high treaſon. It ſeems clear, That a perſon committed for high treaſon becomes guilty of felony only, and not of high treaſon, by breaking the priſon and eſcaping ſingly, without letting out any other priſoner; for that no offence is to be conſtrued high treaſon, which is not either within the purview of 25 Edw. 3. or of ſome ſubſequent ſtatute relating to treaſon. But if other perſons committed alſo for high treaſon eſcape together with him, and his intention in breaking the priſon were to favour their eſcape as well as his own, he ſeems to be guilty of high treaſon in reſpect of their eſcape, for that there are no acceſſaries in high treaſon, and ſuch aſſiſtance given to perſons committed for felony, will make him who gives it an acceſſary to the felony, and by the ſame reaſon a principal in the caſe of high treaſons. But this offence coming more properly under the notion of reſcous than of the breaking of priſon, ſhall be more fully conſidered in the chapter concerning reſcous.

B. 1. c. 17. ſect. 2. 2 Inſt. 590. S. P. C. 32. 1 H. 6. 5. 2 Hale 137. Summary 103.

1 Hale 611. Summary 110. 116. 2 Inſt. 502. 2 Hale 224.254.

Sect. 18. As to the ſixth point, *viz.* At what time and in what manner the offender is to be proceeded againſt; it is ſaid, That he may be arraigned for this offence 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, neither is he puniſhable as an acceſſary in reſpect thereof, but as a principal offender in reſpect of the breach of priſon itſelf. On which account this caſe differs from that of a reſcous or voluntary eſcape, as ſhall be ſhewn more at large in the following chapter.

F. Indict. 30. 1 H. 7. 6.

Sect. 19. It ſeems clear, That the ſheriff's return of a breach of priſon, is not a ſufficient ground to arraign the priſoner for it, unleſs he be alſo indicted.

Summary 1. 2 Inſt. 59. F. Indict. 18.

Sect. 20. As to the ſeventh point, *viz.* In what manner an offender is to be indicted for a breach of priſon, it is certain, That every indictment of this kind, to bring the offender within the intention of the ſtatute, muſt ſpecially ſet forth his caſe in ſuch a manner that it may appear that he was lawfully in priſon, and for ſuch a crime as requires judgment of life or member; and that it is not ſufficient to ſay in general, *quod felonice fregit priſonam.* And it ſeems, That the ſame rules which are required for an indictment of an eſcape, ſet forth at large in the next chapter, are generally to be obſerved in indictments of breaking priſon.

B. 1. c. 20. ſ. 1. and c. 29. ſ. 1. Summary 116. S. P. C. 35. 11 H. 4. 12.

Sect. 21. As to the eighth point, *viz.* In what manner thoſe are to be puniſhed who are within the benefit of the ſtatute, by being freed from that ſevere judgment for the breach of priſon, to which by the common law they would have been liable: There ſeems to be no doubt, but that whoever breaks from any lawful impriſonment is ſtill puniſhable as for a high miſpriſion by fine and impriſonment; for that every capital offence doth include in it a miſpriſion, and may be proceeded againſt as ſuch only, if the king pleaſe; and 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.

CHAPTER THE NINETEENTH.

OF ESCAPES SUFFERED BY OFFICERS.

HAVING ſhewn in the precedent chapters, how far the party himſelf, under a lawful arreſt for a crime charged againſt him, is puniſhable for unlawfully freeing himſelf from ſuch

ſuch arreſt, without waiting for his deliverance by due courſe of law, I ſhall now, in the ſecond place, conſider offences of this kind in relation to others.

And, Firſt, Such as are without force. Secondly, Such as are accompanied with force.

Such offences, without force, come under the notion of eſcapes, which are either, By officers. Or, By private perſons.

As to eſcapes ſuffered by officers, I ſhall endeavour to ſhew the following particulars. Firſt, What ſhall be judged an eſcape. Secondly, Where ſuch eſcape is to be eſteemed voluntary, and where negligent. Thirdly, Where the priſoner may be re-taken after an eſcape. Fourthly, Whether the eſcape is excuſed by ſuch a re-taking; or by killing the priſoner, if he cannot be re-taken. Fifthly, In what manner the officer ſuffering an eſcape is to be indicted. Sixthly, How an eſcape is to be tried and adjudged. Seventhly, How a voluntary eſcape is to be puniſhed. Eighthly, How a negligent one.

As to the firſt point, *viz.* What ſhall be judged an eſcape, the following rules are to be obſerved.

Sect. 1. Firſt, There muſt be an actual arreſt, and therefore, If (*a*) 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.

(*a*) B. Cor. 76. 9 H. 4 1. 27 Aſſize 1. F. Corone 249. Br. Eſcape 22.

Sect. 2. Secondly, As there muſt be an actual arreſt, ſuch arreſt muſt (*b*) alſo be 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: And it ſeems to be a good general rule, That where-ever an impriſonment is ſo far irregular, that it will be no offence in the priſoner to break from it by force, it can be no offence in the officer to ſuffer him to eſcape.

(*b*) F. Cor. 224. 1 Hale 583, 599. 42 Aſſize 5. B. Eſcape 27. 29. 5 Mod. 414. 415, 416. Cro. 2 Leonard 166. See c. 18. ſect. 5, 8.

Sect. 3. Thirdly, As the impriſonment muſt be juſtifiable, ſo muſt it be alſo for a criminal matter; and ſome (*c*) are ſaid to have holden, that no eſcape is criminal, but where the commitment is for felony. However it is certain, that the eſcape of one committed for petit larceny (*d*) only is criminal; and it ſeems moſt agreeable to the general reaſon of the law, That the eſcape of a perſon committed for any other crime whatſoever ſhould alſo be criminal. For ſurely wherever the publick

(*c*) F. Cor. 248. S. P. C. 33.

(*d*) F. Cor. 430 431. S. P. C. 33. 1 Hale 592.

juſtice requires, That a perſon be committed for a crime; it likewiſe requires, That he be ſafely kept under ſuch commitment, and conſequently may reaſonably demand publick ſatisfaction from the officer to whoſe cuſtody he is committed, if he neglect to keep him as he ought.

Sect. 4. Fourthly, As the impriſonment muſt be juſtifiable, and for ſome crime, ſo muſt its continuance at the time of the eſcape, be grounded on that ſatisfaction which the publick juſtice demands for ſuch crime; for if a priſoner be acquitted, (*a*) and detained only for his fees, it will not be criminal to ſuffer him to eſcape, though 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 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.

(*a*) B Eſcape, 16. 21 H 7 7. S. P. C. 34. 1 Hale 594. 234.

See F. Cor. 430. S. P. C. 34.

Sect. 5. Fifthly, 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, (*b*) who by law ought not to be bailed, but to be kept in cloſe cuſtody; or to permit (*c*) a priſoner to go out of the limits of the priſon: Yet ſome (*d*) ſeem to have holden, That in this laſt caſe it ſhall not be adjudged an eſcape, unleſs the priſoner be found to have had an intention to eſcape; but it will be difficult to maintain, That the offence of the gaoler can depend on the intention of the priſoner.

(*b*) 25 E. 3. 39. 1 Hale 596, 597. Summary 113. F. Eſcape 4. F. Cor. 246.

(*c*) F. Cor. 242.

(*d*) F. Cor. 431. S. P. C. 133.

Sect. 6. Sixthly, If (*e*) the gaoler ſo cloſely purſue the priſoner, who flies from him, that he re-take 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 at all to an eſcape: But if the gaoler once loſe ſight of the priſoner, and afterwards re-take him, he ſeems in ſtrictneſs to be guilty of an eſcape; and *à fortiori* therefore, (*f*) if he kill him in the purſuit, he is in like manner guilty, though he never loſt ſight of him, and could not otherwiſe take him, not only becauſe the king loſes the benefit he might have had from the attainder of the priſoner, by the forfeiture of his goods. &c. but alſo becauſe the publick juſtice is not ſo well ſatisfied by the killing him in ſuch an extrajudicial manner.

(*e*) F. Co. 236, 400. S. P. C. 33. 1 Hale 602. B. Eſcape, 14. 32. 49 52. 30 H. 7, 25. 26. 6 H. 7. 11. 12.

(*f*) F. Cor. 328, 346. S P. C. 33. See b. 1. c. 28. ſect. 11. 12.

Sect.

Sect. 7. Seventhly, While the privileges of ſanctuaries were allowed, if a ſheriff conducting a priſoner to gaol, had brought him in the way, through the limits of ſuch a franchiſe, and the priſoner had claimed the privilege of it, and by that means got free, it ſeems, (*a*) that the ſheriff was guilty of an eſcape, for that it was his fault, by bringing his priſoner that way to gaol, to give him an opportunity of claiming the franchiſe.

(*a*) B. Eſcape, 38, 50. 2 H. 4. 15. F. Cor. 222. 316. but 27 Aſſ. 51. and B. Eſcape 24 ſeem con.

Sect. 8. Eighthly, Alſo while the law allowed thoſe who had the benefit of the clergy, to free themſelves from priſon in certain caſes, by making their purgation before the ordinary, it was an eſcape (*b*) in the ordinary, to ſuffer ſuch perſons to deliver themſelves by it, in ſuch caſes in which they ought not to have been admitted to it.

(*b*) F. Cor. 16. 27 H. 6. 7. S. P. C. 33. Vide 23 H. 8. 11.

Sect. 9. Ninthly, If (*c*) a priſoner be reſcued by enemies, the gaoler is not guilty of an eſcape, as he would have been by the better opinion, if he had been reſcued by ſubjects, becauſe there is a legal remedy againſt *them*.

(*c*) B. Eſcape 10. 32. 52. 6 H. 7. 11. 12. 10 H. 7. 25. 26. 29 Aſſize 34. 1 Hale 596. B. Eſcape 26. ſeems contrary.

Sect. 10. As to the ſecond point, *viz.* Where ſuch eſcape is to be eſteemed voluntary, and where negligent, There (*d*) can be no doubt, but that 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 either from his trial or execution, he is guilty of a voluntary eſcape, and thereby involved in the guilt of the ſame crime of which the priſoner was guilty, and ſtood charged with. And it ſeems to be the opinion of Sir Matthew Hale, (*e*) That in ſome caſes an officer may be adjudged guilty of ſuch eſcape, who hath not ſuch intent, but only means to give his priſoner that liberty which by the law he hath no colour of right to give him; as where a gaoler bails a priſoner who is not bailable. But it ſeems agreed, That a perſon who hath power to bail, is guilty only of a negligent eſcape, by bailing one who is not bailable; neither can I meet with any authority in other books, to ſupport the above-mentioned opinion, That the bailing of one who is not bailable, by one who hath no power to bail, muſt neceſſarily be eſteemed a voluntary eſcape; but the contrary opinion ſeems more agreeable to the purview of 5 Edw. 3. c. 8. ſet forth more at large in the ſubſequent part of this chapter: Alſo there are ſome caſes wherein an officer ſeems to have been found (*f*) to have knowingly given his priſoner more liberty than he ought to have had, as to go out of the priſon on promiſe of returning, or to go among his friends, to find ſome who would warrant goods to be his own, which he is ſuſpected to have ſtolen, and yet ſeems to have been only adjudged guilty of a negligent eſcape. But it muſt be confeſſed, That in theſe caſes, the priſoner was only

(*d*) See C. Car. 492. S. P. C. 32. It is an eſcape to diſcharge a night walker from the watch-houſe, although no poſitive charge is made. 2 Burr. 867.

(*e*) Sum. 113. Supra ſect. 5. 1 H le 596, 597.

(*f*) F. Cor. 242. 316, 431. S. P. C. 33.

accuſed of larceny; and it doth not appear, whether he were bailable or not, and generally the old caſes concerning this ſubject are ſo very briefly reported, that it is very difficult to make an exact ſtate of the matter from them: However thus much ſeems clear, That if in the caſes above-mentioned, the officer were only guilty of a negligent eſcape, in ſuffering the priſoner to go out of the limits of the priſon, without any ſecurity for his return, he could not have been guilty in a higher degree, if he had taken bail for his return; from which it ſeems reaſonable to infer, That it cannot be in all caſes a general rule, that an officer is guilty of a voluntary eſcape by bailing his priſoner, whom he hath no power to bail; but that the judgment to be made of all offences of this kind, muſt depend on the circumſtances of the caſe, as the heinouſneſs of his crime with which the priſoner is charged the notoriety of his guilty, the improbability of his returning to render himſelf to juſtice, the intention of the officer, the motives on which he acted, &c.

1 Hale 597.

Sect. 11. Neither is it a certain rule, That an officer, who unlawfully, knowingly, and willingly ſuffers a capital offender to eſcape, is in all caſes to be adjudged guilty of a voluntary eſcape; for where an ordinary ſuffered a clerk attainted, being committed to his cuſtody, to free himſelf from impriſonment, by making his purgation, he might be truly ſaid to have ſuffered ſuch priſoner to eſcape unlawfully, knowingly, and willingly; and yet it ſeems, (*a*) That he was guilty only of a negligent eſcape, for that he did not ſave the priſoner from execution, which was excuſed by the privilege of the clergy, but only from the impriſonment.

(*a*) F. Cor. 16. 370. F. Eſcape 1. S. P. C. 34. 341. 25 H. 7. 9. 1 Hale 593.

Sect. 12. As to the third point, *viz.* In what caſes a priſoner may be re-taken after an eſcape; it ſeems to be clearly agreed, by all the books, (*b*) That an officer making a freſh purſuit after a priſoner, who hath eſcaped through his negligence, may re-take him at any time after, whether he find him in the ſame, or in a different (*c*) county. And it is ſaid generally in ſome books, (*d*) That an officer who hath negligently ſuffered a priſoner to eſcape, may re-take him whereever 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. But where a gaoler hath voluntarily ſuffered a priſoner to eſcape, it is ſaid by ſome, (*e*) That he can no more juſtify the re-taking him, than if he had never had him in cuſtody before, becauſe by his own free conſent he hath admitted, that he hath nothing to do

(*b*) F. Treſ. 94. F. Eſcape 3. F. Corone 236. B. Eſcape 49. 32. 52. 1 Hale 602. 13 Ed. 4. 9. 2 Ed. 4. 6.

(*c*) 33 H. 6. 52, 53. 3 Co. 44. 52. B. Eſcape 4. Freſh Suit 3. 5. Con. Keilw. 3.

(*d*) F. Cor. 236. 4co. 313. 335. S. P. C. 117. B. Execution 58. 151. 27 H. 8. 1. 13 H. 7. 1. F. N. B. 130.

(*e*) 2 Jones 21, 22, 45. 3 Coke 52. C. Jac. 659. Qu. 1. Dany. Abr. 633. 535.

with

with him. And it ſeems to be holden by Sir William Staundford, (*a*) That after a gaoler hath been fined for ſuffering a priſoner negligently to eſcape, he cannot afterwards re-take him; but the book (*b*) on which alone he ſeems to ground his opinion, doth not fully come up to it; for the purport of it ſeems to be no more than this, That a gaoler's re-taking of a priſoner, after he hath been fined for an eſcape, ſhall be to no purpoſe, for that it is contrary to the record, by which it appears, that the priſoner hath been at large; by which it ſeems only to be intended, That a gaoler, who hath been fined for an eſcape, ſhall not avoid the judgment of his fine by re-taking the priſoner: But I do not ſee how it can be collected from hence, that he cannot juſtify the re-taking him.

(*a*) S. P. C. 33.
(*b*) 13 E. 4. 9. F. Eſcape 2. B. Eſcape 35. 1 Hale 602. Summary 114.

Sect. 13. As to the fourth point, *viz.* How far an eſcape is excuſed by re-taking the priſoner, or by killing him, if he cannot be re-taken; perhaps it is 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 finable at the diſcretion of the court, notwithſtanding he re-took him immediately after; for it ſeems agreed, That this is to be adjudged a negligent eſcape, which implies an offence, and conſequently that it muſt be puniſhable. It is true indeed, That in an action againſt a gaoler, for ſuffering one arreſted in a civil action to eſcape, it is a good excuſe for the gaoler, that before the action brought he re-took the priſoner upon freſh ſuit, which is well maintained by ſhewing that he purſued him immediately after notice of the eſcape, though it were ſome hours after it, and re-took him; but it does not from hence follow, that the like excuſe will ſerve for the negligent eſcape of a criminal, becauſe this is an offence againſt the publick, but the other is only a private damage to the party. Neither will it be the like hardſhip to the officer to be expoſed to ſuch puniſhment as the court in diſcretion ſhall think fit to impoſe upon him for the negligent eſcape of a criminal, as it would be to be liable to an action of eſcape, for ſuffering a perſon in his cuſtody, in a civil action, to eſcape; for that in the former caſe the court would moderate his fine according to the circumſtances of the whole matter, and would certainly mitigate, if not wholly excuſe it, if he ſhould appear to have taken all reaſonable care. But in the other caſe, if he ſhould be liable to an action, his judgment would not lie in the diſcretion of the court, but he would be bound to pay the whole debt, for which the party was in his cuſtody, if the eſcape ſhould be adjudged againſt him. However it is certain, That it will be no advantage to a gaoler to re-take his priſoner, after he has been fined for the eſcape, as hath been ſhewn in the precedent ſection, alſo it is clear, That he cannot excuſe himſelf by killing a priſoner in the purſuit, though he could not

S. P. C. 33. Summary 114. ſeems contrary.

See the books cited ſect. 6. 1 R. Abr. 808. 1 Danv. Abr. 633. 3 Danv. Abr. 119. Vide 8 W. 3. c. 27.

Vide ſup. ſect. 6.

not poſſibly re-take him; but muſt, in ſuch caſe, be content to ſubmit to ſuch fine as his negligence ſhall appear to deſerve.

Sect. 14. As to the fifth point, *viz.* In what manner the officer ſuffering an eſcape is to be indicted; it ſeems clear, That every indictment for an eſcape, whether negligent or voluntary, muſt expreſsly ſhew, that the party was actually (*a*) in the defendant's cuſtody for a crime, action, or commitment for it; and that (*b*) it is not ſufficient to ſay, that he was in the defendant's cuſtody, and charged with ſuch a crime; for that a perſon in cuſtody may be ſo charged, and yet not be in cuſtody by reaſon of ſuch charge. And it ſeems alſo, That every ſuch indictment muſt expreſsly ſhew that the priſoner went at large, which is moſt properly (*c*) expreſſed by the word *exivit ad largum.* Alſo it ſeems neceſſary to ſhew the time when the offence was committed, for which the party was in cuſtody, not only (*d*) that it may appear, that it was prior to the eſcape, but alſo (*e*) that it was ſubſequent to the laſt general pardon. Alſo it ſeems clear, That every indictment for a voluntary eſcape, muſt alledge that the defendant *felonice & voluntarie* A. B. *ad largum ire permiſit*; and muſt (*f*) alſo ſhew the ſpecies of the crime for which the party was impriſoned; for it is not ſufficient to ſay in general, That he was in cuſtody for felony, &c. for that no one can be puniſhed in this degree, but as involved in the guilt of the crime for which the party was in his cuſtody; and therefore the particular crime muſt be ſet forth, that it may appear, that the principal is attainted for the very ſame crime, if it were felony, or that it was in truth committed, if high treaſon. But it ſeems queſtionable, (*g*) 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.

(*a*) 27 Aſſize 9. 1 Hale 599. B. Eſcape, 22. F. Aſſize 247.
(*b*) Salkeld 272. 5 Modern 414, 415. Holt 280. 1 Roll Ab. 806. C. J. 588. Salkeld 272.
(*c*) B. Eſcape 52. 10 H. 7. 26.
(*d*) Con. 2 Leon. 166. B. Eſcape 17. C. Eliz. 752.
(*e*) Het. 13.
(*f*) C. Eliz. 52. Het. 73. S. P. C 95. Summary 110, 111. 206. 8 Ed. 4. 3.
(*g*) See Keilw. 192. 194.

Sect. 15. As to the ſixth point, *viz.* In what manner an eſcape is to be tried and adjudged; it is to be obſerved, That where perſons being preſent in a court of record, are committed to priſon by ſuch court, the keeper of the gaol is bound to have them always ready, whenever the court ſhall demand them of him; and if he ſhall fail to produce them at ſuch demand, the court will adjudge him guilty of an eſcape, without any farther inquiry, unleſs he have ſome reaſonable matter to alledge in his excuſe; as that the priſon was ſet on fire, or broken open by enemies, &c. for he ſhall be concluded, (*h*) by the record of the commitment, to deny that the priſoners were in his cuſtody. And ſome (*i*) have holden, That if a gaoler ſay nothing in excuſe of ſuch an eſcape, it ſhall be adjudged voluntary; but I cannot find any reſolution to this purpoſe; and where it ſtands indifferent, whether an eſcape

S. P. C. 34. 35. F. Corone 466.
(*h*) 11 H. 6. 49. 12 H. 6. 2. 3. S. P. C. 35.
(*i*) S. P. C. 34. 39 H. 6. 33. 34. 1 Hale 599. 603.

eſcape be negligent or voluntary, it ſeems difficult to maintain that it ought to be adjudged a crime of ſo high a nature, without a previous trial.

Sect. 16. As to other priſoners who are not ſo committed, but are in the cuſtody of a gaoler, ſheriff, conſtable, or other perſon, by any other means whatſoever, it ſeems agreed, (*a*) That the perſon who has them in cuſtody is in no caſe puniſhable for their eſcape, except in ſome ſpecial caſes, until it be preſented. (*a*) S. P. C. 35.

For the better underſtanding whereof I ſhall endeavour to ſhew, Before whom ſuch preſentments are to be made; and, In what caſes they are traverſable.

Sect. 17. As to the firſt point, it is enacted by the ſtatute of Weſtminſter, 1. c. 3. "That nothing be demanded nor "taken, nor levied by the ſheriff, nor by any other, for the "eſcape of a thief, or felon, until it be judged for an eſcape "by the juſtices in eyre; and that he who does otherwiſe, "ſhall reſtore to him or them that have paid it, as much as "that he or they have taken or received, and as much alſo "unto the king."

Sect. 18. It hath been adjudged, (*b*) That this ſtatute reſtrains not the court of king's bench from receiving ſuch preſentments, for that its juriſdiction includesin it that of juſtices of eyre, and this court is itſelf the higheſt court of eyre. (*b*) 27 Aſſize 9. 21 Aſſize 12. S. P. C. 35. 2 Inſt. 166. 1 Hale 600.

Sect. 19. It is farther enacted, by 31 Edw. 3. c. 14. "That the eſcape of thieves and felons, and the chattels of "felons, and of fugitives, and alſo eſcapes of clerks convict, "out of their ordinary's priſon, from thenceforth to be "judged before any of the king's juſtices, ſhall be levied from "time to time, as they ſhall fall, as well of the time paſt as "time to come." By which it ſeems to be implied, That other juſtices, as well as thoſe in eyre, may take cognizance of eſcapes; and it is certain, That juſtices of gaol-delivery may puniſh juſtices of peace for a negligent eſcape, in admitting perſons to bail, who are not bailable. Ante ſect. 12, 15 S. P. C. 35.

Sect. 20. And it is farther enacted by 1 Rich. 3. c. 3. "That juſtices of peace ſhall have authority to inquire in "their ſeſſions, of all manner of eſcapes of every perſon ar"reſted and impriſoned for felony."

Sect. 21. As to the ſecond particular, In what caſes ſuch preſentments are traverſable; it is laid down as a rule, by Sir William Staundford, That wherever an eſcape is finable, the preſentment of it is traverſable; but that where the offence is amerciable only, there the preſentment is of itſelf concluſive; ſuch amercements being reckoned among thoſe *minima de quibus non curat lex*; and this diſtinction ſeems to be well warranted S. P. C. 35.

warranted by the old (*a*) books; and in what caſes eſcapes are finable, and where amerciable only, ſhall be conſidered in the following part of this chapter, ſection 31. 33. 35.

(*a*) 21 Aſſ. 12. 27 Aſſ. 9. 27. F. Cor. 291, 328 345, 346, 352. 1 Hale 603. 2 Hale 154.

Sect. 22. As to the ſeventh point, *viz.* In what manner a voluntary eſcape is to be puniſhed; it ſeems to be generally (*b*) agreed, That ſuch eſcape 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; and whether the perſon eſcaping were actually committed to ſome gaol, or under an arreſt only and not committed; and whether he were attainted, or only accuſed (*c*) of ſuch crime, and neither indicted nor appealed: And it is ſaid to be no excuſe of ſuch eſcape, That the priſoner had been acquitted on an indictment of death, and only committed till the year and day be paſſed, to give the widow or heir of the deceaſed an opportunity of bringing their appeal.

(*b*) S. P. C. 32. I. Summary 113 3 Hale 234. 390, 391. 593. B. Cor. 112. 27 Aſſize 62. 11 H. 4. 12. (*c*) Sum. 114, 115. Dyer 90. F. Eſcap. 3. 27 Aſſize 62.

Sect. 23. Alſo ſuch an eſcape, ſuffered by one who wrongfully takes upon him the keeping of a gaol, ſeems to be (*d*) puniſhable in the ſame manner as if he were never ſo rightfully intitled to ſuch cuſtody, for that the crime is in both caſes of the very ſame ill conſequence to the publick; 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.

(*d*) B. Eſcape 18. 23. 2 Roll 146. F. Aſſize 252. 39 H. 6. 33. 34. Quære 27. Aſſize 27. 1 Hale 594. Summary 114.

Sect. 24. Alſo if the warrant of commitment do plainly and expreſsly charge the party with treaſon or felony, but in ſome other reſpect be not ſtrictly formal, yet it ſeems, That it may (*e*) be probably argued, That the gaoler ſuffering an eſcape, is as much puniſhable as if the warrant were perfectly right; for it would be highly inconvenient to ſuffer gaolers to take advantage of a ſlip of this kind in commitments, which being generally made by perſons of no great knowledge in the law, cannot be expected to be always agreeable to its forms; and therefore if they be good in ſubſtance, the publick good ſeems to require, that the gaoler be as much bound to obſerve them, as if they were never ſo exactly made.

(*e*) Salkeld 272. 347, 348. Con. Summary 114. 2 Inſt. 590, 591, 592. See c. 16. & c. 18 ſect. 5, 6, 7. 1 Hale 595.

Sect. 25. But it ſeems to be agreed, That no eſcape can amount to a capital offence, unleſs the cauſe for which the party was committed, (*f*) were actually ſuch at the time of the eſcape; and therefore, if a gaoler ſuffer one to eſcape who is committed for having given a dangerous wound to another, who afterwards dies of ſuch wound, yet he is not guilty of felony, for that the offence of the priſoner was but a treſpaſs at the time of the eſcape; and though by a fiction of law it be afterwards, for ſome purpoſes, eſteemed a felony from the time

(*f*) Summary 114. 219. See c. 16. ſect. 19. 11 H. 4. 12. 1 Hale 591.

time of the giving of the wound, yet ſince it is, in truth, no felony till the death of the party, it ſhall be afterwards conſtrued ſuch in reſpect of thoſe only who were privy to the giving of the wound.

Sect. 26. Alſo it ſeems clear, That he who ſuffers another to eſcape who was in his cuſtody for felony, cannot be arraigned for ſuch eſcape as for a felony, until the principal be attainted; for that he who ſuffers ſuch eſcape, is by the better opinion not puniſhable in this degree, but as an acceſſary to the felony; and it is a rule, That no acceſſary ought to be tried till the principal be attainted, as ſhall be more fully ſhewn hereafter. Yet it ſeems certain, (*a*) That one accuſed of ſuch an eſcape may be indicted and tried for a miſpriſion, before the attainder of the principal offender, for that whether ſuch offender were guilty or innocent, it was a high contempt to ſuffer him to eſcape. And if the commitment were for high treaſon, and the perſon committed actually guilty of it, it ſeems, that the eſcape is immediately puniſhable as high treaſon alſo, whether the party eſcaping be ever convicted of ſuch crime or not; for that there are no acceſſaries in high treaſon, but all who are guilty of aſſiſting the party guilty of ſuch crime, in ſuch a manner as would make them acceſſaries to a felony, are accounted principals in the treaſon, as ſhall be more fully ſhewn in the chapter concerning principal and acceſſary.

1 Hale 237, 238. 591. 598. Summary 110. 215, 216. 2 Hale 254. F. Cor. 158. Quære 27 Aſſ. 62 Con. Cromp. 58. (*a*) Summary 116. F. Cor. 158. See c. 18. ſect. 21. Summary 110. ſeems con. Summary 116.

Sect. 27. Alſo it ſeems to be clear, That no one is puniſhable in this degree for a voluntary eſcape, but the perſon only who is actually guilty of it; and therefore, that the principal gaoler is only finable for a voluntary eſcape ſuffered by his deputy, for that no one ſhall ſuffer capitally for the crime of another.

Salkeld 272. Summary 113. 1 Hale 597, 598.

As to the eighth point, *viz.* In what manner a negligent eſcape is to be puniſhed; I ſhall endeavour to ſhew, How ſuch eſcape is puniſhable by the common law; and, How by ſtatute.

Sect. 28. As to the firſt particular, I ſhall take it for granted at this day, that whoever *de facto* occupies the office of gaoler is liable to anſwer for ſuch an eſcape; and that it is no way material whether his title to the office be legal or not.

Summary 114. 2 Roll 146. B. Eſcape, 18. 23. Qu. 27 Aſſ. 27. Vide ſup. ſect. 23.

Sect. 29. Alſo I take it to be the better opinion, That (*b*) a ſheriff is as much liable to anſwer for an eſcape ſuffered by his bailiff, as if he had actually ſuffered it himſelf, and that (*c*) 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: But if the gaoler who ſuffers an eſcape, have an eſtate (*d*) for life or years in the office, I do not find it agreed how far he in reverſion is liable to be puniſhed.

(*b*) F. Cor. 337. (*c*) Salkeld 272. Summary 113. 1 Hale 597. 604. 2 Levinz 71. (*d*) 39 H. 6. 33, 34. 2 R. Abr. 155. 3 Levinz 288. 2 Levinz 81.

Sect.

Sect. 30. It ſeems the better opinion, That one negligent eſcape will not amount to a forfeiture of a gaoler's office, as one voluntary (*a*) one will; yet if a gaoler ſuffer many negligent eſcapes, it is ſaid, that he puts it in the power of the court to ouſt him of his office by its diſcretion.

(*a*) B. For. of Offices, 27. 2 R. A. 155.

Sect. 31. It ſeems to be certain, That wherever a perſon is found guilty upon an indictment, or preſentment, of a negligent eſcape of a criminal actually in his cuſtody, he ought to be condemned in a certain ſum to be paid to the king, which ſeems moſt properly to be called a fine. But this does not clearly appear from the old books, for in ſome (*b*) of them it ſeems to be taken as a fine, in others (*c*) as an amercement, and in others it is ſpoken of generally, as an impoſition of a certain ſum, and without any (*d*) mention either of fine or amercement. But where the books ſpeak of the puniſhment of a vill or hundred, for ſuffering a felon to eſcape without being arreſted, they ſeem always to take it as an amercement, and not as a fine: And where a ſheriff, having returned a *capi corpus* into the king's bench, on a *capias* againſt a man on an indictment of felony, does not bring him in at the day, it ſeems (*e*) that he is, by the courſe of the ſaid court, to be amerced, not fined.

(*b*) 8 H. 5. 2. F. Cor. 84. 292. S. P. C. 35. B. Eſcape 16. Raſt. 583.
(*c*) F. Cor. 335.
(*d*) 25 Ed. 3. 39. 22. 27 Aſſize 9. S. P. C. 65. 26 Aſſize 51. Summary 113. F. Cor. 196, 291. 370. Graunt 39. Eſcape 4. See the Books ſupra c. 12. ſect. 2.
(*e*) F. Eſcap. 7. 40 Aſſize, 42.

Sect. 32. It hath been holden, (*f*) That a negligent eſcape may be pardoned by the king before it happens, but that a voluntary one cannot be ſo pardoned; but this ſhall be more fully conſidered in the chapter concerning pardon.

(*f*) 3 H. 7. 15. 8 H. 5. 2. F. Graunt 37.

Sect. 33. And it ſeems, (*g*) That by the common law, the penalty for ſuffering the negligent eſcape of a perſon attainted, was of courſe 100*l.* and for ſuffering ſuch eſcape of a perſon indicted and not attainted, was 5*l.* (*h*) but if the perſon eſcaping were neither attainted nor indicted, it ſeems, That it was left to the diſcretion of the court to aſſeſs ſuch a reaſonable forfeiture as ſhould ſeem proper; and (*i*) if the party had twice eſcaped, it ſeems, That the penalties above-mentioned were of courſe to be doubled; yet it ſeems, That the forfeiture was to be no greater for ſuffering (*k*) a priſoner committed on two ſeveral accuſations to eſcape, than if he had been committed but on one.

(*g*) S. P. C. 35. Summary 113. 1 Hale 604. F. Cor. 370.
(*h*) S. P. C. 35. Summary 113. 27 Aſſize 9. 40 Aſſize 42. 25 Ed. 3. 39. F. Cor. 454.
(*i*) S. P. C. 33. F. Cor. 422.
(*k*) F. Cor. 196. 26 Aſſize 51.

On a conviction for letting a priſoner eſcape, when the defendant is brought before the court for judgment, the proſecutor may produce and read affidavits, made even by a witneſs on the trial, in aggravation of the damages,

Sect. 34. As to the ſecond particular, *viz.* In what manner offences of this kind are puniſhable by ſtatute; it is recited by 5 Edw. 3. c. 8. "That perſons indicted of felonies in times paſt, had removed the indictments before the king, and there yielded themſelves, and by the marſhals of the king's bench had been incontinently let to bail, and after had done many evil deeds, &c." And thereupon it is enacted, "That "ſuch enditees and appellees ſhall be ſafely and ſurely kept in "priſon, as belongeth to them, according to the charge "which the ſaid marſhals ſhall have of the juſtices; and if "any

" any marſhal ſhall do otherwiſe, at the complaint of every " man that will complain, the juſtices ſhall do him right " during the terms; and in the end of the terms, upon their " riſing, the ſaid marſhals ſhall chooſe before the ſaid juſtices, " before they depart their places, in what town they will keep " ſuch priſoners at their peril: And in the ſame town they " ſhall allow to them houſes to keep ſuch priſoners at their " own coſts and charges; and there they ſhall keep them in " priſon, and ſhall not ſuffer them to go wandring abroad, " neither by bail nor without bail. And if any ſuch priſoner " be found wandring out of priſon, by bail or without bail, " and that be found at the king's ſuit, or at the ſuit of the " party, the marſhals which ſhall be found thereof guilty, " ſhall have half a year's impriſonment, and be ranſomed at " the king's will; and the juſtices ſhall thereof make enquiry " when they ſee time; and as to the marſhals, it ſhall be " done within the verge that which reaſon will. And in caſe " that the marſhals ſuffer by their aſſent ſuch priſoners to " eſcape, they ſhall be at the law, as before the time of the " ſtatute they had been. And the king intendeth not by this " ſtatute to loſe the eſcape, where he ought to have the ſame."

which the defendant, in mitigation, may anſwer and contradict. Rex v. Sharpneſs, Eaſter, 26 Geo. 3.

Sect. 35. Alſo it is enacted by 19 Hen. 7. c. 10. " That " every ſheriff have the cuſtody of the king's common gaols, " during the time of his office, except all gaols whereof any " perſon or perſons have the keeping of eſtate of inheritance: " And that all letters patents made for term of life, or " years, of the keeping of the ſaid gaols, &c. ſhall be annulled " and void."

Vide 5 Anne c. 9.—The penalties for eſcapes inflicted by the ſubſequent part of this ſtatute, which were recited in the former edition of this work, have been expired above 200 years. Vide Ruffhead's Statutes, and 1 Burn's Juſtice 503.

CHAPTER THE TWENTIETH.

OF ESCAPES SUFFERED BY PRIVATE PERSONS.

Summary 122.

HAVING in the precedent chapter endeavoured to ſhew the nature of eſcapes ſuffered by officers, I am now in the ſecond place to conſider the nature of ſuch eſcapes ſuffered by private perſons. But the law being generally the ſame in relation to ſuch eſcapes, as in relation to thoſe ſuffered by officers, I ſhall refer the Reader, for the general learning of this kind, to what is ſaid in the former chapter, concerning Eſcapes ſuffered by Officers.

I ſhall content myſelf in this place with conſidering the two following particulars. Firſt, Where a private perſon is to be adjudged

adjudged guilty of such an escape; and, Secondly, In what manner he is to be punished.

Sect. 1. As to the first point, 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 (*a*) 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.

(*a*) See c. 12. Summary 112. 1 Hale 595.

Sect. 2. And therefore, if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person who receives him, and suffers him to go at large, it is said, (*b*) That both of them are guilty of an escape; the first because he should not have parted with him, till he had delivered him into the hands of a publick officer; the latter, because having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him.

(*b*) Sum. 112. 44 Assize 12. B. Escape 31. 43 Ed. 3. 36. F. Cor. 454. F. Escape 3.

Sect. 3. But if a private person having made such an arrest, have delivered over his prisoner to the proper officer (as the sheriff, (*c*) or his bailiff, (*d*) or a constable (*e*), from whose custody the prisoner escapes, the party who made the arrest is not chargeable with it.

(*c*) F. Cor. 345. (*d*) F. Cor. 328. 337. S. P. C. 34. (*e*) Sum. 112. 1 Hale 594, 595.

Sect. 4. But if no officer will receive such prisoner into his custody, it seems (*f*) to be the safest way to deliver him into the custody of the township where the person who arrested him lives, or perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol-delivery; but if such township refuse also to receive him, I do not see how the person who made that arrest can discharge himself of him before the next gaol-delivery, unless he can in the mean time procure him to be bailed.

(*f*) 10 H. 7. F. Escape 8. Summary 114. F. Cor. 345.

Sect. 5. Neither can such private person excuse himself of the escape of such a prisoner, by alledging, That he delivered him over to a sheriff or other officer, without shewing to whom, in particular, by name, he so delivered him, that the court may certainly know who is answerable for him.

Sect. 6. As to the second point, *viz.* In what manner a private person is punishable for such an escape, I shall take it for granted that if it were voluntary, he is punishable in the same manner as an officer, for which I shall refer the Reader to the former chapter; and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court.

Summary 112. B. Cor. 112. 27 Ass. 62. Vide De Tessier's Case, Black. 868. who was fined 50 l. for effecting the escape of French prisoners. N. B. The 19 Hen. 7. c. 10. recited in the former editions is expired.

CHAPTER

CHAPTER THE TWENTY-FIRST.

OF RESCOUS.

THE offence of a ſtranger in forcibly freeing another from an arreſt, comes under the notion of reſcous, which in moſt inſtances is of the ſame nature with the offence of breaking priſon, which hath been already conſidered in the eighteenth chapter. 1 Hale 606.

It ſeems, therefore, ſufficient for the declaration of the nature of this crime, to ſhew, In what caſes it agrees with the offence of breaking priſon; and, In what it differs.

Sect. 1. And this offence agrees with that of breaking priſon in the following particulars. Firſt, Whatever is ſuch a priſon, that the party himſelf was, by the common law, guilty of felony by breaking from it, in every ſuch caſe a ſtranger was guilty of as high a crime at leaſt, in reſcuing him from it. 2 Inſt. 589. S. P. C 30, 31. and the Caſes cited c. 18. ſ. 1 & 4.

Sect. 2. Secondly, Wherever (*a*) the impriſonment is ſo far groundleſs, or irregular, or for ſuch a cauſe, or the breaking of it is occaſioned by ſuch a neceſſity, &c. that the party himſelf breaking the priſon is, either by the common law, or by the ſtatute *de frangentibus priſonam*, ſaved from the penalty of a capital offender, a ſtranger who reſcues him from ſuch an impriſonment, is in like manner alſo excuſed; *& ſic è converſo.* (*a*) See c. 18. S. P. C. 30. 31. Sum. 116.

Sect. 3. Thirdly, As the party himſelf ſeems not to be guilty of felony by breaking the priſon unleſs he go out of it; ſo neither is a ſtranger unleſs the priſoner actually go out of the priſon. Keilwood 87. B. Eſcape, 52.

Sect. 4. Fourthly, As the ſheriff's return, that a priſoner hath broken the priſon, is not a ſufficient ground to arraign him for ſuch offence, unleſs he be indicted alſo for it, ſo neither is his return of a reſcous a good ground for the arraignment of the reſcuer, unleſs he be indicted. F. Exdit. 30. 1 H. 7. 6. 4 Burr. 2129.

Sect. 5. Fifthly, As an indictment of breaking priſon, and alſo an indictment of eſcape, muſt ſpecially ſet forth the nature and cauſe of the impriſonment, and the ſpecial circumſtances of the fact in queſtion; ſo alſo muſt an indictment of reſcous. Vide ſup. c. 18. ſ. 20. and c. 19. ſ. 14. Dyer 164.

Sect. 6. Sixthly, As thoſe who break priſon are ſtill puniſhable, as for a high miſpriſion, by fine and impriſonment, Vide ſup. c. 18. ſ. 21.

in thoſe caſes wherein they are ſaved from judgment of death, by the ſtatute *de frangentibus priſonam*, ſo alſo are thoſe who reſcue ſuch priſoners in the like caſes in the ſame manner puniſhable.

Vide ſup. c. 18. ſ. 17. 2 Hale 237.

Sect. 7. The offence of reſcous differs from that of breaking priſon in the following particulars. Firſt, Whereas a perſon committed for high treaſon, who breaks the priſon and eſcapes, is guilty of felony only, unleſs he lets others alſo eſcape whom he knows to be committed for high treaſon, in which caſe he is guilty of high treaſon, not in reſpect of his own breaking of the priſon, but of the reſcous of the others: A ſtranger (*a*) who reſcues a perſon committed for and guilty of high treaſon, knowing him to be ſo committed, is in all caſes guilty of high treaſon; and by ſome (*b*) he is in like manner guilty, whether he knew that the priſoners were committed for high treaſon or not. But this opinion is not proved by the authority of the caſe (*c*) on which it ſeems to be grounded.

(*a*) S. P. C. 11. 32. Summary 109. Dalton f. 228. 1 Jones 455. 1 H. 6. 5. F. Cor. 2. B. Treaſ. 11.
(*b*) C. Car. 583.
(*c*) 1 H. 6. 5.

Sect. 8. Secondly, Whereas a priſoner who breaks the priſon, may be arraigned (*d*) for ſuch offence before he be arraigned of the crime for which he was impriſoned; he who reſcues one impriſoned for felony cannot, according to the better (*e*) opinion, be arraigned for ſuch offence as for a felony, till the principal offender be firſt attainted; but if the perſon reſcued were impriſoned for high treaſon, the reſcuer may immediately be arraigned, for that in high treaſon all are principals; alſo it ſeems, that he may be immediately proceeded againſt for a miſpriſion only, if the king pleaſe.

(*d*) Sup. c. 18. ſ. 17.

(*e*) Vide ſup. c. 19. Summary 116. S. P. C. 43. ſeems contrary.

Vide 1 Ann. ſt. 2. c. 6. and 5 Ann. c. 9. reſpecting reſcues upon civil proceſs, and 8 & 9 Will. 3. c 27. by which it is made felony, without benefit of clergy, to oppoſe the execution of proceſs, or to reſcue priſoners

† *Sect.* 9. And it is enacted by 16 Geo. 2. c. 31. "That "if any perſon ſhall by any means whatſoever be aiding or "aſſiſting to any priſoner to attempt to make his or her eſcape "from any gaol, though no eſcape be actually made, in caſe "ſuch priſoner was then attainted or convicted of treaſon, or "any felony except petty larceny, or lawfully committed to "or detained in any gaol, for treaſon or any felony except "petty larceny, expreſſed in the warrant of commitment or "detainer, every perſon ſo offending ſhall, on conviction, be "tranſported for ſeven years."

in any of the pretended privileged places therein mentioned.

Aſſiſting the eſcape of a priſoner for petit larceny, &c.

† *Sect.* 10. And it is alſo enacted, "That in caſe ſuch "priſoner then was convicted of, committed to, or detained "in any gaol for petty larceny, or any other crime, not being "treaſon or felony expreſſed in the warrant of his or her "commitment or detainer as aforeſaid, or then was in gaol "upon any proceſs whatſoever, for any debt, damages, coſts, "ſum or ſums of money, amounting in the whole to the ſum "of one hundred pounds, every perſon ſo offending as afore-

"ſaid

" ſaid ſhall, on conviction, be deemed guilty of a miſdemeanor " liable to fine and impriſonment."

† *Sect.* 11. It is alſo further enacted by par. 2. " That if " any perſon ſhall convey or cauſe to be conveyed into any " gaol or priſon any viſor or other diſguiſe, or any inſtrument " or arms proper to facilitate the eſcape of priſoners; and the " ſame ſhall deliver or cauſe to be delivered to any priſoner in " any ſuch gaol, or to any other perſon there, for the uſe of " any ſuch priſoner, without the conſent or privity of the " keeper or under-keeper of any ſuch gaol or priſon; every " ſuch perſon, although no eſcape or attempt to eſcape be " actually made, ſhall be deemed to have delivered ſuch viſor " or other diſguiſe, inſtrument or arms with an intent to aid " and aſſiſt ſuch priſoner to eſcape or attempt to eſcape; and " in caſe ſuch priſoner then was attainted or convicted of trea- " ſon or any felony except petty larceny, or lawfully com- " mitted to, or detained in any ſuch gaol for treaſon or any " felony except petty larceny expreſſed in the warrant of com- " mitment or detainer, every perſon ſo offending ſhall, on " conviction, be deemed guilty of felony, and tranſported for " ſeven years."

Conveying inſtruments to facilitate eſcapes is tranſportation.

The indictment muſt ſtate that the inſtruments were conveyed with *a deſign* to effectuate the eſcape. O. B. But no indictment can be maintained upon this act of parliament for contributing to the eſcape of a priſoner committed on ſuſpicion only. Walker's Caſe, 1771, and the King v. Greeniſſ, at Maidſtone, Lent Aſſizes, 1785. MS. Vide alſo the caſe of William Gibbons. O. B. 1785. p. 673.

† *Sect.* 21. And it is further enacted, " That in caſe the " priſoner to whom, and for whoſe uſe ſuch viſor or diſguiſe, " inſtrument or arms ſhall be ſo delivered, then was convicted, " committed or detained for petty larceny, or any other " crime not being treaſon or felony expreſſed in the warrant " of commitment or detainer, or upon any proceſs whatſo- " ever, for any debt, damages, coſts, ſum or ſums of money, " amounting in the whole to the ſum of one hundred pounds, " every ſuch perſon ſo offending ſhall, on conviction, be " deemed guilty of a miſdemeanor, and liable to a fine and im- " priſonment."

But if detained for petit larceny, a miſdemeanor.

† *Sect.* 13. And it is alſo enacted by par. 3. " That if any " perſon ſhall aid or aſſiſt any priſoner to attempt to make his " or her eſcape from the cuſtody of any conſtable, head- " borough, tythingman, or other officer or perſon who ſhall " then have the lawful charge of ſuch priſoner in order to " carry him or her to gaol, by virtue of a warrant of com- " mitment for treaſon or any felony (except petty larceny) " expreſſed in ſuch warrant; or if any perſon ſhall be aiding " or aſſiſting to any felon to attempt to make his eſcape from " on board any boat, ſhip, or veſſel, carrying felons for tranſ- " portation, or from the contractor for the tranſportation of

Vide 6 Geo. 1. c. 23. ſ. 5. and 24 Geo. 3 c. 56. where to aſſiſt felons convict to make their eſcape from the perſons to whom they are delivered to be tranſported, is felony without clergy. And vide 3 Peere Will. 439.

" ſuch felons, his aſſigns or agents, or any other perſon to " whom ſuch felon ſhall have been lawfully delivered in order " for tranſportation, then every perſon ſo offending, on con- " viction, ſhall be guilty of felony, and tranſported for ſeven " years."

Returning from tranſportation, felony.

† *Sect.* 14. And it is further enacted, " That if any perſon " who ſhall be ordered for tranſportation in purſuance of this " act, ſhall return or be found at large, without ſome lawful " cauſe, before the expiration of the term, he ſhall be liable " to the ſame puniſhment, proſecution, trial, and conviction, " as other felons returning, &c. from tranſportation, &c. are " liable to."

Limitation.

† *Sect.* 15. Provided always, " That there ſhall be no " proſecution for any of the ſaid offences, unleſs ſuch proſecu- " tion be commenced within one year after ſuch offence com- " mitted."

Reſcuing a convict for murder, &c.

† *Sect.* 16. It is alſo enacted by 25 Geo. 2. c. 37. ſ. 9. " That if any perſon or perſons whatſoever ſhall by force ſet " at liberty, or reſcue, or attempt to reſcue, or ſet at liberty, " any perſon out of priſon who ſhall be committed for, or " found guilty of murder, or reſcue, or attempt to reſcue any " perſon convicted of murder going to execution, or during " execution, every perſon ſo offending ſhall be deemed guilty " of felony, and ſuffer death without benefit of clergy."

Reſcuing the dead body of a malefactor, &c.

† *Sect.* 17. Alſo it is further enacted by par. 10. " That if " any perſon or perſons whatſoever ſhall, after ſuch execution " had, by force reſcue, or attempt to reſcue the body of ſuch " offender out of the cuſtody of the ſheriff or his officers, " during the conveyance of ſuch body to any of the places " directed by the act; or ſhall by force reſcue, or attempt to " reſcue ſuch body from the company of ſurgeons, or their " officers or ſervants, or from the houſe of any ſurgeon where " the ſame ſhall have been depoſited in purſuance of this act, " every perſon ſo offending ſhall be tranſported for ſeven years, " and ſhall be ſubject to the like puniſhment, &c. in caſe of " returning, as by law other felons, returning from tranſport- " ation, are ſubject to."

By 2 W. & M. ſeſſ. 1. c. 5. ſ. 4. perſons guilty of any pound breach, or the reſcous of any goods or chattels diſtrained for rent, or of the owner of any goods ſo diſtrained, ſhall pay treble damages, &c. &c. Vide Raym. 19. 342. C. C. C. 120. and 461.

† *Sect.* 18. It is alſo enacted by 11 Geo. 2. c. 26. " That " if any perſons, to the number of five or more, ſhall in a " tumultuous and riotous manner aſſemble themſelves to reſcue " any offender againſt 9 Geo. 2. c. 23. or to aſſault, beat, " or wound any perſon or perſons who ſhall have given, or " be about to give, any information or evidence againſt, or " ſhall have diſcovered or given evidence againſt, or be about " to diſcover or give evidence againſt, ſeize or bring to juſtice " any perſon or perſons offending againſt the ſaid act, they, " their aiders and abettors ſhall be guilty of felony, and the " court on conviction ſhall have power to tranſport them for " ſeven years."

Sect.

† *Sect.* 19. It is alſo enacted by 9 Geo. 1. c. 22. commonly called the Black Act, "That if any perſon or perſons ſhall "forcibly reſcue any perſon being lawfully in cuſtody of any "officer or other perſon, for any of the offences mentioned in "the act, or if any perſon or perſons ſhall by gift, or promiſe "of money, or other reward, procure any of his majeſty's "ſubjects to join him or them in any ſuch unlawful act, "every perſon ſo offending ſhall ſuffer death without benefit "of clergy." Reſcuing an offender on the black act.

† *Sect.* 20. Alſo it is enacted by 2 Will. and Mary, ſeſſ. 1. c. 5. "That upon any pound breach or reſcous of goods and "chattels diſtrained for rent, the perſon or perſons grieved "thereby ſhall, in a ſpecial action on the caſe, for the wrong "thereby ſuſtained, recover his or their treble (1) damages "and coſts of ſuit, againſt the offender or offenders in any "ſuch reſcous or pound breach, any or either of them, or "againſt the owners of the goods diſtrained, in caſe the ſame "be afterwards found to have come to his uſe or poſſeſſion." (1) The word *treble* refers to both coſts and damages. Ld Raym. 19. Skin. 555. Carth. 321. Salk. 205. for when a ſtatute increaſes damages where they were given before, the plaintiff ſhall have increaſed coſts alſo as parcel of the damages. 2 Inſt. 289. Str. 50. 974. Andr. 377. But to intitle a plaintiff to recover, he muſt ſhew he has complied with the directions of the ſtatute, and conclude contra formam ſtatuti. Ld Raym. 342.—For the form of an indictment where this offence is accompanied with an aſſault. Vide Cro. Cir. Com. 117. 521.

CHAPTER THE TWENTY-SECOND.

OF ATTACHMENT.

HAVING ſhewn in what manner offenders may be apprehended without proceſs from a court of record, I am now to ſhew in what manner they may be brought into court by ſuch proceſs. Of which there are two ſorts.

Firſt, Such as may be awarded by the diſcretion of the juſtices upon a bare ſuggeſtion, or their own knowledge, without any appeal, indictment, or information. Secondly, Such as can be awarded only upon ſuch accuſations.

Sect. 1. And firſt, I ſhall conſider the nature of the firſt of theſe, which is generally called an attachment, 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 court of king's bench, may proceed in a ſummary manner according to their diſcretion. See 2 Sel. Caſ. 176. F. Corody 4.

And if they happen to be done by a perſon preſent in the court, and appear either from the confeſſion of the party on his For contempts in Chancery vide 2 Comn. Dig. 39 to 42.

Raſtal 268.
1 Bar. K. B. 110.
Raymond 376.
C. Car. 146.

his examination upon oath, or by the view or immediate obſervation of the judges themſelves, the court may immediately record the crime, and commit the offender, and alſo inflict ſuch farther puniſhment as ſhall ſeem proper.

1 Roll 315.
1 Bar. K. B. 353.

And if ſuch offences be done by a perſon not preſent in court, and be complained of by affidavit, the court will either make a rule on the party to attend at a certain day, in order to anſwer the matter of the complaint againſt him; or elſe will make a rule upon him to ſhew cauſe why an attachment ſhould not be granted againſt him; or elſe, if the offence were of a very exorbitant nature, as for words of contempt of the court itſelf, will grant an attachment on the firſt complaint, without any ſuch rule to ſhew cauſe; and the party who is ordered to attend the court in purſuance of ſuch rule, ought regularly to appear in proper perſon, and not by attorney, as alſo muſt every one againſt whom an attachment is granted.

Salkeld 84.
8 Modern 123.
Black. 892.

3 H. 7. 6.
22 Ed. 4 33. 34.

And if the offence be of an heinous nature, and the perſon attending the court upon ſuch a rule to anſwer it, or appearing upon an attachment, be apparently guilty, the court will generally commit him immediately, in order to anſwer interrogatories, to be exhibited againſt him in relation to ſuch contempt. But if there be any favourable circumſtances to extenuate or excuſe the offence, or if it appear doubtful whether the party were guilty of it or not, the court will generally in their diſcretion ſuffer the party, having firſt given notice of his intention to the proſecutor, to enter into a recogniſance to anſwer ſuch interrogatories; and if no ſuch interrogatories be exhibited within four days after ſuch recogniſance, will diſcharge the recogniſance upon motion; yet if the party do not make ſuch motion, and the interrogatories be exhibited after the four days, the court will compel him to anſwer them.

6 Modern 73.

The Queen and Barber, Mich. 11 Annæ.
6 Modern 73.
2 Jones 178
Douglas 498, 499.
3 Burr. 1329.
12 Mod. 348. 511.
Comb. 63.

But in all the caſes above mentioned, if the party fully purge himſelf upon oath, in his anſwer to ſuch interrogatories of the whole matter charged upon him, the court will diſcharge him of the contempt, and leave the proſecutor to proceed againſt him for the perjury, if he thinks fit: But if the party confeſs part of the contempts in his anſwer to ſuch interrogatories, and deny others, the court will not diſcharge him from the contempts ſo denied, but will proceed farther to examine the truth of them, and will inflict ſuch puniſhment as from the whole ſhall appear reaſonable: Neither will the court diſcharge the party upon a ſhifting or evaſive anſwer to any material part of the charge againſt him, but will puniſh him in the ſame manner as if he had confeſſed it.

N. B. Vide the note at the end of this chapter.

But for the better underſtanding in what caſes the court may proceed in the manner above mentioned againſt ſuch offenders, I ſhall endeavour to ſhew: Where it may ſo proceed againſt the miniſters of the court; and, Where againſt others.

As

As to the firſt of theſe points I ſhall conſider, Where it may ſo proceed againſt ſheriffs, bailiffs of franchiſes, and ſheriffs bailiffs. Where againſt attornies, and others acting as ſuch. Where againſt other officers; and, Where againſt jurors.

As to the firſt of theſe points I ſhall endeavour to ſhew, Firſt, Where the court may ſo proceed againſt ſheriffs, bailiffs of franchiſes, and ſheriffs bailiffs, for not executing a writ. Secondly, Where for doing it oppreſſively. Thirdly, Where for not doing it effectually. Fourthly, Where for making a falſe return.

Sect. 2. As to the firſt particular, *viz.* In what caſes the court may proceed in the manner above mentioned againſt ſheriffs, &c. for not executing a writ. 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, in the adminiſtration or execution of juſtice, which bring a diſgrace on the courts themſelves, as not taking ſufficient care to prevent them; that wherever it ſhall appear, That any ſuch officers have been guilty of any corrupt practice in not ſerving any writ, as where they refuſe to do it, unleſs paid an unreaſonable gratuity from the plaintiff—or receive a bribe from the defendant—or give him notice to remove his perſon or effects, in order to prevent the ſervice of any writ, the court which awarded it may puniſh ſuch offences in ſuch manner as ſhall ſeem proper by attachment, &c. as well as the court of king's bench, which has a general ſuperintendency over all crimes whatſoever (as the Star-chamber (*a*) had alſo formerly), but commonly leaves offences of this kind, in relation to cauſes in other courts to be puniſhed by ſuch courts to which they more immediately belong (*b*). But if there neither appear to have been any palpable corruption in the caſe, nor particular obſtinacy, as by diſobeying a ſpecial rule of the court, in relation to the ſervice of ſuch writ, nor other extraordinary circumſtances of wilful negligence, the judgment whereof is to be left to the diſcretion of the court, it ſeems not to be uſual to grant an attachment in ſuch caſes, but to leave the party to his ordinary remedy againſt the officer; which he may have either by ſerving him with rules to return the writ, &c. or by ſuing him for the damage ſuſtained by his negligence, in an action of eſcape, or on the caſe, or by taking out an *alias* (*c*) and *pluries*, which if the ſheriff do not execute, an attachment, directed to the coroners, goes againſt him of courſe, unleſs he give a good excuſe for his not having done it.

Dyer 218.

(*a*) Noy 101.

(*b*) 2 Bar. K. B. 277. 2 Vent. 11. Strange 567. Hob. 264. Laſely v. Weſton. See F. Proceſs, 13, 104.

(*c*) F. N. B. 38. 47. 265. Finch 237. 5 Mod. 314, 315 Hob. 62, 263, 264.

Sect. 3. As to the ſecond particular, *viz.* Where the court may proceed in the manner above mentioned, againſt a ſheriff,

or bailiff, &c. for an oppreſſive practice in the execution of a writ; it is every day's practice to grant attachments for miſdemeanors of this kind, as for uſing needleſs force, violence and terror, in making an arreſt, or by breaking open doors where by law it is not juſtifiable, and there is no plauſible excuſe for doing it,—or treating the perſons arreſted baſely and inhumanly,—or keeping them in cuſtody till they conſent to pay money for their deliverance,—or making an arreſt without due authority, as by force of a blank (*a*) warrant, filled up with the name of a ſpecial bailiff by the party himſelf, or bailiff, without the privity or ſubſequent agreement of the ſheriff. Yet I have ſometimes known attachments of this kind denied, in reſpect of the common uſe of the practice, which by experience hath been found to be almoſt neceſſary in ſome caſes to prevent the defendant's having notice of the intended arreſt, and therefore, if it ſhall appear to the court, that there was any ſuch reaſonable cauſe for ſuch a proceeding, it will be a great inducement to excuſe, if not wholly to diſpenſe with it.

11 H. 6. 42. 43.

(*a*) Noy 101. Moor 770. 2 R. Abr. 278.

Sect. 4. As to the third particular, *viz.* Where the court may proceed in the manner above mentioned, againſt a ſheriff, or bailiff, &c. for not executing a writ effectually; it ſeems clear, That where any ſuch officer is guilty of any corrupt practice in depriving the party who ſues out a writ of that benefit and advantage which he ought to have from the execution of it, he is liable to be puniſhed in the manner above mentioned; as if he levied the debt by virtue of an execution, and keep the money in his own hands, and imbezil it: But unleſs there appear ſome groſs and palpable corruption in a ſheriff neglecting to return a writ which hath been executed by him, or to bring in the body or money, &c. according to his return, the court will hardly grant an attachment againſt him immediately, but will rather proceed againſt him by rules to return the writ, &c. and if he do not obey them, will increaſe the amercements upon him till he do, or perhaps grant an attachment for the contempt: And (*b*) if the ſheriff return, That he ſent the proceſs to the bailiff of a liberty, who hath given him no anſwer, a *non omittas* ſhall be awarded to the ſheriff: And if he return, That he ſent the proceſs to ſuch bailiff, who hath returned a *cepi corpus*, or ſuch like matter, and the bailiff bring not in the body or money, &c. at the day, by the better (*c*) opinion the bailiff ſhall be amerced, and a writ (*d*) ſhall iſſue to the ſheriff, to diſtrain the bailiff to bring in the body, &c.

2 Burr. 797. Douglas 446. 2 Bar. K. B. 330.

(*b*) F. Proceſs, 13, 32.

(*c*) Raſtal 109. Capias, pl. 20. 189. pl. 20. 21, 22. 670. pl. 2. 36 H. 6. 1. Con. B. Proceſs 25. F. Return de Vicont. 35. 3 H. 7. 11. 47 Aſſize 6.

(*d*) F. Proceſs 12, 14. 104, 122, 132, 135, 225. Execution 101. Return de V.-cont. 35. 27 Ed. 3. 83. 27 Ed. 3. 77. Raſtal 109. Capias, pl. 20. B. Proceſs, 25. 48. 113, 115. B. Return 96. 99. 5 Ed. 4. 14. 11 H. 4. 43.

38 E. 3. 1. 39 Ed. 3. 3. 8 H. 5. 2.

Sect. 5. As to the fourth particular, *viz.* Where the court may proceed in the manner above mentioned, againſt a ſheriff, &c.

&c. for making a false return to a writ. There seems (*a*) to be no doubt, but that wherever any such officer endeavours to impose upon a court, by making a return to a writ of a matter known by him to be false, he is, in strictness, liable to be punished in this manner for his contempt. Yet it seems, That the court will not easily be prevailed on to proceed in this manner for a bare false return, but will rather leave the party injured by it to his remedy by an action on the case, unless there be some extraordinary circumstances of hardship or oppression, as where (*b*) an officer who had arrested one on a *capias*, returned, That he had taken him, but that the party was so sick, that he could not bring in his body at the day for fear of endangering his life, where in truth the party had been all the while in good health, and was only detained under such pretence, in order to extort money from him, &c.

(*a*) F. Process 5. B. Surmise 19. Return de brief, 100. Rastal, Habeas Corpus, 7.

(*b*) 11 H. 6. 42, 43 Sayer 121.

N. B. If the coroners do not return an attachment of contempt against sheriffs, the court will grant an attachment in the first instance against the coroners directed to elizors, 2 Black. 912. 1218.

As to the second point, *viz.* In what cases the court may proceed in the manner above mentioned, against attornies, and others acting as such; I shall endeavour to shew, First, Where it may so proceed against them, for appearing for a person without sufficient authority. Secondly, Where for injustice to their clients. Thirdly, Where for other contempts to the court, or dishonest practice.

Sect. 6. As to the first of these particulars, *viz.* Where the court may proceed, in the manner above mentioned, against attornies and others acting as such, for appearing for any person without sufficient authority; there is no doubt (*c*) but that it may so proceed against them, for taking upon them to prosecute or defend a suit for another, without any manner of directions from him; also if they have in truth a warrant from the party, but do not cause it to be recorded before judgment, it seems, (*d*) That they are in strictness liable to an attachment, for that the court takes no judicial notice of any such warrant not of record, yet (*e*) if in such case it appear, upon examination, that the warrant of attorney happened not to be recorded, through the negligence of the officer, or some such like accident, attended with no corrupt practice in the attorney, it seems, That the court would never easily be prevailed on to proceed in this manner against the attorney; and much less at this day, since he is liable by statute (*e*) to a certain pecuniary forfeiture for every offence of this kind.

Vide Str. 402.

(*c*) 38 Ed. 3. 8. 41 Ed. 3. 1. Rastal 582. 16 Ed. 4. 5.

(*d*) Rastal 96.

(*e*) F. Judg. 96. 41 Ed. 3. 1. 38 Ed. 3. 8. 4 Ed. 4. 13. 16 Ed. 4. 5. Rastal 582. Burrow 654.

(*e*) Vide infra, sect. 9.

Sect. 7. For it is enacted by 32 Hen. 8. c. 30. made perpetual by 2 Edw. 6. c. 32. and by 18 Eliz. c. 14. and 4 & 5 Annæ, c. 16. "That the plaintiff's attorney shall file his "warrant the same term he declares, and the defendant's at-

Coke's En. 167.

" torney the ſame term he appears; on pain of forfeiting ten " pounds, and alſo ſuffering ſuch impriſonment, as by the " diſcretion of the juſtices of the court, where any ſuch de- " fault ſhall fortune to be, ſhall be thought convenient."

Vide Dyer 180. Raſtal 289.

Sect. 8. And it ſeems, That ſince theſe ſtatutes, it hath not been uſual to grant attachments in theſe caſes, without ſome apparent circumſtances of fraud, or other corruption.

1 Burr. 20.

Sect. 9. But howſoever a regular attorney may be excuſed from an attachment, for not having recorded his warrant, thoſe have no reaſon to expect the like favour from the court, who take upon them to appear for others as attornies without having been admitted and ſworn as ſuch, for theſe are liable to an attachment for every appearance, whether their warrant were recorded or not.

† And it is enacted, by 2 Geo. 2. c. 23. 22 Geo. 2. c. 46. perpetuated by 30 Geo. 2. c. 19. " That whoever ſhall in his own name, or " in the name of another, act as an attorney or ſolicitor for re- " ward, without being admitted and enrolled, ſhall forfeit 50l. to " whoever ſhall proſecute, and be diſabled from acting in either " of thoſe capacities.—And whoever, being admitted and en- " rolled, ſhall lend his name to any other not being admitted " and enrolled, ſhall be incapable to act, and his admittance, " &c. rendered null and void."

Raſtal 93. 3 Atkins 568. 1 Bar. K. B. 201. Savil 31. See 4 H. 4. c. 18. 3 Jac. 1. c. 7. Sayer 51.

Sect. 10. As to the ſecond particular, *viz.* Where the court may proceed in manner above mentioned againſt attornies, and others acting as ſuch, for injuſtice to their clients; it is every day's practice to move for it againſt them, for baſe and unfair dealing towards their clients in the way of buſineſs, as for protracting ſuits by little ſhifts and devices, and putting the parties to unneceſſary expences in order to raiſe their bills, or demanding fees for buſineſs which never was done, or for refuſing to deliver up to their clients writings with which they had been intruſted in the way of buſineſs, or money which has been recovered and received by them to their clients uſe, and for other ſuch-like groſs and palpable abuſes: But the court will ſeldom grant an attachment for the detainer of ſuch writings or money, without firſt making a rule on the attorney, to deliver them to the party. Alſo it will juſtify an attorney's detaining ſuch writings or money for his ſecurity till he be paid all his juſt fees. Nor will it ever interpoſe in this manner as to any writings or money received by an attorney on any other account, except only in his way of buſineſs as an attorney, but will leave the party to his ordinary remedy by action.

Salkeld 87. Str. 547. 621. 8 Mod. 339, 340. 192. 227. 243. 306. 2 Bar. K. B. 34. 263.

Sect.

† It is a contempt of court in an attorney to uſe reproachful words on delivering a declaration in ejectment. Strange 576.—Or to aſſign the death of a plaintiff in ejectment for error. Strange 899. Or to bring a fictitious action. L. Hard. Ca. 237. 8 Mod. 109. Or to ſome proceſs on a perſon attending

attending his buſineſs in the court. Andr. 275. Strange 1004. Or to arreſt one attending arbitrators under a rule of court. Black. 1110. Or to refuſe anſwering queſtions by the court. Strange 1197. Wilſ. 30. Or to undertake to appear and then not appearing. L. H. Caſes 131. Vide Com. Dig. Tit. Attorney, B. 13. 15.—Or to refuſe to prove the execution of a deed to which he is a ſubſcribing witneſs. Cowper 845.—Or to let an argument go on, in order to obtain the opinion of the court after the parties have privately agreed. Strange 420. Or to alter the name in a ſheriff's warrant. 1 Black. 2. And if he has neglected to attend the court after order ſo to do, he ſhall be immediately committed and anſwer interrogatories in vinculis. 2 Bar. K. B. 219. And for any ill practice, attended with fraud and corruption, againſt the obvious rules of juſtice and common honeſty, the court will order the party to be ſtruck off the roll. Freem. 74. Black. 991. But this does not create a perpetual diſability, for he may be again reſtored. Blackſtone 222.

Sect. 11. As to the third particular, *viz.* Where the court may proceed in the manner above mentioned againſt attornies, and others acting as ſuch, for other contempts to the court, or diſhoneſt practice. It ſeems, That it may not only proceed in ſuch manner againſt them for diſobedience of its rules, after notice given them of ſuch rules, either expreſly or impliedly; but alſo, for any ſuch ill practice as is againſt the known and obvious rules of juſtice and common honeſty; as for forging (*a*) a writ, or any other matter of record, (*b*) or but attempting to do it; or for taking out a *capias*, (*c*) which has no original to warrant it; or for receiving (*d*) money of the client for ſuing out an original, and alſo for the fine due thereon to the king, where, in truth, no original has been ſued out, nor any fine paid to the king; or for endeavouring to impoſe upon the court, as (*e*) by cauſing an action to be brought againſt one in it by colluſion, without any juſt ground, in order thereby to intitle the party to the privilege of the court, and afterwards, upon the examination of the matter in court, giving a falſe account of it;—or (*f*) for giving directions to a ſheriff concerning what perſons he ſhould return on a panel; and for other miſdemeanors of the like nature.

4 Hen. 4. c. 18. Freem. 74. 4 Mod. 367. 6 Mod. 16. 187.

(*a*) C. Car. 52. 74.
Dyer 241. 244.
(*b*) F. Attach. 7.
(*c*) 20 H. 6. 37. F. Attach. 3.
(*d*) C. Car. 52. 74.
(*e*) 16 Ed. 4. 5. 1 Burn 20. Vide 12 Geo. 2. c. 13. 12 Geo. 1. c. 29. B. Privilege, 43.
(*f*) Moor 882. 3 Burr. 1564. Vide 1 Black. 2.

Sect. 12. As to the third point, *viz.* Where the court may proceed in the manner above mentioned, againſt other officers of the court. There being ſcarce any thing of this kind to meet with in the books, I ſhall only obſerve, that it ſeems clear, from the general reaſon of the law, which gives all courts of record a kind of diſcretionary power in the government of their own officers, that any ſuch court may proceed in ſuch manner againſt any ſuch officer, not only for refuſing to execute its commands, or for executing them irregularly, remiſly, (*g*) or oppreſſively, but alſo for all kinds of oppreſſion or injuſtice done by them in the execution of their offices, or by colour of them.

2 Bar. K. B. 254. Vide ſup. ſect. 1. F. Off. del Court, 12. Raſt. 329. 268. Dyer 218.

(*g*) F. Treſ. 73. 33 H. 6. 55. b. 56.

Sect. 13. As to the fourth point, *viz.* In what caſes the court may proceed in the manner above mentioned, againſt jurors. It is obſervable, that jurors may be conſidered either in a miniſterial capacity, *viz.* as perſons bound to attend the court, in order to perform the duty for which they are returned,

turned, until they ſhall be diſcharged: Or in a judicial capacity, *viz.* as judges of the fact which is to be tried or inquired by them.

And, therefore, for the better underſtanding of this matter, I ſhall conſider, How far jurors are puniſhable in the manner abovementioned, in their miniſterial capacity; and, How far in their judicial.

As to the firſt particular, it ſeems clear, That jurors are puniſhable in the manner above mentioned in their miniſterial capacity, in the following inſtances.

48 Ed. 3. 30.

(*a*) Raſt. 267. 268.
(*b*) Raſt. 267. 30 Aſſ. 3 42. 48 Ed. 3. 30. B. Jurors, 25, 26. 20 Aſſize 11.
(*c*) Raſt. 267, 268. 4 Ed. 4. 37. 9 H. 4. 5. 20 Aſſize 11. 8 Co. 41.
(*d*) Raſt. 267.
(*e*) Raſt. 267. 268.
(*f*) F. Peine, 1, 2. 30 Aſſize 42. 4 H. 6. 7. 4 Ed. 4. 36. 37. 36 H. 6. 27. B. Jurors, 15. 18. 26. Enqueſt, 42.
(*g*) F. Chal. 47. 36 H. 6. 27.
(*h*) F. Office de Court, 12.
(*i*) F. Peine, 3. 9 H. 4. 5.
(*k*) 10 E. 4. 19.
(*l*) 10 E. 4. 19. 30 Aſſize 17. Qu. 48 E. 3. 12. 21 Aſſize 14. F. Aſſize 65.
(*m*) 1 H. 7. 8.

Sect. 14. Firſt for making default. As where more than one of the perſons returned on a jury, do appear; but not a ſufficient number to take an inqueſt, and ſome (*a*) of the others come within view of the court, or into the ſame town (*b*) in which the court is holden, but refuſe to come into the court to be ſworn. In which caſes, upon proof of ſuch matter, the court (*c*) may, at the prayer of the party, order the jurors who appeared, to inquire what is the yearly value of ſuch defaulters lands, and after ſuch inquiry made, either ſummon them to appear, on pain of forfeiting ſuch ſum as their lands have been found to be worth by the year, or ſome leſſer (*d*) ſum, or impoſe (*e*) a fine of the like ſum upon them, without any farther proceeding. But it ſeems, (*f*) 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 (*g*) 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 (*h*) even in this caſe the court, in diſcretion, will ſometimes only impoſe a ſmall fine. Alſo it is ſaid, That no juror ſhall be ſubject to ſuch penalty, where (*i*) the inqueſt could not be taken, if he had appeared; as where but five of the jurors ſummoned on an aſſize, have had a view of the land. Alſo it ſeems, (*k*) 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: And it is ſaid, That he ſhall neither (*l*) be fined nor amerced, if the defendant be eſſoined on the day on which the jury was to appear, for that his appearance in ſuch caſe would be to no purpoſe. And it ſeems (*m*) queſtionable whether a juror be amerciable for not appearing at the return of a *ſicut alias venire facias*, where the firſt *venire* was not ſerved. Neither doth a juror ſeem to be amerciable at all, at the day of the return of the firſt

firſt *venire* (*a*) *facias*, except before juſtices errant, or of oyer and terminer, &c.

(*a*) F. Aſſ. 136. 466. 11 Aſſize 7. B. Amerce. 68. See the chapter of proceſs againſt jurors.

Sect. 15. Secondly, For refuſing to be ſworn when they do appear. For which, as it ſeems, (*b*) every court of record may of common right impoſe ſuch a reaſonable fine on any one returned on a grand or petit jury, as ſhall ſeem convenient.

(*b*) 2 Inſt. 142. 44 Ed. 3. 19. 8 Co. 38. 7 H. 6. 12.

Sect. 16. Thirdly, For refuſing (*c*) to give any verdict at all.

(*c*) Vaugh. 152. Nov 49. 3 Buſſ. 173. 9 H. 6. 44.

Sect. 17. Fourthly, For endeavouring to impoſe upon the court: As where (*d*) a petit jury offer a verdict to the court, as agreed to by their whole number, where, in truth, ſome of them have not agreed to it: Or where (*e*) they agree upon two verdicts, and firſt offer one of them to the court, and to ſtand to it, if the court ſhall expreſs no diſſatisfaction to it; but if the court ſhall diſlike it, then to give the other.

(*d*) 29 Aſſ. 27. B. Jur. 28. 40 Aſſize 10. 1 R. Abr. 219. (*e*) Co. Eliz. 779. Or if a jury caſt lots for their verdict, 3 Keb. 805. 2 Levinz 140. 205. 2 Jones 83. Str. 642.

Sect. 18. Fifthly, For miſbehaving themſelves after their departure from the bar; as where they (*f*) do not all keep together till they have given their verdict; Or where any (*g*) of them carry any thing eatable with them in their pockets; Or eat (*h*) or drink, or otherwiſe refreſh themſelves without leave from the court, before they have given their verdict, though they were agreed (*i*) on it, and were alſo all the time in the cuſtody of the bailiff appointed to take care of them.

(*f*) 14 H. 7. 29, 30. Vaugh. 151. (*g*) Dyer 78. (*b*) Dyer 218. Vaugh. 152. C. Jac. 21. F. Exam. 17. B. Jur. 13. (*i*) Raſt. 268. Dr. & St. 158. 1 Inſt. 227. 2 Hale 296.

Sect. 19. Sixthly, For ſending (*k*) for, or receiving inſtructions from either of the parties concerning the matter in queſtion, and therefore (*l*) much more for receiving a bribe.

(*k*) Raſt. 329. Hobart 114. F. Exami. 17. 1 Inſt. 227. to 313. 2 Hale 296. (*l*) 40 Aſſ. 43. See Book 1. c. 72. ſect. 4. 2 Hale 160. 161, 310. 5 Ed. 3. c. 10. 34 Ed. 3. c. 8. 38 Ed. 3. c. 12. Ld. Raym. 407.

Sect. 20. As to the ſecond particular, *viz.* How far jurors are puniſhable in the manner above mentioned, in their judicial capacity, 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 ſeem to be very few ancient precedents, for the puniſhment either of a grand or petit jury, merely for giving a verdict againſt evidence, or the direction of the court, either in a criminal or civil matter. It is ſaid (*m*) indeed in Fitzherbert's abridgment of a caſe in the time of king Richard II. That the judge told the jury, upon their acquitting a common thief of an indictment, that they ſhould be bound to their behaviour for their lives: But this was only the ſudden opinion of a judge; and it doth not appear,

(*m*) F. Cor. 108. Vaugh. 152.

appear, that the jurors were afterwards actually ſo bound in the purſuance of the ſaid opinion; and Fitzherbert makes a quære in his abridgment of the caſe, by what law they could be ſo bound: And as to thoſe three (*a*) other caſes in the time of king Edward III. wherein it is ſaid, That a juror was committed for refuſing to agree with the other eleven, it may be anſwered, That it is ſaid (*b*) in the firſt of thoſe caſes, "That "ſuch juror ſtayed his companions a day and a night, with-"out agreeing with them, and this without a reaſon," from whence it is reaſonable to intend, That there might be ſome circumſtances of miſbehaviour, as an obſtinate perverſe reſolution, right or wrong, to find a verdict one way, and not to conſult with the other jurors, nor hear their reaſons, &c. And in the laſt of the (*c*) ſaid caſes it is ſaid, that the juror committed by the juſtices of aſſize, for refuſing two days and a night to agree with his companions, and ſaying, that he would rather die in priſon than agree with them, was afterwards diſcharged by the juſtices of the common bench, upon the adjournment of the aſſize thither. And it was part (*d*) of the charge againſt Empſon, who was indicted in the beginning of the reign of king Henry VIII. for a great complication of offences, That he had committed a jury to ward, and bound them to appear before the king and his council, and afterwards, on their appearance, fined them (though with the concurrence of the reſt of the council) in the ſum of 8 l. a-piece, for refuſing to find a perſon guilty of an indictment of larceny, upon ſufficient evidence; yet it is ſaid in Daliſon's (*e*) reports of caſes, in the third and fourth years of Philip and Mary, That it was agreed, That juſtices of aſſize, oyer and terminer, gaol-delivery or peace, have no power indeed to aſſeſs fines on jurors who make a falſe oath before them, but that they may give them a day before themſelves, or the king's council; by which it ſeems to be implied, That ſuch jurors were then thought to be ſome way or other puniſhable by ſuch judges, or at leaſt by the king's council; for otherwiſe it would be to little purpoſe to bind them to appear before them. Alſo it ſeems to be holden by Sir Edward Coke, (*f*) That though a jury be no way puniſhable for convicting a man upon an indictment againſt evidence, yet they might be charged in the ſtar-chamber for their partiality in finding a manifeſt offender not guilty: And about (*g*) the latter end of the reign of queen Elizabeth, a jury was committed and fined, and bound to the good behaviour, for finding one Wharton guilty of manſlaughter only, againſt clear evidence and the direction of the court, upon an indictment of murder: And it is ſaid in Palmer's (*h*) reports, That jurors, who go againſt the directions of the court are to be fined: And there are ſeveral inſtances in the beginning of the reign of king Charles II. wherein it was reſolved, that both grand (*i*) and petit (*k*) juries

(*a*) F. Impriſon. 4. Judgment 89. Verdict 40.
(*b*) 8 Aſſize 35. Vaugh. 151. 2 Jones 16, 17
(*c*) 41 Aſſ. 11. 41 Ed. 3. 31. Vaugh. 151.
(*d*) Raym. 88, 89.
(*e*) Daliſon 18.
(*f*) 12 Co. 23, 24.
(*g*) Yelv. 23. Noy 48, 49.
(*h*) Palmer 363.
(*i*) 1 Sid. 229. 230. 2 Keb. 180.
(*k*) 1 Sid. 272, 273. Raym. 88, 89. 138. 1 Keb. 769. 938. 1 Keb. 404.

ries were finable by the juſtices of gaol-delivery, for going againſt plain evidence, and the directions of the court.

But theſe proceedings were always thought grievous, and were complained (*a*) of in the houſe of commons; and this queſtion was at laſt fully conſidered and debated in Buſhel's Caſe, who having been committed by the juſtices of oyer and terminer at the Old Bailey, brought his *habeas corpus* in the court of common pleas; to which it was returned, That he was committed for the fine of forty marks, impoſed on him for having, with other jurors, acquitted certain defendants of an indictment for an unlawful aſſembly, againſt full and manifeſt evidence, and againſt the direction of the court in matter of law; and upon this return he was diſcharged, and the return was adjudged inſufficient, for not ſetting forth particularly (*b*) ſo much of the evidence that it might appear that it was full and manifeſt; and likewiſe (*c*) for not ſetting forth, That the defendant did know and believe it to have been full and manifeſt; and alſo, (*d*) for not ſhewing what the direction of the court was, and in what manner the defendant found againſt it. And it was alſo reſolved, (*e*) That petit jurors are in no caſe finable for giving a verdict againſt the evidence delivered in court, whether they be liable to an attaint for ſuch verdict or not, not only for that the jury are by law the proper judges of matter of fact, as the judges are of matter of law, and therefore ought to be free in their judgment of it, without being overruled by the judges, who, ſtrictly ſpeaking, have no more to do with the judgment of the fact, than the jurors have with the judgment of the matter of law; neither is it poſſible that a judge can certainly know that a juror acts corruptly in giving his verdict contrary to the ſtrength of the evidence delivered in court; for he may be influence by his own perſonal knowledge of the truth of the fact, of the credit of the witneſſes, the reputation of the parties, and many other circumſtances unknown to the judge, and well known to the jury; for which cauſe the law provided, That all iſſues ſhould be tried by the neighbourhood of the place in which they are ſuppoſed to ariſe, becauſe neighbours are preſumed to have better knowledge than others of what concerns their neighbours. And for theſe cauſes, and other ſuch like, the court of king's bench granted an information againſt a town-clerk, for publiſhing an order of the court againſt jurors, who had found a perſon guilty of manſlaughter only, upon an indictment of murder, by which order the ſaid jurors were declared to be juſtly ſuſpected of bribery, and declared uncapable of holding an office, &c.

(*a*) 1 Sid. 338. 2 Keb. 180, 181. Tr. Per Pais 225. Vaugh. 135.

(*b*) Vaugh. 142. 2 Jon. 16, 17.

(*c*) Vaugh. 142. 2 Jon. 16, 17.

(*d*) Vaugh. 143.

(*e*) Vaugh. 144, 145. 3 Keble 352. 2 Jones 16. Vide Hob. 114. Co. 3 Keble 352. 1 Inſt. 226. 2 Hawk. c. 47. ſect. 11.

Tr. Per Pais 209. 279. 1 Ventris 67. 1 Salkeld 405. Hil. 10 Ann. Q. & Wakefield.

Sect. 21. Yet if it ſhall plainly appear in any caſe, that jurors are perfectly ſatisfied of the truth of a fact, whereupon they declare to the court, that they find it in ſuch a particular manner, and the court directly tell them, That upon the fact ſo found,

found, as they have agreed it to be, the judgment of the law is such or such, and therefore, that they ought to give a verdict accordingly, yet they obstinately insist upon a verdict contrary to such a direction; it seems agreeable to the general reason of the law, that the jurors are finable by the court in such a case, unless an attaint lies against them; for otherwise they would be dispunishable for so palpable a partiality, in taking upon them to judge of matters of law, which they have nothing to do with, and are presumed to be ignorant of, contrary to the express direction of one who by the law is appointed to direct them in such matters, and is to be presumed of ability to do it.

2 Jones 15, 16. Vaughan 144. 145. Palm. 363. 1 Inst. 228. Ld Raym. 470. 2 Hale 309. 315. Tr. Per. Pait 210.

Sect. 22. Also if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict as they think fit, contrary to his direction, it seems questionable, whether they may not be fined in such a case also, unless an attaint lie against them; for that it is the duty of jurors to take the advice and information of the court, in order to be governed by it as far as shall be consistent with their consciences.

Bract. 288, 289. 2 Jones 15, 16. Vaughan 144.

Sect. 23. Also if a jury shall refuse to find an office for the king, upon full evidence, it hath been holden, That they may be fined, for that in such case they are not liable to an attaint, and their finding does not determine any man's right, and the king, in many cases, hath no other remedy. Yet it seems questionable, how far at this day these reasons may be thought conclusive; and it seems, that they hold as strongly for the punishment of grand jurors refusing to find an indictment of high treason; and yet it will be hard to maintain, That such jurors are any way punishable for such a refusal.

Mror 730. 3 Leon. 148. Vaughan 153. 9 H. 6. 44.

Sect. 24. But if a petit jury in a leet conceal a matter presentable by them, it is a good custom that they may be amerced for such concealment, being found by the grand jury; and by 3 Hen. 7. c. 1. set forth more at large, book 1. c. 59. f. 1. "If an inquest conceal any matter inquirable before "justices of peace, another inquest may be impanelled to in-"quire of such concealments, and the concealers may be "amerced by the discretion of such justices."

9 H. 6. 44.

HAVING shewn in what cases the ministers of the court are punishable in the manner above mentioned, I am now to shew in what cases others may be so punished; and for this purpose I shall endeavour to shew, First, Where inferior judges are punishable in such manner. Secondly, Where counsellors. Thirdly, Where gaolers. Fourthly, Where any person whatsoever.

As to the first point, I shall endeavour to shew, where inferior judges are in such manner punishable, First, For proceeding

ceeding without juriſdiction. Secondly, For proceeding unjuſtly, oppreſſively, or irregularly. Thirdly, For refuſing to do juſtice. Fourthly, For contempts of ſuperior courts.

Sect. 25. As to the firſt of theſe particulars, *viz.* In what caſes inferior judges are puniſhable in the manner above mentioned, for proceeding without juriſdiction. It ſeems, (*a*) That the court of king's bench having a general ſuperintendency over all inferior courts, may in ſtrictneſs award an attachment againſt any ſuch court uſurping a juriſdiction no way belonging to it, and putting the ſubject to unneceſſary vexation by colour of a judicial proceeding wholly unwarranted by law, and therefore (*b*) prohibited by it. Yet in theſe caſes it ſeems to be rather the more uſual (*c*) way, firſt to award a writ of prohibition to ſuch court, and afterwards an attachment upon its proceeding after ſuch prohibition, and not to grant a rule to ſhew cauſe why an attachment ſhould not go in the firſt inſtance, unleſs there be ſome extraordinary circumſtances in the caſe; as where (*d*) the ſteward of a leet is guilty of a double uſurpation, as of holding plea of a matter which aroſe out of his precinct, and which, if it had ariſen within his precinct, would not have been within the juriſdiction of his court; Or where (*e*) the judge of an inferior court refuſes to receive a plea that the cauſe of action aroſe out of his juriſdiction; Or where (*f*) any judge takes cogniſance of a cauſe to which he himſelf is a party; Or where the judge of a court baron is privy to a practice of ſplitting (*g*) a cauſe of action for more than forty ſhillings into leſſer ſums, in order to bring it within the juriſdiction of the court. But in this laſt caſe, there ſeem to be more inſtances (*h*) of prohibitions than attachments; and in the caſes above mentioned, and all others of the like nature, it ſeems to lie wholly in the diſcretion of the court to grant either.

(*a*) 41 Aſſ. 30. Salkeld 201. 1 Keble 484. Palm. 564. Far. 1. 38. 84, 85.
(*b*) Vide 19 H. 6. 54. 9 H. 6. 61. F. N. B. 270.
(*c*) Regiſter 145, 146. F. N. B. 239. 1 Siderfin 464. 6 Modern 90. 2 Inſt. 312. 2 R. Abr. 317.
(*d*) 41 Aſſize 30. F. Leet, 9. B. Leet, 18, 31.
(*e*) Vaughan and Hodges, Paſchæ, 11 Annæ.
(*f*) Salkeld 201, 396. Fortes 1, 2.
(*g*) Palm. 564. 1 Keble 484.
(*h*) 19 H. 6. 54. 2 R. Abr. 317. 6 Modern 90. 2 Keble 617. 1 Ven. 65. 73. 1 Keble 484. 1 Siderfin 464.

Sect. 26. As to the ſecond particular, *viz.* In what caſes inferior judges are puniſhable in the manner above mentioned, for acting unjuſtly, oppreſſively, or irregularly. It is not eaſy to meet with caſes of this kind in the books, there being ſeldom any thing in them ſo remarkable as to be thought worth reporting. But it ſeems to be a common practice, to grant attachments againſt the judges of ſuch courts for any practice contrary to the plain rules of natural juſtice, though it have been never ſo long uſed in ſuch courts; as for denying a defendant a copy of the declaration againſt him, and going on to trial, or giving judgment againſt him, without giving him any manner of notice, or time to make his defence; or for taking of unreaſonable (*i*) diſtreſſes, either on meſne proceſs, or execution; or for compelling (*k*) a defendant to give exorbitant bail; or for proceeding contrary to the prohibition (*l*) of a ſtatute,

(*i*) Salkeld 201. 3 Keble 92.
(*k*) 2 Jones 178.
(*l*) F. N. B. 76. 160. 165, 166, 270. 9 H. 6. 61. 19 H. 6. 54.

ſtatute, as (*a*) by amercing a clergyman according to his ſpiritual benefice; or by aſſeſſing (*b*) an amercement without any affeerment by the tenants of the manor; or by (*c*) taking money of a plaintiff or defendant for vicious pleading.

(*a*) F. N. B. 76.
(*b*) F. N. B. 76.
(*c*) F. N. B. 270. 2 Inſt. 122. F. Attach. 8.

Sect. 27. As to the third particular, *viz.* In what caſes inferior judges are puniſhable in the manner above mentioned, for refuſing to do juſtice. It ſeems clear, from the general reaſon of the law, and the common practice of the court of king's bench in caſes of this nature, That the ſaid court may in its diſcretion award an attachment againſt any ſuch judge, obſtinately and perverſely, and without any colour of a reaſonable excuſe, refuſing to proceed at all, or to give judgment, or award execution, in a matter brought regularly before him; for all ſuch delays of juſtice are not only grievous to the ſuitor, but bring a diſgrace upon the law itſelf: Yet if there be no extraordinary circumſtances in any ſuch delay, to bring the judge under a reaſonable ſuſpicion of corruption, it ſeems the more uſual method to take out a writ to ſuch judge, commanding him to do the thing, of the delay whereof you complain; and if ſuch writ be not obeyed, to take out an *alias & pluries*, or to take (*d*) out the *alias & pluries* together with the firſt writ, and thereupon, if the judge refuſe to comply, to take out an attachment againſt him at the ſuit of the king and of the party, which may either be returnable into the court of king's bench, or at the party's election into the court of common pleas, except in ſome ſpecial (*e*) caſes. And this ſeems (*f*) to be the proper remedy to compel the lord of a manor to hold a court for the determining of a writ of right patent, or a writ (*g*) of right cloſe; or to compel the judge of any inferior court, whether of record (*h*) or not, to proceed (*i*) in a plea, or to give judgment, (*k*) or to award execution (*l*).

(*d*) F. N. B. 68. Infra ſect. 34.
(*e*) F. N. B. 62. 230. 63. 67. 13. 14.
(*f*) F. N. B. 3. 13.
(*g*) F. N. B. 12.
(*h*) Raſtal 83. F. N. B. 20. 153. 243.
(*i*) F. N. B. 12. 13. Raſtal 83.
(*k*) F. N. B. 153. 243.
(*l*) F. N. B. 20.

Sect. 28. As to the fourth particular, *viz.* In what caſes inferior judges are puniſhable in the manner above mentioned, for contempts of ſuperior courts. There is no doubt but that juſtices (*m*) of peace, or commiſſioners (*n*) of ſewers, may be ſo puniſhed for proceeding in any matter before them, after a *certiorari* delivered to them; Or the judge of a ſpiritual (*o*) or civil (*p*) law court, for proceeding in a cauſe, after notice of a rule to ſhew cauſe why a prohibition ſhould not go: Or a judge of any inferior common law court, for proceeding in a cauſe after a *habeas corpus*, or writ of error allowed: Or a ſheriff, (*q*) for proceeding in replevin, or other cauſe, in the county-court, after a *ſuperſedeas pone* or *recordare*. Alſo a rule (*r*) has been granted to ſhew cauſe why an attachment ſhould not go againſt the ſteward of a wapentake for proceeding after a tolt, though this be only a contempt to the county-court.

(*m*) Moor 677. Yelv. 32. 3 Keble 93.
(*n*) 1 Mod. 44.
(*o*) 2 Jones 47.
(*p*) 1 Rol. 315.
(*q*) F. N. B. 13, 14. F. Replev. 31. 43 Ed. 3. 26 F. Proceſs, 168. Act. le Caſe, 39.
(*r*) Burgh and Blunt. Hil. 3 Geo. 1. 10 Modern 349.

Sect.

Sect. 29. Alſo juſtices of peace may be puniſhed in the manner above mentioned, for acting in a contemptuous manner againſt the determination of the court of king's bench; as where an order of ſettlement, ſpecially ſetting forth the circumſtances of the caſe, is removed into the ſaid court, and quaſhed there, by the judgment of the court, upon the merits; and yet the juſtices of peace afterwards make another order to remove the ſame perſon to the ſame place, for the very ſame cauſe, without regarding the judgment of the court, though it were well known to them, and inſiſted on by the parties.

Sect. 30. As to the ſecond point, *viz.* In what caſes counſellors are puniſhable in the manner above mentioned. It ſeems clear, That notwithſtanding they are neither officers of any court, nor inveſted with any judicial office, but barely practiſe as counſellors, yet inaſmuch as they have a ſpecial privilege to practiſe the law, and their miſbehaviour tends to bring a diſgrace upon the law itſelf, they are puniſhable for any foul practice as other miniſters of juſtice are.

6 Modern 137. ſ. 1.
1 Hawk. c. 83. ſ. 27.
3 Burrow 1256.

Sect. 31. As to the third point, *viz.* In what caſes gaolers are puniſhable in the manner above mentioned. It ſeems clear, That they are not only puniſhable in this manner, as all other officers are, by the courts to which they more immediately belong, for any groſs miſbehaviour in their offices, or contempts of the rules of ſuch courts, but they are alſo puniſhable by any other courts for diſobeying writs of *habeas corpus* awarded by ſuch courts, and not bringing up the priſoner at the day prefixed by ſuch writs. Alſo it ſeems clear, (*a*) That it is no excuſe for not obeying a writ of *habeas corpus ad ſubjiciendum*, that the priſoner did not tender the fees due to the gaoler: Alſo (*b*) it ſeems to be the better opinion, That the want of ſuch a tender is no excuſe for not obeying a writ of *habeas corpus ad faciendum & recipiendum*; however (*c*) it is certain, That if the gaoler bring up the priſoner by virtue of ſuch *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees, (*d*) nor, as ſome (*e*) ſay, till he be paid all that is due to him for the priſoner's diet, for that a gaoler is compellable (*f*) to find his priſoner ſuſtenance: But this is denied by others (*g*).

(*a*) 1 Keble 272.
(*b*) March 89. 1 Keble 280. 2 Jones 178. con. 1 Keble 566.
(*c*) 2 Jones 178.
(*d*) 2 R. Abr. 32.
(*e*) 1 Roll 338, 339. Con. 2 R. Abr. 32.
(*f*) Co. Lit. 295. 9 Coke 87.
(*g*) Plowden 68. 2 R. Abr. 32. Strange 532.

Sect. 32. Alſo it ſeems, That the court of king's bench, which has a general (*h*) ſuperintendency over all perſons who are in any reſpect miniſters of juſtice, may award an attachment againſt any gaoler uſing a priſoner barbarouſly and inhumanly. Yet it is ſaid, (*i*) That a gaoler is no way puniſhable for keeping a debtor in irons. And it ſeems agreed at this day, That a gaoler ſhall not be puniſhed in the manner above mentioned, for the bare eſcape of a perſon in his cuſtody by

(*h*) 6 Mod. 137.
(*i*) 2 Inſt. 381. 2 R. Abr. 806, 807. 8 Modern 216. 3 Coke 44.

by civil proceſs; but that the party grieved by ſuch eſcape ought to take his remedy by action.

Sect. 33. As to the fourth point, *viz.* In what caſes any perſon (1) whatſoever is puniſhable in the manner above mentioned. It ſeems, That even peers of the realm, whether ſpiritual or temporal, are liable to ſuch puniſhment for ſome contempts; as for reſcuing (*a*) a perſon arreſted by due courſe of law, or for proceeding in a cauſe againſt (*b*) the king's writ of prohibition, or for diſobeying other (*c*) writs, wherein the king's prerogative, or the liberty (*d*) of the ſubject are nearly concerned. But it doth (*e*) ſeem clear, that it is a certain general rule, That a peer is puniſhable in this manner for diſobedience of all writs whatſoever. And it ſeems (*f*) certain, That no peer is liable to an attachment for not appearing on a jury. Therefore it ſeems, That what is ſaid (*g*) in ſome books in general, That an attachment lies againſt peers for contempts, ought to be underſtood of ſuch only as are of an enormous (*h*) nature, as thoſe above-mentioned, and others (*i*) of the ſame kind, about which it is difficult to lay down any certain particular rules (2). However it is certain, that all other perſons are liable to an attachment for contempts, all the particular inſtances whereof it would be endleſs to enumerate.

(*a*) F. Proceſs, 214. 161. Ret. vicount, 74. 1 H. 5. 14. Dyer 212. 27 H. 8. 22. Crom. Jur. 14.
(*b*) 21 Ed. 3. 3.
(*c*) 2 R. Abr. 228. 234.
(*d*) 11 H. 4. 15. F. Wither. 4.
(*e*) 21 Ed. 3. 3. F. N. B. 33.
(*f*) Dyer 319.
(*g*) F. Proceſs 198. C. Eliz. 170. 2 R. Abr. 234. B. Contempt 3. 19. 6 Coke 54. 29 Aſſize 33. 8 Modern 192.
(*h*) 21 Ed. 3. 3. Finch 355. Dyer 315. Hobart 61. 3 Inſt. 142. 1 Wilſon 332. Sayer 50.
(*i*) C. Eliz. 170. 503. 1 R. Abr. 220, 221.

(1) An attachment alſo was granted againſt a perſon for threatening a *proſecutor*, who had indicted another for perjury (in an affidavit on which an information had iſſued againſt *him*), with danger of his life, &c. 1 Wilſon 75.—It lies alſo againſt a witneſs, material to the cauſe, who abſents himſelf without any excuſe, Douglas 540. Strange 810. Ld Raymond 1528. provided the *ſubpœna* be ſerved upon him in reaſonable time, Strange 510. perſonally and not given to a ſervant, B. R. H. 313. and a proper ſum to defray his expences tendered, Strange 1150. 1054. or a promiſe of them made which he accepts, Cro. Car. 540.—But not where a witneſs did attend, although too late, he not being able to give other evidence than what was given by another witneſs, B. R. H. 170. and the court of exchequer refuſed it where a witneſs went away after attending two hours, although by that means the plaintiff was nonſuited, Bunb. 142.—Vide alſo 3 Burr. 1329.

(2) An attachment lies againſt a peer for refuſing obedience to a *habeas corpus*, 1 Burr. 634. Vide Lords Journals, 8 June 1757. But no attachment lies againſt a corporation in contempt; the mode of compulſion is by ſequeſtration, &c. Cowp. 377.

The moſt remarkable inſtances of contempts ſeem reducible to the following heads. Firſt, Contempts of the king's writs. Secondly, Contempts in the face of a court. Thirdly, Contemptuous words or writings concerning the court. Fourthly, Contempts of the rules or awards of the court. Fifthly, Abuſes of the proceſs of the court. Sixthly, Forgeries of writs, and other deceits of the like kind, tending to impoſe on the court.

Sect. 34. As to the firſt particular, *viz.* Where perſons are puniſhable in the manner above mentioned for contempts of the

the king's writs. It ſeems that it may reaſonably be argued, That all ſuch writs, being in the king's name, and importing ſome lawful command or prohibition from him, which every ſubject is in duty bound to obey, every diſobedience (*a*) of any of them being a contempt of the king's authority, is, in ſtrictneſs, puniſhable in the manner above mentioned, if the court in diſcretion ſhall think fit ſo to proceed: Yet it doth not ſeem to have been uſual for the court to proceed in this manner for a bare nonfeaſance, in not performing the command of the firſt writ in any caſe whatſoever. But (*b*) it ſeems clear, That an attachment lies of courſe for the nonperformance of the demand of a pluries, which may in ſome caſes, if not in all, be taken out together with the alias, at the ſame time with the firſt writ: Alſo it ſeems, That the court may in any ſpecial caſe, in which it ſhall ſeem proper, make a rule to compel the party to whom the firſt writ is directed, to execute it; and if ſuch rule ſhall be diſobeyed, there can be no doubt but that the court may proceed againſt ſuch diſobedience in the ſame manner as they uſually do againſt the diſobedience of any other rule: Alſo it ſeems (*c*) to be common practice to grant attachments upon affidavits of contempts to the king's writs, by acting contrary to the purport of them, Alſo there can be no doubt, but that if a ſheriff ſhall in any caſe return to the court, That a perſon arreſted, (*d*) or goods ſeized, (*e*) or poſſeſſion of lands delivered (*f*) by him, by virtue of the king's writ, were reſcued or violently taken from him, &c. the court may award an attachment againſt the reſcuers. Alſo it is certain, That the court hath, in ſome caſes, awarded an attachment upon affidavits of a reſcous, where the officer hath not returned one. Yet this was anciently (*g*) looked on as irregular, and of late the court has refuſed to grant at attachment in any caſe for a reſcous, unleſs the officer will return it; for that it hath been found by experience, that officers will often take upon them to ſwear a reſcous, where they will not venture to return one.

(*a*) 1 Mod. 44. 5 Modern 314. F. Q. non admiſit, 7.

(*b*) F. Sugg. 25. 43 Aſſize 39. Raſt. 457. Finch 237. 11 H. 4. 86. F. Count 34. Suggeſt. 25. F. N. B. 68. Sup. ſ. 27. 1 Black. 269.

(*c*) F. N. B. 65. 166. 270. 173. 174. 175. F. Suggeſt. 9. 8 Coke 60. Sup. ſ. 33.

(*d*) F. Attach. 1. F. Proceſs 56. F. Ret. vicount. 74. 37 H. 6. 27. Dyer 212. 4 Burrow 2130. 2 Jones 39.

(*e*) F. Attach. 5. 38 Edw. 3. 9.

(*f*) Salk 321. 6 Modern 27.

(*g*) F. Suggeſt. 25. 1 Black. 640.

Sect. 35. As to the ſecond particular, *viz.* Where perſons are puniſhable in the manner above mentioned, for contempts in the face of the court. It ſeems clear, That all perſons are puniſhable in this manner, not only for making an actual breach of the peace, but alſo for any heinous miſdemeanor in the face of the court; as (*h*) for giving falſe, trifling, and contradictory anſwers upon an examination in court concerning one's ability to be bail for another, in an action depending in the court, or concerning any other ſuch like matter in queſtion before the court, and to be determined by the examination of the parties: Or (*i*) for any contemptuous behaviour towards any judge in the face of the court, as by charging him with injuſtice, and praying for an information againſt him, &c.

(*h*) C. Car. 145. 7 H. 6. 25.

(*i*) Ray. 376. 1 Black. 646.

Sect. 36. As to the third particular, *viz.* Where perſons are puniſhable in the manner above mentioned for contemptuous words or writings, concerning the court. It ſeems needleſs to put any inſtances of this kind, which are generally ſo obvious to common underſtanding, and therefore I ſhall only obſerve, That ſometimes attachments have been granted for contemptuous words concerning the rules of the court, without making any rule to ſhew cauſe why ſuch attachments ſhould not be granted, becauſe it would be vain to ſerve him with a ſecond rule who has deſpiſed the firſt.

Salkeld 84. Str. 185. 444. Sed vide Strange 1068. Sayer 48. 114.

Sect. 37. As to the fourth particular, *viz.* Where perſons are puniſhable in the manner above mentioned, for contempts of the rules or awards of the court; There is nothing more frequent than to proceed in this manner for contempts of this kind; as where (*a*) a defendant in an action of account being adjudged to account before auditors, refuſes to do it, unleſs they will allow ſuch an acquittance, which was diſallowed by the court before: Or (*b*) where one who has ſubmitted to an arbitration by the rule of court, being afterwards perſonally ſerved with a copy of the award, and required to perform it, refuſes to do it: Or where one refuſing to pay the coſts taxed by the maſter, for that ſuch a taxation is, in judgment of law, a taxation by the court. But it ſeems, That generally an attachment is not grantable for diſobedience of any rule, unleſs the party have been perſonally ſerved (3) with it; nor for diſobedience of a rule, at *niſi prius*, unleſs it be made a rule of court, nor for diſobedience of a rule made by a judge at his chamber, unleſs it be entered.

43 Aſſize 39. (*a*) F. Impriſ. 18. and vide F. Accompt, 23. 84. 109. 111. 29 Edw. 3. 35. (*b*) 1 Mod. 21. 3 Burrow 1258. 1 Atkins 155. Salkeld 71. 83. Sayer 48. Farrerſly 8. Cowper 23. 2 Burrow 701. Vide 9 & 10 Guil. 3. c. 15. 1 Bar. K. B. 462. 2 Williams 450. Barnes 40, 41. 2 Barnes 55. 140. Salkeld 71. 84. 10 Modern 333. 12 Modern 234. 257. 317. 525. 533. 585. Strange 695.

(3) But if he ſecretes himſelf, the court, on affidavit, will grant a rule *niſi* for ſervice at the laſt place of abode. N.B. One in cuſtody upon an attachment for non-payment of coſts under the 5 & 6 Will. and Mary c. 11. ſ. 3. may be diſcharged under the Lords act. 32 Geo. 2. c. 28. ſ. 13.

1 Bar. K. B. 56. 78. 101.

Sect. 38. As to the fifth particular, *viz.* Where perſons are puniſhable in the manner above mentioned, for abuſes of the proceſs of the court: There are ſo many inſtances of this kind that it would be in vain to go about to enumerate them all, and therefore I ſhall only take notice of ſome of the principal of them, as,

Sect. 39. Firſt, The taking out ſuch proceſs without any colour of right to it; as where one ſues out execution without any judgment to warrant it, &c. or where a woman brings an appeal (*c*) of the death of her huſband, whom ſhe knows to be alive.

Hobart 264. Forteſc. 267. (*c*) 8 H. 4. 17. F. Cor. 73.

Sect. 40. Secondly, The making uſe of ſuch proceſs as a ſtale to help the juriſdiction of an inferior court; as where one arreſts another by a *latitat*, in order by that means to bring him

him within the limits of an inferior court, and when he has got him there, drops the *latitat* and proceeds in the inferior court. Styles 239 343.

Sect. 41. Thirdly, Making uſe of ſuch proceſs in a vexatious manner; as where a perſon who has brought an action in one court, does afterwards ſue the ſame defendant, for the very ſame cauſe, in another court, while the firſt action is ſtill depending, in which caſe the defendant ſeems to have an election either to move for an attachment, (*a*) or to bring an action (*b*) on the caſe for ſuch a vexatious proceeding againſt him.

(*a*) F. Cor. Cum Cauſa, 3. 14 H. 7 6. 7. 6 Coke 60. Sav. 14.
(*b*) H. 7. 6. 45.

Sect. 42. Fourthly, Making uſe of ſuch proceſs any other way to ſerve the purpoſes of oppreſſion or injuſtice; as where (*c*) one arreſts another at my ſuit, without my privity, in order to make ſome undue advantage of him, &c. (4)

(*c*) Hobart 264. Dyer 249. Vide 8 Eliz. 2.

(4) Or where two people put in bail in feigned names. Strange 384. Or where, on a rule for a ſpecial jury, one party ſtrike out all the hundredors, and then at the trial challenge the array on that defect —Strange 593. Ld Raymond 1364. Sed vide 1001.—See alſo Andr. 275.—8 Modern 245. Or for arreſting the plaintiffs while attending arbitration under a rule of court on purpoſe to prejudice his cauſe. 2 Black. 1110. Vide ſup. ſection 37.

Sect. 43. As to the ſixth particular, *viz.* Where perſons are puniſhable in the manner above mentioned for forging of writs, and other deceits of the like kind, tending to impoſe on the court. Nothing can be more frequent than to proceed in ſuch manner for offences of this kind, as for altering (*d*) the teſte of writs, or for filling (*e*) them up after they are ſealed, or (*f*) for bringing groundleſs actions, in order to intitle the parties to the privilege of the court, or for getting (*g*) judgment in ejectment, by affidavit of the ſervice of a declaration on one who was procured to perſonate the tenant, or for any ſuch like practices.

(*d*) Dyer 241. 244.
(*e*) 6 Mod. 310.
(*f*) Dyer 245. B Privilege 43.
(*g*) 6 Mod. 16. Savil 31.

The operation of an attachment is to bring the party perſonally before the court. He is then permitted to enter into a recognizance with two ſureties, in ſuch ſum as the court ſhall direct, to appear and make anſwer, upon oath, to ſuch interrogatories as ſhall be exhibited againſt him. Barnard K. B. 58. After the interrogatories are filed, and not before, the party may confeſs the contempt, unleſs in the caſe of a reſcue, or for contempt in the face of the court. 1 Black. 649. and ſubmit to the mercy of the court. 1 Black 6. Otherwiſe examinations are taken thereon, and referred to the maſter of the crown office to make his report. B. R. H. 23. But the party is not obliged to anſwer any interrogatories tending to convict him of any other offence, Strange 444. or which may ſubject him to a penalty, B. R. H. 239. Upon theſe examinations the maſter is to make his report, and the party is then, and not before, either acquitted of the charge, or adjudged in contempt, B. R. H. 23. and in the latter caſe, is either immediately ſentenced or committed to the marſhal, unleſs the court wave giving judgment, and order the recogniſance to be diſcharged, 3 Burr. 1256. or the Attorney General conſent that he may continue upon the recogniſance to appear, under a rule of court, at ſome future time, 2 Burrow 797.

N. B. The maſter's report cannot be moved for the laſt day of term, unleſs upon extraordinary caſes, without permiſſion of the court, 1 Black. 311. ſuch as in attachments for non-payment of coſts, or not returning a writ, 1 Burrow 651. Nor will the court grant a day rule to one committed for a contempt. 1 Barnard K. B. 167.

CHAPTER THE TWENTY-THIRD,

OF APPEAL.

BEFORE we examine the nature of ſuch proceſs, as is grounded on an Appeal, Indictment, or Information, it may not be improper, to conſider the nature of each of theſe in particular.

And firſt of Appeals, of which there are two ſorts,—By an innocent perſon —and, By an offender confeſſing himſelf guilty, who is commonly called an *Approver*.

Finch 310, 311. Plowden 476.

Sect. 1. And firſt, Of an appeal by an innocent perſon, which is the party's private action;—proſecuting alſo for the crown, in reſpect of the offence againſt the publick, which he may do two ways.—Firſt, By writ—Secondly, By bill.

Sect. 2. As to the writ of appeal, I ſhall only take notice in this place, That it is an original iſſuing out of chancery, and returnable in the king's bench only; and for the form of it, I ſhall refer the reader to the latter part of this chapter, wherein I ſhall endeavour to ſhew for what defects it may be abated.

Sect. 3. Alſo I ſhall refer the Reader to the ſame place, for the form of a bill of appeal, and ſhall not here take any further notice of it, than by obſerving that it muſt contain greater certainty than a writ of appeal, and is in the lieu both of the writ and declaration, and ſhewing before what courts, and againſt whom it may be proſecuted.

(*a*) C. Eliz. 605. 695. Skinner 634. S P. C. 64. Summary 179. 17 Aſſize 5. 17 Ed. 3. 13. (*b*) 4 Inſt. 180. 1 Bulſt. 74. (*c*) 1 Jones 425. C. Car. 532. 1 R. Abr. 536. (*d*) C. Eliz. 694, 695.

Sect. 4. And firſt, there is no doubt (*a*) but that any appeal may be ſued by bill in the king's bench againſt any perſon *in cuſtodia mareſchalli*, either by an actual commitment, or by having bail filed for him in that court; but (*b*) not againſt one who is mainpriſed *de die in diem*, for that ſuch an one cannot be ſaid to be *in cuſtodia mareſchalli*. And it hath been reſolved, (*c*) That if the appellee be arraigned and tried the ſame term, there is no neceſſity to file the bill againſt him. Alſo (*d*) it ſeems clear, That if a defendant appear in the ſaid court on a void writ of appeal, he may be committed to the marſhalſea, and then declared againſt *in cuſtodia mareſchalli*; but where a defendant appears on a writ not void, but voidable only, as for the want of an addition, &c. it was once (*e*) holden, That he could not be committed, nor declared againſt

(*e*) C. Eliz. 605, 695.

in cuſtodia mareſchalli; but ought to be diſcharged. But the contrary hereto ſeems to be now ſettled in the caſe of Reeves (*a*) againſt Trundal, who appearing in the court on a writ of appeal of death, demanded oyer of the writ, and pleaded in abatement the want of an addition; and thereupon the court abated the writ, and ſuffered him to be arraigned by bill *in cuſtodia mareſchalli*: And ſurely this cannot but ſeem more reaſonable than to ſuffer a priſoner under ſo heavy an accuſation, to which he is ſtill liable, to go at large without a trial; neither do I find any reaſon given why a priſoner appearing on a voidable writ, ſhould have a greater advantage than on a void one.

(*a*) Paſ. 3. Geo. 1. Like caſe between Smith and Bowen, Mich. 7 Anne.

Sect. 5. Secondly, It is holden, that an appeal may be commenced before juſtices in eyre, which, as I ſuppoſe, muſt be intended of an appeal by bill, for that all writs of appeal muſt be returnable in the king's bench.

Keilwood 152.

Sect. 6. Thirdly, Alſo it ſeems clearly to follow, from the purport of the ſtatute of Weſtminſter 2. c. 29. That bills of appeal may be commenced and determined before juſtices, ſpecially aſſigned, in ſpecial caſes, and for certain cauſes, to hear and determine them.

2 Inſt. 418. 429.

Sect. 7. Fourthly, It is certain, (*b*) that commiſſioners of gaol-delivery may receive a bill of appeal againſt any priſoner of the gaol which they are authoriſed to deliver. Alſo it is generally holden, That they may receive ſuch a bill againſt a perſon who has been let to bail by them, but not againſt one who has been let to mainpriſe. And it hath been reſolved, That if part of the accomplices to the ſame felony be in the priſon which ſuch juſtices are to deliver, and the others be not in it, the juſtices ſhall receive an appeal againſt them all, which, after the trial of thoſe that are in the priſon, ſhall be removed into the king's bench, where the others ſhall be proceeded againſt. But theſe three laſt points, having been already more largely conſidered, chap. 6. ſect. 5. I ſhall refer the Reader to what is there ſaid concerning them.

(*b*) B. App. 11. 19. 51. 123. Dyer 201. S. P. C. 64. Summary 179. 2 Hale 35.

Sect. 8. Fifthly, It ſeems to follow, from the purport of the ſtatutes which have been generally conſtrued to authoriſe juſtices of aſſize to deliver gaols without any ſpecial commiſſion of gaol-delivery, that they may receive bills of appeal in the ſame manner as commiſſioners of gaol-delivery may.

Vide ſup. f. 28, 29, 30. Dyer 99.

Sect. 9. Sixthly, It ſeems to be holden in Fitzherbert's abridgment, (*c*) That juſtices of peace have power to receive appeals by virtue of 34 Edw. 3. c. 1. which enacts, That they ſhall hear and determine all manner of felonies and treſpaſſes in the ſame county, &c. But there is much greater authority (*d*) for the contrary opinion; and the caſe in the (*e*) year book, in the abridgment whereof the ſaid opinion of Fitzherbert is inſinuated, is plainly miſtaken, for that it makes no manner of mention of juſtices of peace, but only of juſtices of gaol-

(*c*) Corone 95. (*d*) Vide S. P. C. 65. 2 Inſt. 420. Summary 179. 2 H. 4. 19. B. App. 18. (*e*) 44 Ed. 3. 44. See B. App. 11.

gaol-delivery; to which may be added, That the above-mentioned ſtatute of 34 Edw. 3. c. 1. which empowers juſtices of peace to hear and determine felonies, &c. is expreſs, That they ſhall have power ſo to do at the king's ſuit, which muſt be either taken to exclude the ſuit of the party, or to ſignify little or nothing.

(a) See c. 9. ſ. 39, 40, 41. 2 Hale 67, 68. (b) See c. 9. ſ. 42.

Sect. 10. Seventhly, It is certain, That an appeal may be commenced (*a*) by bill before the ſheriff and coroner, and removed (*b*) from them into the king's bench, by *certiorari*, as hath been more fully ſhewn, chapter the ninth.

(1) Where an appeal is commenced in the court below, and removed into the king's bench, the appellee is to be arraigned *de novo*, on the ſame bill of appeal, and it is not neceſſary to exhibit a new bill againſt him *in cuſtodia mareſchalli*; and if the appellant will not appear to proſecute his appeal, the appellee may ſue out a *ſcire facias* reciting the whole matter, warning him to appear at a certain day; and if he make default, the court on demand will nonſuit him; but the appellant may appear *gratis*, and proſecute without any *ſcire facias*. Carth. 394. 595. Skin. 670. Bac. Abr. 126.

(c) Sum. 180. S. P. C. 65. 1 Inſt. 74. Vide inf. ſ. 28.

Sect. 11. Eighthly, It ſeems to be agreed, (*c*) That an appeal by the courſe of the civil law, in nature of a bill of appeal by the common law, may be ſued before the conſtable and marſhal for ſome felonies done out of the realm, in relation whereunto it is enacted by 1 Hen. 4. c. 14. as followeth, "For many great inconveniences and miſchiefs that often "have happened by many appeals made within the realm be"fore this time, it is ordained from henceforth, that all appeals "to be made of things done within the realm, ſhall be tried "and determined by the good laws of the realm: And that "all appeals to be made of things done out of the realm, ſhall "be tried and determined before the conſtable and marſhal of "England for the time being."

(d) S. P. C. 65. 1 Inſt. 74. 13 H. 4. 5. (e) 4 Inſt. 155. 1 Inſt. 74. 391. Sup. c. 4. ſ. 10. B. Jur. 103. (f) See b. 1. c. 37. ſ. 8. and c. 4. of this book, ſ. 10. and 1 Inſt. 391. (g) See c. 4. ſ. 8. Hutton 3. 1 Inſt. 74.

Sect. 12. In the conſtruction of this ſtatute, it ſeems to have been agreed, (*d*) That if any of the king's ſubjects kill any other of his ſubjects in any foreign realm, the wife or heir of the deceaſed may have an appeal of his death, before the conſtable and marſhal, who ſhall proceed according to the civil (*e*) law, and give ſentence by the teſtimony of witneſſes or combat: From whence it follows, (*f*) That no ſuch ſentence can corrupt the blood of the appellee, for that ſuch corruption can only be cauſed by a judgment by courſe of the common law. Alſo (*g*) it ſeems to be clear, That no ſuch appeal can be proſecuted before the marſhal alone without a conſtable.

(h) S. P. C. 65. 1 Inſt. 74. B. 1. c. 31. ſ. 11.

Sect. 13. It hath been holden, (*h*) That if a man die in England, of a wound given him in a foreign realm, he may be appealed by the intent of this ſtatute, before the conſtable and marſhal, for that it is certain, That he cannot be tried by the common law, and it cannot be thought the meaning of the ſtatute in reſtraining the civil law, in caſes within the conuſance of the common, to reſtrain it alſo in caſes which the common law had nothing to do with, and which were properly

cogniſable

cogniſable by the civil law, and by that only; for the only end of ſuch a conſtruction would be to cauſe a failure of juſtice.

Sect. 14. It is farther enacted by the ſaid ſtatute of 1 Hen. 4. c. 14. "That no appeals be from thenceforth made, or in "any wiſe purſued in parliament, in any time to come."

But now by the 2 Geo. 2. c. 21. the offender may be indicted or appealed in the county where either the death or the wound ſhall happen.

APPEALS, conſidered as to the matter of them, are of two kinds, *viz.* Not capital; and, Capital.

Sect. 15. OF thoſe not capital, there were anciently ſeveral kinds, as appeals *de pace*, *de plagis*, and *de impriſonamento*, as well as appeals of *mayhem*. But the former of theſe having been out of uſe, and turned to actions of treſpaſs, for theſe many hundred years, I ſhall only conſider the nature of an appeal of *mayhem*.

Fleta, l. 1. c. 41. Bract l. 3. c. 25. 4 Inſt. 182. 1 Inſt. 126.

For the better underſtanding whereof I ſhall endeavour to ſhew, Firſt, Of what *mayhems* it lies. Secondly, What ought to be the form of the writ, bill, and declaration. Thirdly, What defence may be made by the appellee. Fourthly, How the *mayhem* ſhall be tried, and where the trial ſhall be peremptory.

Sect. 16. As to the firſt point, *viz.* Of what *mayhems* an appeal lies; I ſhall take it for granted, That notwithſtanding every (*a*) hurt whatſoever done to a man's body, whereby he is leſs able in fighting, may perhaps, properly enough, in a large ſenſe, be called a *mayhem*, and (*b*) will certainly ſubject the perſon who occaſioned it to the payment of damages in an action of treſpaſs by the party grieved, whether it were malicious, or happened through accident or miſadventure; yet (*c*) an appeal of *mayhem* cannot be maintained for any ſuch hurt, unleſs it were accompanied with ſome evil intention in the perſon who cauſed it; for ſurely the law, in requiring that the word felony be made uſe of in every ſuch appeal (as will be more fully ſhewn under the next point), cannot imply leſs than that the fact muſt be attended with ſome odious circumſtances. Yet it ſeems clear, That if a man ſtriking another with ſuch an evil intent, as would ſubject him to an appeal of *mayhem*, if the perſon ſtruck at ſhould be maimed, ſhall happen to miſs him, and ſtrike a third perſon, and maim him, he is liable (*d*) to an appeal of *mayhem* at his ſuit, whether he had any kind of ill will againſt him or not.

(*a*) See B. 1. c. 44.

(*b*) 2 Jones 205. Hobart 134.

(*c*) 13 H. 7. 14.

(*d*) B. App. 157. 13 H. 7. 14. See B. 1. c. 31. ſ. 41.

Sect. 17. As to the ſecond point, *viz.* What ought to be the form of the writ, bill, and declaration; I ſhall only take notice

notice in this place, *Firſt*, That the word *mayhemiavit* (*a*) is ſo neceſſary in every ſuch writ, bill, and declaration, that it can be ſupplied by no other word of the like ſenſe, nor by any circumlocution whatſoever.

(*a*) 1 Inſt. 126.

Sect. 18. *Secondly*, That in every ſuch writ, bill, or declaration, the *mayhem* muſt (*b*) be laid to have been done *felonice*, and yet the defendant is not at this day ſubject to the loſs of member from ſuch an appeal, as anciently (*c*) he was, in which reſpect the law ſeems to have required the uſe of the word *felonice*.

(*b*) 1 Inſt. 127. B. App. 72. 86. 143.
(*c*) See B. 1. c. 44. ſect. 3. 1 Inſt. 127. Pulton 17.

Sect. 19. *Thirdly*, (*d*) That it is in the election of the plaintiff to declare againſt him who actually gave the wound, as the principal offender, and againſt thoſe who abetted him, as acceſſaries; or elſe to declare againſt them all as principals.

(*d*) 41 Aſſize 16. 40 Aſſize 9. F. Treſ. 199. F. Cor. 11. 228. S. P. C. 44. contra. B. Appeal 60. 154. F. Cor. 60. 110.

Sect. 20. *Fourthly*, That if a man bring a writ of appeal of mayhem, and count of battery, he abates the writ, becauſe the writ ſuppoſes no battery, and therefore is not purſued by ſuch a declaration as it ought to be. But for other particulars relating to the form of appeals, I ſhall refer the reader to the books (*e*) of entries.

(*e*) Coke's Ent. 50. 51. Raſt. 45, 46.

Sect. 21. As to the third point, *viz.* What defence may be made by the appellee; being able to find little or nothing particular concerning pleas in abatement by ſuch an appellee, I ſhall refer the reader for that matter to what is ſaid concerning pleas in abatement of appeals in general, in the latter part of this chapter, and only take notice in this place of the following particulars.—Firſt, Where a recovery in another action may be pleaded in bar of an appeal of mayhem. Secondly, Where and in what manner *ſon aſſault demeſne*, and other matters of the like nature may be ſo pleaded.—Thirdly, Whether an arbitrament, or an accord with ſatisfaction, may be ſo pleaded.—Fourthly, What kind of releaſe may be ſo pleaded.—Fifthly, Where a nonſuit in a former action.—Sixthly, That (*f*) an appellee cannot wage his law.

(*f*) 1 Inſt. 295. Vide 48. Ed. 3. 6. F. Ley, 36.

Sect. 22. As to the firſt of theſe particulars, *viz.* Where a recovery in another action may be pleaded in bar of an appeal of mayhem; It ſeems clear, That notwithſtanding a recovery (*g*) in an appeal of mayhem cannot be pleaded in bar of an action of treſpaſs for the battery with which the mayhem was accompanied, becauſe (*h*) in ſuch an appeal the mayhem only is conſidered diſtinct from the battery: yet (*i*) a recovery in an action of treſpaſs, for an aſſault, battery, and wounding, may be pleaded in bar of an appeal of mayhem, appearing by proper averments to be brought for the ſame treſpaſs; for it ſhall be intended that the jury in giving damages for the wounding, included the maim, and no man ſhall be liable to double vexation for one and the ſame thing; yet in

(*g*) 22 Aſſize 82. F. Cor. 110. 282. 4 Coke 43. 43 Aſſize 39.
(*h*) B. Ap. 60
(*i*) 4 Co. 43. 2 Leon. 318, 319. 42 Aſſize 3.

(a) in ſuch a caſe if the appellee ſhall make it appear, by a ſpecial replication, that the maim hath been occaſioned ſince the verdict in the action of treſpaſs, by ſome ſubſequent mortification, dryneſs or ſhrinking of the part, by reaſon of the wound, perhaps he may avoid ſuch plea by ſuch ſpecial matter; but the court will not intend it unleſs it be ſpecially ſhewn. (a) 1 Leon. 318, 391.

Sect. 23. As to the ſecond particular, *viz.* Where, and in what manner *ſon aſſault demeſne*, and other matters of the like nature, may be pleaded in bar of an appeal of mayhem; It ſeems clear, that it is a good plea in bar of ſuch an appeal, That (b) the plaintiff firſt aſſaulted the defendant, and would have beaten and killed him, unleſs he had defended himſelf againſt him, &c. Or that (c) the plaintiff firſt aſſaulted the defendant, who fled from place to place, till he was reduced to a neceſſity of fighting, &c. And in ſome books (d) it ſeems to be holden in general, That *ſon aſſault demeſne* may be pleaded in bar of any ſuch appeal without any ſuch ſpecial circumſtances in favour of the defendant: Yet how far a trifling aſſault may juſtify a grievous mayhem, as the cutting off of a leg or hand, &c. unleſs it happened accidentally in the ſcuffle, without any barbarous intention, may well deſerve to be conſidered. However (e) it ſeems clear, That if the maim in the declaration be laid in A. and the defendant juſtify the ſame maim, by reaſon of an aſſault made upon him by the plaintiff in B. he needs not traverſe the maiming of the plaintiff in A. or in any other place, for it is apparent, that the ſame maim could not be given but in one and the ſame place, and therefore being juſtified in any one place it is well anſwered. Alſo it ſeems (f) clear, That a man cannot juſtify the maiming another in defence of his poſſeſſions, but only in the defence of his perſon. Alſo it is certain, (g) That a defendant cannot give in evidence on the general iſſue, that the plaintiff firſt aſſaulted him, but muſt ſpecially plead it.

(b) 2 R. Ab. 547. Raſt. 45.
(c) 2 R. Abr. 112. 25 Ed. 3. 42. See B. 1. c. 60. ſect. 23.
(d) 27 Ed. 3. 94. 41 Aſſize 21. F. Cor. 142. 1 Keb. 922. 1 Sid. 246.
(e) 41 Aſſize 21. B. Viſne, 74. B. Trav. 273.
(f) 2 R. Abr. 548. 2 Inſt. 316.
(g) 2 Inſt. 282. 283. 2 Inſt. 316.

Sect. 24. As to the third particular, *viz.* Where an arbitrament, or accord with ſatisfaction, may be pleaded in bar of an appeal of mayhem; it clearly ſeems to be admitted in the pleadings (b) in ſome books, and is ſaid (i) to have been adjudged in a roll, not printed, That notwithſtanding every ſuch appeal much ſuppoſe the fact to have been done feloniouſly, yet inaſmuch as at this day it ſubjects not the appellee to the loſs of member, but only to damages, &c. as an action of treſpaſs doth, it may be well barred either by arbitrament, or an accord with ſatisfaction executed.

(b) 35 H. 6. 39. 30. 6 H. 7. 1. F. Corone 63. 6 Coke 44.
(i) 9 Co. 78.

Sect. 25. As to the fourth particular, *viz.* What kind of releaſe may be pleaded in bar of an appeal of mayhem; there can be no doubt, but that a releaſe of all manner of appeals,

(a) Lit. ſect. 501. (b) Lit. ſect. 508. (c) Inſt. 288. 1 Inſt. 288.

appeals, (a) or a releaſe of all manner of actions, or a releaſe of all manner of demands, (b) might always be pleaded in bar of ſuch an appeal; and that a releaſe of all manner of actions (c) perſonal may alſo be pleaded in bar of it at this day, becauſe the appellant ſhall recover in it nothing but damages; but while it ſubjected the appellee to the loſs of member, it ſeems queſtionable, whether it could be barred by a releaſe of actions perſonal, becauſe it ſeems to have been then eſteemed an action of a higher nature, and not properly to come under the notion of a perſonal action.

(d) 43 Aſſize 39. 40 Aſſize 1. 2 Inſt. 139. F. Cor. 214. (e) 43 Aſſize 39. B. App. 138. (f) B. App. 60. F. Cor. 110, 182. Vide ſup. ſect. 22. (g) B. App. 138. F. Ley 36. (h) 2 Inſt. 139.

Sect. 26. As to the fifth particular, *viz.* Where a nonſuit in a former action may be pleaded in bar of an appeal of mayhem; It ſeems clear, (d) That a nonſuit in any ſuch appeal, after the plaintiff hath appeared to it, may be pleaded in bar of any other. Alſo (e) it ſeems to have been adjudged, That it may alſo be pleaded in bar of an action of treſpaſs brought for the ſame maim, and alſo for the battery with which it was accompanied; yet, howſoever the law may ſtand in relation to this matter, if ſuch action be brought for the battery only, without mentioning the mayhem, I ſee not how it can be barred by ſuch a nonſuit, becauſe it is generally holden, That in an appeal of mayhem no conſideration (f) can be had of the battery, but only of the mayhem; and if ſo, it ſeems ſtrange, that a nonſuit in ſuch an appeal ſhould bar an action of a different nature, brought for a matter which the appeal had nothing to do with. However (g) it ſeems clear, That a nonſuit in an action of treſpaſs is no bar of an appeal of mayhem. Alſo I take it for granted, That a nonſuit in an appeal of mayhem, before the plaintiff hath appeared to it, is not (h) a bar of any other appeal or action, becauſe the writ, for what appears to the contrary, might be purchaſed by a ſtranger, in the name of the plaintiff.

(i) 28 Aſſize 5. 8 H. 4. 21. 2 R. Abr. 578. (k) 28 Aſſ. 5. Raſtal 46. 28 Ed. 3. 94. (l) 6 H. 7. 1. 21. H. 7. 33. 21 H. 7. 40. 41 Aſſize 27. (m) 22 Aſſ. 82. Vide 21 H. 7. 33.

Sect. 27. As to the fourth point, *viz.* How the mayhem ſhall be tried, and where the trial ſhall be peremptory; There is no (i) doubt but that if the defendant put it in iſſue, whether the plaintiff were maimed or not, and pray that the part which was hurt be viewed by the court, in order to have it adjudged on ſuch view, whether there be any mayhem or not, the court may take a view of the part, and on ſuch view determine the matter; or if there remain a doubt upon the view, may (k) award a writ to the ſheriff to return ſome able phyſicians and ſurgeons, for the better information of the court. But it ſeems, that the court cannot proceed to ſuch a trial by their view, unleſs the defendant pray it: And in ſuch caſe it ſeems, (l) That they are not bound to try it in ſuch manner, but may order a trial by a jury, at which it is ſaid, (m) That they may, if they think fit, order that the jury ſhall have a view of the wound: And becauſe the court has ſuch a diſcretion-

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ary power in relation to ſuch view, it hath been reſolved, (a) That the plaintiff in the appeal muſt appear in proper perſon, and not by attorney, becauſe that would put the view out of the power of the court. And it ſeems to be agreed, (b) That an adjudication made upon ſuch view is peremptory and concluſive to each party.

(a) 2 Inſt. 313.
(b) 6 H. 7. 1. 28 Aſſize 5. 21 H. 7. 33. 37 Aſſize 9. 26 Aſſize 32.

Sect. 28. It ſeems to be holden, That the defendant, in an appeal of maim, may in ſome caſes wage battle; but I find no inſtance in which battle hath been actually waged in ſuch an appeal.

Of capital appeals there are two kinds, *viz.* Of Treaſon—and, of Felony.

Sect. 29. And firſt of appeals of treaſon, which, as it is ſaid, (c) might be ſued anciently not only before the parliament, but alſo before other courts of common law, as well as before the conſtable and marſhal, and were determinable by battel, verdict, or otherwiſe, according to the courſe of the ſeveral courts before which they were commenced. But it is certain, that ſuch appeals before the parliament are taken away by 1 Hen. 4. c. 14. ſet forth more at large in the fourteenth ſection of this chapter. But I do not ſee any reaſon why appeals of treaſon, done in the realm, before other courts of common law, which had before juriſdiction thereof, ſhould be conſtrued to be taken away by that ſtatute, which by ordaining, "That appeal, of things "done within the realm, ſhall be tried and determined by the "good laws of the realm," cannot be intended to reſtrain any appeal determinable wholly by thoſe laws, as all the appeals before the courts of common law ſeem always to have been. However, ſince there has been no inſtance of any ſuch appeal, before any court of common law, either ſince the making of the ſaid ſtatute, nor for many years before, the law relating to ſuch appeals ſeems wholly obſolete at this day. (2) But as for appeals before the conſtable and marſhal, of treaſons done out of the realm, is ſeems clear, that the law in relation to them is ſtill in force, as it always hath been; for the ſaid ſtatute of 1 Hen. 4. c. 14. by ordaining, "That "appeals of things done out the realm, ſhall be tried and "determined before the conſtable and marſhal," ſeems clearly rather to affirm than weaken their juriſdiction in relation to ſuch treaſons. Alſo it hath been adjudged, that the ſtatutes which ordain, That treaſons done out of the realm ſhall be tried in the king's bench, &c. do not take away the juriſdiction of the conſtable and marſhal, in relation to appeals of ſuch treaſons; as hath been more fully ſhewn chap. 4. ſect. 10. And agreeable hereto, an appeal of treaſon, ſuppoſed to have been committed beyond ſea, was actually commenced in the ſeventh year of the reign of king Charles the firſt, by Donald Lord Rea, againſt David Ramſey, eſq; before the conſtable

(c) 3 Inſt. 132. Bract. 118, 119. Fleta l. 1. c. 21. S. P. C. 78. Con. B. Appeal 46. 1 Hale 349. 2 Hale 150.

(2) Appeals of treaſon in the common law courts ſeem to be taken away by 5 Edw. 3. c. 9. and 25 Edw. 3. c. 4. by which none ſhall be put to anſwer except by indictment or preſentment. 1 Hale 349.

4 Inſt. 124. Summary 180. ſeems contrary.

Ruſhworth's Collect. Part 2 vol. 1. from fol. 112. to 128.

ſtable and marſhal, who, for want of ſufficient proof to clear the truth of the accuſation, actually awarded, That a duel ſhould be fought between the ſaid appellant and appellee, for the final determination of the matter.

Of appeals of felony there are four principal kinds. Firſt, Of Death.—Secondly, Of Larceny.—Thirdly, Of Rape.—Fourthly, Of Arſon.

But before I examine the nature of each of theſe in particular, I ſhall premiſe ſome things in general concerning what perſons are capable of bringing them.

Sect. 30. Firſt, That (*a*) the infancy, old age, or other imbecility of the plaintiff, is no good objection againſt his bringing an appeal, though it take from the defendant the benefit of waging battle, and in that reſpect put him in a worſe condition than he would be in, if the appeal were brought by a perſon capable of fighting; for inaſmuch as the defendant has proper means for his acquittal, by putting himſelf upon a trial by his country, and the imbecility of the plaintiff is wholly owing to the act of God, and no ways leſſens the injury complained of by him, it is not reaſonable he ſhould ſuffer any diſadvantage from it. And agreeably hereto it ſeems to have been ſettled, (*b*) of late times, contrary to the numerous authorities (*c*) in the old books, That the parol ſhall not demur in an appeal for the nonage of the plaintiff. Yet it is certain, (*d*) That an infant muſt proſecute ſuch ſuit by a guardian; and it is ſaid, (*e*) That he ſhall be nonſuited for the non-appearance of ſuch guardian, upon demand, at any day whereon he is demandable, notwithſtanding an allegation that he was not able to come by reaſon of ſickneſs, or other ſuch like excuſe. And there (*f*) is a caſe wherein the court refuſed to inlarge the day of ſuch guardian's appearance upon a ſurmiſe of his ſickneſs. But notwithſtanding the guardian be ſo neceſſary in the proſecution of ſuch a ſuit, yet if the infant come into court, and ſay he will relinquiſh it, and yet the guardian will proſecute it; the court may, (*g*) in diſcretion, diſcharge ſuch guardian, and aſſign another, for it is not reaſonable that an infant be bound to continue a ſuit againſt his will, which demands nothing but revenge, and will be chargeable to him.

(*a*) Moor 461. Summary 183, 184. Keilw. 120. S. P. C. 60. See the books under cited. Con. 45 Ed. 3. 25. 41 Aſſize 14.
(*b*) 27 H. 8. 11. Keilwood 120. S. P. C. 60. Summary 183. Smith and Bowen, M. 7 Annæ. 2 Inſt. 320.
(*c*) 32 Aſſ. 8. Dyer 137. 11 H. 4. 94. 13 Aſſize 10. 17 Ed. 4 2. B. App. 116. F. Age 57, 83. 21 Aſſize 4. 27 Ed. 3. 83. 21 Ed. 3. 23.
(*d*) 27 H. 8. 11.
(*e*) Noy 88. Latch 173.
(*f*) Noy 88. Latch 173.
(*g*) 1 R. A. 288. Style 456. Salkeld 176, 177.

Sect. 31. Secondly, (*h*) That a woman may ſue any other appeal except that of the death of an anceſtor; for that the ſtatute of Magna Charta, 34, which ordains, "That no man "ſhall be impriſoned on the appeal of a woman, for the death "of any one but her own huſband," reſtrains not any other appeal whatſoever.

(*h*) Co Lit. 25. 2 Inſt. 68. F. Corone 357. S. P. C. 60. Summary 184.

Sect. 32. Thirdly, That an ideot, (*i*) or perſon born deaf and dumb, or one attainted (*k*) of treaſon or felony, or but out-

(*i*) Summary 183. S. P. C. 60. 98.
(*k*) 11 Aſſ. 27.

out-lawed (*a*) in a perſonal action (ſo long as ſuch attainder or outlawry continues in force) cannot bring any appeal whatſoever.

(*a*) 17 Aſſize 26. B. App. 118. 146. F. Utlag. 47.

And now I am more particularly to conſider the nature of an appeal of death in particular. For the better underſtanding whereof, I ſhall examine the following points.—Firſt, Within what time, it muſt be brought.—Secondly, In what county.—Thirdly, By whom.

Sect. 33. As to the firſt point, *viz.* Within what time an appeal of death muſt he brought, it is enacted by the ſtatute of Glouceſter, chap. 9. "That an appeal," (*b*) which from the purport of the whole ſtatute hath been conſtrued (*b*) to be meant only of an appeal of death, "ſhall ſtand in effect, and "ſhall not be abated for default of freſh ſuit, if the party "ſhall ſue within the year (*c*) and the day after the deed "done." And it hath been holden, (*d*) That the computation of ſuch year and day is to be made from the time of the wound which occaſioned the death, and not from the time of the death; and this opinion ſeems ſomewhat to be favoured by the letter of the ſtatute, which is, "That the party ſhall ſue "within the year and day after the deed done," but no deed is done at the time of the death, but at the time of the wound; yet the contrary opinion is ſettled (*e*) to be law, and is certainly moſt agreeable to the intent of the ſtatute, the plain import whereof ſeems to be, That the appellant ſhall not be adjudged to have made default of freſh ſuit, unleſs he have been negligent a year and day; but negligent he could not be as to the bringing an appeal before the party was actually dead, becauſe till then no appeal lay. And agreeably hereto it ſeems alſo to be ſettled, (*f*) That if a perſon become acceſſary after the death, by receiving the offender, an appeal lies againſt him at any time within the year and day after ſuch receipt, becauſe till then the appellant could not poſſibly be guilty of any negligence as to the bringing of an appeal againſt the receiver. Alſo if an appeal had been abated by the demiſe of the king, before 1 Edw. 6. c. 7. (by which this miſchief is provided againſt), it ſeems (*g*) clear, That the appellant might have ſued a re-attachment againſt the appellee, within the year and day after ſuch demiſe, for that he was in no default, and otherwiſe would have been without remedy.

(*b*) S. P. C. 62. Infra ſect. 48.

(*c*) B. App. 37. 22 Ed. 4. 39.

(*d*) S. P. C. 63.

(*e*) 4 Co. 42. 2 Inſt. 320. 3 Inſt. 53. 1 Hale 427.

(*f*) 26 Aſſ. 25. 3 Inſt. 53. S. P. C. 63. 2 Inſt. 320.

(*g*) 2 H. 7. 10. B. App. 81. 10 Ed. 4. 13. F. Re attach. 8. 7 Co. 30.

Sect. 34. It ſeems, That the year and day in any of the caſes above mentioned, are to be computed from the beginning of the day, on which the death, or receipt, &c. happened, and not from the preciſe minute, or hour, becauſe regularly the law makes no fraction of a day; and therefore (*b*) if the party

(*b*) Vide 5 Co. 1. Co. Lit. 130. 255. Con. 3 Inſt. 53.

party die at any time the firſt day of January, the year ſhall end the firſt day of January following.

Sect. 35. As to the ſecond point, *viz.* In what county an appeal of death muſt be brought; I ſhall take it for granted, That it is a local (*a*) action, and conſequently cannot be brought in a foreign county. But if a perſon happen to die in one county of a wound received in another, it is ſaid, (*b*) That the appellant had by the common law, his election to bring his appeal in either county, and that in every ſuch caſe the trial ought (*c*) to be at the bar, and by a jury returned (*d*) from the body of each of thoſe counties. But ſince the making of 2 & 3 Edw. 6. c. 24. by which it is enacted, "That "in ſuch caſes, the party to whom appeal of murder ſhall "be given by the law, may commence, take, and ſue appeal "of murder in the ſame county where the perſon felonioufly "ſtricken, or poiſoned, ſhall die, &c." I take it for granted, That ſuch an appeal in the county wherein the party died, may be tried by a jury of ſuch county without the joinder of any other.

(*a*) 18 Ed 3 32. S P. C 63. F. Forfeit. 14. Dyer 18. &c.
(*b*) 2 Hale 163. 3 H. 7. 12. 4 H. 7. 18. F. Cor. 50, 60. But the preamble of 2 & 3 Ed. 6 24. ſeems contrary.
(*c*) Dyer 46.
(*d*) 3 H. 7. 12. Finch 410. Dyer 46.

Vide 2 Geo. 2. c. 24.

I ſhall not in this place examine in what county acceſſaries to murder are to be appealed or tried, but ſhall refer the conſideration thereof to the chapter concerning the arraignment of the principal and acceſſary.

As to the third point, *viz.* By whom an appeal of death is to be brought; I ſhall endeavour to ſhew—Where it may be brought by a wife;—and, Where by an heir.

Vide infra ſect. 59 & 60.

Sect. 36. As to an appeal by a wife, the following particulars ſeem moſt obſervable.—Firſt, She muſt be able to prove, not only that ſhe was wholly innocent herſelf of the death complained of, but alſo that ſhe was the lawful wife of the deceaſed, at the time of his death; for it ſeems to be clearly ſettled, (*e*) That *n'unques accouple in loial matrimonie* is a good plea in ſuch an appeal, and triable by the biſhop's certificate, who, if the marriage were unlawful, by reaſon of a precontract or conſanguinity, or otherwiſe, ought to certify againſt the appellant. Alſo it is laid down as a rule in the old books, (*f*) That a wife may have an appeal of the death of her huſband *inter brachia ſua interfecti & non aliter*. By which words, *inter brachia ſua*, according to Sir Edward Coke, (*g*) it is to be underſtood, That the deceaſed had the wife lawfully in poſſeſſion at his death; and if this be the meaning of them, thus much at leaſt ſeems to follow, That if the huſband were divorced from the wife at his death, though by a voidable ſentence,

(*e*) 2 Inſt. 68. 28 Ed. 3. 91. 50 Ed. 3. 15. 27 Aſſize 3. 11 H. 4. 14. S. P. C 59. Summary 181. 3 Inſt. 33.
(*f*) Bract. l. 3. c. 29. Flet. l. 1. c. 35. S. P. C. 58.
(*g*) 2 Inſt. 68. 217.

tence, ſhe cannot maintain an appeal. Yet it is generally holden, That a wife who hath eloped from her huſband may have an appeal of his death, as ſhall be more fully ſhewn in the next ſection. And Staunford (*a*) ſeems to underſtand the import of the expreſſion above mentioned to be this, That the wife ought to have had the deceaſed in her view, and to have been preſent at his death, which is moſt certainly not neceſſary at this day. But finding little more ſaid concerning this matter in any other modern book, I ſhall leave the farther conſideration thereof to others.

(*a*) S. P. C. 59.

Sect. 37. Secondly, In ſome caſes a woman may have an appeal of the death of her huſband, where ſhe cannot claim dower of his lands; as where the huſband was attainted (*b*) of high treaſon at the time of his death; for after the attainder he was ſtill her huſband as much as before, and (*c*) it is the loſs of her huſband which is the cauſe of the appeal. Alſo where a woman elopes from her huſband, it is ſaid, that ſhe may have an appeal (*d*) of his death, though not a writ of dower; for by the common law ſhe might have had both; and the ſtatute of Weſtminſter 2. c. 34. which takes from her the latter, leaves the other as before.

(*b*) 27 Aſſize 42. 35 H. 6. 57. B. Appeal 131. F. Corone 21. Co. Lit. 33. b. 7 Co. Calvin's Caſe, 13 b. S. P. C. 59.
(*c*) B. App. 148.
(*d*) B. App. 17. 1 Inſt. 33. S. P. C. 59. Con. 2 Inſt. 317.

Sect. 38. Thirdly, If ſuch appellant take another huſband either before, or pending the appeal, ſhe puts (*e*) an end to it for ever; for being given her only from a regard to her widowhood, it cannot but ceaſe when that determines, and being once barred, it is barred for ever. And on this ground it ſeems alſo to be certain, (*f*) That if ſhe marry after judgment in appeal, ſhe cannot pray execution. However it ſeems clear, That in ſuch a caſe the appellee ſhall not (*g*) be diſcharged without the king's pardon: But I do not find it ſettled (*h*) what ought to be done with the appellee in ſuch a caſe. But thus much ſeems to be certain, That the king cannot proceed againſt him by way of indictment, becauſe he is attainted already; and therefore it may probably be argued, That the court may award execution againſt him, either *ex officio*, or at leaſt at the demand of the king; for otherwiſe he would ſave his life by reaſon of the attainder by which he is adjudged to loſe it.

(*e*) Sum. 181. S. P. C. 59. 2 Inſt. 69. 20 H. 6. 43. B. App. 148.
(*f*) 11 H. 4. 48. B. App. 109. 112. con. 21 E. 4. 73. See alſo the books above cited.
(*g*) B. App. 27. 3 Inſt. 209. 2 H. 7. 10. 8 H. 4 22. F. Sc. fac. 41. 38 H. 6. 13. 9 H. 7. 5. S P. C. 166.
(*h*) 2 Leon. 83. Vide 21 Ed. 4. 72, 73.

Sect. 39. As to the appeal of death by an heir, the following particulars ſeem moſt remarkable. Firſt, If the deceaſed had a wife at the time of his death, and ſuch wife were wholly innocent of it, ſhe (*i*) only, and not the heir, hath a right to the appeal; and whether ſhe bring one, or wholly neglect it, and though ſhe die or marry within the year and day, the heir cannot bring an appeal; and the reaſon hereof, according to Keilway, (*k*) is this, That the appeal being once out of the blood, ſhall not return to it again: Yet (*l*) if the wife herſelf had a ſhare in the guilt, the heir may have an appeal againſt her.

(*i*) Keilw. 120. Summary 182. S. P. C. 59. 20. 6. 43.
(*k*) Keilw. 120.
(*l*) C. Car. 531, 532. 1 Jones 425. 18 Edw. 4. 2. F. Cor. 459. Sum. 181. 182. S. P. C. 59.

her. But if the petit treaſon be pardoned by the parliament, it ſeems, (*a*) That the heir can bring no appeal; for he cannot bring it for the murder only, becauſe the petit treaſon includes in it murder and more, and being the greater offence drowns the leſs, and therefore the pardon of it ſeems to pardon the murder alſo.

(*a*) Dyer 50. 1 Leon. 326.

Sect. 40. Secondly, Every ſuch appellant muſt be heir (*b*) general to the deceaſed, by the common courſe of the law, unleſs (*c*) the heir general had himſelf a ſhare in the guilt, in which caſe the next heir ſhall have an appeal againſt him. But a father cannot (*d*) have an appeal of the death of his ſon, becauſe he cannot be his heir. Neither (*e*) can any one bring an appeal of the death of a perſon attainted of treaſon or felony, except his wife, becauſe he can have no heir. Neither ſhall a ſpecial (*f*) heir, by the cuſtom of borough Engliſh, or otherwiſe, have an appeal of the death of his anceſtor, becauſe he is not his next general heir; and yet he is inheritable to ſuch of his lands to which the cuſtom extends, &c. And for the like reaſon, if the deceaſed, at the time of his death, had two ſons, the elder whereof is attainted of treaſon or felony, neither (*g*) of them can have an appeal; not the elder, becauſe of the attainder; not the younger, becauſe he cannot be heir to his father while he has an elder brother; who, though he be looked upon as dead in law to ſome purpoſes, is yet in truth alive, and capable of forfeiting all the privileges belonging to the heir, though not of taking benefit from any of them. But notwithſtanding a younger ſon cannot bring an appeal of the death of the father, while there is an elder ſon of the ſame father living; yet if the eldeſt ſon be by one venter, and the middle and younger ſon by another, and the middle ſon be killed, the youngeſt only ſhall have an appeal of his death, becauſe he only is his heir, as being of the whole blood with him; and therefore, (*h*) it is no good plea to an appeal for the death of a brother, That the appellant has J. S. an elder brother living, without ſhewing, that J. S. was of the whole blood to the deceaſed.

(*b*) 27 Ed. 3. 83. F. Cor. 322. Summary 182. S. P. C. 59. 27 Aſſize 85.
(*c*) Sum. 182. F. Cor. 459. S. P. C. 60.
(*d*) F. Cor. 41.
(*e*) B. App. 116. 131. 2 Aſſize 3.
(*f*) S. P. C. 59. Summary 182.
(*g*) S. P. C. 60. 1 Inſt 8. 13. 20 H. 6. 43. F. Cor. 235. But F. Cor. 322. ſeems contrary.
(*h*) 7 E. 4. 15. F. Cor. 28. B. App. 94. S. P. C. 60.

Sect. 41. Thirdly, If an appeal be once commenced by an heir, who dies hanging the ſuit, it ſeems to be agreed, (*i*) by almoſt all the books, That no other heir can afterwards proceed in ſuch appeal, or commence a new one; for that this is a perſonal action, given to the heir in reſpect to his immediate relation to the perſon killed, at the time of his death, and like other perſonal actions, ſhall die with the perſon. But ſome (*k*) have holden, That if the firſt heir die within the year and day, without commencing an appeal, the next heir may bring one. But this is made a doubt by others, (*l*) and the generality (*m*) of the books ſeem to favour the contrary opinion, as being more agreeable to the reaſon of the caſe above-mentioned, and the general tenor of the law in relation to appeals, which, in no caſe that

(*i*) 11 H. 4. 11 b. 12. 9 H. 7. 5. 16 H. 7. 15. S. P. C. 59. Summary 182. B. App. 30. 88. 104. 141. 144.
(*k*) 16 H. 7. 15. B. App. 156. 11 H. 4. 11.
(*l*) S. P. C. 59. Dyer 69.
(*m*) 20 H. 6. 43. 11 H. 4, 12. Summary 182. B. App. 30 88. 104. 141, 144.

that I know of, will ſuffer the right of bringing one to be tranſferred from one to another; and therefore, as in caſe (*a*) where the deceaſed hath a wife at the time of his death who dies within the year and day, the heir hath no right to an appeal; ſo if he have an heir at his death, in whom the right of the appeal is veſted, and ſuch heir die within the year and day, it ſeems, that no other heir ſhall have an appeal. Yet it is holden, (*b*) by Sir Matthew Hale, and ſome others, That if the firſt heir get judgment in an appeal of death, and die, his heir may ſue execution. But this is doubted of by Sir William Staundford, (*c*) and ſeems contrary to many (*d*) of the old books, and not eaſily reconcilable with the reaſon of the caſes above mentioned. But whether in this caſe the court may (*e*) not award execution, either *ex officio*, or at the demand of the king, may deſerve to be conſidered, for the reaſons given *Sect.* 38. Alſo if a perſon who is killed have no wife at the time of his death, and no iſſue but daughters, and all thoſe daughters die within the year and day, it may reaſonably be argued, That the heir male may have an appeal, becauſe the right of bringing one never veſted in any other before. But finding this caſe in none of the books, I ſhall leave it to be more fully conſidered by others.

(*a*) Sup. f. 39.

(*b*) Sum. 182. 13 H. 4. 6. 11 H. 4 11.
(*c*) S. P. C. 59.
(*d*) 38 H. 6. 13. 9 H. 7. 5, 6. 16 H. 7. 15. 11 H 4. 11, 12. B. App. 141. 144 156.
(*e*) 2 Leon. 83. ſeems contrary.

Sect. 42. Fourthly, Every ſuch appellant muſt not only be heir general to the deceaſed, but alſo heir male; and this depends upon *Magna Charta*, c. 35. by which it is enacted, "That no one ſhall be taken or impriſoned on the appeal of a "woman for the death of any one but her own huſband." And the judges are ſo far bound to take notice of this ſtatute, That if a woman bring an appeal of the death of her father, or of any other but her huſband, they ought, (*f*) *ex officio*, to abate the writ, though the defendant take no exception to it. But it is ſaid, (*g*) That by the common law an heir female might have brought an appeal of the death of her anceſtor, as well as an heir male. And it (*b*) ſeems to be the better opinion at this day, That the heir male of the deceaſed, who derives his blood through a female, may have an appeal, as the uncle being heir on the part of the mother, or the grandſon by a daughter, &c. and yet the mother in the firſt caſe, and the daughter in the ſecond, could have had no appeal; for inaſmuch as by the common law, ſuch mother and daughter had not only a right to bring ſuch appeal, but alſo to have ſuch right derived through them to others, it ſeems hard to conſtrue the ſtatute by depriving them of the former to take from them the other alſo; eſpecially conſidering, That an heir male, who derives his blood through females, ſeems no way leſs worthy to bring an appeal, than if he had derived it through males; and all ſtatutes whatſoever, which are made in abridgment of any right of the ſubject, ought to be ſtrictly conſtrued.

(*f*) F. Off. Court 7. 10 Edw. 4. 7.
(*g*) 2 Inſt. 68. 1 Inſt. 25.
(*b*) Sum. 183. 2 Inſt. 68. F. Cor. 385. the contrary adjudged by all the Judges in the Exchequer-Chamber, but one. 20 H. 6. 43. Qu. 17 Ed. 4. 1. 1 Inſt. 25. S. P. C. 58. B. App. 104.

(a) 21 E. 3. 23. 45 Ed. 3. 25. 27 Aſſize 25. S. P. C. 81. 1 Bulſt. 71. 75.

Sect. 43. Fifthly, In every ſuch appeal, by one, as heir to the deceaſed, it muſt ſpecially (*a*) appear by the writ, or at leaſt by the count, in what manner he is ſo.

Summary 187.

AND now I am come to an appeal of Larceny; for the better underſtanding whereof I ſhall conſider,—Firſt, By whom it may be brought.—Secondly, Againſt whom.—Thirdly, In what county.—Fourthly, Within what time.—Fifthly, Where there ſhall be a reſtitution of the goods ſtolen.

(b) F. Cor. 100. Latch. 127. S. P. C. 60. (c) 11 H. 4. 12. 12 H. 7. 27, 28, 29. 37 H. 6. 30, 31. (d) 2 Ed 4. 15. 2 Rich. 3. 22. 3 H. 7. 12. 5 H. 7. 18. 21 H. 7. 14. Bract. L. 3. c. 26. Ste b. 1. c. 33. ſ. 3. S. P. C. 60. (e) Keilw 70. (f) Bract. l. 3. c. 26. F. Cor. 100. 11 H. 4 12. B. G. d'Egliſe 6. B. Cor. 142. B. App. 91. (g) 3 Inſt. 108. See b. 1. c. 33. ſ. 6. (h) Sum. 184. S. P. C. 60. F. Cor. 17. B. Cor. 216. B. App. 34.

Sect. 44. As to the firſt point, *viz.* by whom an appeal of Larceny may be brought; the following particulars ſeem moſt remarkable. Firſt, There is no neceſſity that the appellant have the abſolute property of the goods ſtolen; for it ſeems agreed, That a carrier, or even a ſervant, (*b*) to whom goods are delivered to be carried to a certain place, or church-wardens (*c*) having poſſeſſion of the goods of a church, or in general, any perſon whatſoever, (*d*) who is ſo far intruſted with the goods of another as in judgment of law to have the poſſeſſion, and not the bare charge of them, may have an appeal of larceny againſt any one who ſhall ſteal them, for that they have a ſpecial kind of property in them againſt all ſtrangers: And it ſeems that they may either bring a general (*e*) appeal as for their own goods, or a ſpecial (*f*) one for the goods of J. S. in their cuſtody. Alſo it is ſaid, That a perſon who hath been robbed of his goods, ſtill continues to have ſo far the poſſeſſion as well as the property of them, that he may bring an appeal of larceny againſt any one who ſhall ſteal them from the robber, as ſhall be more fully ſhewn in the next ſection. But it ſeems (*g*) clear, That no one can maintain ſuch an appeal who has the bare charge of goods without a poſſeſſion, as a butler or cook, who in my own houſe have the charge of my goods, for that in ſuch a caſe the whole poſſeſſion, as well as the abſolute property, in the judgment of law always continues in me. Alſo it is certain, That a villein cannot (*h*) have an appeal of larceny againſt his lords, for any of his goods taken by the lord, becauſe (*i*) the lord by ſeizing them makes them his own. But it is agreed, (*k*) That a villein may have an appeal of death or of rape againſt his lord. Alſo it ſeems clear at this (*l*) day, That any tenant who is not a villein, may have an appeal of larceny againſt his lord.

(i) Lit. ſ. 177. (k) Lit. ſ. 189, 190. Summary 184. (l) S. P. C. 62.

Sect. 45. Secondly, There is no neceſſity that the wrong for which ſuch an appeal is brought, were immediately done to the perſon of the appellant; for if a ſervant be robbed of the maſter's goods in his cuſtody, the maſter (*m*) may bring the appeal as well as the ſervant; and in ſuch caſe he who firſt commences it ſhall prevent (*n*) the other. Alſo if one be robbed of goods

(m) Sum. 184. (n) Latch. 127.

goods wherein another is jointly intereſted with him, and die, the ſurvivor (*a*) may bring an appeal. Alſo if I be robbed by A. who afterwards is robbed of the ſame goods by B it is ſaid, (*b*) That I may have an appeal of larceny againſt B. becauſe A. claiming no property, but taking the goods merely as a felon, had, in judgment of law, neither any property nor poſſeſſion in them, but the ſame wholly continued in me. But if the goods had been taken from me by a treſpaſſer, under the pretence of ſome title, and ſuch treſpaſſer had been robbed of them, It ſeems that I could have no appeal for them. Neither can an executor (*c*) bring an appeal for a larceny from the teſtator, becauſe ſuch larceny, at the time when it was committed, was no injury to the executor, but to the teſtator only; and therefore the appeal for it being a mere perſonal action, and wholly veſted in the teſtator, there is no doubt but that it dies with him, as all other actions for mere torts do.

(*a*) Sum. 184. S. P. C. 61 F. Co one 392.
(*b*) Sum. 184. S. P. C. 61. F. Cor. 39 79. 13 Edw. 4. 3. Keilw. 160. B Appeal 100. 4 H. 7. 5. See B. 1. c. 33. ſ. 9.
(*c*) Sum. 184. S. P. C. 60.

Sect. 46. As to the ſecond point, *viz.* Againſt whom an appeal of larceny may be brought; having incidentally ſhewn what is moſt conſiderable relating to this point under the former, I ſhall only take notice in this place, That this, or other appeal lies againſt an infant, (*d*) as well as againſt a perſon of full age, and againſt a *feme covert*, (*e*) in the ſame manner as if ſhe were ſole, without taking notice of the huſband.

(*d*) S. P. C 62. a. Summary 185.
(*e*) B. Cor. 50. 15 Edw. 4. 1. S. P. C. 62. Summary 185. Vide F. Cor. 17.

Sect. 47. As to the third point, *viz.* In what county ſuch appeal is to be brought; there is no doubt, but that, like all other (*f*) appeals, it is a local action, and muſt be brought in the county where the felony complained of was done. Yet if one rob me in the county of A. and afterwards carry my goods into the county of B. I have my election (*g*) either to bring an appeal of robbery in the county of A. or an appeal of larceny in the county of B. becauſe the poſſeſſion as well as property of the goods continued in me, in judgment of law, after the robbery; and therefore, in what place ſoever the robber keeps them from me, he felonioufly injures me in the poſſeſſion as well as property of them, and conſequently may properly enough be ſaid to ſteal them from me. Yet he ſhall be appealed for the robbery in the firſt county only, (*h*) for there only he was guilty of taking from the perſon, without which there can be no robbery. Alſo (*i*) if one take me from the county of A. into the county of B. and there rob me, he ſhall be appealed for the robbery in the county of B. only, for he was guilty only of a treſpaſs in the county of A. But (*k*) if one bring my goods into the county of B. by reaſon of a menace in the county of A. it may be queſtioned which is the proper county for the bringing of the appeal.

(*f*) Sup. ſ. 35. 11 H. 4. 93. F. Cor. 437. B. App. 35. Dyer 38, 39. 40.
(*g*) 7 H. 4. 43. Dyer 39, 40. 4 H. 7. 5, 6. S. P. C. 63. 26 Aſſize 32. 7 Coke 2. F. Cor. 62. 79. F. Aſſize 446. B. App. 35. B. 1. c. 33. ſ. 9.
(*h*) Sum. 184. 7 Co. 2. Con. Keilw. 160.
(*i*) S. P. C. 63. Inſt. ſ. 71.
(*k*) S. P. C. 63.

Sect. 48. As to the fourth point, *viz.* Within what time an appeal of larceny is to be brought; it ſeems to be agreed (*l*) at this

(*l*) Sum. 185. S. P. C. 62 165. B. App. 37. 62.

7 H. 4. 44. Con. 22 Aſſize 97.

this day, That it may be ſued at any time, as well after as within the year and day, if the plaintiff have made freſh ſuit; for that the ſtatute of Gloceſter, c. 9. which requires, "That an "appeal be brought within the year and day," hath been conſtrued (*a*) to intend no other appeal but that of death; and the common law ſeems to have limited no certain time for the bringing of an appeal, but to have ſuffered it to be brought at any time by one who had made freſh ſuit; the nature whereof ſhall be more fully conſidered in the fiftieth ſection. But it ſeems, That one who has been guilty of a groſs neglect in purſuing the offender, may be barred of ſuch an appeal, as well within the year and day as after; for that the common law ſeems (*b*) in all appeals to have required, that the appellant ſhould have made freſh ſuit; and the ſaid ſtatute of Gloceſter, which takes away the neceſſity of it in appeals of death brought within the year and day, extends not to other appeals.

(*a*) Sup. f. 33.

(*b*) 2 Inſt. 319.

Sect. 49. As to the fifth point, *viz.* In what caſes there ſhall be a reſtitution of the goods ſtolen; I ſhall premiſe, That until (*c*) ſuch goods are ſeized to the uſe of the king, or of ſome other perſon claiming them under the crown as being waifs, or the goods of a felon, &c. the rightful owner, without any freſh ſuit or appeal, may ſeize them where-ever he finds them; but they ſhall not be reſtored to them after ſuch ſeizure by others, without bringing his appeal, &c.

(*c*) 21 Edw. 4. 16. 7. F. Eſtray 2. Avowry 151. S. P. C. 186. 5 Co. 109. 1 Hale 541.

And for the better underſtanding in what caſes a reſtitution of the goods ſo ſeized ſhall be awarded on ſuch an appeal, I ſhall examine the following particulars.

Firſt, Whether it neceſſarily require a freſh ſuit.—Secondly, What ſhall be eſteemed a freſh ſuit.—Thirdly, By whom, and in what manner, ſuch freſh ſuit ſhall be inquired and adjudged.—Fourthly, How far the appeal muſt be proſecuted.—Fifthly, Whether the appellant's title to ſuch reſtitution ſhall be preferred to any ſubſequent title claimed in the goods.—Sixthly, Whether there ſhall be ſuch a reſtitution on any other proſecution beſides that of appeal.—Seventhly, Whether there ſhall be a reſtitution to any goods not mentioned in the appeal.

Sect. 50. As to the firſt particular, *viz.* Whether ſuch reſtitution neceſſarily require a freſh ſuit; it ſo fully appears to do ſo by almoſt all the books (*d*) relating to this matter, that it ſeems needleſs to cite authorities to prove it.

(*d*) See the authorities to three next ſections.

Sect. 51. As to the ſecond particular, *viz.* What ſhall be eſteemed a freſh ſuit; it ſeems to have been anciently holden, (*e*) That to make a freſh ſuit, the party ought to have raiſed a hue and cry with all convenient ſpeed, and alſo to have taken the offender. But at this day it ſeems to be ſettled, (*f*) That

(*e*) F. Cor. 319. 379. 392. 1 Hale 540. S. P. C. 62. 165. 2 Rich. 3. 13. a.

(*f*) B. F. Suit 1. 6.

if

if the party have been guilty of no groſs neglect, but have uſed all reaſonable care and diligence in inquiring after, purſuing and apprehending the felon, he ought to be allowed to have made ſufficient freſh ſuit, whether any hue and cry were levied or not, and whether ſuch offender were taken by means of ſuch purſuit, or without any aſſiſtance from it. 7 H. 4. 44. S. P. C. 62. 165. Qu. Het. 64, 65.

Sect. 52. As to the third particular, *viz.* By whom, and in what manner, ſuch freſh ſuit ſhall be inquired and adjudged; it ſeems, (*a*) That it is uſual and proper to make ſuch inquiry by the ſame jury that tries the principal matter; and it is certain, That upon the finding of the freſh ſuit by ſuch jury, the court may award a reſtitution: And in ſuch caſes wherein the appellee is condemned without any trial, as where he is convicted by his own confeſſion, or outlawed, or ſtands mute, &c. it ſeems, That the court may make ſuch inquiry, by any (*b*) inqueſt of office, returned for ſuch purpoſe, and on their finding the freſh ſuit award a reſtitution: But in either caſe ſuch inqueſt is but an inqueſt (*c*) of office, and perhaps is not abſolutely neceſſary, but required chiefly for the ſatisfaction of the conſcience of the judges, in a matter which, if they think fit, they may, by the purport of ſome authorities, (*d*) examine themſelves, as they generally may (according to ſome (*e*) opinions) any matters whatſoever inquirable by an inqueſt of office, eſpecially (*f*) if the parties intereſted in the thing in queſtion be willing that they ſhould do ſo: And agreeably hereto it is holden, in the beſt authors, (*g*) That the judging of freſh ſuit lies in the diſcretion of the court; and there is a caſe (*h*) wherein a writ of reſtitution of the goods ſtoſen was actually awarded, without making any inquiry of the freſh ſuit; but in the book wherein this caſe is reported, it is made a *quære*, whether ſuch inquiry ought not to be made at the return of ſuch writ.

(*a*) 4 Ed. 4. 11. S. P. C. 166.
(*b*) 8 H. 4. 1. 7 H. 4. 31. 2 Rich. 3. 13. 10 H. 4. 5. Cont. S. P. C. 166.
(*c*) S. P. C. 166. and ſee the books cited to the other points of this ſection, and Raſt. 52, 53.
(*d*) Vide F. Cor. 379. 392.
(*e*) 14 H. 4. 9. 3 H. 6. 29. 8 H. 6. 5. Yel. 1, 2. 1 Brownl. 214. 1 Sidney 442. Contra. Latch 213. 3 Leon. 150. 213.
(*f*) C. Jac. 415. 2 Saund. 100, 107.
(*g*) Sum. 185. S. P. C. 62.
(*h*) 21 E. 4. 16. F. Corone 42. B. F. Suit, 4. Vide S. P. C. 166. 2 Leon. 108.

Sect. 53. As to the fourth particular, *viz.* How far the appeal muſt be proſecuted in order to intitle the appellant to a reſtitution; it ſeems, That anciently the appellant could in no caſe be intitled to a reſtitution, unleſs (*i*) the appellee were attainted at his ſuit; and therefore if ſeveral appeals were commenced againſt the ſame perſon by ſeveral plaintiffs, and the appellee were attainted at the ſuit of one of them, no (*k*) other could have a reſtitution, becauſe the appellee (*l*) being once attainted, could not be afterwards attainted again: But (*m*) it ſeems to be ſettled at this day, That there is no ſuch neceſſity that the appellee be attainted at the ſuit of the appellant; and therefore in the caſe above mentioned, after ſuch attainder at the ſuit of one appellant, it ſhall be inquired by an inqueſt of office, Whether the appellee were guilty of the facts complained of in the other appeals, and made freſh ſuit, &c.

(*i*) 44 Ed. 3. 41. F. Cor. 95. 162. 318, 319. Awdry 151. S. P. C. 165, 166.
(*k*) F. Cor. 95.
(*l*) V. inf. in the chapter concerning judgment. Contra, 4 E. 4. 11.
(*m*) S. P. C. 166. 7 H. 4. 31. F. Cor. 81. 194. 379, 380.

&c. and upon ſuch matter found by ſuch inqueſt, a reſtitution ſhall be awarded, &c. Alſo (*a*) if an appellee die in priſon, it ſeems, That the like inquiry ſhall be made by inqueſt of office, and thereupon a reſtitution awarded, &c. And (*b*) if an appellee be outlawed, or have the benefit of his clergy before conviction, or ſtand mute, or challenge peremptorily above twenty jurors, or break from priſon, perhaps a reſtitution ſhall be awarded upon ſuch an inqueſt's finding the freſh ſuit, without any farther inquiry whether the appellee were guilty or not; becauſe by refuſing to take his trial, he tacitly ſeems to admit himſelf guilty. Alſo if one bring an appeal againſt two, whereof one is attainted, and the other acquitted; yet (*c*) it ſeems, he ſhall have a reſtitution. But (*d*) if both the appellees had been acquitted, it ſeems, That the appellant ſhould never have his goods again, though it were expreſsly found that they were his goods, but he ſhall forfeit them to the king for his falſe appeal. But *quære* if this ought not to be underſtood of ſuch goods only (*e*) as were before ſeiſed to the king's uſe, as having been waived, &c.

(*a*) F. Cor. 379. Forſ. 15. S. P. C. 166.
(*b*) 1 Hale 540. 21 Ed. 4. 16. 10 H. 4. 5. 40 Aſſize 39. 2 R. 3. 13. 8 H. 4. 1. 26 Aſſize 32. F. Cor. 42. 71. 194. 217. 379. 466. S. P. C. 166. 2 Leon. 108.
(*c*) S. P. C. 166.
(*d*) F. Cor. 367. 5 Coke 110.
(*e*) V. ſup. f. 48. 5 Coke 110. S. P. C. 186. Contra. 3 Inſt. 227.

Sect. 54. As to the fifth particular, *viz.* Whether the appellant's title to ſuch reſtitution, ſhall be preferred to any ſubſequent title gained in the goods; it ſeems clear, That the appellant's title to ſuch reſtitution ſhall not (*f*) be barred by any ſeiſure of ſuch goods, as being waifs, or eſtrays, or the goods of felons, &c. nor (*g*) even by a ſale of them, *bonâ fide* made in market overt, &c.

(*f*) S. P. C. 186. 5 Coke 109. 21 Ed. 4. 16. Kely. 35. 47. See the books cited ſect. 49. Qu. Het. 64, 65. F. Avo. 151. Cor. 71. 318, 319. H. App. 24.

(*g*) Keyling 34. 47. Qu. Moor 360. Poph. 84. 1 And. 344. 1 Hale 543, 544.

And by the like reaſon it is certain, that the proſecutor of an indictment, ſince 21 Hen. 8. c. 11. ſet forth more at large in the next ſection, ſhall not be barred of his reſtitution by any ſuch ſeiſure, or ſale, in market overt, &c (1).

(1) For market overt, ſee 4 Comm. 449. 2 Inſt. 713. Mirror c. 1. ſ. 3. Cro. Jac. 68. Godbolt 131. fully taken to perty. —— But 5 Rep. 83. 12 Modern 521. and by 1 Jac. 1. c. 21. the ſale of any goods wrong- any pawnbroker in *London*, or within two miles thereof, ſhall not alter the pro- reſpecting pawnbrokers, vide 30 Geo. 2. c. 24. and 24 Geo. 3. c. 42.

Sect. 55. As to the ſixth particular, *viz.* Whether there ſhall be a reſtitution of the goods ſtolen, upon any other proſecution beſides that of appeal; it ſeems to be clearly agreed, (*h*) That by the common law it could not be had upon any other proſecution whatſoever: But to remedy this inconvenience, it is enacted by 21 Hen. 8. c. 11. "That if any felon "or felons do rob, or take away any money, goods or chat- "tels, from any of the king's ſubjects, from their perſons or "otherwiſe, within this realm, and thereof the ſaid felon or "felons be indicted, and after arraigned of the ſaid felony, "and found guilty thereof, or otherwiſe attainted by reaſon of "evidence given by the party ſo robbed, or owner of the ſaid "money,

(*h*) 4 H. 7. 5. F. Cor. 62. 460. S. P. C. 66. 165. 167. Summary 212. Latch. 144. 1 Hale 542.

" money, goods, or chattels, or by any other by their pro-
" curement; that then the party ſo robbed, or owner, ſhall
" be reſtored to his ſaid money, goods and chattels; and that
" as well the juſtices of gaol-delivery, as other juſtices, after
" whom any ſuch felon or felons ſhall be found guilty, or
" otherwiſe attainted, by reaſon of evidence given by the party
" ſo robbed, or owner, or by any other by their procurement,
" have power by the ſaid act to award, from time to time,
" writs of reſtitution (1) for the ſaid money, goods and chat-
" tels (2), in like manner as though any ſuch felon or felons
" were attainted at the ſuit of the party in appeal."

(1) There has been no writ of reſtitution ſued out theſe 200 years.—If the goods are produced at the trial, the court will order them to be reſtored to the owner, and if not reſtored, the owner may after proſecution recover them from the perſon who converts them by an action of trover. Loft. 88. Vide Harris v. Shaw, B. R. H. 349.

(2) A bank note of fifty pounds was ſtolen from Golightly by one Ferguſon. He was apprehended; and ſeveral articles of ſilver plate, a bank note for twenty pounds, and ten guineas in gold, which were found upon him, were produced on the trial, and placed in the cuſtody of Mr. Reynolds, the clerk of the arraigns. Golightly gave evidence againſt Ferguſon at the Old Bailey, and he was convicted of ſtealing the fifty pounds bank note. The owner demanded reſtitution from Reynolds of the goods found upon Ferguſon, but as they were not the identical *goods* which Golightly had loſt, Reynolds refuſed to reſtore them. But on trover being brought before Lord Mansfield, they were ordered to be reſtored, they being the produce of the fifty pound bank note. Loft. 90.—So where a man had ſtolen cattle and ſold them, the money they produced was reſtored to the owner of the cattle. Noy 128. And the ſame of gold ſtolen and changed into ſilver. Cro. Eliz. 661.

Sect. 56. Sir William Staundford, (*a*) in his conſtruction of this ſtatute, ſeems to incline to an opinion, That the party may have a reſtitution by virtue of it, without making any freſh ſuit; and this ſeems to be agreeable to practice, and the purport of the firſt part of the ſtatute, which ſeems to require no more in order to intitle the party to a reſtitution, than that the indicted be found guilty (3) or otherwiſe attainted by his evidence, &c. Yet if it ſhall plainly appear to the court, That the party hath been guilty of groſs neglect in proſecuting the offender, it may reaſonably be argued, That he is not intitled to a reſtitution; for the latter part of the ſtatute, by ordaining, That writs of reſtitution ſhall be awarded as though the felon had been attainted in an appeal, ſeems to imply, That it is a ſufficient favour, within the intentions of the makers of the ſtatute, to the proſecutor of an indictment, to give him a like remedy for a reſtitution of his goods, as the common law gave to the plaintiff in an appeal. But it is certain, (*b*) That the plaintiff in an appeal, who appears to have been guilty of ſuch a neglect, cannot demand a reſtitution by the common law. And the conſtruction I would contend for will appear the more reaſonable, if it be conſidered, that it hardly can be imagined to be the intention of the makers of the ſtatute, to give the party a greater benefit from a conviction grounded on his own evidence, as a conviction on an indictment may be, than from a conviction on the evidence of others, as a conviction in appeal muſt be. However, if it ſhall appear to the court, upon the evidence at the trial or otherwiſe, That the party has been reaſonably diligent in proſecuting the offence, I readily grant, That the juſtices

(*a*) S. P. C. 167. 2 Hale 545.

(3) In the particular caſe of horſe ſtealing, it is enacted by 31 Eliz. c. 12. that 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.*

(*b*) Sup. ſ. 50, 51, 52.

juſtices may, if they think fit, in their diſcretion award a reſtitution, without making any inquiry concerning the freſh ſuit. But this ſeems to be no more than they may alſo do in appeal, if they think fit, as I have already more fully endeavoured to ſhew in ſection fifty-two.

Sect. 57. As to the ſeventh particular, *viz.* Whether there ſhall be a reſtitution to any goods not mentioned in the appeal; There is no doubt, but that if a man be robbed of ſeveral goods by the ſame perſon, either at the ſame or different times, and ſuch goods be ſeiſed as waifs, &c. and afterwards the party, in his appeal for the robbery, mention ſome of thoſe goods only, and omit thoſe reſt, and the appellee be convicted, &c. the appellant ſhall be reſtored to ſuch of the goods only as were mentioned in the appeal, and the reſt ſhall be confiſcated, not only in reſpect of that favour which the law preſumes that the appellant beareth to the felon, in making the charge againſt him eaſier than it ought to have been, which might poſſibly have given him an opportunity to have eſcaped, but alſo becauſe, as it ſeemeth, the reſtitution ought regularly to be grounded on the record of the appeal; and by that no other goods can appear to have been ſtolen than what are mentioned in it: But whether an appellant, who had, before his appeal brought, lawfully regained the poſſeſſion of his goods ſtolen, ſhall forfeit to the king ſuch of them as he leaves out of his appeal, doth neither clearly appear from the principal (*a*) caſe concerning this matter, nor from any of the books above cited, which ſeem chiefly to rely on the authority of it. But there is a ſpecial (*b*) caſe wherein the appellant ſhall recover things which were neither ſtolen from him, nor mentioned in his appeal; as where the appellee ſells (*c*) the things ſtolen, or exchanges (*d*) them for ſome other thing, before the appeal brought, and the money taken on the ſale, a thing given in exchange, are ſeiſed to the king's uſe, &c. in which caſe they ſhall be delivered to the appellant, on the conviction of the appellee, though they were never in his poſſeſſion before; for he appears to be in no manner of fault, and there is no reaſon that he ſhould be prejudiced by the act of the felon. And I take it for granted, That in all theſe caſes the law is the ſame at this day in relation to a reſtitution, by force of the above cited ſtatute of 21 Hen. 8. to the proſecutor of an indictment.

F. Corone 100. Summary 184. 3 Inſt. 227. 5 Coke 110. S. P. C. 186. 1 Hale 538.

Vide ſup. f. 49. 54.

(*a*) F. Cor. 100.

(*b*) Vide F. Cor. 323. B. Reſtitu. 22. Prop. 34. 2 Bulſt. 310.

(*c*) Noy 128.

(*d*) C. Eliz. 661.

And now I am come to an appeal of rape. For the better underſtanding of the nature whereof, I ſhall conſider, Firſt, By whom, and in what manner it may be brought.—Secondly, In what county.—Thirdly, Within what time.

Sect. 58. As to the firſt point, *viz.* By whom and in what manner an appeal of rape may be brought. It ſeems, (*e*) That by

(*e*) Bract. 147, 148. Flet. l. 1. c. 25. f. 14.

by the common law, it might be brought by any woman who had been raviſhed, againſt the raviſher, whether ſuch perſon raviſhed were the nief (*a*) of the raviſher, or a free woman, and whether ſhe were a virgin, wife, or widow; neither (*b*) do I find that ſhe could be barred of her appeal at the common law, for conſenting after the rape, to the raviſher, as ſhe may (*c*) be at this day, by force of the ſtatutes of Weſtminſter 2. c. 34. and 6 Rich. 2. c. 6. But it ſeems that a woman lawfully married, can neither (*d*) by the common law, nor by force of any ſtatute, bring ſuch an appeal without her huſband, as one married *de facto* only, and not *de jure*, perhaps may.

2 Inſt. 180. See b. 1. c. 41. f. 7. Contra. 2 Inſt. 433. 1 Inſt. 123. (*a*) Littleton ſ. 190. Contra. F. Corone 17. S. P. C. 98. (*b*) Vide Bract. 147. S. P. C. 61. 148. (*c*) Vide 2 Inſt. 433, 434.

1 Hale 632. Inf. ſ. 59. 60, 61. (*d*) 8 H. 4. 21. 11 H. 4. 14. S. P. C. 98.

Sect. 59. But howſoever the common law might ſtand in relation to appeals of rape, it ſeems, That they were wholly taken by the ſtatute of Weſtminſter 1. c. 13. by which the offence of rape was reduced to a treſpaſs only, and conſequently puniſhable only by an action, or indictment of treſpaſs: But afterwards, appeals of rape were given again by the ſtatute of Weſtminſter 2. c. 34. by which it is enacted, "That if a "man from thenceforth do raviſh a woman married, maid, "or other, where ſhe did not conſent, neither before nor "after, he ſhall have judgment of life and member. And "likewiſe where a man raviſheth a woman married, lady, "damſel, or other, with force, although ſhe conſent after, he "ſhall have judgment as before is ſaid, if he be attainted at "the king's ſuit, and there the king ſhall have the ſuit."

Sect. 60. It ſeems to be ſo clear, (*e*) That this ſtatute impliedly gives an appeal to the woman who does not conſent to the raviſher, that it ſeems needleſs to endeavour to prove it; but it is obſervable, (*f*) That the ſtatute does not reſtore the old common law in relation to ſuch appeals, as it would have done, if it had only repealed the above mentioned ſtatute of Weſtminſter 1. c. 13. but makes a new law in relation to them; from whence it follows, That all appeals of rape at this day, muſt (*g*) conclude *contra formam ſtatuti*.

(*e*) 47 Aſſize 6. Littleton, ſ 190. 2 Inſt. 433. S. P. C. 6. 81. Contra. F. Utlag. 49. B. Corone 169. (*f*) Vide ſup. c. 10. ſ. 52. (*g*) 9 Ed. 4. 16. F. Endit. 18. Dyer 202.

Sect. 61. It is farther enacted by 6 Rich. 2. ſt. 1. c. 6. in the following words, "Againſt the offenders and raviſhers of ladies, and the daughters of noblemen, and other women in every part of the realm, in theſe days offending more violently, and much more than they were wont:" It is ordained and eſtabliſhed, "That whereſoever and whenſo- "ever ſuch ladies, daughters and other women aforeſaid be "raviſhed, and after ſuch rape do conſent to ſuch raviſhers, "That as well the raviſhers as they that be raviſhed, and "every of them, be from thenceforth diſabled, and by the "ſame deed be unable to have or challenge all inheritance, "dower or joint feoffment after the death of their huſbands and "anceſtors.

Vide inf. ſ. 70. 5 Ed. 4. 6. 3 Coke 61. Bro. Parl. 89. 1 H. 6. 1.

" anceſtors. And that incontinently in this caſe, the next of " the blood of thoſe raviſhers, or of them that be raviſhed, to " whom ſuch inheritance, dower or joint feoffment ought to " revert, remain or fall after the death of the raviſher, or of " her that is ſo raviſhed, ſhall have title; that is to ſay, after " the rape to enter upon the raviſher, or her that is raviſhed, " and their aſſigns, and land-tenants, in the ſame inheritance, " dower or joint feoffment, and the ſame to hold in ſtate of " inheritance: And that the huſbands of ſuch women, if they " have huſbands, or if they have no huſbands in life, that then " the fathers, or other next of their blood, have from thence- " forth the ſuit to purſue, and may ſue againſt the ſame of- " fenders and raviſhers in this behalf, and to have them there- " of convict of life, and of member, although the ſame wo- " men after ſuch rape do conſent to the ſaid raviſhers. " And the defendant in this caſe ſhall not be received to wage " battle, but the truth of the matter ſhall be tried by inquiſi- " tion of the country. Saving always to our lord the king, " and to other lords of the realm, all their eſcheats of the ſaid " raviſhers, if peradventure they be thereof convict."

In the conſtruction of this ſtatute the following points have been holden.

(a) 11 H. 4. 13. F. Cor. 86. 228. B. Parlia. 89.

Sect. 62. Firſt, That (*a*) in an appeal brought upon it by a huſband for the rape of his wife, it is a good plea, That the appellant and woman raviſhed were never lawfully married, which ſhall be tried by the biſhop's certificate, who, if the marriage were unlawful by reaſon of a precontract, &c. ought to certify againſt the appellant.

(b) 11 H. 4. 14. F. Cor. 86. 228. S. P. C. 81. Dy. 312. 202.

Sect. 63. Secondly, That there is no (*b*) neceſſity to alledge, That the woman did conſent to the raviſher, in a count which rehearſes the ſtatute, and concludes that the rape was againſt the form of it; which implies, that the woman conſented, &c.

(c) 2 Inſt. 434. Vide ſup. f. 39, 40. 2 Hale 632.

Sect. 64. Thirdly, That (*c*) if a woman who hath neither huſband nor father, be raviſhed by her next of kin, and conſent to him, the next of kin to the raviſher ſhall have the appeal.

(d) S. P. C. 61.

Sect. 65. Fourthly, That (*d*) whoſoever happens at the time to be next heir to the perſon ſo raviſhed, and conſenting, &c. ſhall have the appeal, and alſo enter (*e*) into the lands of the perſon raviſhed, and retain them againſt any other who ſhall afterwards happen by matter *ex poſt facto* to become heir; and therefore where a woman having iſſue only a daughter, conſents to a raviſher, and the daughter enters, and then a ſon is born to ſuch woman, the daughter ſhall retain the lands, becauſe ſhe took them by virtue of a title given by the ſtatute which

(e) F. Aſſize 27. 5 Ed. 4. 6. 9 H. 7. 25. L. Quin. Ed. 4. 60, 61. 2 Coke 95. 98. 137. 3 Coke 61, 62. Plowden 66. 2 Hale 631.

which firſt veſted in her as a purchaſer, and never was in any anceſtor.

Sect. 66. Fifthly, That (*a*) the next in remainder or reverſion, to whom the lands of the woman who conſents to a raviſher would come if ſhe were dead, ſhall enter and retain her lands by virtue of the ſtatute, provided he be of kin to her, albeit another perſon be nearer; yet it ſeems, That the perſons ſo intitled to the lands cannot have an appeal of rape, where there is another nearer of kin; for though the clauſe relating to the entry into the lands ſeems to intitle ſuch of the next of kin, to whom the inheritance would fall after the death of the party, whether they be abſolutely neareſt or not; yet the clauſe relating to the appeal ſeems to extend to none but the huſband, or father, or very next of kin.

(*a*) L. quin. Ed. 4. 58, 59, 60. B. Ent. Cong. 94. 5 Ed. 4. 5. F. Affize 27.

Sect. 67. Sixthly, That it is not (*b*) ſufficient in ſetting forth the title of the perſon claiming the lands by virtue of the ſtatute, to ſay in general, That he is next of blood to whom the inheritance would fall, &c. without ſhewing ſpecially in what manner he is ſo, &c.

(*b*) L. quin. Ed. 4. 58. Plowden 42, 43.

Sect. 68. Seventhly, That it is not (*c*) concluſive evidence to prove the woman's conſent to the raviſher, to ſhew, That ſhe lived with him ſome years as his wife, and had a child by him, if all the time ſhe was under his power, and never at her liberty.

(*c*) L. quin. Ed. 4. 59, 60, 61. B. Ent. Cong. 64. 5 Ed. 4. 5.

Sect. 69. Eighthly, That (*d*) if the party raviſhed and conſenting to the raviſher, be under the age of twelve years, ſhe ſhall not loſe her lands by the intent of the ſtatute, for that the conſent of a woman under that age is looked upon as given by one uncapable of diſcretion, and therefore is not regarded by the law.

(*d*) Plow. 364. See 1 D. Abr. 698, 669, 700. 1 Inſt. 79.

Sect. 70. Ninthly, That (*e*) in appeals brought on this ſtatute, the count ought to rehearſe it; but I do not find any reſolution cited to maintain this opinion. It is true indeed, That in the year-book of 11 H. 4. 13, 14. the ſtatute is recited in an appeal grounded on it: But it is not there ſaid to be neceſſary to be ſo recited; neither do I find any reaſon given why an appeal may not as well be grounded on this ſtatute without reciting it, as on the ſtatute of Weſtminſter 2. c. 34. as (*f*) it is agreed that it may be: If it be ſaid, (*g*) That the common law gave the ſame appeal as is given by the ſtatute of Weſtminſter 2. and therefore there is no need to recite it; but that there never was ſuch an appeal at the common law as is given by the ſtatute of Rich. 2. and therefore the appeal grounded on it ought to recite it; it may be anſwered, That the ſaid ſtatute of Weſtminſter (*h*) does not revive the old common law in relation to ſuch appeals, but makes a new law in relation to them; ſo that appeals brought upon it, do altogether as much depend upon it, as thoſe brought on the ſtatute

(*e*) S. P. C. 61. See 1 H. 6. 1. B. Rape 4.

(*f*) S. P. C. 81 See 1 H. 6. 1. B. Rape 4.

(*g*) Vide 5 H. 7. 17.

(*h*) Sup. f. 59, 60.

ſtatute of Richard the Second do on that. Neither (a) does there appear to be any ſuch rule, That in indictments, or actions grounded on ſtatutes which give a remedy in caſes which were no way provided for by law, there is a neceſſity to recite ſuch ſtatutes; and indeed at beſt it ſeems but ſurplus to recite what the court is bound *ex officio* to take notice of.

(a) 5 H. 7. 17. C. Car. 564. 6 Modern 140.

Sect. 71. As to the ſecond point, *viz.* In what county an appeal of rape may be brought; there is no doubt, but that this, like all other (b) appeals, is a local action, and conſequently ought to be brought in the county wherein the felony was done. And therefore if a man take a woman by force in one county, and carry her into another, and there raviſh her, the appeal (c) ſhall be brought only in the county wherein the rape was committed; for the taking in the other was no more than a treſpaſs, and needs not be taken notice of at all in the appeal of the rape; and if it be, is only looked upon as ſurplus.

(b) Sup. ſect. 35, 47.

(c) 3 H. 7. 12. F. Viſne 28. B. Appeal 83. S. P. C. 63. Summary 186.

Sect. 72. As to the third point, *viz.* In what time an appeal of rape may be brought; it ſeems, That at this day it may be brought in any reaſonable (d) time, the judgment (e) whereof lies in the diſcretion of the court, for that at the common law there was no certain time limited for the bringing of it; and the ſtatute of Weſtminſter 1. c. 13. by which the offence of rape was turned into a treſpaſs, and forty days limited for the ſuit of the perſon raviſhed, is repealed; and the ſtatute of Glouceſter 9. which requires that appeals be brought within the year and day, extends only to appeals of death; and the ſtatute of Weſtminſter 2. c. 34. which makes rape a felony again, limits no time for the bringing of it, but leaves it to the conſtruction of law, which ſhall be agreeable to the ancient rules of law in ſuch points, wherein the ſtatute is ſilent.

(d) S. P. C. 63. Summary 186. 1 Hale 632.
(e) Vide ſupra ſect. 51, 52. Littleton 69. 2 Inſt. 56. Sup. ſect. 33. 48.

Sect. 73. And now I am come to an appeal of arſon. (f) But the learning relating to it ſeeming to be altogether obſolete at this day, I ſhall refer the reader to old (g) books for it.

(f) 1 Inſt. 288.
(g) Fleta l. 1. c. 37. Bract. l. 3. c. 27.

HAVING thus endeavoured to ſhew in what courts appeals may be brought, and the ſeveral kinds of them, and examined the particulars which ſeemed moſt properly to come under the conſideration of each kind, I ſhall now proceed to examine ſome other matters concerning them, wherein I ſhall conſider them all together.

As, Firſt, In what caſes the appellant and appellee are to appear in proper perſon, and where by attorney or guardian.—Secondly, How the appellant ought to declare.—Thirdly, How he may be nonſuited.—Fourthly, For what faults the writ may

may be abated.—Fifthly, What may be pleaded in bar of an appeal.—Sixthly, Where the appellant and his abettors ſhall render damages to the appellee for a falſe appeal.—Seventhly, Where the appellant is to be fined.

Sect. 74. As to the firſt point, *viz.* In what caſes the appellant and appellee are to appear in proper perſon, and where by attorney, or guardian; it ſeems, That by the common law, neither (*a*) plaintiff nor defendant in any appeal whatſoever, whether of felony or mayhem, (*b*) could make an attorney, but muſt appear either by guardian (*c*) or in proper perſon, on every (*d*) day of continuance, except in ſome ſpecial caſes; as where the defendant being convicted in an appeal of felony prayed the benefit of his clergy, and the plaintiff replied, that he had been twice married, in which caſe he might (*e*) be admitted to go on with the ſuit by attorney, becauſe he had nothing more to do but to get a certificate of the bigamy from the biſhop, which, as it was (*f*) ſaid, any ſtranger might procure as well as the plaintiff. *Sed quære*, for it is ſaid, (*g*) That none can demand execution but the plaintiff, and that the plaintiff cannot do it but in proper perſon; from whence it ſeems reaſonable to argue, That he ought, in all other caſes, as well to carry on his ſuit in proper perſon. But it ſeems (*h*) clear, That after a defendant is acquitted, he may appear by attorney for the recovery of his damages againſt the abettors, &c. And it is enacted (*i*) by 3 Hen. 7. c. 1. "That "the appellant in any appeals of murder or death of a man, "where battel by the courſe of common law lies not, may "make attorney and appear in the ſame, in the ſaid appeals "after they be commenced, to the end of the ſuit and execu-"tion of the ſame." But (*k*) if a defendant or plaintiff appear and plead by attorney where they ought not, and the court receive the plea and adjourn the cauſe; it ſeems, That the appeal is diſcontinued, becauſe ſuch appearance was merely void in law.

(*a*) 2 Inſt. 313. Carth. 55, 56. 3 Modern 268. Salk. 59, 62. 64. B. Attor. 64. 78. 2 Ri. 3. 13. B. App. 112. Raſtal 47.
(*b*) 2 Inſt. 313. F. N. B. 27. Con. F. Attor. 104. 21 H. 7. 39.
(*c*) Sup. ſ. 30.
(*d*) 1 H. 7. 27. F. Utlag. 34.
(*e*) 40 Aſſ. 17. F. Attor. 39. 90. 40 Ed. 3. 42. S. P. C. 135. Vide F. Cor. 13.
(*f*) 11 H. 4. 11. S. P. C. 135. F. Corone 13.
(*g*) 21 Ed. 4. 72, 73.
(*h*) 8 Ed. 4. 3. F. Attorney 24.
(*i*) F. N. B. 26.
(*k*) Salk 59, 60. Carthew 56. Skinner 670. An appellant muſt appear once, perſonally, before he can make an attorney. Skin. 48. Carthew 394.

As to the ſecond point, *viz.* In what manner the appellant ought to declare; I ſhall refer the reader for precedents of counts in appeal, to Staunford's (*l*) pleas of the crown, and the book (*m*) of entries, and ſhall in this place conſider only the following particulars.—Firſt, In what manner ſuch count muſt purſue the writ.—Secondly, How it ought to ſet forth the ſubſtance and matter of fact.—Thirdly, How the circumſtances of time and place.—Fourthly, Whether one and the ſame count ought to be againſt thoſe who do not appear as well as againſt thoſe who do appear, and againſt the acceſſaries as well as the principals.

(*l*) S. P. C. 78, 79.
(*m*) Raſtal and Coke's Entries, Titles Appeal & Mort. Tremaine 15. to 33.

Sect. 75. As to the firſt point, *viz.* In what manner the count in appeal muſt purſue the writ; I ſhall take it for granted,

granted, That this, like all other counts in other actions, muſt in ſubſtance (*a*) agree with the writ, which ſhall be abated, if the count vary from it in any material point. And therefore in a common appeal of death, if the appellant declare, That the appellee traiterouſly killed the perſon deceaſed, as he was going to ſuccour the king in his wars, the writ ſhall be abated, (*b*) becauſe that contains no charge of treaſon. So alſo if the plaintiff, in an appeal of mayhem, declares, That the appellee beat as well as maimed him, the writ ſhall be abated, (*c*) becauſe that mentions not any battery.

(*a*) Finch 357.
(*b*) B. App. 12. 45 Ed. 3. 25. 21 Ed. 3. 23. S. P. C. 78.
(*c*) F. Cor. 110. Sup. ſect. 20.

Sect. 76. As to the ſecond point, *viz.* In what manner the count in appeal ought to ſet forth the ſubſtance and manner of the fact; I ſhall obſerve the following particulars.—Firſt, That where ſeveral are preſent at the fact, and one only actually does it, and the others abet and encourage him, it is in the election of the plaintiff, either to ſuppoſe (*d*) in his declaration, that every one of them did the fact, becauſe in ſuch a caſe the act of one is, in the judgment of the law, the act of all; or to ſhew the ſpecial (*e*) manner of the caſe as in truth it was, and ſet forth the fact to have been done only by the perſon who did it, and the others to have been his abettors, &c.

(*d*) 11 H. 4. 13. 4 H. 7. 18. S. P. C. 44. 80. Sup. ſect. 19. Summary 187. poſt c. 29.
(*e*) 4 Co. 41. F. Cor. 97, 216. 40 Aſſize 25. 44 Ed. 3. 38. Raſtal 43. 45. 46, 47. Coke's Entries 57, &c.

Sect. 77. Secondly, That no periphraſis, (*f*) or circumlocution whatſoever, will ſupply the want of thoſe words of art, which the law hath appropriated for the deſcription of the offence; from whence it follows, That an appeal of death cannot (*g*) amount to a charge of murder without the word *murdravit*, let it be never ſo exact and particular in ſetting forth the malice and all other circumſtances of the killing; neither (*h*) can an appeal of rape be ſufficient without the word *rapuit*; nor (*i*) an appeal of larceny without the word *cepit*; nor (*k*) an appeal of mayhem without the word *mayhemiavit*, nor any (*l*) of the appeals above mentioned without the word *felonicè*.

(*f*) 5 Co. 121.
(*g*) Dyer 261. Farreſley 16. Cro. Jac. 20. Salkeld 377. 9 Ed. 4. 26.
(*h*) S. P. C. 82. 24. 96. 9 Ed. 4. 26. 20 H. 7. 7. 1 Inſt. 124.
(*i*) F. Endict. 2. 8. S. P. C. 96. Summary 207.
(*k*) Sup. ſect. 17 Jac. 20. Dyer
(*l*) S. P. C. 94. 96. Summary 206, 207. 20 H. 7. 7. 1 Bulſt. 93. Cro. 202. Qu. 1 H. 6. 1. Con. F. Endict. 26. Dyer 69.

Sect. 78. Thirdly, That in every appeal of larceny (*m*) it muſt expreſsly appear whoſe the goods were that were ſtolen, and in every appeal of death, (*n*) who the perſon was that was killed; becauſe otherwiſe it cannot appear that the plaintiff is intitled to the appeal; yet an indictment *de morte* (*o*) *cujuſdam ignoti*, or for felonioufly ſtealing (*p*) the goods *cujuſdam ignoti*, is good; for it is ſufficient, That the perſon injured was under the protection of the law.

(*m*) Raſtal 53. 54. 55.
(*n*) F. Endict. 10. S. P. C. 95. 181. 22 Aſſize 94.
(*o*) Sum. 207. 22 Aſſize 94. F. Corone 159. S. P. C. 94. 181. 1 Aſſize 7. Dyer 96.
(*p*) F. Endict. 9. 12. Summary 207. 1 Hale 512. 2 Hale 181. S. P. C. 95. 181. Dyer 99. Keilwood 25. Moor 466. 18 Aſſize 15. Con. 9 H. 6. 45.

Sect. 79. Fourthly, That in an appeal of rape the fact ſeems to be ſufficiently (*q*) declared, by ſhewing, That the defendant

(*q*) Dyer 202. 11 H. 4. 13. F. Co. 86. S. P. C. 81. Summary 187.

fendant *felonicè rapuit* the woman, without adding the words *carnaliter cognovit*, or any others tantamount, or firſt ſhewing the particular manner of the terror or violence, and then concluding, That the defendant *ſic felonicè rapuit*. Alſo it ſeems, (*a*) That the like general manner of ſetting forth the fact, is ſufficient in an appeal of larceny; but it ſeems to be uſual, in appeals of larceny, to ſet forth the price of the things ſtolen; but whether this be neceſſary for any other purpoſe than to ſhew, that the crime amounts to grand larceny, and to aſcertain the goods, in order thereby the better to intitle the appellant to a reſtitution, I leave to be conſidered. But (*b*) in an appeal of mayhem it ſeems neceſſary; Firſt, to ſet forth particularly in what manner the hurt was done, and the conſequence following it, and then to conclude, That the defendant *ſic felonicè mayhemiavit* the appellor.

(*a*) Raſt. 53, 54, 55.
(*b*) Raſt. 45, 46, and Coke's Ent. 50, 51, 52, 53.

Alſo it ſeems clear, (*c*) That in an appeal of death it is neceſſary, not only from the ſtatute of Gloceſter (*d*) chapter 9. which requires, That an appeal of death ſhall declare the deed; but alſo from the common law, Firſt, to ſet forth in the count all the ſpecial circumſtances of the fact, and (*e*) then to conclude, That the appellee *ſic felonicè murdravit* the party; and this being the appeal moſt in uſe at this day, it may not be improper to ſet down theſe following rules concerning this matter.

(*c*) Raſt. 46, 47. &c. Coke's Ent. 53, 54. &c. Salkeld 377. Farreſley 16.
(*d*) 2 Inſt. 318, 319. 2 Lev. 140, 141. 5 Co. 120, 121, 122.
(*e*) 4 Coke 47.

Sect. 80. Firſt, That every ſuch count ought to ſet forth in what part (*f*) of the body the wound was given; in which reſpect the ſame certainty ſeems to be required in appeals as in indictments; and therefore, if the count ſay only, that the wound was given *circa pectus*; it ſeems to be vicious, as it hath been reſolved, (*g*) That an indictment in the like manner uncertain is, becauſe it doth not aſcertain the part wounded, which, for what appears, might have been the neck, arm, or belly; and for the like reaſon ſuch count ſeems alſo to be vicious, if it ſay, That the wound was in the hand, or leg, or arm, without (*h*) ſhewing whether it were the right or left; neither (*i*) is ſuch an uncertainty holpen by laying other wounds with ſufficient certainty, if there be a general concluſion that the party died of the wounds above mentioned; becauſe the death being as much imputed to the wound that is inſufficiently laid, as to the others, it appears not but that it might be chiefly owing to that which is inſufficiently laid, and therefore the whole is inſufficient. But it hath been reſolved, That it is ſufficient in an indictment of death, and therefore it ſeems alſo to be ſufficient in an appeal, to ſhew, That the wound was given in the left (*k*) part of the belly, or in the left part of the ſide, or in the left hand, or in the left arm, or in the face, or in the breaſt, or in the belly, or even in the forepart of the body, in which caſe the word *body* ſhall be

(*f*) 2 Inſt. 31.
(*g*) 4 Coke 40. 5 Coke 121. 2 Hale 186.
(*h*) 5 Coke 121.
(*i*) 4 Coke 40.
(*k*) 4 Cor. 41. Skin. 443. 553. Carthew 332. 5 Coke 121. Cro. Jac. 95. Con. C. Eliz. 137.

be underſtood of the trunk of the body, between the neck and thighs. And it hath been reſolved, (*a*) That where there is ſuch a ſufficient certainty, the addition of a farther uncertain or unintelligible deſcription, will do no hurt; as where a wound is laid *in ſiniſtra parte ventris circa umbilicum, &c.* in which caſe the laſt words ſhall be rejected as abundant and ſurplus.

(*a*) 4 Coke 41. Summary 207.

Sect. 81. Secondly, Such count ought alſo (*b*) to ſhew the length and breadth of the wound, that it may appear to the court that it was mortal; but it is ſaid, (*c*) That anciently this was not required: And if a man be ſhot, or run through the body, with a bullet or ſword, &c. it ſeems (*d*) ſufficient to ſay, that the defendant with malice, &c. ſtruck the perſon killed in ſuch a part of his body, and gave him in ſuch part *mortale vulnus penetrans in & per corpus, &c.* for this ſufficiently ſhews that the wound was mortal. Alſo in ſome caſes it is impoſſible to ſhew the length and breadth of the wound where a limb is cut off, and (*e*) therefore it is plain, That in ſuch caſes it cannot be required.

(*b*) S. P. C. 79. 2 Inſt. 318. 4 Coke 40. 5 Coke 122.
(*c*) S P. C. 79.
(*d*) 5 Co. 121, 122.
(*e*) 2 Inſt. 318. 5 Co. 122. 4 Co. 41. 42.

Sect. 82. Thirdly, It is not ſafe, (*f*) in any ſuch count to omit the word *percuſſit*, where the fact will bear it; and by the authority of ſome (*g*) books this cannot be ſupplied, in ſuch caſes, by the words *dedit mortale vulnus, &c.* nor by any other: Yet in Croke's (*h*) reports this opinion ſeems to be queſtioned; neither do I find any reaſon given why the word *percuſſit* ſhould be of ſuch abſolute neceſſity, for it is not ſo much as pretended in Long's (*i*) Caſe, which ſeems to be the chief foundation of this opinion, That this is a word of art appropriated to this uſe; but all that ſeems there contended for is, That where the death was occaſioned by any external violence, coming under the notion of ſtriking, it muſt expreſsly appear, that a ſtroke was given. Nor does the law admit of a leſs exact certainty, as to the ſetting forth the fact, where the death was occaſioned by any other means, as by poiſon, &c. for it hath been reſolved, (*k*) That an indictment (which in this reſpect ſeems not to differ from an appeal) and ſetting forth, That J. S. perſuaded the perſon deceaſed to take a certain poiſonous potion under a notion of a medicine, and that the deceaſed, *neſciens præd' potum cum veneno fore intoxicatum, ſed fidem adhibens dictæ perſuaſioni dicti* J. S. *recepit & bibit*, is inſufficient, becauſe it doth not expreſsly ſay, That the party received and drank the poiſon. And it was alſo reſolved, That the want of ſuch certainty is not ſupplied by theſe words immediately following, *per quod idem* N. *immediate poſt receptionem veneni prædicti per tres horas immediate ſequentes languebat & obiit, &c.* and yet there cannot well be a ſtronger implication that the poiſon was taken and drank by him; for it being the ſtrict (*l*) rule of law in theſe caſes to have the ſubſtance of the fact expreſſed

(*f*) Palm. 282. 3 Modern 202.
(*g*) 5 Co. 122. 2 Hale 184. 1 Bulſt. 124.
(*h*) C. Jac. 635. Summary 207. Yelverton 28.
(*i*) 5 Co. 122. Dyer 99.
(*k*) 4 Co. 44. 3 Modern 202.
(*l*) 4 Co. 44.

expreſſed with preciſe certainty, the judges will ſuffer no argumentative certainty whatſoever to induce them to diſpenſe with it. For if they ſhould once be prevailed with to do it in one caſe, the like indulgence would be expected from them in others nearly reſembling it, and then in others reſembling thoſe, and no one could ſay where this might end; which could not but endanger the ſubverting of one of the moſt fundamental principles of the law, by giving room to judges by arguments from what the jury have found, to convict a man of a fact which they have not found.

Sect. 83. Fourthly, Such count *(a)* ought alſo expreſsly to ſhew that the party died of the hurt ſpecially ſet forth; and it hath been reſolved, *(b)* That an indictment, and from the ſame reaſon it ſeems that an appeal, ſetting forth that the defendant choaked the deceaſed, *qua ſuffocatione obiit*, inſtead of *de qua ſuffocatione*, &c. is erroneous; yet where the death was cauſed by divers poiſons, or wounds, &c. the count may ſay in general that the party died of the ſeveral poiſons or wounds above mentioned, without *(c)* ſaying, That he died of any one of them in particular; for perhaps the truth of the caſe might be, That none of them alone, but altogether cauſed the death. Or the count in ſuch caſe perhaps may ſay, That the party died of the firſt poiſon or wound, and that he would have died of the ſecond, if he had not died of the firſt, and alſo that he would have died of the third, if he had not died of the two firſt.

(a) 2 Inſt. 318.

(b) 1 Roll 137.

3 Inſt. 50. 135. Qu. 4 Co. 40.

(c) 44 Ed. 3. 13. 40 Aſſize 25. S. P. C. 80. 4 Coke 40. Raſtal 46, 47. 49. 51.

Sect. 84. Fifthly, If the killing were with a weapon, the count muſt ſhew *(d)* with what weapon in particular, and yet if upon the evidence it ſhall appear that the killing was not by ſuch weapon, but by ſome other, the variance *(e)* is immaterial, and the appellee ought to be convicted, as ſhall be ſhewn more at large under the Chapter of Evidence. And if the killing were not by a weapon, but by ſome other means, as by poiſoning, drowning, ſuffocating, burning, or the like, the count *(f)* muſt ſet forth the circumſtances of the fact as ſpecially as the nature of it will admit. But in ſuch caſes, where no weapon was uſed, it cannot but be abſurd to require the mention of one in the appeal, and therefore the ſtatute of Gloceſter, ch. 9. which directs generally, That in all appeals of death the weapon muſt be ſet forth, is to be intended only *(g)* of ſuch killing in which a weapon was uſed: For the law is ſo far from requiring it in other caſes, that it will not ſuffer an appeal of killing by a weapon to be maintained by evidence of killing by any other means in which no weapon was uſed; neither will it ſuffer an appeal of killing by any of thoſe means without the help of a weapon, to be maintained by evidence of killing by a weapon, as ſhall alſo be ſhewn more at large in the chapter above referred to.

(d) 2 Inſt. 318. 3 Modern 138. See Stat. Glo. c. 9.

(e) 2 Inſt. 319. Summary 265. 9 Coke 67.

(f) 2 Inſt. 318, 319.

(g) 2 Inſt. 318, 319.

Sect. 85. It hath been adjudged, *(h)* That the words *vi & armis* are not neceſſary in ſuch appeal, becauſe they are ſo fully implied.

(h) Smith and Bowden, Mich. 7 Ann. 8.

Sect. 86. As to the third point, *viz.* In what manner the count in appeal muſt ſet forth the circumſtances of time and place; it is enacted by the ſtatute of Gloceſter, ch. 9. "That if an appeal declare the deed, the year, the day, the "hour, the time of the king, and the town where the deed "was done, and with what weapon, the appeal ſhall ſtand in "effect, &c." And though this more particularly relates, (*a*) to appeals of death, yet it ſeems alſo to be generally a good rule as to the circumſtances of time and place in other appeals; and therefore I ſhall conſider them all together, and firſt premiſe, (*b*) That no omiſſion of any of theſe circumſtances, where the law requires them to be expreſsly ſet forth, can be aided by the conviction of the defendant.

(*a*) 2 Inſt. 317.

(*b*) 1 R. Abr. 781.

For the better underſtanding in what caſes the law requires them to be expreſsly ſet forth, I ſhall endeavour to ſhew what certainty the count in every appeal ought to ſhew. Firſt, The hour. Secondly, The day. Thirdly, The year and time of the king. Fourthly, The place where the deed was done.

Sect. 87. As to the firſt of theſe particulars, *viz.* With what certainty the count in appeal ought to ſet forth the hour; it is obſervable that all (*c*) the precedents of ſuch counts (excepting only one) (*d*), in appeals of larceny in Raſtal's entries, which ſeems to be the only book of authority in which any ſuch counts are to be found; and alſo all the precedents in Coke and Raſtal of ſuch counts in appeals of (*e*) mayhem, take notice of the hour, as well as thoſe in appeals of death: (*f*) and therefore certainly it is not ſafe wholly to omit it: yet it hath been holden, (*g*) That ſuch an omiſſion is not fatal, even in an appeal of death: becauſe the common law did not require the mention of the hour, and the ſtatute above mentioned is in the affirmative. Yet if the hour, as well as day be ſet forth in the allegation of the offence of the principal, it is ſaid to be fatal to mention the day only of the allegation of the offence of the aiſſieſſary. But it ſeems that there is no neceſſity in any caſe preciſely to alledge, That the fact was done at ſuch an hour, but that it is ſufficient to ſay, That it was done about ſuch an hour, as appears from every (*h*) one of the precedents in Coke and Raſtal, in which the hour is mentioned, and alſo from other (*i*) good authorities; yet we find the contrary opinion holden by three judges againſt two in Bulſtrode's (*k*) reports. But it ſeems (*l*) certain that a miſtake of the hour will not be material upon evidence.

(*c*) Raſt. 53, 54.
(*d*) Raſt. 55.
(*e*) Co. Ent. 50, 51, 52. Raſt. 45.
(*f*) Co. Ent. 53. 56, 57. 59. Raſt. 43. 46, 47, 48, 49, 50, &c.
(*g*) S. P. C. 80. 1 Bulſt. 82. Summary 187.
(*h*) Co. Ent. 50, 51, 52, 53. 56, 57. 59. Raſt. 43. 45, 46, 47, 48, 49. 50. 57.
(*i*) 2 Inſt. 318. Salkeld 59. Skin. 443. 553. 4 Mod. 292. Carth. 17. 333. Trem. 15. 21.
(*k*) 1 Bulſt. 77. 80, 81, 82, 83. Vid. 3 Mod. 158.
(*l*) Sum. 264. 2 Inſt. 318.

Sect. 88. As to the ſecond of the above mentioned particulars, *viz.* With what certainty the count in appeal ought to ſet forth the day; there can be no doubt but that every ſuch count muſt be ſet forth the day on which the fact was done, as appears from all the precedents cited in the foregoing ſection; and alſo from the common form of all other declarations in all actions what-

whatſoever, as well of indictments, for which it is needleſs to cite authorities. And if the fact happened in the night, it ſeems (*a*) moſt proper to alledge it *in nocte ejuſdem diei*. But it is ſaid not to (*b*) be ſufficient to alledge the fact done about ſuch a day, or between ſuch a day and ſuch a day, but that the very day muſt be preciſely ſet forth. And it ſeems to be inſufficient to alledge (*c*) it on the feaſt day of ſuch a ſaint, without an addition, if there be another ſaint the ſame name, as on St. John's day, without ſhewing which ſaint is meant, *viz.* the baptiſt or evangeliſt. Alſo (*d*) it ſeems to be erroneous to ſet forth the fact on an impoſſible day, as on the thirty-firſt of June, or thirtieth of February, for this is of no more effect than to mention no day at all. Alſo it ſeems clear that an appeal of death muſt not only ſet forth the day when the hurt was given, but alſo the day when the party died of it, as appears from all the precedents (*e*) of this kind both in Coke and Raſtal; and alſo from the manifeſt reaſon of the thing, (*f*) that it may appear that the party died within the year and day after the ſtroke, in which caſe (*g*) only the law intends that the death was occaſioned by it. And it is (*h*) ſaid not to be ſufficient to alledge, That the defendant aſſaulted the party at a certain day, and feloniouſly ſtruck him, without expreſsly adding, That he ſtruck him *adtunc et ibidem*; and yet both ſentences being joined with the copulative, it is the moſt natural import of the whole, That the ſtroke and aſſault were both at the ſame time, &c. and ſuch certainty ſeems to be ſufficient in declarations (*i*) in civil actions, and even in indictments (*k*) of treſpaſſes. But in indictments and appeals of death a more expreſs certainty is ſaid to be required, becauſe the ſtroke which cauſed the death, being a crime of a different nature, and much higher than the aſſault, may be well enough intended to have happened at a different time; and therefore the preciſe time of each muſt certainly be expreſſed. And even this may be vitiated by a repugnancy in the concluſion; and if the aſſault and ſtroke be alledged in the premiſſes on the tenth of December, and the death ſubſequent on the twentieth of December following, and then it be alledged in the concluſion, that the defendant in ſuch manner feloniouſly murdered the party on the tenth of December aforeſaid, the whole is naught for the repugnancy; (*l*) becauſe the party could not be ſaid to have been murdered, till he was dead: And though to ſome purpoſes by a fiction of law the offence of the defendant after the death of the party, is puniſhed as a felony from the time of the ſtroke; yet in truth and propriety of ſpeech (which muſt be obſerved in legal proceedings) it is not a felony but only a treſpaſs 'till the death; yet if in ſuch concluſion it had been alledged that the defendant in ſuch manner feloniouſly murdered the party on the twentieth of December aforeſaid, it had been ſufficient. But it is ſaid (*m*) to be the better way to conclude generally, That the defendant in ſuch manner feloniouſly murdered the party. And

(*a*) 2 Inſt. 318.
(*b*) 2 Inſt. 318.
(*c*) B. Indict. 47. 3 H. 7. 5.
(*d*) Moor 555.
(*e*) See citations in the precedent ſection.
(*f*) 2 Inſt. 318. B. Indict. 41.
(*g*) B. 1. c. 31. ſ. 9, 10.
(*h*) Dyer 28. a8 in the margin. Dyer 8. See b. 1. c. 64. ſ. 42. Keilw. 100. Qu.
(*i*) C. Jac. 362. 443.
(*k*) C. Car. 271. 525. C. Jac. 41. See B. 1. c. 64. ſ. 42. 1 Roll. 295.
(*l*) 4 Co. 42. 47. Summary 207. 2 Inſt. 318. Noy 45. Hetley 35. Dyer 50. Qu. Cro. Eliz. 739.
(*m*) 4 Co. 42. 47. 2 Inſt. 318.

it is certain (*a*) that a miſtake of the day will not be material upon evidence.

(*a*) Sum. 264. 2 Inſt. 318.

Sect. 89. It hath been holden that an allegation of the day, *prima facie* ſomewhat uncertain, may be holpen by the apparent ſenſe of the whole; as where (*b*) it is alledged, That the principal ſuch a day made the aſſault and gave the ſtroke, and that the party died on ſuch a ſubſequent day, &c. and that A. B. was *adtunc et ibidem abettans* the ſaid principal to do the felony and murder aforeſaid; in which caſe it is ſaid that the words *adtunc et ibidem*, from the manifeſt import of the whole, ſhall be referred to the time of the ſtroke; becauſe by that only the felony, which A. B. is charged to have abetted, was done. Yet if A. B. had been ſaid to have been preſent at the time of the felony and murder aforeſaid, *ſcilicet* on the day of the ſtroke, *tunc et ibidem* abetting the felony and murder aforeſaid, &c. it ſeems (*c*) that the appeal is inſufficient as to the ſaid A. B. for the repugnancy; becauſe he is expreſsly alledged to have been preſent, and to have abetted the principal, at the time of the felony and murder, which muſt be taken for the time of the death, by which the offence, which was before but a treſpaſs, became felony and murder, but by being preſent at the time of the death, it is impoſſible he could abet a ſtroke given ſo long before; and therefore it is repugnant and inconſiſtent in ſuch a manner to alledge it. Nor is ſuch a repugnancy any way holpen by the ſubſequent allegation of the very day of the ſtroke, coming after the word *ſcilicet*, for it is apparent that the time of the felony could not be on the day of the ſtroke, and therefore it rather adds to than helps the fault to alledge that it was. But (*d*) the beſt way of alledging ſuch abetment had been to have ſet forth, That the ſaid A. B. was *præſens, auxilians, &c. ad feloniam et murdrum prædictum in forma prædicta faciend'*.

(*b*) Dyer 164. 60. C. Eliz. 176. Qu. C. Eliz. 739.

(*c*) 4 Coke 42.

(*d*) 4 Coke 42.

Sect. 90. As to the third particular, *viz.* With what certainty the count in appeal ought to ſet forth the year and time of the king; there can be no doubt but that every ſuch count muſt expreſsly ſet forth in what year the fact was done, as appears from the known form of all other counts, and alſo of indictments. And in an appeal of death it is certainly neceſſary (*e*) to ſet forth not only the year in which the ſtroke was given, but alſo that in which the death happened, that it may appear that the death happened within the year and day after the ſtroke. But it ſeems clear from all the precedents, that it is ſufficient to ſhew in what year of the king's reign the fact was done, and the death happened, without ſhewing the year of the Lord. Alſo it hath been adjudged, (*f*) That it is ſufficient to alledge the fact in ſuch a year of ſuch a king, without ſaying it was in ſuch a year of his reign, becauſe it is clearly implied.

(*e*) 2 Inſt. 318, 319. B Indict. 41. b 1. c. 31. f. 9, 10.

(*f*) 1 Lev. 140. See 1 Sid. 140.

Sect. 91. As to the fourth particular, *viz.* With what certainty the count in appeal ought to ſet forth the place where the

deed was done; there can be no doubt but that every count in an appeal of death muſt ſhew (*a*) the place where the death happened, as well as that where the hurt was given, and this with the ſame (*b*) preciſe certainty and freedom from repugnancy (*c*) as is required in relation to the time of the death and hurt, for which I ſhall refer the reader to the 89th and 90th ſections of this chapter, wherein what is ſaid in relation to the time of the hurt and death is equally applicable to the place. Alſo it ſeems that a miſtake of the place is not (*d*) material upon evidence upon not guilty pleaded, any more than a miſtake of the time, provided the fact be proved at ſome other place in the ſame county.

(*a*) Hat. 35. C. Eliz. 137, 738, 739.
(*b*) Dyer 68.
(*c*) Noy 45. Dyer 59. C. Eliz. 196.
(*d*) Sum. 264, 265. Salkeld 388.

Sect. 92. But it ſeems to be not only neceſſary in an appeal of death to alledge ſome place both of the death and hurt, and in every count in every other appeal to alledge ſome place, where the fact was committed, but alſo that ſuch allegation be in proper place; for the better underſtanding whereof I ſhall premiſe, that if the truth will bear it, it is ſafeſt (*e*) to lay it in a town, as the ſtatute of Gloceſter above mentioned directs; but if it were done out of a town, it ſeems that you may lay it in any other place from whence a viſne may come; in relation to which matter the law being in great meaſure ſuperſeded in civil actions by the ſtatute *for the amendment of the law*, and chiefly in uſe in criminal clauſes, it may not be improper in this place more fully to conſider it, and for that purpoſe I ſhall lay it down as a good general rule, That a viſne may come from any place, which is of ſo ſmall a compaſs, that all who live in or near it may reaſonably be preſumed to have ſome knowledge of the perſons living in it, and therefore are eſteemed the moſt proper judges of the facts done within its limits, as being moſt likely to be proved by witneſſes, and charged upon perſons with whoſe integrity and reputation they are beſt acquainted. And upon this ground it hath been adjudged, that a viſne may come not only from a town, but from (*f*) a ward, (*g*) pariſh, hamlet, (*h*) burgh, manor, (*i*) caſtle, (*k*) or even from a foreſt, (*l*) or other place known (*m*) out of a town. Alſo it ſeems (*n*) clear, that whenſoever a place is generally alledged in pleading, the law will intend it to be a vill, unleſs it be mentioned with ſome addition which ſhews the contrary; or (*o*) be alledged within a city or vill; in which caſe it would be abſurd to take it for a vill of itſelf; yet (*p*) if in truth there be no ſuch town, nor hamlet, nor place known out of a town; or (*q*) if a fact alledged in a foreſt, were done in ſome vill in the foreſt not mentioned in the record, the defendant may plead it in abatement. Alſo if a fact done in a vill within a pariſh, which contains divers vills, be in the count in an appeal alledged generally in the pariſh, (*r*) or a fact done in a city, which contains divers pariſhes, be

(*e*) F. Cor. 20. 2 Inſt. 319. 3 Mod. 158. 4 Mod. 290. Salkeld 59, 60.
(*f*) Yel. 159. 1 Sid. 178. C. Jac. 222.
(*g*) 6 Co. 14. Co. Lit. 125. Salkeld 60.
(*h*) Co. Lit. 125. C. Eliz. 866. 1 Sid. 326.
(*i*) 2 R. Abr. 612, 613, 614. 618. Co. Lit. 125. C. Jac. 405.
(*k*) 2 R. Abr. 618. 621. Co. Lit. 125.
(*l*) C. Eliz. 200. 1 Sid. 326. 2 R. Abr. 621. B. App. 19. Vide Co. Lit. 125. Con. B. App. 127.
(*m*) 6 H. 7. 3. Co. Lit. 125. 2 Inſt. 319. 1 Sid 326.
(*n*) B. Plead. 61. Co. Lit. 125. 2 R. Abr. 54. 1 Sid. 88. con. 1 Sid. 326. Carth. 333. Skin. 554.
(*o*) C. Eliz. 732. 1 Sid. 326.
(*p*) B. Plead. 61. 6 H. 7. 3. 2 R. Abr. 621. 7 H. 4. 27.
See 2 R. Abr. 616.

1 Sid. 88. (*q*) C. Eliz. 200. 7 H. 4. 27. 2 R. Abr. 621.

in

in the count in an appeal alledged generally in the city, it ſeems (*a*) that the defendant may plead ſuch matter in abatement; for otherwiſe he could take no advantage of the inſufficiency of the allegation, becauſe the place named, as it ſtands on the record, muſt, till the contrary be ſhewn, be intended to contain no more than one town, or pariſh, on which ſuppoſition a viſne may well come *de vicineto (b) civitatis*, which does not exclude the city, but takes in the city and its neighbourhood within its juriſdiction, whether ſuch city be within a county, (*c*) or be a county of itſelf; excepting only the city of (*d*) London, from whence it ſeems that no viſne can come, not only by reaſon of the largeneſs of its extent, but alſo becauſe it hath been the conſtant uſage of pleading to ſhew the ward and pariſh in which a fact alledged (*e*) in London, was done.

(*a*) See the caſes cited under letter o.
7 H. 4.
27 Salk. 59, 60.
Co. Lit. 125.
4 Co. 14.
2 Inſt. 319.
(*b*) 2 R. Abr. 622, 623.
8 H. 5. 10.
C. Jac. 307, 308.
2 Hale 262.
Con. S. P. C. 155.
(*c*) See the authorities cited under letter m.
(*d*) 1 Sid. 178.
C. Jac. 307.
2 R. Abr. 622.
Eliz. 732.
(*e*) C. Jac. 150. Qu. C. Eliz. 732. Con. S. P. C. 154. 2 R. Abr. 617.

Sect. 93. It hath been alledged that no (*f*) viſne can come from the wild of Suſſex, not only by reaſon of the largeneſs of its extent, but alſo becauſe it ſhall be taken for a wood without inhabitants; and therefore it would ſeem inconſiſtent to award the return of a jury from it. And yet it hath been holden (*g*) that a viſne may come from a park; alſo it ſeems to be the general opinion, That a viſne may come from a foreſt, as hath been more fully ſhewn in the precedent ſection; from whence it may plauſibly be argued, that it may come as well from ſuch a wild, ſuppoſing it to be a wood. Alſo it ſeems (*h*) to be queſtionable whether a viſne may not come from a walk in a foreſt, being alledged as a place in which a fact was done; but it ſeems clear that no viſne can come from it, if it be alledged only as a liberty, for that no viſne can come from a thing incorporeal, (*i*) but only from a place. Alſo it hath been holden that no viſne (*k*) can come from the ſite of a manor, perhaps for this reaſon, becauſe it doth not properly ſignify a place, but rather the limits and ſituation of a place.

(*f*) 1 Sid. 88.
2 R. Abr. 617.
Hob. 266.
(*g*) 1 Sid. 327.
(*h*) 2 Lev. 307.
Con. 1 Sid. 326.
2 Sid. 327.
(*i*) 1 Sid. 326.
(*k*) 2 R. Abr. 618.
Summary 188.

Sect. 94. As to the fourth point, *viz.* Whether one and the ſame count in appeal ought to be againſt thoſe who do not appear, as well as againſt thoſe who do appear, and againſt the acceſſaries as well as the principals. It is ſaid (*k*) by Sir Matthew Hale, That in an appeal againſt A. B. and C. if A. only appear, yet the plaintiff ought to count againſt them all, by the better opinion. And the like ſeems alſo to be holden by Sir William Staundforde (*l*) and Brook (*m*); yet the point adjudged in the principal (*n*) caſe, which ſeems to be the chief foundation of theſe opinions, ſeems to be no more than this, That where an appellant hath had judgment and execution in one appeal, he ſhall not afterwards have another againſt perſons not named in the firſt. And all the precedents that I can find, either in

(*l*) S. P. C. 65.
(*m*) B. App. 28.
(*n*) 9 H. 4. 1.
4 Coke 47.
Dyer 120.

Coke

Coke (*a*) or Raſtal, (*b*) of counts in appeals, wherein ſome of the defendants have not appeared, do indeed mention the perſons abſent, as well as thoſe preſent, and ſhew in what manner they were guilty, yet are all of them expreſs that the appellant *iſtanter appellat* thoſe that appear only; and that he would in like manner appeal thoſe that are abſent, if they were preſent; by which it ſeems clearly to be implied, That when they ſhall appear, there ſhall be another declaration againſt them, and that the preſent declaration is eſteemed only as a declaration againſt thoſe that do appear. Neither do I find any difference in the precedents above mentioned, as to the form of ſuch counts in relation to this matter, where the perſons not appearing are acceſſaries, from that wherein they are principals. But whether the omitting of a perſon in one appeal be always a good bar to the charging of him in another, ſhall be conſidered in the following part of the chapter, wherein I ſhall treat of the nature of pleas in bar to appeals.

(*a*) Co. Ent. 50.
(*b*) Raſt. 46, 47. 50, 51. 53, 54. See 47 Aſſize.

Sect. 95. As to the third point, *viz.* How the appellant may be nonſuited, it is generally holden in ſome books, (*c*) that by the common law, if a plaintiff in any action whatſoever be demanded at any day of continuance before judgment, and do not appear, either in (*d*) proper perſon, or by attorney or guardian, as the law requires, he ſhall be nonſuited, whatſoever (*e*) excuſe he may have for his abſence. But it is enacted by 2 H. 4. 7. That if the verdict paſs againſt the plaintiff, the ſame plaintiff ſhall not be nonſuited. And ſince the ſtatute it hath been adjudged, (*f*) That if a defendant in an appeal of murder be found guilty of manſlaughter only, the appellant cannot be nonſuited; but it doth not appear whether this reſolution be grounded on the ſaid ſtatute, or on the common law; for it ſeems difficult to maintain that ſuch a verdict which finds the ſubſtance of the fact, ſhall be ſaid to paſs againſt the appellant, in which caſe only the nonſuit is taken away by the ſtatute. And therefore perhaps a nonſuit in this caſe may not be ſuffered by the common law, which ſeems not to have permitted a nonſuit after a full verdict, except in ſuch caſes only whereupon ſome doubt remained with the court, as may be reaſonably argued from the authorities above cited under letter b. But it ſeems that an appellant may be nonſuited after a ſpecial (*g*) verdict, or after a demurrer (*h*) and argument thereupon.

(*c*) B. Nonſ. 44. Co. Lit. 139. 1 Rol. A. 131, 132. 3 Ed. 4. 11. Con. F. Nonſ. 15. 34. Qu. B. Nonſ. 6. 20 H. 6. 44. 2 Bulſt. 19.
(*d*) Vide ſup. f. 74.
(*e*) Noy 88. Latch 173. Vide ſup. 30.
(*f*) Moor 407. C. Eliz. 465.
(*g*) 2 Jones 1.
(*h*) Co. Lit. 139. 2 Jones 1. See 20 H. 6. 44. and the authorities cited under letter e.

Sect. 96. As to the fourth point, *viz.* For what faults the writ may be abated; I ſhall premiſe that in order to take advantage of a defect in the writ itſelf, the appellee (*i*) ought to demand oyer (1) of it, which he muſt do in open (*k*) court (4).

(*i*) 2 Bulſt. 19. 3 Bulſt. 243.
(1) Bigby v. Kennedy. Black. 713.
(*k*) Widdrington v. Charlton, agreed Mich. 10 Annæ.

(4) The writ in an appeal is an original iſſuing out of chancery returnable into the king's bench only; before the return thereof, the court of chancery only can ſet it aſide, where it appears to have iſſued *erronicè* or *improvidè*, by ſome error extrinſic to the writ itſelf; but for any error or defect on the face of it, it may be quaſhed after it is returned into the king's bench. Bac. Abr. 326. and ſee Eq. Caſ. Abr. 416.

And

And for the better underſtanding for what faults ſuch writ ſhall be abated, I ſhall conſider the following particulars. Firſt, Where it may be abated by the court *ex officio*. Secondly, Where upon the exception, or plea of the party, but not without ſuch exception or plea. Thirdly, What defects of this kind may be amended, which without ſuch amendment might abate the writ.

As to the firſt particular it ſeems, that the writ may be abated by the court *ex officio*, (*a*) for the following faults, whether the party take notice of them or not.

(*a*) Finch 226. 2 Danv. Abr. 252. Sup. f. 42.

Sect. 97. Firſt, (*b*) Where a writ or declaration wants thoſe words of art which are appropriated by law for the deſcription of the offence; as where an appeal of burglary (*c*) has the word *burgaliter* inſtead of *burgulariter*, or *burglariter*; or an appeal of rape wants the word *rapuit*, (*d*) or any appeal wants the word *felonicè* (*e*).

(*b*) Vide ſup. f. 77.
(*c*) 4 Co. 39.
(*d*) Sup. f. 77.
(*e*) Sup. f. 18. 77.

Sect. 98. Secondly, Where the declaration varies from the writ; as (*f*) by laying the offence in the reign of a preſent king, where the writ ſuppoſed it to have been in the reign of a former king. Or by giving the defendant a name different from that in the writ; as where the writ (*g*) calls him A. B. of C. alderman, and the declaration A. B. of C. eſquire. Or where the declaration is otherwiſe (*h*) defective in not purſuing the writ, or in not ſetting forth both the ſubſtance (*i*) and circumſtances (*k*) of the fact with that certainty which the law requires: Or in (*l*) laying the offence in a different county from that in which the writ was brought.

(*f*) F. Brief 219. 231.
(*g*) Yel. 120.
(*h*) Sup. f. 75.
(*i*) Sup. f. 76, &c.
(*k*) Sup. f. 86, &c. Cro. El. 196.
(*l*) Sup. f. 35. 47. 71. B. Appeal 38.

Sect. 99. Thirdly, Where (*m*) the declaration doth not conclude *contra formam ſtatuti* in ſuch caſes where by law it ought.

(*m*) Sup. f. 60.

Sect. 100. Fourthly, Where the ſenſe is defective for want of a material word in the writ; as (*n*) if the concluſion be *ibi hoc breve*, &c. without the word *habeas*; or where there is a falſe conc[illegible] in the writ, as *hos* (*o*) or *hanc breve*; or the ſingular (*p*) number inſtead of the plural; or (as ſome (*q*) ſeem to hold generally) any other falſe Latin; or even the uſe of a word which is not Latin, though (*r*) by the change or addition of a letter it might be made ſo. But it ſeems that ſuch faults in the declaration are not fatal if the writ or bill on the file be right, as ſhall be ſhewn more at large in the following part of this chapter.

(*n*) F. Cor. 121. S. P. C. 82.
(*o*) 9 H. 7. 16.
(*p*) 10 Ed. 3. 1.
(*q*) Sum. 189. S. P. C. 82. 5 Coke 121.
(*r*) 2 H. 4. 8.

Sect. 101. Fifthly, Generally where the writ or declaration are any otherwiſe defective in not obſerving the legal form, as (*s*) where in a writ of appeal ſued by huſband and wife, the concluſion is in the name of the wife only: Or where the writ omits (*t*) either the name of baptiſm or ſurname of the appellant or appellee, being under the degree of nobility, which alone can give ſo high (*u*) a name of dignity as to ſupply the want of a ſurname.

(*s*) F. Brief 252.
(*t*) Finch 253. 27 H. 6. 3. 2 Inſt. 665.
(*u*) Finch 253. 8 Edw. 4. 24. 2 Inſt. 666. 25 Edw. 3. 39.

As

As to the ſecond particular, *viz.* Where the writ may be abated upon the plea or exception of the party, but not without ſuch plea or exception; I ſhall endeavour to ſhew, Firſt, Where it may be ſo abated for the want of fifteen days between the *teſte* and the return of the writ. Secondly, Where for a *miſnoſmer* or wrong addition. Thirdly, Where for a defect in the addition of the appellant or appellee. Fourthly, Where for the multiplicity of action. Fifthly, Where for making of J. S. a defendant, where there is no ſuch perſon. Sixthly, Whether the defendant may have more than one of ſuch pleas or exceptions.

Sect. 102. As to the firſt point, *viz.* Where a writ of appeal may be abated upon the exception or plea of the party for the want of fifteen days between its *teſte* and return. If the party, before he hath pleaded in chief, do eſpecially ſhew to the court ſuch a defect in the writ, the latter authorities (*a*) ſeem to incline that it ought to be abated, becauſe the writ is the foundation of the whole proceeding, and the law ſeems to be in nothing more curious than in ſtrictly keeping up its legal forms. Yet it hath been reſolved, (*b*) That ſuch a defect is ſalved by the party's coming in and pleading in chief without taking advantage of it: Alſo it hath been adjudged, That where the original is right, all defects in the meſne proceſs are ſalved by the party's appearance, as ſhall be ſhewn more at large in the chapter concerning proceſs.

(*a*) Salkeld 63. 2 Inſt. 667. C. Jac. 424. 1 Ventris 7. 1 Sid. 406. Con. 12 Edw. 4. 11. B. Error 169.
(*b*) Salkeld 63.

Sect. 103. As to the ſecond point, *viz.* Where a writ of appeal may be abated, upon the exception or plea of the party, for a *miſnoſmer* or wrong addition: It ſeems to be agreed, (*c*) that if there be a miſtake in the writ or declaration as to the name of baptiſm; (*d*) or ſurname (*e*) of the appellant, (*f*) or appellee; or (*g*) as to the town, pariſh or county, eſtate, degree or myſtery, whereof they are ſaid to be; as where (*b*) one who is neither by birth, office, creation, or reputation, an eſquire, or gentleman, is named with either of thoſe additions; or where a gentleman by birth, who follows the trade of huſbandry, is named (*i*) with the addition of the trade of huſbandry, and not of gentleman; or where a peer, who has more than one name of dignity, is not named (*k*) by the moſt noble; or where a gentleman or gentlewoman (*l*) is named ſpinſter; or (*m*) a yeoman is named a gentleman; or (*n*) if there be no ſuch town, pariſh, nor hamlet, nor place known out of a town, as that whereof either the appellant or appellee are ſaid to be; and the appellee before (*o*) imparlance plead ſuch matter in abatement, and thereon iſſue is joined and found for him, the writ ought to be abated. And it ſeems (*p*) alſo to have been holden that if the appellant after imparlance confeſs that he hath brought his appeal by a wrong name, the writ ſhall be abated: But it is ſaid

(*c*) Finch 363, 364.
(*d*) 9 H. 5. 1.
(*e*) Sum. 243. Raſt. Ent. 43. 51. 54.
See ch. pleas to felony.
(*f*) 9 H. 5. 1.
(*g*) B. App. 44. Raſt. 108. 11 H. 6. 11. 35 H. 6. 55. 10 Edw. 4. 12. 2 Inſt. 667, 668.
(*b*) 22 Inſt. 668. 6 Co. 67.
(*i*) 14 H. 6. 15. 2 Inſt. 668, 669.
(*k*) 2 Inſt. 669.
(*l*) 2 Inſt. 668.
(*m*) 5 H. 7. 16. 10 Edw. 4. 16. Raſt. 108. Theloal l. 11. c. 4. ſ. 19.
(*n*) 3 Mod. 267. Salkeld 59.
(*o*) Finch 434. 21 Edw. 4 7. 2.
(*p*) 9 H. 5. 1. B. App. 38.

(a) B. Add. 44.
(b) Raſt. Ent. 50. 54.

ſaid (a) to be no fault to give an eſquire the addition of gentleman, *et ſic è converſo*. Alſo if one (b) who is uſually known and called by the ſurname of B. be ſo named in the appeal, and the appellee plead that his name is C. and not B. and the appellant reply that the appellee is, and at the time of the purchaſe of the original, was as well known by the name of B. as by the name of C. and this be confeſſed and found for him, it avoids the plea of the miſnoſmer. And if one who had his uſual abode at B. and hath been ſome time ſeen at C. be named of C. in an appeal, it hath been queſtioned (c) whether this be ſuch a fault as will abate the writ; becauſe ſometimes appellees may not have any known dwelling; but if that happen to be the caſe, ſurely it is the ſafeſt to reply it, and then there ſeems to be little doubt but it may make good the naming of the party of any place wherein he has at any time been. And if a place where he dwells, and is a houſe-keeper, and alſo another place where he keeps his wife and family be well known, it ſeems that the writ may name him of either of ſuch places, or perhaps of both of them, but is abatable unleſs it name him of one of them.

(c) 1 Sid. 325. Vide 10 Edw. 4. 12. 4 H. 6. 4.

(d) 2 Inſt. 665, 666. 11 H. 4. 40. 11 H. 6. 11. 10 Edw. 4. 16.

Sect. 104. As to the third point, *viz.* Where a writ of appeal may be abated by the exception or plea of the party, for a defect in the addition of the appellant or appellee, it ſeems that the common law in no caſe (d) requires any other deſcription of an appellant or appellee, but by their name of baptiſm and ſurname, unleſs they be of the degree of a knight, (e) or of ſome higher dignity; in which caſes, whether the name or dignity be ancient, or (as ſome ſay) (f) of a new creation, as that of baronet, &c. it ought to be added to the name of baptiſm and ſurname; and if it be of the degree of nobility, it ought (g) to ſupply the place of the ſurname. And it ſeems that the law was (h) ſo curious in this particular, that if a plaintiff in any action gained a new name of dignity hanging a writ, he made it abatable; but this inconvenience is remedied by 1 Edw. 6. c. 7. ſ. 3. by which it is enacted, "That if any plaintiff in any "manner of action ſhall be made a duke, archbiſhop, marquis, "earl, viſcount, baron, biſhop, knight, juſtice of either bench, "[illegible] ſerjeant at law, depending the ſame action, that ſuch "action for ſuch cauſe ſhall not be abateable or abated." But it hath been holden (i) that the dignity of a baronet is not within this ſtatute, becauſe there was no ſuch dignity at the time of the making of it.

(e) 11 H. 4. 40. 14 H. 6. 14.
(f) Hob. 129. 2 R. Abr. 469. 2 Inſt. 666, 667. Con. Lat. 169.
(g) Sup. ſ. 101.
(h) 32 H. 6. 29. Con. 24 E. 3. 25, 26. 28 Edw. 3. 53.
(i) 1 Sid. 40. Litt. Rep. 81. C. Car. 104.

Sect. 105. To prevent (k) the inconvenience of troubling one perſon for another, which cannot but often happen if there be no other additional deſcription of the defendant, it is enacted, by 1 Hen. 5. c. 5. "That in every original writ of actions "perſonal, appeals and indictments, and in which the exigent "ſhall be awarded, to the names of the defendants in ſuch writs "original, appeals and indictments, additions ſhall be made for "their

(k) 26 E. 4. 72. 2 Inſt. 870. 2 Hale 176. 177.

" their eſtate or degree, or myſtery, and of the towns or ham-
" lets, or places and counties of the which they were or be, or
" in which they be or were converſant. And if by proceſs
" upon the ſaid original writs, appeals or indictments, in the
" which the ſaid additions be omitted, any outlawries be pro-
" nounced, that they be void, fruſtrate and holden for none.
" And that before the outlawries pronounced, the ſaid writs
" and indictments ſhall be abated by the exception of the
" party, wherein the ſaid additions be omitted."

Sect. 106. For the better explication of this ſtatute, ſo far as it relates to the ſubject of this treatiſe, I ſhall firſt premiſe, That (*a*) generally ſuch additions in Engliſh are as good as in Latin; and where there are ſeveral defendants of different names, and the ſame addition, it is (*b*) ſafeſt to repeat the addition after each of their names, applying it particularly to every one of them; and where a father hath the ſame name and the ſame addition with a defendant being his ſon, the writ is (*c*) abateable unleſs it add the addition of puiſne to the other additions; but where the father is the defendant, it is ſaid that there is no need of the addition of eigne. (*d*) And if the ſon be *in cuſtodia mareſchalli*, and ſo declared againſt, it is ſaid that the count is good without the addition of puiſne, unleſs the father of the ſame name and addition be alſo in the cuſtody of the marſhal.

(*a*) 1 Sid. 102. 1 Keble 12.

(*b*) B. Add. 3.

(*c*) 37 H. 6. 29. 39 H. 6. 46. 4 Ed. 3. 31.

(*d*) Salkeld 71

And for the better underſtanding of the nature of the ſeveral additions required by the ſtatute above mentioned, I ſhall endeavour to ſhew,—Firſt, What is a ſufficient addition of the eſtate or degree.—Secondly, What of the myſtery.—Thirdly, What of the town, hamlet, place, or county, of the appellee. —Fourthly, How the defect of an addition may be ſalved.

Sect. 107. As to the firſt particular, *viz.* What is a ſufficient addition of the eſtate or degree of the appellee; I ſhall obſerve, Firſt, that it is neceſſary to ſhew the preſent eſtate or degree of the appellee (*e*) at the time of the writ, in which reſpect this addition, and alſo the addition of the myſtery differs from that of the place, which is ſufficiently ſet forth by naming the appellee late of ſuch a place.

(*e*) 9 Ed. 4. 28. 22 Ed. 4. 13. 21 H. 6. 3. 2 Inſt. 670.

Sect. 108. Secondly, That ſuch addition muſt be expreſſed in ſuch a manner that it may plainly appear to refer to the appellee; for it hath been reſolved, That to name the appellee ſon of A. of B. butcher, is inſufficient, becauſe butcher refers to A. rather than to the appellee.

Sect. 109. Thirdly, That (*f*) a biſhop of an Iriſh dioceſe may be as well deſcribed by the addition of his biſhoprick, as an Engliſh biſhop may by the addition of an Engliſh one (as it ſeems to be admitted in the year-book of 21 H. 6. 3. pl. 4.): But it ſeems (*g*) clear, That no one can be well deſcribed by the

(*f*) See Thelo. l. 6. c. 15. ſ. 8.

(*g*) 2 Inſt. 667.

the addition of a temporal dignity in Ireland or any other nation beſides our own, becauſe no ſuch dignity can give a man a higher title here than that of eſquire.

(a) Theloal l. 6. c. 15. ſ. 12.

Sect. 110. Fourthly, That the degree of a ſerjeant (*a*) at law is a good addition, from whence it may reaſonably be argued that a degree in either univerſity is alſo a good addition, as it is holden by Sir Edward (*b*) Coke without queſtion; yet this is made a *quære* by Theloal; (*c*) and it is holden in the year-book of 35 H. 6. 55. and admitted by Sir Edward Coke in the very place above cited, That a doctor in divinity may have the addition of clerk, which ſeems not eaſily reconcileable with the opinion that the degree of a doctor is a good addition; for if it were, why ſhould not the writ be abateable for having the addition of clerk inſtead of it, contrary to the allowed rule (*d*) in other caſes that the moſt worthy addition is to be uſed?

(b) 2 Inſt. 668.
(c) Theloal b. 6. c. 15. ſ. 13.
(d) Vide ſup. ſ. 102.

Sect. 111. Fifthly, That *generoſus* (*e*) or *armiger* (*f*) are, either of them, good additions for the eſtate and degree of a man; *generoſa* (*g*) for that of a woman; and yeoman (*h*) and labourer (*i*) are alſo good additions for the eſtate and degree of a man, but not for that of a woman; and widow (*k*) or ſingle (*l*) woman, or as ſome (*m*) ſay, wife of J. S. 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 (*n*) is a good addition for the eſtate and degree of a woman, and perhaps alſo for that of a man.

(e) 2 Inſt. 667, 668. B. Add. 44. 50.
(f) 2 Inſt. 667. B. Add. 44. 50.
(g) 2 Inſt. 668.
(h) 2 Inſt. 668. B. Add. 3. 47. 50.
(i) B. Add. 5. 39.
(k) F. Add. 5. B. Add. 64. 66. Theloal l. 6. c. 15. ſ. 4
(l) F. Addition 5. 14 Ed. 4. 7. B. Add. 64. 66. Theloal l. 6. c. 15. ſ. 4. (m) 1 H. 4. 5. 4 H. 6. 4. Qu. Cro. E. 198. Dyer 47. (n) Dyer 46, 47, 88. 1 Siderfin 247.

(o) 2 Inſt. 668.
(p) 2 Inſt. 668. B. Add. 42. 50. 55, 56. con. 5.

Sect. 112. Sixthly, That burgeſs (*o*) and citizen, and ſervant, (*p*) are all of them too general, and therefore not good additions of the ſtate or degree either of man or woman.

Sect. 113. As to the ſecond particular, *viz.* What is a ſufficient addition of the myſtery of an appellee; having firſt premiſed that the word myſtery (*q*) includes all lawful arts, trades and occupations; and (*r*) that if one under the degree of a gentleman have divers of ſuch arts, trades or occupations, he may be named by any of them, I ſhall endeavour to ſhew, —Firſt, What additions of this kind are clearly good.—Secondly, What are clearly inſufficient.—Thirdly, What are queſtionable.

(q) 2 Inſt. 668, 669.
(r) B. Add. 44.

Sect. 114. And firſt, The following additions of this kind clearly ſeem to be good, as huſbandman, (*s*) merchant, (*t*) broker, (*u*) taylor, (*x*) point maker, (*y*) ſmith, (*z*) miller, (*aa*) carpenter, (*bb*) cook, (*cc*) brewer, (*dd*) baker, (*ee*) butcher,

(s) P. Add. 44. 50.
(t) B. Add. 40. 50. 66.
(u) 9 H. 6. 65. Theloal l. 6. c. 15. ſ. 5.
(x) B. Add. 15. 39. (y) 7 H. 6. 1. (z) 21 H. 6. 54. 22 H. 6. 53. 39. 51. (bb) B. Add. 15. 22. 39. (cc) 14 H. 6. 15. Theloal. l. 6.
(aa) B. Add. c. 15. ſ. 6.
(dd) F. Utlag. 32. 37. 5 H. 5. 7. (ee) 6 Ed. 4. 3.

parish

(*a*) parish clerk, (*b*) mercer, (*c*) fishmonger, (*d*) dyer, (*e*) schoolmaster, (*f*) scrivener, and such like.

(*a*) B. Add. 42. (*b*) B. Add. 52. 62. (*c*) 2 Inst. 668. (*d*) 19 H. 6. 51. (*e*) 5 H. 5. 7. (*f*) 2 Leon. 186.

Sect. 115. Secondly, The following additions of this kind clearly seem to be insufficient, as maintainer, (*g*) extortioner, (*h*) thief, (*i*) vagabond, (*k*) heretic, (*l*) common informer, and such like.

(*g*) 9 H. 6. 65. 2 Inst. 668. 22 Ed. 4. 1. 2 Inst. 668. (*h*) 9 H. 6. 65. (*i*) 22 Ed. 4. 1. 2 Inst. 668. (*k*) 22 Ed. 4. 1. (*l*) 1 Roll. 190.

Sect. 116. Thirdly, The following additions of this kind seem to be questionable, as, First, Farmer, which by the better (*m*) opinion seems to be an insufficient addition, because if any mystery be implied in the notion of it, it is that of husbandry, of which husbandman is the proper addition.

(*m*) Theloal B. 6. c. 15. s. 9. 2 Inst. 668. B. Addition 10. 28 H. 6. 4.

Sect. 117. Secondly, Chamberlain, butler, and pantler, which are holden (*n*) to be insufficient additions, because they denote only a special kind of officer, or servant, and imply nothing, which in the common understanding of the words comes under the notion of a mystery. And from this ground it seems to follow, that neither groom (*o*) nor page are good additions; and yet in some (*p*) of the old books they seem to have been so admitted.

(*n*) B. Add. 50. 58. 2 Inst. 668. Theloal B. 6. c. 15. s. 10. (*o*) 2 Inst. 668. (*p*) B. Add. 50. 58. F. Corone 43. 21 Ed. 4. 71.

Sect. 118. Thirdly, Hosteler, which hath been holden (*q*) to be a good addition, and seems properly enough to come under the notion of a mystery. And though it hath been resolved, (*r*) That any one who keeps an inn may be sued by the addition of a labourer, upon the custom of the realm for want of due care of the goods of his guests; because whoever keeps a common inn, is in that respect liable to answer for such defects, by whatsoever addition he may be styled; yet this does by no means prove such person may not as well be sued by the addition of hosteler, but only that he may be sued as well under any other addition.

(*q*) B. Add. 35. 21 H. 6. 50. (*r*) 22 H. 6. 21. Theloal B. 6. c. 5.

Sect. 119. As to the third particular, *viz.* What is a good addition of the town, hamlet, place, or county of the appellee; I shall observe, First, That it is good addition of this kind to name the appellee late (*s*) of such a town, in which respect this addition differs from that of the estate, degree, or mystery. And it is said that if a defendant be named of A. and late of B. it is sufficient to prove either addition.

(*s*) Vide sup. 107. 21 Ed. 4. 15. 19 H. 6. 66. 1 Ed. 4. 1. 1 Ed. 4. 2. Dyer 213. 9 H. 6. 66. Theloal B. 6. c. 14. s. 17.

Sect. 120. Secondly, That the constant course of precedents hath made it a sufficient addition of this kind, to name the defendant of a city which is a county (*t*) of itself, as *de Londino*, (*u*) *de Norwico*, &c. without more, by which it shall be intended that he lives in the county as well as city of London and Norwich, &c. unless he shew the contrary, though part of

(*t*) 2 Inst. 669. (*u*) 4 Ed. 4. 16. 21 Ed. 4. 15. 27 H. 6. 4. 35 H. 6. 12.

of each of theſe cities lie out of their counties. However, it is certain, that it is not ſufficient to name a defendant *Londini* (a) or *Briſtoliæ*, &c. becauſe that imports only that he belongs to ſuch town, and not that he reſides there. Alſo it ſeems clear, (b) That it is not ſufficient to name a defendant of any town which is not a county of itſelf, without ſhewing in what county it lies. Alſo if (c) a man be named of a pariſh which contains more towns, or hamlets, or places known out of any town, or hamlet, the defendant may plead ſuch matter in abatement, becauſe ſuch an addition does not purſue the ſtatute; but a pariſh ſhall be intended to contain no more than one town, unleſs the contrary be ſhewn.

(a) 35 H. 6. 12. 7 H. 6. 1. 4 Ed. 4. 10.

(b) C. Jac. 167.

(c) 2 Inſt. 669. Vide ſup. ſ. 92. 103. Theloal B. 6. c. 14. ſ. 20. 35 H. 6. 30.

Sect. 121. Thirdly, That 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 (d) that there are two Dales in the ſame county called Great Dale and Little Dale, and none without an addition, &c. Or according to ſome opinions (e) either in this caſe where there are two different towns called Dale, or even where there is but one town, ſometimes called Southdale, and ſometimes Northdale, but never ſimply Dale without an addition, the defendant may plead that there is no ſuch town as Dale in the ſame county, becauſe parcel of a name cannot be ſaid to be the name. But if there be two towns of the ſame name in a county without any addition to diſtinguiſh them, as it ſometimes happens where they lie at a diſtance from one another, I do not find any authority that it is not ſufficient in ſuch caſe to name the defendant generally of either of ſuch towns, without adding any thing to diſtinguiſh it from the other.

(d) 7 H. 6. 39. 19 H. 6. 35. 8 H. 5. 8. 21 Ed. 4. 51. 10 H. 7. 4. 10 H. 6. 5. Raſtal 47.

(e) 3 H. 6. 8. 14 H. 6. 23. Theloal l. 6. c. 3. 14. 23. Con. 7 H. 6. 45.

Sect. 122. Fourthly, That if an appellee live in a hamlet of a town, it is ſaid (f) to be in the election of the appellant to name him either of the hamlet or of the town; but it ſeems that this is to be intended only of ſuch hamlets which are ſo far eſteemed to be parts of a town, that thoſe who live in them are in common ſpeech indifferently ſtyled ſometimes of the hamlet, and ſometimes of the town; for I ſee not how the addition of the town can be proper, where the party lives in a place known by a diſtinct name, and not parcel of it.

(f) Theloal l. 6. c. 11. ſ. 14. 2 Inſt. 669. 35 H. 6. 30. 14 H. 6. 23. 2 Inſt. 6. 669.

Sect. 123. Fifthly, That if an (g) appellee live 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 ſafeſt to name him of the town or hamlet.

(g) 2 Inſt. 669. 21 Ed. 4. 37. F. Brief 467.

Sect. 124. Sixthly, That the addition of the place of habitation of a wife is ſufficiently ſhewn, by ſhewing that of the husband,

2 Inſt. 669. 3 H. 6. 31. 2 Theloal B. 6. c. 14. ſ. 6, 7. 9.

huſband, becauſe it ſhall be intended that the wife lives where the huſband does.

Sect. 125. As to the fourth particular, *viz.* How the defect of an addition may be ſalved; it hath been adjudged, *(a)* That if an appellee named with an inſufficient addition, or without any, appear and plead to the appeal, he cannot afterwards take advantage of the defect of the addition, becauſe by his appearance and plea he admits himſelf to be perſon intended. And ſome have holden, *(b)* That the party by his bare appearance ſalves the want of an addition, or a bad one; but this ſeems contrary to almoſt all the authorities above cited in relation to this matter, which ſeem to admit that the party before other matter pleaded may take advantage either of the want of an addition or of a bad one. And accordingly it was lately *(c)* adjudged in an appeal of death between *Reeve and Trundal*, that the want of an addition of the appellee was a good plea in abatement, and the writ of appeal was abated by ſuch plea.

(a) 35 H. 6. 12. B. Error 69. C. Jac. 610. 2 Roll. 225. 1 R. Abr. 780. 2 Inſt. 670. 7 H. 6. 39. ſeems con.

(b) 1 Sid. 217. 1 Keble 885.

(c) Paſch. 3. Geo. 1.

Sect. 126. As to the fourth point above mentioned, *viz.* Where a writ of appeal may be abated upon the exception or plea of the party for the multiplicity of action; it ſeems *(d)* clear, That after an appellant hath appeared on a writ of appeal, or even on a bill of appeal removed into the court of king's bench from before the ſheriff and coroners by *certiorari*, if he commence a new appeal for the ſame matter, the appellee may plead in abatement that ſuch prior appeal is ſtill depending, &c. But it ſeems *(e)* clear, That it is no plea in abatement of a writ of appeal, that the appellant hath brought a bill of appeal for the ſame matter before the ſheriff and coroners, becauſe ſuch bill is not of ſo high a nature as a writ of appeal, but it is ſaid to be only in nature of a plaint till it be removed into the king's bench, which ſeems *(f)* to depend on the ſtatute of *Magna Charta* 17. ſince which ſtatute the ſheriff and coroner cannot proceed to trial upon a bill of appeal, as perhaps they might have done by the common law. But after ſuch bill of appeal before the ſheriff and coroners is removed into the king's bench, if the plaintiff bring a writ of appeal for the ſame matter, it is holden *(g)* by Staundford, and ſeems to be admitted in the year-book of 4 H. 6. 14, 15. and both by Fitzherbert (*h*) and Brook (*i*) in their abridgments of the ſaid year-book, that the appellee may plead in abatement that ſuch bill of appeal is depending, becauſe after it is removed into the king's bench, it is of as high a nature as a writ of appeal. Yet Sir Matthew Hale (*k*) ſeems to be of opinion, ſuch bill ſo removed is not pleadable in abatement till the plaintiff hath appeared thereon; perhaps for this reaſon, that before the plaintiff hath appeared, it doth not appear of

(d) S. P. C. 82. Summary 189. B. Brief 192. C. Eliz. 695. F. Brief 548. 774.

(e) 10 H. 4. 4. S. P. C. 82. F. Cor. 269. 465. See 4 Ed. 3. 9.

(f) Sup. c. 9. l. 39, 40, 41.

(g) S. P. C. 82.

(h) F. Cor. 4.

(i) B. App. 44.

(k) Sum. 189.

record, that he hath profecuted the ſuit in the king's court, becauſe the *certiorari* might have been taken out by a ſtranger. Upon which ground it ſeems to have been reſolved (*a*) that it is no good plea in abatement of an appeal, that the plaintiff hath purchaſed another writ of appeal returnable at ſuch a day, &c. and that ſuch writ was delivered of record to the ſheriff, becauſe it might be, for what appears upon the record, That the firſt appeal was ſo far proſecuted by a ſtranger; but in the ſame caſe it is admitted that ſuch prior appeal depending will abate the ſecond, where it appears on record that the ſame plaintiff hath appeared and ſued it, as in paying of proceſs, &c.

(*a*) 7 H. 7. 6. F. Brief 192. B. App. 87. S. P. C. 82. 2 Hale 149.

Sect. 127. As to the fifth point, *viz.* Where a writ of appeal may be abated for the making of J. S. the defendant, where there is no ſuch perſon; it ſeems clear, (*b*) That if there be divers defendants in an appeal, and one of them who does not appear be miſnamed either as to the ſurname, or name of baptiſm, or be deſcribed by a wrong addition, or were dead before the writ purchaſed, any of the defendants who do appear may plead, "That whereas the appeal is ſued out againſt A. B. of C. in the county of D. yeoman, there was not at the time of the purchaſe of the writ, nor hath been ſince, any ſuch perſon as A. B. *in rerum natura*, as by the writ is ſuppoſed," whereon if iſſue be joined, if the appellant cannot prove that there now is, or was at the time when the writ was purchaſed, ſuch a perſon of ſuch name and addition as by the writ are ſuppoſed, it ſeems that the verdict ought to go againſt him, whereupon the writ ſhall be abated as to all the defendants. But it is not (*c*) adviſeable in ſuch a caſe to plead that there was not at the time of the purchaſe of the writ, &c. any ſuch perſon as A. B of C. in the county of D. yeoman, becauſe it implies a negative pregnant. Alſo if a defendant miſnamed or deſcribed by a wrong addition do appear, it ſeems to be agreed (*d*) that no other defendant beſides himſelf can plead the miſnoſmer or wrong addition. But I do not find it to be agreed, (*e*) That ſuch a plea by one defendant ſhall abate the writ as to any other beſides himſelf; but if ſuch matter when pleaded by another on the non-appearance of the defendant, will abate the writ as to all, it ſeems difficult to give a reaſon why it ſhould not have the like effect when pleaded by the party himſelf.

(*b*) Dyer 348. Summary 189. S. P. C. 82. Raſt. 49. 52. F. Cor. 15. 43. 64. 26 H. 6. 6. 21 H. 7. 34. 7 H. 4. 27.

(*c*) B. App. 111. 6 H. 7. 7 21 E. 4. 71, 72.

(*d*) S. P. C. 82. See the Books above cited.

(*e*) 21 H. 7 31. 5 Ed. 4. 3. 7 H. 4. 27. S. P. C. 82.

Sect. 128. As to the ſixth point, *viz.* Whether the appellee may have more than one ſuch plea or exception; there ſeems to be no doubt but that if a defendant in an appeal, or even in an indictment of felony, think it proper to make uſe of never ſo many pleas or exceptions of this kind, requiring all of them the ſame kind of trial, he may take advantage of them al',

all, (a) unleſs (b) they be repugnant to one another. Alſo it ſeems to be the better opinion, (c) That he ſhall have the like advantage, where ſuch pleas or exceptions do not all of them require the ſame kind of trial, but ſome of them are triable by matter of record, and others by the country. And if ſuch pleas or exceptions be all of them triable by the country, it ſeems to have (d) been generally agreed, That the defendant muſt at the ſame time plead alſo with them all his matters in bar, if he have any ſuch, and alſo plead over to the felony (unleſs where he hath admitted the fact by the matter pleaded in bar): But if the plea in abatement be triable by matter of record, it is holden in ſome books, (e) that the defendant is not bound to plead over to the felony, till ſuch plea in abatement be found againſt him. But (f) the greater number of precedents, and conſtant practice of late ſeem to be otherwiſe. However it ſeems clear, (g) That whatſoever matters are pleaded in abatement of an appeal, or indictment of felony, and found againſt the defendant, yet he may afterwards plead over to the felony (60). And in theſe reſpects ſuch an appeal and indictment differ from appeals (h) of *mayhem* and all civil actions whatſoever, except only aſſizes of *mortdanceſtor* (i), *novel* (k) *diſſeiſin*, *nuſance* (l), and *juris utrum*; (m) for it ſeems to be a ſettled rule, that in appeals of *mayhem* and all other civil actions, thoſe above mentioned only excepted, if a plea in abatement, triable by the country, (n) be found againſt the defendant, he ſhall not (o) be ſuffered afterwards to plead any new matter, but final judgment ſhall be given againſt him. Alſo it ſeems to be agreed (p) that in all other actions, except thoſe above mentioned, if a defendant together with a plea in abatement plead alſo a plea in bar, or the general iſſue, he waives the plea in abatement; and the plea in bar or general iſſue only ſhall be tried.

(a) Finch 363, 364, 385. 4 H. 6. 15. 16. B Appeal 44. (b) S. P. C. 82. (c) Finch 364. Qu. 4 H. 6. 16. B. App. 44. (d) Finch 363, 364. 385. 21 Ed. 4. 71. Reeves v. Trundal, Paſc. 3. Geo. 1. Dyer 88. Raſtal 49. 3 Mod. 266, 267. Qu. 6 H. 7. 7. Shower 47. (e) B. App. 48. 66. 1 H. 6. 1. 27 Aſſize 3. (f) C. Eliz. 695. 10 H. 4. 4. 4 H. 6. 15. 1 H. 6. Raſtal 47. (g) Finch 363, 364, 385. 27 Aſſize 3. 1 H. 6. 1. 2 Hale 239. (h) C. Eliz. 495. Pop. 115. Owen 59, 60. Moor 457. Noy 36. (i) Finch 385. 418. 40 Ed. 3. 29. 39 Aſſize 13.

(k) 1 Ed. 3. 11. Dyer 310. 4 H. 6. 16. 1 Jones 413. S. P. C. 82. C. Car. 520. Finch 363, 364. 385. (l) Finch 363. 385. (m) 40 Ed. 3. 29. Finch 363. 385. (n) Vide C Eliz. 203. Dyer 228. Yelv. 36. (o) 1 Sid. 252. 1 Lev. 163. 1 Inſt. 33. Yelv. 112. Aleyn 65, 66. (p) C. Eliz. 495. Owen 59. Noy 36. Moor 457. Pop. 115. Vide Thel. B. 15. c. 5.

(60) It ſeems from Carthew 56. that if the appellee plead in abatement, and doth not plead over to the felony, that the appellant ought to move the court for judgment againſt the defendant, But in that particular caſe, the plea being accepted by the plaintiff, it was held good without pleading over.

Sect. 129. And now I am in the third place to conſider, what faults of this kind are amendable, which without ſuch amendment would abate the writ. It is to be obſerved, that appeals are expreſsly excepted out of 8 Hen. 6. c. 12. which is the principal ſtatute of amendments: Alſo it ſeems (q) to be generally taken for granted, that no criminal proſecution whatſoever is within any other ſtatute of amendments, or any of the ſtatutes of jeofails; from whence it follows that no defect is amendable in an appeal, but ſuch only as is amendable by

(q) Vid. Salk. 51. 6 Modern 269. 1 Bulſt. 142. 144.

the common law. And therefore it ſeems to be the better opinion, that no falſe (*a*) Latin in a writ or bill of appeal, nor omiſſion of a word, (*b*) nor even of a letter, (*c*) nor other defect or variance (*d*) from the proper legal form, can be amended, becauſe no ſuch fault is amendable by the common law, without the conſent (*e*) of the parties, except only in actions wherein the king (*f*) is a party. It ſeems indeed to be generally holden in ſome books, (*g*) That ſuch faults in a writ are amendable where the curſitor varies from his inſtructions, in the names or (*h*) additions of the parties, or other like matters which he muſt take from his inſtructions. But what is ſaid in ſuch books in relation to this matter ſeems to be intended of ſuch writs only as are within the purview of the ſtatutes of amendments, and therefore cannot be applied to appeals; yet it ſeems that a miſpriſion in the count is amendable by the common law, as well in an appeal as in any other action, before it is entered on the record; and ſo it ſeems that the year (*i*) book of 7 Hen. 4. c. 27. is to be intended, in which a miſtake in the declaration in laying the fact in an improper *viſne*, was ſuffered to be amended. Alſo it ſeems that after the count is entered on the record, a variance in it from the writ, if a mere miſpriſion, may be amended by it, as it ſeemed to be agreed in an appeal of death between *Smith and Bowden*, (*k*) wherein the word *murdrum* in the count on the record was adjudged to be amendable by the word *murdrum* in the bill on the file.

(*a*) 9 H. 7. 16. 1 Bulſt. 142. 144. 4 H. 6. 16. B. Amend. 62.
(*b*) F. Cor. 121. 13 Aſſize 0.
(*c*) F Amend. 68.
(*d*) F. Vari. 59. 8 Coke 156. 4 H. 6. 16.
(*e*) F. Amend. 63.
(*f*) 8 Coke 156. 4 H. 6. 16. 40 Aſſize 26.
(*g*) Moor 866. 1 Roll. 138. C. Eliz. 644. Qu. Hob. 128.
(*h*) 2 Ven. 46. 49. 130. 152. 1 Sidney 412. Hobart 118. Hutton 56, 57. C. Car. 74. Littleton's Rep. 50.
(*i*) F. Cor. 80.
(*k*) Mich. 7 Annæ.

As to the fifth general point, *viz.* What may be pleaded in bar of an appeal. Having already in the former part (*l*) of this chapter endeavoured to ſhew what may be pleaded in bar of an appeal of *mayhem*, and intending in the latter part of the book to conſider the learning relating to pleas in bar of criminal proſecutions in general, I ſhall in this place only examine the nature of pleas in bar of appeals of felony in particular. And for that purpoſe having premiſed that, by the better opinion (*m*) at this day, no ſpecial plea in juſtification of the killing ſhall be admitted in an appeal of death, but that in every ſuch caſe the general iſſue is to be pleaded;

(*l*) S. 22, 23, 24, 25, 26.

(*m*) See B. 1. c. 28. ſ. 3.

I ſhall conſider,—Firſt, What pleas will be good bars of an appeal of felony by ſhewing that the plaintiff had never any right to bring it.—Secondly, Whether a *retraxit* on nonſuit in a former appeal of this kind will be a good bar of another.—Thirdly, Whether a diſcontinuance.—Fourthly, Whether an abatement of a former appeal.—Fifthly, Where the bringing of an appeal of this kind againſt one perſon ſhall be a bar of any ſubſequent appeal againſt any other perſon not named in the firſt.—Sixthly, Where a releaſe will be a good bar of an appeal of this kind.—Seventhly, Where the appellant may be

barred as to one appellee, and continue his ſuit againſt the reſt.—Eighthly, Whether any, and which of theſe pleas, are conſiſtent with the general iſſue.

