Sam[l] Elliot

Sam[l] Knight's Book

1787.

Conductor Generalis:

OR, THE

OFFICE, DUTY AND AUTHORITY

OF

JUSTICES OF THE PEACE,

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

AS ALSO

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

Compiled chiefly from BURN's Juſtice, and the ſeveral other Books on thoſe Subjects, as far as they extend and can be adapted to theſe *American* Colonies.

By JAMES PARKER, One of his Majeſty's Juſtices of the Peace for *Middleſex* County, in NEW-JERSEY.

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

To which is added,

A Treatiſe on the Law of Deſcents in Fee-Simple: By WILLIAM BLACKSTONE, Eſq; Barriſter at Law, Vinerian Profeſſor of the Laws of ENGLAND: With ſeveral choice Maxims in Law, *&c.*

WOODBRIDGE, *in* NEW-JERSEY:

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M.DCC.LXIV.

THE PREFACE TO THE READER.

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

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

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

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

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

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

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

cases

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

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

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

[*So far* Burn's.]

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

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

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

An

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

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

Array, a ranking and setting forth a jury.

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

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

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

Capias, a writ before judgment.

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

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

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

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

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

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

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

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

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

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

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

Non est inventus, he is not to be found.

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

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

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

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

Redisseisin,

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

Tales, A book of jury-men's names.

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

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

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

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

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

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

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

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

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

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

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

Judges or juſtices of *aſſize* ſhall be underſtood to ſignify all thoſe of *Niſi Prius, Oyer and Terminer, and General Gaol Delivery*.

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

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

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

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

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

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

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

Some general Rules to be obſerved, in the conſtruction of Statutes, or Acts of Parliament.

Regularly, a ſtatute in the affirmative doth not repeal a precedent affirmative ſtatute. 12 *Co.* 61. But

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

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

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

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

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

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

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

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

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

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

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

Where a ſtatute appoints a conviction to be on the *oath of one witneſs*; this ought not to be by the ſingle oath of the informer; for if the ſame perſon ſhould be allowed to be both proſecutor and witneſs, it would induce profligate perſons to commit perjury, for the ſake of the reward. L. *Raym.* 1545.

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

TABLE

Of the Chief Matters contained in the enſuing Treatiſe.

Warrant

Warrant

How

Form.

Term,

PART II.

ACCESSARY.

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

I. Of acceſſaries in general.

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

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

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

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

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

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

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

But if the act of parliament that makes the felony, in expreſs terms comprehend acceſſaries before, and make no mention of acceſſaries after, namely, receivers or comforters, there it ſeems there can be no acceſſaries after; for the expreſſion of procurors, counſellors, or abettors, all which import acceſſaries before, make it evident, that the law-makers did not intend to include acceſſaries after, which is an offence of a lower degree than acceſſaries before. 1 *H. H.* 614.

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

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

II. *Of acceſſaries before the fact.*

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

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

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

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

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

Alſo in ſome caſes, even a perſon abſent may be principal; as he that puts poiſon into any thing to poiſon another, and leaves it, tho' not preſent when it is taken: And ſo it ſeems all that are preſent

preſent when the poiſon is ſo infuſed, and conſenting thereunto. *Hale's Pl.* 216.

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

1. *When the principal doth not accompliſh the fact altogether in the ſame ſort, as it was before hand agreed between him and the acceſſary.* And therefore if one command another to lay hold upon the third perſon, and he lays hold upon him and robs him, the perſon commanding is not acceſſary to the robbery; for his command might have been performed without any robbery. *Dalt. c.* 161.

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

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

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

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

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

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

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

III. *Of acceſſaries after the fact.*

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

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

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

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

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

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

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

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

4. In like monner, if one commit a felony, and come to a perſon's houſe before he be arreſted, and ſuch perſon ſuffer him to eſcape without arreſt, knowing him to have committed a felony, this doth not make him acceſſary; but if he take money of the felon to ſuffer

ſuffer him to eſcape, this makes him acceſſary: And ſo it is if he ſhut the fore door of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes him an acceſſary; for here is not a bare omiſſion, but an act done by him to accommodate the felon's eſcape. 1 *H. H.* 619.

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

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

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

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

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

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

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

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

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

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

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

IV. How they are to be proceeded against.

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

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

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

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

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

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

It seems to be settled at this day, that if the principal and accessary appear together, and the principal plead the general issue, the accessary shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted; and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessary not guilty. But it seems agreed, that if the principal plead a plea in bar,

or

or abatement, or a former acquittal, the accessary shall not be forced to answer, till that plea be determined; for if it be found for the principal, the accessary is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Haw.* 323. 1 *H. H.* 624.

Anciently, the accessary could not be tried, unless the principal were *attainted* (3 *Ed.* 1 *c.* 14.) but by the 1 *Ann. stat.* 2. *c.* 9. *s.* 1. If the principal be convicted, or stand mute, or peremptorily challenge above twenty of the jury, the accessary may be tried and punished as if the principal had been attainted; and this, altho' the principal be admitted to his clergy, pardoned, or otherwise delivered before attainder.

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

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

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

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

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

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

ADDITION.

TO prevent the inconvenience of troubling one person for another, it is enacted by 1 *H.* 5. *c.* 5. that *in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants additions shall be made, of their estate or degree or mistery, and of the towns, or hamlets, or places, and counties, of the which they were, or be: And if by*

proceſs upon the ſaid original writs, appeals, or indictments, in the which the ſaid additions be omitted, any outlawries be pronounced, they ſhall be void; and before the outlawries pronounced, the ſaid writs and indictments ſhall be abated by the exception of the party.

In which the exigent ſhall be awarded] The *exigent* is a writ whereby the ſheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by theſe words the act extendeth only to caſes where proceſs of outlawry may be awarded; and therefore it extendeth not to an indictment for incroaching on a highway, becauſe in that caſe proceſs of outlawry lieth not, but a diſtreſs. *Croke Eliz.* 148.

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

If there be a corporation of one ſole perſon, that hath a fee ſimple, and may have a writ of right, he may be named by the common law by his chriſtian name with out any ſirname, as *John* biſhop of *P.* 2 *Inſt.* 666.

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

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

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

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

Where a father hath the ſame name and the ſame addition with a defendant being his ſon, the action is abateable unleſs it add the addition of *the younger* to the other additions; but where the father is the defendant, it is ſaid that there is no need of the addition of *the elder*. 2 *Haw.* 187.

Of their eſtate or degree] Eſquire is a good addition; and the ſons of all peers and lords of parliament in the life of their fathers, are in

in law eſquires, and ſo to be named. Alſo the eldeſt ſon of a knight is an eſquire. 2 *Inſt.* 667.

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

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

A gentleman by reputation, that is neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a ſufficient addition; but if he be named yeoman, he cannot quaſh the indictment. 2 *Inſt.* 668.

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

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

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

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

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

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

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

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

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

caſe,

caſe to name the defendant generally of either ſuch towns, without adding any thing to diſtinguiſh it from the other. 2 *Haw.* 189.

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

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

The addition of the place of habitation of a wife, is ſufficiently ſhewn, by ſhewing that of the huſband; becauſe it ſhall be intended that the wife lives where the huſband does. 2 *Haw.* 190.

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

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

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

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

AFFRAY.

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

I. What is an affray.

AN *affray is a publick offence to the terror of the king's ſubjects, and is an* Engliſh *word, and ſo called, becauſe it affrighteth and maketh men afraid.* 3 Inſt. 158.

From

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

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

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

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

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

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

And

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

Nor to go nor ride armed] It is holden, that a man cannot excuse the wearing such armour in publick, by alledging that such a one threatned him, and that he wears it for the safety of his person from his assault; but it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is his castle. 1 *Haw.* 136.

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

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

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

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

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

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

III. How far by a constable.

It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which happens in his presence; but

but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment. 1 *Haw.* 137.

And it is said, that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation: But it seems, that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol, till he shall be punished for his offence: And it is said, that he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such case, is to command them under pain of imprisonment to avoid fighting. 1 *Haw.* 137.

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

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

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

IV. How far by a justice of the peace.

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

V. Punishment of an affray.

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

And

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

Warrant to apprehend affrayers.

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

WHEREAS A. I. *of--------yeoman, hath this day made oath before me* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, that on the--------day of--------in the-------year of the reign of----------*A. O. *of----------yeoman, and* B. O. *of-------- yeoman, at--------in the ſaid county, in a tumultuous manner made an affray, wherein the perſon of the ſaid* A. I. *was beaten and abuſed by them the ſaid* A. O. *and* B. O. *without any lawful or ſufficient provocation given to them, or either of them, by him the ſaid* A. I. *Theſe are therefore to command you forthwith to apprehend the ſaid* A. O. *and* B. O. *and bring them before me, or ſome other of his ſaid majeſty's juſtices of the peace for the ſaid county, to anſwer the premiſſes, and to find ſureties as well for their perſonal appearance at the next general quarter-ſeſſions of the peace to be holden for the ſaid county, then and there to anſwer to an indictment to be preferred againſt them by the ſaid* A. I. *for the ſaid offence, as alſo for their keeping the peace in the mean time, towards his ſaid majeſty and all his liege people, and eſpecially towards him the ſaid* A. I. *Hereof fail not, as you will anſwer the contrary at your peril. Given under my hand and ſeal at--------in the ſaid county, the--------day of* &c.

ALE-HOUSES.

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

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

If one who keeps a common inn, refuſe either to receive a traveller as a gueſt into his houſe, or to find him victuals or lodging, upon

upon his tendering him a reaſonable price for the ſame; he is not only liable to render damages for the injury, in any action on the caſe at the ſuit of the party gieved, but may alſo be indicted and fined at the ſuit of the king. 1 *Haw.* 225.

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

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

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

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

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

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

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

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

[In his majeſty's colonies in *America*, ale-houſes and inns, are licenced according to the ſeveral acts of the legiſlatures in the ſaid colonies, and the penalties inflicted or forfeitures ariſing therefrom, muſt be recovered and diſpoſed of according to thoſe acts, which vary almoſt in every colony.]

A Warrant againſt one for ſelling ſtrong liquor without licence.

To the conſtable of, &c.

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

APPEALS.

THIS word has two ſignifications in law; the one is, removing a cauſe from an inferior court or judge, to a ſuperior; as from one or more juſtices, to the quarter ſeſſions.

The other kind of appeal (which is the ſubject of this title) is a proſecution againſt a ſuppoſed offender, by the party's own private action; proſecuting alſo for the crown, in reſpect of the offence againſt the publick. 2 *Haw.* 155.

An appeal is brought in three caſes; 1. By a man for a wrong to his anceſtor. 2. By a wife for the death of her huſband. 3. For wrong done to the appellants themſelves, as in the caſe of robbery, rape, or maihem; but this laſt is diſuſed, on account of the nicety of the pleadings, and the charge of the proſecution; and the method of indictment is now generally taken. *Wood b.* 4. *c.* 5.

A perſon acquitted on an indictment of murder ſhall not be ſet at liberty but ſhall be recommitted, or bailed, till the year and day be paſt; within which time an appeal may be brought. 3 *H.* 7. *c.* 1.

It is certain, that an appeal may be commenced before the ſheriff and coroner, and removed from them into the king's bench by *certiorari*. 2 *Haw.* 156.

And it ſeems to be holden in *Fitzherbert's* abridgment, that juſtices of the peace have power to receive appeals; but there is much greater authority for the contrary opinion. 2 *Haw.* 156.

If the perſon appealed ſhall be acquitted, the appellor ſhall be impriſoned for a year, and reſtore damages to the party, and be grievouſly fined to the king. 13 *Ed.* 1. *ſt.* 1. *c.* 12. That is if the appeal ſhall appear to the court to have been malicious. 2 *Haw.* 198.

Foraſmuch as an appeal is the ſuit of the party, as well as of the king, hence it is that the king cannot pardon any offender found guilty upon an appeal, as he may when found guilty upon an indictment; for in ſuch caſe he can only pardon for himſelf, but not for the party. 2 *Haw.* 155.

APPRENTICES.

APPRENTICES.

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

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

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

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

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

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

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

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

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

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

On the apprentices side. Any departing from his Service whatsoever, refusing to do any reasonable service, is a departure in law; but as to that part of the act which says, an apprentice departing without

teſtimonial, ſhall be whipped as a vagabond; it muſt be an apprentice in huſbandry, and one of full Age, for otherwiſe an infant who is the ſon of a gentleman, may be puniſhed as a rogue. *Winch* 25.

No perſon ſhall be bound to enter into any apprenticeſhip, other than ſuch as be under the age of 21 years. 5 *El. c.* 4. *ſ.* 36.

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

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

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

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

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

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

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

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

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

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

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

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

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

T. 13 *W.*

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

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

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

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

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

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

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

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

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

It

It hath been said, that if the master dies, the apprentice goes to the executor or administrator to be maintained, if there are assets; but the executor or administrator may bind him to another master, for the remaining part of his time.

An indenture for putting out an apprentice by the Township:

THIS *indenture made the---day of----in the---year of the reign of our sovereign lord* GEGRGE *the third, by the grace of god, of* Great-Britain, France *and* Ireland, *king, defender of the faith,* &c. anno domini 1762. Witnesseth, *That* A. B. *and* C. D. *overseers of the poor of the township of* Woodbridge, *in the county of* Middlesex, *and province of* New-Jersey, *by and with the consent of* E. F. *and* G. H. *two of his majesty's justices of the peace of the said county, whose names are hereunto subscribed; have put and placed, and by these presents do put and place* J. K. *a poor child of the said township, apprentice to* L. M. *of the same, baker, with him to dwell and to serve from the day of the date of these presents, until the said apprentice shall accomplish his full age of* twenty-one *years, according to the laws in that case made and provided: During all which term the said apprentice his said master faithfully shall serve in all lawful businesses, according to his power, wit and ability; honestly, orderly and obediently, in all thinks demean and behave himself towards his said master, and all his during the said term. And the said* L. M. *doth for himself, his executors and administrators, covenant and grant, to and with the said overseers, and every of them, their and every of their executors and administrators, and their and every of their successors for the time being, by these presents, that the said* L. M. *the said apprentice, in the art and mystery of a baker, which he now useth, shall and will teach and instruct, or cause to be taught and instructed, in the best way and manner that he can: And shall and will, during all the term aforesaid, find, provide and allow unto the said apprentice, competent and sufficient meat, drink, and apparel, lodging, washing and all other things necessary, and fit for an apprentice. And also shall and will provide for the said apprentice, that he be not any way a charge to the township; but of and from all charge, shall and will save the said township harmless, and indemnified, during the said term: And at the end thereof, shall and will make, provide, allow and deliver unto the said apprentice, double apparel of all sorts, one suit of which to be new.* In witness *whereof, the parties aboveſaid to these present indentures, interchangeably have put their hands and seals the day and year first above-written.*

Sealed and delivered in
the Presence of

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

A Warrant againſt a maſter for abuſing his apprentice.

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

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

A Warrant againſt a diſorderly apprentice.

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

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

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

New-Jerſey, Eſſex County. AT *at a general quarter ſeſſions of the peace, holden at ---------in and for the county aforeſaid, the------- day of----------in the----------year of the reign of our lord* George *the third, by the grace of god, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth; Before----------juſtices of our ſaid lord the king aſſigned to keep the peace in ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, and of the* quorum, *It is ordered as followeth;*

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

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

A warrant againſt an apprentice for departing from his maſter.

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

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

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

The diſcharge of an apprentice by four juſtices.

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

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

A warrant for ſervants wages.

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

WHEREAS *complaint upon oath hath been made unto me by* W. W. *late ſervant of* W. B. *of* &c. *That he the ſaid* W. W. *being lawfully hired by his ſaid maſter, did ſerve him for the ſpace of* &c.

&c. *and that the said* W. B. *doth now refuse to pay the wages which are justly due to his said servant for the time he hath served him. These are therefore to require you to bring the said* W. B. *before me, or some other of his majesty's justices of the peace for the said county, to answer the premises; and that you give notice to the said* W. W. *to be then and there present to make good his complaint. Given under my hand and seal,* &c.

APPROVER.

AN *approver* (probator) is a person indicted of treason or felony, and in prison for the same, who upon his arraignment, before any plea pleaded, doth confess the indictment and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment. 3 *Inst.* 129.

This accusation of himself, and oath, makes his accusation of another person of the same crime to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. 3 *Inst.* 129. 130.

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. 3 *Inst.* 130.

And besides, as it is in the discretion of the court whether they will suffer one to be an approver, this method of late hath been seldom practised: And in many cases we have what seems to amount to the same, by statute; where pardon is assured to offenders, on discovering and convicting their accomplices.

ARRAIGNMENT.

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

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

And the word in latin (lord *Hale* saith) is no other than *ad rationem ponere*, and in french *ad reson*, or abbreviated *a resn*; for as the antient word *disrain* or *derayn* imports in latin *disrationare* to disprove or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *rationem ponere*, to call to account or answer. 2 *H. H.* 216.

And

And this perhaps may be sufficient to shew the meaning of the word, altho' not to declare its derivation; for it seemeth to have flowed unto the french tongue, from its common origin with the greek; of which we have little doubt, when we consider the verbs, as they are used in the classical remains of that language, and compare them with the terms *arraigne, adraign, disrayne, derayne.*

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

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

ARREST.

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

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

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

Concerning which I will shew,

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

I. Who may or may not be arrested.

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

In

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

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

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

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

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

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

1 The common fame of the country; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. 2 *Haw.* 76.

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

3 The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. 2 *Haw.* 76.

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

4 The being in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52.

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

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

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

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

III. By

III. By whom the arreſt ſhall be made.

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

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

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

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

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

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

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

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

But every other perſon, to whom it is directed, muſt perſonally execute it; yet it ſeems, that any one may lawfully aſſiſt him. 2 *Haw.* 86.

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

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

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

If

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

IV. The manner of an arreſt.

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

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

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

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

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

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

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

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

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

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

As

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

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

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

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

But lord *Hale*, in his history of the pleas of the crown, says, that upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained, notwithstanding the contrary opinion of lord *Coke:* for in such case the general process is for the king, and therefore a *non omittas* is implied. 1 *H. H.* 580, 583. 2 *H.H.* 117.

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

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

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

3 Upon

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

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

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

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

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

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

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

9 If there be diſorderly drinking or noiſe in a houſe, at an unſeaſonable time of night, eſpecially in inns, taverns or alehouſes, the conſtable or his watch, demanding entrance, and being refuſed, may break open the doors, to ſee and ſuppreſs the diſorder. 2 *H. H.* 95.

10 Wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes, and ſhelters himſelf in an houſe. 2 *Haw.* 87.

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

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

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

If there be a warrant againſt a perſon, for a treſpaſs or breach of the peace, and he flies and will not yield to the arreſt, or being taken makes his eſcape; if the officer kills him, it is murder. 2 *H. H.* 117.

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

But

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

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

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

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

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

But the learned editor of *Hale*'s hiſtory obſerves hereupon, that the books referred to do intend the general warrant conſtituting ſuch perſon an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. 2 *H. H.* 116.

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

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

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

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

It hath been holden, that if a conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large, upon his promiſe to come again and find ſureties, he cannot afterwards arreſt him

him by force of the ſame warrant: However if the party return, and put himſelf again under the cuſtody of the conſtable, it ſeems that it may be probably argued, that the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of ſuch warrant; but in this the law doth not ſeem to be clearly ſettled. 2 *Haw.* 81.

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

V. What is to be done after the arreſt.

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

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

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

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

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

If the arreſt is by virtue of a warrant, when the officer hath made the arreſt, he is forthwith to bring the party, according to the direction of the warrant: If it be to bring the party before the juſtice who granted the warrant ſpecially, then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice of the county, then it is in the election of the officer, to bring him before what juſtice he thinks fit, and not in the election of the priſoner. 1 *H. H.* 582. 2 *H. H.* 112.

But if the time be unſeaſonable, as in or near the night, whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick, he may ſecure him in the ſtocks, or in an houſe, till the next day, or ſuch time as it may be reaſonable to bring him. 2 *H. H.* 120.

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

But it is ſaid, the conſtable is not obliged to return the warrant itſelf, but may keep it for his own juſtification, in caſe he ſhould be queſtioned for what he had done; but only to return what he has done upon it. Lord *Raym.* 1196.

ASSAULT and BATTERY.

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

I. Assault, what.

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

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

Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault. 1 *Haw.* 134.

II. Battery, what.

Battery (from the Saxon *batte*, a club, or *beattan*, to beat, from whence cometh also the word *battle*) seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently justling him out of the way, and the like. 1 *Haw.* 134.

III. In what cases they may be justified.

A person may justify an assault, in defence of his person, or of his wife, or master, or parent, or child within age; and even a *wounding* may be justified in defence of his person, but not of his possessions. 3 *Salk.* 46.

Also if an officer having a lawful warrant lay hands on another to arrest him, or if a parent in a reasonable manner chastise his child, a master his servant, a schoolmaster his scholar, a gaoler his prisoner, and even a husband his wife as some say; or if one confine a friend who is mad, and bind and beat him in such a manner as is proper in

his circumstances; or if a man force a sword from one who offers to kill another therewith; in all these cases, and such like, it is justifiable. 1 *Haw.* 130.

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

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

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

IV. How punished.

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

Warrant for an assault.

New-York, King's County. } To any of the constables of Brucklyn.

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

Indictment for an assault.

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

ASSIZES

Sam. Ellis 1810

ASSIZES.

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

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

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

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

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

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

By the precept for the general gaol delivery abovementioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons, with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

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

ATTACHMENT.

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

It

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

ATAINDER.

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

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

ATTAINT.

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

AWARD.

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

I. What things may be ſubmitted to arbitration.

II. The ſeveral kinds of ſubmiſſion to arbitration.

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

I. What things may be ſubmitted to arbitration.

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

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

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

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

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

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

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

II. *The ſeveral kinds of ſubmiſſion to arbitration.*

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

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

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

It ſhall be lawful for all merchants and traders, and others deſiring to end any controverſy, ſuit, or quarrel (for which there is no other remedy but by perſonal action, or ſuit in equity) by arbitration, to agree

agree that their ſubmiſſion to the award or umpirage be made a rule of any of his majeſty's courts of record, which the parties ſhall chooſe, and to inſert ſuch agreement in their ſubmiſſion, or the condition of the bond, or promiſe, whereby they ſubmit themſelves: Which agreement being ſo made, and inſerted in their ſubmiſſion or promiſe, or condition of their reſpective bonds, ſhall or may, on producing an affidavit thereof, made by the witneſſes thereunto, or any one of them, in the court of which the ſame is agreed to be made a rule, and reading and filing the ſaid affidavit in court, be entered of record in ſuch court; and a rule ſhall thereupon be made in the ſaid court, that the parties ſhall ſubmit to, and finally be concluded by ſuch arbitration or umpirage; and in caſe of diſobedience to ſuch arbitration or umpirage, the party neglecting or refuſing to perform the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court; and the court on motion ſhall iſſue proceſs accordingly; which proceſs ſhall not be ſtopped or delayed in its execution, by any order of any other court of law, or equity, unleſs it ſhall be made appear on oath to ſuch court, that the arbitrators or umpire miſbehaved themſelves, and that ſuch award was procured by corruption, or other undue means.

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

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

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

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

But in which way ſoever the ſubmiſſion is made, the ſame nevertheleſs may be revoked, tho' made irrevocable by the ſtrongeſt words; for a man cannot by his own act, make ſuch authority or power

power not countermandable, which by the law and in its own nature is countermandable. 8 *Co.* 82.

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

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

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

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

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

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

It is not required by any of the stamp acts, that an award by name shall be on stamped paper or parchment; nor doth it seem to be comprehended under any description in the said acts, unless it be under these general words [*obligatory instrument*] and if so, then it shall be on a double six-penny stamp.

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

Upon which ground, as the arbitrators are, with respect to the things submitted, circumscribed and tied down to the submission; so in several cases it has been disputed, whether their awarding releases to the time of the award, and not to the time of the submission, was good; it is therefore most advisable to award releases to the time of the submission; tho' it is now clearly held, that general releases shall extend only to the time of the submission, and that if there be releases awarded to the time of the award, they shall be good, unless it be shewn on the other side, that some new matter hath arisen between the parties between the submission and award. 1 *Roll. Abr.* 242. 6 *Mod.* 34.

If the submission be, *so as the award be ready to be delivered to the parties or to such of them as shall desire the same*, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the submission be, *so that the award be delivered*

to

to each party by such a day, then it must be delivered to each party accordingly. *Read. Arb. Wood b.* 4 *c.* 3.

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

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

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

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

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

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

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

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

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

Upon which ground also, the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed them is expired; for then such their award is not certain and final. *Cro. Jac.* 585.

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

But

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

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

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

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

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

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

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

And it is the strongest argument of partiality, to shew that the arbitrators received from either of the parties any considerable sum of money, or any other present which may be a temptation to act corruptly; but the sum or present must be proved to be so exorbitant, as to induce the court to believe that it biassed their judgments; otherwise it will be of no effect. *Compl. Arb.* 76.

If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party

who

who would take advantage of it, must shew that he has done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it shall be done immediately. 2 *Brown.* 311.

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

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

Form of a submission by rule of court.

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

Arbitration bond.

KNOW *all men by these presents, that I* A. B. *of*-----*in the county of*-------*gentleman, am held and firmly bound to* C. D. *of*-------*in the said county of*-------*yeoman, in*----------*pounds of good and lawful money of* Great-Britain, *to be paid to the said* C. D. *or to his certain attorney, his executors, administrators, or assigns: To which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the*------*day of*--------*in the*-------*year of the reign of our sovereign lord* George *the third, of* Great Britain, France *and* Ireland, *king, defender of the faith, and so forth, and in the year of our lord*------

Condition

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

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

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

And the abovebound A. B. *doth agree and deſire, that this his ſubmiſſion be made a rule of his majeſty's court of king's bench at* Weſtminſter, *purſuant to the act of parliament in ſuch caſe made and provided.*

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

THE *condition of this obligation is ſuch, that if the abovebound* A. B. *his heirs, executors, and adminiſtrators, for and on his and their parts and behalfs, ſhall and do well and and truly ſtand to, obey, abide, obſerve, perform, fulfil, and keep the award, order, arbitrament, final end and determination of*-------*or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the ſaid* A. B. *as by and on the part and behalf of the abovenamed* C. D. *to arbitrate, award, order, judge and determine, of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, convenants, contracts, promiſes, accounts, reckonings, ſums of money, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, at any time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done ſuffered, committed, or depending by or between the ſaid parties; ſo as the award of the ſaid arbitrators, or any two of them, be made and ſet down in writing, under their or any two of their hands and ſeals, ready to be delivered*

vered to the said parties in difference, on or before the-----day of-------- now next ensuing; then this obligation to be void, otherwise of force.

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

Form of an award.

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

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

use,

uſe, general releaſes, ſufficient in the law for the releaſing by each to the other of them, his heirs, executors, and adminiſtrators, of all actions, ſuits, arreſts, quarrels, controverſies, and demands whatſoever, touching or concerning the premiſſes aforeſaid, or any matter or thing thereunto relating, from the beginning of the world, until the-------day of------- laſt paſt (viz. the day of the date of the arbitration bonds) *In witneſs whereof we have hereunto ſet our hands and ſeals the------day of----*

Form of an umpirage.

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

BAIL.

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

I. What it is.

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

II. Difference between bail and mainpriſe.

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

III. When

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

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

IV. Who may or may not be bailed.

At the common law, bail was [illegible] caſes but homicide; but now the ſtatute of the 3 *Ed* [illegible] directeth what offenders ſhall be bailed, and what not. *Pl.* 97.

It is true, the ſaid ſtatut[illegible] preſcribeth, who ſhall or ſhall not be let to bail by the *ſheri*[illegible] ut by the 1 & 2 *P. & M. c.* 13. it is enacted, that no juſtice [illegible] juſtices of peace ſhall let to bail or manpriſe any perſon not repleviſable by the ſaid ſtatute of 3 *Ed.* 1 *c.* 15.

Which ſtatute is as follows: *Foraſmuch as ſheriffs and others, which have taken and kept in priſon perſons detected of felony, and incontinent have let out by replevin ſuch as were not repleviſable, and kept in priſon ſuch as were repleviſable, becauſe they would gain of the one party and grieve the other; and forasmuch as before this time it was not determined which perſons were repleviſable, and which not, but only thoſe that were taken for the death of a man, or by commandment of the king, or of his juſtices, or for the foreſt: It is provided, that ſuch priſoners as before were outlawed, and they which have abjured the realm, provers, and ſuch as be taken with the manner, and thoſe which have broken the kings 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 excommunicate taken at the requeſt of the biſhop, or for manifeſt offences, 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 inqueſts taken before ſheriffs or bailiffs by their office, or of light ſuſpicion, or for petit larceny, that amounteth not above the value of* 12d. *if they were not guilty of ſome other larceny aforetime, or guilty of receipt of felons, or of commandment, or force, or of aid in felony done, or guilty of ſome other treſpaſs for which one ought not to loſe life nor member, and a man appealed by a prover, after the death of the prover (if he be no common thief nor defamed) ſhall from henceforth be let out by ſufficient ſurety, whereof the ſheriff will be anſwerable, and that without giving ought of their goods.*

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

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

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

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

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

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

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

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

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

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

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

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

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

Provers]

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

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

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

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

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

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

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

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

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

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

Or of treaſon touching the king himſelf] By the common law, a man accuſed or indicted of high treaſon, or of any felony whatſoever,

was

was bailable upon good ſurety, until he were convicted; for at common law, the gaol was his pledge or ſurety, that could find none. 2 *Inſt.* 189.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And it ſeems to be a 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 crimes: And upon this ground it ſeems clear, that any two juſtices (1 *Q.*) may of common right bail perſons indicted at the ſeſſions, for that any two ſuch juſtices may hear and determine the indictment. Alſo it hath been holden, that any one juſtice hath the like power; and this ſeems to be implied by the ſtatute of 1 *R.* 3. *c.* 3. which giving one juſtice power of bailing perſons arreſted for felony *in like form as if ſuch perſons had been indicted at the ſeſſions*, clearly ſuppoſes, that if ſuch perſons had been indicted at the ſeſſions, they might have been bailed by any one juſtice. And if any one juſtice had ſuch power, before the ſtatutes ſpecially relating to the power of juſtices in granting bail, it ſeems that he hath ſtill the ſame power in relation to perſons ſo indicted of any bailable crime under the degree of *felony*, becauſe the ſaid ſtatutes ſeem not to reſtrain him in any ſuch caſe, under the degree of felony, from any power which he lawfully might claim before. 2 *Haw.* 103.

But

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

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

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

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

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

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

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

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

VI. Requiring excessive bail.

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

VII.

VII. Denying bail where it ought to be granted.

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

VIII. Granting bail where it ought to be denied.

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

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

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

IX. Of bail by writ of habeas corpus.

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

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

Alſo if a perſon is committed for treaſon or felony ſpecially expreſſed, yet if he ſhall in open court the firſt week of the term, or firſt day of aſſize, petition to be tried, and ſhall not be indicted ſometime in the next term or aſſize after the commitment, he ſhall upon motion the laſt day of the term or aſſize, be bailed, unleſs it ſhall appear to the judge upon oath that the king's witneſſes could not be produced within that time, and then if he is not tried in the ſecond term or aſſize, he ſhall be diſcharged.

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

Then application is to be made in writing, by the priſoner or any perſon for him, atteſted and ſubſcribed by two witneſſes who were preſent at the delivery thereof, to the court of chancery, king's bench, common

pleas

pleas, or exchequer, or if out of term time, to the lord chancellor or one of the judges; and a copy of the warrant of commitment shall be produced before them, or oath made that such copy was denied.

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

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

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

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

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

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

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

If he shall be discharged, he shall thereupon enter into recognizance to appear on his trial; and the writ, and return thereof, and recognizance shall be certified into the court where the trial must be.

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

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

Two things I shall observe upon this statute:

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

2. That

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

Form of bail.

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

John Moore,
Richard Burn.

The condition of this recognizance is such, that if the within [*above*] *bound* A. O. *shall personally appear before the justices of our sovereign lord the king assigned to keep the peace within the said county, and likewise to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter sessions of the peace* [or, *before his majesty's justices of gaol delivery, at the next general gaol delivery*] *to be holden in and for the said county, then and there to answer to our said sovereign lord the king, for and concerning the felonious taking and stealing of*--------*the property of* A. M. *of*----------*yeoman, with the suspicion whereof the said* A. O. *stands charged before us the said justices and to do and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above* [*within*] *written recognizance shall be void.*

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

New-Jersey, Essex-County. BE *it remembered, that on the*---------*day of*-------*in the*----------*year of the reign of*---------- *before us* John Moore, *esquire, and* Richard Burn, *clerk, two of the justices of our said lord the king, assigned to keep the peace within the said county, and one of us of the quorum, at* Newark, *in the said county, did come* A. B. *and* B. B. *of*----------*in the said county, yeoman, and took in bail until the next gaol delivery to be holden in the said county, one* A. O. *of*----------*labourer, taken and detained in prison for suspicion of a certain felony in stealing*----------*the property of*----------*and took upon themselves each of the said* A. B. *and* B. B. *under the penalty of*

of 20l. *of good and lawful money of* Great-Britain, *of the goods and chattles, lands and tenements, of them and each of them, to the use of our said lord the king, his heirs and successors, to be levied, if the said* A. O. *shall not personally appear at the said next general gaol delivery, before the justices of our said lord the king, assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of* England. *Given under our seals,* &c.

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

Taken and acknowledged the day and year above written, before us the abovesaid
John Moore,
Ri. Burn.

And hereupon a warrant issues for his deliverance, thus:

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

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

BARRATRY.

I. What it is.
II. How punished.

I. What it is.

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

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

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

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

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

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

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

II. How puniſhed.

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

And altho' this ſtatute doth not create the offence, but ſuppoſes it at common law, and only appoints the puniſhment, yet an indictment of barratry, concluding *againſt the form of the ſtatute*, is holden to be good, and agreeable to many precedents. *Cro. Eliz.* 148. 1 *Haw.* 244.

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

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

Which caſe, and that of a common ſcold, ſeem to be the only offences for which a general indictment will lie, without ſhewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, conſiſting in the repetition of divers acts in diſturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath ſettled it to be ſufficient to charge a man generally as a common barrator, and before the time to give the defendant notice of the particular

ticular matters which are intended to be proved againſt him; for otherwiſe it will be impoſſible to prepare a defence againſt ſo general and uncertain a charge, which may be proved by ſuch a multiplicity of different inſtances; and therefore the court generally will not ſuffer the proſecution to go on in the trial of the indictment, without ſuch note being given to the defendant. 1 *Haw.* 244. 2 *Haw.* 226, 7.

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

Warrant for a barrator.

New-York, Queens County. } To any conſtable of ſaid county.

WHEREAS *complaint upon oath hath been made unto me-------- one of his majeſty's juſtices of the peace in and for the ſaid county, that* A. O. *of------in the ſaid county, yeoman, on the-------day of-------in the-------year of the reign of--------and on divers other days and times as well before as afterwards, at-------aforeſaid in the county aforeſaid, and at divers other places within the county aforeſaid was and yet is a common barrator, and daily diſturber of the peace of our ſovereign lord the king, and alſo a common brawler, wrangler, fighter, ſcandalizer, and ſower of ſeditions, ſuits, and diſcords between his neighbours, and other the liege people and ſubjects of our ſaid ſovereign lord the king, to the great damage and diſturbance of the ſaid liege people and ſubjects of our ſaid lord the king, and againſt the peace of our ſaid lord the king, and to the evil example of all others in the like caſe offending: Theſe are therefore to command you forthwith to bring the ſaid* A. O. *before me to anſwer unto the ſaid complaint, and to find ſureties for his perſonal appearance at the next general quarter ſeſſions of the peace to be holden for the ſaid county, then and there to anſwer unto an indictment on the behalf of our ſaid ſovereign lord the king to be preferred againſt him for the ſaid offences. Hereof fail not upon the peril that ſhall enſue thereon. Given under my hand and ſeal the ----------day of---------.*

BASTARDS.

I. Who ſhall be deemed a baſtard.

THE word *baſtard* ſeemeth to have have been [illegible] unto us by the *Saxons*: and to be compounded of *baſe* vile or ignoble, and *ſtart* or *ſteort* ſignifying a riſe or [illegible]. By the common

common people in the north (amongſt whom is preſerved much of the ancient *Saxon*) it is ſtill pronounced *baſtart*, denoting a perſon ſprung from a vile or ſpurious origin; even as an *upſtart* is a perſon ſuddenly riſen from a mean extraction in general.

Lord *Coke* ſays, We term all by the name of baſtards that are born out of lawful marriage. By the common law, if the huſband be within the four ſeas, that is, within the juriſdiction of the king of *England*, if the wife hath iſſue, no proof is to be admitted to prove the child a baſtard, unleſs the huſband hath an apparent *impoſſibility* of procreation, as if the huſband be but eight years old, or under the age of procreation, ſuch iſſue is baſtard, albeit he be born within marriage. But if the iſſue be born with in a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inſt.* 244.

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

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

M. 10. *W.* *K.* and *Abberton*. The caſe was, a feme covert, during

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

But this non-acceſs of the huſband ought to be proved otherwiſe than upon the wife's oath; as in the following caſe; *M.* 8 *G.* 2. *K.* and *Reading*. The defendant *Reading* was adjudged by an order of baſtardy, to be the putative father of a baſtard child, begotten of the wife of one *Almont* of *Sherborn*. The ſaid woman, on the appeal, gave evidence, that the ſaid *Reading* had carnal knowledge of her body in or about *Auguſt* 1732, and ſeveral times ſince; and that her huſband had no acceſs to her from *May* 1731, to the time of her examination in that court, being the 3d of *Oct.* 1733. and that the ſaid *Reading* was the father of the ſaid child. And the queſtion on removal of the ſame into the king's bench was, whether the wife in this caſe could be admitted as an evidence for or againſt her huſband, and to baſtardize her own child. And the whole court were of opinion, that the wife could be a witneſs to no other fact but that of incontinence, and that this ſhe muſt be admitted to be a witneſs to from the neceſſity of the thing; but not to the abſence of her huſband, which might properly be proved by other witneſſes; and likened it to the caſe of hue and cry, where the perſon robbed ſhall be admitted a witneſs of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, becauſe that may be proved by others. *Seſſ. C. V.* 2. 175.

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

The

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

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

By the 18 *El. c.* 3. it is enacted as follows; *Concerning baſtards begotten and born out of lawful matrimony, the ſaid baſtards being now left to be kept at the charges of the pariſh where they be born, to the burden of the ſame pariſh, and to the evil example and encouragement of lewd life, it is enacted, that two juſtices (1 Q.) in or next unto the limits where the pariſh church is, within which pariſh ſuch baſtard ſhall be born, upon examination of the cauſe and circumſtance, ſhall and may by their diſcretion, take order, as well for the puniſhment of the mother and reputed father, as alſo for the better relief of ſuch pariſh, in part or in all; and ſhall and may, by like diſcretion, take order for the keeping of every ſuch baſtard child, by charging ſuch mother or reputed father, with the payment of money weekly, or other ſuſtentation for the relief of ſuch child, in ſuch wiſe as they ſhall think meet and convenient: And if after the ſame order by them ſubſcribed under their hands, the mother or reputed father, upon notice thereof, ſhall not for their part obſerve and perform the ſaid order, that then every ſuch party ſo making default in not performing the ſaid order, to be committed to ward to the common gaol, their to remain without bail or mainpriſe, except he or ſhe ſhall put in ſufficient ſurety to perform the ſaid order, or elſe perſonally to appear at the next general ſeſſions of the peace, to be holden in that county where ſuch order ſhall be taken; and alſo to abide ſuch order, as the ſaid juſtices, or the more part of them, then and there ſhall take in that behalf (if they then and there ſhall take any); and that if at the ſaid ſeſſions, the ſaid juſtices ſhall take no other order, then to abide and perform the order before made, as it is above ſaid.*

Upon

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

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

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

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

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

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

One whereof is of the quorum] Many orders formerly have been quaſhed, for want of ſetting forth that one of the juſtices was of the *quorum*;

quorum; but now by the ſtatute of 26 *G.* 2 *c.* 27. no order ſhall be quaſhed for that defect only.

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

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

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

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

At----------in the ſaid townſhip of----------] *M.* 11 *An. Q.* and *Caſh.* The order did not ſet forth that the child was born in the townſhip; and by the ſtatute the juſtices cannot make an order to compel a man to contribute towards the maintenance of a baſtard child, but in caſe of that townſhip where the child was born: And quaſhed for this reaſon. *Caſ. of S.* 59.

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

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

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

E. 8 *G.* 2. *K.* v. *Taylor* and *Neale.* Motion in the king's bench for an information againſt the defendants, two juſtices of *Devonſhire*, for making an order on one *Nicholas Mould*, adjudging him

to

to be the putative father of a baſtard child, without ſummoning him, and alſo for refuſing to hear his witneſſes. On ſhewing cauſe, it appeared that he was ſummoned by a third juſtice, which the court held to be ſufficient; but that the defendant not appearing himſelf, the juſtices would not hear his witneſſes. And by the court, ſuppoſing the man was ſummoned, and did not appear, the juſtices are not then bound to hear any evidence for him; and this court will not hear any evidence in behalf of a perſon, who ſhould attend here, and does not. *Seſſ. C. V.* 2. 192.

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

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

The ſum of----------for and towards the lying-in] *M.* 12 *An. Q.* and *Odam.* Order for maintenance of a baſtard child, was excepted to, becauſe the defendant is upon ſight of the order to pay 9*l.* in groſs; and after that, ſo much weekly. And by the court; By the ſtatute the juſtices are to take order for relief of the townſhip, and keeping of the child, by payment of money weekly, or other ſuſtentation; and this may be only indemnifying the townſhip for money laid out before the reputed father was found. 1 *Salk.* 124.

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

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

HAVING thus diſtinctly conſidered the form of an order of baſtardy as eſtabliſhed upon the ſtatutes aforegoing, I proceed to ſome other reſolutions upon the ſaid ſtatutes, concerning divers matters not relating to the form of ſuch order: Which are theſe. 1. In what time the order ſhall be made. 2. Whether the juſtices can

can order ſecurity to be given to perform their order. 3. To what ſeſſions the appeal againſt the order ſhall be. 4. Whether the ſeſſions can proceed originally in the caſe of baſtardy. 5. Whether on appeal it is neceſſary that the reputed father ſhall be preſent in court. 6. In what caſe the order of ſeſſions ſhall be final.

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

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

2. *Whether the juſtices can order ſecurity to be given to perform their order. E.* 2 *An.* 2. and *Chaffey.* Exception was taken, that the order was, that the defendant ſhould give ſecurity for payment of the ſum by them impoſed for the maintenance of the child; when it did not appear, that the defendant had diſobeyed the order in point of payment. And for this reaſon, the order was quaſhed as to that part. L. *Raym.* 858. 3 *Salk.* 66.

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

3. *To what ſeſſions the appeal againſt the order ſhall be.* The ſtatute directs, that the appeal ſhall be *to the next general ſeſſions of the peace to be holden in that county, where ſuch order ſhall be taken.*

4. *Whether the ſeſſions can proceed originally in the caſe of baſtardy.* It hath been much diſputed, whether the ſeſſions may make an original order, in the caſe of baſtardy, by the ſtatute of the 3 *Car. c.* 4. in like manner as the two juſtices may do by the 18 *El.* If a conjecture may be allowed, after ſo long a ſpace of time from the making of the ſaid acts, and after the opinions of ſo many learned men thereupon, it ſhould be this: In the firſt place, as to thoſe who hold the negative, namely, that the ſeſſions cannot proceed originally upon the ſaid ſtatute of 3 *Car.* it is clearly obſervable, albeit their opinion may be true, that it reſteth upon a falſe foundation, namely, upon a ſuppoſition that the ſaid ſtatute of 3 *Car.* is expired; which is none other than a palpable overſight committed by one author, and followed by others without examination (a thing not unuſual in this kind of learning). Suppoſing therefore that the ſtatute of the 3 *Car.* is of force, let us put the caſe, that the ſeſſions may proceed originally thereupon, in like manner as the two juſtices may do by the 18 *El.* then there will appear this difficulty upon the face of it, that after the ſeſſions ſhall have made ſuch order, if the party ſhall make default in the performance thereof, then (according to the directions of the ſaid ſtatute of 18 *El.*) the party ſo making default

default ſhall put in ſurety to perform the ſaid order, or elſe perſonally to appear at the next ſeſſions, to abide ſuch order as ſhall there be made in the premiſſes, or ſhall be committed for his refuſal. Which implies an appeal from one ſeſſions to another; a thing which is unknown to our laws, an appeal always ſuppoſing a removing the cauſe from an inferior to an higher juriſdiction, and not from the ſame court to the ſame court. Now the obvious reſolution of the matter perhaps may be this; the ſtatute of the 18 *El.* which was a temporary act, doth require, that if the party doth make default in performance of the order of the two juſtices, they ſhall commit him to goal, unleſs he ſhall put in ſurety to perform the ſaid order, or elſe perſonally to appear at the next ſeſſions, and to *abide ſuch order as the juſtices there ſhall take in that behalf (if they then and there ſhall take any) and that if at the ſaid ſeſſions they ſhall take no other order, then to perform the ſaid order before-made*; without any ſpecial power given to the ſeſſions, either by that act, or any other, to take any order therein at all. Then comes the ſtatute of 3 *Car. c.* 4. which enacteth, that the ſaid ſtatute of 18 *El.* ſhall be continued, together with this ſupplementary clauſe, that *the juſtices in ſeſſions may do and execute all things concerning the ſaid ſtatute of* 18 El. *that by the juſtices of the ſeveral counties are by the ſaid ſtatute limited to be done.* And then the whole taken together will amount to no more than this; that the two juſtices out of ſeſſions ſhall take order for the puniſhment of the mother and reputed father, and for the relief of the townſhip, and that if upon appeal the matter ſhall come before the ſeſſions, the ſeſſions ſhall have power to determine thereupon, and to take ſuch order therein, as the two juſtices may do out of ſeſſions.

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

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

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

6. *In what caſe the order of the ſeſſions ſhall be final. M.* 13 *G. K.* and *Tenant.* The order of two juſtices being quaſhed upon the merits by the ſeſſions on an appeal, the defendant is thereby legally acquitted, and cannot be drawn in queſtion again for the ſame fact. L. *Raym.* 1423. 4. *Str.* 716.

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

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

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

And it hath been adjudged, that in order to convict a woman by force of this ſtatute, there is no need that the indictment be drawn ſpecially, or conclude againſt the form of the ſtatute: for the ſtatute doth not make a new offence, but only make ſuch concealment an undeniable evidence of murder. 2 *Haw.* 438.

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

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

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

If a woman be with child, and any gives her a potion to deſtroy the child within her, and ſhe take it, and it works ſo ſtrongly that it kills her, this is murder; for it was not given to cure her of a diſeaſe,

diſeaſe, but unlawfully to deſtroy her child within her; and therefore he that gives her a potion to this end, muſt take the hazard, and if he kills the mother, it is murder. 1 *H. H.* 429, 30.

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

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

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

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

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

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

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

Voluntary examination of a woman with child of a baſtard.

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

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

The mark of
Taken and signed the day and year † A. M.
above written before me

J. P.

Examination after the birth.

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

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

The mark of
Taken and signed the day and year † A. M.
above written before me

J. P.

Warrant for apprehending the reputed father, before the birth.

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

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

The

The like after the birth.

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

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

A recognizance to appear at the next sessions.

THE *condition of this recognizance is such, that if the said* A. F. *do and shall appear at the next general quarter sessions* [or *the next general sessions*] *of the peace to be holden for the said county, and shall then and there abide and perform such order or orders as shall be made at the said sessions touching his being charged with begetting a child on the body of* A. M. *singlewoman, which child is likely to be born a bastard, and be chargeable to the said township of*----------*Then this recognizance to be void, otherwise of force.*

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

Mittimus before the birth, for not finding sureties.

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

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

A supersedeas in bastardy.

WHEREAS C. D. *of*----------*hath before me found sufficient sureties for his good behaviour, and personal appearance at the next sessions of the peace to be holden for the said county, after* A. B. *single woman.*

woman, shall be delivered of the bastard child (or children) of which she is now pregnant, and upon her oath charges the said C. D. *to be the father, which when born, is likely to become chargeable to the said township, as the overseers thereof, have complained.*

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

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

A bond to the overseers of the poor.

KNOW all men by these presents, That we *D. E.* and *F. G.* of *Amboy*, in the county of *Middlesex*, in the province of *N. J.* merchants, and *H. I.* of the same place, carpenter, are held and firmly bound unto *K. L.* and *M. N.* overseers of the poor for the time being, in the just and full sum of *Fifty Pounds*, good and lawful money of the province of *N. J.* aforesaid; to be paid to the said overseers of the poor, or to either of them, or to either of their certain attornies, successors or assigns. For the which payment well and truly to be made or done, we do bind ourselves, our heirs, executors and administrators, jointly and severally, for and in the whole, firmly by these presents. Sealed with our seals. Dated this 20th day of *July*, in the third year of the reign of our sovereign lord GEORGE the third, by the grace of GOD, king of *Great Britain, France*, and *Ireland*, defender of the faith, &c. *annoq; domini* 1763.

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

A

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

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

[In moſt of our *American* Britiſh colonies, are particular laws of the legiſlature of the ſaid colonies relating to baſtards, and fornication. And thoſe laws are the general guide for the proceedings, yet are they ſeldom ſo full, as not to need the aforegoing inſtructions, as they muſt all be conſonant to the laws of Great Britain. In *New-Jerſey* the law relating to baſtards is very conciſe,----and ſeems chiefly deſigned to puniſh the fornication or adultery in the begetting.-------Upon that law, the following was the form and method of my proceedings.]

The examination before the birth,

New-Jerſey, Middleſex County. THE voluntary examination of *Sarah Collyer*, ſingle woman, of the townſhip of Woodbridge, in the county aforeſaid, taken on oath, before me *James Parker*, one of his majeſty's juſtices of the peace for the ſaid county, the tenth day of April, 1762. Who ſaith:

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

Warrant iſſued on the above examination.

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

WHEREAS Sarah Collyer, *of the ſaid townſhip, ſingle woman, hath this day made oath before me, that ſhe is with child, which child is like to be born a baſtard, and that* Ebenezer Ford, *of the ſame townſhip, blackſmith, is the father of the ſaid child: Theſe are therefore in his majeſty's name, to command you forthwith to apprehend the ſaid* Ebenezer Ford, *and bring him before me to anſwer the premiſſes, and to find ſurety for his appearance at the next general ſeſſions of the peace, to be held for the ſaid county at Perth Amboy, to be further dealt with according to law: Hereof fail not at your peril. Given under my hand and ſeal, the tenth day of April,* 1762.

JAMES PARKER.

On

On appearance, the following recognizance.

N. Jersey, Middlesex County. } Ebenezer Ford, blacksmith, 20*l.* proc.
April 12, 1762. } Charles Ford, yeoman, 20*l.* proc.

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

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

It is not improper to bind the woman over to the said court also, if her condition will bear it,-----Tho' the law does not seem to warrant demanding security of her, unless on her being called up to examination, she refuse to declare on oath, who is the father.

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

BIGAMY.

AS bigamy in our law seems for the most part to be used to signify the having of two wives successively one after the other, I shall take the liberty to transfer the offence wich is commonly treated of under this title unto the title *POLYGAMY*, which signifies more properly the having two or more wives or husbands at the same time.

BLASPHEMY and PROFANENESS.

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

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

If any person having been educated in, or at any time having made profession of the christian religion in this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be god; or shall assert or maintain there are more gods than one; or shall deny the christian religion

gion to be true, or the holy scriptures to be of divine authority; and shall be convicted thereof, in any of the courts at *Westminster*, or at the assizes, on the oaths of two witnesses, he shall for the first offence be incapable to have any office ecclesiastical, civil or military (unless he shall renounce such opinion in the court where he was convicted within four months after such conviction;) and for the second offence, he shall be disabled to be plaintiff, guardian, executor, or administrator, to take any gift or legacy, or to bear any office, and shall be imprisoned for three years. 9 & 10 *W. c.* 32.

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

M. 1 G 2. *K.* and *Curl.* An information was exhibited by the attorney general, against *Edmund Curl*, for printing and publishing *(obscœnum libellum)* an obscene book, called *Venus in the cloister*, or *the nun in her smock*, setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punished for this in the spiritual court, as an offence against good manners; yet it cannot be a libel, for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was a temporal offence: and the defendant was set in the pillory. *Str.* 788.

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

BRIBERY.

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

BRIDGES.

[Bridges in theſe colonies are built by virtue of acts of the reſpective legiſlatures.]

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

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

BUGGERY.

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

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

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

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

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

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

BUR-

BURGLARY.

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

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

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

----*Breaking*] Every entrance into the houſe by a treſpaſſer, is not a breaking in this caſe; but there muſt be an actual breaking. As if the door of a manſion houſe ſtand open, and the thief enter, this is no breaking. So it is if the window of the houſe be open, and a thief with a hook or other engine draweth out ſome of the goods of the owner, this is no burglary, becauſe there is no actual breaking of the houſe. But if the thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods of the owner, this is burglary, for there was an actual breaking of the houſe. 3 *Inſt.* 64.

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

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

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

M. 4 *G.* 2. *Joſhua Cornwal's* caſe. He was indicted with another perſon for burglary. And upon the evidence it appeared, that he was a ſervant in the Houſe, where the robbery was committed, and in the night time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate; then the defendant opened the door and let him out; but the

the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the ſervant, he not *going out* with the other. But afterwards at a meeting of all the judges at *Serjeants-inn*, they were all of opinion that it was burglary in both, and not to be diſtinguiſhed from the caſe where one watches at the ſtreet end, whilſt another goes in and commits the burglary, which hath been often ruled to be burglary in both; and upon report of this opinion the defendant was executed. *Str.* 881.

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

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

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

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

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

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

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

In

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

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

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

However, it seems the much better opinion, that an intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law; because where ever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 *Haw.* 105.

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

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

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

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

Warrant to apprehend a burglar.

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

FORASMUCH *as* A. I. *of*-------*in the county of*-------*yeoman, hath this day made information and complaint upon oath, before me* J. P. *esquire, one of his majesty's justices of the peace for the said county, that*

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

Indictment for proper burglary.

New-York, Queen's County. THE *jurors for our lord the king upon their oath preſent, That* A. O. *late of------in the county of-------labourer, on the------day of------in the-------year of the reign of---------at the hour of one in the night of the ſame day, with force and arms, at------in the county of-------the dwelling houſe of* A. I. *feloniouſly and burglariouſly did break and enter, with intent him the ſaid* A. I. *of his goods in the ſame dwelling houſe then being feloniouſly and burglariouſly to ſpoil and rob, and the ſame goods feloniouſly and burglariouſly to ſteal, take, and carry away; againſt the peace of our ſaid lord the king, his crown and dignity.*

BURNING.

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

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

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

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

The houſe] Not only a manſion houſe, and the principal parts thereof, but alſo any other houſe, and the out-buildings, as barns and ſtables adjoining thereto; and alſo barns full of corn, whether they

they be adjoining to any houſe or not, are ſo far ſecured by law, that the malicious burning of them is felony at common law. 1 *Haw.* 105.

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

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

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

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

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

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

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

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

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

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

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

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

BUYING of TITLES.

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

I. By the common law

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

II. By statute.

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

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

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

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

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

CARRIERS.

CARRIER'S.

ALL perſons carrying goods for hire, as maſters and owners of ſhips, lightermen, ſtage waggoners, and the like, come under the denomination of common carriers; and are chargeable on the general cuſtom of the realm, for their faults or miſcarriages. 1 *Bac. Abr.* 343.

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

If a common carrier, who is offered his hire, and who hath convenience, refuſes to carry goods, he is liable to an action in the ſame manner as an innkeeper who refuſes to entertain a gueſt, or a ſmith who refuſes to ſhoe a horſe. 1 *Bac. Abr.* 344.

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

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

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

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

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

Alſo it ſeems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again ſecretly, with intent

to steal them, he is guilty of felony; because the possession, which he received from the owner, being determined, his second taking is in all respects the same, as if he were a mere stranger. 1 *Haw.* 90.

Also it hath been resolved, that if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and disposeth of them to his own use, that this is felony; because this declareth that his intention originally was not to take the goods, upon the agreement and contract of the party, but only with a design of stealing them. *Kelynge* 82.

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

And altho' it may be thought a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable, if he were not so: for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. 12 *Mod.* 482.

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

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

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

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

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

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

If a man delivers a box to a carrier to carry, and he asks what is in it, and the man tells him, a book and tobacco (as the case was) and in truth there is 100*l.* besides; yet if the carrier is robbed, he shall

ſhall anſwer for the money: for the other was not bound to tell him all the particulars in the box, and it was the buſineſs of the carrier to have made a ſpecial acceptance. 1 *Bac. Abr.* 345.

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

A man took a place in a ſtage coach, and in the journey the defendant by negligence loſt the plaintiff's trunk: upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promiſed to take care of it, but loſt it: *Holt* chief juſtice held, that the maſter was not chargeable, and that a ſtage-coachman is not within the cuſtom as a carrier is, unleſs the maſter takes a diſtinct price for the carriage of the goods as well as of the perſons. 1 *Salk.* 282.

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

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

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

CERTIORARI.

A Juſtice of the peace may deliver or ſend into the king's bench, an indictment found before him, or a recognizance of the peace taken by him, or a force recorded by him, without any *certiorari*. *Dalt. c.* 195.

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

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

I. In what cases it is grantable.

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

And therefore a *certiorari* lies to justices of the peace, even in such cases which they are impowered by statute finally to hear and determine; and the superintendency of the court of king's bench is not taken away without express words. 2 *Haw.* 286.

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

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

Also, it seems a good objection against the granting a *certiorari*, that issue is joined in the court below, and a *venire* awarded for the trial of it. 2 *Haw.* 288.

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

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

II. How to be granted and allowed.

On *indictment or presentment:* By the 5 *W.* c. 11. and 8 & 9 *W.* c. 33. it is enacted, that *in term time, no writ of* certiorari, *at the prosecution*

profecution of any party indicted, ſhall be granted out of the king's bench, to remove any indictment or preſentment of treſpaſs or miſdemeanor, before trial had, from before the juſtices, in ſeſſions; unleſs ſuch certiorari *ſhall be awarded upon motion of counſel, and by rule of court made for the granting thereof.*

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

And all the parties indicted, proſecuting ſuch certiorari, *ſhall before the allowance thereof, find two ſufficient manucaptors who ſhall enter into a recognizance before a juſtice of the king's bench (who ſhall endorſe the ſame on the writ,) or before a juſtice of the peace of the county or place, in the ſum of* 20l. *with condition, at the return of the writ, to appear and plead to the ſaid indictment or preſentment, in the ſaid court of king's bench, and at his own coſts and charges to cauſe and procure the iſſue that ſhall be joined thereupon, or any plea relating thereunto, to be tried at the next aſſize for the county wherein the indictment or preſentment was found, after ſuch* certiorari *ſhall be returned, or the next term if in* London, Weſtminſter, *or* Middleſex, *unleſs the court ſhall appoint another time, and if ſo, then at ſuch other time; and to give due notice of ſuch trial, to the proſecutor or his clerk in court; and alſo that the party proſecuting the writ of* certiorari, *ſhall appear from day to day, in the ſaid court of king's bench, and not depart until he ſhall be diſcharged by the court.*

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

And if the defendant proſecuting the writ of certiorari, *be convicted of the offence for which he was indicted, then the court of king's bench ſhall give reaſonable coſts to the proſecutor, to be taxed according to the courſe of the ſaid court, who ſhall for the recovery thereof, within ten days after demand and refuſal of payment, on oath, have an attachment awarded; and the recognizance not to be diſcharged till the coſts are paid.*

But if the perſon procuring the certiorari, *being the defendant, ſhall not, before allowance thereof, procure ſuch manucaptors to be bound as aforeſaid, the juſtices may proceed to the trial of the indictment in ſeſſions, notwithſtanding the writ of* certiorari *delivered.*

At the proſecution of any party indicted] This extends only to *certiorari's* procured by perſons indicted; from whence it follows, that thoſe which are procured by the proſecutor of an indictment, remain as they were at common law. 2 *Haw.* 292.

To be tried at the next aſſize] But the recognizance ſhall not be forfeited, unleſs the proſecutor give rules according to the courſe of the court. 2 *Haw.* 292.

Reaſonable coſts] The maſter of the crown office, in taxing the coſts ought only to conſider thoſe, which are ſubſequent to the *certiorari*. 2 *Haw.* 292.

May

May proceed to the trial] Nevertheleſs they muſt make a return to the *certiorari*, otherwiſe they will be in contempt to the court; for all writs muſt be obeyed, unleſs good cauſe be ſhewn to the contrary; and the proper way of ſhewing it, is to return it. 2 *Haw.* 292.

III. The effect of it.

After a *certiorari* is allowed by the inferior court, it makes all the ſubſequent proceedings on the record that is removed by it erroneous. 2 *Haw.* 293.

But it hath been adjudged, that if a *certiorari* for the removal of an indictment before juſtices of the peace be not delivered, before the jury be ſworn for the trial of it, the juſtices may proceed. 2 *Haw.* 294.

And the juſtices may ſet a fine to compleat their judgment, after a *certiorari* delivered. L. *Raym.* 1515.

A *certiorari* removes all things done between the teſte and return. L. *Raym.* 835, 1305.

A *certiorari* removes the record it ſelf out of the inferior court; and therefore if it remove the record againſt a principal, the acceſſary cannot there be tried. 2 *Haw.* 325.

It hath been holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or an appearance at ſeſſions, will ſuperſede the obligation of it: But this would be highly inconvenient, and the contrary ſeems to be ſupported by the better authority. 2 *Haw.* 292.

If a *ſuperſedeas* come out of a ſuperior court, to the juſtices, they ought to ſurceaſe, altho' the *ſuperſedeas* be awarded againſt law; for they are not to diſpute the command of a ſuperior court, which is a warrant to them. *Crom.* 129.

IV. The return of it.

Every return of a *certiorari* ought to be under ſeal. 2 *Haw.* 294.

And altho' the *cuſtus rotulorum* keep the records, yet muſt the juſtices, to whom it is directed, return the *certiorari*; and therefore if it is directed to the juſtices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.

The *certiorari* may be ſometimes to remove and ſend up the record itſelf, and ſometimes but only the tenor of the record (as the words therein be) and it muſt be obeyed accordingly. *Dalt. c.* 195. 2 *Haw.* 295.

Upon a *certiorari* to remove an indictment of a riot, or forcible entry, or the like, the return muſt have theſe words, *as alſo to hear and determine divers felonies* &c. according to the commiſſion; for if the return mentions only that they are juſtices of the peace without ſuch words, the return is inſufficient. *Dalt. c.* 195.

If the perſon to whom a *certiorari* is directed, do make a falſe return, yet the court will not ſtay filing it on affidavit of its being falſe, except in public caſes, as in caſes of commiſſioners of ſewers,

or

or for not repairing highways, or for ſome ſuch ſpecial cauſes; becauſe the remedy for a falſe return is either an action on the caſe at the ſuit of the party grieved, or an information at the ſuit of the king. *Dalt c.* 195.

If the perſon to whom the *certiorari* is directed, do not make a return, then an *alias*, that is, a ſecond writ; then a *pluries*, that is, a third writ, or *cauſam nobis ſignifices*, ſhall be awarded, and then an attachment. *Crom.* 116.

The return of a *certiorari* may be thus:

Firſt, On the back ſide of the writ indorſe theſe or the like words: *The execution of this writ appears in a ſchedule to the ſame writ annexed.*

And that ſchedule may be thus, on a piece of parchment by it ſelf, and filed to the writ:

New-Jerſey, Eſſex County. } Samuel Woodruff, *eſquire, one of the keepers of the peace and juſtices of our lord the king aſſigned to keep the peace within the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, by virtue of this writ to me delivered, do under my ſeal certify unto his majeſty in his court of king's bench, the indictment, of which mention is made in the ſame writ, together with all matters touching the ſame indictment. In witneſs whereof I the ſaid* S. W. *eſq; have to theſe preſents ſet my ſeal. Given at----------in the ſaid county, the----------day of---------- in the----------year of the reign of----------.*

Then take the record of the indictment, and cloſe it within the ſchedule, and ſeal and ſend them up both together with the *certiorari.*

CHEAT.

Of cheats puniſhable by publick proſecution, there are two kinds,

I. By the common law.
II. By ſtatute.

I. By the common law.

CHEATS which are puniſhable by the common law, may in general be deſcribed to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of ſome artful device, contrary to the plain rules of common honeſty; as by playing with falſe dice; or by cauſing an illiterate perſon to execute a deed to his prejudice, by reading it over to him in words different from thoſe in which it was written; or by perſuading a woman to execute writings to another, as her truſtee, upon an intended marriage

marriage, which in truth contained no ſuch thing, but only a warrant of attorney to confeſs a judgment; or by ſuppreſſing a will; and ſuch like. 1 *Haw.* 188.

It ſeemeth to be the better opinion, that the deceitful receiving of money from one man, to another's uſe, upon a falſe pretence of having a meſſage and order to that purpoſe, is not puniſhable by a criminal proſecution, becauſe it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is ſaid to be needleſs to provide ſevere laws for ſuch miſchiefs, againſt which, common prudence and caution may be a ſufficient ſecurity. 1 *Haw.* 188.

A perſon for a counterfeit paſs, was adjudged to the pillory and fined. *Dalt. c.* 32.

On an indictment againſt the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn inſtead of it, it was moved to quaſh the ſame, becauſe it is only a private cheat, and not of a publick nature. It was anſwered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court unanimouſly agreed not to quaſh it. *T.* 16 *G.* 2. *K.* and *Wood. Seſſ. C. V.* 1, 217.

A perſon falſly pretending that he had power to diſcharge ſoldiers, took money of a ſoldier to diſcharge him; and being indicted for the ſame, the court held the indictment good. *T.* 3 *C. Serleſtead's caſe.* 1 *Latch* 202.

As there are frauds which may be relieved civilly, and not puniſhed criminally (which the complaints whereof the courts of equity do generally abound); ſo there are other frauds, which in a ſpecial caſe may not be helped civilly, and yet ſhall be puniſhed criminally: Thus if a minor goes about town, and pretending to be of age, defrauds many perſons by taking credit for conſiderable quantities of goods, and then inſiſting on his non-age; the perſons injured cannot recover the value of their goods, but they may indict and puniſh him for a common cheat. *Barl.* 100.

II. By ſtatute.

By the 33 *H.* 8. *c.* 1. *If any perſon ſhall falſly and deceitfully obtain, or get into his hand or poſſeſſion, any money, goods, chattles, jewels, or other things, of any perſon, by colour and means of any falſe privy token, or counterfeit letter made in another man's name; and ſhall be convicted thereof, by examination of witneſſes, or confeſſion, at the aſſizes or ſeſſions, or by action in any court of record; he ſhall have ſuch puniſhment by impriſonment, pillory, or other corporal pain (except death) as the court ſhall appoint. Saving to the party grieved ſuch remedy by action or otherwiſe, for the goods ſo obtained, as he might have had by common law.*

And two juſtices (1 Q.) *may call and convent by proceſs or otherwiſe, to the aſſizes or ſeſſions, any perſon ſuſpected, and commit or bail him to the next aſſizes or ſeſſions.*

Get

Get into his hands or poſſeſſion] A perſon endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on ſuſpicion of ſuch fraud, before he hath got the goods into his poſſeſſion, ſeems not to be within this ſtatute. *E.* 3 *G.* 2. *K.* and *Brain. Seſſ. C. V.* 2. 27.

Falſe privy token] On motion to quaſh an indictment, which was, that the defendant came pretending that ſuch a perſon ſent him to receive 20 *l.* and received it, whereas ſuch perſon did not ſend him: By the court, It is not indictable, unleſs he came with *falſe tokens*; for we are not to indict one man for making a fool of another. *Black.* 79.

H. 13 *G.* 2. *K.* and *Munoz.* It was adjudged, that an indictment averring the offence to be by falſe tokens, without ſhewing what thoſe falſe tokens are, is not ſufficient; and that the fraudulently procuring a note from a perſon, by falſly affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no ſuch perſon in the next room, is not a *falſe token*, but a falſe affirmation. *Seſſ C. V.* 2. 201. *Str.* 1127.

Note; The ſtatute ſays a falſe *privy* token.

Corporal pain] Lord *Coke* obſerves hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. 3 *Inſt.* 133.

But Mr. *Hawkins* obſerves, that there is a precedent in *Cro. Car.* 564. by which it appears, that one convicted on ſuch a proſecution hath been adjudged not only to ſtand on the pillory, but alſo to pay a fine of 500 *l.* and to be bound with good ſureties to the good behaviour. 1 *Haw* 188.

Commit or bail him] In this caſe the juſtices ſhall do well to take examination of the offence, and to certify the ſame to the ſeſſions or gaol delivery, and withal to bind over the informers and witneſſes to give evidence therein. *Dalt. c.* 32.

Warrant of two juſtices to apprehend an offender.

New-York, Queens County. } To any conſtable of ſaid county.

WHEREAS *complaint hath been made unto us whoſe names and ſeals are hereunto ſet, two of his majeſty's juſtices of the peace for the ſaid county, and one of us of the* quorum, *upon the oath of* A. I. *of*----------*yeoman, and* B. I. *of*----------*yeoman, that on the*----------*day of*----------A. O. *of*----------*yeoman, did by a falſe privy token* [or, *counterfeit letter*] *that is to ſay, by* [here particularize the offence] *falſly obtain and get into his hands and poſſeſſion* [here mention the things] *from* C. I. *of*----------*contrary to the ſtatute in that caſe made: Theſe are therefore to command you, upon ſight hereof, forthwith to bring the ſaid* A. O. *before us at*----------*in the*----------*day of*---------- *to anſwer the ſaid complaint, and farther to be dealt withal according to law. Given under our hands and ſeals the*----------*day of*----------.

CLERGY.

CLERGY.

I. Clergymen.
II. Benefit of clergy.

I. Clergymen.

BY the 43 *El. c.* 2. Clergymen are liable to the poor rates, for their glebe and tithe.

And Mr. *Hawkins* says, clergymen are with in the purview of the statutes relating to the repair of highways, in respect to their spiritual possessions, as much as any other persons whatsoever in respect of any other possessions; for the words are general, and there is no kind of intimation in the said statutes that any particular persons shall be exempted more than others. 1 *Haw.* 204.

And it seems to be now generally settled, that clergymen are liable to all publick charges imposed by act of parliament, where they are not specially excepted.

No clergymen shall take to farm any lands (except he have not sufficient glebe for the expences of his houshold;) on pain of 10 *l.* a month, half to the king, and half to him that shall sue. 21 *H.* 8. *c.* 13.

No clergyman shall buy to sell again any cattle, corn, fish, wool, wood, victual, or any manner of merchandize; on pain of treble value, half to the king and half to him that shall sue: and the contract shall be void. 21 *H.* 8. *c.* 13.

No clergyman shall keep any tanhouse, or any brewhouse but for his own house; on pain of 10 *l.* a month, half to the king, and half to him that shall sue. 21 *H.* 8. *c.* 13.

The ordinary may punish clergymen for incontinency, by committing them to ward or prison by his discretion. 1 *H.* 7. *c.* 4.

A person, laying violent hands on a clergyman, may be punished in the ecclesiastical court. 13 *Ed.* 1. *Circumspecte agatis.* 9. *Ed.* 3. *st.* 1. *c.* 3. 2 *Inst.* 492.

Clergymen in holy orders may have the benefit of clergy a second, or third time, or oftner. 2 *H. H.* 374, 375.

A clerk in holy orders shall not be burned in the hand, but shall have the same privilege as if he had been burned in the hand; and therefore shall not be drawn into question in the ecclesiastical court to deprive him, or inflict any ecclesiastical censure upon him. 2 *H. H.* 389.

To the intent that clergymen may the better discharge their duty in celebration of divine service, and not be entangled with temporal business; if any of them be chosen to any temporal office, he may have his writ to be discharged. 1 *Inst.* 96.

Ecclesiastical persons have this privilege, that they ought not in person to serve in war. 2 *Inst.* 4.

No

No clergymen ſhall be arreſted in any church or church yard, whilſt he attends to divine ſervice; on pain of impriſonment of the offender, and ranſom at the king's will, and gree to the party arreſted. 50 *Ed.* 3. *c.* 5. 1 *R.* 2. *c.* 15.

But the arreſt notwithſtanding (if not on a ſunday) is good in law. *Watſon*, *c.* 34. *p.* 344.

A clergyman ſhall be amerced only according to his lay tenement, and not after the quantity of his ſpiritual benefice. *Mag. Chart. c.* 14. *Gibſ.* 15.

Lord *Coke*, in his readings on the *Magna Charta*, ſays thus; "True it is, that eccleſiaſtical perſons have more and greater liberties than other of the king's ſubjects, wherein to ſet down all "would take up a whole volume of itſelf, and to ſet down no "example agreeth not with the office of an expoſitor; therefore "ſome few examples ſhall be expreſſed, and the ſtudious reader "left to obſerve the reſt as he ſhall read them in our books, and "other authorities of law." And the inſtances he gives, are chiefly thoſe which are mentioned above; nevertheleſs I do not find any author ſince his time, who hath ſaid what are thoſe other many and great privileges of the clergy; but the authors do generally adhere to theſe particular inſtances, probably as being ſupported by ſo great an authority: Other privileges have been aboliſhed, ſince his time, by acts of parliament, and the adjudications of the temporal courts; and others perhaps loſt by diſuſe: and poſſibly ſome of the inſtances above mentioned would have been gone likewiſe, or not looked upon as of ſo much authority, if they had not been vouched by Lord *Coke*.

II. Benefit of clergy.

I. Original of the benefit of clergy.
II. By what perſons it may be demanded.
III. In what caſes it may be demanded.
IV. At what time it muſt be demanded.
V. Effect of clergy allowed.

I. Original of the benefit of clergy.

ANciently princes and ſtates, converted to chriſtianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions; and particularly, an exemption of their perſons from criminal proceedings, in ſome capital caſes before ſecular judges; which was the true original benefit of clergy.

The clergy increaſing in wealth, power, honour, number, and intereſt, afterwards ſet up for themſelves; and that which they obtained

obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely, by the law of god; and by their canons and conſtitutions endeavoured and in ſome places obtained, vaſt extentions of theſe exemptions both with regard to the perſons concerned, to wit, not only to perſons in holy orders, but alſo all that had any kind of ſubordinate miniſtration relative to the church; and likewiſe in reſpect of the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtiture from Chriſt, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdiction.

And by this means they endeavoured, and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power in every kingdom; the one eccleſiaſtical, abſolute, and independant upon any but the pope, over eccleſiaſtical men and cauſes; and the other ſecular, of the king, or civil magiſtrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew ſo burdenſome, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contrary uſage of the kingdom: for eccleſiaſtical canons never bound in *England*, farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, only ſo far forth as they were ſo admitted.

And therefore if they were indicted in caſes criminal, but not capital, nor wherein they were to loſe life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of treſpaſs or petit larceny.

Alſo it was not allowed them in high treaſon.

But, at the common law, in all caſes of felony or petit treaſon, clergy was allowable, excepting two, *inſidiatores viarum, & arſon.* 2 H. H. 323—330.

II. By what perſons it may be demanded.

By a favourable interpretation of the ſtatutes relating to the benefit of clergy, not only thoſe actually admitted into ſome inferior order of the clergy, but alſo thoſe who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verſe) have been taken to have a right to this privilege, as much as perſons in holy orders. 2 *Haw.* 338.

But by the common law, a woman could not have the benefit of clergy: but now by the ſtatute of 3 *W. c.* 8. a woman convicted or outlawed for a felony, for which a man might have his clergy, ſhall upon praying the benefit of that ſtatute, be ſubject only to ſuch puniſhment as a man would be in the like caſe. A

A perſon convicted of hereſy, a Jew, or a Turk, ſhall not have their clergy; but a perſon excommunicate ſhall have his clergy. 2 *H. H.* 373.

Alſo every perſon (not being within orders) who hath been once admitted to his clergy, ſhall not be admitted to the ſame a ſecond time. 4 *H.* 7. *c.* 13.

And if he is convicted of murder, he ſhall be marked (unleſs he is a peer, 2 *H. H.* 376) with an M, on the brawn of the left thumb; and if for any other felony, with a T. 4 *H.* 7. *c.* 13.

But he ſhall not be ouſted of his clergy, by the bare mark in his hand, or by a parol averment, without the record teſtifying it, or a tranſcript thereof, according to the following ſtatutes. 2 *H. H.* 373.

By 34 & 35 *H.* 8. *c.* 14. The clerk of the crown, or of the peace, or of aſſize, ſhall certify a tranſcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of aſſize, or juſtices of the peace write to him for the names of ſuch perſons, ſhall certify the ſame with the cauſes of conviction or attainder.

Alſo it ſeems, that if the party deny that he is the ſame perſon, iſſue muſt be joined upon it, and muſt be found upon trial that he is the ſame perſon, before he can be ouſted of clergy. 2 *H. H.* 373.

III. In what caſes it may be demanded.

By the 25 *Ed.* 3. *ſt.* 3. *c.* 4. All manner of clerks, who ſhall be convicted before the ſecular judges, for any treaſons or felonies, touching other perſons than the king himſelf, ſhall have the privilege of holy church.

Clergy was never allowed in this nation, in caſes of high treaſon, nor is it allowed on indictments of petit larceny or treſpaſs; but by the above recited act, clergy was allowed in all treaſons and felonies, except treaſon againſt the king: So that after this ſtatute, the benefit of clergy might be pleaded and allowed in all other treaſons and felonies *Hale's Pl.* 230. 2 *H. H.* 326.

Conſequently, wherever clergy is not allowable in any other caſes, it is taken away by ſome ſubſequent act of parliament. *Hale's Pl.* 230.

Conſequently, where a new felony is made by an act of parliament, clergy is to be allowed, unleſs expreſly taken away by ſuch ſtatute. *Hale's Pl* 230.

And if it maketh a new felony, and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes, clergy is allowable; as if it take away clergy in caſe the party be convicted by verdict, yet he ſhall have his clergy, if he ſtand mute. 2 *H. H.* 335.

But this is in part remedied by the 3 *W.* *c.* 9. which enacts, that if any perſon be *indicted* of any offence, for which by virtue of any *former*

former ſtatute he is excluded from clergy, if he had been convicted by verdict or confeſſion; if he ſtand mute, or will not anſwer directly, or challenge peremptorily above 20 of the jury, or be outlawed, he ſhall not be admitted to his clergy. *ſ.* 2. But this extends not to *appeals*, nor to offences made felonies by ſubſequent ſtatutes. 2 *Haw.* 348.

But if the ſtatute enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents. 2 *H. H.* 335.

It follows further, from what hath been ſaid, that in all caſes where an act of parliament ouſteth clergy, in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute; otherwiſe, altho' poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alledged in the indictment, the party, tho' convict, ſhall have his clergy. 2 *H. H.* 336.

But altho' the caſe be ſo laid in the indictment, that it comes within the ſtatute, to exempt the priſoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not ſo qualified as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the matter laid in the indictment, and thereupon the priſoner ſhall be admitted to his clergy; and this is commonlydone. 2 *H. H.* 336.

But if the offence was capital at the common law, and a ſtatute only excludes it from clergy; the indictment in ſuch caſe need not conclude *againſt the form of the ſtatute*, becauſe the ſtatute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a perſonal privilege of exemption from ſuch judgment. 2 *Haw.* 342.

Furthermore, from what hath been obſerved above, it follows, that where an act taketh away clergy from the principal, and ſaith nothing of the acceſſary; the acceſſaries as well before, as after, ſhall have their clergy. 11 *Co.* 37. *Poulter's caſe.*

IV. At what time it muſt be demanded.

By the ancient common law, the benefit of clergy was demanded as ſoon as the priſoner was brought to the bar, before any indictment or other proceeding againſt him; but this was found a great inconvenience to the priſoner, becauſe poſſibly he might have been acquitted of the felony; or if not, yet in caſe of an inqueſt of office, he loſt his challenges to ſuch inqueſt, and yet upon ſuch inqueſt found, he forfeited his goods, and the profits of his lands; and therefore *Priſot* Ch. J. with the advice of the other judges, in the reign of *H.* 6. for the ſafety of the innocent, would not allow the priſoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted

convicted thereof; which course hath been generally observed ever since. 2 *Inst.* 164. 2 *H. H.* 378.

And this benefit of clergy may be allowed by the court in discretion, 'tho' the party challenge it not. *Hale's Pl.* 239.

V. Effect of clergy allowed.

Persons admitted to their clergy, may be continued in prison as a further punishmet, not exceeding one year. 18 *El. c.* 7.

A person admitted to his clergy, forfeits all his goods that he hath at the time of the conviction. 2 *H. H.* 388.

But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof 2 *H. H.* 388.

Also, it restores him to his credit; and consequently enables him to be a good witness. 2 *Haw* 364

And it is holden that after a man is admitted to his clergy, it is actionable to call him a felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2. *Haw* 365.

COIN.

For matters common to this with other treasons, see title *TREASON.*

COIN, in *French*, signifieth a corner, and from thence hath its name (according to Lord *Coke*) because in ancient time money was square with corners, as it is in some countries at this day. 1 *Inst.* 207.

The legitimation of money, and the giving it its denominated value, is one special part of the king's prerogative. 1 *H. H.* 188.

And the king may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. 1 *H. H.* 162.

And therefore both *English* money, coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England* 1 *Inst.* 207.

But only gold or silver coin, and not brass or copper, are within this denomination. 1 *Haw.* 42

By the statute of 25 *Ed.* 3 *st.* 5 *c.* 2. it is made treason to counterfeit the coin of this realm: That is to say, whether the person utter it or not 3 *Inst.* 16. 1 *Haw.* 42.

And if any person shall falsly forge and counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, and shall be current therein by the king's consent; he, his counsellors, procurers, aiders and abettors, shall be guilty of high treason. 1 *Mar. sess.* 2. *c.* 6.

By

By the 5 *El. c.* 11. Clipping, washing, rounding, or filing, for lucre or gain, any the proper coin of this realm or the dominions thereof, or of any other realm current within this realm by proclamation, shall be adjudged treason in the offenders, their counsellors, consenters and aiders.

And by the 18 *El. c.* 1. If any person shall, for lucre or gain, by any art, ways, or means, impair, diminish, falsify, scale, or lighten the proper coin of this realm, or any the dominions thereof, or the coin of this realm allowed to be current at the time of the offence committed, by the king's proclamation; he, his counsellors, consenters, and aiders shall be guilty of treason.

Lord *Hale*, speaking of copper halfpence and farthings, makes it a quæry, whether the counterfeiting of them be not treason within the statute of 25 *Ed.* 3. but inclines to the negative. 1 *H. H.* 195, 211, 212.

If any person shall falsly forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, nor permitted to be current within this realm; he, his procurers, aiders, and abettors shall be guilty of misprision of high treason. 14. *El. c.* 3.

If any person shall bring false money into the realm, counterfeit to the money of *England*, knowing the same to be false, to merchandise or make payment, in deceit of the king and his people; he shall be guilty of high treason. 25 *Ed.* 3: *st.* 5. *c.* 2.

If one person counterfeits, and by agreement before the counterfeiting, another person is to take off and vent the counterfeit money, such other is an aider and abettor, and consequently a principal traytor (for in high treason there are no accessaries.) 1 *H. H.* 214.

If one person counterfeit, and another (knowing that he did so) puts it off, but without any such previous agreement; such other person seems to be all one with a receiver of him, because he maintains him. 1 *H. H.* 214.

If one person counterfeit, and another person know that he did so, and doth neither receive, maintain, or abet him, but conceals his knowledge; this is misprision of treason. 1 *H. H.* 214.

If false or clipt money be found in a man's hands; if he be suspicious, he may be arrested till he have found his warrant. 3 *Inst.* 18. *Hale's Pl.* 21. 1 *Haw.* 43.

By the 3 *Ed.* 1. *c.* 15. Persons taken for false money are not bailable by justices of the peace.

But they must take the examinations and informations, and bind over the witnesses to the proper court, and commit the persons accused. 1 *H. H.* 372.

It is not necessary there should be two witnesses in cases of counterfeiting the coin, as it is in other high treasons; but persons may be convicted according to the course of the common law, by one witness only. 1 *H. H.* 318, 328.

The judgment for high treason, relating to the coin, is, to be drawn to the place of execution, and there hanged by the neck till he be dead. 2 *Haw.* 444.

But

But it is generally provided by the ſeveral ſtatutes, that this ſhall work no corruption of blood, nor loſs of dower.

A Warrant to apprehend a perſon for coining of money, and to ſeize his inſtruments, &c.

WHEREAS *A. B.* of *&c.* hath this day made oath before me, that on, *&c.* laſt paſt, at the houſe of *C. D.* ſituate in, *&c.* he being in the next room to a private ſhop or ware-houſe of the ſaid *C. D.* (who is by trade a ſilver-ſmith) through a hole or cranny in the partition-wall or door, ſaw the ſaid *C. D.* buſy with many tools and inſtruments in making and moulding ſome white pieces of metal of a round form, and about the ſize of ſhillings and half-crowns, which he took to be the coining of money: Theſe are therefore in his Majeſty's name to command you to apprehend the ſaid *C. D.* and ſeize all the tools and inſtruments, and money, which you can find in the Shop or Houſe of him the ſaid *C. D.* and that you do bring him together with the ſaid tools and inſtruments and money (if any ſuch you can find) before me, or ſome other of his majeſty's juſtices of the peace for this county, to be examined concerning the premiſes, and to be dealt with according to law. Given, *&c.*

A Warrant for one that hath melted Money.

Eſſex, ſs. *To the conſtables*, &c.

FORASMUCH as I am credibly informed, That *A. B.* of *&c.* gold-ſmith, hath melted the ſilver money of this realm, contrary to the ſtatutes in that caſe made and provided. Theſe are therefore in his majeſty's name, to command you, that you, ſome or one of you, do apprehend the ſaid *A. B.* and bring him before me, or ſome other of his majeſty's juſtices of the peace of the ſaid county, to be examined touching the premiſes, and to be farther dealt with according to law. Hereof fail not at your Perils. Given under my hand and ſeal the, *&c.*

A Warrant to commit a Perſon for melting Bullion, not lawful Silver, but ſuppoſed to be Clippings.

Eſſex, ſs. *To the conſtable of*, &c. *and to the keeper of*, &c.

WHEREAS a large quantity of bullion hath been lately found and ſeized in the poſſeſſion of *C. D.* of *&c.* gold-ſmith, which before the melting thereof was ſuſpected to be unlawful ſilver, and the clippings of money: And whereas upon the examination of the ſaid *C. D.* taken before us upon oath this preſent day, he hath not been able to make ſufficient proof that the ſaid bullion before the melting thereof, was not current coin, or clippings of ſuch coin, according to the ſtatute in that caſe made and provided: Theſe are therefore to command you to convey the ſaid *C. D.* to the common gaol of, *&c.* aforeſaid, and to deliver him to the keeper thereof; hereby alſo requiring you the ſaid keeper to receive the ſaid *C. D.* into your cuſtody and gaol aforeſaid, and him there ſafely to keep, until he ſhall be from thence delivered by due courſe of law. Given, *&c.*

[*In moſt of the American colonies there is paper money, or bills of credit made current by the acts of the legiſlative powers of the ſaid colonies; to counterfeit which in ſeveral of them is, by thoſe acts, made felony, without benefit of clergy; but in ſome others only corporal puniſhment; and thoſe acts muſt and ought to be the proper guide for juſtices, and others, in their ſeveral juriſdictions, on matters relating thereto: However the following precedents may not be amiſs here.*]

Information againſt a perſon counterfeiting bills of credit, &c.

Eſſex, ſs. THE information of *N. Q.* of *R.* in the county of *E.* yeoman, taken upon oath before me, *I. R.* eſq; one of his majeſty's juſtices of the peace for the county aforeſaid, the third day of------in the year, *&c.*

This informant on his oath, depoſeth and ſaith, that on the------day of ---- --laſt paſt, at the houſe of *K. L.* ſituate in *Aſh-ſwamp*, *I. L.* had in his poſſeſſion ſeveral ſtamps, plates or types, proper for counterfeiting the publick current bills of the colony of----------and that he, this informant, ſaw the ſaid *I. L.* make, or print, two ten ſhilling bills, in imitation o' the publick current bills of credit of the ſaid colony; and further, That he ſaw the ſaid *I. L.* offer one bill thereof in payment to *W. A.* of *R.* in the ſaid county, who refuſed the ſame, as juſtly fearing it was counterfeited.

Taken before me the day and year above-written

I. R.

Warrant to apprehend a perſon for counterfeiting bills, &c.

Middleſex, ſs. *To the conſtable of* B. *in the ſaid county.*

WHEREAS *M. A.* of *Q.* in the county aforeſaid, yeoman, hath this day made oath before me *S. W.* eſq; one of his majeſty's juſtices of the peace for the county aforeſaid, That on the 10th day of *May* laſt, *J. M.* of *A.* aforeſaid, did print and make ſeveral bills, *viz.* One of ten ſhillings, and two of fourteen ſhillings, at the houſe of *E. E.* ſituate in *A.* aforeſaid, in imitation of the current bills of credit of the province of *N. J.* contrary to law: Theſe are therefore in his majeſty's name, to require and authoriſe you, to apprehend the ſaid *J. M.* and bring him forthwith before me, or ſome other of his majeſty's juſtices of the peace for this county, to be examined in the premiſes, and to be dealt with according to law. Given under my hand, *&c.*

Examination of a perſon apprehended for counterfeiting, &c.

Eſſex, ſs. THE examination of *E. G.* of *R.* in the ſaid county of *E.* taken before me *I. R.* eſq; one of his majeſty's juſtices of the peace for the county aforeſaid, the 4th day of *March*, in the 3d year of king *George* the third, *an. dom.* 1763. The ſaid examinant being duly ſworn, depoſeth and ſaith, that as to what he is charged with by *S. T.* of *E.* in the county aforeſaid, relating to the counterfeiting of bills of credit of *N. J.* he knoweth nothing thereof, but is entirely innocent, tho' he confeſſeth, that on the 27th of *March* laſt, he was at the houſe of *R. K.* in *E.* aforeſaid, as ſet forth in the ſaid *S. T.*'s information, and that he was handling bills of credit, and holding them near the candle, to try to diſcover whether they were good or not, they being bills he had received that evening by candle light; but that he made any of them, or uſed any paper or types, as the ſaid *S. T.* depoſes, he denies the ſame, or that he ever had any hand in ſuch act.

Taken by me the day and year aboveſaid. I. R.

Warrant to commit a ſuſpected perſon, &c.

Eſſex, ſs. *To the conſtables*, &c. *and to the keeper of*, &c.

WHEREAS a certain quantity of printed paper, cut, *&c.* and printed in imitation of publick bills, *&c.* types, *&c.* (as the caſe may be) were lately found and ſeized in the poſſeſſion of *L. M.* of &c. of which paper, and with which ſaid types, &c. it is ſuſpected he the ſaid *L. M.* has forged and counterfeited the publick bills of credit of &c.

And

And whereas upon examination of the ſaid *L. M.* taken before us this preſent day upon oath, he hath not made ſufficient proof that he was uſing the paper, &c. aforeſaid, on any lawful occaſion; nor giving any reaſon to think he was not forging and counterfeiting as aforeſaid, contrary to the law of this, &c. in that caſe made and provided. Theſe are therefore to command you, to convey the ſaid *L. M.* to the common gaol at, &c. aforeſaid, and to deliver him there to the keeper thereof, together with this precept; commanding alſo you the ſaid keeper, to receive the ſaid *L. M.* into your cuſtody and gaol aforeſaid, and him there ſafely to keep, until he ſhall be from thence delivered by due courſe of law. Hereof fail not. *Given under our hands and ſeals this*, &c.

COMMITMENT.

ANCIENTLY there were more felons committed to gaol without mittimus in writing, than were with it: ſuch were all the commitments by conſtables, watchmen, and private perſons arreſting for felony, and bringing to the common gaol, long before there were any juſtices of the peace; and yet mittimus's are not of ſo ancient date even as they. 1 *H. H.* 610.

But now, ſince the *habeas corpus* act, a commitment in writing ſeems more neceſſary than it was in former times; otherwiſe the priſoner may be admitted to bail upon that act, whatſoever his offence may have been.

When a ſtatute appoints impriſonment, but limits no time when, it is to be underſtood that he ſhall be impriſoned preſently. *Dalt. c.* 170.

Concerning which I will ſet forth,

I. Who may be committed.
II. To what place.
III. The form of the commitment.
IV. Charges of the commitment.
V. That the gaoler ſhall receive the priſoner.
VI. Shall certify the commitment.
VII. Commitment diſcharged.

I. Who may be committed.

There is no doubt, but that perſons apprehended for offences which are not bailable, and alſo all perſons who neglect to offer bail for offences which are bailable, muſt be committed. 2 *Haw.* 116.

And it is ſaid, that whereſoever a juſtice is impowered by any ſtatute to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound, or to do ſuch thing, the juſtice may commit him to the gaol, to remain there till he ſhall comply. 2 *Haw.* 116.

If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 *H. H.* 121.

But if he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice may discharge him; as if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which tho' there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, tho' it be by misadventure, or self defence (which is not properly felony), or in making an assault upon a minister of justice in execution of his office (which is not at all felony), yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed. 2 *H. H.* 121.

But commitment by the justices of the peace almost in all cases (except for the peace, good behaviour, felony, or higher offences) is but to retain the party till he hath made fine to the king; and therefore if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt. c.* 170.

II. To what place.

All felons shall be committed to the common gaol, and not elsewhere. 5 *H.* 4. *c.* 10.

But vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper. 6 *G. c.* 19.

And they may commit other offenders to the stocks, or other custody, by particular statutes.

Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. *Dalt. c.* 170.

Yet if he escapes, and is taken on fresh suit, in another county, he may be carried back to the county where he was first taken. *Dalt. c.* 170.

III. Form of the commitment.

It must be in writing 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, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

Yet the mention of the name and authority of the justice, in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus, is sufficient warrant to the gaoler; for it may be supplied by averment, that it was done by the justice. 2 *H. H.* 122.

It

It ſhould contain the name and ſurname of the party committed, if known; if not known, then it may be ſufficient to deſcribe the perſon by his age, ſtature, complexion, colour of his hair, and the like, and to add that he refuſeth to tell his name. 1 *H. H.* 577.

It is ſafe, but not neceſſary, to ſet forth, that the party is charged upon oath. 2 *Haw.* 120.

It ought to contain the cauſe, as for treaſon, or felony, or ſuſpicion thereof; otherwiſe if it contain no cauſe at all, if the priſoner eſcape it is no offence at all; whereas if the mittimus contained the cauſe, the eſcape were treaſon or felony, tho' he were not guilty of the offence; and therefore for the king's benefit, and that the priſoner may be the more ſafely kept, the mittimus ought to contain the cauſe. 2 *Inſt.* 52.

And hereupon it appeareth, that a warrant or mittimus to anſwer to ſuch things as ſhall be objected againſt him, is utterly againſt law. 2 *Inſt.* 591.

Alſo, it ought to contain the certainty of the cauſe; and therefore if it be for felony, it ought not to be generally for felony, but it muſt contain the ſpecial nature of the felony, briefly, as for felony *for the death of ſuch an one*, or for burglary *in breaking the houſe of ſuch an one*; and the reaſon is, becauſe it may appear to the judges of the king's bench, upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122.

But the want hereof ſeems to make the commitment abſolutely void, ſo as to ſubject the gaoler to a falſe impriſonment; but it lies in averment to excuſe the gaoler or officer, that the matter was for felony. 1 *H. H.* 584.

It muſt have an apt concluſion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due courſe of law. 2 *Haw.* 120. 2 *H. H.* 123.

But if the concluſion be irregular, it doth not ſeem to make the warrant void, but the law will reject that which is ſurpluſage, and the reſt ſhall ſtand; ſo that if the matter appear to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged, but the wrong concluſion ſhall be rejected. 1 *H. H.* 584.

Where a ſtatute appoints impriſonment, but limits no time how long, in ſuch caſe the priſoner muſt remain at the diſcretion of the court. *Dalt. c.* 170.

It muſt be under ſeal; and without this, the commitment is unlawful, the gaoler is liable to a falſe impriſonment, and the wilful eſcape by the gaoler, or breach of priſon by the felon, makes no felony. 1 *H. H.* 583.

But this muſt not be intended of a commitment by the ſeſſions, or other court of record; for there the record itſelf, or the memorial thereof, which may at any time be entered of record, are a ſufficient warrant, without any warrant under ſeal. 1 *H. H.* 584.

It ſhould alſo ſet forth the place at which it was made. 2 *Haw.* 119.

It

It must also have a certain date, of the year and day. 2 *H. H.* 123.

IV. Charges of the commitment.

By the 3 *J. c.* 10. Every person who shall be committed to the common or usual gaol, within any county or liberty, by any justice of the peace, for any offence or misdemeanor, the said person so to be committed, having means or ability thereunto, shall bear his own reasonable charges for so conveying or sending him to the said gaol, and the charges also of such as shall be appointed to guard him to such gaol, and shall so guard him thither: And if any such person so to be committed, shall refuse at the time of his commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same; then such justice shall by writing under his hand and seal, give warrant to the constable of the hundred, or township where such person shall be dwelling and inhabit, or from whence he shall be committed, or where he shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said person so to be committed, as by the discretion of the said justice shall satisfy and pay the charges of such his conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the township where such goods shall be; the overplus to be delivered to the party.

Note; by the *habeas corpus* act, the charges of conveying an offender is limited not to exceed 12 *d.* a mile; which may be an argument for allowing as much in this case, especially as security is to be given before a man is removed on that act by *habeas corpus*, that he shall not escape by the way, which renders guards in that case not so necessary.

V. Gaoler shall receive the prisoner.

If a gaoler shall refuse to receive a felon, or take any thing for receiving him, he shall be punished for the same, by the justices of gaol delivery. 4 *Ed.* 3. *c.* 10. *Dalt. c.* 170.

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken: and that town shall be charged with the keeping of him, until the next gaol delivery: Or the person that arrested him, may in such case keep the prisoner in his own house, as it seemeth. *Dalt. c.* 170.

But in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. 2 *Haw.* 118.

VI. The gaoler shall certify the commitment.

By the 3 *H.* 7. *c.* 3. The sheriff or gaoler shall certify the commitments, to the next gaol delivery. *VII.*

VII. Commitment discharged.

It seems that a person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one but 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 an indictment for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be safely dismissed without any further proceeding, for that he who suffers him to escape is properly punishable only as an accessary to his supposed offence; and it is impossible that there should be an accessary, where there can be no principal; and it would be hard to punish one for a contempt, in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless. 2 *Haw.* 121.

Mittimus for felony.

New-Jersey, Essex County. SAMUEL WOODRUFF, *esquire, one of the justices of our lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; To the keeper of the gaol of our said lord the king at-------in the said county, or to his deputy there, and to each of them, greeting. Whereas* A. O. *late of-------in the said county, labourer, hath been arrested by the constable of---------in the said county, for suspicion of a felony by him, as it is said, committed, in stealing a black mare, of the value of* 40 *s. the property of* A. P. *of--------in the said county, yeoman: Therefore on the behalf of our said lord the king, I command you and each of you, that you or one of you receive the said* A. O. *into your custody in the said gaol, there to remain till he be delivered from your custody by due course of law. Given under my hand and seal at------in the said county, the---------- day of--------in the------year of the reign of our said lord----------*

Another.

New-Jersey, Essex County. J. P. *esquire,* &c. *To the keeper of the common gaol at--------in the said county, or to his deputy there: These are in his majesty's name to charge and command you, that you receive into your said gaol, the body of* A. O. *late of----------in the said county, yeoman, taken by* A. C. *constable of---------in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing----------And that you safely keep the said* A. O. *in your said gaol, until the next general gaol delivery for the said county* [if he be not bailable; or if he be bailable, then thus] *until he shall thence be delivered by due course of law. And hereof fail you not,* &c.

Or

Or thus, in the king's name.

New-Jersey, Essex County. GEORGE *the third by the grace of god, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth: To the keeper of our gaol at------- in our said county of* E. *or to his deputy, greeting: Whereas* A. O. *late of-------in our said county, yeoman, is arrested for suspicion of felony, by him, as it is said, committed, in feloniously taken and carrying away---------of the value of--------the property of---------We therefore command you, and each of you, that you receive him the said* A. O. *into your custody in our said gaol, or that one of you do receive him, there to remain till he be delivered from your custody, according to the law of our kingdom of* England. *Witness* J. P. *esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at---------in the said county, the-------day of---------in the------year of our reign.*

General warrant of commitment.

New-Jersey. Essex County. J. P. *esquire, one of the justices of our lord the king, assigned to keep the peace within the said county, To the constable of--------in the said county, and to the keeper of-------at ---------in the said county.*

These are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said---------the body of A. O. &c. *And you the said keeper are hereby required to receive the said* A. O. *into your custody in the said------and him there safely to keep,* &c. *Given under my hand and seal, the------day of-------in the---------year of the reign of his said majesty king* George *the third.*

CONFESSION.

CONFESSION is twofold, either *express*, or *implied.*

An *express* confession is, where a person directly confesses the crime with which he is charged; which is the highest conviction that can be. 2 *Haw.* 333.

But it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H.* 225.

An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession. 2 *Haw.* 333.

It

It seems that the confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 2 *Haw.* 429.

All those who on their examination own themselves guilty of a felony alledged against them, and are charged in their *mittimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the partybe guilty or innocent. 2 *Haw.* 97.

CONSPIRACY.

I. What it is.
II. How punishable.

I. What it is.

BY the common law there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsly and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 *Haw.* 190.

And conspiracy by statute is as follows: *Conspirators are they, that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsly and maliciously to indict, or cause to indict, or falsly to move or maintain pleas; and such as retain men in the country, with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers: And stewards and bailiffs of great lords, who by their office or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.* 33 Ed. 1. st. 2.

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord *Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsly and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. L. *Raym.* 1169.

But an *action* will not lie for the conspiracy, unless it be put in execution; for in such case, the *damage* is the ground of the action. L. *Raym.* 378.

Also it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it; from

from whence it follows, that if all the defendants who are profecuted for ſuch a conſpiracy be acquitted but one, the acquittal of the reſt, is the acquittal of that one alſo: And upon the ſame ground it hath been holden, that no ſuch proſecution is maintainable againſt a huſband and wife only, becauſe they are eſteemed but as one perſon in law: But it is certain, that an action on the caſe, in the nature of a conſpiracy, may be brought againſt one only: Alſo, it hath been reſolved, that if ſuch an action be brought againſt ſeveral perſons, and all but one be acquitted, yet judgment may be given againſt that one only. 1 *Haw.* 192.

Alſo in the caſe of *K.* againſt *Kinnerſly* and *Moore*, *T.* 5 *G.* An information was brought, ſetting forth that the defendants, being evil diſpoſed perſons, in order to extort money from my lord *Sunderland*, did conſpire together to charge my lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſley* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſley* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one, before the trial of the other. And a caſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the words, *with many others*, judgment was given againſt the defendants. And the court over-ruled the exception. And the defendant had ſentence. And in the *Eaſter* term following, *Moore* alſo was convicted and had judgment. *Str.* 193.

II. How puniſhed.

It is clear, that thoſe who are convicted of conſpiracy at the ſuit of the party, ſhall have judgment of fine and impriſonment, and to render the plaintiff his damages. 1 *Haw.* 193.

Alſo it is certain, that he who is convicted at the ſuit of the king, of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law (whereby he is diſabled from being put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the king's courts) and alſo that his houſes, lands and goods ſhall be ſeized into the king's hands, and his houſes and lands ſtripped and waſted, his trees rooted up, and his body impriſoned. And this is commonly called *villainous* judgment, and is given by the common law, and not by any ſtatute, and is ſaid generally in ſome books to be the proper judgment upon every conviction of conſpiracy at the

ſui

ſuit of the king, without any reſtriction to ſuch as endangered the life of the party; but this point doth not ſeem to be any where ſettled. 1 *Haw.* 193.

In the caſe of *Kinnerſley* and *Moore* above-mentioned, *Kinnerſley* was ſentenced to be fined 500 *l.* to ſuffer a year's impriſonment, and to find ſureties for his good behaviour for ſeven years. *Moore* was ſentenced to ſtand in the pillory, ſuffer a year's impriſonment, and to find ſureties in like manner for ſeven years. *Str.* 196.

CONSTABLE.

THE office of a conſtable, in executing of warrants, is treated of under the titles *ARREST*, and *WARRANT*; and in like manner the other particulars of his duty may be found under the reſpective titles throughout the book; this title treating only of the office of a conſtable in general.

I. Of the antiquity and original of conſtables.
II. Who ſhall be a conſtable.
III. How choſen and ſworn.
IV. His power as a conſervator of the peace.
V. His duty as a ſubordinate officer to juſtices of the peace.
VI. His indemnity and protection in his office.

I. Of the antiquity and original of conſtables.

The word *conſtable* hath afforded matter of much diſquiſition to the learned. It is evidently a compound; but from what two original words it hath ſprung, hath been variouſly conjectured. Hiſtory traceth it from its arrival in *England*, backwards through *France*, and *Germany*, and *Greece*, to the imperial ſeat at *Conſtantinople* in the days of *Conſtantine* the great. From whence we aſcend further ſtill towards the eaſt, where we find the word *cône* or *cûne* in *Paleſtine*, which ſignified in the times of the old teſtament a ſtability, ſtrength, or ſtay. Of which word there ſeem to be ſome traces in the mongrel name of *Laocoon* at *Troy*; and more eſpecially of this ſame *Conſtantine*, who was himſelf of oriental extraction, having ſprung from *Dardania*, a country of the upper *Moeſia*, and was ſaid by his flatterers to have been deſcended from *Dardanus* and the *Trojans*. And perhaps this appellation of the emperor might give occaſion to the adopting of the word into the *Roman* language at that time. For it was then that the word *count* (the genuine offſpring of *cône* or *cûne*) firſt became a name of dignity, and from thence travelled weſtwards (with a little variation according to the genius of each language) throughout the provinces. Amongſt the *Saxons*, the

the word was *koning* or *kyninge*, from whence undoubtedly we received our *Engliſh* word *king*. Again, the word *ſtole*, *ſtaple*, *ſtaſſe*, *ſtable*, by an eaſy tranſmutation of thoſe letters frequent in almoſt all languages, (and which ſeemeth the other conſtituent of the word *conſtable*) is likewiſe common to thoſe languages of the middle ages, and ſignifieth a ſtanding place, diviſion, or department, called by the *Romans ſtatio*; and all of them probably from the ſame origin with the *Latin ſto*. So that according to this etymology, the word *conſtable* will properly ſignify the ſtability or ſtay of the place, or the ſtrong man of the diviſion. The *German* word is *conneſtaſle*; the *French conneſtable*; the *Italian coneſtabile*; the *Spaniſh condeſtable*, from the word *conde* which they uſe for *count*.

By the ſtatute of *Wincheſter*, *in every hundred and franchiſe two conſtables ſhall be choſen to make the view of armour*; *and they ſhall preſent defaults of armour, and of ſuits of towns, and of highways, and ſuch as lodge ſtrangers in uplandiſh towns, for whom they will not anſwer.* 13 Ed. 1. ſt. 2. c. 6.

And from hence, Lord *Coke*, and others, will have it, that high conſtables are no ancienter than this ſtatute: But Mr. *Hawkins* (agreeably with *Lambard*, *Dalton*, and other authorities) ſays, that it ſeems to be the better opinion, that both conſtables of hundreds, which are commonly called high conſtables, and alſo conſtables of tythings, which are at this day commonly called petty conſtables, or tythingmen, were by the common law, and not firſt ordained by the ſaid ſtatute of *Wincheſter*; for that ſtatute doth not ſay, that there ſhall be ſuch officers conſtituted, but clearly ſeems to ſuppoſe that there were ſuch before the making of it. 2 *Haw.* 61.

II. Who ſhall be a conſtable.

It hath been ſaid, that a cuſtom in a town, that the inhabitants ſhall ſerve the office of conſtable by turns, according to the ſituation of their ſeveral houſes, is not good; for that by ſuch a courſe, it may come to a woman's turn to be conſtable, as inhabitant of one of thoſe houſes; yet we find ſuch cuſtoms allowed to be good in later books; and it ſeems, that the conſequence of the reaſoning above-mentioned may well be denied, ſince a woman in ſuch caſe may procure another to ſerve for her. 2 *Haw.* 63.

Alſo it ſeems certain, that if a ſworn attorney, or other officer, of the courts at *Weſtminſter*, be choſen into this office, he may have a writ of privilege for his diſcharge, by reaſon of his neceſſary attendance in thoſe courts: And it hath been reſolved, that ſuch officers ſhall have this privilege, not only where there is no ſpecial cuſtom concerning the election of conſtables, but alſo where they are choſen by a particular cuſtom, in reſpect of their eſtates, or otherwiſe; for that no ſuch cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. 2 *Haw.* 63.

And

And upon the like reaſons, it is taken for granted, that practiſing barriſters at law, and the ſervants of members of parliament, have the ſame privilege; but there ſeem to have been no reſolutions to this purpoſe. 2 *Haw.* 63.

But it hath been holden, that a captain of the king's guards, being preſented to ſerve as conſtable, in purſuance of a cuſtom in reſpect of his lands in a town, cannot claim this privilege; for that notwithſtanding he is bound by his office to perſonal attendance on the king's perſon, yet ſuch office being of late inſtitution, ſhall not prevail againſt an ancient cuſtom. 2 *Haw.* 63.

[*Altho' by the laws of* New-Jerſey, *no militia officer is there exempted from ſerving as conſtable, and the inhabitants are generally choſen by turns; yet a militia captain in* Woodbridge, *who had never ſerved in that office, being nominated and appointed conſtable, he refuſed to ſerve; and on a hearing at the next ſeſſions, he was diſcharged; conſequently Mr.* Hawkins's *opinion was over-ruled. But this may be the leſs wondered at, if it be conſidered that Mr.* Attorney, *who pleaded the cauſe, was the colonel of the regiment to which the captain belonged: I have however heard it aſſerted, that the ſame practice prevails in other parts of that province.*]

Alſo it ſeems, that a practiſing phyſician, being choſen conſtable in purſuance of ſuch cuſtom, has no remedy for his diſcharge; for that there are no precedents of this kind, and his calling is private. 2 *Haw.* 63.

Yet if ſuch an officer as before-mentioned, or a gentleman of quality who hath no ſuch office, or a practiſing phyſician, be choſen conſtable of a town, which hath ſufficient perſons beſides to execute this office, and no ſpecial cuſtom concerning it; perhaps he may be relieved by the king's bench: but it ſeems that even a cuſtom cannot exempt fitting perſons from ſerving the office of conſtable, where there are not ſufficient beſides them to execute it. But theſe points ſeem not to be ſettled. 2 *Haw.* 63.

By the 1 *W. c.* 18. *ſ.* 11. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, ſhall from the time of his ſubſcription and taking the oaths, be exempted from the office of conſtable.

III. How choſen and ſworn.

It being ſaid in ſome books, that both high and petit conſtables are to be choſen and appointed by the ſheriff in his torn (or by the lord of the leet); and by others, that they are to be choſen by the decennary, it ſeems difficult to determine, to whether of them the power of chuſing doth of right belong. 2 *Haw.* 62.

But now the uſual manner is, that the high conſtables of hundreds be choſen either at the ſeſſions, or by the greater number of the juſtices of the diviſion; and likewiſe that they be ſworn at ſeſſions, or by warrant from the ſeſſions; which courſe hath been often allowed and commended by the juſtices of aſſize. *Dalt. c.* 28.

And the reaſon thereof may be this, as hath been intimated above; namely, that their office at preſent doth not ſo much conſiſt in exe-

cuting

cuting the office of high conſtable as ſuch; as in executing the juſtices precepts, which they may do for the moſt part, whether they be indeed high conſtables or not.

And moreover, every petty conſtable, being a principal peace officer, and it being neceſſary for the preſervation of the peace, that every vill ſhould be furniſhed with one; the juſtices of the peace have ever ſince the inſtitution of their office, taken upon them as conſervators of the peace, not only to ſwear the petty conſtables, which have been choſen at a torn or leet, but alſo to nominate and ſwear thoſe who have not been choſen at any ſuch court, on the neglect of the ſheriffs or lords to hold their courts, or to take care that ſuch officers are appointed in them. And this power of juſtices of the peace having been confirmed by the uninterrupted uſage of many ages, ſhall not now be diſputed, but ſhall be preſumed to have been grounded on ſufficient authority. And ſome have carried this point ſo far, as to allow the juſtices at their ſeſſions, to ſwear one who was choſen at the leet, and unduly rejected by the ſteward, who had ſworn another in his place. 2 *Haw.* 65.

However, it is certain, that juſtices of the peace had power to nominate and ſwear conſtables, on the default of the torn or leet, before the ſtatute of 13 & 14 *C.* 2. *c.* 12. and therefore, that they have ſuch authority in ſome caſes not mentioned in that ſtatute; which enacts, that if a conſtable ſhall die, or go out of the pariſh, or continue above a year in his office, any two juſtices may make and ſwear a new one, until the lord ſhall hold a leet, or till the next ſeſſions, who ſhall approve of the officer ſo made and ſworn, or appoint another. 2 *Haw.* 65.

Conſtables lawfully choſen, if they ſhall refuſe to be ſworn, a juſtice of the peace may bind them over to the aſſizes or ſeſſions. *Dalt. c.* 28.

IV. His power as a conſervator of the peace.

Every high and petty conſtable are by the common law conſervators of the peace. 2 *Haw.* 33. *Crom.* 6. *Dalt. c.* 1.

And therefore if any man ſhall make an affray or aſſault upon another in the preſence of the conſtable, or ſhall threaten to kill, beat, or hurt another, or ſhall be in a fury ready to break the peace; the conſtable may commit him to the ſtocks, or other ſafe cuſtody for the preſent, and after may carry him before a juſtice, or to gaol, until he ſhall find ſurety for the peace, which ſurety the conſtable himſelf may alſo take by obligation, to be ſealed and delivered to the king's uſe, and if the party will not find ſurety to the conſtable, he may impriſon the party until he ſhall do it. *Dalt. c.* 1.

But he may not require ſurety of the peace, unleſs the offence be upon his own view, and not if it be committed out of his ſight; for he cannot take any man's oath that he is afraid of death, becauſe he is not a judge of record; which is the reaſon that an obligation taken by him, ſhall be in his own name, and not in the king's name: and the ſame ſhall be certified at the ſeſſions of the peace. *Cro. Eliz.* 375, 376.

V. His

V. His duty as a subordinate officer to justices of the peace.

It hath been always holden, that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it. 2 *Haw.* 62.

VI. His indemnity and protection in his office.

If an action is brought against a constable, for any thing done by virtue of his office; he, and also all others which in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers, he shall have double costs. 7 *J.* c. 5.

Constable's oath.

YOU *shall well and truly serve our sovereign lord the king,* [*and the lord of this leet,* if sworn in a court leet] *in the office of constable, for the township of--------for the year ensuing* [or, *until you shall be lawfully discharged therefrom*; or, *until another shall be sworn in your place:*] *You shall well and truly do and execute all things belonging to the said office, according to the best of your skill and knowledge: So help you god.*

[*Thus far, from* Burn's.]

Extract of an ESSAY on the office of CONSTABLE, with rules and cautions for the more safe and effectual discharge of that duty. By SAUNDERS WELCH, late high-constable of *Holborn-Division*; now one of his majesty's justices of the peace for the county of *Middlesex*, and for the city and liberty of *Westminster*.

NEITHER vanity nor avarice, the common motives of authors, have the least share in the publication of this essay; my sole intention being to render the office of constable better understood, and more respected, by communicating, in the plainest manner, that knowledge which I drew from nine years experience, in the excution of my late office of high constable of *Holbourn* division. Whilst I held this place, I observed many inconveniences and frequent distresses to arise from want of proper knowledge, not only of a constable's power, but the manner of executing that power; I have therefore been at some pains to collect what may be useful, in the most material parts of the duty, for a body of men, enjoined and even compelled by the constitution of their country to perform a very troublesome, sometimes fatiguing, and often dangerous office; or in other

other words, to give them a juſt tranſcript of the manner in which I executed the office I held, which in itſelf was little more than the office of conſtable extended to many pariſhes, as that is confined to one pariſh, precinct, ward, or liberty. And I flatter myſelf that if conſtables will attentively read and practiſe the rules here laid down for their conduct, moſt of them will be better able to diſcharge their duty to the public, and to defend themſelves from the enemies to their power, I mean thoſe low practitioners of the law, who are a ſcandal to their profeſſion, and are conſtantly watching the behaviour of conſtables, in order to take advantage of their raſhneſs or their ignorance.

And for the encouragement of the conſtables to purſue their duty upon the following plan, I do aſſure them (and I hope it will not be imputed to vanity) that in nine years moſt active and faithful diſcharge of the duty of chief conſtable, ſurrounded with difficulties from the moſt artful as well as the moſt daring villains, my name or my actions were never queſtioned, during the whole time, before my lords the judges, by law ſuit of any kind, nor any complaint made againſt me to the magiſtrates from whom I received my power, nor indeed any reproach or cenſure paſſed upon me by them whoſe crimes had rendered them the objects of the puniſhment of the laws they had violated.

In writing upon this office, it may be expected that ſomething ſhould be ſaid concerning its origin, and the derivation of the word *Conſtable*: but as many learned men have employed their time in tracing that word, and as their labours have ended in mere conjectures, it would be affectation in me to attempt the ſubject. The learned and ingenious Mr. *Burn*, after ſcrutinizing the Saxon, French, German, Italian, Spaniſh, Latin, and Greek languages, concludes from the etymology he produces, that the word *conſtable* properly ſignifies *the ſtability or ſtay of the place, or the ſtrong man of the diviſion*; and this agrees well with the nature of the office, which is to protect the innocent from the hand of violence, and to ſeize and bring to juſtice offenders againſt the public peace. Nor is the origin of this office ſettled with more certainty than the etymology of its title. From the ſtatute of *Wincheſter, that in every hundred and franchiſe two conſtables ſhall be choſen*, &c. it is inferred by lord *Coke* and others, that conſtables are not more ancient than that ſtatute. But Mr. ſerjeant *Hawkins* from great authority queſtions this, and ſays, it ſeems to be the better opinion that high and petty conſtables were by the common law, and not firſt ordained by the ſtatute of *Wincheſter*: ſeeing that ſtatute doth not ſay that ſuch officers ſhall be conſtituted, but clearly ſeems to ſuppoſe there were ſuch *before* the making of it. To ſtrengthen Mr. *Hawkins*'s opinion, it may be added, that the great increaſe of people in this kingdom, by the flood of Normans, &c. from the origin of the office of conſtable to 13 *Edw.* I. made it neceſſary to increaſe the number of civil officers; and probably this and an enlargement of their power, was the intention and deſign of that ſtatute, and not a creation of the office. I hope a conjecture upon this ſubject, with a view to fix the time when this office firſt began in *England*, will not be imputed to affectation,

We are informed by the *Engliſh* hiſtorians, that after the great *Alfred* had recovered his dominions from the *Danes* in the year 886, he turned his thoughts towards the reſtoration of learning, then at the loweſt ebb, and to the reformation of the civil polity of his kingdom. To effect this great purpoſe he invited ſeveral learned men from abroad; and as many ſpoils and rapines had been committed during the courſe of the war, as well by his own ſubjects as by the *Danes*; to remedy thoſe diſorders, and effectually to prevent all future exceſſes of that kind, this

this excellent prince divided *England* into distinct counties, and those again into hundreds, parishes, and tythings. Over these he constituted two officers, the judge and the sheriff. And although historians do not descend to the names of the subordinate officers, there can be no doubt but such officers were instituted, as well for the preservation of peace and order in the several districts, as for the apprehending and conveying to prison those whose crimes merited punishment: for without the assistance of such officers the power delegated to the judge and the sheriff could have little effect. But whether *Alfred* introduced this office into *England* from the *Saxon* constitution, or whether the *Saxons* incorporated this office, on account of its utility, into the civil polity of their own country history is silent. However the former is most probable. This at least is certain, that the *Conneſtaſle* of *Saxony* is at this time vested with the very same power, as conservator of the peace, which the constables in *England* now legally exercise.

But the success of king *Alfred*'s constitutions ought not to be passed over in silence, as it may afford a proper lesson to the magistrates and peace-officers of our days. Historians inform us, the king extended his provident vigilance over the judges and other officers in the most effectual manner; punishing all such magistrates as misbehaved, either through bribery, or by making their own arbitrary wills the measure of the law, and removing those whom ignorance or indolence rendered unfit to be intrusted with power; whereby justice came to be so excellently administered, that bags of money might have been left in the common high ways, or gold bracelets hung upon the hedges, without danger of their being touched by any person. And altho' in these times, the declension of our morals, and the debauchery of our manners, are too great, to hope that reformation can be carried to so high a pitch, yet it cannot be doubted, that public spirit in the civil power might prevent that fatal negligence in the peace-officers, to which many glaring crimes and enormities unknown to our fore-fathers, owe, if not their existence, at least their continuance with a kind of impunity.

Every sensible and good man must have reflected with concern upon the low ebb to which the civil power has of late years been reduced. The swearing in improper persons has greatly contributed to the duty being so ill executed, and brought contempt upon the office. Poverty and gross ignorance are too often united in the person of a constable: The first prevents the necessary attendance on his duty, and too often subjects him to temptations; and the latter exposes both him and his office to ridicule; whilst the opulent tradesman screens himself by interest from this most necessary and important duty to his country, and meanly throws it upon the indigent and ignorant. Nor has the office suffered less in its credit from another set of men, who from mercenary views and other, unworthy motives, make interest to get themselves elected into it.

The public is greatly concerned in the faithful and active discharge of the office of constable and head-borough. For, notwithstanding the contempt in which inconsiderate men may hold the office, and the severe treatment the officer may meet with from others, who ought rather to protect him, than take advantage of the law upon the least slip in the discharge of a duty so difficult, and which the law forces him to undertake; I would ask, what must become of the civil policy of this country, if men called upon to execute this office are brought to be either ashamed, or afraid, of doing their duty? The legislature may enact laws, magistrates may issue their processes; but the execution, the effect of all this, depends wholly upon the integrity and activity of the officers under them.

And I wish it were better considered, that every intimidation of the constable in his duty necessarily weakens the power of the magistrate, and reduces the very best constitution to a mere dead letter, and must soon produce that intolerable anarchy, which can alone make the honest part of mankind fly to a military force, as to a miserable refuge from a still worse evil. The idea of power necessarily implies the execution of it by some hands or other, or else it is a mere chimerical notion: is it not therefore to the shame of our policy, that we see justices of the peace and their officers made the joke of counsellors at law in open court, and introduced upon our stage as the constant objects of contempt and ridicule?

To the CONSTABLES.

The just discharge of the office you are to execute doth indeed require a greater share of knowlege in the common and statute law, than men in your station can be supposed endued with; and I pretend not to critical knowlege of this sort: my present intention is to point out to you some general rules for your conduct, whereby I hope the publick may be benefited, and yourselves better enabled to execute your office with credit and safety.

Whatever power is annexed to your office, regard always the intention of it. It was ordained for the glorious purpose of doing good; --- to secure and protect the innocent from the hands of violence; --- to preserve the publick peace, and to bring the disturbers of it to condign punishment: This is briefly your duty. Let then the service of the publick be the great end of all those actions which regard your office: This properly attended to, will keep you from all officious wanton acts of power; this will banish from your minds all your own little resentments; this will prevent all false imprisonments against law and conscience, and render you the objects of general esteem: for, while you act in this manner, and from such motives, your prisoners themselves must respect you, nor will it be in the power of malice to rob you of the just applause of the publick, the reward of the faithful execution of a publick trust.

Let me recommend to you a perfect union among yourselves; a ready and chearful assistance of one another. As this will be a great support to you in the difficult parts of your duty, so it will render you formidable to those to whom you should be always objects of terror, and a valuable safe-guard to those whom it is your duty to protect. Were the civil officers properly united and connected, did they properly correspond with each other, and had fixed times and places of meeting, not for sotting and drinking, (*we presume he chiefly means city constables here*) but for consulting the peace and good order of their respective parishes, it would not be possible for any bawdy-houses, gaming-houses, or gangs of villains to exist; for the immediate danger consequent upon acts of violence would be so great to the actors of them, that such houses would, wherever they arose, be instantly suppressed, and peace and safety restored to our streets.

Next to union I earnestly recommend to you temper and sedateness in the execution of your office. Coolly and well consider the nature of every service you are called upon; what you ought to do, and the best method and manner of doing it with effect. It ill becomes an officer called upon and acting in the king's name, to quell the unruly passions of others, instantly to fall into a passion himself: and a constable deserves to be, and truly is, the object of contempt and ridicule, who will venture to execute his office when intoxicated with liquor. Indeed, this is a fatal error, and hath afforded many opportunities to some unworthy members of the law, to stir up expensive and vexatious suits against civil officers.

Be not therefore easily provoked by the ill-manners, or scurrilous language of those about you. Behaviour of this sort will unavoidably lead you

you into absurdities and a neglect of the duty you are called to execute. I have seen an officer totally forget the service of his warrant, upon being called fool or puppy by some silly fellow, and justify the reflection by neglecting the real prisoner, and apprehending the offender against himself, under the mistaken notion of being insulted or obstructed in the execution of his office; and so, as an abuse of this sort cannot justify him, render himself liable to an action of false imprisonment, and an indictment for neglect of duty in suffering his prisoner to escape.

Having mentioned these few general cautions, that I may be clear in what I offer to you, I shall speak to the two parts of your office separately, *viz.* What you may, and ought to do, as conservators of the peace, *upon view*. And what concerns you as officers and ministers of the sessions, sheriff, coroner, and justices of the peace. In a word, what you may and ought to do with a warrant, and what without one.

I. *As conservators of the peace.* You have power, within your respective parishes and divisions, to quell all affrays, riots, routs, and actual assaults, by commanding the parties in the king's name to keep the peace, and quietly to depart about their respective businesses; and to apprehend all persons who shall in your *view* break the peace, by assaulting, striking or by fighting, though with mutual consent, if either party appear wounded, and to carry such persons directly before some justice of the peace; or if it be night, to imprison them until the next morning. And all persons within view of an affray, riot, rout or assault, being required by you in the king's name to aid and assist, may be indicted if they neglect or refuse so to do, not having a lawful excuse; and the courts of justice have a power to fine and imprison them for their contempt. And as this necessary power of demanding aid is lodged in you, and the execution of it has of late years been treated with contempt by the commonalty; and as your safety is greatly concerned in a ready assistance, you will do well to fix your charge of aid upon some known person or persons; and upon his or their refusal, if the party to be apprehended escape, or you are struck, or even resisted, in pursuance of your duty, indict them for the contempt; and I dare promise you the sessions will support your authority. But though, as conservators of the peace, you have power to apprehend without process, you cannot legally discharge your prisoners upon your own authority, the intention of such an arrest being the delivery of the party to the magistrate to be dealt with according to law; and you not being officers of record, have power only in the first instance. If at any time you should forget this caution, you will be subject to an indictment, or action of false imprisonment; for your discharging amounts to a confession that you had no lawful power to arrest.

Having told you that you have power to arrest persons committing breaches of the peace in your *view*, within the limits of your divisions or parishes; it is necessary to tell you, that it is extremely dangerous for you to intermeddle after the affray or assault is over. In such cases the injured person ought to apply to a magistrate for his warrant; yet here common prudence will direct you, that, upon coming in after an affray or assault is over, if upon your *view* any person appears to be dangerously wounded, and the party wounded charges any person present, you certainly ought to detain him, as the delay of a warrant may be the escape of a murderer: but where there has been a bare affray only, though accompanied with blows, and the constable has interfered by way of prevention only, no real mischief having happened or charge been given, and no danger of any future mischief doth appear, the constable, having first separated the parties, may depart himself: for

in truth he has never had any one lawfully in his cuſtody, and conſequently will have no impriſonment to juſtify.

What hath been ſaid, will ſufficiently caution you againſt interfering in ale-houſe quarrels, upon charges given you of perſons refuſing to pay their reckonings, or giving verbal abuſes very common with people heated by liquor: theſe have nothing to do with your office; and many conſtables, who have, at the requeſt of publicans, taken ſuch rioters (as they deemed them to be) into cuſtody, have anſwered the conſequence in a law-ſuit, in which they have been left to extricate themſelves by the very people to whoſe aſſiſtance they came.

It is ſaid by great authorities in the law, that in the ſuppreſſion of affrays and riots, the conſtable, firſt commanding the peace in the king's name, may, if reſiſted, juſtify beating the parties, and putting them into the ſtocks: and that if the conſtable in beating ſhould kill, it is juſtifiable in him, but murder in all the rioters if he be killed.------This may be law---but it is a part of it which you are not obliged to execute; and reaſon is ſtrong againſt it. If a conſtable coming with the appearance of authority to a riotous mob, and charging them, with a reſolution becoming his office and in the king's name, to keep the peace and depart quietly to their reſpective buſineſſes, and with good-nature warning them of the danger and trouble they will involve themſelves in if they commit acts of violence, or continue together.----I ſay, if this will not avail, what can he rationally expect to obtain by blows, but his own hurt or murder? And what ſatisfaction will this afford, that the parties who kill him will be executed for a murder which his own indiſcretion produced? I adviſe never to ſtrike, except it be abſolutely in your own defence: but ſtriking at all, if poſſible, ſhould be avoided; for the ſword of juſtice, not the arm of the conſtable, was intended for puniſhment. Indeed the law itſelf conveys this caution to officers inclined to a violent exertion of power, by telling them *the parties will be hanged who kill them.* If therefore any riot ſhould be too violent for you to quell, and it may endanger the public peace, give direct notice of it to the two next magiſtrates, and call to their aſſiſtance as many of your brother officers as you can collect together. As to putting into the ſtocks people guilty of riots and affrays, it might be the uſe of conſtables a century ago; but the long diſuſe of it is a reaſon ſufficient to prevent any of you from reviving it, as we have juſtices at hand, and other proper places of ſecurity. I only mentioned this to introduce a caution how you implicitly follow opinions you happen to meet with in law-books; for theſe, except you have knowledge in the law, and a very good underſtanding, will rather miſlead than inſtruct you. Carry this maxim along with you in every branch of your duty -----*Do not do all you may do, but always do what you ought to do.*

The apprehending felons and bringing them to juſtice, is of ſo great conſequence to the public, that the common law authorizes private perſons to perform that ſervice: But it is your immediate and indiſpenſable duty, who are ſelected by the conſtitution of your country, and bound by a ſolemn oath, to exert yourſelves in this important truſt, of preſerving the lives and properties of your fellow-ſubjects: The law hath armed you with all neceſſary power to do this duty with ſafety to yourſelves: You have power to raiſe a hue and cry, with horſe and foot, to ſearch all ſuſpected places, and break open doors in the purſuit of felons; and to extend this purſuit to every pariſh round you, by giving notice to their reſpective conſtables. The ſtatute of the 8th of G. II. cap. 16. provides, that if any conſtable or headborough, within the hundred wherein any robbery ſhall happen, ſhall refuſe or neglect to make hue and

and cry after felons, with the utmoſt expedition, as ſoon as he ſhall receive notice thereof, he ſhall, for every ſuch refuſal or neglect, forfeit the ſum of five pounds. The wiſdom of the law hath here provided a ſtrong check upon rogues; but the ignorance or inactivity of ſubordinate officers renders it ineffectual. A purſuit ſo immediate would be very dreadful to rogues, as the being once well deſcribed would render their eſcape next to impoſſible. Secreſy in committing, and eaſy means of eſcaping, are the great incentives to robberies: and one may venture to aſſert, that if this ſtatute were executed with a vigilance equal to the wiſdom of its formation, highway-robberies, the depredations of foot-pads, and burglaries, in the country eſpecially, would ceaſe. For detection would follow the heels of villainy ſo cloſely, that to rob and be taken would be almoſt the ſame thing: perhaps moſt of the felonies in this kingdom are owing to the non-execution of this excellent law. The law has very prudently rendered warrants to apprehend felons unneceſſary, as ſuch a delay might be the eſcape of the offenders. Your conſideration extends only to two things, firſt, that a felony has been really committed; and, ſecondly, that the perſon you arreſt is properly ſuſpected. The firſt of theſe is abſolutely neceſſary to juſtify an arreſt; a miſtake here is fatal; but an error in the ſecond is excuſable in the law. In order to keep yourſelves as clear as poſſible in the diſcharge of this part of your office, whatever perſon brings you an account of a robbery, and where the felon is, examine well if he informs upon his own knowledge, or on the report of another: if upon his own knowledge, charge him in the king's name to aid and aſſiſt you; if upon the report of another, extend your enquiry to him, and act in the ſame manner: by this means you produce to the magiſtrate your priſoner and his accuſer at the ſame time. But in all caſes of ſuſpicion, not from your own knowledge, the ſafeſt way is to refer the parties to a juſtice of the peace, and act upon his warrant. And this is the advice of my lord chief juſtice Hales, founded perhaps upon this reaſon, that the ſuſpicion of one man cannot properly be transferred to another without the circumſtance of an oath, which the conſtable has no power to adminiſter.

As the law will ſeverely puniſh, by indictments and heavy fines, your neglect or refuſal to purſue and apprehend felons; ſo it will be infinitely more ſevere, if after you have apprehended them, you ſuffer them to eſcape. To do this wilfully is felony, and to do it through negligence may produce a proſecution that ſhall end in your ruin. Indeed a conſtable is inexcuſable in ſuffering an eſcape, as the law has given him power to ſecure his priſoner, by calling in ſuch help as he deems ſufficient, and to diſarm and bind his priſoner. I have already obſerved that a thorough ſearch of a felon is of the utmoſt conſequence to your own ſafety, and the benefit of the public, as by this means he will be deprived of inſtruments of miſchief, and evidence may probably be found on him ſufficient to convict him, of which, if he has either time or opportunity allowed him, he will be ſure to find ſome means to get rid of: of this I have know many inſtances.

After the apprehending of a felon, be as expeditious as poſſible in delivering him over to a magiſtrate, and take care not to loſe ſight of him. I have known officers truſt too much to the integrity and care of perſons charged to aſſiſt them; and others make a temporary priſon of their own houſes for the little conſideration of taking a few dirty ſhillings, if they were in the public way: this has given a gang an opportunity of aſſembling, and if not of effecting a reſcue, at leaſt of preparing an artful defence. After commitment, take care to ſee your priſoner ſafely delivered.

vered to the gaoler, nor trust a felon to the care of a runner to a prison: for as the law requires him at your hands, discretion will dictate the rest.

Profane swearing and cursing is a great nuisance, and a scandal it is to a christian country. This is a vice for which no plea can be made; it is as unprofitable as it is wicked, and were the law put into vigorous execution, the fear of immediate punishment would produce that reformation, which alas! the commands of the supreme being are too weak to effect. Upon you this duty lies; religion requires this of you; the law commands it under severe penalties; and a due exertion of your office in this respect would soon banish swearing and horrid imprecations from our streets. One caution you are to observe, viz. that if the party swearing be known to you, a warrant is absolutely necessary: if the party be not known to you, then you may directly apprehend him without process. The penalty upon offenders is, for every oath of a gentleman five shillings, if under the degree of a gentleman two shillings, and for every labourer and servant one shilling, or ten days imprisonment in Bridewell with hard labour, and a penalty of forty shillings upon the constable, who hearing any person swear, refuses or neglects to apprehend him. These penalties go wholly to the poor of the parish where the offence is committed, except the forty shillings, half of which goes to the informer.

Amongst other almost intolerable nuisances are the swarms of beggars under various disguises of wretchedness artfully put on to excite compassion in weak minds. These are burthens to our minds as well as purses; and although generally complained of, are almost as generally relieved. Our laws are amply sufficient to cure this evil, and your duty well executed in this respect will be at least a great check to it: the law has given you not only power to apprehend them without process, but also assigned you, in order to quicken your diligence, a reward upon the commitment of every vagabond, and inflicts a penalty of ten shillings upon you for every neglect of this kind. I shall only add this caution, be careful when you apprehend such vagrants, that they have either begged in your own view, or that you have evidence of their being beggars.

HAVING cautioned you in those parts of your duty which do not require warrant or process, I shall now mention some necessary hints for your behaviour to those from whom you derive the rest of your power. Those are,

The sessions,
The sheriff, and coronor,
The justice of the peace, and
Your high-constable.

These, in their respective stations, and jurisdictions, you are by law bound to obey.

But whatever power the sessions, sheriff, coroner, and justice hath over you, their respective commands are signified by warrants under their hands and seals (except the justice be with you) as a careful perusal of every warrant will be a good directory; this part of your office is less liable to errour, than where your own discretion is the only guide.

The justices of the peace, assembled in their sessions, may, with great propriety, be deemed the council of the county for the preservation of the peace and good order of it: and if it be your duty to pay strict obedience to the warrants and orders of every particular magistrate; how much more is it incumbent upon you to exert yourselves in the execution of such warrants and orders as come from them in a collective body?

The

The right discharge of your duty in obeying the warrants, of the sheriff, is of no less consequence to the public, than advantage to yourselves; for, at the same time that it impresses upon the minds of the common people a true sense of the strength and consequence of the civil power, it will also render the execution of your office more safe and easy.

The coroner's warrants you are obliged to execute, as well in summoning juries, as apprehending persons charged with, or suspected of murder.

Let your demeanour to the magistrates in general be respectful and obedient, and teach the common people subordination to yourselves, by the example of your own behaviour to your superiors. Never officiously make yourselves parties in any complaint you bring before the magistrate; and, unless you are called upon, be silent. When you are called upon, speak impartially. Officious behaviour, in interesting yourselves in the disputes of others, must bring their resentment upon you, and if you judge ill, lessen your consequence, where you ought to preserve it, in the eye of the justice.

Be careful to execute every warrant you receive with all possible expedition; and bring the offenders, as soon as you can, to answer the complaint. If you act as you ought to do, you will acquire respect and esteem with those you principally have to deal with; and this will give you opportunities to do great good. Little offences, view'd by persons of fiery spirits through the medium of passion and resentment, are generally productive of warrants, the most burthensome part of your office: but by gentleness and persuasion, you may moderate such spirits, and send those away friends, who met almost mortal enemies. It is, indeed, a cheap way of venting passion; for if the common people had not this method of dissipating their spleen, absolute ruin would succeed to thousands of families from expensive law suits; whereas warrants, their service and discharge, are easy methods of reconciliation. But after you have arrested any person upon a warrant, be careful, though the parties should agree, how you discharge your prisoner upon that presumption; for the law requires you to make a return to your warrant, and such warrant is liable to be called for as evidence in the courts above: your safety therefore requires you to carry the parties before a magistrate, that the discharge may be regularly indorsed on the back of the warrant.

In the service of warrants, as you are sworn officers, the law does not require you to shew your warrant, when you act in your respective parishes and places, altho' it be demanded by the person you arrest; but you ought to acquaint the party with the contents of it, especially if it be a bailable offence, that he may have opportunity of sending for, and producing bail before the justice

But if you act out of your parish, you must shew your warrant, if it be demanded. You will also observe, that if you arrest any person before a warrant be issued, though the accuser afterwards procure one, yet this will not justify you, nor prevent an action of false imprisonment. In your arresting any person upon a warrant, it is a sufficient notice to him, to tell him, that you arrest him in the king's name; and shew him your pocket staff or truncheon, as the unquestionable mark of the office you bear.

You will also observe, that if after such arrest, you suffer the party to go at large, either upon your knowledge of the person, or any promise from others that he shall appear, and he fails therein, you cannot legally arrest him upon the same warrant; whereas, on the contrary, if the party escape from you by his own act, or is rescued by the violence of others, you may pursue him, even into another county, and apprehend him on the same warrant.

As

As the law formerly ſtood, the conſtable was anſwerable for falſe impriſonment, if he executed a warrant in caſes where the juſtice had no juriſdiction; and yet, at the ſame time, was indictable for refuſing to obey; and, in determining both theſe inſtances, the law was much too ambiguous and uncertain, conſidering the riſque the conſtable was to run. But this abſurdity not only of placing the judgment of the inferior over the ſuperior, but alſo of puniſhing the party for obeying and for diſobeying, is by a late ſtatute removed; and now you are concerned only in the execution of warrants: but be careful to have your warrants properly diſcharged, and preſerve them with care when they are; for the defendant, or his attorney, has a right to demand a copy and peruſal of ſuch warrant; which if you refuſe, an action of falſe impriſonment, if the warrant be illegal, will lye againſt you; whereas, upon your giving ſuch copy within ſix days after demand, and permitting the peruſal thereof, the juſtice muſt abide by the conſequence of his warrant, and you are diſcharged.

In warrants of common aſſaults, occaſioned by petty quarrels amongſt neighbours of credit and fortune, your good ſenſe will tell you that you are to hold a different conduct from what you are to obſerve if the warrants were againſt vagabonds: for tho' the law makes no diſtinction of perſons, prudence doth; and as the intention of the law is the bringing the party before the magiſtrate to anſwer the complaint, this will be as effectual, and much more genteelly, done by a meſſage, ſignifying the complaint, and appointing a time for the party to appear to anſwer it, than by forcible means.

Great prudence is neceſſary in the execution of ſearch warrants. Theſe muſt be executed between the riſing and ſetting of the ſun, at moſt by viſible day-light. As theſe warrants often proceed from the miſtakes and miſapprehenſions of people, and ſometimes from worſe motives, they may happen to be executed in the houſes of the innocent, and therefore caution and tenderneſs ſhould always be uſed. With good nature acquaint the parties upon whom the warrant is to be executed, of the occaſion; that ſuſpicion has ariſen that part of the goods are lodged with them, for which reaſon you are obliged by your warrant to ſearch, adviſing them, if any of the things ſtolen are in their cuſtody, to produce them voluntarily, and give evidence againſt the felon; for, if they deny the knowledge of them, and ſuch things ſhould upon ſearch be found, or evidence afterwards appear that they were in their cuſtody, the law may conſtrue their denial and ſecreting the goods, into a felonious intent, the conſequence of which may be tranſportation for fourteen years. After ſuch admonition be extremely careful in your ſearch, and that in proportion to the bulk or minuteneſs of the things loſt. Your warrant tells you, if you find the things ſtolen, or any part of them, you are to bring them and the parties, in whoſe cuſtody they were found, to anſwer before the juſtice. And that no miſtake may happen in aſcertaining the property, always take with you a perſon able to ſwear it. Never break open locks until the parties have firſt refuſed to open them.

Be extremely careful to keep in your cuſtody whatever things you take upon felons: the ſame caution is to be obſerved in reſpect to ſuch ſtolen goods as you take in the execution of ſearch warrants. The law ſtrictly requires this of you, in order that they may be produced in evidence upon the trial of the priſoner: for remember that the identity of ſuch things is to be proved upon your oath, as well as the time when taken, and place where: if therefore you ſuffer goods even out of your ſight, you weaken your evidence, if you do not deſtroy it; and ſhould the

the goods be by accident, or otherwiſe loſt, you are not only anſwerable to the court for acting wrong, which may defeat the proſecution, but alſo to the proſecutor for the value of the goods: nor will it be a ſufficient plea to the court, that you left them in the hands of the juſtice, even by his command; for as they were taken by you, the law requires them at your hands; and it is a new practice, and embarraſſes evidence, to make the juſtice's office the warehouſe for ſtolen goods. And as the goods you take upon perſons charged with felony, or by ſearch warrants are, as the law terms it, *in abeyance*: after the jury have returned their verdict, if the priſoner be convicted, you are to deliver ſuch goods to the proſecutor: on the contrary, if the priſoner be acquitted, ſuch goods revert to him, the cauſe of ſeizure being diſcharged. But if any difficulty ſhould ariſe concerning the reſtitution, I adviſe you to pray the direction of the court. Your duty does indeed abſolutely oblige you to produce ſuch goods at the trial; but after that is over, be careful how you bring them out of court, leſt you ſuffer by actions at law from both parties.

I ſhall here mention one general rule for the breaking open doors, as this may happen in aſſiſting the officers of the revenue, as well as in executing ſearch warrants, and apprehending felons. Where the law gives that power to your office, you are, upon finding the doors faſt, to call with an audible voice to the perſons within, demanding entrance in the king's name, as conſtable: and if upon this the parties refuſe to anſwer, or anſwering refuſe to open the door, you are then juſtifiable in uſing force, which you will not be, before ſuch demand is made.

Be careful not to execute warrants, or to do any act as conſtable, out of your reſpective pariſhes and places, except you are ſpecially appointed by a warrant. Magiſtrates may empower any perſon to execute their warrants within their juriſdiction.

When you receive warrants directed generally to bring the offenders before the juſtice who grants, or ſome other of his majeſty's juſtices of the peace, you are at liberty to convey your priſoner to any juſtice of the peace; but if it be ſpecial to bring the party before the juſtice who granted the warrant, you muſt obey it: but this, though the warrant is good, is rarely done, except in caſes where ſome particular information is with the juſtice, or for a purpoſe too mean to be mentioned. Under this head, as common ſenſe will ſufficiently diſtinguiſh a good magiſtrate from a bad one, if ſuch ſhould ever ariſe; ſo common honeſty will dictate to you, that you do not faithfully diſcharge the truſt repoſed in you, if, ſeduced by a bribe from the party, or from any other mean or unworthy motive, you prefer the latter to the former.

If you have had any diſpute or animoſity, with any perſon, I adviſe you to decline ſerving any warrant upon him, or taking him into cuſtody, if poſſible; but rather refer it to a brother officer; ſince if any perſonal prejudice ſhould get the better of your underſtanding, or provoking language ſhould make you tranſgreſs your duty, and an action be the conſequence, the former grudge would prove a great enhancement of damages.

When you arreſt upon a warrant, and the party produces a *ſuperſedeas*, you are to compare ſuch *ſuperſedeas* with the contents of your warrant; and if you find that the names of the plaintiff and defendant, and the offence complained of, agree, you muſt directly diſcharge your priſoner: if they do not agree, either in the names or the offence, you are then to carry the party before the juſtice. But if the offence be felony upon your warrant, the *ſuperſedeas* muſt be ſigned by two juſtices of the peace; for one juſtice of peace cannot, by law, bail felony. And as the conſtables may not be acquainted with the nature of a *ſuperſedeas*, the following is nearly the form they generally run in.

MID-

MIDDLESEX. To the constables, &c.

Wherras Thomas Roe *hath appeared before me, one of his majesty's justices of the peace for the county aforesaid, and entered into sureties for his personal appearance at the next general quarter sessions of the peace to be holden at Hick's-hall in St. John street, in and for the county aforesaid, then and there to answer the complaint of* John Doe for assaulting and beating the said John against the peace. *These are therefore, in his majesty's name, to will and require you, on sight hereof, to forbear to arrest, imprison, or otherwise molest, the said* John Doe *on account of the said complaint, as you will answer the contrary at you peril. Given under my hand and seal this*

In the execution of warrants of distress, first demand the sum to be levied. If that be denied, then you are to seize so many of the goods as will be sufficient to pay the contents of your warrant and the necessary expence consequent thereupon: but to do this, with as little hurt to the parties as possible, let your seizure be rather of superfluites, than necessaries; which goods so distrained you are to make sale of after four days: and within eight days, deducting the sum mentioned in your warrant and reasonable charges, render the overplus upon demand to the party whose goods you distrained; except the penalty, together with the reasonable charges, be sooner paid. Observe that in this case you are obliged to shew your warrant if the party demand it; and be careful not to exact unreasonable charges; for this point being left by the law to your discretion, if you are guilty of oppression the injured person may have redress by an action against you.

When called upon by landlords to assist in seizing goods for rent, your duty is to preserve the peace, without intermeddling otherwise, except as to swearing the appraisers, if the rent be not paid in due time; a copy of which oath follows, as taken from Shaw's justice.

You do swear that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shewn, as between buyer and seller, according to the best of your skill and understanding; you shall not through partiality, interest, or otherwise, over or under estimate the said goods, but impartially do your duty herein. So help you god.

In your quartering soldiers, a little trouble to yourselves at first will be of great benefit to them, and utility to the publicans: for as the guards consist of married and single men, so of houses liable to receive soldiers some have conveniencies to lodge them, and others have barely room in their houses for their own families. To quarter therefore single men in the former, and married ones in the latter, will prove the source of endless disputes. To quarter a married soldier in a lodging-house, is taking from him three shillings a month; and sending the single man to money-quarters, is distressing both him and his landlord. I therefore recommend to you to consult the serjeants of the respective companies upon the general remove, who will inform you of the condition of their men; and by placing them properly in quarters, according to their wants, you will preserve peace in your respective divisions; and if any disputes should arise between the landlord and the soldier, endeavour in a friendly manner to reconcile them. If this fails, in order to prevent worse consequences, remove them to other quarters, and avoid, if possible, all imputation of partiality, than which nothing can be more odious in a public trust. The king's commands are that the soldiers behave peaceably in their quarters, and their officers severally punish such as do not conform to the royal orders.

Keep a regular list of your quarters, and of the soldiers there billetted, to avoid imposition in quartering either a greater number than is

assigned

assigned you by your high-constable, and to prevent those assigned you from fraudulently obtaining double quarters, as well as to be ready at all times to produce a perfect account, should any complaint of partiality be made against you to the magistracy.

I have already cautioned you against passion and resentment in the execution of your office: I shall farther add, avoid that impertinent imperiousness of behaviour too frequently seen in constables, and which may be called the drunkenness of power. This breaks out into personal invective and reproachful language upon them whose actions have rendered them objects of lawful punishment. And, perhaps, this conduct leaves deeper wounds in the mind of the delinquent, than the punishment of the law does upon the body. This imprudent, I may say, foolish, and cruel execution of the law, creates an implacable enmity in every prisoner; and, which is shameful, makes the apprehender, in many cases, the greater criminal. I therefore conjure you to treat your prisoners as unhappy fellow-creatures, and while your minds rise indignant against their offences, remember, with the tenderness of humanity, that they are men. Do every thing you can to secure them, but let the law punish them.

The last part of your office I shall speak to, is your connection with, and obedience to the precepts of your high-constable. Indeed he has not, by virtue of his office, any positive authority over you, and is only to command you, by virtue of such warrants and orders as he receives from the sessions, sheriff, and justices. These you are obliged to obey under penalties of the law; and by his immediate connection with you, he will much better explain them as the incidents arise, than, considering the variety of circumstances, they can be here: To him therefore I must leave that task. And I hope it is needless to exhort you to pay a chearful obedience to his precepts, and give him your ready assistance in his duty when you are called upon.

I have now, I think, laid before you the most essential parts of your duty, and the best methods for the execution of it. It remains that I exhort you most earnestly to give the strictest attention to both in every particular and on all occasions. To this you are bound by your oath, and by all the ties of society. The safety of your neighbours, the confidence placed in you, the laws of your country, honour in the eye of man, and conscience towards God, all join to require it of you If a robbery or murder should be the consequence of your neglect, and more especially if frequent robberies and murders should be the consequence, can you hope to be forgiven either in this world, or the next, by God, or by man? Can you ever forgive yourselves for abusing the trust reposed in you, and for not making a due and honest use of the power with which the laws of the land have invested you and only you? Put this question home to yourselves, and if you have in your breasts the least spark of public or private virtue, it will warm them both into action. Indeed, common prudence and a regard to your private interests will make you resolve on doing your utmost for the public good, if you consider the matter rightly. For, put the laws vigorously in execution during your time, which is but for one year, and you will leave a much easier task to your successors, who will be thereby not only better enabled, but strongly incited and encouraged to follow your example, and so on; till at last, or rather very soon, every man, and yourselves among the rest, may go about his business or to bed in perfect security. Besides, this will also give a dignity to your office while you hold it, and procure respect to your persons from all good men ever after.

By

By all these ties therefore I adjure you, as you value the peace and safety, the lives and properties of your fellow-subjects, as you respect the laws of your country, if you have either honour or conscience, if you wish to live respected, and when you die to meet with that solemn approbation, *Well done, good and faithful servant*: If you care for any of these things, be diligent, steady, active and honest in the discharge of your duty. I have done mine, and if you will not do your's, the shame and the guilt be upon your own heads.

[*The foregoing essay is universally approved of in* England, *for its plainness and usefulness*:----*There are some other matters in it which seem peculiar to the cities of* London, *&c. which are omitted, but all that can be of any use in* America, *are here inserted.*]

CONVICTION.

THE power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace; but the intendment will be against it. Therefore where a special power is given to a justice of the peace by act of parliament, to convict an offender in a summary manner, without a trial by jury, it must appear that he hath strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed nevertheless according to the course of the common law in trials by juries, and consider himself only as constituted in the place both of judge and jury. Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then, if the person is found guilty, there must be a conviction, judgement, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a *record* of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to an account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

The difficulty of drawing up a conviction in due form, hath induced the legislature to institute a more apt and compendious method in divers instances; and it were to be wished, in case of the justices, that this provision might be made more general. The summary forms of convictions, which are specially directed by act of

of parliament, are interſperſed throughout this book under the titles to which they do reſpectively belong.

Other forms of convictions, which are left at large according to the courſe of the common law (having no preſcriptive form of words directed by act of parliament) are likewiſe drawn forth at length under divers titles; particularly, concerning ſuch matters as have been often controverted in the courts above, occaſioned either by the largeneſs of the penalties, or ſometimes by the greatneſs of the offenders; as in caſes of riots, forcible entries, deer ſtealing, and ſuch like.

It remaineth, under this title, to inſert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

New-Jerſey, Eſſex County. BE *it remembered, that on the*——*day of*——— *in the*———*year of the reign of*———*by the grace of god, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth, at*———*in the county of*———*aforeſaid,* A. I. *of*———*cometh before me* J. P. *eſquire, one of the juſtices of our ſaid lord the king, aſſigned to keep the peace of our ſaid lord the king in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed,* [*reſiding near to the place where the offence herein after mentioned was committed*; or as the ſtatute requires] *and giveth me the ſaid juſtice to underſtand and be informed that one* A. O. *of*———*in the ſaid county, yeoman, on the*———*day of*———*now laſt paſt, at*———*in the ſaid county, did* [here ſet forth the fact, in the words of the ſtatute as near as may be] *againſt the form of the ſtatute in ſuch caſe made and provided: And afterwards upon the aforeſaid*———*day of*———*in the year aforeſaid, at*———*aforeſaid in the county aforeſaid, he the ſaid* A. O. *after being duly ſummoned in this behalf before me the juſtice aforeſaid appeareth and is preſent, in order to make his defence againſt the ſaid charge contained in the ſaid information, and having heard the ſame, he the ſaid* A. O. *is aſked by me the ſaid juſtice, if he can ſay any thing for himſelf, why he the ſaid* A. O. *ſhould not be convicted of the premiſſes above charged upon him in form aforeſaid; who pleadeth that he is not guilty of the ſaid offence. Nevertheleſs, on the day aforeſaid, in the year aforeſaid, at*———*aforeſaid, in the county aforeſaid, one credible witneſs, to wit,* A. W. *of*———*yeoman, cometh before me the juſtice aforeſaid, and before me the ſame juſtice upon his oath on the holy goſpel to him then and there by me the ſaid juſtice aforeſaid adminiſtered, depoſeth, ſweareth, and on his oath aforeſaid affirmeth and ſaith, that the aforeſaid* A. O. *on the*———*day of*———*aforeſaid, in the year aforeſaid, at*———*aforeſaid, in the county aforeſaid, did* [here again ſet forth the fact, or ſo much thereof as is ſufficient to convict the offender] *And thereupon the aforeſaid* A. O. *the*———*day of*——— *aforeſaid, in the year aforeſaid, before me the juſtice aforeſaid, by the oath*

oath of one credible witneſs aforeſaid, according to the form of the ſtatute aforeſaid is convicted; and for his offence aforeſaid hath forfeited the ſum of----------of lawful money of Great-Britain, *to be diſtributed as the ſtatute aforeſaid doth direct. In witneſs whereof, I the ſaid juſtice to this preſent record of the conviction as aforeſaid, have ſet my hand and ſeal at----------aforeſaid, in the county aforeſaid, the day and year firſt above-written.*

If he confeſſes the fact then ſay,----------*And becauſe the ſaid* A. O. *hath nothing to ſay, nor can ſay any thing in his own defence touching and concerning the premiſſes aforeſaid, but doth of his own accord freely and voluntarily acknowledge and confeſs all and ſingular the ſaid premiſſes to be true, in manner and form as the ſame are charged upon him in the ſaid information; and becauſe all and ſingular the premiſſes being heard and fully underſtood by me the ſaid juſtice, it manifeſtly appears to me* ———Or, if the party hath been ſummoned, and doth not appear, then ſay,----------*Whereupon, on the ſaid----------day of----------in the year aforeſaid, at----------aforeſaid, in the county aforeſaid, he the ſaid* A. O. *was duly ſummoned in this behalf, to appear before me, in order to make his defence againſt the ſaid charge contained in the ſaid information, but the ſaid* A. O. *doth neglect to appear before me, and doth not appear, nor make any defence againſt the ſaid charge as aforeſaid; Therefore I the ſaid juſtice, on the ſaid----------day of----------in the year aforeſaid, at----------aforeſaid, in the county aforeſaid, do proceed to examine into the truth of the ſaid complaint; And* A. W. *of----------a credible witneſs, cometh before me the juſtice aforeſaid, and before me the ſame juſtice upon his oath* &c.

Cometh before me] A conviction ought to be in the preſent tenſe, and not in the time paſt. L. *Raym.* 1376. *Str.* 608. *Robert's* caſe

And giveth me to underſtand and be informed] A conviction ought to be on an information or complaint precedent. *M.* 11. *W. K.* and *Fuller.* L. *Raym.* 510.

That one A. O. *of----------in the ſaid county, yeoman,* &c.] All acts, which ſubject men to new and other trials, than thoſe by which they ought to be tried by the common law, being contrary to the rights and liberties of Engliſhmen, as they were ſettled by *magna charta*, ought to be taken ſtrictly; and the court of king's bench will require, that it do appear upon the face of ſuch proceedings, that the fact was an offence within the act, and that the juſtices have proceeded accordingly. *M.* 1 *An. K.* and *Chandler.* 1 *Salk.* 378. L. *Raym.* 581.

Being duly ſummoned] *T.* 11 *G. K.* and *Venables.* The court were unanimouſly of opinion, that the party ought to be heard, and for that purpoſe ought to be ſummoned in fact; and that if the juſtices proceeded againſt a perſon without ſummoning him, it would be a miſdemeanor in them, for which an information would lie. L. *Raym.* 1406.

And in the caſe of *K.* and *Allington, H.* 12 *G.* On affidavit that no ſummons was had, the court granted an information againſt the juſtice who made the conviction. *Str.* 678.

One

One credible witneſs, to wit, A. O. *of*----------*yeoman*] It is requiſite to name the witneſs, that it may appear he is not the ſame perſon who was the informer; for an informer who hath a ſhare of the penalty, is never allowed to be a witneſs, unleſs in caſe where a ſtatute ſhall ſpecially ſo direct it.

On his oath aforeſaid affirmeth and ſaith] In all convictions, being in the nature of judgements, the whole evidence ought to be ſet forth, or at leaſt ſo much thereof as is ſufficient to warrant the conviction; that the court of king's bench may judge of the ſufficiency thereof; but otherwiſe it is in orders, which are authoritative.

And for his offence aforeſaid hath forfeited] *H.* 3. *G.* 2. *K.* and *Hawks.* A conviction for killing a deer was quaſhed, becauſe it was only------*he is convicted,* without any judgment of forfeiture. *Str.* 858.

Note; On a ſuggeſtion that the defendant hath a title to the thing in queſtion, a prohibition will be granted by the king's bench, before or after conviction, to ſtay the juſtice from proceeding; for without doubt if the defendant have but a colour of title, the juſtices have no juriſdiction in the cauſe, as where the defendant was convicted for cutting trees, where he had a right of common. L. *Raym.* 901.

CORONER.

CORONERS are ancient officers by the common law, ſo called becauſe they deal principally with the pleas of the crown, and were of old time the principal conſervators of the peace. 2 *Haw.* 42.

Concerning whom I ſhall ſhew,

I. Who may be a coroner.
II. How choſen.
III. His power and duty in taking an inquiſition of death.
IV. His power and duty in other matters.
V. His fees.
VI. Puniſhment for not doing his duty.

I. Who may be a coroner.

Of ancient time this office was of great eſtimation; for none could have it under the degree of a knight. 3 *Ed.* 1. *c.* 10. 4 *Inſt.* 271. And by the 14 *Ed.* 3. *ſt.* 1. *c.* 8. No coroner ſhall be choſen unleſs he have land in fee, ſufficient in the ſame county, whereof he may anſwer to all manner of people.

II. How

II. How chosen.

The coroner (as of ancient time the sheriffs and conservators of the peace) shall be chosen in full county, that is, in the county court, by the commons of the same county. 28 *Ed.* 3. *c.* 6.

And this must be in pursuance of the king's writ for that purpose, issuing out of, and returnable into the chancery; and none but freeholders have a voice at such election, for they only are suitors to the county court. 2 *Haw.* 43, 44.

And being elected by the county, if he be insufficient, and not able to answer such fines and other duties in respect of his office, as he ought; the county, as his superior, shall answer for him. 2 *Inst.* 175.

And being chosen by the county, his office continues, notwithstanding the demise of the king. 4 *Inst.* 271.

And after he is chosen, he shall be sworn, by the sheriff, for the due execution of his office. 2 *Hales's H.* 55.

But in the statute of 28 *Ed.* 3. which enacts that they shall be chosen by the county, there is a saving to the king and other lords, who ought to make coroners, their franchises.

The lord chief justice of the king's bench, by virtue of his office, is the chief coroner of *England*. 2 *H. H.* 53.

III. His power and duty in taking an inquisition of death.

When it happens that any person comes to an unnatural death, the township shall give notice thereof to the coroner. Otherwise, if the body be interred before he come, the township shall be amerced. *Hale's Pl.* 170.

And by *Holt* Ch. J. It is a matter indictable to bury a man that dies a violent death, before the coroner's inquest hath sat upon him. 2 *Haw. Not.* 8.

And if the township shall suffer the body to lie till putrefaction, without sending for him, they shall be amerced. *Hale's Pl.* 170. 2 *Haw.* 48.

When notice is given to the coroner, he is to issue a precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men of their townships, to appear before him in such a place, to make an inquisition touching that matter. 4 *Ed.* 1. 2 *H. H.* 59. Or he may send his precept to the constable of the hundred. *Wood b.* 4. *c.* 1.

But the aforesaid statute being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty not mentioned in it, which was incident to his office before: Upon which ground, it hath been holden, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent towns; but that it is sufficient to say, that it was taken by the oaths of lawful persons of the

the county; inasmuch as such inquisitions, being good before the statute, which is wholly declaratory, must needs be so still. But it seems that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn. 2 *Haw* 47.

These are to be at least 12; and it is said, that all persons of the neighbouring towns, above the age of 12 years, are bound to attend at the taking the inquisition, unless they have a reasonable excuse to the contrary. 2 *Inst.* 148. 2 *Haw.* 54.

If the constables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the constables or jurors in default shall be amerced before the judges of assize. 2 *H. H.* 59.

The jury appearing is to be sworn and charged by the coroner to enquire, upon the view of the body, how the party came by his death. 2 *H. H.* 60.

For he can take indictments of death, only upon view of the body, and not otherwise, therefore if the body be interred before he come, he must dig it up. And this he may do lawfully within any convenient time, as in 14 days. *Hale's Pl.* 170. 2 *Haw.* 48.

If the body cannot be viewed, the coroner can do nothing; but the justices of the peace shall inquire thereof. *Hale's Pl.* 170. 2 *Haw.* 48.

The jury being sworn, and the body upon view, he shall inquire upon the oaths of them, in this manner, by the statute of 4 *Ed.* 1. *st.* 2. called the statute *de officio coronatoris*; *viz.*

If they know where the person was slain; whether it were in any house, field, bed, tavern, or company:

Who are culpable, either of the act, or of the force; and who were present, either men or women, and of what age soever they be, if they can speak, or have any discretion:

And how many soever be found culpable, they shall be taken and delivered to the sheriff, and shall be committed to the gaol;

And such as be found, and be not culpable, shall be attached until the coming of the judges of assize.

And, by the same statute, if it fortune any such man be slain, which is found in the fields, or in the woods, first it is to be enquired, whether he were slain in the same place or not:

And if he were brought and laid there, they shall do so much as they can to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart:

It shall be also enquired, if the dead person were known, or else a stranger, and where he lay the night before.

Also, by the same statute, all wounds ought to be viewed, the length, breadth, and deepness; and with what weapons; and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be; and who gave the wound.

And they must hear evidence on all hands; if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office. 2 *H. H.* 157.

And by the aforesaid statute, if they be found culpable of the murder, the coroner shall immediately go to his house, and shall inquire what goods he hath, and what corn he hath in his graunge; and if he be a freeman, they shall inquire how much land he hath, and what it is worth yearly, and further, what corn he hath upon the ground: and likewise of his freehold, how much it is worth yearly, over and above the service due to the lord of the fee; and the land shall remain in the king's hands, until the lords of the fee have made fine for it:

And when they have thus enquired upon every thing, they shall cause all the land, corn, and goods to be valued, in like manner as if they should be sold immediately; and thereupon they shall be delivered to the whole township, which shall be answerable before the judges for all.

In like manner, by the said statute, it is to be inquired of them that be drowned, or suddenly dead, whether they were so drowned, or slain, or strangled by the sign of a cord tied streight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not slain, then ought the coroner to attach the finders, and all other in the company.

He shall also enquire, whether the persons found guilty, fled; for which flight they forfeit goods and chattels. 2 *Haw.* 48, 53.

And it hath been formerly held, that if a person were slain, and upon the coroner's inquest on view of the body, it were found that such a person fled, tho' the said person were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inquest is so solemn, that it is not traversable; also when the goods are once lawfully vested in the king, by that inquest the property of them cannot be divested. But this opinion seemeth harsh and unreasonable, that a man shall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inquest taken in his absence, without either hearing him, or giving him an opportunity of defending himself. 1 *Bac. Abr.* Coroner. D. 2 *Haw.* 54.

Also it is strongly holden in some books, that an inquest of self murder, found before a coroner, cannot be traversed; but the contrary opinion being also holden by books of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest by being removed into the king's bench by certiorari, may be there traversed by the executor or administrator of the person deceased; or in case the coroner's inquest find him to have been a lunatick, by the king or the lord of the manor. 1 *Bac. Abr.* Coron. D. 2 *Haw.* 54.

And if any person be slain or murdered in the day time, and the murderer escape untaken, the township shall be amerced. 2 *H.* 7. *c.* 1.

Concerning

Concerning horſes, boats, carts, and the like, whereby any are ſlain, which properly are called deodands, they alſo ſhall be valued, and delivered unto the towns as before. 4 *Ed.* 1. *ſt.* 2.

All which things muſt be enrolled in the rolls of the coroner. 4 *Ed.* 1 . *ſt.* 2.

And the ſheriffs ſhall have counter rolls with the coroner, of things belonging to their office. 3 *Ed.* 1. *c.* 10.

But it is not neceſſary that the inquiſition be taken in the very ſame place where the body was viewed; but they may adjourn to a place more convenient. 2 *Haw.* 48.

Immediately upon theſe things being inquired, the bodies of ſuch perſons being dead, or ſlain, ſhall be buried. 4 *Ed.* 1. *ſt.* 2.