Sect. 130. As to the firſt particular, *viz.* What pleas will be good bars of ſuch an appeal by ſhewing that the plaintiff had never any right to bring it; it ſeems to be a good general *(a)* rule, That any plea of this kind is good which ſhews that the plaintiff wants any of thoſe requiſites which the law makes neceſſary to intitle him to the appeal. And therefore in an appeal of death by a woman it is a good plea that *(b)* ſhe was never lawfully married to the deceaſed; or *(c)* that ſhe hath not continued a widow ſince his death, but hath taken another huſband. Alſo in an appeal of death by one as heir, it is a good plea, that A. B. at the time *(d)* of the writ was and ſtill is heir of the deceaſed; or *(e)* that one of the defendants was the wife of the deceaſed, and made a defendant by covin to exclude her from her appeal; or that the plaintiff is a baſtard *(f)* and not legitimate. And where one brings an appeal as brother and heir, it is a good plea, that he is not *(g)* brother and heir as by his writ and declaration he hath ſuppoſed, or *(h)* that he hath an elder brother by the ſame father and mother ſtill alive; or where one brings an appeal as couſin and heir, *viz.* brother of A. B father of the deceaſed, it is a good plea, That he is not couſin *(i)* and heir, *viz.* brother of A. B. father of the deceaſed, &c. as by his writ and declaration he hath ſuppoſed. Alſo *(k)* it is a good plea in any appeal of death, that the plaintiff hath ſlipt his time in not bringing the appeal within the year and day after the death of the perſon ſuppoſed to have been killed. Alſo it is a good *(l)* plea in an appeal of robbery, That the plaintiff is a villein to the defendant. And it is a good *(m)* plea in an appeal of rape by a man and a woman, that the plaintiffs were never lawfully married. And *(n)* it is a good plea in bar of any appeal of felony, That the plaintiff is an ideot, or that he was born deaf and dumb. Alſo it is ſaid by Sir William Staundford, *(o)* that it is a good plea in bar of any ſuch appeal, That the plaintiff is attainted of treaſon or felony; however *(p)* it ſeems that ſuch attainder is no perpetual bar, but only during the time it continues in force.

(a) S. P. C. 98. Summary 190.
(b) Sup. f. 36. S. P. C. 98.
(c) Sup. f. 38. S. P. C. 98.
(d) Raſtal 50.
(e) Raſtal 50.
(f) Raſtal 49.
(g) Raſtal 49.
(h) Supra f. 40.
(i) Raſtal 49.
(k) S. P. C. 98.
(l) Supra f. 44. S. P. C. 98.
(m) Supra f. 62. S. P. C. 98.
(n) Supra f. 32. S. P. C. 98.
(o) S. P. C. 98.
(p) Supra f. 32.

Sect. 131. As to the ſecond particular, *viz.* Where a *retraxit* or nonſuit in a former appeal of this kind will be good bars of another; I take it to be clear, *(q)* that a *retraxit* of any ſuch appeal is a bar of all ſubſequent appeals of the ſame kind; for it ſeems to be a general ſettled rule, That a *retraxit* of any action whatſoever is a bar of all others of the like or inferior nature. Alſo it ſeems to be certain, That a nonſuit on a bill *(r)* of appeal, whether commenced in the court of

(q) 1 Inſt. 138, 139. Summary 190. 8 Coke 58, 62.
(r) S. P. C. 148.

king's bench, or before juſtices (a) of gaol-delivery, or before the ſheriff (b) and coroners, or a nonſuit after (c) declaration on a writ of appeal, is a bar of all other appeals of the ſame kind: becauſe no ſuch bill or declaration ſhall be received, unleſs (d) the appellant have firſt appeared in proper perſon; and it ſeems to be agreed by all the books, That a nonſuit after ſuch an appearance is peremptory. Alſo it is holden generally in ſome books, (e) That a nonſuit after appearance is a peremptory bar to the appellant, without adding that he muſt alſo have declared. From whence, and alſo from the general reaſon of the thing, it may be reaſonably argued, That if it any way appear on record that the appellant who was nonſuited in a former appeal, did actually appear and proſecute ſuch appeal, as by paying (f) of proceſs on it, &c. he ſhall be barred in any other appeal of the ſame kind. But it ſeems (g) that the bare taking out of a writ of appeal, and cauſing it to be delivered of record to the ſheriff, and a nonſuit upon it, is no bar of a ſecond appeal, becauſe it doth not appear of record, but that it might be done by a ſtranger. And notwithſtanding ſome books (h) ſeem to hold generally, That any nonſuit in appeal is peremptory, yet it ſeems to be in great meaſure ſettled (i) at this day, that ſuch nonſuit ought to be after an appearance in proper perſon of record.

(a) 10 H. 4. 4.
(b) S. P. C. 148. 22 Aſſize 97.
(c) Sum. 190. S. P. C. 148. C. Eliz. 605.
(d) Salkeld 64. Vide F. N. B. 26.
(e) 22 Aſſize 97. 47 Ed. 3. 16 B. App. 28. 71. F. Cor. 184. 1 Inſt. 139. Vide 4 H. 6. 16. Supra ſ. 26. 9 H. 4. 2, 3. 47 Aſſize 7.
(f) Vide 7 H. 7. 6.
(g) S. P. C. 148. 7 H. 7. 6. 1 Sid. 32.
(h) 27 Aſſize 7. C. Eliz. 605. Vide 4 H. 6. 16. 1 Sid. 32.
(i) See the books cited to the other points of this ſection.

Sect. 132. As to the third particular, *viz.* Whether a diſcontinuance of a former appeal of this kind will be a good bar of another; it is holden (k) by the reporter of the year-book of 16 Edw. 4. That a diſcontinuance of one appeal is a bar of any other, becauſe the life of the appellee was once put in jeopardy by the firſt appeal; but this reaſon proves as ſtrongly that the abatement of an appeal where the writ was good ſhall be a bar of another; for by an appeal ſo abated the life of the appellee is as much put in jeopardy as by an appeal that is diſcontinued; and yet it ſeems to be agreed at this day, that ſuch an abatement of an appeal cannot regularly be a bar of another, as ſhall be more fully ſhewn in the next ſection. Nor can I find it any where adjudged, That the diſcontinuance of one appeal is a bar of another. It is true indeed, that in Bradley (l) and Bank's caſe, the appellee was totally diſcharged upon a diſcontinuance. But the reaſon hereof ſeems to have been, not that the diſcontinuance would be of itſelf a bar to any other appeal, but becauſe the year and day were paſſed, and conſequently there could be no other appeal; and the appellee had alſo been before convicted on an indictment, and had his clergy, and conſequently could not be proceeded againſt at the ſuit of the king. However, granting the opinion afore-mentioned to be law, That the diſcontinuance of one appeal ſhall be a good bar of any other; ſurely it is to be intended of ſuch a diſcontinuance only, as happens after

(k) 16 E. 4. 11. B. Appeal 103. S. P. C. 59.
(l) 1 Bulſt. 141. C. Jac. 283, 284. Yelv. 204.

after the appearance of the appellant, for the reaſons given in the precedent ſection, in relation to a nonſuit.

Sect. 133. As to the fourth particular, *viz.* Whether an abatement of a former appeal of this kind will be a good bar of another, it ſeems clear, that if an appeal by a wife abate by her taking another huſband, or an appeal by an heir abate by his death, there can be no (*a*) other appeal. But the reaſon hereof ſeems not ſo much to depend on the abatement, as on the marriage in the firſt caſe, and the death in the ſecond; which, as it ſeems the better (*b*) opinion, would of themſelves have abated a ſubſequent appeal, whether any had been brought before or not. Yet I find it holden generally in ſome (*c*) of the old books, that an appeal once determined, cannot revive; and in (*d*) others, that where an appeal of mayhem, which in this reſpect ſeems not to differ from other appeals, is abated without the default of the party, he may have a new one, by which it ſeems to be implied, that if it abated by his default he cannot have a new one; and this opinion ſeems alſo to be confirmed by ſome other (*e*) old books, but it is denied (*f*) by others. However I take it to be ſettled (*g*) at this day, where there continues to be a plaintiff, not diſabled to proſecute, he ſhall not be barred in a ſecond appeal by an abatement of the firſt.

(*a*) Vide S. P. C. 147. Summary 200.

(*b*) Sup. ſect. 38, 39. 41.

(*c*) 6 H. 4. 6. B Appeal 10.

(*d*) 50 Ed. 3. 1. B. Appeal 16.

(*e*) 9 H 5. 1. B. Appeal 38, 44. 4 H. 6. 16.

(*f*) B. Appeal 53. 118. 146. 13 Aſſize 10.

(*g*) Sup. ſ. 4.

Sect. 134. As to the fifth particular, *viz.* Where the bringing of an appeal of this kind, againſt one perſon will be a bar of any ſubſequent appeal againſt any other perſon not named in the firſt; it is ſaid, (*h*) that anciently one might have had two appeals for the ſame fact, one againſt the principal, the other againſt the acceſſary. And even at this day, if one be robbed of the ſame goods, at ſeveral times, or receive different (*i*) maims, whether at the ſame or at ſeveral times; or a woman be raviſhed more than once, whether by the ſame or by different perſons, it ſeems clear that ſeveral appeals lie for each diſtinct offence. But it ſeems to be generally (*k*) agreed at this day, that after one hath brought an appeal of felony againſt one perſon, who is thereon attainted and hanged; he may be barred by it in any ſubſequent appeal, for the very ſame crime, againſt any other perſon not named in the firſt; whether ſuch ſubſequent appeal, againſt the perſon ſo omitted in the firſt, be brought againſt him as principal, or acceſſary (*l*) before the fact, or even as acceſſary after the fact, unleſs where he happens to be ſo acceſſary after the firſt appeal was commenced; in which caſe it is certain that he is liable to ſuch ſecond (*m*) appeal, becauſe it was impoſſible to charge him in the firſt. But otherwiſe after an attainder had on the firſt appeal, the law ſeems to diſallow the bringing of a ſecond; for this reaſon, that where an appellant has ſo far had his revenge

(*h*) S. P. C. 65.

(*i*) 9 H. 4. 2. 11 H. 4. 14. B. Appeal 28.

(*k*) B. App. 32. 11 H. 4. 13. 14.

(*l*) Sum. 190. S. P. C. 65. 98. B. App. 14, 28. 4 Co. 47. ſup. c. 6. ſect. 5.

(*m*) Keilw. 83. ſeems contrary as to appeals of robbery.

venge in one appeal, he ſhall not be indulged in the bringing of another, which his own laches only made neceſſary. Alſo it ſeems to be (*a*) clear, that if one bring an appeal of felony againſt another, who is either acquitted by verdict, or otherwiſe finally diſcharged by any other matter, which will peremptorily bar any other appeal againſt him by the ſame appellant for the ſame fact, the appellant may alſo be barred in any other appeal for the ſame fact againſt any (*b*) other perſon whatſoever; perhaps for this reaſon, that he who appears to have brought an ill grounded action of ſo high a nature, or to have ſo far made default in the proſecution of ſuch an action, as to be for ever barred from bringing another againſt the ſame defendant, ſhall not be thought worthy to bring another againſt any other perſon whatſoever. But I cannot be ſatisfied with the reaſon which ſome of the books ſeem to give why all the defendants muſt be named in one appeal; which is this, that the ſtatute of Magna Charta 34. by which it is provided, "That none ſhall be impriſoned upon the appeal "of a woman, for the death of any other than her own huſ- "band," ſpeaks only of appeal in the ſingular number: from whence it is ſaid to be collected, that all the defendants muſt be named in one appeal. But by what kind of argument this collection is made, I do not find, nor do I ſee why twenty appeals brought by the ſame woman, if the law would permit ſo many, are not as much within the letter and meaning of the ſtatute as one appeal. And where the law does permit the bringing of a ſecond appeal againſt the ſame perſon, as it is clear that in ſome caſes it does, it may reaſonably be argued, that he may as well bring it againſt others alſo; as (*d*) where the firſt is abated, and there ſtill continues to be a plaintiff not diſabled to proſecute, (*e*) and in ſome other caſes: For if an appellant be not barred by the abatement of his firſt appeal, from bringing a ſecond againſt thoſe who had vexation by the firſt, and were legally diſcharged from it, why ſhould he be barred by it, as to thoſe who were not concerned in it?

(*a*) 28 Ed. 3. 90. 26 Aſſize 42. Keilw. 83. 4 Co. 44 48.
(*b*) 47 Ed. 3. 16. F. Cor. 104. 9 H. 4. 2. Summary 188. 190 S. P. C. 98. 47 Aſſize 7.
(*d*) 28 Ed. 3. 90. 4 Co. 48.
(*e*) See the precedent ſection.

Sect. 135. As to the ſixth particular, *viz.* Where a releaſe will be a good bar of an appeal of this kind; it ſeems clear, That a releaſe of all manner of actions, or of all actions (*f*) criminal, or of all actions (*g*) mortal, or of all actions concerning Pleas of the Crown, or of all (*b*) appeals, or of all (*i*) demands, will be a good bar of any ſuch appeal. But it (*k*) ſeems that a releaſe of all actions perſonal will not bar ſuch an appeal, becauſe that an appeal in which the appellee is to have judgment of death, is higher than an action perſonal, and not properly called an action perſonal. Alſo it ſeems (*l*) clear, That whatſoever the nature of the releaſe may be, it ſhall not wholly diſcharge the appeal, unleſs it were made

(*f*) Litt. ſ. 500, 501.
(*g*) 1 Inſt. 287, 288.
(*b*) Litt. ſ. 501.
(*i*) Litt. ſ. 508.
(*k*) Litt. ſ. 500. 501. Con F. Rel 46 Qu. B. App. 29. 21 Ed. 4. 72. 9 H. 4. 2. ſup. ſect. 25.
(*l*) F. Cor. 17. S. P. C. 148. Summary 200. Raſt. 43. 48.

made before it was commenced; for if it be ſubſequent to the appeal, it ſhall only diſcharge it as to the ſuit of the plaintiff, and after judgment given for ſuch diſcharge, he ſhall be arraigned on the appeal at the king's ſuit, as ſhall be ſhewn more at large in the chapter of indictments. Alſo it is (*a*) certain, That no releaſe ſhall diſcharge a perſon attainted, without the king's pardon.

(*a*) Sup. f. 38, 42.

Sect. 136. As to the ſeventh particular, *viz.* Where the appellant may be barred as to one appellee, and continue his ſuit againſt the reſt; it (*b*) ſeems, that if he be barred by releaſe given, or retraxit entered as to one, or by being vanquiſhed in battle by one, yet he may continue his ſuit againſt the reſt, becauſe he is to have a ſeveral execution againſt every one of them. Yet in an appeal againſt divers, whether they plead the ſame or ſeveral iſſues, it hath been adjudged, (*c*) that a nonſuit againſt one, at the trial of any one of the iſſues, is a nonſuit as to all, of which this ſeems to be the beſt reaſon, That (*d*) ſuch a nonſuit operates in nature as a releaſe of the whole. But whether (*e*) the diſcontinuance of an appeal, as to one appellee, ſhall have the like conſtruction as to all, may deſerve to be conſidered.

(*b*) Sum. 190. 21 Ed. 4. 72. 2 R. 3 9. B. Appeal 111. 120.
(*c*) C. Eliz. 460. Dyer 120. 7 H. 6. 27. 27. Ed. 3. 87. 2 R. Abr. 133. 1 Inſt. 139. 1 Sid. 378. B. diſ. de pro. 20.
(*d*) Hob. 180.
(*e*) Vide 7 H. 6. 27. 30 Aſſize 36. 39 Ed. 3. 3. 38 Aſſize 17. 27 Ed. 3. 87.

Sect. 137. As to the eighth particular, *viz.* Whether any, and which of the pleas above mentioned are conſiſtent with the general iſſue; it ſeems agreed at this day, That if the defendant in an appeal of death, by a (*f*) wife, plead *nunques accouple in loial matrimony*; (*g*) or in an appeal of death by one as heir, plead that the appellant is a baſtard, (*h*) or that he hath an elder brother of the whole blood alive, or in (*i*) any appeal of death, plead that the perſon ſuppoſed to have been killed, was dead above a year before the purchaſe of the writ, or that (*k*) the appellant had formerly brought an appeal for the ſame fact againſt another perſon, who was thereon attainted and hanged, or generally (*l*) any other plea not amounting to an implied confeſſion of the fact, as a releaſe, &c. whether it be trial by matter (*m*) of record, or by pais; and whether it (*n*) deny that the appellant had ever any right to the appeal, or admit that he once had a right, but ſhew that he is now barred: he may, together with ſuch plea in bar, plead alſo not guilty to the felony. And if ſuch plea be triable by the common law, unleſs the appellant reply both to that, and alſo to the plea of not guilty, he diſcontinues the appeal; but (*o*) if it be not triable by the common law, the defendant needs only to reply to it, and not to the felony, till after ſuch plea has been tried. But it is holden in many books (*p*) of good authority, That a man ſhall not be admitted

(*f*) 3 Leon. 268. Cor. Eliz. 223.
(*g*) 7 Ed. 4. 15. Qu 14 Ed. 4. 7.
(*h*) Raſtal 49. 7 Ed. 4. 15. Qu 14 Ed. 4. 7. 21 H 6. 29.
(*i*) 22 Ed 4 39.
(*k*) 9 H. 4. 2.
(*l*) 21 H 6. 29. 22 Ed. 4. 39. 40. Raſtal 49, 50. 58. 584. S. P. C. 98. Keil. 188, 189.
(*m*) 21 H. 6. 28, 29. 4 H. 7. 5. 9 H. 4. 2. 35 H. 6. 57. 8 Ed. 4. 3. Con. B. App. 14, 48.
(*n*) 7 Ed. 4. 14. 21 H. 6. 29.
(*o*) C. Eli. 223. 3 Leon. 268.
(*p*) S. P. C. 68. Finch 385, 386. Summary 190, 191. Hob. 170, 171.

mitted to plead a releaſe, and the general iſſue alſo, becauſe it is repugnant at the ſame time to inſiſt that the crime is releaſed, and (*a*) yet that there was no ſuch crime committed to be releaſed. But I do not find this point any where adjudged; and as to the argument above mentioned, from the repugnancy of the plea of a releaſe, to the general iſſue, it may be anſwered, That a man may reaſonably take a releaſe to free himſelf from trouble, from the ſuſpicion of a crime, of which he would by no means own himſelf guilty; and in appeals of death after a plea of (*b*) *autrefoits convict* by verdict, and even after the plea of (*c*) *autrefoits convict* by confeſſion, and clergy thereon had, the general iſſue has been received; and yet ſuch pleas as much imply a confeſſion of the fact, as the plea or releaſe. And in Smith's Caſe, who was indicted of high treaſon in the beginning of his late majeſty's reign, for the murder of Colonel Parks, after a plea of a pardon the general iſſue was received. However, I do not find it any where holden, That the plea of a releaſe may not be pleaded, if the defendant think fit, without pleading the general iſſue. Alſo it ſeems queſtionable, (*d*) Whether any other plea in bar, whether triable by matter of record, or by pais, may not alſo be received without pleading the general iſſue, as it ſeems clear, that in ſome caſes it may; (*e*) as where it declines the juriſdiction of the court, (*f*) or would be prejudicial to the defendant by infranchiſing the plaintiff; as where a villein brings an appeal of robbery againſt his lord, who pleads the villenage in bar, in which caſe he ſhall not be compelled to plead not guilty, becauſe that would amount to an infranchiſement of the plaintiff; by ſuppoſing that the fact, if committed, needs a defence which it cannot do unleſs the plaintiff have a property, which, if he be a villein, he cannot have againſt his lord. Alſo it ſeems clear, That (*g*) if any of the bars above mentioned, except that of a releaſe, be ſuffered to be pleaded without the general iſſue, and be found againſt the defendant, they do not conclude him from pleading the general iſſue afterwards; and as to the plea of a releaſe, whether that being pleaded without the general iſſue, and found againſt the defendant, do conclude him at this day to plead the general iſſue afterwards, may deſerve to be conſidered for the reaſons above mentioned. (*h*) But it ſeems, That if a demurrer to the court be adjudged againſt an appellee, he ſhall not be admitted to plead either in bar, or the general iſſue, but ſhall be condemned, as ſhall be ſhewn more at large in the chapter of demurrers.

(*a*) Hob. 270, 271.

(*b*) 1 Bulſt. 141. Yelverton 204. Cro. Jac. 283.
(*c*) 4 Co. 45. 1 And. 68
(*d*) Finch 385. S. P. C. 151. 22 Ed. 4 39, 40. Show. 47.
(*e*) Widdrington v. Charlton, Tr. 11 Ann. 50 Ed. 3. 15. 28 Ed. 3. 91. 27 Aſſize 41. 35 H. 6 57. 8 Ed. 4. 3.
(*f*) Keil. 175. 91. 186. Raſtal 54.
(*g*) 18 Ed. 3. 32. Carthew 56. Summary 191. S. P. C. 98. Litt. ſ. 192, 193, 194. 208.
(*h*) 14 Ed. 4. 7. 50 Ed. 3. 15, 16. 28 Ed. 3. 91. S. P. C. 98. F. Coſone 429. 27 Aſſize 3. Con. 7 Ed. 4. 15. Keilw. 100. Summary 190. 243. Finch 385, 386. 14 Ed. 4. 7. Keilw. 100.

Sect. 138. As to the ſixth general point, *viz.* Where the appellant ſhall render damages to the appellee for a falſe appeal; having premiſed that by the common law a defendant may (*i*) recover damages for a falſe and malicious appeal, againſt

(*i*) 2 Inſt. 383. Keilw. 27. S. P. C. 167.

againſt the appellant and his abettors, by a writ of conſpiracy or an action on the caſe, in the nature of ſuch writ, as hath been more fully ſhewn in book the firſt, (*a*) I ſhall here endeavour to ſhew in what caſes and in what manner he may, if he chuſe rather ſo to proceed, recover ſuch demages by the ſtatute of Weſtminſter 2. c. 12. which was made for his ſpeedier remedy, and is enacted as followeth :

(*a*) B. 1. c. 72. ſect. 2. and 3.

Sect. 139. " Foraſmuch as many through malice intending to grieve others, do procure falſe appeals to be made, of homicides and other felonies, by appellors, having nothing to ſatisfy the king for their falſe appeal, nor to the parties appealed for their damages;" It is ordained, " that when " any being appealed of felony, ſurmiſed upon him, doth acquit himſelf in the king's court in due manner, either at the " ſuit of the appellor or of our lord the king, the juſtices before whom the appeal ſhall be heard and determined, ſhall " puniſh the appellor by a year's impriſonment; and the appellor " ſhall nevertheleſs reſtore to the parties appealed their damages, " according to the diſcretion of the juſtices, having reſpect to " the impriſonment or arreſtment, that the party appealed hath " ſuſtained by reaſon of ſuch appeals, and to the infamy that " they have incurred by the impriſonment or otherwiſe; and " ſhall nevertheleſs make a grievous fine unto the king. " And if paradventure ſuch appellor be not able to recompence the damages, it ſhall be inquired by whoſe abetment, " by malice, the appeal was commenced, if the party appealed deſire it. And if it be found by the ſame inqueſt, that " any man is abettor through malice, he ſhall be diſtrained " by a judicial writ at the ſuit of the party appealed to come " before the juſtices. And if he be lawfully convict of ſuch " malicious abetment, he ſhall be puniſhed by impriſonment " and reſtitution of damages, as before is ſaid of the appellor."

And for the better underſtanding this ſtatute, I ſhall endeadeavour to ſhew how the ſeveral parts of it have been expounded.

Sect. 140. And firſt, Whereas the words of the preamble are, " That many through malice procure falſe appeals to be " made by appellors, having nothing, &c." And in the purview it is ſaid, " That it ſhall be inquired by whoſe abet" ment, by malice, the appeal was commenced, &c. And if it " be found that any man is an abettor, through malice, &c." In all which places the malice is expreſsly referred to the procurors and abettors only, and in no part of the ſtatute to the appellant, it is holden by (*b*) ſome, That where-ever an appellee is acquitted of an appeal of felony, he ſhall recover damages by force of this ſtatute againſt the appellant, except only where he hath been indicted of the ſame felony before. And

(*b*) 1 Inſt. 139. 2 Inſt. 384. Vide Litt. ſ. 208. 22 Aſſ. 39. 26. H. 8 3.

it

it must be confessed, that in the (*a*) reports and entries (*b*) relating to this matter, damages seem generally of course to have been awarded against the appellant, on the acquittal of the appellee in all other cases, without any finding that the appeal was malicious. Yet it is holden by (*c*) others, That the appellant is no more within the intent of the statute than his abettors, unless his appeal was grounded on malice. And if it be considered, that where the appellant is to render damages by force of the statute, he is also, by the express words of it, to have a year's imprisonment, and to be grievously ransomed to the king; surely it cannot be imagined that the makers of the statute intended in any case to expose him to so severe a punishment for a legal prosecution, which he has reasonable evidence to induce him to commence, though it may not be sufficient to induce a jury to convict the defendant. Neither do I see any reason why the bringing an appeal against one who hath been before indicted, by a sufficient indictment (*d*) of the very same (*e*) crime, which is agreed (*f*) not to be within the meaning of the statute, should be the only excepted case: especially considering that any other case, wherein the appellant plainly appears to proceed on a probable ground of suspicion, is within the reason given in many books (*g*) for the favour shewn to the appellant where the appellee has been indicted before; which is this, that the appellant had cause and evidence to pursue the appeal, and it appears to the court that it was not merely founded on malice. And this is also one of the reasons given in the (*h*) books, why the appellant is not to render damages by the intent of the statute, where the appellee in an appeal of murder is found guilty of homicide *se defendendo* only. And as to the general expressions of the books above mentioned, in which damages seem of course to be awarded against the appellant, without any inquiry, whether his appeal were malicious or not; it may be answered, That the books speak as generally in relation to the recovery of the damages against the abettors; and yet it seems (*i*) plain from the whole purport of the statute, that they are not within the purview of it, unless their abetment were founded on malice. And some (*k*) seem to have gone so far as to hold, that the heir who abets his mother in bringing an appeal for the death of his father, can be in no case within the statute, by reason of such abetment; because nature and duty oblige him in such a case to abet his mother. But this reasoning, if strictly examined, seems to prove no more than this, That in such case the heir shall *primâ facie* be intended to have abetted the appellant, rather out of duty than malice, and that therefore he shall not be taken to be within the purview of the statute, without very strong evidence of his malice. But surely it cannot be denied, That in some cases it may

(*a*) See the books cited under this and the following sections.
(*b*) Rast. Ent. 56.
(*c*) S. P. C. 168. See L. Quin. Ed. 4. 126. 40 Ed. 3. 42.
(*d*) 20 Ed. 4. 6. 2 Inst. 384.
(*e*) 26 H. 8. 3. 33 H. 6. 1. 40 Ed. 3. 42. 24. 14 H. 7. 2. 40 Ass. 18.
(*f*) 22 Ass. 39. 26 H. 8. 3. 33 H. 6. 1. 40 Ed. 3. 42. 14 H. 7. 2. 20 Ed. 6. 40 Ass. 18. F. Damages, 67.
(*g*) 40 Ed. 3. 42. 14 H. 7. 2.
(*h*) 21 Ass. 77. 2 Inst. 384.
(*i*) 2 Inst. 384. S. P. C. 168. Plowden 88. seems con. Vide Dyer 120.
(*k*) F. Champerty 10. Plow. 88. 2 Inst. 384.

may be notorious, that an heir abets such an appeal, not out of duty but malice; as where he himself, without the least probable ground of suspicion, is the first promoter of the prosecution; or where he causes it to be carried on by violent and unfair methods, not for the sake of justice but oppression, in which cases it seems harsh to say, That he is not as well within the meaning as letter of the statute.

Sect. 141. Secondly, in the construction of the words "homicides and other felonies," in the preamble of the statute, it hath (*a*) been adjudged that the purview of it extends to a rape, which was made a felony by another (*b*) branch of the same statute; and it is (*c*) holden, both by Coke and Staundforde, That it in like manner extends to offences made felonies by any subsequent statute.

(*a*) F. Cor. 275. 382. Plowden 124.
(*b*) Sup. sect. 59, 60.
(*c*) 2 Inst. 384. S. P. C. 198.

Sect. 142. Thirdly, in the construction of these words, "When any being appealed of felony surmised upon him, "doth acquit himself in the king's court in due manner, "either at the suit of the appellor or of our lord the king;" it seems to have been generally agreed, That no acquittal is within the intention of the statute, (*d*) unless it be had on an appeal, (either at the suit of the party, or of the king, after a nonsuit of the party,) and be of such a nature as (*e*) finally to bear all other prosecutions for the same felony, whether at the suit of the king, or of the same, or any other party. And therefore it seems clear, That no damages shall be recovered on the (*f*) abatement of an appeal nor on the bare (*g*) nonsuit of the appellant, nor where the appellant is barred either by a (*h*) demurrer, or by a (*i*) plea, shewing that he is not intitled to the appeal, nor on any acquittal on an insufficient (*k*) original; because in all these cases the appellee is liable to another prosecution for the same felony. And if a person appealed of murder, be found guilty (*l*) of homicide by misadventure, or *se defendendo*, which will be a bar of any other prosecution for the same killing; yet it hath been resolved that he shall not recover damages, not (*m*) only because it appears that the appeal was not groundless, but also because the appellee is not totally acquitted. But it is (*n*) clear, that the appellee is intitled to his damages, where he is acquitted on an appeal at the suit of the king, after a nonsuit of the plaintiff, where he vanquishes (*o*) the appellant in a trial by battle. Also if two be appealed, the one as principal, and the other as accessary, and the jury being charged on the accessary, as well as the principal, do acquit the principal; it seems to be (*p*) agreed, that the accessary shall recover damages, by the intent of the statute, without an express verdict concerning him, because he is impliedly acquitted by the acquittal of the principal; for it is impossible that there should be an accessary where there is no principal. And this reason seems to hold as strongly for the damage,

(*d*) S. P. C. 169. 2 Inst. 385. 14 H. 7. 2.
(*e*) S. P. C. 169.
(*f*) 4 Co. 47. S. P. C. 169. 9 H. 4. 2. Vide 9 H. 5. 1.
(*g*) 2 Inst. 385. F. Consp. 25. But 33 H. 6. 1. F. Cor. 102. 48 Ed. 3. 22. seem doubtful.
(*h*) 2 Inst. 385. F. Cor. 12. S. P. C. 169.
(*i*) 27 Ass. 25. 2 Inst. 385. S. P. C. 169.
(*k*) 4 Co. 45. 47. F. Cor. 444. 9 H. 5. 2. S. P. C. 169.
(*l*) 22 Assize 77. 2 Inst. 385. S. P. C. 199.
(*m*) Vide sup. sect. 138.
(*n*) 41 Ass. & 24. F. Cor. 275. 381. Damages 77.
(*o*) F. Cor. 98.
(*p*) S. P. C. 168, 169. 2 Inst. 385. 33 H. 6. 1.

damages, where the acceſſary doth not appear on the trial or acquittal of the principal; becauſe in ſuch caſe the acquittal of the principal is as (*a*) much an acquittal of the acceſſary, as where he doth appear. But it is holden (*b*) by Sir Edward Coke, that ſuch an acceſſary ſhall not recover damages, becauſe no jury can be returned to aſſeſs them; and Sir William Staundford (*c*) ſeems to be of opinion, that ſuch an acceſſary ſhall not recover damages, unleſs he be expreſsly acquitted by verdict, after the acquittal of the principal. Yet whether (*d*) the juſtices themſelves may not, in a caſe of this nature, if they think fit, aſſeſs the damages, without any jury, or elſe aſſeſs them by an inqueſt of office, may deſerve to be conſidered. Alſo it ſeems to be to little purpoſe to require an actual acquittal of a perſon, where it appears by the acquittal of another, that he could not be guilty. However it ſeems clear, That a perſon appealed as acceſſary to two principals, ſhall not (*e*) recover damages by the acquittal of one of them; becauſe for what appears he might be acceſſary to the other. Neither (*f*) ſhall he recover damages where he is diſcharged by the death of the principal, before his attainder, becauſe it doth not appear that he might have been guilty.

(*a*) 33 H. 6. 1.
(*b*) 2 Inſt. 385.
(*c*) S. P. C. 168. Vide 41 Aſſ. 24.
(*d*) Vide ſup. ſect. 52. 53.
(*e*) 2 Inſt. 385. Dyer 120. F. Cor. 463.
(*f*) S. P. C. 173. 33 H. 6. 1.

Sect. 143. It ſeems at this day, that if a defendant, appearing upon erroneous proceſs to a good appeal, be acquitted, he ſhall recover damages by the intent of the ſaid clauſe, becauſe ſuch an acquittal is a good bar of any other proſecution for the ſame felony, and the life of the appellee was put in danger by the (*g*) appeal. But there were formerly ſome opinions, That the appellee in ſuch a caſe ſhould not recover damages, becauſe his life was not in danger at the time of the trial, for that he might have taken advantage of the error in the proceſs: But granting it to be a good rule, That the defendant ſhall not recover damages where his life is not in danger at the time of the trial, which yet I find not confirmed by any authority, beſides the year-book of 9 Hen. 5. c. 2. it may be anſwered, That in the caſe in queſtion the defendant's life is in danger at the time of the trial becauſe the error in the proceſs is ſalved by his appearance, as ſhall be ſhewn more at large in the chapter concerning proceſs.

(*g*) 9 H. 5. 2. 2 Inſt. 386. Qu. S. P. C. 169. F. Cor. 444. Yelverton 204 Cro. Jac. 284. 4 Co. 45.

Sect. 144. If a perſon who has taken a releaſe, or prayed the benefit of clergy, waive ſuch releaſe, or benefit of clergy, and put himſelf on his trial and be acquitted; it is ſaid, (*b*) that he ſhall recover his damages, notwithſtanding the objection that the taking ſuch releaſe or making ſuch prayer, ſeem to carry with them an implied confeſſion of guilt.

(*b*) S. P. C. 169. 173. Vide F. Cor. 386. & 33 H. 6. 1. Sup. ſect 135.

Sect. 145. Where-ever any perſon is ſo far acquitted on an appeal carried on at the ſuit of the party, as to be intitled to his damages, (*i*) he ſhall have judgment for them without any proceſs to bring in the party to anſwer to the damages, becauſe

(*i*) S. P. C 169.

cauſe he is ſtill in court; but where he is ſo acquitted on an appeal carried on at the ſuit of the king after a nonſuit of the party, he ſhall not recover damages, without a *ſcire facias* to bring in the party, becauſe he was out of court by the nonſuit.

Sect. 146. Fourthly, In the conſtruction of theſe words, "The juſtices before whom the appeal ſhall be heard and determined, ſhall puniſh the appellor by a year's impriſonment, "and the appellor ſhall nevertheleſs reſtore to the parties appealed their damages, according to the diſcretion of the "juſtices, having reſpect to the impriſonment or arreſtment, "that the party appealed hath ſuſtained by reaſon of ſuch "appeals, and to the infamy that they have incurred by the "impriſonment, or otherwiſe, &c." the following points have been holden. Firſt, That juſtices of *niſi prius* (*a*) have no power to give judgment for ſuch impriſonment or damages, upon an acquittal before them, whether before or ſince the ſtatute of 14 Hen. 6. by which it is enacted, "That ſuch "juſtices ſhall have power in all caſes of felony or treaſon, "to give their judgments, as well where a man is acquitted, "as where he is attainted." For (*b*) the words above mentioned in the ſtatute of Weſtminſter 2. are to be intended of ſuch juſtices only before whom the whole plea of the appeal is heard and determined, and therefore in ſtrictneſs can extend to the juſtices of the king's bench only, where the appeal is commenced before them, (for that the whole appeal is in ſuch caſe heard and determined before them, either in perſon, or elſe by others delegated by, and repreſenting them,) and not to the juſtices of *niſi prius*, who have nothing to do with the appeal before the trial, nor any original power to try it. And the ſtatute above mentioned of 14 Hen. 6. hath been conſtrued to intend only to enable juſtices of *niſi prius* to give the principal judgment, and not to transfer to them from the court of king's bench a power in collateral matters. Yet (*c*) juſtices of *niſi prius* have by uſage not now to be diſputed, gained a power to aſſeſs the damages, and to inquire of the ſufficiency of the plaintiff to anſwer them, and alſo of the abettors. But I do not find that they have ever given judgment for the damages. Yet there is no doubt (*d*) but that, if ſuch juſtices be alſo juſtices of aſſize, and as ſuch have an appeal commenced before them, they may, as juſtices of aſſize, upon the acquittal of the appellee, not only inquire of the damages, &c. but alſo give judgment for them, both by the letter and meaning of the ſtatute.

(*a*) 10 Ed. 4. 14. 22 Ed. 4. 10. S. P. C. 119. 2 Inſt. 386.

(*b*) S. P. C. 169.

(*c*) 4 Co. 95. 2 Inſt. 386. Dyer 110. B. Appeal 113. F. Corone 463. 8 H. 5. 6.

(*d*) 22 Ed. 419. B. Appeal 113.

Sect. 147. Secondly, That if a jury give too ſmall damages to the appellee, the court may increaſe (*e*) them; from which it ſeems to follow, That if a jury give too large damages, the court may abridge them. And ſurely no leſs can be implied by the ſtatutes ordering, "That the damages ſhall be given acord-

(*e*) C. Eliz. 223. Vide 2 Inſt. 387. 42 Aſſize 19. ſeems contrary.

"ing to the diſcretion of the juſtices, reſpect being had to the "impriſonment, &c." And this conſtruction alſo ſeems agreeable to the rules of law in other caſes, by which the court is ſaid (*a*) to have a general diſcretionary power, except in ſome ſpecial caſes, as local (*b*) treſpaſſes, &c. either to increaſe or abridge the damages found by an inqueſt of office; and where a jury which hath acquitted an appellee inquires afterwards of the damages, it ſeems in reſpect of ſuch inquiry to be no more than an inqueſt of the office, though it were returned to try the cauſe.

(*a*) 3 H. 6. 29. 14 H. 4. 9. 8 H. 4. 23. p 9. 3 H. 4. 4. p. 16. 7 H. 6. 31. 19 H. 6. 31. 19 H. 6. 10. B. Abr. 36. Vide 27 H. 8. 2. ſup. ſ. 52.

(*b*) 27 H. 8. 2. 19 H. 6. 42. 19H. 6. 10 p. 28. 3 H. 6. 29.

Sect. 148. Thirdly, That if there be ſeveral appellees, and all of them acquitted, the damages ought to be ſeverally (*c*) aſſeſſed as to every one of them; and this doubtleſs is agreeable both to the letter and meaning of the ſtatute, which provides that in the giving the damages, reſpect ſhall be had to the impriſonment and infamy, and other damage ſuſtained by reaſon of the appeal; and theſe being ſeveral, and receiving different aggravations from the different circumſtances of the perſon's particular caſe, it cannot but be reaſonable, That the damages be aſſeſſed ſeverally alſo.

(*c*) S P. C. 170. Dyer 120. 21 H. 4. 16. 12 Coke 126. 2 Inſt. 386. 41 Aſſiz 24. F. Damage 77. 8 H. 5. 6.

Sect. 149. Fourthly, That a monk or feme covert, being appealed without the abbot or huſband, cannot have judgment for the damages on their acquittal, becauſe they are diſabled by the law to recover any damages without the abbot or huſband; and the general words of a ſtatute ſhall not be conſtrued to enable perſons in a point, wherein the common law hath diſabled them. But the authority of this opinion, as to a wife, is queſtioned by (*d*) Hobart; neither do any of thoſe (*e*) who ſeem to give it greater weight, bring any other proof of it, than a note in Fitzherbert's abridgement, of a reſolution to ſuch purpoſe, in the time of Edward 3. as to the caſe of a monk, and an aſſertion, that the law is the ſame in the caſe of a wife: Againſt which it may be plauſibly argued, that ſince the impriſonment and infamy ſuſtained by a feme covert, in a malicious appeal againſt her, are far from being leſs grievous in reſpect of her coverture, and are a good (*f*) ground of a writ of conſpiracy at the common law, brought by the huſband and wife; and ſince the wife may take any thing to the benefit of her huſband, and it appears to the court that the appellant by his own act, without any default either in the huſband or wife, gives them a good title to the damages; and ſince no expreſs judgment can be given for the huſband, being not a party to the record, and it is moſt for his advantage, as well as his wife's, that a preſent judgment be given: It may perhaps be thought no unreaſonable conſtruction of the ſtatute, that in this particular caſe judgment ſhould be given for the wife to recover the damages, which would as much enure, for the benefit of herſelf and her huſband, as an expreſs judgment for them both on a writ of conſpiracy.—However, It is certain, (*g*) That if the huſband and

(*d*) Hob. 98.
(*e*) 2 Inſt. 395. 11 Coke 77. 9 Coke 73. 1 Roll 170. S. P. C. 170. F. Corone 276.

(*f*) 2 Inſt. 386. 24 Edw. 3. 73. 2 Inſt. 132.

(*g*) F. Judg. 108. 2 Inſt. 385, 386. 11 H. 4. 16, 17. S. P. C. 170. b.

and wife are both of them appealed and acquitted, they ſhall have a joint judgment for the damage done to the wife, for which the wife alone ſhall ſue execution, if the huſband die without ſuing it, and the huſband alone ſhall have judgment for the damage done to himſelf.

Fifthly, In the conſtruction of the words, "And if perадventure the appellor be not able to recompence the damages, it ſhall be inquired by whoſe abetment, by malice, the appeal was commenced, if the party appealed deſire it. And if it be found by the ſame inqueſt, that any man is abettor through malice, he ſhall be diſtrained by a judicial writ, at the ſuit of the party appealed to come before the juſtices, &c." the following points have been holden.

Sect. 150. Firſt, That (*a*) the abettors are in no caſe liable to render damages, where the appellant himſelf is not liable, though never ſo ſufficient; and this is confirmed by experience, and the manifeſt purport of the ſtatute, which by directing that the abettors be inquired of, where the appellant appears inſufficient to anſwer the damages, plainly intimates that they are to be inquired of in ſuch caſes only, wherein the appellant muſt have anſwered them, if he had been able; and agreeably hereto it ſeems to be ſettled, (*b*) That a releaſe of damages to the appellant will diſcharge the abettors, if they can produce it.

(*a*) S. P. C. 170, 171. 2 Inſt. 386.

(*b*) 20 H. 7. 7.

Sect. 151. Secondly, That (*c*) unleſs the appellant be found by the jury to be inſufficient, the abettors ſhall not be inquired of; and yet the ſtatute doth not expreſsly direct that the jury ſhall inquire of the ſufficiency of the appellant. But it being the general method of the law in other caſes of the like nature, to make an inquiry by a jury, it is certainly a reaſonable conſtruction of the general words of the ſtatute that ſuch inquiry may be made in the preſent caſe. Yet, whether the juſtices themſelves may not, if they think fit, make ſuch inquiry without a jury, it being but an inquiry of office, may deſerve to be conſidered for the reaſons in the 52 and 147 ſections of this chapter. However, there can be no doubt but that the inſufficiency of the appellant muſt appear by one or the other of theſe inquiries, before the abettors can be inquired of.

(*c*) 2 Inſt. 386.

Sect. 152. Thirdly, That (*d*) the abettors may traverſe the jury's finding the appellant to be inſufficient, or that they abetted him, &c. For it is hard that a man ſhould be concluded by any matter whatſoever, found to his prejudice in an action, to which he is no way privy. Alſo it is holden by (*e*) Staundforde, That if a jury on the acquittal of one defendant find that there were no abettors, yet they may afterwards on the acquittal of another defendant find that there were abettors, becauſe there is no reaſon that the firſt inqueſt ſhall bind one who is not privy to it, and has no remedy againſt it. But the contrary hereto is holden in the book of (*f*) aſſizes, where the court refuſed to inquire of the abettors, on the acquittal of a defendant,

(*d*) S. P. C. 171. Qu. 8 Ed. 4. 3. 12 Coke 126. 2 Inſt. 386. Raſtal 44. B. Appeal 96.

(*e*) S. P. C. 170.

(*f*) 41 Aſſiz. 24.

becauſe it had been found on the acquittal of another, that there were no abettors; but this caſe, if thoroughly examined, ſeems repugnant to itſelf; for the jury were permitted on the ſecond acquittal to tax the damages, which yet are ſaid to have been taxed before; but to what purpoſe ſhould this be done, unleſs it were firſt found that the appellant was ſufficient, or elſe that there were abettors, which could not but control the firſt finding; as alſo the ſecond taxation of the damages muſt do, unleſs it were wholly the ſame with the firſt.

(a) 12 Coke 126. S. P. C. 170. 8 Edw. 4. 3. 8 H. 5. 6. 26 H. 8. 3. 2 Inſt. 386. F. Cor. 29. 386. 463. B. Appeal 96. Contra 41. Affize 8. F. Corone 219. B. App. 74.

Sect. 153. Fourthly, That (*a*) if the appellant be found ſufficient to render part of the damages, and not the whole, judgment ſhall be given againſt the abettors for the whole, and not for part againſt them, and for the other part againſt the appellant; for that theſe words of the ſtatute, "If peradventure the "appellor be not able to recompence the damages," muſt be underſtood of all the damages.

(*b*) F. Cor. 13.

Sect. 154. Fifthly, That (*b*) the appellee after his acquittal may ſue for the damages by attorney.

(*c*) F. Act. ſ. le Stat. 28. 2 Inſt. 386, 387. S. P. C. 171. 1 Inſt. 139.

Sect. 155. Sixthly, That (*c*) though the ſtatute expreſsly give only judicial proceſs for the recovery of the damages againſt the abettors, yet the appellee may, if he think fit, take out an original writ of abetment, grounded on the ſtatute, and therein count to greater damages than were found by the jury; which in reſpect of ſuch finding, being but in nature of an inqueſt of office, ſhall not conclude the appellee.

(*d*) S. P. C. 171. 2 Inſt. 386, 387.

Sect. 156. Seventhly, That (*d*) if the appellee chuſe rather to proceed for the recovery of his damages by judicial proceſs, than by original; it is ſafeſt for him to make uſe of a diſtreſs, which is given by the expreſs words of the ſtatute; yet there is a note (*e*) of an old caſe, wherein a *venire facias* was firſt awarded; but it is (*f*) queſtionable, whether this be juſtified by the ſtatute or not.

(*e*) F. Cor. 102. (*f*) S. P. C. 171. 2 Inſt. 386, 387.

(*g*) S. P. C. 171. 2 Inſt. 386. F. Cor. 45.

Sect. 157. Eighthly, That (*g*) it is time enough for the appellee to ſhew the time and place of the abetment, when the abettors appear upon ſuch proceſs; and by ſuch ſhewing he ſupplies the omiſſion of the jury in not finding any time or place, on their inquiry of the abetment, &c.

(*h*) S. P. C. 171. 1 Inſt. 139 F. Corone 386.

Sect. 158. Ninthly, That (*h*) the nonſuit of an appellee, either in an original writ, or proceſs againſt the abettors, whether before or after appearance, is no bar of a ſecond writ or proceſs.

(*i*) S. P. C. 170. F. Fines 2. 1 Aſſize 9. 22 Aſſize 39. 8 H. 4. 17.

Sect. 159. As to the ſeventh general point, *viz.* Where the appellant is to be fined; there can be no doubt but (*i*) that by the expreſs words of the above expounded ſtatute of Weſtminſter 2. c. 18. Wherever the appellant, or his abettors, are by the purport thereof to render damages to an appellee, they are alſo to be fined to the king, and impriſoned for a year. Alſo it

it ſeems clear from the general purport of the (*a*) books, That an appellant appearing to have brought an ill-grounded appeal, whether of felony or (*b*) mayhem, ſhall be fined, in many caſes wherein he is not liable to render damages by the ſtatute above mentioned; as where he is (*c*) nonſuit, either againſt all, or part (*d*) of the appellees only, whether after, or, as ſome (*e*) have holden, before appearance, or where the writ abates through the (*f*) default of the appellant in wilfully ſuing by a (*g*) wrong name, or a (*h*) vitious writ, &c. and even a *feme covert*, (*i*) ſuing an appeal known by her to be groundleſs, as for the death of a huſband whom ſhe knows to be alive, ſhall be fined. But it is certain that where a writ abates by the act (*k*) of God, or for any other cauſe, no way imputable to the appellant, he ſhall neither be fined nor amerced. Alſo it is certain, that an infant is in no caſe to be fined for a falſe appeal; but ſome (*l*) have holden that he may be amerced, which is contradicted by others, who ſay, (*m*) That an infant can in no caſe be amerced.

(*a*) See the books cited in the following part of this ſection. F. Cor. 137. 8 Coke 60. S. P. C. 170. ſeems contrary. (*b*) 40 Aſſize 1. F. Corone 214. (*c*) F. Fines 49. 41 Aſſize 8. F. Corone 219. Damages 77. (*d*) 22 Aſſize 82. F. Corone 182. (*e*) F. Fines 107. (*f*) 8 Coke 60. (*g*) 9 H. 5. 1. F. Fines 28. B. Fines 16. (*h*) F. Cor. 121. (*i*) B. App. 25. 8 H. 4. 17. Cro. Car. 161.

(*k*) F. Brief 612. (*l*) B. Fines for contempt 37. 41 Aſſize 14. (*m*) Co. Lit. 127. Vide 1 Danv. Abr. 462, 463.

CHAPTER THE TWENTY-FOURTH.

OF APPROVER.

HAVING gone through the ſeveral kinds of appeals by innocent perſons, I am now in the ſecond place to conſider the nature of an appeal by an offender, confeſſing himſelf to be guilty, who is commonly called a Prover or (*n*) Approver in Engliſh, or *probator* in Latin; becauſe he muſt at his peril prove his appeal in every point, and for ſo doing is pardoned of courſe.

(*n*) S. P. C. 142. 3 Inſt. 129. Summary 192. 2 Hale 225, 226.

And for the better underſtanding the nature of ſuch appeal, I ſhall examine the following particulars.—Firſt, When a man may be ſaid to become an approver.—Secondly, Who may be admitted to be approvers, and who not.—Thirdly, In what caſes —Fourthly, Of what offences.—Fifthly, Againſt what offenders —Sixthly, Before what juſtices—Seventhly, How they are to be ordered and demeaned, both before and after the appeal.—Eighthly, What proceſs is to be awarded againſt the appellees.—Ninthly, In what manner the court is to proceed upon, and after the trial.—Tenthly, How the approver is to be rewarded for making good his appeal.

Sect. 2. As to the firſt point, *viz.* When a man be ſaid to become an approver. It ſeems (*a*) agreed, That a man is then properly an approver, when being indicted of treaſon or felony, before competent judges, and in priſon for the ſame, and capable of being an approver, he confeſſes the indictment, and is ſworn to reveal all the treaſons and felonies he knows, and then before a coroner enters his appeal againſt all that were partners with him in the crime in the indictment being at the time of the appeal within the realm.

(*a*) Sum. 192. 2 Hale 227. 229. 3 Inſt. 129, 130. Cowper 335.

Sect. 3. As to the ſecond point, *viz.* Who may be admitted to be approvers, and who not; I ſhall obſerve, Firſt, That (*b*) a peer of the realm cannot be an approver.

(*b*) 3 Inſt. 129. Summary 192.

Sect. 4. Secondly, (*c*) neither the perſon attainted of treaſon, or felony, nor even one outlawed in a perſonal action, as ſome (*d*) ſay, can be an approver, becauſe by his attainder or outlawry, he is out of the law, and his accuſation ſhall not be of ſuch credit, as to put any perſon upon his trial.

(*c*) 3 Inſt. 129. Summary 192. S. P. C. 146. B. Cor. 81. 211. F. Cor. 112. 127. 367. 387. 443. 445. 11 Aſſize 27. 17 Aſſize 4. (*d*) B. App. 57. Sup. c. 23. ſ. 32. B. Cor. 175.

Sect. 5. Thirdly, That (*e*) an ideot, or perſon born deaf and dumb, or any one that is *non compos* at the time, or an infant under the age of diſcretion, cannot be an approver, becauſe no ſuch perſon ought to be admitted to take the oath before the coroner, without which there can be no approvement.

(*e*) 3 Inſt. 129. S. P. C. 147. Summary 192. ſup. c. 23. ſ. 32.

Sect. 6. Fourthly, That it is holden both by (*f*) Staundforde, (*g*) Coke, and (*h*) Hale, That no woman nor infant can be an approver; but it is obſervable that the opinions of Staundforde and Coke ſeem chiefly to be grounded on this foundation, that the appellee may have ſuch like exceptions againſt approvers, as the defendant may have an appeal brought by a lawful perſon, and therefore may except that the approver is within age, or a woman, &c. becauſe ſuch perſons cannot wage battle; but it being ſettled at this day, that theſe are no good exceptions to an appeal brought by a lawful perſon, as hath been more fully ſhewn in the precedent (*i*) chapter, it ſeems to be juſtly queſtionable, whether they are now to be admitted as good exceptions to an appeal, by an approver. To which may be added, that in the opinion of (*k*) Hale, contrary to that of (*l*) Staundforde and (*m*) Coke, a man above the age of ſeventy, or maimed, may be an approver, though he cannot wage battle; from whence it follows clearly, that in the judgment of Hale, there is no neceſſity that an approver ſhould be able to wage battle.

(*f*) S. P. C. 147. (*g*) 3 Inſt. 129. (*h*) Sum. 192. 2 Hale. 233.

(*i*) Sect. 30, 31.

(*k*) Sum. 192. 2 Hale 233. con. (*l*) S. P. C. 147. (*m*) 3 Inſt. 129. Vide Cowp. 336. Mrs. Rudd's caſe.

Sect. 7. Fifthly, That it ſeems to be (*n*) agreed, That a perſon in holy orders cannot be an approver, becauſe it is a rule, that no member of the clergy can ſue any appeal whatſoever, in a matter or cauſe of death.

(*n*) S. P. C. 147. Summary 192. 3 Inſt. 139.

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Sect. 8. As to the third point, *viz.* In what caſes one may be admitted to be an approver; I ſhall obſerve,—Firſt, That no (*a*) one ſhall be admitted to be an approver, till he hath confeſſed the crime charged againſt him in his indictment.

(*a*) F. Cor. 50. 251. 441.

Sect. 9. Secondly, That it is holden (*b*) in ſome books, that he that hath once pleaded not guilty, cannot be an approver, but ſhall be hanged, becauſe he is found falſe, and his confeſſion contradicts his former plea; yet the contrary hereunto is holden by (*c*) others, and (*d*) Staundforde admits that the court of grace, may admit ſuch perſons to be approvers, and this is as much as can be contended for in any other caſe; for it ſeems (*e*) agreed, That the court is not bound of right, to admit any perſon whatſoever to be an approver.

(*b*) 3 Inſt. 129. Summary 193. S. P. C. 144. F. Cor. 440. 21 Edw. 3. 18. 19 H. 6. 47.
(*c*) Finch 387. 12 Edw. 4. 10. Vide 2 H. 7. 3.
(*d*) S. P. C. 145.
(*e*) 3 Inſt. 129. Summary 194. 12 Edw. 4. 10. 21 H. 6. 34.

11 Hen. 7. 5. 2 Hale 226. 228, 229.

Sect. 10. Thirdly, That it is (*f*) agreed, That any one indicted of treaſon or felony may be an approver, but that unleſs the crime with which a perſon is charged, amount either to felony or treaſon, he cannot be an approver.

(*f*) 19 H. 6. 47. 3 Inſt. 129. 21 Edw. 3. 18. Finch 387, F. Corone 231. 2 Hale 227.

448. B. Corone 41.

Sect. 11. Fourthly, That it is alſo (*g*) agreed, That no perſon accuſed of treaſon or felony, can be an approver, unleſs he be actually indicted for it; becauſe his confeſſion amounts not to a conviction until he be indicted, and conſequently puts it not in the power of the court to give judgment againſt him, when his appeal ſhall be rejected or falſified, as every approvement ought to do.

(*g*) 3 Inſt. 129. Summary 193. 2 Hale 228. S. P. C. 143. F. Corone 231. ſeems contrary.

Sect. 12. Fifthly, That it ſeems alſo to be generally (*h*) agreed, That if a perſon indicted be alſo appealed of the ſame felony, he can no longer be an approver; the reaſon whereof ſeems to be, that though the king may in his diſcretion, by admitting a perſon to be an approver, reſpite the judgment and execution of one proſecuted by indictment, which is his own ſuit, yet he cannot delay them in an appeal, which is the ſuit of the party; and *à fortiori* therefore it follows, That (*i*) if a perſon be appealed only, and not indicted, he cannot be an approver.

(*h*) Inſt. 129. Finch 387. Summary 193. 2 Hale 228. S. P. C. 147. 181.
(*i*) 2 Rich. 3. 22. 11 H. 7. 5. B. Corone 228. F. Corone 442. 40 Aſſize 39. ſeems contrary.

Sect. 13. Sixthly, That notwithſtanding the appeal of an approver may in ſome reſpects be looked upon as the ſuit of the king, and equivalent to an indictment, yet the appellee (*k*) of an approver cannot become an approver himſelf, not only becauſe it would falſify the appeal of the firſt approver, in ſuppoſing that he had omitted ſome of his partners, but alſo becauſe it would cauſe an infinite delay; for the appellee of ſuch an approver might as well become an approver of others, and ſo on.

(*k*) F. Cor. 118. S. P. C. 147. 2 Hale 228. 11 H. 4. 93. ſeems contrary.

Sect. 14. As to the fourth point, *viz.* Of what offences a perſon may be admitted to approve another. It ſeems (*l*) agreed,

(*l*) S. P. C. 143. 2 Hale 227. Summary 194. Finch 387.

3 Inſt. 129. 150. 2 Inſt. 629.

agreed, That no one can approve another of any other offence, but the very crime contained in the indictment, and therefore that he cannot approve a man of a crime of a different (*a*) nature, nor even of being acceſſary (*b*) before or (*c*) after to the ſame crime, becauſe no man can abet, or receive himſelf. But it ſeems alſo to be agreed, That inaſmuch as the oath of an approver is (*d*) general, to diſcover all the treaſons and felonies he knows, if he accuſe any perſons of crimes of a different nature from his own, whether in the ſame, or a foreign (*e*) county, his accuſation will be a reaſonable ground to carry on a proſecution againſt them for ſuch crimes, though it (*f*) be not of itſelf of force ſufficient to put them on their trials.

(*a*) F. Cor. 127. 217. 40 Aſſize 39. 11 H. 4. 93.
(*b*) 27 Aſſize 69. 10 Edw. 4. 14. F. Cor. 35. 208. B Corone 154.
(*c*) F. Cor. 126.
(*d*) 2 Inſt. 629. Summary 194. Cowper 335. 12 Edw. 4. 10. F. Cor. 37. 387.
(*e*) F. Cor. 437.
(*f*) F. Cor. 126. 127. 387.

Sect. 15. As to the fifth point, *viz.* Againſt what offenders a perſon may be admitted to become an approver. It ſeems (*g*) clear, That a man may be an approver againſt any perſon whatſoever within the realm, whether he live in the ſame or a foreign county, provided he be named of the county wherein he dwells. But it is ſaid, That if it appear either by the (*h*) confeſſion of the approver, or the return (*i*) of the ſheriff, or the teſtimony (*k*) of perſons of credit in the county, that (*l*) there are no ſuch perſons as ſome of thoſe named in the appeal, *in rerum natura*, or within the (*m*) realm, or even (*n*) within the county, whereof they are named in the appeal, the approver ſhall be hanged, unleſs the (*o*) court in mercy will ſpare him, becauſe his appeal in reſpect of ſuch perſons appears to be falſe, or to no purpoſe.

(*g*) F. Aſſ 446. F. Cor. 460. S. P. C. 154.
(*h*) S. P. C. 145. 1 Edw. 4. 16. F. Cor. 153.
(*i*) Sum. 194. 21 H. 6. 34.
(*k*) Sum. 195. S. P. C. 145. F. Cor. 133.
(*l*) B. Cor. 49. 21 H. 6. 34. Summary 195.
(*m*) 1 Edw 3. 16. 1 Aſſize 2. S. P. C. 145.
(*n*) F. Co. 46.
(*o*) S. P. C. 145.

Sect. 16. As to the ſixth point, *viz* Before what juſtices a perſon may be admitted to be an approver. It ſeems to be a ſettled (*p*) rule, That a man may be an approver before any juſtices, who have power to aſſign a coroner to take the appeal; and for this reaſon it ſeems to be (*q*) agreed, That one may be an approver before the juſtices of the king's bench, and juſtices of gaol-delivery, and juſtices in eyre. And upon this ground it is holden in Sir Edward Coke's third (*r*) inſtitute, and alſo in Sir Matthew Hale's (*s*) pleas of the crown, under the chapter of approver, That a man may be an approver before juſtices of oyer and terminer. But the foundation of this opinion ſeems to be overthrown by what is ſaid by both theſe (*t*) authors in other places, wherein it is holden that juſtices of oyer and terminer cannot aſſign a coroner, becauſe it is not within their commiſſion: And it ſeems to be a (*u*) general rule, that thoſe only can receive the appeal of an approver who can aſſign a coroner to take it; and therefore it ſeems to be agreed, That neither a (*x*) court-baron, nor (*y*) juſtices of peace, nor any other ſpecial (*z*) juſtices, can receive ſuch appeal, unleſs their commiſſion extend to it. And for the like reaſon it ſeems to be the opinion of (*aa*) Sir Edward Coke, That the lord high ſteward

(*p*) 3 Inſt. 130. S. P. C. 143. Summary 194.
(*q*) 3 Inſt. 130. S. P. C. 143. Summary 194. 2 Hale 229. F. Aſſize 446.
(*r*) 3 Inſt. 130.
(*s*) Sum. 194. 2 Hale 229. con.
(*t*) 4 Inſt. 165. Summary 162. 2 Hale 31. 229.
(*u*) Sum. 194. 3 Inſt. 130. S. P. C. 143.
(*x*) Sum. 194. S. P. C. 144.
(*y*) 9 H. 4. 1. 2 H. 4. 19. 10 Coke 76. B. App. 18. Summary 194. 2 Hale 229.
(*z*) S P. C. 144.
(*aa*) 3 Inſt. 130.

ſteward of England cannot receive ſuch an appeal; but this is contradicted by Sir (a) Matthew Hale.

(a) Sum. 194. 3 Cowper 335.

Sect. 17. As to the ſixth point, *viz.* In what manner an approver is to be ordered and demeſned, both before and after the appeal; the following particulars ſeem moſt remarkable.—First, that it ſeems to be (b) agreed, That wherever a perſon indicted of treaſon or felony confeſſes the indictment, whether he appealed others or not, he puts it entirely in the diſcretion of the court, either to give judgment, and award execution againſt him, or to reſpite them till he ſhall have made good his appeal.

(b) 21 H. 6. 34. 19 H. 6. 35. B. Cor. 48, 49. F. Cor. 66, 67. 447. Summary 194. 2 Hale 216. Cowper 335. 3 Inſt. 129.

Sect. 18. Secondly, That (c) whenever a perſon is admitted to become an approver, the court ſhall aſſign a coroner to receive his appeal, and ſhall take an oath from him to diſcover *all* the treaſons and felonies that he knows.

(c) Sum. 194. 2 Inſt. 629. S. P. C. 143. F. Corone 37. 12 Edw. 4. 10.

Sect. 19. Thirdly, That (d) the court which admits a man to become an approver, ought to limit him a certain number of days, to make his appeal in, during which it is holden by (e) ſome, That he is to have a penny a day as his wages from the king; but by (f) others, That he ought not to have it till he has made good his appeal, by convicting the appellees.

(d) Sum. 195. 2 Hale 229. S. P. C. 145. 12 Edw. 4. 10. F. Cor. 37. 439. 26 Aſſize 19. (e) F. Cor. 439. Summary 194. Vide 2 Hale 230.

S. P. C. 145. B. Cor. 34. 11 H. 4. 93. (f) 21 H. 6. 34.

Sect. 20. Fourthly, That the approver during all the time aſſigned him for making his appeal, ought (g) to be at his liberty, and out of priſon; for (h) he may diſavow an appeal made by dureſs of impriſonment; but if he alledge that an appeal was extorted from him by ſuch dureſs, and ſuch allegation be found to be falſe, either by the examination of the coroner, or by an inqueſt of office, the approver ſhall be hanged.

(g) Sum. 195. F. Cor. 429. S. P. C. 145. (h) F. Cor. 218. 169. 255. 12 Aſſize 29. S. P. C. 145.

Sect. 21. Fifthly, that (i) the approver ought to make his appeal before the coroner, on every one of the days limited for the making of it; for if he fail on any one of them, and the coroner record ſuch failure, judgment ſhall be given againſt him.—And ſo ſhall it be (k) alſo, if after he have formed his appeal before the coroner, he make the leaſt variation in his repeating it before the court, and the coroner record ſuch variation.

(i) Sum. 145. B. Cor. 99. 26 Aſſize 19. S. P. C. 195. (k) Sum. 195. 2 Hale 230. S. P. C. 145. Cowper 335. 26 Aſſize 19.

Sect. 22. As to the ſeventh point, *viz.* What proceſs is to be awarded againſt the appellees. It ſeems (l) agreed, that the coroner may award proceſs to the ſheriff, againſt any appellee in the ſame county, till it come to the exigent; but it is certain, that (m) he cannot award it to any other officer, except the ſheriff, nor to any ſheriff out of his own county. And it ſeems (n) queſtionable, whether he be not reſtrained by the ſtatute of *magna charta*, c. 17. to award the exigent to the ſheriff of his own county. But it ſeems (o) agreed, that the juſtices of the king's

(l) Sum. 190. 2 Hale 231. S. P. C. 146. (m) F. Cor. 462. 2 Hale 231. 29 Edw. 3. 42. (n) Sup. c. 9. f. 41. 43.

(o) Sum. 196. S. P. C. 146. F. Corone 460.

king's bench, or juſtices in eyre, might by the common law as well award proceſs of outlawry, as any other proceſs, againſt appellees in any county whatſoever.—And it is (*a*) certain, That juſtices of gaol-delivery may award proceſs in any county, to apprehend and try them by force of 28 Edw. 1, commonly called the ſtatute *de appellatis*; but whether this ſtatute do impower ſuch juſtice to award proceſs of outlawry into a foreign county, may deſerve to be conſidered †.

(*a*) Sum. 136. 2 Hale 37. 231. S. P. C. 146.

† 2 Hale 37.

Sect. 23. As to the eighth point, *viz.* In what manner the court is to proceed upon, and after the trial; I ſhall obſerve,—Firſt, That it is in the election (*b*) of the appellee, either to put himſelf upon his country, or to wage battle with the approver.

(*b*) Sum. 196. S. P. C. 142. 3 Inſt. 130. 47 Edw. 3. 5.

Sect. 24. Secondly, That let there be never ſo many appellees, if they wage battle, the approver muſt fight them (*c*) all. But on the contrary, it ſeems to be generally (*d*) agreed, That if a perſon appealed by ſeveral approvers of one and the ſame felony, vanquiſhes any one of them, he ſhall be acquitted againſt them all, and all of them ſhall be condemned, in the ſame manner as if every one of them had been actually vanquiſhed. But if an approver having appealed ſeveral of the ſame crime, be vanquiſhed by one of them, it ſeems to be (*e*) holden, that his appeal is ſtill in force againſt the reſt. But the note in (*f*) Fitzherbert's Abridgement, which ſeems to be the foundation of this opinion, ſeems rather to be intended of an appeal by an innocent perſon, than of an appeal by an approver, in relation to whom it ſeems to be a general rule, that being once falſified as to any one of the appellees, he ought to be condemned, as hath been more fully ſhewn in the 9th and 15th ſections of this chapter.

(*c*) S. P. C. 180. 2 Hale 233, 234. Summary 196. 47 Edw. 3. 5. 39 H. 6. 35. 3 Inſt. 130.
(*d*) Sum. 196. S. P. C. 74. 106. 149. 180. 21 H. 4. 93. 21 H. 6. 34. 35. B. Cor. 31. 49. 3 Inſt. 130. F. Corone 143. 7 Edw. 3 12.
(*e*) S. P. C. 108.
(*f*) F. Cor. 98.

Sect. 25. Thirdly, That if the king pardon the approver or appellee, hanging the appeal, the approvement (*g*) ceaſes, and the appellee ſhall be diſcharged. For in the firſt caſe, by the pardon the felony is extinct, and a man can no longer be an approver, than while he is under the guilt of the crime, whereof the approvement is made, and liable to be condemned by the court, whenever his appeal ſhall be falſified, &c. And in the ſecond (*h*) caſe, it cannot be doubted but that the king's pardon will diſcharge the appellee, becauſe an approvement is rather the ſuit of the king, than of the party.

(*g*) 47 Ed. 3. 16. 47 Edw. 3. 5. F. Corone 103. Summary 201. 3 Inſt. 130. S. P. C. 149.

(*h*) Sum. 201. B. Corone 49. 21 H. 6. 35.

Sect. 26. Fourthly, That whether the appeal of an approver be falſified by the (*i*) confeſſion or vanquiſhment (*k*) of the approver, or verified by the conviction or vanquiſhment of the appellee; yet if the offence be within the benefit of clergy, neither the approver in the firſt caſe, nor the appellee in the ſecond, are excluded from it, any more than in the caſe of an indictment.

(*i*) F. Corone 128. 369. F. Aſſize 421. Sum. 197. con. 21 Edw. 3. 17. B. Corone 38. F. Corone 447.
(*k*) B. Cler. 5. 26. 21 H. 4. 93.

Sect. 27. As to the ninth point, *viz.* How the approver is to be rewarded for making good his appeal. It is ſaid, (*a*) That if an approver convict all the appellees, whether by battle or verdict, the king, *ex merito juſtitiæ*, ought to pardon him as to his life, and alſo give him his wages (*b*) from the time of the appeal to the time of his conviction. But (*c*) it ſeems, That anciently he ought not to be ſuffered to continue in the kingdom.

(*a*) Sum. 197. 2 Hale 233. S. P. C. 142. 3 Inſt. 129, 130. Con. 19 H. 6. 35. F. Corone 6.
(*b*) Vide ſup. f. 19.
(*c*) S. P. C. 143.

And it is recited by 5 Hen. 4. c. 2. "That divers notorious felons, for ſafeguard of their lives, had become provors, to the intent, in the mean time, by brocage, and great gifts, to purſue and have their pardons, and then after their deliverance, had become more notorious felons than they were before," and thereupon it is enacted, "That if any perſon pray or purſue, "or cauſe to be prayed or purſued for any ſuch felon ſo attainted by his own confeſſion, to have any charter of pardon, the name of him that purſues ſuch charter be put in "the ſame charter, making mention that the ſame charter is "granted at his inſtance. And if he to whom ſuch charter is "granted become a felon again, the party who purſued the "charter ſhall forfeit 100 *l.*"

Vide the caſe of Margaret Caroline Rudd. Cowper 331. O. B. 1774. No.

CHAPTER THE TWENTY-FIFTH.

OF INDICTMENT.

AN INDICTMENT is an accuſation, at the ſuit of the king, by the oaths of twelve men of the ſame county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true.

2 Hale 153.

But when ſuch accuſation is found by a grand jury, without any bill brought before them, and (*d*) afterwards reduced to a formed indictment, it is called a PRESENTMENT.

(*d*) Lamb. B. 4. c. 3.

And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an INQUISITION.

FOR the better underſtanding the nature of ſuch proceedings, I ſhall conſider the following particulars:—

1. Whether a grand jury may find part of a bill brought before them true, and part falſe.
2. Whether an indictment be merely the ſuit of the king.
3. What matters are indictable.

4. Where

4. Where a man may be tried at the ſuit of the king for a capital offence, without any indictment.

5. Whether a man may be arraigned on an indictment while an appeal is depending againſt him for the ſame offence.

6. Who may and ought to be indictors, and in what manner they are to be returned.

7. Within what place the offences inquired of muſt ariſe.

8. What ought to be the form of the body of an indictment.

9. What ought to be the form of the caption of it.

10. Upon what proof it may be found.

11. In what caſes it may be quaſhed.

12. What may be pleaded to it, and in what manner.

Sect. 2. As to the firſt point, *viz.* Whether a grand jury may find part of the bill brought before them true, and part falſe. It ſeems to be generally agreed, That they muſt either find *billa vera*, 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 (1), and the party (*a*) cannot be tried upon it, but ought to be indicted anew. And accordingly it hath been reſolved, That if a grand jury indorſe a bill of murder, (*b*) *billa vera ſe defendendo*; or *billa vera* for manſlaughter, (*c*) and not for murder; or if they indorſe a bill upon the ſtatutes of news, *billa vera*, (*d*) but whether *iſta verba prolata fuerunt malicioſe, ſeditioſe, vel e contra, ignoramus*; or if they indorſe an indictment of forcible entry, and forcible detainer, *billa vera* (*e*) as to the forcible entry, and *ignoramus* as to the forcible detainer; or if they indorſe, (*f*) That if the freehold were in J. S. or the poſſeſſion were in J. S. then they find *billa vera*, the whole is void.

Keilwood 50.
2 Keble 80.
(*a*) 2 Roll 52.
3 Bulſt. 206.
1 Roll 407 408.
(*b*) 2 Roll 52.
(*c*) 3 Bulſt. 206.
1 Roll 408.
1 Siderfin 230.
(*d*) Leon. 287.
(*e*) Yelv 99.
1 Siderfin 414.
Vide B. 1. c. 64. ſ. 40.
C. Jac. 151.
Con. 1 Sid. 99.
(*f*) Yelv. 15.

(1) This rule relates only to caſes where the grand jury take upon themſelves to find part of the *ſame indictment* to be true, and part falſe, and do not either affirm or deny the fact ſubmitted to their enquiry: But where there are two diſtinct counts, *viz.* one for a riot, and the other for an aſſault, and the grand jury find a true bill as to the aſſault, and indorſe *ignoramus* as to the riot, this finding leaves the indictment as to the count found, juſt as if there had been originally only that one count. Rex and Fieldhouſe, Cowper 325. Trin. 15 Geo. 3. B. R.

Sect. 3. As to the ſecond point, *viz.* Whether an indictment be merely the ſuit of the king. It is every day's practice, That it is ſo far eſteemed the king's ſuit, that the party who proſecutes it is a good witneſs to prove it. Alſo it ſeems to be agreed, (*g*) That no damages can be given to the party grieved upon an indictment, or any other criminal proſecution, (*h*) notwithſtanding the king, by his commiſſion erecting a new court, expreſsly direct, That the party ſhall recover his damages by ſuch a proſecution. Alſo, where by ſtatute damages are given to the party grieved by the offence intended to be redreſſed, it (*i*) ſeems that they cannot be recovered on an indictment grounded on ſuch ſtatute, unleſs ſuch method of recover-

(*g*) 1 R. Abr. 220.
2 R. Abr. 83.
C. Car. 531. 558.
(*h*) C. Car. 558.
Vide c. 1. ſ. 3, 4. 6, 7, 8.
(*i*) 1 R. Abr. 220.
1 Jones 380.
C. Car. 448.

ing

ing them be expreſsly given by the ſtatute; but that they ought to be ſued for in an action on the ſtatute, in the name of the party grieved. But it ſeems (*a*) certain, That the court of king's bench, having the king's privy ſeal for that purpoſe, may give to the proſecutor the third part of the fine aſſeſſed on a criminal proſecution, for any offence whatſoever. Alſo, it is every day's practice of that court, to induce defendants to make ſatisfaction to proſecutors for the coſts of the proſecution, and alſo for the damages ſuſtained by the injury whereof the defendants are convicted, by intimating an inclination on that account to mitigate the fine due to the king.

(*a*) 1 Keble 487.

Sect. 4. As to the third point, *viz.* What matters are indictable? There can be no doubt, but that all capital crimes whatſoever, and alſo all kinds of inferior crimes of a publick nature, as miſpriſions, and all other contempts, all diſturbances of the peace, all oppreſſions, and all other miſdemeanors whatſoever of a publick evil example againſt the common law, may be indicted; but no injuries of (*b*) a private nature, unleſs they ſome way concern the king. Alſo it ſeems to be a good general ground, That wherever the ſtatute prohibits a matter of a publick grievance to the (*c*) liberties and ſecurity of a ſubject, or commands a matter of publick (*d*) 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 aggrieved, 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 (1). Yet if the party offending have been fined to the king in the action brought by the party, as it is ſaid (*e*) 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. Alſo, if a ſtatute extend only to private (*f*) perſons, or if it extend to all perſons in general, but chiefly concern diſputes of a private nature, as thoſe relating to (*g*) diſtreſſes made by lords on their tenants, it is ſaid that offences againſt ſuch ſtatute will hardly bear an indictment (2).

Vide 3 Com. Digeſt 499. [D] and 501. [E]
(*b*) 27 Aſſ. 20. B. Indict. 16. Preſentment 26. Carth. 277. Strange 792. 2 Burr. 1127. 3 Burr. 1698. 1706. 1727. 1731. 1 Will. 301.
(*c*) 2 Inſt. 55. 163. C. Jac. 577. 10 Coke 75. 2 Croke 577. Ld Raymond 347. 721. 991. 10 Mod. 336. 12 Mod. 30. 104. 117. 223. 446. 502. 614.
(*d*) 1 Mod. 34. 1 Sid. 209, 230. 1 Keble 809. Fitzg. 47. 65. Strange 828. Burrow 828. 2 Seſſ. Ca. 19.
(*e*) 8 Coke 60. 2 Inſt. 131.
(*f*) 1 Sid. 209.

1 Modern 34. denied to be law in 1 Burrow 545. (*g*) 1 Mod. 71. 288. 1 Levinz 299. 146. Raymond 205. 1 Vent. 104. 2 Inſt. 131, 132. 2 Keble 687. 697. (1) Vide note (3) infra.

(2) It is not an indictable offence to impede the publick intercourſe by delivering hand-bills in the ſtreets. 1 Burr. 516—Nor to throw down ſkins into a publick way which accidentally occaſions a perſonal injury. Strange 190. Nor for killing a hare. Strange 679.—Nor for an offence made penal by ſtatute, without it directs to whom the penalty is payable, &c. Strange 828.; nor for acting, unqualified, as a juſtice of peace. Cro. Jac. 643.; nor for entering a yard, erecting a ſhed, unthatching a houſe, or by numbers keeping another out of poſſeſſion if unattended with violence or riot, &c. 3 Burr. 1698. 1706. 1727. 1731.; nor for ſelling ſhort meaſure, &c. 1 Will. 301. 3 Burr. 1697. nor for excluding commoners by incloſing. C. Eliz. 90.; nor for an attempt to defraud, if neither by falſe tokens or conſpiracy. Strange 793. 866. 6 Mod. 105.; nor for ſecreting another. Ld Raym. 1368. nor for bringing a baſtard child into a pariſh. Strange 644. 3 Burr. 1645. 2 Vezey 450.

Alſo, where a ſtatute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner

manner of proceeding againſt the offender, as by commitment, or action of debt, or information, &c. without mentioning an indictment, it ſeems to be (*a*) ſettled at this day, that it will not maintain an indictment, becauſe the mentioning the other methods of proceeding only, ſeems impliedly to exclude that of indictment. (*b*) Yet it hath been adjudged, That if ſuch a ſtatute give a recovery by action of debt, bill, plaint, or information, or otherwiſe, it authoriſes a proceeding by way of indictment. (*c*) 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 ſtill be indicted, if the proſecutor think fit, at the common law. And if the indictment for ſuch offence conclude *contra formam ſtatuti*, and cannot be made good as an indictment upon the ſtatute, it ſeems (*d*) to be now ſettled, That it may be maintained as an indictment at common law, as will be more fully ſhewn in the following part of this chapter (3).

(*a*) Bond's Caſe. M. 3 Geo. 1. Show. 398, 399. 3 Keble 34. 273. C. Jac. 643, 644. 3 Modern 79. 4 Modern 144. Carthew 263. Palmer 388. 1 Sid. 434. 439. 6 Modern 86. 2 Roll. 247, 248. 398. Seſſ. Caſe. 295. Ld Ray. 682. 991. 10 Modern 337. 12 Modern 104. 446. 502. 634. Fitz. 47. 65. Str. 62. 679. 828. 1256.

(*b*) Rex v. Dixon Trin. 3 Geo. 1. (*c*) 3 Modern 118. 1 Siderſin 192. ſeem con. (*d*) The Norwich caſe adj. Paſch. 3 Geo. 1. 2 Hale 171. contra.

(3) Where new created offences are only prohibited by the general prohibitory clauſe of an act of parliament, an indictment will lie. But where there is a prohibitory particular clauſe, ſpecifying only particular remedies, there ſuch particular remedy muſt be purſued. Lord Mansfield. 1 Burrow 545. and by Mr. Juſtice Deniſon. Where an offence, not ſo at common law, is made an offence by act of parliament, an indictment will lie where there is a ſubſtantive prohibitory clauſe, though there be afterwards a particular *proviſion* and a particular remedy given; but it is otherwiſe where the act is not prohibitory, but only inflicts the forfeiture, and ſpecifies the remedy. Ibid.—The true rule ſeems to be this; where the offence was puniſhable before the ſtatute preſcribing a particular method of puniſhing it, then ſuch particular remedy is cumulative (Burrow 799.) and does not take away the former remedy; but where the ſtatute only enacts, "That the doing an act, not puniſhable before, "ſhall, for the future, be puniſhable in ſuch and ſuch a particular manner," there it is neceſſary to purſue ſuch particular method; and not the common law method of indictment. Lord Mansfield. 2 Burrow 805. 834. Cowper 524. 650.

As to the fourth point, *viz.* Where a man may be tried at the ſuit of the king for a capital offence without any indictment; I ſhall endeavour to ſhew, Firſt, Where one may be ſo tried as having been taken with the *manieur*. Secondly, Where one may be ſo tried upon a verdict. Thirdly, Where upon an appeal not proſecuted. Fourthly, Whether one may be ſo tried upon a ſheriff's return.

(*e*) Ante c. 15. ſ. 41. 7 H. 4. 43. 26 Aſſize 32. 1 Edw. 3. 13. S. P. C. 28, 29. 148. 179. Summary 198. 1 Hale 187. 349. 2 Hale 146. 159. B. App. 130. 1 Aſſize 5. F. Cor. 156. 357.

Sect. 5. As to the firſt point, *viz.* Where one may be ſo tried as having been taken with the *manieur* (*e*). It is ſaid, That anciently if one guilty of larceny had been freſhly purſued and taken with the *manieur*, and the goods ſo found upon him had been brought into the court with him, he might be tried immediately without any indictment; and this is ſaid to have been the proper method of proceeding in ſuch manors which had the franchiſe of infangthefe, but ſeems to be altogether obſolete at this day (3).

(3) It is ſaid that proceedings upon the *manieur* are wholly taken away by 25 Eliz. 3. c. 4. 28 Ed. 3. c. 3. and 42 Edw. 3. c. 3. Vide 2 Hale 149.

Sect.

Sect. 6. As to the ſecond point, *viz.* Where one may be ſo tried upon a verdict: It is (*a*) ſaid, That in an action of treſpaſs in the king's bench, *de muliere abducta cum bonis viri*, if the defendant be found guilty of having carried away the woman and goods with force, and felonioufly; or (*b*) in a common action of treſpaſs in the ſaid court, for goods carried away, if it be found that the defendant felonioufly ſtole them, he ſhall be put to anſwer the felony without any further accuſation; for ſuch a charge by the oath of twelve men, on their inquiry into the merits of a cauſe in a court which has juriſdiction over the crime, is equivalent to an indictment, and the king being always in judgment of law preſent in court. may take advantage of any matter therein properly diſcloſed for his benefit. But ſuch a verdict in a court which has (*c*) no juriſdiction over criminal matters, ſeems to be of little force, becauſe ſuch court has nothing to do with ſuch matters. And it ſeems, (*d*) That even in the king's bench, if on any indictment whatſoever, except only an inquiſition of death, found before a coroner on view, a perſon not mentioned in it be found guilty of the crime whereof others are indicted, yet ſuch finding ſhall not ſerve for an indictment againſt him, becauſe it was wholly extrajudicial. (*e*) But ſuch finding of others guilty, whether in the king's bench, or other court of criminal juriſdiction, upon an inquiſition of death, found before a coroner on view, is of greater force, becauſe the jury acquitting the party ſo indicted, (*f*) ought to inquire what other perſon did the fact; becauſe it appears by a record of the higheſt credit, that a perſon is killed. (*g*) Alſo, if a perſon be declared againſt in a proper court, for having been guilty of a miſdemeanor, *ſimul cum* A. B. and C. and thereupon the jury find A. B. and C. guilty; it ſeems that ſuch verdict will ſerve for an indictment againſt them, becauſe it was not wholly extrajudicial.

(*a*) Sum. 199. 2 Hale 150*, 151*. S. P. C. 94, 95. F. Corone 122. F. Utlagary 49. 13 Aſſize 5. B. Corone 77.
(*b*) Sum. 199. S. P. C. 94. F. Indict. 31.
(*c*) S. P. C. 94. F. Indict. 31.
(*d*) 13 Ed. 4. 3. F. Corone 39.
(*e*) 13 Ed. 4. 3.
(*f*) Supra c. 9. ſ. 33.
(*g*) B. Indict. 13. 26 Aſſize 62.

Sect. 7. As to the third point, *viz.* Where one may be ſo tried upon an appeal not proſecuted; the following particulars ſeem moſt remarkable. Firſt, That an appeal by an innocent perſon, and an appeal by an (*b*) approver, are equally favoured in this reſpect.

2 Hale 149*, 150*.
(*b*) S. P. C. 147, 148. Sum. 199, 200. B. Appeal 53. B. Corone 3. 16. 49.

Sect. 8. Secondly, That regularly where a perſon is indicted and appealed of the ſame (*i*) crime, and the appeal is not proſecuted, he ſhall not (*k*) be arraigned upon the indictment, but upon the appeal.

4 Edw. 4. 10. B. App. 92. 149. S. P. C. 147.

(*i*) Sum. 199. 31 H. 6. 11. F. Corone 18. S. P. C. 107.
(*k*) 2 Hale 221. 33 Hen. 6. 1. F. Corone 114.

Sect. 9. Thirdly, (*l*) That if an appellant be nonſuit in an appeal by writ, before he hath declared the appellee cannot be arraigned at the king's ſuit on the writ of appeal; not only becauſe it contains no certainty of the circumſtances of the fact, which

(*l*) S. P. C. 148. Summary 199. B. Appeal 67. 130. F. Corone 156. 198. 357. 384.

which is the proper (*a*) office of the declaration to aſcertain; but alſo becauſe, for what appears to the contrary by the record, the writ might (*b*) have been purchaſed by a ſtranger: And therefore in ſuch caſe it ſeems to be in the diſcretion (*c*) of the court, either to diſmiſs the appellee, or to bail him, till it ſhall appear whether there will be any other proſecution againſt him. But if an appellant, by writ, be nonſuit after declaration, or any appellant by bill or approver, be nonſuit, it ſeems, (*d*) That regularly the appellee ſhall be arraigned at the king's ſuit, on the bill or declaration; becauſe they muſt be as certain as an indictment, and cannot be commenced but in perſon.

(*a*) See c. 23. ſ. 86, 87, &c.
(*b*) See c. 23. ſ. 26. 131.
(*c*) S. P. C. 148. B. Appeal 67. 130. 27 Aſſize 7. 1 Aſſize 5. F. Corone 156. 198. 357.
(*d*) S. P. C. 148. Sum. 199, 200. B. Appeal 67.

Sect. 10. Fourthly, That it ſeems to be a ſettled rule, That wherever an appeal is once well commenced, and afterwards ſo far determined, without a full acquittal, That neither the ſame, nor any (*e*) other plaintiff, can never bring another appeal againſt the ſame appellee, he may be arraigned upon the bill or declaration, at the ſuit of the king; as where an appellant, having a good title to the appeal, makes a releaſe (*f*) to the appellee, hanging the action, or ſuffers a (*g*) nonſuit, or (*h*) *retraxit*, or (*i*) demurs to a good plea or iſſue, tendered by the appellee, which demurrer is adjudged againſt him; or where ſuch an appellant or approver (*k*) confeſs their appeal to be falſe, (*l*) unleſs they make ſuch confeſſion in the field, upon a trial awarded by battle; for ſuch confeſſion amounts to a vanquiſhment of the appellant or approver, and conſequently is a full acquittal of the appellee; after which his life ſhall not be brought again into danger for the ſame crime. And this ſeems to be the only reaſon why after ſuch a vanquiſhment, or a verdict in his favour, an appellee ſhall be diſcharged, as well againſt the ſuit of the king, as that of the party. But it ſeems, That in all other caſes whatſoever, an appellee, in an appeal well commenced, being wholly diſcharged of the ſuit of the party, may be arraigned upon the appeal, at the ſuit of the king, whether ſuch diſcharge were merely owing to the act of the party, as in the caſes above mentioned, or to the act of the court; as (*m*) where an approver is judged to be hanged before he hath perfected his appeal; or (*n*) partly to the act of law, and partly to the act of the party; as where an appeal by a woman for the death of her firſt huſband, is abated by her marrying a ſecond; or where an appellee is diſcharged of an appeal, for not (*o*) having been made a defendant in a former appeal, brought by the ſame appellant for the very ſame fact; or whether ſuch diſcharge be merely owing to the act of God; as (*p*) where an appellant dies a natural death, while the appeal is depending. It ſeems indeed to be holden in the year-book (*q*) of 4 H. 6. as a general rule, that wherever a writ is abated, the declaration depending upon it is determined alſo, and conſequently, that the

(*e*) S. P. C. 148. B. Appeal 118. F. Corone 369. B. Corone 35. 9 H. 5. 2.
(*f*) S. P. C. 148. Summary 200. B. Appeal 27. F. Corone 12.
(*g*) Sum. 199. S. P. C. 147. C. Eliz. 460. F. Cor. 25. 381. B. N. prius 2. F. Utlag. 47.
(*h*) S. P. C. 147, 148.
(*i*) Dyer 120.
(*k*) S. P. C. 148. F. Corone 103. 3 H. 6. 50. 13 Aſſize 10. Summary 200. 47 Ed. 3. 5. B. Corone 3. 16. 49. 78. B. Appeal 53.
(*l*) 21 H. 6. 34. S. P. C. 148. Summary 200.
(*m*) S. P. C. 147. 21 Ed. 3. 17.
(*n*) S. P. C. 147. Summary 200.
(*o*) 47 Ed. 3. 16. F. Cor. 104.
(*p*) S. P. C. 147. 47 Ed. 3. 5.
(*q*) 4 H. 6. 16. B. Appeal 44.

the appellee cannot be arraigned upon it. But to this it may be anſwered, that in the very ſame place it is allowed, that after a nonſuit in an appeal, the appellee may be arraigned at the ſuit of the king; and it ſeems difficult to give a reaſon, why a writ is not as much determined upon a nonſuit, as upon an abatement. To which may be added, that the point adjudged, which was this, That where a writ abates for a miſnoſmer, the defendant ſhall not be arraigned at the ſuit of the king, ſeems plainly to go on this ground, That where a ſuit is ill commenced, the king ſhall not have a greater advantage from it than the party might have had; and therefore the opinion above mentioned, being alſo contradicted by the beſt (*a*) authorities, ſeems to be of little weight.

(*a*) S. P. C. 147. Summary 200.

Sect. 11. Fifthly, That wherever (*b*) an appeal abates for an inſufficiency of the writ, or is barred for want of a good title in the appellant, or for any other matter which ſhews it was ill commenced, the defendant ſhall not be arraigned upon it at the ſuit of the king, becauſe it never had a good foundation, and cannot give a greater advantage to the king than to the party himſelf who ſued. And, therefore, it ſeems to be agreed, That if an appeal be abated for want of form apparent in the writ, as (*c*) for the omiſſion of the word *habeas*, or for falſe (*d*) Latin, or for any other (*e*) apparent defect; or if it be abated for a defect not apparent of itſelf, but diſcloſed by the pleadings of the parties, as for a (*f*) miſnoſmer, or wrongful addition, or any ſuch like inſufficiency; or if it be abated on account of the diſability of the appellant; as by the plea of outlawry (*g*) for felony or treſpaſs; or if it be put without day upon a plea of excommunication of the appellant; or (*h*) if it be barred by a releaſe made before the commencement of the ſuit, or by reaſon that the time for bringing it was elapſed (*i*) before it was commenced, or becauſe the appellant appears to have never had any right to bring it; as where in an appeal by one as wife, it is found that ſhe was (*k*) never lawfully married to the deceaſed; or in an appeal by one as heir (*l*) to his father, is found that he hath an elder brother alive by the ſame father, &c. the appellee ſhall not be arraigned upon the appeal, at the ſuit of the king, but ſhall be wholly diſcharged of it. But where an appeal is put without day on the plea of (*m*) excommunication, the appellee ſhall be mainpriſed from day to day till the plaintiff be abſolved. And notwithſtanding it ſeems to be holden generally in ſome (*n*) books, That where an appeal is abated for any of the inſufficiencies above mentioned, or barred, the appellee ſhall be ſet at large, and be diſcharged, as well againſt the king as the party; yet (*o*) ſurely this muſt be

(*b*) B. Appeal 5. F. Corone 68. B. Corone 35. Contra 41. Aſſize 14. F. Age, 74.
(*c*) F. Cor. 121. S. P. C. 149. 13 Aſſize 10. B. Appeal 53.
(*d*) Sum. 200.
(*e*) B. Cor. 78. S. P. C. 148.
(*f*) B. App. 44. F. Cor. 12. 103. 4 H. 6. 15. 16. S. P. C. 148. Summary 200.
(*g*) S. P. C. 149. Summary 200. F. Utlagary 47. B. Appeal 57. 118. 146. 17 Aſſize 26. F. Corone 175.
(*h*) S. P. C. 148. F. Corone 12. Summary 200. Vide ſup. ſ. 10.
(*i*) S. P. C. 149. Summary 200.
(*k*) S. P. C. 149. Summary 200. F. Corone 3.
(*l*) S. P. C. 149. 27 Aſſize 25. B. Appeal 68. Summary 200. F. Corone 201. 3 & 4. Con. B. App. 53. 13 Aſſize 10.
(*m*) S. P. C. 149. B. Appeal 146.

13 Ed. 4. 8. 3. 3 Aſſize 12. F. Mainp. 6. (*n*) 18 Ed. 3. 35. 15. 11 Aſſize 27. 17 Aſſize 26. F. Utlag. 47. F. Corone 12. 68. 167. 175. 201. 384. B. Nonability 23. (*o*) Summary 200. Vide S. P. C. 149. B. Appeal 67. 130. F. Corone 156. 198. 357. F. Error 52. 27 Aſſize 7. 2 Aſſize 5. 32 Aſſize 8. 7 H. 7. 5.

underſtood only by ſuch caſes wherein it appears, That neither any indictment is preferred, nor intended to be preferred by the king, nor any other appeal preferred, nor intended to be preferred by the ſame or ſome other party; for otherwiſe ſurely it cannot but be intended, that it muſt be in the diſcretion of the court, upon conſideration of the circumſtances of the caſe, either to commit or bail the appellee for a reaſonable time, in order to anſwer ſuch further proſecution, or (*a*) to bind him to his good behaviour for a certain time, &c.

(*a*) F. Cor. 387. S. P. C. 149.

Sect. 12. Sixthly, That whatſoever may be pleaded by an appellee either in bar or abatement of an appeal, while it is carried on at the ſuit of the party, may (*b*) as well be pleaded by him, when it is proſecuted at the ſuit of the king; as (*c*) that the appellant ſuing an appeal of death, as wife to the deceaſed, was never married to him, or (*d*) that ſhe is outlawed, &c. which depends upon the reaſon taken notice of in the precedent ſections, *viz.* That an appeal ſhall not give the king a greater advantage than the party himſelf who ſued it.

(*b*) S. P. C. 172. Qu. F. Cor. 452.
(*c*) F. Cor. 3.
(*d*) 21 Ed. 3. 17. 20. B. Corone 37.

Sect. 13. Seventhly, That (*e*) wherever an appellee is arraigned upon the ſuit of the king, he may plead the king's pardon, in the ſame manner as if he had been arraigned upon an indictment: But if an appellee, who by pleading ſuch a pardon diſcharges himſelf of an appeal at the ſuit of the king, be alſo indicted, it is adviſeable (*f*) to take care at the ſame time when he is in ſuch manner diſcharged of the appeal, to have a ceſſer of proceſs entered on the indictment, to prevent the vexation of a cauſeleſs proſecution upon it.

(*e*) F. Mon. de faits 128. Summary 201. S. P. C. 104. F. Corone 25. 11 rd 4. 41. c. 24. f. 25.
(*f*) S. P. C. 104. Summary 201. 4 Ed. 4. 10. F. Corone 25.

Sect. 14. As to the fourth point, *viz.* Whether one may be tried at the ſuit of the king for a capital offence, without any indictment upon a ſheriff's return. It ſeems to be generally agreed, (*g*) That neither the ſheriff's return of a reſcous or eſcape, or of any other matter, nor any other record whatſoever, except only an appeal or indictment, or ſomething equivalent thereto, as the verdict of twelve men, finding a man guilty in ſuch manner as is above ſet forth in the 6th ſection of this chapter, can at this day put a man upon his trial for a capital offence, as being contrary not only to the common law, but to (*h*) MAGNA CHARTA, and other (*i*) ſtatutes made in affirmance of it.

(*g*) 2 Hale 151. Summary 201. 2 Inſt. 50.
(*h*) S. P. C. 31. 94. 95. 2 Ed. 3. 1. 1 H. 7. 6. F. Cor. 48. 149. B. Corone 130. Sup. c. 19. f. 15.
(*i*) 9 H. 3. c. 29. 25 Ed. 3. de proditionibus, c. 4. 28 Edw. 3. 3. 37 Edw. 3. 18.

Sect. 15. As to the fifth general point of this chapter, *viz.* Whether a man may be arraigned on an indictment, while an appeal is depending againſt him for the ſame offence. It ſeems (*k*) that it was the common practice before the ſtatute of 3 Hen. 7. c. 1. whether any appeal were depending or not, not to try any man upon an indictment of murder, before the year and day were paſſed, leſt thereby the ſuit of the party ſhould be prevented. And if ſuch regard were had to an appeal where

(*k*) See Pream. 3 H. 7. 1. S. P. C. 107. F. Cor. 44 82. 7 H. 4. 36.

where none was depending, it cannot be thought but that much (a) greater was had to one actually depending whether before or after the year and day were paſſed. (b) Yet it ſeems that the court was never in any caſe peremptorily bound to ſuſpend the proceedings on an indictment in reſpect of an appeal, but might always in diſcretion, whenever it ſhould ſeem proper, proceed on an indictment, hanging an appeal. And accordingly we find, that in many inſtances (c) in the old books, when it is holden, That in an appeal by an infant, the parol ſhould (d) demur till his full age, the court have proceeded to try a man upon an indictment, while an appeal by an infant was depending againſt him, to prevent the delay, which could not but be occaſioned, if the proceedings ſhould be deferred till the appellant ſhould come to full age. Alſo (e) where a writ of appeal of robbery hath been ſued out againſt a perſon under an indictment for the ſame robbery, and ready to be tried, the court have refuſed to put off the trial of the indictment in reſpect of ſuch writ of appeal; becauſe before the appellant hath declared, it doth not judicially appear, That both the indictment and appeal are for the very ſame fact. But if there was no ſuch ſpecial reaſon to induce the court to proceed upon an indictment while an appeal is depending, it ſeems to have been the general (f) practice to ſuſpend the proceedings on the indictment till the appeal were determined.

(a) 44 Ed. 3. 38 31 H. 6. 11. 21 Edw. 3. 23. F. Cor. 18. 114. F. Reſponder 36.
(b) 4 Coke 45. 7 H. 4. 34, 35. 21 H. 6. 28, 29. F. Conſpir. 6. F. Corone 82. Qu. F. Cor. 114. B. Appeal 41.
(c) F. Corone 278, 279. 32 Aſſize 8. 41 Aſſize 14. B. Appeal 75. Qu. F. Cor. 114.
(d) 21 Ed. 3. 23. B. Appeal 105. 119. 13 Aſſize 10. F. Age 41. 47. 17 Edw. 4. 2. B. Appeal 105.
(e) 31 H. 6. 11. F. Corone 18. Sup. c. 23. ſ. 30.
(f) Dyer 296. See the books cited to the other parts of this ſection.

As to the ſixth general point of this chapter, *viz.* Who may be, and ought to be indictors, and in what manner they are to be returned, I ſhall endeavour to ſhew, How theſe matters ſtand by the common law; and, How by ſtatute.

Sect. 16. As to the firſt particular, it ſeems clear, That by the common law every indictment muſt be found by twelve (g) men at the leaſt, every (h) one of which ought to be of the ſame (i) county, and returned by the ſheriff, or other proper officer, without the nomination of any other perſon whatſoever; and ought alſo to be a freeman, and a lawful liege ſubject; and conſequently neither under an (k) attainder of any treaſon or felony; nor a (l) villein, nor alien, nor outlawed, whether for a criminal matter, or, as (m) ſome ſay, in a perſonal action. And from hence it ſeems clear, that if it appear by the caption of an indictment, or otherwiſe, that it was found by (n) leſs than twelve, the proceedings upon it will be erroneous. (o) Alſo, it ſeems that any one who is under a proſecution for any crime whatſoever, may, by the common law, before he is indicted, challenge any of the perſons returned on the grand jury; as being outlawed for felony, &c. or villeins, or returned at the inſtance of a proſecutor, or not returned by the proper officer, &c.

(g) C. Eliz. 654. Vide 2 Burrows 1088. 3 Inſt. 30. 2 Inſt. 387.
(h) See Pream. 11 H. 4. 9. 3 Inſt. 32, 33, 34. 12 Coke 99.
(i) 2 Roll 82.
(k) 3 Inſt. 32.
(l) Popham 202. 1 Inſt. 156.
(m) 2 Hale 155. 3 Inſt. 32. 21 H. 6. 30. Vide F. Pro. 208. Qu. C. Car. 134. 147. 1 Jones 198, 199.
(n) C. Eliz. 654.
(o) 11 H. 4. 41. 147.

B. Corone 189. B. Indict. 2. 21 H. 6. 30. Qu. C. Car, 134, 135.

Sect. 17. Alſo many indictments in inferior (*a*) courts have been (*b*) quaſhed for want of the words *proborum & legalium hominum*, in the caption of the indictment, ſetting forth by what perſon it was found. (*c*) But this is ſaid to be no exception to an indictment found in the court of king's bench, or grand ſeſſions, or counties palatine, and hath been often (*d*) over-ruled, as to indictments in other courts; becauſe all men ſhall be intended to be honeſt and lawful, till the contrary appear.

(*a*) 1 Keble 629. 2 Keble 471. Ld Raymond 592. 609.
(*b*) C. Eliz. 751. C. Jac. 635. Palm. 282. 389. 2 Roll. 400. 2 R. Abr. 82. 3 Modern 122. Popham 202.
(*c*) 1 Keble 629. 2 Keble 471. 1 Levinz 208.
(*d*) 2 Keb. 135. 208. 1 Keb. 50. C. Jac. 41. 1 Sid. 106. 367. Qu. 2 R. Abr. 82.

Sect. 18. It is reſolved in the (*e*) year book of 11 Hen. 4. by the advice of all the juſtices, That one outlawed on an indictment of felony, may plead in avoidance of it, that one of the indictors was outlawed for felony, &c. But it ſeems to be the general (*f*) opinion, That this reſolution is rather grounded on the ſtatute of 11 Hen. 4. c. 9. which was made in the ſame term in which this reſolution was given, than on the common law; becauſe it appears by the very ſame year-book, that when this plea was firſt propoſed it was diſallowed; from whence, as I ſuppoſe, it is collected, That the ſubſequent reſolution was founded on the authority of the ſaid ſtatute, which may be intended to have been made after the plea was diſallowed, and before the ſubſequent reſolution, by which it was adjudged good. Yet, conſidering that the ſaid reſolution was given in the beginning of Hilary term, and that the parliament which made the ſaid ſtatute was not holden before the beginning of the ſame term; and therefore it is not likely that the ſaid ſtatute was ſo ſoon made; and alſo conſidering, that the ſaid reſolution was given by advice of all the judges, who ſeem to have been conſulted about the validity of the plea above mentioned at the common law, and takes no manner of notice of any ſtatute, but only of the law in general, it may deſerve a queſtion, Whether ſuch plea be not good at the common law?

(*e*) 11 H. 4. 41. F. Indict. 25. Corone 89. B. Indict. 2. Infra ſ. 27.
(*f*) S. P. C. 88. 12 Coke 99. Summary 202. 3 Inſt. 32, 33, 34. Vide C. Car. 134, 135.

Sect. 19. I do not find it any where holden, that none but freeholders ought to be returned on a grand jury (4). But how far the law is in this reſpect altered by ſtatute, ſhall be ſhewn in the twenty-firſt ſection.

Vide 2 R. Abr. 647, 648. C. Eliz. 413. C. Jac. 672.

(4) They ought to be freeholders, but to what value it is uncertain. 2 Hale 155. which ſeems to be *caſus omiſſus*, and proper to be ſupplied by the legiſlature. 4 Comm. 302.

Sect. 20. As to the ſecond particular, *viz.* How the matters above mentioned ſtand by ſtatute, it is enacted by the ſtatute of Weſtminſter 2. 28. "That old men above the age "of ſeventy years, perſons perpetually ſick, or infirm at the "time of the ſummons, or not dwelling in the county, ſhall "not be put in juries, or leſſer aſſizes." And the equity thereof,

of, and the reaſon of the thing, ſeem plainly ſo far to extend to grand juries, that if it ſhall appear, That any of the perſons above mentioned be returned on a grand jury, the court, into which they are returned, will eaſily excuſe their non-appearance. But it ſeems clear, (*a*) that any ſuch perſons being returned on a grand jury, may lawfully ſerve upon it, if they think fit. Neither do I find that they can have an action on the ſaid ſtatute for being ſo returned; for the writ (*b*) in the regiſter grounded on, and reciting the ſtatute, mentions the prohibition of it to be, that men above the age of ſeventy years ſhall not be put *in aſſiſis, juratis, vel recognitionibus aliquibus*, which expreſſions ſeem proper for petit juries only, whereas the (*c*) writ grounded on the ſtatute of *articuli ſuper chartas*, ſet forth at large in the twenty-firſt ſection, recites the prohibition thereof to be, that none of the perſons in the writ mentioned ſhall be but *in inquiſitionibus nec juratis*, which expreſſion ſeems to be of a large extent, and to take in grand as well as petit juries; by which it ſeems clearly to be implied, that in the judgment of thoſe who formed the ſaid writ, the ſtatute laſt mentioned is more general than the former.

(*a*) 2 Inſt. 448.

(*b*) Reg. 180. F. N. B. 166. Vide 2 Inſt. 447, 448.

(*c*) Regiſt. 178. F. N. B. 165. Vide 2 Inſt. 561.

Sect. 21. It is farther enacted by the above mentioned ſtatute of Weſtminſter 2. c. 38. "That none ſhall be put in aſſizes or juries, though they ought to be taken in the proper county, who have leſs tenements than to the value of twenty ſhillings yearly." And it is required by the ſtatute of 21 Edw. 1. commonly called the ſtatute *De his qui ponendi ſunt inaſſiſis*, That "they ſhould have tenements to the value of 40*s.* yearly;" Provided, "That before juſtices in eyre for common pleas "in their eyres, and alſo in aſſizes, and juries, which ſhall "be taken in cities and burghs, and other trading towns, the "ſame may be done as was accuſtomed:" And this exception is likewiſe mentioned in the (*d*) writ in the regiſter, which ſeems to be grounded on both theſe ſtatutes; by which it appears, That neither by the common law nor by theſe ſtatutes there was any neceſſity in proceedings before juſtices in eyre, &c. That petit jurors ſhould be freeholders; and if ſo, it ſeems probable that there is no greater neceſſity that grand jurors making an inquiry before them ſhould be freeholders; and if a grand juror before ſuch juſtices need not to be a freeholder, why ſhould there be a greater neceſſity that a grand juror before other juſtices ſhould be a freeholder? And it is farther remarkable, that the above mentioned writ in the regiſter, which ſeems to be grounded on theſe ſtatutes, mentions only perſons put *in aſſiſis, juratis, vel recognitionibus aliquibus:* To which may be added, that the (*e*) ſeveral ſubſequent ſtatutes, which require that none but freeholders or copyholders of lands of ſuch a value ſhall be returned on juries, expreſsly extend only to juries returned for the trial of iſſues, except only the (*f*) ſtatutes concerning indictments in the ſheriff's torn, which re-

(*d*) Regiſter 181. F. N. B. 166. Vide 2 R. Abr. 647, 648. C. Eliz. 413.

(*e*) 2 Hen. 5. ſt. 2. c. 3. 35 Hen. 8. c. 6. 27 Eliz. c. 6. 4 & 5 W. and M. c. 24. 7 & 8 W. 3. 32. 3 Geo. 2. c. 25

(*f*) Vide ſo. c. 10 ſ. 62, 66 & 68.

quire, that every juror finding ſuch indictment ſhall have 20*s.* yearly of freehold, or 26*s.* of copyhold, and alſo except 3 Hen. 7. c. 1. which requires that every juror of an inqueſt by which juſtices of peace ſhall inquire of concealments by other inqueſts ſhall have tenements of the yearly value of 40*s.* and alſo except 33 Hen. 6. c. 2. which requires that every indictment in the county palatine of Lancaſter, of perſons ſuppoſed by the ſame indictment to live in ſome other county, and alſo every indictment in any other county, of perſons in the ſame indictment, ſuppoſed to live in the ſaid county of Lancaſter, ſhall be taken by ſuch jurors only as have lands to the yearly value of one hundred ſhillings: All which ſeems to make it doubtful, whether there be any neceſſity either by the common law or ſtatute, that a grand juror in any other caſe muſt be a freeholder (5).

(5) Vide ſupra, note to ſection nineteen.

Sect. 22. It is enacted by 28 Edw. 1. commonly called the ſtatute of *articuli ſuper chartas*, cap. 9. "That no ſheriff, "nor bailiff, ſhall impanel in inqueſts, nor in juries over "many perſons, nor others, nor otherwiſe than as is ordained "by ſtatute: And that they ſhall put in thoſe inqueſts and "juries, ſuch as be next neighbours, moſt ſufficient and leaſt "ſuſpicious." And the like is enacted almoſt in the very ſame words by 42 Edw. 3. c. 11. And it is farther enacted by the ſaid ſtatute of *articuli ſuper chartas*, "That he who "doth contrary, and is attainted thereupon, ſhall pay unto the "plaintiff his damages double, and ſhall be grievouſly "amerced to the king." And the ſaid ſtatute of *articuli ſuper chartas*, is ſaid by Sir Edward Coke to extend to all ſuits or proceedings, either criminal or civil, real, perſonal, or mixed, publick or private, aſſizes or enqueſts; and ſurely that part of it which ordains, "that the moſt ſufficient and leaſt ſuſpicious "ſhall be returned on all juries," is ſo agreeable to common right and natural juſtice, that it cannot but be thought to be in affirmance of the common law, and equally to extend to grand and petit juries, and conſequently if any officer ſhall be wilfully guilty of an offence againſt it in the return of any jury, he cannot but be puniſhable for his contempt, at the ſuit of the king. And it is enacted by 23 Edw. 3. c. 6. "That juſtices of aſſizes ſhall have commiſſions ſufficient to inquire in their ſeſſions of ſheriffs, &c. for putting into panels jurors ſuſpect and of evil fame." And it is farther enacted by 34 Edw. 3. c. 4. "That all panels ſhall be made of the next people, "which ſhall not be ſuſpect nor procured. And that the "miniſters which do againſt the ſame, ſhall be puniſhed be-"fore the juſtices, who take the inqueſt, according to the "quantity of their treſpaſs, as well againſt the king as againſt "the party for the quantity of the damage which he hath "ſuffered in ſuch manner;" and both theſe ſtatutes ſeem equally to extend to the undue return of grand and petit juries.

2 Inſt. 561.

But

But it is obſervable, that the clauſe of the above recited ſtatute of *articuli ſuper chartas*, which ordains "that the ſheriff, "&c., ſhall render double damages," extends only to juries returned in ſuits between party and party, becauſe it ſays, that he ſhall render them to the plaintiff, which is a denomination never given to the king or proſecutor, where the proceeding is by way of indictment; and accordingly we find that the writs in the (*a*) regiſter grounded on this ſtatute expreſsly relate to ſuits between party and party.

(*a*) Regiſt. 178, F. N. B. 165.

Sect. 23. But the principal ſtatutes relating to the return of grand juries, are 11 Hen. 4. c. 9. and 3 Hen. 8. c. 12. the firſt whereof is as followeth, "Becauſe that now of late enqueſts were taken at Weſtminſter, of perſons named to the juſtices, without due return of the ſheriff, of which perſons ſome were outlawed before the ſaid juſtices of record, and ſome fled to ſanctuary for treaſon, and ſome for felony, there to have refuge, by whom, as well many offenders were indicted, as other lawful liege people of our lord the king, not guilty, by conſpiracy, abetment, and falſe imagination of other perſons, for their ſpecial advantage and ſingular lucre, againſt the courſe of the common law uſed and accuſtomed before this time:" Our ſaid lord the king, for the greater eaſe and quietneſs of his people, willeth and granteth, "That the ſame in-"dictment ſo made, with all the dependance thereof, be re-"voked, annulled, void, and holden for none for ever: And "that from henceforth no indictment be made by any ſuch "perſons, but by enqueſt of the king's lawful liege people, "in the manner as was uſed in the time of his noble progeni-"tors, returned by the ſheriffs, or bailiffs of franchiſes, with-"out any denomination to the ſheriffs, or bailiffs of franchiſes "before made by any perſon, of the names, which by him "ſhould be impanelled, except it be by the officers of the ſaid "ſheriffs or bailiffs of franchiſes ſworn and known to make "the ſame, and other officers to whom it pertaineth to make "the ſame according to the law of England: And if any in-"dictment be made hereafter in any point to the contrary, "that the ſame indictment be alſo void, revoked, and for ever "holden for none."

In the conſtruction of this ſtatute the following points have been reſolved.

Sect. 24. (*b*) Firſt, That where a perſon not returned by the ſheriff on a grand jury procures his name to be read among thoſe of others who were actually returned, whereupon he is ſworn of the grand jury, &c. he may be indicted, either in the king's bench (*c*) or before juſtices of oyer and terminer, for his contempt of the ſtatute; and being found guilty, may be fined and impriſoned; and yet the ſtatute doth not expreſsly provide

(*b*) 12 Co. 98, 99. 3 Inſt. 33.

(*c*) Supra c. 5. ſ. 33.

that any ſuch perſon ſhall be any way puniſhed, but only that the indictment ſhould be void, &c.

(a) 12 Coke 98. 3 Inſt. 33. C. Car. 134.

Sect. 25. (*a*) Secondly, That indictments of offences not capital, are as much within the ſtatute as indictments of treaſon or felony; and alſo indictments before juſtices of peace as much as indictments before ſuperior juſtices; but it hath been (*b*) queſtioned whether a coroner's inqueſt be within the purview of it.

(b) 1 Jones 198, C. Car. 134, 147.

(c) Sum. 202. 3 Inſt. 34. C. Car. 134. 147. 1 Jon. 198, 199.

Sect. 26. Thirdly, That a perſon arraigned upon any indictment taken contrary to the purview of the ſtatute, (*c*) may plead ſuch matter in avoidance of the indictment, and alſo plead over to the felony.

Sect. 27. Fourthly, That a perſon outlawed upon any ſuch indictment without a trial, may alſo ſhew in avoidance of the outlawry, that the indictment was taken contrary to the purview of the ſtatute, as ſeems fully to appear from the (*d*) abovementioned year-book of 11 Hen. 4. c. 41. But if a perſon, who is tried upon ſuch an indictment, takes no ſuch exception before his trial, it may be (*e*) doubtful whether he may be allowed to take ſuch exception afterwards, becauſe he hath ſlipped the moſt proper time for it; except it can be verified by the records of the ſame court wherein the indictment is depending, as by an outlawry in ſuch court of one of the indictors, &c. in which caſe it is (*f*) ſaid, That any one, as *amicus curiæ*, may inform the court of it.

(d) Sup. ſ. 17.

(e) 3 Inſt. 34. B. Indict. 2.

(f) 3 Inſt. 34.

(g) 11 H. 4. 41. pl. 8. Summary 202. S. P. C. 88. 3 Inſt. 33.

Sect. 28. (*g*) Fifthly, That if any one of the grand jury who find an indictment be within any one of the exceptions in the ſtatute, he vitiates the whole, though never ſo many unexceptionable perſons joined with him in finding it.

(h) C. Car. 134. 147. 1 Jones 198. 3 Inſt. 34.

Sect. 29. Sixthly, That if a priſoner indicted of felony offer to take any ſuch exception, he ſhall upon his prayer have (*h*) counſel aſſigned him for his aſſiſtance in it.

(i) C. Car. 147.

Sect. 30. (*i*) Seventhly, That the court needs not admit of the plea of the outlawry of an indictor, in avoidance of any ſuch indictment, unleſs he who pleads it, have the record ready.

(k) Jones 198, C. Car. 134. 147. Vide ſup. ſ. 16. 2 Hale 155*.

Sect. 31. It ſeems ſomewhat queſtionable, (*k*) whether outlawry in a perſonal action be within the purview of the ſtatute.

For other particulars relating to juries, vide 4 & W. and M. c. 24. 7 & 8 W. 3. c. 34. 3 & 4 An. c. 18. 3 Geo. 2. c. 25. 4 Geo. 2. c. 7. ſ. 3.

Sect. 32. It is recited by the above mentioned ſtatute of 3 Hen. 8. c. 12. "That many oppreſſions had been, by the untrue demeanor of ſheriffs and their miniſters, done to great numbers of the king's ſubjects, by means of returning, at ſeſſions holden for the bodies of ſhires, the names of ſuch perſons, as for the ſingular advantage of the ſaid ſheriffs and their miniſters, would be wilfully forſworn and perjured, by the

miniſter

ſiniſter labour of the ſaid ſheriffs and their miniſters; by reaſon whereof many ſubſtantial perſons (the king's true ſubjects) had been wrongfully indicted of divers felonies and other miſbehaviour by their covin and falſehood; and alſo ſometimes by labour of the ſaid ſheriffs, divers great felonies had been concealed, and not preſented by the ſaid perſons, by the ſaid ſheriffs and their miniſters partially returned, to the intent to compel the offenders to make fines, and give rewards to the ſaid ſheriffs and their miniſters."

And thereupon it is enacted, "That all panels to be returned, which be not at the ſuit of any party, that ſhall be made and put in by every ſheriff and their miniſters afore any juſtice of gaol-delivery, or juſtices of peace, whereof one to be of the quorum, in their open ſeſſions, to enquire for the king, ſhall be reformed by putting to, and taking out of the names of the perſons which ſo be impanelled by every ſheriff and their miniſters, by the diſcretion of the ſame juſtices, before whom ſuch panels ſhall be returned. And that the ſame juſtice and juſtices ſhall command every ſheriff, and their miniſters in his abſence, to put other perſons in the ſame panel by their diſcretions: And that the ſame panels ſo reformed by the ſaid juſtices be good and lawful. And that if any ſheriff, or any their miniſter, at any time do not return the ſame panels ſo reformed, that then every ſuch ſheriff and miniſter ſo offending ſhall forfeit for every ſuch offence 20 *l.* &c."

N. B. If the inhabitants of a hundred have enjoyed an immemorial exemplification from ſerving upon juries, they are not liable to be ſummoned under any of the diff-rent ſtatutes relative to jurors. Douglas 188.

Sect. 33. It hath been reſolved that this ſtatute doth not take away the force of the above recited ſtatute of 11 Hen. 4. in any point wherein it doth not expreſsly vary from it; from whence it follows, that if any of the jurors who find an indictment be outlawed, or returned by a ſheriff or bailiff, at the nomination of any other perſon, the indictment may be avoided in the ſame manner as before, by force of 11 Hen. 4. except ſuch nomination be made by the juſtices authoriſed by 3 Hen. 8. to reform that panel.

Summary 202, 2 Hale 156*, 3 Inſt. 33. Con. S. P. C. 88. 4 St. Tr. 183. Upon what evidence the grand jury may find an indictment. Vide poſt ſ. 145.

Sect. 34. As to the ſeventh general point of this chapter, *viz.* Within what place the offences inquired of muſt ariſe. Notwithſtanding it was anciently (*a*) holden, That if one who had committed a robbery in the county of A. were taken with the *manner* in the county of B. he might be put to anſwer in the county of B. (by which I ſuppoſe it is intended that he might be put to anſwer on an indictment found in the county of B.), and then tried by a jury from the county of A, yet it ſeems to be generally (*b*) agreed at this day, that by the common law, no grand jurors can indict any offence whatſoever, which doth not ariſe within the limits of the precincts for which they are returned. And upon this ground it hath been reſolved to be a fatal exception to an indictment, that it doth not

(*a*) 26 Aſſ. 32, F. Corone 194. Sup. ſ. 5.

(*b*) 3 Inſt. 49. Summary 203. 4 Comm. 303.

not appear by it that the offence aroſe within the (a) county, or (b) riding, or (c) other ſpecial diviſion, or (d) precinct, for which the jury which found it was returned. And *à fortiori* therefore it muſt be a (e) good exception, that it expreſsly appears by the indictment that the offence aroſe in a county, &c. different from that for which the jury was returned. And it is (f) holden, that even the finding of a collateral matter expreſsly alledged in the indictment to have happened in a different county, is void. But (g) ſome have holden, that if the county be expreſſed in the margin of an indictment, the vill or vills, in which the offence is laid, ſhall be intended to be in the ſame county. But the greater (h) number of authorities require a greater certainty, as by expreſsly alleging ſuch vill or vills in the county named in the margin, or *in comitatu prædicto*, which ſeems to be ſufficient where but one county is named before; but to be (i) uncertain where a county is named in the body of the indictment different from that in the margin. But it ſeems from the authority of (k) Baud's caſe, that if a fact be alleged in B. *juxta* D. *in comitatu* E. being the ſame county for which the jury is returned, the county is ſet forth with ſufficient certainty, becauſe B. ſhall be intended to be in the ſame county with D. Alſo if one be indicted for a reſcous from an arreſt in the county of B. it hath been (l) holden, That it is needleſs to expreſs the county wherein the reſcous was done with greater certainty, becauſe it ſhall be intended to have been in the ſame county wherein the arreſt was; *à* (m) *fortiori* therefore, if a fact be alleged at B. in the pariſh of C. in the county of D. it cannot but be intended that B. as well as C. is in the county of D.

(a) 1 Bulſt. 203. 205. C. Eliz. 137. Dyer 69. 2 Keble 302.
(b) C. Jac. 276.
(c) C. Jac. 276.
(d) Keilw. 89. 33.
(e) C. Eliz. 137.
(f) C. Jac. 17.
(g) 1 Bulſt. 203. 2 Siderfin 312. Keilwood 33. C. Jac. 167.
(h) 1 Sid. 345. C. Eliz. 606. 677. 738. 751. C. Jac. 96. 276. 2 Keble 302. 3 P. Will. 439.
(i) C. Eliz. 100. 284. 436.
(k) C. Jac. 41.
(l) C. Jac. 345. F. Corone 45. F. Attach. 1. F. Ret. de Viſc. 32. B. Ret. de Brief 97. 3 H. 7. 11. 5 H. 7. 17. 10 Edw. 4. 15. Dyer 69.
(m) C. Eliz. 108. Andrews 162.

Sect. 35. But of whatſoever nature an offence indicted may be, whether local or tranſitory, as ſeditious words, or battery, &c. it ſeems to be (n) agreed, That if upon not guilty pleaded it ſhall appear, that it was committed in a county different from that in which the indictment was found, the defendant ſhall be acquitted, as ſhall be ſhewn more at large in the chapter concerning evidence.

(n) Sum. 203. Kelynge 15. 2 Hale 163.

Sect. 36. And therefore at the common law, if a man had died in one county of a ſtroke received in another, it ſeems to have been the more (o) general opinion, that regularly the homicide was indictable in neither of them, becauſe the offence was not complete in either, and no grand jury could inquire of what happened out of their own county. But this inconvenience is remedied by 2 & 3 Edw. 6. c. 24. by which it is enacted, "That where any perſon ſhall be feloniouſly "ſtricken, or poiſoned in one county, and die of the ſame "ſtroke or poiſoning in another county, that then an indict-"ment thereof found by jurors of the county where the death "ſhall happen, whether it ſhall be found before the coroner, "upon the ſight of ſuch dead body; or before the juſtices of "peace,

(o) Vide B. 1. c. 31. ſ. 13. 6 H. 7. 10. 10 H. 7. 28. F. Indict. 23. See Prea. 3 Ed. 6. 24. Con. F. Cor. 373. Indict. 24. 7 H. 7. 8. 10 H. 7. 20. F. Corone 446. 2 Hale 164.

" peace, or other juſtices or commiſſioners, which ſhall have " authority to inquire of ſuch offences, ſhall be as good and " effectual in the law, as if the ſtroke or poiſoning had been " committed and done in the ſame county where the party " ſhall die, or where ſuch indictment ſhall be ſo found."

† Alſo it is enacted by 2 Geo. 2. c. 21. " That where " death ſhall happen in England from any cauſe felonioufly " given out of England; or where the felonious cauſe ſhall " be given in England and the death enſue in any place out " of England, an indictment thereof found by the jurors of " the county, in which either the death or the cauſe of the " death ſhall reſpectively happen, ſhall be as good and effec- " tual in law, as well againſt the principals and acceſſaries, " as if the offence had been compleated in the ſame county " where ſuch indictment ſhall be found, &c." Vide Book the firſt p. 120.

Sect. 37. And it ſeems by the common law, if a fact done in one county prove a nuſance to another, it may be indicted in (*a*) either county. (*a*) Sum. 203. F. Bar. 279. Aſſize 446. 19 Aſſize 6.

Sect. 38. Alſo by the common law, if one guilty of larceny in one county carry the goods ſtolen into another, he may be indicted in (*b*) either, as hath been more fully ſhewn in the firſt (*c*) book. (*b*) Keilw. 160. 4 H. 7. 5. F. Corone 62. (*c*) Ch. 33. S. c.

Sect. 39. Alſo if a man marry two wives, the firſt in a foreign country, and the ſecond in England, it is (*d*) holden that he may be indicted and tried for it in England upon the ſtatute of 1 Jac. 1. c. 11. which makes it felony; becauſe the ſecond marriage alone was criminal, and the firſt had nothing unlawful in it, and was merely of a tranſitory nature: But where the ſecond marriage is in a foreign country, it hath been holden, That the party is not triable on the ſtatute above mentioned; but this ſeems contrary to the purview of it, as hath been more fully ſhewn in Book 1 chap. 43. ſect. 7. (*d*) 1 Sid. 177. Kelynge 79. 80. 2 Hale 164.

Sect. 40. Alſo if a woman be taken with force in one county, and carried into another, and there married, the offender may be indicted and tried in the ſecond county, upon the ſtatute of 3 Hen. 7. c. 2. againſt forcible marriage, becauſe the continuance of the force in ſuch county amounts to a forcible taking within the ſtatute. But if an offence in ſtealing, taking away, withdrawing, or avoiding a record, againſt the purport of 8 Hen. 6. c. 12. be committed partly in one county and partly in another, ſo as not to amount to a compleat offence within the ſtatute in either, it is ſaid that the party cannot be indicted for a felony in either, but only for a miſpriſion. B. 1. c. 42. ſ. 19. B. 1. c. 45. ſ. 6.

Sect. 41. It is enacted by 26 Hen. 8. c. 6. " For the puniſhment and ſpeedy trials, as well of the counterfeitors of any coin current within this realm, waſhing, clipping, or miniſhing of the ſame, as of all and ſingular felonies, murders, wilful Vide the caſe of Parry v Roberts, Book the firſt, p. 220. notes.

wilful burning of houſes, manſlaughters, robberies, burglaries, rapes, and acceſſaries of the ſame, and other offences feloniouſly done within any lordſhip marcher of Wales," "That the "juſtices of the gaol-delivery, and of the peace, and every of "them for the time being in the ſhire or ſhires of Eng-
(6) Vide Rex v. Amery, Trin. 26 Geo. 3. Durnford and East 363.
"land, where the king's writ runneth, (6) next adjoining to "the lordſhip marcher, or other places in Wales, where ſuch "counterfeiting, waſhing, clipping, or miniſhing of any coin "current within this realm, or murder ſhall be committed; "or where any other felonies or acceſſaries ſhall be committed, "ſhall have full power at their ſeſſions and gaol-delivery, to "inquire by verdict of twelve men of the ſame ſhire or ſhires "next adjoining, within England, where the king's writ "runneth, there to cauſe all ſuch counterfeiters, waſhers, "clippers of money, felons, murderers, and acceſſaries to the "ſame, to be indicted according to the laws of this land, in "like manner and form, as if the ſame petit treaſons, mur-"ders, felonies, and acceſſaries to the ſame, had been done "within any of the ſaid ſhires within the ſaid realm: And alſo "to hear, determine and judge the ſame, according to the "laws of the realm."

(a) 1 Mod. 64. 68. 2 Keble 685. Car. 247. 331. 2 Hale 157. See b. 1. c. 31. ſect. 14.
Sect. 42. And it ſeems generally to have been (*a*) holden, That the power given by this ſtatute to the juſtices of gaol-delivery, and of peace, in the adjoining Engliſh counties, in relation to the offences therein mentioned, is not repealed by 34 & 35 Hen. 8. c. 26. which impowers the juſtices of the grand ſeſſions in Wales to take indictments of ſuch offences. But it hath been (*b*) reſolved, That an acquittal on an indictment at the grand ſeſſions is a good bar of an indictment for the ſame crime in an Engliſh county.

(b) 1 Levinz 118.
Sect. 43. It is enacted by 28 Hen. 8. c. 15. which hath been more fully ſet forth and expounded in Book 1. c. 37. "That treaſons, felonies, and robberies, &c. upon the ſea, "&c. ſhall be inquired, &c. in ſuch places in the realm as "ſhall be limited in the king's commiſſion, in like manner as "if ſuch offences had been committed on the land."

Qu. Moor 121.
Sect. 44. It hath been reſolved, That this ſtatute extends not to offences done in creeks or ports within the body of a county, becauſe ſuch offences were always cogniſable by the common law.

(c) 3 Inſt. 11. 112. 4 Inſt. 124.
Sect. 45. Alſo it hath been (*c*) reſolved, That the force of this ſtatute, in relation to treaſons done upon the ſea, is not taken away by 35 Hen. 8. c. 2. more fully ſet forth in the forty-ſeventh ſection.

(d) Yelv. 134, 135. 13 Coke 51, 52. Noy 131. Con. Summary 77. 3 Inſt. 112.
Sect. 46. It was made a (*d*) doubt upon this ſtatute, Whether one who was an acceſſary at land to a felony at ſea, were triable by the admiral, within the purview of it; but this is ſettled by 11 & 12 Will. 3. c. 7. made perpetual by 6 Geo. 1. c. 19. which enacts, "that acceſſaries to piracy before or after,"

in

in ſuch manner as is ſet forth more at large in that ſtatute, "ſhall be inquired of, tried, and adjudged according to the "ſaid ſtatute of 28 Hen. 8. c. 15."

† And it is enacted by 8 Geo. 1. c. 24. made perpetual by 2 Geo. 2. c. 28. "That all perſons who are made acceſſaries "by 11 & 12 Will. 3. c. 7. ſhall be deemed and taken to be "principal pirates, felons, and robbers, and ſhall be proceed-"ed againſt accordingly."

Vide alſo 4 Geo. 1. c. 11. 18 Geo. 2. c. 30. Book the firſt p. 120.

Sect. 47. It is farther enacted by the ſaid ſtatute of 11 & 12 Will. 3. c. 7. "That all piracies and felonies upon the ſea, &c. may be tried at ſea, or upon the land, in his majeſty's plantations," in ſuch manner as hath been more fully ſet forth in the firſt book.

4 Geo. 1. c. 11. Vide 8 Geo. 1. c. 24. 18 Geo. 2. c. 30.

Sect. 48. It ſeems to have been a great (*a*) doubt before the making of the ſtatute of 35 Hen. 8. c. 2. in what manner and in what place high treaſon done out of the realm was to be tried. For ſome ſeem to have holden, That it was triable only upon an (*b*) appeal before the conſtable and marſhal; others, that it might be tried upon an indictment, laying the offence in (*c*) any county where the king pleaſed; and others, that it was triable by way of indictment in that county (*d*) only wherein the offender had lands: But ſurely it (*e*) cannot reaſonably be doubted, but that it was triable ſome way or other, for it cannot be imagined that an offence of ſuch dangerous conſequence, and expreſsly within the purview of 25 Edw. 3. ſhould be wholly diſpuniſhable, as it muſt have been, if it were no way triable.

(*a*) 19 E. 4. 6. See the preamble of 35 H. 8. 2.

(*b*) Vide ſup. c. 4. ſect. 9. and c. 23. ſ. 29. Dyer 131.

(*c*) 1 Inſt. 261.

(*d*) Sum. 204. 3 Inſt. 11.

(*e*) Con. Dyer 131. and 11 Co. 63.

Sect. 49. But for a plain remedy, order, and declaration of this matter, it is enacted by 35 Hen. 8. c. 2. "That all man-"ner of offences, being then already made or declared, or "after to be made or declared, by any of the laws and ſta-"tutes of this realm, to be treaſons, miſpriſions of treaſons, "or concealments of treaſons, and done, perpetrated, or com-"mitted by any perſon or perſons, out of this realm of Eng-"land, ſhall be from thence forth inquired of, heard and de-"termined before the king's juſtices of his bench, for pleas "to be holden before himſelf, by good and lawful men of "the ſame ſhire, where the ſaid bench ſhall ſit and be kept, "or elſe before ſuch commiſſioners and in ſuch ſhire of the "realm, as ſhall be aſſigned by the king's majeſty's commiſ-"ſion, and by lawful men of the ſame ſhire, in like manner "and form to all intents and purpoſes, as if ſuch treaſons, "miſpriſions of treaſons, or concealments of treaſons, had been "done, perpetrated, and committed within the ſame ſhire, "where they ſhall be ſo inquired of, heard and determined, as "is aforeſaid."

1 Anderſon 262. 2 Hale 164.

Sect. 50. In the conſtruction of this ſtatute the following points have been reſolved. Firſt, That if the court of king's bench,

bench, or commiſſioners appointed in purſuance of the ſtatute, after having taken an indictment of a foreign treaſon, remove into a different county from that in which the indictment was found, the (*a*) trial ſhall be by jurors returned from the firſt county. And this is moſt agreeable to the general courſe of the common law; which (*b*) requires, That indictments ſhall be tried by jurors of the ſame county in which they were found.

(*a*) Sum. 204. 3 Inſt. 34.
(*b*) S. P. C. 90. Vide Dyer 286.

Sect. 51. Secondly, That the commiſſioners and county for the trial of ſuch treaſons, are (*c*) ſufficiently aſſigned by the king in purſuance of this ſtatute, by his either writing his name to the commiſſion that appoints them, or ſigning the warrant to the lord keeper for the commiſſion.

(*c*) Sum. 16. 205. 3 Inſt. 11. The king cannot by his *charter* give judges a power to try in one county offences committed in another, Ld. Mansfield. Douglas 796.

Sect. 52. Thirdly, That a treaſon done by an (*d*) Iriſhman in Ireland, is triable in England according to the purview of this ſtatute; for Ireland being out of the realm of England, a treaſon committed (*e*) in it is certainly within the letter of the act; and nothing within the letter of a ſtatute made for enlarging the juriſdiction, and ſupplying the defects of the common law, ſhall eaſily be conſtrued out of the meaning of it. And therefore it ſeems reaſonable, that any offence which by 25 Edw. 3. or any other ſubſequent ſtatute, either expreſsly extending to, or (*f*) received in Ireland, is equally treaſon in Ireland and England, may be tried here by virtue of this ſtatute.—But if an offence be made treaſon by an Iriſh ſtatute, which is not treaſon in England, I ſee not how it can be tried here; ſince being neither made nor declared to be treaſon by any law or ſtatute of this realm, it is not within the deſcription of the offences provided for by 35 Hen. 8. To which may be added, that offences beyond ſea, to be tried here by virtue of that ſtatute, are to be inquired of and determined in like manner as if they had been committed in ſuch ſhire wherein they ſhall be inquired of and determined; but if an offence which is treaſon in Ireland and not in England, had been committed in any Engliſh county, it is manifeſt that it could not be puniſhed as treaſon.—Alſo it hath been (*g*) reſolved, That no treaſon committed in Ireland by an Iriſh peer, is triable in England, becauſe he is intitled to a trial by his peers, which cannot be had (7).

(*d*) 3 Inſt. 11. 1 And. 262, 263. Sum. 16. 205. 1 Hale 155. 11 Coke 63. 3 Keble 560. 566. Warner's Caſe.
(*e*) See B. 1. c. 17. ſect. 67.
(*f*) 1 And. 263. 1 Sider. 357.
(*g*) Dyer 360.
(7) Reſolved by three judges in Dyer 360. Vide alſo O'Rouck's Caſe, 1 Anderſon 262. But in the Caſe of Ld Macguire, 1 St. Tr. 928. 1 Hale 155. 284. the reſolution in Dyer was declared not to be law, and it was ruled that an Iriſh peer might be tried by a common jury in England for a treaſon committed in Ireland. Sed Quære.

Sect. 53. Fourthly, That this ſtatute is not (*b*) repealed by 1 & 2 Ph. and Mary, c. 10. which enacts, "That all trials "hereafter to be had, awarded or made, for any treaſon, ſhall "be had and uſed, according to the common laws of the realm "and not otherwiſe." For it is the manifeſt purport of this ſtatute to reſtore the ancient courſe of the common law as to the trial of treaſons, in which great innovations had been made by ſtatutes

(*b*) 11 Coke 63. Co. Litt. 261. 1 Hale 284. Summary 205. 3 Inſt. 24. 1 Anderſon 262. S. P. C. 90. Dyer 131. 286. 298. 300. 2 Hale 164.

ſtatutes in the reigns of king Henry the eighth and Edward the ſixth; but it cannot be thought agreeable to the intention of it to abrogate any ſtatute, which in a doubtful caſe ſettled and confirmed the juriſdiction of the common law, and gave a method of trial as agreeable as poſſible to its uſual and ordinary manner of proceeding.

Sect. 54. It was a great doubt at the common law, (*a*) Whether an acceſſary in one county to a felony in another, were indictable in either. But this is remedied by 2 & 3 Edw. 6. c. 24. by which it is enacted, "That ſuch an acceſſary "may be indicted and tried in the ſame county wherein he was "acceſſary."—But intending more fully to treat of this matter in the chapter concerning the arraignment of the principal and acceſſary, I ſhall refer the reader thither for the farther conſideration of it.

(*a*) Keil. 67. Dyer 38.

As to the eighth general point of this chapter, *viz.* What ought to be the form of the Body of an Indictment, I ſhall endeavour to ſhew, What ought to be the form of the body of an indictment at common law; and, What of an indictment upon a ſtatute.

As to the firſt of theſe particulars I ſhall endeavour to ſhew,

1. How the body of an indictment at common law ought to ſet forth the ſubſtance and manner of the fact.
2. How the perſons mentioned or referred to in it.
3. How the thing wherein the offence was committed.
4. How the circumſtances of time and place.
5. Where it may be vitiated by falſe, or improper Latin, or the uſe of Engliſh inſtead of Latin.
6. Where the offence indicted may be laid jointly and where ſeverally, and where both jointly and ſeverally, and where the offences of ſeveral perſons may be laid in one indictment.
7. Whether the words *vi & armis* be in any caſe neceſſary.
8. Whether it be neceſſary to lay the offence *contra pacem.*
9. Whether it be neceſſary to lay it *contra coronam & dignitatem regis.*
10. Whether it be neceſſary to lay it *in contemptum regis.*
11. Whether it be neceſſary to lay it *illicitè.*
12. Whether a defect in any of theſe particulars be amendable.

As to the firſt point, *viz.* How the body of an indictment at common law ought to ſet forth the ſubſtance and manner of the fact, I ſhall endeavour to ſhew: In what manner it ought to ſet them forth in relation to the offence of the principal.

cipal.—And, In what manner in relation to the offence of the acceſſary.

2 Hale 169, 172, 184, 187. (a) C. 23. ſ. 77. Dyer 304. B. Indict. 7. Cro. Eliz. 920. (b) F. Cor. 119. Indict. 2. 8. B. Corone 76. 12 Aſſize 32. 2 Ed. 3. 1. c. 23. ſect. 77. (c) C. 23. ſ. 77. (d) 2 Ed. 3. 1. 3. 2 Ed. 3. 18. 1. F. Indict. 3. c. 23. ſect. 77. B. Indict. 36. indictment of a (e) Daliſon 22. 3 Inſt. 15. F. vin's caſe 5, 6.

Sect. 55. As to the firſt of theſe particulars, *viz.* In what manner the body of an indictment at common law, ought to ſet forth the ſubſtance and manner of the fact, in relation to the offence of the principal; I ſhall obſerve, Firſt, That no periphraſis or circumlocution whatſoever will ſupply thoſe words of art which the law hath appropriated for the deſcription of the offence, as (*a*) *murdravit* in an indictment of murder; (*b*) *cepit*, in an indictment of larceny; (*c*) *mayhemiavit*, in an indictment of maim; (*d*) *felonicè*, in an indictment of any felony whatever; (*e*) *burglariter* or *burgulariter*, or elſe *burgalariter*, in an indictment of burglary; (*f*) *proditoriè*, in any indictment of treaſon; (*g*) *contra ligeantiæ ſuæ debitum*, in an indictment of treaſon againſt the king's perſon (8).

B. Appeal 48. 18 Ed. 4. 10. C. Eliz. 193. 4 Coke 41. 5 Coke 121. An ſcold muſt be laid *ad communè nocumentum*. Strange 1246. See 9 Coke 69. Con. 4 Co. 39. Summary 207. 5 Coke 121. Cro. Eliz. 920. (f) Summary 11. Corone 55. S. P. C. 3. 3 H. 7. 10. Carthew 319. (g) 3 Lev. 396. Cal. 10. Skinner 442. Carthew 319. (8) *Fabricavit* denotes forgery, Strange 19.

(b) C. 23. ſ. 79. F. Indict. 18. 9 Ed. 4. 26. (i) Sup. c. 23. ſect. 79. Let K. (9) Vide 18 Eliz. c. 7. and the caſe of the King v. Lord at the aſſizes for Surry, where Gould J. held the indict. bad, becauſe not

Sect. 56. Secondly, That in an indictment, as well as in an (*b*) appeal of rape, the fact ſeems to be ſufficiently aſcertained by the words *felonice rapuit*, without adding *carnaliter cognovit*, or firſt ſetting forth the ſpecial manner of the terror or violence, and then concluding that the defendant *ſic felonicè rapuit*, &c. Alſo it ſeems, that the like general manner of ſetting forth the offence, which is ſufficient in an (*i*) appeal of larceny, will alſo be ſufficient in an indictment (9).

ſtated under 10 years of age. MS.

(k) C. Eli. 147, 201. 9 Ed. 4. 26. 2 Hale 184, 185, 186. 8 St. Tr. 566. Sacheverel's caſe, 2 Seſſ. Caſ. 31.

Sect. 57. Thirdly, That in other caſes it is (*k*) generally a good rule in indictments as well as appeals, that the ſpecial manner of the whole fact ought to be ſet forth with ſuch certainty, that it may judicially appear to the court, That the indictors have not gone upon inſufficient premiſſes.

Vide Strange 699.

(l) B. Indict. 7. 9 Ed. 4 26. Strange 1226. 1268. (m) Aleyn 78, 79. Strange 920. 1146. Douglas 534. 538. 1 Modern 24. 5 Modern 96, 129. Comb. 416.

And upon this ground it ſeems to be agreed, That an indictment finding that a perſon hath feloniouſly broken priſon, without ſhewing the cauſe of his impriſonment, &c. by which it may appear that it was of ſuch a nature, that the breaking might amount to felony, is (*l*) inſufficient.—Alſo (*m*) indictments againſt perſons for refuſing to be ſworn conſtables, after they had been *legitimo modo electi*, have been quaſhed for not ſhewing the manner of the election, that it might appear to have been ſuch as obliged the defendants to have undertaken

Sup. c. 10. ſect. 46.

the office.—Alſo it hath been (*a*) adjudged, That an indictment of burglary is inſufficient without the word *noctanter*.—Alſo it ſeems to be (*b*) agreed, That an indictment charging a man with a nuſance in reſpect of a fact, which is lawful in itſelf, as the erecting of an inn, &c. and only becomes unlawful from particular circumſtances, is inſufficient, unleſs it ſet forth ſome circumſtances which make it unlawful. But it is ſaid that this is needleſs where the thing indicted is unlawful in its own nature, as the keeping of a bawdy-houſe, &c.—Alſo it hath been (*c*) adjudged, That an indictment for traiterouſly coining alkemy like to the king's money, without ſhewing what money, is inſufficient; of which this ſeems to be the plaineſt reaſon, That it appears not whether it were made like to the king's gold or ſilver coin, or only like to that in braſs or copper, &c. and if it were made like to that of the latter kind only it (*d*) ſeems that the offence could not amount to treaſon.—Alſo it (*e*) ſeems, That an indictment of perjury, not ſhewing in what manner and in what court the falſe oath was taken, is inſufficient, becauſe for what appears it might have been extrajudicial, &c. Alſo it ſeems clear, That it is neceſſary both in indictments and (*f*) appeals of mayhem and murder, to ſet forth particularly in what manner the hurt was given, and that an omiſſion thereof is not holpen by a general concluſion, that the defendant *ſic felonicè mayhemiavit* or *murdravit*, &c. But having already ſhewn in the chapter of appeals, with what certainty the count in an appeal of death, muſt ſet forth the ſpecial manner of the fact, as by ſhewing in what (*g*) part of the body the wound was given, and the (*h*) length and breadth of ſuch wound, and (*i*) that the party died of it; and with what (*k*) weapon it was given; and that the word (*l*) *percuſſit* cannot ſafely be omitted where the truth of the fact will bear it, I ſhall refer the reader to the ſaid chapter of appeals, for the learning relating to theſe points.—It hath been adjudged, that an indictment of extortion charging J. S. with the taking of 50s. as bailiff of an hundred, *colore officii*, without ſhewing for what he took it, is good at leaſt after verdict, for perhaps he might claim it generally as being due to him as bailiff, in which caſe the taking could not be otherwiſe expreſſed. But this ſeems to be a ſpecial caſe (10).

(*a*) C. Eliz. 583. (*b*) 2 Roll. 345. Palm. 368. 374. (*c*) F. Indict. 10. S. P. C. 95. Summary 206. Vide 2 Roll. 12. (*d*) B. 1, c. 17. ſ. 57. (*e*) C. Eliz. 137. Rex v. Aylett D. and E. 69. (*f*) Sup. c. 23. ſ. 79. 2 Lev. 140. 141. Salkeld 377. Farreſley 16. Kelyng 124. An indictment for murder muſt ſtate, that the priſoner gave the deceaſed a *mortal wound*, or it is bad, Rex v. Lord, 1773. by all the judges, MS. (*g*) Sup. c. 23. ſect. 80. (*h*) Sup. c. 23. ſect. 81. (*i*) Sup. c. 23. ſect. 83. (*k*) Sup. c. 23. ſect. 82. (*l*) 1 Sid. 91. Vide Rex v. Koll. Strange 999. Davy v. Baker. 4 Burrow 2471. Sed vide Reg v. Wyatt, where on an indictment for not returning the warrant of two juſtices, the time when the warrant was returnable is not ſet out. Ld Raym. 1195. But this was againſt the opinion of Holt C. J.

(10) An indictment for procuring, &c. muſt ſhew the falſe tokens. Strange 1127. Vide 21 Hen. 8. c. Alſo an indictment for words ſpoken of a juſtice in the execution of his office, muſt ſet out the words. 3 Com. Dig. 506. Alſo if it be for obſtructing him, it muſt ſhew by what act it was done. Rex v. How. Strange 699.—So an indictment that the defendant took a ſervant without a teſtimonial muſt ſhew a former ſervice. Skinner 343. So for a contempt in not executing a warrant it ought to ſhew the nature of the warrant. 1 Ventris 305.——Sed vide Ld Raym. 1192. So for a forcible entry there ought to be a poſitive charge of a diſſeiſin. Ld Raymond 610.

Sect. 58. Fourthly, That an indictment charging a man disjunctively is void. As where it finds that A. *murdravit* B. *vel murdrari cauſavit*, or that A. *verberavit* B. *vel verberari cauſavit*;

(a) 5 Mod. 137. 138. 1 Salk. 342. 371. Rex v. Flint. B. R. H. 370. Rex v. Stroughton, Strange 900. Barnard K. B. 347. 2 Seſſ. Caſ. 25.

ſavit; or that A. (a) *fabricavit talem cartam vel fabricari cauſavit*; for here are diſtinct offences, and it appears not of which of them the indictors have accuſed the defendant.

(b) 1 Lev. 203. 1 Keble 298. 2 Hale 182. Shower 389, 390.

Sect. 59. Fifthly, That (b) regularly every indictment muſt either charge a man with ſome particular offence, or elſe with ſeveral of ſuch offences, particularly and certainly expreſſed, and not with being an offender in general. For no one can well know what defence to make to a charge ſo uncertain, or to plead it either in bar or abatement of a ſubſequent proſecution; neither can it appear that the facts given in evidence againſt a defendant on ſuch a general accuſation, are the ſame of which the indictors have accuſed him; neither can it judicially appear to the court, what puniſhment is proper for an offence ſo looſely expreſſed. And upon this ground it hath been adjudged, That an indictment is inſufficient which only charges a man in general, with having (c) ſpoken divers falſe and ſcandalous words againſt J. S. being mayor of ſuch a place;—Or with being a (d) common defamer, vexer, and oppreſſor of many men;—Or with being a common (e) diſturber of the peace, and having ſtirred up divers quarrels as well among his neighbours as other of the king's ſubjects at ſuch a place, to the great loſs and diſturbance of his neighbours aforeſaid, and other the king's ſubjects, &c.—Or with being a (f) common oppreſſor and diſturber of the peace;—Or with having been and ſtill continuing to be a man of evil (g) behaviour;—Or with being a (h) common deceiver of the king's people;—Or with being a (i) common publiſher of the king's ſecrets, and of his own, and of divers other perſons impanelled together with him to inquire for the body of the county of divers felonies againſt his oath, &c.—Or with being a (k) common foreſtaller;—Or with being a (l) common thief;—Or being a (m) common evil doer;—Or with being a common (n) champertor;—Or with being a common (o) conſpirator, and ſuch like (11).

(c) 1 Roll 79. 2 R. Abr. 79. Rex v. How. Strange 699. 3 Com. Dig 506.

(d) 2 R. A. 79. 1 Mod. 71. Rex v. Taylor, Strange 849. Rex v. Cooper, Strange 1246. Barn. K. B. 229.

(e) 2 R. Ab. 79.

(f) 1 Mod. 71. 288 1 Lev. 299. Raymond 205. 1 Ventris 104.

(g) 2 R. A. 79.

(h) 6 Mod. 311.

(i) Moor 302.

(k) F. Act. ſur le Stat. 26. 29 Aſſize 45. Moor 302.

(l) 2 R Ab. 79. Moor 302. 22 Aſſize 73.

(m) 22 Aſſ. 73.

(n) 29 Aſſ. 45. (o) 29 Aſſ. 45.

(11) Or *quia male et negligenter ſe geſſit* of the office of a conſtable is too general. Strange 2. Or for deceiving one D. of ſeveral lottery orders, viz. *de ſcriptis bonis et catallis of D. deciprebant et defraudabant.* Strange 8. Or of a clerk of a market that he did cauſe his agents illegally to receive of *ſeveral perſons, ſeveral ſums*, &c. Rex v. Robe, Strange 999. So in a declaration "that the defendant did receive a gift or reward," without ſpecifying it, is too general. Davy v. Baker. Burr. 2471.—So an indictment on 5 Eliz. for exerciſing a trade, &c. "in Great Britain," is too general. Rex v. Liſter. Strange 788.

(p) 22 Aſſ. 45. (q) B. Inditt. 12. (r) 2 R. Ab. 79.

It is holden indeed in a note of Fitzherbert's Abridgement, That an indictment for confederacy in general is good, but this is made a *quære* by the reporter of the (p) year book, from which the ſaid note in Fitzherbert is taken, and is denied to be law, both by (q) Brook and (r) Rolle; nor do I any where find the leaſt reaſon offered to diſtinguiſh this from the other caſes above mentioned. Alſo it is holden by Sir Edward (s) Coke, That the ancient form of indictments, charging men with

(s) 3 Inſt. 41.

with having, as hereticks and traitors, and infeſtors of the highways, conſpired and confederated, &c. to deſtroy the catholick faith, and having daily publiſhed falſe and ſeditious writings, &c. were utterly inſufficient, and yet ſuch indictments ſeem to have been (a) frequent; as were alſo indictments charging men in general, as *inſidiatores viarum, & depopulatores agrorum*, which (b) words took the benefit of clergy from the perſons indicted, before the ſtatute of 4 Hen. 4. c. 2. by which it is enacted, "That theſe words ſhall no more be "put into indictments, nor if they be, ſhall have ſuch effect "as to take from the perſons indicted the benefit of clergy." (c) And this ſtatute in this reſpect ſeems to be in affirmance of the common law, which ſeems generally to diſallow of ſuch uncertain indictments, as appears from the reaſons and authorities above ſet forth.—Yet it hath been adjudged, That a man may be generally indicted as a common barrator againſt the (d) form of the ſtatute, and (e) againſt the peace, without ſhewing any of the particular facts in the indictment, by which he appears to have been ſo; for barratry is an offence of a (f) complicated nature, conſiſting in the repetition of divers acts in diſturbance of the common peace, all of which it would be too prolix to enumerate in the indictment; and therefore (g) experience hath ſettled it to be ſufficient to charge a man generally as a common barrator (which is a (h) word of art appropriated to this purpoſe), and before the trial to give the defendant a (i) note of the particular matters which you intend to prove againſt him. Alſo it is (k) holden, That there is no need to name any particular place where the defendant was a barrator, becauſe he ſhall be ſuppoſed to have been guilty in divers places, and the *venire* is moſt proper from the body of the county. Alſo it is ſaid that there is no need in the concluſion of ſuch an indictment to lay the offence *ad nocumentum omnium ligeorum, &c.* but that (l) *diverſorum* is ſufficient in ſuch an indictment as well as in an indictment of a common ſcold, &c. becauſe it appears from the nature of the thing, that it could not but be a common nuſance (1). Alſo it ſeems to be (m) agreed, That an indictment againſt one as a common ſcold, is good without ſetting out the particulars, for the ſame reaſons that ſuch indictment of barratry is good.

(a) 3 Inſt. 41.

(b) 11 Coke 29. Summary 206. 1 Hale 571. 2 Hale 333.

(c) Vide 3 Inſt. 41. Lamb. B. 4. c. 5. 404.

(d) Bk. 1. c. 81. ſ. 10.

(e) C. Jac. 527. 2 R. Abr. 82.

(f) B. 1. c. 81. 8 Coke 36, 37.

(g) 2 R. Abr. 79. C. Jac. 527. 2 Keble 409.

(h) B. 1. c. 81. ſ. 10. 2 Levinz 208. Strange 900. 1246. B. R. H. 370.

(i) B. 1. c. 81. ſ. 13.

(k) Vide b. 1. c. 81. ſ. 11.

(l) 2 Keble 409. See b. 1. c. 75. ſ. 5.

(1) An indictment of a ſcold muſt be laid *ad commune nocumentum*. Rex v. Cooper. Strange 1246.

(m) 6 Mod. 311. b. 1. c. 75. ſ. 5. Strange 1246.

Sect. 60. Sixthly, That the charge muſt be laid poſitively, and not by way of (n) recital, as with a *quod cum, &c.* and that the want of a direct allegation of any thing material in the deſcription of the ſubſtance, nature, or manner of the crime, (o) cannot be ſupplied by any intendment or implication whatſoever (p). And upon this ground it ſeems to be (q) generally holden, That an indictment of death having the words *felonicè murdravit*, &c. cannot amount to an indictment of murder, without the words *ex malitia præcogitata*; and yet by the word *murdravit* it expreſsly charges the party with murder, and it is

(n) Salk. 371. 3 Modern 53. Ld Raym. 1363. 1 Burrow 400.

(o) S. P. C. 96. C. Jac. 20. 4 Coke 42. 5 Coke 120.

(p) 1 Vent. 268. 337.

(q) Dyer 99. Summary 231. 2 Hale 187. Vide 2 Lev. 140. Con. Dyer 68.

141. 4 Coke 41. impoſſible

impoſſible that there could be a murder, and no malice prepenſe. Alſo it ſeems to be generally agreed, That no indictment of death can be good without an expreſs allegation, that the deceaſed both received the hurt which is laid as the cauſe of his death, and alſo that he died of the hurt ſo received; and that the want thereof cannot be made good by any implication whatſoever, as hath been more fully ſhewn, c. 23. ſect. 82, 83. Alſo it hath been (*a*) adjudged, That an indictment againſt J. S. for feloniouſly breaking ſuch a priſon, and commanding J. N. who was therein impriſoned for felony to eſcape, is not a good indictment for a felonious breaking, without expreſsly ſhewing that J. S. did eſcape, and yet the breaking is expreſsly laid to be felonious, and it is impoſſible that it could be ſo, unleſs the party did eſcape. But it will be needleſs to enumerate any more inſtances of this kind, which are ſo very frequent, that there is ſcarce any caſe which mentions exceptions taken to indictments, without having ſome or other grounded on this rule, *That in an indictment nothing material ſhall be taken by intendment or implication.*

(*a*) Keilw. 87. Vide ſup. c. 18. ſ. 12.

Yet the law will not admit of too great a nicety of this kind; for it hath been adjudged, That if in the firſt part of an indictment of death, the aſſault be laid with malice prepenſe, &c. there is no (*b*) need to repeat it in the following clauſe, which ſhews the giving of the wound, being joined with a copulative to the precedent ſentence, and laid at the ſame time and place with the aſſault. Alſo it hath been (*c*) adjudged, that where an indictment ſets forth, That J. S. was lawfully arreſted by virtue of a plaint before ſuch a ſheriff, &c. it ſhall be intended that there was a good warrant. Alſo it hath been (*d*) adjudged, that where a warrant is alleged, authoriſing the arreſt of J. S. within the liberties of London, and the indictment lays the execution of it in ſuch a pariſh and ward in London, without expreſsly laying the pariſh and ward within the liberties of London, yet the indictment is good; for the court will not admit of ſuch a ſtrained exception, that a pariſh in London may be out of the liberties of London.

(*b*) 4 Coke 41.

(*c*) C. Jac. 473.

(*d*) 9 Coke 67. 5 Coke 120.

Sect. 61. Alſo it hath been (*e*) adjudged, That where an indictment finds that J. S. *exiſtens* of ſuch or ſuch a degree or trade, &c. as brings him within the purview of the law whereon the indictment is founded, committed ſuch a fact, it ſhall be intended that he was of ſuch degree, &c. at the time of the fact, without any expreſs allegation to that purpoſe, becauſe that is the moſt natural conſtruction of the participle *exiſtens*, going before the verb to which it is the nominative caſe. (*f*) Yet where an indictment of forcible entry finds that A. diſſeiſed B. of ſuch land *exiſtens liberum tenementum* of B. it

(*e*) C. Jac. 610. 2 Modern 128. Moor 606. 2 Levinz 229. 2 Roll. 226. Ld Raym. 378. 1 Keble 852. Rex v. Boyall. Burrow 832.

(*f*) B. 1. c. 64. ſ. 38. C. Jac. 610. 2 Roll. 226. 2 Levinz 229. 2 Modern 129.

Rex v. Bigg. Strange 18. Vide Rex v. Boolie, Burrow 864. Rex v. Hammond, Strange 44. For a ſufficient deſcription of a nuſance, 1 Burrow 333; and for keeping a diſorderly houſe. Vide 2 Burrow 1262.

ſeems

ſeems agreed, that the indictment is inſufficient, becauſe it ſtands indifferent, according to the common rules of conſtruction, whether the land were the freehold of *B.* at the time of the diſſeiſin, or at the time of the finding of the indictment, the word *exiſtens* not being the nominative caſe to the verb, but applied to the thing which was the ſubject of the action. But I cannot find any certain general rule, whereby it may be known in what caſes an exception of this kind ſhall be taken to be ſo over-nice, that the court will not regard it. All therefore that I ſhall add on this head is this, That as on the one hand the law will not ſuffer a man to be condemned of any crime, whereof the jury have not expreſsly found him guilty, by any argument or implication from what they have ſo found; ſo on the other hand it will not ſuffer a criminal to eſcape on ſo trifling an exception, which it would be abſurd and ridiculous to take notice of; for *nimia ſubtilitas in jure reprobatur*. But the judgment hereof cannot but be in a great meaſure left to the diſcretion of the judges, who from the circumſtances of each particular caſe, the compariſon of precedents, and the plain reaſon of the thing, ſeem always to have endeavoured to go within theſe rules as nearly as poſſible.

Sect. 62. Seventhly, That it is a certain rule, That where one material part of an indictment is repugnant to another, the whole is void, for the law will not admit of ſuch nonſenſe and abſurdities in legal proceedings, which, if ſuffered, would ſoon introduce barbariſm and confuſion. Alſo it takes off much from the credit of an indictment, that thoſe by whom it is found, have contradicted themſelves. And upon this ground it hath been adjudged, That if an indictment (*a*) charge the defendant with having forged a certain writing by which A. was bound to B. which is impoſſible, if the writing were forged; or if an indictment of forcible entry ſet forth, That the defendant diſſeiſed J. S. of lands, wherein it appears by the indictment itſelf that he had no freehold whereof he could be diſſeiſed; or that the defendant entered peaceably on J. S. and then and there forcibly diſſeiſed him; or that he diſſeiſed him of land then being and ever ſince continuing to be his freehold; (*b*) every ſuch indictment is void, for it is manifeſt inconſiſtency and repugnancy. And upon the like reaſon it hath been adjudged, That an indictment of death, laying the ſtroke at A. and the death at B. or the ſtroke on the firſt of May, and the death on the tenth, and then concluding that the defendant in ſuch manner murdered the party at A. aforeſaid, or on the firſt of May aforeſaid, is inſufficient for the repugnancy, as hath been more fully ſhewn in the (*c*) chapter of appeals, becauſe it ſuppoſes the murder to have been committed at a place in the firſt caſe, and on the day in the ſecond; in which it appears by the indictment itſelf, That the party was not killed but only wounded. Alſo it hath been (*d*) adjudged,

(*a*) 3 Mod. 104.

(*b*) See b. 1. c. 64. ſ. 39.

(*c*) Sup. c. 23. ſ. 88. and 89. 2 Hale 188.

(*d*) 2 R. Abr. 18.

adjudged, That an indictment for ſelling iron with falſe weights and meaſures, is void, not only becauſe it is abſurd to ſuppoſe that iron could be ſold by meaſure, but alſo becauſe it is repugnant and inconſiſtent that it ſhould be ſo ſold at the ſame time when it was ſold by weight. Alſo if an indictment at a ſeſſions holden the 13th of January, 30 Car. 2. find that the defendant has been abſent from church ſix months from the firſt of January, 30 Car. 2. it is (*a*) agreed, That it is void for the impoſſibility, for there are but eleven days between the firſt of January and the holding of the ſeſſions. Alſo if an indictment charge a man with having felonioufly done a fact, which appears upon the face of the indictment to have been but a treſpaſs, as with felonioufly cutting down and carrying away trees, the court will (*b*) not arraign him; yet where the ſenſe appears plain, the court will often diſpenſe with a ſmall impropriety in the expreſſion, as where one is indicted for having mowed *unam acram fœni*, which is (*c*) ſaid to be ſufficient, and yet that which was mowed, could not at the time of the mowing be in ſtrictneſs called hay, but graſs only.

(*a*) Raym. 434. Par. Caſe. 3 Keble 653. Vide Dunriord and Eaſt's reports 316.

(*b*) 12 Aſſ. 32. F. Corone 171. Indictment 9. B. Corone 76. b. 1. c. 33. ſ. 21.

(*c*) 2 R. Abr. 81. Parallel Caſes. 2 R. Abr. 81. Vide 18 Aſſ. 15.

Sect. 63. As to the ſecond particular, *viz.* In what manner the body of an indictment at common law muſt ſet forth the ſubſtance and manner of the fact, in relation to the offence of the acceſſary; I ſhall obſerve,

Firſt, That a repugnancy in ſetting forth ſuch offence is equally fatal as in ſetting forth that of the principal; and therefore if an indictment of death which lays the ſtroke on one day, and the death on a ſubſequent one, charge the acceſſaries with having abetted the fact, at the time of the felony and murder only, it is inſufficient, as hath been more fully ſhewn in the (*d*) chapter of appeals: Becauſe it appears by the indictment itſelf, That the time of the death, and conſequently of the murder, was ſubſequent to that of the ſtroke, and therefore it is repugnant to alledge that the defendant abetted the ſtroke by being preſent at the time of the death.

(*d*) C. 23. ſ. 88, 89. Supra ſ. 64.

Sect. 64. Secondly, That where ſeveral are preſent, and abet a fact, and one only actually does it, an (*e*) indictment may in the ſame manner as an (*f*) appeal, either lay it generally, as done by them all, or ſpecially, as done only by the one and abetted by the reſt. But it hath been reſolved, That if an indictment barely charge a man with having been preſent when a murder was committed, it is (*g*) void, becauſe a man may be innocently preſent, and ſhall not be preſumed to have been a party, where no circumſtance is found that makes him ſo.

(*e*) Sum. 265. 9 Coke 67. Plowden 97. 1 Hale 437.

(*f*) Sup. c. 23. ſ. 76.

(*g*) 14 H. 7. 31. B. Indict. 5. Foſter 351.

Sect. 65. Alſo it hath been (*b*) adjudged, That an indictment of J. S. as acceſſary to four, by theſe words, that J. S. *ſciens ipſos quatuor homines feloniam prædictam feciſſe apud* D. *felonicè receptavit*, is naught for not ſaying *eos receptavit*, for it

(*b*) 30 H. 6. 2. F. Indict. 13. S. P. C. 95. Summary 206.

it doth not appear how many of them the indictors have found him to have received, whether all four, or three, or two, or but one.

Sect. 66. It hath been (*a*) holden, That an indictment charging a conſtable with having voluntarily and feloniouſly ſuffered a perſon, arreſted by him upon ſuſpicion of felony, to eſcape, without ſhewing what the nature of the felony was, and that it was actually committed, is void for the uncertainty, not only becauſe it appears not but that the offence of which the party was ſuſpected, was never actually committed; in which caſe the eſcape could (*b*) not be criminal; but alſo becauſe it appears not what the felony was, and unleſs the arreſt were for a felony, the eſcape could not be felonious. But it is ſaid, That an indictment for knowingly receiving perſons outlawed for, or convicted of felony, or for knowingly ſuffering ſuch perſons to eſcape, (*c*) may be good without ſhewing what the felony was, or that it was actually committed, if the record of the outlawry or conviction be ſet forth with convenient certainty: And the moſt plauſible reaſon of this opinion ſeems to be this, That it may be ſufficiently made out by ſuch record, of what kind the felony was, and alſo that it was actually committed, &c. It is holden indeed by Sir William (*d*) Staundford, That ſuch a general indictment for receiving a perſon outlawed for felony in the ſame county wherein he dwells is good, but not if it were in another, becauſe a man is bound at his peril to take conuſance of an attainder of felony in his own county, but not in another. But I much queſtion the authority of this diſtinction, ſince, as the law ſeems now to be (*e*) holden, a man is no more bound to take conuſance of ſuch an attainder in his own county, than in any other.

(*a*) C. Eliz. 752. Hetley 53. 8 Edw. 4. 3. S. P. C. 95. F. Indict. 16. Vide F. Corone 45. 76.

(*b*) Sup. c. 12. ſ. 16, 17. c. 18. ſ. 7. c. 19. ſ. 2, 3. Str. 1226. 1268.

(*c*) 8 Edw. 4. 3. F. Indict. 16. Qu. Keilw. 194.

(*d*) S. P. C. 96. Vide F. Cor. 377. Dyer 355.

(*e*) Sum. 218.

Sect. 67. It hath been (*f*) holden, That an indictment finding that J. S. *ſcienter receptavit* ſuch a one, being a felon is not good, for this reaſon among others, becauſe it doth not expreſsly find, that J. S. knew the perſon ſo received by him to have been a felon. But this is contradicted by other (*g*) authorities, by which it is holden, That the word *ſcienter* in ſuch a caſe ſhall be conſtrued to go through the whole ſentence.

(*f*) 7 H. 6. 42. B. Indict 4. F. Indict. 11. 3 Keble 760. S. P. C. 96.

(*g*) 2 Lev. 208. 8 Edw. 4. 3. 1 D. An. Abri. 19. 5 Modern 129. Fitzgib. 122.

Strange 75. Vide Rex v. Lawley. Strange 904. Barnard K. B. 263. Rex v. Bunce. Andrews 162.

As to the ſecond point, *viz.* In what manner the body of an indictment at common law muſt deſcribe the perſons mentioned in it; I ſhall endeavour to ſhew,—In what manner it muſt deſcribe the defendant;—and, How perſons mentioned or referred to in the indictment.

Sect. 68. As to the firſt particular, it is ſaid, That an indictment that the king's highway in ſuch a place is in decay,

through the default of the inhabitants of ſuch a town, is (*a*) good without naming any perſon in certain.

(*a*) 2 Roll. Ab. 79. Wood 620.

Alſo it is ſaid, (*b*) That no indictee can take any advantage of a miſtaken ſurname in the indictment, either by plea in abatement, or otherwiſe, notwithſtanding ſuch ſurname hath no manner of affinity with his true one, and he was (*c*) never known by it. And in this reſpect, an indictment differs from an appeal, whereof it is (*d*) certain that a miſnoſmer of a ſurname may be pleaded in abatement, as well as any other miſnoſmer whatſoever.

(*b*) 1 H. 5. 5. Summary 243. S. P. C. 181. P. Miſno. 9. Vide 3 H. 6. 25, 26. Thel. B. 11. c. 5. ſ. 14. Sed vide B. R. H. 303.

(*c*) Q. Kely. 11, 6 St. Tr. 237.

12. 2 Hale 238. (*d*) 1 H. 5. 5. Raſtal 50. 54. Summary 243. 2 Hale 176. 238. Ante 185. ſ. 103.

Sect. 69. But I do not find but that every other miſnoſmer of the defendant, except that of the ſurname, and alſo every defective addition, are as fatal in an indictment as an appeal; for it ſeems generally to be (*e*) holden, That a miſnoſmer of the defendant's name of baptiſm may be pleaded in abatement of an indictment. Alſo it hath been (*f*) adjudged to be a good plea in abatement of an indictment againſt one by the name of Sir J. S. knight, that he is a baronet and no knight. Alſo it hath been (*g*) holden, That it is a good plea in abatement of an indictment againſt garter king at arms, that he is not called garter in the indictment, becauſe it is a name of dignity, being given him by the words *creamus*, *coronamus*, and *nomen imponimus*; and from the reaſon of this caſe it ſeems plainly to follow, That the omiſſion of any other name of (*h*) dignity may be pleaded in abatement of an indictment: (*i*) And if ſo, why ſhould not the omiſſion of the defendant's name of baptiſm be equally fatal?

(*e*) Thel. B. 11. c. 5. ſ. 12. 11 H. 4. 41. F. Corone 88. Miſnoſmer 18. Summary 243. Con. 3 H. 6 26. B. Miſno. 6.

(*f*) Cro. Car. p. 371. 1 Jones 346.

(*g*) 2 Leon. 248, 249. Qu. Cro. Eliz. 543.

(*h*) Vide ſup. c. 23. ſ. 103, 104. Shower 392, 393. Skinner 517. 2 Hale 240. Tremain 12. Carthew 299. Qu. Palm. 195, 6 St. Tr. 230.

3 C. Dig. 502. 2 Inſt. 668. (*i*) Vide c. 23. ſ. 103 Keilw. 25, 26. Fitz. Cor. 88. 3 Bac. Ab. 104. 2 Hale 175. Cro. Jac. 609. B. R. H. 303. 2 Hale 238.

Sect. 70. It ſeems to be agreed, That notwithſtanding an indictment be the ſuit of the king, yet being within the expreſs letter of the ſtatute of 1 Hen. 5. c. 5. concerning additions, ſet forth more at large in the chapter of (*k*) appeals, it (*l*) cannot be conſtrued to be out of the meaning of it. From whence it follows, That the want of a ſufficient addition, within that ſtatute, is as good an (*m*) exception to an indictment, if (*n*) proceſs of outlawry lie on it, as it is to an appeal.

(*k*) Sup. c. 23. ſ. 105.

(*l*) B. Add. 50. L. quin. Ed. 4. 33, 34. Finch 234.

(*m*) B. Add. 23. 41. 2 Leon. 183. Shower 392, 393.

9 Edw. 4. 48.

Dyer 46. (*n*) C. Eliz. 32. 148. C. Jac. 531.

Alſo it hath been adjudged, That it is a (*o*) fatal fault to apply ſuch addition to the name which comes under the *alias dictus* only, and not to the firſt name: But it is ſaid not to be material (*p*) whether any addition be put to the name which comes under the *alias dictus* or not, becauſe what is ſo ex-

(*o*) S. P. C. 68. 2 Hale 177. 2 Inſt. 669. 2 Leon. 183, 30 H. 6. C. Eliz. 583. Vide Dyer 88. 3 Edw. 4. 1. F. Proceſs 103.

Sayer 280. Semple's Caſe, O. B. June ſeſſ. 1786. (*p*) 30 H. 6. S. P. C. 68. 3 Edw. 4. 1.

preſſed

preſſed is not material. But it is ſo great a fault to put no addition to the firſt name, that where ſeveral are indicted, ſuch an omiſſion, in reſpect of one of them, makes the indictment (*a*) vicious as to all. And it may be probably argued, that there is the ſame reaſon for the like fault in an appeal againſt divers, to abate it alſo as to all; but I do not find this point (*b*) expreſsly agreed. But it ſeems clear, That generally the law is the ſame in relation to additions in indictments and appeals.

(*a*) 1 Bulſt. 183. Contra 2 Hale 177.

(*b*) Vide ſup. c. 23. ſ. 127. F. Count 18.

Having therefore already treated in the chapter of appeals of the general learning relating to this ſubject, and ſhewn that an addition in (*c*) Engliſh is as good as in Latin; and that where ſeveral defendants have the ſame addition, it is (*d*) ſafeſt to repeat it after each of their names; and that the ſon being of the ſame name and addition with the father, ought to be diſtinguiſhed with ſome (*e*) farther deſcription; and having alſo ſhewn what is a ſufficient addition of the (*f*) eſtate, or degree, or (*g*) myſtery, and alſo of the (*h*) town, hamlet, place and county of the defendant: And alſo how the defect of an addition may be (*i*) ſalved by the appearance and plea of the defendant, I ſhall refer the reader for all theſe particulars to the chapter of appeals.

(*c*) Sup. c. 23. ſ. 106.
(*d*) Sup. c. 23. ſ. 106.
(*e*) Sup. c. 23. ſ. 106.
(*f*) Sup. c. 23. ſ. 107. to 113.
(*g*) Sup. c. 23. ſ. 113 to 118.
(*h*) Sup. c. 23. ſ. 118. to 124.
(*i*) Sup. c. 23. ſ. 124.

Sect. 71. As to the ſecond particular, *viz.* In what manner the body of an indictment at common law muſt deſcribe the other perſons beſides the defendant mentioned or referred to in it. It is certainly ſafeſt to deſcribe them with convenient certainty, which will hardly be diſpenſed with except in ſpecial caſes, and for ſpecial reaſons. For thoſe general indictments which (*k*) anciently ſeem to have been allowed for ſuffering divers bakers to bake, &c. againſt the aſſize, &c. nor for diſtraining divers perſons without cauſe, &c. have by the later (*l*) authorities been holden inſufficient for their uncertainty in not naming ſome perſons in particular who were ſo ſuffered to bake, or diſtrained, without which the court cannot ſo well know what fine will be proper; nor can the defendant be ſo well enabled to make his defence, nor to plead the indictment to a ſubſequent proſecution.

(*k*) 38 Aſſiſe 11. 22. B. Preſent. 27.

(*l*) B. Indict. 21. 2 R. Abr. 80.

And for the ſame reaſons among others, an (*m*) indictment for taking divers ſums of divers perſons for ſuch a toll at ſuch a rate, without naming any perſons in particular, hath been adjudged naught. Yet where in common preſumption it may be very difficult, if not impoſſible, to know the names of the perſons referred to in an indictment, it (*n*) may be good without naming any of them; (*o*) as where one is indicted for having knowingly received and harboured divers thieves, to the jurors unknown. In which caſe, ſuch a general charge is maintainable from the neceſſity of the thing; for otherwiſe a notorious offender of this kind might be wholly diſpuniſhable, for want of the jurors knowing the names of the perſons ſo received, and yet

(*m*) Shower 389, 390.

(*n*) Plow. 85. 129.

(*o*) 2 Lev. 208.

yet might be publickly known to carry on ſuch a practice, to the common nuſance of the country; in which reſpect it cannot but be reaſonable in ſuch a caſe to puniſh him, though not as an acceſſary to the thieves, without ſhewing that he had received ſome of them in particular. And for the like reaſon, if a (*a*) ſtranger unknown to the country be found ſlain, or if the dead body of a perſon who was well known, be disfigured in ſuch a manner by its wounds, that no one can diſcover whoſe it was, it is certain that an indictment againſt the offender, for having killed *quendam ignotum*, will be good. (*b*) And upon the ſame ground, if a ſtranger unknown to the country be robbed, and will not come in to proſecute, nor diſcover his name; it ſeems clear, That an indictment againſt the offender for having robbed *quendam ignotum* is good. And if goods be found upon one notoriouſly ſuſpected of felony, of which he can give no manner of account, as where a highwayman is apprehended with his pockets full of watches and rings; it ſeems, That he may either be indicted for ſtealing ſuch watches and rings, being the goods *quorundum ignotorum*, or, as ſome (*c*) ſay, for ſtealing them generally. Alſo in the indictment of the regicides for the murder of King Charles I. it was (*d*) agreed, That the fact was well laid, as done *per quendam ignotum*, with a vizor on his face. And if one ſteal the goods of an abbey, &c. during a vacancy, he may be indicted for ſtealing (*e*) *bona eccleſiæ*, and yet the church can have no property. But theſe ſeem to be ſpecial and extraordinary caſes, depending on particular reaſons, and grounded on manifeſt neceſſity, without which, it ſeems, that ſuch indictments cannot be maintained.

(*a*) 1 Ed. 3. 20. 1 Aſſize 7. F. Cor. 159. 23 Aſſize 94. F. Indict. 10. S. P. C. 95. 2 Hale 181. Plow. 85. 129. 9 H. 6. 45. b. Dyer 99. 285. Vide F. Cor. 146. 183. Noy 85. Sup. c. 23. ſ. 78.

(*b*) F. Indict. 12. 17. 9 Edw. 4. S. P. C. 95. 2 Hale 181. Dyer 99. Keilw. 25. Sup. c. 23. ſ. 78. B. Indict. 11. Plowden 85. 129. 38 Aſſize c. 15. ſeeems contrary.

(*c*) F. Indict. 9. 26. S. P. C. 95. Contra F. Indict. 27. B. Indict. 20. 30 Aſſize 37.

(*d*) Kelynge 10.

(*e*) 7 Ed. 4. 14. F. Indict. 15. S. P. C. 95.

It ſeems to be taken as a ground in (*f*) many books, That regularly the perſons offended, as well as the defendant, ought to be certainly deſcribed in every indictment. And agreeably hereto it hath been (*g*) adjudged, That an indictment for ſtealing *quandam peciam panni linei cujuſdam J. S.* without adding *de bonis et catallis cujuſdam J. S.* is inſufficient, becauſe it doth not expreſsly appear to whom the goods ſtolen did belong. Alſo it was anciently (*h*) holden, That where one is indicted for the death of a perſon unknown, the inqueſt ought to tell his name to the court; but ſurely this muſt he intended where they have ſome means to know it. However, from the whole thus much ſeems plainly to follow, That wherever the perſon injured is known to the jurors, his name ought to be put into the indictment. And therefore, as I take it, thoſe (*i*) books which ſeem generally to allow of indictments of killing, or robbing perſons unknown, are to be underſtood with this limitation, That ſuch indictments are then good when the party is in truth unknown to the jurors. And agreeably hereto, others (*k*) who ſpeak more fully of the matter ſeem plainly to go upon the neceſſity of the ſeveral caſes. And the want of ſuch neceſſity ſeems probably

(*f*) Lamb. B. 4. c. 5. Dalt. c. 131. S. P. C. 95.

(*g*) Cro. El. 489, 490.

(*b*) 1 Ed. 3. 20. 26. 1 Aſſize 7. F. Cor. 159. 183. Vide B. Indict. 10.

(*i*) Sum. 107. Dyer 285.

(*k*) Sum. 95. Plowden 85. 129. Keilw. 25. 9 H. 6. 45. Vide Dyer 99. Dalton c. 131.

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to have been the beſt reaſon why indictments not ſhewing to whom the wrong was done, were diſallowed in ſome of the old (*a*) books. However, it is certain, That an appeal for the death or robbery of a perſon unknown, is in no caſe good, as hath been more fully ſhewn in the (*b*) chapter of appeals.

(*a*) Indict. 27. 30 Aſſize 37. 18 Aſſize 15. 2 Leonard 39.
(*b*) Supra c. 23. ſ. 78.

Sect. 72. It hath been (*c*) adjudged, That an indictment of an aſſault on John pariſh-prieſt of D. in the county of C. is good, without mentioning his ſurname; for if a wrongful ſurname of the defendant himſelf will not vitiate an indictment, as hath been more fully ſhewn, *Sect.* 69. ſurely *à fortiori* the omiſſion of the ſurname of any other perſon will not vitiate it; eſpecially where ſuch perſon is otherwiſe deſcribed with ſuch certainty that it is impoſſible to miſtake him for any other. But if an indictment for a wrong done to a perſon well known deſcribe him only by his name of baptiſm, without ſome addition to diſtinguiſh him from others of the ſame name, it ſeems (*d*) queſtionable, Whether it be not inſufficient for the reaſons given in the foregoing ſection. It is (*e*) ſaid, indeed, in a ſhort note of a caſe in Moor's reports, That an indictment againſt one Cole, *quod burglariter domum cujuſdam Ricardi fregit*, was adjudged good, without the ſurname; and it not being there mentioned, that there was any other deſcription of the party but by his name of baptiſm, it may be argued that that alone is ſufficient: But to this it may be anſwered, That the only point taken notice of as adjudged, is that the ſurname is not neceſſary, and perhaps in the record at large there might be ſome addition: But granting that there was none, yet the authority of this caſe is the leſs to be regarded, becauſe of the books cited to ſupport it, (*f*) two ſeem to be directly againſt it; and the (*g*) third, which is moſt to the purpoſe, only proves that an indictment for ſtealing the goods *cujuſdam ignoti* is good, which ſeems by no means to come up to the point in queſtion, as hath been more fully ſhewn in the precedent ſection. Yet, however the law may ſtand in relation to ſuch an uncertainty, it ſeems to be (*h*) agreed, That a repugnancy or abſurdity in the deſcription of the perſon injured will vitiate an indictment; as where one is indicted for ſtealing *bona prædict'* J. S. where no J. S. was mentioned before (12), for though in civil actions, the word *prædict'* hath been ſometimes (*i*) rejected, as ſurplus and void, where it could be referred to (*k*) no certain antecedent, yet this may perhaps chiefly depend on the ſtatutes of Jeofailes, which in many caſes help defects in form in civil actions, but extend

(*c*) Keilw. 25. Dyer 285.

(*d*) Vide Dalt. c. 131. Lamb. B. 4. c. 5. 2 Hale 182.
(*e*) Moor 466.

(*f*) 18 Aſſize 25. F. Indict. 27.
(*g*) 9 Edw. 4. 1.
(*h*) Lamb. B. 4. c. 5. p. 495. 9 Edw. 4. 1. F. Indict. 17. B. Indict. 6. S. P. C. 95. Vide C. Ca. 465.

(*i*) 3 Lev. 436. C. Eliz. 709.
(*k*) Vide C. Jac. 549. 550. 585. 586. 618. Yelv. 76. 111. C. Eliz. 658. O. B. 1784. p.

(12) *Francis* Morris was indicted as a receiver. The indictment ſtated, "he the ſaid *Thomas* Morris well knowing, &c." but the indictment was held good without the words *the ſaid Thomas Morris*, by all the judges Mich. 1774. MS. But where an indictment contained two counts, one for ſtealing a bank note, and the other for ſtealing a pocket-book; and the ſame indictment charged Mary Graham with knowingly receiving them, and the ſtealers were found guilty on the laſt count only, and Mary Graham was found guilty *of the offence aforeſaid*,—this is bad, for it is uncertain to which offence this finding refers. Rex v. Jenings. MS. So alſo on an information charging two diſtinct offences, and the offender is convicted of the *ſaid offence*, it is inſufficient. Rex v. Salamans, B. R. Eaſter. 26 Geo. 3.

not

not to criminal caſes, wherein the greateſt exactneſs is required, and if an award may be defeated by appointing a (*a*) payment on a certain day before mentioned, where no ſuch day was mentioned before, it cannot well be imagined that the like inconſiſtency will be leſs fatal in a criminal proceeding.

(*a*) C. Jac. 149. 1 R. Abr. 254. 263. Yelv. 97, 98.

Sect. 73. It hath been (*b*) adjudged not to be neceſſary in an indictment of death to alledge, that the perſon killed was in the peace of God, and of our Lord the King, &c. though ſuch words are commonly put into indictments, for they are not of ſubſtance, and perhaps the truth might be that the party was at the time actually breaking the peace.

(*b*) 4 Coke 41.

Sect. 74. As to the third point, *viz.* In what manner the body of an indictment at common law muſt deſcribe the thing wherein the offence was committed. It ſeems clear that no indictment can be good which wants a convenient certainty of this kind. And therefore it is (*c*) ſaid, That an indictment for forging a leaſe of certain lands, without naming ſome one certain parcel, is inſufficient. Alſo it ſeems to be agreed, That an (*d*) indictment for ſtealing *bona et catalla* J. S. without any farther deſcription of them, is void for its uncertainty, for the like reaſons for which indictments charging a man with being an offender in general are void, and hath been more fully ſet forth in the fifty-ninth ſection. And upon the like ground it hath been (*e*) adjudged, That an indictment for a treſpaſs in two cloſes of meadow or paſture; or for diverting *quandam* (*f*) *partem aquæ* running from ſuch a place to ſuch a place, without any farther deſcription; or for ingroſſing (*g*) *magnam quantitatem ſtraminis et fœni*, or (*h*) *diverſos cumulos tritici*, without ſhewing how much of each; or for carrying away *duas* (*i*) *centenas caſei*, without adding the words, *libras* or *uncias*, or ſome other ſubſtantive to *centenas*; or for erecting ſeveral (*k*) cottages *contra formam ſtatuti*, without ſhewing how many, &c. are inſufficient for their uncertainty.

(*c*) Hob. 272. Burrow 1127.
(*d*) Dalton c. 131. Lamb. B. 4. c. 5. ſ. 496. 2 Hale 182. Rex v. Powell. Strange 8.
(*e*) 2 R. Abr. 81. 5 Modern 38. Dalton c. 131. Parallel Caſes B. 1. c. 64. ſ. 37.
(*f*) 2 R. Abr. 80. 2 Bulſtrode 119. Parallel Caſes B. 1. c. 76. ſ. 88.
(*g*) Cro. Car. 380, 381. Vide 2 Bulſ. 317. Show. 389, 390.
(*h*) 1 Roll 134, 135.
(*i*) C. Eliz. 754.
(*k*) 2 R. Abr. 80. or, for *diverſas quantitates cerviſiæ*. Rex v. Gibbs. Strange 497.

As to the caſe of *The King v. Wetwang* (*l*), wherein the court diſallowed an exception to the generality of an indictment for taking *quoſdam piſces*, without ſhewing how many, it may be anſwered, that this was contrary to the opinion of Mr. Juſtice Twiſden, and was only the ſudden opinion of two of the other judges; neither does it appear that the indictment was adjudged good, but only that the court refuſed to quaſh it, and ordered the defendant to plead to it. However, it ſeems clear from conſtant experience, (*m*) That if an indictment be uncertain as to ſome particulars only, and certain as to the reſt, it is void only as to thoſe which are uncertainly expreſſed, and good for the reſidue.

(*l*) 2 Keble 178. 1 Levinz 203. Skinner 343. Ld Raym. 1363. B. R. H. 370. Andrews 162. Vide Burr. 336. 1232, 1233. 832. 864. Strange 2 8. 849. 497. 900. 552. 788. 699. 1227. 1127. 6 Com Dig. 355. 3 P. Will. 419.
(*m*) Vide Poph. 208.

Sect.

Sect. 75. If the indictment be for a larceny or treſpaſs on a living thing, as an ox, ſheep, or horſe, &c. It ſeems to be holden by (*a*) Lambard and (*b*) Dalton, that it is moſt proper to expreſs to whom the property of it belonged, by calling it reſpectively the ox, ſheep, or horſe of the party injured, without uſing the words *bona* or *catalla*: But that it is proper to uſe theſe words, where the thing taken was not a living creature. Alſo it is holden by (*c*) Lambard, that it is proper to ſhew the worth of all living things, and alſo of ſuch dead things as are ſold by weight or meaſure, by expreſſing that they are of ſuch a price, and the worth of other dead things, by expreſſing that they are of ſuch a value; yet no inſtance is produced where any indictment has been diſallowed in either caſe for a variance from theſe rules. And as to the firſt of them it is farther obſervable, that the (*d*) precedents in Crompton of indictments for ſtealing of horſes, and oxen, expreſly alledge the horſe and ox ſtolen *de bonis et catallis cujuſdam* J. S. &c. Alſo an appeal of ſtealing ſheep in (*e*) Raſtal's entries expreſly alledge them *de bonis et catallis* of the appellant.

(*a*) Lamb. B. 4. c. 5. f. 496.
(*b*) Dalt. c. 131.
(*c*) Lamb. B. 4. c. 5. f. 497, 498. 2 Hale 187. Vide Cro. Ja. 130.
(*d*) Cromp. 247, 248.
(*e*) Raſt. Ent. 55.

And as to the ſecond of the rules above mentioned, it is obſervable that the directions in the (*f*) regiſter concerning this matter, which ſeem to be the chief foundation of the ſaid rule are thus expreſſed, "That in a writ of treſpaſs of immoveable "chattels, the writ ſhall ſay, *Tants de chatteux ad valentiam* "X. S. But if it be brought of a moveable chattel, it ſhall "ſay *precii X. S.* and *ad non valentiam.*" Yet it appears by the regiſter itſelf that even in writs of treſpaſs concerning which theſe directions are given, the worth of the things taken away is ſometimes omitted for the (*g*) whole, and ſometimes for (*h*) part. And it is ſaid to have been (*i*) adjudged, That ſuch writs are good notwithſtanding ſuch omiſſions. Alſo where things moveable and immoveable are mentioned together in the ſame writ, the worth of all of them together is ſometimes (*k*) expreſſed under the words *ad valentiam, &c.* And ſometimes the worth of moveable chattels, as that of (*l*) corn in a granary, &c. of (*m*) wine in a veſſel, and of (*n*) wool, is expreſſed under the words *ad valentiam.*

(*f*) Regiſter 95.
(*g*) Vide Regiſter 93. in the writ de warrena fugata, &c. and that de parco fracto, and 94. a. in the writ de equo et catallis arreſtatis, 94. b. in the writ de averiis imparcatis, &c. and in that de tranſgreſſione facta uxori, &c. and 96 b. in that de equo percuſſo, and 97. a. in that de ovibus fugatis, &c.
(*h*) Regiſt. 93. b. in the writ de clauſo fracto, arboribus ſuccifis, 94. b. In the writ de domo fracta, &c. and in the writ de jumento, &c. fugatis, and in that de equis imparcatis, and 95. b in that de paliſ, &c. and in that de piſcaria piſcata, &c. and in that de domo fracta, &c. and 96. a. in that de ovibus tonſis, &c. and 96. b. in that de warrena fugata, &c. and 97. a. in de porcis fugatis, &c.
(*i*) Regiſter 97. Vide Cro. Ja. 130. 1 Sid. 39. 150.
(*k*) Regiſter 94. a. in the writ de piſcaria piſcata, &c. and 95 b. in that de piſca' piſcata, &c. and in that de domo fracta, &c. and 96. de excluſis ſtagni.
(*l*) Reg. 95. b. In the writ de bladis inundatis, &c. and 96. a. in that de clauſo fracto, &c.
(*m*) Regiſter 95. b. in the writ de vino, &c.
(*n*) Regiſter 16. and in the writ de ovibus tonſis, &c.

From all which it ſeems to (*o*) appear, That the ſaid directions are not neceſſary to be obſerved even in writs of treſpaſs, concerning the form whereof they are expreſsly given, and that it is not material whether the words *ad valentiam* or *precii* are uſed, or whether any value be ſet on the things taken away or not.

(*o*) Vide F. N. B. 88. Cro. Jac. 130. 1 Sid. 39. 150. 121. 15. 2 Hale c. 173.

not. And if ſo, why ſhould it be a greater fault not to obſerve the ſaid directions in indictments which are (*a*) not tied to the ſtrict forms of writs? Therefore from the whole, it ſeems (*b*) queſtionable, whether it be needful to ſet forth the value of the goods in an indictment of treſpaſs for any other purpoſe than to aggravate the fine, and whether it be neceſſary in an indictment of larceny for any other purpoſe than to ſhew that the crime amounts to grand larceny, and to aſcertain the goods, thereby the better to entitle the proſecutor to a (*c*) reſtitution (13).

(*a*) Q. Dyer 4.26.
(*b*) See Dalton c. 131. Lamb. B. 4. c. 5. f. 496, 497. 2 Hale 183.
(*c*) Sup. c. 23. ſ. 55, 56, 57.

(13) The benefit of clergy is taken away by ſeveral ſtatutes, provided the larceny amounts to a certain value. It is therefore neceſſary now to ſtate the value of the things ſtolen purſuant to the words of the reſpective ſtatutes.

As to the fourth point, *viz.* In what manner the body of an indictment at common law muſt ſet forth the circumſtances of time and place; I ſhall endeavour to ſhew,—How it ought to ſet forth the circumſtance of time;—and, How that of place.

Sect. 76. And firſt as to the circumſtance of time, I find it no where holden, That it is neceſſary to mention the hour in an indictment. But on the contrary, it is ſaid, (*d*) That if there be any neceſſity for it in an appeal, which yet is (*e*) queſtionable, it is from the ſtatute of Glouceſter, and not from the common law, and therefore I ſhall take it for granted, That it is not neceſſarily required in an indictment; ſince it is certain, That there is no ſtatute that makes it ſo, and the common law ſeems to have required no greater certainty in an indictment than in an appeal.

(*d*) S. P. C. 80.
(*e*) Sup. c. 23. ſ. 87. 1 Bulſtrode 203.
In burglary the hour is uſually mentioned, in order to ſhew that the offence was committed in the night-time.

Sect. 77. But it is laid down as an undoubted principle in all the books (*f*) that treat of this matter, That no indictment whatſoever can be good, without preciſely ſhewing a certain year and day of the material facts alledged in it. Alſo it hath been (*g*) adjudged, That the ſheriff's return of a reſcous, without ſhewing the year and day, is inſufficient becauſe ſuch a return is in lieu of an indictment. Alſo it is taken for granted in (*h*) Dyer, That an indictment of reſcous is not good, without expreſsly ſhewing the day and year both of the arreſt, and and alſo of the reſcous, and that the time of the latter is not ſufficiently ſhewn, by (*i*) ſhewing that of the former. And where an indictment of reſcous ſet forth, That J. S. committed ſuch a felony ſuch a day, and year, and place, *per quod A. B. prædictum J. S. cepit et arreſtivit, et in ſalva cuſtodia ſua adtunc et ibidem eundem J. S. habuit et cuſtodivit*, it is made a (*k*) *quære*, Whether the indictment be not inſufficient, becauſe no time of the arreſt is alledged in the ſame ſentence with it; and it is doubtful whether the time of the cuſtody which is alledged in the next ſentence, by force of the copulative be applied alſo to the arreſt or not, and Dyer ſeems rather to incline to the contrary opinion.

(*f*) S. P. C. 95. Lamb. B. 4. c. 5. Dalton c. 131. F. Indict. 28. Dyer 164. Summary 206. 2 Hale 177. 179. 8 H. 5. 8.
(*g*) F. Cor. 45. F. Attach. 1. B. Return de Brief 97. 3 H. 7. 11.
(*h*) Dyer 164. Vide F. Return de Viſc. 32. Dyer 69. 10 Edw. 4. 15. Qu. 5 H. 7. 17, 18.
(*i*) Yet the contrary is adjudged 2 Bulſt. 208. C. Jac. 345.
(*k*) Dyer 164.

However,

However, it is certain, That if an indictment lay, the offence on an (*a*) uncertain or impoſſible day, as where it lays it on a (*b*) future day, or lays one and the ſame offence at (*c*) different days, or lays it on ſuch a day, which makes the indictment (*d*) repugnant to itſelf, it is void. Alſo it hath been adjudged, That no (*e*) defect of this kind can be helped by the verdict. Alſo it is ſaid, That an indictment of death laying an aſſault at a certain time and place, is (*f*) not ſufficient without repeating the time and place in the clauſe of the ſtroke, and the like rule ſeems alſo to hold as to indictments of other felonies, in which reſpect ſuch indictments differ from indictments of treſpaſs. Alſo it is (*g*) certain, That an indictment of death ought as well to ſet forth the year and day of the death as of the ſtroke, that it may appear that the party died within the year and day. But theſe matters having been more fully conſidered in the chapter of appeals, I ſhall refer the reader thither for the better underſtanding of them.

(*a*) Sup. c. 23. f. 88. Moor 555. Rex v. Fearnly D. & E. 316.
(*b*) Raſt. 263.
(*c*) 2 H. 7. 7.
(*d*) Sup. f. 64. and c. 23. f. 88, 89.
(*e*) 1 R. Abr. 781.
(*f*) Sup. c. 23. f. 88. Hetley 35. 119, 120. 5 H. 7. 17, 18. 1 Bulſt. 203, 204.
(*g*) Sup. c. 23. f. 90.

Sect. 78. It ſeems to be (*h*) generally agreed, That the words *adtunc et ibidem* (1) in the ſubſequent clauſes of an indictment, are of the ſame effect as if the year and day mentioned in the former part of it had been expreſsly repeated. Alſo it hath been (*i*) adjudged, That an indictment laying the offence on the Thurſday after the day of Pentecoſt in ſuch a year is good. And from the like ground it ſeems to follow, That an indictment laying it on the (*k*) Utas of Eaſter, &c. which ſhall be taken for the very eighth day after the feaſt, or on the tenth of March (*l*) laſt (if it may be aſcertained by the ſtyle of the ſeſſions before which the indictment was taken), is as good as if it had ſhewn the day and year by expreſsly naming ſuch a day of ſuch a month, &c.

(*h*) Dyer 28. 2 Hale 178. Keilwood 100. ſup. c. 23. f. 88. 4 Coke 41. Qu. Dyer 164.
(*i*) 7 H. 6. 39. F. Error 17. Plowden 122.
(*k*) Lamb. B. 4. c. 5. f. 491.
(*l*) Lamb. B. 4. c. 5. f. 491.
(1) If omitted, judgment may be arreſted. Strange 901.

Sect. 79. And where an indictment charges a man with a bare omiſſion, as the not ſcouring ſuch a ditch, &c. it is (*m*) ſaid, That it needs not ſhew any time.

(*m*) B. 1. c. 10. f. 5. Lamb. B. 4. c. 5. f. 492.

Sect. 80. It is moſt (*n*) 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, for that only is material. And therefore in the (*o*) caſe of the regicides no year of any king was laid for the king's murder, but the compaſſing of his death was laid in the twenty-fourth year of King Charles the Firſt, and the murder was laid on the thirtieth day *ejuſdem menſis Januarii*, becauſe if the reign of either king had been expreſſed, it might have cauſed a diſpute whether that or the other would have been more proper.

(*n*) Sup. c. 43. f. 90. 1 Levinz 113. 1 Salkeld 195.
(*o*) Kelyng 11. Burrows 1901.

Sect. 81. It is (*p*) agreed, That a miſtake in not laying an offence on the very ſame day on which it is afterwards proved upon the trial, is not material upon evidence.

(*p*) Sup. c. 23. f. 87, 88. 91. 3 Inſt. 230. 2 Hale 179.

Sect.

Sect. 82. If an indictment charge a man with having done ſuch a nuſance ſuch a day and year, &c. and on divers other days, it is void (*a*) only as to the facts on thoſe days which are uncertainly alledged, and effectual for the nuſance on the day ſpecified. But if it charge a man generally with ſeveral offences at ſeveral times, without laying any one of them on a certain day, (*b*) as with extorting divers ſums of divers ſubjects for a paſſage over ſuch a ferry, &c. between ſuch a day and ſuch a day, it hath been adjudged, That it is wholly void (14). Yet it hath been ſolemnly reſolved, That a conviction of (*c*) deer-ſtealing, ſetting forth the offence between the eighth and twelfth of July, &c. is ſufficient.

(*a*) 10 Mod. 336. Vide ſup. f. 74.

(*b*) Shower 389. Carthew 226.

(*c*) Reg. v. Simpſon, ad Trin. 13 Annæ, 10 Mod. 248. 341.

(14) Becauſe every extortion is a ſeparate and diſtinct offence, requiring a ſeparate and diſtinct puniſhment in proportion to the enormity of it; and if accumulated under a general charge, inſtead of being ſingly and certainly laid, it is impoſſible for the court to adapt the puniſhment to the meaſure of the crime. 4 Mod. 103. Sed vide Cro. Jac. 611. 1 Keble 357.

Sect. 83. As to the ſecond particular, *viz.* How an indictment at common law muſt ſhew the place where the offence was done. It ſeems agreed by all the (*d*) books, That no indictment can be good without expreſsly ſhewing ſome place wherein the offence was committed; which muſt (*e*) appear to have been within the juriſdiction of the court in which the indictment is taken, and muſt alſo be alledged in ſuch a manner as is perfectly free from all (*f*) repugnance and inconſiſtency. For if one and the ſame offence be laid at two (*g*) different places, or at the town of B. (*h*) aforeſaid, where no ſuch town was mentioned before; or if in an indictment of murder, the ſtroke be laid at A. and the death at B. and then it is (*i*) concluded that the defendant *ſic felonicè murdravit* the perſon deceaſed at A. the indictment is void. And ſo it is alſo, if it do (*k*) not lay a place both of the ſtroke and death; or if the place or places ſo alledged, be not ſuch from whence a (*l*) *viſne* may come. Yet it hath been adjudged, That a fact laid in a pariſh of London, with ſome other addition, as in the pariſh of St. (*m*) Michael in Woodſtreet, London, or in the pariſh of St. (*n*) Lawrence Jury, is good, without ſhewing the ward in which the pariſh lies (15). But theſe matters having been more fully treated of in the (*o*) chapter of appeals, and alſo in the foregoing part of this (*p*) chapter, relating to the certainty of the time of the offence, I ſhall refer the reader thither, for the fuller conſideration of them.

(*d*) 25 Ed. 3. 43. F. Indict. 1 Suggeſtion 7. 4 H. 7. 8. 2 Hale 180. Kielwood 98. 1 Bulſt. 124. See the books cited f. 70. B. R. H. 109.

(*e*) Vide Keil. 33. 89. C. Eliz. 448.

(*f*) Sup. f. 62. 77. & c. 23. f. 88, 89. 91.

(*g*) 2 H. 7. 7.

(*h*) Cro. Car. 465. Vide ſup. f. 74.

(*i*) See c. 23. f. 88, 89. 91.

(*k*) Sup. c. 23. f. 92. Het. 35. 118, 119. Dyer 68.

(*l*) Sup. c. 23. f. 92, 93.

(*m*) 9 Coke 66. Con. C. Eliz. 732. Sup. c. 23. f. 92.

(*n*) 7 H. 6. 36.

(*p*) Sup. f. 76, which of them

(*o*) C. 23. f. 88, 89. 91, 92. and 93. 77, 78. (15) If there be two vills in a pariſh, the indictment need not ſhew in the defendant lives. Sayer 119. Vide alſo Burrow 337.

Vide Rex v. White. Burrow 333.

Sect. 84. It ſeems, that there is no need in an indictment on a ſtatute, ſetting forth the deſcription which brings the defendant within the purview of it, to ſet forth any place where thoſe

thoſe things happened, which brought him within ſuch deſcriptions; and therefore where a ſtatute makes it high treaſon for a perſon born within the realm, and in popiſh orders, to come into, or remain in the kingdom, &c. there is no need in an (a) indictment on ſuch ſtatute to ſhew in what place the defendant was born or ordained. Alſo it ſeems to be (b) agreed, That a miſtake of the place in which an offence is laid, will not be material upon the evidence on not guilty pleaded, if the fact be proved at ſome other place in the ſame county.

(a) Pop. 93, 94. B. 1. c. 17. ſ. 79, 80, 81, 82.
(b) Vide ſup. ſ. 81. & c. 23. ſ. 91. Kelynge 15. Salkeld 288. Summary 264. Strange 44. 3 P. Will. 439. Andrews 164. 1 Burrow 333.

Foſter 7.

But if there be no ſuch place in a county as that wherein an offence is laid in an appeal or indictment, all proceſs on ſuch indictment or appeal is made void by the ſtatute of 7 Hen. 5. and 9 Hen. 5. c. 1. and 18 Hen. 6. c. 12. by the laſt of which ſtatutes it is recited, "That in the parliament holden "in the ninth year of Hen. 5. it was ordained, For that many "people of malice cauſe often the king's liege people to be ap"pealed or indicted in diverſe counties of treaſons or of fe"lonies, ſuppoſing by the ſaid indictments or appeals, that the "ſaid treaſons or felonies were done in a certain place in ſuch "a county, &c. where no ſuch place is in the ſame county, "that the proceſs of the ſame ſhall be void; and that the in"dictors, procurators and conſpirators ſhall be puniſhed by "fine, &c. by the diſcretion of the juſtices, and alſo liable to "writs of conſpiracy, and by the preſent ſtatute the above re"cited ſtatute is made perpetual."

9 Hen. 5. c. 4.

Sect. 85. It is obſervable, That the ſtatute made in the ninth year of Henry the fifth herein referred to, ſeems to be wholly omitted by Keble and Pulton, who have no other ſtatute concerning this matter made in the ninth year of Henry the Fifth excepting the firſt, which only confirms a ſtatute made in the ſeventh year of the ſame king concerning appeals and indictments; and there is no other ſtatute whatſoever in the ſeventh (c) year of that king mentioned in Keble or Pulton, but only one which requires the juſtices before the award of any exigent to inquire by inqueſt of office, Whether there be any ſuch place in the county as that wherein an offence is laid in an appeal or indictment. But this ſtatute ſeems only to extend to the county of Lancaſter, for it is directed to the chancellor of that county, and recites, "That perſons had been indicted and appealed in places falſly alleged in the ſaid county," and in the enacting part ſpeaks only of juſtices who had power to determine felonies in the ſaid county, and in the latter expreſsly commands the ſaid chancellor to cauſe it to be proclaimed in the ſame county, but mentions no other. From all which I ſee not how it can extend to any other county, and yet Wingate in his (d) abridgement makes it equally extend to all counties. However, (e) Raſtal in his collection of ſtatutes ſeems to

(c) Qu. vide 9 Hen. 5. c. 2. Ruff head's ſtatutes.

(d) Wingate's Abridgement of the ſtatutes under the title of Conſpiracy, ſ. 3.
(e) Raſt. Statutes, Conſpiracy 3. ſo alſo Ruffhead ſtat. p. 512.

(a) Lamb. 4. B. 5. f. 493. F. N. B. 115.

to have ſet down the very ſtatute which is referred to by the above recited ſtatute of 18 Hen. 6. c. 12. and this is certainly (a) ſtill in force.

All law proceedings are now to be in the Engliſh tongue. Vide infra f. 88.

As to the fifth point, *viz.* Where the body of an indictment may be vitiated by falſe or improper Latin, or the uſe of Engliſh inſtead of Latin; I ſhall endeavour to ſhew,—Where falſe Latin will vitiate an indictment.—Where a word which is not Latin.—Where ſuch faults are holpen by an *Anglicè*.

(b) 5 Coke 121. Cro. Ca. 465.

(c) 5 Coke 121. Vide Cro. El. 108. 2 Hale 169.

Sect. 86. As to the firſt of theſe particulars, it ſeems to be holden generally in ſome (b) books, That no falſe Latin will vitiate an indictment; and it ſeems to be holden by my Lord (c) Coke, That an indictment ſhall not be quaſhed for any falſe concord between the ſubſtantive and adjective, as *præfatæ regi*, or *præfato reginæ*, becauſe though the expreſſions be incongruous, yet they are Latin and ſignificant. Neither do I find this opinion denied by any other authority, and therefore I leave it to be conſidered, Whether it may not ſtill be maintained, eſpecially (d) conſidering, That the ſenſe appears as fully, clearly and expreſsly from ſuch Latin as if it had been never ſo properly expreſſed. And it ſeems alſo, That the like reaſon may be given for the caſe in (e) Yelverton, wherein an indictment of forcible entry, finding that the defendant *unum meſuagium ingreſſum fecit*, without adding the word *in* before *meſuagium*, was adjudged good; but it is ſaid in the book, That this is not falſe, though it be not fine Latin; by which it ſeems to be implied, That if it had been falſe Latin, it might have vitiated the indictment.

(d) Vide Cro. El. 108.

(e) Yelv. 27, 28.

However, it ſeems to be ſettled at this day, That an indictment againſt two or more, laying the fact charged againſt them in the ſingular number, is inſufficient; as, where it finds, That A. and B. *inſultum* (f) *fecit*. The reaſon whereof perhaps may be this, That it appears ſomewhat doubtful upon the face of the indictment whether the jurors intended to charge more than one, becauſe the fact is laid in the ſingular number, which it ſeems abſurd to apply to more than one, and therefore the indictment is inſufficient for its uncertainty. As to (g) Fulwood's caſe, wherein Croke reports the contrary to have been reſolved, it is certain, That the verb in the record is in the plural number. And as to the (h) caſes wherein faults of this kind have been amended in original writs, as *teneat conventionem* for *teneant*, and ſuch like; it may be anſwered, That thoſe amendations were made by virtue of the ſtatutes of (i) amendments, which extend not to criminal proceedings. And as to the caſe in (k) Bulſtrode's Reports, wherein it is ſaid to have been reſolved, That an indictment of felony againſt more than one in the ſingular number was amended, and thereupon the defendants were adjudged to be hanged; it may be anſwered, That it doth not appear in what part of the indictment the ſingular

(f) Rex v. Dobſon. Hil. 3 Geo. 1. 2 Keble 51. Vide Cro. Car. 465. 573. Cro. El. 754.

(g) Cro. Car. 489.

(h) 2 Vent. 173. Yelv. 224, 225. 2 Saunders 38. C Jac. 306 369.

(i) Salk. 51. 52. 6 Modern 268.

(k) 2 Bulſt. 35.

ſingular number was put for the plural; neither is the ſaid reſolution, in whatſoever ſenſe it be taken, reconcilable with the later authorities, as ſhall be more fully ſhewn under the twelfth point.

But it is ſaid (*a*), That a fault of this kind is made good by the grand jury's finding the indictment *billa vera* againſt one of the defendants only; the reaſon whereof perhaps may be this, That the uncertainty of the indictment is ſupplied by ſuch an indorſement. But this ſeems contrary to the authorities, relating to this matter, cited in the ſecond ſection. Alſo it hath been adjudged (*b*), That where a bill of indictment lays the fact in the plural number againſt two, and it is found *billa vera* as to one of them only, it is good; and yet the verb in the plural number in the record muſt, after ſuch a finding, be applied only to one perſon; but to this it may be anſwered, That there is no uncertainty either in the bill or indorſement. Alſo it hath been adjudged (*c*), That the word *ſolvet* inſtead of *ſolvat*, is not fatal in a judgment; but that a new one ſhall be given.

(*a*) 2 Keble 52.
(*b*) C. Car. 464, 465.—See alſo Rex. v. Fieldhouſe, Cowper 325. where *billa vera* was indorſed as to one *diſtinct* count of an indictment and *ignoramus* as to the reſt, and held good.

(*c*) 1 Sid. 219. 2 Hale 169. 170. 2 Strange 870. Bar. K. B. 24.

Sect. 87. As to the ſecond particular, *viz.* Where the uſe of a word which is not Latin will vitiate an indictment.—It ſeems generally agreed (*d*), That an indictment wholly in Engliſh is void, which ſeems to depend upon the ſtatute of 36 Edw. 3. c. 15. By which it is enacted, "That all pleas "which be pleaded in any of the king's courts ſhall be entered "and enrolled in Latin." And from hence it ſeems clearly to follow, That if any material part either of the body or caption of an indictment be expreſſed in a word which is not Latin, as by the word (*e*) *erectaverunt*, inſtead of *erexerunt*, or (*f*) *brachia ſua dextra*, inſtead of *brachio*, or (*g*) *præſantant' exiſtit* inſtead of *præſentat'*, the indictment is inſufficient (except in ſome ſpecial caſes herein after ſet forth); for no one can ſay, that the bare giving a Latin termination to a word unknown in that language, can make it become Latin: and if the want of one material word may be ſupplied, why not the want of two, and ſo on? It hath indeed been (*h*) holden, That a fault of this kind, as *imaginavit* for *imaginatus eſt*, *avæ* for *aviæ*, is amendable in an original writ, which yet is denied by others, if it be in a (*i*) ſubſtantial part. However, it ſeems certain, That ſuch amendment muſt depend upon the ſtatutes of amendments, which extend (*k*) not to criminal proceedings.

(*d*) C. Eliz. 85. Qu. 3 Keb. 637.
(*e*) C. Eliz. 231. Hutt. 56. Sed vide Cowper 229.
(*f*) C. Eliz. 137.
(*g*) 1 Sid. 175. Salkeld 370. Sed vide 2 Salk. 660. Doug. 194.
(*h*) 8 Coke 159. 2 Bulſt. 35. Moor 5. N. Bend. 33. 1 Anderſon 24.
(*i*) 1 Lev. 1, 2. 5 Coke 45. C. Eliz. 462.
(*k*) 1 Salkeld 51, 52. 6 Mod. 268. Vide ſup. ſect. 86.

Alſo it ſeems, That it is no leſs a fault to make uſe of a word which is proper Latin in another ſenſe, whether entirely different, or of a much larger extent, than that in which it is uſed, as of the word (*l*) *collis* for *colli*, or (*m*) *mala ars* for *veneficium*. Alſo it ſeems agreed, That an abbreviation not juſtified by legal uſage, as (*n*) *dno* without a daſh, for *domino* (*o*) *R. Rs.*

(*l*) 1 Bulſt. 109.
(*m*) Noy 85. 1 Jones 144. Latch 156.
(*n*) 5 Sid. 175.
(*o*) 1 Salk. 110.

for *regni regis*; or the expreſſion of a number of figures that
(*a*) Salkeld 195. 1 Sid. 40. 3 Keble 301. 2 Levinz 102. 1 Modern 78. are not (*a*) Roman, is equally fatal as it would have been wholly to have omitted what you endeavour in ſuch manner to expreſs. Alſo it hath been (*b*) adjudged, That an inquiſition finding that J. S. *ſeipſum emerſit*, &c. is inſufficient; becauſe *emergo* doth not ſignify to put into, but riſe out of the
(*b*) 2 Lev. 140. 3 Modern 100. B. 1. c. 27. ſ. 15. water. (*c*) Alſo it is ſaid, That an indictment has been quaſhed for the words *pace regia*, inſtead of *pace regis*; but it appears
(*c*) 1 Sid. 140. not what was the nature of the indictment, nor in what part of it theſe words are uſed, and therefore I would ſuppoſe it to have been in ſuch part of ſome indictment wherein thoſe expreſſions are ſo material that they cannot be rejected as ſurplus and immaterial; for it ſeems to be a ſettled rule, That nothing which may be ſo rejected ſhall vitiate an indictment; as where the year
(*d*) 1 Salk. 195. 1 Modern 78. of the Lord is written in common (*d*) figures, but the year of the king is well expreſſed, or where an indictment is ſaid to be
(*e*) C. Eliz. 108. taken before J. S. and J. N. (*e*) *duo juſticiariis*, &c. Alſo it ſeems, That the uſe of a word which is not proper Latin, as
(*f*) 2 Jon. 59, 60. (*f*) *contrafacere*, for counterfeiting, may be made good by precedents. And there can be no doubt but that (*g*) terms of
(*g*) Dalt. c. 131. 10 Coke 133. art, which are neceſſary in all indictments, as *felonia*, *murdrum*, *burglaria*, and ſuch like, are good, though they be not good claſſical Latin; for they are of ſuch a complex and peculiar ſignification as no proper Latin word will come up to. Alſo
(*b*) 2 Levinz 221. it hath been (*b*) adjudged, That a literal tranſlation of a ſtatute into Latin is ſufficient, if intelligible, let it be never ſo inelegant, as where it ſets forth that the defendant *ſuper caput ſuum proprium* did forge, meaning, That he did it of *his own head*.

The word *indicari* inſtead of *indictari*; and *diſtrictionem* inſtead of *diſtructionem*, have been thought fatal. Parker's Caſe, Hutton 56. So alſo *auſtrialia*, as a deſcription of the South Sea Company, inſtead of *auſtralia*, has been adjudged fatal. Strange 787. Ld Raym. 1515. But in the caſe of the king and Beach LORD MANSFIELD ſaid, that the court had looked into all the caſes upon the ſubject, and that the true diſtinction is, even in the caſe of a variance, that where the omiſſion or addition of a letter does not change the word ſo as to make it *another* word, it is not material. Cowper 230. Douglas 194. Vide alſo note, page 616. ſect. 36.

2 Hale 169. *Sect.* 88. As to the third particular, *viz.* What faults of this kind are holpen by an *Anglicè*. It ſeems to be holden generally in ſome books, That the uſe of a word which is either not Latin at all, or not Latin in the ſenſe in which it is
(*i*) Cro. El. 231. (*k*) Keilw. 10c. 3 Bulſtrode 178. ſeems contrary. (*l*) 1 Sid. 318. (*m*) Cro. Ja. 129. uſed, may in many caſes be holpen by an *Anglicè*, as (*i*) *erectaverunt*, *Anglicè* did erect; (*k*) *retes*, *Anglicè* nets; (*l*) *pellices*, *Anglicè* ſkins; *ollis* (*m*) *æriis*, *Anglicè* braſs pots. But to this it may be anſwered, That as to the three firſt of theſe inſtances, what is ſaid concerning this matter is only ſpoken of by the bye, and did not come into judgment; and as to the laſt of them it may be ſaid,

ſaid, That it doth not concern a criminal proceeding, but a civil action, and that after a verdict: And if the purport of it be, that an *Anglicè* helps the uſe of a word that is not Latin in an action of trover, though damage be expreſsly given for it, it is contradicted by many other expreſs (*a*) reſolutions in which it ſeems to have been taken as a ſettled rule, That where damages are expreſsly given for a thing expreſſed by a word that is not Latin, it is no way helped by an *Anglicè*. Alſo it hath been (*b*) adjudged, That an indictment for taking *octo diſcos*, *Anglicè* diſhes, is inſufficient; and this is agreeable to what is laid down as a ſettled rule in many (*c*) books, *viz.* That where there is a proper Latin word for the thing intended to be expreſſed, no *Anglicè* will help an improper one, as it will do where there is (*d*) no proper Latin word, becauſe in ſuch a caſe there is ſuch a neceſſity either to uſe a feigned one or none at all. Alſo it hath been adjudged, That where there is a proper Latin word, an *Anglicè* cannot make good uſe of any other either in a more (*e*) ſpecial or (*f*) extenſive ſignification than the Latin language will bear, as to make the words (*g*) *malas artes* ſignify witchcraft, or (*h*) *riſcus*, a box full of linen, or (*i*) *fulcrum tecti*, a field bed with a teſter and curtains; in which caſes the judges will take (*k*) no manner of notice of what comes under the *Anglicè* beyond the ſtrict ſignification of the Latin.

(*a*) 1 Lev. 99. 120, 204. 1 Sid. 98. 318. Raymond 5. 3 Lev. 336. 10 Co. 130. 133.
(*b*) Keble 779.
(*c*) Noy 85. Latch 156. March 16, 60. 1 Jones 144. 10 Coke 133. Vide 1 Lev. 204. 1 Sid. 318. Yelverton 68.
(*d*) Coke 131. Noy 85. Latch 156. March 16. 1 Sid. 81. 1 Jones 144.
(*e*) Noy 85. 1 Sid 60. 81.
(*f*) Cro. Jac. 664. 665.
(*g*) Noy 85. Latch 156. 1 Jones 144.
(*h*) Cro. Jac. 664, 665. 2 Roll. 254, 255.
(*i*) 10 Co. 130. 132, 133. (*k*) Cro. Jac. 664, 665. 2 Roll. 254, 255. 10 Coke 130. 132, 133.

† But it is recited by 4 Geo. 2. c. 26. "That many and "great miſchiefs do frequently happen to the ſubjects of this "kingdom from the proceedings in courts of juſtice being in "an *unknown* language, &c. &c. And it is therefore enacted, "That all proceedings whatſoever in any courts of juſtice in "England, and in the court of exchequer in Scotland, and by "6 Geo. 2. c. 14. ſ. 5. in Wales and Berwick upon Tweed, "which concern the law and adminiſtration of juſtice, ſhall "be in the Engliſh tongue and language only, and not in "Latin or French, or any other tongue or language whatſo-"ever, and ſhall be written in ſuch a common legible hand "and character, as the acts of parliament are uſually ingroſſ-"ed in, &c. and in words at length, and not abbreviated, "and all perſons offending againſt this act ſhall forfeit fifty "pounds to any perſon who ſhall ſue for the ſame. But by "6 Geo. 2 c. 14. ſ. 5. their proceedings may be written or "printed in the like way of expreſſing numbers by figures, "as have been commonly uſed, and with ſuch abbreviations "as are now commonly uſed in the Engliſh language, nor "ſhall the penalty aforeſaid be extended to the expreſſing the "proper or known names of writs or other proceſs or tech-"nical words in the ſame language as hath been commonly "uſed. Nor ſhall this act extend to the certifying proceed-

Vide obſervations upon theſe ſtatutes 3 Comm, 322. Barnardiſton, K. B. 177. 261. 268. 298. 271, 334. 336.

"ings in the court of admiralty; nor by 6 Geo. 2. c. 6. to "the court of *receipt of exchequer* in Scotland."

Sect. 89. As to the ſixth point, *viz.* Where the offence indicted may be laid jointly, and where ſeverally; and where both jointly and ſeverally; and where the offences of ſeveral perſons may be laid in one indictment. It ſeems certain at this day, That notwithſtanding the offence of ſeveral perſons cannot but in all caſes be ſeveral becauſe the offence of one man cannot be the offence of another, but every one muſt anſwer ſeverally for his own crime; yet if it wholly ariſe from any ſuch joint act, which in itſelf is criminal, without any regard to any particular perſonal default of the defendant, as the joint (*a*) keeping of a gaming-houſe, or the (*b*) unlawful hunting and carrying away of a deer, or (*c*) maintenance, or (*d*) extortion, &c. The indictment or information may either charge the defendants jointly and ſeverally, as thus: *quod* (*e*) *cuſtodiverunt, & uterq; eorum cuſtodivit*; or, *quod* (*f*) *aſportaverunt, & eorum uterq*; *aſportavit*; *or* may charge them jointly only, without charging them (*g*) ſeverally, becauſe it ſufficiently appears from the conſtruction of law, That if they joined in ſuch act, they could but be each of them guilty; and from hence it follows, That on ſuch indictment or information (*h*) ſome of the defendants may be acquitted, and others convicted; for the law looks on the charge as ſeveral againſt each, though the words of it purport only a joint charge againſt all. 10 Modern 63. Foſter 329.

(*a*) Rex v. Dixon & ux. adj. T. 2 Geo. 1. 10 Modern 335. 2 Hale 174.
(*b*) Rex v. Hawkins, adj. M. 3 Geo. 1.
(*c*) 1 Vent. 302.
(*d*) Salkeld 382.
(*e*) Rex v. Dixon & uxorem, adj. Tr. 2 Geo. 1. 10 Modern 335.
(*f*) Rex v. Hawkins, adj. M. 3 Geo. 1.
(*g*) Reg. v. Williams, adj. M. 10. Annæ. Bear & White, 4 Will. 3. C. Car. 380, 381. 2 R. Abr. 707. 48. 708. Con. 2 Roll. 345. Palm. 367, 368.
(*h*) 2 R. Abr. 707. 48. 708. Bear & White, 4 Will. 3.

But where the offence indicted doth not wholly ariſe from the joint act of all the defendants, but from ſuch act joined with ſome perſonal and particular defect or omiſſion of each defendant, without which it would be no offence; as the following a joint trade without having ſerved a ſeven years apprenticeſhip required by the ſtatute, in which caſe it muſt be the particular defect of each trader which muſt make him guilty, and one of them may offend againſt the ſtatute, and the others not, the indictment or information (*i*) muſt charge them ſeverally and not jointly; for it is abſurd to charge them jointly, becauſe the offence of each defendant ariſes from a defect peculiar to himſelf. And for the like reaſon a joint indictment againſt ſeveral, for not (*k*) repairing the ſtreet before their houſes, hath been quaſhed (15).

(*i*) 2 R. Abr. 81. 5 Modern 180. 2 Hale 174.
Confirmed Strange 623. 2 Seſſ. Caſ. 221. 4 Burrow 2046. Barnard. K. B. 56. See alſo Burrow 980. Ld Raym. 1572. But this laſt caſe is ſaid not to be law.
(*k*) 2 R. Abr. Burr. 984 81.

(15) Several defendants cannot be joined in one indictment for perjury; for perjury is a ſeparate act in each; and one may be deſirous to have a certiorari, and the other not; and the jury on the trial of all may apply evidence to all that is but evidence againſt one. Strange 921.—So alſo in Rex v. Clendon, and others, where two were joined in the ſame indictment for an aſſault, the court held they were diſtinct offences. Strange 870. Ld Raymond 1572. Bar. K. B. 337. 2 Seſſ. Caſ. 24. But in the caſe Rex v. Benfield and Saunders, E. 33 Geo. 2. on an information againſt both for the ſame libel, it was held good; and the caſe of the king v. Clendon, held not to be law; for cannot the king call a man to account becauſe he broke two heads inſtead of one? Ld Mansfield. Burrow 980.

But I do not find it ſettled in what caſes ſeveral offences of ſeveral perſons may be joined in one indictment; for in ſome (a) books indictments againſt ſeveral for ſeveral offences, as for a recuſancy, (b) following a trade without having ſerved an apprenticeſhip, not (c) repairing the ſtreets, &c. are mentioned without any exception on this account. And it is holden, That one indictment againſt two juſtices for not (d) inquiring of a riot, and an indictment againſt two perſons for ſpeaking of the ſame (e) words, may be maintained; and yet it is (f) agreed, that one action lies not againſt ſeveral for the ſame words. Alſo in (g) Rolle's reports an indictment againſt ſeveral for having inmates in their houſes is ſaid to have been quaſhed; becauſe it was but one joint indictment againſt them all, whereas there ought to have been ſeveral indictments againſt them. Alſo in the ſixth (h) Modern reports, an indictment againſt ſeveral for the neglect of a day of faſting appointed by proclamation, is ſaid to have been quaſhed for the like reaſon. And this is certainly the moſt agreeable to the rule of bringing actions upon penal ſtatutes, wherein ſeveral offences ſhall not be joined, except it be in reſpect of ſome one thing to which all of them have a relation; as where ſeveral (i) join in a ſuit in the (k) admiralty for a contract on land, or in procuring or giving an untrue verdict, or are privy to one another (l) in maintenance of the ſame cauſe.

(a) 1 Lern. 241.
(b) 2 R. Abr. 81. Salkeld 382. 1 Ventris 302.
(c) 2 R. Ab. 81.
(d) Style 245.
(e) Style 312.
(f) C. Jac. 647. 1 R. Abr. 781. Palmer 313. 1 Bulſt. 15.
(g) 2 Roll 164.
(h) 6 Mod. 210. Strange 623. 870. 921. 2 Ld Ray. 1572. 2 Sef. Caſ. 28. 154. 2 Bar. K. B. 80. 337. Sed vide Burr. 985.
(i) B. Join. in action, 5. 47. 100. 108. F. N. B. 171. F. Dec. tant. 1. 4. 6. 8, 9.
(k) Qu. Dyer 159.
(l) B. Maint. 26, 52.

Sect. 90. As to the ſeventh point, *viz.* Whether the words *vi & armis* be in any caſe neceſſary in the body of an indictment at common law. It is taken for granted in ſome (m) books, That they were neceſſary at common law in all indictments for offences which amount to an actual diſturbance of the peace, as reſcouſes and aſſaults, and ſuch like; yet I do (n) not find it agreed, That they were ever neceſſary in ſuch indictments, wherein it would ſeem abſurd to put them in, as in indictments for (o) conſpiracies, (p) cheats, ſlanders, eſcapes, and ſuch like; or (q) nuſances committed in a man's own ground.

(m) C. Jac. 473. Skinner 426. 2 Hale 187. 2 Lev. 221. See the books cited in the next ſect. qu. ſup. c. 23. ſect. 85.
(n) Yet ſee prea. 37 H. 8. 8.
(o) 1 Lev. 125, 126. Dalton c. 131.
(p) 1 Keb. 562 Dalton c. 131. Cro. Car. 377
(q) Pop. 206.

However, there can be no doubt but that the omiſſion of them in indictments of this kind, is made good by the ſtatute of 37 Hen. 8. c. 8. by which it is recited, "That in all indictments of felony and treſpaſs, and divers others, it was common to uſe the words *vi & armis*, and in divers of them to declare the manner of the force and arms, that is to ſay, *vi & armis, videlicet, baculis, cultellis, arcubus & ſagittis*, or other ſuch like words; where in truth the parties indicted had no ſuch weapons at the time of the offence, yet for lack of ſuch words the ſaid indictments were taken as void, and had been avoided by writ of error or plea, &c." and thereupon it is enacted, "That theſe words *vi & armis, videlicet,*

" *cum baculis, cultellis, arcubus & ſagittis*, or other ſuch like, " ſhall not of neceſſity be put in any indictment or inquiſi- " tion: Nor ſhall the parties indicted have any advantage by " writ of error or plea or otherwiſe, to avoid any ſuch indict- " ment or inquiſition for the want of theſe or the like words: " But that the ſame inquiſitions and indictments, and every of " them, lacking the ſaid words, or any of them, ſhall be ad- " judged as effectual to all intents, conſtructions and purpoſes, " as the ſame inquiſitions and indictments having the ſame " words in them."

Sect. 91. But notwithſtanding this ſtatute ſeems be ſo expreſs as to all indictments, yet it is *(a)* holden in many books, That indictments of treſpaſs, and ſuch like, are ſtill inſufficient without the words *vi & armis* (16); and many indictments have accordingly been quaſhed for want of them, where they are not implied in ſome others, as *(b) reſcuſſit*, or *(c) manu forti*, &c. But it ſeems difficult to aſſign any reaſon for theſe opinions, unleſs it be, That becauſe the enacting part of the ſtatute ſays, That the words " *vi & armis, videlicet, cum baculis, cul-* " *tellis, &c.*" are not neceſſary, &c. the meaning was only to take away the neceſſity of thoſe ſuperfluous words *baculis & cultellis*, &c. but not of the words *vi & armis*, where they are proper and pertinent. But to this it may be anſwered, That the preamble ſeems to complain of the opinion, that the words *vi & armis*, whether put by themſelves, or uſed with thoſe other words, were in any caſe thought neceſſary in indictments; and it is moſt natural ſo to explain the enacting part of a ſtatute as to make it extend to all the miſchiefs complained of in the preamble; beſides, the enacting part of the ſtatute is expreſs, " That indictments without theſe words *vi & armis*, " *videlicet, baculis, cultellis, arcubus et ſagittis*, or any of them, " ſhall be as effectual as if they had been compriſed in them;" and ſurely the words *vi et armis* cannot but be comprehended under theſe words, " or any of them."

It is ſaid *(d)* indeed in Levinz's ſecond reports, That the words *vi et armis* are ſtill neceſſary, becauſe without them there can be no *capiatur* entered, nor fine to the king; but this is in effect to contradict the ſtatute, which ſays, that an indictment without thoſe words ſhall be as effectual to all intents, conſtructions and purpoſes, as an indictment with them. Beſides, will any one ſay, That there can be no *capiatur*, nor fine to the king upon indictments of cheats, conſpiracies and ſuch like? Wherein yet it ſeems to be agreed, that thoſe words are not neceſſary. And agreeably hereto, the court of king's bench has *(e)* often refuſed to quaſh indictments of treſpaſs for want of thoſe words. However, it is certainly ſafe and adviſeable to make uſe of them where they are proper and pertinent, if it be to no other purpoſe than to aggravate the offence.

(a) S. P. C. 94. 2 Levinz. 221. 3 Siderfin 140. 2 Bulſtrode 205. 1 Levinz 126. 1 Keble 101. 2 Kebie 154. Vide Pop. 206. C. Ca. 377, 378.

(16) In an indictment for a riot the words *vi et armis* are implied in the words *riotoſe ceſſerunt, fregerunt, et proſtraverunt.* Strange 834. Bar. K. B. 138. 2 Seſſ. Caſ. 13. Cro. Car. 345. 472. Styles 12. 3 Peere Will. 464.

(b) C. Jac. 345. 2 Bulſt. 208. 2 Hale 177.

(c) B. 1. c. 64. ſect. 44. Dalt. c. 131.

(d) 2 Lev. 221.

(e) C. Jac. 472, 473. Vide C. Jac. 345. 2 Bulſt. 208. Dalton c. 131. Lamb. B. 4. c. 5. ſ. 502, 503.

Sect. 92. As to the eighth point, *viz.* Whether it be neceſſary in the body of an indictment at common law to lay the offence *contra pacem*. Inaſmuch as all offences whatſoever which are ſubject to a publick proſecution ſeem in general to be ſo, as they are breaches of the law, and in that reſpect tend to the diſturbance of the quiet and peaceable government of the king over his people, it ſeems to be a good general *(a)* rule, That no indictment or information, for an offence, capital or not capital, againſt the common law or ſtatute, can be good, except it expreſsly ſuppoſe ſuch offence to have been done againſt the peace of the king or kings, in whoſe reign (17) or reigns it was committed.

(a) 3 Keble 490. 1 Keb. 490. 2 Bulſtrode 258. 2 Hale 188. See the caſes cited in the following part of this ſection, and Cro. Eliz. 186. 6 Modern 128.

(17) Confirmed by all the judges in Rex v. Lookup. Burr. 1901.

And accordingly I find, that every precedent of an indictment in Coke's entries, whether for *(b)* treaſon, or *(c)* felony, or *(d)* inferior offences, expreſsly lays the offence againſt the peace of the king, except only in four inſtances, whereof the one is of an indictment for a *(e)* nuſance for not repairing the highway, which if it may be maintained, ſeems to depend chiefly on this reaſon, That the offence is of ſuch a nature, that a man may be as well guilty of it in his own ground as in that of another; and therefore it hath been *(f)* holden, That it needs not be laid againſt the peace, becauſe the laying it in ſuch manner may ſeem to imply ſomewhat of force or treſpaſs againſt the perſon or poſſeſſion of another; but it ſeems difficult to reconcile this opinion with thoſe many reſolutions taken notice of in the following part of this ſection, by which indictments, for want of theſe words, *contra pacem*, have been adjudged inſufficient, where the offences could on no other account be ſaid to be againſt the peace, than as they were breaches of the law, as all nuſances certainly are. And one *(g)* other of the ſaid inſtances in Coke's entries is, of an indictment of homicide by miſadventure, and one other *(h)* of an indictment of homicide in ſelf-defence: but theſe precedents, if they may be maintained, ſeem to depend chiefly on this reaſon, That ſuch offences are ſuppoſed to be owing rather to the misfortune than fault of the party. And the *(i)* fourth of the ſaid inſtances, is of an indictment of perjury on the ſtatute, which concludes *in contemptum Reginæ, &c. et contra formam ſtatuti*, without adding *contra pacem*. But *(k)* Raſtal's precedents, both of indictments of felony, and of inferior offences, do as often omit the words *contra pacem*, as make uſe of them. However, certainly the much greater number of precedents expreſsly conclude *contra pacem*, and the authority of theſe is much ſtrengthened by thoſe many caſes in the reports, wherein indictments and informations appear to have been quaſhed for want of the words *contra pacem*; as indictments and informations for *(l)* barratry, *(m)* forgery, *(n)* retaining a ſervant without a teſtimonial from his laſt maſter, *(o)* following

(b) Co. Ent 360, 361.
(c) Co. Ent. 351, 352. 355. 356. 358. 359.
(d) Co. Ent. 352, 353. 361, 362.
(e) Co. Ent. 358. See Raſtal 263.
(f) 2 R. Abr. 82. 83. Con. Cro. Car. 584.
(g) Co. Ent. 253.
(h) Co. Ent. 254.
(i) Co. Ent 363.
(k) Raſtal 263.
(l) 2 R. Ab. 82.
(m) 2 R. Abr. 82.
(n) 1 Mod. 78.
(o) 3 Keble 790. 1 Keble 501. 848. 6 Modern 128.

lowing a trade without having ſerved an apprenticeſhip, (*a*) erecting a cottage, (*b*) aſſault and battery, &c.

(*a*) 1 Keble 474.
(*b*) 2 Keble 36. 779. Yelverton 66.

But it ſeems clear from all the precedents, that neither an information (*c*) *qui tam*, on a penal ſtatute, nor an information by the king for an (*d*) intruſion, or other (*e*) wrong of a civil nature done to his lands, goods or revenues, need the words *contra pacem*.

(*c*) Raſtal 409. 2 Keble 369. Co. Ent. 364. to 372. 393.
(*d*) Raſtal 412. Co. Ent. 372 to 390. (*e*) Raſtal 410. Co. Ent. 390.

Sect. 93. If the offence indicted be expreſsly laid, partly in the reign of one king, and partly in the reign of another, as where J. S. is indicted for having erected a wear in the time of queen Elizabeth, and continued it in the time of king James, and thereupon the indictors conclude, That ſo the wear was erected and continued *contra pacem regis, &c.* without adding *contra pacem nuper reginae*, the indictment is (*f*) inſufficient; becauſe it appears, that the commencement of the wrong, which is as much indicted as the continuance, was in the reign of queen Elizabeth, and conſequently, if a crime, muſt have been againſt the peace of her reign. But if the indictors had concluded only, That J. S. ſo continued the wear *contra pacem domini regis, &c.* and had laid the erection of it by way of recital or inducement only, it is (*g*) ſaid, that the indictment had been good, becauſe it ſhould be taken as an indictment for the continuance only.

(*f*) Yelver. 66. Vide 4 H. 6. 4. 2 Hale 188, 189. F. Brief, 25.

(*g*) Yelv. 66. 4 H. 6. 4. F. Brief 25. Vide Rex v. Lookup. Burr. 1902.

Sect. 94. As to the ninth point, *viz.* Whether it be neceſſary in the body of an indictment at common law, to lay the offence *contra coronam et dignitatem regis*; it is obſervable, that all the precedents of indictments in Coke's entries, cited in the ninety-fourth ſection, which lay the offence *contra pacem*, lay it alſo *contra coronam et dignitatem, &c.* Yet not one of (*h*) Raſtal's precedents doth ſo. Neither do I find any one caſe wherein an indictment againſt which no other exception could be taken, has been adjudged (*i*) inſufficient for the want of theſe words. But on the contrary I find it expreſsly reſolved in (*k*) Holbrook's caſe, That an indictment of a riot is good without them.

(*h*) Raſtal 263.
(*i*) 2 Bulſt. 258. Aleyn 49, 50.
(*k*) 2 R. Abr. 82. 2 Hale 188. N. B. Moſt of the precedents in Tremain's Ent. agree with the precedents in Coke.

Sect. 95. As to the tenth point, *viz.* Whether it be neceſſary in the body of an indictment at common law, to lay the offence *in contemptum regis*. It is ſo laid in ſome indictments of inferior crimes in (*l*) Coke and Raſtal, and in others (*m*) not. Alſo it is ſo laid, with the addition of the clauſe *contra leges ſuas*, in every information of intruſion upon the king's lands in (*n*) Coke and (*o*) Raſtal, and alſo in an information in (*p*) Coke for a trover and converſion of the king's goods. But in (*q*) two informations for mines claimed by the king, which are the

(*l*) Co. Ent. 353. 363. Raſtal 263.
(*m*) Co. Ent. 362. Raſtal 263.
(*n*) Co. Ent. 372. 376. 379. 381. 385. 387. 2 Coke 16. 26.
(*o*) Raſtal 412.
(*p*) Co. Ent. 390.
(*q*) Raſtal 4 Q. Plowden 310.

the only precedents I find of this kind, the ſuppoſed injury is laid only *ad damnum regis*, without either of the ſaid clauſes. Neither do I find either of them in any indictment of treaſon or felony, nor in any information *qui tam* in Coke or Raſtal. And though it ſeems to be admitted in the year book of (*a*) 4 Hen. 6. that in an action on a ſtatute it is neceſſary to conclude, *in contemptum domini regis*, yet in (*b*) Lutwych's Entries it is oftener omitted than uſed, and no exception appears to have been taken for the omiſſion.

(*a*) 4 H. 6. 6. F. Brief, 25.
(*b*) Lutw. 132, 133, 134, 135. 139. 165, 167.

Sect. 96. As to the eleventh point, *viz.* Whether it be neceſſary in an indictment at common law to lay the offence *illicitè*. I cannot find this word uſed in any one of Coke's or Raſtal's precedents of indictments; neither do I find any clear and expreſs (*c*) authority, that it is in any caſe neceſſary in an indictment at common law; but on the contrary I find it expreſsly (*d*) adjudged, That it is not neceſſary in an indictment of a riot, becauſe the act itſelf contained in the indictment ſo plainly appears to be unlawful. But where a ſtatute uſes the word *unlawfully* in the deſcription of an offence, it is certain that an indictment grounded on it muſt uſe the *illicitè*, or ſome other tantamount.

(*c*) See 1 Keble 859. 2 Keble 715.
(*d*) 2 R. Abr. 82.

Sect. 97. As to the twelfth point, *viz.* Whether a defect in any of the particulars above mentioned be amendable, I take it to be (*e*) ſettled, That no criminal proſecution is within the benefit of any of the ſtatutes of amendments (18); from whence it follows, that no amendment can be admitted in any ſuch proſecution, but ſuch only as is allowed by the common law.

For the riſe and hiſtory of amendments, vide 3 Com. 307.
(*e*) 1 Jon. 421. 1 Salk. 51, 52. 6 Mod. 268, &c. Vide ſup. c. 23. ſect. 129. 1 Sid. 66. with reſpect to

(18) Confirmed by Ld Mansfield, Burr. 2527. Sed vide Douglas 115. penal actions.

And agreeably here to I find it laid down as a (*f*) principle in ſome books, That the body of an indictment removed into the king's bench from any inferior court whatſoever, except only thoſe of London, can in no caſe be amended. But it is (*g*) ſaid, That the body of an indictment from London may be amended, becauſe by the city-charter a tenor of the record only can be removed from thence (19) (*h*). And it ſeems, That by the courſe of the king's bench, a rule may be made on any coroner to amend even the body of his inqueſt by his notes in a mere matter of form. But I do not find it any where holden, That this can be done after it is filed, by which it becomes a record of the court; and then the ſame objection ſeems to lie againſt the amendment of it, as of an indictment.

(*f*) 1 Keb. 252. 2 Keble 580. 1 Sid. 155. Vide 1 Keb. 45. 2 Keble 141, 142. Con. 2 Bulſtrode 35.
(*g*) 1 Keb. 252. 1 Sid. 155. 229, 230. 1 Keble 571. Vide Hob. 135.
(19) The cuſtom extends to Middleſex as well as London. 1 Keble 571.
(*h*) See B. 1. c. 27. ſect. 16.

But

But it ſeems to be (*a*) agreed, That the caption of the indictment from any place may, upon motion, be amended by the clerk of the aſſizes or of the peace, ſo as to (*b*) make it agree with the original record at any time during the ſame term in which it came in, (*c*) but not in a ſubſequent term. But I have known it holden, That the caption of an inquiſition cannot be amended at any time after filed, any more than the body; the reaſon whereof perhaps may be this, that the caption being part of, and drawn at the ſame time with the inquiſition, greater exactneſs is required in it than in that of an indictment, which is left as a thing of courſe to be drawn up by the clerk of the court, when occaſion ſhall require.

(*a*) 1 Saund. 249. 1 Sid. 175. 1 Keble 656. 3 Modern 167.

(*b*) C. Jac. 276, 277. 2 Sid. 155.

(*c*) 1 Sid. 155. Rex v. Atkinſon, Trin. 25 Geo. 3. 1 Keble 45. 656. 1 Sid. 175. 12 H. 7. 25. 10 Ed. 4. 15.

Alſo by the opinion of two judges againſt that of two, the want of continuances in the record of an attainder of felony (*d*) cannot be amended by the certificate of the clerk of the aſſizes, eſpecially if the king ſignify his pleaſure, that he doth not deſire any amendment. And it ſeems to be (*e*) ſettled at this day, That no diſcontinuance is amendable in any criminal proſecution, (*f*) without conſent. But it hath been (*g*) adjudged, That a mere miſpriſion in the joining of an iſſue in a criminal proſecution, as where the word *ſimiliter*, &c. is omitted, may be amended at any time. Alſo it hath been (*h*) adjudged, That the direction of a *venire vicecomitibus* of ſuch a place, which is returned by J. S. *vicecomite*, may be amended on the oath of J. S. that there is but one ſheriff of the place, which is himſelf. Alſo it is every day's practice to amend (*i*) criminal information, (20) and the pleadings thereon by rule of court, while all is in paper. And (*k*) *quære* if the record may not be ſo amended by the paper-book at any time before judgment.

(*d*) 1 R. Abr. 196. 1 Jones 420.

(*e*) Salkeld 51. 52. 6 Modern 268. B. Amend. 10. 17. 66. 92. F. Amend. 59. 29. 32. Diſ. de proceſs, 47.

(*f*) 21 H. 7. 40. F. Amend. 78.

(*g*) C. Jac. 502. 529, 530. 2 Roll. 59.

(*h*) Keble 900, 901. 1 Sid. 244. Vide 8 Coke 156. 3 Lev 430.

(*i*) 1 Salk. 47.

(20) Vide Rex v. Wilkes. Burrows 2527. 2578. where the doctrine of amendments underwent a very critical inveſtigation.

(*k*) Salkeld 47. Salkeld 50. Vide 1 Keb. 452. C. Car. 144. 1 Levinz 189. 3 Levinz 430. 2 Burrow 758.

Sect. 98. It ſeems to have been anciently the common practice where an indictment appeared to be inſufficient, either for its uncertainty, or the want of proper legal words, not to put the defendant to anſwer it; but if it were found in the ſame county in which the court ſat, to award proceſs againſt the grand jury, to come into court and (*l*) amend it. And it ſeems to be the common practice at (*m*) this day, while the grand jury who found a bill is before the court, to amend it by their conſent in a matter of form, as the name or addition of the party, &c.

(*l*) 22 Aſſize 73. 2 Ed. 3. 1. 8 H. 5. 8. S. P. C 97. F. Indict. 2, 3. 27. 25 E. 3. 43. B. Indict. 12.

(*m*) Kelyng 37. N. B. They conſent at the time they are ſworn.

Sect. 99. And now I am in the ſecond place to ſhew what ought to be the form of the body of an indictment upon a ſtatute.

For

For the better underſtanding whereof, having premiſed, that the ſame rules which have been already laid down concerning indictments at common law, are generally applicable to indictments on ſtatutes, I ſhall in this place conſider ſuch matters only as more peculiarly belong to the form of the body of an indictment upon a ſtatute, under the following particulars:—

Firſt, Whether it be neceſſary that ſuch indictment recite the ſtatute whereon it is grounded.—Secondly, What miſ-recitals of ſuch ſtatutes are fatal.—Thirdly, How far it is neceſſary to bring the offence indicted within the very words of the ſtatute. Fouthly, Whether an indictment grounded on a ſtatute, which will not maintain it, may be made good, as an indictment at common law.—Fifthly, How far it is neceſſary to conclude *contra formam ſtatuti*.

Sect. 100. As to the firſt particular, *viz.* Whether it be neceſſary that ſuch indictment recite the ſtatute whereon it is grounded. I take it to be (*a*) ſettled, that there is no neceſſity in any indictment or information on a (*b*) publick ſtatute, to recite ſuch ſtatute, whether the offence be ſuch only becauſe prohibited, or be an evil in its own nature, and whether it be prohibited by more than one ſtatute, or by one only. For the judges are bound *ex officio* to take notice of all public ſtatutes, (*c*) and where there are more than one by which an indictment or information may be maintained, they will go upon that which is moſt for the king's advantage.

(*a*) 5 H 7. 17. F. Act. ſur le Stat. 7. 20. 2 R. Abr. 79. Plowden 1. 79, &c. 1 H. 6. 1. 4 Co. 48. C. Eliz. 236. C. Car. 229. Dyer 155. 346. B. Act. ſur le Stat. 4. Parl. 15. but C. Eliz 187. 55. cont. Qu. Parl. 15, 32. 187.

47 Ed. 3. 10. Dyer 159. B. Parl. 75. B. Champ. 1. Shower 337. F. N. B. 6 Modern 140, 141. (*b*) Moor 468. 699. 4 Co. 13. 76. B. Avow. 5. B. 2 Hale 172, 192. (*c*) Dyer 155 346. 5 H. 7. 17. 6 Modern 140. Cro. Eliz.

As to the ſecond particular, What miſ-recitals of ſuch ſtatutes are fatal, I ſhall endeavour to ſhew:—Firſt, Whether all miſ-recitals of the ſubſtantial part of the ſtatute are fatal.—Secondly, What miſ recitals of the place or time at which the parliament was holden.—Thirdly, Whether a miſ-recital of the title of a ſtatute.—Fourthly, What other miſ-recitals are fatal.

Sect. 101. As to the firſt of theſe particulars, it ſeems to be ſettled, That notwithſtanding there be no neceſſity to recite a publick ſtatute; yet if the proſecutor take upon him to do it, (*d*) and materially vary from a ſubſtantial part of the purview of the ſtatute, and conclude *contra formam ſtatuti prædicti*, he vitiates the indictment (21); becauſe it judicially appears to the court, that there is no ſuch foundation for the proſecution, as that whereon it is expreſsly grounded; As where in an (*e*) indictment with ſuch a concluſion, on the ſtatutes which prohibit entries with ſtrong hand, the word *vi* is put for *manu forti*;

(*d*) Plow. 79. 83, 84. Cro. Eliz. 236. 245. Palmer 565. 4 Coke 48. See the three next ſections. 1 Roll 50. C. Car. 136. 136. 2 Hale 172. 1 Jones 194. (21) Vid. 2 Hale 2 Bulſt. 258.

 (*e*) C. Eliz. 93.

or

or where the word (a) *nuncia* is put for *mendacia* in ſuch an indictment on the ſtatutes againſt the tellers of lies of great men; (b) or where the verb in a ſtatute which expreſſes the principal act wherein the offence conſiſts, is expreſſed in ſuch an indictment on ſuch a ſtatute by a word which is neither claſſical nor legal Latin; (c) or where a ſtatute in deſcribing the courts wherein it prohibits perſons to bring actions in other names without their privity, calls them courts wherein pleas are holden in actions perſonal, &c. and you, in reciting it in ſuch an indictment, (d) call them courts wherein pleas are holden in any actions.

(a) 4 Co. 12, 23. C. Car. 135.
(b) 2 Jon. 49. 50. 3 Keble 661.
(c) C. Eliz. 236.
(d) C. Jac. 362. See ſect. 108.

Sect. 102. Yet it ſeems that the following miſ-recitals of the ſubſtantial part of the purview of a ſtatute in any indictment are not fatal; as the omiſſion of a ſynonymous word, having no other meaning than what is fully expreſſed in the words which are recited; or the joining of words which are either wholly ſynonymous, or much of the ſame ſenſe, as ſignifying ſuch things as generally include one another, as (e) the words *malitioſè, et contemptuoſè*, &c. with a copulative, where the ſtatutes uſe a disjunctive; or the uſing the ſingular number for the plural, or the plural for the ſingular, where the ſenſe is the ſame; as where in (f) reciting a ſtatute ſpeaking of ſuits in any courts, you uſe the words *in aliqua curia*; or where in reciting the ſtatute againſt diſturbing perſons in their open preaching, you uſe the (g) words *in apertis prædicationibus*.

(e) 2 Bulſt. 47. 49, 50, 51, 52, 53.
(f) C. Car. 522, 523.
(g) 2 Bulſt. 47, &c.

Sect. 103. Alſo it (h) ſeems that no advantage can be taken of a variance from any part of a private ſtatute, without ſhewing it to the court in a proper manner, becauſe otherwiſe ſuch a ſtatute ſhall be taken to be as it is recited.

(h) 4 Coke 3. 1 Sid. 356.

Sect. 104. As to the ſecond of the particulars above mentioned, *viz.* What miſ-recitals of the place or time at which the parliament was holden, are fatal; (i) it ſeems to be generally agreed, That a miſ-recital of the place or day at which the parliament was holden, vitiates an indictment. (k) As if a parliament was firſt holden on the twenty-eighth of April in the thirty-ſecond year of Henry the eighth, and afterwards holden by prorogation on the twelfth of April the next year, and a ſtatute then made be recited, as made at a parliament holden on the twenty-eighth of April in the thirty-ſecond year of Henry the eighth: Or if a parliament be ſummoned to meet on the twenty-third of January in ſuch a year, and before the meeting be prorogued to the twenty-fifth, and then holden, and a ſtatute made by ſuch parliament be (l) recited as made in a parliament holden on the twenty-third: Or if a parliament firſt holden in one year be continued by prorogation to another, and then ſit again, and a ſtatute made at ſuch ſeſſions be (m) recited as made in a parliament holden or begun at ſuch ſecond year, (which is all one,) inſtead of ſaying that it

(i) B. Parl. 87. Cro. El. 853.
(k) Plowden 79. 83. 84. C. Car. 136. 232. 3 Keble 468. 2 Jones 50. Hobart 310. Cro. Jac. 139. C. Eliz. 245. But Qu. by Coke. 2 Bulſt. 53.
(l) Dyer 203. Hetley 129.
(m) C. Jac. 111. 139. Lutw. 140. 4 Inſt. 27. 1 Brown. 100. Yelverton 127. Dyer 95. 171. Skinner 110, 111.

it was made at a ſeſſions of parliament then holden, and the indictment conclude *contra formam ſtatuti prædicti*, the variances in ſtrictneſs are fatal; for the court will not make any caſe better than the record has made it; and therefore where that expreſsly grounds it on the act of a ſuppoſed parliament, where there was no ſuch act, the court will not find one out to make it good.

Alſo it hath been (*a*) adjudged, That a repugnancy in ſetting forth the time when a parliament was holden, is fatal, as if a ſtatute be recited as made on ſuch a day, in the firſt and ſecond years of ſuch a king, for it is impoſſible that one and the ſame day ſhould be in two years. Alſo it is holden in (*b*) Croke's Reports, That an indictment was diſcharged for not ſhewing in what county a parliament was holden; but no reaſon is given for this opinion, (*c*) and it hath been adjudged, That the total omiſſion of the day when the parliament was holden, is no fault in the recital of a ſtatute. Alſo it ſeems to be (*d*) agreed, That a miſtake in ſuppoſing a ſtatute to have been made at a parliament holden in ſuch a year, when in truth it was then holden by prorogation, may be helped by the conſtant courſe of precedents upon ſuch ſtatute. Alſo it ſeems to be (*e*) agreed, That not only a miſ-recital of the day whereon the parliament was holden, but even a miſ-recital of the purview of a ſtatute may be ſalved by a general concluſion *contra formam ſtatuti*, without adding *prædicti*, &c. (*f*) But I do not find it ſettled, Whether a fault of this kind can be helped by the defendant's admittance, that there is ſuch a ſtatute as is ſuppoſed; and it will be difficult to maintain that the party's admittance of what the court judicially knows to be contrary to the truth, can make good any indictment.

(*a*) Moor 302.

(*b*) C. Eliz. 106.

(*c*) Dyer 203.

(*d*) Yelver. 127. Brownlow 100. 2 Keble 34. Dyer 271.

(*e*) C. Car. 232; 233. Palmer 365. Raymond 191, 192. 3 Keble 647, 648. Lutwych 140.

(*f*) Affirmed C. Jac. 139. Denied C. Eliz. 236.

Sect. 105. As to the third of the particulars above mentioned, *viz.* Whether the miſ-recital of the title of a ſtatute be fatal. It is (*g*) ſaid to have been holden by Sir Matthew Hale, That the miſ-recital of the entitling of an act will not vitiate a replication, becauſe it is not matter of ſubſtance; and a judgment is (*h*) ſaid to have been lately given in the court of common pleas agreeable to this opinion; but the contrary is (*i*) ſaid to have been ſince adjudged in the court of king's bench.

(*g*) Hardr. 324.

(*h*) 6 Mod. 62.

(*i*) 6 Mod. 62.

Sect. 106. As to the fourth of the particulars above mentioned, *viz.* What other miſ-recitals of a ſtatute are fatal. (*k*) It is ſaid to have been often adjudged, That a variance in reciting a ſtatute to commence after the making, where the ſtatute is expreſs, that it ſhall commence after the end of the ſeſſions, is fatal. But I take it to be a ſettled rule, That a variance no way altering the ſenſe of the ſtatute does (*l*) no hurt; as where in the recital of an oath preſcribed by ſtatute, the

(*k*) 2 R. Abr. 465.

(*l*) 1 Ven. 172. Skinner 11. 52.

the words "*Sea* of Rome" are put for "*See* of Rome;" and "I do declare in conſcience," inſtead of "I do declare in *my* conſcience."

(*a*) C. Eliz. 186. 4 Coke 48. Palmer 565. C. Car. 135. 136. 564. 1 Jones 194. (*b*) Plow. 65. 105. Dyer 103. Hobart 226. 3 Keble 662.

Alſo it ſeems to be (*a*) agreed, That a variance from an immaterial part of a ſtatute does no hurt, (*b*) and therefore that where a ſtatute contains ſeveral branches relating to ſeveral diſtinct matters, an omiſſion of ſuch branches as no way relate to the offence indicted does no hurt, becauſe they are nothing to the preſent purpoſe. Alſo it hath been adjudged, That every miſ-recital even of ſuch branch is not fatal; as if it vary only in ſuch a part of the deſcription of the offence, as is put in only by way of flouriſh, and *ex abundanti*, and makes no neceſſary ingredient in the offence prohibited, nor needs any proof; as if in a proſecution on the ſtatute of 12 Rich. 2. the (*c*) recital be that none ſhall deviſe, ſpeak, or tell any falſe news, lies, or other ſuch falſe things, &c. *unde diſcordia aut aliqua lis* (Anglicè Debates) *inter magnates, vel inter magnates & communitatem dicti regni oriri poſſint*; where the words of the ſtatute are, "That none ſhall deviſe, "ſpeak, or tell any falſe news, lies, or other ſuch falſe things, "&c. whereof diſcord or any ſlander might ariſe within the "ſaid realm;" for the firſt words, *viz.* "That none ſhall "deviſe, &c. any falſe news, lies, or other ſuch falſe things, "&c." are only material. Indeed, as this caſe is reported by Croke, there is a miſ-recital even in this part, for inſtead of "other falſe things," the recital is ſaid to mention "other "things" generally, omitting the word "falſe;" but I ſuppoſe that this is a miſtake of the printer, and that there is no ſuch variance in the record of the caſe, becauſe no exception is reported to have been taken to it.

(*c*) C. Car. 135, 136. Palmer 565. 1 Jones 194.

Burrows 999.

Sect. 107. But if a miſ-recital of ſuch a part of the purview of a ſtatute be not fatal, it ſeems *à fortiori* to follow, That a miſ-recital of the preamble is not material, where the ſubſtantial part of the purview is well recited. And upon this reaſon chiefly, as I ſuppoſe, it hath been adjudged, That if in an action on the (*d*) ſtatute of hue and cry for a robbery, the declaration recite the preamble to ſpeak of the burning of houſes, where the ſtatute mentions arſons generally, without any particular mention of the arſon of houſes; or in an action for the ſlander of an earl, on 2 Rich. 2. c. 5. if the declaration in reciting the preamble mention only what relates to earls, &c. and omit the clauſe concerning the other great officers, (*e*) yet the plaintiff may have judgment eſpecially after verdict. And theſe reſolutions ſeem to weaken the authority of Parker's Caſe reported by (*f*) Hutton, wherein it was ſaid to have been holden by three judges againſt the opinion of Hobart, that the putting of the word *indicari* for *indictari* in the recital of the preamble of the ſaid ſtatute of hue and cry, in a writ grounded thereupon, is fatal.

(*d*) Vide 3 Keb. 647. 661, 662. 2 Jones 51.

(*e*) 2 Jones 49, 50, 51. 3 Keble 647. 3 Keb. 661, 662. Vide C. Jac. 139.

(*f*) Hut. 56, 57. 3 Keb. 648 662. 2 Jones 50, 51.

Sect.

Sect. 108. If an indictment on the eighth of Henry the ſixth, in reciting that part of the ſtatute which declares in what actions the party grieved ſhall recover his damages, after having mentioned recoveries by verdict, omit the (*a*) words "or in any other manner;" or uſe the (*b*) words *aſſiſm novæ diſſeiſinæ* for *aſſiſam novæ diſſeiſinæ*; (*c*) or recite the ſtatute, as giving the fine on a recovery by action *dicto domino regi*, where there is nothing to make good the word *dicto*, (*d*) or recite the ſtatute relating to the bringing an action to be, "if the party "after ſuch entry make any feoffment, &c." where the words are, "if after ſuch entry any feoffment be made," or (*e*) recite it to be, "if any perſon be put out *and* diſſeiſed" in the conjunctive, where the words of the ſtatute are, "if any per- "ſon be put out *or* diſſeiſed" in the diſjunctive, the variances have been adjudged fatal. Yet (*f*) it hath been holden, That the laſt of theſe is an immaterial variance, becauſe though the words above mentioned be diſjunctive in the ſtatute, they have always been expounded in the copulative.—Alſo it may be queſtioned how far the reſt of theſe authorities may be law at this day, ſince of (*g*) late the court has not been ſo ſtrict in recitals as formerly; and if an indictment fully recite a ſtatute ſo far as it concerns indictments, a miſpriſion in what concerns other matters ſeems to be much helped by the authorities of the caſes above cited.

(*a*) C. Eliz. 186.
(*b*) C. Eliz. 393.
(*c*) 1 Bulſt. 218.
(*d*) C. Eliz. 307. Parallel Caſe. C. Eliz. 697.
(*e*) C. Eliz. 96. 697.
(*f*) C. Eliz. 307.
(*g*) 3 Keb. 662.

Sect. 109. It hath been (*b*) adjudged, That a total omiſſion of the clauſe of a ſtatute which ordains what the party ſhall forfeit, does no hurt. Yet if the ſtatute be wholly miſ-recited in ſuch clauſe, as if the words (*i*) *admitteret* or *forisfaceret* be uſed in ſuch clauſe for *amitteret* and *forisfaceret*, the exception for the variance ſeems to have greater weight. Yet if the word miſ-recited be ſynonymous with the other which is rightly recited, and the (*k*) whole purport of both as fully expreſſed in one word, which is properly recited, as if both had been uſed, as it certainly is in the caſe above cited, wherein the word *forisfaceret* is rightly recited, and the word *admitteret* miſ-recited, it may perhaps be queſtioned whether ſuch an exception would be fatal at this day, eſpecially conſidering that it is in a part of the ſtatute which might as well have been omitted in the recital; and there is no variance but from a word wholly nugatory and ſuperfluous, and the ſenſe would be complete by the rejecting the word miſtaken, as ſurplus and inſenſible. But if in the miſ-recital of ſuch a clauſe, there be ſuch a variance as carries with it a plain material repugnancy to the intent of the ſtatute, (*l*) as where the words, "whoever ſhall do the ſame, ſhall incur the pain, &c." are thus recited, "whoever ſhall do the contrary, ſhall incur "the pain, &c." I do not well ſee how any thing can be ſaid to make it good; for it is a general rule, that (*m*) repugnancies in indictments are fatal, and the proſecutor himſelf declares,

(*b*) 20 H. 6. 31, 32. which ſeems miſtaken in the abridgments. F. Brief 86. B. Champerty 1. Vide Plow. 84. Dyer 160.
(*i*) C Jac. 133.
(*k*) Vide C. Jac. 362.
(*l*) 4 Co. 12, 13.
(*m*) Sup. f. 62, 63.

declares, That not thoſe who do the thing indicted, but thoſe who do it not, are within the penalty of the ſtatute.

Sect. 110. As to the third particular, *viz.* How far it is neceſſary to bring the offence indicted within the very words of the ſtatute. I take it for a general rule, that (*a*) unleſs the ſtatute be recited, neither the words *contra* (*b*) *formam ſtatuti*, nor any periphraſis, intendment or (*c*) concluſion will make good an indictment, which does nor bring the fact prohibited or commanded, in the doing or not doing whereof the offence conſiſts, within all the material words of the ſtatute. And upon this ground it hath been reſolved, That an indictment of rape finding that the defendant ſuch a day and place, &c. A. B. *felonicè cepit & eam adtunc & ibidem carnaliter cognovit, &c. contra voluntatem ſuam, &c.* is not (*d*) ſufficient without the word *rapuit*; becauſe that is the word uſed by the ſtatute which makes the offence felony. Alſo it hath been (*e*) adjudged, That indictments for perjury on 5 Eliz. c. 9. omitting the words *voluntariè & corruptè*, in ſetting forth the ſwearing; and indictments for ſtriking in a church on 5 & 6 Edw. 6. c. 4. (*f*) omitting the words "to the intent to ſtrike, &c." and indictments for aiding the procurers of the pope's bulls on 13 Eliz. c. 4. (*g*) omitting the words "to the intent to ſet forth, &c. the uſurped power, &c." and indictments for foreſtalling on 5 & 6 Edw. 6. c. 14. ſetting forth, That the defendant bought certain goods of J. S. which he was about to ſell at ſuch a market; but (*h*) not expreſsly alledging, that "ſuch goods were then coming to ſuch market to be ſold," and (*i*) indictments for ingroſſing on the ſame ſtatute, ſetting forth, that the defendant bought ſo much corn, &c. without alledging, that "he ingroſſed, &c. by buying, &c." and (*k*) indictments for treaſon in compaſſing the king's death, on 25 Edw. 3. having neither the word "compaſs" nor "imagine, &c." cannot be taken as indictments on ſuch ſtatutes. And the like hath been adjudged in many other (*l*) caſes (21).

(*a*) C. Eliz. 535. See Books cited to latter part of this ſection. C. Eliz. 749. ſeems con. Vide Harding 20. Bunbury 119. 177. 254. Forteſcue 32.
(*b*) Dyer 363. 2 Hale 170, 171. 2 Roll. 227. 263. 2 Leonard 211. 21 Coke 58.
(*c*) C. Eliz. 147. 201. 2 Leonard 211. Rex v. Trelawny, Eaſt. 26 Geo. 3.
(*d*) 9 Ed. 4. 26. B. Indict. 7. Sup. c. 23. f. 77.
(*e*) C. Eliz. 147. 201. 2 Leonard 211. Co. Ent. 367. 368.
(*f*) C. Eliz. 231. 2 Leonard 188. Noy 171.
(*g*) Dyer 363.
(*h*) 1 Roll. 421. B. 1. c. 80. f. 12, 13.
(*i*) 2 Leon. 39. B. 1. c. 80. f. 15. 20.
(*k*) Kelyng 8. B. 1. c. 17. f. 8.
(*l*) 11 Coke 58. Dyer 346. 2 Roll. 227. 263. Sup. ſec. 104. 2 Roll Abr. 81. the words of a are *neceſſary* to 1037. But it

(21) Vide 2 Hale 190, 191. Cro. Car. 283. And where ſtatute are *deſcriptive of the nature of the offence*; or the *purview* of the ſtatute; or *give a ſummary juriſdiction*, the indictment muſt follow the very words. Burrow is ſaid the new exemptions in a penal ſtatute need not be ſet out. Black. 230.

Sect. 111. Neither doth it ſeem to be always ſufficient to purſue the very words of the ſtatute, unleſs by ſo doing you fully, directly, and expreſsly alledge the fact, in the doing or not doing whereof the offence conſiſts, without any the leaſt uncertainty or ambiguity; for it hath been (*m*) adjudged, That an indictment for perjury on 5 Eliz. c. 9. ſetting forth, that the defendant *tacto per ſe ſacro evangelio falſo depoſuit, &c.* is not good without directly ſhewing that he was ſworn. Alſo

(*m*) C. Eliz. 105.

it

it hath been (*a*) adjudged, That an information on the 18 Hen. 6. c. 17. for not abating ſo much of the price of wine ſold, as the veſſels wanted of the ſtatute-meaſure, is inſufficient, if it do not expreſsly ſhew how much they wanted. Alſo it is ſaid, That an indictment on the ſtatute of uſury, ſetting forth, that the defendant took more than five in the hundred, is not good, without ſhewing in particular how much.

(*a*) 2 Leon. 38, 39.

Sect. 112. As to the deſcription of the perſon of the defendant, in order to bring him within the purview of a ſtatute, which extends only to ſuch kind of perſons as are ſpecially mentioned in it. It is a good (*b*) general rule, that every indictment muſt bring the defendant within all the deſcriptions mentioned in the body of the act, except they are ſuch as carry with them the bare denial of a matter, the affirmation whereof is a proper and natural plea for the defendant, as where it is enacted, "That all perſons having no reaſonable "excuſe to be abſent, ſhall go to their pariſh church, &c." in which caſe it is ſaid, that it is not neceſſary to ſhew, that the defendant had no reaſonable excuſe, for this will come moſt properly in queſtion from the plea of the defendant. Alſo it ſeems that there is no need in deſcribing the defendant to ſet forth the place where the thing happened, which brought him within the deſcription, as hath been more fully ſhewn in the eighty-fourth ſection. Alſo it hath been adjudged, That it is (*c*) ſufficient in deſcribing the defendant to ſay, That he *exiſtens* ſo and ſo, as the ſtatute mentions, did the fact, without alledging that he was ſo at the time of the fact; for that ſhall be intended, as hath been more fully ſhewn in the ſixty-firſt ſection.

(*b*) Pop. 93, 94. See B. 1. c. 10. ſ. 2. 2 Leonard 5. Qu. 2 Keb. 582.

(*c*) Moor 606. C. Jac. 610. 2 Leonard 5. 2 Levinz 229. 2 Roll. 226. Con. 2 Roll. 263. Qu. Raym. 378. 1 Keble 852.

Sect. 113. It ſeems (*d*) agreed, That there is no need to alledge in an indictment, that the defendant is not within the benefit of the proviſoes of a ſtatute whereon it is founded; and this hath been (*e*) adjudged, even as to thoſe ſtatutes which in their purview expreſsly take notice of the proviſoes, as by ſaying, that none ſhall do the thing prohibited, otherwiſe than in ſuch ſpecial caſes, &c. as are expreſſed in this act. But as I take it, a conviction on a penal ſtatute ought expreſsly to ſhew, that the defendant is not within any of its proviſoes; for ſince no (*f*) plea can be admitted to ſuch 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, and ſatisfy the court, That the defendant had no ſuch matter in his favour as the ſtatute itſelf allows him to plead.

(*d*) Pop. 93, 94. 1 Jones 157. 1 Levinz 26. Savil 32. 2 Hale 170, 171.

(*e*) Pop. 93, 94.

(*f*) Qu. Salk. 81. Douglas 531.

Sect. 114. It ſeems to be laid down as a general rule in (*g*) Savil's Report, which is alſo confirmed by the year-book of 11 Hen. 4. pl. 14. That if the ſtatute whereon an indictment is grounded be particularly recited; the general concluſion,

(*g*) Savil 33. Sup. c. 23. ſ. 63. 2 Roll. 227. S. P. C. 81.

cluſion, *contra formam ſtatuti*, after the allegation of the fact, will ſupply an omiſſion in it of a circumſtance mentioned in the ſtatute, which would be fatal without ſuch a recital and concluſion; for ſince the ſtatute is particularly recited, and the defendant charged with having done the offence againſt the form of it; and it is impoſſible that he could ſo have done, if any circumſtance expreſsly required by the ſtatute had been wanting; it ſeems that the offence may properly enough be ſaid to be as fully ſet forth in the very words of the ſtatute, as if ſuch words had been repeated in the allegation of the offence, according to the common rule, that *verba relata hoc maximè operantur per referentiam ut ineſſe videantur*. Neither do I find this contradicted by any of the reſolutions in the precedent ſections; for it does not appear that there was ſuch a recital and concluſion in any of the indictments therein referred to (*a*). Yet notwithſtanding the omiſſion of a circumſtance mentioned in a ſtatute, may perhaps in ſuch manner be holpen; it ſeems that the want of a certain deſcription of the time or place, or things or perſons concerned, or of the concluſion *contra pacem*, or an expreſs and direct allegation of the fact itſelf, cannot be ſo ſupplied; for ſuch omiſſions (*b*) vitiate an indictment drawn in the very words of the act.

(*a*) Dornford and Eaſt 251.

(*b*) 2 Roll. 226. ſeems contra.

Sect. 115. As to the fourth particular, *viz.* Whether an indictment grounded on a ſtatute which will not maintain it, may be made good as an indictment at common law. It ſeems formerly to have been (*c*) generally taken for granted, that no indictment whatſoever which is grounded on a ſtatute, and concludes *contra formam ſtatuti*, and cannot be made good by the ſtatute, can be maintained as an indictment of an offence at common law. The chief reaſon whereof ſeems to be this, That it appears that the proſecution is intended to be grounded on a foundation which will not ſupport it. But the contrary ſeems to have been adjudged in (*d*) Page's caſe, wherein it was reſolved, That if perſons be indicted ſpecially on the ſtatute of ſtabbing, and the evidence be not ſufficient to bring them within the ſtatute, they may be found guilty of general manſlaughter at common law, and that the words *contra formam ſtatuti* ſhall be rejected as ſenſeleſs, where the offence is prohibited by the common law only. And the ſame hath been ſince (*e*) adjudged as to other ſtatutes; and, as I took it, was lately agreed in an information againſt the city of (*f*) Norwich (*g*).

(*c*) C. Eliz. 231. 307. 697. 2 Leonard 10. Noy 171, 172. 5 Coke 99. 2 Roll. 263. C. Car 465. 2 Keble 36 566. 6 Modern 17. 2 R. Abr. 82. and 1 Jones 379. 2 Hale 170.

(*d*) Sum. 58. 2 Hale 191. Aleyn 43. 44. B. 1. c. 30. ſ. 9.

(*e*) 1 Sid. 420. 2 Keble 138. 1 Salkeld 212.

(*f*) King v. City Norwich, Hil. 5 Geo. 1. 1 Cowper 648.

(*g*) Vide alſo Rex v. Smith, Trin. 20 Geo. 3. Doug. 441. 445.

Sect. 116. As to the fifth particular, *viz.* How far it is neceſſary for an indictment on a ſtatute, to conclude *contra formam ſtatuti*. It ſeems that judgment on a ſtatute ſhall in no caſe be given on an indictment, which does not ſo conclude; for granting that ſuch judgment may in ſome caſes be given in an action brought at common law, without reference to any ſta-

tute,

tute, as it is (a) ſaid, that judgment on 8 Hen. 6. c. 9. may be given on the old common law writ of aſſize of novel diſſeiſin, yet it will not follow, That ſuch judgment can in any caſe be given on an indictment drawn as for an offence at common law, without any reference to ſtatute. For as to the ſaid caſe of an aſſize of *novel diſſeiſin*, it may be ſaid that the ſtatute of 8 Hen. 6. expreſsly ſays, "That the party may recover by ſuch writ;" and therefore ſince there is no ſpecial writ of this kind formed upon the ſtatute, and the party has (b) no authority to make out a writ himſelf in a new form, it is reaſonable that he may recover by the old writ. But it (c) ſeems that judgment on this ſtatute cannot be given on an action of treſpaſs in the common law form, becauſe there is a ſpecial writ of treſpaſs in the (d) Regiſter grounded on the ſtatute; and it ſeems to be (e) agreed, That where there is a ſpecial writ grounded on a ſtatute, judgment ſhall never be given on ſuch a ſtatute in an action brought at common law.

(a) 9 H. 6. 2. B. Act. ſ. le Stat. 6. An indictment for an offence created by ſtatute is bad unleſs it conclude *contra formam ſtatuti*. Douglas 445. Vide alſo Cowper 30.
(b) 2 Inſt. 407.
(c) 2 Inſt. 200. B. Parl. 75.
(d) Reg. 289.
(e) 9 H. 6. 2. 56. 19 H. 6. 54. 47 Edw. 3. 10. 8 H 4. 13. 2 Edw. 4. 9. B. Act. ſ. le ſtat. C. Eli. 759, 760.

6. 10. Parl. 75. F. Jud. 10. Ceſſavit 18. Attach. ſur Pro. 1. 3. Benloe 57.

And in like manner, ſince every one who proſecutes an indictment is at liberty to draw it as he pleaſes, ſo that he obſerves the general rules of law concerning indictments, it ſeems to be taken as a common ground, That a judgment by ſtatute ſhall never be given on an indictment at common law, as every indictment which doth not conclude *contra formam ſtatuti*, ſhall be taken to be. And therefore (f) if an indictment do not conclude *contra formam ſtatuti*, and the offence indicted be only prohibited by ſtatute and not by common law, it is wholly inſufficient, and no judgment at all can be given upon it. But if the offence were alſo an offence at common law, I take it to be in a great meaſure ſettled at this day, That (g) judgment may be given as for an offence at common law, though the indictment conclude *contra formam ſtatuti*, as hath been more fully ſhewn in the precedent ſection.

(f) 2 Roll. 38. 1 Saun. 249. 1 Siderfin 403. 2 Keble 506. 1 Salkeld 370.
(g) See ſ. 115. 2 Keble 477. 1 Siderfin 409. 1 Saunders 249. 9 H. 6. 56. F. Attach. ſur Pro. 1. 3. But 2 R. Abr. 82. 2 Keble 566. 1 Jo. 379, 380. ſeem contra. Vide 2 Hale 190, 191. Cro. Car. 283.

Sect. 117. If there be more than one ſtatute concerning the ſame offence, and the firſt of them was never diſcontinued, and the latter only (h) continue the former without making any addition to it, or only (i) qualify the method of proceeding upon it, without altering the ſubſtance of its purview, it ſeems agreed, That it is ſafe in an indictment on any ſuch ſtatute to conclude *contra formam ſtatuti*; and it hath been (k) holden, That a concluſion *contra formam ſtatutorum*, will in ſuch caſes vitiate the proſecution.—But where a ſtatute hath been wholly diſcontinued, and is afterwards revived, there (l) ſeem to have been ſome opinions, That a proſecution on it ought to conclude *contra formam ſtatutorum*.

(h) C. Eliz. 750. Owen 135. 1 Lut. 221. 2 Hale 173.
(i) Yelv. 116. C. Jac. 187.
(k) Yelv. 116. C. Jac. 187.
(l) Owen 135. 1 Lutw. 221. 2 Hale 173.

Alſo where the ſame offence is prohibited by ſeveral independent ſtatutes, there are ſome (m) authorities, that you muſt either

(m) C. Eliz. 760. 187. 2 Leonard 5. Dalton c. 131.

C. Jac. 142. Aleyn 49, 50. 2 Bulſt. 258.

either conclude *contra formam ſtatutorum*, or *contra formam* of the particular ſtatutes naming them, and that if you barely conclude *contra formam ſtatuti*, the indictment will be inſufficient, for not ſhewing on which of the ſtatutes it was taken. But there are alſo ſtrong (*a*) authorities for the contrary opinion, which is alſo moſt agreeable to (*b*) precedents; to which may be added, that if it be a good objection to ſuch an indictment concluding *contra formam ſtatuti*, that it appears not on which of the ſtatutes the proſecution is grounded, the ſame objection may as well be made to an indictment concluding *contra formam ſtatutorum*; for it no more appears from ſuch a concluſion on what ſtatute the proſecution is grounded, than from the concluſion *contra formam ſtatuti*; and yet it ſeems to be (*c*) generally admitted, That a concluſion *contra formam ſtatutorum* is good where the indictment is for an offence prohibited by ſeveral ſtatutes. Alſo where ſuch an indictment concludes *contra formam ſtatuti*, without ſhewing what ſtatute is (*d*) intended, why may it not be ſaid that ſuch ſtatute ſhall be taken as is moſt for the king's advantage, as well as where the indictment concludes *contra formam ſtatutorum*, in which caſe it ſeems to be admitted, that it ſhall be ſo taken?

(*a*) Cro. 104. 5 H. 7. 17. C. Eliz. 186. 4 Coke 48.
(*b*) 2 Roll. Abr. 79. 82. Dalton c. 129. Aleyn 50. B. 1. c. 81. l. 10.
(*c*) Dyer 155. C. Eliz. 750. Aleyn 49, 50. Lamb. B. 4. c. 5.
(*d*) Dyer 155. 347. 2 Roll. 227. 5 H. 7. 17. Owen 135. Sup. f. 90. con. 2 Leonard 5. 2 Roll. 65.

But where a later ſtatute ordains, That a former ſtatute ſhall be executed in a new caſe not mentioned in the former, as 8 Hen. 6. c. 9. does, that 15 Rich. 2. c. 2. ſhall be executed in the caſe of a forcible detainer, which is not mentioned in 15 Rich. 2. or where a new ſtatute adds a new penalty to an offence prohibited by a former ſtatute, as (*e*) 23 Eliz. doth that of 20 *l.* for a month's abſence from church contrary to the tenor of 1 Eliz. it ſeems that it may with greater reaſon be argued, That if the indictment conclude *contra formam ſtatuti*, it will be (*f*) inſufficient, becauſe it may ſeem that the offence is not puniſhable by any one ſtatute only. Yet conſidering that the precedents in theſe caſes generally conclude *contra formam ſtatuti*, and the proſecution in truth depends on the addition made by the later ſtatute, which ſeems of itſelf alone ſufficient to ſupport it, it may be reaſonably argued, and ſeems agreeable to the later (*g*) opinions, that ſuch a concluſion may be allowed in theſe caſes alſo. However it ſeems ſafe in any of the caſes above mentioned, to conclude *contra formam* (*h*) *ſtatut'*, which ſhall ſtand either for *ſtatuti* or *ſtatutorum*, or be rejected, in ſuch manner as will beſt maintain the indictment.

(*e*) C. Jac. 142. C. Eliz. 750. 2 Leonard 5.
(*f*) Aleyn 49, 50.
(*g*) 1 Mod. 191. 3 Levinz 61. 1 Lutw. 212.
(*h*) Aleyn 50. 6 Modern 140. 2 Hale 165, &c. Str. 602. 843. 1066. Ld Raym. 1518. Douglas 425.

Sect. 118. As to the ninth general point of this chapter, *viz.* What ought to be the form of the caption of an indictment; I ſhall take it for granted, that every ſuch caption is erroneous, which doth not ſet forth with proper certainty, both the court in which, and the jurors by whom, and alſo the time and place at which the indictment was found.

For

For the better underſtanding whereof I ſhall endeavour to ſhew what certainty of this kind is neceſſary. Firſt, In reſpect of the court, before which. Secondly, Of the jurors, by whom. Thirdly, Of the time; and, Fourthly, Of the place, at which the indictment was found.

Sect. 119. As to the firſt of theſe particulars, it is certain, that every ſuch caption muſt ſhew that the indictment was taken before ſuch a court as had juriſdiction over the offence indicted; and therefore if it ſet forth, that any indictment whatſoever was taken before J. S. (*a*) ſteward, without ſhewing to whom he was ſteward, or in what court; or that an inquiſition of death, upon view of the body, was taken before J. S. (*b*) mayor of London, or before J. S. ſteward to (*c*) ſuch a perſon, and in ſuch a court, without adding, that he was a coroner; or if it expreſsly call him coroner, but do not alſo ſhew that he was ſuch for the (*d*) diſtrict in which the inquiſition was taken, it is inſufficient. But it hath been adjudged, That it is ſufficient to ſet forth, that it was taken before J. S. a coroner in the county, without ſaying that he was a coroner for the county, for that cannot but be intended.

(*a*) Ld Raym. 710. 22 Ed. 4. 19. B. Batteil 7. Indictment 46.
(*b*) 22 Ed. 4. 13. Summary 207. S. P. C. 96.
(*c*) 22 Ed. 4. 12.
(*d*) C. Eliz. 193. 2 Roll. 82 22 Ed. 4. 16. B. Bat. 7. Indictment 46.
(*e*) Plow. 76, 77. 4 Coke 41.

Sect. 120. Where (*f*) the caption of an indictment alledges it taken at the general ſeſſions of the peace of ſuch a county or burgh, it doth not ſeem neceſſary to add, that ſuch ſeſſions was holden for ſuch county or burgh, becauſe it could not but be ſo holden, if it were the general ſeſſions of ſuch a county or burgh; but if it had been only deſcribed as a general ſeſſions holden in ſuch county or burgh, it is ſaid (*g*) to be a fatal exception, that it is not expreſsly alledged as holden for ſuch county or burgh. But (*h*) *quere* if this be not helped by putting the county in the margin.

(*f*) 1 Sid. 247.
(*g*) 1 Keb. 329. 668. con. 635. 1 Levinz 304. 2 Keble 133. 128. 141.
(*h*) C. Eliz. 490. Crown Cir. 125.

Sect. 121. There are ſome (*i*) authorities, that if the caption of an indictment before juſtices of peace take no notice of their commiſſion to hear and determine felonies, &c. which is generally done by the clauſe *nec non ad diverſas felonias, &c.* it is inſufficient. But having already more fully conſidered this matter, c. 8. ſ. 33. I ſhall refer the Reader to what is there ſaid concerning it.

(*i*) S. P. C. 96. Summary 207. 2 Keble 160. B. Indict. 32. But Qu. 22 Ed. 4. 12, 13. B. Err. 186. B. Indict. 50. 2 Hale 166. Lamb. 46, 47. upon the authority of which Rex v. Straw was quaſhed. Hil. 10 Geo. 1. without debate.

Cro. Jac. 633. 1 Vent. 33. and Rex v. Carter. Strange 442. exactly in point,

Sect. 122. There are alſo ſeveral authorities, that the caption of an indictment before juſtices of peace is inſufficient, unleſs either the words (*k*) *domini regis*, or (*l*) *publicæ*, be added after *pacis*. And it hath been ſometimes holden, that even the words *domini regis* are not ſufficient without the word (*m*) *nunc*, or ſome other, to ſhew whether it were the peace of the preſent king, or of ſome of his predeceſſors. The chief ground of theſe opinions ſeems to be the ſtatute of 27 Hen. 8. c. 24.

(*k*) 1 Lev. 175. 2 Keble 647. 1 Sid. 247. 422.
(*l*) 1 Keb. 37. 1 Siderfin 422.
(*m*) 1 Sid. 422. 2 Keble 582.

ſ. 4. by which it is enacted, "That in every writ and in-
"dictment that ſhall be made within any county-palatine or
"liberty, whereby any thing ſhall be ſuppoſed to be done
"againſt the king's peace, it ſhall be ſuppoſed to be done
"againſt the king's peace, his heirs and ſucceſſors, and not
"againſt the peace of any other perſon whatſoever; any
"ſtatute, grant, or uſage, to the contrary notwithſtanding."
From whence, I ſuppoſe, it may have been collected, that by parity of reaſon, juſtices of peace ought to be ſtyled, in legal proceedings, juſtices of the king's peace, that it may appear that the peace of no other perſon, but of the king, is intended. But ſince this is not expreſsly required by the ſaid ſtatute; it cannot but be intended, eſpecially at this (*a*) day, when none but the king can appoint juſtices of peace, that all juſtices of peace muſt be juſtices of the publick peace, or of the king's peace, which is the ſame thing. Accordingly exceptions for the want of theſe words have been often (*b*) overruled; and I take them to be obſolete at this day, as it ſeemed to be lately ſettled between the (*c*) king and Hawkins on a conviction of deer ſtealing.

(*a*) Vide c. 5. ſ. 1.

(*b*) 2 Keb. 385. 1 Siderfin. 247. Qu. 1 Keb. 656. 1 Siderfin 175.

(*c*) Adjudged, M. 3 Geo. 1. 3 Burrow 1903.

Sect. 123. But it ſeems generally agreed, (*d*) That if the caption of an indictment, at a ſeſſions of the peace, do not mention before whom it was holden, or if it ſet it forth (*e*) generally as holden before juſtices, without ſhewing any thing of the nature of their commiſſion, or as holden before juſtices (*f*) of the peace, &c. without naming any of them, or ſhewing for what place they were juſtices, or if it (*g*) deſcribe them as juſtices *ad pacem in comitatu prædict' conſervand'*, omitting the word *aſſignat'*, it is inſufficient. (*h*) Yet it hath been adjudged, That it is not neceſſary for the caption of an indictment taken at a general ſeſſions of the peace, to ſtyle any of the juſtices of the *quorum*, becauſe it ſufficiently ſhews that one or more of them were ſuch, by ſhewing, that the ſeſſions was a general one.

(*d*) 1 Mod. 24. 2 Keble 580. C. Eliz. 738.

(*e*) 1 Bulſt. 203.

(*f*) 2 Keb. 128. C. Eliz. 738. Keilw. 192. 194. 2 Keble 385. 22 Edw. 4. 19. B. Batteil 7. Indictment 46.

(*g*) 1 Saund. 263.

(*h*) 1 Sid. 367. 3 Modern 152. 2 Keble 366.

Sect. 124. It hath been adjudged, (*i*) That the caption of an indictment ſetting it forth as taken *ad magnam curiam cum leta tentam*, is inſufficient. The chief reaſon whereof ſeems to be this, that ſuch a caption rather imports, that the indictment was taken at the court which had no juriſdiction to take it, than at the proper one; for it ſeems to be expreſs, that it was taken at the court-baron, and mentions nothing in relation to the court-leet, but that it was holden together with the court-baron. And agreeably hereto it is ſaid in the year-book of 10 Edw. 4. c. 15. that if the caption had been *ad magnam curiam & ad letam*, it had been ſome ſenſe, but that *cum leta* bears no ſenſe. From whence it may be argued, that if a caption ſet forth an indictment as taken at a court-baron and court-leet, it may be good, becauſe the court-baron having no manner of juriſdiction in criminal matters, and the court-leet having

(*i*) 10 Ed. 4. 15. B. Indict. 34. F. Indict. 20. S. P. C. 95. Summary 206. 2 Keble 139.

having ſuch juriſdiction, it may well be (a) intended that the indictment was taken at the court-leet, and not at the court which had nothing to do with it. *A fortiori* therefore, if an indictment be ſet forth as taken *ad viſ. franci pleg. cum cur' baron' tent'*, it ſhall be intended to have been taken at the court-leet; as it is (b) ſaid to have been holden by the late chief juſtice Holt, who yet ſeemed to be of opinion, That if a court-baron had a juriſdiction of ſuch matters as well as a court-leet, but in a different manner, ſuch a caption would have been inſufficient, for not ſhewing more expreſsly at which of the courts the indictment was taken.

(a) 1 Salk. 195. Sup. c. 11. ſ. 6.

(b) 1 Salk. 195.

Sect. 125. It hath been adjudged, (c) That the not ſetting forth in the caption of an indictment taken at a leet, whether the court were holden by grant or preſcription, is holpen by the multitude of precedents.

(c) 1 Salk. 200.

Sect. 126. As to the ſecond particular, *viz.* What certainty is neceſſary in the caption of an indictment in reſpect of the jurors by whom it was found. It ſeems agreed, That no caption of an indictment whether found at a (d) court-leet, or other inferior court, can be good without expreſsly ſhewing, that the jurors who found it were of the (e) county, city, or burgh, or other precinct, for which the court was holden, and that they were at leaſt (f) twelve in number, and (g) alſo, that they found the indictment upon their oaths.—Alſo, indictments have been (h) quaſhed for an omiſſion of the names of the jurors in the caption; but there is a (i) precedent in Saunders's Reports of a caption, ſetting forth, that the indictment was taken by twelve men, &c. without naming them, and yet no exception appears to have been taken on this account.—Alſo many indictments taken in inferior (k) courts, have been quaſhed for want of the words *proborum et legalium hominum* in the caption; but this exception hath been often over-ruled, as it hath been more fully ſhewn in the ſixteenth ſection of this chapter.—Alſo many indictments in ſuch courts have been quaſhed for want of the words (l) *jurat' et onerat'* in the caption, and alſo for want of the words (m) *adtunc et ibidem*, before the words *jurat' et onerat'*; and alſo for (n) want of the words *ad inquirendum pro dicto domino rege et pro corpore comitatus*; and alſo for want of the words (o) *ſuper ſacramentum ſuum dicunt*, after the words *jurat et onerat'*; and alſo for expreſſing the (p) oath to have been to inquire *pro corpore civitatis prædictæ*, where the offence aroſe in, and the ſeſſions was holden for a burgh, &c. But it is (q) ſaid, That in the caption of an indictment taken in the king's bench, or at the (r) grand ſeſſions, the words *ſuper ſacramentum ſuum dicunt*, ſupply the want of the words *jurat' et onerat'*, &c.—Alſo, it is ſaid to have been (s) adjudged that the words

2 Hale 167.
(d) 6 H. 4.
(e) Raym. 434. C. Eliz. 677. 2 Keble 160. 3 Keble 807. Vide ſup. ſ. 33.
(f) C. Eliz. 654. ſup. ſ. 25. 6 H. 4. 4. 41 Edw. 3. 31.
(g) 2 Keble 676. 1 Siderfin 140. 3 Modern 201. 1 Keble 629. 329.
See the caſes cited to letters, b, c, d, e, f, g, h; ſections 122 and 123. p. 360. and 1 Salkeld 371.
(h) 2 R. Abr. 82. 2 Keble 470. 6 H. 4. 4. Qu. 2 R. 3. 11. Raſtal 553, 606.
(i) 1 Saund. 249. Vide 13 H. 7. 20. 2 Keble 366.
(k) 1 Keble 629. 2 Keble 471. 2 R. Abr. 82. 2 Keble 366.
(l) 1 Keble 101. 524. 629. 852. 2 Keble 367. Vide 3 Keble 128.
Con. 2 Keble 59. 2 Jones 180. 1 Keble 498.

(m) 1 Mod 26 2 Keble 583. 610. (n) 2 Keble 471. Shower 272. (o) 1 Sid. 140. (p) 1 Saund. 249. (q) 1 Keb. 629. (r) 2 Keble 471. (s) 6 Modern 180.

jurat,

(a) 1 Sid. 140. 3 Shower 272. 6 Mod. 95. (b) 6 Mod. 95. 98c. (c) R. v. Gravenor, adj. Hil. 3. Geo. 1.

jurat. et onerat. ad inquirend. pro domino rege et corpore comitatus are ſufficient, without the word *pro* before *corpore*; and that the addition of the words *ad largum* after *inquirend.* does no (*a*) hurt; and that there is no need of the words *ad inquirendum pro corpore comitatus* in an (*b*) inquiſition taken for a particular purpoſe; and that the omiſſion of the word (*c*) *onerat.* is not fatal, if there be the word *jurat'*, for that fully implies it.

(d) 1 Bulſt. 203. Sup. c. 10. ſ. 9. (e) 1 Sid. 229, 230. 1 Keble 37. 823. 3 Modern 81. 2 Saunders 393. 1 Vent. 170. Rex v. Bunce, Andrews 162. (f) 4 Coke 48. (g) 2 Keb. 582. Vide ſup. ſ. 87. (h) 1 Mod. 78. 2 Keble 128. (i) Vide ſup. 1. 80. and c. 23. ſ. 90. (k) 1 Sid. 140. 368. 1 Keble 37. 2 Keble 367.

Sect. 127. As to the third particular, *viz.* What certainty is neceſſary in the caption of an indictment, in reſpect of the time when it was found. It ſeems (*d*) agreed, That ſuch caption muſt ſet forth a certain day and year when the court was holden, before which the indictment was found (22), and muſt record it as then found in the (*e*) preſent tenſe, and not in the preter-perfect (23), for it hath been (*f*) adjudged, That if it deſcribe the ſeſſions at which the indictment was taken, as holden *die Martis et die Mercurii*; or as holden on ſuch a day in ſuch a year of the king, without (*g*) aſcertaining what king; or if it ſet forth the ſtyle of the day or year in any (*h*) figures but Roman, it is inſufficient (24). But it ſeems to be (*i*) agreed, That it is ſufficient to expreſs the year of the king, without adding that of the Lord. Alſo it ſeems, that (*k*) *extitit præſentatum* for *exiſtit* is made good by the multitude of precedents.

5 Coke 120. F. Indict. 20. B. Indict. 34. 19 Edw. 4. 15.

(22) The caption ſtated the ſeſſions to be held *ad feſtum Ephiphanii* inſtead of *Epiphaniæ*, and it was adjudged fatal. Strange 698. An indictment taken at the adjourned ſeſſions muſt ſhew when the original ſeſſions began. Strange 865. And if the court is ſtated to be held on an impoſſible day, it will vitiate the indictment. Rex v. Fearnly, Trin. 26 Geo. 3. Durnford and Eaſt's Reports 316. —(23) Vide Rex v. Hall. Durnford and Eaſt 320. where it is decided (ſince note 2. Bk. 1. p. 12. was printed), that a conviction may be in the preter-perfect, as well as in the preſent tenſe.—(24) Vide 2 Hale 170. Strange 261. Andrews 137.

(l) Dyer 69. (m) C. Jac. 276. 277. (n) C. Eliz. 137. 606. 738. 751. (o) Dyer 135. (p) 5 Coke 120, 121. Vide Pop. 208. C. Eliz. 490.

Sect. 128. As to the fourth particular, *viz.* What certainty is neceſſary in the caption of an indictment in reſpect of the place where it was found. It ſeems agreed, That if ſuch caption either ſet forth no (*l*) place at all where the indictment was found, or do not (*m*) ſhew with ſufficient certainty, that the place ſet forth is within the juriſdiction of the court before which it was taken, as where it ſets forth the indictment as taken at a ſeſſions of the peace holden for ſuch a county, at B. (*n*) without ſhewing in what county B. is, otherwiſe than by putting the county into the margin, it is inſufficient. Alſo if an act of parliament, whether it be in print or not, appoint, that the quarter-ſeſſions of ſuch a county ſhall be holden at ſuch a place only, and not elſewhere, except for cauſe of the plague, &c. it ſeems, (*o*) that the caption of every indictment taken at any ſuch ſeſſions, is inſufficient, unleſs it expreſsly ſhew, that it was holden at ſuch place. But it hath been (*p*) adjudged,

That

That the caption of an inquiſition as taken at B. before J. S. coroner of the king's liberty of B. aforeſaid, is good, without expreſsly ſhewing that B. is within the liberty of B. for it cannot but be intended.

Sect. 129. As to the tenth general point of this chapter, *viz.* Upon what proof, and within what time after the offence, an indictment may be found. It (*a*) ſeems, That before the firſt of Edward the ſixth no certain number of witneſſes was required upon the indictment or trial of any crime whatever. For it ſeems to be generally (*b*) agreed, That the ſtatutes of the firſt and ſecond of Philip and Mary, in reſtoring the order of trial by the courſe of the common law, took away the neceſſity of two witneſſes in all caſes within thoſe ſtatutes; from whence it plainly ſeems to follow, that they were not required by the common law. It is holden (*c*) indeed by ſome, that by the ancient common law one witneſs was not ſufficient to convict any perſon of high treaſon; and this is ſaid to be grounded on the law of God, expreſſed both in the Old and New Teſtament. But granting that one witneſs was not ſufficient for a conviction, it doth not follow but that he might be ſufficient for an indictment.

(*a*) 3 Keble 68. B. Corone 220. 2 Jones 233.
(*b*) B. Cor. 220. S. P. C. 164. Dyer 132. 1 Jones 233. Kielwood 18. 49. Vide 3 Inſt. 24, 25, 26. Sum. 208. 262. 1 Hale 299. 300.
(*c*) 3 Inſt. 26. Raymond 408. See this ſubject examined very much at large Fol. 232 to 246.

Alſo, however the law might have ſtood in relation to theſe matters before the conqueſt, it ſeems to have been wholly altered long before the ſtatute of Edward the ſixth. And I rather incline to this opinion, ſince I find it ſo little ſupported by the generality of the authorities cited by Sir Edward Coke for the proof of the contrary, which wholly relate either to the proof of an eſſoin, or of a ſummons (*d*) in a real action, or (*e*) of the default of perſons ſummoned on a jury, or (*f*) other matters rather leſs to the point. And as to the above-recited paſſages of Scripture it may be anſwered, that thoſe in the Old Teſtament concern only the judicial part of the Jewiſh law, which being formed for the particular government of the Jewiſh nation doth not bind us any more than the ceremonial; and that thoſe in the New Teſtament contain only prudential rules for the direction of the government of the church, in matters introduced by the goſpel. and no way control the civil conſtitutions of countries. To which may be added, That whatſoever may be ſaid either from reaſon or ſcripture for the neceſſity of two witneſſes in treaſon, holds as ſtrongly in other capital cauſes, and yet it is not pretended, that there is or ever was any ſuch neceſſity in relation of any other crime but treaſon.

(*d*) Bract. 354.
(*e*) 35 H. 6. 46, 47.
(*f*) 48 Edw. 3. 30. 15 Edw. 4. 1.

1 Hale 299.

Sect. 130. But it is enacted by 1 Edw. 6. c. 12. ſ 22. "That no perſon or perſons, ſhall be indicted, arraigned, condemned, or convicted for any offence of treaſon, petit treaſon, or miſpriſion of treaſon, &c. unleſs the ſame offender or offenders be accuſed by two ſufficient and lawful *witneſſes*, or ſhall willingly without violence confeſs the ſame."

Two witneſſes required in treaſon;

Sect.

or two lawful accuſers.

Sect. 131. Alſo it is further enacted by 5 and 6 Edw. 6. c. 11. ſ. 8. "That no perſon or perſons ſhall be indicted, arraigned, condemned, convicted or attainted, for any of the treaſons in the act mentioned, or for any other treaſons that then were, or after ſhould be, which ſhould after be perpetrated, committed, or done, unleſs the ſame offender or offenders be thereof accuſed by two lawful *accuſers*; which ſaid accuſers at the time of that arraignment of the party accuſed, if they be then living, ſhall be brought in perſon before the party ſo accuſed, and avow and maintain what they have to ſay againſt the ſaid party, to prove him guilty of the treaſons or offences contained in the bill of indictment laid againſt the party arraigned, unleſs the ſaid party arraigned ſhall willingly, without violence, confeſs the ſame."

Treaſons to be tried *as* at common law

Sect. 132. But it is enacted by 1 and 2 Philip and Mary, c. 10. "That all trials after that ſtatute to be had, awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common law."

before the 1 Edw. 6.

Sect. 133. Alſo it is enacted by 1 and 2 Philip and Mary, c. 11. "That all and every perſon and perſons who ſhall be accuſed or impeached of any of the offences contained in that ſtatute, or of any other offence or offences concerning the impairing, counterfeiting or forging of any coin current within this realm, ſhall and may be indicted, arraigned, tried, convicted or attainted by ſuch like evidence, and in ſuch manner and form as has been uſed and accuſtomed within the realm, at any time before the firſt year of Edward the ſixth."

Two lawful witneſſes required in *open court*.

Sect. 134. It is further enacted by 7 Will. 3. c. 3. "That no perſon or perſons whatſoever ſhall be indicted, tried or attainted of high treaſon, whereby any corruption of blood may or ſhall be made to any ſuch offender or offenders, or to any the heir or heirs of any ſuch offender or offenders, or of miſpriſion of ſuch treaſon, but by and upon the oaths and teſtimony of two lawful witneſſes, either both of them to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon, unleſs the party indicted and arraigned, or tried, ſhall willingly, without violence, *in open court* confeſs the ſame, or ſhall ſtand mute, or refuſe to plead; or in caſes of high treaſon, ſhall peremptorily challenge above the number of thirty-five of the jury."

Indictment to be found within three years.

Sect. 135. And it is further enacted by the ſaid ſtatute, "That no perſon or perſons whatſoever (ſuch only excepted as ſhall be guilty of deſigning, endeavouring, or attempting any aſſaſſination on the body of the king, by poiſon, or otherwiſe), ſhall be indicted, tried or proſecuted for any ſuch treaſon as aforeſaid, or for miſpriſion of ſuch treaſon, that ſhall "be

" be committed or done within the kingdom of England, do-
" minion of Wales, or town of Berwick upon Tweed, un-
" leſs the ſame indictment be found by a grand jury within
" three years next after the treaſon or offence done and com-
" mitted."

Sect. 136. But it is provided, That nothing in this act ſhall " any ways extend to any impeachment, or other proceedings in " parliament, nor to any indictment of high treaſon, nor to " any proceeding thereupon for counterfeiting his majeſty's " coin, his great ſeal, or privy ſeal, his ſign manual, or privy " ſignet." Vide 20 Geo. 2. c. 30. Poſt. c. 39. ſ. 12.

Sect. 137. Upon theſe ſtatutes the following particulars ſeem moſt remarkable.—Firſt, That where the ſtatute of the firſt of Edward the ſixth requires, That the party be accuſed by two lawful witneſſes; and that of the fifth and ſixth of Edward the ſixth, That he be accuſed by two lawful accuſers; they both mean the very (*a*) ſame thing, becauſe the common law admits of no other accuſers but witneſſes.

(*a*) B. Cor. 220. 3 Inſt. 25, 26. Summary 208. 1 Hale 301.

Sect. 138. Secondly, That according to the general (*b*) opinion, it is not required either by the firſt, or the fifth and ſixth of Edward the ſixth, That ſuch accuſers or witneſſes be preſent with the indictors in perſon, but that they may ſend their accuſation to the indictors in writing under their hands, which will be ſufficient even after their death. Alſo it is obſervable, That the books which ſpeak of this matter do not expreſsly ſay, that ſuch accuſation muſt be upon oath, but ſurely this cannot but be intended; for how can any accuſer be ſaid to be a lawful witneſs, if he be not upon his oath? But this is cleared by the ſeventh of William the third, as to the treaſons within that ſtatute; for it expreſsly provides, " That no perſon " ſhall be indicted thereof, but by and upon the oath and teſti-" mony of two lawful witneſſes."

(*b*) S. P. C. 164. B. Corone 2. Summary 208. But 3 Inſt. 25, 26. ſeems contrary.

1 Hale 304.

Sect. 139. Thirdly, By the judgment both of (*c*) Coke and (*d*) Hale, one who can only witneſs, by hearſay, what he has heard a good witneſs ſay, is not a lawful accuſer within any of theſe ſtatutes; for if this were to be allowed, nothing would be more eaſy than in any caſe, where there is one witneſs, to get a ſecond, which would totally elude the proviſion of the ſtatutes in requiring two lawful witneſſes, &c.

(*c*) 3 Inſt. 25, 26. (*d*) Sum. 208. 1 Hale 306. Con. Dyer 99. Vide S. P. C. Fol. 164. & 234. B. Cor. 220. Foſter 243. Sed vide ſup. ſ. 134.

Sect. 140. Fourthly, That the words, " unleſs the party " ſhall willingly, without violence, confeſs the ſame," in the 1ſt, and 5 and 6 Edw. 6. are to be underſtood (*e*) where the party accuſed upon his examination, before his arraignment, willingly confeſſes the ſame without torture: But it is obſervable, that 7 Will. 3. is thus expreſſed, " Unleſs the party in-" dicted and arraigned, or tried, ſhall willingly, without vio-" lence, *in open court* confeſs the ſame."

(*e*) 2 And. 66, 67. 1 Hale 304. 3 Inſt. 25. Kelynge 18. 2 St. Tr. 488.—N. B. It was decided in *Francia's* caſe, 6 St. Tr. 58. that theſe words only mean a confeſſion *upon the arraignment* of the party. Foſter 241.

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Sect. 141. Fifthly, That one witneſs to one, and another witneſs to another overt act of the very ſame (*a*) treaſon, have been conſtrued to be ſufficient, within the ſtatutes of the firſt, and the fifth and ſixth of Edward the ſixth, and the expreſs words of the ſeventh of William the third are agreeable hereto.

(*a*) Raym. 407. Kelynge 9. 3 St. Tr. 204. Foſter 237.

And a collateral fact, not tending to the proof of the overt acts, may be proved by one witneſs. Salk. 634. 5 St. Tr. 17. or by the confeſſion of the priſoner. 8 St. Tr. 255. for the words of the ſtatute are confined to the proof of the overt acts. Foſ. 242.

Sect. 142. Sixthly, That the ſtatute of 1 and 2 Philip and Mary, c. 10. by enacting, "That all trials of treaſon ſhall from thenceforth be according to the courſe of common law," doth not (*b*) take away the neceſſity of two witneſſes upon an indictment, required by the 1ſt, and 5 and 6 Edw. 6. c. 6. becauſe the indictment is no part of the trial, but is more properly the accuſation to be tried.

(*b*) S. P. C 90. 164. 3 Inſt. 24 to 27. B. Cor. 220. Foſter 235.

Sect. 143. Seventhly, (*c*) That the ſaid ſtatute of 1 and 2 Philip and Mary doth not extend to miſpriſion of treaſon. But this is expreſsly provided for by 7 Will. 3. as to ſuch treaſons as are within that ſtatute, and therefore there muſt be two witneſſes to the indictment, as well as trial of every ſuch miſpriſion.

(*c*) B. Cor. 220. 3 Inſt. 24. Foſter 233.

Sect. 144. Eighthly, That (*d*) petit treaſon is within the 1ſt, and 5 and 6 Edw. 6. and 1 and 2 Ph. and Mary, c. 10. but not within the 7 Will. 3. from whence it follows, That two witneſſes are required to the indictment, and not to the trial of it, and that two witneſſes are not neceſſary even upon the indictment, if (*e*) the party, upon his examination, confeſs it.

(*d*) B. Cor. 220. 3 Inſt. 24. Foſter 233.

(*e*) Vide ſup. 1. 140.

Sect. 145. Ninthly, That the ſtatute of 1 and 2 Ph. and Mary, c. 11. which enacts, "That all perſons accuſed of any "offences concerning the impairing, counterfeiting or forging "the coin, ſhall be indicted and tried as at the common law," hath been conſtrued (*f*) to extend to clipping, and all other offences in impairing the coin, which have been made treaſons ſince the ſaid ſtatute of 1 and 2 Ph. and Mary. From whence it may be probably argued, That the ſtatute of 7 Will. 3. by "expreſsly providing, That nothing therein ſhall extend to high "treaſon for counterfeiting the coin," intended in like manner, that it ſhould not extend to any other high treaſon concerning the coin.

(*f*) 2 Jones 233. Vide B. Cor. 220. 3 Keble 68.

Within what time penalties may be recovered.

† By 31 Eliz. c. 5. "All indictments upon any penal ſtatute, "whereby the forfeiture is limited to the king, ſhall be ſued "within two years after the offence committed: If the for-"feiture 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

" where a ſtatute limits a ſhorter time the ſuit ſhall be brought " within ſuch time limited."

INDICTMENTS, being the foundation of all capital proſecutions, found in the abſence of the party accuſed, and only the evidence for the king adduced; it is neceſſary that the proof of the offence ſhould be ſubſtantial. Lord Coke 3 Inſt. 25—and it has been obſerved, with great ſtrength of argument, that a grand jury ought to have the ſame perſuaſion of the truth as a petty jury, or a coroner's inqueſt. 4 State Trials, p. 183. But it is ſaid by Lord Hale, 2 vol. 157. and confirmed by Pemberton C. J. in Ld Shaf ſbury's caſe, 3 State Trials, p. 415. that as an indictment is merely an accuſation, and the party is afterwards to undergo a full trial, they ought *upon probable evidence only* to find the bill. And it has been lately decided by all the judges, that a perſon committed as a principal in the ſame felony with another, and taken from his confinement, before the grand jury, by a ſurreptitious order to the gaoler, and without authority ſtrictly regular, is a competent witneſs for that purpoſe. Indeed, many of the judges were inclined to think, that if a grand jury ſhould find a bill upon evidence *palpably improper*, and the party be afterwards convicted on it by *lawful evidence*, before the petty jury, the validity of ſuch a conviction could not be impeached. Dr. Dodd's caſe, O. B. February ſeſſions 1777. MS.

Sect. 146. As to the eleventh general point of this chapter, *viz.* In what caſes an indictment may be quaſhed: I take it to be (*a*) ſettled, That by the common law the court may, in diſcretion, quaſh any indictment, for any ſuch inſufficiency, either in the caption, or body of it, as will make any judgment whatſoever, given upon any part of it againſt the defendant, erroneous. Yet it ſeems, That judges are in no caſe bound, *ex debito juſtitiæ*, to quaſh an indictment, but may oblige the defendant either to plead or to demur to it. And this they generally do where it is for a crime of an enormous or publick nature, as perjury, forgery, ſedition, nuſances to the highways, and other offences of the like nature. (*b*) Neither will the court quaſh an indictment removed by *certiorari*, if a recognizance for the trial of it hath been forfeited (25).

(*a*) 4 St. Tr. 135. 1 Siderfin 54. 247. 2 Keble 128. 1 Keble 45. Cro. Car. 584. Palmer 389. Salkeld 372. 4 St. Tr. 134. Stra. 602. Durnford and Eaſt 316. Sayer 27. 65. 158. 161. Burrow 1127. 1129. 2116. 1 Wilſon 325.
(*b*) Salkeld 380.

(25) Between quaſhing indictments and arreſting the judgment, quaſhing is the ſtrongeſt way; becauſe they muſt be very groſsly bad to have the court to deſtroy them at once. 1 Black. 275. Even on the part of a proſecutor, the court will ſee that no miſchief or oppreſſion enſues, and will impoſe terms before they grant leave to quaſh an indictment. 1 Black. 461. Vide Douglas 239. 3 Burrow 1468. For although it is frequently done. Foſ. 105. Cro. Car. 147. yet it is by no means of courſe. Strange 946. But the reaſon of not quaſhing on motion, but leaving the party to demur, does not hold where the objection is, to the juriſdiction of the court that has undertaken to proceed. 1 Burr. 389.—For a detail of caſes from the modern reporters, in which the court will or will not quaſh indictments, vide 3 Bac. Abr. 116. and 3 Comyn's Digeſt, p. 508. to 510. [H]

How exceptions to an indictment for high treaſon ſhall be taken.

Sect. 147. Alſo it is enacted by 7 Will. 3. c. 3. " That no " indictment for high treaſon, or miſpriſion thereof (except " only indictments for counterfeiting the king's coin, ſeal, " ſign or ſignet), nor any proceſs or return thereupon, ſhall be " quaſhed on the motion of the priſoner, or his counſel, for " miſwriting, miſ-ſpelling, falſe or improper Latin, unleſs exception concerning the ſame be taken and made in the reſpective " court where ſuch trial ſhall be, by the priſoner, or his counſel aſſigned, before any evidence given in open court upon " ſuch indictment; nor ſhall any ſuch miſwriting, miſ-ſpelling, " falſe or improper Latin, after conviction on ſuch indictment, " be any cauſe to ſtay or arreſt judgment thereupon: But ne-

" vertheleſs,

"verthelefs, any judgment given upon ſuch indictment ſhall "and may be liable to be reverſed upon a writ of error, in the "ſame manner, and no other, than as if this act had not been "made."

(a) 4 St. Tr. 135. 329.

Sect. 148. It hath been ſettled (*a*) in the conſtruction of this ſtatute, That no ſuch exception can be taken, after plea pleaded.

(b) 1 Sid. 54. 152. 140. Strange 953. 1103. 1072. Andrews 174. 216.
(c) 1 Keble 255.
(d) Rexv. Nixon, Trin. 5 Geo. 1. Strange 185. Burrow 385.

Sect. 149. It is ſaid (*b*) in Siderfin's reports, That the court never (*c*) quaſheth an information exhibited by a common perſon, but that it will quaſh an information exhibited by the attorney general, or by the maſter of the crown office, upon motion, if there be cauſe: But this was denied in one (*d*) Nixon's caſe, wherein the court ſeemed to be agreed, That they never have, or will quaſh any information whatſoever.

B. R. H. 365. Vide Douglas 239. Salkeld 372.

(e) Sup. f. 25.
(f) Sup. f. 70, 71, 72. Vide c. 23. f. 103.

Sect. 150. As to the twelfth general point of this chapter, *viz.* What may be pleaded to an indictment, and in what manner: Having already ſhewn in this chapter how a defendant may plead (*e*) to an indictment, That the indictors were returned contrary to the purview of 11 Hen. 4. c. 9. And having alſo (*f*) ſhewn, how he may plead a miſnoſmer, or wrongful addition; and intending in the following part of the book to ſhew, how he may plead a former acquittal, conviction or attainder, or a pardon or other ſpecial plea, or the general iſſue; I ſhall in this place only take notice, That the defendant may plead any plea in abatement of an indictment of felony; and alſo plead over in bar, and take (*g*) the general iſſue alſo, in the ſame manner as an appellee may do, as hath been more fully ſhewn, Ch. 23. Sect. 127. 138.

(g) Finch 385. Summary 202. 249. 254. 2 Hale 239. 4 Comm. 332.

CHAPTER THE TWENTY-SIXTH.

OF INFORMATION.

5 Mod. 456. 463. Shower 106. 2 Hale c. 20.

INFORMATIONS are of two kinds, *viz.* Such as are merely at the ſuit of the king. And ſuch as are partly the ſuit of the king, and partly the ſuit of the party.

For the better underſtanding the firſt of theſe I ſhall endeavour to ſhew,—In what caſes they lie; What ought to be the form of them; and, How the law concerning them hath been altered by ſtatute.

Sect.

Sect. 1. As to the first of these particulars. *viz.* In what cases such informations lie. It hath been holden, That the king shall put no *(a)* one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience; for it is every day's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the attorney-general, or of the master of the crown-office, for offences of the former kind, as for *(b)* batteries, *(c)* cheats, seducing *(d)* a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose; spiriting *(e)* away a child to the plantations, rescuing *(f)* persons from legal arrests, *(g)* perjuries and subornations thereof, *(h)* forgeries, conspiracies, whether to accuse *(i)* an innocent person, or to impoverish *(k)* a certain set of lawful traders, &c. or to *(l)* procure a verdict to be unlawfully given, by causing persons bribed for the purpose, to be sworn on a *tales*; and other such like crimes done principally to a private person, as well as for offences done principally to the king, as for *(m)* libels, *(n)* seditious words, *(n)* riots, false news, *(o)* extortions, nusances, as in not *(p)* repairing highways, or obstructing *(q)* them, or stopping *(r)* a common river, &c. contempts, as in departing *(s)* from the parliament without the king's licence, disobeying *(t)* his writs, uttering *(u)* money without his authority, escaping *(x)* from a legal imprisonment on a prosecution for a contempt, neglecting to keep watch and ward, abusing *(y)* the king's commission to the oppression of the subject, making a return to a *mandamus* of matters *(z)* known to be false; and in general, any other offences against the publick good, or against the first and obvious principles of justice and common honesty.

(a) Thelo. b. 1. c. 4. s. 9, 10, 11, 12, 13, 14. Finch 336.
(b) Pre. 4 & 5 Wil. & Ma. Infra s. 5. Shower 116, 117, 118.
(c) Shower 110. 1 Siderfin 431. 7 Modern 40. Skinner 108.
(d) C. Car. 557. March 52. 3 Keble 101. 1 Levinz 257. 1 Siderfin 387. 5 Modern 221. 7 Modern 39. Carthew 384. but no judgment was given in this case. Skinner 81. 2 Keble 432. Raymond 473.
(e) Raym. 474. Skinner 47. 1 Black 386.
(f) Raym. 231. Shower 109. 113. C. Car. 579.
(g) Raym. 202. 5 Modern 342. 7 Modern 100. Salkeld 78.
(h) Shower 111.
(i) Raymond 417.
(k) 1 Sid. 174.
(l) See precedent 1 Saunders 300, 301. (m) Raymond 201. Shower 118, 119. Carthew 4. 1 Black. 269. 510. (n) And in this case there must be 14 days notice of trial. Fort. 357. (o) 5 Mod. 459. C. Car. 252. Show. 106. Skin. 116. (o) Raym. 216. Carth. 226. Bun. 311. (p) Raymond 384. Shower 110. 116. 1 Siderfin 140. (q) Shower 112. 116. (r) Shower 114. 118. (s) Ibid. (t) C. Car. 253. (u) Raymond 185. (x) C. Car. 209. (y) Shower 116. (z) Salkeld 374.

Sect. 2. Also it seems, That of common right such an information, 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.

Shower 111. 115, 116, 117. 3 Modern 117. 2 And. 128. Rastal 686. Vitail, 1. Vide 3 Leon. 237. & sup. c. 25. s. 4. 2 And. 127, 128.

Sect. 3. But I do not find it any where holden, That such an information will lie for any capital crime, or for misprision of treason.

Vide Shower 109, 110. 2 Hale 151.

Sect. 4. As to the second particular, *viz.* What ought to be the form of such informations. Having already in the chapter

of Indictments incidentally ſhewn the principal points relating to this matter, I ſhall only take notice in this place, That, ſeeing an information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not ſo found, but is only the allegation of the officer who exhibits it, whatſoever certainty is requiſite in an indictment, the ſame at leaſt is neceſſary alſo in an information, and conſequently, as all the material parts of the crime muſt be preciſely found in the one, ſo muſt they be preciſely alledged in the other, and not by way of (*a*) argument or recital.—Yet it hath been adjudged, That where an information of perjury was drawn in this manner, *memorandum quod A. B.* &c. *dat curiæ hic intelligi et informari quod termino ſancti Hill'*, &c. *in rotulis continetur ſic, viz.* That ſuch an action was brought, and a trial had thereon, &c. *Et quod* the defendant, at ſuch trial, took ſuch an oath, which was falſe, &c. without adding before ſuch mention of the falſe oath, *et ulterius dat Cur. hic intelligi*; yet, by reaſon of the late precedents the information is as (*b*) ſufficient, at leaſt after verdict, as if thoſe words had been added: It muſt be confeſſed, That this is the moſt reaſonable conſtruction, for how can it be intended that it could be contained in the record of the trial, That ſuch an oath was taken at it, or that it was falſe?

3 Black 93.

(*a*) Salkeld 375.

Vide Strange 70.

(*b*) Raym. 34. 35. Ld Raym. 370.

Sect. 5. As to the third particular, *viz.* How the law concerning ſuch Informations hath been altered by ſtatute? It is recited by 4 & 5 Will. and Mary, c. 18. "That divers malicious and contentious perſons had more of late, than in times paſt, procured to be exhibited and proſecuted Informations in their Majeſties court of king's bench at Weſtminſter, againſt perſons in in all the counties of England, for treſpaſſes, batteries, and other miſdemeanors, and after the parties ſo informed againſt had appeared to ſuch Informations, and pleaded to iſſue, the informers had very ſeldom proceeded any further, whereby the perſon ſo informed againſt had been put to great charges in their defence; and although at the trials of ſuch informations verdicts had been given for them, or a *nolle proſequi* entered againſt them, they had no remedy for obtaining coſts againſt ſuch informers." And thereupon it is enacted, "That the "clerk of the crown, in the ſaid Court of king's bench, for the "time being, ſhall not without expreſs order, to be given by "the ſaid court, in open court, exhibit, receive, or file any in- "formation for any of the cauſes aforeſaid; or iſſue out any "proceſs thereupon, before he ſhall have taken, or ſhall have "delivered to him a recognizance from the perſon or perſons "procuring ſuch information to be exhibited, with the place "of his, her, or their abode, title or profeſſion, to be entered "to the perſon or perſons againſt whom ſuch information or "informations, is or are to be exhibited, in the penalty of "twenty

1 Black. 542. B. R. H. 247.

" twenty pounds, that he, ſhe, or they will effectually pro-
" ſecute ſuch information or informations, and abide by, and
" obſerve ſuch orders as the ſaid court ſhall direct; which re-
" cognizance the ſaid clerk of the crown, and alſo every juſtice
" of the peace of any county, city, franchiſe, or town cor-
" porate (where the cauſe of any information ſhall ariſe), are
" by the ſame ſtatute impowered to take: After the taking
" whereof by the ſaid clerk of the crown, or the receipt
" thereof, from any juſtice of the peace, the ſaid clerk of the
" crown ſhall make an entry thereof upon record, and ſhall
" file a memorandum thereof in ſome publick place in his
" office, that all perſons may reſort thereunto without fee; and
" in caſe any perſon or perſons againſt whom any information
" or informations for the cauſes aforeſaid, or any of them,
" ſhall be exhibited, ſhall appear thereunto, and plead to iſſue,
" and that the proſecutor or proſecutors of ſuch information or
" informations, ſhall not at his and their own proper coſts and
" charges, within one whole year next after iſſue joined there-
" in, procure the ſame to be tried; or if upon ſuch trial a ver-
" dict paſs for the defendant or defendants, or in caſe the ſame
" informer or informers procure a *nolli proſequi* to be entered;
" then, in any of the ſaid caſes the ſaid court of king's bench is
" authorized to award the ſaid defendant or defendants, his,
" her, or their coſts, unleſs the judge, before whom ſuch in-
" formation ſhall be tried, ſhall at the trial of ſuch informa-
" tion, in open court, certify upon record, That there was Strange 1137.
" reaſonable cauſe for exhibiting ſuch information; and in
" caſe the ſaid informer or informers ſhall not within three
" months next after the ſaid coſts taxed, and demand made
" thereof, pay to the ſaid defendant or defendants the ſaid coſts,
" then the ſaid defendant and defendants ſhall have the benefit
" of the ſaid recognizance, to compel them thereunto."

Sect. 6. But it is provided, " That nothing hereof ſhall ex-
" tend, or be conſtrued to extend, to any other informa-
" tion than ſuch as ſhall be exhibited in the name of their Ma-
" jeſties Coroner, or Attorney, in the court of king's bench, for
" the time being, commonly called the maſter of the Crown-
" office."—From whence it follows, That informations exhi-
bited by the Attorney-general remain as they were at the com-
mon law.

For the better underſtanding this ſtatute, I ſhall endeavour to ſhew, Firſt, Whether it extend to all kinds of Informations.—Secondly, In what caſes the court will order an Information to be filed. Thirdly, How the party may be relieved againſt proceſs iſſued againſt him, before any recognizance given.—Fourthly, Where the defendant ſhall have coſts.

For the nature of the writ of *quo warranto*, vide 1 Comm. 485.
3 Comm. 263.
4 Comm. 307. 434.
2 Inſt 282. 495.
1 Black 34 46. 187. 579.
Salk. 374. 376.
Carthew 504.
Ld Raym. 426.
Strange 1042.
Bull N. P. 210.
Carthew 218. 503.
1 Burr. 402.

Sect. 7. As to the firſt of theſe particulars: It ſeems clear, That this ſtatute extends to all informations whatſoever exhibited by the maſter of the crown-office; and though it may be objected, That an information in the nature of a *quo warranto*, being a proper means to try a right, is not within the meaning of the ſtatute, which mentioning treſpaſſes, batteries, and other miſdemeanors, may be reaſonably conſtrued to intend ſuch other miſdemeanors only as are of an inferior nature, like to thoſe ſpecified, which are generally wrangling and frivolous ones; yet ſeeing this is a remedial law, and therefore ought to be largely conſtrued, and ſuch informations may be as vexatious as any other, and always ſuppoſe an uſurpation of ſome franchiſe, and every ſuch uſurpation is certainly a miſdemeanor, it hath been ſettled that this ſtatute doth extend to them.

6 Com. Dig. 362. 2 Inſt. 282. 9 Co. 28. Yelv. 191. Finch 322. *Quo warranto* is not within the ſtatute of additions. Wilſon 244.

Law of *niſi prius* 210.
Upon the rule being granted in *quo warranto*, the court will grant a rule to inſpect the books of the corporation. Trin. 23 Geo. 2.

Sect. 8. As to the ſecond particular, *viz.* In what caſes the court will order an information to be filed: It ſeems to have been the general practice not to make ſuch an order, without firſt making a rule upon the perſon complained of to ſhew cauſe to the contrary; which rule is never granted, but upon motion made in open court, and grounded upon affidavit of ſome miſdemeanor, which if true, doth either for its enormity, or dangerous tendency, or other ſuch like circumſtances, ſeem proper for the moſt publick proſecution. And if the perſon upon whom ſuch rule is made, having been perſonally ſerved with it, do not, at the day given him for that purpoſe, give the court good ſatisfaction, by affidavit, that there is no reaſonable cauſe for the proſecution, the court generally grants the information; and ſometimes upon ſpecial circumſtances, will grant it againſt thoſe who cannot be perſonally (*a*) ſerved with ſuch rule, as if they purpoſely abſent themſelves, &c.(2)

(*a*) Stra. 1044. B. R. H. 271.

(2) The court will not grant an information againſt a *private* perſon for reading a *pretended* proclamation. Black. 2. Nor againſt a huſband for endeavouring to *retake* his wife contrary to articles of ſeparation. Black. 18. Nor againſt perſons who aſſemble with a lawful deſign, notwithſtanding ſome unlawful and irregular acts enſue. Black 48. Nor againſt juſtices acting improperly, in their publick capacity, unleſs flagrant proof of corruption appears. Strange 1181. Burrow 785. 1162. Black. 432. Douglas 589. Nor againſt miniſters for converting brief-money. Strange 1130. Black. 443. Nor for bribing electors. Black. 541. Nor for a perjored intruſion to a living, upon an affidavit that it was ſimoniacal. Strange 70. Barnard K. B. 11. Nor for a libel if it appear to be true. Strange 498. Douglas 284. 387. 3 Bac. Abr. 475. Nor for offences committed upon the high ſeas. Strange 918. 2 Keble 190. Nor againſt a diſſenter for refuſing the office of ſheriff. Strange 1193. 3 Wilſon 18. Nor againſt an offender, although the penalty of the offence is veſted in the Crown. Strange 1234. Nor for *words* ſpoken *of* a juſtice in his publick character. Strange 1157. Nor for attempting ſubornation. B. R. H. 24. Nor for ſending a challenge, if the informant had previouſly imparted a challenge. Burrow 316. 402. Nor in favour of one cheat againſt another cheat. Burrow 548. Nor for a general charge of extortion. Strange 959. Nor for ſtriking a magiſtrate in the execution of his office, if the magiſtrate ſtruck firſt. B. R. H. 240. Nor for an offence againſt a private ſtatute. Burrow 385. Nor if a civil ſuit is depending, upon the ſame ſubject. B. R. H. 241. And in general the diſcretion of the court in granting information is guided by the merits of the perſon applying; by the time of the application; by nature of the caſe; and by the conſequences which may poſſibly reſult from the granting it. Ld Mansfield. Black. 542. Vide alſo 3 Com. Dig. 521.

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The court will grant an information for reproaching the office of magiſtracy, or defaming the character of magiſtrates. Carthew 14, 15. For taking away a young woman from her guardian, although chancery has committed the offender for a contempt. Str. 1107. Andr. 310. Or from her putative father. Str. 1162. For not examining evidence upon oath under a reference and rule of court. 1 Wilſ. 7. Or for demanding a ſhilling, by a juſtice, to diſcharge his warrant and committing the party for not paying it. 1 Wilſ. 7. For ſeducing a man to marry a pauper in order to exonerate the pariſh. 1 Wilſ. 41. For ſeducing a woman, habituated to drinking, to make her will. 2 Burr. 1099. For voluntarily aſſenting, by a juſtice, from ſeſſions. Str. 21. For refuſing to put an act in execution. Str. 413. For bribing perſons to vote at corporation elections. Ld Raymond 1377. For publiſhing an obſcene book. Strange 788. For blaſphemy. Str. 834. For unduly diſcharging a debtor by judges of an inferior court. Hardw. 135. For refuſing, by the captain, to let the coroner come on board a man of war. And. 231. Str. 1097. For keeping great quantities of gunpowder. Str. 1167. For a juſtice making order of removal and not ſummoning the party. And. 238. 273. For impreſſing a captain as a common ſeaman maliciouſly. 1 Black. 19. For ſpeaking treaſonable words, although the offender has been previouſly puniſhed; viz. in an academical way, by the vice chancellor. 1 Black. 37. For contriving the eſcape of French priſoners. 1 Black. 286. For giving a ludicrous account of a marriage between an actreſs and a married man. 1 Black. 294. For contriving pretended converſations with a ghoſt with intention to accuſe another of having murdered the body of the diſturbed ſpirit. 1 Black. 392. 401. For procuring a female apprentice to be aſſigned, though with her own conſent, to another, for the purpoſes of proſtitution. 1 Black. 439.

Sect. 9. But if the party on whom ſuch rule is made, ſhew to the court a reaſonable cauſe againſt ſuch proſecution; as that he has been before indicted for the ſame cauſe, and acquitted; or that the intent of the (*a*) proſecution is to try a civil right, as the title to land, &c. which is not yet determined, or that the complaint is trifling, vexatious, or oppreſſive; or if he can ſhew to the court (in anſwer to a motion for an information, in the nature of a *quo warranto*) that his right to the franchiſe in queſtion had been already determined on a *mandamus*; or that it hath been acquieſced (*b*) in many years, (3) without any diſpute; or that it depends on the right of thoſe who voted for him, which hath not been yet tried, (4) or that the franchiſe no way concerns the publick (5) (as all thoſe which relate to the government of a corporation (*c*) or the election of members of parliament, (*d*) and fairs and markets (*e*) &c. are ſaid to do), but is wholly of a private (*f*) nature, as a coney-warren (*g*) &c. Or that the election by which he claims, is agreeable to charter: or that he has never acted under it; the court will not grant the information, unleſs there be ſome particular and extraordinary circumſtances in the caſe; (6) the determination whereof, being wholly left to the diſcretion of the court, cannot well come under any certain ſtated rules.

(*a*) C. Jac. 212. 4 Burr. 1963. 2024. B. R. H. 241.
(*b*) Burrow 434. 2123. Black. 634. Durnford and East 2. Three years and a half acquieſcence is no bar. Black. 470.
(*c*) Black. 187. Burr. 869.
(*d*) Strange 547. Douglas 588.
(*e*) Black. 580. 3 Burr. 1812.
(*f*) Salkeld 374. C. Eliz. 547. Strange 637.
(*g*) B. R. H. 249. 261. Ld Raymond 1409
(6) Or where the law is unſettled, Cowp. 59. Or a fact is diſputed, Black. 470.

Burrow 1485. Or where there is no other remedy, Law of *niſi prius* 212.

Sect.

(3) In Mich. 7 Geo. 3. It was at length ſettled (vide Black. 470.) that after twenty years unimpeached poſſeſſion of a corporate franchiſe, no rule ought to be granted to ſhew by what right the poſſeſſor holds it. But that within twenty years, the granting an information would depend upon the particular circumſtances of each caſe. Winchelſea Cauſes. Burrow 1963. and 2524. A *great* length of quiet enjoyment, though *ſomewhat ſhort* of 20 years, ought to weigh the diſcretion of the court. Rex v. Daws. Burr. 2023. Ten years, however, is not a ſufficient poſſeſſion under this rule. Burr. 2025. Nor has any rule been laid down as deciſive, reſpecting an information *within* the 20 years.

Cowper 76. But the court has refuſed one after a quiet poſſeſſion for 14 years. Rex v. Pike and Braddock, Trin. 20 Geo. 2.

(4) It is not preciſely determined how far a derivative title to a corporate franchiſe may be impeached when the original holder died poſſeſſed of it undiſputed. Rex v. Stacie. Mich. 26 Geo. 3. Vide alſo Rex v. Spearing. Wincheſter aſſizes 1771. and Black. 471. where it is made a quere, if the rights of *electors* poſſeſſed *de facto* of the franchiſe, can be impeached in *quo warranto* againſt the elected. An information was refuſed, becauſe, among other reaſons, the queſtion of non-reſidence had never been tried. Douglas 590. Vide alſo Cowper 508.

(5) The court refuſed a *quo warranto* againſt a recorder who had forfeited the office by non-attendance; for the corporation may remove him and elect another. Strange 819. And. 14. So alſo againſt a burgeſs for non-reſidence. Burr. 1693. 2024. So alſo againſt two ſetts of churchwardens, Strange 1196.

Sect. 10. As to the third particular, *viz.* How the party may be relieved againſt proceſs iſſued againſt him, before any recognizance given according to the ſtatute? It ſeems that he may move the court (*a*) to ſet it aſide, as having iſſued contrary to the directions of the ſtatute.

(*a*) Salk. 376. 2 Lilly 61. Hardw. 247. Strange 1042.

Sect. 11. As to the fourth particular, *viz.* Where the defendant ſhall have coſts.—I ſhall obſerve, Firſt, That if the Information be tried at bar, the defendant can have no coſts within this ſtatute; for the words are, (*b*) That the court is authorized to award coſts, &c. "unleſs the judge, before "whom the information ſhall be tried, ſhall at the trial, in "open court, certify upon record, that there was a reaſonable "cauſe for exhibiting ſuch information;" which is moſt naturally to be underſtood of a trial at *niſi prius*; and it would be abſurd to ſuppoſe, that the ſtatute intended that the juſtices of the king's bench, at a trial before themſelves, ſhould make a certificate to themſelves: To which may be added, That where a cauſe is of ſuch conſequence as to be tried at the bar, it may reaſonably be intended to be out of the purview of the ſtatute, which was chiefly deſigned againſt trifling and vexatious proſecutions.

(*b*) Clerk's Caſe Farreſley 47. Strange 1131. 874. 33. 1069. 1039, 1042. 2 Black. 356. 2 Wilſon 261. 139. 3 Com. Dig. 517. Comb. 345. 225. Douglas 314. 3 Black. 1305. Salk 193. Bull N. P. 333. 211. Bunbury 90. B R. H. 247. Sayer's Law of Coſts 290.

Sect. 12. Secondly, That if there be ſeveral defendants, and any one of them found guilty, thoſe who are acquitted cannot have (*c*) coſts within this ſtatute; and this is agreeable to the conſtruction made of the ſtatutes which give coſts to defendants in civil actions, by force whereof no defendant in ſuch like caſe, could recover coſts before the ſtatute of 8 & 9 Will. c. 10.

(*c*) Salkeld 194. 2 Wilſon 21.

Sect. 13. Thirdly, That it hath been adjudged in the conſtruction of theſe words, "The court of king's bench is au-"thorized to award to the defendant his coſts, where the "judge

" judge who tries an information does not at ſuch trial certify, " That there was a reaſonable cauſe for the information (*a*)." That the ſaid court is bound of right, in every ſuch caſe, to award them, whether the acquittal were upon the merits, or only from a ſlip in point of form, and howſoever notorious the offence might be; for where a court is authorized by ſtatute, to do a matter of juſtice to the party, upon certain circumſtances, it has no diſcretionary power of conſidering, whether it ought to do it, or not, when a caſe appears to be within thoſe circumſtances. To which may be added, That the ſtatute being general as to all caſes, wherein the judge, who tries the information, doth not certify a reaſonable cauſe, ſeems to imply, That it ſhall be left to ſuch judge only for this purpoſe to conſider whether the proſecution were reaſonable or not, and it is the proſecutor's folly not to apply to him.

(*a*) Reg. v. Davis, adj. Mich. 10 Annæ, and alſo Strange 1131. Rex v. Woodfall. Vide 2 Chan. Caſe 191.

Vid. 19 Geo. 2. c. 34. for coſts reſpecting ſmuggling informations, and alſo 4 Geo. 3. c. 15.

Sect. 14. It is further enacted by 9 Annæ, c. 20. " That in " caſe any perſon or perſons ſhall uſurp, (7) intrude into, or " unlawfully hold and execute the office or franchiſe of " mayor, bailiff, portreeve, or other office within a city, town " corporate, borough, or place in England or Wales, it ſhall " and may be lawful, to and for the proper officer of the court " of queen's bench, the court of ſeſſions of counties pala- " tine, or the court of grand ſeſſions in Wales, with the leave " of the ſaid courts reſpectively, to exhibit one or more inform- " ation or informations, in the nature of a *quo warranto*, at " the relation of any perſon or perſons deſiring to ſue or pro- " ſecute the ſame, and who ſhall be mentioned in ſuch inform- " ation or informations, to be the relator or relators againſt " ſuch perſon or perſons ſo uſurping, intruding into, or un- " lawfully holding and executing any of the ſaid offices or " franchiſes, and to proceed therein in ſuch manner as is uſual " in caſes of informations, in the nature of a *quo warranto*; " and if it ſhall appear to the ſaid reſpective courts, that the " ſeveral rights of divers perſons to the ſaid offices or " franchiſes, may properly be determined on one information, " it ſhall and may be lawful for the ſaid reſpective courts to " give leave to exhibit one ſuch information againſt ſeveral " perſons, in order to try their reſpective rights to ſuch offices " or franchiſes, and ſuch perſon or perſons, againſt which " ſuch information or informations in the nature of a *quo* " *warranto* ſhall be ſued or proſecuted, ſhall appear and " plead as of the ſame term of ſeſſions in which the ſaid in- " formation or informations ſhall be filed, unleſs the court, " where ſuch information ſhall be filed, ſhall give further time " (8) to ſuch perſon or perſons againſt whom ſuch information " ſhall be exhibited, to plead; and ſuch perſon or perſons who " ſhall ſue or proſecute ſuch information or informations in the

Burr. 402. 575. 869. 1485. 1812. 1564. 1963. 2022. 2024 2120. 2147. 2143. 2177. 2523. Black. 95. Coke's Ent. 527. Salkeld 374.

(7) An information will not lie upon this ſtatute againſt a corporation as a body; but only againſt individuals uſurping corporate franchiſes —An information againſt a corporation is always by the Att. Gen. ordur- ing vacancy by Soll. Gen. 11 St. Tr. 334. Burr. 869. and *qu.* whether the K. B. can grant it at the relation of a private perſon for uſurping a market upon the crown. 3 Burr. 1812.

(8) After the rules are made abſolute againſt divers defendants the court may direct that there ſhall be only one information againſt all, Burr. 573. 1270. Vide Cowp. 489.

" nature of a *quo warranto* ſhall proceed thereupon, with the " moſt convenient ſpeed that may be."

Sect. 15. And it is further enacted and declared, " That " in caſe any perſon or perſons, againſt whom any informa- " tion or informations, in the nature of a *quo warranto*, ſhall, " in any of the ſaid caſes, be exhibited in any of the ſaid " courts, ſhall be found or adjudged guilty of an uſurpation, " or intruſion into, or unlawfully holding and executing any of " the ſaid offices or franchiſes, it ſhall and may be lawful to " and for the ſaid courts reſpectively, as well to give judgment " of ouſter againſt ſuch perſon or perſons, of and from any of " the ſaid offices or franchiſes, as to fine ſuch perſon or perſons " reſpectively for his or their uſurping, &c. (9) And alſo to " give judgment that the relator and relators, in ſuch informa- " tion named, ſhall recover his or their coſts of ſuch proſecu- " tion; and if judgment ſhall be given for the defendant or " defendants in ſuch information, he or they, for whom ſuch " judgment ſhall be given, ſhall recover his or their coſts " therein expended againſt ſuch relator or relators, ſuch coſts " to be levied by *capias ad ſatisfaciendum*, *fieri facias*, or " *elegit*."

(9) 5 Com. Dig. 389. 2 Modern 234. Str. 582. 952. Burr. 2277. 2143. 4 Modern 58. Rex v. Ponſonby 25 Geo. 2. Queenv. Blagden, B. R. H. 248. Sayer's Law of Coſts 293.

Sect. 16. And it is further enacted, " That the ſtatute for " the amendment(10) of the law, and all the ſtatutes of Jeofails, " (11) ſhall be extended to informations, in nature of a *quo* " *warranto*, and proceedings thereon, for any the matters in " the ſaid act mentioned."

(10) 11 Hen 4. c. 3.
(11) 14 Edw. 3. c. 6.
9 Hen. 5. c. 4.
4 Hen. 4. c. 3.
8 Hen. 6. c. 12. & 15.

32 Hen. 8. c. 30. 18 Eliz. c. 14. 21 Jac. 1. c. 13. 16 & 17 Car. 2. c. 8. (ſtyled in 1 Ventris 100. an omnipotent act.) 4 & 5 Ann. c. 16. 9 Ann. c. 20. 5 Geo. 1. c. 13. Vide alſo 4 Com. 406. 4 Burr. 1099. Str. 1011. Co. Litt. 260. Douglas 115.

†OF INFORMATION QUI TAM.

And now I am in the ſecond place to conſider the nature of ſuch Information, as is partly the ſuit of the king, and partly the ſuit of the party, which is commonly called an Information Qui tam.

And this having a great affinity with actions on ſtatutes, I ſhall conſider them together, and endeavour to ſhew,

1. In what caſes they lie.
2. What ought to be the form of them.
3. In what courts they may be brought.
4. In what county.
5. Within what time.
6. Who are diſabled to bring them.
7. Whether there may be a nonſuit in them.

8. Whether

8. Whether the informer or defendant may appear by attorney.

9. In what caſes there ſhall be coſts.

10. Whether the defendant may wage his law, or take advantage of a protection.

11. In what manner the defendant is to plead to ſuch an information or action.

12. By whom the replication ſhall be made.

13. In what manner the iſſue ſhall be joined, and where it ſhall be tried.

14. Where the verdict may be found as to part of the information againſt the informer, and as to other part for him.

15. What judgment on ſuch an information or action is good.

16. Whether the penalty of a penal ſtatute may be compounded or granted over.

Sect. 17. As to the firſt of theſe particulars, *viz.* In what caſes an information or action *qui tam* will lie. I (*a*) take it for granted, that they lie on no ſtatute which prohibits a thing as being an immediate offence againſt the publick 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 (*b*) 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, &c. I take it to be ſettled at this day, That any one may bring ſuch action, or information, and lay his demand (*c*) *tam pro domino rege quam pro ſeipſo.* (*d*) Alſo where a ſtatute prohibits, or commands a thing, the doing or omiſſion whereof is an immediate damage to the party, and alſo highly concerns the peace, ſafety, or good government of the publick, or the honour of the king, or of his ſupreme courts of juſtice; as the ſtatutes of the (*e*) ſcandal of great men; of (*f*) hue and cry; and thoſe that reſtrain certain ſuits in the (*g*) civil or canon law courts, or even in inferior (*h*) common law courts; it ſeems to have been the general opinion, that the party grieved may, and it is holden (*i*) by ſome that he ought to bring his action on ſuch ſtatute *tam pro domino rege quam pro ſeipſo:* And it ſeems to be taken (*k*) as a ground in ſome books, That wherever the king is to have a fine on an action on a ſtatute, the action muſt be ſo laid; but not where the defendant is only to be amerced. But I much queſtion, whether this be a good general ſettled rule in relation to this matter; ſince in an action on the ſtatutes of hue and cry, the defendant ſhall (*l*) only be amerced; and yet ſuch action may certainly be laid *tam pro domino rege quam pro ſeipſo.* Alſo in actions, which by

When an act only gives a remedy to the party grieved, it is not to be conſidered as a penal ſtatute. B. R. H. 412.

(*a*) 2 And. 127.
(*b*) 2 And. 128. 2 Jones 234. 1 And. 139. 140. Strange 818.
(*c*) Co. Ent. 375, 376, 377. 1 Lutw. 133, 134. 138, &c. Dyer 95. 346. 1 And. 139. 140. L. quin. Ed. 4. 117. 118. 3 Com. Dig. 518.
(*d*) 4 Coke 13. 12 Coke 134.
(*e*) 4 Co. 13. 12 Coke 134. Hetley 122.
Qu. 1 Sid. 233, 1 Levinz 248.
(*f*) Raſt. 406, 407. Co. Ent. 348, &c.
(*g*) Raſtal 226. Diſmes 23. 24. C. Jac. 134. Dyer 159. 1 Roll 203.
(*h*) Raſt. 433. (*i*) 4 Co. 13. (*k*) C. Jac. 134. Hetley 121. Moor 911. (*l*) C. Jac. 350.

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(a) 1 R. Abr. 1. (b) 1 R. Ab. 1. (c) 1 Roll 78. C. Jac. 360, 361, 532. 533. C. Eliz. 877. Parallel Caſes, Noy 22. 2 R. Abr. 93. 41 Aſſize 12. 27 Aſſize 49. (d) C. Jac. 619. (e) Co. Ent. 44. 146. Precedents both ways. (f) Raſtal 226. 2 Inſt. 132, 133. (g) Co. Ent. 45. 35 H. 6. 6. 2 Inſt. 131. 1 R. Abr. 222, Qu. Dyer 177. 1 Danvers 460. C. Car. 559, 560. (b) Moor 911. 2 R. Abr. 223. Cr. Eliz. 621. Hetley 121, 122. (i) Moor 911. C. Jac. 538, 631. (k) Savil. 62.

the common law a man may bring *tam pro domino rege quam pro ſeipſo*, as in thoſe for injuries to the party, mixed with a high contempt to the king (as where a (a) judge refuſes to allow the benefit of the king's pardon to a priſoner, unleſs he will give him ſuch a bribe; or where one makes a (b) reſcous of one taken on a *capias utlagatum*, at the ſuit of the party, or the ſheriff ſuffers one taken on ſuch a *capias* to (c) eſcape), the plaintiff is (d) ſaid to have his election to lay his action this way, but not to be compelled ſo to do. To which may be added, that the plaintiff cannot ſo lay his action for a common treſpaſs at common law, and yet therein the defendant is to be fined. Neither does the opinion I would contend againſt, ſeem to be confirmed by the conſtant courſe of precedents; but on the contrary, many of thoſe on the ſtatutes againſt (e) forcible entries, and on the ſtatutes againſt (f) illegal diſtreſſes, do not lay the action *tam pro domino rege quam pro ſeipſo*; and yet there are (g) authorities in this laſt caſe, as well as in the former, that the defendant is liable to be fined. But the caſe of an (b) action on 2 & 3 Edw. 6. c. 13. wherein it ſeems clear that it is not neceſſary to lay the action *tam pro domino rege quam pro ſeipſo*, does not ſeem to come up to the point; becauſe it is generally holden, that the defendant is only amerceable in ſuch action, being in nature of an action of debt, and not finable, as it is ſaid (i) that he may be in an indictment or information grounded on the (k) contempt of the ſtatute.

Sect. 18. As to the ſecond particular, *viz.* What ought to be the form of ſuch information or action. Having in the precedent chapter, ſection ninety two, endeavoured to ſhew, That there is no need that ſuch information or action conclude *contra pacem*, and in ſection ninety-five, Whether it be neceſſary for them to conclude *in contemptum regis*; and in ſect. 100. That they need not recite the ſtatute whereon they are grounded; and in ſections 101, 102, &c. What miſ-recitals of a ſtatute will be fatal; and in ſect. 110, 111, &c. How far it is neceſſary to bring the caſe within the very words of the ſtatute; (12) and in ſect 116, 117. How far it is neceſſary to conclude *contra formam ſtatuti*; and in ſect. 115. In what caſes one may have judgment on a ſtatute, in an action brought at common law; I ſhall in this place obſerve only theſe following particulars:

(12) Vide Rex v. Trelawney, Faſter Term 26 Geo. 3. D. & E 222.

Qu. Whether a perſon can be convicted of two diſtinct penalties in the ſame information. Rex v. Salmons D. & E. 249.

Sect. 19. Firſt, If an information contain ſeveral offences againſt a ſtatute, and be well laid as to ſome of them, but defective as to the reſt, the informer may have judgment for ſo much as is well laid. (l) As where the words of the ſtatute are fully purſued in the deſcription of ſome of the offences and not of others; (m) or where ſome of the times that the

(l) C. Jac. 104. (m) 1 Sid. 368. Vide Rex v.

2 Keble 366, 2 R. Abr. 696. C. Jac. 529. C. Eliz. 835. Bunbury 42. 63. Taylor, 1 Bac. Abr. 39. 41.

defendant

defendant hath offended againſt the ſtatute are expreſſed with convenient certainty, and others not; as where it is alledged that the defendant, for eleven months, and more, from 10 September in ſuch a year, unto 9 September in the year following, uſed a trade, without having been an apprentice, &c. or was abſent from church, &c. in which caſes judgment ſhall be given for the eleven months. But if the whole time be expreſſed inconſiſtently; as that the defendant was an offender eleven months, from the firſt of November in ſuch a year to the firſt of Auguſt following, the whole is void for the repugnancy, as hath been more fully ſhewn, chap. 25. ſect. 62.

Sect. 20. Secondly, It ſeems to be ſettled at this day, That it is in the election of him who brings an action on a penal ſtatute, which gives one moiety of the forfeiture to the king, and another to the informer, either to have a writ againſt the defendant, *quod reddat* (*a*) *domino regi & A. B. qui tam, &c. quas eis debet*; or to have it in this form, *quod reddat* A. B. *qui tam, &c. quas ei debet*. Alſo it ſeems to be ſettled, That whether the writ be in the one form, or the other, it is well purſued by a declaration in the name of the plaintiff only. (*b*) Alſo it ſeems to be doubtful, whether there be any neceſſity that either the writ, or count, in any ſuch action, do expreſs that it is brought by it for the king, as well as the party, as hath been more fully ſhewn in the 17th ſection; and there is a (*c*) precedent of ſuch an action brought in the king's name by A. B. *qui pro ſeipſo in hac parte ſequitur*. But it ſeems (*d*) agreed that every information muſt be in this form, That the informer *tam pro domino rege quam pro ſeipſo ſequitur*, even where it is brought on a ſtatute which gives one third part of the penalty to a third perſon. But I find ſome difference as to the forms of ſuch informations, as to ſome other reſpects; for ſometimes they ſay, (*e*) that the action accrues to the informer, *qui tam, &c.* to demand the ſum forfeited for the king and himſelf; and (*f*) ſometimes that it accrues to the king, and to the informer, *qui tam, &c.* and (*g*) ſometimes, that it accrues to the king, and to J. S. &c. (*viz.* where the ſtatute divides the penalty into three parts, &c.) and alſo to the informer, *qui tam, &c.* and ſometimes they have no (*h*) clauſe at all of this kind. And (*i*) *quære*, If it be not fatal to have any ſuch clauſe where the penalty is not recoverable by the information, but requires a ſubſequent one, grounded on the conviction? Alſo, ſometimes ſuch informations pray proceſs againſt the defendant, to bring him in to (*k*) anſwer to the informer, *qui tam, &c.* only; ſometimes (*l*) to anſwer *tam domino regi quam* A. B. *qui tam, &c.* and (*m*) ſometimes to anſwer *de & ſuper præmiſſis* generally, without expreſſing to whom.

Sect. 21. Thirdly, regularly it is ſafeſt for every ſuch information, or action, to demand the very ſum due to the informer, and neither more or leſs; for it hath been adjudged, That

(*a*) 1 Jones 261, 262. C. Car. 256. Plowden 77, 78. Dyer 95. 3 Lev. 374, 375. Qu. Dalif. 66, 67. Moor 64, 65. B. Act. ſur. le Stat. 4. 27 H. 8. 23.
(*b*) B. Act. pop. 5. L. Quin. Ed. 4. 117. See Raſtal 686. Vit. 1. 427, 428.
(*c*) Raſtal 427.
(*d*) Jones 261, 262. C. Car. 256. Coke's Ent. 371.
(*e*) Co. Ent. 370. Raſt. 430, 431. 463.
(*f*) Co. Ent 369. 366. 365. Raſtal 208.
(*g*) Co. Ent. 371. Vide 2 Keb. 820. 2 Modern 100.
(*h*) Co. Ent. 370. 364.
(*i*) 1 Lutw. 162. Vide ſup. B. 1. c. 8. ſect. 10.
(*k*) Co. Ent. 364.
(*l*) Co. Ent. 370. 369. 365, 366.
(*m*) Co. Ent. 371, 372.

(a) Bro. Act. ſur le Stat. 4. 27 H. 8. 23. Vide Hob. 245. Bull N. P. 196.

(b) Hobart 245. Vide C. Car. 330, 331.

(c) C. Car. 330, 331. Cunningham v. Bennet, Trin. 2 Geo. 1. C. B.

(d) 1 Jones 156, 157.

(e) 1 Jones 156, 157.

(13) Q. As to the blank, if it would not be bad? 1 Bac. Abr. 38. *in notis.*

(f) B. Act. Pop. 2.

(a) That if an action on a ſtatute demand the whole forfeiture for the informer, where the ſtatute gives part of it to the king, it is inſufficient: Alſo it hath been holden, (b) That if the information make no demand at all, or demand more or leſs for the party than appears to be his due, it is inſufficient as to him; yet (c) perhaps it may be good as to the ſhare of the forfeiture given to the king. Alſo, it hath been (d) adjudged, That it is ſufficient to demand the ſhare due to the informer, without making any mention of that due to the king. Alſo, (e) where the *quantum* of the forfeiture depends upon the finding of the jury, as it does on the ſtatute of Foreſtalling, it hath been adjudged ſufficient to leave a blank (13) for the ſum. Alſo it hath been (f) adjudged, That a popular action may conclude *ad grave damnum*, without adding, of the plaintiff; becauſe every offence, for which ſuch action is brought, is ſuppoſed to be a general grievance to every body.

(g) C. Eliz. 76, 77. Moore 247. 3 Inſt. 194.

(h) C. Eliz. 544.

(i) 23 H. 6. 10. C. Eliz. 76, 77. More 247. 390. 3 Inſt. 194.

(k) 4 & 5 P. & M. 5. ſ. 32, 33, 34. 6 Coke 19. Moore 412.

(l) 5 Eliz. 4. ſ. 31, 39. C. Eliz. 544. Noy 60.

(m) 1 R. Abr. 537.

(n) Vide 2 D. Abr. 279, 280. 3 Leonard 237.

Sect. 22. Fourthly, It is enacted by 18 Eliz. c. 5. ſect. 1. "That none ſhall be admitted or received to purſue againſt "any perſon or perſons, upon any penal ſtatute, but by way of "information or original action, and not otherwiſe." And it hath been adjudged, That no popular action, ſince this ſtatute, can be brought on a former ſtatute, either by (g) bill in the king's bench, or by (h) plaint in an inferior court, but only by original writ, or information; whether the ſtatute on which ſuch action is grounded, (i) inflict a penalty generally, without ſaying how it ſhall be recovered, or expreſsly give a recovery by bill or plaint, &c. (as that of 4 & 5 Ph. & Mary againſt (k) making kerſeys, without having ſerved an apprenticeſhip; and that of 5 Eliz. c. 4. againſt (l) following any other trade without having ſerved an apprenticeſhip.) Yet the contrary hath been ſince expreſsly adjudged (m) as to ſuch former ſtatutes as expreſsly give a recovery by bill or plaint, becauſe the ſtatute of 18 Eliz. doth not mention original *writs*, but original *actions*; and a ſuit by bill or plaint is an (n) original action in the court in which it is commenced, and therefore may reaſonably ſeem to be only within the intent of the ſtatute, where it is removed into a ſuperior court, and there proceeded upon. And if this be the meaning of the ſtatute, I ſee not how any ſuit whatever, by bill or plaint on any penal ſtatute, can be within the purview of it while ſuch bill or plaint continue in the court in which they were commenced, whether the ſtatute on which they are brought do expreſsly mention them, or leave the method of ſuing to the general conſtruction of law. To which may be added, That the ſtatute 21 Jac. 1. c. 4. ſect. 1. ſeems to ſuppoſe, that actions on penal ſtatutes may indifferently be brought by writ, plaint, bill, or information; for the words are, "That all offences here-"after to be committed againſt any penal ſtatute, for which any

"common

" common informer or promoter may lawfully ground any " popular action, bill, plaint, ſuit, or information, before " juſtices of aſſize, &c. ſhall be commenced, &c. by way of " action, plaint, bill, information, or indictment in the pro- " per county, before the juſtices of aſſize, &c."

However, it ſeems clear, (a) That no ſuit, by bill or plaint, by a party grieved, ſuing upon a clauſe, either expreſsly or impliedly relating to himſelf only, is within the ſaid ſtatute of 18 Eliz. For it is expreſsly provided, ſect. 6. " That it ſhall not " reſtrain any certain perſon, body politick or corporate, to " whom, or to whoſe uſe any forfeiture is limited by any ſtatute, " and not generally to any perſon that will ſue; but that every " ſuch perſon may uſe as before." (b)—But where the party particularly grieved by an offence againſt a ſtatute, ſues for a forfeiture generally limited to any one who will ſue for it, he ſeems to be as much within the reſtraint of the ſaid ſtatute, as if he were not the party grieved.

(a) C. Eliz. 434. 645. Vide C. Eliz. 76, 77. 3 Leonard 237.

(b) C. Eliz. 76, 77. 3 Leon. 237.

Sect. 23. Fifthly, (c) In an action on a ſtatute, which requires ſome officers at one certain time after their admiſſion, and others at another, to qualify themſelves by certain acts, it is ſafeſt, expreſsly to ſhew the time when the defendant was admitted to his office, and that he neglected to qualify himſelf in the time limited; and alſo, That he actually exerciſed his office after ſuch neglect.

(c) Lutw. 162.

Sect. 24. Sixthly, It is ſaid, (d) That the fact is ſufficiently alledged after a *quod cum* in an action on a ſtatute, but not in an information.

(d) Shower 337.

Sect. 25. As to the third particular, *viz.* In what courts ſuch an information or action may be brought: Having already, c. 5. ſect. 33. endeavoured to prove, that where a ſtatute appoints that a penalty ſhall be recovered in any of the king's courts of record, the offence may be indicted before juſtices of *oyer* and *terminer*, though not in a court-leet, or of (e) piepowders, or ſuch others, inſtituted for ſpecial purpoſes; and intending under the next particular, incidentally to conſider what ſuits may be brought in the courts of Weſtminſter-hall, on penal ſtatutes; I ſhall only take notice in this place, That where a ſtatute limits ſuits by an informer *qui tam* to other courts, yet any (f) one may, by conſtruction of law, exhibit an information in the exchequer for the whole penalty for the uſe of the king.

Con Hut. 99. 1 Jones 193. Littleton 163. C. Car. 112. 1 Ventris 8.

(e) C. Eliz. 530. 6 Coke 20.

(f) 2 And. 127, 128. C. Jac. 178, 279.

Sect. 26. As to the fourth particular, *viz.* In what county ſuch information or action may be brought: It is enacted by 31 Eliz. c. 5. " That in any declaration, or information, (g) " not being exhibited by ſuch officers of record, as had in " reſpect of their offices, before the time of the ſaid ſtatute, " lawfully uſed to exhibit informations, or ſue upon penal " laws;

(g) Par. 3.

(a) Par. 4 B. 1. c. 80. ſect. 47. Law of niſi prius 195.

" laws; and not (a) concerning champerty, buying of titles, " or extorting, or the king's cuſtoms, &c. or uſury, or foreſtall- " ing, &c. the offence againſt any penal ſtatute ſhall not be " laid to be done in any other county but where the matter " alledged to be the offence was in truth done: And that the " defendant may traverſe, and alledge, That the offence ſup- " poſed to be committed, was not committed in the county " where it is alledged; which being tried for the defendant, " or if the plaintiff be thereupon nonſuit, the plaintiff ſhall be " barred in that action or information.

Sect. 27. It is further enacted, par. 7. " That all ſuits for " uſing unlawful, or not uſing lawful games, or for not having " bows or arrows, or for uſing a trade without having been " brought up in it,(†) ſhall be ſued and proſecuted in the general " quarter-ſeſſions of the peace, or aſſizes of the ſame county, " where the offence ſhall be committed, or otherwiſe inquired " of, heard and determined in the aſſizes, or general quarter- " ſeſſions of the peace of the ſame county, where ſuch offence " ſhall be committed, or in the leet within which it ſhall " happen, and not in any wiſe of the ſame county where ſuch " offence ſhall happen, or be committed."

(†) Farren *qui tam* v. Williams. Cowper 369.

In the conſtruction of this ſtatute, the following particulars ſeem moſt remarkable:

Sect. 28. Firſt, That it hath been adjudged, That the defendant can have no advantage of the above-recited clauſe, which appoints, That all offences againſt penal ſtatutes ſhall be laid in the proper counties but (*b*) only by way of plea; and this conſtruction ſeems very agreeable to the purport of the ſaid clauſe; the words whereof are, " That the defendant " may traverſe the county, &c. which being tried for him, or " if the plaintiff be thereupon nonſuit, the plaintiff ſhall be " barred, &c."—But this point is otherwiſe ſettled by 21 James 1. chapter 4. ſection 3.

(*b*) 2 And. 180. the contrary adjudged. C. Eliz. 735, 736.

Sect. 29. Secondly, That the ſaid clauſe extends (*c*) not to any ſuit by a party grieved, or by the (*d*) attorney general, but only to thoſe brought by common informers.

(*c*) C. Eliz. 645.
(*d*) 1 Vent. 8. C. Jac. 178.

Sect. 30. Thirdly, That the laſt recited clauſe, concerning ſuits for uſing a trade without having been brought up in it, &c. which are appointed to be brought at the aſſizes or ſeſſions, in the proper county, and not in any wiſe out of the county, reſtrains not an information in the (*e*) king's bench or exchequer, for ſuch offence happening in the ſame county where thoſe courts are ſitting; for the negative words of the ſtatute are not, That ſuch ſuits ſhould not be brought in any other court, but, That they ſhall not be brought in any other county; and the prerogative of theſe high courts ſhall not be reſtrained without expreſs words. But where the offence is in a differ-

(*e*) C. Jac. 178, 179. Salkeld 373. Hobart 184.

" ent

ent county, ſuch ſuits, in thoſe, or any other courts, out of the proper county, ſeem to be within the expreſs (*a*) words of ſtatute: Yet it was long a very great (*b*) queſtion, Whether an action of debt or information, in the courts of Weſtminſter-hall, were not to be conſtrued to be out of the meaning of them: But this point is now ſettled in the conſtruction of the ſtatute of 21 Jac. 1. c. 4. as ſhall be more fully ſhewn hereafter.

(*a*) Vide Hob. 184. 327. C. Jac. 85.
(*b*) 1 Keble 584. 2 Keble 99. 125. 3 Keble 247. 448. 1 Sid. 303. 400.

Sect. 31. It is enacted by the ſaid ſtatute, of 21 Jac. 1. c. 4. "That all offences to be committed againſt any penal ſtatute, "for which any common informer or promoter may lawfully "ground any popular action, bill, plaint, ſuit or information "before juſtices of the aſſize, juſtices of *niſi prius* or gaol-de-"livery, juſtices of *oyer and terminer*, or juſtices of peace, in their "general or quarter-ſeſſions, (except offences againſt the ſta-"tutes concerning (*c*) recuſancy, &c. or maintenance, &c. "or the king's cuſtoms, &c. or tranſporting gold, or ſilver, or "munition, or wool, or leather, &c.) ſhall be commenced, "ſued, proſecuted, tried, recovered and determined, by way "of action, plaint, bill, information or indictment before the "juſtices of aſſize, juſtices of *niſi prius*, juſtices of *oyer and* "*terminer*, and juſtices of gaol-delivery, or before the juſtices "of the peace of every county, city, borough or town corpo-"rate, and liberty, having power to enquire of, hear and de-"termine the ſame, in England or Wales, wherein ſuch of-"fences ſhall be committed, in any of the courts, places of "judicature, or liberties aforeſaid, reſpectively, only at the "choice of the parties who ſhall commence ſuit, or proſecute "for the ſame, and not elſewhere, ſave only in the ſaid counties, "or places uſual for thoſe counties, or any of them: and that "the like proceſs in every popular action, bill, plaint, inform-"ation or ſuit, to be commenced, ſued or proſecuted, by "force of, or according to the purport of this act, be had and "awarded, to all intents and purpoſes, as in an action of treſ-"paſs *vi & armis* at common law. And that all and all "manner of informations, actions, bills, plaints, and ſuits "whatſoever, to be commenced, ſued, proſecuted, or awarded, "either by the attorney general, or by any officer whatſoever, "or by any common informer, or other perſon whatſoever, in "any of his majeſty's courts at Weſtminſter, for or concern-"ing any the offences aforeſaid, ſhall be void."

(*c*) Vide Hobart 251. & B. 1. c. 10. S. 5. Raymond 394.

Sect. 32. And it is further enacted, "That if on the "general iſſue the offence be not proved in the ſame county in "which it is laid, the defendant ſhall be found not guilty," as ſhall be more fully ſhewn under the eleventh particular.

Sect. 33. Alſo it is further enacted, "That no officer "ſhall receive, file, or enter of record, any information, bill, "or plaint, count or declaration, grounded on the ſaid penal "ſtatutes, or any of them, which by this act are ap-

This ſection is ſaid to be obſolete. 1 Bac. Abr. 39. Vide alſo Cro. Car. 316. 4 Inſt. 272.

"pointed

2 Inſt. 193. Salkeld 367. Ld Raym. 426. Carthew 503.

" pointed to be heard and determined in their proper counties, " until the informer or relator hath firſt taken a corporal oath " before ſome of the judges of that court, that the offence or of- " fences laid in ſuch information, &c. was or were not com- " mitted in any other county than where, by the ſaid informa- " tion, &c. the ſame is, or are ſuppoſed to have been committed, " &c. the ſame oath to be there entered of record."

In the conſtruction of this ſtatute, I ſhall obſerve the following particulars:

(a) 1 Salk. 372. Carthew 465. 5 Modern 425. 2 Levinz 204. 3 Inſt. 192, con. adjudged. 1 Ventris 8. 1 Levinz 249. 3 Levinz 71. 3 Keble 804. 2 Keb. 340. 401. 447. 458. 1 Sid. 303. 359. 400. ſame caſe doubted. 1 Ventris 364. 2 Levinz 204. Latch. 192. Sup. ſect. 30. 1 Lutwyche 165. Strange 1081. Raymond 394. (b) 1 Jones 193. Sup. ſect. 30. Strange 415. (c) 1 Salk. 373.

Sect. 34. Firſt, That as the law is now (*a*) ſettled, no action of debt, or information, or other ſuit whatever, can be brought in any court of Weſtminſter-hall, on any penal ſtatute made before the ſaid ſtatute of 21 Jac. for any offence not herein excepted, for which the offender may be proſecuted in the country, (*b*) unleſs ſuch offence ſhall be committed in the ſame county in which court ſhall ſit; and ſurely this cannot but be thought moſt agreeable to the meaning as well as the letter of the ſaid ſtatute; the whole proviſion whereof would be to little purpoſe, if ſuch ſuits ſhould be conſtrued out of it. And as to the objection, 'That if all ſuits on penal ſtatutes ſhould be wholly taken from the ſuperior courts, all offences againſt them would become diſpuniſhable by the offender's removing himſelf out of the county wherein he committed them; becauſe the courts in the ſtatute mentioned, have no juriſdiction out of the counties wherein they ſit; it hath been (*c*) anſwered, That proceſs of outlawry will lie againſt ſuch offenders, by virtue of the above-recited clauſe of the ſaid ſtatute, which gives the like proceſs in all ſuits proſecuted according to the purport of it, as in actions of treſpaſs at the common law.

(d) 1 Salk. 372. Hick's Caſe. Carthew 465.

Sect. 35. Secondly, That (*d*) where a ſubſequent ſtatute gives an action of debt, or any other remedy, for the recovery of a penalty in any court of record generally, it ſo far impliedly repeals the reſtraint of 21 Jac. and conſequently leaves the informer at his liberty to ſue in the courts of Weſtminſter-hall.

(e) 1 Ventris 8. C. Car. 112. 146. Hetley 101. 10 Jones 198. Hutton 98, 99. (f) C. Car. 112. Salkeld 372. Lit. Rep. 163. 1 Vin. Ab. 203.

Sect. 36. Thirdly, That the ſtatute of 21 Jac. gave (*e*) no juriſdiction to the courts therein mentioned, over any offences, in relation to which they had none before; and (*f*) therefore that ſuits for ſuch offences muſt be brought in the courts of Weſtminſter-hall in the ſame manner as before.

Hutton 98. 99. 2 Keble 106. Strange 1103. Andrews 27. 174. 191. 6. Viner 342.

(g) 1 Jones 193. Rex v. Martel. Bull N. P. 196.

Sect. 37. Fourthly, That (*g*) the ſaid ſtatute hinders not the removal of any indictment into the king's bench by *certiorari*;

orari; after which it may be either tried there, or in the country by *nisi prius* (13).

(13) And it is resolved, that a writ of error lies from the king's bench to the exchequer chamber in a *qui tam* action of debt. Lloyd v. Skutt. Douglas 353. N. (91)

Sect. 38. Fifthly, That (*a*) it hath been adjudged, That an officer, by receiving an information without such a previous oath, That the offence arose in the same county in which it is laid, doth not make the proceedings upon it erroneous; for the act is only directory to the officer, but doth not intend that such oath should be made parcel of the record; and therefore the omission of it cannot be assigned for error; and yet the act is express, "That such oath shall be entered of record." But *quære*, If the court may not properly be (*b*) moved to set aside such process, as having issued contrary to the directions of the statute?

(*a*) C. Car. 316. Vide 4 Inst. 272. 2 Inst. 193.

(*b*) Vide Salk. 376. Sup. sect. 10.

Sect. 39. Sixthly, That no (*c*) suit by a party grieved is within the restraint of the statute.

Noy 71. Shower 354.

(*c*) Cro. Eliz. 645. 3 Leonard 237.

Sect. 40. As to the fifth particular, *viz.* Within what time such information or action may be brought: It is to be observed, That all popular actions were limited to a certain time by 7 Hen. 8. c. 3. But this (*d*) statute being repealed by 31 Eliz. c. 5. I shall take no farther notice of it.

(*d*) Vide B. Act. Pop. 6. Law of *nisi prius* 195.

Sect. 41. It is enacted by the said statute of 31 Eliz. c. 5. sect. 5. "That all actions, suits, bills, indictments, or informations which shall be brought for any forfeiture upon any statute penal, made, or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only, shall be brought within two years after the offence committed; and not after two years. And that all actions, suits, bills, or informations, which shall be brought for any forfeiture, upon any penal statute, made, or to be made, except the statutes of tillage, the benefit and suit whereof is, or shall be by the said statute, limited to the queen, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same, within one year next after the offence committed, and in default of such pursuit, that then the same shall be brought for the queen's majesty, her heirs or successors, any time within the two years after that year ended. And if any action, suit, bill, indictment, or information, shall be brought after the time so limited, the same

4 Modern 144. 1 Shower 353. Noy 71. Carthew 232. Ld Raymond 78. Douglas 235.

"shall be void. And it is provided, That where a shorter "time is limited by any penal statute, the prosecution must be "within that time."

Sect. 42. Also it is enacted by 18 Eliz. c. 5. s. 1. "That "upon every information which shall be exhibited on any "penal statute, a special note shall be made of the very day, "month, and year of the exhibiting thereof into any office, or "to any officer, which lawfully may receive the same, with-"out any antedate thereof to be made; and that the same in-"formation be accounted and taken to be of record, from that "day forward and not before: And that no process be sued "out upon such information, until the information be exhi-"bited in form aforesaid, &c. and that every clerk making out "process contrary to this act, shall forfeit forty shil-"lings, &c."

Sect. 43. It is farther enacted by 21 Jac. 1. c. 5. "That "no officer shall receive, file, or enter of record, any inform-"ation, bill, plaint, count, or declaration, grounded on "any penal statute (being (*a*) within the provision of the said "statute of 21 Jac.), until the informer or relator hath first "taken a corporal oath, before some of the judges of the "court, that he believes in his conscience, the offence was "committed within a year before the information or suit, "within the county where the said information was com-"menced, &c."

(*a*) Cro. Car. 316. 2 Inst. 192. 4 Inst. 292. Salkeld 376. For this matter see the 38th sect.

Sect. 44. In the construction of these statutes, I shall ob-serve the following particulars; First, That (*b*) if an offence prohibited by any penal statute, be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes.

(*b*) Hobart 270. 4 Modern 144. 1 Shower 353. Bull. N. P. 195.

Sect. 45. Secondly, That if a suit on a penal statute be brought after the time limited, the defendant needs not plead the statute, but (*c*) may take advantage of it on the general issue.

(*c*) 3 Bac. Abr. 505. Shower 353, 354. Noy 71.

Sect. 46. Thirdly, That if an information *qui tam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is naught only (*d*) as to the informer, but good for the king.

(*d*) C. Car. 331. C. Jac. 366. Vide Salis. 60.

Sect. 47. Fourthly, That the party grieved is (*e*) not within the restraint of these statutes, but may sue in the same manner as before.

(*e*) Sup. s. 38. C. Eliz. 645. 3 Leonard 237. Shower 354. Carthew 232.

Ld Raymond 78. B. N. P. 195.

Sect. 48. Fifthly, That it seems not (*f*) to be settled, Whether the suing of a *latitat* within the year be a sufficient com-

(*f*) Shower 353, 354.

commencement of a ſuit on a penal ſtatute, to avoid the limitation of theſe ſtatutes (14)?

(14) It has been determined that it is a ſufficient commencement of the ſuit. Carthew 232. Shower 353. But if the writ were not ſued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonſuited. 3 Burrow 1241. Bull. N. P. 195. and the real day of ſuing out the writ, which ſhall be conſidered as the commencement of the ſuit, may be ſhewn in the pleadings. 3 Burrow 1423.

Sect. 49. Sixthly, that it *(a)* ſeems alſo to be queſtionable, Whether a ſuit by a common informer, on a penal ſtatute, which firſt gives an action to the party grieved, and in his default, after a certain time, to any one who will ſue, be within the reſtraint of theſe ſtatutes?

(a) Shower 353. Bull. N. P. 195. Vide Cowper 366.

Sect. 50. Seventhly, That it ſeems queſtionable, Whether the clauſe in 31 Eliz. c. 5. ſ. 4. by which it is enacted, "That nothing in the ſaid act contained ſhall extend to "champerty, king's cuſtoms, or foreſtalling, &c. but that "every ſuch offence may be laid in any county; any thing in "the ſaid act to the contrary notwithſtanding," do except the ſaid offences, out of the above-recited clauſe, relating to the time within which ſuits on penal ſtatutes muſt be brought? For the words above-mentioned, *viz.* "But that every ſuch offence may be laid in any county," ſeem to reſtrain the generality of the precedent, which ſay, "That nothing in the act contained ſhall extend to ſuch offences."

Sect. 51. As to the ſixth particular, *viz.* What perſons are diſabled (15) to bring ſuch an information or action: It is enacted by 31 Eliz. c. 5. ſ. 1. "That no perſon, other than "the party grieved, ſhall be received to inform, or ſue upon "any penal ſtatute, that before that time hath been for any "miſdemeanour, by any order of any the queen's majeſty's "courts, ordered not to follow or purſue any ſuit upon any "penal ſtatute."

(15) A corporation cannot ſue as a common informer. Strange 1241.

Sect. 52. As to the ſeventh particular, *viz.* Whether there may be a nonſuit in ſuch an information or action? It ſeems agreed, that notwithſtanding the king *(b)* cannot be nonſuit in any information or action wherein he himſelf is the ſole plaintiff; yet any *(c)* informer *qui tam*, or *(d)* plaintiff in a popular action, may be nonſuit, and hereby wholly *(e)* determine the ſuit as well in reſpect of the king as of himſelf: Alſo it ſeems agreed, *(f)* That the attorney general may enter a *nolle proſequi* (which, as *(g)* ſome ſay, has the effect of a nonſuit) to any information or action brought by the king only.

(b) Co. Lit. 139. F. Nonſ. 13. B. Nonſ. 68. Prerog. 116.
(c) Co. Lit 139. B. Nonſ. 68. Prerog. 116.
(d) B. Nonſ. 35.
(e) 37 H. 6. 5. B. Nonſ. 35.
(f) Lit. 139. Burrow 72, 220.
(g) Coke Litt. 139. Vide 1 Sid. 426. 1039.

Qu. Salkeld 21. 2 Ld Raymond

Sect. 53. As to the eighth particular, *viz.* Whether the informer or defendant may appear by attorney? It ſeems

(a) B. Att. 53, 54. 63. 101. 9 Edw. 4. 2. 9 Edw. 4. 4. 22 Aſſize 73. (b) B. Att. 63. (c) Dyer 346. 9. 1 Levinz 146. Vide 21 Edw. 4. 77. 7 H. 6. 21. (d) F. Att. 48. 53. 104. 3 Inſt. 125. 39 Edw. 3. 7. 15 H. 7. 9. F. N. B. 66. Vide B. Att. 69. 81, 82. 37 H. 6. 27. 3 H. 7. 6. C. Jac. 462. 616 22 Edw. 4. 33, 34. (e) See caſes lett. d. (f) 15 H. 7. 9. 39 Edw. 3. 7. (g) 1 Roll. 190. 2 Bulſtrode 299.

agreed, That after (a) plea pleaded to an indictment, information, or action, for any crime whatſoever, under the degree of (b) capital, the defendant might always, by the favour of the court, be permitted to appear by attorney. Alſo it ſeems, That generally the court might always diſpenſe with the perſonal appearance of the defendant, even before (c) plea pleaded, (d) except in ſuch caſes, wherein a perſonal appearance is required by ſome ſtatute, as it is in (e) *præmunire*, &c. in which caſes it ſeems generally agreed, That an appearance by attorney cannot be admitted without ſome ſpecial writ or grant to that purpoſe, whether the defendant be a peer (f) or commoner. It is ſaid indeed, in Roll's Reports, That Sir (g) Anthony Mildmay was ſuffered to plead a pardon to a *præmunire* by attorney, and no mention is made of any ſuch writ or grant. But I preſume that there was a clauſe to this effect in his pardon.

How an informer ſhall ſue.

Sect. 54. It is enacted by 18 Eliz. c. 5. ſ. 1. "That "every informer, upon any penal ſtatute, ſhall exhibit his "ſuit in proper perſon, and purſue the ſame only by himſelf, "or by his attorney in court; and that he ſhall not uſe any "deputy or deputies at all (16)."

(16) Therefore an infant cannot be a common informer, for he muſt ſue by guardian. Maggs v. Ellis' M. 25 Geo. 2. and he cannot be an attorney, becauſe he cannot be ſworn. March 92.

In what caſes the informer may appear by attorney.

Sect. 55. It is recited by 29 Eliz. c. 5. ſ. 21. "That divers of her majeſty's ſubjects, dwelling in the remote parts of the realm, had been many times maliciouſly troubled upon informations and ſuits exhibited in the courts of the king's bench, common pleas, and exchequer, upon penal ſtatutes, and had been drawn up upon proceſs out of the countries where they dwell, and driven to attend and put in bail, to their great trouble and undoing:"—For reformation thereof, it is enacted, "That if any perſon or perſons "ſhall be ſued or informed againſt, upon any penal law, in "any the ſaid courts, where ſuch perſon or perſons are bail-"able by law, or where, by the leave or favour of the court, "ſuch perſon or perſons may appear by attorney; in every "ſuch caſe, the perſon or perſons ſo to be impleaded or ſued, "ſhall and may, at the day and time contained in the firſt "proceſs ſerved for his appearance, appear by attorney of the "ſame court where the proceſs is returnable, to anſwer and "defend the ſame, and not be urged to perſonal appearance, "or to put in bail for the anſwering ſuch ſuits."

Does not extend to alien informers.

Sect. 56. And it is enacted by 31 Eliz. c. 10. ſ. 20. "That this ſhall extend only to the natural ſubjects born, or "to be born, within the dominions of the queen's majeſty, "her heirs or ſucceſſors, and to perſons made free denizens, "and to no others."

As

As to the ninth particular, *viz.* In what caſes there ſhall be coſts, on ſuch an action or information. I ſhall endeavour to ſhew, Whether *an informer* ſhall, in any caſe, have his coſts; and, In what caſes *the defendant* ſhall have them.

Sect. 57. As to the firſt of theſe particulars, I take it to be in a great meaſure ſettled, (*a*) That an informer upon a popular ſtatute, ſhall in no caſe whatſoever have his coſts, unleſs they be expreſsly given him by ſuch ſtatute; for it is certain that he cannot recover them by the common law, for that doth not (*b*) give coſts in any caſe. Neither can he recover them by the ſtatute of Gloceſter (*c*), which gives the demandant his coſts in all caſes wherein he ſhall recover his damages; for this ſeems to ſuppoſe ſome damage to have been done to the demandant in particular, which cannot be ſaid in any popular action; and therefore ſuch actions have always been conſtrued to be out of the benefit of this ſtatute. But it ſeems agreed, (*d*) That an action on a ſtatute, by the party grieved, for a certain penalty given by ſuch ſtatute, is within the ſtatute of Gloceſter, becauſe ſuch penalty is intended him by way of recompence for his particular damage by the offence prohibited; and if he could recover that only, and no more, by way of coſts, it would be in moſt caſes in vain for him to ſue for it, ſince the coſts of ſuit would exceed it. But it is ſaid, That no coſts ſhall be recovered in an action on a ſtatute, which gives no certain penalty to the party grieved, but only his damages in general, &c. if ſuch a ſtatute be introductive of a new law, and give a remedy in a (*e*) point not remediable at the common law. But there is not that inconvenience in this caſe as in the former; becauſe no certain ſum being ſpecified, the jury may give the plaintiff a full ſatisfaction by way of damages (17).

(*a*) 2 Keble 781. 1 R. Abr. 574. 1 Lutwyche 200. 1 Ventris 133. Salkeld 206. Moor 65. 3 Levinz 374.
(*b*) 2 Inſt. 288. Gilbert's C. P. 258.
(*c*) 6 Edw. 1. c. 1.
(*d*) 2 Keb. 781. 1 R Abr. 516, 517. 574. 1 Jones 447. C. Car. 559. 1 Lutwyche 200. 2 Inſt. 289. Carthew 230. Skin. 363. 367. Holt. 172. 12 Modern 46. Comb. 224.
(*e*) 1 R. Abr. 574. 1 Lutwyche 20. 10 Coke 16. Sed vide 2 Wilſ. 92. C. Car. 560. Salkeld 206. Vide Jackſon v. the innabitants of Caleſworth, Mich. 26 Geo. 3.

(17) In an action *qui tam* on the 5 Eliz. c. 4. the plaintiff ſhall pay coſts. Ld Raymond 1333. But it ſeems unſettled whether an informer ſhall be obliged to give ſecurity for the payment of coſts on account of his poverty. Cowper 24. It has been refuſed; for the ſtatute having given him a power to ſue, it is a debt due to him. Bull. N. P. 197. but an informer, who is gone abroad, muſt give ſecurity. Strange 697. and it ſeems that a foreign informer muſt do the ſame. Strange 1206, Vide 1 Wilſ. 166. But this does not extend to other actions. Cowper 158. Sed vide Fitzgerald v. Whitmore, Trin. 26 Geo. 3. Durnford and Eaſt 362. *ibid.* 267. Alſo if a proſecution is brought in a feigned name, the court will oblige the real proſecutor to give ſecurity. Shinlee v. Roberts, Eaſter 12 Geo. 2. C. B.—The defendant, on motion, may pay the coſts and penalty into court, Rex v. Walker, Trin. 31 Geo. 2. B. N. P.—Vide Cowper 367.

Sect. 58. As to the ſecond particular, *viz.* In what caſes the defendant ſhall have coſts. It is enacted by 18 Eliz. c. 5. which is made perpetual by 27 Eliz. c. 10. "That if any "informer or plaintiff, on a penal ſtatute, ſhall willingly "delay his ſuit, or ſhall diſcontinue, or be nonſuit in the ſame, "or ſhall have the trial or matter paſſed againſt him therein, "by verdict or judgment of law, that then, in every ſuch caſe, "the ſame informer or plaintiff ſhall yield, ſatisfy, and pay

This ſtatute extends to *qui tam* informers as well as to thoſe who ſue for the whole penalty. Cowper 366. Strange 1103. Ld Raym. 1333. 1 Wilſon 117.

"unto the party defendant, his coſts, charges, and damages, "to be aſſigned by the court in which the ſame ſuit ſhall be "attempted, &c."

(a) 1 Salk. 30. 1 And. 116. Cro. Eliz. 177. Noy 71. 2 Leonard 116. (b) C. Eliz. 177. (c) Hutton 22. (d) 2 Danv. Abr. 224. (e) 2 Danv. 225. Ld Raymond 27. Savil 50. 1 Burr. 402. 1723. Bac. Abr. 522. Vide Wilkinſon *qui tam* v. Allot. Cowper 366.

Sect. 59. In the conſtruction hereof, I ſhall take notice of the following particulars. Firſt, That it ſeems to be agreed, That no action on any ſtatute by the party *(a)* grieved, is within the purview of this ſtatute, the whole purport whereof ſeems clearly to relate only to common informers: Yet, if ſuch action, by the party grieved, be "for any offence or wrong *(b)* perſonal, immediately ſuppoſed to be done to the plaintiff or plaintiffs;" or, whatſoever the nature of the action may be, "if the plaintiff *(c)* might have coſts, in caſe judgement ſhould be given for him," he ſhall pay them on a nonſuit or verdict againſt him, &c. by virtue of *(d)* 23 Hen. 8. c. 15. and *(e)* 4 Jac. 1. c. 3.

(f) 2 Keb. 581. 1 Siderfin 311. (g) 2 Keb. 106. 42. Qu. Hutt. 35, 36. Vide Cowp. 367. Bunbury 72.

Sect. 60. Secondly, That it hath been holden, That where judgment is given againſt an informer becauſe the court in which he *(f)* ſues has no juriſdiction of the cauſe, or *(g)* becauſe the ſtatute on which he grounds his information is diſcontinued, yet he ſhall pay coſts within the intent of the ſaid ſtatute of 18 Eliz. which ſhall have a liberal conſtruction, and was intended to prevent all vexatious informations; and ſurely ſuch ill-grounded proſecutions cannot but be thought ſuch (18).

(18) If a proſecutor does not go on to trial he ſhall pay coſts. B. R. H. 159. But if he gives notice of trial, and neither goes to trial or countermand in time, unleſs the defendant draws him in to give notice, defendant ſhall have coſts. 3 Burrow 1304. So where a *qui tam* informer, in debt, on the 21 Hen. 8. c. 13. is nonſuited, the defendant is intitled to coſts. Cowper 366. where 3 Burrow 1723. is denied to be law. But the court will not ſtay proceedings in a *qui tam* action, till coſts in a *non pros* in a former action, by a different plaintiff, againſt the ſame defendant, be paid. Cowper 372. If proſecutor *qui tam*, for killing game, &c. does not reply, defendant ſhall have coſts, for 18 Eliz. extends to informers on all penal ſtatutes. 1 Wilſ. 177.

Sect. 61. As to the tenth particular, *viz.* Whether the defendant, in ſuch an action or information, may wage his law, or take advantage of a protection. It is ſaid *(h)* to have been ruled, That the defendant ought not to be admitted to wage his law in any ſuch action or information, becauſe they are founded on a ſtatute; nor do I find any authority to the contrary. But perhaps it may be queſtioned, How far the reaſon given for the opinion above mentioned may be concluſive, ſince ſuch an action or information doth not ſeem ſo *(i)* properly to be grounded on a ſtatute, as on the contempt of it. But as to the queſtion, Whether the defendant can take advantage of a protection? There ſeems to be near the ſame number of authorities on each *(k)* ſide. But there is no great need nicely to examine theſe matters, ſince generally it is expreſsly provided by penal ſtatutes, That neither wager of law,

(h) 10 H. 7. 18. Br. Ley gage, 63 106. Co. Lit 295. (i) Vide 21. H. 7. 15. (k) In the affirmative, F. Protect. 98. 322. Keilway 135. In the negative, F. Protection 61. 105. 21 Edw. 3. 13. Coke Lit. 131. Vide 2 R. Abr. 323.

law, nor protection, ſhall be admitted in any ſuit brought upon them.

Sect. 62. As to the eleventh particular, *viz.* In what manner the defendant is to plead to ſuch an information, or action: I ſhall take it for granted, That he muſt anſwer to the whole (*a*) time laid in ſuch information or action; and that if he have any (*b*) ſpecial matter for his excuſe or juſtification, he muſt ſet it forth (19) with all convenient certainty; and that if he plead the general iſſue to the whole, he muſt depend upon it, and not (*c*) together with it plead alſo a ſpecial plea either to the whole or part of the charge.

(19) For a *qui tam* information cannot be quaſhed on motion. Strange 953.
(*a*) Bridg. 113.
(*b*) Vide Bridg. 114, 115.
(*c*) 1 Roll. 49. 50. 134.
A defendant cannot plead double in *qui tam.* Strange 1044. Barn. K. B. 17.

But for theſe matters I ſhall refer the Reader to the Books which treat of pleading in general. Vide 1 Com. Dig. 227, to 232.

And in this place ſhall only conſider,—1. Where a prior ſuit depending may be pleaded to ſuch an information or action.—2. Where a pardon, or releaſe, or a recovery in a former ſuit.—3. What is a good general iſſue; and where it may be pleaded.

Sect. 63. As to the firſt point, *viz.* Where a prior ſuit depending may be pleaded to ſuch an information or action: It ſeems agreed, (*d*) That wherever any ſuit on a penal ſtatute may be ſaid to be actually depending (*e*), it may be pleaded in abatement of a ſubſequent proſecution, being expreſsly averred to be for the ſame offence. (*f*) Neither will it be any exception to ſuch a plea, That the offence in the ſubſequent proſecution is laid on a day different from that in the former. (*g*) Neither doth a miſtake in ſuch a plea of the very day whereon the ſuit pleaded as prior was commenced, ſeem to be material on the iſſue of *nul tiel record*, if it appear in truth to have been commenced before the other, and for the ſame matter. And if two informations be exhibited on the very ſame day, it ſeems (*h*) that they may mutually abate one another, becauſe there is no priority to attach the right of the ſuit in one informer more than in the other. Alſo it ſeems, That an (*i*) information or bill (*k*) the ſame day that they are filed, may be ſo far ſaid to be depending, before any proceſs ſued upon them, that they may be pleaded in abatement of any other ſuit on the ſame ſtatute. And from the ſame reaſon it ſeems alſo, That a writ of debt may be ſo pleaded after it is returned; becauſe then it ſeems to be agreed, That it may properly be ſaid to be depending; and whether it may not alſo be ſo pleaded before it be returned, ſeems queſtionable; becauſe, according to ſome (*l*) opinions, a writ may be ſaid to be depending as ſoon as purchaſed (20).

(*d*) C. Eliz. 261. 1 Roll. 49. 134.
(*e*) Doug. 240.
(*f*) C. Eliz. 61. 1 Roll. 49, 50.
(*g*) Hobart 209.
(*h*) Hobart 138.
(*i*) C. Eliz 261.
(*k*) 10 Ed. 4. 13. Str. 237. 701. Bull. N. P. 197.
(*l*) C. Eliz. 677. C. Jac. 11. 5 Coke 48. 1 Roll. 376. Con. Salk. 89. Farreſley 5. 2 Edw. 4. 11. 7 Coke 30. 1 Bac. Abr. 41.
(20) The day of ſuing forth the writ is the commencement of the ſuit. 3 Burrow 1423.

Sect. 64. As to the ſecond point, *viz.* Where a pardon, or releaſe, or a recovery in a former ſuit, may be pleaded to ſuch an information or action? It ſeems agreed, That notwithſtanding the king have ſuch an intereſt in every penal ſtatute, that he may (*a*) proceed in a ſuit brought upon it by a common informer, after the death, releaſe, or nonſuit of ſuch informer, hanging the proſecution; and may alſo totally prevent any ſuch ſuit, by firſt (*b*) ſuing for the whole penalty himſelf; or may totally bar it by a pardon or releaſe (*c*) precedent to its commencement; yet if it be actually commenced before any ſuit by the king, the informer hath ſuch an intereſt in the part of the penalty aſſigned him by the ſtatute, that the king can no (*d*) way diſcharge, or ſuſpend the ſuit, as to (*e*) ſuch part. Alſo it ſeems that the king can in (*f*) no caſe bar the ſuit of a party grieved, nor proceed in it after the death of the plaintiff, &c.—Alſo it ſeems agreed, (*g*) That a conviction or acquittal *bona fide* in any action or information on a penal ſtatute, whether by the party grieved, or a common informer, or a releaſe *bona fide*, from the party grieved, or common informer, (*b*) after ſuch a conviction, hath always been a good bar of any ſubſequent proſecution for the ſame offence.

(*a*) 11 Co. 65, 66. 5 Coke 48. Noy 100. 3 Inſt. 194. 2 Bulſt. 261, 262. C. Eliz. 583. Moor 541. Con. C. Eliz. 138. 37 H. 6. 5. 20. B. Attaint 130. Vide 2 Roll. 33. Hutton 82. (*b*) Crom. Juriſ. 38. 3 Inſt. 194. 11 Coke 65, 66. (*c*) F. Dec. tant. 5 Charter 21. B. Act. Pop. 3, 4. 1 H. 7. 3. 37 H. 6. 4. 3 Inſt. 194. 5 Edw. 4. 2, 3. (*d*) C. Eliz. 138. 1 Leonard 119. 1 H. 7. 3. (*f*) Noy 100. 482. 1 H. 7. 3. 2, 3.

37 H. 6. 4. Hutton 82. B. Act. Popham 3, 4. 3 Inſt. 194. (*e*) Savil 23. Moor 58. (*g*) F. Dec. tant. 4, 5. B. Act. Popham 4. 7. C. Jac. 480, 481, 11 Coke 65, 66. 9 Edw. 4. 4. (*b*) 2 Roll. 33. B. Act. Popham 7. 5 Edw. 4.

No recovery on an information ſhall be had by colluſion.

But for the better ſettling of theſe matters, the ſtatute of 4 Hen. 7. c. 20. was made, by which is recited, "That it had been uſual for offenders againſt penal ſtatutes, to cauſe popular actions to be commenced againſt them by covin of the plaintiffs, or elſe when ſuch actions had been commenced againſt them, to delay the ſame either by non-appearance, or by traverſe; and hanging the ſame, to cauſe the like action popular to be brought againſt them by covin for the ſame cauſe and offence, and therein by covin of the plaintiff to be condemned, either by confeſſion, feigned trial, or releaſe, which condemnation or releaſe, ſo had by colluſion and covin, did uſe to bar the plaintiff in the action ſued in good faith;" and thereupon it is enacted, "That if any perſon ſue with good "faith any action popular, and the defendant plead any man-"ner of recovery of action popular in bar of the ſaid action; "or elſe, that he before that time barred the plaintiff in any "ſuch action popular, that then ſuch plaintiff, with good "faith, may aver, That ſuch recovery or bar were by covin; "and if ſuch colluſion or covin ſo averred, be lawfully found, "ſuch plaintiff ſhall recover, &c. and the defendant con-"demned of covin or colluſion, as aforeſaid, ſhall have two "years impriſonment, &c. and that no releaſe of any com-"mon perſon to any ſuch party, whether before or after "any action popular, or indictment of the ſame, had, or

" commenced, or made, hanging the ſaid action, ſhall be any " wiſe available or effectual to let or ſurceaſe the ſaid action, " indictment, proceſs, or execution." Provided always, " That " no plaintiff or plaintiffs be received to aver any covin in " any action popular, where the point of the ſame action, or " elſe the covin or colluſion, have been once tried, or lawful- " ly found with the plaintiff or plaintiffs, or againſt them, by " trial of twelve men, and not otherwiſe."

Sect. 65. It is (*a*) ſaid, That if a recovery in a former ſuit be pleaded in bar of any popular action, the plaintiff may, by reaſon of the expreſs words of the ſtatute, aver, That ſuch recovery was by covin, without ſhewing wherein the covin conſiſted. (21) But otherwiſe ſuch a general pleading would be vicious. (*a*) Plowd. 49. 50.

(21) But the plea muſt ſtate that the plaintiff, in the other action, had priority of ſuit, or, on demurrer, it will be bad. Jackſon v. Giſling, Trin. 15 Geo. 2. Strange 1169. 2 Levinz 141. Burrow 1133. Black. 437.—The record of the former recovery cannot be given in evidence upon *nil debet*; it muſt be ſpecially pleaded; and then the plaintiff may reply *nul tiel record*, or that it was a recovery by fraud to defeat a real proſecutor; which the plaintiff could not be prepared to ſhew upon the general iſſue. Breden *qui tam* v. Harman. Strange 701.

Sect. 66. As to the third point, *viz.* What is a good general iſſue, and where it may be pleaded? I ſhall obſerve the following particulars.

Firſt, That if the defendant plead *nil debet* to an action or information *qui tam*, it is ſafeſt to ſay that he owes (*b*) nothing to the informer, nor to the king; becauſe if he only plead, that he owes nothing to the informer, it may be objected, (*c*) That the whole declaration is not anſwered, which makes a demand for the king as well as the informer: Yet perhaps it may be a good anſwer (*d*) to ſuch objection, That in the plea, that he owes nothing to the informer, it is neceſſarily implied that he owes nothing to the king, and therefore needs not be expreſſed. Vide law of niſi prius 225. (*b*) Vide Coke Ent. 165. 167. (*c*) Hob. 327, 328. 1 Vent. 122. (*d*) 3 Lev. 375. C. Car. 10, 11.

Sect. 67. Secondly, That if there be more than one defendant, they ought (*e*) not to plead jointly that they are not guilty, but ſeverally, That neither they, nor any of them, are guilty, &c. (*e*) 21 H. 6. 20. F. Deci. tant. 6. 2 R. Abr. 707. Bull. N. P. 197.

Sect. 68. That wherever the breach of the ſtatute, whereon ſuch ſuit is grounded, is alleged only from a matter *in pais*, and not from matter of record, the defendant (*f*) may plead, that he owes nothing, or that he is not guilty, &c. but if it be alleged from a matter of record, ſuch a plea is not good; becauſe a record is not triable by the country, but only by itſelf. (*f*) 21 H. 7. 14. Bro. Iſſues joins, 23. Vide 21 Jac. 14. par. 4.

Sect. 69. Fourthly, That if the defendant be within the benefit of any proviſo of a penal ſtatute, he might, according to ſome, always give it in (*g*) evidence on the general iſſue, in a ſuit on ſuch ſtatute: But if he have matter in his diſcharge depending on a ſubſequent ſtatute, it hath been holden (*h*) even (*g*) 2 R. Abr. 683. Con. pl. 11. (*h*) 2 R. Abr. 683.

even ſince the ſtatute of 21 Jac. 1. c. 4. That he muſt plead it ſpecially, and cannot give it in evidence. But this ſeems contrary to the expreſs purview of the ſaid ſtatute; by which it is enacted, "That if any ſuit ſhall be brought againſt any "perſon for any offence againſt any penal law, either by, or on "the behalf of the king, or by any other, or on the behalf of "the king and any other, it ſhall be lawful for ſuch defend- "ant, to plead the general iſſue that he is not guilty, or that
1 Bac. Abr. 42. "he owes nothing, and to give ſuch ſpecial matter in evi- "dence to the jury that ſhall try the ſame, which matter "being pleaded, had been ſufficient in law to have diſcharged "the ſaid defendant againſt the ſaid ſuit, and the ſaid matter "ſhall be then as available, to all intents and purpoſes, as if "it had been ſufficiently pleaded in bar."

Sect. 70. Alſo it is enacted by the ſame ſtatute, par. 2. "That if the defendant to any ſuit, commenced by, or on "the behalf of the king, or any other, for any offence againſt "any penal ſtatute, plead, that he oweth nothing, or, that "he is not guilty, and the plaintiff or informer, upon evi- "dence to the jury, ſhall not prove the offence laid in the "ſaid ſuit, and that the ſame offence was committed in the "ſame county in which it is laid, the defendant ſhall be found "not guilty."

Sect. 71. It is provided by the laſt paragraph of the ſaid ſtatute, "That no clauſe thereof ſhall extend to any ſuit on "any law againſt popiſh recuſants, &c. or againſt champerty, "&c. or concerning defrauding the king of his cuſtom, &c. or
Vide ſup. ſ. 50. "the tranſporting of gold, or ſilver, or munition, &c. or "wool, or leather, but that ſuch offence may be laid in any "county, at the pleaſure of the informer." But *quære*, if the laſt words of this proviſo, *viz.* "but that ſuch offence "may be laid in any county," do not reſtrain the exception intended by it to that part of the ſtatute only which relates to the laying the offence in the proper county? For if ſo, the defendant in a ſuit on the laws mentioned in it, may give the ſpecial matter in evidence on the general iſſue, as well as in a ſuit on any other penal ſtatute.

Sect. 72. As to the twelfth particular, *viz.* By whom the replication is to be made in ſuch an information or action: It ſeems agreed, (*a*) That regularly a replication to a ſpecial plea to an information in the courts of Weſtminſter-hall, ſhall be made by the attorney-general only, who, in reſpect of the king's intereſt in the ſuit, is preſumed to be moſt proper to be conſulted concerning it; and by the ſame reaſon it (*b*) ſeems, That ſuch replication in a ſuit before juſtices of aſſize, ſhall be made by the clerk of the aſſizes only. Alſo it is ſaid, (*c*) That the replication to a general iſſue in an information *qui tam* in the courts of king's bench or exchequer, may be made in

(*a*) 6 Coke 20. Vide C. Jac. 538. C. Eliz. 138. 2 Roll. 33. B. Attaint 127. Co. Ent. 365, 366, 367, 368. 395. Kaſtal 410.
(*b*) Vide C. Jac. 502.
(*c*) 2 And. 49.

in the name of the attorney general only, by the uſage of thoſe courts. But in moſt of the (*a*) precedents I can find of actions *qui tam*, the replication is made by the plaintiff only. Alſo I find a demurrer by the informer only to a plea in bar to an (*b*) information *qui tam*, without any mention of the attorney general. And if the attorney general, &c. ſhall abſolutely refuſe to make a replication to any plea to an information, ſurely the informer may be (*c*) admitted to make it himſelf; for otherwiſe it would be in the power of the attorney general, &c. by refuſing to make a replication, wholly to defeat the ſuit (22).

(*a*) Co. Ent. 159. 163. 165, 166, 167.

(*b*) Co. Ent. 371.

(*c*) Sup. f. 64. 5 Coke 48.

(22) If the plaintiff reply in the exchequer the defendant ſhall rejoin in four days, or judgment *nil dicit* ſhall be entered—and if the plaintiff demur, the defendant ſhall join in ſix days, or judgment ſhall be entered as aforeſaid. 3 Com. Dig. 514.

Sect. 73. As to the thirteenth particular, *viz.* In what manner the iſſue is to be joined in ſuch an information or action, and where it ſhall be tried: It had been laid down (*d*) as a ſettled rule, That where the king is to have no part of the thing demanded in an action on a penal ſtatute, but only a fine or amercement, there is no neceſſity either in the joining of the iſſue or *venire facias*, to uſe the words *qui tam pro domino rege, &c.* but that it is ſufficient ſimply to name the party as in actions at common law; for the king ſeems to have little more intereſt in ſuch ſuits than in actions at law. Yet wherever the plaintiff may declare *tam pro domino rege quam pro ſeipſo*, it ſeems, (*e*) That it can be no fault to uſe thoſe words as well in the joining of the iſſue, &c. as in the beginning of the ſuit. And if the king be to have part of the penalty demanded, it hath been (*f*) adjudged to be a fatal fault, and not amendable after verdict, not to mention that the plaintiff ſues *tam pro domino rege quam pro ſeipſo*, in the joining of the iſſue. But *quære*; for there are many (*g*) precedents where the iſſues in ſuch actions have not mentioned the plaintiff, as ſuing for the king; but have ſimply named him by his proper name, as in other actions. And where he is expreſsly named in the declaration, as ſuing for the king as well as for himſelf, Why ſhould it be intended that he ſues otherwiſe in the progreſs of the action (23)?

(*d*) C. Car. 336, 337. Co. Ent. 160, 161. 164, 348. 350. Reſpecting the imparlance and pleading in an information, vide 3 Com. Dig. 514.

(*e*) Raſtal 406, 407. Co. Ent. 349.

(*f*) 1 Vent. 122. 2 Keble 788. Sup. f. 17. 20.

(*g*) Co. Ent. 159. 163. 165, 166, 167. Sup. f. 17. 20.

(23) Vide the uſual form of pleading in this caſe, 1 Bac. Abr. 41. *in notis.*

Sect. 74. As to the place where ſuch iſſues ſhall be tried, it is enacted by 18 Eliz. c. 5. "That no jury ſhall be compelled "to appear in any of the queen's courts at Weſtminſter, for "the trial of any iſſue in any ſuit (by a common (*h*) informer) "upon any penal law, for any offence committed above thirty "miles from the city of Weſtminſter; except in caſe where "the attorney-general for the time being, for ſome reaſonable "cauſe in that behalf to be ſhewed, ſhall require the ſame to "be tried at the bar, in any of the courts of the queen's

Notice of trial in London and Middleſex ſhall be given ſix days before the trial; and at the aſſizes within ſix days after the term. 3 Com. Dig. 514, 515.

(*h*) See the three laſt ſections of the ſtatute, and the 22d, 47th and 49th ſections of this chapter.

"majeſty,

" majeſty, her heirs or ſucceſſors, at Weſtminſter aforeſaid:
" Which requeſt ſhall be noted on the backſide of the writ of
" *diſtringas* thereupon awarded, to the end the ſheriff, or his
" bailiff, may, and ſhall ſignify the ſame to the jury that are
" in ſuch caſe impanelled."

Strange 1085. Andrews 67.

† And by 24 Geo. 2. c. 18. ſ. 3. " Every *venire facias*
" for the trial of any iſſue, in any action or information upon
" any penal ſtatute in any of the courts of record at Weſt-
" minſter, counties palatine of Lancaſter, Cheſter, and Dur-
" ham, and the principality of Wales, ſhall be awarded of
" the body of the proper county where ſuch iſſue is triable."

Vide Rex v. Hale. Cowper 728.

Sect. 75. As to the fourteenth particular, *viz.* Where a verdict may be found as to part againſt the informer, and as to part for him: It ſeems, (*a*) That regularly, if an offence againſt a ſtatute be of ſuch a nature that it may be committed by a ſingle perſon, without the concurrence of any other, and ſeveral perſons be jointly charged in one information for one act done by them all againſt ſuch ſtatute, one of them only may be found guilty, and the reſt acquitted; becauſe, though the words of the information ſeem to import a joint charge againſt all the defendants, yet in judgment of law each of them is charged ſeverally for his own offence, which cannot but be ſeveral, whether the act, in the doing whereof it conſiſted, were done by one or more; and accordingly the iſſue muſt be, that (*b*) neither they, nor any of them, are guilty. And for the like reaſons, if one be informed againſt for having offended againſt a ſtatute for more times, or in a higher degree than can be proved; as for not coming to church during the ſpace of ten months, where he can be proved to have been abſent but eight months, &c. or for (*c*) ingroſſing 1000 quarters of wheat, where the evidence amounts but to 700, he may be found guilty ſo far as the evidence goes, and not guilty for the reſidue; for ſuch offences are not in the nature of intire contracts, which regularly muſt be fully proved in the ſame manner as they are alledged, but are in the nature of treſpaſſes, which it is ſufficient to prove for any part. But if the offence againſt a ſtatute conſiſt in making a contract contrary to the purview of it; as in the caſe of uſury, it is (*d*) ſaid, That if it be alledged as having been made by two, it muſt be ſo proved likewiſe, becauſe it is a rule of law, That if contracts be not proved as they are laid, they ſhall not be taken to be the ſame (24).

(*a*) 2 R. Abr. 707, 708. Lane 19, 59, 60.

(*b*) Sup. ſ. 67.

(*c*) 2 R. Abr. 707. Lane 59, 60.

(*d*) Lane 19. 59, 60.

(24) Where an offence, made penal by ſtatute, is, in its nature *ſingle*; one ſingle penalty only can be recovered, though ſeveral join in committing it. But if the offence be in its nature ſeveral, each offender is ſeparately liable to the penalty. Rex v. Clark. Cowper 610.

Sect. 76. As to the fifteenth particular. *viz.* What judgement on ſuch an information or action is good? It hath been adjudged,

adjudged, That where a ſtatute (as that of recuſancy, for inſtance) ordains that the offender ſhall forfeit ſuch a ſum, and that the ſum ſo forfeited ſhall be divided into three parts, whereof one-third ſhall go to the king, and one to the informer, and the other to the poor, &c. and that if the offender do not pay, &c. within ſuch a time, that he ſhall be committed, &c. the judgment on an information *qui tam* on ſuch ſtatute may be general, that the (*a*) king and informer ſhall recover the whole (*b*) ſum, without making any mention how it ſhall be diſtributed, or that the party ſhall be committed (*c*) for non-payment, &c. But on ſuch an information, if the judgment for the recovery of the forfeiture be given wholly for the informer, without any mention of the king, it hath been holden, (*d*) That it is totally erroneous. Yet it hath been adjudged, That if on an information *qui tam*, wherein, as it is laid, the informer hath no right to any part, but the king ought to have the whole, judgment be given that the defendant ſhall forfeit the ſum mentioned by the ſtatute, and that the king ſhall have one moiety, and the informer the other, ſuch judgment is erroneous (*e*) only as to the latter part, wherein it awards to whom the penalty ſhall go; but ſhall ſtand for the clauſe concerning the forfeiture, which ſufficiently entitles the king to the whole. And it hath been adjudged, (*f*) That if there be no clauſe at all concerning the forfeiture in a conviction on a penal ſtatute, but only a judgment *quod convictus eſt*, it is ſufficient, for the forfeiture is implied (25).

Lut. 159. 162. 5 Modern 431 Cro. Car. 504. Co. Ent. 362. Salkeld 383.

(*a*) 1 And. 139, 140. Vide Style 329. 330.

(*b*) 2 R. Abr. 102. Vide 2 Keble 820.

(*c*) 1 And. 139, 140.

(*d*) Style 329, 330.

(*e*) 2 And. 128, 129, 130.

(*f*) Rex v. Hawkins, M. 3 Geo. 1.

(25) Wherever the act expreſſes the amount of the penalty, or leaves it to the diſcretion of the magiſtrate, there muſt be a judgment of forfeiture as well as a conviction. Rex v. Hawks. Strange 858. Barnard K. B. 212. Fitzg. 124. and Rex v. Vipont. 2 Burrow 1163.—But where the act as the 9 Ann. c. 14. ſays, "That the offender ſhall forfeit five times the value, &c." all the judgment the court can give is *quod convictus eſt*, and a new action muſt be brought upon that judgment for the forfeiture. And in the caſe of recuſancy, there is no other judgment. Rex v. Lockup. Strange 1048. Vide alſo Strange 50.—N. B. One who is convicted on a penal ſtatute cannot be apprehended on a Sunday for non-payment of the forfeiture. Rex v. Myers, Eaſter 26 Geo. 3. Durnford and Eaſt 265.

Sect. 77. As to the ſixteenth particular, *viz.* Whether the penalty of a penal ſtatute, may be compounded or granted over? It is enacted by 18 Eliz. c. 5. "That no informer, or "plaintiff, ſhall or may compound or agree with any perſon "or perſons, that ſhall offend, or that ſhall be ſurmiſed to "offend againſt any penal ſtatute, for an offence committed or "pretended to be committed; but after anſwer made in court "unto the information or ſuit in that behalf exhibited or pro-"ſecuted: Nor after anſwer, but by the order or conſent of "the court in which the ſame information or ſuit ſhall be "depending; on pain that whoſoever ſhall offend, in making "of compoſition, or other miſdemeanour, contrary to the "true intent and meaning of this ſtatute, or ſhall by colour "or pretence of proceſs, or without proceſs, upon colour or "pretence

4 Comm. 135. Strange 167. 1 Wilſ. 79. 130. 4 Burrow 1929. An indictment on a popular ſtatute cannot be compounded after conviction. Berry *qui tam* v. Levy. Black. 443.

"pretence of any matter of offence againſt any penal law, "make any compoſition, or take any money, reward, or "promiſe of reward, for himſelf or to the uſe of any other, "without order or conſent of ſome of her majeſty's courts "at Weſtminſter, and ſhall be thereof convict, ſhall ſtand on "the pillory, &c. and for ever be diſabled to purſue, or "be plaintiff or informer in any ſuit or information upon "any ſtatute popular or penal; and ſhall alſo forfeit ten "pounds, &c."

(a) Law of *niſi prius* 196. See the three laſt ſections of the ſtatute, and

Sect. 78. It ſeems (*a*) clear, both from the preamble and the whole tenor of the ſtatute, that it extends only to ſuits by common informers, and not to thoſe by a party grieved.

the 22d, 47th, and 49th ſections of this chapter. It is decided that this ſtatute extends to *qui tam* informers as well as to thoſe who ſue for the whole penalty. Wilkinſon *qui tam* v. Allot, Cowp. 366.

(b) Hutton 35.

(c) 1 Keb. 106. 2 Siderfin 311.

Sect. 79. But it hath been (*b*) holden, That it extends as well to ſubſequent penal ſtatutes, as to thoſe which were in being when it was made. (*c*) And alſo it extends to the compounding of ſuits commenced in courts which have no juriſdiction, as much as if they had a juriſdiction.

(d) 7 Co. 36, 37. Moor 763. Hobart 183. 3 Inſt. 186, 187. 2 R. Abr. 187. ſeems contrary.

Sect. 80. It is enacted and declared by 21 Jac. 1. c. 3. (which as to theſe matters, appears, both by the preamble, and body of the ſtatute, and many former (*d*) reſolutions, to be made in affirmance of the common law), "That all commiſ- "ſions, grants, licences, charters, and letters patents, made or "to be made to any perſon or perſons, bodies politick or "corporate whatſoever, of power, liberty, or faculty, to "diſpenſe with any others, or to give licence, or toleration, "to do, uſe, or exerciſe any thing againſt the tenor or pur- "port of any law or ſtatute, or to give or make any warrant "for any ſuch diſpenſation, licence, or toleration to be had "or made, or to agree, or compound with any others for any "penalty or forfeitures limited by any ſtatute, or of any grant "or promiſe of the benefit, profit, or commodity of any for- "feiture, penalty, or ſum of money, that is or ſhall be due "by any ſtatute, before judgment thereupon had; and all "proclamations, &c. any way tending to the furthering of "the ſame, are altogether contrary to the laws of this realm, "and ſhall be utterly void, &c."—And it is farther enacted, "That all ſuch commiſſions, &c. ſhall be examined, heard, "tried and determined by and according to the common laws "of this realm, and not otherwiſe."

Sect. 81. But it is provided, "That this act ſhall not "extend to any warrant or privy ſeal, made or directed by the "king to the juſtices of either bench, or the exchequer, or "of aſſize, or of oyer and terminer and gaol-delivery, or "peace, or other juſtices for the time being, having power to "hear and determine offences done againſt any penal ſtatute,

"to

" to compound for the forfeitures of any penal ſtatutes, de-
" pending in ſuit and queſtion before them, or any of them
" reſpectively, after plea pleaded by the defendant."

Sect. 82. It is ſaid by Sir (*a*) Edward Coke, That ſuch juſtices, by ſuch warrant, &c. can make ſuch compoſition for the uſe of the king only; however it ſeems, That by the eighteenth of Elizabeth, they may give leave to an informer to (*b*) compound with a defendant after plea pleaded.

(*a*) 3 Inſt. 178.

(*b*) Vide ſupra ſ. 64, 65, 66. Black. 444.

Sect. 83. Alſo it is provided, " That the ſaid act ſhall not
" extend to any grants, letters patents, or commiſſion hereto-
" fore granted, of, for, or concerning the licenſing of the
" keeping of any tavern or taverns, or ſelling, uttering, or re-
" tailing of wines to be drunk, or ſpent in the manſion-houſe
" or houſes, or other place, in the tenure or occupation of the
" party or parties, or ſelling or uttering the ſame; or for or
" concerning the making of any compoſitions for ſuch licences,
" ſo as the benefit of ſuch compoſitions be reſerved and ap-
" plied to and for the uſe of his majeſty, his heirs or ſuc-
" ceſſors, and not to the private uſe of any other perſon or
" perſons."

CHAPTER THE TWENTY-SEVENTH.

OF PROCESS.

AND now I am come to ſuch proceſs as is to be awarded upon an Appeal, Indictment, or Information.—For the better underſtanding the nature whereof (having premiſed that it ſeems plain, from the nature of the thing, that there can be (*c*) no need of it where the defendant is preſent in court, but only where he is abſent), I ſhall conſider it,—In general; without any particular regard to proceſs of outlawry; and, In particular; with regard to ſuch proceſs only.

(*c*) Lamb. B. 4. c. 8. Dalton 123. Cromp. 150.

And I ſhall examine the nature of ſuch proceſs in general, without any particular regard to proceſs of outlawry, under the following particulars; 1. Where it is well awarded into a county different from that wherein the court ſits from which it is awarded. 2. What kind of proceſs ſhall iſſue on an indictment, appeal, and information. 3. In what manner it is to be executed. 4. What is required by ſtatute, in relation to proceſs on informations. 5. What is the proper proceſs on a default. 6. What after a removal by *certiorari*. 7. Where it ſhall be ſaid to be diſcontinued, or miſcontinued, or put without day. 8. How far an error in proceſs is fatal.

Sect.

Sect. 1. As to the firſt particular, *viz.* Where ſuch proceſs is well awarded into a county different from that wherein the court ſits from which it is awarded. It ſeems (*a*) to be a good general rule, That no proceſs without writ can be well awarded on any indictment, or appeal, &c. from any court, out of the county wherein it ſits. But it ſeems agreed, (*b*) That ſuch proceſs by writ may, by the common law, be well awarded into any county of England, either by the court of king's bench or by juſtices of eyre, upon an indictment, &c. before them. Alſo it is clear, That juſtices of oyer and terminer have the ſame power, in relation to perſons indicted or appealed before them of felony by force of 5 Edw. 3. c. 11. whereby it is recited, "That in times paſt, ſome perſons appealed or indicted of divers felonies in one county, or outlawed in the ſame county, had been dwelling, or received in another county, whereby ſuch felonious perſons indicted and outlawed, had been encouraged in their miſchief, becauſe they might not be attached in another county;" and thereupon it is enacted, "That juſtices aſſigned to hear and determine ſuch felonies, "ſhall direct their writs, to all the counties of England, where "need ſhall be to take ſuch perſons indicted."

(*a*) 19 Aſſize 6. F. Barr. 279. B. Juriſ. 105. F. Aſſize 446.

(*b*) S. P. C. 146. Summary 196. 2 Hale 198, 199. Vide ſup. c. 24. ſ. 22.

Sect. 2. It is obſervable, That the miſchief complained of in the preamble of this ſtatute relates as well to perſons appealed, as to thoſe who are indicted; and therefore it ſeems reaſonable to conſtrue them alſo to be within the meaning of the purview, though they be not within the letter of it, which extends only to perſons indicted.

Sect. 3. It ſeems queſtionable, (*c*) Whether juſtices of peace, being aſſigned (*d*) by their commiſſion to hear and determine felonies, are as well within the meaning as letter of this ſtatute? For, as on the other ſide it may be urged, That this being a remedial law, ought to receive as favourable and large an interpretation as the words will admit; ſo on the other ſide it may be ſaid, That the preamble of the ſtatute making mention as well of perſons appealed, as of thoſe who are indicted, cannot be thought to have any manner of regard to juſtices of the peace, before whom no appeal lies; and nothing can be more reaſonable than to conſtrue one part of a ſtatute by another.

(*c*) Cromp. 149. Lamb. B. 4. c. 8.

(*d*) Vide ſup. c. 8. ſ. 33.

Sect. 4. But by 22 Hen. 8. c. 5. ſ. 5. "Juſtices of "peace of the ſhire, &c. wherein any decayed bridge ſhall be, "&c. ſhall make proceſs into every ſhire within this realm, "againſt any perſons who ought to amend ſuch bridge, being "preſented before them to be decayed, &c."—Alſo they have the like power by other ſtatutes in many other caſes, for which not being ſo proper for this treatiſe, I ſhall refer the Reader to the Authors which more particularly treat of the OFFICE OF A JUSTICE OF PEACE.

Dalton c. 193. 4 Burn 46. Crom. 151, 152. Lamb. B. 4. c. 8.

As

As to the ſecond particular, *viz.* What kind of proceſs ſhall iſſue on an Appeal, Indictment, and Information.

I ſhall endeavour to ſhew, 1. Where ſuch proceſs ought to have the clauſe of *non omittas*. 2. In whoſe name, and under what teſte it is to be made. 3. What is the proper proceſs on indictments for crimes of an inferior nature. 4. What is the proper proceſs on informations. 5. What is the proper proceſs on appeals, and on indictments of treaſon, felony, and mayhem.—6. How many days there ought to be between the *teſte* and return of ſuch proceſs.

Sect. 5. As to the firſt point, *viz.* Where ſuch proceſs ought to have the clauſe of *non omittas*. It is laid (*a*) down in ſome books as a general rule, That in every ſuit, to which the king is a party, the proceſs ought to have the clauſe *non omittas propter aliquam libertatem, &c.*

F. Prerog. 21. 1 Hale 577. 2 Hale 202.

(*a*) Cromp. 149. Lamb. B. 4. c. 8. Dalton c. 132. 41 Aſſize 17. B. Franc. 18. Proceſs 102. Vide inf. ſ. 17.

Sect. 6. But I do not find this rule obſerved as to all kinds of ſuits by the king, in the beſt precedents. For though the ſaid clauſe is mentioned in every award of proceſs on (*b*) indictments (except only (*c*) one) and even on (*d*) informations *qui tam*, in Coke's entries; yet it is omitted in all awards of proceſs I can find on informations of (*e*) intruſion on the king's lands, or of (*f*) trover and converſion of his goods; and yet theſe are at leaſt as much, if not more properly, the ſuits of the king, than the former.

(*b*) Coke's Ent. 352. to 363. (*c*) Ibid. 358. (*d*) Ibid. 365 to 368. (*e*) Ibid. 372. 376. 379. 381. 387. 1 Coke 16, 17. (*f*) Co. Ent. 390.

Sect. 7. As to the ſecond point, *viz.* In whoſe name, and under what *teſte* ſuch proceſs is to be made. It is expreſsly (*g*) enacted by 27 Hen. 8. c. 24. ſ. 3. "That all manner of proceſs "upon indictment of treaſon, felony, or treſpaſs, to be made in "every county palatine, and other liberty, ſhall be made only "in the name of the king; and that every ſuch perſon having "ſuch county palatine, or any other ſuch liberty, to make pro-"ceſs, &c. ſhall make the *teſte* in the name of the perſon that "hath ſuch county-palatine, &c."

(*g*) Vide 4 Inſt. 205.

Sect. 8. And as to proceſs on indictments in any other courts, there can be no (*h*) doubt but that it ought alſo to be in the name of the king. And if it iſſue from the court of king's bench, it (*i*) ſeems clear, That it ought to be under the *teſte* of the chief juſtice, or of the ſenior judge of the court, if there be no 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; and that ſuch a *teſte* will be ſufficient. It is holden indeed by (*k*) Lambard, That every proceſs on an indictment before juſtices of peace, ought to be under the *teſte* of ſome two juſtices: But there are precedents to the contrary in (*l*) Crompton; and even in (*m*) Lambard.

(*h*) Vide Lamb. B. 4. c. 8. Dalton c. 132. (*i*) Finch 436. C. Car. 393. 2 Hale 199. (*k*) Lamb. B. 4. c. 8. See Dalt. c. 132. (*l*) Cromp. 232. (*m*) See the printed precedents in the end of his Eirenarcha.

(a) B. Peace 6, 7. Vide 14 H. 7, 8. b. Crompton 151.

Neither do the *(a)* authorities cited by Lambard ſeem to come up fully to his point; for they ſeem to amount to no more than this, That one juſtice of the peace cannot award proceſs on an indictment, but that two of them at the leaſt muſt do it, and that ſitting the court in the ſeſſions: And indeed it ſeems plainly to appear, from the *(b)* commiſſion itſelf, That one juſtice has no authority either to take an indictment, or to proceed upon it: But I do not ſee the conſequence, That becauſe an indictment cannot be taken, or proceeded upon, by leſs than two, therefore the proceſs cannot be teſted by leſs than two.

(b) Vide ſup. c. 8. ſ. 24, 25. Dalton c. 132.

(c) Crompton 150. 151. Dalton c. 132. Lamb. B. 4. c. 8. F. Aſſize 17. 32 H. 6 10. (d) Co. Ent. 358. 362, 363. (e) Finch 356. (f) Vide ſup. c. 23. ſ. 156. Raſtal 263. (g) 1 Saund. 271.

Sect. 9. As to the third point, *viz.* What is the proper proceſs on indictment for crimes of an inferior nature: It ſeems clear, both from the *(c)* books which ſpeak of this matter, and the conſtant courſe of *(d)* precedents, That a *venire facias* (which is but in nature of a ſummons to cauſe the party to appear) is a proper proceſs to be firſt awarded on an *(e)* indictment for any crime (whether againſt the common law or ſtatute), under the degree of treaſon, felony, or *(f)* mayhem, except in ſuch caſes wherein other (*g*) proceſs is directed by ſome ſtatute. Alſo ſuch a *venire* ſeems to be the firſt proper proceſs on an (*h*) information in the crown-office, for a debt claimed by the king, as having been forfeited by a *felo de ſe.*

(i) Cromp. 150. Lamb. B. 4. c 8. Dalton c. 132. Dalt. Sh. c. 34. 78. (k) Reg. Jud. 1. Finch 352, 353. Dalt. Sh. c. 34. 78. Dalt. c. 132. Crom. 150, 151.

Sect. 10. If it appear by the *(i)* return to ſuch *venire*, that the party has lands in the county whereby he may be deſtrained, the (*k*) diſtreſs infinite ſhall be awarded from time to time, till he do appear, and by force hereof he ſhall *(l)* 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*, a *(m) capias*, *alias* and *pluries*, ſhall iſſue, &c.

(l) Vide 2 Dan. Abr. 296. f. 5. 2 Inſt. 453. 454. (m) Lamb. B. 4. c. 8. F. Treſpaſs 232. Dalt. c. 132. 11 H. 6. 4. Finch 352.

(n) F. Proceſs 188.

Sect. 11. It is ſaid in Fitzherbert's (*n*) abridgement, "That in *oyer and terminer*, if the party at the firſt day make default, a man may have a *venire facias*, or a *pone ver vadios*, &c. at his election;" the meaning whereof perhaps may be this, That if the defendant, being ſummoned on the *venire*, do not appear, the proſecutor may either take out a ſecond *venire*, or a (*o*) *pone per vadios*, &c. But I cannot (*p*) find any expreſs authority, or precedent, to juſtify the making either a *pone per vadios*, &c. or a *capias*, the firſt proceſs on any indictment under the degree of mayhem, or felony, &c. except only where ſuch proceſs is expreſsly given by ſome ſtatute.

(o) Vide Finch 352. (p) Vide ſup. ſ. 9, 10. F. Pro. 213. Treſpaſs 232. 29 Edw. 4. 18.

(q) Co. Ent. 372. 367. 379. 381. 1 Coke 16. (r) Co. Ent. 97.

Sect. 12. As to the fourth point, *viz.* What is the proper proceſs on informations: It ſeems, that a *capias* againſt a (*q*) commoner, and a (*r*) *diſtringas* againſt a peer, are the firſt proper proceſſes on an information for an intruſion on the king's lands,

lands, or for a (a) trover and converſion of his goods: And either an (b) attachment or (c) *ſubpœna*, at the election of the informer, were by the common law proper proceſſes on all informations *qui tam* on popular ſtatutes. And ſo was a (d) ſummons in all originals in debt on ſuch ſtatutes, in the ſame manner as in an action of debt at (e) common law; and an (f) attachment or *pone per vadios*, &c. in other actions on ſuch ſtatutes, in the ſame manner as in actions upon the caſe, and in actions of treſpaſs at (g) common law.

(a) Co. Ent. 390.
(b) Co. Ent. 365, 366, 367. 368.
(c) Co. Ent. 370, 371. 395. 1 Anderſon 48.
(d) Co Ent. 158. 164 166. Raſtal 599.
(e) Finch 352.
(f) Co. Ent. 43, 44. 46. 348, 349, 350, 351. Raſtal 406.
(g) Finch 355.

Sect. 13. And it is enacted by 21 Jac. 1. c. 4. by which all popular ſuits on penal ſtatutes are reſtrained to their proper counties, as is ſhewn at large in the precedent (h) chapter of informations, "That the like proceſs in every popular action, "bill, plaint, information, or ſuit to be commenced, ſued, or "proſecuted, by force of, or according to the purport of the ſaid "act, be had and awarded, to all intents and purpoſes, as in "an action of treſpaſs *vi et armis*, at the common law." And (i) conſequently the proceſs in all ſuch ſuits muſt now be by attachment or *pone per vadios*, &c. and after by diſtreſs infinite, where by the return the party appears to be ſufficient, (k) otherwiſe by *capias*.

(h) Vide c. 26. ſ. 32 to 39.
(i) See Finch 345. 352. 355.
(k) 1 R. Abr. 463. 780. 793. pl. 4. the ſame caſe. Palmer 449. 1 Keble 159. 2 R. Abr. 277.

Sect. 14. It is, as I take it, the uſual practice of the crown-office, on a criminal information, firſt, to award a *ſubpœna*; and after the return thereof, if no appearance be entered in four days, and an affidavit be made of the ſervice of the *ſubpœna*, to make out a *capias* of courſe, where the defendants are informed againſt in their private capacity, and a (l) *diſtringas*, where they are ſued as a corporation aggregate.

(l) Vide Salk. 374.

Sect. 15. As to the fifth point, *viz.* What is the proper proceſs on appeals, and on indictments of treaſon, felony and mayhem: It ſeems certain, That a *capias* is the firſt proceſs in all indictments of (m) treaſon or felony, and in (n) all appeals whether of mayhem or felony; from whence it ſeems reaſonable to conclude, That it ought alſo to be the firſt proceſs in an indictment of mayhem, as well as of felony or treaſon.

(m) 3 Mod. 265. 2 Hale 194.
(n) Co. Ent. 50. F. Exigent 28. Finch 346. 351. Raſtal 45 there is a precedent ſeemingly contrary.

Sect. 16. As to the ſixth point, *viz.* How many days there muſt be between the *teſte* and return of all ſuch proceſs: It ſeems agreed, That there ought to be at leaſt fifteen days between the *teſte* and return of every proceſs awarded from the king's bench into any (o) foreign county: But that this is not required in proceſs awarded into the ſame county wherein the court ſits.

(o) Co Lit. 134. Salkeld 374. 3 Salkeld 371. 1 Lev. 61. 9 Coke 118.

Sect. 17. As to the third particular, *viz.* In what manner ſuch proceſs is to be executed: It is laid down as a (p) general

(p) Dalt. c. 132. B. Franch. 18. 1 Hale 577. 2 Hale 202.

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, (*a*) whether it have the clauſe *non omittas*, &c. 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, (*b*) 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.

(*a*) 41 Aſſize 17. B. Proceſs 102. F. Prerog. 21.
(*b*) B. Prero. 109. Franch. 31.—By 29 Car. 2. c. 7. ſ. 6. all proceſs, &c. ſerved on the Lord's day, except in "*treaſon, felony, and breach of the peace*," is void.

Sect. 18. As to the fourth particular, *viz.* What is required by ſtatute in relation to proceſs on informations: It is enacted by 4 and 5 Will. and Mary, c. 18. "That no proceſs ſhall "iſſue on any information to be exhibited by the maſter of "the crown-office, till the proſecutor have given ſuch a (*c*) "recognizance, as by the ſaid act is directed." Alſo it is enacted by 18 Eliz. c. 5. "That (*d*) no proceſs ſhall iſſue on any "information on a penal ſtatute, till a ſpecial note be made of "the time when ſuch information was exhibited, &c."—But theſe matters having been already handled in the chapter of informations, in the places cited in the margin, I ſhall refer the reader thither, for the fuller conſideration of them.

(*c*) Sup. c. 26. ſ. 5, 6, 10.

(*d*) Sup. c. 26. ſ. 40, 41. 42, 44. 45, 46, 47.

Sect. 19. As to the fifth particular, *viz.* What is the proper proceſs upon a default: It ſeems, That if a defendant appear to an (*e*) indictment or (*f*) appeal of felony, and afterwards, before iſſue joined, make an eſcape, whether from his (*g*) bail, or from an actual (*h*) priſon, the common *capias*, *alias* and *pluries*, &c. ſhall be awarded againſt him, unleſs there had been an exigent before, in which caſe a new (*i*) exigent ſhall be immediately awarded. And if the defendant, againſt whom no exigent had been before awarded, make ſuch default after iſſue joined, and an inqueſt awarded to try it, it ſeems (*k*) that a *capias* &c. ſhall be awarded againſt him *ad audiendum juratam*, &c. and as I take it, the ſame day on which the *capias* is returnable, ſhall be given to the inqueſt (for it ſeems (*l*) agreed, That the inqueſt ſhall never be taken by default in the caſe of felony, as it may for an inferior crime.) But in ſuch caſe, if the exigent had before been awarded; it (*m*) ſeems, That a new exigent in the common form ſhall be awarded; and that thereby both the iſſue and inqueſt are without day. And it is ſaid in ſome (*n*) books, That ſuch exigent ſhall be *ad audiendum judicium:* But this ſeems queſtionable; ſince it ſeems to be (*o*) agreed, That the defendant may ſave himſelf from judgment by a render at any time before the return of the exigent.

(*e*) Sum. 211. 2 Hale 201, 202.
(*f*) 16 Aſſiz. 13. 26 Aſſize 51.
(*g*) 16 Aſſize 13. F. Exig. 10. Qu. Cromp. 150.
(*h*) 26 Aſſize 51.
(*i*) 19 H. 8. 1. B. Proceſs 1. ſeems contrary.
(*k*) S. P. C. 70. 2 Hale 224. B. Waiver de choſes 39. F. Exig. 10. Proceſs 113. 127.
(*l*) S. P. C. 70. F. Exig. 10. Corone 173. B. Waiver de choſes 39. 16 Aſſize 13. B. Appeal 54.
(*m*) 26 Aſſ. 51. S. P. C. 70. Summary 211. B. Waiver de choſes 39.
(*n*) F. Exigent 10. Corone 196. (*o*) 26 Aſſize 51. Crompton 150. F. Corone 196. B. Waiver de choſes 39. Corone 192. Summary 211.

Sect. 20. It is ſaid (*p*) by Sir Matthew Hale, That the defendant in ſuch caſe appearing on the exigent, ſhall plead *de novo*, becauſe

(*p*) Sum. 211. 2 Hale 225.

becauſe the iſſue and inqueſt are *ſine die* by the award of the exigent; but this ſeems to be made a *quære* by (*a*) Staundforde, and the (*b*) authorities whereon it ſeems to be chiefly founded, are very obſcure; and as it ſeems may well be underſtood in this (*c*) ſenſe, That the court may cauſe the ſame inqueſt to come to try the ſame iſſue, which (according to (*d*) Brook) though it be put without day by the exigent, is not waived by it, unleſs the defendant fail to render himſelf before the return of it.

(*a*) S. P. C. 70.
(*b*) F. Exig. 10. 16 Aſſize 13.
(*c*) F. Cor. 173.
(*d*) B. Waiver de choſes 39. B. Proceſs 148. B. Exigent 67.

Sect. 21. BEFORE I proceed to the ſixth particular, *viz.* What is the proper proceſs to be awarded after a removal by *certiorari*; it may not be improper to premiſe ſome things concerning the nature of a *certiorari* (*e*).

(*e*) 2 Hale 210. to 216. 1 Bac. Abr. 2 Com. Dig. 16.

Firſt, As to what courts it lies.—2. Where the court of king's bench uſes a diſcretionary power in granting, denying, and filing it.—3. What reſtraints are put upon it by ſtatute.—4. How the *fiat* for it is to be ſigned.—5. To whom it ought to be directed.—6. Where a record may be removed into the court of king's bench without it.—7. What is to be done by a defendant before the allowance of it.—8. How far it is a *ſuperſedeas* to the court below.—9. In what manner it is to be returned.—10. Where a record is removed by it.—11. What is to be done by the court above, where the record is not removed.

As to the firſt point, *viz.* To what courts a *certiorari* lies: I ſhall endeavour to ſhew, Firſt, Whether it lie to all inferior courts in general. Secondly, Whether to thoſe of the cinque-ports. Thirdly, Whether to thoſe of Wales. Fourthly, Whether to thoſe of London.

Sect. 22. As to the firſt point, *viz.* Whether regularly it lie to all inferior courts in general. It ſeems agreed at this day, That regularly the court of king's bench having a general (*f*) ſuperintendency over all other courts of criminal juriſdiction, whether they be of an ancient or (*g*) newly created juriſdiction, may award a *certiorari* as well as the court of chancery, to remove the proceedings before any ſuch courts, unleſs the ſtatute or (*b*) charter which erects them expreſsly give them an abſolute judicature, exempt from ſuch ſuperintendency; as the (*i*) ſtatutes concerning the commiſſioners of the Cambridgeſhire Fens, &c. are ſaid, by ſome, to have done.

Long's Caſe, C. Eliz. 48.
(*f*) Carthew 494. 501. S. P. C. 70. Ld Raymond 216. 469. Comyn 76. 12 Mod. 386. 643. 145. 7 Mod. 138. 3 Salkeld 79. 5 Modern 446. Cro. Eliz. 489. 2 Burrow 1040. 1 Black 233. Ld Raym. 836.
(*b*) C. Car. 295.

1 Salkeld 148. 2 Lev. 86. 2 Burrow 349. 1 Lev. 312. Con. 41 Aſſize 22. B. Corone 193. Certiorari 8. (*g*) 1 Salkeld 144. Ld Raymond 580. 148. 3 Modern 93, 94. (*i*) 1 Siderfin 296. Con. 1 Keble 43. 2 Keble 722.

Sect. 23. And accordingly it ſeems to be agreed, That ſuch a *certiorari* lies to (*k*) juſtices in eyre, and alſo to thoſe of (*l*) gaol-

(*k*) 1 Sid. 226. 2 Keble 81, 82. 12 Modern 145. Farreſly 118.

4 Inſt. 294, 295. (*l*) 1 Salkeld 144. 10 Modern 278.

(a) 3 Mod. 229, 230 836. Ld Raym. 836. Cowper 749. 2 Lev. 223. 1 Salkeld 146. 148. 1 R. Abr. 395. Aleyn 49. Farneſly 138. 12 Modern 197. 1 Hale 158. Douglas 723. 5 & 6 W. & M. c. 11. ſ. 5. (b) Comyn 768 Carthew 194. 421. 431.

delivery, or of a (a) county-palatine, and to the (b) college of phyſicians, having a ſpecial power by ſtatute to fine and impriſon for certain offences; and to juſtices of peace, &c. even in ſuch (c) caſes which they are impowered by ſtatute finally to hear and determine; and alſo to (d) commiſſioners of ſewers, notwithſtanding the clauſe in 13 Eliz. c. 9. ſ. 5. "That the "ſaid commiſſioners ſhall not be compelled to make any certi- "ficate or return of their commiſſions, or of their ordinances, "laws, or doings, &c." For it hath been adjudged, (e) That this is intended to exempt them from returning their orders into chancery, as by the ſtatute of 23 Hen. 8. c. 5. they were obliged to do, and ſhall not be conſtrued to take away the ſuperintendency of the court of king's bench, without expreſs words.

1 Salk. 44. 396. (c) 3 Modern 93, 94. (d) 1 Salkeld 145. Strange 609. Fort. 374. Ld Raymond 469. 8 Modern 331. 1 Keble 129. March 196, 197. 199. Raymond 186. (e) 1 Modern 44, 45. Ld Raymond 469. Douglas 534. 1 Ven. 67. 1 Levinz 288. Raymond 186. C. Jac. 336. Bunb. 61. Strange 1263. Burrow 1042. 1 Lev. 288. 1 Ven. 66, 67, 68.

It lies to remove a preſentment in a court-leet, and when removed, the preſentment is traverſable, Cowper 458. vide ante 76. It lies to remove examinations taken before juſtices of the peace in purſuance of the 2 & 3 Ph. & M. c. 10. Rex v. Bolton, Mich. 26 Geo. 3. It lies to a juriſdiction created by a private act of parliament. Ld Raymond. And to remove proceedings before commiſſioners of bankrupts. Ld Raymond 580. But without laying a ſpecial ground before the court, it cannot be ſued out to remove proceedings in an action from the courts of the counties palatine. Douglas 749. It lies to remove an information before juſtices of aſſize, againſt a parſon for non-reſidence, for they have no juriſdiction. Andrews 27. But not to judges of oyer and terminer to remove a recognizance of appearance. Lucas 278. It lies to remove an indictment for not doing ſtatute labour on the highway. Strange 849. ſed vide Strange 944. Or for not repairing a bridge. Strange 900. It lies to the quarter ſeſſions of a corporation. Ld Raymond 1452. So alſo to remove proceedings before two juſtices. Strange 470. Andrews 343. To remove orders of conviction on the conventicle act. 22 Car. 2. c. 1. 2 Burrow 1040. To remove an order on an appeal from ſcavengers rate, 3 Burrow 1458. But it will not lie to remove a poor's rate. Strange 932. 975. To remove an order of baſtardy if applied for in ſix months. 2 Wilſon 35. To remove an inquiſition taken by the ſheriff under a private act of parliament, and the verdict and judgment thereon. 4 Burrow 2244.

(f) C. Car. 252, 253. 264. 291. 1 R. Abr. 395. Style 14. 2 Hale 212. (g) 2 Lev. 86. 3 Siderfin 356. 3 Keble 154. (h) 1 R. Abr. 395. 2 Burrow 849.

Sect. 24. As to the ſecond point, *viz.* Whether a *certiorari* lie to the courts of the Cinque-ports. It hath been adjudged, That ſuch a *certiorari* lies to ſuch courts to remove an (f) indictment of ſodomy there found, or an (g) order made by the juſtices of peace at a ſeſſions there holden. It is ſaid indeed, by (h) Rolle, That the reaſon why ſuch an indictment may be removed is, becauſe the offence is made felony by a late ſtatute, and therefore the courts of the Cinque-ports cannot hold plea of it without a new charter; by which it ſeems to be implied, That in his opinion indictments in ſuch courts of crimes whereof they have juriſdiction, are not removeable. But the other books above cited, ſeem to ſpeak generally of all indictments, and to lay it down as a rule, That the privilege of the courts of the Cinque-ports, uſed time out of mind, that the king's writ doth not run there, is to be intended only of civil (i) cauſes between party and party.

(i) Vide C. Eliz. 910, 911. Palm. 54, 55, 56. 96. C. Jac. 531. 1 Siderfin 532. Bridges 475, 476.

Sect. 25. As to the third point, *viz.* Whether a *certiorari* lie to the courts of Wales: It ſeems to be ſettled, that ſuch a *certiorari*

certiorari lies to remove any indictment taken in Wales for a crime not capital (1), either at the (*a*) grand ſeſſions or at a (*b*) ſeſſions of the peace: But it is (*c*) ſaid, That it hath never been granted to remove an appeal from Wales; (*d*) neither doth it ſeem to be clearly ſettled, That it lies to remove an indictment of felony from thence, for ſuch indictments are never (*e*) quaſhed, as indictments for inferior crimes are. Neither do I find it agreed, (*f*) in what manner the king's bench ſhall proceed on any indictment removed from Wales. But it is ſaid, That an indictment of felony ſo removed, may be tried in the next (*g*) Engliſh county, by force of (*h*) 26 Hen. 8. But it ſeems (*i*) agreed, that the ſtatute extends not to appeals.

(1) Vide Rex v. Althoes. 8 Mod. 135. where an indictment for murder was removed. Strange 553. Wilſon 320. Atkyns 175. 182. 8 Modern 146.

(*a*) 1 R. Abr. 394. 2 Rol. 28, 29. C. Jac. 484. Popham 144. 2 Keble 471.

Cowper 751. [Note 2.] C. Car. 248. Ld Raymond 581. 1 Hale 157. Strange 704. Vide 4 Burrow 2457. It lies alſo to Berwick, and to other dominions of the Crown.

(*b*) 1 Salk. 146. 2 Burrow 835. 856. 861. 1 Strange 104.

(*c*) C. Car. 248. 2 Keble 797. 798.

(*d*) 1 Modern 64. 68. 2 Keble 685. 724. C. Car. 331, 332. 1 R. Abr. 394. 1 Ventris 93. 146. 1 Hale 158.

(*e*) Vide c. 25. f. 146.

(*f*) Vide 1 R. Abr. 394. 2 Keble 786. 724.

(*g*) 2 Keble 785. 799. 1 Ventris 146. 1 R. Abr. 394, 395.

(*h*) Sup. c. 25. f. 41, 42.

(*i*) C. Car. 248. 2 Keble 797. 1 Ventris 146. 2 Hale 157. See B. 1. c. 31. f. 41. B. R. H. 165. Ld Raymond 561. 580. 3 Bac. Abr. 351. 2 Burrow 835 to 858. Douglas 751.

Sect. 26. As to the fourth point, *viz.* Whether a *certiorari* lie to the courts of London: It ſeems to be admitted in the late (*k*) reports, That a *certiorari* may be granted to remove any indictment from London or Middleſex; but it is (*l*) ſaid, That he who prays it ought to give three days notice to the other ſide: Alſo it is ſaid, (*m*) That by a *certiorari* to London, the tenor of the indictment only ſhall be removed by the city-charters. And it ſeems, (*n*) That anciently that city inſiſted on a privilege, That all indictments and proceedings for any cauſe, except felony, ſhould be tried and determined there, and not elſewhere.

(*k*) Raym. 74. 1 Keble 352. 1 Burrow 386. Vide 1 Black 230. 3 Mod. 230, &c. Hardres 402. 419. 6 Modern 246. Vide 5 & 6 W. & M. c. 11.

(*l*) Raym. 74.

(*m*) 1 Keble 252. 1 Sid. 155. 230. Vide c. 25. f. 99.

(*n*) C. Car. 128. 265.

Sect. 27. As to the ſecond particular, *viz.* Where the court of king's bench uſes a diſcretionary power in granting, denying, and filing a *certiorari*; It hath been (*o*) 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 it 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).

10 Mod. 205. 278. 12 Mod. 390. 403. 601. 645. Ld Raymond 216. 469. 580. 608. 971. 1203. 1515. 2 Burrow 861.

(*o*) Paſ. 5 Geo. 1. Burrow 2456. Strange 609. 8 Modern 331. 1 Modern 41.

And 1 Ventris 63.

(2) This abſolute right to a *certiorari* relates only to caſes where the crown itſelf, proſecuting by the attorney-general, is ſpecially concerned; and where the matter is proſecuted by a private perſon, in the name of the crown, it iſſues unleſs ſufficient cauſe is ſhewn againſt it. But on an application for it by a defendant, there muſt be a ſpecial ground laid to induce the court to grant it. 4 Burrow 2458. Strange 583. 549. 1 Bar. K. B. 445. 2 Bar. K. B. 447. 177. Andrews 27. 2 Com. Dig. 18. And to remove an indictment from Hicks's Hall for bigamy, the conſent of the proſecutor muſt be had. Strange 877. Cowper 283. or from the Old Bailey for forgery. Strange 717.

(a) Salk. 144, 146. 1 Keble 4. Far. 118.

And agreeably hereto, it is laid (a) down as a general rule, That the court will never grant it for the removal of an indictment before juſtices of gaol-delivery, without ſome ſpecial cauſe; (b) as where there is juſt reaſon to apprehend that the court below may be unreaſonably prejudiced againſt the defendant; (c) or where there is ſo much difficulty in the caſe, that the judge below deſires that it may be determined in the king's bench, (d) or where he king himſelf gives a ſpecial direction that the cauſe ſhall be removed; or where the (e) proſecution appears to be for a matter not properly criminal.

(b) 1 Salk. 150. Strange 583. Ld Raym. 1452.

(c) 1 Salk. 149.

(d) 1 Ventris 63. 1 Modern 41. Ld Raym. 938.

(e) 1 Salk. 151.

(f) 1 Sid. 54.

Sect. 28. It ſeems, (f) 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 their proſecution (3).

(3) But the court granted it on the application of the defendant in perjury, from the Old Bailey, upon affidavit that he had twice paid coſts for not going on to trial, the judges being gone away. Strange 1049.—This, however, was upon the extraordinary circumſtances of the caſe. Caſes, Ld Hard. 354. They alſo granted it at the inſtance of the defendant on affidavit, that the proſecutor's attorney was under-ſheriff of Middleſex, and attended the grand jury on finding the bill. Strange 1068. Alſo on the defendant appearing to be a man of good repute, and the proſecution on ſlight grounds. Strange 549. Alſo if it be clearly proved, that the proſecution is malicious. 1 Bar. K. B. 7. 41. Alſo after conviction for compounding of ſelony, if the objections in arreſt of judgment are ſerious and weighty. 1 Bar. K. B. 415. Alſo of a nuſance at the aſſizes, where it is neceſſary the defendant ſhould have a view. 2 Bar. K. B. 214.

(g) 1 Salk. 145. It was done in the caſe of James Duke of York. But this is ſingular. Holt 132.

(h) 3 Jac. 1. c. 4. ſ. 9. Vide B. 1. c. 10. ſ. 23.

Sect. 29. Alſo it is ſaid, (g) That the court of king's bench will never grant a *certiorari* for a conviction of a recuſancy upon a default at ſeſſions; becauſe by the (h) ſtatute ſuch convictions are to be removed into the exchequer, and from thence proceſs is to be awarded upon them. But the court of king's bench cannot proceed upon them, and therefore will not ſuffer them to come thither, leſt the ſtatute ſhould be evaded.

(4) It is ſaid the party may waive the iſſue. Carthew 6.

(i) 16 Edw. 4. 5. B. Corone 162.

Sect. 30. It ſeems from the year-book of 16 Edw. 4. That it is 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 (4). For it appears by that (i) book, where a *certiorari* had been granted in ſuch a caſe, that the court being afterwards appriſed of the matter, remanded the cauſe.

(k) 1 Salk. 149. Ld Raymond 137. 991. 1372. 6 Modern 17. Carthew 6. Strange 612. 1227. Burrow 749. 8 Modern 319.

Sect. 31. It ſeems (k) agreed, That a *certiorari* ſhall never be granted to remove an indictment or appeal after a conviction, unleſs for ſome ſpecial cauſe, as where the judge below is doubtful what judgment is proper to be given; for unleſs there be ſome ſuch reaſon, the judge who tried the cauſe, ſhall not be prevented from giving judgment in it; for it cannot be intended but that he is beſt acquainted with the circumſtances of it, and conſequently beſt able to judge what fine, or other puniſhment is proper for it.

(l) 1 Sid. 296. 2 Keble 81, 82.

Sect. 32. But it hath been adjudged, (l) That a *certiorari* for the removal of a preſentment before juſtices in eyre, of a matter which is inquirable and puniſhable by the foreſt law only,

only, ſhall not be granted before, but only after conviction; for if it ſhould be granted before, the offence would be diſpuniſhable; but it may be granted after conviction, in order to give the party, the right of whoſe freehold is concerned in it, an opportunity ſo far to (*a*) traverſe it.

(*a*) Vide F. Aſſize 42. 4 Inſt. 294, 295, 1 Edw. 3. 48. B. Foreſt. 3. 1 Siderfin 296. 2 Keble 81, 82.

Sect. 33. The court has (*b*) refuſed to grant a *certiorari* to remove a recognizance of appearance before juſtices of oyer and terminer, &c. becauſe the court below is moſt proper to judge, upon the whole circumſtances of the caſe, which are equitably to be conſidered, whether it ought to be eſtreated or not.

(*b*) Rex v. Combs, Hill. 1 Geo. 1.

Sect. 34. There is a rule in the court of king's bench, That no order of commiſſioners of ſewers ought to be filed without notice given to the parties concerned. Alſo it is every (*c*) day's practice of that court, before it will ſuffer the return of a *certiorari* for the removal of the orders of ſuch commiſſioners to be filed, to hear affidavits concerning the facts whereon they are grounded; (†) and if the matter ſhall ſtill appear doubtful, to direct the trial of feigned iſſues, and either to file the return, or ſuperſede the *certiorari*, and grant a *procedendo*, as ſhall appear to be moſt reaſonable for the trial of ſuch iſſues, and to give (*d*) coſts againſt the proſecutor of the *certiorari*, if it appear to have been groundleſs.

(*c*) Vide 1 Salk. 145. 2 Keble 157. ſeems contrary.

(*d*) Vide 2 Keb. 500.

† But a *certiorari* to bring up an order for the removal of their clerk, is of common right, and not diſcretionary. Strange 609. 8 Modern 331. Fort. 374.

Sect. 35. As to the third particular, *viz.* What reſtraints have been put by ſtatute upon the granting a *certiorari*.—It is enacted by 1 and 2 Ph. and Mary 13. c. 7. "That no writs of "*habeas corpus*, or *certiorari*, ſhall be granted to remove any pri- "ſoner out of any gaol, or to remove any recognizance, except "the ſame writs be ſigned (*e*) with the proper hands of the chief "juſtice, or in his abſence, of one of the juſtices of the court "out of which the ſame writ ſhall be awarded or made; upon "pain that he that writeth any ſuch writs, not being ſigned as "is aforeſaid, to forfeit for every ſuch writ five pounds."

2 Ld Raymond 1379. 11 Modern 174. 12 Mod. 2. 3.

(*e*) Vide Salk. 150. 2 Strange 895.

Sect. 36. Alſo it is enacted by 5 and 6 Will. and Mary, c. 11. "That in term-time, no writ of *certiorari* whatſoever, "at the proſecution of any party indicted, be granted out of the "king's bench to remove any indictment or preſentment from "any general quarter ſeſſions, before trial, but upon motion of "counſel, and by rule of court made in open court."—But it is provided, "That in vacation ſuch writ may be granted by any juſtices of the ſaid court, whoſe names ſhall be indorſed thereon, and alſo the name of the perſon at whoſe inſtance it is granted."

Burrow 431.

† *Sect.* 37. It is enacted by 13 Geo. 3. c. 78. ſ. 24. "That "the juſtices ſhall make preſentment of any highway, cauſway, "or bridge, at their reſpective aſſizes or ſeſſions within the juriſ- "diction where the ſame do lie, and not elſewhere; and that "no ſuch preſentment, nor any indictment ſhall be removed by

The 22 Car. 2. c. 12. ſ. 4. and the 3 and 4 W. and M. c. 12. recited in the former edition of this work, are repealed by the 7 Geo. 3. c. 42. ſ. 15. Vide Strange 944.

"*certiorari*

" *certiorari* or otherwiſe, out of ſuch juriſdiction till ſuch in-
" dictment or preſentment be traverſed, and judgment there-
" upon given (5), except where the duty or obligation of re-
" pairing the ſaid highways, cauſways, or bridges may come in
" queſtion."—And by ſection 81. it is further enacted, "That
" no proceedings to be had or taken in purſuance of this act
" ſhall be quaſhed or vacated for want of form, or removed by
" *certiorari*, or any other writ or proceſs whatſoever (except
" as therein before excepted), into any of his Majeſty's courts
" at Weſtminſter."

(5) It lies on the part of the proſecution before traverſe and judgment. Cowper 78. Strange 1209. Vide 2 Barnard K. B. 203.

But it is enacted by 5 and 6 Will. and Mary, c. 11. "That
" if the right or title to repair ſuch cauſways, &c. may come in
" queſtion upon ſuggeſtion and affidavit of the truth thereof, a
" *certiorari* may be granted to remove ſuch indictment or preſent-
" ment into the king's bench, &c." upon the like recognizance as is required by the ſaid ſtatute as to other (*a*) *certiorari's* for the removal of indictments from ſeſſions, for which I ſhall refer the reader to the forty-ſixth and following ſections.—Alſo it hath been adjudged, That if the ſeſſions manifeſtly exceed their authority in making orders concerning highways, (*b*) ſuch orders may be removed by *certiorari*, into the king's bench, and quaſhed.

(*a*) See 13 & 14 Car. 2. c. 6. ſ. 16.

(*b*) See B. 1. c. 67. ſ. 10. Strange 944. Sayer 128.

Sect. 38. It is enacted by 7 and 8 Will. and Mary, c. 6. made for the recovery of ſmall tithes before juſtices of peace, "That no proceedings or judgment by virtue thereof ſhall be re-
" moved or ſuperſeded by any writ of *certiorari* out of any court
" whatſoever unleſs the title of the tithes, &c. ſhall come in
" queſtion." And in the conſtruction hereof, it hath been adjudged, (*c*) That if the party inſiſt on any matter of law before the juſtice of peace, which is any way doubtful, as on a cuſtom in a pariſh to be diſcharged of a certain kind of tithe, &c. the order may be removed within the intent of the ſtatute.

(*c*) Rex v. Furnace, Term Hill. 6 Geo.

Sect. 39. And it is enacted by 12 Car. 2. c. 23. ſ. 35. concerning the exciſe (6), "That no writ of *certiorari* ſhall ſuperſede
" execution or other proceedings, upon any order by juſtices of
" peace in purſuance of that ſtatute, but that execution, and
" other proceedings, ſhall and may be had thereupon, any ſuch
" writ, or allowance thereof notwithſtanding." And the like is generally enacted by other ſtatutes concerning the revenue; for which I ſhall refer the reader to the ſeveral ſtatutes.

1 Keble 818. (6) A *certiorari* will not lie to remove a conviction by commiſſioners of exciſe for double duties on beer, under 12 Car. 2. c. 24. ſ. 33. But it will lie *under* 11 *Geo.* 1. *c.* 30. ſ. 16. for harbouring tea and ſpirits, either by juſtices of peace or commiſſioners of exciſe; but not on any objection to the merits. Douglas 549. 555. and the caſes there cited. Bunbury 106.—And for the ſtatutes which allow or take away the *certiorari*, vide the index to Runnington's ſtatutes.

Sect. 40. As to the fourth point, *viz.* How the *fiat* for a *certiorari* is to be ſigned: It is ſaid, (*d*) That if a *certiorari* be taken out in vacation, and teſted of the precedent term, the *fiat* for it muſt be ſigned by ſome judge of the court, ſome time before the eſſoin-day of the ſubſequent term, otherwiſe it is irregular, and the court upon motion will order a *procedendo*. But it is ſaid, that there is no need for any judge to ſign the writ of

(*d*) 1 Salk. 150. Holt 133.

certiorari

certiorari itſelf, but only in ſuch caſes wherein it is required by ſtatute.

Sect. 41. As to the fifth point, *viz.* To whom the writ of *certiorari* is to be directed. It ſeems, That notwithſtanding (*a*) regularly it ought to be directed to the judge of the inferior court, yet in ſome caſes it may be directed to the proper (*b*) officer known to have the cuſtody of the record to be removed, and in ſome other caſes to (*c*) others as ſhall be moſt agreeable to the uſual courſe of approved precedents, which (*d*) ſeems to be the beſt guide whereby to judge of this matter. And accordingly it ſeems, That for an indictment or confeſſion of an approver before a coroner, it ſhall be directed to the coroner alone, (*e*) and for an appeal, both (*f*) to the ſheriff and coroner; and for an indictment in the Cinque-ports, to the (*g*) mayor and jurats; and for an indictment at an aſſize in a county palatine, to the chancellor of ſuch (*h*) county who ſhall ſend for it to the juſtices of aſſize.

(*a*) 3 Keble 13. 4 H. 6. 15, 16. S. P. C. 64. Hobart 135.
(*b*) Dalt. c. 134. Style 371. 2 Levinz 223. Raſtal 110.
(*c*) See the caſes cited to the other parts of this ſection.
(*d*) Dyer 163.
(*e*) Reg. 74 78. Raſtal 55. 263.
(*f*) Reg. Jud. 76. Sup. c. 9. ſ. 42.
(*g*) 2 Hale 211. C. Car. 252, 253. 264.
(*h*) 1 Lev. 223. 3 Keble 279.

Sect. 42. If the perſon who ought to certify a record, as a juſtice of peace (*i*) &c. who hath taken a recognizance, &c. or a (*k*) judge of *niſi prius*, who hath taken a verdict, or a (*l*) coroner, who hath taken an inqueſt, &c happen to die, having ſuch a record in his cuſtody, it ſeems, That a *certiorari* may be directed to his executor or adminiſtrator to certify it. (*m*) Alſo it hath been adjudged, That it may be directed to a juſtice of aſſize to certify a record of aſſize taken before his companion in his abſence.

(*i*) 2 Keble 750. 8 H. 4. 3. 5. C. Jac. 669.
(*k*) 21 H. 7. 1. Strange 470. Dyer 163. Raſtal 439. 2 Inſt. 424. 2 R. Abr. 629.
(*l*) B. Certio. 9. Indictment 23. 43 Aſſize 40. 11 H. 7. 5.
(*m*) B. Rec. 81.

Sect. 43. All the precedents, I am able to find, of *certiorari's* for the removal either of (*n*) indictments, or (*o*) recognizances from ſeſſions, are directed either to the juſtices of peace for the county generally, or to ſome of them in particular by name, and not to the *cuſtos rotulorum*; and according to (*p*) Lambard, they are never directed to him: Yet it is taken for granted in the (*q*) year-book of Hen. 7. That after a recognizance for the peace is brought into the *cuſtos rotulorum*, it ſhall be certified by him. But ſurely, if the *certiorari* be directed generally to the juſtices of the county or any one of them, it may be as well returned by any of them as by the *cuſtos rotulorum*. And I queſtion whether it can be well (*r*) returned by him, unleſs he do it as a juſtice of peace, naming himſelf ſuch? But if there are ſufficient precedents to warrant the directing the *certiorari* to him as *cuſtos rotulorum*, there can be no doubt but that a return by him as ſuch will be good.

(*n*) 1 Reg. Jud. 76, 77. Raſtal 263.
(*o*) Reg. Orig. 90. F. N. B. 81.
(*p*) Lamb. B. 4. c. 7.
(*q*) 2 H. 7. 1.
(*r*) Hob. 135.

Sect. 44. As to the ſixth point, *viz.* Where a record may be removed into the court of king's bench without any writ of *certiorari*

(a) Dalton c. 134. Lamb. B. 4. c. 7. 8 Edw. 4. 18. B. Record 17. 64. 8 H. 4. 4, 5. Crom. 132, 133. (b) Dyer 163. 2 Inſt. 424. See March 112, 113. (c) 1 Dyer 163. Raſtal 439. 8 H. 4. 4. (d) 8 Edw. 4. 18. Lamb. B. 4. c. 7. f. 517. Cromp. 133. (e) Dalt. c. 134. 8 H. 4. 4, 5. B. Gar. c' Attorney 9. B. Record 17. 64. Dyer 163. Raſt. 438.

certiorari: It ſeems agreed, That if (*a*) a juſtice of peace, or other judge of record, having taken recognizance, or inquiſition, or recorded a riot, or done any other executory matter, within his juriſdiction, have ſtill continued in the ſame commiſſion, &c. without any interruption, the court of king's bench ſhall receive ſuch record from his hands, without any writ of *certiorari*. Alſo it ſeems to be (*b*) agreed, That upon the death of both the juſtices of aſſize, the clerk of the aſſize may, without any *certiorari*, bring in the records of the verdicts of *niſi prius*: But that the (*c*) executors or adminiſtrators of a judge, can in no caſe bring in a record without a writ to authoriſe them to do it. Alſo it ſeems to be (*d*) agreed, That no record which is executed as by acquittal, &c. can be brought into a higher court without a writ. And it ſeems to be the ſtronger (*e*) opinion that neither a juſtice who is out of commiſſion at the time, or one who has been out of commiſſion, but is afterwards reſtored, can certify any record without a writ of *certiorari*.

Brook tit. *certiorari*, pl. 9.

Sect. 45. As to the ſeventh point, *viz.* What is to be done by a defendant before the allowance of a *certiorari*.—It is enacted by 21 Jac. 1. c. 8. ſ. 7, 8. "That all writs of *certiorari* for the "removal of any indictment of riot, forcible entry, or of aſſault "and battery, at any quarter-ſeſſions of the peace, or otherwiſe, "ſhall be delivered at ſome quarter-ſeſſions of the peace in open "court; and that the party indicted ſhall before the allowance "thereof, become bound to the proſecutor in 10*l.* with ſuf-"ficient ſureties as the juſtices of peace, at their quarter-ſeſſions, "ſhall think fit, with condition to pay unto ſuch proſecutor, "within one month after conviction, ſuch reaſonable coſts and "damages as the ſaid juſtices of peace of ſuch counties where "ſuch indictments ſhall be found, in the ſaid ſeſſions of the "peace, ſhall aſſeſs or allow; and in default thereof, it ſhall be "lawful for the ſaid juſtice to proceed to trial of ſuch indict-"ments; any ſuch writs of *certiorari* notwithſtanding."

A feme covert is not within this ſtatute to find ſureties. 2 Hale 213.

Sect. 46. And the like recognizance in the ſum of 40*l.* is required by 13 & 14 Car. 2. c. 6. ſ. 16. concerning the highways, on the removal of every indictment, &c. on that ſtatute.

Sed vide 13 Geo. 3. c. 78 and 84. Bk. 1. p. 415. 419.

Sect. 47. It is obſerveable, That theſe ſtatutes do not (*f*) extend to all indictments at ſeſſions in general, but only to thoſe particular ones therein mentioned: But this defect was in a great meaſure (*g*) ſupplied by the rules of the court of king's bench, which upon the removal of an indictment from London or Middleſex, required a recognizance from the defendant to carry down the record to trial the ſame term, on which the *certiorari* was returnable, or the ſittings after; and on the removal

(*f*) 1 Keble 225. 727. Vide inf. ſ. 61. (*g*) Vide 1 Keble 33. 6 Modern 246. 2 Salkeld 564. Farreſley 10.

moval of an indictment from other counties (*a*) required such recognizance for a trial at the next assizes.

(*a*) Shower 336.

Sect. 48. And agreeably hereto, it is enacted by 5 and 6 Will. and Mary, c. 11. and 8 and 9 Will. 3. c. 33. "That "all the parties indicted at a general or quarter-sessions of the "peace, prosecuting a *certiorari*, before the allowance thereof, "shall find two sufficient manucaptors, who shall enter into a "recognizance in the sum of 20l. before one or more justices "of the peace of the county or place, (or (*b*) else before one "of the judges of the king's bench, in which case such judge "shall make mention of it under his hand, on the back of the "writ) and there cognizance shall be with condition, at the "return of such writ, to appear and plead to the indictment or "presentment in the court of king's bench, and at his own "costs to procure the issue that shall be joined upon the said in-"dictment or presentment, or any plea relating thereto, to be "tried at the next assizes for the county wherein the indict-"ment was found after such *certiorari* shall be returnable, if "not in London, Westminster, or Middlesex; and if there, "then to cause it to be tried the next term after wherein such "*certiorari* shall be granted, or at the sitting after the said term, "if the court of king's bench shall not appoint any other time "for the trial thereof; and if any other time shall be appoint-"ed by the court, then at such other time, and to give due "notice of such trial to the prosecutor, or his clerk, in court, "and (*c*) also, that the party or parties prosecuting such "*certiorari*, shall appear from day to day in the said court of "king's bench, and not depart until he or they shall be dis-"charged by the said court: And such recognizances, *cer-*"*tiorari's*, and indictments, shall be filed in the king's bench, "and the name of the prosecutor (if he be the party grieved or "injured) or some publick officer, endorsed on the back of the "indictment; and if the person prosecuting such *certiorari*, "being the defendant, shall not, before allowance thereof, "procure such manucaptors to be found as aforesaid, the jus-"tices of peace shall and may proceed to trial of the indictment "notwithstanding such *certiorari*."

It is said this act relates only to quarter sessions of the peace, not to indictments for perjury found at Hicks's hall, which is before the justices as justices of oyer and terminer, Burr. 1462. For the sessions there sit in both capacities, and draw up their orders with one title or with the other, according to the degree of the offence, and the *certiorari* are directed accordingly. Burr. 11. 10 Mod. 193. 205. 278.

(*b*) Viz. By force of 8 & 9 Guil. 3. 33.

(*c*) Viz. by 8 & 9 Guil. 3. 33.

Sect. 49. And it is farther enacted by the said statute of 5 & 6 Will. & Mary, c. 11. "That if the defendant pro-"secuting such *certiorari*, be convicted, the king's bench "shall give reasonable costs to the prosecutor, if he be the "party grieved or injured, or be a civil officer who shall "prosecute on account of any fact that concerned him as "officer to prosecute or present, (*d*) which costs shall be taxed "according to the course of the said court; and the prosecu-"tor, for the recovery of such costs, shall within ten days "after demand (*e*) made of the defendant, and refusal of pay-"ment on oath, have an attachment granted against the de-"fendant

(*d*) 1 Wilf. 139. Burrow 54.

(*e*) Vide Durnford and East's Reports p. 104.

"fendant by the ſaid court for ſuch his contempt; and the ſaid "recognizance ſhall not be diſcharged till the coſts ſo taxed "ſhall be paid."

Sect. 50. And the like in effect is enacted by the ſaid ſtatute of 5 & 6 Will. & Mary, c. 11. ſect. 5. concerning the removal of indictments by *certiorari* within the counties palatine of Cheſter, Lancaſter, and Durham.

In the conſtruction of theſe ſtatutes, the following points ſeem moſt remarkable.

Sect. 51. Firſt, That notwithſtanding, by the expreſs words, juſtices of peace may proceed to trial of the indictments, notwithſtanding the *certiorari*, if a proper recognizance be not given; yet they will be in contempt to the court that awarded the *certiorari*, if they make no (*a*) return to it; for all writs muſt be obeyed unleſs good cauſe be ſhewn to the contrary; and the proper way of ſhewing is to return it.

(*a*) 1 Keb. 225. 231. 598, 903. 1 Sid. 70.

Sect. 52. Secondly, That it appears from the manifeſt purport of theſe ſtatutes, That they extend 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 (*b*) common law.

(*b*) 6 Mod. 42. 246.

(*c*) 2 Salk 564. Far. 10. 120 Ld Raym. 756. Salk. 600. 659.

Sect. 53. Thirdly, That (*c*) theſe ſtatutes, being in the affirmative, as to the taking of recognizances, do not take away the power which the juſtices of the king's bench have by the common law of taking recognizances upon their granting *certiorari's*; from whence it follows, That if any ſuch juſtice, granting a *certiorari*, ſhall take a recognizance variant from that preſcribed by the act, either as to the ſum or condition, &c. ſuch recognizance will have the ſame force as it would have had, if theſe ſtatutes had not been made; but it is ſaid, That the *certiorari*, if procured by the defendant, will not in ſuch caſe be a *ſuperſedeas* to the proceedings below, as it would have been at the common law; for the ſtatutes ſeem to be expreſs, That the ſeſſions may proceed notwithſtanding any *certiorari* procured by a defendant, whereon ſuch a recognizance is not given as is expreſsly preſcribed.

Sect. 54. Fourthly, That if the perſons offering to be ſureties, appear to be worth 20*l.* the juſtices (*d*) cannot refuſe them.

(*d*) March 27.

Sect. 55. Fifthly, That if divers be indicted (*e*) in the ſame indictment, and ſome of them find ſureties, and others not, the indictment ought to be removed as to thoſe who find ſureties, (becauſe they ſhall not be prejudiced by the default of the others.) And, as (*f*) ſome ſay, It ſhall be removed as to the others alſo.

(*e*) March 27.

(*f*) 1 Keb. 231. Vide 6 Ed. 4. 5. March 111.

Sect.

Sect. 56. Sixthly, (*a*) That the maſter of the crown-office, in taxing the coſts, ought only to conſider thoſe which are ſubſequent to the *certiorari*.

(*a*) 1 Salk. 55. 2 Ld Raym. 85. Rex v. Wallace, Mich. 14 Geo. 3.

Sect. 57. Seventhly, That the proſecutor, by accepting the coſts ſo taxed, is not reſtrained from aggravating the fine to be ſet on the defendant, becauſe he has a right to ſuch coſts by the expreſs words of the ſtatutes; and therefore the defendant can claim no indulgence from having paid them:—But in other caſes, after a proſecutor has accepted coſts (7) from a defendant, he cannot by the rules of the court, aggravate his fine; becauſe in ſuch caſes, having no right to demand coſts, if he take them at all, he muſt take them by way of ſatisfaction of the wrong; after which it is unreaſonable in him to haraſs the defendant. And this I take to be a common practice; though in (*b*) Salkeld's Reports there ſeems to be a note to the contrary.

Sayer's Law of Coſts 268. 2 Ld Raym. 854. Strange 1165. 10 Modern 193.

(*b*) 1 Salk. 55.

(7) The clauſe in the act reſpecting the payment of coſts does not extend to a proſecutor, even when bound over by the magiſtrate to proſecute, unleſs he be either a civil officer, or a party injured. 1 Wilſ. 139. 1 Burr. 431. 3 Burn 1462. And it is immaterial, whether the name be on the back of the indictment or not, provided it be proved by affidavit that the proſecutor is in fact a party injured or a civil officer. 1 Burr. 54, 55. And if the proſecutor has received a third part of the fine and then applies for his coſts under the recognizance, the court will order what he has received to be deducted from the amount of the taxation. 4 Burr. 2126. But the payment of a fine does not diſcharge the defendant's recognizance for the coſts. Rex v. Oſbourn. S. Law Coſts 267.—And on taxation, coſts become a veſted debt and the perſonal repreſentatives of the perſon to whom they were due may proceed to recover them. Rex v. Chamberlayne, Hill. 26 Geo. 3.—But where there is no recognizance taken, on removing ſummary proceedings, as for inſtance under the lottery act, there are no coſts, and the court have no power to tax by virtue of the ſtatutes which relate to criminal proceedings. Rex v. Jenkinſon, Mich. 26 Geo. 3.—Nor will they order the recognizance of a defendant, to ſtand as a ſecurity of the coſts of the proſecutor, if ſuch recognizance be as at common law, and not upon the ſtatute. 1 Burr. 11. Strange 1165. But if the defendant forfeit his recognizance under the ſtatute, ſuch recognizance ſhall ſtand as a ſecurity to the proſecutor for his coſts (if taxed) for the defendant's not going on to trial purſuant to the condition, notwithſtanding he was afterwards acquitted, and the proſecutor had taken him in execution for the amount of them. Burr. 1463.

Sect. 58. Eighthly, (*c*) That notwithſtanding the condition of the recognizance ſeem to be expreſs, That the defendant ſhall procure a trial at the next aſſizes, &c. yet it ſhall not be forfeited, unleſs the proſecutor of the indictment give rules according to the courſe of the court.

(*c*) 1 Salk. 370. 193. Strange 946.

Sect. 59. Ninthly, That after ſuch (*d*) recognizance is forfeited by the defendant's not procuring a trial according to the purport of the condition, the court will not hear any motion to quaſh the indictment, or *certiorari*.

(*d*) 1 Salk. 380. Rex v. Somers, Mich. 6 Geo. 1. Sed vide Rex v. Gale, 1 Geo. 3.

Sect. 60. It is enacted by 16 Geo. 3. c. 30. ſect. 19. againſt deer-ſtealers, "That no *certiorari* ſhall be allowed to remove "any proceedings on that act, unleſs the party convict ſhall "become bound, to the perſon proſecuting, with ſufficient

No *certiorari* lies on the 30 Geo. 2. c. 24. Cowper 24.

(The 3 & 4 Will. & Mar. c. 10. ſ. 6. recited in the former edition, was enforced by the 5 Geo. 2. c. 15. But both acts are repealed by 16 Geo. 3. c. 30. ſect. 27. Vide 2 Burn. 272.)

"ſureties,

" ſureties, in one hundred pounds, to pay full coſts and da-
" mages, within thirty days after ſuch conviction confirmed,
" or a procedendo granted—and ſhall alſo become bound to
" the juſtice before whom the offender was convicted, in ſixty
" pounds for each offence; to proſecute ſuch *certiorari* with
" effect; and to pay the forfeitures, or to ſurrender in thirty
" days, &c." But by ſect. 23, " If the party convicted, giv-
" ing ſix days notice to the proſecutor, and ſecurity to a juſtice,
" appeals to the quarter ſeſſions, a *certiorari* ſhall be allowed."

3 Burr. 1720. Ld Raym. 581.

Sect. 61. And the like in effect is enacted by 4 & 5 Will. & Mary, c. 23. and 5 Annæ, ſeſſ. 2. c. 14. in relation to convictions on thoſe acts of offences concerning the game.

How the *certiorari* ſhall iſſue to remove judgments and orders, &c.

† And whereas in many caſes his majeſty's juſtices of the peace by law are impowered to give or make judgements or orders; and divers writs of *certiorari* have been procured to remove ſuch judgements or orders into his majeſty's court of king's bench at Weſtminſter, in hopes thereby to diſcourage and weary out the parties concerned in ſuch judgements or orders by great delays and expences. It is therefore enacted by 5 Geo. 2. c. 19. ſect. 2. " That no *certiorari* ſhall be allowed
" to remove any ſuch judgment or order, unleſs the party or
" parties proſecuting ſuch *certiorari* before the allowance there-
" of ſhall enter into a recognizance, with ſufficient ſureties,
" before one or more juſtices of the peace of the county or
" place, or before the juſtices at their general quarter ſeſſions,
" or general ſeſſions, where ſuch judgement or order ſhall have
" been given or made, or before any one of his majeſty's
" juſtices of the ſaid court of king's bench, in the ſum of fifty
" pounds, with condition to proſecute the ſame at his or their
" own coſts and charges with effect, without any wilful or
" affected delay, and to pay the party or parties in whoſe fa-
" vour, and for whoſe benefit ſuch judgement or order was
" given or made, within one month after the ſaid order or
" judgement ſhall be confirmed, their full coſts (*a*) and charges,
" to be taxed according to the courſe of the court where ſuch
" judgements or orders ſhall be confirmed; and in caſe the party
" or parties proſecuting ſuch *certiorari* ſhall not enter into ſuch
" recognizance, or ſhall not perform the conditions aforeſaid,
" it ſhall and may be lawful for the ſaid juſtices to proceed and
" make ſuch further order or orders for the benefit of the party
" or parties for whom ſuch judgement ſhall be given, in ſuch
" manner as if no *certiorari* had been granted."

(*a*) Coſts are not to be paid where any material part of an order is quaſhed, Strange 1198.

How recognizances ſhall be certified, and coſts recovered.

† And it is further enacted, par. 3. " That the recognizance
" ſhall be certified to the king's bench, and there filed with the
" *certiorari*, and order or judgement thereby removed; and if
" the ſaid order or judgement ſhall be confirmed by the ſaid
" court, the perſons intitled to ſuch coſts for the recovery there-
" of, within ten days after demand made of the perſon or per-
" ſons

" ſons who ought to pay the ſaid coſts, upon oath made of " making ſuch demand and refuſal, ſhall have an attachment " for contempt, and the recognizance ſhall not be diſcharged " until the coſts ſhall be paid, and the order ſo confirmed com- " plied with and obeyed."

† And for the better preventing vexatious delays and expence, occaſioned by the ſuing forth writs of *certiorari* for the removal of convictions, judgments, orders, and other proceedings before juſtices of the peace. It is further enacted by 13 Geo. 2. c. 18. ſect. 5. " That no writ of *certiorari* ſhall " be granted, iſſued forth, or allowed to remove any convic- " tion, judgment, order, or other proceeding had or made by " or before any juſtice or juſtices of the peace of any county, " city, borough, town corporate, or liberty, or the reſpective " general or quarter ſeſſions thereof, unleſs ſuch *certiorari* be " moved or applied for within ſix calendar months next after " ſuch conviction, judgment, order, or other proceedings ſhall " be ſo had or made *(a)*, and unleſs it be duly proved upon " oath that the ſaid party or parties ſuing forth the ſame, hath " or have given ſix days notice thereof in writing to the juſtice " or juſtices, or to two of them (if ſo many there be), by and " before whom ſuch conviction, judgment, order or other " proceedings ſhall be ſo had or made, to the end that ſuch " juſtice or juſtices, or the parties therein concerned may ſhew " cauſe *(b)*, if he or they ſhall ſo think fit, againſt the iſſuing or " granting ſuch *certiorari*."

For what proceedings are not removable. Strange 391.

(a) Theſe words give the act a retroſpective operation. 1 Wilſon 35.

(b) N.B. Where there is no recognizance on removing ſummary proceedings there are no coſts. But the court will oblige the party applying for a *certiorari* to enter into a recognizance to pay coſts; and without which the court is not authorized to grant them by virtue of this act.

Rex v. Jenkinſon, Mich. 26 Geo. 3.

Sect. 62. As to the eighth point, *viz.* How far a *certiorari* is a *ſuperſedeas* to the court below. It is *(c)* agreed by all the books, That after it is allowed by ſuch court, it makes all its ſubſequent proceedings on the record, that is removed by it, erroneous. Alſo it ſeems to be generally *(d)* agreed, That a *certiorari*, for the removal of an indictment of forcible entry found at the ſeſſions of the peace, being delivered to any one juſtice of peace of the ſame place, before the ſtatute of 21 Jac. 1. ſet forth more at large ſect. 45. which requires, " That " every ſuch *certiorari* ſhall be delivered at ſome quarter-ſeſſions " in open court," did (by ſuch delivery without more) ſo far ſuperſede the power of the ſeſſions, that all its ſubſequent proceedings thereon, and even an execution of a prior award on the ſame indictment, would have been erroneous. And it ſeems to be generally *(e)* agreed that any one ſuch juſtice to whom ſuch *certiorari* ſhould be delivered, might and ought thereupon immediately to have awarded a *ſuperſedeas* to the ſheriff in order to have ſtopped the execution of any prior award of ſuch court upon ſuch indictment.

(c) C. Car. 261. 1 Salk. 148. Yelverton 32. March 27.

(d) C. Eliz. 915. 2 Keble 306. Moor 677. 1 Salkeld 151. Ld Raym. 610. 1515.

(e) C. Eliz. 915. Moor 677. Qu. F.N.B. 237. Dalton c. 134.

Sect. 63. It ſeems to be the better *(f)* opinion, That a *ſuperſedeas* on ſuch a *certiorari*, being delivered to the ſheriff before

(f) C. Eliz. 915. 916 Moor 677. 2 Hale 215.

before he hath begun to put a process in execution, will make his subsequent execution of it wholly void; because it is a ministerial act, and not a judicial one. But if such *supersedeas* be not delivered to the sheriff till after he have in part executed such award, it (*a*) seems, That he may afterwards be authorised to go through with it by a writ of *venditioni exponas*, in the same manner as he may in the like case after a writ of error; but I (*b*) question, Whether he can lawfully proceed after such *supersedeas* actually delivered to him, without the writ of *venditioni exponas*?

(*a*) Dyer 98. Yelverton 6. C. Eliz. 597. 1 R. Abr. 894. 2 R. Abr. 491. 3 Keble 169. 174 309.

(*b*) See the books next above cited, and Moor 542. 1 Salk. 147.

Sect. 64. It seems to be the stronger opinion, That a *certiorari*, being once delivered, makes all subsequent proceedings on the record that ought to be removed by it, (*c*) erroneous, by force of these words, *coram nobis terminari volumus, & non alibi*, whether such proceedings are before or after its return; and notwithstanding the party who prosecuted it, never make any other suit to have the record certified, but only by causing the *certiorari* to be delivered. And in this respect a *certiorari* hath a stronger force than a writ of error; for that becomes (*d*) of no effect, if the party who prosecuted it, neglect to get the record certified in a reasonable time. Also it seems to be holden in some (*e*) books, That the very issuing of a *certiorari* is of itself a *supersedeas* to the inferior court, whether the *certiorari* be ever delivered or not. In the same manner as an appearance in the court above, and a *supersedeas* purchased there, will avoid (*f*) an outlawry pronounced after, though such *supersedeas* were not delivered to the sheriff before the *quinto exactus*; but the contrary hereto, in relation to a *certiorari*, seems more agreeable to the general tenor of the (*g*) books and the reason of the thing. And it hath been (*h*) adjudged, That if a *certiorari* for the removal of an indictment before justices of peace be not delivered, before the jury be sworn for the trial of it, the justices may proceed. Also it hath been (*i*) holden, That a *certiorari* is of no effect, unless it be delivered before its return is expired. And it is certain that by force of the statute it cannot at this time be any (*k*) *supersedeas* to the proceedings on an indictment at sessions, without a proper recognizance, &c.

(*c*) Yelver. 32. Dyer 245. 6 H. 7, 15. 16. B. Recordare 8. Dalt. c. 134. Lamb. f. 516. Crompton 132. 2 Hale 215.

(*d*) Dyer 245. 1 Keb. 54. 107. 118. 1 Siderfin 268. 2 R. Abr. 491.

(*e*) Moor 73. Keble 93.

(*f*) Dyer 222. Moor 73. 1 Inst. 128.

(*g*) C. Ja. 282. Sup. c. 5. f. 8, 9, 10, 11. C. Eliz. 152. 915. C. Jac. 43. Yelv. 52. 57. 221. C. Car. 79. 2 Jones 209.

(*h*) 1 Salk. 144. 150.

(*i*) 1 Keb. 944.

(*k*) Sup. f. 45 to 62. A *certiorari* removes all things done between the *teste* and return, Ld Raym. 835. 1305.

Sect. 65. It hath been (*l*) holden, That a *certiorari* for the removal of a recognizance for the good behaviour, or for an appearance at sessions, will supersede its obligation. But this would be highly inconvenient; and the contrary opinion seems to be supported by the better (*m*) authority.

(*l*) 2 R. A. 492. Dalton c. 75.

(*m*) C. Jac. 282. Yelverton 207. 2 Bulst. 155.

Sect. 66. It (*n*) seems, That if an indictment be removed by *certiorari* after issue joined, and afterwards remanded, the inferior court shall proceed to trial, in the same manner as it would have done, if no *certiorari* had been granted.

(*n*) 16 Ed. 4. 5. B. Dis. de Pl. 10. 52.

Sect.

Sect. 67. I ſhall take it for (*a*) granted, That inferior courts proceeding after a *certiorari* delivered, where by law they ought not, are puniſhable for a contempt; as hath been more fully ſhewn, chap. 22. ſect. 28.

(*a*) Raym. 186. Farreſly 38. 1 Vent. 86. 1 Salk. 144, 148. Yelverton 32.

Sect. 68. Alſo it ſeems, That by the common law if a *certiorari* be once filed, the proceeding below can (*b*) never be revived by any *procedendo* (†).

(*b*) Agreed by the court of king's bench, in the caſe of the king v. Whitlow, Hil. 6 Geo. 1. Vide alſo 2 Burn 749. King v. Gwynne.

(†) The *certiorari* may be taken off the file if it was improperly obtained. 1 Burr. 488. 4 Burr. 2459. 2522. on motion for that purpoſe previous to a motion for a *procedendo*. 4 Burr. 2456. If the defendant is convicted on confeſſion, and the proſecutor brings a *certiorari*, the defendant ſhall have a *procedendo*. 2 Burrow 749.

Sect. 69. As to the ninth point, viz. In what manner a *certiorari* is to be returned; I ſhall refer the reader for the form in which it is to be done, to (*c*) Lambard and (*d*) Dalton, and ſhall farther take notice only of theſe following particulars.

(*c*) Lamb. B. 2. c. 2. 107, 108. (*d*) Dalt. c. 73. 134. 2 Burn 322. to 319. Carthew 223.

Sect. 70. Firſt, That every ſuch return ought to be under the ſeal (*e*) of the inferior court, or of the juſtice or juſtices to whom it is directed; and if ſuch court have no proper ſeal, it ſeems, (*f*) That the return may be well made under any other.

A return was held bad becauſe it was upon paper inſtead of parchment.

(*e*) C. Eliz. 821. (*f*) 1 Lev. 312. 1 Siderfin 70. Salkeld 479. Shower 336. 2 Barnard 113.

Sect. 71. Secondly, That every ſuch return muſt be made by the very ſame perſon to whom the *certiorari* is directed. For if it be directed to the juſtices of peace of ſuch a place, and the (*g*) clerk of the peace only return it; or to the conſtable, or to the recorder of B. and the (*h*) deputy conſtable, or deputy recorder, return it, without ſhewing in the return that the principal had power to make a deputy; or to the ſteward of St. *Paul*'s, and the ſteward of the church of St. (*i*) *Peter* and St. *Paul* return it, nothing is removed. Yet it is (*k*) certain, That if it be directed to the juſtice of *Cheſter*, it may be returned by A. B. chief juſtice; for the ſame officer is known to be meant, in the writ and return, and his deſcription in both is in ſubſtance the ſame. Alſo it is (*l*) ſaid, That if a writ of error be directed to ſeveral juſtices, and returned by part of them only; yet if it (*m*) truly recite the record, it ſo far removes it, that a new writ of error lies, *de recordo quod coram nobis reſidet*, &c. And (*n*) quere how the court ſhall proceed upon the like miſ-return or a *certiorari*?

(*g*) 2 Salk. 479. (*h*) 1 R. Abr. 752. 754. 2 Keble 385. (*i*) 2 Keb. 385. (*k*) 1 Sider. 64. 1 Levinz 50. 2 Salkeld 452. 1 Keb. 165. 187. (*l*) Yelv. 212. C. Jac. 254. 1 Sid. 349. 1 Keble 941. 2 Keble 385. 1 R. Abr. 753. (*m*) Yelv. 6. 7. 28 H. 6. 12. 1 R. Abr. 753. (*n*) F. N. B. 71. Holt 157. A *certiorari* to remove an order of two juſtices may be directed to the ſeſſions, and returned by them. Strange 470.

Sect. 72. Thirdly, That (*o*) regularly a recognizance taken by a juſtice of peace, whether it ſtill actually continue in the hands

(*o*) 21 H. 7. 21. C. Jac. 669. 2 H. 7. 1. ſup. ſect. 43.

hands of ſuch juſtice, or (a) have been ſent by him to the clerk of the peace, ought to be certified on a *certiorari* for the removal of it by ſuch juſtice only, until it be made a record of the ſeſſions, (b) after which it ſhall be certified in the ſame manner as the other records thereof ſhall be.

(a) Reg. v. Randal, 13 Ann.
(b) Supra, ſect. 43.
Reg. Origin 90. 151. 283. 284, &c.
F. N. B. 81.

2 H. 7. B. Peace 11. Dalton c. 70.

Sect. 73. Fourthly, That it is (c) adviſeable, That a return to a *certiorari* directed to juſtices of peace, for the removal of an indictment taken before them, have the clauſe *Necnon ad diverſas felonias, &c.* as well in the (d) deſcription of the juſtices who make the certificate, as of thoſe before whom the indictment is ſaid to be taken in the caption; which matter hath been already conſidered, ch. 8. ſect. 33. and ch. 25. ſect. 121, 122, 123.

(c) Cromp. 131, 132.
Lamb. B. 4. c. 7. f. 516, 517.
Dalt. c. 134.
(d) 22 Ed. 4. 22. b. 13.
12 H. 7. 25.
3 R. 3. 9.
B. Indict. 32, 50.

Cauſe a remover plea, 27. Vide 1 Keb. 263. Vide 11 Mod. 172.

Sect. 74. Fifthly, (e) That the perſon to whom a *certiorari* is directed, may make what return to it he pleaſes; and the court will not ſtop the filing of it on affidavits of its falſity, except only where the publick good requires it, as in the caſe of the (f) commiſſioners of ſewers, or for ſome other ſpecial reaſon: But regularly the (g) only remedy againſt ſuch a falſe return, is an action on the caſe at the ſuit of the party injured by it, and an information, &c. at the ſuit of the king.

(e) 6 Mod. 90. Reg. v. Norton, Paſ. 11 Annæ.
(f) Sup. ſ. 34.
(g) 6 Mod. 90. Strange 63.

Sect. 75. Sixthly, (h) That whatſoever matters are put into the return of a *certiorari*, by way of explanation or otherwiſe, beſides thoſe which are expreſsly ordered to be certified, are put in without any warrant or authority, and conſequently ſhall be no more regarded by the court above, than if they had been wholly omitted.

(h) 2 Salk. 492, 493.

Sect. 76. Seventhly, That (i) generally the return to a *certiorari* ought to certify the record itſelf, or the tenor of it, or the (k) tenor of the tenor, (l) according as the writ requires. And agreeably hereto it hath been (m) adjudged, That if on a *certiorari* to return an order of juſtices of peace, the tenor of ſuch order be certified, the return is naught. Yet a return of the tenor of an indictment from London on a *certiorari* to remove the indictment itſelf, is good by the city-charter, as hath been already ſhewn, ſect. 26. Alſo, it (n) ſeems to have been generally holden, That wherever the purport of a *certiorari* is not to proceed upon the record to be removed, but only to try an iſſue of *nul tiel record*, it is ſufficient to certify the tenor of the record, whether the *certiorari* require a certificate of the record itſelf, or of the tenor of it only. However, I take it to be clear, That if the court which awards ſuch a *certiorari*, have no juriſdiction to proceed on the record thereby ordered to be removed; as where the court of (o) common pleas award a *certiorari*

(i) Reg. Origin. 151. 169.
F. N. B. 245.
(k) F. N. B. 245.
3 Keb. 13.
(l) F. N. B. 245.
Cromp. 131.
Dalton c. 134.
Lamb. B. 4. c. 7. f. 515.
(m) 1 Salk. 147. 2 Salk. 492, 493.
(n) 3 Keble 13. Vide 2 Burrow 1034.
Dy. 187.
1 Keble 107.
(o) 1 R. Abr. 394, 395.
Hobart 135.

certiorari for the removal of an indictment on the iſſue of *nul tiel record*, concerning ſuch indictment, the court below ought only to certify the tenor of it, leſt there ſhould be a failure of juſtice.

Sect. 77. As to the tenth point, *viz.* Where a record is removed by a *certiorari*. Having premiſed that nothing can be removed by it where it is improperly (*a*) directed, or (*b*) returned, (for which I ſhall refer the reader to the foregoing parts of this chapter) I ſhall in this place obſerve only the following particulars:

(*a*) Vide ſup. ſec. 41, 42, 43.
(*b*) Vide ſup. ſ. 69, &c.

Sect. 78. Firſt, That it ſeems to be ſettled at this day, That as a writ of (*c*) error may remove a judgment given; and a (*d*) *recordare* may remove a plaint entered, after its *teſte* and before its return, ſo likewiſe a (*e*) *certiorari* may remove a record that ſhall come within its deſcription before the time of its return, though there were no ſuch record *in eſſe* at the time of its *teſte*, (*f*) nor at the time when it was firſt delivered to the court below.

(*c*) 1 R. 3. 4. B. Recordare 9. 2 Modern 112. 3 Keble 308. Con. Noy 51. 1 R. Abr. 749.
(*d*) 1 R. 3. 4. B. Recordare 9.
(*e*) 1 R. 3. 4. Dyer 222. 1 Ventris 63. c. 7. f. 517. 2 Keble 141, Vide 11 Mod. 765. 819.

B. Recordare 9. 1 Modern 41. 1 Salkeld 149. Farreſly 138. Lamb. B. 4. Crompton 132. Dalton c. 134. 1 Modern 112. Yelverton 32. Con. 1 Sid. 317. 142. Noy 54. 1 R. Abr. 749. (*f*) 1 R. Ab. 395. Ld Raymond 833. 1305. 110. 236. A verdict cannot be removed from ſeſſions before judgment. Strange

Sect. 79. Secondly, That as a *recordare* will remove a plaint that was (*g*) diſcontinued below, becauſe the court above will proceed only on the plaint, and all the other proceedings thereon below are to no purpoſe; there ſeems to be the like reaſon that a *certiorari* alſo may remove an indictment which was diſcontinued below.

(*g*) 3 H. 6. 30. F. N. B. 71. F. Recordare 8.

Sect. 80. Thirdly, That as a writ of error can remove no record which materially varies from the deſcription ſet forth in ſuch writ; ſo neither can a *certiorari*, as in the following inſtances.

A *certiorari* to remove an indictment, will not remove a conviction. Ld Raymond 971.

Sect. 81. Firſt, Where the writ deſcribes an indictment or other record, taken before A. B. and eight others, and that certified appears to have been taken before (*h*) A. B. and ſeven others only, or (*i*) before him and the other eight mentioned, and others alſo beſides them; or where the writ deſcribes a record (*k*) *coram A. & B. & ſociis ſuis*; and the record certified appears to have been taken *coram C. D. & ſociis ſuis*; or (*l*) where the writ calls the juſtices, before whom the record is taken, *juſticiarios noſtros*, and in the record certified they appear to have taken it as juſtices of a former king.

(*h*) C. Jac. 254, 255. Yelverton 42. Plowden 392.
(*i*) B. Err. 13. 28 H. 6. 11. 1 Keble 129. 282. 102.
(*k*) 1 Sid. 448. Parallel caſe. 1 R. Abr. 753.
(*l*) 1 R. Abr. 754. Ld Raym 1203.

Dyer 105. Yelverton 212.

Sect. 82. Secondly, Where the writ deſcribes an indictment for ſtealing (*m*) two horſes, and that certified is for ſtealing one horſe only.

(*m*) 2 Aſſize 3. S. P. C. 70. B. Variance, 62. Lamb. B. 4. c. 7. f. 518. B. Cor. 69. Crompton 132. 1 Bulſt. 155.

Sect. 83. Thirdly, (*a*) Where the writ deſcribes an order concerning foreign ſalt, and that certified is concerning ſalt in general.

(*a*) 1 Salk. 245. Farreſly 97.

Sect. 84. Fourthly, (*b*) Where the writ deſcribes an order concerning the town of Needham-Market, or concerning the manor of Anſly, (*c*) and an order concerning the town of Needham, or the manor of Aneſley, is returned, without ſhewing in the return that they are both the ſame town.

(*b*) 2 Salk. 452. C. Eliz. 882.
(*c*) 12 Aſſize 2. B. Variance 66.

Sect. 85. Fifthly, Where the writ mentions only (*d*) orders againſt A. B. & C. or indictments wherein A. B. & C. are indicted, and thoſe certified are againſt A. only, or againſt A. & B. only. Yet (*e*) it is taken for granted in many books, neither do I find it any where denied, That a *certiorari* for the removal of all indictments againſt A. may remove one wherein the ſaid A. is indicted, together with twenty others, ſo far as it concerns him; becauſe in judgment of law it is a ſeveral indictment as to every one of the perſons indicted. But I do not find it (*f*) agreed, Whether in ſuch a caſe the indictment ſhall be removed ſo far as it concerns the other twenty?

(*d*) 1 Salk. 145. 351. Reg. v. Hotſpurt, Hill. 12 Ann. Con. 1 R. Abr. 395.
(*e*) 6 Ed. 4. 5. Lucas 205. B. Record. 57. Lamb. B. 4 c. 7. f. 517. Crompton 132. Dalton c. 134. Mareh 112.
(*f*) Aſſ. 6 Ed. 4. 5. B. Record. 112. 1 Keb. 231. 57. Lamb. B. 4. c. 7. f. 517. Cromoton 132. Dalton c. 134. Denied, March 10 Modern 205. Ld Raymond 609. 1203.

Sect. 86. Sixthly, Where there is a (*g*) material variance between the writ and the records certified, in the names or additions of the parties; as where the writ gives the defendant the ſurname of (*h*) Giggure, and the record certified that of Giggeer; or where the writ commands the removal of all convictions againſt (*i*) Henry, coachman, *quocunque nomine cenſeatur*, and thoſe certified are againſt Henry Munton, coachman; or where the writ calls the defendant John (*k*) of Stiles, and the record John Stiles; or where the one calls him (*l*) knight and baronet, and the other baronet only; or the one (*m*) Garret Malines, and the other Gerrard Malines; or the one J. S. (*n*) *nuper de* B. and the other J. S. *nuper de* C. or the one J. S. of B. ſadler, (*o*) and the other J. S. of B. ſalter.

(*g*) Vide 1 R. Abr. 754.
(*h*) Salk. 264.
(*i*) Ad. Mich. 5 Geo. 1.
(*k*) 26 Aſſize 31.
(*l*) C. Jac. 633.
(*m*) Vide C. Jac. 477. 2 R. Abr. 329. Such a variance between a protection and the writ adjudged fatal.
(*n*) Adj. in a writ of error. Ainſworth and Wilſon, Hil. 5. Geo. 1. Par. Caſe, 1. To a *certiorari* on a writ of error diminution may be certified. 3 Modern 31. Siderfin 193.
(*o*) Dyer 173. 1 R. Abr. 753.

Yet if the variance be only in the ſpelling, and the words have the very ſame ſound either way, as (*p*) Bird and Burd, (*q*) Shelbury and Shelbery, it ſeems that it will not be material; becauſe it appears not by any record of the court, but that the name in the *certiorari* may be the true name, and the record certified deſcribing one by a name of the ſame ſound, ſhall be intended to mean the ſame perſon. Alſo, if a *certiorari* name the party without any addition, and the record certified, name him with an addition; yet it ſeems that it may be probably argued, that the record may be well removed by ſuch writ, in the ſame manner as it may be by a writ of (*r*) error, which has the like variance. But if a writ of error deſcribe a perſon with an addition, which is

(*p*) C. Eliz. 172. Con. 25 Ed. 3. 43.
(*q*) Vide C. Eliz. 172. 1 R. Abr. 797.
(*r*) 1 Sid. 193. 9 H. 6. 1. Dyer 25.

omitted

omitted in the record certified, it hath been *(a)* lately adjudged, contrary to the opinion in ſir Edward Coke's *(b)* Third Report to the contrary (which ſeems to be rather contradicted than ſupported by the *(c)* authorities cited to maintain it), that it cannot remove the record; and the reaſon ſeems to be the ſame in reſpect of a *certiorari*.

1 R. Abr. 752. *(c)* 9 H. 6. 1. 7 Aſſize 5.

(a) Shute v. Car. Hill. 3 Geo. 1. 9 H. 6. 1. B. Variance 6. Vide Dyer 25. Con. 1 Sid. 104. 2 R. Abr. 328. 329.

(b) 3 Co. 2. 26 Aſſize 31.

If the writ name more defendants than are in the record, it is variance. Strange 116. But it need not deſcribe whether the offence be laid *contra formam ſtatuti*. Strange 845. Vide alſo 2 Hale 214.

A *certiorari* to remove a conviction on indictment muſt give the defendant a day in court. Ld Raymond 971. Strange 116. 845.

Sect. 87. As to the eleventh point, *viz.* What is to be done by the court above, where the record mentioned in a *certiorari* is not removed by it. It is *(d)* ſaid, That ſuch court cannot in ſuch caſe proceed upon the record; becauſe in judgment of law it ſtill remains in the court below, but will either *(e)* quaſh the writ, and *(f)* award a new one, or ſuffer the court below to proceed in the cauſe, and take ſuch *(g)* order in relation to the defendant's appearance either in the one court, or the other, to anſwer the farther proſecution of the cauſe againſt him, as ſhall in diſcretion appear to be moſt proper.

2 Keb. 142. Lamb. B. 4. c. 7. f. 518. Sup. c. 25. ſect. 11. 2 Hale c. 198. 2 Bac. K. B. 413.

(d) 12 H. 7. 25. 2 R. 3. 9. 3 Aſſize 3. Vide 1 Sid. 193. 2 Keble 142.

(e) 1 Keble 102. 1 Salkeld 147.

(f) Stra. 1227. 3 Aſſize 3.

(g) 12 H. 7. 25. 3 Aſſize 3. 2 R. 3 9. 20. B. Indict. 50. B. Cor. 69. Carthew 223.

Sect. 88. And now I ſhall conſider the ſixth particular, *viz.* What *proceſs* is to be awarded after the removal of a record by *certiorari* into a ſuperior court. As to which I take it to be agreed, That, after ſuch removal, if the defendant do not appear in the court of king's bench, the ſame (*h*) kind of proceſs lies againſt him as if the cauſe had been originally commenced there. Alſo I take it to be *(i)* agreed, That ſeeing by ſuch removal the cauſe below is wholly put without day, there is no way to nonſuit the plaintiff, before he hath appeared in the court of king's bench, but by taking out a *ſcire facias* to warn him to proſecute his appeal in that court. Whereupon if the ſheriff return a *ſcire feci*, he ſhall be nonſuit; and if the ſheriff return a *nihil*, a *ſcire facias ſicut alias* ſhall be awarded; whereupon if the ſheriff return a ſecond *nihil*, I do not find it *(k)* agreed what ought farther to be done (*l*).

ſuit. Bac.

(b) S. P. C. 70. Summary 211. Carthew 223.

(i) S. P. C. 70. 48 Ed. 3. 22. 48 Aſſize 3. 1 Salkeld 61, 62. 6 Modern 246. B. Appeal 15, 140. F. Cor. 105.

(k) Vide S. P. C. 70. 72. 48 Ed. 3. 22. 48 Aſſize 3. B. Appeal 15, 140. F. Corone 105.

(l) We ſhould ſuppoſe a non- Ab. 359. note.

Sect. 89. As to the ſeventh particular, *viz.* Where the proceſs on an appeal, indictment, or information ſhall be ſaid to be diſcontinued, or miſcontinued, or put without day. Having premiſed, that 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 that the ſuffering any ſuch gap or chaſm, is properly (a) called a diſcontinuance; and the continuing of the ſuit by (b) improper proceſs, as by a *capias* inſtead of a *diſtringas*, or by giving the parties an (c) illegal day, is properly called a miſcontinuance.

(a) F. Judg. 12. Finch 431. Co. Litt. 325. B. Amend. 17. F. Pro. 124. 127. 1 H. 7. 2.

22 E. 3. 2. 22 E. 4. 3. 12 H. 4. 3. (b) 21 H. 7. 16. 8 H. 6. 29. 12 H. 4. 3. 10 H. 7. 21. Keilway 36. Finch 431. Coke Lit. 325. B. Diſ. de Pro. 11. 23. 58. 57. 61. 12 H. 4. 18. Con. 40 E. 3. 16. F. Amend. 12. (c) B. Diſ. de Pro. 23. 21 H. 7. 16.

I ſhall for the more diſtinct underſtanding of the learning of this kind, endeavour more particularly to ſhew; 1. In what particular inſtances proceſs is generally ſaid to be diſcontinued: 2. Where to be miſcontinued: 3. Where to be put without day.

Sect. 90. PROCESS is generally ſaid to be diſcontinued in the following inſtances: Firſt, Where the ſecond is not teſted on the very ſame (d) day on which which the firſt is returnable; as where a *venire facias* is returnable on the 23d of January, and the *diſtringas* is teſted on the 24th or any other ſubſequent day.

(d) 1 Bulſt. 141, 142, 143. Yelverton 204, 205. C. Jac. 283. 284. 6 Modern 281, 282, 283. 1 Salkeld 51.

Sect. 91. Secondly, Where there is a term intervening between the *teſte* and return of a (e) *capias*; for the law will not ſuffer any ſuch *capias*, leſt thereby the defendant ſhould be impriſoned an unreaſonable time; but an original may be continued by any (f) other proceſs, except a *capias*, though it have a term or more intervening between its *teſte* and return. (g) Neither is it any objection to an exigent, That it is not made returnable on the next term after its *teſte*, becauſe it muſt allow time enough for five counties to be holden between its *teſte* and return.

(e) 8 Ed. 4. 13. Dyer 175. C. Eliz. 467. F. Continuance 3. (f) 8 Ed. 4. 13. Daliſon 108. Dyer 175. Qu. B. Diſ. de Pro. 23. 21 H. 7. 16. (g) Daliſon 108. 1 R. Abr. 484.

Sect. 92. Thirdly, (h) Where after iſſue or demurrer, the court give the parties a day to a diſtant term, without making any continuance to that immediately following.

(h) C. Jac. 256. Yelverton 169. 21 H. 7. 16. 1 R. Abr. 484. 9, 10. Con. 1 Bulſt. 144. 3 Bulſt. 233.

Sect. 93. Fourthly, Where the term to which the ſuit is continued is adjourned, and the ſuit is (i) not adjourned accordingly.

(i) 1 Dan. Abr. 243. 4 E. 4. 40. F. Diſ. 27.

Sect. 94. Fifthly, Where any of the parties are deſcribed in any continuance of the ſuit, whether on the (k) roll, or by (l) proceſs, by a name or addition variant from thoſe in the original, &c. though (m) only in one letter.

(k) F. Diſ. 1. B. Amendm. 22. 4 H. 6. 6. 40 E. 3. 18. (l) F. Amend. 13. 17. 21. 27. 38 Edw. 3. 22. 4 H. 6. 6. B. 69. 77. Diſ. 7. 12. 17. 40. 42. Err. 15. B. Diſ. de Pro. 46. Amend. 50. 39 Ed. 3. 31. 40 Ed. 3. 31. 34. 8 H. 5. 2. 7 H. 6. 27. 9 H. 6. 39. (m) Qu. Amend. 45. F. Amend. 21.

Sect. 95. Sixthly, Where after iſſue joined the proceſs is (n) not continued from time to time againſt the jurors, returnable on the ſame days to which the ſuit is continued on the roll againſt the parties.

(n) 21 Ed. 4. 20. B. Diſ. de Pro. 53. Continuance 82.

Sect.

Sect. 96. Seventhly, Where (*a*) a joint *venire* is first awarded for the trial of all the defendants together, and afterwards ſeveral *venires* for the trial of each of them.

(*a*) Qu. 22 H. 6. 3. 4. F. Diſ. 11. Vide 7 H. 6. 27.

Sect. 97. Eighthly, Where (*b*) a *venire* omits part of the iſſue or iſſues to be tried.

Vide B. Diſ de Pro. 63. Qu.

(*b*) F. Diſ. 14. 35. 2 H. 5. 3. C. Eliz. 622.

Sect. 98. Ninthly, (*c*) Where a *venire* omits any of the parties.

1 Roll 22. 3 Bulſtrode 311. Winch. 73. B. Amend. 50.

(*c*) F. Diſ. 10. 35. 39 E. 3. 21.

Sect. 99. Tenthly, Where a juror is named in the *habeas corpora*, by a name (*d*) different from that in the panel returned on the *venire*; or where a juror returned on ſuch a panel is wholly omitted in the *habeas corpora*. But in theſe caſes, if the juror ſo miſnamed, or (*e*) omitted, be not ſworn at the trial of the cauſe, it is (*f*) queſtionable, Whether there be any diſcontinuance at all?

(*d*) F. Replead. 4. Amend. 26. 4 H. 6. 7, 8. 19 H. 6. 39. 9 Ed. 4. 13. 27 H. 6. 5. B. Diſ. 47. 1 Dan. Abr. 330. 331. 1 Keb. 182. 191. But 19 H. 6. 39. Amend. 10. 37.

5 Co. 42 (*e*) F. Amend. 57. 37 H. 6. 12. B. Amend. 51. (*f*) 1 Sid. 66. 198. 215. 6 Modern 285. F. Diſ. 4. ſeem to make it no diſcontinuance. 34 H. 6. 20. 27 H. 6. 5. F. Enqueſt 18. 5 Coke 6. 37. F. Diſ. 37. 38. B. 92. are to the contrary. Vide Cro. Eliz. 586.

Sect. 100. Eleventhly, Where a *venire* or *diſtringas* are iſſued without any (*g*) award on the roll to warrant them.

(*g*) F. Err. 16. 7 H. 6. 28.

Sect. 101. It (*h*) ſeems, That before the making of the ſtatutes of 11 Hen. 6. c. 6. and 1 Edw. 6. c. 7. all pleas and proceſſes before juſtices of aſſize, gaol-delivery, *oyer* and *terminer*, or peace, or other the king's commiſſioners, were diſcontinued by the making a new commiſſion, or aſſociation, or by altering the names of the juſtices or commiſſioners; but this miſchief is fully remedied by thoſe ſtatutes.

(*h*) Vide ſup. c. 5 ſect. 5, 6, 7, 8, 9, 10, 11, 12. Raſtal 77.

Sect. 102. If an (*i*) indictment be removed by *certiorari*, after iſſue joined, and proceſs awarded for the trial; *Qu.* If it ſhall be diſcontinued, if not remanded before the return of ſuch proceſs?

(*i*) Vide B. Diſ. de Pro. 52. 15 Ed. 4. 5. Sup. ſect. 66.

Sect. 103. As to the ſecond point, *viz.* Where proceſs is generally ſaid to be miſcontinued. It ſeems, That whereever an error in proceſs doth not amount to a diſcontinuance, it is generally called a miſcontinuance. And this ſeems agreeable to the proper notion of the word; for as a cauſe may then properly be ſaid to be diſcontinued, when there is either nothing at all done to continue it, or nothing but what is as to this purpoſe merely void in law; ſo it ſeems to be properly ſaid to be miſcontinued, where it is continued amiſs, or by an (*k*) erroneous and not void continuance. And agreeably hereto, the books which ſpeak of errors in proceſs, ſeem generally to include them all, without (*l*) exception, under the general heads of miſcon-

(*k*) Finch 431. Sup. ſect 89. 21 H. 7. 16. 39 E. 3. 20. (*l*) 21 H. 7. 16. B. Diſ. de Pro. 11, 47, 50, 57. Amend. 17. C. Jac. 283, 284. 2 Bulſt. 142, 143.

miſcontinuance and diſcontinuance. And this, as I apprehend, was alſo the opinion of the greater part of the court of king's bench, in the late caſe of (*a*) Widdrington and Charlton.

(*a*) Trin. 11 Annæ. 10 Modern 86.

Sect. 104. As to the third particular, *viz.* Where proceſs ſhall be ſaid to be put without day. It ſeems (*b*) agreed, That by the common law all proceedings upon any indictment, information, or popular action, whereon no judgment had been given, were wholly determined by the demiſe of the king, and that nothing remained but the indictment or information, original writ, or bill, which were put without day till re-continued by re-attachment to bring in the defendants to plead *de novo*. But this is fully (*c*) provided for by 4 & 5 Will. 3. c. 18. and 1 Annæ, c. 8. By which it is enacted, "That ſuch proceſs, &c. ſhall continue in the ſame force af-"ter the king's demiſe, as it would have had if he had "lived."

(*b*) 7 Coke 30, 31. Cro. Jac. 14. Moor 748. 2 Hale 189. 209.

(*c*) Supra c. 1. ſ. 12, 13.

Sect. 105. As for Appeals, (*d*) I do not find it any where ſaid, That the pleas, and other proceedings therein, being put without day by the demiſe of the king, might not be revived by a ſpecial re-attachment, in the ſame manner as in any other action: However, it is certain at this day, That by force of 1 Edward 6. c. 7. and 1 Annæ, c. 8. "neither the writ nor "bill, nor any plea, nor proceedings therein, ſhall be any "way diſcontinued or put without day by ſuch demiſe."

(*d*) 7 Coke 30.

Sect. 106. It ſeems to be holden by (*e*) ſome, That all cauſes, whether civil or criminal, are diſcontinued; and by (*f*) others, who ſeem to ſpeak more accurately, That they are put without day, by the juſtices before whom they were depending, not coming on the day to which they are continued, whether ſuch abſence were occaſioned by (*g*) death, or any other cauſe. But it ſeems to be agreed by all, That a cauſe ſo diſcontinued, or put without day, cannot be revived without a re-ſummons, or re-attachment; which if they are (*b*) ſpecial, may revive the whole proceedings; but if general, the original record only. Nor do I find that any ſtatute hath remedied this miſchief, except in the caſe of aſſizes, and *juris utrum*, which are provided for by 1 Edw. 6. c. 7.

(*e*) Dyer 226. Keilway 2. C. Eliz. 12. B. Diſ. de Pro. 29, 25 Aſſize 5. Vide 1 Coke 38.

(*f*) Co. Lit. 135. Finch 432, 433. Raſtal 77. F. Diſ. 19. Re-attach. 1. 27. 23. 24. 9 H. 6. 40. 24 E. 3. 23. 28 Aſſize 42. 30 Aſſize 39. B. Diſ. de Pro. 2.

(*g*) B. Re-attachment 18. 4 H. 7. 7. F. N. B. 111. 287. 188. (*b*) 7 Coke 20. F. Re-attach. 1.

Sect. 107. As to the eighth particular, *viz.* How far errors in proceſs are fatal. It ſeems to be generally taken (*i*) as

(*i*) 1 Bulſt. 143. Yelverton 204. C. Jac. 283, 8 H. 6. 29. 21 H. 6. 16. 12 H. 4. 17. 34 H. 6. 20. 18 H. 6. 15. Coke Litt. 325. B. Diſ. de Pro. 4. 11. 47. Amend. 17. F. Pro. 127. Diſ. 40. Amend. 27. 38 Ed. 3. 22. 19 H. 6. 39. Vide B Err. 3. Replead. 2. and Diſc. 1. Where the contrary opinion is ſaid to have been holden; but this ſeems not to be warranted by the Caſe at large in the Year Book.

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 *inſtanter* upon the determination of the precedent, ſhall never be aided by an appearance and pleading over. And the book (*a*) of 9 Hen. 5. 2 pl. 7. ſeems to have an opinion, That the miſreturn of a ſheriff, as where he returns a *cepi* on the award of an exigent, is not ſaved by the defendant's pleading over; but this is (*b*) queſtioned by Staundforde, and ſeems contrary to the general tenor of the other (*c*) books, and contradicted both by (*d*) Brook and (*e*) Fitzherbert, in their abridgment of this very caſe; and in all probability the book is miſ-printed; for, as it ſtands at preſent, it is hardly ſenſe, or reconcileable with (*f*) itſelf. But if a defendant appearing on erroneous proceſs, expreſsly except to it before he have pleaded over, there have been many (*g*) authorities, that he ought to be diſcharged, and that (*h*) new proceſs ſhall iſſue where the defect firſt happened. But there is a greater (*i*) number of authorities to the contrary; by which it appears, That if the original be good, and the defendant preſent in court, he ſhall be compelled to anſwer it, 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 that 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. And therefore where a defendant hath excepted to the proceſs whereon he hath appeared, that he was (*k*) never ſerved with it, or that (*l*) no ſuch proceſs lies in the caſe, or that it bore (*m*) *teſte* before the original, or that it was not awarded into the (*n*) proper county, or that it was (*o*) not returnable at a proper day, or that it was (*p*) directed to one who was no officer, or that it had not ſo many days as it ought (*q*) between its *teſte* and return, or for any (*r*) other ſuch like defect; yet he hath been compelled to anſwer the original. And agreeably hereto it was lately (*s*) reſolved, upon great deliberation by the court of king's bench, againſt the opinion of Mr. Juſtice Powell, that the defendant in an appeal

(*a*) Vide ſup. c. 23. ſect. 143.
(*b*) S. P. C. 169.
(*c*) 3 Coke 45. F. Corone 444. Coke Lit. 325. Salkeld 59. 2 Siderfin 260. 1 R. Abr. 779. 780. Yelverton 158. C. Eliz. 582. C. Jac. 311. See the books cited to the other parts of this ſection. In 1 R. Abr. 380. notice is taken of three reſolutions, that a capias where it lies not, is not aided by an appearance and pleading over, and of a ſubſequent one contradicting them.
(*d*) B. Reſtitution 8.
(*e*) F. Cor. 68. But in another part of his book he abridges this caſe, without taking any exception to it. F. Damage 50.
(*f*) Alſo it is cited in Yelver. 204. C. Jac. 284. 1 Bulſt. 142. for the proof of the contrary opinion.
(*g*) 40 E. 3. 31. 47 Ed. 3. 14. 18 H. 6. 15. 3 H. 6. 9. F. Replevin 1. Amend. 14. Proceſs 154.

Error 82. B. Diſ. de Pro. 50. 57. Def. and appearance 11. 1 R. Abr. 779. 3 Mod. 265. But the Yea Book of 8 H. 6. 29. from which the above cited authority in Brook, Diſcontinuance, 50. is taken, ſeems rather to contradict than warrant it. (*b*) 8 H. 6. 29. 12 H. 6. 18. 18 H. 6. 15. 47 E. 3. 14. B. Diſ. de Pro. 11. 50. 57. F. Pro. 127. Diſ. 17. (*i*) 21 H. 7. 16. F. Err. 47. 46 E. 3. 30. B. Err. 28. Reſp. 12. F. Judg. 4. 18 H. 7. 21. Yelverton 158. 1 Sid. 100. 260. and ſee the other books under cited. (*k*) F. Diſ. 36. 9 H. 5. 3. 1 R. Abr. 779. 46 Ed. 3. 30. B. F. Judg. 4. (*l*) 10 H. 7. 21. 12 H. 4. 18. B. Err. 109. Pro. 173. Jour. 36, 54. 21 H. 7. 16. 8 H. 6. 29. F. Pro. 7. (*m*) 1 Sid. 406. (*n*) 38 E. 3. 20. 29 E. 3. 31. F. Diſ. 39. (*o*) 21 H. 7. 16. Con. 40 E. 3. 31. F. Amend. 14. (*p*) Cro. Eliz. 482. (*q*) B. Jour. 36. 54. Diſ. 23. Err. 169. Amend. 60. F. Jour. 37, 38. 12 E. 4. 11. 9 E. 4. 18. 2 H. 7. 11. (*r*) F. Diſ. 51. 3 H. 4. 10. (*s*) Widdrington v. Cheriton, T. 11 Annæ. 10 Modern 86. 1 Salk. 59.

of

of death, coming in upon an exigent, which was erroneous for want of the words *de morte viri*, &c. had ſalved the error by his appearance, notwithſtanding he had done all he could to take advantage of it, by craving *oyer* of the proceſs, and then demurring.

(a) Vide 40 E. 3. 31. F. Amend. 14, 59.
(b) 2 H. 7. 11.

And *note*, That in all the year-books *(a)* above-cited to this point, except *(b)* one, it is ſaid generally, That ſuch errors are ſalved by an appearance, without any mention or any amendment: But in that one it is ſaid, That they ſhall be amended.

(c) Vide 1 Bulſt. 141, 142, 143. Yelverton 204. 6 Mod. 281 to 286. 2 Salkeld 51. C. Jac. 284.
(d) 1 R. Abr. 779. 12 H. 4. 18. 21 H. 7. 16. 38 Ed. 3. 20. 12 H. 4. 3. B. Diſ. de Pro. 11. F. Diſ. 39.
(e) C. Jac. 311.
(f) 38 E. 3. 22. F. Diſ. 40. 19 H. 6. 39. Amend. 27. B. Replead. 2. Diſ. de Pro. 1.

Alſo it ſeems that where-ever proceſs is awarded *(c)* *inſtanter* from time to time, without any the leaſt break or chaſm, and the parties *(d)* have always a day upon the roll, all other kinds of errors whatſoever that come under the name of diſcontinuances, are *(e)* ſalved by an appearance, for there are *(f)* caſes by which it appears, That defendants appearing, and taking exceptions to ſuch errors, have been compelled to anſwer to the original, which they would not have been, if ſuch original had been taken to have been diſcontinued by ſuch errors, as they certainly are by an error, in ſuffering a total chaſm in the continuance. And if the original be not diſcontinued by ſuch errors, Why ſhould they not be as much ſalved by an appearance, as any of the other errors above mentioned? For would it not be altogether as trifling in this, as in any other caſe, to diſmiſs a perſon only in order to ſend for him again? And in criminal caſes this could not but be of the utmoſt ill conſequence, by giving the defendant, who is actually in the power of the court, an opportunity of eſcaping.

Error. 3. 3 H. 6. 9.

(g) F. Amend. 26. B. Amend. 10. 92. Diſc. de Pro. 4. 10 H. 6. 39. 27 H. 6. 5. 3 H. 6. 20.
(h) 30 Aſſize 36. Con. B. Diſ. 47. But this note is not warranted by the books at large, which are 27 H. 6. 5. and 34 H. 6. 20.
(i) 19 H. 6. 39. 34. H. 6. 20. F. Amend. 26. 57. Enqueſt 18. F. Diſ. 24. 38.
(m) F. Judg. 12.

Sect. 108. But it ſeems agreed by the *(g)* books, That any other diſcontinuance in the proceſs againſt jurors, ſhall have the ſame effect as a diſcontinuance in ſuffering a chaſm in the proceſs. But it ſeems, That no ſuch *(h)* diſcontinuance, whether in the proceſs or in the roll, ſhall in any caſe diſcontinue or abate the original ſuit. But if it appear before trial, ſhall cauſe *(i)* new proceſs to be awarded where the firſt fault happened; and if after trial, a new *(k)* *venire* to have the whole *(l)* iſſue tried over again; becauſe the firſt *venire* was executed, and the whole trial unwarranted. But *(m)* if judgment be given on a verdict by jurors appearing on a proceſs any way erroneous, it will be totally erroneous; becauſe the trial was wholly unwarranted, and conſequently the iſſue miſtried.

29 E. 3. 31. B. Amend. 10. Diſ. 30. 30 Aſſize 36. (k) 6 Mod. 286, 287. 22 H. 6. 3. 4. (l) 2 H. 5. 3. F. Diſ. 35. Vide 9 H. 4. 7. B. Enqueſt. 98. Error 16. 22 E. 3. 2. 7 H. 6. 28. 29 E. 3. 31.

Sect. 109. Alſo, as I apprehend, any other error in the proceſs againſt the jurors, who actually try a cauſe will make a miſ-

(a) miſ-trial, as much as thoſe which are called diſcontinuances; as where ſuch proceſs of this kind is awarded which is not (b) proper in the caſe, or where it is directed to a (c) wrong officer, or has a (d) wrong viſne, or (e) miſ-recites the former proceſs, or is (f) miſ-returned, or (g) not returned at all, &c. For if errors of this kind have ſuch effect even in civil actions where they are not within ſome of the ſtatutes of Amendments or Jeofails, as it ſeems to be admitted that they have, it plainly follows, that they muſt always have it in criminal proceedings, ſince (h) no ſuch proceedings are within the benefit of any of thoſe ſtatutes. But if an error of this kind, owing wholly to the miſpriſion of the clerk, be diſcovered before trial, and the amendment of it will ſet the whole matter right, perhaps it may be (i) amended by the common law. And it hath been (k) holden clearly, That even a diſcontinuance of proceſs may be amended by conſent of the parties.

(a) Vide 1 Dan. Abr. 334, 335, 352, 357, 455, 456.
(b) 7 H. 6. 28. F. Err. 16.
(c) 1 Brow. 134. C. Eliz. 574. 586. Moor 356. Yelverton 15. 5 Coke 36.
(d) C. Eliz. 468. Vide ſup. c. 23. ſect. 92. 2 D. Abr. 455, 456.
21 Jac. c. 13, 16. and 17 Car. 2. c. 8.
(e) C. Ja. 89.
(f) C. Jac. 467. 1 Dan. Abr. 354, 355. 357. (g) Vide 21 Jac. c. 13. 1 Dan. Abr. 340, 341. 8 Co. 163. (h) 6 Modern 283. 1 Salkeld 51. (i) L. quint. E. 4. 140. B. Amend. 10. 17. 66. 92. Diſ. de Pro. 47. F. Amend. 59. 75. 29 E. 3. 32. (k) 21 H. 7. 40. F. Amend. 78.

Sect. 110. Howſoever an error may be ſo far ſalved by the party's appearance, that he ſhall be as much compellable to anſwer the original, as if there had been no ſuch error: Yet if he were ſubject to any diſadvantage in reſpect of having ſuch proceſs awarded againſt him; as to the loſs of his goods upon an exigent, or to the forfeiture of the privilege of appearance by attorney upon a *pluries*; he (l) ſhall wholly avoid ſuch diſadvantage when ſuch award, which ſhould have cauſed it, appears to be any way erroneous, whether in reſpect of a diſcontinuance, or miſ-continuance, or otherwiſe.

F. Amend. 77. B. Appeal 7.

(l) 10 H. 7. 21. 12 H. 4. 18. 19 H. 6. 29. 3 H. 4. 10. S. P. C. 184. B Att. 82. 84. Exig-nt 20. Summary 271. F. Amend. 27. F. Diſ. 40. 51. F. Error 82. But 8 H. 5. 2. 43 E. 3. 17, 18. 34. ſeem contrary.

Sect. 111. Alſo, for the like reaſon, it ſeems to be (m) agreed, That if a man be outlawed, or be condemned by default, for not appearing to proceſs, which is any way erroneous, he may take advantage of the error in avoidance of ſuch outlawry, or other condemnation; for no one ſhall be condemned barely for not appearing, where that which ſhould have compelled him to have appeared is defective. But it (n) ſeems, That a defect in proceſs in an outlawry, may be ſalved by the defendant's purchaſing a pardon, and ſhewing it to the court; for that ſuppoſes that there was ſuch an outlawry againſt him, as needed a pardon, which, if it were erroneous, it would not do.

(m) 3 H. 7. 8. 9. F. Replead. 1. F. Error 47. Diſc. de Pro. 17. 1 Sid. 100. 260. B. Reſtitu. 8. B. Amend. 60. 9 E. 4. 18.
(n) 3 H. 7. 10. F. Chart, 25. F. Diſcont. 51.

Sect. 112. How far a diſcontinuance of one appeal will be a bar to another, hath been already conſidered, chap. 23. ſect. 132.

AND

And now I am in the ſecond place particularly to conſider the nature of proceſs on a criminal accuſation, with a particular regard to proceſs of Outlawry only.

For the better underſtanding thereof, I ſhall conſider the following points: Firſt, Whether proceſs of outlawry lie in all criminal caſes? Secondly, In what manner it is to be awarded in general. And, Thirdly, What is particularly required in the award of it againſt the principal and acceſſary.

Sect. 113. As to the firſt point, *viz.* Whether proceſs of outlawry lie in all criminal caſes. I take it to be certain, That it lies in all appeals, (*a*) whether of felony or mayhem; and in all indictments of treaſon or felony, and on all (*b*) returns of a reſcous; and alſo in all indictments of (*c*) treſpaſs *vi & armis*. Alſo it ſeems probable, That it lies on an indictment of (*d*) conſpiracy, or (*e*) deceit, or any other crime of a higher nature than a treſpaſs with force and arms, but (*f*) not on any indictment for a crime of an inferior nature.

(*a*) Finch 346. Thelo. B. 1. c. 15. 1. 35 H. 6. 6.
(*b*) 33 H. 7. 21. 2 Inſt. 665.
Con. F. Pro. 56. 213. 29 E. 3. 18.
(*c*) 22 E. 4. 11. Finch 355. B. Exigent, 51. 35 H. 6. 6. 2 Hale 194.
(*d*) 8 H. 6. 9. F. Pro. 89. B. Exigent 25. 28. 46. S. P. C. 172. 192. 22 H. 6. 7.
(*e*) 35 H. 6. 6. Dyer 213, 214.
(*f*) Vide 22 E. 4. 11. 35 H. 6. 6. Con. 8 H. 6. 9. Thel. B. 1. c. 15.

Sect. 114. It ſeems (*g*) agreed, That it lies not on any action on a ſtatute, unleſs it be given by ſuch ſtatute, either expreſsly, as in the caſe of a (*h*) *præmunire*, and many other caſes; or impliedly, as where a recovery is given by an action wherein ſuch proceſs lay before. And agreeably hereto it hath been adjudged, That it lies not in an action on the ſtatutes of (*i*) liveries, or of (*k*) maintenance, nor in (*l*) *decies tantum*, and that it lay not in a writ of (*m*) entry on 5 Rich. 2. c. 7. till it was given by 23 Hen. 8. c. 14. But that it lies on a writ of treſpaſs for a (*n*) forcible entry on 8 Hen. 6. c. 9. becauſe the ſtatute expreſsly gives a recovery by ſuch writ, and ſuch proceſs lies in it by the common law. It ſeems to be holden in the (*o*) year-book 8 H. 6. That it lies on all indictments on ſtatutes; but the contrary is adjudged in (*p*) 22 E. 4. as to the ſtatutes againſt foreſtalling; and it is there laid down as a general rule, That it lies not on an indictment any more than in an action on a ſtatute, unleſs it be expreſsly or impliedly given by ſuch ſtatute.

(*g*) 22 E. 4. 11. 8 H. 6. 9. F. Pro. 81. B. Prn. 57. Exigent 25.
(*h*) F. Pro. 106. 9 E. 4. 2. See St. Proviſors, 27 E. 3.
(*i*) 8 H. 6. 9.
(*k*) 22 E. 4. 11. Con. F. Pro. 89. 22 H. 6. 7. Qu. B. Exig. 28.
(*l*) 8 H. 6. 9. 35 H. 6. 6. B. Pro. 145.
(*m*) 35 H. 6. 6. F. Pro. 101. B Pro. 16.
(*n*) B. Exig. 35. 37 H. 6. 23. 1 Keble 563.
(*o*) 8 H. 6 9. F. Pro. 81.
(*p*) 22 E. 4. 11. B. Exig. 51. 35 H. 6. 6. 37 H. 6. 23. 2 Hale 194. Ld Raym. 987.

Sect. 115. As to the ſecond point, *viz.* In what manner proceſs of outlawry is to be awarded in general: I ſhall obſerve the following particulars. Firſt, That it ſeems to be agreed (*q*) That in every indictment or appeal, for any crime

(*q*) Finch 351. 355. Raſtal 188. 302. 26 E. 3. 72. F. Exigent 30. Utlagary] 17. Err. 82. Vide 3 H. 6. 9. 3 H. 4. 11.

under

under the degree of capital, there muſt be three *capias's* to the ſheriff of the ſame county wherein the proſecution is commenced, before the exigent ſhall be awarded, unleſs it be after (*a*) judgment; in which caſe one *capias* is ſufficient.—And (*b*) *quære*, If three *capias's* be not ſtill neceſſary in an appeal of rape, as they were at the common law, notwithſtanding it be made (*c*) felony by ſtatute?

(*a*) 40 E. 3. 25. F. Exigent 7. 27. Finch 476.
(*b*) 26 Aſſiſe 13. F. Exig. 10. F. Corone 273. B. Pro. 142. Exigent 67.
(*c*) Ch. 23. ſ. 59, &c.

Sect. 116. Secondly, That it ſeems to be (*d*) agreed, That one *capias*, before the award of the exigent, hath always been ſufficient in an indictment or appeal of death, or high treaſon; but that it ſeems (*e*) doubtful whether two *capias's* were not required by the common law, in all indictments and appeals of any other felony. However it is certain, That they are required in all indictments of any other felony, by 25 Edw. 3. c. 14. by which it is recorded, "That if after any man be "indicted of felony before the juſtices in their ſeſſions, to "hear and determine, it ſhall be commanded to the ſheriff to "attach his body by writ or precept, which is called a *capias*; "and if the ſheriff return that the body is not found, another "ſhall be incontinently made, returnable at three weeks after, "wherein it ſhall be compriſed, that the ſheriff ſhall cauſe to "be ſeized his chattels, and ſafely keep them till the day of "the writ or precept returned. And if the ſheriff return, "That the body is not found, and the indictee cometh not, "the exigent ſhall be awarded, and the chattels ſhall be for-"feit, as the law of the crown ordaineth. But if he come and "yield himſelf, or be taken by the ſheriff, or by other miniſter, "before the return of the ſecond *capias*, then the goods and "chattels ſhall be ſaved."—It ſeems to have been the general (*f*) opinion, That this ſtatute extends to appeals as well as indictments, though it mention only the latter; but that it extends not to any indictment or appeal of death, though it ſpeak of felony in general.

(*d*) S. P. C. 67. Summary 209. 2 Hale 194. F. Cor. 234. 1 H. 5. 5. Finch 351.
(*e*) F. Cor. 184. 234. 22 Aſſiſe 97. Con. 8 H. 5. 6. F. Exig. 3. Cro. Car. 31. 2 Inſt. 665. 6 Mod. 85.
(*f*) S. P. C. 67. Summary 209. A preſentment is the ſame as an indictment, upon which proceſs of outlawry lies. 1 Leonard 100.

Sect. 117. Thirdly, (*g*) That after the ſheriff hath returned a *cepi*, if he have not the body at the day, the court will not award an exigent on the ſuggeſtion of an eſcape, unleſs the ſheriff will return one.

S. P. C. 70. F. Exig. 25.

(*g*) F. Exig. 3. 28. 30. F. Pro. 226. 8 H. 5. 6. 1 H. 5. 6. 30 Aſſiſe 23.

Sect. 118. Fourthly, That if there be ſeveral appellees, ſome of which appear, and others make default, thoſe who appear and plead a plea in abatement of the writ, or any ſuch plea in bar as goes to the whole, the ſuit (*b*) ſhall be continued againſt thoſe who make default by *capias* only, and no exigent ſhall iſſue till ſuch a plea or pleas ſhall be determined.

(*b*) S. S. um. 210.

Sect. 119. Fifthly, That an exigent ſhall (*i*) never be awarded to the ſheriff of any other county than that wherein the offence is laid; and that by the (*k*) common law there

(*i*) F. Exig. 26. Default 10. 97. 22 E. 3. 11. 30 H. 6, 2. 10.

11 H. 4. 72. (*k*) F. Proceſs 4. 34. See Preamble 6 H. 6, c. 1. and 8 H. 6. c.

was

(a) Vide F. Pro. 1. 3. 34. 155. 364. 22 E. 3. 11. 47 Ed. 3. 4. Dyer 205. 30 H. 6. 2. 21 H. 4. 72.

was no (a) neceſſity of a *capias* to the ſheriff of any other county. But the law relating to this matter, having been altered by ſeveral ſtatutes, I ſhall ſet forth thoſe ſtatutes in particular, and endeavour to ſhew how they are to be underſtood.

How writs of *capias* ſhall be iſſued and *exigents* awarded.

Sect. 120. And firſt it is enacted by 6 Hen. 6. c. 1. "That before any exigent by awarded againſt perſons indicted in the king's bench of treaſon or felony, writs of *capias* ſhall be directed as well to the ſheriff or ſheriffs of the county wherein they be indicted, as to the ſheriff or ſheriffs of the county whereof they be named in the indictments; the ſame *capias* having the ſpace of ſix weeks at the leaſt, or longer time, by the diſcretion of the ſaid juſtices, if the caſe require it, before the return of the ſame; which writs ſo returned, the juſtices ſhall proceed in the manner as they had done before the ſtatute: And if any exigent be awarded or any outlawry pronounced againſt ſuch perſons before the return of the ſaid writs, the ſame exigent, ſo awarded, with the outlawry thereof pronounced, ſhall be void, and holden for none."

2 Hale 195.

Sect. 121. And it is farther enacted by 8 Hen. 6. c. 10. "That upon every indictment or appeal, by the which any ſubject, dwelling in other counties than where ſuch indictments or appeal ſhall be taken, of treaſon, felony, and treſpaſs, before the juſtices of peace, or before any other, having power to take ſuch indictments or appeals, or other commiſſioners or juſtices, in any county, franchiſe, or liberty of England, before any exigent awarded, *preſently* after the firſt writ of *capias* returned, another writ of *capias* ſhall be awarded, directed to the ſheriff of the county, whereof he, who is ſo indicted, is or was ſuppoſed to be converſant by the ſame indictment, returnable before the ſame juſtices, before whom he is indicted, or appealed, at a certain day, containing the ſpace of three months, from the date of the ſaid laſt writ, where the counties be holden from month to month; and where the counties be holden from ſix weeks to ſix weeks, the ſpace of four months, until the day of the return of the ſaid writ; by which writ of ſecond *capias*, the ſheriff ſhall be commanded to take him which is ſo indicted or appealed, by his body, if he can be found within his bailiwick: And if he cannot be found within his bailiwick, to make proclamation in two counties before the return of the ſame writ, that he which is ſo indicted or appealed, ſhall appear before the ſaid juſtices, &c. at the day contained in the ſaid writ, to anſwer, &c. After which writ ſo ſerved and returned, if he which is ſo indicted or appealed, come not at the day of ſuch writ returned, the exigent ſhall be awarded. And that every exigent and outlawry otherwiſe awarded or pronounced, ſhall be holden for none, and void."

Sect.

Sect. 122. But it is expreſsly provided, "That the above-"recited ſtatute, concerning proceſs to be made before the "king in his bench, ſtand in force." And that this preſent ſtatute ſhall not extend to "indictments or appeals taken with-"in the county of Cheſter." And that "if any perſon ſhall be "indicted or appealed of felony or treaſon, and at the time of "the ſame felony or treaſon ſuppoſed, was converſant within "the county, whereof the indictment or appeal makes men-"tion, the like proceſs be made againſt him as was uſed be-"fore."

Sect. 123. And it is farther enacted by 10 Hen. 6. c. 6. "That ſuch ſecond *capias*, as is required by 8 Hen. 6. c. 10. "ſhall be awarded upon indictments or appeals, removed in-"to the king's bench, or elſewhere, by *certiorari* or other-"wiſe."

Sect. 124. It is obſervable that it ſeems to be holden generally in many (*a*) books, That every outlawry whatever, on an indictment or appeal againſt a perſon living in a county different from that wherein the court ſits, is erroneous, if no ſuch *capias*, with a command to the ſheriff to make proclamation, as is given by 8 Hen. 6. were awarded to the ſheriff of the county wherein the party is ſuppoſed to be converſant, before the award of the exigent: And there are (*b*) precedents wherein outlawries in appeals, originally commenced in the king's bench, have been reverſed for want of ſuch a *capias*. Yet it ſeems, That on the other ſide it may be probably argued, That indictments of treaſon or felony, originally commenced in the king's bench, are expreſsly provided for by the (*c*) ſtatute of 6 Hen. 6. which requires, "That a *capias*, having the ſpace of ſix "weeks or more, ſhall be awarded to the ſheriff of the county "whereof the indictee ſhall be named;" and this ſtatute is taken notice of by that of 8 Hen. 6. which expreſsly enacts, "That it "ſhall ſtand in its full force," and therefore cannot well be imagined to intend either to ſuperſede or repeal it. Eſpecially, conſidering that it begins with juſtices of peace, and makes no expreſs mention of the king's bench: And it is a (*d*) general rule, in the conſtruction of ſtatutes, That where things of an inferior degree are firſt mentioned, thoſe of a higher dignity ſhall not be included under ſubſequent general words. Alſo it appears from the preamble of 10 Hen. 6. c. 6. That neither indictments nor appeals, removed into the king's bench by *certiorari*, were within the benefit of 8 Hen. 6. c. 10. before the making of that ſtatute, which expreſsly provides for indictments and appeals ſo removed; and there ſeems at leaſt as good reaſon, that indictments and appeals, originally commenced in the king's bench, ſhall not be taken to be within the benefit of it. To which may be added, That it ſeems to have been admitted in the year-book of (*e*) 31 H. 6. that an appeal, originally commenced in the king's bench, is within the equity of 6 Hen. 6.

(*a*) 1 E. 4. 1. 19 H. 6. 2. S. P. C. 67, 68, 69. Summary 209. F. Proceſs 103. 39 H. 6. 1.

(*b*) Raſtal 304. Vide 19 H. 6. 2. F. Error 26. Raſtal 52.

(*c*) Sup. f. 120. 2 Hale 195.

(*d*) 2 Coke 46.

(*e*) 31 H. 6. 11.

c. 1. and that an outlawry thereon is erroneous if there were no *capias* containing the ſpace of ſix weeks, directed to the ſheriff of the county whereof the appellee is named, as that ſtatute requires; by which it ſeems to be implied, That ſuch an appeal is not within the 8 but the 6 Hen. 6. and that the ſame is ſtill in force.

(a) S. P. C. 68. Summary 209, 210. 2 Hale 196, 197. 19 H. 6. 2. 31 H. 6. 11. F. Corone 19. B. Cin. Ports 22. Sed vide 1 H. 6. 10. (b) Raſtal 52. 1 H. 6. 2. 31 H. 6. 11. Con. S. P. C. 68. F. Proceſs 197. B. Cin. Port 22. (c) 31 H. 6 11. (d) S. P. C. 69.

Sect. 125. It ſeems to have been *(a)* agreed, That by force of theſe ſtatutes, a *capias* ſhall be awarded into a county palatine, where the defendant is named of any place in ſuch county, in any indictment or appeal. And it ſeems, That ſuch *capias* ſhall be directed to, and returned by the *(b)* chancellor of ſuch county. And it hath been (*c*) ſaid, That if he will not return it, the exigent may be awarded as well as if he had returned it; becauſe the court cannot compel him to return it; and the proſecution might be unreaſonably delayed, if the proceedings were to be ſtayed till he ſhould return it. But (*d*) Staundeforde makes a *quære*, Whether the court of king's bench may not enforce a return of the writ?

Vide Cro. Car. 252, 253.

(e) 1 E. 4. 7. F. Proceſs 103. Dyer 214. B. Proclam. 5. S. P. C. 68. (f) Sup. c. 25. ſ. 70. (g) S. P. C. 68. F. Proceſs 192. Crompton 152.

Sect. 126. If a defendant be expreſsly named of the ſame county wherein he is indicted or appealed, and be alſo named under an *alius dictus* of another, it hath been (*e*) adjudged, That there is no need of any *capias*, with a command for proclamation, according to 8 Hen. 6. becauſe that which comes under the *alius dictus* is (*f*) no way traverſable nor material. Alſo if a defendant be named of B. and late of C. there is (*g*) no need of any *capias* to the ſheriff of the county wherein 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. &c. being all of them in counties different from that wherein the proſecution is commenced, a *capias* ſhall go to the ſheriff of (*h*) every one of thoſe counties.

(h) Sum. 210. 2 Hale 196.

(i) 39 H. 6. 1. B. Utl. 34. Error 16. 19 H. 6. 2. F. Error 26. C. Fitz. 179. 3 Coke 59. Plowden 137.

Sect. 127. Notwithſtanding the words are expreſs, That any outlawry pronounced contrary to the directions of the ſtatutes ſhall be void: Yet it ſeems to be agreed, (*i*) That it is not to be taken to be utterly void, but only voidable by writ of error.

None ſhall be outlawed, unleſs he be attainted.

Sect. 128. As to the third point, *viz.* What is particularly required in the award of proceſs of outlawry againſt the principal and acceſſary, it is recited by the ſtatute of Weſtminſter 1. c. 14. "That it had been uſed in ſome counties to outlaw perſons being appealed of commandment, force, aid, or receipt, within the ſame time that he which is appealed for the deed is outlawed:" And thereupon it is provided, "That none be "outlawed upon appeal of commandment, force, aid, or re- "ceipt, unleſs he that is appealed of the deed be attainted: So "that

" that one like law be uſed therein through the realm; ne-
" vertheleſs he that will ſo appeal, ſhall not, by reaſon of this,
" intermit to leave off to commence his appeal to the next
" county againſt them, no more than againſt their principals,
" which be appealed of the deed, but their exigent ſhall re-
" main, until ſuch as be appealed of the deed be attainted by
" outlawry or otherwiſe."