By the 1 & 2 *P.* & *M. c.* 13. *ſ.* 5. Every coroner, upon any inquiſition before him found, whereby any perſon ſhall be indicted for murder or manſlaughter, or as acceſſary before the offence committed, ſhall put in writing the effect of the evidence given to the jury before him, being material; and ſhall bind over the witneſſes to the next general gaol delivery to give evidence; and ſhall certify the evidence, the recognizance, and the inquiſition or indictment before him taken and found, at or before the trial, on pain of being fined by the court.

By the expreſs words of which ſtatute, he may enquire of *acceſſaries before the fact*; but he cannot enquire of acceſſaries *after* the fact. 2 *Haw.* 48.

He ought alſo to enquire of the death of all perſons who die in priſon; that it may be known, whether they died by violence, or any unreaſonable hardſhips: for if a priſoner by the dureſs of the gaoler, comes to an untimely death, it is murder in the gaoler, and the law implies malice in reſpect of the cruelty. 3 *Inſt.* 52, 91.

And this inqueſt upon priſoners ought to conſiſt of a party jury, that is, ſix of the priſoners, and ſix of the next vill or townſhip, not priſoners. *Umfreville's Coroner* 212.

If the inquiſition ſhall be quaſhed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquiſition. *E.* 5 *G. K.* and *Saunders.* Str. 167. *M.* 9 *G.* Caſe of the coroner of *Wenlock.* Str. 533.

And if a coroner appear to have been corrupt in taking an inqueſt, it ſeems that a *melius inquirendum* ſhall go to ſpecial commiſſioners, who ſhall proceed not on view, but upon teſtimony; and the coroner ſhall have nothing to do with ſuch inqueſt: But where the inqueſt is quaſhed for want of form only, he ſhall take a new one in like manner, as if he had taken none before. 1 *Bac. Abr.* Coron. D.

IV. His power and duty in other matters.

He ought to inquire of treaſure that is found; who were the finders, and likewiſe who is ſuſpected thereof; and that may well be perceived, where one liveth riotouſly, haunting taverns, and hath done ſo of long time; hereupon he may be attached for ſuſpicion, by four, or ſix, or more pledges, if he may be found. 4 *Ed.* 1. *ſt.* 2.

Beſides his judicial place, he hath alſo an authority miniſterial as a ſheriff; namely when there is juſt exception taken to the ſheriff, judicial proceſs ſhall be awarded to the coroner, for the execution of the king's writs: and in ſome ſpecial caſes, the king's original writ ſhall be immediately directed to him. 4 *Inſt.* 271.

He is bound to be preſent in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood. b.* 4. *c.* 1.

V. His fees.

By the ſtatute of 3 *H.* 7. *c.* 1. The coroner ſhall have for his fee, upon every inquiſition taken upon the view of the body ſlain, 13*s.* 4*d.* of the goods and chattels of him that is the ſlayer and murderer if he have any goods; and if not, he ſhall have for his ſaid fee, of ſuch amerciaments as ſhall fortune any townſhip to be amerced for eſcape of ſuch murderer.

VI. His puniſhment for not doing his duty.

Coroners concealing felonies or not doing their duty thro' favour to the miſdoers, ſhall be impriſoned a year, and fined at the king's pleaſure. 3 *Ed.* 1. *c.* 9.

And by the 3 *H.* 7. *c.* 1. If any coroner be remiſs, and make not inquiſitions upon the view of the body dead, and certify the ſame to the gaol delivery; he ſhall forfeit to the king an hundred ſhillings.

And he ought to execute his office in perſon, and not by deputy: for he is a judicial officer. *Wood. b.* 4. *c.* 1. Otherwiſe it ſeemeth that he ſhall incur the aforeſaid penalties, for remiſſneſs or neglect of duty.

The coroner's precept to ſummon a jury.

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

THESE *are in the name of our ſovereign lord the king, to require you, immediately upon ſight hereof, to ſummon and warn* 24 *good and lawful men of the four next townſhips to*----------*in the ſaid county, to be and appear before me* A. C. *gentleman, one of the coroners of the county aforeſaid, at*--------*aforeſaid in the ſaid county, on the*----------*day of*----------*then and there to inquire of, do, and execute all ſuch things as on his majeſty's behalf ſhall be lawfully given them in charge, touching the death of* A. D. *And be you then there to certify what you ſhall have done in the premiſſes, and further to do and execute what in behalf of our ſaid lord the king ſhall be then and there injoined you. Given under my hand and ſeal the*----------*day of*----------.

When you come to the place appointed, call the conſtable or bailiff to make return of their warrants.

Then command three proclamations to be made, *O yes, ſilence is commanded.* Then call the jury after this manner; *You*

You good men that are returned to appear here this preſent time, to enquire for our ſovereign lord the king, anſwer to your names, as you ſhall be called, every man at the firſt call, upon pain and peril that ſhall fall thereon.

And ſuch of the jury who fail to appear, ſhall be fined *forty ſhillings*.

The jury appearing, ſwear fourteen or fifteen of them, and give the foreman his oath, thus,

YOU ſhall diligently inquire, and true preſentment make, on the behalf of our ſovereign lord the king, how and in what manner A. D. (or, *a perſon unknown*, as the caſe is) *here lying dead, came to his death; and of ſuch other matters relating to the ſame as ſhall be lawfully required of you, according to your evidence: So help you God.*

After the foreman is ſworn, the reſt may be ſworn, three or four together, as follows;

Such oath as A. F. *the foreman of this inqueſt hath for his part taken, you and every of you ſhall well and truly obſerve and keep on your parts reſpectively: So help you God.*

If the evidence be not ready, you may adjourn until another day and place to receive their evidence, binding the jury by recognizance in twenty pound each for their appearance.

Then ſend out your warrant for the witneſſes, commanding them to come to be examined before you, and to deliver their knowledge touching the matter in queſtion. And when they appear, take their examinations in writing under their hands.

If it be about the trial of a man's life, then muſt the witneſſes be all bound over in twenty pound a piece, at the leaſt, perſonally to appear at the next aſſizes, to deliver their knowledge therein.

The recognizance muſt be in this Manner, *viz.*

THE 22d *Day of* Auguſt, *in the third year of the reign of our ſovereign lord king* GEORGE *the third, of* Great-Britain, *&c.* A. B. *of* C. *came before me* D. E. *one of his majeſty's coroners*, &c. *and acknowledged himſelf to be indebted to our ſovereign lord the king*, &c.

THE Condition of this recognizance is ſuch, That if the above-bounden *A. B.* do perſonally appear before the juſtices of aſſize and gaol-delivery, at the next aſſizes to be holden at------for the ſaid county, and then and there deliver and ſet forth his knowledge, touching the death of *A. D.* and do not depart thence without licence of the ſaid court, that then this recognizance to be void and of none effect, or elſe to be and remain in full force and virtue. *Acknowledged before me the day and year above-written.* D. E.

Then command three proclamations to be made, thus,

O yes, O yes, O yes, If any man can give evidence on the behalf of his majeſty, how and in what manner A. D. *here lying dead, came to his death, draw near and you ſhall be heard.*

The evidence appearing, give him, her or them the oath, *viz.*

THE

THE *evidence which you shall give to this inquest, on the behalf of our sovereign lord the king, touching the death of* A. D. *shall be the truth, the whole truth, and nothing but the truth: So help you God.*

The jury being sworn, command them to stand together and hear their charge, which the coroner must give, *viz.*

Gentlemen,

YOU that are sworn, you shall by your oath declare of the death of this man, whether he died of felony, or by mischance; and if of felony, whether of his own, or of another's; and if by mischance, whether by the act of god or man? And if of famine, whether of poverty or of common pestilence; and from whence he came, and who he was. And if he died of another's felony, who were principals and who were accessaries; and if hue-and-cry were made or not, and whether the man fled or not; you are also to enquire, whether he died of long imprisonment and hard usage there, or not; and who threatned him of his life or members? and so of all prevailing circumstances that can come by presumption.

And in case he died by hurt or fall, then you shall enquire the names of the finders, of his next neighbours, and who were his parents, and if he was killed there, or elsewhere; and if elsewhere, by whom and how he was brought: So also you are to enquire, if there was any *deodand*, and to whose hand it came.

And in case he died of another's felony, than you are to enquire who were the felons, from whence they came, and where they now are.

And if he died of his own felony, then you are to enquire of the manner, and how he came to make away with himself; and of the value of his goods, and where they are. All which you are to enquire of, and endeavour to find out. *So far the charge to the jury.*

Inquisition of murder.

New-Jersey, Essex County. AN *inquisition indented, taken at----------in the county of---------aforesaid, the----------day of--------in the------year of the reign of-------before me* A. C. *gentleman, one of the coroners of our lord the king, for the county aforesaid, upon the view of the body of* A. D. *then and there lying dead, upon the oaths of* A. B. C. D. E. F. *&c. good and lawful men of--------aforesaid, and of three other of the next towns, to wit,* K. L. *and* M. *in the said county, who being sworn and charged to inquire on the part of our said lord the king, when, where, how, and after what manner, the said* A. D. *came to his death, do say, upon their oath, that one* A. M. *late of ------aforesaid, gentleman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the------day of -------in the------year of--------aforesaid, at the first hour in the night of the same day, with force and arms, at--------in the county aforesaid, in and upon the aforesaid* A. D. *then and there being in the peace of God and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault; and that the aforesaid* A. M. *then*

then and there with a certain sword made of iron and steel, of the value of 5 s. *which he the said* A. M. *then and there held in his right hand, the aforesaid* A. D. *in and upon the left part of the belly of the said* A. D. *a little above the navel of the said* A. D. *then and there violently, feloniously, voluntarily, and of his malice forethought, struck and pierced, ; and gave to the said* A. D. *then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said* A. D. *a little above the navel of the said* A. D. *one mortal wound of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid* A. D. *then and there instantly died; and so the said* A. M. *then and there feloniously killed and murdered the said* A. D. *against the peace of our said lord the king, his crown and dignity.*

And the said jurors further say, upon their oath aforesaid, that A. A. *of*----------*yeoman, and* B. A. *of*----------*yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid in form aforesaid committed, that is to say, on the said*----------*day of*----------*in the*----------*year aforesaid, at*----------*aforesaid, in the county aforesaid, at the first hour in the night of the said day, then and there comforting, abetting, and aiding the said* A. M. *to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of our said lord the king, his crown and dignity.*

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. *and* B. A. *had not, nor any of them had, nor as yet have or hath any goods or chattles, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors.* [Or, *And the jurors aforesaid, upon their oath aforesaid, do say, that the said* A. M. *at the time of the doing and committing of the felony and murder aforesaid, had goods and chattles, contained in the inventory to this inquisition annexed, which remain in the custody of* B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. C. *Coroner.*

A. B.
C. D.
E. F. *&c. jurors.*

An inquisition where one hangs himself.

----------As above to----------*not having God before his eyes, but being seduced and moved by the instigation of the devil, at*----------*aforesaid, in a certain wood at*----------*aforesaid, standing and being the said* A. D. *being then and there alone, with a certain hempen cord of the value of* 3 d. *which he then and there had and held in his hands, and one end thereof then and there put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice forethought, hanged and suffocated; and so the jurors aforesaid, upon their*

their oaths aforesaid say, that the said A. D. *then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice forethought, himself killed, strangled, and murdered, against the peace,* &c.

An inquisition where one drowns himself.

---------at----------aforesaid, in the county aforesaid, then and there being alone, in a common river there, called---------himself voluntarily and feloniously drowned; And so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid A. D. *in manner and form aforesaid. then and there himself voluntarily and feloniously as a felon of himself killed and murdered; against the peace---------.*

An inquisition upon one who dies in gaol.

----------who say upon their oath, that the aforesaid A. D. *on the day of the taking of this inquisition, being a prisoner in the gaol at------- in the county aforesaid, then and there in the manner and form aforesaid came to his death, and not otherwise. In witness* &c.

An inquisition on one *non compos mentis,*

----------who say upon their oath, that the aforesaid A. D. *on the day and year aforesaid, and at the time of his death, to wit, from the ----------day of----------to the time of his death, and at the time of his death aforesaid, was a lunatick, and a person of insane mind; and that the said* A. D. *being a lunatick and a person of insane mind as aforesaid, did on the----------day of----------come alone to a certain river, called----------in the said county, and did then and there cast himself into the said river, and drowned himself in the water of the said river. And so the jurors aforesaid upon their oath aforesaid say, that the aforesaid* A. D. *from the cause aforesaid, in manner and form aforesaid came to his death, and not otherwise, In witness* &c.

An inquisition on one for cutting his throat.

-------by the instigation of the devil, at--------aforesaid in the county aforesaid, in and upon himself then and there being in the peace of god and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made on assault; and that the aforesaid A. D. *then and there with a certain knife, of the value of one penny, which he the said* A. D. *then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought did strike, and gave to himself then and there with the knife aforesaid, upon his throat aforesaid one mortal wound of the breadth of four inches, and the depth of one inch, of which said mortal wound the said* A. D. *at---------- aforesaid in the county aforesaid languished, and languishing lived, from the said---------day of----------in the----------year aforesaid, to the ---------day of----------and that the said* A. D. *on the--------day of ————aforesaid*

----------*aforesaid, in the*--------*year aforesaid, at*----------*aforesaid, in the county aforesaid, of that mortal wound died. And so the jurors aforesaid* &c.

For killing another in his own defence.

--------*upon their oaths say, that* A. K. *late of*---------*gentleman, at*----------*aforesaid in the said county, on the*----------*day of*--------*in the*-------*year of*--------*in the peace of god and of our said lord the king then being,* A. M. *late of*--------*in the county of*---------*at the hour of* ----------*in the afternoon of the same day, did come, and upon him the said* A. K. *then and there of his malice forethought did make an assault, and him the said* A. K. *did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one* W. H. *in*------ *aforesaid to a certain place called*--------*in the county aforesaid, and the said* A. K. *seeing that the said* A. M. *was so maliciously disposed, to a certain wall in the said place, called*---------*did flee, and from thence for fear of death could not escape, and so the said* A. K. *himself, in preservation of his life, against the said* A. M. *continued to defend, and in his own defence him the said* A. M. *upon the right part of the breast of him the said* A. M. *with a certain sword of the price of one shilling, which the said* A. K. *then and there held in his right hand, did strike, then and there giving to the same* A. M. *one mortal wound, of the breadth of one inch and of the depth of three inches, of which said mortal wound the said* A. M. *at*---------*aforesaid in the county aforesaid languished, and languishing lived from the said* ---------*day of*---------*to the*---------*day of*----------*from thence next ensuing, and that the said* A. M. *on the said*---------*day of*---------- *in the*---------*year aforesaid, at*---------*aforesaid in the said county, of that mortal wound died; And so the said* A. K. *did then and there kill him the said* A. M. *in his own defence.*

An inquisition where the murderer is unknown.

——— The same as before, only say,-------*that a certain person unknown* &c. and add-----*And the said jurors upon their oath aforesaid further say, that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did fly away: Against the peace* &c.

DEMURRER.

A *Demurrer* (from *demorari*) signifies an *abiding* in point of law, upon which the defendant joins issue, allowing the fact to be true as laid in the indictment. *Wood. b.* 4. *c.* 5.

In criminal cases not capital, if the defendant demur to an indictment, the court will not give judgment against him to answer over, but final judgment. 2 *Haw.* 334.

But

But regularly in all cases of felony, where a man pleads a special matter, tho' he conclude his plea with not guilty to the felony, or do not conclude it so, yet if his plea be tried, or found, or ruled against him, he shall be put to his plea of not guilty, and be tried for the felony; for tho' a man shall lose his land in some cases, for mispleading, yet he shall not lose his life for mispleading. 2 *H. H.* 257.

DEODAND.

DEODAND is, when any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 3 *Inst.* 57.

This, altho' it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder: And the unhappy instrument or occasion of such death, is called a *deodand (deo dandum)* and forfeited to the king, to be disposed of to pious uses, by the king's almoner; as also are all such weapons whereby one man kills another. 3 *Inst.* 57. 1 *Hawk.* 66.

It seems clearly settled, contrary to the former opinions, that a horse, or the like, killing an *infant* within the age of discretion, is as much forfeited as if he were of age. 1 *Hawk.* 66.

Also, it was anciently holden, that things *fixed to a freehold*, as the wheel of a mill, or a bell hanging in the steeple, may be deodands; but by the latter resolutions they cannot, unless they were severed before the accident happened. 1 *Hawk.* 66.

It is agreed by all, that a *ship* in salt water, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes not such misfortunes to the ship. Also it seems clear, that when a man riding on a horse over a river, is drowned thro' the violence of the stream, the horse is not forfeited, because not that, but the water caused his death. But it is said, that a ship, by a fall from which a man is drowned, in the fresh water, shall be forfeited, but not the merchandize therein; because they no ways contributed to his death. And by the same reason it seems, that if a man riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon, only are forfeited, and not the loading, because it no way contributed to his death: for which cause, where a thing not in motion causes a man's death, that part thereof only, which is the immediate cause, is forfeited. As where one climbing upon the wheel of a cart, while it stands still, falls from it, and dies of the fall, the wheel only is forfeited: But if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt

hurt the greater; and it is a general rule, that wherever the thing which is the occaſion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo. 1 *Haw.* 66.

Thus a cart met a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon a high bank and overturned, and threw a perſon that was in the cart, juſt before the wheels of the waggon, and the waggon ran over him and killed him; it was reſolved in this caſe, that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved to the death. 1 *Salk.* 220.

If a weight of earth fall upon a worker in a mine, and kill him; the weight of earth is forfeit, and not the whole mine. 1 *H. H.* 420.

In all theſe caſes, if the party wounded die not of his wound, within a year and a day after he received it, there ſhall be nothing forfeited, for the law doth not look on ſuch a wound as the cauſe of a man's death, after which he lives ſo long: But if the party die within that time, the forfeiture ſhall have relation to the wound given, and cannot be ſaved by any alienation or other act whatſoever in the mean time. 1 *Haw.* 67.

However nothing can be forfeited as a deodand, nor ſeized as ſuch, till it be found by the coroner's inqueſt to have cauſed a man's death; but after ſuch inquiſition, the ſheriff is anſwerable for the value of it, and may levy the ſame on the town where it fell, and therefore the inqueſt ought to find the value of it. 1 *Haw.* 67.

And if the coroner omits his duty in this caſe, the inquiſition may be made by the commiſſioners of gaol delivery, oyer and terminer, or of the peace. 1 *H. H.* 419.

DISTRESS.

THE remedy for recovering rent by way of diſtreſs ſeems firſt to have come over to us from the civil law. For anciently in the feudal law, the not paying attendance at the lord's courts, or not doing the feudal ſervice was a forfeiture of the eſtate: But theſe feudal forfeitures were afterwards turned into diſtreſſes, according to the pignorary method of the civil law; that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands, to anſwer the rent agreed to be paid to the landlord, and the whole profits ariſing from the land are liable to the lord's ſeizure for the payment and ſatisfaction thereof.

Concerning which, we will ſhew,

I. For

I. For what cauſes a diſtreſs ſhall be.

Diſtreſs for rent muſt be, for rent in arrear; therefore it may not be made on the ſame day on which the rent becomes due; for if the rent is paid in any part of that day, whilſt a man can ſee to count money, the payment is good.

It muſt not be after tender of payment; for if the landlord come to diſtrain the goods of his tenant for rent behind before the diſtreſs, the tenant may upon the land tender the arrearages, and if after that a diſtreſs be taken, it is wrongful: And if the landlord have diſtrained; if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the diſtreſs, and if he doth not, the detainer is unlawful. Even ſo it is, in caſe of a diſtreſs for damage feaſant (or damage done by cattle treſpaſſing) the tender of amends before the diſtreſs, maketh the diſtreſs unlawful; and after the diſtreſs, and before the impounding, the detainer unlawful. 2 *Inſt.* 107.

But in this caſe, altho' the owner tender ſufficient amends, yet he cannot take his beaſts out of the pound, if the amends be refuſed; but he muſt replevy: and if it be found at the trial that the amends was not ſufficient, the perſon on whom they treſpaſſed ſhall have damages; if the amends tendered were ſufficient, then the owner of the beaſts ſhall have damages. *Dr. & St.* 112.

Note, there are three kinds of rents; rent *ſervice*, rent *charge*, and rent *ſeck*.

Rent *ſervice* is, where the tenant holdeth his land of his lord, by fealty and certain rent; or by homage, fealty, and certain rent; or by

by other ſervice, and certain rent. And it is called a rent ſervice, becauſe it hath ſome corporal ſervice incident to it, which at the leaſt is fealty. 1 *Inſt.* 141, 2.

Rent *charge* is ſo called, becauſe the land for payment thereof, is charged with a diſtreſs; but before this act ſuch diſtreſs could not be ſold, but only detained till the rent ſhould be paid. 4 *G.* 2. *c.* 28.

If the rent be reſerved, without any clauſe put in the deed of diſtreſs for the ſame, then it is called a rent *ſeck*, *redditus ſiccus*, or dry rent: and the difference between a rent charge and a rent ſeck is, that there is a clauſe of diſtreſs annexed to one, and no ſuch clauſe to the other; and therefore the one is a charge upon the land, but for the other the grantee had formerly no remedy but to charge the perſon of the grantor in a writ of annuity. 1 *Inſt.* 143.

Rents of *aſſize* are the certain rents of freeholders and ancient copyholders, ſo called becauſe they are aſſized and certain, and thereby diſtinguiſhed from *redditus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. 2 *Inſt.* 19.

Where the agreement is not by deed, the landlord may recover a reaſonable ſatisfaction, in an action on the caſe. 11 *G.* 2. *c.* 19. *ſ.* 14.

So an action of debt may be brought againſt a tenant for life, in purſuance of the ſtatute of the 8 *An.* *c.* 14. which enacteth, that whereas before the ſaid ſtatute no action of debt did lie againſt a tenant for life or lives, for any arrears of rent during the continuance of ſuch eſtate for life or lives; it ſhall be lawful, for any perſon having any rent in arrear or due upon any leaſe or demiſe for life or lives, to bring an action of debt for ſuch arrears, in like manner as he might have done in caſe ſuch rent were reſerved upon a leaſe for years. *ſ.* 4.

Perſons having rent in arrear, upon any leaſe determined, may diſtrain for ſuch arrears after the determination of the leaſe, in the ſame manner as if it had not been determined; provided that ſuch diſtreſs be made in ſix months after the determination of ſuch leaſe, and during the continuance of ſuch landlord's title or intereſt, and during the poſſeſſion of the tenant from whom ſuch arrear became due. 8 *An.* *c.* 14. *ſ.* 6, 7.

Before the ſtatute of the 17 *C.* 2. *c.* 7. in caſe a diſtreſs was too little, where ſufficient diſtreſs was to be had, a man could not diſtrain again, be the demand never ſo great; for it was his folly that at firſt he diſtrained no more. *Mo.* 7. *Comb.* 546.

But now, by the ſaid ſtatute, in all caſes where the value of the cattle diſtrained ſhall not be found to be to the full value of the arrears diſtrained for; the party to whom ſuch arrears were due, his executors or adminiſtrators, may diſtrain again for the reſidue of the ſaid arrears. *ſ.* 4.

If any diſtreſs and ſale ſhall be made, for rent in arrear and due, when none is in truth due, the owner ſhall recover double value with full coſts. 2 *W.* *Seſſ.* 1. *c.* 5. *ſ.* 5.

And

And if the diſtreſs be taken of goods without cauſe, the owner may make *reſcous*; but if they be diſtrained without cauſe and impounded, the owner cannot break the pound and take them out, becauſe they are in the cuſtody of the law. 1 *Inſt.* 47.

II. What goods may be diſtrained, and what not.

Diſtreſs for rent muſt be of a thing, whereof a valuable property is in ſomebody; and therefore, dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be diſtrained, 1 *Inſt.* 47.

Altho' it be of valuable property, as a horſe; yet when a man or woman is riding on him, or an ax in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be diſtrained. 1 *Inſt.* 47.

But it is ſaid, that if one be riding upon an horſe damage feaſant, the horſe may be led to the pound with the rider upon him. 1 *Sid.* 422, 440.

And it hath been held, that horſes joined to a cart, with a man upon it, cannot be diſtrained for rent (altho' they may for damage feaſant); but both cart and horſes may, if the man be not upon the cart. 1 *Vent.* 36.

Valuable things ſhall not be diſtrained for rent, for benefit and maintainance of trades, which by conſequent are for the commonwealth, and are there by authority of law: as a horſe in a ſmith's ſhop ſhall not be diſtrained for the rent iſſuing out of the ſhop, nor a horſe in a hoſtry, nor the materials in a weaver's ſhop for making of cloth, nor cloth or garments in a taylor's ſhop, nor ſacks of corn or meal in a mill, nor any thing diſtrained for damage feaſant, for it is in cuſtody of the law; and the like. 1 *Inſt.* 47.

Beaſts belonging to the plough ſhall not be diſtrained (which is the ancient common law of *England*, for no man ſhall be diſtrained by the utenſils or inſtruments of his trade or profeſſion, as the ax of the carpenter, or the books of a ſcholar) while goods or other beaſts may be diſtrained. 1 *Inſt.* 47.

But this rule holds only in diſtreſſes for rent arrear, amerciaments, and the like; but doth not extend to caſes, where a diſtreſs is given, in the nature of an execution, by any particular ſtatute, as for poor rates, and the like. 3 *Salk.* 136.

Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a houſe, or the like, cannot be diſtrained. 1 *Inſt.* 47.

Things for which a replevin will not lie, ſo as to be known again, as money out of a bag, cannot be diſtrained. 2 *Bac. Abr.* 109.

But money in a bag ſealed may be diſtrained; for that the bag ſealed may be known again.

By the 2 *W. ſeſſ.* 1. *c.* 5. Perſons having rent arrear on any demiſe, leaſe, or contract, may ſeize and ſecure any ſheaves or cocks of corn, or corn looſe or in the ſtraw, or hay being in any barn or granary, or upon any hovel, ſtack, or rick, or otherwiſe upon any part

part of the land charged with the rent, and may lock up or detain the ſame in the place where found, in the nature of a diſtreſs; ſo as the ſame be not removed to the damage of the owner, out of the place where found and ſeized, but be kept there (as impound) till replevied or ſold. *ſ.* 3.

Where a ſtranger's beaſts eſcape into the land, they may be diſtrained for rent, tho' they have not been levant and couchant (that is, tho' they have not been in the ground for a good ſpace of time, or ſo long as to have laid down and roſe up again to feed) provided they are treſpaſſers; But if the tenant of the land is in default, in not repairing his fences, whereby the beaſts came into the land, the leſſor cannot diſtrain ſuch beaſts, tho' they have been levant and couchant, unleſs he have given notice to the owner, and he ſuffer them to remain there afterwards. *Lutw.* 364.

In caſe of rent reſerved upon a leaſe for years, the leſſor cannot diſtrain ſuch cattle, until they be levant and couchant; for if the leſſor had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a leſſee, he ought by covenant to oblige him to repair: and therefore in that caſe, if the law would allow the leſſor to diſtrain the cattle of a ſtranger which come in by eſcape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong. Therefore if the cattle come in by default of the owner of the cattle, then they may be diſtrained before they be levant and couchant; but if in default of the tenant of the land, there they cannot be diſtrained until they have been levant and couchant, that is to ſay, for rent upon leaſes for years. And in ſuch caſe, the leſſor ſhall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his diſtreſs; and if he doth not come to take them away, then they become diſtrainable, And by *Treby* chief juſtice; Where the cattle eſcape accidentally, there they are not diſtrainable, until they have been levant and couchant; but if they eſcape by default of their owner, they are diſtrainable the firſt minute. L. *Raym.* 168, 9.

If ten head of cattle are doing damage, a man cannot take one of them and keep it till he be ſatisfied for the whole damage; but he may bring an action of treſpaſs for the reſt. 12 *Mod.* 660. H. 13 W. Vaſper and Edwards.

If a man hath common for ten cattle, and he puts in more; the ſurpluſage above ten may be taken damage feaſant. 1 *Roll's Abr.* 665.

If a man come to diſtrain, and ſee the beaſts in his ground, and the owner chace them out, of purpoſe before the diſtreſs taken; yet the owner of the ſoil cannot diſtrain them, and if he doth the owner of the cattle may reſcue them, for the beaſts muſt be damage feaſant at the time of the diſtreſs. 1 *Inſt.* 161.

For diſtreſs damage feaſant is the ſtricteſt diſtreſs that is; and the thing diſtrained muſt be taken in the very act: for if the goods are once off, tho' on freſh purſuit, the owner of the ground cannot take them. 12 *Mod.* 661.

III.

III. At what time the diſtreſs ſhall be taken.

For a rent or ſervice the lord cannot diſtrain in the night, but in the day time; and ſo it is of a rent charge: but for damage feaſant, one may diſtrain in the night, otherwiſe it may be, the beaſts will be gone before he can take them. 1 *Inſt.* 142.

For before ſun riſing, or after ſun ſet, no man may diſtrain but for damage feaſant. *Mirrour c.* 2. *ſ.* 26.

IV. Where the diſtreſs ſhall be made.

The king's officers, as ſheriffs and others, ſhall not take diſtreſſes in the fees wherewith churches in times paſt have been endowed; but diſtreſſes may be taken in poſſeſſions of the church newly purchaſed. 9 *Ed.* 2 *c.* 9.

A man may diſtrain in places or lands within the fee, liable to diſtreſs, and not elſewhere. 52 *H.* 3. *c.* 15. 2 *Inſt.* 131. *Mir. c.* 2. *ſ.* 26.

And by the 11 *G.* 2 *c.* 19. The landlord may diſtrain any cattle or ſtock of the tenant, depaſturing on any common appendant or appurtenant, or any ways belonging to the premiſſes demiſed. *ſ.* 8.

No perſon (except the king's officers) ſhall take diſtreſſes in the king's highway. 52 *H.* 3. *c.* 15.

And the reaſon is, becauſe the king's ſubjects ought to have free paſſage, as well to fairs and markets, as about their other affairs. But yet this ſhall not be taken, to make the diſtreſs utterly unlawful, ſo as to take advantage thereof in bar to an avowry, but to this purpoſe that if the lord diſtrain in the highway, the tenant may have an action againſt him upon this ſtatute. 2 *Inſt.* 131, 132.

But by the 11 *G.* 2. *c.* 19. If any tenant for life, years, at will, ſufferance, or otherwiſe, ſhall fraudently or clandeſtinely convey off the premiſſes his goods or chattels, to prevent the landlord from diſtraining; ſuch landlord, or any perſon by him lawfully impowered, may in 30 days next after ſuch conveying away, ſeize the ſame wherever they ſhall be found, and diſpoſe of them in ſuch manner, as if they had been diſtrained on the premiſſes. *ſ.* 1.

But no landlord ſhall diſtrain any goods ſold *bona fide*, and for a valuable conſideration, before ſuch ſeizure made, to any perſon not privy to ſuch fraud. *ſ.* 2.

And if any tenant ſhall ſo fraudently remove and convey away his goods or chattels, or if any perſon or perſons ſhall wilfully and knowingly aid or aſſiſt him in ſuch fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing the ſame; every perſon ſo offending ſhall forfeit to the landlord double the value of ſuch goods, to be recovered in any court of record at *Weſtminſter*. *ſ.* 3.

But if the goods and chattels ſo fraudently carried off or concealed ſhall not exceed the value of 50*l.* the landlord or his agent may exhibit a complaint in writing before two juſtices of the peace of the ſame county

county or diviſion, reſiding near the place whence ſuch goods and chattels were removed, or near the place where the ſame were found, not being intereſted in the lands or tenements whence ſuch goods were removed; who may ſummon the parties concerned, examine the fact, and all proper witneſſes upon oath (or if it is a quaker, upon affirmation required by law;) and in a ſummary way determine whether ſuch perſon or perſons be guilty of the offence, with which he or they are charged, and to inquire in like manner of the value of ſuch goods and chattels; and upon full proof of the offence, by order under their hands and ſeals the ſaid juſtices ſhall adjudge the offender or offenders to pay double the value of the ſaid goods and chattels, to ſuch landlord, his bailiff, ſervant or agent, at ſuch time as the ſaid juſtices ſhall appoint: And if the offender or offenders having notice of ſuch order, ſhall refuſe or neglect ſo to do, they ſhall by their warrant levy the ſame by diſtreſs; and for want of ſuch diſtreſs may commit the offender or offenders to the houſe of correction there to be kept to hard labour, without bail or mainprize, for the ſpace of ſix months, unleſs the money ſo ordered to be paid as aforeſaid ſhall be ſooner ſatisfied. *ſ.* 4.

Perſons aggrieved by order of ſuch juſtices, may appeal to the next general or quarter ſeſſions; who may give coſts to either party. *ſ.* 5.

And where the party appealing ſhall enter into recognizance, with one or two ſureties, in double the ſum ſo ordered to be paid, with condition to appear at ſuch ſeſſions: the order of the juſtices ſhall not be executed againſt him in the mean time. *ſ.* 6.

V. That reaſonable diſtreſs ſhall be taken.

Diſtreſſes ſhall be reaſonable, and not too great; and he that taketh great and unreaſonable diſtreſſes, ſhall be grievouſly amerced. 52 *H.* 3. *c.* 4. For example, if the lord diſtrain two or three oxen for 12 *d.* or the like ſmall ſum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12 *d.* of his own ſhewing, he ſhall make fine: or the party may have his action upon this ſtatute. 2 *Inſt.* 107.

If the lord diſtrain an ox, or horſe, for a penny; if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive: but if there were a ſheep, or a ſwine, or the like, then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 *Inſt.* 107.

VI. Manner of making diſtreſs.

Gates or incloſures may not be broken open, nor thrown down, to make diſtreſs. 1 *Inſt.* 161.

Nor may the leſſor enter into the tenant's houſe, unleſs the doors are open. *Read.* Diſtr. 2 *Bac. Abr.* 111.

Upon a queſtion about taking a diſtreſs, it was held by the lord chief juſtice *Hardwicke*, at the ſummer aſſizes at *Exeter*, 1735, that a padlock put on a barn door could not be opened by force, to take the corn by way of diſtreſs. *Vin.* Diſtr. (E. 2.) 6.

Where any goods or chattels fraudulently or clandeſtinely conveyed or carried away, ſhall be put, placed, or kept in any houſe, barn, ſtable, outhouſe, yard, cloſe, or place, locked up, faſtened, or otherwiſe ſecured, ſo as to prevent ſuch goods or chattels from being taken and ſeized as a diſtreſs for arrears of rent; it ſhall be lawful for the landlord, or his ſteward, bailiff, receiver, or other perſon or perſons impowered, to take and ſeize, as a diſtreſs for rent, ſuch goods and chattels (firſt calling to his aſſiſtance the conſtable, of the diſtrict, or place, where the ſame ſhall be ſuſpected to be concealed, and in caſe of a dwelling houſe, oath being alſo firſt made before a juſtice of the peace, of a reaſonable ground to ſuſpect that ſuch goods or chattels are therein) in the day time to break open and enter into ſuch houſe, barn, ſtable, outhouſe, yard, cloſe, and place; and to take and ſeize ſuch goods and chattels for the ſaid arrears of rent, as he might have done if they had been in any open place. 11 *G.* 2. *c.* 19. *ſ.* 7.

But except it be in this caſe where the goods are clandeſtinely conveyed, it may ſeem from what hath been ſaid, that the landlord hath no mean to come at the goods in order to make diſtreſs, if the tenant ſhall think fit to lock up his gates, and ſhut the doors: And the like may be obſerved in caſes of diſtreſs for the levying a penalty, by warrant of juſtices of the peace. Which matter may ſeem to require ſome conſideration.

If a landlord comes into a houſe, and ſeizes upon ſome goods as a diſtreſs, in the name of all the goods of the houſe; that will be a good ſeizure of all. 6 *Mod.* 215.

VII. Diſtreſs how to be demeaned.

By the 52 H. 3. c. 4. *None ſhall cauſe any diſtreſs that he hath taken, to be driven out of the county where it was taken: and if one neighbour do ſo to another of his own authority* (as for damage feaſant, or rent charge, 2 Inſt. 106.) *he ſhall make fine as for a thing done againſt the peace; and if the lord ſo preſume to do againſt his tenant, he ſhall be grievouſly puniſhed by amerciament.*

Before this act, at the common law, a man might have driven the diſtreſs to what county he pleaſed: which was miſchievous, for two cauſes; 1. Becauſe the tenant was bound to give the beaſts being impounded in an open pound ſuſtenance, and being carried into another county, by common intendment he could have no knowledge where they were. 2. He could not know where to have a replevy; but the party was, before this ſtatute, driven to his action upon the caſe. 2. *Inſt.* 106.

And albeit this ſtatute be in the negative, yet if the tenancy be in one county, and the manor in another county, the lord may drive the diſtreſs which he taketh in the tenancy to his manor in the other county; for that the tenant is out of both the ſaid miſchiefs: for the tenant by doing of ſuit and ſervice to the manor, by common intendment may know what is done there, and therefore may give his beaſts

beasts sustenance. And to know where to have his replevy, the bailiff of the manor usually drives the cattle distrained to the pound of the manor. And hereby it is to be noted, that a case out of the mischief, is out of the meaning of the law, tho' it be within the letter. 2 *Inst*, 106.

And by the 1 & 2 *P. & M. c.* 12. it is further enacted, that *no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe, where such distress shall be taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the said distress was taken; and no cattle or other goods distrained for any cause at one time, shall be impounded in several places, whereby the owner may be constrained to sue several replevies; on pain of* 100 *s. to the party grieved, and treble damages.* s. 1.

T. 21 *G.* 2. *Gimbart* and *Pelah.* The defendant justified impounding cattle damage feasant. And on evidence it appeared, he put them in the next pound, though it happened to be in another county, And *Lee* Ch J. held, it did not make him a trespasser, though it subjected him to the penalty of the statute of the 1 & 2 *P. & M. Str.* 1272.

Note, a pound is either *overt* or open, as in a pinfold made for such purposes, or in his own close, or in the close of another by his consent; and it is therefore called open, because the owner may give his cattle meat and drink, without trespass to any other, and then the cattle must be sustained at the peril of the owner: Or it is a pound *covert* or close, as to impound the cattle in some part of his house; and then the cattle must be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore. 1 *Inst.* 47.

But if the distress be of utensils of household, or such like dead goods, which may take harm by wet or weather, or be stolen away; there he must impound them in a house, or other pound *covert*, within three miles in the same county; for if he impound them in a pound *overt*, he must answer for them. 1 *Inst.* 47.

Cattle distrained may not be worked or used, unless for the owner's benefit, as a cow milked, or the like; much less may they be abused or hurt. *Cro. Jac.* 148.

And it hath been said in this case, that even a cow may not be milked; for tho' the cow be better for this, yet he who took the distress ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, yet he who took the distress may distrain again. 2 *Bac. Abr.* 112.

So if the distress be lost by the act of God: as if the distress dies in the pound, without any default in the distrainer; in such case, he who made the distress may distrain again. 1 *Salk.* 248.

It is the distrainer's own fault, if he puts the distress in a pound which will not hold it; but he cannot justify the tying of cattle in the pound; and if he ties a beast, and it is strangled, he must pay damages. 1 *Salk.* 248.

VIII. Of reſcous and pound breach.

By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth againſt the peace, and doth treſpaſs to the king, and to the lord of the fee, and to the ſheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of juſtice; and therefore hue and cry is to be levied againſt him, as againſt thoſe who break the peace. *Mir. c.* 2 *ſ.* 26.

And by ſtatute, on any pound-breach or reſcous, of goods diſtrained for rent, the perſon grieved thereby, ſhall in a ſpecial action upon the caſe, recover treble damages and coſts againſt the offender, or againſt the owner of the goods, if they be afterwards found to have come to his uſe or poſſeſſion. 2 *W. ſeſſ.* 2. *c.* 5. *ſ.* 4.

Treble damages and coſts] In the caſe of Sir *Wilfred Lawſon* v. *Storey*, *M.* 6 *W.* It was adjudged, that the coſts ſhall be trebled as well as damages. L. *Raym.* 20.

When a man hath taken diſtreſs, and the cattle diſtrained, as he is driving them to the pound, go into the houſe of the owner; if he that took the diſtreſs demand them of the owner, and he deliver them not, this is a reſcous in law. 1 *Inſt.* 161.

IX. Replevying the diſtreſs.

It is worthy of obſervation, how provident the law is, that mens beaſts, cattle, or other goods be not unjuſtly or exceſſively diſtrained; and if they be, that deliverance be ſpeedily made of them by replevy: otherwiſe the huſbandry of the realm, and mens other trades, might be overthrown or hindered. 2 *Inſt.* 106.

And the ſheriff, or other officer having authority to grant replevins, ſhall in every replevin of a diſtreſs for rent, take in his own name, from the plaintiff and two ſureties, a bond in double the value of the goods diſtrained, to be aſcertained on the oath of one witneſs, and conditioned for proſecuting the ſuit with effect, and without delay, and for duly returning the goods diſtrained, in caſe a return ſhall be awarded; before any deliverance be made of the diſtreſs: and the ſheriff ſhall aſſign ſuch bond to the *avowant*, or perſon making *conuſance*. 11 G. 2. c. 19. ſ. 23.

Note, *avowry* is, where one takes a diſtreſs, and the perſon diſtrained ſues a replevin; then he that took the diſtreſs muſt *avow* and juſtify in his plea, for what cauſe he took it, if he took it in his own right; and this is called an *avowry*: If he took it in the right of another, then, when he hath ſhewed the cauſe, he muſt make *conuſance* of the taking, as bailiff or ſervant to him, in whoſe right he took it. *Terms of the L.*

X. Sale of the diſtreſs.

Diſtreſs taken for an offence preſented in the leet, may of common right be ſold, becauſe it is a court of record; but otherwiſe it is, of diſtreſſes in courts that are not of record. 12 *Mod.* 330.

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So a diſtreſs for an amercement in a court baron cannot be ſold; but in ſuch caſe a diſtreſs infinite ſhall go. 1 *Bulſt.* 52, 53.

In like manner before the ſtatue of the 2 *W. ſſ.* 1 *c.* 5. diſtreſs for rent in arrear could not be ſold, but only detained till payment of the rent: But by the ſaid ſtatute it is enacted, that *whereas the moſt ordinary and ready way for recovery of arrears of rent is by diſtreſs, yet ſuch diſtreſſes not being to be ſold, but only detained as pledges for enforcing the payment of ſuch rent, the perſons diſtraining have little benefit thereby; therefore from henceforth, where any goods ſhall be diſtrained for rent reſerved and due upon any demiſe, leaſe or contract whatſoever, and the tenant, or owner of the goods diſtrained, ſhall not within five days next after ſuch diſtreſs taken, and notice thereof (with the cauſe of ſuch taking) left at the chief manſion houſe, or other moſt notorious place on the premiſſes, replevy the ſame; in ſuch caſe the perſon diſtraining ſhall, with the ſheriff or under-ſheriff of the county, or with the conſtable of the hundred, pariſh, or place, where ſuch diſtreſs ſhall be taken, cauſe the goods and chattels ſo diſtrained to be appraiſed by two ſworn appraiſers (whom ſuch ſheriff, under-ſheriff, or conſtable ſhall ſwear) to appraiſe the ſame truly, according to the beſt of their underſtandings; and after ſuch appraiſemén, ſhall ſell the ſame for the beſt price can be gotten for them, for ſatisfaction of the rent, and charges of the diſtreſs, appraiſement, and ſale; leaving the overplus (if any) with the ſheriff, under-ſheriff, or conſtable, for the owner's uſe.* 2 W. ſeſſ. 1. c. 5. ſ. 2.

XI. Irregularity in the proceedings.

Where any diſtreſs ſhall be made, for any kind of rent juſtly due, and any irregularity ſhall be afterwards done by the party diſtraining, or his agent; the diſtreſs ſhall not be deemed unlawful, nor the diſtrainer a treſpaſſer *ab initio*, but the party aggrieved may recover ſatisfaction for the ſpecial damage, in an action of treſpaſs or on the caſe; and if he recover, he ſhall have full coſts. 11 *G.* 2. *c.* 19. *ſ.* 19.

But no tenant ſhall recover on ſuch action, if tender of amends hath been made before the action brought. *ſ.* 20.

XII. Landlord re-entring on non-payment.

In caſe where half a year's rent ſhall be in arrear, and the landlord or leſſor hath right by law to re-enter for non-payment thereof; he may, without any formal demand or re-entry, ſerve a declaration in ejectment; and on recovering judgment and execution, ſhall hold the premiſſes diſcharged from the leaſe. But this not to bar the right of any mortgagee. And if the defendant files a bill in equity, he ſhall not have an injunction againſt the proceedings at law, unleſs he ſhall bring the arrears into court, and alſo the coſts taxed in the ſaid ſuit. Provided, that if the tenant ſhall before the trial in ejectment, pay all the arrears and coſts, the proceedings on the ejectment ſhall thenceforth ceaſe. 4 *G.* 2. *c.* 28. *ſ.* 2, 3, 4.

XIII.

XIII. Case of tenant holding over.

If any tenant for life or years, or other person who shall come into possession by, from, or under him, shall willfully hold over any lands, after the determination of such term, and after demand made, and notice in writing given for delivering the possession thereof; he shall, from the time that he shall so hold over, pay double the yearly value thereof, to be recovered by action of debt, in any court of record. 4 *G.* 2. *c.* 28. *s.* 1.

But this remedy seemeth not altogether adequate to the evil; for three reasons. 1. Because such action is certainly tedious and expensive. 2. It is uncertain, when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into possession, is not obtained by such action, but for that he shall be still to seek. A more short and easy method of ousting the tenant of his possession, seemeth more eligible in the like cases.

If any tenant shall give notice of his intention to quit the premises, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at a time; he shall from thenceforth pay double rent, to be recovered in like manner as the single rent. 11. *G.* 2. *c.* 19. *s.* 8.

This clause also proceedeth upon a supposition, which perhaps may not be true, namely, that the tenant is a man of substance. It is more likely, that if he were able to live elsewhere, he would not chuse to hold over under such circumstances, nor perhaps would the landlord want to be rid of him. The putting him out of possession, by some expeditious and easy method, seemeth the more adequate remedy in this case also, in like manner as is provided in the case where the tenant deserteth the premises.

XIV. Rent in case of execution.

No goods being on any messuage, lands or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by execution, unless the party, at whose suit the execution is sued out, shall before the removal of such goods from off the premisses, pay to the landlord or his bailiff all such rents as shall be then due for the premisses, provided that it amount not to more than one year's rent; and if the said arrears shall exceed one year's rent, then the party paying such landlord one year's rent, may proceed to execute his judgment. 8 *An.* *c.* 14. *s.* 1.

XV. Rent how far recoverable by executors or administrators.

By the 32 *H.* 8. *c.* 37. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, fee tail, and for term of life, of rent services, rent charges, rents secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due to their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his

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eſtate after his deceaſe, may diſtrain or have action to levy the ſame; it is enacted, that the executors and adminiſtrators of every ſuch perſon to whom any ſuch rent or fee farm ſhall be due and not paid at the time of his death, may have an action of debt for the ſame, againſt the tenant who ought to have paid the ſame, or againſt his executors and adminiſtrators; or may diſtrain upon the premiſſes, ſo long as they continue in the poſſeſſion of ſuch tenant in demeſn who ought immediately to have paid the ſame to the teſtator in his life, or of any other perſon claiming the ſame only from or by ſuch tenant by purchaſe, gift, or deſcent. *ſ.* 1.

In like manner the huſband may have action, or diſtrain for arrears due in the life time and in the right of his wife. *ſ.* 3.

XVI. Of diſtreſs by warrant of juſtices of the peace.

By the 27 *G.* 2. *c.* 20. It is enacted as follows: *In all caſes where any juſtice of the peace is or ſhall be required or impowered by any act of parliament, to iſſue a warrant of diſtreſs, for the levying of any penalty inflicted, or any ſum of money directed to be paid by ſuch act; it ſhall be lawful for the juſtice granting ſuch warrant, therein to order and direct the goods and chattels ſo to be diſtrained, to be ſold and diſpoſed of, within a certain time to be limited in ſuch warrant, ſo as ſuch time be not leſs than four days, nor more than eight days, unleſs the penalty or ſum of money, for which ſuch diſtreſs ſhall be made, together with the reaſonable charges of taking and keeping ſuch diſtreſs, be ſooner paid.*

And the officer making ſuch diſtreſs, ſhall and may deduct the reaſonable charges of taking, keeping, and ſelling ſuch diſtreſs, out of the money ariſing by ſuch ſale; and the overplus (if any) after ſuch charges, and alſo the ſaid penalty or ſum of money, ſhall be ſatisfied and paid, ſhall be returned on demand, to the owner of the goods ſo diſtrained: and the officer executing ſuch warrant, if required, ſhall ſhew the ſame to the perſon whoſe goods are diſtrained, and ſhall ſuffer a copy thereof to be taken.

Officer may deduct the reaſonable charges] But here is no power given to the juſtices, to aſcertain ſuch charges, therefore it ſeemeth, that the officer executing the warrant ſhall be the ſole judge thereof in the firſt inſtance, and afterwards, if the owner of the goods diſtrained ſhall be diſſatisfied, the reaſonableneſs thereof ſhall be determined by a judge and jury upon an action brought.

Form of a complaint and oath to be made before a juſtice, in caſe of a dwelling-houſe, where goods and chattels are fraudently and clandeſtinely removed and conveyed away, and ſecured, ſo as to prevent them from being taken and ſeized as a diſtreſs for arrears of rent.

New-Jerſey, Middleſex County. BE *it remembered, that this*----------*day of* ----------A. I. *of*----------*yeoman, complaineth and maketh oath, that certain goods and chattels of* A. O. *of*-------*yeoman,*

yeoman, have been fraudently and clandeſtinely conveyed and carried away from----------by the ſaid A. O. *his ſervant or ſervants, agent or agents, or other perſon or perſons, aiding or aſſiſting therein, to prevent ----------from diſtraining the ſaid goods and chattels for arrears of rent due to the ſaid----------for the ſaid----------; And that the ſaid goods and chattels are put, placed, or kept, in the houſe, barn, ſtable, out-houſe, yard, cloſe or other place of----------at---------locked up, faſtened, or otherwiſe ſecured, ſo as to prevent the ſaid goods and chattels from being taken and ſeized as a diſtreſs for arrears of rent; and that the ſaid* A. I. *hath a reaſonable ground to ſuſpect, and doth ſupect, that the ſaid goods and chattels are in the dwelling houſe of the ſaid------ at----------*

A. I.

Taken and ſworn at--------the--------
day of----------before----

Warrant upon the preceeding complaint and oath.

New-Jerſey, } To any conſtable of ſaid county.
Middleſex County. }

WHEREAS A. I. *of----------yeoman, hath this----------day of---------exhibited his complaint and made oath, before--------- juſtice of the peace of----------that certain goods and chattels of* A. O. *of----------yeoman, have been fraudently and clandeſtinely conveyed and carried away from----------by the ſaid* A. O. *his ſervant or ſervants, agent or agents, or other perſon or perſons, aiding or aſſiſting therein, to prevent----------from diſtraining the ſaid goods and chattels for arrears of rent due to the ſaid----------for the ſaid ----------; And that the ſaid goods and chattels are put, placed, or kept in the houſe, barn, ſtable, outhouſe, yard, cloſe, or other place of---------at----------locked up, faſtened, or otherwiſe ſecured, ſo as to prevent the ſaid goods and chattels from being taken and ſeized as a diſtreſs for arrears of rent; And that the ſaid* A. I. *hath a reaſonable ground to ſuſpect, that the ſaid goods and chattels are in the dwelling houſe of---------at----------: Theſe are therefore to command you, to aid and aſſiſt----------his ſteward, bailiff, receiver, or other perſon or perſons impowered to take and ſeize, as a diſtreſs for rent, the ſaid goods and chattels, in the day time, to break open, and enter into the ſaid dwelling houſe, barn, ſtable, outhouſe, yard, cloſe, or other place of the ſaid----------at----------and to take and ſeize the ſaid goods and chattels for the ſaid arrears of rent, according to law. Given under my hand and ſeal at----------the---------day of----------*

The form of the inventory of the goods diſtrained may be this.

AN *inventory of the ſeveral goods and chattels, diſtrained by us whoſe names are underwritten, the--------day of-------in the year ------in the houſes, outhouſes, and lands, of* A. T. *in------by the authority*

authority and on the behalf of A. L. *of*-------*for*-------*pounds arrear of rent due to him the said* A. L.

In the dwelling house:
One table,
Six chairs, &c.
In the cow house:
Six cows,
Two calves, &c.

Notice.

A. T.

TAKE *notice, that by the authority and on the behalf of your landlord* A. L. *I have this*------*day of*-----*in the year of our lord*----- *distrained the several goods and chattels specified in the schedule hereunto annexed, in your houses, outhouses, and grounds, at*-------*for*-----*pounds arrear of rent due to him the said* A. L. *And if you shall not pay the said rent so due and in arrear as aforesaid, or replevy the said goods and chattels, I shall after the expiration of five days from the date hereof, cause the said goods and chattels to be appraised and sold, according to the statute in that case made and provided. Given under my hand the day and year first above written,*

A. D.

Witness that a copy hereof was this day delivered to the said A. T. (Or, *left at the chief mansion house of the said* A. T.)

A. W.

Appraisers oath.

YOU *and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your understanding: So help you god.*

Form of the appraisement.

THE appraisement may be in the form of the inventory, specifying the particulars, and their respective valuations: And then add at the end,

Appraised by us, this------*day of*-------*in the year*-------

A. P. }
B. P. } sworn appraisers.

Distringas. See *PROCESS.*
Dogs mischievous. See *NUSANCE.*
Door breaking open. See *ARREST.*
Drunkenness. See *ALEHOUSES.*
Duelling. See *HOMICIDE.*

ESCAPE.

THIS is to be understood of escapes in *criminal* cases; and not in *civil* cases, as for debt, or the like.

An escape is, where one that is arrested gaineth his liberty, before he is delivered by course of law. *Terms de la ley.*

Escapes are of three kinds. 1. By a person who hath the offender in his custody; this is properly called an *escape*. 2. Caused by a stranger; this is commonly called a *rescue*. 3. By the party himself; either without force, which is simply an escape, or with force, which is *prison breaking*. *Rescous* and *prison breaking* are treated of under their respective titles; and this title treats only of escapes properly so called. Concerning which we will treat in the following order:

I. Of escape by the party himself.
II. Escape suffered by a private person.
III. Escape suffered by an officer.
IV. What is a voluntary, and what a negligent escape.
V. Concerning the retaking of a person escaped.
VI. Indictment for an escape.
VII. Trial and conviction for an escape.
VIII. Punishment of an escape.
IX. Aiding in attempting to escape.

I. Of escape by the party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment, 2 *Haw.* 122.

But escape committed by the party himself, belongs more properly to the title *Prison breaking*.

II. Escape suffered by a private person.

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other who by law ought to have the custody of him. 2 *Haw.* 138.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. 2 *Haw.* 138.

III.

III. Escape suffered by an officer.

In order to make it an escape, there must be an actual arrest; and therefore, if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Haw.* 129.

And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 *Haw.* 129.

And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 *Haw.* 129.

Also if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, tho' the judgment were, that *he be discharged paying his fees*, so that till they be paid, the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor: Yet if a person convicted of a crime, be condemned to imprisonment for a certain time, and also *till he pay his fees*, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid; but it seems, that this is to be intended where 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 nonpayment of a debt in his power to release. 2 *Haw.* 129, 130.

Also, it is an escape in some cases, to suffer a prisoner to have greater liberty, than by the law he ought to have; as to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody. 2 *Haw.* 130.

So if a gaoler, or other officer, shall license his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of his prison, tho' the prisoner return again, according as he shall be prescribed. *Dalt. c.* 159.

If the gaoler so closely pursue the prisoner who flies from him, that he retakes him, without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, tho' he never lost sight of him, and could not otherwise take him, not only because the king loses the

the benefit he might have had by the forfeiture on his attainder, but alſo becauſe the publick juſtice is not ſo well ſatisfied by the killing him in ſuch an extrajudicial manner. 2 *Haw.* 130.

IV. What is a voluntary, and what a negligent eſcape.

Wherever an officer, who hath the cuſtody of a priſoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to ſave him from his trial or execution, this is a voluntary eſcape. 2 *Haw.* 130.

A negligent eſcape is, when the party arreſted or impriſoned doth eſcape againſt the will of him that arreſted or impriſoned him, and is not freſhly purſued and taken again, before he hath loſt the ſight of him. *Dalt. c.* 159.

If the conſtable or other officer, ſhall voluntarily ſuffer a thief, being in his cuſtody to go into the water to drown himſelf, this eſcape is felony in the conſtable, and the drowning is felony in the thief: Otherwiſe if the thief ſhall ſuddenly without the aſſent of the conſtable, kill, hang, or drown himſelf, this is but a negligent eſcape in the conſtable. *Dalt. c.* 159.

V. Concerning the retaking of a perſon eſcaped.

If an officer hath arreſted a man by virtue of a warrant, and then taketh his promiſe that he will come again, and ſo letteth him go; the officer cannot after arreſt or take him again by force of his former warrant, for that this was by conſent of the officer: But if he return, and put himſelf again under the cuſtody of the officer, it ſeems that it may be probably argued, that the officer may lawfully detain him, and bring him before the juſtice in purſuance of the warrant. *Dalt. c.* 169. 1 *Haw.* 81.

But if the party arreſted had eſcaped of his own wrong, without the conſent of the officer, now upon freſh ſuit, the officer may take him again and again, ſo often as he eſcapeth, altho' he were out of view, or that he ſhall fly into another town or county, and bring him before the juſtice upon whoſe warrant he was firſt arreſted. *Dalt. c.* 169.

And it is ſaid generally in ſome books, that an officer who hath negligently ſuffered a priſoner to eſcape, may retake him wherever he finds him, without mentioning any freſh purſuit; and indeed ſince the liberty gained by the priſoner is wholly owing to his own wrong, there ſeems to be no reaſon he ſhould take any manner of advantage from it. 2 *Haw.* 131, 132.

And wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes, and ſhelters him in a houſe, the doors may be broke open to take him, on refuſal of admittance. 2 *Haw.* 87.

It is perhaps the better opinion, that wherever a priſoner, by the negligence of his keeper, gets ſo far out of his power, that the keeper loſes ſight of him, the keeper is puniſhable for the eſcape, notwithſtanding

notwithſtanding he retook him immediately after: And it is clear, that he cannot excuſe himſelf from an eſcape, by killing a priſoner in the purſuit, tho' he could not poſſibly retake him; but muſt in ſuch caſe be content to ſubmit to ſuch puniſhment, as his negligence ſhall appear to deſerve. 2 *Haw.* 132.

VI. Indictment for an eſcape.

It ſeems clear, that every indictment for an eſcape, whether negligent or voluntary, muſt expreſly ſhew, that the priſoner was actually in the defendant's cuſtody, for ſuch a crime; and that he went at large; And if for a voluntary eſcape, that the defendant feloniouſly and voluntarily ſuffered him to go at large; and muſt ſet forth, not the felony in general, but the particular kind of felony: But it ſeems queſtionable, whether ſuch certainty, as to the nature of the crime, be neceſſary in an indictment for a negligent eſcape; for that it is not material in this caſe, whether the perſon who eſcaped were guilty or not. 2 *Haw.* 133, 229.

VII. Trial and conviction for an eſcape.

If the priſoner be of record in a court, and the gaoler being called, cannot give an account where he is, this is a conviction of an eſcape; but ſeems not a conviction of a voluntary eſcape, unleſs the gaoler confeſſeth it; And the gaoler may be fined in ſuch a caſe; but not convicted of felony, without indictment or preſentment. 1 *H. H.* 599, 603.

And it ſeems to be clear, that a keeper who voluntarily ſuffers another to eſcape, who was in his cuſtody for felony, cannot be arraigned for ſuch eſcape as for felony, until the principal be attainted, for that the felony of the priſoner ſhall not be tried between the king and the keeper, becauſe the priſoner is a ſtranger thereunto; yet he may be indicted and tried for it as a miſpriſion, before the attainder of the principal offender. 2 *Haw.* 135. 2 *Inſt.* 591. 592.

VIII. Puniſhment of an eſcape.

If a felon eſcapes before arreſt, it is not puniſhable in him as felony; but for the flight he forfeits his goods when preſented. *Hale's Pl.* 111.

If a private perſon arreſt a felon, and he eſcape by force from him, the townſhip ſhall be amerced, but it ſeems it excuſeth the party, becauſe he cannot raiſe power to aſſiſt him; but if a conſtable, or other officer, hath the cuſtody of a priſoner, bringing him to the gaol, it ſeems that a ſimple eſcape by the reſcue of the priſoner himſelf, doth not wholly excuſe him, becauſe he may take ſufficient ſtrength to his aſſiſtance. 1 *H. H.* 601.

Wherever a perſon is found guilty upon an indictment or preſentment of a negligent eſcape of a criminal actually in his cuſtody, he

is

is punishable by fine and imprisonment, according to the quality of the offence. 2 *Haw.* 136, 139. 1 *H. H.* 600, 604.

And it seems to be the better opinion, that a sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

Note; Mr. *Hawkins*, altho' he is one of the most accurate of all writers, yet hath inserted in this place certain penalties for escapes, which were expired above 200 years before. 2 *Haw.* 137.

If a prisoner for felony break the gaol, this seems to be a negligent escape in the gaoler, because there wanted either that due strength in the gaol, that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it; and therefore it is lawful for the gaoler to hamper them with irons to prevent their escape; for if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *H. H.* 601.

It seems to be generally agreed, that a voluntary escape suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. 2 *Haw.* 134.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c.* 159,

Also, a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner, as if he was never so rightfully intitled to such custody; for that the crime is in both cases of the same ill consequence to the 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. 2 *Haw.* 134

But it seemeth to be clear, that no one is punishable as for felony, for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, altho' in all civil causes, the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape; this, inasmuch as it reacheth to life, is felony only in the gaoler, that was immediately trusted with the custody, and not in the sheriff. 1 *H. H.* 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho' it were such in the gaoler, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person

perſon with the cuſtody of his priſoners, that would be falſe to his truſt, and therefore the ſheriff ſhall pay, but not corporally ſuffer for the miſcarriage of his gaoler. 1 *H. H.* 597, 598.

But altho' the felony for which a man is committed, be not within clergy; yet the perſon who voluntarily ſuffers him to eſcape, ſhall have the benefit of clergy. 1 *H. H.* 599.

IX. Aiding in attempting to eſcape.

By the 16 *G.* 2. *c.* 31. If any perſon ſhall aſſiſt any priſoner to *attempt* his eſcape from any gaol, though no eſcape be actually made, if ſuch priſoner was then attainted or convicted of treaſon or felony (except petty larceny) or lawfully committed to, or detained in any gaol, for treaſon or felony (except petty larceny) expreſſed in the warrant of commitment; he ſhall be guilty of felony, and be tranſported for ſeven years: And if ſuch priſoner was then convicted of, or detained in gaol for petty larceny, or any other crime not being treaſon or felony, expreſſed in the warrant of commitment, or was then in gaol for debt amounting to 100 *l.* he ſhall be guilty of a miſdemeanor, and be liable to fine and impriſonment.

And if any perſon ſhall convey, or cauſe to be conveyed any *diſguiſe, inſtrument, or arms,* to any priſoner in gaol, or to any other perſon there for his uſe, without conſent of the keeper; ſuch perſon, although *no eſcape or attempt* be actually made, ſhall be deemed to have delivered ſuch diſguiſe, inſtrument, or arms, with an intent to aſſiſt ſuch priſoner to eſcape or attempt to eſcape; and if ſuch priſoner then was attained or convicted of treaſon or felony (except petty larceny) or lawfully detained in gaol, for treaſon or felony (except petty larceny) expreſſed in the warrant of commitment;---he ſhall be guilty of felony, and be tranſported for ſeven years: But if the priſoner was then convicted or detained for petty larceny, or any other crime not being treaſon or felony, expreſſed in the warrant of commitment, or for debt amounting to 100 *l.* he ſhall be guilty of a miſdemeanor, and liable to fine and impriſonment.

And if any perſon ſhall aſſiſt any priſoner to attempt to eſcape *from any conſtable,* or other perſon, who ſhall have the lawful charge of him, in order to carry him to gaol, by virtue of a warrant of commitment for treaſon or felony (except petty larceny); or if any perſon ſhall aſſiſt any felon to attempt his eſcape from on board any *boat or veſſel carrying felons for tranſportation,* or from the *contractor* for the tranſportation of ſuch felons, or his agents, he ſhall be guilty of felony, and be tranſported for ſeven years.

All proſecutors on this act to be commenced within a year after the offence committed,

Indictment againſt a conſtable for an eſcape.

New-York, Ulſter county. THE *jurors for our lord the king upon their oath preſent, That on the----------day of----------in the----------year of the reign of----------at----------in the county aforeſaid,*

ſaid, one A. I. *of*————*came before* J. P. *eſquire, then and yet one of the juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed; and the ſaid* A. I. *did, then and there, on his oath before the ſame juſtice, charge, accuſe, and give information againſt one* A. O. *of*----------*aforeſaid, yeoman, for a certain miſdemeanor, in taking fiſh out of the pond of*--------*at*----------*in the ſaid county* [or, as the offence ſhall be:] *Whereupon he the ſaid* J. P. *the juſtice aforeſaid, did then and there, to wit, at*----------*aforeſaid, in the county aforeſaid, make a certain warrant, under his hand and ſeal, in due form of law directed to the conſtable of*----------*aforeſaid, in the county aforeſaid, thereby requiring him the ſaid conſtable to take the body of the ſaid* A. O. *and bring him before the ſaid* J. P. *the juſtice aforeſaid, to anſwer to ſuch matters and things as ſhould be alledged againſt him, touching the ſaid miſdemeanor; Which ſaid warrant, afterwards, to wit, on the ſame day and year abovementioned, at*----------*aforeſaid in the county aforeſaid, was delivered to one* A. C. *then being conſtable of*----------*aforeſaid, in due form of law, to be executed; by virtue of which ſaid warrant the ſaid* A. C. *afterwards, to wit, on the ſaid*----------*day of*----------*in the year aforeſaid, at*————*aforeſaid, in the ſaid county, did take and arreſt the body of the ſaid* A. O, *and him the ſaid* A. O. *in his cuſtody for the cauſe aforeſaid, had: Nevertheleſs, the ſaid* A. C. *of*---------- *aforeſaid, in the county aforeſaid, yeoman, afterward, to wit, on the ſaid*----------*day of*----------*in the year aforeſaid, the duty of his office, in that part not regarding, at*----------*aforeſaid in the county aforeſaid, unlawfully and negligently did permit the ſaid* A. O, *to eſcape, and go at large, out of the cuſtody of him the ſaid* A. C. *to the great hindrance of juſtice, in contempt of our ſaid lord the king, and of his laws, and againſt the peace of our ſaid lord the king, his crown and dignity.*

ESTRAY.

And herein alſo of goods *waived*

ESTRAY *is, where any horſes, ſheep, hogs, beaſts, or ſwans, do come into a lordſhip, and are not owned by any man.* Kitch. 23. *Where any horſes, ſheep, hogs, beaſts, or ſwans*] *Bees*, and other creatures of a wild nature, are not within this deſcription, and therefore not to be reckoned amongſt ſtray goods: nevertheleſs it ſeemeth that a ſwarm of bees, of which the owner hath loſt ſight, and conſequently can make out no property, may be ſeized for the uſe of the king, or of the lord of the manor; for it is a maxim of the common law, that ſuch goods whereof no one can claim property do belong to the king; and that which the king hath he may grant to another, and conſequently another may preſcribe to have the ſame, within

within such a precinct or lordship. And therefore it is said, that if any take honey or swarms of bees within the demesnes of the lord, it is inquirable in the court baron. *Kitch.* 114.

[Note, *There are particular laws relating to ESTRAYS in almost all the American* British *colonies, passed by the respective legislatures of each colony, which are always esteemed, to be the guides to the several inhabitants thereof, in respect to those matters.*]

Waif is, where a felon in pursuit waiveth the goods; or where the felon, for fear of being apprehended, thinking that a pursuit was made, having them with him in his possession, fleeth, and waiveth, casteth away, or goeth from the goods: in these cases, they shall be said to be waived in law. But if he hath not the goods with him, when he fleeth being pursued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take them when he will, without any fresh suit. 5 *Co.* 109. *Sher.* 78.

But if the thief in his flight waive them, there the goods are forfeited to the king or lord of the liberty by the common law, if the felon upon fresh suit was not attainted at the suit of the owner of the goods: And the reason why waif is given to the king, and that the party shall lose his property in such case, is for default in the owner, that he pursued not freshly to apprehend the felon; for it concerneth the publick that crimes do not remain unpunished, and impunity always encourageth to that which is worse. And therefore the law hath imposed this penalty upon the owner, that if the thief by his industry and fresh suit be not attainted at his suit, in an appeal of the same felony, he shall lose for his default all his goods which the thief at the time of his flight waived: But if the thief had them not with him when he fled, having peradventure hid them, there no default can be in the party; and therefore they shall not be forfeited, for if he maketh fresh suit after notice of the felony it sufficeth. 5 *Co.* 109.

Heretofore waifs and strays were the finder's, by the law of nature; and afterwards the king's by the law of nations. *Dalt. Sher.* 79.

In the case of goods *waived*; the owner may seize them twenty years after, if the lord of the franchise, nor the king seize before; but if they are seized, then they become forfeited to the king or lord of the liberty. *Kitch.* 82.

And this forfeiture is not like a stray, where tho' the lord may seize, yet the party who is the owner, may retake them within the year and day: but here the true owner cannot seize his own goods, tho' upon fresh suit within the year and day. 1 *H. H.* 541.

But this is not an absolute loss of the owner's goods, but rather an expedient settled by law, to drive the owner to convict the felon by prosecuting his appeal; and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convict or attaint, and the fresh suit be enquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 1 *H. H.* 541.

EVIDENCE.

I. Of evidence in general.
II. Of written evidence.
III. Of the evidence of witneſſes.
IV. Of proceſs to cauſe witneſſes to appear.
V. Of the manner of giving evidence.

I. Of evidence in general.

EVIDENCE in legal underſtanding, doth not only contain matters of record, as letters patents, fines, recoveries, inrollments and the like, and writings under ſeal, as charters and deeds, and other writings without ſeal, as court rolls, accounts, and the like; but in a larger ſenſe it containeth alſo the teſtimony of witneſſes, and other proofs to be produced and given, for the finding of any iſſue joined between the parties. And it is called *evidence*, becauſe thereby the point in iſſue is to be made evident to the jury. 1 *Inſt.* 283.

It is a general rule in all caſes, civil and criminal, that the beſt evidence that may be had, or that the nature of the thing will bear, is to be given: and it is upon this reaſon, that a copy of the record is admitted, becauſe one cannot have the record itſelf; but a copy of a copy will not do. *Law of Evid.* 286.

Many times juries, together with other matter, are much induced by preſumptions; whereof there are three ſorts, violent, probable, and light or temerary. Violent preſumption many times amounts to full proof; as if one be run through the body with a ſword in a houſe, whereof he inſtantly dieth, and a man is ſeen to come out of that houſe, with a bloody ſword, and no other man was at that time in the houſe. Probable preſumption moveth little. But light or temerary preſumption moveth not at all. 1 *Inſt.* 6.

If all the witneſſes to a deed be dead (as no man can keep his witneſſes alive, and time weareth out all men) then violent preſumption, which ſtands for a proof, is continual and quiet poſſeſſion; altho' the deed may receive credit from a comparing of ſeals, writing, and the like. 1 *Inſt.* 6.

The common law did not require any certain number of witneſſes, for the trial of any crime whatſoever. 2 *Hawk.* 428.

And before a juſtice of the peace in divers caſes, one witneſs is ſufficient to convict an offender; the fame being directed by ſpecial ſtatutes.

But in caſe of high treaſon, whereby corruption of blood ſhall be made, no perſon ſhall be attainted, but upon the oaths of two witneſſes, either both to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon. 7 *W.* c. 3. *ſ.* 2.

By

By 29 C. 2. c. 3. ſ. 5. Deviſes of lands ſhall be atteſted by three witneſſes at the leaſt.

II. Of written evidence.

A *private* act of parliament, that concerned *Rocheſter* bridge, tho' printed by *Raſtal*, was not allowed in evidence, not being examined by the record. Otherwiſe of general ſtatutes; there the printed book is good evidence. *Tr. per pdis.* 348.

And there are very many of the old ſtatutes, which are admitted and obtain as ſuch, tho' there be no record at this day extant thereof, nor yet any other written evidence of the ſame, but what is in a manner only traditional, as namely, ancient copies, tranſcripts, books, pleadings, and the common received opinion and reputation, and the approbation of the judges learned in the laws. For the judges and courts of juſtice are *ex officio* bound to take notice of publick acts of parliament, and whether they are truly pleaded or not, and therefore they are the triers of them. But it is otherwiſe of private acts of parliaments, for they may be put in iſſue, and tried by the record upon *non tiel record* pleaded. *Hale's Hiſt. Com. L.* 15, 16.

Records prove themſelves, and cannot be proved by witneſſes. But copies of them muſt be proved by witneſſes, and then they are good evidence. No razure or interlining ſhall be intended in them. But the ſureſt way is, to exemplify a record under the great ſeal, or at leaſt under the ſeal of the court. 10 *Co.* 92.

And nothing ſhall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Read.* Evid.

A record of the ſeſſions was allowed in evidence, to prove that a perſon had not taken the oaths. 1 *Salk.* 284.

The entry of the names and titles of perſons in a church book either for marriages or births is evidence, but not concluſive evidence of the marriage or birth of any perſons, unleſs the identity of the perſons (by ſuch entries intended) is fully proved, and alſo ſtrengthened with circumſtances, as cohabitation, the allowance of the parties themſelves, and the like. *Vin.* Evid. A. b. 15. 11.

By the 7 *J. c.* 12. No tradeſman nor handicraftſman ſhall be allowed to give his ſhop book in evidence, on an action for money due for wares delivered, or for work done, above one year before the action brought. But this not to extend to any trading between merchant and merchant, merchant and tradeſman, or between tradeſman and tradeſman, for any thing directly falling within the compaſs of their mutual trades and merchandize.

In the caſe of *Pitman* and *Maddox*, 11 *W.* A ſhop book was allowed for evidence, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries, and no proof was required of the delivery of the goods; and *Holt* C. J. ſaid, it was as good evidence as the proof of a witneſs's hand to an obligation; and he held, that tho' the ſtatute of

the 7 *J.* says, a shop book shall not be evidence after the year, yet it is not of itself evidence within the year. 2 *Salk.* 690.

A man's book of accounts is no evidence for the owner of the book, but for the adverse party: for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per pais* 348.

Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands; which was opposed by the other side; but admitted by the court, who said, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. *Vin.* Evid. Q. a. 9. *E.* 11 *G.* 2. *Porter* and *Gordon.*

In cases where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like; the law, in such cases of necessity, allows them to be proved by witnesses. *Jenk.* 19. *Wood b.* 4. *c.* 4.

If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it; and therefore the defendant having torn his own note signed by him, a copy sworn was admitted to be good evidence to prove it. L. *Raym.* 731.

And it was holden for law, by *Vernon* judge of assize, that where the defendant himself hath the deed which concerns the land in question, and will not produce it; in such a case, the copy thereof will be permitted to be given in evidence; and so it was, and the witness swore it once in his hand, and that the copy produced was a true copy of the deed, and himself did examine it. *Clayt.* 15.

And the counterpart of an ancient deed which is lost, may be good evidence with other circumstances: but not of it self, without other circumstances. 6 *Mod.* 225.

An indenture to guide the uses of the common recovery, was offered in evidence, but the seals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402.

If upon collateral issue it is to be proved, that such a one was justice of the peace, baronet, or the like; common reputation is sufficient proof, without shewing the commission, or letters patent of the creation. *Tr. per pais* 347.

The copy of the probate of a will is good evidence, where the will it self is of chattels; for there the probate is an original taken by authority, and of a publick nature: otherwise, where the will is of things in the realty; because in such case the ecclesiastical courts have no authority to take probates; therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154.

For the copy of an original is evidence, wherever the original is evidence, if proved a true copy; but the copy of the probate of a will of lands is no evidence, because the probate in such case is not an original taken by authority, and therefore is only a copy of a copy. *Comb.* 337.

So

So the copy of a court roll of a manor, is good evidence; as alſo the copy of a church regiſter, the copies of town books, and the like; for where the original it ſelf is good evidence, the immediate copy thereof is alſo good evidence. *Skin.* 584. L. *Raym.* 154.

And generally, wherever an original is of a publick nature, and would be evidence if produced, an immediate ſworn copy thereof will be evidence, as a copy of a bargain and ſale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unleſs the original is loſt or deſtroyed. 3 *Salk.* 154. *H.* 8 *W. Lynch* and *Clarke.*

On a warrant to a conſtable to diſtrain goods by virtue of an act of parliament; the conſtable makes diſtreſs, and returns the overplus to the offender, but keeps the warrant. Reſolved, that a copy of the warrant in this caſe will be good evidence. 6 *Mod.* 83. *M.* 2 *An. Morley* and *Staker.*

M. 11 *G. Serle* and Lord *Barrington.* The indorſement on a bond by the obligee, of payment of intereſt, was allowed to be given in evidence by his adminiſtrator, to take off the preſumption from the length of time. L. *Raym.* 1371.

It ſeems ſettled, that the examination of an informer taken upon oath, and ſubſcribed by him, either before a coroner upon an inquiſition of death, or before juſtices of the peace, in purſuance of the ſtatutes of *Ph. & M.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the ſatisfaction of the court, that ſuch informer is dead, or unable to travel, or kept away by the means or procurement of the priſoner, and that the examination offered in evidence is the very ſame that was ſworn before the coroner or juſtice, without any alteration whatſoever. 2 *Haw.* 429.

But it hath been adjudged, that it is not ſufficient to authorize the reading of ſuch examination, to make oath that the proſecutors have uſed all their endeavours to find the witneſs, but cannot find him. 2 *Haw.* 430.

But it is ſaid to have been adjudged, by the court of king's bench, in the 7 *W.* (1 *Salk.* 281.) upon advice with the juſtices of the common pleas, on an indictment for a *libel,* that depoſitions taken before a juſtice of the peace, relating to the fact, could not be given in evidence, tho' the deponent were dead: and that the reaſon why ſuch depoſitions may be given in evidence in *felony,* depends upon the ſtatutes of *P. & M.* and that this cannot be extended farther than the particular caſe of felony. But in the report of this caſe, 5 *Mod.* 165. it is ſaid, that the reaſon why ſuch depoſitions could not be read, was becauſe the defendant was not preſent when they were taken, and therefore had not the benefit of a croſs examination. 2 *Haw.* 430.

Depoſitions *in perpetuam rei memoriam,* are not evidence, ſo long as the witneſſes live. 1 *Salk.* 286.

A copy of an inſcription on a grave ſtone, has been allowed to be given in evidence. The

The examination of an almanack, that such a day of the month was *sunday*, was ruled to be sufficient; and that a trial of this by a jury is not necessary, altho' it is a matter of fact. *Cro. El.* 227.

And the reason why the kalendar in an almanack is allowed as evidence seemeth to be, because the said kalendar is part of the book of common prayer, and consequently established by act of parliament.

And an almanack wherein the father had writ the day of the nativity of his son, was allowed as evidence to prove the nonage of the son. *Raym.* 84.

Generally, it is said, that similitude of hands is no evidence; but saying that he was well acquainted with his writing, and knew it to be the party's, is evidence. *Vin.* Evid. (T. b. 48.) 14.

Tho' one consent to have a letter read, yet the jury, on pain of attaint, are not bound to find it. 1 *Keb.* 249.

III. Of the evidence of witnesses.

It seems that the confession of the defendant, whether taken on an examination before justices of the peace, in pursuance of the 1 & 2. *P. & M. c.* 13. or 2 & 3 *P. & M. c.* 10. upon a bailment or commitment for felony, or taken by the common law upon an examination for other crimes not within those statutes, or in discourse with private persons, hath always been allowed to be given in evidence against the party confessing, but not against others. 2 *Haw.* 429.

But wherever a man's confession is made use of against him, it must be all taken together, and not by parcels. 1 *Haw.* 429.

It is to be observed, that there be many circumstances that disable a juror, that are not sufficient exceptions against a witness: Thus the exception of kindred, is a good cause of challenge against a juror, but not against a witness; therefore the father may be a competent witness for or against his son, or the son for or against his father. These and the like exceptions may be to the credit or credibility of the witness, but are not exceptions against his competency. 2 *H. H.* 276.

For, that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury. 2. Exceptions to the competency of the witness, which do exclude him from giving his testimony, and of these exceptions the court is the judge. 2 *H. H.* 276, 277.

It seems agreed, that an attainder, judgment, or conviction of treason, felony, piracy, præmunire, perjury, or forgery on 5 *El.* and also a judgment in attaint for giving a false verdict, or in conspiracy at the suit of the king; and also judgment for any crime whatsoever to stand in the pillory, or to be whipped or branded, are causes of exception against a witness, while they continue in force. 2 *Haw.* 432.

But

But it is agreed, that no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court. 2 *Haw.* 433.

Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. 2 *Haw.* 433.

And a man shall not be permitted to swear, that he was suborned and perjured. *St. Tr. V.* 3. 427.

And lord *Coke* says, a witness alledging his own infamy or turpitude, is not to be heard. 4 *Inst.* 279.

Thus a wife was disallowed to be a witness, to prove her husband had no access to her in a case of bastardy. *Sess. Cases. V.* 2. 175. *K.* and *Reading*, *M.* 8 *G.* 2.

It seems clear at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 433.

A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness. 2 *Haw.* 433.

And it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder restores the party to his credit. 2 *Haw.* 433.

It seems agreed to be a good exception, that a witness is an infidel; that is, as it seemeth, that he believes neither the old nor new testament to be the word of god, on one of which our laws require the oath should be administred. 2 *Haw.* 434.

Want of discretion is a good exception against a witness; on which account alone it seems, that an infant may be excepted against. 2 *Haw.* 434.

But if an infant be of the age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear, that he hath a competent discretion, he may be sworn. 2 *H. H.* 278.

And in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practised upon children. 2 *H. H.* 279, 284. *Str.* 700.

It seems an uncontested rule in all cases, that it is a good exception against a witness, that he is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw.* 433.

Thus in an information upon the statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be witness in his own cause, and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst.* 6.

Thus

Thus alſo an attorney ought not to be examined againſt his client, becauſe he is obliged to keep his ſecrets: but of his own knowlege, before retainer, he may be examined as a witneſs, if ſerved with a ſubpœna. *Wood. b.* 4. *c.* 4.

But upon an indictment for battery, or the like, the party grieved may be a witneſs againſt the defendant, be cauſe the proſecution is at the ſuit of the king. *Wood. b.* 4. *c.* 5.

And in many criminal caſes, from the neceſſity of the thing, intereſted perſons are allowed as witneſſes. As where the owner proſecutes an indictment of felony for ſtolen goods, he is concerned in intereſt; for he will be intitled to reſtitution: and yet his evidence is admitted. So in removing an indictment by certiorari from the ſeſſions to the king's bench; tho' the proſecutor in that caſe, if the defendant be convicted, is intitled to his coſts, yet he is allowed as a witneſs. So where a man, in caſe of conviction of the offender, will be intitled to a 40 *l.* reward; yet his evidence ſhall be received. And by *Parker* chief juſtice: As to the caſes where a 40 *l.* reward is given, they admit of this anſwer; that the intention of thoſe acts would be quite defeated, if ſo be the reward ſhould take off the evidence. The ſame anſwer may ſerve to the caſes put upon an indictment of felony for ſtolen goods; and where the indictment is removed by certiorari: for none in the firſt caſe but the owner can prove the property of the goods; and in the ſecond, if the giving of coſts ſhould take off the evidence of the proſecutor, the act of parliament deſigned to diſcountenance the removing of ſuits by certiorari, would give the greateſt encouragement to them that is poſſible. 10 *Mod.* 193. *M.* 12 *An. Q.* and *Muſcott.*

Alſo it ſeems agreed, that it is no good exception againſt a witneſs, that he has a maintenance from the king; for every one may maintain his own witneſs. 2 *Hawk.* 434.