In the conſtruction of this ſtatute, the following particulars ſeem moſt remarkable:—

Sect. 129. Firſt, That it ſeems to be (*a*) agreed, That it extends as well to indictments as to appeals, not only becauſe the word (*b*) appeal in the ſtatute may, in a large ſenſe, be taken for an accuſation in general, but becauſe indictments are certainly as much within the reaſon of the ſtatute, as appeals; and the common law, for the (*c*) ſettling whereof this ſtatute was made, did (*d*) not make any diſtinction in this reſpect between appeals and indictments.

(*a*) Sum. 210. 2 Hale 200. 2 Inſt. 183. S. P. C. 46. 69.
(*b*) 9 Coke 119.
(*c*) S. P. C. 44. 46 69.
(*d*) Bract. 127, 128. Britton f. 5. 2 Inſt. 183.

Sect. 130. Secondly, That it ſeems alſo to be (*e*) agreed, That wherever ſome of the defendants are expreſsly charged as principals, and others as acceſſaries, before the award of this exigent, the outlawry thereon of thoſe charged as acceſſaries, cannot be but reverſable; becauſe it appears upon the record, That the exigent iſſued contrary to the directions of the ſtatute. But if ſeveral be outlawed on a writ of appeal, which (*f*) chargeth them all alike, without any diſtinction, I (*g*) ſee not how any advantage can be taken of the appellant's not having purſued the ſtatute, ſince it appears not but that he might have charged them all as principals.

(*e*) 43 E. 3. 17, 18. 34. 44 Aſſize 16. Raſtal 48.
(*f*) Sum. 210. 2 Hale 200. 2 Inſt. 183. S. P. C. 46. 70. 148.
(*g*) Vide 43 E. 3. 17. 18. 34. 44 Aſſize 16. B. Appeal 7. 79. B. Hale Exig. 44. F. Forfeiture 14.

Sect. 131. Thirdly, That it is holden both by (*h*) Staundforde, (*i*) Coke, and (*k*) Hale, That if an appellant take out the exigent at the ſame time againſt all the defendants, he muſt, when they appear, count againſt them all as principals, and ſhall be concluded to count againſt ſome as principals, and others as acceſſaries, becauſe he has taken out ſuch proceſs againſt them which is erroneous, where all are not principals. But granting that an exigent taken out at the ſame time againſt all the defendants, appear to have been erroneous, when by the declaration it appears that ſome of the defendants are accuſed only as acceſſaries, and therefore ought not to have had an exigent awarded againſt them, till the principal had been attainted: Yet ſeeing this is only an error in the proceſs to bring in the defendant, and all ſuch errors are ſalved by an appearance, as the law ſeems to be now ſettled, and hath been more fully ſhewn, ſections 107, &c. It ſeems (*l*) queſtionable at this day,

(*h*) S. P. C. 46. 70.
(*i*) 2 Inſt. 183.
(*k*) Sum. 210. 2 Hale 200. The principal authorities in the old books for the maintenance of this opinion ſeem to be 7 H. 4. 27. F. Corone 80. 20 E. 3. 7.
(*l*) See 40 Aſſize 25. where it appears that perſons appealed as acceſſaries, and brought in by exigent were ſtill proceeded againſt as acceſſaries. See alſo 43 E. 3. 17, 18. 35. 44 Aſſize 16. B. Appeal 7. B. Exigent 44. F. Forfeiture 14.

Whether an appellant may not be at liberty to declare as he pleaſes againſt defendants appearing on ſuch an exigent? However it is certainly ſafeſt (*a*) and moſt adviſeable for an appellant when he comes to the exigent to ſhew which of the defendants he intends to charge as principals, and which of them acceſſaries, and to take out the exigent againſt the former only, and a *capias* againſt the others.

(*a*) B. Appeal 107. 29 E. 3. 7.

Sect. 132. Fourthly, That it ſeems the better (*b*) opinion, That where there are more than one principal, the exigent ought not to iſſue till all of them are attainted.

(*b*) 2 Inſtitute 383. 1 H. H. P. C. 624. 2 Hale 200, 201.

Plowden 29 *dubitatur* 7 H. 4. 36. B. Appeal 22. contra. F. Exigent 4.

CHAPTER THE TWENTY-EIGHTH.

OF ARRAIGNMENT IN GENERAL.

2 Hale 216 to 225. 4 Comm. 317.

HAVING ſhewn in what manner a perſon under a criminal accuſation is to be brought into court; I ſhall in the next place endeavour to ſhew in what manner he is to be arraigned or put upon his trial.

And this I ſhall conſider, As it relates to all criminals in general; and, As it relates to Principal and Acceſſaries in particular.

(*c*) Sect. 15. (1) The court is not peremptorily bound to ſuſpend the arraignment upon the indictment, but will exerciſe its diſcretion according to the circumſtances of the caſe. 4 Co. 45. b. 47. and by the ſtatute of 3 Hen. 7. c. 1. the juſtices are ordered to proceed to try the priſoner upon an indictment of *murder or manſlaughter*, although the year limited for the appeal is not expired.

As to the Arraignment of all criminals in general. *Having* already ſhewn in the twenty-fifth (*c*) chapter, That regularly the court will not arraign a man upon an indictment while an appeal for the ſame crime is depending againſt him (1); I ſhall here conſider only the following particulars:—1. In what manner a criminal is to be arraigned.—2. Whether the omiſſion of it will be error.—And, 3. Where a perſon ſhall be arraigned upon ſeveral appeals or indictments.

(*d*) 3 Inſt. 34. 2 Inſt. 315. Mirr. c. 5. ſ. 54. (*e*) Bracton 137. p. 3. Britton 14. 17. Fleta, L. 1. c. 31. (*f*) Bracton 137. 3 Inſt. 34, 35. Summary 212. 2 Hale 219. Kelynge 10.

Sect. 1. As to the firſt particular, *viz.* In what manner a criminal is to be arraigned; I ſhall obſerve, Firſt, That every perſon at the time of his arraignment, ought to be uſed with all the (*d*) 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 (*e*) hands tied together, or any other mark of ignominy and reproach: Nor even with fetters on (*f*) his feet, unleſs there be ſome danger

danger of a reſcous or eſcape. It ſeems indeed to have been holden by (*a*) ſome, That this is a particular privilege of perſons in holy orders. But it ſeems the (*b*) better opinion, That the law makes no diſtinction in this reſpect, between them and laymen (2).

(*a*) F. Cor. 432. S. P. C. 133.
(*b*) 3 Inſt. 34, 35. Summary 212. 2 Inſt. 315. Britton 14. 17. Bracton 137. S. P. C. 133. Kelynge 10.

(2) In Layer's caſe, A. D. 1722. a difference was taken between the time of arraignment and the time of trial; and accordingly the priſoner ſtood at the bar in chains during the time of his arraignment. 6 State Trials 230. 4 Comm. 322.

Sect. 2. Secondly, That 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 (*c*) only a ceremony for making known the perſon of the offender to the court; and if he anſwer that he is the ſame perſon, it is all one (3).

(*c*) Agreed by all the judges in the Lord Stafford's caſe. Raymond 408.

(3) This ceremony of holding up the hand is not required in the caſe of a peer. 4 State Trials 211, 508.

Sect. 3. Thirdly, That on every indictment the arraignment muſt be in Engliſh, by virtue of 37 Edw. 3. c. 15. by which it is enacted, "That all pleas which ſhall be pleaded in "any courts whatſoever, before any of the king's juſtices what-"ſoever, or in his other places, or before any of his other "miniſters whatſoever, or in the courts and places of any "other lords whatſoever within the realm, ſhall be pleaded, "ſhewed, defended, anſwered, debated, and judged in the "Engliſh tongue, and entered and inrolled in Latin." But it ſeems to have been always taken, That appeals are not within this ſtatute, but that they are to be arraigned, and the plea of the defendant to be read, in (*d*) French, in the ſame manner as anciently. And thus I have often known it done in my own (*e*) experience; but upon what reaſon this difference between appeals and all other proſecutions is grounded, I have never heard.

(*d*) 1 Sid. 324. 2 Jones 210. C. Eliz. 69. 1 Salkeld 61.
(*e*) As in the caſe of Smith and Bowen, Mich. 7 Ann. And that of Widdrington and Charlton, Trin. 11 Annæ. 10 Modern 86. And that of Reeve and Trundal, Paſ. 3 Geo. 1.

† Now by 4 Geo. 2. c. 26. explained by 6 Geo. 2. c. 6 and 14. "All proceedings whatſoever in any courts of juſtice in "England, and in the court of exchequer in Scotland, which "concern the law and adminiſtration of juſtice, ſhall be in the "Engliſh tongue and language only, and not in Latin or "French, or any other tongue or language whatſoever."

Vide ante, page 341.

Sect. 4. Fourthly, (*f*) That an appeal in the king's bench ought to be arraigned on the plea-ſide, unleſs it come in by *certiorari*, in which caſe it is ſaid, That it ought to be arraigned on the crown-ſide.

(*f*) 2 Jones 210. 1 Siderfin 324. 1 Salkeld 62.

Sect. 5. Fifthly, That where a writ of appeal is abated, the priſoner ſhall not (*g*) be arraigned on the count at the ſuit of the party, becauſe the count depends upon the writ, and that being determined, all (*h*) falls to the ground. Yet it ſeems certain, that if the writ were good, the appellee may in many caſes

(*g*) Style 7.
(*h*) B. App. 42. 4 H. 6. 16. Sup. c. 23, ſ. 10.

be arraigned at the ſuit of the king upon the count, as hath been more fully ſhewn, chapter twenty-three (†).

(†) Sect. 6 to 14.

Sect. 6. As to the ſecond particular, *viz.* Whether the omiſſion of an arraignment will be error: It is ſaid in the third (*a*) Modern Report, That an attainder of high treaſon was reverſed for this *and other errors.* Neither do I find any precedent of an attainder in Coke's Entries, on an indictment of (*b*) treaſon or (*c*) felony, in which it is not expreſſed either in theſe words, *ad barram hic ductus in propria perſona ſua committitur mareſchallo, &c. et ſtatim de præmiſſis* (in caſe of felony) or *de altis proditionibus*, (in caſe of high treaſon) *ei ſuperius impoſitis allocutus qualiter ſe velit inde acquietare dicit*, &c. or in words (*d*) tantamount. And therefore it is certainly ſafeſt to expreſs it in every record of ſuch attainder, where the party appears and is condemned, whether upon confeſſion or verdict, or ſtanding mute, &c. Yet I find it wholly omitted in every attainder upon an (*e*) appeal in Coke's Entries, and much oftener (*f*) omitted than expreſſed (*g*) in ſuch attainders in Raſtal.

(*a*) 3 Mod. 265. Raymond 408. 2 Hale 217, 218.

(*b*) Co. Ent. 360, 361.

(*c*) Co. Ent. 352. 354, 355, 356. 358. 360.

(*d*) Raſtal 42.

(*e*) Co. Ent. 53 to 60.

(*f*) Raſtal 47 to 55. 47. 52.

(*g*) Raſt. 42, 53.

Sect. 7. As to the third particular, *viz.* Where a perſon ſhall be arraigned upon ſeveral appeals or indictments. It ſeems that by the common law, if a man be appealed of divers robberies at the ſuit of divers perſons, he may be ſeverally (*h*) arraigned on each appeal, and then ſeverally tried on each, that each appellant may be equally intitled to the reſtitution of his goods, upon the conviction of the appellee. And in like manner at this day a perſon charged with ſeveral (*i*) indictments of robbery at the proſecution of ſeveral perſons, may be ſeverally arraigned and tried on each indictment; becauſe the proſecutor ſince the ſtatute of 21 Hen. 8. c. 11. is intitled to a reſtitution of his goods upon a conviction on ſuch an indictment, in the ſame manner as the plaintiff is upon a conviction in an appeal. And it is holden both by (*k*) Staundforde and (*l*) Hale, that even a perſon attainted of robbery at the ſuit of one perſon, may be arraigned and tried at the ſuit of another, if ſuch ſuit were commenced before the attainder: But *quære:* For of the authorities cited for the maintenance of this opinion two (*m*) ſeem to be directly againſt it; and the (*n*) other, which ſeems moſt to the point, does not come up to it.

(*h*) 4 E. 4. 17. Summary 212. S. P. C. 66. 107. 160. F. Corone 26, 27.

(*i*) S. P. C. 66. Summary 212. 2 Hale 220.

(*k*) S. P. C. 66.

(*l*) Summary 212. 258.

(*m*) F. Cor. 379. 7 H. 4. 31. Ab. F. Cor. 81.

(*n*) 4 Ed. 4. 11. Ab. F. Corone 26, 27. See 44 E. 4. 44. Ab. F. Co. 95. See alſo c. 23. ſ. 53. and the chapter concerning the plea of Autrefoits convict and attaint.

Sect. 8. It is made a *quære* by (*o*) Staundforde, Whether a priſoner before his attainder ſhall anſwer to divers Appeals of death or rape, in the ſame manner as in caſe of robbery?

(*o*) S. P. C. 66.

CHAP.

CHAPTER THE TWENTY-NINTH.

OF THE ARRAIGNMENT OF THE PRINCIPAL AND ACCESSARY.

AND now I am in the ſecond place to conſider the nature of Arraignment, ſo far as it particularly relates to Principals and Acceſſaries. 1 Hale c. 55 & 56. 4 Comm. c. 3. Foſter diſc. 3.

For the better underſtanding whereof, it may not be improper to conſider, 1. In what caſes, in judgment of law, a man ſhall be ſaid to be a principal, and in what caſes he ſhall be ſaid to be an acceſſary. 2. Where he ſhall be adjudged an acceſſary before. 3. Where an acceſſary after.

Sect. 1. And Firſt, For the better underſtanding in what caſes a man ſhall be ſaid to be a principal, and in what an acceſſary; having premiſed, that where a felony is committed by divers perſons, the (*a*) ſame man may be a Principal and Acceſſary in it, and ſo charged in the (*b*) ſame indictment or appeal; as where A. commands B. to kill C. and afterwards actually joins with him in the fact. And having alſo farther premiſed, that it is agreed by all the books, that the man may be an acceſſary after the fact, by (*c*) receiving one who was an acceſſary before, as well as by receiving a principal; and that there ſeems to be the ſame (*d*) reaſon, that a man may be an acceſſary before the fact, by procuring another to be in ſuch manner an acceſſary to the principal:

(*a*) Sum. 219. 3 Inſt. 139. Keilway 107. F. Corone 80. (*b*) 7 H. 4 27. F. Corone 80. 176. 285. (*c*) Lamb. B. 2. c. 7. f. 291. 26 Aſſize 52. B. Corone 104. F. Corone 196. Crompton 42. S. P. C. 43. (*d*) See the books above cited, and Summary 219.

I ſhall endeavour to ſhew, 1. In what offences there can be no acceſſaries, but all muſt be principals, if any way guilty. 2. Where thoſe who only abet a fact, ſhall be eſteemed as much principals in it as thoſe who actually do it. 3. Where thoſe who are actually abſent when a fact is committed may be eſteemed principals in it. 4. Where one ſhall be adjudged a principal in an offence againſt a ſtatute. 5. Whether the offence of an acceſſary can ever riſe higher than that of the principal.

Sect. 2. As to the firſt particular, *viz.* In what offences there can be no acceſſaries, but all muſt be principals, if any way guilty: It ſeems to have been always an uncontroverted maxim, that there can be no acceſſaries in (*e*) high treaſon, or (*f*) treſpaſs. Alſo it ſeems to have been always agreed, That whatſoever will make a man an acceſſary before in felony, will

Foſter 341. (*e*) 3 Inſt. 20, 21. 138. Dalſon 16. Summary 215 1 Hale 613. 12 Coke 81, 82. 2 Inſt. 183. B Treaſon 19. Dalton c. 108. Coke Litt. 57.

3 H. 7. 10. F. Corone 55. 19 H. 6. 47. S. P. C. 3. 40. B. Cor. 135. Crompton 42. Coke Lit. 57. (*f*) 12 Coke 81, 82. 2 Inſt. 183. B. Rape 3. 1 Hale 613.

(a) 19 H. 6. 47. B. Treaſon 9. F. Corone 8. 3 Inſt. 138. (b) 38 Aſſize Keilway 55. (c) Co. Lit. 57. (d) B. 1. c. 64. ſ. 22. Co. Litt. 57. F. Gard. 99. (e) Moor 666. 1 Siderfin 312.

make him a principal in (a) high treaſon and treſpaſs; as (b) battery, (c) riot, rout, (d) forcible entry, and even in (e) forgery and (f) petit larceny. And therefore, wherever a man commands another to commit a treſpaſs, who afterwards commits it in purſuance of ſuch command, he (g) ſeems by neceſſary conſequence to be as guilty of it, as if he had done it himſelf. From whence it follows, that being, in judgment of law, a principal offender, he may be tried and found (h) guilty before any trial of the perſon who actually did the fact (1).

(f) C. Eliz. 750. 2 Inſt. 183. 12 Coke 81. Con. Summary 223. 1 Hale 616. (g) Moor 787. Summary 217. Plowden 475. Vide inf. ſec. 7. F. Cor. 314. 433. S. P. C. 41. Qu. Moor. 53. (h) B. Treſ. 256. 1 Levinz 124. 29 Aſſize 59. F. Aſſize 291. Con. 27 Aſſize 4. Qu. Vaugh. 115, 116.

(1) This rule requires diſtinction.—In that ſpecies of treaſon touching the death of the king, &c. every *acceſſorial agency* is, independently and in its own nature, a complete overt act of compaſſing; and renders the offender guilty, though the fact itſelf ſhould never be attempted. But in *every* other ſpecies of treaſon, the acceſſorial offence is of a derivative kind; ſome *act* muſt be done, to which act the offender muſt be acceſſary, and out of which his guilt muſt ſpring before he can be converted, by this rule of law, into a principal offender. It ſeems, therefore, that although in the event of the proſecution ſuch an offender may be conſidered as a principal, yet in his progreſs towards conviction he ought, from a principle of natural juſtice, to be conſidered merely *as in the nature of an acceſſary*, before or after the fact; and if under ſuch a conſideration he were tried, before the perſon who *actually did the fact*, the abſurdity might follow, that the acceſſorial agent may be convicted, and the principal who did the act, and on whoſe guilt the offence of the acceſſary muſt alone depend, may be acquitted. Foſter 341 to 347. and 1 Hale 613. 2 Hale 223.

(i) Dyer 296. 12 Coke 81, 82. 3 Inſt. 138. Dalt. c. 89. 108. Crompton 42. 3 H. 7. 10. S. P. C. 3. (k) Sum. 215. 3 Inſt. 138. Dalton c. 108. Crompton 42. Sup. ſ. 2. and B. 1. c. 20. ſ. 3, 4. S. P. C. 3. B. Treaſon 19.

Sect. 3. It was formerly a (i) queſtion, Whether the ſame receipt of an offender, which will make the receiver an acceſſary after the fact in the caſe of felony, will make him a principal in high treaſon, as it ſeems to be (k) ſettled at this day that it will? For if it ſhould be adjudged a miſpriſion only, as (l) ſome have contended, a man would be ſubject to a leſs puniſhment for receiving a traitor than for receiving a felon; for he who receives a felon is certainly liable to judgment of death, as being an acceſſary to the felony, but he who receives a traitor would be liable only to fine and impriſonment, as being guilty of a miſpriſion only.

B. Corone 135. (l) Dyer 296. 21.

(m) C. Eliz. 824. 38 Aſſize 9. B. Diſſeiſ. 98. B. Eject. Cuſtodie 8. B. Treſ. 256. 38 E. 3. 18. Co. Lit. 180. F. Gard 89. (n) Poph. 134. 2 R. Abr. 75.

Sect. 4. It ſeems (m) agreed, That whoſoever agrees to a treſpaſs on lands or goods done to his uſe, thereby becomes a principal in it. But that no one can become a principal in a treſpaſs on the perſon of a man by any ſuch agreement. Alſo it ſeems (n) agreed, That no one ſhall be adjudged a principal in any common treſpaſs, or inferior crime of the like nature, for barely receiving, comforting, and concealing the offender, though he know him to have been guilty, and that there is a warrant out againſt him, which by reaſon of ſuch concealment, cannot be executed. And if he cannot be puniſhed as a principal, it is certain that he cannot be puniſhed as an acceſſary; becauſe in ſuch offences, all who are puniſhed as partakers of the

the guilt of him who did the fact, must be punished as principals in it, or not at all. Yet if a man knowing that there is a warrant against such offender, advise and persuade him to absent himself, (*a*) perhaps he may be indictable for a contempt of the law in hindring the due course of justice.

(*a*) 2 R. Ab. 75.

Sect. 5. It is certain, That in (*b*) petit treason, and also such felony as shall have (*c*) judgment of death, there may be accessaries both before and after the fact, who must be proceeded against as such, and not as principals, as shall be more fully shewn in the following part of this chapter. Also it seems, (*d*) that there may be accessaries before the fact in mayhem, but that the appellant hath his (*e*) election to proceed against them either as principals, or as accessaries.—(*f*) But I find it no where holden, that there can be accessaries in mayhem after the fact.

(*b*) Dalis. 16. 3 Inst. 20, 21. Crompton 42. S. P. C. 40. B. 1. c. 32. s. 5. 6.

(*c*) 12 Co. 81, 82. C. Eliz. 700. 2 Inst. 183.

(*d*) See the citations to the next letter. Co. B. Appeal 154. (*e*) Sup. c. 23. s. 19. 22 Assize 82. F. Corone 11. 182. 215. 221. B. Appeal 71. 154. (*f*) Sup. s. 4. 1 Hale 613. Con. 40 Assize 1.

Sect. 6. I do not find it agreed, (*g*) Whether there can be any accessaries in *præmunire*?

(*g*) S. P. C. 44. Dalton c. 108. B. Præm. 4. 6. Plowden 97. 1 Hale 613.

Sect. 7. As to the second particular, *viz.* Where those who only abet a fact, shall be esteemed as much principals in it as those who actually do it: It seems to have been (*h*) anciently the more prevailing opinion, that those only were to be adjudged principals in felony who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c. and that those in the company who were only present and abetted and encouraged the doing it, were to be esteemed accessaries; or at most principals in the (*i*) second degree only.—But I take it to be settled at this day, that all those who (*k*) assemble themselves together with a felonious intent, the execution whereof causes either the felony intended, or any other to be committed, or with an intent to commit a (*l*) trespass, the execution whereof causes a felony to be committed, and continuing together abetting one another till they have actually put their design in execution; and also all those who are (*m*) present when a felony is committed, and abet the doing of it as by holding the (*n*) party while another strikes him; or by (*o*) delivering a weapon to him that strikes, or by moving (*p*) him to strike, are principals in the highest (*q*) degree, in respect of such abetment, as much

(*b*) Plowden 99. F. Corone 90. 216. 40. Assize 8 & 25. B. Corone 11. 40 E. 3. 42. 22. S. P. C. 48. 41. 44 E. 3. 38. See Bract. B. 3. c. 12. s. 10, 11. 13. C. 19. s. 11. C. 21. s. 8. 10, 11. Lamb. B. 2. c. 7. f. 283. Stat. of West. 1. c. 14. Con. F. Cor. 433.

(*i*) Plowden 97. Foster 347.

(*k*) 11 H. 4. 13. F. Cor. 86. 228. B. Appeal 32. Moor 53. 9 Coke 67. Kelynge 47. Plowden 98. 4 Coke 42. See the cases

cited to the other parts of this and the next section, and B. 1. c. 31. s. 31. c. 32. s. 5. and c. 41. s. 6.

(*l*) B. 1. c. 31. s. 46. Summary 216, 217. F. Corone 60. 314. 350. 433. B. Corone 172. Kellw. 161. Kelynge 47. Salkeld 334. S. P. C. 40.

(*m*) See B. 1. c. 32. s. 6. Moor 53. 2 Institute 182. 3 Institute 138. 59. B. Appeal 19 132. B. Cor. 19. 167. 188. S. P. C. 40. 41. 10 E. 4. 14. Summary 215, 216. F. Cor. 99. 309. 433. Dalton c. 108. Lamb. B. 2. c. 7. f. 283. 7 H. 4. 27. Presence holden not to be necessary for this purpose. F. Cor. 60. 4 H. 7. 18.

(*n*) Summary 216. F. Cor. 135. S. P. C. 40. 13 H. 7. 10.

(*o*) Summary 216. 2 Inst. 41. 82.

(*p*) F. Corone 60. S. P. C. 40. Summary 216. 4 H. 7. 18. B. Corone 141. B. Appeal 85.

(*q*) Summary 215, 216. Plowden 98. Sup. c. 23. s. 76. c. 25. s. 64.

as the perſon who does the fact, which in judgment of law is as (a) much the act of them all, as if they had all actually done it; (b) and if there were malice in the abettor, and none in the perſon who ſtruck the party, it will be murder as to the abettor, and manſlaughter only as to the other.

(a) Plowden 98. 100. F. Corone 60. B. Corone 141. B. Appeal 85. 4 H. 7. 18. 9 Coke 67.

(b) B. 1. c. 31. ſ. 49. 54.

Sect. 8. It doth not ſeem neceſſary to the making an abettor a principal, that the perſon on whom the felony is committed ſhould be under any (c) terror from the abetment, and by reaſon thereof diſcouraged from making that defence which otherwiſe he might have made. But it ſeems to be ſufficient for this purpoſe, that the perſon who does the fact is encouraged and emboldened in it from the hopes of preſent and immediate aſſiſtance from the abettor, whether he be within view of the fact, or (d) not. And upon this ground it hath been adjudged, (e) That where perſons combined together, to ſtand by one another in the breach of the peace, with a general reſolution to reſiſt all oppoſers, and in the execution of their deſign a murder is committed, all of the company are equally principals, though at the time of the fact ſome of them were at ſuch a diſtance as to be out of view. Alſo upon the ſame reaſon it hath been adjudged, (f) That where a company of rogues aſſault a man in the highway, who eſcapes from them, and then one of them rides from the reſt, in the ſame highway, and robs another out of the view of his companions, and then returns to them, they are all of them equally principals. And the like hath been (g) adjudged in relation to all thoſe who accompany one another with an intent to commit a burglary, in the execution whereof ſome ſtand to watch only in the adjacent places, and the reſt actually break, and enter the houſe.

(c) But this ſeems required in Plowden 98.

(d) F. Cor. 60. Summary 216. 217. 4 H. 7. 18. Salkeld 334, 335. B. 1. c. 35. ſ. 7. and c. 38. ſ. 8.

(e) See B. 1. c. 31. ſ. 46. Summary 216, 217. B. Corone 172. Salkeld 334, 335. Keilway 161. F. Corone 60. 314. 350. 433. S. P. C. 40. Vide Kelynge 47.

(f) B. 1. c. 34. ſ. 7. Moor 53. S. P. C. 40.

(g) B. 1. c. 38. ſ. 8, 9. 11 H. 4. 13. 30. Moor 53.

Sect. 9. But (h) where divers perſons accompany one another in the doing of a lawful act, and one of them happens to kill a man, he that gives the wound is only guilty of the homicide, and the reſt of the company ſhall neither be eſteemed principals nor acceſſaries. (i) Alſo if the act intended, though unlawful, were a bare treſpaſs, and one of the company be guilty of larceny, it is a felony in ſuch offender only, becauſe it is a crime of a nature entirely different from that intended, and not cauſed by the execution of it.

(h) Keil. 161.

(i) Kelynge 47.

Sect. 10. Alſo thoſe who by accident are barely preſent when a felony is committed, and are merely paſſive, and neither any way encourage it, nor endeavour to hinder it, nor to apprehend the offenders, ſhall (k) neither be adjudged principals nor acceſſaries; (l) yet if they be of full age, they are highly puniſhable by fine and impriſonment for their negligence, both in not endeavouring to (m) prevent the felony, and in not

(k) S. P. C. 40. Summary 216. F. Corone 92. 197. 395. B. Indict. 5. 14 H. 7. 31. Con. F. Corone 314. 197. Lamb. B. 2. ch. 7. f. 289. Vide ſup. c. 23. ſ. 66.

(l) S. P. C. 40. F. Corone 395.

(m) Noy 50. Dalton c. 108.

endeavour-

endeavouring (*a*) to apprehend the offender. And (*b*) if they any way ſhewed an aſſent to the felony, it ſeems, that they may be puniſhed as principals in it; becauſe the ſhewing ſuch an aſſent could not but give encouragement to it.

(*a*) Sup. c. 12. ſect. 1, 2, 3, 4.
(*b*) Vide infra ſect. 15. S. P. C. 40. Summary 217. Crown, B. 1. c.

F. Corone 150. Dalton c. 108. Lamb. B. 2. c. 7. f. 282. My pleas of the 20. ſect. 3. But F. Corone 92. and Cromp. 41. ſeem contrary.

Sect. 11. As to the third particular, *viz.* Where thoſe who are actually abſent when a felony is committed may be eſteemed principals in it: I take it to be a ſettled rule, That where-ever a man procures a felony to be committed, and is abſent at the time when it is committed, and no other perſon but himſelf can be adjudged a principal in it, he ſhall be eſteemed as much a principal as if he had been preſent. For no one can be (*c*) puniſhed as a felon, but either as a principal or as an acceſſary; and therefore where the procurer of a felony cannot be puniſhed as an acceſſary, becauſe there is no other to whom he can be an acceſſary, he muſt be puniſhed as a principal, or not at all. And upon this ground, it ſeems to be clear, that if a man (*d*) perſuade another to drink a poiſonous liquor, under the notion of a medicine, who afterwards drinks it in his abſence; (*e*) or if A. intending to poiſon B. put poiſon into a thing and deliver it to C. who knows nothing of the matter, to be by him delivered to B. and C. innocently deliver it accordingly in the abſence of A. or if one (*f*) incite a madman to kill another, who afterwards kills him in the abſence of the perſon that incited him; in all theſe and the like caſes, the procurer of the felony is as much a principal as if he had been preſent when it was done. And ſo (*g*) likewiſe all thoſe ſeem to be, who were preſent when the poiſon was infuſed, and privy to, and conſenting to the deſign. But (*h*) thoſe who only abetted the crime by their command, counſel, or advice, but were abſent when the poiſon was infuſed, are acceſſaries and not principals. Alſo if A. intending to poiſon B. deliver a poiſonous thing to C. to be by him delivered to B. and C. knowing it to be poiſoned deliver it to B. in the abſence of A. In this caſe C. (*i*) only is a principal in the felony, and A. an acceſſary.

(*c*) 4 Coke 44. Pulton 122.
(*d*) 4 Co. 44. 2 Inſt. 183. Cromp. 44. Summary 216. 2 Hale 435. 615, 616. Pulton 122. Dalton c. 108. 9 Coke 81. 3 Inſt. 138.
(*e*) Sum. 218. 9 Coke 81. Kelynge 52, 53.
(*f*) See B. 1. c. 1. ſect. 7. 1 Hale 617.
(*g*) Sum. 216.
(*h*) 4 Coke 44. Crompton 44.
(*i*) Kely. 52, 53. Foſter 349.

Sect. 12. By force of 3 Hen. 7. c. 2. All thoſe who are acceſſaries before to the forcible taking away of a woman, made felony by that ſtatute, whether they were preſent or abſent at the time of the taking, or acceſſaries after, by wittingly receiving the woman ſo taken away, ſhall be puniſhed as (*k*) principals. But this depends on the expreſs words of the ſtatute, and not on any conſtruction from the reaſon of the common law.

(*k*) See B. 1. c. 42. ſect. 8, 9. and Sum. 217. 1 Hale 614.

Sect. 13. As to the fourth particular, *viz.* Where a man ſhall be adjudged a principal in an offence againſt a ſtatute. It ſeems to have been always generally agreed, That notwithſtanding

(a) S. P. C. 44. 19 H. 6. 47. 3 Inſt. 45. 59. 72. B. 1. c. 40. ſect. 4 Crompton 42. Dalton c. 108. Lamb. B. 2. c. 7. f. 286. Daliſon 11. 22. Summary 215. 1 Hale 613. Qu. Dyer 88. Daliſon 11. Summary 223. 2d Edit.

ſtanding all penal ſtatutes are to be conſtrued ſtrictly (a); yet where-ever a ſtatute ordains, That thoſe who are guilty of the thing prohibited by it, ſhall be adjudged traitors or felons, it by a neceſſary implication makes all the procurers and abettors of it principals or acceſſaries before, upon the ſame circumſtances which will make them ſuch in a treaſon or felony at common law; becauſe ſuch perſons may properly be ſaid to have done the thing in ſuch a manner cauſed by them, and conſequently to come within the very words of the ſtatute. And therefore it ſeems to have been generally unqueſtionable, That thoſe who procure the (b) clipping of the king's coin, or other offence, made high treaſon by ſtatute, in ſuch a manner as will make them principal traitors in a treaſon at common law, ſhall be adjudged principal traitors by the ſtatute. And that thoſe who abet a (c) petit treaſon, or a felony by ſtatute; as a (d) rape, or (e) buggery, &c. ſhall be adjudged principals if preſent when it was committed, and acceſſaries if abſent, in the ſame manner as in felonies at common law, unleſs the ſtatute expreſsly provide otherwiſe; as that of 3 Hen. 7. c. 2. does, as hath been ſhewn in the foregoing ſection.

(b) Sup. ſect. 2. B. 1. c. 17. f. 55. 19 H. 7. 47. S. P. C. 3. Summary 18.

(c) B. 1. c. 32. ſect. 5, 6.

(d) Sum. 187. 215. B. 1. c. 41. f. 6. S. P. C. 44. Summary 215.

11 H. 4. 13. Daliſon 22. F. Corone 86. 228. B. Rape 2, 3. (e) 3 Inſt. 59. B. 1. c. 38. ſect. 18. Vide Foſter 355, 356.

(f) S. P. C. 44. ſup. ſect. 3.

Sect. 14. But there (f) ſeems to have been formerly ſome opinions, That the receivers of a felon by ſtatute, ſhall not be adjudged acceſſaries to the felony after the fact, in the ſame manner as the receivers of a felon at common law; becauſe ſuch perſons can in no propriety of ſpeech be ſaid to have done the thing prohibited, as the procurers of it may be ſaid to have done. But this ſeems (g) to have been more ſtrongly holden in reſpect of thoſe ſtatutes, which expreſsly provide that acceſſaries before to the offence prohibited, ſhall be puniſhed as felons, &c. but ſay nothing of acceſſaries after; from which words it may be argued, That they muſt be either intended to exclude acceſſaries after the fact, or have no manner of effect. Yet I take it to be ſettled at this day, That in theſe and all other caſes, where a ſtatute makes any offence (h) treaſon or (i) felony, it involves the receiver of the offender in the ſame guilt with himſelf, in the ſame manner as in treaſon or felony at common law, unleſs there be an expreſs proviſion to the contrary. For ſince it is agreed, That ſuch new treaſon or felony ſhall have the ſame conſtruction with a treaſon or felony at common law to all other (k) intents and purpoſes, Why ſhould it not alſo have the ſame in relation to thoſe who are to be eſteemed principals and acceſſaries in it? And as to the objection, That the receivers of the offender cannot thereby be ſo properly ſaid to have done the offence, as the acceſſaries before, it may be anſwered, That they may properly enough be ſaid to be partakers in the guilt of the offender; and what crime ſuch a partaking ſhall be adjudged to amount to, is moſt reaſonably determined by the

(g) S. P. C. 44. Lamb. B. 2. c. 7. f. 284. 1 Hale 614.

(h) Sup. ſect. 3. B. Treaſon 19. S. P. C. 3. 3 H. 7. 10.

(i) Sum. 215. Daliſon 22. Lamb. B. 2. c. 7. f. 284, 285. 3 Inſt. 45. 51. 72, 73.

(k) See B. 1. c. 40. ſect. 4. Sup. c. 18. ſect. 13. S. P. C. 168. Summary 230, 231.

the rules of law in other caſes of like nature. And as to the objection, That a ſtatute by expreſſing acceſſaries before, muſt be intended to exclude acceſſaries after, or to have no manner of effect, it may be anſwered, That nothing is more common than for ſtatutes to expreſs thoſe things which the law would have implied, in which caſes it ſeems a very reaſonable conſtruction, That *expreſſio eorum quæ tacite inſunt nihil operatur.*

Sect. 15. As to the fifth particular, *viz.* Whether the offence of the acceſſary can ever riſe higher than that of the principal: I take it to be an uncontroverted (*a*) rule, That it never ſhall: it ſeeming incongruous and abſurd that he who is puniſhed only as a partaker of the guilt of another, ſhould be adjudged guilty of a higher crime than the other. And therefore it ſeems clear, (*b*) That if a wife or ſervant cauſe a ſtranger to murder the huſband or maſter, and are abſent when the murder is committed, they cannot be ſaid to be acceſſaries to petit treaſon, but to murder only, becauſe the offence of the principal is but murder. But if ſuch wife or ſervant had been (*c*) preſent when the murder was committed, they would have been guilty of petit treaſon, and the ſtranger of murder; becauſe in reſpect of ſuch (*d*) preſence they would have been principals in killing, as hath been more fully ſhewn, Book the firſt, in the chapter of Petit Treaſon, ſection the ſixth.

(*a*) 3 Inſt. 20. 139. Summary 215. B. Corone 119. Vide Keil. 34. and inf. f. 21, 22.
(*b*) 3 Inſt. 20. Daliſon 16. Dyer 254. 3. 332. 128. Summary 24, 25. 215. Crompton 19. B. Corone 119. But 40 Aſſize 25. whereof this note in Brook is an abridgement, ſeems contrary. See alſo F. Corone 216. which is an abridgement of the ſame caſe. (*c*) 3 Inſt. 20. Summary 24, 25. 1 Hale 615. Dyer 128. 254. 332. Crompton 19. Moor 91. Daliſon 16. (*d*) Vide Sup. f. 7.

Sect. 16. As to the ſecond point, *viz.* In what caſe a man ſhall be adjudged an acceſſary before: It ſeems to be (*e*) agreed, that thoſe who by hire, command, counſel or conſpiracy; and it ſeems to be generally (*f*) holden, That thoſe who by ſhewing an expreſs liking, approbation, or aſſent to another's felonious deſign of committing a felony, abet and encourage him to commit it, but are ſo far (*g*) abſent when he actually commits it, that he could not be encouraged by the hopes of any immediate help or aſſiſtance from them, are all of them acceſſaries before the fact, both to the felony intended, and to all other felonies which ſhall happen in and by the execution of it, if they do not (*h*) expreſsly retract and countermand their encouragement, before it is actually committed.

(*e*) 2 Inſt. 182. Dalton c. 108. Lamb. B. 2. c. 7. S. P. C. 40. Crompton 41. Summary 217.
(*f*) 2 Inſt. 182. Dalton c. 108. Lamb. B. 2. c. 7. Plowden 475. Con. Cromp. 41.
(*g*) Vide Sup. f. 7, 8. S. P. C. 40. B. Appeal 19. B. Corone 188.
(*h*) 3 Inſt. 51. Crompton 42. Foſter 354. Summary 217, 218. Lamb. B. 2. c. 7. f. 289. Dalton c. 108. 1 Hale 537. Plowden 475, 476.

Sect. 17. But it doth not ſeem neceſſary in any indictment or appeal againſt a man as acceſſary before the fact, to ſet forth the ſpecial manner by which he abetted it, but only to charge him (*i*) generally, *Quod felonice, &c. abbettavit, incitavit & procuravit, &c.* Alſo the like general way of ſetting forth the aid given to a felon, ſeems to be ſufficient both as to thoſe who are

(*i*) Co. Ent. 56, 57. Raſtal 51. F. Corone 433. ſeems ſomewhat contrary.

are (*a*) principals by being preſent when the felony is committed, and alſo as to thoſe who are (*b*) acceſſaries after.

(*a*) 4 Coke 41. Coke Ent. 57. (*b*) Co. Ent. 56. Raſtal 48. 52.

Sect. 18. It cannot be doubted, but that if a man 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 (*c*) acceſſary to the murder, though at the time of the advice, the (*d*) 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. Alſo it ſeems (*e*) agreed, That if I command another to beat a man, and he beat him in ſuch a manner that he dies thereof, I am an acceſſary before to the felony; (*f*) becauſe it happened in the execution of a command, which naturally tended to endanger the life of the other. And (*g*) *a fortiori* therefore it follows, That if a man commands another to rob a man, and he in robbing him kill him; or to burn the houſe of J. S. and he by burning it, burn alſo the houſe of J. N. the commander is as much an acceſſary to the ſubſequent felony as to that which was directly commanded. Alſo it is ſaid, (*h*) That if I command a man to rob another, and he kill him in the attempt, but do not rob him, I am guilty of the murder, becauſe it was the direct and immediate effect of an act done in execution of my command to commit a felony. But if I perſuade A. to poiſon B. and A. accordingly give poiſon to B. who eats part of it, and gives the reſt to C. who is killed by it, I am guilty of a great miſdemeanor only in reſpect of C. but not (*i*) an acceſſary to his murder, becauſe it was not the direct and immediate effect of the act done in purſuance of my command, but happened accidentally through the act of B. to which I being no way privy, cannot be made acceſſary by reaſon of it. Yet in this caſe A. is certainly guilty of the murder of C. as hath been more fully ſhewn, Book the firſt (†).

(*c*) Dyer 186. 3 Inſt. 51. Dalton c. 108. Lamb. B. 2. c. 7. Crompton 41. 1 Hale 617. (*d*) See B. 1. c. 3. ſ. 16, 17. (*e*) Sum. 217. Plowden 475. Lamb. B. 2. c. 7. Plowden 475. 1 Hale 617. (*f*) S. P. C. 41. F. Coron. 314.

Vide Plow. 475. Dalton c. 108. Crompton 43. (*g*) Plow. 475.

(*h*) Plow. 475. Dalton c. 108. Lamb. B. 2. ſ. 286. Crompton 42.

(*i*) Plowden 474, 475. Dalton c. 108. Lamb. B. 2. c. 7. ſ. 288. Crompton 42.

(†) Ch. 31. ſ. 42.

Sect. 19. It ſeems to be holden generally in ſome (*k*) books, That where-ever a felony enſues, and follows upon any unlawful act commanded by another, and executed in the ſame manner as it was commanded, the commander is an acceſſary to the felony. But this (*l*) ſeems to be too large a rule, and liable to great difficulties, unleſs limited by ſome diſtinctions.—But finding little in the books concerning this matter, I ſhall leave it to be farther conſidered by others.

(*k*) Plow. 475. Moor 487. Dalton c. 108. 3 Inſt. 51. (*l*) S. P. C. 41. F. Corone 314. Dalton c. 108. Moor 53. Foſter 369.

Sect. 20. It ſeems to be (*m*) agreed, That if the felony committed be the ſame in ſubſtance with that which was intended, and variant only in ſome circumſtance, as in reſpect of the time or place, at which, or the mean whereby it was effected, the abettor of the intent is altogether as much an acceſſary as if there had been no variance at all between it and the execution of it; as where a man adviſes another to kill ſuch an

(*m*) Plow. 475. Summary 217. 1 Hale 617. Lamb. B. 2. c. 7. ſ. 287. 3 Inſt. 51. Crompton 42. Dalton c. 108. Foſter 370.

one

one in the night, and he kills him in the day, or to kill him in the fields, and he kills him in the town, or to poiſon him, and he ſtabs or ſhoots him.

Sect. 21. But if a man command another to commit a felony on a particular perſon or thing, and he do it on (*a*) another; as to kill A. and he kill B. or to burn the houſe of A. and he burn the houſe of B. or to ſteal an ox, and he ſteal an horſe; or to ſteal ſuch an horſe, and he ſteal another; or to commit a felony of one kind, and he commit another (*b*) of a quite different nature; as to rob J. S. of his plate as he is going to market, and he break open his houſe in the night, and there ſteal the plate; it is ſaid, That the commander is not an acceſſary, becauſe the act done varies in ſubſtance from that which was commanded.

(*a*) Sum. 217. 1 Hale 617. Plowden 475. Dalton c. 108. Lamb. B. 2. c. 7. f. 287. Crompton 42.

(*b*) Plow. 475. 3 Inſt. 51. Dalton c. 108. Lamb. B. 2. c. 7. f. 287, 288. Crompton 42. Vide Foſter 370, 371.

Sect. 22. But it is obſervable, That (*c*) Plowden, in his report of Saunder's caſe, which ſeems to be the chief foundation of what is ſaid by others concerning theſe points, in putting the caſe of a command to burn the houſe of A. which ſhall not make the commander an acceſſary to the burning the houſe of B. unleſs it were cauſed by burning that of A. ſtates in this (*d*) manner, *If I command a man to burn the houſe of ſuch an one, which he well knows, and he burn the houſe of another, there I ſhall not be acceſſary, becauſe it is another diſtinct thing, to which I did not give aſſent, &c.* By which it ſeems to be implied, That it is a neceſſary ingredient in ſuch a caſe to make B. no acceſſary, that he knew the houſe which he was commanded to burn; for if he did not know it, but miſtook another for it, and intending only to burn the houſe which he was commanded to burn, happen by ſuch miſtake to burn the other, it may probably be argued, That the commander ought to be eſteemed an acceſſary to ſuch burning, becauſe it was the direct and immediate effect of an act wholly influenced by his command, and intended to have purſued it.

(*c*) Plow. 475.

(*d*) But this caſe is not ſtated in this manner, either by Lambard, Dalton, or Crompton. See Lamb. 2. c. 7. f. 287. Dalton c. 108. Crompton 42. Vide Foſter 371, 372. for ſeveral obſervations upon this caſe.

Sect. 23. It ſeems to be generally agreed, (*e*) That he who barely conceals a felony, which he knows to be intended, is guilty only of a miſpriſion (*f*) of felony, and ſhall not be adjudged an acceſſary.

(*e*) Lamb. B. 2. c. 8. f. 289. Moor 8. S. P. C. 37. Sum. 129. 219. 3 Inſt. 139. 142. 2 Inſt. 183.

(*f*) See B. 1. c. 59. But this is made a quære by Dalton c. 108.

Sect. 24. It ſeems to be certain, That no one can be any (*g*) way puniſhed as an acceſſary to homicide *per infortunium*, or *ſe defendendo*, becauſe they are not felonies; from whence it follows, That if he who is indicted or appealed, as a principal in murder, be found guilty of ſuch homicide only, thoſe who are only charged as his acceſſaries before or after, ſhall be diſcharged. (*h*) And ſo alſo ſhall thoſe who are charged only as acceſſaries before, where the principal is found guilty of manſlaughter;

(*g*) F. Cor. 116, 172. B. Cor. 33. 80. 15 Aſſize 7. 11 H. 4. 93. Crompton 43. B. Forf. 13. 1 Hale 615, 616.

(*h*) 4 Coke 43. 44. Summary 217. See B. 1. c. 30.

1 Hale 615, 616. Moor 461. C. Eliz. 540. Crompton 43. Dalton c. 108.

ſlaughter; becauſe that neceſſarily ſuppoſes the fact to have happened on a ſudden; for if it had been done upon premeditation, it would have been murder.

(a) Vide Crom. 44. 3 Inſt. 55. Moor 461. C. Eliz. 540 Vide Foſter 363.

And *quære*, If they who are charged as acceſſaries (a) after, ſhould not alſo be diſcharged at common law, where the principal was found guilty of manſlaughter, and admitted to the benefit of his clergy, becauſe in ſuch caſe it could not appear by any judgment that there was a principal; but the law in this reſpect ſeems to be altered by 1 Annæ, c. 9. ſet forth more at large in the following part of this chapter, which makes a conviction equivalent as to this purpoſe to an attainder.

Sect. 25. Before the ſtatute of 11 & 12 Will. 3. acceſſaries to piracy were not within the purview of 28 Hen. 8. by which piracy is triable according to the courſe of the common law. But for this I ſhall refer the reader to book the firſt, chapter the thirty-ſeventh.

As to the third point, *viz.* In what caſes a man ſhall be adjudged an acceſſary after: I ſhall endeavour to ſhew, 1. What kind of receipt of a felon will make the receiver ſuch an acceſſary. 2. Whether it be neceſſary that ſuch receiver know of the felony. 3. Where the receivers of a felon ſhall be excuſed in reſpect of the relation they bear to him. 4. How far the felony muſt be complete at the time of the receipt, to make the receiver an acceſſary.

(b) 2 Inſt. 183. S. P. C. 41. Dalton c. 108. Lamb. B. 2. c. 7. f. 289, &c. Summary 218. 1 Hale 618. Dalton c. 108. Crompton 43. (c) Sum. 218. Dalton c. 108. Crompton 43. (d) Dalt. c. 108. F. Corone 427. Lamb. B. 2. c. 7. f. 291. S. P. C. 43. Crompton 42. (e) 26 Aſſize 47.

Sect. 26. As to the firſt particular, *viz.* What kind of receipt of a felon will make the receiver an acceſſary after the fact: It ſeems agreed, (b) That 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 a ſufficient receipt for this purpoſe; as where one aſſiſts him with a (c) horſe to ride away with, or with money or victuals to ſupport him in his eſcape; or where one harbours and (d) conceals in his houſe a felon under purſuit, by reaſon whereof the purſuers cannot find him; and much more, where one harbours in his houſe, and openly (e) protects ſuch a felon, by reaſon whereof the purſuers dare not take him.

Adj. B. Cor. 130. F. Corone 195.

(f) Sup. c. 21. ſect. 7, 8. F. Cor. 158. 433. Summary 116. Contra. F. Corone 48. S. P. C. 43. Dalton c. 108. and c. 37. ſect. 1,

Sect. 27. Alſo I take it to be ſettled at this day, That whoever (f) reſcues a felon from an arreſt for the felony, or voluntarily (g) ſuffers him to eſcape, is an acceſſary to the felony: (h) Alſo ſome have ſaid, That all thoſe are in like manner guilty who oppoſe the apprehending of a felon. But for theſe

1 H. 7. 6. B. Corone 130. (g) Sup. c. 19. ſect. 10. 22. 26. (h) Sup. ſect. 10.

matters I ſhall refer the reader to the former part of this book, wherein they are more fully handled.

Sect. 28. It ſeems to be holden both by (*a*) Brooke and (*b*) Staundforde, That the bare receiving into one's houſe a perſon known to be a felon, is ſufficient without any farther circumſtances to make a man an acceſſary to the felony. And this ſeems to be favoured by the year-books of (*c*) 25 Edw. 3. and (*d*) 7 Hen. 6. Alſo it ſeems to be holden both by (*e*) Staundforde and (*f*) Dalton, That not only ſuch a receipt of ſuch a felon into one's houſe, but any other favour or aid voluntarily afforded him, as by relieving him with money, meat, or drink, is ſufficient for this purpoſe. But it is obſervable, That the caſe in the book of (*g*) aſſiſes, whereon Dalton ſeems chiefly to ground his opinion, and which is more accurate than any other year-book I met with on this ſubject, is of one who was indicted for having received a felon, and for that no one by reaſon of him dared to take him: Whereupon it is ſaid by Shard, *If one receive a felon in favour and aid of the felony, I hold ſuch a one an acceſſary to the felony.* Alſo it is farther obſervable, That the year-book of 9 (*h*) H. 4. on which the above-mentioned opinion of Brook ſeems to be grounded, ſeems to prove only that every receiver of a felon, knowing him to be ſuch, is indictable, but not that he is indictable for felony; and the chief purport of the caſe is to ſhew, That one who having a felon in his houſe, voluntarily ſuffers him to go at large, is not guilty of a felonious eſcape, unleſs he had arreſted him. To which may be added, that (*i*) Lambard doth not ſay generally, That all thoſe who receive a felon, knowing him to be ſuch, are acceſſaries after; but all thoſe who felonioufly, and with an evil mind receive a felon, &c. And Sir Edward Coke, in his (*k*) ſecond inſtitute, deſcribes ſuch acceſſaries as thoſe who knowing a felony receive the felon, and not only conceal his offence, but favour and aid him, that he be not known. And in his (*l*) third inſtitute he ſaith, *If one receive a thief, and aid and maintain him in his felony, he is an acceſſary*; by which expreſſions it ſeems to be implied, That there ought to be ſome other circumſtance beſides that of the bare ſuffering of a perſon known to be a felon to be in one's houſe, to make a man an acceſſary.

(*a*) B. Eſcape 43.
(*b*) S. P. C. 41.
(*c*) 25 E. 3. 39. Ab. F. Cor. 26.
(*d*) 7 H. 6. 42. Ab. B. Indict. 4. F. Indict. 11.
(*e*) S. P. C. 47.
(*f*) Dalt. c. 108. See alſo Crom. 42.
(*g*) 26 Aſſize 47. Ab. B. Cor. 103. F. Corone 195.
(*h*) 9 H. 4. 1. Ab. F. Cor. 76. B. Corone 26. B. Eſcape 43.
(*i*) Lamb. B. 2. f. 289.
(*k*) Page 183.
(*l*) Page 134. F. Cor. 427. 1 Hale 619.

Sect. 29. However, it ſeems to be (*m*) agreed, That no one ſhall be adjudged an acceſſary to a felony for receiving into his houſe a perſon under bail for ſuch crime, or for relieving with money or victuals a perſon ſo bailed, or in priſon; and the reaſon given by (*n*) Dalton is, becauſe the felony cannot be concealed, nor the trial hindered by it. And if this be a ſufficient reaſon, Why may not any other receipt or relief of a felon, whereby the felony is not concealed, nor the trial, &c. hindered,

(*m*) Sum. 218. 1 Hale 620, 621. Dalton c. 108. Crompton 42.
(*n*) Dalt. c. 108. Crompton 42. Lamb. B. 2. f. 209. are to the ſame purpoſe.

(a) 26 Aſſize 47. B. Corone 103. F. Corone 195. S. P. C. 41. Summary 219. 1 Hale 621. 3 Inſt. 139. Lamb. b. 2. f. 289, 290.

hindered, come under the like rule? as it ſeems (a) agreed, That the ſending a letter to procure the deliverance of a felon, or the inſtructing him to (b) read, in order to entitle him to the benefit of clergy, ſhall do; and even the (c) adviſing his friends to perſuade witneſſes not to come againſt him at his trial; and alſo the (d) labouring of witneſſes in purſuance of ſuch advice. And yet the two laſt of theſe practices are certainly very highly criminal; and though they do not tend totally to prevent the trial, yet are the moſt likely means to make it fruitleſs and ineffectual. Alſo it ſeems to be agreed, That the ſuffering a felon to eſcape (e) without arreſting him, (f) or the bare concealment of a felony, though they are crimes of a very high nature, do not make a man an acceſſary.

(b) 3 Inſt. 139. Summary 219. 1 Hale 621.
(c) 3 Inſt. 139.
(d) 3 Inſt. 139.
(e) Sum. 219. 1 Hale 618. Sup. ſect. 10. 27.
Moor 8.
(f) Sup. ſect. 10. 27. B. 1. c. 59.

(g) Aleyn 57. Style 91. C. Eliz. 888. Yelverton 4, 5. Lamb. 290, 291. 1 R. Abr. 68. Summary 218. 1 Hale 619, 620. 25 E. 3. 39. Ab. F. Cor. 126. 27 Aſſize 69. Ab. F. Cor. 208. B. Cor. 114. Con. Cromp. 42, 43. 39. It is made a Qu. Crom. 42. and S. P. C. 43.

Sect. 30. Alſo I take it to have been generally agreed, before the ſtatute of 3 & 4 Will. & Mar. c. 9. That neither the receiving of (g) other men's goods, known to have been ſtolen, nor the taking of one's (h) own goods again, from one that had ſtolen them, on an agreement not to proſecute him, nor the taking of any other (i) reward on ſuch an agreement, did make a man an acceſſary to the felony, unleſs he alſo had *received the thief.* But now it is enacted by that ſtatute, and by 5 Ann. c. 31. ſ. 5. "That if any perſon or perſons ſhall buy "or receive any goods or chattels that ſhall be feloniouſly "taken or ſtolen from any other perſon, knowing the ſame to "be ſtolen, he or they ſhall be taken and deemed an acceſſary "or acceſſaries to ſuch felony after the fact, and ſhall incur "the ſame puniſhment as an acceſſary or acceſſaries to the fe"lony, after the felony committed." And it is farther enacted by 1 Annæ, c. 9. "That ſuch perſons may be proſecuted for a miſdemeanor, before the principal ſhall be convicted," as ſhall be ſhewn more at large in the following part of this chapter, ſect. 44.

(h) Sum. 130. 3 Inſt. 134. 138. B. 1. c. 59. ſect. 5, 6, 7. Con. Cromp. 41. 2 And. Qu. Moor 8. and Dalton c. 108. Vide Bk. 1. c. 58 App. 8.
(i) Sum. 130. 3 Inſt. 134. 138. B. 1. c. 59. ſect. 5, 6, 7. Con. Cromp. 41. 2 And. Qu. Moor 8. and Dalton c. 108. Vide Bk. 1. c. 58 App. 8.
Vide Noy 90. Lambard 290. For the offences in buying and receiving ſtolen goods, vide book 1. ch. 58. app. 7.

(k) Vide Plowd. 476. Dalton c. 108.

Sect. 31. It doth not ſeem to be ſettled, (k) Whether the receipt of a felon who is pardoned by the king, but ſtill liable to an appeal, may not make the receiver an acceſſary.

(l) S. P. C. 41. Summary 218. 1 Hale 622. (m) 7 H. 6. 42. Ab. B. Indict. 4. 3 H. 7. 10. B. Cor. 150. F. Cor. 55. 285. 429. 22 Aſſize 55. Summary 218.

Sect. 32. As to the ſecond particular, *viz.* Whether it be neceſſary that a man know the felony, in order to make him an acceſſary by receiving the felon; there can be no doubt but that it is neceſſary that ſuch receiver have (l) notice of the felony either expreſs or implied; and therefore it is the ſettled form of all (m) indictments and appeals (n) againſt acceſſaries after the fact, expreſsly to charge them with having known

(n) Raſtal 43. 54. 51. Co. Ent. 56. 57.

that

that the perſon received by them, had committed the principal felony.

Sect. 33. But it is not clearly ſettled, Whether in ſome caſes an implied notice of the felony be not ſufficient for this purpoſe? As where a man receives a perſon attainted of felony, in the ſame county wherein he is attainted, in which caſe it hath been (*a*) holden, That he is an acceſſary to the felony, whether he had actually notice of the attainder or not; becauſe it appears by matter of record in the ſame county, whereof every man is ſaid to be conuſant. But to this it may be anſwered, That felony implies in it ſomething of wilfulneſs and baſeneſs; ſomething (*b*) *felleo animo perpetratum*; and that it would be extremely hard, by ſuch a forced way of reaſoning, to preſume a man guilty of it, who probably may be entirely innocent: And to this opinion the greater number of (*c*) authorities ſeem to incline.

(*a*) S. P. C. 41, 96. Crompton 43. Summary 218. Dyer 355. F. Cor. 377. Dalton c. 108. Qu. 7 H. 6. 42, 43.
(*b*) Co. Litt. 391.
(*c*) S. P. C. 41. Dalton c. 108. Lamb. 293. Summary 218.

Sect. 34. As to the third particular, *viz.* Where the receivers of a felon ſhall be excuſed in reſpect of the relation they bear to him. It ſeems agreed, (*d*) 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 whatſoever given to her huſband. Yet if ſhe be any way guilty of (*e*) 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 (*f*) 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.

(*d*) Lamb. B. 2. c. 9. Bract. B. 3. c. 32. ſ. 9. Dalton c. 108. 1 Hale 621. Summary 219. Crompton 42. ſect. 22. S. P. C. 26. See B. c. 1. ſect. 9, 10.
(*e*) Bract. l. 3. c. 32. ſect. 9, 10. Dalton c. 108. See B. 1. c. 1. ſect. 11, 12. F. Co. 383.
(*f*) Dalt. c. 108. S. P. C. 26.

Crompton 42. ſect. 22. Summary 219.

Sect. 35. As to the fourth particular, *viz.* How far the felony muſt be complete at the time of the receipt, to make the receiver an acceſſary. It ſeems to be clearly agreed, (*g*) That a man ſhall never be conſtrued an acceſſary to a felony, in reſpect of the receipt of an offender, who at the time of the receipt was not a felon, but afterwards becomes ſuch by matter ſubſequent; as where one receives another who has wounded (*h*) a perſon dangerouſly, that happens to die after ſuch receipt. For though the offender be for ſpecial reaſons adjudged to ſome purpoſes guilty of homicide *ab initio*, yet he ſhall not be ſo eſteemed in reſpect of any others but himſelf; for fictions of law ſhall never be carried farther than the reaſons which introduce them neceſſarily require.

(*g*) 21 H. 7. 34. See B. Cor. 62. 1 Hale 622. H. P. C. 219. Crompton 42. Dalton c. 108. Lamb. B. 2. c. 7.
(*h*) Sup. c. 18. ſect. 13. c. 19. ſ. 25.

HAVING thus ſhewn who are to be eſteemed principals, and who acceſſaries; I am now to ſhew in what manner they are to be arraigned. And I ſhall endeavour to ſhew,—1. How far it is neceſſary that the principal be actually attainted or convicted before the acceſſary ſhall be proceeded againſt.—2. Whether the acceſſary ſhall in any caſe be arraigned or tried before any principal hath appeared.—3. Whether a perſon charged as acceſſary to more than one, may be tried before all the principals have appeared.—4. Whether the principal and acceſſary may be both tried by the ſame inqueſt, and in what manner they are to be tried.—5. In what manner the acceſſary ſhall be tried, where his offence ariſes in a different county from that of the principal.

Sect. 36. As to the firſt point, *viz.* How far it is neceſſary that the principal be actually attainted *(a)* or convicted before the acceſſary ſhall be proceeded againſt: It ſeems clear, That whatſoever the nature of the felony be, if the principal be in ſuch manner (*b*) acquitted of it, (*c*) whether at the ſuit of the king, or of the party, that he may plead ſuch acquittal in (*d*) bar of any ſubſequent proſecution for the ſame felony, the acceſſary ſhall not be arraigned, but ſhall be diſcharged, according to the rule, *ubi factum (e) nullum, ibi fortia nulla.*

(a) Vide 9 Aſſ 5. Bract. 128. 13, 14, and the notes to the fourth of theſe points.
(*b*) F. Aſſ. 291. Conſpira. 4. Summary 221. 1 Hale 623, 624. S. P. C. 47. 48. Sup. c. 23. ſect. 140. F. Corone 222.
(*c*) F. Cor. 277.
33 H. 6. 1. 29 Aſſize 59. Raſtal 57. Raymond 477. F. Off. de Court 23.
(*d*) Vide ſup. c. 23. ſect. 142. (*e*) 4 Coke 43. S. P. C. 47.

Sect. 37. How far the acceſſary ſhall be diſcharged upon the principal's being found guilty of manſlaughter, &c. hath been already ſhewn, ſection twenty-four.

Sect. 38. It is certain that the *exigent* ſhall not be awarded againſt the acceſſary before the principal is attainted, as hath been more fully ſhewn, ch. 27. ſect. 128, &c.

Sect. 39. It ſeems alſo to be clear, That where the law requires the attainder or conviction of the principal before the acceſſary ſhall be convicted, it requires that ſuch attainder and conviction of the principal be on the (*f*) ſame ſuit, and for the ſame crime, of which the acceſſary is to be convicted; for it is agreed, That an attainder of the principal at the ſuit of the (*g*) king no way helps the proceedings againſt the acceſſary at the ſuit of the party, and *ſic e converſo:* Alſo it ſeems to be agreed, That the attainder of the principal of one felony is no way (*b*) material as to the proceedings againſt the acceſſary for another.

(*f*) B. App. 19.
(*g*) 2 Inſt. 184. Plowden 98, 99. Summary 221. S. P. C. 47. B. Corone 19. 7 H. 4. 27. Dyer 133.
(*b*) 40 Aſſ. 25. Summary 221. 1 Hale 625. 22 Aſſize 40.

Sect. 40. But where the principal is actually attainted, though erroneouſly, of the ſame felony with which the acceſſary is charged, it ſeems (*i*) agreed, That ſuch attainder, while it ſtands unreverſed, is as ſufficient for this purpoſe as it would have been if there had been no error in it. Yet it ſeems (*k*) certain,

(*i*) F. Coro. 58. 2 R. 3. 21, 22. Summary 222, 223. 2 Inſt. 184. Crompton 43. B. Cor. 165, 174. S. P. C. 47. 9. Cromp. 41.
7 H. 4. 16. 9 Coke 68. 119. (*k*) Summary 164. 207. B. Cor. 156. 18 E. 4. 1 R. Abr. 777. 9 Coke 119. F. Mortdanceſter 46.

certain, That if the principal be attainted, and then the acceſſary, the reverſal of the attainder of the principal, *ipſo facto* reverſes the attainder of the acceſſary; and that the heir may have an aſſize of *mortdanceſtor* againſt the lord of the fee, having entered into the lands of ſuch an acceſſary, as having eſcheated to him by reaſon of the attainder.

Sect. 41. It ſeems to have been in a great meaſure ſettled (*a*) before the ſtatute of 1 *Annæ*, c. 9. notwithſtanding the great variety of opinions in the old books concerning this matter, That wherever the attainder of the principal was prevented by his (*b*) death, or (*c*) ſtanding mute, or challenging (*d*) peremptorily above the number allowed him by law, or being admitted (*e*) to the benefit of clergy, or (*f*) pardoned, whether before or after his conviction, the acceſſary ſhould not be arraigned.

(*a*) Prea. Ann. 9. (*b*) B. App. 19. B. Corone 86. 7 H. 4. 27. F. Corone 378. Conſpi. 4. Reſpond. 35. F. N. B. 115. Summary 221. 44 E. 3. 7. 33 H. 6. 12. 21 H. 7. 31. 15.

22 Aſſize 40. (*c*) Summary 221. 2 Inſt. 284. Con. F. Cor. 58. Qu. S. P. C. 47. (*d*) Stat. 1. Annæ, c. 9. Qu. S. P. C. 47. F. Corone 51. 3 H. 7. 12. (*e*) C. Eliz. 541. 4 Coke 43, 44. Summary 221. 3 Inſt. 114. 139. 3 H. 7. 1. C. Car. 566, 567. Cromp. 43, 44. Raymond 477. F. Corone 145. 176. 193. 252. 376. 450. B. Cor. 18. 70, 71. 83. 101. 132. 138. 18 Aſſize 13. 26 Aſſize 27. 5 Aſſize 5. 7 H. 4. 16. B. Clergy 15. Con. F. Cor. 58. 53. 270. 466. Crompton 42. 10 H. 4. 15. B. Corone 158. Qu. 3 H. 7. 12. S. P. C. 47. H. 48. (*f*) Summary 221. F. N. B. 115. C. Eliz. 541. F. Corone 53. F. Conſpi. 4. 33 H. 6. 1. B. Corone 18. 4 Coke 43. 44. 3 Inſt. 139. Cromp. 44. 3 H. 7. 12. 7 H. 4. 16. Raymond 477. Qu. Cromp. 42. S. P. C. 47. Con. F. Corone 151. 260. B. Corone 70. 3 Aſſize 14. Vide Dyer 88.

Sect. 42. But it ſeems to have been generally agreed, (*g*) That after the principal is actually attainted, whether after a conviction by verdict, or by (*b*) outlawry, &c. his death or pardon, &c. ſubſequent, will no way avail the acceſſary.

(*g*) C. Eliz. 541. 4 Coke 43. 44. Summary 221. Raymond 477. Con. F. Cor. 450.

(*b*) 4 Coke 43. Dyer 120. F. Cor. 58. 93. 40 Aſſize 8. 43 E. 3. 17. 3 H. 7. 1. 9 H. 4. 4, 9. B. Corone 16. 5. B. Mainpriſe 58. Con. as to Abjuration, 7 H. 4. 16. B. Corone 18.

Sect. 43. And it is enacted by the ſaid ſtatute of 1 Annæ, ſeſſ. 2. c. 9. par. 1. "That if any principal offender ſhall be con-"victed of any felony, or ſhall ſtand mute, or ſhall peremp-"torily challenge above the number of twenty perſons, return-"ed to ſerve on the jury, it ſhall and may be lawful to proceed "againſt any acceſſary either before or after the fact, in the "ſame manner as if ſuch principal felon had been attainted "thereof, notwithſtanding any ſuch principal felon ſhall be "admitted to the benefit of his clergy, pardoned, or otherwiſe "delivered before his attainder; and ſuch acceſſary ſhall ſuffer "the ſame puniſhment, if he or ſhe ſhall be convicted, or ſhall "ſtand mute, or peremptorily challenge above the number of "twenty perſons returned to ſerve on the jury, as he or ſhe "ſhould have ſuffered if the principal had been attainted."

Sect. 44. And it is recited by the ſame ſtatute, par. 2. "That the buyers and receivers of ſtolen goods had oftentimes conveyed away and concealed the principal felons, ſo that they

could not be convicted of ſuch principal felony, and thereby ſuch buyers and receivers had eſcaped all manner of puniſhment, which had greatly encouraged the buying and receiving of ſuch ſtolen goods," and thereupon it is enacted, "That it "ſhall and may be lawful to proſecute and puniſh every ſuch "perſon or perſons buying or receiving any ſtolen goods, "knowing the ſame to be ſtolen, as for a miſdemeanor, to be "puniſhed by fine and impriſonment, although the principal "felon *be not convicted* before of the ſaid felony, which ſhall "exempt the offender from being puniſhed as acceſſary, if the "*principal ſhall be* afterwards convicted."

By 4 Geo. 1. c. 11. receivers of ſtolen goods may be tranſported for fourteen years. Vide Bk. 1. c. 58. App. 7.

† It is alſo provided by 5 Ann. c. 31, ſ. 6. "That if any "ſuch principal felon *cannot be taken* ſo as to be proſecuted and "convicted, it ſhall and may be lawful to proſecute and puniſh "every ſuch perſon and perſons, buying or receiving any "goods ſtolen, by any ſuch principal felon, knowing the ſame "to be ſtolen, as for a miſdemeanor, to be puniſhed by fine "and impriſonment, or other ſuch corporal puniſhment as the "court ſhall think fit to inflict, although the principal felon "be not before convict of the ſaid felony, which ſhall exempt "the offender from being puniſhed as acceſſary, if ſuch prin-"cipal felon ſhall be afterwards taken and convicted."

Upon theſe ſtatutes it has been decided, that it is in the election of the proſecutor to proceed either immediately for the miſdemeanor, or for the felony when the principal is taken. Lord Raymond 1370. and in the firſt caſe it is not neceſſary to aver, that he could not be taken. 8 Mod. 264.—But Mr. Juſtice Foſter denies this caſe, if taken in its full extent, to be law; and contends, that where the principal is amenable, the proſecutor hath no option, but muſt proceed againſt the receiver for the felony. Foſter 374. And in the caſe of the King v. Wilkes, at Warwick aſſizes, a caſe was reſerved on an indictment againſt a receiver for the miſdemeanor; and the court held the indictment good, *as reaſonable evidence was given that the principal could not be taken and proſecuted, ſo as to be convicted.* MS.

(2) Vide Bk. 1. p. 232. ſect. 2.

† And it is enacted by 22 Geo. 3. c. 58. "That in all "caſes whatſoever, where any goods or chattels (except lead, "iron, copper, braſs, bell-metal and ſolder (2) ſhall have "been feloniouſly taken and ſtolen, whether the offence ſhall "amount to grand larceny or ſome greater offence, or to petty "larceny only (except where the felon ſhall have been already "convicted of grand larceny, or ſome greater offence), every "perſon who ſhall knowingly buy or receive any ſuch goods "and chattels, may be proſecuted for a miſdemeanor, and "ſhall be puniſhed by fine, impriſonment, or whipping, as the "court of quarter ſeſſions, or any other court ſhall think fit to "inflict; although the principal felon or felons be not before "convicted of the ſaid felony, and whether he, ſhe, or they is "or are amenable to juſtice or not (3).—And in caſes where "the felony actually committed ſhall amount to grand larceny "or to ſome greater offence; and where the perſon or perſons "actually committing ſuch felony ſhall not be before convict-"ed, ſuch offender or offenders ſhall be exempted from being "puniſhed

(3) The principal felon may be an evidence againſt the receiver upon this act. Adjudged by all the judges in the caſe of Rex v. Haſlam, 26 Geo. 3.

" puniſhed as acceſſary or acceſſaries if ſuch principal felon or " felons ſhall be afterwards convicted.—Provided, par. 6. that " this act ſhall not repeal any former law againſt this offence, " and that offenders puniſhed under this act ſhall be exempted " from puniſhment under any other act for the like offence."

For the authority given to juſtices, officers, pawnbrokers, &c. by the ſubſequent clauſes of this act, vide Bk. 1. p. 236. ſect. 12, 13, &c.

Sect. 45. As to the ſecond point, *viz.* Whether the acceſſary ſhall in any caſe be arraigned or tried before any principal hath appeared: Notwithſtanding the numerous *(a)* authorities in the old books, that an acceſſary ſhall not be compelled to anſwer before the principal have appeared and anſwered, I take the contrary opinion to be in a great meaſure (*b*) ſettled at this day. And yet it ſeems to have been always agreed, (*c*) That his plea cannot be tried before ſuch appearance or attainder, (*d*) unleſs he deſires it himſelf; in which caſe it is agreed, That he may be tried without the principal, according to the rule that *quilibet poteſt renunciare juri pro ſe introducto.*

(*a*) B. Cor. 11. 20. 118. Fort. 374. 9 H. 7. 19. Bract. 128. 139. 142, 143. F. Reſp. 35, 36. F. Cor. 33. 82. 90. 135, 136. 216. 350. F. Trei. 199. 44 E. 3. 38. 9 E. 4. 48. 40 E. 3. 42.

44 E. 3. 7. 25 E. 3. 44. 40 Aſſize 8. 25. B. Appeal 9. 189. 2 R. 3. 21. B. Mainpriſe 58. S. P. C. 46. 'Tis ſaid that the law was ſo anciently, but that it is now changed. Yet Dalton, ch. 108. ſeems to be for the old opinion. (*b*) Summary 222. 9 H. 4. 3. F. Corone 77. B. Appeal 28. S. P. C. 46. (*c*) Summary 222. 1 Hale 623. 2 Hale 223. 224. B. Appeal 28. 9 H. 4. 3. F. Corone 77. S. P. C. 46. 1 And. 109. (*d*) F. Corone 12, 124. 463. Summary 222. S. P. C. 46.

Sect. 46. As to the third point, *viz.* Whether a perſon charged as acceſſary to more than one principal, may be tried before all of them have appeared: It ſeems to be holden by Sir (*e*) Matthew Hale, agreeably to what ſeems to be the ſtronger (*f*) opinion in Plowden, That if a man be indicted as acceſſary to more than one, and one of the principals appear and be convict, The court may, if they pleaſe, try the acceſſary, as being acceſſary to ſuch principal, and alſo condemn him, if the iſſue be found againſt him; and if it be found for him, may afterwards arraign and try him as acceſſary to the other when they ſhall appear. But the contrary opinion is certainly ſupported by great (*g*) authorities, neither do I find any inſtance in the books wherein the court hath actually proceeded to the trial of an acceſſary in ſuch a caſe before all the principals have either appeared, or been attainted: And (*h*) unleſs there be ſome very particular circumſtances in the caſe, it cannot be doubted but that it will be a weighty motive to induce the court in diſcretion to reſpite the trial of an acceſſary, to ſhew that ſome of thoſe to whom he is charged as an acceſſary, are neither attainted, nor have appeared; for it muſt be owned, That it is a ſtrong objection againſt the trying him immediately, as acceſſary to thoſe who do appear, that thereby the country may be ſubject to the trouble of attending two trials where one might do as well; and the perſon tried may be ſubject to the hardſhip

(*e*) Sum. 222. 1 Hale 624.
(*f*) Plow. 98, 99.
(*g*) S. P. C. 46. See the books cited to ſection 47. 7 H. 4. 36. Qu. B. App. 22. 7 H. 4. 36. Keilw. 107.
(*h*) Plow. 99. 7 H. 4. 36.

and hazard of two trials for his life; which is contrary to the general courſe of the law (as ſhall be more fully ſhewn under the chapter concerning the plea of *auterfoits acquit*); whereas if the trial ſhould be deferred till all the principals be attainted or appear, he would be tried but once. (*a*) But if there be ſeveral principals, and a perſon be charged as acceſſary to one of them only, it ſeems clear, That it is no objection againſt his being tried as acceſſary to ſuch a principal, that the others have not yet appeared, nor are attainted, &c.

(*a*) S. P. C. 46. Foſter 361.

Sect. 47. As to the fourth point, *viz.* Whether the principal and acceſſary may be both tried by the ſame inqueſt, and in what manner they are to be tried. It ſeems (*b*) 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 (*c*) one inqueſt; but that the principal muſt be (*d*) 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 to the writ, the acceſſary ſhall not (*e*) be driven to anſwer till ſuch plea be determined (4).

(*b*) Sum. 222. 1 Hale 624. 2 Hale 222. 223. Dyer 120. 2 Inſt. 184. 28 E. 3. 94. F. Corone 10. 17. S. P. C. 46. Raſtal 50. 52. 54. F. Exigent 4. F. Mainpriſe 3. Con. Bract. 128. 139. 142. 148. 44 E. 3. 7. F. Corone 82. 90. 135. 216. 350. F. Treſpaſs 199. 40 E. 3. 42. 25 E. 3. 44. 40 Aſſize 25. 44 E. 3. 8. B. Appeal 9. F. Corone 11. 118. F. Mainpriſe 58. 2 R. 3. 21. In all which books it ſeems to be holden, that the acceſſary is not compellable to anſwer till all the principals be convict. (*c*) See the books cited to letter *b*. Con. F. Cor. 10. 77, 82. 96 H. 4. 3. 7 H. 4. 36. Dyer 120. S. P. C. 46. (*d*) Summary 222. F. Corone 10. Raſtal 50, 51, 52. 54. 9 Coke 117. (*e*) B. Peremp. 42. 2 Inſt. 184. S. P. C. 46. Foſter 360 to 368.

(4) Where the principal and acceſſary are tried by the ſame inqueſt, the acceſſary may enter into the full defence of the principal, and avail himſelf of every matter of fact and of every point of law tending to *his* acquittal; and when the acceſſary is tried after the conviction of the principal, if it ſhall come out in evidence that the offence of which the principal was convicted did not amount to felony in *him*, or not to that ſpecies of felony with which he was charged; or if it ſhall manifeſtly appear in point of fact that he was innocent, the acceſſary ought to be acquitted. M'Daniel's Caſe. Foſter 121. 10 State Trials 417. Foſter's Third Diſcourſe 365. and Smith's Caſe, Q. B. 1784. p. 69—It is alſo *ſaid*, that the production of the record of conviction of the principal is ſufficient to put the acceſſary upon his defence. Foſter 363. But it ſeems that ſome additional evidence is neceſſary for that purpoſe, in order to apply and connect it with the caſe of a priſoner indicted as acceſſary; for a bare unqualified record can only be evidence againſt thoſe who are parties to it. Q. B. 1784. p. 474. Foſter 365.

Sect. 48. As to the fifth point, *viz.* In what manner the acceſſary ſhall be tried, where his offence ariſes in a different county from that of the principal: It ſeems to have been (*f*) agreed anciently, That by the common law, if a town extended into more than one county, and a felony were committed in that part of it which lay in one county, and there were acceſſaries in that part of it which lay in another county, an appeal may be brought againſt the acceſſaries as well as the principals, in that county in which the principal felony was committed; and where the counties were at a diſtance, it ſeems that it may be

(*f*) 44 Aſſize 16. 43 E. 3. 17. 21. 34 F. C r. 93. B. Cor. 125. 45 Aſſize 9. B. Appea. 80. But S. P. C. 63. this caſe ſeems to be cited with ſome doubt.

be probably argued, (*a*) That an appeal might be brought in like manner againſt all in the county wherein the principal felony was committed; becauſe in an appeal the trial may be by a jury returned from each county. But where one of the counties cannot join with any other in taking an inqueſt; as that of London, &c. it (*b*) hath been adjudged, That an appeal againſt the acceſſary could not be brought in either. Alſo, becauſe there can be no (*c*) joinder of counties for the finding of an indictment, it ſeems to have been very (*d*) doubtful at the common law, where the offence of the acceſſary aroſe in a different county from that of the principal, whether it could be indicted at all; becauſe the county in which it aroſe could not take conuſance of the principal felony ariſing in another county, without which they could not find that of the acceſſary.

(*a*) 3 H. 7. 12. See B. 1. c. 32. ſect. 18. and Dyer 38, 39, 40. 7 Coke 2. But F. Cor. 93. B. Cor. 125. B. Appeal 7. 45 Aſſize 9. and S. P. C. 63. ſeem to be con. In S. P. C. 65. there is an opinion, That in this caſe there ſhall be ſeveral appeals in the ſeveral counties.

But now one appeal is ſufficient, in the caſe of murder, by force of 2 and 3 Ed. 6. 24. ſet forth more at large in the next ſection. Summary 188. Qu. 44 Aſſize 16. 43 E. 3. 17. 21. 34. (*b*) Dyer 38, 39, 40. 7 Co. 2. (*c*) Finch 411. B. 1. c. 31. ſec. 13. (*d*) Keilw. 67. The acceſſary in ſuch caſe is ſaid to be indictable in the county in which the principal felony was committed. But in the year book of 9 E. 4. 48. 1. abridged F. Cor. 33. and B. Indict. 52. the acceſſary was indicted in the county in which he was acceſſary, and the court wrote to the juſtices of the county wherein the principal felony was committed, to certify whether the principal were indicted before them. And in S. P. C. 90. this caſe is holden to be law. See alſo 3 Inſt. 49. 135. but in S. P. C. 63. it is ſaid, That there was no remedy at common law againſt the acceſſary where his offence was in a different county from that of the principal, and 1 Hale 623.

Sect. 49. But theſe matters are fully cleared by the ſtatute of 2 and 3 Edw. 6. c. 24, by which it is enacted, par. 3. "That "an appeal of murder may be ſued in the ſame county where "the party feloniouſly ſtricken or poiſoned ſhall die, as well "againſt the principals as acceſſaries, in whatſoever county "or place the acceſſaries ſhall be guilty; and the juſtices be"fore whom any ſuch appeal ſhall be commenced, ſued and "taken, within the year and day after ſuch murder and man"ſlaughter committed and done, ſhall proceed againſt ſuch ac"ceſſaries in the ſame county where ſuch appeal ſhould be "ſo taken, in like manner and form, as if the ſame offence "of acceſſaries had been committed in the ſame county where "ſuch appeal ſhall be ſo taken, as well concerning the trial by "the jurors, or twelve men of ſuch county where ſuch ap"peal ſhall be taken upon the plea of not guilty, as other"wiſe."

Vide Rex v. Burridge, 3 Peere Will. 466. 494.

Sect. 50. And it is farther enacted, par. 4. "That where "any murder or felony ſhall be hereafter committed and done "in one county, and another perſon, or more, ſhall be acceſ"ſary or acceſſaries in any manner of wiſe, to any ſuch mur"der or felony in any other county, that an indictment found "or taken againſt ſuch acceſſary or acceſſaries upon the cir"cumſtances of ſuch matter before the juſtices of peace, or "other juſtices or commiſſioners, to enquire of felonies in the "county where ſuch offences of acceſſary or acceſſaries in any "manner

" manner of wiſe ſhall be committed or done, ſhall be as good " and effectual in the law, as if the ſaid principal offence had " been committed or done in the ſame county where the ſame " indictment againſt ſuch acceſſary ſhall be found: And that " the juſtices of gaol-delivery, of oyer and terminer, or two of " them, of or in any ſuch county where the offence of any " ſuch acceſſary ſhall be hereafter committed and done, upon " ſuit to them made, ſhall write to the *cuſtos rotulorum*, or " keepers of the records, where ſuch principal ſhall be at- " tainted or convict, to certify them whether ſuch principal be " attainted, convicted or otherwiſe diſcharged of ſuch princi- " pal felony; who, upon ſuch writing to them, or any of them, " directed, ſhall make ſufficient certificate in writing, under " their ſeal or ſeals, to the ſaid juſtices, whether ſuch principal " be attainted, convicted or otherwiſe diſcharged, or not: And " after they that ſo ſhall have the cuſtody of ſuch records, do " certify that ſuch principal is attainted, convicted, or other- " wiſe diſcharged of ſuch offence by the law; that then the " juſtices of goal-delivery, or of oyer and terminer, or other " thereto authoriſed, ſhall proceed upon every ſuch acceſſary, " in the county where ſuch acceſſary or acceſſaries became ac- " ceſſary, in ſuch manner and form, as if both the ſaid principal " offence and acceſſary had been committed and done in the " ſame county where the offence of acceſſary was, or ſhall be " committed or done: And that every ſuch acceſſary ſhall " anſwer upon his arraignment, and receive ſuch trial, judg- " ment, order and execution, and ſuffer ſuch forfeitures, pains " and penalties, as is uſed in other caſes of felony; any law " or cuſtom to the contrary before uſed in any wiſe notwith- " ſtanding."

In the conſtruction of this ſtatute, the following points ſeem moſt remarkable, *viz.*

3 Coke 118. Vide ſup. c. 25. ſect. 60.

Sect. 51. Firſt, An indictment againſt an acceſſary, in purſuance of this ſtatute, in the county wherein he was acceſſary, ought expreſsly to recite that the principal did the felony in the other county, and not barely that he was indicted for it; for that is only an argument, and no direct affirmation that he did it.

(*a*) 3 Inſt. 49. 238. 9 Coke 118. Summary 223. See the notes to ſect. 48. under letter (*d*). (*b*) 3 Inſt. 49. 235.

Sect. 52. Secondly, The court of (*a*) king's bench, in relation to a perſon, there indicted as an acceſſary in the county wherein the ſaid court happens to ſit, to a felony in another county; and the lord (*b*) high ſteward, in relation to a peer to be tried before the lords on an indictment againſt him as acceſſary in one county to a felony in another, are within the purview of the ſaid ſtatute; not only becauſe it is a remedial law, and made to ſupply a very miſchievous defect of the common law, which oftentimes neceſſarily occaſioned a failure

failure of juſtice, and therefore ought to have a beneficial conſtruction; but alſo becauſe the court of king's bench being the (a) ſupreme court of oyer and terminer, and gaol-delivery, may naturally be included in the very words of a ſtatute which gives ſuch juſtices any new power; or if it be not thought to be ſtrictly within the words, it is at leaſt within the meaning of them, which otherwiſe would give a higher privilege to an inferior court than to a ſuperior: And the like in effect may be ſaid in the caſe of the lord (b) ſteward, who by the words of his commiſſion, as well as the nature of the thing, ſeems to be a juſtice of oyer and terminer, and within the very words of the ſtatute, or at leaſt within the meaning. To which may be added, that theſe words in the latter part of the ſtatute, "That then the "juſtices of gaol-delivery, or of oyer and terminer, or other "there authorized, ſhall proceed againſt ſuch acceſſaries," &c. ſeem plainly to imply, That ſuch other ſo authoriſed may alſo ſend for a certificate of the record relating to the principal; for nothing can be more natural than to expound one part of the ſtatute by another. As to the objection, That the words of the ſtatute are, that the ſaid juſtices, "or two of them," ſhall write to the *cuſtos rotulorum*, &c. and therefore that the lord ſteward cannot do it, becauſe he is but one; it may be (c) anſwered, That thoſe words are to be thus conſtrued, That where there are two or more ſuch juſtices, they muſt write, &c. but not where there is but one.

(a) Vide ſup. c. 3. ſect. 11.

(b) 3 Inſt. 136.

(c) 3 Inſt. 136.

Sect. 53. Thirdly, Not only the juſtices of the king's bench, the pleas before whom are properly ſtyled (d) *placita coram rege*, and not *coram juſticiariis*, but any other juſtices, writing for a certificate in purſuance of the ſtatute, ought to do it by writ in the king's name, and not by a precept in their own names, and under their own ſeals, and the reaſon given by Dyer is becauſe it is a writing from juſtices to juſtices.

(d) Dyer 253, 254. 12 Coke 32. But Sir Edw. Coke, in 3 Inſt. 49. 135. ſeems to make it neceſſary for the juſtices of the king's bench only to write in the king's name.

Sect. 54. Fourthly, Where ſome of thoſe ſuppoſed to have been acceſſaries to a felony in a different county, are proceeded againſt in the king's bench, in purſuance of the ſtatute, if there be a likelihood that others will be in the ſame manner proceeded againſt in another court, it ſeems moſt adviſable (e) to ſend for the record relating to the principal by a ſpecial writ formed upon the matter according to the words of the ſtatute, and not by *certiorari*, becauſe that would wholly (f) remove the record from the court below into the court of king's bench, which might cauſe a doubt, whether either the court below, or that of king's bench could certify it upon a ſubſequent writ; for as to the court below, it might be objected, That being no longer a record of that court, it cannot be certified by it; and as to the king's bench, it might be objected, That the principal was neither

(e) 3 Inſt 49, 136.

(f) Vide ſup. c. 27. ſect. 62 to 69. and ſect. 77 to 87.

ther attainted nor convicted there: Whereas the words of the ſtatute are, "That the juſtices ſhall write to the keepers of the "records where ſuch principal ſhall be attainted or convict-"ed." But theſe doubts are avoided by (*a*) directing a ſpecial writ to the court below, on which a ſpecial certificate ſhall be made in purſuance of the ſtatute, and the record ſhall ſtill remain below, and conſequently may be certified from thence on a ſubſequent writ.

(*a*) 3 Inſt. 49. 236.

Murder, how it may be tried as if it had wholly happened in England.

† And for preventing any failure of juſtice, and taking away all doubts touching the trial of *murders*, it is enacted by 2 Geo. 2. c. 21. "That where any perſon ſhall be feloniouſly "ſtricken or poiſoned upon the ſea, or at any place out of Eng-"land, and ſhall die of the ſame within England; or ſhall be ſo "ſtricken or poiſoned within England, and die of the ſame "upon the ſea or out of England, an indictment by the jurors "of the county in which ſuch death, ſtroke, or poiſoning ſhall "reſpectively happen, whether found before the coroner, or "before juſtices of the peace, or other juſtices or commiſ-"ſioners who have authority to enquire of murders, ſhall be "good as well againſt the principal as the acceſſary; and "the gaol-delivery and *oyer* and *terminer* for the county, and "alſo any ſuperior court, into which the indictment ſhall be "removed by *certiorari*, may proceed therein in all points, as "if the fact had been wholly committed in the ſaid county. "And the offenders ſhall be entitled to all and the ſame ad-"vantages, &c. except challenges for the hundred."

Vide book the firſt, page 120.

CHAPTER THE THIRTIETH.

OF STANDING MUTE.

HAVING ſhewn in what manner a priſoner is to be arraigned, I am in the next place to examine in what manner he is to be dealt with afterwards; and to that end ſhall endeavour to ſhew what is to be done with him. Upon his ſtanding mute. Upon his confeſſion; and, Upon his pleading.

And firſt as to the priſoner's ſtanding mute, I ſhall conſider, 1. Where he ſhall be ſaid to ſtand mute.—2. How it ſhall be tried whether he do ſo of malice, or by the act of God.—3. What ſhall be done where one is found to ſtand mute by the act of God.—4. Where he who ſtands mute ſhall be awarded to the ſame execution, as if he had not ſtood mute, and where he

he ſhall be adjudged to his penance.—5. What is the nature of ſuch penance.—6. What he ſhall forfeit, and to whom.—7. Whether the proſecutor of an indictment or appeal of larceny be entitled to a reſtitution of the goods ſtolen, upon the defendant's ſtanding mute.—8. Where one that ſtands mute ſhall have the benefit of clergy.

Sect. 1. As to the firſt point, *viz.* In what caſes a man ſhall be ſaid to ſtand mute: I take it to be agreed, That he who anſwers impertinently, or ineffectually, or refuſes to put himſelf upon his trial in ſuch manner as the law directs, may as properly be ſaid to ſtand mute as he who makes no anſwer at all; as where a man (*a*) refuſes to plead a plea in chief, or the general iſſue, but inſiſts on ſome frivolous defence, or even to plead a good (*b*) dilatory plea, and refuſes to plead over to the felony, in which caſe after ſuch a plea is found againſt him, he ſhall not (*c*) be admitted to plead in chief, but ſhall be adjudged to his penance in the ſame manner as if he had made no plea at all. And ſo ſhall he be who pleads a good plea in chief, or the general iſſue, but (*d*) refuſeth to put himſelf upon the inqueſt (that is, to be tried by God and his country if a commoner, or by God and his (*e*) peers, if a lord), or to wage battle where ſuch trial is (*f*) allowed.

(*a*) Dyer 49. 241. 2 Hale 316, 317. Summary 226. S. P. C. 150. (*b*) Keilw. 70. Vide B. Cor. 22. (*c*) Keilw. 70. (*d*) B. Pain 2. 14, 15. S. P. C. 150. B. Appeal 93. 2 Inſt. 178. Summary 226. F. Corone 27. 30. 359. 4 E. 4. 11. 7 E. 4. 29. 14 E. 4. 7. 3 Inſt. 227. B. Cor. 149. S. P. C. 81.

8 E. 4. 3. (*e*) Kelynge 57. (*f*) See Poſt c. 44.

Sect. 2. It ſeems to be holden in the (*g*) ſecond Inſtitute, and alſo in the latter part of Sir Matthew Hale's pleas of the (*h*) crown, That if a priſoner on his trial peremptorily challenge above the number allowed him by law, he ſhall not be dealt with as one that ſtands mute, but ſhall be hanged: But this very point is made a *quære* in another (*i*) part of Hale's pleas of the crown, and alſo in (*k*) Kelynge; and the contrary is holden in the third (*l*) Inſtitute: Neither does it ſeem eaſy to aſſign a reaſon why he who challenges more jurors than he ought, ſhall, in reſpect of an implied refuſal of a legal trial, be thought worthy of a greater puniſhment than he who obſtinately, directly, and expreſsly refuſes it. To which may be added, That there ſeems to be but one (*m*) full authority in the old books for the maintenance of this opinion, whereas there is a great (*n*) number of the other ſide.

(*g*) 2 Inſt. 178. (*h*) Sum. 259. (*i*) Sum. 226. (*k*) Kelynge 36. (*l*) 3 Inſt. 227. (*m*) 3 H. 7. 12. F. Corone 56. B. Corone 136. B. Pain 5. And note, there is no other authority cited for this opinion by Coke, Hale, or Kelynge. 2 Inſt. 178. Summary 259. Kelynge 36. (*n*) F. Cor. 359. 3 H. 7. 12. Abr. F. Cor. 51. B. Clergy 27. And note that this caſe is the more remarkable, becauſe of the very ſame year with the former, and ſubſequent to it. Vide Kelynge 36. 3 H. 7. 2, 5. The like is ſaid to be adjudged by all the juſtices but Keble; and this caſe is abridged. B. Appeal 82. B. Pain 4. 2 Hale 316.

A priſoner thus perverſely and obſtinately offending is, in high treaſon, *ipſo facto*, attainted. 2 Hale 268. 4 Comm. 348. And in felony the challenge ſhall be over-ruled. 2 Hale 376. Vide infra, ſect. 7. notes.

Sect. 3. But it is clear, (*o*) That he who demurs in law to an indictment or appeal, ſhall not be eſteemed to ſtand mute, nor

(*o*) See the next chapter, ſect. 5.

nor be dealt with as ſuch, as having refuſed a trial by his country, for he puts himſelf upon a trial by the court, which is the proper trial of a matter in law.

(a) S. P. C. 150. Same point admitted, 8 H. 4. 3. 5. which is abridged B. Pain 2. But in theſe books it is incidentally holden, he ſhall be put to his penance. (b) Kelynge 36, 37. Summary 225, 226. 2 Hale 316. 15 E. 4. 33. Ab. B. Penance 9. B. Corone, 51. Con. 8 H. 4. 3. for which ſee the note next above.

Sect. 4. Alſo it ſeems clear, That after a man hath (*a*) confeſſed himſelf guilty, or pleaded, and put himſelf upon his (*b*) country, he ſhall not afterwards be demeaſned 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.

(c) Sum. 225. S. P. C. 150. 2 Inſt. 177, 178. 8 H. 4. 1. F. Corone 71. 225. 43 Aſſize 30. B. Appeal 24. (d) Raſt. Ent. 385. 3. (e) 8 H. 4. 1. 2. F. Corone 71. B. Appeal 24. (f) S. P. C. 150. from the authority of 8 H. 4. 3. for which ſee the notes to the precedent ſection.

Sect. 5. As to the ſecond point, *viz.* In what caſes, and in what manner it ſhall be tried, whether one who ſtands mute do ſo of malice, or of the act of God: It ſeems agreed, (*c*) That where a priſoner wholly ſtands mute without making any anſwer at all, the court ſhall take an inqueſt of office by the oath of any (*d*) twelve perſons that (*e*) happen to be preſent, whether he do ſo of malice, or by the act of God. But (*f*) after an iſſue hath been joined, if the priſoner ſtand mute when the jury are in court, if there be any need for ſuch inquiry, it ſhall be made by them, and not by an inqueſt of office.

(g) Sum. 226. S. P. C. 150. 2 Inſt. 177, 178. 2 Hale 317.

Sect. 6. Where (*g*) a man anſwers, but not effectually, it ſeems needleſs to make any inquiry whether his refuſal be owing to his malice or not, becauſe it is apparent.

(h) S. P. C. 150. 2 Inſt. 177, 178. Summary 225.

Sect. 7. As to the third point, *viz.* What ſhall be done where one is found to ſtand mute by the act of God: It is agreed, (*h*) That in ſuch a caſe, the judges of the court (who are always to be of counſel with the priſoner, to ſee that he have law and juſtice) ſhall not only cauſe the felony to be enquired of, but alſo whether the priſoner be the ſame perſon, and all other matters which he might have pleaded in his defence. And ſuch inquiry ſhall be made, as I ſuppoſe, 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 no way his 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. To which may be added, That Sir Matthew Hale ſaith, (*i*) "That the felony ſhall be enquired of, &c. in the ſame "manner as if the priſoner had pleaded not guilty;" from which words it ſeems plain, That in his opinion the inquiry ought to be by an inqueſt returned by the ſheriff as in the other trials at the miſe of the parties, becauſe if the defendant had pleaded, it muſt certainly have been ſo. And therefore it ſeems

(i) Sum. 225.

reaſonable, that where Sir William Staundforde (*a*) having ſpoken of ſuch inquiry, adds immediately, That it is but an inqueſt of office, ought to be underſtood, not of the inquiry of the felony, whereof he had laſt ſpoken, but of the inquiry whether the priſoner ſtood mute of malice, or by the act of God, whereof he had ſpoken in the ſentence next before. And I the rather incline to think that this is his meaning, becauſe the (*b*) books cited by him, to this point, relate to this inquiry only.

(*a*) S. P. C. 150.

(*b*) F. Cor. 225. 43 Aſſize 30. 8 H. 4. 1. 2 Hale 316, 317. accords.

Old Bailey ſeſſion 1778, (No. 32.) Francis Mercier, on his arraignment for murder, ſtood mute. The ſheriff was directed to return a jury to inquire whether it was "through obſtinacy or the viſitation of God."—The jury found that he ſtood mute "fraudulently, wilfully and obſtinately, and not by the providence of God." The judge immediately paſſed ſentence, and he was executed. Vide 12 Geo. 3. c. 20. Infra ſection 25.

As to the fourth point, *viz.* In what caſes he that ſtands mute ſhall be awarded to the ſame execution as if he had not ſtood mute, and where he ſhall be adjudged to his penance, I ſhall conſider, 1. What ſhall be done to him who ſtands mute after an attainder. 2. What to a perſon arraigned for high treaſon. 3. What to one arraigned for petit larceny. 4. What to one arraigned for a felony by ſtatute. 5. What to one arraigned upon an appeal. 6. What to one indicted of a capital felony, petit treaſon.

Sect. 8. As to the firſt particular, *viz.* What is to be done to him who ſtands mute after an attainder: It ſeems to be ſettled (*c*) at this day, That wherever one who is attainted, either by judgment on a verdict, or confeſſion, or by outlawry, or abjuration, ſtands mute to the demand why execution ſhould not go againſt him, he ſhall not be awarded to his penance, but to the ſame kind of execution, if any, that would have been awarded, if he had not ſtood mute. Yet there ſeems to be this difference, That where one who hath always continued in priſon, after an attainder by verdict or confeſſion, ſtands mute to the demand why execution ſhould not go, it ſhall be awarded (*d*) againſt him, without any inquiry whether he ſtand mute by malice, or otherwiſe, or whether he be the ſame perſon who is ſo attainted or not; becauſe it ſufficiently appears that he is the ſame perſon, and that is ſufficient to juſtify an award of execution againſt him, where nothing appears to the contrary. But if a perſon ſo attainted, be retaken after an eſcape; or if one be taken after an outlawry or abjuration, and ſtand mute to the demand, why execution ſhould not go againſt him? It ſhall be inquired, whether he ſtand mute of malice, or of the act of God; and if it be found of malice, it ſeems that execution ſhall be awarded without any farther inquiry: (*e*) But if it be found to be of the act of God, it ſeems, That it ought to be alſo inquired,

(*c*) Sum. 226. 2 Hale 315, 316. Kelynge 36. S. P. C. 150. So adjudged 8 H. 4. 3. Ab. B. Pain 2. B. Corone 22. as to the cauſe of abjuration or any other attainder after a confeſſion; but the contrary is inſinuated as to other attainders. But in 26. Aſſ. 19. Ab. F. Cor. 191. B. Pain 12. F. Cor. 99. one who had abjured ſtanding mute, was put to his penance and not hanged.

(*d*) S. P. C. 150. 10 E. 4. 19. 26. F. Cor. 36. B. Corone 155.

(*e*) S. P. C. 150. 10 E. 4. 19. 26. F. Cor. 36. B. Corone 155.

quired, whether he be the ſame perſon or not, in the ſame manner as where one ſtands mute by the act of God, when firſt brought upon his trial.

(a) Sum. 226. 2 Hale 317. Skinner 145. Savile 56. Kelynge 57. Dyer 205. 1 Inſt. 177. B. Pain 19. Co. Lit. 391. 3 Inſt. 14. S. P. C. 150. Con. F. Cor. 283.

Sect. 9. As to the ſecond point, *viz.* What is to be done to one who ſtands mute to an arraignment for high treaſon: It is clearly ſettled (*a*) at this day, That ſtanding mute upon an arraignment for high treaſon is equivalent to a conviction by verdict or confeſſion, and conſequently ſubjects the criminal to the ſame kind of judgment and execution as ſuch a conviction would do. But I take it for granted, That ſuch ſtanding mute muſt in (*b*) like manner appear to be obſtinate; and that if it be found to be the act of God, the whole matter ſhall in like manner (*c*) be inquired of, as hath been more fully ſhewn in the former part of this chapter. But where ſuch perſon appears to ſtand obſtinately mute, I do not find it any where holden, that there is any neceſſity that he probably appear to be guilty, or that any evidence be examined to prove him ſo, before he ſhall be condemned or executed. But this is adviſable, where one ſtands obſtinately mute on an arraignment for felony by ſtatute, as ſhall be more fully ſhewn in the fourteenth and fifteenth ſections.

(b) Vide ſup. ſect. 5, 6, 7. 38 E. 3. 26. S. P. C. 150.

(c) S. P. C. 150.

Sect. 10. As to the third particular, *viz.* What is to be done to one who ſtands mute to an arraignment for petit larceny: I take it to be agreed, (*d*) That if a man appear to ſtand obſtinately mute on an arraignment for petit larceny, he ſhall have the like judgment, &c. as if he had confeſſed the indictment.

(d) 2 Inſt. 177.

Sect. 11. As to the fourth particular, *viz.* What is to be done to thoſe who ſtand mute to an arraignment for felony by ſtatute: It is expreſsly enacted by 33 Hen. 8. c. 12. ſ. 12. "That if a perſon indicted, and arraigned of treaſon, miſ-"priſion of treaſon, murder, manſlaughter, or bloodſhed, &c. "againſt that act, within the verge of the court, ſhall obſtinate-"ly refuſe to anſwer directly, or ſhall ſtand mute, he ſhall have "the like judgment, &c. as if he were found guilty, &c." But (*e*) where a ſtatute, as that of piracy, &c. ordains a trial by the common courſe of the law, it hath been adjudged, That the criminal ſhall have judgment of his penance, &c. as in other felonies.

(e) Dyer 241. 3 Inſt. 114. 2 Hale 320. St. Tr. 367. B. 1. c. 37. ſect. 9. S. P. C. 150. Summary 226. 2 Hale 318, 319.

Sect. 12. As to the fifth particular, *viz.* What is to be done to one who ſtands mute to an arraignment on an appeal: It is holden by Sir Matthew Hale, (*f*) That an appellee of felony ſtanding mute ſhall not have judgment of penance, but to be hanged; but this is made a *quære* in (*g*) Staundforde, and (*h*) Brook; and the contrary opinion ſeemsto be favoured by Sir (*i*) Edward Coke, and is expreſsly holden by (*k*) Kelynge, and ſupported

(f) Sum. 226. Sed 2 Hale 317. 322. Contra. (g) S. P. C. 150. (h) B. Pain 8. 19. (i) 2 Inſt. 178, 179. (k) Kelynge 37.

ſupported by ſeveral (*a*) reſolutions in the old books. Whereas the year-book of 21 (*b*) E. 3. ſeems to be the only reſolution in favour of the other ſide; to which it may be anſwered, Not only that three of the above-cited reſolutions to the contrary, are much later, but alſo that the appellee in this caſe appears to have been taken with the *manner*, (*c*) which probably might be a circumſtance of conſiderable weight in the judgment.

(*a*) 8 H. 4. 1. Ab. B. Pain 1. B. Forfeit. 11. B. Appeal 24. F. Corone 71. 4 E. 4. 11. 18. Ab. F. Cor. 78. B. Appeal 93. B. Pain 14. 43 Aſſize 30.

Ab. B. Pain 13. B. Appeal 78. B. Corone 123 or 124. F. Corone 225. 14 E. 4. 7. This point is made a quære; but in the very next folio, pl. 17. Ab. B. Corone 161, it is adjudged by all the juſtices, That the appellee in ſuch caſe ſhould have his penance. (*b*) 21 E. 3. 18. Ab. B. Pain 8. B. Appeal 40. B. Corone 43. But neither F. Corone 56. nor 3 H. 7. 2. pl. 5. nor 3 H. 7. 12. pl. 5. cited by Staundforde, ſeem to come up to this point, but rather to be authorities of the other ſide. See B. Corone 82. (*c*) Vide ſup. c. 15. ſect. 41.

Sect. 13. As to the ſixth particular, *viz.* What is to be done to one who ſtands mute to an indictment of a capital felony, or a petit treaſon: It is enacted by the (*d*) above-mentioned ſtatute of Weſtminſter 1. c. 12. "That notorious felons "which openly be of evil fame, and will not put themſelves "in enqueſts 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 on light ſuſpicion.

(*d*) Vide 2 Inſt. 177, 178.

Sect. 14. Sir (*e*) Edward Coke, in the conſtruction of this ſtatute, ſaith, That 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 into; and Sir William (*f*) Staundforde ſaith, That there ought to be evident or probable matter to convict the party of the crime whereof he is arraigned, or otherwiſe that he be a notorious felon, or openly of bad fame; and therefore he adviſes the judge, for the ſatisfaction of this ſtatute, and diſcharge of his duty, to examine the evidence which proves the priſoner guilty of the fact, before he proceed to the judgment of *pain fort et dure*. Yet I cannot find any book which takes notice of any examination of this kind, or of any entry that the defendant appeared to be a notorious felon, before ſuch judgment given againſt him, upon his ſtanding mute, whether upon an (*g*) indictment or (*h*) appeal: But all the books cited in the margin ſeem to intimate, that the ſtanding mute is of itſelf a ſufficient ground for ſuch judgment. Yet all that can be inferred from thence ſeems to be this, That it is not neceſſary to make any thing of this kind part of the record, it being a matter left to the diſcretion and conſcience of the judge, and to be preſumed where it is not expreſſed. But as to all capital appeals whatſoever, and all indictments and appeals of petit treaſon, perhaps it may be ſaid, That (*i*) not being within this ſtatute, but remaining as they were at the common law, the obſtinacy of a criminal in ſtanding mute ſo them, may be of itſelf,

(*e*) 2 Inſt. 177.

(*f*) S. P. C. 159. Summary 226. 2 Hale 320, 321, 322.

(*g*) Ra. Ent. 383. Keilway 70. 7 E. 4. 29. 3 H. 7. 12.

(*h*) 8 H. 4. 1. 4 E. 4. 11. 14 E. 4. 7. 43 Aſſize 30. 21 E. 3. 18. 3 H. 7. 2.

(*i*) S. P. C. 150. 2 Inſt. 177, 178, 179. And the books cited, ſect. 12. under lett. (*a*).

ſelf, without more, a ſufficient inducement to a judge to award him to his penance. But conſidering that ſuch appeals and indictments are within the ſame reaſon with thoſe mentioned in the ſtatute; and it is uncertain how the common law ſtood in relation to theſe matters, as appears by the beſt authors (*a*) differing among themſelves concerning them; and ſeeing the method preſcribed by the ſtatute is very juſt and equitable, it ſeems prudent at leaſt in a judge to obſerve the ſame rules in all caſes of this kind.

(*a*) S. P. C. 149. 2 Inſt. 178, 179.

Sect. 15. I do not find it ſaid in any book, what ſhall be done to a priſoner who, obſtinately ſtanding mute to an arraignment, ſhall appear to be charged upon very light ſuſpicion; but I take it for granted, that he may be ſeverely fined and impriſoned for the contempt.

Sect. 16. As to the fifth point, *viz.* What is the nature of the penance to which a priſoner is to be adjudged upon his obſtinately ſtanding mute: It is obſervable, That the above-cited ſtatute of Weſtminſter 1. ſays only in general, That felons ſtanding mute ſhall be put *in priſon forte et dure*, without ſaying any thing of the manner of it, which it ſeems to leave as a known thing to the uſual practice in ſuch caſes; which we ſhall beſt find from the books of entries, and other law books, all of which generally agree, That the priſoner ſhall be remanded (*b*) to the place from whence he came, and put (*c*) in ſome low dark room, (*d*) and there laid on his back, without any manner of covering, except for the privy parts, and (*e*) that as many weights ſhall be laid upon him as he can bear, and more, and that he ſhall have no manner of ſuſtenance but of the worſt (*f*) bread and (*g*) water, and that he ſhall (*h*) not eat the ſame day in which he drinks, nor drink the ſame day on which he eats; and that he ſhall ſo continue till he (*i*) die. But it is ſaid, (*k*) That anciently the judgment was not, That he ſhould ſo continue till he ſhould die, but till he ſhould anſwer, and that he might ſave himſelf from the penance by putting himſelf on his trial, which he cannot do at this day after the judgment of penance is once given.

(*b*) Sum. 227. 2 Hale 319. 399, 400. S. P. C. 150. Keilw. 70. 4 E. 4. 11. 14 E. 4. 8. Ab. B. Cor. 161. 2 Inſt. 178 Raſt. Ent. 385. 8 H. 4. 1.

(*c*) This clauſe is omitted in Keilw. 70. 4 E. 4 11. but it is mentioned in all the other books above cited, but with this difference, That 14 E. 4. 11. ſays only that he ſhall be put in a chamber, without adding that it ſhall be low or dark.

(*d*) In this all the books above cited, ſeem to agree. And 14 E. 4. 8. pl. 17. S. P. C. 150. and 2 Inſt. 178. adds That he ſhall lie without any litter or other thing under him, and that one arm ſhall be drawn to one quarter of the room with a cord, and the other to another, and that his feet ſhall be uſed in the ſame manner. But theſe clauſes are wholly omitted in all the other books above cited, except Hale's Summary, which takes notice of the latter of them only. And Raſtal Entries 385. pl. 2. adds, That an hole ſhall be made for the head, and Keilway 70 a. ſays, That the head ſhall not touch the earth; but none of the other mention either of theſe clauſes. (*e*) In this all the books above recited agree. (*f*) But 14 E. 4. 8. S. P. C. 150. and 2 Inſt. 178. are, That he ſhall only have three morſels of barley bread a day. Keilway 70. a. that he ſhall have only rye bread; and Raſtal 385 and 2 H. 4. 1. generally that he ſhall have of the worſt bread. (*g*) 14 E. 4. 8. S. P. C. 150. 2 Inſt. 178. and 8 H. 4. 1. and Keilway 70. are, That he ſhall have the water next the priſon, ſo that it be not current; but Raſtal 385, is general, That he ſhall have the worſt water. (*h*) This is omitted in Keilway 70. and in 8 H. 4 1. (*i*) This is omitted in none of the books above cited, except 14 E. 4 11. and Summary 227. but neither of theſe books give the whole judgment at large. (*k*) S. P. C. 150, 151, Britton 11.

Sect.

Sect. 17. It ſeems clear, (*a*) That women upon ſtanding mute, are liable to ſuch penance as well as men.

(*a*) 2 Inſt. 177. 2 Hale 319.

Sect. 18. It is ſaid (*b*) to be the conſtant practice of Newgate ſeſſions, where a priſoner refuſes to plead, to endeavour to compel him to do it by tying his thumbs together with whipcord, and not to proceed to the judgment and penance, before all methods of perſuading him to plead, are found ineffectual.

(*b*) Kelynge 27 This practice is rendered unneceſſary by 12 Geo. 3. c. 20. Vide Infra ſect. 25.

Sect. 19. As to the fifth point, *viz.* What he who obſtinately ſtands mute ſhall forfeit, and to whom: There is no doubt but that in caſe of (*c*) high treaſon he ſhall forfeit both lands and goods, in the ſame manner as if he had been attainted any other way. Alſo I take it for granted that in the caſe of felony and petit treaſon, where a perſon by ſtanding mute ſhall not avoid being attainted for ſuch crimes, he ſhall forfeit his lands and goods in the ſame manner as on other attainders. But wherever a perſon ſtanding mute is adjudged to his penance, and thereby prevents that attainder which otherwiſe he might have incurred, it ſeems agreed, (*d*) That he forfeits his chattels only, and not his lands.

(*c*) See the books cited to ſect. 9.
(*d*) 14 E. 4. 7. Sum. 226, 227. 2 Hale 319. Coke Lit. 391. F. Eſc 10. F. Corone 51. Aſſize 421. S. P. C. 151. 2. B. Forfeit. 11. 64. B. Appeal 24. 8 H. 4. 1, 2. 3 H. 7. 12.

Sect. 20. It is agreed in the year-book of 8 (*e*) Hen. 4. That the goods ſo forfeited ought not to be delivered to any perſon claiming them under a grant from the crown, till he have ſhewed a good title to them in the king's court, by ſome grant ſufficient to paſs them.

(*e*) 8 H. 4. 2. B. Appeal 24.

Sect. 21. And it ſeems, (*f*) That ſuch goods will not paſs by grant of all felons goods, having no words ſpecially extending to the goods of thoſe who ſtand mute, &c becauſe a perſon adjudged to his penance for ſtanding mute, does not ſeem to ſuffer as a felon, being neither attainted nor convicted of any felony, but as a perſon refuſing to ſtand to the law of the land. And it ſeems rather the ſtronger opinion, (*g*) That they paſs not by the grant of all goods of felons and fugitives of all perſons within ſuch a diſtrict; ſo that if ſuch perſons for any treſpaſs or other fault ought to loſe life or member; or ſhall fly and refuſe to ſtand to judgment, or do any other treſpaſs for which they ought to loſe their chattels.

(*f*) Dyer 268. 18. 8 H. 4. 2. B. Forfeit. 11.

(*g*) Dyer 268. 8 H. 4. 2. B. Forfeit. 11.

Sect. 22. As to the ſixth point, *viz.* Whether the proſecutor of an indictment or appeal of larceny be entitled to a reſtitution of the goods ſtolen, upon the defendant's ſtanding mute. It ſeems agreed, (*h*) That by the common law, where a perſon ſtands mute to an appeal of larceny, it is proper to charge the ſame inqueſt which is to inquire whether the ſtanding mute be of malice or not, to inquire alſo whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a freſh ſuit (*i*) made by ſuch appellant; which points being found (*k*) for him, he ſhall

(*h*) Vide ſup. c. 23. ſect. 53. 8 H. 4. 1. Ab. B. Appeal 2. S. P C 166.
(*i*) Vide c. 23. ſect. 50, 51, 52.
(*k*) Sup. c. 23. ſect. 53.

(a) Sup. c. 23. ſect. 57.
(b) Sup. c. 23. ſect. 54.
(c) 21 E. 3. 18. Ab. B. Appeal 40.
43 Aſſize 30. Ab. B. App. 78. B. Corone 123. F. Corone 225. Vide 40 Aſſize

have an award of reſtitution to ſuch goods, and to ſuch only, (a) in whoſe hands ſoever (b) they are found. And it is ſaid in general in ſome books, (c) That in any appeal of larceny there ſhall be a reſtitution of the goods, upon the appellee's ſtanding mute, without ſaying any thing of any inquiry concerning the property, or freſh ſuit: But I take it for granted, That where it is ſo omitted, it is taken as a thing known, and done of courſe, and therefore needleſs to be be expreſsly mentioned.

39. Ab. Fitz. Corone 217.

(d) Sup. c. 23. ſect. 55, 56.

Sect. 23. But it ſeems queſtionable, Whether the proſecutor of an indictment of larceny, be in like manner intitled to a reſtitution upon the defendant's ſtanding mute? Becauſe it ſeems agreed, (d) That by the common law there could be no ſuch reſtitution upon any other proſecution but an appeal; and it is certain, That the proſecutor of an indictment is not entitled to a reſtitution by the expreſs words of 21 (e) Hen. 8. c. 11. which require, "That the felon be found guilty, or otherwiſe "attainted, &c." And I do not know that he is entitled to it by any other ſtatute, or any equitable conſtruction of this.

(e) Set forth more at large c. 23. ſect. 55.

(f) F. Cor. 233. 283. Aſſize 421. 8 H. 4. 3. Summary 231. 2 Hale 320, 380. Moore 550. 3 H. 7. 12. Ab. B. Clergy 27. F. Corone 51. 3 H. 7. 12. Ab. F. Cor. 53. F. Cor. 58 ſeems contrary, but I cannot find any thing in 3 H. 7. 1. which is the year book cited to this note to warrant this opinion.
(g) See Sum. 332 to 338. 2 Hale 345.

Sect. 24. As to the ſeventh point, *viz.* Where one who ſtands mute ſhall have the benefit of his clergy. It ſeems clear, (f) That unleſs it happen to be otherwiſe ſpecially provided by ſome ſtatute, wherever he ſhall be allowed it upon a conviction, by verdict or confeſſion, he ſhall have it upon his ſtanding mute. Alſo I take it to be agreed, (g) That a ſtatute taking away the benefit of clergy from thoſe who ſhall be convicted of a crime, doth not thereby take it away from thoſe who ſtand mute on an indictment or appeal for ſuch crime. But it is enacted by 3 and 4 W. & M. c. 9. ſet forth more at large in the chapter of clergy, "That if any perſon ſhall "be indicted of any offence, for which by virtue of any former "ſtatute he is excluded from the benefit of his clergy, if he "had been thereof convicted by verdict or confeſſion, if he "ſtand mute he ſhall not be admitted to it." But appeals and offences excluded from the benefit of clergy by ſubſequent ſtatutes, ſeem not to be within the purview of this ſtatute; for the fuller conſideration whereof I ſhall refer the reader to the chapter of clergy.

Vid: ante ſect. 6.

† *Sect.* 25. And it is enacted by 12 Geo. 3. c. 20. "That "if any perſon being arraigned on any indictment or appeal "for felony, or on any indictment for piracy, ſhall upon ſuch "arraignment ſtand mute, or will not anſwer directly to "the felony or piracy, he ſhall be convicted of the felony "or piracy charged in ſuch indictment or appeal; and the "court before whom he ſhall be ſo arraigned ſhall there-"upon award judgment and execution againſt ſuch perſon in "the

" the ſame manner, and attended with the ſame conſequences, " as if he had been convicted by verdict or confeſſion."

CHAPTER THE THIRTY-FIRST.

OF CONFESSION AND DEMURRER.

AND now I am to conſider what is to be done to a priſoner upon his confeſſion; which may be either Expreſs, or Implied.

Sect. 1. An expreſs confeſſion is where a perſon directly confeſſes (*a*) the crime with which he is charged, which is the higheſt conviction that can be, and may be received (*b*) after the plea of not guilty recorded, notwithſtanding the repugnancy; for the entry is, That the defendant *poſtea* or *relicta verificatione, cognovit indictamentum.*

(*a*) S. P. C. 142. Lamb. B. 4. c. 9. Finch 38.
(*b*) Kelynge 11. Qu if the law be the ſame in civil actions. Affirmed Cro. Eliz. 144. Denied 2 Jones 156.

Sect. 2. Such a confeſſion carries with it ſo ſtrong a preſumption of guilt, that an entry (*c*) on record *quod cognovit indictamentum*, &c. in an indictment of treſpaſs, eſtops the defendant to plead not guilty to an action brought afterwards againſt him for the ſame matter. But it ſeems queſtionable, Whether ſuch entry of a confeſſion of an indictment of a capital crime, will in the like manner eſtop a defendant to plead not guilty to an appeal, becauſe in caſe of life, the court will be very tender in going upon preſumptions. And where a perſon upon his arraignment actually confeſſes (*d*) himſelf guilty, or unadviſedly diſcloſes the ſpecial (*e*) manner of the fact, ſuppoſing that it doth not amount to felony, where it doth, yet the judges, upon probable circumſtances, that ſuch confeſſion may proceed from fear, menace, or dureſs, or from weakneſs or ignorance, may refuſe to record ſuch confeſſion, and ſuffer the party to plead not guilty.

(*c*) 9 H. 6. 60. F. Eſtoppel 24. 102. 11 H. 6. 6. Lamb. B. 4. c. 9. Tr. per Pais 25.
(*d*) S. P. C. 141. 2 Hale 225.
(*e*) 22 Aſſ. 71. Ab. F. Cor. 180. 27 Aſſize 40.

Sect. 3. 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 the king's mercy, and deſiring to ſubmit to a ſmall fine: in which caſe, if the court think fit to accept of ſuch ſubmiſſion, and make an entry that the defendant *poſuit ſe in gratiam regis*, without putting him to a direct confeſſion, or plea (which in ſuch caſes ſeems to be left to diſcretion), the defendant ſhall (*f*) not be eſtopped to plead not guilty

(*f*) 9 H. 6. 60. Ab. F. Eſtoppel 24. 11 H. 4 65. 21. Lamb. B 4 c. 9 Farrefly 40.

guilty to an action for the ſame fact, as he ſhall (a) be where the entry is *quod cognovit indictamentum.*

(a) Sup. § 2.

Sect. 4. I take it for granted, That no confeſſion whatever ſhall, before final (b) judgment, deprive the defendant of the privilege of taking exceptions in arreſt of judgment to faults apparent in the record; (c) for the judges muſt *ex officio* take notice of all ſuch faults, and any one, as *amicus curiæ*, may inform them of them.

(b) 1 Salkeld 77, 78. Farreſly 100.
(c) Finch 226. 2 Danv. Ab. 252. 2 Levinz 223.

Sect. 5. It ſeems to be taken for granted, both by (d) Brook and (e) Staundforde, (f) Coke and (g) Hale, ſpeaking, as I ſuppoſe, of a general demurrer, That it amounts ſo far to a confeſſion of the indictment as laid, that if the indictment be good, judgment and execution ſhall go againſt the priſoner. But it is obſervable, That no adjudged caſe is cited for the maintenance of this opinion, nor any authority from the old books except the year book of 14 Edw. 4. 7. *a. pl.* 10. (1) in which it is reported to have been ſaid by Choke, That if a defendant demur to a plea, he ſhall be hanged, *quod fuit conceſſum.* But to this it may be ſaid, That it was only ſpoken incidentally, and not a point adjudged; and beſides that it is ſo ſhort and obſcure that is ſcarce intelligible, which appears by Brook's abridging it in different ſenſes; for in one place (h) he ſeems to underſtand it of a demurrer by a defendant to a plea in bar, which ſeems impoſſible; and in another (i) place he ſeems to underſtand it in a different ſenſe. And therefore perhaps the meaning of it may be only this, That after a defendant hath pleaded ſuch a bar as confeſſes the fact, and concludes him to plead the general iſſue afterwards, as ſome pleas are ſaid (k) to do; if he afterwards demur to a replication to ſuch plea, he ſhall be condemned, if the demurrer be adjudged againſt him, and the indictment or appeal be good.

(d) B. Peremptory 86.
(e) S. P. C. 150.
(f) 2 Inſt. 178.
(g) Sum. 243. 2 Hale 315.
(1) Hale ſays, this authority muſt be taken *cum grano ſalis.* 2 Hale 257. Vide alſo 225 and 4 Comm. 328. where it is ſaid, that although a man may in ſome caſes loſe his property, yet the law will not ſuffer him by ſuch nicetiesto loſe his life. However, upon this doubt demurrers to indictments are ſeldom uſed: ſince the ſame advantages may be taken upon *not guilty* or in arreſt of judgment.

(h) B. Demurrer 17. (i) B. Peremptory 86. (k) Vide ſup. c. 23. ſect. 137.

Sect. 6. But howſoever the law may ſtand in relation to a (l) general demurrer concluding in bar of an appeal, or indictment, as in common demurrers in civil actions, or a demurrer to a plea in bar, (m) which admits the fact, or to a (n) replication to ſuch a plea: It hath been adjudged, That if an appellee demur in law to an appeal by reaſon of the (o) inſufficiency of the declaration, or generally demur to the declaration, with a (p) concluſion *et petit judicium de narratione illa et quod narratio illa caſſetur*; or having prayed (q) oyer of the writ and proceſs, demand judgment of the appeal, *quia dicit quod breve de appello prædict. et proceſſ. inde minus ſufficient' in lege exiſtunt ad ipſum W. C. ad dictum breve de appello reſpondere compellend'; et hoc parat. eſt verificare prout cur', &c. unde petit judicium de brevi de appello prædict. et petit inde allocationem, et quod breve illud de appello caſſetur*; ſuch demurrer ſhall not conclude him from

(l) See the precedent ſection.
(m) Vide B Peremptory, 86. F. Cor. 12.
(n) Vide B. Peremptory 86.
(o) Dyer 38, 39. Cro. Eliz. 196.
(p) As it was done in the caſe of Smith v. Bowen, Mich. 7 Ann. Vide Salkeld 59.
(q) As it was done in the caſe of Widdrington and Charlton, Hill. 10 Ann.

from pleading over to the felony, either at the ſame time (*a*) with the demurrer, or (*b*) after it ſhall be adjudged againſt him.

(*a*) Smith and Bowen, Mich. 7 Annæ; In which caſe the demurrer was continued on the record with a ceſſet triatio exitus, &c. and after the demurrer was determined againſt the defendant, a venire was awarded. (*b*) Dyer 38. Salkeld 59, 60. Cro. Eliz. 196.

Sect. 7. But it ſeems, That in criminal caſes not capital, if the defendant demur to an indictment, &c. whether an abatement or otherwiſe, the court will not give judgment againſt him to anſwer over, but final (*c*) judgment. For it ſeems, That in ſuch caſes there can be no demurrer properly in abatement, except (*d*) it be to a plea in abatement, or to a (*e*) replication to ſuch a plea.

(*c*) Vide Salk. 220.
(*d*) Salk. 218.
(*e*) Raſtal 160. 611.

Sect. 8. A demurrer to an appeal hath been (*f*) received after iſſue joined: But it hath been adjudged, (*g*) That a demurrer to an indictment ought not to be received after verdict.

(*f*) Cro. Eliz. 196.
(*g*) 1 Sider. 208. wherein the precedent in Co. Ent. 363. to the contrary is denied to be law.

CHAPTER THE THIRTY-SECOND.

OF SANCTUARY.

BEFORE I conſider in the third place, how a priſoner is to be demeaned upon his pleading, I ſhall examine the nature of the ſeveral kinds of pleas in criminal caſes; which are either Dilatory, or in Chief.

Dilatory pleas are either Declinatory, or, in Abatement.

Declinatory pleas are either, Firſt, Of the privilege of ſanctuary; or, Secondly, Of the benefit of clergy.

27 Hen. 8. c. 19. 32 Hen. 8. c. 12. 3 Peere Will. 39. 4 Comm. 326. 358. 429. Vide alſo 9 Geo. 1. c. 28. for ſuppreſſing the pretended privileged place in Saint George's Fields called the *Mint*. And alſo 11 Geo. 1. c. 22. for ſuppreſſing another pretended ſanctuary of the ſame nature in the hamlet of *Wapping*, *Stepney*, by which acts all reſiſtance is made felony and tranſportation for ſeven years. Vide alſo 8 and 9 Will. 3. c. 27. for ſuppreſſing many other pretended ſanctuaries from civil proceſs, where the ſame puniſhment is inflicted upon the offenders.

Sect. 1. As to the plea of the privilege of ſanctuary, the learning relating to it being made in a great meaſure uſeleſs by the ſtatute of 21 Jac. 1. c. 28. ſ. 7. by which it is enacted, "That no ſanctuary, or privilege of ſanctuary, ſhall after that "time be admitted or allowed in any caſe:" I ſhall but briefly conſider it under the following heads, 1. What was

he nature of the privilege of ſanctuary. 2. What authority was neceſſary for the creating it. 3. To what matters it extended. 4. At what time, and in what manner it was to be pleaded.

Sect. 2. As to the firſt point, *viz.* What was the nature of the privilege of ſanctuary. It ſeems to be agreed, (*a*) That ſo far as a place was allowed to have it, it gave all thoſe that fled to it for ſafeguard, and continued within its (*b*) precincts, a (*c*) freedom from being apprehended, or compelled to anſwer in any court of juſtice, and a right to be remanded if taken out againſt their will.

(*a*) Finch 374. S. P. C. 108. 2 Hale 323, 324.
(*b*) What thoſe precincts were, Keilway 189. 191. 9 H. 7. 20. S. P. C. 113. B. Sanctuary 10.
(*c*) Keilw. 188, 189, 190, 191. 8 H. 6. 4. Ab. F. Cor. 5. 1 H. 7. 23. Ab. F. Cor. 49. 9 E. 4. 28. Ab. F. Cor. 32. Keilway 107. 188.

Sect. 3. As to the ſecond point, *viz.* What authority was neceſſary for the creating it. It ſeems, that it belonged of common (*d*) right to every church and churchyard, for the ſpace of forty days, but could not be claimed for a longer time, either by force of any bull from the (*e*) Pope, nor even by (*f*) preſcription, (*g*) eſpecially in the caſe of high treaſon; but only by a grant (*h*) from the king, made, or at leaſt confirmed (*i*) or allowed (*k*) in Eyre, ſince the time of memory. But it is ſaid, That it did not gain (*l*) the name of a ſanctuary till it had the Pope's bull, though it had the (*m*) full privilege of one, as to all exemption from temporal courts, by the king's grant only.

(*d*) 32 H. 8. c. 12. Finch 388. 3 H. 7. 12. Ab. F. Cor. 54. 21 E. 3. 17. Ab. B. Sanct. 2. Sup. c. 9. ſect. 44. Keilw. 189. B. Sanct. 11. 14. 16. Raſtal 583.
(*e*) Keilw. 189, 190, 191. S. P. C. 110, 111. B. Sanct. 6. 15. 5 Coke de jure Regis Eccleſ. 26. (*f*) 1 Inſt. 114. Keilway 188, &c. But Quære if ſuch preſcription were confirmed by king, or allowed in Eyre ſince time of memory. Keilway 188, 189, 190, 191. (*g*) S. P. C. 112. 1 H. 7. 23. 25, 26. Ab. F. Cor. 49. Preſcrip. 20. Vide Raſtal 584. (*h*) S. P. C. 108. 110, 111. 1 H. 7. 25. 26. B. Sanct. 7. Keilw. 189, 190, 191. (*i*) Keilw. 189, 190. 1 H. 7. 23. 2 R. Abr. 268, 269. (*k*) Keilw. 189, 190. 2 R. Abr. 268, 269. 1 H. 7. 23. B. Sanct. 7. 15. this is made a quære, S. P. C. 112. (*l*) Finch 375. (*m*) Finch 374, 375.

Sect. 4. As to the third point, *viz.* To what matters it extended: It ſeems agreed, That it never was any farther a protection againſt any action merely civil, (*n*) than to ſave the defendant from execution of his body. Alſo it ſeems to be generally agreed, That if it were granted by general words, it extended not to (*o*) high treaſon. But it ſeems agreed, (*p*) That in ſuch caſe it extended to all felonies except (*q*) ſacrilege, and to all inferior crimes except ſuch as were committed by a ſanctuary man (*r*) within the ſanctuary, or even (*s*) out of it, *ſub ſpe redeundi.*

(*n*) B. Sanct. 3. 11. 7 H. 6, 8. 34. Ab. F. Jur. 2. Dyer 295.
(*o*) 21 E. 3. 17. Denied 29 Aſſ. 24. Ab. F. Grant 77. B. Sanctuary 6. 1 H. 7. 23. 25, 26. Ab. F. Cor. 49. Preſcription 20.
Cont. Keilway 190, 191. Qu. Finch. 374. (*p*) See the books cited to the other parts of this ſection. Quære if in ſuch caſe it extended to petit treaſon. B. Sanct. 2. (*q*) 3 Inſt. 115. Fitz. 420. (*r*) Agreed by all the canoniſts. Keilway 191. (*s*) Denied by many of the canoniſts Keilway 191.

Sect. 5. As to the fourth point, *viz.* At what time, and in what manner it was to be pleaded: It ſeems agreed, That the defendant loſt the benefit of it, unleſs he pleaded it before any other

(a) other plea, and properly made out his caſe; but for this matter I ſhall wholly refer the reader to the old (b) books.

(a) S. P. C. 113. F. Cor. 438. B. Sanct. 5.

(b) Keilw 90. 21 E. 3. 17. 21. Ab. B. Sanct. 2. F. Corone 447. 9 E. 4. 28. Ab. F. Cor. 32. 107, 108. 189. S. P. C. 113. 1 H. 7. 23, 24, 25, 26. 9 H. 7. 20. Raſtal's Entries, 584. 683.

Sect. 6. For the learning of abjuration, (c) depending much upon that of ſanctuaries, and ſeeming to be of very little uſe at this day, I ſhall refer to STAUNDFORDE'S PLEAS OF THE CROWN, Book 2. chap. 40. and to what hath been ſaid already concerning that matter in the chapter concerning coroners, ſection forty-four.

(c) 3 Inſt. 115. F. Ariel 5.

CHAPTER THE THIRTY-THIRD.

OF CLERGY.

FOR the better underſtanding the nature of the benefit of clergy, or rather of the (d) ſtatute at this day, I ſhall endeavour to ſhew, 1. By what kind of perſons it is demandable. 2. For what crimes. 3. At what times. 4. Whether it ſhall be allowed where it is not demanded. 5. Who is to judge whether the perſon who demands it have a right to it or not. 6. How far the ordinary was puniſhable at law for demanding or refuſing a clerk againſt law. 7. In what manner at the common law a clerk was to be delivered to the ordinary, and what is to be done to him afterwards. 8. What is to be done to him at this day, and how far it ſhall be to his benefit.

(d) See the latter part of this chapter. 4 Comm. 327. 358. 406. 428.

Sect. 1. As to the firſt point, *viz.* By what kind of perſons the benefit of clergy, or rather of the ſtatute at this day, is demandable. It may not be improper to look a little back into the original of clergy, whereby we ſhall find, That anciently the clergy (e) ſtrongly inſiſted, that by the law of God their perſons were ſo ſacred, that they could not, without a violation of that law, be convened before, and much leſs be puniſhed with the loſs of life, or member, by any ſecular judge, for any crime whatſoever. But there ſeems to be ſo little colour for any pretence of this kind from Scripture, that I almoſt wonder how it was poſſible that any perſons could be ſo far prejudiced, as ſeriouſly to be perſuaded that it is deducible from thence,

(e) Keilw. 181. 185. 2 Hale 323. 330. &c.

Sect.

Sect. 2. But it ſeems agreed, *(a)* That all perſons in holy orders have this privilege by the canon law. But this law being no farther in *(b)* force here than as it hath been received, and is conſiſtent with the common or ſtatute law; it will be proper to ſhew how far it hath been received, and is conſiſtent with thoſe laws; which I ſhall at preſent conſider under this head, ſo far as it relates to the perſons intitled to this privilege; and ſhall farther conſider it as to other matters, in the following part of this chapter.

(a) See Lyndw. Book 2. in the chapter de foro competente. Kelynge 99. 101. &c. S. P. C 123, 124. Finch 462.

(b) Keilway 181, &c. 5 Coke de jure Regis eccleſ. 13, &c. 2 Hale 325. 1 Comm. 14. 4 Comm. 414.

Sect. 3. It ſeems agreed, That before the ſtatute of Articuli cleri, c. 15. made in the ninth year of Edward the ſecond, it was *(c)* generally denied to thoſe who had abjured, or who had any other way confeſſed themſelves guilty. But by a favourable interpretation of that ſtatute, which expreſsly extends only to thoſe who fly to the church for ſafeguard, it hath been allowed *(d)* to all thoſe who have confeſſed themſelves guilty upon their arraignment or otherwiſe, in the ſame manner as if they had not confeſſed.

(c) F. Corone 155. 11 Coke 29. S P C. 124. Keilway 186. Seld. Ja. Ang. c. 10

(a) B. Clergy 3. 7, 8. 9 E. 4. 28. 8 H. 4 3. 1 Aſſize 4. 27 H. 6, 7. F. Corone 191.

Sect. 4. Alſo it ſeems, That notwithſtanding the clergy *(e)* contended, That the word *Clericus* (which is the word generally uſed by the *(f)* Canon law, as well as ours, *(g)* to expreſs thoſe who are entitled to this privilege) did include thoſe of the inferior orders, as well *(h)* as biſhops, prieſts, and deacons: yet it ſeems, *(i)* That the temporal judges ſometimes denied it to thoſe in inferior orders, as well as to mere *(k)* laymen, before the ſtatute of 25 Edw. 3. c. 4. which reciting, "That the prelates had grievouſly complained, That ſecular clerks, as well chaplains as other monks, and other people of religion, had been drawn and hanged by award of the ſecular juſtices, in prejudice of the franchiſe of holy church, &c." doth enact, "That all manner of clerks, as well ſecular as religious, &c. "ſhall freely enjoy the privilege of holy church, &c."

(e) Kelynge 99, 100,

(f) Lyndwood B. 2. c. de foro competente.

(g) See St. Marl. c. 28. Weſtm. 1. c. 2. Art. cleri, c. 15. and the old books cited 2 Inſt. 633, 634, &c.

(h) Keilw. 181. Kelynge 99, 100.

(i) Kely. 99, 100.

(k) F. Cor. 233. But they ſometimes allowed it to mere laymen, being able to read. F. Corone 117.

Sect. 5. It ſeems that by a favourable interpretation of this ſtatute, which univerſally prevailed ſoon *(l)* after it was made, not only thoſe actually admitted into ſome inferior order of the clergy, *(m)* but alſo thoſe who were never qualified to be admitted into orders (which was *(n)* tried by putting them to read a verſe), have been taken to have a *(o)* right to this privilege, as much as perſons in holy orders, whether they were perſons lawfully born, or *(p)* baſtards, *(q)* aliens or denizens, in the com-

(l) Yet it was holden the next year after the ſtatute, quod literatura non facit clericum niſi habeat ſaciam tonſuram. 26 Aſſize 19. Ab. F. Corone 191.

S. P. C. 124. 2 Hale 372, 373. *(m)* Kely. 100, 101, 102. B. Clergy 7. 20. *(n)* Kelynge 100, 101. Finch 462, 463. S. P. C. 133. 34 H. 6. 49. F. Corone 44. See the caſes cited to the fourth general point of this chapter. *(o)* 9 E. 4. 28. Ab. B. Clergy 7. *(p)* B. Clergy 21. 2 Hale 373. *(q)* B. Clergy 20.

munion

munion of the church or (a) excommunicate, within the common benefit of the law, or (b) outlaws, &c. ſo that they were not (c) hereticks convict, nor (d) Jews, Mahometans, nor Pagans; nor under (e) perpetual diſability of going into orders, admitting of no diſpenſation, as (f) blind and maimed perſons formerly were, and women (g) ſtill are; nor liable to the objection of bigamy, *viz.* of having (h) married two different women ſucceſſively, or a widow, which by a conſtitution of the council of Lyons, (i) received in this kingdom, was a bar to the demand of the privilege of the clergy; and by force of 18 Edw. 3. c. 2. was triable by the certificate (k) of the biſhop.

(a) B. Clergy 20. Summary 229. 11 Coke 29.
(b) See 3 & 4 W. & M. 9. 11 Coke 29. b.
(c) S. P. C. 133. B. Clergy 20. 11 Coke 29.
(d) B. Clergy 20. 11 Coke 29. Summary 229. 2 Hale 373.
(e) 11 Coke 29.

(f) 11 Coke 29. Summary 229. Con. B. Clergy 21. (g) Finch 463. 11 Coke 29. See prea. 21 Jac. 1. c. 6. and 3 & 4 W. & M. 9. ſect. 7. Yet it is admitted, F. Corone 461, That a woman might claim the benefit of clergy. (h) S. P. C. 134, 135. Raſtal 106. 2 Hale 372. (i) See ſtat. of bigamy. 4 E. 1. c. 5. 5 Coke de Jure Regis Eccleſiaſtico 13. S. P. C. 225. (k) Raſtal 260. S. P. C. 134, 135. 11 H. 4. 11. Ab. F. Corone 85. 40 E. 3. 42. Ab. F. Attorney 39.

Sect. 6. But it is expreſsly enacted by 1 Edw. 6. c. 12. ſ. 16. "That any perſon who by the law of this realm ought to have "the benefit of his clergy ſhall be admitted to it, although he "have been divers times married to any ſingle woman, or "to any widow or widows, or to two wives or more." But it bore ſome (l) queſtion whether this ſtatute were not impliedly repealed by 1 & 2 Philip & Mary, c. 8. while it ſtood in force, which repealed "all clauſes, &c. againſt the See of Rome."

(l) S. P. C. 134. Daliſon 21. Dyer 201. B. Clergy 20. Summary 229. 2 Hale 372.

Sect. 7. As to women it is enacted by 21 Jac. 1. c. 6. "That on a conviction of grand larceny under the value of "ten ſhillings, being no burglary, nor robbery in or near the "highway, nor a felonious private taking from the perſon, "&c. but only ſuch an offence for which a man might have "his clergy, they ſhall be burnt in the hand, and impriſon-"ed, &c."

Sect. 8. But it is enacted by 3 & 4 Will. & Mary, c. 9. ſ. 7. "That where a man being convicted of any felony may "demand the benefit of his clergy, if a woman be convicted "for the ſame or the like offence, upon her prayer to have "the benefit of this ſtatute, judgment of death ſhall not be "given againſt her upon ſuch conviction, or execution award-"ed upon any outlawry for ſuch offence; but ſhe ſhall ſuffer the "ſame puniſhment as a man ſhould ſuffer, that has the benefit "of his clergy allowed him in the like caſe; that is to ſay, "ſhall be burnt in the hand by the gaoler in open court, and "further be kept in priſon for ſuch a time as the juſtices in "their diſcretion ſhall think fit, ſo as the ſame do not exceed "one year's impriſonment."

Sect. 9. It ſeems, (m) That one who had been guilty of ſacrilege, or of breaking the priſon of the ordinary, had no

(m) S. P. C. 31, 32. 123, 124. 133.

F. Corone 112. 117. 120. 270. 257. 4 Inſt. 314. 12 Aſſize 39. Ab. B. Clergy 10. 17 Aſſize 4. 37 E. 3 13. Ab. F. Corone 112. 9 E. 4. 28. Ab. B. Clergy 7. 27 Aſſize 42. Ab. F. Cor. 205. B. Clergy 13. 11 Coke 29.

right

right to the benefit of clergy, but at the (a) diſcretion of the ordinary.

(a) Yet it ſeems to be holden, 26 Aſſize 19. 27. Ab. B. Cler. 11, 12. F. Corone 191. 193. That one who had been guilty of ſacrilege might demand it as well as any other. 2 Hale 333. 366. And it ſeems to be holden, F. Corone 232. 250. 257. 419. 2 Hale 372. That one who had broken the priſon of the ordinary had no manner of right to it. 12 Aſſize 39. Ab. B. Clergy 10. This point is made a quære. 9 Edw. 4. 28. pl. 40. Ab. B. Clergy 7.

Sect. 10. It ſeems clear, (b) That before the ſtatute of 4 Hen. 7. c. 13. He who had been admitted to the benefit of clergy, might have it a ſecond time as well as the firſt, unleſs he had broken the priſon of the ordinary, to which he was committed when clergy was firſt allowed him; in which caſe it ſeems, (c) That he could not ſave himſelf from a ſecond proſecution, though for the very ſame felony for which he was before convicted, unleſs he could ſhew a purgation.

(b) Sum. 230. S. P. C. 32, 32. 307. 124. 135. See Pre. 4 H. 7. c. 13. But 37 Aſſize 4. 37 E. 3. 13. 17. Ab. F. Corone 312. It ſeems to have been doubted where the clerk was attainted before he firſt had the benefit of clergy. (c) F. Corone 232. and the books cited to letter (b), and to the former ſection.

Sect. 11. But it is enacted by 4 Hen. 7. c. 13. "That "every perſon, not being within orders, who hath once been "admitted to the benefit of his clergy, eſtſoons arraigned of "any ſuch offence, be not admitted to have the benefit or pri"vilege of the clergy, &c."—And it is provided, "That if "any perſon at the ſecond time of aſking his clergy, becauſe "he is within orders, hath not there ready his letters of his "orders, or a certificate of his ordinary, witneſſing the ſame: "That then the juſtices afore whom he is ſo arraigned, ſhall "give him a day by their diſcretion to bring in his ſaid letters "or certificate; and if he fail, and bring not at ſuch a day his "ſaid letters or certificate, then the perſon to loſe the benefit of "his clergy as he ſhall do that is without orders."

Sect. 12. But it is enacted by 28 Hen. 8. ſ. 7. "That per"ſons within holy orders, ſhall be under the ſame pains and "dangers for the offences referred to by that ſtatute, and be "uſed and ordered to all intents and purpoſes, as other per"ſons, not being within holy orders."

And it is farther enacted by 32 Hen. 8. c. 3. ſ. 8. "That per"ſons within holy orders who ſhall be admitted to their clergy, "ſhall be burnt in the hand in like manner as lay clerks, and "ſhall ſuffer and incur all ſuch pains, dangers, and forfeitures, "and be ordered and uſed for their offences of felony, to all "intents, purpoſes, and conſtructions, as lay perſons admitted "to their clergy be, or ought to be, &c."

Sect. 13. But it is enacted by 1 Edw. 6. c. 12. ſ. 10. "That in all caſes of felony, other than thoſe in that act men"tioned, every perſon who ſhall be found guilty, or confeſs, or "ſtand mute, or not anſwer directly, ſhall have the benefit of "his clergy, in like manner and form as before the firſt year

"of

" of King Henry the eighth."—And therefore it ſeems plain, That where lay perſons are not excluded from the benefit of clergy the firſt time, perſons in holy orders may have it as often as they want it, in the ſame manner as they might upon the foot of the ſaid ſtatute of 4 Hen. 7. c. 13. *(a)* except they ſhall be outlawed, or challenge above the number of twenty, in which caſe they are not within the purview of 1 Edw. 6. which extends only to thoſe " who ſhall be found guilty, or confeſs, or " ſtand mute, &c." But *(b)* where the crime itſelf charged againſt a perſon in holy orders, is, by any ſtatute, generally excluded from clergy, ſuch perſon ſhall no more have the benefit of it than if he were a mere layman.

(a) Sum. 238, 239. S. P. C. 135.
(b) S. P. C. 135, 136. Sum. 235, 236. Vide 2 Hale 374, 376. 339. 341. 342. 345.

Sect. 14. It is recited by 34 & 35 Henry 8. c. 14. " That divers perſons had been indicted and attainted, and ſome of them clerks convict, and ſome of them clerks attainted, &c. before juſtices of peace, gaol-delivery, &c. within divers cities, counties, and franchiſes, &c. the records of which attainders and convictions often, by negligence of the clerks, &c. having the rule and keeping thereof, had been embezzled, and not ready to be objected againſt ſuch perſons, being newly arraigned before other juſtices, &c. And for that it hath not been known certainly whither to reſort for the ſame records, becauſe they were not certified into any place certain, ſuch offenders had often had the benefit of the clergy where they ought not, &c." And thereupon it is enacted, " That the " clerk of the crown, clerks of the peace, and clerks of aſſize, " where any ſuch attainder, or conviction ſhall be ſo had, ſhall " certify a tranſcript, briefly containing the effect of every ſuch " indictment, &c. and clerk attainted, &c. that is to ſay, the " name, ſurname, and addition of every ſuch perſon, &c. and " the certainty of the offence, &c. and the day and place of " his attainder or conviction, &c. and the day and place of " his offence, &c. before the king in his bench at Weſtminſter, " there to remain of record for ever, within forty days after " ſuch attainder, &c. if the term be then, and if not, then " within twenty days after the next term, &c. on pain of 40 s. " &c. And that the clerk of the crown in the king's bench, " ſhall receive the ſame without fee, under the like pain."

Sect. 15. Provided, " That if there be more perſons con- " tained in any ſuch indictment, other than ſuch perſon ſo at- " tainted or convicted, that then ſuch clerk ſhall certify ſuch " tranſcript only (*c*) concerning the perſon or perſons ſo at- " tainted or convicted, which ſhall be as effectual againſt ſuch " perſon and perſons againſt whom it ſhall be objected, alledged, " or pleaded, as if the very record were preſent."

(*c*) Omitted in Keble's Statutes; but inſerted in Ruff head's.

Sect. 16. And it is farther enacted, " That the ſaid clerk " of the crown in the king's bench, ſhall at all ſuch times as " the juſtices of the gaol-delivery, or juſtices of the peace, in " every county within this realm of England, do write unto " him

" him for the names of ſuch perſons, which be ſo attainted or " convict, and certified in the ſaid bench, ſhall incontinently " certify the ſaid names and ſurnames of the ſaid perſons, with " the cauſes why and wherefore they were convicted or at- " tainted, unto the juſtices of gaol-delivery, or juſtices of the " peace, &c. on pain of forty ſhillings."

Sect. 17. But it is provided, " That this act ſhall not ex- " tend to the clerks of the crown, &c. in Wales or Cheſter, " or counties palatine of Lancaſter and Durham, to make any " tranſcript of any ſuch attainder or conviction, before the " king's juſtices of his counties in Wales, &c."

(a) Dyer 253. *Sect.* 18. It ſeems, *(a)* That the juſtices may, by force of this act, write in their own names to the clerk of the crown in the king's bench, for a certificate of the tranſcript of an attainder or conviction, and need not do it by writ in the king's name under their *teſte*, &c. which is required *(b)* by the conſtruction of 2 & 3 Edw. 6. c. 24. where the juſtices of one county write to thoſe of another for the certificate of the attainder, or acquittal of the principal, in order to proceed againſt the acceſſary. And the reaſon of the difference is, becauſe in this laſt caſe juſtices write to juſtices, but in the former to an officer only.

(b) Sup. c. 29. ſect. 53.

Sect. 19. It is farther provided by 3 & 4 Will. and Mary, c. 9. ſ. 7. as followeth, " Foraſmuch as ſuch men and women who have once had their clergy, &c. may happen to be indicted for an offence committed afterwards in ſome other county:" Be it therefore enacted, " That the clerk of the crown, clerk of " the peace, clerk of the aſſizes where ſuch man or woman " ſhall be convicted, ſhall at the requeſt of the proſecutor, or " any other in his Majeſty's behalf, certify a tranſcript briefly, " and in few words, containing the effect and tenor of every " indictment and conviction of ſuch man or woman, of his or " her having the benefit of the clergy, &c. and addition of " every ſuch perſon or perſons, and the certainty of the felony " and conviction, to the judges and juſtices in ſuch other " county where ſuch man or woman ſhall be indicted, which " certificate being produced in court, ſhall be ſufficient proof " that ſuch man or woman have before had the benefit of " clergy, &c."

2 Hale 373.

As

Againſt the defendant's prayer of clergy, the proſecutor may file a COUNTER PLEA; alledging ſome fact which, in law, deprives the defendant of the priviledge he claims. Thus, before the ſtatute *de bigamis*, the offender on a conviction for bigamy in the temporal courts was allowed his clergy, but this priviledge having been taken away by the Pope at the council of Lyons, (Vide ante ſect. 5.) the practice was to enter a COUNTER PLEA ſtating the offence to have been committed within a certain dioceſſe; which allegation carried the trial of the fact into the eccleſiaſtical court, and upon a certificate of the truth of it from the biſhops, the offender was ouſted of his clergy. To this counter plea, however, the priſoner might reply that the firſt marriage was made within the age of conſent, and that he diſagreed to it on his attaining to maturity; and the iſſue taken on this replication being triable by the country and not by the biſhops, reſtored the offender to clergy. Staundforde 134. 4 Inſt. 274. Thus alſo it is a good counter plea to the prayer of clergy, that the offender

fender is not entitled to the benefit of the ſtatute in ſuch caſe made and provided, becauſe he was before convicted of an offence and thereupon prayed the benefit of the ſtatute, which was allowed to him, alledging the truth of the fact, and praying the judgment of the court, that he may die according to law; which fact is to be tried by the record in purſuance of 34 and 35 Hen. 8, c. 14. Staundforde 135.—Divers other counter pleas alſo by which an offender may be deprived of clergy may be framed from a conſideration of *the perſons* to whom it is allowed or denied by the common law, and of *the circumſtances* under which that allowance or denial of it has been placed by divers acts of parliament. Staundforde 138.—The uſe of this counter plea, however, had for many years become obſolete and out of practice; no traces of it appearing in any of the books ſince the time of Sir William Staundforde, who was chief juſtice of the king's bench in the reign of Queen Elizabeth. But the daring practices of ſome money coiners have occaſioned its revival, and accordingly in the caſe of the King v. Marſton Rothwell and Mary Child, who were convicted for coining at the old Bailey in September Seſſions 1783 before Mr. Juſtice Aſhurſt, Mr. Silveſter filed a COUNTER PLEA of record on the part of the proſecution, alledging that they had been before allowed the benefit of the ſtatute, &c. and the offenders were thereby ouſted of their clergy.

As to the ſecond point, *viz.* For what crimes the benefit of clergy, or rather of the ſtatute may be demanded; I ſhall premiſe,

Sect. 20. Firſt, That it ſeems to be generally agreed, That by the common law, it is demandable as well upon an (*a*) appeal as indictment, for any crime whatſoever which ſubjects the offender to the (*b*) loſs of life or member, except (*c*) high treaſon (whether againſt the king's perſon or (*d*) not), and ſacrilege; for the firſt of which the common law ſeems to give the offender no manner of right to the benefit of his clergy, and for the latter to have it left to the diſcretion of the ordinary, as hath been more fully ſhewn in the ninth ſection.

(*a*) 11 Coke 29. (*b*) S. P. C. 124. B. Clergy 19 Finch 462, 463. (*c*) S. P. C. 124. F. Corone 283. 19 H. 6. 47. Ab. F. Corone 8. B. Clergy 6. Vide 2 Inſt. 634. And all new created treaſons which in judgment of law are levelled at the perſon of the king or his royal majeſty, are excluded without ſpecial words for that purpoſe, as coming within the exception of the ſtatute de Clero. Foſter 190. (*d*) So it appears from the books cited to letter (*c*). Yet in Summary 330. and 11 Coke 29. and B. Clergy 25 31. it ſeems to be holden, That by the common law clergy was excluded from ſuch high treaſon only as was againſt the perſon of the king. But quære upon what ground this is holden. And ſee 25 E. 3. De Clero c. 5. and 2 Hale 332. and Foſter 191.

Sect. 21. Secondly, That it ſeems to be doubtful, (*e*) whether it were demandable at the common law for petit treaſon, But this was ſettled by 25 Edw. 3. *de Clero*, c. 4. which expreſsly allows it for "any treaſons or felonies, touching other "perſons than the king himſelf, or his royal majeſty."

(*e*) S. P. C. 124. Summary 230. Finch 463. 11 Coke 29.

Sect. 22. Thirdly, That after this a conſtruction (*f*) prevailed, That clergy might be denied to felons charged as *inſidiatores viarum, et depopulatores agrorum.* But this is remedied by the fourth of Henry the fourth, chapter the ſecond.

(*f*) Stat. c. 25. ſect. 59. S. P. C. 124. 2 Hale 328. 333.

Sect. 23. From theſe premiſſes it ſeems to be generally agreed, (*g*) That the following concluſions neceſſarily follow: Firſt, So far as a perſon, who in reſpect of his orders or learning, or otherwiſe, is qualified to be admitted to the benefit of clergy, is denied it in reſpect of his (*b*) crime, not amounting to high treaſon or ſacrilege; ſuch denial muſt be grounded on ſome act of (*i*) parliament, made ſince the twenty-fifth of Edward the third,

(*g*) Sum. 230, 231. (*b*) S. P. C. 124, &c. Sum. 232, &c. (*i*) 2 Hale 331. Summary 230.

Sect. 24. Secondly, Wherever an offence is made felony by ſtatute, it (*a*) ſhall have the benefit of clergy, unleſs it be expreſsly excluded from it.

(*a*) Sum. 230. 2 Hale 330. 334.

Sect. 25. Thirdly, Wherever a perſon is denied the benefit of clergy, in reſpect of a ſtatute, excluding it from the crime charged againſt him, the (*b*) indictment or appeal, and the (*c*) evidence thereon, muſt expreſsly bring his caſe within the words of ſuch ſtatute. And therefore, if a (*d*) murder be not expreſsly laid, and proved to have been done of *malice prepenſe*; and the offence of an acceſſary (*e*) before, to have been done *maliciouſly*; and that of a (*f*) cut-purſe *clam et ſecrete a perſona &c.* the offender ſhall have his clergy. And agreeably hereto it hath been adjudged, (*g*) That an indictment of robbery *in quadam via regia pedeſtri ducent' de* London *ad* Iſlington, ſhall not ouſt the defender of the benefit of his clergy; becauſe the words of the ſtatute (*b*) to this purpoſe are *in, or about, or near the highway.*

(*b*) Sum. 231. 2 Hale 336. 344. 11 Coke 37. S. P. C. 114. 130.

(*c*) S. P. C. 130. Dyer 261. 224.

(*d*) Sum. 231. S. P. C. 130. Dyer 261. Vid. 23 H. 8. c. 1. 1 E. 6. 12. ſect. 10.

(*e*) Sum. 231. 1 Anderſon 195. 11 Coke 37. Dyer 183. Vid. 4 & 5 Ph. & M. 4.

(*f*) 1 Edw. 6. c. 12. Sum. 231. 8 Eliz. c. 4. (*g*) Moore 5. 2 Hale 349. (*b*) 23 H. 8. c. 1. ſect. 3. Par. 10. 4 & 5 Ph. & M. 4.

Yet it hath been adjudged, (*i*) That an indictment againſt a man as acceſſary to murder before the fact, by the words *malitioſe excitavit, movit et procuravit, &c.* is ſufficient to ouſt the offender of the benefit of clergy, by force of 4 & 5 Philip and Mary, the words whereof are, "That all perſons who ſhall "maliciouſly command, hire, or counſel any perſon, &c." which are not expreſsly purſued in ſuch indictment. But the counſelling another being neceſſarily included in the *moving procuring, and exciting him,* which therefore are tantamount in ſenſe, and different only in the manner of expreſſion, ſuch an indictment is as (*k*) much within the ſtatute as if it followed the very words.

(*i*) 1 And. 195.

(*k*) See B. 2. c. 32. ſect. 3.

Alſo it hath been (*l*) adjudged, That an order to ouſt a man of the benefit of clergy by force of a ſtatute, which takes it away from a capital offence at common law, there is no need that the indictment or appeal conclude *contra formam ſtatuti*, becauſe the ſtatute doth no way alter the nature of the offence, but only leaves it to its proper judgment, and takes away a perſonal privilege or exemption from ſuch judgment.

(*l*) See b. 2. c. 30. ſect. 9. 2 Ventris 13. Foſter.

Sect. 26. Fourthly, A ſtatute excluding the principals from the benefit of clergy, doth (*m*) not thereby exclude the acceſſaries before or after. Neither (*n*) doth a ſtatute, excluding the acceſſaries, thereby exclude the principals. And it ſeems agreed, (*o*) That where a ſtatute excludes thoſe from the clergy who ſhall *be found guilty* of petit treaſon, murder, burglary, robbery, or any other kind of crimes, it ſhall be conſtrued to intend only to exclude the principals, and not acceſſaries before or after, notwithſtanding they are certainly in a high degree

(*m*) See B. 1. c. 3. ſect. 4. c. 30. ſect. 7. Sum 7. 58. 231. 2 Hale 335, 336. 11 Coke 29 to 36. 1 Anderſon 195. Dyer 99. 183. See 4 & 5 Ph. & M. 4.

(*n*) 11 Coke 29 to 36. Savil 46.

(*o*) Summary 7. 58. 1 Anderſon 195. Dyer 99. 183. Foſter 355 to 360.

partakers

partakers in *the guilt* of the principal offender, as hath been more fully ſhewn chapter 29. ſections 13, 14. Yet inaſmuch as ſuch ſtatutes, taking away a privilege of ſo high a conſequence to the ſubject, ought to receive the ſtricteſt interpretation, and the words of them may, without any manner of ſtrain, or repugnance to the general rules of law, be taken in ſuch a ſenſe as will include the principals only, I do not know that they have ever been carried farther.

Sect. 27. Fifthly, Where clergy is allowable, it ſhall be as much allowed to one who ſtands (*a*) mute, or challenges peremptorily (*b*) above the number of twenty, or is (*c*) outlawed, &c. as to one who is convicted by verdict, or confeſſion, &c.

(*a*) Sum. 231. 25 H. 8. 3. ſ. 2. Sup. c. 30. ſect. 24. Moore 550. Con. F. Corone 283. (*b*) 3 H. 7. 12. Ab. B. Clergy 27. F. Corone 51. Sum. 231. 25 H. 8. c. 3. ſ. 2. 3 & 4 W. & M. c. 9. (*c*) 11 Coke 29. See 3 & 4 W. & M. c. 9.

Sect. 28. Sixthly, A ſtatute taking the benefit of clergy from thoſe who ſhall be found guilty, doth not (*d*) thereby take it from thoſe who ſtand mute, or challenge peremptorily above the number of twenty, or are outlawed, &c. But it ſeems (*e*) clear, That a ſtatute taking it away from thoſe who ſhall be found guilty, extends as well to thoſe who ſhall confeſs themſelves guilty upon record, as to thoſe who ſhall be found guilty by verdict; for as the latter are found guilty by a jury, ſo are the former by the court, and their conviction being from their own mouths, is of the higheſt nature poſſible.

(*d*) See 25 H. 8. c. 3. ſect. 2. 3 & 4 W. & M. c. 9. 11 Coke, Poulter's Caſe. 2 Hale 335. (*e*) 11 Coke 29.

Sect. 29. And now I ſhall endeavour to ſhew for what crimes perſons are excluded from the benefit of clergy by ſtatutes made ſince 25 Edw. 3. c. 4. which being ſomewhat perplexed and intricate, I ſhall for the better clearing of this matter, firſt take a general view of thoſe ſtatutes ſo far as they are in force at this day, and then ſhall more diſtinctly conſider them, as they particularly concern the ſeveral kinds of capital crimes.

Sect. 30. The firſt of thoſe ſtatutes, I ſhall take notice, is 23 Hen. 8. c. 1. ſ. 3. by which it is enacted, "That no perſon who ſhall be found guilty after the laws of this land for "any manner of petit treaſon, or for any wilful murder of "malice prepenſed,—or for robbing any churches, chapels, or "other holy places,—or for robbing of any perſon or perſons, "in their dwelling houſes, or dwelling place, the owner or "dweller in the ſame houſe, his wife, his children, or ſervants, "then being within, and put in fear and dread by the ſame, "—or for robbing of any perſon or perſons in or near about (*f*) "the highways,—or for wilful burning of any dwelling houſes "or barns, wherein any grain of corn ſhall happen to be,— "nor any perſon or perſons being found guilty of any abet"ment, procurement, helping, maintaining, or counſelling of, "or

(*f*) So Raſtal's Statutes; but Pulton omits the word *about*, and Keble the word *near*.

" or to any ſuch petit treaſons, murders or felonies, ſhall be " admitted to his clergy; ſuch as be within holy orders only " excepted."

(a) 11 Coke 30. 2 Hale 338. (b) Sup. ſect. 28. (c) 11 Coke 30. (d) See pream. 25 H. 8. c. 3. And 11 Coke 30.

Sect. 31. *Note*, That this ſtatute extends (*a*) as well to appeals as to indictments, and to thoſe who ſhall confeſs (*b*), as much as thoſe who ſhall plead and be found guilty. For the words are general, " That no perſon who ſhall be found " guilty, after the laws of this realm, &c. ſhall be admitted to " his clergy, &c." But it extends not (*c*) to perſons outlawed, and was eaſily evaded (*d*) by perſons brought to their trials, by ſtanding mute or challenging peremptorily above the number of twenty, whereby they prevented their being found guilty.

Sect. 32. But theſe two laſt defects are provided for by 25 Hen. 8. c. 3. by which it is enacted, par. 2. " That every " perſon who ſhall from thenceforth be indicted of petit trea- " ſon,—wilful burning of houſes,—murder,—robbery,—burg- " lary, or other felony, according to the tenor and meaning of " 23 Hen. 8. and thereupon arraigned, do ſtand mute of malice " or froward mind, or challenge peremptorily above the num- " ber of twenty (*e*), or elſe will not, or do not anſwer directly " to the ſame indictment and felony, whereupon he is ſo " arraigned, ſhall from thenceforth loſe the benefit and privi- " lege of his clergy, in like manner and form as if he had di- " rectly pleaded to the ſaid petit treaſon, murder, robbery, " burglary, or other felony, whereupon he is ſo arraigned, and " thereupon had been found guilty, after the laws of the " land."

(e) This challenge now imports nothing as to the point of clergy, for the challenge is overruled. 2 Hale 339. 345.

(f) 11 Coke 31. 2 Hale 573.

Sect. 33. But this ſtatute extends not (*f*) to thoſe who are outlawed, any more than 23 Hen. 8. Neither doth it extend to appeals, nor to acceſſaries before, both of which are included in the twenty-third of Henry the eighth.

Sect. 34. After came the ſtatute of 1 Edw. 6. c. 12. ſ. 10. " That no perſon who ſhall be in due form of the laws at- " tainted or convicted of murder of malice prepenſed, or of " poiſoning of malice prepenſed, or of breaking of any houſe " by day or by night, any perſon being then in the ſame houſe " where the ſame breaking ſhall be committed, and thereby put " in dread; or of robbing any perſon in the highway, or " near the highway; or of felonious ſtealing of horſes, geld- " ings, or mares, or of felonious taking of any goods out of " any pariſh church, or other church or chapel; or being in- " dicted or appealed of any of the ſame offences, and there- " upon found guilty by verdict of twelve men, or ſhall confeſs " the ſame upon his arraignment; or will not anſwer di- " rectly according to the laws of this realm, or ſhall ſtand wil- " fully, or of malice, mute, ſhall not be admitted to the bene- " fit

" fit of his clergy: And that in all other caſes of felony all " perſons that ſhall be arraigned, or found guilty upon their " arraignment, or ſhall confeſs, or ſtand mute in form afore- " ſaid, or will not anſwer directly in form aforeſaid, ſhall have " their clergy in the ſame manner as before the firſt year of " King Henry the eighth."

Sect. 35. *Note*, That this ſtatute extends as well to (*a*) appeals as to indictments, in which reſpect it is more fully penned than 25 Hen. 8. And that it extends to perſons in holy (*b*) orders, as much as to laymen, and to all perſons attainted in general, and conſequently to thoſe who are outlawed, in which reſpects it is more fully penned than either twenty-third or twenty-fifth of Henry the eighth. Yet it hath ſeveral conſiderable defects; as

(*a*) 11 Coke 32. 2 Hale 343.
(*b*) 11 Coke 31, 32.

Sect. 36. Firſt, In that it doth not exclude thoſe from the benefit of the clergy, who challenge above the number of twenty; ſo that it is eaſily made ineffectual (*c*) by taking ſuch challenges, as to crimes excluded from the benefit of clergy, by this ſtatute, and no other. But as to the crimes within 25 Hen. 8. it (*d*) ſeems plain, That a perſon that takes ſuch challenges might be excluded from his clergy by force of that ſtatute even before it was revived by 5 & 6 Edw. 6. ſet forth more at large ſect. 42, &c. becauſe 1 Edw. 6. reſtores the benefit of clergy, as it was before the reign of Henry the eighth, to ſuch only as ſhall be found guilty, or confeſs, or ſtand mute, or not anſwer directly, and conſequently (*e*) thoſe who challenge above the number of twenty, ſeem clearly to be excluded in the ſame manner as if the firſt of Edward the ſixth had never been made.

(*c*) 11 Coke 32. Sup. ſect. 27, 28. But S.P.C. 126. it is made a Quære whether thoſe who challenge more than twenty, are not included under the word convict.
(*d*) But in 11 Coke 32. it ſeems to be otherwiſe holden.
(*e*) Vide Sum. 239.

Sect. 37. Secondly, In that it omits acceſſaries in the clauſe which takes away clergy, but includes them in that which reſtores it, which is general as to all caſes of felony, not mentioned in the act, whereof any perſon ſhall be found guilty, and conſequently as to acceſſaries wholly takes off the force of 23 Hen. 8. which extends only to thoſe who ſhall be found guilty, and is the only ſtatute in this reign which excludes acceſſaries from the clergy. And accordingly we find, (*f*) That after this ſtatute acceſſaries were admitted to their clergy, in the ſame manner as before the reign of Hen. 8. till the making of 4 & 5 Ph. & Mary, ſet forth more at large ſection forty-five.

(*f*) 11 Coke 31. Dyer 133.

Sect. 38. Thirdly, In that it alſo omits arſon in the clauſe which takes away clergy, but includes it in the general words of that which reſtores it, and conſequently re-entitled thoſe (*g*) convict of it to clergy, in all caſes but that of challenging more than twenty, till the making of 5 & 6 Edw. 6. as ſhall be more fully ſhewn hereafter.

(*g*) 11 Coke 31, 32, &c. Vide ſup. f. 36.

Sect. 39. Fourthly, In that the clauſe which ouſts horſe-ſtealers of their clergy is worded in ſuch a manner as makes it doubtful whether it extend to thoſe who ſteal but one, which occaſioned the making of 2 (*a*) & 3 Edw. 6. c. 33. which declares, "That a perſon felonioufly ſtealing one horſe, gelding "or mare, ſhall be put from his clergy in the ſame manner as "if he had been indicted, or appealed for ſtealing of two, "&c."

(*a*) Vide infra ſect. 61.

Sect. 40. Fifthly, In that the clauſe which ouſts houſe-breakers of their clergy, is not worded in ſuch a manner as fully brings their offence under the notion of felony; for it is thus expreſſed, "Any perſon who ſhall be attainted, &c. of "breaking any houſe by day or night, any perſon being there-"in and put in fear, or dread, &c." But ſuch a breaking even in the night is no felony unleſs it be done with an intent to commit a felony, which makes it burglary; neither can it be felony, if done in the day with any intent whatſoever; for though a felony follow, which may make the houſe-breaking done with an intent to commit it, properly enough to be called felonious: Yet it ſeems, That it cannot make it become (*b*) a felony, becauſe it is not reducible to any ſpecies of felony. And therefore the ſtatute muſt be ſupplied by a reaſonable intendment, and (*c*) conſtrued to mean ſuch houſe-breaking only as amounts to, or is attended with felony.

(*b*) Yet quære, for this matter is doubtfully expreſſed. S. P. C. 126. and 11 Coke 31, 32.

(*c*) S. P. C. 125, 126. 11 Coke 31, 32.

Sect. 41. It is (*d*) holden by Sir Edward Coke, That piracy was reſtored to the benefit of clergy by this ſtatute; but as to piracy on the high ſea, the contrary hath been ſolemnly (*e*) adjudged and confirmed by conſtant experience, and is certainly agreeable to the (*f*) legal notion of piracy in other caſes; which being a capital offence by the civil law only (even after the ſtatute of 28 Hen. 8 c. 15. which altered not the nature of the offence, but only the manner of the trial), ſhall not be included in a ſtatute ſpeaking generally of felonies, which ſhall be conſtrued only of thoſe felonies which are ſuch by our law; as thoſe piracies are (*g*) which are committed in a creek or port within the body of a county, but no other.

(*d*) 11 Coke 31.

(*e*) Moor 756. 3 Inſt. 111.

(*f*) B. 1. c. 37. ſect. 6, 7. 2 Hale 370.

(*g*) Bk. 1. c. 37. ſect. 11. 2 Hale 369.

Sect. 42. The next general ſtatute relating to theſe matters, is 5 & 6 Edw. 6. c. 10. which firſt recites the above-mentioned (*h*) clauſe of 23 Hen. 8. concerning clergy, and takes notice that it was defective in omitting thoſe who rob, &c. in one county, and remove the thing taken into another, and there tried, &c. and that this omiſſion was ſupplied by 25 Hen. 8. and that the ſaid ſtatute of 25 Hen. 8. was in this reſpect made ineffectual by 1 Edw. 6. c. 12. which reſtored clergy as it ſtood before the reign of Hen. 8. to all the felonies not therein mentioned; and that by reaſon of the ſaid ſtatute of 1 Edw. 6. divers perſons had committed robberies, &c. in one county, and after had been taken, &c. and tried in another, and there had their clergy, which they would not have had,

(*h*) Vide ſup. ſect 30.

2 Hale 341.

had, if the ſaid ſtatute of 25 Hen. 8. had ſtood in force; and then goes on in theſe words, "For redreſs whereof from hence-"forth to be had, be it enacted, &c. That the ſaid act made in "the ſaid 25th year, touching the putting of ſuch offenders "from their clergy; and every article, clauſe and ſentence, "contained in the ſame, touching clergy, ſhall from hence-"forth, touching ſuch offence from henceforth to be commit-"ted and done, ſtand, remain and be in full ſtrength and vir-"tue, in ſuch manner and form, as it did before the making "of the ſaid act in the firſt year of the reign of our ſovereign "lord the king that now is: Any clauſe, article, or ſentence "compriſed therein to the contrary notwithſtanding."

Sect. 43. It was for ſome time a great queſtion, Whether this ſtatute revived 25 Hen. 8. for the whole, or only for ſuch part of it which relates to felons removing the thing feloniouſly taken into a different county from that wherein they took it, and there tried, &c. And Sir (*a*) William Staundforde [illegible]lines to the latter opinion; becauſe the words are, "That the ſaid "act made in the ſaid twenty-fifth year, touching the p[illegible]ing "*ſuch* offenders from their clergy, ſhall be revived, &c." where the word *ſuch* ſhall have relation only to the offenders mentioned before; which are thoſe who ſteal in one county, and remove the thing ſtolen into another. And this objection is ſtrengthened (*b*) by the title of the act, which is only this, "That ſuch as rob in one ſhire, and fly into another, ſhall "not have their clergy." To which it may be added, That all ſtatutes which take away clergy, are to be conſtrued ſtrictly *in favorem vitæ*.

(*a*) S. P. C. 128.

(*b*) 11 Coke 33.

Yet it hath been adjudged, (*c*) and is, as I take it, fully (*d*) ſettled, That this ſtatute revived 25 Hen. 8. as to every other part of it, as well as that concerning felons carrying the things ſtolen from one county into another. For granting that the makers of the ſtatute of 5 & 6 Edw. 6. had the caſe of ſuch felons principally in their view; which appears pretty plainly, not only from the title of the ſtatute, but alſo from the preamble and purview, for the preamble expreſsly takes notice of no other miſchief from the repeal of 25 Hen. 8. but only this, "That thereby many of ſuch felons had their "clergy;" and then follows the enacting clauſe, which begins in theſe words, "For redreſs whereof," and then goes on "be it enacted, &c. That 25 Hen. 8. touching ſuch of-"fenders and ſuch offences, remain in full force." Yet conſidering that the ſtatute of 5 & 6 Edw. 6. begins with a recital of the whole clauſe of 23 Hen. 8. wherein there are ſeveral other offences contained, and that the words, "ſuch offenders "and ſuch offences" in the enacting clauſe of 5 & 6 Edw. 6. may properly enough refer to them, as well as to the offence of the felons mentioned next immediately before: And farther conſidering that the words, "*ſuch* offenders and *ſuch* offences,"

(*c*) 11 Coke 33, 34, 35.

(*d*) Sum. 232. to 232. 2 Hale 341. See Raſtal's ſtatutes, title Clergy, Par. 16.

may properly enough be taken to include all *ſuch in miſchief*, and *ſuch in inconvenience*, according to the received (*a*) conſtruction of the word *ſuch*, in ſome other ſtatutes, and *à fortiori* thoſe in greater miſchief and greater inconvenience, as almoſt all the other offences ſpecified in 25 Hen. 8. are; as for inſtance, petit treaſon, murder, arſon, &c.; and that it is a received (*b*) conſtruction of penal ſtatutes, to extend them to all caſes that come within the meaning of the words; and that it would be abſurd to imagine that the makers of the ſtatute intended to put thoſe, who carried goods ſtolen into a different county, in a worſe caſe in ſuch county than in that wherein they ſtole them, as they muſt be, if 25 Hen. 8. were only revived againſt them where they carried the thing ſtolen into a different county; for by ſuch a conſtruction they would have been excluded from clergy, in the county wherein they committed the robbery, by 1 Edw. 6. c. 12. only, which not extending to thoſe who challenge above the number of twenty, might eaſily be evaded; whereas in a different county they would be excluded from it in ſuch caſe by 25 Hen. 8. To which may be added, (*c*) That the firſt ſentence of the purview of 5 & 6 Edw. 6. *viz* "That "the ſaid act of 25 Hen. 8. touching the putting ſuch offenders "from their clergy," had been ſufficient, if no more had been intended but the excluding thoſe who rob in one county and fly into another; and therefore it is moſt natural to intend that it was the meaning of the makers of the ſtatute, by adding thoſe farther words, "That every article, clauſe and ſentence in the "ſame, touching clergy, ſhall, touching *ſuch* offences, remain, "&c." to revive the whole ſtatute ſo far as it related to clergy.

(*a*) 11 Coke 33.

(*b*) 11 Coke 33, 34. Vide ſup. ſect. 25. and book the firſt, chap. 33. ſect. 3.

(*c*) 11 Coke 34.

Sect. 44. And ſince the whole ſtatute of 25 Hen. 8. is revived, it follows by a neceſſary conſequence, That ſo much of 23 Hen. 8 alſo as is expreſsly affirmed by it, is revived alſo. And therefore ſince 25 Hen. 8. having recited the clauſe of 23 Hen. 8. concerning clergy, and the miſchief that it extended only to thoſe who are found guilty, expreſsly enacts, "That whoever "ſhall be indicted of petit treaſon, wilful burning of houſes, "murder, robbery or burglary, or other felony, according to "the tenor and meaning of the ſaid ſtatute, and ſtand mute, "or challenge peremptorily above twenty, &c. ſhall loſe the "benefit of the clergy, in like manner as if he had pleaded, and "been found guilty;" whereby it affirms and inforces the 23 Hen. 8. as to thoſe found guilty of ſuch crimes; it follows by a neceſſary conſequence, That perſons not in holy orders found guilty of petit treaſon, or (*d*) arſon, which were omitted by 1 Edw. 6. are excluded from clergy by 23 Hen. 8. thus affirmed and enforced by 25 Hen. 8. and conſequently revived by 5 & 6 Edward the ſixth.

See Foſter 335.

(*d*) 11 Coke 34, 35. Summary 232, 233. 1 Hale 570, 571, &c. 2 Hale 345, 346. Con. Savil 46. S. P. C. 125.

Sect. 45. But it is obſervable, That the ſaid ſtatute of 25 Hen. 8. wholly omits (*e*) acceſſaries, as well as 1 Edw. 6. But

(*e*) Vide ſup. ſect. 33.

to

to remedy this defect, it is enacted by 4 & 5 Ph. & Mary, c. 4. "That every perſon that ſhall maliciouſly command, hire, or "counſel any perſon or perſons, to commit or do any petit "treaſon, wilful murder, or to do any robbery in any dwelling-"houſe or houſes, or to commit or do any robbery in or near "the highway in the realm of England, or in any other the "queen's dominions, or to commit or do any robbery in any "place within the marches of England againſt Scotland, or "wilfully to burn any dwelling houſe, or any part thereof, or "any barn then having corn or grain in the ſame, that then "every ſuch offender, being outlawed thereof, or being there-"of arraigned and found guilty by the order of the law, or "being otherwiſe lawfully attainted or convicted of the ſame "offence, or being arraigned thereof, do ſtand mute of malice "or froward mind, or do challenge peremptorily above the "number of twenty perſons, or will not anſwer directly to ſuch "offence, ſhall not have the benefit of his clergy."

Sect. 46. It is obſervable, Firſt, That this ſtatute is general as to all robberies in any dwelling-houſe; yet it ſeems to have been always taken as a (*a*) reaſonable conſtruction, that it ſhall be reſtrained to ſuch robberies of this kind as were excluded from the benefit of clergy, by ſome former ſtatute; for it cannot be well imagined that the makers of this, or any ſtatute, intended in any caſe to take away clergy from the acceſſary, where the principal is left to the full benefit of it.

(*a*) 11 Coke 35. 36. 27. Summary 235. 2 Hale 342. Con. Savil 46.

Sect. 47. Secondly, That an indictment or appeal, in order to ouſt an acceſſary of his clergy by force of this ſtatute, muſt expreſsly purſue it, in ſubſtance (*b*) at leaſt, as hath been already ſhewn, ſection twenty-five.

(*b*) Vide Dyer 186. That the words wilful murder, in an indictment on the ſtatute are ſufficiently purſued by laying the murder done *ex malitia præcogitata*.

Sect. 48. It is farther enacted by 3 & 4 Will. & Mary, c. 9. ſ. 3. "That if any perſon or perſons whatſoever be indict-"ed of any offence, for which by virtue of any former ſtatute, "he or they are excluded from having the benefit of his or their "clergy, if he or they had been thereof convicted by verdict or "confeſſion, if he or they ſtand mute, or will not anſwer directly "to the felony, or ſhall challenge peremptorily above the num-"ber of twenty perſons returned to be on the jury, or ſhall be "outlawed thereupon, ſhall not be admitted to the benefit of "his or their clergy."

Sect. 49. But *note*, That this ſtatute extends not to appeals, nor to offences made felonies by ſubſequent ſtatutes.

AND now I am in the ſecond place more diſtinctly to conſider the ſeveral ſtatutes which take away the benefit of clergy, ſo far as they particularly relate to the ſeveral kinds of crimes.

For the better illuſtration whereof, having referred the reader, as to the felonies made ſuch by ſtatute, to the ſeveral chapters in the firſt book wherein ſuch felonies are handled, I ſhall here conſider the ſtatutes which take away clergy, from capital offences at the common law, under the following heads.—As they relate, To petit Treaſon; To Homicide; To Larceny; To Sacrilege; To Robbery; To Burglary; and to Arſon.

(a) Sup. ſ. 43, 44. Summary 232. 2 Hale 341. (b) Sup. ſect. 13. (c) Sup. ſect. 30. (d) Sup 32, 33. (e) Sup. ſect. 33.

Sect. 50. As to PETIT TREASON; It is certain that by force of 23 & 25 Hen. 8. revived (*a*) by 5 & 6 Edw. 6. the principal not being a (*b*) clerk in holy orders, is excluded from the benefit of clergy, upon a (*c*) conviction, (*d*) ſtanding mute, or challenge of more than twenty, upon an (*e*) indictment.

(f) 2 Hale 338, 339. 341. Summary 232.

Sect. 51. And Sir (*f*) Matthew Hale ſeems to be of opinion, That the principal is likewiſe ouſted of his clergy, by 23 Hen. 8. in appeal of petit treaſon, if he be convict by verdict or confeſſion, but not in other caſes.

(g) Sup. ſect. 43, 44.

But *quære*, How this can be? For ſince ſo much (*g*) only of 23 Hen. 8. ſeems to be revived, as affirmed and enforced by 25 Hen. 8. and that no way extends to appeals but only to indictments, it ſeems difficult to make out, that any part of 23 Hen. 8. ſo far as relates to appeals, is revived by 25 Hen. 8.

(b) Sup. ſ. 34, 35. (i) Bk. 1. c. 32. ſ. 6. 2 Hale 340.

Sect. 52. But I would rather incline to think that the principal in an appeal of petit treaſon may be excluded from his clergy by 1 (*b*) Edw. 6. c. 12. in all caſes except that of challenging above the number of twenty, under the words "*murder of malice prepenſed*," in that ſtatute; becauſe all petit treaſon, in the very notion of it, neceſſarily (*i*) includes ſuch murder and more.

(k) Vide ſupra Section 45. (l) Vide 11 Coke 35. 2 Hale 342. 346. And ſup. ſect. 46.

Sect. 53. However, the makers of 4 (*k*) & 5 Ph. & Mary, c. 4. ſeem plainly to have been of opinion, That the principals in petit treaſon are excluded from clergy in all caſes, as well upon an appeal as indictment; becauſe they have in all caſes expreſsly excluded the acceſſaries maliciouſly before, as well upon an appeal as indictment; and (*l*) it cannot be well imagined that they intended to make the law more ſevere againſt them than againſt the principals.

(m) Ante, page 481, 482.

Sect. 54. As to HOMICIDE. It is certain that wilful murder of malice prepenſed is excluded from the benefit of clergy upon indictments in all caſes by 23 & 25 Hen. 8. and 1 Edw. 6. c. 12. before recited (*m*).

(n) Sum. 232. 2 Hale 343. (o) Vide ſup. ſ. 42, 43. 51.

Sect. 55. Alſo it ſeems (*n*) to be the opinion of Sir Matthew Hale, That it likewiſe is excluded from clergy in all caſes as well upon appeals as indictments. But this ſeems queſtionable; for appeals are certainly not (*o*) within 25 Hen. 8. and therefore

ſince

ſince ſo much only of 23 Hen. 8. is revived by 5 & 6 Edw. 6. as is affirmed and enforced by 25 Hen. 8. I do not ſee how it can be revived as to any appeal. From whence it ſeems to follow, That the only ſtatute which expreſsly excludes them is 1 Edw. 6. c. 12. which *(a)* omits the caſe of challenging more than twenty. Neither is this defect ſupplied by 3 & 4 Will. and Mary, c. 9. for this extends (*b*) only to indictments.

(*a*) Vide ſup. ſect. 34, 36.
(*b*) Sup. ſect. 48, 49.

Sect. 56. But acceſſaries maliciouſly before to ſuch murder are expreſsly excluded from clergy in all caſes, as well upon appeals as indictments by 4 & 5 Ph. & Mary, c. 4. and how far the principal may (*c*) hereby in like manner be implicitly excluded alſo in all caſes, I ſhall leave to be conſidered.

(*c*) 11 Coke 35. and ſup. ſect. 46. 53. Vide 2 Hale 342. 344. as to acceſſaries after the fact in petty treaſon and murder.

Sect. 57. By 1 Jac. 1. c. 8. "He that ſhall be convicted by "verdict of twelve men, or confeſſion, or otherwiſe according "to the laws of this realm, of homicide, by ſtabbing," but not thoſe who abet them, &c. (for which I ſhall refer to book the firſt, chapter 30. ſect. 4, 5, &c.) "ſhall be excluded from the "benefit of his clergy, &c."

Sect. 58. And this ſtatute ſeems plainly to extend as well to appeals as indictments, but not to the caſe of ſtanding mute, or challenging above twenty, &c. But thoſe who are indicted of ſuch manſlaughter are excluded from clergy in all ſuch caſes, as well as on a conviction, by 3 and 4 Will. and Mary, c. 9.

LARCENY is excluded from the benefit of clergy in the following caſes: 1. In that of a felonious ſecret taking from the perſon. 2. In that of horſe-ſtealing. 3. In that of ſtealing from a ſhop or dwelling-houſe, &c. 4. In that of ſtealing woollen manufactures from the tenters, or linen from the place of manufacture. 5. In that of ſtealing the king's naval ſtores. 6. In that of ſtealing ſheep and other cattle. 7. In that of theſts on navigable rivers above the value of forty ſhillings. 8. In that of ſtealing from veſſels in diſtreſs, or that have ſuffered ſhipwreck.

Sup. ſect. 48, 49.

Sect. 59. And firſt, As to a felonious ſecret taking from the perſon: It is enacted by 8 Eliz. c. 4. "That no perſon "who ſhall be indicted or appealed for felonious taking of any "money, goods, or chattels, from the perſon of any other, "*privily without his knowledge*, in any place whatſoever, and "thereupon found guilty by verdict of twelve men, or ſhall "confeſs the ſame upon his or their arraignment, or will not "anſwer directly to the ſame, according to the laws of the "realm, or ſhall ſtand wilfully or of malice, or obſtinately "mute, or challenge peremptorily above the number of twenty, "or

Vide O.B. 1786.

" or ſhall be upon ſuch indictment or appeal outlawed, ſhall " be admitted to his clergy, &c."

From the words of the preamble it appears that this ſtatute was intended to ſuppreſs a certain ſpecies of dexterity, againſt the ſucceſs of which the common *vigilance* of mankind was found not to be an adequate ſafeguard and protection. If, therefore, the larceny is, in the ſlighteſt degree, *diſcovered*, at the time it is committing, the offender is not within the penalty of the act. Purſuant to the preamble, the words " privily without *his knowledge*" imply that the mind of the party *robbed* ſhould be *capable of knowledge* at the time the offence is committed; and it hath accordingly been *ruled* that where the property is taken from a perſon ſo intoxicated by liquor as to be altogether ſenſeleſs of the tranſaction, the offender ſhall have his clergy; for it would be highly unreaſonable, in ſo penal a caſe, to permit the faulty drunkenneſs of a proſecutor, to deprive a priſoner of any advantage which *might* have reſulted to him from the ſobriety of his accuſer. But if the intoxication ſhould appear to have been provoked by the inſtigation of the offender, the law certainly would not permit him to derive any advantage from his own wrong; and it ſeems queſtionable how far this conſtruction would apply to the caſe of *privately ſtealing* from a perſon deprived of conſciouſneſs by the powers of ſleep.

Vide ſect. 26. 45, 46. 1 Hale 529. Foſter 356.

Sect. 60. But *note*, That this ſtatute extends not to any acceſſaries before or after.

(*a*) Vide ſect. 34. 39. 2 Hale 364, 365.

Sect. 61. Secondly, As to Horſe-ſtealers: It ſeems that they are (*a*) ouſted of their clergy in all caſes, as well upon appeals, as indictments, by 1 Edw. 6. c. 12. and 2 & 3 Edw. 6 c. 33. by the latter of which ſtatutes it is enacted, " That all perſons " felonioufly taking or ſtealing any horſe, gelding, or mare, " ſhall not be admitted to the privilege of the clergy, but ſhall " be put from the ſame, in like manner and form as though " they had been indicted or appealed for felonious ſtealing of " two horſes, two geldings, or two mares of any other, and " thereupon found guilty by verdict of twelve men, or con- " feſſed the ſame upon their arraignment or ſtand wilfully or " of malice mute."

(*b*) S. P. C. 125. Summary 238. 2 Hale 365.

Sect. 62. It ſeems a reaſonable (*b*) conſtruction of this ſtatute to extend it as well to thoſe who are outlawed, or challenge more than twenty, as to thoſe who are found guilty by verdict, &c. becauſe it is general, That all ſuch perſons " ſhall " be put from their clergy, &c. in ſuch manner as if they had " been found guilty, &c." and if they had been found guilty, it is certain that they would have been ouſted of their clergy by the expreſs words of 1 Edw. 6. c. 12. ſ. 10.

Supra 34, &c.

† *Sect.* 63. It is enacted by 31 Eliz. c. 12. ſ. 5. (which preſcribes the manner in which horſes ſhall be publickly bought and ſold), " That not only all acceſſaries before the fact, but " alſo all acceſſaries after the fact in horſe-ſtealing ſhall be " deprived and put from all benefit of their clergy, as the prin- " cipal by ſtatute heretofore made, is, or ought to be."

This ſtatute extends only to ſuch perſons as were, in judgment of law, acceſſaries at the time the act was made. And acceſſaries at the time the act was made were thoſe only who received and harboured the *thief*. A perſon, therefore, knowingly receiving a *ſtolen horſe* is not ouſted of his clergy by this ſtatute. But he is puniſhable as a knowing receiver of *ſtolen goods*, and made an acceſſary by the 3 & 4 Will. & Mary, c. 9. Agreed by all the judges, Eaſter Term, 2 Anne. Foſter 373.

Sect.

Sect. 64. Thirdly, As to larceny from a dwelling-houſe, ſhop, &c. it is enacted by 10 & 11 Will. 3. c. 23. "That all "perſons who by night or day ſhall in any ſhop, ware-houſe, "coach-houſe, or ſtable, privately and feloniouſly ſteal any "goods, wares, or merchandizes, of the value of 5 *s.* or more, "though ſuch ſhop, &c. be not broke open, and though the "owner, or any other perſon be not in ſuch ſhop, &c. or that "ſhall aſſiſt, hire or command any perſon to commit ſuch "offence, being thereof convict, or attainted by verdict or "confeſſion, or being indicted thereof ſhall ſtand mute, or "challenge above twenty of the jury, ſhall be excluded from "the benefit of the clergy."

Barrington upon the ſtatutes 477.

Sect. 65. But this ſtatute ſeems defective in neither mentioning perſons *(a)* outlawed, nor (*b*) acceſſaries; neither is it helped by 3 & 4 Will. & Mary, c. 9. becauſe (*c*) it is ſubſequent to it.

(a) Vide ſect. 26, 27, 28.
(b) Vide ſect. 26. 45, 46.
(c) Vide ſect. 48, 49.

The property ſtolen muſt be ſuch as is uſually expoſed *to ſale in the ſhop*, not any other valuable thing which may happen to be put there, and the ſame equitable conſtruction ſhould take place with regard to warehouſes. And though coach-houſes and ſtables are not places for ſale, yet the goods ſhould be ſuch as are uſually lodged in thoſe places. It hath been rightly holden, 1 Peer Will. 267. 3 Peer Will. 112. that money is not within the act, the words being "goods, wares, and mer-"chandizes," and the ſafer conſtruction to confine it to goods *ejuſdem generis*, goods expoſed to ſale. Foſter 78.—Accordingly it hath been doubted whether the box coat or any part of the cloaths of a coachman can be conſidered as any part of the proper furniture of a ſtable, as the bridles, ſaddles, horſe-cloths, box-cloths, &c. certainly are. O. B. 1784. p. 433. Goods alſo ſent to warehouſes by the water-ſide in order to be ſhipped, are not within this act, for ſuch warehouſes are not places where merchants and other traders keep their their goods *for ſale* in the nature of ſhops and where cuſtomers go to view them. And it has even been *ruled* that a watchmaker's ſhop, where the watch of another is left to be repaired, is in this reſpect a repoſitory and not a ſhop, within this ſtatute, becauſe ſuch watch was not there for ſale. O. B. 1784. No. 725. p 960. ſo alſo the warehouſe of a Blackwell-hall factor, who does not expoſe his goods to ſale, till aſked for, and who ſells on commiſſion, has been *ruled* not within the act. O. B. 1784. p. 51.

Sect. 66. It is enacted by 12 Annæ, c. 7. "That every per-"ſon who ſhall feloniouſly ſteal any money, goods or chattels, "wares or merchandizes of the value of 40 *s.* or more, being "in a dwelling-houſe, or out-houſe thereunto belonging, al-"though ſuch houſe or out-houſe be not actually broken by "ſuch offender, and although the owner of ſuch goods, or any "other perſon or perſons be or be not in ſuch houſe or out-"houſe, or ſhall aſſiſt, or aid any perſon or perſons, to commit "any ſuch offence, being thereof convicted or attainted by "verdict or confeſſion, or being indicted thereof ſhall ſtand "mute, or will not directly anſwer to the indictment, or ſhall "peremptorily challenge above the number of twenty returned "to be of the jury, ſhall be abſolutely debarred of and from the "benefit of clergy, &c."

In an indictment on this ſtatute in the dwelling houſe of Mary Lunns, the name appeared to be London, and ruled fatal as to the capital part.

Sect. 67. But it is provided, "That nothing in this act "ſhall extend to apprentices under the age of fifteen years who "ſhall rob their maſters as aforeſaid."

Sect.

Vide ſect. 26. 27, 28. 64, 65.

Sect. 68. This ſtatute ſeems alſo defective like the former, as to perſons outlawed, and acceſſaries.

Sect. 69. Fourthly, As to thoſe who ſhall felonioufly ſteal woollen manufactures from the tenters; it is enacted by 22 Car. 2. c. 5. "That no perſon who ſhall be indicted for felonioufly cutting and taking, ſtealing or carrying away of any cloth or woollen manufactures from the rack or tenter in the night-time, and thereupon found guilty by verdict of twelve men, or ſhall confeſs the ſame on arraignment, or will not anſwer directly to the ſame, according to the laws of the realm, or ſhall ſtand wilfully of malice mute, or challenge peremptorily above the number of twenty, or ſhall be upon ſuch indictment outlawed, ſhall be admitted to the benefit of clergy, &c."

Stealing from bleaching-yards or printing-grounds.

† It is alſo enacted by 18 Geo. 2. c. 27. "That all and every perſon and perſons who ſhall by day or night felonioufly ſteal any linen, fuſtian, callico, cotton, cloth, or cloth worked, woven or made of any cotton or linen yarn mixed, or any thread, linen, or cotton yarn, linen or cotton tape, incle, filleting, laces, or any other linen, fuſtian, or cotton goods, or ware whatſoever, laid, placed, or expoſed to be printed, whitened, bowked, bleached, or dryed in any whitening or bleaching croft, lands, fields, or grounds, bowking-houſe, drying-houſe, printing-houſe, or or other building, ground, or place made uſe of by any callico printer, whitſter, crofter, bowker or bleacher, for printing, whitening, bowking, bleaching, or drying of the ſame, to the value of ten ſhillings; or who ſhall aid or aſſiſt, or ſhall wilfully or maliciouſly hire or procure any other perſon or perſons to commit any ſuch offence, or who ſhall buy or receive any ſuch goods or wares ſo ſtolen, knowing the ſame to be ſtolen as aforeſaid, ſhall, on conviction, be deemed guilty of felony, and ſuffer death without benefit of clergy."

† But it is alſo provided by the ſaid ſtatute, p. 2. "That in caſe the judge or court, by and before whom any ſuch offender ſhall be tried and convicted, ſhall think it reaſonable, he may, inſtead of giving judgment of death, order ſuch offender or offenders to be tranſported for the ſpace of fourteen years."

N. B. This ſtatute extends neither to appeals nor to acceſſaries. Vide ſect. 26, and 45, 46.

Sect. 70. Fifthly, As to thoſe who ſteal naval ſtores: It is obſervable, That thoſe who "ſhall ſteal or embezzle any of his Majeſty's ſails, cordage, or any other his Majeſty's naval ſtores, to the value of twenty ſhillings," are in the like manner excluded from clergy by 22 Car. 2. c. 5. as thoſe who ſteal woollen manufactures from the tenters, &c.

† *Sect.* 71. But it is provided by the ſaid ſtatute, par. 4. "That it ſhall and may be lawful for the judges or juſtices of the court before whom ſuch offender ſhall be arraigned and con-

" condemned to grant a reprieve for the ſtaying execution, and " to cauſe ſuch offender to be tranſported for the ſpace of " ſeven years."

For the offence of having the cuſtody of the king's naval ſtores, vide Book the firſt, Appendix 18.

† Sixthly, As to ſtealing SHEEP AND OTHER CATTLE. It is enacted by 14 Geo. 2. c. 6. " That if any perſon or per- " ſons ſhall felonioufly drive away, or in any other manner fe- " loniouſly ſteal one or more ſheep, or other cattle of any other " perſon or perſons whatſoever, or ſhall wilfully kill one or " more ſheep, or other cattle of any other perſon or perſons " whatſoever, with a felonious intent to ſteal the whole car- " caſe or carcaſes, or any part or parts of the carcaſe or car- " caſes of any one or more ſheep, or other cattle that ſhall be " ſo killed, or ſhall aſſiſt or aid any perſon or perſons to com- " mit any ſuch offence or offences, they ſhall be adjudged guilty " of felony, and ſuffer death without benefit of clergy."—But it is enacted by 15 Geo. 2. c. 34. " That this act was meant " and intended, and ſhall be conſtrued, deemed, and taken to " extend to any bull, cow, ox, ſteer, bullock, heifer, calf, " and lamb, as well as ſheep, and to no other cattle whatſo- " ever."

Vide Book 1. page 180.

† Seventhly, As to thefts on NAVIGABLE RIVERS. It is enacted by 24 Geo. 2. c. 45. " That all and every perſon and " perſons that ſhall felonioufly ſteal any goods, wares, or " merchandize of the value of forty ſhillings in any ſhip, barge, " lighter, boat, or other veſſel or craft upon any navigable " river, or in any port, or entry, or diſcharge, or in any creek " belonging to any navigable river, port of entry, or diſcharge " within the kingdom of Great Britain, or ſhall felonioufly " ſteal any goods, wares, or merchandize of the value of forty " ſhillings upon any wharf or key adjacent to any navigable " river, port of entry, or diſcharge, or ſhall be preſent, aiding " and aſſiſting in the committing any of the offences afore- " ſaid, being thereof convicted or attainted; or being indicted " thereof, ſhall of malice ſtand mute, or will not directly an- " ſwer to the indictment, or ſhall peremptorily challenge " above the number of twenty perſons returned to be of the " jury, ſhall be excluded from the benefit of clergy."

Evidence of a theft from a barge in Limehouſe dock is not ſufficient to deprive the priſoner of his clergy for ſtealing goods to the amount of forty ſhillings, on a navigable river. O. B. 1784. p. 813.

† Eighthly, As to ſtealing from VESSELS IN DISTRESS, or plundering goods that have been ſaved from the wreck, the benefit of clergy is taken away by 12 Ann. ſtat. 2. ch. 18. and 26 Geo. 2. c. 19. the particulars of which are fully ſet forth Book the firſt, Appendix the ſecond, p. 219. and to which I refer.

Sect.

Sect. 72. As to SACRILEGE: It is obſervable, That all perſons not in holy orders, who ſhall be indicted, whether in the ſame county wherein the fact was committed, or in a (*a*) different county, of "robbing any church, chapel, or other holy place," are excluded from their clergy by (*b*) 23 Hen. 8. c. 1. and 25 (*c*) Hen. 8. c. 3. revived (*d*) by 5 & 6 Edw. 6. c. 10. upon a conviction, ſtanding mute, or peremptory challenge of more than twenty; and by 3 & (*e*) 4 Will. & Mary, c. 9. upon an outlawry.

(*a*) Infra 80, 81, 82.
(*b*) Vide ſup. ſect. 30. 31. 2 Hale 365.
(*c*) Vide ſup. ſect. 32, 33.
(*d*) Vide ſup. ſ. 43, 44.
(*e*) Vide ſupra, ſect. 48, 49.

Sect. 73. But the word robbing (*f*) being always taken to carry with it ſome force, as ſhall be more fully ſhewn, ſections 88. 92. 96. it ſeems that no ſacrilege is within any of theſe ſtatutes, which is not accompanied with the actual breaking of a church, &c.

(*f*) Kely. 58, 69. Dyer 224.

Sect. 74. But by 1 Edw. 6. c. 12. (*g*) ſ. 10. all perſons in general are ouſted of their clergy for the "felonious taking of "any goods out of any pariſh church, or other church or "chapel," in all caſes, except that of challenging more than twenty; and by 3 & (*h*) 4 Will. & Mary, c. 9. upon ſuch a challenging as well as upon a conviction, &c. upon an indictment (*i*) whether in the ſame county wherein the ſacrilege was committed, or in a different one.

(*g*) Vide ſup. ſect. 34, 35, 36.
(*h*) Vide ſup. ſect. 48, 49.
(*i*) Infra 80. 82. 2 Hale 365, 366.

Sect. 75. But it ſeems, That acceſſaries to ſuch a robbery or felonious taking, are excluded from their clergy by no ſtatute; for though they are expreſsly mentioned by 23 Hen. 8. c. 1. yet ſince they are omitted by 25 Hen. 8. c. 3. and ſo much only (*k*) of 23 Hen. 8. c. 1. is revived as is affirmed and enforced by 25 Hen. 8. c. 3. they ſeem to remain in the ſame caſe as if they had been wholly omitted by 23 Hen. 8. c. 1. which is the only ſtatute I know of which extends to them, except the offence amount to burglary; in which caſe acceſſaries before are ouſted of their clergy by 3 & 4 Will. & Mary, c. 9.

(*k*) Vide ſup. ſect. 43, 44. 52. 55.

Sect. 76. But *quære* if there be need of any ſtatute to exclude them, ſince the common law ſeems to have given no perſon whatſoever any right to demand the privilege of the clergy for ſacrilege, but only at the diſcretion of the ordinary, as hath been more fully ſhewn, ſection the ninth.

2 Hale 333.

As to ROBBERY, I ſhall particularly conſider the ſtatutes excluding it from clergy, as they relate, 1. To robbery in or near the highway. 2. To robbery in a dwelling-houſe, booth or tent. 3. To robbery in general.

Sect. 77. And firſt, as to robbery in or near the highway: It is obſervable, That all perſons, not in holy orders, who ſhall be indicted (*l*) of "robbing any perſon or perſons in or near "the highways," are excluded from the clergy by 23 (*m*) Hen. 8. c. 1. and 25 (*n*) Hen. 8. c. 3. revived (*o*) by 5 & 6 Edw. 6. c. 10. upon a conviction, ſtanding mute, or peremptory

(*l*) Vide ſup. ſect. 30.
(*m*) Vide ſup. ſect. 30, 31.
(*n*) ſ. 32, 33.
(*o*) 42, 43, 44.

tory challenge of more than twenty; and by 3 & 4 (*a*) Will. and Mary, c. 9. upon an outlawry.

(*a*) Sect. 48, 49.

Sect. 78. And *note*, That all perſons in general, "who ſhall "be guilty of robbing any perſon or perſons in the highway, or "near to the highway," are excluded from the clergy both upon an appeal and indictment by (*b*) 1 Edw. 6. c. 12. ſ. 10. in all caſes except that of challenging more than twenty; and by 3 & 4 Will. & Mary, c. 9. upon ſuch a challenge upon an indictment.

(*b*) Vide ſup. ſect. 34, 35, 36, 37.

Sect. 79. *Note*, That no robbery is within theſe ſtatutes, but ſuch as is laid in the indictment to have been committed in or near the (*c*) highway, and to have (*d*) put the perſon robbed in fear.

(*c*) Vide ſ. 25.
(*d*) Sect. 73. Dyer 224. And Bk. 1. c. 35. ſ. 13.

Sect. 80. It is recited by 25 Hen. 8. c. 3. revived (*e*) by 5 & 6 Edw. 6. c. 10. "That divers felons and robbers that had committed many heinous robberies and burglaries in one ſhire, and conveyed the ſpoil and robbery into another ſhire, and had been there (*f*) taken, indicted and arraigned upon felony, and felonious taking of the ſame goods, and not upon the ſame robbery nor burglary; for that it was not committed nor done in the ſame ſhire where they had been ſo indicted and arraigned, and by reaſon thereof the ſame felons, robbers, and burglers had enjoyed the privilege of their clergy." And thereupon it is enacted, "That if any perſon or perſons be "indicted of felony for ſtealing of any goods or chattels, in "any county within this realm of England, and thereupon ar-"raigned and be found guilty, or ſtand mute of malice, or chal-"lenge peremptorily above the number of twenty perſons, or "will not directly anſwer to the law, ſhall loſe and be put from "the benefit of the clergy, in like manner and form as they "ſhould have been if they had been indicted, and arraigned, and "found guilty in the ſame county where the ſaid robbery or burg-"lary was done or committed; if it ſhall appear to the juſtices "before whom any ſuch felons or robbers be arraigned, by "evidence given before them, or by examination, that the ſame "felonies whereupon they were ſo arraigned, had been ſuch "robberies or burglaries, in the ſame ſhire wherein ſuch rob-"beries or burglaries were committed or done, by reaſon "whereof they ſhould have loſt the benefit of their clergy by "force of 23 Hen. 8. in caſe they had been found guilty "thereof in the ſame ſhire where ſuch robberies or burglaries "were ſo committed and done."

(*e*) Vide ſupra ſ. 43. 44.
(*f*) Vide Bk. 1. c. 33. ſ. 9.

Sect. 81. But *note*, That this ſtatute extends (*g*) not to thoſe who are outlawed; nor to thoſe who are indicted out of the realm of England; nor to thoſe who are indicted of ſuch ſtealing as is excluded from clergy by ſubſequent ſtatutes; nor to appellees; but the three firſt of theſe defects are ſupplied by 3 & 4 Will. & Mary, c. 9. by which it is enacted, "That if "any

(*g*) 11 Coke 31. 1 Hale 518. 2 Hale 349.

" any perſon or perſons be indicted of felony for ſtealing of " any goods or chattels in any county within this realm of " England, dominion of Wales, or town of Berwick-upon- " Tweed, and thereof be convicted or attainted, or upon his " or their arraignment ſhall ſtand mute, or will not directly " anſwer to the indictment, or ſhall challenge peremptorily " above the number of twenty perſons returned to be of the " jury, he or they ſhall be totally excluded from having the " benefit of his or their clergy, if it appear upon evidence or " examination before the juſtices, that the ſaid goods or chattels " were taken by robbery or burglary, or in any other man- " ner, in any other county, whereof if ſuch perſon or per- " ſons had been convicted by a jury of the ſaid other county, he " or they are excluded by virtue of this or any other act from " having the benefit of his or their clergy."

(a) 11 Coke 31.

Sect. 82. *Note*, That (*a*) the words " If it ſhall appear upon " evidence before the juſtices, &c." are to be intended where the party pleads not guilty, and is found guilty by the jury, and the words " If it ſhall appear upon examination, &c" are to be intended where he ſtands mute, or challenges peremptorily above the number of twenty, or is outlawed, or confeſſes (*b*), &c. And it hath been (*c*) adjudged, That there is no need to make any entry on the record, that it appears by ſuch evidence, or examination, that the felony was originally commenced in a different county, and was of ſuch a nature that the offender could not have his clergy. But it is ſaid, (*d*) That it is uſual to write in the margent of the indictment, that it is for robbery, &c. in another county.

(b) Vide ſup. f. 28, 31. 11 Coke 31. Con. 1 And. 114.

(c) And. 114. 2 Hale 518.

(d) Sum. old edition 1678.

Sect. 83. It is ſaid to (*e*) have been holden by all the juſtices, That if the felony, whereof a man is found guilty in the county wherein he is indicted, be ſuch as doth not need the benefit of clergy, as amounting only to petit larceny, &c. the offender ſhall have only the proper judgment for ſuch offence, and no other, in reſpect of the robbery, &c. proved upon the evidence, &c. in the firſt county; for being convicted of no offence which will warrant a judgment of death, and conſequently having no need to demand his clergy, he cannot be hurt by being excluded from it.

(e) Moore 550. Summary 241. 3 Hale 536. 2 Hale 349.

Sect. 84. It is enacted by 3 & 4 (*f*) Ph. & Mary, c. 4. " That thoſe who ſhall maliciouſly command, hire or counſel " any perſon or perſons to commit or do any robbery in or near " any highway in this realm of England, or in any other the " Queen's dominions, ſhall be ouſted of their clergy, on a " conviction, ſtanding mute, peremptory challenge of more " than twenty, or outlawry."

(f) Vide ſup. f. 45, 46. How ſuch offence muſt be laid in the indictment, vide ſup. f. 25.

Secondly, As to ROBBERY IN A DWELLING-HOUSE, BOOTH OR TENT, I ſhall conſider the ſtatutes concerning it as

as they relate, To ſuch robbery putting ſome perſons in fear. To ſuch robbery putting no perſon in fear.

Sect. 85. Firſt, As to ſuch Robbery putting ſome perſon in fear: It is obſervable, That all perſons not in holy orders, "who ſhall rob any perſon or perſons in their dwelling-"houſes, or dwelling-place, the owner or dweller in the ſame "houſe, his wife, his children or ſervants then being within, "and put in fear and dread by the ſame," and indicted, (*a*) are excluded from their clergy by 23 Hen. 8. c. 1. and 25 Hen. 8. c. 3. revived by 5 & 6 Edw. 6. c. 10. upon a conviction, ſtanding mute, or peremptory challenge of more than twenty, and by 3 & 4 Will. and Mary, c. 9. upon an outlawry.

2 Hale 351, 352, &c.

(*a*) Vide ſup. ſect. 30, 31, 32, 33. 42. 43, 44. 48, 49. 72. 77.

Sect. 86. And *note*, (*b*) That by 25 Hen. 8. c. 3. and 3 & 4 Will. & Mary, c. 9. they are excluded from their clergy on an indictment in a foreign county. And their acceſſaries before are excluded in all caſes by 3 & 4 (*c*) Ph. & Mary, chapter the fourth.

(*b*) Vide ſup. ſect. 80, 81, 82, 83.

(*c*) Vide ſup. ſect. 45, 46.

Sect. 87. And by 1 (*d*) Edw. 6. c. 12. ſect. 10. all perſons in general who ſhall *break any houſe by day or by night*, *viz.* "who ſhall break a houſe burglarily, if in the night, or "ſhall break a houſe or commit a felony therein, if in the "day, (*f*) any perſon being then in the ſame houſe where "the ſame breaking ſhall be, and thereby put in fear or "dread," are excluded from their clergy, as well upon an appeal as an indictment, in all caſes, (*g*) except that of challenging more than twenty; and by 3 (*h*) & 4 Will. & Mary, c. 9. upon ſuch a challenge, as well as upon a conviction, &c. upon an indictment, whether in the ſame county wherein the breaking and felony was committed, or in a (*i*) different county; and the acceſſaries before to ſuch a breaking, if accompanied with ſtealing in a dwelling-houſe, are ouſted of their clergy in all (*k*) caſes by 4 & 5 Ph. &. Mary, c. 4. becauſe the felonious taking being accompanied with a breaking, ſeems properly (*l*) enough to come under the notion of robbery in a dwelling-houſe, all acceſſaries to which before the fact are expreſsly excluded from their clergy by that ſtatute, as acceſſaries before to robbery in general are by 3 & (*m*) 4 Will. and Mary, c. 9.

(*d*) Vide ſup. ſect. 44, &c.

(*e*) Vide ſup. ſect. 40. 11 Coke 36.

(*f*) Vide infra ſect. 93.

(*g*) Vide ſup. ſect. 36.

(*h*) Vide ſup. ſect. 48, 49.

(*i*) Vide ſup. ſect. 80, 81, 82, 83.

(*k*) Sum. 236. Sup. ſ. 45, 46,

(*l*) Vide ſup. ſ. 73. And infra ſect, 82. 92. 96.

(*m*) Vide ſup. ſect. 48, 49.

Sect. 88. But (*n*) no breaking is within the ſtatute of 1 Edw. 6. which doth not amount to an actual breaking of an houſe, or of ſome part of it; as of a cupboard or door, &c. fixed to the freehold; and therefore the breaking of a trunk or box, &c. ſeem plainly not to be within the ſtatute.

But by 3 & 4 Will. & Mary, c. 9. "every perſon or perſons "that ſhall felonioufly take away any goods or chattels, being "in any dwelling-houſe, the owner, or any other perſon be-

(*n*) Kelynge 58, 59. 70. Sup. ſ. 73. 87. infra ſ. 92. 96. Sum. 237, 238. Vide Foſter 108, 109.

" ing therein, and put in fear, or ſhall comfort, aid, abet, aſ-
" ſiſt, counſel, hire, or command any perſon to commit ſuch
" offence, being thereof convicted, or attainted, or indicted,
" and ſtanding mute, or peremptorily challenging above
" twenty, ſhall be ouſted of the benefit of their clergy."

2 Hale 354, 355, &c.

Secondly, As to ſuch robbery, putting no perſon in fear: I ſhall conſider the ſtatutes concerning it as they relate,—To ſuch robbery in a houſe, which ſome perſon is in at the time; and, To ſuch robbery in a houſe, which no perſon is in at the time.

Sect. 89. As to the firſt of theſe, it is enacted by 5 & 6 Edw. 6. c. 9. " That if it happen any perſon or perſons to
" be found guilty according to the laws of this realm, for
" robbing of any perſon or perſons in any part or parcel of
" their dwelling-houſes, or dwelling-places, the owner or
" dweller in the ſame houſe, or his wife, his children or ſer-
" vants being then within the ſame houſe or place where it
" ſhall happen the ſame robbery and felony ſhall be com-
" mitted and done, or in any other place within the pre-
" cinct of the ſame houſe or dwelling-place, that ſuch of-
" fenders ſhall in no wiſe be admitted to their clergy, whe-
" ther the owner or dweller in the ſame houſe, his wife,
" or children then and there being, ſhall be waking or
" ſleeping."

Sect. 90. " And that no perſon or perſons which ſhall
" happen to be found guilty after the laws of this realm, of
" and for robbing any perſon or perſons, in any booth or tent
" in any fair or market, the owner, his wife, his children, or
" ſervants or ſervant then being within the booth or tent,
" ſhall not be admitted to the benefit of his or their clergy,
" but utterly be excluded thereof, &c. without having any
" reſpect or conſideration whether the owner or dweller in
" ſuch booths and tents, his wife, children or ſervants being
" in the ſame booths or tents, at the time of ſuch robberies
" and felonies committed, ſhall be ſleeping or waking."

(a) Sum 236, 237. 2 Hale 355.

Sect. 91. This ſtatute (*a*) ſeems plainly to extend to all who ſhall be convicted by verdict or confeſſion, whether upon an appeal or indictment, but not to thoſe who ſhall be outlawed, or ſtand mute, or challenge peremptorily above twenty jurors; but theſe defects are ſupplied as to indictments by 3 (*b*) & 4 Will. & Mary, c. 9.

(b) Vide ſect. 48, 49.

(c) For this, vide ſup. f. 73. 87, 88. 96. Summary 237, 238. 2 Hale 354.

Sect. 92. It ſeems to be generally agreed, That no robbery is within this ſtatute which is not accompanied with an actual (*c*) breaking of an houſe, or of ſome part of it.

Yet in Popham 84. there is a caſe ſeemingly contrary.

Sect.

Sect. 93. Alſo it ſeems to be agreed, (*a*) That a ſojourner's being in a houſe at the time of the robbery doth not bring it within this ſtatute; for the words are, "The owner "or dweller in the ſame houſe, or his wife, his children, or "ſervants, being then within the ſame houſe, &c." Yet it is ſaid in (*b*) Hale's Pleas of the Crown to have been ruled by advice of the juſtices, That where one entered into the lodging of Sir H. Hungate, being parcel of Whitehall, and broke open a chamber and took away his goods, his caſe was within this ſtatute, and that the indictment ought to be for breaking the king's houſe, called Whitehall, and for ſtealing the goods of Sir H. Hungate, divers perſons being in the houſe.

(*a*) Hetley 64. S. P. C. 129. Summary 236, 237. 11 Coke 36.

(*b*) Folio 237, 238. 1 Hale 522, 523. Kelynge 27.

But *note*, That this caſe is wholly omitted in the firſt edition of Hale's Pleas of the Crown, and I cannot but think that it is miſprinted in the ſecond; becauſe ſuch a robbery ſeems by no means within the purview of this ſtatute, which extends only to ſuch robberies as are done to a man in ſuch a place as may be called *his dwelling-houſe, or dwelling-place, his wife, children, or ſervants being at the ſame time within the ſame.*

But in the ſtate of this caſe it ſeems to be admitted, That Whitehall, wherein the felony was committed, could not properly be called, nor ought to be laid in the indictment as the dwelling-houſe or dwelling-place of the ſaid Sir H. Hungate, who was the perſon robbed, but of the king.

Alſo it ſeems to be admitted, That it is ſufficient to ſet forth generally in the indictment that divers perſons were in the houſe, without ſhewing that they were under any relation to the perſon robbed, as his children or ſervants, &c. which (*c*) ſeems to be neceſſarily required by 5 & 6 Edw. 6. c. 9. And therefore I take it, that the ſtatute here intended is not 5 & 6 Edw. 6. c. 9. but rather 1 Edw. 6. (*d*) c. 12. ſect. 10. or 39 (*e*) Eliz. c. 15.—Yet *quære*, for neither of theſe ſtatutes ſeem to extend to this caſe as it is here put.

(*c*) Vide Hetley 64. Summary 235, 236. 11 Coke 36. S. P. C. 129. Popham 84.

(*d*) Vide ſup. ſ. 87.

(*e*) Vide infra. ſ. 95, 96, 97.

However, 3 & 4 Will. & Mary, c. 9. ſeems fully to extend to it; by which it is enacted, "That all thoſe who ſhall "rob any dwelling-houſe in the day-time, any perſon being "therein, or ſhall comfort, aid, abet, aſſiſt, counſel, hire or "command any perſon to commit ſuch offence, being there-"of convicted or attainted, or indicted, and ſtanding mute, or "challenging peremptorily above twenty, ſhall be ouſted of "their clergy." But I do not (*f*) find that any ſtatute excludes thoſe from their clergy who are acceſſaries to a robbery in a booth or tent, except it be from the perſon of a man, in which caſe the acceſſaries before the fact ſeem to be excluded from their clergy by 3 & 4 Will. & Mary, c. 9. as ſhall be more fully ſhewn hereafter.

(*f*) See the Statute of 3 & 4 Ph. & Mary, ſupra ſ. 45, 46.

Sect. 94. It ſeems plain, That thoſe who are guilty of a felony within theſe ſtatutes, are excluded from their clergy by 3 & 4 Will. & Mary, c. 9. on an indictment in a foreign county in the ſame manner as if they had been convicted in the firſt county, as hath been more fully ſhewn, ſect. 80, 81, 82, 83.

a Hale 356.

Sect. 95. Secondly, As to ſuch robbery in a houſe which no perſon is in at the time: It is recited by 39 Eliz. c. 15. "That then of late divers lewd and felonious perſons, underſtanding that the robbing of houſes in the day-time, no perſon being therein at the time, is not ſo penal as where ſome perſon is therein, had been emboldened to take their opportunity to commit many heinous robberies in breaking and entering divers houſes, &c." and thereupon it is enacted, "That if any perſon ſhall be found guilty, and convicted "by verdict, confeſſion, or otherwiſe, according to the laws "of this realm, for the felonious taking away in the day-time, "of any money, goods or chattels, being of the value of 5s. "or upwards, in any dwelling-houſe or houſes, or any part "thereof, or any out-houſe or out-houſes, belonging and uſed "to and with any dwelling-houſe or houſes, although no per-"ſon ſhall be in the ſaid houſe or out-houſes at the time of "ſuch felony committed, then ſuch perſon ſhall not be admitted to the benefit of his clergy."

Sect. 96. Notwithſtanding the words of the purview of this ſtatute ſeem plainly to include all felonious takings to the value of 5 s. out of an houſe, &c. whether with or without force; yet ſince the miſchief complained of in the preamble, and intended to be redreſſed, is the frequent committing of many "heinous robberies in breaking and entering, &c." and ſince all other (*a*) ſtatutes excluding the benefit of clergy from robberies in houſes, have been conſtrued to extend to ſuch larcenies only as are accompanied with a breaking of a houſe, or of ſome part of it; it ſeems agreed, (*b*) That this ſtatute alſo ſhall extend only to ſuch a felonious taking as is accompanied with the like breaking.

(*a*) Sup. f. 73. 87. 88. 92. 96.
(*b*) Kelynge 30. 58. 69, 70. Sum. 237, 238. 2 Hale 256. 11 Coke 36. Cro. Car. 473, 474.

Sect. 97. It ſeems agreed, (*c*) That a chamber in one of the Inns of Court, wherein a perſon uſually lodges, is properly a dwelling-houſe within this ſtatute, and may be ſo called in an indictment, becauſe every owner of ſuch a chamber hath a ſeparate intereſt in it. But that a lodging in Whitehall or Somerſet-houſe is not (*d*) a dwelling houſe within this ſtatute; from whence it ſeems to follow, That a robbery in ſuch a lodging is not excluded from the clergy by this ſtatute, if any perſon were at the time in any other part of the palace, becauſe the whole is but one dwelling-houſe.

(*c*) C. Car. 473. 1 Jones 394. Summary 83. 237. 2 Hale 338. Kelynge 27. 52. Cowper 5. See Bk. 1. c. 38. ſect. 13.
(*d*) Kelynge 27. 52. Vide ſup. f. 93.

Sect. 98. It ſeems agreed, (*e*) That no acceſſary is ouſted of his clergy by this ſtatute. Alſo it hath been adjudged, That

(*e*) Sum. 237. 2 Hale 357. 1 Hale 527. 521. Sup. f. 45, 46.

(a) That he who ſtands by and abets another while he breaks and enters the houſe, and afterwards divides the money with him, but doth actually enter the houſe himſelf, is not within the ſtatute. The reaſon whereof ſeems to be this, that the words, "If any perſon ſhall be convicted, &c. of a felonious taking, "&c. in a dwelling-houſe, &c." ſhall in ſo penal a law be intended only of an actual taking, and not of a conſtructive one. But this ſeems an extremely nice caſe, and if it were a new point, and not confirmed by experience, the authority of it might perhaps be juſtly queſtioned; for if the perſon, who only ſtood by and entered not the houſe, had actually entered it, and the other only had taken the money, and had not given him any part of it till both had gone out of the houſe; in this caſe as well as in the other, it might be ſaid, That he who actually received not any part of the money till he was gone out of the houſe, was guilty only of a conſtructive taking in the houſe, and conſequently not within this ſtatute. But I cannot eaſily perſuade myſelf but that in ſuch a caſe both muſt be adjudged equally within the ſtatute; and why not as well in the other, it ſeeming an uncontroverted (b) rule, That where divers are preſent and abet one another in committing any felony, the act of one ſhall be looked on as the act of all.

(a) C. Car. 473, 474. 2 Hale 358. Note, That the ſame caſe is in 1 Jones 394. but this point is not taken notice of.

(b) Vide ſup. c. 29. ſ. 7, 8. 13. Vide Foſter 357.

And upon this ground, as I take it, it hath been always agreed, that thoſe who are preſent, and abetting, when a murder or robbery is committed, are all of them equally excluded from their clergy, whether they actually gave the ſtroke or took the money or not; and yet the ſtatutes to this purpoſe mention only thoſe who ſhall be found guilty of murder or robbing, &c. Nor do I find any reſolution to the contrary on any other ſtatute concerning clergy, except only the (c) ſtatute of Stabbing, whereon it hath been adjudged, (d) That the perſon only who gives the ſtab is within the purview of it: But this ſeems plainly to depend on the particular circumſtances of this offence, which is excluded from clergy in reſpect of the cruelty and bloody mind of him who gives the ſtab, which certainly is peculiar to himſelf.

(c) 1 Jac. 1. 8.
(d) Aleyn 44. Summ. 58. Bk. 1. c. 30. ſ. 71 Aleyn 43. Stile 86. Foſter 356. 1 Hale 468. Salkeld 542. Farreſly 129. 2 Ld Raym. 842.

Sect. 99. However it is certain at this day, "That whoever "ſhall comfort, aid, abet, aſſiſt, counſel, hire or command any "perſon or perſons to break any dwelling-houſe, ſhop, or "warehouſe thereunto belonging, or therewith uſed, in the "day-time, and feloniouſly take away any money, goods, or "chattel of the value of 5s. or upwards therein being, although "no perſon ſhall be within ſuch dwelling-houſe, ſhop, or "warehouſe, being convicted or attainted, or being indicted and ſtanding mute, or challenging peremptorily above "twenty, ſhall be excluded from their clergy by the expreſs "words of 3 & 4 Will. & Mary, c. 9."

Sect. 100. But *note*, That this clauſe mentioning only a felonious taking in a dwelling-houſe, ſhop, or ware-houſe thereunto belonging, and not mentioning out-houſes in general, as 39 Eliz. doth, ſeems to have prevailed before; and therefore I take it that an aſſiſtant to ſuch a felony in an out-houſe, not being ſuch a ſhop or warehouſe, without entering into it, is clearly intitled to the benefit of his clergy ſince this ſtatute, however it might be diſputed before.

Supra f. 98.

Sect. 101. *Note* alſo, That the acceſſaries before to ſuch a felony in any out-houſe, not being ſuch a ſhop or ware-houſe, are ſtill intitled to the benefit of their clergy, becauſe the only *(a)* law which excludes them is the *(b)* above-cited clauſe of 3 & 4 Will. & Mary, c. 9. which extends only to ſuch felonies "in a dwelling-houſe, ſhop, or warehouſe thereunto "belonging."

(a) Sum. 227.
(b) Supra f. 99.

Sect. 102. But all principals in any felony within the ſaid ſtatute of 39 Eliz. are excluded from their clergy by the ſame ſtatute upon any conviction, whether upon an indictment or appeal; and by the ſaid ſtatute of 3 (c) & 4 Will. & Mary, upon an outlawry, ſtanding mute, or peremptory challenge of more than twenty, upon an indictment, whether in the ſame county in which the felony was firſt committed, or in a different (d) county.

(c) Sup. f. 48, 49.
(d) Supra ſect. 81, 82, 83.

Sect. 103. Thirdly, As to robbery in general, it is enacted by 3 & 4 Will. & Mary, c. 9. "That all and every perſon "or perſons that ſhall rob any other perſon, or ſhall comfort, "aid, abet, aſſiſt, counſel, hire or command any perſon or per"ſons to commit ſuch offence, being thereof convicted or at"tainted, or being indicted and ſtanding mute, or challenging "peremptorily above twenty, ſhall not have the benefit of "his clergy."

Sect. 104. As to BURGLARY: (e) If any perſon be in the houſe at the time of the breaking, and thereby put in fear, the principal is excluded from his clergy by 1 Edw. 6. c. 12. ſ. 10. in all caſes, except that of challenging more than twenty, and by 25 Hen. 8. revived *(f)* by 5 & 6 Edw. 6. or at leaſt by 3 & 4 Will. & Mary, c. 9. upon ſuch a challenge, upon an indictment.

(e) Vide 11 Coke 35, 36. 2 Hale 360, 361. Sup. f. 34. 36. 40.
(f) Vide ſup. ſect. 42, 43, 44.

Sect. 105. Alſo the principal in every burglary, whether *(g)* any perſon were in the houſe at the time or not, is excluded from his clergy by 18 Eliz. c. 7. upon a (h) conviction by verdict, outlawry, or confeſſion; and by 3 & 4 Will. & Mary, upon ſtanding mute, or challenging peremptorily more than twenty upon an indictment.

(g) Popham 42. 52. 1 Anderſon 302. Moore 660. 4 Coke 40. Fl. 1. c. 38. ſect. 11.
(h) 11 Coke 35. Summary 233.
(i) 11 Coke 35. Summary 233, 234.

Sect. 106. Alſo by (i) the ſame ſtatute of 3 & 4 Will. & Mary, c. 9. "Every perſon who ſhall counſel, hire or com"mand any perſon to commit any burglary, being thereof con"victed,

" victed, or attainted, or being indicted, and ſtanding mute, " or challenging peremptorily above twenty, ſhall not have his " clergy."

Sect. 107. As to ARSON: It hath been clearly ſettled, ſince *Poulter's Caſe* (*a*), that the principal (*b*), not being in holy orders, is excluded from clergy upon an indictment in all caſes, except outlawry, by 23 Hen. 8. and 25 Hen. 8 as (*c*) revived by 5 & 6 Edw. 6. c. 10. And it is certain that he is excluded upon an outlawry on an indictment by 3 & 4 Will. & Mary, c. 9.—Alſo acceſſaries to the fact before, maliciouſly, are excluded in all caſes by 4 & 5 Ph. & Mary, c. 4. (*d*).

(*a*) 11 Coke 29 to 38. Summary 233. 1 Hale 570. 571.
(*b*) 2 Hale 345. Ante p. 481, 482.
(*c*) Ante 485, 486.
(*d*) Ante 487.

† *Sect.* 108. And to remove all doubt (*e*) it is enacted by 9 Geo. 1. c. 22. " That if any perſon or perſons ſhall " ſet fire to any houſe, barn, or out-houſe, or to any hovel, " cock, mow, or ſtack of corn, ſtraw, hay, or wood, or " ſhall by gift or promiſe of money or other reward, procure " another to join him or them in any ſuch unlawful act, ſuch " offender ſhall ſuffer death without benefit of clergy."

(*e*) 2 Hale 346. Bk. the firſt, page 166 *in notis.*

Sect. 109. *Note*, That by 1 Edw. 6. c. 12. ſ. 14. (*f*) Every lord of parliament is allowed his clergy in all caſes, wherein others are excluded by that act, except wilful murder, and conſquently cannot be denied his clergy for any other felony wherein it was grantable at common law, unleſs it be ouſted by ſome ſtatute made ſince the firſt year of Edward the ſixth or (*g*) revived by 5 & 6 Edw. 6. c. 10.

(*f*) S. P. 6. 130. 2 Hale 376.
(*g*) Sup. ſect. 42, 43, 44.

Sect. 110. As TO the third general point of this chaper, viz. At what time the benefit of clergy is demandable. It ſeems, (*h*) That it might be demanded, by the ancient common law, as ſoon as the priſoner was brought to the bar, before any indictment or other proceeding againſt him; for it is plain, That anciently the clergy claimed, and were in a great meaſure indulged, a privilege of being wholly (*i*) free from ſecular juriſdiction for crimes puniſhable with loſs of life or member. But after the ſtatute of *Weſtminſter the firſt*, which ſtrictly enjoined the ordinaries not to ſuffer clerks who have been indicted by ſolemn inqueſts to be delivered without due purgation, the judges ſoon made a ſettled rule (*k*) not to deliver any clerk to the ordinary, before he had been firſt indicted and arraigned, and his offence had been inquired of and found by an inqueſt of office, which was done both to the end that if the priſoner were found guilty, he (*l*) might abſolutely forfeit his goods (which anciently were ſaved by a purgation), and alſo that the court might be ap-

(*h*) See the Stat. of Marl. c. 28. Weſtm. 1. c. 2. Art. Cler. c. 15. 2 Inſt. 150. 163, 164, 633. S. P. C. 123. 130, 131. 185. 2 Hale 377, 378. Bracton l. 3. c. 9. Sup. c. 15. ſ. 84. Hobart 288, 289. Yet in Kelynge 100. the contrary ſeems to be holden.
(*i*) Vide Bract. l. 3. c. 9. Art. Cleri. c. 15. S. P. C. 138, 139, 140. Supra ſect. 1, 2. F. Corone 118. 3 Comm. 62. 4 Comm. 359. F. Corone 232. 376. 382. 386. 417. But this ſeems to be doubtful. F. Corone 233.
(*l*) S. P. C. 131. 185. 3 Coke 110. Regi. 68. Plowden 262. Contra 40. Aſſize 42, 43. Ab. F. Corone 91. B. Forf. 5. Hobart 289. it is holden, That the goods are not forfeit without a conviction.

priſed, whether it were proper, from the circumſtances of the caſe diſcloſed upon ſuch an enquiry, to deliver the clerk to the ordinary generally, in which caſe he was allowed to make his purgation (*a*), or ſpecially, (*b*) *abſque purgatione facienda.* But this practice being found inconvenient to priſoners, becauſe they loſt their goods if found guilty by ſuch inquiry, and yet could take no challenge to any of the jury, it being but an inqueſt of office; it hath been the general practice (*c*) ever ſince the reign of Henry the ſixth to oblige thoſe who demand the benefit of clergy to plead and put themſelves upon their trial, under (*d*) pain of being dealt with as thoſe that ſtand mute, whereby they forfeit their goods (*e*) without any inquiry concerning their crime; but yet (*f*) cannot be denied their clergy, where they ſhould be intitled to it in caſe they were convicted, unleſs they be ſpecially excluded by ſome ſtatute. But after a clerk hath put himſelf upon his trial, and the inqueſt are charged with him, it is ſaid that he (*g*) may, if he deſire it, be admitted to his clergy, before the jury come back; but ſhall not forfeit his goods unleſs they find him guilty.

(*a*) Sum. 240. Hobart 288, 289. S. P. C. 139. 5 Coke 109.
(*b*) Vide F. Cor. 109. 417. Sum. 240. Raſt. 121. Hob. 288, 289. Kelynge 100. 4 Comm. 363.
(*c*) Sum. 239. 2 Hale 378. 2 Inſt. 164. F. Corone 53. 58. S. P. C. 131. Salkeld 61. Finch 463. Hobart 288.
(*d*) F. Cor. 58. ſo ſaid in a note of a caſe in 3 H. 7. 1. But I do not find it made out by the books at large. But this is clearly holden 3 H. 7. 12. Ab. F. Cor 53. (*e*) Sup. c. 30. ſ. 19. (*f*) 8 H. 4. 3. Ab. F. Corone 72. Sup. c. 30. ſect. 24. (*g*) S. P. C. 131. Finch 463.

Sect. 111. Alſo I take it to be generally agreed in the later (*h*) books, That a perſon may demand his clergy after a *non legit* recorded; and alſo after judgment given againſt him, whether of (*i*) death, or of (*k*) *pain fort et dure*, or of (*l*) outlawry, &c. as well as before judgment, and even (*m*) under the gallows, if there be a judge there who has power to allow it; as a juſtice of the king's bench, if the party were condemned there; or a juſtice of gaol-delivery, if he were condemned before him, and the commiſſion of gaol-delivery be not (*n*) yet adjourned, and according to ſome (*o*) opinions, even though the commiſſion were adjourned.

(*h*) Sum. 239, 240. 2 Hale 378, 379, 380. S. P. C. 132. Finch 363, 364. F. Corone 99. 109. Dyer 205. This ſeems doubtful, 12 Aſſize 15. Ab. F. Cor. 117. Con. F. Corone 233.
(*i*) 40 Aſſize 42. 23. F. Corone 91. Dyer 183. 34 H. 6. 49. F. Corone 20. B. Clergy 1. (*k*) Summary 239. 1 Hale 380. Sup. c. 30. ſect. 24. (*l*) 9 E. 4. 28. 8 H. 4. 2. F. Corone 72. (*m*) 34 H. 6. 49. Ab. F. Cor. 20. B. Clergy 1. Summary 239, 240 Dyer 205. S. P. C. 132. Crompton Jur. 126. (*n*) S. P. C. 132. Summary 240. Cor. Juriſ. 126. (*o*) As it ſeems from Dyer 205. 2 Hale 379.

Sect. 112. As to the fourth general point of this chapter, *viz.* Whether the benefit of clergy ſhall be allowed where it is not demanded: I take it to be generally agreed, That notwithſtanding it was anciently the (*p*) uſual method for the ordinary to demand the criminal as his clerk, before the court allowed him the benefit of his clergy; yet there was no (*q*) neceſſity that any ſuch demand ſhould be made by the ordinary;

(*p*) Bract. B. 3. c. 9. Weſt. 1. c. 2. 2 Inſt. 163, 164. S. P. C. 130. 9 E. 4. 28. 12 Aſſize 15. 34 H. 6. 49. Kelynge 99.
(*q*) S. P. C. 131, 132, 133. Hobart 289, 290. F. Corone 117. B. Clergy 1, 9. See the following ſection. But this matter ſeems to be left doubtful, 12 Aſſize 15. Ab. B. Clergy 9. 34 H. 6. 49 Kelynge 99. F. Cor. 44. 120. 191. 9 E. 4. 28. F. N. B. 66.

But

But the court might without it admit a perſon to the benefit of his clergy upon ſufficient evidence of his being a clerk; as upon his producing letters of orders, or reading as a clerk, &c. except he appears to have been guilty of ſacrilege, or of breaking the priſon of the ordinary; in which caſes it is ſaid to have been in a great meaſure left to the (*a*) diſcretion of the ordinary, whether he ſhould have his clergy or not. And as there is no neceſſity that the ordinary ſhould demand the benefit of clergy for a clerk; ſo (*b*) neither doth there ſeem to be any that the priſoner himſelf ſhould demand it, where it ſufficiently appeared to the court that he has a right to it in reſpect of his being in orders, &c.; in which caſe, if the priſoner does not demand it, it ſeems to be left to the diſcretion of the judge, whether he will allow it him or not.

(*a*) Vide ſup. ſect. 9. F. Cor. 112. 122. S. P. C. 133. 27 Aſſize 42. Ab. F. Cor. 205.
(*b*) S. P. C. 131. F. Cor. 191, 254. 26 Aſſize 19. Summary 239. 2 Hale 321. 378, 379. B. Clergy 1. 9. B. Corone 73. Hobart 289.

Sect. 113. As to the fifth general point of this chapter, *viz.* Who is to judge whether a perſon who demands the benefit of clergy, have a right to it or not: I take it, That in all caſes the temporal judge is to determine both whether the crime be within the benefit of clergy, and alſo whether the perſon who demands it be qualified to demand it or not. For notwithſtanding it had its (*c*) original commencement from the canon law: yet it being no (*d*) otherwiſe to be allowed here than as it hath been received by, and is agreeable to the common or ſtatute law, whereof the temporal courts are the judges, it ſeems very reaſonable that all queſtions (*e*) of this kind be determined by thoſe courts. And therefore even in thoſe caſes wherein by the old books the ordinary ſeems to have been allowed a diſcretionary power of demanding or refuſing a clerk; as where he hath been guilty of (*f*) ſacrilege, and alſo in caſes wherein it is ſaid generally, that a priſoner hath no right to his clergy, as where he is convict of (*g*) hereſy, &c. it ſeems to be taken as a ground by Staundforde, That the temporal judge, where the ordinary refuſes a priſoner, has a power to determine whether ſtill he may be allowed his clergy or not. And this ſeems to be grounded on good reaſon; for otherwiſe in ſuch caſes the ordinary by ſuch pretences might have an abſolute power of comptrolling the temporal courts in a matter properly determinable by ſuch courts. And therefore whatever point it may turn upon, whether a priſoner ought to have his clergy or not, as the validity of his letters of orders, or his being a heretick convict, &c. howſoever the temporal courts may pay the higheſt regard to the certificate of the ordinary; yet I take it to be generally (*b*) holden, That they only are finally to determine whether upon the whole the priſoner be well intitled to his clergy, or not, becauſe the ordinary is not in this reſpect

(*c*) Sup. ſect. 2. Hobart 288.
(*d*) Sup. ſ. 2. 110. Hobart 288.
(*e*) Vide 1 E. 3. 13. 1 Aſſize 4. F. Corone 155. B. Clergy 8. Where the court refuſed to deliver to the ordinary a clerk who had abjured, till he ſhould get the king's pardon of his return into the land without licence. See Kelynge 28.
(*f*) S. P. C. 133. Sup. ſ. 9.
(*g*) S. P. C. 133. But 21 E. 4. 21. Ab. B. Clergy 18. 9 E. 4. 28. Ab. B. Clergy 7. ſeem to be contrary, where the ordinary aſſigns no particular caſe of refuſal.
(*b*) Hobart 200. See the notes to the other parts of this and the foregoing ſection; yet 9 E. 4. 28. this Ab. B. Cler. 7. F. N. B. 66.

matter ſeems to be left doubtful. Vide F. Corone 44.

eſteemed

(a) 7 E. 4. 29. Ab. F. Fines 24. B. Clergy 17. B. Ordinary 16. 34 H. 6. 49. Ab. F. Fines 19. B. Clergy 1. 7 H. 4. 41. Ab. B. Clergy 2. Ordinary 20. 15 H. 7. 9.

eſteemed as a judge, but (a) only as a miniſter to the court. However it was certainly the (b) ſettled practice (while the method of trying the priſoner's capacity of receiving orders was by putting him to read a verſe), for the judges of the common law to over-rule the ordinary as to the point, whether the priſoner read as a clerk or not; and to record a *legit* or *non legit*, according to their own judgment.

Ab. F. Impriſ. 28. B. Ordinary 11. Kelynge 51, 89. Finch. 463, 464. S. P. C. 131, 132, 133. 141. Summary 240. 2 Hale 378, 381. 21 E. 4. 21. Ab. B. Clergy 18.

(b) Kelynge 28. 51. 9 E. 4. 28. Ab. F. Corone 32. B. Ordinary 12. See the caſes cited to the precedent letter.

Sect. 114. But the neceſſity of ſuch an ability to read in the caſe of a peer, was taken away by 1 Edw. 6. (c) c. 12. ſ. 15. by which it is enacted, "That in every caſe where any of the "king's ſubjects ſhall upon his prayer have the privilege of his "clergy, &c. every lord having place and voice in parliament, "ſhall by virtue of that act of common grace, upon his re-"queſt or prayer, alledging that he is a lord or peer of this "realm, and claiming the benefit of this act though he can-"not read, without any burning in the hand, loſs of inheritance, "or corruption of blood, be adjudged, deemed, taken and uſed "for the firſt time only, to all intents, conſtructions and pur-"poſes, as a clerk convict, and ſhall be in caſe of a clerk con-"vict, which may make purgation, without any further or "other benefit or privilege of clergy, to any ſuch lord or peer "from thenceforth, at any time after, for any cauſe to be al-"lowed, &c."

(c) Sup. ſec. 109. S. P. C. 129. 130.

Sect. 115. The neceſſity of ſuch reading is alſo taken away, as to every common perſon, by 5 Annæ, c. 6. by which it is enacted, "That if any perſon convict of ſuch felony, for "which he ought to have the benefit of clergy, pray the bene-"fit of that act, he ſhall not be required to read, but ſhall be "puniſhed as a clerk convict."

(d) F. Coro. 32. 191. 233. 9 E. 4. 28. 21 E. 3. 3. B. Contempt 19. S. P. C. 132. Hobart 290. 2 Inſt. 164. See the notes under the next letter.

Sect. 116. As to the ſixth general point of this chapter, *viz.* How far the ordinary was puniſhable at law for demanding or refuſing a clerk againſt law: It ſeems agreed, (d) That anciently this was ſuch a contempt for which his temporalities might be ſeized: But ſince the ſtatute of 25 Edw. 3. c. 6. which provides, "That prelates ſhall be admitted to pay a reaſonable "fine for contempts to writs of *quare non admiſit*, and ſuch "like," it ſeems to have been generally (e) agreed, That the ordinary is liable only to be fined, but to no ſuch ſeizure for a

(e) 9 E. 4. 28. Ab. F. Coro. 32. Bro. Clergy 7. F. Fines 19. B. Finch 463. 2 F. Corone 191.

7 E. 4. 29. Ab. F. Fines 24. B. Clergy 17. Ordinary 16. 34 H. 6. 49. Ab. Clergy 1. 15 H. 7. 9. Ab. F. Impriſ. 28. B. Ordinary 11. Kelynge 28. 51. Inſt. 164. Yet ſee the contrary holden the very next year. 26 Aſſize 19. Ab. And alſo 7 H. 4. 41. Ab. B. Clergy 2. Ordi. 20. And S. P. C. 132.

contempt

contempt of this kind, as in obſtinately (*a*) perſiſting to return that a priſoner reads as a clerk, or the contrary, &c. againſt the declared ſenſe of the court.

(*a*) See the books cited to the other parts of this ſection.

Sect. 117. As to the ſeventh general point of this chapter, viz. In what manner a clerk was to be delivered to the ordinary, and afterwards demeſned by the common law. It ſeems (*b*) plain, That anciently wherever a clerk was delivered to the ordinary by a temporal judge, his perſon ought to be kept in the ordinary's priſon, till (*c*) he had been tried before him by a jury of twelve clerks. For the clergy never pretended to an abſolute exemption from all kind of puniſhment for their crimes, but only to a privilege of being tried only by eccleſiaſtical judges; and this was anciently ſo far indulged them, that after they had once been delivered to the ordinary, they could not afterwards be remanded to any temporal court, before the ſtatute of 8 Eliz. c. 4. ſet forth more at large ſection 122, &c. either for the ſame crime wherewith they had been charged in ſuch court, or for any other (*d*) committed before the time when the benefit of clergy was allowed them, whether ſuch other crimes were within the benefit of clergy, or not. And if they could acquit themſelves on their trial before the ordinary of the crimes for which they had been arraigned in the temporal courts, which acquittal was called a purgation, (*e*) they anciently claimed a right not only to be delivered out of priſon, but alſo to be reſtored (*f*) to their goods, &c. But to render ſuch purgation the more difficult, and alſo to delay the delivery of great offenders as much as poſſible, the judges anciently often refuſed (*g*) to deliver them to the ordinary till they had been arraigned of all the crimes whereof they ſtood indicted. But after the ſtatute of (*h*) 25 Edw. 3. the judges could not refuſe the delivery of clerks convict in reſpect of any crime whereof they had not been actually arraigned; and therefore they uſed to arraign them at once for all the crimes whereof they ſtood indicted.

2 Hale 382, 383. &c.
(*b*) Br. l. 3. c. 9. S. P. C. 137.
(*c*) See the Sta. of Weſt. 1. c. 2. 2 Inſt. 163, 164. S. P. C. 137, 138. if the ordinary ſuffered a clerk to go at large without making ſuch purgation, he might be fined by the temporal courts. 15 H. 7. 9. 9 E. 4. 28.
(*d*) And this privilege was expreſsly confirmed, 25 E. 3. c. 5. and appears from the recital of 8 Eliz. c. 4. Vide Dyer 214, 215. Summary 213. 249. Anderſon 114. S. P. C. 108. Finch 464. Popham 107.
(*e*) Finch 464, 465.
(*f*) Sum. 241. 5 Coke 110. S. P. C. 185. In the Regiſter 68. there are three writs to this purpoſe. S. P. C. 52. 185. 192, 193. Regiſter 68. Vide 1 Rich. 3. c. 3. B. Corone 11.
(*g*) F. Corone 394. 461. B. Clergy 24. 30. S. P. C. 56. 108. Summary 213.
(*h*) S. P. C. 108. 142. Dyer 214, 215.

Sect. 118. And if ſuch clerks could not purge themſelves upon ſuch a trial, I do not (*i*) find that they were anciently liable to any greater puniſhment than degradation, and the (*k*) loſs of their goods, and the profits of their lands, unleſs they had been guilty of apoſtacy, &c. But afterwards, (*l*) by a provincial conſtitution, if they were notoriouſly ſcandalous, they were to be kept in a perpetual priſon, on ſlender diet, &c.

(*i*) Bract. l. 3. c. 9. ſ. 2. S. P. C. 138.
(*k*) Sum. 241. 5 Coke 110. Bracton and Staundforde in the places cited to the precedent letter ſeem to hold generally, That degradation was the only puniſhment; but I ſuppoſe that they mean the only puniſhment to the perſon.
(*l*) S. P. C. 140, 141. See C. Jac. 431.

Sect.

Sect. 119. If the ordinary had refuſed to admit a clerk delivered to him to make his purgation, he might be compelled (*a*) by a ſpecial writ for that purpoſe.

(*a*) Bract. l. 3. c. 9. ſec. 3. S. P. C. 137, 138. 15 H. 7. 9. Cro. Jac. 431.

B. Corone 223.

Sect. 120. But this privilege was often very much abuſed; and therefore after the ſtatute of Weſtminſter 1. c. 2. which requires that no clerk ſhall be delivered without due purgation, the courts of common law would never deliver over a clerk to the ordinary, without a (*b*) previous enquiry into, or trial of his crime; whereupon if the clerk were found guilty, he abſolutely forfeited his goods, and the judges would (*c*) often in their diſcretion make a ſpecial delivery *abſque purgatione facienda*; as where it appeared that a priſoner was a common (*d*) thief, &c. or where in an appeal of robbery a reſtitution of the goods ſtolen had been awarded (*e*) to the appellant, which judgment they would not ſuffer to be contradicted by a purgation. And both in ſuch a caſe, and alſo *à fortiori*, where a clerk is admitted to his clergy after an attainder, whether by an expreſs judgment or by outlawry, &c. or even after a confeſſion, (*f*) though he were not ſpecially delivered *abſque purgatione facienda*, the ordinary ſeems by the ſtronger (*g*) opinions to have been liable to an eſcape, if he had admitted him to his purgations, becauſe it could not but contradict a judgment, or the party's own confeſſion, which is the higheſt conviction. Neither was any purgation thought lawful without a previous notice to the (*h*) king of the time when it was intended to be made.

(*b*) Sup. f. 117.
(*c*) Sum. 240. 2 Inſt. 195. Hobart 289.
(*d*) S. P. C. 139. Hobart 289. F. Corone 247.
(*e*) Finch 464. S. P. C. 139. F. Corone 109. 247.
(*f*) Qu. S. P. C. 138, 139. But it ſeems agreed, That a clerk might be admitted to his purgation after a conviction by verdict, F. Corone 393. 5 Aſſize 5. Ab. F. 145. Con. F. Corone 417.
(*g*) S. P. C. 48. 138. 27 H. 6. 7. Ab. F. Corone 16. 33 E. 4. 3.
(*h*) Ab. B. Cor. 158. F. Corone 38. 3 H. 7. 12. Ab. F. Corone 56 136. 9 E. 4. 28. Ab. B. Corone 55. B. Corone 4. Finch. 464, 465. Con. Hobart 289. F. Corone 109. 128. 247. 450. 18 Aſſize 13. Ab. F. Corone 176. Utl. 2. Theloal B. 1. c. 15. ſec. 26.

Sect. 121. As to the eighth general point of this chapter, *viz.* What ſhall be done to one who is allowed the privilege of clergy at this day, and how far it ſhall be for his benefit: It is enacted by 4 Hen. 7. c. 13. "That if any perſon not in orders, ſhall be convict of murder, he ſhall be marked with an M. and if of any other felony, with a T. on the brawn of the left thumb, in open court, before he ſhall be delivered to the ordinary." And it is ſaid by (*i*) Hale, That by 3 Hen. 7. c. 1. A clerk convicted of manſlaughter ſhall be committed, or bailed at diſcretion till the year be paſſed. But the contrary hath been (*k*) adjudged; for the ſaid ſtatute mentions only thoſe who are acquitted of murder at the king's ſuit, within the year and day, in which caſe it directs that they ſhall be committed or bailed, till the year and day be paſſed, that they may be forthcoming, in order to anſwer to an appeal, if brought within that

(*i*) Sum. 240.
(*k*) Kelynge 25.

that time. But it admits the clergy once had to be a good bar to an appeal, even after an attainder, and therefore cannot be thought to have intended to make proviſion in any caſe for the parties being forthcoming to anſwer an appeal after clergy hath been allowed him, which makes it ineffectual. But it is certain, that any perſon who hath his clergy may be committed for any time within a year by 18 Eliz. c. 7. ſ. 3. ſet forth more at large, ſection 125.

Sect. 122. It is recited by 8 Eliz. c. 4. ſ. 3. "That divers perſons had oft times committed ſundry deteſtable felonies, for the which clergy is not allowable, and afterwards had fled to places remote where they were not known, and committed ſome other felony within the benefit of clergy, and being arraigned for the ſame had had their clergy allowed them, and thereupon been committed to the cuſtody of the ordinary, the former offence being then not known, and ſo by that means could not after be impeached for the ſame, to the great encouraging of offenders, uſing ſuch practices of foreknowledge and ſet purpoſe for their diſcharge of the ſame."

Sect. 123. For reformation whereof it is enacted, "That "every perſon or perſons, who ſhall hereafter upon his or "their arraignment for any felony, be admitted to the benefit "of his clergy, and delivered to the ordinary for the ſame, and "ſhall make his due purgation for the ſame offence or offences "whereupon he was ſo admitted to his clergy, and ſhall, be"fore the ſame admiſſion to his clergy, have committed any "other ſuch offence, whereupon clergy is not allowable, and not "being thereof indicted and acquitted, convicted or attainted, "or pardoned, ſhall and may be indicted or appealed for the "ſame, and thereupon put to anſwer, and ordered and uſed "in all things according to the laws and ſtatutes of this realm, "in ſuch like manner and form, as though no ſuch admiſſion of "clergy had been; any law, cuſtom, or uſage to the con"trary notwithſtanding."

Sect. 124. And for the avoiding of ſundry perjuries and other abuſes, in and about the purgation of clerks convict, delivered to the ordinaries, it is enacted by 18 Eliz. c. 7. "That "every perſon who ſhall be admitted to his clergy ſhall not "thereupon be delivered to the ordinary, but after ſuch clergy "allowed, and burning in the hand, according to the (*a*) ſta"tute in that behalf provided, ſhall forthwith be enlarged and "delivered out of priſon by the juſtices before whom ſuch "clergy ſhall be granted, that cauſe notwithſtanding."

(*a*) 4 H. 7. 13. for which ſee ſec. 121.

Sect. 125. But it is provided, par. 3. "That the juſtices "before whom any ſuch allowance of clergy ſhall be had, ſhall "and may for the further correction of ſuch perſons to whom "clergy ſhall be allowed, detain and keep them in priſon for "ſuch convenient (*b*) time, as the ſame juſtices in their diſcre"tions

(*b*) 2 Bulſt. 137.

" tions ſhall think convenient, ſo as the ſame do not exceed " one year's impriſonment."

Sect. 126. And it is farther provided, par. 5. " That all " perſons admitted to their clergy, ſhall, notwithſtanding ſuch " admiſſion, be put to anſwer to all other felonies whereof they " ſhall be indicted or appealed, and not being thereof before " acquitted, convicted, attainted or pardoned, and ſhall in ſuch " manner and form be arraigned, tried, adjudged, and ſuffer " ſuch execution for the ſame, as they ſhould have done, if, as " clerks convicts, they had been delivered to the ordinary, and " there had made their purgations; any thing in this act con- " tained to the contrary notwithſtanding."

Upon theſe ſtatutes the following points ſeem moſt remarkable:

Sect. 127. Firſt, Inaſmuch as it plainly appears, not only from the preamble, but alſo from the expreſs words of the above recited clauſe of 8 Eliz. c. 4. That it had nothing elſe in view but only to prevent the inconvenience that offenders ſhould be diſcharged of crimes not within the benefit of clergy, by being admitted to their clergy for crimes within the benefit of it, as they were (*a*) before this ſtatute; and inaſmuch as the above-recited *proviſo* of 18 Eliz. c. 7. though it be more largely worded than 8 Eliz. c. 4. hath a plain relation to it, and therefore may reaſonably receive the ſame conſtruction; it ſeems to have been agreed, (*b*) ever ſince theſe ſtatutes, That a conviction for a felony within the benefit of clergy, and an allowance of clergy thereon, is as much a diſcharge of all precedent felonies within the benefit of clergy (though not of any others) as it was before theſe ſtatutes.

(*a*) Supra. ſ. 117.

(*b*) Sum. 213. 249. 2 Hale 388. 1 Anderſon 114. Popham. 107.

Sect. 228. Secondly, Inaſmuch as the ſtatute of 18 Eliz. c. 7. is expreſs, " That every perſon admitted to his clergy, " ſhall not be delivered to the ordinary, but after ſuch clergy " allowed, and burning in the hand, ſhall forthwith be en- " larged and delivered out of priſon, &c. with a *proviſo* never- " theleſs, that for further correction he may be kept in priſon, " &c. and alſo with a farther *proviſo* that he ſhall anſwer to all " former felonies, in the ſame manner as if he had made his " purgation." It ſeems to be the more prevailing opinion, (*c*) That a clerk convict being admitted to his clergy, may either be taken to have a kind of a ſtatute-pardon, or elſe to be in the ſame caſe as if he had made his purgation at the common law.

(*c*) Kelynge 37. 102.

And both theſe conſtructions ſeem reaſonable. For as to the firſt it may be ſaid, That the ſtatute by ordaining that the party ſhall be forthwith enlarged and delivered out of priſon, under certain *proviſoes*, ſeems plainly to imply that he ſhall be liable to no other puniſhment, and conſequently in effect pardons him.

him. And as to the ſecond it may be ſaid, That the ſtatute ſeems only to intend to take away the practice of making purgation, which had been ſo much abuſed, but not the benefit accruing to the ſubject by it, but rather to make it more univerſal, by giving the ſame advantage to all by a direct and expreſs law, attended with no inconvenience, which before ſome only gained by an uſurped practice, very frequently abuſed, and highly derogatory from the honour of the common law. But (*a*) Sir Edward Coke is of opinion, That it ſhall enure by way of purgation in reſpect of ſuch perſons only who might be admitted to make their purgation before the ſtatute, and in reſpect of others by way of pardon. And (*b*) Hobart argues, That becauſe many offenders before the ſtatute might have their clergy, who yet could not be diſcharged by making their purgation; and the ſtatute intends that all in general who are admitting to their clergy, ſhall be diſcharged, &c. And alſo becauſe all purgations diſcredited a trial at law, therefore it is not reaſonable to intend that the ſtatute meant that ſuch a diſcharge ſhould enure by way of a purgation, but only by way of a ſtatute-pardon. But to this it ſeems a reaſonable anſwer, That it doth by no means follow, that becauſe the ſtatute intended that ſuch diſcharge ſhould extend to perſons who could not have the benefit of a purgation, therefore it did not intend that it ſhould have the effect of a purgation; neither doth it ſeem to follow, That becauſe a purgation diſcredited the acts of a jury, therefore ſuch a diſcharge, if it have to ſome purpoſes the ſame effect as a purgation, muſt diſcredit them likewiſe.

(*a*) 5 Coke 110.

(*b*) Hobart 292, 293.

Sect. 129. Thirdly, Taking the ſtatute to enure either by way of a ſtatute-pardon, or purgation, it ſeems that it reſtores (*c*) the party to his credit, and conſequently enables (*d*) him to be a good witneſs; which it hath been queſtioned whether a pardon by the king can do, as ſhall be ſet forth more at large in the chapter of pardon. Alſo it ſeems agreed, That it gives him a capacity to purchaſe (*e*) goods, and to retain the (*f*) profits of his land, but gives him no right to be reſtored to thoſe which he had at the time of the conviction, which, being veſted in the king by the forfeiture upon the conviction, (*g*) ſhall not be deveſted either by a (*h*) pardon or (*i*) purgation. For it is certain that a pardon never avoids (*k*) any precedent legal act, as ſhall be more fully ſhewn in the chapter of pardon. Neither would the common law endure that purgation, which was introduced by a connivance, or rather tolerated than allowed, ſhould ſo far controul its proceedings.

(*c*) Sum. 241. (*d*) Kelynge 37. Raymond 369, 370. 380. Siderfin 222. 2 Stat. Tr. 523. 4 Stat. Tr. 379. to 386. 5 Modern 15.

(*e*) Sum. 241. 5 Coke 110. Hobart 293.

(*f*) 5 Coke 110. F. Corone 393. Forfeit 34.

(*g*) 12 Co. 121. 5 Coke 110. Summary 241. Co. Lit. 391. 3 H. 7. 12. F. Corone 53. 356. 365. 393.

F. Forfeit. 23. 34. B. Forfeit. 11. 8 H. 4. 2. Plowden 262. S. P. C. 185. 20 E. 4. 5. B. Corone 166. But it is holden 40 Ed. 3. 42. Ab. F. Corone 91. and B. Forfeit. 5. That nothing is forfeited unleſs there be an attainder. Alſo it is ſaid, that the profits of lands are not forfeited. 20 E. 4. 5. pl. 3. B. Corone 166. (*b*) 1 Saund. 362. 1 Levinz 8. 20. (*i*) Vide ſupra, ſect. 110. F. Corone 356. Finch 464. Con F. Coro. 365. B. Forf. 113. F. N. B. 66. B. Clergy 28. (*k*) 1 Saund. 362. 1 Levinz 8. 120.

Sect.

Sect. 130. Fourthly, Whether the ſtatute enure as a pardon or purgation, it (*a*) ſeems to take from the ſpiritual court the power of depriving the party for the crime for which he has had his clergy. For if it enure as a pardon, ſurely it cannot be doubted but that it frees the party from all ſubſequent puniſhment, and conſequently from a deprivation. And if it enure as a purgation, which is admitted (*b*) to have been a good bar to a deprivation before the ſtatute, why ſhould it not have the ſame effect as a purgation had formerly, in this as well as in other reſpects. Yet (*c*) Watſon, in his clergyman's law, holds an opinion on the authority of (*d*) Croke's ſecond report, that a clergyman may be deprived for manſlaughter after he has had his clergy, not obſerving, as I ſuppoſe, that what is ſaid in this book was only, on the ſudden, on a motion, for a prohibition in the king's bench; and that in the ſame caſe a prohibition was afterwards actually brought and declared on in the (*e*) common pleas, and judgment thereupon ſolemnly given for the plaintiff upon open argument by all the judges.

(*a*) Hobart 292, 293. 2 R. Abr. 305.

(*b*) C. Jac. 431.
(*c*) C. 6. f. 35, 36. in the folio edition.
(*d*) C. Jac. 430, 431.
(*e*) Hobart 288. 2 Hale 389. 2 R. Abr. 305. Alſo a prohibition was granted in the like caſe 27 & 28 Eliz. Rotulo 2574. cited, Hobart 294.

Sect. 131. Fifthly, It ſeems agreed, that where a perſon exempt from burning in the hand, either in reſpect of his (*f*) peerage or (*g*) orders, or a (*h*) ſpecial pardon, is admitted to the benefit of his clergy, he ſhall have the ſame advantage of the ſtatute without being burnt in the hand as others ſhall have upon ſuch burning; for the words of the ſtatute, that the party, "after ſuch clergy allowed, and burning in the hand, ſhall be "enlarged, &c." ſhall have this conſtruction, that he ſhall be enlarged, &c. upon burning where burning ought to be.

(*f*) 1 Levinz 180.
(*g*) Hobart 294.
(*h*) 5 Coke 110.

Sect. 132. It is holden, That after a man is admitted to his clergy, it is (*i*) actionable to call him felon, &c. becauſe his offence being pardoned by the ſtatute, all the infamy and other conſequences of it are diſcharged.

(*i*) Hobart 67. 81. 294. 5 State Tr. 168. 2 Danv. 163. pl. 6. and the chapter of pardon.

Sect. 133. How far a perſon convicted of a crime within the clergy, and praying or being ready to pray it, but not actually admitted to it, ſhall be within theſe ſtatutes, ſhall be conſidered, chapter thirty-ſeven.

Sect. 134. It is enacted by 5 Anne c. 6. "That in all caſes "where any perſon or perſons ſhall be convicted of any theft "or larceny, who ſhall be liable to be burnt in the hand, ſhall "be burnt in the hand as formerly they ought or ſhould have "been, and the judge or juſtices before whom ſuch offender or "offenders ſhall be tried and convicted, ſhall *alſo* at his or their "diſcretion award and give judgment that ſuch offender and "offenders ſhall be committed to ſome houſe of correction or "publick work-houſe within the county or place where ſuch "conviction ſhall be, there to remain without bail or main-"priſe for ſuch time as ſuch judge or juſtices ſhall then judge "and award, not leſs than ſix months and not exceeding two "years from the time of ſuch conviction. An entry whereof "is to be made of record, &c. and if ſuch offender eſcape he "ſhall

An additional puniſhment to burning in the hand, inflicted.

" ſhall be committed to ſome houſe of correction or publick " workhouſe within the county or place where he ſhall be " retaken and kept to hard labour, &c. not leſs than twelve " months and not exceeding four years."

† *Sect.* 135. But it is recited by 19 Geo. 3. c. 74. ſ. 3. " That the puniſhment of burning in the hand, when any perſon is convicted of felony within the benefit of clergy, is often diſregarded and ineffectual and ſometimes may fix a laſting mark of diſgrace and infamy on offenders, who might otherwiſe become good ſubjects and profitable members of the commonwealth;" and therefore it is enacted, " That when " any perſon ſhall be lawfully convicted at any ſeſſion of " *oyer and terminer*, or gaol delivery, or at any general or " quarter ſeſſions, of any felony within the benefit of clergy, " for which he or ſhe is liable to be burnt in the hand, the " court before which any perſon ſhall be ſo convicted, or any " court holden at the ſame place with the like authority, if " ſuch court ſhall think fit, inſtead of ſuch burning, may im- " poſe upon ſuch offender ſuch a moderate pecuniary fine as to " the court in its diſcretion ſhall ſeem meet. Or otherwiſe " it ſhall be lawful inſtead of ſuch burning in any of the " caſes aforeſaid, except in the caſe of manſlaughter, to " order and adjudge that ſuch offender ſhall be once or " oftener, but not more than three times, either publickly or " privately whipped; ſuch private whipping to be inflicted in " the preſence of no leſs than two perſons beſides the of- " fender and the officer who inflicts the ſame. And in caſe " of female offenders, in the preſence of females only. And " ſuch fine or whipping ſo impoſed or inflicted, inſtead of " ſuch burning in the hand, ſhall have the like effects and " conſequences to the party, with reſpect to any diſcharge " from the ſame, or other felonies, or any reſtitution to his " or her eſtates, capacities, and credits, as if he or ſhe had been " burned or marked as aforeſaid."

Burning in the hand aboliſhed, except in manſlaughter, and other puniſhments inflicted in lieu thereof.

† *Sect.* 136. But it is provided, par. 4. " That nothing in " this act ſhall abridge the ſaid courts from detaining and " keeping in priſon for any time not exceeding one year, or of " committing to the houſe of correction for any time not " leſs than ſix months or exceeding two years, any offender " as aforeſaid; but that ſuch offender may, if ſuch court ſhall " think fit, after ſuch burning or marking, or after ſuch " whipping or fine impoſed by this act in lieu thereof, be ſo " detained or committed and with ſuch accumulated puniſh- " ment in caſe of eſape as before-mentioned."

This ſtatute ſhall not take away the impriſonment and whipping inflicted by 5 Anne, c. 6.

† *Sect.* 137. And it ſeems agreed (*a*) that judgment of TRANSPORTATION is only put in the place of judgment for burning in the hand, and not in the place of the actual burning itſelf.—I ſhall therefore proceed to conſider the nature of that ſpecies of puniſhment.

(*a*) Rex v. Bunbridge, 3 Peere Williams 493 to 504.

†CHAPTER THE THIRTY-THIRD

CONTINUED.

OF TRANSPORTATION.

3 Peer Williams 37 and 460.

EXILE or TRANSPORTATION is a ſpecies of puniſhment unknown to the common law of England; and where it is now inflicted it is either by the choice of the criminal himſelf, in order to eſcape capital puniſhment, or it is impoſed by the expreſs direction of ſome modern act of parliament. For no power on earth, except the authority of parliament, can ſend a ſubject of England, *not even a criminal*, out of the land againſt his will *(a)*. The firſt introduction of it into our laws was in the reign of queen Elizabeth *(b)*. But it ſeems to have taken place, more nearly as now practiſed, about the time of the reſtoration *(c)*. It is ſaid by a very elegant writer upon CROWN LAW *(d)*, that the effect of tranſportation as practiſed in this kingdom "is often beneficial to the criminal, and always injurious to the community. The kingdom is deprived of a ſubject, and renounces all the emoluments of his future exiſtence. He is merely transferred to a new country; diſtant indeed, but as fertile, as happy, *as civilized*, and in general as healthy as that which he hath offended;" and from hence he concludes, that it may have operated as a temptation to the offence, and become an argument for the multiplication of capital penalties. But it is by no means proved that theſe evil conſequences have reſulted from the practice; and whatever comforts the criminal may incidentally derive from the circumſtances of his baniſhment, the ſociety at large is certainly benefited by the temporary removal of a dangerous, and perhaps incorrigible individual. After the eſtabliſhment of Engliſh colonies in America, therefore it became in this country, as in all others which have had colonies, the moſt common ſentence of criminals *(e)*.

(a) 1 Com. 137.
(b) 39 Eliz. c. 4. Raſtal's ſtatutes 429. Rymer, par. 2. page 36.
(c) Kelynge 45.
(d) Mr. Eden.
(e) Barrington 445.

For felonies within clergy.

Sect. 138. Accordingly, it is enacted by 4 Geo. 1. c. 11. "That where any perſon ſhall be convicted of grand or petit larceny, or any felonious ſtealing or taking of money, or goods and chattels, either from the perſon, or the houſe of any

" any other, or in any other manner, and who by the law ſhall be " entitled to the benefit of clergy, and liable only to the penal- " ties of burning in the hand, or whipping (except perſons con- " victed of buying or receiving ſtolen goods, knowing them to " have been ſtolen), it ſhall and may be lawful for the court be- " fore whom they were convicted, or any court held at the ſame " place with the like authority, if they think fit, inſtead of " ordering any ſuch offenders to be burned in the hand, or " whipped, to order and direct that they ſhall be ſent to " America for the ſpace of ſeven years."

For felonies excluded from clergy.

Sect. 139. And it is further enacted, " That where any per- " ſon ſhall be convicted of any offence for which death by law " ought to be inflicted, or where any offenders ſhall be con- " victed of crimes excluded from the benefit of clergy, and the " king ſhall extend mercy to ſuch offender upon the condition " of tranſportation to any part of America, and ſuch intention " of mercy be ſignified by one of his majeſty's principal ſecre- " taries of ſtate, it ſhall and may be lawful to and for any " court having proper authority to allow ſuch offenders the " benefit of a pardon under the great ſeal."

Receivers of ſtolen goods.

Sect. 140. And it is further enacted, " That it ſhall and may " be lawful for the court as aforeſaid, to order and direct any " perſon convicted of buying or receiving ſtolen goods, know- " ing them to be ſtolen, to be tranſported as aforeſaid for the " term of fourteen years, in caſe ſuch condition of tranſport- " ation be general, or elſe for ſuch other term as ſhall be " made part of ſuch condition, if any time be ſpecified by his " majeſty as aforeſaid."

The king may diſpenſe with the ſentence.

Sect. 141. Provided nevertheleſs, " That his majeſty may at " any time pardon and diſpenſe with any ſuch tranſportation, " and allow of the return of any ſuch offender or offenders " from America."

To have the effect of pardon.

Sect. 142. And it is further enacted, " That where any ſuch " offenders ſhall be tranſported, and ſhall have ſerved their " reſpective terms according to the order of any ſuch court as " aforeſaid, ſuch ſervices ſhall have the effect of a pardon to " all intents and purpoſes as for that crime or crimes for " which they were ſo tranſported, and ſhall have ſo ſerved as " aforeſaid."

The power given to ſubſequent courts.

Sect. 143. And it is further enacted by 6 Geo. 1. c. 23. " That all the powers and authorities given by the above act " to any court before whom any felons or offenders tried for " and convicted of any offences for which they may be tranſ- " ported *to America*, ſhall and may be obſerved and executed by " any other ſubſequent court with the like authority held for the " ſame county, riding, diviſion, or liberty, where ſuch felons " or offenders were tried and convicted, notwithſtanding ſuch " ſubſequent court ſhall happen to be held at, or in any other

" term or place than that wherein ſuch trials or conviction " were, or ſhall be."

Power of ſubſequent court in felonies excluded clergy.

† *Sect.* 144. But the judges of aſſize, according to the circumſtances of the caſe, frequently reprieved convicts tried before them, for the purpoſe of applying to the crown for a pardon, on condition that ſuch convicts ſhould be tranſported to America; in which caſe ſuch convicts were obliged to lie in gaol until the coming of the judges at the ſubſequent aſſize. To remedy this inconvenience it is enacted by 8 Geo. 3. c. 15. " That where any offender ſhall be convicted of any crimes " excluded from the benefit of clergy, and the judge before " whom ſuch offender ſhall be convicted or condemned ſhall " grant a reprieve for ſtaying the execution of ſuch offender, " and recommend him to the crown as an object of mercy. " If his majeſty ſhall be pleaſed to extend his mercy to ſuch " offender on condition of tranſportation to any part of Ame- " rica, and ſuch intention of mercy ſhall be ſignified by one or " more principal ſecretary of ſtate to the judge ſo recommend- " ing; it ſhall and may be lawful for every ſuch judge of oyer " and terminer, or gaol-delivery, to make an order for im- " mediate tranſportation of every ſuch offender, in the ſame " manner as if ſuch intention of mercy had been ſignified to " him by a principal ſecretary of ſtate during the continuance " of the aſſizes at which ſuch offender was condemned: And " ſuch order ſhall be conſidered as an order made at ſuch " aſſizes or place, and ſhall be as effectual to every intent and " purpoſe, and ſhall have all the ſame conſequences in every " reſpect, as any order for the tranſportation of any offender " made by any juſtice of oyer and terminer, and gaol-delivery, " as aforeſaid."

Of tranſportation to parts beyond the ſeas.

† *Sect.* 145. But the Engliſh colonies in *America* having ſeparated from their connection with Great Britain, the tranſportation of felons to that country became impracticable; and it is therefore enacted by 19 Geo. 3. c. 74. continued by 24 Geo. 3. ſeſſ. 2. c. 56. ſect. 18. to the firſt of June 1787, " That when any perſon at any ſeſſion of *oyer and terminer* or " gaol-delivery, or at any quarter or other general ſeſſion of " the peace in *England* or *Wales*, ſhall be lawfully convicted " of any grand or petty larceny or any other crime for which " he or ſhe ſhall be liable by law to be tranſported to *Ame-* " *rica*, the court may order and adjudge, that ſuch perſon " ſhall be tranſported *to any parts beyond the ſeas*, whether the " ſame be ſituated in *America* or elſewhere, in ſuch and the " like manner and for any term of years not exceeding ſuch " and the ſame term as and for which ſuch perſon was liable " to be tranſported to America."

The former laws confirmed.

† *Sect.* 146. And it is further enacted, par. 2. " That where " any perſon ſo convicted, ſhall, in conſequence thereof, be " ordered to be tranſported beyond the ſeas.—Or if his ma-

" jesty shall extend the royal mercy to any offender convicted " or attainted of any felony, by which he or she is excluded " from the benefit of clergy, or of such statutes as are equi- " valent thereunto, upon the condition of transportation to " any parts beyond the seas as aforesaid; then, and in any " such cases, all laws now in force with regard to the trans- " portation of criminals to *America*, and particularly the 4 " Geo. 1. c. 11. the 6 Geo. 1. c. 23. the 16 Geo. 2. c. " 15. *(a)* and the 8 Geo. 3. c. 15. shall be in force, take " place, and enure, as if the same had been specially recited " in this act."

(a) This statute only relates to the offence of returning from transportation, which see, book the first, page 245.

† *Sect.* 147. By the above statute the king was empowered to appoint three supervisors for the purpose of purchasing ground, and to erect thereon two substantial houses to be called PENITENTIARY HOUSES for confining and employing convicts; but as this part of the act has never been carried into execution, it seems useless to recite it.

Punishment in lieu of transportation.

† *Sect.* 148. But it is further enacted by the said statute, par. 27. " That where any *male person*, at any session of *oyer* and " *terminer* or gaol-delivery in England, or great session in Wales, " shall be lawfully convicted of grand larceny, or any other " crime, except petty larceny, for which he shall be liable by " law to be transported to any parts beyond the seas, the court " before whom any such person shall be so convicted, or any " other court holden at the same place with the like authority, " *may in the place of such punishment by transportation* order and " adjudge that such person, appearing to be of competent " age *(b)*, and free from any bodily infirmity, shall be punished " by being kept on board ships or vessels properly accommo- " dated for the security, employment, and health of the per- " sons to be confined therein; and by being employed in hard " labour, in the raising sand, soil and gravel from, and cleans- " ing the river *Thames*, or any other river navigable for ships of " burthen, or any port, harbour, or haven in England, such river, " port, harbour, or haven, being previously approved and appoint- " ed for that purpose by an order of privy council, or in any " other service for the benefit of the navigation of the said " rivers, ports, harbours, or havens, or in any other publick " works upon the banks or the shores of the same, under the " management and direction of such superintendant as shall " be appointed for the Thames by the justices of *Middlesex*, " and for other rivers, &c. by the justices of the county where " they are situated, or of such counties adjoining the same as " the council shall direct at their quarter session for such term, " not less than one year, nor exceeding five years;—or in case " such offender shall be liable to be transported for fourteen " years, not exceeding seven years, as such court of oyer and " terminer, and gaol-delivery, shall think fit to order and " adjudge."

(b) Therefore on conviction, the age of the offender is always enquired of, and recorded by the clerk of the assize, &c.

Hard labour on board the hulks.

† *Sect.* 149. And it is further enacted, par. 28. "That where any perſon ſhall, at any ſeſſion of *oyer* and *terminer*, or gaol-delivery, or great ſeſſion with *England* or *Wales*, be lawfully convicted of any robbery or other felony for which he or ſhe ſhall, by law, either under this ſtatute, or under any other ſtatute now in force, or hereafter to be made, be liable to ſuffer death without benefit of clergy, and his majeſty ſhall extend the royal mercy to any ſuch offender upon condition of being kept to hard labour, during any ſpecified term, in any PENITENTIARY HOUSE to be erected purſuant to this act, or, ſuch offenders being MALES, upon condition of being kept to hard labour during any ſpecified term, in the cuſtody of ſuch ſuperintendant as aforeſaid, for the benefit of the ſaid navigation; and ſuch intention of mercy ſhall be notified in writing by one of the principal ſecretaries of ſtate, to the court in which ſuch offender ſhall be convicted, or to any other court of the ſame place with the like authority; or if no ſuch court ſhall be ſitting, then to any juſtice of oyer and terminer, or gaol-delivery, or juſtice of great ſeſſions, by or before whom ſuch offender ſhall have been convicted or condemned, ſuch court or juſtice may and ſhall, immediately on receiving ſuch notification, allow to every ſuch offender the benefit of a conditional pardon, in the ſame manner as if there was a conditional pardon under the great ſeal; and may and ſhall order that every ſuch offender ſhall be kept to hard labour in ſuch penitentiary houſe as aforeſaid, or in the cuſtody of ſuch SUPERINTENDANT as aforeſaid, for the time ſpecified in the notification from ſuch ſecretary of ſtate."

How convicts may be removed.

† *Sect.* 150. And it is further enacted by 24 Geo. 3. ſeſ. 2. c. 56. ſ. 6. extended to Scotland by 25 Geo. 3. c. 46. ſ. 4. "That it ſhall be lawful for his majeſty, from time to time, by an order in writing to be notified by one of his principal ſecretaries of ſtate; or for any three or more of ſuch juſtices of peace for any county or place in which any gaol ſhall be ſituated, as ſhall be authoriſed by his majeſty, under his ſign manual, to direct the removal of any MALE offender, who ſhall be under ſentence of death, but reprieved during his majeſty's pleaſure, or under ſentence or order of tranſportation, and who having been examined by a ſurgeon, &c. ſhall be fit to be removed from the gaol in which ſuch offender ſhall be confined, to ſuch place of confinement in *England* or *Wales* either at land or on board any ſhip or veſſel in the river *Thames*, or any navigable or other river, or within the limits of any port of *England* or *Wales*, as his majeſty or any three of ſuch juſtices ſo authoriſed as aforeſaid, ſhall from time to time appoint under the management of any overſeer to be appointed by his majeſty, or any three or more of ſuch juſtices authoriſed as aforeſaid.—And every

"offender

" offender who ſhall be ſo removed ſhall continue in the ſaid " place of confinement, or be removed to, and confined in any " other ſuch place as aforeſaid, as his majeſty or any three or " more of ſuch juſtices ſhall appoint, until ſuch offender ſhall " be tranſported according to law, or by the expiration of the " term of ſuch tranſportation, or otherwiſe ſhall be entitled " to his liberty, or until his majeſty or any three or more ſuch " juſtices ſo authoriſed as aforeſaid, ſhall direct the return of " ſuch offender to the gaol from which he ſhall have been ſo " removed."

A certificate to be given.

† *Sect.* 151. And the clerk of aſſize is directed by the ſaid act 19 Geo. 3. c. 74. ſ. 29. and 24 Geo. 3. c. 53. ſ. 6, 7, 8, &c. " To give to the ſheriff or gaoler a certificate in writing under his hand, containing an account of the Chriſtian name, ſurname, and age of ſuch offender, of his or her offence, of the court before which he or ſhe was convicted, and of the term for which he or ſhe ſhall be ſo ordered to hard labour, and the ſaid ſheriff or gaoler ſhall with all convenient ſpeed, after the making of ſuch order, and the recovering ſuch certificate, convey ſuch offender to the place to which ſuch order ſhall direct, and deliver him with the certificate to the governor or ſuperintendant as aforeſaid, who ſhall give a receipt in writing under his hand to the ſheriff or gaoler delivering ſuch offender, which ſhall be his diſcharge; and ſuch governor or ſuperintendant ſhall tranſmit the certificate to the clerk of the peace, to be inrolled among the records of the ſeſſion."

Of tranſportation to ſuch places as his majeſty ſhall direct.

† *Sect.* 152. But difficulties ſtill occurred, notwithſtanding the foregoing ſtatute, of fixing proper places for the tranſportation of convicts, inſomuch that " there was ſuch a want of convenient and ſufficient room in many of the gaols within England " and Wales, that very dangerous conſequences were to be " apprehended, unleſs ſome immediate proviſion was made for " removing ſuch offenders to ſome other place of confinement (*a*)." To remedy this inconvenience it was thought expedient to empower his majeſty, with the advice of his privy council, to appoint certain places, as well out of his Majeſty's dominions, as within the ſame to which felons and other offenders might be tranſported: It is therefore enacted by 24 Geo. 3. ſeſ. 2. c. 56. (*b*), which repeals 24 Geo. 3. ſeſ. 1. c. 12, " That when any perſon or perſons at any ſeſſions of oyer and " terminer, or gaol-delivery, or at any quarter or general ſeſſion of the peace in England, or great ſeſſion of Wales, or " by 25 Geo. 3. c. 46. in Scotland, ſhall be lawfully convicted " of grand or petit larceny, or any other offence liable to " tranſportation, the court before which any ſuch perſon ſhall " be ſo convicted as aforeſaid, or any ſubſequent court holden " in the ſame county or place with like authority, to order and " adjudge that ſuch perſon ſhall be tranſported beyond the ſeas " for any term of years, not exceeding the number of years or " term for which ſuch perſon is or ſhall be liable by any law to be

(*a*) The preamble to 24 Geo. 3. ſeſſ. 1. cha. 12.

(*b*) The ſeveral clauſes of this act are extended to Scotland, by 25 Geo. 3. c. 46.

" transported; and in every such case it shall and may be lawful " for his majesty by and with the advice of his privy council, to " declare and appoint to what place or places, part or parts be- " yond the seas, either within his majesty's dominions, or else- " where out of his majesty's dominions, such felons or other of- " fenders shall be conveyed or transported; and such court as " aforesaid is hereby authorised and empowered to order such of- " fenders to be transferred to the use of any person or persons, " and his or their assigns, who shall contract for the due per- " formance of such transportation."

Of such transportation for offences excluded clergy.

† *Sect.* 153. And it is further enacted by the said statute, " That when his majesty, his heirs and successors, shall be " pleased to extend mercy to any offender or offenders who " shall be convicted of any crime or crimes, for which he, she, " or they shall be by law excluded from the benefit of clergy, " upon condition of transportation to any place or places, part " or parts beyond the seas, either for term of life, or any num- " ber of years, and such intention of mercy shall be signified " by one of his majesty's principal secretaries of state, it shall " be lawful for any court, having proper authority, to allow " such offender or offenders the benefit of a conditional par- " don, and (except in cases where such offender or offenders " shall be authorised by his majesty to transport himself, her- " self, or themselves) to order the transfer of such offender or " offenders to any person or persons who shall contract for the " due performance of such transportation, and his or their " assigns, for such and the same term of years for which any " such offender or offenders shall have been ordered to be " transported, or for such term of life or years as shall be " specified in such condition of transportation as aforesaid."

Convicts may be assigned to contractors, &c.

† *Sect.* 154. And it is further enacted, " That such person " or persons so contracting as aforesaid, his or their assigns, by " virtue of such order of transfer, shall have a property in the " service of such offender or offenders for such terms respec- " tively.—And when any offender or offenders shall be con- " victed of any crime or crimes, for which he, she, or they, is, " or are, by law excluded the benefit of clergy, the judge before " whom such offender or offenders shall be convicted, or any " justice of the king's bench, common pleas, or baron of the " exchequer of the degree of the COIF, in case the said offender " or offenders shall have been tried at any court of oyer and " terminer, or gaol-delivery in England, or any justice of " *Chester* or *Wales* (extended to Scotland by 25 Geo. 3. c. " 46.), in case the said offender or offenders shall be tried and " convicted within any of their respective jurisdictions, may, " on such intention of mercy as aforesaid being signified to " him by one of the said principal secretaries of state, make an " order for the immediate transportation of such offender or " offenders in the same manner as if such intention of mercy " had been signified by one of the said principal secretaries of

" state

" ſtate during the continuance of the aſſizes or ſeſſions at which " ſuch offender or offenders was or were condemned; and " ſuch order ſhall be conſidered as an order made at ſuch " aſſizes or ſeſſions as aforeſaid, and ſhall be as effectual, and " have all the ſame conſequences as any order for the tranſ- " portation of any offender or offenders made by any juſtice " of *oyer* and *terminer*, great ſeſſions, or gaol-delivery, during " the continuance of the aſſizes or ſeſſions."

The place of tranſportation may be changed.

† *Sect.* 155. And it is alſo enacted, par. 13. " That if any " order for the tranſportation of any offender cannot be con- " veniently executed with reſpect to the place in ſuch order " mentioned, either the king's bench, or the court before which " ſuch perſon ſhall have been convicted, or any court holden " for the ſame place having like authority; or (in vacation " time, and out of term) for any two juſtices of the king's " bench, common pleas, or barons of the exchequer of the " degree of the coif, to order that ſuch offender ſhall be tranſ- " ported to any other part or place beyond the ſeas, which " ſhall have been appointed by his majeſty for the tranſporta- " tion of ſuch offenders in ſuch and the like manner, and for " the ſame term of years, as ſuch offender ſhall be liable to be " tranſported for to the place mentioned in the original ſen- " tence or order; and ſuch order ſhall be conſidered as made " at the ſame time, and ſhall be as effectual to every intent " and purpoſe, and ſhall have all the ſame conſequences in every " reſpect as the original order for the tranſportation of ſuch " offender."

How convicts ſhall be tranſferred to contractors.

† *Sect.* 156. It is alſo enacted, " That the perſon to whom ſuch " offenders ſhall be transferred as aforeſaid, ſhall, before they " are delivered over, give ſecurity to tranſport them purſuant to " their ſentences, and procure ſuch evidence of the landing of " ſuch offenders in the ſaid parts beyond the ſeas reſpectively, " as the nature of the caſe will admit of. And that the court " aforeſaid may appoint two juſtices where the offenders ſhall be " convicted, to contract with any perſon for the performance of " the tranſportation, and to order ſuch ſecurity to be taken as " aforeſaid; and to cauſe the offenders to be delivered accord- " ingly by their reſpective gaolers; which contract and ſecurity " ſhall be certified by the juſtice to the next court to be filed " of record. And all ſuch ſecurities ſhall be by bond in the " name of the clerk of the peace, &c. &c."

May carry them through any county.

† *Sect.* 157. And it is further enacted, " That the perſons " ſo contracting as aforeſaid, and to whom ſuch offenders ſhall " be ſo delivered to be tranſported, may in ſuch manner as " they ſhall think fit, carry and ſecure the ſaid offenders in

" and through any county in *Great Britain* towards the ſea-
" port or place from whence they are to be tranſported, and
" whoever ſhall reſcue ſuch offenders, or aſſiſt therein, ſhall
" ſuffer death without benefit of clergy."

The time of confinement to be part of the ſentence.

† *Sect.* 158. But it is declared, par. 9. " That the time dur-
" ing which any offender ſhall have continued in gaol under
" ſentence of tranſportation, or, being removed under the pro-
" viſions aforeſaid (*a*), ſhall continue confined, ſhall be taken
" and reckoned in diſcharge, or part diſcharge, or ſatisfaction
" of the term of his tranſportation."

(*a*) Vide ante ſection 13.

Of tranſportation to Botany Bay.

† *Sect.* 159. Notwithſtanding the proviſions of the above ſtatutes, it was found extremely difficult to fix upon proper places to which convicts might with propriety be tranſported; and the gaols, in every part of the kingdom, became ſo dangerouſly crowded, that at the meeting of the parliament in the twenty-ſeventh year of George the Third, his majeſty declared from the throne, " that a plan had been formed, by his
" direction, for tranſporting a number of convicts, in order to
" remove the inconvenience which aroſe from the crowded
" ſtate of the gaols in different parts of the kingdom;" and recommended to the parliament ſuch further meaſures as might be neceſſary for this purpoſe.

Sect. 160. In conſequence of this recommendation, it is recited by 27 Geo. 3. c. 2. " That whereas by 24 Geo. 3. c. 56. it is enacted, That when any perſon ſhall be lawfully convicted of grand or petit larceny, or any other offence for which ſuch perſon ſhall be liable to be tranſported, the court before which ſuch perſon ſhall be convicted, or any ſubſequent court with like authority, may order that ſuch perſon ſhall be tranſported; and that in every ſuch caſe, his majeſty, by the advice of his privy council, may appoint to what place beyond the ſeas ſuch felons ſhall be conveyed, &c. &c.

24 Geo. 3. c. 56.

Sect. 161. And it is alſo further recited, that when his majeſty ſhall extend mercy to any offender convicted of any crime excluded from the benefit of clergy, upon condition of tranſportation to any place, and ſuch extenſion of mercy ſhall be ſignified by one of his majeſty's principal ſecretaries of ſtate, it ſhall be lawful for any court, having proper authority, to allow ſuch offender the benefit of a conditional pardon, and (except where ſuch offender ſhall be authoriſed to tranſport himſelf) to order the transfer of ſuch offender to any perſon who ſhall contract for ſuch tranſportation, &c. &c.

Sect.

Sect. 162. "And whereas his majesty, by two several orders in council, hath judged fit, by and with the advice of his privy council, to declare and appoint the place to which certain offenders should be transported for the time or terms in their several sentences, to be THE EASTERN COAST OF NEW SOUTH WALES, OR SOME ONE OR OTHER OF THE ISLANDS ADJACENT:

Sect. 163. And whereas it may be found necessary that a colony and a civil government should be established in the place to which such convicts shall be transported, and that a court of criminal jurisdiction should also be established within such place as aforesaid, with authority to proceed in a more summary way than is used within this realm, according to the known and established laws thereof;"

His Majesty may authorise the governor or lieutenant governor of *New South Wales* to convene a court of judicature for the trial of offenders.

Sect. 164. It is therefore enacted, "That his majesty "may, by his commission under the great seal, authorise the "person to be appointed governor, or the lieutenant gover- "nor in the absence of the governor, of such place, as afore- "said, to convene from time to time, as occasion may re- "quire, a court of judicature for the trial and punishment of "all such outrages and misbehaviours as, if committed within "this realm, would be deemed and taken, according to the "laws of this realm, to be treason or misprision thereof, fe- "lony, or misdemeanor,"

Who are to be members of the court, and how they are to proceed in trying offenders.

Sect. 165. And it is further enacted, "That the said court "shall consist of the judge-advocate to be appointed in and "for such place, together with six officers of his majesty's "forces by sea or land: Which court shall proceed to try such "offenders, by calling such offenders respectively before that "court, and causing the charge against him, her, or them "respectively to be read over; which charge shall always "be reduced into writing, and shall be exhibited to the "said court by the judge-advocate; and by examining wit- "nesses upon oath, to be administered by such court, as well "for as against such offenders respectively, and afterwards ad- "judging, by the opinion of the major part of the persons "composing such court, that the party accused is or is not (as "the case shall appear to them) guilty of the charge, and by "pronouncing judgment therein (as upon a conviction by "verdict) of death, if the offence be capital, or of such cor- "poral punishment, not extending to capital punishment, as "to the said court shall seem meet; and in cases not capital, by "pronouncing judgment of such corporal punishment, not ex- "tending to life or limb, as to the said court shall seem "meet."

Sect.

Provoſt marſhal to execute the judgment of the court.

Sect. 166. And it is further enacted, par. 2. "That the provoſt marſhal, or other officer to be for that purpoſe appointed by ſuch governor or lieutenant governor, ſhall cauſe due execution of ſuch judgment to be had and made under and according to the warrant of ſuch governor, or lieutenant governor in the abſence of the governor, under his hand and ſeal, and not otherwiſe: Provided always, That the execution ſhall not be had or done on any capital convict or convicts, unleſs five perſons preſent in ſuch court ſhall concur in adjudging him, her, or them, ſo accuſed and tried as aforeſaid, to be reſpectively guilty, until the proceedings ſhall have been tranſmitted to his majeſty, and by him approved."

If five members do not concur in adjudging capital offenders, the proceedings to be tranſmitted to his majeſty.

Court to be a court of record.

Sect. 167. And it is alſo enacted, par. 3. "That the ſaid court ſhall be a court of record, and ſhall have all ſuch powers as by the laws of England are incident and belonging to a court of record."

CHAPTER THE THIRTY-FOURTH.

OF PLEAS IN ABATEMENT.

AND now I come to PLEAS IN ABATEMENT. And, having already conſidered them ſo far as they particularly relate to appeals, indictments, and informations, in the ſeveral chapters concerning them, and having ſhewn what pleas are good in abatement of an appeal (*b*). And, That an appellee may plead as many of them as he pleaſes, unleſs they be repugnant to one another, and afterwards take the general iſſue (*c*). And, That the ſame matters may be pleaded to an appeal on an arraignment thereon at the ſuit of the king, as on an arraignment at the ſuit of the party (*d*). And in the ſame chapter, what miſnomers, &c. may be pleaded in abatement of an indictment (*e*). And, what pleas are good in abatement of an

(*b*) Chapter 23. ſection 102 to 128.
(*c*) Sect. 128, 137.
(*d*) Chap. 25. ſect. 12.
(*e*) Section 68 to 71.

an information (*a*). And having alſo conſidered demurrers in abatement (*b*). I ſhall in this place take notice only of the following particulars.

(*a*) Chap. 26. ſection 63 to 65.
(*b*) Chap. 31. ſection 5 to 7.

Sect. 1. Firſt, That it hath been holden (*c*), that it is no good plea in abatement of an indictment, as it is of an appeal (*d*) or information, (*e*) that there is another indictment againſt the defendant for the ſame offence. But in ſuch (*f*) a caſe the court in diſcretion will quaſh the firſt indictment if any fault can be found in it.

(*c*) 1 Jones 199. C Car. 147.
(*d*) Ch. 23. ſec. 126.
(*e*) Ch. 26. 63.
(*f*) C. Car. 147. 3 Burr. 1468. 1 Jones 199. Vide the caſe of Douglas 240.

John Swan and Elizabeth Jefferies, Foſter 105. 106. Alſo Rex v. Stratton,

Sect. 2. Secondly, That where an indictment of a capital crime is abated for a miſnoſmer of the defendant's (*g*) chriſtian name, the court will not diſmiſs him, but cauſe him to be indicted *de novo* (*h*) by his true name, and arraign him again on ſuch new indictment. For I take it to be ſettled (*i*) at this day, That regularly a defendant ſhall not be diſmiſſed for an inſufficiency in an indictment, or an appeal for a capital crime.

(*g*) Vide c. 25. ſect. 70, 71.
(*h*) Sum. 243. 2 Hale 176. 238. C. Car. 371, 372.
(*i*) Vide c. 23. ſect. 4. 133. c. 25. ſect. 9, 10, 11. Con. 11 H. 4. Banbury's Caſe.

41. Fitz. Miſno. 18. Corone 88. B. Miſno. 23. State Tr. 51. the earl of
See the books cited c. 23. ſect. 11. 4 Comm. 329.

Sect. 3. Thirdly, That a defendant appearing *gratis*, and by attorney to an information, may (*k*) plead a miſnoſmer in abatement, as well as if he had appeared in proper perſon; for if he be not the perſon intended, the attorney-general may reject the plea and ſign judgment on a *nihil dicit*. But if he accepts the plea, he thereby admits him that pleads it to be the perſon concerned to make a defence, and therefore ſhall not afterwards ſay that it doth not appear but that the plea might be put in by a ſtranger.

(*k*) Adju. Trin. 4 Geo. 1. King and Weſtby.

CHAPTER THE THIRTY-FIFTH.

OF THE PLEA OF AUTREFOITS ACQUIT.

PLEAS in chief are either, In Bar. Or the General Iſſue.

As to the PLEAS IN BAR, having ſhewn already, what pleas of this kind to an appeal are good, which ſhew that the plaintiff had never any right to bring it (*l*). And where a *retraxit*, *nonſuit*, *diſcontinuance*, or *abatement*, of one appeal may be pleaded in bar of another (*m*). And where the bringing of

(*l*) Ch. 23. ſec. 130.
(*m*) Sect. 131 to 133.

an appeal againſt one perſon will be a bar to a ſubſequent one againſt another perſon not named in the firſt (*a*). And where a releaſe will bar an appeal (*b*). And where an appellant may be barred as to one appellee, and continue his ſuit againſt the reſt (*c*). And what pleas of this kind are conſiſtent with the general iſſue (*d*). And what is a good plea in bar to an information (*e*).

(*a*) Sect. 134.
(*b*) Sect. 135.
(*c*) Sect. 136.
(*d*) Sect. 137.
(*e*) Ch. 26. ſ. 64, 65.

I ſhall, in this place, only conſider, The Plea of *Autrefoits acquit*. The Plea of *Autrefoits attaint* or *convict*. And the Plea of a Pardon.

Sect. 1. AND firſt of the plea of *Autrefoits acquit*, which is grounded on this maxim, (*f*) That a man ſhall not be brought into danger of his life for one and the ſame offence, more than once. From whence it is generally taken, by all the books, (*g*) as an undoubted conſequence, that where a man is once found *not guilty* on an indictment or appeal free (*h*) from error, and (*i*) well commenced before any (*k*) court which hath juriſdiction of the cauſe, he may by the common law in all (*l*) caſes whatſover plead ſuch acquittal in bar of any ſubſequent indictment or appeal for the ſame crime.

(*f*) S. P. C. 105. 4 Coke 40. 45 to 47. 9 H. 7. 19. F. Pard. 3. B. App. 9. 12. 89. B. Corone 11. Crompton 111.
(*g*) See the authorities cited to all the other parts of this chapter, and 5 E. 3. 25.
(*h*) Infra ſect. 8. (*i*) Infra 9. (*k*) Infra 10. (*l*) 25 E. 3. 44. Ab. F. Corone 136. 41 Aſſize 9. Ab. F. Corone 220. B. Corone 120. 2 Leonard 161. Infra, ſect. 14, 15. 47 E. 3. 16. Ab. F. Corone 104. B. Appeal 14.

The ſeveral heads under which this title is conſidered.

But for the more diſtinct underſtanding hereof I ſhall particularly conſider, Firſt, How far he who pleads this plea muſt be ready to produce the record of his former acquittal. Secondly, Where a variance between the record of the former acquittal and the indictment or appeal to which it is pleaded, may be helped. Thirdly, How far other diſcharges of a former proſecution have the ſame effect as an acquittal by verdict. Fourthly, How far it is neceſſary that the indictment or appeal in the record of acquittal be free from error and well commenced. Fifthly, Whether an acquittal in any court which has a juriſdiction be ſufficient for this purpoſe. Sixthly, How far an acquittal of a perſon as principal will bar a ſubſequent proſecution againſt him as acceſſary; *& e converſo*, how far an acquittal of a man as acceſſary will bar a proſecution againſt him as principal. Seventhly, How far the law is altered in theſe reſpects as to an indictment of death, by 3 Hen. 7. chap. 1.

Sect. 2. As to the firſt particular, *viz.* How far he who pleads this plea muſt be ready to produce the record of his former acquittal.—I take it to be (*m*) agreed, that ſuch plea being a plea in bar, and the record not in the cuſtody of, nor the property of, him that pleads it, there is no need to plead with a *proſert*

(*m*) S. P. C. 105. Sum. 245. 2 Hale 241, 243. F. Corone 33. F. Mon. de faits, 33. Raſtal 385. ſeems contrary.

profert ſuo pede ſigilli; (a) but the defendant ſhall have a (b) day given him to bring it in. And there is in *Brook* a note of a (c) caſe in the time of Edward the third wherein a plea of *autrefoits acquit* was diſallowed, becauſe the defendant ſhewed forth the record when he pleaded it; and the book gives this reaſon, That *the record ought to come before the court by writ.*

Ab. F. Corone 189. 11 H. 4. 41. Ab. F. Mon. de faits, 128. B. Corone Ab. B. App. 89. ſeem contrary.

(a) Co. Litt. 128. See the chapter of Pardon.
(b) Co. Lit. 128. F. Corone 232.
(c) B. Corone 218. But 26 Aſſize 15. 29. 9 H. 7, 19.

Sect. 3. As to the ſecond particular, *viz.* Where a (d) variance between the record of the former acquittal, and the indictment or appeal to which it is pleaded, may be helped. I take it to be clear, That if the nature of the crime be in (e) ſubſtance the ſame, a variance may generally be helped by proper (f) averments. And therefore if a man be named in the firſt record Yeoman, and in the ſecond Gentleman, yet it ſeems (g) clear, That he may make good the variance, with an averment that he only was meant under each addition. Alſo if a man be acquitted of an indictment of murder or robbery *cujuſdam* (h) *ignoti*, and afterwards arraigned on an indictment for the ſame fact, deſcribing the perſon killed or robbed by his proper name: yet it hath been holden, (i) That he may plead the acquittal in bar, averring that both the indictments are for the very ſame felony. Alſo if the perſon killed be deſcribed by his proper name and ſurname in the firſt indictment, and by the ſame chriſtian but by a different ſurname in the ſecond, yet it hath been (k) adjudged That he may plead an acquittal on the firſt in bar of the ſecond indictment averring that the perſon ſo differently named was one and the ſame perſon. But it ſeems (l) adviſeable in ſuch caſe to add a farther averment, That the perſon killed was known as well by the name in the firſt, as by that in the ſecond indictment; for if he were never known by the name in the firſt indictment, I much queſtion whether the defendant could be found guilty upon it; and if he could not, it ſeems plain that his life having never been in danger by it, the acquittal upon it (m) cannot be any bar to a ſubſequent indictment. But if there be no other variance between the firſt and ſecond indictment but only as to the (n) times when the crime is alledged to have been committed, or as to the (o) places being both in the ſame county, there is no doubt but that regularly it may be helped by an averment, that the felony in both is one and the ſame, becauſe neither the time nor place laid in an indictment, &c. are material upon evidence, ſo that the defendant be proved guilty at any other (p) time before the indictment, or at any other place (q) within the county. And it is holden by (r) Staundforde, That an acquittal of murder in one county may be pleaded in bar of a ſubſequent indictment in another county for the ſame

(d) 2 Keble 705.
(e) 14 H. 7. 2. S. P. C. 168.
(f) S. P. C. 105. Summary 246.
(g) Keilway 58.
(h) Sup. c. 25. f. 73.
(i) Keilway 25. Dyer 285. F. Corone 159.
(k) 26 Aſſize 15. Ab. B. Corone 98. F. Corone 98. Crompton 112. S. P. C. 105. 2 Hale 244.
11 H. 4. 41. Ab. F. Mon. de faits, 128. B. Variance, 31. B. Corone 29. 1 Roll 368.
(l) Sum. 246. S. P. C. 105. Crompton 112.
(m) Sup. ſect. 1. & infra f. 8, 9, 10.
(n) Dyer 285. Summary 246. 2 Hale 244. 22 Aſſize 55. Ab. F. Cor. 179. S. P. C. 105. 11 H. 4. 41. Ab. B. Cor. 29. Variance, 31. F. Mon. de faits, 128. 25 Ed. 3. 44. Ab. F. Cor. 136. 3 Aſſize 15. Ab. F. Cor. 166. Crompton 112.
(o) Sum. 246. 2 Hale 245. S. P. C. 105, 106.
(p) Sum. 264. Salkeld 388.
(q) See the chap. of evidence; and See Cromp. 122.

Summary 264. (r) S. P. C. 105.

murder.

murder. But this ſeems queſtionable, becauſe all indictments are local; and therefore if the firſt were laid in an improper county, the defendant could not be found guilty upon it, and conſequently was in no danger of his life, and therefore (*a*) cannot plead an acquittal upon it in bar of a ſubſequent indictment in the proper county. But if the firſt indictment were in the proper county, the ſecond cannot but be in an improper one, and conſequently the defendant not being liable to be found guilty upon it, cannot be ſaid to be reduced by it to the inconvenience of being twice brought into danger of his life for one and the ſame offence, the avoiding of which inconvenience (*b*) ſeems the chief inducement for which the law allows the plea of *autrefoits acquit*.

(*a*) Vide ſect. 1. 8, 9, 10.

(*b*) Sup. ſect. 1. 8, 9, 10.

Sect. 4. But if a man ſteal goods in one county, and then carry them into another, in which caſe it is certain (*c*) that he may be indicted and found guilty in either, it ſeems very reaſonable, that an acquittal in the one county for ſuch ſtealing may (*d*) be pleaded in bar of a ſubſequent proſecution for the ſame ſtealing in another county, becauſe the defendant may be altogether as well convicted in the one county, as in the other; and therefore if he could not bar the ſecond proſecution by the acquittal on the firſt, his life would be twice in danger from that which is in truth but one and the ſame offence, and only conſidered as a new one by a mere fiction or conſtruction of law, which ſhall hardly (*e*) take place againſt a maxim made in favour of life. And as to the (*f*) objection, that the jurors of the one county can take no manner of conuſance of what is done in the other, and conſequently cannot try whether the felony whereof the party is indicted in the ſecond county be the very ſame with that of which he is acquitted in the firſt, it may be anſwered, That it appears from the old books, that anciently the judges often ſatisfied themſelves of the truth of an averment that the offences in both indictments were the ſame, by (*g*) witneſſes, or by an (*h*) inqueſt of office, without putting it to a trial by jury, upon an iſſue joined, on the denial thereof by the proſecutor, which ſeems (*i*) to have been of later years the uſual method. But granting, that it is to be tried by ſuch jury, I do not ſee how it follows, That becauſe they cannot convict a defendant upon evidence of a fact done out of their own county, therefore they cannot collaterally inquire whether an offence laid in their own county be in ſubſtance the ſame with that done in another, ſince it cannot be denied but that in abundance of caſes a jury of one county may receive evidence of facts done in another. To which may be added, That in the year-book of 4 H. 7. 5. *pl.* which is the (*k*) chief authority for the contrary opinion, it is admitted that an acquittal of an appeal of larceny in the one county, may be pleaded in bar of ſubſequent appeal in the other; becauſe ſuch an appeal intitles the

(*c*) Sup. c. 23. ſect. 47. c. 25. ſect. 38 and B. 1. c. 33. ſect. 9.

(*d*) 41 Aſſize 9. F. Corone 220. But this is left doubtful, S. P. C. 105, 106. Summary 246. Crompton 112. B. Corone 139. 4 H. 7. 5. F. Corone 62.

(*e*) Sup. c. 18. ſect. 13. and c. 19. ſect. 25. and c. 29. ſect. 35.

(*f*) 4 H. 7. 5. F. Corone 62.

(*g*) 26 Aſſ. 15. Ab. F. Corone 189. B. Corone 98. 41 Aſſize 9. Ab. F Cor. 220.

(*h*) 3 Aſſ. 15. Ab. F. Cor. 166. See ſect. 6.

(*i*) 9 H. 7. 19. Ab. B. App. 89.

(*k*) Vide B. Cor. 139 or 140. F. Corone 62. S. P. C. 106. Summary 246. 2. Hale 245.

the plaintiff to a reſtitution of the goods, whereof being once barred he is barred for ever. But granting this to be a good reaſon, which yet it ſeems difficult to make out, the very ſame may be ſaid at this day as to an indictment, which ſince (*a*) 21 Hen. 8. c. 11. intitles the proſecutor to a reſtitution alſo. Beſides, taking the law as it ſtood formerly, why may not a jury of one county try whether a felony therein indicted, be the ſame whereon the party was before acquitted in another county, in the caſe of a ſecond indictment, as well as of a ſecond appeal?

(*a*) Vide ſup. c. 23 ſect. 55, 56.

Sect. 5. It ſeems (*b*) that it is no plea to an appeal of larceny, That the defendant hath been found not guilty in an action of treſpaſs brought againſt him by the ſame plaintiff for the ſame goods; for larceny and treſpaſs are entirely different. Alſo it ſeems a general (*c*) rule, That a bar in action of an inferior nature, will not bar another of a ſuperior. Yet it ſeems, (*d*) That an acquittal in an indictment of murder, will be a good bar of an indictment of petit treaſon, becauſe both offences are in ſubſtance the ſame. But it is clear, that an acquittal of one felony is (*e*) no manner of bar to a proſecution for another in ſubſtance different, whether committed before or at the ſame time with that of which he is acquitted; and therefore if a man commit a Burglary, and ſteal the goods of A. and B. and be indicted for the burglary and ſtealing the goods of A. and acquitted; it hath been adjudged, (*f*) That he cannot plead ſuch acquittal to an indictment for ſtealing the goods of B. But it ſeems agreed, That he may plead it to a ſecond Indictment for the Burglary.

(*b*) 2 Rich. 3. 14. a. B. App. 121. Vide inf. c. 36. ſect. 7.
(*c*) Co. Litt. 146. 2 Rich. 3. 14, 15.
(*d*) 3 Inſt. 213. Summary 246. 2 Hale 246.
(*e*) S. P. C. 105. Summary 244. B. Corone 11.
(*f*) Kely. 30. 52.

Sect. 6. As to the third particular, *viz.* How far other diſcharges of a legal proſecution have the ſame effect as an acquittal by verdict.—Having ſhewn already in the (*g*) chapter of appeals, how far the diſcharge of one appeal will bar another, I ſhall only add in this place, That notwithſtanding the (*h*) allowance of a pardon, or any other bar of one indictment, ſeems to be pleadable in bar of another, and by the like reaſon whatever hath been allowed a good bar of one appeal may be pleaded in bar of another: Yet it ſeems that no other diſcharge of an indictment will bar an appeal, and no other diſcharge of an appeal will bar an indictment, but only an (*i*) acquittal by battel, or an acquittal by verdict on the general iſſue, finding the defendant's (*k*) innocence; as where it finds him not guilty on ſuch an iſſue, on an indictment or appeal of any felony whatſoever; or where it finds (*l*) him guilty of homicide *ſe defendendo*, or *per infortunium*, on an indictment of murder. But it hath been adjudged, (*m*) That where a demurrer by an appellant to a tender of battel to a plea, hath been adjudged againſt him, yet the appellee may be afterwards arraigned at the ſuit of the king.

(*g*) C. 23. ſect. 129, 130, 131.
(*h*) 11 H. 4. 41. Ab. F. Mon. de faits, 128. B. Corone 29. B. Appeal 33. B. Variance 31. Vide S. P. C. 106.
(*i*) 2 Hale 246. Infra, ſ. 7.
(*k*) S. P. C. 169.
(*l*) 3 Inſt. 213. Crompton 111. 4 Coke 46.
(*m*) Dyer 120. Crompton 112.

Sect.

Sect. 7. It is ſaid by Sir Matthew Hale in the (*a*) chapter of *Autrefoits acquit*, That an acquittal by battel in an appeal is no bar of an indictment. But I find no other authority to this point but a note in Fitzherbert (*b*) of a caſe to this purpoſe in the time of king Edward the ſecond. To which it may be anſwered, That this matter is only ſpoken of incidentally, and not adjudged. And that Staundforde in the ſame place (*c*) where he cites it, makes a *quære*, whether it be law or not. And it is expreſsly holden by Bracton, (*d*) That an appellee who vanquiſhes the appellant in battel, ſhall go quit not only from all all other appeals, "but alſo from the ſuit of the king; "becauſe by this he clears his innocence againſt all, in the "ſame manner as if he had put himſelf upon his country, and "his country had acquitted him." Alſo it is admitted by Sir Matthew Hale in the (*e*) chapter of indictments, that if an approver be vanquiſhed in battel joined on his appeal, he ſhall be hanged, and the appellee diſcharged, without being arraigned at the ſuit of the king. Alſo it hath been (*f*) adjudged, That upon ſuch a vanquiſhment the appellee is intitled to his damages againſt the appellant, as being *legitimo modo acquietatus*, which ſeems (*g*) neceſſarily to imply that he is finally acquitted as well againſt the king as againſt the party.

(*a*) Sum. 245. 2 Hale 249.

(*b*) F. Cor. 375.

(*c*) S. P. C. 106.

(*d*) Lib. 3. c. 29. ſect. 8.

(*e*) Sum. 200. 2 Hale 233, 234. Vide ſup. c. 25. ſect. 10. 21 H. 6. 34. S. P. C. 168.

(*f*) F. Cor. 98. S. P. C. 168. Sup. c. 23. ſect. 140.

(*g*) S.P. C. 169. Sup. c. 23. ſect. 140.

Sect. 8. As to the fourth particular, *viz.* How far it is neceſſary that the indictment or appeal, in the record of acquittal, be free from error, and well commenced: I take it to be ſettled (*h*) at this day, That wherever the indictment, or appeal, whereon a man is acquitted, is ſo far erroneous (either for want of ſubſtance in ſetting out the crime, or of authority in the (*i*) judge before whom it was taken), that no good judgment could have been given upon it againſt the defendant, the acquittal can be no bar of a ſubſequent indictment or appeal, becauſe in judgment of law the defendant was never in danger of his life from the firſt; for the law will preſume *prima facie* that the judges would not have given a judgment, which would have been liable to have been reverſed. But if there be no error in the indictment or appeal, but (*k*) only in the proceſs, it ſeems agreed, that the acquittal will be a good bar of a ſubſequent proſecution, notwithſtanding ſuch error; the beſt reaſon whereof ſeems to be this, That ſuch error is (*l*) ſalved by the appearance.

(*b*) 4 Coke 41. 47. Summary 244, 245. 2 Hale 248. 251. 3 Inſt. 214. F. Corone 444. Sup. c. 23. ſect. 140. Crompton 112. 20 H. 7. 11, 12. 9 H. 5. 2. Ab. B. App. 39. B. Corone 35. F. Corone 68.

(*i*) But Staundforde ſeems to be of opinion, That an acquittal on an erroneous appeal, is a good bar to an Indictment till it be reverſed by error. S. P. C. 106. cited in Crompton 112. But this ſeems repugnant to all other books, and to what is ſaid by Staundforde himſelf, in the very ſame page. Indeed in the ſecond edition of Hale's Plea of the Crown, there is a note to the ſame effect with what is ſaid in Staundforde; but this is manifeſtly miſprinted, and the word acquit put for attaint.

(*k*) Crompton 111. Sup. c. 9. ſect. 15, 16. 4 Coke 46.

(*l*) F. Corone 444. 9 H. 5. 2. Ab. B. App. 39. Corone 35. F. Corone 68. S. P. C. 106, 169. Crompton 112. 2 Hale 248.

(*m*) Sup. c. 27. ſect. 107.

Sect.

Sect. 9. It ſeems agreed, (*a*) That an acquittal on an appeal brought by one who had no right to bring it, as by any other woman (*b*) except the wife of the deceaſed, or by any other man (*c*) except the next heir, is no more a bar to an appeal by another appellant, or to an indictment, than an acquittal on an inſufficient appeal or indictment would have been.

(*a*) 20 H. 7. 11, 12. 21 H. 6. 28, 29. Ab. B. App. 41. Crompton 112. S. P. C. 106. Summary 245. 2 Hale 249.

(*b*) Sup. c. 23. ſect. 36, 37, 38. (*c*) Sup. c. 23. ſ. 39, 40, 41, 42.

Sect. 10. As to the fifth particular, *viz.* Whether an acquittal in any court which has a juriſdiction, be ſufficient for this purpoſe.—Notwithſtanding the (*d*) opinion in the book of Aſſizes, That no acquittal in any other court can be any bar to a proſecution in the court of king's bench, becauſe that is the higheſt court, I take it to be ſettled (*e*) at this day, That an acquittal in any court whatſoever which has a juriſdiction of the cauſe, is as good a bar of any ſubſequent proſecution for the ſame crime as an acquittal in the higheſt court. And therefore it hath been adjudged, (*f*) That an acquittal of murder at a grand ſeſſions in Wales, may be pleaded to an indictment for the ſame murder in England. For the (*g*) rule is, That a man's life ſhall not be brought into danger for the ſame offence more than once.

(*d*) 9 Aſſize 15. (*e*) 4 Coke 45. Raſtal 385. 21 H. 4. 41. Ab. F. Monſ. de faits 128. 25 E. 3. 44. Ab. F. Cor. 136. 41 Aſſize 9. Ab. B. Cor. 120 or 121. Crompton 112. F. Corone 220. (*f*) 1 Lev. 118. 1 Siderfin 170. Sup. c. 25. ſ. 41. 42. (*g*) Sup. ſ. 1. 8, 9.

Sect. 11. As to the ſixth particular, *viz.* How far an acquittal of a perſon as principal will bar a ſubſequent proſecution againſt him as acceſſary; and *è converſo*, how far an acquittal of a man as acceſſary will bar a proſecution againſt him as principal. It ſeems to be (*h*) ſettled at this (*i*) day, That an acquittal of a man as principal is no bar of a ſubſequent proſecution againſt him as acceſſary after the fact, becauſe ſuch acquittal clears him only of the charge of having committed the fact, which being a crime entirely different from that of receiving him that hath committed it, there ſeems no more reaſon that the acquittal of it ſhould bar a proſecution for the receipt, than if they were offences that bore no manner of relation to one another. But it is (*k*) holden in many books of good authority (contrary to what is admitted (*l*) to have been the ancient law), that the acquittal of a man as principal is a good bar of a ſubſequent proſecution againſt him as acceſſary before; for it is ſaid, That ſuch an acceſſary is in ſome meaſure (*m*) guilty of

(*h*) Kely. 25, 26. Vide Foſter 362. Summary 244. 2 Hale 244. S. P. C. 105. Crompton 42. 112. 27 Aſſize 10. Ab. F. Cor. 200. B. Corone 105. Lamb. B. 2. c. 7. (*i*) Con. F. Cor. 282. (*k*) S. P. C. 44. 105. Kelynge 25, 26. Lamb. B. 2. c. 7 Summary 224. 244. 1 Hale 626. 2 Hale 244. Compton. 42.

112. But the principal authority in the old book is 2 E. 3. 20. Ab. F. Corone 150. which ſeems inconſiſtent with itſelf; for the words are for an example, that a man may in ſuch caſe be twice put to anſwer, We award that you go quit. And F. Corone 282. is contradicted by all other books; for it ſays, That a man acquitted as principal, cannot be ſo much as arraigned as an acceſſary after. And 27 Aſſize 10. Ab. B. Corone 105. and F. Corone 200. extend only to the caſe of an acceſſary after. And 8 H. 5. 6. Ab. F. Corone 463. expreſly goes upon the ſuppoſition, that a man may be found guilty as principal, upon evidence which only proves him acceſſary, (*l*) S. P. C. 105. F. Corone 424. 2 Hale 244. (*m*) Vide ſup. c. 29. ſect. 13, 14. 1 Hale 626 2 Hale 244. Kelynge 25, 26.

the fact, and therefore that an acquittal which clears a man from being guilty of the fact, doth by conſequence clear him from being ſuch an acceſſary. And this ſeems reaſonable *upon the ſuppoſition* that a man may be found guilty of an indictment againſt him as principal, upon evidence which only proves him to have been an acceſſary before.

(a) Sum. 266. Keilway 107. Daliſon 14.

But if a man cannot be found guilty of ſuch an indictment upon ſuch evidence, as it is ſtrongly (*a*) holden that he cannot, it may with great reaſon be ſaid, that the acquittal of him as principal no way acquits him as acceſſary before; for if ſo, he might ſave himſelf by a mere ſlip in the indictment, and bar all other proſecutions by an acquittal on a trial, which in truth never brought him into (*b*) danger of his life. And it is upon this ſuppoſition, as I ſuppoſe, that it is holden in ſome (*c*) books, contrary to thoſe above cited, that one who has been acquitted as principal may be tried again as acceſſary before, as well as after.

(b) Vide ſup. c. 1. 8, 9, 10.

(c) Keilway 107. Daliſon 14. Lamb. B. 2. c. 7. Foſter 362.

Mr. Juſtice Foſter contends with ſome warmth for the opinion of our author, that the acquittal of a principal is no bar to a ſubſequent proſecution againſt him as an acceſſary *before the fact* in the ſame offence. 3 Diſcourſe 362. And in February 1668, Samuel Atkins was tried on two ſeveral indictments; firſt, as principal, next as acceſſary in the murder of Sir Edmonbury Godfrey. 2 State Trials 798.

(d) Crompt. 43. B. Corone 186. 1 Hale 622.625. 2 Hale 244.

Sect. 12. But it ſeems (*d*) agreed, That an acquittal of a man as acceſſary before, or after, is no bar to a ſubſequent proſecution againſt him as principal.

1 Hale 624. Foſter 361.

Sect. 13. Alſo it hath been holden, than an acquittal of a man as acceſſary to one principal, will not ſave him from being arraigned afterwards as acceſſary to another in the ſame fact. But for this I ſhall refer to chapter 29. ſection forty-ſix.

(e) Sup. c. 25. ſ. 15. 21 H. 6. 28,29. Ab. B. App. 41. 44 E. 3. 25. Ab. B. App. 12. Summary 244, 245. 47 E. 3. 16. Ab. F. Corone 104. B. Appeal 33, 35. 102. 2 Leonard 161. But this is made a quære, 17 Aſſize 1.

(f) Vide ſup. c. 25. ſect. 15. Crompton 111. Kelynge 95, 96, 97, 98. 2 Leonard 161. 219. 45. 25. Appeal 75.

Sect. 14. As to the ſeventh particular, *viz.* How far the law is altered in theſe reſpects as to an indictment by 3 Hen. 7. c. 1. It ſeems agreed, (*e*) That by the common law an acquittal on an indictment might be pleaded in bar of an appeal of death, in the ſame manner as an acquittal of any other felony might be pleaded in bar of a ſubſequent proſecution; and therefore in favour of appeals a general practice was introduced, (*f*) not to try any perſon on an indictment of death, till after the year and day had been paſſed, by which time it often happened that all was forgotten. For reformation thereof it is enacted, "That if any man be ſlain or murdered, and thereof "the ſlayers, murderers, abettors, maintainers and comforters "of the ſame, be indicted, that the ſame ſlayers and murder-"ers, and all other acceſſaries of the ſame, be arraigned and "determined of the ſame felony and murder at any time at "the king's ſuit, within the year after the ſame felony and

Summary 244, 245. S. P. C. 107. B. Appeal 9. 32 Aſſize 8. Ab. B. Appeal 12. 11 H. 4. 94. Ab. B. Appeal 361. 41 Aſſize 14. Ab. B

"murder

" murder done, and not tarry the year and day for any appeal " to be taken for the ſame felony or murder. And if it hap- " pen any perſon named as principal or acceſſary to be acquit- " ted of any ſuch murder at the king's ſuit, within the year " and day, that then the ſame juſtices afore whom he is ac- " quitted, ſhall not ſuffer him to go at large, but (*a*) either " to remit him again to the priſon, or elſe to let him to bail " after their diſcretion till that year and day be paſſed. And " if it fortune the ſame felons or murderers, and acceſſaries " ſo arraigned, or any of them to be acquit, or the principal " of the ſaid felony, or any of them to be attainted, the wife " or next heir to him ſo ſlain, as ſhall require, may take and " have their appeal of the ſame death and murder, within " the year and day after the ſame felony and murder done, " againſt the ſaid perſons ſo arraigned and acquit, and all other " their acceſſaries, or againſt the acceſſaries of the ſaid prin- " cipal, or any of them ſo attainted, or againſt the ſaid prin- " cipals ſo attainted, if they be on live, and the benefit of his " clergy thereof before not had; and that the appellant ſhall " have ſuch and like advantage, as if the ſaid acquittal or at- " tainder had not been, the ſaid acquittal or attainder not- " withſtanding (*b*)."

(*a*) Vide ſupra c. 33. ſ. 121. F. N. B. 251. Crompton 111.

(*b*) Vide S. P. C. 107. and Raſtal Statutes title murder 2.

Sect. 15. It ſeems (*c*) agreed, That this ſtatute ſhall not be conſtrued to extend to any other appeal but of death, nor to any other acquittal but upon an indictment; from whence it follows, That an acquittal on an indictment, or appeal, for any other (*d*) felony except death, may ſtill be pleaded in bar of an appeal for the ſame crime, and that an acquittal on an appeal of death (*e*) may ſtill be pleaded in bar of an indictment, in the ſame manner as by the common law.

(*c*) Sum. 244. 2 Hale 250. S. P. C. 107.
(*d*) Sum. 244. S. P. C. 107.
(*e*) Sum. 244. Crompton 111. S. P. C. 107.

Sect. 16. How far a perſon found guilty of manſlaughter, or of homicide *ſe defendendo*, on an indictment of murder, is liable to be tried again upon an appeal by force of this ſtatute, ſhall be conſidered in the next chapter.

CHAPTER THE THIRTY-SIXTH.

OF AUTREFOITS ATTAINT.

(a) Sum. 247. 2 Hale 251, 252. S. P. C. 107. 12 Coke 100. 6 Coke 13. 3 Inſt. 213, 214.

IT ſeems to be generally agreed, (a) That wherever a man is attainted of felony, either by judgment upon a verdict, or by (b) outlawry, or abjuration, whether upon an indictment or appeal, he may plead ſuch attainder to any ſubſequent indictment or appeal, for the ſame or any other felony.

Supra c. 23 ſect. 38. (b) Yet this is made a quære, 28 E. 3. 90. but no notice is taken of the quære in the abridgment of the caſe in F. Corone 136. Vide 18 H. 8. 2. 12 Coke 100.

(c) 9 H. 7. 19. Ab. B. App. 89. B. Corone 11. (d) S. P. C. 107. Summary 247. 12 Coke 100. C. Eliz. 516. Crompton 113. (e) B. Appeal 9. 44 E. 3. 44. Ab. F. Corone 95. 6 H. 4. 6. Ab. F. Corone 227. B. Appeal 10. Popham 107. 7 H. 4. 31. F. Eſcheat 14. B. Corone 11. F. Corone 21.

And two reaſons are given for ſuch plea to a ſecond proſecution for the ſame felony.—Firſt, (c) becauſe the life of the defendant was in danger by the firſt; and it is againſt a maxim of law to bring a man into ſuch danger more than once for one and the ſame offence:—Secondly, (d) becauſe generally the proceeding in ſuch ſecond proſecution cannot be to any purpoſe, becauſe the party is dead in law by the firſt attainder, and hath forfeited all that he can forfeit, and therefore it is ſaid, That it is equally abſurd to attaint him a (e) ſecond time, as to attempt to kill one who is already dead. And that is the only (f) reaſon I find any where given for the plea of *autrefoits attaint* of one felony to a proſecution for another. But where both of theſe reaſons fail in the firſt caſe, and the latter of them in the ſecond, and alſo in ſome other caſes, for ſpecial reaſons; the plea of *autrefoits attaint* ſeems to be of little effect: as in the following inſtances.

95. Contra. 4 E. 4. 11. F. Corone 27. See the chapter of judgment. (f) See the books cited to the precedent letter.

Sect. 2. Firſt, Where the firſt attainder is reverſed for error, after which it can neither be pleaded to a proſecution for the ſame or any other felony; becauſe by ſuch reverſal the attainder is of no (g) more force than if it had never been: And if an acquittal on an erroneous indictment or appeal will not bar a ſubſequent proſecution, ſurely *à fortiori* an attainder reſerved will not do it. But it is agreed to be a good bar while it ſtands unreverſed, becauſe it is not void but voidable only.

(g) S. P. C. 106. 12 Coke 100. Summary 247. 4 Coke 45.

Sect.

Sect. 3. Secondly, Where the attainder was at the ſuit of the king and *(a)* pardoned, and after the party is proſecuted upon an appeal. For it is an allowed maxim, that the king cannot bar the ſuit of the ſubject, and if he cannot bar an appeal by pardoning the offender before it appear whether he be guilty or innocent, there cannot but be much leſs reaſon that he ſhould bar it after the guilt appears by a judgment upon record.

(a) B. Cor. 11. 28 E. 3. 90. Ab. F. Cor. 139 S. P. C. 107. 3 Inſt. 213. Crompton 113. 6 H. 4. 6. Ab. F. Cor. 227. B. Appeal 10. con. 12 Coke 100.

Sect. 4. Thirdly, Where a perſon attainted of felony, is afterwards indicted of high treaſon, whether before or after his *(b)* attainder. For the judgment of death in high treaſon is not only different from that in felony, but the forfeiture is alſo more general (extending to land in tail as well as to land in fee-ſimple, ſince *(c)* the ſtatutes of 26 Hen. 8. c. 13. and 33 Hen. 8. c. 20.) But if the felony were firſt committed, it ſeems *(d)* agreed, That the title of eſcheat to the felon's lands in fee-ſimple, veſted in the lords of whom they are holden from the time of the felony, ſhall not be deveſted by the ſubſequent attainder for the treaſon, as it would be if the treaſon had been firſt committed.

(b) 1 H. 6. 5. 22. Ab. B. Treaſ. 11. F. Corone 2. 3 Inſt. 213. Popham 107. Summary 213, 214. 2 Hale 252. And the obſervation to the contrary in 2 Inſt. 590. and S. P. C. 107. Cromp. 113. on the above cited year-book of H. 6. 5. to the plain purport of it ſeems repugnant. *(c)* Co. Litt. 372. 392. See the chapter of Forfeiture. *(d)* 3 Inſt. 213. S. P. C. 137.

Sect. 5. Fourthly, Where an appellee of larceny hath a ſecond appeal brought againſt him, hanging the firſt, and afterwards is attainted in the firſt.—In which caſe, according to ſome *(e)* opinions, the court may, in order to intitle the ſecond appellant to a reſtitution, inquire by an inqueſt of office, and according to others *(f)* by an inqueſt taken at the miſe of the parties, whether ſuch appellee be guilty of the larceny or not. And the law ſeems to be the ſame in relation to an indictment of *(g)* larceny ſince the ſtatute of 21 Hen. 8. c. 11. which intitles the proſecutor to a reſtitution of his goods, upon the offender's being found guilty, &c. in the ſame manner as upon an appeal. Alſo it hath been *(h)* adjudged, That a perſon attainted is as liable to anſwer a perſonal action, as if he had not been attainted. For otherwiſe his attainder would give him a privilege and protection, which the law is far from intending in allowing the plea of *autrefoits attaint* to a ſecond proſecution for a new crime, which is chiefly grounded on this reaſon, that the law will not ſuffer an abſurd and vain thing in attainting one who is attainted already.

(e) Sup. c. 23. ſect. 53 and c. 28. ſect. 7. 2 Hale 252. F. Corone 379. 7 H. 4. 31. Ab. F. Cor. 81. B. Appeal 21. Vide 44 E. 3 44. Ab. B. Appeal 11. F. Corone 95. *(f)* 4 E. 4. 11. S. P. C. 66. Summary 212. 248. B. Appeal 93. F. Corone 26. 6 Ed. 4. 4. Ab. B. Cor. 147. *(g)* Sup. c. 23. ſect. 55, 56. Sum. 212. 248. *(h)* 3 Inſt. 213. 215. C. Eliz. 516. con. C. Eliz. 213.

Sect. 6. Fifthly, Where a perſon attainted of one felony, is afterwards proſecuted as a principal in another, and others are alſo proſecuted together with him as his acceſſaries. In which caſe it is ſaid, *(i)* That for the benefit of publick juſtice he is com-

(i) Popham 107.

compellable to plead, &c. to the ſecond proſecution in the ſame manner as if he had not been attainted, becauſe otherwiſe the acceſſaries to ſuch ſecond felonies could not (*a*) be brought to their trials for want of a conviction of their principal.

(*a*) Sup. c. 29. from ſect. 36 to ſect. 45.

Sect. 7. It ſeems (*b*) clear, That a judgment againſt a man on an indictment or action of treſpaſs, is no bar to an indictment or appeal of larceny for the ſame taking, becauſe treſpaſs and larceny are offences of a different nature, and the judgment for the one entirely differs from that for the other. Alſo I take it to be in a great meaſure (*c*) agreed, That the judgment of *pain forte et dure* in one felony is no bar to a proſecution for another, becauſe ſuch judgment neither corrupts the blood, nor forfeits the lands, as an attainder doth. But it ſeems queſtionable, whether it may not bar a ſecond proſecution for the ſame felony, becauſe the life of the party was brought into danger by the firſt.

(*b*) Sup. c. 35. ſect. 5. 7 H. 4. 35. F. Cor. 82.

(*c*) 3 Inſt. 213. Crompton 113. Dyer 308.

Sect. 8. It is (*d*) ſaid, That *autrefoits attaint* or *convict* was no plea for one who had broken the priſon of the ordinary.—But for this I ſhall refer to the books cited, chapter the thirty-third (*e*).

(*d*) S. P. C. 31, 32.

(*e*) Sect. 9, 10.

Sect. 9. It is certain that an attainder on an indictment of death is no bar to an appeal, by reaſon of 3 Hen. 7. c. 1. ſet forth more at large in the precedent chapter, which gives an appeal againſt perſons attainted of death, the benefit of clergy thereof being not had, as it is certain that it cannot at this day. But it ſeems (*f*) agreed, That in all other caſes the plea of *autrefoits attaint* is ſtill of the ſame force as it was by the common law.

(*f*) Sum. 247. 2 Hale 250, 251.

Sect. 10. THE PLEA OF AUTREFOITS CONVICT ſeems chiefly to depend on this reaſon, (*g*) That the party ought (*h*) not to be brought twice into danger of his life for the ſame crime. Upon which ground it ſeems (*i*) agreed, That a conviction on an appeal or indictment of burglary, or other felony, may be pleaded to an indictment or appeal for the ſame felony: And that a conviction of manſlaughter in an appeal of death may be pleaded in bar of a ſubſequent indictment or appeal of the ſame death; and that the reaſon why ſuch a conviction on an indictment of death cannot be pleaded to an appeal as well as to an indictment (unleſs the perſon ſo convicted be admitted to his clergy, or at leaſt have prayed it), (*k*) depends entirely on 3 Hen 7. c. 1. which expreſsly giving an appeal againſt a perſon attainted on an indictment of death, who hath not had his clergy, cannot but be thought to give it as well againſt a perſon convicted, ſince every attainder includes a conviction and more; and it is wholly owing to the default of the court, which ſhall not prejudice any one, that a perſon convicted is not attainted (*l*). But I do not find any authority that a conviction of one felony may be pleaded in bar of another; on the contrary it

(*g*) Sup. ſect. 1.
(*h*) 4 Coke 39, 40. 47. 2 Leonard 83.
(*i*) 4 Coke 39, 40. 2 Leonard 83. Crompton 113. Kelynge 94. 98. 4 Coke 46. 1 Salk. 62, 63. C. Car. 147.
(*k*) 1 And. 68. 4 Coke 46. 3 Modern 156, Infra ſect. 19.
(*l*) S. P. C. 280. Sum. 247, 248. Crompton 113.

it is plain, That it was anciently the uſual (*a*) practice, where a clerk was indicted of ſeveral felonies, and tried and convicted of one of them, and demanded by the ordinary, not to deliver him upon ſuch demand, but to detain him in priſon till he had been arraigned of all the felonies whereof he ſtood indicted. Alſo it ſeems (*b*) agreed, that even after the ſtatute of 25 Edw. 3. c. 5. *de clero*, a clerk convict of one felony, might immediately, while he ſtood at the bar, be arraigned of any other.

(*a*) F. Corone 394. 461. S. P. C. 108. Sup. c. 33. ſect. 117 Pream. 25. E 3. 5.
(*b*) S. P. C. 108. Dyer 215.

Sect. 11. But it ſeems to be admitted (*c*) as a general rule, That after a clerk convict was once delivered to the ordinary, he could not afterwards be impeached either for the ſame, or any other felony committed before ſuch delivery to the ordinary, whether it were within the benefit of clergy or not: And though this be ſo far remedied (*d*) by 8 Eliz. c. 4. and 18 Eliz. c. 7. That a perſon admitted to his clergy for any felony, ſhall not in reſpect thereof bar a ſubſequent proſecution for another felony not within the benefit of clergy; yet, as I take it, the law generally ſtill continues as it was, as to the felony whereof the party who is admitted to his clergy is convicted, and alſo as to other felonies within the benefit of clergy committed before ſuch admittance, whereof it ſeems agreed, That regularly one admitted to his clergy ſhall not be afterwards arraigned.

(*c*) Dyer 214, 215. Sum. 238, 240. Sup. c. 33. ſect. 117 to 121. 18 H. 8. 2. 3 Inſt. 131. Kely. 93. 103. Cromp. 113. F. Corone 232.
(*d*) Sup. c. 33. ſect. 121 to 130.

Sect. 12. It ſeems to have been long ſettled, That not only he who hath been admitted (*e*) to his clergy on a conviction of manſlaughter, upon an indictment of murder, but alſo that he who, being called to judgment on ſuch conviction, hath (*f*) prayed his clergy, but hath not been actually admitted to it, may bar any ſubſequent appeal for the ſame death, as he might by the common law. And ſo to the objection from the ſeeming abſurdity, that if the law be ſo, he that hath his clergy on a conviction of manſlaughter will be in a better caſe than if he had been wholly acquitted, it may be anſwered, That this doth not depend on any reaſoning from the nature of the thing, but from the ſtatute of 3 Hen. 7. c. 1. which expreſsly takes away the plea of *autrefoits acquit* in this caſe, but by ſuffering even perſons attainted on an indictment of death, who have been admitted to their clergy to plead ſuch admiſſion in bar of an appeal, plainly ſeems to have intended to leave the benefit of clergy, as it ſtood before.

(*e*) 4 Coke 40. Wetherel's caſe 45, 46. Crompton 102. C. Jac. 282. Yelver. 204, 205. 1 Bulſt. 241. See the caſes cited to the next letter.
(*f*) 2 Leon. 160. 1 And. 68. 4 Coke 45. 46. Kelynge 93, &c. 3 Inſtitute 161. Coke Ent. 55. Salkeld 63. 2 Hale 250. 390. This is left doubtful, 2 Roll 478.

Sect. 13. Alſo it hath been adjudged, (*g*) That it is not material whether the appeal, in bar whereof ſuch conviction and clergy are pleaded, were depending at the time of ſuch conviction or not; ſince the judges (*h*) may, if they think fit in their diſcretion, proceed on an indictment of death, notwithſtanding an appeal thereof be depending; and therefore as on the one ſide the party is liable to be hanged, if found guilty of murder on a verdict againſt him on ſuch an indictment, pending an appeal, cannot but be equitable, that on the other ſide he ſhould

(*g*) Salkeld 63. Kelynge 91, 92, 94. 104. 107. 108. But the contrary ſeems to be holden in 3 Inſt. 131.
(*h*) Sup. c. 25. ſect. 15. and the notes to c. 35. ſect. 14. Kely. 94, 95, 96, 97, 98.

ſhould have the full benefit of the verdict, if found in his favour.

(a) 1 Sid. 316. Carthew 7. 18. Kelynge 106. Vide Dyer 214, 215. 296.

Sect. 14. But there have been many (*a*) opinions, That unleſs the court call a man to judgment, on a conviction of manſlaughter, on an indictment of murder, he cannot demand the privilege of his clergy, and conſequently cannot plead ſuch conviction and clergy thereon had or prayed, in bar of an appeal. And accordingly it was ſolemnly reſolved (*b*) by all the judges, except one, in the latter end of the reign of king James the ſecond, That the court might delay the calling a convict to judgment, to hinder him from praying his clergy (eſpecially if an appeal be depending), in order to make him liable to an appeal.—But the contrary ſeems (*c*) to be fully ſettled in the caſe of Armſtrong and Liſle, wherein it was adjudged upon great deliberation, that a conviction of manſlaughter, on an indictment of murder, and the (*d*) prayer of clergy thereupon, may be pleaded in bar of an appeal of the ſame death, whether ſuch prayer were made upon the party being called to judgment or not. For it ſeems to be (*e*) admitted, even by thoſe of the contrary opinion, That the delay of the court in not admitting a man to his clergy who prays it when called to judgment, ſhall no way prejudice him, but that he may bar an appeal by pleading a conviction and prayer of clergy as much as if he had been actually admitted to it. And why ſhould it be more reaſonable that the delay of the court in not calling a man to judgment, ſhall put it in the power of the court to make ſo high a privilege in favour of life wholly precarious and diſcretionary? To which may be added, That a demand of clergy by a convict before he is called to judgment, ſeems in ſtrictneſs to be as legal as a demand after a call to judgment; ſince whenever a perſon appears to have a right to his clergy, as he ſeems plainly to do when his crime is found to be ſuch as is within the benefit of it, it ſeems a neceſſary conſequence that he has a right to pray it. And it ſeems (*f*) agreed, That by the ancient common law, clergy might be demanded upon the priſoner's firſt arraignment. And though afterwards for ſpecial reaſons, the judges made it a rule not to admit any one to it till after he had pleaded; yet I find it no where holden in the old books, That a man could not legally demand it till called to judgment. Neither doth the (*g*) opinion to the contrary, in the report of the caſe of *Armſtrong* and *Liſle*, grounded upon the authority of (*h*) *Searl's Caſe*, ſeem to be at all made out by that caſe.

(b) 3 Modern 156, 157, 158. Kelynge 106.

(c) Skin. 670, 671. Carthew 394, 395. Kelynge 93. 103, 104, 105. 107. Salkeld 62, 63.

(d) But note, That in this caſe the party was actually admitted to his clergy in the King's Bench.

(e) Vide ſup. ſect. 12. 1 And. 68. 4 Coke 45, 46. Kelynge 105. Salkeld 63.

(f) Sup c. 33. 1. 110, 111.

(g) 1 Salk. 63. Kelynge 105.

(h) Hobart 289.

N. B. The reaſoning of the ho tained in this ſection is ſanctified by the approbation of Ld Mansfield. 5 Burrow 2801.

Sect. 15. But it ſeems clearly ſettled, That whenever the record on which a man is convicted of manſlaughter, and admitted to his clergy, on an indictment or appeal of murder, is erroneous, either in reſpect of inſufficiency (*i*) in the indictment

(i) 4 Coke 39, 40. 47. Crompton 111.

ment or appeal, or for a (*a*) miſ-trial, &c. ſo that his life was not in danger at the trial, &c. he cannot plead ſuch conviction and clergy thereon had, in bar of a ſecond indictment or appeal.

(*a*) 6 Coke 14.

Sect 16. It hath been adjudged, (*b*) That the concluſion of a plea of *autrefoits convict* of manſlaughter, and clergy thereon, &c. may be either *petit judicium ſi prædict' A. B. iterum de eadem morte, de qua ſemel convictus eſt, reſpondere compelli debeat*; or thus, (*c*) *petit judicium ſi prædict' A. B. appellum ſuum prædict' verſus eum de morte prædict' habere ſeu manutenere debeat.*

(*b*) 3 Inſt. 131.

(*c*) Coke's Ent. 55. 3 Inſt. 131.

Sect. 17. It is ſaid (*d*) to have been adjudged in Holcroft's caſe, That a verdict finding a man guilty of homicide *ſe defendendo* on an indictment of murder, may be pleaded to an appeal of the ſame death; but this was certainly not the very point (*e*) in queſtion in that caſe; neither do I find it expreſsly taken notice of in any report of it. However, ſince it ſeems clear, that ſuch a conviction would be a good bar of an appeal at the common (*f*) law; and ſince it is not within the letter of 3 Hen. 7. c. 1. which mentions only perſons acquitted or attainted, it ſhall not be eaſily conſtrued to be within the meaning of it, (*g*) being in this reſpect a penal ſtatute, and derogatory from a maxim of the common law in favour of life. And though it be in a great meaſure (*h*) agreed, That the ſtatute in giving an appeal againſt a perſon attainted of murder doth by neceſſary conſequence give it as well againſt one convict of murder, becauſe every perſon attainted is convict and more; and if an appeal ſhould not lie againſt a perſon convicted until he were attainted, it would be wholly in the power of the court, by delaying to give judgment on a perſon convicted, to bar an appeal. Yet ſince theſe reaſons hold not in the caſe of one convict of *homicide ſe defendendo* only, it may well be argued, That a conviction thereof may ſtill be a good bar of an appeal.

(*d*) Cromp 111.

(*e*) Co. Ent. 55. 4 Coke 45, 46. 3 Leonard 160, 161 3 Inſtitute 131. 11 Anderſon 68.

(*f*) Sup. ſ. 10.

(*g*) 3 Inſt. 131. Kelynge 104.

(*h*) 1 And. 68. 4 Coke 46. Sup. ſ. 10.

CHAPTER

CHAPTER THE THIRTY-SEVENTH.

OF PARDON.

BEFORE I proceed to conſider in what manner a pardon is to be taken advantage of, it may not be improper to premiſe ſome things concerning the nature of pardon in general.

As, 1. By whom grantable. 2. Where it is grantable of right. And, 3. What is the nature of a Pardon of Grace.

Sect. 1. As to the firſt point, *viz.* By whom a pardon is grantable. It ſeems that anciently the right of pardoning offences within certain diſtricts was claimed by the lords marchers and others, who had *jura regalia*, by ancient grants (*a*) from the crown, or by preſcription.—But it is enacted by 27 Hen. 8. c. 24. ſect. 1. "That no perſon or perſons, of "what eſtate or degree ſoever they be, ſhall have power to "pardon or remit any treaſons or felonies whatſoever, nor "any acceſſaries to the ſame, nor any outlawries for ſuch "offences, whether committed in England or Wales, or the "marches of the ſame; but that the king ſhall have the whole "and ſole power and authority thereof united and knit to the "imperial crown of this realm, as of good right and equity "it appertaineth."

(*a*) See the ſtatute of 27 H. 8 c. 24. Coke Litt. 114. Crompton 116. S. P. C. 104. 3 Inſt. 233.

As to the ſecond point, *viz.* Where a pardon is grantable of right (1), I ſhall endeavour to ſhew where it is to be ſo granted. Firſt, To perſons found guilty of excuſable homicide. Secondly, To robbers, clippers, burglars, &c. who ſhall diſcover two or more guilty of robbery, &c. Thirdly, To an approver who hath convicted an appellee.

(1) Vide the caſe of Margaret Carolina Rudd, Cowper 331.

Sect. 2. And firſt, as to perſons found guilty of excuſable homicide.—It is enacted by the ſtatute of Glouceſter, c. 9. "That in caſe it be found by the country, that a perſon tried "for the death of a man, did it in his defence or by "misfortune, then by the report (*b*) of the juſtices to "the king, the king ſhall take him to his grace, if it pleaſe "him." By which, at firſt ſight, it ſeems to be implied, That

(*b*) For the form of a certiorari in ſuch caſe, and a pardon thereon, ſee Reg. 190.

That it is left to the diſcretion of the king, whether he will grant a pardon in ſuch a caſe or not. And agreeably hereto it is ſaid in four ſeveral notes (*a*) in Fitzherbert's abridgement of caſes in the time of Edward the third; That a perſon found guilty of homicide *ſe defendendo* is to be remitted to priſon in order to attend the king's grace: And yet in two other notes of (*b*) caſes in the very ſame year, it is ſaid, That in ſuch a caſe, if the priſoner cauſe the record to come into the Chancery, the chancellor will make him a charter of pardon, without ſpeaking to the king; and this ſeems to be (*c*) ſettled at this day, and agreeable to the ancient (*d*) common law, which ſhall not without expreſs words be reſtrained by a ſtatute which ſeems to be made in affirmance of it. And therefore theſe words in the ſtatute, "If it ſhall pleaſe the king," ſhall be taken as ſpoken only out of reverence to him, and not as intended to make the right of the ſubject to ſuch a pardon precarious. And the caſes above cited, which ſeem to be contrary, may be reconciled with the others, by intending them to mean only the grant of the king's pardon to a perſon repreſented to him as guilty of homicide *ſe defendendo* only, without any certificate of the verdict upon record. For none of thoſe caſes make any mention of ſuch certificate, as the others do; and if there be no ſuch certificate, it ſeems plain that the grant of a pardon is a mere matter of favour. However it ſeems to have been always (*e*) agreed, That the forfeiture of goods by ſuch homicide may be ſaved by a pardon, (which in this *particular* caſe ſeems to purge the offence *ab initio*). And it hath been (*f*) adjudged, That ſuch a pardon is as neceſſary for one who is indicted only of homicide *ſe defendendo* and confeſſes it, as for one who is found guilty of homicide *ſe defendendo* on an indictment of murder. And if he were found guilty of having fled (*g*), &c. I queſtion whether the pardon will ſave the forfeiture of the goods by reaſon of the flight; for that is grounded not on the homicide, but on the contempt of the law in not ſtanding to its judgment.

(*a*) F. Corone 284. 286, 287, 354. Alſo F. Co 305. and 34 E. 3. 44. Ab. F. Cor. 94. and 2 H. 4. 18. Ab. B. Forf. 9. are to the ſame purpoſe.
(*b*) F. Corone 297. 361.
(*c*) S. P. C. 15, 16. 2 Inſt. 316, 317. Summary 250. B. 1. c. 29. ſ. 24. B. Ch. de Pard. 65. Keilway 108.
(*d*) Kely. 122, 123. Bract. l. 3. c. 17. B. 1. c. 29, ſect. 19. to the end of the chapter.
(*e*) See the books cited to the other parts of this ſection, and 4 H. 7. 2. Ab. F. Cor. 61. B. Corone 138. or 139. B. Forfeit 51. 2 H. 4. 18. Ab. F. Cor. 69, B. Forfeit 9.
(*f*) Keilway 53. 4 H. 7 2. Ab. F Cor. 61.
(*g*) Vide F. Cor. 286, 287. and infra, in the chapter of falſifying attainders.

Sect. 3. Secondly, As to robbers, clippers and coiners, and burglars, &c. who ſhall diſcover two or more guilty of robbery, &c. it is enacted by 4 & 5 Will. & Mary, c. 8. "That if "any perſon or perſons, being out of priſon, ſhall com- "mit any robbery, and afterwards diſcover two or more, who "then had, or afterwards ſhall commit any robbery, ſo as two "or more of the perſons diſcovered ſhall be convicted of ſuch "robbery, any ſuch diſcoverer ſhall himſelf have, and is hereby "entitled to the gracious pardon of their majeſties, their heirs "and ſucceſſors for all robberies which he or they ſhall have "committed at any time or times before ſuch diſcovery made, "which

A pardon offered to robbers.

" which pardon ſhall be likewiſe a good bar to any appeal " brought for any ſuch robbery."

A pardon offered to clippers of the coin.

Sect. 4. Alſo it is enacted by 6 & 7 William 3. c. 17. " That if any perſon or perſons, being out of priſon, ſhall be " guilty of clipping, coining, counterfeiting, waſhing, fil- " ing, or otherwiſe diminiſhing the coin of this realm, and " afterwards diſcover two or more who then had, or after- " wards ſhall commit any of the ſaid crimes, ſo as two or " more of the perſons diſcovered ſhall be convicted of the " ſame, any ſuch diſcoverer ſhall himſelf have, and is hereby " intitled to the gracious pardon of his majeſty, his heirs and " ſucceſſors, for all ſuch his crimes, which he or they have " committed at any time or times before ſuch diſcovery " made."

Sect. 5. Alſo it is enacted by 10 & 11 Will. 3. c. 23. (which excludes (*a*) all perſons from their clergy who ſhall by night or day, in any ſhop, warehouſe, coach-houſe or ſtable, privately and feloniouſly ſteal any goods, wares or merchandizes, being of the value of 5 s. or more, although ſuch ſhop, &c. be not actually broken open, and although no perſon be therein, or ſhall aſſiſt, hire, or command any perſon to commit ſuch offence), " That if any perſon or perſons ſhall com- " mit any burglary, houſe-breaking, or felony in ſtealing of " any horſe or horſes, or any money, wares or goods, from " whom the benefit of clergy is by the ſaid act taken away, " and being out of priſon, ſhall diſcover two or more, who " then had, or after ſhall commit any ſuch burglary, horſe- " ſtealing or felony, as aforeſaid, and ſhall be convicted there- " of, or cauſe to be diſcovered and apprehended two or more, " who ſhall be convicted, as aforeſaid, every ſuch diſcoverer " ſhall have, and is hereby intitled to his majeſty's moſt gra- " cious pardon for the burglaries, houſe-breakings, horſe- " ſtealings or felonies as aforeſaid, which he or ſhe or they " ſhall have committed at any time or times before ſuch diſ- " covery made; which pardon ſhall be likewiſe a good bar to " an appeal for any ſuch burglary, &c."

(*a*) Vide ſup. c. 33. ſ. 64, 65.

A pardon offered to burglars, houſe-breakers, horſe-ſtealers, and ſhop-lifters.

Sect. 6. And it is farther enacted by 5 Annæ, c. 31. ſect. 4. " That every perſon who ſhall be guilty of burglary, or " of the (*b*) felonious breaking and entering any houſe in the " day-time, and after ſhall diſcover two who ſhall have com- " mitted ſuch burglary or felony, ſo as they be convict, &c. " ſhall have 40 l. &c. and be entitled to a pardon of all bur- " glaries and felonies, except murder and treaſon; which par- " don ſhall be a bar to an appeal, &c."

(*b*) Vide c. 33. ſect. 85 to ſect. 105.

A pardon offered to ſmugglers.

† It is enacted by 8 Geo. 1. c. 18. ſ. 7. " That if any " runner of foreign goods ſhall within two months after his " offence, and before his conviction, diſcover two or more of " his

" his accomplices therein to the commiſſioners of the cuſtoms " or exciſe in England or Scotland, ſo as they or two of them " at leaſt be convicted of ſuch offence (as deſcribed in the " act), the offender or offenders ſo diſcovering ſhall receive " the ſum of forty pounds for every ſuch offender ſo diſcovered " and convicted, ſo as the value of the goods recovered by ſuch " diſcovery ſhall exceed fifty pounds; and ſuch perſon ſo diſ- " covering ſhall be clearly acquitted and diſcharged of ſuch " his or her offence." And the like is enacted by 9 Geo. 2. c. 35. upon the ſame ſubject.

By 25 Geo. 3. c. 57. Accomplices diſcovering an offender in counterfeiting LOTTERY ORDERS, &c. are entitled to a pardon.

PERSONS to whom the king has, by ſpecial proclamation in the gazette, or otherwiſe, promiſed his pardon, are alſo entitled to it of legal right. Cowper 333.

Sect. 7. Thirdly, In what manner an approver who convicts the appellee is intitled to a pardon. This hath been ſhewn, chapter 24. ſection twenty-ſeven.

(1) Great inconvenience aroſe from the practice of approvement. A mode has therefore been adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to the king's mercy; but not to a pardon as of legal right, which he may plead in bar, or avail himſelf of on his trial. It is where an accomplice, having made a full and fair confeſſion of the whole truth, is in conſequence thereof admitted evidence for the crown, and that evidence is afterwards made uſe of to convict the other offenders. If he act fairly and openly, and diſcover the whole truth, though he is not entitled of right to a pardon, yet the uſage, the practice and the lenity of the court is to ſtop the proſecution againſt him; and he has an equitable title to a recommendation for the king's mercy. —It holds out a kind of hope, that accomplices who behave fairly, and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment and be pardoned.

(2) But a juſtice of the peace cannot pardon the offender, and tell him he ſhall be a witneſs againſt others. He cannot ſelect whom he pleaſes to pardon or proſecute, and the proſecutor has even a leſs pretence to ſelect than the juſtice of peace. However, although the juſtices deceive the accomplice under a promiſe, or aſſurance, or hope of pardon from them, which in ſtrictneſs they had no right to make, yet if he make a full and fair diſcloſure, at the time of his examination, of all he knows, he will be intitled to a recommendation to mercy, and the king's bench will in this caſe bail him in order that he may apply for the king's pardon. Or the juſtices of gaol-delivery, on all the circumſtances relative to the priſoner's claim of indemnity being laid before them, will exerciſe their diſcretion in deferring the trial accordingly. Lord Mansfield. Cowper 331.

Pardon of grace.

As to the third point, *viz.* What is the nature of a pardon of grace: I ſhall conſider the following particulars; Firſt, Where ſuch a pardon is good in law. Secondly, What is the effect of it. Thirdly, Whether it may be waived.

The ſeveral points in which it is conſidered.

As to the firſt point, *viz.* Where ſuch a pardon is good in law; I ſhall conſider, 1. What is required to make a good pardon of felony in general. 2. What is particularly required in a pardon of treaſon, murder, or rape. 3. How far the pardon of one man may diſcharge another. 4. How far it is neceſſary that the pardon of ſeveral perſons for felony, be ſeveral. 5. Whether the king's grant of a protection, or of a place of truſt to a traitor or felon, carry with it an implied pardon of his crime. 6. What is required to make a good pardon of offences

offences not capital. 7. Whether any offence can be pardoned before it is committed. 8. Whether there be any offence which cannot be pardoned after it is committed. 9. How far a pardon may be of force againſt the private intereſt of the ſubject. 10. Whether it may be conditional. 11. Where a pardon is void in reſpect of a wrong recital.

Sect. 8. As to the firſt particular, *viz.* What is required to make a good pardon of felony in general: It ſeems to be laid down as a general rule in many books, that wherever it may be reaſonably intended that the king, when he granted ſuch pardon, was not fully (*a*) appriſed both of the heinouſneſs of the crime, and alſo how far the party ſtands convicted thereof upon record, the pardon is void, as being gained by impoſition upon the king. And this is very agreeable to the reaſon of the law, which ſeems to have intruſted the king with this high prerogative, upon a ſpecial confidence that he will ſpare thoſe only whoſe caſe, could it have been foreſeen, the law itſelf may be preſumed willing to have excepted out of its general rules, which the wit of man cannot poſſibly make ſo perfect as to ſuit every particular caſe. And upon this ground it hath been holden, (*b*) that if one be indicted by theſe words, "that he had ſlain a man for having ſued him "in the king's court," and the king make him a charter of all manner of felonies; this charter ſhall not be allowed, becauſe it ſhall be intended that the king was not acquainted with the heinouſneſs of the crime, but deceived in his grant. Alſo where one outlawed in an appeal of felony prayed his clergy, which was counterpleaded on the account of bigamy, &c. and afterwards purchaſed a pardon, and ſued a *ſcire facias* againſt the appellant, &c. it is (*c*) ſaid, That the pardon was not allowed, becauſe it made no mention of the bigamy. Alſo it ſeems agreed by all the (*d*) books, That if a man be attainted of any felony, whether by abjuration, or outlawry, or otherwiſe, and afterwards get a pardon which doth not expreſsly mention the attainder, the pardon will not avail him, (*e*) becauſe it ſhall be intended that the king had not conuſance of the attainder, but was deceived in his grant, which ſhall not grieve him when he has true notice of the matter. And upon the like ground it hath been holden (*f*) that the pardon of one who is convicted by verdict of a felony is not good, unleſs it recite the indictment and conviction. Alſo it hath been (*g*) queſtioned, whether the pardon of one who is barely in-

(*a*) 8 H. 6. 20. Ab. B. Char. of Pardon 19. 8 H. 6. 21. Ab. B. Patents 15. 6 Coke 13. 3 Inſt. 238.

(*b*) 8 H. 6. 20. but note, that Brook in abridging this caſe in the title of charter of Pardon 19. omits the words, "becauſe he ſued him in the king's court."

(*c*) F. Charter 16. S. P. C. 102. Crompton 115. from the authority of the year book of 11 H. 4. 11. pl. 24. and 48. pl. 23. where on the debate of this caſe it ſeems admitted, that the Pardon was not good becauſe it made no mention of the bigamy; and yet it is ſaid that upon the non-appearance of any one to maintain the appeal, the Pardon was afterwards allowed. *Ergo quære.*

(*d*) 8 H. 6. 21. Ab. B. Patents 15. 9 Ed. 4. 28. Ab. F. Char. 23. B. Charter 23. 6 Ed. 4. 4. 1 Ed. 3. 13. 1 Aſſize 4. Ab. F. Corone 155. Same point admitted, 36 H. 6. 25, 26. Ab. B. Charter 25. 6 Coke 13. F. Corone 124. Crompton 115. 3 Inſt. 238. Summary 251. S. P. C. 102. 123. Dalton c. 94. Kelynge 28.

(*e*) Theſe are the very words of 8 H. 6. 21. Ab. B. Patent 15.

(*f*) 1 Sid. 366. 430. 2 Keble 363. 3 Keble 694.

(*g*) 2 Jones 56. 3 Keble 30.

dicted

dicted of felony be good, if it do not mention the indictment. But this hath been (a) adjudged to be helped by the words *five indictatus five non.*

(a) 2 Jones 56. 3 Keble 30. 694. Crompton 115.

Sect. 9. It hath been holden, That anciently (b) a pardon of all felonies included all treasons, as well as all felonies whatsoever, and might be pleaded to an indictment for them: And it seems to be taken for granted, in many (c) books, that a pardon of all felonies in general, without describing any one particular felony, may even at this day, if the party be neither (d) attainted nor indicted, be pleaded in bar of any felony whatsoever, coming within the general limitations of the pardon, except murder or rape, and that the only (e) reason why it cannot be also pleaded to murder or rape, is because the statute of 13 Rich. 2. set forth more at large under the next point, requires an express mention of them. But I find this point no (f) where solemnly debated. Neither doth it seem easy to reconcile it with the general rules concerning pardons, agreed to be good in other cases; for if a felony cannot be well (g) pardoned where it may be reasonably intended that the king, when he granted, the pardon was not fully apprised of the state of the case, much less doth it seem reasonable that it should be pardoned where it may be well intended that he was not apprised of it at all. And if a felony whereof a person be attainted cannot be well pardoned, even though it appear that the king was informed of all the circumstances of the fact, unless it also appear that he was informed of the attainder; much less doth it seem reasonable that a felony should be well pardoned where it doth not appear that he knew any thing of it: For by this means, where the king in truth intends only to pardon one felony, which may be very proper for his mercy, he may by consequence pardon the greatest number of the most heinous crimes, the least of which, had he been apprised of it, he would not have pardoned. And for these reasons, as I suppose, general pardons are commonly made by act of parliament; and have been of late years (h) very rarely granted by the crown, without a particular description of the offence intended to be pardoned. As to the (i) precedents of such general pardons in Rastal's entries, it may be answered, That their authority seems to be of less weight when compared with those many precedents of pardons in the Register (k), every one of which particularly describes the offence which is pardoned, and even those which relate to (l) homicide by lunaticks, or infants, or in self-defence, &c. except only one which pardons escapes, but expressly excepts all voluntary ones. And therefore where the books speak of pardons of all felonies in general as good, perhaps it may be reasonable for the most part to intend that they either speak of a pardon by parliament, or that they

(b) 10 Ed. 4. 10. Co. Litt. 391. 3 Inst. 236. Vide 22 Ass. 49. S. P. C. 2. 102. F. Charter 13. Dyer 124. March 214, &c.

(c) Keilw. 91. B. Corone 147. Coke Litt. 391. S. P. C. 2. 102. 3 Inst. 236. 22 E. 4. 7. See the Books cited to the other parts of this section.

(d) 8 H. 6. 21. Ab. B. Pat. 15. F. Corone 24. 2 Keble 574. 16 Edw. 4. 10. 36 H. 6. 25. 26 Sum. 251. 2 Jones 56. 6 Edw. 4 4. B. Charter F. Pardon 10.

(e) Keilway 91. 9 Edw. 4. 26. Crompton 115.

(f) 2 Keb. 363. 415. 574.

(g) See the precedent section.

(h) Vide 2 Keb. 575.

(i) Rastal 455. 459.

(k) Register of original writs f. 308 to 313.

(l) Register of origi. writs 309.

they ſuppoſe (a) that the particular crime is mentioned in the pardon though they do not expreſs it.

(a) Dyer 124. Vide 22 Aſſ. 47. Ab. F. Charter 14.

Sect. 10. It is enacted by 27 Edw. 3. c. 2. "That in "every charter of pardon of felony, which ſhall be grant-"ed at any man's ſuggeſtion, the ſaid ſuggeſtion and the "name of him that makes it ſhall be comprized; and if after "the ſame ſuggeſtion be found untrue, the charter ſhall be "diſallowed. And the juſtices before whom ſuch charters "ſhall be alledged, ſhall enquire of the ſame (b) ſuggeſtion, "and if they find it untrue, ſhall diſallow the charters ſo "alledged." And it is enacted by 5 Hen. 4. c. 2. "That if "an approver become a felon again after a pardon, he who "procured the pardon ſhall forfeit 100 *l.*"

(b) Vide Raym. 13. 1 Siderfin 41.

Sect. 11. It is certain that a general pardon of felonies extends not to piracy, as hath been more fully ſhewn, Book 1. ch. 37. ſect. 6.

Sect. 12. It ſeems a ſettled rule, That no pardon of felony ſhall be carried farther than the expreſs purport of it; and therefore where a man was attainted on an appeal of robbery, and the king reciting the attainder pardoned the execution, it is ſaid, (c) That becauſe the pardon did not expreſsly mention the felony, it was diſallowed. But it does not appear how it was pleaded, nor to what purpoſe it was attempted to be made uſe of, nor how far, or in what reſpect it was diſallowed; and therefore though (d) ſome books ſeem to hold generally, on the authority of this caſe, that ſuch a pardon is no way good, yet I do not well ſee how any more can be proved from it than this, That it ſhall neither amount to a pardon of the felony itſelf, nor of any other conſequence of the attainder beſides the execution. But it ſeems difficult to give a reaſon why it ſhould not well pardon the execution, ſince the king doth not appear to have been any way deceived; and (e) it hath been clearly adjudged, that the king may, if he think fit, pardon the execution, and no more.

(c) 8 H. 4. 21. Ab. F. Chart. 26. B. Appeal 27. Chart. de Par. 13. B. Corone 24. 6 Coke 13 S. P. C. 102.
(d) Crompton 115. Summary 251.
(e) 6 H. 4. 6. Ab. F. Cor 227. See the chapter of execution and reprieve. 1 Stat. Tr. 261.

Sect. 13. It ſeems (f) agreed, That where a general act of pardon excepts ſome particular kinds of felony, ſuch exception extends as well to thoſe whereof any perſons are attainted as others; for if thoſe whoſe guilt appears not on record are excepted, much greater reaſon is there that thoſe whoſe guilt appears in ſo high a manner ſhould be excepted; and therefore being within the letter of the exception, they cannot but be intended to be within the meaning of it alſo. Neither doth it follow, That becauſe the pardon of a felony whereof a perſon is attainted is not (g) good without mentioning the attainder, therefore ſuch a general exception of all felonies ſhall not extend to thoſe whereon there hath been an attainder; for the caſe of ſuch a pardon depends on this ſpecial reaſon, That the king ought to be fully appriſed of the proceedings againſt

(f) 6 Coke 13. Summary 251. 3 Inſt. 238.

(g) Vide ſup. ſect. 8, 9.

againſt the party before he pardons him, as hath been more fully ſhewn, ſection the eighth.

Sect. 14. As to the ſecond particular, *viz.* What is particularly required in a pardon of treaſon, murder, or rape:—I do not (*a*) find that the common law required any thing particular in the form of pardons of ſuch crimes, which was not equally requiſite in the pardon of any felony whatever. But it being enacted by the ſtatute of 2 Edw. 3. c. 2. which is confirmed by ſeveral (*b*) ſubſequent ſtatutes, "That charters "of pardon of manſlaughters ſhall not be granted, but only "where the king may do it by his oath, that is to ſay, where "a man ſlayeth another in his own defence, or by misfor-"tune." And there being no precedent in the regiſter (*c*) of a pardon of any other homicide, but ſuch as is done either in ſelf-defence or by miſadventure, or by infants or madmen; (*d*) ſome have gone ſo far as to hold that the king's pardon of any other homicide is not good unleſs it be confirmed by parliament, or at leaſt have a *non obſtante* of theſe ſtatutes. But this ſeems contrary not only to the general tenour of the books, which clearly (*e*) admit the king's power to pardon any homicide in general, but alſo to the expreſs purport of 13 Rich. 1. which by ſhewing in what form the king ſhall make a pardon of murder, plainly allows that he has a power to make it. Beſides, the ſame reaſons hold as ſtrongly againſt the king's power to pardon manſlaughter as murder, which yet I never knew diſputed. However, it ſeems reaſonable that thus much at leaſt be allowed to follow from the arguments above mentioned, that too great caution cannot well be (*f*) taken in the grant of pardons of any homicide, that there be ſome ſuch favourable circumſtances in extenuation of it, as may bring it ſome way within the equity of the caſes in the regiſter, and thoſe old ſtatutes.

(*a*) Sup. ſect. 9. Moor 752. 3 Modern 37, 38. F. Chart. 13. F. Corone 25. Keilway 91.
(*b*) 4 Ed. 3. c. 13. 10 Ed. 3. 2. 14 Ed. 3. 14.
(*c*) Regi. 309.
(*d*) S. P. C. 101. 3 Inſt. 236. Style 375. 377. March 217. Bracton 133. Shower 283, 284. 1 Keble 67. 1 Levinz 8.
(*e*) 11 H. 4. 11. Ab. F. Char. 16. 4 Ed. 4. 10. Ab. F. Cor. 25. 9 H. 7. 5. Ab. F. Scire fac. 56. 9 H. 4. 1. Ab. F. Sc. fa. 63. 13 H. 4. 6. Ab. F. Cor. 266. Dyer 34. In all which books it is clearly admitted, That an outlawry in an appeal of death may be pardoned by the king ſo far as the public juſtice is concerned in it. See alſo Shower 283, 284. 2 Jones 56. Kelynge 24, 25. 1 Siderfin 366. Moor 752. Raymond 13. 2 Keble 363. 415. 574. 3 Keble 30. 694. 3 Modern 37.
(*f*) See Bracton 133.

Sect. 15. It is recited by the ſtatute of 13 Rich. 2. c. 1. "That the commons had grievouſly complained of the outrageous miſchiefs which had happened to the realm, for that treaſons, murders and rapes had been commonly done, and the more becauſe charters of pardon had been eaſily granted in ſuch caſes, and that hereupon the commons had requeſted the king that ſuch charters might not be granted; to which the king had anſwered, That he would ſave his liberty and regality, as his progenitors had done;" and thereupon it is enacted, "That no charter of pardon ſhall from henceforth "be allowed before any juſtice for murder, or for the death

" of a man ſlain by await, aſſault or malice prepenſed, treaſon, " or rape of a woman, unleſs the ſame murder, death of a man " ſlain by await, aſſault, or malice prepenſed, treaſon, or rape " of a woman, be ſpecified in the ſame charter. And if the " charter of the death of a man be alledged before any juſtices, " in which charter it is not ſpecified, That he of whoſe death " any ſuch is arraigned, was murdered or ſlain by await, aſſault, " or malice prepenſed, the ſame juſtices ſhall enquire by a " good inqueſt, of the *viſne* where the dead was ſlain, if " he were murdered or ſlain by await, aſſault, or malice pre- " penſed; and if they find that he was murdered, or ſlain by " await, aſſault, or malice prepenſed, the charter ſhall be diſ- " allowed, and further it ſhall be done as the law allow- " eth."

Sect. 16. Alſo the ſaid ſtatute required, That the name of him who ſued for ſuch a charter ſhould be endorſed upon the bill under a great penalty, &c. But to this, and all other matters, except only what is contained in the precedent ſection, it is repealed by 16 Rich. 2. c. 6.

Sect. 17. It ſo fully appears from the expreſs words of 13 Rich. 2. That the king's pardon of murder, rape, or treaſon, cannot be good, without a clauſe of *non obſtante*, unleſs the crime be ſpecified in the pardon, that I do not (*a*) know that it hath ever been diſputed. But it hath been often formerly (*b*) adjudged, That a murder might be well pardoned under the general deſcription of a felonious killing, if the charter had the clauſe of *non obſtante* of this ſtatute. Which conſtruction ſeems in a great meaſure to evacuate ſo excellent a law, by barely changing the form of the charter. But it ſeems difficult to give a good reaſon why this ſtatute ſhould ſo eaſily be evaded, which was made for the prevention of ſuch great miſchiefs, and no ways tends to aboliſh the king's prerogative, but only to put ſuch a reſtraint upon the abuſe of it, which every one muſt own to be reaſonable. But if ſuch opinions were founded on the king's power of diſpenſing with ſtatutes, they ſeem to have been of (*c*) little force ſince the ſtatute of 1 Will. & Mary, ſeſſ. 2. c. 2. by which it is declared and enacted, " That " from and after that ſeſſion, no diſpenſation by *non obſtante* " of or to any ſtatute, or any part thereof, ſhall be allowed, " &c."

(*a*) Vide B. Chart. of Par. 10. Crompton 115. Keilway 91. C. Jac. 495. March 213, 214, &c. 1 Hale 466. 497. Yet in Raſtal 455. there are precedents of pardons of all murders in general, without any non obſtante; and in Dyer 124. pl. 39. there is mention of a pardon of all treaſons, &c. but I ſuppoſe that the particular treaſon was alſo expreſly pardoned; for it appears that the attainder for it was expreſsly mentioned.

(*b*) 2 Keble 363. 574. Shower 283, 284. Skinner 157. 1 Siderfin 366. 3 Modern 37, 38. Kelynge 24, 25. Moor 752. 12 Coke 18. 2 Jones 56. Raſtal 455. The ſame point is admitted and complained of, S. P. C. 132. Summary 250. Vide 3 Inſt. 136. 2 H. 7. 6. 6. March 214. Styles, Rickabee's caſe. (*c*) Shower 283, 284.

Sect. 18. But it ſeems plain, That pardons of manſlaughter, or any other felony, except murder or rape, remain as they were

were at common law, for which I ſhall refer to ſection 8, 9, 10, 11, 12, 13. from whence it follows, that the pardon of the (*a*) felonious killing of J. S. may be well pleaded to an indictment of manſlaughter for killing him. But where ſuch a pardon hath been pleaded to an indictment of manſlaughter by the coroner's inqueſt, the court in prudence hath refuſed (*b*) to allow it till the fact had been found manſlaughter only, by a jury directed by a higher court.

(*a*) 2 Keble 363. 574. Kelynge 24, 25. 2 Jones 56.

(*b*) 2 Keb. 415.

Sect. 19. It hath been (*c*) adjudged, That where a general act of pardon expreſsly pardons all petit treaſons, but excepts murder, it cannot be avoided by indicting one for murder only, without the word *proditorie*, &c. who has been guilty of petit treaſon; for the leſs offence being included, and conſequently drowned in the greater, cannot but be pardoned by a pardon of it; and therefore the exception of murder in ſuch a pardon muſt be conſtrued of ſuch murder only as is ſpecially ſo called, and doth not amount to petit treaſon.

(*c*) Dyer 50. 235. 6 Coke 13. Crompton 115.

Sect. 20. Alſo it hath been (*d*) adjudged, That a general act of pardon of all felonies, &c. except murder, ſhall extend to a *felo de ſe*, for notwithſtanding his offence may in ſtrictneſs be called murder, and conſequently may ſeem naturally enough to come within the exception, yet ſince the general words of an act of parliament are to be expounded according to the common uſe of them, and the offence of *felo de ſe* and murder are generally underſtood as diſtinct offences, and ſuch as are diſtinctly treated by all authors, who when they uſe the word murder as ſignifying a certain ſpecies of offences, always meant by it the murder of another; and farther, ſince there is greater reaſon to except the murder of another out of a pardon, than that of a man's ſelf, becauſe both the law of God and nature ſeem generally to require blood for blood, which can be applied only to the murder of another, the word murder ſhall in ſuch an exception be taken only to ſignify the murder of another.

(*d*) 1 Levinz 8. 120. 1 Siderfin 150. 1 Keb. 66. 548.

Sect. 21. Alſo it hath been (*e*) adjudged, That if a general act of pardon extend to all felonies, offences, injuries, miſdemeanors, and other things done before ſuch a day, it pardons a homicide from a wound given before the day, whereof the party died not till after the day, becauſe the ſtroke which is the cauſe of the death being pardoned, all the effects of it are conſequently pardoned.

(*e*) Plow. 401. 1 Hale 426. Crompton 116. This is made a *Qu.* Dyer 99.

Sect. 22. As to the third particular, *viz.* How far the pardon of one man may diſcharge another: It ſeems to be generally (*f*) agreed, That notwithſtanding all felonies are (*g*) ſeveral, and conſequently a pardon of one man cannot be a direct diſcharge of another, yet in ſome caſes the felony of one man may be ſo far dependant upon that of another, that the

(*f*) Sup. c. 29. ſect. 41. 34 H. 6. 9. 42 Aſſize 16. B. Chart. of Pardon. 33. Corone 122 or 123. F. Charter 23. Dyer 34.

15. (*g*) Cro. Eliz. 30, 31. 22 E. 4. 7. Infra ſect.

pardon of the one will by a neceſſary conſequence enure to the benefit of the other. As where the principal pleaded his (a) pardon, and was allowed it at the common law, (b) before his attainder, or where he pleads and is allowed it at this day before his (c) conviction, in which caſe it ſeems that the acceſſary may by a neceſſary conſequence take benefit of it, becauſe he cannot be arraigned till after the principal is convicted.

(a) F. N. B. 115. 7 H. 4. 16. Sup. c. 29. ſect. 41.
(b) Sup. c. 29. ſect. 41, 42.
(c) Sup. c. 29. ſect. 43.

Sect. 23. It is (d) agreed, That if a man be bound to the king as ſurety for another, for the payment of a certain fine or other debt due to the crown, the pardon of the principal is a diſcharge of the ſurety alſo. But it ſeems to have been (e) holden as a general rule, That where a man is bound a ſurety for another for the performance of a future act, the diſcharge of the principal before the time of the performance will not diſcharge the ſurety, becauſe nothing was due to the king at the time of ſuch diſcharge: But this ſeems extremely nice: neither do the caſes (f) brought for the proof of it ſeem any way to come up to it. For as to the firſt of them, *viz.* that of the king's releaſe of a recognizance for the peace to the principal, before it is forfeited, which ſhall not diſcharge the ſureties; it may be anſwered, that it will (g) not ſo much as diſcharge the principal. And as to the other caſe (h) cited for this purpoſe, *viz.* that of the king's pardoning J. N. the building of ſuch a houſe, for his building whereof J. S. is bound to the king, which ſhall be no diſcharge to J. S.; it may be anſwered, that as this caſe is put, J. N. doth not ſeem to be bound at all, but only J. S. who therefore doth not ſeem to come under the notion of a ſurety but of a principal.

(d) 1 H. 7. 10. F. Pardon 4. B. Chart of Pardon 36.
(e) See the books next above cited.
(f) See the books next above cited.
(g) See Bk. 1. c. 60. ſect. 17.
(h) 1 H. 7. 10.

Sect. 24. As to the fourth particular, *viz.* How far it is neceſſary that the pardon of ſeveral perſons for felony be ſeveral: It ſeems (i) agreed, That the pardon of A. B. and C. of all felonies by them done, without adding, or any of them, is void; becauſe it ſuppoſes them jointly guilty, and extends to no other but joint felonies, whereas all felony is ſeveral (k) in each offender, and cannot be joint. And the year-book of (l) 22 E. 4. goes ſo far as to hold, That the addition of the words, *or any of them*, will not help a pardon beginning with ſuch joint words. But this is (m) ſaid to be miſreported, and contrary to the roll, and ſeems to be agreed (n) not to be law at this day.

(i) 22 E. 4. 7. B. Char. of Par. 51. Dyer 34. S. P. C. 102.
(k) Sup. c. 23.
(l) 22 E. 4. 7.
(m) B. Char. of Pardon 51. Dyer 34. S. P. C. 102.
(n) Dyer 34. Summary 252.

Sect. 25. As to the fifth particular, *viz.* Whether the king's grant of a protection, or of a place of truſt to a traitor or felon, carry with it an implied pardon of his crime. It is generally (o) agreed, That a protection granted to a felon ſhall be ſo far from

(o) S. P. C. 104. Co. L. 130. 7 Ed. 4. 29. Ab. F. Corone 30. 3 Inſt. 230. 240. 2 R. Abr. 323. F. Corone 61. But F. Corone 122. ſeems contrary.

enuring

enuring as a pardon, that it ſhall not ſo much as privilege him from anſwering immediately to an indictment, in the ſame manner as if he had no protection at all. But there is a ſhort (a) note of a caſe in Fitzherbert's abridgement, where one being indicted and found guilty of felony, produced a charter whereby it appeared that the king had hired him to go into Gaſcoign, to the army, whereupon the court allowed the charter. And Sir Edward Coke (b) ſuppoſes that the offence was ſpecially recited in the charter, and that ſuch recital varies this caſe from that of a protection, which muſt be a formed writ, and therefore can have no ſuch recital. But however ſuch a charter may enure as a (c) ſuſpenſion of the proceedings againſt a felon for a time, I do not ſee how it can be collected from this caſe, that it ſhall enure as a pardon of the felony by implication, which ſeems contrary to the rule (d) of law in other caſes, which will not ſuffer a pardon of felony to be carried beyond the expreſs purport of it.

(a) F. Cor. 239. cited. 3 Inſt. 239, 240. S. P. C. 140. 2 Roll 50.

(b) 3 Inſt. 240.

(c) S. P. C. 104. 3 Inſt. 239, 240. 2 Roll 50.

(d) Sup. ſect. 12, &c.

However it was ſolemnly adjudged (e) in Sir Walter Raleigh's caſe, That the king's grant of a military command to a perſon attainted of high treaſon, wherein he called him his true and loyal ſubject, and gave him judicial power over the lives of others, did not pardon the high treaſon, becauſe every pardon of high treaſon requires an expreſs mention of it, if not by the common law, yet at leaſt by the ſtatute of 13 (f) Rich. 2. Beſides, if the offence had been but felony, yet after an attainder it could not have been pardoned without an expreſs mention both of the (g) felony, and alſo of the (h) attainder.

(e) C. Jac. 49. 2 Roll 50. 1 State Trials 187, 188. 877.

(f) Sup. ſect. 15.

(g) Sup. ſect. 8, 9.

(h) Sup. ſect. 8, 9.

Sect. 26. As to the ſixth particular, *viz.* What is required to make a good pardon of offences not capital: It hath been adjudged, That a pardon of all miſpriſions, treſpaſſes, offences and contempts, will pardon a contempt in making a (i) falſe return, &c. and a (k) ſtriking in Weſtminſter-hall, and (l) barratry, and even a (m) *præmunire:* And it hath been laid down as a (n) general rule, That it will pardon any crime which is not capital. But it is ſaid (o) to have been holden, That ſuch a pardon will not extend to ſimony, becauſe it is *malum in ſe*; but this ſeems to be no good reaſon; for barratry, and the injurious ſtriking of another, and generally all offences at common law, are alſo *mala in ſe*; and yet it ſeems clear, that unleſs they be capital, they may be pardoned by ſuch a pardon.

(i) 36 H. 6. 24. 37 H. 6. 21, 22. Ab. F. Chart. 22. Bro. Charter of Par. 25.

(k) 1 Lev. 106. 1 Siderfin 211. 1 Keble 852.

(l) 1 Mod. 102.

(m) Cro. Jac. 3 6. 2 Bulſt. 299.

(n) 1 Mod. 102. Keilway 159. 198. F. Corone 122.

(o) Watſon's clergyman's law, taken notice of. 2 Modern 52.

c. 5. 1 Siderfin 170. 222. the ſame caſe is in Keble 780. but this point is not And the contrary ſeems to be admitted, Cro. Eliz. 685. Moor 916. And is agreed

Sect. 27. It hath been queſtioned (p) whether a general pardon of all treſpaſſes extends to champerty or confederacy.

(p) 7 H. 4. 9.

(a) Finch 234, 235. 19 H. 6. 62. 37 H. 6. 4, 5. 21 H. 7. 11, 12. B. Chart. de Pardon 76. Davis 75. 5 Coke 35. 12 Coke 29, 30.

(b) But chief juſtice Vaughan, in Sorrel's caſe, f. 332, &c. ſeems to find fault with the diſtinction between *malum in ſe et prohibitum*, as not fully anſwering all the caſes concerning diſpenſations.

Sect. 28. As to the ſeventh particular, *viz.* Whether any offence can be pardoned before it is committed: It ſeems agreed (*a*), That the king can by no previous licence, pardon, or diſpenſation whatſoever, make an offence diſpuniſhable which is (*b*) *malum in ſe*, *i. e.* unlawful in itſelf, as being againſt the law of nature, or ſo far againſt the publick good, as to be indictable at common law. For a grant of this kind tending to encourage the doing of evil, which it is the chief end of government to prevent is plainly againſt reaſon and the common good, and therefore void.

(c) 3 H. 7. 15. Ab. F. Grant 37. B. Pat. 51. Cited S. P. C. 102.

(d) Dyer 52. 19 H. 6. 62, 63, 64. Ab. B. Pat. 16.

Yet it ſeems to have been adjudged (*c*), That the king's grant to the biſhop of Saliſbury, and his ſucceſſors, having the cuſtody of a priſon, that they ſhall be quit from all eſcapes, &c. having been allowed in eyre, ſhall be a good diſcharge from any fine for a negligent eſcape out of ſuch priſon. And yet it is admitted that ſuch a grant is no diſcharge of a voluntary eſcape; but it is ſaid, that it ſhall diſcharge a negligent one, becauſe it is puniſhable only by pecuniary penalty; and it is a general rule, That the king may diſcharge a (*d*) poſſibility of an intereſt before it happens; as where the tenants of his manor are to be amerced for a default in reſpect of their tenures, which the king may pardon beforehand. But if it be a good rule, that the king cannot pardon an offence which is *malum in ſe* before it happens, and the negligent keeping of a priſon be ſuch an offence, which I think cannot be denied; and farther if it be alſo a good rule, that where the king's grant is plainly againſt the common good, as a grant of this kind ſeems to be, as tending to make a gaoler leſs diligent in his duty, by taking off the legal puniſhment of his negligence, I do not well ſee how this caſe can be maintained. For it ſeems by no means to follow, that becauſe the king can diſcharge his right to an amercement before it happens, for a default of his tenants in a matter relating barely to the revenue of the crown, which it is admitted that in the like caſe any other lord may do as well; therefore he can diſcharge a pecuniary penalty for an offence of a publick nature before it happens. Neither doth it ſeem that a negligent eſcape is only puniſhable by a pecuniary penalty; for in ſome (*e*) books it is ſaid to be finable, by which it is implied that the offender may be impriſoned. Beſides it ſeems (*f*) agreed, That many negligent eſcapes will forfeit the office of keeping a gaol, and therefore it is plain that a pecuniary penalty cannot be ſaid to be their only puniſhment. However, this is the only caſe I (*g*) meet with which looks like an exception out of the general

(e) Sup. 19. f. 31.

(f) Sup. c. 19. ſect. 29, 30.

(g) But chief juſtice Vaughan, in Sorrel's caſe, 335, 336. ſeems to argue to the contrary.

ral rule, that the king cannot pardon an offence that is *malum in ſe* before it happens.

Sect. 29. But where *(a)* a thing, which is lawful in its own nature, is made unlawful by the prohibition of an act of parliament only, as the carrying *(b)* bell-metal or *(c)* beer, &c. out of the realm, importing *(d)* certain merchandiſes in foreign ſhips, &c. ſelling *(e)* wines beyond a certain price, *(f)* exporting wool to another place than Calais, ſelling *(g)* wines without a licence, multiplying *(h)* gold or ſilver, *(i)* coining money of a baſe alloy, and *(k)* other matters of the like nature, it ſeems to have been formerly taken *(l)* for granted, that generally the king might diſpenſe with it as to a *(m)* particular time, or place, or perſon, or even a *(n)* corporation aggregate, &c. ſo far as the publick was concerned in it. Yet where ſuch diſpenſation could not but be attended with a great inconvenience, as the introducing a monopoly, or fruſtrating the end for which the law was made, as the licenſing *(o)* a particular perſon to import foreign cards or wines prohibited by parliament, and *(p) a fortiori*, if it tended to ſuſpend the whole ſtatute in general, it was commonly agreed to be void.

(a) Davis 75, 76. Finch 234, 235. (b) Dyer 52. (c) Dyer 92. (d) Dyer 54. (e) Dyer 270. (f) 2 Rich. 2. 11, 12. 11 H. 7. 11, 12. 37 H. 6. 4. 2 H. 7. 6. B. Chart. de Pardon 24. 76. Parliament 98. 13 H. 7. 8. F. Chart. 21. F. Grant 33. (g) Vaugh. 330. 1 Levinz 217. 1 Siderfin 6, 7. (h) Vaugh. 344. (i) 11 H. 7. 11. Vaughan 344. (k) 2 Rich. 3. 12.

2 H. 7. 6. 12 H. 3. by Martyn. Dyer 224, 225. 303. *(l)* See the books above cited to the other parts of this ſection, and 3 State Trials 799 to 810. and 845. *(m)* 11 Coke 88. 7 Coke 36. 1 Levinz 218. Co. Litt. 99. Vide 3 Levinz 389. *(n)* Vaughan 352. 1 Levinz 217. *(o)* Vaughan 344. 11 Coke 88. See the books above cited. *(p)* 3 State Trials 793. 796. 808, 809.

Alſo wherever an act of parliament gives a particular intereſt, or right of action, to the party *(q)* grieved by the breach of it, as the ſtatutes of *(r)* mortmain, which give an entry to the next immediate lord for an alienation to a corporation, the *(s)* ſtatutes againſt maintenance, forcible entries, carrying diſtreſſes out of the hundred, *(t)* ſuffering one in execution to eſcape, &c. which give an action to the party grieved by the offence prohibited; it ſeems to have been always agreed, That no charter by the king can be of any force to bar the right of the party grounded upon ſuch ſtatute, becauſe it is a ſettled rule, that the king cannot prejudice the intereſt of the party.

(q) Sup. c. 26. ſect. 64. 37 H. 6. 4. 2 Rich. 3. 12. Vaughan 342, 343. Infra, ſect. 34. (r) 11 Coke 98, 99. Vide Keilway 134. But now by 7 & 8 W. 3. 37. ſuch licence may be granted by the king alone.

(s) Vaughan 342, 343. (t) Dyer 162. 297.

Alſo where a ſtatute is expreſs, that the king's charter againſt the purport of it, whether with or without a clauſe of *non obſtante*, ſhall be void; it is ſaid by Sir *(u)* Edward Coke, and no clauſe of *non obſtante* can diſpenſe with it, unleſs it tend to reſtrain ſome prerogative, ſolely and inſeparably incident to the perſon of the king; as the right of pardoning, or of commanding the ſervice of the ſubject, for the publick weal, which being

(u) 12 Co. 18, 19.

being, (a) as he ſeems to argue, founded on the law of nature, are ſo far inſeparable from the king, that by a clauſe of *non obſtante* he may diſpenſe with any ſtatute whatſoever, which tends to deprive him of them. And on this ground the reſolution of the judges in the (b) year-book of H. 7. is ſaid to be maintainable, whereby it was adjudged, without any difficulty, That where the ſtatute of 23 Hen. 6. c. 8. expreſsly enacts, That patents to ſheriffs to continue longer than a year ſhall be void, and the party diſabled to bear the office of ſheriff notwithſtanding any clauſe of *non obſtante*, yet the king by the clauſe of *non obſtante* might make a good patent of ſuch office for life. Which is in effect to ſay, that let there be never ſo good reaſons for the making a new law for the reſtraint of the prerogative in any particular relating to the ſervice of the ſubject, yet it is not in the power of the legiſlature to make ſuch a law; and yet no one will deny that wherever the law of nature leaves a matter indifferent, there the law of man ought to prevail. Neither is there any pretence to ſay, that the king has a right by the law of nature to appoint ſheriffs, ſince it is plain that before the (c) ſtatute of 9 Edw. 2. the freeholders choſe them, unleſs they had a fee in their office. And what reaſon can there be, that the ſtatute-law, which gives the crown the power of making ſheriffs, may not alſo qualify that power as ſhall be thought convenient? But it is obſervable that the reſolution above mentioned does not go upon any particular reaſon which may diſtinguiſh the caſe of a ſheriff from any other caſe, but only on the king's power by *non obſtante* to diſpenſe with the ſtatutes concerning the tranſporting wool, the pardoning of murder, and the expreſſing the quantities of the land granted by the king's patents, and ſuch like; which becauſe they may be diſpenſed with by clauſes of *non obſtante*, it is taken for granted, that the ſtatute of 23 Hen. 6. might as well be diſpenſed with by them; as if it were a plain conſequence, that becauſe ſtatutes which ſay nothing concerning the clauſe of *non obſtante*, may be diſpenſed with by it; therefore the ſtatute which expreſsly provides againſt it, may alſo as well be diſpenſed with by it.

(a) 7 Coke Calvin's caſe, 14.

(b) 2 H. 7. 6. Ab. F. Grant 33. B Pat. 102. Vide Finch 234, 235. 13 H. 7. 8. Plowden 502.

(c) 2 Inſt. 558, 559.

Sect. 30. It is (d) ſaid, That the king may diſpenſe with the ſtatutes of mortmain, without any clauſe of *non obſtante*; and this ſeems very reaſonable, becauſe thereby he only gives up that right of entry which thoſe ſtatutes give him for the forfeiture, which every meſne lord might alſo do as well ſo far as he had a right by thoſe ſtatutes. Alſo it ſeems to be holden (e) by ſome books, That the clauſe of *non obſtante* was only requiſite in reſpect of ſuch ſtatutes which expreſsly ſaid it ſhould be void. But the far greater number of (f) authorities ſeem to be to the contrary.

(d) Co. Litt. 99. Plowden 502. Dyer 269. where the grant is made ex certa ſcientia con. by Dyer in Plowden 502. Vide Raſt. 302. F. Grant 36. Ent. conge. 28. Plowden 334.

(e) Finch 234, 235. Plowden 502. Dyer 52. 54 29.

(f) 2 H. 7. 6. Ab. B. Pat. 109. F. Chart. 33. 2 Rich. 3. 12. 43 Aſſiſe 19. 270. 303. 352.

Sect.

Sect. 31. But the diſpenſing power was carried ſo very high in a late reign, and found to be of ſuch dangerous conſequence, as to make the execution of the moſt neceſſary laws in effect precarious, and merely dependent on the pleaſure of the prince. And it ſeeming highly incongruous that the king ſhould have a kind of abſolute and unlimited power in diſpenſing with laws wherein the church and ſtate have the higheſt intereſt, when at the ſame time he has no power at all to diſpenſe with any law which veſts the leaſt right or intereſt in a private ſubject, it was found by experience neceſſary to declare and enact by 1 Will. & Mary, ſeſſ. 2. c. 2. "That no diſpenſation by *non* "*obſtante* of or to any ſtatute, or any part thereof, be allowed, "but that the ſame ſhall be held void and of none effect, ex- "cept a diſpenſation be allowed in ſuch ſtatute. But it is "provided that no charter, grant, or pardon, granted before "23 October 1689, ſhall be any way impeached or invali- "dated by that act, but that the ſame ſhall be and remain "of the ſame force and effect in law, and no other, as if the "ſaid act had never been made."

Sect. 32. It hath been always (*a*) agreed, That the king never could diſpenſe with a ſtatute before it was made.

(*a*) Finch 235. 1 Siderfin 6. Dyer 52.

Sect. 33. As to the eighth particular, Whether there be any offence which cannot be pardoned after it is committed: I take it to be a ſettled rule (*b*), That the king may pardon any offence whatever, whether againſt the common or ſtatute law, ſo far as the publick is concerned in it, after it is over, and conſequently (*c*) may prevent any popular action on a penal ſtatute by a pardon of the offence before any ſuit commenced by an informer. But while a publick nuſance continues unreformed, it ſeems (*d*) agreed, That the king cannot wholly pardon it, becauſe ſuch pardon would take away the only means of compelling a redreſs of it. But it hath been (*e*) holden by ſome, That a pardon of ſuch offence will ſave the party from any fine for the time precedent to the pardon.

(*b*) See the books cited to the other parts of this and the next ſection.
(*c*) Sup. c. 26. ſect. 64. Infra ſect. 34.
(*d*) 3 Inſt. 237. Vaughan 333. 37 H. 6. 4. Plowden 487. Vide F. Aſſize 445. Keilway 134. 22 Coke 29. 30. 1 State Trials 578.
(*e*) 12 Coke 30.

Sect. 34. As to the ninth particular, *viz.* How far a pardon may be of force againſt the private intereſt of the ſubject: I take it to be a (*f*) ſettled rule, That the king cannot by any diſpenſation, releaſe, pardon or grant whatſoever, bar any right, whether of entry, or action, or any legal intereſt, benefit or advantage whatſoever before veſted in the ſubject; and upon this ground it ſeems clear, That the king can no way bar any action on a ſtatute by the party (*g*) grieved; nor even a popular (*h*) action by a common informer, if commenced before

(*f*) Sup. ſ. 29. 8 H. 6. 19. Ab F. Grant 4. 37 H. 6. 4. Ab. B. Char. de Pardon 24. 2 Rich. 3. 12. Plowden 487. F. Aſſize 445. C. Car. 199. 2 R. Abr. 178, 304. C. Jac. 259.
(*g*) Sup. c. 26. ſect. 64. 2 Rich. 3. 12. Keilway 134. F. Char. 21.
(*h*) Sup. c. 26. ſect. 64. 37 H. 6. 4. Ab. F. Grant 22. B. Chart. de Pardon 24. 2 Rich. 3. 12. 5 Ed. 4 3.

his pardon or releaſe; and that he cannot diſcharge a recognizance (*a*) for the peace before it is forfeited.

(*a*) 37 H. 6. 4. F. Chart. 21. Pardon 4, 5. Brd. Charter de Pardon 24. Recogniſ. 22. 11 H. 7. 12. 12 Coke 29, 30. B. 1. c. 60. ſect. 17.

Sect. 35. And upon the ſame ground, it ſeems to be clearly agreed, That as the releaſe of a perſon robbed, or of the wife or heir of a perſon killed, will not (*b*) bar an indictment, or a demand of execution at the ſuit of the king; ſo neither will a pardon (*c*) by the king be any bar to an appeal, except only where it is carried on at the ſuit of the king, after a nonſuit of the party, in which caſe it may be barred by a (*d*) pardon in the ſame manner as an indictment. But if one who appears to be attainted of felony, whether by outlawry, or otherwiſe, on an appeal carried on at the ſuit of the party, get a pardon from the king, he (*e*) muſt ſue a (*f*) *ſcire facias* againſt the appellant before the pardon ſhall be allowed, unleſs the appellant appear (*g*) *gratis*, and confeſs that he will ſue no farther, &c.

(*b*) 8 H. 4. 22. Ab. F. C. 26. B. Char. de Pardon 13. Appeal 27. 33. 41. 128. 11 H. 4. 16.
(*c*) See the authorities cited to the other parts of this ſection, and B. Appeal 150. 3 Inſt. 237.
(*d*) Sup. c. 25. ſect. 13. B. Appeal 33.
(*e*) Dyer 34. S. P. C. 104. Summary 251. 11 H. 4. 11. 11 H. 4. 48. 9 H. 7. 5. 2 Rich. 3. 8. 9 H. 4. 1. 13 H. 4. 6. 38 H. 6. 13. and the authorities cited to the other parts of this ſection. (*f*) That the appellee may have ſuch a ſcire facias of courſe on ſuch a pardon, without producing a releaſe or other deed from the appellant. 9 H. 7. 5. Ab. F. Scire facias 56. B. Scire facias 166. 2 Rich. 3. 8. S. P. C. 104. con. 11 H. 4. 16. Ab. B. Scire facias 73. That there was no need of any ſcire facias where an appeal was abated by the king's death, and the year and day were paſſed. 2 H. 7. 10. B. Chart. of Pardon 69. (*g*) 11 H. 4. 16. F. Corone 87. Same caſe B. confeſſion 12 and Jour. in court 21. But it is made a wonder that a ſcire facias was not awarded.

Sect. 36. If the appellant appear on the *ſcire facias*, it is (*h*) certain that he may pray execution notwithſtanding the pardon: but if the ſheriff have returned a (*i*) *ſcire facias*, or two (*k*) *nihils*, and the appellant appear not (*l*) upon demand, the appellee ſhall be diſcharged. Yet if the appeal be of death, and the ſheriff return the appellant dead, there are ſome (*m*) authorities that a *ſcire facias* ought to go againſt the next heir to the deceaſed, but the greater number of (*n*) authorities ſeem to be to the contrary.

(*h*) S. P. C. 104. Summary 251. 11 H. 4. 1.
(*i*) S. P. C. 104. Summary 251.
(*k*) Finch 477. Vide Dyer 168. 172.
(*l*) 2 Rich. 3. 8. 9 H. 4. 1. Ab. F. Sc. fa. 63.
B. Ch. de Par. 14. (*m*) 11 H. 4. 11. 11 H. 4. 48. 19 H. 4. 6. Ab. F. Corone 266. F. Corone 85. Sup. c. 23. ſ. 38 & 41. (*n*) 9 H. 7. 5. Ab. F. Sc. fa. 56. B. Sc. fa. 166. F. Appeal 88. 144. 38 H. 6. 13. B. Appeal 141. C. de Par. 28. Sup. c. 23. ſ. 38. 41.

Sect. 37. There is ſaid (*o*) to be no need of any *ſcire facias* on ſuch a pardon againſt the lords mediate or immediate, becauſe the pardon no way tends to reverſe the attainder, and conſequently can do no hurt to their title of eſcheat, &c. grounded on the attainder, but rather affirms it.

(*o*) Dyer 34.

Sect. 38. If ſeveral perſons be outlawed in an appeal, and one of them be pardoned, and get his pardon allowed on the non-appearance of the appellant on a *ſcire facias*, &c. and afterwards another of them get his pardon; it ſeems, That he ſhall take

take no (a) advantage of the appellant's default on the firſt *ſcire facias*, but muſt ſue out his *ſcire facias*, &c. in the ſame manner as if there had been no ſuch default.

(a) 1 H. 4. 1. F. Sc. fa. 63. But B. C. de Par. 14. in the

Ab. of the ſame caſe holds the contrary.

Sect. 39. It is holden by great (b) authorities, That if a perſon be convicted of manſlaughter upon an appeal of death, the king may pardon the burning in the hand; for which this reaſon is given by Sir Edward Coke, That it is no part of the judgment at the ſuit of the party, but a collateral and exemplary (c) puniſhment inflicted by the ſtatute of 4 Hen. 7. c. 13. But this is made a *quære* by (d) others, and the principal caſe wherein it is ſaid to have been reſolved, is very differently (e) reported, and was never adjudged (f): And the ground laid down that the king may pardon it becauſe it is no part of the judgment at the ſuit of the party, by which it ſeems admitted, that if it were part of the judgment, the law would be otherwiſe, ſeems rather to make againſt it than for it; for there are (g) precedents of expreſs judgments, *quod cautariſetur in manu ſua læva.* Alſo it is (h) admitted, that where a defendant is to have a certain impriſonment, &c. at the ſuit of the party upon a ſtatute, the king cannot diſpenſe with it, except in ſome ſpecial (i) caſes, wherein it may be reaſonably intended that ſuch impriſonment was given by the ſtatute, by way of ſatisfaction to the publick juſtice only, in which caſe it ſeems agreed, (k) That the king may diſpenſe with it, as it is ſaid that he may, with finding of ſureties by one convict on the ſtatute againſt treſpaſſes in parks. But it ſeems doubtful, whether the ſtatute of 4 Hen. 7. c. 13. which appoints the burning of the hand, can well admit of ſuch a conſtruction; for the words are, "whereas upon truſt of the privilege of the church, "diverſe have been more bold to commit murder, &c. becauſe "they have been admitted to their clergy as oft as they have "offended; for avoiding of ſuch preſumptuous boldneſs," it is enacted, "That every perſon not being in orders, who hath "once been admitted to his clergy, be not again admitted "thereto, and that every ſuch perſon convict, &c. ſhall be "marked, &c." from whence it ſeems plain, That the ſtatute expreſsly intends ſuch marking as a diſcouragement of the offence; and it ſeems difficult to give a reaſon why it ſhould be conſtrued to mean it only as a collateral and not as a direct puniſhment. Neither doth it ſeem a plain reaſon, That becauſe the ſtatute intended it an exemplary puniſhment, the king may diſpenſe with it; for ſurely the execution of an appellee attainted of murder, and the perpetual impriſonment of a clerk delivered to the ordinary upon a conviction on an appeal, who could not make his purgation, were alſo exemplary puniſhments; and yet it is generally (l) agreed, That the king never could diſpenſe with them. And therefore upon the whole

(b) Sum. 252. 3 Inſt. 237. Hobart 294. cited 4 St. Tr. 382.

(c) But my Lord Hobart f. 294. ſays, That it is no part of the judgment, nor ſo much as in the nature of the puniſhment, but only a mark to notify that the party may have his clergy but once.

(d) Raym. 369, 370. Dyer 202. 261. C. Eliz. 464.

(e) Bigging's Caſe, 5 Coke 50. C. Eliz. 632. 682, Moor 571.

(f) Raym. 371.

(g) Raſtal 1. 56. Yet it is omitted, 55.

(h) 5 Coke 50. Dyer 261. 313.

(i) 3 Inſt. 171. 237. 2 Inſt. 200. 439.

(k) Dyer 238. 3 Inſt. 171. 2 Inſt. 200.

(l) Sup. f. 35. 5 Coke 50. Dyer 261. Yet 'tis made a quære, Dyer 200. whether the king could not pardon ſuch impriſonment.

whole this ſeems to be a point that deſerves to be farther conſidered.

Sect. 40. But granting that the king may pardon the burning the hand in an appeal, it ſeems a very reaſonable *(a)* conſequence that the party ſhall immediately be delivered by force of the ſtatute of 18 Eliz. c. 7. which ſays, That after burning he ſhall be delivered, which ought to have this conſtruction, That he ſhall be delivered after burning, where he is to be burned.

(a) 5 Coke 50. Vide c. 33. f. 131. C. Car. 596, 597. Hobart 294.

Sect. 41. It ſeems to have been always agreed, *(b)* That the king's pardon will diſcharge any ſuit in the ſpiritual court *ex officio:* Alſo it ſeems to be (*c*) ſettled at this day, That it will diſcharge any ſuit in ſuch court *ad inſtantiam partis pro reformatione morum*, or *ſalute animæ*, as for defamation, or laying violent hands on a clerk, and ſuch like; for ſuch ſuits, like thoſe in the ſtar-chamber, are in truth the ſuits of the king, though proſecuted by the party. Alſo it ſeems to be (*d*) agreed, That if the time to which ſuch pardon hath relation, be prior to the award of coſts to the party, it ſhall diſcharge them: And it ſeems to be the general *(e)* tenour of the books, that though it be ſubſequent to the award of the coſts, yet if it be prior to the taxation of them it ſhall diſcharge them; becauſe nothing appears in certain to be due for coſts before they are taxed. (*f*) Alſo if a perſon be impriſoned on a writ of *excommunicato capiendo* for his contumacy in not paying coſts, and afterwards the king pardon all contempts, it ſeems, that he ſhall be diſcharged of ſuch impriſonment without any *ſcire facias* againſt the party, becauſe it is grounded on the contempt, which is wholly pardoned; and the party muſt begin anew to compel a payment of the coſts.

(b) 5 Coke 51. C. Eliz. 684. C. Car. 113, 114.

(c) 5 Coke 51. Winch. 125. C. Jac. 335. Hobart 81. Con. C. Eliz. 684.

(d) C. Jac. 335. C. Car. 9. Vide C. Car. 667, 668.

(e) 2 R. Abr. 304. 299. 5 Coke 51. Latch 190. Noy 85. 91. C. Car. 46, 47. Vide C. Car. 9, wherein it is holden, that an award of coſts, though they have not been taxed, ſhall not be avoided by a pardon; but the other books ſeem contrary. 259. And 'tis made a quære C. Jac. 212. whether an excommunication canbe diſcharged by the king's pardon.

(*f*) 1 Jones 227. 2 Roll 178. Con. adjudged C. Jac. 8 Co. 68, 69.

Sect. 42. But it ſeems agreed, (*g*) That a pardon ſhall not diſcharge a ſuit in the ſpiritual court, any more than a temporal, for a matter of intereſt or property in the plaintiff, as for tithes, legacies, matrimonial contracts and ſuch like. Alſo it is (*h*) agreed, That after coſts are taxed in a ſuit in ſuch court at the proſecution of the party, whether for a matter of private intereſt, or *pro reformatione morum*, or *pro ſalutæ animæ*, as for defamation, &c. they ſhall not be diſcharged by a ſubſequent pardon.

(g) 5 Coke 51.

(h) Latch 190. 5 Coke 51. C. Car. 46, 47. and the authorities cited to the precedent ſect.

Sect. 43. If the offence be pardoned after coſts are taxed, and then the defendant appeal to a ſuperior court, which gives new coſts, whether upon the affirmance or reverſal of the firſt ſentence, they ſhall (*i*) not be avoided by reaſon of the pardon, becauſe they are not given in reſpect of the offence, but of the award of the former coſts, which being taxed before the pardon, are not avoided by it, and therefore the appeal was proper

(i) C. Car. 46, 47. Winch. 125.

proper for determining whether they were well given or not. But if the offence for which the ſuit was in the ſpiritual court be pardoned, hanging an appeal, and ſuch pardon relate to a time precedent to the award of the coſts, and after ſuch pardon the appellant deſert his appeal, and the ſpiritual court award coſts againſt him in reſpect of ſuch deſertion, it ſeems, (a) That he may have a prohibition, becauſe the pardon having diſcharged the coſts of the firſt ſuit as well as the offence, made the appeal to be to no purpoſe. It is (b) ſaid, That coſts taxed to the party grieved for a contempt in a court of equity are not diſcharged by a general pardon of all contempts, becauſe it is the common courſe of a court of equity to award ſuch coſts at the pleaſure of the judge. But it hath been queſtioned whether coſts taxed by the prothonotary upon an attachment to the party grieved be not diſcharged by a general pardon of all contempts.

(a) 2 R. Abr. 304. Noy 85. Latch 155.
(b) 2 Ventris 194.

Sect. 44. It was inſiſted (c) by the houſe of commons in the earl of Danby's caſe, and it is enacted by 12 & 13 Will. 3. c. 2. "That no pardon under the great ſeal be pleaded "to an impeachment by the commons in parliament."

(c) 2 St. Tr. 199. 723. Com. Jour. 28 April 1679. & 5 May 1679. 4 Comm. 392. 3 Inſt. 238.

But after the impeachment is ſolemnly heard and determined, it is not underſtood that the king's royal grace is farther reſtrained or abridged; for after the impeachment and attainder of the ſix rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon. 4 Comm. 392, 393.

Sect. 45. As to the tenth particular, *viz.* Whether a pardon may be conditional: It ſeems agreed, (d) That the king may extend his mercy on what terms he pleaſes, and conſequently may annex to his pardon any condition that he thinks fit, whether precedent or ſubſequent, on the performance whereof the validity of the pardon will depend.

(d) Moor 460. Co. Litt. 274.

Sect. 46. As to the eleventh particular, *viz.* Where a pardon is void in reſpect of a wrong recital: It being a general rule, (e) That wherever the king appears to have been deceived, his grant is void, I take it be agreed, That if it appears from the recital of a pardon, that the king was miſinformed either as to the (f) nature of the caſe, or the proceedings thereupon, the pardon is void; as where the (g) king pardons a man for felony whereof he ſtands indicted, or indicted and attainted, and in truth he never was indicted, &c.

(e) Yelverton 43. 47, 48. C. Jac. 18. 34. 2 R. Ab. 188. Dyer 352. C. Jac. 548.
(f) Raym. 13. 1 Siderfin 41.
(g) 3 Inſt. 238. Summ. 251.

Sect. 47. How a pardon of felony ſhall be avoided by ſtatute in reſpect of a wrong ſuggeſtion, hath been already ſhewn, ſection the tenth.

Sect. 48. As to the ſecond general point, *viz.* What is the effect of a pardon: I take it to be ſettled at this day, that the pardon

pardon of a treaſon or felony even after a conviction or attainder, does ſo far clear the party from the infamy and all other (*a*) conſequences of his crime, that he may not only have an action (*b*) for a ſcandal in calling him traitor or felon after the time of the pardon, but may alſo be a good witneſs notwithſtanding the (*c*) attainder or conviction; becauſe the pardon makes (*d*) him as it were a new man, and gives him a new capacity and credit.

(*a*) Vide 1 Keb. 940. F. Corone 154. 281. 1 Aſſize 3. C. Car. 55. 1 Siderfin 222. 5 Coke 49.

(*b*) Hobart 67. 81, 82. Moor 863. 872. 1 R. Ab. 87. Owen 150. 1 Brownlow 10. Raymond 23. Con. Cro. Jac. 622.

(*c*) 2 St. Trials 269. 3 Stat. Trials 552, 553. 585. 596. 610. 4 Stat. Trials 119. 5 Modern 15, 16. Raymond 369, 370. 2 Hale 278. But the contrary is held Bulſtrode 154. and 2 Stat. Trials 520, to 524. Raymond 379, 380.

(*d*) Skinner 578, 579. 4 Stat. Trials 119.

Sect. 49. And it hath been (*e*) admitted, That the king's pardon of the burning of the hand on a conviction of manſlaughter hath the ſame effect as to this purpoſe, as the burning would have had, which is (*f*) agreed to reſtore the party to his credit.

(*e*) 4 Stat. Tr. 379 to 386.

(*f*) Sup. c. 33. ſect. 129.

Sect. 50. But it hath been adjudged, (*g*) That a pardon is of no manner of force, as to this purpoſe, till it have paſſed the great ſeal.

(g) By the lords in the earl of Warwick's trial 4 Stat. Trials 379 to 386.

Sect. 51. Alſo it is ſaid, (*h*) That the pardon of a felony will not make an arreſt for it, by one who did not know of the pardon, unlawful, becauſe ſuch arreſts being for the publick good are to be favoured; and therefore ſhall not be actionable by reaſon of ſuch a pardon, as ſcandalous words ſhall be, becauſe they deſerve no favour.

(*h*) Hobart 67. 82.

† And it is enacted by 4 Geo. 1. c. 11. ſ. 2. "That where "any offender ſhall be tranſported, and ſhall have ſerved his "term according to the order of the court, ſuch ſervice ſhall "have *the effect of a pardon* to all intents and purpoſes, as for "the crime for which he was ſo tranſported, and ſhall have "ſo ſerved."

Sect. 52. I do not (*i*) find it clearly ſettled, Whether the pardon of a conviction of perjury make the party a good witneſs.

(*i*) Stat. Trials 520 to 524. 1 Keble 780. 5 Mod. 15, 16. Raymond 369, 370. 379, 380. Kelynge 37, 38. 1 Siderfin 52. 221, 222. 3 Levinz 426. It is ſaid 1 Ventris 349. that it does not; becauſe it would be injurious to ſociety to ſubject them to the teſtimony of ſo dangerous an offender.

Sect. 53. If a man be convicted, or deprived, or otherwiſe puniſhed for an offence during a ſeſſion of parliament, and at the ſame ſeſſion an act paſſeth which pardons the offence: It ſeems agreed, (*k*) That the conviction or deprivation, &c. are *ipſo facto* avoided, becauſe the act taking effect from the firſt day of the ſeſſion, it now appears that the offence was pardoned at the time of the conviction, &c. Alſo it hath been adjudged, That where an act of parliament expreſsly pardons ſuch and ſuch crimes from a certain day before the ſeſſion, it thereby avoids all (*l*) convictions and (*m*) deprivations, and (*n*) awards

(*k*) C. Eliz. 41. Latch 22.

(*l*) 6 Coke 14. C. Car. 67, 68. 114, 115. Vide Latch 22. 141. 8 H. 5. 2. 36 H. 6. 1. 2. F. Fines 21. Pardon 6.

(*m*) 6 Co. 13, 14. But this caſe has often been denied to be law.

1 Keble 780. 1 Siderfin 164. 222. (*n*) Latch 190. Noy 91. Cro. Car. 47.

awards of coſts and amerciaments, (a) &c. for ſuch crimes, whether ſuch convictions, &c. were before or after the ſeſſions, becauſe it appears to be the intent of the parliament that ſuch crimes ſhall no way be puniſhed, which cannot take effect if ſuch convictions, &c. continue in force.

(a) 36 H. 6. 24; 25. 37 H. 6. 21. F. Chart. 22. 5 Coke 49. Co. Litt. 126. C. Jac. 64.

Moor 394. Cro. Eliz. 768. 778. Whether an excommunication be pardoned by a general pardon of all contempts, &c. Sup. ſect. 41.

Sect. 54. But it ſeems to be a ſettled (b) rule, That no pardon by the king, without expreſs words of reſtitution, ſhall diveſt, either from the king or (c) ſubject, an intereſt either in lands or goods, veſted in them, by an attainder or conviction preceed. Yet it ſeems (d) agreed, That a pardon prior to a conviction, ſhall prevent any forfeiture either of lands or goods.

(b) 1 Levinz 8. 120. 2 Modern 53. 1 Keble 695. 757. 817. 921, 922. 3 Modern 101. 241, 242. 1 Saunders 362. 363. 1 Siderfin 167, 168. 264. Theloal l. 1. c. 85. ſect. 8. (c) Dyer 34. Finch 467. Theloal l. 1. c. 15. ſect. 3. (d) 5 Coke 110. Owen 87. 4 Stat. Trials 119. 2 Modern 53.

Sect. 55. It hath been adjudged, (e) That a clauſe of releaſe of all judgments and executions in a general pardon, extends as well to debts due to the king by aſſignment or forfeiture, as to thoſe originally due to him, and that it doth not reſtore them to the perſon who aſſigned or forfeited them, but extinguiſhes them in the hands of the debtor.

(e) 1 Lev. 120. 1 Keble 695. 757. 817. 921, 922. 1 Saunders 362. 1 Siderfin 167. 264.

Sect. 56. It ſeems agreed, That notwithſtanding the king's pardon to a ſimoniſt coming into church contrary to the purport of 31 Eliz. c. 6. or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5 & 6 Edw. 6. c. 16. may ſave (f) ſuch clerk or officer from any criminal proſecution in reſpect of the corrupt bargain; yet ſhall it not (g) enable the clerk to hold the church, nor the (h) officer to retain the office, becauſe they are abſolutely diſabled by ſtatute.

(f) Sup. ſ. 26. 33. Owen 87, 88. (g) Het. 104. Co. Lit. 120. Watſon's Clergyman's Law c. 5. (h) 3 Inſt. 154. 3 Bulſt. 90, 91. See Bk. 1. c. 67. ſ. 5. 1 Keble 781.

Sect. 57. Alſo it ſeems (i) agreed, That the king's pardon cannot ſalve the corruption of blood by attainder of treaſon or felony.

(i) Co. Litt. 8. a. 391. 3 Inſt. 233. 240, 241. 1 Hale 358.

Sect. 58. As to the third general point, *viz.* Whether a pardon may be waived: I take it to be (k) agreed, That a general pardon by parliament cannot be waived, becauſe no one by his admittance can give a court a power to proceed againſt him, when it appears there is no law to puniſh him.

(k) See Bk. 1. c. 64. ſ. 63. S. P. C. 173. 169. 103. B. Notice 1. 26 H. 8. 7. 11 H. 4. 41. Crompton 115.

B. Corone 30. 200. Indict. 2. F. Corone 89.

Sect. 59. But it is (l) certain, That a man may waive the benefit of a pardon under the great ſeal; as where one who has

(l) S. P. C. 173. 169. B. Corone 200.

Kelynge 24. Jenk. Cent. 129. Hale 252. Foſter 40. Wilſon 150. and vide the caſe of Rex v. Haines, Wilſon 214. where the benefit of an act of grace was allowed after the general iſſue pleaded.

ſuch

ſuch a pardon doth not plead it, but takes the general iſſue, after which he ſhall not reſort to the pardon.

And now I am to ſhew in what manner a pardon is to be taken advantage of, which I ſhall conſider,—Firſt, In relation to a general pardon by parliament.—Secondly, In relation to a particular pardon under the great ſeal.

Sect. 60. And firſt, as to the pleading of a general pardon by parliament: It ſeems (*a*) agreed, That if any perſons are excepted out of it, the court is not bound, and ſome (*b*) have holden that it hath no power in diſcretion to give any perſon the benefit of it unleſs it be pleaded. Alſo it ſeems generally agreed, That if the body of ſuch a pardon either excepts divers particular perſons by name, or excepts all thoſe who come under a general deſcription, as all thoſe who adhered to J. S. &c. no one can demand the benefit of it, without expreſsly ſhewing in the (*c*) firſt caſe that he is not one of the perſons excepted; and in the latter (*d*) caſe, that he is not included in ſuch deſcription. And if he happen to be of the ſame name with one of the perſons excepted by name, it is ſaid that it will not (*e*) be ſufficient for him to aver that he was none of the perſons excepted, without adding that he is a different perſon from ſuch other of the ſame name. Which, how it can be tried, unleſs it appear by ſome additions to the name in the ſtatute, may deſerve to be conſidered. But if the body of a ſtatute be general as to all perſons whatſoever, and afterwards ſome are excepted in the proviſoes, (*f*) perhaps it may be ſufficient to plead ſuch a pardon, without any averment, That he who pleads it is none of the perſons ſo excepted; it being a (*g*) general rule, That where a man is within the general words of the body of a record or deed, which is qualified by ſubſequent proviſoes, it is ſufficient for him to bring his caſe within ſuch general words, and that the exceptions in ſuch proviſoes ought to be ſhewn of the other ſide.

(*a*) Sum 252. 8 E. 4. 7. C. Car. 32. Crompton 115. C. Eliz. 768. 778. 6 Coke 79. Moor 770. Raymond 23. 2 Inſt. 234. 2 Roll 307. C. Eliz. 4. Moor 619.

(*b*) 1 Leon. 300. C. Eliz. 125. Con. Lane 71. Moor 394. Vide 5 Coke 49. C. Car. 32. Yelverton 126.

(*c*) 8 E. 4. 7. S. P. C. 103. F. Pardon 3. B. Plead. 124. Con. 2 Leon. 26.

(*d*) 8 E. 4. 7. S. P. C. 103. F. Pardon 3. Plowden 103. 448. B. Charter 66. 4 H. 7. 8. Dyer 27. 2 St. Tr. 5.

(*e*) 8 E. 4. 7. S. P. C. 103. F. Pardon 3.

(*f*) Vide 1 Lev. 26. 4 H. 7, 8. Raym. 23. (*g*) 1 Levinz 26. 88. Raym. 65. C. Car. 515. Vide the earl of Saliſbury's caſe, Shower 100, more fully reported Carthew 131, &c.

Sect. 61. But it ſeems agreed, (*h*) That the court is ſo far bound to take notice *ex officio* of a general pardon by parliament, which extends to all perſons in general without exception, that it cannot proceed againſt any perſon whatſoever as to any of the offences pardoned, though he be ſo far from pleading it, or praying the benefit of it, that he does all he can to (*i*) waive it.

(*h*) Sum. 252. Plowden 83. 26 H. 8. 7. B. Notice 1. Dyer 28. 5 Coke 49. 3 Inſt. 234. 11 H. 4. 41. B. Corone 30. Indictment 2. 2 Roll 307.

(*i*) Sup. ſ. 58.

Sect.

Sect. 62. Alſo, where a general act of pardon excepts certain kinds of crimes, there is (*a*) no need to aver that the crime whereof a perſon is indicted is not one of ſuch excepted crimes; but the court ought judicially to take notice whether it be excepted or not.

8 Coke 68.

(*a*) Noy 100. C. Car. 449. Moor 620. 2 Leonard 26. Carthew 132. Crompton 116. 3 Inſt. 234.

Sect. 63. Alſo, where ſuch a ſtatute excepts only one particular perſon, it hath been (*b*) ſaid, that there is no need of an averment that a perſon indicted is not ſuch perſon; but that the court is to take notice whether he be or not.

(*b*) C. Eliz. 125. 2 Leonard 26.

Sect. 64. Secondly, As to the taking advantage of a particular pardon under the (*c*) great ſeal, I ſhall obſerve only the following particulars.

(*c*) That no ſuch pardon is good unleſs under the Great Seal, and conſequently that articles of ſurrender cannot be pleaded as amounting to a pardon. 1 State Trials 578, &c. Neither can the ſign manual, importing a pardon, be pleaded. Rex v. Beaton, 1 Black. 479. Vide infra ſect. 71. and the caſe of the king v. Murphy in July ſeſſion 1773.

Firſt, That it will be (*d*) error to allow a man the benefit of ſuch a pardon unleſs it be pleaded.

(*d*) C. Eliz. 153.

Sect. 65. Secondly, That he who pleads ſuch a pardon ought to (*e*) produce it *ſub pede ſigilli*, though it be a plea in bar, becauſe it is preſumed to be in his cuſtody, and the (*f*) property of it belongs to him. Yet if a man plead ſuch pardon without producing it, it ſeems (*g*) that the court may in diſcretion indulge him a farther day to put in a better plea; and at ſuch a day he may perfect his plea by producing the charter. Alſo it ſeems (*h*) agreed, that there is no need in a plea of *autrefoits acquit*, &c. to produce the record immediately; becauſe it is pleaded in bar, and he that pleads it hath neither the cuſtody nor property of it.

(*e*) Sum. 252. S. P. C. 103. 11 H. 4. 41.
(*f*) See the books above cited, and Cro. Jac. 70. 317. Cro. Car. 441, 442. 1 Jones 377. 1 Siderfin 311. C. Eliz. 217. 547. 716.
(*g*) 11 H. 4. 41. S. P. C. 103.
(*h*) Vide ſup. c. 35. ſect. 2.

Sect. 66. Thirdly, That if there be a variance (*i*) between the record on which a man is convicted or attainted, and his charter of pardon; yet if there be no repugnancy to intend that the ſame perſon or thing are meant in both, it may be ſupplied by proper averments: And therefore if one be indicted by the name of J. S. (*k*) yeoman, and pardoned by the name of J. S. gentleman, or indicted by the name of B. the taſker, and pardoned by the name of B. the ſon of W. he may make good the variance by averring that he is the ſame perſon intended in ſuch indictment and pardon: Or if in an indictment (*l*) of the death of J. S. the ſtroke being ſuppoſed to have been given on the firſt of Auguſt, and in the pardon on the third, the party may aver that the death of one and the ſame J. S. are intended in both. And if ſuch a variant pardon be pleaded without any ſuch averment, it ſeems that the court may

(*i*) Sum. 253. Sup. c. 35. ſ. 3, 4, 5. 3 Inſt. 240. S. P. C. 104. Crompton 116.
(*k*) Keilway 58. Dyer 34. 1 Roll 368. F. Corone 294. but 18 E. 3. 33. Ab. F. Brief. ſeems contrary 364.
(*l*) 11 H. 4. 41. Ab. F. Mon. de faits 128. B. Variance 38. B. Corone 29. B. Chart. de Pardon 15. But note, that none of theſe books make mention of any averment, but ſeem to imply that the pardon was allowed without it, notwithſtanding the variance.

in diſcretion give the party a farther day either to (*a*) perfect his plea, or to (*b*) purchaſe a better pardon. And there are ſome (*c*) inſtances in old books, where upon ſuch variance the court took an enquiry of office, whether the ſame perſon were meant in both records.

(*a*) 11 H. 4. 41. F. Mon de faits 128.
(*b*) 3 Inſt. 240. 1 Siderfin 41. 26 Aſſize 46. Raymond 13.

F. Office de court 34. B. Chart. de Pardon 32. B. Office de court 25. (*c*) F. Cor. 294. 3 Aſſize 15. Ab. F. Corone 166. B. Cor. 190. B. Variance 63. But Brook, in abridging this caſe under the title of charter of pardon 29, makes this remark, *quod mirum mihi.*

Vide ſect. 59. where this point is treated of.

Sect. 67. Fourthly, That no ſuch pardon can be pleaded together with, or after the general iſſue, unleſs it be of a date ſubſequent to the time of the pleading ſuch iſſue, becauſe otherwiſe it is waived by it.

(*d*) 37 H. 6. 4. F. Charter 21.

Sect. 68. Fifthly, (*d*) That the party ſhall not be obliged to lay the ſtreſs of his caſe on any particular words or clauſe in ſuch pardon, but may take advantage of the whole.

(*e*) 36 H. 6. 24, 25. F. Charter 22. B. Charter 25.

Sect. 69. Sixthly, That after an (*e*) amerciament in the king's bench hath been eſtreated into the exchequer, and the party, being taken upon proceſs from thence, hath inſiſted upon a pardon, and been denied any benefit from it, yet he may be brought by a *habeas corpus cum cauſa* to the king's bench, becauſe the record remains there, and the tranſcript is only ſent into the exchequer, and may plead the ſame pardon in the king's bench, and if it be adjudged ſufficient, may have a *ſuperſedeas* to the barons, &c.

(*f*) S.P.C. 103. Crompton 115. 3 H. 7. 5. Plowden 502. 1 Keble 9. 1 Siderfin 41. Raymond 13. 3 Inſt. 234, 235. Carthew 121. But there never was any neceſſity for ſuch writ upon a pardon of treaſon. C. Eliz. 814. Noy 31.
(*g*) That a breach of the recognizance avoided the pardon. 3 H. 7. 7. S. P. C. 103. Crompton. 115.

Sect. 70. Seventhly, That while the ſtatute of 10 Edw. 3. c. 2. ſtood in force (which required all perſons pardoned for felony to find ſureties for their good behaviour before the ſheriff and coroners within three months, &c.) no pardon of (*f*) felony could be allowed, without a writ out of chancery, commonly called a writ of allowance, teſtifying that the party had found (*g*) ſureties, &c. according to that ſtatute, unleſs it were diſpenſed with by a ſpecial clauſe of *non obſtante*, &c. But the neceſſity hereof is taken away by 5 & 6 Will. & Mary, c. 13. which hath repealed the ſaid ſtatute of 10 Edw. 3. but hath provided, "That the juſtices before whom any pardon for "felony ſhould be pleaded, may at their diſcretion remand, "or commit the perſon who pleads it to priſon, till he or they "ſhall enter into a recognizance with two ſufficient ſureties "for the good behaviour for any time, not exceeding ſeven "years. Provided that if ſuch perſon be an infant or feme "covert, he or ſhe may find two ſufficient ſureties, who ſhall "enter into a recognizance for his or her being of the good "behaviour, as is aforeſaid."

(*h*) Fitzherbert's abridgment, tit. Corone 294. 4 E. 4. 10. 2 Jones 56.

Sect. 71. Eighthly, That the judges may inſiſt on the uſual fee of gloves (*h*) to themſelves and officers, before they allow a pardon.

1 Siderfin 452. Kelynge 25. Pulton de pace et regis 88.

The mode of taking advantage of a pardon upon the circuits and at the Old Bailey is to procure the king's ſign manual or privy ſeal ſignifying his majeſty's intention to afford a pardon to the priſoner, citizen

either abſolutely or conditionally as the caſe may be, and directing the juſtices of the gaol delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that ſhall come out. This mandate the juſtices obey; taking ſecurity, if the pardon is conditional, for the performance of the ſtipulations upon which it is granted; and afterwards iſſuing their warrant to the gaoler for his diſcharge. 1 Black. 479. 2 Black. 797.

CHAPTER THE THIRTY-EIGHTH.

OF THE GENERAL ISSUE.

HAVING ſhewn already, that the general iſſue is pleadable in capital caſes, together with any other plea in bar or abatement, which is not repugnant to it; and that it may alſo be pleaded even after ſuch plea found againſt a defendant (a): And having alſo ſhewn, That the plea of the general iſſue amounts to a waiver of a pardon (b): And what is a good general iſſue to an information on a penal ſtatute (c); and in the ſame chapter in what manner the iſſue is to be joined on ſuch an information, and where it is to be tried (d); I ſhall in this place take notice only of the following particulars.

(a) Chap. 23. ſect. 128 & 137.
(b) Chap. 37. ſect. 59.
(c) Chap. 26. ſect. 66.
(d) Sect. 73, 74. 4 Comm. 332.

Sect. 2. Firſt, That in a criminal information or indictment in the (e) king's bench, for a miſdemeanor, and alſo in an indictment before (f) juſtices of the peace, the iſſue is well joined for the king by the words *A. B. qui pro rege ſequitur ſimiliter, &c.* without any addition, ſhewing that A. B. is the proper officer for this purpoſe; for it ſhall be intended that he was ſufficiently known to be ſuch by the court. But in all (g) precedents I meet with of informations of intruſion, the iſſue for the king is joined by the attorney-general, (h) naming himſelf ſuch.

(e) 1 Sid. 230. Co. En. 363.
(f) C. Car. 31.
(g) 1 Coke 17. 27. Co. Ent. 372. 379. 381. 385. 387. 390 Raſtal 412.
(h) Coke 352 to 361. Raſtal 385.

Sect. 3. Secondly, That in indictments of capital crimes, after the defendant hath pleaded *quod ipſe in nullo eſt inde culpabilis, et inde de bono et malo ponit ſe ſuper patriam* (which is the general form of pleading the general iſſue in capital caſes, both in (i) indictments and (k) appeals), the uſage ſeems to have been immediately to award proceſs againſt the jury, without any expreſs joining of iſſue on the part of the king (l). But in the precedents of appeals of felony, whether by an (l) appellant or (m) approver, generally the iſſue is expreſsly joined by the appellant and approver, as well as the appellee.

(i) See the precedents above cited.
(k) Coke Ent. 57. Raſt. 47. to 55.
(l) 4 Burrow 2084, 2085. Tremaine 286. 8 Sat. Tr. 287. agree that it is not neceſſary to join iſſue on re-

cord. Sed vide 9 Rep. 63. (l) See the precedents cited to the precedent letter. But in Raſtal 43. after the general iſſue with an &c. the proceſs is immediately awarded againſt the jury. (m) Raſt. 42.

Sect. 4. Thirdly, It ſeems (n) the better opinion, that if an iſſue be joined in proceſs on a recognizance for the peace, whether the defendant killed J. S. and ſuch iſſue be found for the king, yet ſhall it not eſtop the defendant to plead not guilty to an indictment or appeal for the death of the ſame J. S.

(n) H. 4. 35. B. App. 19.

CHAPTER THE THIRTY-NINTH.

OF ASSIGNING COUNSEL, AND OF COPY OF THE INDICTMENT.

A PERSON having pleaded Not guilty, is to be tried either, By his Country,—or By his Peers,—or By Battle.

But before I consider what is proper to each of these in their order, I shall endeavour to shew. First, In what cases a prisoner may have Counsel to assist him in his defence. Secondly, Where he may have a copy of the Indictment.

(a) 3 Inst. 29. 137. 7 H. 4. 35. Finch 386. 2 Bulst. 147. B. Cor. 54. F. Corone 31. C. Car, 147. S. P. C. 151. 9 E. 4. 2. 1 Levinz 86. Dr. & St. B. 2. c. 48. 2 St. Tr. 70. 2 Stat. Tr. 1002. See the books cited to the other parts of this chapter. (b) 1 St. Trials 70. 265. 614. 4 St. Trials 355. 3 Inst. 29. 1 Rush. Col. 94. Foster 231.

Sect. 1. As to the first of these particulars, I take it to be a settled (*a*) rule at common law, that no counsel shall be allowed a prisoner, whether he be a (*b*) peer or commoner, upon the general issue, on an indictment of treason or felony, unless some point of law arise, proper to be debated.

Sect. 2. This indeed many have complained of as very unreasonable; yet if it be considered, that generally every one of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best; the simplicity and innocence, artless and ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own. And if it be farther considered that it is the (*c*) duty of the court to be indifferent between the king and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that, generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than prejudice in having the court their only counsel. Whereas on the other side, the very speech, gesture and countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.

(c) 2 Bulst. 147. 3 Inst. 29. Vide the opinions of Mr. Justice Foster upon this subject. Discourse of high treason, sect. 7. p. 231, 232. See also the opinion of Sir Robert Atkyns upon this point. 3 Stat. Trials 758. 4 St. Trials 130. 174.

Sect.

Sect. 3. But the law allows a defendant the ſame benefit of counſel in an (*d*) appeal, whether capital or not capital, as in any other action. Perhaps for this reaſon among (*e*) others, becauſe appeals are preſumed to be generally carried on with greater heat and ſpleen than indictments, and yet are not ſo much to be favoured, as being for the moſt part rather grounded on a deſire of private revenge than of public juſtice; and therefore the defendant ſhall have at leaſt the ſame advantage in them as in common actions.

(*d*) S. P. C. 151. Dr. & St. bk. 2. c. 48. Dyer 296. Kelway 176. Finch 386. 1 Buiſt. 85. 9 E. 4. 2. B Corone 54. F. Corone 31.
(*e*) Dr. & St. bk. 2. c. 48.

Sect. 4. Alſo upon indictments, the court will never refuſe to aſſign the priſoner counſel to argue a doubtful point of law, happening to ariſe at or after his trial; as where it ſhall appear queſtionable whether the facts proved, if true, fully (*f*) amount to the crime charged againſt him; or whether the perſons offered to be evidence againſt him be (*g*) legal witneſſes in reſpect to ſuch or ſuch exceptions againſt them; or whether certain perſons returned (*h*) of his jury can be lawful jurors, in reſpect of certain objections againſt them; or whether the (*i*) indictment or (*k*) proceſs, *&c.* be ſtrictly legal: In all which caſes the priſoner muſt (*l*) propoſe the point, and (*m*) if the court think it will bear a debate, they will aſſign him counſel to argue it.

(*f*) 3 Inſt. 137. 1 St. Tr. 569. Ruſh. Stafford 671.
(*g*) 2 St. Tr. 520.
(*h*) 3 St. Tr. 135.
(*i*) 3 Inſt. 29. 1 Levinz 68. C. Car. 147. 2 Hale 236.
(*k*) 3 Inſt. 29. 137. 6 Coke 14.
(*l*) 3 Inſt. 137. 2 St. Tr. 762.
(*m*) 2 St. Tr. 694. 701. 709. 763, 764. 3 St. Tr. 876.

Sect. 5. Alſo wherever a priſoner hath a (*n*) pardon or other (*o*) ſpecial matter to plead to an indictment, or an (*p*) error to aſſign in order to reverſe an outlawry, the court will of courſe aſſign him counſel. And it is (*q*) ſaid, That for ſuch collateral matters any one may be of counſel for a priſoner without any aſſignment.

(*n*) 3 Inſt. 29. 137. 26 Aſſiſe 46. F. Off. de Court, 34.
(*o*) 1 H. 7. 23. B. Corone 128, 129. Finch 386.

(*p*) 2 Jones 180. C. Car. 365. Yet in the Year-book of 1 Hen. 7. 13. the court refuſed it, becauſe the party was of very bad fame. (*q*) 2 Jones 180. Strange 824. Foſter 232. 9 State Trials 85.

Sect. 6. But if a queſtion ariſe on the trial of a peer concerning the courſe of parliamentary proceedings, the lords will not (*r*) ſuffer it to be argued by counſel, but will debate it among themſelves.

(*r*) 2 St. Tr. 694. 699. Vide the trial of the ducheſs of Kingſton for bigamy, before the peers. 11 State Trials.

Sect. 7. There is a caſe in the year-book of (*s*) H. 4. where a ſerjeant at law, as *amicus curiæ*, offered his opinion to the court, concerning the trial of an indictment of death, That it was not proper to proceed in it till the year and day were paſſed, nor doth he appear to have been any way reprehended for it. (*t*) But it is not ſafe for any one to be either counſel or ſolicitor to one in priſon for a capital crime, in order to prepare him for his trial, without an aſſignment from the court. But by leave

(*s*) 7 H. 4. 36. S. P. C. 151. 3 Inſt. 29. 137.
(*t*) 2 St. Tr. 272, 273. 712. 743. 763. 768.

of the court priſoners have ſometimes been indulged the aſſiſtance of counſel, not only to (*u*) adviſe them in priſon, but (*x*) alſo to ſtand by them at the bar: But it is ſaid, (*y*) That, in ſtrictneſs, they ought not to be prompted by them as to matters of fact, (*z*) nor to have the aſſiſtance of any papers drawn up by counſel to prepare them for their trial.

(*u*) 3 St. Tr. 133.
(*x*) 2 St. Tr. 614.
(*y*) 2 St. Tr. 614
(*z*) 1 St. Tr. 732. 2 St. Tr. 743. 762, 763. 770.

Sect. 8. After a priſoner hath had counſel aſſigned him, the court will not (*a*) diſcharge them without his conſent, though they deſire it, but will ſometimes add others to them.

(*a*) 3 St. Tr. 233. ſect. 8.

(*b*) 1 Bulſt. 85.

Sect. 9. It is (*b*) ſaid, That the court cannot aſſign an appellee any of the king's counſel; but that if they will they may be either for or againſt them.

Sect. 10. It having been found by experience that priſoners have been often under great diſadvantages from the want of counſel, in proſecutions of high treaſon againſt the king's perſon, which are generally managed for the crown with greater ſkill and zeal than ordinary proſecutions, it is enacted by 7 Will. 3. c. 3. "That all and every perſon and perſons whatſo- "ever, that ſhall be accuſed and indicted for high treaſon, "whereby any corruption of blood may or ſhall be made to "any ſuch offender or offenders, or to any the heir or heirs of "any ſuch offender or offenders, or for miſpriſion of ſuch trea- "ſon, ſhall be received and admitted to make his and their "full defence by counſel learned in the law: And in caſe any "perſon or perſons ſo accuſed or indicted ſhall deſire counſel, "the court, before whom ſuch perſon or perſons ſhall be tried, "or ſome judge of that court, is authoriſed and required, im- "mediately upon his or their requeſt, (*c*) to aſſign to ſuch per- "ſon or perſons, ſuch and ſo many counſel, not exceeding "two, as the perſon or perſons ſhall deſire, to whom ſuch "counſel ſhall have free acceſs at all ſeaſonable hours; any "law or uſage to the contrary notwithſtanding."

Sir Bartholemew Shower was the firſt counſel aſſigned by virtue of this act.

(*c*) In the caſe of lord George Gordon Mr. Erſkine moved that counſel might be aſſigned; but Buller juſtice doubted whether this application ought not to be made by the priſoner himſelf at the bar, the words of the ſtatute being, "upon *his* or *their* requeſt;" but the attorney general conſenting the motion was allowed. Douglas 591.

Sect. 11. But it is provided, par. 3. "That any perſon "being indicted of ſuch treaſon may be outlawed, *&c.* and "where by the law, after ſuch outlawry, he may come in "and be tried, he ſhall upon ſuch trial have the benefit of the "ſaid act."

Sect. 12. And it is further provided, par. 12 and 13. "That "nothing in the ſaid act ſhall extend, or be conſtrued to ex- "tend to any impeachment or other proceedings in parliament "whatſoever. And alſo that it ſhall not any ways extend to "any indictment of high treaſon, nor to any proceedings "thereupon,

" thereupon, for counterfeiting his majeſty's coin, his great " or privy ſeal, his ſign manual, or privy ſignet."

† But now by 20 Geo. 2. c. 30. it is alſo enacted, " That " all and every perſon and perſons whatſoever who ſhall be im- " peached by the commons of Great Britain of any high treaſon, " whereby any corruption of blood may or ſhall be made to " any ſuch offender or offenders, or to any the heir or heirs of " any ſuch offender or offenders, or for miſpriſion of ſuch trea- " ſon, ſhall be received and admitted to make his or their full " defence by counſel learned in the law, not exceeding two " counſel, who ſhall be aſſigned for that purpoſe, on the appli- " cation of the party or parties impeached at any time after the " articles of impeachment ſhall be exhibited by the commons."

Sect. 13. As to the ſecond particular, *viz.* Where a priſoner may have a copy of the indictment againſt him: It is ſaid, (*d*) That by the common law it is always denied in caſes of treaſon or felony. Yet if a priſoner take a legal exception to an indictment, it is ſaid, (*e*) That the court will grant him a copy of ſo much as concerns his exception. Alſo if he have ſuch matter to plead which cannot well be put into form without knowledge of the charge againſt him as laid in the indictment, as *autrefoits acquit*, &c. it is (*f*) ſaid, That the court will give him the heads of the indictment, to enable him to have his plea ſo drawn as to ſuit the charge againſt him.

(*d*) 1 Lev. 68. Moor 666. 1 St. Tr. 644. 2 St. Tr. 711. 763. 3 St. Tr. 861. 862, 863, 864. Show. 131. 1 Sid. 85. 2 Hale 236.
(*e*) Lev. 68. 1 Sid. 85.
(*f*) 2 St. Tr. 711.

Sect. 14. But it is enacted by 7 Will. 3. " That every " perſon and perſons indicted for high treaſon, except for coun- " terfeiting the coin, or the great or privy ſeal, or ſign manual or " privy ſignet, ſhall have a true copy of the whole indictment, " but not the names of the witneſſes, five days at the leaſt before " trial, (*g*) to adviſe with counſel thereupon, to plead and " make their defence, his or their attorney or agent, requiring " the ſame, and paying the officer his reaſonable fees for writing " thereof, not exceeding five ſhillings for the copy of every " ſuch indictment."

(*g*) This muſt be intended five days before arraignment, becauſe the priſoner pleads inſtanter upon the arraignment. Douglas 591.

Sect. 15. What exceptions may be taken to ſuch indictment, and when, hath been ſhewn, chapter the twenty-fifth. (*b*)

(*b*) Sect. 145 to 150.

† *Sect.* 16. It is alſo enacted by 7 Anne, c. 21. ſ. 11. " That " from and after the deceaſe of the pretender, when any perſon " is indicted for high treaſon, or miſpriſion of treaſon, a liſt " of the witneſſes that ſhall be produced on the trial for proving " the ſaid indictment, and of the jury, mentioning the names, " profeſſion and place of abode of the ſaid witneſſes and jurors, " (*i*) ſhall be alſo given at the ſame time that the copy of the in- " dictment is delivered to the party indicted; and that copies of " all indictments for the offences aforeſaid, with ſuch liſts, ſhall be

(*i*) The caſe of lord George Gordon, Hilary term 21 Geo. 3. was

" delivered to the party indicted, ten days before the trial and " in preſence of two or more credible witneſſes."

the firſt which has happened ſince this act took effect. The attorney general, as the only method of complying with the directions of the act, moved the King's Bench for a rule upon the ſheriff, to deliver to the proſecutor a liſt of the jurymen he *intended* to return upon the panel, in order that the proſecutor might be enabled to deliver ſuch liſt to the priſoner. And the rule was drawn up accordingly. For the terms of which, vide Douglas 591.

† *Sect.* 17. But it is enacted by 6 Geo. 3. c. 53. " That no- " thing contained in the above laſt recited act ſhall any ways " extend to any indictment of high treaſon for counterfeiting " his majeſty's coin, the great ſeal or privy ſeal, his ſign ma- " nual or privy ſignet, or to any indictment of high treaſon or " to any proceedings thereupon againſt any offender or offenders " who by any act or acts now in force is and are to be indicted, " arraigned, tried, and convicted by ſuch like evidence, and " in ſuch manner as is uſed and allowed againſt offenders for " counterfeiting his majeſty's coin."

CHAPTER THE FORTIETH.

OF THE JURY.

FOR the better underſtanding what more particularly relates to a trial by the country in capital caſes, having ſhewn, (*a*) That by virtue of a ſpecial commiſſion, juſtices of *oyer* and *terminer* may ſit in one county, for the trial of a fact in another by the proper jurors. And having alſo ſhewn, (*b*) what is a proper place from whence a *viſne* may come, I ſhall in this place only conſider, From what county the jury is to be returned.—By virtue of what proceſs.—Before what court: And, How they may be challenged.

(*a*) Chap. 5. Sect. 18.

(*b*) Chap. 23. Sect. 92, 93.

As to the firſt of theſe particulars, *viz.* From what county the jury is to be returned: I ſhall endeavour to ſhew,—From what county they are to be returned for the trial of the general iſſue.—And—From what county for the trial of a foreign plea.

Sect. 1. As to the firſt point, *viz.* From what county a jury is to be returned for the trial of the general iſſue. I take it to be (*c*) agreed, That (*d*) regularly by the common law they muſt be returned in all caſes, for the trial of the general iſſue from the ſame county wherein the fact was committed. And it is ſaid,

(*c*) S. P. C. 154. Dyer 138. 286. F. Corone 194. 3 Inſt. 27. 26 Aſſize 32. ſup. c. 5. ſ. 29.

(*d*) Inſ. ſ. 5.

ſaid, That in an appeal of death, where the wound was given in one county, and the party died in another, the jury (*e*) ought to be returned from each county before the ſtatute of 2 and 3 Edw. 6. c. 24. ſince which the whole may be tried either upon an (*f*) indictment or appeal, in the county wherein the death happens.

(*e*) B. 1. c. 31. f. 13. ſup. c. 23. f. 35. F. Cor. 59, 60.
(*f*) Sup. c. 35. f. 35. 2 Hale 262.

Sect. 2. But it is enacted by 33 Hen. 8. c. 23. "That if "any perſon being examined by the king's council, or three of "them, upon any manner of treaſons, miſpriſions of treaſons, or "murders, do confeſs any ſuch offences, or that the ſaid "council, or three of them, upon ſuch examination, ſhall think "any perſon ſo examined, to be vehemently ſuſpected of any "treaſon, miſpriſions of treaſons, or murder, that then in every "ſuch caſe by the king's commandment, his majeſty's commiſ-"ſion of *oyer* and *terminer* under the great ſeal, ſhall be made "by the chancellor of England to ſuch perſons and into ſuch "vills and places as ſhall be named and appointed by the king, "for the ſpeedy trial, conviction or delivery of ſuch offenders; "which commiſſioners ſhall have power to enquire, hear and "determine all ſuch treaſons, miſpriſions of treaſons, and mur-"ders, within the places limited by their commiſſion, by ſuch "good and lawful perſons as ſhall be returned before them by "the ſheriff, or his miniſter, or any other having power to "return writs and proceſs for that purpoſe, in whatſoever other "ſhire or place within the king's dominions, or without, ſuch "offences were done or committed, and that in ſuch caſes, no "challenge for the ſhire or hundred ſhall be allowed."

Sect. 3. It hath been (*g*) adjudged, That this ſtatute, as far as it relates to treaſon done within the realm, is repealed by 1 and 2 Ph. and Mary, c. 10. which enacts, "That all trials "for treaſon ſhall be according to the common law." But as to (*h*) murder and (*i*) miſpriſion of treaſon, it ſtill ſeems to continue in force. And as to high (*k*) treaſon done without the realm, it doth not ſeem material whether it be in force or not, becauſe that is fully provided for by 35 Hen. 8. c. 2. as hath been more fully ſhewn ch. 25. ſect. 49, 50, 51, 52, 53.

(*g*) 1 And. 204.
(*h*) 1 And. 194.
(*i*) Sup. c. 25. 143. B. Cor. 220. 3 Inſt. 24.
(*k*) Dyer 286.

Sect. 4. It hath been (*l*) adjudged, That the word *murder* in this ſtatute ſhall have the ſame ſtrict conſtruction as in the (*m*) ſtatutes which take away the benefit of clergy from murder, and conſequently ſhall not extend to one examined before the council as acceſſary only, and not as principal; for murder is one offence, and the being acceſſary to it is another.

(*l*) 1 And. 194.
(*m*) Sup. c. 33. f. 26. Bk. 1. c. 31. f. 11.

Sect. 5. Having ſhewn already, that he who ſteals (*n*) goods in one county, and carries them into another, or does a fact in one county which proves a (*o*) nuiſance to another, may be indicted or appealed in either; from whence it follows, That he may be alſo tried in either: Having alſo (*p*) ſhewn, That he who marries two wives, the firſt in a foreign country, and the ſecond

(*n*) Bk. 1. c. 33. f. 9. ſup. c. 23. f. 47. c. 25. f. 38.
(*o*) Sup. c. 25. f. 37.
(*p*) Bk. 1. c. 43. ſect. 7. Sup. c. 25. ſect. 39.

second in England, may be indicted and tried in England; and that he who takes a woman by force out of one county, and carries her into another and there marries her, (q) may be indicted and tried in the second county: and that felonies in (r) Wales may by force of 26 Hen. 8. c. 6. be indicted and tried in the next adjoining Engliſh county: And that treaſons upon the ſeas, (s) or in any foreign (t) country, and felonies (u) and piracies upon the ſea, may be indicted and tried in any county in England; and that an (x) acceſſary in one county to a murder in another, may be appealed and tried in the county wherein the ſtroke was given; and that an acceſſary to murder, or any other felony in one county, may be indicted (y) and tried in the county wherein he was acceſſary; I ſhall refer to the places cited in the margin for the farther conſideration of theſe matters,

(q) Bk. 1. c. 42. ſ. 10. Sup. c. 25. ſ. 40.
(r) Bk. 1. c. 31. ſ. 14. Sup. c. 25. ſ. 41, 42.
(s) Sup. c. 25. ſ. 43. 44. 45.
(t) Sup. c. 25. ſ. 48 to 54.
(u) Bk. 1. c. 37. ſ. 12, 13, 14, 15. Sup. c. 25. ſ. 43 to 48.
(x) Sup. c. 29. ſ. 49.
(y) Sup. c. 25. ſ. 54. and c. 29. ſ. 50, 51, &c.

Sect. 6. As to the ſecond point, *viz.* From what county the jury is to be returned for the trial of a foreign plea, that is, the plea of iſſuable matter alledged in a different county from that wherein the party is indicted or appealed; as where a man indicted in the county of A. (z) pleads, That he was taken out of a ſanctuary in the county of B. Or where one appealed by a woman for the death of her huſband in one county, (a) pleads, That ſince the death of her huſband ſhe hath married J. S. in another county; it is (b) agreed, That by the common law ſuch pleas can only be tried by juries returned from the counties wherein they are alledged: And therefore if iſſue be joined on ſuch matters before a court which has no juriſdiction out of the county wherein it ſits, there ſeems to be (c) no remedy by the common law, but to remove the proceedings by *certiorari* into the King's Bench, which having a juriſdiction throughout the whole kingdom, will award proper proceſs for the trial.

(z) Keilway 175.
(a) Dyer 296.
(b) 3 Inſt. 27. S. P. C. 154. Keilway 175. Dyer 296. Sum. 255. Vide 23 H. 8. c. 14. ſ. 5.
(c) Keilway 175. Dyer 286, 296.

Sect. 7. But for the more ſpeedy trials of murders and felonies, it is enacted by 23 Hen. 8. c. 14. ſ. 5. "That all manner of foreign pleas triable by the country, upon an indictment for any petit treaſon, murder, or felony, ſhall be forthwith tried before the ſame juſtices afore whom the party ſhall be arraigned, and by the jurors of the ſame county that ſhall try the petit treaſon, murder, or felony, whereof he ſhall be ſo arraigned, without any further reſpite or delay, in whatſoever county or counties, place or places of this realm, the matter of the pleas be ſuppoſed or alledged."

Sect. 8. But this ſtatute extending neither to indictments of high treaſon, nor to appeals, it (d) is ſaid, that a foreign iſſue therein muſt ſtill be tried by the jury of the county wherein it is alledged.

(d) 3 Inſt. 27. S.P.C 154. Sum. 255. Vide Dyer 296.

CHAPTER

CHAPTER THE FORTY-FIRST.

OF PROCESS AGAINST JURORS.

FOR the better underſtanding the nature of proceſs againſt jurors in criminal caſes, I ſhall endeavour to ſhew, Firſt, Where a panel may be returned without any precept by a bare award. Secondly, In what manner the proceſs is to be returnable. Thirdly, Where a *venire* may be joint or ſeveral. Fourthly, Where proceſs may be awarded by proviſo. Fifthly, In what caſes, and in what manner a *tales* is grantable. Sixthly, Where it is neceſſary to return a panel into court, before an inqueſt can be taken upon it, and where the priſoner may have a copy of it.

Sect. 1. As to the firſt point, *viz.* Where a panel may be returned without any precept by a bare award. It is (*a*) agreed, that juſtices of (*b*) gaol-delivery may have a panel ſo returned by the ſheriff without any precept or writ; and the (*c*) reaſon given for it is, That before their coming, they always make a general (*d*) precept to the ſheriff on parchment under their ſeals, "to bring before them at the day of their "ſeſſions twenty four out of every hundred, *&c.*" "to do "thoſe things which ſhall be enjoined them on the part of the "king, *&c.*" And therefore it is ſaid that they need not make any other precept for the return of a jury, for the trial of any iſſue joined before them. But that their bare (*e*) award that the jury ſhall come is ſufficient, becauſe there are enow for that purpoſe ſuppoſed to be preſent in court, whom the ſheriff may return immediately whenever the court ſhall require their ſervice. Alſo it is ſaid, (*f*) that a jury may be ſo returned before juſtices of peace at their ſeſſions, becauſe the (*g*) precept for the ſummons of the ſeſſions hath a clauſe to the ſame effect for the ſummons of twenty-four out of every hundred, *&c.* Yet I much queſtion whether this matter doth not rather depend on (*h*) practice, and the conſtant courſe of precedents, than on any argument from the reaſon of the thing. For the (*i*) precept to the ſheriff from juſtices of *oyer* and *terminer*, in order for the holding of their ſeſſions, hath in effect

(*a*) F. Inq. 55. 4 Inſt. 168. 2 Inſt. 568. Sum. 138. 256. 2 Hale 261, 264. Crom. 128. S. P. C. 155. 4 Comm. 344.

(*b*) Yet 'tis ſaid that the law is otherwiſe if they have a ſpecial commiſſion. F. Inq. 55. 4 Inſt. 168. Crompton Jur. 128.

(*c*) F. Inq. 55. Crompton Jur. 128. 4 Inſt. 168. 2 Inſt. 568. 2 Hale 34. 261.

(*d*) Vide Raſt. 384, 385. Cro. Ca. 448.

(*e*) For the form of ſuch an award, ſee Raſt. 385. 4 St. Tr. 182.

(*f*) 2 Inſt. 568. 2 Hale 261.

Aſh. 1 Sid. 364. (*g*) See Lamb. Juſt. b. 4. c. 2. and Crompton 232. (*h*) 4 Inſt. 164. 1 Sid. 364. (*i*) Raſt. 443.

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the very ſame clauſe for the bringing of twenty-four before them, out of each hundred, at the day of their ſeſſions, &c. And yet it ſeems (*k*) agreed, that they cannot have a jury returned for the trial of any iſſue joined before them, by force of a bare award, but ought to make a particular precept to the ſheriff for that purpoſe under their ſeals.

(*k*) Sum. 162. 156. 4 Inſt. 164. 2 Inſt. 568.

Sect. 2. It ſeems (*l*) agreed, That by the courſe of the King's Bench no jury can be returned into it from a foreign county, without proper proceſs, under the (*m*) ſeal of the chief juſtice, &c. But (*n*) *quære* if it may not be returned for the trial of an indictment, &c. in the ſame county wherein it ſits, by a bare *præceptum eſt*, &c.

(*l*) S. P. C. 154. Vide 27 H. 6. 10. Sup. c. 27. ſ. 16.
(*m*) Sup. c. 27. ſ. 8.
(*n*) Dyer 118.

Sect. 3. As to the ſecond point, *viz.* In what manner the proceſs againſt jurors is to be returnable.—It ſeems agreed, that it may be returnable immediately into the court of King's Bench for the trial of an indictment in the ſame county wherein it ſits, whether for a crime committed in ſuch county, or for a (*o*) treaſon, &c. beyond the ſea. But that for the trial of indictments, removed thither by *certiorari* from other counties, there (*p*) ought to be fifteen days between the *teſte* and return of every proceſs.

(*o*) C. 25. f. 49 to 70.
(*p*) 2 R. Abr. 626. 2 Hale 260. Sup. c. 3. ſ. 12. and c. 27. ſ. 16. 2 Inſt. 568. 4 St. Tr. 214.

Sect. 4. Alſo it is (*q*) agreed, That juſtices in *eyre*, or of gaol-delivery, may order a jury to be returned immediately for the trial of a priſoner arraigned before them. Alſo it is clearly (*r*) holden by Sir Edward Coke, and hath been often (*s*) adjudged, That juſtices of *oyer* and *terminer*, for the trial of any iſſue joined before them, might award a *venire* returnable the ſame day on which the party is arraigned. Alſo it is holden by Sir (*t*) Edward Coke, and hath been (*u*) adjudged, That juſtices of the peace may do the like; but there are very (*x*) ſtrong authorities to the contrary, unleſs the crime amount (*y*) to felony, or the party (*z*) conſent to be tried immediately.

(*q*) Keilway 159. 256. Crompton 152. C. Car. 315. 1 Siderſin 335. F. Inqueſt 55. Kelynge 7.
(*r*) 2 Inſt. 568. 4 Inſt. 164.
(*s*) C. Car. 340. 583. 2 R. Abr. 96. Sum. 161. 2 Hale 261. Admitted 2 Keble 212. 292. 718. 2 Keble 433. 1 Siderſin 334. 1 R. Abr. 96. C. Car. 340. 583. Cro. Keilway 159. Tr. per pais 26. 2 R. Abr. 625. Sum. 266. (*t*) 2 Inſt. 568. 4 Inſt. 164. (*u*) C. Jac. 404. And in this book it is ſaid that common experience is ſo. (*x*) F. Coroner 44. Keilway 159. 1 Jones 379. S. P. C. 156. 1 Keble 433. Tr. per pais 25, 26. 2 Keble 212. Crom. 152. 1 Siderſin 99. 335. C. Car. 438. 448. 2 R. Abr. 625. Sum. 256. (*y*) 1 Sid. 335. In Crompton 150. 'tis ſaid that the ſeſſions for the peace may award proceſs for the trial of an indictment of felony the next day after it is traverſed. Quære if the party's being in gaol make no difference. C. Car. 340. 2 R. Abr. 96. 1 Sid. 335. (*z*) 1 Keble 433. 1 Siderſin 99. 334.

Sect. 5. *Quære* how far the law is altered as to theſe points by 4 and 5 Will. and Mary, c. 24. and 7 and 8 Will. 3. c. 32. which by requiring that jurors ſhall be ſummoned ſix days before they are to appear, ſeem to make it neceſſary whenever (*a*) *venire* or particular precept is required for the return of a jury, (*b*) that there be ſix days between its *teſte* and return.

(*a*) Sup. ſect. 1.
(*b*) 4 St. Tr. 99, 100.

Sect. 6. It hath been (*c*) adjudged, That a *venire* before juſtices of *oyer* and *terminer* returnable at a day certain is erro-

(*c*) 1 Sid. 348. 2 Keb. 284. 292. 718. 854.

neous

neous, unleſs the ſeſſions appear to have been (d) adjourned to the ſame day; becauſe otherwiſe it ſhall not be intended that their commiſſion continued till ſuch day; and if it did not, their authority to try the iſſue was determined. But it is admitted (e) that ſuch *venire* may be made returnable at the next aſſizes, and then tried by virtue of (f) 1 Edw. 6. c. 7.

And in theſe books ſuch error is ſaid not to be helped by the next aſſizes happening to fall on the ſame day.

(d) Sup. c. 5. ſect. 7. 14. (e) 1 Sid. 348. 2 Keble 284. 718. 954. C. Car. 340. (f) Vide c. 5. ſect. 12. Salkeld 51. pl. 14. Ld. Raym. 1061.

Sect. 7. It hath been (g) adjudged, That the award of a *venire* returnable at a certain day before juſtices of oyer, &c. need not expreſsly mention before what juſtices it ſhall be returnable; for it cannot but be intended that it ought to be before the ſame court which awards it.

(g) 29 Ed. 3. 30, 31. In Dyer 315. the ſame caſe is taken notice of, and it is there ſaid, that the venire itſelf needs not ſhew before what juſtice it is returnable; but this ſeems not to be warranted by the book at large. Vide 2 Keble 855.

Sect. 8. As to the third point, *viz.* Where a *venire* may be joint or ſeveral: It ſeems agreed, that where ſeveral perſons are arraigned upon the ſame (h) indictment or (i) appeal, and ſeverally plead not guilty, it is in the (k) election of the proſecutor, &c. either to take out (l) joint *venires* againſt them all, or (m) ſeveral againſt each of them. But in an appeal, if one plead not guilty, and the other plead a releaſe made at A. it ſeems (n) that there muſt be ſeveral *venires*.

(h) Sum. 256. 2 Hale 263. (i) 4 State Tr. 100. Summary 256. S. P. C. 155. 1 Jones 425. But C. Eliz. 541. it is ſaid to be the courſe to try the defendants in appeal by ſeveral venires, S. P. C. 155. It is ſaid, that where there are three defendants the plaintiff may join two of them in one venire, and take out another againſt the third. (k) See the books above cited, and 1 Jon. 425. and F. quare impedit. 199. 21 H. 6. 22. (l) See the book above cited. Alſo the ſame is adjudged 1 Jon. 425. where one appellee was charged with doing the fact *proditorie*, the others *felonice*. See F. quare impedit 199. Viſne 11. 14. Keilway 106. (m) Dyer 120. 131. C. Eliz. 541. (n) 50 E. 3. 1. B. Viſne 27. Vide 11 H. 7. 5. B. Diſc. de Pro. 62. F. Execut. 114. Niſi prius 7, 8.

Sect. 9. It ſeems generally (o) agreed, That where the ſame jury is returned on ſuch a joint proceſs againſt ſeveral defendants, if a juror be challenged by any one defendant, and the challenge allowed, and the juror thereupon (p) drawn, he is by neceſſary conſequence drawn as to all the other defendants alſo, becauſe there being but one panel, the ſame perſon cannot at the ſame time be taken from it, and yet continue in it. But where one jury is jointly returned for the trial of ſeveral defendants before juſtices of gaol-delivery, it is (q) certain that

(o) S. P. C. 159. Summary 256. 2 Hale 263. 9 Ed. 4. 27. Moor 13. Co. Litt. 156. Dyer 246 Plowden 100. B. Chall. 84. Parallel caſe, Co. Litt. 130. 4 H. 4. 4. Dyer 246. 50 Ed. 3. 1. F. Protection 21. 126. 3 H. 4. 5. Crompton 113. But this is made a quære Dyer 152. And denied in the ſame caſe in Daliſon 25. (p) But if no judgment be given that the juror who is challenged by one ſhall be drawn, but only that he ſhall ſtand aſide for a time, it is ſaid, that he may try thoſe who do not actually challenge him. Dyer 120. Con. Bendloe 58. (q) Kelynge 7. Summary 256. 2 Hale 264. Plowden 100. 9 Ed. 4. 27. Crompton 113.

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they may afterwards ſever the panel, if they find it expedient, for the prevention of this inconvenience. But I do not find *(r)* that this can be done in any other caſe. And it ſeems agreed, That after an appellant hath taken out a joint *venire* againſt all the appellees, he cannot *(s)* afterwards take out ſeveral ones, though the firſt be never returned; and the reaſon ſeems to be becauſe it would amount to a *(t)* diſcontinuance.

(r) Plowd. 100. 2 Hale 263, 264. (s) 8 Co. 66. S. P. C. 155. 27 H. 6. 4. F. Pro. 94. S. P. C. 155. B. Veni. faci. 32. 9 Ed. 4. 27. F. Chall. 56.

Vide F. Inqueſt 59. Executors 114. (t) Sup. ch. 27. ſect. 96.

Sect. 10. As to the fourth point, *viz.* Where proceſs may be taken out by the defendant in criminal caſes by *proviſo* (*i. e.* with a *(u)* clauſe that if two writs come to the ſheriff he ſhall execute one of them only): I take it to be agreed *(x)*, That it may be ſo awarded in any appeal, whether capital or not capital, in the ſame manner as in other actions after the appellant hath made default in *(y)* relation to the very ſame kind of proceſs. And therefore if the appellant, after iſſue joined, either neglect to take out any *(z) venire* the ſame term, &c. or takes one out but doth not *(a)* get it returned, it ſeems that the defendant may take one out by *proviſo*, &c. And in like manner if the appellant make the like default in ſuing out an *habeas corpora*, or other ſubſequent proceſs, the defendant may ſue out the like proceſs by *proviſo*. But where the defendant hath ſued out any proceſs by *proviſo*, there are *(b)* authorities that the plaintiff is to ſue out the proper ſubſequent proceſs upon it in the ſame manner as if he had ſued out the firſt; and that it is irregular for a defendant to take out any ſuch ſubſequent proceſs till the plaintiff has made a *(c)* default in reſpect of the ſame kind of proceſs, except only in ſuch actions wherein the defendant is an actor as well as the plaintiff; as in *(d)* replevin, or *(e)* error, or *(f) quare impedit* againſt the patron only, or *(g)* prohibition, &c. in which actions the defendant may either take out proceſs by *proviſo*, without any default in the plaintiff, or *(h)* may, if he think fit, take it out in the ſame manner as the plaintiff, without any clauſe of *proviſo*. But it ſeems agreed, That neither in actions wherein the king is ſole *(i)* party, nor in *(k)* indictments, there can be any proceſs taken out by *proviſo*, becauſe no laches is imputable to the king. Alſo it hath been *(l)* queſtioned, whether there can be any ſuch proceſs in informations *qui tam*, becauſe the king is in ſome ſort a party.

(u) 8 H. 6. 6. F. Proceſs 79. Vide 2 R. Ab. 666. Raſtal 625. (x) Sum. 257. S. P. C. 155. F. Proceſs 211. 15 H. 7. 9. Keilway 176. (y) See the books cited to the other part of this ſection. 33 H. 6. 13. (z) Dyer 215. C. Car. 484. Vide Dyer 284. 319. 2 R. Abr. 666. 2 Jones 34. Keilway 176. (a) 8 H. 6. 6. F. Pro. 79. B. Niſi prius 13. (b) 15 H. 7. 9. 14 H. 7. 7. F. Proteſt 211. Dyer 318. Summary 257. C. Car. 484. 2 R. Abr. 666. B. Octo Tales 8. S. P. C. 71. 155. Dyer 284. 193. Con. F. Proceſs 68. Dyer 215. 217. 2 Jones 34. (c) Dyer 215. Bro. Niſi prius 40. 6 Modern 246. (d) Dyer 193. 21 H. 6. 22. 16 H. 7. 14. F. Niſi prius 9. Bro. Niſi prius 40. (e) 2 Levinz 5, 6. 2 Staund. 336. (f) 6 Modern 246. F. Niſi prius 6. (g) Par. Caſe 2. R. Ab. 666. F. Niſi prius 3. (h) 2 Levinz 5, 6. 16 H. 7. 14. Bro. Niſi prius 40. 21 H. 6. 22. B. Octo Tales 17. 2 Saunders 336. (i) 2 Leonard 110. (k) 6 Modern 246, 247. 1 Keble 195. Con. 1 Sid. 316. (l) 2 Leonard 110. Vide 7 & 8 Will. 3. c. 32.

Sect. 11. As to the fifth point, *viz.* In what caſes, and in what manner a *tales* is grantable; I ſhall obſerve the following particulars.

Firſt, That if a full jury appear not in an appeal, whether by reaſon of the (*m*) death of ſome of the perſons returned, or for any other cauſe, or if ſo many be (*n*) challenged and drawn that there do not remain enow to make a jury; or if after the jury is charged, one (*o*) or more of them die, the appellant (*p*) may pray a *tales*, in the ſame manner as a plaintiff in other actions. And ſo alſo may the appellee, if the appellant neglect to pray one the ſame (*q*) term, &c. But it ſeems that a defendant cannot regularly pray it till there has been a default in the plaintiff.

(*m*) S. P. C. 155. 10 Coke 104. Sum. 257. 20 Ed. 3. 11.
(*n*) 1 State Trials 502, and the books next above cited.
(*o*) S. P. C. 155. 12 H. 4. 10. 10 Coke 104. Quæ. 2 Roll Ab. 671.
(*p*) Summary 257. S. P. C. 155. 14 H. 7. 7. (*q*) C. Car. 484. 14 H. 7. 7. 10 Coke 104. See the books cited to the precedent ſection, under the letter (*x*). Yet it is ſaid in Dyer 359. That if a full jury doth not appear, and the plaintiff pray a diſtringas without praying any tales, the court ought to grant it at the prayer of the defendant. Vide 2 R. Ab. 671.

Sect. 12. Secondly, That in capital caſes, a *tales* may be granted for a larger number than the firſt proceſs, as for (*r*) ſixty or forty, or any other even (*s*) number that the court thinks proper, in order to prevent the delay, which may be occaſioned by the defendant's peremptory challenges. And in this reſpect the law in reſpect of a *tales* in capital caſes is different from what it is in any other caſe; it being an allowed rule, that in all (*t*) other caſes the *tales* muſt be for a leſs number than the firſt proceſs.

(*r*) 14 H. 7. 7. Summary 257. 2 Hale 266. S. P. C. 155. Finch 415. B. Octo Tales 6. 8. 19. Keilway 176. Dyer 213. 1 Bulſtrode 121. 15 Ed. 4. 33. 16 Edw. 4, 5. 10 Co. 104, 105.
(*s*) 10 Coke 105. Finch of law 414. But a tales de circumſtantibus may be of any uncertain number, 10 Coke 105. (*t*) 14 H. 7. 7. Finch 414. 10 Coke 104. 105. 2 R. Ab. 672. 37 H. 6. 12. B. Octo Tales 11. 16. F. Inqueſt 20. 40. 18 Ed. 4. 6.

Sect. 13. Thirdly, That every ſubſequent *tales*, in capital as well as in all (*u*) other caſes, muſt be for a (*x*) leſs number than the former, except the former were quaſhed, in which (*y*) caſe the next may be for the ſame number.

(*u*) Finch 414. 2 R. Ab. 672. B. Octo Tales 15, 16. B. Attaint 7. 10 Coke 105. Keilway 176.
47 Aſſize 10. 14 H. 7. 2. (*x*) S. P. C. 155. Summary 257. 2 Hale 266. 10 Coke 105. F. Inqueſt 40. It is ſaid that there may 12 tales; but this is contrary to all the other books (*y*) S. P. C. 155. Summary 257. F. Challenge 36. 20 H. 6. 38.

Sect. 14. Fourthly, That the quaſhing the array of the principal panel doth (*z*) not quaſh that of the *tales*, but the inqueſt ſhall be taken of thoſe returned on the *tales* if there be enow, and if not, others ſhall be added to them by a new *tales*. Yet it ſeems (*a*) agreed, That if all the perſons returned on a *habeas corpora*, be challenged and drawn, there ſhall not be a *tales* awarded, but a new *venire facias*; for the word *tales* plainly refers to ſome others, to whom the perſons returned are to be like. Alſo it ſeems agreed, (*b*) That if the firſt *habeas corpora* be

(*z*) F. Inqueſt 30. S. P. C. 155. Dyer 245. 10 Coke 104, 105.
(*a*) S. P. C. 155. Finch 414.
(*b*) 34 H. 6. 20. F. Inqueſt 20.

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

(*d*) Cro. Eli. 502. 27 H. 6. 10. B. Niſi prius 1. B. Oct. Tales 1. 34 H. 6. 21. 2 R. Abr. 671.

Sect. 15. Fifthly, That it ſeems the ſtronger opinion, That a *tales* is not grantable upon the return of a *venire*, but only (*d*) upon the return of a *habeas corpora* or *diſtringas*, becauſe it appears not before ſuch return but that a full jury may appear.

Cont. B. Octo Tales 10. 15 H. 7. 9.

(*e*) 1 R. Abr. 708. (*f*) 27 H. 6. 10. B. Niſi prius 1. Octo Tales 1. (*g*) 27 H. 6. 10. B. Niſi prius 1. Octo Tales 1.

Sect. 16. Sixthly, That the (*e*) *diſtringas* or (*f*) *habeas corpora*, with a command to add ſo many more to thoſe ſummoned on the *venire*, is the firſt proceſs againſt the *tales*; but it is (*g*) ſaid not to be grantable with a *niſi prius*, without having been firſt returned into the court.

1 H. 5. 11. S. P. C. 157.

(*h*) Cro. Jac. 677.

Sect. 17. Seventhly, That (*h*) if a juror be withdrawn after a trial is commenced whereon a *tales de circumſtantibus* was awarded, and afterwards a new *habeas corpora* be taken out with a *tales*, it ſhall appoint ſuch *tales* to be added to the jurors returned on the firſt *venire*, and alſo to thoſe returned on the *tales de circumſtantibus*; becauſe the court above will take judicial notice of what is done at *niſi prius* being entered on record.

(*i*) 35 H. 8. 6. 1. 7. made perpetual by 2 & 3 Ed. 6. 32. 4 & 5 P. & M. 7. 5 Eliz. c. 25. 14 Eliz. c. 9. 7 & 8 Will. 3. c. 32. 3 Geo. 2. c. 24. Vide alſo 2 Seſſ. Caſ. 333. 21 Viner 313. 3 Bac. Ab. 248. 365. (*m*) See

Sect. 18. Eighthly, That the (*i*) ſtatutes which authoriſe juſtices of *niſi prius* to award a *tales de circumſtantibus*, extend (*k*) as well as to all capital caſes, whether of treaſon or felony, as to others. But it ſeems, That ſuch a *tales* cannot be prayed for the king upon an indictment, or criminal information, without a (*l*) warrant from the attorney general, or an expreſs (*m*) aſſignment from the court before which the inqueſt is taken. But for the fuller underſtanding of theſe matters, not being ſo proper for this treatiſe, I ſhall refer to the ſtatutes in the margin.

(*k*) Raym. 367. 1 Levinz 223. 1 Keble 490. (*l*) 1 Levinz. 223. 4 Comm. the Statute of 14 Eliz. c. 9.

(*n*) 4 Stat. Tr. 179 to 182. (*o*) 4 St. Tr. 179 to 182. Yet there is an inſtance in Keilw. 176. of the tales awarded in an appeal before ſuch juſtices. And the like was done Plowden 100. upon an indictment of murder. Vide 2 Hale 266, S. P. C. 155. Keilw. 176. Plowden 100. Jenk. 340. (*p*) 4 St. Tr. 179 to 182. larger

Sect. 19. Ninthly, That it hath been (*n*) queſtioned whether any *tales* be grantable by juſtices of oyer and terminer; and it hath been (*o*) holden, That it is not grantable by juſtices of gaol-delivery: And therefore if a trial before ſuch juſtices be put off for want of a ſufficient number of jurors, it ſeems the uſual practice for the court not to order a *tales*, but a (*p*)

larger panel, whereon the former jurors ſhall be returned in the ſame order as before, and called to be ſworn as they ſtand, without any more regard to thoſe who were ſworn before than to the others. Which is the method likewiſe to be obſerved in the like caſe, (*q*) as to the ſwearing of a jury returned with a *tales*.

(*q*) Yelver. 23. It was agreed to be common practice on the circuits, that if but one juror appears and he is challenged, there may be 12 taleſmen ſworn, who may try the cauſe. Sel. caſ. evid. 120. 3 Bac. Ab. 249.

Sect. 20. As to the ſixth point, *viz.* Where it is neceſſary to return a panel into court, before an inqueſt can be taken upon it, and where the priſoner may demand a copy of it.—It is recited by 42 Edw. 3. c. 11. "That divers miſchiefs had happened, becauſe that the panels of inqueſts which had been taken before juſtices by writ of *ſcire facias*, and other writs, had not been returned before the ſeſſions of the juſtices at the *niſi prius*, and otherwiſe, ſo that the parties could not have knowledge of the names of the perſons which ſhould paſs in the inqueſt, whereby divers of the people had been diſherited and oppreſſed," and thereupon it is ordained "that no inqueſt (*r*) "but aſſizes and deliverances of gaols, be taken by writ of "*niſi prius*, nor in any other manner, at the ſuit of great or "ſmall, before the names of all them that ſhall paſs in the in-"queſt be returned in the court."

(*r*) Note, that 6 H. 6. ch. 2. provides alſo for aſſizes, 3 Inſt. 175.

Sect. 21. It ſeems (*s*) agreed, that this ſtatute extends as well to writs of *niſi prius* in criminal caſes as in civil, and to jurors returned upon a *tales* as well as to thoſe returned upon a principal panel.

(*s*) S. P. C. 156, 157. Summary 258. Quære, If the ſtatute extends to juſtices of oyer and terminer, for it is ſaid to be the practice for trials before them for treaſon to be on the *venire*, and not to award any *habeas corpora*. 4 Stat. Trials 102.

Sect. 22. But it ſeems, (*t*) That in trials before the juſtices of gaol-delivery the priſoner has no right to a copy of the panel before the time of his trial, except only in caſes within the purview of 7 & 8 Will. 3. c. 3. which enacts, "That "every perſon indicted and tried for high treaſon, or miſpriſion "thereof (except it be for counterfeiting the coin, &c.), ſhall "have a copy of the panel of the jurors, who are to try him, "duly returned by the ſheriff, and delivered unto him two "days (*u*) at leaſt before he ſhall be tried."

(*t*) 2 Stat. Tr. 762. 3 Stat. Tr. 866, 867. 4 Stat. Tr. 6.

(*u*) Vide ante ch. 39. ſect. 16. for an alteration in this reſpect.

Sect. 23. It hath been (*x*) adjudged to be ſufficient, within the intent of this act, to deliver to a priſoner a copy of a panel arrayed by the ſheriff before it is returned into court, if the very ſame panel be afterwards returned.

(*x*) 4 Stat. Tr. 101 to 104.

CHAPTER THE FORTY-SECOND.

BEFORE WHAT COURT THE JURY IS TO BE RETURNED.

AND now I am to conſider before what court the proceſs againſt jurors in criminal caſes is returnable.

(a) 4 Inſt. 159.

Sect. 1. There can be no (*a*) doubt but that, by the common law, it is returnable only into the court wherein the proſecution was depending.

(b) 2 Inſt. 421. 423, 424 C. Car. 349.
(c) 2 Inſt. 424. 4 Inſt. 160. See the books cited to the other parts of this ſection.
(d) B. Corone 231.
(e) 4 Coke 43. 4 Inſt. 160. Dyer 46. 261. 21 H. 7 34. Raſtal 47. 55.

Sect. 2. But the ſtatute of (*b*) Weſtmin. 2. c. 30. having ordained "that all pleas in either bench, which require only "an eaſy examination, ſhall be determined in the country "before the juſtices of aſſize, by virtue of the writ preſcribed "by that ſtatute, commonly called the writ of *niſi prius*." It ſeems to have been univerſally agreed, (*c*) That an iſſue joined in the king's bench upon an (*d*) indictment or (*e*) appeal, whether for treaſon or (*f*) felony, or a crime of an inferior (*g*) nature, committed in a different county from that wherein the court ſits, may be tried in the proper county by writ of *niſi prius* by virtue of the ſaid ſtatute.

Sup. c. 7. ſect. 18. c. 23. ſect. 146. (*f*) B. Corone 231. 4 Inſt. 160. Raymond 367. (*g*) C. Car. 348, 349. 6 Modern 246, 247.

(b) F. Niſi prius 16. 2 Leonard 110. 2 Inſt. 424. F. N. B. 241. 4 Comm. 344. B. Niſi prius 16.
(i) 2 Inſt. 424. F. N. B. 241. Crompton Jur. 211.

Sect. 3. Yet inaſmuch as the king is not expreſsly named in this ſtatute, and it is a general rule, That he ſhall not be bound by a ſtatute which doth not expreſsly name him; it ſeems to have been generally holden, That wherever the king is a party it is irregular to grant a trial by *niſi prius* without his (*h*) ſpecial warrant, or the (*i*) aſſent of his attorney. But I do not find it denied, (*k*) but that regularly the court may grant it in an appeal in the ſame manner as in any other action.

6 Modern 246, 247. S. P C. 156. Summary 258. In Cro. Car. 348, 349. In an indictment of barratry, which ſeemed to require great examination, the court refuſed to grant a trial by Niſi prius at the motion of the attorney general, till the king by his letters had ſignified his pleaſure, that it ſhould be ſo tried. Vide 6 Modern 123. (*k*) But not where the jury is to be from two counties, Dyer 46. (*l*) See the books cited to the precedent ſection under letter *e*.

(m) Chapter 7. ſect. 17, 18. and Ch. 23. ſ. 146.
(n) Ch. 25. from ſect. 7 to 14.

Sect. 4. Having ſhewn already (*m*), that juſtices of *niſi prius* have power by 14 Hen. 6. c. 1. to give judgment in felony and treaſon, and how far they have power to give damages in an appeal, and having alſo ſhewn (*n*) in what caſes they may arraign an appellee at the ſuit of the king, after a nonſuit of the party, I ſhall refer to what is there ſaid concerning theſe matters.

CHAPTER

CHAPTER THE FORTY-THIRD.

OF CHALLENGES.

AND now I am to ſhew in what manner the jurors returned for the trial of a criminal may be challenged.

I ſhall conſider this ſubject ſo far as it relates to all Perſons in general; and with regard to Aliens only.

As to the learning of this kind, ſo far as it relates to all perſons in general.

Sect. 1. Having premiſed, That no challenge (*a*) can be taken, either to the array or to the polls, till a full jury have appeared; and that no juror can be (*b*) challenged either by the king or priſoner, without (*c*) conſent, after he hath been ſworn, whether on the ſame day, or (according to the greater number of (*d*) authorities) on a former, on the ſame trial, unleſs it be for ſome cauſe which happened (*e*) ſince he was ſworn.

(*a*) Hobart 235. (*b*) Yelver. 23. C. Car. 291. Co. Litt. 158. 2 Inſt. 431. 22 Ed. 3. 8. 2 R. Abr. 658, 659. 661. 12 H. 4. 10. F. Chall. 64. 14 H. 7. 6. B. Chall. 73.

9 H. 5. 7. Ab. F. Chall. 72. B. Challenge 50. 14 H. 7. 19. Ab. B. Chal. 75. 3 State Trials 379. Neither can a challenge be taken to the array after any of the jurors are ſworn. Hob. 235. (*c*) C. Car. 291. 3 State Trials 379. (*d*) 22 Ed. 3. 8. 2 R. Ab. 658, 659. 661. 12 H. 4. 10. 14 H. 7. 6. B. Challenge 50. 53. 130. F. Challenge 143. 28 Aſſize 44. Yelverton 23. Yet adjudged, That a juror after he is ſworn may be peremptorily challenged another day, though not on the ſame wherein he is ſworn, 32 H. 6. 26. Ab. B. Challenge 193. 14 H. 7. 19. Ab. B. Challenge 75. S. P. C. 158. 2 Rich. 3. 19. Ab. B. Challenge 194. (*e*) 22 Ed. 3. 8. Yelverton 23. 2 R. Ab. 658. B. Challenge 130. 28 Aſſize 44. Co. Litt. 158. 14 H. 7. 6. B. Challenge 50. 73. 75. F. Challenge 64. 72. 143. 2 Hale 270.

I ſhall endeavour to ſhew, How jurors may be challenged on the part of the king. And, How on the part of the priſoner.

And firſt, As to ſuch challenges on the part of the King.

Sect. 2. It ſeems (*f*) agreed, That by the common law the king might challenge peremptorily as many as he thought fit, of any jury returned to try any cauſe in which he was a party.

(*f*) Co. Lit. 156. Summary 259. S. P. C. 162. 1 R. Ab. 645. 4 Comm. 347.

But this is remedied by 33 Edw. 1. commonly called an ordinance for inqueſts, which is enacted as followeth: "Of inqueſts "to be taken before any of the juſtices, and wherein our lord "the king is party, howſoever it be: It is agreed and ordained "by the king and all his counſel, that from henceforth, not-

" withſtanding it be alledged by them that ſue for the king, " that the jurors of thoſe inqueſts, or ſome of them, be not " indifferent for the king, yet ſuch inqueſts ſhall not remain " untaken for that cauſe; but if they that ſue for the king " will challenge any of thoſe jurors, they ſhall aſſign of their " challenge a cauſe certain, and the truth of the ſame chal- " lenge ſhall be enquired of according to the cuſtom of the " court."

(g) Moor 595. S. P. C. 162. Summary 259. Co. Litt. 159. and the books cited to other parts of this ſection. Yet peremptorily challenges were taken for the queen in Throckmorton's trial.

Sect. 3. It ſeems to be clearly ſettled *(g)* at this day, that this ſtatute being general, extends as well to all criminal caſes as civil. However if the king challenge a juror before a panel is peruſed, it is *(h)* agreed that he needs not ſhew any cauſe of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the perſon ſo challenged. And if the defendant, in order to oblige the king to ſhew cauſe, preſently challenge *touts paravaile (i)*, 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.

1 Mar. 1 Stat. Trials 48. *(h)* 1 Ventris 309, 310. S. P. C. 162. 2 Stat. Tr. 744. 3 Stat. Trials 52. 869. Skinner 82. Summary 259. 2 Hale 271. 4 Comm. 347. *(i)* 3 Stat. Trials 52. Raym. 473, 474. Skinner 82. See 3 Stat. Trials 4. 4 Stat. Tr. 177. 407.

(k) 2 Ruſhw. 94. Moor 621, 622. Co. Litt. 156. 1 Stat. Tr. 164. 265. Tr. p. pais c. 9. 2 Hale 275.

Sect. 4. As to the ſecond point, *viz.* How jurors may be challenged on the part of the priſoner: Having premiſed that a *(k)* peer can take no challenge to any of his peers; and that where ſeveral are tried on a joint *(l) venire*, a juror challenged and drawn as to one, cannot but be drawn as to all.

(l) Sup. c. 41. ſect. 9. Strange 1023. Rex v. B. of Worceſter, K. B. Mich. 23 Geo. 2. 3 Comm. 359.

† And that by 24 Geo. 2. c. 18. " No challenge ſhall be taken " by a peer or lord of parliament, to any panel of jurors for want " of a knight's being returned in ſuch panel, nor any array " quaſhed by reaſon of any ſuch challenge taken after that " time."

I ſhall farther endeavour to ſhew, How jurors may be challenged peremptorily; and, How they may be challenged for cauſe.

(m) 4 Stat. Tr. 105. 1 Stat. Tr. 601. 2 Stat. Tr. 743, 744.

As to the firſt particular, *viz.* How jurors may be challenged peremptorily: Having premiſed that the priſoner muſt take all ſuch challenges himſelf, *(m)* even in ſuch caſes wherein he may have counſel.

I ſhall endeavour to ſhew, In what caſes a peremptory challenge is allowable; and, How many jurors may be ſo challenged.

Sect. 5. As to the firſt particular, I take it to be agreed, that a peremptory challenge was allowable by the common law, in all (*n*) capital caſes both upon indictments and (*o*) appeals, and alſo in (*p*) miſpriſion of high treaſon; but it was enacted by 33 Hen. 8. c. 23. ſ. 3. "That it ſhould not be "allowed in any caſes of high treaſon, or miſpriſion of high "treaſon." Nor do I know that any ſtatute hath revived it to the latter of theſe; for it is ſaid that the ſtatute of 1 Ph. & Mary, c. 10. which, by reſtoring the old courſe of the common law as to trials of treaſon, has revived (*q*) ſuch challenges as to treaſon, doth not (*r*) extend to miſpriſion of high treaſon.

(*n*) Co. Litt. 156. Moor 12. (*o*) Moor 12. Bendl. 42. 9 H. 5. 7. Ab. F. Challenge 72. B. Challen. 50. 14 H. 7. 7. B. Chall. 74, 75. 211. 3 H. 7. 2. (*p*) 3 Inſt. 27. But in no other caſe that is not capital, 2 State Trials 254. (*q*) 3 Inſt. 227. S. P. C. 157, 158. 1 Anderſon 107, 108. Co. Litt. 156. 2 Stat. Tr. 764, &c. But this is made a quære Savil 57. (*r*) Sup. c. 255. ſect. 145. 4 Comm. 347. Yet 3 Inſt. 27. a. it is ſaid that for miſpriſion of treaſon one may peremptorily challenge 35.

Sect. 6. It hath been anciently (*s*) adjudged, and is holden both by (*t*) Staundforde and (*u*) Coke, That a man ſhall have the ſame peremptory challenges on an iſſue joined upon collateral matter alledged in avoidance of an outlawry for a capital crime, as he may on the general iſſue: But the contrary is holden by (*x*) Hale, and is ſaid to have been (*y*) adjudged in the caſe of *Okey and Berkſtead* (1).

(*s*) F. Chal. 153. 165. (*t*) S. P. C. 163. Yet the ſame point is made a quære S. P. C. 158. (*u*) Co. Litt. 157. (*x*) Sum. 259. 2 Hale 267. (*y*) 1 Lev. 61. But the other books which report the ſame caſe take no notice of this point. 1 Siderſin 7. Kelynge 13. (1) Charles Rateliffe had been convicted of high treaſon; and in B. R. Mich. 20 Geo. 2. upon a collateral iſſue that he was not the ſame perſon, a peremptory challenge was inſiſted on, *and refuſed by chief juſtice Lee.* 1 Black. 4. 6.—Vide Foſter 42. and Johnſon's Caſe, *ibid.* 46.

Sect. 7. As to the ſecond particular, *viz.* How many jurors may be challenged peremptorily: It ſeems to have been the ſettled (*z*) rule of the common law, wherever ſuch challenge was allowed, to ſuffer the priſoner to challenge as many as he thought fit under the number of three full juries, *i. e.* not amounting to more than thirty-five. But if a criminal challenge more than that number, (*a*) it ſeems there more prevailing opinion that he is to be dealt with as one that ſtands mute.

(*z*) Co. Litt. 156. Crompton 114. 9 H. 5. 7. 14 H. 7. 7. B. Chall. 70. 74, 75. 217. 19 E. 4. 33. 3 H. 7. 2. Ab. B. Chall. 211. 17 Aſſize 6. 17 Ed. 3. 23. Ab. B. Chall. 105. Trial per pais, c. 9. S. P. C. 157, 158. See the books cited, c. 30. ſect. 2. Lamb. b. 4. c. 14. ſays that it was doubtful at common law how many might be challenged. (*a*) Sup. c. 30. ſect. 2.

Sect. 8. It is enacted by 22 Hen. 8. c. 14. ſ. 7. made perpetual by 32 Hen. 8. c. 3. "That no perſon arraigned for any "petit treaſon, murder or felony, be admitted to any peremp- "tory challenge above the number of twenty." But it ſeems (*b*) agreed, That 1 & 2 Ph. & Mary, c. 10. which reſtores the courſe of the common law as to trials of treaſon, has revived the old challenge of thirty-five in trials of petit treaſon.

(*b*) B. Chall. 217. 2 Hale 260. 269. 3 Inſt. 227. Vide ſupra ſect. 5 and c. 25. ſ. 132. 144. S. P. C. 158. Co. Lit. 156.

Sect. 9. It ſeems to have been holden by Sir (*c*) Edward Coke, that he who challenges more than twenty upon an ar-

(*c*) 3 Inſt. 227. 4 Comm. 348.

raignment of felony, ſince the above-mentioned ſtatute of 22 Hen. 8. ſhall (*d*) neither forfeit his goods, nor have judgment of death, nor of *pain forte et dure*, but ſhall only be over-ruled as to his challenges ſo far as they exceed twenty, and put upon his trial. But this ſeems to have been doubted by Sir Matthew (*e*) Hale, and the contrary is holden by (*f*) Crompton, and ſeems more agreeable to the moſt natural conſtruction of 22 Hen. 8. which ſeems to have intended no alteration as to the nature or effect of peremptory challenges, but only as to their number. To which may be added, That nothing is more common than for (*g*) ſubſequent ſtatutes, which take from felons the benefit of clergy, (*h*) expreſsly to exclude thoſe who challenge more than twenty, which would be needleſs if their challenge were only to be over-ruled, and did not ſubject them to judgment of (*i*) death, &c.

(*d*) Vide c. 30. ſect. 19. Staund. Prer. 46.
(*e*) Sum. 260. Sed vide 2 Hale 270. 345. 399.
(*f*) Crompton 214.
(*g*) Sup. c. 33. ſect. 32. 45. 48. 59. 64. 66. 69. &c.
(*h*) Vide ſup. c. 33. ſect. 27. 36. 11 Coke 31, 32. 35. S. P. C. 126.
(*i*) Vide c. 33. ſect. 20. The words of the ſtatute are, "That he be not admitted to challenge, &c." the evident conſtruction of which is, that any further challenge ſhall be diſallowed or prevented, and, being null from the beginning and never in fact a challenge, it can ſubject the priſoner to no puniſhment; but the juror ſhall be regularly ſworn. 4 Comm. 348.

Sect. 10. As to the ſecond particular, *viz.* How jurors may be challenged for cauſe: Having premiſed that it is a (*k*) general rule, That wherever (*l*) the king is a party, as he is in every (*m*) indictment, and in ſome ſort alſo in (*n*) appeals of felony, he who takes a challenge for cauſe muſt ſhew it preſently, and ſhall not have time till the panel is peruſed, as the king ſhall where he takes a challenge; as hath been more fully ſhewn, ſect. 3. and having alſo farther premiſed that after a priſoner hath challenged a juror for cauſe, and his cauſe hath been diſallowed, or found againſt him, he may (*o*) challenge the ſame juror peremptorily, before he is (*p*) ſworn.

(*k*) Co. Litt. 158. F. Chall. 128. 3 Stat. Trials 235. S. P. C. 162. 2 R. Ab. 659. 38 Aſſize 22. 1 Siderfin 244. Cont. 19 Aſſize 6 Ab. B. Chall. 107.
(*l*) Except in inqueſts, F. Challenge 105. 107. 2 R. Ab. 659, 660. (*m*) That cauſe muſt be ſhewn preſently on indictments. Coke Litt. 158. 1 Siderfin 244. 1 H. 5. 1. Ab. F. Challenge 70. Skinner 82. (*n*) That cauſe muſt be ſhewn preſently in appeals. Coke Litt. 158. This is left a quære S. P. C. 162. (*o*) Coke Litt. 158. 37 H. 6. 8. Ab. F. Challenge 48. B. Challenge 86. Cont. 10 H. 4 9. Ab. F. Challenge 180. (*p*) Vide ſup. ſect. 1.

I ſhall endeavour to ſhew, What ſhall be a good challenge of a juror, in reſpect of his honour or inſufficiency; and, What in reſpect of his indifferency.

And firſt as to the challenge of a juror for his honour or inſufficiency; having premiſed that it is agreed to be a good challenge of this kind that a juror is an (*q*) alien (*r*), minor, or (*s*) villein.

(*q*) Co. Litt. 156. Theloal b. 1. ch. 6. ſect. 14. 14 H. 4. 19 B. Challenge 48. F. Challenge 91. 2 R. Ab. 656. Calvin's caſe 18. b. (*r*) Coke Litt. 157. 172. Litt. ſect. 259. Vide 7 & 8 Will. 3. c. 32. (*s*) 2 R. Ab. 657. Co. Litt. 156. 9 Edw. 4. 16. 26 Aſſize 28. F. Challenge 135. B. Challenge 64. 118. But the contrary is holden in the year-book of 10 H. 7. 20. Ab. B. Challenge 220. and a quære by the reporter and Brook.

I ſhall

I ſhall more fully endeavour to ſhew, Firſt, Where peerage is a good cauſe of challenge. Secondly, Where the want of freehold. Thirdly, Where infamy. Fourthly, Whether old age, ſickneſs, or non-reſidence in the county, be in any caſe a good cauſe of challenge.

Sect. 11. As to the firſt particular, *viz.* Where a peerage is a good cauſe of challenge.—It is (*s*) agreed, That if a peer be returned on a jury and bring a writ of privilege, he ſhall be diſcharged. Alſo it ſeems to have been (*t*) holden, that even without ſuch a writ he may either challenge himſelf, or be challenged by the party. *Quære.*

(*s*) 48 Aſſiſe 6. 48 Ed. 3. 30. B. Chal. 18. 37. 209. Dyer 314. 35 H. 6 46. Moor 767. Reg. 179.

F. N. B. 165. (*t*) 22 E. 3. 18. F. Chall. 119. 2 R. Ab 646. but his notes are not warranted by the books at large. Co. Lit. 157 9 Coke 49. 27 H. 8. 22. con. 35. H. 6. 46. B. Challenge 8. Finch 506. 6 Coke 53. F. Challenge 44. 1 Jones 153. F. N. B. 166. Vide 3 Bac. Ab. 260.

Sect. 12. As to the ſecond particular, *viz.* Where the want of freehold is a good cauſe of challenge: It ſeems to be admitted by the ſtatute of 21 Edw. 1. *de his qui ponendi ſunt in aſſiſis*, and alſo by the regiſter, That at the common law there was no (*u*) neceſſity that jurors ſhould have any freehold as to inqueſts before juſtices in eyre, or in cities or burghs, as hath been more fully ſhewn, chap. 25. ſect. 21. Alſo it ſeems (*x*) agreed, That the common law doth not require that a juror ſhould in any caſe have a freehold of any certain value; and upon this ground it hath been adjudged, That a freehold worth but (*y*) 20*s.* or (*z*) 5*s.* or even a (*a*) penny, is ſtill a ſufficient qualification for a juror in ſuch caſes as are not within the ſtatutes which require a freehold of a greater value. Alſo it hath been (*b*) adjudged, that the common law did not require that a juror ſhould in any caſe have any freehold. But this is not only contrary to what ſeems implied by all the authorities above cited, which, in ſaying that the common law did not require a freehold of any certain value, plainly ſeem to ſuppoſe that it required ſome freehold, but it hath been alſo contradicted by many expreſs (*c*) authorities; agreeably to which it ſeems to be (*d*) ſettled at this day, that the want of freehold is a good challenge of a juror in all caſes not otherwiſe provided for by (*e*) ſtatute, and conſequently in a trial for high treaſon in London as well as in any other county.

(*u*) Vide Raym 485, 486. 1 Vent. 366. Infra ſect. 21. (*x*) Keilw. 46. 54 92. C. Eliz. 413. See the citations to the next three letters, Litt. ſect 464. and 2 R. Ab. 647, 648. (*y*) 10 H. 6. 7. Ab. F. Chall. 29. B. Chall. 189. 19 H. 6. 9. Ab. F. Chall. 32. B. Chall. 60. 2 H 7. 13. B. Chall. 152. 10 H. 6. 18. B Chall. 192. (*z*) 3 H 4. 4. Ab. F. Chal. 78. B. Chall. 32. (*a*) Keilway 46. (*b*) 28 Aſſ. 15. Ab. B. Chall. 106. 10 H. 7. 13. B. Chall. 57. (*c*) Cro. Eliz. 413. Trial per pais c. 9. 3. H. 4. 4. Ab. F. Challenge 78. B. Challenge 32. 4 H. 4. 1. Vide Keilw. 54. Coke Litt. 156, 157. 2 R. Ab. 647. 7 H. 4. 1. Ab. B. Challenge 34. F. Challenge 58. 21 H. 7. 29. Ab. B. Chall. 90, 10 H. 7. 11. It ſeems taken for granted that iſſues in all caſes are to be returned upon jurors, by which it ſeems to be implied that they ought to have land, &c. (*d*) 3 State Trials 869. 4 State Trials 874. 6 State Trials 58. 245. (*e*) Vide infra, ſect. 19, &c.

3 State Trials 135 to 140. Vide 16 H. 7. 14. 7 H. 6. 44. Ab. F. Chall. 24. It ſeems to be holden that by the common law it is a challenge only to the favour.

Sect. 13. But it ſeems agreed, that wherever the letter of the common or ſtatute law require that a juror ſhould have a freehold, the meaning is fully ſatisfied, by his having the (*f*) uſe of a freehold; and that it is not material whether he hath it in his own or his (*g*) wife's right, or whether it be (*h*) abſolute or upon condition, or an eſtate of inheritance, or only (*i*) for term of one's own or another's life, ſo that it be in the ſame (*k*) county, wherein the ſuit is brought, and actually continue in the juror (*l*) till the time when he is ſworn.

(*f*) Keilw. 46. 92. Dyer 9. F. Chall. 27. 33 H. 7. 7. 5 Edw. 4. 7. B. Chall. 165. Co. Litt. 272. Plowd. 58. 35 H. 7. 13. S. P. C. 160. B. Jurors 14.

(*g*) F. Chall. 27. 9 H. 7. 1. B. Chall. 157. 12 H. 7. 4. B. Chall. 160. Co. Litt. 156. (*h*) Co. Litt. 156. Keilw. 167, 168. 2 R. Ab. 648. con. 7 H. 4. 1. F. Chall. 158. But Bro. in abridging this caſe in title Challenge 53. ſays quod mirum. (*i*) 9 H. 7. 1. 12 H. 7. 4. B. Chall 160. Co. Litt. 156. B. Chall. 157. See F. N. B. 14. 16. (*k*) 9 H. 7. 1. B. Chall. 157. Co. Litt. 157. Raſtal 18. 19 H. 6. 9. (*l*) 12 H. 7. 4. B. Chall. 160. Coke Litt. 157. 7 H. 4. 1. Ab. F. Challenge 158.

Sect. 14. It is enacted by the (*m*) ſtatutes of Weſtminſter 2. c. 38. and 21 Edw. 1. *de his qui ponendi ſunt in aſſiſis*, that none ſhall be put in aſſizes or juries, except in cities, burghs or trading towns, who have not tenements to the yearly value of 40*s.* &c. But it ſeems to have been (*n*) generally agreed that a juror can neither be challenged by the parties for being returned contrary to theſe acts, nor alledge ſuch matter himſelf for his diſcharge, but muſt take his remedy by action againſt the ſheriff, or by writ of privilege for his diſcharge.

(*m*) Vide c. 25. f. 21, 22. 30.

(*n*) 2 Inſt. 448. 28 Aſſize 15. Ab. B. Chall. 106. 3 H. 4. 4. Ab. B. Chall. 32. F. Chall. 78. F. N. B. 166. 2 St. Tr. 744. But 38 Aſſize 19. is contrary.

Sect. 15. It is farther enacted by 2 Hen. 5. c. 3. "That "no perſon ſhall be admitted to paſs in any inqueſt upon trial "of the death of a man, nor in any inqueſt betwixt party or "party in plea real, nor in plea perſonal, whereof the debt "or the damage declared amount to forty marks, if the ſame "perſon have not lands or tenements of the yearly value of "forty ſhillings (1) above all charges of the ſame; ſo that it "be challenged by the party, that any ſuch perſon ſo impanelled in the ſame caſes, hath not lands or tenements of "the yearly value of forty ſhillings above the charges as "afore is ſaid."

(1) Extended by 27 Eliz. c. 6. to 4*l.*

Sect. 16. It hath been (*o*) adjudged, that this ſtatute extends as well to a collateral iſſue, as to the general one, but not to an indictment or information for a crime not (*p*) capital, for the words are, "Upon trial of the death of a man, nor "in any inqueſt between party and party in plea real or perſonal, &c."

(*o*) Keilway 92. 36 H. 7. 14. 2 R. Ab. 647, 648.

(*p*) C. Eliz. 413. Raymond 485, 386.

Sect. 17. It ſeems (*q*) agreed, That a *ceſtuy que uſe* of any freehold in the ſame county, of the yearly value of 40*s.* is a good juror within this ſtatute. And ſome have (*r*) holden,

(*q*) Vide ſup. f. 13.

(*r*) Keilway 92. and B. Chall. 202. Jurors 14. in an abridgment of the year-book of 15 H. 7. 13. pl. 1. But I do not find this point in the book at large.

That

That the law is the ſame as to a feoffee of ſuch land in truſt for another, or a (s) remainder-man of a ſtate of freehold expectant on a leaſe for years. But this ſeems not to be maintainable, becauſe the ſtatute in requiring that a juror ſhall have lands of the yearly value of 40 *s.* above all charges, plainly ſeems to intend that he ought to have lands of the clear (t) income whereof at the time he can expend ſo much. But a man cannot expend any thing out of lands whereof he is enfeoffed to the uſe of another, or wherein he has only a dry remainder.

(s) Keilw. 162.
(t) Vide Keilw. 92. 18 Edw. 4. 13. 19 H. 6. 9. F. Chall. 32. 36 H. 6. 23. 2 R. Ab. 647, 648, 649.

Sect. 18. It hath been (u) adjudged, that this ſtatute is repealed as to treaſons by 1 (x) & 2 Ph. & Mary, c. 10. which enacts "that all trials for treaſon ſhall be according to the "common law."

(u) 3 St. Tr. 135 to 140.
(x) Vide c. 25. f. 132. 142, 143, 144.

Sect. 19. It is recited by 23 Hen. 8. c. 13. "That trials in murders and felonies in cities, boroughs, and towns corporate within this realm having authority to proceed in the deliverance of ſuch offenders, had been oftentimes deferred and delayed, by reaſon of challenge of ſuch offenders, for lack of ſufficiency of freehold, to the great hindrance of juſtice." And thereupon it is enacted, "That every perſon and "perſons being the king's natural ſubject born, which either "by the name of a citizen, or of a freeman, or any other "name, doth enjoy and uſe the liberties and privileges of any "city, borough or town corporate where he dwelleth or "maketh his abode, being worth in moveable goods and ſub-"ſtance to the clear value of forty pounds, be admitted in "trial of murders and felonies in every ſeſſions and gaol-de-"livery, to be kept and holden in and for the liberty of ſuch "cities, boroughs and towns corporate, albeit they have no "freehold; any act, ſtatute, uſe, cuſtom or ordinance to the "contrary hereof notwithſtanding."

Sect. 20. "Provided that this act no way extend to any "knight or eſquire, dwelling, abiding, or reſorting in or "to any ſuch city, &c."

Sect. 21. Alſo ſpecial proviſion is made by 11 Hen. 7. c. 21. and 4 Hen. 8. c. 3. for jurors in London in real and perſonal actions above the value of forty marks, for which I ſhall refer to the ſtatutes at large.

Vide 1 Rich. 3. c. 4. 27 Eliz. c. 6.

Sect. 22. It is enacted by 4 & 5 Will. & Mary, c. 24. "That all jurors (other than ſtrangers upon trials *per medietatem linguæ*) who are to be returned for trials of iſſues joined, "in any of the courts of King's Bench, Common Pleas or "Exchequer, or before juſtices of aſſize or *niſi prius*, *oyer* and "*terminer*, gaol-delivery, or general quarter-ſeſſions of the "peace in any county of this realm of England, ſhall every of "them have in their own name, or in truſt for them, within "the ſame county, ten pounds by the year at leaſt above re-"prizes, of freehold or copyhold lands or tenements, or of

"lands

(b) But by the common law a freehold in ancient demeſne was not ſufficient. 9 H. 7. 1. pl. 2. B. Chall. 157. Co. Litt. 156.

" lands or tenements of ancient (*b*) demeſne, or in rents or in " all or any of the ſaid lands, tenements or rents, in fee-ſim- " ple, fee-tail, or for the life of themſelves or ſome other " perſon; and that in every county in Wales, (1) every ſuch " juror ſhall have in the ſame county ſix pounds by the year at " leaſt, in manner aforeſaid, above repriſes."

(1) This is the firſt time that copy-holders (as ſuch) were admitted to ſerve upon juries in any of the king's courts, though they had before been admitted to ſerve in ſome of the ſheriffs courts, by 1 Rich. 3. c. 4. and 9 Hen. 8. c. 13.

Sect. 23. But it is provided, " That it ſhall be lawful to " return any perſon on a tales in England, who ſhall have five " pounds by the year, or in Wales, who ſhall have three " pounds by the year in manner aforeſaid."

Vide 3 Comm. 362.

† Alſo it is enacted by 3 Geo. 2. c. 24. ſ. 18. made perpetual by 6 Geo. 2. c. 37. " That any perſon having an eſtate in " poſſeſſion in land in their own right, of the yearly value of " twenty pounds or upwards over and above the reſerved rent " payable thereout, ſuch lands being held by leaſe or leaſes " for the abſolute term of five hundred years or more, or for " ninety-nine years, or any other term determinable on one " or more life or lives, the name of every ſuch perſon ſhall and " may and is hereby directed and required to be inſerted in " the liſts (in the manner directed by 7 & 8 Will. 3. c. 32. " and 3 & 4 Ann c. 18.) in order to their being inſerted in the " freeholders book, and the perſons appointed to make ſuch " liſts are hereby directed to inſert them accordingly; and ſuch " leaſeholder or leaſeholders ſhall and may be ſummoned to " ſerve on juries in like manner as freeholders may be ſum- " moned and impanelled to ſerve on juries by virtue of this or " any other act or acts of parliament for that purpoſe, and " be ſubject to the like penalties for non-appearance."

† Alſo it is enacted by 3 Geo. 2. c. 25. ſ. 19. " That the " ſheriffs of the city of London ſhall not impanel or return any " perſon or perſons to try any iſſue joined in any of his majeſty's " courts of King's Bench, Common Pleas, and Exchequer, " or to be or ſerve on any jury at the ſeſſions of *oyer* and *terminer*, " gaol-delivery, or ſeſſions of the peace, to be had or held for " the ſaid city of London, who ſhall not be an houſeholder " within the ſaid city, and have lands, tenements, or perſonal " eſtate to the value of one hundred pounds; and the ſame " matter and cauſe alledged by way of challenge, and ſo found, " ſhall be admitted and taken as a principal challenge, and the " perſon or perſons ſo challenged ſhall and may be examined " on oath of the truth of the ſaid matter."

† And it is further enacted by the ſaid ſtatute par. 20. " That the ſheriffs or other officers to whom the returning " of juries doth and ſhall belong, for any county, city or place " reſpectively,

" reſpectively, ſhall not impanel or return any perſon or per-
" ſons to ſerve on any jury for the trial of any capital offence,
" who at the time of ſuch return would not be qualified in
" ſuch reſpective county, city or place to ſerve as jurors in civil
" cauſes (2) for that purpoſe; and the ſame matter and cauſe
" alledged by way of challenge and ſo found ſhall be admitted
" and taken as a principal challenge, and the perſon or perſons
" ſo challenged ſhall and may be examined on oath of the truth
" of the ſaid matter."

(2) For the qualifications of jurors in civil cauſes, vide ſup. 4 & 5 Will. & Mary c. 24. and 3 Geo. 2. c. 24. ſect. 18.

† Alſo it is recited by 4 Geo. 2. c. 7. ſ. 3. made perpetual by 6 Geo. 2. c. 37. that by the very frequent occaſions there are for juries in Middleſex and by the ſmall number of freeholders that are in the ſaid county the ſheriffs may be under difficulties of procuring juries, it is therefore enacted, " that
" all leaſeholders upon leaſes when the improved rents or value
" ſhall amount to 50 l. *per annum* or upwards, over and above
" all ground rents, or other reſervations payable by virtue of
" the ſaid leaſes, ſhall be liable and obliged to ſerve upon juries
" when they ſhall be legally ſummoned for that purpoſe."

Sect. 24. Alſo there is a ſaving to all (*f*) cities, boroughs and towns corporate, of their ancient uſage of returning jurors of ſuch eſtate, and in ſuch manner as before had been uſed and accuſtomed. But there is no expreſs ſaving of any trial contrary to the purview of this ſtatute and made good by ſome other; and therefore it may be argued that the trial of felonies in towns by jurors worth 40l. in goods by virtue of the above-cited ſtatute of 23 Hen. 8. is no longer lawful, it not being a trial by uſage, but by ſtatute. Yet ſeeing 4 & 5 Will. & Mary ſeems plainly to have a view to trials in counties only, and the ſtatute of 16 & 17 Car. 2. c. 3. which is penned almoſt in the very ſame words, was taken (*g*) no way to alter the former method of trials in towns, leſt it ſhould cauſe a failure of juſtice; and it being generally impracticable to get a ſufficient number of ſuch freeholders as the ſtatute requires in towns, it ſeems a reaſonable conſtruction of 4 & 5 Will. & Mary that the trial by 23 Hen. 8. ſtill continues lawful as before.—But it hath been (*h*) agreed. That for trials in London for high treaſon, every juror ought to have ſuch freehold or copyhold as is required by 4 & 5 Will. & Mary.

(*f*) Vide ſ. 12. and there is the like exception in 27 Eliz. c. 6. ſ. 7, and in 16 & 17 Car. 2. c. 3. ſ. 4.

(*g*) 1 Vent. 366.

(*h*) 4 St. Tr. 186. and in Francia's Trial.

Sect. 25. As to the third particular, *viz.* Where infamy is a good cauſe of challenge.—It ſeems that it is a good challenge of a juror that he is (*i*) outlawed, or that he hath been (*k*) adjudged to any corporal puniſhment whereby he becomes infamous, or that he hath been convicted of treaſon, or (*l*) felony,

(*i*) Co. Litt. 158. 21 H. 6. 30. 11 H. 4. 41. B. Indict. 2. 2 R. Ab. 657. B. Chall. 64. F. Proceſs 208.

C. Car. 134. Trial per pais, c. 9. (*k*) Co. Litt. 6. 156. Trial per pais, c. 9. 158. 2 Buſſ. 154. 2 St. Tr. 521 to 524. Trial per pais, c. 9. Con. 1 Lev. 263. (*l*) Co. Litt. 6.

or (*l*) perjury, or (*m*) conſpiracy or of (*n*) forgery on 5 Eliz. c. 14. or attainted in an (*o*) attaint forgiving a falſe verdict. And it hath been (*p*) holden, That ſuch exceptions are not ſalved by a pardon. And it was anciently (*q*) holden that excommunication was alſo a good challenge. Yet it (*r*) ſeems that none of the above-cited challenges are principal ones, but only to the favour, unleſs the record of the outlawry, judgment or conviction be produced, if it be a record of another court, or the term, &c. be ſhewn, if it be a record of the ſame court.

(*l*) Bracton lib. 4. c. 19. ſect. 2. Fleta lib. 4. c. 8. ſect. 2. Trial per pais c. 9.

(*m*) See b. 1. c. 72. ſect. 9. Co. Litt. 6. 158. It ſeems to be holden, That the conviction for conſpiracy ought to be at the king's ſuit. But 33 H. 6. 55. B. Challenge 15. F. Challenge 41. make no ſuch diſtinction.

(*n*) Coke Litt. 6. and the reaſon ſeems to be becauſe the ſtatute is expreſs, that the offender ſhall be ſet on the pillory, &c. but it was adjudged, 33 H. 6. 55. Ab. F. Chall. 41. B. Chall. 15. 2 R. Ab. 649. That a conviction on 1 H. 5. 3. was not a good challenge to a juror, becauſe it was not a conviction on an action at the common law. Vide 44 Ed. 3. 39. F. Decitant. 11, 12.

(*o*) See the authorities under the precedent letter.

(*q*) 2 State Trials 521 to 524. 2 Bulſtrode 154. 2 Male 278. Vide c. 37. ſect. 48 to 53.

(*r*) Co. Litt. 158. 33 H. 6. 55. 43 Aſſize 46. 8 H. 5. 11. 21 Ed. 4. 74. 2 R. Abr. 649, 650. 658. 33 H. 6. 1. B. Challenge 15. 147. 4 Comm. 363.

Sect. 26. As to the fourth particular, *viz.* Whether old age, or ſickneſs, of non-reſidence in the county be in any caſe a good cauſe of challenge of a juror: I take it to be agreed, That notwithſtanding the (*s*) ſtatute of Weſtminſter 2. c. 38. be expreſs "that neither old men above the age of ſeventy years, "nor perſons perpetually ſick, nor thoſe who are infirm at the "time of their ſummons, nor thoſe who do not reſide in the "county ſhall be put in juries, or in the leſſer aſſizes;" and therefore ſuch perſons may ſue out a writ of (*t*) privilege for their diſcharge, grounded on this ſtatute; yet if they be (*u*) actually returned and appear, they can neither be challenged by the party, nor excuſe themſelves from not ſerving if there be not enow without them.

(*s*) 2 Inſt. 446, 447, 448.

(*t*) F. N. B. 165, 166. Reg. 179, 180.

(*u*) 2 State Tr. 744. 2 Inſt. 448. By 7 & 8 Will. 3. c. 32. Infants under 21 are exempted from juries. 4 Comm. 364.

Sect. 27. As to the ſecond point, *viz.* What ſhall be a good challenge of a juror in reſpect of his indifferency: It is expreſsly enacted by 25 Edw. 3. c. 3. which ſeems to have been made in (*x*) affirmance of the common law, "That no indictor "ſhall be put in inqueſts upon deliverance of the indictees of "felonies or (*y*) treſpaſs, if he be challenged for that ſame "cauſe by him which is ſo indicted." And this exception againſt a juror that he hath found an indictment againſt the party for the ſame cauſe, hath been adjudged good, not only upon the trial of (*z*) ſuch indictment, but alſo upon the trial of another indictment or action (*a*) wherein the ſame matter is either in queſtion, or happens to be material, though not directly in iſſue.

(*x*) 12 Aſſ. 36. 19 Aſſize 6. B. Chall. 101. 107. S. P. C. 158.

(*y*) Yet in 7. Ed. 4. 4. Ab. B. Chal. 166. F. Chall. 53. is holden to be no principal Challenge in treſpaſs.

(*z*) 2 St. Tr. 379. 4 St. Trials 286. In the year-book of 40 Aſſ. 10. Ab. B. Chall. 142. An indictor being returned on the petit jury and giving a verdict, was fined becauſe he did not challenge himſelf. Yet 27 Aſſize 13. Ab. B. Challenge 110. and F. Challenge 137. it is not allowed to be a principal Challenge, even upon the trial of the ſame indictment.

(*a*) 8 H. 4. 2. Ab. B. Challenge 42. F. Challenge 79. Co. Litt. 157. 3 Siderfin 844. 2 R. Ab. 649.

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Sect. 28. It hath been allowed a good cauſe of challenge on the part of the priſoner, That the juror (*b*) hath a claim to the forfeiture, which ſhall be cauſed by the party's attainder or conviction; or that he hath declared his (*c*) opinion before-hand that the party is guilty, or will be hanged, or the like. Yet it hath been (*d*) adjudged, That if it ſhall appear that the juror made ſuch declaration from his knowledge of the cauſe, and not out of any ill-will to the party, it is no cauſe of challenge.

(*b*) 1 St. Tr. 502.
(*c*) 21 H. 7. 29. B. Chall. 90. 4 State Tr. 184, 185. and ruled, That the priſoner ſhall not examine a juror concerning ſuch matter on a voir dire, becauſe it ſounds in reproach. Vide 49 Edw. 3. 1. Ab. B. Chall. 25. F. Chall. 100.
(*d*) 7 H. 7. 25. Ab. B. Chall. 55. F. Chall. 22. 20 H. 6. 40. 2 R. Abr. 657. Vide 49 Edw. 3. 1. Ab. B. Chall. 25. F. Challenge 100.

Sect. 29. But it hath been (*e*) adjudged to be no good cauſe of challenge, that the juror hath found others guilty on the ſame indictment; for the indictment is in judgment of law ſeveral againſt each defendant, for every one muſt be convicted by particular evidence againſt himſelf.

(*e*) Kelynge 9. 4 St. Tr. 141. 175.

Sect. 30. It hath been (*f*) ruled to be a good challenge of a juror, on the part of the king, that he hath given his dogs the names of the king's witneſſes.

(*f*) 2 St. Tr. 738.

Sect. 31. It ſeems to be (*g*) ſettled, that where the king is a party he may take either a principal challenge, or to the favour.

(*g*) Co. Litt. 156. 4 H. 7, 8. F. Chall. 63. 44 Edw. 3. 38. B. Chall. 22. 2 R. Abr. 646.

Sect. 32. It is (*h*) ſaid, That the ſubject cannot take a challenge for the favour againſt the king, becauſe every one is bound by his allegiance to favour the king. But if (*i*) no more be meant by theſe books, than that ſuch a challenge is not good without ſhewing ſome actual partiality in ſuch ſheriff or juror, or ſome particular cauſe in reſpect whereof the king may influence them, it ſeems not clearly ſettled how the king in this reſpect hath a greater (*k*) privilege than the ſubject, which yet it ſeems agreed (*l*) that he hath.

(*h*) F. Chall. 63. 65. Co. Litt. 156. 2 R. Abr. 646. 4 H. 7. 8. Tr. per pais, c. 9. 3 St. Tr. 235, 236. 3 St. Tr. 661. C. Eliz. 663.
(*i*) 2 R. Abr. 646, 640. 1 Ventris 309.
(*k*) For in the year-book of 20 H. 6. 40. ab. 2 R. Ab. 641. It is holden in the caſe of the ſubject to be no cauſe of challenge, that the ſheriff hath malice againſt the party without ſhewing ſome particular inſtance of partiality.
(*l*) See the books cited to the other parts of this and the next ſection.

Sect. 33. It hath been (*m*) ſaid to be no principal challenge where the king is a party, that a juror is of the king's livery, or his immediate tenant; but it is ſaid, That a challenge for ſuch cauſe ought to conclude to the (*n*) favour. But theſe matters ſeeming to be unſettled, I ſhall leave them to be farther conſidered by others.—And for other matters relating to

(*m*) F. Chall. 17. S. P. C. 162. 2 R. Abr. 646. It is ſaid generally in ſome books, that it is a good challenge of a juror that he is the king's menial ſervant, or a valet of the crown. Co. Litt. 156. F. Cor. 63. Tr. per pais, c. 9. 2 R. Abr. 646. But 3 St. Tr. 235, 236. 4 St. Tr. 70. And in other books the contrary is ruled. B. Chall. 154. 4 H. 7. 3. Cro. Eliz. 663.
(*n*) Vide ſup. ſ. 33.

challenges,

challenges, being not ſo proper for this treatiſe, I ſhall refer to the (o) books which more particularly treat of them.

(o) Co. Litt. 157, 158. Tr. per pais, c. 9. 2 R. Abr. 635 to 666.

And now I am in the ſecond place to conſider the learning of challenges, ſo far as it particularly relates to Aliens.

Sect. 34. It is enacted by 28 Edw. 3. c. 13. ſ. 2. "That in all inqueſts and proofs, to be taken or made "amongſt aliens and denizens, be they merchants or (p) "other, as well before the mayor of the ſtaple as before any "other juſtices or miniſters, although the king be party, the one "half of the inqueſt or proof ſhall be denizens, and the other "half of aliens, if ſo many aliens and foreigners be in the "town or place where ſuch inqueſt or proof is to be taken, "that be not parties, nor with the parties in contracts, pleas, "or other quarrels, whereof ſuch inqueſts or proofs ought to "be taken: And if there be not ſo many aliens, then ſhall be "put in ſuch inqueſts or proofs, as many aliens as ſhall be "found in the ſame towns or places which be not thereto "parties, nor with the parties, as aforeſaid, and the remnant "of denizens, which be good men, and not ſuſpicious to the "one party nor to the other."

(p) F. Inqueſt 22. 3 Edw. 4. 11.

Sect. 35. It is declared by 9 Hen. 6. c. 29. that the above recited ſtatute of 2 Hen. 5. which requires that the jurors in certain caſes ſhall have tenements to the yearly value of 40s. "ſhall be no wiſe prejudicial to this ſtatute of 28 Edw. 3. "nor extend itſelf but only to the inqueſts to be taken "between denizen and denizen." Alſo it ſeems agreed, (q) That the ſubſequent ſtatutes which require that jurors ſhall have tenements to a greater value no way repeal the ſaid ſtatute of 28 Edw. 3. Yet it ſeems, (r) That the Engliſh half of the jury ought to have tenements to the ſame value as in other caſes. And it hath been (s) adjudged, That the words *quorum quilibet habeat quatuor libratas terræ, &c.* ſhall be applied to the Engliſh only.

(q) Cro. Eliz. 272. Vide Summary 260, 261.
(r) C. Eliz. 272.
(s) C. Eliz. 272. 841.

Sect. 36. It ſeems (t) agreed, that there is no need that any of thoſe who find an indictment againſt an alien ſhould be aliens.

(t) Sum. 260. S. P. C. 159.

Sect. 37. Alſo it hath been adjudged, (u) That the ſaid ſtatute of 28 Edw. 3. is repealed as to trials for treaſon, by (x) 1 & 2 Ph. & Mary, c. 10. which enacts "That all trials for "treaſon ſhall be according to the courſe of the common law." Yet it ſeems that the (y) king may, if he thinks fit, make a ſpecial grant to an alien to be tried for treaſon by a jury whereof the one half ſhall be aliens.

(u) Dalliſon 22. Dyer 144, 145. 3 Inſtitute 27. Summary 260.
(x) Vide ſup. c. 23. ſ. 132. 142. 144.
(y) S. P. C. 158. F. Trial 71. 22 Edw. 3. 14.

Sect.

Sect. 38. Alſo it hath been adjudged (*z*) that the ſaid ſtatute of 28 Edw. 3. doth not extend to an appeal, or other action by an alien againſt an alien, for the words are, "all inqueſts, "&c. between aliens and denizens."

(*z*) 21 H. 6. 4. F. Trial 32. B. Trial 42. S. P. C. 260. Summary 261. Bu by 27 Edw. 3. 8. it is enacted, That in pleas between aliens concerning the ſtaple there ſhall be a jury of none but aliens. S. P. C. 159.

Sect. 39. It is (*a*) holden, That by denizens in this ſtatute are meant not only thoſe who are born within the king's ligeance, but alſo thoſe who are made denizens by the king's letters patents.

(*a*) B. Den. 4.

Sect. 40. It ſeems to be (*b*) ſettled, That no alien, whether he be plaintiff or defendant, can take any advantage of the ſtatute, unleſs he (*c*) pray it in time; and that if he have neglected to pray it before the return of a common *venire*, he can neither except to ſuch *venire*, nor pray a tales or other proceſs *de medietate linguæ*.

(*b*) Dyer 28. 145. 304. 357. 3 Edw. 4. 11. 22 Edw. 3. 14. 2 R. Abr. 643. F. Inqueſt 22. Trial 71. Summary 261. B. Panel 3. Con. 21 H. 7. 32. B. Deniz. 4. S. P. C. 259. 'Tis holden C. Eliz. 869. by two judges againſt one, that though the defendant appear by the declaration to be alien, yet the common venire is well awarded, unleſs a venire de medietate be prayed. (*c*) For the form of ſuch a prayer. Raſt Ent. 7. 158, 159 264, 265. Dyer 144. S. P. C. 259. Plowden 2. 2 Hale 272. 3 Bac. Abr. 263.

Sect. 41. It was (*d*) holden, even before the union of the two kingdoms under king James the firſt, That no Scot was an alien within the meaning of this ſtatute, not only becauſe the Scotch language is the ſame with the Engliſh, but alſo (*e*) becauſe the Scots were never reckoned aliens, but rather ſubjects.

(*d*) Dyer 304. Summary 261. (*e*) But quære of his reaſon, for it ſeems contrary to what is admitted in the whole argument of Calvin's Caſe, 7 Coke. See 1 St. Tr. 572, 573. 4 St. Tr. 652, &c.

Sect. 42. Note, That (*f*) ſome of the precedents for the award of a *venire* of a jury of half denizens, and half aliens, in purſuance of 28 Edw. 3. mention, that the aliens ſhall be of the ſame country whereof the party alledges himſelf; and others direct (*g*) generally that one half of the jury ſhall be aliens, without ſpecifying any country in particular. And this form ſeems moſt agreeable to the ſtatute which ſpeaks of aliens in general, and ſeems to be confirmed both by late (*h*) practice, and the greater number of (*i*) authorities.

(*f*) Dyer 144. Raſt. Ent. 7. 159. 264. (*g*) Raſt. 265. 10 Coke 104. (*h*) 3 St. Tr. 3. (*i*) Sum. 261. S. P. C. 158. B. Denizen 4. B. Panel 3. Con. F. Tr. 30. By five judges againſt one.

Sect. 43. If on a *venire* of half denizens and half aliens, the ſheriff return twelve as aliens, and among them ſome who in truth are not ſuch, it ſeems (*k*) that the party ſhall not be concluded by ſuch return, but may notwithſtanding challenge the array for want of a ſufficient number of aliens.

(*k*) 2 R. Abr. 643. Vide S. P. C. 158.

Sect. 44. It ſeems (*l*) agreed, That the return of a *venire* of half denizens, and half aliens, ought to ſpecify which of the jurors are denizens and which aliens, and that a full number of each muſt appear to be ſworn.

(*l*) C. Eliz. 818. 84. 18. But this being only a miſ-return is helped by a verdict in caſes within the ſtatute of Jeofails.

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Sect. 45. If one or more be wanting to make up the full number of ſix denizens or aliens, the juſtices of *niſi prius*, by a reaſonable (*m*) conſtruction of the ſtatutes which give a *tales de circumſtantibus*, may award ſuch a *tales* for ſo many denizens or aliens as ſhall be wanting.

(*m*) 26 Co. 104. Cro. Eliz. 305. 818. 841.

Sect. 46. It is expreſsly enacted by 2 & 3 Ph. & Mary, and 4 & 5 Eliz. c. 20. ſet forth more at large Book the firſt, chapter fifty-fourth, that thoſe adjudged felons, as Egyptians, by virtue of thoſe ſtatutes, ſhall be tried by the inhabitants of the county or place where they ſhall be taken, and not *per mediatatem linguæ*.

CHAPTER THE FORTY-FOURTH.

OF TRIAL BY PEERS.

AS to the trial by peers, having ſhewn already, chapter the thirty-ninth, ſection the firſt, That a peer has no more privilege than a commoner as to having the benefit of counſel. And chapter the forty-third, ſection the fourth, That a peer cannot challenge any of his peers.

I ſhall now endeavour to ſhew, Firſt, The particular form and ſolemnity to be obſerved in ſuch a trial. Secondly, Who are to be triers. Thirdly, Who are to be ſo tried. Fourthly, As to what crimes. Fifthly, Upon what ſuits and pleas. Sixthly, Whether a peer can waive a trial by his peers. Seventhly, In what manner the peers may require the opinion of the lord ſteward or of the judges. Eighthly, Whether the court may be adjourned.

(*a*) S. P. C. 152. Year-book 13 H. 8. 11. 4 Inſt. 59. Barr. 234. Ante 5. 4 Comm. 259. (*b*) 3 H. 4. 1. 3 Inſt. 28. 13 H. 8. 11. S. P. C. 152. the neceſſity of making a high ſteward for the trial of the earl of Danby's Caſe, 2 State Trials 198.

Sect. 1. And firſt of the particular form and ſolemnity to be obſerved in ſuch a trial. When an indictment is found againſt a peer for a crime for which he ought to be tried by his peers, the king by his commiſſion under the great ſeal, reciting the indictment, conſtitutes ſome (*a*) peer, high (*b*) ſteward of the kingdom *pro hac vice*, and by the ſame commiſſion gives him power to receive and proceed on ſuch indictment, and requires the peers to be attendant on him, and the lieutenant of the Tower to bring the priſoner before him.

an impeachment for high treaſon was denied by the Houſe of Commons in

Sect.

Sect. 2. Alſo (*c*) a *certiorari*, which may either have the ſame date with the ſteward's commiſſion, or a ſubſequent one, goes out of Chancery to certify the indictment before the ſteward *indilate*; and the ſteward by his precept under his ſeal, directed to thoſe before whom the indictment was found, appoints a certain day and place, at which it ſhall be certified. And another writ goes out of Chancery to the lieutenant of the Tower, &c. to bring the priſoner before the ſteward at ſuch a day and place as he ſhall appoint; and thereupon the ſteward by his precept under his ſeal directed to the lieutenant, &c. appoints the day and place.

(*c*) 3 Inſt. 28. 4 Comm. 259.

Sect. 3. Alſo the ſteward makes (*d*) another precept under his ſeal to the ſerjeant at arms, appointed to ſerve him during the time of his commiſſion, to ſummon the (*e*) peers before him at ſuch a place, day and hour, &c.

(*d*) This is to be intended when the parliament is not ſitting, but is either diſſolved or prorogued. 3 State Tr. 659 to 663. 3 Inſt. 28. S. P. C. 152. 13 H. 8. 11. (*e*) It is ſaid 13 H. 8. 11. S. P. C. 157. That the ſteward ſhall make ſuch precept to cauſe 20 or 18 peers to come before him; but Sir Edward Coke 3 Inſt. 28. ſays that the precept doth not mention any certain number; and now by 7 Will. 3. all the peers are to be ſummoned. Kelynge 56. 4 Comm. 260.

Sect. 4. At the time appointed the ſteward, attended (*f*) with ſix or (*g*) ſeven ſerjeants at arms carrying maces before him, and by the king at arms, and the uſher of the black rod, enters the place of trial uncovered, and aſcends a chair of ſtate which always is (*h*) provided for that purpoſe, and then the (*i*) clerk of the crown, or a (*k*) maſter in chancery delivers to him his commiſſion, and he delivers it again to the clerk (*l*) of the crown, and then a ſerjeant at arms makes three (*m*) oyes, and a proclamation for ſilence in the name of the ſteward, and then the lord ſteward and all the other lords (*n*) ſtanding up uncovered, the commiſſion is read, and then the (*o*) uſher on his knees delivers to the ſteward a white rod, who delivers it to him or to a ſerjeant at arms, who holds it by him during the trial: Then an (*p*) *oyes* is made, and a command given in the name of the ſteward to all juſtices and commiſſioners to certify all indictments, &c. which being delivered into court, the clerk of the crown reads the return. Another *oyes* is made that the lieutenant of the tower, &c. return his writ and precept, and bring the priſoner to the bar, and then the priſoner is brought to the bar, the (*q*) gentleman-gaoler of the tower carrying the axe before him, which being (*r*) done the clerk reads the return.

(*f*) 3 Inſt. 28. (*g*) Ruſhw. 96. 2 Jones 54. (*h*) 3 Inſt. 28. S. P. C. 152. 1 H. 4. 1. 13 H. 8. 11. (*i*) 3 Inſt. 21. (*k*) 1 Ruſhw. 96. (*l*) 3 Inſt. 28. 1 Ruſhw. 96. (*m*) 1 H. 4. 1. 3 Inſt. 28. (*n*) 3 State Tr. 955. 4 Stat. Tr. 350. (*o*) 3 Inſt. 28. 1 Ruſhw. 96. (*p*) 3 Inſt. 28. (*q*) 3 State Tr. 955. 4 State Tr. 355. (*r*) By 3 Inſt. 28. all this is to precede the call of the peers and their ſeating themſelves; but 1 H. 4. 1. and 13 H. 8. 11. and S. P. C. 152. 1 State Trials 266. 3 State Trials 955, 956. 4 State Trials 353 to 355. and 2 Jones 55. are contrary.

(s) 3 Inſt. 29. S. P. C. 152. 2 Jones 55. and the other books cited to the precedent ſection.

Sect. 5. All things being thus prepared, the high ſteward (s) acquaints the priſoner with the nature of the crime, and ſuch like matters proper for ſuch an occaſion, and then the clerk of the crown arraigns him, (t) but is not to inſiſt on his holding up his hand.

(t) Raym. 408. 3 State Trials 638. 957. 2 State Tr. 702, 703.

(u) 3 Inſt. 30. 2 Inſt. 49. F. Corone 34. 1 H. 4. 1. S. P. C. 152. 13 H. 8. 12. 2 Jones 55, 56. 10 Ed. 4 61.
(x) See the books above cited, and 1 Coke 30. 2 Inſt. 49.
(y) 1 H. 4. 1. 13 H. 8. 12. S. P. C. 153. 3 Inſt. 30. Moor 622.
(z) 2 State Tr. 702. 3 State Tr. 657. 679.

Sect. 6. After the priſoner hath pleaded, and put himſelf upon God and his peers, the king's counſel go through with their evidence; and after the priſoner hath made his defence, and the king's counſel have been fully heard, the priſoner is withdrawn from the bar, and the lords go together to conſider of their evidence; and when a majority of them are agreed, they return to the place of trial, and the lord ſteward demands of them one by one, beginning with the puiſne, whether the perſon arraigned be guilty or not guilty, and they (u) all anſwer one by one, not upon their oaths but on their (x) honours and ligeances. And the lord ſteward gives judgment according to the determination of the (y) majority, being more than twelve, but gives no vote himſelf on a trial by (z) commiſſion, but only on a trial by the houſe of peers, while the parliament is ſitting.

(a) 2 Inſt. 48. Co. Litt. 150.

Sect. 7. As to the ſecond point, *viz.* Who are to be triers; it is agreed (a) That none but lords who have a vote in parliament can paſs on ſuch a trial; and before 7 Will. 3. c. 3. when the trial was by commiſſion, it ſeems to have been the practice for the lord ſteward to cauſe as many temporal lords to be ſummoned as he thought fit; and for the lords ſo ſummoned alone to paſs on the trial. But this is remedied by that ſtatute ſet forth more at large in the next ſection.

(b) Ab. F. Cor. 34. cited S. P. C. 153. Brook in a note of the ſame caſe, Corone 153. ſays that they ſhall make proxies. Sir Edward Coke 3 Inſt. 31. ſays that they muſt withdraw and make their proxies.
(c) See biſhop Stillingfleet of the biſhops juriſdiction in criminal caſes c. 2, 3. and Hunt's argument, c. 9, 10, 11. (d) Vide the 4 Commentary 161. Foſter 248.

Sect. 8. It is agreed, That at a trial before the houſe of peers, every temporal lord who has a right to vote in that houſe, has a right to paſs on ſuch trial. But it is ſaid in the year-book of 10 Ed. 4. 6. (b) pl. 17. That upon the trial of a peer in parliament, the biſhops ſhall make a procurator, becauſe they cannot conſent to the death of a man; but this is (c) ſaid to be wholly grounded on a canon not in force at this day. Neither do I find any precedent wherein they have been excluded againſt their conſent, or have withdrawn themſelves without a proteſtation of their right, or making a proxy; (d) and the judgment againſt the Spencers, was expreſsly reverſed for this reaſon among others, becauſe the biſhops were not preſent; and in the precedents chiefly inſiſted on of the other ſide, it is not expreſsly ſaid that they were not preſent, and it doth

not

not clearly appear, but that they might be included under the word peers. However it hath been always (*e*) admitted that they have a right to vote in a bill of attainder: Alſo in the earl of Danby's caſe, they were adjudged (*f*) by the houſe of lords to have a right to vote in queſtions *previous* to the trial of a peer, though this was ſtrongly oppoſed by the houſe of commons. And their right to vote at the trial itſelf, if they think fit, ſeems fully implied in 7 Will. 3. c. 3. which enacts, "That upon the trial of any peer or peereſs for treaſon or "miſpriſion, all the peers who have a right to ſit and vote in "parliament ſhall be ſummoned twenty days at leaſt before "every ſuch trial, to appear at every ſuch trial, and that "every peer ſo ſummoned and appearing, ſhall vote at the "trial; every ſuch peer firſt taking the oaths of allegiance "and ſupremacy, and ſubſcribing and repeating the (*g*) declaration againſt popery."

(*e*) See Hunt's argument for the right of biſhops, &c. c. 12. and Stillingfleet of the biſhops juriſdiction in capital caſes, c. 7. ſect. 3. and c. 2.
(*f*) 2 State Tr. 742.
(*g*) B. 1. c. 14. ſect. 1.

Sect. 9. As to the third point, *viz.* What perſons are to be thus tried: It is (*h*) agreed, That no lord of any (*i*) other country, or even of (*k*) Scotland, before the union under queen Anne, or of (*l*) Ireland, nor the ſon and heir (*m*) apparent of any peer or any other man whatſoever, who is not at the time a lord of parliament, hath any right to ſuch a trial in this kingdom. But that every lord of parliament hath a right to ſuch a trial (*n*) by virtue of that clauſe in Magna Charta, ch. 29. "*Nec ſuper eum ibimus, nec ſuper eum mitte-*"*mus, niſi per legale judicium parium ſuorum vel per legem* "*terræ.*"

(*h*) 2 Inſt. 48. 3 Inſt. 30. Co. Litt. 156.
(*i*) Vide F. Brief 473. 20 Ed. 4. 6. B. Noſme de Dignity 49.
(*k*) 9 Coke 117. Vide 32 Ed. 3. 35. B. Noſme de Dignity 29.
(*l*) Vide ſup. c. 25. ſect. 50.
(*m*) B. Treaſon 2. (*n*) Such trial is ſaid to be very ancient, 2 Inſt. 45. 50.

Sect. 10. It is recited by 20 Hen. 6. c. 9. to have been a doubt in the law of England how ladies of great eſtate in reſpect of their huſbands, peers of the land, married or ſole, that is to ſay, dutcheſſes, counteſſes or baroneſſes, ſhall be put to anſwer, and judged upon indictments of treaſons and felonies, becauſe they are not mentioned in the ſaid ſtatute of Magna Charta, ch. 29. and thereupon to put out ſuch doubts, (*o*) it is declared, "That ſuch ladies ſo indicted of any "treaſon or felony, whether they be married or ſole, ſhall "thereof be brought to anſwer, and judged before ſuch judges "and peers of the realm, as peers of the realm ſhould be, if "they were indicted or impeached of ſuch treaſons or felonies."

(*o*) 2 Inſt. 45. 50.

Sect. 11. It ſeems (*p*) agreed, that a queen, the king's conſort, and alſo a queen dowager, whether ſhe continue ſole after the king's death, or take a ſecond huſband, be he a

(*p*) 2 Inſt. 50. Crompton Juriſ. 33.

peer or commoner; and alſo all peereſſes by birth, whether they be ſole or (p) married to peers or commoners; and alſo all marchioneſſes and viſcounteſſes, are intitled to a trial by the peers though none of them be expreſly mentioned in this act, or in Magna Charta. But it is (q) agreed, That a peereſs by marriage loſes her dignity by marrying a commoner.

(p) See the citations to the next letter.

(q) 2 Inſt. 50. Co. Litt. 16. 6 Coke 53. Dyer 79.

Sect. 12. It is ſaid by (r) Staundforde and (s) Coke, that thoſe who are lords of parliament, not in reſpect of their nobility, but of their baronies which they hold of the crown, as biſhops now do, and ſome abbots and priors (t) did formerly, are not within the intent of Magna Charta, to be tried by the peers. And (u) Selden ſeems clear, that this is the only privilege which biſhops have not in common with other peers. And thoſe who ſeem (x) moſt for the contrary opinion admit that the law hath been generally ſo taken. Neither do they produce any precedent where a biſhop or abbot has been tried by the peers upon a commiſſion; but on the contrary admit that there are (y) two precedents of their being tried by the country. And it is ſaid by (z) others, that there are divers precedents of this kind; yet Selden, with his utmoſt diligence, ſeems able to produce but two, which clearly and fully come up to his point, *viz.* thoſe of archbiſhop Cranmer and biſhop Fiſher. However it ſeems to be (a) agreed, That while the parliament is ſitting a biſhop ſhall be tried by the peers

(r) S. P. C. 152.