A truſtee may be a witneſs, if he hath releaſed his truſt; but not if he hath conveyed it over. *Sid.* 315. M. 18 *C.* 2. *Stephens* and *Gerrard.*

An heir at law may be a witneſs concerning the title to the land, but the remainder man cannot, for he hath a preſent intereſt, but the heirſhip is a mere contingency. 1 *Salk.* 283. *M.* 10 *W. Smith* and *Blackham.*

A witneſs's laying a wager in the cauſe, is no hindrance to his being a witneſs; for the other has an intereſt in his evidence, which he cannot deprive him of. *Fareſt.* 31. *Str.* 652.

If a perſon *apprehends* himſelf to be intereſted, though in ſtrictneſs of law he is not, yet he ought not to be ſworn: as where the witneſs for the plaintiff apprehended that if the plaintiff ſhould recover, he would remit a claim of ſome money which he (the plaintiff) had upon this witneſs; but if he ſhould not recover, he would not remit it; although in ſtrictneſs of law, his recovering or not recovering in that caſe would not alter the claim: or as in caſe where the witneſs owned himſelf to be under an honorary, though not under a binding engagement, to pay the coſts. *Str.* 129.

It

It ſeems agreed, that the huſband and wife being as one and the ſame perſon in affection and intereſt, can no more give evidence for one another, in any caſe whatſoever, than for themſelves; and that regularly the one ſhall not be admitted to give evidence *againſt* the other, nor the examination of the one be made uſe of againſt the other, by reaſon of the implacable diſſenſion which might be cauſed by it, and the great danger of perjury from taking the oaths of perſons under ſo great a bias, and the extreme hardſhip of the caſe. Yet ſome exceptions have been allowed in caſes of evident neceſſity; as in lord *Audley*'s caſe, who held his wife, while his ſervant by his command raviſhed her; or where a man is indicted for a forcible marriage on the ſtatute of the 3 *H.* 7. or where either a huſband or wife have cauſe to demand ſureties of the peace againſt the other. 2 *Haw.* 431, 432.

It ſeems agreed, that it is no exception againſt a perſon's giving either for or againſt a priſoner, that he is one of the judges or jurors who are to try him. 2 *Haw.* 432.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr.* Evid, A. 2.

It hath been long ſettled, that it is no exception againſt a witneſs, that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witneſſes, it would be generally impoſſible to find evidence to convict the greateſt offenders. 2 *Haw.* 432.

Alſo it hath been often ruled, that accomplices who are indicted, are good witneſſes for the king, until they be convicted. 2 *Haw.* 432.

Alſo it hath been often adjudged, that ſuch of the defendants in an information, againſt whom no evidence is given, may be witneſſes for the others. 2 *Haw.* 432.

It hath been alſo adjudged, that where three perſons are ſued in three ſeveral actions on the ſtatute for a ſuppoſed perjury, in their evidence concerning the ſame thing, they may be good witneſſes in ſuch actions for one another. 2 *Haw.* 432.

It ſeems agreed, that it is no good exception againſt a witneſs, that he is an alien, or villien, or bondman. 2 *Haw.* 434.

There were two witneſſes to a deed, and one of them was blind. It was ruled by *Holt* chief juſtice, that ſuch deed might be proved by the other witneſs, and read; or might be proved without proving that this blind witneſs is dead; or without having him at the trial, proving only his hand. L. *Raym.* 734. Wood and Drury. Warwick aſſiz. 1699.

If a witneſs is beyond the ſea, it is uſual to prove his hand, and that he is beyond the ſea. *Vin.* Evid. [T. b. 48.] 13.

There were two witneſſes to a bond; one in *Africa*; and the other in Bedlam, mad: On an order to prove an exhibit *viva voce* in chancery, a witneſs proved theſe facts, and their hands to the bond as if dead. *T.* 5 & 6 *G.* 2. Vin. *Evid.* [T. b. 48.] 12.

If

If a witneſs to a deed is dead; it is ſufficient to prove the witneſs's hand, without proving the hand of the party. By *Pratt* chief juſtice, T. Vac. 1719. *Vin.* Evid. [T. b. 48.] 10.

The ſayings of a dead man are not to be given in evidence to prove a particular fact; they are only to be admitted in proof of general uſages and cuſtoms; but as for a particular fact, lying in the knowledge of a particular perſon, by his death the evidence is loſt. *St. Tr. V.* 5. 456.

And it hath been agreed, that the evidence given by a witneſs at one trial, cannot in the ordinary courſe of juſtice, be made uſe of againſt a defendant, on the death of ſuch witneſs at another trial. 2 *Haw.* 430.

In the caſe of murder, what the deceaſed declared after the wound given, may be given in evidence. *Vin.* Evid. [A. b. 38.] 11.

But where ſuch declaration is reduced into writing, the writing itſelf muſt be produced, and not evidence thereof given viva voce. *id.* 12.

It ſeems agreed, that what a *ſtranger* has been heard to ſay, is in ſtrictneſs no manner of evidence, either for or againſt a priſoner, not only becauſe it is not upon oath, but alſo becauſe the other ſide hath no opportunity of a croſs examination; and therefore it ſeems a ſettled rule, that it ſhall never be made uſe of, but only by way of inducement or illuſtration of what is properly evidence: yet it ſeems, that what the *priſoner* has been heard to ſay at another time, may be given in evidence, either to invalidate or confirm the teſtimony which he gives in court. 2 *Haw.* 431.

IV. Of proceſs to cauſe witneſſes to appear.

The compulſory means to bring in witneſſes, are of two kinds. 1. By proceſs of *ſubpœna* iſſued in the king's name, by the juſtices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal caſes,) the juſtices that take the examination of the perſon accuſed, and the information of the witneſſes, may at that time, or at any time after, and before the trial, bind over the witneſſes to appear, at the ſeſſions, and in caſe of their refuſal, either to come, or to be bound over, may commit them for their contempt in ſuch refuſal. 2 *H. H.* 282.

But that which is a great defect in this part of judicial adminiſtration, is, that there is no power to allow witneſſes their charges in criminal caſes; whereby many times poor perſons grow weary of attendance, or bear their own charges therein, to their great hindrance and loſs. 2 *H. H.* 282.

Where a witneſs is a priſoner in execution for debt, he muſt be brought up by *habeas corpus ad teſtificandum*, to give his evidence. *St. Tr. V.* 2. 580. *V.* 4. 37.

One was ſubpœnaed *ad teſtificandum*, and prayed a privilege from being arreſted, which was granted; and by the court it will ſuperſede an arreſt upon mean proceſs, but not upon an execution; yet the

the sheriff in that case may be committed for his contempt. *Nevil's* case, 15 *C.* 2. *Tr. per p.* 310.

By the 5 *El. c.* 9. *s.* 12. If any person, upon whom any process out of any of the courts of record within this realm shall be served, to testify or depose concerning any matter depending therein, and having tendered unto him, according to his countenance or calling, such reasonable sum for his costs and charges as (having regard to the distance of places) is necessary to be allowed in that behalf, do not appear according to the tenor of the process, having not a lawful and reasonable impediment; he shall forfeit 10*l.* and shall yield such further recompence to the party grieved, as to the judge of the court, out of which the process was awarded, shall seem meet, according to the loss that the party which procured the process shall sustain; to be recovered by the party grieved, in any court of record.

In criminal cases, if a witness hath been bound over, and do not appear; he shall forfeit his recognizance.

V. Of the manner of giving evidence.

He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence. *Litt.* 35.

The evidence both for and against a prisoner ought to be upon oath.

And if a peer is produced as a witness, he ought to be sworn. 3 *Keb.* 61.

Lord *Preston* was committed by the court of quarter sessions, for refusing to be sworn to give evidence to the grand jury, on an indictment of high treason; and on his being brought by *habeas corpus* into the king's bench, *Holt* Ch. J. said, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed. 1 *Salk.* 278.

But a quaker's affirmation in all cases not being criminal, shall be allowed as evidence, without an oath; but in criminal cases his affirmation shall not be allowed. 7 & 8 *W. c.* 34.

The court may indulge a prisoner in examining the witnesses apart, but he cannot demand it of right. *St. Tr. V.* 4, 9.

In cases of life, no evidence is to be given against a prisoner, but in his presence. 2 *Haw.* 428.

Witnesses cannot testify a negative, but only an affirmative. *Wood. b.* 4. *c.* 4.

A prisoner may not call witnesses to disprove what his own witnesses have sworn. *St. Tr. V.* 2. 764, 792.

A witness shall not be permitted to read his evidence, but he may look upon his notes to refresh his memory. *St. Tr. V.* 2. 792.

A witness shall not be cross examined, till he has gone thro' the evidence for the party on whose side he was procured. *St. Tr. V.* 2. 792.

It

It hath been admitted, that in order to shew a variance in the evidence, a deposition taken by a witness of a justice of the peace, may at the prisoner's desire be read at the trial, in order to take off the credit of the witness, by shewing a variance between such depositions, and the evidence given in court. And for the same reason it seems agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may also be given in evidence to invalidate his testimony at a second trial. 2 *Haw.* 430.

The counsel of that party which doth begin to maintain the issue, ought to conclude. *Tri. p. pais* 220.

Subpœna to give evidence.

GEORGE *the third, by the grace of god, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and so forth. To* A. B. C. D. *and* E. F. *greeting: We command you, and every of you, that all business being laid aside, and all excuses whatsoever ceasing, you do in your proper persons appear before our justices assigned to keep the peace in our county of----------and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the general quarter sessions of the peace, to be holden at----------in and for the said county, on----------the----------day of----------at the hour of ten in the forenoon of the same day, to testify the truth, and give evidence on behalf of the inhabitants of the parish of----------in the said county, against* A. O. *in a case of bastardy. And this you are in no wise to omit, nor any of you to omit, on pain of one hundred pounds. Witness* Richard Smith, *esq; the----------day of----------in the---------- year of our reign.* C

Note; There may be four witnesses put in one subpœna.

A subpœna ticket.

To Mr. A. W.

BY *virtue of his majesty's writ of subpoena to you directed, and herewith shewn to you, you are personally to be before his majesty's justices of the peace for the county of----------at the general quarter sessions of the peace to be holden for the said county, at----------in the said county, on----------the----------day of----------next, to testify the truth, and give evidence on behalf of the inhabitants of the township of----------in the said county, against* A. O. *in a case of bastardy. And this you are not to omit, on pain of one hundred pounds. Dated this ----------day of----------*1763. By the court.

C.

Condition of a recognizance to appear and give evidence.

THE *condition of this recognizance is such, that if the above-bound* A. W. *shall personally appear at the next general quarter sessions of the peace to be holden at----------in and for the said county, and*

and then and there give ſuch evidence as he knoweth, upon a bill of indictment to be exhibited by A. I. *of*----------*yeoman, to the grand jury, againſt* A. O. *late of*----------*in the ſaid county, yeoman, for feloniouſly taking and carrying away*----------*the property of*----------*and in caſe the ſaid bill be found a true bill, then if the ſaid* A. W. *ſhall then and there give evidence to the jurors that ſhall paſs on the trial of the ſaid* A. O. *upon the ſaid bill of indictment, and not depart thence without leave of the court, then this recognizance to be void, otherwiſe of force.*

EXAMINATION.

IF a felony is committed, and one is brought before a juſtice upon ſuſpicion thereof, and the juſtice finds upon examination that the priſoner is not guilty; yet the juſtice ſhall not diſcharge him, but he muſt either be bailed or committed: for it is not fit that a man once arreſted and charged with felony, or ſuſpicion thereof, ſhould be delivered upon any man's diſcretion, without farther trial. *Dalt. c.* 164.

In order to which bail or commitment, the examination and information of the parties muſt firſt be taken, according to the following ſtatutes:

Two or more juſtices (1 Q.) *or one of the ſaid juſtices, before they bail a perſon apprehended for felony (if the offence is bailable) ſhall take his examination and the information of them that bring him, of the fact and circumſtances thereof, and the ſame, or as much thereof as ſhall be material to prove the felony, ſhall put in writing; which examination they ſhall certify (together with the bailment) at the next general gaol delivery, to be holden within the limits of their commiſſion.* 1 & 2 P. & M. c. 13. ſ. 4.

And they ſhall have power to bind by recognizance all ſuch as do declare any thing material to prove the offence, to appear at the next general gaol delivery, to be holden within the county where the trial ſhall be, then and there to give evidence againſt the party, and ſhall certify ſuch recognizance in like manner. ſ. 5.

And if they offend in any thing therein, they ſhall be fined by the juſtices of gaol delivery. id.

In like manner, where the perſon is not bailed, but committed to ward, the juſtice or juſtices who commit him, ſhall before ſuch commitment, take the like examination and information, and ſhall put the ſame in writing within two days after the ſaid examination, and ſhall in like manner bind over the witneſſes; and certify the whole as above. 2 & 3 P. & M. c. 10.

Shall take his examination] And in order thereunto, if by ſome reaſonable occaſion, the juſtice cannot at the return of the warrant take the examination, he may by word of mouth command the conſtable or any other perſon, to detain in cuſtody the priſoner till

till the next day, and then to bring him before the justice, for farther examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 *H. H.* 585.

But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time. 2 *Haw.* 119.

But the examination of the person accused, ought not to be upon oath. 1 *H. H.* 585.

But if upon his examination he shall confess the matter, it shall not be amiss that he subscribe his name, or mark to it. *Dalt. c.* 164.

Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others. 1 *H. H.* 585. 2 *Haw.* 429.

Information of them that bring him] Or of other witnesses; whom the justice may bring before him by his warrant for that purpose. 1 *H. H.* 586. *Dalt. c.* 164.

And this information must be upon oath. *Dalt. c.* 164. 1 *H. H.* 586.

And therefore if a quaker is a witness, his affirmation must not be taken in this case; for by the 7 & 8 *W. c.* 34. *s.* 36. it is provided, that no quaker shall be examined for or against any person in any criminal cause, unless it be upon oath.

And the said information being upon the trial sworn to be truly taken, by the justice or his clerk, may be given in evidence against the prisoner, if the witnesses be dead and not able to travel. 1 *H. H.* 586.

Or as much thereof as shall be material to prove the felony] Yet it seemeth also just and right, that the justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as maketh against the prisoner: for such information, evidence, or proof so taken, is only to inform the king and his justices of the truth of the matter. *Dalt. c.* 165.

Shall certify at the next gaol delivery] And yet for petty larcenies, and small felonies, the offenders may be tried at the quarter sessions, and the examinations and informations may be certified thither. *Dalt. c.* 164.

To be holden within the limits of their commission] And yet examinations taken by justices of the peace in one county, may be by them certified in another county, and there read, and given in evidence against the prisoner. *Dalt. c.* 164.

To bind by recognizance] And upon refusal, may commit the person refusing. 1 *H. H.* 586.

And the parties grieved ought to be bound, not only to give evidence, but also to prefer a bill of indictment against the prisoner. *Dalt. c.* 164.

Examination

Examination of a felon.

New-York, Suffolk County. THE *examination of* A. O. *of*---------*yeoman, taken before me* William Hicks, *esq; one of his majesty's justices of the peace for the said county* [or, in the case of bail,----*taken before us*---------*two of his majesty's justices of the peace for the said county, and one of us of the* quorum] *the*---------*day of*---------*in the*---------*year of the reign of*--------

The said A. O. *being charged before me* [or, *us*] *by* A. I. *of*---------*yeoman, with the felonious stealing out of the house of the said* A. I. *at*---------*on the*---------*day of*---------*the following goods, to wit,*---------*to the value of*---------*he the said* A. O. *upon his examination now taken before me* [or *us*] *confesseth that*---------[or, *denieth that* ---------] *&c.*

Information of a witness.

New-York, Suffolk County. THE *information of* A. I. *of*---------*yeoman, taken upon oath before me* [as before]

Recognizance to give evidence.

New-York, Suffolk County. BE *it remembered, that on the*--------*day of*-------- *in the*---------*year of the reign of*---------A. I. *of*--------*in the said county, yeoman, did come before me* William Hicks, *esq; one of the justices of our said lord the king, assigned to keep the peace in the said county, and did acknowledge himself to owe to our said lord the king ten pounds of lawful money of* Great-Britain, *under condition, that if he shall personally appear before the justices of our said lord the king, at the next general quarter sessions of the peace* [or, *gaol delivery*] *to be holden in and for the said county, then and there to give evidence in behalf of our said lord the king, against* A. O. *late of*---------*who being attached, and suspected of felony, is now committed to the gaol of our said lord the king in the said county, then this recognizance to be void, otherwise of force.*

EXECUTION.

WHERE a person attained hath been at large after his attainder, and afterwards is brought into court and demanded why execution should not be awarded against him; if he deny that he is the same person, it shall be immediately tried by a jury returned for that purpose. 2 *Haw.* 463.

The court may command execution to be done, without any writ. 2 *Haw.* 463.

In fixed and stated judgments, the law makes no distinction between a peer and a commoner, or between a common and ordinary case, and

and one attended with extraordinary circumstances; for which reason it was adjudged in *Felton*'s case, who murdered the duke of *Buckingham*, that the court could not order his hand to be cut off, nor make it part of the sentence that his body should be hanged in chains, but the body after execution being at the king's disposal, might be hanged in chains, or otherwise ordered as the king should think fit. 2 *Haw.* 443.

But the king may pardon part of the judgment; as where the judgment is hanging, beheading, imbowelling and the like, the king may pardon all but the beheading; whereby the judgment is not altered, but part of it remitted. 2 *H. H.* 412.

It is clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again: for the judgment was not executed till he was dead. 2 *Haw.* 463.

EXTORTION.

IT is said, that extortion, in a large sense, signifies any oppression under colour of right: but that, in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. 1 *Haw.* 170.

And by the statue of the 3 *Ed.* 1. *c.* 26. (which is only in affirmance of the common law) *No sheriff, nor other the king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth, shall yield twice as much, and shall be punished at the king's pleasure.*

No sheriff nor other the king's officer] Under these words, the law beginning with the *sheriffs*, are understood escheators, coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of this act, which do any way concern the administration or execution of justices, or the common good of the subject, or for the king's service. 2 *Inst.* 209.

Also the justices of the peace, whose office was instituted after this act, are bound by their oath of office, to take nothing for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute.

And generally, no publick officer shall take any other fees or rewards, for doing any thing relating to his office, than some statute in force gives him, or else as hath been antiently and accustomably taken: and if he do otherwise, he is guilty of extortion. *Dalt. c.* 41.

Shall take any reward] Therefore by this statute, they can at this day take no more for doing their office, than hath been since allowed to them by authority of parliament. 2 *Inst.* 210.

And it hath been resolved, that a promise to pay them money for doing of a thing, which the law will not suffer them to take any thing for, is merely void. 1 *Haw.* 171.

To

To do his office] It is not said, that he shall take no reward generally, but no reward to do his office.

It cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers: for the chief danger of oppression is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts, which will not suffer them to be exceeded, without a proper resentment. 1 *Haw.* 171.

The fees in sessions, for traversing, trying, or discharging indictments, discharging recognizances, and the like, do vary according to the different customs in different places. *Dalt. c.* 41.

Shall yield twice as much] At the common law this offence is severely punishable at the king's suit, by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed. And this statute doth add a greater penalty than the common law did give; for hereby the plaintiff shall recover his double damages. 2 *Inst.* 210. 1 *Haw.* 171.

And by the 31 *El. c.* 5. Actions for extortion may be laid in any county.

At the king's pleasure] That is, by the king's justices, before whom the cause depends. 2 *Inst.* 210.

Indictment for extortion in a gaoler.

THE *jurors for our lord the king, upon their oath present, that* A. O. *late of*-----*in the said county, yeoman, on the*------*day of*-----*in the*------*year of the reign of*------*was taken upon suspicion of having committed a certain felony, by*-------*constable of*------*in the said county, by virtue of a warrant directed to the said*------*under the hand and seal of* *esquire, then and yet one of the justices of our sovereign lord the king, assigned to keep the peace in the said county, and was on the same day and year committed by him the said* to A. G. *keeper of the gaol of our sovereign lord the king at*--------*in the said county, under the custody of him the said* A. G. *to be safely kept, upon suspicion of the felony aforesaid, and the said* A. O. *was detained in that prison under the custody of the said* A. G. *from the time that he was committed to the said prison for one month from thence next ensuing, upon suspicion of the said felony; nevertheless the said* A. G. *in no wise regarding the statute in that case made, and the penalty therein contained, did on the*------*day of*------*at*------*aforesaid, in the said county, demand and receive*-------*pounds of lawful money of* Great-Britain, *of and from the said* A. O. *for ease and favour in the said gaol for the said time, in contempt of our said sovereign lord the king, and against the form of the statute aforesaid, and against the peace of our said sovereign lord the king, his crown and dignity.*

FELONY, MISPRISION of FELONY, and THEFTBOTE.

I. *Felony.*

FELONY is generally ſuppoſed to come from the Saxon *fell*, which ſignifieth fierce, or cruel; of which the verb *fell* ſignifieth to throw down or demoliſh; and the ſubſtantive of that name is uſed to ſignify a mountain rough and uncultivated. But the ſame word, with a little variation, runneth through moſt of the *European* languages, and ſignifieth more generally an offence at large; and the Saxon word *fællan* ſignifieth to offend, and *fælniſſe* an offence or *failure:* and although *felony*, as it is now become a technical term, ſignifieth in a more reſtrained ſenſe an offence of an high nature, yet it is not limited to *capital* offences only, but ſtill retaineth ſomewhat of this larger acceptation; for petit larceny is felony, altho' it is not capital.

It would ſwell this title near to the bigneſs of half the book, to ſet down every thing which may be comprehended under this word *felony:* therefore it is neceſſary to refer the conſideration of the ſeveral particular kinds of felonies to their reſpective titles; as for inſtance, *Homicide*, *Robbery*, *Burglary*, *Rape*, *Coin*, *Forgery*, and many others; and eſpecially the law relating to ſtolen goods of all kinds belongeth to the title *Larceny*.

The method of bringing a felon to juſtice from the firſt commiſſion of the felony, to his condemnation and execution, is treated of under the ſeveral titles of *Hue and cry*, *Arreſt*, *Examination*, *Bail*, *Commitment*, *Gaol*, *Arraignment*, *Appeal*, *Indictment*, *Mute*, *Confeſſion*, *Jurors*, *Evidence*, *Clergy*, *Judgment*, *Attainder*, *Forfeiture*, *Execution*. And the courſe and whole procedure of trying an offender, is treated of under title *Seſſions*.

So that there is nothing left for this place, but to take notice of one circumſtance which is common to all felonies in general, and that is, concerning the charges of proſecution.

By the 3 *J. c.* 10. The felon ſhall pay the charges of his carrying to gaol, if able; to be levied by diſtreſs by warrant of one juſtice.

By the ſtatute of the 27 *G.* 2. *c.* 3. if he is not able, the ſame ſhall be paid, by order of ſuch juſtice, by the treaſurer out of the county rates.

II. *Miſpriſion of felony.*

Miſpriſion of felony (from the *French* word *meſpris*, a neglect or contempt, 3 *Inſt.* 36.) is the concealing of a felony which a man knows, but never conſented to: for if he conſented, he is either principal or acceſſary in the felony, and conſequently guilty of miſpriſion of felony and more. 1 *H. H.* 374.

For

For it is said, that every felony includes misprision of felony, and may be proceeded against as a misprision only, if the king pleases. 1 *Haw.* 125.

The punishment of misprision of felony in a common person, is fine and imprisonment; in an officer, as sheriff or bailiff of liberties, imprisonment for a year, and ransom at the king's pleasure, by the statute of 3 *Ed.* 1. *c.* 9.

If any person will save himself from the crime of misprision, he must discover the offence to a magistrate with all speed that he can. 3 *Inst.* 140.

Misprision, in a larger sense, is used to signify every considerable misdemeanor, which hath not a certain name given to it in the law.

III. *Theftbote.*

Theftbote (from the *Saxon* words *theft*, and *bote*, boot or amends) is, where one not only knows of a felony, but takes his goods again, or other amends not to prosecute. 1 *Haw.* 125.

But the bare taking of one's own goods again, which have been stolen, is no offence, unless some favour be shewn to the thief. 1 *Haw.* 125.

This offence is very nearly allied to felony, and is said to have been anciently punished as such; but at this day it is punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessary after the fact. 1 *Haw.* 125.

Warrant for Felony.

New-Jersey, Middlesex County. } To the constable of--------

FORASMUCH *as* A. I. *of*-------*in the county of*--------*yeoman, hath this day made information and complaint upon oath, before me*---------*one of his majesty's justices of the peace for the said county, that this present day divers goods of him the said* A. I. *to wit,*---------*have feloniously been stolen, taken, and carried away from the house of him the said* A. I. *at*--------*aforesaid in the county aforesaid, and that he hath just cause to suspect, and doth suspect, that* A. O. *late of*-------*yeoman, feloniously did steal, take and carry away the same* [Or otherwise as the case shall be:] *These are therefore to command you forthwith to apprehend him the said* A. O. *and to bring him before me, to answer unto the said information and complaint, and to be farther dealt with according to law. Herein fail you not. Given under my hand and seal the*-------*day of*--------*in the year*--------.

Forcible Entry and Detainer.

FORCE, in the common law, is moſt commonly taken in ill part, for unlawful violence. 1 *Inſt.* 161.

It ſeems that at the common law, a man diſſeiſed of any lands or tenements, if he could not prevail by fair means, might lawfully regain the poſſeſſion thereof by force, unleſs he were put to a neceſſity of bringing his action, by having neglected to re-enter in due time: And it ſeems certain, that even at this day, he who is wrongfully diſpoſſeſſed of his *goods*, may juſtify the retaking of them by force from the wrong doer, if he refuſe to re-deliver them; for the violence which happens thro' the reſiſtance of the wrongful poſſeſſor, being originally owing to his own fault, gives him no juſt cauſe of complaint, inaſmuch as he might have prevented it by doing as he ought. 1 *Haw.* 140.

But this indulgence of the common law, in ſuffering perſons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the publick peace, by giving an opportunity to powerful men under the pretence of feigned titles, forcibly to eject their weaker neighbours, and alſo by force to retain their wrongful poſſeſſions, it was thought neceſſary by many ſevere laws to reſtrain all perſons from the uſe of ſuch violent methods of doing themſelves juſtice. 1 *Haw.* 141.

However even at this day, in an *action* of forcible entry grounded on thoſe laws, if the defendant make himſelf a title which is found for him, he ſhall be diſmiſſed without any inquiry concerning the force; for howſoever he may be puniſhable *at the king's ſuit*, for doing what is prohibited by ſtatute, as a contemner of the laws, and diſturber of the peace, yet he ſhall not be liable to pay any damages for it to the plaintiff, whoſe injuſtice gave him the provocation in that manner to right himſelf. 1 *Haw.* 141.

Since therefore offences of this nature are made ſuch, not by the common law, but by ſtatute (after having premiſed, that *they who keep poſſeſſion with force, in lands and tenements, whereof they or their anceſtors, or they whoſe eſtate they have in the ſame, have continued their poſſeſſion in the ſame, by three whole years next before without interruption, ſhall not be indamaged by force of any of the ſtatutes concerning forcible entry*, 8 H. 6. c. 9. ſ. 7. 1 Haw. 152.) I ſhall conſider thoſe ſeveral ſtatutes, with the interpretation that hath been put upon them, under the following heads:

I. What is a forcible entry.
II. What is a forcible detainer.
III. How the ſame are puniſhable by action at law.
IV. How puniſhable at the general ſeſſions.
V. How puniſhable by one juſtice.
VI. How puniſhable on a certiorari.
VII. How puniſhable as a riot.

I. What

I. What is a forcible entry.

By the 5 *R.* 2. *c.* 8. *None shall make any entry into any lands or tenements (or benefices of holy church,* 15 R. 2. c. 2. *or other possession,* 8 H. 6. c. 9. f. 2.) *but where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; on pain of imprisonment and ransom at the king's will.*

Or other possessions] It seems clear, that no one can come within the danger of these statutes, by a violence offered to another in respect of a *way*, or such like easement, which is no possession. And there seems to be no good authority, that an indictment will lie in this case for a *common*, or *office*. 1 *Haw.* 146.

Not with strong hand, nor with multitude of people] It seems certain, that if one who pretends a title to lands, barely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act, which either expresly or impliedly amounts to a claim of such lands, he cannot be said to make an entry thereinto. 1 *Haw.* 144.

But it seemeth, that if a person enter into another man's house, or ground, either with apparent violence offered to the person of any other, or furnished with weapons, or company, which may offer fear, tho' it be but to cut, or take away another man's corn, grass, or other goods, or to fell or crop wood, or do any other like trespass, and tho' he do not put the party out of his possession, yet it seemeth to be a forcible entry. *Dalt. c.* 126.

But if the entry were peaceable, and after such entry made, they cut or take away any other man's corn, grass, wood, or other goods, without apparent violence or force; tho' such acts are counted a disseisin with force, yet they are not punishable as forcible entries. *Dalt. c.* 126.

But if he enter peaceably, and there shall by force or violence cut or take away any corn, grass, or wood, or shall forcibly or wrongfully carry away any other goods there being; this seemeth to be a forcible entry punishable by these statutes. *Dalt. c.* 126.

So also shall those be guilty of a forcible entry, who having an estate in land, by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto. 1 *Haw.* 145.

But he who barely agrees to a forcible entry made to his use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he no way concurred in, or promoted the force. 1 *Haw.* 145.

And, in general, it seemeth clear, that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual *violence*, or *terror*; and therefore that an entry which hath no other force than such as it implied by the law, in every trespass whatsoever, is not within these statutes. 1 *Haw.* 145.

As

As to the matter of *violence*; it seems to be agreed, that an entry may be forcible, not only in respect of a violence actully done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods; but it seems that an entry is not forcible, by the bare drawing up a latch, or pulling back the bolt of a door, there being no appearance therein of being done by *strong hand*, or *multitude of people*; and it hath been holden, that an entry into a house thro' a window, or by opening a door with a key, is not forcible. 1 *Haw.* 145.

In respect of the circumstances of *terror*; it is to be observed, that wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession just cause to fear, that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror, by carrying with him such an unusual number of attendants, or by arming himself in such a manner, as plainly intimates a design, or by actually threatning to kill, maim, or beat those who shall continue in possession, or by giving out such speeches, as plainly imply a purpose of using force, as if one say that he will keep his possession in spite of all men, or the like. 1 *Haw.* 145.

But it seems that no entry shall be judged forcible, from any threatning to spoil another's *goods*, or to destroy his cattle, or to do him any other such like damage, which is not personal. 1 *Haw.* 146.

However it is clear, that it may be committed by a single person, as well as by twenty. 1 *Haw.* 146.

But nevertheless all those who accompany a man, when he makes a forcible entry, shall be adjudged to enter with him, whether they actually come upon the lands or not. 1 *Haw.* 144.

II. What is a forcible detainer.

It seemeth certain, that the same circumstances of violence or terror which will make an entry forcible, will make a detainer forcible also. And a detainer may be forcible, whether the entry were forcible or not. 1 *Haw.* 146.

III. How they are punishable by action at law.

If any person be put out or disseised of any lands or tenements in forcible manner, or put out peaceably, and after holden out with strong hand; the party grieved shall have assize of novel disseisin, or a writ of trespass against the disseisor; and if he recovers, he shall have treble damages, and the defendant moreover shall make fine and ransom to the king, 8 H. 6. c. 9. s. 6.

The party grieved shall have assize &c.] But this action, being at the suit of the party, and only for the right, is only where the entry of

of the defendant was not lawful; for if a man entreth with force, where his entry is lawful, he shall not be punished by way of action; but yet he may be indicted upon the statute, for the indictment is for the force, and for the king, and he shall make fine to the king, altho' his right be never so good. *Dalt. c.* 129.

Treble damages] And this he shall recover, as well for the mean occupation, as for the first entry: And albeit he shall recover treble damages, yet he shall recover costs, which shall be trebled also; for the word *damages* includeth costs of suit. 1 *Inst.* 257.

IV. How punishable at the general sessions.

The party grieved, if he will lose the benefit of his treble damages and costs, may be aided and have the assistance of the justices at the general sessions, by way of indictment on the statute of 8 *H.* 6. Which being found there, he shall be restored to his possession, by a writ of restitution granted out of the same court to the sheriff. *Dalt. c.* 129.

In the caption of which indictment, it will be sufficient to say, *justices assigned to keep the peace of our lord the king*, without shewing that they have authority to hear and determine felonies and trespasses; for the statute enables all justices of the peace, as such, to take such indictments. 1 *Haw.* 147.

And the tenement in which the force was made, must be described with convenient certainty; and must set forth that the defendant actually entred; and ousted the party grieved; and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 *Haw.* 147, 149, 150.

But if a man's wife, children, or servants do continue in the house or upon the land, he is not ousted of his possession; but his cattle being upon the ground, do not preserve his possession. *Dalt. c.* 132.

An indictment for forcible entry was quashed, for not setting forth, that the party was seised or disseised, or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid into the freehold of *A.* in the possession of *B.* 3 *Salk.* 169.

V. How punishable by one justice.

For a more speedy remedy, the party grieved may complain to any one justice; or to a mayor, sheriff, or bailiff, within their liberties. 8 *H.* 6. *c.* 9.

But altho' one justice alone may proceed in such cases, yet it may be advisable for him, if the time for viewing the force will suffer it, to take to his assistance one or two more justices.

Concerning which power of one justice, it is enacted as follows: *After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements, or other possessions, or forcible holding*

holding thereof, he shall within a convenient time, at the costs of the party grieved (without any examining or standing upon the right or title of either party) *take sufficient power of the county, and go to the place where such force is made.* 15 R. 2. c. 2. 8 H. 6. c. 9. f. 2. Dalt. c. 44.

Complaint----by the party grieved] Yet these words do not inforce any necessity of such a complaint; for it is holden, that the justice may and ought to proceed, upon any information or knowledge thereof whatsoever, tho' no complaint at all be brought unto him, by any party grieved thereby. *Lamb.* 147.

Power of the county] All people of the county, as well the sheriffs as others, shall be attendant on the justices, to arrest the offenders; on pain of imprisonment and fine to the king. 15 *R.* 2. *c.* 2.

And if the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house, to remove the force. *Dalt. c.* 44.

And if after such entry made, the justice *shall find such force; he shall cause the offenders to be arrested.* 15 R. 2. c. 2. 8 H. 6. c. 9. f. 2.

He shall also *take away their weapons and armour, and cause them to be appraised, and after to be answered to the king as forfeited, or the value thereof.* 2 Ed. 3. c. 3.

Also such justice ought to *make a record of such force by him viewed*; which record shall be a sufficient conviction of the offenders, and the parties shall not be allowed to traverse it: And this record, being made out of the sessions, by a particular justice, may be kept by him; or he may make it indented, and certify the one part into the king's bench, or leave it with the clerk of the peace; and the other part he may keep himself. For this view of the force by the justice, being a judge of record, maketh his record thereof, in the judgment of the law, as strong and effectual, as if the offenders had confessed the force before him; and touching the restraining of traverse, more effectual, than if the force had been found by a jury, upon the evidence of others. (That is, as to the fine and imprisonment, but not as to restitution.) 15 *R.* 2. *c.* 2. *Dalt. c.* 44.

And the offenders, being arrested (as before is said) *shall be put in the next gaol there to abide convict by the record of the same justice, until they have made fine and ransom to the king.* 15 R. 2. c. 2.

Shall be put in the next Gaol] It is said, that the justice hath no power to commit the offender to gaol, unless he do it upon his own view of the fact, and not upon the jury finding the same afterwards. *Dalt. c.* 44. 1 *Hawk.* 142.

And if such offenders, being in the house at the coming of the justice, shall make no resistance, nor make shew of any force, then the justice cannot arrest or remove them at all upon such view. *Dalt. c.* 44.

But howsoever, if the force be found afterwards, by the inquiry of the jury, the justice may bind the offenders to the peace; and if they be gone, he may make his warrant to take them, and may after

send

ſend them to the gaol, until they have found ſureties for the peace. *Dalt. c.* 44.

Note; Mr *Dalton* in this place ſays *good behaviour*, which I have preſumed to alter to *the peace*, as deeming it much the ſafer; and not being ſufficiently ſatisfied concerning the power of a juſtice of the peace to bind to the good behaviour in the like caſes, which power Mr. *Dalton* hath enlarged more than all other authors, without any aſſiſtance from the commiſſion of peace, or any act of parliament, other than had been for above 200 years before.

Until they have made fine] *H.* 1. *G.* 2. *K.* and Sir *Edm. Ellewell.* He was brought up upon a *habeas corpus*, with a return of the cauſe of his commitment, which was upon a conviction of forcible entry and detainer. And it being moved to diſcharge him upon exceptions to the commitment, the court refuſed to enter into the conſideration of them, till the conviction was likewiſe regularly removed before them. But by conſent he was bailed in the mean time. And this term the conviction being before the court, it appeared that there was no fine ſet by the juſtices, and it was therefore moved to be quaſhed. It was agreed on both ſides, that there ſhould be a fine; it was inſiſted, that it being now before the king's bench by a certiorari, they might ſet the fine. But by the court, we are not to execute the judgment of an inferior court. The conviction is to be upon view, and they who view the nature of the force are the propereſt judges what fine to ſet; and though a certiorari ſhould come before the fine is ſet, yet it would be no contempt in the juſtices to compleat their judgment by ſetting one. *Lambard* indeed was of opinion, that the juſtices could not ſet the fine at all; but upon what foundation we can never imagine. The juſtices are not bound to do it upon the ſpot, but may take a reaſonable time to conſider of the fine; becauſe by the words of the act, the commitment is to be, till he has paid the fine. The conviction muſt be quaſhed, and the defendant diſcharged. *Str.* 794. L. *Raym.* 1515. *Seſ. C. V.* 1. 289.

And the ſame was likewiſe ſolemnly reſolved in *Leighton*'s caſe; and that the juſtice may aſſeſs the ſame, either before the conviction or after. 1 *Haw.* 142.

And the fine muſt be aſſeſſed upon every offender ſeverally, and not upon them jointly; and the juſtice ought to eſtreat the fine, and to ſend the eſtreat into the exchequer, and from thence the ſheriff may be commanded to levy it for his majeſty's uſe. *Dalt. c.* 44.

But upon payment of the fine to the ſheriff, or upon ſureties found (by recognizance) for the payment thereof, it ſeemeth that the juſtice may deliver the offenders out of priſon again at his pleaſure. *Dalt. c.* 44.

And ſo much concerning removing the force: But the party ouſted cannot be reſtored to his poſſeſſion by the juſtice's view of the force; nor unleſs the ſame force be found by the inquiry of a jury.

Concerning

Concerning which it is enacted as follows: *And tho' that the persons making such entry be present, or else departed before the coming of the justice; he may notwithstanding in some good town, next to the tenements so entered, or in some other convenient place by his discretion* (and that tho' he go not to see the place where the force is; *Dalt. c.* 44.) *have power to enquire by the people of the county, as well of them that make such forcible entry, as of them which hold the same with force.* 8 H. 6. c. 9. f. 3.

In order to which, *the justice shall make his precept to the sheriff, commanding him in the king's behalf, to cause to come before him, sufficient and indifferent persons, dwelling next about the lands so entered, to enquire of such entries; whereof every man shall have lands or tenements of* 40*s. a year, above reprizes. And the sheriff shall return issues on every of them, at the day of the first precept returnable* 20*s. and at the second day* 40*s. and at the third day* 100*s. and at every day after double. And the sheriff making default, shall on conviction before the same justice, or before the judge of assize, forfeit* 20*l. half to the king, and half to him who shall sue, with costs; and moreover shall make fine and ransom to the king.* 8 H. 6. c. 9. f. 4, 5.

Before the same justice] And the justice may proceed against the sheriff for this default, either by bill at the suit of the party, or by indictment at the suit of the king. *Dalt. c.* 44.

And the defendant also, if he is not present, ought to be called to answer for himself; for it is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself. 1 *Haw.* 154.

And it seems to be settled at this day, that if the defendant tender a *traverse* of the force, the justice ought not to make any restitution, till the traverse be tried. 1 *Haw.* 154.

The defendant may also by the 31 *El. c.* 11. plead *three years possession*; whereby it is enacted, that *no restitution upon an indictment of forcible entry, or holding with force, shall be made, if the person indicted have had the occupation, or been in quiet possession for three years together next before the indictment found, and his estate therein not determined; and restitution shall stay till that be tried; and if it is found against the party indicted, he shall pay such costs and damages as the judges or justices shall assess; to be recovered as costs and damages in judgments on other actions.*

And it hath been holden, that the plea of such possession is good, without shewing under what title, or of what estate such possession was; because it is not the title, but the possession only, which is material in this case. 1 *Haw.* 152.

And it was holden by the court in *Leighton*'s case, that if the defendant shall either traverse the entry or the force, or plead that he has been three years in possession, the justice may summon a jury for the trial of such traverse, for it is impossible to determine it upon view; and if the justice have no power to try it, it would be easy for any one to elude the statute by the tender of such a traverse

traverſe, and therefore by a neceſſary conſtruction the juſtices muſt needs have this power as incidental to what is expreſly given them. 1 *Haw.* 242.

And this traverſe muſt be tendered in writing, and not by a bare denial of the fact in words; for thereupon a *venire facias* muſt be awarded, a jury returned, the iſſue tried, a verdict found, and judgment given, and coſts and damages awarded; and there muſt be a record, which muſt be in writing, to do all this, and not a verbal plea. *Dalt. c.* 133. 1 *Haw.* 154.

Upon which traverſe tendred, the juſtice ſhall cauſe a new jury to be returned by the ſheriff, to try the traverſe; which may be done the next day, but not the ſame day. *Dalt. c.* 133.

And it ſeemeth, that he who tendreth the traverſe, ſhall bear all the charges of the trial; and not the king, or the party proſecuting. *Dalt. c.* 133.

And *if ſuch forcible entry or detainer be found before ſuch juſtice, then the ſaid juſtice ſhall cauſe to reſeiſe the lands and tenements ſo entered or holden, and ſhall reſtore the party put out, to the full poſſeſſion of the ſame.* 8 H. 6. c. 9. ſ. 3.

The ſaid juſtice] It ſeems to be agreed, that no other juſtices of the peace, except thoſe before whom the indictment ſhall be found, ſhall have any power either at the ſeſſions or out of it, to make any award of reſtitution. 1 *Haw.* 152.

Shall cauſe to reſeiſe] And the juſtice may break open the houſe by force, to reſeiſe the ſame; and ſo may the ſheriff do, having the juſtices warrant. *Dalt. c.* 44.

Reſeiſe] That is, ſhall remove the force, by puting out all ſuch offenders as ſhall be found in the houſe, or upon the lands, that entered or held with force. *Dalt. c.* 130.

And ſhall reſtore the party put out] And this he may do in his own proper perſon; or he may make his warrant to the ſheriff to do it. *Dalt. c.* 44. 1 *Haw.* 151, 2.

VI. How puniſhable on a certiorari.

Although regularly the juſtices only who were preſent at the inquiry, and when the indictment was found, ought to award reſtitution; yet if the record of the preſentment or indictment ſhall be certified by the juſtice or juſtices into the king's bench, or the ſame preſentment or indictment be removed and certified thither by certiorari, the juſtices of that court may award a writ of reſtitution to the ſheriff, to reſtore poſſeſſion to the party expelled: for the juſtices of the king's bench have a ſupreme authority in all caſes of the crown. *Dalt. c.* 44.

Alſo where upon a removal of the proceedings into the king's bench the conviction ſhall be quaſhed, the court will order reſtitution to the party injured. As in the caſe of *K.* and *Jones*, *M.* 8 *G.* A conviction of forcible entry was quaſhed for the old exception of *meſſuage* or *tenement*, by reaſon of the uncertainty; but the reſtitution

was

was oppoſed, on an affidavit that the party's title (which was by leaſe) was expired ſince the conviction. But the court ſaid, they had no diſcretionary power in the caſe, but were bound to award reſtitution on quaſhing the conviction. *Str.* 474.

VII. How puniſhable as a riot.

If a forcible entry or detainer ſhall be made by three perſons or more, it is alſo a riot, and may be proceeded againſt as ſuch, if no inquiry hath before been made of the force. *Dalt. c.* 44.

Indictment for a forcible entry and detainer at common law.

New-Jerſey, } THE *jurors for our lord the king, upon their oath*
Morris County. } *preſent, that* A. O. *late of*----------*in the county aforeſaid, gentleman, and* B. O. *late of the ſame, yeoman, together with divers other malefactors and diſturbers of the peace of our ſaid lord the king (whoſe names to the jurors aforeſaid are yet unknown) on the*-------*day of*----------*in the*----------*year of the reign of*----------*with force and arms, at*----------*aforeſaid, in the county aforeſaid, unlawfully and injuriouſly did enter into a certain barn and a certain orchard, then and there being in poſſeſſion of one* A. I. *and that the ſaid* A. O. *and* B. O. *together with the ſaid other malefactors, then and there, with force and arms, unlawfully and injuriouſly did expel, amove, and put out the ſaid* A. I. *from the poſſeſſion of the ſaid barn and orchard, and the ſaid* A. I. *ſo as aforeſaid expelled, amoved, and put out from the poſſeſſion of the ſaid barn and orchard, then and there with force and arms, unlawfully and injuriouſly did keep out, and ſtill do keep out, to the great damage of him the ſaid* A. I. *and againſt the peace of our ſaid lord the king, his crown and dignity.*

Record of a forcible detainer upon view.

Note, That the books upon the office of a juſtice of the peace do generally ſet forth, that the record ought to be in the preſent tenſe, and not in the time paſt (and herewith do accord the adjudged caſes in the court of king's bench, *Str.* 443.); yet nevertheleſs they do all exhibit the form of a record in the time paſt, and not in the preſent: Therefore I have taken the liberty to alter the ſame, from the record in L. *Raymond* of the conviction of Sir *Edm. Elwell* aforeſaid, and others; adding the fine thereunto, for the want of which that conviction was quaſhed. And I have given the form of a record of a forcible *detainer*, rather than of a forcible *entry*, becauſe the juſtice for the moſt part cannot be ſuppoſed to be preſent at the entry, as not having knowledge thereof until after the entry is made.

Eſſex, } BE *it remembered that on the 23d day of* March, *in the third*
to wit. } *year of the reign of our ſovereign lord* George *the third, of* Great-Britain, France *and* Ireland, *king, defender of the faith, and*

and so forth, at *in the county of* Essex *aforesaid, complaineth to us three of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, that late of----------and late of----------into the messuage of her the said being the mansion house of her the said situate within the township of aforesaid, did enter, and her the said of the messuage aforesaid, whereof the same at the time of the entry aforesaid, was seised as of the freehold of her the said for the term of her life, unlawfully ejected, expelled, and amoved, and the said messuage from her the said unlawfully, with strong hand and armed power, do yet hold and from her detain, against the form of the statute in such case made and provided; whereupon the same then, to wit, on the said 23d day of* March, *at the township of---------- aforesaid prayeth of us, so as aforesaid being justices, to her in this behalf that a due remedy be provided, according to the form of the statute aforesaid: Which complaint and prayer by us the aforesaid justices being heard, we the aforesaid esquires, justices aforesaid, to the messuage aforesaid personally have come, and do then and there find and see the aforesaid and the aforesaid messuage, with force and arms, unlawfully, with strong hand and armed power, detaining, against the form of the statute in such case made and provided, according as she the same so as is aforesaid hath unto us complained: Therefore it is considered by us the aforesaid justices, that the aforesaid and of the detaining aforesaid with strong hand, by our own proper view then and there as is aforesaid had, are convicted, and every of them is convicted, according to the form of the statute aforesaid: Whereupon we the justices aforesaid, upon every of the aforesaid and do set and impose severally a fine of* 10l. *of good and lawful money of* Great-Britain, *to be paid by them and every of them severally, to our said sovereign lord the king, for the said offences; and do cause them, and every of them, then and there to be arrested; and the same and being convicted, and every of them being convicted upon our own proper view, of the detaining aforesaid, with strong hand as is aforesaid, by us the aforesaid justices are committed, and every of them is committed, to the gaol of our said lord the king, at in the county of* Essex *aforesaid, being the next gaol to the messuage aforesaid, there to abide respectively, until they shall have paid their said several fines respectively, to our said lord the king, for their respective offences aforesaid. Concerning which the premisses aforesaid, we do make this our record. In witness whereof we the aforesaid esquires, the justices aforesaid, to this record our hands and seals do set, at the township of aforesaid, in the county of* Essex *aforesaid, on the 23d day of* March, *in the third year aforesaid of the reign of our said sovereign lord the now king.*

Mittimus

Mittimus for forcible detainer.

New-Jersey, Middlesex County. JOHN Nevill, *esquire, one of the justices of our sovereign lord the king's majesty, assigned to keep the peace within the said county, of* M. *and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; To the keeper of his majesty's gaol at----------in the said county, and to his deputy, and deputies there, and to every of them, greeting. Whereas upon complaint made unto me this present day, by* A. I. *of----------in the said county yeoman, I went immediately to the dwelling house of the said* A. I. *at----------aforesaid, in the said county, and there found* A. O. *late of----------labourer,* B. O. *late of the same, weaver, and* C. O. *late of----------butcher, forcibly, with strong hand and armed power, holding the said house, against the peace of our said lord the king, and against the form of the statute in such case made and provided: Therefore I send you, by the bringers hereof, the bodies of the said* A. O. B. O. *and* C. O. *convicted of the said forcible holding, by mine own view, testimony and record; commanding you in his said majesty's name to receive them in your said gaol, and there safely to keep them, and every of them respectively, until they shall have respectively paid the several sum of* 10l. *of good and lawful money of* Great-Britain, *to our said sovereign lord the king, which I have set and imposed upon every of them seperately, for a fine and ransom for their said trespasses respectively. Herein fail you not, at the peril that may follow thereof. Given at----------aforesaid, in the county aforesaid, under my seal, the----------day of----------in the----------year of the reign of our said sovereign lord king* George *the third.*

Note; By the forms in all the books, all the offenders stand committed until all have paid, so as that the first shall not be discharged on payment of his own fine, but continue until all the rest have paid likewise; which seems unreasonable, and is not warranted by the statute.

Precept to the sheriff to return a jury.

New-Jersey, Essex County. SAMUEL WOODRUFF, *esquire, one of the justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors within the said county committed: To the sheriff of the said county, greeting: On behalf of our said lord the king, I commend you, that you cause to come before me at----------in the county aforesaid, on the----------day of---------- next ensuing, twenty-four sufficient and indifferent men, of the neighbourhood of----------aforesaid, in the county aforesaid, every of whom shall have lands or tenements of* 40s. *yearly at the least, above reprizes, to enquire upon their oaths for our said lord the king, of a certain entry made with strong hand (as it is said) into the messuage of one*

A. I.

A. I. *at*----------*aforesaid in the county aforesaid, against the form of the statute in such case made and provided. And you are to return upon every of the jurors by you in this behalf to be impanelled,* 20*s. of issues at the aforesaid day. And have you then and there this precept. And this you shall in no wise omit, upon the peril that shall thereof ensue, Witness the said* S. W. *at*----------*in the county aforesaid, the*---------*day of*----------*in the*----------*year of the reign of*----------.

The jurors oath.

YOU *shall true inquiry and presentment make of all such things as shall come before you, concerning a forcible entry* [or, *detainer*] *said to have been lately committed in the dwelling house of*---------*yeoman, at*----------*in this county; you shall spare no one for favour or affection, nor grieve any one for hatred or ill-will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you: So help you god.*

The oath that A. F. *your foreman hath taken on his part, you and every of you shall truly observe and keep on your parts: So help you god.*

The inquisition, indictment, or finding of the jury.

New-Jersey, Essex County. AN *inquisition for our sovereign lord the king, indented and taken at*----------*in the said county, the*----------*day of*----------*in the*----------*year of the reign of*---------- *by the oaths of*----------*good and lawful men of the said county, before* S. W. *esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, who say upon their oaths aforesaid, that* A. I. *of*---------- *aforesaid, yeoman, long since lawfully, and peaceably was seised in his demesne as of fee* [if it is not freehold, then say, *possessed*] *of and in one messuage, with the appurtenances, in*----------*aforesaid, in the county aforesaid, and his said possession* [*and seisin*] *so continued until* A. O. *late of*---------- *yeoman,* B. O. *late of the same, yeoman, and* C. O. *late of the same, yeoman, and other malefactors unknown, the*----------*day of*---------- *now last past, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter, and him the said* A. I. *thereof disseised, and with strong hand expelled; and him the said* A. I. *so disseised and expelled from the said messuage with the appurtenances aforesaid, from the said*----------*day of*---------- *until the day of the taking of this inquisition, with like strong hand and armed power did keep out, and do yet keep out, to the great disturbance of the peace of our said lord the king, and against the form of the statute in such case made and provided.*

We whose names are hereunto set, being the jurors abovesaid, do upon the evidence now produced before us, find the inquisition aforesaid true.

A. B.
C. D. &c.

Warrant

Warrant to the sheriff for restitution.

New-Jersey, Essex County. JOHN OGDEN, *esquire, one of the justices of our sovereign lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; To the sheriff of the said county, greeting: Whereas by an inquisition taken before me the justice aforesaid, at----------in the county aforesaid, on this present ----------day of----------in the----------year of the reign of---------- upon the oaths of----------and by virtue of the statutes made and provided in cases of forcible entry and detainer, it is found, that* A. O. *late of----------yeoman, and* B. O. *late of----------yeoman, on the ----------day of----------now last past, into a certain messuage with the appurtenances, of* A. I. *of----------aforesaid, in the county aforesaid, gentleman, situate, lying, and being at----------aforesaid, in the county aforesaid, with force and arms did enter, and him the said* A. I. *thereof then with strong hand, did disseise and drive out, and him the said* A. I. *thus driven out from the aforesaid messuage with the appurtenances, from the----------day of----------aforesaid, to this present day of the taking of the said inquisition, with strong hand and armed force did keep out, and do yet keep out, as by the inquisition aforesaid more fully appeareth of record: Therefore on the behalf of our said sovereign lord the king, I charge and command you, that taking with you the power of the county (if it be needful) you go to the said messuage and other the premisses, and the same with the apurtenances you cause to be reseised, and that you cause the said* A. I. *to be restored and put into his full possession thereof, according as he, before the entry aforesaid was seised, according to the form of the said statutes, And this you shall in no wise omit, on the penalty thereon incumbent. Given under my hand and seal at----------in the said county, the----------day of----------in the----------year of the reign of----------.*

FORESTALLING, INGROSSING, and REGRATING.

FOreſtalling (*foreſtallan*, or *foreſtallàn*) in the Engliſh Saxon ſignifieth properly to *market before the publick*, or to *prevent the publick market*; and metaphorically, to *intercept* in general: and ſeemeth to be derived from *fore*, which is the ſame as *before*, and *ſtalle* a ſtanding place or department; from whence ſprang the ancient word *ſtallage*, which ſignifieth money paid for erecting a ſtall or ſtand, for the ſelling of goods in a fair or market:

Ingroſſing is from *in*, and *groſs*, great or whole:

And *regrating*, from *re*, again, and the French *grater*, to *grate* or ſcrape; and ſignifieth the ſcraping or dreſſing of cloth or other goods, in order for ſelling the ſame again.

I ſhall

I ſhall treat, firſt, concerning theſe offences at the common law; and, ſecondly, concerning the ſame by ſtatute.

I. Concerning theſe offences at common law.

At the common law, all endeavours whatſoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by ſpreading falſe rumours, or by buying things in a market before the accuſtomed hour, or by buying and ſelling again the ſame thing in the ſame market, or by any other ſuch like devices, are highly criminal, and puniſhable by fine and impriſonment. 8 *Haw.* 234, 5.

By the common law, a merchant bringing victuals into the realm, may ſell the ſame in groſs; but no perſon can lawfully buy within the realm any merchandize in groſs, and ſell the ſame in groſs again, without being liable to be indicted for the ſame. 3 *Inſt.* 196.

And the bare ingroſſing of a whole commodity, with an intent to ſell it at an unreaſonable price, is an offence indictable at common law, whether any part thereof be ſold by the ingroſſer or not. 1 *Haw.* 235.

And ſo jealous is the common law of all practices of this kind, that it will not ſuffer corn to be ſold in the ſheaf; perhaps for this reaſon, becauſe by ſuch means the market is in effect foreſtalled. 1 *Haw.* 235.

Anciently the ingroſſer and regrater were comprehended under the word foreſtaller; but now they are diſtinguiſhed by the following ſtatute.

II. Concerning theſe offences by ſtatute.

Whoſoever ſhall buy, or cauſe to be bought, any merchandize, victual, or any other thing whatſoever, coming by land or by water toward any market or fair, to be ſold in the ſame, or coming toward any city, port, haven, creek, or road, from any parts beyond the ſea to be ſold; or make any bargain, contract or promiſe, for the having or buying the ſame, or any part thereof ſo coming as is aforeſaid, before the ſaid merchandize, victuals, or other things ſhall be in the market, fair, city, port, haven, creek or road, ready to be ſold; or ſhall make any motion by word, letter, meſſage, or otherwiſe, to any perſon for the inhancing of the price, or dearer ſelling of any thing abovementioned, or elſe diſſuade, move, or ſtir any perſon coming to the market or fair, to abſtain or forbear to bring or convey any of the things above rehearſed, to any market, fair, city, port, haven, creek, or road to be ſold, as aforeſaid,——ſhall be deemed a foreſtaller,. 5 & 6 Ed. 6. c. 14. ſ. 1.

Whoſoever ſhall ingroſs, or get into his hands by buying, contracting, or promiſe-taking, other than by demiſe, grant, or leaſe of land or tythe, any corn growing in the fields, or any other corn or grain, butter, cheeſe, fiſh, or other dead victuals whatſoever, to the intent to ſell the ſame again, ſhall be deemed an unlawful ingroſſer. 5 & 6 Ed. 6. c. 14. ſ. 3.

And it is said not to be sufficient in an indictment or information, to say that the defendant bought so much goods, but the words of the statute are to be pursued, which are——*shall ingross or get into his hands by buying.* But it is not necessary to set forth, that the defendant did not come by it, by a demise of land, or the like; but the defendant, if he have any such matter to alledge, must give it in evidence. 1 *Haw.* 237, 238.

Whosoever shall by any means regrate, obtain, or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market to be sold, and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four mile thereof, shall be deemed a regrator. 5 & 6 Ed. 6. c. 14. s. 2.

And if any shall be guilty of any the said offences, he shall for the first offence be imprisoned two months, and forfeit the value of the goods; for the second offence, be imprisoned half a year, and forfeit double value; and for the third offence, shall be set on the pillory, forfeit all his goods, and be imprisoned during the king's pleasure. 5 & 6 *Ed.* 6. *c.* 14. *s.* 4, 5, 6.

Half the said forfeitures to go to the king, and half to him that will sue, in two years after the offence. *id. s.* 9, 14.

And the sessions may hear and determine the same, by inquisition, presentment, bill, or information, and by examination of two witnesses, and may make process thereupon, as tho' they were indicted; and estreat the king's moiety, and award execution of the other moiety for the party, by *fieri facias*, or *capias*, as the courts at *Westminster* may do: And if any conviction or attainder shall be at the king's suit only, then the whole forfeitures shall be levied to the king's use. *s* 10.

From hence it seems clearly to follow, as well as from the general rules of law, that no information for any of the said offences against the said statute can be good, without shewing in certain the quantity of the thing for which the penalty is supposed to be incurred, not only because otherwise the judgment to be given on such an information can never be pleaded in bar of any other, because it cannot appear that both of them were brought for the same thing; but also, because it cannot appear to the court what forfeiture the defendant ought to incur, unless the extent of the offence be specially set forth. 1 *Haw.* 238.

By 31 *El. c.* 5. which ordains that informations for offences against penal statutes, must be laid in the proper county, it is provided, that nevertheless an information on the said statute of *Ed.* 6. against forestalling, ingrossing, or regrating, where the penalty shall appear to be 20 *l.* or above, may be laid out of the proper county, and in any other county at the pleasure of the informer.

Indictment

Indictment for foreſtalling.

New-York, THE *jurors for our lord the king upon their*
Queen's County, *oath preſent, that* A. O. *late of the townſhip of*----------*in the county aforeſaid, yeoman, on the*----------*day of*-------*in the*----------*year of the reign of*----------*at the townſhip aforeſaid, in the county aforeſaid, did buy and cauſe to be bought of and from one* A. S. *twenty oxen, for the ſum of* 200l. *of current money of* New-York, *as he the ſaid* A. S. *then and there was driving the ſaid twenty oxen, to the market of*---------*to ſell the ſaid twenty oxen in the ſaid market, and before the ſaid twenty oxen were brought into the ſaid market, where the ſame ſhould be ſold; in contempt of our ſaid lord the king and his laws; to the evil example of all others in the like caſe offending, againſt the peace of our ſaid lord the king, his crown and dignity, and againſt the form of the ſtatute in that caſe made and provided.*

FORFEITURE.

The forfeitures for particular offences may be found under their reſpective titles; here it is treated of forfeitures in general.

I. Of forfeiture of lands and goods.
II. Of loſs of dower.
III. Of corruption of blood.

I. Of forfeiture of lands and goods.

IT ſeems agreed, that by the common law, all lands of inheritance, whereof the offender was ſeiſed in his own right, and alſo all rights of entry to lands in the hands of a wrong doer, are forfeited to the king, by an attainder of high treaſon, and to the lord of whom they are immediately holden, by an attainder of petit treaſon or felony. 2 *Haw.* 448.

But it ſeems clear, that the lord cannot enter into the lands holden of him, upon an eſcheat for petit treaſon or felony, without a ſpecial grant, till it appear by due proceſs, that the king hath had his prerogative of the year, day, and waſte. 2 *Haw.* 448.

Concerning which year, day, and waſte, it is enacted by the 17 *Ed.* 2. *c.* 16. that the king ſhall have the goods of all felons attainted, and fugitives, whereſoever they be found. And if they have freehold, it ſhall be forthwith taken into the king's hands, and the king ſhall have all profits of the ſame by one year and one day; and the land ſhall be waſted and deſtroyed in the houſes, woods, and gardens, and in all manner of things, belonging to the ſame land. And after the king hath had the year, day, and waſte, the land ſhall be reſtored to the chief lord of the fee, unleſs that he fine before with the king, for the year, day, and waſte.

As to forfeiture of goods, it seems agreed, that all things whatsoever, which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is intitled to, in his own right, and not as executor or administrator to another, are liable to such forfeiture, in the following cases:

1. Upon a conviction of treason or felony. 2 *Haw.* 450.

2. Upon a flight found before the coroner, upon view of a dead body. *id.*

3. Upon an acquittal of a capital felony, if the party is found to have fled. *id.*

4. Also a person indicted of petit larceny, and acquitted, yet if it be found he fled for it, forfeits his goods, as in case of grand larceny. 1 *H. H.* 530. 2 *Haw.* 451.

But it is certain that the party may in all cases, except that of the coroner's inquest, traverse the finding of the flight. Also it seems agreed, that the particulars of the goods found to be forfeited may be also traversed. 2 *Haw.* 451.

5. Upon a presentment by the oaths of 12 men, that a person arrested for treason or felony, fled from, or resisted those who had him in custody, and was killed by them in the pursuit or scuffle. 2 *Haw.* 451.

6. By being waived or left by a felon in his flight, whereby he forfeits the goods so waived, whether they be his own, or the goods of others stolen by him, which shall not be restored to the right owners but upon a proper prosecution. 2 *Haw.* 451.

7. Also, a convict within clergy, forfeits all his goods, tho' he be burnt in the hand; yet thereby he becomes capable of purchasing other goods. 2 *H. H.* 388, 389.

But on burning in the hand, he ought to be immediately restored to possession of his lands. 2 *H. H.* 389.

Upon outlawry in treason or felony, the offender shall lose and forfeit as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force. *Wood b.* 4. *c.* 5.

And those that tarry till the exigent, in treason, felony, or petit larceny, forfeit their goods, tho' they render themselves to justice, and are acquitted; for it was a flight in law. *Wood b.* 4. *c.* 5.

But where the killing a man in his own defence is in the law no felony, there is no forfeiture, unless he fled; for that is a distinct forfeiture, altho' the party be not guilty of the fact. 1 *H. H.* 493.

It seems agreed, that the forfeiture, upon an attainder either of treason or felony, shall have relation to the time of the offence, for the avoiding of all subsequent alienations of the *lands*; but to the time of the conviction or flight found only, as to *chattels*; unless the party were killed in flying or resisting, in which case it is said, that the forfeiture of the chattels shall relate to the time of the offence. 2 *Haw.* 454.

But tho' the goods of an offender be not forfeited till the conviction, or flight found by inquest, yet whether they may be seized upon

upon the offence committed, hath been controverted; concerning which lord *Hale* ſaith thus:

It ſeemeth clear, that at the common law, if a man had committed felony or treaſon, or tho' poſſibly he had committed none, yet if he had been indicted, the ſheriff, coroner, or other officer, could not ſeize and carry away the goods of the offender or party accuſed:

Again, he could not in that caſe have removed the goods out of the cuſtody of the offender or party accuſed, and deliver them over to the conſtables or to the *villata*, to anſwer for them:

But if the party were indicted, the ſheriff or other officer might make a ſimple ſeizure of them only to inventory and appraiſe them, and leave them to the cuſtody of the ſervants or bailiff of the party indicted, in caſe he would give ſecurity againſt their being imbezilled, or in default thereof he might deliver them to the conſtable or vill to be anſwerable for them, but yet ſo that the party accuſed and his family have ſufficient out of them for their livelihood and maintenance:

And poſſibly the ſame law was, tho' he were not indicted, but *de facto* had committed a felony, but with this difference, if he had been indicted, this kind of ſeizure might have been made, whether he committed the felony or not:

But in caſe there were no indictment, then it is at the peril of him that ſeizeth, if he committed not the felony:

And then as to the ſtatute of 1 *R.* 3. *c.* 3. it is as follows; *No ſheriff or other perſon ſhall take or ſeize the goods of any perſon arreſted or impriſoned for ſuſpicion of felony, before he be convicted or attainted, or before the goods be otherwiſe forfeited; on pain of double value to the party grieved.*

Mr. *Stamford* thinks this is but in affirmance of the common law, only that it gives a penalty; but it ſeems to be ſomewhat more than ſo, for this prohibits the ſeizure of the goods of a party impriſoned, tho' he were alſo indicted, but not yet convicted, where unqueſtionably the common law allows ſuch a ſeizure, if the party or his friends did not ſecure the forthcoming of the goods, where the party was indicted:

But upon this ſtatute theſe things are conſiderable; 1. As to perſons at large, it ſeems to me (ſays he) that if they flie not, there can be no ſeizure at all made, whether they are indicted or not; for the ſtatute did not intend a greater privilege to a party impriſoned, than to him that is at large. 2. That if he be at large, and *fly* for it, yet his goods cannot be ſeized and removed, whether he be indicted or not indicted. 3. That if he be indicted, and at large, yet the goods cannot be removed, but only viewed, appraiſed, and inventoried, in the houſe or place where they lie:

And yet I know not how it comes to paſs, ſays he, the uſe of ſeizing the goods of perſons accuſed of felony, tho' impriſoned or not impriſoned, hath ſo far obtained notwithſtanding this ſtatute, that it paſſeth for law and common practice, as well by conſtables, ſheriffs, and other the king's officers, as by lords of franchiſes, that there is nothing more uſual:

Upon

Upon the whole, he says, that the opinion of my Lord *Coke*, in his 3 *Inst.* 228. hath truly stated the law, at least as it stands upon the statute of 1 *R.* 3. *viz.* 1. That *before* the indictment, the goods of any person cannot be searched, inventoried, or in any sort seized. 2. That *after* the indictment, they cannot be seized and removed, or taken away, before conviction or attainder:

But then it may be said, to what purpose may they be searched and inventoried after indictment, if they may not be removed, but are equally liable to imbezilling as before:

I think (he says) he is not bound to find sureties, neither hath the officer at this day any power to remove them in default of sureties, and commit them to the vill, but only to inventory them, and leave them where he found them (unless in case of a second *capias* on the 25 *Ed.* 3. *c.* 14.) for the prisoner or party indicted may sell them *bona fide*; and if he may do so, the vendee may take them, and the *villata* cannot refuse the delivering of them to the vendee, tho' the goods had been delivered to them:

But there is this advantage by the viewing and appraising, that thereby the king is ascertained what the goods are, and may pursue them that take or imbezil them, by information (if the party happen to be convict) and try the property with them, whether they are really sold, or sold only fraudulently without valuable consideration, to prevent the forfeiture. 1 *H. H.* 363, 4, 5, 6, 7.

II. Of loss of dower.

Albeit a person shall be attainted of felony, yet his wife shall not forfeit her dower. 1 *Ed.* 6. *c.* 12. *f.* 17.

But on his attainder of any treason, she shall forfeit her dower. 5 & 6 *Ed.* 6. *c.* 11. *f.* 13. But in some kinds of treason (particularly with regard to the coin) there is a special saving of the wife's dower by statute.

III. Of corruption of blood.

It is agreed, that by an attainder of treason or felony, 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. 2 *Haw.* 456.

Also, that he can neither inherit as heir to an ancestor, nor have an heir. 2 *Haw.* 456.

But the king's pardon, tho' it doth not restore the blood, yet as to issues born after, hath the effect of a restitution. 1 *H. H.* 358.

But restitution of blood in its true nature and extent, can only be by act of parliament. 1 *H. H.* 358. 2 *Haw.* 458.

FOR-

FORGERY.

FORGERY is an offence at common law, and an offence alſo by ſtatute.

Forgery at the common law, is an offence in falſly and fraudulently making or altering any manner of record, or any other authentick matter of a publick nature; as a pariſh regiſter, or any deed, will, privy ſeal, certificate of holy orders, protection of a parliament man, or the like. 1 *Haw.* 182, 184.

As for writings of an inferior nature, as private letters, and ſuch like, the counterfeiting of them is not properly forgery; therefore in ſome caſes it may be more ſafe to proſecute ſuch offenders for a miſdemeanor, as cheats. For by reaſon of the uncertainty of opinions, concerning proper forgeries at common law, indictments are generally brought upon ſome of the following ſtatutes, and very few at common law. But if the indictment is at common law, and the offender is convicted, he may be pilloried, fined, and impriſoned. *Wood. b.* 3 *c*, 3. 1 *Haw.* 184.

But as to the power of juſtices of the peace in this matter, Mr. *Hawkins* ſays, it hath been ſettled of late, that they have no juriſdiction over forgery at the common law; the principal reaſon of which reſolution (he ſays) as he apprehended, was, that inaſmuch as the chief end of the inſtitution of the office of theſe juſtices was for the preſervation of the peace againſt perſonal wrongs and open violence, and the word *treſpaſs* in its moſt proper and natural ſenſe, is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only in the commiſſion, or at the moſt to extend to ſuch other offences only as have a direct and immediate tendency to cauſe ſuch breaches of the peace, as libels, and ſuch like, which on this account have been adjudged indictable before juſtices of the peace. 2 *Haw.* 40. 1 *Salk.* 406.

But Mr. *Barlow* ſays nevertheleſs, that it ſeemeth clear, that a juſtice of the peace may take an information thereof, bind over the informers, examine the offender, certify his examination to the proper judges, and commit him to priſon in order to abide his trial. *Barl.* 244.

The ſtatutes that makes forgery an offence are theſe that follow:

The firſt is that famous ſtatute of the 5 *El. c.* 14. which by an example worthy to be imitated, doth (in order to prevent confuſion) repeal all former ſtatutes againſt forgery. By this it is enacted, that *if any perſon upon his own head and immagination, or by falſe conſpiracy and fraud with others, ſhall wittingly, ſubtilly, and falſly forge or make, or ſubtilly cauſe, or willingly aſſent to be forged or made, any falſe deed, charter, or writing ſealed, court roll, or the will of any perſon in writing, to the intent that the eſtate of freehold, or inheritance of any perſon, of any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or intereſt of any perſon in the ſame may be moleſted, troubled, defeated, recovered, or charged; or ſhall*

shall pronounce, publish, or shew forth in evidence the same as true, knowing the same to be false or forged, to the intent as above (except lawyers or attornies, for their clients, not being privy to the forgery); and shall be thereof convicted, either upon action at the suit of the party, or otherwise according to the order and due course of the laws of this realm,——he shall pay to the party double costs and damages, and be set in the pillory, and have both his ears cut off, and his nostrils slit and seared with a hot iron, and shall forfeit the profits of his lands for life, and be imprisoned also during life. s. 2.

And all justices of oyer and terminer, and justices of assize, shall have power to inquire of, hear and determine all offences in this act. s. 10.

Forge or make] Making a second deed, or antedating it, with intent to make it take place of a former deed, is forgery within this statute. 3 *Inst.* 167.

Or subtilly cause, or willing assent] To *cause*, is to procure or counsel one to forge; to *assent*, is to give his assent or agreement afterwards, to the procurement or counsel of another; to *consent*, is to agree at the time of the procurement or counsel, and such is in law a procurer. 3 *Inst.* 169.

But lord *Hale* says, that an *assent* after the fact is committed, makes not the party assenting guilty or principal in the forging; but it must be a precedent, or concomitant assent. 1 *H. H.* 684.

False deed, charter, or writing] It seems to be no way material, whether a forged instrument be made in such a manner, that if it were in truth such as it is counterfeited for, it would be of validity or not; and upon this ground it hath been adjudged, that the forgery of a protection in the name of a member of parliament, who in truth at the time was not a member, is as much a crime as if he were. 1 *Haw.* 184.

Writing sealed] These are large words; and the making of a false customary of a manor in writing under seal, containing divers false customs, to the disherison of the lord of the manor, and that the same had been allowed and permitted by the lord of the manor, which was also false, was resolved to be within these words *a false writing sealed.* 3 Inst. 171.

Sealed] It is required that the deed, charter, or writing must be sealed, that is have some impression upon the wax; for wax, without an impression is not a seal. 3 *Inst.* 169.

Court roll, or will] Here are two writings which need not be sealed, because they may take effect without any seal, for that they be no deeds and no writing can have the force of a deed, without a seal. 3 *Inst.* 170.

Will] If any person which writeth the will of a sick man, inserteth a clause therein concerning the devise of lands, without any direction of the devisor, this is forgery, altho he did not forge the whole will. 3 *Inst.* 170.

To the intent that the state of freehold or inheritance of any person, of any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest of any person in the same may be molested, troubled

troubled, defeated, recovered, or charged] *E.* 4 *G.* 2. *K.* and *Japhet Crooke.* The defendant was convicted on this ſtatute for forging a leaſe and releaſe. And the indictment ſets forth, that *Garbut* and his wife were ſeized in fee of certain meſſuages, lands, and tenements called *Jawick* in the pariſh of *Clackton* in *Eſſex*, and that the defendant intending to moleſt them and their intereſt in the premiſſes, forged a leaſe and releaſe as from *Garbut*, and his wife, whereby they are ſuppoſed for a valuable conſideration, to convey to him "all that park called *Jawick* park in the pariſh of *Clackton* "in *Eſſex*, containing eight miles in circumference, with all the "deer, woods, *&c.* thereto belonging." It was moved in arreſt of judgment, that the premiſſes ſuppoſed to be conveyed, were ſo materially different from thoſe which were really the eſtate of *Garbut* and his wife, which was houſes, lands and tenements; that it was impoſſible this conveyance ever could moleſt or diſturb them: if it was a true deed, it could not paſs their lands at law, for want of a proper deſcription: and though where lands are improperly deſcribed, a court of equity will oblige the vendor to convey them by proper words, yet that is only where there is a previous contract for a ſale, and they do it as carrying that contract into execution. The court for ſeveral terms inclined ſtrongly with the objection; but this term *Raymond* Ch. J. declared that they were all of opinion to over-rule it: for by the words of the act, it is not neceſſary that there ſhould be a charge or poſſibility of a charge; it is ſufficient that it be done with that intent, and the jury have found that it was done with intent to moleſt *Garbut* and his wife in the poſſeſſion of their lands. Accordingly judgment was given for the king, and the defendant had ſentence to undergo the puniſhment appointed by the act for forging a deed, and the ſame was executed upon him at Charing-croſs, *Str.* 901.

Pronounce or publiſh] That is, when one by words, or writing pronounceth or publiſheth the deed to any other as true. 3 *Inſt.* 171.

Knowing the ſame to be forged] This knowledge may come by two means; either of his own knowledge, or of the relation of another; for if another tell him it is forged, and he publiſh it afterwards as true, and it prove to be forged indeed, he is in danger of this ſtatute. 3 *Inſt.* 171. 1 *Hawk.* 187.

But lord *Hale* ſays, that tho' ſuch a relation may be an evidence of fact to prove his knowledge, yet it is not concluſive; for perchance there might be circumſtances of fact, that might make the perſon relating it, or his relation, not credible: So that the *knowing* muſt be upon the whole matter left to the jury, upon the circumſtances of the caſe. 1 *H. H.* 685.

Juſtices of oyer and terminer] Albeit juſtices of the peace, by their commiſſion, have power to hear and determine felonies and treſpaſſes, yet they are not included under the name of juſtices of oyer and terminer; for juſtices of oyer and terminer are known by one diſtinct name, and juſtices of the peace by another. 3 *Inſt.* 103.

And

And by the same statute it is further enacted, that *if any person, upon his own head or imagination, or by false conspiration or fraud with any other, shall wittingly, subtilly, and falsly forge or make, or cause or assent to be made and forged any false charter, deed, or writing, to the intent that any person may have or claim any estate or interest for term of years in any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity of fee simple, fee-tail, or for term of life, lives, or years; or any obligation, or bill obligatory, or any acquittance, release, or other discharge of any debt, account, action, suit, demand, or other thing personal; or shall pronounce, publish, or give the same in evidence as true, knowing the same to be false and forged, he shall, on conviction in like manner, pay to the party double costs and damages, and be set on the pillory, and have one of his ears cut off, and be imprisoned for a year.* s. 3.

Obligation or bill obligatory] The forgery of a deed of gift of mere personal chattels, is not within this statute. 1 *Haw.* 186.

And *if after verdict, the plaintiff shall release the judgment or execution, or suffer a discontinuance, it shall only discharge his own costs and damages, and not the other punishments.* s. 6.

And by the same statute it is further enacted, that *if any person shall after conviction offend again in any of the ways abovementioned, he shall be guilty of felony without benefit of clergy.* s. 7, 8.

And by the 7 G. 2. *c.* 22. it is further enacted, by way of addition to the foregoing, that *if any person shall falsly make, alter, forge, or counterfeit, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intent to defraud any person; or shall utter or publish the same as true, with intent to defraud any person, knowing the same to be false;----he shall be guilty of felony without benefit of clergy:* and this, without any saving of the corruption of blood, or dimerison of heirs.

Forgery is excepted out of the act of general pardon; 20 G. 2.

GAMING.

MR. *Dalton* says, that playing at cards and dice, and the like are not prohibited by the common law; neither are they, *malum in se*, of their own nature, but only prohibited by statute. *Dalt. c.* 46.

But it hath been said, that all common gaming houses are nusances in the eye of the law, as being great temptations to idleness, and apt to draw together numbers of disorderly persons. 1 *Haw.* 198.

By the statute of the 33 *H.* 8. *c.* 9. No person shall for his gain, lucre, or living, keep any common house, alley, or place of bowling, coyting, cloysh cayls, half bowl, tennis, dicing table, or carding, or any unlawful game; on pain of 40*s.* a day. *s.* 11.

GAOL

GAOL and GAOLER.

I. Building and repairing of gaols.
II. Who ſhall have the keeping of gaols.
II. Gaoler ſhall receive criminals.
IV. How they ſhall be maintained.
V. How they ſhall be reſtrained and kept.
VI. How they ſhall be delivered.
VII. Of gaolers permitting eſcapes.
VIII. Concerning debtors.

I. Building and repairing of gaols.

[THE building and repairing of gaols in *America*, are generally done purſuant to the acts of the ſeveral legiſlatures made for that purpoſe.]

II. Who ſhall have the keeping of gaols.

The gaol it ſelf is the king's, but the keeping thereof is incident to the office of the ſheriff, and inſeparable from it; except ſuch gaols whereof any perſons have the keeping by inheritance or ſucceſſion. 14 *Ed.* 3. *ſt.* 1. *c.* 20. 19 *H.* 7. *c.* 10. 2 *Inſt.* 589.

And therefore the ſheriffs ſhall put in ſuch keepers for whom they will anſwer. 14 *Ed.* 3. *ſt.* 1. *c.* 10.

And a gaoler in fact, is as much puniſhable for a miſdemeanor in his office, as if he were a rightful gaoler. 2 *Haw.* 134.

III. Gaoler ſhall receive criminals.

All felons ſhall be impriſoned in the common gaol, and not elſewhere. 5 *H.* 4. *c.* 10.

And if the gaoler refuſes to receive a felon, or take any thing for receiving him, he ſhall be puniſhed for the ſame by the juſtices of gaol delivery. 4 *Ed.* 3. *c.* 10. *Dalt. c.* 170.

IV. How they ſhall be maintained.

The gaoler cannot refuſe the priſoner victuals, for he ought not to ſuffer him to die for want of ſuſtenance, 1 *Inſt.* 295.

Which ſhall be provided for, by a ſum to be paid out of the general county rate. 14 *El. c.* 5.

V. How they ſhall be reſtrained and kept.

If any perſon ſhall be committed to any priſon, for any criminal or ſuppoſed criminal offence, he ſhall not be removed from thence, unleſs it be by *habeas corpus* or ſome other legal writ; or where he is

is removed from one prison or place to another, within the same county, in order to his trial or discharge; or in case of sudden fire or infection, or other necessity: on pain that the person signing any warrant for such removal, and the person executing the same, shall forfeit for the first offence 100 *l.* and for the second 200 *l.* to the party grieved. 31 *C.* 2. *c.* 2. *s.* 9.

But on emergent occasions, as in case of infectious diseases, the sheriff or gaoler, with the advice and consent of three or more justices (1 *Q.*) may, if they shall find it needful, provide other safe places (with the owners consent) for the removal of sick or other persons out of the usual gaols. 19 *C.* 2. *c.* 4. *s.* 2.

It seemeth generally in all cases where a man is committed to prison, especially if it be for felony, or upon an execution, or but for a trespass or other offence, every gaoler, ought to keep such prisoner in safe and close custody; safe, that he cannot escape: close, without conference with others or intelligence of things abroad. *Dalt. c.* 170.

And therefore if the gaoler shall license his prisoner to go abroad for a time, and then to come again, or to go abroad with a keeper tho' he come again, yet these are escapes. *Dalt. c.* 170.

And hereupon it is lawful for the gaoler to hamper a felon with irons to prevent his escape. 1 *H. H.* 601. *Dalt. c.* 170.

But the learned editor of *Hale's History* observes, that this liberty can only be intended, where the officer has just reason to fear an escape; as where the prisoner is unruly, or makes any attempt to that purpose; but otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of *England*, by which gaolers are forbidden to put their prisoners to any pain or torment. And lord *Coke*, 2 *Inst.* 381. is express, that by the common law it might not be done. 1 *H. H.* 601.

And if the gaoler keep the prisoner more straitly than he ought of right, whereof the prisoner dieth, this is felony in the gaoler by the common law: and this is the cause, that if a prisoner die in gaol, the coroner ought to sit upon him. 3 *Inst.* 91.

But if a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71. 1 *H. H.* 496.

VI. How they shall be delivered.

By the 3 *H.* 7. *c.* 3. Those that have the custody of gaols, must certify the names of all prisoners, to the justices of gaol delivery, in order to their trial or discharge; on pain of 5 *l.*

And if a gaoler detains a prisoner in gaol after his acquittal, unless it be for his fees (not for meat, drink, or lodging) this is an unlawful imprisonment. 2 *Inst.* 53.