(s) 3 Inſt. 30. But in F. Cor. 161. it ſeems admitted that a biſhop ſhall be tried by the peers, in caſes proper for ſuch trial, and B. Trial 142. cites a note from F. Chall. 115. wherein he ſays it was holden that biſhops ſhall be tried by the peers; but this is miſtaken, for there is no ſuch opinion there holden.

(t) Co. Litt. 97. Fuller's Ch. Hiſtory b. 6. fol. 292.

(u) Selden of Baronage 152. Titles of honour, 1ſt edit. p. 347. (x) Hunt's argument for the biſhops right in capital caſes, ch. 18. Gibſon's Codex 154. Stillingfleet of the biſhops juriſdiction in capital caſes, c. 4. (y) B. Trial 142. See Hunt's argument c. 18. and Stillingfleet of the biſhops juriſdiction in capital caſes. (z) S. P. C. 153. Seld. Baron. 142 to 155. Vide 3 Inſt. 30. (a) See Hunt's argument c. 18. Trials per pais c. 2. par. 8. 1 State Trials 374. Stillingfleet of the biſhops juriſdiction in capital caſes. B. Abr. Trial 142. contrary. Vide 4 Comm. 462.

Sect. 13. As to the fourth point, *viz.* As to what crimes a peer is to be tried by his peers: I take it to be (b) agreed, That he has a right to be ſo tried upon an indictment of treaſon or felony, (c) whether ſuch treaſon or felony be made ſuch by the common law, or by ſtatute; and alſo upon an indictment for a miſpriſion of treaſon or felony; but it (d) ſeems that regularly he is to be tried by the country for all other crimes, out of parliament, as (e) *præmunire*, (f) riot, (g) ſeducing a young lady from her parents in order to debauch her, &c.

(b) 3 Inſt. 30. 2 Inſt. 40. S. P. C. 153. 1 Bulſtrode 198.

(c) S. P. C. 158. 1 Bulſtrode 198.

(d) See the books above cited. 2 State Tr. 3. F. Corone 161.

(e) 1 Bulſtrode 198, 199. 3 Inſt. 30. 12 Coke 93.

(f) 3 State Tr. 79. (g) 3 State Tr. 52. 12 Coke 93.

Sect. 14. As to the fifth point, *viz.* Upon what ſuits and pleas a peer is to be tried by his peers: It hath been (h) adjudged, That he ſhall not be ſo tried upon an appeal of felony, but only upon an indictment; and the reaſon given for it is, that thoſe words in Magna Charta, ch. 29. *nec ſuper eum*

(h) 10 Ed. 4. 6. F. Corone 34. B. Corone 153. S. P. C. 152. 2 Inſt. 49. 3 Inſt. 30. Raſtal 50.

tum ibimus, &c. are to be intended only of the ſuit of the king, and not of the ſuit of the ſubject.

Sect. 15. Alſo it hath been (*g*) adjudged, and appears from conſtant (*b*) experience, that neither the ſaid clauſe of Magna Charta, nor any other law, privileges a peer from being indicted by a grand jury of commoners, either in the king's bench, or before commiſſioners of oyer, or the coroner, &c.

(*g*) 3 Inſt. 26. 28. 2 Inſt. 49.
(*b*) 1 H. 4. 1. 3 State Tr. 52, 79. 637, 951. 4 State Tr. 351, &c. Skinner 683. 4 Comm. 259.

Sect. 16. Alſo it ſeems (*i*) to be clear, That if a peer abſent himſelf, and cannot be found, he may be outlawed *per judicium coronatorum, &c.*

(*i*) 3 Inſt. 31. 2 Inſt. 49.

Sect. 17. Alſo it is ſaid that the court of king's bench may allow a (*k*) pardon pleaded by a peer to an indictment in that court: But that it cannot receive either his plea of not guilty, or confeſſion, but only the lord ſteward on an arraignment before the lords.

(*k*) 2 Inſt. 49.

Sect. 18. It ſeems clear, That if a peer be (*l*) attainted of treaſon or felony, he may be brought before the king's bench and demanded, what he has to ſay why execution ſhould not be awarded againſt him? And if he plead any matter to ſuch demand, his plea ſhall be diſcuſſed and execution awarded by the ſaid court, upon its being adjudged againſt him.

(*l*) 1 H. 7. 22. 23. B. Corone 129. Treaſon 18. F. Corone 49.

In the caſe of earl Ferrers, April 17, 1760, it was determined by all the judges that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the ſame according to the proviſions of 25 Geo. 2. c. 37. (vide infra c. 51. ſect. 10.) And, ſecondly, ſuppoſing the day appointed by the judgment for execution ſhould laple before ſuch execution done, that a new time may be appointed for the execution, either by the high court of parliament before which ſuch peer ſhall have been attainted, although the office of high ſteward be determined, or by the court of king's bench, the parliament not then ſitting; and the record of the attainder being properly removed into that court. Foſter 139.

Sect. 19. As to the ſixth point, *viz.* Whether a peer can waive a trial by his peers: It hath been (*m*) adjudged, That if a peer on an arraignment before the lords refuſe to put himſelf upon his peers, he ſhall be dealt with as one that ſtands mute; for it is as much the law of the land, that a peer be tried by his peers as a commoner by commoners. Yet if one who has a title to peerage, be indicted and arraigned as a commoner, and plead not guilty, and put himſelf upon his country, it hath been (*n*) adjudged, That he cannot afterwards ſuggeſt that he is a peer, and pray a trial by his peers.

(*m*) 1 Ruſhw. part 2. f. 94. 3 Inſt. 30. Kelynge 57. Yet there is ſaid to be a record in 4 Edw. 3. That T. Ld Berkley put himſelf on his country, and was tried by a jury of knights.
(*n*) Daliſon 26.

Sect. 20. As to the ſeventh point, *viz.* In what manner the peers may require the opinion of the lord ſteward, or of the judges: It was (*o*) reſolved by all the judges in the lord Dacre's caſe, who was tried by commiſſion, that no queſtion ought to be aſked of the lord ſteward or of the judges in the abſence of the priſoner. And it was (*p*) adjudged by the lord ſteward, in the earl of Warwick's caſe, who was tried by the

(*o*) 3 Inſt. 29, 30. 2 Inſt. 49. Kelynge 57. 3 St. Tr. 679.
(*p*) 4 St. Tr. 381.

houſe of peers in parliament, that no queſtion ought to be aſked of the judges in the abſence of the priſoner. But in the lord Audley's caſe, who was tried by commiſſion, the lords triers, (q) after they were withdrawn, conſulted with the lord chief juſtice four ſeveral times, and alſo ſent to conſult with the lord ſteward. Yet, notwithſtanding this precedent, the judges (r) reſolved in the lord Morley's caſe, who was likewiſe tried by commiſſion, that if after the lords were withdrawn they ſhould ſend for any of the judges to deſire their opinions, on a point in law, and the lord ſteward ſhould permit them to go, they would tell the lords, if they ſhould aſk them any queſtion, that they were not to give any private opinion, without conference with the reſt of the judges, and that openly in court. But they reſolved that if the lord ſteward ſhould aſk them any queſtion in open court, though in the abſence of the priſoner, they would anſwer it, becauſe they are called to aſſiſt the court, and the demand of any queſtion in ſuch caſe is to be referred to the diſcretion of the lord ſteward.

(q) 2 Ruſhw. p. 2. f. 101. 2 State Tr. 271.

(r) Kelynge 54. 7 State Tr. 422, 423. Sed vide 3 Inſt. 29 and 30.

Sect. 21. When a peer is tried before the houſe of peers in parliament, the lord ſteward (s) withdraws with the reſt of the lords, and conſults with them.

(s) 3 St. Tr. 679.

Sect. 22. As to the eighth point, *viz.* Whether the court may be adjourned: It is agreed, (t) That where a peer is tried by the houſe of lords in full parliament, the houſe may be adjourned as often as there is occaſion, and the evidence taken by parcels; Alſo it hath been (u) adjudged, That where the trial is by commiſſion, the lord ſteward after a verdict is given, may take time to adviſe upon it, and that his office continues till he has given judgment. Alſo it was (x) ſaid to have been agreed by the judges in the lord Dacre's caſe, That on ſuch a trial the court might be adjourned, and that if the lords triers did not agree, it was holden by ſome they ought to be kept together all night, and by others that they might go to their ſeveral houſes. But it is ſaid, (y) that there is no precedent of the lords triers ever having ſeparated upon a trial by commiſſion, after the evidence has been given for the king; and it is ſaid to have been (z) reſolved by all the judges in the caſe of the duke of Norfolk, That the peers in ſuch caſe muſt continue together till they agree to give verdict, and the like was (a) adjudged by the lord ſteward in the lord Delamere's caſe.

(t) 2 St. Tr. 954. 3 St. Tr. 977 to 680. Foſter 143.

(u) Ruſhw. p 2. f. 95. 2 St. Tr. 265. But Moor 622. ſeems contrary. Foſter 140.

(x) Kely. 57. But Moor 622. in a report of the very ſame caſe, it is ſaid that the contrary was holden.

(y) 3 St. Tr. 678. But ſee Moor 622.

(z) 3 Inſt. 30. in the margin.

(a) 3 St. Tr. 677 to 680.

During a trial before the houſe of peers in parliament, every peer preſent on the trial is to judge both of the law and the fact, Foſter 142. and a lord high ſteward is uſually, though not neceſſarily, appointed, rather in the nature of a ſpeaker to regulate the proceedings, than as a judge. 4 Comm. 260. Foſter 145. But in the court of the high ſteward, which is held in the receſs of parliament, he alone is judge in all points of law and practice, and the peers triers are merely judges of the fact. Foſ. 142.

CHAPTER

CHAPTER THE FORTY-FIFTH.

OF TRIAL BY BATTEL.

A Trial by Battel, at the (*a*) defendant's choice, is allowable in appeals (*b*) of treaſon before the conſtable and marſhal, and in appeals (*c*) of felony, whether by appellants or (*d*) approvers.

(*a*) Finch 421. S. P. C. 176. Fleta l. 1. c. 34. ſ. 27. Tr. per pais c. 2. ſ. 19.

(*b*) Vide c. 23. ſ. 29. Crompton Jur. 82. b. 88. B. Battel 15. (*c*) Raſtal 50. C. Eliz. 69. Dyer 120. S. P. C. 176. (*d*) Raſtal 42. S. P. C. 178. 9 Coke 31.

Sect. 2. For the manner of waging battel in an appeal of treaſon, being according to the civil law, I ſhall refer to Ruſhworth's collections, part 2. volume 1. folio 112 to 128.

Sect. 3. When an appellee of felony wages battel, he pleads (*e*) that he is not guilty, and that he is ready to defend the ſame by his body, and then (*f*) flings down his glove, and if the appellant will join battel, he replies, "That he is ready to make good his appeal by his body upon the body of the appellee," and takes up the glove: And then the appellee lays his (*g*) right hand on the book, and with his left hand takes the appellant by the right, and (*h*) ſwears to this effect, "hear "this thou who calleſt thyſelf John by the name of baptiſm, "that I who call myſelf Thomas by the name of baptiſm, did "not felonioufly murder thy father W. by name (on the — day "of — in the year of — at B.) as you ſurmiſe, nor am any "way guilty of the ſaid felony; ſo help me God;" and then he ſhall kiſs the book and ſay, "and this I will defend againſt thee "by my body, as this court ſhall award." And then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and ſwears to this effect, "Hear this thou who calleſt thyſelf Thomas by the name of "baptiſm, that thou felonioufly (on the — day of — in "the — year of — at B.) didſt murder my father W. by "name, ſo help me God;" and then he ſhall kiſs the book and ſay, "and this I will prove againſt thee by my body, as this "court ſhall award." And then the court ſhall (*i*) appoint a day and place for the battel, and in the mean while the appellee ſhall be kept in the (*k*) cuſtody of the marſhal, and the

(*e*) C. Eliz. 62. Raſtal 42. 50. Dyer 120. 9 H. 4. 3. (*f*) S. P. C. 178. F. Corone 385. 1 H. 6. 6. (*g*) B. Bat. 1. 6. 9 H. 43. 17 Aſſize 1. 17 Edw. 3. 2. Britton 41. S. P. C. 178. (*h*) Fleta B. 1. c. 3, 4. ſ. 28, 29. 9 H. 4. 3. 17 Aſſize 1. B. Battel 1. 6. 17 Edw. 3. 2. Britton 41. Bracton B. 3. c. 21. ſ. 2. (*i*) Raſtal 42. S. P. C. 178. (*k*) Fleta B. 1. c. 33. ſ. 28. Raſtal 42. 9 H. 4. 3. S. P. C. 178. B. Battel 1. F. Corone 78. 111.

appellant ſhall find (*l*) ſureties to be ready to fight at the time and place, unleſs he be an approver, in which caſe (*m*) he ſhall alſo be kept by the marſhal. And the (*n*) night before the day of battel, both parties ſhall be arraigned by the marſhal, and ſhall be brought into the field before the (*o*) juſtices of the court where the appeal is depending, at the riſing of the ſun, (*p*) bare headed, and bare legged from the knee downwards, and bare in the arms to the elbows, and armed only with baſtons an ell long, and four-cornered targets, and before they engage they ſhall both take this (*q*) oath, "Hear this ye "juſtices, that I, A. B. have neither eat nor drank, nor done "any thing elſe, nor any other for me, by which the law of "God may be depreſſed, and the law of the devil exalted." And then after (*r*) proclamation for ſilence under pain of impriſonment for a year and a day, &c. they ſhall begin the combat, wherein if the appellee be ſo far vanquiſhed that he cannot or will not fight any longer, he may be adjudged to be (*s*) hanged immediately; but if he can maintain the fight till the ſtars appear, he ſhall have (*t*) judgment to go quit of the appeal. And if the appellant become recreant, that is, a crying coward or craven, the appellee ſhall not only recover his damages, but may alſo, as it (*u*) ſeems, plead his acquittal in bar of a ſubſequent indictment or appeal, and the appellant (*x*) ſhall for his perjury loſe his *liberam legem*. Yet if there be other appellees in the ſame appeal, it hath been adjudged, (*y*) that it ſhall ſtill ſtand in force againſt them. But for theſe matters I ſhall refer to ch. 24. ſect. 24.

(*l*) Fleta B. 1. c. 34. ſ. 28. 9 H. 4. 3. 17 Aſſize 1. S. P. C. 178. F. Corone 78. 111. B. Battel 1. 6. 17 Edw. 3. 2. Bracton B. 3. c. 21. ſ. 3. ſays that both parties ſhall be kept in cuſtody.

(*m*) Raſtal 42.

(*n*) 9 H. 4. 3. B. Battel 1.

(*o*) Fleta B. 1. c. 34. ſ. 30, 31. Dyer 301. B. Battel 15. S. P. C. 177, 178. Bracton B. 3. c. 21. ſ. 4. 5. Britton 40. Con. 37 H. 6. 20.

(*p*) Britton 41. By ſome the appellant's head ſhall be covered. 9 H. 4. 3. B. Battel 1. Vide 1 H. 6. 6, 7. Dyer 301.

(*q*) Fleta B. 1. c. 34. ſ. 30. Bracton B. 3. c. 21. ſ. 4. Britton f. 40. (*r*) Fleta B. 1. c. 34. ſ. 31. (*s*) S. P. C. 178. b. See where this is done accordingly. 19 H. 6. 35. F. Corone 6. B. Coron. 46. Bracton B. 1. c. 21. ſ. 6. (*t*) Trials per pais c. 2. ſ. 19. 3 Inſt. 221. Fleta B. 1. c. 34. ſ. 32. Bracton B. 3. c. 21. ſ. 5. (*u*) Sup. c. 23. ſ. 140. and c. 35. ſ. 6. F. Corone 98. Fleta B. 1. c. 34. ſ. 32. (*x*) 3 Inſt. 221. Co. Litt. 6. (*y*) F. Corone 98.

Sect. 4. In appeals each party muſt fight in proper (*z*) perſon, and not by champions. And therefore if the appellant be under an apparent diſability of fighting, as being a (*a*) woman, or in (*b*) holy orders, or under (*c*) age, or of the age of (*d*) ſixty, (*e*) or maimed, or (*f*) blind, he may counterplead the wager of battel, and compel the appellee to put himſelf upon his country. (*g*) Alſo if an appellant become blind by the act of God after he has waged battel; the court will diſcharge him of the battel; and in ſuch caſe it is (*h*) ſaid that the appellee ſhall go free.

(*z*) Finch 421, 422. 9 Coke 31. 3 Inſt. 221. Plowden 335. Trials per pais c. 2. ſect. 19. (*a*) Keilway 120. Fleta, B. 1. c. 34. ſect. 25. S. P. C. 180. (*b*) Britton 40. (*c*) Keilway 120. Finch 423. F. Droit 3. S. P. C. 60. 180. 22 Edw. 4. 20. Fleta B. 1. c. 34. ſect. 25. (*d*) S. P. C. 60. 180. F. Corone 385. 22 Ed. 4. 20. Trials per pais c. 2. ſect. 19. Fleta, B. 1. c. 34. ſect. 25. (*e*) Finch 423. F. Corone 230. 268. S. P. C. 180. 22 Edw. 4. 20. Trials per pais c. 2. ſect. 19. Fleta B. 1. c. 34. ſect. 25. (*f*) F. Droit 57. 3 Inſt. 158, 159. (*g*) F. Droit, 57. 3 Inſt. 158, 159. (*h*) 3 Inſt. 158, 159.

Sect.

Sect. 5. Alſo if a (*b*) peer of the realm, and much more if the king bring an appeal, the defendant ſhall not be admitted to wage battel by reaſon of the dignity of the perſons.

(*b*) Finch 423. S. P. C. 152. Plowden 335. Fleta B. 1. c. 34. ſect. 25.

Sect. 6. Alſo the citizens of London have a ſpecial (*i*) privilege by charter, that in appeals brought by any of them, there ſhall be no wager of battel.

(*i*) S. P. C. 180. F. Corone 185. 187.

Sect. 7. Alſo any plaintiff may counterplead a wager of battel, by alledging ſuch matters againſt the defendant as induce a violent preſumption of guilt; as in an appeal of robbery, by ſhewing (*k*) that the defendant was taken with the manner, &c. And in an appeal of death, that he was found lying upon the deceaſed (*l*) with a bloody knife in his hand; and in any appeal by ſhewing that the defendant being under an arreſt for the crime charged againſt him, (*m*) brake the priſon, or (*n*) eſcaped, unleſs ſuch breaking or eſcape be (*o*) pardoned. For the law will (*p*) not oblige a plaintiff to make good his accuſation in ſo extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is alſo a good counterplea of battel that the defendant hath been (*q*) indicted for the ſame fact, unleſs the indictment were inſufficient.

(*k*) Finch 422, 423. S. P. C. 179. F. Corone 100. 125. 144. 157. 230. 268. 375. 4 Affize 1. 22 Ed. 4. 19. B. Battel 5. 7. B. Appeal 114. 20 H. 7. 8. pl. 18. Vide ſup. c. 15. ſ. 41.

(*l*) Finch 422. S. P. C. 179. F. Corone 411.

(*m*) Finch 422. S. P. C. 180. 1 Affize 3. 6. Hobart 82.

F. Corone 154. 157. 164. 251. 281. (*n*) Finch 422. Hobart 82. S. P. C. 80. B. Battel 3. F. Corone 164. 251. (*o*) S. P. C. 100. Hobart 82. F. Corone 154. 281. B. Battel 3. 1 Affize 3. (*p*) Trials per pais, c. 2. ſ. 19. (*q*) Finch 422. 22 Edw. 4. 19. B. Battel 7. 11. Appeal 114. 20 Edw. 4. 6. Raſtal 50.

Sect. 8. It is enacted by 6 Rich. 2. That the defendant ſhall not be received to wage battel in an appeal of rape.

CHAPTER

CHAPTER THE FORTY-SIXTH.

OF EVIDENCE.

AS to the nature of evidence, ſo far as it more particularly concerns criminal caſes, having premiſed that it is a ſettled rule, That in caſes of life no *(a)* evidence is to be given againſt a priſoner but in his preſence; and that it hath been *(b)* adjudged, That no bill of exceptions is grantable on an indictment of treaſon or felony, the ſtatute of Weſtminſter 2. c. 3. *cum aliquis implacitatus, &c. proponat exceptionem*, &c. having been never thought to extend to any ſuch caſe, it being plain that it could not but cauſe an infinite delay of juſtice, if it ſhould.

(a) State Trials vol. 4. f. 277. 310.

(b) Sir Henry Vane's caſe, State Trials, vol. 1. f. 938. wherein it is ſaid that ſuch bill never was nor ought to be allowed in any capital caſe, and as this caſe is reported in 1 Sid. 85. 1 Keble 384. it ſeems to have been holden that it is not grantable on any indictment; and as it is reported in 1 Lev. 68. and Kelynge 15. that it is not grantable in any criminal caſe whatſoever. Vide 2 Inſt. 427.

I ſhall more fully conſider the following points: Firſt, How many witneſſes are required in criminal caſes. Secondly, What is to be allowed as evidence. Thirdly, Who may be witneſſes. Fourthly, In what manner the witneſſes for the defendant are to give their evidence. Fifthly, Whether a defendant have right to proceſs to bring in his witneſſes. Sixthly, What evidence maintains an indictment, &c. Seventhly, What may be given in evidence on the part of the defendant. Eighthly, In what caſes witneſſes may be allowed their expences.

Sect. 2. As to the firſt point, *viz.* How many witneſſes are required in criminal caſes: Having already endeavoured to ſhew that the common law did *(c)* not require any certain number of witneſſes for the trial of any crime whatſoever, I ſhall only add in this place, That it ſeems to have been the more *(d)* prevailing opinion, That 1 Edw. 6. c. 12. and 5 & 6 Edw. 6. c. 11. which required two witneſſes in treaſon, were not repealed by 1 & 2 Ph. & Mary, c. 10. *(e)* which ordered that all trials of treaſon ſhould be according to the courſe of the common law; and therefore that it was ſtill neceſſary in all trials of high treaſon, not concerning the coin, to have either

(c) Ch. 25. ſect. 129. there muſt be two witneſſes to prove perjury. 10 Mod. 244.

(d) Sum. 262. and the authorities cited to the other parts of this ſection. Con. St. Tr. 180, 181. 636. 2 St. Tr. 408. and ſup. c. 25. f. 129.

(e) For theſe ſtatutes, and their expoſition, ſee c. 25. f. 130 to 146.

two

two witneſſes to the (*f*) ſame overt-act, or one witneſs to one, and another (*g*) witneſs to an overt-act of the ſame kind of treaſon, or at leaſt one witneſs to an overt-act, and (*b*) another to a material circumſtance to prove it.

(*f*) Raymond 407, 408. 2 St. Tr. f. 533. 3 St. Tr. 688.

(*g*) 1 St. T. 697. 723, 724.

2 St. Tr. 317. 695. 785. 829, 830. 3 St. Tr. 149. 156. 228. 4 St. Tr. 86, 87, 88. 117. Raymond 407, 408. Kelynge 9. (*b*) 2 St. Tr. 408. 3 St. Tr. 228, 229. 688, 689. 894 to 901. 928, 929, 930. 1 St. Tr. 636. But 1 St. Tr. 180, 181. 'tis holden that circumſtantial evidence alone is ſufficient.

Foſter hath examined the opinions upon theſe ſtatutes, contained in 3 Inſt. 26. Summary 262. 1 Hale 296. 306. 2 Hale 286. 2 State Trials 144. 171. 177. and in Kelynge 9. very much at large, and concludes with our author, that they are ſtill in force. He adds, however, that the 1 Ed. 6. c. 12. which, both in petit and high treaſon, requires two witneſſes *upon the indictment* and at the trial, and the 5 & 6 Edw. 6. c. 11. which, in all treaſons, requires that the witneſſes, if living, ſhall be examined in perſon at the trial in open court, are not altered *as to petit treaſon* by 7 Will. 3. c. 3. Vide Foſter 232. 238. 240.

But in relation to theſe matters it will be needleſs, at this day, to examine how far theſe opinions were reconcilable with the firſt of Philip and Mary; the law ſeeming to be ſettled by 7 Will. 3. c. 3. ſ. 2. which is expreſs, "That no perſon or "perſons whatſoever ſhall be indicted, tried, or attainted of "high treaſon, whereby any corruption of blood may or ſhall "be made to any ſuch offender or offenders, or to the heir or "heirs of any ſuch offender or offenders, or of miſpriſion of "ſuch treaſon, but by and upon the oaths and teſtimony of two "lawful witneſſes, either both of them to the ſame overt-act, "or one of them to one, and the other of them to another "overt-act of the ſame treaſon (*i*); unleſs the party indicted "and arraigned or tried ſhall willingly, without violence, in "open court, confeſs the ſame or ſhall ſtand mute, or refuſe "to plead; or in caſes of high treaſon ſhall peremptorily "challenge above the number of thirty-five of the jury."

Vide chapter 25. ſect. 134 to 146. Foſter 233.

(*i*) A collateral fact, not tending to the proof of the overt-acts may be proved by one witneſs. Foſter 240. 242. Salkeld 654. per Holt. Vaughan's Caſe, 5 State Trials 17.

And it is further enacted by par. 4. "That if two or more "diſtinct treaſons of divers heads or kinds ſhall be alledged "in one bill of indictment, one witneſs produced to prove one "of the ſaid treaſons, and another witneſs produced to prove "another of the ſaid treaſons, ſhall not be deemed or taken to "be two witneſſes to the ſame treaſon within the meaning of "this act."

As to the ſecond point, *viz.* What is to be allowed as evidence in criminal caſes: I ſhall conſider, Firſt, Where the confeſſion of the defendant or the depoſitions of others out of court may be allowed as evidence. Secondly, How far hearſay is evidence. Thirdly, Whether ſimilitude of hands be any evidence in criminal caſes.

Sect. 3. As to the firſt particular, *viz.* Where the confeſſion of the defendant, or the depoſitions of others, out of court, may

may be allowed as evidence. It ſeems that the confeſſion of the defendant himſelf, whether taken upon an (*k*) examination before juſtices of peace, in purſuance of 1 & 2 Ph. & Mary, c. 13. or of 2 & 3 Ph. & Mary, c. 10. upon (*l*) a bailment or (*m*) commitment for felony, or taken by the common law upon an examination (1) before a ſecretary of ſtate, or other magiſtrates for (*n*) treaſon, or (*o*) other crimes, not within thoſe ſtatutes, or in (*p*) diſcourſe with private perſons, hath always been allowed to be given in evidence againſt the party confeſſing, but (*q*) not againſt others (2).

(*k*) Sum. 102. 193. 262. 264. 1 Hale 304. 3 State Trials 15. 131.
(*l*) Ante c. 15. ſec. 11. 58.
(*m*) 1 St. Tr. 89. 386. 964.
(*n*) Kely. 18, 19.
(*o*) 5 Mod. 164, 165. 2 St. Tr. 426.
(*p*) Dyer 215. See the contrary practiſed. 1 State Trials in Sir Jerv. Ellis's Trial, and in Throgmorton's Trial fol. 49 to 56. Duke of Norfolk's trial, fol. 73 to 85 and 97, 98. Other trials from fol. 118 to 122. Earl of Eſſex's trial 167, 168. Sir Walter Raleigh's trial fol. 177, 178. 181.
4 State Trials 33. 3 State Trials 8, 9. Francia's Trial. (*q*) 1 State Trials 265.

(1) The identity of theſe examinations muſt be proved at the trial before they can be read in evidence, Summary 263. and if they are not proved they cannot be admitted orally; for a confeſſion, being the ſtrongeſt proof of guilt, requires the higheſt authenticity, O. B. 1785. p. 861. and this confeſſion muſt be proved to have been without menace, or undue terror. 2 Hale 285.

(2) The human mind under the preſſure of calamity is eaſily ſeduced; and is liable, in the alarm of danger, to acknowledge, indiſcriminately, a falſehood or a truth, as different agitations may prevail. A confeſſion, therefore, whether made upon an official examination or in diſcourſe with private perſons, which is obtained from a defendant either by the flattery of hope, or by the impreſſions of fear, however ſlightly the emotions may be implanted (vide O. B. 1786. page 387.), is not admiſſible evidence; for the law will not ſuffer a priſoner to be made the deluded inſtrument of his own conviction.—But if any facts ariſe in conſequence of even ſuch a confeſſion, they may be given in evidence; becauſe *they* muſt ever be immutably the ſame, whether the confeſſion which diſcloſed them be true or falſe; and juſtice cannot ſuffer by their admiſſion. O. B. 1785. p. 861. The truth of theſe contingent facts, however, muſt be proved independently of, and not coupled with, or explained by the converſation or confeſſion from which they are derived. Vide O. B. 1784. p. 420. Moſs's Caſe, O. B. Feb. ſeſſ. 1781.

Sect. 4. Alſo it was (*r*) holden, That two witneſſes of a confeſſion of high treaſon, upon an examination before a juſtice of peace, were ſufficient to convict the perſon ſo confeſſing, within the meaning of 1 Edw. 6. c. 12. & 5 & 6 Edw. 6. c. 11. which required two witneſſes in high treaſon, "unleſs "the offender ſhould willingly without violence confeſs the "ſame:" But this is remedied by 7 Will. 3. c. 3. (3) which requires two witneſſes, "unleſs the party ſhall willingly, "without violence, *in open court* confeſs, &c."

(*r*) Kelynge 18. Sup. c. 25. ſect. 140. 1 Hale 304. 2 And. 67. 3 Inſt. 25.

(3) This ſtatute prevents *ſuch* confeſſion, as above mentioned, from having the force of a conviction; but does not deſtroy the admiſſibility of it in evidence *for any purpoſe*, except to prove the overt-acts laid in the indictment. The overt acts muſt ſtill be proved by two lawful witneſſes, notwithſtanding the admiſſion of any ſuch confeſſion as to collateral matters; for no confeſſion unleſs made in open court, which in Francia's caſe was determined to mean upon the arraignment of the party, can be a ſufficient ground for a conviction in treaſon. Foſter 240 to 244. Francia's caſe, 6 State Trials 5. Willis's caſe, 8 State Trials 254, 255. 262, 263. Sed vide Berwick's caſe. Foſter 11.

Sect. 5. It (*s*) ſeems an eſtabliſhed rule, that wherever a man's confeſſion is made uſe of againſt him, it muſt all be taken together, and not by parcels.

(*s*) 5 Mod. 165. Cont. 1 State Trials 53. Throgmorton's Trial.

Sect.

Sect. 6. It ſeems (*t*) ſettled, That the examination of an informer taken upon (*u*) oath, and (*x*) ſubſcribed by him either before a (*y*) coroner upon an inquiſition of death in purſuance of 1 and 2 Ph. and Mary, c. 13. or before (*a*) juſtices of peace in purſuance of 1 & 2 Ph. & Mary, c. 13. and 2 & 3 Ph. & Mary, c. 10. upon a (*b*) bailment or (*c*) commitment for any felony, may be given in evidence at the trial of ſuch inquiſition, or of an indictment for the ſame felony, if it be made out by oath to the ſatisfaction of the court, that ſuch informer is (*d*) dead, or unable to (*e*) travel, or kept (*f*) away by the means or procurement of the priſoner, and that the examination offered in evidence is the very ſame (*g*) that was ſworn before the coroner or juſtice, without any alteration whatſoever.

(*t*) Kelynge 55. Sum. 262, 263. 1 Levinz 180. Salkeld 281. 2 Keble 19. Vide C. Eliz. 901. Dalton c. 111, 112, 113.

(*u*) 1 St. Tr. 265. Sum. 262, 263.

(*x*) Sum. 262, 263.

(*y*) Supra c. 9. ſect. 31. 2 Jones 53.

(*a*) See the books above cited; but 2 Jon. 53. it is adjudged that depoſitions before a coroner may be read, but ſaid that thoſe taken before a juſtice of peace can in no caſe be read. (*b*) Supra c. 15. ſect. 59, 60, 61. (*c*) Supra c. 16. ſect. 11. (*d*) Kelynge 55. 1 Levinz 180. 1 Hale 305. 2 Keble 19. Summary 263. (*e*) Kelynge 55. (*f*) Kelynge 55. In Harriſon's caſe 3 State Trials 941. ſuch an examination was read in evidence, upon proof that the witneſs had been enticed away, though it did not directly appear to have been done by the procurement of the priſoner. (*g*) Kelynge 55. 2 Keble 19. Summary 263. 2 Hale 284, 285. 1 Hale 305.—But in *petit treaſon*, theſe depoſitions, it is ſaid, are not ſufficient to convict the offender if the party be living, although he is unable to travel, or is kept out of the way by the procurement of the priſoner. Foſter 337.

Sect. 7. But it hath been (*h*) adjudged, That it is not ſufficient to authoriſe the reading ſuch an examination, to make oath that the proſecutors have uſed all their endeavours to find the witneſs, but cannot find him.

(*h*) Kelynge 55.

Sect. 8. Alſo it hath been (*i*) adjudged, That depoſitions taken before a coroner upon an inquiſition of death *ſuper viſum corporis*, cannot be given in evidence upon an appeal for the ſame death, becauſe it is a different proſecution from that wherein they were taken.

(*i*) 2 Roll 460, 461. Vide 1 Sid. 325. 2 Keble 384.

Sect. 9. There are many (*k*) inſtances in the reigns of queen Elizabeth and king James the firſt, wherein the depoſitions of abſent witneſſes were allowed as evidence in treaſon and felony, even where it did not appear, but that the witneſſes might have been produced *viva voce*. And it was adjudged in (*l*) the earl of Strafford's trial, that where witneſſes could not be produced *viva voce*, by reaſon of ſickneſs, &c. their depoſitions might be read for or againſt the priſoner on a trial of high treaſon, but not where they might have been produced in perſon. And it was admitted (*m*) in the lord Stafford's trial, that the depoſitions taken by a witneſs before a juſtice of the peace might 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 *viva voce*. And for the ſame reaſon it ſeems (*n*) agreed, That where

(*k*) Foſter 234. Dyer 99, 100. 1 State Trials, Duke of Norfolk's Trials 84. Abington's Trial 118, 119. Udal's Trial fol. 148, 149. Earl of Eſſex's Trial fol. 166. Sir Walter Raleigh's trial fol. 181, 182. and the like was admitted in the Lord Audley's caſe on an indictment for a rape on his own lady. 1 State Trials 268, 269. 1 Ruſhworth. Strafford fol. 231. 526 to 531. (*l*) 3 St. Tr. 204. Ld Raym. 407. (*m*) 2 State Trials 622 to 627. 644. 647. 651. 1 State Trials 911. (*n*) 2 State Trials 343, 344. 528, 529. See ſect. 12.

a wit-

a witneſs at one trial varies from his own evidence at another, in relation to the ſame matter, ſuch variance may alſo be given in evidence to invalidate his teſtimony at the ſecond trial.

(o) Salkeld 281. Sup. ſect. 3.

Sect. 10. But it is (*o*) ſaid to have been adjudged in the ſeventh year of Will. 3. by the court of king's bench upon advice with the juſtices of the common pleas, upon an indictment for a libel, that depoſitions taken before a juſtice of 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 Philip and Mary; and that this cannot be extended farther than the particular caſe of felony. But in the report of this caſe in 5 (*p*) Modern 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.

(p) 5 Mod. 165. Vide Ruſhw. Stafford 524 to 531. 2 State Trials 420. 4 State Trials 261. and 2 Roll 460, 461.

(q) 4 St. Tr. 237, &c. 5 St Trials 17. Salkeld 634. Foſter 242.

Sect. 11. However it was (*q*) agreed in Sir John Fenwick's caſe, That the information of a witneſs taken upon oath before a juſtice of peace, being joined with the evidence of one other witneſs only *viva voce*, could not in the ordinary courſe of juſtice, amount to ſufficient evidence within the 7 Will. 3. which requires *two witneſſes* in high treaſon; and therefore it was thought neceſſary to proceed in that caſe by bill of attainder in parliament, whoſe power can be reſtrained by no rules but thoſe of natural juſtice.

(r) 4 State Tr. 265 to 272. Sup. ſect. 9. 1 Sid. 325. 2 Keble 384. Nor can depoſitions taken in a

Sect. 12. And in the ſame caſe it was (*r*) agreed, That the evidence given by a witneſs at one trial, could not in the ordinary courſe of juſtice be made uſe of againſt a defendant on the death of ſuch witneſs, at another trial.

ſuit of a different nature and juriſdiction be read. Welch's Caſe, 1 Hale 304.

2 Hale 285.

Summary 263. 2 Hale 285. 1 Hawk. c. 42.

Sect. 13. Alſo it ſeems clear that depoſitions taken in the ſpiritual court in a cauſe of divorce for a forcible marriage cannot be given in evidence upon an indictment for ſuch marriage on the ſtatute of 3 Hen. 7. c. 2.

(s) 2 State Tr. 332. 414, 415. 761. 802, 803. 3 St. Tr. 145. 210. 252. 4 St. Tr. 33.

Sect. 14. As to the ſecond particular, *viz.* How far hearſay is evidence: It ſeems (*s*) agreed, That what a (*t*) 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 (*u*) or illuſtration of what is properly evidence. Yet it ſeems (*x*) that what the priſoner had been heard to ſay at another time, may be

(t) Vide ſup. ſect. 3.

(u) 2 State Tr. 325. 328. 372, 333. 414, 415. 3 Stat. Tr. 144, 145. 209. 210.

(x) 4 St. Tr. 33. 3 St. Tr. 254, 255.

given

given in evidence for him (4), as well as againſt (y) him, and alſo (z) what a witneſs hath been heard to ſay at another time, may be given in evidence in order either to invalidate or confirm the teſtimony which he gives in court.

(y) Vide ſup. ſect. 3.
(z) 2 State Tr. 529. 802, 603. 3 State Tr. 218 to 222. 428, 429. 4 State Tr. 51, 52, 53. Vide ſup. ſect. 9 & 12. 1 Hale 285.

(4) The declarations of a priſoner may be given in evidence againſt him, but not for him; therefore a witneſs, for this purpoſe, cannot be called in his defence; but he may croſs examine any of the witneſſes on the part of the proſecution as to any thing which they may have heard him ſay relating to the fact he is charged with.

Sect. 15. As to the third particular, *viz.* Whether ſimilitude of hands be any evidence in criminal caſes: It is obſervable that this with other circumſtances in (a) Algernoon Sidney's caſe was ruled to be good evidence of his having written a paper charged againſt him as an overt-act of high treaſon: Yet in the trial of the ſeven (b) biſhops, the court was divided in opinion, whether ſimilitude of hands were evidence of the defendants having ſigned the paper charged againſt them as a libel; and the parliament having declared an opinion in the reverſal of Algernoon Sidney's attainder, that compariſon of hands is no evidence of a man's hand-writing in criminal caſes: It ſeems to have been generally holden (c) ſince that time, that it is not evidence in any criminal caſe, whether capital or not capital.

(a) 3 Stat. Tr. 213. 216, 217. 226. 230.
(b) 3 State Tr. 762 to 767.
(c) Vide 3 State Trials 892, 893. 4 State Tr. 271, 272. and Francia's Trial. Ld Raym. 39. Theory of evidence 25, 26. 12 Viner 204. Quere vide Skinner 579. Papers found in the cuſtody of the priſoner, eſpecially if they be proved to be in his hand writing, by perſons who have ſeen him write, may be read in evidence againſt him. Henſey's Caſe, 1 Burrow 644. Vide alſo Lord Preſton's Caſe. 4 State Trials 440. 4 State Trials 447. 6 State Trials 478.

As to the third point, *viz.* Who may be witneſſes in criminal caſes, I ſhall endeavour to ſhew, Firſt, Whether a huſband or wife may be witneſſes for or againſt one another. Secondly, Whether a judge or juror may be a witneſs. Thirdly, Where an accomplice in the crime charged againſt a priſoner may be a witneſs againſt him or for him. Fourthly, Where a perſon ſhall be diſabled to be a witneſs in reſpect of his having been attainted or convicted of a crime. Fifthly, Where it is a good exception againſt a witneſs that his intereſt is concerned. Sixthly, What other exceptions are good againſt a witneſs.

Sect. 16. As to the firſt of theſe particulars, *viz.* Whether a huſband or wife may be witneſſes for or againſt one another: It ſeems (d) 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

(d) Co. Litt. 6. 112. 187. 2 R. A. 686. Summary 263. 2 Hale 279. 4 St. Tr. 608. 2 Ch. Ca. 39. 2 Ven. 79.

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 biaſs, and the extreme hardſhip of the caſe: And therefore it hath been (e) adjudged, That the huſband cannot be a witneſs againſt the wife, nor the wife againſt the huſband, to prove the firſt marriage on an indictment on the ſtatute of 1 (f) Jac. 1. c. 11. for a ſecond marriage. Yet (g) ſome exceptions have been allowed to this general rule in caſes of evident neceſſity, as in the lord (h) Audley's caſe, who held his wife's hands and legs while his ſervant, by his command, raviſhed her; or where a man is indicted for a (i) forcible marriage againſt the (k) purport of 3 Hen. 7. or where either a huſband or wife have cauſe to demand (l) ſureties of the peace againſt the other, &c.

Co. Litt. 6. 2 R. Ab. 686. Summary 263. 1 Hale 301. 2 Hale 279. 2 Brownl. 47. Hutt. 116. Raym. 1. 4 Stat. Tr. 608.

(e) Raym. 1. and the ſame point was admitted in Fielding's Trial. State Trials, vol. 4. f. 754.

(f) Vide B. 1. ch. 43.

(g) In Raym. 1. there is an opinion, that a huſband and wife may be witneſſes againſt one another in treaſon, but the contrary is adjudged, 1 Brownlow 47. See 2 Keble 403. 1 H. P. C. 301. (b) State Trials vol. 1. f. 388. 265. 209. 366. Hutt. 116. Ruſhw. Collections, part 2. vol. 1. f. 94. 99. But this caſe is denied to be law, Raym. 1. (i) Cro. Ca. 488. State Trials vol. 4. fol. 588. 3 Keble 193. pl. 43. (k) See B. 1. ch. 42. 492. (l) See b. 1. c. 60. ſect. 4. Hutt, 116. So in an information againſt two, one for perjury, and the other for ſubornation, in ſwearing on the trial of an ejectment, that a child was ſuppoſititious, Keeling admitted the huſband of one of the defendants to give evidence of the birth, but refuſed to admit him as to the ſubornation. Sid. 377. 2 Keble 403. Mar. 120. And the evidence of a wife has been diſallowed even againſt others where her huſband might be indirectly in danger. Dalton 540.——In Sir Thomas Raymond 1. the caſe of lord Audley, 1 St. Tr. 388. Hutt. 116. is denied to be law; and it is there ſaid alſo, that the wife may be admitted againſt her huſband in high treaſon, but this is doubted by 1 Hale 48. and denied 301.——But no other degree of kindred, or affection, as that of parent to child, &c. will prevent a perſon from being a witneſs. Sid. 75. Salk. 289.

Sect. 17. As to the ſecond particular, *viz.* Whether a judge or juror may be a witneſs: It ſeems (m) agreed, That it is no exception againſt a perſon's giving evidence either for or againſt a priſoner, that he is one of the judges or jurors who are to try him. And in the caſe of Hacker, two of the perſons in the commiſſion for the trial came off from the bench, and were ſworn and gave evidence, and did not go up to the bench again during his trial.

(m) 2 State Tr. 257. 632. 674. Kelynge 12. 1 Sid. 133.

Sect. 18. As to the third particular, *viz.* Where an accomplice in the crime charged againſt a priſoner may be a witneſs againſt him or for him: It has been long ſettled (n), That it is no exception againſt a witneſs that he hath confeſſed himſelf guilty of the ſame crime, if he have not been (o) 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. Alſo it hath been often (p)

(n) 1 State Tr. 96. 696, 697. 723. 2 St. Tr. 334. 501. 3 St. Tr. 161, 217, &c. 595. 698, 669. 4 St Tr. 12. 33. 1 Hale 303, 304. See Hale's opinion to the contrary argoendo. 1 State Trials 724. and Bracton 118. (o) 1 State Trials 96. 2 State Trials 501. (p) 1 State Trials 966. 4 State Trials 12. Kelynge 17, 18. 3 Keble 136. Vide vol. 1. fol. 697. 10 State Trials 190.

ruled,

ruled, That accomplices who are indicted, are good witneſſes for the king, until they be convicted.

But the bare, uncorroborated teſtimony of an accomplice is not thought of ſufficient credit to put a priſoner upon his defence; and the queſtion therefore is, whether ſuch teſtimony ſhould be received until *ſome* fair and unpolluted evidence be previouſly given of the fact charged againſt the priſoner. This point not being ſettled, it remains with the judges to adopt ſuch practice upon the occaſion as they reſpectively think moſt eſſential to the ends of juſtice.

Alſo it hath been (*r*) adjudged, That ſuch of the defendants in an information againſt whom no evidence is given, may be witneſſes for the others. It hath been alſo (*s*) adjudged, That where A. B. and C. 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.

(*r*) 1 Sider. 237. Vide Trial per pais 148. Style 401. 12 Aſſize 12. Savil 34.
(*s*) 2 R. Abr. 685.

Sect. 19. As to the fourth particular, *viz.* Where a perſon ſhall be diſabled to be a witneſs in reſpect of his having been attainted, or convicted of a crime. It ſeems agreed, That a conviction, and therefore *a fortiori* an attainder or judgment of (*t*) treaſon, (*u*) felony, (*x*) piracy, (*y*) *præmunire*, (*z*) perjury, forgery (*a*) on 5th Eliz. and alſo a (*b*) judgment in attaint for giving a falſe verdict, or in conſpiracy at the ſuit of (*c*) the king, and alſo (*d*) judgment for any (*e*) crime whatſoever to ſtand in the pillory (5), or to be whipt or branded, being in a court which had a (*f*) juriſdiction, are good cauſes of exception againſt a witneſs, while they continue in force.

(*t*) 5 Mod. 16. 74. Kelynge 33.
(*u*) Raym. 369. Co. Litt. 6. 2 Bulſtrode 154.
(*x*) 2 R. Ab. 686
(*y*) Co. Litt. 6.
(*z*) Raym. 32. infra ſect. 22, 23.
Supra c. 37. ſect. 52. Co. Litt. 6.

Summary 263. (*a*) Co. Litt. 6. Vide ſup. c. 43. ſ. 25. 33 H. 6. 55. 2 Hale 277. But Summary 263. 'tis ſaid in general, that one attaint of forgery cannot be a witneſs. (*b*) Co. Litt. 6. 2 Roll. 684. (*c*) 33 H. 6. 55. 24 E. 3. 34. Vide 1 Hale 306. ſup. c. 43. ſ. 25. B. 1. c. 72. ſ. 9. Co. Litt. 6. 2 Hale 277. But Summary 263. 'tis ſaid in general, that one attaint of conſpiracy cannot be a witneſs. (*d*) That it is not material whether ſuch judgment were actually executed. 2 Salkeld 689. 3 Inſt. 219. 3 Levinz 426. But Co. Litt. 6. Kelynge 37, 38. Summary 263. 2 Hale 277. 5 Mod. 75, 76. ſeem to make the execution of the judgment material. (*e*) 2 Salkeld 689. 3 Lev. 426. This point is made a quære, 5 Mod. 15, 16. 75, 76. Skinner 578, 579. And it is ſaid that by the civil and canon law no ſuch judgment diſables a witneſs, unleſs the nature of the crime be infamous. 3 Levinz 426, 427. (*f*) 1 Siderfin 51. Raymond 32. (5) It is the infamy of the crime which deſtroys the competency; and not the nature or mode of the puniſhment. Vide 2 Wilſon. Pendock v. Mackender, and the caſes there cited. Gilbert's Law of Evidence 139. Principles of Penal Law 61, 62.

Sect. 20. But it is (*g*) agreed, That no ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court. Alſo it is a general rule, That a (*h*) 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 (*i*) be impeached only by general ac-

(*g*) 1 State Tr. 268. 2 State Tr. 307. 436. 445. 3 State Tr. 425. 4 St. Tr. 130.
(*h*) 1 State Tr. 268. 472. 3 State Tr. 387.

1010. 4 State Tr. 44. Con. Ruſhw. Stafford 605. *et ibid.* 551. one was not admitted to ſpeak to clear himſelf. Nor are witneſſes permitted to give evidence of their own infamy or turpitude. 3 St. Tr. 427. 4 Inſt. 279. 2 Seſſ. Caſes 175. Strange 1148. Salkeld 461. 689. 3 St. Tr. 256. 680. 4 St. Tr. 129. 3 St. Tr. 151. 267. 297. Bull N. P. 291.
(*i*) Kelynge 38.

counts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted.

Sect. 21. It ſeems clear, (*k*) at this day, That outlawry in a perſonal action is not a good exception againſt a witneſs, as it is againſt a juror. And that a perſon convicted of felony, who is admitted to his clergy and (*l*) burnt in the hand, is thereby re-enabled to be a witneſs.

(*k*) Co. Lit. 6. 1 Hale 303. But 33 H. 6. 32. pl. 2. taken notice of 2 R. Abr. 675. ſeems contrary.

(*l*) Sup. c. 33. ſect. 129. c. 37. ſect. 49. Ld Raym. 370. 380. Godb. 288. Sty. 388. Kelynge 38. Vent. 349. Skinner 578. 5 Modern 15. 2 Siderfin 51. Hobart 81.

Sect. 22. It ſeems (*m*) agreed, That the king's pardon of treaſon or felony after a conviction or attainder, reſtores the party to his credit: Alſo it was holden by the late chief juſtice (*n*) Holt, That the king's pardon will remove a man's diſability to be a witneſs in all caſes whatſoever, wherein it is only the conſequence of the conviction or judgment againſt him, and not an expreſs part of the judgment, as it is in conſpiracy (*o*) at the ſuit of the king, and in perjury on the ſtatute. But this matter (*p*) ſeems not to be fully ſettled.

(*m*) Sup. c. 37. ſect. 48, 49, 50. (*n*) 2 Salk. 514. 689. But ſee 2 Brow. 47. (*o*) B. 1. c. 72. ſect 9. Hale thinks that a convict of conſpiracy, perjury, or forgery, may be a good witneſs, if pardoned. 1 Hale 306. (*p*) Vide Sup. c. 37. ſ. 52.

Sect. 23. It hath been (*q*) ruled, That a conviction of perjury doth not diſable a man from making an affidavit in relation to the irregularity of a judgment.

(*q*) 2 Salk. 461. 689. Strange 1148.

Sect. 24. As to the fifth particular, *viz.* Where it is a good exception againſt a witneſs that his intereſt is concerned. It ſeems an uncontеſted (*r*) rule, in all caſes whatſoever, 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. And this ſeems to be the reaſon why he who is bail for the defendant, (*s*) cannot be an evidence for him without conſent.

(*r*) Co. Litt. 6. 2 Siderfin 237. 1 Keble 836. 1 Hale 302, 303. 2 Hale 279.

(*s*) 3 St. Tr. 253.

Alſo upon the ſame ground it is (*t*) agreed, That he who borrows money upon an uſurious contract, cannot be a witneſs upon an information for the uſury unleſs he (*u*) hath paid the money, whether ſuch information be brought by himſelf or any other; for if in ſuch caſe a man might be a witneſs, he would in effect ſwear for himſelf, by proving a matter which may avoid his own contract.

(*t*) Co. Litt. 6. 2 R. Abr. 685. 1 Hale 302. (*u*) Raym. 191. 2 Keble 384. Vide B. v. page 533. ſect. 27.

And upon the like reaſon it hath been (*x*) ruled, That he who by a ſlight hath been impoſed upon to ſet his hand to a note for more money than he intended, is no good witneſs on an information for the cheat; becauſe a conviction may be a

(*x*) 1 Salk. 282. Yet between the King and Paris, 1 Siderfin 431. 2 Keble 572. 1 Ventris 49. the contrary was ruled in a ſtronger caſe, by three judges againſt the opinion of Twiſden. Watt's Caſe, Hardres 331, King v. Nunez, Strange 1043. King v. Ellis, Strange 1104.

means

means to avoid the note, by being made uſe of by the party when ſued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be (y) no evidence.

(y) Salk. 328. 1 Siderfin 325.

And for the like reaſon I take it to be generally (z) agreed, That he whoſe property may be prejudiced by a forgery, is no evidence to prove it on an indictment or information. And if it be a forgery within 5 Eliz. a farther reaſon may be offered why ſuch a perſon cannot be an evidence, becauſe he may have an action on the ſtatute; and upon this reaſon alone it hath been (a) adjudged, That he againſt whom a verdict is given, cannot be a witneſs to prove perjury in the evidence.

(z) Salk. 283. Vide Strange 728. Dr. Dodd forged a bond in the name of Ld Cheſterfield; the obligees executed a releaſe; and thereupon his lordſhip was admitted to prove that the ſignature was not his hand-writing.—Newland forged a bank-note in the name of William Lander one of the caſhiers, and, *without any releaſe*, Lander was admitted to prove that it was not his ſignature; becauſe the intereſt, and liability to pay muſt be immediate and apparent either upon the face of the inſtrument forged, or upon a *voir dire*; but in this caſe the Bank are *prima facie* and firſt liable; and Lander the caſhier only *mediately* liable over to the Bank upon his ſecurity. O. B. 1784. No. 276. *paſſim.* (a) 2 R. Abr. 685. and the ſame point is taken for granted, 1 Sid. 237. 1 Keble 836. Vide 1 Salkeld 283.—But a perſon cannot be a witneſs who apprehends himſelf intereſted, although in fact he is not. Strange 129.

And yet it appears from daily experience, That (b) a perſon beaten, and generally any other perſon to whoſe (c) damage a criminal information concludes, is a good evidence to prove ſuch battery or other miſdemeanor, notwithſtanding the objection that he may have an action. And therefore, upon the whole, the rules of evidence concerning this matter ſeem not to be clearly ſettled.

(b) 2 R. Abr. 685. 2 Keble 572. (c) 1 Sid. 237. 2 Keble 384. 572. 1 Keble 836. 1 Salkeld 286. 1 Siderfin 211.

Sect. 25. It ſeems (d) 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 witneſſes. Alſo it hath been (e) adjudged to be no good exception againſt a witneſs, that he has received a reward for having made a diſcovery of the crime to be proved againſt the priſoner. Alſo it hath been (f) ruled to be no good exception, that a witneſs hath the promiſe of a pardon or other reward on condition of giving his evidence, unleſs ſuch reward be promiſed by way of contract for giving ſuch and ſuch particular evidence, or full evidence, or any way in the leaſt to biaſs him to go beyond the truth; which not being eaſily avoided in promiſes or threats of this kind, it is certain that too great caution cannot be uſed in making them.

(d) 2 State Tr. 334, 335. 691. 693. (e) 1 State Tr. 723, 724. 2 State Tr. 334, 335. 4 State Tr. 121. Kelynge 18. (f) Kelynge 18. 2 Stat. Tr. 334. 335. 693. 3 St. Tr. 221, 222. But Sir Matthew Hale is of a different opinion. 1 Hale 304, 2 Hale 280. Kelynge 18. 4 State Tr. 121.

Sect. 26. As to the fifth particular, *viz.* What other exceptions are good againſt a witneſs. It ſeems (g) agreed to be a good

(g) Co Litt. 6. 2 Hale 279. 4 St. Tr. 131.

a good exception, that a witneſs is an infidel; that is, as I (*b*) take it, that he believes neither the Old nor New Teſtament to be the word of God; on one of which our law require the oath ſhould be adminiſtered (6).

(*b*) Vide Tr. per pais 165. 2 Keble 314. Vide Atkins 44. where this is ſaid to be a miſtake of Lord Coke's opinion.

(6) The ſtrictneſs of this rule has in many inſtances been relaxed. Ld Raymond 282. Vide alſo the caſe of Barker v. Omichund. 1 Atkyns 21 to 51. where the queſtion was very critically diſcuſſed; and the oaths of Gentoos, ſworn according to the ceremonies of their religion, admitted *in a civil cauſe*. A *Mahomedan*, ſworn upon the *koran*, had been admitted. Strange 1104. 2 Eq. Caſ. Ab. 397. pl. 15. the teſtimony of a Jew *tacto libro legis Moſaicæ* is not to be rejected. 2 Hale 279. Atkins 42. 44. 2 Keble 314. 6 State Trials 58. Francia's trial for high treaſon. A perſon has been admitted to ſwear by holding up his hand without laying it on the book or kiſſing it afterwards. Dutton v. Colt. Atk. 42. O. B. And by Wills C. J. an *Infidel*, in general, is an admiſſable witneſs; for the term does not imply that he is an *Atheiſt*. Atkins 40. 45. But the affirmation of a Quaker is excluded in criminal caſes by 7 & 8 Will. 3. c. 34. ſ. 6. Vide 3 Burn's Juſtice 254. And it ſeems that wherever it appears that a witneſs has no idea of a God or religion, he ſhall not be permitted to give his teſtimony. Atkyns 45.

(*i*) Co. Litt. 6.

(*k*) Sum. 263. 2 Hale 278. 1 Brownlow 47.

Sect. 27. Alſo it is (*i*) certain, That want of diſcretion is a good exception againſt a witneſs; on which account alone (*k*) it ſeems, That an infant may be excepted againſt; for in ſome caſes an infant of nine years of age has been allowed to give evidence.

In the caſe of the King v. Powell, tried before Mr. Juſtice Gould at York aſſizes 1775, for a rape, and in a later caſe of the King v. Brazier, of the ſame kind, it was determined by the judges that an infant under ſeven years of age may be ſworn, and give her evidence *upon oath*, provided ſhe appears to have ſufficient diſcretion, &c. &c. MS.

(*l*) 1 St.Tr. 253. A man deaf and dumb, with whom communication can be made by means of ſigns, &c. was admitted to give material evidence againſt a priſoner at the Old Bailey, January ſeſſions 1786, by Mr. Juſtice Heath, after an argument againſt his competency. MS.

Sect. 28. But it ſeems agreed, That it is no good (*l*) exception againſt a witneſs that he is an alien, or villein, or bondman, &c.

(*m*) Sum. 264. 2 Hale 283. 2 Bulſtrode 147. (*n*) 2 State Tr. 737. 1 Sanderſon 325. (*o*) 1 Siderfin 211. (*p*) 3 Inſt. 79. (*q*) Sum. 264. 2 Hale 283.

Sect. 29. As to the fourth point, *viz.* In what manner the witneſſes for the defendant are to give their evidence: It hath always been (*m*) agreed, That the evidence for the king muſt in all caſes be upon oath, and alſo that the evidence for the defendant in an (*n*) appeal, whether capital or not capital, or in an indictment or information for a (*o*) miſdemeanor, muſt alſo be upon oath. And it is ſaid by Sir Edward (*p*) Coke, "That we "never read in any ſtatute, ancient author, book-caſe, or re- "cord, that in criminal caſes the party accuſed ſhould not "have witneſſes ſworn for him, and therefore that there is "not ſo much as *ſcintilla juris* againſt it." And it is ſaid by Sir (*q*) Matthew Hale, That there is no known law againſt it.

However

However there having been a conſtant immemorial (*r*) practice not to ſuffer witneſſes to be ſworn againſt the king upon indictments of capital crimes (*s*), except in ſome caſes ſpecially provided for by ſtatute; and the judges being always tender of departing from the ſettled practice of their predeceſſors, and generally chooſing rather to preſume it originally founded on ſome ſtatute or other good foundation, than to ſuffer the reaſonableneſs of it to be nicely inquired into, which might be an inlet to endleſs uncertainties, it was thought neceſſary to enact by 1 Annæ c. 9. ſ. 3. "That every perſon who ſhall be produced or appear as a witneſs on the behalf of the priſoner, "before he or ſhe be admitted to depoſe, or give any manner of "evidence, ſhall firſt take an oath (7) to depoſe the truth, the "whole truth, and nothing but the truth, in ſuch manner as "the witneſſes for the queen are by law obliged to do (8); "and if convicted of any wilful perjury in ſuch evidence, ſhall "ſuffer all the puniſhments, penalties, forfeitures and diſabili-"ties, which by any of the laws and ſtatutes of this realm, are "or may be inflicted upon perſons convicted of wilful per-"jury."

(*r*) C. Car. 292. 2 Bulſtrode 147. 1 State Tr. 118. 2 State Tr. 296. 737. Summary 264.

(*s*) Vide 31 El. c. 4. 4 Jac. c. 1.

(7) A peer muſt be ſworn in a criminal proceeding. 3 Keble 61. 1 Salkeld 278.

(8) It is not ſufficient for a witneſs to ſay *he thinks or perſuades himſelf*; for the court muſt give judgment upon unequivocal evidence. Dyer 53. The court will indulge the priſoner by examining the witneſſes againſt him apart, but he cannot demand it as his right. 4 State Trials 9. And it is ſaid that a priſoner cannot call witneſſes to diſprove what his own witneſſes have ſworn. 2 St. Tr. 764. 792.—Nor ſhall any witneſs read his evidence; but he may look on his notes to refreſh his memory. 5 State Trials 445.

Sect. 30. As to the fifth point, *viz.* Whether a defendant in criminal caſes have right to proceſs to bring in his witneſſes: I take it, that in proſecutions for (*t*) miſdemeanors the defendant may take out *ſubpœna's* of courſe; but that in capital caſes he hath no (*u*) right, by the common law, to any proceſs againſt his witneſſes without a ſpecial order of the court. And it is ſaid in *Turner's caſe* (*x*), that the court cannot grant the priſoner any precept to bring in his witneſſes, &c.

(*t*) 1 State Tr. 969. 3 State Trials 238. 252. 420.

(*u*) Vide 1 State Trials 969. 3 St. Tr. 1002.

(*x*) St. Tr. 995

But it is enacted by 7 Will. 3 c. 3. ſ. 7. "That all perſons accuſed and indicted *for any high treaſon*, whereby any "corruption of blood may enſue, ſhall have the like proceſs "of the court where they ſhall be tried, to compel their witneſſes to appear for them at any ſuch trial or trials, as is "uſually granted to compel witneſſes to appear againſt them."

And it ſeems that ſince the ſtatute of 1 Annæ c. 9. ſet forth more at large in the precedent ſection, which ordains, "That "the witneſſes for the priſoner ſhall be ſworn," proceſs may

be taken out againſt them of courſe in any caſe whatſoever (9).

(9) The compulſory proceſs to bring in witneſſes in criminal cauſes is either by *ſubpœna* iſſued in the king's name by the juſtices where the plea of *not guilty* is to be tried. Or the juſtices or coroner, who take the examination of the perſon accuſed; and the information of the witneſſes may at that time (and this is the uſual way), or at any time after, and before the trial, bind over the witneſſes to appear at the ſeſſions, and if they refuſe to be bound over, may commit them for contempt. 2 Hale 52. 282. and alſo, if they neglect to appear when bound over, they ſhall forfeit their recognizance. 1 Burn's juſtice 533. Where a witneſs is a priſoner in execution for debt, he muſt be brought up by *habeas corpus ad teſtificandum*, to give his evidence. 2 State Trials 580. 4 State Trials 37.

(y) Ch. 25. ſect. 115. Ch. 30. ſect. 9. (z) Ch. 35. ſect. 11.

Sect. 31. As to the ſixth point, *viz.* What evidence maintains an indictment, &c. Having already ſhewn, (y) That according to the later opinions, where one is indicted upon a ſtatute, and the evidence doth not bring the caſe within the ſtatute, but yet proves the offence in the indictment as it is an offence at the common law, the defendant may be found guilty at the common law, and the words *contra formam ſtatuti* rejected as ſurplus. Having alſo ſhewn, (z) That it is ſtrongly holden that a man cannot be found guilty of an indictment againſt him as principal, upon evidence which only proves him to have been acceſſary before, but ſhall be diſcharged of the indictment.—I ſhall in this place take notice only of the following particulars.

(a) Sum. 264. 1 Hale 361. 2 Hale 179. 291. 3 Inſt. 230. 1 Salk. 288. Kelynge 16. 2 Inſt. 318, 319. 4 State Trials 9. (b) Sum. 187. (c) 1 Salk. 288. 4 State Tr. 9. 3 Kelynge 16. (d) Sum. 264. 2 Inſt. 318.

Sect. 32. Firſt, That it is a ſettled rule (a) in all caſes, whether capital or not capital, That the day laid in the indictment or (b) appeal is not material upon evidence, but that the defendant may be convicted upon proof of a fact at any other time, whether before or after the day laid; ſo (c) that it were before the time when the indictment or appeal were preferred. And agreeably hereto Sir (d) Henry Vane was found guilty of an indictment of high treaſon laid on the 30th of May, 11 Car. 2. upon evidence of a fact done the 30th of January, in the firſt year of Charles the ſecond.

3 Inſt. 230. Confirmed by all the judges in the caſe of Lord Balmarino, 9 State Trials 587. and Townley's Caſe, Foſter 7, 8.

(e) Sum. 264. 270. 3 Inſt. 230. and infra. Ch. 51. (f) Kely. 16. Summ. 264. 1 Hale 361. 2 Inſt. 318. 3 Inſt. 230.

Sect. 33. Secondly, That where the time proved varies from that laid in the indictment or appeal, the jury may either find the defendant guilty generally, in which caſe the forfeiture ſhall relate to the time laid, till the verdict be falſified by the party intereſted (as it may be in this (e) reſpect, though not as to the point of the offence); or they may (f) ſpecially find him guilty on the day on which the fact is proved, whether before or after the day laid in the indictment or appeal, in which caſe the forfeiture ſhall relate to the day ſo ſpecially found. But where a verdict expreſsly finds a defendant guilty before the time laid in the indictment or appeal, whether it may be falſified, as to the time, by the party intereſted, as it may be where it

it finds him guilty generally of the offence in the indictment or appeal, upon evidence of a fact after the time laid, may deſerve to be conſidered.

Sect. 34. Thirdly, That where a certain (*g*) place is made part of the deſcription of the fact which is charged againſt the defendant, the leaſt variance as to ſuch place between the evidence and indictment is fatal; as where a treſpaſs in taking away goods, or any other offence is alledged in ſuch a pariſh in the houſe of J. S. or in ſuch a pariſh in a play-houſe in Lincoln's-Inn-Fields, and upon evidence it appears to have been done at the houſe of a different perſon, or that there is no play-houſe in Lincoln's-Inn-Fields. But it is a ſettled (*h*) rule, That a place laid only for *a venue* in an indictment or appeal is no way material upon evidence; but that a proof of the ſame crime at any other place in the (*i*) ſame county, maintains the indictment or appeal as well as if it had been proved in the very ſame place.

(*g*) Salk. 185. 661. Vide Fielding's Penal Law 317.
(*h*) Sum. 264. Salk. 288. 4 State Trials 9. Kelynge 15. 33.
(*i*) 2 Hale 291. See the books above cited and ſupra ch. 25. ſect. 35 to 54. and Cro. Eliz. 911.

Alſo it hath been adjudged, That after a crime hath been proved in the county in which it is laid, evidence may be given of other inſtances of the ſame crime in another county, in order to ſatisfy the jury.

Kelynge 53. 4 Sta. Tr. 410. 1 Burrow 47.

It was adjudged, in *Sir Henry Vane's caſe* (*l*), That where one is indicted for high treaſon in compaſſing the king's death in *one county*, and the levying of war in the ſame county is laid as an overt-act of ſuch treaſon, and (*m*) proved in the ſame county by one witneſs, the levying of war in *another county* may alſo be proved by another witneſs. But it ſeems to have been (*n*) agreed at the ſame time, That where the levying of war is the treaſon for which the party is indicted, it muſt be fully proved in the county in which it is laid.

(*l*) Kelynge 14. 4 Stat. Tr. 78.
(*m*) It is neceſſary that ſome overt-act be proved in the ſame county, for otherwiſe the compaſſing could no way be ſaid to be proved in the county wherein it is laid.

Alſo it ſeems, That *at this day* the levying of war can in no caſe be given in evidence as an overt-act in any county in which it is not laid, unleſs it tend to prove ſome overt-act that is expreſsly laid; for it is enacted by 7 Will. 3. c. 3. ſ. 8. "That no (*o*) "evidence ſhall be admitted or given of any overt-act that is "not expreſsly laid in the indictment againſt any perſon or "perſons whatſoever."

(*n*) Kelynge 15. And Deacon's caſe, 9 State Trials 558. Foſter 9.
(*o*) Foſter 245.

In the conſtruction whereof it hath been adjudged, (*p*) That where one is indicted for high treaſon in adhering to the king's enemies, and certain acts of hoſtility done by him in a certain ſhip called *the Clencarty*, are laid as the overt-acts of ſuch adherence, no evidence can be given of any other diſtinct act of adherence, having no relation to, nor any way tending to prove, what was done in *the Clencarty*, though it conduce to prove the ſame ſpecies of treaſon; and therefore that on ſuch an indictment no evidence can be given of the priſoners having run away to the enemy in a cuſtom-houſe-boat, &c.

(*p*) Captain Vaughan's caſe, 5 State Trials p. 17 to 38.

But it hath been adjudged, (*q*) That where one is indicted for high treaſon in compaſſing the king's death, and a conſult and agreement to aſſaſſinate the king is laid as one of the overt-

(*q*) Rookwood's caſe, 4 St. Tr. 661 to 697.

acts of such treason, the defendant's giving about among the conspirators a list of the persons names who were intended to be employed in the assassination, may be given in evidence against him upon such indictment, because it naturally tends to prove his agreement to the intended assassination, which agreement is one of the overt-acts laid in the indictment.

(r) Francia's case, 6 State Tr. 58. to 102.

Also it hath been adjudged (r) That where the writing of several treasonable letters is laid as an overt-act of high treason in compassing the king's death, and the purport of such letters is only set forth in the indictment without a particular recital or description of any of them, the particular letters making good such charge may be read at the trial.

Lowick's case, 4 St. Tr. 718. Layer's case, 6 St. Tr. 226. Foster 194.

Sect. 35. Fourthly, That where several overt-acts are laid in an indictment of high treason, the proof of any of them maintains the indictment as much as if every one of them were proved.

Dr. Drake's case, Salkeld 660. where the word *nor* for *not* was held a fatal variance in an information for a libel, vide Hobart 272.

Sect. 36. Fifthly, That where one is indicted for writing a libel *secundum tenorem sequentem*, or for forging a deed *so and so* described, any the least variance between the libel recited, or deed described, and those given in evidence, is fatal. But that where the substance only of a libel is set forth in Latin, it is sufficient if the libel be proved to have the same sense as is set forth.

The words "in manner and form following that is to say," do not bind the party to recite the instrument *verbatim*, nor render mere formal omissions or mistakes fatal. May's case, Douglas 193. In perjury on an affidavit recited to the "tenor and effect, &c." where "*understood*" was inserted in the indictment instead of "*understood*," the variance was held not fatal. Beach's case, Cowper 229. So also in forgery where the bill given in evidence was "value *received*," and the recital in the indictment was "value *received*," the variance was determined by all the judges to be immaterial; for it is impossible to mistake it. Hart's case, Easter Term 1776, MS. The true distinction is said by Lord MANSFIELD to be that where the omission or addition of a letter does not change the word so as to make it *another* word, the variance is not material; but that where the mis-recited word is in itself *a word* not intelligible with the context, there the variance is fatal. Salk. 660. Cowp. 230. Douglas 194 note 25. But by Powys if the court once give into solutions of variances, they will never know where to stop, and being once at sea will find it difficult to reach the harbour again. 2 Str. 231, 232.

(s) Hobart 294.

Yet it seems (s) agreed, That it is no evidence in any criminal case, that the defendant said so and so, or words to the like effect; because the court must know the very words, to judge of their force and effect.

Sect. 37. Sixthly, that a variance between an indictment or appeal of death, and the evidence, as to the instrumental cause mentioned in such indictment or appeal, is no (t) way material, so that the party be proved to have died by the same kind of death as is alledged in the indictment or appeal. And therefore it is (u) agreed, That if one be indicted or appealed for killing another with a sword, and upon evidence it appear that he killed him with a staff, hatchet, bill or hook, or any other weapon with which a wound may be given, he ought to be found guilty, for the substance of the matter is whether he gave the party a wound of which he died; and it is not material with what weapon he gave it, though for

(t) 9 Coke 67. 2 Hale 105. 291. 185. 1 Inst. 319. 2 Inst. 135. 50. Summary 265. Gilo. 270. 277.

(u) See the books.

form's ſake it be (*c*) neceſſary to ſet forth a particular weapon. And on the ſame ground it hath been alſo (*d*) adjudged, That an indictment, or appeal for poiſoning a man with one kind of poiſon, may be maintained by evidence of a different kind of poiſon; for the ſubſtance of the matter is, whether the defendant did poiſon the deceaſed or not. (*e*) Yet it ſeems clear, That evidence of poiſoning, burning, or famiſhing, or any other kind of killing wherein no weapon is uſed, will not maintain an indictment or appeal of death by killing with a weapon; and that evidence of killing with a weapon will not maintain an indictment or appeal of poiſoning, &c. becauſe they are different kinds of deaths; and in like manner that an indictment of treaſon could (*f*) never be maintained by evidence of treaſon of a different ſpecies.

(*c*) Vide ſup. c. 23. ſ. 84.
(*d*) 3 Inſt. 135. Summary 265. 3 Inſt. 319.
(*e*) 2 Hale 291. 2 Inſt. 319. 1 State Trials p. 118. Overbury's Caſe.
(*f*) 4 State Tr. 9. 2 Hale 291. Mackally's Caſe 9 Coke 67.

Sect. 38. Seventhly, That it ſeems a (*g*) general rule, That wherever a variance between an indictment or appeal, and the evidence brought to ſupport them, is material or immaterial in reſpect of the principal; in the ſame caſes alſo it will be material or immaterial in reſpect of the acceſſary.

(*g*) Sum. 265. 2 Hale 292. 3 Inſt. 165.

Sect. 39. Eighthly, That it is (*h*) ſettled at this (*i*) day, That if an indictment or appeal againſt A. B. and C. for the death of D. charge A. as having given the mortal blow, and B. and C. as having been preſent, procuring, and abetting, and the evidence prove that B. and C. gave the blow, and that A. was only preſent, procuring, and abetting; yet it maintains the indictment, becauſe in ſuch a caſe in the (*k*) judgment of law, the act of any of them is the act of all.

(*h*) But there were anciently ſome opinions to the contrary, ſup. c. 29. ſect. 7. Gilb. L. E. 271. 2 Hale 185. 292. 344, 345. S. P. C. 41.
(*i*) Plowden 98. 100. 1 Salkeld 334, 335. Wallis's Caſe. 3 Modern 121. 9 Coke 67. 4 H. 7. 18. Ab. F. Corone 60. B. Appeal 85. Corone 140. S. P. C. 41. 1 Hale 437, 438. 2 Summ. 292. Sup. c. 23. ſect. 76. c. 25. ſect. 64.
(*k*) See the books above cited, and B. 1. c. 32. ſect. 6. ch. 31. ſect. 31, and 50. ch. 34. ſect. 7. ch. 38. ſect 8, 9. ch. 41. ſect. 6. Douglas. 210.

Sect. 40. Ninthly, That it hath (*l*) been reſolved, That if one be indicted as acceſſary to two, and upon evidence appear to have been acceſſary to one of them only, yet he ſhall be found guilty. But it is (*m*) holden by Sir Edward Coke, That if an appeal be brought againſt two as principals and againſt another as acceſſary to them, and one of thoſe charged as principals be found not guilty, the acceſſary is diſcharged, for which he gives this reaſon, That becauſe the plaintiff made him acceſſary to two, he cannot be found acceſſary to one. But no authority is cited for the maintenance of this opinion; neither doth it ſeem eaſy to reconcile it with the reſolution above mentioned, unleſs the rules of evidence on any appeal differ from thoſe on an indictment, which I do not (*n*) find that they do as to other variances.

(*l*) 9 Coke 119. Sancher's caſe. Summary 222. 265. 2 Hale 292. Vide Keilway 107. and ſup. c. 29. ſ. 46, 47.
(*m*) 2 Inſt. 183.
(*n*) Vide ſup. ſ. 32. 34. 37, 38, 39.

Sect.

Sect. 41. Tenthly, That it hath been (*o*) agreed, That if a perſon be generally indicted for the murder of another *ex malitia præcogitata*, and no expreſs malice appear upon the evidence, but only (*p*) malice implied by law, yet he ſhall be found guilty. Alſo it hath been (*q*) adjudged, That where an indictment ſets forth all the ſpecial matter in reſpect whereof the law implies malice, a variance between the indictment and evidence as to the circumſtances doth no hurt, ſo that the ſubſtance of the matter be found. As (*r*) where an indictment for the murder of a ſerjeant at mace in London upon an arreſt, ſuppoſes that the ſheriff made a precept to ſuch ſerjeant for the arreſt, and upon the evidence it appears that there was not any ſuch precept, but that the ſerjeant made the arreſt *ex officio* at the plaintiff's requeſt upon the entry of the plaint, according to the cuſtom of the city; for the ſubſtance of the matter is whether the defendant killed an officer in the lawful execution of legal proceſs.

(*o*) 9 Coke 67. C. Jac. 280. Summary 266.
(*p*) See B. 1. c. 31. ſ. 18, 19. and ſ. 40 to 43.
(*q*) 9 Coke 67.
(*r*) 9 Coke 62, 63. 67. Vide the caſe of Rex v. Barker, Somerſet aſſize 1775, before Baron Burland ſo the murder of P. Maggs, decided by the judges on the firſt day of the next Michaelmas Term. MS.

Sect. 42. Eleventhly, That violent (*s*) preſumption from plain circumſtances is in ſome caſes taken for full proof; as where a man is ſtabbed in a houſe, and another runs out with a bloody knife in his hand, and no one elſe is in the houſe at the time. Alſo it is (*t*) ſaid, That a probable preſumption is of ſome weight, but that a light one is not to be regarded at all.

(*s*) Co. Litt. 6. S. P. C. 179. Vide ſup. c. 45. ſ. 10. and 1 St. Tr. 181. 636. 2 St. Tr. 408. 3 St. Tr. 228, 229, 688, 689. 894. 901. 928, 929, 930.
(*t*) Coke on Littleton 6. Comm. 367. 4 Comm. 353.

Sect. 43. Twelfthly, That it is enacted by 21 Jac. c. 27. "That 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 that 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 it may not come to light, whether "it were born alive or not, but be concealed; in every ſuch "caſe, the ſaid mother ſo offending ſhall ſuffer death as in "caſe of murder, except ſuch mother can make proof by one "witneſs at the leaſt, that the child whoſe death was by her "ſo intended to be concealed was born dead."—In the conſtruction whereof it hath been (*u*) adjudged, That in order to convict a woman by force of this ſtatute, there is no need that the indictment be drawn ſpecially, or conclude *contra formam ſtatuti*; but that it is the better way to ſet forth only that the defendant *infantem maſculum vivum parturiit, qui quidem infans maſculus adtunc & ibidem vivus exiſtens natus per legem hujus Angliæ ſpurius fuit, Anglice* a baſtard, and then go on in the ordinary way to ſhew that ſhe murdered him, &c. *contra pacem, &c.* for the ſtatute doth not make a new offence, but only makes ſuch concealment an undeniable evidence of murder. Alſo it hath

(*u*) Kelynge 32. 2 Hale 288, 289.

hath been (*x*) 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. But it hath been (*y*) 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. Alſo it hath been (*z*) agreed, that if a woman confeſs herſelf with child beforehand, and afterwards be ſurpriſed 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 (*a*), that the child was born alive.

(*x*) Kelynge 32, 33.

(*y*) Kelynge 32.

(*z*) Kelynge 33.

(*a*) 4 Comm. 198. 358.

Sect. 44. As to the ſeventh point, *viz.* What may be given in evidence on the part of the defendant. It ſeems (*b*) agreed, that *ſon aſſault demeſne* may be given in evidence on the general iſſue in an indictment, but not in an action of battery.

(*b*) B. 1. c. 62. ſect. 3.

Alſo it ſeems to have been always (*c*) agreed, that the defendant in an information on a penal ſtatute may give in evidence any exception in his favour in the body of the act. And it hath alſo been (*d*) holden that he may give in evidence any ſuch exception in a *proviſo* of the act, (becauſe any ſuch exception ſhews that he did not act againſt the form of the ſtatute;) but that he cannot (*e*) give in evidence any clauſe of exemption in a latter ſtatute, but ought to plead it.

(*c*) Savil 32. 1 Jones 157. 2 R. Abr. 683.

(*d*) 2 R. Abr. 683. But this is left a quære, Savil 32. B. Gen. Iſſue 3. Vide ſup. c. 25. f. 113.

(*e*) 2 R. Abr. 683.

† *Sect.* 45. 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.

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† *Sect.* 46. In the caſe of murder, the declarations of the deceaſed after the mortal wound is given, may be given in evidence, (10) But where ſuch declaration is reduced into writing, the writing itſelf muſt be produced, and not evidence thereof given *viva voce*.

12 Viner 118, 119.

(10) Quere unleſs the party is ſenſibly apprehenſive of approaching diſſolution; for this evidence ſeems to be admiſſable only upon the idea, that no human motive can at ſuch an awful moment interpoſe to bias the truth of what is aſſerted; and therefore the law conſiders *the declarations* of a perſon ſo *dying* as equal to the ſolemnity of an oath. 4 St. Tr. 203. 9 St. Tr. 161. 10 St. Tr. 504.

† *Sect.* 47. On an indictment for clipping and counterfeiting the king's coin, it is not neceſſary to prove it the king's coin by

1 Hale 196. 204. 212, 213.

by proclamation; but, as a queſtion of fact, it muſt be left to the jury upon all the circumſtances, and if it be not commonly known, the moſt that can be expected is, that the officers of the mint their indenture ſhould be produced to prove the currency of it.

2 Hale 197. 213. 310. Vide alſo 229. reſpecting evidence of intention.

† *Sect.* 48. But on an indictment for the counterfeiting, clipping or diminiſhing *foreign coin* on the firſt of Mary, ch. 6. or the 5 or 18 of Eliz. for high treaſon, a proclamation with a proclamation writ under the great ſeal ſeems neceſſary to be produced.

Belmore's caſe 2 Hale 305.

† *Sect.* 49. If three perſons be indicted for perjury on three ſeveral indictments, and one pleads Not guilty, the other two may be witneſſes for him on the trial, for they ſtand unconvicted, although they are indicted.

† *Sect.* 50. As to the eighth point, *viz.* In what caſes witneſſes may be allowed their expences, it ſeems that in civil proceedings a witneſs is not obliged to attend unleſs his expences are tendered to him purſuant to 5 Eliz. c. 9. and if after ſuch tender he neglects to appear, he may be fined according to the directions of that ſtatute, or puniſhed by attachment for a contempt of the court, as the circumſtances of the caſe ſhall appear to be. (11) But in criminal proceedings the demands of public juſtice ſupercede every conſideration of private inconvenience; and witneſſes are bound, unconditionally, to attend the trial upon which they may be ſummoned, and be bound over to give their evidence. To perſons of opulence and public ſpirit this obligation cannot be either hard or injurious; but indigent witneſſes grew weary of expenſive attendance, and frequently bore their own charges to their great hindrance and loſs, and Sir Mathew Hale (12) complains of the want of power in judges to allow witneſſes their charges, as a great defect in this part of judicial adminiſtration.

(11) Ld Raym. 1529. Strange 1054. 1150. 510. Black. 36. B. R. H. 313.

(12) 2 Hale 282.

Indigent proſecutors to be allowed their expences.

† *Sect.* 51. And it is recited by 25 Geo. 2. c. 36. "That many perſons are deterred from proſecuting perſons guilty of felony upon account of the expence attending ſuch proſecution;" whereupon it is enacted, "That the court before "whom any perſon has been tried and convicted of any grand "or petit larceny or other felony, at the prayer of the proſecu- "tor, and in conſideration of his circumſtances, may order the "treaſurer of the county in which the offence ſhall have been "committed, to pay ſuch proſecutor ſuch ſum as the ſaid "court ſhall think reaſonable, not exceeding the expences "he ſhall appear to have been put to in carrying on ſuch "proſecution, making him a reaſonable allowance for his "time and trouble therein; which order the clerk of aſſize, or "clerk

" clerk of the peace reſpectively, is hereby required forthwith " to make out and to deliver unto ſuch proſecutor, on being " paid one ſhilling and no more; which order the treaſurer " ſhall forthwith pay to the proſecutor or his aſſigns."

† *Sect.* 52. But the foregoing ſtatute having only removed the inconvenience as to proſecutors, it is farther enacted by 27 Geo. 2. c. 3. ſect. 3. " That when any poor perſon ſhall " appear on recognizance in any court to give evidence " againſt another accuſed of felony; the court, at the prayer, " and on the oath of ſuch perſon, and on conſideration of " his circumſtances, in open court, may order the treaſurer " of the county or place where the offence was committed, " to pay what ſum to the court ſhall ſeem reaſonable for his " time, trouble and expence; which order the proper officer of " ſuch court ſhall make out and deliver to ſuch perſon, upon " being paid ſixpence; which order the treaſurer ſhall pay as " aforeſaid."—Except by par. 4. within the county of *Middleſex* (13), where the ſame ſhall be paid by the overſeers of the poor where the perſon was apprehended.

Poor witneſſes allowed their expences.

(13) 1 Burn's Juſtice 530. has adopted this proviſion as the *meaning* of the act; but it certainly is not ſo expreſſed in Ruffhead's Collection.

† *Sect.* 53. And as this laſt recited act extends only to poor perſons appearing on recognizance; and the 25 Geo. 2. c. 36. before mentioned, gives relief only where the offender is convicted. It is further enacted by 18 Geo. 3. c. 19. " That " the court before whom any perſon has been tried and con- " victed, or tried and acquitted of felony, in caſe it ſhall ap- " pear that there was a reaſonable ground for the proſecution, " and that the ſaid proſecutor hath *bona fide* proſecuted, may or- " der, upon the prayer of the ſaid proſecutor, the treaſurer of the " county, riding, or diviſion, in which the offence ſhall have been, " or have been ſuppoſed to have been, committed, to pay ſuch " proſecutor ſuch ſum of money as to the ſaid court ſhall ſeem " reaſonable, not exceeding the expences which it ſhall appear " he has been *bona fide* put to, in carrying on ſuch proſecu- " tion, making, in caſe the proſecutor ſhall appear to be in " poor circumſtances, a reaſonable allowance for his trouble " and loſs of time; which order the clerk ſhall deliver on re- " ceiving one ſhilling, and the treaſurer ſhall pay as afore- " ſaid."

† *Sect.* 54. And it is further enacted, par. 8. " That the " court where any perſon ſhall appear on recognizance or ſub- " pœna to give evidence as to any felony, whether any bill of " indictment be preferred or not to any grand jury, provided " the ſaid perſon ſhall in the opinion of the court, *bona fide* have " attended the ſaid court in obedience to ſuch recognizance or " ſubpœna, may order the treaſurer to pay, what to the ſaid " court it ſhall appear the ſaid perſon was *bona fide* put to, by " reaſon of the ſaid recognizance or ſubpœna, making, in caſe " he is in poor circumſtances, a reaſonable allowance for

" his

" his trouble and loſs of time; for which order the clerk " ſhall receive ſixpence, and the treaſurer ſhall pay as afore- " ſaid."

† *Sect.* 55. And by par. 9. " The quarter ſeſſion may alter " or lay down ſuch rules and regulations concerning any coſts " and charges to be allowed to any perſon by virtue of this " act as to them ſhall ſeem juſt; which rules and regulations " having received the approbation and ſignature of one or " more of the judges of aſſize, ſhall be binding on all parties " whatſoever; and no perſon ſhall be allowed a greater ſum " than according to the ſaid rules ſo approved of, &c."

N. B. Vide 14 Geo. 3. c. 20. for the manner in which priſoners ſhall be diſcharged, againſt whom no evidence is given.

CHAPTER THE FORTY-SEVENTH.

OF VERDICT.

FOR the general learning of verdicts I ſhall refer to other books, and in this place take notice only of the following particulars.

Sect. 1. Firſt, That it ſeems to have been (*a*) anciently an uncontroverted rule, and hath been allowed, even by thoſe (*b*) of the contrary opinion, to have been the general tradition of the law, that a jury ſworn and charged in a capital (*c*) caſe, cannot be diſcharged (without the (*d*) priſoner's conſent) till they have given a verdict. And notwithſtanding ſome (*e*) authorities to the contrary in the reign of king Charles the ſecond, this hath been holden for clear law both in the reign of king (*f*) James the ſecond, and (*g*) ſince the revolution.

(*a*) Co. Litt. 227. 3 Inſtitute 110. 1 Anderſon 103, 104. Summary 267. 2 Hale 294. 2 State Trials 827. 1 Anderſon 103.

(*b*) Raym. 84.

(*c*) And the ſame is holden by Coke as to larceny, and any caſe of member. 3 Inſtitute 110. Co. Litt. 227. b. But as to caſes of an inferior nature, the contrary hath been adjudged. Raymond 84. Vide 1 Ventris 69. (*d*) 1 Anderſon 103, 104. Foſter 36. (*e*) Kelynge 47. 26. 52. Camberbach 401. 1 State Trials 978. 2 State Trials 155. 277. 389. Raymond 84. (*f*) 3 State Trials 678. Vide ſup. c. 44. ſ. 22. (*g*) 4 State Trials 110, 178, 179. Sed vide Rookwood's caſe, 4 State Trials 649. And this was confirmed by the declaration of Lord Mansfield at the trial of Lord George Gordon for high treaſon. Vide alſo 4 Comm. 354. But ſee this point argued at large, Foſter 29 to 39. where in certain caſes there may be an exception to this general rule.

Sect. 2. Secondly, That it ſeems to have been (*b*) always agreed, that in all (*i*) capital caſes the jury muſt give their verdict openly in court, and cannot give a privy verdict.

(*b*) Co. Lit. 227. 3 Inſt. 110. Raym. 193. 2 Hale 300. 4 Comm. 354. 1 Hale 598. 2 Hale 300.

(*i*) The ſame is holden by Sir Edward Coke, as to larceny, and any caſe of member, 3 Inſt. 110. Coke Litt. 227. And it is ſaid in Raymond 193. That no privy verdict can be given in any caſe where the jury are to look upon the priſoner when they give it.

Sect. 3. Thirdly, That it is ſettled, (*k*) that the jury may give a ſpecial verdict in any criminal caſe, whether capital or not capital, as well as in a civil.

(*k*) S. P. C. 165. Summary 267. 2 Hale 301, 302. 9 Coke 12. 63. 1 Bulſtrode 87.

Vide inf. ſ. 6. But, it is ſaid, Kelynge 29, 30. That it is diſhonourable for the court to ſuffer a ſpecial verdict in a plain caſe.

Sect. 4. Fourthly, That it hath been (*l*) adjudged, that where the jury find a man not guilty of an indictment or appeal of murder, they are not bound to make any inquiry, whether he be guilty of manſlaughter, &c. But that if they will they may, according to the nature of the evidence, find him guilty of (*m*) manſlaughter or (*n*) homicide *ſe defendendo*, or *per infortunium*; for the killing is the ſubſtance, and the malice but a circumſtance, a (*o*) variance as to which hurts not the verdict. Yet the books ſeem to make this difference, that where the jury find the defendant guilty of manſlaughter on an indictment of murder, they may give their verdict (*p*) generally, without ſetting out any of the circumſtances of the fact: But that they ſhall not (*q*) be received to find him guilty, generally, of homicide *ſe defendendo* or *per infortunium*, but muſt ſet out the whole circumſtances of the fact, and in the (*r*) concluſion ſhew of what crime they find the defendant guilty, wherein if they be miſtaken, it is (*s*) ſaid, that the court may notwithſtanding give ſuch judgment as ſhall appear to be proper from the circumſtances of the fact ſpecially ſet forth.

(*l*) C. Eliz. 276. 296. 464 (*m*) Dyer 261. 4 Coke 43. 9 Coke 81. Daliſon 14. Summary 267. Latch. 126. Plowden 101. C. Eliz. 276. 296. 464. Moor 407. B. Corone 121. But 2 Roll 461. this was queſtioned as to an appeal of death. (*n*) B. Corone 267. 2 Hale 302. Daliſon 14. S. P. C. 165. See the book cited to the following ſection. (*o*) 1 Bulſt. 87.

'Tis holden by two judges againſt one, That where the appeal mentioned three wounds, and the verdict found but one, yet the variance was immaterial. Vide c. 46. ſ. 37. (*p*) See the books cited ſupra lett. *m*. (*q*) Summary 267. 2 Hale 302. S. P. C. 15. 165. 3 Inſt. 56. 26 H. 8. 5. Aleyn 12. (*r*) F. Cor. 264. 286, 287. 305. Vide Benlowe 47. 1 Anderſon 41. (*s*) 43 Aſſize 31. F. Corone 226. Crompton 114. S. P. C. 165. Vide Benlowe 47. 1 Anderſon 41.

Sect. 5. Fifthly, That it hath been (*t*) adjudged, That if the jury on an indictment or appeal of murder find the defendant guilty of manſlaughter, without ſaying any thing expreſsly as to the murder, it is inſufficient and void, as being only a verdict for part. And *quære* if the law be not the ſame where

(*t*) 1 Anderſon 103, 104. and note, That in all the books cited under the fourth ſection to letter *m*. where

the defendant is found guilty of manſlaughter on an indictment of murder, he is expreſsly acquitted of the murder; but other books, which ſpeak of this matter, ſay in general that the defendant may be found guilty of manſlaughter on an indictment of murder, without ſaying any thing as to the neceſſity of giving an expreſs verdict upon the murder. 9 Coke 67. Crompton 114. 1 Hale 267. 2 Hale 302. See 4 Coke 40. 46.

the

the jury upon ſuch an indictment find that the defendant killed the deceaſed *ſe defendendo* or *per infortunium*, and do not expreſsly find that he did not murder him, according to the generality of the ancient (*u*) authorities.

(*u*) F. Corone 284. 286, 287. See vide 44 E. 3. 44. F. Corone 94. Benlowe 47. 1 Anderſon 41.

Sect. 6. Sixthly, That it is agreed, that on an indictment for ſtealing goods of a certain value above 12 *d.* the (*x*) jury may find the defendant guilty, but that the goods are but of the value of 10 *d.* &c.

(*x*) F. Corone 115. 177. 451. 18 Aſſize 14. Summary 267. 2 Hale 392. S. P. C. 165. Crompton 114. B. 1. c. 35. ſ. 4.

† So alſo on an indictment of robbery with putting in fear, the jury may find the priſoner guilty of the felony, but not guilty of the robbery.

† So alſo on an indictment on the 8 Eliz. c. 4. where it is *clam et ſecrete a perſona*, the jury may find the offender guilty of ſtealing, but not *privately* from the perſon.

Harwood's caſe, 23 Charles the firſt, Styles 86.

† So if a man be indicted on the ſtatute of ſtabbing, 1 Jac. 1. c. 8. and the indictment conclude *contra formam ſtatuti*; yet the jury may acquit him upon the ſtatute, and find him guilty of manſlaughter at common law.

Co. Litt 282. 2 Hale 302. where it is ſaid that in the latter caſes the ſpecial matter muſt be ſet down.

† So if a man be indicted of murder *ex malitia præcogitata*, the jury may find him guilty of manſlaughter, or that he killed the deceaſed *ſe defendendo*, or *per infortunium*.

2 Hale 184.

† So alſo on an indictment for petit treaſon *felonicè et proditoriè*, the offender may be acquitted of the petit treaſon, and found guilty of the manſlaughter or murder, as the circumſtances of the caſe ſhall appear to be.

1 Hale 560. Vide the king v. Summers Tri. term 1706. Rex v. Francis, Comyns 478.

† So alſo on an indictment for burglary *quod felonicè et burglariter fregit et intravit*, and certain goods *felonicè et burglariter cepit et aſportavit*, the offender may be acquitted of *the burglary* and found guilty of *the felony*.—But on the contrary, it ſeems that he cannot on ſuch an indictment be acquitted of the felony and found guilty of the burglary; becauſe, though where the indictment comprizes burglary and felony the indictment is good, though it be not ſuppoſed in the indictment that it was *ea intentione ad bona furandum*, for *the act of theft* being charged at the ſame time it is a ſufficient evidence of his intention; but when he is acquitted *of the felony*, there being nothing expreſsly charged in the indictment that *burglariter fregit*, &c. *ea intentione*

intentione ad bona, &c. felonicè furandum, it ſtands ſingle, as if the indictment had been of *ſingle burglary*; in which caſe the clauſe of *ea intentione ad furandum, &c.* had been neceſſary to complete the ſingle burglary.

Comer was indicted for burglary, "and that he one diamond necklace, &c. did feloniouſly and "burglariouſly ſteal, &c." The verdict was "guilty of ſtealing in the dwelling-houſe. Not guilty "of the burglary." On 30th November 1744, all the judges agreed, that the *fact of felony* being laid to conſtitute the burglary, and not the *intention of felony*, Vide 1 Hale 559, 560. the acquittal of the burglary included an acquittal of the *felony in the dwelling-houſe*, and that he was entitled to clergy, on *this manner* of taking the verdict. But if the verdict had acquitted him of breaking and entering the houſe in the night time, and found him guilty *of the reſt of the indictment*, this finding would have included the offence of ſtealing goods in the dwelling-houſe, and then by 12 Anne he would have been excluded from clergy. And in the King v. Withal and Overand at Guildford aſſizes 1772 for burglary, the jury found a verdict "not guilty of breaking," but "guilty of ſtealing in the "dwelling-houſe." It was objected that the priſoners could not be ouſted of clergy by 12 Anne, becauſe there was no ſeparate count to ſupport that charge. But all the judges were unanimous that the priſoners were ouſted of clergy; for an indictment for burglary contains every charge that is neceſſary in the twelfth of Anne. MS.

† So alſo upon the 10 & 11 Will. 3. c. 23. for ſtealing to the value of 5 *s.* from ſhops, &c. if the offence ſhould appear to have been committed in ſuch a place as the act was intended to protect; yet a jury may find a verdict for the larceny only, as under five ſhillings. Vide ante p. 491.

But it ſeems that if a man be indicted for felony generally, and upon the evidence it *(y)* plainly appear that the fact amounts to no more than a bare treſpaſs, he cannot be found guilty of the treſpaſs, but ought to be indicted anew. Yet if the ſpecial circumſtances of the caſe be ſet forth in an indictment for an offence laid as felony, and the defendant be found guilty generally, and afterwards the court be of opinion that the fact doth not amount to felony, but only to an enormous treſpaſs, it ſeems (z) agreed, That judgment may be given as for a treſpaſs only. Alſo if the jury find a ſpecial verdict on a general indictment for felony; and the crime be adjudged upon ſuch verdict to be but a treſpaſs, *(a)* judgment may be given upon it as for a treſpaſs only. Alſo if on an indictment of treſpaſs the fact appear to have been felonious, it hath been *(b)* adjudged, That the defendant may be found guilty of the indictment, as it is laid, becauſe the king may proceed againſt the offender as he thinks fit, either as a treſpaſſer or felon. But the contrary is *(c)* ſaid to have been holden by the late chief juſtice Holt; and it hath been (d) adjudged, That if it appear in an action of treſpaſs that the taking was felonious, no verdict ought to be taken unleſs the defendant have been be-

(y) Kelynge 29, 30. C. Car. 332. 'Tis made a quære 2 H. 7. 22. and 10. whether where an indictment of larceny is inſufficient as to the felony, the party may be found guilty of the ſame taking as for a treſpaſs.

(z) Kelynge 29, 30. C. Car. 376, 377. 1 Jones 351.

(a) C. Jac. 497, 498.

(b) 18 Edw. 4. 10. 2 Levinz 208. Vide ſup. c. 35. ſ. 5. and c. 36. ſ. 6.

That an acquittal or judgment againſt a man in an action or indictment of treſpaſs is no bar on an indictment or appeal of larceny. Kelynge 30. (c) 6 Modern 77. (d) 2 R. Abr. 556, 557. Noy 18. Vide 1 Jones 147. Noy 82. Latch 145. 1 Modern 283. Cont. Bracton cited S. P. C. 28. 83. Vide Strange 1137.

fore tried for felony, becauſe the ſuffering ſuch actions might be a means to prevent proſecutions for felonies.

Commonly it is a buſineſs of form, for they uſually ſay, perſons unknown did it. 2 Hale 301. 305.

Sect. 7. Seventhly, That it hath been holden, That a verdict acquitting a defendant of the death of a man, found againſt him by the coroner's inqueſt, ought not to be received unleſs it ſhew what other perſon did the fact; but for this I ſhall refer to chapter nine, ſection thirty-three.

(e) Popham 202. 1 Salkeld 385. 2 St. Tr. 60, 61. 4 St.Tr. 160, 161. In the year book of 11 H. 4. 2 pl. 3. Ab. F. Verdict 18. it is agreed, That ſuch a verdict is repugnant, and therefore the court would not receive it, but ſent the jury back again, whereupon they found both the defendants guilty.

Sect. 8. Eighthly, That on an indictment for a riot againſt three or more, if a verdict acquit all but two, and find them guilty; or on an indictment for a conſpiracy, if the verdict acquit all but one, and find him guilty, it is repugnant and (e) void as to the two found guilty in the firſt caſe, and as to the one found guilty in the ſecond, unleſs the indictment charge them with having made ſuch riot or conſpiracy, *ſimul cum aliis juratoribus ignotis*; for otherwiſe it appears that the defendants are found guilty of an offence whereof it is impoſſible that they ſhould be guilty; for there can be no riot where there are no more perſons than two, nor can there be a conſpiracy where there is no partner. Yet it ſeems (f) agreed, That if twenty perſons are indicted for a riot or conſpiracy, and any three found guilty of the riot, or any two of the conſpiracy, the verdict is good (1).

(f) 4 St. Tr. 160, 161.

(1) It has been determined where only two are found guilty of a riot, or only one found guilty of conſpiracy; they having, in both caſes, been *indicted with others*, that judgment ſhall be given againſt them; Strange 193. even though the others who were indicted do not come in to trial. Strange 1227. So where ſix were indicted for a riot, and two of them died before trial; two were acquitted; and two only found guilty; yet judgment was given upon this verdict; for by Lord Mansfield, they muſt have been found guilty with one or both of thoſe who had not been tried, or it could not have been a riot. Burrow 1262.

(g) 4 St. Tr. 160, 161. (h) Yet it hath been holden, That on an indictment of burglary and other felony againſt A. and B. the jury cannot, upon the very ſame evidence againſt both, find A. guilty of the burglary, and B. of the felony only. 1 Siderfin 171. Vide 2 Hale 293.

And (g) where ſeveral are indicted for treaſon or felony, or other crime, which may be as well done by one only, as by more, a verdict (h) may find one of the defendants only guilty, and acquit all the reſt. And in like manner it ſeems (i) agreed, That a verdict on an information on a penal ſtatute againſt ſeveral perſons jointly charged with the offence againſt the ſtatute, may acquit ſome and find others guilty; becauſe though the words of the information be joint, yet in judgment of law, each defendant is ſeverally charged for his own offence. And in like manner (k) it ſeems, That the defendant in ſuch information may be found guilty for a leſs time or degree than is laid, unleſs the offence conſiſt in doing ſome entire thing, which muſt be preciſely proved in the ſame manner as it is laid.

(i) Vide ſup. c. 26. ſ. 75. (k) Vide ſup. c. 26. ſ. 75. 4 State Trials 160, 161.

Sect.

Sect. 9. Ninthly, That the court in judging upon a ſpecial verdict is confined to the facts expreſsly found, and cannot ſupply the want thereof, as to any material part by any argument or implication from what is expreſsly found (2); and therefore where an indictment ſet forth that the defendant diſcharged a gun againſt J. S. and thereby gave him *a mortal wound, &c.* and the ſpecial verdict found that he diſcharged a gun and thereby killed J. S. but did not expreſsly ſay that he diſcharged it *againſt* J. S. it was (*l*) adjudged, That the court could not take it from the other circumſtances of the fact, which were expreſsly found, though they were as full to the purpoſe as poſſibly they could well be, that the defendant diſcharged the gun againſt J. S.

(*l*) Vide Rex v. Meſſenger and others, Kelynge 72. Rex v. Plummer, Kelynge 111. Rex. v. Royce, 4 Burrow 2073. Rex v. Francis, Strange 1015. Comyns 748. Rex v. Borthwick, Douglas 207. Rex v. Phillips, Cowper 830. for the preciſion with which ſpecial verdicts muſt find the neceſſary facts.—N. B. On a ſpecial verdict for murder the court are judges of the malice. Lord Raymond 1485. Strange 766.

(2) If the verdict do not ſufficiently aſcertain the fact, a *venire facias de novo* ought to iſſue. Skinner 667. Ld Raymond 1521. for a ſpecial verdict cannot be amended in capital caſes *per* Lord Holt. Ld Raymond 141. Yet in the caſe of Sarah Hazel, Lord Mansfield ſaid it might if there were minutes to amend it by. MS. Eaſter 24 Geo. 3. and in forgery a ſpecial verdict was amended becauſe the fault was committed by the defendant. Strange 844.—If a ſpecial verdict find only part of the matter in iſſue, or don't take in the whole iſſue, or if the imperfection be ſuch that judgment cannot be given, it is bad. Lord Raymond 1522. Cro. Jac. 31. But if there be ſeveral iſſues, and the jury find only ſome of them, the court may give judgment. Strange 845. for in a general verdict upon ſeveral counts, if any one of them is good, it is ſufficient in criminal caſes. Salkeld 384. Douglas 730.

Sect. 10. Tenthly, that it hath been (*m*) adjudged, That where an indictment found at the aſſizes is removed into the king's bench by *certiorari*, and there the defendant pleads not guilty, *et de hoc ponit ſe ſuper patriam, et* T. F. *miles coronatur et attornatus dom' regis, &c. ſimiliter*, and thereupon the defendant is found guilty of the offence *in indictamento prædict' interius ei impoſit' prout prædict' T. F. interius verſus eum queritur*, the verdict is good; for theſe words *prout prædict' T. F. interius verſus eum queritur* ſhall be rejected as ſurplus, (*n*) repugnant and void, and the verdict is complete without them.

(*m*) Saunders 308.

(*n*) See B. 1. c. 30. ſ. 9. What is a good verdict on an indictment of forgery, B. 1. c. 70. ſ. 27.

Sect. 11. Eleventhly, that it hath been (*o*) 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 (*p*) not after, order them to go out again and reconſider the matter; but this is by many thought hard, and ſeems not of late years to have been ſo frequently practiſed as formerly. Alſo there are (*q*) inſtances where defendants acquitted againſt plain evidence, of felonies and other enormous crimes, have been bound to their good behaviour.

(*o*) 1 Anderſon 104. Crompton 114. Alcyn 18. 2 State Trials 260.

(*p*) Crompton 14. F. Corone 108. 2 Hale 299. 310. Foſter 30.

(*q*) C. Car. 292. againſt the opinion of Croke and Berkely, and Cro. Jac. 507. Vide 2 State Trials 60, 61. where the court upon the acquittal of the defendants of the indictment againſt them for a riot, committed them for their contempt to the court, during the trial.

Sect. 12. However, it is settled, That the court cannot set aside a verdict which (*r*) acquits a defendant of a prosecution properly criminal, as it seems that they may a verdict that (*s*) convicts him, for having been given contrary to evidence, and the directions of the judge, or any verdict whatever for a (*t*) mistrial.

(*r*) Agreed in the case of the King v. Bennet, Hil. 4 Geo. 1. wherein it was holden by six of the judges against six, That a new trial was not grantable upon an acquittal on an information in the nature of a *quo warranto*, because it sounds in the criminality. 1 Keble 124 2 Keble 403, 404. Whether it be grantable for a corrupt practice in obtaining a verdict, 1 Levinz 9, 10. 124. Siderfin 153, 154. 1 Keble 546. 568. 590. 3 Keble 179. 409. Shower 336. That it is not grantable where the acquittal was occasioned by a slip in an indictment of perjury in varying from the original record, 2 Keble 409. (*s*) Adjudged 2 Jones 163. 3 Keble 525. 1 Levinz 9. But it is doubted, 1 Keble 124. 127. 5 Modern 350. 1 Siderfin 49. and the contrary is ruled. 2 Keble 396. 403. (*t*) See Coke 14. 1 Keble 546. Supra c. 23. s. 92. and c. 36. s. 15. Vide 2 Hale 310. 4 Comm. 354. 1 Levinz 9. T. Jones 163. 10 State Trials 416.

How prisoners shall be discharged on a verdict of acquittal.

† *Sect.* 13. And whereas persons acquitted on their trials, or having no indictments found against them, are frequently detained in prison by gaolers on account of their fees, it is enacted by the 14 Geo. 3. c. 20. "That every prisoner charged "with any felony or other crime, or as an accessary thereto, "before any court holding criminal jurisdiction in *England* and "*Wales*, against whom no bill of indictment shall be found by "the grand jury, or who on trial shall be acquitted, or who "shall be discharged by proclamation for want of prosecution, "shall be immediately set at large in open court without the pay-"ment of any fee or sum of money to the sheriff, gaoler, or keeper "of the gaol or prison from whence such prisoner shall be so dis-"charged and set at liberty. And the treasurer of every county, "&c. on receiving a certificate from the judge, &c. shall pay out "of the county rate, a sum not exceeding 13s. 4d. for every "prisoner so discharged, to the sheriff, gaoler, or keeper as "aforesaid."

CHAPTER

CHAPTER THE FORTY-EIGHTH.

OF JUDGMENT.

HAVING ſhewn already what judgment is good on an information, or action *qui tam*; where it may be ſaved by an award of tranſportation; *(a)* and that judgment in high treaſon, not being for counterfeiting the coin or ſeal, &c. ſhall not be arreſted for miſwriting or miſpelling, or falſe or improper Latin: Having alſo premiſed, That by the courſe of the court of king's bench, upon every conviction in that court, of a crime *(b)* capital or not *(c)* capital, whether by *(d)* verdict or confeſſion, the party is to have four days to move in *(e)* arreſt of judgment, if there be ſo many days remaining of the term; and if not, *(f)* then the longeſt time that can be had in the term: Having alſo premiſed, That on a conviction of homicide *ſe defendendo* or *per infortunium*, no *(g)* judgment at all is to be given, but the party let to mainpriſe in order to purchaſe his pardon.

Ch. 33, ſ. 135.
(a) Ch. 25. 147.
(b) Algernon Sidney's caſe, 3 State Trials 207. 231. Roſewell's caſe, 3 State Trials Knightley's caſe, 4 State Tr. 215.
(c) 3 State Tr. 77.
(d) 4 St. Tr. 210.
(e) But in Saund. 301, 302. chief juſtice Hale refuſed to hear any motion in arreſt of judgment of a ſcandalous conſpiracy; but in my own experience I never knew ſuch a motion refuſed to be heard.
(f) 4 State Trials 217. Yet in the Lord Gray's Caſe, 3 State Trials 77. the court would not give judgment on a conviction for a miſdemeanor, becauſe there were not four days left of the term.
(g) Summary 269. 2 Hale 395. B. 1. c. 29. ſect. 24. Sup. c. 37. ſect. 2.

I ſhall farther endeavour to ſhew the nature. Firſt, Of judgment by expreſs ſentence to the puniſhment proper for the crime. Secondly, Of judgments without any ſuch ſentence.

Of judgments by ſuch expreſs ſentence in criminal caſes there are two kinds. Firſt, Such as are fixed and ſtated, and always the ſame for the ſame ſpecies of crimes. Secondly, Such as are diſcretionary and variable according to the different circumſtances of each caſe.

Sect. 2. And firſt,—Of fixed and ſtated judgments. As to which it ſeems *(h)* agreed, That the law makes no diſtinction between a peer and a commoner, or between a common or ordinary caſe, and one attended with extraordinary circumſtances; for which reaſon it was *(i)* adjudged in Felton's caſe, who was convicted, by confeſſion, of the murder of the Duke of Buckingham, that the court could not order his hand to be

(b) 2 State Tr. 704. 3 Inſt. 31.
(i) Hetley 126. Litt Rep. 237. Ruſh. Collect. 640, 641.

(k) Agreed 3 Inſt. 140. 12 Coke 71. That the court cannot order the hand to be cut off in any inf. c. 51. ſ. 12.

(k) cut off, nor make it part of the ſentence that his body ſhould be hanged in chains, but that the body after execution being at the king's diſpoſal might be hanged in chains, (l) or otherwiſe ordered as the king ſhould think fit.

caſe wherein it is not the ſtated judgment. See B. 1. c. 21. ſect. 1 to 7. (l) Vide

Of ſuch fixt and ſtated judgments, the moſt remarkable are thoſe for treaſon, and felony,—*Præmunire*, and miſpriſions.

(m) 3 Inſt. 210. 211. Summary 268. 1 Hale 350, 351. 2 Hale 397. S. P. C. 182. Plowden 387. Co. Ent. 361. (n) In the time of Will. Rufus judgment was given againſt two convicted of high treaſon, that one ſhould have his eyes put out, and the other

Sect. 3. The ſettled (m) judgment at (n) this day againſt a man for high treaſon, not relating to the coin, ſeems to be, That he ſhall be (o) carried back to the place from whence he came, and from thence be (p) drawn to the place of execution, and be there hanged by the (q) neck, and cut (r) down alive, and that his (s) entrails be taken out, and (t) burnt before his face, and his head cut off, and his body divided into four quarters, and his head and quarters diſpoſed of at the king's pleaſure. And I find little or no variation in ſubſtance from this judgment, but only in ſome circumſtances, for which I ſhall refer to the notes in the margin and the State Trials.

in *crucem tollatur*. Mad. Exchequer fol. 6. (o) S. P. C. 187. But this clauſe is wholly omitted in Summary 268. and 3 Inſt. 210 and in Plowden 387. it is thus expreſſed, *quod præd' R. D. duceretur per preſat' conſtabu'ar' uſque dictam turrim London, & deinde, &c.* And in Coke's Entries 361. b. it is thus, *quod præd' T. B. ducatur per preſat' Mareſc. uſque priſonam Mar' Mareſc' Domini Regis, &c.* (p) S. P. C. 182. it is expreſſed, That he ſhall be drawn upon an hurdle, And Plowden 387. it is, That he ſhall be drawn through the middle of the city of London, to the gallows at Tyburn; Alſo in Coke Entries 361. and 3 Inſt. 210. a particular place of execution is mentioned. (q) S. P. C. 182. and 3 Inſt. 110. But Plowden 387. Coke En. 361. and Summary 268. it is only ſaid *quod ſuſpendatur* without adding *per collum*. (r) 3 Inſt. 110. S. P. C. 182. Plowden 387. Coke's Entries 361. But this is omitted Summary 268. (s) This clauſe is thus expreſſed 3 Inſt. 210, 211. Plowden 387. Coke's Entries 361. *quod interiora ſua extra ventrem ſuum capiantur*, without mentioning the cutting off the privy members; and ſo is Summary 268. 2 Hale 397. and the later precedents. But S. P. C. 182, is expreſs that they ſhall be cut off. (t) S. P. C. 102. But in Plowden 387. Coke's Entries 361. 3 Inſt. 211. it is thus expreſſed, *ipſeque vivente comburantur.*——Vide alſo Skinner 442. Carthew 318. 349.

(u) S. P. C. 182. 3 Inſt. 17. Summary 268. 1 Hale 351. 2 Hale 397. C. Car. 383. 19 H. 6. 47. Ab. F. Cor. 8. B. Treaſ. 9. (x) Fleta B. 1. c. 22. (y) S. P. C. 182. 3 Inſt. 17. Summary 19. (z) B. 1. c. 40. ſect. 4.

Sect. 4. It hath been always agreed to be proper judgment againſt a man for high treaſon at common law, in counterfeiting the king's (u) coin or (x) ſeal, that he ſhall be drawn to the place of execution, and there hanged by the neck till he be dead. But there have been (y) great opinions, That the judgment againſt a man for clipping, and other offences againſt the coin, made treaſon by ſtatute, ſhall be to be drawn, hanged and quartered, as for other high treaſons; becauſe it is a general (z) rule, That where a ſtatute makes an offence treaſon or felony, it gives it the like incidents that belong to a treaſon or felony by the common law; yet inaſmuch as high treaſon at common law in counterfeiting the coin had judgment only of drawing and hanging; and it is a reaſonable conſtruction, That the makers of the ſtatutes, which made other of-

fences concerning the coin high treaſon, intended to give ſuch offences the like (*a*) incidents with high treaſons againſt the coin at the common law, and not to make inferior offences of this kind ſubject to heavier puniſhment than the greater; it ſeems to be (*b*) ſettled at this day, That the judgment for ſuch offences ſhall be the ſame as for counterfeiting the coin, &c. at the common law, *i. e.* of drawing and hanging without quartering.

(*a*) See 2 Jon. 233. Sup. c 25. ſect. 145.
(*b*) Dyer 230. 2 Levinz 98. 2 Jones 233. 3 Keble 278. Raym. 234. 1 Ventris 254.

Sect. 5. It hath been (*c*) long (*d*) agreed, That the judgment againſt a man for petit treaſon is the ſame with that for counterfeiting the coin, *viz.* That he ſhall be (*e*) drawn to the place of execution and there hanged by the neck till he be dead.

(*c*) But Bract. 104. it is ſaid, That they are burnt, *qui ſaluti dominorum ſuorum inſidiaverint.*

(*d*) 3 Inſt. 211. Summary 268. 1 Hale 382. 2 Hale 399. S. P. C. 182. 19 H. 6. 47. Ab. F. Corone 7. B Treaſon 8. 33 Aſſize 7. Ab. B Treaſon 15. F. Corone 210. (*e*) See 21 E. 3. 17. Ab. F. Corone 447. B. Corone 38. where an approver becoming nonſuit, had judgment to be hanged only, and not drawn, though he ſtood indicted of petit treaſon. But the caſe is obſcure both in the Reports and Abridgments.

Sect. 6. The judgment againſt a (*f*) woman, in all caſes of treaſon, whether high or petit treaſon, is, That ſhe ſhall be drawn to the place of execution, and there burnt.

(*f*) Pref. to the 6th Report. Summary 268. 3 Inſt. 211. S. P. C. 182.

F. Corone 383. 23 Aſſize 2. Ab. Bro. Treaſon 26. 19 Aſſize 30. Ab. B. Corone 74. B. Treaſon 12. F. Corone 170. 1 Rich. 3. 4. Ab. F. Corone 46.

Sect. 7. The judgment againſt a man or (*g*) woman for felony of death, hath always been the ſame (*h*) ſince the reign of Hen. 1. *viz.* That he or ſhe be (*i*) hanged by the (*k*) neck till (*l*) dead, which in the (*m*) roll is ſhortly entered thus, *ſuſ. per coll.*

(*g*) 1 Rich. 3. 4. Ab. F. Cor 46.
(*h*) 3 Inſt. 53.
(*i*) S. P. C. 182. Summary 268. 2 Hale 399.

3 Inſt. 211. F. Corone 227. See the citations to the next letter. (*k*) The words *per collum* are omitted. Coke Entries 60. 352. 353. 355. 360. Raſtal 42. 53. 55. (*l*) 3 Inſt. 53. 211. Sum. 268. 6 E. 4 4. But this is omitted 6 H. 4. 6. S. P. C. 182. Raſtal Entries 42. 53. 55. the precedents in Coke's Entries cited to letter *k* come only under an &c. (*m*) S. P. C. 182. 4 Com. 396. 5 Modern 22. For the judgment and proceedings in murder, vide 25 Geo. 2. c. 37. Poſt, ch. 51. ſect. 10.

Sect. 8. For the judgment of *pain fort & dure* upon all offenders ſtanding mute, I ſhall refer to ch. 30. ſect. 16.

Sect. 9. Judgment in *præmunire* at the ſuit of the (*n*) king, againſt the defendant, being in (*o*) priſon, is, That he ſhall be out of the king's protection, and that his lands and tenements, goods and chattels ſhall be forfeited to the king, and that his body ſhall remain in priſon at the king's pleaſure; but if the defendant be condemned upon his (*p*) default in not

(*n*) Coke Lit. 129. It is agreed 30 E. 3 11. Ab. F. Jud. 145. And in 8 H. 4. 6. 7. Ab. F. Forfeit. 13. B. Forfeit. 12. Præm. 6. 20. That ſuch judgment ſhall not be given at the ſuit of the party, on 27 Ed. 3. but in the two laſt citations, it is holden, That the ſame judgment ſhall be given at the ſuit of the party, on 16 Rich. 2. (*o*) 3 Inſt. 218. Supra B. 1. c. 19. ſect. 14. 45. Co. Litt. 129, 130. (*p*) Vide B. 1. c. 19. ſect. 14. Raſtal 466, 467. 3 Inſt. 125. 218. Dalton c. 90.

 appearing,

(p) 8 H. 4. 6, Ab. F. Forfeit. 13. B. Forfeit. 12. Præm. 6. 20. 30 E. 11. Ab. F. Judg. 145. 44 E. 3. 7. Ab. Reſp. 35. 39 E. 3. 37. Ab. F. Ret. de Vic. 61. Attorney 36. 8 H. 6. 3. Ab. B. Præ. 8. 20.

appearing, whether at the ſuit of the king or (p) party, the ſame judgment ſhall be given as to the being out of the king's protection, and the forfeiture; but inſtead of the clauſe, that the body ſhall remain in priſon, there ſhall be an award of a *capiatur*.

(q) Sum. 128. 269. 1 Hale 374. 2 Hale 400. 3 Inſt. 36. 218. B. Treaſ. 19. 25.

Sect. 10. The judgment againſt a man for miſpriſion of high treaſon (q) is, That he ſhall be impriſoned during his life, and forfeit all his goods, and the profits of his lands during his life.

(r) B. 1. c. 21. ſect. 3. to 6. (s) Sum. 131. 41 Aſſize 25. Ab. B. Fines 11. Forfeit. 41. Reſtitut. 32. Sci. facias 160, 2 R. Ab. 76.

Sect. 11. The judgment againſt a man for drawing a ſword on a judge, or ſtriking any perſon in the (r) preſence of the king's higher courts, is, that he ſhall be impriſoned during life, and forfeit his goods, and the profits of (s) his lands during life, and that his (t) right hand ſhall be cut off at a certain place.

Judgment was given, that the lands ſhould be ſeiſed into the king's hands, and the king anſwered of the profits; after which the king granted over the lands as forfeited, and then pardoned the offence; and the heir was reſtored upon a *ſcire facias*. By which it appears that the inheritance of the lands was not forfeited. (Vide ſup. c. 37. ſect. 54.) But in 1 Keble 751 the judgment is, That the lands ſhall be forfeited during life; and Daliſon 23. Quæ. is made by what law the lands ſhall be forfeited any farther than during life; yet 3 Inſt. 140 218. and 39 Aſſize 1. Ab. B. Contempt 9. F. Aſſize 333. Dyer 188. F. Judgment 174. F. Corone 280. S. P. C. 38. Owen 120. C. Eliz. 405. Daliſon 23. ſay in general, that the land ſhall be forfeited without adding for life; and 22 Ed. 3. 12. Ab. F. Forfeit. 21. That the offender ſhall be diſinherited. (t) In this part of the judgment the books above cited generally agree.

(u) B. 1. c. 21. ſect. 1, 2. (x) B. 1. c. 21. ſect. 5. (y) B. 1. c. 69. ſect. 11, 13. (z) Bk. 1. c. 70. ſect. 12.

Sect. 12. For the judgments for (u) ſtriking in the king's palace, for (x) reſcuing a priſoner from the ſuperior courts, (y) for perjury, or (z) forgery on the ſtatute, and for the villainous (a) judgment in conſpiracy at the ſuit of the king, I ſhall refer to the citations in the margin.

(a) B. 1. c. 72. ſect. 9.

(b) Co. Ent. 356. Raſtal 47, 48. (c) Coke Ent. 358, 359. Raſtal 51. 56, 57. (d) Co. Ent. 360. Raſtal 51. (e) Raſtal 49. 57. (f) Raſt. 43. 50. (g) S. P. C. 288.

Sect. 13. The entry of the judgment for a defendant upon an acquittal by verdict, or upon the plea of a pardon is, *Ideo conſid' eſt quod præd'* A. B. *de* (b) *præmiſſis eat inde ſine die*, or *eat ſine die*, omitting (c) *de præmiſſis*; or *de proditionibus prædictis eat inde* (d) *quietus*; or (e) thus, *quod ſit inde quietus, &c. & quod ipſe eat inde ſine die*; and upon the plea of a releaſe to an appeal, and in other caſes of like nature, it is *Ideo conſid' eſt quod* (f) *pred'* A. *quoad ſectam præd'* B. *in præmiſſis eat inde ſine die*. And (g) Staundeforde ſays, that upon the acquittal of one arraigned of treaſon or felony, the judgment is no other, but that the court diſcharges the defendant paying his fees.

Sect.

Sect. 14. *Secondly*, As to judgments by expreſs ſentence, which are diſcretionary and variable according to different circumſtances, I ſhall obſerve in general that for crimes of an infamous nature, ſuch as petit (*h*) larceny, (*i*) perjury, or (*k*) forgery at common law, groſs (*l*) cheats, conſpiracy not requiring a villainous judgment, keeping a bawdy-houſe, bribing (*m*) witneſſes to ſtifle their evidence, and offences of the like nature, againſt the firſt principles of natural juſtice, and common honeſty, it ſeems to be in great meaſure left to the prudence of the court to inflict ſuch corporal puniſhment, and alſo ſuch fine and lien to the good behaviour for a (*n*) certain time (*o*), &c. as ſhall ſeem moſt proper and adequate to the offence, from the conſideration of the baſeneſs, enormity, and dangerous tendency of it, the malice, deliberation, and wilfulneſs, or the inconſideration, ſuddenneſs, and ſurprize with which it was committed, the age, quality, and degree of the offender, and all other circumſtances which may any way aggravate or extenuate the guilt.

(*b*) 3 Inſt. 218. Bk. 1. c. 33. ſect. 36.
(*i*) 3 State Tr. 487, 488. Hobart 62.
(*k*) Raym. 81. 1 Sid. 142. 278. 3 Leonard 170.
(*l*) C. Jac. 498. 2 R. Ab. 78. H. 1. 1 Keble 849. Noy 99. 103.
(*m*) 2 State Tr. 272. Raym. 376.
(*n*) 1 Sid. 214.
(*o*) See C. Car. 55. a decree of the Star-chamber againſt a Judge for bribery, that he ſhould be incapable of any office of judicature. Vide 4 Com. 371.

Sect. 15. And at this day by force of 5 Annæ, c. 6. and 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. &c. &c. ſet forth more at large, Title Tranſportation (†), the judges, upon a conviction for larceny, may in their diſcretion award the offender to the houſe of correction, and for that and other felonies within the benefit of clergy, inſtead of giving the uſual ſentence, &c. may direct that the offender be tranſported.

(†) Page 514 to 522.

Sect. 16. But it (*p*) ſeems that the court cannot be authoriſed by any letters patents, but only by act of parliament, to inflict a puniſhment unknown to our laws, as of (*q*) baniſhment, &c.

(*p*) Daliſon 20.
(*q*) 2 Inſt. 47. 201. Co. Litt. 135.

Sect. 17. *Note*, That the court may aſſeſs a fine, but cannot award any corporal puniſhment againſt a defendant, unleſs he be actually preſent in the court (*r*).

(*r*) Salk. 56. 400. Skinner 684.

Sect. 18. *Note alſo*, That where there are ſeveral defendants, a joint award of one fine againſt them all is (*s*) erroneous, for it ought to be ſeveral 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.

(*s*) 11 Coke 43. 1 Roll. 74. Ch. 9. ſect. 16. 1 Levinz 126.

Sect. 19. It hath been adjudged, (*t*) that where a man is to make fine and ranſom, the ranſom muſt be treble the fine at leaſt. But *Sir Edward Coke* ſtrongly argues (*u*), That fine and ranſom are in legal underſtanding the ſame thing under different names, called a *fine*, becauſe it makes an end of the buſineſs, and a *ranſom*, becauſe it redeems from impriſonment; for if they were different things, it would follow that where the

(*t*) Dyer 232.
(*u*) Co. Litt. 127.

the books ſay, That a man ſhall make a fine and ranſom, they muſt be taken to intend that he ought to pay two different ſums, of which there is no precedent.

(x) 1 Inſt. 260. Adj. Raym. 376, and Cro. Car. 251.

Sect. 20. A fine is under the power of the court, during the term in which it is ſet, and (*x*) may be mitigated as ſhall be thought proper; but after the term it admits of no alteration.

Of judgments without an expreſs ſentence to the puniſhment proper to the crime, there are two kinds. Firſt, Outlawry. Secondly, Abjuration.

(y) Finch 356. Dyer 223. B. Corone 166. 3 Inſt. 212. (z) C. Jac. 531. 1 Burn 639. If the judgment appear not by the return of the *exigent* to have been given by the coroner, it is erroneous, except in London, where the mayor by cuſtom is coroner, and the judgment is given by the recorder. Coke Litt. 288. B. Utlagary 31. Dyer 317. 3 Coke 126. 21 H. 7. 33. Cro. Eliz. 648. (a) Reg. Judg. 2. (b) 3 Inſt. 212.

Sect. 21. Judgment of outlawry is (*y*) given by the (*z*) coroner at the fifth county-court upon the party's not appearing to the exigent, (which is a (*a*) writ commanding the ſheriff to cauſe the defendant to be demanded from county-court to county-court until he be outlawed, &c.); and ſuch judgment is (*b*) entered thus, *Ideo, &c. per judicium coronatoris domini regis comitatus prædict' utlagatus eſt.*

(c) Co. Litt. 128. 288. 28 Aſſize 49. Ab. B. Nonab. 25. 3 Inſt. 212. Theloal, B. 1. c. 15. ſ. 20. (d) Coke Litt. 288. But the contrary ſeems to be holden, Dyer 223. and it is made a quære, 38 E. 3, 14. (e) Vide Raſtal 332. 2 Hale 399. (f) Finch 467. 3 Inſt. 52. 212. 3 Stat. Tr. 324. B. Corone 166.

Sect. 22. It ſeems (*c*) agreed, that when a judgment of outlawry for treaſon or felony appears of record by the ſheriff's return of the exigent, and it hath been (*d*) holden, That if it appears not by ſuch return, but only by the coroners return of a (*e*) *certiorari* to them directed to certify whether the party were outlawed or not, the party is as much (*f*) attainted, and ſhall forfeit and loſe as much as if ſentence had been given againſt him upon verdict or confeſſion.

(g) 3 Inſt. 212. 1 Burrow 639. 2 Hale 408. (h) 3 State Tr. 323. 334. (i) Finch 389. S. P. C. 34. F. Corone 313. 11 H. 7. 4. Ab. B. Cor. 226 27 Aſſize 54. Ab. B. Corone 310, 9 Ed. 4. 28, Ab. B. Corone 55. 12 Co. 100. F. Eſch. 14. Ch. 23. ſect. 53. ch. 36. ſect. 1. Yet ſentence was given upon one outlawed of felony, 3 H. 7. 7. Ab. B. Cor. 134. (1) The court cannot aſſign counſel upon an outlawry for diminiſhing the coin till the defendant has pleaded, and then he may have counſel upon the *collateral matter*, whether he was out of the realm, &c. 1 Burr. 638, both as to law and fact, though not on the indictment itſelf, becauſe treaſon in diminiſhing the coin is excepted out of the 7 Will. 3. Strange 824.

sect. 23. If ſuch (*g*) outlawry appear to the court to be erroneous, whereof any one as *amicus curiæ* may inform them, the party ſhall have counſel aſſigned (1) him to take advantage of the error; but if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only and not void, the proper execution ſhall be (*h*) awarded againſt him, but no ſentence pronounced, becauſe the outlawry is a judgment, and no man ſhall have (*i*) two judgments for one offence.

The

Sect. 24. For the nature of abjuration (which was alſo an (*k*) attainder of itſelf), being wholly obſolete at this day, I ſhall refer to the citations (*l*) in the margin.

(*k*) Finch 389. 467. S. P. C. 34. 117. 122. F. Corone 313. 335. 3 Inſt. 216, 217.

(*l*) Supra c. 9. ſec. 44 and 32. 6. 3 Inſt. 216, 217.

Sect. 25. It ſeems to be generally (*m*) agreed, That a man can no other way be attainted of treaſon or felony at this day, but only by judgment by expreſs ſentence, or by outlawry or abjuration; and therefore where an appellee was ſlain in the field upon a wager of battle, (*n*) judgment was given, *quod ſuſpendatur per collum*, in order to entitle the lord to his eſcheat. But I know of no other caſe wherein it is clear at this day, that a man may be attainted after his death: It is ſaid indeed in a note in Fitzherbert's Abridgment of a caſe in the time of Edward III. (*o*) that in eyre in hath been ſeen that a man hath been attainted by preſentment after his death; alſo it was holden by (*p*) Markham in the time of Henry IV. that if he who levies war againſt the king be ſlain in battle, his lands may be ſeiſed by the king. And it is ſaid in the (*q*) Fourth Report, that if one aiding the king's enemies be ſlain in open rebellion, and the chief juſtice of the king's bench, who is the ſovereign coroner of England, make a record of it upon the view of the body, and return it into the king's bench, he ſhall forfeit his lands (2). And this ſeems agreeable to 34 Edw. 3. c. 12. whereby the king expreſsly reſerves his prerogative as to forfeiture of wars, but grants that he will in no other caſe ſeiſe lands for treaſon whereof the party is not attainted in his life. Yet the contrary opinion ſeems to be holden in the firſt and third (*r*) inſtitutes, and alſo by (*s*) *Hale*; and to this (*t*) *Staundforde* ſeems alſo to incline.

(*m*) B. Corone 166. and the other books under-cited.

(*n*) Judgm. 225. Coke Litt. 390. 3 Inſt. 212. 2 Inſt. 283. Plowden 261, 262. B. Eſch. 24.

(*o*) F. Petit. 2. Coke Litt. 390. Vide F. Corone 290. 312. 1 Hale 348. and the next chapter, ſec. 16. where a felon killed in the purſuit forfeited his chattels, and the year, day and waſte, and the meſne profits of his lands from the time of the felony.

(*p*) 7 H. 4. 46. but denied by *Gaſcoign*; and it is ſaid by Brown, in Plow. 263. that the ancient law was ſo. See alſo Plow. 262. and Dalton c. 89.

(*q*) 4 Coke 57.

(*r*) 3 Inſt. 37. Coke Litt. 13.

(*s*) Summary 17. 1 Hale 342, 343.

(*t*) S. P. C. 188, 189.

(2) This may be true as to goods but not as to lands, becauſe none can be attainted after his death but by act of parliament. 2 Hale 53. Alſo ſee this point largely treated of, 1 Hale 342 to 349.

CHAPTER

CHAPTER THE FORTY-NINTH.

OF FORFEITURE, LOSS OF DOWER, AND CORRUPTION OF BLOOD.

AND now I am to ſhew the conſequences of an attainder, or conviction of treaſon and felony.

I ſhall conſider under the following particulars, Firſt, What ſhall be forfeited by the offender. Secondly, Where his wife loſes her dower. Thirdly, How far his blood is corrupted.

As to the firſt point, I ſhall endeavour to ſhew, *Firſt*, What is forfeited by the common law.—*Secondly*, What by ſtatute.—*Thirdly*, To what time the forfeiture ſhall relate.—*Fourthly*, What ſhall be done with the goods of an offender before they are actually forfeited.

As to the firſt particular, *viz.* What is forfeited by the offender, by the common law: I ſhall endeavour to ſhew, Where his lands are forfeited by the common law; and Where his goods.

(*a*) 3 Inſt. 19. 3 Coke 2, 3. 1 Hale 240, 241, &c.
(*b*) 3 Inſt. 19. 3 Coke 2, 3.
(*c*) See 25 Ed. 3. c. 2.
(*d*) Co. Litt. 2. 392. 4 Coke 58. 1 Leonard 21. Infra ſ. 23. 4 Comm. 375. 1 Hale 242.

Sect. 1. And firſt, as to the forfeiture of lands. It ſeems agreed, that by the common law all lands of inheritance whereof the offender was (*a*) ſeiſed in his own right, and alſo all rights of (*b*) entry to lands in the hands of a wrong doer, are forfeited to the (*c*) 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. And that the lands, whereof a perſon attainted of high treaſon dies (*d*) ſeiſed, of an eſtate in fee, are actually veſted in the king without any office, becauſe they cannot deſcend, the blood being corrupted, and the freehold ſhall not be in obeyance.

(*e*) 3 Coke 10. Co. Litt. 2. S. P. C. 191. B. Corone 208. 210. 1 Leon. 21. Infra ſ. 23.

Sect. 2. But it ſeems (*e*) agreed, That by the common law ſuch lands were not veſted in the actual poſſeſſion of the king during the life of the offender without an office.

(*f*) S P. C. 191. F. Traverſe 48. Aſſize 166.

Sect. 3. Alſo it (*f*) ſeems clear, That the lord cannot enter into the lands holden of him upon an eſcheat for petit treaſon or

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.

Sect. 4. It is *(g)* ſaid, That the inheritance of things not lying in tenure, as of rents-charge, rents-ſeck, commons, &c. ſhall be forfeited to the king by an attainder of high treaſon, and that the profits of them ſhall be alſo forfeited to the king by an attainder of felony during the life of an offender, and that the inheritance ſhall be extinguiſhed by his death; for it cannot eſcheat becauſe there is no tenure, nor deſcend becauſe the blood is corrupted.

(g) 3 Inſt. 19. 21. 4 Comm. 378.

Sect. 5. But it is *(h)* ſaid, That no right of action whatſoever to lands of an eſtate of inheritance are forfeited, either by the common law, or by the ſtatute; and it ſeems agreed, That no *(i)* right of entry into ſuch lands whereof there is a tenant by feoffment, or other title, nor *(k)* uſe (except only lands conveyed *(l)* fraudulently with an intent to avoid a forfeiture), nor *(m)* condition, were liable to be forfeited before the ſtatute of 33 Hen. 8. and that *(n)* land in tail could not be forfeited after the ſtatute of Weſtminſter 2. but only for the life of the tenant in tail, till the ſtatute of 26 Hen. 8. c. 13.

(h) 3 Coke 2, 3. 7 Coke 13. 1 Hale 242, 243. Vide infra ſ. 23, 24, 25. *(i)* F. Ent. cong. 28. 3 Coke 2, 3. 3 Inſtitute 19. *(k)* 3 Inſt. 19. 1 Hale 247. *(l)* 2 R. Abr. 34. *(m)* 3 Inſt. 19.

1 Hale 244. *(n)* 3 Inſt. 19. S. P. C. 187. Plowden 554, 555. Dyer 289. Co. Litt. 330, 372, 391. 1 Banb. 92. Vide the caſe of John Gordon in the Houſe of Lords. Foſter 95.

Sect. 6. It *(o)* ſeems, That the profits of ſuch lands whereof a perſon attainted of felony is ſeiſed, of an eſtate of inheritance in the right of his wife, or of an eſtate for life only in his own right, are forfeited to the king, and that nothing thereof is forfeited to the lord.

(o) 3 Inſt. 19. F. Aſſize 166. Forfeiture 23. 4 Aſſize 4.

Sect. 7. It ſeems *(p)* agreed, That by force of a ſpecial cuſtom a copy-hold of inheritance may be forfeited by an attainder or conviction of treaſon or felony: Alſo it hath been *(q)* holden, That by cuſtom it may be forfeited for treaſon or felony, even without a conviction; alſo it *(r)* ſeems the ſtronger opinion, That it ſhall be forfeited by an attainder of treaſon or felony of common right, without any ſpecial cuſtom, but *(s)* not by a conviction only (1).

(p) 2 Jones 151. 1 Levinz 263. 1 Leonard 1. *(q)* 1 Bulſt. 13. 2 Brownl. 217. to 220. See Godbolt 267. 2 Ventris 38, *(r)* 2 Jones 189. 2 Ventris 38, 39. 5 Coke 117. 2 Keble 451. Co. Copyholder ſ. 58. *(s)* 1 Lev. 263. 2 Keble 252. (1) But if the attainder happens before the tenant is admitted, the copyhold is not forfeited, but ſhall go to the heir at law. 2 Wilſon 13.

Sect. 8. It ſeems *(t)* agreed, That by the common law, upon an attainder of felony, the king had a right utterly to waſte the lands holden of any but himſelf, where the perſon attainted was ſeiſed of an eſtate of inheritance, either in his own or in his *(u)* wife's right. *(x)* And it is ſaid by ſome,

(t) 4 Coke 124. S. P. C. 190, 191. Staund. Prerog. 48, 49, 50. *(u)* F. Cor. 327, 332. *(x)* 2 Inſt. 36, 37. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50.

That

That the king hath both this right, and alſo a right to hold ſuch lands for a year and a day; but it is holden by others, That the right to hold over the lands for a year and a day was given to the king in lieu of the waſte; and this ſeems (*y*) implied in Magna Charta, ch. 22. which ſaying, "That the king ſhall "not hold over the lands of thoſe convicted of felony, but for "one year and a day," and making no mention of the waſte, ſeems plainly to intimate that at the time of the making of that ſtatute the king was thought to have no other right but only to the year and day. Yet the ſtatute of *prærogativa regis*, 17 Edw. 2. having declared the king's right to the year and day, and alſo to the waſte; it ſeems to have been the more general (*z*) opinion ſince that time, that he hath a right to both. Indeed if this ſtatute had been againſt the expreſs purview of Magna Charta, it would have been clearly repealed by thoſe many ſubſequent ſtatutes which repeal all ſtatutes contrary to Magna Charta; but being not contrary to the expreſs words of it, but only to what is argumentatively drawn from it, it may be well argued that it is ſtill in force.

(*y*) See the books above cited; yet it ſeems admitted 8 Edw. 3. F. Trav. 489. Preſcription 50. That the king was intitled to the waſte as to the year and day ſince this ſtatute.

(*z*) B. Cor. 206. 208, 209, 210. F. Corone 290. 308. 310. 312. 327. 358. Regiſter 165. F. Traverſe 19. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50. 49 Edw. 3. 11. 4 Coke 124.

But 49 Aſſiſe 21. the contrary ſeems to be holden. 2 Inſt. 36, 37. F. Utl. 2. See alſo F. Corone 285. 390. 332. 344. And it ſeems agreed, That the king's prerogative of the waſte is not grantable over, except only as to ſuch intereſts which by virtue of it are actually veſted in him. F. Cor. 310. S. P. C. 191. Staundforde's Prerogative 50. 2 Inſt. 37. 4 Comm. 378.

As to the ſecond point, *viz.* Where *the goods* of the offender ſhall be forfeited for treaſon or felony.

I ſhall endeavour to ſhew, Firſt, What goods are liable to ſuch forfeiture. Secondly, In what caſes.

Sect. 9. As to the firſt of theſe particulars, it ſeems (*a*) 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.

(*a*) Staundf. Prerog. 45, 46. S. P. C. 187. C. Car. 566. 12 Coke 121. It is holden Staund. Prerog. 45. and S. P. C. 188. c. 28. That a felon ſhall forfeit the goods of others ſtolen by him, but the authorities cited to this point, viz. 44 Edw. 3. 44. F. Corone 317, 318, 319. 323. 334. 376. 380. do not ſeem fully to come up to it except where ſuch goods are waived, or of ſuch a nature as not to be diſtinguiſhable from others of the like kind, as corn out of a bag, &c. Vide 2 Leonard 5, 6. 1 Anderſon 19. Moor 100. Dyer 309, 310. That a term limited to executors, and not veſted in the party himſelf, is not forfeitable. Sed vide Foſter 223.

Sect. 10. Alſo it (*b*) ſeems to be ſettled, That a bond taken in another's name, or a leaſe made to another in truſt for a perſon who is afterwards convicted of treaſon or felony, are as much liable to be forfeited, as a bond made to him in his own name, or a leaſe in poſſeſſion.

(*b*) C. Jac. 312, 313. Hobart 214. and the books cited to the following ſection.

Sect.

Sect. 11. Alſo it (*c*) ſeems to be in a great meaſure ſettled, That the truſt of a term granted by a man for the uſe of himſelf, his wife and children, &c. is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a ſubſequent forfeiture; but that it ſhall be forfeited ſo far only as it is reſerved to the benefit of the party himſelf, if made *bona fide*, whether before or after marriage, for good conſideration without fraud, which is to be left to a jury on the whole circumſtances of the caſe, and ſhall never be preſumed by the court where it is not expreſsly found.

1 Siderfin 260. 403.

(*c*) 2 Keble 564. 608. 644. 763. 772. 1 Levinz 279. Lane 54. 113. 1 Modern 16. 38. Hardries 466. 1 Anderſon 294. Raymond 120. 2 R. Abr. 34. 1 R. Abr. 343. March 45. 88. 1 Keble 909.

Sect. 12. It hath been (*d*) adjudged, That a power of revocation of the truſt of a ſettlement reſerved to the grantor is not liable to be forfeited, if it depend on ſomething perſonal to be done by the grantor himſelf, as the making the deed of revocation under his own hand and ſeal.

(*d*) 2 Keble 564. 644. 763. 772. 1 Levinz 279. 1 Modern 16. 38. Vide inf. f. 26.

Sect. 13. PERSONAL THINGS liable to forfeiture ſhall be forfeited in the following caſes,—Firſt, Upon a conviction of treaſon or felony (*e*).

the three foregoing ſections.

(*e*) 5 Coke 109. Sup. c. 33. f. 129. and the books cited to 4 Comm. 200.

Sect. 14. Secondly, Upon a *fugam fecit* found before a coroner, upon an inquiſition of death taken upon view of a dead body; as to which it is (*f*) agreed, That wherever a perſon found guilty by ſuch inqueſt either as a principal, or as an acceſſary (*g*) before the fact, is found alſo to have fled for the ſame, he forfeits his goods abſolutely, and the iſſues of his lands till he be acquitted or pardoned. Alſo it is (*h*) agreed, That where one indicted of any capital felony, either as principal or acceſſary before or after, before juſtices of oyer, &c. is acquitted at his trial but found to have fled, he ſhall incur the like forfeiture of his goods, but not of the iſſues of his lands, becauſe by the acquittal the land is diſcharged, and conſequently the iſſues. And it hath been (*i*) holden, That the law is the ſame as to the finding of a *fugam fecit* upon an acquittal of an indictment of petit larceny. But it is (*k*) certain, That the party may in all caſes, except that of the coroner's inqueſt, traverſe the finding of a *fugam fecit*. Alſo it ſeems (*l*) agreed, That whenever the indictment againſt a man is ſufficient, the finding a *fugam fecit* will not hurt him; and that in all caſes the particulars of the goods found to be forfeited may be traverſed.

(*f*) S. P. C. 183, 184. 191, 192. Summary 271. Staundf. Prerog. 46. Keilway 68. Dyer 239. 5 Coke 110.

(*g*) *Secus* if he be found acceſſary after, for the indictment is ſo far void. S. P. C. 184. Sup. c. 9. f. 26.

(*b*) S. P. C. 184. 191. Summary 271. Keilway 68. 5 Coke 110. F. Forfeiture 35.

(*i*) Summary 271. S. P. C. 184. F. Corone 206.

(*k*) Sum. 271. 36 H. 6. 26. Sup. c. 9. f. 51. F. Traverſe 18.

52. F. Corone 22. (*l*) Summary 271. S. P. C. 184. 47 Edw. 3. 26. Ab. B. Corone 17. But the jury very ſeldom find *the flight*. Vide 4 Comm. 380.

Sect.

(m) F. Corone 181. Forfeiture 28. S. P. C. 183, 184. Staundf. Prerog. 47. B. Corone 8. Finch 352. 1 R. Abr. 793. 41 Aſſize 13. 22 Aſſize 81. C. Eliz. 4. 72. 5 Coke 110. 111.
(n) Sum. 271.
(o) 5 Coke 110, 111.
43 Ed. 3. 17, 18. Cro. Jac. 464.

Sect. 15. Thirdly, Upon a default till the award of an exigent, as to which it is (*m*) agreed, That if one make ſuch a default either upon an appeal or indictment of a capital felony, he forfeits his goods, unleſs he was pardoned before the exigent was awarded; and it hath been (*n*) holden, That the law is the ſame as to ſuch a default upon an indictment of petit larceny: However it is clear, That wherever goods are ſo forfeited, they are not ſaved by an acquittal at the trial. But it ſeems (*o*) agreed, That they are ſaved by a reverſal of the award of the exigent, for an error either in fact or in law; as for the impriſonment of the defendant at the time when the exigent was awarded, or for a defect in the indictment, appeal, or proceſs.

1 R. Abr. 743. S. P. C. 184. Co. Litt. 259. Staundforde's Prerogative 47.

(p) 5 Coke 109. F. Corone 289, 290, 291. 312. S. P. C. 184. 189. 191, 192. 3 Inſt. 56. 227. Plowden 260.

Sect. 16. Fourthly, Upon a (*p*) preſentment by the oaths of twelve 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.

But Staundforde makes a quære whether the law in this point be not altered by 34 E. 3. 12. taken notice of above c. 48. ſ. 25. Staundforde's Prerogative 46.

(q) S. P. C. 186. 5 Coke 109. C. Eliz. 611. 693.
(r) S. P. C. 186. and 29 E. 3 29. Ab. F. Avo. 253. ſeems expreſs to this purpoſe.

Sect. 17. Fifthly, By being (*q*) waived or left by a felon in his flight, from thoſe who either actually do purſue him, or are apprehended by him ſo to do, whereby he forfeits the goods ſo waived, whether they be his own (*r*) proper goods, or the goods of others ſtolen by him, which ſhall not be reſtored to the right owners but upon a proper proſecution, as hath been more fully ſhewn, chap. 23. from ſect. 49 to 58.

But 3 Inſt. 227. and 5 Coke 109. it is ſaid, That the felon's proper goods are not forfeited as waifs, but as the goods of a fugitive.

Sect. 18. As to the ſecond particular, *viz.* What is forfeited by ſtatute: It is enacted by 26 Hen. 8. c. 13. "That every "offender and offenders being hereafter lawfully convicted of "any manner of high treaſons by preſentment, confeſſion, verdict "or proceſs of outlawry, according to the due courſe and "cuſtom of the common laws of this realm, ſhall loſe and "forfeit to the king, his heirs and ſucceſſors, all ſuch lands, "tenements, and hereditaments, which any ſuch offender or "offenders ſhall have of any eſtate of inheritance, in uſe or "poſſeſſion, by any right, title or means, within the realm of "England, or elſewhere within any of the king's dominions, "at the time of any ſuch treaſon committed, or any time after. "Saving to every perſon and perſons, their heirs and ſucceſ- "ſors, other than the offenders in any treaſons, their heirs "and ſucceſſors, and ſuch perſon and perſons as claim to any

"their

" their uſes, all ſuch rights, titles, intereſts, poſſeſſions, leaſes, " rents, offices, and other profits, which they ſhall have at the " day of committing ſuch treaſons, or at any time before, in " as large and ample manner as if this act had never been had " nor made."—And the ſame is enacted in near the ſame words by 5 & 6 Edw. 6. c. 11.

Sect. 19. And it is farther enacted by 33 Hen. 8. c. 20. ſect. 2. " That if any perſon ſhall be attainted of high " treaſon by the common laws or ſtatutes of this realm, " every ſuch attainder by the common law ſhall be of as " good ſtrength, value, force and effect, as if it had been done " by authority of parliament; and that the king, his heirs and " ſucceſſors, ſhall have as much benefit and advantage by ſuch " attainder, as well of uſes, rights, entries, conditions, as poſ- " ſeſſions, reverſions, remainders and all other things, as if it " had been done and declared by authority of parliament, and " ſhall be deemed and adjudged in actual and real poſſeſſion of " the lands, tenements, hereditaments, uſes, goods, chattels, " and all other things of the offenders ſo attainted, which his " highneſs ought lawfully to have, and which they being ſo " attainted ought or might lawfully loſe or forfeit, if the at- " tainder had been done by authority of parliament, without " any office or inquiſition to be found of the ſame; any law, " ſtatute or uſe of the realm to the contrary thereof in any " wiſe notwithſtanding."

Attainders for high treaſon by the common law ſhall be as effectual as attainders by parliament.

Sect. 20. " Saving to all and every perſon and perſons, and " bodies politic, and their heirs and aſſigns, and ſucceſſors, " every of them (other than ſuch perſon and perſons which " hereafter ſhall be attainted of high treaſon, and their heirs " and aſſigns, and every of them, and all and every other " perſon and perſons, claiming by them or any of them, or to " their uſes, or to the uſes of any of them, after the ſaid trea- " ſons committed), all ſuch right, title, uſe, poſſeſſion, entry, " reverſions, remainders, intereſts, conditions, fees, offices, " rents, annuities, commons, leaſes, and all other commodi- " ties, profits and hereditaments whatſoever they or any of " them ſhould, might or ought to have had, if this act had " never been had or made."

Section the third.

In the conſtruction of theſe ſtatutes the following points ſeem moſt conſiderable.

Sect. 21. Firſt, It is *(s)* ſettled, That they are not repealed by 1 Mary, ſeſſ. 1. c. 1. which enacts, " That no pains of " death, penalty or forfeiture in any wiſe enſue or be to any " offender or offenders, for the doing or committing any trea- " ſon, petit treaſon or miſpriſion of treaſon other than ſuch as " be in the ſtatute 25 Edw. 3. ordained and provided;" for the

(s) S. P. C. 187. 3 Inſt. 19. Dyer 28. 1 Hale 241, 356.

words, "other than such as be within the statute of 25 Edw. 3. "&c." shall not be taken to refer to the pains, penalties and forfeitures which are mentioned in the beginning of the sentence, but to treasons, petit treasons and misprision of treason, which are last mentioned.

(t) S. P. C. 187. Co. Litt. 372. 391. and the books cited to the following sections.
(u) Dyer 322.

Sect. 22. Secondly, It is (*t*) agreed, That estates in tail are forfeited by force of those words in 26 Hen. 8. "of any estate "of inheritance," which must be void, if they do not include estates in tail; for estates in fee-simple were forfeited before. Also it hath been (*u*) adjudged, That where lands are given to a man and his wife, and the heirs of their two bodies, the intail is forfeited by his attainder, and the heir is as much disabled as if the gift had been made to the heirs of his body in general.

(x) 3 Coke 2, 3. 1 Leonard 270, Moor 125. Hobart 340. C. Eliz. 389. cited and agreed, C. Car. 428. 7 Coke 13. Moor 323. Lit. Rep. 100. 1 Hale 242.
(y) 3 Coke 2. Hobart 340, 341. 7 Coke 13. 4 Coke 58.
(z) 3 Coke 2, 3. 1 Hale 242.
(a) 3 Coke 11. 4 Coke 58. 1 Leonard 21. 9 Coke 95. Supra f. 1, 2.

Sect. 23. Thirdly, It was (*x*) settled in the *marquis of Winchester's case*, That the right to a writ of error to reverse an erroneous common recovery is not forfeited by these statutes. Also it is (*y*) agreed, That a mere right of action to lands in the hands of a stranger, as of a discontinuee, or of the heir of a disseisor, is not forfeited: (*z*) But, That a right of entry into lands to which a person attainted of high treason is entitled, is as much forfeited as lands in possession. But yet the king shall (*a*) not be adjudged in possession of such lands without an office, and *scire facias*, or seizure on such office; for the words, "That the king shall be deemed in possession without office," shall have this construction, That he shall be in possession without office in the same manner as he should have been upon an office found at common law: But at the common law, if a disseisee had been attainted of high treason, and the *seisin* found by office, the king should not have been in possession, without a *scire facias*, or a seizure at least.

(b) C. Car. 427. Vide Plowden 552. 1 Hale 243.

Sect. 24. Fourthly, After two contradictory judgments upon the same point, it was at last (*b*) settled by a majority of the judges in *Stone and Newman's case*, That where a tenant in tail of the gift of the crown makes a feoffment in fee, the reversion being still in the crown, and afterwards is attainted of high treason, the right of the intail is forfeited to the crown; because the reversion continuing always in the crown, the intail could not be discontinued, but the heir might have entered after the death of the feoffer, without bringing any action; and though the intail by such a feoffment be put in abeyance as to any benefit which the feoffer himself may claim from it; yet since it is not turned to a right of action, and would have continued still in him for the benefit of the heir, if he had not been attainted (as appears from the form of a writ of *formedon*, which supposes that the right descended to the heir from the feoffor, and consequently that it was in him at his death), it shall likewise continue in him for the benefit of the king.

Sect. 25. Fifthly, It was ſolemnly adjudged in the exchequer chamber in (*c*) *Sheffield's caſe*, and a judgment to the contrary in the exchequer reverſed, That where one attainted of high treaſon is ſeiſed of a defeaſible eſtate in tail, and hath at the ſame time a right to an ancient intail which is diſcontinued, he forfeits both the intail in poſſeſſion, and the right to the old intail; for the firſt is within the expreſs words of 26 Hen. 8. and the latter within thoſe of 33 Hen. 8. And it by no means follows, That becauſe naked rights of action to lands int he hands of the heir of a diſſeiſor, or of a diſcontinuee, or not within the meaning of the ſtatute, as it is (*d*) ſettled that they are not; therefore alſo a right to lands in the hands of the perſon attainted himſelf is not within the meaning of it; for the forfeiture of ſuch naked rights, might not only be of dangerous conſequence in unſettling poſſeſſions, but might alſo be highly prejudicial to ſtrangers whom the ſtatute by an expreſs ſaving plainly intends to favour; but the forfeiture of the offender's right to his own lands can be of no prejudice to any but himſelf and his heirs, to whom the ſtatute is ſo far from intending any favour, that it expreſsly excludes them from all the benefit of the ſaving clauſe.

(*c*) Hobart 334, &c. Palmer 351, &c. 2 Roll 305, &c.

(*d*) Sup. f. 231

Sect. 26. Sixthly, It ſeems (*e*) agreed, That a power of revoking the uſes of a ſettlement may be forfeited by force of 33 Hen. 8. if the execution of it require nothing but what may be as well performed by any other perſon, as by the party himſelf, by whom it was reſerved; as the tender of a ring, &c. Alſo it was adjudged in (*f*) *Engleſield's caſe*, That the mention of ſuch conſiderations and inducements for the reſerving of ſuch a power of revocation in the preamble of it, as are inſeparable from the perſon, do not alter the caſe, if nothing of this kind be inſerted in the proviſo itſelf, by which it is reſerved. But it is agreed, That if the proviſo by which ſuch a power is reſerved requre ſomething inſeparably annexed to the perſon, it keeps it out of the ſtatute; and therefore in the (*g*) *duke of Norfolk's caſe* where there was this proviſo, That if the duke ſhould be minded to alter and revoke the uſes, and ſignify his mind in writing under his hand and ſeal, that then, &c. it was clearly adjudged, That the power of revocation was not forfeitable, becauſe it depended on the duke's ſignifying his mind in writing under his proper hand and ſeal, which none but himſelf could do. Alſo it was adjudged in (*h*) *Main's caſe*, That the law is the ſame where ſuch proviſo doth not expreſsly require the party's ſignifying a change of mind, but only that the deed of revocation be under his proper hand and ſeal. (*i*) But if ſuch proviſo require only the tender of a ring by the ſeoffer, *ipſo actunc declarante* that the tender is to the intent to avoid the feoffment, it ſeems unſettled, whether it come within the ſame conſtruction.

(*e*) 7 Coke 12, 13. 1 Hale 245. Popham 18. 1 Anderſon 293. Moor 303. 4 Leonard 135. Palmer 433, &c 1 Roll 142.

(*f*) 7 Coke 12. and the other books above cited. Cited and agreed 2 Keble 566. 763. 773. 1 Levinz 279. Lane 44. 1 Roll 142.

(*g*) 7 Coke 13. 1 Hale 245. Cited and agreed 1 Levinz 279. 2 Keble 566, 367. 773. 3 Inſt. 19.

(*h*) Sup. f. 12. 1 Hale 246.

(*i*) Palmer 429. Latch 25, 26, &c. 70. 102. 1 Jones 135. 2 Ventris 129. 1 Modern 40.

(k) Plowden 381, 382.
(l) Plowden 379. &c.
(m) Plowden 379.

Sect. 27. Seventhly, It (*k*) ſeems, That an annuity granted to a man *pro conſilio impendendo*, is not forfeitable by theſe ſtatutes: Alſo it ſeems (*l*) doubtful whether an office granted to a man for life, and requiring ſkill and confidence, be forfeitable; but if it be (*m*) granted in fee, it ſeems clear that it may be forfeited even by the common law; becauſe the grantor in giving ſuch an eſtate, which ſhall deſcend to all the heirs of the grantee however unqualified, ſeems plainly not to have been induced to make his grant from any conſideration of the peculiar merit of the perſons who are to execute the office.

(n) 2 Levinz 169. 3 Keble 459. 611 712. 2 Modern 130, 131. 2 Jones 57. 1 Ventris 299.
(o) Co. Litt. 130. and the books above cited.

Sect. 28. It hath been (*n*) adjudged, but not without great difficulty, That an act of parliament that certain perſons ſhall forfeit all their lands, poſſeſſions, rights, intereſts and hereditaments, and other things of what nature ſoever, extends to eſtates in tail, by force of the words "all intereſts of what nature ſoever." Yet it is (*o*) agreed, That the ſtatutes of *præmunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to land in tail.

(p) Summary 8. 1 Hale 704. 3 Inſt. 47 90. Salkeld 85.
(q) Salkeld 85.

Sect. 29. It is (*p*) holden, That a ſaving againſt the corruption of blood in a ſtatute concerning felony, doth by neceſſary conſequence ſave the land to the heir; becauſe the eſcheat to the lord for felony is only *pro defectu tenentis*, occaſioned by the corruption of blood. Alſo it is holden, That a ſaving of the land to the heir prevents the corruption of blood, and alſo the loſs of dower. But it hath been (*q*) adjudged, That a ſaving againſt the corruption of blood in a ſtatute concerning treaſon, doth not ſave the land to the heir, becauſe in treaſon the land goes to the king by way of immediate forfeiture, and not by eſcheat.

(r) F. Forf. 3. 30. 30 H. 6 5. S. P. C. 192. F. Counterp. de voucher 30. Co. Litt. 2. 8 Coke 170. 38 Edw. 3. 32. Plowden 488. 1 Hale 360. 361.
(s) F. Forf. 30.

Sect. 30. As to the third particular, *viz.* To what time the forfeiture ſhall relate.—It ſeems (*r*) 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 (*s*) conviction, or *fugam fecit* found, &c. only, as to *chattels*; unleſs the party were (*t*) killed in flying from or reſiſting thoſe who had arreſted him; in which caſe it is ſaid, that the forfeiture ſhall relate to the time of the offence.

Staundford's Prerogative 48. S. P. C 192. B. Relation 31. Expoſition 26. Forfeiture 119. F. Corone 296. 1 Hale 362. (t) Vide ſup. f. 16. S. P. C. 192. F. Corone 290. 1 Hale 362.

(u) C. Car. 172. 1 Jones 217.

Sect. 31. But it ſeems (*u*) unſettled, Whether in *præmunire* it ſhall relate to the time of the offence, or only to that of the judgment.

Sect.

Sect. 32. It seems the better (*x*) opinion, That no attainder whatsoever shall have any relation as to the mean profits of the lands of the person attainted, but only from the time of the attainder.

(*x*) 8 Coke 170. Plowden 488. 38 Edw. 3. 32. But this is made a quære S. P. C. 191. and the contrary seems holden. F. Corone 290. 344. See also F. Forfeiture 16. F. Corone 374. Finch 326, 327.

Sect. 33. As to the fourth particular, *viz.* What shall be done with the goods of an offender both before and after they are actually forfeited: It seems to have been always (*y*) agreed, That one indicted or appealed of treason or felony may *bona fide* sell any of his chattels real or personal for the sustenance of himself and family until they be actually forfeited.

(*y*) Bracton B. 3. c. 8. f. 5. and c. 18. f. 1, 2. Fleta B. 1. c. 26. f. 1, 2. 8 Coke 171. 7 H. 4. in the last case. S. P. C. 193. 1 State Trials 994, 995. 4 State Trials 65, 66. 454. 1 Hale 362. 367. But if they are conveyed over for the purpose of avoiding the forfeiture, it is fraudulent and void. Skinner 357, 358.

Sect. 34. Also it seems (*z*) agreed, That the goods of such person can in no case be lawfully removed out of his house until they be forfeited.

(*z*) See the citations to the foregoing and following section.

Sect. 35. Yet according to the general tenor of the old (*a*) books, the goods of one (*b*) arrested for treason or felony, may by the purview of an ancient statute, which (*c*) seems to continue still in force, be immediately inventoried and appraised, after which, and on surety found that they shall be forthcoming, they shall be kept by the bailiffs of the party arrested, and, for want of such surety, by his neighbours, till he be convicted, or found to have fled, &c. whereby they are actually forfeited.

(*a*) Fleta B. 1. c. 26. f. 2. Bracton B. 3. c. 18. f. 2. Britton f. 4. S. P. C. 52. 192. Staundf. Prerog. 47, 48. 1 Hale 263. 364. It is said 26 Assize 32.

Ab B. Corone 102. That justices of oyer, &c. shall put the chattels of felons in estreat presently, &c. and deliver them to the towns, &c. to answer to the king in eyre. But this seems intended of the chattels of one convict of felony. And in 44 Assize 13. and 43 E. 3. 21. Ab. B. Corone 9. Forfeiture 7. Reseiser 3. Office and Officer 3. F. Trespass 7 Bar. 196. the 2d. it is said, That no minister of the king ought to take the chattels of an appellee of felony away with him, but to seize them, and cause the party to find surety that they shall not be eloined, &c. And if the party cannot find surety, he ought to deliver them to the neighbours, &c. And in the last case of 7 H. 4. Ab. F. Cor. 83. and B. Forfeit 10. it is said, That where one is indicted of felony, until he be attainted, his goods shall not be removed out of his house, but shall be kept by his neighbours until, &c. and in the mean time the felon ought to live upon his goods. Vide 41 Assize 13. Ab. F. Process 183. B. Forfeit 40. 13 H. 3. 13. in which books it is said, That goods shall not be seized till they be forfeited. (*b*) The old writ recited Bracton B. 3. c. 18 sect. 2. and Fleta B. 1. ch. 26. sect. 2. is express to this purpose: Yet in 3 Inst. 228. it is said, That the goods of any delinquent cannot be inventoried, and the town charged therewith before the owner is indicted of record; and a note in Summary 269. seems to be to the same effect, and 1 Hale 367. (*c*) 1 State Trials 994, 995. 4 State Trials 65, 66. S. P. C. 139.

Sect. 36. Also it was enacted by the statute *de officio coronatoris* (set forth more at large ch. 9. sect. 19, 20.), That where one is found guilty of murder by a coroner's inquest upon view of a dead body, the coroner shall inquire what goods he hath, and cause them to be valued and delivered to the township, &c.

But ſo much of this ſtatute as enables the coroner to ſeize the goods, (*d*) ſeems to be repealed by 1 Rich. 3. (ſet forth more at large ſect. 38.), unleſs the party indicted be found alſo to have fled.

(*d*) S. P. C. 52.

Sect. 37. Alſo it was enacted by 25 Edw. 3. c. 14. ſet forth more at large ch. 27. ſect. 116. That in the ſecond *capias* given by that ſtatute on the return of a *non inventus*, it ſhall be compriſed, that the ſheriff ſhall cauſe the party's chattels to be ſeized, and ſafely kept till the day of the writ or precept returned, &c. and this is ſtill in (*e*) force notwithſtanding the ſtatute of 1 Rich. 3. c. 3. for this prohibits only the ſeizing of the goods of thoſe who are arreſted.

(*e*) S. P. C. 193. 1 Hale 366. Staundf. Prereg. 48.

Sect. 38. And ſo far as it relates to this purpoſe, is enacted by the ſaid ſtatute 1 Rich. 3. c. 3. as followeth: "And "that no ſheriff, under ſheriff, nor eſcheater, bailiff of franchiſe, or any other perſon, take or ſeize the goods of any "perſon arreſted or impriſoned for ſuſpicion of felony, before "that the ſame perſon ſo arreſted and impriſoned be convicted "or attainted of ſuch felony according to the law, or elſe the "ſame goods otherwiſe lawfully forfeited, upon pain to forfeit "the double value of the goods ſo taken, to him that is ſo "hurt in that behalf, by (*f*) action of debt, &c."

Vide 1 Hale 366, 367. for a variety of obſervations upon this act.

(*f*) For precedents of ſuch actions, ſee 1 Lutwyche 132. C. Eliz. 749.

Sect. 39. This ſtatute is ſaid to be in (*g*) affirmance of the common law, and hath been (*h*) adjudged to extend as well to the ſeizure of money as of any other chattel.

(*g*) Vide ſup. f. 33, 34, 35. S. P. C. 193.

(*h*) 1 Ray. 414.

Sect. 40. It ſeems plain from this ſtatute, That goods may be ſeized as (*i*) ſoon as they are forfeited; and it ſeems the whole townſhip is anſwerable (*k*) for them to the king (3), and may ſeize them (*l*) wherever they can be found.

(*i*) Co Litt. 391. (*k*) F. Corone 300. 347. 366. 13 H. 4. 13. 6. Ab. F. Forf. 32. 22 Aſſize 81.

Ab. F. Corone 181. B. Charge 45. Forfeiture 32. S. P. C. 193, 194. Staundford's Prerogative 47. 47 E. 3. 26. (*l*) 23 Aſſize 81. Ab. F. Corone 181. B. Charge 45. Forfeiture 32. Staundford's Prerogative 47.

(3) Whether the king takes the forfeited goods, ſubject to the debts of the party, vide Douglas 542.

Sect. 41. And at the common law it was no (*m*) plea for ſuch townſhip, That the goods were delivered to the cuſtody of J. S. who imbezzled them, &c. But it is enacted by 31 Edw. 3. c. 3. "That if any man or town be charged in the "exchequer by eſtreats of the juſtices of the chattels of fugitives and felons, and will alledge in diſcharge of him another "which is chargeable, he ſhall be heard, and right done to the "other."

(*m*) F. Corone 300. 347. S. P. C. 194.

Sect. 42. As to the ſecond point, *viz.* Where the wife loſes her dower: It is agreed, That before the ſtatute of 1 Edw.

Edw. 6. ch. 12. the wife not only loſt her dower at common (n) law, but alſo her dower (o) *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, or by ſpecial (p) cuſtom (except that of (q) gavelkind), by an attainder of any treaſon or (r) capital felony, whether (s) committed before or after the marriage, and whether the lands were in the hands of a (t) feoffee, or forfeited to the king, or eſcheated to the lord of the fee; and though the (u) attainder were pardoned, &c.

(n) S. P. C. 194. Co. Litt. 31. 37. 41. 392. Litt. §. 747. 3 Inſt. 47. 211. 1 Hale 359. (o) Co. Litt. 37. 41. S. P. C. 195. Bracton 311. (p) Co. Litt. 41. (s) Co. Litt. 31.

Bracton 311. Winch 27. (q) Bracton 311. (r) Co. Litt. 41. 1 Hale 359. (t) 3 Inſt. 216. Sav. 54, 55. Co. Litt. 41. Benlowe 55, 56, 57. Dyer 140. Moor 639. Con. by Vavaſor. Litt. ſ. 55. (u) 1 Leonard 3.

Sect. 43. But it (x) ſeems that the wife never forfeited lands given jointly to her huſband and her, whether by way of frank-marriage or otherwiſe, but only for the year and day and waſte (y).

(x) Co. Litt. 37. 3 Inſt. 216. Bracton 129, 130. (y) Bract. 129. Con. Bract. 130.

Supra ſect. 8.

Sect. 44. Alſo it hath been (z) adjudged, That if a huſband having levied a fine with proclamations, is afterwards erroneouſly attainted of high treaſon, and the five years paſs after his death, and then the outlawry is reverſed, the wife may purſue her title of dower within five years after ſuch reverſal; becauſe being barred of her dower by the attainder while it ſtood in force, which attainder ſhe could no way reverſe, ſhe had no remedy to purſue her title of dower within the five years, and therefore ſhall not be barred by her non-claim.

(z) 3 Inſt. 216. Moor 639. 879.

Sect. 45. It is enacted by 1 Edw. 6. c. 12. ſ. 17. "That "albeit any perſon ſhall be attainted of any treaſon or felony "whatſoever, yet that notwithſtanding every woman that ſhall "fortune to be wife of the perſon ſo attainted, ſhall be endow-"able and enabled to demand, have, and enjoy her dower in like "manner and form as though her huſband had not been at-"tainted, &c."

Sect. 46. But this is repealed as to treaſon by 5 & 6 Edw. 6. c. 11. par. 9. by which it is enacted, "That the wife whoſe "huſband ſhall be attainted of any treaſon whatſoever, ſhall "in no wiſe be received to aſk, challenge, demand, or have "dowry of any the lands, tenements, or hereditaments of the "perſon ſo attainted during the ſaid attainder in force." And this hath been conſtrued (a) to extend as well to an attainder of petit treaſon, as of high treaſon.

(a) S. P. C. 195. Dyer 140. Co. Litt. 37. 392. 1 Hale 359.

As to the third point, *viz.* How far the blood is corrupted by an attainder of treaſon or felony, the following particulars ſeem moſt remarkable.

2 Comm. 251. 4 Comm. 381.

Sect. 47. First, It is (*a*) agreed, That by (*b*) ſuch an attainder, the blood is ſo far ſtained or corrupted, that the party loſes all the nobility or gentility he might have had before, and becomes ignoble.

(*a*) 3 Inſt. 211. S. P. C. 195.
(*b*) But an attainder of piracy, [128] (B. 1. c. 37. ſ. 6. 8. 112. Co. Litt. Co. Litt. 391.) or petit larceny corrupts not the blood. B. 1. c. 33. ſ. 36. 3 Inſt. 41. Noy 170.

Sect. 48. Secondly, It is alſo (*c*) agreed, That he can neither inherit as heir to an anceſtor, nor have an heir,

(*c*) Co. Litt. 8. 391, 392. S. P. C. 195. B. Nonabil. 21. Corone 60.

Sect. 49. Thirdly, It is alſo farther (*d*) agreed, That wherever it is neceſſary for any one who would make a title to another, to derive the deſcent through him, the attainder is a bar to ſuch title, (*e*) unleſs the land were intailed. And therefore if there be grandfather, father and ſon, and the father be attainted, it is clear, That the ſon (*f*) cannot claim as heir to the grandfather of the lands in fee-ſimple, becauſe he muſt of neceſſity derive the deſcent through the father, which by reaſon of the attainder he cannot do. And for the ſame reaſon, if there be two brothers, and one of them having iſſue a ſon, be attainted, and either the ſon or uncle purchaſe land and die without iſſue, the other (*g*) cannot be his heir, becauſe the blood of the father, through whom the deſcent muſt be conveyed, is corrupted. But it ſeems a (*h*) general rule, That the attainder of a perſon who needs not be mentioned in the conveyance of the deſcent, does no hurt, let the anceſtor be never ſo remote; and *a fortiori* therefore it ſeems clearly to follow, that where one may claim as immediate heir to another, without deriving the deſcent through any other, he ſhall not be barred by the attainder of any other. And therefore it ſeems (*i*) agreed, That if the ſon of one attainted purchaſe land, and have a ſon and die, ſuch ſon ſhall inherit him, becauſe he derives his deſcent immediately from him. And for the like reaſon it hath been (*k*) ſettled, That if a man hath two ſons, and then be attainted, and one of the ſons purchaſe lands and die without iſſue, the other ſhall be his heir, becauſe he may make his title without mentioning the father.

(*d*) C. Car. 543. Litt. Rep. 28. 1 Ven. 413, 417. Noy 159. 166. &c. 1 Levinz 60. 1 Sid. 200, 201.
(*e*) 3 Coke 10. Litt. ſec. 746, 747. 1 Hale 356. 8 Coke 166.
(*f*) 1 Ventris 416, 418. Daliſon 14. 1 Hale 356. Co Litt. 392.
(*g*) C. Car. 543. Dyer 274. 1 Ventris 413. 416. 425. 1 Hale 357.
(*h*) C. Car. 543. 1 Ventris 413. 417, &c. Litt. Rep. 28. Noy 159. 166, &c. 1 Levinz 60. 1 Sid 200, 201. Vide Bracton B. 3. c. 14. ſ. 17.
(*i*) 1 Ventris 416.
(*k*) Co. Litt. 8. 1 Hale 357. 4 Leonard 5. C. Jac. 539. 1 R. Ab. 625. C. Car. 543. 1 Ventris 425. Palmer 19. 1 Levinz 59. 2 Roll 93. 2 Siderfin 25. 27. This is left doubtful, Moor 569. Noy 158, &c. Con. Litt. Rep. 28.

But *Sir Edward Coke* (*l*) ſays, That the reaſon of this caſe is, "becauſe the attainder of the father corrupts only the lineal blood, and not the collateral blood between the brethren, which was veſted in them before the attainder;" but he ſaith, "That ſome have holden, that if a man after he be attainted have iſſue two ſons, the one cannot be heir to the other,

(*l*) Co. Litt. 8. 1 R. Ab. 625.

other, becauſe they could not be heir to their father, for that they never had any inheritable blood in them." But the ground of this opinion ſeems to be overthrown by the reſolution in the *caſe of Collingwood and Pace*, wherein it was adjudged (*m*) in the exchequer-chamber by ſeven judges againſt three, that the ſons of an alien might be heirs to one another if born in England or naturalized; and yet it is certain that they could not be heirs to their father. Alſo it ſeems to (*n*) be the better opinion, That where a perſon attainted hath iſſue by a woman ſeiſed of lands of inheritance, ſuch iſſue may inherit the mother, though he never had any inheritable blood from the father.

(*m*) 1 Sid. 193. Hardres 224. 1 Ventris 413. 1 Levinz 59.

(*n*) 1 Sid. 201. 1 Ventris 422. 426. Noy 159. 167, 168, 169. 2 Siderfin 248. This alſo appears from 13 H. 7. 17. cited S. P. C. 196. Abridged Bro. Tenant by Curteſy 15. and wherein it is holden, That if the huſband of an inheritrix have iſſue, and be attainted of felony and pardoned, he ſhall not be tenant by courteſy by reaſon of the iſſue born before the pardon, but by reaſon of iſſue born after he ſhall; from whence it neceſſarily follows, that ſuch iſſue muſt be inheritable to the wife. Alſo it is admitted, Co. Litt. 84. b. That the iſſue of an inheritrix by an alien or a perſon attainted may be in ward, which could not be unleſs he could inherit the mother. Vide C. Jac. 539. Litt. Rep. 28. 1 Levinz 59, 60. But the contrary was anciently holden. 3 Coke 41. Bracton B. 3. c. 13. f. 19, 20.

Sect. 50. Fourthly, It ſeems clear, That notwithſtanding a perſon attainted be to many purpoſes looked upon as dead in law, yet he hath a capacity to (*o*) purchaſe land, which the king ſhall have upon office found. Alſo if the father of a perſon attainted die ſeiſed of an eſtate of inheritance during his life, no (*p*) younger brother can be heir, but the land ſhall rather eſcheat; for the elder brother, though attainted, is ſtill a brother, and no other can be heir to the father while he is alive: But it ſeems (*q*) agreed at this day, That if he die before the father, the younger brother ſhall be heir.

(*o*) Co. Litt. 2.

(*p*) Fleta B. 1. c. 28. f. 9. Co. Litt. 8. 13. B. M. danceſtor 36. S. P. C. 195. B. Bracton B. 5. c. 6. f. 7. F. Petition 20. M. Danceſtor 28. Diſcent 7. 1 Ventris 413. 417. 1 Levinz 60. 29 Aſſize 11. Noy 166. 170. 1 Siderfin 195. 26 Aſſize 2.

(*q*) See the books next above cited, and Bro. Diſcent 64. Con. Bracton B. 3. c. 14. f. 17.

Sect. 51. Fifthly, It is clear, That the corruption of blood from an attainder is ſo high that it cannot be abſolutely ſalved but by the act of parliament; for it ſeems (*r*) agreed, That the king's pardon cannot reſtore the blood ſo as to make the perſon attainted capable either of inheriting others, or of being inherited himſelf by any one born before the pardon. (*s*) Yet if ſuch perſon have a ſon born after the pardon, and purchaſe lands and die, ſuch ſon may be his heir, unleſs he have an elder brother alive born before the pardon; for a pardon doth as it were make a man a new creature, and give him a new capacity, in reſpect whereof his iſſue born after the pardon may be his heir, as to lands purchaſed after the pardon in the ſame manner as if he had never been attainted.

(*r*) Co. Litt. 8. 391, 392. S. P. C. 195. 3 Inſt. 233. Daliſon 14. 1 Hale 358. Con. 9 H. 5. 9.

(*s*) See the books next above cited.

† *Sect.* 52. It is enacted by 7 Ann. c. 21. f. 10. "That "after deceaſe of the pretender no attainder for treaſon ſhall

Vide the very learned and elegant treatiſe intitled "Conſiderations on the Law of Forfeitures," attributed to the late Lord Hardwicke, or to his ſon the *noble minded* Yorke.

"extend

" extend to the diſinheriting of any heir, nor to the prejudice " of the right or title of any perſon or perſons, other than the " right or title of the offender or offenders during his, her, or " their natural lives only; and that it ſhall and may be lawful " to every perſon or perſons to whom the right or intereſt of " any lands, tenements, or hereditaments, after the death of " any ſuch offender or offenders, ſhould or might have apper- " tained, if no ſuch attainder had been, to enter into the " ſame."

Vide 4 Comm. 382.

† *Sect.* 53. But it is enacted by 17 Geo. 2. c. 39. ſ. 3. " That the ſaid proviſion ſo made by the ſaid laſt recited clauſe " of the 7 Ann. c. 21. ſhall not take place, nor have any ope- " ration, force, or effect whatſoever, until after the deceaſes, " not only of the ſaid pretender, but alſo of his eldeſt, and all " and every his ſon and ſons."

CHAPTER THE FIFTIETH.

OF AVOIDING JUDGMENT.

4 Comm. 382.

FOR the better underſtanding the learning concerning the avoiding of judgments in criminal caſes, I ſhall endeavour to ſhew, How ſuch Judgments may be avoided; and, The effect of ſuch Avoidance.

And firſt, ſuch judgments may be avoided either, Without writ of Error; or, by writ of Error.

They may be avoided without writ of error two ways. Firſt, For faults apparent in the record. Secondly, For other matter *dehors* the record.

(*a*) Co. Litt. 259. 1 Anderſon 36. Vide inf. ſ. 9. *Secus* if he comes in gratis. Dyer 192. Con. 39 H. 6. 27. Ab. F. Reſp. 52. B. Utlag. 35. Vide 14 H. 4. 27. F. Ind. nominis 3. B. Utlag. 28. 30 H. 6. 3.

Sect. 1. And firſt I ſhall endeavour to ſhew where ſuch judgments may be avoided by plea without any writ of error for faults apparent in the record. As to which it is obſervable, That notwithſtanding it be the allowed practice of the court of common pleas to ſuffer a defendant coming in by (*a*) *capias ut-*

lagatum

logatum the ſame (*b*) term in which an exigent is returnable, to avoid the outlawry without writ of error, by ſhewing that he purchaſed a (*c*) *ſuperſedeas* out of the (*d*) ſame court, and (*e*) delivered it to the ſheriff before the *quinto exactus*, &c. or by ſhewing any (*f*) other matter apparent on record which makes the outlawry erroneous, as the want of an (*g*) original, or the (*h*) omiſſion of proceſs, or want (*i*) of form in a writ of proclamation, &c. or a (*k*) return by a perſon appearing not to be ſheriff, or a (*l*) variance between the original and exigent, or other proceſs, or the want of ſuch addition as (*m*) required by 1 Hen. 5. Yet it is ſaid in many (*n*) books, to be the conſtant courſe of the court of king's bench, never to reverſe an outlawry on the crown-ſide, either in the ſame or a different term, for (*o*) theſe or other errors of the like nature (as (*p*) the want of a *capias* to the ſheriff of the county whereof the party is named, or a (*q*) fault in the indictment), without a writ of error.—Yet ſince Sir Edward (*r*) Coke ſeems to be of another opinion, and ſince alſo it is clearly holden, That one may plead even a matter of fact in the king's bench in avoidance of an outlawry *of felony*, which cannot be pleaded in avoidance of any other outlawry, as ſhall be more fully ſhewn, ſection the ſixth; I ſhall leave this point to be farther conſidered. However it is (*s*) agreed, That conviction of felony whereon the party hath had his clergy may be diſcharged by exception to the indictment, becauſe no writ of error lies of ſuch a conviction, not being a judgment.

(*b*) 8 H. 6. 37. Ab. F. Error 19. 19 H. 6. 2. a. Ab. F. Err. 26. But ſome have holden, That an outlawry cannot be avoided for this or any other cauſe in another term. Co. Litt. 259. 37 H. 6. 17. Ab. F. Utlag. 28. B. Error 97. 8 H. 6. 37. Con. ad. 1 And. 36. (*c*) 19 H. 6. 44. Ab. F Utla. 20. B. Utlag. 21. 33 H. 6. 1. Ab. F. Utlag. 27. Bro. 2. 30 H. 6 3. Ab. F. Protect. 21. B. Utlag. 74. 12 H. 4. 18. Ab. B. Utlag. 14. 7 H. 4. 1. Ab. B. Utlag. 5. 8 H. 6, 7.

F. Error 42. 11 H. 4. 34. 33 H. 6. 1. 45. Ab. F. Utlag. 27. 1 Anderſon 36. But 1 R. Abr. 743. the contrary is ſaid to have been holden 39 Eliz. (*d*) 30 H. 6. 3. Ab. F. Protect. 11. Secus if the ſuperſedeas were from the chancery, 7 H. 4, 5. Ab. F. ſuperſ. 10. B. Utlag. 65. Superſedeas 8. Vide 18 H. 6. 18. Ab. F. Error 24. 7 Edw. 4. 9. Ab. F. Exigent 1. B. Superſedeas 31. F. N. B. 236. (*e*) 14 H. 4. 27. B. Utlag. 15. L. quin. Edw. 4, 5. Ab. B. Error 155. Dyer 222, 223. and it is ſaid not to be material whether it were delivered to the ſheriff or not. Co. Litt. 128. B. Utlag. 8. 4 E. 4. 42. Con. F. Error 77. Vide F. Err. 42. (*f*) Coke on Litt. 259. 33 H. 6. 1. 5. Ab. B. Utlag. 27. (*g*) 11 H. 7. 4. Ab. B. Utlag. 78. 16 E. 4. 9. Ab. B. Error 172. F. Utlag. 41. Vide 19 Edw. 4. 8. But it is agreed, That an outlawry without any original is not void, but voidable only, F. Color 45. Utlag. 18. 7 H. 7. 5. Ab. F. Error 52. Keilway 19. B. Utlag. 45. L. quin. Edw. 4. 116. (*h*) 33 H. 6. 1, 45. Ab. F. Utlag. 27. 8 H. 6. 37. Ab. F. Error. 19. B. Utlag. 19. 19 H. 6. 2. Ab. F. Error 26. L. quin. Ed. 4. 116. B. Utlag. 45. (*i*) Dyer 206. 11 H. 4. 34. (*k*) Dyer 41. (*l*) F. Utlag. 41. 38 H. 6. 31. Ab. F. Utlag. 31. 21 Edw. 3. 56. Ab. F. Diſ. 3. 16 Edw. 4. 9. B. Error 172. F. Diſ. 17. 20 H. 6. 18. Ab. F. Diſ. 22. 2 Rich. 3. 13. B. Miſ. 80. Variance 90. (*m*) 8 H. 6. 37. Ab. B. Er. 19. 1 Anderſon. 36. 1 R. Abr. 743. 2 Inſt. 670. Con. B. Utlag. 34. 39 H. 6. 1. (*n*) 1 R. Ab. 743. 37 H. 6. 17. Ab. F. Utlag. 28. 4 E. 4. 42, 43. Ab. B. Error 158. Utlag. 67. 19 H. 6. 2. Ab. F. Error 26. Vide Palmer 43. Con. 11 H. 7. 4. Ab. B. Utlag. 78. (*o*) Not for the want of an addition, 19 H. 6. 2. Ab. F. Error 26. 11 H. 6. 15. b. 54. (*p*) Sup. c. 27. ſ. 127. 9 H. 6. 15. B. Utlag. 20. 34. 39 H. 6. 1. (*q*) 1 Bulſtrode 109. 1 Siderſin 144. (*r*) Co. Litt. 259. Vide 11 H. 7. 4. B. Utlag. 78. 33 H. 6. 1. Ab. F. Utlag. 27. 8 H. 6. 37. Ab. B. Utlag. 19. (*s*) Cro. Eliz. 489, 490.

Sect. 2. As to the ſecond particular, *viz.* Where a judgment may be avoided, without writ of error, for matters *dehors* the record.—It is holden, That he who purchaſes land of a perſon

perſon who afterwards is (*t*) outlawed of felony, or condemned upon his own (*u*) confeſſion, may falſify the record, not only as to the time wherein the felony is ſuppoſed to have been committed, but alſo as to the point of the offence. But it is (*x*) agreed, That where a man is found guilty by verdict, a purchaſer cannot falſify as to the point of the offence, but that he may falſify for the time, where the party is found guilty generally of the offence in the appeal or indictment; becauſe the time is not material upon evidence.

(*t*) Summary 270. 3 Hale 361. 3 Inſt 230. Yet the contrary ſeems holden, 49 Edw. 3. 11. 49 Aſſize 2. B. Corone 20. 8. F. Traverſe 19.

(*u*) Summary 270. 3 Hale 361. 3 Inſt. 231.

B. Traverſe de Office 35. 7 Edw. 4. 1, 2. F. Eſtopel 91. (*x*) See the books above cited.

(*y*) Summary 270. 3 Inſt 231. Plowden 392, &c.

Sect. 3. Alſo it ſeems (*y*) agreed, That any judgment whatſoever given by perſons who had no good commiſſion to proceed againſt the perſon condemned, may be falſified by ſhewing the ſpecial matter without writ of error, becauſe it is void; as where a commiſſion authoriſes to proceed on an indictment taken before A. B. C. and twelve others, and by colour thereof the commiſſioners proceed on an indictment taken before eight perſons only.

(*x*) 3 Inſt. 232. Summary 271. 8 Coke 79. Sup. c. 37. ſ. 53. C. Eliz. 72. C. Eliz. 4.

Sect. 4. Alſo it ſeems (*z*) agreed, That if the treaſon or felony of which a man is attainted, be afterwards pardoned by parliament, the attainder may be falſified by himſelf or his heir without plea.

'Tis ſaid that a writ of error lies on ſuch a pardon. But this contrary to 3 Inſt. 232. and 6 Coke 14. For the avoiding of an outlawry by the king's pardon, vide c. 49. ſ. 15. F. Charter 27. B. Error 56. 18 Edw. 3. 38. B. Appeal 7. 92. 9 H. 5 14, 15.

(*a*) 29 Edw. 3. 25. 1 R. Abr. 489.

Sect. 5. But it hath been (*a*) adjudged, that the king's letters patents reverſing an attainder are void, unleſs they be afterwards made good by act of parliament.

(*b*) Co Litt. 269. 10 H. 4. 7. F. Reſpon. 101. (*c*) F. Utl. 2. 11. 18. 27. 33 H. 6. 1. 7 H. 6. 25. B. Utl. 18. 40. 38 Aſſize 17. 27 Aſſize 47. F. Corone 123.

Sect. 6. It ſeems generally agreed, that by the common law, in (*b*) *favorem vitæ*, an outlawry of treaſon or felony might be avoided by plea, that the defendant was in (*c*) priſon, or in the kings's ſervice beyond the (*d*) ſea, &c. at the time of the outlawry (*e*) pronounced againſt him. But I take it to be generally (*f*) agreed, that no outlawry for any other crime (againſt a party (*g*) rightly deſcribed) can be avoided by the plea of any matter (*h*) of fact whatſoever.

8 H. 4. 13. 3 Inſt. 32. Con. 21 Edw. 4. 73. B. Utl. 57. 1 H. 7. 13. B. Utlag. 68. B. Corone 118. That he who pleads this plea muſt ſhew in whoſe cuſtody he was, and in what county, and muſt alſo aver his plea; and by 5 Edw. 3. 13 an averment is given againſt the teſtimony of a ſheriff or other, having no record teſtifying ſuch impriſonment. (*d*) F. Utl. 11. 2 E. 4. 1. F. Reſpond. 54. 9 H. 4. 3. F. Sci. fac. 64. 11 H. 7. 5. B. Utl. 79. 4 Edw. 4. 10. Con. F. Cor. 123. Vide 10 H. 4. 7. 2. Ab. F. Reſ. 201. 9 Coke 31. Co. Litt. 74. (*e*) Skinner 16. F. Utlag. 2. 48. F. Forfeiture 19. F. Reſpond. 54. 101. 7 H. 6. 25. Ab. B Utlag. 28. 16 Edw. 4. 6. (*f*) Co. Litt. 259. (*g*) Infra ſ. 9. (*h*) Not by the plea of impriſonment. F. Utlag. 27. 47. 33 H. 6. 1. 45. Nor by the plea of being beyond ſea. F. Utlag. 27, 33 H. 6. 1. 45.

Sect. 7. And it is enacted by 26 Hen. 8. c. 13. and 5 & 6 Edw. 6. c. 11. "That all proceſs of outlawry to be had "or made within this realm, againſt any offenders in treaſon, "being reſiant or inhabiting out of the limits of this realm, or "in any of the parts beyond the ſeas at the time of the out-"lawry pronounced againſt them, ſhall be as good and effec-"tual in law to all intents and purpoſes, as if ſuch offenders "had been reſident and dwelling within this realm at the "time of ſuch proceſs awarded, and outlawry pronounced; "(*b*) provided, that if the party ſo to be outlawed, ſhall, with-"in one year next after the ſaid outlawry pronounced, (*i*) "yield himſelf to the chief juſtice of England for the time be-"ing, and offer to traverſe the indictment or appeal whereon "the ſaid outlawry ſhall be pronounced as is aforeſaid, that "then he ſhall be received to the ſame traverſe, and being "thereupon found not guilty by the verdict of twelve men, "he ſhall be clearly acquitted and diſcharged of the ſaid out-"lawry, &c."

Outlawry againſt perſons abroad, may be reverſed within a year and a day.

(*b*) 5 & 6 E. 6. 4.

(*i*) 3 State Tr. 335. 3 Modern 47. and Skin. 195. Sir Tho. Armſtrong's caſe.

Sect. 8. And it hath been (*k*) reſolved, That theſe ſtatutes extend as well to treaſons by ſubſequent ſtatutes as to thoſe within 25 Edw. 3.

(*k*) 3 Inſt. 32. 216. But ſee Dyer 287. and 2 Jones 180. Error aſſigned for the reverſal of an outlawry of high treaſon, that the defendant was beyond ſea at the time.

Sect. 9. It ſeems generally agreed, That any outlawry whatſoever may be avoided by a defendant's coming in upon the (*l*) *capias utlagatum*, and pleading a (*m*) miſnoſmer either of the name or addition in the writ, &c. as by ſhewing that whereas he is called by ſuch a name of (*n*) baptiſm, or (*o*) ſurname, he hath been always known by a different one, and not by that in the writ, &c. or whereas he is named of ſuch eſtate, degree, or myſtery, that he hath ſome other (*p*) addition, and not that in the writ, &c. Alſo it is ſaid in many (*q*) books that he may plead, that there is no ſuch town as that whereof he is named. And it ſeems clearly agreed, That he may plead, that at the time of the writ purchaſed and ever ſince, he hath

(*l*) 33 H. 6. 1. 38. 45. F. Utlag. 22, 23. 26, 27. 29. 32. 35. 37. 44. Nonſuit 6. Eſtopel 47. 54. 67. Dyer 192. B. Utlagary 1. 21, 23, 24, 25, 26. Miſnoſmer 52. 1 Edw. 4. 2. 21 H. 6. 50. 5 H. 7. 16. 7. Edw. 4. 1.

27 H. 8. 11, 12. 22 H. 6. 23. 19 H. 6. 80. 5 H. 5. 7. 28 H. 6. 2. Vide F. Variance 74. 19 H. 6. 58. 22 Edw. 4. 37, 38. (*m*) 33 H. 6. 1. 45. But in the abridgment of this caſe, Bro. Utlagary 2. the contrary ſeems to be holden, Fitz. Utlagary 27. (*n*) Fitz. Utlagary 44. Bro. Utlagary 1. 27 H. 8. 11, 12. (*o*) 14 Edw. 4. 6. Bro. Utlagary 53. 19 Edw. 4. 24, 25. Bro. Sci. Fac. 132. Miſnoſmer 1. 27 H. 8. 11, 12. 12 H. 6, 7. So if one be called in the writ the ſon of J. S. he may plead that he is the ſon of W. S. 10 Edw. 4. 12. Bro. Idemp. nominis 9. (*p*) Fitz. Nonſuit 6. Eſtopel 47. 67. 1 Edw. 4. 2. 21 H. 6. 50. 28 H. 6. 2. b. F. Utlagary 32. 35. 37. Bro. Utlagary 15. 24 78. Miſnoſmer 52. 5 H. 7. 16. a. 7 Edw. 4. 1. 5 H. 5. 7. Abridged Bro. Utlagary 15. Fitz. Utlagary 37. But 'tis there ſaid, that ſome were of opinion, That the party ſhould be put to his writ of error, becauſe he is the ſame perſon. See 38 H. 6. 1. B. Utlagary 32. 51. 10 Edw. 4. 16. Bro. Scire Facias 132. 9 Edw. 4. 24, 25. (*q*) Fitz. Utlagary 23. 26. 22 Edw. 4. 37. 22 H. 6. 23. 33 H. 6. 51. Bro. Utlagary 26. Raſtal Ent. 300, 301. But the contrary is holden 33 H. 6. 1. Becauſe ſuch plea would avoid the outlawry againſt all perſons. Bro. Utlagary 29. There is an opinion to the contrary, but it ſeems not warranted by the year-book.

made

made his abode at ſome (*r*) other town, and not at that in the writ, &c. and it is (*s*) ſaid, That by ſuch plea, the outlawry ſhall only be avoided as to the perſon who pleads it (who ſhall (*t*) not be intended to be the perſon meant), and ſhall ſtand in force againſt the perſon of the name and addition in the record. But it is ſaid, That a perſon of the ſame name and addition as are mentioned in a record of outlawry, (*u*) cannot avoid it by averring that there are two perſons of ſuch name and addition, and that the perſon intended is the elder, and he himſelf is the younger, but ſhall be put to his writ of *idempnitate nominis*, which is ſaid by ſome to be the (*x*) only remedy in ſuch caſe after an outlawry returned. And it ſeems, That notwithſtanding in civil cauſes (*y*) before an outlawry is returned, one of the ſame name may come into court, and ſhew, (*z*) that he is not the perſon intended; whereupon if the plaintiff confeſs it, the diverſity of the names ſhall be entered on the roll, and a new exigent ſhall iſſue with a fuller deſcription of the perſon intended: Yet this (*a*) cannot be done upon an indictment, without a writ of *idempnitate nominis*, becauſe it would make the proceſs variant from the indictment, which cannot be altered without the conſent of the jurors.

(*r*) Fitz. Utlag. 22, 23. 25. 29, 30. 33. Eſtopel 54. Error 23. 38 H. 6. 1. 28 H. 6. 2. 33 H. 6. 38. 22 H. 6. 7. 16. 23. 19 H. 6. 80. Dyer 192. 2 E. 4. 1. B. Utlag. 22. 25. 32, 33. 58. 21 Edw. 4. 79. Keilway 101. Such matter is pleaded without any traverſe of the place in the indictment. Vide 22 E. 4. 37, 38. 20 H. 6. 19. It is adjudged 28 H. 6. Ab. F. Utl. 25.

That it is no plea for one named of the pariſh of C. that there are 3 vills in the ſame pariſh, viz. D. E. F. and that he was commorant at D. and therefore ought to have been named of it. (*s*) 39 H. 6. 1. B. Utl. 34 73. 10 H. 6. 4. 30 H. 6. 2. F. Error 23. 21 H. 7. 13. But it is ſaid, 21 H. 6. 21. Ab. F. Sci. fac. 55. B. Utl. 23. That a *capias ad ſatisfaciendum* the judgment is affirmed or diſaffirmed by the affirmance or avoidance of the outlawry. Vide 22 H. 6. 16. B. Utlag. 25. 19 H. 6. 58. F. Utl. 21. (*t*) And for this cauſe this is a good plea in avoidance of the plea of outlawry in diſability. F. Nonability 14. 21 H. 7. 13. 7 E. 4. 1. B. Nona. 50. (*u*) 21 H. 7. 13. 14 H. 4. 27. 2. F. Idemp. nominis 2, 3. Vide B. Utlag. 29. 55, 56. 21 Edw. 4. 15. 54. 13 H. 6, 7. F. Utl. 1. 24. 43. Variance 74. (*x*) F. Utl. 6. 16 Reſp. 21. Nona. 1. 7. (*y*) 21 E. 4. 15. 13 H. 7. 12. Bro. Idemp. nom. 3. 5. 7, 8. F. Idemp. nom. 3. 6, 7. Con. F. N. B. 268. (*z*) F. N. B. 268. Bro. Idemp. nom. 3, 4. 11. 14 H. 4. 27. F. Idemp. nom. 5. 21 Edw. 3. 36. Con. F. Idemp. nom. 4. B. Idemp. nom. 6. L. quin. Edw. 4. 51. (*a*) F. Idemp. nom. 3. F. N. B. 268. B. Idemp. nom. 2. 11. 9 H. 4. 3.

AND now I am to ſhew how judgments in criminal caſes may be avoided by writs of error; as to which having ſhewn already, ch. 29. ſect. 4c. That the reverſal of the attainder of the principal *ipſo facto* reverſes that of the acceſſary, I ſhall in this place only obſerve the following particulars.

Sect. 10. Firſt, That it ſeems to be in a great meaſure (*b*) ſettled, That a writ of error to reverſe an attainder of treaſon or felony may be brought as well by the executor as by the heir of the party, but (*c*) no other perſon whatſoever.

(*b*) Cro. Eliz. 225. 273. 558, 5 Coke 111. Owen 147, 148. 1 Leonard 325, 326. Salkeld 295.

Shower 13. (*c*) Vide Salkeld 60, 61.

Sect. 11. Secondly, That a perſon attainted of treaſon or felony, before he can have a writ of error to reverſe his attainder, muſt (*d*) aſſign his errors, and thereupon have leave from the court to proſecute his writ of error.

(*d*) 1 H. 7. 13. b. B. Error 351.

Sect.

Sect. 12. Thirdly, That no writ of error for the reverſal of an attainder of treaſon or felony is to be (*e*) allowed without an expreſs warrant from the king, or the conſent of the attorney general.

(*e*) 1 Sid. 69. 1 Bulſt. 71. 3 Modern 42. 1 Roll 175.

Sect. 13. Fourthly, That an attainder of felony of a perſon who had any lands, ſhall never be reverſed by writ of error (*f*) without a *ſcire facias* againſt all the ter-tenants and lords mediate and immediate; but it is (*g*) ſettled, That ſuch *ſcire facias* is not neceſſary in the caſe of high treaſon. Alſo it is (*h*) ſaid, That it is not neceſſary in the caſe of felony when it is ſuggeſted on the roll that the party had no lands, and the attorney general confeſſes it.

(*f*) Dyer 34. 1 Keble 141. 1 Siderfin 316. 22 E. 4. 37. 3 Keble 29. 4 E. 4. 10. F. Error 52. 7 H. 7. 5. 4 Edw. 4. 10.

(*g*) Queen v. Stafford, M. 12 Annæ, upon examination of all the precedents.

(*h*) 2 Salkeld 495. Vide 3 Keble 29.

Sect. 14. Fifthly, That it hath been (*i*) ſettled, That the ſtatute of 33 Hen. 8. c. 29. which enacts, "That if any perſon ſhall be attainted of high treaſon by the courſe of the common laws or ſtatutes of this realm, that in every ſuch caſe, every ſuch attainder by the common law ſhall be of as good ſtrength, value, force and effect, as if it had been done by authority of parliament," is to be intended of lawful attainders by due courſe of the common law, and not of erroneous and void attainders, which therefore may be avoided in the ſame manner as before.

(*i*) 3 Inſt. 214, 215. 1 Hale 353.

Sect. 15. Sixthly, That it is alſo clear, That the ſtatute of (*k*) 28 Eliz. c. 2. which enacts, "That no record of attainder that then was of high treaſon, where the party is or hath been executed, ſhall be reverſed, avoided or impeached by any plea or writ of error," extends not (*l*) to attainders ſince that time.

(*k*) Which is called the 29th in the printed Statutes by a miſtake. 3 Levinz 333.

(*l*) 3 Inſt. 214. 1 Hale 53.

Sect. 16. Seventhly, (*m*) That it hath been holden, That a writ of error lies in the king's bench of an attainder before the lord high ſteward.

(*m*) 1 Sid. 208.

AND now I am in the ſecond place to ſhew the effect of the avoidance of a judgment, as to which I ſhall take notice only of the following particulars:

Sect. 17. Firſt, That it is (*n*) agreed, That after an outlawry of treaſon or felony is reverſed, the party ſhall be put to (*o*) plead to the indictment, for that ſtill remains good.

(*n*) B. Cor. 27. 144. 165. 7 H. 7. 5. 18 Edw. 4. 9. 3 Modern 42. C. Jac. 464. F. Er. 52. C. Car. 365.

(*o*) That the law is the ſame in civil cauſes. F. Er. 41. 37 H. 6. 17. B. Utlag. 28. 20 H. 6. 3. Ab. F. Protection 11. B. Utlag. 74. Con. 21 H. 6. 50. Ab. F. Nonſuit 6. B. Utlag. 24. Vide B. Utlag. 35.

Sect. 18. Secondly, That it is ſaid by *Sir Edward Coke*, If the judgment be erroneous, both that, and the execution thereupon,

upon, and all former proceedings ſhall be (*p*) reverſed by writ of error; but if the execution be erroneous that only ſhall be reverſed.

(*p*) 3 Inſt. 2. 10.

Sect. 19. Thirdly, That it hath been (*q*) adjudged, That if the king grant over the lands of a perſon outlawed for treaſon or felony, and afterwards the outlawry be reverſed, the party may enter on the patentee, and needs neither to ſue a petition to the king, nor a *ſcire facias* againſt the patentee.

(*q*) 1 Anderſon 188.

CHAPTER THE FIFTY-FIRST.

OF EXECUTION AND REPRIEVE.

4 Comm. 387.

AND now nothing remains but to ſhew in what manner a perſon condemned is to be executed or reprieved.

(*a*) Ch. 30. ſ. 8.

As to which, having ſhewn already (*a*) That a perſon attainted, ſtanding mute to a demand why execution ſhall not go againſt him, ſhall not be awarded to his penance, but to the ordinary execution proper for the crime, I ſhall farther obſerve only the following particulars:

(*b*) 1 Sid. 72. 1 Levinz 61. 1 Keble 244. Sup. c. 44. ſ. 18. (*c*) 2 Hale 4. Popham 131. C. Car. 176. C. Jac. 495. (*d*) C. Car. 176. C. Jac. 495. 1 Siderfin 72, 73. (*e*) C. Car. 176. C. Jac. 495. Foſter 140.

Sect. 1. *Firſt*, That the court of king's bench hath not only power to award execution againſt perſons attainted there, but alſo againſt perſons attainted in (*b*) parliament, or any other (*c*) court, the record of their attainder, or a tranſcript thereof, being firſt (*d*) removed into the court of king's bench, and themſelves brought thither by (*e*) *habeas corpus*.

In the caſe of the Earl of Ferrers it was reſolved, by all the judges, that if a peer be convicted of murder, before the lords in parliament, and the day appointed by them for execution purſuant to 25 Geo. 2. ſhould lapſe before ſuch execution done, a new time may be appointed for the execution either by the high court of parliament before which ſuch peer ſhall have been attainted, or by the court of king's bench, *the parliament not then ſitting*, the record of the attainder being properly removed into that court. Foſter 140.—N. B. Where the priſoner is in the cuſtody of the marſhall of the king's bench the uſual place of execution is at Saint Thomas a Waterings, in the county of Surry. 4 Burrows 2086. Strange 553.

(*f*) C. Car. 176. 3 Mod. 124, 125. (*g*) C. Car. 176. C. Jac. 495. Hutt. 21. 1 Levinz 61. 1 Siderfin 72.

Sect. 2. Secondly, That execution ought (*f*) not to be awarded into a different county from that wherein the party was tried and convicted, except only where a record of attainder is removed into the court of king's bench, which (*g*) may award the execution in the ſame county wherein it ſits.

Sect.

Sect. 3. Thirdly, That where a perſon attainted hath been at large after his attainder, and afterwards is brought into court and demanded why execution ſhou'd not be awarded againſt him, (*h*) if he deny that he is the ſame perſon, it ſhall be (*i*) immediately tried by a jury returned for that purpoſe.

(*h*) Popham 131. C. Car. 176. C. Jac. 495. Crompton 183. 2 Hale 407.
(*i*) 1 Sid. 72. 1 Levinz 61.—

Whether the party may have peremptory challenges on ſuch a trial, vide c. 43. ſ. 6. Alſo Ratcliff's caſe, Foſter 40, 41.

Sect. 4. Fourthly, That the court (*k*) may command execution to be done without any writ.

(*k*) Finch 478. 3 Modern 42. 2 Hale 409.

But ſometimes execution is commanded by writ, as in Sir Walter Raleigh's caſe. Cro. Jac. 496. and in Lord Stafford's caſe, State Trials, vol. 3. p. 101. being both in the cuſtody of the Lieutenant of the Tower, and beheaded only.

Sect. 5. Fifthly, That it is (*l*) holden by *Coke* and *Hale*, That no execution can be warranted unleſs it be purſuant to the judgment; and therefore that it cannot be altered by the king, as from hanging to beheading. Yet ſince there is a great number of precedents, where (*m*) men condemned to be hanged for felony, and women condemned to be burnt (*n*) for treaſon, have been beheaded by force of a ſpecial warrant from the king to that purpoſe; and ſince (*o*) *Bracton* and (*p*) *Staundford* and the (*q*) *year-book* of 35 Hen. 6. ſpeaking of this matter, are not ſo expreſs as *Coke* and *Hale*, but ſay only in general, That the ſheriff cannot lawfully behead a man who is only condemned to be hanged; by which they may perhaps intend no more than that he cannot lawfully do it of his own authority; I ſhall leave this matter to be farther conſidered (1). However, it is agreed, That where beheading is part of the judgment, as in caſe of high treaſon, the king may (*r*) pardon all the reſt, and conſequently in ſuch caſe the judgment will be well executed by beheading only.

(*l*) 3 Inſt. 52. 211, 212. 217. 12 Coke 130. 4 Comm. 179. 397. Summary 273. 1 Hale 501. 496. 2 Hale 411. 15 Raym. 295. 19 Raym. 284. Regis 165. F. N. B. 339. Staunf. 198. And accordingly Lord Dacres, Lord Stourton, and Sanchar, a Scotch lord, were hanged for murder. 3 Inſt. 211, 212. 9 Coke 121.
(*m*) Lord Hungerford in 32 H. 8. Duke of Somerſet in 5 Edw. 6. 3 Inſt. 211. Lord Audley in 6 Car. 1. 1 State Trials 271. (*n*) Queen Catharine Howard, Lady Jane Grey, Counteſs of Saliſbury, Lady Alice Liſle. 4 State Trials 129. (*o*) Bracton 104. (*p*) S. P. C. 13. (*q*) 35 H. 6. 38. (*r*) Summary 273. 3 Inſt. 31. 52. 212. 12 Coke 130. Supra c. 37. ſ. 12. 3 Inſt. 31. it is ſaid, That ſuch a pardon muſt be under the great ſeal; but it ſeems admitted that it may be by a writ. 2 St. Tr. 704, 705.

(1) The king cannot vary the execution ſo as to aggravate the puniſhment. But it doth not follow from thence, that he who can wholly pardon the offender cannot mitigate his puniſhment, with regard to the pain or infamy of it. Foſter 269. 1 Burr. 650. and this prerogative is part of the common law. Foſter 270. 4 Comm. 398. therefore it is not criminal in the officer who obeys a warrant from the crown for beheading a perſon under ſentence of death for a felony, or a woman for treaſon of any kind. Foſter 268.

Sect. 6. Sixthly, That it ſeems (*s*) agreed at this day, That an execution cannot be lawfully executed by any but the proper officer.

(*s*) Foſter 267. See Bk. 1. c. 28. ſ. 8, 9. 2 Hale 411.

In all caſes as well capital as otherwiſe, execution muſt be performed by the ſheriff or his deputy, whoſe warrant for ſo doing was anciently by precept under the hand and ſeal of the judge, as it is ſtill practiſed in the court of the lord high ſteward upon the execution of a peer, 2 Hale 409. though in the court of the peers in parliament it is done by writ from the king, Append. 4. B. C.

ſect. 5. afterwards it was eſtabliſhed, Finch 478. that in caſe of life the judge may command execution to be done without any writ. And now the uſage is for the judge to ſign the calendar, a liſt of all the priſoners names, with the ſeparate judgments in the margin, which is left with the ſheriff. 4 Comm. 396. S. P. C. 182. 5 Modern 12. The ſheriff, upon receipt of this warrant, is to do execution within a convenient time, which in the country is left at large. In London the Recorder, after reporting to the king in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure that the law muſt take its courſe, iſſues his warrant to the ſheriffs, directing them to do execution at the day and place aſſigned. Appendix 4. B. C. ſ. 4. and in the King's Bench. See 4 State Trials 332. Foſter 43.

(t) 6 Edw. 4 4. F. Corone 335. Finch 389. 467. 2 Hale 412. Vide ſup. c. 48. ſect. 7. 4 Comm. 399.

Sect. 7. Seventhly, That it is (t) clear, That if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again; for the judgment is not executed till he be dead.

(t) 26 Aſſize 46. Ab. F. Office de Court 34. (u) Dyer 235. (x) Dyer 296. (y) Dyer 205. Sup. c. 6. ſ. 7. This power is ſaid to be rather by common uſage than of ſtrict right, 2 Hale 412. 4 Comm. 387. Vide 8 Geo. 3. c. 15. for a power given to judges of aſſize to reprieve a priſoner for the purpoſe of obtaining a conditional pardon.—Ante p. 517.

Sect. 8. Eighthly, It ſeems agreed, That every court which has power to award an execution, has alſo of common right a diſcretionary power of granting a reprieve; as (t) where a perſon pleads a pardon defective in point of form, but ſufficiently ſhewing the king's intention of mercy; or where it is (u) doubtful whether the offence be not included in a general ſtatute-pardon; or (x) whether as it is laid in the indictment, it amounts to ſo high a crime, as that with which the priſoner was charged. And it ſeems (y) agreed at this day, That judges continue to have this power after their commiſſion is determined.

(z) Sum. 272. 2 Hale 413. 4 Comm. 388. 3 Inſt. 17. (a) Quære if before juſtices of peace, Keilway 51. (b) S. P. C. 198. 22 Aſſize 71. Ab. F. Corone 180. B. Corone 88.

Sect. 9. Ninthly, That it is clear, That if a woman quick with child be condemned either for (z) treaſon or (a) felony, ſhe may alledge her being with child in order to get the execution reſpited, and thereupon the ſheriff (b) or marſhall ſhall be commanded to take her into a private room, and to impanel a jury of (c) 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 reſpited (d) till her delivery.

(c) 3 Inſt. 17. Finch 478. S. P. C. 198. (d) 4 State Trials 612. S. P. C. 198. 3 Inſt. 17. 4 State Trials 612. F. Corone 253. 410. 23 Aſſize 2. Ab. B. Corone 97. Fitz. Corone 188. 25 Edw. 3. 42. Abridged Fitz. Corone 130. 12 Aſſize 11. Abridged Fitz. Corone 168. Bro. Corone 72. Bro. Pain 11.

(e) Finch 478. S. P. C. 198. F. Corone 168. 253. 3 Inſt. 17. Summary 272. 23 Aſſize 2. Ab. B. Corone 97. F. Corone 188. 25 Edw. 3. 42. Abridged Fitz. Corone 130. 12 Aſſize 11. Bro. Corone 72. Pain 11.

Sect. 10. But it is agreed, That a woman (e) cannot demand ſuch reſpite of execution by reaſon of her being quick with child more than once; and that ſhe can neither ſave herſelf by this means from (f) pleading upon her arraignment, nor from having (g) judgment pronounced againſt her upon her conviction. Alſo it is ſaid both by (h) *Staundforde* and *Coke*, That a woman can have no advantage from being found with child, unleſs ſhe be alſo found *quick* with child.

(f) Finch 478. 3 Inſt. 17. 22 Aſſize 71. Abridged F. Corone 180. B. Corone 88. (g) 4 State Trials 611. S. P. C. 198. 3 Inſt.

3 Inſt. 17. 2 Hale 413. (*b*) 3 Inſt. 17. S. P. C 198. and in 22 Aſſize 71. Abridged Fitz. Cor. 180. Bro. Corone 88. it is expreſsly ſaid, That the inquiry was whether the women were enſient with a live child or not. See alſo Summary 272. and Finch 478. Yet F. Corone 127. 168. 388. 240. 410. 22 Aſſize 2. 25 Edw. 3. 42. 12 Aſſize 11. B. Corone 72. B. Pain 11. 'tis ſaid only, That the woman was found enſient or pregnant.

† *Sect.* 11. "For the purpoſe of adding a further terror and peculiar mark of infamy to the puniſhment of death now inflicted by the law upon the horrid crime of MURDER; a crime ſo contrary to the known humanity and natural genius of the Britiſh nation:" it is enacted by 25 Geo. 2. c. 37. "That all "perſons (3) who ſhall be found guilty of wilful murder, be "executed according to law on the day next but one after "ſentence paſſed, (*k*) unleſs the ſame ſhall happen to be the "*Lord's day* commonly called *Sunday*, and in that caſe on the "Monday following.—That the body of ſuch murderer ſo con-"victed ſhall, if ſuch conviction and execution ſhall be in the "county of *Middleſex* or within the city of *London* (*l*) or the "liberties thereof, be immediately conveyed by the ſheriff or "ſheriffs, his or their deputy or deputies, and his or their "officers, to the hall of the Surgeons Company, or ſuch other "place as the ſaid company ſhall appoint for this purpoſe, and "be delivered to ſuch perſon as the ſaid company ſhall depute "or appoint, who ſhall give to the ſheriff or ſheriffs, his or "their deputy or deputies, a receipt for the ſame; and the "body ſo delivered to the ſaid Company of Surgeons ſhall be "diſſected and anatomized (4) by the ſaid ſurgeons or ſuch "perſon as they ſhall appoint for that purpoſe. And in caſe ſuch "conviction and execution ſhall happen to be in any other "county or other place in Great Britain, then the judge or "juſtice of aſſize, or other proper judge, ſhall award the ſen-"tence to be put in execution the next day but one after ſuch "conviction (except as is before excepted), and the body of "ſuch murderer ſhall in like manner be delivered by the "ſheriff, or his deputy and his officers, to ſuch ſurgeon as ſuch "judge or juſtice ſhall direct for the purpoſe aforeſaid."

(3) A peer indicted of felony and murder, and tried and convicted thereof before the Lords in parliament, ought to receive judgment for the ſame according to the proviſions of this act. The Earl of Ferrers' caſe, Foſter 139. 19 State Trials p. 478.

(*k*) Beccaria c. 19. 4 Comm. 397.

(*l*) Upon all executions in London, the Recorder, after reporting to the King in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure that the law muſt take its courſe, iſſues his warrant to the ſheriffs, directing them to do execution on the day, and at the place aſſigned. 4 Comm. 397.

(4) At a meeting of the judges in 1752 to conſider of this act, it was agreed by much the greater part, that the judgment for diſſecting and anatomizing, and touching the time of execution, ought to be pronounced in caſes of petty treaſon, though murder is only mentioned, except in the caſe of women, and in that caſe too the time of execution may be a part of the judgment. Foſter 107.

† *Sect.* 12. It is alſo further enacted by the ſaid ſtatute, par. 3 & 4. "That ſentence ſhall be pronounced in open court "immediately after the conviction of ſuch murderer, and be-"fore the court ſhall proceed to any other buſineſs, unleſs the "court ſhall ſee reaſonable cauſe for poſtponing the ſame; in "which ſentence ſhall be expreſſed, not only the uſual judg-"ment of death, but alſo the time (*m*) appointed hereby for the "execution

(*m*) It was held by the twelve judges in Mich. Term, 10 Geo. 3. That, except in the caſes within this act, the time and place of execution are by law no part of the judgment. 4 Comm. 397.

In what manner sentence shall be pronounced against a murderer.

" execution thereof, and the marks of infamy hereby directed " for such offenders, in order to impress a just horrour in the " mind of the offender, and in the minds of such as shall be " present, of the heinous crime of murder. But it is provided, " that after such sentence is pronounced as aforesaid, in case " there shall appear reasonable cause, it shall and may be law- " ful to and for such judge or justice, before whom such cri- " minal shall have been so tried, to stay the execution of the " sentence, at the discretion of such judge or justice, regard " being always had to the true intent and purpose of this " act."

† *Sect.* 13. And it is also provided by par. 5. " That it shall " be in the power of any such judge or justice to appoint the " body of any such criminal to be hung in chains (*n*).—But " that in no case whatsoever the body of any murderer shall be " suffered to be buried, unless after such body shall have been " dissected and anatomised as aforesaid; and every such judge " or justice shall, and is hereby required to direct the same " either to be disposed of as aforesaid to be anatomised, or to " be hung in chains in the same manner as is now practised " for the most atrocious offences."

4 Comm. 202. 21 Deut. v. 23. Ff. 48. 19. 28. 1. 15. 4 St. Tr. 203.

(*n*) Upon a conference of the judges there was some doubt whether hanging in chains might ever be made part of the judgment. But on debate it was agreed by nine judges, that in all cases within the act, the judgment for dissection and anatomizing *only*, should be part of the sentence. And if it should be thought advisable, the judge might *afterwards* direct the hanging in chains by special order to the sheriff, pursuant to the power given for that purpose in the *proviso*. Foster 107.

How a condemned murderer shall be confined.

† *Sect.* 14. And it is further enacted by par. 6. " That from " and after such conviction, and judgment given thereupon, " the gaoler or keeper to whom such criminal shall be delivered " for safe custody, shall confine such prisoner to some cell, or " other proper and safe place within the prison, separate and " apart from the other prisoners; and that no person or per- " sons whatsoever, except the gaoler or keeper, or his servants, " shall have access to any such prisoner, without licence being " first obtained for that purpose under the hand of such judge or " justice, before whom such offender shall have been tried, or " under the hand of the sheriff, his deputy or under sheriff."

Judges may relax the restraints of the act.

† *Sect.* 15. But it is also provided by par. 7. " That in case " any such judge or justice shall see cause to respite the execu- " tion of such offender so condemned as aforesaid, such judge " or justice may relax or release all or any of the restraints or " regulations herein before or herein after directed to be ob- " served by the gaoler or keeper of the prison where such pri- " soner shall be confined, by any licence in writing signed by " such judge or justice for that purpose, for and during the " time of such stay of execution."

Sect.

† *Sect.* 16. And it is further enacted by the ſaid ſtatute, par. 8. "That after ſentence paſſed as aforeſaid, and until "the execution thereof, ſuch offender ſhall be fed with bread "and water only, and with no other food or liquor whatſoever "(except in caſe of receiving the Sacrament of the Lord's "Supper, and except in caſe of any violent ſickneſs or wound, "in which caſe ſome known phyſician, ſurgeon, or apothecary "may be admitted by the gaoler or keeper of the ſaid priſon to "adminiſter neceſſaries; the chriſtian and ſurname of ſuch "phyſician, ſurgeon, or apothecary, and his place of abode "being firſt entered in the books of the ſaid priſon or gaol, "there to remain)."

Convicts for murder to be fed on bread and water only.

† *Sect.* 17. And it is alſo enacted, "That in caſe ſuch gaoler "or priſon keeper ſhall offend againſt or neglect to put in exe- "cution any of the directions or regulations hereby enacted to "be obſerved, ſuch gaoler or priſon keeper ſhall for ſuch of- "fence forfeit his office, and be fined in the ſum of twenty "pounds, and ſuffer impriſonment until the ſame be paid."

Penalty for not executing the directions of the act.

† *Sect.* 18. Alſo, by the ſaid ſtatute, "to reſcue the body of any ſuch malefactor from the cuſtody of the ſheriff, *after execution*, is made felony and tranſportation for ſeven years." —And "to releaſe any perſon from priſon committed for, or found guilty of murder, or to reſcue ſuch an offender going to or during execution, is felony without benefit of clergy" (*a*).

Penalty for reſcuing the body of a malefactor. (*a*) Vide ante p. 312. where this part of the act is recited at large.

A

TABLE

OF

PRINCIPAL MATTERS

CONTAINED IN THE

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6 It is ſufficient that the perſon who does the fact is encouraged by the abetment *ibid.*
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13 To abet another in treſpaſs will not make the abettor a principal if a felony be committed *ibid.* ſ. 9
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5 Judgment of abjuration was an attainder of itſelf Ch. 48. ſ. 24
6 No man can be attainted but by ſentence, or by outlawry, or by abjuration ſ. 25

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ABBREVIATIONS.

All law proceedings ſhall be in the Engliſh language, in words at length, and not abbreviated, except in expreſſing numbers by figures, or in ſuch abbreviations as are moſt commonly uſed

ACCESSARY and PRINCIPAL.

1 By ſtat. Weſtm. 1. c. 15. thoſe who are accuſed of the receipt of thieves or felons, or of commandment, or of force, or

or of aid of felony done, *ſhall be repleviſable* *Page* 159 ſ. 53
2 And acceſſaries by any other means than thoſe mentioned in the ſtatute are within the equity of it *ibid*
3 All acceſſaries are bailable till the principal be convicted or attainted, if they be of good fame and reputation *ibid.*
4 And afterwards upon their pleading to the indictment *ibid.*
5 But acceſſaries *notoriouſly guilty* of crimes excluded from clergy ſhall not be bailed *ibid.*
6 By 31 Car. 2. c. 2. no perſons charged, *on ſuſpicion*, as acceſſaries to petit treaſon or felony ſhall be removed or bailed in any other manner than before 160
7 An acceſſary charged *on an appeal* with his principal ſhall have damages from the appellant, if the principal be acquitted 287 ſ. 142
8 The ſame man may be charged as PRINCIPAL AND ACCESSARY in the ſame indictment or appeal 439 c. 29
9 A man may be acceſſary after the fact, by receiving the principal, or one who was an acceſſary before *ibid.* ſ. 1
10 A man may be acceſſary *before* by procuring another to be acceſſary *before* to the principal *ibid.*
11 There can be no acceſſaries in high treaſon or treſpaſs ſ. 2
12 Whatever will make an *acceſſary before in felony* will make him a principal in treaſon or treſpaſs 439, 440
13 If one, by command of another, commit treſpaſs, the perſon commanding is as guilty as if *he* had actually done it 440
14 And being a principal may be tried and found guilty before the actual perpetrator *ibid.*
15 But in *his progreſs to conviction* he ought to be conſidered in the light of an acceſſary only (N) 1
16 The ſame receipt which will make a man *acceſſary after the fact* in felony will make him a principal in high treaſon 440 ſ. 3
17 Whoever agrees to a treſpaſs *on goods, done to his own uſe*, is a principal offender—but not in a treſpaſs *on the perſon* *ibid.* ſ. 4
18 Nor ſhall a receipt of a man who has committed an *inferior* treſpaſs, make ſuch receiver a principal *Page* 440 ſ. 4
19 And as he cannot be puniſhed as principal he cannot be puniſhed as acceſſary; for he muſt be puniſhed as principal or not at all 440, 441
20 But *perhaps* he may be puniſhed for contempt of law in ſcreening ſuch an offender from legal proceſs 441
21 In petit treaſon, and in all felonies of death, there may be acceſſaries both before and after, who muſt be proceeded againſt as ſuch, and not as principals *ibid.* ſ. 5
22 There may be acceſſaries before but not after the fact in *maybem* *ibid.*
23 *Quere.* If there can be *any* acceſſaries in *præmunire* *ibid.* ſ. 6
24 All perſons who aſſemble with intent to commit felony or treſpaſs, and abet one another *till* the execution of that or any other felony; and all who are *actually preſent* and abetting at the execution thereof, are (contrary to ancient opinions) principals in the higheſt degree ſ. 7
25 And in homicide, if there were malice in the abettor and none in the perſon who actually did the fact, the abettor would be guilty of murder, and the actual perpetrator of manſlaughter only 442
26 It is not eſſential to the making an abettor a principal, that the perſon on whom the felony is committed ſhould be under any terror from, or know of, the abetment ſ. 8
27 It is ſufficient that the perſon who does the fact is encouraged in it by *the hope* of aſſiſtance from the abettor, whether he be within view of the fact or not *ibid.*
28 Therefore in a combination in breach of the peace, with a reſolution to reſiſt all oppoſers, if a murder enſue, all are equally principals, though at the time of the fact, ſome of them be out of view *ibid.*
29 So if a man eſcapes from one party of ſuch a combination and is robbed by another party of it, they are all principals *ibid.*

30 So in burglary thoſe are equally principals who watch at a convenient diſtance from the houſe while the fact is committing *Page* 442 ſ. 8

31 But in doing *a lawful act*, if murder enſues, the companions of the perpetrator ſhall neither be eſteemed principals nor acceſſaries ſ. 9

32 So alſo where a bare treſpaſs is committed, and one of the company be guilty of larceny, the reſt ſhall not be included in his guilt *ibid.*

33 Nor ſhall a perſon who is barely preſent when a felony is committed, *without taking any part or ſhewing aſſent therein*, be conſidered as either principal or acceſſary ſ. 10

34 But they may be puniſhed for the miſdemeanor 443

35 Wherever a man procures a felony to be committed, and is abſent at the time, *and no other perſon but himſelf can be adjudged a principal in it*, he ſhall be eſteemed as much a principal as if he were preſent ſ. 11

36 No one can be puniſhed *as a felon* but either as principal or as acceſſary; and where the procurer of a felony can not be puniſhed as an acceſſary, *becauſe there is no other to whom he can be an acceſſary*, he muſt be puniſhed as a principal, or not at all *ibid.*

37 If a man perſuade another to drink poiſon, and he drink it in his abſence, or if he deliver it to a third perſon who adminiſters it innocently in his abſence; or if he incite a madman to kill another, and he does it in his abſence, yet the perſuader, deliverer, or inciter, is a principal as much as if he had been preſent when it was done *ibid.*

38 And ſo alſo are thoſe who were *preſent* when the poiſon was infuſed, conſenting to the deſign *ibid.*

39 But abettors *abſent* at the infuſion are acceſſaries only *ibid*

40 And if the perſon adminiſtring, know it to be poiſon, he is a principal, and the perſon who knowingly gave it to him to be adminiſtered, is an acceſſary *ibid.*

41 By 3 Hen. 7. c. 2. all who are concerned in the felony of forcibly taking away a woman, ſhall be deemed principals *ibid.* ſ. 12

42 Where a ſtatute ordains, that thoſe guilty *of the offence* ſhall be traitors or felons, it makes, *by neceſſary implication*, all the procurers and abettors of it, principals or acceſſaries before, upon the ſame circumſtances which will make them ſuch at common law *Page* 444

43 Therefore thoſe who *procure* the clipping of the coin, ſo as to make them principals at common law, ſhall alſo be adjudged principal under the ſtatute *ibid.*

44 So alſo thoſe who abet petit treaſon, rape, buggery, or any felony *by ſtatute*, ſhall be adjudged principals if *preſent*, and acceſſaries if *abſent* in ſame manner as in felonies at common law, unleſs the ſtatute otherwiſe expreſsly provide *ibid.*

45 Where a ſtatute makes any *offence* treaſon or felony, it involves the receiver of the offender in the ſame guilt with himſelf, in the ſame manner as in treaſon and felony at common law, unleſs there is ſome expreſs proviſion to the contrary ſ. 14

46 The knowing receiver of an offender may properly be ſaid to be a partaker in his guilt *ibid.*

47 And the crime is determined by the rules of law in other caſes of like nature 444, 445

48 A ſtatute by expreſſing acceſſaries before, does not neceſſarily exclude acceſſaries after *ibid.*

49 It is an uncontroverted rule of law, that THE OFFENCE OF the acceſſary can never riſe higher than that of the principal 445 ſ. 15

50 Therefore if a wife or ſervant cauſe a ſtranger to murder the huſband or maſter, *and are abſent*, they are not acceſſaries to the petit treaſon, but to the murder only; becauſe the offence of the principal is but murder *ibid.*

51 But if preſent, they will be guilty of the treaſon, and the ſtranger of murder *ibid.*

52 AN ACCESSARY BEFORE THE FACT, is he who commands, or perhaps aſſents to, if ſuch aſſent abet, the felonious deſign of another, but is ſo far abſent when he actually commits it, that the perpetrator could not hope for any aſſiſtance

fiſtance from him in commiting the intended felony, or in any other which ſhall happen in conſequence of it *Page* 445 ſ. 16

53 But if ſuch abettor expreſsly retract and countermand his counſel or aſſent, before the felony is actually committed, he ſhall not be conſidered an acceſſary to it *ibid.*

54 And in the indictment he need not be eſpecially charged, but only *quod felonicè, &c. abettavit, incitavit et procuravit, &c.* ſ. 17.

55 And the ſame general allegation is ſufficient in ſetting forth the *aid given to a felon* by thoſe who are principals by being preſent at a felony, and alſo as to acceſſaries after 446

56 If a man adviſe a woman to deſtroy a child *enſient*, and after its birth ſhe does it in purſuance of ſuch advice, he is an acceſſary 446 ſ. 18

57 If one command another to beat a man, and he beat him *accordingly* in ſuch a manner that he dies thereof, the commander is acceſſary before to the death *ibid.*

58 If one command another to rob or burn the houſe of a man, and in *ſo doing* he kill him, or burn the houſe of another, the commander is as much an acceſſary to the ſubſequent felony, as to that which he directly commanded *ibid.*

59 So if I command a man to rob another, and he kill him in the attempt without robbing him, I am an acceſſary *ibid.*

60 But if I direct A. to poiſon B. but B. gives part of the poiſon to C. I am not an acceſſary to the death of C. *ibid.*

61 And *quere*, if upon any unlawful act commanded by another, and executed *purſuant* to ſuch command, and a felony enſues, whether the commander is not acceſſary thereto ſ. 19

62 If the felony committed be ſubſtantially the ſame with the felony commanded, variance only in circumſtance as of time, place, &c. the commander is certainly acceſſary ſ. 20

63 But if the command be to commit one kind of felony, and the perſon commanded commit a felony of quite a different nature, the commander is not an acceſſary, becauſe the act done ſubſtantially varies from that commanded *Page* 447 ſ. 21

64 Yet if the perſon meaning to execute the felony commanded, and under a miſtake commit a different felony, in this caſe the commander is acceſſary ſ. 22

65 Whoever conceals a felony intended, is guilty of miſpriſion, but is not an acceſſary ſ. 23

66 No one can be puniſhed as acceſſary to homicide *per infortunium* or *ſe defendendo*, becauſe they are not *felonies* ſ. 24

67 Therefore, on an indictment for murder, if the principal be found guilty only *per infortunium*, &c. the acceſſaries muſt be diſcharged of courſe *ibid.*

68 So alſo acceſſaries before, where the principal is found guilty of manſlaughter 448

69 Before 11 & 12 Will. 3. c. 7. acceſſaries to piracy were not within 28 Hen. 8. ſ. 25

70 Any aſſiſtance given to a known felon, ſo as to intercept the ends of juſtice, will make the offender an acceſſary after the fact 448 ſ. 26

71 Inſtances given of this effect *ibid.*

72 Whether reſcuing, ſuffering the eſcape, or preventing the apprehenſion of a felon, will make an acceſſary after 448 ſ. 27. p. 188

73 Whether the bare receiving of a felon is ſufficient for this purpoſe 449

74 It is ſaid, relieving by money or victuals, without receiving, will conſtitute an acceſſary after, eſpecially if it prevents his being taken *ibid.* ſ. 28.

75 Receiving a felon under bail will not make an acceſſary; for the trial is not hindered by it ſ. 29

76 Soliciting the releaſe of a felon, teaching him to read, labouring the king's witneſſes, ſuffering his eſcape without arreſting him, or barely concealing his felony, are not acts which will make an acceſſary after 450

77 Nor at common law receiving the ſtolen goods, nor retaking ſtolen goods not

not to proſecute, nor taking any other reward, unleſs the offender *received the thief* *Page* 450 ſ. 30

78 But by 3 & 4 Will. and Mary, c. 9. and 5 Ann. c. 31. receivers of ſtolen goods ſhall be deemed acceſſaries after *ibid.*

79 By 1 Ann. c. 9. ſuch offenders may be proſecuted *for a miſdemeanor* before the principal *is convicted* *ibid.*

80 Whether the receipt of a felon pardoned, but liable to an appeal, will make an acceſſary ſ. 31.

81 The receiver muſt have notice, either expreſs or implied, of the felony ſ. 32

82 How far this notice ſhall be implied 451 ſ. 33

83 A wife cannot be an acceſſary by any receipt of her huſband ſ. 34

84 If a wife *procure* her huſband to commit felony, it makes her an acceſſary before *ibid.*

85 No other relation but man and wife will exempt the receiver from being an acceſſary *ibid.*

86 The reception of one who becomes a felon *ex poſt facto*, will not make an acceſſary although the cauſe of the felony be committed before 451 ſ. 35

87 If the principal be acquitted, the acceſſary ſhall not be arraigned 452 ſ. 36

88 The *exigent* ſhall not be awarded againſt the acceſſary, until the principal be attainted ſ. 38

89 The attainder of the principal at the king's ſuit will not help the trial of an acceſſary in an appeal ſ. 39

90 The attainder of the principal in one felony will not affect an acceſſary to another *ibid.*

91 But an erroneous attainder of the principal, while unreverſed, will let in the trial of the acceſſary to the ſame felony ſ. 40

92 But the reverſal of the attainder of the principal *ipſo facto* reverſes the attainder of the acceſſary *ibid.*

93 Where the attainder of the principal is prevented by his death, &c. &c. &c. the acceſſary ſhall not be arraigned 453 ſ. 41

94 But after the principal is attainted, neither his death nor any other ſubſequent event will avail the acceſſary *Page* 453 ſ. 42

95 By 1 Ann. c. 9. where any principal ſhall be convicted, or ſtand mute, or challenge above 20, the acceſſary before and after may be proceeded againſt, though the principal be afterwards admitted to clergy, pardoned, or otherwiſe delivered before attainder *ibid.* ſ. 43

96 Receivers of ſtolen goods may be proſecuted for a miſdemeanor though the principal be not convicted 454

97 But this ſhall exempt the offender from puniſhment as acceſſary, if the principal ſhall be *afterwards convicted* *ibid.*

98 By 5 Ann. c. 31. if any ſuch principal *cannot be taken*, ſuch receiver may be proſecuted *ibid.*

99 It is in the election of the proſecutor to indict for the miſdemeanor immediately, or wait for the trial, &c. of the principal, and then proceed for the felony *ibid.*

100 But on a trial for the miſdemeanor, reaſonable evidence muſt be given that the principal could not be taken *ibid.*

101 By 22 Geo. 3. c. 58. where the principal has not been convicted of grand larceny, or ſome greater offence, receivers of any goods except lead, iron, copper, braſs, bell-metal, and ſolder, may be proſecuted for a miſdemeanor, although the principal be not convicted, *and whether he be amenable to juſtice or not* 454, 455

102 *Quere* if by the common law the acceſſary may not be arraigned, though he cannot be tried before the principal be convicted, unleſs he deſires it himſelf 455 ſ. 45

103 Whether a perſon charged as acceſſary to more than one principal may be tried before all of them have appeared ſ. 46

104 If there be ſeveral principals, and a perſon be charged as acceſſary to one of them only, he may be tried though *the other* principals do not appear 456

105 If the principal and acceſſary appear, and plead, they may be both tried by the ſame inqueſt ſ. 47

106 The

106 The guilt of the principal must be first established *Page* 456 f. 47
107 If the principal plead in bar, the accessary need not answer till it is determined *ibid.*
108 The accessary may enter into the full defence of his principal where they are tried together *ibid.* (N)4
109 If the accessary be tried alone, and it shall *manifestly* appear that the principal was not guilty, he shall be discharged *ibid.*
110 Whether *the bare production* of the record of the conviction of the principal is sufficient proof to put the accessary upon his defence *ibid.*
111 In what manner the accessary shall be tried where the offence arises in a different county from that of the principal 456, 457
112 By 2 & 3 Edw. 6. c. 24. *an appeal for murder* may be brought against both *principals and accessaries* in the county where the party shall die 457 f. 49
113 An indictment for murder or *felony* may be brought against accessaries in the county where *they* commit the offence 457, 458
114 And as a ground for proceeding, the court shall write to the county where the principal was tried, for a certificate of the fate of such principal 458
115 On the trial of an accessary on this statute, the indictment must expressly recite that the principal did the felony in the other county 458 f. 51
116 The court of king's bench and the court of the lord high steward are within the provision of the statute of Edw. 6. although not named therein: The reason of it 458, 459
117 In what *form* the justices shall write for the certificate of the principal's attainder f. 53
118 In what manner, and under what circumstances, it is advisable for the king's bench to send *for the record itself* relating to the principal by *special writ* f. 54
119 The probable consequences of removing it by *certiorari* *ibid.*
120 By 2 Geo. 2. c. 21. where a person shall be stricken or poisoned at sea, or abroad, and die in England, and *è converso*, principals and accessaries may be tried in the county where either the stroke, poisoning, or death shall happen *Page* 460
121 A statute excluding principals from clergy doth not thereby exclude the accessaries before or after 480 f. 26
122 Nor doth a statute excluding accessaries thereby exclude principals *ibid.* & 487
123 Where a statute excludes those who shall *be found guilty*, &c. accessaries are not included *ibid.*
124 For the cases in which accessaries both before and after are excluded from the benefit of clergy, *vide* the Index to the First Book, "felonies without clergy," and 488 to 503
125 By 3 Hen. 7. c. 1. a principal or accessary acquitted of murder on indictment, may be detained till the year and day be passed 151

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1 How justices of gaol-delivery may receive an appeal against accomplices out of prison 32 f. 5
2 In analogy to the law of approvement, an accomplice may entitle himself to a recommendation to mercy by making a confession, and being admitted an evidence for the crown 541
3 But an accomplice giving evidence is not entitled to a pardon of right *ibid.*
4 An accomplice may be admitted as an evidence, notwithstanding he has confessed himself guilty of the same crime, if he have not been *indicted* for it 608
5 Accomplices *indicted* are good witnesses for the king until they are *convicted* 609
6 But the unsupported evidence of accomplices is not sufficient to convict a prisoner *ibid.*
7 Whether the evidence of an accomplice should be *received* till some *unpolluted* evidence has been given to affect the prisoner *ibid.*

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An appeal of mayhem may be barred either by arbitrament, or an accord with satisfaction executed *Page* 237 ſ. 24

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1 When a perſon is brought before a juſtice of peace upon an accuſation of treaſon or felony, he muſt be either bailed or committed, unleſs no crime appear, or the ſuſpicion be groundleſs 140
2 An indictment is an accuſation at the ſuit of the king 299
3 The number of *accuſers* neceſſary to high treaſon 363 to 367

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1 By the common law no addition in an appeal was neceſſary except the chriſtian and ſurname, unleſs the party was knighted or of higher degree 270 ſ. 104
2 In which caſe the title was to be added to the names *ibid.*
3 But of the degree of nobility the title ought to ſupply the place of the ſurname *Page* 270 ſ. 104
4 But by 1 Edw. 6. c. 7. if any plaintiff, pending any action, ſhall be made noble, or a biſhop, knight, juſtice, or ſerjeant, the ſuit ſhall not abate for want of the proper addition *ibid.*
5 The dignity of a baronet is not within this ſtatute *ibid.*
6 By 1 Hen. 5. c. 5. in every original writ of actions perſonal appeals and indictments, in which the exigent ſhall be awarded, additions ſhall be made to the names of the defendants, of their eſtate, or degree, or myſtery, and of their terms, places, and counties, or otherwiſe all outlawry thereon ſhall be void, and the proceſs abated 270, 271
7 Where there are ſeveral defendants it is ſafeſt to apply the additions to each of their names ſ. 106
8 Where a father has the ſame name and addition with a defendant ſon, the word *puiſne* muſt be added to the other additions *ibid.*
9 But where a father is defendant there is no need of the ſur-addition *ſigne* *ibid.*
10 Nor is *puiſne* a neceſſary addition to a ſon in *cuſtodia mareſchalli*, unleſs the father be ſo likewiſe *ibid.*
11 In the addition OF THE ESTATE OR DEGREE, that which the defendant hath at the time of the writ muſt be ſhewn ſ. 107
12 But in the addition of place "late of ſuch a place," is ſufficient *ibid.*
13 If the antecedent to which the addition of degree, &c. refers is not the defendant, it is inſufficient ſ. 108
14 An Iriſh biſhop may be deſcribed by his Iriſh biſhoprick 109
15 But a deſcription of temporal dignity in Ireland, or any other nation beſides our own, is inſufficient, becauſe no ſuch dignity can be higher here than the title eſquire 272
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17 But *quære* if a degree in either univerſity be ſo *ibid.*
18 A doctor in divinity may have [illegible]

addition of clerk *Page* 272 ſ. 110
19 The general rule is, that the moſt worthy addition ſhall be uſed *ibid.*
20 Yeoman and labourer are good additions *for a man* ſ. 111
21 So widow, ſingle woman, wife, ſpinſter, are good additions for women *ibid.*
22 But burgeſs, citizen, ſervant, are too general, and not good additions either to a man or woman ſ. 112
23 How the MYSTERY of the defendant ſhall be added to his name ſ. 113
24 Myſtery includes all lawful arts, trades or occupations; and a defendant, under the degree of gentleman, having divers, may be named by any of them ſ. 113
25 Good additions of this kind enumerated 272, 273
26 Maintainer, extortioner, vagabond, and ſuch like, are inſufficient 273 ſ. 115
27 The additions of farmer, inſtead of huſbandman, or chamberlain, butler, groom, &c. *ſeem* inſufficient ſ. 115, 116
28 But hoſtler is a good addition for one who keeps an inn, &c. though he may be ſued, &c. by the addition of labourer ſ. 117
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30 If a defendant be named of A. late of B. it is ſufficient to prove either addition ſ. 119
31 It is ſufficient to name a defendant of a city, which is a county of itſelf, without more ſ. 120
32 But not by words which import reſidence in the town only 274
33 And if the town be not a county of itſelf, the addition muſt ſhew in what county it lies *ibid.*
34 So if a man be named of a pariſh which contains more towns, the town muſt be ſhewn *ibid.*
35 But it ſhall be intended to contain only one town, unleſs the contrary be ſhewn *ibid.*
36 If there be two towns in a county of the ſame principal name, but *differently diſtinguiſhed*, and the addition be only of the principal, the defendant may plead there are two towns of that name ſ. 121
37 If a defendant live in a hamlet of a different name to the town, the hamlet ſhould be named *Page* 122
38 If a defendant live in a place known by a ſpecial name, out of any town or hamlet, he may be well named of that place 123
39 The habitation of the wife is implied in the addition of the huſband 275
40 How a DEFECTIVE ADDITION MAY BE CURED ſ. 125
41 If the defendant appear and plead, he cannot afterwards take advantage of the defect of the addition ſ. 125
42 And *quere*, if the bare appearance does not cure this defect *ibid.*
43 It ſeems from the caſe of Reve v. Trundal, that it will not *ibid.*
44 The ſtatute 1 Hen. 5. c. 5. concerning additions extends as well to indictments as appeals 328 ſ. 70
45 It is a fatal fault to apply ſuch addition to the name which comes under the *alias dictus* only, and not to the firſt name *ibid.*
46 But it is not material, whether any name be put to the *alias dictus* or not *ibid.*
47 But to omit the addition to the firſt name of one defendant, makes the indictment vicious as to all 329
48 The king cannot give any *addition* of juriſdiction to an ancient court 2 ſ. 4.

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2 As where *pro hac vice*; but where *quamdiu nobis placuerit* it does not neceſſarily require any adjournment *ibid.* & 24 ſ. 14
3 An adjournment without the authority of the majority of the commiſſioners is void 22 ſ. 7
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2 But it is not material whether any addition be put to the name which comes under the *alias dictus* or not *ibid.*
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2 Appeals are excepted out of this ſtatute *ibid.*
3 No criminal proſecution whatſoever is within this or any other of *the ſtatutes* of amendment *ibid.* & 347
4 Therefore no defects in appeals are amendable except by the common law *ibid.*
5 No writ or bill of appeal is amendable for falſe Latin, omiſſion of a word or letter, or other defect or variance from the proper legal form where the king is a party 278
6 But *quære* if ſuch defects ariſe from the negligence of the curſiter or other officer *ibid.*
7 A miſpriſion of the count, either in appeal or other action before it is entered on the record *ibid.*
8 A miſtake in laying the fact in an improper viſne has been amended *ibid.*
9 And after the count is entered, a variance in it from the writ, if a mere miſpriſion, may be amended by it *ibid.*
10 In what caſes criminal proceedings may be amended by *common law* 347

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1 Appeals are either by an innocent perſon, or by an approver *Page* 232
2 An appeal by an innocent perſon is the party's private action, for the crown in reſpect of the publick offence *ibid.*
3 An appeal may be brought either by writ or by bill *ibid.*
4 The writ is original out of chancery, and returnable in the king's bench only ſ. 2
5 The bill muſt contain greater certainty than the writ, and is in lieu of both writ and declaration ſ. 3
6 An appeal may be ſued by bill in the king's bench againſt any one *in cuſtodia mareſchalli* ſ. 4.
7 If the appellee be arraigned and tried the ſame term, the bill need not be filed *ibid.*
8 If he appear upon a void, or a voidable writ, he may be committed and proceeded againſt by bill *ibid.*
9 A bill of appeal may be commenced before juſtices in eyre 233 ſ. 5
10 Or before juſtices ſpecially aſſigned ſ. 6
11 Juſtices of gaol-delivery may receive a bill of appeal againſt a priſoner in the gaol they are commiſſioned to deliver, or whom they have *bailed*, not *mainprized* ſ. 7
12 So if part of the accomplices only be in the gaol, they may try them on the bill, and afterwards remove it into the king's bench to proceed againſt the others *ibid.*
13 And juſtices of aſſize may receive bills in the ſame manner as juſtices of gaol-delivery *ibid.*
14 But *it ſeems* juſtices of peace have no ſuch power ſ. 9
15 But an appeal by bill may be commenced before the ſheriff or coroner, and removed by *certiorari* into the king's bench 234 ſ. 10
16 But then the appellee ſhall be arraigned *de novo*, not declared againſt *in cuſtodia mareſchalli*, and he may ſue out a *ſcire facias* for the appellant to appear, if he does not appear *gratis*, and on default nonſuit him *ibid.* (N)
17 By

17 By 1 Hen. 4. c. 14. appeals of things done out of the realm may be tried before the conſtable and marſhal *Page* 234 ſ. 11
18 Therefore the wife or heir may appeal before them for death in a foreign realm by the king's ſubjects ſ. 12
19 But as they proceed by the civil law, their ſentence cannot corrupt the blood *ibid.*
20 If a man die in England of a wound received abroad, he may by force of 1 Hen. 4. be appealed before the conſtable and marſhal ſ. 13
21 And now by 2 Geo. 2. c. 21. it may be tried by the common law 235
22 But by ſaid 1 Hen. 4. no appeals ſhall be purſued in parliament 235 ſ. 14
23 Appeals are either capital or not capital *ibid.*
24 But appeals *de pace, de plagis, de impriſonamento,* and *mayhem* are now become obſolete ſ. 15
25 An appeal of *mayhem* cannot be maintained unleſs the injury is done with an evil intention, but the offender is liable in damages *ibid.*
26 The word *mayhemiavit* eſſential in every appeal of mayhem 236
27 And the offence muſt be laid to be done *felonicè* 236 ſ. 18
28 The party hurt may proceed againſt abettors either as principals or as acceſſaries ſ. 19
29 But *mayhem* and battery cannot be joined in the ſame writ ſ. 20
30 Nor can an appeal of *mayhem* be pleaded in bar to treſpaſs for the battery ſ. 22
31 But a recovery in treſpaſs may be pleaded in bar to the appeal, unleſs the maim has been occaſioned by reaſon of the wound ſubſequent to the action *ibid.*
32 *Son aſſault demeſne* a good bar to appeal of *mayhem* ſ. 23
33 A maim laid in one place may be juſtified in another *ibid.*
34 Defence of *poſſeſſions* is no juſtification in maim *ibid.*
35 And the *ſon aſſault* and juſtification muſt be ſpecially pleaded *ibid.*
36 An appeal of *mayhem* may be barred by a plea of accord and ſatisfaction *Page* 236 ſ. 24
37 A *general releaſe* may be pleaded in bar to maim ſ. 25
38 A nonſuit in an appeal of *mayhem* may be pleaded in bar to another ſuit for the ſame offence 238
39 But it cannot be pleaded in bar to an action for the battery which accompanied the maim ſ. 26
40 And the defendant muſt have appeared, or the nonſuit will be no bar to the *maim* itſelf *ibid.*
41 An appeal of *maim* may be tried by *the view* ſ. 27
42 And if doubtful they may impannel able phyſicians to inform them *ibid.*
43 But the court cannot proceed *upon view* except the defendant pray it *ibid.*
44 And even then they may try it by jury, and order the jurors to take the view *ibid.*
45 Therefore the plaintiff muſt *perſonally* appear; and if decided on view, it is peremptory 239
46 The defendant may wage battle in appeal of maim ſ. 28
47 Capital APPEALS are either OF TREASON OR FELONY 239
48 Appeals of treaſon are taken away from the common law courts of the realm; they may be brought before the conſtable and marſhall ſ. 29
49 APPEALS of FELONY are either of death, larceny, rape, or arſon 240
50 WHO MAY BRING APPEAL. ſ. 30
51 Infancy, age, or imbecillity, is no objection *ibid.*
52 Therefore, in appeal, the parol of an infant, for nonage ſhall not demur *ibid.*
53 But he muſt proſecute by guardian, and is bound by his *laches* *ibid.*
54 But the guardian ſhall not perſevere in an appeal againſt the inclination of his ward *ibid.*
55 By *Magna Charta* a woman cannot appeal any one *for death,* except that of *her huſband.*—But ſhe may proſecute any other appeal ſ. 31
56 An ideot, a perſon deaf and dumb, one attainted of felony, an outlaw,

cannot bring *any appeal* *Page* 240, 241
57 OF AN APPEAL OF DEATH 241 ſ. 33
58 It muſt be ſued within a year and a day from the day on which *the death* happen, and not from the time *the wound* was given *ibid.*
59 Againſt the receiver of an appellee, the time ſhall be computed from the receipt *ibid.*
60 And in both caſes the day ſhall be taken from the beginning of it, and not from the preciſe minute or hour on which the death or receipt happened ſ. 34
61 An appeal is a local action, and cannot be brought in a foreign county 242 ſ. 35
62 By 2 & 3 Edw. 6. c. 24. it may be tried by *a jury of the county where the death* ſhall happen, although *the wound* may have been given in a foreign county *ibid.*
63 In an APPEAL BY A WIFE, ſhe muſt exculpate herſelf from the death, and prove the fact of marriage *ibid.* ſ. 36
64 Therefore *ne unques accouple, &c.* is a good plea, and may be tried by certificate *ibid.*
65 The appeal may alledge *inter brachia ſua interfecti et non aliter*, and then a voidable ſentence of divorce is a good plea in bar. *Sed quere* 242, 243
66 A wife may appeal notwithſtanding ſhe has forfeited her dower by her huſband's attainder for treaſon 243 ſ. 37
67 So alſo ſhe may appeal his death, although ſhe had eloped from him *ibid.*
68 If the widow marries pending her appeal, the appeal is gone ſ. 38
69 If ſhe marry after judgment, *ſhe cannot* pray execution *ibid.*
70 But in this caſe the appellee muſt obtain the king's pardon *ibid.*
71 For although he cannot be indicted, being already attainted, yet the court *ex officio*, or at *the king's demand*, may award execution *ibid.*
72 AN APPEAL BY THE HEIR cannot be brought if the deceaſed had A WIFE living, and innocent of the fact at the time of the death ſ. 39
73 But if the wife partake of the guilt, the heir may bring an appeal againſt *her*, excepting that the petit treaſon be pardoned, which pardons the murder alſo *Page* 243, 244
74 It muſt alſo be brought by the *legal heir general*; but if he alſo partake in the guilt, the next heir may bring it againſt him ſ. 40
75 Therefore a father cannot appeal for the death of his ſon, for he cannot be his heir *ibid.*
76 So none, except the wife, can appeal for the death of one attainted of felony *ibid.*
77 A *ſpecial heir*, as by borough engliſh, &c. cannot appeal for the death of his anceſtor; for it muſt be by the *general heir* *ibid.*
78 Where the eldeſt of two ſons is attainted of treaſon or felony, neither of them can appeal for the death of their father *ibid.*
79 If there be an eldeſt ſon by one venter, and a middle and a younger ſon by another venter, and the middle ſon be killed, the younger ſon, and not the eldeſt by the former venter, can alone appeal his death *ibid.*
80 Therefore a plea to an appeal by a brother; viz. *that there is an elder brother*, is not good, except it ſhews him to be an elder brother of *the whole blood* *ibid.* ſ. 40
81 An appeal by an heir who dies pending the ſuit, cannot be continued by the next heir ſ. 41
82 But if the firſt heir die *within the year and day*, it is ſaid the appeal may be commenced by the next heir; *but the latter opinion is otherwiſe* *ibid.*
83 And *quere*, whether a *preſumptive heir* may not bring an appeal, if the right to do it has never before *veſted* 245
84 By *Magna Charta* none but the general heir *male* ſhall bring an appeal, except a wife in the caſe of her huſband ſ. 42
85 And if an appeal be brought by any other, the judges are bound, *ex officio*, to abate the writ *ibid.*
86 By the common law an heir female might have appealed for the death of her

her anceſtor, as well as an heir male *Page* 245

87 And now the heir male, *deriving through a female*, may bring an appeal *ibid.*

88 In an appeal by an heir, it muſt appear by the writ, in what manner he is ſo 246 ſ. 43

89 Of AN APPEAL OF LARCENY 246

90 The appellant, in larceny, need not prove an *abſolute* property in the goods ſtolen; if he has a *ſpecial* property in them it is ſufficient 246 ſ. 44

91 Therefore the appeal may be either *general* or *ſpecial*, at the option of the appellant *ibid.*

92 But the *bare charge* of goods, without the *poſſeſſion* of them, is not ſuch a property on which *this* appeal can be maintained *ibid.*

93 How far a *villein* may appeal againſt his lord *ibid.*

94 The maſter and ſervant may ſeparately appeal for the larceny of goods from the ſervant, they being the property of the maſter; but both cannot appeal for the ſame offence ſ. 45

95 The ſurvivor of joint property may bring an appeal of larceny 247

96 So alſo this appeal may be brought againſt the thief who ſteals my goods, from the perſon who ſtole them from me *ibid.*

97 But not if the firſt taker is a mere treſpaſſer, claiming title to the goods he takes *ibid.*

98 Neither can an executor appeal for larceny committed on his teſtator *ibid.*

99 An appeal of larceny may be brought as well againſt an infant, as an adult; and alſo againſt *a feme covert* without naming her huſband ſ. 46

100 An appeal of larceny muſt be brought in the county where the felony is committed ſ. 47

101 Robbery in one county and the goods taken into another, an appeal may be brought in either; in the firſt for the robbery, in the ſecond for larceny *ibid.*

102 Therefore if one take me from the county of A. to B. and there rob me, the appeal muſt be in the county of B. *ibid.*

103 But if *by menace* goods are brought from one county to another, perhaps the appeal may be brought in either *Page* 247 ſ. 47

104 An appeal of larceny is not within the ſtatute of Gloceſter reſpecting being brought within a year and a day; but, *on freſh ſuit*, may brought at any time 248

105 OF RESTITUTION OF GOODS 248 ſ. 49

106 Stolen goods not ſeized by the crown or lord of a franchiſe, may be retaken, *upon freſh ſuit*, at any time, by the owner, without proſecuting his appeal; but not after ſuch ſeizure *ibid.*

107 Anciently *freſh ſuit* implied, that hue and cry ſhould be made; but now, if the party is reaſonably diligent to apprehend the offender, it is ſufficient 249

108 The jury who try the offence, are judges of the *freſh ſuit*, and upon their verdict the court may award reſtitution ſ. 52

109 And where the appellee is condemned by confeſſion, &c. without trial, the court may, by inqueſt of office, inquire of the freſh ſuit, and ſo award or withhold reſtitution *ibid.*

110 But this inqueſt is rather for the ſatisfaction of the court, than by neceſſity; for the judges may award a writ of reſtitution in their diſcretion *ibid.*

111 Anciently every appellant muſt have *attainted* the appellee before he was *intitled* to reſtitution ſ. 53

112 But now if *one* appellant *attaint*, an inqueſt ſhall enquire of the *freſh ſuit* made by other appellants, and reſtitution ſhall be awarded to them accordingly, without their being put to attaint the appellee *ibid.*

113 And the ſame may be done if the appellee die in priſon 250

114 And perhaps the ſame ſhall be done, if the appellee be outlawed, or have benefit of clergy before conviction, or ſtand mute, or challenge above 20, or break priſon, &c. *ibid.*

115 On an appeal againſt two, and one is acquitted, yet the appellant ſhall have reſtitution *ibid.*

116 If both were acquitted the appellant forfeited his goods to the king for his falſe appeal. But *quere*, if the goods are not ſeized as waived, &c. *Page* 250

117 But the appellants *title to reſtitution* ſhall not be barred by any ſeizure of the goods, as waifs, eſtrays, the goods of felons, &c. ſ. 54

118 Nor even by a ſale of them *bona fide* made in market overt *ibid.*

119 Nor ſhall *the proſecutor of an indictment* be barred of his reſtitution by any ſuch ſeizure or ſale in market overt, &c. *ibid.*

120 By 1 Jac. 1. c. 21. the ſale of ſtolen goods to any pawn-broker within two miles of London ſhall not change the property *ibid.*

121 By 21 Hen. 8. c. 11. the proſecutors of indictments for goods ſtolen, or obtained by any larceny, are *entitled to writs of reſtitution* from the court, in the ſame manner as if the felon had been attainted by appeal 257

122 But awarding *writs of reſtitution* is now obſolete, and the judges will order a redelivery of the property in court *ibid.* (N) 1

123 Or the owner may bring *trover*, either for the identical goods ſtolen, or for the produce of them if the identity be changed *ibid.* (N) 2

124 By 31 Eliz. c. 12. ſtolen horſes ſold in market overt ſhall be reſtored, upon payment of the price ſold for, *without proſecution* (N) 3

125 In other caſes if it ſhall appear that the owner has neglected thoſe endeavours to proſecute the felon, which the ends of public juſtice require, the court may refuſe to grant reſtitution 251, 252

126 The appellant ſhall have only ſuch goods reſtored as are mentioned in the appeal 252 ſ. 57

127 And if the owner has retaken his goods, and not included the whole of them in the appeal, it is queſtioned whether thoſe left out are not confiſcated, &c. *ibid.*

128 Of AN APPEAL OF RAPE 252

129 How, and by whom this appeal might have been brought at common law, before the ſtatute of Weſtminſter 1. c. 13. reduced the crime to a treſpaſs *Page* 252, 253

130 But the crime is made felony by ſtat. Weſt. 2. c. 34. which impliedly reſtores the appeal; and therefore they muſt now conclude *contra formam ſtatuti* ſ. 60

131 By 6 Rich. 2. c. 6. if the woman, after rape, conſent, both parties are diſabled from inheriting, taking dower, &c. and the next of blood ſhall have title; and the huſband, father, or next of blood, may ſue and convict the offenders, of life and member, &c. 253, 254

132 To an appeal by a huſband on this act, for the rape of his wife, it may be pleaded they were not lawfully married, &c. ſ. 62

133 The conſent of the woman need not be averred ſ. 63

134 If an orphan be raviſhed by her next of kin, the next of kin to the raviſher ſhall have the appeal ſ. 64

135 The next heir at the time of the rape ſhall have the appeal, and the lands, &c. in excluſion to any *ex poſt facto* heir ſ. 65

136 The next remainder man, or reverſioner, ſhall have the woman's land, provided he be of kin to her, albeit another be *nearer* of kin; but not the appeal in excluſion to the *next* of kin 255 ſ. 66

137 It muſt be ſhewn in *what manner* the perſon ſuing for the land, is next of blood to the offender ſ. 67

138 But cohabitation, or child-bearing, are not concluſive evidence of the woman's conſent, if during the whole time ſhe be under the power of the raviſher ſ. 68

139 And *quere* whether the appeal muſt recite the ſtatute ſ. 69

140 The appeal muſt be brought in the county where the rape is committed 256 ſ. 71

141 And within proper time in the diſcretion of the court ſ. 72

142 An appeal of arſon is now obſolete ſ. 73

143 Of

143 Of PROCEEDINGS IN APPEAL *Page* 257

144 In what caſes the parties to an appeal muſt appear in perſon, or may appear by attorney or guardian ſ. 76

145 If the count in an appeal vary from the writ in a material point, it ſhall abate 258

146 If ſeveral be preſent abetting a fact, but only one actually does it, the plaintiff may declare generally againſt all as principals, or ſpecially ſetting out the manner of abetting, &c. ſ. 76

147 No circumlocution will expreſs the *words of art* deſcriptive of the offence; as *murderavit* for murder; *rapuit* in rape, *cepit* in larceny, *mayhemiavit* in maim, and *felonicè* in all felonies ſ. 77

148 An appeal of larceny muſt ſhew to whom the goods belonged; and of death who was killed; for *cujuſdam ignoti* will not do in appeals ſ. 78

149 In rape, *felonicè rapuit* is ſufficient, without the words *carnaliter cognovit*, or any words to that amount 259

150 And the ſame general manner is ſufficient in larceny, ſtating the value of the property. But in *mayhem* the particular manner of the fact muſt be ſtated *ibid.*

151 And in an APPEAL OF DEATH, all the ſpecial circumſtances of the fact muſt be ſet forth, both by common law, and the ſtatute of Glouceſter 259

152 As the part of the body in which the wound was given; and therefore that it was *circa pectus*, or in the hand, leg, or arm, &c. &c. &c. is not ſufficient either in an indictment or appeal ſ. 80

153 And where there is a ſufficient certainty, the addition of an indefinite deſcription ſhall be rejected as *ſurplus* 260

154 The length and breadth of the wound ought to be ſtated, that it may appear that it was mortal ſ. 81

155 But, deſcribing the part, and that he gave him *mortale vulnus penetrans in et per corpus*, &c. is ſufficient *ibid.*

156 The word *percuſſit*, ſhould be inſerted where the fact will bear it; but *quere*, if it be abſolutely neceſſary ſ. 82

157 So alſo in poiſoning, the count muſt aver that the party received and drank the poiſon; and this defect ſhall not be ſupplied by any implication *Page* 260 ſ. 82

158 The count ought expreſsly to ſhew that the party died of the hurt ſpecially ſet forth 261 ſ. 83

159 Therefore *qua ſuffocatione obiit*, inſtead of *de qua ſuffocatione*, &c. is erroneous *ibid.*

160 But it may alledge that he died of the *ſeveral poiſons* or wounds, they having been before particularized, without ſtating any wound or poiſon in particular *ibid.*

161 Or perhaps the ſeveral cauſes of the death may be alledged in the alternative *ibid.*

162 The particular weapon alſo with which the fact was committed muſt be ſet forth; but if the evidence vary in this reſpect it is not material ſ. 84

163 If the killing be by poiſon, drowning, ſuffocating, burning, or the like, the circumſtances muſt be alledged as ſpecially as poſſible *ibid.*

164 And an appeal cannot be ſupported by an inverſe evidence, as to the mode of killing *ibid.*

165 *Vi et armis*, are not neceſſary in appeal ſ. 85

166 An appeal by ſtat. Glouceſter, muſt declare the deed, the year, the day, the hour, the time of the king, the town, and the weapon 262

167 An omiſſion of any of theſe circumſtances is not aided by the conviction *ibid.*

168 THE HOUR was not required by the common law; and it is ſufficient to ſay, "about ſuch an hour" ſ. 87

169 If the hour and day are ſet forth againſt the principal, it is fatal to mention the day only, againſt the acceſſary *ibid.*

170 The miſtake of the hour will not be material upon the evidence *ibid.*

171 THE DAY on which the fact was done *muſt* be ſet forth ſ. 88

172 If the fact were in the night the count ſhould alledge it *in nocte ejuſdem diei* 263

173 It is not ſufficient to ſay "about ſuch

ſuch a day, or between ſuch a day and another day;" but the very day muſt be ſet forth *Page* 263
174 So it is inſufficient to alledge the fact on a feaſt day; as St. John's; without ſhewing whether it is the Baptiſt or the Evangeliſt *ibid.*
175 So it is erroneous to ſet forth the fact on an impoſſible day, as 31 June or 30 February *ibid.*
176 And the day both of *the wound* and *the death* muſt be ſet forth *ibid.*
177 It muſt alſo be alledged that "he ſtruck him *adtunc et ibidem*" *ibid.*
178 How a repugnancy in ſetting forth the day will vitiate either an indictment or appeal *ibid.*
179 A miſtake of the day will not be material upon evidence 264
180 If the allegation of the day be only *prima facie* uncertain, it may be helped by the apparent ſenſe of the context ſ. 89
181 How the day on which a principal in the ſecond degree abetted ſhall be alledged *ibid.*
182 In an appeal of death the year in which the ſtroke was given, and that in which the death happened, muſt be ſet forth ſ. 90
183 But the king's reign, in which theſe facts happened, is ſufficient without ſhewing the year of our Lord *ibid.*
184 And alledging the facts in ſuch a year of ſuch a king, is ſufficient without ſaying it was in ſuch a year of his reign *ibid.*
185 The place where the death happened, as well as that where the hurt was given, muſt be ſhewed with preciſe certainty, and free from repugnancy 265
186 A miſtake of the place is not material upon not guilty, provided the fact be proved at ſome place within the county *ibid.*
187 In appeal of death, ſome place both of the death and hurt, and in every other appeal ſome place where the fact was committed, muſt be alledged ſ. 92
188 It is ſafeſt to lay it in a town; but if done out of a town it may be laid in any other place from whence a *viſne* may come *Page* 265 ſ. 92
189 A *viſne* may come from any place, where all the inhabitants, from the ſmallneſs of its environs, may be preſumed to have ſome knowledge of the fact. &c. *ibid.*
190 Therefore a *viſne* may come from a town, ward, pariſh, hamlet, burgh, manor, caſtle, or even from a foreſt, or other place known out of a town *ibid.*
191 Where *a place* is generally alledged, the law will intend it to be a vill, unleſs the contrary appear *ibid.*
192 But if there be no ſuch town, hamlet, or place, or the fact be done in ſome vill in a foreſt, and not mentioned, it may be pleaded in abatement *ibid.*
193 So if a fact done in a vill within a pariſh containing divers vills, be alledged generally in the pariſh; or if a fact done in a city containing divers pariſhes, be alledged generally in the city, it may be pleaded in abatement *ibid.*
194 But till the contrary be ſhewn, the place ſhall be intended to contain no more than one town or pariſh, from whence a *viſne* may well come *de vicineto civitatis*, which includes a city whether it be within a county, or be a county of itſelf 266
195 But London, from its ſize, cannot be intended a place from whence a *viſne* may come, and it is uſual to ſhew the ward and pariſh in which the fact was done in ſo large a city 266
196 No *viſne* can come from the Wilds of Suſſex ſ. 93
197 But a *viſne* may come from a park *ibid.*
198 A *quere* whether a *viſne* may not come from the walk of a foreſt; it being alledged the place where the fact was done *ibid.*
199 No *viſne* can come from ſuch place if it be alledged only as a liberty *ibid.*
200 No *viſne* can come from the ſcite of a manor *ibid.*
201 An appellant muſt count againſt all, though only ſome of the appellees appear ſ. 94
202 For if he have judgment in one appeal, he ſhall not afterwards have judgment

ment againſt others, unleſs they are named therein *Page* 266 ſ. 94
203 But he may count againſt thoſe who are named whenever they ſhall appear 267
204 Appellants ſhall be NONSUITED FOR NON-APPEARANCE ſ. 95
205 By 2 Hen. 4. c. 7. if the verdict paſs againſt the plaintiff he ſhall be nonſuited *ibid.*
206 But in a verdict for manſlaughter on an appeal of murder, the appellant ſhall not be nonſuit *ibid.*
207 An appellant may be nonſuited, after ſpecial verdict or demurrer *ibid.*
208 Of ABATEMENT OF THE WRIT, vide *Abatement, Amendment.*
209 OF PLEAS IN BAR TO AN APPEAL 278
210 No ſpecial plea in juſtification of the killing ſhall be admitted in an appeal of death *ibid.*
211 In an appeal of death by a woman, it is a good plea in bar, that ſhe was never married to the deceaſed, or that ſhe is ſince married 279 ſ. 130
212 So in appeal by an heir, it may be pleaded that another perſon is heir; or that one of the defendants is the wife of the deceaſed, or that the plaintiff is illegitimate *ibid.*
213 So in appeal by brother and heir, it may be ſaid he hath an elder brother by the ſame father and mother *ibid.*
214 So alſo in any appeal of death it is a good bar, that the plaintiff hath ſlipt his time *ibid.*
215 So in appeal of robbery, that the plaintiff is a *villein* to the defendant *ibid.*
216 So in appeal of rape by man and woman, that they were never married *ibid.*
217 So in felony, that the plaintiff is an ideot, or born deaf and dumb *ibid.*
218 So alſo it is a good plea in bar to any appeal that the plaintiff is attainted of treaſon or felony, ſo long as the attainder continues *ibid.*
219 A *retraxit*, or a *nonſuit* of a former, is a bar to all ſubſequent appeals *of the ſame kind* ſ. 131
220 A nonſuit after appearance is a peremptory bar, without having declared *Page* 280
221 But the bare purchaſe of the writ, and delivering it of record to the ſheriff, is no bar, after nonſuit *ibid.*
222 And to make a nonſuit in appeal, a good bar it ought to be after an appearance in proper perſon of record *ibid.*
223 Q. if a *diſcontinuance* of one appeal is a good bar to *any* other ſ. 132
224 At any rate, the *diſcontinuance*, to make a good bar, muſt be after appearance 281
225 If an appeal by a wife abate by her marriage, or an appeal by an heir abate by his death, there can be no other appeal ſ. 133
226 And *quere* if appeal once determined cannot revive *ibid.*
227 Where there is a plaintiff not diſabled to proſecute, he ſhall not be barred in a ſecond appeal by an abatement of the firſt *ibid.*
228 One appeal is no bar to a ſubſequent appeal either againſt the ſame, or different perſons not named in the firſt, if it be for a diſtinct offence, although it be committed by or againſt the ſame perſon and property ſ. 134
229 But this muſt be underſtood where it was impoſſible to charge the offender in the firſt appeal *ibid.*
230 For after an appellant has *indulged his revenge* in one appeal, the law will diſcourage any other which his *own laches* only makes neceſſary 282
231 And if an appellant is barred againſt one appellee, he is thereby barred againſt all others *for the ſame fact* ibid.
232 A releaſe of all manner of actions, or of all actions criminal, or all actions mortal, or all actions concerning Pleas of the Crown, or of all appeals, or of all demands, will be a good bar to any *ſubſequent* appeal ſ. 135
233 But a releaſe of all actions perſonal will not bar ſuch an appeal *ibid.*
234 But no kind of releaſe will wholly diſcharge an appeal unleſs made previous to the commencement 283
235 And no releaſe ſhall diſcharge a perſon attainted, without the king's pardon *ibid.*

236 An appellant barred *by releaſe, retraxit*, or *vanquiſhment*, againſt one appellee, may continue to execution againſt the reſt *Page* 283 ſ. 136
237 But a *nonſuit*, at the trial, upon any one iſſue, will bar the appellant againſt all the appelles to the ſuit *ibid*
238 *Quere* as to the operation of a diſcontinuance in this reſpect *ibid.*
239 WHAT *ſpecial pleas in bar* are conſiſtent, and may be pleaded with the *general iſſue* ſ. 137, 138
240 A defendant may recover damages for a falſe and malicious appeal againſt the appellant or his abettors by writ of conſpiracy, or an action in the nature of ſuch writ 285
241 By ſtat. Weſt. 2. c. 12. any one bringing a falſe appeal ſhall ſuffer one year's impriſonment, and reſtore damages to the appellee, &c. and on default, his abettors, &c. ſhall be diſtrained by a judicial writ, &c. ſ. 139
242 And the court have always awarded damages upon an acquittal without direct evidence of the appeal being falſe or malicious 287
243 And this extends to appeals for felonies by any ſubſequent *ſtatute* 289
244 But no damages ſhall be given where the appellee is liable to another proſecution ſ. 142
245 An appellee acquitted upon erroneous proceſs ſhall have damages 288 ſ. 143
246 So alſo ſhall one who waives the benefit, or a releaſe, or his clergy, and is acquitted on taking trial 144
247 And where an appellee is entitled to damages, he ſhall have judgment for them without any proceſs 145
248 To what courts this power of awarding damages upon appeals ſhall extend 146
249 If a jury give too ſmall damages to an appellee, the court may increaſe them ſ. 147
250 If there be ſeveral appellees, and all of them acquitted, the damages ought to be ſeverally aſſeſſed as to every one of them 290 ſ. 148
251 A *monk* or *feme covert* appealed without the *abbot* or huſband, cannot have judgment for damages *Page* 149
252 *Abettors* are in no caſe liable to render damages where the *appellant* himſelf is not liable 291 ſ. 150
253 And unleſs the *appellant* be found by the jury to be inſufficient, the *abettors* ſhall not be inquired of 151
254 The abettors may traverſe the juries finding the appellant to be inſufficient, or that they abetted him, &c. 152
255 If the appellant be found ſufficient only as to *part of the* damages, judgment ſhall be given againſt the abettors for the whole 292. ſ. 153
256 The appellee after his acquittal may ſue for the damages by attorney 154
257 He may take out an *original writ* and *count* for greater damages againſt the abettors than given by the jury 155
258 Or he may make uſe of *judicial proceſs* by diſtreſs, as given by the ſtatute 156
259 He need not ſhew the time and place of abetment, till the abettors appear upon ſuch proceſs, which ſhewing, ſupplies the omiſſion of the jury in this reſpect 157
260 The nonſuit of an appellee either in an original writ, or proceſs againſt the abettors, whether before or after appearance, is no bar to a ſecond writ or proceſs 158
261 And wherever the appellant or his abettors are to render damages, they are alſo to be fined to the king, and impriſoned for a year 159
262 And in many, and what caſes the appellant ſhall be fined, though he is not liable to damages by ſtat. Weſt. 293
263 How far a coroner may receive a bill of appeal 83, 84
264 How a perſon *without an indictment*, upon an appeal not proſecuted 303 to 306
265 By 1 Hen. 4. c. 14. appeals of things done out of the realm ſhall be tried by the conſtable and marſhal 14 ſ. 6.
266 The marſhal cannot determine an appeal of death without the conſtable 17
267 An error in the court of the conſtable and marſhal can only be remedied

remedied by appeal to the king *Page* 18 f. 11
268 By 5 Geo. 2. c. 19. the ſeſſions on appeal may mend defects in form 68
269 In what caſes the coroner may receive an appeal 82

APPEARANCE.

1 Appearance will cure a defect in a writ for want of 15 days between the *teſte* and the return 269 f. 102
2 If an *appellee* appear, his life ſhall be conſidered as in danger, notwithſtanding any error in the proceſs, becauſe the error is cured by the appearance 288 f. 148. p. 528 f. 8
3 Whether erroneous proceſs is cured by appearance, if the defendant takes exception to the error at the time he appears 427
4 *Diſcontinuances* are ſalved by an *appearance* 428
5 Judgment on erroneous proceſs not cured by the appearance of the jurors *ibid.* f. 108
6 In what caſes the appearance of the defendant on erroneous proceſs ſhall not deprive him of any advantage 429
7 An appearance to an inſufficient addition cures the defect 275 f. 125
8 But an appearance will not cure the want of an addition, or a bad addition *ibid.*

APPRENTICE.

Apprentices under the age of fifteen who ſhall rob their maſters are excepted out of 12 Ann. c. 7. which ouſts clergy from ſtealing in a dwelling-houſe to the amount of 40 *s.* 491 f. 66

APPROVER.

1 An approver is an offender, confeſſing himſelf guilty, and *appealing* or impeaching an accomplice in his guilt 293 ch. 24
2 He is ſo called becauſe he muſt *prove his appeal* in every point, to entitle himſelf to a pardon of courſe *Page* 293 ch. 24
3 He muſt be *properly* indicted of treaſon or felony; and in priſon; he muſt confeſs the indictment, and be ſworn to reveal *all* the treaſons and felonies he knows, before the coroner enters his appeal againſt his *accomplices* in the crime he is charged with, being at the time of the appeal within the realm 294
4 A peer of the realm cannot be an approver f. 3
5 A perſon attainted or outlawed cannot approve f. 4
6 Nor an ideot, or deaf and dumb perſon, or one *non compos*, nor an infant wanting diſcretion f. 5
7 A perſon in holy orders cannot be an approver f. 7
8 But *it ſeems* a woman, or an infant who poſſeſſes ſufficient diſcretion, may approve f. 6
9 None ſhall be admitted to approve, without firſt confeſſing the crime in the indictment 295
10 *Quere* if one found guilty can be an approver f. 9
11 The court is not bound *of right* to admit any one to approve *ibid.*
12 No perſon indicted unleſs for treaſon or felony can be an approver f. 10
13 And he muſt be indicted, to enable the court to give judgment againſt him if his appeal be falſe f. 11
14 A perſon indicted and appealed for the ſame felony, ſhall not be admitted an approver.—Nor can a perſon appealed only, and not indicted, be an approver f. 12
15 The appellee of an approver cannot become an approver himſelf f. 13
16 No perſon can be approved, but of the very crime contained in the indictment 296
17 But, being bound to diſcloſe all the treaſons and felonies he knows, his accuſation of other crimes is a ground to proſecute the perſons he accuſes; but not to put them on their trials *ibid.*
18 A man may approve any perſon, within the realm, whether in the ſame or a foreign

foreign county, provided he be named of the county where he dwells *Page* 296 ſ. 15

19 But if no ſuch perſons exiſt, or are within the realm, or perhaps in the very county named in the appeal, the approver ſhall be hanged *ibid.*

20 A man may be admitted an approver before any juſtices who have power to aſſign a coroner ſ. 16

21 As the king's bench, gaol-delivery, and juſtices in eyre; but *quere* as to juſtices of *oyer and terminer* *ibid.*

22 Neither a court baron, nor juſtices of peace, nor any other ſpecial juſtices, can receive the appeal of an approver unleſs their commiſſion extend to it *ibid.*

23 And *quere* if the lord high ſteward of England can receive ſuch an appeal 297

24 On the confeſſion of an indictment of treaſon or felony, the court may in their diſcretion either award execution, or reſpite the convict till he prove his appeal ſ. 17

25 If the court admit an approver, they ſhall aſſign him a coroner to take his appeal, and to *ſwear him* to diſcover *all the treaſons and felonies he knows* ſ. 18

26 The court ought alſo to limit the proof of his appeal to a certain number of days;—and *quere* if his wages of a penny a day ſhall be allowed in the interval ſ. 19

27 During the time limited he ought to be at liberty and out of priſon; for he may diſavow an appeal obtained by *dureſs* or extortion; but if ſuch an allegation be found againſt him either by the coroner, or by an inqueſt, he ſhall be hanged ſ. 20

28 If he fail to make his appeal before the coroner, on any one of the days limited, or make the leaſt variation in repeating it to the court, on ſuch default being recorded, the approver ſhall be hanged ſ. 21

29 The coroner may award proceſs to the ſheriff againſt any appellee in the ſame county;—but *quere* if he can award the *exigent* ſ. 22

30 The king's bench, or juſtices in eyre, may award outlawry or any other proceſs againſt appellees in any county *Page* 298

31 And juſtices of gaol-delivery may do the ſame to apprehend and try them; but perhaps they cannot award outlawry in a foreign county *ibid.* & 34 ſ. 10

32 The *appellee* may either put himſelf upon his country, or wage battle with the approver ſ. 23

33 If there be never ſo many appellees, the approver muſt fight them all ſ. 24

34 But if there be ſeveral approvers, and one only be vanquiſhed, they ſhall all be condemned *ibid.*

35 *Quere* if the appeal ſhall be good againſt the other appellees *ibid.*

36 The king's pardon to either party, pending the appeal, deſtroys the approvement, and the appellee ſhall be diſcharged ſ. 25

37 Clergy is allowable, according to the nature of the offence, as well upon a conviction by appeal, as by indictment ſ. 26

38 If an approver convict all the appellees, the king *ex merito juſtitiæ* ought to pardon *as to his life*, and give him his wages (vide N° 26.) 299

39 But *quere* if he ought not to be tranſported *ibid.*

40 By 5 Hen. 4. c. 2. whoever ſolicits a charter of pardon for an approver, ſhall have his own name inſerted therein, and if the approver become a felon again, the ſuitor for the pardon ſhall forfeit 100 *l.* *ibid.*

APOTHECARY.

By 6 Will. 3. c. 4. apothecaries who have ſerved a regular apprenticeſhip are exempted from ſerving the office of conſtable in the places where they live and carry on their art 101 ſ. 45

ARBITRAMENT

Is a good bar to an appeal 236

ARGUMENT.

1 In indictments it is the ſtrict rule of law to have the ſubſtance of the fact expreſſed with preciſe certainty, and not to admit any argumentative certainty *Page* 261

2 An indictment againſt an acceſſary in one county ought expreſsly to recite that the principal did, *and not barely that he was indicted* for, the felony in another; for that is only argument 458 ſ. 51

3 The charge in an indictment muſt be laid poſitively, and not by way of recital; for it is a rule that nothing material in an indictment ſhall be taken by argument, intendment, or implication 323, 324

ARMS.—*Conſtable and Marſhal.*

1 By 13 Rich. 2. c. 2. the conſtable ſhall have cognizance of contracts touching deeds of arms done out of the realm, &c. 14 ſ. 5

2 The conſtable and marſhal ſhall be prohibited from proceeding to puniſh the painting of coats of arms, &c. 16 ſ. 8

ARRAY.

No challenge can be taken either to the array or to the polls, unleſs a full jury have appeared 579

ARRAIGNMENT.—Vide *Principal and Acceſſary.*

1 Anciently, no man was arraigned upon an indictment for an offence for which an appeal could be brought, until the year and day for bringing the appeal had paſſed 306 ſ. 15

2 But the court was not peremptorily bound to ſuſpend the arraignment upon the indictment, except for ſpecial reaſons 307. 436

3 By 3 Hen. 7. c. 1. the juſtices are ordered to try an indictment of murder or manſlaughter, although the time limited for the appeal is not expired *Page* 436 (N) 1

4 Every priſoner *upon his arraignment* ought to be uſed with gentleneſs and humanity; and not be brought to the bar under any terror but that incidental to his condition 436 ſ. 1.

5 His hands ſhould not be tied; nor his feet fettered except for neceſſary ſecurity, nor ſhould he ſuffer any mark of ignominy or reproach *ibid.*

6 And in this privilege the law makes no diſtinction between clerks and laymen 437

7 But a diſtinction has been made, reſpecting this freedom, between the time of arraignment and the time of trial *ibid.* (N) 2

8 The holding up of the hand is a mere ceremony intended only to identify the perſon, and may be diſpenſed with; for if the priſoner do not deny his identity, it is ſufficient ſ. 2

9 This ceremony is not required in the caſe of a PEER (N) 3

10 By 37 Edw. 3. c. 15. every arraignment on an indictment muſt be in Engliſh ſ. 3

11 Appeals not conſidered as within this act *ibid.*

12 But by 4 Geo. 2. c. 26. all proceedings muſt be in Engliſh *ibid.* †

13 An appeal in the king's bench ought to be arraigned on the plea ſide, unleſs it came in by *certiorari*, and then on the Crown ſide ſ. 4

14 An appellee ſhall not be arraigned on *the count* when *the writ* is abated ſ. 5

15 But if the writ be good, he may in many caſes (vide ch. 23. ſect. 6. to 14.) be arraigned on the count at *the ſuit of the king* 438

16 An attainder of high treaſon has been reverſed (*inter alia*) for the omiſſion of an arraignment ſ. 6

17 And in all the precedents *an arraignment* appears upon the face of the record *ibid.*

18 And it is ſafeſt to expreſs it in every record of attainder by condemnation, either by confeſſion, verdict, or ſtanding mute *ibid.*

19 In attainders upon an appeal, the arraignment

raignment does not conſtantly appear upon the records *Page* 438. ſ. 6
20 An appeal of robbery at the ſuit of ſeveral, the appellee *was* ſeverally arraigned and tried on each appeal, in order to entitle the different appellants to a reſtitution of their goods ſ. 7
21 And a perſon charged with ſeveral indictments of robbery, at the proſecution of ſeveral perſons, *may* be ſeverally arraigned and tried on each indictment; becauſe by 21 Hen. 8. c. 11. each is entitled to reſtitution on conviction, &c. *ibid.*
22 Every perſon attainted of robbery at the ſuit of one perſon may be arraigned and tried at the ſuit of another if ſuch ſuit were commenced before the attainder. *Sed quere* *ibid.*
23 *Quere* if a priſoner before his attainder ſhall anſwer to *divers appeals* of death and rape, in the ſame manner as of robbery ſ. 8.
24 Wherever an appellee is arraigned upon an appeal at the ſuit of the king, he may plead a pardon, as upon an arraignment on indictment 306 ſ. 13
25 Anciently the king ſat with the juſtices upon the arraignment of great offenders 1
26 How a priſoner ſhall be arraigned for breaking of priſon 210
27 Whether a man may be arraigned on an indictment while an appeal is depending
28 For the arraignment of the principal and acceſſary, vide p. 452,—*and ſee Acceſſary* No. 87, &c. &c.

ARRESTS.—*Vide Hue and Cry. Watchmen. Warrant.*

1 OF ARRESTS FOR CRIMES, BY PRIVATE PERSONS. 115. c. 12
2 Every perſon preſent at a felony, or a dangerous wound, is bound to apprehend the offender, on pain of impriſonment 115. ſ. 1
3 On default, the town where it happens, or hundred if out of a town, ſhall be amerced, both by common law and he ſtat. Wincheſter 115, 116
4 And all perſons, though not preſent, are bound to attend the hue and cry, to apprehend the offenders *(Vide Hue and Cry)* *Page* 116 ſ. 4
5 *Officers* are bound by duty to apprehend offenders *ibid.*
6 And every private perſon is bound to aſſiſt an officer demanding his help, to take a felon, to ſuppreſs an affray or to apprehend the affrayers ſ. 7
7 OF ARRESTS FOR TREASON OR FELONY, BY PRIVATE PERSONS ON SUSPICION 119
8 Common fame; living an idle life; keeping bad company; ſuch circumſtances as induce a preſumption of guilt; betraying a conſciouſneſs of guilt; ſuffering purſuit upon hue and cry, are ſufficient grounds of ſuſpicion to juſtify the arreſt of an innocent perſon for felony ſ. 8 to 15
9 But this ſuſpicion muſt be original: and not ariſe from the communication of any other man's ſuſpicion 120. 132
10 But conſtables are *juſtified* in arreſting a man upon a given charge of felony; although eventually it appears no felony was committed (N) *(a)*
11 And by a private perſon the arreſt of an innocent perſon is juſtifiable upon hue and cry 120, 121. ſ. 16
12 So alſo one who only attempts to rob, or who only dangerouſly wounds, may be arreſted upon hue and cry, though theſe are no felonies 121
13 And *à fortiori* a private perſon may arreſt an innocent man on a warrant from a juſtice ſ. 17
14 To juſtify the arreſt of an innocent perſon, the party muſt ſhew in pleading that the ſuſpicion aroſe from himſelf, and ſet forth the cauſe of the ſuſpicion, and that the crime for which he made the arreſt, was in fact committed ſ. 18
15 But if he have ſeveral cauſes, he may alledge them all under *ſon tort demeſne* *ibid.*
16 And when the perſon arreſted actually did the fact, that fact alone may be alledged in juſtification *ibid.*
17 But by 24 Geo. 2. c. 44. officers, &c. are allowed to plead the general iſſue, and to give the ſpecial juſtification in evidence

evidence *Page* 121 (N) *(d)*
18 Any one may lawfully lay hold on another whom he ſhall ſee upon the point of committing a treaſon or felony, or doing any act which would manifeſtly endanger the life of another, and detain him till the danger ſubſides ſ. 19
19 Thus any one may ſeize a perſon expoſing an infant in the ſtreets, &c. *ibid.*
20 ARREST BY PRIVATE PERSONS FOR INFERIOR OFFENCES ſ. 20
21 No private perſon can arreſt another for the bare breach of the peace after it is over 122
22 Yet it is ſaid, any one may apprehend a night-walker, or notorious cheat, and take him before a juſtice *ibid.*
23 So alſo private perſons may juſtify an arreſt for offences in like manner ſcandalous and prejudicial to the public *ibid.*
24 And any perſon may juſtify executing the warrant of a juſtice, authoriſed by the law to require ſuch execution ſ. 21
25 In what caſes the arreſts of offenders by private perſons are rewarded by law. *Vide Reward.* 122 to 128
26 ARRESTS BY PUBLIC OFFICERS 128 c. 13
27 Wherever ſuch arreſt may be juſtified by a private perſon, it may be juſtified by an officer 129
28 In manner watchmen are appointed. *Vide watchmen.* 129, 130
25 By ſtat. Wincheſter, c. 4. if *any ſtranger* do paſs by the watch he ſhall be arreſted till morning 129 ſ. 5
26 If no ſuſpicion be found, he ſhall go quit, or otherwiſe he ſhall be delivered to the ſheriff, until acquitted by law *ibid.*
27 If they diſobey the arreſt, hue and cry may be levied until they are taken; for which arreſtment none ſhall be puniſhed 130
28 A CONSTABLE in general has merely the ſame power to arreſt another for felony, as a private perſon ſ. 7
29 The chief difference is, that a conſtable has greater authority to demand aſſiſtance from others; and that he muſt deliver his priſoner to a juſtice, as a private perſon muſt his to the conſtable *Page* 130
36 A conſtable, on view, has authority to arreſt affrayers, and detain them till they find ſurety; but a private perſon can only ſtay the affray till the heat is over ſ. 8
31 But of offences out of view, the power of a conſtable and a private perſon ſeem the ſame; for it is clear that a conſtable cannot juſtify ſuch an arreſt, without a warrant from a juſtice.—*Quere vide* No. 10. *ibid.*
32 And an unlawful arreſt by a conſtable without a warrant cannot be made good by taking out a warrant afterwards ſ. 9
33 A man once arreſted by a conſtable, on warrant, who is freed upon a promiſe to return, &c. cannot be retaken upon the ſame warrant 131
34 But if he ſurrender, the conſtable may may take him before the juſtice in purſuance of the warrant *ibid.*
35 A conſtable cannot juſtify any arreſt by force of a warrant which expreſsly appears to be for an offence of which the juſtice had no juriſdiction *ibid.* ſ. 10
36 Nor can he take the party to him at a place out of the county for which he is juſtice *ibid.*
37 But he ought to execute a general warrant, for he muſt preſume the juſtice to have juriſdiction *ibid.*
38 THE CASE OF GENERAL WARRANTS;
Conſtables being bound to know the law, quere if they ought now to execute a general warrant—for they are not juſtified in ſo doing 131 (N) 2
39 And *quere* if a conſtable can juſtify the execution of a general warrant *to ſearch for ſtolen goods*; for ſuch warrant is illegal on the face of it 132
40 A juſtice cannot legally grant a blank warrant for the arreſt of *a ſingle perſon*, leaving it to the party to fill up *ibid.*
41 But any conſtable, or even private perſon, may execute the warrant of a juſtice to arreſt a particular perſon for felony or other miſdemeanor, within his juriſdiction, whether the perſon be innocent or guilty, or whether he be indicted

indicted or not *Page* 132 ſ. 11
42 For the juſtice muſt be anſwerable for the conſequence *ibid.*
43 It has been the modern practice to make out warrants on the ſuſpicion of felony, before any indictment found *ibid.*
44 This practice countenanced by 1 & 2 Philip & Mary, c. 13. and 2 & 3 Ph. & Mary, c. 10. *ibid.*
45 The ancient opinion, that a juſtice could not grant a warrant till an indictment was found, contradicted by conſtant experience *ibid.*
46 And a warrant before indictment found, is a good juſtification to the officer; and the old caſes to the contrary do not warrant the concluſion 133
47 And the juſtice who grants it, if he did it maliciouſly of his own head, &c is liable to an action by the perſon injured *ibid.*
48 It is not politic that the officer ſhould be liable for executing a warrant, he is bound to obey, unleſs it appeared that the juſtice had no juriſdiction *ibid.*
49 And a warrant *properly penned* (even though the magiſtrate who iſſues it ſhould exceed his juriſdiction) will by 24 Geo. 2. c. 44 at all events indemnify the officer *ibid.* (N) 3
50 Therefore a warrant to apprehend *all perſons* guilty of a crime therein ſpecified, will not juſtify the officer who acts under it, *vide* No. 38. *ibid.* (N) 4
51 How the officer ſhall avail himſelf of a plea in juſtification *ibid.*
52 As to ARRESTS BY BAILIFFS of towns, it is enacted by ſtatute of Winchester c. 4. that they ſhall make enquiry among the inhabitants for ſuſpicious perſons, and do right therein 134
53 And by this ſtatute bailiffs may arreſt and detain *ſuſpected* perſons until they give an account of themſelves *ibid.*
54 JUSTICES OF THE PEACE have the ſame power to arreſt as private perſons, and other inferior officers ſ. 13
55 Juſtices may command an arreſt either by parol or by warrant *ibid.*
56 By parol, where any perſon is guilty of an actual breach of the peace in his preſence, or ſhall be engaged in a riot in his abſence (*Vide Bk.* 1. *ch.* 65. *ſect.* 16.) *Page* 134 ſ. 14.
57 A warrant may be granted by any juſtice for treaſon, felony, *præmunire*, or any other offence againſt the peace ſ. 15
58 So where a ſtatute gives a juſtice juriſdiction, it impliedly impowers him to iſſue a warrant 135
59 And by uncontrouled practice one juſtice may iſſue a warrant where the juriſdiction is given to the ſeſſions, or to two juſtices *ibid.*
60 But a juſtice cannot juſtify ſending a *general warrant* to ſearch all ſuſpected houſes for ſtolen goods ſ. 17
61 And a general warrant from a ſecretary of ſtate to ſearch for, and bring all papers, &c. in the caſe of a libel, is illegal and void (N) 6
62 The evidence on which warrants ought alone to be granted (*Vide Warrants*) 135, 136
63 The form in which a warrant ought to be made *ibid.* ſ. 21 to 28
64 A bailiff or conſtable, known as officers within their precinct, need not ſhew their warrant to the party arreſted, though he demand a ſight of it 137 ſ. 28
65 But every perſon making an arreſt ought to make the party acquainted with the ſubſtance of their warrant *ibid.*
66 But all private perſons, and officers not known, and out of their precincts, muſt ſhew their warrants if demanded *ibid.*
67 By 27 Geo. 2. c. 20. the officers in executing the warrant of a juſtice, *for the levying any penalty*, ſhall ſhew the ſame to the perſon whoſe goods are to be diſtrained, and ſuffer a copy to be taken *ibid.*
68 If a warrant be directed to a ſheriff, he may depute another to make the arreſt; but all others muſt execute it perſonally, but may take aſſiſtance *ibid.*
69 If a warrant be directed to *all conſtables*, none can execute it out of his precinct, but if it be directed particularly,

larly, the conſtable may execute it any where within the juriſdiction of the juſtice *Page* 136 ſ. 30
70 The execution of a warrant muſt be purſuant to the directions of it ſ. 31
71 No one can juſtify breaking open doors, unleſs he firſt ſignify the cauſe of his coming, and require admittance 138 ch. 14
72 But no preciſe form of words is neceſſary in this notice, it is ſufficient if the party be ſatisfied the officer does not come as a mere treſpaſſer *ibid.* (N) 1
73 For the officer, it is ſufficient that he has a warrant; for the validity of it as to him will not depend upon the truth or falſehood of the information on which it was granted *ibid.*
74 On an arreſt, doors may be broke open upon a *capias* grounded on an indictment ſ. 3
75 Upon a *capias* from the king's bench or chancery *ibid*
76 Upon a warrant from a juſtice to compel appearance for good behaviour *ibid.*
77 Upon a *capias utlagatum*, or *capias pro fine* in any action whatſoever ſ. 4
78 Upon the warrant of a juſtice for the levying a forfeiture in execution of a judgment *qui tam* 138, 139
79 So doors may be broke open where a forcible entry or detainer is either found by inquiſition before juſtices, or appears upon view 139 ſ. 6
80 Or where one is known to have committed a felony, and given a dangerous wound, and is purſued either by a conſtable or private perſon without warrant ſ. 7
81 Where an affray is made in a houſe in the view or hearing of a conſtable ſ. 8
82 Or where the affrayers fly and take ſhelter in a houſe *ibid.*
83 And in every caſe of an eſcape after lawful arreſt *ibid*
84 Or, by 3 & 4 Jac. 1. ſ. 35. for arreſting any Popiſh recuſant excommunicated ſ. 9
85 An officer cannot break open doors on a warrant from a juſtice, to require perſons to come before him to take certain oaths ordained by ſtatute *Page* 139 ſ. 10
86 But if the officer enter into any houſe to ſerve ſuch a warrant, and the doors be locked upon him, his friends may break them open to ſet him at liberty *ibid.*
87 In what caſes juſtices of the peace may arreſt perſons of evil fame 46 ſ. 16
88 Of the offence of a ſtranger in forcibly freeing another from an arreſt 209 ch. 21
89 Any judge of record may diſcharge a perſon arreſted in the face of the court 6 ſ. 18
90 How far perſons attending courts of juſtice are privileged from arreſts 5. 6
91 How warrants ſhall be indorſed for the purpoſe of making an arreſt in a foreign country 55

ARRESTING AND AVOIDING JUDGMENT.

1 No confeſſion ſhall preclude any exception in arreſt of judgment for faults apparent on the record 470 ſ. 4
2 The court is bound *ex officio* to take notice of ſuch faults *ibid.*
3 Any one as *amicus curiæ* may inform the court of them *ibid.*
4 By 7 Will. 3. c. 3. in high treaſon, or miſpriſion thereof, no miſwriting, miſpelling, falſe or improper Latin, ſhall, after conviction, be any cauſe to arreſt the judgment 367 ſ. 147
5 In what manner judgment of outlawry may be avoided by plea without bringing a writ of error 651
6 A conviction of felony whereon the party hath had his clergy, may be diſcharged by an exception to the indictment *ibid.*
7 How judgment may be avoided without writ of error for matters *de hors* the record 652
8 The purchaſer of the land of one who is afterwards outlawed or condemned by confeſſion for felony, may falſify the record both as to the offence itſelf and the time when committed *ibid.*
9 A judgment given without juriſdiction may

may be falſified without writ of error 652
10 An attainder of treaſon or felony pardoned, may be falſified either by the convict or his heir without plea *ibid.*
11 Letters patent to reverſe an attainder are void unleſs confirmed by parliament *ibid.*
12 Outlawry of treaſon or felony might be avoided *by plea*, that the defendant was in priſon, or in the king's ſervice *ibid.*
13 But no outlawry can be avoided for any other crime for any matter of fact *ibid.*
14 By 26 Hen. 8. c. 13. outlawry for treaſon againſt one abroad ſhall be good, and upon appearing within one year the party may traverſe it 653
15 Outlawry may be avoided upon *capias utlagatum* for miſnomer, or want of addition, &c. &c. *ibid.*
16 The reverſal of the attainder of the principal *ipſo facto* reverſes that of the acceſſary *ibid.*
17 How an attainder may be reverſed by writ of error (*vide Attainder*) *ibid.*
18 If an outlawry for treaſon or felony be reverſed, the party ſhall plead to the indictment *ibid.*
19 If the judgment be erroneous, both that and the execution ſhall be reverſed *ibid.*
20 On reverſing the outlawry the party may enter on the king's *patentee* of his lands, without ſuing out a *ſcire facias* *ibid.*

ARSON.

1 The appeal of arſon is become obſolete 256 ſ. 73
2 If a perſon command another to burn a particular houſe, and by burning it he alſo burn another houſe, the commander may be indicted as an acceſſary to arſon for the ſubſequent felony 446 ſ. 18
3 But not if the command lie to burn the houſe of A. and he burn the houſe of B. except he miſtook the houſe of B. for that of A. 447 ſ. 21
4 Arſon cannot be bailed by juſtices of peace *Page* 164
5 In the ſtatutes which ouſt felonies of clergy, the crime of arſon is omitted 483 ſ. 38
6 But the offence of arſon is now clearly excluded from clergy 503 ſ. 107

ARTICULI SUPER CHARTAS.

Juries.

How far it authoriſes the coroner for the county to take notice of felonies done within the verge 74

ASSAULT.—Vide *ſon aſſault demeſne.*

1 An aſſault and battery is inquirable of in the ſheriff's torn 105, 106
2 By 11 Geo. 2. c. 26 to aſſault, beat, or wound any perſons, contrary to the proviſions of 9 Geo. 2. c. 23. is tranſportation for ſeven years 212
3 How juſtices ſhall conduct themſelves on being aſſaulted 52 (N) 4

ASSENT.

In what caſes, and in what degree it is required to be given to make the party a principal in felony 442

ASSIZES.—*Vide Courts.*

ASSIZE *and* NISI PRIUS.

1 The power of juſtices of aſſize, in criminal matters, depends wholly upon ſtatute 37 ch. 7
2 By 27 Edw. 1. c. 3. juſtices of aſſize, after the aſſizes taken ſhall remain *sub* together if they be lay; if one of them be a clerk, then the moſt diſcreet knights of the ſhire aſſociated by the king's writ, with the lay juſtice, ſhall deliver the gaols, &c. in the manner they had been before delivered, and enquire if the ſheriffs have improperly admitted any to bail ſ. 2
3 By 2 Edw. 3. c. 2. no juſtices ſhall be

be made againſt the form of the above ſtatute *Page* 37 ſ. 3
4 The above ſtatutes have been conſtrued to extend only to felony; but this is a forced conſtruction, and juſtices of aſſize have power over both treaſon and felony with juſtices of gaol-delivery 38
5 Juſtices of aſſize, being laymen, may deliver gaols without any ſpecial commiſſion for that purpoſe ſ. 5
6 By 3 Hen. 5. c. 7. they ſhall have power by commiſſion to hear and determine offences againſt the coin 39
7 As judges of aſſize their juriſdiction over this offence is by virtue of the king's commiſſion; but they have cognizance of it without, as juſtices of gaol-delivery ſ. 7
8 By 28 Edw. 1. c. 10. juſtices of aſſize may award proceſs into any foreign county againſt perſons appealed by approvers, and proceed againſt them ſ. 8
9 How juſtices of aſſize may be ſaid to poſſeſs all the authority of juſtices of gaol-delivery 39, 40
10 By 28 Edw. 1. c. 10. judges of aſſize, upon plaint, may award inqueſts, and do right againſt conſpirators, falſe informers, and evil procurers of dozens, aſſizes, juries and inqueſts ſ. 10
11 By 4 Edw. 3. c. 11. whenever they hold *niſi prius* they ſhall inquire, hear, and determine, both at the ſuit of the king and the party, of maintainers, bearers, conſpirators, &c. *ibid.*
12 By 20 Edw. 3. c. 6. ſuch juſtices ſhall have commiſſion to inquire of maintainers and common embracerors *ibid.*
13 By 5 Edw. 3. c. 10. they may inquire and determine the offence of any juror, &c. &c. ſ. 11
14 But by 38 Edw. 3. c. 12. no juſtices ſhall inquire of officer of the ſaid offence, but only at the ſuit of the party ſ. 12
15 By 32 Hen. 8. c. 9. juſtices of aſſize of every circuit ſhall, in every county within their circuits, twice a-year cauſe open proclamation againſt unlawful maintainance, champerty, embracery, &c. ſ. 13
16 By 20 Edw. 3. c. 6. they ſhall have commiſſions to enquire of ſheriffs, eſcheaters, bailiffs of franchiſes, and their miniſters, &c. *Page* 41
17 By 23 Hen. 6. c. 10. they are authoriſed to determine of office without ſpecial commiſſion, of and upon all ſheriffs, under-ſheriffs, clerks, bailiffs, gaolers, coroners, ſtewards, bailiffs of franchiſes, officers and other miniſters, as to matters of arreſt and taking bail ſ. 15
18 By 1 Hen. 8. c. 7. juſtices of aſſize have juriſdiction, as well by examination as preſentment, over coroners for not taking inqueſt without fee *ſuper viſum capias* ſ. 16
19 By 14 Hen. 6. c. 1. juſtices before whom inqueſts and juries ſhall be taken by *niſi prius*, ſhall have power in all caſes of treaſon and felony to give judgment of acquittal or attainder, and to award execution ſ. 17
20 On nonſuit in appeal the juſtices cannot arraign the appellee at the ſuit of the king ſ. 18
21 But on the acquittal of the appellee, ſuch juſtices have power to enquire of the abettors, &c. &c. 41, 42
22 By 8 Rich. 2. c. 2. no man ſhall be juſtice of aſſizes, or of the common deliverance of gaols, in his own county ſ. 19
23 By 33 Hen. 8. c. 24. no man ſhall be juſtice of aſſize in the county where he was born or doth inhabit, on pain of 100*l.*; but this ſhall not extend to the inferior officers ſ. 20
24 By 12 Geo. 2. c. 27. this penalty and reſtriction, as to the offices of juſtices of oyer and terminer and gaol-delivery, are repealed ſ. 21
25 By 19 Geo. 3. c. 74. the lodgings of the juſtices upon the circuits ſhall be conſtrued to be both within the city, town, &c. and within the county of ſuch city, town, &c. ſ. 22

ASSOCIATION.

1 By 1 Ann. c. 8. no commiſſion of aſſociation, &c. &c. ſhall be determined by the death of any king and queen,

but ſhall continue in force for ſix months, unleſs ſooner determined by the ſucceſſor *Page* 4

2 Commiſſions of aſſociation frequently called writs 20, 21

3 The manner in which juſtices may be aſſociated, and the nature of the commiſſion for that purpoſe 25

4 The king can grant but one patent of aſſociation to one commiſſion *ibid.*

ATTACHMENT.

1 An attachment is a proceſs from a court of record, awarded by the diſcretion of the juſtices upon a bare ſuggeſtion, or their own knowledge 213 ch. 22

2 It is properly grantable in caſes of contempts, againſt which all courts of record, but more eſpecially thoſe of Weſtminſter Hall, and above all the court of king's bench, may proceed in a ſummary manner *ibid.* ſ. 1

3 The contempt being eſtabliſhed by affidavit, the court will make a rule for him to ſhew cauſe why an attachment ſhould not iſſue; or if the offence be exorbitant and apparent, the court will grant the writ in the firſt inſtance 214

4 Every one againſt whom an attachment is granted muſt appear perſonally in court *ibid.*

5 And on appearance, if the party be evidently guilty, the court will generally commit him immediately to anſwer interrogatories 214

6 Otherwiſe they will allow him to enter into recognizance for that purpoſe *ibid*

7 The practice of the court upon this occaſion *ibid*

8 All courts of record have a *kind* of diſcretionary power over all abuſes by their own officers, and may grant attachment againſt them for any corrupt practice 215 ſ. 2

9 As againſt a ſheriff for not ſerving a writ unleſs paid an unreaſonable gratuity from the plaintiff *ibid.*

10 Or receive a bribe from the defendant *ibid.*

11 Or give him notice to remove his perſon or effects in order to avoid the effect of the writ *ibid.*

12 The court of king's bench has a general ſuperintendency over all crimes whatſoever, but in contempts it leaves each court to puniſh by attachment, &c. *Page* 215 ſ. 2

13 But if the negligence, &c. does not appear wilful, the courts will leave the party to the ordinary remedy *ibid.*

14 The mode of obtaining that remedy *ibid.*

15 The court will grant an attachment againſt ſheriff or bailiff, &c. for an oppreſſive practice in executing a writ 216

16 Inſtances in which the court will grant attachment upon this ground *ibid.*

17 So alſo an attachment may be moved for againſt a ſheriff or bailiff, &c. for not executing a writ effectually *ibid.* ſ. 4

18 As if he levies the money and keep it in his own hands and embezzle it *ibid.*

19 By what proceſs the ſheriff ſhall be forced to return the writ, and pay the money, &c. *ibid.*

20 The court may grant attachment againſt a ſheriff, &c. for making a falſe return to a writ 217

21 As where he returns *languidus* when the defendant is in health *ibid.*

22 In what caſes an attachment againſt the ſheriff ſhall be directed to the coroner 215 ſ. 2

23 If the coroner make no return of ſuch attachment, the court will grant an attachment in the firſt inſtance againſt the coroner, directed to eliſors 217 (N)

24 Attachment may be granted againſt attornies for appearing to a ſuit without authority 217 ſ. 6

25 But if they have a warrant yet do not record it till judgment, the court will hardly grant attachment *ibid.*

26 Penalties impoſed by ſtatute on attornies for not recording the warrant, and for appearing without authority 217, 218

27 Attachments may alſo be granted againſt attornies after a rule *niſi* for injuſtice towards their clients, as for protracting ſuits by little ſhifts and devices, &c. 218 ſ. 10

28 Or for refuſing to deliver up their clients writings (unleſs detained for his bill) or money received to their uſe *Page* 218 ſ. 10
29 But the court will not interpoſe reſpecting any other writings or money but what he poſſeſſes in the way of his profeſſion *ibid.*
30 Inſtances in which attachments have been granted againſt attornies for contempts 218, 219
31 In what caſes an attachment ſhall iſſue againſt an attorney for *diſhoneſt practices* 219 ſ. 11
32 All courts of record may proceed by attachment againſt any of its officers for refuſing to execute its demands &c. &c. *ibid.* ſ. 12
33 In what caſes an attachment may be granted againſt jurors (*vide Jurors*) 219 ſ. 13 to 224 ſ. 24
34 In what caſes inferior judges are puniſhable by attachment for *proceeding without juriſdiction* 225 ſ. 25
35 How they ſhall be ſo puniſhed for acting *unjuſtly, oppreſſively, or irregularly* ſ. 26
36 They ſhall be puniſhed by attachment *for refuſing* to do juſtice 226 ſ. 27
37 And for contempts of the ſuperior courts ſ. 28
38 *Quere* if counſellors are ſubject to an attachment for foul practice 227 ſ. 30
39 In what caſes gaolers are puniſhable by attachment ſ. 31
40 Peers, whether ſpiritual or temporal, are liable to attachment for contempt of court 228
41 Inſtances in which attachments have been granted *ibid.*
42 The moſt material inſtances of contempts for which an attachment ſhall iſſue (*vide Contempts*) 228 to 231
43 The nature and conſequences of an attachment 231 (N)

ATTAINDER.

1 Perſons attainted of felony or other heinous crime ſhall not be bailed 153 ſ. 40
2 But even attainted perſons may be bailed by the king's bench in ſpecial caſes, and upon very particular grounds *Page* 175 ſ. 80
3 An attainder in treaſon or felony while it continues in force is a good objection againſt a plaintiff in bar to an appeal 279 ſ. 130
4 The reception of an attainted perſon in the ſame county in which he was attainted, will make the receiver an acceſſary without notice of the attainder 451 ſ. 33
5 If an attainted perſon ſtand mute upon the demand why execution ſhould not be done, his obſtinacy ſhall be diſregarded 463 ſ. 8
6 In what caſes it ſhall be tried whether the perſon ſtanding mute is the ſame perſon who was before attainted *ibid.*
7 Whether upon an attainder on one appeal, pending another for larceny, an inqueſt ſhall be to entitle the appellant to reſtitution 533 ſ. 5
8 An attainted perſon is liable to anſwer a perſonal action, as if he had not been attainted *ibid.*
9 Whether a perſon attainted of one felony, ſhall be forced to plead to a proſecution for another, in order to let in the trial of the acceſſaries 533, 534
10 A perſon attainted of treaſon or felony cannot become an approver 294 ſ. 4
11 A reverſal of the attainder of the principal, *ipſo facto* reverſes the attainder of the acceſſary 654
12 A writ of error to reverſe an attainder of treaſon or felony may be brought by the executor and heir only *ibid.* ſ. 10
13 Before the allowance of the writ the errors muſt be aſſigned, and the leave of the court obtained *ibid.* ſ. 11
14 There muſt be an expreſs warrant for it from the attorney-general 655
15 In what caſes a *ſcire facias* is neceſſary *ibid.* ſ. 13
16 An attainder by the common law of as much validity as by ſtatute *ibid.* ſ. 14
17 The 28 Eliz. c. 2. that no attainder of high treaſon ſhall be reverſed by writ of error, does not extend to attainders ſince that time *ibid.* ſ. 15
18 A writ of error lies in the king's bench

bench on an attainder before the lord high ſteward *Page* 516. 655
19 The conſequences of an attainder reſpecting the forfeiture of goods and chattels, and land (*vide Forfeiture*)

ATTAINT.—*Vide Jurors.*

ATTORNEY.

1 By 5 Geo. 2. c. 18. no attorney ſhall be capable of being a juſtice of the peace 47 ſ. 20
2 By 22 Geo. 2. c. 46. no perſon, unleſs he be regularly admitted an attorney, ſhall practiſe at the quarter ſeſſions on pain of 50 l. 66 ſ. 54
3 And if any attorney ſhall ſuffer another to uſe his name he ſhall incur the like penalty ſ. 55
4 No clerk of the peace or his deputy, or any under-ſheriff or his deputy, ſhall act as attorney at the quarter ſeſſions on like penalty 67 ſ. 56
5 A ſworn attorney may be diſcharged from the office of conſtable by writ of privilege 99 ſ. 39
6 In miſdemeanors the defendant *after plea* was always permitted by the court to appear by attorney 388
7 And in ſome caſes before plea pleaded *ibid.*
8 But where the perſonal appearance of the defendant is required, an attorney cannot appear without a ſpecial writ for the purpoſe *ibid.*
9 By 18 Eliz. c. 5. a *qui tam* informer ſhall exhibit his ſuit in proper perſon, and purſue it by himſelf or his attorney ſ. 54
10 An infant cannot be an attorney, becauſe he cannot be ſworn *ibid.*
11 By 29 Eliz. c. 5, defendants to a *qui tam* proſecution may appear by attorney with the leave of the court ſ. 55
12 In appeal of *mayhem* the plaintiff cannot appear by attorney where a view is granted 239
13 In what caſes the parties in an appeal may appear by attorney 257
14 A defendant againſt whom an attachment is granted muſt appear in proper perſon, and not by attorney 213, 214
15 Whoever without being admitted and enrolled ſhall practiſe as an attorney, or being ſo admitted ſhall lend his name, ſhall forfeit 50 l. &c. *Page* 218
16 In what caſes attornies may be proceeded againſt by attachment 217 ſ. 6 to 219 ſ. 12

ATTORNEY-GENERAL.

1 The king's attorney excepted out of 2 Hen. 5. c. 4. concerning juſtices of the peace 47
2 In what caſes the attorney-general may file informations *ex officio* (*vide Information*) 371 to 374
3 Where the attorney-general may enter a *nolle proſequi* to a *qui tam* information, &c. 387

AVERMENT.

1 No averment ſhall be allowed againſt a record 5 ſ. 14
2 A material part of an indictment not found by the oaths of the indictors, cannot be ſupplied by any averment 75
3 Where a variance in *autrefois acquit* may be aided by an averment 525
4 How far averment is neceſſary in pleading a pardon 561

AVOWRY.—*Sheriffs Torn.*

AUTHORITY.—*Courts.*

AUTREFOITS ATTAINT.

1 An attainder of felony, either by verdict, outlawry, or abjuration, may be pleaded in bar of *any* ſubſequent proſecution, for the ſame, or any other felony 532 ch. 36
2 This plea is of no effect if the attainder be reverſed for error, but until reverſal it is good, for error only renders it voidable ſ. 2

3 A perſon attainted at the ſuit of the king, and pardoned, cannot plead it in bar to an appeal *Page* 533
4 Where a perſon is attainted of felony and afterwards indicted for high treaſon either before or after the attainder, the attainder cannot be pleaded in bar to the treaſon ſ. 4
5 Where an appellee of larceny hath a ſecond appeal againſt him, and is afterwards attainted on the firſt, he cannot plead it in bar to the ſecond ſ. 5
6 A perſon attainted is liable to anſwer a perſonal action *ibid.*
7 A principal attainted cannot plead it againſt a proſecution on his conviction, on which the trial of acceſſaries depend 533, 534
8 Judgment of *fort et dure* in one felony is no bar to a proſecution for another felony. *Sed quære* for the ſame felony ſ. 7
9 Autrefois attaint no plea for one who breaks the priſon of the ordinary ſ. 8
10 An attainder on an indictment for murder is no bar to an appeal by treaſon 3 Hen. 7. c. 1. ſ. 9
11 In all other caſes autrefois attaint is ſtill of the ſame force as it was at common law *ibid.*

AUTREFOITS ACQUIT.

1 This plea is grounded on the maxim "*that a man's life ſhall not be in danger more than once for the ſame offence*" 523 ch. 35
2 Therefore, where an indictment or appeal is free from error, well commenced, and brought before a competent juriſdiction, and the priſoner is found *not guilty*, he may in all caſes plead *ſuch acquittal* in bar to any ſubſequent proſecution for the ſame crime 524 ſ. 1
3 This *bar* need not be pleaded with a *profert*, &c. of the record of acquittal; it ought to come before the court *by writ*; and the priſoner ſhall have *a day* given him to bring it in 525
4 A variance between the indictment and the record, provided the nature of the crime charged be ſubſtantially the ſame, may be helped by proper averments ſ. 3
5 If a man be named *yeoman* in the record, and *gentleman* in the indictment; or if the acquittal be for murder or robbery *cujuſdam ignoti*, and the indictment inſert the name; or if the indictment ſtate a different ſurname than that on which the priſoner was acquitted; yet the variance may be cured by averring, that the perſon ſo differently named was one and the ſame perſon; that he was known as well by the one name as the other *Page* 525 ſ. 3
6 So alſo a variance reſpecting the time and place may be helped by averring that they were one and the ſame felony *ibid.*
7 If the firſt indictment be in an *improper* county, the priſoner cannot plead an acquittal upon it, in bar to a ſubſequent proſecution, in the *proper* county 526
8 And if the acquittal be in the *proper county*, his life is not endangered by the ſubſequent proſecution in an improper county, and ſo cannot be pleaded in bar *ibid.*
9 An acquittal for larceny in the county where the goods are *found* may be pleaded in bar to a proſecution for the ſame offence in the county where they were *taken* ſ. 4
10 And a jury of one county may try, whether an offence laid in their own county be the ſame offence that was done in another 526, 527
11 An acquittal *in treſpaſs* cannot be pleaded againſt an appeal *of larceny* for the ſame goods, for they are diſtinct offences 527 ſ. 5
12 And generally a bar in an action of an inferior nature will not bar another of a ſuperior *ibid.*
13 An acquittal in murder is a good bar to an indictment for petit treaſon, for ſubſtantially they are the ſame offence *ibid.*
14 Burglary and ſtealing the goods of A. and B. and acquittal on an indictment for the burglary and ſtealing the goods of B. will not bar a ſubſequent proſecution for ſtealing the goods of A. but it may be well pleaded againſt a ſecond indictment for the burglary *ibid.*

15 No discharge of an indictment will bar an appeal, and no discharge of an appeal will bar an indictment, except an acquittal by battle, or by verdict on the general issue *Page* 527 s. 6
16 *Quere* if an acquittal *by battle* in an appeal may not be pleaded in bar to an indictment 528 s. 7
17 The acquittal upon indictment or appeal so erroneous as not to support the judgment, cannot be pleaded in bar to a subsequent indictment or appeal s. 8
18 But it is otherwise if the error be only in the process *ibid.*
19 An acquittal on an appeal brought by an *improper* appellant will not bar an appeal by the *right* appellant 529 s. 9
20 An acquittal in *any court* of competent jurisdiction is as good a bar as an acquittal *in the highest court* s. 10
21 An acquittal of murder at the grand session in *Wales* may be pleaded to an indictment for the same murder in England *ibid.*
22 An acquittal of a man as accessary is no bar of a subsequent prosecution against him *as accessary after the fact* s. 11
23 But it is doubtful, whether the acquittal of a man as principal is a good bar against an indictment *as accessary before the fact* *ibid.*
24 Whether a man can be found guilty as principal upon evidence which only proves him to have been an accessary before 530
25 If not, the acquittal of him as principal no way acquits him as an accessary before; which opinion is strongly holden by Mr. Justice Foster *ibid.* (N)
26 The acquittal of a man as *accessary before or after* is no bar to a prosecution against him as *principal* s. 12
27 An acquittal as accessary to one principal is no bar to an arraignment afterwards as accessary to another in the same fact s. 13
28 By 3 Hen. 7. c. 1. principals and accessaries in murder may be tried before the expiration of the year and day, within which time an appeal is allowed to be brought 530, 531
29 But an acquittal on this trial within the time shall not bar the appeal *Page* 530, 531
30 Nor shall this statute extend to any other acquittal but on an indictment s. 15
31 And an acquittal on any other indictment or appeal, except for death, may still be pleaded in bar to an appeal for the same crime *ibid.*
32 And an acquittal on an appeal of death may be still pleaded to an indictment *ibid.*
33 How the record shall be produced in pleading *autrefois acquit* 561
34 A prisoner shall be allowed a copy of his indictment to enable him to plead *autrefois acquit* 567

AUTREFOITS CONVICT.

1 This plea is allowed, because the party ought not to be brought twice into danger of his life for the same crime 334 s. 10
2 A conviction of felony may be pleaded to an indictment or appeal for the same felony. *ibid.*
3 A conviction of manslaughter *on an appeal* may be pleaded to an indictment or appeal of the same death *ibid.*
4 But a conviction of manslaughter *on an indictment* cannot be pleaded to an appeal, unless the convict be admitted to, or has prayed his clergy *ibid.*
5 A conviction of *one* felony cannot be pleaded in bar of another felony 334, 335
6 A person admitted to his clergy shall not thereby bar a subsequent prosecution for another felony not within the benefit of clergy s. 11
7 A person convicted of manslaughter on an indictment of murder, who hath prayed his clergy though not actually admitted to it, may bar any subsequent *appeal* for the same death s. 12
8 But if a person be acquitted on such an indictment it is no bar to the subsequent appeal *ibid.*
9 It is not material whether the appeal in bar, whereof such conviction and clergy are

are pleaded, were depending at the time of such conviction, or not *Page* 335 s. 13

10 Unless the court call a man to judgment, on a conviction of manslaughter on an indictment of murder, he cannot demand clergy, and therefore cannot plead such conviction and clergy in bar to an appeal 536 s. 14

11 But it is now settled that such a conviction, and *the prayer of clergy*, may be pleaded in bar to an appeal for the same death, whether the party were called to judgment or not *ibid.*

12 But if the record is erroneous either in respect of insufficiency in the indictment or appeal, or for a mis-trial, &c. so that his life was not in danger, the prisoner cannot plead such conviction and clergy thereon had, in bar of a second indictment or appeal 536, 537

13 The form of the conclusion of a plea of *autrefois convict* of manslaughter s. 16

14 *Quere* if *autrefois convict* of *se defendendo* on an indictment of murder may not be pleaded to an appeal of the same death s. 17

15 An appeal lies against a person convicted until he is attainted *ibid.*

AWARD.

How far, and in what cases an attachment shall issue for disobedience to an award, made a rule of court 330 s. 37

B.

BACKING.—*Vide Warrant.*

BAIL.

1 Bail and mainprize alike save a man from gaol, by committing him to the custody of his sureties 140 s. 2

2 Bail have a coercive power over the person of the principal, but *mainpernors* have not 140, 141

3 Not less than two bail should be taken for felony *Page* 141 s. 4

4 On a *habeas corpus* for treason or felony, the king's bench always require four sureties, in a sum not less than 40l. but higher in the discretion of the court *ibid.*

5 They may be examined on oath respecting their sufficiency *ibid.*

6 If insufficient bail be taken, the principal may be forced into a new recognizance *ibid.*

7 The number of bail must be mentioned in the notice (N) 1

8 But excessive bail ought not to be required 141, 142

9 If the ends of justice are defeated by the non-appearance of the principal, and the bail prove insufficient, the sheriff or justice of peace who admitted may be fined by judges of assize 142 s. 6

10 To admit persons to bail, not bailable by law, is punishable by the common law as an escape s. 7

11 By stat. West. 1. officers shall lose their fee and office for ever, and be imprisoned three years, &c. s. 8

12 By 27 Edw. 1. c. 3. and 4 Edw. 3. c. 7. judges of assize shall enforce the stat. West. s. 9, 10

13 By 1 & 2 Ph. & Mary, c. 13. justices of peace shall not admit to bail persons forbidden to be repleviſed by stat. West. on pain of being fined by the judges of assize 143 s. 11

14 Ignorance of the cause of commitment, or that the *mittimus* charged the offender *on suspicion* of felony only, is no excuse for improperly admitting him to bail s. 12

15 But denying, delaying, or obstructing bail, where it ought to be taken, is indictable; and the offender is also liable to an action s. 13

16 It is incumbent on the offender to be prepared with his bail s. 14

17 By stat. West. if any withhold bail from persons *repleviſable*, they shall be grievously amerced 143, 144

18 By THE HABEAS CORPUS ACT 31 Car. 2. c. 2. wherever any writ of habeas corpus is served at any prison, the gaoler within three days after (unless

leſs the commitment be for treaſon or felony, plainly and ſpecially expreſſed in the warrant) and upon tender of the charges, &c. ſhall make a return of ſuch writs, and bring up the body of his priſoner to the court from whence the writ iſſues, and certify the true cauſes of his commitment or detainer *Page* 144

19 If the priſon be above 20, and not exceeding 100 miles diſtant from the court, the return, &c. ſhall be within 10 days, and if above 100 miles, then within 20 days *ibid.*

20 All ſuch writs ſhall be marked *per ſtatutum triceſſimo primo Caroli ſecundi regis*; and ſigned by the perſon awarding it . 145

21 Therefore if a writ be not ſigned, it need not be obeyed *ibid.* (N) 1

22 In vacation, any of the judges, on view of the commitment, or on oath or certificate that the warrant was refuſed, may grant a *habeas corpus* under the ſeal of the court returnable *immediate* (other than to convicts or perſons in execution), and on ſervice thereof the gaoler ſhall make return, &c. as above 145

23 Within two days after the return, &c. the judge awarding the writ, or in his abſence any other of the judges, may diſcharge the priſoner on bail, &c. unleſs it appear that he is detained upon a legal proceſs out of a court of criminal law, or that he is not bailable *ibid.*

24 If a priſoner is too infirm to be brought up, the court will order him to be attended (N) 5

25 If a priſoner neglects for two whole terms to pray a *habeas corpus*, he ſhall loſe the right to it in vacation 145, 146

26 To refuſe obedience to this writ, &c. incurs a penalty of a 100l. for the firſt offence, 200l. for the ſecond and loſs of office 146

27 No privilege will excuſe a peer from obeying this writ *ibid.* (N)

28 No perſon diſcharged by habeas corpus, ſhall be again impriſoned for the ſame offence, other than by legal proceſs, &c. on pain of 500l. *Page* 146 ſ. 20

29 Priſoners committed for treaſon or felony plainly and ſpecially expreſſed, praying in open court the firſt week of the next term, or firſt day of the ſeſſions, to be *tried*, who ſhall not be indicted the term or ſeſſions after commitment, may upon motion the laſt day of the term or ſeſſion, be diſcharged *on bail*, unleſs it appear *on oath* the king's witneſſes could not be produced. If not indicted and tried the ſecond term or ſeſſions, they ſhall be diſcharged ſ. 21

30 Priſoners may obtain *habeas corpus* out of any of the courts at *Weſtminſter* ſ. 22

31 If the chancellor or any of the judges in vacation time, upon view of the warrant, or oath of its refuſal, &c. ſhall deny the writ of *habeas corpus*, they ſhall ſeverally forfeit 500l. *ibid.*

32 And ſuch writs do not expire on the commencement of the term (N) 7

33 After *aſſizes* proclaimed, no priſoner ſhall be diſcharged there upon *habeas corpus*, but ſhall be taken before the *judge of aſſize* 146, 147

34 Judges not liable to penalty for refuſing *habeas corpus* in term time; becauſe no judge is liable to *an action* for what he does *as judge* 147 ſ. 24

35 *Quere*, if a ſheriff or conſtable, as conſervators of the peace, may take bail ſ. 25

36 The ſtatutes empowering juſtices to take bail, have taken away this power from the ſheriff and conſtable ſ. 26

37 The ſheriff, *in his torn*, might have taken bail; for whoſoever is judge of the offence, may bail the offender. But this power is loſt by reaſon of 1 Edw. 4. c. 2. 148 ſ. 27

38 Bail is grantable by ſheriffs by virtue of the writs *de odio et atia mainprize*, and, *homine replegiando* ſ. 28

39 The writ *de odio et atia* is obſolete *ibid.*

40 In what caſes *mainprize* is yet in force ſ. 29

41 In what caſes *homine replegiando* and *capias in withernam* are proper and effectual remedies 149

42 By ſtat. Weſt. 1. outlaws, abjurers, provers,

provers, houſe-burners, counterfeiters of the coin or ſeals, perſons excommunicate, and traitors touching the king himſelf, ſhall be in no wiſe repleviſable *Page* 149 ſ. 32

43 But perſons indicted for larceny, or of light ſuſpicion, or for petty larceny (unleſs accuſed as acceſſaries), may be let out on ſurety by the ſheriff 149, 150

44 Thoſe who are taken for the death of a man, were not repleviſable by ſheriffs, &c. at the common law. Nor can juſtices bail for manſlaughter or even excuſable homicide, though they may for light ſuſpicion thereof; and even the ſuperior courts are cautious how they bail for homicide ſ. 33, 34

45 By 3 Hen. 7. c. 1. principals and acceſſaries acquitted of murder, may be recommitted or bailed at the diſcretion of the court till the year and day be paſſed 150, 151

46 Perſons impriſoned by the ſpecial command of the king, or his privy council, were not repleviſable by the ſheriff, &c. 151 ſ. 36

47 How far perſons committed by command of the king's juſtices are repleviſable by the ſheriff under the ſtat. of Weſt. 151, 152

48 Perſons impriſoned *for the foreſt*, are excepted out of the writ *de homine replegiando* 152

49 But by ſeveral ſtatutes, no man ſhall be impriſoned *for the foreſt*, without indictment, unleſs taken with the *mainour*, or treſpaſſing 152, 153

50 How ſuch offenders may be bailed or mainprized 153 ſ. 39

51 PERSONS outlawed, or who have abjured the realm, thoſe taken upon an *excommunicato capiendo*, approvers, and all perſons *convicted* of felony, or *other heinous crime*, and alſo all thoſe who, on examination, confeſs the guilt of felony, and *are ſo charged in the warrant*, are excluded from the *benefit of replevin* by the ſtat. of Weſt. 153 ſ. 40

52 Bail is only proper where it ſtands indifferent, whether the party be guilty or innocent of the charge. But when that indifferency is removed, it would be abſurd to bail *Page* 153 ſ. 40

53 By ſeveral ſtatutes, the bodies of priſoners convicted or in execution, reſtrained from being bailed 153, 154

54 The court of king's bench may bail a perſon upon an outlawry for felony 154

55 Juſtices of gaol-delivery may bail or convict of manſlaughter, and *it is ſaid*, for any other felony *ibid.*

56 A perſon impriſoned by *excommunicato capiendo*, in a cauſe of which the ſpiritual court has no conuſance, may be bailed on *habeas corpus*, or he may ſuperſede the writ *ibid.*

57 PERSONS taken with the *mainour*, priſon-breakers, perſons appealed by provers, perſons apprehended upon hue and cry, notorious thieves, dangerous and treaſonable rioters, conſpirators, reſcuers, and perſons guilty of miſpriſion, præmunire, or maim, and ſuch like notorious offences, ſeem not to be bailable by the ſtat. Weſt. 153

58 But in offences, under the degree of felony, bail ſeems to be left, in a great meaſure, to the diſcretion of the judge *ibid.*

59 PERSONS *apprehended* for arſon, for falſifying the coin, or king's ſeal, or for treaſons, are excluded from replevin by the ſtat. Weſt. 156

60 *The ſheriff* therefore cannot releaſe ſuch offenders even by *homine replegiando* *ibid.* ſ. 46

61 Yet if any be charged before the ſheriff with any of the above offences, *upon very light ſuſpicion*, it ſeems the ſheriff is not bound by the ſtatute to commit him *ibid.*

62 If ſuch offender be under an arreſt, either of a magiſtrate or private perſon, the ſheriff cannot replevy him *ibid.*

63 By modern practice, ſheriffs ſhall receive no one into their cuſtody, but by warrant from a magiſtrate 156, 157

64 The king's bench not reſtrained by the ſtat. Weſt. from bailing in all caſes 157

65 PERSONS of good reputation *indicted* of larceny before ſheriffs in their torns, and

and lords in their leets, are repleviſable by virtue of the ſtatute of Weſt. *Page* 157 ſ. 48

66 Perſons not excepted by the ſtatute, who, being of good repute, are impriſoned upon light ſuſpicion, are alſo repleviſable 158 ſ. 49

67 Perſons impriſoned for petit larceny, if there be any colour to preſume their innocence, may alſo be bailed *ibid.* ſ. 50

68 Treſpaſs not extending to life or member, except the offence be *open and manifeſt*, is bailable by the ſtatute ſ. 51

69 The *appellee* of an *approver* is bailable ſ. 52

70 ACCESSARIES of good reputation are bailable till the principal be convicted 159

71 Perſons notoriouſly guilty as acceſſaries of crimes excluded from clergy, are not bailable 159, 160

72 By 31 Car. 2. c. 2. no perſon charged as acceſſary ſhall be removed or bailed by that act, otherwiſe than he might have been before 160

73 Where there are ſtrong preſumptions of guilt againſt an acceſſary he was not bailable before the ſtatute, nor is now bailable by it *ibid.*

74 IN WHAT CASES JUSTICES OF PEACE MAY ADMIT OFFENDERS TO BAIL 160

75 Wherever juſtices have juriſdiction over the offence they may bail the offender *indicted* before them, upon the like circumſtances as other courts may bail 160 ſ. 54

76 Two juſtices, one *quorum*, may bail perſons indicted before the ſeſſions; becauſe any two ſuch juſtices may try the offence *ibid.*

77 One juſtice of the peace may bail any offence, under the degree of felony, over which the ſeſſions has juriſdiction; for ſuch juſtice, being a judge of the court, retains the diſcretionary power of judging of the propriety of admitting ſuch an offender to bail 160, 161

78 One juſtice of the peace may either bail or impriſon a perſon who has given another a dangerous wound, exerciſing his judgment on its probable mortality *Page* 161

79 By 1 Rich. 3. c. 3. every juſtice of peace may let perſons arreſted or impriſoned *for ſuſpicion of felony* to bail or mainprize, in like form as if they had been indicted at ſeſſions ſ. 55

80 But by 3 Hen. 7. c. 3. the 1 Rich. 3. c. 3. is repealed and power is given to *two* juſtices, one to be of the *quorum*, to let *perſons mainpernable* by law to bail until the next ſeſſions or gaol-delivery, the recognizance of which ſhall be certified to the ſaid ſeſſion, &c. 161, 162

81 Alſo by 1 & 2 Phil. & Mary c. 13, no juſtices of the peace ſhall admit any perſons to bail who are declared irrepleviſable by the ſtatute of Weſtminſter 162 ſ. 57

82 And two juſtices, one to be of the *quorum*, ſhall not let to bail any perſon arreſted for manſlaughter or felony, or for ſuſpicion thereof, unleſs the ſame juſtices be preſent together at the time of the bailment (except in open ſeſſions), and the ſame ſhall be certified to the next gaol-delivery under their hands 162 ſ. 58

83 And previous to bailing *ſuch* priſoner, the ſaid juſtices, or the one *quorum*, ſhall take his examination and the depoſitions of the witneſſes in writing, as far as may be neceſſary to prove *the felony*, &c. and tranſmit the ſame to the next gaol-delivery *ibid.* ſ. 59

84 Juſtices of the peace are authoriſed to *bind over* neceſſary witneſſes to appear and give evidence againſt ſuch priſoners at the gaol-delivery 163

85 Juſtices of peace and coroners in *London*, *Middleſex*, and other cities, have authority to let to bail felons and priſoners in the ſame manner as before, and to bind over witneſſes, &c. *ibid.* ſ. 61

86 The juſtices of gaol-delivery ſhall puniſh juſtices of the peace for offending againſt the above recited act of Phil. and Mary *ibid.*

87 Juſtices, as conſervators of the peace, may bail any offence only tending directly

rectly to a breach of the peace *Page* 163, ſ. 62

88 One juſtice cannot bail a perſon for any other crime than that which barely tends to a direct breach of the peace, unleſs ſuch power be limited by ſome ſtatute, or the party have been indicted at ſeſſions 163 ſ. 62

89 No juſtice of the peace can bail a perſon *impriſoned* for treaſon againſt the king, arſon, &c. or any crime declared not bailable by the ſtat. Weſt. (*vide ſupra*) 164 ſ. 63

90 But if ſuch offender be only *accuſed on light ſuſpicion*, the juſtice may take ſurety for his appearance 156 *and* 164

91 And by virtue of 1 & 2 P. & M. c. 13. juſtices of the peace may bail any perſon impriſoned on a ſlight ſuſpicion of a fact clearly appearing to be no higher offence than manſlaughter, and *à fortiori* if it only amount to miſadventure or ſelf-defence 164 ſ. 63

92 The juſtices at their peril muſt take care that the offence in truth amounted not to murder *ibid.*

93 Juſtices of the peace ought in no caſe to bail any perſon guilty of any homicide, by his own confeſſion or the notoriety of the fact *ibid.*

94 The above mentioned ſtatutes (*vide ſupra*, No. 81 *to* 86) only ſhew the manner of bailing by juſtices, and do not point out the perſons bailable; for which the ſtat. of Weſt. muſt be obſerved *ibid.* ſ. 64

95 Juſtices are not impowered to bail civil actions, perſons taken on proceſs of contempt, or writ of rebellion out of chancery 164, 165

96 IN WHAT CASES BAIL IS GRANTABLE BY JUSTICES OF GAOL-DELIVERY 165 ſ. 65

97 Such juſtices may bail on conviction of homicide by miſadventure or *ſe defendendo*, to enable the offender to purchaſe his pardon *ibid*

98 If a convict of manſlaughter purchaſe his pardon, they may bail him after their ſeſſion is determined, &c. *ibid.*

99 They may bail a priſoner convicted before them of manſlaughter againſt plain evidence *ibid.*

100 Juſtices of the peace cannot bail in any of the above caſes: The reaſon of it *Page* 165. ſ. 65

101 Juſtices of gaol-delivery may bail an *appellee* in death or robbery, &c. &c. where the appellant is diſabled by excommunication, until the plaintiff be abſolved *ibid.*

102 WHERE BAIL IS GRANTABLE BY THE KING'S BENCH 165

103 The king's bench will exerciſe its diſcretion as to bailing priſoners on commitments by the privy council, where the crime is ſpecially expreſſed 166

104 Where a perſon is impriſoned upon a *uſurped authority*, the king's bench will diſcharge him without bond *ibid.*

105 The famous caſe of *Sir John Corbet* ſtated, in which it was determined that the king's bench will not bail on a commitment by the privy council, in which warrant no other cauſe of impriſonment was contained, but that it was at the king's command 166 to 168

106 This deciſion produced the PETITION OF RIGHT; ſince which it is agreed that wherever any commitment by the privy council hath not expreſſed, with ſome convenient certainty, the crime alledged againſt the party, he ought to be bailed upon his *habeas corpus* 168, 169

107 And by 16 Car. 1. c. 1. whoever ſhall be impriſoned by the command of the king or privy council ſhall have his *habeas corpus*, &c. &c. &c. 169, 170

108 The court of king's bench will not bail a priſoner committed by either houſe of parliament during the continuance of the ſeſſions 170 ſ. 73

109 Even if an exceſs of juriſdiction *plainly and expreſsly* appear, it ſeems queſtionable how far the court would interpoſe *ibid.*

110 The ſeveral caſes of commitments by parliament enumerated 170, 171

111 On a commitment by either houſe for a contempt, the court of king's bench has no juriſdiction: *Lord Holt* ſaid the power extended only to commitments

mitments for contempt in the face of the houſe *Page* 171
112 Modern opinions of the privilege of parliament to commit for contempts, and the impoſſibility of the courts to interpoſe to bail the priſoner *ibid.* (N)
113 It is agreed that the king's bench may bail a priſoner committed by either houſe for a contempt after the diſſolution or prorogation of the parliament *ibid.* ſ. 74
114 Whether the king's bench will bail a lord committed by the houſe of lords and pardoned 171 ſ. 75
115 The diſpute in the reign of James the firſt reſpecting the power of the king's bench to bail perſons committed by the court of chancery 172
116 A commitment by the court of chancery for diſobedience to a decree is good without ſhewing what the decree was 173
117 The king's bench may, in diſcretion, bail any perſon deprived of his liberty by an inferior court *ibid.* ſ. 77
118 Inſtances in which the court will exerciſe this diſcretion 173, 174
119 Of the proceedings in the king's bench upon a *habeas corpus* 174, 175
120 Neither the judges of the king's bench, nor of any other ſuperior court of juſtice, are reſtrained from admitting any offenders to bail by the ſtatute of Weſtminſter; yet they will regard the rules preſcribed by it, and not bail one thereby declared *irrepleviſable*, without ſome *ſpecial* circumſtance 175 ſ. 80
121 Therefore, without ſpecial motive they will not bail perſons convicted of felony, or notoriouſly guilty thereof *ibid.*
122 The king's bench will bail a perſon for an erroneous deſcription, who is taken on *capias utlagatum* 175 ſ. 80
123 Or where a perſon *outlawed* alledges an error in the record *ibid.*
124 Or where a perſon is convicted of felony againſt manifeſt evidence *ibid.*
125 Or where the proſecutor of an indictment hath unreaſonably delayed the proſecution, &c. *Page* 157. ſ. 80
126 Or where the priſoner in appeal hath pleaded the excommunication of the plaintiff *ibid.*
127 Or where the life of a priſoner is endangered by his continuance in priſon 175, 176
128 The fact of indiſpoſition upon which the court will bail a priſoner muſt be immediate, and not be ſelf-created, or the reſult of an habitual diſeaſe 176 (N) 1
129 The king's bench has power to bail in all caſes whatſoever, and will exerciſe their diſcretion in all caſes not capital; in capital caſes where innocence may be fairly preſumed; and in every caſe where the charge is not alledged with ſufficient certainty *ibid.* (N) 2
130 A variety of inſtances enumerated in which the court of king's bench have bailed priſoners *ibid.*
131 The king's bench will not look into the depoſitions before the coroner in order to bail for murder *ibid.*
132 Caſes in which the king's bench will not admit priſoners to bail *ibid.*
133 IN WHAT CASES BAIL IS GRANTABLE BY THE OTHER COURTS OF WESTMINSTER HALL 176 ſ. 81
134 The *Common Pleas* and *Exchequer* at any time during term, and the *Court of Chancery* during term or vacation, may award a *habeas corpus* by the common law, &c. 176 ſ. 81
135 By the HABEAS CORPUS ACT (*vide ſupra* No. 19, &c.) any of the ſaid courts in term time, and any judge of either bench, or baron of the exchequer in vacation, may award a *habeas corpus*, and thereupon bail the priſoner 176, 177
136 The above mentioned clauſes of the *habeas corpus* act extend not to treaſon or felony *plainly and ſpecially* expreſſed in the warrant 177 ſ. 82
137 No inſtance of ſuch crimes having ever been bailed by the *common pleas* or *exchequer* *ibid.*
138 In ſome inſtances, perſons committed for felony are bailable by the court of chancery *ibid.*

139 IN WHAT FORM BAIL IS TO BE TAKEN *Page* 177 ſ. 83
140 The king's bench, in admitting to bail for felony, &c. take a ſeveral recognizance from each of the bail in a ſum certain, and alſo in body for body *ibid.*
141 Juſtices of peace may in diſcretion adopt the ſame form *ibid.*
142 If the priſoner be bailed before the return of the *capias* in felony—or if he be bailed by an inferior court for an inferior crime, the recognizance ſhall only be in a ſum certain, and not body for body *ibid.*
143 Perſons bound body for body are at this day, only liable to fine, &c. *ibid.*
144 WHAT SHALL FORFEIT A RECOGNIZANCE OF BAIL 177 ſ. 84
145 How far ſtanding mute on the trial amounts to a forfeiture 178
146 A man's bail are his gaolers of his own chuſing *ibid.*
147 Non-appearance to a ſecond information, after a *nolle proſequi* entered on the firſt, and upon which a recognizance was taken, is a forfeiture *ibid.*
148 The recognizance in the above caſe ſhall not be forfeited by the non-appearance of the party the firſt day of every term, after plea; as it may be before he hath pleaded *ibid.*
149 By 4 Geo. 3. c. 10. the barons of the exchequer upon affidavit and petition, may diſcharge perſons liable to impriſonment upon eſtreated recognizances without any *queſtion* 178, 179
150 No diſcharge ſhall be ſo given where any other debt is due to the crown, than by ſuch recognizance 179
151 Nor in any caſes relating to frauds on the revenue *ibid.*
152 If the party to an eſtreated recognizance takes his trial the next ſeſſion, he may compound the forfeiture for a very ſmall matter *ibid.* (N)
153 If the money be levied, the court will order the proſecutor's coſts to be paid, and the ſurplus to be reſtored *ibid.*
154 On an acquittal, the bail, on motion, ſhall be diſcharged, though the acquittal be not entered *Page* 179
155 Neither the defendant nor his bail can be called on their recognizance without notice, except on the day they were bound to appear *ibid.*
156 On non-appearance, the court will not diſcharge the recognizance, even though the attorney general conſents; but will reſpite it till next term *ibid.*
157 The court is to judge whether the recognizance ought to be eſtreated or diſcharged *ibid.*
158 A convict pardoned on condition of tranſportation, may ſurrender in diſcharge of his bail by *habeas corpus*, &c. *ibid.*
159 But if the convict be actually on board the tranſport the court will not award the *habeas corpus* *ibid.*
160 On a recognizance entered into to try a miſdemeanor at the enſuing ſeſſions, the defendant muſt take out his *venire* on the ſecond day of the ſeſſion. But on neglecting ſo to do, upon motion and affidavit that it was not to delay the trial, the court will reſpite the recognizance: notice of the motion muſt be given.
161 On a recognizance being forfeited, it is of courſe eſtreated; but the court, on motion, will grant freſh proceſs againſt the party for the purpoſes of juſtice.
162 Juſtices of gaol-delivery may puniſh thoſe who improperly admit offenders to bail 33 ſ. 9. 34 ſ. 11 & 12
163 Whether a gaoler, &c. who bails a priſoner that is not bailable, is anſwerable for an eſcape, if he do not appear, &c. 199
164 In what manner offenders who are apprehended in a different county from that in which the offence was committed, ſhall be admitted to bail 55. 183
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3 How far a *recognizance* for good behaviour may be ſuperſeded by *certiorari* 417, 418

BEHEADING.—Vide *Execution.*

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BIGAMY.

1 Where the firſt marriage is abroad, and the ſecond within the realm, may be tried in England.—*Quere* if the firſt is in England, and the ſecond abroad, if it may not be ſo tried *Page* 315 ſ. 39
2 Bigamy was anciently debarred of clergy 475. 478
3 By 1 Edw. 6. c. 12. although a man be married to two wives or more, he ſhall have his clergy 475

BILLA VERA.—*Vide Indictment.*

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1 An *Iriſh* biſhop may be as well deſcribed by the addition of his biſhoprick as an *Engliſh* biſhop may by his 271 ſ. 109
2 A ſpecial commiſſion may be granted for enquiring into the temporalties of a biſhoprick while in the king's hands 27 ſ. 25

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1 The rewards allowed to thoſe who ſhall apprehend and convict offenders againſt this act 124, 125
2 Whoever ſhall reſcue any perſon in lawful cuſtody for any of the offences created by this act, or ſhall induce another to join in committing them, ſhall be guilty of felony without clergy 213

BLANK WARRANT.—*Arreſt.*

1 The court may grant an attachment againſt the ſheriff or bailiff for making an arreſt by force of *a blank warrant* *Page* 216
2 A juſtice cannot legally grant a blank warrant 132

BLINDNESS.

1 Formerly, blind perſons, being incapable of holy orders, werecon ſequently inadmiſſible to the benefit of clergy 475
2 A blind appellant may counterplead his infirmity againſt the wager of battle by the appellee 600

BLOOD CORRUPTED.

1 A condemnation by the court of the *conſtable and marſhal*, not being a court of common law, corrupts not the blood 18 ſ. 11
2 No ſentence, in appeal, by virtue of 1 Hen. 4. c. 14. ſhall cauſe the blood to be corrupted 234 ſ. 12
3 The king's pardon cannot ſalve the corruption of blood by attainder of treaſon or felony 559 ſ. 57
4 An attainder of treaſon or felony ſtains the blood, and renders the party *ignoble* 648 ſ. 47
5 The convict, whoſe blood is corrupted, can neither inherit as heir, nor can he have an heir *ibid.* ſ. 48
6 Corruption of blood bars a deſcent, unleſs the land were entailed *ibid.* ſ. 49
7 Inſtances of the courſe of deſcents which may be barred, by the corrupted blood of one, in the line through which it muſt paſs *ibid.*
8 A perſon whoſe blood is corrupted, ſtill retains a capacity to purchaſe lands, but he cannot hold them 649 ſ. 50
9 In what caſe corruption of blood ſhall create eſcheat *ibid.*
10 Blood once corrupted, cannot be reſtored to its original purity, but by the omni-

omnipotence of parliament (*vide ſupra* No. 3) *Page* 649 ſ. 51
11 But iſſue, born after pardon, may inherit in the ſame manner as if the blood of the anceſtor had never been corrupted *ibid.*
12 By 7 Ann. c. 21. and 17 Geo. 2. 39. after the death of *the pretender and his ſons*, no attainder for treaſon ſhall corrupt the blood 649, 650

BONA *et* CATALLA.—*Vide Goods.*

BOOTH.

By 5 & 6 Edw. 6. c. 9. robbery in any booth or tent, in any fair or market, the owner, his wife, children, or ſervants being therein, is ouſted of clergy whether ſuch inmates be ſleeping or waking 498 ſ. 90 p. 500

BOTANY BAY.—*Vide Tranſportation.*

BRASS.—*Arraignment.*

BREAKING.—*Vide Arreſt. Houſe-breaking.*

BREAKING PRISON.—*Eſcape. Reſcous.*

1 Breaking of priſon was felony by the common law, if the impriſonment was legal, whether it were for a criminal or a civil cauſe, or whether the priſoner was actually within the walls, or only in the ſtocks or perſonal cuſtody of another 190 ch. 18
2 It is immaterial whether it be the king's priſon or one belonging to the lord of a franchiſe; for every perſon who is in lawful cuſtody is the king's priſoner, and whoever breaks therefrom is by the ſtatute *de frangentibus priſonam* (*infra* No. 4.) guilty of felony *ibid.*
3 The confeſſion of having broke priſon before the coroner is not traverſable at the common law *Page* 190 ch. 18
4 By 1 Edw. 2. ſt. 2. none that breaketh priſon ſhall have judgment of life or member for breaking of priſon only, except the offence for which he was taken required ſuch judgment 190 ſ. 3
5 Any place whatſoever wherein a perſon, under a lawful arreſt for a ſuppoſed crime, is reſtrained of liberty, is a priſon within the act 191 ſ. 4
6 The impriſonment of a perſon, who is taken on a *capias* awarded on an indictment, is lawful, though eventually the priſoner appear to be innocent, or the proſecution groundleſs ſ. 5
7 A commitment by lawful *mittimus* on ſuſpicion of a felony *actually done*, although the party be not indicted, is a lawful impriſonment within the act *ibid.* ſ. 6
8 But if no felony were done, nor the party indicted, his breaking from priſon is no offence *ibid.* ſ. 7
9 If a felony were done, yet no juſt cauſe of ſuſpicion, and the *mittimus* be not in legal form, the breaking priſon is no felony *ibid.* ſ. 8
10 But if the cauſes of ſuſpicion be ſtrong enough to juſtify the arreſt, the breaking will be felony although the *mittimus* be informal 192
11 A juſtice's *mittimus* is a good juſtification of impriſonment, and, under any circumſtances, makes it dangerous to break therefrom *ibid.*
12 There muſt be *an actual* breaking of the priſon to come within the act *ibid.* ſ. 9
13 Every indictment for this offence as a felony muſt have the words *felonicè fregit priſonam* *ibid.*
14 If a priſoner eſcape *without uſing violence*, he is only guilty of a miſdemeanor *ibid.*
15 The breaking muſt be by the priſoner, or by his privity or procurement 193
16 An eſcape through a breach which others have made is not within the act *ibid.*
17 A priſoner who breaks a priſon on fire in order to ſave his life, or from any other act of neceſſity, and thereby eſcapes,

eſcapes, is not within the act *Page* 193 ſ. 11

18 No breach of priſon will amount to felony, unleſs the priſoner eſcape *ibid.* ſ. 12

19 Nor is it felony, *it is ſaid*, in a ſtranger who breaks a priſon, unleſs felons thereby eſcape *ibid.*

20 A priſoner, whoſe offence is made capital by any ſtatute ſince the ſtatute *de frangentibus priſonam*, is equally within the act, if he break his confinement, as if it had been ſo by the common law, or made ſo before the act *ibid.* ſ. 13

21 The offence for which the party was impriſoned muſt be capital at the time the offence is committed 193, 194

22 If the *mittimus* charge the priſoner with an offence under the degree of capital, and in truth it be not capital, he cannot be guilty of felony by breaking the priſon 194 ſ. 15

23 And if in truth the offence be not capital, although the *mittimus* charge it to be ſo, it would be difficult to maintain that a breaking would be felony *ibid.*

24 A perſon committed for felony where in fact no felony hath been done, cannot be guilty *of felony* by breaking from his reſtraint *ibid.*

25 It is the crime itſelf, and not the nature of the charge, that conſtitutes the offence *ibid.*

26 The queſtion examined whether, in priſon breach, the felony ſhall be conſtrued from the charge in the *mittimus*, or from the real nature of the offence 194, 195

27 It is immaterial, whether the party who breaks his priſon were under an accuſation only, or actually attainted of the crime for which he is confined 195

28 A perſon committed for high treaſon, becomes guilty of felony only, by breaking and eſcaping *ſingly*; but if by his breaking he knowingly effectuates the eſcape of other traitors, he is thereby guilty of high treaſon *ibid.* ſ. 17

29 As ſuch aſſiſtance given to felons will make an acceſſary, ſo if given to traitors it will make high treaſon *ibid.*

30 A perſon breaking priſon may be arraigned for the offence before he is convicted of the crime for which he was impriſoned *Page* 196

31 The offender cannot be arraigned on the ſheriff's return of a priſon breach; he muſt be indicted *ibid.* ſ. 19

32 It muſt appear by the indictment that the offender was lawfully in priſon, and for a capital offence *ibid.* ſ. 20

33 It is not ſufficient to ſay *quod felonicè fregit priſonam.*

34 Breakers of priſons, whoſe offence is under the degree of capital, ſhall be ſeverely puniſhed by fine and impriſonment *ibid.* ſ. 21

35 By 16 Geo. 2. c. 31. to aſſiſt the eſcape of a priſoner for treaſon or felony, or to convey inſtruments to him for the purpoſe, is tranſportation. But if the priſoner be confined for petty larceny, &c. it is a miſdemeanor only (*Vide eſcape for the particulars*) 210, 211

36 Breaking the priſon of the ordinary was ouſted of clergy 475 ſ. 9

BURGESS.

Burgeſs is too general, and therefore not a good addition of the ſtate and degree 272

BURGLARY.

1 A writ of appeal for burglary may be abated by the court *ex officio*, for the word *burgaliter*, inſtead of *burglariter*, or *burgulariter* 268

2 An indictment muſt deſcribe the offence by the word *burglariter*, or *burgulariter*, or *burgalariter* 320

3 By 5 Ann. c. 31. whoever ſhall proſecute a burglar to conviction, ſhall have 40 l. reward, and a certificate exempting from pariſh offices, &c. 124 ſ. 27

4 Principals and acceſſaries, before the fact in burglary, excluded from clergy 475. 484. 502, 503

5 Where a man found guilty in one county of an offence which amounted to burglary in another, is ouſted of clergy 495, 496

6 An indictment for burglary is inſuffi-

cient without the word *noctanter* Page 321

7 Accomplices in burglary diſcovering, &c. two offenders, are entitled to a pardon 540 ſ. 6

BURGH.

1 A *viſne* may come from a burgh 265
2 By common law, juries from *burghs* needed not to have 40l. yearly 309. 583
3 By 23 Hen. 8. c. 13. burghers ſhall have 40l. clear, to be jurors, &c. 585

BURNING IN THE HAND.

1 By 4 Hen. 7. c. 13. convicts for murder, not in holy orders, ſhall be marked with an M; and for felony with a T, in the brawn of the left thumb 508 ſ. 121
2 By 18 Eliz. c. 7. every convict admitted to clergy and burnt in the hand, ſhall be delivered out of priſon, and not to the ordinary 509 ſ. 124
3 By 5 Ann. c. 6. perſons convicted of larceny and burnt in the hand, may be ordered to the houſe of correction 512, 513
4 By 19 Geo. 3. c. 74. burning in the hand aboliſhed 513
5 Tranſportation is only put in the place of *judgment* for burning in the hand, and not in the place of the *actual* burning *ibid.* ſ. 137

BUTLER.

A butler who has the bare charge of goods, without the poſſeſſion, cannot maintain an appeal 246

C

CALENDAR OF PRISONERS.

By 3 Hen. 7. c. 3. the ſheriff ſhall certify a liſt of his priſoners to the juſtices of gaol-delivery, for the purpoſe of being calendared

CANON LAW.

1 All perſons in holy orders have the privilege of clergy by the canon law 474
2 The canon law is of no force, except where it is allowed by, and is conſiſtent with the common or ſtatute law of the realm 474 ſ. 2
3 In what inſtances the common law has been received, with reſpect to the benefit of clergy 474, 475

CAPITAGE.

What it is 113 ſ. 2

CAPIAS.—*Vide Proceſs.*

1 Doors may be broke open to execute a *capias*, grounded on an indictment; or a *capias* from the king's bench, or chancery, to compel ſurety for the peace, &c. or a *capias utlagatum* or *pro fine* in any action 138 ſ. 3, 4
2 A *capias* upon an indictment will bring the party impriſoned by virtue of it within the ſtatute *de frangentibus priſonam*, if he break from cuſtody, although no crime were in truth committed 191 ſ. 5
3 In what caſe a *capias* ſhall iſſue, upon a *nihil* being returned to a *venire* 402 ſ. 10
4 A *capias* is not, *properly*, the firſt proceſs on an indictment, under the degree of *mayhem*, or felony, &c. unleſs given by ſome ſtatute *ibid.* ſ. 11
5 A *capias* is the firſt proceſs on information againſt a commoner for intruſion, &c. *ibid.* ſ. 12
6 Where a *capias* ſhall iſſue in QUI TAM 403 ſ. 13
7 A *capias* ſhall iſſue on a criminal information, if no appearance be entered in four days after ſubpœna ſ. 14

8 A *capias* is the first process in all indictments of treason or felony *Page* 403 ſ. 15
9 How many days muſt be between the teſte and the return ſ. 16
10 A *capias* ſhall iſſue againſt a defendant who eſcapes 404 ſ. 19
11 A ſuit by *capias* inſtead of *diſtringas* is a diſcontinuance 424
12 A *capias* is annulled by the intervention of a term between the teſte and the return *ibid.*
13 On every indictment under the degree of capital, there muſt be three *capias's* before the *exigent* ſhall be awarded 431
14 How many *capias's* are required in *outlawry* on a capital offence 431 to 435

CAPTION.

1 If it appear by the caption of an indictment, that it was found by leſs than twelve jurors, the proceedings upon it will be erroneous 307 ſ. 16
2 Contrary to former determinations, the omiſſion of the words *proborum et legalium hominum* in the caption of an indictment, is not fatal 308
3 The caption of every indictment muſt ſhew, that it was taken before ſuch a court as had juriſdiction over the offence 359 ſ. 119
4 Whether it be neceſſary in the caption of an indictment to inſert the words *necnon ad diverſas felonias*, or the words *domini regis*, &c. *ibid.* ſ. 121, 122
5 The caption of an indictment at a ſeſſions of the peace muſt mention before whom the ſeſſions was holden, and ſet forth the nature of the commiſſion of the juſtices, &c. 360 ſ. 123
6 If it does not name the juſtices, or if it omits the word *aſſignat'* it is inſufficient *ibid.*
7 A caption, taken *ad magnam curiam cum leta tentam*, is ſufficient *ibid.* ſ. 124
8 A caption taken at a leet, without ſhewing whether the court was held by grant or preſcription, is ſanctified by many precedents *Page* 361
9 The caption of an indictment found at the leet, or other inferior court, *muſt expreſsly ſhew*, that the jurors were 12 in number; that they were of *the place*, &c. for which the court is holden, and that it was found upon their oaths 361. ſ. 126
10 And *quere*, if the omiſſion of the jurors names in the caption is not error *ibid.*
11 How far the omiſſion of certain *technical phraſes* in the caption will, or will not, vitiate the indictment *ibid.*
12 The caption of an indictment muſt ſet forth the day and year when the court was holden 362 ſ. 127
13 It may be recorded as found either in the *preſent* or the *preterperfect* tenſe *ibid.*
14 It muſt ſhew in the year of *what king* it was taken *ibid.*
15 If the ſtyle of the day or year be ſet forth in any figures but Roman, it is inſufficient *ibid.*
16 The year of our lord, is not neceſſary *ibid.*
17 An indictment taken at an *adjourned* ſeſſion, muſt ſhew when the *original* ſeſſion began *ibid.* (N) 22
18 If the court is ſtated to have been held on a day which is impoſſible, it is fatal *ibid.*
19 If a caption ſet forth no place at all, where the indictment was found, or not with ſufficient certainty, or ſet forth a place not within the juriſdiction of the court, it is inſufficient 362 ſ. 128

CARRIER.

A carrier to whom goods are delivered may have an appeal againſt thoſe who ſhall take them felonioufly away 246 ſ. 44

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A *viſne* may come from a caſtle 265

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An appeal of larceny is insufficient without the word *cepit* *Page* 258 *s.* 77

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1 *Ne unques accouple, &c.* shall be tried by the bishop's certificate 242 *s.* 36 254 *s.* 62
2 How the offence of the principal shall be certified in order to proceed against the accessary 458, 459
3 How a conviction of felony shall be certified, in order to exclude the offender from clergy 478, 479
4 Where the judges shall send for a certificate of a conviction, &c. in their own names, and where by writ in the king's name 459

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1 A writ or bill of appeal may be removed from the sheriff into the king's bench by a *certiorari* taken out by a stranger 277, 278
2 An appeal removed into the king's bench by *certiorari* ought to be arraigned on the crown side 437 *s.* 4
3 A *certiorari* is not the proper writ to remove a record of the conviction of a principal, as evidence on a trial of the accessaries in the king's bench 459
4 The king's bench may award a *certiorari* to remove the proceedings from *any* inferior court, unless they are exempted by the charter of institution 405 *s.* 22
5 A *certiorari* from the king's bench lies to justices in *eyre*, gaol-delivery, and of a county palatine 405, 406
6 It lies to the *college of physicians* in cases where they are empowered to fine and imprison 406
7 It lies to *justices of the peace*, &c. even where they are empowered finally to hear and determine *Page* 406
8 It lies to *commissioners of sewers*, notwithstanding the act says they shall not be *compelled* to certify their proceedings *ibid.*
9 It lies to remove a presentment in a *court leet* 406 (N)
10 It lies to remove the *examinations of prisoners* before justices of peace taken pursuant to the statutes of Philip and Mary *ibid.*
11 It lies to a *private jurisdiction* created by act of parliament *ibid.*
12 It lies to commissioners of bankrupts *ibid.*
13 A special ground must be laid before a *certiorari* shall issue to a *county palatine* to remove proceedings in *an action* *ibid.*
14 If judges of assize proceed against a person for non-residence, it is a good ground for a *certiorari* *ibid.*
15 A *certiorari* lies to remove an indictment for not doing statute duty on the highway, or for not repairing a bridge *ibid.*
16 It lies to the quarter sessions of a corporation *ibid.*
17 Or to remove proceedings before two justices *ibid.*
18 Or to remove proceedings on the conventicle act *ibid.*
19 It lies to remove an order on appeal from a scavenger's rate *ibid.*
20 It lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon *ibid.*
21 It lies to remove an order of bastardy *ibid.*
22 But no *certiorari* will lie to *judges of oyer and terminer* to remove a recognizance; nor to justices, &c. to remove a poors rate *ibid.*
23 A *certiorari* will lie to the *courts of the Cinque Ports* to remove all *criminal* proceedings 406 *s.* 24
24 A *certiorari* will lie to the grand session, or to a session of the peace *for Wales*, to remove any indictment for a crime non-capital 407
25 A *certiorari* has removed an indictment

ment *for murder* from *Wales* *Page* 407 (N) 1
26 A *certiorari may* be granted to remove any indictment from *London* or *Middlesex*, on three days notice being given 407 ſ. 26
27 But by a *certiorari* to London, only the *tenor* of the indictment ſhall be removed *ibid.*
28 The king's bench is *bound* to grant a *certiorari* to remove an indictment, *at the inſtance of the king* 407 ſ. 27
29 But if the *defendant* pray a *certiorari*, it is in the diſcretion of the court whether they will grant it or not *ibid.*
30 And the abſolute right of a proſecutor to a *certiorari*, is confined to caſes where the crown itſelf is concerned, by the attorney general 407 (N) 2
31 Where a private proſecutor only uſes the king's name, it is alſo granted, *unleſs cauſe be ſhewn againſt it* *ibid.*
32 But *every defendant* muſt lay a ſpecial ground before the court will grant a *certiorari* *ibid.*
33 The court will not grant a *certiorari* to remove an indictment for *bigamy* from Hicks's Hall, without the proſecutor conſents *ibid.*
34 The court will never grant a *certiorari* for the removal of an indictment before juſtices of gaol-delivery, without ſome ſpecial cauſe 408
35 Inſtances in which the court have removed indictments from juſtices of gaol-delivery *ibid.* (N) 3
36 The court of *king's bench* will not grant a *certiorari* for a conviction of recuſancy upon a default at ſeſſions 408 ſ. 29
37 It *ſeems* a good objection againſt the granting a *certiorari*, that *iſſue* is joined below, and a *venire* awarded ſ. 30
38 A *certiorari* ſhall never be awarded to remove an indictment *after conviction*, unleſs for ſpecial cauſe ſ. 31
39 A *certiorari* may iſſue to remove a *conviction* upon the foreſt law: The reaſon of it 408, 409
40 The court will refuſe a *certiorari* to remove a recognizance from juſtices of *oyer* and *terminer* 409
41 No orders of commiſſioners of ſewers ought to be filed without notice *Page* 409
42 In what manner the king's bench will proceed on a *certiorari* to commiſſioners of ſewers ſ. 34
43 By 1 & 2 Philip and Mary, c. 13. no *certiorari* ſhall be granted to remove any *recognizance*, unleſs ſigned by the chief juſtice, or, in his abſence, one of the other judges, &c. ſ. 35
44 By 5 & 6 W. & M. c. 11. in term time no *certiorari*, at the proſecution of the party indicted, ſhall be granted by the king's bench to remove any indictment or preſentment from ſeſſions *before trial*, unleſs on motion in open court ſ. 36
45 But *in vacation* ſuch writ may be granted by any of the judges of B. R. whoſe name, and alſo the name of the perſon to whom granted, ſhall be endorſed thereon ſ. 36
46 By 13 Geo. 3. c. 78. no preſentment, &c. of any highway ſhall be removed from ſeſſions until it be *traverſed*, except the right to repair be the queſtion 409, 410
47 But this is conſtrued to mean on the part of the defendant only; for on the part of the proſecution, it lies before traverſe and judgment 410 (N) 5
48 No other proceedings under the highway act ſhall be removed by *certiorari* 410
49 If the ſeſſions manifeſtly exceed their authority in making orders concerning highways, they may be removed by *certiorari* into the king's bench, and quaſhed *ibid.*
50 By 7 & 8 W. & M. c. 6. no proceedings for the recovery of ſmall tythes ſhall be removed by *certiorari* 410 ſ. 38
51 But if any matter of law come in queſtion, the proceedings may be removed *ibid.*
52 By 12 Car. 2. c. 23. no *certiorari* ſhall be allowed to remove proceedings before juſtices concerning *exciſe* ſ. 39
53 A *certiorari* will not lie to remove a conviction by commiſſioners of exciſe for double duties on beer under 12 Car. 2. c. 24. *ibid.* (N) 6

54 But a *certiorari* will lie under the 11 Geo. 1. c. 30. for harbouring tea and ſpirits, except the objection lie to the merits *Page* 410 ſ. 39

55 How the *fiat* for a *certiorari* is to be ſigned ſ. 40

56 Generally the *certiorari* ought to be directed to the judge of the inferior court; but in certain caſes it may be directed to the officer who has the cuſtody of the record 411 ſ. 41

57 In caſe of death, a *certiorari* may be directed to the *perſonal repreſentative* of the perſon who ought to certify the record ſ. 42

58 A *certiorari* may be directed to a juſtice of aſſize to certify a record taken before his companion during his abſence *ibid.*

59 *Certiorari's* for the removal of indictments or recognizances, are directed, either to the juſtices of the county generally, or to ſome of them by name, and not to the *cuſtos rotulorum* 411 ſ. 43

60 But if the record is in the hands of the *cuſtos rotulorum*, the *certiorari* ſhall be directed to him *ibid*

61 *Sed quere*, if he muſt not make the return to it *as a juſtice of the peace* *ibid*

62 The court of king's bench may receive the proceedings of a judge of record *in any executory matter* without any *certiorari* 412

63 If both the judges in a commiſſion of aſſize happen to die, the clerk of aſſize may bring in the verdicts without *certiorari* *ibid.*

64 But neither the executors or adminiſtrators of a judge can bring in a record without *a writ* for that purpoſe *ibid.*

65 No record *executed*, as by *acquittal*, &c. can be brought into a higher court without a writ *ibid.*

66 No juſtice out of commiſſion, or who is afterwards reſtored, can certify a record without *certiorari* *ibid.*

67 By 21 Jac. 1. c. 8. *certiorari's* for the removal of an indictment of riot, forcible entry, or aſſault and battery, from the quarter ſeſſions, ſhall be delivered in open court, and before allowance the defendant ſhall be bound in 10l. with ſureties, to pay the proſecutor his coſts and damages *Page* 412 ſ. 45

68 The king's bench upon the removal of *any* indictment required a recognizance from the defendant, to carry down the record 412, 413

69 By 5 & 6 W. & M. c. 11. and 8 & 9 Will. 3. c. 33. defendants proſecuting *certiorari's* at ſeſſions ſhall enter into a recognizance of 20l. with two ſureties, before one juſtice of the peace, or judge of king's bench, &c. to appear and plead to iſſue in the king's bench at his own coſts, to try the indictment at the next aſſizes, or term, on notice to the proſecutor 413 ſ. 48

70 Such *recognizances, certiorari's, and indictments*, ſhall be filed in the king's bench, and the name of the proſecutor (if he be the party grieved, or ſome public officer) indorſed on the back of the indictment *ibid.*

71 How this act relates to indictments found at Hicks's Hall *ibid.* (N)

72 By 5 & 6 Will. & Mary, c. 11. if the defendant proſecuting ſuch *certiorari* be convicted, the king's bench ſhall award *taxed* coſts to the proſecutor *if he be the party grieved, or a civil officer*, &c. 413 ſ. 49

73 The proſecutor within ten days after demand ſhall have an attachment for the recovery of the coſts ſo taxed, and the defendant's recognizance ſhall not be diſcharged till they are paid 413, 414

74 By 5 & 6 W. & M. c. 11. the ſame is enacted concerning *certiorari's* to the counties palatine 414

75 The juſtices muſt make a return, although a proper recognizance be not given according to the act 414 ſ. 51

76 The above ſtatutes only refer to defendants indicted, therefore *certiorari's* obtained by proſecutors remain as at common law *ibid.* ſ. 52

77 The above ſtatutes do not reſtrain the power of the king's bench in taking recognizances upon granting *certiorari's* at common law 414 ſ. 53

78 If ſuch a recognizance varies, either in the ſum or the condition, from the directions

directions of the act; yet it is of the ſame force as before the act was made *Page* 414 ſ. 53

79 A *certiorari* procured by a defendant under the ſtatutes will not be a *ſuper ſedeas* to the courts below, *unleſs the conditions are complied with* *ibid.*

80 If the ſureties appear to be worth 20l. the juſtices cannot refuſe them 414 *ibid.* ſ. 54

81 *Quere*, if ſome of ſeveral defendants find ſureties, whether the indictment ſhall be removed as to all ſ. 55

82 The taxation ſhall only be of the coſts ſubſequent to the *certiorari* 415 ſ. 56

83 The proſecutor by accepting taxed coſts is not reſtrained from aggravating the fine *ibid.* ſ. 57

84 But under a *certiorari* at common law, the acceptance of coſts is entire ſatisfaction *ibid.*

85 The proſecutor, to be entitled to coſts, muſt be either a civil officer, or the party injured (*Vide ſupra* No. 72.) 415 (N)

86 Being bound over to proſecute, will not entitle the party to coſts *ibid.*

87 If the proſecutor be a party injured, or a civil officer, and the name is omitted to be indorſed on the back of the indictment (*Vide ſupra* No. 70.), the truth of the fact may be ſupplied by affidavit *ibid.*

88 If the proſecutor receive the third part of the fine, and then applies for his coſts under the recognizance, what has received ſhall be deducted *ibid*

89 The payment of the fine does not diſcharge the defendant's recognizance *for the coſts* *ibid.*

90 When the coſts are taxed they become a *veſted debt*, and the perſonal repreſentatives of the party may recover them *ibid.*

91 Where no recognizance is taken, as under the lottery act, &c. the court cannot tax coſts *ibid.*

92 The court will not order a *recognizance at common law* to ſtand as a ſecurity for coſts *ibid.*

93 But a recognizance on the ſtatute ſhall ſtand as a ſecurity for *taxed* coſts, for not going on to trial (*vide ſupra* No. 69.), although he *acquitted*, or the proſecuted had taken *the defendant in execution* for the amount *Page* 415

94 But the recognizance ſhall not be forfeited for not going on to trial, unleſs the proſecutor give rules according to the practice of the court 415 ſ. 58

95 After the recognizance, the court will not *liſten* to any motion to quaſh the indictment or *certiorari* ſ. 59

96 By 16 Geo. 3. c. 30. againſt deerſtealers, no *certiorari* ſhall iſſue unleſs the party *convicted* ſhall become bound *to the proſecutor*, &c. in 100l. to pay full coſts and damages within 30 days; and to the juſtice convicting in 60l. to proſecute the *certiorari* with effect, &c. 416

97 But if an offender appeal from the juſtice of the ſeſſions, he may ſue out a *certiorari* on ſix days notice to the proſecutor *ibid.*

98 The like in effect is enacted by the ſtatutes concerning game *ibid.*

99 By 5 Geo. 2. c. 19. No JUDGMENTS OR ORDERS OF JUSTICES OF THE PEACE ſhall be removed by *certiorari*, unleſs the party ſuing the *certiorari* ſhall firſt enter into a recognizance, with ſureties, before the juſtice or ſeſſions where the judgment or order is made, or before one of the judges of king's bench, in the ſum of 50l. to proſecute the ſame at their own coſts without delay, and to pay the *other party* their full coſts and charges within one month after ſuch judgment or order is confirmed *ibid.*

100 The recognizance ſhall be certified to king's bench, and filed with the *certiorari* and judgment, &c. If the judgment is confirmed, *the party* entitled ſhall have an attachment for his coſts, if not paid within 10 days after demand 416, 417

101 By 13 Geo. 2. c. 18. no *certiorari* ſhall iſſue to remove *any* proceedings before juſtices of peace, unleſs applied for within ſix calender months, and on oath, that ſix days notice thereof in writing to the juſtice, &c. who may ſhew

ſhew cauſe againſt the iſſuing of ſuch *certiorari* *Page* 417
102 After a *certiorari* is allowed, all ſubſequent proceedings on the record below are erroneous 417 ſ. 62
103 How the delivery of a *certiorari* operated before the 21 Jac. 1. (*Vide ſupra* No. 67.) *ibid.*
104 If execution has been awarded below, the juſtices, &c. ſhould iſſue a *ſuperſedeas* to the ſheriff, which will make *a ſubſequent* execution void 417, 418
105 If the execution be partly levied before the delivery of the *ſuperſedeas*, a writ of *venditioni exponas* will authoriſe the ſheriff to proceed *ibid.*
106 A *certiorari coram nobis*, &c. makes *all* proceedings on *the* record, ſubſequent to its delivery, erroneous, whether before or after its return 418 ſ. 64
107 A *certiorari* in this reſpect is ſtronger than a *writ of error*, which is ineffectual unleſs the record be certified in a reaſonable time *ibid.*
108 It *is ſaid* the very iſſuing of a *certiorari* is a *ſuperſedeas*. *Sed quere* *ibid.*
109 For if a *certiorari* to remove an indictment be not delivered before the jury be ſworn, the trial may proceed *ibid.*
110 A *certiorari* is of no effect unleſs it be delivered before its return is expired *ibid.*
111 A *certiorari* is no *ſuperſedeas* of an indictment at ſeſſions, without a proper recognizance *ibid.*
112 A *certiorari* removes all proceedings done between the *teſte* and the return *ibid.* (N)
113 A *certiorari* for the removal of a recognizance of good behaviour, or for an appearance at ſeſſions, will not *ſuperſede* its obligation 418 ſ. 65
114 If an indictment be removed by *certiorari* after *iſſue joined* and remanded, the trial ſhall proceed as if no *certiorari* had iſſued ſ. 66
115 Inferior courts proceeding after *certiorari* delivered, are guilty of contempt 419
116 A *certiorari* once filed, the proceeding below can never be revived by *procedendo* *Page* 419 ſ. 68
117 But the *certiorari* may be taken off the file, if improperly obtained, and then a *procedendo* may be moved for *ibid.* (N) †
118 If the defendant be *convicted* and the proſecutor ſues out a *certiorari*, the defendant ſhall have *procedendo* *ibid.*
119 The return to a *certiorari* muſt be under the ſeal of the court or perſon to whom it is directed 419 ſ. 70
120 A return held bad, becauſe upon paper inſtead of parchment *ibid.* (N)
121 The return muſt be made by the *very* perſon to whom the *certiorari* is directed, unleſs he have power to make a deputy, and that power be ſhewn in the return, or otherwiſe nothing is removed by it 419 ſ. 71
122 If the return differ from the writ in the deſcription of the perſon, yet it is good, provided he is equally well-known by either deſcription *ibid.*
123 *Quere*, how the court ſhall proceed upon a *certiorari* returned by a part only of the perſons to whom it was directed *ibid.*
124 A *certiorari*, to remove an order of *two juſtices*, may be directed to *the ſeſſions* and returned by *them* *ibid.* (N)
125 Before a recognizance taken by a juſtice is recorded at the ſeſſions it muſt be returned by *the juſtice*, although it may be in the cuſtody of *the clerk of the peace* 419, 420
126 A return by juſtices ſhall have the clauſe *necnon ad diverſas felonias*, &c. 420
127 If the perſon to whom a *certiorari* is directed make a falſe return, no affidavits ſhall be received of its falſity, but the party injured muſt *ſue* or *inform* for the falſe return 420 ſ. 74
128 But if the public good be immediately concerned, the court will refuſe to file ſuch falſe return *ibid.*
129 *Surpluſſage*, in a return to a *certiorari*, ſhall be diſregarded 420 ſ. 75
130 The return to a *certiorari* ought to certify the record itſelf, or the tenor of it, or the tenor of the tenor, according as the writ may require 420 ſ. 76

131 Where the *writ* requires the record a return of the tenor only is nought *Page* 420 ſ. 76

132 Except in London, where a return of the tenor only is warranted by the city charters *ibid*

133 If the purport of the *certiorari* be only to try the iſſue of *nul tiel record*, it is ſufficient to certify the tenor, though the *writ* require the record *ibid.*

134 Alſo if the court awarding the *certiorari*, have no juriſdiction to proceed upon the ſubject matter of the record itſelf, the court below ought *only* to certify *the tenor* 420, 421

135 Nothing can be removed where the *certiorari* is improperly directed 421

136 A *certiorari* may remove a record, before its *return*, though ſuch record be not *in eſſe* at the time of the *teſte*, or delivery 421 ſ. 78

137 A verdict cannot be removed from ſeſſions before judgment *ibid.* (N)

138 A *certiorari* will remove an indictment, notwithſtanding a diſcontinuance on it in the court below 421 ſ. 79

139 Where the *certiorari* requires an indictment or other record taken before juſtices of a *certain deſcription*, and that certified appears to have been taken before juſtices of a *different deſcription*, nothing is removed 421. ſ. 80, 81

140 Where *the writ* deſcribes an indictment for ſtealing two horſes, and that certified is for ſtealing one only, no thing is removed 421 ſ. 82

141 Nor where the variance is between *foreign ſalt*, and *ſalt in general*; or in the deſcription of a place 422 ſ. 83, 84

142 Nor where the record required is againſt A. B. and C. and that certified is againſt A. only *ibid.* ſ. 85

143 But a *certiorari* to remove a record againſt A. only, will remove it as againſt him, although others may be included in it *ibid.*

144 Where there is a material variance between *the writ* and the records certified, in the names or addition of the parties, nothing is removed *Page* 422 ſ. 86

145 Yet if the variance be only in the ſpelling, and the words have the very ſame ſound, it is immaterial *ibid.*

146 If the writ name more defendants than are named in the record, it is variance 423 (N)

147 *The writ* need not deſcribe whether the offence be *contra formam ſtatuti ibid.*

148 A *certiorari* to remove a conviction on an indictment muſt give the defendant a day in court *ibid.*

149 Where the record required is not removed, the court will quaſh the writ and award a new one, or ſuffer the court below to proceed, as in diſcretion ſhall appear proper 423 ſ. 87

150 What proceſs is to be awarded after the removal of a record by *certiorari* into a ſuperior court 424 ſ. 88

151 No proceedings of any court of criminal juriſdiction can be removed into a ſuperior court, but by writ of error or *certiorari* 5 ſ. 14

CHAINS.

1 By 25 Geo. 2. c. 37. the court before whom a *murderer* is convicted may *appoint* the body of any ſuch criminal to be *hung in chains*, after execution 660 ſ. 13

2 It has been reſolved by the judges that the hanging in chains is not to form any part of the ſentence *ibid.*(N)

3 The court may, after ſentence, direct the hanging in chains, by a ſpecial order to the ſheriff *ibid.*

CHALLENGES.—*Vide Jurors.*

1 A priſoner, for any crime, may, by the common law, challenge any of the GRAND JURY, as being outlawed for felony, villeins, returned by the proſecutor, or not returned by the proper officer, &c. 307 ſ. 16

2 Whether a priſoner who challenges more jurors than the law allows, ſhall be

be adjudged to ſtand mute *Page* 461 ſ. 2
3 No challenge can be taken either to the array or the polls of the PETTY JURY, until a full jury appear 579
4 No juror can be challenged, either by the king or the priſoner, after he is ſworn, except by conſent; unleſs for ſome cauſe ſubſequent to his being ſworn *ibid.*
5 The array cannot be challenged after *any* of the jurors are ſworn *ibid.* ſ. 1 (N)
6 A juror after he is ſworn may be peremptorily challenged another day *ibid*
7 Formerly the king might challenge *peremptorily* any number of jurors. But by 33 Edw. 1. he ſhall now aſſign a cauſe certain, the truth of which ſhall be tried as in other challenges 579, 580
8 This ſtatute extends as well to *all* criminal caſes as to civil 580 ſ. 3
9 The king need not ſhew his cauſe of challenge till the whole panel is peruſed, and it appear there will not be ſufficient without the perſon ſo challenged *ibid.*
10 If the defendant challenge *touts paravaile*, he ſhall ſhew his cauſes, before the king need ſhew any 580 ſ. 3
11 A *peer* can take no challenge to any of his peers 580 ſ. 4
12 Where ſeveral are tried on a joint *venire*, the challenge of one is a challenge as to all *ibid.*
13 By 24 Geo. 2. c. 18 no challenge ſhall be taken by a peer to any panel for want of a *knight* *ibid.*
14 The priſoner muſt take all ſuch challenges himſelf, even in caſes where counſel are allowed 580
15 By the common law, *a peremptory* challenge was allowable in all capital caſes 581
16 By 33 Hen. 8. c. 23. it ſhall not be allowed in high treaſon or miſpriſion of high treaſon *ibid.*
17 But as to high treaſon, the right of peremptory challenge is revived by 1 P. & M. c. 10. *ibid.*
18 *Quere*, whether a peremptory challenge ſhall be allowed upon the trial of a collateral iſſue *Page* 581 ſ. 6
19 At common law the priſoner might challenge any number of jurors *peremptorily*, under the number of thirty-five 581 ſ. 7
20 By 22 Hen. 8. c. 14. no perſon arraigned for any petit treaſon, murder, or felony, ſhall be admitted to challenge peremptorily above twenty 581 ſ. 8
21 But the 1 & 2 Phil. & Mary, c. 10. has revived the old challenge of 35 as to *petit treaſon* *ibid.*
22 Contrary to the opinions of *Hale* and *Hawkins*, if a priſoner challenge more than 20, the challenge ſhall be overruled and the juror ſworn 582
23 Where a juror is challenged for cauſe *by the priſoner*, the cauſe ſhall be immediately ſhewn, and not as in a challenge by the king *(Vide ſupra* No. 9.) after the panel is peruſed 582 ſ. 10
24 If the *cauſe* of challenge be diſallowed, the ſame juror may be challenged *peremptorily* before he is ſworn *ibid.*
25 It is a good *cauſe* of challenge that a juror is an alien, a minor, or a villein *ibid.*
26 A peer may be diſcharged from the jury by writ of privilege, or he may challenge, himſelf as being a peer, or he may be challenged, for that cauſe, by the party 583 ſ. 11
27 In what caſes the want of freehold is a good cauſe of challenge againſt jurors. *(Vide Jurors)* 583 ſ. 12 to 587 ſ. 25
28 It is a good cauſe of challenge that a juror is outlawed, or ſentenced to any *infamous* puniſhment, or that he hath been convicted of treaſon, felony, perjury, conſpiracy, forgery on 5 Eliz. &c. 587, 588
29 Such exceptions are not ſalved by a pardon, *quere* *ibid.*
30 Anciently excommunication was a good cauſe of challenge 588
31 But ſuch cauſes, unleſs the record be ſhewn, are not principal, but to the favour only *ibid.*
32 The conviction of conſpiracy muſt be at the king's ſuit *ibid.* (N)
33 It

33 It is no good cauſe of challenge to a juror that he is returned upon the panel contrary to the ſtat. Weſt. 2. c. 38. *Page* 588 ſ. 26

34 By 25 Edw. 3. c. 3. a challenge that a juror is indicted for the ſame offence which he is impanelled to try, is good ſ. 27

35 If the juror have any claim to the forfeiture which may follow conviction, it is a good cauſe of challenge 589 ſ. 28

36 Or that he hath declared an opinion againſt the priſoner *maliciouſly* *ibid.*

37 A juror cannot be examined as to ſuch fact upon a *voir dire*, becauſe it ſounds in reproach *ibid.* (N)

38 It is no good challenge that the juror has found others guilty on the ſame indictment 589 ſ. 29

39 If a juror hath given *his dogs the names of the king's witneſſes*, it is a good cauſe of challenge for the king 589 ſ. 30

40 The king may either make a principal challenge or to the favour, *where he is a party* 589 ſ. 31

41 A ſubject cannot take a challenge for the favour againſt the king 589 ſ. 32

42 The ſubject cannot challenge for the malice of the ſheriffs, unleſs ſome inſtance of partiality be ſhewn *ibid.*

43 It is no principal challenge where the king is a party that the juror is his immediate tenant 589 ſ. 33

44 A challenge for ſuch cauſe ought to conclude to the favour *ibid.*

45 By 28 Edw. 3. c. 13. ALIENS AND DENIZENS ſhall be tried by jurors *the one half denizens and the other aliens*, if ſo many aliens can be found in the place, &c. 590 ſ. 34

46 The Engliſh half of the jury ought to be qualified as jurors. *(Vide Jurors)* *ibid.*

47 *Quere*, if any omiſſion which the law requires in a jury *per medietatem linguæ*, be a good cauſe of challenge 590 to 592

CHAMPIONS.—*Vide Battle.*

CHANCERY.—*Vide Bail.*

CHARGE.

He who has the *bare charge* of goods without the poſſeſſion, cannot maintain an appeal of larceny for them ch. 23 ſ. 44

CHEAT.

Any one may arreſt a notorious cheat actually caught playing with falſe dice 122

CHIEF PLEDGES.

Conſtables of tythings, now called petit conſtables, were anciently called chief pledges 97 ſ. 33

CHURCH-WARDENS.—*Vide Appeal.*

CINQUE PORT.—*Vide Certiorari.*

CITIZEN.

Citizen is too general, and therefore not a good addition of the ſtate and degree 272 ſ. 112

CITY.

1 A *viſne* may well come *de vicineto civitatis*, which does not exclude the city 266

2 A city and the county thereof ſhall be taken *prima facie* to be of the ſame extent 273, 274

3 Who may be jurors for trials in cities c. 43 ſ. 12. 19. 24

CIVIL LAW.

1 The civil law, where it is admitted, is part of the common law 18 ſ. 11

2 The

2 The court of the conſtable and marſhal ſhall be guided by the civil law, in caſes not within its own practice *Page* 18 ſ. 11
3 What appeals are to be tried by the civil law ch. 23. ſ. 12. 29. ch. 45. ſ. 2
4 A condemnation by the civil law corrupts not the blood 18. 234

CLERICUS.

The word *clericus* is uſed both by the *canon* and the *common* law as deſcriptive of thoſe who are entitled to the benefit of clergy 474

CLERGY.

1 Anciently the clergy inſiſted that the *ſacredneſs* of their characters exempted them from the puniſhments of *ſecular tribunals* 473 ſ. 1. 503 ſ. 110
2 And, by the *canon law*, all perſons in holy orders were intitled to the *privilegium clericale* 474
3 Before the ſtat. *articuli cleri*, 9 Edw. 2. the *privilege of* clergy was denied to thoſe who had abjured the realm, or confeſſed their guilt, &c. 474 ſ. 3
4 By 25 Edw. 3. c. 4. all manner of clerks, as well ſecular as religious, ſhall enjoy the benefit of holy church 474 ſ. 4
5 All perſons were conſtrued to be within this ſtatute, who could *read a verſe*, except convicted heretics, jews, mahomedans, pagans, perſons blind or maimed, or thoſe guilty of *bigamy* 474, 475
6 But by 1 Edw. 6. c. 12. perſons guilty of bigamy are admitted to clergy 475
7 By 21 Jac. 1. c. 6. women, guilty of ſuch larceny for which men were admitted to clergy, ſhall be burnt in the hand and impriſoned 475 ſ. 7
8 By 3 & 4 Will. & Mary, c. 9. where a man may demand his clergy, a woman, upon her prayer *for the benefit of this ſtatute*, ſhall have it alſo and be burnt in the hand and impriſoned 475 ſ. 8
9 Sacrilege, and breaking the priſon of the ordinary, were only intitled to clergy at the diſcretion of the ordinary *Page* 475, 476
10 By 4 Hen. 7. c. 13. every perſon not within orders, who has once received the benefit of clergy, ſhall not be admitted to it a ſecond time 476 ſ. 11
11 Perſons within holy orders claiming clergy a ſecond time, ſhall loſe the benefit, if he fail to produce his letters or a certificate on a day given by the court *ibid.*
12 By 28 Hen. 8. c. 3. perſons in holy orders ſhall be under the ſame pains as perſons not in holy orders, as to the offences mentioned in this ſtatute *ibid.* ſ. 12
13 By 32 Hen. 8. c. 2. perſons in holy orders admitted to clergy, ſhall be burnt in the hand and ſuffer in all reſpects as lay perſons ſo admitted *ibid.*
14 By 1 Edw. 6. c. 12. all perſons convicted of other offences than thoſe mentioned in the act, ſhall have the benefit of clergy, as before the firſt of Hen. 8. *ibid.* ſ. 13
15 Where lay perſons are not excluded from clergy the firſt time, perſons in holy orders may have it as often as they want it, except, &c. 477
16 But where the *offence* is generally excluded from clergy, perſons in holy orders ſhall have no more benefit than lay perſons *ibid.*
17 By 34 & 35 Hen. 8. c. 14. the clerks of the peace ſhall certify the attainders of clerks convict, unto the king's bench, and on being written to, ſhall certify the ſame to the judges of gaol-delivery 477 ſ. 14
18 The juſtices may write in their own name to the clerk of the crown in the king's bench, for the *certificate* of the *tranſcript* of an attainder 478 ſ. 18
19 By 3 & 4 Will. & Mary, c. 9. the clerks of the peace, &c. ſhall certify convictions, at the requeſt of the proſecutor, which ſhall be evidence on a ſecond indictment for an offence within clergy *ibid.* ſ. 19
20 In what manner a COUNTERPLEA may

may be filed, in order to ouſt an offender of his clergy *Page* 478 ſ. 19 (N)

21 Clergy is demandable by the common law upon an indictment or appeal, for any crime whatſoever, which ſubjects the offender to the loſs of life or member, except high treaſon and ſacrilege 479 ſ. 20

22 New created treaſons *againſt the king*, are alſo excluded without ſpecial words *ibid.* (N)

23 Petty treaſons ſeem to have been excluded by the common law. But by 25 Edw. 3. *de clero*, c. 4. it is allowed for any treaſons or felonies touching other perſons than the king himſelf 479 ſ. 21

24 The conſtruction alſo, that *inſidiatores viarum* and *depopulatores agrorum*, were ouſted of clergy, is revived by 4 Hen. 4 c. 2. ſ. 22

25 From the above ſtatutes it follows, that all perſons who were entitled to the benefit muſt, if not entitled to it, be denied it by ſome ſtatute made ſince the 25 Edw. 3. ſ. 23

26 Wherever an offence is made felony by ſtatute it ſhall have clergy, unleſs expreſsly excluded 480 ſ. 24

27 To ouſt an offender from the benefit of clergy, the indictment muſt expreſſly bring his caſe within the ſtatute by which the privilege is taken away ſ. 25

28 A murder muſt be laid and proved of *malice prepenſe*; the offence of an acceſſary before muſt be *maliciouſly*; of a cutpurſe *clam et ſecretè à perſona*; robbery muſt be *in or near the highway*, or the offender ſhall have his clergy *ibid.*

29 But with reſpect to acceſſaries, words which are tantamount in ſenſe, and differ only in the manner of expreſſion, are ſufficient *ibid.*

30 Where a ſtatute takes away clergy from an offence which was capital at common law, the indictment need not conclude *contrà formam ſtatuti* *ibid.*

31 A ſtatute excluding the principals from clergy doth not thereby exclude acceſſaries before or after ſ. 26

32 Neither doth a ſtatute excluding the acceſſaries thereby exclude principals *Page* 480 ſ. 26

33 Where a ſtatute excludes thoſe from clergy who ſhall be *found guilty* of any crime, it ſhall be conſtrued to exclude principals only *ibid.*

34 Where clergy is allowable it ſhall be allowed as well to one who ſtands mute, &c. as to one who is convicted 481 ſ. 27

35 But a ſtatute taking clergy from thoſe who ſhall be found guilty, doth not take it from thoſe who ſhall ſtand mute, &c. 481 ſ. 28

36 But ſuch a ſtatute extends as well to thoſe who ſhall confeſs as to thoſe who are convicted by verdict *ibid.*

37 OF STATUTES TAKING AWAY CLERGY 481 ſ. 29

38 By 23 Hen. 8. c. 1. no perſon found guilty of petit treaſon, murder of *malice prepenſe*, robbing churches, &c. or perſons in their dwelling-houſe, any of *the family being therein and put in fear*, robbing *in or near the highway*, burning houſes, or barns of corn, nor any *acceſſaries* to ſuch offenders, ſhall be admitted to clergy, perſons in holy orders excepted 481, 482

39 This ſtatute does not extend to perſons ſtanding mute, challenging, &c. or outlawed, and was therefore eaſily evaded 482 ſ. 31

40 By 25 Hen. 8. c. 3. this defect is remedied *ibid.* ſ. 32

41 But this ſtatute extends not to appeals, nor to acceſſaries before, nor to perſons outlawed *ibid.* ſ. 33

42 By 1 Edw. 6. c. 12. the above offences (*Vide ſupra* No. 38.) and all *horſeſtealers* are again ouſted of clergy; but all other caſes of felony ſhall be entitled to clergy in the ſame manner as before the 1 Hen. 8. 483

43 The ſtatute extends to appeals, perſons in holy orders (*Vide ſupra* No. 38.), and perſons outlawed 483 ſ. 35

44 The defects of this ſtatute pointed out 483, 484

45 By 5 & 6 Edw. 6. c. 10. the 25 Hen. 8. is revived 484, 485

46 The queſtion examined, whether this ſtatute

ſtatute revives the whole of the 25 Hen. 8. &c. &c. *Page* 485, 486
47 By 4 & 5 Phil. & Mary, c. 4. *acceſſaries before* to petit treaſon, wilful murder, robbery in a dwelling houſe, or near the highway, and arſon, are deprived of clergy 487
48 This ſtatute is reſtrained to ſuch robberies in a dwelling-houſe only as were deprived of clergy by the former acts 487 ſ. 46
49 An indictment or appeal to *ouſt* an acceſſary of clergy, muſt purſue the ſubſtance of this ſtatute exactly ſ. 47
50 By 3 & 4 Will. & Mary, c. 9. ſuch perſons as were before excluded by former acts, on conviction by verdict or confeſſion, are excluded on ſtanding mute, challenging, &c. or being outlawed ſ. 48
51 This ſtatute does not extend to appeals, nor to felonies by ſubſequent ſtatutes ſ. 49
52 By 23 & 25 Hen. 8. principals in PETIT TREASON are excluded from clergy upon indictment, &c. &c. 488 ſ. 50
53 *Quere* if they are not excluded in appeals ſ. 51, 52
54 By 23 & 25 Hen. 8. and 1 Edw. 6. c. 12. wilful MURDER of malice prepenſe is excluded in all caſes ſ. 54
55 It is not excluded in appeals upon challenging more than twenty 489
56 By 4 & 5 Phil. & Mary, c. 4. acceſſaries before are excluded as well upon indictments as appeals *in all caſes* 489 ſ. 56
57 By 1 Jac. 1. c. 8. HOMICIDE BY STABBING is excluded; but thoſe who *abet* this offence are not ſ. 57
58 By 3 & 4 Will. & Mary, c. 9. thoſe indicted of *ſuch manſlaughter* are excluded, as well on ſtanding mute, &c. as on conviction ſ. 58
59 By 8 Eliz. c. 4. LARCENY from the perſon of another *privily without his knowledge* is excluded from clergy ſ. 59
60 This ſtatute does not extend to acceſſaries either before or after 490 ſ. 60
61 If the larceny is diſcovered at the time it is committing, the offender ſhall have his clergy *Page* 490 (N)
62 Larceny from the perſon of a man whoſe ſenſes are loſt in intoxication is not within the act *ibid.*
63 *Quere* if the larceny is committed while the perſon is aſleep *ibid.*
64 By 1 Edw. 6. c. 12. and 2 & 3 Edw. 6. c. 33. principals in HORSE-STEALING, &c. are excluded from clergy 490 ſ. 61
65 By 31 Eliz. c. 12. all acceſſaries both before and after are alſo excluded *ibid.* ſ. 63
66 Thoſe who only receive the *ſtolen horſe* without receiving *the felon*, are not excluded by this ſtatute *ibid.* (N)
67 But by 3 & 4 W. & M. c. 9. receivers of *ſtolen goods* are made *acceſſaries* *ibid.*
68 By 10 & 11 Will. 3. c. 23. to commit larceny in any ſhop, ware-houſe, coach-houſe, or ſtable, *privately*, and to the value of 5 *s.* or to aid therein, is excluded from clergy 491 ſ. 64
69 Neither acceſſaries nor perſons outlawed are excluded from clergy for this offence *ibid.* ſ. 65
70 The property ſtolen muſt be ſuch as is uſually expoſed in the places mentioned in the act *ibid.* (N)
71 Warehouſes on wharfs for goods intended to be ſhipped are not within this act *ibid.*
72 The warehouſe of a Blackwell-hall factor is not within the act *ibid.*
73 A watch left to be repaired at a watch-maker's is not property within the protection of this act *ibid.*
74 By 12 Ann. c. 7. to ſteal from any dwelling-houſe or out-houſe to the amount of 40 *s.* is excluded from clergy *ibid.* ſ. 66
75 Apprentices under 15 years of age who ſhall rob their maſters are not within the act ſ. 67
76 Perſons outlawed and acceſſaries are not within this act 492 ſ. 68
77 By 22 Car. 2. c. 5. to ſteal cloth or WOOLLENS FROM THE RACK or tenter in the *night-time* is excluded from clergy 492 ſ. 69
78 By 18 Geo. 2. c. 27. to ſteal linen, &c. from

from BLEACHING OR PRINTING GROUNDS, or to aid therein, is felony without clergy *Page* 492 ſ. 69
79 But the court may in diſcretion tranſport the offender for fourteen years *ibid.*
80 By 22 Car. 2. c. 5. embezzling NAVAL STORES to the amount of 20s. is excluded from clergy 492 ſ. 76
81 But the court may tranſport for ſeven years 492, 493
82 By 14 Geo. 2. c. 6. & 15 Geo. 2. c. 34. to ſteal SHEEP, OR THE OTHER CATTLE therein mentioned, is excluded from clergy 493
83 By 24 Geo. 2. c. 45. to ſteal goods on NAVIGABLE RIVERS to the value of 40s. is excluded from clergy 493
84 Evidence of a theft in Lime-houſe dock is not within this act *ibid.* (N)
85 Money, though a great part of it be Portugal money, *commonly* current, is not goods within the meaning of this act. *Grimes's Caſe. Foſter* 79.
86 By 26 Geo. 2. c. 19. ſtealing from VESSELS IN DISTRESS, &c. is excluded from clergy 493
87 By 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. and 3 & 4 Will. & Mary, c. 9. SACRILEGE, or *robbing* any church, chapel, or holy place, is excluded from clergy 494 ſ. 72
88 It is not ſacrilege within this act, unleſs the robbery be accompanied with a breaking 494 ſ. 73
89 But by 1 Edw. 6. c. 12. all perſons are ouſted of clergy for feloniouſly *taking* goods out of any church, &c. 494 ſ. 74
90 The offender may be tried in a diſferent county than that in which the offence ſhall be committed *ibid.*
91 Acceſſaries to ſuch a *robbery* or *taking* are not excluded by any ſtatute, unleſs the offence amount to *burglary* 494 ſ. 75
92 *Quere*, if *ſacrilege* is not excluded from clergy by the common law 494 ſ. 76
93 All perſons, not in holy orders, indicted of "robbing in or near the highways," are excluded by 23 and 25 Hen. 8. 1 Edw. 6. c. 12. and 3 & 4 Will. and Mary, c. 9. *Page* 494, 495
94 No robbery is within theſe ſtatutes but ſuch as is laid "in or near the highway, and to have put the perſon robbed in fear" 495 ſ. 79
95 By 25 Hen. 8. c. 3. and 3 & 4 Will. & Mary, c. 9. robberies and burglaries tried in a different county from that in which they were committed, are excluded from clergy, if they be of ſuch a kind as would have been excluded upon a conviction in the proper county 495, 496
96 There is no need of an entry on record that the felony was committed in a different county 496 ſ. 82
97 But it is uſual to write on the margent of the indictment, that it is for felony in another county *ibid.*
98 What judgment an offender ſhall receive who is convicted of an offence within clergy in the ſecond county, &c. 497 ſ. 83
99 By 3 and 4 Phil. and Mary, c. 4. acceſſaries before the fact in robbery, in or near any highway, are excluded clergy 497 ſ. 84
100 By 23 & 25 Hen. 8. and 3 & 4 Will. & Mary, c. 9. to rob any perſon in his dwelling-houſe, any of the *family* being within, and put in fear, is excluded from clergy 497 ſ. 85
101 By 3 & 4 Phil. & Mary, c. 4. acceſſaries before are alſo excluded 497 ſ. 86
102 By 1 Edw. c. 12. to *break* a houſe in the day time, and commit felony therein, *any perſon* being within at the time, is excluded from clergy, whether tried in the ſame or a different county 497 ſ. 87
103 By 4 & 5 Phil. and Mary, c. 4. acceſſaries before are alſo excluded *ibid.*
104 The breaking of a cupboard, door, or trunks, &c. or any fixture only, is not a breaking within the act 497 ſ. 88
105 By 3 and 4 Will. and Mary, c. 9. to take away goods in any dwelling-houſe, any perſon being therein and put in fear, or to aid in ſo doing, is excluded from clergy 497, 498

106 By 5 and 6 Edw. 6. c. 9. perſons *found guilty* of robbing any other in their dwelling houſe, or any part thereof, any of *the family* being within the precincts of the ſame, ſhall be excluded from clergy, whether the family there being ſhall be ſleeping or waking *Page* 498 ſ. 89

107 No perſon *found guilty* of robbing any perſon in any booth or tent in any fair or market, the owner or *any of his family* being within, ſhall be admitted to clergy, whether the family there being, be ſleeping or waking 498 ſ. 90, 91

108 No robbery is within this ſtatute which is not accompanied with an actual breaking 498 ſ. 92

109 A ſojourner being in the houſe at the time of the robbery, will not bring it within the ſtatute 499

110 It is only neceſſary to ſtate, that *divers perſons* were in the houſe, without ſhewing they were under any relation to the party robbed *ibid.*

111 By 3 and 4 Will. and Mary, c. 9. to rob any houſe in the day time, *any perſon* being therein, or to aid in ſo doing is excluded from clergy *ibid.*

112 *Quere*, if acceſſaries to a robbery in a booth or tent are excluded, except it be from the perſon of a man *ibid.*

113 By 39 Eliz. c. 15. any perſon *found guilty* for felonious taking away, in the day time, money or goods to the value of 5s. in any dwelling houſe, or the outhouſe thereto belonging, *although no perſon be therein at the time*, ſhall be excluded from clergy 500 ſ. 95

114 The ſtatute ſhall only extend to ſuch a felonious taking as is accompanied with a breaking of the houſe, &c. 500 ſ. 96

115 A chamber in an inn of court is a dwelling-houſe within this act ſ. 97

116 A lodging in *Somerſet-houſe* (*an old palace*) or Whitehall is not within this act *ibid.*

117 No acceſſary is ouſted of clergy by this ſtatute ſ. 98

118 He who ſtands by and abets another while he breaks and enters the houſe, and afterwards divides the ſpoil, but doth not actually enter the houſe himſelf, is not within the ſtatute *Page* 501

119 The law of this caſe doubted and explained *ibid.*

120 By 3 & 4 Will. & Mary, c. 9. whoever ſhall *aſſiſt* another to break any dwelling-houſe, ſhop, or warehouſe thereunto belonging, in the day time, and ſteal money or goods to the value of 5s. *although no perſon be therein*, ſhall be excluded from their clergy 501 ſ. 99

121 This ſtatute not mentioning outhouſes, an *aſſiſtant* to ſuch a felony in an outhouſe, not being a ſhop, &c. is clearly intitled to his clergy 502 ſ. 106

122 The acceſſaries before to ſuch a felony in an *outhouſe*, not being a ſhop, &c. are ſtill entitled to clergy 502 ſ. 101

123 But all principals in any felony within 39 Eliz. are excluded from clergy, whether in the ſame or a different county 502. ſ. 102

124 By 3 & 4 Will. and Mary, c. 9. whoever ſhall *rob* any other perſon, or ſhall *aſſiſt*, &c. to commit ſuch offence, ſhall not have the benefit of his clergy 502. ſ. 103

125 In BURGLARY the principal is ouſted of clergy, by 1 Edw. 6. c. 12. if any perſon be in the houſe at the time of the breaking and thereby put in fear 502 ſ. 104

126 By 18 Eliz. c. 7. principals in burglary are excluded generally *ibid.* 105

127 By 3 & 4 Will. & Mary, c. 9. acceſſaries before the fact are excluded 502, 503

128 By 23 and 25 Hen. 8. and 3 & 4 Will. and Mary, c. 9. principals in ARSON are excluded from clergy 503 ſ. 107

129 By 4 and 5 Phil. and Mary, c. 4. acceſſaries to the fact before, in all caſes are alſo excluded 503 ſ. 108

130 By 1 Edw. 6. c. 12. every *peer* is allowed clergy in all caſes wherein others are excluded by that act, except wilful murder 503 ſ. 109

131 Therefore peers are entitled to clergy, unleſs ouſted by ſome ſtatute made ſince 1 Edw. 6. or revived by 5 & 6 Edw. 6. 10. *ibid.*

132 By the above ſtatutes clergy is taken from

from the *offences*, but aiders and abettors are not named in them *Page* 503(N)

133 CLERGY might be demanded by *the ancient common law* as ſoon as the priſoner was brought to the bar 503 ſ. 110

134 But ever ſince the reign of Hen. 6. it has been held not demandable till after trial 504

135 And clergy may now be allowed, *by the perſon authoriſed* to grant it, at any time or under any circumſtances, before execution actually done 504 ſ. 111

136 The court might always admit to clergy, without its being demanded, upon evidence of the priſoner being a *clerk* 505

137 Except the conviction was for ſacrilege, or breaking the priſon of the ordinary *ibid.*

138 The *temporal* judge is to decide whether the offence be within the privilege, and whether the priſoner is entitled to the benefit 505. ſ. 113

139 How far the canon law is part of the common law *ibid.*

140 While the title to clergy depended upon reading the *neck verſe*, the *temporal* judge over-ruled the *ordinary*, and recorded *legit* or *non legit*, according to his own judgment 506

141 By 1 Edw. 6. c. 12. the neceſſity of ſuch an *ability to read*, in the caſe of *a peer*, is taken away 506 ſ. 114

142 And by 5 Ann. c. 6. the neceſſity of ſuch reading is alſo taken away as to every *common* perſon 506 ſ. 115

143 Anciently, if the ordinary demanded or refuſed his clerk againſt law, his temporalities might be ſeized 506 ſ. 116

144 But ſince, 25 Edw. 3. c. 6. the ordinary is only liable to a fine for contempt of the *quare non admiſit* *ibid.*

145 In what manner *a clerk* was to be delivered to *the ordinary*, and afterwards *demeſned* by the common law 507, 508

146 By 4 Hen. 7. c. 13. *commoners* convict of murder ſhall be marked with an M; and of other felony with a T on the brawn of the left thumb, in open court, before they are delivered to the ordinary 508 ſ. 121

147 How a convict for manſlaughter may be detained 508, 509

148 By 8 Eliz. c. 4. perſons admitted to clergy, who have before committed *any other ſuch offence*, and have not been indicted for the ſame, may be indicted and tried for the ſame, as if they had not been admitted to clergy *Page* 509 ſ. 122, 123

149 By 18 Eliz. c. 7. after clergy allowed and burning in the hand according to 4 Hen. 7. c. 15. *(Vide ſupra*, No. 146.) the priſoner, inſtead of being delivered to the ordinary, ſhall be diſcharged 509. ſ. 124

150 But the court may, in diſcretion, inflict one year's impriſonment on ſuch offenders 509, 510

151 And all perſons admitted to their clergy ſhall, notwithſtanding, be put to anſwer for all other felonies 510 ſ. 126

152 Since theſe ſtatutes a conviction for a felony within clergy, and an allowance of it thereon, is as much a diſcharge of all precedent felonies within clergy (though not of any others) as it was before the ſtatutes 510 ſ. 127

153 A clerk convict, admitted to clergy, has by it a kind of ſtatute pardon, the ſame as if he had made his purgation at common law 510 ſ. 128

154 The reaſonableneſs of theſe conſtructions defended 510, 511

155 The admiſſion of clergy reſtores the party to his credit and enables him to be a witneſs 511 ſ. 129

156 *Quere*, if a pardon would have this effect *ibid.*

157 The admiſſion to clergy gives the party a capacity to purchaſe goods and to retain the profits of his land 511. 129

158 The lands, &c. which the offender had at the time of conviction being thereby veſted in the king, ſhall not be directed either by pardon or purgation 511 *ibid.*

159 A pardon never avoids any precedent legal act *ibid.*

160 Purgation was rather connived at than allowed by the common law *ibid.*

161 The 8 Eliz. c. 4. &c. *(Vide ſupra*, No. 148, 149.) ſeems to take from the ſpiritual court the power of *depriving* the party for the crime for which he may have received clergy 512

162 Thoſe who are exempt from burning

ing in the hand ſhall have the ſame privilege without it, as others have with it *Page* 512 ſ. 131

163 After a man is admitted to his clergy, it is actionable to call him a felon 512 ſ. 132

164 By 5 Ann. c. 6. where perſons ſhall be burnt in the hand, &c. the judge may alſo in his diſcretion commit the offender for not leſs than ſix months nor more than two years, to the houſe of correction, &c. 512 ſ. 134

165 By 19 Geo. 3. c. 74. perſons convicted of felony within clergy, and liable to be burnt in the hand, may, *inſteaa of ſuch burning*, be ordered to pay a moderate fine, or to be publicly or privately whipped, but not more than three times 513 ſ. 135

166 Such whipping, &c, ſhall have the like effects and conſequences as burning in the hand *ibid*

167 But this act ſhall not abridge the power of the court to impriſon convicts for manſlaughter for one year, nor any of the powers or puniſhments given by 5 Ann. c. 6. *ibid.*

168 Judgment of tranſportation is only put in the place of *judgment* for burning in the hand, and not in the place of the actual burning *ibid.*

CLERK.—*Vide Clergy. Appeal. Approver. Battle. Attachment.*

CLERK OF THE CROWN, ASSIZE, AND PEACE.

In what manner to certify the conviction or attainder of one admitted to his clergy, in order to ouſt him on a demand of it a ſecond time 477, 478

CLIPPING.—*Vide Coin.*

COIN.

1 By 6 & 7 Will. 3. c. 17. whoever ſhall convict a counterfeiter or clipper of the coin, ſhall have 40 l. &c. 123 ſ. 25

2 By 15 Geo. 2. c. 28. whoever ſhall convict counterfeiters of the gold, ſilver, or copper coin of the realm, ſhall have 40 l. for the two firſt, and 10 l. for the two laſt offences *Page* 123, 124

3 By 6 & 7 Will. 3. c. 17. a counterfeiter or clipper of the coin, who ſhall diſcover and convict two offenders, ſhall be entitled to the king's pardon 540

4 The judgment for treaſon by the common law in counterfeiting the coin is, that the convict ſhall be drawn to the place of execution, and there hanged by the neck till he be dead 630 ſ. 4

5 But in treaſons againſt the coin by ſtatute, it is queſtionable whether the offender ought not to be drawn, hanged, or quartered *ibid.*

COLLATERAL.—*Vide Iſſue.*

Whether collateral matters in a different county from that of an indictment may be found in it 313 ſ. 34

COLLEGE *of* PHYSICIANS.

Vide Phyſicians.

COMMAND.—*Vide Acceſſary* No. 52 *to* No. 64. *Bail* No. 105.

COMMON LAW.

1 The 1 & 2 Phil. & Mary, which ordained treaſons to be tried according to the common law, doth not abrogate 35 Hen. 8. concerning the trial of foreign treaſon 318, 319

2 Nor 26 or 33 Hen. 8. concerning forfeitures for treaſon 641, 642

3 Whether it abrogates the 1 and the 5 & 6 Edw. 6. concerning two witneſſes in treaſon 363. 366

4 Or the 33 Hen. 8. concerning the trial of treaſons examined by the privy council 569

COMMONS.

Commons of counties in the reign of Edward

ward the third were equivalent to freeholders *Page* 72

COMPUTATION.—*Vide Year and Day.*

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1 The court of the conſtable and marſhal may be holden by commiſſioners 19
2 Commiſſions for *judicial purpoſes* may be granted notwithſtanding the petition of right; provided they are founded in neceſſity, and the furtherance of juſtice *ibid.*
3 The king cannot grant *judicial* commiſſions, not warranted by ancient precedents (*Vide Courts*) 2, 3
4 Commiſſions to ſeize the property or perſon upon ſuſpicion, without proceſs or indictment, are illegal and void 2 ſ. 7
5 All commiſſions muſt be agreeable to known ſtated forms 20
6 Whether commiſſions of *oyer*, &c. do not come under the general notion of *writs* 21, 22
7 The form of a commiſſion of the peace 50, 51
8 Whether judges commiſſions be determined by the demiſe of the king 1 to 5
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10 How commiſſioners are to be aſſigned by the king for the trial of foreign treaſons 317, 318. 569

COMMITMENT.

1 Perſons apprehended for offences not bailable, or who refuſe bail for ſuch offences as are bailable, muſt be committed 180
2 A perſon in the cuſtody of a *meſſenger*, who has not his bail ready upon a *habeas corpus* to the king's bench, muſt be recommitted to the marſhal 180 (N) 1
3 A juſtice of the peace may lawfully commit a perſon who refuſes to perform a duty which the juſtice is authoriſed to require 180 ſ. 2
4 All perſons, as well private as official, having a right to apprehend for treaſon or felony, are juſtified in carrying their priſoner to the common gaol; except that *officers* may do this by the command of another, and a *private perſon* cannot *Page* 180 ſ. 3
5 And it is moſt adviſable for *private perſons*, who may apprehend another for treaſon or felony, to carry him before a magiſtrate, that he may, *by ſuch Magiſtrate*, be committed or bailed *ibid.*
6 The privy council, or a ſecretary of ſtate, may commit for high treaſon 181
7 The queſtion examined whether a ſecretary of ſtate, not having a power to examine upon oath, can have a power to commit 181 (N)
8 The common law of England knows of no ſuch committing magiſtrate as a ſecretary of ſtate *ibid.* (N) 2
9 The ſeveral caſes in which commitments have been made by ſecretaries of ſtate *ibid.* (N) 4
10 Commitments muſt be to ſome priſon in *England*, and regularly it ought to be to a common priſon 181, 182
11 By 31 Car. 2. c. 12 whoever ſhall ſend a ſubject of *England* priſoner into Scotland, Ireland, Jerſey, Guernſey, Tangiers, or any of the king's dominions abroad, ſhall be liable to treble coſts, 500l. damages, and incur a *præmunire* 182 ſ. 5
12 By 14 Edw. 3. c. 10. the ſheriffs ſhall have the cuſtody of gaols, and employ reſponſible under-keepers 182 ſ. 6
13 By 5 Hen. 4. c. 10 none ſhall be impriſoned by any juſtice of the peace, but only in the common gaol *ibid.*
14 The king's grant of the cuſtody of priſoners committed by juſtices of peace is void 182 ſ. 7
15 None can claim a priſon as a franchiſe unleſs he have alſo a gaol-delivery *ibid.*
16 By 6 Geo. 1. c. 19. juſtices may commit vagrants and *other criminals*, either to the common gaol or to the houſe of correction 182, 183
17 An offender apprehended in one county for a crime committed in another, may be brought before a juſtice of the

county where the offence was committed *Page* 183 ſ. 8

18 But it ſeems the ſtronger opinion, that ſuch an offender ought to be carried before a juſtice of the county in which he is taken, &c. *ibid.*

19 An offender may be committed to the next gaol where he is taken, whether in the ſame county or not *ibid.*

20 By 23 Geo. 2. c. 26. and 24 Geo. 2. c. 55. an offender may be apprehended in one county for an offence done in another, by virtue of the warrant being indorſed 183 †

21 If it be a bailable offence, he may be bailed by a juſtice of the county in which he is apprehended. If it is not bailable, or he cannot find bail, he ſhall be carried back into the county from whence the warrant iſſued, and there be either committed or bailed *ibid.*

22 If a gaoler refuſe to take the charge of a felon from a conſtable, the town ſhall keep him till the gaol-delivery 183 ſ. 9

23 No one, without ſpecial reaſons, can juſtify the detention of a priſoner out of the common gaol *ibid.*

24 Practice ſeems to have authoriſed a commitment to a meſſenger for the purpoſe of conveying him to gaol *ibid.*

25 By 31 Car. 2. c. 2. no perſon in cuſtody upon a criminal charge ſhall be removed from ſuch cuſtody unleſs by *habeas corpus*, or other legal writ, except where the conſtable is carrying him to the common gaol, &c. &c. 184

26 By 2 & 3 Phil. & Mary, c. 10. every juſtice of peace upon a charge of manſlaughter or felony, ſhall, previous to commitment, take the examination of ſuch priſoner, and the information of thoſe that bury him, reſpecting the fact and circumſtances, and within two days after, ſhall put as much thereof as may be material to prove the felony into writing, and certify the ſame to the next gaol-delivery 184 ſ. 11

27 The juſtices ſhall alſo bind the witneſſes to appear and give evidence, &c. *ibid.*

28 A juſtice cannot detain a priſoner an unneceſſary length of time under pretence of further examination: it is ſaid, three days is a reaſonable time *Page* 185

29 A COMMITMENT muſt be in writing, under hand and ſeal, expreſſing the magiſtrate's office and authority, the time and place at which it is made, and be directed to the gaoler 185 ſ. 13

30 It may be made in the king's name, or the name of the perſon who makes it, or it may be merely *teſted* by him 185 ſ. 14

31 The uſual clauſe in a commitment deſiring the gaoler to keep his priſoner in ſafe cuſtody, is merely admonitory 185 ſ. 15

32 A commitment muſt ſet forth the crime alledged againſt the party with convenient certainty, or he may be diſcharged upon *habeas corpus* ſ. 16

33 So alſo he may be bailed if the offence be looſely expreſſed *ibid.*

34 Commitments for high treaſon, or felony in general, are good *ibid.*

35 It is ſafe, but not neceſſary, to ſet forth that the party is charged upon oath; for where the magiſtrate hath juriſdiction, the legality of his warrant does not depend upon the truth or falſehood of the information on which it is granted 186

36 Every *mittimus* muſt have a lawful concluſion 186 ſ. 18

37 What ſhall be ſaid to be a lawful concluſion *ibid.*

38 By 3 Jac. 1. c. 10. perſons committed to gaol by juſtices of the peace ſhall bear their own charges, which ſhall be levied by diſtreſs upon their goods, &c. 186, 187

39 By 27 Geo. 2 c. 3. if the offender ſhall not have wherewith to defray the charges of his commitment, the juſtice ſhall order the treaſurer of the county to defray the ſame 187 ſ. 20

40 In *Middleſex* the expences of conveying a priſoner to gaol ſhall be paid by the overſeers of the poor of the pariſh where the perſon was apprehended *ibid.*

41 By 3 Hen. 7. c. 3. every ſheriff or gaoler ſhall certify the names, &c. &c. of

of their ſeveral priſoners to the next gaol-delivery to be calendared *Page* 187 ſ. 21

42 A priſoner lawfully committed cannot be diſcharged but by the king; or by the grand jury indorſing *ignoramus*; or by acquittal by the trial jury; or on *proclamation* by the gaol-delivery *ibid.*

43 But a perſon committed upon a ſuſpicion, which afterwards appears to be groundleſs, may be lawfully diſcharged 188

44 By 14 Geo. 3 c. 20 every priſoner againſt whom no bill is found, or who ſhall be acquitted, or who ſhall be diſcharged by proclamation, ſhall be ſet at large in open court without paying any fees 628

45 The treaſurer of every county, upon the judge's certificate, ſhall pay 13 s. 4 d. for every priſoner ſo diſcharged, &c. to the ſheriff or gaoler out of the county rate 628 ſ. 13

CONCEALMENT.—*Vide Court Leet.*

CONFESSION.

1 By 5 and 6 Edw. 6. c. 11. and 7 Will. 3. c. 3. high treaſon muſt be proved by two lawful witneſſes, unleſs the party without violence confeſs the ſame in *open court* 364 ſ. 134

2 Theſe words mean a confeſſion upon the arraignment of the party 365 ſ. 140

3 If a priſoner pleads or confeſſes, he ſhall not be treated as one who ſtands mute, if he be afterwards obſtinately ſilent, but ſhall be tried or condemned 462 ſ. 4

4 *An expreſs confeſſion* is, where a perſon directly confeſſes the crime, which is the higheſt conviction that can be, and may be received after *not guilty*, notwithſtanding the repugnancy 469 ſ. 1

5 A confeſſion of an indictment of treſpaſs eſtops the defendant to plead not guilty to an action for the ſame treſpaſs *Page* 469 ſ. 2

6 *Quere*, whether a confeſſion of a capital crime will eſtop not guilty to an appeal for the ſame offence *ibid.*

7 Judges will not record a confeſſion, which *probably* proceeds from fear, folly, or ignorance *ibid.*

8 *An implied confeſſion* is, where a defendant in a caſe not capital, doth not directly own his guilt, but in a manner admits it by yielding to the king's mercy *ibid.*

9 The effect of an implied confeſſion 469, 470

10 No confeſſion whatever before final judgment will deprive the defendant of taking exceptions in arreſt of judgment, to errors on the face of the record 478 ſ. 3

11 How far thoſe are excluded from bail who ſhall appear guilty by confeſſion 153 ſ. 40

12 Before the ſtatute *articuli cleri*, clergy was refuſed to thoſe who confeſſed themſelves guilty 474 ſ. 3

13 By the conſtruction of *articuli cleri* clergy was allowed to ſuch as confeſſed on arraignment *ibid.*

14 A ſtatute which *ouſts* clergy from thoſe who ſhall be found guilty, extends to thoſe whoſe confeſſion is recorded 481 ſ. 28

15 The party's own confeſſion is the higheſt conviction 508

16 A confeſſion, whether upon examination in purſuance of 1 & 2 Ph. and M. c. 13. or on a bailment or commitment on 2 and 3 Ph. and M. c. 10. or by the common law, or in diſcourſe with private perſons, may be given in evidence againſt the party confeſſing, but not againſt others 603, 604

17 The identity of the examination muſt be proved before it can be read in evidence 604 (N) 1

18 Confeſſions obtained by the flattery of hope, or extorted by the impreſſions of fear, are not admiſſible in evidence *ibid.*

19 All acts and facts which ariſe in conſequence of even an extorted confeſ-

ſion may be given in evidence *Page* 604 (N) 1

20 The ſtatute 7 Will. 3. prevents a confeſſion of high treaſon, unleſs in ope court, from having the force of a conviction 604 (N) 3

21 In high treaſon, a confeſſion may be given in evidence for any purpoſe, except to prove the *overt acts* laid in th indictment *ibid.*

22 A confeſſion muſt be taken all together, and not by parcels 604 ſ. 5

CONSENT.

1 By 6 Rich. 2. c. 6. if women after raviſhment conſent to the raviſhers, they ſhall forfeit their eſtates, &c. to the next of blood 253, 254

2 The conſent of a woman under 12 years of age is conſidered as the conſent of one under the years of diſcretion; and therefore ſuch a female conſenting ſhall not loſe her lands, &c. 255 ſ. 69

3 It is not concluſive evidence of conſent, that the woman lived with the raviſher, and bore children to him, if during the whole time ſhe was under his coercion *ibid.*

CONSERVATORS.

1 Conſervators of the peace were by the common law either *ex officio*, or by commiſſion 43

2 The king is the principal conſervator, from whom all authority of this kind is derived 43 ſ. 1

3 Neither dukes, earls, or barons, are conſervators *ibid.*

4 The lord chancellor, keeper of the ſeal, the lord high ſteward, the lord high conſtable, the judges of king's bench, and maſter of the rolls, are conſervators 43 ſ. 2

5 But neither privy counſellors nor ſecretaries of ſtate are conſervators *ibid.* (N) 1

6 The juſtices of every court of record are conſervators within their reſpective precincts 44

7 Every ſheriff and coroner is a principal conſervator within the county *Page* 44

8 So alſo is every high and petit conſtable within their reſpective limits *ibid.*

9 There were alſo, by the common law, conſervators of the peace by tenure 44 ſ. 7

10 Conſervators of the peace by election were choſen by the king's writ 45 ſ. 9

11 Extraordinary conſervators of the peace were alſo appointed in times of danger 45 ſ. 12

12 The power of conſervators 43 to 45

CONSPIRACY.

Whether a conviction of conſpiracy diſables a man from being a witneſs or juror 588. 605

CONSTRUCTION.—*Vide Statute.*

CONSTABLES.—*Vide Arreſts. Bail. Commitment.*

1 Conſtables are officers originally inſtituted by the common law, and were not firſt appointed by the ſtatute of Wincheſter 97 ſ. 33

2 The object of their office was the preſervation of the peace, and therefore they are authoriſed to arreſt felons, and all ſuſpicious perſons, and to ſuppreſs affrays 98 ſ. 34

3 Their duty is to preſent all offences inquirable in the torn or leet *ibid.*

4 The conſtable is the proper officer of the juſtice of the peace; and bound to execute his warrants *ibid.*

5 The office of conſtable is wholly miniſterial, and no way judicial *ibid.* ſ. 36

6 Upon ſpecial cauſe a conſtable may appoint a deputy *ibid.*

7 By 1 Will. & Mary, c. 18. Proteſtant diſſenters elected to the office of conſtable, who ſcruple to take the oaths, may appoint a deputy *ibid.*

8 Both high and petit conſtables are to be choſen and appointed, and ſworn in by the ſheriff in his torn 99 ſ. 37

9 A cuſtom of chuſing conſtable by either the torn or the decennary is good 99 ſ. 37

10 The court leet has this power of common right *Page* 99
11 *Quere*, if a cuſtom to ſerve the office by turns is good *ibid.*
12 The ſheriff of the torn, and ſteward of the leet, having power to appoint conſtables, have alſo power to remove them 99 ſ. 38
13 A ſworn attorney, or rather officer of the courts at Weſtminſter, may have a writ of privilege to excuſe him from ſerving the office of conſtable 99 ſ. 39
14 And no cuſtom whatever can be pleaded againſt this privilege 100
15 Practiſing barriſters, and ſervants of members of parliament, have the ſame privilege *ibid.*
16 An alderman of London is not compellable to be a conſtable *ibid* ſ. 40
17 A captain of the king's guards has no privilege of exemption from ſerving the office of conſtable againſt a ſpecial cuſtom ſ. 41
18 By 2 Geo. 3. c. 20. no ſerjeant or private man ſerving in the militia, ſhall, during ſuch ſervice, be appointed either a peace or a pariſh officer, unleſs he conſents thereto *ibid.*
19 A practiſing phyſician ſhall ſerve the office of conſtable *ibid.*
20 But perhaps both the captain (*vide* No. 17.) and phyſician may be relieved by the king's bench, if choſen, where there are ſufficient beſides, and no ſpecial cuſtom againſt it, *ibid.*
21 Even a cuſtom cannot exempt fit perſons from ſerving the office *ibid.*
22 A tenant in *ancient demeſne* is liable to ſerve the office *ibid.* (N)
23 By 5 Hen. 8. c. 6. the wardens and fellows of the company of the *barber ſurgeons* were exempted from the office of conſtable 100, 101
24 By the equity of this act, and by cuſtom, all ſurgeons are allowed the like privilege 101 ſ. 43
25 By 18 Geo. 2. c. 15. which divided the *ſurgeons* from the *barbers* company — all freemen of the corporation of ſurgeons ſhall be exempted while they practiſe *ibid.*
26 By 32 Hen. 8. c. 40. the preſident and fellows of the college of phyſicians ſhall not be choſen conſtables *in London*, &c. *Page* 101. ſ. 44
27 This act does not extend to any other phyſicians *ibid.*
28 By 6 Will. 3. c. 4. regular bred apothecaries are exempted during their practice ſ. 45
29 By 1 Will. & Mary, c. 18. Proteſtant diſſenting teachers are exempted 101, 102
30 By 10 & 11 Will. 3. c. 23. thoſe who convict *burglars* or *ſhoplifters* ſhall have a certificate to diſcharge them from ſerving the office 102
31 By 31 Geo. 2. c. 17. perſons at or above 63 years of age are *in Weſtminſter* exempted from the office *ibid.*
32 A naturalized foreigner, excluded from offices of truſt, is thereby rendered ineligible to the office of conſtable 102 (N) 3
33 A college barber *of Oxford* ſeems exempted from this office *ibid.*
34 A younger brother of the Trinity-houſe is not, *as ſuch*, exempted from the office of conſtable by the charters of that fraternity.—*Decided in Rex* v. *Clarke, Eaſter Term, 27 Geo. 3. ſince the body of the Work was printed* *ibid.*
35 In what manner a perſon choſen may be puniſhed for refuſing to ſerve the office: and how the indictment muſt ſtate the offence 102, 103
36 The king's bench may award a *mandamus* to an inferior court, to ſwear in, reſtore, or diſcharge a perſon to, of, or from the office of conſtable 103 ſ. 47
37 A conſtable is the principal peace officer; and it is neceſſary that every vill ſhould be furniſhed with one 103 ſ. 49
38 Juſtices may not only ſwear conſtables choſen at the torn or leet, but may alſo nominate and ſwear conſtables on neglect of the ſheriffs or lords *ibid.*
39 Juſtices alſo may diſplace conſtables ſo nominated and ſworn *ibid.*
40 *Quere* whether the ſeſſions may not ſwear in a conſtable *unduly* rejected by the ſteward of a leet 103, 104
41 A ſingle juſtice may ſwear in a conſtable choſen by the leet 104 (N) 4
42 In all *caſes of neceſſity* juſtices may chuſe any number of conſtables *ibid.*
43 Juſtices had power to nominate and ſwear

ſwear conſtables *on default* of the torn or leet *Page* 104 ſ. 50
44 By 13 & 14 Car. 2. c. 12. if any conſtable, &c. ſhall die or go out of the pariſh, any two juſtices may make and ſwear a new one, until the lord ſhall hold a court, or until the next ſeſſions, who ſhall approve of him, or appoint another, &c. *ibid.*
45 The juſtices in ſeſſions may diſcharge a conſtable after the expiration of a year, and put another in his place, until the lord ſhall hold a court as aforeſaid *ibid.*
46 But the ſeſſions, by this ſtatute, cannot diſcharge conſtables *choſen and ſworn in* at the leet *ibid.* (N) 5
47 An appointment by the ſeſſions "for a year, or until others are choſen" is not good: The ſtatute muſt be ſtrictly purſued *ibid.*
48 The ſeſſions upon this ſtatute, have no power to appoint a conſtable, but upon the default of the leet *ibid.*
49 The king's bench will grant *quo warranto* againſt a conſtable elected at a veſtry, and ſworn in by the ſeſſions *ibid.*
50 A conſtable, &c. may apprehend a perſon expoſing a child in the ſtreets, &c. 121 c. 19
51 Where, in making an arreſt, they need not ſhew their warrant 137
52 In what caſes they may execute a warrant out of their own precincts 137 ſ. 30
53 Whether they have power to commit or bail thoſe whom they have arreſted 142. 147. 180

CONSTABLE *and* MARSHAL.

1 The office of high conſtable of England was anciently hereditary 12 c. 4
2 But ſince the reign of Hen. 8. he has only been appointed *pro hac vice ibid.*
3 The hiſtory and ancient juriſdiction of the conſtable *ibid.*
4 The hiſtory of the ancient marſhals 13
5 By 8 Rich. 2. c. 5. no pleas concerning the common law ſhall be heard or determined by the conſtable and marſhal *Page* 14
6 By 13 Rich. 2. c. 2. the conſtables ſhall have cognizance of contracts touching deeds of arms and war out of the realm, and of things touching war within the realm, not cognizable by the common law *ibid.*
7 If the conſtable exceed this juriſdiction, the party grieved ſhall have a privy ſeal directed to the conſtable to ſurceaſe his plea until it be diſcuſſed in the council *ibid.*
8 By 1 Hen. 4. c. 14. appeals of things done out of the realm ſhall be tried by the conſtable 14, 15
9 How far the court of the conſtable and marſhal hath conuſance of points of honour in general 15, 16
10 Whether this court can puniſh private perſons for marſhalling funerals 16 ſ. 8
11 Whether this court can be holden by the lord marſhal alone without the conſtable 16, 17
12 Whether this court can take cognizance of treaſon 17, 18
13 In what manner, and by what law the court of the conſtable and marſhal proceeds 18
14 It is queſtioned, whether an information may not be brought in this court by the attorney-general 18 ſ. 12
15 This court, if it exceed its juriſdiction, may be prohibited by the courts of common law 18 ſ. 13
16 This court upon urgent neceſſity may be holden by commiſſioners, without the earl marſhal 18, 19
17 The lord high conſtable of England is by virtue of his office a conſervator of the peace 43 ſ. 2

COPY *of* INDICTMENT.

1 By the *common law* it was always denied in treaſon and felony 567 ſ. 13
2 On a legal exception being taken, the court will grant a copy of ſo much of the indictment as relates to the exception *ibid.*
3 The court will grant a copy of the heads of an indictment, ſo as to enable a pri-

a priſoner to frame a plea in bar, &c. to the charge againſt him *Page* 567 ſ. 13

4 By 7 Will. 3. perſons indicted for high treaſon, except counterfeiting the coin, &c. &c. ſhall have a true copy of the whole indictment 5 days before their *trial* 567 ſ. 14

5 This muſt be intended 5 days before his *arraignment*, becauſe the priſoner pleads *inſtanter* upon his arraignment *Note in marg.*

6 By 7 Ann. c. 21. copies of all indictments for high treaſon, except, &c. ſhall be delivered to the party indicted 10 days before the trial in the preſence of two witneſſes 568

7 Lord George Gordon's the firſt trial upon this act after it took effect (N) *in marg.*

COPYHOLD.

Whether forfeited for treaſon or felony ch. 49 ſ. 7

CONTEMPTS.

1 Every court of record may impoſe reaſonable fines on all ſuch as ſhall be guilty of contempts in the face of the court 5 ſ. 15

2 It is ſaid that every ſuch court, except the court leet, may alſo impriſon the offender *ibid.*

3 It is a contempt to uſe opprobrious language to a judge; or for an officer to refuſe to do his duty *ibid.*

4 The ſheriff, in his torn, may fine for contempt 92. 93

5 And this fine needs no other affeerement than the judge's order 94 ſ. 19

6 A commitment by the chief juſtice, without ſhewing any cauſe whatſoever, ſhall be *intended* to be for a contempt 153

7 Perſons committed for contempts are not bailable 152. 164. 172

8 To perſuade a perſon to abſent himſelf, for the purpoſe of avoiding a warrant for having been guilty of treſpaſs, is, *perhaps*, a contempt 441

9 How the ordinary was anciently puniſhable for the contempt of unlawfully demanding or refuſing a clerk convict *Page* 506, 507

10 An attachment is grantable againſt perſons guilty of contempt 213 ſ. 1

11 A contempt in the face of the court, or by confeſſion on oath, may be immediately recorded, and the offender committed and puniſhed 214

12 On a contempt, *complained of by affidavit*, the court will either order the offender to anſwer it, or make a rule to ſhew cauſe why an attachment ſhould not iſſue againſt him 214

13 If the contempt be of an exorbitant nature, affecting the court itſelf, they will grant an attachment in the firſt inſtance *ibid.*

14 In what manner the offender may purge the offence in anſwering interrogatories 214

15 Where a ſheriff ſhall be in contempt for not executing a writ, &c. 215 to 217

16 In what inſtances the miſconduct of attornies ſhall be conſidered as contemptuous to the court 217 to 219

17 How far jurors may be puniſhed for contempts 219 to 225

18 How far the conduct of inferior judges ſhall be thought contemptuous of the ſuperior courts 226

19 In what caſes barriſters may be puniſhed for contempt 227

20 Gaolers may be guilty of contempt, &c. *ibid.*

21 Peers of the realm are puniſhable for contempts, &c. 228

22 The moſt remarkable inſtances of contempts 228 to 230

23 Where perſons are puniſhable for contemptuous words or writings concerning courts 230

24 Of contempts to the rules and awards of the court *ibid.*

CONVICTION.

1 Conviction eſtabliſhes the guilt of the offender, and by deſtroying the probability of his innocence, renders him incapable of being bailed, except by the ſuperior diſcretion of the king's bench 153, 154. 175, 176

2 A conviction of recuſancy cannot be appealed from to the king's bench *Page* 408 ſ. 29
3 A *certiorari* ſhall never be granted to remove an indictment or appeal, after conviction, except for ſpecial cauſe *ibid.* ſ. 31
4 But a preſentment on the foreſt law can only be removed after conviction 409
5 In what caſes ſome of the defendants in the ſame indictment may be convicted, and the others acquitted 342, 343
6 How far a conviction on one proſecution may be pleaded in bar to another. *(Vide Autrefois Attaint.)* 334
7 It is a good challenge to a juror, that he hath been convicted of treaſon, or felony, or perjury, or conſpiracy, &c.&c. 587, 588
8 How far, and in what caſes, a conviction will diſable the convict from being a witneſs. *(Vide Evidence)* 609, &c.

CONVICTS —*Vide Clergy. Tranſportation.*

CORONER.

1 Coroners were formerly the principal conſervators of the peace 70
2 They are of equal antiquity with the ſheriffs *ibid.*
3 Coroners are either *virtute officii*, or by charter, or by election *ibid.* (N)
4 By the ſtat. Weſt. they ſhall be choſen through all ſhires, of the moſt ſufficient *knights*, who ſhall beſt attach *the pleas of the crown* 70
5 It is no good cauſe to remove a coroner, that he is not a knight 71
6 By 14 Edw. 3. no coroner ſhall be choſen, unleſs he have ſufficient in the county to anſwer *ibid.* ſ. 4
7 Coroners are elected by the freeholders by virtue of the king's writ iſſuing out of, and afterwards returned into the chancery *ibid.* ſ. 5
8 Therefore their authority does not determine by the demiſe of the king *Page* 71 ſ. 5
9 The form of the writ for the election of a coroner 71 ſ. 6
10 The coroner elected by virtue of this writ, ſhall be ſworn by the ſheriff lawfully to execute his office 71 ſ. 7
11 If he is inſufficient to pay his fines, &c. the county, as his ſuperior, ſhall anſwer for him 72
12 By 28 Edw. 3. c. 6. all coroners of counties ſhall be choſen by the freeholders at full county court 72 ſ. 9 and 10
13 The king may claim the franchiſe of appointing coroners by preſcriptions. And other lords may claim it by grant from the crown. No ſubject can claim it by preſcription ſ. 11
14 Coroners may be diſcharged by the writ *de coronatore exonerando* for want of leiſure to execute their office; or by being choſen *verderor*, or for not having ſufficient property; or for bodily infirmity, or old age, *and perhaps* for following *a trade* 72 ſ. 12
15 This writ recites the cauſe of his diſcharge and then commands the ſheriff to chuſe another *ibid.*
16 The iſſuing of this writ is in the diſcretion of the court of chancery; and the defendant muſt have notice of the application made for it 72 (N) 1
17 The power of the old coroner is *ipſo facto* extinguiſhed by the election of a new one by the freeholders *ibid.*
18 The old coroner may controvert the truth of the ſuggeſtion upon which a writ *de coronatore exonerando* is obtained by a commiſſion from the chancery, and on diſproving it he ſhall not be removed, or, if removed, reſtored 73
19 A coroner may inquire of a felony committed on the arms of the ſea, and on the ſea between high and low water mark when the tide *is out* 73 ſ. 14
20 The coroner has juriſdiction on board a veſſel lying in a harbour, to take an inquiſition of *felo de ſe* *ibid.* (N) 2
21 How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice verſa* 74, 75
22 The

22 The ſtatute *de officio coronatoris* recited, which deſcribes, very circumſtantially, the manner in which the coroner ſhall take an inquiſition of death *Page* 76

23 This ſtatute is only in affirmance of the common law, and therefore the coroner ſhall ſtill take inquiſition of ſuch as die, &c. in gaol, although this is not directed by the act 77 ſ. 21

24 It is ſufficient if the inquiſition ſtate that it was taken by the oaths of lawful *perſons of the county*, although the act directs it to be by the oaths of perſons of the next adjacent towns 77 ſ. 22

25 It muſt appear at *what place*, and by what jurors, *by name*, the inquiſition was taken, and that they were ſworn, and, *perhaps*, that they were of the next towns, &c. *ibid.*

26 The coroner has no manner of power to take an inqueſt of death without a *view of the body* 77 ſ. 23

27 If a dead body be buried, or ſuffered to putrify, before the coroner hath taken his view, the offender ſhall be amerced 77, 78

28 And it is indictable as a miſdemeanor alſo 78 (N) 3

29 The coroner, within convenient time, may order a buried body to be taken from the grave in order to take his view, where it has been either omitted or inſufficient, or where the firſt inquiſition is quaſhed 78

30 But this muſt be by order of the king's bench, who will exerciſe their diſcretion upon the time which has elapſed ſubſequent to the interment *ibid.* (N) 4

31 If a view cannot be had by the coroner, an enquiry ſhall be made by juſtices, &c. on the teſtimony of witneſſes 78

32 None can take an inqueſt, on view, in any caſe, but the coroner *ibid.*

33 The king's bench will refuſe to file a coroner's inquiſition, if, on an affidavit of the proceedings, it appears to have been improperly taken 78 ſ. 24

34 It is not neceſſary that *the view* and *the inquiſition* ſhould be both taken at the ſame place 78 ſ. 25

35 A coroner has no power to enquire of any acceſſaries to a felony *after the fact* *Page* 78 ſ 26

36 A coroner may enquire of *acceſſaries before* as well as *of principals*, and alſo whether they did *fly* for the offence; for which *flight* they forfeit all their goods and chattels 78, 79

37 The coroner ought alſo to enquire into the circumſtances, and of the thing which cauſed the death; and if it happened from a bridge, &c. being out of repair, the town ſhall be amerced 79 ſ. 28

38 A coroner who is remiſs in doing his office, *on being* ſent for, ſhall be amerced 79 ſ. 29

39 By 3 Hen. 7. c. 1. the coroner may enquire if the townſhip have been negligent in not apprehending a murderer; and if the coroner be remiſs, and not make inquiſition on the dead body, he ſhall forfeit 5 l. *ibid.*

40 An inquiſition by juſtices, on the default of the coroner, muſt be done *openly*, or it ſhall be quaſhed 79 (N) 6

41 A coroner who impoſes on his jury may be committed *ibid.*

42 By 3 Hen. 7. c. 1. coroners ſhall certify their inquiſitions to the next general gaol-delivery, &c. 79 ſ. 30

43 By 1 & 2 Phil. and Mary, c. 13. coroners ſhall take the depoſitions of the witneſſes in writing, and bind them over to appear at the next gaol-delivery, &c. &c. 79, 80

44 By 1 Hen. 8. c. 7. if any coroner ſhall not do his office himſelf, he ſhall forfeit 40s. 80 ſ. 32

45 By 25 Geo. 2. c. 29. coroners convicted of extortion or neglect of duty ſhall be amerced and diſplaced 80 ſ. 33

46 Anciently, the coroner's jury, on acquitting a defendant, were obliged to find who did commit the fact: they now generally find that it was done by perſons unknown 80, 81

47 The high credit which the law pays to a coroner's inquiſition *ibid.*

48 Whether coroners may take inquiſition of other felonies than thoſe of homicide 81 ſ. 35

49 By 4 Edw. 1. the coroner may enquire of *treaſure trove*, and of royal fiſhes,

as

as ſturgeons, whales, &c. *Page* 82 ſ. 36, 37

50 A coroner in the county-court may receive *an appeal* of any felony or mayhem, upon pledges to the ſheriff to proſecute the ſuit 82 ſ. 39

51 But the ſheriff muſt be preſent to receive the *counter roll*, or the appeal is not well received 82, 83

52 A coroner cannot receive an appeal for an offence committed out of his county 83 ſ. 40

53 A coroner may receive the appeal of *an approver*, or take the confeſſion of a felony done in any county *ibid.*

54 Before *Magna Charta*, coroners might try offenders as well as receive accuſations againſt them 83 ſ. 41

55 But now, no ſheriff, conſtable, *coroner*, or other bailiff of the king, ſhall hold pleas of the crown *ibid.*

56 The coroner may award proceſs on appeals, till the *exigent* *ibid.*

57 And *quere* if he may not proceed to *outlawry* *ibid.*

58 An appeal may be moved from the coroner, by *certiorari*, into either the king's bench or chancery, directed to the *coroner and ſheriff*, but not to the *ſheriff* only *ibid.*

59 The coroner may receive the appeal of an approver without the preſence of the ſheriff (*Vide ſupra* No. 51.) and may award proceſs thereon to outlawry, except in a foreign county 84 ſ. 43

60 The coroner may record the confeſſion of the breach of priſon of a felon, &c. &c. 84. ſ. 44

61 Before 21 Jac. 1. c. 28. which aboliſhes the plea of ſanctuary, he might take an abjuration *ibid.*

62 The law concerning ſanctuary and abjuration explained *ibid.*

63 The *judicial act* of one coroner is of equal force as if all the other coroners had joined in it 85

64 But in *miniſterial acts* all the coroners of the county muſt join *ibid.*

65 By *ſtat. Weſt.* 1. c. 10. no coroner ſhall demand or take any thing from another for doing his office 85 ſ. 46

66 By 3 Hen. 7. c. 1. coroners upon every inquiſition on view of a dead body, ſhall have 13s. 4d. *Page* 85 ſ. 47

67 By 1 Hen. 8. c. 7. coroners ſhall do their office without any fee *ibid.* ſ. 48

68 By 25 Geo. 2. c. 29. coroners for every inquiſition on view of a body not dying in gaol, ſhall have 20s. and alſo 9d. for every mile they ſhall travel over and above the 13s. 4d. above mentioned, to be paid out of the county rates; and for every inquiſition of a body dying in gaol, ſuch ſum not exceeding 20s. as the quarter ſeſſions ſhall direct 85, 86

69 This act only extends to coroners of counties *ibid.*

70 A coroner's record of an abjuration, or confeſſion by an approver of felony, or of priſon breach, cannot be traverſed 87

71 But the circumſtances may be enquired of by witneſſes, to inform the conſcience of the judge *ibid.*

72 The coroner's record of an eſcape cannot be traverſed 87 ſ. 53

73 The coroner's record of a flight found cannot be traverſed, nor the conſequent forfeiture controuled by any ſubſequent finding of the trial jury. *Sed quæ.* 87 ſ. 54. 639 ſ. 14

74 The coroner's record of *felo de ſe*, being moved by *certiorari* into the king's bench, may be traverſed 88

75 The court will not order the coroner to return the depoſitions without ſpecial reaſon for it *ibid.* (N) 11

76 The coroner poſſeſſes a *miniſterial* office as the ſheriff's ſubſtitute, &c, &c. *ibid.* ſ. 12

77 Upon what occaſions he ſhall execute writs inſtead of the ſheriff *ibid.*

78 If a coroner take an inquiſition corruptly, a *melius inquirendum* ſhall iſſue to commiſſioners who ſhall examine the fact by witneſſes *ibid.* ſ. 56

79 But where a coroner's inquiſition is quaſhed for defect of form, the coroner ſhall again take the inquiſition *ibid.*

80 In what manner the *caption* of an inquiſition of death, on view of the body, muſt ſhew that the coroner was coroner and had juriſdiction 359 ſ. 119

81 The caption of an inquiſition taken a B. be-

B. before J. S. coroner of the king's liberty of B. *aforesaid* is good, without shewing that B. is within the liberty *Page* 369

82 The chief justice of the king's bench is the supreme coroner all over England 11 (N)

CORPORATION.

How jurors for trials in corporations shall be qualified 583, 584. 586

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Where persons convicted of larceny may be sent to the house of correction 512, 513

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Vide Certiorari. Information.

1 For costs on an information 376. 389

2 Where a pardon will discharge costs given by a spiritual court *ibid.*

3 How costs shall be allowed and taxed on a *certiorari* 415

COUNSEL.

1 If a prisoner indicted of felony offers an exception to the indictment, for any error respecting the grand jury, he shall have counsel assigned 312

2 At common law no counsel shall be allowed a prisoner, whether peer or commoner, upon the general issue upon an indictment of treason or felony, unless some point of law arise *proper* to be debated 564

3 This rule of law defended *ibid.*

4 Counsel are allowed in an appeal. The reason of it 565

5 The court will assign counsel where it is doubtful if the facts proved amount to the crime charged; or whether the witnesses be legally admissible; or the jurors be lawful jurors; or the indictment, process, &c. erroneous 565 s. 4

6 But the prisoner must propose the point; and the court will judge whether it is of sufficient importance to require counsel *ibid.* s. 4

7 Any one may be counsel for a prisoner, without assignment, for matters collateral to the point in issue, as the pleading a pardon, assigning an error to reverse outlawry, or any special matter *Page* 565 s. 5

8 On the trial of a peer, if a question arise concerning parliamentary proceedings, the lords will not permit counsel to argue it *ibid.* s. 6

9 An *amicus curiæ* may inform the court of any error in the record s. 7

10 A counsel cannot assist a man in prison for a capital crime, and prepare him for his trial, without being assigned by the court *ibid.*

11 By the indulgence of the court, counsel may assist prisoners both in prison and at the bar 565, 566

12 But *in strictness* they ought not to interpose in matters of fact 566

13 Nor ought prisoner to have the assistance of any papers drawn by counsel *ibid.*

14 After counsel are assigned, they cannot be discharged without the prisoner's consent 566 s. 8

15 The court will frequently add more counsel to those first assigned *ibid.*

16 The court cannot assign *a king's counsel* to an appellee 566 s. 9

17 A king's counsel may be either for or against an appellee *ibid.*

18 By 7 Will. 3. c. 3. persons accused of high treason, whereby corruption of blood ensues, &c. or for misprision of such treason, may make *full defence* by counsel, not exceeding two, who shall be assigned by the court on the prisoner's desire, and have free access to him at all seasonable hours 566 s. 10

19 A question has been made *(by Buller, J.)* whether the request of counsel ought not to be made by the prisoner *in person* *ibid.* (N)

20 If any person be outlawed for such treason, and after take his trial, he shall have the benefit of the act 566 s. 11

21 By 20 Geo. 2. c. 30. persons impeached by the commons of Great Britain of any such high treason, &c. &c. may make full defence by two counsel to be assigned on the application

tion of the party at any time after the articles ſhall be exhibited *Page* 567
22 In what caſes counſellors are liable to an attachment.

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1 Where the count doth not purſue the writ, it may be pleaded in abatement 257
2 For the form of a count in appeal 258 to 267
3 For the form of a count or avowry, for the recovery of an amercement 94, 95
4 Where a woman's conſent to a raviſher ſhall be taken by implication in a count in appeal of rape 254 ſ. 63

COUNTER ROLL.

The ſheriff ſhall keep a counter roll with the coroner 82 ſ. 39

COUNTY.

Vide Grand Jury. Jurors. Trial.

1 Regularly all offences are to be determined in the county where they are committed; and the king cannot authoriſe them to be heard in any other 25 ſ. 19
2 If the king grant a city the privilege of being a county of itſelf, as Glouceſter, diſtinct from the county in which it lies, with a reſervation that the juſtices for the county may ſit in ſuch city, it makes the city for ſuch purpoſe part of the county, and an indictment found in the city for an offence committed in the county, is good 25, 26
3 By ſpecial cuſtom indictments of offences within a county may be taken in a place out of it 26
4 The king may grant that indictments found in one county ſhall be determined in another; but the jurors muſt come from the proper county *ibid.*
5 No judge of aſſize ſhall ſit in the county wherein he was born. *Quere* *Page* 42
6 By 19 Geo. 3. c. 74. the judges lodgings upon the circuits ſhall be taken to be both within the county at large, and the county of any adjoining city *ibid.*
7 How far juſtices of the peace for a county may act out of it, or within a liberty 53
8 In what county an appeal of death, larceny, or rape, muſt be brought 242 c. 35. 247 ſ. 47. 256 ſ. 71
9 A coroner cannot receive an appeal out of the county for which he is coroner; but he may receive an abjuration, or the appeal of an approver, out of his county 83 ſ. 40
10 In what caſes a coroner may award proceſs out of his own county 84 ſ. 43
11 How far, and under what circumſtances an offender may be arreſted in one county for an offence committed in another. (*Vide Commitment*, No. 17.) 183
12 A city and a county thereof, where they ſhall be conſidered as *prima facie* equivalent 273, 274
13 No grand jurors can indict any offence which doth not ariſe within the limits of the county for which they are returned 313 ſ. 34
14 The finding any collateral matter, expreſsly alledged in an indictment, to have happened in a different county, is void 314
15 If the county be expreſſed in the margin of the indictment, the vill in which the offence is laid ſhall be intended within the county *ibid.*
16 A man cannot be found guilty on evidence of the fact being done out of the county in which it is laid in the indictment 314. 525, 526
17 By 2 & 3 Edw. 6. c. 34. if a man be ſtricken or poiſoned in one county and die thereof in another, the offender may be tried where the death ſhall happen 314 ſ. 36
18 By 2 Geo. 2. c. 21. If a man die in England of a wound, &c. received abroad,

abroad, &c. or *vice versa*, the offender may be tried in the county where either the ſtroke or the death ſhall happen *Page* 315

19 If a fact in one county prove a nuſuance to another, it may be tried in either county *ibid.*

20 How bigamy ſhall be tried where one of the wives was married in a foreign county ſ. 39

21 A woman taken by force in one county and carried into another, may be tried in the ſecond county ſ. 40

22 If a record be embezzled partly in one county, and partly in another, the offender cannot be tried *for felony* in either *ibid.*

23 By 26 Hen. 8. c. 6. felonies in Wales ſhall be tried in the next adjoining Engliſh county 315, 316

24 An acquittal in Wales will bar an indictment for the ſame offence in an Engliſh county 316 ſ. 42. 529 ſ. 10

25 In what counties, felonies committed out of the realm, may be tried by virtue of ſpecial commiſſion 216. 317, 318

26 By 2 & 3 Edw. 6. c. 24. an acceſſary in one county to a felony in another, may be indicted and tried in the ſame county where he was acceſſary 319

27 From what county the jury is to be returned (*Vide Jurors*) 568 ch. 40

28 Perſons indicted of larceny in one county, ſhall, on conviction, be excluded from clergy, if their offence be ſuch that they would have been excluded by 23 Hen. 8. in caſe they had been found guilty in the county where the offence was committed 495, &c.

29 Execution ought not to be awarded into a different county from that wherein the party was convicted, except the record be removed into the king's bench, which may award execution in the ſame county wherein it ſits 656 ſ. 2

30 Where proceſs is well awarded into a county different from that wherein the court ſits, from which it is awarded 400

31 In what manner the acceſſary ſhall be tried where the offence ariſes in a different county from that of the principal *Page* 456 ſ. 43

COUNTY COURT.—*Vide Torn. Court Leet.*

COUNTY PALATINE.—*Vide Palatine.*

COURTS *in* GENERAL.

Vide Appeal. Attachment. Inferiour Court.

1 No court whatſoever can poſſeſs *criminal* juriſdiction, unleſs it, ſome way or other, derive it from the crown 1 ſ. 1

2 The king cannot himſelf ſit in judgment upon any indictment, becauſe he is a party 1 ſ. 2

3 Anciently, kings ſat in court as ſpectators, and for the purpoſe of adding ſolemnity to the proceedings *ibid.*

4 The king has delegated all his power of judicature to the ſeveral courts of juſtice 2

5 The known and eſtabliſhed rules, which by immemorial uſage prevail in courts of juſtice, can only be altered by the legiſlature *ibid.*

6 The king cannot give any addition of juriſdiction to an ancient court; and therefore the *common pleas* cannot be authoriſed to inquire of felony or treaſon 2 ſ. 4

7 The king cannot even grant *a judicial office* for life, which has *uſually* been granted at will 2 ſ. 5

8 The adminiſtration of juſtice highly concerns the ſafety of the ſubject, and the law is, therefore, jealous of any kind of innovation 2 ſ. 6

9 Commiſſions to ſeize the property or impriſon the perſon, upon ſuſpicion, without indictment or legal proceſs, are void 2 ſ. 7

10 The king cannot grant any new commiſſion not warranted by ancient precedents 2, 3

11 Judges muſt derive their authority from the crown by a legal commiſſion; and

and they muſt alſo exerciſe it in a legal manner *Page* 3 ſ. 9
12 Where there are divers judges of a court of record, the act of one of them is effectual; except the commiſſion expreſsly require more 3 ſ. 10
13 By the common law, all patents of juſtices of either bench, barons of the exchequer, ſheriffs, eſcheaters, commiſſioners of *oyer and terminer*, gaol-delivery, and of the peace, determine by the death of the king who made them 3 ſ. 11
14 But no judicial office by charter ſo determines *ibid.*
15 By 7 & 8 Will. 3. c. 27. no commiſſion, either civil or military, ſhall determine by the king's death. but ſhall continue in force for ſix months after, unleſs ſooner determined by the ſucceſſor 4, 5
16 By 1 Ann. c. 8. the ſame is enacted of patents, or grants of officers 5 ſ. 13
17 No commiſſion of aſſize, *oyer and terminer*, gaol-delivery, aſſociation, or the peace, writ of admittance, *ſi non omnes*, or aſſiſtance, ſhall be determined by the death of the king, &c. *ibid.*
18 No proceſs or proceedings in any matters criminal or civil, ſhall determine by the king's death, &c. *ibid.*
19 By 12 & 13 Will. 3. c. 2. the judges commiſſioners ſhall be made, *quamdiu bene ſe geſſerit*, &c. 4 †
20 By 1 Geo. 3. c. 23. judges commiſſions ſhall remain in force, notwithſtanding any demiſe of the crown, and the judges ſhall only be removable upon the addreſs of both houſes of parliament; and their ſalaries ſhall be paid out of the civil liſt 4, 5
21 ALL COURTS of criminal juriſdiction muſt be of record, as no other can either fine or impriſon 5 ſ. 14
22 No proceeding from a criminal court can be removed, but by writ of error or *certiorari* *ibid.*
23 No averment can be taken againſt the truth of any thing recorded in ſuch a court *ibid.*
24 All courts of common law that have power to fine and impriſon, are thereby courts of common law *ibid.*
25 All ſuch courts may injoin ſilence on pain of fine and impriſonment *Page* 5 ſ. 15. p. 44
26 How far they may impriſon for contempts *ibid.*
27 No judge of any court of record is compellable to deliver his opinion beforehand, in relation to any queſtion which may afterwards come before him 6
28 No judge of record can be puniſhed for an error of judgment 6 ſ. 17
29 All courts of record may diſcharge any perſon arreſted either in the face of the court, or during his going or coming 6 ſ. 18
30 In what courts a *qui tam* informer may ſue 381
31 The judgment for ſtriking, &c. in a ſuperior court 632

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COURT LEET.

1 A court leet is a court of record within a particular precinct 112. c. 11
2 All who are now bound to attend the leet were formerly obliged to ſwear allegiance at the ſheriff's torn 113 ſ. 2
3 The origin of courts leet *ibid.*
4 *Capitage* is a recompence paid by the tenants to the lord for procuring the leet *ibid.*
5 *Capitage* may be preſcribed and diſtrained for, &c. *ibid.*
6 No man can be within two leets at the ſame time 113 ſ. 3
7 The inhabitant of a leet cannot be compelled to attend the ſheriff's torn, unleſs the juriſdiction of the leet be limited *ibid.*
8 A grand leet may oblige a certain number of its inhabitants to appear and inquire of ſuch offences as have not been noticed by inferiour leets 114
9 The ſheriff's torn may inquire of ſuch offences,

offences, &c. as have been neglected by the leet *Page* 114 ſ. 4
10 If a leet be ſeized into the king's hands, thoſe who owed ſuit to it ought to attend the torn *ibid.*
11 To hold a leet is a franchiſe granted for the publick good, and not for the benefit of the lord 114 ſ. 5
12 It may therefore become forfeited by groſs acts of oppreſſion and injuſtice; or by omiſſions defeating the ends of its inſtitution *ibid.*
13 What ought to be the form of the caption of an indictment in the court leet 114, 115
14 This court has fallen into diſuſe, &c. *ibid.*

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1 Burning in the hand reſtores the party to his credit, and enables him to be a good witneſs 511 ſ. 129
2 How far a pardon reſtores the ſubject of it to his former credit 558

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2 Whether the cuſtom of any other place ſhall prevail againſt the privileges of the officers of *Weſtminſter Hall* 99, 100
3 Whether a cuſtom to make *bye-laws* in a *leet* be good 113, 114

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1 *Quere* if a *certiorari* to remove indictments or recognizances from ſeſſion ought to be directed to the *cuſtos rotulorum*, or to the juſtices of the peace *Page* 411 ſ. 43
2 It may as well be directed to the *cuſtos rotulorum* as to the juſtices, &c. *ibid.*

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2 Damages cannot be given to a party grieved upon any criminal proſecution, even though the king's commiſſion ſhould expreſsly direct it to be done 300 ſ. 3

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1 Regularly the law makes no fraction of a day 241 ſ. 34
2 How the year and day in an appeal ſhall be computed 242
3 In what manner an appeal muſt ſet forth the day on which the fact was done 262, 263
4 No indictment can be good without preciſely ſhewing a certain year and day of the material facts alledged in it 334 ſ. 77
5 The ſheriffs return of a *reſcous* is bad, if it do not ſhew the year and day *ibid.*
6 An indictment for *reſcous* muſt ſhew the year and day both of the *reſcous* and the arreſt *ibid.*
7 An indictment which lays the offence on an impoſſible day is void 335
8 In what *manner* the day muſt be alledged 335, 336
9 A miſtake in not laying an offence on the very ſame day on which it is afterwards proved upon the trial, is not material upon evidence 335 ſ. 81. p. 614 ſ. 32
10 In what caſes *proceſs* ſhall be ſaid to be put without day 426

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1 An appellant may be nonſuited after a demurrer and argument thereon 267 ſ. 95
2 An informer *qui tam* may demur to a plea in bar, without naming the attorney general 39
3 If the plaintiff demur, the defendant ſhall join in ſix days, or judgment ſhall be entered (N) 22
4 He who demurs to an indictment or appeal, ſhall not be eſteemed to ſtand mute 461 ſ. 2
5 Whether if a *general* demurrer to a good indictment, be found againſt the priſoner, it is ſuch a confeſſion of the fact that execution ſhall be awarded 470 ſ. 5
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1 It is a good plea to an appeal brought in the king's bench, that another appeal

peal of the ſame offence is depending before the juſtices in eyre, even though the king's bench be removed into the ſame county *Page* 10, 11

2 If an appeal be removed into the king's bench from any inferior juriſdiction by *certiorari*, it may be pleaded in abatement to any ſubſequent appeal for the ſame offence, that ſuch appeal, ſo removed, is ſtill depending 275

3 In what caſes a prior ſuit depending may be pleaded to a *qui tam* action or information 391

4 But to an indictment, it is no good plea that another indictment for the ſame offence is depending 523 ſ. 1

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1 If a man be deprived for an offence during a ſeſſion of parliament, and at the ſame ſeſſion an act paſſes by which the offence is pardoned, the deprivation is *ipſo facto* avoided 558 ſ. 53

2 Whether a clerk admitted to clergy may be afterwards deprived of it ch. 33 ſ. 130

DEPOSITIONS.

1 Depoſitions, taken by magiſtrates upon the examination of offenders, may be given in evidence upon the trial, if legally proved, and it be made out to the court that the *deponent* is dead, or unable to travel, or kept away by the priſoner's procurement 605

2 Such a depoſition, upon evidence that the witneſs had been enticed away, admitted, though it did not appear to be by the priſoner's procurement *ibid.* (N)

3 *Quære* if ſuch depoſitions can be read in petit treaſon if the deponent be living, although he is unable to travel, or kept out of the way by any procurement *ibid.*

4 Evidence that the proſecutor has *uſed all his endeavours* to produce the deponent, is not ſufficient to authoriſe the reading of ſuch depoſition 605 ſ. 7

5 Depoſitions taken before a coroner, *upon his view*, cannot be given in evidence in an appeal for the death *Page* 605 ſ. 8

6 The depoſitions in high treaſon may be read both *for and againſt* the priſoner, where the attendance of the deponent is prevented by ſickneſs 605 ſ. 9

7 The priſoner may read depoſitions to diſcredit the evidence of the witneſs who made them, by ſhewing the variance of his teſtimony *ibid.*

8 So alſo the depoſition of a witneſs *viva voce* on one trial may be given in evidence on another trial, to ſhew the variance of his teſtimony &c. 605, 606

9 And *quære*, whether any other written depoſitions than thoſe which are taken before juſtices of the peace in treaſon and felony, purſuant to the ſtatutes of Philip and Mary, can be read in evidence 606 ſ. 10

10 Depoſitions of witneſſes, taken in the abſence of the offender, cannot be read *againſt him* upon his trial *ibid.*

11 The depoſitions of one witneſs before the magiſtrate, and the evidence *viva voce* of another witneſs at the trial, are not two ſufficient witneſſes to prove the *overt acts* in high treaſon, within the 7 Will. 3. 606 ſ. 11

12 Depoſitions taken in a *ſuit* of a different nature, or in a court of a *different* juriſdiction, from that in which they are produced, cannot be read in evidence 606 ſ. 12

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1 Judges of the common law cannot act by deputy, nor any way tranſfer their power to another 3 ſ. 9

2 Judges of the eccleſiaſtical courts may act by deputy *ibid.*

3 The perſon to whom a *certiorari* is directed cannot depute another to make a return to it 419 ſ. 71

4 *Quære* if a conſtable can make a deputy without ſpecial cauſe 98

5 By 1 Will. & Mary, c. 18. diſſenters who are choſen conſtables may appoint deputies *ibid.*

6 An eſcape ſuffered by a deputy gaoler, only affects himſelf as to the felony, but it renders his principal liable to fine, &c. *Page* 205

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1 The court may grant an attachment againſt an attorney who *improperly* detains his clients writings 218
2 An attorney is authoriſed to detain writings until he is paid his juſt fees *ibid.*

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A dilatory plea is either *declinatory* or in *abatement* 471

DIGNITY.

1 By the common law, if a juſtice of *oyer* and *terminer* accepted of any new name of dignity, his commiſſion was *ipſo facto* determined 22
2 But by 1 Edw. 6. c. 7. notwithſtanding any *king's commiſſioner* ſhall fortune to be created duke, archbiſhop, marquis, earl, viſcount, baron, biſhop, knight, judge of either bench, ſerjeant at law, or ſheriff (*Sed vide* 1 *M. ſeſſ.* 2. *c.* 8. *as to ſheriffs*), he ſhall remain commiſſioner *ibid.*
3 *Quere* if the dignity of a *baronet* be within the equity of this ſtatute *ibid.*
4 No name of dignity, under the degree of nobility, is ſo high as to ſupply the want of a ſurname in legal proceedings 268 ſ. 101
A peer who has more than one name of dignity, muſt, in legal proceedings, be named by the moſt noble 269 ſ. 103
6 The omiſſion of a name of dignity is a good plea in abatement *Page* 268. 328
7 Garter king of arms is a name of dignity 328 ſ. 69

DISCONTINUANCE.

1 All ſuits, civil or criminal, and all proceſs thereon, muſt be properly continued without the leaſt gap or chaſm, from day to day, from the commencement to their concluſion 423 ſ. 89
2 DISCONTINUANCE is where any gap or chaſm is ſuffered in legal proceedings 424
3 MISCONTINUANCE, is continuing a ſuit by *improper proceſs*, as by *capias*, inſtead of *diſtringas*, or by giving the parties an illegal day 424
4 If the *ſecond proceſs* be not teſted on the very ſame day on which the *firſt proceſs* is returnable, the ſuit is *diſcontinued* 424 ſ. 90
5 A *diſtringas* returnable a day after the *venue* is a diſcontinuance *ibid.*
6 If a term is made to intervene between the *teſte* and *return* of a *capias*, it is a diſcontinuance 424, ſ. 91
7 The intervention of a term, between the *teſte* and the *return* of *an original*, continued by other proceſs than a *capias*, is no diſcontinuance *ibid.*
8 An *exigent* muſt allow time enough for five counties to be holden between the *teſte* and the *return* *ibid.*
9 To give the parties a day, to a diſtant term, without continuing the proceedings to the term immediately following, is a diſcontinuance whether after iſſue or demurrer 424 ſ. 92
10 If the term to which the ſuit is continued be adjourned, it is diſcontinuance, if the ſuit be not adjourned alſo 424 ſ. 93
11 The variance of a ſingle letter in the deſcription of the parties, in any continuance, whether on the roll or in the proceſs, is a diſcontinuance ſ. 94
12 After iſſue, the proceſs againſt the jurors muſt be regularly continued and made returnable on the days given on the roll ſ. 95

13 If a joint *venire* be first awarded, and afterwards several *venires*, it is discontinuance *Page* 425 s. 96
14 If a *venire* omit part of the issue to be tried, or the name of any of the parties, it is discontinuance s. 97, 98
15 *Quere*, whether it be discontinuance if a juror is differently named in the *habeas corpora*, and in the panel on the *venire*, or being in the panel is omitted to be named in the *habeas corpora*, if such juror be not sworn 425 s. 99
16 Where a *venire* or *distringas* are issued without any award on the roll, the proceedings are thereby discontinued 425 s. 100
17 The discontinuance, which, at common law, was created by the demise of the crown, is remedied by statute 425 s. 101
18 *Quere*, if an indictment removed by *certiorari* after issue and process for trial be awarded, whether it is discontinued by not being remanded before the return of such process 425 s. 102
19 Wherever an error in process doth not amount to a *discontinuance* it is called *miscontinuance*
20 In what cases process put without day shall be discontinuance 426, 427
21 A cause discontinued, by the non-attendance of the justices on the day to which the proceedings are continued, may be revived by *re-summons* or *re-attachment* 426 s. 106
22 But by 1 Edw. 6. c. 7. assizes of *novel desseisin, mortdancester, juris utrum*, and attaint, shall not be discontinued or put without day, by the not coming of the justices, &c. *ibid.*
23 Discontinuance either in the process or on *the roll*, where a *total chasm* is suffered, as by not giving a fresh continuance *instanter*, upon the determination of a precedent continuance, shall never be aided by an appearance and pleading over 427
24 *Quere*, if the misreturn of *cepi* on the award of an *exigent* is cured by *pleading over* *ibid.*
25 If the original process be right, and no discontinuance have happened, the appearance of the defendant will cure any error or defect in the process whereon he came in, or in the execution of it *Page* 427
26 Where there is *no chasm*, and the parties have a day, all other errors, *under the name of discontinuances*, are salved by appearance 428
27 Unless there be some break or chasm in the proceedings, *the original* is not discontinued by other errors *ibid.*
28 But by a *total chasm*, the original itself is discontinued *ibid.*
29 *All discontinuance* in process against *jurors*, shall have the same effect as discontinuance occasioned by *total chasm*, except that it shall not abate the original suit 428 s. 108
30 Where a discontinuance which does not abate the original, is discovered before trial, new process shall be awarded where the first fault happened. If after trial *a venire de novo* shall issue. But if judgment be given, it is *mis-trial* and the whole erroneous *ibid.*
31 What other errors in process against jurors will cause a mis-trial as well as those which are called discontinuances 429
32 How far a discontinuance of one appeal will be a bar to another ch. 23 s. 132. 136
33 Where a replication, omitting part of the bar, is a discontinuance of the suit *ibid.*

DISCOVERY.—*Accomplice. Depositions. Evidence.*

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1 Where a court is authorised by statute to do a matter of justice upon certain circumstances, it has no discretion upon the case where it is within the circumstances 375
2 Want of discretion is a good exception against a witness 612 s. 27
3 In what cases courts may inflict discretionary punishments; and by what circumstances such discretion is to be guided 633

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1 By 21 Jac. 1. c. 3. all commiſſions, &c. authoriſing any perſon to diſpenſe with any power given by any law or ſtatute, or to make a warrant for a diſpenſation of any penalty, &c. are void *Page* 398, 399

2 The king cannot, by any previous diſpenſation, make an offence diſpuniſh able which is unlawful in itſelf 550

3 But the king may diſpenſe with the *poſſibility* of an intereſt before it hap pens *ibid.*

4 The king cannot diſpenſe with a pecuniary penalty for an offence of a public nature before it happens *ibid.*

5 Nor can any diſpenſation be good which is attended with great publick inconvenience 551

6 The king cannot diſpenſe with a right of action to prejudice the intereſt of the party to whom it is given *ibid.*

7 How far the king may diſpenſe with a ſtatute which reſtrains ſome prerogative ſolely and ſeparately incident to the perſon of the king 551, 552

8 The king may diſpenſe with the ſtatutes of *mortmain*, without any clauſe of *non obſtante*; becauſe he only thereby gives up a right of entry for the forfeiture 552 ſ. 30

9 By 1 Will. & Mary, c. 2. no diſpenſation by *non obſtante*, of or to any ſtatute, or any part thereof, ſhall be allowed, except the ſtatute itſelf allow ſuch diſpenſation 553

10 The king could never diſpenſe with a ſtatute before it was made *ibid.*

DISSECTION.

1 By 25 Geo. 2. c. 37. in *London*, or *Mid dleſex*, the court *ſhall* order the body of an executed murderer to be diſſected 659

2 Judgment of diſſecting and anatomiſing ought to be pronounced in *petty treaſon*, though *murder* only is mentioned in the act, except in the caſe of women *ibid.* (N) 4

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Whether a *commitment* by parliament be determined by a diſſolution Ch. 15 ſ. 74

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DOORS.—*Vide Arreſt.*

DOWER.

1 In what caſes a wife may have an appeal of death, although ſhe has no claim of dower 243 ſ. 37

2 At the common law every ſpecies of dower, excepting that of gavelkind, were forfeited by one attainted of treaſon or felony, whether the lands were in the hands of a *feoffee*, or forfeited to the king, or eſcheated to the lord, and though the attainder were pardoned 646, 647

3 Lands given jointly to huſband and wife were only forfeited for the year day, and waſte 647 ſ. 43

4 A woman may purſue her title to dower within five years after the reverſal of her huſband's attainder, he having previouſly levied a fine of the lands 647 ſ. 44

5 By 1 Edw. 6. c. 12. a wife ſhall have her dower although her huſband be attainted of treaſon or felony 647 ſ. 48

6 By 5 & 6 Edw. 6 c. 11. the wife ſhall not have her dower while the attainder of the huſband *for treaſon* ſtands in force 647 ſ. 46

7 This

7 This ſtatute extends to an attainder of petit treaſon *Page* 647 ſ. 46

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An approver may diſavow an appeal taken from him by dureſs c. 24 ſ. 20

DWELLING-HOUSE.—*Clergy.*

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1 Anciently certain conſervators of the peace were choſen by election of the freeholders at the county court 45
2 Where it is in the election of the appellee of an approver to wage battle 298, 599
3 An indictment for refuſing to be ſworn conſtable muſt ſhew the manner of the election 320

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If a priſoner be reſcued by *enemies*, the gaoler is not liable to eſcape *Page* 199. 202

ENGLISH.

1 Such *additions* as were good in Latin, are now good in Engliſh 271
2 Formerly an indictment wholly in Engliſh was void 339
3 But now by 4 Geo. 2. c. 26. & 6 Geo. 2. c. 14. all law proceedings whatſoever ſhall be in the Engliſh tongue and language only, except the known names of writs and other uſual technical words 341
4 And ſince the 37 Edw. 3. c. 5. all pleas, &c. were to be debated in Engliſh, though they were enrolled in Latin 437

ERROR.—*Diſcontinuance. Certiorari. Proceſs.*

1 An error in the proceedings of the court of the conſtable and marſhal, cannot be remedied by writ of error, but only by appeal to the king 18 ſ. 11
2 If an inferior court proceed after writ of error allowed, it is a contempt 226 ſ. 28
3 A writ of error becomes of no effect if the party who proſecutes it neglect to get the record certified in a reaſonable time 418 ſ. 64
4 If a writ of error directed to ſeveral juſtices, yet returned by part of them only, truly recite the record, it ſo far removes it that a new writ *coram nobis* lies 419 ſ. 71
5 A writ of error may remove a judgment given after its *teſte* and before its return 421 ſ. 78
6 How far errors in proceſs are fatal 427. 429
7 An erroneous attainder of the principal is effectual againſt the adverſary while it ſtands unreverſed 452, 453
8 Whether an acquittal or conviction on an erroneous indictment or appeal be pleadable

pleadable to a ſecond proſecution *Page* 528, 529. 532
9 A priſoner's life is not in jeopardy by being tried upon an erroneous indictment or appeal 537
10 An erroneous attainder of the huſband bars the wife's dower; but when it is reverſed, it avoids the bar of a fine and non-claim 647 ſ. 44
11 In what caſes judgment in criminal caſes may be avoided by writs of error 654

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1 If a coroner's inqueſt find that the murderer has eſcaped, the townſhip ſhall be amerced, but they cannot traverſe the record 87 ſ. 53
2 If the eſcape be made out of the town, the hundred ſhall be amerced 116
3 A priſoner who eſcapes and returns, may be detained by virtue of the original proceſs 131
4 Doors may be broken open to retake a priſoner, *lawfully arreſted*, who has made his eſcape 139 ſ. 9
5 There muſt be an *actual arreſt*, or there can be no eſcape 197 ſ. 1
6 The actual arreſt muſt alſo be *juſtifiable*; for wherever an impriſonment is ſo far irregular, that it will be no offence to break from it by force, it can be no offence in the officer to ſuffer the priſoner to eſcape 197 ſ. 2
7 The arreſt muſt not only be *actual* and *juſtifiable*, but it muſt be for a criminal matter 197 ſ. 3
8 The impriſonment at the time muſt be for *the crime*; therefore it is not criminal to ſuffer a priſoner to eſcape who is detained only for his fees, except the payment of them be part of the puniſhment, and due to ſome other perſon than the gaoler 198 ſ. 4
9 To bail an unbailable priſoner, or to ſuffer a priſoner to go beyond the limits of his priſon, are eſcapes 198 ſ. 5
10 It is no eſcape if the gaoler retake a priſoner *without loſing ſight of him* 198 ſ. 6
11 If a gaoler kill a priſoner in endeavouring to retake him, it is an eſcape *Page* 198 ſ. 6
12 While the privilege of ſanctuary prevailed, if a gaoler conducted his priſoner through the limits of ſuch a franchiſe, and he claimed the privilege, it was an eſcape 199
13 So whiie purgation to thoſe within clergy was allowed, if the ordinary permitted any one to free himſelf by it who was not entitled, it was an eſcape 199 ſ. 8
14 If a priſoner be reſcued by *enemies*, the gaoler is not puniſhable for an eſcape, but otherwiſe if he were reſcued *by ſubjects* 199 ſ. 9
15 What eſcapes are VOLUNTARY and what NEGLIGENT 199 ſ. 10
16 A gaoler who liberates his priſoner, with an intent to defeat either his trial or his execution, is guilty of a voluntary eſcape *ibid.*
17 If an officer, not having authority to take bail, bail a priſoner who is not bailable, it is a voluntary eſcape *ibid.*
18 A perſon who hath power to bail is guilty only of a negligent eſcape in bailing a perſon who is not bailable *ibid.*
19 But theſe diſtinctions ſeem unſettled and muſt depend on the circumſtances of each caſe 199, 200
20 Wilfully to ſuffer the eſcape of a capital offender ſhall not in all caſes be deemed voluntary 200 ſ. 11
21 An officer making *freſh* purſuit, and perhaps without making *freſh* purſuit, after a priſoner eſcaped, may retake him either in the ſame or any other county 200 ſ. 12
22 But if it be a voluntary eſcape the gaoler hath no right to retake him *ibid.*
23 If a gaoler retake his priſoner after being fined, yet it does not avoid the fine 201
24 If a gaoler, by negligence, loſes ſight of his priſoner, he is finable for an eſcape, though he retook him 201 ſ. 13
25 It is a good defence to *an action* againſt a gaoler

a gaoler for an eſcape, that he retook his priſoner upon freſh purſuit after notice of the eſcape *Page* 201 ſ. 13

26 Every INDICTMENT FOR AN ESCAPE, whether voluntary or negligent, muſt expreſsly ſhew that the party was actually in the defendant's cuſtody for a crime, &c. 202, ſ. 14

27 It is not ſufficient to ſay, that he was in the defendant's cuſtody, and charged *with ſuch a crime* *ibid.*

28 The indictment muſt ſhew expreſsly that the priſoner *went at large*, which is well expreſſed by *exivit ad largum* *ibid.*

29 The time when the offence was committed, for which the priſoner was in cuſtody, muſt alſo appear: The reaſon of this rule *ibid.*

30 Every indictment for a *voluntary* eſcape muſt alledge, that the defendant *felonice et voluntarie* permitted the priſoner *ad largum ire* *ibid.*

31 It muſt alſo ſhew *the ſpecies of crime* for which the priſoner was in cuſtody *ibid.*

32 It ſeems that an indictment for a *negligent eſcape* need not ſtate *the particular crime* *ibid.*

33 Where a priſoner is committed to a gaoler by *the court*, if the gaoler ſhall fail to produce him on demand, the court will adjudge him guilty of an eſcape without further enquiry; for he ſhall be concluded by the record of commitment to deny that the priſoner was in his cuſtody 202 ſ. 15

34 But in the caſe of *other commitments* the eſcape cannot be puniſhed until it be PRESENTED 203 ſ. 16

35 By *Stat. Weſt.* 1. c. 3. nothing ſhall be demanded for an eſcape until it be ſo adjudged by *the juſtices in eyre* 203 ſ. 17

36 This ſtatute does not reſtrain *the king's bench* from receiving preſentments for eſcapes 203 ſ. 18

37 By 31 Edw. 3. c. 14. the eſcape of thieves, felons, &c. to be judged by the king's juſtices, ſhall be levied from time to time, &c. 203 ſ. 19

38 Juſtices of gaol-delivery may puniſh juſtices of the peace for a negligent eſcape in admitting perſons to bail, who are not bailable *Page* 203 ſ. 19

39 By 1 Rich. 3. c. 3. juſtices in ſeſſions are authoriſed to enquire of all manner of eſcapes of perſons impriſoned for felony 203 ſ. 20

40 Wherever an eſcape is *finable*, the preſentment of it is traverſable 203 ſ. 21

41 Where the offence is *amerciable* only, there the preſentment is of itſelf concluſive *ibid.*

42 A VOLUNTARY ESCAPE amounts to the ſame kind of crime, and is puniſhable in the ſame degree as the offence of which the party was guilty, who has eſcaped 204 ſ. 22

43 It is equally an eſcape, although the perſon eſcaping be under the arreſt only, and not actually committed to gaol *ibid.*

44 It is not material whether the priſoner who eſcapes were attainted, or only accuſed *ibid.*

45 *Quere*, if it be any excuſe for ſuffering a voluntary eſcape, that the priſoner had been acquitted on an indictment of death, and was only detained till the year and day for the appeal expired *ibid.*

46 A gaoler who has wrongfully aſſumed the cuſtody of a priſon, is equally liable for ſuffering an eſcape as if he had been the rightful officer 204 ſ. 23

47 If the warrant expreſsly charge the perſon committed with treaſon or felony, the gaoler ſhall be puniſhed for ſuffering his eſcape, although the warrant may in ſome other reſpect be erroneous 204 ſ. 24

48 No eſcape can amount to a capital offence, unleſs the cauſe for which the party was committed were actually a capital offence *at the time* of the eſcape 204 ſ. 25

49 Therefore in homicide, where an eſcape is ſuffered between the ſtroke given and the ſubſequent death, it is only treſpaſs, for it was not felony till the death happened *ibid.*

50 He who ſuffers another to eſcape, who was in his cuſtody *for felony*, cannot be arraigned for ſuch eſcape *as for a felony*,

felony, until the principal be attainted *Page* 205 ſ. 26
51 But one accuſed of ſuch an eſcape may be indicted and tried for *a miſpriſion* before the attainder of the principal offender *ibid.*
52 And *quere*, if the commitment be for high treaſon, whether the perſon ſuffering the eſcape ſhall be tried as a principal until the perſon *guilty of the treaſon* be convicted *ibid.*
53 No one but the very perſon who ſuffers it ſhall be deemed guilty of a voluntary eſcape 205 ſ. 27
54 But the principal gaoler may be fined for a voluntary eſcape ſuffered by his deputy *ibid.*
55 A gaoler *de facto* only is equally liable for ſuffering an eſcape as a gaoler *de jure* 205 ſ. 28
56 A ſheriff is liable for an eſcape ſuffered by his bailiff 205 ſ. 29
57 If a deputy gaoler be not ſufficient to anſwer for a *negligent* eſcape, his principal muſt anſwer for him *ibid.*
58 *Quere*, if a gaoler who ſuffers an eſcape have *an eſtate* in the office, how far the reverſioner may be puniſhed *ibid.*
59 A *voluntary eſcape* deprives the gaoler of his office, and the court, in their diſcretion, may *ouſt* him for *negligent eſcapes* 206
60 The puniſhment for ſuffering a negligent eſcape is a fine, in a certain ſum of money, to the king 206 ſ. 31
61 The diſtinction between a fine and an amerciament as they relate to the puniſhment for ſuffering eſcapes *ibid.*
62 A negligent eſcape may be pardoned by the king before it happens; but not a voluntary eſcape *ibid.*
63 In what manner the ancient common law puniſhed the offence of ſuffering negligent eſcape 206 ſ. 33
64 By 5 Edw. 3. c. 8. any marſhal who ſhall ſuffer *inditees* or *appellees* to eſcape ſhall be puniſhed by half a year's impriſonment and ranſom at the king's will 206, 207
65 By 19 Hen. 7. c. 10. the cuſtody of gaols is committed to the ſheriffs 206 ſ. 35
66 When a defendant for ſuffering an eſcape is brought up for judgment, affidavits may be read both for and againſt him, in aggravation, and in mitigation of his puniſhment *Page* 206, 207. *Notes in marg.*
67 OF ESCAPES BY PRIVATE PERSONS *Page* 207 ch. 22
68 If a private perſon who hath another lawfully in his cuſtody, whether upon an arreſt by himſelf or another, he is guilty of an eſcape, if he ſuffer him to *go at large* before he is delivered by law 208
69 If one private perſon deliver a felon, whom he has arreſted on ſuſpicion, over to another private perſon who ſuffers the felon to go at large; both are guilty of eſcape 208 ſ. 2
70 But not if he had delivered his priſoner over to the proper officer 208 ſ. 3
71 If no officer will receive ſuch a priſoner, the ſafeſt way is to deliver him to the townſhip, who are bound to keep him till the next gaol-delivery 208 ſ. 4
72 If the townſhip refuſe to take charge of ſuch priſoner, ſtill the perſon who made the arreſt cannot diſcharge him *ibid.*
73 The private perſon, to excuſe himſelf, muſt ſhew what officer *by name* he delivered his priſoner over to 208 ſ. 5
74 A private perſon is puniſhable in the ſame manner as an officer for a voluntary eſcape ſ. 6
75 For a negligent eſcape he is puniſhable by fine and impriſonment, at the diſcretion of the court *ibid.*

ESCHEAT.

1 A felon's lands in fee-ſimple, being *veſted* in the lord of whom they are holden by eſcheat from the time of the felony, ſhall not be *diveſted* by a ſubſequent attainder for treaſon 533 ſ. 4
2 The lord cannot enter upon the lands which eſcheat to him for petit treaſon or felony without a ſpecial grant, until the king hath had his year, day, and waſte 636, 637
3 Inheritances which, not lying in tenure, cannot be holden, can neither eſcheat nor deſcend, but ſhall be forfeited to the king by an attainder of high treaſon 637

4 The eſcheat to the lord for felony is only *pro defectu tenentis*, occaſioned by corruption of blood; and therefore where a ſtatute ſaves the corruption of blood, it, by neceſſary conſequence, ſaves the land to the heir *Page* 644 ſ. 29

ESQUIRE.

In what caſes the title *eſquire* is a good addition in legal proceedings 269, 270

ESTOPPEL.—*Confeſſion. Demurrer.*

1 An entry on the record *quod cognovit indictamentum*, &c. in treſpaſs eſtops the defendant to plead *not guilty* to a ſubſequent action for the ſame offence 469

2 *Sed quere* if the ſame entry for a capital crime will eſtop not guilty to an appeal *ibid.*

EVES-DROPPERS.

Eves-droppers are indictable in the torn 107

EVIDENCE.

1 In caſes *of life* no evidence is to be given againſt a priſoner but in his preſence 602

2 THE NUMBER OF WITNESSES REQUIRED 602 ſ. 2

3 By the common law no certain number of witneſſes was required upon the indictment or trial of any crime whatever 363 ſ. 129

4 By 1 Edw. 6. c. 12. no *proceedings* ſhall be had for *any* treaſon unleſs the offender ſhall be accuſed by two witneſſes, or ſhall voluntarily confeſs his guilt 363 ſ. 130

5 By 5 & 6 Edw. 6. c. 11. no *proceedings* ſhall be had for any treaſon, not concerning the coin, &c. unleſs the offender be thereof accuſed by two lawful accuſers, in perſon, upon his arraignment, unleſs he ſhall, without violence, confeſs the ſame 364

6 Theſe ſtatutes are not repealed by 1 & 2 Phil. & Mary, c. 10, 11. which require that all trials of treaſon ſhould be according to the common law *Page* 602 ſ. 2

7 In high treaſons, not concerning the coin, therefore, two witneſſes to the overt act, or one witneſs to one, and another witneſs to an overt act of the ſame kind of treaſon, or to a material circumſtance to prove it, were always required 603

8 And now by 7 Will. 3. c. 3. no perſon ſhall be indicted, tried, or attainted of high treaſon, whereby corruption of blood enſues, or of the miſpriſion thereof, but upon the oaths of two lawful witneſſes, either both of them to the ſame overt act, or one of them to one, and the other of them to another *overt act* of the ſame treaſon, unleſs the party ſhall voluntarily confeſs the ſame in *open court* 603

9 One witneſs to one diſtinct kind of treaſon, and another to another diſtinct kind of treaſon, are not two ſufficient witneſſes within the meaning of the act 603

10 A collateral fact not tending to the proof of the overt acts, may be proved by one witneſs *Note in marg.*

11 WHETHER CONFESSIONS MAY BE GIVEN IN EVIDENCE 604

12 The defendant's confeſſion whether taken before a magiſtrate on examination, or made to private perſons in diſcourſe, has always been admiſſable againſt the party confeſſing, but not againſt others 604

13 If the confeſſion be reduced to writing, the identity of it muſt be proved before it can be read *ibid.* (N) 1

14 *Viva voce* evidence cannot be given of a confeſſion reduced to writing *ibid.*

15 A confeſſion obtained by the flatteries of hope, or by the impreſſions of fear, is not admiſſable (N) 2

16 But any *facts* which are diſcovered in conſequence of even an extorted confeſſion, may be given in evidence *ibid.*

17 No confeſſion of high treaſon, unleſs made in open court purſuant to 7 Will. 3. (*Vide*

(*Vide ſupra* No. 8.) is ſufficient to authoriſe a conviction *Page* 604 (N) 3

18 But a confeſſion of high treaſon, before a magiſtrate upon examination, purſuant to the ſtatutes of Edward the ſixth (*Vide ſupra* No. 4, 5.) may be given in evidence on the trial by two witneſſes, for any other purpoſe than to prove the overt acts laid in the indictment 604 ſ. 4 (N) 3

19 The confeſſion in *open court* required by 7 Will. 3. (*Vide ſupra* No. 8.) is determined to mean upon the arraignment of the party *ibid.* (N) 3

20 A confeſſion muſt be taken together, and not by parcels 604 ſ. 5

21 The examination of an informer, taken on oath in purſuance of the ſtatutes of Philip & Mary, and ſubſcribed by him, may be given in evidence, on proof of its identity, and that the deponent is dead, ſick, unable to travel, or kept out of the way by the procurement of the priſoner 605

22 A precedent of ſuch an examination being read upon evidence, that the examinant had been ſpirited away, though it did not appear to have been done by the priſoner or his procurement *ibid.* (N)

23 In petit treaſons theſe depoſitions are not ſufficient to convict, if the examinant be living, although he is unable to travel, or kept away by the procurement of the priſoner *ibid.*

24 Oath that the proſecutor has vainly endeavoured to produce the examinant is not ſufficient to authoriſe the reading of the examinations 605 ſ. 7

25 Depoſitions taken *ſuper viſum corporis* cannot be read in evidence on an appeal for the ſame death ſ. 8

26 Under what circumſtances depoſitions were formerly admitted to be read in evidence ſ. 9

27 Examinations may be read in favour of a priſoner to ſhew a variance between ſuch examinations and the evidence given *viva voce* *ibid.*

28 Where a witneſs at one trial varies from his own evidence at another, ſuch variance may be given in evidence to invalidate his teſtimony, at the ſecond trial *Page* 606

29 *Quere* if examinations taken before magiſtrates upon any other offence than *treaſon or felony* can be read in evidence on the trial 606 ſ. 10

30 The written information of a witneſs, joined to another witneſs *viva voce*, are not two legal witneſſes in high treaſon within 7 Will. 3. 606 ſ. 11

31 *Quere* if the evidence of a witneſs on one trial can, on the death of ſuch witneſs, be made uſe of againſt a defendant on another trial 606 ſ. 12

32 Depoſitions taken in a *ſuit* of a different nature, and before a different kind of juriſdiction to that which is to try the cauſe, cannot be read in evidence 606 ſ. 13

33 HEARSAY EVIDENCE 606 ſ. 14

34 Hearſay can only be made uſe of by way of inducement or illuſtration to what is properly evidence 606 ſ. 15

35 But what the priſoner has been heard to ſay may be given in evidence *againſt him* 607

36 What a witneſs has been heard to ſay may be given in evidence either to invalidate or confirm the teſtimony he gives in court *ibid.*

37 And the priſoner may give in evidence what he has been heard to ſay, from the mouths of the witneſſes produced againſt him *ibid.* (N)

38 SIMILITUDE OF HANDS 607 ſ. 15

39 Similitude of hands is not legal evidence in any criminal caſe 607 ſ. 15

40 Papers in the priſoner's hand-writing, and found in his cuſtody, may be read in evidence againſt him *ibid.* (N)

41 Whether HUSBAND AND WIFE can be evidence againſt each other 607 ſ. 16

42 They cannot give evidence *for* one another in any caſe, and *regularly* the one ſhall not be admitted to give evidence *againſt* the other; nor ſhall the examinations of the one be read againſt the other 607 *ibid.*

43 In caſes of evident neceſſity there may be exceptions to this general rule 608

44 *Quere* whether huſband and wife may not be admitted to give evidence in *high*

high treason againſt each other *Page* 608 (N)
45 Even where a huſband or wife may be collaterally affected by their giving evidence againſt others, their teſtimony ſhall be waived 608 (N)
46 No other degree of kindred or affection than man and wife will excuſe a perſon from being a witneſs *ibid.*
47 A judge or juror may be witneſs; but they ſhould not afterwards be concerned in the cauſe 608 ſ. 17
48 An accomplice who hath confeſſed himſelf guilty of the crime, if not indicted, may be a witneſs on the trial of his confederates 608 ſ. 18
49 Accomplices, indicted, are good witneſſes for *the king* until convicted 608, 609
50 But the *uncorroborated* teſtimony of an accomplice is not ſufficient to convict a priſoner 609 (N)
51 It is in the diſcretion of the judge either to receive the evidence of an accomplice firſt, or to poſtpone it until ſome fair and unpolluted evidence be given. But the judges differ in their practice upon this point *ibid.*
52 A defendant in an information, againſt whom no evidence is given, may be ſworn as a witneſs for others 609
53 A conviction, and *à fortiori*, an attainder of treaſon, felony, piracy, *præmunire*, perjury, forgery on 5 Eliz. attaint, conſpiracy, or any crime for which an *infamous* puniſhment is inflicted, is a good cauſe of exception againſt a witneſs while it continues in force 609 ſ. 19
54 One attainted of any forgery cannot be a witneſs *ibid.*(N)
55 But it is the infamy of the crime, and not any particular ſpecies of puniſhment, which deſtroys the competency *ibid.*
56 No ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court 609 ſ. 20
57 A witneſs ſhall not be aſked any queſtion the anſwer to which might accuſe him of a crime *ibid.*
58 The credit of a witneſs is only to be impeached by general accounts of his character and reputation *Page* 609, 610
59 Witneſſes are not permitted to give evidence of their own infamy or turpitude 609 ſ. 20 (N)
60 Outlawry in a perſonal action is not a good exception to a witneſs 610 ſ. 21
61 A perſon convicted of felony and admitted to clergy, is thereby re-enabled to be a witneſs *ibid.*
62 A pardon of treaſon or felony reſtores the object of it to his credit 610 ſ. 22
63 *Quere*, if a pardon will not remove diſability in all caſes where the diſability is only a conſequence of the conviction and not an expreſs part of the judgment *ibid.*
64 A conviction of perjury doth not diſable a man from making an affidavit in relation to the irregularity of a judgment 610 ſ. 23
65 It is a good exception to 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 610 ſ. 24
66 Bail for a defendant cannot be evidence for him without his conſent *ibid.*
67 The borrower of money upon a uſurious contract is not a competent witneſs till he has repaid the money (*Vide b.* 1. *p.* 533 ſ. 27.) *ibid.*
68 A man who has been fraudulently deluded to ſign a note is not a competent witneſs on an information for the cheat 610, 611
69 A perſon whoſe property may be prejudiced by a forgery is no evidence to prove it 611
70 He againſt whom a verdict is given cannot be a witneſs to prove perjury in the evidence *ibid.*
71 But the perſon whoſe ſignature is forged may be made a competent witneſs to prove the forgery, by being *releaſed* from the payment 611 (N)*marg.*
72 And if the *liability to pay* be not immediate, or apparent on the face of the inſtrument forged, the perſon whoſe name is forged is competent to prove the forgery *ibid.*
73 Yet if ſuch a perſon, upon the *voir dire*,

dire, conceive himſelf liable to pay, it is a good objection to his competency *Page* 611. *Notes in marg.*

74 In an indictment for aſſault and battery, the party injured is competent to prove the offence notwithſtanding he may alſo bring his action for it *ibid.*

75 It is no objection to a witneſs, that he hath maintenance from the king; for every one may maintain his own witneſſes 611 ſ. 25

76 It is no objection to *the competency* of a witneſs, that he hath received a reward for having made a diſcovery of the crime to be proved againſt the priſoner *ibid.*

77 A promiſe of a pardon, or other reward, on condition of giving evidence, will not deſtroy the competency of a witneſs, unleſs it appears that he has contracted to go beyond the truth in conſequence of it 611 ſ. 25

78 An *unbeliever* was anciently thought incompetent to take an oath; but now *any perſon* may be admitted to give evidence unleſs it appear that he has *no idea of God and religion* 612

79 A *Gentoo* has been admitted to be ſworn according to the ceremonies of his religion *in a civil cauſe* *ibid.* (N) 6

80 A *Mahomedan* has been ſworn on the *Koran* *ibid.*

81 *Jews* are conſtantly admitted in *all cauſes* to ſwear upon the old teſtament; and according to the true ceremony *with their heads covered* *ibid.*

82 A *covenanter* is admitted to take an oath under the ceremony of *holding up his hand* *ibid.*

83 By 7 & 8 Will. 3. c. 34. the affirmation of a quaker is not admiſſible in a criminal caſe *ibid.*

84 Want of diſcretion is a good objection againſt the competency of a witneſs 612 ſ. 27

85 But it has been lately decided, that where an infant appears to *have diſcretion*, he may be ſworn, although he is *within the age of ſeven years* 612 ſ. 27 (N)

86 It is no exception to a witneſs that he is an alien, a villein, or bondman 612 ſ. 28

87 A man deaf and dumb, *with whom communication can be made by means of ſigns, &c.* has been admitted to give evidence in a criminal caſe *Page* 612 ſ. 28. *Notes in marg.*

88 By the common law, the witneſſes *for the king* were always required to be upon oath in *all caſes*, but witneſſes for the defendant, except in *an appeal*, or in *miſdemeanors*, were never ſworn 612 ſ. 29

89 But by 1 Ann. c. 9. witneſſes for the defendant ſhall be ſworn and give their evidences in ſuch manner as witneſſes for the crown do 613

90 A peer muſt be ſworn in a criminal caſe (N) 7

91 It is not ſufficient for a witneſs to ſay *he thinks or perſuades himſelf*, for the court muſt give judgment upon unequivocal evidence 613 (N) 8

92 The court will *indulge* a priſoner by examining his witneſſes apart *ibid.*

93 A priſoner cannot call witneſſes to diſprove what his own witneſſes have ſworn *ibid.*

94 A witneſs cannot read his evidence, but he may look at his notes *(taken at the time of the fact)* to refreſh his memory *ibid.*

95 In miſdemeanors the defendant may, by the common law, take out *ſubpœna's* for his witneſſes, of courſe 613 ſ. 30

96 In capital caſes he hath no right, by the common law, to *ſubpœna's* without a ſpecial order of the court *ibid.*

97 But by 7 Will. 3. c. 3. all perſons indicted for *high treaſon, &c.* ſhall have the like proceſs, as is uſually granted to compel the witneſſes againſt them *ibid.*

98 Since 1 Ann. (*Vide ſupra* No. 89) proceſs may be taken out againſt witneſſes for the defendant in all caſes whatſoever 613, 614

99 The court before whom the plea of *not guilty* is to be tried may iſſue compulſory proceſs to bring in the witneſſes 614 (N) 9

100 The uſual way is for the juſtices or coroner, on the examination, to bind them over, &c. *ibid.*

101 A witneſs in execution for debt may be

be brought up to give evidence upon a *habeas corpus* *Page* 614 (N) 9
102 WHAT EVIDENCE MAINTAINS AN INDICTMENT 614 ſ. 31
103 Where a perſon indicted upon *a ſtatute*, may be found guilty of the offence at *common law* *ibid.* & 356
104 A priſoner cannot be found guilty *as principal* upon evidence, which only proves him to have been *acceſſary before the fact* *ibid.* & 464
105 The day laid is not material upon evidence: the defendant may be convicted on evidence of the fact at any other day, either before or after that which is laid 614 ſ. 32
106 But the offence muſt be proved to have happened before the time when the indictment was preferred *ibid.*
107 According to the evidence given, the jury may either find generally guilty, or they may find the particular time when the fact was committed, &c. 33
108 How the forfeiture ſhall relate according as the evidence proves the fact *ibid.*
109 *The place* where the offence is laid to be committed *is material:* the leaſt variation in the evidence of it is fatal 615 ſ. 34
110 A place laid only for a *venire* is no way material upon evidence *ibid.*
111 Evidence muſt be given that the crime was committed in the ſame *county* as laid in the indictment *ibid.*
112 After a crime hath been proved in the *county laid*, evidence may be given of facts in *another county* 615
113 In treaſon where a *levying of war* is *an overt act* of the treaſon, and it is proved in the county laid by *one witneſs*, evidence of levying in another county may be proved by another witneſs 615
114 But where the *levying of war* is the treaſon for which the party is indicted, it muſt be proved *in the county* where it is laid *ibid.*
115 The *levying of war* cannot *at this day* be given in evidence as *an overt act*, but only in the county in which it is laid, unleſs it tend to prove ſome other overt act that is laid *ibid.*
116 For by 7 Will. 3. c. 3. no evidence ſhall be given of any overt act not laid in the indictment *Page* 615
117 No evidence ſhall be admitted in high treaſon but what is immediately *relevant* to the overt act laid in the indictment; and no other evidence tending to prove *the ſame ſpecies of treaſon* as is laid ſhall be given 115, 116
118 But every thing incidental to the overt act laid may be given in evidence; as where the treaſon is the *king's death*, and the overt act, a *conſult and agreement for aſſaſſination*, here a liſt of the conſpirators may be given in evidence 616
119 So alſo in *compaſſing the king's death*, and letters to that purpoſe, the purport of which only are laid, the particular letters tending to prove the overt act may be read *ibid.*
120 Where ſeveral overt acts of treaſon are laid, proof of any one of them is ſufficient 616 ſ. 35
121 Where an inſtrument *ſecundum tenorem ſequentem* is ſet out in an indictment, any, the leaſt variance between the inſtrument recited, and that given in evidence, is fatal 616 ſ. 36
122 But where *the ſubſtance* only is ſet forth, it is ſufficient *if the ſenſe* of what is ſo ſet forth be proved *ibid.*
123 Evidence that the defendant ſaid *ſo and ſo* is no evidence, for the court muſt know the words to judge of their force and effect *ibid.*
124 In homicide the *inſtrumental cauſe* of the death need not be ſpecifically proved: Evidence that the party died by the *ſame kind of death* as that laid is ſufficient 617 ſ. 37
125 Where a variance between the evidence and the indictment is fatal as to the principal, it is equally fatal as to the acceſſary 617 ſ. 38
126 If ſeveral be indicted, and ſome be charged as principals, and others as abettors, evidence that thoſe who are charged as abettors *did the fact* will maintain the indictment 617 ſ. 39
127 If one be indicted as acceſſary to two, and upon evidence he appear to have been acceſſary to one of them only, yet he ſhall be found guilty 617 ſ. 40
128 If a perſon be indicted of murder *ex malitia*

malitia precogitata, and only *malice implied by law* be proved, yet he ſhall be found guilty . *Page* 618 ſ. 41

129 Where an indictment ſets forth the ſpecial matter from which the law implies malice, a variation in the evidence as to the circumſtance is immaterial 618 ſ. 41

130 In what caſe *violent preſumption* ſhall be taken for *full proof* 618 ſ. 42

131 *Probable preſumption* may be of ſome weight; but *a light preſumption* ought not to be regarded at all *ibid.*

132 By 21 Jac. 1. c. 27. if any woman be delivered of a *live* baſtard child, and endeavour to conceal by drowning, &c. whether it were born alive or not, ſuch endeavour ſhall be evidence of murder, unleſs the mother can prove by one witneſs that the child was born dead 618 ſ. 43

133 How the indictment may be drawn upon this ſtatute *ibid.*

134 The ſtatute does not create any new offence, but only makes ſuch concealment an undeniable evidence of murder *ibid.*

135 It is uſual for the court to expect evidence that the child was born alive, &c. 619

136 *Son aſſault demeſne* may be given in evidence on *an indictment* for battery 619 ſ. 44

137 On an indictment on a penal ſtatute a defendant may give in evidence any exception in his favour in the body or the *proviſo* of the act *ibid.*

138 But he cannot give in evidence any clauſe of exemption in a later ſtatute; but ought to plead it *ibid.*

139 The very beſt evidence that the nature of the thing will bear, muſt in all caſes be given 619 ſ. 45

140 A copy of a record is admitted where the record itſelf cannot be had, but a copy of a copy is not admiſſable *ibid.*

141 In murder, the declarations of the deceaſed, after the mortal wound given, and while he is ſenſible of approaching diſſolution, may be given in evidence 619 ſ. 46

142 How the currency of coin may be proved on an indictment for clipping counterfeiting it 619, 620

143 In what caſes the court are authoriſed to allow witneſſes their expences *Page* 620 to 622

144 Priſoners againſt whom no evidence is given ſhall be diſcharged by the proclamation, without paying any fee 622. 628

EXAMINATION.—*Vide Evidence.*

By 1 & 2 Phil. & Mary, c. 13. juſtices of the peace ſhall take the examination of perſons accuſed before them of felony, ſhall put the ſame into writing, and ſhall bind over ſuch of the witneſſes as can give material evidence, to the next gaol-delivery 59. 79, 80. 162, 163, 184, 185

EXCEPTION.—*Bill of Exceptions. Pardon. Evidence.*

EXCHEQUER.—*King's Bench.*

EXCISE.—*Certiorari.*

EXCOMMUNICATION.

1 By the *ſtat. Weſt.* perſons excommunicate taken at the requeſt of the biſhop are denied the benefit of replevin 153 ſ. 40

2 If a defendant in appeal of death plead excommunication in diſability of the plaintiff, juſtices of gaol-delivery may bail till the plaintiff be abſolved 165. 175

3 Perſons excommunicated were incapable of receiving the benefit of clergy 474, 475

4 It was anciently holden that excommunication was a good cauſe of challenge 588

EXECUTION.

1 Juſtices of gaol-delivery may award execution againſt ſuch priſoners as have been

been outlawed for felony before juſtices of the peace *Page* 33 ſ. 7
2 By 1 Edw. 6. c. 7. perſons found guilty by juſtices of gaol-delivery of treaſon and felony, and reprieved, may be ordered for execution by ſubſequent juſtices of gaol-delivery 35 ſ. 17
3 This power does not extend to convictions before judges of oyer and terminer 35 ſ. 18
4 And *quere* if by this ſtatute they can award execution if the convict has received judgment by the former judges, and then been reprieved 36
5 If a woman in an appeal for death, take another huſband after judgment, ſhe cannot pray execution 243
6 *Quere*, whether if the firſt heir get judgment in an appeal of death and die, his heir may ſue out execution 245
7 In what caſes execution ſhall be awarded againſt a priſoner who ſtands mute of malice 461 to 468
8 A peer attainted of treaſon or felony may be brought before the king's bench, and demanded why execution ſhould not be awarded againſt him 597
9 If a peer be convicted of murder by parliament, and the day appointed for the execution ſhould lapſe before execution done, a new time may be appointed by the houſe, if ſtill ſitting, or if prorogued, by the king's bench (N)
10 A peer convicted of murder ſhall have execution done upon him purſuant to 25 Geo. 2. c. 37. (*Vide infra*, No. 33.) *ibid.* & 656
11 By the common law the king, after execution done, may order the body to be hung in chains 630
12 The king's bench may award execution, on a conviction in any other court, the record being firſt removed, and the convict brought up by *habeas corpus* 656 ſ. 1
13 *St. Thomas a Watering*, is the uſual place where *the marſhal* does execution, when it is awarded by the king's bench ſitting in Middleſex (N)
14 Execution, by any other court than the king's bench, ought not to be awarded into a different county from that wherein the party was tried and convicted 656 ſ. 2
15 If a convict, on the award of execution, deny that he is the ſame perſon, the identity ſhall be immediately tried by a jury returned for that purpoſe *Page* 657 ſ. 3
16 *Quere*, if on ſuch a trial the party is entitled to a peremptory challenge *ibid.* (N)
17 The court may command execution to be done *without writ* 657 ſ. 4
18 Where the execution is beheading only, and the priſoner is in the cuſtody of the lieutenant of the Tower, execution is commanded by *writ* (N)
19 No execution is warranted unleſs it be purſuant to the judgment 657 ſ. 5
20 The ſheriff is juſtified in doing execution according to the terms of the warrant, although it may differ from the judgment *ibid.*
21 But the king cannot vary the execution ſo as to aggravate the puniſhment (N) 1
22 An execution cannot be lawfully executed by any but the proper officer 657 ſ. 6
23 Execution muſt be performed by the ſheriff or his deputy (N)
24 The warrant for execution was anciently by precept under the hand and ſeal of the judge, as it is ſtill practiſed in the court of the lord high ſteward, upon the execution of a peer *ibid.*
25 In the court of the peers in parliament execution is done by writ from the king *ibid.*
26 The modern practice is, in common caſes, for the judge to ſign the calender, which is a liſt of all the priſoner's names, with their ſeparate judgments in the margin, &c. 658
27 This calender is left with the ſheriff, who in a convenient time after the receipt of their warrant, is to do execution, which time, in the county is left at large *ibid.*
28 The manner in which execution is awarded in London and Middleſex *ibid.*
29 Execution is not completely performed until the party be dead 658 ſ. 7
30 Every court which has power to award an execution, has alſo a diſcretionary power of granting a reprieve 658 ſ. 8.

31 A woman may allege that ſhe is *quick with child*, in ſtay of execution *Page* 658 ſ. 9

32 A woman cannot demand ſuch reſpite of execution by reaſon of her being quick with child more than once 658 ſ. 10

33 By 25 Geo. 2. c. 37. perſons found guilty of murder, ſhall be executed on the day but one next after ſentence paſſed, unleſs *Sunday* intervene, and then on the Monday following 659 ſ. 11

34 If ſuch conviction and execution be in *London* or *Middleſex*, the body of ſuch murderer ſhall be immediately conveyed to Surgeons-hall for diſſection *ibid.*

35 If ſuch conviction ſhall be in any other county, the body of ſuch murderer ſhall be delivered to ſuch ſurgeon as the judge ſhall direct *ibid.*

36 Upon all executions in *London*, &c. the recorder, after reporting to the king in perſon, the caſes of the ſeveral priſoners, and receiving the royal pleaſure, &c. iſſues his warrant to the ſheriffs directing them to do execution on the day and at the place therein mentioned 639 *Note in marg.*

37 Judgment of diſſecting, and touching the time of execution, ought to be pronounced in *petty treaſon*, though *murder* only is mentioned in the act (N) 4

38 But, except in caſes within this act, the time and place of execution is never any part of the judgment (N) *m*

39 The judge in his diſcretion may ſtay execution upon this act 660

40 Convicts for murder ſhall be fed on bread and water only, &c. after judgment and till execution 661

41 To reſcue the body of ſuch convict during execution, is felony without clergy *ibid.*

EXECUTORY.

The difference between a record *executed* and *executory*, as to the removal by *certiorari* ch. 27 ſ. 44

EXECUTOR.

1 An executor cannot bring an appeal for larceny committed on the property of his teſtator, for ſuch an appeal being merely perſonal, it dies with the teſtator *Page* 247

2 An executor, upon conviction of treaſon or felony, does not forfeit the goods of his teſtator 638

3 A writ of error may be brought to reverſe an attainder of treaſon or felony, as well by the executor as the heir of the party 654

EXISTENS.

The difference of its conſtruction as to the time when applied to *a perſon* and when to *a fact* 324, 325

EXIGENT.

—*Proceſs. Outlawry. Avoiding Judgment.*

EX OFFICIO.

—*Information. Bail. Arreſt.*

EXILE.

—*Tranſportation.*

EXPENCES OF WITNESSES.

—*Evidence.*

EXTORTION.

Form of indictment for it ch. 25 ſ. 67

EYRE.

—*Vide Oyer and Terminer. Gaol-delivery.*

F.

FAIRS AND MARKETS.

Vide Clergy No. 107.

FALSIFY JUDGMENT.—*Vide Avoiding Judgment.*

FAME.

In what cases the common fame of the country will be a justification for arresting a man for felony *Page* 119 s. 9

FARMER.

Farmer is an insufficient addition in legal proceedings, he should be styled husbandman 273 s. 116

FATHER.

1 A father cannot have an appeal for the death of his son; for he cannot be his heir 244 s. 40
2 A younger son cannot have an appeal for the death of his father; living an elder brother *ibid.*
3 The relation of father and son will not excuse them from being accessaries to a felony by receiving each other, &c. 451

FAVOUR.—*Vide Challenge.*

FEAR.—*Vide Clergy*, No. 94.

FEES.

1 What fees a coroner is intitled to, for taking an inquest *super visum corporis* 85, 86
2 If a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape 198 s. 4
3 If a prisoner be brought up by *habeas corpus ad faciendum, &c.* they will not turn him over till the gaoler be paid all his fees 227 s. 31
4 The judges may insist on the usual fee of gloves to themselves and officer before they allow a pardon 562 s. 71
5 By 14 Geo. 3. c. 20. prisoners against whom no indictment shall be found, or who shall be acquitted, or discharged by proclamation, shall be discharged without the payment of any fee *Page* 628 s. 13
6 In lieu thereof, the treasurer of every county shall pay to the sheriff or gaoler 13s. 4d. for each prisoner so discharged *ibid.*

FELO DE SE.

1 The coroner's inquest of *felo de se*, being moved, *by certiorari*, into the king's bench, may be there traversed by the executor or administrator of the deceased, and perhaps by the lord of the manor 88 s. 55
2 If no matter be *depending* in the king's bench, to make it necessary, the court will not order the coroner to return his deposition *ibid.* (N) 11
3 A general act of pardon of all felonies, &c. except murder, shall extend to a *felo de se* 547

FELONY.

1 All felonies are several 547 s. 22
548 s. 24
2 In what cases persons *indicted* for felony are repleviable. *(Vide Bail.)* 157, &c.
3 What circumstances will make a man an accessary in felony, and what a principal 439 ch. 29
4 How a grant of the goods of felons shall be explained ch. 30 s. 21
5 What is required in a pardon of felony ch. 37
6 In what cases a wife shall lose her dower for treason or felony ch. 49
7 Where an arrest for felony is justifiable ch. 13
8 Whether felonies by statute are inquirable of in the torn ch. 10 s. 51
9 In what cases felons are entitled to the benefit of clergy ch. 33 s. 24
10 What judgment is to be given in felony ch. 40 s. 7
11 Every appeal of *mayhem* must be laid to be done *felonicè* 256

12 The word *felonicè* is neceſſary in appeals of every kind *Page* 258. 268

FEME COVERT.—*Vide Huſband and Wife.*

FENS.—*Vide Certiorari.*

FETTERS.—*Vide Arraignment.*

FIAT.—*Vide Certiorari.*

FICTION.

1 The fiction of law, that in murder the death ſhall be ſuppoſed to happen at the time the ſtroke, &c. was given, ſhall be ſo conſtrued in reſpect of thoſe only who gave the wound 204. 205
2 And as to ſome purpoſes ſuch a fiction ſhall not extend to convert the treſpaſs, which alone exiſts between the ſtroke and the death, into a felony 263
3 Fictions of law ſhall never be carried farther than the reaſons which introduce them neceſſarily require 451 ſ. 35
4 The fiction of law that a perſon attainted is *civilly dead*, ſhall not be extended to deprive the party of the *capacity of purchaſing* lands 649

FIGURES.

If the caption of an indictment ſet forth the ſtyle of the day or year in any figures but Roman, it is inſufficient 362 ſ. 127

FILING.—*Appeal. Amendment. Indictment. Certiorari.*

FINES.

1 Fines impoſed by the ſheriff in his torn ought to be ſeverally impoſed on each particular offender and not jointly upon the whole of them, except where a whole vill is fined *Page* 93
2 The ſheriff in his torn may impoſe a fine on all ſuch as are guilty of a contempt in the face of the court, &c. &c. *ibid.*
3 In what manner ſuch fines may be recovered 94 to 97
4 The puniſhment for ſuffering a negligent eſcape, is inflicting the payment of a certain ſum of money to be paid to the king, which ſeems, moſt properly, to be a fine 206
5 The diſtinction between a fine and an amerciament *ibid.*
6 Where an appellant ſhall be fined 285
7 The proſecutor, by accepting coſts taxed under a *certiorari*, is not reſtrained from aggravating the fine ſet upon the defendant 415
8 But if he demands coſts after having received the fine, what he has received ſhall be deducted from the amount of the taxation *ibid.* (N)
9 By the common law, where a man is to make *fine* and *ranſom*, the ranſom muſt be treble the fine 633 ſ. 19
10 But it is contended that *fine* and *ranſom* are the ſame thing *ibid.*
11 A fine is under the power of the court, during the term in which it is ſet, and may be mitigated; but after the term it cannot be altered 634
12 The court may aſſeſs a fine without the defendant being actually preſent in court 633 ſ. 17

FLIGHT.—*Forfeiture.*

1 In what caſes goods ſhall be forfeited upon the coroner's finding a *fugam fecit* 78. 79
2 On flying from an arreſt, if a *fugam fecit* be found, the goods of the offender are forfeited 189
3 Whether ſuch a finding be traverſable 88
4 In what caſes forfeiture is the conſequence of a *fugam fecit*, found upon the

the trial of a capital offence, or of petty larceny *Page* 639, 640

FORCE.

1 In what county a man ſhall be indicted for taking a woman by force in one county, and marrying her in another 315 ſ. 40
2 Where an indictment of forcible entry is inſufficient as to the time of the *ſeiſin* 324, 325
3 By 3 Hen. 7. c. 2. all who are *parties* to the forcible carrying away a woman, ſhall be deemed principals 443 ſ. 12

FOREIGN.—*Vide Indictment. Jury. Trial.*

FOREST.

1 How far thoſe who are impriſoned *for the foreſt* are repleviſable 152
2 How far the proceedings *for the foreſt* are removable by *certiorari* before conviction *ibid.*
3 A *viſne* may come from a foreſt 265

FORFEITURE.

1 Principal and acceſſary before, upon a *fugam fecit* being found by the Coroner, forfeit all their goods and chattels 78, 79
2 The right to hold a court leet may be forfeited by bare omiſſions, which diſappoint the ends of its inſtitution, as well as by acts of groſs and palpable oppreſſion and injuſtice 114 ſ. 5
3 What acts ſhall forfeit a recognizance of bail 177, 178
4 Whether it be neceſſary, in an indictment on a ſtatute, to relate the clauſe of forfeiture 353, 354
5 Whether, on a *qui tam* action or information, it be neceſſary to give any, and what judgment for the forfeiture 397
6 Under what circumſtances the recognizance taken on a *certiorari* becomes forfeited *Page* 415 ſ. 58
7 What he who obſtinately ſtands mute ſhall forfeit, and to whom 467 ſ. 19
8 Where the time *proved* varies from that *laid* in the indictment, and the jury find a general verdict guilty, the forfeiture ſhall relate to the time laid 614 ſ. 33
9 FORFEITURE OF LANDS 636 c. 49
10 By the common law, all lands of inheritance, of which the offender is ſeiſed in his own right, and all right of entry to lands in the hand of a wrong doer, are forfeited to THE KING by *an attainder of high treaſon*, and to THE LORD of whom they are immediately holden by *an attainder of petty treaſon and felony* 636 ſ. 1.
11 Freehold lands forfeited by an attainder of high treaſon are veſted in the king without office found *ibid.*
12 But during the life of the offender, the king cannot take poſſeſſion of them till office found 636 ſ. 2.
13 The lord cannot enter into the eſcheated lands without ſpecial grant, until it appear by due proceſs that the king hath had the year, day, and waſte 637
14 The inheritance of things not lying in tenure are forfeited to the king by an attainder of high treaſon 637 ſ. 4.
15 The profits of things not lying in tenure are forfeited during the life of the offender, by an attainder of felony *ibid.*
16 The inheritance of things not lying in tenure is extinguiſhed by the death of the offender; the reaſon of it *ibid.*
17 No right of action to lands of an eſtate of inheritance, are forfeited either by the common law or by ſtatute 637 ſ. 5
18 No right of entry into ſuch lands, nor to the uſe (unleſs fraudulently conveyed, &c.) nor condition, were liable to be forfeited before 33 Hen. 8. *ibid.*
19 Land in tail could not be forfeited after *ſtat. Weſt.* but only for the life of the tenant in tail, till 26 Hen. 8. c. 13. *ibid.*
20 Lands of inheritance which a huſband

is ſeiſed of in right of his wife, or ſeiſed of in his own right for life, are forfeited to the king only *Page* 637 ſ. 6.

21 By force of a ſpecial cuſtom, a copyhold of inheritance may be forfeited by an attainder, or conviction of treaſon or felony, *even without a conviction* 637 ſ. 7

22 A copyhold may be forfeited of common right, but not by a conviction only *ibid.*

23 If the attainder happens before the tenant is admitted, a copyhold is not forfeited, but ſhall go to the heir at law *ibid.* (N)

24 At common law, upon an attainder of treaſon or felony, the king had a right utterly to waſte the lands holden of any but himſelf, &c. 637, 638

25 How the king is now intitled to the *year, day, and waſte* 638

26 WHERE THE GOODS SHALL BE FORFEITED *ibid.*

27 All things comprehended under the notion of a perſonal eſtate, whether in action or poſſeſſion, which the offender hath in *his own right*, are liable to forfeiture 638 ſ. 9

28 Whether a felon ſhall forfeit the goods of others ſtolen by him *ibid.* (N.)

29 A term limited to executors, and not veſted in the party himſelf, is not forfeitable *ibid.*

30 A bond or leaſe made to a perſon in truſt are forfeitable 638 ſ. 10

31 The truſt of a term for the uſe of the offender, his wife, or children, is forfeitable, if fraudulently made to avoid a ſubſequent forfeiture 639

32 If ſuch a term be *bona fide* made, it ſhall only be forfeitable ſo far as the offender's intereſt in it extends *ibid.*

33 A power reſerved to the grantor to do ſome perſonal act is not forfeitable 639 ſ. 12

34 IN WHAT CASES THINGS PERSONAL SHALL BE FORFEITED 639 ſ. 13

35 Things perſonal ſhall be forfeited upon *a conviction* of treaſon or felony 639 ſ. 14

36 They alſo become forfeited upon a *fugam fecit* found by the coroner, *ſuper viſum corporis* 639 ſ. 14

37 The goods, upon ſuch a finding, are forfeited abſolutely, and alſo the iſſues of the offender's lands, till he be acquitted or pardoned *Page* 639. ſ. 14

38 Where a priſoner, either as principal or acceſſary before or after, is acquitted before juſtices of *oyer, &c.* of a capital felony, but is *found to have fled*, he ſhall forfeit his goods, but not the iſſues of his lands *ibid.*

39 *Quere*, if the law is not the ſame upon acquittal and *fugam fecit* in petty larceny *ibid.*

40 The party may in all caſes, except in the coroner's inqueſt, traverſe the *fugam fecit* *ibid.*

41 In all caſes the particulars of the goods found to be forfeited may be traverſed *ibid.*

42 If a default be made before the *exigent* is awarded, the party forfeits his goods, both in a capital caſe and in petty larceny 640

43 Wherever goods are ſo forfeited, they are not ſaved by an acquittal at the trial *ibid.*

44 But they are ſaved by a reverſal of the award of the *exigent* *ibid.*

45 *Quere*, if the party do not forfeit his goods upon a preſentment of twelve men, that he fled or reſiſted being apprehended 640 ſ. 16

46 Goods are alſo forfeited, by being *waived* by a felon in his flight, whether they are his own goods, or thoſe of others which he has ſtolen 640 ſ. 17

47 OF FORFEITURE BY STATUTE 640 ſ. 18

48 By 26 Hen. 8. c. 13, all eſtates of inheritance in uſe or poſſeſſion are forfeited by an attainder of high treaſon 640 ſ. 19

49 By 33 Hen. 8. c. 20, attainders for high treaſon by the common law, ſhall be as effectual as attainder by parliament, and forfeitures veſted in the king without office 641 ſ. 19

50 The rights of ſtrangers how ſaved 642 ſ. 20.

51 Theſe ſtatutes are not repealed by the 1 Mary, c. 1. 642 ſ. 21

52 Eſtates in tail are forfeited by force of the words "any eſtate of inheritance," in the 26 Hen. 8. 642 ſ. 22

53 Where

53 Where lands are given to a man and his wife, *and the heirs of their two bodies*, the entail is forfeited by his attainder *Page* 642 ſ. 22

54 The right to *a writ of error* to reverſe an erroneous common recovery is not forfeited by theſe ſtatutes 642 ſ. 23

55 The mere right of action to lands in the hands of a ſtranger, as of *a diſcontinuance*, or of the heir of a *diſſeiſor*, is not forfeited *ibid.*

56 A right of entry into lands to which a perſon attainted of high treaſon is intitled, is as much forfeited as lands in poſſeſſion *ibid.*

57 The king ſhall not be adjudged in poſſeſſion of ſuch lands till *office*, and *ſcire facias* and *ſeiſure* on ſuch office *ibid.*

58 How the king became poſſeſſed of ſuch lands *at common law* *ibid.*

59 Where a tenant in tail of the gift of the crown makes a feoffment in fee, the reverſion being ſtill in the crown, and afterwards is attainted of high treaſon, the right of the entail is forfeited to the crown 642 ſ. 24

60 Where one attainted of high treaſon is ſeiſed of a defeaſible eſtate in tail, and hath at the ſame time a right to an ancient entail which is diſcontinued, he forfeits both the entail in poſſeſſion, and the right to the old entail 643 ſ. 25

61 A power of revoking the uſes of a ſettlement may be forfeited by force of the 33 Hen. 8. if the execution of it require nothing but what may be as well performed by any other perſon as by the party by whom it was reſerved 643 ſ. 26

62 In what caſes the form of the *proviſo* by which ſuch a power is reſerved, will keep the forfeiture out of the ſtatute *ibid.*

63 An annuity granted to a man *pro conſilio impendendo*, is not forfeitable by theſe ſtatutes 644

64 *Quere*, if an office granted to a man for life, and requiring ſkill and confidence, be forfeitable *ibid.*

65 If an office be granted *in fee*, it may be forfeited by *the common law* *ibid.*

66 Eſtates tail, are forfeited by force of the words "all intereſts of what nature ſoever," in an act of parliament *Page* 644 ſ. 28

67 The ſtatutes of *præmunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to land in entail *ibid.*

68 A ſaving of *corruption of blood* in a ſtatute concerning felony doth, by neceſſary conſequence, ſave the land to the heir 644 ſ. 29

69 A ſaving of land to the heir prevents corruption of blood and loſs of dower *ibid.*

70 A ſaving of the corruption of blood in a ſtatute concerning treaſon, doth not ſave the land to the heir *ibid.*

71 The forfeiture upon an attainder of either treaſon or felony ſhall have relation to the time of *the offence*, for avoiding all ſubſequent alienation of *the lands* 644 ſ. 30

72 But as to chattels, the forfeiture ſhall only relate to the time of *the conviction* or *fugam fecit* found *ibid.*

73 *Quere*, whether, in *præmunire*, the forfeiture ſhall relate to the time of *the offence*, or only to that of *the judgment* 644 ſ. 31

74 The attainder *as to mean profits* ſhall only relate to the time of *the attainder* 645 ſ. 32

75 Any one indicted or appealed of treaſon or felony may *bona fide* ſell any of his chattels, real or perſonal, for the ſuſtenance of himſelf and family, until they are forfeited 645 ſ. 33

76 The goods of ſuch a perſon cannot be removed till they are forfeited 645 ſ. 34

77 Whether the goods of a perſon indicted may be inventoried, and detained in cuſtody before the conviction, and till they are forfeited 645 ſ. 35, *and Notes*

78 *Quere*, Where a perſon is *found guilty* of murder by the coroner's inqueſt, whether the coroner ſhall inquire, and value his goods, and deliver them to the townſhip 645 ſ. 36

79 The party's goods may be appraiſed by the ſheriff upon a *non eſt inventus* returned to the ſecond *capias* 646 ſ. 37

80 But by 1 Rich. 3. c. 3, no sheriff, &c. shall seize the goods of any person imprisoned on suspicion of felony, until such person be convicted, or his goods forfeited *Page* 646 s. 38

81 This statute extends, as well to the seizure of money as to any other chattel 646 s. 39

82 The goods may be seized as soon as forfeited by force of this statute, &c. 646 s. 40

83 *Quere*, whether the king takes the goods forfeited subject to the debts of the party *ibid.* (N. 3.)

84 At common law it was no plea for the township that the goods were delivered to a particular person, and that he had embezzled them 646 s. 41

85 But by 31 Edw. 3. c. 3, if any man or town charged with the goods of felons will alledge, in discharge of himself, another who is chargeable, he shall be heard 646 s. 42

86 In what cases a wife shall lose her dower—*Vide Dower* 647

FORGERY.

1 Forgery is not within the jurisdiction of justices of the peace 60, 61

2 In what cases the forger of writs, and other proceedings of courts, may be proceeded against by attachment 231

3 The court will not, without special cause, remove an indictment for forgery by *certiorari* at the prayer of the defendant 408 s. 29

4 A conviction of forgery on 5 Eliz. c. 14. is a good cause of challenge to a juror 587, 588

5 And *quere*, whether it is not a good objection to the competency of a witness 609 s. 19

6 A person whose property is prejudiced by a forgery, is no evidence to prove it on an indictment or information 611

7 An reason why a person on 5 Eliz. whose name is forged, cannot be a witness, is that he may have an action for the injury *ibid.*

FORESTALLING.

1 Indictments for forestalling on 5 and 6 Edw. 6. c. 14, must expressly shew that the goods were coming to market (*N. B. This statute is repealed*) *Page* 354

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In all process where the king is a party to the suit, no clause of *non omittas* is requisite; for the king's prerogative of executing writs by his sheriff shall be preferred to the privilege of any franchise 404

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1 None but freeholders shall be electors to the office of coroner 72

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1 While other proceedings were in Latin, appeals

appeals were in the French tongue *Page* 437
2 But now all proceedings ſhall be in the Engliſh language only, and not in the Latin or French *ibid.*

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1 If a gaoler, upon freſh ſuit, retake a priſoner without loſing ſight of him, it ſhall not be conſtrued an eſcape: but otherwiſe if he kill him in the purſuit 198 ſ. 6. 201 ſ. 13
2 Reſtitution of goods in an appeal of larceny is the neceſſary conſequence of making freſh ſuit after the offender 248 ſ. 50
3 Anciently the party, to make freſh ſuit, ought to have raiſed the hue and cry 248 ſ. 51
4 Now if the party be guilty of no groſs neglect in endeavouring to apprehend the offender, it is ſufficient freſh ſuit 249
5 The freſh ſuit ſhall be enquired of by the jury who try the principal matter 249 ſ. 52
6 Upon the finding of the freſh ſuit by ſuch jury, the court may award reſtitution *ibid.*
7 How the court may enquire of the freſh ſuit, and award reſtitution where the appellee is convicted by confeſſion *ibid.*
8 The inqueſt which inquire of the freſh ſuit is a mere inqueſt of office, to ſatisfy the conſcience of the judge *ibid.*
9 The inqueſt of freſh ſuit is in the diſcretion of the court *ibid.*

G.

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The privilege of the clergy may be allowed at any time, even under the gallows 504 ſ. 111

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GAOL.—*Vide Commitment.*

1 By 14 Edw. 3. c. 10. the cuſtody of gaols is rejoined to the office of ſheriffs *Page* 182 ſ. 6
2 By 5 Hen. 4. c. 10. none ſhall be impriſoned but in the common gaol *ibid.*
3 None can claim a priſon as a franchiſe unleſs he have alſo a gaol-delivery 182 ſ. 7
4 By 11 & 12 Will. 3. c. 19. juſtices of peace are enabled to rebuild and repair the gaols at the expence of the county *Note in marg.*
5 Every gaol in the kingdom is the gaol of the king's bench 8 ſ. 5
6 No perſon can juſtify the detaining a priſoner in cuſtody out of the common gaol without ſome ſpecial cauſe 183 ſ. 9

GAOL-DELIVERY.—*Vide Aſſize. Oyer.*

1 The commiſſion of gaol-delivery is a patent, in nature of a letter from the king, to certain perſons appointing them his juſtices, or two or three of them, of which number ſuch a particular perſon is ſpecially required to be, authoriſing them to deliver his gaol at a particular place of the priſoners then in it 31 ſ. 1
2 For this purpoſe it appoints them to meet at ſuch a place, at an appointed time, &c. where the ſheriff is commanded to bring the priſoners *ibid.*
3 Theſe commiſſions muſt be agreeable to ancient precedents 2. 21. 31
4 Juſtices of gaol-delivery may, by the common law, proceed upon any indictment of felony or treſpaſs found before other juſtices againſt any perſon in the priſon they are commiſſioned to deliver 31 ſ. 2
5 By 4 Edw. 3. c. 2. in affirmance of the common law, juſtices of gaol-delivery may deliver the gaols of perſons indicted before juſtices of the peace *ibid.*
6 But juſtices of oyer and terminer can only

only proceed againſt perſons indicted before themſelves *Page* 31 ſ. 2
7 Juſtices of gaol-delivery have power to take an indictment themſelves 31 ſ. 3
8 They can only deliver the gaol by proclamation where there is no indictment, and by proper trial where there is one 32
9 Contrary to ſome opinions, it is certain, that juſtices of gaol-delivery may deliver the gaol of perſons committed for high treaſon 32 ſ. 4
10 *Quere*, whether juſtices of gaol-delivery may receive an appeal againſt acceſſaries to a felony, the principal to which is in the cuſtody of the gaol they are commiſſioned to deliver 32, 33. 233. ſ. 7
11 Juſtices of gaol-delivery may take an indictment againſt one admitted to bail 33 (N) 1
12 Juſtices of gaol-delivery, on proclamation, may diſcharge all priſoners who are either not indicted or not proſecuted. But this power does not extend either to judges of *oyer and terminer*, or juſtices of the peace 33 ſ. 6
13 Juſtices of gaol-delivery may award *execution* againſt ſuch priſoners as have been outlawed for felony before juſtices of the peace 33 ſ. 7
14 Juſtices of gaol delivery have power, after their commiſſion is expired, either to order the execution or the reprieve of the perſons who have been condemned before them 33 ſ. 8
15 They may by the common law puniſh thoſe who unduly let priſoners to bail 33 ſ. 9
16 By 28 Edw. 1. they may award proceſs into a foreign county againſt perſons appealed before them by an approver 34 ſ. 10
17 By 27 Edw. 1. c. 3. they ſhall puniſh ſheriffs for letting priſoners to bail contrary to the ſtatute of Weſtminſter. *Sed quere* 34 ſ. 11, 12
18 By 4 Edw. 3. c. 2. they ſhall puniſh ſheriffs and gaolers for delivering their priſoners upon bail, when they are not bailable 34 ſ. 13
19 And this puniſhment, though not expreſſed, ſhall be according to the ſtatute of Weſtminſter *Page* 34 ſ. 14
20 By 1 & 2 Phil. & Mary, c. 13. juſtices of gaol-delivery ſhall fine juſtices of the peace and coroners, either as to bailing priſoners, or for not taking their examination, or the information of the witneſſes, or not reducing it to writing, &c. &c. &c. 34, 35. 79, 80. 163. 203
21 By 4 Edw. 3. c. 10. juſtices of gaol-delivery ſhall puniſh ſheriffs and gaolers refuſing to take felons into their cuſtody from conſtables without being paid 35
22 By 1 Edw. 6. c. 7. priſoners convicted of treaſon and capital felony, who ſhall be reprieved by the juſtices of one gaol-delivery, may have judgment paſſed upon them by the judges at a ſubſequent gaol-delivery 35 ſ. 17
23 This ſtatute extends not to convictions before juſtices of oyer and terminer 35 ſ. 18
24 It only extends to priſoners reprieved *before judgment*, and gives ſubſequent commiſſioners no manner of power over perſons condemned by former juſtices 35 ſ. 19
25 If a perſon condemned by former juſtices plead a pardon before their ſucceſſors, they have no power to allow it 35, 36
26 The manner in which ſuch a pardon muſt be pleaded 36
27 Subſequent juſtices commiſſioned by the next king to that who commiſſioned the former juſtices, have the ſame power as if both commiſſions had been made by the ſame king 36
28 An enumeration of ſundry ſtatutes giving juriſdiction to juſtices of gaol-delivery 36 ſ. 20
29 By 6 Rich. 2. c. 5. juſtices of gaol-delivery ſhall hold their ſeſſions in the chief towns of the ſeveral counties 36 ſ. 21
30 Juſtices of gaol-delivery may award *tales*
31 Juſtices of gaol-delivery may bail any perſon convicted before them of homicide by miſadventure or in ſelf-defence 165

32 They may bail a perſon convicted of manſlaughter, who has purchaſed his pardon after their ſeſſion is determined *Page* 165 ſ. 65

33 So alſo if a man be convicted of manſlaughter before them againſt plain evidence, they may bail him till the next ſeſſion *ibid.*

34 So alſo they may bail an appellee from day to day, who pleads excommunication in diſability of the appellant *ibid.*

35 Juſtices of gaol-delivery have power to aſſign a coroner, and therefore may take an appeal by an approver 296 ſ. 16

36 The king's bench will never remove an indictment from juſtices of gaol-delivery without ſpecial cauſe 408

37 By 34 & 35 Hen. 8. c. 14. ſ. 16. juſtices of gaol-delivery are authoriſed to write to the clerk of the peace for the certificate of the conviction of a defendant, for the purpoſe of preventing his receiving the benefit of clergy a ſecond time 477, 478

38 The juſtices of gaol-delivery may have a panel returned without any precept or writ, and by a bare award: the reaſon of it 571

39 Juſtices of gaol-delivery may order a jury to be returned immediately for the trial of a priſoner arraigned before them 572 ſ. 4

40 By 8 Geo. 3. c. 15. ſubſequent judges of gaol-delivery may order tranſportation, &c. 516

GAOLER.—*Habeas Corpus* No. 2, 3.

1 In what caſes gaolers ſhall be liable to an attachment 227 ſ. 31

2 They are puniſhable by the juſtices of gaol-delivery for refuſing to take the cuſtody of felons from conſtables, &c. 35 ſ. 16

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It is a good plea in abatement of an indictment, that *garter king at arms* is not called *garter* 328 ſ. 69

GENERAL ISSUE.