And a gaoler must not disobey a writ of *habeas corpus*, for want of his fees; but the court will not turn the prisoner over, till the gaoler be paid his fees. 2 *Haw.* 151. *VII. Of*

VII. Of gaolers permitting escapes.

If the gaoler voluntarily suffer a prisoner to escape, he shall be punished in the same manner as the prisoner ought to have been who escaped: and if he negligently permit him to escape, he shall be punished by fine and imprisonment. And the sheriff shall answer for him. 2 *Haw.* 134, 5, 6.

But the principal gaoler is only finable for the voluntary escape of a felon suffered by his deputy; for no one shall suffer capitally for any crime, but he who is actually guilty of it. 2 *Haw.* 135.

But for a negligent escape suffered by his bailiff, the sheriff is as much liable to answer, as if he had actually suffered it himself; and the court may charge either the sheriff or bailiff for it: and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

VIII. Concerning debtors.

The county gaol is the prison for malefactors; but prisoners for debt, where escape lies against the sheriff for their escaping, may be kept in what place the sheriff pleases. L. *Raym.* 136.

But he shall not put, keep, or lodge prisoners for debt and felons together in one room or chamber; but they shall be put, kept, and lodged separate and apart from one another in distinct rooms; on pain of forfeiting his office, and treble damages to the party grieved. 22 & 23 *C.* 2. *c.* 20. *s.* 13.

But it is said, that a gaoler is no way punishable for keeping a debtor in irons. 2 *Haw.* 152. But it seemeth that this must at least be understood with the qualification abovementioned.

Good behaviour. See *SURETY.*

HIGHWAYS.

MOST of the books are remarkably confused under this title; occasioned by a multiplicity of statutes, standing unrepealed, and yet altered perhaps five or six times, or oftener, by succeeding statutes: [And it does not appear that any of the statutes about highways and bridges are properly extended to *America*, as every legislature, in the several *English* colonies, have passed laws for laying out and regulating highways, in their respective governments; nevertheless it will be necessary here to consider,]

I. What is a highway.

There are three kinds of ways; 1. A foot way. 2. A foot and horse way, which is also a pack or drift way. 3. A foot, horse, and cart way. 1 *Inst.* 56.

It

It seemeth that any one of the said ways, which is common to all the king's people, whether it leads directly to a market town, or only from town to town, and does not terminate there, but is also a thoroughfare to other towns, may properly be called a highway. And therefore the distinction which is taken in some books, concerning this matter, seems to be very reasonable; that every way from town to town may be called a highway, because it is common to all the king's subjects; and consequently that a nusance therein is a common nusance, and punishable by indictment: but that a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the king's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nusance therein. 1 *Haw.* 201.

It hath been holden, that if there be an highway in an open field, and the people have used time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; from whence it follows, that if such outlets be sown with corn, and the beaten track be foundrous, the king's subjects may justify going upon the corn. 1 *Haw.* 201.

In books of the best authority, a river common to all men is called a highway. 1 *Haw.* 201.

II. *Of annoyances in general.*

There is no doubt, but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act, which will render it less commodious to the king's people, are publick nusances at common law. 1 *Haw.* 212.

And by the common law any one may abate a nusance, to a highway, and remove the materials, but not convert them to his own use. 1 *Haw.* 214.

Also it seemeth, that an heir may be indicted for continuing an incroachment, or other nusance to a highway, begun by his ancestor; because such a continuance thereof amounts in the judgment of law to a new nusance. 1 *Haw.* 214.

A gate erected in a highway, is a common nusance, because it interrupts the people in that free and open passage which they before enjoyed, and were lawfully intitled to; but where a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy. 1 *Haw.* 199.

III. *Presentment*

III. *Preſentment of a juſtice on his own view.*

By the 5 *El. c.* 13. Every juſtice of the peace ſhall have authority on his own proper knowledge, in the open general ſeſſions, to make preſentment of any highway not well and ſufficiently repaired, or of any other default contrary to the ſtatute of the 2 & 3 *P. & M.* And every ſuch preſentment made by a juſtice upon his own knowledge ſhall be as good, and of the ſame force, ſtrength, and effect in the law, as if the ſame had been preſented, found, and adjudged by the oath of 12 men: And for every ſuch default ſo preſented, the juſtices ſhall immediately at the ſaid general ſeſſions, have authority to aſſeſs ſuch fines as to them ſhall be thought meet: Saving every perſon that ſhall be touched by any ſuch preſentment, to have his lawful traverſe to the ſame preſentment, as they may have upon any indictment of treſpaſs or forcible entry. *ſ.* 9.

Hereupon it hath been obſerved by Mr. *Dalton*, and others, that the juſtices at the ſaid ſeſſions may aſſeſs the fine upon ſuch offenders, and that in the abſence of the party, without calling him to anſwer by any proceſs: Which opinion ſeeming contrary to natural juſtice, and to the privilege of an *Engliſhman* as eſtabliſhed by the great charter, perhaps hath not been ſufficiently weighed by all the authors who have adopted it; and there ſeems to be the more ground for this ſuſpicion, in that moſt of them do quote Mr. *Crompton* for this opinion, one after another, in a wrong page; and in fact Mr. *Crompton* ſaith no ſuch thing, but rather ſeems to incline to the contrary opinion; his words are theſe,—— A preſentment at the ſeſſions by a juſtice of the peace, upon his own knowledge, of ſuch a highway not repaired, is as a preſentment of 12 men, upon which the juſtices may aſſeſs a fine by 5 *El. c.* 13. and 3 *P. & M. c.* 8. but the party may have a traverſe to the preſentment by the ſaid ſtatute of 5 *El.* Cromp. 110.

And Mr. *Hawkins*, obſerving upon this opinion, ſaith thus: It hath been holden, in the expoſition of this clauſe, that the party againſt whom ſuch a preſentment ſhall be made, cannot take any traverſe to the want of repair of ſuch highway; but it is agreed, that he may plead that ſome other perſon ought to repair the ſame, and traverſe his own obligation to do it. Neither can I ſee upon what reaſon the former opinion is grounded, that he cannot traverſe the want of repair of ſuch highway; for ſince the ſtatute expreſly ſaves to every perſon who ſhall be touched by any ſuch preſentment, his lawful traverſe to the ſame, as he might have to an indictment of treſpaſs or forcible entry; and ſince it ſeems clear, that every defendant to any ſuch indictment (*viz.* of treſpaſs or forcible entry) may traverſe the whole matter alledged againſt him: why may he not as well have the ſame benefit in the preſent caſe? And tho' the record of a juſtice of the peace, acting by force of any ſtatute, as a judge be not traverſeable, yet it ſeems hard by ſuch a general rule, to make any record not traverſable, which by the expreſs words of the ſtatute which authorizes the making of it is allowed to be traverſable. 1 *Haw.* 217.

To

To which may be added, that the ſtatute doth not ſay, that ſuch preſentment ſhall be of like force, as if found by the oaths of both juries (that is to ſay, both of the grand and traverſe jury,) but only that it ſhall be of the like force, as if it had been preſented, found and adjudged, by the oath of 12 men; which can only intend, that it ſhall be of equal force with the preſentment of a grand jury.

So that the ſenſe of the ſtatute perhaps may be no more than this; that if the party is preſent in court, and ſubmits to the preſentment, the juſtices may immediately aſſeſs a fine: but he may traverſe the preſentment if he will; and if upon the traverſe he ſhall be acquitted, then there can be no foundation for fining him. But if he is abſent, it is reaſonable that he be firſt ſummoned to anſwer for himſelf; and if he ſhall afterwards be convicted either by confeſſion, or by verdict, then will be the time to ſet the fine. Otherwiſe, the aſſeſſing of a fine, in this and the like caſes, ſeemeth to be premature; beginning where the court ſhould end; being in effect the giving of judgment before they have heard the parties; and it is poſſible the defendant may be acquitted, and then the fining of him is ridiculous.——Beſides, that the court cannot ſo well judge beforehand of the *quantum* of the fine, which ought to be proportioned according to the demerits of the offence; of which they can by no means judge, until the matter hath come before them in a legal courſe of proceeding.

IV. Certiorari.

By the 22 *C.* 2. *c.* 12. it is provided, that no preſentment or indictment for the defect of repairs of highways, ſhall be removed by certiorari or otherwiſe, till after traverſe and judgment. *ſ.* 4.

And by the ſtatute of the 3 *W.* *c.* 12. No preſentment, indictment, or order made upon that act, ſhall be removed at all by certiorari, into any other court. *ſ.* 23.

But by the 5 *W.* *c.* 11. If the right or title to repair come in queſtion, a certiorari (upon affidavit made of the truth thereof) may be granted to remove the ſame into the king's bench; provided that the party proſecuting the certiorari, ſhall (before the allowance thereof) find two mainucaptors who ſhall enter into recognizance of 20*l.* before a juſtice of the peace, that he ſhall at his own coſts and charges procure the iſſue to be tried at the next aſſizes, as in the caſe of other certioraries. *ſ.* 6.

And it hath been reſolved, that if the quarter ſeſſions, under pretence of the juriſdiction given them by theſe ſtatutes, take upon them to do a thing manifeſtly exceeding their authority, as to make an order on ſurveyors to make up their accounts before a ſpecial ſeſſions, their proceedings may be removed by certiorari into the king's bench, and there quaſhed; for the quarter ſeſſions have no manner of power given them, to intermeddle originally with ſuch accounts, but only by way of appeal. 1 *Haw.* 218.

Indictment

Indictment for incroaching upon a highway, by building thereupon.

New-York, Queen's County. THE *jurors for our lord the king, upon their oath present, that* A. O. *late of----------carpenter, the----------day of----------in the----------year----------with force and arms, at----------in and upon a common highway, in a certain place commonly called----------there leading from----------to----------by a certain building there, containing in length----------feet, and in breadth ----------feet, by him the said* A. O. *erected and built, hath unlawfully and unjustly incroached, and doth yet incroach, and the building aforesaid, so as is aforesaid erected and built by him the said* A. O. *from the aforesaid----------day of----------in the year aforesaid, unto the day of exhibiting this information, at----------aforesaid in the county aforesaid, with force and arms, unlawfully and unjustly hath continued and doth yet continue, by reason whereof the common highway aforesaid hath become and is greatly straitned, so that the leiges and subjects of the said lord the king upon and through the said common highway aforesaid, with their horses, carts, and carriages cannot go, pass, ride, and labour as they ought and were wont to do, to the great and common nusance of all the leiges and subjects of the said lord the king in and through the said common highway going, passing, riding, and labouring, and against the peace of the said lord the king.* Trem. 196.

Indictment for laying timber or other obstructions in the highway.

New-York, Orange County. THE *jurors for our lord the king, upon their oath present, that* A. O. *late of----------in the county aforesaid, yeoman, on the----------day of----------in the----------year of the reign of----------and on divers other days and times, as well before as afterwards, with force and arms, at----------in the said county, in and upon the king's common highway there, leading from---------- unto the town of----------divers great pieces of timber put and placed and caused to be put and placed, and the same great pieces of timber so as aforesaid put and placed, from the aforesaid----------day of---------- in the----------year aforesaid, until the day of exhibiting this information, in and upon the king's common highway aforesaid, to be, lie, and remain, hath permitted, and doth still permit, to the grievous and common nusance of all the lieges and subjects of the said lord the king, upon and through the king's common highway aforesaid going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity.* Trem. 197.

Or,——*great quantity of dung, and other filth, by reason whereof, divers hurtful and unwholesome smells from the said dung and other filth did then and there arise, and thereby the air there became, was, and is corrupted and infected*——

Or,——cart loads of rubbiſh—by reaſon whereof the ſaid highway for the whole time aforeſaid was ſtraitned and obſtructed, ſo that the liege ſubjects of our ſaid lord the king could not ſo freely paſs and repaſs about their lawful buſineſs, thro' the ſaid common highway there, as they ought and have been accuſtomed——.

HOMICIDE.

HOMICIDE in law ſignifies the killing of a man by a man. 1 *Haw.* 66.

And it includes in it, not only petit treaſon, concerning which ſee title *TREASON*; but alſo the ſeveral offences which are treated of in the following ſections.

There is alſo another kind of untimely death of a man, not properly homicide: when he is killed by a horſe, a cart, a tree, or the like, and not by a man; which is called Caſual death: for which ſee title *DEODAND*.

I. Juſtifiable homicide.
II. Homicide by miſadventure.
III. Homicide by ſelf defence.
IV. Manſlaughter.
V. Murder.
VI. Self-murder.

I. Juſtifiable homicide.

To make homicide juſtifiable, it muſt be owing to ſome unavoidable neceſſity, to which the perſon who kills another muſt be reduced, without any manner of fault in himſelf. 1 *Haw.* 69.

And there muſt be no malice coloured under pretence of neceſſity; for wherever a perſon who kills another, acts in truth upon malice, and takes occaſion from the appearance of neceſſity to execute his own private revenge, he is guilty of murder. 1 *Haw.* 69.

If any evil diſpoſed perſon ſhall attempt feloniouſly to rob or murder any perſon in any dwelling houſe or highway, or feloniouſly attempt to break any dwelling houſe in the night time, and ſhall happen in ſuch felonious intent to be ſlain; the ſlayer ſhall be diſcharged, and ſhall forfeit no lands nor goods. 24 *H.* 8. *c.* 5.

If treſpaſſers in a foreſt, chaſe, park, or warren, or any incloſed ground wherein deer are kept, will not render themſelves to the keepers, upon a hue and cry made to ſtand to the king's peace, but fly from, or defend themſelves againſt them, they may be ſlain by them. 1 *Haw.* 71.

If

If rioters, or forcible enterers or detainers, ſtand in oppoſition to the juſtices lawful warrant, and any of them is ſlain; it is no felony. *Hale's Pl.* 37.

If a man come to burn my houſe, and I ſhoot out of my houſe, or iſſue out of my houſe, and kill him; it is no felony. *Hale's Pl.* 39.

If a woman kill him that aſſaulteth to raviſh her; it is no felony. *Hale's Pl.* 39.

If a perſon having actually committed a felony, will not ſuffer himſelf to be arreſted, but ſtand on his own defence, or fly, ſo that he cannot poſſibly be apprehended alive by thoſe who purſue him, whether private perſons, or publick officers, with or without a warrant from a magiſtrate; he may be lawfully ſlain by them. 1 *Haw.* 70.

So if a felony hath actually been committed, and an officer or miniſter of juſtice, having lawful warrant ſo to do, arreſt an innocent perſon, and ſuch perſon aſſault the officer or miniſter of juſtice; the officer is not bound by law to give back, but to carry him away; and if in execution of his office, he cannot otherwiſe avoid it, but in ſtriving kill him, it is no felony. And in that caſe, the officer or miniſter of juſtice ſhall forfeit nothing; but the party ſo aſſaulting, or offering to fly away, and is killed, ſhall forfeit his goods. 3 *Inſt.* 56.

And if a perſon arreſted for felony, break away from his conductors to gaol, they may kill him, if they cannot otherwiſe take him. But in this caſe likewiſe, there muſt have been a felony actually committed. *Hale's Pl.* 36, 37.

Alſo if a criminal endeavouring to break the gaol, aſſault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

In civil cauſes; Altho' the ſheriff cannot kill a man who flies from the execution of a civil proceſs; yet if he reſiſt the arreſt, the ſheriff or his officer need not give back, but may kill the aſſailant. *Hale's Pl.* 37.

So if in the arreſt and ſtriving together, the officer kill him, it is no felony. *Hale's Pl.* 37.

In all theſe caſes the party upon arraignment having pleaded not guilty, the ſpecial matter muſt be found; whereupon the party ſhall be diſmiſſed, without any forfeiture, or pardon purchaſed. *Hale's Pl.* 38.

II. Homicide by miſadventure.

I have purpoſely avoided the word *chancemedley* in this place, becauſe authors do not ſeem to be agreed whether it is to be applied to homicide *by miſadventure*, or to *manſlaughter*. Ld. *Coke* and Mr. *Hawkins* ſeem to underſtand it of *manſlaughter*; Ld. *Hale*, and others, of homicide *by miſadventure*. The original meaning of the word ſeems to favour the former opinion, as it ſignifies a ſudden or caſual meddling or contention; whereas homicide *by miſadventure* ſuppoſeth no previous meddling or falling out. But the ſame author ſometimes, in different places, applies it to both of them promiſcuouſly.

Homicide by misadventure is, where a man is doing a lawful act, without intent of hurt to another, and death casually ensues. *Hale's Pl.* 31.

As where a labourer being at work with a hatchet, the head flies off, and kills one who stands by. 1 *Haw.* 73.

Or where a third person whips a horse, on which a man is riding, whereupon he springs out, and runs over a child, and kills him; in which case the rider is guilty of homicide by misadventure, and he who gave the blow of manslaughter. 1 *Haw.* 73.

But if a person, riding in the street, whip his horse to put him into speed, and run over a child and kill him, it is homicide and not by misadventure; and if he ride so, in a press of people, with intent to do hurt, and the horse killeth another, it is murder in the rider. 1 *H. H.* 476.

If a person drives his cart carelessly, and it runs over a child in the street, if he have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart ran over the child before it was possible for the carter to make a stop, it is by misadventure. 1 *H. H.* 476.

It is said before, that this homicide is only when it happeneth upon a man's doing a lawful act; for if the act be unlawful, it is murder. As if a person, meaning to steal a deer, in another man's park, shooteth at the deer, and by the glance of the arrow killeth a boy, that is hidden in a bush; this is murder, for that the act was unlawful, altho' he had no intent to hurt the boy, nor knew of him. But if the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure and no felony. 3 *Inst.* 56.

So if any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is by misadventure; for it was not unlawful to shoot at the wild fowl; But if he had shot at a cock or a hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder; for the act was unlawful. 3 *Inst.* 56.

Also, if there be an evil intent, it is murder. Thus, if a man, knowing that many people are in the street, throw a stone over a wall, intending only to fright them, or to give them a little hurt, and thereupon one is killed, this is murder; for he had an ill intent, tho' that intent extended not to death, and tho' he knew not the party slain. 3 *Inst.* 57.

And it is a general rule, in case of all felonies, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Haw.* 74.

But in all the cases above, if it doth only hurt a man, by such an accident, it is nevertheless a trespass; and the person hurt shall recover

recover his damages; for tho' the chance excuſe from felony, yet it excuſeth not from treſpaſs. 1 *H. H.* 472.

If a perſon eſcape that hath killed another by miſadventure, the town ſhall be amerced. 2 *Inſt.* 149.

This homicide is not felony, becauſe it is not accompanied with a felonious intent, which is neceſſary in every felony. 1 *Haw.* 75.

But yet a perſon guilty thereof is not bailable by juſtices of the peace, but muſt be committed to the aſſizes. 1 *Haw.* 75.

But if he is taken only on a ſlight ſuſpicion, the juſtices of the peace may bail him. 2 *Haw.* 105.

Altho' this homicide is not properly a man's crime, but his misfortune; yet becauſe the king hath loſt his ſubject, and in reſpect of the great favour the law hath to the life of man, and to the end that men ſhould uſe all care, diligence, and circumſpection in all they do, that no hurt ſhould come of their actions, a perſon convicted hereof ſhall forfeit his goods, and ſhall not preſently be diſcharged of his impriſonment, but bailed, that he may ſue out his pardon, which he ſhall have out of the chancery of courſe. 1 *H. H.* 477, 492. 1 *Haw.* 76.

III. Homicide by ſelf defence.

Homicide in a man's own defence ſeems to be, where one who hath no other poſſible means of preſerving his life from one who combats with him on a ſudden quarrel, kills the perſon by whom he is reduced to ſuch an inevitable neceſſity. 1 *Haw.* 75.

And not only he, who upon an aſſault retreats to a wall, or ſome ſuch ſtrait, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable neceſſity; but alſo he, who being aſſaulted in ſuch a manner, and in ſuch a place, that he cannot go back without manifeſtly indangering his life, kills the other without retreating at all. 1 *Haw.* 75.

And notwithſtanding a perſon who retreats from an aſſault to the wall, give the other wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *ſe defendendo* only. 1 *Haw.* 75.

But if the mortal wound was firſt given, then it is manſlaughter. *Hale's Pl.* 42.

And an officer who kills one that reſiſts him in the execution of his office, and even a private perſon that kills one who felonioufly aſſaults him in the highway, may juſtify the fact, without ever giving back at all. 1 *Haw.* 75.

But if a perſon upon malice *prepenſe* ſtrike another, and then fly to the wall, and there in his own defence kills the other, this is murder. *Hale's Pl.* 42.

Hereof there can be no acceſſaries, either before or after the fact; becauſe it is not done with a felonious intent, but upon inevitable neceſſity. 3 *Inſt.* 56.

If a man eſcape, that hath killed another in his own defence, the town ſhall be amerced. 2 *Inſt.* 315.

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A perſon guilty thereof is not bailable by juſtices of the peace; but they muſt commit him till the aſſizes. 1 *Haw.* 76.

But otherwiſe it is, if he is taken only on ſlight ſuſpicion. 2 *Haw.* 105.

Lord *Coke* (2 *Inſt.* 316.) ſays; that the juſtices of the peace cannot take an indictment of killing a man *ſe defendendo*; becauſe their commiſſion is not general, as is that of the juſtices of gaol delivery, but limited: But lord *Hale* (2 *H. H.* 46.) holds the contrary.

A perſon convicted hereof, ſhall not be diſcharged out of priſon but upon bail, and ſhall forfeit all his goods, altho' the cauſe was inevitable. And this, becauſe of the great regard which the law hath for the life of man; and alſo, by reaſon that the law intends it had a beginning upon an unlawful cauſe: for quarrels are not preſumed to grow without ſome wrongs in words or deeds, and ſo malice on both ſides. But he ſhall have his pardon out of the chancery of courſe. 3 *Inſt.* 56. 1 *Haw.* 76.

If a man be indicted for homicide *ſe defendendo*, and is found not guilty, yet if it be found that he fled for the ſame, he ſhall forfeit his goods for ſuch flight, in not ſtanding to the law of the land. 1 *H. H.* 493.

IV. Manſlaughter.

By manſlaughter is to be underſtood ſuch killing of a man as happens either on a ſudden quarrel, or in the commiſſion of an unlawful act, without any deliberate intention of doing any miſchief at all. 1 *Haw.* 76.

There is no difference between murder and manſlaughter, but that murder is upon malice forethought, and manſlaughter upon a ſudden occaſion. As if two meet together, and ſtriving for the wall, the one kill the other, this is manſlaughter and felony. And ſo it is, if they had upon that ſudden occaſion gone into the field and fought, and the one had killed the other, this had been but manſlaughter, and no murder; becauſe all that followed was but a continuance of the firſt ſudden occaſion, and the blood was never cooled, till the blow was given. 3 *Inſt.* 55.

There can be no acceſſaries to this offence before the fact, becauſe it muſt be done without premeditation. 1 *Haw.* 76.

But there may be acceſſaries after the fact. 3 *Inſt.* 55.

This offence is not bailable by juſtices of the peace. 3 *Ed.* 1. *c.* 15.

It is within the benefit of clergy; but the offender ſhall forfeit as in other felonies. 2 *H. H.* 344.

But there is one kind of manſlaughter, which by the ſtatute of the 1 *J. c.* 8. is excluded the benefit of clergy; *viz.* He who ſhall ſtab or thruſt any perſon that hath not then any weapon drawn, or hath not then ſtricken firſt, ſo as the perſon ſo ſtabbed or thruſt ſhall die thereof in ſix months, altho' it cannot be proved that the ſame was done of malice forethought, ſhall be guilty of felony without benefit of clergy. *V. Murder.*

V. Murder.

Murder is, when a man of ſound memory, and of the age of diſcretion, unlawfully killeth any perſon on the king's peace, with malice forethought, either expreſſed by the party, or implied by law; ſo as the party wounded or hurt, die of the wound or hurt, within a year and a day. 3 *Inſt.* 47.

By *malice expreſſed*, is meant, a deliberate intention of doing any bodily harm to another, whereunto by law a perſon is not authorized. 1 *H. H.* 451.

And the evidence of ſuch a malice muſt ariſe from external circumſtances diſcovering that inward intention; as lying in wait, menacings antecedent, former grudges, deliberate compaſſings, and the like; which are various, according to the variety of circumſtances. 1 *H. H.* 451.

Malice implied is in ſeveral caſes: as when one voluntarily kills another, without any provocation; for in this caſe the law preſumes it to be malicious, and that he is a publick enemy of mankind. 1 *H. H.* 455, 456.

Poiſoning alſo implies malice, becauſe it is an act of deliberation. 1 *H. H.* 455.

Alſo when an officer is killed in the execution of his office, it is murder, and the law implies malice. 1 *H. H.* 457.

Alſo where a priſoner dieth by dureſs of the gaoler, the law implies malice, by reaſon of the cruelty. 3 *Inſt.* 52.

And in general, any formed deſign of doing miſchief may be called malice, and therefore not ſuch killing only as proceeds from premeditated hatred or revenge againſt the perſon killed but alſo in many other caſes, ſuch as is accompanied with thoſe circumſtances that ſhew the heart to be perverſely wicked, is adjudged to be of malice *prepenſe*, and conſequently murder. 2 *Haw.* 80. *Strange* 766. *Oneby*'s caſe.

And wherever it appears that a man killed another, it ſhall be intended *prima facie* that he did it maliciouſly, unleſs he can make out the contrary, by ſhewing that he did it on a ſudden provocation, or the like. 1 *Haw.* 82.

Alſo wherever a perſon in cool blood, by way of revenge, beats another in ſuch a manner, that he afterwards dies thereof, he is guilty of murder however unwilling he might have been to have gone ſo far. 1 *Haw.* 83.

And it ſeems to be agreed, that no breach of a man's word or promiſe, no treſpaſs either to lands or goods, no affront by bare words or geſtures, however falſe or malicious it may be, and aggravated with the moſt provoked circumſtances, will excuſe him from being guilty of murder, who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard, if he kills him in purſuance of ſuch aſſault, whether the perſon ſlain did at all fight in his own defence or not. 1 *Haw.* 82.

If

If a man by harsh and unkind usage put another into such a passion of grief or fear, that the party either die suddenly, or contract some disease whereof he dies, though this may be murder or manslaughter in the sight of god, yet in a human judicature it cannot come under the judgment of felony, because no external act of violence was offered, whereof the law can take notice. 1 *H. H.* 429.

If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go in to the field, and therein fight, and the one killeth the other, this is no malice prepensed; for the fetching of the weapon, and the going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if there were deliberation, as that they meet the next day, nay though it were the same day if there were such a competent distance of time, that in common presumption, they had time of deliberation, is murder. 3 *Inst.* 51. 1 *H. H.* 453.

And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not. And it is holden, that the seconds of the party slain are likewise guilty as accessaries. 1 *Haw.* 82.

If a physician or surgeon gives a person a potion, without any intent of doing him any bodily harm, but with intent to cure or prevent a disease, and contrary to the physician or surgeon's expectation it kills him, this is no homicide. And lord *Hale* says, he holds their opinion to be erroneous, who think that if he be no licensed surgeon or physician, that occasioneth this mischance, that then it is felony. These opinions (he says) may caution ignorant people not to be too busy in this kind with tampering with physick, but are no safe rule for a judge or jury to go by. 1 *H. H.* 429.

But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy the child, within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother it is murder, 1 *H. H.* 430.

Also if a woman be quick with child, and by a potion or otherwise, killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder: but if the child be born alive, and dieth of the potion, battery, or other cause, this is murder. 3 *Inst.* 50.

Lord *Hale* says, that in this case it cannot legally be known, whether the child were killed or not; and that if the child die, after it is born and baptized, of the stroke given to the mother, yet it is not homicide. 1 *H. H.* 433. And Mr. *Dalton* says, whether it die within her body, or shortly after her delivery, it maketh no difference. *Dalt.* 332. But Mr. *Hawkins* says, that (in this latter

latter caſe) it ſeems clearly to be murder, notwithſtanding ſome opinions to the contrary. 1 *Haw.* 80.

Alſo it ſeems agreed, that where one counſels a woman to kill her child when it ſhall be born, who afterwards doth kill in purſuance of ſuch advice, he is an acceſſary to the murder. 1 *Haw.* 80.

By the 21 *J.* c. 27. If a woman be delivered of a baſtard child, and ſhe endeavour privately, either by drowning or ſecret burying thereof, or any other way, either by herſelf, or the procuring of others, ſo to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; ſhe ſhall ſuffer death as in caſe of murder, except ſhe can prove by one witneſs that it was born dead.

Lord *Hale* ſays, if a man have a beaſt, as a bull, cow, horſe, or dog, uſed to hurt people, and he hath notice thereof, and it doth any body hurt, he is chargeable with an action for it:

If he have no particular notice that it did any ſuch thing before, yet if it is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or a monkey, if it get looſe and do harm to any perſon, the owner is liable to an action for the damage:

If he have notice of the quality of any ſuch his beaſt, and uſe all due diligence to keep him up, yet he breaks looſe and kills a man, this is no felony in the owner, but the beaſt is a deodand:

But if he did not uſe that due diligence, but through negligence the beaſt goes abroad, after warning or notice of his condition, and kills a man, he thinks it is manſlaughter in the owner:

But if he did purpoſely let him looſe or wander abroad, with deſign to do miſchief, nay though it were with deſign only to fright people and make ſport, and it kills a man, it is murder in the owner. 1 *H. H.* 431.

They that are preſent when any man is ſlain, and do not their beſt endeavour to apprehend the murderer or manſlayer, ſhall be fined and impriſoned. 3 *Inſt.* 53.

If a murder be committed in the day time, in a town not incloſed, and the murderer eſcape, the townſhip ſhall be amerced: but if incloſed, whether the murder be in the night or day, the town ſhall be amerced. 3 *Inſt.* 53.

Where any perſon ſhall be felonioufly ſtriken or poiſoned in one county, and die in another county; the offender may be indicted in the county where the party dies, before the coroner, juſtices of the peace or other juſtices. 2 & 3 *Ed.* 6. c. 24. *ſ.* 2.

Where a murder is committed in one county, and a perſon is acceſſary in another county, he may be indicted in the county where he was acceſſary, on certificate of the conviction of the principal in the county where he committed the murder. 2 & 3 *Ed.* 6. c. 24.

If a man be ſlain or murdered, and the ſlayers, murderers, and acceſſaries be indicted, they may be tried at any time within the year, and not tarry the year and day for an appeal: but if upon trial

trial they are acquitted, they ſhall not be ſuffered to go at large, but be committed or bailed, till the year and day be paſt: and an appeal may be brought notwithſtanding ſuch acquittal on indictment, if he hath not had his clergy. 3 *H.* 7. *c.* 1.

The principal in murder is ouſted of clergy in all caſes, and the acceſſary before is alſo ouſted of clergy in all caſes, but the acceſſary after is in no caſe ouſted of clergy. 2 *H. H.* 344.

VI. Self-murder.

A *felo de ſe*, or felon of himſelf, is a perſon, who being of ſound mind, and of the age of diſcretion, voluntarily killeth himſelf. 3 *Inſt.* 54. 1 *H. H.* 411.

If a man give himſelf a wound, intending to be *felo de ſe*, and dieth not within the year and day after the wound, he is not *felo de ſe*. 3 Inſt. 54.

Mr. *Hawkins* ſpeaks with ſome warmth againſt an unaccountable notion (as he calls it) which hath prevailed of late, that every one who kills himſelf muſt be *non compos* of courſe; becauſe it is ſaid to be impoſſible, that a man in his ſenſes ſhould do a thing ſo contrary to nature, and all ſenſe and reaſon. But he argues, that if this doctrine were allowable, it might be applied in excuſe of many other crimes as well as this; as for inſtance that of a mother murdering her child, which is alſo againſt nature and reaſon, and this conſideration, inſtead of being the higheſt aggravation of a crime would make it no crime at all; for it is certain a perſon *non compos mentis* can be guilty of no crime. 1 *Haw.* 67.

And lord *Hale* ſays, it is not every melancholy or hypochondriacal diſtemper, that denominates a man *non compos*; for there are few who commit this offence, but are under ſuch infirmities; but it muſt be ſuch an alienation of mind, as renders a perſon to be a madman, or frantick, or deſtitute of the uſe of reaſon, which will denominate him *non compos*. 1 H. H. 412.

The offender herein doth incur a forfeiture, of goods and chattels, but not of lands; for no man can forfeit his land, without an attainder by courſe of law. 3 *Inſt.* 54.

Nor ſhall his goods be forfeited, until it be lawfully found by the oath of 12 men; and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the juſtices in ſeſſions may inquire thereof; for they have power by their commiſſion to inquire of all felonies: and a preſentment thereof found before them, intitles the king to the forfeiture. 3 *Inſt.* 54, 55. *Dalt. c.* 144.

But nevertheleſs, the forfeiture ſhall relate to the time of the wound given, and not to the time of the death, or inquiſition. 3 *Inſt.* 55. *Dalt. c.* 144. 1 *Hale's Pl.* 29. 1 *Haw.* 68.

But lord *Hale*, in his hiſtory of the pleas of the crown, ſeemeth to doubt, whether it ſhall not relate to the time of the death only, and not to the time of the wound given. 1 *H. H.* 414.

Nor

Nor doth the offence work any corruption of blood, or loss of dower. 1 *Haw.* 68.

By the rubrick in the common prayer, before the burial office (confirmed by act of parliament, 13 & 14. *C.* 2. *c.* 4.) persons who have laid violent hands upon themselves, shall not have that office used at their interment.

HUE and CRY.

LORD *Coke* saith, that hue and cry (called in ancient record[a] *hutesium & clamor*) do mean the same thing; for that *huer* in *French* is to hoot or shout, in *English* to cry. 2 *Inst.* 173. 3 *Inst.* 116.

But since it appeareth by the old books (of which also lord *Coke* maketh observation, 2 *Inst.* 173.) that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonymous, but that this *hutesium* or *hooting* is by the *horn*, and *crying* by the *voice*; with which also accordeth the *French* word *huchet*, which signifieth a huntsman's horn: So that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry is said to be practised also in *Scotland*.

And this blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time: for amongst the laws of *Wihtred* king of *Kent*, in the year 696, this is one; that "if a stranger go "out of the road, and neither shout nor blow a horn, he shall be "taken for a thief."

Hue and cry is the old common law process after felons, and such as have dangerously wounded any person: And this hath received great countenance aud authority by several acts of parliament. 2 *H. H.* 98.

To prevent felonies; In walled towns the gates shall be shut from sun setting to sun rising: and none shall lodge without the town, from nine of the clock till day, unless his host will answer for him. In other towns, watches shall be kept: and if a watchman arrest a night walker, and he disobey and fly, the watchman may make hue and cry. 13 *Ed.* 1. *st.* 2. *c.* 4.

When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night; the party grieved, or any other, may resort to the constable of the vill; and 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he know it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must

must mention the number of persons, or the way they took. 5. If none of all these can be discovered, as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night; for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found. 2 *H. H.* 100, 101. 3 *Inst.* 116.

For levying hue and cry, altho' it is a good course to have the warrant of a justice of the peace, when time will permit, in order to prevent causeless hue and cry; yet by the frame of the statutes it is by no means necessary, nor is it always convenient; for the felon may escape before the warrant be obtained: and hue and cry was part of the law, before justices of the peace were first instituted. 2 *H. H.* 99.

And the duty of the constable is, to raise the power of the town, as well in the night as in the day, for the prosecution of the offender. 3 *Inst.* 116.

And upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felons. 2 *H. H.* 103.

But tho' he may search suspected places or houses, yet his entry must be by the doors being open; for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore in case of such a search, the breaking open the door is at his peril, namely, justifiable, if he be there; not justifiable, if he be not there: But it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken. 2 *H. H.* 103. 2 *Haw.* 86.

If the person, against whom the hue and cry is raised, be not found in the constablewick, then the constable shall give notice to the next constable, and he to the next, until the offender be found, or till they come to the sea side. And this was the law before the conquest. 3 *Inst.* 116.

And the officer of the town where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other town round about him, and not to one next town only. And in such cases it is needful to give notice in writing (to the pursuers) of the things stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, and the like, and which way he is gone, if it may be. *Dalt.* c. 54.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that hid the fact is neither

neither known nor deſcribable by perſon, clothes, or the like, yet ſuch a hue and cry is good, as hath been ſaid, and muſt be purſued, though no perſon certain be named or deſcribed. 2 *H. H.* 103.

And therefore in this caſe, all that can be done is, for thoſe that purſue the hue and cry, to take ſuch perſons as they have probable cauſe to ſuſpect; as for inſtance, ſuch perſons as are vagrants, or ſuch ſuſpicious perſons as come late into their inn or lodgings, and give no reaſonable account where they had been, and the like. *id.*

By the ſtatute of the 3 *Ed.* 1. *c.* 9. All ſhall be ready, and apparelled, at the commandment and ſummons of ſheriffs (or conſtables, 2 *Inſt.* 171.) and at the cry of the county, to ſue and arreſt felons; on pain of a grievous fine. And if default be found in the lord of the franchiſe, the king ſhall take the franchiſe to himſelf; and if in the ſheriff or other officer, they ſhall have one year's impriſonment, and ſhall make a grievous fine.

And by the ſtatute of the 13 *Ed.* 1. *ſt.* 2. *c.* 1. it is likewiſe enacted, that immediately upon robberies and felonies committed, freſh ſuit ſhall be made, from town to town, and from county to county.

And no hue and cry ſhall be lawful, except it be by horſemen and footmen. 27 *El. c.* 13. *ſ.* 10.

And the life of hue and cry is freſh ſuit. 3 *Inſt.* 117.

If the perſon purſued by hue and cry be in a houſe, and the doors are ſhut, and refuſed to be opened on demand of the conſtable, and notification of his buſineſs, he may break open the doors; and this he may do in any caſe, where he may arreſt, though it be only a ſuſpicion of felony; for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the caſe: and the ſame law is, upon a dangerous wound given, and hue and cry levied upon the offender. 2 *H. H.* 102.

And it ſeems in this caſe, that if he cannot be otherwiſe taken, he may be killed; and the neceſſity excuſeth the conſtable. 2 *H. H.* 102.

If hue and cry be raiſed againſt a perſon certain for felony, though poſſibly he is innocent; yet the conſtables, and thoſe that follow the hue and cry, may arreſt and impriſon him in the common gaol, or carry him to a juſtice of the peace, to be examined where he was at the time of the felony committed, and the like. 2 *H. H.* 102.

If the hue and cry be not againſt a perſon certain, but by deſcription of his ſtature, perſon, clothes, horſe, and the like; yet the hue and cry doth juſtify the conſtable, or other perſon following it, in apprehending the perſon ſo deſcribed, whether innocent or guilty: for that is his warrant; it is a kind of proceſs that the law allows of, not uſual in other caſes, namely, to arreſt a perſon by deſcription. 2 *H. H.* 103.

In caſe of hue and cry once raiſed and levied, on ſuppoſal of a felony committed, though in truth there was no felony committed, yet

yet thoſe that purſue hue and cry, may arreſt and proceed, as if ſo be a felony had been really committed.

And therefore the juſtification of an impriſonment by a perſon upon ſuſpicion, and by a perſon (eſpecially a conſtable) upon hue and cry levied, do extremely differ; for in the former caſe there muſt be a felony averred to be done, and it is iſſuable; but in the latter, to wit, upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is ſufficient, though perchance the information were falſe.

And the reaſons hereof are theſe; 1. Becauſe the conſtable cannot examine the truth or falſhood of the ſuggeſtion of him that firſt levied it, for he cannot adminiſter to him an oath; and if he ſhould forbear his purſuit of the hue and cry till it be examined by a juſtice of the peace, the felon might eſcape, and the purſuit would be loſt and fruitleſs. 2. Becauſe the conſtable is by the ſeveral acts of parliament compellable to purſue hue and cry; and he is puniſhable, and ſo are thoſe of the vill, if they do it not. 3. Becauſe he that firſt raiſeth a hue and cry, where no felony is committed, that is, he who giveth the falſe information, is ſeverely puniſhable by fine and impriſonment, if the information be falſe.

And therefore if he raiſe hue and cry upon a perſon that is innocent, yet they that purſue the hue and cry may juſtify the impriſonment of that innocent perſon; and the raiſer is puniſhable: and by the ſame reaſon, if he give notice of a felony committed, where there was in truth none.

And here the juſtification of the impriſonment is mixed, partly upon the hue and cry, and partly upon their own ſuſpicion; and therefore, 1. In reſpect that it is upon hue and cry, there needs no averment, that the felony was done, if the arreſt be by that conſtable that firſt received the information, and ſo raiſed the hue and cry; of if the arreſt were made by that conſtable, or thoſe vills, to whom the hue and cry came at the ſecond hand, it muſt be averred, that ſuch a hue and cry came to them, purporting ſuch a felony to be done. 2. But alſo inaſmuch as the hue and cry neither names nor deſcribes the perſon of the felon, but only the felony committed, and therefore the arreſt of this or that particular perſon, is left to the ſuſpicion and diſcretion of the conſtable, or of the people of the ſecond or third vill, he that arreſts any perſon upon ſuch general hue and cry, muſt aver that he ſuſpected, and ſhew a reaſonable cauſe of ſuſpicion.

But now by the ſtatute of 7 *J. c.* 5. the conſtable, or any that come to his aſſiſtance, even in this caſe of hue and cry, may plead the general iſſue, and give the whole matter of the juſtification in evidence; for the purſuit of hue and cry, though performed by others as well as the conſtable, is principally the act of the conſtable of the vill, and the others are but as his deputies or aſſiſtants, within the precicts of their conſtablewick. 2 *H. H.* 101, 2, 3, 4.

It ſeems that they who are taken upon freſh hue and cry, are not bailable, as being to be accounted amongſt thoſe perſons, who are under a violent preſumption of guilt. 2 *Haw.* 98. By

By the 13 *Ed.* 1. *ſt.* 2. *c.* 6. Conſtables of hundreds ſhall be choſen, who ſhall preſent before juſtices aſſigned, defaults of the ſuits of towns, and all ſuch as lodge ſtrangers in uplandiſh towns, for whom they will not anſwer.

And they which levy not hue and cry, or purſue not upon hue and cry, may be indicted, fined, and impriſoned. 3 *Inſt*, 117.

A warrant to levy hue and cry on a robbery having been committed.

New-York, } To all conſtables of ſaid county or elſewhere.
Ulſter County. }

WHEREAS A. I. *of*----------*in the county of*----------*yeoman, hath this day made information upon oath, before me* J. P. *eſq*; *one of his majeſty's juſtices of the peace in and for the ſaid county, of* U. *that on this preſent*----------*day of*----------*in the*----------*year of the reign of*----------*betwixt the hours of three and four in the afternoon of the ſame day, at a place called*----------*in the ſaid county of* U. *in the king's highway there, two malefactors and felons, to him the ſaid* A. I. *unknown, in and upon him the ſaid* A. I. *then and there being in the peace of god and our lord the king, feloniouſly did make an aſſault, and him the ſaid* A. I. *then and there feloniouſly did put in great fear and danger of his life, and the ſum of*----------*of lawful money of* Great-Britain, *of the goods and chattels of him the ſaid* A. I. *from the perſon, and againſt the will of him the ſaid* A. I. *then and there violently and feloniouſly did ſteal, take, and carry away; and that one of the ſaid malefactors and felons, to him the ſaid* A. I. *unknown, is a tall, ſtrong man, and ſeemeth to be about the age of* ----------*years, is pitted in the face with the ſmall pox, and hath the ſcar of a wound under his left eye, and had then on a dark brown riding coat, &c. and did ride upon a bay gelding, with a ſtar on his fore-head; and the other &c. And that after the ſaid felony and robbery committed, they the ſaid malefactors and felons to him the ſaid* A. I. *unknown, did fly, and withdraw themſelves to places unknown, and are not yet apprehended: Theſe are therefore to command you, forthwith to raiſe the power of the towns within your ſeveral precincts, and to make diligent ſearch therein, for the perſons above deſcribed, and to make freſh purſuit and hue and cry after them from town to town, and from county to county, as well by horſemen as by footmen; and to give due notice hereof in writing, deſcribing in ſuch notice the perſons and the offence aforeſaid, unto every next conſtable on every ſide, until they ſhall come to the ſea ſhore, or until the ſaid malefactors and felons ſhall be apprehended; and all perſons whom you or any of you ſhall, as well upon ſuch ſearch and purſuit, as otherwiſe, apprehend or cauſe to be apprehended, as juſtly ſuſpected for having committed the ſaid robbery and felony, that you do carry forthwith before ſome one of his ſaid majeſty's juſtices of the peace in and for the county where he or they ſhall be ſo apprehended, to be by ſuch juſtice examined, and dealt withal according*

to

to law. And hereof fail not respectively, upon the peril that shall ensue thereon. Given under my hand and seal, at----------in the county of U. *the----------day of----------aforesaid, in the year aforesaid.*

INDICTMENT.

I. Indictment what.
II. What offences are indictable.
III. Within what time an indictment shall be brought.
IV. How far several offenders or several offences may be joined in one indictment.
V. Whether the grand jury may examine witnesses against the king.
VI. How many witnesses are requisite to an indictment.
VII. Whether a grand jury may find an indictment specially.
VIII. Indictment to be in English.
IX. Form of an indictment.
X. Charges of an indictment.

I. Indictment what.

INDICTMENT cometh from the *French* word *enditer*, and signifieth in law, an accusation found by an inquest of twelve or more upon their oath. And as the *appeal* is ever the suit of the party, so the indictment is always the suit of the king, and as it were his declaration; and the party who prosecutes it, is a good witness to prove it. And when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a *presentment*; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *inquisition*. 1 Inst. 126. 2 Haw. 209.

II. What offences are indictable.

There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a publick nature, as misprisions, contempts, disturbances of the peace, oppressions and all other misdemeanors whatsoever of a publick evil example against the *common law*, may be indicted; but no injuries of a private nature, unless they some way concern the king. 2 *Haw.* 210.

Also

Alſo it ſeems to be a good general ground, that wherever a *ſtatute* prohibits a matter of publick grievance to the liberties and ſecurity of a ſubject; or commands a matter of a publick convenience, as the repairing of the common ſtreets of a town; an offender againſt ſuch ſtatute is puniſhable, not only at the ſuit of the party grieved, but alſo by way of indictment for his contempt of the ſtatute, unleſs ſuch method of proceeding do manifeſtly appear to be excluded by it. Yet if the party offending hath been fined to the king, in the action brought by the party (as it is ſaid that he may in every action for doing a thing prohibited by ſtatute); it ſeems queſtionable, whether he may afterwards be indicted, becauſe that would make him liable to a ſecond fine for the ſame offence. 2 *Haw.* 210.

But if a ſtatute extends only to *private* perſons, or if it extends to all perſons in general, but chiefly concern diſputes of a private nature, as thoſe relating to diſtreſſes made by lords on their tenants; is is ſaid that offences againſt ſuch ſtatute will hardly bear an indictment. 2 *Haw.* 211.

Alſo where a ſtatute makes a new offence, and appoints a particular method of proceeding, without mentioning an indictment, it ſeemeth to be ſettled at this day, that it will not maintain an indictment. 2 *Haw.* 211. *Str.* 679.

But lord *Hale* diſtinguiſhes upon this, and ſays, that if a ſtatute prohibit any act to be done, and by a ſubſtantive clauſe, gives a recovery by action of debt, bill, plaint or information, but mentions not an indictment; the party may be indicted upon the *prohibitory clauſe*, and thereupon fined, but not to recover the penalty; but then it ſeems the fine ought not to exceed the penalty; but if the act be not prohibitory, but only that if any perſon ſhall do ſuch a thing, he ſhall forfeit ſo much, to be recovered by action of debt, bill, plaint, or information; then he cannot be indicted for it, but the proceeding muſt be by action, bill, plaint, or information. 2 *H. H.* 171.

Alſo, where a ſtatute adds a farther penalty, to an offence prohibited by the common law; there can be no doubt, but that the offender may be ſtill indicted, if the proſecutor thinks fit, at the common law. And if the indictment for ſuch offence conclude *againſt the form of the ſtatute*, and cannot be made good as an indictment upon the ſtatute, it ſeems to be now ſettled, that it may be maintained as an indictment at common law. 2 *Haw.* 211.

A fact amounting to a felony, is not indictable as a treſpaſs. L. *Raym.* 712.

III. *Within what time an indictment ſhall be brought.*

By the 31 *El. c.* 5. All indictments upon any ſtatute penal, whereby the forfeiture is limited to the king, ſhall be ſued within two years after the offence committed: if the forfeiture is limited to the king and proſecutor, the ſuit ſhall be in one year; and in default

default thereof, the ſame ſhall be ſued for the king, within two years after that year ended. But where a ſtatute limits a ſhorter time, the ſuit ſhall be brought within ſuch time limited.

IV. How far ſeveral offenders or ſeveral offences may be joined in one indictment.

If there be *one offender*, and *ſeveral offences* committed by him, as burglary and larceny, they may be contained in one indictment. 2 *H. H.* 173.

But in the caſe of *K.* and *Clenden*, *T.* 4 *G.* 2. There was an indictment ſetting forth, that the defendant made an aſſault upon *Sarah Beatniff*, and *Elizabeth Cooper*, and did them beat, wound, and evil intreat. After verdict for the king, it was moved in arreſt of judgment, that theſe were two diſtinct offences, and therefore could not be laid in the ſame indictment; and of that opinion was the court, and the judgment was arreſted. *Str.* 870.

If there be *ſeveral offenders* that commit the *ſame offence*, though in law they are ſeveral offences in relation to the ſeveral offenders, yet they may be joined in one indictment; as if ſeveral commit a robbery, or burglary, or murder. 2 *H. H.* 173.

And ſo it is, though the offences are of *ſeveral degrees*, but dependant one upon another, as the principal in the firſt degree, and the principal in the ſecond degree, to wit, preſent, aiding and abetting the principal, and acceſſary before or after. 2 *H. H.* 173.

Alſo ſeveral perſons may be indicted in the ſame indictment for *ſeveral offences of the ſame nature*, as for keeping diſorderly houſes; but the indictment ought to ſet forth that they ſeverally did ſo. 2 *H. H.* 173.

And this is only to be underſtood where the offences may be joint, as in extortion, maintenance, receiving ſtolen goods, and the like; and not where the offence is a ſeparate act in each, as in the caſe of *K.* againſt *Phillips* and others, *M.* 5 *G.* 2. Six were indicted in one indictment for *perjury*, and four of them pleading, were convicted. It was moved in arreſt of judgment, that the crime of perjury is in its nature ſeveral, and two cannot be indicted together. And by the court, there may be great inconveniencies if this is allowed; one may be deſirous to have a certiorari, and the other not; the jury on the trial of all, may apply evidence to all, that is but evidence againſt one: And they cited a caſe, *T.* 7 *An.* *Q.* againſt *Hodgſon* and others, where two were indicted for being ſcolds, and compared to barratry, and it was held not to lie. And in the principal caſe judgment was arreſted. *Str.* 921.

Larcenies committed of ſeveral things, though *at ſeveral times*, and *from ſeveral perſons*, may be joined in one indictment. 2. *H. H.* 173.

V. Whether

V. Whether the grand jury may examine witneſſes againſt the king.

Lord *Hale* ſays, that the grand jury at the aſſizes or ſeſſions ought only to hear the evidence for the king, and in caſe there be probable evidence, they ought to find the bill, becauſe it is but an accuſation, and the party is to be put on his trial afterwards. 2 *H. H.* 157.

Which doctrine is alſo laid down by chief juſtice *Pemberton* in the caſe of the earl of *Shaftsbury*, *Str. Tr. V.* 3. *p.* 415.

But the learned Editor of *Hale's Hiſtory* obſerves upon this, that Sir *John Hawles* in his remarks on the ſaid caſe, *St. Tr. V.* 4. *p.* 183. unanſwerably ſhews, that a grand jury ought to have the ſame perſuaſion of the truth of the indictment as a petty jury, or a coroner's inqueſt; for they are ſworn to preſent the truth, and nothing but the truth.

And lord *Coke* ſays, that ſeeing indictments are the foundation of all, and are commonly found in the abſence of the party accuſed, it is neceſſary there ſhould be ſubſtantial proof. 3 *Inſt.* 25.

VI. How many witneſſes are requiſite to an indictment.

An indictment may be found upon the oath of one witneſs only, unleſs it be for high treaſon, which requires two witneſſes. 2 *Hawv.* 256.

VII. Whether the grand jury may find an indictment ſpecially.

It ſeems to be generally agreed, that the grand jury may not find part of an indictment to be true, and part falſe; but muſt either find a true bill or *ignoramus* for the whole; and that if they take upon them to find it ſpecially, or conditionally, or to be true for part only, and not for the reſt, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew. 2 *Hawv.* 210.

VIII. Indictment to be in Engliſh.

All indictments, informations, inquiſitions and preſentments, ſhall be in *Engliſh*, and be written in a common legible hand, and not court hand; on pain of 50 *l.* to him that ſhall ſue in three months. 4 *G.* 2. *c.* 26. 6 *G.* 2. *c.* 14.

IX. Form of an indictment.

In order to underſtand this matter rightly, it is judged requiſite firſt to inſert the intire form of an indictment, and then to take it to pieces, and explain the ſeveral parts of it in their order.

The inſtance which is choſen is on the ſtatute of ſtabbing. 1 *J.* *c.* 8.

The *caption* of the indictment is no part of the indictment itself, but is the ſtyle or preamble, or return that is made from an inferior court to a ſuperior, from whence a certiorari iſſues to remove; or when the whole record is made up in form; for whereas the record of the indictment, as it ſtands upon the file in the court where it is taken, is only thus, *The jurors for our lord the king upon their oath preſent*; when this comes to be returned upon a certiorari, it is more full and explicit, as follows: 2 *H. H.* 166.

Pennſylvania, Bucks County. AT *the general quarter ſeſſions of the peace holden at* New-Town, *in and for the county aforeſaid, the ſeventh day of* April, *in the firſt year of the reign of our ſovereign lord* George *the third of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth, Before* J. P. *and* K. P. *eſquires, and others their aſſociates, juſtices of our ſaid lord the king, aſſigned to keep the peace of our ſaid lord the king in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, by the oath of----------good and lawful men of the county aforeſaid, ſworn and charged to enquire for our ſaid lord the king, and for the body of the county aforeſaid, it is preſented*;

That John Armſtrong *late of* New-Town, *in the county aforeſaid, yeoman, not having god before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the thirtieth day of* March *in the firſt year of the reign of our ſaid ſovereign lord* George *the third, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth, at the hour of nine in the afternoon of the ſame day, with force and arms, at* New-Town *aforeſaid in the county aforeſaid, in and upon one* George Harriſon *in the peace of God and of our ſaid lord the king, then and there being (the aforeſaid* George Harriſon *not having any weapon then drawn, nor the aforeſaid* George Harriſon *having firſt ſtricken the ſaid* John Armſtrong) *feloniouſly did make an aſſault*; *and that the aforeſaid* John Armſtrong, *with a certain drawn ſword, of the value of five ſhillings, which he the ſaid* John Armſtrong *in his right hand then and there had and held, the ſaid* George Harriſon *in and upon the right ſide of the belly near the ſhort ribs of him the ſaid* George Harriſon *(the aforeſaid* George Harriſon *as is aforeſaid then and there not having any weapon drawn, nor the aforeſaid* George Harriſon *then and there having firſt ſtricken the ſaid* John Armſtrong) *then and there feloniouſly did ſtab and thruſt, giving unto the ſaid* George Harriſon *then and there with the ſword aforeſaid, in form aforeſaid, in and upon the right ſide of the belly near the ſhort ribs of him the ſaid* George Harriſon, *one mortal wound of the breadth of one inch, and of the depth of nine inches; of which ſaid mortal wound, he the ſaid* George Harriſon *then and there inſtantly died: And ſo the jurors aforeſaid upon their oath aforeſaid do ſay, that the ſaid* John Armſtrong *him the ſaid* George Harriſon *on the aforeſaid thirtieth day of* March *in the year aforeſaid, at* New-Town *aforeſaid in the county aforeſaid, in manner and form aforeſaid, feloniouſly did kill*;

againſt

againſt the peace of our ſaid lord the now king, his crown and dignity, and againſt the form of the ſtatute in ſuch caſe made and provided.

Bucks County] The name of the county muſt be in the margin, or repeated in the body of the caption. 2 *H. H.* 166.

At the general quarter ſeſſions of the peace] The court where the indictment is made, muſt be expreſſed; otherwiſe the caption is erroneous. 1 *H. H.* 166. 2 *Haw.* 252.

Holden at New-Town *in and for the county aforeſaid*] It muſt appear where the ſeſſions was held; and that the place, where it was held, is within the extent of the commiſſion. 2 *H. H.* 166.

The ſeventh day of April *in the firſt year of the reign of our ſovereign lord* George *the third*] It hath been adjudged, that if the caption of the indictment deſcribe the ſeſſions holden in the time paſt, and not in the time preſent; or as holden on ſuch a day in ſuch a year of the king, without aſcertaining what king, it is inſufficient. But it ſeems to be agreed, that it is ſufficient to expreſs the year of the king, without adding that of our lord. 2 *Haw.* 255.

The ſeventh day] Figures to expreſs numbers are not allowable in an indictment; but numbers muſt be expreſſed in words. 2 *H. H.* 170. *Cr. Cir.* 109. *Andr.* 137. *H.* 11 *G.* 2. *K.* and *Haddock.* Or at leaſt in *Roman* numerals. *Str.* 261. *H.* 6 *G. K.* and *Philips.*

Before J. P. *and* K. P. *eſquires, and others their aſſociates*] It is not neceſſary to name all the juſtices, but only ſo many as are enabled to hold a ſeſſions, and the reſt may be ſupplied by the words *and others their aſſociates.* 2 H. H. 166.

And altho' no ſeſſions can be held without one of the juſtices being of the *quorum*, yet in the caption there need not be any mention which of them, or whether any of them, are of the *quorum*, for it is ſufficient if *de facto* the ſeſſions be held before him or them that are of the *quorum*, altho' not ſo mentioned, and ſo is the uſual courſe. 2 *H. H.* 167.

And alſo to hear and determine, &c.] Theſe words are neceſſary, becauſe without this clauſe (by the commiſſion) they cannot proceed by indictment. 2 *H. H.* 166. *Str.* 442.

By the oath] If the caption concludes that *it is preſented*, without ſaying *on their oath*, it ſhall be quaſhed; for their preſentment muſt be upon oath, and ſo returned. 2 *H. H.* 168.

By the oath of------] It muſt name the jurors that preſented the offence; and therefore by the oath of *A. B. C. D.* and others, is not good; for it may be the preſentment was by a leſs number than 12. or that ſome one of them was incapacitated who might influence all the reſt, as for inſtance a perſon outlawed; in which caſe the indictment may be quaſhed by plea. 2 *H. H.* 167.

Good and lawful men of the county aforeſaid] Theſe words alſo, lord *Hale* ſaith, are neceſſary. 2 *H. H.* 167. But Mr. *Hawkins* ſays, they have been often over-ruled; becauſe all men ſhall be intended to be honeſt and lawful, till the contrary appear. 2 *Haw.* 215.

Sworn

Sworn and charged to inquire for our said lord the king, and for the body of the county aforesaid] These words also seem requisite to be inserted. 2 *H. H.* 167. But yet do not seem to be absolutely necessary. L. *Raym.* 710.

It is presented; that John Armstrong, *late of* New-Town *in the county aforesaid, yeoman*] The name of the party indicted regularly ought to be inserted truly in every indictment. 2 *H. H.* 175.

But the inhabitants of a parish, may be indicted for not repairing the highway, although no person is particularly named. *Wood. b.* 4. *c.* 5.

It is said that no person indicted can take any advantage of a mistaken surname in the indictment, notwithstanding such surname hath no manner of affinity with his true one, and he was never known by it. 2 *Hawk.* 230, 1, 2, 3. 2 *H. H.* 176.

But the mistake of the christian name is pleadable, and the party shall be dismissed from that indictment. 2 *H. H.* 176.

But the safest way is to allow his plea of *misnomer*, both as to his surname and to his christian name, for he that pleads *misnomer* of either, must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. 2 *H. H.* 176.

Also an indictment naming the defendant by two christian names is not good. L. *Raym.* 562.

If the *county* is in the margin, and the indictment sets forth the fact to be done at such a place *in the county aforesaid*, it is good, for it refers to the county in the margin; but if there be two counties named, one in the margin, and another in the addition of any party, or in the recital of an act of parliament, the fact laid at such a place in the county aforesaid, vitiates the indictment, because two counties are named before, and therefore it is uncertain to which it refers. *Crown Cir.* 115, 116.

By the 1 *H.* 5. *c.* 5. In all indictments on which process of outlawry lieth, to the names of the defendants *additions* shall be made of their estate, or degree, or mistery, and of the towns, or hamlets, or places, and counties where they were to be conversant.

But altho' the defendant be indicted by a wrong name or addition, or with no addition, yet if he appear, and plead not guilty, without taking advantage of that defect, he shall never alledge the *misnomer* or want of addition to stop his trial or judgment; for by such his appearance, and pleading to issue, the indictment is affirmed, and the *misnomer* or want of addition salved. 2 *H. H.* 176.

And if several persons be indicted for one offence, *misnomer* or the want of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in the law as several indictments. 2 *H. H.* 177.

And it is the common practice, where an indictment is insufficient, while the grand jury is before the court, to amend it by their consent, in a matter of form, as the name or addition of the party, or the like. 2 *Hawk.* 245.

Not

Not having God before his eyes, but being moved and seduced by the instigation of the devil.] I do not find it asserted by any authority, that these words are necessary in an indictment.

On the [illegible]th day of March *in the first year of the reign*, &c.] No indictment can be good, without precisely shewing a certain *day* of the material facts alledged in it: 2 *Haw.* 235.

And if the offence be done in the night, before midnight, the indictment shall suppose it to be done in the day before; and if it happen after midnight, then it must say, it was done that day after. *Lamb.* 492.

And although the day be inserted, yet if the *year* is not likewise inserted, the indictment is insufficient. 2 *H. H.* 177.

But where an indictment charges a man with a bare omission, as the not scouring such a ditch, it is said, that it needs not shew any time. 2 *Haw.* 236.

It is most regular to set forth the year, by shewing the year of the king; yet this may be dispensed with for special reasons, if the very year be otherwise sufficiently expressed. 2 *Haw.* 236.

And if it say, on such a day last past, without shewing in what year, that is good enough; for the certainty may be found out by the stile of the sessions. *Lamb.* 491.

But tho' the day or year be mistaken in the indictment, yet if the offence were committed in the same county, tho' at another time, the offender ought to be found guilty; but then it may be requisite, if any escheat or forfeiture of land be conceived in the case, for the petit jury to find the true time of the offence committed; and therefore it is best in the indictments to set down the times as truly as can be, tho' it be not of absolute necessity to the defendant's conviction. 2 *H. H.* 179.

And this the rather, because the jury are to find the indictment upon their oaths. *Dalt. c.* 184.

Upon which ground, namely, because the jury are sworn to present the truth, it is best to lay all the facts in the indictment as near to the truth as may be; and not to say, in an indictment for a small assault (for instance), wherein the person assaulted received little or no bodily hurt, that such a one *with swords, staves, and pistols, beat, bruised, and wounded him, so that his life was greatly despaired of*; nor to say in an indictment for an highway being obstructed, that the king's subjects cannot go thereon, *without manifest danger of their lives*; and the like. Which kind of words as they are not at all necessary, so they may stagger an honest man upon his oath, to find the fact as so laid.

At the hour of nine in the afternoon of the same day] It is not necessary to mention the *hour*, in an indictment. 2 *Haw.* 235.

With force and arms] By the 37 *H.* 8. *c.* 8. it is enacted, that where it hath been commonly used in indictments, to put in the same words *vi & armis*, and in divers of the same indictments to declare the manner of the force and arms, *viz. baculis, cultellis, arculus, & sagittis*, or such like, where in truth the parties had no manner

manner of such weapons at the time of the offence committed: therefore for the future, these words, or such like, shall not of necessity be put in any inquisition or indictment.

But yet where such words are proper and pertinent, it is safe and advisable to insert them, if it be to no other purpose than to aggravate the offence. 2 *Haw.* 242.

At New-town *aforesaid, in the county aforesaid*] No indictment can be good, without expressly shewing some *place* wherein the offence was committed, which must appear to have been within the jurisdiction of the court. 2 *Haw.* 236.

But a mistake of a place will not be material upon the evidence, on not guilty pleaded, if the fact be proved at some other place in the same county. 2 *Haw.* 237.

And it is not sufficient that the county be expressed in the margin, but the vill where the offence was committed must be alleged to be in the county named in the margin, or, *in the county aforesaid*, which seems to be sufficient where but one county is named before, but to be uncertain where the county is named in the body of the indictment different from that in the margin. 2 *Haw.* 220. 2 *H. H.* 180.

In and upon one George Harrison] Wherever the person injured is known to the jurors, his name ought to be put in the indictment. 2 *Haw.* 232.

But if they know not his name, an indictment for the murder of a person unknown, or for stealing the goods of a person unknown, is good. 2 *H. H.* 181.

Also there is no need of an addition of the person upon whom the offence is committed, unless there be a plurality of persons of the same name; neither then is it essential to the indictment, tho' sometimes it may be convenient for distinction sake to add it. 2 *H. H.* 182.

In the peace of god and of our said lord the king, then and there being] It is usual to alledge this, but not necessary, and possibly not true, for he might be breaking the peace at the time. 2 *H. H.* 186.

The aforesaid George Harrison *not having any weapon then drawn, nor the aforesaid* George Harrison *having first striken the said* John Armstrong] An indictment grounded upon an offence made by act of parliament, must by express words bring the offence within the substantial description made in the act of parliament; and those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion *against the form of the statute*. 2 H. H. 170.

And so it is if an act of parliament oust clergy in certain cases, as murder *of malice forethought*, robbery *in or near the highway*, though the offences themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, though convicted, unless those circumstances, as *of malice forethought*, or *near the highway*, be expressed in the indictment. 2 *H. H.* 170.

But

But there is no neceſſity in an indictment on a publick ſtatute, to recite ſuch ſtatute; for the judges are bound *ex officio* to take notice of all publick ſtatutes. 2 *Haw.* 245.

Yet if the proſecutor take upon him to recite it, and materially vary from a ſubſtantial part of the purview of the ſtatute, and conclude *againſt the form of the ſtatute aforeſaid*, he vitiates the indictment. 2 *Haw.* 246.

Alſo it ſeems to be generally agreed, that a miſrecital of the place or day at which the parliament was holden, vitiates an indictment. 2 *Haw.* 246.

And it hath been adjudged, that a miſrecital of the title of a ſtatute is fatal. 2 *Haw.* 247.

But there is no need to alledge in an indictment, that the defendant is not within the benefit of the proviſoes of the ſtatute; although the ſame may be neceſſary in a *conviction:* for ſince no plea can be admitted to a conviction, and the defendant can have no remedy againſt it, but from an exception to ſome defect appearing in the face of it, and all the proceedings are in a ſummary manner, it is but reaſonable that ſuch a conviction ſhould have the higheſt certainty. 2 *Haw.* 250. 2 *H. H.* 170, 1.

Feloniouſly did make an aſſault] There are ſeveral words of art which the law hath appropriated for the deſcription of the offence, which no circumlocution will ſupply; as *feloniouſly*, in the indictment of any felony; *burglariouſly*, in an indictment of burglary; and the like. 2 *H. H.* 184.

And if a man be indicted that he *ſtole*, and it is not ſaid *feloniouſly*, this indictment imports but a treſpaſs. 2 *H. H.* 172.

With a certain drawn ſword] Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poiſoning, or ſtrangling, it doth not maintain the indictment upon evidence. 2 *H. H.* 185.

Of the value of five ſhillings] Regularly it ought to ſet forth the price of the ſword or weapon, or elſe ſay of no value; for the weapon is a deodand forfeited to the king, and the townſhip ſhall be charged for the value, if delivered to them; but this ſeems not to be eſſential to the indictment. 2 *H. H.* 185.

Which the ſaid John Armſtrong *in his right hand then and there had and held*] It muſt ſhew in what hand he held his ſword. 2 *H. H.* 185.

In and upon the right ſide of the belly near the ſhort ribs of him the ſaid George Harriſon] There muſt be a *certainty* of the offence committed, and nothing material ſhall be taken by intendment or implication; but the ſpecial manner of the whole fact ought to be ſet forth with certainty. 2 *Haw.* 225, 227.

And therefore in caſe of murder, it ought to ſhew in what part of the body the perſon was wounded: and therefore if it be on his arm, or hand, or ſide, without ſaying whether right or left, it is not good. 2 *H. H.* 185.

If

If theft be alleged in any thing, the indictment must set forth the value of the thing stolen; that it may appear, whether it be grand or petty larceny. 2 *H. H.* 183.

In like manner an indictment that the defendant took and carried away such a person's goods and chattels, without shewing what in certain, as one horse, one cow, is not good. 2 *H. H.* 182.

An indictment that the defendant is a common highway-man, a common defamer, a common disturber of the peace, and the like, is not good; because it is too general, and contains not the particular matter wherein the offence was committed. 2 *H. H.* 182.

In like manner an indictment for divers scandalous, threatning, and contemptuous words, spoken of a justice of the peace, is not good, but ought to set forth the words in special. *Str.* 699.

An indictment for disobeying an order of justices, must find positively, that such an order was made, and not by way of recital, *that whereas*——L. Raym. 1363.

But in an indictment on a conviction, it is not necessary to set forth the conviction at large, but only shortly, that such a one was before such and such justices convicted, according to the form of the statute, and thereupon a warrant was issued, &c. L. Raym. 1196.

Then and there feloniously did stab and thrust] In an indictment it is best, and often necessary, to repeat the time and place, to the several parts of the fact. 2 *H. H.* 178.

Thus in an indictment of murder and manslaughter, as well the day and place of the stroke, or other act done, as of the death, must be expressed; the former, because the escheat or forfeiture of lands relates thereto; the latter, because it must appear, that the death was within the year and day after the stroke. 2 *H. H.* 179.

One mortal wound of the breadth of one inch, and of the depth of nine inches] Regularly the length and depth of the wound is to be shewed; but this is not necessary in all cases, as namely, where a limb is cut off; so it may be also a dry blow. 2 *H. H.* 186.

But though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done as near the truth as may be; yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is sufficient to maintain the indictment. 2 *H. H.* 186.

Against the peace of our said lord the now king] An indictment without concluding against the peace, is insufficient, though it be but for using a trade not having been an apprentice; for every offence against a statute is against the peace, and ought so to be laid. 2 *H. H.* 188.

Also an indictment that concludes against the peace, and saith not *of our lord the king*, is insufficient. 2 *H. H.* 188.

His crown and dignity] An indictment need not conclude *against his crown and dignity*, though it be usual in many indictments. 2 *H. H.* 188.

And

And againſt the form of the ſtatute in ſuch caſe made and provided] Regularly, if a ſtatute only make an offence, or alter an offence from one crime to another, as making a bare miſdemeanor to become a felony, the indictment for ſuch new made offence, or new made felony, muſt conclude againſt the form of the ſtatute, or otherwiſe it is inſufficient. 2 *H. H.* 192.

But if a man be indicted for an offence, which was at common law, and concludes againſt the form of the ſtatute, but in truth it is not brought by the indictment within the ſtatute, it ſhall be quaſhed, and the party ſhall not be put to anſwer it as an offence at common law. 2 *H. H.* 171.

And if an offence were felony at common law, but a ſpecial act of parliament ouſts the offender of ſome benefit that the common law allowed him, when certain circumſtances are in the fact; though the body of ſuch indictment muſt expreſs thoſe circumſtances, according as they are preſcribed in the ſtatute, yet the indictment need not conclude againſt the form of the ſtatute: Thus on the ſtatute of the 8 *El. c.* 4. in caſe of pick-pockets, the body of the indictment muſt bring them within the expreſs purview of the ſtatute, or otherwiſe they ſhall have the benefit of clergy; but it need not conclude againſt the form of the ſtatute, neither is it uſual in ſuch caſes, for it was felony before, and the ſtatute doth not give a new puniſhment, nor make it to be a crime of another nature, but only takes away clergy. But yet, if it ſhould conclude in ſuch caſe againſt the form of the ſtatute, it would not vitiate the indictment, but would be only ſurpluſage. 2 *H. H.* 190.

If an act of parliament, making an offence, be but temporary, and made perpetual by another ſtatute, the indictment concluding againſt the form of the *ſtatute*, is good. 2 *H. H.* 173.

If the former ſtatute be diſcontinued, and revived by another ſtatute, the beſt way is to conclude againſt the form of the *ſtatutes*; though there is good opinion, that it is good enough to conclude againſt the form of the firſt ſtatute. 2 *H. H.* 173.

If one ſtatute be relative to another, as where the former makes the offence, the latter adds a penalty; the indictment ought to conclude againſt the form of the ſtatutes. 2 *H. H.* 173.

X. Charges of an indictment.

By the 10 & 11 *W. c.* 23. No clerk of aſſize, clerk of the peace, or other perſon, ſhall take any fee of any perſon bound over to give evidence againſt a traytor or felon, for the diſcharge of his recognizance: nor ſhall take more than 2*s.* for drawing any bill of indictment againſt any ſuch felon: on pain of 5*l.* to the party grieved, with full coſts. And if he draw a bill defective, he ſhall draw a new one *gratis*, on the like pain.

For the drawing of indictments for other miſdemeanors, not being treaſon or felony, no fee is limited by any ſtatute: and therefore the ſame dependeth upon the cuſtom and ancient uſage.

Condition

Condition of a recognizance to prefer a bill of indictment.

THE *condition of this recognizance is such, That if the abovebound* A. I. *shall personally appear at the next general quarter sessions of the peace to be holden at*----------*in and for the said county, and then and there prefer a bill of indictment against* A. O. *late of*----------*yeoman, for the felonious taking and carrying away of*---------- *the property of*----------*and shall then and there give evidence concerning the same, to the jurors who shall inquire thereof on the part of our said lord the king: And in case the same be found a true bill, Then if the said* A. I. *shall personally appear before the jurors who shall pass upon the trial of the said* A. O. *and give evidence upon the said indictment, and not depart without leave of the court, Then this recognizance to be void.*

Condition of a recognizance to answer to an indictment.

THE *condition of this recognizance is such, that if the abovebound* A. O. *shall personally appear at the next general quarter sessions of the peace to be holden at*----------*in and for the said county, then and there to answer to an indictment, to be preferred against him by* A. I. *of*----------*yeoman, for assaulting and beating him the said* A. I. *and not depart without leave of the court, Then this recognizance to be void.*

INFANTS.

BY an infant, or minor, is meant any one who is under the age of 21 years. 1 *Inst.* 2.

Those who are under a natural disability of distinguishing between good and evil, as infants under the age of 14 years, which is called the age of discretion, are not punishable by any criminal prosecution whatsoever. But this must be understood with some allowance; for if it appear by the circumstances, that an infant under the age of discretion, could distinguish between good and evil, as if one of the age of nine or ten years, kill another and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit as much as if he were of full age: but in such case, the judges will in prudence respite the execution, in order to get a pardon; and it is said, that if an infant apparently wanting discretion, be indicted and found guilty of felony, the justices themselves may dismiss him, without a pardon. And in general it must be left to the discretion of the judge, upon the circumstances of the case, how far an infant, under that age, is *capax doli*, or hath knowledge to discern betwixt good and evil. *Hale's Pl.* 43. 1 *Haw.* 2. 1 *H. H.* 18.

But

But within seven years of age, there can be no guilt whatsoever of any capital offence: the infant may be chastized by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if he be indicted for such an offence as is in its nature capital, he must be acquitted. 1 *H. H.* 19, 20.

An infant under 14, is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it; and though in other felonies *malitia supplet ætatem* in some cases, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion. 1 *H. H.* 630.

An infant may be guilty of forcible entry, in respect of personal actual violence. 1 *Haw.* 147. And the justices may fine him therefore: But yet it shall be good discretion in the justices of the peace, to forbear the imprisonment of such infant. *Dalt. c.* 126.

Because it is said, that he shall not be subject to corporal punishment, by force of the general words of any statute, wherein he is not expressly named. 1 *Haw.* 147.

But if one, who wants discretion, commit a trespass, against the person or possession of another, he shall nevertheless be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2. 1 *H. H.* 15, 16.

An infant may bring an appeal, although it take from the defendant the benefit of waging battle; but he must prosecute such appeal by a guardian. 2 *Haw.* 161, 162.

An appeal likewise may be brought against him. 2 *Haw.* 168.

An infant under the age of discretion cannot be an approver; because he cannot take the oath requisite in that case. 2 *Haw.* 205.

In case of rape, committed upon a child of 12 years old, such child may be sworn as evidence; yea if she be under that age, if it appear to the court that she knows and considers the obligation of an oath, she may be sworn. And in case of evidence against witches, an infant of nine years old was sworn. 1 *H. H.* 634. *Dalt.* 378.

An infant before 21 years of age, shall not be sworn in an inquest. 7 *W. c.* 32. *s.* 4. 1 *Inst.* 172.

A woman at 9 years of age may have dower; at 12 may consent to marriage; and at 14 is of the age of discretion, and may chuse a guardian. 1 *Inst.* 78.

A man is of the age of 12 years to take the oath of allegiance in the torn or leet; and at 14 is of age of discretion, may consent to marriage, and chuse his guardian. 1 *Inst.* 78.

At 21, and not before, persons may bind themselves by any deed, and aliene lands, goods, and chattels, 1 *Inst.* 171.

Upon which ground, infants may not enter into a recognizance to keep the peace, or to be of the good behaviour, but their sureties only.

But an infant may bind himself to pay for his necessary meat, drink, apparel, physick, and such like; and also for his good teaching or instruction, whereby he may profit himself afterwards: but

but if he binds himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation will not bind him. 1 *Inst.* 172.

And in *Earl's* case, 1 *Salk.* 387. it is said, that an infant may buy necessaries, but cannot borrow money to buy; for he may misapply the money, and therefore the law will not trust him, but at the peril of the lender, who must lay it out for him, or see it laid out.

Also, an infant hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age, he may either agree thereunto, and perfect it, or without any cause to be alledged, waive, or disagree to the purchase: and so may his heirs after him, if he agree not thereunto after his full age. 1 *Inst.* 2.

The common law seems not to have determined precisely, at what age one may make a testament of a personal estate: it is generally allowed, that it may be made at the age of 18, and some say under, for the common law will not prohibit the spiritual court in such cases. 1 *Inst.* 89. 1 *H. H.* 17.

A person is of age to be an executor at 17; and an administration of any one during the minority of an infant, ceaseth when the infant comes to that age. 5. *Co. Pigot's* case. 1 *H. H.* 17.

Any person having child or children, under 21 years of age, and not married, may by deed or will attested by two witnesses, dispose of the custody and tuition of such child or children, until they shall be of the age of 21, or for a lesser time; and this, whether such parent be within or above the age of 21. 12 *C.* 2. *c.* 24. *s.* 8.

An infant cannot answer but by guardain; but he may sue either by his next friend or by guardian. 3 *Salk.* 196.

If an infant of the age of 17 years release a debt, this is void; but if an infant make the debtor his executor, that is a good release in law of the action. 1 *Inst.* 264.

By the 5 *El. c.* 4. Persons above the age of 10 years, by their own consent and agreement, may be bound apprentices.

And by the 5 *El. c.* 5. Any person, above seven years old, may be bound apprentice to the sea service.

By the 43 *El. c.* 2. No age is limited for the binding of parish apprentices; so that it seemeth they may be bound at the age of seven, when they cease to be nurse children, and consequently may be taken from the mother.

It shall be felony without benefit of clergy, to steal goods to the value of 40 *s.* out of an house, though the house be not broken open; but this shall not extend to apprentices under 15 years of age. 12 *An. st.* 1. *c.* 7.

Servants above the age of 18, embezilling their master's goods to the value of 40 *s.* shall be punished as felons. 21 *H.* 8. *c.* 7.

INFOR-

INFORMATION.

INFORMATIONS are of two kinds; 1. Such as are merely at the ſuit of the king: And, 2. Such as are partly the ſuit of the king, and partly the ſuit of the party; which are commonly called informations *qui tam*, for thoſe words in the information when the proceedings were in *latin*, *qui tam pro domino rege quam pro ſeipſo, &c.* 2 Haw. 259.

Of near affinity to an information *qui tam*, is an action upon a ſtatute: which is either a *private* action, which is, when an action is given upon a ſtatute to the king, and to the *party grieved* only; or, a *popular* action, which is, where the action is given to the king, or to any one that will ſue for the king and himſelf. *Wood b.* 4. *c.* 4.

Where a matter concerns the publick government, and no particular perſon is intitled to action, there an information will lie. 18 *El. c.* 5. *ſ.* 1. *Salk.* 374.

An information lies, at the *common law*, for a great variety of crimes leſs than capital, as batteries, cheats, perjuries, riots, extortions, nuſances, contempts, and ſuch like: and alſo it lies in very many caſes by *ſtatute*, wherein the offender is liable to a fine or other penalty. *Finch* 340. 2 *Haw.* 260.

And in general, it ſeems that of common right an information *at the ſuit of the king*, or an action in the nature thereof, may be brought for offences againſt ſtatutes, whether they be mentioned by ſuch ſtatutes or not, unleſs other methods of proceeding be particular appointed, by which all others are impliedly excluded. 2 *Haw.* 260.

But an information or action *qui tam* will not lie on any ſtatute, which prohibits a thing as being an immediate offence againſt the publick good in general, under a certain penalty, unleſs the whole or part of ſuch penalty be expreſly given to him who will ſue for it; becauſe otherwiſe it goes to the king, and nothing can be demanded by the party: But where ſuch ſtatute gives any part of ſuch penalty to him who will ſue for it by action or information, any one may bring ſuch action or information, and lay his demand *as well for our lord the king, as for himſelf.* 2 Haw. 265.

Alſo where a ſtatute prohibits or commands a thing, the doing or omiſſion whereof is an immediate danger to the party, and alſo highly concerns the peace, ſafety, or good government of the publick, or the honour of the king, or of his ſupreme courts of juſtice, it ſeems to be the general opinion, that the party grieved may bring his action *qui tam* on ſuch ſtatute. 2 *Haw.* 265.

By the 31 El. c. 5. *All actions, ſuits, bills, indictments, or informations on any penal ſtatute, whereby the forfeiture is limited to the king, ſhall be brought within two years after the offence committed; if limited to the king, and to any other who ſhall proſecute, then within one*

one year; and in default of such prosecution, then to be brought for the king, in two years after that year ended. Provided that if they are limited by statute to be brought within shorter time, then they shall be brought within such time limited. s. 5, 6.

On any penal statute] But if an offence prohibited by a penal statute, be also an offence at common law; the prosecution of it, as of an offence at common law, is no way restrained hereby. 2 *Haw.* 272.

To any other who shall prosecute.] This is, to a common informer; and therefore the *party grieved* is not within the restraint of this statute, but may sue in the same manner as before. 2 *Haw.* 272.

If two informations be exhibited on the same day, for the same offence, they mutually abate one another. 2 *Haw.* 275.

Form of an information *qui tam.*

New-York, Queen's County. BE *it remembered, that* A. I. *of-------in the county of-------gentleman, who as well for our lord the now king, as for himself doth prosecute, cometh before the justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and their general quarter sessions of the peace holden at-------in and for the said county, the-------day of--------in the-------year of the reign of--------in his proper person; and as well for the same lord the king, as for himself, giveth the court here to understand and be informed, That* A. O. *late of-------in the county aforesaid, yeoman, on the-------day of---------in the year aforesaid, at--------aforesaid, in the county aforesaid, not regarding the laws and statutes of our said lord the king, but intending to------with force and arms* [Here insert the offence, with the same precision as in an indictment] *against the form of the statute in that case made and provided: Whereupon the aforesaid* A. I. *as well for the said lord the king, as for himself, prayeth the advice of this court in the premisses; and that the aforesaid* A. O. *may forfeit the sum of---------according to the form of the statute aforesaid; and that he the same* A. I. *may have one moiety thereof, according to the form of the statute aforesaid; and also that the aforesaid* A. O. *may come here into this court, to answer concerning the premisses; and there are pledges of prosecuting,* John Doe *and* Richard Roe. *And hereupon it is commanded to the said* A. O. *that all other things omitted, and all excuses laid aside, he be in his proper person at the next general quarter sessions of the peace to be holden for the said county, to answer as well to our said lord the king, as to the said* A. I. *who as well for the said lord the king, as for himself, doth prosecute, of and concerning the premisses, and further to do and receive what the said court shall consider in this behalf.*

JUDG-

JUDGMENT.