1 What pleas in bar to an appeal are conſiſtent with the general iſſue *Page* 283 ſ. 137

2 A priſoner who pleads in avoidance of an indictment taken contrary to 11 Hen. 4. c. 9. & 3 Hen. 8. c. 12. which relate to the return of grand juries, may alſo plead the general iſſue 312 ſ. 26

3 The defendant to a *qui tam* action or information cannot plead a ſpecial plea together with the general iſſue 391 ſ. 62

4 A pardon *ſub pede ſigilli* cannot be pleaded with, or after the general iſſue, unleſs it bear a date ſubſequent to ſuch iſſue 562 ſ. 67

5 A defendant *qui tam* may take advantage on the general iſſue, that the offence aroſe in a different county 383 ſ. 32 p. 394 ſ. 70

6 A defendant *qui tam*, cannot give a *diſcharge* by a ſubſequent ſtatute, as he may a *proviſo* in the ſtatute upon which he is ſued, in evidence on the general iſſue; but he muſt plead it ſpecially 393 ſ. 69

7 If a ſuit be brought on a penal ſtatute after the time limited, he may take advantage of it on the general iſſue 386 ſ. 45

8 In capital caſes the general iſſue may be pleaded with any other plea, either in bar, or in abatement, which is not repugnant to it, even after ſuch plea is found againſt the defendant 277. 283. 563

9 The plea of the general iſſue amounts to a waiver of a pardon 563

10 In what form the general iſſue may be joined in criminal as well as capital caſes 563

11 Where a defendant ſhall be *eſtopped* to plead the general iſſue by a confeſſion, or a former iſſue found againſt him *ibid.* ſ. 4

12 *Son aſſault demeſne* may be given in evidence on the general iſſue in an indictment, but not in an action 619 ſ. 44

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The caſe of general warrants ſtated *Page* 131

GENTLEMAN.

1 *Generoſus* or *armiger* are either of them good addition for the eſtate and degree of a man; and *generoſa* for that of a woman 272 ſ. 111

2 Where an appeal deſcribes a party as gentleman who is not ſo either by birth or reputation, it will abate the writ 269 ſ. 103

3 In what caſes ſcandal thrown upon the character of a gentleman was cognizable by the court of the conſtable and marſhal, as a court of honour 15

4 By an attainder of treaſon or felony the offender's blood is ſo far ſtained, that he loſes all the *gentility* he might have had before, and becomes *ignoble* 648

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The judges and officers are entitled to the fee of gloves upon allowing a pardon 562 ſ. 71

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1 In what caſes the goods of the offender ſhall be forfeited for treaſon or felony 638, 639, 640

2 How they may be deſcribed in an indictment for ſtealing them 329, 330

GRAND JURY.—*Vide Jurors.*

1 A grand jury are returned to enquire of all offences in general in the county for which they are returned 299

2 They may preſent ſuch offences within the county as they conceive require redreſs, without any bill being before them for that purpoſe *ibid.*

3 Upon a bill of indictment being preferred before them, they muſt either find *billa vera*, or *ignoramus* for the whole *Page* 300

4 If they find a bill either ſpecially or conditionally it is void *ibid.*

5 This relates only to caſes where they find part of *the ſame indictment* to be true, and part falſe, and do not either affirm or deny the fact ſubmitted to their enquiry (N) 1

6 Where a bill contains two counts for diſtinct offences, they may indorſe *billa vera* as to the one, and *ignoramus* as to the other *ibid.*

7 OF THE RETURN AND QUALIFICATION OF GRAND JURORS 307

8 The grand jury muſt be at leaſt twelve in number, all of the ſame county, and returned by the ſheriff or other proper officer, without any nomination 307 ſ. 16

9 Grand jurors ought to be freemen and liege ſubjects, and not under an attainder for treaſon or felony, nor *villeins*, aliens, or outlaws, whether for a criminal or perhaps perſonal matter *ibid.*

10 Any perſon under proſecution may, before he is indicted, challenge a grand juror as being outlawed for felony, &c. a villein, or returned at the inſtance of the proſecutor, or not returned by the proper officer *ibid.*

11 But grand jurors, like all other men, ſhall be intended legal and honeſt, until the contrary appear 308

12 One outlawed on an indictment of felony may plead, in avoidance of it, that one of the grand jury was outlawed for felony 308 ſ. 18

13 It is unſettled at the common law, whether grand jurors ought to be freeholders 308 ſ. 19. 309, 310

14 Hale ſays, they ought to be freeholders, but to what value is uncertain *Note in marg.*

15 Upon the equity of the *ſtat. Weſt.* 2. c. 28. old men above 70 years of age, perſons perpetually ſick, or living out of the county, ſhall not be returned upon grand juries 308, 309

16 But ſuch perſons being returned upon the grand jury may lawfully ſerve on it if they think fit 309

17 The

17 The court may in diſcretion excuſe ſuch perſons, but they cannot have any action for being ſo returned *Page* 309
18 Grand jurors in the ſheriff's torn ſhall have 20s. a year freehold or 26s. a year copyhold 310
19 By 3 Hen. 7. c. 1. every grand juror for the enquiry of concealments, &c. before juſtices of the peace ſhall have 40s. yearly
20 By 33 Hen. 6. c. 2. grand jurors in the county palatine of Lancaſter, ſhall have 5 l. a year 310
21 By 28 Edw. 1. c. 9. ſheriffs ſhall put thoſe in inqueſts as be next neighbours moſt ſufficient and leaſt ſuſpicious *ibid.* ſ. 22
22 By 34 Edw. 3. c. 4. all panels ſhall be made of the next people which ſhall not be ſuſpect nor procured *ibid.*
23 Both theſe ſtatutes extend to grand jurors *ibid.*
24 By 11 Hen. 4. c. 9. all grand jurors ſhall be of the king's lawful liege people and returned by the ſheriffs or their bailiffs, without any denomination 311 ſ. 23
25 Upon this ſtatute, a perſon who is not returned, but procures his name to be read among thoſe of the grand jury, may be indicted and fined 311 ſ. 24
26 It is queſtioned, whether a coroner's inqueſt is within the purview of this ſtatute; but all other inqueſts are within it 312 ſ. 25
27 A perſon arraigned or outlawed upon an indictment taken by a grand jury, contrary to 11 Hen. 4. may plead it in avoidance of it. *Sed quere*, if he has taken trial on it without exception 313 ſ. 26, 27
28 If one grand juror returned contrary to 11 Hen. 4. join in finding an indictment, it vitiates the whole 313 ſ. 28
29 A priſoner ſhall have counſel aſſigned to take an exception to an indictment found by grand jurors returned contrary to 11 Hen. 4. 313 ſ. 29
30 In objecting to an indictment for ſuch a defect, the record muſt be in court 312 ſ. 30
31 By 3 Hen. 8. c. 12. juſtices of gaol-delivery and juſtices of the peace, may reform the panel of grand jurors returned by the ſheriff, by taking out and putting to the names which be ſo impanelled *Page* 312, 313
32 Therefore if a grand juror who is *nominated* to the ſheriff, except by the juſtices in purſuance of the above act, it ſhall vitiate the indictment he joins to find, according to the 11 Hen. 4. 313 ſ. 33
33 No grand jurors can indict any offence whatſoever which doth not ariſe within the limits of the precincts for which they are returned 313 ſ. 34
34 Whether a grand jury ought to find a bill of indictment to be true upon probable evidence only 367 (N)
35 A perſon committed as principal, and taken ſurreptitiouſly from his confinement to give evidence before the grand jury on a bill preferred againſt his accomplice, is a competent evidence for that purpoſe *ibid.*
36 And *quere*, if a grand jury ſhould find a bill to be true upon *evidence palpably improper*, and the petty jury ſhould afterwards find the priſoner guilty of the indictment, *on legal evidence*, whether the validity of ſuch a conviction ſhall be impeached on that account *ibid.*

GRAND LARCENY. *Vide Clergy.*

GRAND SESSIONS.

An acquittal at the grand ſeſſion of *Wales* is pleadable in bar to an indictment for the ſame offence in *England* 316 ſ. 42. 529 ſ. 10

GRANT.

1 Grant of the goods of a felon ſtanding mute, ſhall be taken to be good before it is ſo proved 467 ſ. 20
2 Such goods will not paſs by a grant of all

all felons goods, without being ſpecially named *Page* 467 ſ. 21

GUARDIAN. *Vide Appeals*, No. 144.

H.

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1 It is a contempt puniſhable by attachment for an inferior court to proceed after a *habeas corpus* allowed 226 ſ. 28
2 A gaoler is puniſhable by attachment for diſobeying writs of *habeas corpus* 227 ſ. 31
3 It is no excuſe for not obeying a writ of *habeas corpus*, that the priſoner did not tender his fees to the gaoler *ibid.*
4 By 1 & 2 Phil. & Mary, no *habeas corpus* ſhall be granted to remove any priſoner out of gaol, except ſigned by the hand of the chief juſtice, &c. 409 ſ. 35

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1 There is no neceſſity for holding up the hand upon arraignment, being merely a ceremony to identify the priſoner 437
2 In the caſe of a peer this ceremony is not required *Notes in marg.*

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1 The reward for apprehending and convicting a highwayman 122, 123
2 In what caſes he is ouſted of clergy 494 ſ. 77 to 498 ſ. 89

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1 A perſon arreſted upon *light ſuſpicion* of homicide may be bailed by a juſtice of the peace 150 ſ. 34
2 Excuſable homicide not bailable by juſtices of the peace *ibid.*
3 In what caſes a perſon committed for homicide is repleviſable 150. 156. 158. 164
4 Whether bailable by juſtices of gaol-delivery 156, 170
5 No one can be any way puniſhed as an acceſſary to a homicide *per infortunium* or *ſe defendendo* 447 ſ. 24 6 Ia

6 In what caſe a priſoner *acquitted* of homicide may be remitted to priſon, or bailed *Page* 150, 151
7 In what caſes homicide is excluded from clergy 488, 489
8 How a perſon convicted of *homicide* ſhall be puniſhed 508 ſ. 121
9 *Quere*, if a verdict finding a man guilty of excuſable homicide may be pleaded in bar to a ſubſequent proſecution 537
10 How far *bare homicide* is entitled to pardon 538
11 What fee is due to a coroner for taking an inqueſt of homicide 85, 86
12 Where homicide is indictable, when the ſtroke is given in one county, and the death happens in another 314, 315

HOMINE REPLEGIANDO.—*Bail.*

HONOUR.—*Conſtable and Marſhal.*

HORSE-STEALERS.

1 By 1 Edw. 6. c. 12. no perſon convicted of felonious ſtealing of horſes, geldings, or mares, ſhall be admitted to clergy 482 ſ. 34
2 By 2 and 3 Edw. 6. c. 33. (the above ſtatute being plurally expreſſed), ſtealing one horſe, gelding, or mare, ſhall be put from clergy in the ſame manner as ſtealing of two, &c. 484
3 Theſe ſtatutes extend, as well to thoſe who are outlawed, or challenge more than twenty, as to thoſe who are found guilty by verdict 490
4 By 31 Eliz. c. 12. acceſſaries both before and after the fact in horſe-ſtealing are put from clergy 490 ſ. 63
5 The knowing receiver of a *ſtolen horſe* is not an acceſſary within this ſtatute, unleſs he receive the *horſe ſtealer* alſo; but as a receiver of *ſtolen goods*, he is ouſted by 3 and 4 Will. and Mary, c. 9 *ibid.* (N)
6 By 10 and 11 Will. 3. c. 23. if any horſe-ſtealer, being out of priſon, ſhall diſcover two or more who had then been guilty of horſe-ſtealing, and cauſe them to be convicted, he ſhall be entitled to a pardon 540 ſ. 5

HOSTLER.

Hoſtler is a good addition, as coming properly under the notion of a myſtery; but he may be ſued by the addition of *labourer* *Page* 273 ſ. 118

HOUR.

1 Omitting the hour in the count in an appeal is not fatal; but it is ſafeſt to inſert it 263 ſ. 87
2 If the hour as well as day be ſet forth in alledging the offence of the principal, it is fatal to mention the day only in deſcribing the offence of the acceſſary *ibid.*
3 It is ſufficient to ſay the fact was done about ſuch an hour; and a miſtake of the hour will not be material upon evidence *ibid.*
4 In an indictment the hour is not at all neceſſary 334 ſ. 76

HOUSE.—*Vide Robbery.*

1 By 12 Ann. c. 7. whoever ſhall feloniouſly ſteal money or goods to the value of 40 s. out of any dwelling-houſe or out-houſe thereunto belonging, ſhall be debarred from the benefit of clergy 491 ſ. 66
2 This act ſhall not extend to apprentices under the age of fifteen years 491 ſ. 67
3 Perſons outlawed, and acceſſaries, are not within this ſtatute 492

HOUSEBREAKING.—*Vide Robbery.*

1 By 1 Edw. 6. c. 12. no perſon *convicted* of breaking any houſe, any perſon being therein and put in fear, ſhall be admitted to clergy 482 ſ. 34
2 This ſtatute extends both to indictments and appeals 483 ſ. 35
3 It doth not exclude thoſe who challenge more than twenty 483 ſ. 36
4 *Sed quere*, if thoſe who challenge more than twenty are not included in the word *convicted* *Note in marg.*
5 This ſtatute omits acceſſaries 483 ſ. 37
6 The breaking of the houſe muſt be ſuch as the law conſtrues to be felonious 484 ſ. 40
7 By 3 and 4 Will. and Mary, c. 9. houſebreakers who challenge more than twenty are ouſted of clergy, upon an indict-

indictment, whether in the ſame or a different county *Page* 497 ſ. 87
8 By 4 and 5 Ph. and Mary, c. 4. acceſſaries before to ſuch breaking, if accompanied with ſtealing in a dwelling-houſe, are ouſted of their clergy in all caſes 497 ſ. 87
9 No breaking is within the 1 Edw. 6. which doth not amount to an actual breaking of an houſe, or of ſome part of it, as of a cupboard, &c. fixed to the freehold, and therefore the breaking a trunk, &c. is not within the ſtatute, &c. 497 ſ. 88
10 By 39 Eliz. c. 15. whoever ſhall be found guilty of feloniouſly taking away in *the day time* any goods to the value of 5 s. in any dwelling-houſe or out-houſe, &c. ſhall not be admitted to clergy, though no perſon be within the ſame at the time 500 ſ. 95
11 This ſtatute ſhall only extend to ſuch a taking as is accompanied with a felonious breaking 500 ſ. 96
12 A chamber in an inn of court is a houſe within the intent of this ſtatute; but a lodging in White-hall or Somerſet-houſe is not 500 ſ. 97
13 No acceſſary is ouſted of his clergy by this ſtatute 500 ſ. 98
14 Nor is an aider or abettor ouſted, unleſs it appear that he was actually within the houſe 501
15 By 3 and 4 Will. and Mary, c. 9. whoever ſhall aid or abet another to break any dwelling-houſe, *ſhop*, *warehouſe*, &c. and ſhall feloniouſly take to the value of 5 s. ſhall be excluded from clergy 501 ſ. 99
16 An aſſiſtant, or an acceſſary before, to ſuch a felony in an *out-houſe*, not being a ſhop or warehouſe, &c. without entering it, is ſtill entitled to clergy 501 ſ. 100, 101
17 But all principals in any felony within 39 Eliz. c. 15. are excluded, whether in the ſame or a different county 501 ſ. 102

HOUSE *of* CORRECTION.

1 By 6 Geo. 1. c. 19. juſtices of the peace may commit vagrants, and other offenders charged with ſmall offences, either to the common gaol or houſe of correction, as they ſhall think proper *Page* 182, 183
2 By 5 Ann. c. 6. perſons convicted of larceny, who are liable to be burnt in the hand, may be committed to the houſe of correction for not leſs than ſix months, nor more than two years, &c. 512, 513
3 By 19 Geo. 3. c. 74. a further puniſhment inflicted 513

HUE *and* CRY.

1 The ſheriff in his torn may inquire of all thoſe who ſhall levy hue and cry without cauſe, or ſhall neglect to levy it where they ought 107
2 Private perſons are bound to apprehend offenders upon a hue and cry levied againſt them 116
3 Hue and cry is the purſuit of an offender from town to town till he is taken 116 ſ. 5
4 All who are preſent when a felony is committed, or a dangerous wound is given, are bound both by common law and by ſtatute, to raiſe the hue and cry againſt the offenders who eſcape *ibid.*
5 A man may lawfully raiſe it againſt one who ſets upon him in the highway to rob him *ibid.*
6 By 13 Edw. 1. c. 4. hue and cry ſhall be levied upon any ſtranger who ſhall not obey the arreſt of the watch in the night time *ibid.*
7 By 21 Edw. 1. ſt. 2. it may be raiſed againſt treſpaſſers in parks *ibid.*
8 To levy hue and cry without cauſe is conſidered as a diſturbance of the public peace *ibid.*
9 The manner in which the hue and cry ſhall be levied 116 ſ. 6
10 By the ſtatutes of Winton, if the country will not anſwer for the bodies of ſuch as commit robberies and felonies within 40 days, by levying the hue and cry, the inhabitants, where the offence was committed, ſhall be anſwerable, &c. 116, 117
11 But to make the country liable, the robbery muſt be open and violent, and not done in any houſe 117 (N)

12 But it is not neceſſary that it ſhould be done in the public highway; if committed in a coppice it is ſufficient *Page* 117 (N)
13 By 27 Eliz. c. 18. the inhabitants of every hundred where the offence ſhall be committed ſhall pay half the damages recovered againſt the hundred for neglecting hue and cry 117
14 No hue and cry ſhall be deemed ſufficient, unleſs made both with horſemen and footmen *ibid.*
15 No perſon robbed ſhall maintain any action upon theſe ſtatutes, unleſs he give immediate intelligence, and within 20 days before the action be examined before a magiſtrate, &c. *ibid.*
16 By 8 Geo. 2. c. 16. the perſon robbed muſt alſo give notice to a conſtable near the place, deſcribing the particulars of the robbery, &c. &c. 118
17 No hundred ſhall be chargeable, if the felons be apprehended within forty days after notice, &c. in the gazette *ibid.*
18 By 22 Geo. 2. c. 24. no perſon ſhall recover more than 200 l. unleſs two perſons are in company at the time of the robbery *ibid.*
19 Nor by 30 Geo. 2. c. 3. and 4 Geo. 3. c. 2. unleſs three perſons be together, if the plaintiff is receiver of the land-tax *ibid.*
20 Thoſe who are taken upon a hue and cry are irrepleviſable by the ſtatute of Weſtminſter 154 ſ. 41

HUNDRED.—*Vide Eſcape. Hue and Cry.*

HUSBAND *and* WIFE.

1 A *feme covert* being appealed without the huſband cannot have damages on her acquittal, *ſed quære* 290 ſ. 149
2 A conſpiracy may be ſuſtained at common law by huſband and wife, for a malicious appeal againſt the wife only *ibid.*
3 If a huſband and wife are appealed and acquitted, they ſhall have a joint judgment for the damage to the wife, and ſhall have ſeparate executions for their ſeveral damages *Page* 290, 291
4 A wife cannot be made an acceſſary *after* to felony by *any receipt* whatſoever given to her huſband 451 ſ. 34
5 But if a wife *procure* her huſband to commit a felony, *it ſeems* to make her an acceſſary *before* *ibid.*
6 No other relation than that of *a wife to her huſband*, will exempt the receiver of a felon from being an acceſſary to the felony *ibid.*
7 Therefore, if a huſband receive his guilty wife, he is thereby an acceſſary to her felony *ibid.*
8 A huſband and wife being one perſon, can no more give evidence for or againſt each other than they can for themſelves 607 ſ. 16
9 Exception allowed to this rule in caſes of evident neceſſity 608
10 An appeal lies againſt a *feme covert* without taking notice of the huſband 247 ſ. 46
11 But a wife cannot bring an appeal without her huſband 253
12 In an appeal, the addition of the place of habitation of a wife is ſufficiently ſhewn by ſhewing that of the huſband 274, 275
13 What lands ſhall be forfeited by attainder of the huſband, which he holds in right of his wife 637, &c.
14 In what caſes dower ſhall be forfeited (*Vide Dower*) 646 ſ. 42

I *and* J.

IDENTATE NOMINIS.

To reverſe an outlawry upon an indictment for a variance in the name of the defendant, between the record and the proceſs, the diverſity muſt be ſhewn by the writ *identate nominis* 654

IDEOT.—*Vide Appeal, No.* 56. *Approver, No.* 6.

JEOFAILS.

1 The ſtatutes of jeofails do not extend to criminal proſecution 347
2 By 9 Ann. c. 20. they ſhall extend to informations in the nature of *quo warranto* 376

JEW.—*Clergy, No.* 5. *Evidence, No.* 5.

IGNORAMUS.—*Grand jury.*

IMPARLANCE.

Where an appeal may be abated before and after imparlance c. 23 ſ. 102

IMPEACHMENT. — *Vide Trial by Peers.*

1 A lord committed by the houſe of lords on an impeachment of treaſon, and afterwards pardoned, cannot be *diſcharged* by the court of king's bench.—*Sed quere*, if the court may not bail, eſpecially if no parliament be ſitting 171, 172
2 By 12 and 13 Will. 3. c. 2. no pardon under the great ſeal ſhall be pleaded to an impeachment by the commons in parliament 557
3 But after the impeachment is tried, the offender may be pardoned *ibid.* (N)
4 The neceſſity of making a high ſteward for the trial of an impeachment for high treaſon, has been denied by the houſe of commons 592 ſ. 1 *Note in marg.*

IMPLICATION.—*Vide Intendment.*

IMPRISONMENT.—*Vide Commitment. Arreſt. Habeas Corpus.*

INCENDIARIES.—*Arſon.*

INDICTMENT.

1 An indictment is an accuſation at the ſuit of the king, found to be true by the oaths of twelve men of the county, returned to inquire of all offences therein committed *Page* 299
2 The difference between an indictment and a preſentment and inquiſition *ibid.*
3 A grand jury muſt either find *billa vera* or *ignoramus* for the whole, or the finding is void 300 ſ. 2
4 So alſo, if they indorſe a bill conditionally, or true as to a different crime than that which the indictment charges, it is void *ibid.*
5 But where the bill conſiſts of two diſtinct counts, as *riot* and *aſſault*, they may indorſe *billa vera* as to the one, and *ignoramus* as to the other (N) 1
6 An indictment is ſo far the king's ſuit, that the party who proſecutes it is a good witneſs to prove it 300 ſ. 3
7 No damages can be given upon an indictment even if the king were, by his commiſſion to any new court, ſo to direct *ibid.*
8 But if a ſtatute expreſsly direct that a party ſhall recover damages by indictment, they may be ſo recovered; otherwiſe they ought to be ſued for in an action on the ſtatute 300, 301
9 The king's bench, by virtue of a privy ſeal, may give to a proſecutor the third part of a fine aſſeſſed on a criminal proſecution 301
10 And to induce defendants to pay proſecutors their coſts, it is the practice to intimate an inclination to mitigate the fine to the king *ibid.*
11 All crimes of a public nature, all diſturbances of the peace, all oppreſſions, and all miſdemeanors of a public evil example againſt the common law, may be indicted 301 ſ. 4
12 No injuries of a private nature, unleſs they ſome way concern the king, can become the ſubject of indictment *ibid.*
13 Wherever a ſtatute prohibits a matter of public grievance, or commands a matter

matter of public convenience, an offender is puniſhable both by action and indictment, unleſs ſuch a mode of proceeding is expreſsly excluded *Page* 301 ſ. 4

14 *Quere*, if the offender has, in an action, *been fined to the king*, whether he can afterwards be indicted for the ſame offence *ibid.*

15 No offence againſt a ſtatute of a private nature will bear an indictment *ibid.*

16 Inſtances of injuries which are not indictable (N) 2

17 Where a new offence, not prohibited by the common law, is created by ſtatute, and a particular manner of proceeding appointed, but no mention made of indictment, no indictment can be maintained on ſuch ſtatute 301, 302, *and* (N) 3

18 But if ſuch a ſtatute give a recovery by action, bill, plaint, information, *or otherwiſe*, then it authoriſes a proceeding by way of indictment 302

19 Where a ſtatute adds a further penalty to an offence prohibited by the common law, the offender may ſtill be indicted as at common law *ibid.*

20 If ſuch an indictment conclude *contra formam ſtatuti*, and cannot be made good upon the ſtatute, it may be maintained as an indictment at common law *ibid.*

21 Where new created offences are prohibited by a general prohibitory clauſe, an indictment will lie; but not if the clauſe be particular, and ſpecific remedies are appointed (N) 3

22 Where a *new offence* is created, an indictment will lie on a *ſubſtantive* prohibitory clauſe, although there be afterwards a particular *proviſion* and remedy given *ibid.*

23 An indictment will not lie where a ſtatute creating a new offence is not prohibitory, but only inflicts the forfeiture, and ſpecifies the remedy *ibid.*

24 Where the offence was puniſhable before the ſtatute, the particular remedy given in it is cumulative; but where the offence was not puniſhable at common law, the particular remedy given muſt be purſued *Page* 302 (N) 3

25 WHERE INDICTMENT IS UNNECESSARY 302

26 Anciently a perſon taken upon immediate purſuit, with the property ſtolen upon him, might be brought into court, and tried without indictment 302 ſ. 5

27 But by 25 Eliz. c. 4. &c proceedings upon the *mainovre* are wholly taken away *N. in marg.*

28 In treſpaſs for goods in the king's bench, if the jury find they were ſtolen, the defendant may be tried, on ſuch finding, for the felony without indictment 303

29 But ſuch a finding, except in a court of criminal juriſdiction, has no effect *ibid.*

30 Even in the king's bench, on an indictment, if the jury find that ſome other than the defendant did the fact, yet that other cannot be tried on ſuch finding without being firſt indicted *ibid.*

31 But it is otherwiſe on the finding of a coroner's inqueſt *ibid.*

32 A verdict upon a declaration for a miſdemeanor in a proper court, will ſerve for an indictment againſt the perſons found guilty by it *ibid.*

33 Where a perſon may be tried without indictment upon an appeal not proſecuted (*Vide Appeal*) 303 ſ. 7 to 306 ſ. 14

34 Whether one may be tried at the ſuit of the king for a capital offence upon the ſheriff's return without any indictment 306 ſ. 14

35 A man may be arraigned upon an indictment while an appeal is depending 306 ſ. 15

36 Who may be indictors, and in what manner they are to be returned (*Vide Grand Jury*) 307 ſ. 16 to 313 ſ. 34

37 Within what place the offences enquired of by the grand jury muſt ariſe (*Vide Grand Jury*) 313 ſ. 34 to 319

38 If it doth not appear by an indictment that the offence aroſe within the county, or riding, or other ſpecial diviſion, or precinct for which the jury

which found it was returned, it is erroneous *Page* 314
39 *A fortiori*, if it appear that the offence were in a different county than that for which the grand jury are returned *ibid.*
40 *Quere*, if the finding of collateral matter, expreſsly alledged in the indictment to have happened in a different county, is not void *ibid.*
41 In what manner the county and place in which the offence aroſe muſt be expreſſed in the indictment *ibid.*
42 If upon not guilty pleaded it ſhall appear that the offence was committed in a different county from that in which the indictment was found, the defendant ſhall be acquitted 314 ſ. 35
43 By the common law if a man had died in one county of a ſtroke received in another, he could not be indicted in either 314 ſ. 36
44 But by 2 & 3 Edw. 6. c. 24. where any perſon ſhall be ſtricken or poiſoned in one county, and die of the ſame in another, an indictment may be found in the county where the death ſhall happen 314, 315
45 By 2 Geo. 2. c. 21. where the ſtroke, &c. ſhall happen upon the ſea or out of England, and the death enſue within any county of England, or where the ſtroke, &c. ſhall happen in England, and the death abroad, an indictment may be found where either the death or ſtroke ſhall happen 315
46 So if a fact done in one county prove a nuſance in another, it may be indicted in either 315 ſ. 37
47 If one guilty of larceny in one county carry the goods ſtolen into another, he may be indicted in either 315 ſ. 38
48 If a man marry two wives, the firſt in a foreign county, and the ſecond in England, he may be indicted in England 315 ſ. 39
49 If a woman be taken by force in one county and carried into another, and there married, the offender may be indicted and tried in the ſecond county 315 ſ. 40
50 But if a record be ſtolen or avoided, &c. partly in one county and partly in another, he cannot be indicted *for the felony* in either *Page* 315 ſ. 40
51 By 26 Hen. 8. c. 6. offences committed in *Wales* may be enquired of in the next *Engliſh county* where the king's writ runneth 315, 316
52 By 28 Hen. 8. c. 15. treaſons and felonies committed upon the ſea ſhall be enquired of in ſuch places as ſhall be limited by the king's commiſſion, in like manner as if done upon land 315 ſ. 43
53 But this ſtatute extends not to offences done in creeks, &c. within the body of a county 315 ſ. 44
54 By 11 & 12 Will. 3. c. 7. acceſſaries before and after to piracy ſhall be enquired of according to 28 Hen. 8. c. 15. 316, 317
55 By 8 Geo. 1. c. 24. perſons deemed acceſſaries by 11 & 12 Will. 3. c. 7. ſhall be proceeded againſt as principals 317
56 All piracies and felonies upon the ſea may be enquired of upon the land, or tried at ſea, &c. 317 ſ. 47
57 Ancient opinions, how high treaſon done out of the realm was to be indicted 317 ſ. 48
58 By 35 Hen. 8. c. 2. all treaſons committed out of the realm ſhall be enquired of by the king's bench, or in any county by the king's commiſſion 317 ſ. 49
59 If the king's bench or the king's commiſſioners remove into a different county from that in which the indictment is found, the jury ſhall come from the firſt county 318
60 How the commiſſioners and county for ſuch trials are well aſſigned 318 ſ. 51
61 Whether treaſons committed in Ireland *by a peer* may be tried in England 318 ſ. 52
62 By 2 & 3 Edw. 6. c. 24. acceſſary in one county to a felony in another may be tried in the county where the offender is acceſſary 319
63 THE FORM OF THE BODY OF AN INDICTMENT 319
64 Of ſetting forth THE FACT AS TO THE PRINCIPAL 320
65 No

65 No periphraſis will ſupply thoſe words of art which the law hath appropriated for a deſcription of the offence *Page* 320 ſ. 55

66 Where no technical words have been adopted, the ſpecial manner of the whole fact ought to be ſet forth with ſuch certainty, that it may judicially appear to the court that the indictors have not gone upon inſufficient premiſes 320 ſ. 55

67 An indictment for breaking priſon without ſhewing the cauſe of impriſonment is bad *ibid.*

68 An indictment for refuſing to be ſworn conſtable after *legitimo modo electi*, muſt ſhew the manner of the election *ibid.*

69 An indictment of burglary muſt have the word *noctanter* 321

70 An indictment for a nuſance for doing that which in its conſequences only, and not in itſelf, is ſo, muſt ſhew the circumſtances which cauſe the nuſance *ibid.*

71 But where the thing done is in itſelf a nuſance, as keeping a bawdy-houſe, &c. the particular circumſtances are not neceſſary *ibid.*

72 An indictment for coining *alchemy* like the king's money muſt ſhew what money: the reaſon of it *ibid.*

73 An indictment for perjury not ſhewing in what manner, and in what court the falſe oath was taken, is inſufficient *ibid.*

74 It is neceſſary both in indictments and appeals of mayhem and murder to ſet forth particularly in what manner the hurt was given *ibid.*

75 An indictment for extortion *colore officii* without ſhewing for what it was extorted, held good *ibid.*

76 An indictment for procuring, &c. muſt ſhew the falſe tokens 321 (N) 10

77 An indictment for words againſt a juſtice muſt ſhew the words *ibid.*

78 An indictment for obſtructing a juſtice muſt ſhew how it was done *ibid.*

79 An indictment for a contempt of a warrant, &c. muſt ſhew the nature of the warrant *ibid.*

80 An indictment for a *forcible entry* ought to contain a poſitive charge of *diſſeiſin* *Page* 321 (N) 10

81 An indictment charging a man diſjunctively is void, as *murdravit vel murdrari cauſavit*, &c. 321 ſ. 58

82 Every indictment muſt charge ſome particular offence, or elſe ſeveral offences particularly, and certainly expreſſed, and not with being an offender in general: the reaſon of this rule 322 ſ. 59

83 Inſtances in which, upon this ground, indictments have been held too general and inſufficient *ibid.* & (N) 11

84 Anciently, indictment *for conſpiracy* in general was held good, and the general charge of *inſidiatores viarum et depopulatores agrorum* ouſted of clergy; but this is remedied by 4 Hen. 4. c. 2. 323

85 But a man may be *generally* indicted as a common barrator; but the defendant muſt have *a note* of the facts intended to be proved delivered to him previous to the trial *ibid.*

86 There is no need to name any particular place where the defendant was a barrator *ibid.*

87 An indictment for barratry need not conclude *ad nocumentum omnium legiorum*; *diverſorum* is ſufficient *ibid.*

88 *Quere*, whether an indictment of a common ſcold may ſo conclude, or whether it muſt be *ad commune nocumentum* *ibid.* & (N) 1 *in marg.*

89 An indictment againſt one as a common ſcold is good without ſetting out the particulars, for the ſame reaſons that ſuch indictment of barratry is good: the reaſon given 323

90 So alſo an indictment charging a man generally with keeping a diſorderly houſe, without ſhewing any particular acts of diſorder, but concluding to the common nuſance, has been adjudged good. *Rex v. Higgins—on* 2 *Burrow* 1233. *See alſo* 2 *Atkins* 340.

91 Every charge in an indictment muſt be laid poſitively, and not by way of recital, as with a *quod cum*, &c. and the want of a direct allegation of any

any thing material cannot be ſupplied by intendment *Page* 323 ſ. 60

92 An indictment *felonicè murdravit* cannot amount to murder without *ex malitia præcogitata* *ibid.*

93 An indictment of death is bad without an expreſs allegation, that the deceaſed both received and died of the hurt laid; and the want cannot be ſupplied by any implication 324

94 An indictment for breaking priſon muſt aver, that a priſoner for felony did thereby eſcape *ibid.*

95 It is an incontrovertible rule, "*that in an indictment nothing material ſhall be taken by intendment or implication*" *ibid.*

96 But if in the firſt part of an indictment of death, the aſſault be laid with *malice prepenſe*, &c. there is no need to repeat it in the ſubſequent clauſe which ſhews the giving of the wound *ibid.*

97 So alſo where it ſtates that one was arreſted by virtue of a plaint, &c. the warrant ſhall be intended a good warrant *ibid.*

98 Where a warrant is alledged authoriſing an arreſt *within the liberties of London*, and the indictment lays the execution of it in ſuch a *pariſh and ward of London*, without ſaying they are within *the liberties*, the court will intend the *pariſh and ward laid* to be within *the liberties of London* *ibid.*

99 Where an indictment finds that the defendant BEING ſo and ſo, committed ſuch a fact, it ſhall be intended that *he was* ſo and ſo, without any expreſs allegation to that purpoſe; the reaſon of it 324 ſ. 61

100 But where an indictment of forcible entry finds that A. diſſeiſed B. of ſuch land *exiſtens liberum tenementum* of B. it is inſufficient; for there is no certain antecedent to which the *participle* can refer 325

101 Upon the ſubject of nice exception to an indictment there is no general rule. There is a maxim *nimia ſubtilitas in jure reprobatur*. But the application of it is in the diſcretion of the court 325

102 It is a certain rule *that where one material part of an indictment is repugnant to another, the whole is void* *Page* 325 ſ. 63

103 If an indictment charge a forged writing by which A, was bound to B.; or that the defendant diſſeiſed I. S. of lands, *when it appears that I S. had no freehold*; every ſuch indictment is void for its manifeſt inconſiſtency and repugnancy *ibid.*

104 An indictment of death laying the ſtroke at A. and the death at B. or the ſtroke on the firſt, and the death on the tenth, and then concluding that the defendant in ſuch manner murdered the party at A. aforeſaid, or on the firſt of May aforeſaid, is repugnant and void *ibid.*

105 An indictment for ſelling iron with falſe *weights* and *meaſures*, is inconſiſtent 326

106 If an indictment taken on the 13th find that the defendant had been abſent ſix months from church, from the firſt of the ſame month and year, it is repugnant *ibid.*

107 An indictment which charges any thing as a *felony*, which appears to be only a *treſpaſs*, as with cutting down trees, the court will not arraign the defendant on it *ibid.*

108 But the court will diſpenſe with a *ſmall impropriety of expreſſion* as for having moved *unam acram fœni*, when in fact it was *graſs* only and not *hay* *ibid.*

109 Of ſetting forth THE FACT AS TO THE ACCESSARY 326 ſ. 63

110 A repugnancy in ſetting forth the offence of the acceſſary is equally fatal as in ſetting forth that of the principal *ibid.*

111 If an indictment of death which lays the ſtroke on one day, and the death on a ſubſequent one, charge the acceſſary with having abetted the fact at the time of the felony and murder only, it is inſufficient *ibid.*

112 Where ſeveral are preſent and abet a fact, and one only actually does it, an indictment may lay it generally, as done by

by them all; or ſpecially, as done only by one and abetted by the reſt *Page* 326 ſ. 63

113 But an indictment which barely charges a man with having been preſent is void *ibid.*

114 An indictment againſt an acceſſary for receiving four principals is naught, unleſs it ſays *eos receptavit*, &c. 326, 327

115 An indictment againſt a conſtable for ſuffering the eſcape of a perſon arreſted for ſuſpicion of felony, muſt ſhew what the felony was and that it was committed 327 ſ. 66

116 But an indictment for receiving, or ſuffering to eſcape, perſons whoſe guilt is upon record, need only ſet out ſuch record properly 327 ſ. 66

117 *Quere*, if a man is more bound to take notice of an attainder in his own county than in any other *ibid.*

118 *Quere*, if an indictment finding that J. S. *ſcienter receptavit*, ſuch a one being a felon, is good *ibid.* ſ. 67

119 HOW AN INDICTMENT MUST DESCRIBE THE PERSONS 327

120 An indictment that the king's highway in ſuch a place is in decay, through the default of the inhabitants of ſuch a town, is good without naming any perſon in certain 327, 328

121 No *Indictee* can take any advantage of a miſtaken *ſurname* in an indictment, as an appellee may in an appeal 328

122 Every other *miſnomer* of the defendant, except that of the ſurname, and alſo every defective addition, are as fatal in an indictment as an appeal 328 ſ. 69

123 A *miſnomer* of the defendant's name of baptiſm may be pleaded in abatement *ibid.*

124 The addition of *knight* inſtead of *baronet* is pleadable in abatement *ibid.*

125 If garter king at arms be not ſtyled garter in an indictment, it, or the omiſſion of any other name of dignity, is pleadable in abatement *ibid.*

126 The omiſſion of the defendant's name of baptiſm is, *perhaps*, equally fatal *ibid.*

127 Indictments are within 1 Hen. 5. c. 5. concerning additions, and therefore the omiſſion of thoſe additions which that act requires are equally fatal to an indictment as an appeal, if proceſs of outlawry lie upon it *Page* 328 ſ. 70

128 It is a fatal fault to apply ſuch addition to the name which comes under the *alias dictus* only, and not to the firſt name *ibid.*

129 It is not material whether any addition be put to the name which comes under the *alias dictus* or not *ibid.*

130 It is ſo great a fault to put no addition to the firſt name, that the omiſſion of it as to one defendant renders the indictment vitious as to all 329

131 An addition in Engliſh was always as good as in Latin *ibid.*

132 Where ſeveral defendants have the ſame addition, it is ſafeſt to repeat it after each of their names 329

133 Where the ſon is of the ſame name and addition with the father, he ought to be diſtinguiſhed by ſome further deſcription *ibid.*

134 What is a ſufficient addition of the eſtate, or degree, or myſtery. *(Vide Appeal.)* *ibid.*

135 How the town, hamlet, place and county of the defendant ought to be added. *(Vide Appeal.)* *ibid.*

136 In what caſes a defective addition may be ſalved by the appearance and plea of the defendant. *(Vide Appeal.)* *ibid.*

137 HOW OTHER PERSONS MUST BE DESCRIBED 329 ſ. 71

138 They muſt be deſcribed with convenient certainty, ſo as to enable the court to impoſe the proper fine; and to enable the defendant to make his defence, or to plead the indictment in bar to any ſubſequent proſecution *ibid.*

139 An indictment for taking *divers* ſums of *divers* perſons for toll, without naming any perſons in particular, is naught 329 ſ. 71

140 Where, in common preſumption, it may be very difficult, if not impoſſible, to know the names of the perſons referred to in an indictment, it may be good without naming any of them. Inſtances given 329. 330

141 In many books it is ſaid, that regularly the perſons offended, as well as the

the defendant, ought to be certainly deſcribed in every indictment *Page* 330
142 An indictment for ſtealing *quandam peciam panni linei cujuſdam, J. S.* without adding *de bonis et catallis*, is inſufficient *ibid.*
143 Wherever the perſon injured is known to the jurors, his name ought to be put into the indictment *ibid.*
144 An indictment of an aſſault on John, pariſh prieſt of D. in the county of C. is good without mentioning his ſurname 331 ſ. 72
145 *Quere*, if an indictment for a wrong done to a perſon well known deſcribe him only by his name of baptiſm, without ſome addition to diſtinguiſh him from others of the ſame name, can be good *ibid.*
146 An indictment for ſtealing the goods *cujuſdam ignoti* is good *ibid.*
147 A repugnancy or abſurdity in the deſcription of the perſon injured will vitiate an indictment; as where one is indicted for ſtealing, *bona prædict. J. S.* where no J. S. was mentioned before *ibid.*
148 But if the indictment will be good by rejecting the words, they ſhall be conſidered as ſurpluſage (N) 12
149 If the word *aforeſaid* refer with equal uncertainty to two antecedents, the indictment is void *ibid.*
150 It is not neceſſary in an indictment of death, to alledge that the perſon killed was "*in the peace of God and of our Lord the King, &c.*" 332 ſ. 73
151 HOW THE THING MUST BE DESCRIBED 332 ſ. 74
152 No indictment can be good which wants convenient certainty of this kind *ibid.*
153 An indictment for forging a leaſe of certain lands, without naming ſome one certain parcel, is inſufficient *ibid.*
154 An indictment for ſtealing *the goods and chattels* of J. S. without any farther deſcription of them, is void for uncertainty *ibid.*
155 An indictment for treſpaſs in *two cloſes of meadow or paſture*; or for diverting *quandam partem aquæ* running from ſuch a place to ſuch a place; or for engroſſing *magnam quantitatem ſtraminis et fœni*, or *diverſos cumulos trilici*, &c. &c. &c. without ſhewing how much of each, is void for uncertainty *Page* 332 ſ. 74
156 The caſe of the *king v. Wetwang* impeached 332
157 If an indictment be uncertain as to ſome particulars only, and certain as to the reſt, it is void only as to thoſe which are uncertainly expreſſed, and good as to the reſidue *ibid.*
158 Whether an indictment of larceny be good without expreſſing to whom the property belonged, if it be for a living thing, &c. 333
159 It ſeems queſtionable, whether the price of the goods be otherwiſe neceſſary in an indictment of treſpaſs than to aggravate the fine; or in an indictment of larceny, other than to ſhew the offence amounted to grand larceny 334
160 The value now made neceſſary by ſeveral acts of parliament ouſting the offender of clergy, if above a certain value (N) 13
161 HOW AN INDICTMENT MUST STATE TIME AND PLACE 334
162 It is not neceſſary to mention the hour in an indictment 334 ſ. 76
163 But no indictment whatſoever can be good without preciſely ſhewing a certain year and day of the material facts alledged in it 334 ſ. 77
164 The ſheriff's return of a reſcous is bad without ſhewing the year and day, both of the arreſt and reſcous, becauſe it is in lieu of an indictment *ibid.*
165 An indictment which lays the offence on an uncertain or impoſſible day, is void; as where it lays it on a future day; or lays one and the ſame offence on different days; or lays it on ſuch a day that makes the indictment repugnant 335
166 No defect of this kind can be helped by verdict *ibid.*
167 An indictment of death laying the aſſault at a certain time and place, is not ſufficient without repeating the time and place in the clauſe of the ſtroke *ibid.*
168 An indictment of death ought as well to ſet forth the year and day of the death as of the ſtroke, &c. *ibid.*

169 The words *adtunc et ibidem* in the ſubſequent clauſes of an indictment are of the ſame effect as if the year and day mentioned in the former part had been expreſsly repealed *Page* 335 ſ. 78
170 An indictment laying the offence on the Thurſday after the day of Pentecoſt or Utas of Eaſter in ſuch a year, is good: the reaſon of it *ibid.*
171 Where an indictment charges a man with a bare omiſſion, as the not ſecuring ſuch a ditch, no time need be ſhewn 335 ſ. 79
172 The year of the king may be diſpenſed with if the very year be otherwiſe ſufficiently ſhewn 335 ſ. 80
173 A miſtake in not laying an offence on the very ſame day on which it is afterwards proved upon the trial, is not material upon evidence 335 ſ. 81
174 If an indictment charge a man with having done ſuch a nuſance on ſuch a day and year, &c. and on divers other days, it is void only as to the fact on thoſe days which are uncertainly alledged 336
175 An indictment charging a man *generally* with ſeveral offences at ſeveral times, without laying any one of them on a certain day, is void *ibid.*
176 The particular reaſon of this rule in extortion (N) 14
177 A conviction of deer-ſtealing, ſetting forth the offence between 8 and 12 July, &c. is ſufficient *ibid.*
178 HOW THE INDICTMENT MUST SHEW THE PLACE 336 ſ. 83
179 No indictment can be good without expreſsly ſhewing ſome place wherein the offence was committed, which muſt appear to be within the juriſdiction of the court, and be free from all repugnance *ibid.*
180 Inſtances of repugnance in alledging the place *ibid.*
181 There is no need, in an indictment on a ſtatute ſetting forth the deſcription which brings the defendant within the purview of it, to ſet forth any place where thoſe things happened 336, 337
182 Where a ſtatute makes it high treaſon for a perſon born within the realm, and in popiſh orders, to come into or remain in the kingdom, there is no need to ſhew in the indictment where he was born *Page* 337
183 A miſtake of the place in which the offence is laid will not be material upon not guilty, if the fact be proved at ſome other place in the ſame county *ibid.*
184 But if there be no ſuch place within the county as that laid in the indictment, all proceſs on ſuch an indictment is made void by ſtatute *ibid.*
185 WHERE AN INDICTMENT IS VITIATED BY FALSE WORDS 338 ſ. 86
186 An indictment ſhall not be quaſhed for any falſe concord between the *ſubſtantive* and the *adjective* *ibid.*
187 An indictment againſt two or more, laying the fact charged againſt them in the ſingular number, is inſufficient: the *probable* reaſon of it *ibid.*
188 Such a defect cannot be amended *ibid.*
189 Where an indictment lays the fact in the plural number againſt two, and it is found *billa vera* as to one only, it is good 339
190 The word *ſolvet* inſtead of *ſolvat* is not fatal *ibid.*
191 Formerly an indictment, wholly in Engliſh, was void by 36 Edw. 3. c. 15. But by 4 Geo. 2. c. 26 & 6 Geo. 2. c. 14. all proceedings ſhall now be in Engliſh, &c. except terms of art, &c. 339, 341
192 Inſtances where a word which is not *Latin* would have vitiated an indictment 339 ſ. 87
193 Nothing that can be rejected as ſurplus and immaterial ſhall vitiate an indictment 340
194 *Receivd* inſtead of *received* has been adjudged immaterial 340 (N)
195 *Undertood*, inſtead of *underſtood* has been adjudged immaterial *ibid.*
196 Where a whole word was omitted in reciting an indictment, the omiſſion was held not material *ibid.*
197 The rule is, *where the omiſſion or addition of a letter does not change the word ſo as to make it another word*, the variance is not material *ibid.*

198 But

198 But if the miſrecited word is in itſelf *a word*, though not intelligible with the context, as "air" for "heir," there the variance is fatal *Page* 340 (N)
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202 Inſtances in which indictments may be joint or ſeveral *ibid.*
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205 Keeping a bawdy-houſe, unlawful hunting deer, maintenance, or extortion, may be laid either jointly and ſeverally, or jointly only *ibid.*
206 Following a joint trade againſt 5 Eliz. or for not repairing a ſtreet, muſt be ſeveral *ibid.*
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220 No criminal proſecution is within the benefit of any of the ſtatutes of amendment; and therefore all amendment which can be made muſt be by the common law *ibid.*
221 Generally, an indictment removed from an inferior court can in no caſe be amended 347 ſ. 97
222 But the body of an indictment removed from London may be amended, becauſe the tenor only is removed *ibid.*
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228 But a mere miſpriſion in joining iſſue in a criminal proſecution may be amended at any time *ibid.*
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257 But a *conviction* on a penal ſtatute ought expreſsly to ſhew that the defendant is not within any of its *proviſoes:* the reaſon of this rule *ibid.*
258 If a ſtatute whereon an indictment is grounded be particularly recited, the general concluſion *contra formam ſtatuti*, after the allegation of the fact, will ſupply an omiſſion in it of a circumſtance mentioned in the ſtatute, which would be fatal without ſuch recital and concluſion 356
259 But the want of a certain deſcription of time or place, or things or perſons concerned, or of the concluſion *contra pacem*, or an expreſs and direct allegation of the fact itſelf, cannot be ſupplied *ibid.*
260 An indictment grounded on a ſtatute which will not maintain it, may be made good as an indictment at common law 356 ſ. 115
261 How far it is neceſſary for an indictment on a ſtatute to conclude *contra formam ſtatuti* 356 to 358
262 What ought to be the form of the caption of an indictment (*Vide Caption*) 358 to 363
263 Upon what *proof*, and within what time after the offence, an indictment may be found (*Vide Evidence*) 363
264 IN WHAT CASES AN INDICTMENT MAY BE QUASHED 367 ſ. 146
265 The court, in diſcretion, may quaſh any indictment, the judgment upon which would be erroneous *ibid.*
266 Judges are in no caſe bound *ex debito juſtitiæ* to quaſh an indictment, but may oblige the party to *demur* *Page* 367 ſ. 146
267 In heinous offences, the court will not quaſh the indictment; neither will they if the recognizance or *certiorari*, is forfeited *ibid.*
268 The difference between quaſhing and arreſting the judgment (N) 25
269 On the part of a proſecutor even, the court will ſee that no miſchief enſues; and will impoſe terms before they quaſh an indictment *ibid.*
270 Where the objection to the indictment is, that the court before whom it was taken had not juriſdiction, the court will not put the party to a demurrer, but will quaſh *ibid.*
271 By 7 Will. 3. c. 23. no indictment for high treaſon, &c. &c. ſhall be quaſhed on motion of the priſoner, before evidence given thereon in open court, &c. &c. 367, 368
272 And no exception can be taken on this act after plea pleaded 368 ſ. 148
273 *Quere*, Whether the court will quaſh *an information* 368 ſ. 149
274 What may be pleaded to an indictment, and in what manner 368 ſ. 150
275 The defendant may plead any plea *in abatement* to a felony, and alſo plead over *in bar*, and alſo take the *general iſſue* *ibid.*
276 Whether it is a good plea to an indictment that another is depending ch. 34 ſ. 1
277 What is the proper proceſs on an information (*Vide Proceſs*) ch. 27

INFAMY.

1 Where it diſables a man to be a witneſs or juror (*Vide Evidence. Jurors*) 587 ſ. 25
2 How far infamy is cleared by pardon (*Vide Pardon*) 558

INFANT.—*Vide Appeal* No. 51 *to* 54. 99. 261. *Approver* No. 6. 8. *Battle. Challenge. Evidence. Arreſt.*

INFIDEL.—*Vide Evidence.*

INFORMATION.

1 Informations are of two kinds, *viz.* at the ſuit of the king and QUI TAM *Page* 368 ch. 26

2 IN WHAT CASES AN INFORMATION AT THE SUIT OF THE KING WILL LIE 369 ſ. 1

3 Informations will lie for offences *of a public nature*, done either to the king himſelf, or to a ſubject. Inſtances enumerated *ibid.*

4 Information will lie for offences againſt ſtatutes, unleſs expreſsly or impliedly excluded 369 ſ. 2

5 No information will lie for any capital crime, or for miſpriſion of treaſon 369 ſ. 3

6 WHAT OUGHT TO BE THE FORM OF SUCH INFORMATION 369 ſ. 4

7 Information is in every reſpect like indictment, only that indictment is found by the oaths of 12 men, and information is only the allegation of the officer who exhibits it 370

8 Whatſoever certainty is requiſite in an indictment, the ſame is alſo neceſſary in an information; the material parts of the crime muſt be preciſely found in the one, and alledged in the other, and not by way of argument or recital *ibid.*

9 Exception as to an information for perjury *ibid.*

10 By 4 & 5 Will. & Mary, c. 18. the maſter of the crown office ſhall not, without the expreſs order of the court, file any information, nor iſſue proceſs thereon, until he has taken a recognizance from the proſecutor in 20l. to proceed with effect, &c. 370, 371

11 The recognizance ſhall be filed in the crown-office for the purpoſe of public inſpection 371

12 If the defendant to ſuch information plead to iſſue, and the proſecutor ſhall not procure a trial at his own coſts within a year after iſſue joined; or if verdict be given for the defendant; or a *nolli proſequi* be entered, the king's bench ſhall award the defendant his coſts, unleſs the judge, at the trial, in open court, certify on the record that there was reaſonable cauſe to bring the information *Page* 371

13 If the informer ſhall not, within three months after taxation and demand, pay the coſts, the defendant ſhall have the benefit of his recognizance to compel him *ibid.*

14 But nothing in this act ſhall extend to any other informations than thoſe filed by the *maſter of the crown office*: therefore informations by the *attorney-general* remain as at common law 371 ſ. 6

15 This ſtatute extends to informations in the nature of *quo warranto* 372

16 The form of granting informations 372 ſ. 8

17 A variety of inſtances enumerated in which the king's bench have granted and refuſed informations 372, 373 (N)

18 Cauſes for which the court will refuſe an information *quo warranto* (*Vide infra*) 373 ſ. 9

19 The party may move the court to ſet aſide proceſs iſſued againſt him, previous to a recognizance having been given by the informer 374 ſ. 10

20 WHERE THE DEFENDANTS SHALL HAVE COSTS 374 ſ. 11

21 If the information be tried at bar, the defendant can have no coſts within this ſtatute 374 ſ. 11

22 Of ſeveral defendants, if ſome be found guilty, thoſe who are acquitted cannot have coſts within this ſtatute 374 ſ. 12

23 The king's bench is bound of right, in every caſe within the ſtatute (*vide ſupra* No. 12.) to award the defendant his coſts, whether the acquittal be upon the merits, or only upon a ſlip of form, and howſoever notorious the offence may be 375

OF INFORMATIONS QUO WARRANTO.

24 By 9 Ann. c. 20. the proper officer of the king's bench, the ſeſſions of counties palatine, and the grand ſeſſions of Wales, may with leave of the ſaid courts file one or more informations, in the nature of *quo warranto*, at

at the relation of any perſon, againſt thoſe who ſhall uſurp or intrude into any corporate franchiſe *Page* 375 ſ. 14

25 The perſon deſiring to inform ſhall be named to be the relator in the information, &c. *ibid.*

26 If it ſhall appear to the ſaid courts that the ſeveral rights of divers perſons may properly be determined by one information, one information may be granted againſt them *ibid.*

27 The defendant ſhall appear and plead the ſame term in which the information is filed, unleſs further time is allowed by the court *ibid.*

28 The proſecutor of ſuch information *quo warranto* ſhall proceed with as much convenient ſpeed as may be 375, 376

29 If the defendants on any ſuch information ſhall be found guilty, the court may give judgment of *ouſter*, and fine for the uſurpation, and alſo that the relator ſhall recover his coſts 376

30 And if a verdict ſhall be given *for the defendant* by the court, he ſhall recover his coſts of the proſecution againſt the relator by *ca. ja.* : *fi. fa.* or *elegit* *ibid.*

31 The ſtatute for the amendment of the law, and all the ſtatutes of *jeofails*, ſhall extend to informations in the nature of a *quo warranto* 376 ſ. 16

32 An information will not lie upon this ſtatute againſt a corporation as a body, but only againſt individuals uſurping corporate franchiſes 375 *N. in margin*

33 An information againſt a corporation as a body muſt be by the attorney-general *ibid.*

34 *Quere*, whether the king's bench can grant an information *quo warranto* at the relation of a private perſon, for uſurping a market on the crown *ibid.*

35 After the rules are made abſolute againſt divers defendants, the court may direct that there ſhall be only one information againſt all *ibid.*

36 If the defendant againſt whom a rule for an information is granted can ſhew to the court, that the queſtion has been already determined on *mandamus*, the court will refuſe the information *Page* 373 ſ. 9

37 So alſo the court will refuſe the information, if the franchiſe appear to have been acquieſced in without diſpute; or that it depended on the right of thoſe who voted for the defendant; or that it no way concerns the public; or that the election by which he claims is agreeable to charter; or that he has never acted under it *ibid.*

38 Three years and half acquieſcence is no bar to an information *quo warranto* *N. in marg.*

39 If the law is unſettled upon the point in diſpute, the court will grant information *ibid.*

40 It is ſettled, that after twenty years unimpeached poſſeſſion of a corporate franchiſe, no rule ought to be granted to ſhew by what right the poſſeſſor holds it 373 (N) ;

41 Within twenty years, the granting an information will depend on the particular circumſtances of each caſe *ibid.*

42 A great length of quiet enjoyment, though ſomewhat ſhort of twenty years, ought to weigh with the diſcretion of the court *ibid.*

43 Ten years quiet poſſeſſion of a corporate franchiſe is not a ſufficient enjoyment to prevent an information *ibid.*

44 No rule has been laid down reſpecting informations *quo warranto*, where the enjoyment has been leſs than twenty years *ibid.*

45 The king's bench has refuſed an information *quo warranto*, after a quiet poſſeſſion of the franchiſe for fourteen years 374

46 It is not ſettled how far a derivative title to a corporate franchiſe may be impeached by information *quo warranto*, when the original poſſeſſor died of it undiſputed 374 (N) 4

47 *Quere*, if the rights of ELECTORS, poſſeſſed *de facto* of the franchiſe, can be impeached in *quo warranto* againſt the elected *ibid.*

48 An information *quo warranto* has been granted,

granted, because the question of *non residence* had never been tried *Page* 374 (N) 4

49 The court will refuse an information *quo warranto*, where it is in the power of the corporation to remove the officer who is charged with usurping the office 374 (N) 5

50 In what manner justices of the peace are to take the information of those who bring felons before them 184

51 Whether an information can be quashed c. 25 s. 145

INFORMATION QUI TAM.

1 IN WHAT CASES IT WILL LIE 377

2 It will not lie on any penal statute, unless the whole or part of the penalty be expressly given to him who will sue for it 377 s. 17

3 Where a penalty is given to an informer, any one may sue for it, and lay his damage *tam pro domino rege quam pro seipso* 377 s. 17

4 Where a statute prohibits or commands a thing, the doing or omission whereof is an immediate damage to the party, and concerns the public, the party grieved may sue *tam pro domino*, &c. *ibid.*

5 Wherever the king is to have a fine on an action on a statute, there are contrary opinions whether the action may be brought *tam pro domino*, &c. *ibid.*

6 What ought to be the form of an information or action *qui tam* 378 s. 18

7 There is no need to conclude *contra pacem* *ibid.*

8 *Quere*, if it be necessary to conclude in *contemptum regis* *ibid.*

9 They need not recite the statute whereon they are grounded *ibid.*

10 What misrecitals of such statute will be fatal *(Vide Indictment, No.* 234) 349. 378

11 How far it is necessary to bring the case within the very words of the statute *(Vide Indictment, No.* 251) 354. 378

12 How far it is necessary to conclude *contra formam statuti* 356 to 358

13 In what cases one may have judgment on a statute, in an action brought at common law *Page* 356

14 If an information contain several offences against a statute, and be well laid as to some only, the informer may have judgment for so much as is well laid; instances given 378 s. 19

15 If the whole time that the defendant hath offended be expressed inconsistently, the whole is repugnant and void 379

16 An informer on a *qui tam* statute may have a writ against the defendant, either *quas eis debit*, &c. or *quas ei debet*, which is good, in the declaration, in the name of the plaintiff only 379 s. 20

17 *Quere*, if the writ or count need express that *the action* was brought for the king as well as the party *ibid.*

18 But every information must be in this form, that the informer *tam pro domino rege quam pro seipso sequitur*, even where the statute gives one third of the penalty to a third person *ibid.*

19 How the form of the information shall be in such case *ibid.*

20 It is safest for every information or action *qui tam* to demand the very sum due to the informer, and neither more nor less 379 s. 21

21 If an action on a statute demand the whole forfeiture for the informer, where the statute gives part of it to the king, it is insufficient—*Sed quere*, if it is not good for the part due to the king 380

22 *Quere*, if where the *quantum* of forfeiture depends on the finding of the jury, *a blank* may be left for the sum *ibid.*

23 A popular action may conclude *ad grave damnum*, without adding of the plaintiff *ibid.*

24 By 18 Eliz. c. 5. "no person shall be sued upon a penal statute, but by way of information or original action"—if such statute inflict a penalty *generally* 380 s. 22

25 But former statutes, which expressly give a recovery by bill, plaint, &c. are not within the exception of this act; the reason of it *ibid.*

26 No ſuit by bill or plaint, by a party grieved, ſuing upon a clauſe impliedly relating to himſelf only, is within the 18 Eliz. c. 5. *Page* 381

27 But where the party particularly grieved ſues for a forfeiture generally limited to any who will ſue for it, he is as much within the reſtraint of the ſtatute, as if he were not the party grieved *ibid.*

28 In an action on a ſtatute againſt an officer for not qualifying, it is ſafeſt to ſhew when the defendant was admitted to his office; that he neglected to qualify in time; and that he exerciſed the office after the neglect 381 ſ. 23

29 The fact is ſufficiently alledged after a *quod cum* in a *qui tam* action, but not in an information 381 ſ. 25

30 Where a ſtatute appoints that a penalty ſhall be recovered in any of the king's courts of record, the offence may be indicted before juſtices of *oyer* and *terminer* 381 ſ. 25

31 Where a ſtatute limits ſuits by an informer *qui tam* to other courts, yet any one may, by conſtruction of law, exhibit an information in the exchequer for the whole penalty, for the uſe of the king *ibid.*

32 IN WHAT COUNTY A QUI TAM ACTION OR INFORMATION MAY BE BROUGHT 381 ſ. 26

33 By 31 Eliz. c. 5. the ſuits by common informers on any penal ſtatute ſhall lay the offence in any other county but where the matter alledged was in truth done, which fact may be traverſed by the defendant 381, 382

34 Suits for champerty, buying of titles, extortion, the king's cuſtoms, &c. or uſury, or foreſtalling, &c. are excepted from the reſtraints of the act *ibid.*

35 All ſuits for unlawful games, for not having bows and arrows, for uſing a trade contrary to 5 Eliz. ſhall be ſued in the general quarter ſeſſions or aſſizes of the ſame county where the offence ſhall be committed, &c. &c. 382 ſ. 27

36 The defendant can only take advantage of the offence being laid in a wrong county (*Vide ſupra, No.* 32.) by way of plea *Page* 382 ſ. 28

37 The ſaid clauſe extends not to any ſuit by a party grieved, or by the attorney-general 382 ſ. 29

38 The clauſe (*Vide ſupra, No.* 34) reſtrains not an information in the king's bench or exchequer, for an offence happening in the ſame county where thoſe courts are ſitting, for the prerogative of theſe courts ſhall not be reſtrained without expreſs words 382 ſ. 30

39 By 21 Jac. 1. c. 4. ſuits for offences againſt any penal ſtatute by a common informer, ſhall be commenced by action, bill, plaint, information, or indictment, before juſtices of *aſſize, niſi prius, oyer and terminer*, and *gaol-delivery*, or before *juſtices of the peace*, in every county of England and Wales wherein the offences ſhall be committed, only at the choice of the parties who ſhall commence the ſuit, &c. 383 ſ. 31

40 The ſame proceſs ſhall be awarded in every popular action commenced according to this act, as in an action of treſpaſs *vi et armis* at common law *ibid.*

41 And all other informations, &c. either by the attorney-general or any officer, or by a common informer or other perſon, ſhall be void *ibid.*

42 If on the general iſſue the offence be not proved in the ſame county, the defendant ſhall not be found guilty 383 ſ. 33

43 No information ſhall be filed until the relater hath made oath that the offence was not committed in any other county 383, 384

44 No information, *qui tam*, &c. can be brought in Weſtminſter hall on any penal ſtatute made before 21 Jac. 1. for which the offender may be proſecuted in the country, unleſs committed in the county where the court ſhall ſit 384 ſ. 34

45 Where a ſubſequent ſtatute gives a remedy in any court of record generally, the informer may ſue in Weſtminſter-hall

hall notwithſtanding 21 Jac. 1. *Page* 384 ſ. 35

46 The 21 Jac. gives no juriſdiction to the courts therein mentioned over any other offences, where they had none before 384 ſ. 36

47 The 21 Jac. 1. does not hinder the removal of any indictment into the king's bench by *certiorari*, after which it may be either tried there or at *niſi prius* 384 ſ. 37

48 A writ of error alſo lies from the king's bench to the exchequer chamber in a *qui tam* action of debt 385 (N) *in marg.*

49 The want of the informer's oath (*Vide ſupra*, No. 42.) will not make the proceedings *erroneous*; but the court may be moved to ſet the proceſs aſide 385 ſ. 38

50 No ſuit *by a party grieved* is within the reſtraint of the 21 Jac. 1. c. 4. (*Vide ſupra*, No. 38.) 385 ſ. 39

51 WITHIN WHAT TIME SUCH INFORMATION, &c. MUST BE BROUGHT 385 ſ. 40

52 By 31 Eliz. c. 5. all informations, &c. &c. upon any penal ſtatute, where the forfeiture is limited to the queen only, ſhall be brought within two years after the offence is committed 385 ſ. 41

53 And all informations, &c. upon any penal ſtatute where the forfeiture is limited to the queen, and to any other that ſhall proſecute, ſhall be brought by *ſuch proſecutor* within one year, and in default thereof the queen may proſecute any time within two years after that year ended *ibid.*

54 By 18 Eliz. c. 5. upon exhibiting an information on a penal ſtatute, a ſpecial note of record ſhall be made of the very day, month, and year, or no proceſs ſhall be ſued on the ſame 356 ſ. 42

55 By 21 Jac. 1. c. 5. *no ſuit* ſhall be filed upon any penal ſtatute, within the proviſions of this act, until the informer hath made oath that the offence was committed within the county within one year preceding 356 ſ. 43

56 If an offence prohibited by any penal ſtatute be alſo an offence at common law, the proſecution of it at common law is no way reſtrained by theſe ſtatutes *Page* 356 ſ. 44

57 If a ſuit on a penal ſtatute be brought after the time limited, the defendant need not plead the ſtatute, but may take advantage of it in the general iſſue 356 ſ. 45

58 If an information *qui tam* be brought after the year, it is bad only as to the informer, but good as to the king 386 ſ. 46

59 The party grieved is not within the reſtraint of the above ſtatutes (*Vide ſupra, No.* 51. *to* 55.), but may ſue in the ſame manner as before 386 ſ. 47

60 Suing out a *latitat* within the year is a ſufficient commencement of the ſuit to avoid the limitation of theſe ſtatutes 387 (N) 14

61 But if the writ be not ſued out till after the year, though *by relation it would be within the time*, the plaintiff ought to be nonſuited *ibid.*

62 The real day of ſuing out the writ may be ſhewn in the pleadings *ibid.*

63 *Quere*, if a ſuit by a *common informer* on a penal ſtatute which firſt gives an action to the party grieved, and, in his default, after a certain time to any one who will ſue, be within the reſtraint of theſe ſtatutes 387 ſ. 49

64 And *quere*, whether the exception of certain offences out of the 31 Eliz. c. 5. (*Vide ſupra, No.* 32, 33.) do except the ſaid offences 387 ſ. 50

65 By 31 Eliz. c. 5. none but the party grieved ſhall inform, &c. upon a penal ſtatute, if he hath been ordered by any of the queen's courts not to ſue, &c. 388 ſ. 51

66 A corporation cannot ſue as a common informer 387 ſ. 51 *N. in marg.*

67 The king cannot be nonſuit in any information or action wherein he himſelf is the ſole plaintiff 387 ſ. 52

68 Yet an informer *qui tam*, or plaintiff in a popular action, may be nonſuit, and thereby determine the ſuit, as well for the king as for himſelf *ibid.*

69 The attorney-general may enter a *noli proſequi*

proſequi to any information by the king only *Page* 387 ſ. 52
70 Whether the informer or defendant may appear by attorney 387 ſ. 53
71 By 18 Eliz. c. 5. every informer ſhall *exhibit his ſuit* in proper perſon, and *purſue the ſame* only by himſelf or his attorney 388 ſ. 54
72 By 29 Eliz. c. 5. the defendant to a penal ſuit, if bailable by law, or by leave of the court, may appear by attorney at the day and time contained in the firſt proceſs, and ſhall not be urged to perſonal appearance, or to put in bail to ſuch ſuits 388 ſ. 55
73 By 31 Eliz. c. 10. this ſhall extend only to ſubjects natural born, and to denizens 388 ſ. 56
74 OF COSTS ON AN INFORMATION, &c. 389
75 An informer upon a popular ſtatute can in no caſe have coſts, unleſs they are expreſsly given him by ſuch ſtatute; the reaſon of this rule 389 ſ. 57
76 But an action on a ſtatute, by the party grieved for a certain penalty given by a popular ſtatute, is within the ſtatute of Glouceſter, which gives the demandant his coſts in all caſes where he ſhall recover his damages; and ſuch penalty is in lieu of damage *ibid.*
77 No coſts ſhall be recovered in an action on a ſtatute creating a new offence, which gives no certain penalty to the party grieved, but only his damages in general, &c. *ibid.*
78 But the jury in this caſe may give the party a full ſatisfaction by way of damages *ibid.*
79 By 18 Eliz. c. 5. if an informer on a penal ſtatute ſhall delay his ſuit, or diſcontinue or be nonſuit, or have judgment againſt him, he ſhall pay the defendant his coſts, charges, and damages, &c. 389, 390
80 No *action* on any ſtatute by the party grieved is within the purview of this ſtatute; it relates to common informers only 390 ſ. 59
81 But by 23 Hen. 8. c. 15. and 4 Jac. 1. c. 3. if the action be for ſome perſonal injury, or if the plaintiff is intitled to coſts, he ſhall pay them, on a verdict or nonſuit, to the defendant *Page* 390 ſ. 59
82 If judgment be given againſt an informer becauſe the court had no juriſdiction, or becauſe the ſtatute on which he ſues is diſcontinued, yet he ſhall pay coſts within the 18 Eliz. c. 5. *ibid.*
83 In an action *qui tam* on 5 Eliz. c. 4. the plaintiff ſhall pay coſts 389 (N) 17
84 *Quere*, if an informer ſhall be obliged to give ſecurity for coſts on account of his poverty *ibid.*
85 An informer who is gone abroad, and alſo a foreign informer, ſhall be obliged to give ſecurity for coſts *ibid.*
86 If a proſecution is brought in a feigned name, the court will oblige the real proſecutor to give ſecurity *ibid.*
87 The defendant, on motion, may pay the coſts and the penalty into court *ibid.*
88 The 18 Eliz. c. 5 (*Vide ſupra, No.* 79.) extends to *qui tam* informers, as well as to thoſe who ſue for the whole penalty 389 ſ. 58 *N. in marg.*
89 If a proſecutor does not go on to trial, he ſhall pay coſts 390 (N) 18
90 If a *qui tam* informer in debt, on 21 Hen. 8. c. 13. is nonſuited, the defendant is intitled to coſts *ibid.*
91 The court will not ſtay proceedings in a *qui tam* action, till coſts in a *non pros* in a former action, by a different plaintiff againſt the ſame defendant, be paid *ibid.*
92 If a proſecutor *qui tam* for killing game does not reply, the defendant ſhall have coſts *ibid.*
93 Whether a defendant in ſuch an information may wage his law 370 ſ. 61
94 OF PLEADING TO AN INFORMATION QUI TAM 371 ſ. 62
95 The defendant muſt anſwer the whole time laid; if he have any ſpecial matter in juſtification, it muſt be alledged with certainty; but if he plead the general iſſue, he cannot alſo plead a ſpecial plea 391 ſ. 62
96 A penal ſuit actually depending, may be

be pleaded in abatement to a ſubſequent proſecution, it being averred to be for the ſame offence *Page* 391 ſ. 63

97 It is no objection to ſuch a plea, that the offence in the ſubſequent ſuit is laid on a different day *ibid.*

98 A miſtake of the day is not material on *nul tiel record*, if the prior ſuit appear to have been really firſt commenced *ibid.*

99 Two informations exhibited on the ſame day may mutually abate each other; for there is no priority *ibid.*

100 The king may totally bar a ſuit on a penal ſtatute, by a pardon or releaſe before its commencement; but if the informer actually commence before the king, he hath ſuch an intereſt in his part of the penalty, that the king can no way diſcharge it 392

101 The king can in no caſe bar the ſuit of the party grieved, nor proceed in it after the death of the plaintiff *ibid.*

102 A conviction or acquittal, or releaſe *bona fide*, whether by a party grieved or a common informer, is a good bar to any ſubſequent proſecution for the ſame offence *ibid.*

103 By 4 Hen. 7. c. 20. if any defendant ſhall be found pleading any recovery, &c. or bar to a popular action, &c. which in fact has been obtained by fraud or covin, the plaintiff, if he ſue with good faith, ſhall recover, and the defendant ſhall ſuffer two years impriſonment *ibid*

104 Upon this ſtatute the plaintiff may *aver* covin generally, without ſhewing wherein the covin conſiſted 393 ſ. 65

105 But the plea muſt ſtate, that the plaintiff in the other action had priority of ſuit, or on demurrer it will be bad 393 (N) 21

106 The record of the former recovery cannot be given in evidence on *nil debet*; it muſt be pleaded ſpecially; and then the plaintiff may reply *nul tiel record*, or that it was a recovery by *covin* to defeat a real proſecutor, which the plaintiff could not be prepared to ſhew on the general iſſue *ibid.*

107 OF THE GENERAL ISSUE 393 ſ. 66

108 If the defendant plead *nil debet*, it is ſafeſt to ſay, that he owes nothing to the informer nor to the king; the reaſon of this caution *Page* 393 ſ. 65

109 Several defendants cannot plead jointly *guilty*, but they ſhould plead ſeverally, that neither they nor any of them are guilty 393 ſ. 67

110 If the offence be alledged from matter in *pais*, the defendant may plead that he owes nothing, or that he is not guilty; but if it be alledged from matter of record, ſuch a plea is not good 393 ſ. 68

111 If the defendant be within the *proviſo* of the ſtatute, he may give it in evidence on the general iſſue; but if he have matter in diſcharge depending on a ſubſequent ſtatute, he muſt plead it ſpecially. 393, 394

112 But by 21 Jac. 1. c. 4. defendants to any ſuit for any offence againſt any penal law, may plead the general iſſue, and give the ſpecial matter in evidence 394

113 And if the plaintiff ſhall not prove the offence to have been committed in the county in which it is laid, the defendant ſhall be found not guilty 394 ſ. 70

114 Whether the laſt words of the *proviſo* of this act do not reſtrain the exception reſpecting recuſancy, champerty, &c. to that part of the ſtatute which relates to laying the offence in a proper county 394 ſ. 71

115 OF THE REPLICATION 394 ſ. 72

116 A replication to a ſpecial plea to an information in the courts at Weſtminſter, ſhall be made by the attorney-general only *ibid.*

117 Such a replication in a ſuit before juſtices of aſſize, ſhall be made by the clerk of the aſſizes only *ibid.*

118 A replication to a general iſſue in an information *qui tam* in the king's bench or exchequer, may be made in the name of the attorney-general only 394, 395

119 In actions *qui tam*, the replication is to be made by the plaintiff only 395

120 A demurrer may be made by an informer

former *qui tam*, without mentioning the attorney-general *Page* 395
121 If the attorney-general refuſe to reply, the informer may make the replication himſelf *ibid.*
122 The time which is allowed for pleading *N. in marg.*
123 OF JOINING ISSUE AND TRIAL 395 ſ. 73
124 Where the king is to have no part of the thing demanded, but only a fine or amercement, there is no neceſſity either in the iſſue or *venire facias*, to uſe the words *qui tam*, *pro domino*, &c. but the party may be ſimply named, as in actions at common law; but it is no fault to uſe them 395 ſ. 73
125 If the king be to have part of the penalty, it is fatal, and not amendable, after verdict, not to mention that the plaintiff ſues *tam pro domino*, &c. in the joining of the iſſue, *ſed quere*, *ibid.*
126 By 18 Eliz. c. 5. no jury ſhall be compelled to appear at *Weſtminſter* to try any iſſue by a common informer on a penal ſtatute committed thirty miles from *Weſtminſter*, except the attorney-general require it to be tried at bar, which requeſt ſhall be on the back of the *diſtringas* 395, 396
127 By 24 Geo. 2. c. 18. every *venire facias* upon a penal ſtatute, in Weſtminſter, Lancaſter, Cheſter, Durham, and Wales, ſhall be awarded of the body of the proper county where ſuch iſſue is triable 396
128 OF THE VERDICT IN QUI TAM 396 ſ. 75
129 If any offence againſt a penal ſtatute be in its nature ſingle, and ſeveral perſons be jointly charged, yet one of them only may be found guilty, and the reſt acquitted *ibid.*
130 So alſo, if a perſon be charged on a penal ſtatute for offending oftener, or in a higher degree than can be proved, yet he may be found guilty as far as the evidence goes *ibid.*
131 But if the offence conſiſt in making a contract contrary to the ſtatute, as uſury, and it be alledged to be made by two, it muſt be proved as laid; for if *contracts be not proved as laid, they ſhall be taken not to be the ſame* *Page* 396 ſ. 75
132 Where an offence made penal by ſtatute is in its nature ſingle, one ſingle penalty only can be recovered, though ſeveral join in committing it; but if it be ſeveral, each defendant is liable for the penalty 396 (N) 24
133 OF JUDGMENT IN QUI TAM 396 ſ. 76
134 Where the ſtatute ordains that the penalty ſhall be forfeited, one third to the king, one third to the informer, and one third to the poor, &c. and that if the offender do not pay, he ſhall be committed, &c. the judgment may be general, that the king and the informer ſhall recover the whole, &c. 397
135 But if the judgment on ſuch a ſtatute give the whole to the king, it is erroneous *ibid.*
136 If the judgment be one moiety to the king, and the other to the informer, upon a ſtatute which gives the king the whole, it is erroneous only as to the latter part *ibid.*
137 If there be no clauſe at all concerning the forfeiture in *a conviction* on a penal ſtatute, but only a judgment *quod convictus eſt*, it is ſufficient, for the forfeiture is implied *ibid.*
138 Wherever the act expreſſes the amount of the penalty, or leaves it to the diſcretion of the magiſtrate, there muſt be a judgment of forfeiture as well as a conviction (N) 25
139 But where the act inflicts a penalty in a multiplied value, all the judgment the court can give is *quod convictus eſt*, and a new action muſt be brought on that judgment for the forfeiture *ibid.*
140 One who is convicted of a penalty on a penal ſtatute, cannot be apprehended on a Sunday for the forfeiture *ibid.*
141 OF COMPOUNDING PENALTIES 397 ſ. 77
142 By 18 Eliz. c. 5. no informer or plaintiff on a penal ſtatute ſhall compound with the defendant till after anſwer

ſwer made in and with the leave of the court *Page* 397, 398
143 This ſtatute extends only to ſuits by common informers, and not to thoſe by a party grieved 398 ſ. 78
144 But it extends to *qui tam* informers, as well as to thoſe who ſue for the whole penalty *N. in marg.*
145 It extends, as well to ſubſequent ſtatutes as to thoſe in being at the time it was made 398 ſ. 79
146 It extends to the compounding of ſuits in court which have no juriſdiction, as much as to thoſe which have *ibid.*
147 By 21 Jac. 1. c. 3. all grants and diſpenſations from the penalties of ſtatutes, &c. &c. are void *ibid.*
148 But this ſhall not prevent the courts from granting leave to compound for the forfeitures on penal ſtatutes, after plea pleaded 398, 399
149 The above act ſhall not extend to compoſitions for licences to keep taverns, &c. &c. 399
150 An indictment on a popular ſtatute cannot be compounded after conviction 397 ſ. 77. *N. in marg.*
151 What is the proper proceſs on an information *(Vide Proceſs)* ch. 27 ſ. 12 to 14
152 It is queſtioned whether there can be any proceſs againſt jurors by *proviſo* in *qui tam* informations 574 ſ. 10

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INQUEST *of* OFFICE.—*Vide Coroner. Mute. Indictment. Reſtitution.*

INQUISITION.—*Vide Coroner.*

An inquiſition is an accuſation, &c. found by jurors returned to inquire of the particular offence only which is indicted 299 c. 25

INSIDIATORES VIARUM.—*Vide Indictment, No.* 83. *Clergy, No.* 24.

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IRONS.

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1 A gaoler is no way puniſhable for keeping a debtor in irons 227 ſ. 32
2 A priſoner ought not to be brought to the bar in irons, unleſs there is danger of an eſcape 436, 437

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JUDGMENT.—*Abjuration,* No. 5.

1 In what caſes judgment may be ſaved by an award of tranſportation. *(Vide Tranſportation.)* 511 to 519
2 What judgment is good on an action or information *qui tam* 397
3 Judgment in high treaſon, not being for counterfeiting the coin and ſeal, &c. ſhall

ſhall not be arreſted for miſ-writing, miſ-ſpelling, or falſe or improper *Latin* *Page* 629

4 In the king's bench upon every conviction, whether by verdict or confeſſion, the party is to have four days to move in arreſt of judgment, if there be ſo many days remaining of the term, if not, then the longeſt time that can be had in the term 629

5 On a conviction of homicide *ſe defendendo* or *per infortunium*, no judgment at all is given *ibid.*

6 Hale refuſed to hear a motion in arreſt of judgment, of a ſcandalous conſpiracy *Notes in marg.*

7 The court has refuſed to give judgment on a miſdemeanor, becauſe there were not four days left of the term *Notes in marg.*

8 OF STATED JUDGMENTS. 629 ſ. 2

9 The law makes no diſtinction between a peer and a commoner; or between an ordinary caſe and one attended with extraordinary circumſtances *ibid.*

10 Judgment for HIGH TREASON not relating to the coin, is, that the priſoner ſhall be carried back to the place from whence he came, and from thence be drawn to the place of execution, and be there hanged by the neck, cut down alive, his entrails burnt before his face, his head cut off, and his body divided into four quarters to be diſpoſed of at the king's pleaſure 630 ſ. 3

11 In the time of Will. Rufus, judgment was given againſt two convicted of high treaſon, that one ſhould have his eyes put out, and the other *in crucem tollatur* *Note in marg.*

12 The different manner in which the judgment for high treaſon is differently expreſſed by different authors *Note in marg.*

13 The proper judgment at common law for high treaſon in counterfeiting, &c. is to be drawn to the place of execution, and there hanged by the neck till he be dead 630 ſ. 4

14 *Sed quere*, if the judgment for clipping and other offences againſt the coin, &c. is not to be drawn, hanged and quartered, as for other high treaſons *ibid.*

15 It ſeems ſettled, that the judgment for treaſon againſt the coin ſhall only be drawing and hanging without the quartering: the reaſon of it *Page* 630, 631

16 The judgment for PETIT TREASON is, that the priſoner ſhall be drawn to the place of execution, and there hanged by the neck till he be dead 631 ſ. 5

17 The judgment AGAINST A WOMAN IN ALL CASES OF TREASON is, that ſhe ſhall be drawn to the place of execution and there burnt 631 ſ. 6

18 The judgment againſt a MAN OR WOMAN for a CAPITAL FELONY, is to be hanged by the neck till dead; which is entered on the roll, *Suſ. per Coll.* 631 ſ. 7

19 For judgment in the caſe of MURDER, *vide Execution.*

20 The judgment of *pain fort et dure*, upon ſtanding mute 466 ſ. 16

21 Judgment in *præmunire* 631 ſ. 9

22 Judgment for MISPRISION OF TREASON, is impriſonment during life, forfeiture of all goods and the profit of lands during life 632 ſ. 10

23 The judgment againſt a man for drawing a ſword on a judge, or ſtriking in the ſuperior courts, is the ſame as miſpriſion, and that his right hand ſhall be cut off 632 ſ. 11

24 The judgment for ſtriking in the king's palace, reſcuing a priſoner from the ſuperior courts for perjury, or forgery of the ſtatute, and the villanous judgment in conſpiracy 632 ſ. 12

25 In what manner judgment for the defendant upon an acquittal by verdict, or upon a plea of pardon, is entered 633 ſ. 13

26 The judgments for crimes of an infamous nature, againſt the firſt principles of natural juſtice and common honeſty, are diſcretionary, and left in a great meaſure to the prudence of the court to inflict ſuch corporal puniſhment, and alſo ſuch fine and lien to the good behaviour as ſhall appear proportionate to the enormity of the offence 633

27 The judges upon a conviction of larceny, may in diſcretion award the offender

fender to the houſe of correction, or inflict fine and whipping *Page* 512, 513. 633

28 The court may aſſeſs *a fine*, but cannot award any *corporal puniſhment* unleſs the defendant be actually preſent in court 633 ſ. 17

29 Where there are ſeveral defendants, a joint award of one fine againſt them all is erroneous 633 ſ. 18

30 The diſtinction between *fine* and ranſom 633, 634

31 A fine is under the power of the court during the term in which it is ſet, not afterwards 634 ſ. 20

32 Judgment of outlawry. (*Vide Outlawry*) 634 ſ. 21, &c.

33 There never ſhall be two judgments for the ſame offence 633, 634

34 Whether judgment at common law can be given on an indictment concluding *contra formam ſtatuti* ch. 25 ſ. 115, 116

JURISDICTION.

Vide Juſtice of Peace. Court. King's Bench.

1 If a man have a houſe which ſtands upon the precincts of two leets, he ſhall do ſuit at that within the juriſdiction of which his bedchamber lies 91 ſ. 12

2 A court ſhall not be preſumed to have juriſdiction where it doth not appear 94 ſ. 21

3 In what caſes judges are puniſhable for exceeding their juriſdiction 225

4 Whether a ſuit *qui tam* in a court which has no juriſdiction, makes the informer liable to coſts 350 ſ. 60

5 The 18 Eliz. c. 5. for compounding penal ſuits extends to courts which have no juriſdiction, as much as if they had juriſdiction 398 ſ. 79

6 If death at ſea, within the admiral's juriſdiction, be effected by a cauſe within the juriſdiction of the common law; yet the offence ſhall be tried by the admiral. Coomb's Caſe.

JURORS.

1 If the king grant a ſpecial commiſſion for the trial of indictments in one county which have been found in another, yet the trial muſt be by jurors of the proper county *Page* 26

2 What is a proper place from whence a *viſne* may come (*Vide Appeal*, No. 187 to 201.) 265, 266

3 FROM WHAT COUNTY THE JURY ARE TO BE RETURNED 568 ch. 40

4 By the common law, they muſt in all caſes be returned from the ſame county wherein the fact was committed 568 ſ. 1

5 In murder where the wound is given in one county and the death ſhall happen in another, the jurors ſhall come from the county where the death ſhall happen 569

6 By 2 Geo. 2. c. 25. where the wound is abroad, &c. and the death in England, or *è converſo*, the jury may come from the county in which either the wound or the death ſhall happen *ibid.*

7 By 33 Hen. 8. c. 23. if treaſon, miſpriſion or murder, be examined by three of the privy council, and the party *vehemently* ſuſpected, the king may grant a ſpecial commiſſion to try the offenders by jurors from the county named in the commiſſion, notwithſtanding the fact was committed in a different county 569 ſ. 2

8 This ſtatute as far as it relates to treaſon done within the realm is repealed by 1 & 2 Phil. & Mary, c. 10. but as to murder and miſpriſion of treaſon, it ſeems ſtill in force 569 ſ. 3

9 For the trial of treaſons done out of the realm. (*Vide Indictment*, No. 58.) 317

10 The ſtatute 33 Hen. 8. c. 23. does not extend to an *acceſſary* in murder, examined before the council; for *murder* is one offence, and being *acceſſary* to it is another, and the ſtatute ſhall be ſtrictly taken 569 ſ. 4

11 If goods are ſtolen in one county and carried into another, or if a nuſance be done in one county which proves a nuſance in another, the jurors may come from either of the counties in which it is tried 569 ſ. 5

12 From what county the jurors ſhall come in bigamy. (*Indictment*, No. 48, 49) 570

13 For felonies in Wales the jurors may come from the next Engliſh county where it may be tried by 26 Hen. 8. c. 6. (*Indictment*, No. 51.) *Page* 570

14 For treaſon upon the ſea, or in a foreign county, or for felonies or piracies upon the ſea. (*Indictment*, No. 52 to 61) 570

15 From what county the jurors ſhall come for the trial of an acceſſary in one county, to a felony committed in another. (*Indictment*, No. 62) 570

16 From what county the jury ſhall be returned for the trial of A FOREIGN PLEA 570 ſ. 6

17 A foreign plea is a plea of iſſuable matter alledged in a different county from that wherein the party is indicted or appealed *ibid.*

18 By the common law ſuch pleas can only be tried by juries returned from the counties wherein they are alledged 570 ſ. 6

19 If iſſue be joined on ſuch matters before a court that has no juriſdiction out of the county where it ſits, the proceedings muſt be removed by *certiorari* into the king's bench, &c. *ibid.*

20 By 23 Hen. 8. c. 14. all foreign pleas triable by the county upon indictments for petit treaſon, murder, or felony, ſhall be tried by jurors from the county where the offender is arraigned, in whatever county the matter of the plea may be ſuppoſed 570 ſ. 7

21 This ſtatute extends neither to indictments of high treaſon, nor to appeals *ibid.* ſ. 8

22 PROCESS AGAINST JURORS 571 ch. 41

23 Juſtices of gaol-delivery may have a panel returned by the ſheriff, without any precept, by a bare award. The reaſon of it 571 ſ. 1

24 A jury may be ſo returned before juſtices of the peace at their ſeſſions; *quere*, whether this does not rather depend on practice than on principle *ibid.*

25 Juſtices of gaol-delivery cannot have a jury by force of a bare award, but they ought to make a particular precept to the ſheriff for that purpoſe under their ſeals 572

26 No jury can be returned into the king's bench from a foreign county without proper proceſs under the ſeal of the chief juſtice *Page* 572 ſ. 2

27 But *quere*, if the return for the trial of an indictment, &c. in the ſame county where the court ſits, may not be made by a bare *preceptum eſt*, &c. *ibid.*

28 Proceſs againſt jurors may be returnable immediately into the king's bench for trial, in the county where it ſits, &c. but for an indictment, &c. removed by *certiorari*, there muſt be fifteen days between the *teſte* and the return 572 ſ. 3

29 Juſtices in eyre or gaol-delivery may order a jury to be returned immediately for the trial of a priſoner arraigned before them 572 ſ. 4

30 Juſtices of *oyer and terminer* may award a *venire* returnable the ſame day on which the party is arraigned *ibid.*

31 *Quere*, if juſtices of the peace can do the like unleſs for felony or the priſoner conſent to be tried immediately *ibid.*

32 It is ſaid the ſeſſion of the peace may award proceſs on felony the next day after the indictment is traverſed. *Sed quere*, if the party being in gaol make no difference *ibid.* (N)

33 But it ſeems neceſſary by force of 4 & 5 Will. & Mary, c. 24. & 7 & 8 Will. 3. c. 32. that every *venire*, &c. ſhould have ſix days between its *teſte* and return 572 ſ. 5

34 A *venire* before juſtices of *oyer and terminer*, returnable at a day certain, is erroneous unleſs the ſeſſion be adjourned the ſame day 572, 573

35 A *venire* before juſtices of *oyer and terminer* may be made returnable at the next aſſizes 573

36 *Quere*, if a *venire* awarded by juſtices of *oyer*, &c. returnable at a certain day, need ſhew before what juſtices it is returnable 573 ſ. 7

37 Where ſeveral are arraigned on one indictment and ſeverally plead not guilty, it is in the election of the proſecutor, &c. either to take out joint or ſeveral *venires* 573 ſ. 8

38 In

38 In an appeal, if one plead not guilty, and the other plead a releaſe, there muſt be ſeveral *venires* *Page* 573

39 Where there are three defendants, the plaintiff may join two in one *venire*, and take out another againſt the third *ibid.* (N)

40 Where the ſame jury is returned on a joint proceſs againſt ſeveral, if a juror be challenged by any one defendant, he is by neceſſary conſequence drawn as to all the others 573 ſ. 9

41 But where one jury is jointly returned before juſtices of gaol-delivery, for the trial of ſeveral defendants, they may ſever the panel 573, 574

42 If an appellant take out a joint *venire* againſt all the appellees, he cannot afterwards take out ſeveral ones 574

43 If no judgment be given that the juror who is challenged ſhall be drawn, but only that he ſhall ſtand aſide for a time, he may try thoſe who do not actually challenge him 573 ſ. 9 (N)

44 Where proceſs may be taken out by the defendant in criminal caſes by *proviſo*; that is with a clauſe, that if two writs come to the ſheriff he ſhall execute one of them only 574

45 IN WHAT MANNER A TALES IS GRANTABLE 575 ſ. 11

46 In an appeal, if a full jury do not appear, or ſo many be challenged and drawn that ſufficient jurors do not remain, the appellant may pray a *tales* *ibid.*

47 If a full jury do not appear and the plaintiff pray a *diſtringas* without praying a *tales*, the court ought to grant it at the prayer of the defendant *ibid.* (N)

48 In capital caſes a *tales* may be granted for a larger *even and certain* number than the firſt proceſs; but in all other caſes the *tales* muſt be leſs 575 ſ. 12

49 A *tales de circumſtantibus*, may be of any uncertain number *ibid.* (N)

50 But every ſubſequent *tales*, in capital as well as other caſes, muſt be for a leſs number than the former, except the former *tales* were quaſhed 575 ſ. 13

51 The quaſhing *the array* of the principal panel doth not quaſh *the tales*, but the inqueſt ſhall be taken of thoſe returned on the *tales* if there be enow, and if not others ſhall be added by a new *tales* *Page* 575 ſ. 14

52 If all the perſons returned on a *habeas corpora* be challenged and drawn, there ſhall not be a *tales*, but a new *venire facias* ſhall be awarded *ibid.*

53 If the firſt *habeas corpora* be quaſhed, the *tales* is quaſhed with it, and the party muſt proceed as if the *venire* only had been returned 575, 576

54 A *tales* is not grantable upon the return of a *venire*, but only upon the return of a *habeas corpora* or *diſtringas* 576 ſ. 15

55 *The diſtringas* or *habeas corpora*, with a clauſe to add thoſe on the *venire* is the firſt proceſs againſt a *tales*, but it cannot be granted with a *niſi prius*, unleſs previouſly returned 576 ſ. 16

56 Whether a ſubſequent *tales* ſhall take notice of the jurors returned on a former *tales de circumſtantibus* 567 ſ. 17

57 The ſtatutes which authoriſe a *tales* extend to all capital caſes; but ſuch a *tales* cannot be prayed for the king without a warrant from the attorney-general, or order of the court 567 ſ. 18

58 *Tales* is not grantable by juſtices of *gaol-delivery*, and *quere* if by oyer and terminer; therefore ſuch courts order a *larger panel*, and not *a tales*. *Sed quere* 567, 568

59 If but one juror appears, and he is challenged, there may be twelve taleſmen ſworn to try the cauſe, *Note in marg.*

60 By 42 Edw. 3. c. 11. no inqueſt ſhall be by writ of *niſi prius*, before the names of jurors impanelled be returned into court 577 ſ. 20

61 This ſtatute extends as well to criminal as to civil caſes and to jurors on a *tales* as well as to thoſe on the principal panel 577 ſ. 21

62 But it is the practice of juſtices of *oyer and terminer* for treaſon, to proceed on the *venire* and not to award any *habeas corpora* 577 ſ. 22

63 By 7 & 8 Will. 3. c. 3. perſons indicted for high treaſon, &c. ſhall have a copy of the panel of the jurors two days before the trial 577 ſ. 23

64 By 7 Ann. c. 21. a liſt of the jury, mentioning

mentioning the name and place of abode, ſhall be delivered ten days before the trial in the preſence of two witneſſes *Page* 567, 568

65 The mode of complying with the directions of this act, is by motion to the king's bench for a rule upon the ſheriff to deliver to the proſecutor a liſt of the jurors he intends to return upon the panel 568 *Note in marg.*

66 A *tales de circumſtantibus* may be awarded upon a trial *de medietatem linguæ* 592

67 BEFORE WHAT COURT THE JURY IS TO BE RETURNED 578 ch. 42

68 By the common law it is returnable only into the court where the proſecution is depending *ibid.*

69 But the *ſtat. Weſt.* 2. *c.* 30. having ordained that "all pleas of eaſy examination ſhall be determined in the country by *niſi prius*," an iſſue joined in the king's bench for an offence committed in a different county may be tried in the proper county by writ of *niſi prius* 578 ſ. 2

70 This ſtatute does not extend to the king, and in caſes where he is a party the writ *ought* to be granted by his ſpecial warrant, or by the aſſent of the attorney-general 578 ſ. 3

71 And the court has refuſed a *niſi prius* to the attorney general, till the king's warrant was procured; becauſe the caſe ſeemed to require great examination 578 (N)

72 How jurors may be *challenged* on the part of the king, and how on the part of the priſoner *(Vide Challenge)* 579 to 583

73 OF THE QUALIFICATION OF JURORS 583 ſ. 12

74 At common law there was no neceſſity that jurors ſhould have any freehold, before juſtices in *eyre*, or in cities or burghs *ibid.*

75 Neither was a freehold to *a certain value* in any caſe neceſſary *ibid.*

76 The want of a freehold is a good challenge to a juror in all caſes not otherwiſe provided for by ſtatute *ibid.*

77 For *iſſues* are to be returned upon jurors, which implies that they ought to have land; *ſed quere*, if by the common law the want of it was not a challenge to the favour only *Page* 583 (N)

78 The uſe of a freehold in his own or his wife's right, whether abſolute upon condition, of inheritance, or for life, is ſufficient if it be in the county, and in poſſeſſion at the time the juror is ſworn 584

79 By 21 Edw. 1. c. 38. jurors, except in cities, burghs, or trading towns, ſhall have tenements of 40 s. yearly 584 ſ. 14

80 Whether the want of this qualification be a cauſe of challenge *ibid.*

81 By 2 Hen. 5. c. 3. none ſhall be upon the inqueſt for the death of a man, &c. unleſs he have land of 40 s. a year clear of all charges: the want of this ſhall be good cauſe of challenge ſ. 15

82 In capital crimes this ſtatute extends as well to the collateral iſſue as to the general iſſue 584 ſ. 16

83 A *ceſtuy que truſt* of a freehold of 40 s. yearly in the ſame county is a competent juror within the ſtatute 584 ſ. 17

84 But a feoffee in truſt, or a remainder man, &c. is not within the act 585

85 This ſtatute is repealed as to treaſons 585 ſ. 18

86 By 23 Hen. 8. c. 13. jurors in cities, boroughs, and towns corporate, who are worth 40 l. in goods ſhall not be challenged for defect of freehold on the trial of murders and felonies at *their* ſeſſions or gaol-delivery 585 ſ. 19

87 This act ſhall not extend to any knight or eſquire dwelling in ſuch city, &c. &c. 585 ſ. 20

88 By 11 Hen. 7. c. 21. and 4 Hen. 8. c. 3. proviſion is made for the qualification of jurors in London 585 ſ. 21

89 By 4 & 5 Will. & Mary, c. 25. all jurors, other than in trials *per mediatatem linguæ*, ſhall have 10 l. a year, above reprizes, of freehold, copyhold, or ancient demeſne lands, or in rents, &c. &c. in England. In Wales every ſuch juror ſhall have 6 l. a year 584. 586

90 And any perſon who has 5 l. in England,

land, and 31 in Wales, may be returned on a *tales* *Page* 586 ſ. 23

91 By 3 Geo. 2. c. 24. perſons having 20 l. a year in land in poſſeſſion, &c. may be put in the freeholders' book, and ſerve on juries as freeholders *ibid.*

92 By 3 Geo. 2. c. 25. jurors in London ſhall be houſeholders, and have a perſonal eſtate of 100 l. or they may be challenged *ibid.*

93 In other counties, cities, or places, none ſhall be ſummoned to ſerve any jury for the trial of any capital offence who are not therein qualified to ſerve as jurors in civil cauſes, and they may be challenged for that cauſe in *voir dire* 586, 587

94 By 4 Geo. 2. c. 7. in *Middleſex*, leaſeholders of 50 l. a year may be ſummoned, and may ſerve on juries 587

95 For trials in London for high treaſon every juror ought to have ſuch freehold or copyhold as required by 4 & 5 Will. & Mary 587 ſ. 24

96 In what caſes a jury acquitting a defendant muſt find who did the fact *(Vide Coroner)* 81

97 HOW FAR JURORS ARE PUNISHABLE BY ATTACHMENT 220

98 Jurors are puniſhable by attachment for non-attendance; or the court may impoſe a fine for the default 220 ſ. 14

99 No juror ſhall be liable where the inqueſt could not be taken if he had appeared *ibid.*

100 In what caſes a juror ſhall loſe his *iſſues*, and in what caſes he ſhall be fined *ibid.*

101 *Quere* whether a juror be amerciable for not appearing at the return of the *ſicut alias*, &c. where the firſt *venire* was not ſerved *ibid.*

102 If a juror refuſe to be ſworn he may be fined or attached 221 ſ. 15

103 So alſo for refuſing to give any verdict at all, or for endeavouring to impoſe on the court, or for miſbehaviour after departure from the bar, or for ſending or receiving inſtructions from either of the parties 221 ſ. 15 to 20

104 How far jurors are puniſhable in their JUDICIAL CAPACITY 221 to 225

105 In what manner the proceſs againſt the jury muſt be continued *(Vide Diſcontinuance)* *Page* 424 ſ. 95

106 It is no objection againſt a perſon's giving evidence that he is one of the jurors; but *quere* if he ought to go to his companions afterwards 608 ſ. 17

107 A jury ſworn and charged in a capital caſe cannot be diſcharged till they have given their verdict; but in certain caſes there may be an exception to this general rule 622 ſ. 1 & *Notes*

JUSTICES.

Vide Oyer and Terminer. Courts. Bail. Proceſs. Gaol delivery. Aſſize.

JUSTICES *of the* PEACE.—*Vide Conſervators. Coroner. Attachment. Seſſions. Eſcape. Conſtables. Examination. Bail. Commitment. Arreſt.*

1 By 2 Edw. 3. c. 16. it is ordained that in every county, good and lawful men, &c. ſhall be aſſigned to keep the peace 45 ſ. 13

2 By 4 Edw. 3. c. 2. juſtices aſſigned to keep the peace ſhall not bail thoſe who are not mainpernable, and they ſhall tranſmit their indictments to the juſtices of gaol-delivery 46

3 By 18 Edw. 3. c. 2. they ſhall, with other learned in the law, be aſſigned by the king's commiſſion to hear and determine felonies and treſpaſſes in the ſame counties, and to inflict reaſonable puniſhment 46 ſ. 15

4 By 34 Edw. 3. c. 1. they ſhall reſtrain barrators, &c. and inquire of pillers and robbers, and arreſt ſuch as they find by indictment or ſuſpicion, and put them in priſon, and take all that be not of good fame, &c. &c. 46 ſ. 16 61 ſ. 39

5 By 17 Rich. 2. c. 10. in every commiſſion of the peace two men of the law ſhall be aſſigned to deliver thieves and felons 46, 47

6 By 2 Hen. 5. c. 4. the juſtices named of the quorum, except, &c. ſhall be reſiant in the ſhire, and make their ſeſſions four times a year 47 ſ. 18

7 By 14 Hen. 6. the ſeſſions in Middleſex ſhall be two times in the year, or oftener if need be *Page* 47 ſ. 18
8 N. B. In this county it is uſual to hold eight ſeſſions, four general, and four general quarter ſeſſions *ibid.* (N)
9 By 2 Hen. 5. c. 1. juſtices of the peace ſhall be made by the advice of the chancellor, &c. without taking perſons dwelling in foreign counties, &c. 47 ſ. 19
10 N. B. The power of the chancellor extends only to the appointment of juſtices of the peace; he cannot puniſh them for malverſation; the king's bench may proceed againſt them by information, and the chancellor may turn them out of the commiſſion *ibid.* (N)
11 By 1 Mary c. 8. no ſheriff ſhall be a juſtice of the peace during his office 47 ſ. 20
12 By 5 Geo. 2. c. 18. no attorney, ſolicitor, or proctor, ſhall be capable of being a juſtice of the peace during the time he ſhall practiſe *ibid.*
13 By 14 Geo. 2. c. 40. and 26 Geo. 2. c. 13. no common brewer, innkeeper, or diſtiller, ſhall act as juſtices in any matter concerning their reſpective trades 48 *Note in marg*
14 By 31 Geo. 2. c. 29. no miller, baker, &c. ſhall be concerned in the aſſize of bread, &c. *ibid.*
15 By 5 Geo. 2. c. 18. no perſon ſhall be qualified as a juſtice of the peace for any county who ſhall not have, in poſſeſſion a freehold, copyhold, cuſtomary, or leaſehold eſtate on life of 100 l. *per annum* clear of incumbrances; or who ſhall not take the oath in the act preſcribed; on *qui tam* penalty of 100 l. 48
16 In every proſecution for defect of qualification, the proof of it ſhall lie on the juſtice; but he may give notice of other lands than thoſe mentioned in the oath, which he may adduce at the trial as a qualification *ibid.*
17 By 1 Geo. 3. c. 13. juſtices who have taken the oaths required by 18 Geo. 2. c. 20. ſhall not incur the penalty for omitting to take them again on a ſucceſſion by the demiſe of the crown *Page* 48, 49
18 None who have taken the oaths under a *dedimus* ſhall be obliged to retake them, &c. 49
19 On a new commiſſion the clerk of the peace ſhall prepare a roll, with the oaths annexed, &c. and every juſtice who ſhall ſubſcribe the ſame ſhall not be neceſſitated to take the oaths again *ibid.*
20 By 7 Geo. 3. c. 9 juſtices are exempted from taking and ſubſcribing the oaths above mentioned more than once in any reign *ibid.*
21 In general there is an act of indemnification every ſeſſions for ſuch as have neglected to qualify (N) 2
22 By 9 Geo. 3. commiſſioners of the navy, &c. &c. may act as juſtices of the peace in bringing offenders againſt the king's naval ſtores to juſtice *ibid.*
23 Juſtices of the peace are either by act of parliament, by charter, or by commiſſion 50 (N) 3
24 The form of the commiſſion of the peace 50, 51
25 What STATUTES MAY BE EXECUTED BY JUSTICES OF PEACE 51
26 By virtue of their commiſſion juſtices may execute all ſtatutes whatſoever for the better keeping of the peace 51, 52
27 By 16 Geo. 2. c. 18. juſtices of the peace may execute ſtatutes relating to the poor, vagrants, highways, and parochial taxes, notwithſtanding they are to be rated within the places for which they act 52
28 The reaſon of making this ſtatute (N) 4
29 By 15 Geo. 3. c. 39. juſtices are authoriſed to adminiſter oaths, in caſes where they are empowered to act 53
30 Juſtices have no coercive power when out of the county 53 ſ. 29
31 Recognizances and informations voluntarily taken before them in any place are good *ibid.*
32 By 9 Geo. 1. c. 7. juſtices for a county dwelling in a city within the county which is a county of itſelf, may act at their dwelling-houſe for the county at large
33 But

33 But they cannot hold their ſeſſions out of the county, nor authoriſe officers to intermeddle with the buſineſs of the city, &c. *Page* 53, 54
34 Juſtices by their commiſſion have an expreſs authority as well within liberties as without 54
35 They may execute their office within a town which has a ſpecial commiſſion for itſelf, except ſuch ſpecial commiſſion exclude them *ibid.*
36 It is queſtionable whether even ſuch a ſpecial clauſe do abſolutely make void the act of the county juſtice within the liberties of ſuch town *ibid.*
37 But if they have expreſs notice of ſuch an *excluſive* commiſſion, they may *perhaps* be puniſhable for contempt of the king's *prohibition* *ibid.*
38 The crown may grant to any city to have juſtices of their own, and exclude the county juſtices from the *ordinary* buſineſs of a juſtice of the peace 54(N)5
39 And in ſuch caſe the act of the county juſtice will be void, and not merely a breach of the franchiſe *ibid.*
40 Where juſtices are named generally, they have a concurrent juriſdiction with the other juſtices, as their locality may chance to be *ibid*
41 By 15 Geo. 2. c. 24. juſtices of the peace may commit offenders to the houſe of correction, who ſhall be apprehended within the pariſh or place which contributes to ſupport the ſame 54, 55
42 By 24 Geo. 2. c. 55. juſtices of one county ſhall indorſe warrants iſſued by juſtices of another for the apprehending of felons who have eſcaped from the county where the offence was committed; and if apprehended, and the offence be bailable, the juſtices indorſing the warrant may admit ſuch offender to bail, but if not bailable, or if he cannot find bail, he ſhall be carried back and dealt with by the juſtice who iſſued the warrant 55, 56
43 What commiſſions of the peace require a ſpecial ſuit to the king for granting them 56, 57
44 By what name juſtices of the peace are to be deſcribed 57
45 Their uſual deſcription in *certiorari's* is by the name of *keepers of the peace*; and the caption of an indictment ſo naming them is good *Page* 57 ſ. 32
46 The deſcription of juſtices by the name of *juſticiarii domini regis ad pacem conſervandum* is good without ſaying *ad pacem domini regis*, for that is implied *ibid.* 359 ſ. 122
47 By 26 Geo. 2. c. 17. no *act, &c.* done by two or more juſtices of the peace, which doth not expreſs that one of them was of the *quorum*, ſhall be ſet aſide for that defect only 57
48 By 7 Geo. 3. c. 21. all acts done which are required to be done by two juſtices in ſuch cities, &c. as have only one juſtice of the *quorum*, ſhall, though neither of the ſaid juſtices be of the *quorum*, be as valid as if one of them had been of the quorum 57, 58
49 OF THE JUSTICES AUTHORITY IN FELONY 58
50 Juſtices have herein no power unleſs their commiſſion authoriſes them *to hear and determine felonies*, which in general is given to thoſe of the *quorum* only, and a *certiorari* has been quaſhed becauſe it only mentioned juſtices of the peace, without adding they were aſſigned to *hear and determine felonies*. *Sed quere* 58 ſ. 33. p. 359 ſ. 121. p. 420 ſ. 73
51 The clauſe in the commiſſion, to hear and determine felonies, gives juſtices no juriſdiction over an offence which by ſtatute is ſpecially appointed to juſtices of *oyer and terminer* 59
52 Juſtices of the peace have no power to take an indictment on 5 Eliz. c. 14. concerning forgery *ibid.*
53 Nor on 2 & 3 Edw. 6. c. 24. concerning acceſſaries in one county to felonies in another *ibid.*
54 Yet by force of 2 & 3 Ph. & M. c. 10. and as all felonies include breach of the peace, juſtices of the peace may take examinations for any kind of felony, and commit the offenders, &c. &c. *ibid.*
55 But as the 2 & 3 Ph. & M. c. 10. and 1 & 2 Ph. & M. c. 13. direct juſtices to certify their examinations in homicide, they

they ſeldom proceed further in relation to any felonies, though within their commiſſion, except only petty larcenies *Page* 59

56 Juſtices of the peace in England may commit an offender againſt the Iriſh law for felony, in order to be ſent to Ireland, the offence being committed there 59 (N) 7

57 A juſtice of the peace cannot take a perſon from the cuſtody of the king's bench and ſend him to the county gaol, but he may, by his warrant, charge him criminally where he is in cuſtody *ibid.*

58 Two juſtices may take a recognizance for felony on the high ſeas, &c. &c. *ibid.*

59 Juſtices may take an inquiſition of murder if the body cannot be found *ibid.*

60 Of the POWER OF JUSTICES IN TREASON, PREMUNIRE AND MISPRISION

61 None of theſe offences are within their commiſſion, yet, being againſt the peace, any juſtice may apprehend the offender 59, 60

62 They may alſo take the examination of ſuch offenders, and the information of witneſſes, and bind them over, &c. purſuant to ſtatutes of Phil. & Mary 60

63 By 3 Hen. 5. c. 7. juſtices of the peace ſhall have power by the king's commiſſion to inquire of falſe money, &c. 60 ſ. 35

64 By 5 Eliz. c. 1. they may enquire of the offence of maintaining the Pope's power 60 ſ. 36

65 By 13 Edw. 1. c. 8. they may inquire of offences touching the ſupremacy, &c. 60 ſ. 37

66 Of INFERIOUR OFFENCES 60 ſ. 38

67 Juſtices of the peace are empowered to hear and determine all treſpaſſes; which comprehends all inferiour offences againſt the peace *ibid.*

68 By the common law juſtices of the peace have no juriſdiction over forgery or perjury: the reaſon of it 61

69 Libels are indictable before juſtices of the peace *ibid.*

70 A perſon may be indicted before juſtices of the peace for being an extortioner or a night-walker, and haunter of bawdy-houſes *Page* 61

71 Juſtices of peace have juriſdiction over all inferiour crimes whether mentioned in their commiſſion or not, as being againſt the peace 61 ſ. 39

72 By 7 Jac. 1. c. 5. if an action ſhall be brought againſt any juſtice or officer for any thing done by virtue of their office, they may plead the general iſſue and give the ſpecial matter in evidence, and if the plaintiff does not recover, the defendant ſhall have double coſts 61, 62

73 Secretaries of ſtate and privy counſellors are not magiſtrates, nor is a king's meſſenger an officer within the protection of this act 61 (N) 1

74 Before the double coſts are allowed it muſt be certified that the defendant was acting by virtue of his office, except in the caſe of a ſpecial verdict where it is ſo found 62 *Note in marg.*

75 By 21 Jac. 1. c. 12. the above act is extended to church-wardens and overſeers, and it is ordained that the plaintiff ſhall lay his action in the county where the fact complained of was committed; and if he do not prove it to have happened in ſuch county, the defendant ſhall be acquitted 62 ſ. 41

76 Juſtices cannot be treſpaſſers on account of what the officers do; inſtance in which an action will lie 62 (N) 8

77 By 24 Geo. 2. c. 44. no writ or proceſs ſhall be ſerved by a ſubject on any juſtice, &c. until notice in writing ſhall have been given to him one month before ſuing out the ſame; in which notice, the cauſe of action ſhall be expreſſed, and on which ſhall be indorſed the attorney's name 62 ſ. 42

78 And one month after notice, the juſtice may tender amends, which, if not accepted, he may plead in bar of the action, together with the general iſſue, or on ſufficient tender being proved, the defendant ſhall be acquitted. N. B. the plaintiff muſt prove that notice was given 62, 63

79 If the defendant neglect the tender of amends, he may, by leave, pay it into court;

court; the plaintiff cannot give in evidence any other cauſe of action than that contained in the notice *Page* 63 ſ. 44
80 No action ſhall be brought againſt any officer, &c. for any thing done in obedience to a juſtice's warrant, until demand in writing hath been made of the peruſal and copy of ſuch warrant, and the ſame has been refuſed for ſix days; and if complied with, the production and proof of ſuch warrant at the trial ſhall intitle the defendant to a verdict, &c. 63, 64
81 If ſuch action ſhall be brought jointly againſt the juſtice and officer, the proof of the warrant ſhall acquit the officer, notwithſtanding any defect of juriſdiction in the juſtice; and if the verdict ſhall be given againſt the juſtice, the plaintiff ſhall have his coſts 64
82 And if the judge certify that the injury was maliciouſly done, the plaintiff ſhall have double coſts 64 ſ. 46
83 It is incumbent on the juſtice to ſhew his proceedings regular, and he is bound to produce and prove the information and other document at the trial 62 ſ. 42. *N. in marg.*
84 If it does not appear that the action is for ſomething done by the juſtice, &c. in the execution of his office, the court will fix the time to plead; but if it appear in the notice, it is ſufficient 63 ſ. 44. *N. in marg.*
85 If a juſtice makes a warrant in a caſe *plainly* out of his juriſdiction, ſuch warrant is no juſtification to the officer *N. in marg.*
86 But if a juſtice exceed his authority, the warrant will indemnify the officer, for he is bound to execute it 63 ſ. 45 *N. in marg.*
87 By 18 Geo. 3. c. 19. juſtices are authoriſed to award coſts upon complaints brought before them 64 ſ. 47
88 In what caſe and proportion the coſts ſhall be deducted from the amount of the penalty 64, 65
89 Where a ſpecial authority is given to juſtices out of ſeſſions, it ought to appear in their orders that the authority is exactly purſued 65 (N)
90 *Quere*, if juſtices out of ſeſſions may iſſue a warrant for offences within the cognizance of ſeſſion only *Page* 65 (N)
91 For the power of juſtices of peace in ſeſſions *(Vide Seſſions)* 65 to 69
92 A commiſſion of the peace is not determined by a new commiſſion to hear and determine felonies, &c. 23
93 Juſtices of peace cannot receive an appeal 233, 234
94 Juſtices of the peace cannot admit a perſon to be approver; for they cannot aſſign a coroner 296 ſ. 16

JUSTICIER.—*Vide King's Bench.*

JUSTIFICATION. — *Vide Juſtices of Peace. Arreſts. Pleading.*

KING.—*Vide Indictment. Pardon. Challenge. Courts.*

1 The king is the ſupreme magiſtrate of the kingdom, and *entruſted* with the whole executive power of the law 1 ſ. 1
2 No court can have any juriſdiction, unleſs it ſome way or other derive it from the king *ibid.*
3 The king cannot ſit in judgment upon any indictment, becauſe he is a party, and he has delegated all his power to his judges 1 ſ. 2
4 The king cannot alter the certain and eſtabliſhed rules of court, or add juriſdiction to an ancient court 2
5 The king's grant of a judicial office for life, which has been uſually granted at will, is void 2 ſ. 5
6 The king cannot grant even *a mere* ſpiritual juriſdiction *Note in marg.*
7 The king cannot grant any new commiſſion whatſoever that is not warranted by ancient precedents, however neceſſary or conducive to the public good 2 ſ. 8
8 Before the *ſtat. of Weſt.* he could not authoriſe perſons to take care of rivers, and the fiſhing therein *ibid.*
9 The king's demiſe does not determine commiſſions, &c. &c. 3, 4
10 The king ſtill continues the principal conſervator of the peace; but he cannot take

take a recognizance of it *Page* 43 ſ. 1
11 The king, by his commiſſion, may authoriſe whom he pleaſes to execute an act of parliament 52
12 The king's lands, while they continue in his poſſeſſion, are wholly out of the juriſdiction of the ſheriff's torn, and of all ſuch courts 96 ſ. 26
13 Whether thoſe who are taken by the commandment of the king are repleviſable (*Vide Bail, No.* 107.) 151.166.169
14 How far the king's pardon will bar a *qui tam* 392
15 Sanctuary could only be claimed by grant from the king, made or allowed in *eyre* ſince the time of memory 472 ſ. 3
16 The king may ſue in what court he pleaſes ch. 27 ſ. 27
17 Wherever the king appears to have been deceived in his grant, it is void 557 ſ. 46
18 Where the king is a party, there can be no proceſs by *proviſo* 574
19 The king may inſiſt upon a *niſi prius*; but neither *niſi prius* or *tales* are grantable without his conſent 576, 578. ſ. 3 *in Notes*
20 The king ſhall not be bound by a ſtatute which does not expreſsly name him 578 ſ. 3
21 The king is a party in every indictment, and alſo, in ſome ſort, in appeals 582 ſ. 10 p. 299

KING's BENCH.—*Bail. Apptal. Certiorari.*

1 The king's bench retains all the power which remained in the court of the high juſticier, after the courts of exchequer and common pleas were ſeparated from it, eſpecially the ſupreme juriſdiction in all criminal matters 7 ch. 3
2 The king's bench is entruſted with the higheſt juriſdiction over all capital offences, miſdemeanors, public breaches of the peace, oppreſſions of the ſubject, and all factions, controverſies, debates, miſgovernment, or other crime, manifeſtly againſt the public good 8 ſ. 3
3 This court is empowered to find redreſs for every injury *ibid*
4 It is not neceſſary to ſhew a precedent for the remedial interpoſition of this court; for, being the *cuſtos morum* of the realm, wherever it meets with an offence contrary to the firſt principles of common juſtice, and of dangerous public conſequence, it will adapt a puniſhment proportioned to the enormity *Page* 8 ſ. 4
5 It is in the diſcretion of the king's bench to inflict ſuch fine and impriſonment, and even infamous puniſhment, on offenders, as the nature of the crime requires 8 ſ. 5
6 This court is not confined to make uſe of their own priſon, but may commit to any priſon in the kingdom, and no other court can bail a priſoner committed by this court *ibid.*
7 The king's bench may proceed on indictments found before any other courts, and removed into it by *certiorari*, as well as on indictments and informations originally commenced in it, &c. 8, 9
8 A ſtatute which appoints that crimes of a certain denomination ſhall be tried before certain judges, does not exclude the juriſdiction of the king's bench without expreſs negative words 9. 382 ſ. 30
9 Where a ſtatute creates *a new offence*, and creates a new juriſdiction, preſcribing a certain mode of proceeding for the puniſhment of it, it is queſtionable whether the king's bench has concurrent juriſdiction *ibid.*
10 A record removed into the king's bench cannot regularly be remanded after the term; but the judges, to prevent a delay of juſtice, may refuſe to receive it, &c. 9 ſ. 7
11 The king's bench may grant a *niſi prius*, as well in caſes of treaſon and felony as in other caſes; and in ſuch caſe the tranſcript of the record only is ſent down to trial *ibid.* 578 ſ. 2
12 By 6 Hen. 8. c. 6. the king's bench may remand and ſend down, as well the bodies of all felons and murderers brought before them as their indictments, into the counties where the offence ſhall have been committed, and may

may command the juſtices to proceed in the trial thereof, as if the ſame had never been removed *Page* 9, 10

13 This ſtatute ſhall not extend to high treaſon 10 ſ. 9

14 The king's bench is the higheſt court of common law, and hath power to reverſe erroneous judgments of all inferior courts, and to puniſh all inferior magiſtrates, and all officers of juſtice for corrupt abuſes of their authority, but not for mere miſtakes, &c. 10 ſ. 10. 405 ſ. 22

15 The king's bench, being the ſupreme court of *oyer and terminer*, gaol-delivery, and *eyre*, ſuſpends the power of all other courts of this kind in the county wherein it ſits, during the time of its ſitting, and renders all their proceeding void 10 ſ. 11. 203 ſ. 18

16 But ſuch juſtices may proceed upon indictments taken in a foreign county, and removed before them, or if taken before the term; *ſed quere*, if it is not ſafeſt to have a ſpecial commiſſion for this purpoſe 10, 11. 22 ſ. 3

17 By 25 Geo. 3. c. 18. the ſeſſion of oyer and terminer, and gaol-delivery of Newgate in Middleſex, if begun before the eſſoin day of any term, ſhall not be ſuſpended, &c. by the ſitting of the king's bench on the commencement of any term 11†

18 All proceſs upon writs of appeal or indictments removed into the king's bench by *certiorari* ought to be made returnable *coram nobis ubicunque fuerimus* 11 ſ. 12

19 All proceſs upon bills of appeal of one *in cuſtodia mareſchalli*, and upon indictments commenced in the king's bench, ought to be returnable *coram nobis apud Weſtmonaſterium* *ibid.* 232, 233

20 Where the king's bench proceeds on an offence committed in the ſame county wherein it ſits, the proceſs may be made returnable immediately *ibid.*

21 Proceſs on an offence removed into the king's bench by *certiorari* from a different county muſt have have fifteen days between the *teſte* and the return *ibid.* 572 ſ. 3

22 Where proceedings are limited to judges of gaol-delivery and oyer and terminer, the court of king's bench has an implied juriſdiction *Page* 11 ſ. 12 (N) 203 ſ. 18

23 The juſtices of the king's bench are conſervators of the peace throughout the realm, and ſupreme coroners over all England *ibid.* & 43 ſ. 2

24 Where the ſheriff or coroner may receive bills of appeal, the court of king's bench may *à fortiori* do the ſame *ibid.* 32, 33

25 This court during term, and any judge of it during vacation, may admit perſons to bail for any crime whatſoever, except perſons committed for contempts 12

26 Where the body of an offender attainted in the county is removed by *habeas corpus*, and the indictment by *certiorari* into the king's bench, the court may award execution to be done by the marſhal *ibid.*

27 Where perſons put in feigned bail ſo as not to be reached by 21 Jac. 1. this court may order the parties to be ſet on the pillory *ibid.*

28 The king's bench may order one who is not a party to the cauſe to attend the maſter *ibid.*

29 The king's bench may compel the production of examinations, books, papers, &c. *ibid.*

30 In what caſes the king's bench may puniſh offenders by attachment 213 c. 22

31 The proceedings before juſtices of *oyer and terminer*, after the *oyer* determined, ought to remain in the king's bench 35 ſ. 18

32 Whether a pardon of a perſon condemned before juſtices of gaol-delivery may be allowed in the king's bench after the ſeſſion is determined 35, 36

33 An appeal in the king's bench ought to be arraigned on the crown ſide, unleſs it comes in by *certiorari* 437 ſ. 4

34 The king's bench is within 2 & 3 Edw. 6. c. 24. which authoriſes juſtices to proceed againſt acceſſaries, in the county wherein they are acceſſary 458 ſ. 52

35 After an amerciament hath been *estreated* into the exchequer, and a pardon been there produced and denied, the party, by *habeas corpus cum causa*, may have it allowed in the king's bench *Page* 562 f. 69

36 No jury can be returned into the king's bench from a foreign county, without proper process under the hand of the chief justice; if for an indictment in same county, *quere*, if a jury may not be returned by a bare *preceptum est*, &c. returnable immediately 572 f. 2, 3

37 A writ of error lies in the king's bench of an attainder before the lord high steward 655 f. 16

38 The king's bench may not only award execution against persons attainted there, but also against persons attainted in parliament, or any other court of record 656

39 In what manner the body, &c. must be removed *ibid.*

40 If a peer be convicted in parliament, and the day of execution elapse before execution done, the king's bench may appoint a new time of execution, *the parliament not sitting* (N)

41 How far the king's bench may proceed in the trial of a peer 597

42 The king's bench may award process into any county in England 400

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1 By *stat. West.* the most loyal and wise knights are ordered to be chosen coroners; but at this day it is no good cause to remove a coroner that he is not a knight 70, 71

2 It is a good plea in abatement of an indictment, that a *baronet* is named *knight* 328

3 By 24 Geo. 2. c. 18. no peer shall challenge for want of a knight being returned 580

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2 In what cases larceny is bailable (*Vide Bail, No.* 65 *to* 67.) 157, 158

3 In what cases larceny is excluded from clergy (*Vide Clergy, No.* 59 *to* 87.) 489 to 493

4 If a man appear obstinately mute on an arraignment for petit larceny, he shall have the like judgment as if he had confessed the indictment 464 f. 10

5 Persons convicted of larceny may be sent to the house of correction, or transported (*Vide Clergy, No.* 164. *Transportation*) 513, 514

6 Where an acquittal or conviction of larceny is pleadable to a second prosecution (*Vide Autrefois Acquit, No.* 8. 11.) 526

7 In what cases those who shall apprehend and convict persons guilty of larceny are intitled to a reward (*Vide Reward*) 124, 125, 126

8 Where accomplices discovering and giving evidence against persons guilty of larceny are intitled to a pardon (*Vide Pardon*) 540

9 On an indictment for grand larceny the jury may find the prisoner guilty of petty larceny only 624 f. 6

10 So also where the larceney is ousted of clergy, and laid capitally, the jury may find him guilty, but not of the capital part (*Vide Verdict*) 624

11 The goods of a person guilty of petit larceny became forfeited on a *fugam fecit*, or default to the exigent (*Vide Forfeiture*) 639, 640

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1 An alderman of London is not compellable to be a conſtable; for his exemption is neceſſary for the good government of the city 100 ſ. 40
2 Formerly only the London ſurgeons were exempted from the office of conſtable, *ſed vide* 18 Geo. 2. c. 15. ſ. 10 101
3 No *viſne* can come from the city of London generally by reaſon of its extent; and the conſtant uſage is to ſhew in what ward and pariſh in London a fact is done 266
4 But it is a ſufficient addition to name a defendant generally of London, &c. without more 273 ſ. 120
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7 London cannot join with other counties in taking an inqueſt 457
8 The juſtices of peace and coroners within the city of London and county of Middleſex, &c. ſhall have the ſame authority to let to bail felons and priſoners as before, 1 & 2 Phil. & Mary, c. 13. 163
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12 By 4 Geo. 2. c. 7. leaſeholders of

50 l. a year over and above the ground-rents, may be jurors in Middlesex *Page* 587

13 By 11 Hen. 7. c. 21. and 4 Hen. 8. c. 3. jurors in London in real and personal actions, shall have the value of forty marks 585 s. 21

14 The citizens of London have a special privilege by charter, that in appeals brought by any of them there shall be no wager of battle 601 s. 6

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2 The king cannot, by any previous licence, pardon, or dispensation whatsoever, make an offence dispunishable which is *malum in se* 550

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1 Those who are taken with the *mainour*, that is, with the thing stolen as it were in their hands, are excluded from the benefit of a replevin by the *stat. of West.* 154 s. 41

2 Anciently persons taken with the *mainour*, might be tried without the formality of an indictment 302 s. 5. 313 s. 34

3 By 28 Edw. 3. c. 3. 42 Edw. 3. c. 3. and 25 Eliz. c. 4. proceedings upon the mainour are said to be taken away *N. in marg.*

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1 If the county in which the fact to be tried was committed, be alledged in the *margent* of the indictment, the particular vill in which the offence is laid shall be intended within the county 314

2 *Sed quere*, except such vill be expressly alledged to be in the county named in the margent, or in the county aforesaid *ibid.*

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3 A clergyman convicted of manslaughter, and admitted to his clergy, shall not afterwards be deprived for the offence 512

4 Whether by 3 Hen. 7. c. 1. a clerk convicted of manslaughter shall be committed,

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2 But every other *miſnomer* of the defendant, except that of the ſurname, is equally fatal in an indictment as in an appeal *ibid.*
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2 The ſtatutes of mortmain give a duty to the next immediate lord for an alienation to a corporation; which being a gift of a particular intereſt to the party, can never be prejudiced by any prerogative of the king 551
3 But it is ſaid that the king might, before 1 Will. & Mary, c. 2. have diſpenſed with the ſtatutes of mortmain; *ſed quere* 552

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10 On an indictment of murder *ex malitia præcogitata*, evidence of *malice implied* is ſufficient 618
11 The declarations of the deceaſed after the mortal wound given, and while he is *in extremis*, are, on a trial for the murder,

murder, admiſſable evidence *Page* 619 ſ. 46

12 If a jury on an indictment of *murder* find the priſoner guilty of *manſlaughter*, they muſt add "and not of the murder" 623, 624

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1 To anſwer impertinently, ineffectually, or not to comply with the rules of law when put upon trial, are as much a ſtanding mute in conſtruction of law, as if no anſwer be made at all 461 ſ. 1

2 Inſiſting upon ſome frivolous defence, refuſing to plead in chief, or the general iſſue, or even to plead a good dilatory plea, and refuſe to plead over to the felony, are inſtances of ſtanding mute *ibid.*

3 If a priſoner refuſes to put himſelf upon God and his country, or by God and his peers, or to wage battel where ſuch trial is allowed, after having pleaded, it is a ſtanding mute *ibid.*

4 The opinions of crown lawyers whether a priſoner who peremptorily challenged above the number allowed by law was to be dealt with as with one that ſtands mute, or to be hanged 461 ſ. 2

5 A priſoner who thus perverſely and obſtinately offends in high treaſon is *ipſo facto attainted*; and in felony the challenge ſhall be overruled 461 (N)

6 He who demurs in law to an indictment or appeal ſhall not be eſteemed to ſtand mute 461, 462

7 After a priſoner hath confeſſed, or pleaded, and put himſelf on his country, he ſhall not be conſidered to ſtand mute in reſpect to his ſubſequent ſilence 462 ſ. 4

8 *Sed quære*, where a man does not confeſs, but pleads not guilty, and afterwards ſtands mute, whether he ſhall not be put to his penance 462 ſ. 4, *Note in marg.*

9 Where a priſoner makes no anſwer at all, the court ſhall take an inqueſt of office, by the oath of any twelve perſons that happen to be preſent, whether he do ſo of malice or by the act of God *Page* 462 ſ. 5

10 If after iſſue joined, and the jury are charged, the ſtanding mute ſhall be tried by the jury, and not by an inqueſt of office *ibid.*

11 If a man anſwers, but not effectually, no inqueſt is neceſſary, for his malice is apparent 462 ſ. 6

12 Where the priſoner is found to ſtand mute by the act of God, the court ſhall cauſe the felony to be inquired of, and whether the priſoner be the ſame perſon, and ſhall ſee into whatever may be neceſſary for his defence 462 ſ. 7

13 Such inquiry ſhall not be made by an inqueſt of office, but by a jury returned by the ſheriff in the ſame manner as if the defendant had pleaded *ibid.*

14 Wherever a perſon attainted ſtands mute to the demand of execution, he ſhall not be ſentenced to penance, but to execution 463 ſ. 8

15 If ſuch an offender hath always continued in priſon after his attainder, no inqueſt is neceſſary to prove his identity; but where a perſon attainted be retaken after an eſcape, and ſtand mute to the demand of execution, it ſhall be inquired whether it is of malice or by the act of God, and in the latter finding then whether he be the ſame perſon or not 463, 464

16 Standing mute upon high treaſon is equivalent to a conviction 464 ſ. 9

17 If a man appear to ſtand obſtinately mute on an arraignment for petit larceny, he ſhall have the like judgment, &c. as if he had confeſſed the indictment 464 ſ. 10

18 By 33 Hen. 8. c. 12. any perſon ſtanding obſtinately mute upon an arraignment for any of the offences mentioned in the act, ſhall have the like judgment, &c. as if he were found guilty 464 ſ. 11

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20 By *ſtat. Weſt.* notorious felons, &c. who will not put themſelves on inqueſts, ſhall have ſtrong and hard impriſonment 465 ſ. 13

21 The

21 The opinion of the writers upon crown law upon this ſtatute *Page* 465 ſ. 14
22 What is the nature of the PENANCE to which a priſoner *was* to be adjudged upon his ſtanding mute 466 ſ. 16
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24 At Newgate, where a priſoner refuſed to plead, the practice *was* to tie his thumbs together with whipcord, &c. 467 ſ. 18
25 On ſtanding mute in high treaſon, petit treaſon, or felony, a priſoner forfeits both lands and goods in the ſame manner as if he had been attainted any other way 467 ſ. 19
26 But where a perſon was adjudged to his *penance* for ſtanding mute, and thereby prevented attainder, he forfeits his chattels only, and not his lands 467 ſ. 19
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29 Wherever a priſoner ſhall be allowed clergy upon a conviction by verdict or confeſſion, he ſhall be allowed it on ſtanding mute 468 ſ. 24. p. 481 ſ. 27
30 A ſtatute taking away clergy from thoſe who ſhall be convicted of a crime doth thereby take it away from thoſe who ſhall ſtand mute *ibid.* 481
31 By 3 & 4 Will. & Mary, c. 9. if any perſon is excluded from clergy by any former ſtatute, on conviction, by verdict or confeſſion, he ſhall not be admitted to it on ſtanding mute *ibid.* 487
32 By 12 Geo. 3. c. 20. priſoners who ſhall ſtand mute in felony or piracy, ſhall, on conviction, be liable to the ſame conſequences as if convicted by verdict or confeſſion 4
33 Whether the recognizance of bail for felony be forfeited by the priſoner's ſtanding mute 177, 178

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1 It is ſafeſt in ſetting forth a preſentment, or an affeerment, or an action of debt, to ſhew the names of the preſenters *Page* 95 ſ. 23
2 In an appeal, a miſtake of the chriſtian or ſurname of the *appellant*, or where he is named with an addition to which he is not entitled, or where a peer who has more than one name is not named of the moſt noble, it may be pleaded in abatement 269 ſ. 103
3 It is a good reply to a plea of a miſnomer of the ſurname, that the party is as well known by one name as by the other 270
4 No *indictee* can take advantage of a miſtaken ſurname *(Vide Miſnomer)* 328
5 The omiſſion of any name of dignity may be pleaded in abatement *ibid.*
6 It is a fatal fault to place the addition after the *alias dictus* inſtead of the firſt name 328, 329
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9 It is diſcontinuance to deſcribe a man in the roll or proceſs, by a name variant from that in the original 424 ſ. 94
10 A variance between a record of acquittal and that to which it is pleaded as to the name of the party, may be helped by an averment, that the ſame perſon was intended in both 525

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2 Theft from a barge in Limehouſe dock is not within this act 493, *Note in marg.*
3 Money is ſaid not to be goods within the meaning of this act.—*Vide Foſter* 79. *Sed quere*

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2 But the judges are empowered to tranſport the offender for ſeven years 493

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2 A conſtable may arreſt night-walkers without a warrant 98
3 Night-walkers may be indicted at the ſheriff's torn 107
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5 It hath been holden that any private perſon may arreſt a ſuſpicious night-walker 122. 130

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1 The king's bench may grant a *niſi prius* in treaſon and felony as well as in common caſes 9 ſ. 7
2 Where a trial of *niſi prius* is granted, or tranſcript only of the record is ſent down *ibid.*
3 What power and juriſdiction juſtices of *niſi prius* have in criminal matters *(Vide Aſſize and Niſi prius)* 37. ch. 7
4 Juſtices of *niſi prius* have no power by *ſtat. Weſt.* c. 12. to give judgment of impriſonment and damages in appeal upon an acquittal before them *Page* 289
5 But by 14 Hen. 6. juſtices of *niſi prius* may in an appeal give the principal judgment *ibid.*
6 Juſtices of *niſi prius* by an eſtabliſhed uſage have gained a power to aſſeſs the damages *ibid.*
7 The coſts allowed to a defendant acquitted upon an information, only extend to trials by *niſi prius*, and not where the cauſe is tried at *bar* 374 ſ. 11
8 A perſon is not liable to attachment for diſobedience of a rule at *niſi prius* unleſs it be made a rule of court 230 ſ. 37
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12 By *ſtat. Weſt.* c. 30. all pleas in either bench which require an eaſy examination may be tried by writ of *niſi prius* 578 ſ. 2
13 An iſſue joined in the king's bench, whether for treaſon, felony, or other crime, committed in a different county, may, by virtue of the above ſtatute, be tried in the proper county by writ of *niſi prius* *ibid.*
14 Wherever the king is a party it is irregular to grant a *niſi prius* without his ſpecial warrant, or the aſſent of the attorney-general 578 ſ. 3
15 In an appeal the court may grant it as in common caſes *ibid.*
16 The court of king's bench may refuſe a *niſi prius*, even on the motion of the attorney general if the cauſe require great examination, except the king by letters ſignify his pleaſure to have a *niſi prius* *ibid.* (N)

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2 The king's pardon of murder, rape, or treaſon, cannot be good without a *non obſtante* of 13 Rich. 2. unleſs the crime be ſpecified in the pardon 548
3 By 1 Will. & Mary c. 2. no diſpenſation of any ſtatute by *non obſtante* ſhall be allowed *ibid.*
4 Where a *non obſtante* is neceſſary in a diſpenſation, and how far it may be effectual 551, 552

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1 In what caſe a *non omittas* ſhall be awarded upon a ſheriff's return 216
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2 If a fact done in one county prove a nuſance in another, it may be indicted in either 315 ſ. 37
3 An indictment for barratry, &c. need not conclude to the nuſance of *all* the king's ſubjects, to the nuſance of *divers* is enough 323
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1 All perſons are compellable to take the oath of allegiance at the torn or leet 89 ſ. 2. p. 113
2 Jurors are puniſhable by attachment for refuſing to be ſworn 221
3 It muſt appear in a coroner's inqueſt that

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4 The caption of an indictment is bad unless it shew that the jurors found the indictment upon their oaths 361 s. 126
5 Whether it be necessary in *qui tam* to have an oath, that the offence arose in the same county in which it is laid, and within a year before the suit 383, 384. 386
6 An oath may be administered to any sect of religion, but it must be according to the respective forms of each 612
7 All evidence as well for the king as against him must be upon oath 613

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5 By the common law, lands forfeited by an attainder were not vested in the king during the life of the offender, till office found 636 s. 2
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1 By *stat. West.* old men above the age of seventy years shall not be put on juries *Page* 308 s. 20. 588 s. 26
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1 By *stat. West.* ordinaries were prevented from delivering their clerks who had been tried, without due purgation 503 s. 110
2 In what manner the judges used to deliver clerks to the ordinaries in order to make purgation 504
3 It was anciently the usual method for the ordinary to demand the criminal as his clerk before the allowance of clergy 504 s. 112
4 But the court might allow the clergy without such demand 505
5 If the criminal had broke the prison of the ordinary, the allowance of clergy was in the ordinary's discretion *ibid.*
6 The temporal judge and not the ordinary was to decide who had the right to clergy 505 s. 113
7 In what manner a clerk was to be delivered to the ordinary, and afterwards *demesned* at the common law 507

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It is a contempt punishable by attachment to take out a *capias* not warranted by the *original* ch. 22. s. 11

OVERT ACT.—*Vide Indictment. Treason. Evidence.*

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1 By 39 Eliz. c. 15. larceny to the value of 5s. in the day time from any dwelling *or out-house thereto belonging* by breaking the same, is excluded from clergy; but *accessaries* are not within this statute 500 s. 95

2 An assistant who does not *enter* the place where the larceny is committed is not within the act *Page* 501
3 By 3 & 4 Will. & Mary, c. 9. aiders and abettors to any larceny to the value of 5s. by breaking any *dwelling, shop, or warehouse thereto belonging*, are excluded from clergy 501 s. 99
4 An *assistant* to such a felony in an *out-house*, not being a *shop, or warehouse belonging to a dwelling*, without *entering* it, is *clearly* entitled to clergy 502
5 Accessaries before to such a felony in any *out-house*, not being a *shop or warehouse*, are also still entitled to their clergy 502 s. 101

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1 Process of outlawry upon an appeal may be awarded in the county court till the *exigent* 83 s. 41
2 And *quere*, if the coroner may not award it even to an outlawry on the appeal of an approver 84
3 A person outlawed in a personal action cannot bring an appeal until the outlawry be reversed 241
4 A *quere*, if a person outlawed in a personal action can be an approver 294 s. 4
5 It is said a person outlawed in a personal action cannot be a grand juror 307 s. 16
6 Whether one outlawed on an indictment of felony may plead in avoidance of it that one of the *indicters* was outlawed for felony 308 s. 18
7 An outlaw may, in avoidance of the outlawry, shew that the indictment was found contrary to the 11 Hen. 4. c. 9. respecting the return of grand jurors 312 s. 27
8 *Quere*, whether outlawry in a personal action be within the exceptions of 11 Hen. 4. c. 9. 312 s. 31
9 OF PROCESS OF OUTLAWRY 430
10 Process of outlawry lies in all crimes of a higher nature than trespass with force and arms; but not on *any indictment* for a crime of an inferior nature 430 s. 113
11 Outlawry does not lie upon a statute unless it be either expressly or impliedly given by it *Page* 430 s. 114
12 Several statutes enumerated on which it has been adjudged not to lie *ibid.*
13 In process of outlawry for any crime not capital, there must be three *capias's* to the sheriff of the county where the prosecution is commenced, before the *exigent* shall be awarded, unless after judgment, and then one *capias* is sufficient 431
14 *Quere*, if the three *capias's* be not still necessary in rape *ibid.*
15 In high treason and murder one *capias*, before the *exigent* is sufficient 431 s. 116
16 By 25 Edw. 3. c. 14. after indictment found the court shall award a *capias*, and upon *non est inventus* returned, another *capias* shall issue, returnable in three weeks, commanding the sheriff to seize the chattels of the offender, and if he then return that the body is not to be found, the *exigent* shall be awarded, and the chattels forfeited. But if he appear before the return of the second *capias*, the goods shall be saved 431 s. 116
17 This statute does not extend to murder *ibid.*
18 After *cepi* returned, the court will not award the *exigent* upon the suggestion of an escape; the sheriff must return one 431 s. 117
19 Of several defendants, if some plead in abatement, the suit shall be continued against those who make default by *capias* only, and no *exigent* shall issue till such plea be determined 431 s. 118
20 An *exigent* shall never be awarded but into the county where the offence is laid 431 s. 119
21 By 6 Hen. 6. c. 1. before *exigent* shall be awarded for treason or felony in the king's bench, writs of *capias* shall be directed to the sheriffs of the county where the party is indicted, and where he is named in the indictment, returnable in six weeks or more, and any *exigent* awarded or outlawry pronounced before

before the return of such *capias*, shall be void *Page* 432 s. 120

22 By 8 Hen. 6. c. 10. where the offender dwells in a different county from that in which the indictment is found, after the first *capias* is returned, another *capias* shall issue to the county where the offender dwells, returnable in three months where the counties are holden from month to month, or in four months where they are holden by six weeks, commanding the sheriff to take his body, or to make two proclamations, and if the offender do no appear at the return, the *exigent* shall be awarded 432 s. 121

23 This statute does not alter the 6 Hen. 6. c. 1. (*Vide supra* No. 21.) concerning the process of king's bench, &c. 433

24 By 10 Hen. 6. c. 6. the second *capias* required by 8 Hen. 6. c. 10. shall be awarded upon indictment removed by *certiorari* 433 s. 123

25 Observations upon these statutes 433 s. 434

26 A *capias*, directed to and returned by the chancellor of such county, shall be awarded into a county palatine, when the defendant is named of any place in such county 434 s. 125

27 What shall be done if the chancellor does not return such writ *ibid.*

28 If a defendant be named both of the county in which the indictment is found and in which he dwells, there is no need of a *capias* with *proclamation* according to 8 Hen. 6. 434 s. 126

29 No *capias* need be awarded to the county of which it is stated the defendant *lately* was *ibid.*

30 But if a defendant be named late of B. late of C. &c. a *capias* shall go to each county, different from that in which the prosecution is commenced *ibid.*

31 An outlawry contrary to the statutes above mentioned is not *void*, but voidable by writ of error 434 s. 127

32 By *stat. West.* which extends to indictments as well as appeals, none shall be outlawed as accessary unless the principal be attainted, but the exigent shall continue till the principal be attainted *Page* 434, 435

33 Where some of the defendants are charged as principals and others as accessaries, before the award of this *exigent*, the outlawry of the accessaries is reversable 435 s. 130

34 *Quere*, whether if an appellant take out the *exigent* at the same time against all the defendants, he must not, when they appear, count against them as principals 435, 436

35 If when he comes to the exigent, he counts against some as principals and others as accessaries (which is the safest way), he must take out the *exigent* only against the principals, and a *capias* against the accessaries 436

36 Where there is more than one principal, the *exigent* ought not to issue till all of them are attainted 436 s. 132

37 A person outlawed shall have his clergy in the same manner as if he had been otherwise convicted 481 s. 27

38 A statute taking clergy from those who shall be *found guilty*, does not take it from those who are *outlawed* 481 s. 28

39 Persons outlawed are ousted of their clergy by the 1 Edw 6. (*page* 485 s. 35. but not by 23 Hen. 8. (*page* 481. s. 31.) nor by 25 Hen. 8. (*page* 481 s. 33.) nor by 10 & 11 Will. 3. c. 9. (*page* 491 s. 65.) nor by 12 Ann. c. 7. (*page* 492 s. 68.)

40 Whether persons outlawed for horse-stealing, be ousted of their clergy 490 s. 61, 62

41 Justices of gaol-delivery may award execution against such prisoners as have been outlawed before justices of the peace 33 s. 7

42 Persons outlawed for felony are excluded from *replevin* by the statute of Westminster 153 s. 40

43 It is a good cause of challenge to a juror that he is outlawed 587, 588

44 If a peer absent himself and cannot be found, he may be outlawed *per judicium coronatorum*, &c. 597 s. 16

45 Outlawry in a personal action is not a good exception against a witness as it is against a juror 610 s. 21

46 Judgment of outlawry is given by the coroner

coroner at the fifth county court upon the parties not appearing to the *exigent* *Page* 634 ſ. 21

47 The *exigent* is a writ commanding the ſheriff to cauſe the defendant to be demanded from county court to county court, till he be outlawed *ibid.*

48 How ſuch judgment ſhall be entered on the record *ibid.*

49 If the judgment appear not to have been given by the coroner, it is erroneous *Notes in marg.*

50 In London judgment of outlawry is given by the recorder *ibid.*

51 When a judgment of outlawry for treaſon or felony appears of record by the ſheriff's return of the *exigent*, the party is as much attainted, and ſhall forfeit and loſe as if he had received ſentence upon verdict or confeſſion 634 ſ. 22

52 And *quere*, if the party is not equally attainted by the coroner's return of a *certiorari* directed to the ſheriffs to certify whether he were outlawed or not 634 ſ. 22

53 Any one as *amicus curiæ*, may inform the court of error in proceſs of outlawry 634 ſ. 23

54 The party ſhall have counſel aſſigned to take advantage of error in outlawry *ibid.*

55 But if the outlawry be only voidable and the party will take no advantage of error, execution ſhall be awarded, but no judgment pronounced *ibid.*

56 Whether an outlawry may be reverſed, upon a defendant coming in upon the *capias utlagatum* the ſame term the *exigent* is returnable, without a writ of error for faults apparent on the record 650, 651

57 The purchaſer of land of a perſon afterwards outlawed for felony may falſify the record both as to the time and nature of the offence 652

58 At common law in *favorem vitæ*, an outlawry of treaſon or felony might be avoided by plea of ſome fact which rendered his appearance impoſſible; but no outlawry for any other crime, againſt a party rightly deſcribed, can be avoided by any plea of fact *Page* 652 ſ. 6

59 By 26 Hen. 8. c. 13. & 5 & 6 Edw. 6. c. 11. judgment of outlawry for treaſon againſt perſons abroad at the time it is pronounced ſhall be good, but the party within a year may appear in the king's bench and traverſe the indictment, &c. 653

60 Theſe ſtatutes extend to treaſon, ſubſequent to the 25 Edw. 3. 653 ſ. 8

61 Any outlawry may be awarded by the defendant coming in upon the *capias utlagatum* and pleading a miſnomer, &c. &c. &c. 653, 654

OYER *and* TERMINER.

1 By the common law as well as 27 Hen. 8. c. 24. none ſhall create juſtices of oyer and terminer, &c. &c. except the king 19 ſ. 1

2 By what kind of inſtruments ſuch juſtices muſt be conſtituted *(Vide Commiſſions)* 20

3 How the authority of ſuch juſtices may be ſuſpended, revived, or determined 22

4 Their power is wholly ſuſpended by the court of king's bench ſitting in the ſame county for which they are commiſſioned; but it revives without *procedendo* upon the abſence of the king's bench 22 ſ. 3

5 Their authority may be ſuſpended by *ſuperſedeas* on proof that their commiſſion was unduly granted, but it may be again revived by *procedendo* *ibid.*

6 A commiſſion once determined cannot be revived without a new commiſſion *ibid.*

7 Commiſſion of oyer and terminer, &c. was, before 7 & 8 Will. 3. c. 27. and 1 Ann. c. 8. impliedly determined by the demiſe of the king, and before 1 Edw. 6. c. 7. by the juſtice's acceptance of any new name of dignity 22 ſ. 5, 6

8 The authority of ſuch juſtices is alſo impliedly determined by holding a ſeſſion without adjourning it, &c. 22 ſ. 7

9 So

9 So alſo by granting a new commiſſion to other perſons of the ſame nature *Page* 23
10 In what manner notice of ſuch new commiſſion ſhall be ſaid to be given 23 ſ. 9, 10
11 By 1 Edw. 6. c. 7. the proceſs made by the old commiſſioners ſhall be continued by the new ones 23, 24
12 By 2 & 3 Phil. & Mary, c. 18. commiſſions of *oyer and terminer*, &c. &c. &c. ſhall not invalidate commiſſions of the peace 24 ſ. 13
13 How far the preciſe letter of commiſſions of *oyer and terminer*, &c. &c. muſt be obſerved by the juſtices 24 ſ. 14
14 What form is to be obſerved in the adjournment of ſuch commiſſions 24 ſ. 15
15 How far the power given by commiſſions of *oyer and terminer* may be altered, enlarged, abridged, or divided 24, 25
16 Whether juſtices of *oyer and terminer*, &c. may ſit in one county to try offences committed in another 25, 26
17 By 9 Edw. 3. c. 5. juſtices of *oyer and terminer*, &c. &c. ſhall ſend their records, &c. into the exchequer every Michaelmas 26 ſ. 20
18 Juſtices of *oyer and terminer* and gaol-delivery may proceed in the execution of both commiſſions at the ſame time 26 ſ. 21
19 Commiſſions of *oyer and terminer* are either general or ſpecial 26
20 The form of a general commiſſion of oyer and terminer 27
21 Whether it extends to ſuits between party and party 27 ſ. 23
22 An enumeration of ſpecial commiſſions of *oyer* and *terminer* 27
23 Juſtices of oyer and terminer have no power to proceed againſt any perſons but thoſe who are indicted before themſelves 28 ſ. 32
24 But they may be authoriſed by the wording of their commiſſion to hear and determine indictments found elſewhere *ibid.*
25 Where a ſtatute prohibits a thing, and does not appoint in what court it ſhall be puniſhed, the offender may be indicted before juſtices of oyer and terminer 28 ſ. 33
26 To what perſons and on what occaſions commiſſions of *oyer and terminer* are grantable *Page* 29 ſ. 34
27 By *ſtat. Weſt.* no writ of treſpaſs *ad audiendum et terminandum* ſhall be granted, except to the juſtices of either bench, or juſtices in *eyre*, *&c.* 29 ſ. 34
28 By 2 Edw. 3. c. 2. *oyers and terminers* ſhall not be granted but before juſtices of the one bench or the other, or juſtices *itinerant* 29, 30
29 By 34 Edw. 3. c. 1. juſtices of *oyer* and *terminer* ſhall be named by the court and not by the party 30 ſ. 36
30 Theſe ſtatutes only relate to ſpecial commiſſions granted upon particular occaſions at the requeſt of the party, and not to the king's general commiſſion of *oyer and terminer* 30
31 The 1 Edw. 6. c. 7. which gives ſubſequent juſtices power over thoſe reprieved by former juſtices, does not extend to conviction before juſtices of *oyer and terminer* 35 ſ. 18
32 The proceedings before juſtices of *oyer and terminer* after the *oyer* is determined ought to remain in the king's bench *ibid.*
33 Whether juſtices of the peace may proceed on a ſtatute which gives authority to juſtices of *oyer and terminer* 58
34 Juſtices of *oyer and terminer* cannot aſſign a coroner, and therefore they cannot receive the appeal of an approver 296 ſ. 16
35 *Quere* if juſtices of *oyer and terminer* may award a *venire* for the trial of an iſſue joined before them, returnable the day on which the party is arraigned, unleſs the crime amount to felony, or the party conſent to be tried immediately 572 ſ. 4
36 A *venire* before juſtices of *oyer and terminer*, returnable at a day certain, is erroneous, unleſs the ſeſſion appear to have been adjourned to the ſame day 573
37 The award of a *venire* returnable before juſtices of *oyer and terminer*, &c. need not expreſsly mention before what juſtices it ſhall be returnable 573 ſ. 7
38 Juſtices of *oyer and terminer* cannot have a jury returned for the trial of any

any iſſue joined before them by force of a bare award: They ought to make a particular precept to the ſheriff for that purpoſe under their ſeals *Page* 572
39 In what caſes they may award a *tales* (*Vide Jurors*, No. 45) 585, 586
40 By 5 Edw. 3. c. 11. Juſtices of *oyer and terminer* may award proceſs into any county of England in relation to perſons indicted or appealed before them of felony 400 ſ. 1

P.

PAIN FORT ET DURE.

1 The nature of the judgment 466 ſ. 16
2 Judgment of *pain fort et dure* in one felony, is no bar to a protecution for another 534

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The judgment for ſtriking in the king's palace 632 ſ. 12

PALATINE.

1 By 27 Hen. 8. c. 24. proceſs for treaſon, felony, or treſpaſs in every county palatine, ſhall be in the name of the king only, &c. *teſted* in the name of him who hath the franchiſe 401 ſ 7
2 A *certiorari* lies to a county palatine 406
3 A *certiorari* to remove an indictment at an aſſize in a county palatine ſhall be directed to the chancellor of ſuch county, who ſhall ſend for it to the juſtices of aſſize 410 ſ. 4
4 The proviſions of 5 & 6 Will. & Mary, c. 11. concerning the removal of indictments by *certiorari*, are extended to the counties palatine of Cheſter, Lancaſter, and Durham 414
5 A *capias* ſhall be awarded into a county palatine, where the defendant in an indictment or appeal is named of any place in ſuch county 434 ſ. 125
6 The 34 & 35 Hen. 8. c. 14. reſpecting the clerks of aſſize, &c. certifying tranſcripts of records of attainder, does not extend to the counties palatine *Page* 477, 478

PANEL.—*Vide Jurors.*

PARDON.

1 Anciently the right of pardoning was claimed by certain lords: But by 27 Hen. 8. c. 24. no perſon whatſoever ſhall have power to pardon treaſon and felony except the king 538 ſ. 1
2 WHERE A PARDON IS MATTER OF RIGHT 538 ſ. 2
3 By *ſtat. Glouceſter*, c. 9. where perſons are indicted for murder, and the jury find it *per infortunium* or *ſe defendendo*, upon the report of the juſtices the king ſhall pardon him *if it pleaſe him* 538 ſ. 2
4 The words *if it pleaſe the king*, are only ſpoken out of reverence to him, and do not render *the right* of the ſubject to a pardon precarious 539
5 The forfeiture of goods by ſuch homicide, is ſaved by pardon 539
6 A pardon is as neceſſary for one who is indicted of homicide *ſe defendendo*, and confeſſes it, as for one who is found guilty *ſe defendendo* on an indictment for murder *ibid.*
7 *Quere*, if the perſon convicted be found to have fled, whether a pardon will ſave the forfeiture *ibid.*
8 By 4 & 5 Will. & Mary, c. 8. robbers out of priſon who ſhall diſcover two offenders ſo as they be convicted, ſhall be entitled to a pardon 539, 540
9 By 6 & 7 Will. 3. c. 17. clippers, coiners, &c. diſcovering and convicting two offenders, are entitled to a pardon for all ſuch crimes committed before the diſcovery 540
10 By 10 & 11 Will. 3. c. 23. burglars, houſebreakers, horſeſtealers, ſhoplifters, who ſhall diſcover two or more offenders, ſhall be entitled to a pardon 540 ſ. 5
11 By 5 Ann. c. 31. burglars or houſebreakers who ſhall convict two or more offenders,

offenders, ſhall have 40l. and a pardon of all felonies except treaſon and murder *Page* 540 ſ. 6

12 By 8 Geo. 1. c. 18. any ſmuggler diſcovering and convicting two or more of his accomplices, ſo as the value of the goods recovered by ſuch diſcovery exceed 50l. ſhall receive 40l. and be entitled to a pardon 540, 541

13 By 25 Geo. 3. c. 57. accomplices diſcovering an offender in counterfeiting lottery orders, are entitled to a pardon 541 *Notes in marg.*

14 Perſons to whom the king has by ſpecial proclamation in the gazette or otherwiſe promiſed his pardon are entitled to it of legal right 541 (N)

15 In what manner an approver who convicts the appellee is entitled to a pardon 299. 541

16 An accomplice who makes a full and fair diſcovery, and gives evidence of all he knows, may, by analogy to the law of approvement, entitle himſelf to a *recommendation to the king's mercy*, but not to a pardon *of legal right* 541 (N) 1

17 A juſtice of the peace cannot pardon an offender, and tell him he ſhall be admitted a witneſs for the king 541 (N) 2

18 The king's bench will bail an accomplice who has entitled himſelf to the hope of mercy by the fairneſs of his diſcovery, in order that he may apply for the king's pardon *ibid.*

19 THE NATURE OF A PARDON OF GRACE 541

20 Wherever it may be reaſonably intended that the king, when he granted the pardon, was not fully apprized of the heinouſneſs of the crime, or the nature of the conviction for it, the pardon is void, as being gained by impoſition on the king 542 ſ. 8

21 The law has intruſted the king with the high prerogative of pardoning, upon a ſpecial confidence that he will ſpare thoſe only who ought, by the peculiar circumſtances of their caſe, to be exempted from the general rules of the law *ibid.*

22 Inſtances of pardons being void on the ground of the king being unacquainted with the true ſtate of the caſe *Page* 542, 543

23 Anciently a pardon of *all felonies* included a pardon of *all treaſons* 543 ſ. 9

24 But a pardon of all felonies will not now pardon any felony coming within the general limitations of the pardon; and murder and rape are expreſsly excluded by 13 Rich. 2.—The reaſon of it *ibid.*

25 It muſt appear by the pardon of a perſon attainted, that the king was acquainted with the attainder *ibid.*

26 General pardons are uſually made by act of parliament, and have of late very rarely been granted by the crown without a particular deſcription of the offence intended to be pardoned *ibid.*

27 In what manner the precedents of pardons which do not particulariſe the offence are to be underſtood *ibid.*

28 By 27 Edw. 3. c. 2. in every pardon of felony, the ſuggeſtion on which it is made, and the name of the perſon making the ſuggeſtion, ſhall be compriſed; and if the ſuggeſtion be after found untrue, the pardon ſhall not be allowed 544 ſ. 10

29 By 5 Hen. 4. c. 2. if an approver become a felon again after a pardon, he who procured the pardon ſhall forfeit 100l. *ibid.*

30 A general pardon of felonies extends not to piracy 544 ſ. 11

31 No pardon of felony ſhall be carried further than the expreſs purport of it 544 ſ. 12

32 Where a general act of pardon excepts ſome particular kinds of felony, ſuch exception extends to perſons attainted of them 544 ſ. 13

33 By 2 Edw. 3. c. 2. a pardon of manſlaughter ſhall only be granted when a man ſlayeth another in his own defence, or by misfortune 545 ſ. 14

34 But it ſeems the king's pardon of any other homicide is good without *a non obſtante* of this ſtatute *ibid.*

35 An outlawry in an appeal of death may be pardoned ſo far as the public juſtice is concerned in it *N. in marg.*

36 By 13 Rich. 2. c. 1. no pardon ſhall be allowed for treaſon, murder, or rape,

rape, unleſs the ſame treaſon, murder, or rape, be ſpecified in the ſame charter *Page* 546

37 This ſtatute was meant to prevent the abuſe of the prerogative; and no pardon of *murder, rape, or treaſon*, without a *non obſtante*, could be good; but by 1 Will. & Mary, c. 2. no diſpenſation of any ſtatute, by *non obſtante*, ſhall be allowed 546 ſ. 17

38 Pardons of *manſlaughter, or any other felony*, remain as they were at common law *(Vide ſupra)* 547

39 The pardon of a *felonious killing* may be well pleaded to an indictment of *manſlaughter* for the ſame homicide *ibid.*

40 If ſuch a pardon be pleaded to the finding of manſlaughter upon the coroner's inqueſt, the court will not allow it, until manſlaughter only has been found on the indictment *ibid.*

41 Where a general pardon of all *petit treaſons* excepts *murder*, it cannot be avoided by indicting one for murder who is guilty of petit treaſon 547 ſ. 19

42 A general pardon of *all felonies, &c.* except *murder*, ſhall extend to a *felo de ſe*, and not be conſidered within the exception 547 ſ. 20

43 If a general act of pardon extend to all *felonies*, offences, injuries, miſdemeanors, and other things done before ſuch a day, it pardons a homicide from a wound given before the day of which the party died not till after 547 ſ. 21

44 But it ſeems that this rule of law muſt be underſtood to pardon ſuch offences only, as are not within any of the exceptions of the pardon, although they may not be completed till after the day mentioned *Foſter* 66

45 The pardon of a principal allowed before his conviction, is thereby in effect a pardon of the acceſſary 548

46 If a man be bound as ſurety for another to the king for *the payment of a debt*, the pardon of the principal is alſo a pardon of the ſurety, even if the time of performance be not arrived at the time of the pardon 548 ſ. 23

47 A pardon to ſeveral, of all felonies done by them, without adding *or any of them*, is void. The reaſon of it *Page* 548 ſ. 24

48 The king's grant of *a protection*, &c. to a felon ſhall not operate as a pardon 549

49 The law will not ſuffer a pardon to be carried beyond the expreſs purport of it *ibid.*

50 A pardon of all *miſprifions, treſpaſſes, offences, and contempts*, will pardon a contempt, a *falſe return*, ſtriking *in Weſtminſter hall, barratry, præmunire*, and perhaps all offences *not capital* 549 ſ. 26

51 It is queſtionable, whether a general pardon of all treſpaſſes extends to champerty or confederacy 549 ſ. 27

52 The king cannot pardon any offence, ſo far againſt the public good as to be indictable at common law, before it happens; and *quere*, if he can ſo pardon an offence made puniſhable by ſtatute 550 ſ. 28

53 The king's grant to the keeper of a priſon that he ſhall go free from all eſcapes, has been adjudged to diſcharge a fine for a ſubſequent *negligent eſcape*; *ſed quere*, but it will not pardon a *voluntary eſcape* 550 ſ. 29

54 The king may diſcharge *the poſſibility of an intereſt* before it happens *ibid.*

55 It is a general rule that the king cannot pardon an offence that is *malum in ſe* before it happens 551

56 Formerly it was held, that the king might diſpenſe with a thing which, being lawful in its own nature, was only prohibited by act of parliament, ſo far as the public is concerned, excepting ſuch diſpenſation introduced a great inconvenience *ibid.*

57 The king cannot diſpenſe with an act of parliament which gives a particular intereſt or right of action to a party grieved *ibid.*

58 The king's power of diſpenſing with ſtatutes which intrench upon the prerogative examined 551, 552

59 The king may diſpenſe with a right of entry for a forfeiture, which ſtatutes, as thoſe of *mortmain*, give him 552 ſ. 30

60 But by 1 Will. & Mary, c. 2. every diſpen-

diſpenſation, by *non obſtante*, of or to any ſtatute, ſhall be void, except a diſpenſation be allowed in ſuch ſtatute *Page* 553 ſ. 31

61 The king could never diſpenſe with a ſtatute before it was made 553 ſ. 32

62 The king may pardon *any* offence after it is committed, ſo far as the public are concerned 553 ſ. 33

63 The king may pardon the penalty for an offence againſt a popular ſtatute, before any ſuit commenced by an informer *ibid.*

64 The king cannot pardon a public nuiſance which continues unreformed, except as to the fine incurred previous to the pardon *ibid.*

65 The king cannot bar any action on a ſtatute by a party grieved, nor even a popular action by a common informer, if commenced previous to the pardon 553, 554

66 The king cannot diſcharge a recognizance of the peace before it is forfeited 554

67 A pardon will not bar an appeal, except it be at the ſuit of the king, after the nonſuit of the party 554 ſ. 35

68 If a pardon be granted of an appeal at the ſuit of the party, it ſhall not be allowed, except on a *ſcire facias* againſt the appellant, &c. *ibid.* ſ. 36, 37

69 In what manner an *appellee* muſt proceed to make a pardon of the appeal good 554, 555

70 *Quere*, whether the king, upon an appeal of death, can pardon the burning in the hand, if the appellee be convicted of manſlaughter 555 ſ. 39

71 Where a ſtatute gives a public puniſhment for a private injury, the king may pardon it *ibid.*

72 The king's pardon will diſcharge any ſuit in the ſpiritual court *ex officio*, or *pro reformatione morum*, or *ſalute animæ* 556 ſ. 41

73 If the time of ſuch a pardon be prior to the award or taxation of coſts, it will diſcharge them alſo; but not if the coſts be taxed *ibid.* ſ. 42

74 A pardon of all *contempts* will pardon a perſon impriſoned by *excommunicato capiendo* for non-payment of coſts *ibid.*

75 *Quere*, whether an excommunication can be diſcharged by the king's pardon *Page* 556 ſ. 42. (N)

76 A pardon will not diſcharge a ſuit, either temporal or ſpiritual, in which the plaintiff hath a ſpecial intereſt 556 ſ. 42

77 Whether a pardon will diſcharge ſubſequent coſts upon a removal of a cauſe into the ſuperior courts 556, 557

78 Coſts taxed to the party grieved for a contempt in equity are not diſcharged by a pardon of all contempts; *ſed quere*, if the coſts are taxed upon attachment by the prothonotary 557

79 By 12 and 13 Will. 3. c. 2. no pardon under the great ſeal ſhall be pleaded to an impeachment by the commons in parliament 557 ſ. 44

80 After the impeachment is determined, the king may pardon the offender 557 (N)

81 The king may extend his mercy on what terms he pleaſes, and may annex a condition, either precedent or ſubſequent, on the performance of which the validity of the pardon depends 557 ſ. 45

82 If the king pardons a man for felony *whereof he ſtands indicted, &c. &c.* and the man in fact never was indicted, the pardon is void; for the king appears to have been deceived 557 ſ. 46

83 A pardon gives the ſubject of it a new capacity and credit; clears him from the infamy of his conviction; makes him a good witneſs; and enables him to maintain an action for calling him felon, &c. 558

84 A pardon of burning in the hand in manſlaughter hath the ſame effect as burning in the hand would have had 558 ſ. 49

85 A pardon is of no manner of force, as to the legal effect of it, till it has paſſed the great ſeal 558 ſ. 50

86 The arreſt of a perſon pardoned without notice is excuſable, becauſe arreſts are for the public good 558 ſ. 51

87 By 4 Geo. 1. c. 11. completely ſerving the term for which a convict may be tranſported ſhall have the effect of a pardon *ibid.*

88 *Quere*, whether a pardon of a conviction

tion *of perjury* will enable the perſon pardoned to be a competent witneſs *Page* 558 ſ. 52

89 A conviction, &c. during a ſeſſion of parliament is diſcharged by an act paſſed during the ſame ſeſſion which pardons the offence 558 ſ. 53

90 No pardon without expreſs words ſhall diveſt an intereſt veſted by a precedent conviction or attainder 559 ſ. 54

91 A pardon prior to a conviction ſhall prevent any forfeiture, either of land or goods *ibid.*

92 In what manner a general pardon of all judgments and executions ſhall operate 559 ſ. 55

93 A pardon of a crime, which is made penal by ſtatute, and which alſo diſables the party, will diſcharge the penalty, but not the diſability 559 ſ. 56

94 The king's pardon cannot ſave corruption of blood by attainder of treaſon or felony 559 ſ. 57

95 A general pardon by parliament cannot be waived 559 ſ. 58

96 But a man may waive the benefit of a pardon under the great ſeal, as where one who hath ſuch a pardon doth not plead it, but takes the general iſſue, after which he ſhall not reſort to the pardon 559, 560

97 The exceptions of a general pardon muſt be pleaded, or the court cannot allow the party the benefit of it 560 ſ. 60

98 In what manner thoſe who plead a general pardon muſt ſhew they are not within the exceptions *ibid.*

99 Where a man is within the general words of a ſtatute pardon, which is qualified by ſubſequent *proviſoes*, it is ſufficient if he bring his caſe within ſuch general words; for the exceptions in ſuch proviſoes ought to be ſhewn on the other ſide *ibid.*

100 But the court are *ex officio* bound to take notice of a general pardon of all perſons, &c. without exception 560 ſ. 61

101 Where certain crimes are excepted from a general pardon, there is no need to aver that the crime indicted is not one of them *Page* 561 ſ. 62

102 Where a ſtatute pardon excepts only one perſon in particular, there is no need of an averment that the perſon indicted is not the perſon excepted 561 ſ. 63

103 Articles of ſurrender cannot be pleaded as amounting to a pardon 561 ſ. 64 *N. in marg.*

104 The ſign manual importing a pardon cannot be pleaded as a pardon *ibid.*

105 It will be error to allow a man the benefit of a pardon, unleſs it be pleaded 561

106 He who pleads a pardon under the great ſeal ought to produce it *ſub pede ſigilli*, though it be a plea in bar 561 ſ 65

107 If the party pleading do not produce the pardon, the court may indulge him with a future day for the purpoſe *ibid.*

108 A *variance* between the record and the pardon pleaded may be ſupplied by averment, if it is not repugnant 561 ſ. 66

109 If ſuch variant pardon be pleaded without averment, the court may give a further time to perfect the plea, or to purchaſe a better pardon 561, 562

110 If the variance be *perſonal*, an inqueſt of office has been taken whether the ſame perſon were meant in both records 562

111 No pardon under the great ſeal can be pleaded together with or after the general iſſue, unleſs it be dated ſubſequent to the iſſue 283 ſ. 137. & p. 562 ſ. 67

112 The party ſhall take advantage of his whole pardon, and not be driven to any particular words of it 562 ſ. 68

113 A perſon apprehended upon an eſtreated recognizance may plead a pardon in the king's bench, and have a *ſuperſedeas* to the exchequer 562 ſ. 69

114 Formerly no pardon was allowed without a writ for that purpoſe (except for treaſon) out of chancery, and ſurety taken for the good behaviour 562 ſ. 70

115 By 5 and 6 Will. & Mar. c. 13. juſtices before whom any pardon for felony ſhall be allowed, may oblige the party,

party, whether infant or *feme covert*, to find two ſureties for their good behaviour, not exceeding ſeven years *Page* 562 ſ. 70

116 The judges may inſiſt on the *fee of gloves* before they allow a pardon 562 ſ. 71

117 The mode of taking advantage of a pardon on the circuits and at the Old Bailey deſcribed 562, 563

118 Where beheading is part of the judgment, as in high treaſon, the king may pardon all the reſt 657 ſ. 5

119 If petit treaſon be pardoned by parliament, the heir can bring no appeal; for the pardon of the petit treaſon pardons the murder alſo 244

120 In what caſes a pardon of a former ſuit may be pleaded to a *qui tam* action or information 392

121 Though an appeal be determined by the marriage of the widow, the appellee ſhall not be diſcharged without the king's pardon 243 ſ. 38

122 If the king pardon the approver hanging the appeal, the appellee ſhall be diſcharged 298 ſ. 25

123 An appellee at the king's ſuit may plead a pardon to the appeal, in the ſame manner as to an indictment 306 ſ. 13

124 The 18 Eliz. c. 7. which ſubſtitutes burning in the hand inſtead of purgation, enures by way of ſtatute pardon, and reſtores the party to his credit 510, 511

125 So alſo does the king's pardon of treaſon or felony after conviction or attainder 610

126 An attainder after pardon may be falſified, either by the party or by his heir 652 ſ. 4

127 A pardon will not ſave the dower of the wife after attainder 647

128 In what manner a pardon will ſave corruption of blood 649 ſ. 51

129 The pardon of an attainder on a proſecution at the ſuit of the king will not bar an appeal 533

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1 A *viſne* may come from a pariſh, ward, &c. &c. 263

2 If a fact done in a vill within a pariſh which contains divers vills, or in a city which contains divers pariſhes, be alledged generally in the pariſh or the city, it may be pleaded in abatement *Page* 265, 266

3 It is the conſtant uſage in pleading, to ſhew the *ward and pariſh* in which a fact alledged in LONDON was done 266

4 If a man be named of a pariſh which contains more towns, hamlets, or places known out of any town or hamlet, the defendant may plead it in abatement 274

5 A pariſh ſhall be intended to contain no more towns than one, unleſs the contrary appear *ibid.*

6 Where a warrant is alledged, authoriſing an arreſt within the *liberties* of London, and the indictment lays the execution of it in ſuch a pariſh and ward in London, it is good; for the pariſh ſhall be intended within the liberties 324

7 A fact laid in a pariſh of London with ſome other addition, as St. Michael, Woodſtreet, &c. without ſhewing the ward in which the pariſh lies, is good 336 ſ. 83

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A *viſne* may come from a park 266 ſ. 93

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2 No preſumption ſhall be made that they do not act within their juriſdiction 170 ſ. 73

3 The form in which the parliament ſhall draw commitments is not cognizable by the king's bench *ibid.*

4 *Quere*, what remedy a ſubject has who ſhall be illegally committed by either houſe of parliament *ibid.*

5 The courts of common law cannot *directly* intermeddle with the privileges of parliament 171 (N)

6 The power in either houſe of parliament to commit for contempt, is inherent in the very nature of their inſtitution *Page* 171 (N)
7 After the diſſolution or prorogation of parliament, a perſon committed by either houſe may be diſcharged by the king's bench 171 ſ. 74
8 All matters before either houſe muſt be commenced anew at the next parliament, except a writ of error *ibid.*
9 *Quere*, whether a lord committed by the houſe of lords on an impeachment of treaſon, and afterwards pardoned, cannot be diſcharged by the king's bench (*Vide* p. 557 ſ. 44.) 171 ſ. 75
10 The court of king's bench may in their diſcretion bail, though not diſcharge, a lord upon an impeachment of high treaſon *ibid.*
11 By 1 Hen. 4. c. 14. no appeals ſhall be purſued in parliament 235. 239
12 What miſrecitals in an indictment on a ſtatute, of the place or time at which the parliament was holden, are fatal 350, 351
13 In what manner a parliamentary pardon muſt be pleaded, and how far the court are bound *ex officio* to take notice of it 560, 561
14 No authority, except the parliament, can inflict a puniſhment unknown to the common law, as tranſportation, &c. 514. 633
15 By 33 Hen. 8. c. 29. attainders of treaſon by the common law are made of equal force as attainders by parliament 655 ſ. 14
16 The duty of peers in the court of the king in parliament 7 (N)

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1 All peers of the realm are privileged from attendance at the ſheriff's torn, unleſs neceſſary on ſome particular occaſion 91 ſ. 11
2 None but peers can hold the office of lord high ſteward 7
3 The authority and duty of peers in the court of the lord high ſteward, and in the court of the king in parliament 7 (N)
4 No peers, as ſuch, have any greater authority to keep the peace than mere private perſons 43 ſ. 1
5 A peer is puniſhable by attachment for diſobedience to all writs whatſoever 228 ſ. 33. & (N) 2
6 A peer of Ireland where triable for a crime committed in Ireland 318
7 A peer of the realm cannot be an approver 294 ſ. 3
8 Where a *diſtringas* is the firſt proceſs againſt a peer 402, 403
9 By 1 Edw. 6. c. 12. every peer is allowed clergy in all caſes except murder, and therefore cannot be denied it for any crime where it was allowed by the common law, unleſs ouſted by ſome ſtatute ſince 1 Edw. 6. 503 ſ. 109 506 ſ. 114
10 A peer cannot have counſel where a commoner ought not 564 ſ. 1
11 By 24 Geo. 2. c. 18. no challenge ſhall be taken by a peer for want of *knights* returned on the panel 580 ſ. 4
12 A peer cannot challenge any of his peers *ibid.*
13 A peer returned on a jury may be diſcharged by writ of privilege, or he may challenge himſelf, or be challenged for that cauſe 583 ſ. 11

14 If a peer bring an appeal the defendant ſhall not wage battle *Page* 601
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16 Where a peer is to be tried by his peers, the king, by commiſſion, conſtitutes ſome peer high ſteward *pro hâc vice*, which reciting the indictment authoriſes him to receive and proceed upon the ſame, and require the peers to attend him, and the lieutenant of the Tower to bring up his priſoner 592 ſ. 1
17 A *certiorari* goes out of chancery to certify the indictment before the ſteward *indilate* 593
18 The ſteward by precept under ſeal directs a certain day and place at which it ſhall be certified *ibid.*
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20 The ſteward directs another precept to the ſerjeant at arms to ſummon the peers. *Quere*, if the parliament be ſitting 593 ſ. 3
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25 None but lords who have a vote in parliament can paſs on ſuch a trial 594 ſ. 7
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27 It is agreed they have a right to vote in a bill of attainder 598
28 They have alſo a right to vote in queſtions previous to the trial of a peer 595
29 By 7 Will. 3. c. 3. all peers who have a right to ſit and vote ſhall be ſummoned 20 days before the trial, and take the oaths, &c. *ibid.*
30 No lord of any other country, or of Ireland, nor the ſon or heir of any peer hath a right to ſuch a trial 595 ſ. 9
31 By 20 Hen. 6. c. 9. dutcheſſes, counteſſes, baroneſſes, indicted of treaſon or felony, whether married or ſole, ſhall be tried as peers of the realm would be tried for the offence of which they ſhall be indicted *Page* 595 ſ. 10
32 A queen, conſort or dowager, ſole, or married to a ſecond huſband, be he a peer or commoner; and all peereſſes by birth, ſole, or married to peers or commoners; all marchioneſſes and vicounteſſes are entitled to a trial by peers 595, 596
33 But a peereſs by marriage loſes her dignity by marrying a commoner 596
34 While the parliament is ſitting a biſhop ſhall be tried by the peers 596 ſ. 12
35 A trial by peers may be of right upon an indictment of treaſon or felony, or miſpriſion thereof, but for all other crimes a peer ſhall be tried by the country 596 ſ. 13
36 A peer ſhall not be tried by his peers upon an appeal of felony 596 ſ. 14
37 A peer is not by any privilege exempted from being indicted by a grand jury of commoners, either in the king's bench, before commiſſioners of oyer, or the coroner 597 ſ. 15
38 If a peer abſent himſelf and cannot be found, he may be outlawed *per judicium coronatorum, &c.* 597 ſ. 16
39 The king's bench may allow a pardon pleaded by a peer to an indictment in that court 597 ſ. 17
40 The king's bench cannot receive a peer's plea of not guilty, or his confeſſion *ibid.*
41 A peer attainted of treaſon or felony, may be brought into the king's bench, and demanded why execution ſhould not paſs 597 ſ. 18
42 If the day appointed by the houſe of lords for the execution of a peer ſhould lapſe before execution done, a new time may be appointed by the king's bench, the parliament not then ſitting, and the record, &c. being properly removed 597 ſ. 18 (N)
43 If a peer on an arraignment before the lords refuſe to put himſelf upon his peers, he ſhall be dealt with as one who ſtands mute 597 ſ. 19
44 One entitled to peerage who pleads

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45 No queſtion ought to be aſked of the lord high ſteward, or of the judges, in the abſence of the priſoner 597 ſ. 20
46 After the lords are withdrawn, the judges are not to give them any opinion without conſulting the reſt of the judges, and openly in court 598
47 But the judges may anſwer the lord high ſteward any queſtion in open court, during the abſence of the priſoner *ibid.*
48 When a peer is tried before the peers *in parliament*, the lord ſteward withdraws with the reſt of the peers (*Vide page* 7) 598 ſ. 21
49 Where a peer is tried by the lords in full parliament, the houſe may be adjourned, and the evidence taken by parcels 598 ſ. 22
50 Where the trial is by commiſſion the lord ſteward, after verdict, may take time to adviſe upon it, and his office continues till judgment *ibid.*
51 On a trial by commiſſioners the lords triers cannot ſeparate after evidence given; but muſt continue together till verdict given *ibid.*
52 In a trial before the peers *in parliament* every peer is a judge both of law and fact; but in the court of the high ſteward, he is to judge of the law, and the peers triers are mere judges of the fact *ibid.* (N)
53 In ſtated and fixed judgments the law makes no diſtinction between a peer and a commoner 629 ſ. 2

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1 The whole penalty of a penal ſtatute goes to the king, where it is not otherwiſe diſpoſed of 377
2 The king's grant of ſuch penalties is void 398, 399

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It is not ſafe to omit the word *percuſſit* in an appeal of murder where the fact will bear it *Page* 260

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In an indictment no *periphraſis* or circumlocution whatſoever will ſupply thoſe words of art which the law hath appropriated for the deſcription of the offence (*Vide Indictment*, No. 65. 252.) 320. 354

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1 Perjury is not cognizable at common law by juſtices of the peace 60, 61
2 An indictment of perjury on 5 Eliz. c. 9. omitting the words *voluntariè et corruptè* in ſetting forth the ſwearing is inſufficient 354 ſ. 110
3 So alſo if ſuch an indictment ſet forth *tacto per ſe ſacro evangelio falſo depoſuit*, without directly ſhewing that he was ſworn, it is not good 354 ſ. 111
4 The court will not grant a *certiorari* to remove an indictment of perjury at the inſtance of the defendant, except for ſpecial cauſe 408 ſ. 28
5 It is unſettled whether the pardon of a conviction of perjury make the party a good witneſs 558 ſ. 52
6 A conviction of perjury, and judgment thereon, is a good cauſe of challenge to a juror 588
7 It is alſo a good exception to a witneſs, notwithſtanding the king's pardon 610
8 A conviction of perjury will not diſable a man from making an affidavit as to the irregularity of a judgment 610 ſ. 23
9 Precedent of an information for perjury 370

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2 Petty treaſon includes in it murder and more 240
3 Two witneſſes are required upon an indictment of petty treaſon 366 ſ. 144 & p. 603 (N)
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5 *Quere*, whether petty treaſon was, at common law, entitled to clergy.—But this is ſettled by ſtatute *De Clero* 479 ſ. 21
6 By 23 & 25 Hen. 8. petty treaſon is ouſted of clergy 487 ſ. 50
7 In petty treaſon, depoſitions taken on the examination, &c. are not ſufficient to convict if the deponent be living, though unable to travel, or kept out of the way by the procurement of the priſoner 605 (N)
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9 The judgment againſt a woman is that ſhe ſhall be drawn to the place of execution and there burnt *ibid.* ſ. 6
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2 By 32 Hen. 8. c. 40. the preſident and fellowſhip of the college of phyſicians ſhall not be choſen conſtables 101
3 A *certiorari* will lie to the college of *phyſicians* 406

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2 Pirates ſtanding mute were to be adjudged to *pain fort et dure*: But by 12 Geo. 3. c. 20. they ſhall be convicted, &c. as by verdict or confeſſion 464. 468.
3 Piracy is ouſted of the benefit of clergy 484 ſ. 41

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2 Inſtance of a pardon pleaded to *præmunire* by attorney without ſuch ſpecial grant *ibid.*
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6 A pardon of all miſpriſions, treſpaſſes, offences, and contempts, will pardon a *præmunire* 549 ſ. 26
7 The judgment in *præmunire* 631 ſ. 9
8 The ſtatutes of *præmunire* which give a general forfeiture of all the lands and tenements of the offender extend not to land in tail 644 ſ. 28
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1 Who were conſidered at common law as conſervators of the peace by preſcription 45
2 The king may lawfully claim the franchiſe of making coroners by preſcription; but no ſubject can ſo do 72 ſ. 11
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4 *Quere*, if a vill may be bound by preſcription to provide a pillory and tumbril 114 ſ. 5
5 The caption of an indictment taken at a court leet need not ſhew that it was holden by grant or preſcription 115 ſ. 7

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2 A *preſentment* is an accuſation found by a grand jury without any bill brought before them 299 ch. 25

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1 What circumſtances are allowed to induce ſo ſtrong a preſumption of guilt as will juſtify the arreſt of the perſon ſuſpected 119 ſ. 12
2 The ſeveral inſtances enumerated from which the law preſumes ſuch guilt as will

will exclude the ſuſpected perſon from the benefit of a replevin (*Vide Bail*) *Page* 154. 156

3 Any plaintiff may counterplead wager of battle by alledging ſuch matters as induce a violent preſumption of guilt 601

4 *Violent preſumption* from plain circumſtances is in ſome caſes taken for full proof 618 ſ. 42

5 *Probable preſumption* is of ſome weight; but *light preſumptions* ought not to be regarded at all *ibid.*

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1 The coroner ought to inquire of the death of all perſons whatſoever who die in priſon 77 ſ. 21

2 By 25 Geo. 2. c. 29. the county ſhall pay 20s. for every inquiſition *ſuper viſum corporis* taken in priſon, and pay the coroner 9d. a mile, &c. 85, 86

3 Perſons who break priſon are not bailable 154 ſ. 42

4 In what manner priſon breach muſt be laid in an indictment for the offence 324

5 Thoſe who had broke the priſon of the ordinary were denied the privilege of clergy 475, 476. 505

6 Wager of battle by one who has broken priſon may be counterpleaded 601

7 In what inſtances of miſconduct a priſon keeper may be puniſhed by attachment 227

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1 Wherever a commitment by the privy council ſpecially expreſſes the crime, the king's bench will exerciſe its diſcretion as to admitting the party to bail *Page* 166 ſ. 66

2 If the commitment be by colour of any uſurped authority or pretended patent, the court will diſcharge without bail *ibid.*

3 Ancient opinions and determinations reſpecting commitment by the privy council 166, 167

4 By 16 Car. 1. c. 10. perſons reſtrained of their liberty by warrant from the council board, ſhall have a *habeas corpus* 169

5 Whether the privy council may lawfully commit perſons for treaſon and for *other offences againſt the ſtate* 181 & (N) 1, 2, 3

6 By 33 Hen. 8. c. 23. the king's council may examine treaſons, miſpriſions, and murders, and the priſoners may be tried in any county by the king's commiſſion 569

7 This ſtatute, as far as relates to treaſon done within the realm, is repealed 569 ſ. 3

PROCEDENDO.—*Certiorari.*

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1 Juſtices of the peace by virtue of 1 Ed. 4. c. 2. may award proceſs upon indictments found at the ſheriff's torn 111 ſ. 74

2 In what caſes attachment may be iſſued for abuſes of the proceſs of the court 230, 231

3 What proceſs is to be awarded againſt *appellees* 297, 298

4 No proceſs without writ can be well awarded on an indictment, &c. from any court out of the county wherein it ſits; but by writ it may be well awarded into any county of England either by the king's bench, juſtices of eyre, or juſtices of *oyer and terminer*: But juſtices of the peace have not this power 400

5 All proceſs to which the king is a party ought to have the clauſe of *non omittas*, &c. 401 ſ. 5

6 By 27 Hen. 8. c. 24. all proceſs upon indictment of treaſon, felony, or treſpaſs, to every county palatine or other liberty, ſhall be made in the king's name only, and all proceſs iſſuing from a county palatine, &c. ſhall be *teſted* in the name of him who has the franchiſe *Page* 401 ſ. 7

7 All proceſs to other courts ought to be in the king's name; and if from the king's bench, *teſted* in the name of the chief juſtice, or, in his abſence, the ſenior judge, &c. 401 ſ. 8

8 Proceſs on an indictment before juſtices of the peace muſt be under the hands of two of them, and that ſitting the court in the ſeſſions 401, 402

9 A *venire facias* is the proper proceſs to be firſt awarded on an indictment for any crime under the degree of treaſon, felony, or mayhem, except where other proceſs is directed by ſome ſtatute 402 ſ. 9

10 A *venire facias* is the firſt proper proceſs on an information in the crown office for a debt claimed by the king, as having been forfeited by a *felo de ſe* *ibid.*

11 If, on ſuch *venire*, the defendant cannot be found, a *diſtreſs infin te* ſhall go, if he have lands, &c. But if a *nihil* be returned, a *capias, alias & pluries* ſhall iſſue 402 ſ. 10

12 *Quere*, whether in *oyer and terminer* if the party make default at the firſt day a *venire facias* or *pone per vadios* may iſſue, &c. &c. 402 ſ. 11

13 On informations, a *capias* againſt a commoner, and a *diſtringas* againſt a peer, are the firſt proceſs, &c. &c. 402 ſ. 12

14 At common law an *attachment* or *ſubpœna* at the election of the informer were the proper proceſs in *qui tam* on popular ſtatutes 403

15 In other actions an *attachment* or *pone per vadios* was the proceſs *ibid.*

16 And in all *originals*, in debt on popular ſtatutes or ſummons, was the proper proceſs *ibid.*

17 By 21 Jac. 1. c. 4. the like proceſs in *popular proſecutions* ſhall be had, as in actions of treſpaſs *vi et armis*, at common law 403 ſ. 13

18 Therefore the proceſs in all ſuch ſuits muſt now be by *attachment* or *pone per vadios*, &c. and after by *diſtreſs infinite*, where by the return the party appears ſufficient, or otherwiſe by *capias* *Page* 403 ſ. 13

19 The practice on a criminal information is firſt to award a *ſubpœna*, and on no appearance, &c. in four days, a *capias* of courſe; but if the defendant be a corporation aggregate, a *diſtringas* 403 ſ. 14

20 A *capias* is the firſt proceſs on all indictments or appeals of treaſon, felony, and mayhem 403 ſ. 15

21 There ought to be fifteen days between the *teſte* and the *return* of proceſs iſſued from the king's bench into a foreign county.—But this is not neceſſary in the county where the court ſits 403 ſ. 16

22 The ſheriff, and not the bailiff of any franchiſe, ſhall execute all writs where the king is party, whether there be the clauſe of *non omittas*, or not; for the king's prerogative ſhall be preferred to every franchiſe, unleſs there is a clauſe to the contrary in the grant of the franchiſe 404

23 By 4 & 5 Will. & Mary, c. 18. no proceſs ſhall iſſue, on any information exhibited by the maſter of the crown office till a recognizance be given, &c. *(Vide Information)* 404 ſ. 18

24 By 18 Eliz. c. 5 no proceſs ſhall iſſue on a penal information till a ſpecial note be made of the time when ſuch information was exhibited *ibid.*

25 If a defendant appear and before iſſue joined eſcape the common *capias, alias*, and *pluries* ſhall be awarded, unleſs there has been an *exigent*, in which caſe a new *exigent* ſhall go *inſtanter* 404 ſ. 19

26 If no *exigent* be awarded, and the defendant make default after iſſue joined, and an inqueſt be awarded to try it, a *capias* ſhall go againſt him *ad audiendam juratam*, &c. *ibid.*

27 *Quere*, if the defendant appear upon the *exigent*, whether he ſhall not be admitted to plead *de novo* 404, 405

28 Of

28 Of proceſs by *certiorari*. *(Vide Certiorari)* *Page* 405 to 423
29 Where the proceſs on an appeal, indictment, or information, ſhall be ſaid to be *diſcontinued*, *miſcontinued*, or put without day. *(Vide Diſcontinuance)* 423 to 430
30 How far and in what manner proceſs is neceſſary in OUTLAWRY. *(Vide Outlawry)* 436
31 In what manner proceſs ſhall be iſſued againſt jurors. *(Vide Jurors*, No. 22 to No. 45.) 571 to 577
32 In what manner proceſs ſhall iſſue to compel the attendance of witneſſes. *(Vide Evidence*, No. 95 to No. 102) 613, 614

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1 The plea of *autrefoits acquit* being a plea in bar and the record not in the pleader's cuſtody, there is no need to plead it with a *profert ſuo pede ſigilli* 524. 525
2 Whoever pleads a pardon under the great ſeal ought to produce it *ſub pede ſigilli* 561 l. 65

PROHIBITION.

1 The court of the conſtable and marſhal, being holden before the marſhal only, may be prohibited if it exceed its juriſdiction 18 ſ. 13
2 The king's bench uſually awards a writ of prohibition to an inferior court which exceeds its juriſdiction; and if it proceeds after the ſervice of the writ, will grant an attachment, &c. 225
3 Peers as well as commoners liable to an attachment for diſobeying a writ of prohibition, &c. 228

PROROGATION.—*Parliament. Bail. Commitment.*

PROVISO.—*Proceſs. Indictment. Evidence.*

PURCHASER.

1 Where an heir takes lands under the forfeiture given by 6 Rich. 2. c. 6. againſt ſuch women as conſent to the raviſher, he ſhall not be diveſted by any *ex poſt facto* heir, becauſe they are veſted in ſuch firſt heir as a purchaſer *Page* 254, 255
2 A perſon attainted may be a purchaſer of land, but he cannot hold it: The king ſhall have it on office found 649 ſ. 50

PURGATION.—*Clergy.*

PURPRESTURE.—*Vide Sheriff's Torn.*

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QUARTER SESSIONS.—*Vide Seſſions.*

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In what caſes the court will quaſh an indictment, information, or *certiorari* 367, 368. 423. 523

QUEEN.—*Vide Peers.*

QUI TAM.—*Vide Information Qui Tam.*

QUINTO EXACTUS.—*Outlawry.*

QUOD CUM.—*Vide Indictment.*

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RAPE.

1 Whether the ſheriff in his torn has juriſdiction over this offence *Page* 105
2 In what manner an appeal of rape muſt be brought, and by whom. (*Vide Appeal* No. 128 to 142.) 252 to 256
3 It is ſaid, that the coroner may enquire of rape 81 ſ. 35
4 Anciently only thoſe who actually raviſhed the party were conſidered principals: but now all who are preſent aiding, &c. are involved in the ſame degree of guilt 441 ſ. 7
5 *Quere*, if three *capias's* be not neceſſary in an appeal of rape in order to outlaw the offender 431
6 The word *rapuit* is neceſſary in all indictments and appeals of rape 258 ſ. 77. 268 ſ. 97
7 *Felonicè rapuit* are ſufficient without the words *carnaliter cognovit* 259. 320

READING.—*Vide Clergy*, No. 140 to 143.

RECEIVER.—*Vide Acceſſary and Principal.—Indictment.*

RECITAL.—*Vide Indictment, Pardon.*

RECOGNIZANCE.

1 The king cannot take a recognizance for the keeping of the peace 43 ſ. 1
2 No one can take a recognizance who is not either a juſtice of record or by commiſſion *ibid.*
3 *Quere*, if the maſter of the rolls may not take a recognizance of the peace by virtue of his office 43 ſ. 2
4 The ſecurity for the peace taken by the ſheriff is conſidered as a recognizance, and not as a common obligation *Page* 44 ſ. 4
5 But ſuch ſecurity taken by a coroner is only a common obligation, and not a recognizance, except it be taken in his court 44 ſ. 5
6 Neither the ſheriff nor conſtable could take bail of perſons indicted of larceny in the leet, acceſſaries to felony, or perſons appealed by provers, by recognizance, but only by obligation 147 ſ. 26
7 The practice of the king's bench in admitting a perſon to bail who is preſent in court, for felony, &c. is to take a ſeveral recognizance in a certain ſum from each of the bail to appear, &c. and that the bail ſhall be liable on non-appearance *body for body* 177 ſ. 83
8 Juſtices of the peace may take the recognizance in a certain ſum, or body for body, in their diſcretion *ibid.*
9 Where the king's bench take bail before return of a *capias*, the recognizance ought to be only in a certain ſum, and not body for body *ibid.*
10 Perſons bound *body for body* are only liable *to fine* on forfeiture of the recognizance *ibid.*
11 WHAT SHALL FORFEIT A RECOGNIZANCE 177 ſ. 84
12 *Quere*, if in felony the uſual form *ad ſtandum recto de felonia predicta et reſpondendum domino regi*; be uſed, and at the trial the party ſtand obſtinately mute, it ſhall be conſidered as a forfeiture of the recognizance 177, 178
13 If the recognizance be "to appear in in the king's bench on the firſt day of term, and not depart till diſcharged by the court," and on a *nolle proſiqui* entered and a new information filed, the defendant, after perſonal notice, refuſes to appear, it is a forfeiture of the recognizance 178
14 Such a recognizance is not forfeited by non appearance, on the firſt day of every term *after he hath pleaded* *ibid.*
15 By 4 Geo. 3. c. 10. upon eſtreated recognizances, the barons may, upon affidavit and petition of any perſon impriſoned,

priſoned or liable ſo to be for the forfeiture, diſcharge ſuch perſon without *quietus*, excepting the offence concerned the crown *Page* 179
16 On a recognizance eſtreated, if the party take his trial at the next ſeſſion the court of exchequer will allow him to compound the penalty for a very ſmall matter 179 (N)
17 If the penalty be paid, the court will order the proſecutors coſts to be paid and the ſurplus to be returned, provided the recognizance has ultimately been complied with *ibid.*
18 Recognizances in caſes of felony are to be certified to the next gaol-delivery *ibid.*
19 If a defendant be acquitted of perjury, the recognizance ſhall be diſcharged on motion, though the acquittal is not entered on record *ibid.*
20 Neither the bail nor the defendant can be called on their recognizances without notice, except on the day of appearance *ibid.*
21 On non-appearance the recognizance may be reſpited on cauſe ſhewn; but the court will not diſcharge, even on the conſent of the attorney-general *ibid.*
22 The court is the proper judge whether recognizances ought to be eſtreated or ſpared *ibid.* & 409 ſ. 33
23 An offender pardoned on condition of tranſportation may ſurrender to diſcharge a recognizance, by obtaining a *habeas corpus*; but if ſuch convict be on board the tranſport the court will not grant the writ *ibid.*
24 What recognizance ſhall be taken by the maſter previous to iſſuing proceſs on an information. *(Vide Information.)* 370 to 372. 374
25 What recognizance is to be given before the allowance of a *certiorari*. *(Vide Certiorari*, No. 67 to No. 101) 412 to 417
26 The removal of a recognizance by *certiorari* does not ſuperſede its obligation 418 ſ. 65
27 How a recognizance ſhall be certified 419, 420
28 The king cannot diſcharge a recognizance of the peace, before it is forfeited *Page* 554

RECORD.—*Vide Certiorari. Avoiding Judgment. London.*

1 By 9 Edw. 3. c. 5. juſtices of aſſize, gaol-delivery, and *oyer*, *&c.* ſhall ſend their records into the exchequer every *Michaelmas* 26
2 Whether an offence made cognizable by the king's courts of record extends to a court of *oyer and terminer* 28, 29
3 A gaoler, in caſe of eſcape, is concluded from denying the priſoner was in his cuſtody by the record of commitment 202
4 A fact may be verified by the records of the ſame court where the indictment is depending 312
5 Where a record is pleaded the party muſt have it ready 312, ſ. 30. 524 ſ. 2. 561 ſ. 65. 609 ſ. 20

RECOVERY.—*Information Qui Tam.*

RECREANT.—*Battle.*

RECUSANCY.

1 The king's bench will not grant a *certiorari* to remove a conviction of recuſancy 408 ſ. 29
2 It was never done but in the caſe of James Duke of York (N) *in marg.*

RELEASE.

Vide Appeal No. 37. 232 to 237.—*Information Qui Tam.*

REMAINDER.

Whether a remainder, expectant on a leaſe for years, will qualify a man to be a juror 584, 585

REPLICATION.

By whom the replication is to be made in *qui tam* ch. 26 ſ. 72

REPRIEVE.

1 Every court which has power to award an execution has alſo of common right a diſcretionary power of granting a reprieve, even after the commiſſion is determined *Page* 658 ſ. 8
2 Cauſes for which a reprieve may be granted 658 ſ. 8, 9
3 By 8 Geo. 3. c. 15. judges may reprieve a convict for the purpoſe of obtaining a pardon 650 *Note in marg.*
4 The court may reprieve a convict for murder 659, 660

REPUGNANCY.

1 In murder, if the aſſault and ſtroke be alledged in the premiſſes on the tenth, and the ſubſequent death on the twentieth of any month, and then the concluſion alledge that the defendant in ſuch manner murdered the party on the 10th aforeſaid, the whole is naught for the repugnancy, for he could not be murdered till he was dead 263
2 If an indictment alledge a party to have been preſent aiding and abetting the murder *the day of the death*, inſtead of the day when the ſtroke was given, provided they were on different days, it is repugnant 264
3 A defendant in felony may uſe any number of pleas in abatement, and take advantage of them all, except they are repugnant to one another 276, 277
4 What pleas in bar are repugnant to the general iſſue 283, 284
5 Where one material part of an indictment is repugnant to another, the whole is void 325. 388
6 If an indictment charge the defendant with having forged a certain writing by which A. was bound to B. it is repugnant, for it is impoſſible he ſhould be ſo bound by a forgery *Page* 325, 388
7 If an indictment alledge that the defendant *deſſeiſed* another of lands, and it appear *by the indictment* that he had no freehold; or that the defendant entered peaceably and then *deſſeiſed* the proſecutor; or that he *deſſeiſed* of land then being, and ever ſince continuing his freehold; ſuch indictment is void for repugnancy *ibid.*
8 An indictment for ſelling iron with falſe weights and meaſures is void; for it is inconſiſtent it ſhould be ſold by both *weight* and *meaſure* at the ſame time 326
9 If an indictment at a ſeſſion the 13th, find that the defendant was abſent from church ſix months from the 1ſt of the ſame month, it is void 326
10 An indictment charging a fact as felony which on the face of it is treſpaſs only, as cutting down and carrying away trees, is void *ibid.*
11 But an indictment for having mowed *unam acram fœni*, ſhall be intended to be *hay*, though in fact it was only *graſs* when it was mowed *ibid.* & 336
12 A verdict which is repugnant, is void 626, 627

REPUTATION.— *Bail.*

RESCOUS.— *Vide Breaking Priſon.*

1 A reſcue by *enemies* will not make the gaoler liable as for an eſcape, as a reſcue by *ſubjects* will do 199 ſ. 9
2 Reſcous is, a ſtranger forcibly freeing another from an arreſt 209
3 A priſon which it is felony to break, is ſuch a priſon as will make a ſtranger guilty of felony by reſcuing a priſoner from 209 ſ. 1
4 But where the priſoner is not capitally guilty in breaking priſon, a ſtranger who reſcues him ſhall be, in like manner, excuſed 209 ſ. 2
5 A ſtranger is not guilty unleſs the pri-

ſoner actually goes out of the priſon *Page* 209 ſ. 3

6 The ſheriff's return of a reſcous is not a good ground to arraign the reſcuer upon, unleſs he be alſo indicted 209 ſ. 4

7 An indictment for reſcous muſt ſpecially ſet forth the nature and cauſe of the impriſonment and the circumſtances of the fact in queſtion 209 ſ. 5

8 A reſcuer of a priſoner who would not be capitally guilty if he had broken the priſon, may be puniſhed for a high miſpriſion 209, 210

9 A ſtranger who knowingly reſcues a perſon committed for and guilty of high treaſon, is in all caſes guilty of high treaſon 210 ſ. 7

10 Whoever reſcues one impriſoned for felony cannot be arraigned for ſuch offence as for felony, till the principal offender be firſt attainted 210 ſ. 8

11 But he may be immediately proceeded againſt for a miſpriſion only *ibid.*

12 By 16 Geo. 2. c. 31. to aſſiſt a priſoner to eſcape, though no eſcape be actually made, in caſe ſuch priſoner was convicted or attainted of high treaſon or any felony, except petty larceny, or lawfully detained for ſuch crimes expreſſed in the warrant, he ſhall be tranſported for ſeven years 210 ſ. 9

13 If ſuch priſoner was in gaol for petty larceny, or for any debt or damages exceeding 100l. every perſon aſſiſting his eſcape, ſhall be guilty of a miſdemeanor 210, 211

14 To deliver *into* any gaol or priſon, any viſor, diſguiſe, inſtrument, or arms, to facilitate an eſcape of any priſoner attainted, convicted, or detained for treaſon, felony, or other crime, except petty larceny, is tranſportation for ſeven years 211

15 The indictment muſt ſtate, that the inſtruments were conveyed with a deſign to effectuate the eſcape 211 (N)

16 No indictment can be maintained on this act for contributing to the eſcape of a priſoner committed on *ſuſpicion* only *ibid.*

17 To deliver into any gaol or priſon any diſguiſe or inſtruments to facilitate the eſcape of a priſoner confined for petty larceny or for debt, &c. above 100l. is a miſdemeanor *Page* 211 ſ. 12

18 To aſſiſt any priſoner to make his eſcape from the conſtable carrying him to gaol by virtue of a warrant for treaſon or felony (except petty larceny) expreſſed in the warrant, or from any ſhip or veſſel for tranſportation, is felony and tranſportation for ſeven years 211, 212

19 All proſecution for any of the ſaid offences muſt be commenced within one year after the offence committed 212 ſ. 15

20 By 25 Geo. 2. c. 37. to reſcue or attempt to reſcue any perſon committed for murder, or any perſon convicted of murder going to or during execution, is felony without benefit of clergy 212 ſ. 16

21 By force to reſcue or attempt to reſcue, after execution, the dead body of any perſon convicted of murder, is tranſportation for ſeven years 212 ſ. 17

22 By 11 Geo. 2. c. 26. if five perſons or more ſhall tumultuouſly aſſemble to reſcue any offender againſt the 9 Geo. 2. c. 23. for the better apprehending of ſmugglers, their aiders, &c. they ſhall be guilty of felony and be tranſported ſeven years 212 ſ. 18

23 By 9 Geo. 1. c. 22. forcibly to reſcue any perſon in lawful cuſtody for any of the offences in the *black act*, is death without clergy 213

24 By 2 Will. & Mary, c. 5. to reſcue goods diſtrained or impounded, is treble damages, &c. *ibid.*

25 Peers as well as commoners are liable to an attachment for a reſcous ch. 22 ſ. 33

26 Whether ſuch attachment ſhall be granted on an affidavit of a reſcous where the officer will not return one ſ. 34

27 The ſheriff's return of a reſcous, without ſhewing the year and the day, is inſufficient 334 ſ. 77

28 Proceſs of outlawry lies on the return of a reſcous ch. 27 ſ. 113

RESIDENCE.

1 No man can be obliged to do ſuit at the ſheriff's torn in reſpect to lands, if he does not reſide within the precinct *Page* 91 ſ. 12

2 If a man have a houſe within two leets, he ſhall do ſuit to that within the juriſdiction of which his bed-chamber ſhall lie *ibid.*

3 How far non-reſidence is a ground for an information 374

4 By *ſtat. Weſt.* thoſe who do not reſide within the county ſhall not be put upon juries 588

RESISTANCE.—*Arreſt.*

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RESTITUTION.—*Appeal, No.* 105 *to* 128. *Mute, No.* 28. *Indictment.*

RE-SUMMONS *and* RE-ATTACHMENT.

How an appellant might ſue out a re-attachment on the demiſe of the king before 1 Edw. 6. c. 7. 241. 426, 427

RETRAXIT.—*Vide Appeal, No.* 219. 236.

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REVERSAL.—*Attainted. Arreſting Judgments.*

REVOCATION.

Whether a power of revocation may be forfeited by an attainder of treaſon or felony *(Vide Forfeiture.)* 639 ſ. 12—643 ſ. 26

RIGHT.—*Vide Forfeiture.*

RIOT.

1 On an indictment for a riot, if a verdict acquit all but two, it is repugnant, unleſs it charge them with having made ſuch riot, *ſimul cum aliis juratoribus ignotis* *Page* 626 ſ. 8

2 If twenty perſons are indicted for a riot, and any *three* found guilty, the verdict is good *ibid.*

3 Where only two are found guilty of a riot, they having been indicted with others, judgment ſhall be given againſt them, even though the others do not come in to trial 626 (N) 1

4 Six were indicted for a riot; two of them died before trial; two were acquitted; and two only found guilty; and judgment was given againſt the two found guilty *ibid.*

REWARDS.

1 By 4 and 5 Will. & Mary, c. 8. a reward of 40 l. is given to thoſe who ſhall convict a HIGHWAY ROBBER, together with the arms, money, goods, &c. of ſuch robber 122, 123

2 By 6 and 7 Will. 3. c. 17. a reward of 40 l. is given to thoſe who ſhall convict CLIPPERS OF THE COIN 123 ſ. 25

3 By 15 Geo. 2. c. 28. a reward of 40 l. is given to thoſe who convict COUNTERFEITERS OF THE COIN 123. 125

4 By 10 and 11 Will. 3. c. 23. a certificate exempting from pariſh and ward offices ſhall be given to thoſe who convict any perſon of privately ſtealing to the value of 5 s. in any ſhop, warehouſe, &c. 124

5 By 5 Ann. c. 31. thoſe who convict any one of BURGLARY or HOUSE-BREAKING in the day time, ſhall receive 40 l. and alſo the certificate given by 10 and 11 Will. 3. 124 ſ. 27

5 By 9 Geo. 1. c. 22. a reward of 50 l. is given for any injury received in apprehending any offender againſt the black act, &c. &c. 124, 125

7 By 8 Geo. 2. c. 16. if ſuch offender ſhall be apprehended ſo as the hundred be

be thereby discharged, the person apprehending shall have 10l.
Page 125 s. 29
8 By 10 Geo. 2. c. 32. the provisions of 9 Geo. 1. c. 22. are extended to the apprehending of destroyers of sea banks, cutters of hop-binds, firing collieries, &c. 125. *Note in marg.*
9 By 14 Geo. 2. c. 6. a reward of 10l. is given to those who shall prosecute SHEEP-STEALERS, &c. &c. to conviction 125 s. 30
10 By 16 Geo. 2. c. 15. &c. a reward of 20l. is given to those who shall prosecute to conviction such as RETURN FROM TRANSPORTATION 125, 126
11 By 19 Geo. 2. c. 34. rewards are given to such as shall be wounded, &c. &c. in apprehending SMUGGLERS 126, 127
12 If two accomplices in SMUGGLING discover and convict two or more offenders, they shall receive 50l. for every offender 128
13 By 6 Geo. 1. c. 23. a reward of 50l. is given to such as shall convict another of THEFT-BOTE 128 s. 37
14 By 25 Geo. 3. c. 57. whoever shall apprehend a counterfeiter of LOTTERY TICKETS, &c. is intitled to a reward of 50l. 128. *N. in marg.*
15 *Quere*, whether it is a good exception to a witness that he has taken a reward on condition *of giving his evidence* 611 s. 25

ROBBERY.

1 Justices of assize have jurisdiction in an appeal of robbery by the commission of gaol-delivery implicitly given to them by the statute *de finibus* 39 s. 9
2 If a robbery be committed in one county, and the goods carried into another, the offender may be indicted of the robbery in the first county, and of larceny in the second county 247 s. 47
3 If one man carry another into a different county, and there rob him, the appeal must be in the county where the robbery was committed *ibid.*
4 *Quere*, if goods be taken in one county from a menace given in another county, in which county the offender shall be tried *Page* 247 s. 47
5 An indictment of robbery *in quadam via regia pedestri ducent. de* L. *ad* I. shall not oust the defendant of clergy; for the words of the statute are, *in, or about, or near, the highway* 480
6 By 5 and 6 Edw. 6. c. 10. those who are found guilty in one county of an offence amounting to robbery in another, are ousted of their clergy 484, 485. 495
7 By 23 and 25 Hen. 8. c. 3. &c. &c. all persons indicted of robbing any person *in or near the highways*, are excluded from clergy 494, 495
8 No robbery is within these statutes, but such as is laid in the indictment to have been committed *in or near the highway*, and to have put the person robbed *in fear* 495
9 By 3 and 4 Phil. & Mary, accessaries before the fact in robbery are excluded from clergy 496 s. 84
10 ROBBERY IN A DWELLING HOUSE (*Vide Clergy, No.* 102 *to* 125. *Housebreaking)* 497 to 502
11 The word *robbery* always implies some force (Vide OB. 1787 page) 494 s. 73. 498 s. 92. 500 s. 96
12 Those who apprehend and convict a robber in the highways are intitled to a reward of 40l. &c. &c. 122, 123
13 If any accomplice out of prison shall discover and convict two or more highway robbers, he shall be intitled to a pardon 539 s. 3
14 The manner in which robbers may be apprehended upon hue and cry (*Vide Hue and Cry*) 116 to 118

S

SACRILEGE.

1 Sacrilege was considered as a crime of such signal enormity by the common law, that the offender was denied the privilege of sanctuary 84 s. 44
472 s. 4. 505
2 Persons guilty of sacrilege were denied

the benefit of clergy *Page* 475, 476. 479
3 By 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. and 3 and 4 Will. & Mary, c. 9. robbing any church, chapel, or other holy place, is excluded from clergy 494 ſ. 72
4 But no ſacrilege is within theſe ſtatutes which is not accompanied with an actual breaking 494 ſ. 73
5 By 1 Edw. 6. c. 12. all perſons are ouſted of clergy for felonious taking goods out of any pariſh church, or other church or chapel 497 ſ. 74
6 But acceſſaries to ſuch a robbery are not excluded by any ſtatute; *ſed quere*, if acceſſaries to ſacrilege are not excluded by the common law 497 ſ. 75, 76

SALE.

1 Whether goods diſtrained for an amercement may be ſold *(Vide Torn)* 56 ſ. 29
2 Whether a ſale in market overt will prevent the reſtitution of goods ſtolen *(Vide Appeal, No.* 105 *to* 128.) 250, 251
3 Whether one under proſecution for treaſon or felony may ſell his goods *(Vide Forfeiture, No.* 75 to 82.) 645

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1 The privilege of ſanctuary was a declinatory plea 471 ch. 32
2 By 21 Jac. 1. c. 28. no plea of ſanctuary ſhall be allowed 471 ſ. 1
3 The ſeveral ſtatutes enumerated which make it felony to reſiſt proceſs in the pretended privileged places of the Mint, Wapping, &c. &c. 471 *N. in marg.*
4 The nature of the privilege of ſanctuary 472
5 The authority which was neceſſary for creating this privilege 472 ſ. 3
6 To what matters the privilege of ſanctuary extended 472 ſ. 4
7 At what time and in what manner this privilege was pleaded 472, 473

SCIRE FACIAS.

1 Where two *nihils* are returned upon two writs of *ſcire facias* awarded againſt a proſecutor in a cauſe removed by *certiorari*, and the priſoner hath been long confined, the king's bench will admit to bail *Page* 175
2 *Scire facias* is the proper proceſs after the removal of a cauſe by *certiorari* 423 ſ. 88
3 A perſon pardoned on an appeal by the party muſt ſue out a *ſcire facias* to the appellant before it ſhall be allowed, unleſs he appear *gratis* 554 ſ. 35
4 If the ſheriff return two *nihils* to ſuch *ſcire facias*, the appellee ſhall be diſcharged 554 ſ. 36
5 If the appeal be of death, and the ſheriff return that the appellant is dead; *quere*, if a *ſcire facias* ſhould not iſſue to the heir *ibid.*
6 A *ſcire facias* need not go to the lords intitled to the *eſcheat*, becauſe the pardon no way reverſes *the attainder* 554 ſ. 37
7 One appellee cannot take advantage of the appellant's default on a *ſcire facias* by another appellee 554, 555
8 An attainder of felony of a perſon who hath lands, ſhall never be reverſed by writ of error, without *ſcire facias* againſt all the tenants and lords, mediate and immediate 655
9 But ſuch *ſcire facias* is not neceſſary in high treaſon 655

SCOLD.

1 *Common Scolds* may be indicted at the ſheriff's torn 106 ſ. 58
2 An indictment againſt a *common ſcold* is good without ſetting out the particulars 323
3 It need not conclude *ad nocumentum omnium, diverſorum* is ſufficient *ibid.*

SCOT.

A Scotchman was not conſidered as an *alien*

alien within the ſtatute *de meditate lin guæ* *Page* 591 ſ. 41

SEA.

1 A ſpecial commiſſion of *oyer* may iſſue for inquiring into the repairs of ſea walls 27 ſ. 28
2 The coroner may inquire of a felony committed on the arms of the ſea 75 ſ. 14
3 But he has no juriſdiction of offences committed in open ſea between high and low water mark when the tide is *in* *ibid.*
4 For the trial of offences beyond ſea *vide County, No.* 18. 315
5 If death ſhall be *effected* on the ſea within the juriſdiction of the admiral, by *a cauſe* from the ſhore within the juriſdiction of the common law, the trial ſhall be in the juriſdiction where *the effect* took place, and not in the juriſdiction where *the cauſe* of that effect aroſe—*Coomb's Caſe argued in the Exchequer Chamber, Michaelmas term* 1785, and decided at Serjeants Inn, 20 January 1786.

SEAL.

1 By *ſtat. Weſt.* the ſheriff ſhall take no inqueſt but by a jury of twelve men, who ſhall put *their ſeals* thereto 108 ſ. 64
2 This act relates to ſuch inquiſitions only as are a foundation for impriſonment, and not to inquiſitions for offences where the party cannot be apprehended 108 (N) 7
3 If the jury conſiſt of more than twelve, it is ſufficient if twelve put their ſeals 108 ſ. 65
4 Every return to a *certiorari* muſt be under ſeal 419 ſ. 70

SEARCH WARRANT.—*Warrant.*

SECRETARY *of* STATE.

1 A ſecretary of ſtate is not a magiſtrate within the protection of 7 Jac. 1. c. 5. 21 Jac. 1. c. 12. and 24 Geo. 2. c. 44. *Page* 61 (N) 1
2 The 16 Car. 1. c. 10. does not authoriſe ſecretaries of ſtate to commit 169
3 A ſecretary of ſtate, as ſuch, is no conſervator of the peace; the office neither implies nor requires the authority of a magiſtrate; and the law of England knows of no ſuch committing magiſtrate 181 (N) 3
4 But a ſecretary of ſtate may lawfully commit perſons for treaſons, and for other offences againſt the ſtate 181 ſ. 4. *and Note* 1
5 All the caſes in which commitments have been made by ſecretaries of ſtate enumerated *(Vide p.* 186.) 181 (N) 4

SE DEFENDENDO.—*Homicide.*

SELF-MURDER.—*Forfeiture.*

SERVANT.

1 Either maſter or ſervant may have an appeal for a robbery done to the ſervant 246, 247
2 Servant is not a good addition of the ſtate or degree of either man or woman 272 ſ. 112
3 If a ſervant receive a maſter, or a maſter a ſervant, they are acceſſaries as much as if they had been mere ſtrangers 451 ſ. 34

SESSIONS.

1 A *ſeſſion* is an aſſembly of two or more juſtices of the peace, one whereof muſt be of the *quorum*, at a certain day and place appointed, in order to *inquire, hear, and determine*, in purſuance of their commiſſion, of any cauſes or matters therein contained 65 ſ. 48
2 By 2 Hen. 5. c. 4. juſtices ſhall make their ſeſſions four times by the year, and oftener if need be 47 ſ. 18
3 By 14 Hen. 6. c. 4. the juſtices of Middleſex ſhall hold the court of ſeſſion two times in the year, or more often if need

need be—and it is uſual in this county to hold four general and four general quarter ſeſſions in the year *Page* 47 ſ. 19

4 By 26 Geo. 2. c. 17. juſtices may act, though not of the *quorum*, &c. &c. 57

5 Any two juſtices of the peace may hold a ſeſſion, to which the ſheriff is bound to return proper juries, and the *cuſtos rotulorum* ought to attend with the rolls of the peace 65 ſ. 49

6 The juſtices may direct their precept under their *teſte* to the ſheriff, to ſummon the ſeſſion, commanding him to return a jury, and to give notice to all conſtables, &c. 65 ſ. 50. 571 ſ. 1

7 Such precept cannot be ſuperſeded by any of their fellow juſtices, but only by *writ* out of chancery 66

8 Two juſtices may hold a ſeſſion without any ſuch ſummons, where there is no need either of grand jurors or officers, &c. 66 ſ. 52

9 If a ſufficient number of juſtices do not appear, thoſe who do appear may adjourn to any future day within the twelve following weeks *Note*

10 A juſtice, if his attendance be neceſſary, is ſubject to an information, for a voluntary abſence from ſeſſions *ibid.*

11 The ſheriff is bound to attend the ſeſſion, to return his precept, and to take charge of all the priſoners who ſhall be committed to him 66 ſ. 53

12 All conſtables of hundreds are bound to attend to make their preſentments *ibid.*

13 All bailiffs of franchiſes, perſons returned on juries, and keeper of the houſe of correction, are bound to attend the ſeſſion *ibid.*

14 By 22 Geo. 2. c. 46. no perſon, not enrolled purſuant to 2 Geo. 2. c. 23. ſhall act as attorney, ſolicitor, or agent, at any general or quarter ſeſſions 66 ſ. 54

15 If any attorney, &c. ſuffer a perſon not enrolled to act in his name, he ſhall forfeit 50l. 66 ſ. 55

16 No clerk of the peace, under-ſheriff, or their deputies, ſhall act as ſolicitor, attorney, or agent, or ſue out any proceſs at any general or quarter ſeſſion *Page* 67 ſ. 56

17 The clerk of the peace is appointed by the *cuſtos rotulorum*; but he may be ſuſpended, &c. by the mere order of the juſtices *N. in marg.*

18 The ſeſſions have no authority to amerce any juſtice of the peace for his non-attendance or for miſbehaviour 67 ſ. 57

19 The quarter ſeſſions are a ſpecies only of general ſeſſions 67 ſ. 58

20 Such ſeſſions only are properly general quarter ſeſſions, which are holden in the four quarters of the year, purſuant to the 2 Hen. 5. c. 4. *ibid.*

21 Special ſeſſions may be holden for ſome particular branch of the juſtice's authority 68

22 Offences may be proſecuted at ſeſſion by preſentment, information, or indictment 68 (N)

23 The ſeſſion once convened, a matter depending cannot be adjourned without adjourning the ſeſſion *ibid.*

24 An adjournment muſt ſhew when the original ſeſſions commenced, but need not ſet out all the particular adjournments *ibid.*

25 If the ſeſſion iſſue a warrant, it muſt be ſhewn that the ſeſſion was continued by adjournment till the taking *ibid.*

26 The ſeſſion cannot refer any matter before them to the determination of the judges of aſſize *ibid.*

27 When the ſeſſion proceed upon indictments, as a court of common law, all their proceedings muſt have regular and legal continuances *ibid.*

28 If the court of quarter ſeſſion be once dropped it cannot be reſumed *ibid.*

29 The ſame ſtrictneſs is not neceſſary where the ſeſſion proceed upon orders *ibid.*

30 The juriſdiction of the ſeſſion, as a court of appeal, is co-extenſive with that of the two juſtices; and they need not give the reaſons upon which their opinions are founded *ibid.*

31 The whole ſeſſion being conſidered but as one day, the juſtices may alter their

their opinion during the continuance of it *Page* 68 (N)
32 A *mandamus* will lie to compel the juſtices to do what their duty requires *ibid.*
33 The ſeſſion are not obliged to proceed after the juriſdiction in the matter is repealed, although fully *attached* before the repeal *ibid.*
34 When the ſeſſion have not an original juriſdiction, the conſent of parties can never give it them *ibid.*
35 Whether a bill of exceptions may be at ſeſſions in caſes not capital *ibid.*
36 By 8 and 9 Will. 3. c. 30. the quarter ſeſſions, upon appeals concerning the ſettlement of the poor may award coſts, and direct them to be levied by diſtreſs, &c. 68 ſ. 59
37 The appeal from any order of removal ſhall be determined by the ſeſſions of the place from whence ſuch removal ſhall lie, and not elſewhere 68 ſ. 60
38 By 5 Geo. 2, c. 19. the ſeſſions may amend appeals from juſtices in matters of form 68, 69
39 Where an authority is given to two juſtices to do an act, the ſeſſions may alſo do it, except an appeal be directed 69 (N)
40 The ſeſſions have no juriſdiction in new created offences, unleſs by expreſs words *ibid.*
41 The ſeſſion have no power over a bailiff of a corporation for not qualifying *ibid.*
42 The ſeſſions are bound to receive appeal againſt an order of removal, if offered at the next ſeſſions, though no notice of appeal has been given *ibid.*
43 The *next* ſeſſion is that at which the party is *firſt* empowered to lodge the appeal *ibid.*
44 An original order of baſtardy may be made at the quarter ſeſſions *ibid.*
45 No appeal lies from an order for the relief of a pauper *ibid.*
46 The ſeſſion may proceed by *information* on 5 Eliz. for exerciſing a trade, &c. *ibid.*
47 The ſeſſion cannot make an original order for late overſeers to pay over-monies to their ſucceſſors *ibid.*
48 The ſeſſion cannot make an original order for a ſcavenger's rate *Page* 69 (N)
49 Seſſion cannot vacate the aſſignment of an apprentice bound out by juſtices *ibid.*
50 By 9 Geo. 3. c. 20. the ſeſſion, upon preſentment by the grand jury, ſhall order the ſhire-hall, or other building, to be repaired and paid for by a county rate 69 ſ. 51
51 The form of the caption of an indictment at a ſeſſion of the peace *(Vide Caption. Indictment.)* 359, 360

SEWERS.

1 A ſpecial commiſſion of *oyer and terminer* may be granted for inquiring of ſewers, &c. 27 ſ. 28
2 A *certiorari* lies from king's bench to commiſſioners of ſewers, notwithſtanding 13 Eliz. c. 9, ſays, they ſhall not be compelled to make certificate of their proceedings 406
3 But the court, before they will ſuffer the return to be filed, will hear affidavits concerning the facts 409 ſ. 34. 420 ſ. 74
4 A *certiorari* to bring up an order for the removal of the clerk to commiſſioners of ſewers is of common right *N. in marg.*

SHEEP-STEALING.

1 Whoever ſhall convict another of ſtealing ſheep, or other cattle, is intitled to a reward of 10l. 125
2 By 14 Geo. 2. c. 6. and 15 Geo. 2, c. 34. to ſteal any ſheep, bull, cow, ox, ſteer, bullock, heifer, calf, or lamb, is excluded from clergy 493

SHERIFF.—*Vide Term.*

1 Every ſheriff is a principal conſervator of the peace within his county, and may award proceſs of the peace 44 ſ. 4
2 The ſheriff is bound to return proper juries

juries to the ſeſſions of the peace *Page* 65 ſ. 49
3 By *ſtat. Weſt.* the ſheriff ſhall have counter rolls with the coroner, and attend with him to take appeals 82, 83
4 The ſheriff having a juſtice's warrant directed to him, may authoriſe others to execute it 137 ſ. 29
5 Juſtices of aſſize may puniſh ſheriffs for letting perſons to bail who are not bailable 142 ſ. 8, 9
6 By 4 Edw. 3. c. 2. ſheriffs ſhall not let to mainprize thoſe who are indicted or taken before juſtices of the peace *(Vide Bail)* 142, 143
7 By 14 Edw. 3. c. 10. the ſheriffs ſhall have the cuſtody of gaols 182 ſ. 6
8 In what caſes the court may proceed by attachment againſt ſheriffs for not executing a writ 215
9 Where the court may proceed by attachment againſt a ſheriff for *oppreſſive practice* 216
10 Where the court may proceed by attachment againſt a ſheriff *for not executing a writ effectually* 216 ſ. 4
11 When the court may proceed by attachment againſt a ſheriff, *for making a falſe return to a writ* 216, 217
12 In all ſuits where the king is a party, as in indictments and informations, the proceſs ought to be executed by the ſheriff, and not by the bailiff of any franchiſe, whether it have the clauſe of *non omittas* or not 404
13 The ſtatute 23 Hen. 6. c. 8. which enacts, "that ſheriffs ſhall continue in their office no longer than one year," cannot be diſpenſed with 551

SHIPS.—*Vide Clergy*, No. 83—86.

SHOPLIFTER.

1 By 10 and 11 Will. 3. c. 23. whoever ſhall convict another of privately ſtealing to the value of 5 s. from any ſhop, &c. ſhall have 40 l. 124 ſ. 26
2 By 10 and 11 Will. 3. c. 23. whoever ſhall *privately* ſteal to the value of 5 s. in any ſhop, warehouſe, coach-houſe, or ſtable, ſhall be excluded from the benefit of clergy *Page* 491
3 The goods taken muſt be ſuch as are generally ſold or uſed in the places mentioned in the act *Notes*

SICKNESS.—*Vide Bail*, No. 24. 127, 128.

SIGN MANUAL.

1 The ſign manual importing a pardon cannot be pleaded as a pardon, neither will it reſtore the competency of a witneſs 561 *N. in marg.*
2 The ſign manual is uſually the firſt progreſs to a pardon, upon the circuits and at the Old Bailey 562, 563

SIMILITUDE.

Although ſimilitude of hands was admitted as good evidence in *Sidney's caſe*, and the propriety of ſuch evidence was only doubted in the *caſe of the ſeven biſhops*, yet it is held that ſimilitude of hands is not evidence in any criminal caſe 607 ſ. 15

SIMONY.

1 How far a *ſimoniſt* may take advantage of a pardon for *ſimony* 559 ſ. 56
2 *Quere*, whether a pardon of all miſpriſions, &c. &c. will extend to ſimony 549 ſ. 26

SMUGGLERS.—*Reward.*

SOJOURNER.

A ſojourner being in the houſe at the time of the robbery, doth not bring the caſe within the 5 and 6 Edw. 6. c. 9. which excludes robbery from clergy committed in any dwelling houſe, *the owner, his wife, children, or ſervants, being therein* 498

SON ASSAULT.

1 Where pleadable *in bar* to an appeal of mayhem *Page* 257
2 *Son aſſault demeſne* may be given in evidence on the general iſſue in an indictment, but not in an action 619 ſ. 44

SPECIAL HEIR.

No ſpecial heir, by cuſtom of borough Engliſh or otherwiſe, can bring an appeal of death 244

SPELLING.—*Vide Variance.*

SPINSTER.

1 Where a gentleman or gentlewoman is named *ſpinſter*, the wrong addition may be pleaded in abatement 269 ſ. 103
2 Spinſter is a good addition for the eſtate and degree of a woman, and *perhaps* alſo for that of a man 272 ſ. 11

STAR CHAMBER.

Whether the ſtar chamber had a general ſuperintendency over other courts 215

STABBING.

1 By 1 Jac. 1. c. 8. whoever ſhall ſtab or thruſt any perſon that hath not then any weapon drawn, or that hath not then firſt ſtricken the party which ſhall ſo ſtab, ſo as the party ſtabbed die thereof within ſix months, ſhall be excluded from clergy 489 ſ. 57
2 The perſon only who gives the ſtab is within the purview of this ſtatute 501

STATUTES.

1 A ſtatute making a new law concerning an old offence, appointing certain juſtices to execute it, does not exclude the juriſdiction of the king's bench *Page* 8, 9
2 A ſtatute which appoints that all crimes of a certain denomination ſhall be tried before certain judges, does not exclude the juriſdiction of the king's bench without expreſs negative words 9. 414. ſ. 53
3 Where a ſtatute creates *a new offence*, and erects a new juriſdiction for the puniſhment of it, and preſcribes a certain method of proceeding, it is queſtionable whether the king's bench hath juriſdiction 9
4 Affirmative ſtatutes ſhall not, without expreſs words, be conſtrued to take away the juriſdiction of an ancient court 18
5 The uſage of many ages is the beſt interpreter of ſtatutes 71, 72
6 Whether the ſtatute *de officio coronatoris*, being directory and in affirmance of the common law, leaves the power of the coroner as it found it 77, 78
7 Wherever a ſtatute gives to any one juſtice of peace a juriſdiction over any offence, or a power to require a perſon to do a certain thing, it impliedly gives a power to ſuch juſtice to iſſue a warrant for the purpoſe 134, 135
8 All ſtatutes are to be conſtrued ſtrictly in favour of life, and no parallel caſe which comes within the ſame miſchief ſhall be conſtrued to be within the purview of them, unleſs it can be brought within the meaning of the words 195 ſ. 16. p. 485, 486
9 Wherever a ſtatute *prohibits* a matter of publick grievance, or commands a matter of publick convenience, an offender is puniſhable at the ſuit of the party grieved, and by way of indictment, unleſs ſuch proceeding be expreſsly excluded 301
10 A ſtatute which extends to private perſons, or to matters of a private nature, will not bear an indictment *ibid.*
11 Where a ſtatute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding, without mentioning

tioning indictment, no indictment can be maintained (*Vide infra* No. 15, &c.) *Page* 302

12 If a ſtatute give a recovery by action of debt, bill, plaint, or information, *or otherwiſe*, it authoriſes a proceeding by indictment *ibid.*

13 Where a ſtatute adds a further penalty to an offence prohibited by the common law, the offender, at the election of the proſecutor, may be indicted at common law *ibid.*

14 If ſuch indictment conclude *contra formam ſtatuti*, and cannot be made good upon the ſtatute, it may be maintained as at common law, and the words *contra formam ſtatuti* rejected *ibid.* ſ. 31

15 Where new created offences are only prohibited by a general prohibitory clauſe of a ſtatute, an indictment will lie (N) 3

16 Where there is a prohibitory particular clauſe ſpecifying only particular remedies, there ſuch particular remedy muſt be purſued *ibid.*

17 Where an offence, not ſo at common law, is made an offence by ſtatute, an indictment will lie where there is a ſubſtantive prohibitory clauſe, though there be afterwards a particular *proviſion* and remedy given *ibid.*

18 No indictment will lie where the ſtatute is not *prohibitory*, but only inflicts the forfeiture, and ſpecifies the remedy *ibid.*

19 Where the offence was puniſhable before the ſtatute which preſcribes *a particular* method of puniſhing it, there ſuch particular method is *cumulative* *ibid.*

20 But where a ſtatute appoints a particular mode of puniſhment for an offence which was not puniſhable before, there the *particular mode* muſt be purſued, and not the common law mode of indictment *ibid.*

21 An information may be brought for offences againſt ſtatutes unleſs a different mode is preſcribed 396 ſ. 4

22 In what caſes an indictment, grounded on a ſtatute which will not maintain it, may be made good as at common law (*Vide Indictment* No. 260.) *Page* 356 ſ. 115. ch. 23 ſ. 70

23 What ought to be the form of the body of an indictment on a ſtatute (*Vide Indictment* No. 233 *to* No. 251.) 349 to 363

24 Where an offence is made felony by ſtatute it ſhall have the benefit of clergy unleſs it be expreſsly excluded from it 480

25 Where a perſon is denied clergy by a ſtatute excluding it from *the crime*, the indictment and evidence muſt expreſsly bring the caſe within the words *ibid.* 618

26 Where a ſtatute makes an offence treaſon or felony, it gives it the like incidents that belong to a treaſon or felony at common law 603 ſ. 4

27 Whether a ſtatute may be diſpenſed with (*Vide Pardon. Diſpenſation*) 550 to 53

28 How the words *ſuch offences* and *ſuch offenders* in a ſtatute, ſhall be conſtrued to mean *ſuch in miſchief, and ſuch in inconvenience* 485, 486

29 No preſcription can be good againſt a ſtatute which has negative words 90 ſ. 8

STEWARD.—*Vide Peers.*

1 The nature of the office of lord high ſteward 6

2 None under the degree of nobility can be appointed lord high ſteward 7

3 The high ſteward, in the court of the high ſteward, is ſole judge in matters of law *ibid.* (N)

4 The lord high ſteward is, by virtue of his office, a conſervator of the peace 43 ſ 2

5 In what manner a lord high ſteward is to be created for the trial of a peer, and the proceedings therein 593

6 None but the lord high ſteward can receive the plea or confeſſion of a peer 597

7 In what manner the peers may require the opinion of the high ſteward, or of the judges 597, 598

8 Whether the court of the high ſteward may be adjourned 598

9 A writ of error lies in the king's bench of

of an attainder before the lord high ſteward *Page* 655 ſ. 16
10 An indictment before J. S. ſteward muſt ſhew to whom he is ſteward ch. 25 ſ. 119

STOCKS.—*Torn* No. 48.

STOLEN GOODS.

Vide Acceſſary and Principal No. 78.

STORES.

1 By 22 Car. 2. c. 5. thoſe who ſhall ſteal or embezzle any of the king's naval ſtores to the value of 20 s. are excluded from clergy 492 ſ. 70
2 But the judge, on conviction, may ſtay the execution, and tranſport the offender for ſeven years 493

STROKE.—*Vide Sea* No. 5.

1 In what manner the death muſt be laid in an indictment or appeal, where the party died on one day of a ſtroke given on another.—(*Vide Appeal* No. 182.—*Indictment* No. 111. *Repugnancy* No. 4.) 263. 325, 326
2 Whether it be neceſſary to ſhew the time of the ſtroke as well as the death 264 ſ. 90 p. 334
3 The word *percuſſit* neceſſary in an appeal of death where the fact will bear it 260 ſ. 82
4 A general pardon intervening between the ſtroke and the death, will pardon the treſpaſs, as that offence alone exiſted before the death happened (*Sed vide* the caſe of W. Nicholas. Foſter 64.) 547 ſ. 21

SUBPŒNA.

1 In proſecutions for miſdemeanors the defendant may take out *ſubpœna's* of courſe 613 ſ. 30
2 And ſince the ſtatute 1 Anne 9. which ordains that the witneſſes for the priſoner ſhall be ſworn, proceſs may be taken out againſt them in any caſe *Page* 614

SUGGESTION.

If the king's pardon ſhall be obtained upon an untrue ſuggeſtion, the pardon ſhall be void, &c. 544

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1 Whether a ſeſſion of the peace may be holden without ſummons (*Vide Seſſion*) ch. 8. ſ. 44
2 How many days are required for the ſummons of a juror ch. 41 ſ. 5

SUNDAY.

1 An indictment cannot be well taken on a Sunday 91 ſ. 9
2 One who is convicted on a penal ſtatute cannot be apprehended on a Sunday for the non-payment of the forfeiture 397 (N) 25

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1 The authority of juſtices of *oyer and terminer* may be ſuſpended by writ of *ſuperſedeas*, on proof that the commiſſion was unduly granted 22
2 A precept by two juſtices for the ſummon of a ſeſſion of the peace cannot be *ſuperſeded* but by writ out of chancery. *Sed quere, vide Note* 1. 66
3 A writ *de coronatore exonerando* may be *ſuperſeded* by writ from the king, on an inquiſition in chancery, that it was obtained upon an untrue ſuggeſtion 73
4 How far a *certiorari* ſhall be a *ſuperſedeas* to the court below (*Vide Certiorari* No. 102 *to* 117) 417 to 419
5 On a pardon allowed in the king's bench, the party may have a *ſuperſedeas* to the exchequer to ſtop the proceſs there on an eſtreated amercement 562 ſ. 69
6 How

6 How far a defendant coming in by *capias utlagatum* may avoid an outlawry in the common pleas by ſhewing that he purchaſed a *ſuperſedeas*, and delivered it before the *quinto exactus* Page 651

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In what caſe the pardon of the principal will operate as a diſcharge of the ſurety 548

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Surgeons are exempted, during the time they practiſe, from ſerving the office of conſtable 100, 101

SURNAME.—*Abatement. Name. Miſnomer.*

1 If a writ of appeal omit the appellant's ſurname, *being under the degree of nobility*, it may be abated by the court *ex officio* 268 ſ. 101
2 If there be a miſtake of the ſurname of an appellant, the writ may be abated upon the exception or plea of the party 269 ſ. 101
3 In an indictment, no indictee can take any advantage of a miſtaken ſurname 328
4 An indictment of aſſault on John, pariſh prieſt of D. &c. is good without mentioning his ſurname 331

SURPLUSSAGE.

1 Where there is a *ſufficient certainty*, the addition of a farther uncertain or unintelligible deſcription will do no hurt, but ſhall be rejected as ſuperabundant and ſurpluſſage 260. 331 (N) 12
2 So where a ſpecial verdict is perfect, without certain words therein inſerted, they may be rejected as ſurplus 627 ſ. 10
3 Nothing which can be rejected as *ſurplus* ſhall vitiate an indictment 340

SURVIVOR.

Where two joint owners of goods are robbed, the ſurvivor may bring an appeal *Page* 246, 247

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Vide Bail. Arreſt.

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In what caſes an eſtate in tail is forfeited by an attainder of treaſon or felony 640 to 645

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Inordinate haunters of taverns are indictable at the torn 106, 107

TAXATION.

1 It is a contempt not to pay coſts after taxation by the maſter 230 ſ. 37
2 On taxation, coſts become a veſted debt, and the perſonal repreſentatives of the party entitled may recover them 415 (N) 7

TEMPORALITIES.

Anciently, if the ordinary demanded his clerk contrary to law, the temporalities might be ſeized 506 ſ. 116

TENOR.

1 By the charter of the city of London, only

only the tenor of a record can be removed from thence *Page* 347
2 And it is ſaid, this extends to Middleſex as well as London *Note in marg.*
3 The return of a *certiorari* ought to certify the record, or the tenor of it, or the tenor of a tenor, as the exigence of the writ requires 420 ſ. 76
4 How far a *variance* is fatal when an inſtrument is ſet out in an indictment *ſecundum tenorem ſequentem* 616 ſ. 36

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TENURE.

Conſervators of the peace by tenure ch. 8. ſ. 7

TORN.—*Diſcontinuance.*

TERM *of* ART.—*Indictment* No. 65.

TESTE.

1 Where the king's bench proceeds on an offence removed by *certiorari*, there muſt be 15 days between the *teſte* and return of every proceſs 11 ſ. 12
2 The precept for a ſeſſion of the peace muſt be *teſted* by two juſtices 65 ſ. 50
3 Proceſs for treaſon, felony, or treſpaſs, from a county palatine ſhall be *teſted* in the name of him who hath the franchiſe 401 ſ. 7
4 Proceſs from the king's bench ought to be under the *teſte* of the chief juſtice 401 ſ. 8
5 Proceſs ought to be under the *teſte* of the firſt in a commiſſion *ibid.*
6 What ſhall be removed by a writ of error, or *recordare*, between the *teſte* and return 421 ſ. 78
7 Where a term intervenes between the *teſte* and return of a *capias*, it is diſcontinuance 424 ſ. 91
8 If proceſs be *teſted* after the day of the return of the firſt proceſs, it is diſcontinuance 424 ſ. 90

THEFT.—*Vide Larceny.*

TIME.

Vide Indictment. Information. Verdict.

TITHES.—*Certiorari* No. 50.

TORN.

1 The ſheriff's torn is the king's court of record, for redreſſing *common grievances* within the county *Page* 89
2 The ſheriff ought to make his torn or circuit throughout every hundred in his county twice in the year 89 ſ. 1
3 All the inhabitants of each hundred, above the age of twelve years, unleſs ſpecially exempted, are bound to attend the torn, and to take the oath of allegiance, &c. *ibid.*
4 The words *frank pledge*, or *tithing*, explained *ibid.*
5 The ſtyle of the ſheriff's torn 90
6 By MAGNA CHARTA, the torn ſhall be held only twice a year in every hundred, at the accuſtomed place 9 ſ. 4
7 By 31 Edw. 3. c. 15. the torn is to be held within a month after *Eaſter* and *Michaelmas* 90 ſ. 5
8 The ſheriff is indictable for holding his torn at another time, or at an unuſual place, and an indictment found thereon is void 90 ſ. 6, 7
9 *Quere*, if theſe ſtatutes extend to the court leet 90, 91
10 Every caption of an indictment at the torn ought to ſet forth the day whereon it was taken 91 ſ. 9
11 All perſons who are bound to appear at the torn are not within the *ſtat. Merton*, which allows *ſuit ſervice* to be performed by attorney 91 ſ. 10
12 All ſervants as well as maſters are bound to pay ſuch ſuit; and if a maſter ſuffered a ſervant to continue a year and a day without being enrolled in a *decennary*, he was *amerciable* *ibid.*
13 But tenants in *ancient demeſne*, parſons, peers, and women, are exempted from attending the torn 91 ſ. 11
14 No man can belong to two leets, and therefore

therefore he ſhall do ſervice at that only within the precincts of which *he reſides or ſleeps* *Page* 91 ſ. 12

15 The ſheriff or his ſteward may *hear and determine* any offence within his juriſdiction, being indicted before him, except PLEAS OF THE CROWN 92 ſ. 13

16 This exception does not reſtrain the power of *taking* indictments or preſentments 92 ſ. 14

17 The ſheriff in his torn, being a judge of record, may fine an offender for a contempt of court; or for a non-compliance with that which the juriſdiction requires 93

18 Such fines muſt be ſeveral, and not joint, except a whole vill be fined 93 ſ. 16

19 The ſheriff may award a fine or amercement for contempts, &c. and amerce any perſon *indicted* for an offence not capital within his juriſdiction without any farther proceeding or trial 93 ſ. 17

20 An amercement, being a judgment, that the party ſhall be *in miſericordia domini regis*, and a judicial act, does not require the aſſent of a jury 93 ſ. 18

21 The award of a *miſericordia* is only to authoriſe others, viz. affeerors, to fix the ſum which the party is to pay to the king; and therefore there is no neceſſity to mention a ſum certain 93, 94

22 If the amercement be for a contempt of court, it may be ſettled by the judge himſelf, and needs no other *affeerment* 94 ſ. 19

23 No fine for a contempt is within the ſtatutes which require an amercement to be *affeered* *ibid.*

24 The king or lord have an election of common right either to diſtrain or to bring an action of debt for ſuch fines and amercements 94 ſ. 20

25 Every *avowry* of this kind ought expreſsly to ſhew that the offence was committed within the juriſdiction of the court 94 ſ. 21

26 It is not neceſſary to alledge it in the preſentment itſelf, but ſuch an allegation will perhaps ſupply the want of the averment of juriſdiction in the pleadings *Page* 94, 95

27 *Quere*, if it be neceſſary expreſsly to alledge that the offence was *committed* as well as that it was preſented, &c. 95

28 It is ſafeſt in ſetting forth a preſentment, or an affeerment of an amercement to ſhew the names of the preſentors and affeerors. *Sed quere*, if the names of the preſentors are neceſſary in replevin 95 ſ. 23

29 Notice of the holding of the court need not be ſhewn, for, being of record, all perſons within the juriſdiction ſhall be intended to have notice of it 95 ſ 24

30 It is not neceſſary in an *avowry* for a diſtreſs for a fine or amercement to ſhew that the party had previous notice what it was *ibid.*

31 Diſtreſs is incident of common right to the ſheriff's torn, if the offence be incidental to the juriſdiction 95, 96

32 But for a duty of a private nature no diſtreſs can be made without a ſpecial cuſtom 96

33 The ſheriff may diſtrain any lands of the offender within the county or precinct; except lands in the king's poſſeſſion; for they are wholly out of the juriſdiction of the court 96 ſ. 26

34 The ſheriff may diſtrain in the highway notwithſtanding the *ſtat. Marlebridge* 96 ſ. 27

35 Fines and amercements being for a perſonal offence, no ſtranger's beaſts can lawfully be diſtrained for them, although they have been *levant and couchant* on the lands of the offender 96 ſ. 28

36 The goods diſtrained may be ſold within a reaſonable time after the diſtreſs 96 ſ. 29

37 No bailiff can diſtrain without a ſpecial warrant for ſo doing, and in juſtification of ſuch diſtreſs the warrant muſt be ſet forth in the *avowry* 96 ſ. 30

38 In *replevin* it muſt be averred that the defendant was guilty. In treſpaſs the conviction is ſufficient to juſtify the officer: but the amercement muſt appear to have been by the court, and not by the jury *ibid.* (N) 1

39 In

39 In *nuſance* the ſheriff may amerce the perſon preſented, or order an abatement without any amercement, and if he diſobey ſuch order he ſhall forfeit without further proceeding *Page* 97 ſ. 33

40 No ſuch pain can be *aſſeered* for any leſs ſum than what is at firſt ſet *ibid.*

41 The authority of the ſheriff in his torn in relation to the appointment of conſtables, and the nature and antiquity of that office *(Vide Conſtables)* 97 ſ. 33 to 105

42 The ſheriff in his torn may inquire of ALL TREASONS, except ſuch as are created by ſtatute 105

43 The ſheriff may alſo enquire of all FELONIES at common law, except *rape*, which being an offence made felony by ſtatute, though originally a felony at common law, he can inquire of it as a *treſpaſs* only 105 ſ. 52

44 An aſſault and battery, *if there be bloodſhed*, is inquirable in the torn; for otherwiſe it is not a common grievance, but a private injury only 105, 106

45 The *common* breaking of fences and pound breaches are within the cognizance of the torn 106 ſ. 55, 56

46 Purpreſtures, mortmains, *treaſure trove*, waifs, ſtrays, wrecks, &c. belonging to the king are inquirable at the torn. *Sed quere*, as to the ſeizure of ſuch things as belong to the lord 106 ſ. 57

47 All common nuſances, annoyances, bawdy-houſes, victuallers, aſſize of beer and ale *(but not the aſſize of bread)*, neglecting to hold fairs, falſe weights and meaſures, common barraters, ſcolds, eaves-droppers, &c. &c. are within the juriſdiction of the torn 106, 107

48 Every vill within the precinct of a torn ſhall have a pair of ſtocks on pain of 5 l. 107 ſ. 59

49 A man cannot be amerced in a court leet for ſurcharging a common 107 ſ. 61

50 *Quere*, whether a matter concerning the private intereſt of the lord, or of the inhabitants of a leet, can be brought within the juriſdiction of the torn by cuſtom 107 ſ. 62

51 The offence need not ariſe within the particular hundred; it is triable if it ariſe within the county; but *preſentations* muſt be of offences within the hundred *Page* 108

52 The inhabitants of one bailiwick ſhall not be compellable to ſerve as jurors for another *ibid.*

53 No offence ariſing within the precincts of a leet is inquirable at the torn, unleſs on the default of the leet, which neglect muſt be alledged in the pleadings *ibid.*

54 By *ſtat. Weſt.* 2. c. 13. the ſheriff ſhall take no inqueſt but by 12 lawful men at leaſt, who ſhall put their ſeals to ſuch inquiſitions 108 ſ. 64

55 This act reſpects ſuch inquiſitions only as are a foundation for impriſonment, and not inquiſitions for offences for which the party cannot be apprehended *Note in marg.*

56 If there be more than 12 jurors the ſeals of any twelve of them are ſufficient 108 ſ. 65

57 By 1 Rich. 3. c. 4. jurors at the torn ſhall have yearly 20 s. freehold, or 26 s. 8 d. copyhold on pain of 40 s. and rendering their indictments void 108 ſ. 66

58 *Quere*, if courts leet are within theſe ſtatutes 109

59 By 1 Edw. 3. c. 17. indictments taken at the torn ſhall be by roll indented; one part to remain with the indictors, and the other with the court, ſo that one part may be delivered to the juſtices of aſſize 109 ſ. 68

60 Preſentments, not being neceſſary to be preſented to the juſtices, are not within theſe ſtatutes: they need neither to be indented nor ſealed *Note in marg.*

61 This ſtatute extends to courts leet 109 ſ. 69

62 The general practice of the torn was to impannel both a grand and petty jury.—Preſentments were made by the headborough, affirmed by the petty jury, and then confirmed by the grand jury 109 ſ. 70

63 By 28 Edw. 3. c. 9. the ſheriff is reſtrained from taking indictments, by commiſſion or writ 109 ſ. 71

64 By 1 Edw. 4. c. 2. all ſheriffs in their torns, except in London, are reſtrained from

from awarding proceſs, to levy fines and amercements on indictments or preſentment found before them, and are ordered to deliver ſuch indictments, &c. to the juſtices of the peace at their next ſeſſions, who ſhall have power to award proceſs thereon, &c. &c. *Page* 110, 111

65 Not only the judge of the torn, by this ſtatute, is puniſhable for awarding ſuch forbidden proceſs; but alſo the officer for denying it 111 ſ. 74

66 In what manner indictments in the ſheriff's torn may be traverſed, tried, and determined 111, 112

67 The torn has no power to try a traverſe 112 ſ. 76

TORN.—*Coroner* No. 22. *Addition* No. 32. *Eſcape* No. 2. *Forfeiture. Hue and Cry.*

TRADE.

Where a joint indictment will lie againſt ſeveral for following a trade without having ſerved an apprenticeſhip ch. 25. p. 89

TRANSPORTATION.
Vide Burning in the Hand, No. 5.

1 Tranſportation is a ſpecies of puniſhment unknown to the common law 514

2 The origin and effect of this puniſhment *ibid.*

3 By 4 Geo. 1. c. 11. an offender convicted of grand or petit larceny, or other offence within the benefit of clergy, and liable only to burning in the hand, or whipping, may be tranſported to *America* for ſeven years 515

4 Where an offender is convicted of any offence excluded from the benefit of clergy, and the king ſhall extend his mercy on condition of tranſportation to *America*, and ſuch intention ſhall be ſignified by a ſecretary of ſtate, a court of competent authority may allow ſuch offender the benefit of a pardon under the great ſeal 515 ſ. 139

5 Buyers or receivers of ſtolen goods *knowingly* ſhall be tranſported to *America* for 14 years, &c. &c. *Page* 515 ſ. 140

6 The king may at any time *diſpenſe* with any ſuch tranſportation, and allow the return of the offender 515 ſ. 141

7 Offenders tranſported, who ſhall ſerve the term of tranſportation, ſhall be conſidered as pardoned of the crime for which they were tranſported 515 ſ. 142

8 By 6 Geo. 1. c. 23. the powers of 4 Geo. 1. c. 11. are given to any ſubſequent court of like authority, notwithſtanding ſuch ſubſequent court may be held at a different place from that in which the offender was tried and convicted 515, 516

9 By 8 Geo. 3. c. 15. where any offender ſhall be convicted without benefit of clergy, and the judge ſhall grant a reprieve, if the king ſhall grant a pardon to ſuch offender on condition of tranſportation *to America*, and ſuch intention ſhall be ſignified by a ſecretary of ſtate to the judge recommending mercy, ſuch judge may make an order for the immediate tranſportation of the offender 516

10 By 19 Geo. 3. c. 74. offenders liable to be tranſported, or who ſhall be pardoned on condition of tranſportation *to America*, may be tranſported *to any parts beyond the ſeas*; and all the above mentioned acts ſhall be in force 517

11 Male perſons, in lieu of ſuch tranſportation may be ſent on board ſhips or veſſels (*commonly called the* HULKS) on the river Thames, &c. for a term not leſs than one, nor more than five years, where the offence is tranſportation for ſeven years, and not exceeding ſeven years where the tranſportation is for fourteen years 517, 518

12 By 24 Geo. 3. c. 56. directions are given in what manner ſuch male convicts ſhall be removed from the place of their conviction, &c. &c. 519

13 By 24 Geo. 3. c. 56. convicts liable to tranſportation, &c. ſhall be tranſported to ſuch places beyond the ſeas as his majeſty by the advice of *his privy council ſhall order and direct* 519, 520

14 The manner in which convicts may be

be assigned to contractors *Page* 520 s. 154
15 In what manner the place to which offenders are ordered to be transported may be changed 521 s. 155
16 How convicts shall be transferred to the contractors 521 s. 156
17 The contractor may carry convicts through any county *ibid.*
18 The time a convict is confined previous to his being transported shall be considered as part of his sentence 522 s. 157
19 By 27 Geo. 3. c. 1. the authority given by the above acts to transport convicts *to such place as his majesty by the advice of his privy council shall direct*, is recited, and the place to which convicts shall in future be transported is declared to be to *the eastern coast of New South Wales (commonly called* BOTANY BAY) 522
20 The powers given to the king by this act *ibid.*

TRAVERSE.

Vide Escape No. 40. *Appeal* No. 254. *Breaking Prison* No. 3. *Coroner* No. 18. 74. *Torn* No. 66.

TREASON.

1 Justices of gaol-delivery have power to deliver the gaol of persons committed for high treason 32 s. 4. p. 38 s. 4
2 Treason being against the peace of the king, any justice of the peace, either on his own knowledge, or the complaint of others, may cause any person to be apprehended for this offence; and may take the examination of such offender, and the information of the witnesses pursuant to the statute of Philip and Mary 59, 60
3 The statute of 6 Hen. 8. c. 6. which authorises the king's bench to send down the bodies of felons and murderers, together with their indictments, to be tried in the counties where the offences are committed;—shall not be extended to high treason 10 s. 9
4 In what cases the sheriff has power to enquire of high treason (*Vide Torn* No. 42.) *Page* 105
5 Persons apprehended of dangerous riots *savouring* of high treason are excluded from *replevin* by the sheriff by the *stat. West.* 155 s. 45
6 The king's bench *may* bail a person committed for high treason 176
7 *Quere*, Whether one who knowingly opposes the arrest of a person *guilty* of high treason be thereby guilty of high treason himself 188 s. 1
8 Whether the offence of breaking prison can ever amount to the crime of high treason (*Vide Breaking Prison* No. 28. 29.) 195, 196
9 In escape, if the prisoner committed were guilty of high treason, it is high treason whether the party be ever convicted or not 205
10 A stranger who knowingly *rescues* a person committed for and guilty of high treason, is in all cases guilty of high treason 210
11 The offender may be *immediately* arraigned for the high treason, or for the misprision *ibid.*
12 Of appeals for treason (*Vide Appeal* No. 47, 48.) 239
13 Standing mute upon an arraignment of high treason is equivalent to a conviction 464
14 The privilege of sanctuary never extended to high treason 472
15 There are no accessaries in high treason 439 s. 2
16 Whatever will make an accessary before in felony will make him a principal in high treason 440
17 A distinction applied to this rule between treasons touching the king's death and other inferiour species of treason, respecting the mode of trial 440 (N) 1
18 The same receipt of an offender which will make the receiver an accessary after the fact in felony, will make him a principal in high treason 440 s. 3
19 Wherever a statute ordains that those who are guilty of the thing prohibited by it shall be adjudged traitors, it impliedly makes all procurers and abettors of it principals 444

20 In what manner treaſon is excluded from the benefit of clergy. *Vide Clergy*, No. 22, 23. 38. 47. 52. *Page* 480 to 489

21 By 7 Will. 3. c. 3. perſons indicted of high treaſon ſhall make full defence by two counſel 566

22 In what manner a perſon indicted of high treaſon ſhall have a copy of his indictment, &c. &c. *(Vide Copy of Indictment.)* 567, 568

23 What evidence is neceſſary to ſupport an indictment of high treaſon. *(Vide Evidence*, No. 4 to 11. No. 97, &c.) 603. 614

24 The judgment in high treaſon. *(Vide Judgment*, No. 10.) 630 ſ. 3

25 What forfeiture enſues upon an attainder of high treaſon. *(Vide Forfeiture)* 636 ch. 49

26 For the trial of treaſons beyond the ſea. *(Vide County Indictment*, No. 52 to 61.)

27 For other matters relating to treaſon, *vide Acceſſary*, No. 11, 12. 15, 16. *Approver*, No. 3. 12. *Attainder*, No. 3, &c. *Bail. Clergy*, No. 22, 23. *Commitment*, No. 34. *Confeſſion*, No. 1. *Counſel. Evidence.*

TREASURE TROVE.

Vide Coroner, No. 49. *Torn*, No. 46.

TRESPASS.

1 A court which is not of record cannot even hold plea of a common treſpaſs *vi et armis* 5 ſ. 14

2 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, but alſo all others which are only ſo by conſtruction 62 ſ. 38

3 An enumeration of the variety of treſpaſſes of which the ſheriff in his torn had juriſdiction 106, 107

4 There can be no acceſſaries in treſpaſs *Page* 439 ſ. 2

5 Whatſoever will make a man an acceſſary before in felony will make him a principal in treſpaſs *ibid.*

6 Wherever a man commands another to commit a treſpaſs, and he does it, the perſon commanding is equally guilty as if he had done it himſelf 440

7 Whoever agrees to a treſpaſs on *lands or goods*, thereby becomes a principal: But not in a treſpaſs on *the perſon* 440 ſ. 4

8 No one ſhall be adjudged a principal in any common treſpaſs for barely receiving, &c. the offender *ibid.*

9 What offences ſhall be included under a general pardon of all treſpaſſes 549 ſ. 26

10 On an indictment for felony, if the offence amount only to treſpaſs, the offender cannot be found guilty of the treſpaſs on that indictment. *Sed quere*, if the ſpecial circumſtances of the treſpaſs be ſet forth 625

11 If a jury find a ſpecial verdict for felony, and it be adjudged only treſpaſs, *quere*, if judgment may be given on it for treſpaſs only 625

12 On an indictment for treſpaſs, if the fact appear felonious, judgment may be given for treſpaſs, for it is in the election of the king to proceed either for the treſpaſs or the felony *ibid.*

13 Whether a former recovery or acquittal may be pleaded in bar of treſpaſs. *(Vide Appeal. Autrefois Acquit.)*

TRIAL.—*Vide County. Indictment.*

1 Stewards of leets cannot try any perſon indicted before them, but muſt refer the trial to the gaol-delivery 92 ſ. 13

2 In what manner indictments in the ſheriff's torn are to be tried 111 ſ. 75

3 Neither the torn nor the leet have any power to try a traverſe 112 ſ. 76

4 Juſtices of peace may try a man indicted before a ſheriff in his torn *ibid.*

5 Where an appeal of *mayhem* ſhall be tried, and where the trial ſhall be peremptory. *(Vide Appeal,* No. 41.) *Page* 238, 239.
6 By 1 & 2 Phil. & Mary, c. 10. all trials of treaſon ſhall be according to the common law; conſtructions on this ſtatute 366
7 In what manner the *acceſſary* ſhall be tried where the offence ariſes in a different county from that of the *principal* *(Vide Acceſſary)* 457 to 460
8 In what caſes and in what manner it ſhall be tried, whether one who ſtands mute do ſo of malice or of the act of God 462
9 In what places treaſons and murders examined by the privy council ſhall be tried 569
10 He who ſteals goods in one county, and carries them into another, or if an act in one county prove a nuſance to another, the offender may be tried in either *ibid.*
11 Of trial by peers. *(Vide Peers)* 592 ch. 44
12 Of trial by battle. *(Vide Battle)* 599
13 Of trial by jury. *(Vide Jurors)* 569
14 Of trial by certificate. *(Vide Certificate)* 242. 254. 458. 478

TUMBREL.

Whether every *vill* be bound by preſcription to keep a TUMBREL ch. 11 ſ. 5

V.

VACATION.

1 By the *habeas corpus* act, the lord chancellor, lord keeper, any juſtice of either bench, or baron of the exchequer, may grant a *habeas corpus* in vacation time 145
2 And this writ does not expire with the vacation; but the priſoner may be brought into court upon it, in full term 146 ſ. 22 *Note in marg.*
3 By 5 & 6 Will. & Mary, c. 11. a writ of *certiorari* may be granted in vacation time, by any of the juſtices of the king's bench, to remove an indictment or preſentment from any general quarter ſeſſions *Page* 409 ſ. 36

VAGABONDS.

Vagabonds were indictable at the torn 107

VALUE.

1 Whether the value of the things ſtolen muſt be laid in an indictment of larceny. *(Vide Indictment)* 333, 334
2 At the Lent aſſizes for Eſſex 1787, Gould J. and Thompſon B. held an indictment for privately ſtealing bad, becauſe no value was ſtated, MS.

VANQUISHMENT.

Vide Appeal, No. 236. *Approver,* No. 34. *Autrefois Acquit,* No. 16. *Battle.*

VARIANCE.

1 In appeal, if the declaration lays the offence in the reign of a preſent king where the writ ſuppoſed it to have been in the reign of a former king, it is ſuch a variance, that it ought to be abated by the court *ex officio* 268 ſ. 98
2 So alſo where the defendant is miſnamed, or the fact not ſet forth with ſufficient certainty, or the offence be la d in a different county; or, &c. &c. 268 ſ. 99. 101
3 In forgery, the bill was value *received*; in the indictment it was *received*; and the variance held immaterial 340 (N) 616 *n*
4 In perjury on an affidavit, "he *underſtood* and believed," the indictment, he *underſtood*, &c. and the variance held immaterial *ibid.*
5 In perjury in giving evidence: The original indictment was, "*whereby his*

life was greatly deſpaired of;" the preſent indictment, after ſaying "*in manner and form following*," ſtated the paſſage, "*whereby his life was greatly of*," omitting the word *deſpaired*, and after a rule, the matter was given up *Page* 340 (N)

6 LORD MANSFIELD ſaid, the rule was, *that where the omiſſion or addition of a letter does not change the word ſo as to make it another word*, the variance is not material *ibid.* and 616

7 But if the miſ-recited word is in itſelf a word, though not intelligible with the context, as "*air*" for "*heir*," there the variance is fatal 340

8 What is ſuch a variance between the *certiorari* and the return, as ſhall prevent the removal of the record. (*Vide Certiorari*, No. 121) 419 ſ. 71

9 What is ſuch a variance between the original and the proceſs as ſhall cauſe a diſcontinuance. (*Vide Diſcontinuance*, No. 11 to 16.) 424, 425

10 Where a variance between the record of the former acquittal and the indictment or appeal to which it is pleaded, may be helped. (*Vide Autrefois Acquit*, No. 4, 5, 6.) 525, 526

11 If there be a variance between the record, on which a man is convicted or attainted, and his charter of pardon; yet if there be no repugnancy to intend that the ſame perſon or thing are meant in both, it may be ſupplied by proper averments. Inſtances given 561, 562

12 Where the time proved varies from that laid in the indictment, the jury may find the defendant guilty generally, or they may find him guilty ſpecially on the day proved. (*Vide Evidence. Forfeiture.*) 614 ſ. 33

13 Where a certain place is made part of the deſcription of the fact charged, the leaſt variation as to ſuch place between the evidence and the indictment is fatal 615 ſ. 34

14 Where one is indicted for writing a libel *ſecundum tenorem ſequentem*, or for forging a deed ſo and ſo deſcribed, any the leaſt variation between the libel recited or the deed deſcribed, and thoſe given in evidence, is fatal *Page* 616 ſ. 36

15 A variance between an indictment and appeal of death, as to the inſtrumental cauſe, is no way material, ſo that the party be proved to have died by the ſame kind of death 616 ſ. 36

16 Whatever variance is material with reſpect to the principal, is equally ſo with reſpect to the acceſſary 617 ſ. 38

17 Where an indictment ſets forth all the ſpecial matter in reſpect whereof the law implies malice, a variance between the indictment and the evidence as to the circumſtances do no hurt, ſo that the ſubſtance of the matter be found 618

18 How far a variance in the recital of a ſtatute upon which an indictment is founded will be fatal. (*Vide Indictment*, No. 244 to 251.) 351, 352

VENDITIONI EXPONAS.

In what caſe a ſheriff may be authoriſed by *venditioni exponas*, to ſell the goods after the delivery of a *certiorari* 418

VENIRE FACIAS.—*Vide Proceſs. Diſcontinuance. Outlawry. Jurors.*

VERDICT.

1 A jury ſworn and charged in a capital caſe cannot be diſcharged till they have given a verdict; *quere*, if the priſoner conſent. (*Sed vide Foſter* 29 to 39.) 622 ſ. 1

2 In all capital caſes the jury muſt give their verdict openly in court; they cannot give a privy verdict 623 ſ. 2

3 The jury may give a ſpecial verdict in any criminal caſe, whether capital or not capital 623 ſ. 3

4 It is diſhonourable in the court to ſuffer a ſpecial verdict in a plain caſe *Note in marg.*

5 In murder, on not guilty, the jury are not bound to enquire whether the priſoner

ſoner be guilty of manſlaughter *Page* 623 ſ. 4
6 On an indictment of murder the verdict may find generally manſlaughter *ſe defendendo*, or *per infortunium*; but it muſt alſo ſay, not guilty of the murder *ibid.* 623, 624
7 On an indictment for grand larceny the verdict may find it petty larceny only 624 ſ. 6
8 On an indictment for robbery and putting in fear, the jury may find guilty of the felony, not guilty of the robbery *ibid.*
9 So on the 8 Eliz. c. 4. the jury may find, guilty of *ſtealing*, but not *privately* *ibid.*
10 On the 1 Jac. 1. c. 8. the priſoner may be acquitted of murder on the ſtatute, and found guilty of manſlaughter at common law *ibid.*
11 On an indictment for petty treaſon, the verdict may find murder or manſlaughter, as the caſe may be *ibid.*
12 In burglary, where a *cepit et aſportavit* is alſo laid, the priſoner may be acquitted of the burglary and found guilty of the *felony* *ibid.*
13 But he cannot, on a charge ſo laid, be acquitted of the *felony*, and found guilty of the burglary; becauſe ſuch a verdict acquits him of the *intention to commit felony*, in which the crime of burglary conſiſts 624, 625
14 A verdict found the priſoner "guilty of ſtealing in the dwelling-houſe, not guilty of the burglary," and it was held that the acquittal of the burglary was an acquittal of ſtealing in *the dwelling-houſe* 625 (N)
15 "Not guilty of breaking," but "guilty of ſtealing in the dwelling-houſe," is a good verdict in burglary to ouſt the offender of clergy on the 12 Ann. *ibid.*
16 On the 10 & 11 Will. 3. c. 23. for *privately* ſtealing to the value of 5s. in a ſhop, the verdict may reduce the value under the ſum laid 625
17 On an indictment for felony *generally*, if it appears to be only a treſpaſs, yet the offender cannot, on ſuch indictment, be found guilty of the treſpaſs. *Sed quere*, if the ſpecial circumſtances be ſet forth *Page* 625
18 On a ſpecial verdict for felony, judgment may be given for treſpaſs *ibid.*
19 On an indictment for treſpaſs, if the fact appear to have been felony, the priſoner may be found guilty of the treſpaſs; for it is in the election of the king to proceed either for the treſpaſs or the felony. *Sed quere* 625, 626
20 A verdict of acquittal on the coroner's inqueſt ought to ſhew what other perſon did the fact 626 ſ. 7
21 Where two only are found guilty of a riot, or only one of a conſpiracy, they having been indicted *with others*, judgment ſhall be given 626 ſ. 8 & (N)
22 Six were indicted for a riot; two died before trial; two were acquitted and two found guilty; and judgment was given on this verdict *ibid.*
23 On an indictment againſt ſeveral for an offence which may be done as well by one as by more, the verdict may find one only guilty, and acquit the reſt 626
24 So where defendants are jointly charged, ſome may be acquitted, and others found guilty *ibid.*
25 Unleſs an offence conſiſt in doing ſome intire thing, the defendant may be found guilty for a leſs time and degree than is laid *ibid.*
26 The court in judging of a ſpecial verdict is confined to the facts found; and cannot ſupply any defect by implication, &c. 627
27 The preciſion with which a ſpecial verdict muſt find the fact *ibid.*
28 On a ſpecial verdict for murder, the court are judges of the malice *Note in marg.*
29 If the ſpecial verdict do not ſufficiently aſcertain the fact, *a venire facias de novo* ſhall iſſue 627 (N) 2
30 A ſpecial verdict cannot be amended in capital caſes. *Sed quere*, if there are notes to amend it by *ibid.*
31 A ſpecial verdict amended in forgery, becauſe the fault was committed by the defendant *ibid.*
32 If the imperfection of a ſpecial verdict be

be ſuch as that judgment cannot be given on it, it is bad *Page* 627 (N) 2
33 If there be ſeveral iſſues, and the jury only find ſome of them, yet judgment may be given; for in a general verdict upon ſeveral counts, if any one of them is good, it is ſufficient in criminal caſes *ibid.*
34 Words repugnant, in a verdict which would be complete without them, ſhall be rejected as ſurpluſſage 627 ſ. 10
35 On an acquittal againſt manifeſt evidence the court may, before the verdict is recorded, but not after, order the jury to reconſider it 627 ſ. 11
36 Inſtances of ſurety for the good behaviour after verdict of acquittal, and of commitment for contempt of court during trial *ibid.*
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3 But indictments of *treſpaſs, and ſuch like*, are ſtill held inſufficient, without the words *vi et armis*. (*Vide* 3 *Peer Will.* 498.) *Page* 344

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3 A *viſne* may come not only from a town, but from a ward, pariſh, hamlet, burgh, manor, caſtle, or even from a foreſt or other place out of a town *ibid.*
4 Abatement may be pleaded of a fact laid in one place which is done in another *ibid.*
5 A *viſne* may well come *de vicineto civitatis*, &c. &c. 266
6 No *viſne* can come from London, or the wilds of Suſſex, on account of their largeneſs *ibid.*
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5/19/03