OF judgments, ſome are fixed and ſtated; as in caſes of treaſon, felony, præmunire, and miſpriſions; the particular form of which may be ſeen under their reſpective titles.

Others are diſcretionary and variable, according to the different circumſtances of each caſe; Thus for crimes of an infamous nature, ſuch as petit larceny, perjury, or forgery at common law, groſs cheats, conſpiracy not requiring a villianous judgment, keeping a bawdy houſe, bribing witneſſes to ſtifle their evidence, and other offences of the like nature; it ſeems to be in a great meaſure left to the prudence of the court to inflict ſuch corporal puniſhment and alſo ſuch fine, and binding to the good behaviour for a certain time, as ſhall ſeem moſt proper and adequate to the offence. 2 *Haw.* 445.

The court may aſſeſs a fine, but cannot award any corporal puniſhment againſt a defendant, unleſs he be actually preſent in court. 2 *Haw.* 446.

Where there are ſeveral defendants, a joint award of one fine againſt them all, is erroneous; for it ought to be ſeverally againſt each defendant; for otherwiſe, one who hath paid his proportionable part, might be continued in priſon till all the others have alſo paid theirs, which would be in effect to puniſh him for the offence of another. 2 *Haw.* 446.

A fine is under the power of the court, during the term in which it is ſet; and may be mitigated as ſhall be thought proper: but after the term it admits of no alteration. 2 *Haw.* 446.

A judgment contrary to the verdict, is void. *Read.* Judgm.

By many ſtatutes, peculiar puniſhments are appointed for ſeveral offences, as pillory, ſtocks, impriſonment and the like; and in all theſe caſes, no room is left for the juſtices diſcretion, for they ought to give judgment, and to inflict the puniſhment in all the circumſtances thereof, as ſuch ſtatutes do direct. *Dalt. c.* 188.

JURORS.

TRIAL by juries is the *Engliſhman*'s birth right, and is that happy way of trial, which notwithſtanding all revolutions of times, hath been continued beyond all memory to this preſent day; the beginning whereof no hiſtory ſpecifies, it being contemporary with the foundation of this ſtate, and one of the pillars of it, both as to age and conſequence. *Tr. p. pais* 3. *Dalt. c.* 186.

Concerning which, I will treat in the order following:

I. Who

I. Who may or may not be jurors.
II. Of the returning jurors.
III. Of the challenge of jurors.
IV. Of the demeanor of jurors in giving their verdict.
V. Of the indemnity and punishment of jurors.

I. Who may or may not be jurors.

Mr. *Hawkins* says, it doth not seem to be any where holden, that none but freeholders ought to be returned on a grand jury. 2 *Haw.* 216, 217.

But in another place he says, that by the common law, every grand juryman ought to be a freeman. 1 *Haw.* 215.

And L. *Hale* says, touching the yearly value of the estate of a grand juryman, he doth not find any thing determined; but freeholders they ought to be. 2 *H. H.* 155.

Also a grand juryman must be a lawful liege subject; and consequently, neither under an attainder of any treason or felony, nor an alien, nor outlawed, whether for a criminal matter, or as some say, in a personal action; and from hence it seems, that any one who is under a prosecution for any crime, may by the common law, before he is indicted, challenge any of the persons returned on the grand jury, for the defect of any of the qualifications aboveſaid. 1 *Haw.* 215.

It is enacted by the 28 *Ed.* 3. *c.* 13. that in inquests to be taken amongst aliens and denizens, before any judges, one half of the inquest shall be denizens, and the other half aliens, if so many there be in the place who are not parties: if not, then so many as there are.

And by the 27 *Ed.* 3. *st.* 2. *c.* 8. Before the mayor of the staple, if both parties be strangers, the inquest shall be taken by strangers; if both be denizens, by denizens; if one party be denizen, and the other alien, half the jury shall be denizens, and half aliens.

And these aliens need not have any qualification by their estate. 8 *H.* 6. *c.* 29.

But it seems that the *English* half of the jury ought to have estates of the same value as in other cases. 2 *Haw.* 419.

But by the 13 & 14 *C.* 2. *c.* 11. *s.* 11. In actions concerning tonnage and poundage, or ships or goods to be forfeited by reason of unlawful importation or exportation, there shall not be any party jury, but such only as are natural born subjects.

The coroner's jury, upon inquests taken before him, are to be of the neighbouring towns; but no qualification by estate is required by any statute, 2 *H. H.* 152.

Young men, under 21 years of age, shall not serve upon juries. 7 *W.* *c.* 32. *s.* 4.

Old

Old men above 70, perſons continually ſick, or being diſeaſed at the time of the ſummons, or not dwelling in the county, ſhall not be put in juries of petit aſſizes; on pain of the ſheriff paying damages to the party grieved, and being amerced to the king. 13 *Ed.* 1. *ſt.* 1. *c.* 38.

And the equity of this ſtatute, and alſo the reaſon of the thing, ſeem plainly ſo far to extend to grand juries, that if it ſhall appear that any of the perſons abovementioned be returned on a grand jury, the court will eaſily excuſe their non-appearance. But it ſeems clear, that any ſuch perſons being returned on a grand jury, may lawfully ſerve upon it if they think fit. 2 *Haw.* 216.

The jury ought to be men; yet there ſhall be a jury of women, to try if a woman be enſient, upon the writ *de ventre inſpiciendo.* *Tr. p. pais* 86.

Clergymen cannot be impanelled upon juries. *Lamb.* 396.

Diſſenting teachers, qualified under the toleration act, are exempted from ſerving on juries. 1 *W.* *c.* 18. *ſ.* 11.

II. Of the returning jurors.

By a clauſe in the commiſſion of the peace, it is ſaid,----We command our ſheriff, that at certain days, which you (the juſtices) ſhall make known to him, he cauſe to come before you, ſo many and ſuch good and lawful men of his bailiwick (as well within liberties as without) by whom the truth ſhall be the better known and inquired into.

It ſeems that juſtices of the peace may not order a jury to be returned immediately, nor on the ſame day, for the trial of a priſoner arraigned before them, as juſtices of gaol delivery may, unleſs the crime amount to felony, or the party conſent to be tried immediately. 2 *Haw.* 406.

Alſo it ſeems that a jury may not regularly be returned before juſtices of the peace in their ſeſſions, by a bare award of the court, as before juſtices of gaol delivery; but that there ought to be a particular precept to the ſheriff for that purpoſe. 2 *Haw.* 405, 406.

But in caſes of felony, it is agreed (4 *Inſt.* 164.) and is the uſual practice, after the priſoners are arraigned, and have pleaded to the country, for the juſtices to iſſue a precept to the ſheriff, in nature of a *venire facias*, which may bear the teſte the ſame day that the priſoners plead, commanding the ſheriff to return 24 jurors, to try the iſſue upon ſuch a day; or they may make it returnable the ſame day that the priſoner pleads, as at one of the clock in the afternoon, or the like: and this precept muſt be in the name, and under the ſeals of the juſtices, or two of them (1 *Q.*) and not barely by an award upon the roll. 2 *H. H.* 261, 262.

The writ of *venire facias* by the ſtatute of the 4 & 5 *W.* *c.* 24. ſhall be after this form: *The king*, &c. *We command*, &c. *that you cauſe to come before* &c. *twelve free and lawful men of the vicinage of* A. *every of whom ſhall have* 10l, *of lands, tenements, or rents, by the year, at leaſt; by whom* &c. *and who neither*, &c. ſ. 15. The

The reaſon why they are required to come from the vicinage is, for that the neighbours are preſumed to know what is done in the neighbourhood. 1 *Inſt.* 158.

But yet this is not neceſſarily required; for they of one ſide of the county, are by law of the neighbourhood, to try an offence of the other ſide of the county. 2 *H. H.* 264.

Although the words of the writ be twelve, yet by the ancient courſe, the ſheriff muſt return 24, for the expedition of juſtice; for if 12 only ſhould be returned, a man would ſeldom have a full jury appear; and in this caſe uſage and cuſtom makes the law. 2 *H. H.* 263. *Read. Jur.*

But the general precept that iſſues before a ſeſſions is, to return 24, and commonly the ſheriff returns upon that precept 48. 2 *H. H.* 263.

But in iſſues of *niſi prius*, the ſheriff ſhall, upon his return of the writ of *venire facias juratores* (unleſs in cauſes intended to be tried at bar, or where a ſpecial jury ſhall be appointed) annex a panel to the ſaid writ, containing the chriſtian and ſurname, additions, and places of abode, of a competent number of jurors, the names of the ſame perſons to be inſerted in the panel annexed to every *venire facias*, for the trial of all iſſues at the ſame aſſizes; which number of jurors ſhall not be leſs than 48 in any county, nor more than 72, unleſs the judges ſhall order otherwiſe. And the writs of *habeas corpora juratorum*, or *diſtringas*, ſubſequent to ſuch writ of *venire facias juratores*, need not have inſerted in the bodies of ſuch writs the names of all the perſons contained in ſuch panel, but it ſhall be ſufficient to inſert in the mandatory parts of ſuch writs reſpectively, *the ſeveral bodies of the perſons named in the panel annexed to this writ*, or words of the like import, and to annex to ſuch writs reſpectively panels, containing the ſame names as were returned in the panel to ſuch *venire facias*, with their additions and places of abode, that the parties concerned in any ſuch trials may have timely notice of the jurors who are to ſerve at the next aſſizes, in order to make their challenges to them, if there be cauſe; and the perſons named in ſuch panels ſhall be ſummoned at the next aſſize, and no other. 3 *G.* 2. *c.* 35. *ſ.* 8. It is true, this gives them an opportunity of knowing how to make their challenges; but it alſo gives them an opportunity to another purpoſe, namely, of labouring the jurors,———a practice which cannot be too much diſcouraged.

Upon the grand jury; there may be, and uſually are, more than 12: but if there be 12 aſſenting, tho' others diſſent, it is not neceſſary for the reſt to agree. 2 *H. H.* 161.

But upon trial by a petit jury; it can be by no more nor leſs than 12, and all aſſenting to the verdict. 2 *H. H.* 161.

In any actions brought in the courts at *Weſtminſter*, where it ſhall appear to the court, that is is neceſſary that the jurors ſhould have the view of the place in queſtion, they may order ſpecial writs of *diſtringas*

diſtringas or *habeas corpora* to iſſue, by which the ſheriff ſhall be commanded, to have ſix out of the firſt 12 of the jurors, or ſome greater number of them, at the place in queſtion ſome convenient time before the trial; who ſhall have the matters in queſtion ſhewn to them by two perſons in the ſaid writs named; and the ſheriff by a ſpecial return upon the ſame, ſhall certify that the view hath been had according to the command of the ſaid writ. 4 *Ann*, *c.* 16. *ſ.* 8.

And by the 3 *G.* 2. *c.* 25, *ſ.* 14. Where a view ſhall be allowed, ſix or more of the jurors in the panel, who ſhall be conſented to by the parties on both ſides, or their agents, or if they cannot agree, by the proper officer or judges of the court, —— —ſhall have the view, and ſhall be firſt ſworn, or ſuch of them as appear, before any drawing, and others ſhall be drawn to make up the number.

Tr. 8 *W.* A rule was made, that when the maſter is to ſtrike a jury, *viz.* 48 out of the freeholders book, he ſhall give notice to the attornies of both ſides to be preſent; and if the one comes, and the other does not, he that appears ſhall according to the ancient courſe ſtrike out 12, and the maſter ſhall ſtrike out other 12 for him that is abſent. 1 *Salk.* 405.

Where a full jury at *niſi prius* (or on indictments, informations, or other actions on penal ſtatutes, 4 & 5 *P.* & *M.* *c.* 7.) ſhall not appear, or ſhall be reduced below the number by challenge, the judges on requeſt of the plaintiff (or defendant, 14 *El.* *c.* 9.) may command the ſheriff to appoint ſo many other able perſons of the county then preſent at the aſſizes, as ſhall make up a full jury; whoſe names ſhall be annexed to the panel. 35 *H.* 8. *c.* 6. *ſ.* 6.

No ſheriff ſhall return any juror, without the addition of his dwelling, or ſome other addition by which he may be known; and no extract of iſſues ſhall be delivered out, without ſuch addition; on pain of five marks to the king, and five marks to the party grieved; to be recovered in ſeſſions, or elſewhere. 27 *El.* *c.* 7.

By the common law, jurors returned, and not appearing, ſhall loſe and forfeit the iſſues returned upon them. 35 *H.* 8. *c.* 6.

And if a juryman be called, and (being preſent) refuſe to appear; or, having appeared, withdraw himſelf before he be ſworn, the court may ſet a fine upon him at their diſcretion. 2 *H.* *H.* 309. 35 *H.* 8. *c.* 6. *ſ.* 9.

IV. Of the challenge of jurors.

And herein,

i. Of the ſeveral kinds of challenge.
ii. When the challenge is to be taken.
iii. How the challenge ſhall be tried.
iv. How panels may be reformed by the court, without challenge.

I. Of

I. Of the ſeveral kinds of challenge.

There are two kinds of challenge; either to the *array*, by which is meant the whole jury as it ſtands *arrayed* in the *panel*, or little ſquare *pane* of parchment on which the jurors names are written: or to the *polls*, by which are meant the ſeveral particular perſons or *heads* in the array. 1 *Inſt.* 156, 158.

Challenge to the *array*, is in reſpect of the partiality or default of the ſheriff, coroner, or other officer that made the return: and this is two-fold;

1. Principal challenge to the array: which if it is made good, is a ſufficient cauſe of exception, without leaving any thing to the judgment of the triers.

Cauſes of challenge of this ſort, are ſuch as theſe: If the ſheriff, or other officer, be of kindred or affinity to the plaintiff or defendant, if the affinity continue. If any one or more of the jury be returned at the denomination of the party plaintiff or defendant, the whole array ſhall be quaſhed. If the plaintiff or defendant have an action of battery againſt the ſheriff, or the ſheriff againſt either party, this is a good cauſe of challenge. So if the plaintiff or defendant have an action of debt againſt the ſheriff; but otherwiſe it is, if the ſheriff have an action of debt againſt either party. Or if the ſheriff have parcel of the land depending upon the ſame title, Or if the ſheriff, or his bailiff which returned the jury, be under the diſtreſs of either party. Or if the ſheriff or his bailiff, be either of counſel, attorney, officer, or ſervant of either party, goſſip; or arbitrator in the ſame matter, and treated thereof. 1 *Inſt.* 156.

And the ſubject may challenge the array againſt the king; as in traverſe of an office, he that traverſeth may challenge the array: And ſo it is in caſe of life. 1 *Inſt.* 156.

And where a ſubject may challenge the array, for unindifferency, there the king being a party may alſo challenge for the ſame cauſe. 1 *Inſt.* 156.

The array challenged on both ſides ſhall be quaſhed. 1 *Inſt.* 156.

2. Challenge to the array, for favour. He that taketh this muſt ſhew in certain the name of him that made it, and in whoſe time, and all in certainty. This kind of challenge, being no principal challenge, muſt be left to the diſcretion and conſcience of the triers. As if the plaintiff or defendant be tenant to the ſheriff, this is no principal challenge, but he may challenge for favour, and leave it to trial. So affinity between the ſon of the ſheriff, and the daughter of the party, or the like, is no principal challenge, but to the favour; but if the ſheriff marry the daughter of either party, or the like, this (as hath been ſaid) is a principal challenge. 1 *Inſt.* 156.

But where the king is party, one ſhall not challenge the array for favour; becauſe in reſpect of his allegiance, he ought to favour the king more; but if the ſheriff be a menial ſervant to the king, there the

the challenge is good. 1 *Inſt.* 156. By which ſeems to be meant, that ſuch challenge is not good, without ſhewing ſome actual partiality in the ſheriff. 2 *Haw.* 419.

But the king may challenge the array for favour, 1 *Inſt.* 156.

Challenge to the *polls* is threefold:

1. Peremptory. This is ſo called, becauſe a perſon may challenge peremptorily, upon his own diſlike, without ſhewing of any cauſe.

This peremptory challenge ſhall not be allowed to the king; for it is provided by the 33 *Ed.* 1. *ſt.* 4. that he who challengeth a juror for the king, ſhall ſhew cauſe, and the truth thereof ſhall be inquired of. And this extends as well to criminal, as civil cauſes. However, if the king challenge a juror, he need not ſhew any cauſe of his challenge, till the whole panel be gone through, and it appear that there will not be a full jury without the perſon challenged. And if the defendant in order to oblige the king to ſhew cauſe, preſently challenge all the reſt, yet it hath been adjudged, that the defendant ſhall be firſt put to ſhew all his cauſes of challenge, before the king need to ſhew any. 2 *Haw.* 413.

And this peremptory challenge is not allowable to the party againſt the king, but only in caſe of treaſon or felony, in favour of life. 1 *Inſt.* 156.

But in caſe of treaſon or felony, the priſoner by the common law might peremptorily challenge 35, which was under the number of three juries; but by the ſtatute of the 22 *H.* 8. *c.* 14. *ſ.* 6. the number is reduced to 20, in petit treaſon, murder, and felony; and in caſe of high treaſon, and miſpriſion of high treaſon, it was taken away by the ſtatute of the 33 *H.* 8. *c.* 23. but by the ſtatute of the 1 & 2 *P.* & *M. c.* 10. the common law was again revived for *any* treaſon, and therein the priſoner ſhall have his peremptory challenge to the number of 35. 1 *Inſt.* 156.

But as to all murders and other felonies, the ſtatute of the 22 *H.* 8. *c.* 14. taking away the peremptory challenge of above 20 ſtands in force. 2 *H. H.* 269. But if the party challenge above that number, he ſhall not have judgment of death, but his challenge ſhall be over-ruled, and he ſhall be put upon his trial. *H. Pl.* 259. 2 *H. H.* 270.

2. Principal challenge to the polls: where cauſe is ſhewn, but which if found true, ſtands ſufficient of itſelf, without leaving any thing to the triers.

Cauſes of principal challenge to the polls, are ſuch as theſe:

A peer is not to be ſworn on juries, and he may be challenged by either party, or may bring a writ of privilege for his diſcharge. 1 *Inſt.* 156. 2 *Haw.* 415.

Want of freehold, is a good cauſe of challenge. 1 *Inſt.* 156.

Alſo, if a perſon is an alien. 1 *Inſt.* 156.

If the juror is above the age of 70, or is ſick, or is non-reſident in the county, he may ſue out a writ of privilege for his diſcharge; but if he be returned and appear, he can neither be challenged by the

the party, nor excuſe himſelf from not ſerving, if there be not enow without him. 2 *Haw.* 418.

If the juror be of blood or kindred to either party, this is a principal challenge; for that the law preſumeth that one kinſman doth favour another, before a ſtranger; and how far remote ſoever he is of kindred, yet the challenge is good. 1 *Inſt.* 157.

Affinity, or alliance by marriage, is a principal challenge, if the ſame continues, or iſſue be had; otherwiſe, it is but to the favour. 1 *Inſt.* 157.

If the juror be godfather to the child of the plaintiff or defendant, or they to his child, this is allowed to be a good challenge in our books. 1 *Inſt.* 157.

If the juror have part of the land that dependeth upon the ſame title, it is a principal challenge. 1 *Inſt.* 157.

It hath been allowed a good cauſe of challenge, on the part of the priſoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Haw.* 418.

Likewiſe if the juror gave a verdict before, for the ſame cauſe, or upon the ſame title or matter, though between other perſons. 1 *Inſt.* 157.

So likewiſe one may be challenged, that he was indictor of the plaintiff or defendant in the ſame cauſe; for ſuch a one, it may be thought, will not falſify his former oath. *Lamb.* 554. And if a grand juryman, who was one of the indictors in the ſame cauſe, be returned upon the petit jury, and do not challenge himſelf, he ſhall be fined. 2 *H. H.* 309.

If a juror hath been an arbitrator, choſen by the plaintiff or defendant in the ſame cauſe; and hath been informed thereof, or treated of the matter, this is a principal challenge; otherwiſe, if he were choſen indifferently by either of the parties. 1 *Inſt.* 157.

If he be of counſel, ſervant, or of fee, of either party, it is a principal challenge. 1 *Inſt.* 157.

Alſo, if a juryman, before he be ſworn, take information of the caſe, this is cauſe of challenge. 2 *H. H.* 306.

If any, after he be returned, do eat and drink at the charge of either party, it is a principal cauſe of challenge. 1 *Inſt.* 157.

But it is not a principal challenge to a juror, but only to the favour, that the proſecutor was lately entertained at his houſe. 3 *Salk.* 81.

Actions brought either by the juror againſt either of the parties, or by either of the parties againſt him, which imply malice or diſpleaſure, or cauſes of principal challenge; other actions, which do not imply malice or diſpleaſure, are but to the favour. 1 *Inſt.* 157.

In a cauſe where the parſon of a pariſh is party, and the right of the church cometh in debate, a pariſhioner is a principal challenge. 1 *Inſt.* 157.

If either party labour the juror, and give him any thing to give his verdict, this is a principal challenge; but if either party labour the juror to appear, and to do his conſcience, this is no challenge at all, but lawful for him to do it. 1 *Inſt.* 157. That

That the juror is a fellow servant with either party, is no principal challenge, but to the favour. 1 *Inst.* 157.

If the juror be attainted or convicted of treason or felony, or for any offence to life or member, or in attaint for a false verdict, or for perjury as a witness, or in a conspiracy at the suit of the king, or in any suit (either for the king or for any subject) be adjudged to the pillory, tumbrel, or the like, or to be branded or stigmatized, or to have any other corporal punishment, whereby he becometh infamous: these, and the like, are principal causes of challenge. 1 *Inst.* 158.

So it is, if a man be outlawed in trespass, debt, or any other action, for he is *exlex*, and therefore not a lawful man. 1 *Inst.* 158.

And old books have said, that if he be excommunicated, he could not be of a jury. 1 *Inst.* 158.

Challenge to the polls for favour. This is, when either party cannot take any principal challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triers, upon hearing their evidence, to find him favourable, or not favourable. And the causes of favour are infinite. For all which, the rule of law is, that he must stand indifferent, as he stands unsworn. 1 *Inst.* 157.

ii. When the challenge is to be taken.

No challenge can be taken either to the array, or to the polls, till a full jury have appeared. 2 *Haw.* 412.

He that hath divers challenges, must take them all at once. 1 *Inst.* 158.

If a juror be challenged by one party, and after, be tried indifferent, it is time enough for the other party to challenge him. 1 *Inst.* 158.

After challenge to the array, and trial duly returned, if the same party take a challenge to the polls, he must shew cause presently. 1 *Inst.* 158.

When the king is party, the defendant that challengeth for cause must shew his cause presently. 1 *Inst.* 158.

But if a juror be challenged between party and party, and there be enough of the panel besides; the cause of challenge needeth not to be shewed, unless the other side challenges *touts peravail. Tr. p. pais* 143.

If a man, in case of treason or felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. 1 *Inst.* 158.

The prisoner must take all peremptory challenges himself, even in cases wherein he may have counsel. 2 *Haw.* 413.

The challenge to the array, must be in writing, but where the challenge is to the polls, it is a short way by a verbal challenge. *Tr. p. pais* 172.

iii. How

iii. How the challenges ſhall be tried.

The challenge of him who firſt challenged ſhall be firſt tried. *Tr. p. pais* 144.

If the array be challenged, it lies in the diſcretion of the court how it ſhall be tried; ſometimes it is done by two coroners, and ſometimes by two of the jury, with this difference, that if the challenge be for kindred in the ſheriff, it is moſt fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two aſſigned thereunto by the court. 2 *H. H.* 275.

When any challenge is made to the polls, if it be before any jurors are ſworn, the court ſhall chuſe the triers; if two are ſworn, they ſhall try; and if they try one indifferent, and he be ſworn, then he and the two triers ſhall try another; and if another be tried indifferent, and he be ſworn, then the two triers ceaſe, and the two that be ſworn on the jury ſhall try the reſt: If the plaintiff challenge ten, and the defendant one, and the twelfth is ſworn, becauſe one cannot try alone, there ſhall be added to him one challenged by the plaintiff, and another by the defendant. *Finch.* 112. 1 *Inſt.* 158.

The triers oath is, "You ſhall well and truly try, whether "*A. B.* (the juryman challenged) ſtand indifferent between the "parties to this iſſue: ſo help you god." 1 *Salk.* 152.

If the cauſe of challenge touch the diſhonour or diſcredit of the juror, he ſhall not be examined on his oath; but in other caſes, he ſhall be examined on his oath, to inform the triers. 1 *Inſt.* 158. 1 *Salk.* 153.

If the array be quaſhed againſt the ſheriff, the proceſs of *venire facias juratores* ſhall be directed to the coroners; if againſt any of the coroners, then proceſs ſhall be awarded to the reſt; if againſt all of them, then the court ſhall appoint certain eliſors (ſo named *ab eligendo*) againſt whoſe return no challenge ſhall be taken to the array, becauſe they were appointed by the court; but he may have his challenge to the polls. 1 *Inſt.* 158.

iv. How panels may be reformed by the court without challenge.

Beſides the challenges which may be taken by the plaintiff or defendant, it is enacted by the 3 *H.* 8. *c.* 12. that in caſes where the king is party, the juſtices of aſſize, or of the peace in ſeſſions, may reform the panels of jurors, by putting to and taking out of the names of the perſons impanelled by their diſcretion; and if the ſheriff do not return the panel ſo reformed, he ſhall forfeit 20*l.* half to the king, and half to him that ſhall ſue.

And this extends both to grand and petit juries. 2 *H. H.* 156.

And

And hence it is, that if a prisoner be arraigned before the judge that sits upon the crown side, it is usual for the judge to send for a jury to the judge of *nisi prius*, and when the jury is brought, the sheriff returns them between the king and the prisoner; which is by virtue of this statute. 2 *H. H.* 265.

V. Of the demeanor of jurors in giving their verdict.

By the law of *England*, a jury after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, and without speech with any, unless it be the bailiff, and with him only if they be agreed. 1 *Inst.* 227.

And the bailiff ought to be sworn to keep them together, and not suffer any to speak with them. 2 *H. H.* 296.

And if the jury after their evidence given to them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict; but if before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant, it shall not avoid it. and so on the contrary. But if after they be agreed on their verdict, they eat or drink at the charge of him for whom they do pass, it shall not avoid the verdict. 1 *Inst.* 227.

But with the assent of the justices they may both eat and drink; as if any of the jurors fall sick before they be agreed of their verdict, then by the assent of the justices he may have meat or drink, and also such other things as be necessary for him and his fellows also, at their own costs, or at the indifferent costs of the parties, if they so agree: and if they cannot agree, the justices may in such case suffer the jury to have both meat and drink for a time, to see whether they will agree. *Dr. & St.* 158.

After their departure they may desire to hear one of the witnesses again, and it shall be granted, so he deliver his testimony in open court; and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court. 2 *H. H.* 296.

But if the plaintiff after evidence given, and the jury departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in issue, or any evidence, or any writing touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant, and so on the contrary. But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carried it with them. 1 *Inst.* 227.

A jury sworn and charged in a capital case, cannot be discharged (without the prisoner's consent) till they have given a verdict. 2 *Haw.* 439.

And

And the king cannot be nonsuit, for he is in judgment of law ever present in court. 1 *Inst.* 227.

If a jury say they are agreed, and it being asked who shall say for them, they say their foreman, but upon farther inquiry they are not agreed, they may be fined. 2 *H. H.* 309.

If a jury cast lots for their verdict, it shall be set aside, and they shall be fined for the contempt. 3 *Keb.* 805. 2 *Lev.* 140, 205. *M.* 12 *G. Hale* and *Cove.* The jury having sat up all night, agreed in the morning to put two papers into a hat, marked *Plaintiff* and *Defendant*, and so draw lots; *Plaintiff* came out, and they found for the plaintiff, which happened to be according to the evidence, and the opinion of the judge. Upon motion for a new trial, it was agreed that the verdict must be set aside; but the question was, whether the defendant should pay costs: the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed, that the costs should wait the event of the new trial. *Str.* 642.

The jury may give a verdict without testimony, when they themselves have conusance of the fact. *Tr. p. pais* 279. 1 *Ventr.* 97.

But if they give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court before they are sworn that they have evidence to give. 1 *Salk.* 405.

For certainly it is of dangerous consequence, to receive a verdict against evidence given, on supposal that some of the jury knew otherwise, or on private information given by any juryman to the rest, where he cannot be cross examined. *Tr. p. pais.* 209.

After they be agreed, they may in causes between party and party, if the court be risen, give a private verdict, before any of the judges of the court; and then they may eat and drink; and the next morning in open court they may either affirm or alter their private verdict; and that which is given in court shall stand. 1 *Inst.* 227.

But in criminal cases of life or member, the jury can give no private verdict, but they must give it openly in court. 1 *Inst.* 227.

In all causes, and in all actions; the jury may give either a general or a special verdict, as well in causes criminal as civil, and the court ought to receive a special verdict, if pertinent to the point in issue. 3 *Salk.* 373.

Thus if one be indicted for grand larceny, that is, for stealing goods above the value of 12*d.* yet the jury may find specially, that he is guilty, but that the goods are not above the value of 12*d.* In which case he shall only have judgment of petit larceny. 1 *Haw.* 95.

Jurors are to try the fact, and the judges ought to judge according to the law that ariseth upon the fact. 1 *Inst.* 226.

But if they will take upon them the knowledge of the law upon the matter, they may, yet it is dangerous, for if they mistake the law, they run into the danger of an attaint: therefore to find the special matter is the safest way, where the case is doubtful. 1 *Inst.* 228.

But

But if the jury find according to the direction of the judge, in matter of law, altho' the judge be mistaken, yet the jury shall not be liable to attaint, L. *Raym.* 470.

It hath been adjudged, that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again, and re-consider the matter; but this by many is thought hard, and seems not of late years to have been so frequently practised as formerly. However it is settled, that the court cannot set aside a verdict which acquits a defendant, of a prosecution properly criminal, as it seems that they may a verdict that convicts him for having been given contrary to evidence and the directions of the judge, or any verdict whatsoever for a mistrial. 2 *Hawk.* 442.

After the verdict recorded, the jury cannot vary from it; but before it be recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand. 1 *Inst.* 227.

A verdict finding an impossible matter shall not be void, if at the same time it find the substance of the indictment; but the surplus shall be rejected. 1 *Hawk.* 77.

Verdicts shall not be taken so strictly as pleadings; but the substance of the thing in issue ought to be always found. 3 *Salk.* 373.

It is said, that if the jurors agree not, before the departure of the justices of gaol delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdicts in a foreign county, 2 *H. H.* 297. *Tr. p. pais*, 274, 285. 1 *Vent.* 97.

But if the case so happen, that the jury can in no wise agree, as if one of the jurors knoweth in his own conscience, the thing to be false, which the other jurors affirm to be true, and so he will not agree with them in giving a false verdict, and this appeareth to the justices by examination; the justices (as it seemeth) in such case may take such order in the matter, as shall seem to them by their discretion to stand with reason and conscience, by awarding a new inquest, or otherwise, as they shall think best by their discretion, like as they may do, if one of the jury die before the verdict. *Dr. & Stud.* 158.

VI. Of the indemnity and punishment of jurors.

If a man assault or threaten a juror, for giving a verdict against him, he is highly punishable by fine and imprisonment; and if he strikes him in the court, in the presence of the judge of assize, he shall lose his hand, and his goods, and profits of his lands during life, and suffer perpetual imprisonment. 1 *Hawk.* 57, 58.

Where more than one of the persons returned on a jury do appear, but not a sufficient number to take an inquest, and some of the others come within view of the court, or into the same town in which the court is holden, but refuse to come into the court to be sworn; upon proof of such matter, the court may, at the prayer of

of the party, order the jurors who appeared, to inquire what is the yearly value of such defaulter's lands, and after such inquiry made, either summon them to appear, on pain of forfeiting such sums as their lands have been found to be worth by the year or some lesser sum, or impose a fine of the like sum upon them, without any farther proceeding. But it seems, that such juror shall be liable to lose his issues only for such default, and not the yearly value of his lands, unless the party pray it: But a juror who hath actually appeared, and after makes default, is said to be subject to such forfeiture of the yearly value of his lands, whether the party pray it or not; because his contempt appears to the court by its own record: yet even in this case, the court in discretion will sometimes only impose a small fine. Also it seems, that a juror who makes default without ever coming into the town wherein the court is holden, is liable only to lose his issues, or to be amerced, but not to be fined. 2 *Hawk.* 146.

And by the 3 *G.* 2. *c.* 25. *s.* 13. In causes of *nisi prius*, every person whose name shall be drawn, and who shall not appear, after being openly called three times, shall on oath made of his having been lawfully summoned, forfeit not exceeding 5 *l.* nor less than 40 *s.* unless some reasonable cause be proved, by oath or affidavit, to the satisfaction of the judge.

If the grand jury at the assizes or sessions will not find a bill, the court may impanel another inquest (by the 3 *H.* 7. *c.* 1.) to inquire of their concealments, and thereupon set fines upon them: But it seemeth that fines set upon grand inquests in any other manner, are not warrantable by law; for the privilege of an *Englishman* is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard, if every justice of the peace, or judge of assize, may make the grand jury present what he pleases, or otherwise fine them. 2 *H. H.* 160, 1.

If any juror do take of either party to give his verdict, he shall on conviction by bill or plaint, before the court where the verdict shall pass, forfeit ten times as much as he hath taken, half to the king, and half to him that shall sue. 5 *Ed.* 3. *c.* 10.

It seems to be certain, that no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a *criminal* matter, either upon a grand or petit jury; for since the safety of the innocent, and punishment of the guilty, doth so much depend upon the fair and upright proceedings of jurors, it is of the utmost consequence, that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biassed with the fear of being harrassed by a vexatious suit, for acting according to their consciences, the law will not leave any possibility for a prosecution of this kind. And as to the objection, that an attaint lies against a jury for a false verdict in a civil cause, and that there is as much reason to allow of it in a criminal one; it may be answered, that in an attaint in a civil cause, a man's property

perty is only brought into queſtion a ſecond time, and not his liberty or life. 1 *Haw.* 191. L. *Raym.* 469.

But where the jurors give a falſe verdict upon an iſſue joined in any court of record, and judgment thereupon, the party grieved may bring his writ of attaint in the king's bench or common pleas, upon which 24 of the beſt men of the county are to be jurors, who are to hear the ſame evidence which was given to the petty jury, and as much as can be brought in affirmance of the verdict, but no other againſt it. And if theſe 24 who are called the grand jury, find it a falſe verdict, then followeth this terrible judgment at the common law upon the petit jury; that the party ſhall be infamous, ſo as never to be received to be a witneſs, or a juror; ſhall forfeit his goods and chattels; and his lands and tenements ſhall be taken into the king's hands; his wife and children caſt out of doors; his houſes proſtrated; his trees rooted up; his meadows ploughed up; and his body impriſoned. And ſeeing all trials of real, perſonal, and mixt actions depend upon the oath of 12 men, prudent antiquity inflicted a ſevere and ſtrange puniſhment upon them, if they were attainted of perjury. 1 *Inſt.* 294. *Read.* Jur.

But now by the ſtatute of 23 *H.* 8. *c.* 3. The ſeverity of this puniſhment is moderated, if the writ of attaint be grounded upon that ſtatute; but nevertheleſs, the party grieved may at his election, either bring his writ of attaint upon that ſtatute, or at the common law. *Tr. p. pais.* 222.

But this proceeding ſeems to be entirely diſuſed at this day; and in the place of attaint, motions are now uſually made for new trials, when a verdict is againſt evidence. *Wood. b.* 4. *c.* 4. *Read.* Jur.

But there can be no new trial for or againſt the king. *Tr. p. pais.* 210.

It ſeems to be the current opinion of the old books, that jurors are not ſubject to any proſecution for a falſe verdict, except by way of attaint: and there ſeems to be very few ancient precedents for the puniſhment either of a grand or petit jury, merely for giving a verdict againſt evidence, or the direction of the court, either in a capital or civil matter. 2 *Haw.* 147.

And the fining and impriſoning of jurors for giving their verdict hath ſeveral times been declared in parliament an illegal and arbitrary innovation, and of dangerous conſequence to the government, and the lives and liberties of the ſubject. 2 *Keb.* 180. *Read.* Jur.

And in *Buſhel's* caſe, it was reſolved by all the judges, upon a full conference together, that a jury is not finable for going againſt their evidence, where an attaint lies. And where an attaint doth not lie, L. *Vaughan* ſays thus; "That the court could not fine a "juryman at the common law, where attaint did not lie, I think "to be the cleareſt poſition that ever I conſidered, either for au- "thority, or reaſon of law." And one reaſon for this is, becauſe the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence, than what is ſhewed in court; they are of the vicinage, the judge is a ſtranger; they may have

have evidence from their own perſonal knowledge that the witneſſes ſpeak falſe, which the judge knows not of; they may know the witneſſes to be ſtigmatized and infamous, which may be unknown to the parties or court. And if the jury knew no more than what they heard in court, and ſo the judge knew as much as they, yet they might make different concluſions, as oftentimes two judges do; and therefore as it would be a ſtrange and abſurd thing, to puniſh one judge for differing with another in opinion or judgment, ſo it would be worſe for the jury, who are judges of the fact, to be puniſhed for finding againſt the direction of him, who is not judge of the fact. *Tr. per pais* 225. L. *Vaugh.* 135.

And to ſay the truth, ſays Lord *Hale*, it would be the moſt unhappy caſe that could be to the judge, if he at his peril muſt take upon him the guilt or innocence of the priſoner: and if the judge's opinion muſt rule the matter of fact, the trial by jury would be uſeleſs. 2 *H. H.* 315.

But what if a jury gave a verdict againſt all reaſon, convicting or acquitting a perſon indicted of felony, what ſhall be done? If the jury *convict* a man, againſt or without evidence, and againſt the direction of the court, the court may reprieve him before judgment, and acquaint the king, and certify for his pardon: if the jury *acquit* him in like manner, the court may ſend them back again (and ſo in the former caſe) to conſider better of it, before they record the verdict; but if they are peremptory in it, and ſtand to their verdict, the court muſt take their verdict and record it. 2 *H. H.* 309, 310.

The form of a writ to the ſheriff to ſummon jurors, for the trial of an iſſue joined.

GEORGE *the third* &c. *To the ſheriff of* ——— *greeting. We command you, that you do not omit by reaſon of any liberty within your county, but that you enter therein, and cauſe to come before* ——— *twelve good and lawful men of the* vicinage *of* ——— *whereof every one hath ſuch lands, tenements, or rents, as will qualify them to ſerve upon juries, and who* are neither of affinity to ——— (the plaintiff) nor to ——— (the defendant); *to hear and do thoſe things, which on our behalf ſhall be then and there enjoined them: And have you then there this precept. Witneſs* A. B. *and* C. D. *at* ——— *the* ——— *day of* ——— 4 & 5 W. c. 24. ſ. 15.

Note; The general precept for ſummoning jurors to the ſeſſions, is contained in the precept for ſummoning the ſeſſions, in the title *SESSIONS.*

Challenge to the array, becauſe the ſheriff is of kindred to one of the parties; from *Coke*'s entries.

AND *now at this day to wit* ——— *came the aforeſaid* A. *the plaintiff, and* B. *the defendant, by their attornies, and the jurors were impanelled, and demanded, and came, and thereupon the aforeſaid* B. *challengeth*

B. *challengeth the array of the panel aforesaid, because he said that that panel was arrayed by one* John Zouch, *knight, now and at the time of making the array aforesaid, sheriff of the county of* Derby, *which said sheriff is a kinsman of the aforesaid* John Manners, *(the plaintiff)*; *to wit, the son of* George Zouch, *esquire, the son of* John Zouch, *knight, the son of* John Zouch, *esquire, the son of* William *Lord* Zouch, *the son of* Alan *Lord* Zouch, *the son of* William *Lord* Zouch, *the son of* Elizabeth *daughter of* William *Lord* Roos, *the father of* William *Lord* Roos, *the father of* Thomas *Lord* Roos, *the father of* Eleanor *mother of* George Maners, *knight, the father of* Thomas *Earl of* Rutland, *the father of the aforesaid* John Maners. *And this he is ready to verify, whereupon he prayeth judgment, and that the said panel may be quashed. Which said challenge by* ——— *and by* ——— *triers, to this chosen and sworn, is found true. And therefore let the panel aforesaid be quashed and amoved,* &c. Tr. per p. 160.

Challenge because the panel was returned at the instance of the party.

And upon this, the said ——— *challenges the array of the said panel, because he says, that that panel was arrayed by one* J. S. *esquire, late sheriff of the county of* ——— *aforesaid, at the nomination of the said* ——— *and in his favour; which said challenge, by triers thereof sworn, is found true.*

For other forms of challenges, and proceedings thereupon, see *Tr. per pais* 159—184.

JUSTICES OF THE PEACE.

JUSTICES of the peace are judges of record, appointed by the king, to be justices within certain limits, for the conservation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge. *Dalt. c.* 2.

And a record or memorial made by a justice of the peace, of things done before him judicially in the execution of his office, shall be of such credit, that it shall not be gainsaid. One man may affirm a thing, and another man may deny it; but if a *record* once say the word, no man shall be received to aver or speak against it; for if men should be admitted to deny the same, there would never be any end of controversies. And therefore to avoid all contention, while one saith one thing, and another saith another thing, the law reposeth itself wholly and solely in the report of the judge. And hereof it cometh, that he cannot make a substitute or deputy in his office, seeing that he may not put over the confidence that is

put in him. Great cauſe therefore have the juſtices to take heed that they abuſe not this credit; either to the oppreſſing of the ſubject by making an untrue record, or the defrauding of the king by ſuppreſſing the record that is true and lawful. *Lamb.* 63---66.

Hereof alſo it cometh, that if a juſtice of the peace certify to the king's bench, that any perſon hath broken the peace in his preſence, upon this certificate ſuch perſon ſhall be there fined, without allowing him any traverſe thereto. *Dalt. c.* 70.

And that I may treat intelligible concerning this office (of which lord *Coke* ſays the whole chriſtian world hath not the like, if it be duly executed, 4 *Inſt.* 170.) I will ſet forth

I. The office of conſervators of the peace at the common law, before the inſtitution of juſtices of the peace.
II. The commiſſion of the juſtices of the peace founded on the ſtatute law.
III. The juſtice of the peace his oath of office.
IV. Of fees to be taken by juſtices of the peace.
V. Some general directions relating to juſtices of the peace, not falling under any particular title of this book.
VI. Their indemnity and protection by the law, in the right execution of their office; and their puniſhment for the omiſſion of it.

I. The office of conſervators of the peace at the common law, before the inſtitution of juſtices of the peace.

Of ancient time ſuch officers or miniſters, as were inſtituted either for preſervation of the peace of the county, or for execution of juſtice, becauſe it concerned all the ſubjects of that county, and they had a great intereſt in the juſt and due exerciſes of their ſeveral places, were by force of the king's writ in every ſeveral county choſen in full or open county by the freeholders of that county: as before the inſtitution of juſtices of the peace, there were conſervators of the peace in every county, whoſe office (according to their names) was to conſerve the king's peace, and to protect the obedient and innocent ſubjects from force and violence. Theſe conſervators, by the ancient common law, were by force of the king's writ choſen by the freeholders in the county court, out of the principal men of the county; after which election ſo made, and returned, then in that caſe the king directed a writ to the party ſo elected, to take upon him and execute the office, until the king ſhould order otherwiſe. And thus the coroners ſtill continue to be choſen in full county; as alſo the knights of the ſhire for the parliament. 2 *Inſt.* 558, 559.

Beſides

Besides these conservators of the peace properly so called, there were and are other conservators of the peace by virtue of certain offices: as for instance;

1. The lord chancellor, and every justice of the king's bench, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizance for it. 2 *Haw.* 32.

2. Also, every court of record, as such, have power to keep the peace within its own precinct. 2 *Haw.* 32.

3. Also, every justice of the peace is a conservator of the peace. *Crom.* 6.

4. Also, every sheriff is a principal conservator of the peace, and may without doubt *ex officio* award process of the peace, and take surety for it. And it seems the better opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation. 2 *Haw.* 33.

5. Also, every coroner is another principal conservator of the peace, and may certainly bind any person to the peace who makes an affray in his presence. But it seems the better opinion, that he has no authority to grant process for the peace; and it seems clear that the security taken by him for the keeping the peace (except only where it is taken by him as judge of his own court for an affray done in such court) is not to be looked on as a recognizance, but as an obligation. 2 *Haw.* 33.

6. Also, every high and petit constable are by the common law conservators of the peace. 2 *Haw.* 33.

And it is said, that if a constable see persons engaged in an affray, or upon the very point of entering upon it, as where one shall threaten to kill, wound, or beat another, he may imprison the offender of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find surety of the peace by obligation. 1 *Haw.* 137.

But it is said, that a constable hath no power to arrest a man for an affray done out of his own view; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor doth it follow from his having power to compel those to find sureties who break the peace in his presence, that he hath the same power over those who break it in his absence. 1 *Haw.* 137.

The general duty of the conservators of the peace by the common law, is to employ their own, and to command the help of others, to arrest and pacify all such who in their presence and within their jurisdiction and limits, by word or deed, shall go about to break the peace. *Dalt. c.* 1.

And if a conservator of the peace, being required to see the peace kept, shall be negligent therein, he may be indicted and fined. *Dalt. c.* 1.

And if the conservators of the peace have committed or bound over any offenders, they are then to send to, or be present at, the

next ſeſſions of the peace, or gaol delivery, there to object againſt them. *Dalt. c.* 1.

II. Of the commiſſion of juſtices of the peace.

Juſtices of the peace at this day are of three ſorts; 1. By act of parliament; as the biſhop of *Ely* and his ſucceſſors, and the archbiſhop of *York*, and biſhop of *Durham*, 27 H. 8. c. 4. 2. By charter, or grant made by the king under the great ſeal; as mayors and the chief officers in divers corporate towns. 3. By commiſſion.

At the firſt, by the ſtatute of the 1 *Ed.* 3. which is the firſt ſtatute that ordains the aſſignment of juſtices of the peace by the king's commiſſion, thoſe juſtices had no other power but only to keep the peace. But the very next year, the form of the commiſſion was enlarged, and continued ſtill further to be enlarged both in that king's reign, and in the reign of almoſt every other ſucceeding prince, until the 30th year of the reign of Q. *Elizabeth*, when by the number of the ſtatutes particularly given in charge therein to the juſtices, many of which nevertheleſs had been a good while before repealed, and by much vain repetition, and other corruptions that had crept into it, partly by the miſwriting of clerks, and partly by the untoward huddling of things together, it was become ſo cumberſome and foully blemiſhed, that of neceſſity it ought to be redreſſed. Which imperfections being made known to ſir *Chr. Wrey*, then Lord Ch. Juſtice of the king's bench, he communicated the ſame with the other judges and barons, ſo as by a general conference had amongſt them, the commiſſion was carefully refined in the *Michaelmas* term 1590, and being then alſo preſented to the lord chancellor, he accepted thereof, and commanded the ſame to be uſed: Which continues with very little alteration to this day. *Lamb. c.* 9.

Which is as follows:

George *the third, by the grace of* God, *of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth. To* A. B. C. D. &c. *greeting.*

Know ye, that we have aſſigned you, jointly and ſeverally, and every one of you, our juſtices to keep our peace in our county of——And to keep and cauſe to be kept all ordinance and ſtatutes, for the good of the peace, and for preſervation of the ſame, and for the quiet rule and government of our people, made, in all and ſingular their articles in our ſaid county (as well within liberties as without) according to the force, form, and effect of the ſame: And to chaſtiſe and puniſh all perſons that offend againſt the form of thoſe ordinances or ſtatutes, or any one of them in the aforeſaid county, as it ought to be done according to the form of thoſe ordinances and ſtatutes; And to cauſe to come before you, or any of you, all thoſe who to any one or more of our people concerning their bodies or the firing of their houſes have uſed threats, to find ſufficient ſecurity for the peace, or their good behaviour, towards us and our people; and

if they shall refuse to find such security, then them in our prisons until they shall find such security to cause to be safely kept.

We have also assigned you, and every two or more of you (of whom any one of you the aforesaid A. B. C. D. &c. *we will shall be one) our justices to enquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of felonies, poisonings, inchantments, sorceries, art magick, trespasses, forestallings, regratings, ingrossings, and extortions whatsoever; and of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to inquire, by whomsoever and after what manner soever in the said county done or perpetrated, or which shall happen to be there done or attempted; And also of all those who in the aforesaid county in companies against our peace, in disturbance of our people, with armed force have gone or rode, or hereafter shall presume to go or ride; And also of all those who have there lain in wait, or hereafter shall presume to lay in wait, to maim or cut or kill our people; And also of all victuallars, and all and singular other persons, who in the abuse of weights or measures, or in selling victuals, against the form of the ordinances and statutes, or any one of them therefore made for the common benefit of* England, *and our people thereof, have offended or attempted, or hereafter shall presume in the said county to offend or attempt; And also of all sheriffs, bailiffs, stewards, constables, keepers of gaols and other officers, who in the execution of their offices about the premisses, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be careless, remiss, or negligent in our aforesaid county; And of all and singular articles, and circumstances, and all other things whatsoever, that concern the premisses or any of them, by whomsoever, and after what manner soever, in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted, in what manner soever; And to inspect all indictments whatsoever so before you or any of you taken or to be taken, or before others late our justices of the peace, in the aforesaid county made or taken, and not yet determined; and to make and continue processes thereupon, against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted; until they can be taken, surrender themselves, or be outlawed; And to hear and determine all and singular the felonies, poisonings, inchantments, sorceries, arts magick, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premisses, according to the laws and statutes of* England, *as in the like case it has been accustomed, or ought to be done; And the same offenders, and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures, and other means as according to the law and custom of* England, *or form of the ordinances and statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish.*

Provided always, that if a case of difficulty, upon the determination of any of the premisses before you, or any two or more of you, shall happen

happen to arise; then let judgment in no wise be given thereon, before you, or any two or more of you, unless in the presence of one of our justices of the one or other bench, or of one of our justices appointed to hold the assize in the aforesaid county.

And therefore we command you and every of you, that to keeping the peace, ordinances, statutes, and all and singular other the premisses, you diligently apply yourselves; and that at certain days and places, which you, or any such two or more of you as is aforesaid, shall appoint for these purposes, into the premisses ye make inquiries; and all and singular the premisses hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of England: *Saving to us the amerciaments, and other things to us therefrom belonging.*

And we command, by the tenor of these presents, our sheriff of——— that at certain days and places, which you, or any such two or more of you as is aforesaid, shall make known unto him, he cause to come before you, or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premisses shall be the better known and inquired into.

Lastly, we have assigned you the aforesaid A. B. *keeper of the rolls of our peace in our said county. And therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined as is aforesaid,*

In witness whereof we have caused these our letters to be made patent. Witness our self at Westminster, &c.

George *the third*, &c.] This manner of issuing the commission in the king's name, seems to be founded on the statute of the 27 *H.* 8. *c.* 24. which enacts, that all justices of the peace shall be made by letters patent under the king's great seal, in the name and by authority of the king; but reserves to all cities and towns corporate which have justices, the liberties which they have enjoyed in that behalf.

To A. B. C. D. &c. *greeting*] From the persons here named in the commission, it may be proper to consider who may, or may not, be justices of the peace.

By the statutes of 13 *R.* 2. *c.* 7. and 2 *H.* 5. *st.* 2. *c.* 1. The justices shall be made within the counties of the most *sufficient* knights, esquires, and gentlemen of law.

By the 1 *M. sess.* 2. *c.* 8. No *sheriff* shall exercise the office of a justice of the peace, during the time that he acts as sheriff. And the reason seems to be, because he cannot act at the same time both as judge and officer, for so he would command himself to execute his own precepts. *Dalt. c.* 3.

Also if he be made a *coroner*, this by some opinions is a discharge of his authority of justice. *Dalt. c.* 3.

But

But if he be created duke, archbishop, marquis, earl, viscount, baron, bishop, knight, judge, or serjeant at law, this taketh not away his authority of a justice of the peace. 1 *Ed.* 6. *c.* 7. *Dalt. c.* 3.

Also, no *attorney*, solicitor, or proctor, shall be a justice of the peace, during the time he shall continue in the practice of that business. 5 *G.* 2. *c.* 18. *s.* 2.

By *Holt* Ch. J. Though a man be a *mayor*, it doth not follow that he is a justice of the peace, for that must be by a particular grant in the charter. L. *Raym.* 1030. But although he be not a justice of the peace by the charter, yet there are many cases, wherein he hath the same power as a justice of the peace given unto him by particular statutes.

Know ye, that we have assigned you] This is founded on the statute of the 1 *Ed.* 3. *c.* 16. *viz.* For the better keeping and maintenance of the peace, the king will, that in every county good men and lawful, which be no maintainers of evil, or barretors in the country, shall be assigned to keep the peace.

And from this act we are to date that great alteration in our constitution, whereby the election of conservators of the peace was taken from the people, and translated to the assignment of the king. *Lamb.* 20.

And here we may observe, that the commission hath two parts; or consisteth of two different assignments: By the first assignment, any one or more justices have as well all the ancient power touching the peace, which the conservators of the peace had at the common law, as also that whole authority which the statutes have since added thereto. *Dalt. c.* 5.

Jointly and severally, and every one of you] Whatsoever any one justice alone may do, the same also may lawfully be done by any two or more justices; but where the law giveth authority to two; there one alone cannot execute it. *Dalt. c.* 6.

And yet where a statute appointeth a thing to be done by two justices or more, if the offence be any misdemeanor or matter against the peace, there upon complaint made of the offence, to any one of those justices, it seemeth that one of them may grant out his warrant to attach the offender, and to bring him before the same justice and the other justice so appointed (at some convenient place) and then they to hear and determine the same. *Dalt. c.* 6.

But it seemeth, that when a thing is appointed by any statute to be done by or before one person certain, such thing cannot be done by or before any other: and by such express designation of one; all others are excluded, and their proceedings therein are *coram non judice*. *Dalt. c.* 6.

Our justices] In that the king calls them *our* justices, their authority determines of course by his death or demise: so that he being once dead, or having given over his crown, they are no more his justices, and the justices of the next prince they cannot be, unless it shall please him afterwards so to make them. *Dalt. c.* 3.

By

By the 1 *An. st.* 1. *c.* 8. *s.* 2. No patent or grant of any office or employment shall determine by the king's death or demise, but shall continue in force for six months after, unless in the mean time made void by the successor.

Also, before his death or demise, the king may determine the commission at his pleasure; and that either expressed, as by writ under the great seal, or by implication, by making a new commission, and leaving out the former justices names. But until notice, or publishing of the new commission, the acts of the former justices are good in law. *Dalt. c.* 3.

But to mayors and chief officers in corporations, which have the authority of justices of the peace, or of conservators of the peace, by grant under the king's letters patent to them and their successors, the authority remaineth, notwithstanding the king's death or demise. *Dalt. c.* 3.

Neither can the king discharge these again at his pleasure; but yet such grants and charters may for some great and general defect, or miscarriage, in the execution of the powers therein granted, be repealed, and the liberties seized. *Dalt. c.* 3.

Justices to keep our peace] Although they are in no part of the commission called *keepers of the peace*, yet inasmuch as by the 18 *Ed.* 3. *c.* 7. 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 certioraries is by the name of *keepers of the peace*; it hath been adjudged, that in the caption of an indictment, *keepers of the peace and justices of our lord the king*, is good, without expressly naming them *justices of the peace*. 2 Haw. 38.

To keep our peace] These words seem to give them the authority which the conservators of the peace had at common law; and all that follows in the commission, seems an addition to the power of the ancient conservators.

Our peace] It hath been resolved, that the description of justices of the peace, by the name of *justices of our lord the king to keep the peace*, is good, without saying, the *peace of our lord the king*; for that is necessarily implied. 2 *Haw.* 38.

Also, by these words *our peace*, when the king dies, the surety of the peace is discharged; for when he is dead, it is not *his* peace, *Crom.* 124,

In our county of-----.] Here are two considerations; One is, that the justice cannot act when he is out of the county; And the other is, that when he is in the county, he can act for that county only, and his power extendeth to no other. But both these are to be understood with some limitations.

As to the former case, when he is out of the county; It is said, that the justices have no *coercive* power when out of the county; and therefore that an order of bastardy, or for payment of labourers wages, made by them out of the county, is not binding. Yet it is said, that *recognizances* and *informations* voluntarily taken before them in any place, are good. 2 *Haw.* 37.

And

And L. *Hale* says, that a justice of the peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons; but that he cannot do a compulsory act, as committing a person for not giving recognizance. 2 *H. H.* 50, 51.

And to keep and cause to be kept all ordinances and statutes for the good of the peace] It seems certain, that by virtue hereof, they may execute all statutes whatsoever, made for the better keeping of the peace, and consequently those of *Winchester* and *Westminster*, and all others concerning the peace, made before the reign of *Ed.* 3. in whose time (as hath been said) justices of the peace were first instituted; for all those statutes were expressly mentioned in the ancient commissions of the peace, and have always been undoubtedly taken to be included in these general words of the present commission. And yet none of the statutes which ordain the office of justices of the peace, say any thing concerning the execution of the said former statutes; so that the power of justices of the peace in relation to those statutes, seems entirely to depend on the king's commission, and yet hath always been unquestionably allowed. From whence it appears, that regularly the king, by his commission, may authorize whom he pleases to execute an act of parliament. 2 *Haw.* 37.

But if no power be expressly given in any such statute to any one justice alone, he cannot proceed upon it, but he may prefer the cause at the sessions, and work it to a presentment upon the statute. *Dalt. c.* 5.

But besides the statutes relating to the peace, there are also many other statutes which are not specified in the commission, and yet are committed to the charge and care of the justices of the peace, by the express words of such statutes; and all such statutes are to them a sufficient warrant and commission of themselves, altho' they be not recited in the commission, and are to be executed by them, according as the same statutes themselves do severally prescribe and set down. *Dalt. c.* 5.

And for the quiet government of our people] Of *our* people;---yet it seemeth, that the subjects of a foreign prince coming into *England*, and living under the protection of our king, shall be subject to, and have the benefit of the laws, in respect of the local allegiance which they owe to him. 2 *Haw.* 35. 1 *H. H.* 93, 94.

Concerning their bodies] *Lambard* and *Dalton* both think it seems clear, that if a man is in fear that another will hurt his *servants*, or *cattle*, or other *goods*, the surety of the peace shall not be granted; but Mr. *Dalton* is of opinion, that if one threatens to hurt a man's *wife*, or *child*, he may crave the peace by virtue of these words. *Lamb.* 82. *Dalt. c.* 116.

Have used threats] It should seem, from the many causes which from time to time have been adjudged sufficient to bind to the good behaviour, that this expression is not to be understood of *words* only, but of threatning *actions* likewise, or any thing whereby a man has just cause to apprehend the burning of his houses, or some bodily hurt to be done to him.

To

To find sufficient security] This is done by recognizance; by a reasonable intendment of law, more than by any especial law in that case provided, *Crom.* 125.

For the peace or their good behaviour] Lord *Hale* speaking of the statute of 34 *Ed.* 3. *c.* 1. (on which Mr. *Crompton* says the power of justices to bind to the good behaviour is grounded) says, that this power of binding, tho' expressed generally, and without any time limited, yet is not intended to be perpetual, but in nature of bail, *viz.* to appear at such a day at their sessions, and in the mean time to be of good behaviour. 2 *H. H.* 136.

In our prisons] The king's prison is the common gaol of the county: But by the statute of the 6 *G. c.* 19. the justices may commit vagrants and other criminals, and persons charged with small offences, either to the gaol, or to the house of correction, by their discretion, for such offences, or for want of sureties.

We have also assigned you, and every two or more of you] Here beginneth the second part of the commission, or the second assignment: All the business within which assignment belongeth to the sessions of the peace. *Dalt. c.* 5.

And by this it appeareth, that two justices may hold a sessions, but that one justice cannot. *Crom.* 6, 7.

Of whom any one of you the aforesaid A. B. C. D. *&c.* we *will shall be one*] This clause, which gives power to two or more justices to hear and determine offences, requires that at least one of those justices be of that select number, which is commonly termed of *Quorum* (for that word in the *Latin* commissions, *Quorum---unum esse volumus.*) For those of the *quorum* were wont to be chosen specially for their knowledge in the laws: And this was it which led the makers of several ancient statutes expressly to enact, that some learned in the laws should be put into the commission of the peace; and (to say the truth) all statutes that require the presence of the *quorum*, do secretly signify such a learned man. For albeit that a discreet person (not conversant in the study of the laws) may sufficiently follow sundry particular directions concerning this service of the peace; yet when the proceeding must be by way of presentment or indictment, upon the evidence of witnesses, and oaths of jurors, by the order of hearing and determining, according to the streight rule and course of the law, it must be confessed that learning in the laws is very necessary. *Lamb.* 48, 49.

But learning being now greatly advanced and improved since the first institution of this office, this distinction is not usually made in the commissions of late years, but all the justices are equally assigned to be of the *quorum*; and by the statute of 26 *G.* 2. *c.* 27. no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument done or executed by two or more justices, which doth not express that one or more of them is of the *quorum* (altho' the statutes respectively do require it) shall be impeached, set aside, or vacated, for that defect only.

By

By the oath of good and lawful men] That is, by a jury ſworn.

Of all and all manner of felonies] That is, either by the common law, or by ſtatute. *Crom.* 8.

Felonies] Tho' the commiſſion doth not mention *murders* and *manſlaughters*, by expreſs name, but only felonies generally, yet by theſe general words, they have power to hear and determine murder and manſlaughter, and alſo may take an indictment of *ſe defendendo*, contrary to the opinions of *Fitzherbert* and *Stamford*. But tho' the juſtices have this power, yet they do not ordinarily proceed to hear and determine theſe offences, and rarely other offences without clergy, both becauſe of the monition and clauſe in their commiſſion, in caſes of difficulty to expect the preſence of the juſtices of aſſize; and alſo becauſe of the direction of the ſtatute of the 1 & 2 *P. & M. c.* 13. which directs juſtices of the peace, in caſe of manſlaughter and other felonies, to take the examination of the priſoner, and the information of the fact, and put the ſame in writing; and then to bail the priſoner, if there be cauſe, and to certify the ſame with the bail at the next gaol delivery; And therefore in caſes of great moment, they bind over the proſecutors, and bail the party if bailable, to the next gaol delivery. But in ſmaller matters, as petit larceny, and ſome caſes within clergy, they bind over to the ſeſſions; but this is only in point of diſcretion and convenience, not becauſe they have not juriſdiction of the crime. 2 *H. H.* 46.

So alſo, an inquiſition of *ſelf-murder*, if the body cannot be ſeen, and ſo not inquired of by the coroner, may be taken before juſtices of the peace; for it is a felony, and within the extent of their commiſſion. 1 *H. H.* 414.

So alſo, if a perſon hath committed *treaſon*, tho' the juſtices have no cognizance of it as treaſon, yet they have cognizance of it as a felony, and as a breach of the peace; and therefore a juſtice of the peace, upon information on oath, may iſſue his warrant to take the traytor, and may take his examination, and commit him to priſon. 1 *H. H.* 580.

Treſpaſſes] This is founded on the ſtatute of the 34 *Ed.* 3. *c.* 1. which enacts, that the juſtices aſſigned ſhall have power to reſtrain the offenders, rioters, and all other barrators, and to chaſtiſe them according to their treſpaſs or offence.

And upon this Mr. *Hawkins* obſerves, that the word *treſpaſs* is of a very general extent, and in a large ſenſe not only comprehends all inferior offences, which are properly and directly againſt the peace, as aſſaults and batteries, and ſuch like, but alſo all others which are ſo only by conſtruction; as all breaches of the law in general are ſaid to be. Yet it hath been of late ſettled, that juſtices of the peace have no juriſdiction over forgery or perjury at the common law; the principal reaſon of which reſolution, he ſays, as he apprehended was, that inaſmuch as the chief end of the inſtitution of the office of theſe juſtices was, for the preſervation of the peace.

againſt

againſt perſonal wrongs, and open violence; and the word *treſpaſs* in its moſt proper and natural ſenſe, is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only in the ſaid ſtatute and commiſſion, or at the moſt to extend to ſuch other offences only as have a direct and immediate tendency to cauſe ſuch breaches of the peace, as libels, and ſuch like, which on this account have been adjudged indictable before juſtices of the peace. 2 *Haw.* 40.

The word for treſpaſſes in the old latin commiſſions, is *tranſgreſſiones.*

Foreſtallings, regratings, ingroſſings] Over theſe offences the juſtices in ſeſſions have a juriſdiction given them, by the ſtatute of the 5 & 6 *Ed.* 6. *c.* 14.

Extortions] The intent of this word is, to inquire of thoſe who have done exceſſive wrongs; for wrong done by any one is properly treſpaſs, but exceſſive wrong done by any one is called extortion; and this is more properly in officers, as ſheriffs, mayors, bailiffs, eſcheators, and other officers whatſoever (as well ſpiritual as temporal) who by colour of their office have done great oppreſſion and exceſſive wrong to the king's ſubjects, in taking exceſſive reward or fees, for doing their offices. *Crom.* 8.

The juſtices have no expreſs power given them over this offence by any ſtatute; upon which Mr. *Hawkins* obſerves, that juſtices of the peace have juriſdiction of all inferior crimes within their commiſſion, whether ſuch crimes be mentioned in any ſtatute concerning them or not; for that all ſuch crimes are either directly, or at leaſt by conſequence and judgment of law, againſt the peace: And upon this ground principally, he ſays, as he apprehended, it was lately reſolved, that they may take an indictment of *extortion.* 2 *Haw.* 40.

And of all and ſingular other crimes and offences of which the juſtices of our peace may or ought lawfully to inquire] Which general words ſeem to include the vaſt number of offences over which they have a juriſdiction given them by many ſtatutes, and which are not particularly mentioned in the commiſſion.

And alſo all thoſe who in companies againſt our peace in diſturbance of our people with armed force have gone or rode] By theſe words they are to inquire of riots, routs, and all unlawful aſſemblies. *Crom.* 8.

Weights or meaſures] This clauſe was firſt eſtabliſhed by the 34 *Ed.* 3. *c.* 5. And they have further power given herein by ſeveral ſubſequent ſtatutes, all which ſtatutes muſt be ſtrictly purſued in relation to the ſeveral offences.

Selling victuals] Over this they have a juriſdiction given them, by the 2 & 3 *Ed.* 6. *c.* 15. intitled, *The bill of conſpiracies of victuallers and craftſmen.*

And to inſpect all indictments ſo before you taken] But they cannot proceed upon indictments taken before coroners, or juſtices of oyer and terminer or gaol delivery; but on indictments taken before the ſheriff in his turn they may proceed. *Hale's Pl.* 168.

Or

Or before other late our justices] This is founded on the statute 11 *H.* 6. *c.* 6. which enacts, that no indictment, plea, suit, or process shall be discontinued by a new commission; but the justices in the new commission, after they shall have the record of the same pleas and processes before them, shall have power to continue the said pleas and processes, and to hear and finally to determine the same, as the former justices might have done.

And to make and continue processes] This is by *venire, distringas, capias,* or *exigent*, as the case shall be. And it differs from a warrant, in that a warrant is only to attach and convene the party before indictment, and may be either in the name of the king or of the justice; but the process issues after indictment, and must be in the name of the king only. *Dalt. c.* 193.

Until they can be taken, surrender themselves, or be outlawed] For the process is sent out to this end, that either the party shall come in, to answer and to be justified by the law; or else that he shall for his contumacy be deprived of the benefit of the law. *Lamb.* 521.

Or be outlawed] It is observable, that the power of the justices stops here, and goes no further; so that they cannot make out a *capias utlagatum*, but the outlawry must be certified into the king's bench. *Lamb.* 521: 2 *H. H.* 52.

But by the 12 *Co.* 103. they that have power to award process of outlawry, have also a power to award a *capias utlagatum*, as incident to their authority and jurisdiction.

Hear and determine] This power was first given to them by the statute of the 18 *Ed.* 3. *st.* 2. *c.* 2. and afterwards confirmed and enlarged by divers other statutes.

Yet this clause doth not in propriety make the justices of the peace justices of oyer and terminer, because that is a distinct commission; and therefore a statute limiting an offence to be heard and determined before justices of oyer and terminer, gives not the power therein to justices of the peace. *Hale's Pl.* 165.

And thereupon it is said, that although they have power to hear and determine felonies, yet they cannot deliver a person suspected thereof by proclamation (as justices of gaol delivery may) until an inquisition taken; but if an inquisition be taken, and an *ignoramus* found, they may deliver him as it seemeth. 2 *H. H.* 46, 47.

Likewise, although commissioners of oyer and terminer may indict and try at the same sessions, yet it hath been ruled otherwise in case of justices of the peace, unless by consent; but certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony. 2 *H. H.* 48.

By fines, ransoms, amerciaments, forfeitures, and other means—to chastise and punish] Hereby the justices are now armed with far more ample authority and power, than the ancient conservators of the peace were; for they had no power to convene the offender before them, nor to examine, hear or determine the cause, nor to punish except in some few cases as mentioned before. *Dalt. c.* 6.

But

But the justices may not award any recompence to the party wronged, otherwise than by persuasion. *Dalt. c. 5.*

Nevertheless, these words are inserted, not as of necessity (for the punishment of all offenders is implied in the word *determine*), but for the plainer declaration of the justices power, and for the more assured terrifying of offenders. *Lamb. 49.*

If a case of difficulty shall happen to arise] That is, a difficulty in point of law. *Crom. 6.*

Then let judgment in no wise be given] But yet if they list to proceed without the judges advice, their judgment is not void; but it standeth good and effectual, until it be reversed by a writ of error. *Lamb. 50.*

At certain days and places] That is, when they hold their sessions; which they are impowered and required to do, by several statutes.

III. *The justice of the peace his oath of office.*

On renewing the commission of the peace (which generally happeneth as any person is newly brought into the same) there cometh a writ of *dedimus potestatem* directed out of chancery, to some ancient justice (or other) to take the oath of him which is newly inserted, which is usually in a schedule annexed; and to certify the same into that court, at such a day, as the writ commandeth. *Lamb. 53.*

The form of which oath at this day is as followeth:

Ye shall swear, that as justice of the peace in the county of W. *in all articles in the king's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of the realm, and statutes thereof made: And ye shall not be of counsel of any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments that shall happen to be made, and all forfeitures which shall fall before you, ye shall cause to be entered without any concealment (or embezilling) and truly send them to the king's exchequer. Ye shall not let, for gift or other cause, but well and truly ye shall do your office of justice of the peace in that behalf: And that you take nothing for your office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute. And ye shall not direct, nor cause to be directed, any warrant (by you to be made) to the parties, but ye shall direct them to the bailiffs of the said county, or other the king's officers or ministers, or other indifferent persons, to do execution thereof. So help you god.*

This oath seems to be founded on the statute of the 13 *R. 2. c. 7.* which enacts, that the justices shall be sworn, duly and without favour, to keep and put in execution all the statutes and ordinances touching their offices.

IV. *Of fees to be taken by justices of the peace.*

In the oath of office abovementioned are these words; *And that you take nothing for your office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute.*

V. *Some*

V. Some general directions relating to justices of the peace, not falling under any particular title of this book.

Regularly, justices of the peace ought not to execute their office, in their own case; but cause the offenders to be convened or carried before some other justice, or desire the aid of some other justice, being present. *Dalt. c.* 173.

By *Holt* Ch. J. *M.* 10 *W.* The mayor of *Hereford* was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court. 1 *Salk.* 396.

And lord chief justice *Raymond*, who had an estate in the parish of *Abbots Langley*, went off the bench, when an order relating to a pauper there came before the court. *Str.* 1173.

And yet if the justice shall deal in his own case, it seems in some cases justifiable; as when a justice shall be assaulted, or (in the doing his office especially) shall be abused to his face, and no other justice present with him; then it seems he may commit such offender until he shall find sureties for the peace or good behaviour, as the case shall require: But if any other justice be present, it were fitting to desire his aid. *Dalt. c.* 173. *Str.* 420, 421.

And as it is unjust in many cases, for the magistrate to act in his own cause, so it is also imprudent: To which purpose the advice of lord *Coke* is applicable, who upon the occasion of mentioning a certain judge, who made a settlement of his estate which was void in law, and brought an action in his own name, which all the other judges, of his own shewing in the court, were of opinion did not lie, makes this observation, that it is not safe for any man (be he never so learned) to be of counsel with himself in his own cause, but to take advice of other great and learned men; and the reason he gives is, for that men are generally more foolish in their own concerns, than in those of other people. 1 *Inst.* 377.

If a justice exceed his authority, in granting a warrant, yet the officer must execute it, and is indemnified for so doing; but if it be in a case wherein he hath no jurisdiction, or in a matter whereof he has no cognizance, the officer ought not to execute such warrant; so that the officer is bound to take notice of the authority and jurisdiction of the justice. *Cro. Car.* 394. 10 *Co.* 76.

Thus if a justice send a warrant to a constable to take up one for slander, or the like, the justice hath no jurisdiction in such cases, and the constable ought to refuse the execution of it. *Wood. b.* 1. *c.* 7.

In summary convictions, the party ought to be heard, and for that purpose ought to be summoned in fact; and if the justice proceed against a person without summoning him, it would be a misdemeanor in him, for which an information would lie. 1 *Salk.* 181. L. *Raym.* 1407. *Str.* 678.

Where a special authority is given to justices out of sessions, it ought to appear in their orders, that that authority was exactly pursued. 2 *Salk.* 475.

In

In all cases where justices may hear and determine out of sessions (*viz.* on their own view, or confession, or oath of witnesses) the justices ought to make a record in writing under their hands of all the matters and proofs; which record notwithstanding in many cases they may keep by them. *Dalt. c.* 115.

And if upon such conviction, the offender is to be fined to the king, then the justices are to estreat such fine, and to send the estreat into the exchequer, whereby the barons of the exchequer may cause the said fine or forfeiture to be levied for the king's use. *Dalt. c.* 115.

Lord *Hale* says (contrary to the opinion of lord *Coke*) that the justices out of sessions may issue their warrants for apprehending persons charged of crimes within the cognizance of the sessions, and bind them over to appear at the sessions, although the offender be not yet indicted. 1 *H. H.* 579.

But in another place he says, this seemeth doubtful; and that one thing which seems to make against it is, that in most cases of this nature, though the party were indicted, or an information preferred, yet a *capias* was not the first process, but a *venire facias*, and *distringas*. 2 *H. H.* 113.

And Mr. *Hawkins* on this point saith thus: It seems that anciently no one justice could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognizable only by a sessions of two or more justices; for that one single justice hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it: Yet the long, constant, universal and uncontroulled practice of justices of the 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. 2 *Haw.* 84.

Forasmuch as most of the business of a justice of the peace, consisteth in the execution of divers statutes, which cannot be sufficiently abridged but that they will come short of the body and substance thereof; therefore it shall be safest for the justices to have an eye to the statutes at large, and thereby to take their further and better directions, for their whole proceedings: for (as lord *Coke* observeth) abridgments are of good and necessary use to serve as tables, but not to ground any opinion, much less to proceed judicially upon them. *Dalt. c.* 173.

VI. Their indemnity and protection by the law in the right execution of their office; and their punishment for the omission of it.

A justice of the peace is strongly protected by the law, in the just execution of his office.

Thus in the first place, he is not to be slandered or abused; as appears by the following report: *M.* 11 *G. Alston* and *Blagrave*.

The

The plaintiff declared that he was a juſtice of the peace, and that upon a *colloquium* of him and the execution of his office, the defendant ſaid, *You are a raſcal, a villain, and a lyar.* After verdict for the plaintiff it was moved in arreſt of judgment, that theſe words are not *actionable.* It was urged for the plaintiff; there is a great difference between magiſtrates and common tradeſmen: words of the latter muſt affect them in their particular way of dealing; but any thing that tends to impeach the credit of the former, is actionable: And although an *indictment* might not lie for theſe words, as perhaps not tending to a breach of the peace, yet nevertheleſs they are *actionable*; for in many caſes words are actionable, which are not indictable. After conſideration, *Pratt*, Ch. J. delivered the opinion of the court, That though *raſcal* and *villain* were uncertain, yet being joined with *lyar*, and ſpoken of a juſtice of the peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff. *Str.* 617. *L. Raym.* 1369.

Afterwards, *T.* 15. *G.* 2. *Kent* and *Pocock.* Theſe words ſpoken of a juſtice of the peace in the execution of his office, and relating thereto, were held actionable, *viz. Mr.* Kent *is a rogue*; according to the aforeſaid caſe of *Aſton* and *Blagrave.* *Str.* 1168.

T. 14 *G.* 2. *K.* and *Pocock.* An *information* was moved for againſt the defendant, on account of words ſpoken of Mr. *Kent* a juſtice of the peace. And the affidavit ſtated, that in a converſation about a warrant granted by Mr. *Kent*, the defendant aſked, if Mr. *Kent* was a ſworn juſtice; and being anſwered, to be ſure he was, elſe he would not act, the defendant replied, *If he is a ſworn juſtice, he is a rogue and a forſworn rogue.* To this it was objected, that the words were not ſpoken *to* him in the execution of his office, but only in relation to what he had formerly done: And by the court, There ought to be no information; it is not the ſame inſult and contempt, as if ſpoken to him in the execution of his office, which would make it a matter indictable. *Str.* 1157.

Nevertheleſs, according to the diſtinction in the aforeſaid caſe of *Aſton* and *Blagrave*, although an *information* or *indictment* might not lie, yet it doth not follow but that the words were *actionable*; and ſo it ſeemeth to have been held in the caſe laſt but one abovementioned, of *Kent* and *Pocock*, which ſeemeth to have been none other than an *action* brought for this very ſame offence, after it had been determined that an *information* would not lie.

In the next place: he is not puniſhable at the ſuit of the party, but only at the ſuit of the king, for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other; for regularly no man is liable to an action for what he doth as judge: but in caſes wherein he proceeds miniſterially, rather than judicially, if he acts corruptly, he is liable to an action at the ſuit of the party, as well as to an information at the ſuit of the king. 2 *Hawk.* 85.

In

In the next place, by the 7 *J. c.* 5. it is enacted, that if any action ſhall be brought againſt a juſtice for any thing done by virtue of his office, he may plead the general iſſue, and give the ſpecial matter in evidence; and if he recovers, he ſhall have double coſts.

And by the 21 *J. c.* 12. ſuch action ſhall not be laid, but in the county where the fact was committed.

Moreover, if a juſtice will not, on complaint to him made, execute his office, the party grieved may complain to the judges of aſſize, or to the lord chancellor; and upon examination, if it appeareth that the complaint is true, the chancellor may put him out of commiſſion, and he ſhall be puniſhed moreover according to his deſert. *Crom.* 7.

But the moſt uſual way of compelling them to execute their office in any caſe, is by a writ of *mandamus* out of the king's bench.

And in actions brought againſt juſtices, they are obliged to ſhew the regularity of their convictions; and the informations laid before them, upon which the convictions are grounded, muſt be produced and proved in court. *Seſſ. Caſ. V. I. p.* 372. *Hill* and *Bateman.* 12 *G.*

LARCENY.

LARCENY comes from *latrocinium*, *latrocini*; and by contraction or rather abuſe, *larceny*. 3 Inſt. 107.

I. Of grand larceny in general.
II. Of petit larceny.
III Larceny from the perſon.
IV. Larceny from the houſe.
V. Larceny in a booth or tent.
VI. Receiving ſtolen goods.
VII. Offering goods ſuſpected to be ſtolen, to be pawned or ſold.

I. Of grand larceny in general.

Grand larceny is *a felonious and fraudulent taking, and carrying away, by any perſon, of the mere perſonal goods of another, above the value of* 12 d. 1 Haw. 89.

Felonious and fraudulent] Felony is always accompanied with an evil intention, and therefore ſhall not be imputed to a mere miſtake or miſanimadverſion; as where perſons break open a door, in order to execute a warrant, which will not juſtify ſuch a proceeding; for in ſuch caſe there is no felonious intention. 1 *Haw.* 65.

For

For it is the mind that makes the taking of another's goods to be felony, or a bare treſpaſs only; but becauſe the variety of circumſtances, is ſo great, and the complications thereof ſo mingled, that it is impoſſible to preſcribe all the circumſtances evidencing a felonious intent, or the contrary; the ſame muſt be left to the due and attentive conſideration of the judge and jury; wherein the beſt rule is, in doubtful matters rather to incline to acquittal than conviction. Only in general it may be obſerved, that the ordinary diſcovery of a felonious intent is, if the party doth it ſecretly, or being charged with the goods denies it. 1 *H. H.* 509.

Taking] All felony includes treſpaſs; and every indictment muſt have the words *feloniouſly took*, as well as *carried away*: from whence it follows, that if the party be guilty of no treſpaſs in taking the goods, he cannot be guilty of felony in carrying them away. 1 *Haw.* 89.

And from this ground it hath been holden, that one who finds the goods which I have loſt, and converts them to his own uſe, with intent to ſteal them, is no felon; and *a fortiori* therefore it muſt follow, that one who has the actual poſſeſſion of my goods by my delivery, for a ſpecial purpoſe, as a carrier who receives them, in order to carry them to a certain place; or a taylor who has them in order to make me a ſuit of cloaths; or a friend who is intruſted with them to keep for my uſe, cannot be ſaid to ſteal them, by imbezzilling them afterwards. 1 *Haw.* 89.

But yet it hath been reſolved, that if a carrier open a pack, and take out part of the goods; or a weaver who has received ſilk to work, or a miller who has corn to grind, take out part thereof, with intent to ſteal it, it is felony. 1 *Haw.* 90.

So where a man's goods are in ſuch a place, where ordinarily they are, or may be lawfully placed, and a perſon takes them, with intent to ſteal them, it is felony; and the preſence of finding muſt not excuſe. 1 *H. H.* 506.

So if a man's horſe be going upon a common where he has a right to put him, and another take the horſe with intent to ſteal him, it is no finding, but a felony. 1 *H. H.* 506.

So alſo, if the horſe ſtray into a neighbour's ground or common, it is felony in him that ſo takes him. But if the owner of the ground takes him doing damage, or the lord ſeize him as a ſtray, though perchance he hath no title ſo to do, yet here is not a felonious intention, and therefore cannot be felony. 1 *H. H.* 509.

If one man's ſheep ſtray into another man's flock, and that other perſon drives it along with his flock, or by bare miſtake ſhears it, this taking is not felony; but if he knew it to be another's, and marks it with his mark, this is an evidence of felony. 1 *H. H.* 507.

Lord *Hale* ſays, If one man take another man's hay or corn, and mingles it with his own heap or ſtock; or take another man's cloth, and embroider it with ſilk or gold; ſuch other perſon may retake

the whole heap of corn, or cock of hay, or garment and embroidery alſo; and this retaking is no felony, nor ſo much as a treſpaſs. 1 *H. H.* 513.

It ſeems generally agreed, that one who has the bare charge, or the ſpecial uſe of goods, but not the poſſeſſion of them; as a ſhepherd who looks after my ſheep, or a butler who takes care of my plate, or a ſervant who keeps a key of my chamber, or a gueſt who has a piece of plate ſet before him in an inn, may be guilty of felony in fraudulently taking away the ſame. 1 *Haw.* 90.

By the 21 *H.* 8. *c.* 7. Servants imbezilling their maſter's goods, to the value of 40*s.* or above (although his taking be no treſpaſs) ſhall be puniſhed as felons. But this ſhall not extend to any apprentice, nor to any perſon within 18 years of age.—And by the 12 *Ann. c.* 7. If it is taken out of an houſe, or outhouſe, it is felony without benefit of clergy.

Alſo by the 3 *W. c.* 9. If any perſon ſhall take away, with intent to ſteal, or imbezil, any furniture out of his lodging, he ſhall be guilty of felony.

And carrying away] To make it come within this deſcription, it ſeemeth that any the leaſt removing of the thing taken, from the place it was before, is ſufficient for this purpoſe, though it be not quite carried off: And upon this ground, the gueſt, who having taken off the ſheets from his bed, with an intent to ſteal them, carried them into the hall, and was apprehended before he could get out of the houſe, was adjudged guilty of larceny: So alſo was he, who having taken a horſe in a cloſe, with an intent to ſteal him, was apprehended before he could get him out of the cloſe. 1 *Haw.* 93.

By any perſon] A wife may be guilty thereof, by ſtealing the goods of a ſtranger; but not by ſtealing the goods of her huſband. 1 *Haw.* 93.

It is ſaid by Mr. *Dalton* and others, that it is no felony for one reduced to extreme neceſſity, to take ſo much of another's victuals, as will ſave him from ſtarving; but lord *Hale* ſays, that this rule by the law of *England* is falſe; and therefore that if a perſon, being under the neceſſity for want of victuals or cloaths, ſteals another man's goods, it is felony. 1 *H. H.* 54.

If one ſtealeth another man's goods, and afterwards another ſtealeth the ſame from him; the owner may charge the firſt or ſecond felon at his choice. *Dalt. c.* 162.

Of the mere perſonal goods] *Mere*; for if the perſonal goods ſavour any thing of the realty, it cannot be larceny. And therefore they ought to be no way annexed to the freehold; therefore it is no larceny, but a bare treſpaſs, to ſteal corn or graſs growing, or apples on a tree; but it is larceny to take them being ſevered from the freehold, as wood cut, graſs in cocks, ſtones digged out of the quarry; and this, whether they are ſevered by the owner, or even by the thief himſelf, if he ſever them at one time, and then come

come again at another time and take them. 1 *Haw.* 93. 1 *H. H.* 510.

But by the 4 *G.* 2. *c.* 32. Every perſon who ſhall ſteal, rip, cut, or break, with intent to ſteal, any lead, iron bar, iron gate, iron paliſadoe, or iron rail, fixed to any building, or in any garden, orchard, court-yard, fence or out-let belonging to any building; he, his aiders and abettors, and alſo all who ſhall knowingly buy or receive the ſame, ſhall be guilty of felony, and be tranſported for ſeven years.

Alſo the goods ought to have ſome worth in themſelves, and not to derive their whole value from the relation they bear to ſome other thing, which cannot be ſtolen; as paper or parchment, on which are written aſſurances concerning lands, or obligations, or covenants, or other ſecurities for a debt, or other *choſe* in action. 1 *Haw.* 93.

But by the 8 *H.* 6. *c.* 12. If any perſon ſhall ſteal any record or proceſs belonging to any of the courts at *Weſtminſter*, by reaſon whereof any judgment ſhall be reverſed, he ſhall be guilty of felony.

Of another] It ſeems agreed, that the taking of goods, whereof no one had a property at the time, cannot be felony; and therefore that he who takes any treaſure trove, or a wreck, waif, or ſtray, before they have been ſeized by the perſons who have a right thereto, is not guilty of felony, but ſhall be puniſhed by fine. 1 *Haw.* 94.

But yet the taking of theſe muſt be, where the party that takes them, really believes them to be ſuch, and colours not a fellonious taking under ſuch a pretence; for then every felon would cover his felony under that pretence. 1 *H. H.* 506.

Neither ſhall he who takes fiſh in a river or other great water, wherein they are at their natural liberty, be guilty of felony; as he may be, who takes them out of a trunk or pond. 1 *Haw.* 94.

Upon the like ground it ſeems clear, that a man cannot commit felony, by taking hares or conies in a warren, or old pigeons being out of the houſe; but it is agreed, that one may commit larceny, in taking ſuch or any other creatures, *feræ naturæ*, if they be fit for food, and reduced to tameneſs, and known by him to be ſo. 1 *Haw.* 94.

Alſo it is ſaid, that there may be felony in taking goods, the owner whereof is unknown; in which caſe, the king ſhall have the goods, and the offender ſhall be indicted for taking the goods of a perſon unknown; and it ſeems that in ſome caſes the law will rather feign a property, where in ſtrictneſs there is none, than ſuffer an offender to eſcape. 1 *Haw.* 94.

Above the value of 12*d*] The learned editor of *Hale*'s hiſtory of the pleas of the crown obſerves, that in former times, though the puniſhment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ranſom; but in the 9 *H.* 1. it was enacted, that whoever was convicted of theft ſhould be hanged, and

and the liberty of redemption was entirely taken away; which law continues to this day. But considering the alteration in the value of money, the severity of which is much greater now than it was then; for 12*d.* would then purchase as much as 40*s.* will now: and yet a theft above the value of 12*d.* is still liable to the same punishment. Upon which Sir *H. Spelman* justly observes, that while all things else have risen in their value, and grown dearer, the life of man is become much cheaper; and from thence takes occasion to wish, that the ancient tenderness of life was again restored. 1 *H. H.* 12.

And lord *Coke*, observing, that when the statute of the 3 *Ed.* 1. was made, which makes stealing of goods above the value of 12*d.* to be grand larceny, the ounce of silver was at the value of 20*d.* and now it is at the value of 5*s.* and above, draws this conclusion, that the thing stolen ought to be reasonably valued, that is, having respect to the great alteration in the value of money. 2 *Inst.* 189, 199. For 20*s.* were then a real *pound* weight; which name we still retain, although the weight is much diminished.

If two persons or more, together, steal goods above the value of 12*d.* every one of them is guilty of grand larceny; for each person is as much an offender as if he had been alone. 1 *Haw.* 95.

Also it seems the current opinion of all the old books, that if one at several times steal several parcels of goods, each under the value of 12*d.* but amounting in the whole to more, from the same person, and be found guilty thereof on the same indictment, he shall have judgment of death for grand larceny; but this severity is seldom practised. 1 *Haw.* 25.

II. *Of petit larceny.*

Petit larceny agrees with grand larceny in the several particulars abovementioned, except only the value of the goods (and except as hereafter followeth); so that wherever an offence would amount to grand larceny, if the thing stolen were above the value of 12*d.* it is petit larceny, if it be but of that value or under. 1 *Haw.* 95.

And if one be indicted for stealing goods to the value of 10*s.* and the jury find specially, as they may, that he is guilty, but that the goods are worth but 10*d.* he shall not have judgment of death, but only as for petit larceny. 1 *Haw.* 95.

In petit larceny there can be no accessaries, neither before nor after. 1 *H. H.* 530.

By the 3 *Ed.* 1. *c.* 15. Persons indicted of petit larceny, if they were not guilty of some other larceny aforetime, are bailable by justices of the peace. And it seems to be agreed, that there is no necessity, that such persons be of good reputation: but yet if the crime be open and manifest, it seems that they ought not to be bailed; but if there be any colour of probability for their innocence, it seems most agreeable to the intention of the statute, to bail them. 2 *Haw.* 101.

For

For a juſtice of the peace, before whom an offender ſhall be brought for petit larceny out of ſeſſions, may not puniſh the ſaid offender by his diſcretion, and ſo let him go; but muſt have him committed or bailed, to the intent he may come to his trial, as in caſes of other felonies: and if upon his trial, the jury ſhall find the goods ſtolen to exceed 12*d* in value, the offender ſhall have judgment to die for the fault. *Dalt. c.* 154.

It ſeemeth that all petit larceny is felony, and conſequently requires the word *feloniouſly* in an indictment for it; yet it is certain that it is not puniſhable with the loſs of life, or lands, but only with the forfeiture of goods, and whipping, tranſportation, or other corporal puniſhment. 1 *Haw.* 95.

If a man appear to be obſtinately mute, on an arraignment of petit larceny, he ſhall not have judgment of *pain fort et dure*, as in caſes of grand larceny; but he ſhall have the like judgment as if he had confeſſed the indictment. 2 *Haw.* 329.

III. Larceny from the perſon.

If the goods are taken from a man's perſon, the offence receives a farther degree of guilt; and if it is attended with putting him in fear, it is called *robbery:* for which ſee that title.

If it is without putting him in fear, then it is called barely *larceny from the perſon.* 1 Haw. 95.

If it be done privily without his knowledge, by picking of pockets, or otherwiſe, it is excluded from the benefit of clergy by the 8 *El. c.* 4. (That is, if the thing ſtolen be above the value of 12*d.* 2 *H. H.* 366.) But this ſtatute extendeth not to acceſſaries, either before or after. 2 *Haw.* 350.

If it be done openly and avowedly before his face, it is within the benefit of clergy, (1 *Haw.* 97.) except where it is committed in a dwelling houſe, or outhouſe thereunto belonging, to the value of 40*s.* from which the benefit of clergy is taken away by the 12 *Ann. ſt.* 1. *c.* 7. hereafter following.

IV. Larceny from the houſe.

This muſt be underſtood where the offence falls ſhort of *burglary.*

By the 3 *W. c.* 9. Every perſon that ſhall feloniouſly take away any goods, being in any dwelling houſe, any perſon being therein, and put in fear; or ſhall rob any dwelling houſe in the day time, any perſon being therein; he, his comforters and abettors, ſhall be guilty of felony without benefit of clergy.

And by the 39 *El. c.* 15. Every perſon who ſhall be convicted of the feloniouſly taking away in the day time any money or goods of the value of 5*s.* in any dwelling houſe, or outhouſe thereunto belonging, and uſed to and with the ſame, altho' no perſon be therein, ſhall be guilty of felony without benefit of clergy.

This requires an actual breaking, and not entring by the doors being open. 1 *H. H.* 548.

And

And by the 1 *Ed.* 6. *c.* 12. *ſ.* 10. Every perſon who ſhall be convicted of breaking any houſe in the day time, any perſon being therein, and put in fear, ſhall be guilty of felony without benefit of clergy.

And this altho' nothing be actually taken: But it requires not only an actual breaking, and putting in fear, but alſo an entry *with intent to commit* felony, and ſo to be laid in the indictment. 1 *H. H.* 548.

V. Larceny in a booth or tent.

Perſons found guilty of robbing any perſon in any booth or tent, in any fair or market, the owner, his wife, children, or ſervants being within, whether they be ſleeping or waking, ſhall ſuffer as felons without benefit of clergy. 5 & 6. *Ed.* 6. *c.* 9. *ſ.* 5.

VI. Receiving ſtolen goods.

By the 3 *W.* *c.* 2. If any perſon ſhall buy or receive any ſtolen goods, knowing the ſame to be ſtolen; he ſhall be deemed an acceſſary after the fact, and ſuffer accordingly. *ſ.* 4

And by the 5 *An.* *c.* 31. If any perſon ſhall buy or receive any ſtolen goods, knowing them to be ſtolen, or ſhall receive, harbour, or conceal any felons or thieves, knowing them to be ſo; he ſhall be deemed acceſſary to the felony, and, being convicted on the teſtimony of one witneſs, ſhall ſuffer death as a felon convict. *ſ.* 5.

Warrant for larceny.

New-York, Queens County. } To any conſtable of ſaid county.

FORASMUCH *as* A. I. *of* ——— *in this county of* ——— *yeoman, hath this day made information and complaint upon oath, before me* ——— *one of his majeſty's juſtices of the peace for the ſaid county, that this preſent day divers goods of him the ſaid* A. I. *to wit,* ——— *have feloniouſly been ſtolen, taken, and carried away from the houſe of him the ſaid* A. I. *at* ——— *aforeſaid in the county aforeſaid, and that he hath juſt cauſe to ſuſpect, and doth ſuſpect that* A. O. *late of* ——— *yeoman, feloniouſly did ſteal, take, and carry away the ſame: Theſe are therefore to command you forthwith to apprehend him the ſaid* A. O. *and to bring him before me to anſwer unto the ſaid information and complaint, and to be further dealt withal according to law: Herein fail you not. Given under my hand and ſeal the* ——— *day of* ——— *in the year* ———.

Note; The form of a warrant to ſearch for ſtolen goods is inſerted under the title *Search Warrant.*

LEWD.

LEWDNESS.

ALTHO' lewdneſs be properly puniſhable by the eccleſiaſtical law, the offence of keeping a bawdy houſe cometh under the cognizance of the law temporal, as a common nuſance, not only in reſpect of its endangering the publick peace, by drawing together diſſolute and debauched perſons, but alſo in reſpect of its apparent tendency to corrupt the manners of both ſexes. 3 *Inſt.* 205. 1 *Haw.* 196.

And in general, all open lewdneſs groſsly ſcandalous is puniſhable upon indictment at the common law. 1 *Haw.* 7.

And offenders of this kind are puniſhable not only with fine and impriſonment, but alſo with ſuch infamous puniſhment as to the court in diſcretion ſhall ſeem proper. 1 *Haw.* 196.

And upon information given to a conſtable, that a man and woman are in adultery or fornication together, or that a man and woman of evil report are gone to a ſuſpected houſe together in the night, the officer may take company with him, and if he find them ſo, he may carry them before a juſtice, to find ſureties of the good behaviour. *Dalt. c.* 124. 2 *Haw.* 61.

For it ſeems always to have been the better opinion, that a man may be bound to his good behaviour, for haunting bawdy houſes with women of bad fame, as alſo for keeping bad women in his own houſe. 1 *Haw.* 132.

And a wife may be indicted together with her huſband, and condemned to the pillory with him, for keeping a bawdy-houſe; for this is an offence as to the government of the houſe; in which the wife has a principal ſhare; and alſo ſuch an offence as may generally be preſumed to be managed by the intrigues of her ſex. 1 *Haw.* 2.

And if a wife go away, and remain with an adulterer, without being reconciled to her huſband, ſhe ſhall loſe her dower. 2 *Inſt.* 435.

But if a perſon is indicted for frequenting a bawdy houſe, it muſt appear that he knew it to be ſuch a houſe; and muſt be expreſly alledged that it is a bawdy houſe, and not that it is ſuſpected to be ſuch a houſe. *Wood. b.* 3. *c.* 3.

On an indictment for keeping a diſorderly houſe, a female witneſs ſwore, that ſhe was a ſailor's wife, and during her huſband's abſence out of the realm, ſhe had often proſtituted her ſelf there: Lord *Raymond* ſaid, it was an odious piece of evidence, and ought not to be heard. *Barl. Bawdy-h.*

But it is ſaid, a woman cannot be indicted for being a bawd generally, for that the bare ſolicitation of chaſtity is not indictable. 1 *Haw.* 196. 1 *Salk.* 382.

Adultery and fornication were anciently inquirable in the torn and leet. 2 *Inſt.* 206, And this power doth not ſeem to have been taken away by any ſtatute.

Indictment

Indictment for keeping a disorderly house.

New-York, Queen's County. THE *jurors for our lord the king upon their oath present, that* A. O. *late of* ——— *in the said county, labourer, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *and at divers other times as well before as after, with force and arms, at* ——— ——— *aforesaid, in the county aforesaid, did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly house, and in his said house, for his own lucre and gain, certain evil and ill-disposed persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together then, and the said divers other times, there unlawfully and wilfully did cause and procure; and the said men and women, in his said house, at unlawful times, as well in the night as in the day, then and the said other times, there to be and remain, drinking, tipling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nusance of all the subjects of our said lord the king, and against the peace of our said lord the king, his crown and dignity.*

LIBEL.

I. What it is.
II. Who are punishable for it.
III. How punishable.

I. What it is.

A Libel *is a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead.* Wood. b. 3. c. 3.

A malicious defamation] And the scandal which is expressed in a scoffing and ironical manner, is as properly a malicious defamation, as that which is expressed in direct terms; as where a person proposes one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar; and the like: which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so. 1 *Hawk.* 194.

And from the same foundation it hath also been resolved, that a defamatory writing, expressing only one or two letters of a name, in such a manner, that from what goes before and follows after, it must needs be understood to signifiy such a particular person, in the plain,

plain, obvious, and natural conſtruction of the whole, and would be perfect nonſenſe if reſtrained to any other meaning, is as properly a libel, as if it had expreſſed the whole name at large; for it brings the utmoſt contempt upon the law, to ſuffer its juſtice to be eluded by ſuch trifling evaſions: And it is a ridiculous abſurdity to ſay, that a writing which is underſtood by every the meaneſt capacity, cannot poſſibly be underſtood by a judge and jury. 1 *Haw.* 194.

And it matters not whether the libel be true, or whether the party againſt whom it is made be of good or bad fame; for in a ſettled ſtate of government, the party grieved ought to complain, for any injury done to him, in the ordinary courſe of law, and not by any means to revenge himſelf, either by the odious courſe of libelling, or otherwiſe. 5 *Co.* 125. But this is to be underſtood, when the proſecution is by information or indictment; but in an action on the caſe, one may juſtify that it is true. *Wood. b. c. c.* 3.

Of any perſon] Where a writing inveighs againſt mankind in general, or againſt a particular order of men, as for inſtance, men of the gown, this is no libel; but it muſt deſcend to particulars and individuals to make it a libel. 3 *Salk.* 224.

And it hath been agreed in the court of king's bench, that a writing full of obſcene ribaldry, without any kind of reflection upon any one, is not puniſhable at all by any proſecution at common law: yet it ſeems that the author may be bound to his good behaviour, as a ſcandalous perſon of evil fame. 1 *Haw.* 195.

But if the libel is only againſt a private perſon, yet it deſerveth ſevere puniſhment; for albeit the libel be againſt one, yet it inciteth all thoſe of the ſame family, kindred, or ſociety, to revenge, and ſo tendeth by conſequence to quarrels, and breach of the peace, and may be the cauſe of effuſion of blood, and of great inconvenience: But if it be againſt a magiſtrate, or other publick perſon, it is a greater offence: for it concerneth not only the breach of the peace, but the ſcandal of the government. 5 *Co.* 125.

Expreſſed either in printing or writing, ſigns or pictures] A libel is either in writing, or without writing: In writing, when an epigram, rhyme, or other writing is publiſhed to the contumely of another, by which his fame or dignity may be prejudiced: Without writing, may be by pictures, as to paint the party in any ſhameful and ignominious manner; or by ſigns, as to fix a gallows, or other reproachful and ignominious ſigns at a man's door. 5 *Co.* 125.

E. 7 *G.* Mayor of *Northampton*'s caſe. He ſent lord *Halifax* a licence to keep a publick houſe, which the court ſaid was a libel in the caſe of a perſon of his quality, and granted an information for it. *Str.* 422.

Or the memory of one that is dead] For the offence is the ſame, whether the perſon libelled be alive or dead. 5 *Co.* 125.

II. *Who*

II. Who are punishable for it.

It is certain, that not only he who composes a libel, or procures another to compose it, but also he who publishes, or procures another to publish it, are in danger of being punished for it; and it is said not to be material, whether he who dispersés a libel knew any thing of the contents or effect of it or not; for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them. 1 *Haw.* 195.

Also it hath been said, that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it, in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. 1 *Haw.* 195.

Also it hath been holden that the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove, that he delivered it to a magistrate to examine it. 1 *Haw.* 195.

And it hath been ruled, that the finding a libel on a bookseller's shelf, is a publication of it by the bookseller; and that it is no excuse to say, that the servant took it into the shop without the masters knowledge; for the law presumes the master to be acquainted with what the servant does. *Sess. C. V.* 1 *p.* 33. *K.* and *Dodd,* 10 *G.*

And it seems to be the better opinion, that he who first writes a libel dictated by another, is thereby guilty of making it, and consequently punishable for the bare writing; for it was no libel, till it was reduced to writing: For the essence of a libel consisteth in the writing of it; for if a man speaks such words, unless the words be put in writing, it is not a libel. 2 *Salk.* 410. 1 *Haw.* 195.

Also it hath been resolved, that the sending of a letter full of provoking language to another, without publishing it, is highly punishable, as manifestly tending to a disturbance of the peace. 1 *Haw.* 195.

But it hath been resolved, that he who barely reads a libel in the presence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his custody, shall not in respect of any such act be adjudged the publisher of it. But the having in one's custody a written copy of a libel publickly known, is an evidence of the publication of it. 1 *Haw.* 196.

The way for a man to keep himself out of danger in such cases is, if he finds a libel, and it be composed against a private person, he either may burn it, or forthwith deliver it to a magistrate; but if it concern a magistrate, or other publick person, he ought immediately to deliver it to a magistrate, to the intent that by examination and enquiry, the author may be found and punished. 5 *Co.* 125.

III. How.

III. How punishable.

There seemeth to be no doubt, but that the offenders may be condemned to pay such fine, and also to suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heniousness of the crime, and the circumstances of the offender. 1 *Haw.* 196.

And it hath been adjudged, that libels, as having a direct and immediate tendency to a breach of the peace, are indictable before justices of the peace. 2 *Haw.* 40.

On an indictment setting forth the offence, *according to the tenor and to the effect following*, it was agreed by the court, that *to the effect following* had been naught, being vague and useless words; for the court must judge of the words themselves: but the words, *according to the tenor*, do correct the defect; for they import the very words themselves, for the *tenor* of a thing is the transcript and true copy of it, to which it may be compared: and therefore of words spoken there can be no tenor, because there is no written original. 2 *Salk.* 417. 3 *Salk.* 225.

And it must be proved to be written or published, in the county laid in the indictment; all matters of crime being local. *Read.* Lib. *State. T. V.* 3. 774, 775. *V.* 4. 672.

Indictment for a libel.

THE *jurors for our lord the king upon their oath present, that* A. O. *late of* ——— *in the county of* ——— *gentleman, not having god before his eyes, but moved by the instigation of the devil, and falsly and maliciously contriving and intending to bring our said lord the king into hatred and infamy amongst his subjects, and to move sedition amongst the subjects of our said lord the king, did on the* ——— ——— *day of* ——— *in the* ——— *year of the reign of* ——— *with force and arms, at* ——— *aforesaid in the county aforesaid, falsly, seditiously, and maliciously write and publish, and cause to be written and published, a certain false seditious, and scandalous, libel, intitled* ——— ——— *In which said libel are contained, among other things, divers false, seditious, scandalous, and malicious matters, according to the tenor following, to wit,* ——— *And in another part of the same libel are contained divers other false, seditious, scandalous, and malicious matters, according to the tenor following* ——— *to the evil example of all others in the like cases offending, and against the peace of our said lord the king, his crown and dignity.*

LORD's DAY.

ALL persons, not having reasonable excuse, shall resort to their parish church or chapel (or to some congregation of religious worship allowed by the toleration act) on every *sunday*; on pain of punishment

punishment by the censures of the church, or of forfeiting 1 *s.* to the poor for every offence. 1 *El. c.* 2. *f.* 14, 24. To be levied by the churchwardens by distress, by warrant of one justice. 3 *J. c.* 4. *f.* 27, 28.

By the 3 *C. c.* 1. No *carrier* with any horse, nor waggonman with any waggon, nor wainman with any wain, nor *drover* with any cattle, shall by themselves, or any other, travel on the lord's day, on pain of 20 *s.* or if any *butcher*, by himself, or any other for him, with his privity and consent, shall kill or sell any victual, on the lord's day, he shall forfeit 6 *s.* 8 *d.* The conviction to be in six months, before one justice, or mayor, on view or confession, or oath of two witnesses; to be levied by the constable or churchwardens, by distress; or to be recovered in any court of record, in any city or town corporate, before the justices in the sessions; to be applied to the use of the poor, except that the justice may reward the informer or prosecutor with part of the forfeiture, not exceeding one third part.

A justice issued a warrant to the constable, to make a person to find sureties for his *good behaviour:* the constable executed the warrant on a *Sunday*, and he was justified by the court; who resolved, that a warrant for the good behaviour is a warrant for the *peace*, and more; and that this statute is to be favourably interpreted for the peace. *Raym.* 250.

Warrant on the 3 *C. c.* 1. to levy 20 *s.* on a carrier for travelling on the lord's day.

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

FOR ASMUCH *as* A. O. *of*——*in this county of*—— *carrier, is duly convicted before me* J. P. *esquire, one of his majesty's justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, for that he the said* A. O. *on the*—— *day of*——*in the*——*year of the reign of*——*being the lord's day, commonly called* Sunday, *with his horses into and through your said township of*——*did travel, contrary to the statutes in that case made and provided, whereby he hath forfeited the sum of* 20 *s. of lawful money of* England; *these are therefore to command you forthwith to levy the said sum of* 20 *s. by distraining the goods and chattels of him the said* A. O. *And if within the space of* [*five*] *days next after such distress by you taken, the said sum shall not be paid, together with the reasonable charges of taking and keeping the same, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay the sum of* 6 *s.* 8 *d. part of the said sum of* 20 *s. to* A. I. *of*——*yeoman, who informed me of the said offence, and that you see the remaining sum of*

13 *s.*

13 s. 4d. *employed to the use of the poor of your said township of--------returning to him the said* A. O. *the overplus upon demand, the reasonable charges of taking, keeping, and selling the said distress, being first deducted. And you are to certify to me, with the return of this precept, what you shall have done in the execution thereof. Herein fail you not. Given under my hand and seal at--------in the said county, the--------day of*

LUNATICKS.

NON *compos mentis* is of four kinds:

First, Ideots; who are of *non sane* memory from their nativity, by a perpetual infirmity,

Secondly, Those that lose their memory and understanding by the visitation of God, as by sickness, or other accident.

Thirdly, Lunaticks; who have sometimes their understanding, and sometimes not.

Fourthly, Drunkards; who by their own vicious act for a time deprive themselves of their memory and understanding. 1 *Inst.* 247.

He who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. 1 *Haw.* 2.

But ideots and lunaticks, who are under a natural disability of distinguishing between good and evil, are not punishable by any criminal prosecution. 1 *Haw.* 2.

Yet drunkards shall have no privilege by their want of sound mind; but shall have the same judgment as if they were in their right senses. 1 *Inst.* 247. 1 *Haw.* 2. 1 *H. H.* 32.

But if a person, who wants discretion, commit a trespass, against a person or possession of another; he shall be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2.

If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. *Hale's Pl.* 10. 1 *Haw.* 2.

By the common law, if it be doubtful whether a criminal, who at his trial in appearance is a lunatick, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff; and if it be found by them, that the party only feigns himself mad, and still refuse to answer, he shall be dealt with as one that stands mute. 1 *Haw.* 2.

An ideot cannot bring an appeal. 1 *Haw.* 162.

Neither can he be an approver; because he can neither take the oath in that case required, nor wage battle. 3 *Inst.* 129.

Any person may justify confining and beating his friend being mad, in such manner as is proper in such circumstances. 1 *Haw.* 130.

MAIM.

MAIM is such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary. 1 *Haw.* 111.

For the members of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country, when occasion shall be offered: and therefore a person who maims himself, that he may have the more colour to beg, may be indicted and fined. 1 *Inst.* 127.

And by the like reason a person who disables himself, that he may not be impressed for a soldier.

The cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye, or foretooth, or castrating him, are said to be maims, but the cuting off his ear, or nose, were not esteemed maims at the common law, because they do not weaken but only disfigure him. 1 *Haw.* 111, 112.

It is said, that anciently castration was punished with death; and other maims with the loss of member for member: but afterwards no maim was punished in any case with the loss of life or member, but only with fine and imprisonment. 1 *Haw.* 112.

But now by the 22 & 23 *C.* 2. *c.* 1. (which is called the *Coventry* act, because it was made on occasion of Sir *John Coventry*'s being assaulted in the street and his nose slit) If any person, on purpose, and of malice forethought, and by lying in wait, shall unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject, with intention in so doing to maim or disfigure him; the the person so offending, his counsellors, aiders, and abettors (knowing of and privy to the offence) shall be guilty of felony without benefit of clergy; but not to work corruption of blood.

If a man attack another with intent to murder him, and he does not murder, but only maim him; the offence is nevertheless within this statute. 1 *Haw.* 112.

If the maim comes not within any of the descriptions in the act, yet it is indictable at the common law, and may be punished by fine and imprisonment: Or an appeal may be brought for it at the common law; in which the party injured shall recover his damages: Or he may bring an action of trespass; which kind of action hath now generally succeeded into the place of appeals in smaller offences not capital. 2 *Haw.* 157----160.

It doth not seem, that in maiming there may be accessaries after the fact. 2 *Haw.* 311.

MAIN-

MAINTENANCE.

BUYING *of titles* belongeth not to this place, but is treated of under a title of its own.

I. Of maintenance in general.
II. Of champerty in particular.
III. Of embracery in particular.

I. Of maintenance in general.

Concerning which I will shew,

i. What it is.
ii. How punishable by the common law.
iii. How by statute.

i. What it is.

Maintenance *(manu tenere) is an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right.* 1 Haw. 249.

And it is twofold;

One in the *country*; as where one assists another in his pretention to certain lands, by taking or holding the possession of them for him by force or subtilty; or where one stirs up quarrels, and suits in the country, in relation to matters wherein he is no way concerned. And this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but it is said not to be actionable. 1 *Haw.* 249.

Another in the *courts of justice*; where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money or otherwise, in the prosecution or defence of any such suit. 1 *Haw.* 249.

Of this second kind of maintenance, there are three species;

First, where one maintains another, without any contract to have part of the thing in suit; which generally goes under the common name of *maintenance:*

Secondly, where one maintains one side, to have part of the thing in suit; which is called *champerty:*

Thirdly, where one labours a jury; which is called *embracery.* 1 *Haw.* 249.

But it seemeth to be agreed, that wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, by the same title, they may maintain one another in a suit relating to the same. 1 *Haw.* 252.

Alſo, that whoever is any way of kin or affinity to the party, may counſel and aſſiſt him, but that he cannot juſtify the laying out any of his own money in the cauſe, unleſs he be either father or ſon, or heir apparent. 1 *Haw.* 252.

Alſo, that any one in charity may lawfully give money to a poor man, to enable him to carry on his ſuit. 1 *Haw.* 253.

ii. How puniſhable by the common law.

It ſeemeth that all maintenance is not only *malum prohibitum* by ſtatute, but is alſo *malun in ſe*, and ſtrictly prohibited by the common law, as having a manifeſt tendency to oppreſſion; and therefore it is ſaid, that all offenders of this kind are not only liable to an action of maintenance at the ſuit of the party grieved, wherein they ſhall render ſuch damages as ſhall be anſwerable to the injury done to the plaintiff, but alſo that they may be indicted as offenders againſt publick juſtice, and adjudged thereupon to ſuch fine and impriſonment as ſhall be agreeable to the circumſtances of the offence. Alſo it ſeemeth, that a court of record may commit a man for an act of maintenance done in the face of the court. 2 *Inſt.* 212. 1 *Haw.* 255.

iii. How by ſtatute.

By the 1 *Ed.* 3. *ſt.* 2. *c.* 14. *No perſon ſhall take upon him to maintain quarrels nor parties in the country, to the diſturbance of the common law.*

And by the 20 *Ed.* 3. *c.* 4. *None ſhall take in hand quarrels, other than their own, nor the ſame maintain, by them nor by other, for gift, promiſe, amity, favour, doubt, fear, nor other cauſe, in diſturbance of law, and hindrance of right,*

And by the 1 *R.* 2. *c.* 4. *None ſhall take or ſuſtain any quarrel by maintenance in the country, on pain, if he is a great officer, as the king by advice of the lords ſhall ordain; if he is a leſſer officer, he ſhall forfeit his office, and be impriſoned and ranſomed at the king's will; and all other perſons, on pain of impriſonment, and ranſom at the king's will.*

And by the 32 *H.* 8. *c.* 9. *No perſon ſhall unlawfully maintain, or procure any unlawful maintenance, in any action, demand, or complaint, in any court having power to hold plea of lands; nor ſhall unlawfully retain any perſon for maintenance of any plea, to the diſturbance or hindrance of juſtice; on pain of* 10 l. *half to the king, and half to him that ſhall ſue within one year.* ſ. 3. 6.

Unlawfully maintain] It ſeemeth that in an information on this ſtatute, it is not ſufficient to ſay, that the defendant maintained the party, without adding that he did it *unlawfully*. 1 *Haw.* 256.

Having power to hold plea of lands] It is ſaid to have been adjudged, that maintenance of a ſuit in a ſpiritual court, is neither within

within this nor any other ſtatute concerning maintenance. 1 *Haw.* 256.

To hold plea] It hath been holden that in an information on this ſtatute, it is neceſſary to ſhew, that a plea was depending; and therefore that it is not ſufficient to ſay that a bill was exhibited. 1 *Haw.* 256.

II. Of champerty in particular.

i. What it is.
ii. How puniſhable by the common law.
iii. How by ſtatute.

i. What it is.

Champerty (from *campi parte)* is *the unlawful maintenance of a ſuit, in conſideration of ſome bargain to have part of the lands or things in diſpute, or part of the gains.* 1 Haw. 256. 33 Ed. 1. ſt. 2.

Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a *ſpecies* of maintenance which is the *genus*. 2 *Inſt.* 208.

ii. How puniſhable by the common law.

Champerty was an offence at the common law, and as ſuch is puniſhable in like manner as hath been expreſſed in treating of maintenance in general. 2 *Inſt.* 208.

iii. How by ſtatute.

By the 3 *Ed.* 1. *c.* 25. *No officer of the king, by himſelf, nor by other, ſhall maintain pleas, ſuits, or other matters hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth, ſhall be puniſhed at the king's pleaſure.*

By covenant made] That is, by agreement either by word or writing; for albeit in the common ſenſe, a covenant is taken for an agreement by writing, yet in a larger ſenſe it is taken (as it is here) for an agreement by writing or by word. 2 *Inſt.* 209.

And by the 28 *Ed.* 1. *c.* 11. *No perſon whatſoever, for to have part of the thing in plea, ſhall take upon him the buſineſs that is in ſuit, nor ſhall any upon ſuch covenant give up his right to another; on pain that the taker ſhall forfeit to the king the value of the part he hath purchaſed for ſuch maintenance. But no perſon ſhall be prohibited hereby to have counſel of pleaders, or of men learned in the law, for their fee; or of his parents and next friends.*

And

And by the 33 *Ed.* 1. *ſt.* 3. *Any perſon who ſhall take for maintenance, or the like bargain, any ſuit or plea againſt another; he, and alſo they who conſent thereunto, ſhall be impriſoned three years, and make fine at the king's pleaſure.*

And by the 1 *R.* 2. *c.* 9. *A feoffment of lands, or gift of goods, for maintenance, ſhall be void, and the perſon diſſeized ſhall recover the lands againſt the firſt diſſeizors, with double damages, without having any regard to ſuch alienations.*

Shall be void] But it is ſaid, that it ſhall only be void with regard to him that hath right, and not between the feoffor and feoffee. 1 *Inſt.* 369.

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

III. Of embracery in particular.

i. What it is.
ii. How puniſhable by the common law.
iii. How by ſtatute.

i. What it is.

It ſeems clear, *that any attempt whatſoever to corrupt, or influence, or inſtruct a jury, or any way to incline them to be more favourable to the one ſide than to the other, by money, promiſſes, letters, threats, or perſuaſions, is a proper act of embracery,* whether the juror on whom ſuch attempt is made give any verdict or not, or whether the verdict given be true or falſe. 1 *Haw.* 259.

And the law ſo far abhors all corruptions of this kind, that it prohibits every thing which has the leaſt tendency to it, what ſpecious pretence ſoever it may be covered with, and therefore it will not ſuffer a mere ſtranger ſo much as to labour a juror to appear and act according to his conſcience. 1 *Haw.* 259.

But any perſon who may juſtify any other act of maintenance, may ſafely labour a juror to appear and give a verdict according to his conſcience; but no one whatſoever can juſtify the labouring a juror not to appear. 1 *Haw.* 260.

ii. How puniſhable by the common law.

There is no doubt, but that offences of this kind, do ſubject the offender either to an indictment or action, in the ſame manner as all other kinds of unlawful maintenance do by the common law. 1 *Haw.* 260.

iii. How by ſtatute.

By the 32 H. 8. c. 9. *No perſon ſhall embrace any jurors on pain of* 10l. *half to the king, and half to him that ſhall ſue within the year.* ſ. 3, 6.

And

And by the 38. Ed. 1 ſt. 1. c. 12. *If any juror ſhall take any thing to give his verdict; both he, and the embracer, ſhall forfeit ten times as much, half to the king, and half to him that ſhall ſue.*

Upon which ſtatute is founded the writ of *Decies tantum.*

Indictment for maintenance.

THE *jurors for our lord the king upon their oath preſent, that* A. O. *late of*——*in the county aforeſaid, yeoman, on the*——*day of*——*in the*——*year of the reign of*——*with force and arms, at*——*aforeſaid, in the county aforeſaid, did unjuſtly and unlawfully maintain and uphold a certain ſuit, which was then depending in the court of our ſaid lord the king, before the king himſelf, between* A. P. *plaintiff, and* A. D. *defendant, in a plea of debt, on the behalf of the ſaid* A. P. *againſt the ſaid* A. D. *contrary to the form of the ſtatute in ſuch caſe made and provided, and to the manifeſt hindrance and diſturbance of juſtice, and in contempt of our ſaid lord the king, and to the great damage of the ſaid* A. D. *and againſt the peace of our ſaid lord the king, his crown and dignity.*

MISDEMEANOR.

THIS word in its uſual acceptation is applied to all thoſe crimes and offences, for which the law has not provided a particular name; and they may be puniſhed according to the degrees of the offence, by fine, or impriſonment, or both. *Barl.*

Miſpriſion of felony. See *FELONY.*
Miſpriſion of treaſon. See *TREASON.*
Mittimus. See *COMMITMENT.*
Money. See *COIN.*
Murder. See *HOMICIDE.*

MUTE.

THE whole learning relating to this title, will be comprehended in the explication of the ſtatute of *Weſtminſter* 1. *c.* 12. which is as follows:

Notorious felons, and which openly be of evil name, and will not put themſelves in inqueſt of felonies that men ſhall charge them with before the juſtices at the king's ſuit, ſhall have ſtrong and hard impriſonment, as they which refuſe to ſtand to the common law of the land. But this is not to be underſtood of ſuch priſoners as be taken of light ſuſpicion. 3 Ed. 1. c. 12.

Felons

Felons] This ſtatute extendeth not to treaſon, which is the higheſt offence; nor to petit larceny, which is of all felonies the loweſt; but if a man ſtand obſtinately mute upon an arraignment of treaſon or petit larceny, he ſhall have the like judgment as if he had confeſſed the indictment. 2 *Inſt.* 177. 2 *Haw.* 329.

This word *felons* extendeth as well to women, as to men. 2 *Inſt.* 177.

Notorious, openly and of evil fame] Therefore no perſon ſhall be put to this puniſhment, unleſs the matter be evident or provable, which it is the duty of the judge to look unto, and to examine the evidence which proves the priſoner guilty of the fact, before he proceed to the judgment of *pain fort & dure*. 2 Inſt. 177. 2 Haw. 330.

And will not put themſelves in inqueſts] This is called ſtanding mute. Now a man may ſtand mute two manner of ways:

Firſt, when he ſtands mute *without ſpeaking of any thing*; and then the court ſhall *ex officio* inquire by the oath of any 12 perſons that happen to be preſent, whether he do ſo of malice, or by act of god; and if it be found that it was by the act of god, then the judges of the court (who are always to be of counſel with the priſoner to give him law and juſtice) ought to enquire touching all thoſe points which he might poſſibly plead himſelf, as whether a felony were done, whether he be the ſame perſon that is indicted for it, whether he did it, and whether he hath any matter to alledge for his diſcharge; and ſuch enquiry ſhall be made, not by an inqueſt of office, but by a jury returned by the ſheriff, in the ſame manner as if the defendant had actually pleaded; for ſince it is his own fault that he did not ſo plead, there is no reaſon why his trial ſhould be in a more looſe and ſummary manner, or any way leſs regular or ſolemn, than if he had ſo pleaded. 2 *Inſt.* 178. 2 *Haw.* 327, 328. 2 *H. H.* 317.

But what if all this be found againſt the priſoner, what ſhall be done? — Whether judgment of death ſhall be given againſt him, though he never pleaded, ſeems yet undetermined. 2 *H. H.* 317.

But after a man hath confeſſed himſelf guilty, or pleaded and put himſelf upon his country, he ſhall not afterwards be deemed as one that ſtands mute, in reſpect of his ſubſequent ſilence; but the jury ſhall be charged, and the trial ſhall proceed, and the like judgment ſhall be given as in common caſes. 2 *Haw.* 327.

Alſo if the perſon become mute, and not by the act of god, as by cutting out his own tongue, he ſhall forthwith be put to his penance. 2 *Inſt.* 178.

Another kind of mute is, when the priſoner can ſpeak and perhaps pleadeth not guilty, or pleadeth a plea in law, and *will not conclude to the inqueſt* according to this act, that is to be tried by god and the country; then this act is ſufficient warrant, if the cauſe be evident or probable, to put him to his penance: But if he demur in law, and it be adjudged againſt him, he ſhall have judgment to be

be hanged; and tho' by his demurrer he refuſe to put himſelf upon the inqueſt according to the letter of this act, yet foraſmuch as he is out of reaſon of this act, for that he refuſeth not the trial of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he ſhall not be put to his penance, but ſhall have judgment to be hanged, and not have *pain fort & dure*. 2 Inſt. 178.

At the king's ſuit] This act ſpeaketh only of indictments at the ſuit of the king; but the judgment of *pain fort & dure* was at the common law, both in indictments and appeals. 2 *Inſt.* 177.

Shall have ſtrong and hard impriſonment] *Soient miſes en la priſon fort & dure:* The judgment in this caſe is, that the man or woman ſhall be remanded to the priſon, and laid there in ſome low and dark room, where they ſhall lie naked on the bare earth without any litter, ruſhes, or other cloathing, and without any garment about them, but ſomething to cover their privy part, and that they ſhall lie on their backs, their head uncovered and their feet, and one arm ſhall be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the ſame manner ſhall be done with their legs, and there ſhall be laid upon their bodies iron and ſtone, ſo much as they may bear and more, and the next day following they ſhall have three morſels of barley bread without any drink, and the ſecond day they ſhall drink thrice of the water that is next to the houſe of the priſon (except running water) without any bread, and this ſhall be their diet until they be dead. So as upon the matter they ſhall die three manner of ways, by weight, by famine, and by cold. And the reaſon of this terrible judgment is, becauſe they *refuſe to ſtand to the common law of the land.* 2 Inſt. 178, 179.

Which puniſhment being ſo ſevere, lord *Hale* adviſes, that it be not given too haſtily, but that the priſoner be not only thrice admoniſhed, but alſo have ſome convenient reſpite, as until the afternoon, to bethink himſelf, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and that the judgment itſelf be diſtinctly read to him, that he may know his danger before his final refuſal, with due admonition not to deſtroy himſelf. 2 *H. H.* 320.

And as to the other conſequences of ſtanding mute, it is obſervable, that where a perſon ſtanding mute is adjudged to his penance, and thereby prevents that attainder which otherwiſe he might have incurred, he *forfeits his chattels* only, and not his *lands*; and for this reaſon ſome have endured this puniſhment. 2 *Haw.* 331.

It doth not appear that the proſecutor of an indictment for felony, where the defendant ſtandeth mute, is intitled to the reſtitution of his goods, either by the common law or by any ſtatute. 2 *Haw.* 332.

But this is not to be underſtood of ſuch priſoners as ſhall be taken on light ſuſpicion] But if they obſtinately ſtand mute, it ſeemeth that they may be ſeverely fined and impriſoned for the contempt. 2 *Haw.* 330.

NUSANCE.

I. What it is.
II. How it may be removed.
III. How punished.

I. What it is.

A Common nusance seems to be, an offence against the publick, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. 1 *Haw.* 197.

Annoyances to the prejudice of particular persons, are not punishable by a publick prosecution as common nusances, but are left to be redressed by the private actions of the parties aggrieved by them. 1 *Haw.* 197.

Where note a diversity between a *private* and a *publick* nusance: If it is a *private* nusance, he shall have his action upon his case, and recover his damages; but if it is a *publick* nusance, he shall not have an action upon his case, and this the law hath provided for avoiding of multiplicity of suits, for if any one might have an action, all men might have the like; but the law for this common nusance hath provided an apt remedy, by presentment or indictment at the suit of the king, in the behalf of all his subjects; unless any man hath a particular damage, as if he and his horse fall into a ditch made across a highway, whereby he received hurt and loss, there for this special damage which is not common to others, he shall have an action upon his case. 1 *Inst.* 56.

And from hence it clearly follows, that no indictment for a nusance can be good, which lays it to the damage of private persons only: as where it accuses a man of surcharging such a common; or of inclosing such a piece of ground, wherin the inhabitants of such a town have a right of common, to the nusance of all the inhabitants of such a town or of disturbing a watercourse running to such a mill, to the damage of such a person and his tenants, without saying *of all the liege subjects of the king.* 1 *H.* 197.

Yet it hath been said, that an indictment of a common scold is good, altho' it conclude to the common nusance of *divers*, instead of *all*, the king's subjects; perhaps for this reason (says Mr. *Hawkins*) because a common scold cannot but be a common nusance. 1 *Haw.* 198.

And if the law be so in this case, why should not an indictment setting forth a nusance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude to the nusance of *divers*, without saying *all* the king's subjects? And perhaps the authorities which seem to contradict this opinion, might

might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way, wherein the nusance was alledged, were a highway, or only a private way; and therefore that it shall be intended from the conclusion of the indictment, that it was a private way. 1 *Haw.* 198.

There is no doubt, but that common bawdy houses are indictable as common nusances; and it hath been said that all common stages for rope dancers, and also all common gaming houses, are nusances in the eye of the law, not only because they are great temptations to idleness, but also they are apt to draw great numbers of disorderly persons. 1 *Haw.* 198.

Also it hath been holden, that a common playhouse may be a nusance, if it draw together such a number of coaches or people, as prove generally inconvenient to the places adjacent. 1 *Haw.* 198.

Erecting a shed so near a man's house, that it stops up his lights is not a nusance for which an action will lie, unless the house is an ancient house, and the lights ancient lights. 2 *Salk.* 459.

Also stopping a prospect is not a nusance. 3 *Salk.* 247.

A gate erected in a highway, where none had been before, is a common nusance. 1 *Haw.* 199.

A person was indicted, for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood; and it was held by the court to be a nusance. *T.* 12 *G. K.* and *Smith. Str.* 704.

II. How it may be removed.

It seemeth to be certain, that any one may pull down or otherwise destroy a common nusance, as a new gate, or even a new house erected in a highway, or the like; for if one whose estate is or may be prejudiced by a *private* nusance actually erected, as a house hanging over his ground, or stopping his lights, may justify the entering into another's ground, and pulling down and destroying such a nusance, whether it were erected before or since he came to the estate, it cannot but follow *a fortiori*, that any one may lawfully destroy a *common* nusance: And as the law is now holden, it seems that in a plea, justifying the removal of the nusance, a man need not shew that he did as little damage as might be. 1 *Haw.* 199.

But although he may remove the nusance, yet he cannot remove the materials, or convert them to his own use. *Dalt. c.* 50.

III. How punished.

It is said, that a common scold is punishable by being put into the cucking stool. 1 *Haw.* 200.

Note; *cuck* or *guck* in the *Saxon* tongue (according to lord *Coke*) signifieth to scold or brawl; taken from the bird *cuckow* or *guckhaw*: and *ing* in that language signifieth water; because a scolding woman was for her punishment sowsed in the water. 3 *Inst.* 219. The common people

people in the northern parts of *England*, amongſt whom the greateſt remains of the ancient *Saxon* are to be found, pronounce it *ducking ſtool*; which perhaps may have ſprung from the *Belgic* or *Teutonick ducken*, to dive under water; from whence alſo probably we denominate our *duck* the water fowl: or rather, it is more agreeable to the analogy and progreſſion of languages, to aſſert, that the ſubſtantive *duck* is the original, and the verb made from thence; as much as to ſay, that to *duck* is to do as that fowl does.

And ſhe may be convicted without ſetting forth the particulars in the indictment. 2 *Haw.* 227.

Nevertheleſs, the offence muſt be ſet forth with convenient certainty; and the indictment muſt conclude not only *againſt the peace*, but *to the common nuſance of divers of his majeſty's liege ſubjects*. As in the caſe of *K.* and *Margret Cooper*, *H.* 19 G. 2. She was convicted on an indictment, for being *a common and turbulent brawler, and ſower of diſcord amongſt her honeſt and quiet nieghbours, ſo that ſhe hath ſtirred, moved, and incited divers ſtrifes, controverſies, quarrels, and diſputes, amongſt his majeſty's liege people, againſt the peace* &c. It was moved in arreſt of judgment, that the charge was too general, and did not amount to being either a barrator or common ſcold, which are the only inſtances in which a general charge will be ſufficient. It was likewiſe objected, that if the words did amount to a deſcription of a ſcold, yet it ſhould be laid to be to the common nuſance of her neighbours, for every degree of ſcolding is not indictable. And the court was of opinion, that the judgment ought to be arreſted on both exceptions; for none of the words here uſed are the technical words, and it muſt be laid to be to the common nuſance. *Str.* 1246.

There is no doubt, but that whoever is convicted of another nuſance, may be fined and impriſoned; and it is ſaid, that one convicted of a nuſance done to the king's highway, may be commanded by the judgment to remove the nuſance at his own coſts: and it ſeemeth to be reaſonable, that thoſe who are convicted of any other common nuſance, ſhould alſo have the like judgment. 1 *Haw.* 200. *Str.* 686.

And the defendant ſhall not be allowed to make any objections againſt the indictment, until he hath pleaded to it. *Dalt. c.* 66.

And the court never admits a perſon convicted of a nuſance, to a ſmall fine, until proof is made of the nuſance being removed. *Dalt. c.* 66.

A maſter is indictable for a nuſance done by his ſervant. L. *Raym.* 264.

All common nuſances are indictable not only at the ſeſſions, but alſo in the torn and leet. 2 *Haw.* 67.

There are many offences by particular ſtatutes declared to be common nuſances, which are treated of under their reſpective titles.

General

General indictment for a nuſance.

New-York, Queen's Couuty. THE *jurors for our lord the king upon their oath preſent, that* A. O. *late of* ——— *in the county of* ——— *yeoman, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *and on divers other days and times, as well before as afterwards, with force and arms, at* ——— *in the ſaid county,* [here ſet forth the nuſance;] *and the ſame* (nuſance) *ſo as aforeſaid done, doth yet continue and ſuffer to remain; to the common nuſance of all the lieges and ſubjects of our ſaid lord the king, to the evil example of all others in the like caſe offending, and againſt the peace of our ſaid lord the king, his crown and dignity.*

OATHS.

I. Of oaths in general.
II. The common forms of oaths.
III. Quakers oaths.
IV. Oaths of infidels.

I. Of oaths in general.

OATH is a corruption of the *Saxon* word *eoth.* 3 Inſt. 165.

It is called a corporal oath, becauſe the perſon lays his hands upon ſome part of the ſcriptures when he takes it. 3 *Inſt.* 165.

If the oath be taken on the common prayer book, which hath the epiſtles and goſpels, it is good enough, and perjury upon the ſtatute may be aſſigned upon this oath. 2 *Keb.* 314.

The words, *So help me God,* in the common form of an oath, perhaps may have been firſt uſed in the very ancient manner of trial by battle in this kingdom, or at leaſt are delivered with a peculiar emphaſis in that ſolemnity; wherein the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and ſwears to this effect, *Hear this, thou who calleſt thy ſelf* John *by the name of baptiſm, whom I hold by the hand, that falſly, upon me thou haſt lied; and for this thou lieſt, that I who call my ſelf* Thomas *by the name of baptiſm did not felonioufly murder thy father* W. *by name------So help me god--.--*(and then he kiſſes the book, and ſays) *and this I will defend againſt thee by my body, as this court ſhall award.* And ſo the appellant is ſworn in like manner.

No ancient oath can be altered, or new oath impoſed, without an act of parliament; nor can any oath be adminiſtred by any, that have not allowance by the common law time out of mind, or by an act of parliament. 2 *Inſt.* 479. 3 *Inſt.* 165.

And

And this is the reaſon why generally there is a clauſe in the ſtatutes, giving power to the juſtices to this or the like effect [*which oath ſuch juſtice is hereby impowered to adminiſter*;] tho' it ſeems to be clear, that if an act impowers a juſtice, in a ſummary way to convict an offender by the oath of a witneſs, it doth (without any more) of neceſſity give him power to adminiſter the oath to that witneſs; and that it is ſufficiently implied in the words, and neceſſarily included in the power. For when the law grants any thing, that alſo is granted, without which the thing it ſelf cannot be. 12 *Co.* 130, 131.

Where an oath is adminiſtred by a perſon that hath lawful authority to tender the ſame, and it be afterwards broken, yet if it be not in a judicial proceeding, it is no perjury, nor puniſhable by the common law. 3 *Inſt.* 166.

Therefore if one call another a *perjured* man, he may have an action on the caſe, becauſe it ſhall be intended to be contrary to his oath in a judicial proceeding; but for calling one a *forſworn* man, no action lies; becauſe the forſwearing may be extrajudicial, and conſequently no perjury in law. 3 *Inſt.* 166.

Every layman, above the age of 12 years, was anciently obliged to take the oath of allegiance at the torn or leet, and it was a high contempt to refuſe it. 1 *Inſt.* 68.

Lord *Hale*, ſpeaking of the ancient oath of allegiance, which continued above 600 years, ſays, that therein the prudence of the common law is obſervable, that it was ſhort and plain, not intangled with long and intricate clauſes or declarations, but that the ſenſe of it was obvious to the moſt common underſtanding, and yet withal comprehenſive of the whole duty of a ſubject to his prince. 1 *H. H.* 63. And from this the preſent form of the oath of allegiance hath not much varied.

The oath of ſupremacy came in, upon aboliſhing the papal authority at the reformation. *Read.* Oath.

The oath of abjuration came in after the revolution; received ſome alterations in the firſt year of queen *Anne*; and again in the firſt year of king *George* the firſt; and ſo continues to this time.

Perhaps it might be wiſhed, that it were made more applicable to lord *Hale*'s rule, in being more ſhort and plain; there being in it ſeveral hard words, which probably many who take it do not well underſtand; and there being an act of parliament therein referred to, which perhaps not one in fifty who take it have conſulted.

Two juſtices may ſummon by writing under hand and ſeal, any perſon whom they ſhall ſuſpect to be dangerous or diſaffected to the government, to appear before them, at a certain day and time therein to be appointed, to take the oaths of allegiance, ſupremacy, and abjuration; and if ſuch perſon neglects or refuſes to appear, then on due proof made on oath of the ſummons having been ſerved on ſuch perſon, or left at his dwelling houſe, or uſual place of abode, with one of the family there, they ſhall certify the ſame to the next ſeſſions, there to be recorded by the clerk of the peace. And

if

if such person shall neglect or refuse to appear and take the oaths at the said sessions (the name of such person being publickly read at the first meeting of the said sessions) then such person shall be esteemed and adjudged a popish recusant convict: and the same shall be thence certified, by the clerk of the peace, into the chancery or king's bench, to be there recorded. 1 *G. st.* 2. *c.* 13. *s.* 10, 11.

Whom they shall suspect] It seemeth that a bare suspicion is not sufficient, but there should be some good cause of suspicion, and that the cause of suspicion is traversable. *Read.* Oath.

Refuse—to take the oaths] A person cannot be said to *refuse* the oaths, unless they be read to him, or offered to be read. *Read.* Oath.

II. *The common forms of oaths.*

The oath of allegiance, by the 1 *G. st.* 2. *c.* 13.

I A. B. *do sincerely promise and swear, that I will be faithful, and bear true allegiance to his majesty king* George: *So help me god.*

The oath of supremacy, by the 1 *G. st.* 2. *c.* 13.

I A. B. *do swear, that I do from my heart abhor, detest and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of* Rome, *may be deposed or murdered by their subjects, or any other whatsoever. I do declare that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm: So help me god.*

The oath of abjuration, by the 1 *G. st.* 2. *c.* 13.

I A. B. *do truly and sincerely acknowledge, profess, testify, and declare in my conscience before god and the world, that our sovereign lord king* George *is lawful and rightful king of this realm, and all other his majesty's dominions thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretended to be prince of* Wales, *during the life of the late king* James, *and since his decease, pretending to be, and taking upon himself, the stile and title, of king of* England, *by the name of* James *the third, or of* Scotland, *by the name of* James *the eighth, or the stile and title of king of* Great-Britain, *hath not any right or title whatsoever, to the crown of this realm, or any other the dominions thereto belonging: And I do renounce, refuse and abjure any allegiance or obedience to to him. And I do swear, that I will bear faith and true allegiance to his majesty king* George, *and him will defendt, o the utmost of my power, against all traiterous conspiracies and attempts whatsoever, which shall be made against his person, crown or dignity. And I will do my utmost endeavour, to disclose and make known to his majesty, and his successors, all treasons and traiterous conspiracies which I shall know to be against him, or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain and defend the succession of the crown against him the said* James, *and*

all

all other persons whatsoever; which succession, by an act, intled, An act for the further limitation of the crown, and better securing the rights and liberties of the subject, *is and stands limited to the princess* Sophia, *Electress and dutchess dowager of* Hanover, *and the heirs of her body being protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a christian: So help me god.*

The declaration against transubstantiation; by the 25 *C.* 2. *c.* 2, *s.* 9.

I A. B. *do declare, that I do believe, that there is not any transubstantiation in the sacrament of the lord's supper or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever.*

The declaration against popery; by the 30 *C.* 2. *st.* 2. *c.* 2.

I A. B. *do solemnly and sincerely, in the presence of god, profess, testify an declare, that I do believe, that in the sacrament in the lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of* Christ, *at or after the consecration thereof by any person whatsoever: And that the invocation, or adoration of the virgin* Mary, *or any other saint, and the sacrifice of the mass, as they are now used in the church of* Rome, *are superstitious and idolatrous: And I do solemnly in the presence of god, profess, testify, and declare, That I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by* English *protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever,* or *without any hope of any such dispensation from any person or authority whatsoever,* or *without thinking that I am or can be acquitted before god or man, or absolved of this declaration or any part thereof, although the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null or void from the beginning.*

III. Quakers oaths.

In all cases wherein by any act of parliament an oath shall be allowed or required, the solemn affirmation of quakers shall be allowed instead of such oath; and that, altho' no express provision be made for that purpose in such act. 22 *G.* 2. *c.* 46.

And if any person shall be lawfully convicted of wilful, false, and corrupt affirming or declaring any matter or thing, which if sworn in the usual form would have amounted to wilful and corrupt perjury, he shall suffer as in cases of perjury. 8 *G. c.* 6. *s.* 2.

The quakers solemn affirmation, instead of an oath, as finally settled by the 8 *G. c.* 6. is as follows; *viz.*

" *I*

" *I* A. B. *do ſolemnly, ſincerely, and truly declare and affirm.*"

Inſtead of the oaths of allegiance and ſupremacy, quakers ſhall be allowed to make the following declaration of fidelity by the 8 *G. c.* 6.

I A. B. *do ſolemnly and ſincerely promiſe and declare, that I will be true and faithfull to king* George; *and do ſolemnly, ſincerely, and truly profeſs, teſtify, and declare, that I do from my heart abhor, deteſt, and renounce, as impious and heretical, that wicked doctrine and poſition, that princes excommunicated or deprived by the pope, or any authority of the ſee of* Rome, *may be dipoſed or murdered by their ſubjects, or any other whatſoever. And I do declare, that no foreign prince, perſon, prelate, ſtate, or potentate, hath or ought to have, any power, juriſdiction, ſuperiority, pre-eminence, or authority, eccleſiaſtical or ſpiritual, within this realm.*

And by the ſame act, they ſhall be allowed to take the effect of the abjuration oath, in theſe words;

I A. B. *do ſolemnly, ſincerely, and truly acknowledge, profeſs, teſtify, and declare, that king* George *is lawful and rightful king of this realm,* &c.

IV. Oaths of infidels.

A Jew is to be ſworn on the old teſtament, and perjury upon the ſtatute may be aſſigned upon this oath. 2 *Keb.* 314.

H. 2 *G.* 2. *Gomez Serra* and *Munez.* Upon error in debt upon a bond, the bail being both Jews, were ſuffered to put on their hats while they took the oath. *Str.* 821.

When Jews take the oath of abjuration, the words [*on the true faith of a chriſtian*] ſhall be omitted. 10 *G. c.* 4. *ſ.* 18.

At the council, *Dec.* 9, 1738. Preſent the two chief juſtices. On a complaint of *Jacob Fachina,* againſt general *Sabine,* as governor of *Gibraltar*; *Alderaman Ben Monſo,* a Moor, was produced as a witneſs, and ſworn upon the *Koran.* Str. 1104.

So in the caſe of *Omichund* againſt *Barker,* in the court of chancery, a Mahometan was ſworn upon the *Koran.* Str. 1104.

OFFICE.

BY the 1 *G. ſt.* 2. *c.* 13. Every perſon who ſhall be admitted into any office civil or military; or ſhall receive any pay by reaſon of any patent or grant from the king; or ſhall have any command or place of truſt in *England.* or in the navy; or ſhall have any ſervice or employment in the king's houſhold; all eccleſiaſtical perſons; heads and members of colleges, being of the foundation, or having any exhibition, of eighteen years of age; and all perſons, teaching pupils; ſchoolmaſters and uſhers; preachers and teachers of ſeparate congregations; high conſtables; and practiſers of the law, ſhall (within

(within six kallendar months after such admission, 9 *G.* 2. *c.* 26. *s.* 3.) take and subscribe the oaths of allegiance, supremacy, and abjuration, in one of the courts at *Westminster*, or at the quarter sessions; 1 *G. st.* 2, *c.* 13. *s.* 2. between the hours of nine and twelve in the forenoon, and no other; and during the time of taking thereof, all proceedings in the said court shall cease. 25 *C.* 2. *c.* 2. *s.* 2.

PARDON.

A Pardon is a work of mercy, whereby the king, either before the attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. 3 *Inst.* 233.

Pardons are either *general* or *special*: *General*, are by act of parliament; of which, if they are without exceptions, the court must take notice *ex officio*; but if there are exceptions therein, the party must aver that he is none of the persons excepted. 3 *Inst.* 233. *Hale's Pl.* 252.

Special pardons, are either *of course*, as to persons convicted of manslaughter, or *se defendendo*, and by divers statutes to those who shall discover their accomplices in several felonies; or, *of grace*, which are by the king's charter, of which the court cannot take notice *ex officio*, but they must be pleaded. 3 *Inst.* 233.

By the 27 *Ed.* 3. *c.* 2. In every charter of the pardon of felony, the suggestion, and the name of him that maketh the suggestion, shall be comprized; and if it be found untrue, the charter shall be disallowed.

And by the 13 *R.* 2. *st.* 2. *c.* 1. No charter of pardon shall be allowed for murder, treason, or rape, unless the offence be specified therein.

Lord *Coke* says, the intention of this act was not, that the king should grant a pardon of murder by express name in the charter, but because the whole parliament conceived that he would never pardon murder by special name. And he says, he hath never seen any pardon of murder by any king of *England*, by express name. 3 *Inst.* 233, 236.

The king cannot pardon an offence before it is committed; but such pardon is void. 2 *Haw.* 389.

As the release of the party will not bar an indictment at the suit of the king; so neither will a pardon by the king be any bar to an appeal at the suit of the party. 2 *Haw.* 392.

And in some cases even where the king is sole party, some things there are which he cannot pardon; as for example, for all common nusances, as for not repairing of bridges or highways, the suit (for avoiding multiplicity of suits) is given to the king only,

only, for redreſs and reformation thereof; but the king cannot pardon or diſcharge either the nuſance, or the ſuit for the ſame; becauſe ſuch pardon would take away the only means of compelling a redreſs of it. But it hath been holden by ſome, that a pardon of ſuch offence will ſave the party from any fine, for the time precedent to the pardon. 3 *Inſt.* 237. 2 *Haw.* 391.

Thus alſo, if one be bound by recognizance to the king, to keep the peace againſt another by name, and generally all other lieges of the king; in this caſe, before the peace be broken, the king cannot pardon or releaſe the recognizance, altho' it be made only to him, becauſe it is for the benefit and ſafety of his ſubjects. 3 *Inſt.* 238.

Likewiſe, after an action popular is brought, *as well for the king as for the informer*, according to any ſtatute, the king can but diſcharge his own part, and cannot diſcharge the informer's part; becauſe by bringing of the action, the informer hath an intereſt therein: but before the action brought, the king may diſcharge the whole (unleſs it be provided to the contrary by the act) becauſe the informer cannot bring an action or information originally for his part only, but muſt purſue the ſtatute. And if the action be given to the *party grieved*, the king cannot diſcharge the ſame. 3 *Inſt.* 238.

When a pardon is pleaded by any one for felony, the juſtices may at their diſcretion remand him to priſon, till he enter into recognizance, with two ſureties, for his good behaviour, for any time not exceeding ſeven years. 5 *W. c.* 13.

It ſeems to be a ſettled rule, that no pardon by the king, without expreſs words of reſtitution, ſhall diveſt, either from the king or ſubject, an intereſt either in lands or goods, veſted in them, by an attainder or conviction precedent: Yet it ſeems agreed, that a pardon prior to a conviction, ſhall prevent any forfeiture either of lands or goods. 2 *Haw.* 396.

A pardon after the attainder, doth not reſtore the corruption of blood; for this cannot be reſtored but by act of parliament. 3 *Inſt.* 233.

But as to iſſue born after the pardon, it hath the effect of reſtitution of blood. 1 *H. H.* 358.

It ſeems to be ſettled at this day, that the pardon of a treaſon or felony, even after a conviction or attainder, doth ſo far clear the party from the infamy and all other conſequences of his crime, that he may not only have an action for a ſcandal, in calling him traytor or felon, after the time of the pardon, but may alſo be a good witneſs, notwithſtanding the attainder or conviction; becauſe the pardon makes him as it were a new man, and gives him a new capacity and credit. 2 *Haw.* 395.

But it ſeems to be the better opinion, that the pardon of a conviction of *perjury* doth not ſo reſtore the party to his credit, as to make him a good witneſs; becauſe it would be an injury to the people in general, to make them ſubject to ſuch a perſon's teſtimony. 1 *Vent.* 349.

PERJURY AND SUBORNATION.

I. Of perjury and ſubornation by the common law.
II. Of perjury and ſubornation by the ſtatute of the 5 El.

I. Of perjury and ſubornation by the common law.

PERJURY by the common law, ſeemeth to be *a wilful falſe oath, by one who being lawfully required to depoſe the truth in any judicial proceeding, ſwears abſolutely, in a matter material to the point in queſtion, whether he be believed or not.* 1 Haw. 172. 3 Inſt. 164.

Wilful] The falſe oath alledged againſt him, ſhould be proved to be taken with ſome degree of deliberation; for if upon the whole circumſtances of the caſe it ſhall appear probable, that it was owing rather to the weakneſs than perverſeneſs of the party, as where it was occaſioned by ſurpriſe, or inadvertency, or a miſtake of the true ſtate of the queſtion, it cannot but be hard to make it amount to voluntary and corrupt perjury. 1 *Haw.* 172.

Falſe] It is ſaid not to be material, whether the fact which is ſworn be in it ſelf true or falſe; for however the thing ſworn may happen to prove agreeable to the truth, yet if it were not known to be ſo by him who ſwears to it, his offence is altogether as great as if it had been falſe, inaſmuch as he wilfully ſwears that he knows a thing to be true, which at the ſame time he knows nothing of, and impudently endeavours to induce thoſe before whom he ſwears, to proceed upon the credit of a depoſition, which any ſtranger might make as well as he. 1 *Haw.* 173.

Being lawfully required] It ſeemeth clear, that no oath whatſoever, taken before perſons acting merely in a private capacity; or before thoſe who take upon them to adminiſter oaths of a publick nature, without legal authority; or before thoſe who are legally authoriſed to adminiſter ſome kinds of oaths, but not thoſe which happen to be taken before them; or even before thoſe who take upon them to adminiſter juſtice by virtue of an authority ſeemingly colourable, but in truth unwarranted and merely void,——can amount to perjuries, but are altogether idle and of no force. 1 *Haw.* 174.

In any judicial proceedings] For tho' an oath be given by him that hath lawful authority, and the ſame is broken, yet if it be not in a judicial proceeding, it is not perjury; becauſe ſuch oaths are general and extrajudicial: but it ſerves for aggravation of the offence. Such are, general oaths given to officers or miniſters of juſtice, the oath of fealty and allegiance, and ſuch like. Thus if an officer commit extortion, it is againſt his general oath, but yet not perjury, becauſe not in a judicial proceeding; but when he is charged with extortion, the breach of his oath may ſerve for aggravation. 3 *Inſt.* 166.

If

If a perſon calleth another *perjured* man, he may have his action upon this caſe, becauſe it muſt be intended contrary to his oath in a judicial proceeding; but for calling him a *forſworn* man, no action doth lie, becauſe the forſwearing may be extrajudicial. 3 *Inſt.* 166.

Swears abſolute] For the depoſition muſt be direct and abſolute; and not, as he thinketh, or remembereth, or believeth, or the like. 3 *Inſt.* 166.

In a matter material to the point in queſtion] For if it be not material tho' it be falſe, yet it is no perjury, becauſe it concerneth not the point in iſſue, and therefore in effect it is extrajudicial. 3 *Inſt.* 167.

But it is not neceſſary that it appear *to what degree*, the point in which a man is perjured, was material to the iſſue; for if it is but circumſtantially material, it will be perjury. L. *Raym.* 258.

Much leſs is it neceſſary that the evidence be ſufficient, for the plaintiff to recover upon; for in the nature of the thing, an evidence may be very material, and yet it may not be full enough to prove directly the point in queſtion. L. *Raym.* 889.

Whether he be believed or not] It hath been holden, not to be material upon an indictment of perjury at common law, whether the falſe oath were at all credited, or whether the party in whoſe prejudice it was intended, were in the event any way aggrieved by it or not; inſomuch as this is not a proſecution grounded on the damage of the party, but on the abuſe of publick juſtice. 1 *Haw.* 177.

Subornation of perjury, by the common law, ſeems to be *an offence, in procuring a man to take a falſe oath, amounting to perjury, who actually taketh ſuch oath.* 1 Haw. 177.

But it ſeems clear, that if the perſon incited to take ſuch an oath, do not actually take it, the perſon by whom he was ſo incited is not guilty of ſubornation of perjury; yet it is certain, that he is liable to be puniſhed, not only by fine, but alſo by infamous corporal puniſhment. *id.*

The puniſhment of perjury, and the ſubornation of perjury, by the common law, is reſtrained by the ſtatute of the 5 *El.* hereafter following; that it ſhall not be leſs than is inflicted by that ſtatute.

Mr. *Hawkins* ſays, it hath been of late ſettled, that juſtices of the peace have no juriſdiction over perjury at the common law; the principal reaſon of which reſolution, he ſays, as he apprehended, was, that inaſmuch as the chief end of the inſtitution of the office of theſe juſtices, was, or the preſervation of the peace againſt perſonal wrongs and open violence, and the word *treſpaſs* (in the commiſſion) in its moſt proper and natural ſenſe, is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only, or at the moſt to extend to ſuch other offences only as have a direct and immediate tendency to cauſe ſuch breaches of the peace; as libels, and ſuch like, which on this account have been adjudged indictable before juſtices of the peace. 2 *Haw.* 40.

And in the case of *K.* and *Bainton*, *E.* 11. *G.* 2. An indictment at the quarter sessions for perjury at the common law, was quashed for want of jurisdiction; and was said to have been done so about three years before, in the case of *K.* and *Westiness*. *Str.* 1088.

II. Of perjury and subornation by the statute of the 5 El.

As to subornation of perjury, in the first place, *Every person who shall unlawfully and corruptly procure any witness to commit any wilful and corrupt perjury; in any matter or cause depending in suit and variance, by any writ, action, bill, complaint, or information, touching any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages; in chancery, or in any court of record, leet, ancient demesne court, hundred court, court baron, or court of chancery; or shall unlawfully and corruptly procure or suborn any witness which shall be to testify* in perpetuam rei memoriam, ——— *shall forfeit* 40 l. *half to the king, and half to the party grieved who shall sue for the same. And if he has not lands or goods worth* 40 l. *he shall be imprisoned half a year, and stand on the pillory an hour in open market. And he shall be disabled to be a witness in any court of record.*

And as to perjury, *If any person, either by subornation or otherwise, shall wilfully and corruptly commit any wilful perjury, by his deposition in any the courts before mentioned, or being examined* in perpetuam rei memoriam; *he shall forfeit* 20 l. *in like manner, and be imprisoned* 6 *months; and if he has not goods worth* 20 l. *he shall be set on the pillory in the market place by the sheriff, and have both his ears nailed. And he shall be for ever disabled to be a witness in any court of record.*

And *the judge of the court, where the perjury shall be, and the judges of assize, and justices of the peace in sessions, may inquire, hear, and determine thereof, by inquisition, presentment, bill, or information, or otherwise.*

But this act shall not extend to any ecclesiastical court.

Also this statute shall not restrain the authority of any judge, having absolute power to punish perjury before the making thereof, but that every judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done, and used to do, to all purposes, so that they set not upon the offender less punishment, than is contained in the said statute. 5 El. c. 9.

By any writ, action, bill, complaint, or information] It hath been resolved, that these words are to be extended to the latter clause concerning perjury, as well as to this concerning subornation; because it cannot well be intended, that the makers of the act, who inflict a greater penalty on subornation of perjury, than on the perjury itself, should meanto extend the purview of the law in relation to what they esteemed the lesser crime, farther than in relation to that which they esteemed the greater. 1 *Haw.* 179. 5 *Co.* 99.

But

But it is to be obſerved, that perjury or ſubornation in an action depending by *indictment*, are not within this ſtatute; but only in an action depending by *writ, action, bill, complaint, or information.* 3 Inſt. 164.

Half to the party grieved] It hath been collected from this clauſe, that no falſe oath is within the meaning of this ſtatute, which doth not give ſome perſon a juſt cauſe of complaint: and upon this ground it hath been ſaid, that he who ſwears a thing is true, but not known by him to be ſo, is not within this ſtatute; becauſe howſoever henious his offence may be in its own nature, yet when it proves in the event to be in maintenance of the truth, it cannot be ſaid to give him a juſt cauſe of complaint, who would take advantage againſt another from his want of legal evidence to make out the juſtice of his cauſe. Alſo from the ſame ground it ſeemeth clearly to follow, that no falſe oath can be within the ſtatute, unleſs the party againſt whom it was ſworn ſuffered ſome kind of diſadvantage by it; for otherwiſe it cannot be ſaid, that any one was grieved by it: and therefore that in every proſecution upon this ſtatute, it muſt appear upon the trial, that there was ſuch a ſuit depending, wherein the party might be prejudiced in the manner ſuppoſed. 1 *Haw.* 181.

Either by ſubornation, or otherwiſe] It is not neceſſary to ſet forth in the indictment, whether the party took the falſe oath thro' the ſubornation of another, or without any ſuch ſubornation, theſe words being only ſuperfluity. 1 *Hawk.* 179.

Wilfully and corruptly] Theſe words are neceſſary in an indictment or action on this ſtatute, and cannot be ſupplied by adding *againſt the form of the ſtatute*, or by concluding *and ſo a wilful and corrupt perjury did commit.* 1 Haw. 178.

Juſtices in the ſeſſions] And one juſtice may bind the offender over to the ſeſſions. *Dalt. c.* 70.

But becauſe the proſecution upon this ſtatute is more difficult than by indictment at the common law, offenders are ſeldom proſecuted upon this ſtatute, eſpecially at the ſeſſions; and it ſeems generally the ſafer way to proceed by indictment at the common law, at the aſſizes, or in the court of king's bench.

Shall not reſtrain] From this it ſeemeth undoubtedly to follow, that the court of king's bench, *&c.* proceeding upon an indictment or information of perjury, or ſubornation of perjury, at the common law, may not only ſet a diſcretionary fine on the offender, but alſo condemn him to the pillory, without making any inquiry concerning the value of his lands or goods. 1 *Haw.* 178.

PILLORY and TUMBREL.

PILLORY is derived from *pilaſtere*, a pillar; for it is a wooden pillar, wherein the neck of the offender is put and preſſed: which kind of puniſhment is very ancient, and was uſed by the *Saxons.* 3 *Inſt.* 219. The

The *tumbrel* ſeemeth to have been the ſame anciently with the *ducking ſtool*, an engine for the puniſhment of ſcolding women, by ducking them over head and ears in water, and eſpecially in muddy or ſtinking water, according to the etymology of lord *Coke*, who tells us, that the word *tumbrel* ſignifieth a dung cart. *Lamb.* 61. 3 *Inſt.* 219.

They that have been adjudged to the pillory or tumbrel, are ſo infamous, that they ſhall not be received to be jurors or witneſſes. 3 *Inſt.* 219.

And for that the judgment to the pillory or tumbrel doth make the delinquent infamous, the juſtices of the peace ſhould be well adviſed before they give judgment of any perſon to the pillory or tumbrel, unleſs they have good warrant for their judgment therein. Fine and impriſonment, for offences fineable by them, is a fair and ſure way. 3 *Inſt.* 219.

POLYGAMY.

BIGAMY is, where a man has two wives ſucceſſively, Polygamy where he has ſeveral wives at the ſame time. 3 *Inſt.* 88. *Stam.* 134.

By the ſtatute of the 1 *J. c.* 11. *If any perſon within his majeſty's dominions of* England *and* Wales, *being married, ſhall marry any perſon, the former huſband or wife being alive; ſuch offence ſhall be felony* (but within clergy).

If the firſt marriage was beyond ſea, and the latter in *England*, the party may be indicted here, becauſe the latter marriage makes the offence; but if the firſt marriage was in *England*, and the latter beyond ſea, it ſeemeth that the offender cannot be indicted here, becauſe the offence was not within the kingdom. *Kely.* 79, 80.

But *this act ſhall not extend to any perſon, whoſe huſband or wife ſhall be continually remaining beyond the ſeas, by the ſpace of ſeven years together.* id.

And this, altho' the party in *England* hath notice, that ſuch huſband or wife is living. 1 *H. H.* 693.

Nor to any perſon whoſe huſband or wife ſhall abſent him or her ſelf, the one from the other, by the ſpace of ſeven years together, in any part of his majeſty's dominions, the one of them not knowing the other to be living within that time. id.

Nor to any perſon who ſhall be, at the time of ſuch marriage, divorced by ſentence in the eccleſiaſtical court. id.

And this divorce is to be underſtood not only *a vinculo matrimonii*, as for precontract, conſanguinity, or affinity, which diſſolveth the marriage, and therefore needeth not this proviſo; but alſo, and chiefly *a menſa & thoro*, as for adultery, which diſſolveth not the marriage, yet in reſpect of the generality of the words, a perſon divorced

divorced only *a mensa & thoro* is privileged from being a felon in marrying again, altho' the second marriage is void. 3 *Inst.* 89. 1 *H. H.* 694.

Nor to any person whose former marriage hath been, by sentence in the ecclesiastical court, declared to be void, and of none effect. id.

Nor to any person, by reason of any former marriage made within age of consent. id. That is, either the woman being under 12, or the man under 14. 3 *Inst.* 89.

On a prosecution upon this statute, the first and true wife is not to be allowed as a witness against the husband; but it seems clear, that the second wife may be admitted to prove the second marriage, for she is not his wife so much as *de facto*. 1 *H. H.* 693.

POOR.

CONCERNING the binding and ordering of parish and other apprentices, see title APPRENTICES.

Concerning the filiation and maintenance of Bastard childern, see title BASTARDS.

[*In these* American *colonies, there are generally acts of the several legislatures, particularly relating to their poor, which must be the guide to the repective justices in these colonies, in whatever cases come under their cognizance: But inasmuch as those laws cannot be repugnant to the laws of* England, *and don't perhaps in all those colonies, extend to every case, it cannot but be useful, to treat of some matters, as they are enjoined by the laws of* England, *and in particular something relating to settlements*]

By the common law, a settlement did imply no more, than a man's house and home and habitation; and at the commom law a man might gain a settlement any where, and could not be removed, unless in the case of vagrancy. The statute of the 39 *El.* is the first statute that mentions the word *settlement*. The first day a man came into a parish he was a stranger, the second day he was a guest, and the third he was an inhabitant. And until the dissolution of monasteries, the poor were in a great measure maintained by the religious houses. *Cas. of S.* 44.

Afterwards, when the statute of the 43 *El.* was made, by which every parish was to maintain its own poor; such persons were held to be the poor of any parish, as were settled there a convenient time, which was judged to be a month; so that a month's abode made an inhabitant. 2 *Salk.* 492.

But there remaining some doubts upon the said statute, of the 43 *El.* the statute of the 13 & 14 *C.* 2. was made, which statute will often occur in the following sections, being the foundation of all the settlements as they stand at this day; upon which single act there have been more cases adjudged, than upon any other fifty acts in the statute book.

But

But that we may treat distinctly, and as clearly as may be, concerning this subject of settlements, (after having first premised one general rule which controlls almost all the cases of settlements, *viz.* That *no settlement can be legal, which is brought about by practice or compulsion*; Read. Tit. *Poor.)* I shall proceed in the following method:

i. Of certificates.
ii. Of settlement by birth, viz. *of bastards, and others.*
iii. Of the settlement of children with their parents.
iv. Of settlement by apprenticeship.
v. Of settlement by marriage.

i. Of certificates.

By the 13 & 14 *C.* 2. *c.* 12. Power is given, upon complaint of the churchwardens or overseers, within 40 days after a person is come to settle on any tenement under 10*l.* a year, unto two justices (1 Q.) to remove such person to the place where he was last legally settled, *unless he give sufficient security for discharge of the parish, to be allowed by the said justices.* s. 1.

And by the 8 & 9 *W.* *c.* 30. it is enacted as follows: Forasmuch as many poor persons chargeable to the place where they live, merely for want of work, would elsewhere maintain themselves, but not being able to give such *security* as may be expected, on their coming to settle in any other place, it is therefore enacted, That *if any person who shall come into any parish or place, there to reside, shall at the same time procure, bring, and deliver to the churchwardens or overseers of the parish or place where he shall come to inhabit, or to any of them, a certificate, under the hands and seals of the churchwardens and overseers of any other parish, township, or place, or the major part of them, or of the overseers where there are no churchwardens; to be attested by two or more credible witnesses, thereby owning and acknowledging the person mentioned in the said certificate, to be an inhabitant legally settled in that parish, township, or place; Every such certificate, having been allowed of and subscribed by two justices of the place from whence the certificate shall come, shall oblige the said parish or place, to receive and provide for the person mentioned in the said certificate, together with his family, as inhabitants of that parish, whenever they shall happen to become chargeable to, or be forced to ask relief of the parish, township, or place, to which such certificate was given: And then, and not before, it shall be lawful for such person, and his children, tho' born in that parish, not having otherwise acquired a legal settlement there, to be removed, conveyed, and settled in the parish or place, from whence such certificate was brought.* s. 1.

A

A certificate] The form of which certificate may be this:

New-York, Dutchess County. WE *the churchwardens and overseers of the poor of the parish* [or *township*] *of*———*in the said county of* Dutchess *do hereby certify, own and acknowledge, that* A. L. *yeoman, is an inhabitant legally settled in our parish* [or *township*] *of*———*aforesaid. In witness whereof we have hereunto set our hands and seals, the*———*day of*———*in the year of our lord*———

Attested by
A. W.
B. W.

A. B. } *Churchwardens.*
C. D. }
E. F. } *Overseers of the*
G. H. } *poor.*

We J. P. *and* K. P. *esquires, two of his majesty's justices of the peace in and for the county of* Dutchess *aforesaid, do allow of the above written certificate. And we do also certify, that* A. W. *one of the witnesses who attested the same, hath this day made oath before us the said justices, that he the said* A. W. *did see the churchwardens and overseers of the poor of the said parish, whose names and seals are thereunto subscribed and set, severally sign and seal the same; and that the names of* A. W. *and* B. W. *who are the witnesses attesting the said certificate, are respectively of their own proper hand writing. Given under our hands this*———*day of*———

Formerly it was held, that a certificate was only conclusive between the two parishes: but now it is held to be conclusive to all the world, as is determined in the following case; *viz.*

M. 9 *An. Honyton* and *St. Mary-Axe.* The question was, Whether the parish granting the certificate was bound thereby as to the parish only to which the certificate was granted, or concluded as to all parishes whatsoever? *Parker* Ch. J. delivered the opinion of the whole court: Before the statute a certificate was only the evidence of a private undertaking between the parishes, in the nature of a contract; but now it is a solemn acknowledgement, like the conuzance of a fine; and thereby the party is owned to be legally settled there: and as all other parishes on this certificate are bound to receive him, so the parish that certifies is concluded as to all other parishes. 2 *Salk.* 535. *Foley* 177.

And the case is put yet even stronger in the following report *T.* 20 *G.* 2. *K.* and *Hedcron.* The parish of *Maidstone* gave a certificate to *Hedcron*, acknowledging *Ric. Burden*, and *Mary* his wife, and their four children, to be legally settled at *Maidstone.* Afterwards it appeared, that *Mary* was not his lawful wife, but that he had a former wife then living. Upon which *Maidstone* acknowledged the settlement of the real and true wife, but not of the said *Mary* and her children; and pleaded, that it would be hard that they should be forced to take two wives, and different children. But by the court, the parish that certifies must take care for whom they

they certify; and the certificate is concluſive. *Seſſ. C. V.* 2. 206. *Str.* 1233.

Whenever they ſhall happen to become chargeable] Yet a certificate to receive the perſons whenever they become chargeable, is not binding againſt a ſubſequent ſettlement; for tho' it be according to the agreement between the pariſhes, yet a private agreement in this reſpect ſhall not alter the law. *Harriſon* and *Lewis*, 3 *Salk.* 253.

ii. Of ſettlement by birth; viz. *of baſtards, and others.*

1. Of *baſtards.*

Note; It is not in this place queſtioned, who ſhall or ſhall not be deemed a baſtard, but the ſettlement only is conſidered of ſuch as are firſt ſuppoſed to be baſtards: other matters relating to them, as concerning their filiation, and maintenance, and the like, are treated of under title BASTARDS.

A baſtard child is prima facie *ſettled where born*: This is an uncontroverted rule, and is ancienter than the ſtatute of 13 & 14 *C.* 2. concerning ſettlements; and ancienter than the 43 *El.* which requires the poor to be maintained within their reſpective pariſhes; for in the ſtatute of the 18th of *Eliz.* which takes order for the mother and reputed father to contribute towards their maintenance, it is thus recited in the preamble, *Concerning baſtards begotten and born out of lawful matrimony, the ſaid baſtards being now left to be kept at the charges of the pariſh where they were born.*

Nevertheleſs this rule admits of divers exceptions; which are as follows:

1. If a woman comes into a place by privity and coluſion of the officers where ſhe belongs, and is there delivered of a baſtard; ſuch baſtard gains no ſettlement, notwithſtanding its birth. *Caſ. of S.* 66.

And in the caſe of *Maſters* and *Child*, *H.* 10 *W.* It was ruled, that if a woman big with child of a baſtard, and ſettled in one pariſh, is perſuaded to go into another, and there be delivered; this fraud will make the pariſh chargeable where the mother was ſettled, tho' the child was not born there: But if a woman, with child of a baſtard, come accidentally into one pariſh, and is perſuaded by ſome of the pariſhoners to go into another pariſh, which ſhe doth, and there is delivered, this ſhall not charge that pariſh which perſuaded her. 3 *Salk.* 66.

2. Alſo, if a baſtard is born under an order of removal, and before the mother can be ſent to her place of ſettlement, being hindred by water or otherwiſe; ſuch baſtard ſhall not be ſettled where ſo born, but at the mothers ſettlement. *M.* 10 *An.* 2. and *Icrleford. Seſſ. C. V.* 1. 33. *Caſ. of S.* 66.

3. So alſo, If the officers are carrying a woman by virtue of an order of removal, and ſhe be delivered on the road *in tranſitu*; the baſtard

baſtard ſhall go with the mother where ſhe is going, by virtue of the order, notwithſtanding the birth. *E.* 10. *An. Jane Grey*'s caſe. *Caſ. of S.* 66.

4. Again, In the caſe of *Much-Waltham* and *Peram*, *M.* 8 *W.* A woman big with a baſtard child, was removed by order of two juſtices, from *Much-Waltham* to *Peram*. Before the next ſeſſions, ſhe was delivered at *Peram* of a baſtard child. At the ſeſſions, *Peram* appealed, and the juſtices adjudged the woman to be laſt ſettled at *Much-Waltham*, and ordered her to be ſent back thither. After which, an order was made, to ſettle the child at *Peram*; which it was moved to quaſh, becauſe tho' regularly baſtards muſt be maintained where born, yet in this caſe, where there ſeems to be a contrivance, it ſhall not be ſo. The court ſeemed to agree to this, and a rule was made to ſhew cauſe, but none was ſhewed. 2 *Salk.* 474.

And further, In the caſe of *Weſtbury* and *Coſton*, *H.* 2 *An.* A woman big with child was removed by order of the juſtices, from *Weſtbury* to *Coſton*: And, pending the order, before next quarter ſeſſions, ſhe was delivered of a baſtard child. *Coſton* appealed, and thereupon the order of the two juſtices was reverſed; but the child was ſent back to *Coſton*, as the place of its birth. But by the court, the birth at *Coſton*, did not ſettle the child there, becauſe it was under an illegal order procured at *Weſtbury*, which order being reverſed, the matter is no more than this, that they unjuſtly procured the woman to go thither. And *Holt* Ch. J. ſaid, Tho' here be no fraud in this caſe, yet here is a wrongful removal, and the reverſal makes all void *ab initio*: Fraud, or not fraud, is not material in this caſe; but the ſettlement of the child depends upon the removal, for if that was wrong, they ſhall not eaſe themſelves by it. 1 *Salk.* 121. 2 *Salk.* 532.

5. So alſo, By the ſtatute of the 17 *G.* 2. *c.* 5. Where any woman, wandering and begging, ſhall be delivered of a child, in any pariſh or place, to which ſhe doth not belong, and thereby becometh chargeable to the ſame; the churchwardens or overſeers may detain her, till they can ſafely convey her to a juſtice of the peace. And if ſuch woman ſhall be detained, and conveyed to a juſtice as aforeſaid, the child of which ſhe is delivered, if a baſtard, ſhall not be ſettled in the place where ſo born, nor be ſent thither by a vagrant paſs; but the ſettlement of ſuch woman, ſhall be deemed the ſettlement of ſuch child. *ſ.* 25.

6. A child born in the houſe of correction, ſhall be ſent to the place of its mother's ſettlement. 2 *Bulſtr.* 358.

And in the caſe of *Elſing* and county gaol of *Hereford/hire*, *H.* 2 *G.* A baſtard was born in the county gaol: Reſolved, that the ſettlement was with the mother. *Seſſ. C. V.* 1. 94.

7. *T.* 5 *G.* *New Windſor* and *White Waltham*. The pariſh of *White Waltham*, gave a certificate to a man and a woman ſuppoſed to be his wife, with which they went into the pariſh of *New Windſor*, and had there ſix children. Afterwards, the woman ſwearing

swearing they were never married, the question was, whether (upon that supposition) the children, as bastards, should be settled in the parish where they were born, or in the parish which gave the certificate with their father and mother. And by the court, there is no doubt but the bastard of a certificate person is settled in the place of his birth, for he is not such an issue as will follow the settlement of his father or mother, neither is such bastard *his* or *her* child within the intention of the statute, so as to be sent back with the parent. *Str.* 186.

But in this case the point turned chiefly upon the certificate's being conclusive (for as the parish had given a certificate with the man and woman, as husband and wife, the court held that they were not afterwards to be admitted to dispute the validity of such marriage, but adjudged the children to be settled in the parish granting the certificate); Therefore in the case of *Hynton* and *Lydlinch*, *T.* 15. *G.* 2. the matter came under debate again; which was thus: A single woman went into the parish of *Lyd-linch*, with a certificate from *Hinton*; lived there a year, and then had a bastard child. The sole question was, Whether the child should be settled in the parish where born, or in the parish giving the certificate. By the court; The certificate must be taken to be good, and all frauds to be laid out of this case, it being a year that she dwelt in the parish, before she was delivered of the child; and wherever this court, in determinining a settlement, adjudges upon the point of fraud, that fraud must be expressly stated; for as fraud is odious, it is never to be presumed. The cases hitherto adjudged, as to this point, have either depended on point of fraud, or an illegal removal. So where the child is born in a gaol, he shall be settled in the parish where his mother is; for she shall be construed to be in the custody of the law, and in all other respects a parishioner. But the present case stands entirely on the 8 & 9 *W.* which for the encouragement of labour and industry, gave power of removing persons by certificate, which certificate obliges the parish to whom given, to receive and continue them in that parish, till they become actually chargeable, and then such person is to be removed, together with his or her *family*, and in another place, with his or her *children*, to the place from whence the certificate was brought. The question then is, whether the bastard is included under the words *family* or *children*, and we take it he is not: for the law takes no notice of bastard children, they are *filii nullius*, *filii populi*, and are *prima facie* settled where born. *Nelf. Baft. Seff. C. V.* 2. 170. *Str.* 1168.

Hitherto concerning the settlement of a bastard child: But notwithstanding the child's settlement, yet nevertheless, if the mother and the child have different settlements, it seemeth that the bastard child, even as all other children, shall go with the mother for nurture until the age of seven years, and be maintained at the charge of the parish where the mother is settled, as a necessary appendage of the mother, and inseparable from her; for there doth

doth not seem to be any law to force the child from the mother, or to compel the parish where it was born to maintain it whilst it is out of their parish.

As to its being inseparable from the mother, the following case happened, *M.* 3 *G.* 2. *Skeffreth* and *Walfoad.* The order was, to remove a woman to her settlement; and her bastard child, of two years of age, to another parish at a distance from the mother, being the place of its birth. It was objected, that the child being a nurse child, they cannot separate it from the mother, by reason of the care necessary to nurture so very young a child; which none can be supposed so fit to administer as the mother of it; and therefore it should have been sent with her to the place of her settlement. And it was quashed by the court for that reason. *Sess. C. V.* 2. 90.

But altho' the child may not be separated from the mother, yet if she voluntary desert it, it seemeth that the cause of nurture then ceaseth, and that then it may be sent to its place of settlement.

2. Of *legitimate children.*

In the case of *Rickmansworth* and St. *Giles*'s; A child was ordered to be removed from the parish of *Rickmansworth* to the parish of St. *Giles*'s, as being the place of his birth, the place of his father's last legal settlement being not known: For where the father's place of last legal settlement of a legitimate child is not known, there the child may be sent to the place of its birth, as well as an illegitimate one. *Black.* 246.

H. 8 *An. Cripplegate* and *St. Saviour*'s. A child of three years of age was removed from one of these parishes to the other, and it appeared in the order, that they removed him there, because he was born there, not having any other settlement. By the court; The father's settlement is the settlement of the children, when it can be found out; otherwise the birth of the child *prima facie* is the settlement of the child, until there is another settlement found out. So a bastard child's settlement is its birth, because it is *filius nulius*; so if they cannot find out the settlement of a legal father, the birth is a settlement of the child. If a child be dropt in a parish, they may remove him to the place of his birth, or where his father's settlement was; and the settlement by birth is only *quousque* they find the father's settlement; and if they never can find that, it is absolute upon them. *Foley* 265.

But here it is to be observed, that in the two cases abovementioned, the point was not in question, whether or no if the father had no settlement, yet if the *mother* had a settlement, such children should follow the mother's settlement, or should be sent to the place of their birth; and there will appear good opinions in the next course of settlements, that if the father had no settlement as being a foreigner, or if the father's settlement is not known, yet if the mother hath a settlement, the children in such case shall not be sent to the place of their birth, but to the place of their mother's settlement:

ſettlement: But the rule intended to be drawn from theſe caſes, which is ſufficient for this place, and which the caſes will well bear, is no more than this, that the birth place of a legitimate child is the ſettlement of it, until another ſettlement be found out.

iii. *Of the ſettlement of children with their parents.*

The birth of legitimate children doth not give them a ſettlement, except where the ſettlement of their father and mother is not known, and then only till it is known. *Foley* 269.

Formerly it was held, that a child ſhall continue with its parents as a nurſe child, until it ſhall be 8 years of age, during which time it ſhall not be deemed capable of gaining a ſettlement in its own right; but by the latter reſolutions it ſeems to be agreed, that a legitimate child ſhall neceſſarily follow the ſettlement of its parents as a nurſe child, or as part of the family, only until it ſhall be 7 years of age; and that after that age it ſhall not be removed as part of the father's family, but with an adjudication of the place of its own laſt legal ſettlement, as being deemed capable at that age of having gained a ſettlement of its own. But it ſeemeth not difficult to determine, with exact certainty, at what age a child may have acquired a ſettlement of its own, diſtinct from the parents ſettlement. For by the 5 *El. c.* 5. *ſ.* 12. A child of ſeven years of age may be bound apprentice to a ſhipwright, fiſherman, owner of a ſhip, or other perſon uſing the trade of the ſeas; and by the vagrant act of the 17 *G.* 2. a vagrant's child of that age may by the juſtices be put out an apprentice: And ſo ſoon as he ſhall have reſided and lodged in a pariſh for 40 days under the indenture, he will have thereby gained a ſettlement. So that the preciſe time, when a perſon may have gained a ſettlement in his own right, is at the age of ſeven years and 40 days.

E. 10 *An. R.* and *St. Giles*'s. Order to remove an infant to the pariſh of *St. Giles*; becauſe it appeared, that tho' the father was ſettled at another place, yet the child was born at *St. Giles*'s. Quaſhed, by the court; for that the place of the ſettlemeut of the child is with the father, and not the place where the child was born, *Seſſ. C. V.* 1. 18.

H. 10 *G. St. Giles's Reading* and *Everſly Blackwater.* It was ruled by all the court upon argument, that where a father gains a ſecond ſettlement after the birth of his child, that ſettlement is immediately communicated to the child. And a child may be ſent to the place of his father's ſettlement, without ever having been there before. *Seſſ. C. V.* 2. 112. *Str.* 580.

M. 12 *G.* 2. *Scuton* and *Sidbury.* The queſtion was, whether the children, being above the age of nurture, ſhall be removed with the father to the father's ſettlement, where the children had never inhabited? By *Lee* Ch. J. In the caſe of *Everſly Blackwater*, the court were of opinion, that a child might be ſent to the ſettlement of his father, tho' it had never been there before, contrary

contrary to an opinion of L. *Parker* in a former case. And he said, the true distinction, I think, is, that where children have gained no settlement, but continue part of their father's family, they shall follow their father's settlement. *Sess. C. V.* 2. 150. *Andr.* 345.

T. 2 *An. Comner* and *Milton.* A man settled at *Comner*, and having several children born in that parish, afterwards removed to *Milton* with his children, and gained a settlement there; and becoming very poor, his children born in *Comner*, were by an order of two justices sent to *Comner*, *viz.* those that were under seven years old; the justices apprehending, that the place of their birth was the place of their lawful settlement. And this order being removed into the king's bench by certiorari, it was insisted to maintain the order, that the children had gained a settlement in *Comner* by birth, which was not altered or defeated by any subsequent act of their father in gaining a settlement at *Milton*; for his children were with him there only as nurse children, and his settlement shall not be the settlement of the children. But by *Holt* Ch. J. The place where a bastard is born, is the place of his settlement, unless there is some trick to charge the parish; but the place where legitimate children are born, is not the place of their settlement, for let that be where it will, the children are settled where their parents are settled; as for instance, if the father is settled in the parish of *H.* but goes to work in the parish of *B.* and before he gains any settlement there, has a son born in the parish of *B.* and then dies; this child may be sent to the parish of *H.* for it is not the birth, but the settlement of the father, that makes the settlement of his child; and if the father hath gained a new settlement for himself, he hath likewise gained a new settlement for his children, who do not go with him to his new settlement as nurse children, but as part of his family. 3 *Salk.* 259.

H. 10 *G. St. Giles's* and *Eversly Blackwater.* Tho' the place of the birth of a child, where the father hath no settlement, is the place of the settlement of the child; yet where the father hath gained a settlement, his children, tho' born in another parish, shall be looked on as settled at the place of their father's last legal settlement, and shall be removed thither, as well after the death of their father, if occasion requires, as in his life time, supposing they have gained no settlement of their own. L. *Raym.* 1332. *Str.* 589.

T. 8 *W. K.* and *Luckington.* *Howel* and his wife were settled at *Luckington*, and came to *St. Austin's*, and there a child was born. The father dies in the king's service. The question was, who shall keep the child? It was objected, that it was settled where born; for that they could not send it to the father, when he was dead. But by *Holt* Ch. J. The death of the father doth not alter the child's settlement. *Comb.* 380.

M. 1 *G. St. George's* and *St. Katharine's.* A man settled in *St. Katharine's*, married, and had six children born there, and died. After his death, the widow goes into the parish of *St. George*, with her

her six children, and rents a house of 12*l.* a year, and lives in it with her children four months. The single question was, whether the children should be settled, where their father was last settled, or have a settlement with their mother in the parish of *St. George*; the whole court were of opinion, that the six children were settled in the parish of *St. George*, where the mother's last settlement was. And by *Parker* Ch. J. There is no distinction between the settlement of children with the father or mother; for they are as much hers as the father's, and nature obliges her, as much as the father, to provide for them; so does the law; and every argument that holds for their settlement with the father, holds as to their settlement with the mother. The reason why children shall not gain a settlement, where the widow gains a settlement only by intermarriage, is, because it is then not her family, but her husband's; and she cannot give the children any sustenance without the husband's leave. But in this case, since she is equally punishable with her husband for deserting her children, and therefore could not leave them behind her, they must gain a settlement with her. *Foley* 254. *Sess. C. V.* 1. 60.

H. 13 *G. Woodend* and *Paulespury*. *John Buncher* was settled at *Woodend*, and died, leaving a widow and one daughter aged 14 years. The widow removed to *Paulespury*, into a messuage and tenement of her own for life, and took her daughter with her, and the daughter lived with her there two years. And the question was, whether the daughter gained a settlement at *Paulespury*? And it was adjudged that she did; because the mother being a widow, having gained a new settlement after her husband's death, the daughter gained a settlement also as part of her family. And there is no difference, between a father's gaining a settlement, and a mother's in such case as this; for the mother is obliged to provide for her children after her husband's death, as the father was when living; and she could not leave this daughter behind her, neither could she be removed from her. L. *Raym.* 1473. *Fol.* 256. *Str.* 746.

The same resolved in the case of *Barton Tuff* and *Happisburg*. *T.* 8 & 9 *G* 2. *Sess. C. V.* 1. 317.

If after the husband's death, the wife shall marry again, to a man settled in another parish; her children by her former husband must go with her for nurture, yet they are no part of her second husband's family; and therefore gain no settlement thereby, in the parish where the father in law is settled. L. *Raym.* 1473.

T. 2. *An. Comner* and *Milton*. 2 *Salk.* 482. *M.* 10 *W.* 3 *Salk.* 259. If after the death of the father, the mother marries again, to a husband who is settled in another parish; her children, such of them as are above seven years old, shall not be removed; those under, shall be removed, but that only for nurture, for they shall be kept at the charge of the other parish, where their father whilst living was settled; and to that parish they may be sent after 7 years old, as to the place of their lawful settlement; for this accidental settlement

settlement of their mother, which was only by the marriage with a second husband, and as she is now become one person with him, shall not gain a settlement for her children.

Note; this authority is only produced here, to shew the *settlement*, as to which it may be good enough; but as to the *maintenance* (as hath been intimated before, and as will be considered more at large when we come to treat of the maintenance of the poor) it doth not seem sufficiently to appear, how one township may be compelled to maintain their poor residing in another township, unless it be in the case of persons residing under a certificate.

E. 8. *G.* 2. *K.* and *St. Mary Berkhampstead* The father ran away, and the mother went and resided on an estate devised to her: The question was, whether the children could gain a settlement, by residing with the mother on such estate, where the father had never lived? By *Hardwick* Ch. J. As it doth not appear, that the father is dead, we must suppose him to be living; and in such case, the children could gain no settlement but what is derived from the father. *Sess. C. V.* 2. 182.

H. 12 *G.* *K.* and *Westerham.* An *Englishman*, whose settlement was not known, married, had a child, and ran away: The child was then nine years of age. By the court, the mother and child ought to be settled, where the mother was settled before marriage. *Foley* 252.

M. 3 *G.* 2. *St. Giles's* and *St. Margaret's.* *Sarah Etherington*, with *Dorothy* her daughter aged five years, was removed from *St. Margaret's* to *St. Giles's*, as being the place of *Sarah's* last legal settlement before her marriage, she having married an *Irishman* who had no settlement: And it was adjudged, that *Dorothy* her daughter shall be settled with her mother in the parish of *St. Giles*, where her said mother's settlement was before marriage. *Fol.* 251.

T. 9 *G.* *K.* and *St. Paul's Shadwell.* Resolved by *Eyre* and *Forteſcue*, that where the father being a foreigner had no settlement, the children should have the benefit of their mother's settlement; for that her right should descend to them, and they should not be sent to the place of their birth. *Sess. C. V.* 2. 113.

H. 10 *G.* 2. *St. John's Wapping* and *St. Botolph's Bishopgate.* A child of an *Irishman* having no settlement in *England*, and supposed to be on board a man of war in the *West Indies*, and of his wife being an *Englishwoman*, was adjudged to go with the mother, to the mother's settlement which she had before marriage.

A travelling woman, having a small sucking child upon her, was apprehended for felony, and sent to the gaol, and was hanged: This child is to be sent to the place of its birth, if it can be known; otherwise it must be sent to the town where the mother was apprehended, because that town ought not to have sent the child to gaol, being no malefactor. *Read. Poor. Dalt.* 163.

And where a child is first known to be, that parish must provide for it, till they find another. *Comb.* 364. 372.

iv. Of settlement by apprenticeship.

The statutes relating to the settlement of apprentices, are these following; which I will first exhibit together at one view, and then set forth the judgment of the court of king's bench upon the several clauses of the said statutes in their order.

By the 13 & 14 *C.* 2. *c.* 12. *On complaint by the church-wardens or overseers, within* 40 *days after any person shall come to settle in any parish, on any tenement under* 10 *l. a year; two justices* (1 Q.) *may remove him to the place where he was last legally settled, either as a native, housholder, sojourner, apprentice, or servant, for the space of* 40 *days, at least.* By the 1 *J.* 2. *c.* 17. *The said* 40 *days shall be reckoned, not from the time of his coming to inhabit, but from the time of his delivering notice in writing.* And by the 3. *W.* *c.* 11. *Not from the time of delivering such notice, but from the time of the publication of such notice in the church.*

But by the said act of the 3 *W.* *If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, tho' no such notice in writing be delivered and published.* s. 8.

H. 4 *An. St. Bride's* and *St. Saviour's.* A woman who was settled at *St. Saviour's*, with her apprentice by indenture, came and took lodging in *St. Bride's*, and there continued above 40 days with her apprentice, who served her there. This was held by the court, to be a settlement of the apprentice at *St. Bride's*, 2 *Salk.* 533.

M. 8 *G* 2. *K.* and *St. George Hanover Square.* *Alice Wheeler* was bound by indenture a parish apprentice, to *George Lister*, in the parish of *St. George*, where she lived above 40 days under the indenture, and gained a settlement; Afterwards, she was by parol agreement hired out by the said master to one *Hall* in the parish of *St. Mary le bone*, and there lived and lodged above 40 days, that is, for the space of one year and upwards, the said apprenticeship continuing; and the said *George Lister* her master received her wages, and found her cloaths: By the court, the apprentice is well settled in *St. Mary le bone.* Sess. C. V. 2. 138. *Str.* 1001.

E. 3 *G. St. Olave's* and *All Hallows.* A person is bound apprentice to a master who lives in *St. Olave's*: Afterwards, the apprentice by his master's consent lives with another person in *All Hallows.* By the court; He gains a settlement in the last place; for a person may serve his master in another parish or place; and altho' he serves another man, yet it is by consent of his master, and the benefit accrues to his master. *Cases of S.* 153. *Str.* 554.

E. 10 *G. Buckington* and *Shepton Bechamp.* The master ran away: The apprentice hired himself for a year, and served the year. By the court; He gained no settlement, not being *sui juris*, nor of a capacity to hire himself; otherwise, had it been by consent of his master, or had his indenture been cancelled. *Cases of S.* 155. *L. Raym.* 1352. *Str.* 582.

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The ſon was bound apprentice to his father, who afterwards gave up the indentures of apprenticeſhip, but did not cancel them: Then the ſon was hired into another pariſh for a year, and ſerved the year; and being likely to be chargeable, he was ſent by an order to the pariſh where he lived as an apprentice; becauſe, the indentures being not cancelled, he ſtill continued an apprentice there. *Mod. Ca.* 190. *Dalt.* 180.

E. 9 *G. St. Olave* and *All Hallows.* If a maſter aſſigns over his apprentice, and the apprentice ſerves in purſuance of that aſſignment; he thereby gains a ſettlement: and it differs not whether he ſerves with one maſter or another; for he ſtill ſerves by virtue of the firſt indenture. *Seſſ. C. V.* 1. 215.

13 *W. Caſtor* and *Aicles.* A poor child being bound at *Caſtor*, his maſter there aſſigned him over to another maſter; who lived in *Aicles.* And it was held, that the poor child ſhould gain a ſettlement at *Aicles*, where his ſecond maſter lived; for tho' the apprentice was not aſſignable, yet that aſſignment was not merely void, but amounted to a contract between the two maſters, that the child ſhould ſerve the latter. So that this aſſignment is good by way of covenant, tho' it be not an aſſignment to paſs an intereſt. 1 *Salk.* 68.

T. 12 *G.* 2. *K.* and *Eaſt Bridgeford.* Upon a ſpecial order it was ſtated, that an apprentice upon the death of his maſter, was with his own conſent turned over by the widow (who had taken no adminiſtration) to another maſter, whom he ſerved. And the court held it a good ſettlement in the laſt pariſh, where the apprentice was bound to one maſter, and ſerved another all the while in another pariſh, and there gained a ſettlement. *Str.* 1115.

An apprentice well ſettled, being with a maſter removable, cannot be removed with him; but the maſter may complain on the covenant. *Caſes of S.* 211.

H. 8 *G.* 2. *Newbury* and *St. Mary's* in *Reading.* A poor boy of 14, bound himſelf apprentice for ſeven years to a weaver. It was argued, that this was not a binding according to the ſtatute, and therefore did not gain a ſettlement; and that the indenture was void, becauſe an infant could not bind himſelf. But by the whole court, It did gain him a ſettlement; for an infant may make an indenture for his own benefit. *Foley* 154. *Andr.* 373.

v. *Of ſettlement by marriage.*

It ſeemeth to be a good general rule, that a woman marrying a huſband who hath a known ſettlement, ſhall follow the huſband's ſettlement. And although in the caſe of *Uppoterce* and *Dunſwell*, *M.* 1 *G.* it was held, that the wife ſhall not gain a ſettlement with the huſband, until ſhe hath lived with him 40 days unremoveable as part of his family; yet afterwards, in the caſe of *K.* and *Pinceborton*, *M.* 3 *G.* it was agreed by the court, that a wife is to be ſent to her huſband's ſettlement, though ſhe never lived with him

there. And in the case of *St. Giles*'s and *Everfly Blackwater*, *H.* 10 *G.* the widow was removed to the deceased husband's settlement, though she had never been there; and it was ruled by all the court, that the removal was good, and that she must be sent to the last legal settlement of her husband, having acquired no other settlement since his death. *Cas. of S.* 89. *Sess. C. V.* 1. 80, 105. *V.* 2. 112.

It seemeth also to be agreed, that a wife can gain no settlement, separate and distinct from her husband, during the coverture. As in the case of *Alta Roding* and *White Roding*, *M.* 30 *G.* 2. where the wife, after the husband was run away, went to live upon a copyhold of her husband's, where her husband had never resided: it was held, that although she might not be removed from thence yet (her husband being living) she could not thereby gain a settlement.

It seemeth also to be agreed, that a woman marrying a husband that hath no known settlement, doth not lose her former settlement which she had before marriage. But the great point of difference hath been, whether such settlement continues to her during the coverture, or it is suspended during the coverture, and only revives after the husband's death, Which point includes in it this question, Whether the parish where the woman was last legally settled before marriage, shall, by barely proving such marriage, avoid the settlement with them during the husband's life? or whether, in order to avoid such settlement, it is not also necessary for them to prove, that such woman had gained another settlement, that is to say, that the husband hath a settlement, and where?

In relation to which case, where the husband hath no known settlement, it hath been adjudged as follows:

E. 2 *G. St. Giles*'s and *St. Margaret*'s. A woman marries a foreigner; and her husband dies. By the court; She must be sent to the place of her settlement before marriage. *Sess. C. V.* 1. 97.

H. 12 *G. Westham* and *Chiddingstone*. It was stated, that a single women, settled at *Chiddingstone*, was married to a man who is since dead, but his settlement did not appear: And by the court, Her settlement before marriage stands. *Str.* 683.

M. 1 *G. Uppoterce* and *Dunswell*. A woman is settled in *Dunswell*; and afterwards marries a vagrant, whose settlement doth not appear. But he goes and lives in *Uppoterce*, and dies there. Two justices remove the widow to *Dunswell*, where she was settled before marriage. And by the court; Where it appears that the husband in his life time had no legal settlement as can be found, there the marriage shall not put her in a worse condition than she was before.

Hitherto the cases seem to be agreed, being that the husband is dead. But the difficulty is, where the husband is supposed to be living. And in relation to this point, the following strong cases have been adjudged.

M. 12 *An. Dunsford* and *Wilborough Green*. A woman who was settled at *Wilborough*, marries *Archibald Player*, a *Scotchman*, who had

had gained no settlement in *England*, Two justices remove her f[illegible] *Dunsford* to *Wilborough*, the place of her settlement before marr[illegible]e. Exception; this is a married woman, and by her marriage she ought to be settled where her husband was, and this cannot be right; for if the justices may send away a wife, it is making a divorce between husband and wife; and if he is a *Scotchman*, they ought to send her, as part of his family, to the bordering counties of *Scotland*, according to the act of the 39 *El. c.* 4. *s.* 6. The court held, though she was a married woman, yet if her husband had no settlement, she could not gain any other settlement than she had before marriage; and as for divorce it was none; for the husband might come to her as well at *Wilborough Green* as at *Dunsford*. Foley 249. Cas. of S. 31.

M. 3 *G. St. Giles*'s and *St. Margaret*'s. *Sarah Etherington* was settled at *St. Giles*'s; and marries an *Irishman*. By the court; The marriage will not put her in a worse condition than she was before; and they held that she continued her settlement, notwithstanding her marriage. *Cas. of S.* 98.

H. 12 *G. K.* and *Westerham*. The order specially stated by the sessions was this: It appeared to the court, by the testimony of *Elizabeth Pinchen*, that the said *Elizabeth Pinchen* was, at the time the said order was made, a married woman, and that her husband was one *Thomas Pinchen*, who was born in *Wiltshire*, but in what place or parish he never informed her, nor doth she know; but that he is run away, and still living, for what she knows. By the court; She ought to be settled where her settlement was before marriage. *Foley* 252. *Sess. C. V.* 2. 110.

Although it is generally true, that no settlement shall be good, which is brought about by fraud or practice; yet it seemeth that the rule faileth in this case, and that if the marriage take effect, the settlement is good: for the two following cases do proceed upon such supposition.

M. 11 *G. K.* and *Edwards*. The overseers were indicted for a conspiracy, in giving a small sum of money to a poor man of another parish, for marrying a poor lame woman of their own parish, and so by this contrivance conspiring to settle the woman in the other parish, where her husband was settled: By the court; If there is a conspiracy, to let lands of 10*l.* a year to a poor man in order to gain him a settlement, or to make a certificate man a parish officer, or to send a woman big of a bastard child into another parish to be delivered there, and so to charge the parish with the child, these are certainly crimes indictable. But this indictment was quashed, for want of averment, that the woman was last legally settled in the parish relieved by her marriage. 8 *Mod.* 321. *Sess. C. V.* 1. 265.

H. 6 *G.* 2. *K.* and *Parkins*. A single woman of *Studley*, big with child of a bastard, was sent back to *Studley*. *Parkins* overseer of *Studley*, threatened with all the severity of the law, to force her to

to marry a ſtranger of another pariſh, againſt both his and her conſent, he giving five guineas to the huſband, and keeping him in liquor. By the court; Shew cauſe why an information ſhould not go. *Seſſ. C. V.* 1. 176.

[*There are ſeveral other ſorts of ſettlements than thoſe here largely treated of, the gaining of which are generally ſomewhat different in the different provinces in* America, *ſome being acquired by leſs ſervices or leſs eſtates than others; all which are beſt adjudged by the ſeveral laws of thoſe provinces,---- Yet we can't well diſmiſs this head without ſome farther extracts from the laws of* England, *relating to removals.*]

i. Order of removal in general.

In treating of this ſubject, we will firſt ſet forth the ſtatutes: Then the eſtabliſhed form of an order of removal thereupon: And then take the ſame in pieces orderly and diſtinctly, thereby to diſcover the ſeveral ſhelves and rocks upon which numberleſs orders have been ſhipwrecked.

By the 13 & 14 *C.* 2. *c.* 12. it is enacted as follows: *Whereas by reaſon of ſome defects in the law, poor people are not reſtrained from going from one pariſh to another, and therefore endeavour to ſettle themſelves in thoſe pariſhes where there is the beſt ſtock, the largeſt commons or waſtes to build cottages, and the moſt woods for them to burn and deſtroy, and when they have conſumed it, then to another pariſh, and at laſt become rogues and vagabonds; it is enacted, That it ſhall be lawful, upon complaint made by the churchwardens or overſeers of the poor of any pariſh, to any juſtice of the peace, within* 40 *days after any ſuch perſon coming ſo to ſettle in any tenement under the yearly value of* 10l. *for any two juſtices of the peace (one whereof is of the* quorum*) of the diviſion where any perſon that is likely to become chargeable to the pariſh, ſhall come to inhabit, by their warrant to remove and convey ſuch perſon to ſuch pariſh where he was laſt legally ſettled, unleſs he give ſufficient ſecurity for the diſcharge of the ſaid pariſh, to be allowed by the ſaid juſtices.* ſ. 1.

And if ſuch perſon ſhall refuſe to go, or ſhall not remain in ſuch pariſh where he ought to be ſettled, but ſhall return of his own accord to the pariſh from whence he was removed, one juſtice may ſend him to the houſe of correction, there to be puniſhed as a vagabond. ſ. 3.

And if the churchwardens and overſeers of the pariſh to which he ſhall be removed, refuſe to receive ſuch perſon, and to provide work for him, as other inhabitants of the pariſh; any juſtice of that diviſion ſhall bind any ſuch officer in whom there ſhall be default, to the aſſizes or ſeſſions, there to be indicted for his contempt in that behalf. 13 & 14 *C.* 2. *c.* 12. ſ. 3.

Upon complaint made by the churchwardens or overſeers of the poor of any pariſh to any juſtice of the peace] By theſe words one juſtice alone hath cognizance of the matter, ſo far as concerneth the complaint only; and by virtue thereof may iſſue his warrant to bring the party before him in order to his examination; or he may iſſue his warrant,

warrant, to bring the party before himself and another justice, in order to hearing and determining the complaint; for he himself alone cannot hear and determine, but only bring the matter into the course of being heard and determined by two justices: and therefore it is most usual for the two justices originally to issue their joint precept to bring the party before them for that purpose. Nevertheless, if the party is willing, he may go voluntarily before the justices, at the request of the overseers, without any warrant at all.

The form of which warrants or precepts aforesaid, where they are requisite, may be to this effect:

Warrant of one justice for a person to be examined concerning his settlement.

New-York, Ulster County. } To any Constable of said county.

FORASMUCH *as complaint hath been made before me——one of his majesty's justices of the peace in and for the said county, by the churchwardens and overseers of the poor of the parish of———in the county aforesaid, that* A. P. *hath come to inhabit in the said parish, not having gained any legal settlement therein, nor produced any certificate owning him to be settled elsewhere, and that the said* A. P *is likely to become chargeable to the said parish of———. These are therefore to require you to bring the said* A. P. *before me, to be examined concerning the place of his last legal settlement. Herein fail you not. Given under my hand and seal the———day of———*

Warrant of two justices in order to the adjudication.

New-York, Ulster County. } To———

FORASMUCH *as complaint hath been made before us——— two of his majesty's justices of the peace in and for the said county, and one of us of the* quorum, *by the churchwardens and overseers of the poor of the parish of——— in the said county, that* A. P. *hath come to inhabit in the said parish, not having gained any legal settlement therein, nor produced any certificate owning him to be settled elsewhere, and that the said* A. P. *is likely to become chargeable to the said parish of———. These are therefore to require you to bring the said* A. P. *before us, at the house of——— in——— in the said county, on———the———day of———at the hour of———in the afternoon of the same day, to be examined concerning the place of his last legal settlement, and to be further dealt withal according to law. Given under our hands and seals the——— day of———*

It

It may also not be unfitting, especially in cases of doubt or difficulty, to give notice (if it may be) to the overseers of the parish or place where the settlement is supposed to be, that they may attend, if they think proper, when the adjudication is made; which probably might prevent appeals oftentimes from such adjudications and orders, Which notice may be to the effect following.

Summons to shew cause against an order of removal.

New-Jersey, Essex County. TO *the churchwardens and overseers of the poor of the parish of* ——— *in the county of* ——— *and to every of them.*

This is to summon you, or some of you, to appear (if you shall so think proper) before ———, *and such other of his majesty's justices of the peace for the said county of* E. *as shall be at the house of* ——— *in* ——— *in the said county of* E. *on* ——— *the* ——— *day of* ——— *at the hour of* ——— *in the afternoon of the same day, to shew cause why* A. P. *should not be removed from the parish of* ——— *in the said county of* E. *to your said parish of* ——— *Given under* ——— *hand* ——— *and seal this* ——— *day of* ——— *in the year of our lord* ———.

And then the general form of an order of removal, as grounded upon the statute of the 13 & 14 *C.* 2. above recited, may be thus:

The form of a general order of removal.

New-Jersey, Essex County. TO *the churchwardens and overseers of the poor of the parish of* ——— *in the said county of* Essex, *and to the churchwardens and overseers of the parish of* ——— *in the county of* ——— *and to each and every of them.*

Upon the complaint of the churchwardens and overseers of the poor of the parish of ——— *aforesaid, in the said county of* Essex, *unto us whose names are hereunto set and seals affixed, being two of his majesty's justices of the peace in and for the said county of* Essex, *and one of us of the quorum, that* John Thomson, Mary *his wife,* Thomas *their son aged eight years, and* Agnes *their daughter aged four years, have come to inhabit in the said parish of* ———, *not having gained a legal settlement there, nor produced any certificate owning them or any of them to be settled elsewhere, and that the said* John Thomson, Mary *his wife, and* Thomas *and* Agnes *their children, are likely to be chargeable to the said parish of* ———; *We the said justices, upon due proof made thereof, as well upon the examination of the said* John Thomson *upon oath, as otherwise, and likewise upon due consideration had of the premisses, do adjudge the same to be true; and we do likewise adjudge, that the lawful settlement of them the said* John Thomson, Mary *his wife, and* Thomas *and* Agnes *their children, is in the said parish of* ——— *in the said county of* ———: *We do therefore require you the said churchwardens and overseers of the poor of the parish*

parish of , *or some or one of you, to convey the said* John Thomson, Mary *his wife, and* Thomas *and* Agnes *their children, from and out of your said parish of to the said parish of and them to deliver to the churchwardens and overseers of the poor there, or some or one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original; And we do also hereby require you the said churchwardens and overseers of the poor of the said parish of , to receive and provide for them as inhabitants of your parish. Given under our hands and seals the day of in the year of the reign of his said majesty king* George *the third.*

Upon the complaint] *H.* 12 *G.* 2. *K.* and *Hareby.* It was moved to quash an order of removal, because it did not set forth any complaint made; And by the court, the objection is fatal, for the complaint is the foundation of the justices jurisdiction. *Andr.* 361.

Upon the complaint of the churchwardens and overseers of the poor] *E.* 1 *An. Weston Rivers* and *St. Peter's.* Exception to an order of removal, in that it was said to be upon complaint only, and not of the churchwardens or overseers. By the court; This exception is fatal; for no one can disturb a man coming into a parish, but they that have authority to do it: A complaint from one not concerned is nothing; it may be the parish is willing to keep him. 2 *Salk.* 492.

[*These parts of* America, *not being divided into parishes as in* England, *but only into townships or precincts, there are no church-wardens in the same capacity they bear in* England, *but only overseers of the poor, therefore tho' the usage of these parts is similar to what is here directed, yet we use not to mention church wardens, but only overseers of the poor, and use the words township or precinct, instead of parish.*]

Upon the complaint of the churchwardens and overseers of the poor of the parish of Orton *aforesaid*] *M.* 9 *An. Spalding* and *St. John Baptist.* The order was, To the churchwardens and overseers of the poor of the parish of *Spalding*, and to the churchwardens and overseers of the poor of the parish of *St. John Baptist:* Whereas complaint hath been made by you——It was moved to quash the same for the uncertainty, because it did not say by which: But by *Parker* Ch. J. Sure that is well enough, for it is upon complaint of the right, if both complain. *Foley* 267.

Unto us whose names are hereunto set and seals affixed, being two of his majesty's justices of the peace] An order was quashed, because it did not appear that it was made by two justices: It was only, Whereas complaint hath been made unto us; without reciting their authority as justices. 5 *Mod.* 322.

Two of his majesty's justices of the peace] *M.* 4 *G. K.* and *Westwoodhay.* On complaint to one justice, two justices adjudge and remove; and it was held to be well: Otherwise, where one justice sets his hand to the order in the absence of the other. *Cases of S.* 107. *Str.* 73.

T. 11 *G.* 2. *K.* and *Wykes.* It was held, that though the complaint may be to one juſtice, yet the examination ought to be by two, and thoſe the ſame who ſign the order of removal. *Str.* 1092.

Juſtices of the peace in and for the ſaid county] *M.* 12 *An.* *Q.* and *Uplin.* The order was quaſhed, becauſe it did not ſay that they were juſtices of the peace, but only juſtices of the county. *Caſes of S.* 27.

In and for the ſaid county] *M.* 13 *G.* *K.* and *Owlton.* Exception was taken to an order, for ſaying——— unto us two of his majeſty's juſtices of the peace *in* the county aforeſaid; for that by this it appears only that they lived in the county, and not that they were juſtices *for* that county: And the court held this to be a fatal exception, and quaſhed the order for that cauſe. *Seſſ. C. V.* 2. 70. 2 *Salk.* 474.

The ſaid county] *M.* 8 *W.* It was objected to an order, that it did not appear thereby that the juſtices were of the *diviſion*, which is required by the ſtatute: But this objection was over-ruled, for that the ſtatute therein is only directory. 2 *Salk.* 473.

That John Thomſon] *M.* 11 *An.* *Southwell* and *Needwell.* Whereas a certain woman hath intruded, Theſe are therefore to require you to convey: Objection, It is not ſaid who this woman was. And by *Parker* Ch. J. You muſt either name her, or ſay a certain woman unknown. *Caſe of S.* 57.

T. 10 *An.* Caſe of *Newington.* Whereas ſuch a perſon hath intruded into the pariſh, and is likely to become chargeable; Theſe are therefore to require you to remove him *with three chilaren.* Quaſhed as to the children, for they have removed more than is complained of. *Caſe of S.* 45.

Mary *his wife*, Thomas *their ſon*] *H.* 10 *W.* *Johnſon's* caſe. Order to remove a man and *his family*, not good; becauſe too general: for ſome of the family might not be removable. 2 *Salk.* 485.

M. 5 *G.* *Beaton* and *Siſton.* Order for removal of *Thomas Block* and his family: Upon the firſt reading, quaſhed as to the family, becauſe too general. *Str.* 114.

T. 9 *W.* *Flixon* and *Roſton.* Order to remove *Jane Smith* and her five children; Quaſhed as to the children, for the the uncertainty; becauſe it neither tells the names nor ages of the children: for ſhe might have more children than five, and ſome of thoſe five might have gained ſettlements. *Seſſ. C. V.* 1 11. *Foley* 278.

T. 8 *G.* *Hobey* and *Kingſbury.* Two juſtices adjudging the ſettlement of the huſband to be at *Kingſbury*, and that he is likely to become chargeable to *Hobey*, ſend him, his wife, and ſon of one year old, to *Kingſbury*; And whether this was good as to the wife and child, was the queſtion: And it was held to be well enough: and the order was confirmed. *Str.* 527.

Thomas *their ſon aged* 8 *years. and* Agnes *their daughter aged* 4 *years*] *M.* 9 *An.* *Q.* and *Middleham.* Order to remove a child, of ten

ten years, to *Middleham*, becauſe *Middleham* was the place where his father was laſt legally ſettled. Quaſhed by the court; for that there was no adjudication that *Middleham* was the place of the child's laſt legal ſettlement, and at that age it might have gained a ſettlement. *Foley* 271.

T. 10 *An. Ringmore* and *Petworth.* The order was, Whereas ſuch a perſon and his 3 children are likely to become chargeable, and there laſt legal ſettlement was at *Ringmore.* It was moved to quaſh the ſame, becauſe the children's ages were not ſet forth. But by the court; It is not neceſſary in this caſe; for the order ſays, they were laſt legally ſettled in *Ringmore,* and then no matter what their ages are. *Caſe of S.* 41.

H. 11 *G. K.* and *Trinity.* This rule was laid down; Every order that concerns the removal of a father and his children, ought to ſhew the ages of the children, for they may have gained a ſettlement in ſome other right, as by being apprentices or ſervants; therefore their age ought to be ſet forth, that it may appear to the court, that by reaſon of their infancy they have not gained any ſettlement in their own right, but have only a relative ſettlement from their father. Seven years is an age that the court will preſume a child could gain a ſettlement at, in his own right; but if it appears upon the order that the child was above 7 years old, the order muſt ſet forth, that ſuch child hath not gained a ſettlement in his own right. *Seſſ. C. V.* 2. 74.

Have come to inhabit] *E.* 12 *An. Q.* and *Graffham.* The order ſets forth, that *Henry Tate* and his wife do *endeavour* to intrude into the pariſh. And quaſhed by the court; for that he cannot be removed out of the pariſh, unleſs he hath come into it. *Caſe of S.* 16.

Nor produced any certificate owning them or any of them to be ſettled elſewhere] For by the 8 & 9 *W. c.* 30. If they have a certificate, they cannot be removed for being likely to be chargeable, nor until they do actually become chargeable. But if the order ſet forth that they are actually become chargeable, then this clauſe therein, concerning the certificate, is ſuperfluous.

Likely to become chargeable] *Scrivenham* and *St. Nichols.* Order, not ſaying that the party was likely to become chargeable: Quaſhed. 3 *Salk.* 255.

Note; It doth not appear from any adjudged caſe, that upon appeal it was ever controverted, whether the perſon was or was not likely to become chargeable. And in the caſe of *South Sydenham* and *Lamerten, T.* 3 *G.* Mr. J. *Eyre* ſaid, that by the words of the act, living on a tenement under 10 *l.* a year, and likely to become chargeable, are convertible terms. *Seſſ. C. V.* 1. 115.

Nevertheleſs, complaint muſt firſt be made, that the party is likely to become chargeable, before the juſtices can remove. And, in the caſe of *K.* and *Wykes, T.* 11 *G.* 2. an information was granted againſt a juſtice, for taking the examination of a perſon in order for his removal, upon the officers complaining, that he endeavoured

to

to gain a ſettlement in the pariſh contrary to law; without complaining at the ſame time, that he was likely to become chargeable. *Andr.* 238.

Upon due proof made thereof, as well upon the examination &c.] *H.* 13 *G.* 2. *K.* and *Fiſherton Dallemer.* Upon *due conſideration* was held to be ſufficient; for that due conſideration implies a due examination. *Seſſ. C. V.* 2. 43.

Examination.] *T.* 12 *W. Ware* and *Stanſtead Mount Fitchet.* Exception to an order, for that it was ſaid, it appears upon examination *before us or one of us.* By the court; The examination ought to be before both, becauſe both are to make the judgment of removal. And *Gould* J. ſaid, the ſtatute directed, and the practice was, to make *complaint* to one juſtice, and he grants his warrant to bring the poor man before two juſtices, and then they two examine and remove. *Salk.* 488.

Examination of the ſaid John Thomſon] *T.* 11 & 12 *G.* 2. *K.* and *Wykes.* A perſon ought to have notice, and be heard before he be removed: for he may produce a certificate, or give other ſufficient ſecurity, or ſhew cauſe otherwiſe why he ought not to be removed; eſpecially as he himſelf perhaps, by the removal, is likely to be the greateſt ſufferer: and therefore natural juſtice requires, that he be not condemned unheard. *Andr.* 238.

Of the ſaid John Thomſon *upon oath*] In the caſe of *K.* and *Wykes* laſt abovementioned, one juſtice took the examination, and other two juſtices removed upon that ſole examination, and in the order did ſet forth that the party was examined before themſelves; for which, and for not ſummoning the party before them, an information was granted againſt the two juſtices. *Andr.* 238.

Upon oath] *H.* 10 *G. Munger-bunger* and *Warden.* Exception to an order, for that it is ſaid to be made upon *due examination*, without ſaying *upon oath:* By the court, This is ſufficient; for where it is ſaid to be made upon due examination, it ſhall be intended to be upon oath. *Seſſ. C. V.* 2. 40.

Do adjudge the ſame to be true] *T.* 13 *W. Suddeſcomb* and *Burwaſh.* Order quaſhed, becauſe it was only ſaid to be complained by the officers, that the perſon removed was likely to become chargeable, but not adjudged ſo by the juſtices. 2 *Salk.* 491.

ii. Order of removal of a certificate perſon.

As it will appear from what hath been ſaid under the former head, concerning the removal of poor perſons having no certificate, that in moſt of the books there are many bad orders; ſo it will appear alſo from thence, and from what will be ſaid under this head, concerning the removal of certificate perſons, that as to this kind of removal there is ſcarce one good order (which is a little ſurpriſing in a matter of daily practice) yea ſcarce one which is capable of being amended even by the ſtatute of the 5 *G.* 2. for there are

objections

objections which go to the very eſſence and ſubſtance of the order, eſpecially the want of proper adjudications, either that the party is become chargeable, or of the place of his laſt legal ſettlement (for he may have gained one after the certificate), or both: for a judgment without adjudging, is a contradiction; and where there is no judgment, there is in ſtrictneſs nothing to appeal againſt, but only an order that the pariſh ſhall receive and provide for a perſon, who for aught appears doth not belong to them.

By the 8 & 9 *W. c.* 30. *If any perſon who ſhall come into any pariſh or place, there to reſide, ſhall deliver a certificate, to one of the churchwardens or overſeers of the poor there, ſuch certificate ſhall oblige the pariſh or place granting the ſame, to receive and provide for the perſon mentioned in the ſaid certificate, together with his family, as inhabitants of that pariſh, whenever they ſhall happen to become chargeable to, or be forced to aſk relief of the pariſh, townſhip, or place, to which ſuch certificate was given; and then, and not before, it ſhall be lawful for any ſuch perſon, and his children, though born in that pariſh, not having otherwiſe acquired a legal ſettlement there, to be removed, conveyed, and ſettled in the pariſh or place from whence ſuch certificate was brought.* ſ. 1.

And by the 3 *G.* 2. *c.* 29. *When any overſeer or other perſon ſhall remove back any perſons or their families, reſiding under a certificate, and becoming chargeable, to the pariſh or place to which they ſhall belong; ſuch overſeer or other perſon ſhall be reimburſed ſuch reaſonable charges as they may have been put unto in maintaining and removing ſuch perſons, by the churchwardens or overſeers of the place to which ſuch perſons are removed; the ſaid charges being firſt aſcertained and allowed of by one or more juſtices for the county or place to which ſuch removal ſhall be made; which ſaid charges, ſo aſcertained and allowed, ſhall, in caſe of refuſal of payment, be levied by diſtreſs and ſale of the goods of the churchwardens and overſeers of the place to which ſuch certificate perſon is removed, by warrant of ſuch juſtice or juſtices.* ſ. 9.

Form of an order of removal of a certificate perſon.

Pennſylvania, Bucks County. } To the churchwardens and overſeers of the poor of the pariſh of in the ſaid county of *Bucks*, and to the churchwardens and overſeers of the poor of the pariſh of in the county of

WHEREAS *complaint hath been made by the churchwardens and overſeers of the poor of the pariſh of aforeſaid, in the ſaid county of* Bucks, *unto us whoſe names are hereunto ſet, and ſeals affixed, being two of his majeſty's juſtices of the peace in and for the ſaid county of* Bucks, *and one of us of the* quorum, *that* John Thomſon, Mary *his wife*, Thomas *their ſon aged eight years, and* Agnes *their daughter aged four years, having for ſome time laſt paſt dwelt in the*

the parish of aforesaid, *being allowed so to do by reason of a certificate bearing date the*----------*day of*----------*in the year of our lord*----------*under the hands and seals of* A. C. *and* B. C. *churchwardens, and* A. O. *and* B. O. *overseers of the poor of the said parish of* , *attested by* A. W. *and* B. W. *two credible witnesses, and allowed by* J. P. *and* K. P. *esquires, two of his majesty's justices of the peace for the said county of* , *according to the directions of the several acts of parliament in such case made and provided, are become chargeable to the said parish of* ; *And whereas it appears to us, as well upon the oath of the said* John Thomson, *as otherwise, that neither they the said* John Thomson, Mary *his wife,* Thomas *and* Agnes *their children, nor any of them, have gained any legal settlement since the date of the said certificate: Whereby, and upon due consideration had of the premises, it appears to us, and we do hereby adjudge, that the said* John Thomson, Mary *his wife, and* Thomas *and* Agnes *their children, are become chargeable to the said parish of* , *and that the place of the last legal settlement of them is in the said parish of in the said county of : These are therefore to require you the said churchwardens and overseers of the poor of the said parish of* , *or some or one of you, to convey the said* John Thomson, Mary *his wife, and* Thomas *and* Agnes *their children, from and out of your said parish of* , *to the said parish of* ; *and them to deliver to the churchwardens and overseers of the poor there, or to some or one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original; And we do also hereby require you the said churchwardens and overseers of the poor of the said parish of* , *to receive and provide for them as inhabitants of your parish. Given under our hands and seals the*----------*day of*----------*in the year of our lord*----------

Allowed by J. P. *and* K. P. *esquires, two of his majesty's justices of the peace*] *H.* 9 *An.* R. and *Newton.* Order for removing a certificate person, not setting forth that it was allowed by two justices, but adjudging the parish which granted the certificate to be the place of the last legal settlement. By Mr. J. *Probyn*; The order is good, for it sets out that the *pauper* came by certificate, and adjudges that he was actually chargeable, and that *Newton* was the place of his last legal settlement, he having gained no settlement elsewhere since; which sets out the whole reason of their judgment, and would make the settlement good, if there had been no certificate. *Sess. C. V.* 1. 149.

Are become chargeable] *E.* 9 *An.* Q. and *Brumstead.* An order of two justices for the removal of a man that came into a parish by a certificate, was quashed upon this exception; It was said in the order, that they removed him, because he was *likely to become chargeable*: And the whole court were of opinion, that the justices cannot remove a person that comes into a parish by certificate, till he is actually chargeable to the parish. 2 *Salk.* 530.

H. 4.

H. 4 *G. Teelby* and *Willerton.* The juſtices remove a certificate woman, being *likely* to become chargeable. But by the court; She is by the ſtatute not removeable, till ſhe actually becomes chargeable. And the order was quaſhed. *Str.* 77.

And we do hereby adjudge] *T.* 2 *An. Maldon* and *Fleetwick.* An order was made, reciting, that whereas complaint hath been made unto us, that ſuch a perſon, who is lately come into the pariſh with a certificate, is actually chargeable to the pariſh; theſe are therefore to require you to remove: And quaſhed, for that there was no adjudication. 2 *Salk.* 530.

T. 15 *G.* 2. *K.* and *Great Bedwin,* Order of removal of a certificate perſon, in which there was no complaint of the churchwardens or overſeers, nor any adjudication that the certificate perſon is actually become chargeable. On appeal, the ſeſſions in purſuance of the 5 *G.* 2. amend the order in theſe particulars, as matter of form only, and inſert in the ſaid order ſuch complaint and adjudication. And now the queſtion was, whether theſe amendments went only to matter of form, or to the ſubſtance and merit of the order? By *Lee* Ch. J. There has been but one caſe in this court on this act ſince the making of it, and that was not determined: The preſent ſeems to be a very ſtrong caſe againſt the power of amending. For there muſt be a *complaint* from the overſeers, otherwiſe the juſtices have no power to remove; and a certificate perſon muſt be *adjudged* to be actually chargeable, otherwiſe he cannot be removed: And theſe amendments might be the real merits on which this caſe depended. And it would be a detrimental conſtruction of the act, to take it ſo largely; and would be giving the ſeſſions an original juriſdiction. And quaſhed by the whole court. *Seſſ. C. V.* 2. 142. *Str.* 1158.

But after all, it doth not appear, how it becomes neceſſary in the order of removal, to take any notice of the certificate at all, or to make any further uſe of it than as evidence to the juſtices of the ſettlement: And if it is not neceſſary to recite it, it is better to omit the ſame; becauſe a miſrecital, either in the date, or in the names of the perſons, or in any other material part, will be fatal, for that then there will be no ſuch certificate as it is there recited, and the order muſt fall of courſe. And I do not ſee, why the form may not be much more plain and ſimple, by drawing the ſame very little varied from the common form of an order of removal of other perſons having no certificate. It is true, where the perſons are only *likely to be chargeable,* it is then requiſite to ſet forth in the order that they have no certificate; for if they have one, they cannot be removed till they actually be chargeable. But if the order do ſet forth that they are chargeable, in that caſe it is not at all material whether they have a certificate or not: for in both caſes alike, they are then equally removable. And if ſo, then the form may be this, both for a certificate perſon, and for a perſon having no certificate, who is actually become chargeable:

Pennſylvania,

Pennſylvania, Bucks County. TO *the churchwardens and overſeers of the poor of the pariſh of in the ſaid county of* Bucks, *and to the churchwardens and overſeers of the poor of the pariſh of in the county of , and to each and every of them.*

Upon the complaint of the churchwardens and overſeers of the poor of the pariſh of aforeſaid, in the ſaid county of Bucks, *unto us whoſe names are hereunto ſet and ſeals affixed, being two of his majeſty's juſtices of the peace in and for the ſaid county of* Bucks, *and one of us of the* quorum, *that* John Thomſon, Mary *his wife,* Thomas *their ſon aged* 8 *years, and* Agnes *their daughter aged four years, have come to inhabit in the ſaid pariſh of , not having gained a legal ſettlement there, and that the ſaid* John Thomſon, Mary *his wife, and* Thomas *and* Agnes *their children are now chargeable to the ſaid pariſh of ; We the ſaid juſtices, upon due proof made thereof, as well upon the examination of the ſaid* John Thomſon *upon oath, as otherwiſe, and likewiſe upon due conſideration had of the premiſſes, do adjudge the ſame to be true; and we do likewiſe adjudge, the lawful ſettlement of them the ſaid* John Thomſon, Mary *his wife, and* Thomas *and* Agnes *their children, is in the ſaid pariſh of in the ſaid county of : We do hereby require you the ſaid churchwardens and overſeers of the poor of the ſaid pariſh of or ſome or one of you, to convey the ſaid* John Thomſon, Mary *his wife, and* Thomas *and* Agnes *their children, from and out of your ſaid pariſh of , to the ſaid pariſh of and them to deliver to the churchwardens and overſeers of the poor there, or to ſome or one of them, together with this our order, or a true copy thereof, at the ſame time ſhewing to them the original; and we do alſo hereby require you the ſaid churchwardens and overſeers of the poor of the ſaid pariſh of , to receive and provide for them as inhabitants of your pariſh. Given under our hands and ſeals the----------day of---------- in the----------year of the reign of his ſaid majeſty king* George *the third.*

ii. Appeal againſt the order of removal.

All perſons who think themſelves aggrieved by any ſuch judgment of the ſaid two juſtices, may appeal to the juſtices of the peace of the ſaid county, at their next quarter ſeſſions, who ſhall do them juſtice according to the merits of their cauſe. 13 & 14 C. 2. c. 12. ſ. 2.

And by the 8 & 9 *W.* c. 30. *The appeal againſt any order of removal of any poor perſon, ſhall be had, proſecuted, and determined, at the general or quarter ſeſſions of the peace for the county, diviſion, or riding, wherein the pariſh, township, or place, from whence ſuch poor perſon ſhall be removed, doth lie, and not elſe-where.* ſ. 6.

All perſons who think themſelves aggrieved] *E.* 4 *W. K.* and *Hartfield.* Two juſtices removed *Nicholas Wells,* from the pariſh of *Hartfield,* to the pariſh of *Frampfield*; from which order, *Wells* the party

party himſelf, and not the pariſh, appealed: It was objected, that the party himſelf cannot appeal, becauſe the appeal is given only to the pariſh aggrieved: But by the whole court, the party may appeal as well as the pariſh. *Carth.* 222.

T. 4 *G. K.* and *Almonbury.* An order of two juſtices is quaſhed at the ſeſſions upon appeal, without ſaying *at the appeal of the party grieved.* And the court inclined to quaſh the order for that fault, till they were informed the precedents were moſt of them ſo, and for that reaſon and that only, as *Pratt* Ch. J. declared, the order was confirmed. *Str.* 96.

At the next general or quarter ſeſſions] *E.* 2 *G.* 2. *K.* and *Norton.* Exception was taken to an order of ſeſſions, for diſcharging an order of removal, becauſe the juſtices order was dated *June* 21, and the ſeſſions order was not till *Michaelmas* ſeſſions following, ſo that *Midſummer* ſeſſions intervened. To this it was anſwered, that by the expreſs words of the ſtatute the appeal is to be to the next ſeſſions after the parties find themſelves aggrieved, which is not till the removal: and for aught appears *Michaelmas* ſeſſions might be the next ſeſſions after the grievance. And ſo it was held in the caſe of *Milbrook* and *St. John's* in *Southampton, M.* 1 *G.* To which the court agreed, and the ſeſſions order was affirmed. *Str.* 831.

T. 11 *W. K.* and *Langley.* It was moved to quaſh an order of ſeſſions, becauſe the juſtices had adjourned the appeal from one ſeſſions to another, and ſo the determination upon the appeal was not at the next quarter ſeſſions. But by the court; The appeal muſt be lodged at the next quarter ſeſſions, but when it is lodged, the juſtices may adjourn it. 2 *Salk.* 605, *Comb.* 365.

No appeal from any order of removal ſhall be proceeded upon, unleſs reaſonable notice be given by the churchwardens or overſeers of the pariſh or place appealing, unto the churchwardens or overſeers of the pariſh or place, from which the removal ſhall be; the reaſonableneſs of which notice ſhall be determined by the juſtices at the quarter ſeſſions to which the appeal is made; and if it ſhall appear to them, that reaſonable time of notice was not given, then they ſhall adjourn the appeal to the next quarter ſeſſions, and then and there finally determine the ſame. 9 G. c. 7. ſ. 8.

Reaſonable notice] It is not expreſſed in the act, that this notice ſhall be in writing; but the court will better judge of the reaſonableneſs of it, if it ſhall be in writing; And it may be thus:

TO the churchwardens and overſeers of the poor of the pariſh of in the county of .

This is to give notice to you and every of you, that we the churchwardens and overſeers of the poor of the pariſh of in the county of do intend at the next quarter ſeſſions of the peace to be holden for the ſaid county of to commence and proſecute an appeal againſt an order of J. P. and K. P. eſquires, two of his majeſty's juſtices

of the peace for the said county of for and concerning the removal of to our said parish of Witness our hands this day of ..

A. B. } *Churchwardens.*
C. D. }
E. F. } *Overseers of the*
G. H. } *poor.*

H. 12 *An. Malendine* and *Hunsdon.* Two justices by an order send some poor persons to *Hunsdon.* Two justices there by an order send them back again. By the court; They ought to have appealed, and not sent them back; and held the order of the first two justices to be good, because there was no appeal against it. *Fol.* 273.

T. 12 *W. Chalbury* and *Chipping Farringdon.* A person was removed by order of two justices from a parish in *Warwickshire,* to *Chalbury* in *Oxfordshire,* from thence by order of two justices to *Chipping Farringdon* in *Berkshire:* It was objected, That *Chalbury* ought to have appealed, and got the order upon them discharged: Which *Holt* Ch. J. agreed: For sending the poor man to another place, is satisfying the first order, which cannot be done, but by appeal; for the order of two justices is a determination of the right against all persons, till it be reversed: *Chalbury* should have appealed from the *Warwickshire* order, and got that set aside, and sent the man back thither; and the justices there should have sent him to *Chipping Farringdon.* Therefore the latter order was naught. 2 *Salk.* 488.

E. 5 *G.* 2. *K.* and *Northfeatherton.* Two justices made an order, by which they removed a man, his wife, and 4 children, naming them, to *Featherton:* and there was no appeal. Afterwards *Featherton* finds out that this woman was not the wife, for that the man, tho' married to her, was married before to another woman, and consequently the second marriage totally void. And they remove the woman by her maiden name to *Horsington,* and the four children thither also as bastards. *Horsington* appeals; and the sessions upon hearing the matter state the case specially, that this woman and the 4 children were the same with the woman and the children removed by the first order, and gave judgement that the first order was conclusive, and thereupon quashed the said second order. And by the court; They have slipped their opportunity, and the first order not appealed against is conclusive. *Sess. C. V.* 1. 154.

M. 3 *An. St. Andrew's* and *St. Clements Danes.* The sessions made an order, on an appeal from an order of removal, and afterwards the same sessions vacated it by a subsequent order; and a certiorari being brought, both orders of sessions were returned thereon. By *Holt* Ch. J. The sessions is all as one day, and the justices may alter their judgment at any time, whilst it continues; but they should not have returned the vacated order, but only the latter; for the effect of the court's setting aside the first order is,

is, that it ceaſeth to be an order, and conſequently ought not to be returned as an order vacated by another order, but it ſhould have been annulled and made nothing. 2 *Salk.* 494, 606.

And for the more effectual preventing of vexatious removals and frivolous appeals, the juſtices in ſeſſions upon any appeal concerning the ſettlement of any poor perſon, or upon any proof before them there to be made, of notice of any ſuch appeal to have been given by the proper officer to the churchwardens or overſeers of any pariſh or place (tho' they did not afterwards proſecute ſuch appeal) ſhall at the ſame ſeſſions order to the party in whoſe behalf ſuch appeal ſhall be determined, or to whom ſuch notice did appear to have been given, ſuch coſts and charges in the law, as by the ſaid juſtices in their diſcretion ſhall be thought moſt reaſonable and juſt; to be paid by the churchwardens, overſeers, or any other perſon, againſt whom ſuch appeal ſhall be determined, or by the perſon that did give ſuch notice; and if the perſon ordered to pay ſuch coſts, ſhall live out of the juriſdiction of the ſaid court, any juſtice where ſuch perſon ſhall inhabit, ſhall on requeſt to him made, and a true copy of the order for the payment of ſuch coſts produced, and proved by ſome credible witneſs on oath, by his warrant cauſe the ſame to be levied by diſtreſs; and if no ſuch diſtreſs can be had, ſhall commit ſuch perſon to the common gaol, there to remain by the ſpace of 20 days. 8 & 9 W. c. 30. ſ. 3.

M. 5 *G.* 2. *K.* and *the county of Nottingham.* A *mandamus* was granted for the juſtices to give coſts to the party in whoſe favour the appeal had been determined; yet upon their return of it, the court held it reaſonable for them to have the power of judging whether coſts ſhall be allowed or not, and thereupon quaſhed the writ of *mandamus.* *Nelſ. Poor.*

For the preventing of vexatious removals, if the juſtices ſhall at their quarter ſeſſions, upon an appeal before them there had, concerning the ſettlement of any poor perſon, determine in favour of the appellant, that ſuch poor perſon was unduly removed, they ſhall at the ſame quarter ſeſſions, order and award to ſuch appellant, ſo much money, as ſhall appear to the ſaid juſtices to have been reaſonably paid by the pariſh or other place on whoſe behalf ſuch appeal was made, towards the relief of ſuch poor perſon, between the time of ſuch undue removal, and the determination of ſuch appeal; the ſaid money ſo awarded, to be recovered in the ſame manner as coſts and charges upon an appeal are to be recovered by the ſtatute of the 8 & 9 W. 9 G. c. 7. ſ. 9.

E. 3 *G.* 2. *St. Mary's Nottingham* and *Kirklington.* Motion for a *mandamus* to the juſtices of the town and county of *Nottingham,* commanding them to allow the pariſh of *Kirklington,* the expence and charges their officers had been put to, in keeping a poor perſon from the time of his removal, till the order was diſcharged by the ſeſſions upon appeal. And a *mandamus* was granted. *Seſſ. C. V.* 2. 67.

M. 13 *W. Mynton* and *Stony Stratford.* By *Holt* Ch. J. and the court; If on appeal to the ſeſſions an order be diſcharged, that judgment binds only between the parties: But when upon appeal

an order is confirmed, that is concluſive to all perſons as well as to the parties; for it is an adjudication that this is the place of the party's laſt legal ſettlement. 2 *Salk.* 527.

H. 10 *W. St Michael's Beaingham* and *Kingſton Bowſey.* Order reverſed on the appeal is concluſive only as to the pariſh acquitted; but the firſt pariſh may remove again to any pariſh not party to the former removal. 2 *Salk.* 486.

An order of two juſtices, if quaſhed at the ſeſſions upon an appeal, for want of form only, is not concluſive between the two pariſhes. *Foley* 276.

It was moved for ſetting aſide an order of the ſeſſions confirming an order of two juſtices upon appeal. But the court would hear nothing of the merits of the cauſe, the order of ſeſſions being in that caſe final, unleſs there had been an error in form. 1 *Ventr.* 310.

M. 9 *An. South Cadbury* and *Braddon.* On appeal to the ſeſſions, the court diſcharged the firſt order. It was moved to ſet aſide the order of diſcharge, becauſe the juſtices do not ſay, whether they diſcharge it for form, or on the merits; for if it was for form, the pariſh is not bound, but if on the merits, the pariſh in conſequence is hereby diſcharged for ever. But by the court; The juſtices are not bound to expreſs the reaſon of their judgment, any more than other courts; but the reaſon of their judgment muſt be collected from the record. Particularly,

If the ſeſſions reverſe the firſt order, and that being removed appears to be good, this court will intend it was reverſed on the merits, and affirm the order of ſeſſions.

If the ſeſſions reverſe the firſt order, and that being removed appears to be good, we muſt inthend it was reverſed for form, and affirm the order of reverſal.

But if the ſeſſions affirm the firſt order, and that appears to be good, we muſt affirm the order of ſeſſions.

But if the firſt order appears bad, and the ſeſſions affirm it, this court will reverſe it, becauſe it appears naught. 2 *Salk.* 607.

So that the caſe is this: If the ſeſſions by their order do barely affirm or quaſh the order of the two juſtices, and both the ſaid orders are removed into the king's bench, the court hath nothing properly before them to judge upon, but the validity of the firſt order of the two juſtices. And if that order appears *good as to form*, and is *confirmed* by the ſeſſions, the court will intend it was confirmed upon the merits; If it is *good as to form*, and *quaſhed* by the ſeſſions, the court will intend it was quaſhed upon the merits; If it is *bad as to form*, and is *confirmed* by the ſeſſions, the court will quaſh the confirmation, becauſe it appears to be erroneous; If it is *bad as to form*, and is *quaſhed* by the ſeſſions, the court will intend it was quaſhed for form.

But if the ſeſſions, by their order, do not barely affirm or quaſh the order of the two juſtices, but do ſet forth the reaſons of their ſaid order, and ſtate the caſe ſpecially thereupon; then the court will

will judge upon the case so stated by the sessions; that is to say, they will judge of the law as it arises upon those facts stated, but not of the facts themselves, for those they will suppose to have appeared sufficiently to the justices upon the evidence. And this is the method, when the justices are doubtful in point of law, whereby to obtain the opinion of that court, namely, in their order of sessions which confirms or quashes the order of the two justices, to state the case specially; and then the party which is not satisfied, by procuring the same to be removed into the king's bench by certiorari, may have it determined there by the judgment of that court, who will quash or confirm the order of sessions as they see cause.

How far parents and children are liable to maintain each other.

The father and grand father, mother and grandmother, and children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges, relieve and maintain every such poor person, in that manner, and according to that rate, as by the justices of that county where such sufficient persons dwell, in their sessions shall be assessed; on pain of 20 s. *a month.* 43 El. c. 2. s. 7.

[*With this, several of our provinces in* America, *agree; but vary some times in the method or manner of it.*]

Of the relief and ordering of the poor.

By the statute of the 43 *El. c.* 2. the several parishes were required to maintain and employ their own poor, under the direction of two justices; in consequence whereof, before the statute of *C.* 2. the justices were wont to send the poor to their own parishes to be relieved and ordered: and there is no power given by either of those statutes, nor by any other (except in the case of certificate persons, and in the case of contracting as is herein after mentioned) to the churchwardens or overseers to relieve any persons out of their own parish, much less any obligation upon them to exercise that part of their office out of their own jurisdiction.

By the 43 *El. c.* 2. *The churchwardens and overseers, with the consent of two justices* (1 Q.) *shall take order from time to time, for setting to work the children of all such whose parents shall not by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children; and for setting to work all such persons, married or unmarried, having no means to maintain them, and using no ordinary and daily trade; and for the necessary relief of the lame, impotent, old, blind, and such other among them being poor, and not able to work.* s. 1.

And the said justices, or one of them, shall send to the house of correction, or common gaol, such as shall not employ themselves to work, being appointed thereunto as aforesaid. s. 4.

Poor, and not able to work] *M.* 3 *G. K.* and the inhabitants of *Highworth*. There was an order to pay 3 *s.* weekly to a poor perſon, by the pariſh of *Highworth*, ſo long as he ſhall continue poor. It was objected, that by the ſtatute it ought to appear that they are poor and impotent. *Parker* Ch. J. I favour theſe orders as much as I can, becauſe no body takes care to draw them up for the poor. But it muſt be quaſhed. *Str.* 10.

Oath of a poor perſon wanting maintenance.

A. P. *of*——*in the pariſh of*——*in the county of*——*maketh oath, that he is very poor and impotent, and not able to provide for himſelf and his family, and that his lawful ſettlement is in the ſaid pariſh of*——*and that on*——*laſt he did apply for relief to the pariſhioners of the ſaid pariſh at a veſtry* (or other publick) *meeting* [or, to two of the overſeers of the poor of the ſaid pariſh] *and was by them refuſed to be relieved.*

A. P.

Taken and made before me one of his majeſty's juſtices of the peace for the ſaid county, the——*day of*——

J. P.

Order for maintenance.

New-York, Ulſter County. WHEREAS A. P. *of*——*in the pariſh of*——*in the ſaid county of*——*yeoman, hath made oath before me*——*one of his majeſty's juſtices of the peace for the ſaid county, that he the ſaid* A. P. *is very poor and impotent, and not able to work; and that he ſaid* A. P. *did on*——*laſt apply for relief to the pariſhioners of the ſaid pariſh of*——*at a veſtry* (or, *publick) meeting* [or, *to* A. B. *and* C. D. *two of the overſeers of the poor of the ſaid pariſh*] *and was by them refuſed to be relieved; And whereas* A. B. *and* C. D. *overſeers of the poor of the ſaid pariſh, have been duly ſummoned by me, to ſhew cauſe why relief ſhould not be given to the ſaid* A. P. *and have appeared before me in purſuance of ſuch ſummons, but have not made any ſufficient cauſe to appear as aforeſaid* [or, *but have made default to appear before me according to ſuch ſummons*]: *I do therefore hereby order the churchwardens and overſeers of the poor of the ſaid pariſh, or ſome of them, to pay unto the ſaid* A. P. *the ſum of*——*weekly and every week, for and towards his ſupport and maintenance, until ſuch time as they ſhall be otherwiſe ordered according to law to forbear the ſaid allowance. Given under my hand and ſeal at*——*in the ſaid county, the*——*day of*——*in the*——*year*——.

Of

Of the overſeers account.

By the 43 *El. c.* 2. *The churchwardens and overſeers ſhall, within four days after the end of their year, and other overſeers nominated, make and yield up to two juſtices* (1 Q.) *a true and perfect account of all ſums by them received, or rated and aſſeſſed and not received, and alſo of ſuch ſtock as ſhall be in their hands, or in the hands of any of the poor to work, and of all other things concerning their office: And ſuch ſums of money as ſhall be in their hands, ſhall pay and deliver over to their ſucceſſors: And the ſubſequent churchwardens or overſeers, by warrant from two ſuch juſtices, may levy by diſtreſs and ſale of the offender's goods, the ſaid ſums or ſtock which ſhall be behind on any account to be made; and in defect of ſuch diſtreſs, two ſuch juſtices may commit him to the common gaol, there to remain without bail or mainpriſe, until payment of the ſaid ſum and ſtock: And alſo any ſuch two juſtices may commit to the ſaid priſon, every one of the ſaid churchwardens and overſeers, which ſhall refuſe to account, there to remain without bail or mainpriſe, until he have made a true account, and ſatisfied and paid ſo much as upon the ſaid account ſhall be remaining in his hands.* ſ. 2, 4.

Allowance of the account.

New-York, Ulſter County. PERUSED *and allowed (having been firſt ſigned and verified on oath by* A. B. *and* C. D. *churchwardens, and* E. F. *and* G. H. *overſeers of the poor) By me one of his majeſty's juſtices of the peace in and for the ſaid county, the* ——— *day of* ———.

J. P.

I do not find that any one or more juſtices of the peace may or can, in any caſe, licence a man to beg or aſk relief at all; but only may make a teſtimonial, or licence in the two following caſes, *viz.* 1. To ſuch as ſuffer ſhipwreck; and 2. To ſoldiers or mariners coming from the ſeas to paſs from place to place, and in theſe two caſes only the law tolerateth them to aſk, and receive neceſſary relief, as aforeſaid.

Alſo juſtices of the peace upon requeſt, may grant teſtimonials of loſs by fire towards repairing the damages ſuſtained by the poor ſufferers.

A licence and teſtimonial for ſuch as have ſuffer'd ſhipwreck.

Kent, ſs. To all conſtables, *&c.*,

R. *C.* of *W.* in the ſaid county, eſq; one of his majeſty's juſtices, *&c.* Foraſmuch as the bearer hereof, *L. M.* aged about twenty four years having lately been at ſea in a ſhip called the, *&c.* and hath ſuffered ſhipwreck, and got to land at *D.* in the county of *K.* upon the third day of, *&c.* laſt paſt, as I am credibly informed, as well by the report of the ſaid *L. M.* as alſo by the teſtimonial of divers of the inhabitants of *K.* aforeſaid: And for that the ſaid *L. M.* hath not wherewithal to relieve himſelf

himſelf in his travels homewards to *W.* in the county of *H.* where he ſaith he was born, (or hath a dwelling, *&c.*) Theſe are therefore to pray you, and every of you to whom theſe preſents ſhall come, not to moleſt or trouble the ſaid *L. M.* in his travel to *W.* aforeſaid, where he is limited to be within, *&c.* days next after the date hereof, but deſiring you rather to relieve him in his neceſſity as to you ſhall ſeem meet; and withal, you the conſtables of every town where he ſhall come, to help him with lodging in a convenient time, ſo that he travelleth the direct way to *W.* aforeſaid, not doing any thing contrary to the laws and ſtatutes in this realm. In witneſs, *&c.*

A licence or paſſport for a poor man to his friends, for relief.

Kent, ſs. To all conſtables, *&c.*

R. G. and *J. D.* eſqrs; two of his majeſty's juſtices of the peace for the ſaid county, greeting: Foraſmuch as *A. B.* of *D* &c. the bearer hereof, being reduced to great poverty and neceſſity, hath deſired a teſtimonial or licence for his ſafe travel unto the city of *Y.* in the county of *Y.* where he ſaith he was born, and hath ſome friends yet living, by whoſe means and friendſhip he hopeth to be fully reliev'd and holpen: In conſideration whereof, *Know Ye*, That we the ſaid *R. G.* and *J. D.* (as far as in us lieth) hath licenſed the ſaid *A. B.* to travel and paſs the direct way from *D.* unto the ſaid city of *Y.* ſo that his journey be not for longer or farther continuance than twenty days next after the date hereof; praying you, and every of you, not to moleſt or trouble the ſaid poor man in his travel, but to permit and ſuffer him to paſs, ſo that he ſhew himſelf in no reſpect offenſive to his majeſty's laws. *In witneſs*, &c.

* Note, *Theſe paſſports are often made to travel upon other occaſions, and the party ought to be particularly deſcrib'd therein.*

A teſtimonial and charitable requeſt from juſtices of the peace, for poor men that have had loſs by fire.

Kent, ſs. TO all chriſtian people to whom this preſent writing or teſtimonial ſhall come to be ſeen, heard, or read; *A. B. D. E.* and *G. H.* eſqrs, three of the juſtices of peace within the ſaid county of *K.* ſend greeting: *Whereas* it is both godly and conſonant to chriſtian charity, in matters doubtful and ambiguous, to certify and report the truth; we have thought it our duty, (at the earneſt and lamentable ſuit of our loving neighbours, the bearers or bringers hereof, *G. H. I. K. L. M.* &c.) to publiſh and declare, That on the tenth of *M.* laſt paſt, between three and four of the clock in the morning, by caſualty and great miſchance by fire, as well their ſeveral dwelling-houſes, to the number of, *&c.* and all other edifices and buildings to every of the ſaid dewlling-houſes belonging; and alſo all their corn, and moſt of their ſeveral goods and houſhold-ſtuff, were conſumed, waſted, and burnt, to the great danger of the bodies of them and their families, and their exceeding great loſs and impoveriſhment. And foraſmuch as it is a godly and charitable deed, to further, help, and relieve ſuch poor, needy, and miſerable perſons (being of honeſt name, fame and converſation) as they who have ſuffered this great loſs: And for that the bearers, in behalf of themſelves and their neighbours, are inforced, by reaſon

reaſon of their loſſes to ſeek for help and ſuccour for their relief. And we knowing their eſtate to be ſuch as is premiſed, and moved with commiſeration of their ſaid eſtate and condition, have therefore as much as in us lieth, given licence unto them, and every of them, to make their repair from pariſh-church to pariſh-church, and every pariſh-church and chappel, town and place, within the county of *K.* to aſk, receive and take the charitable benevolence of all good and well-diſpoſed people towards the recovery of their ſaid great loſſes. And our requeſt further is, That you and every of you to whom they ſhall repair, do extend your loving favour and charity unto them, permitting them, without your denial, to execute the tenour of this our licence; deſiring all eccleſiaſtical perſons to whom theſe diſtreſſed perſons ſhall make their addreſs in this behalf, to declare the tenour hereof to their pariſhioners in every of their pariſh-churches and chappels on ſunday, or other feſtival days, exhorting them to extend their charity in this behalf; and thoſe whom it concerns, to aid and aſſiſt them in the collection thereof. *In witneſs whereof*, &c.

A certificate for obtaining a brief upon a loſs by fire.

To his excellency the honourable, &c.

WE his majeſty's juſtices of the peace for the county of *M.* do certifie your excellency, that at his majeſty's court of general quarter-ſeſſions of the peace holden at *N.* for the ſaid county of *M.* on *Monday* the 10th of *March* laſt paſt, it did then and there appear unto us the ſaid juſtices ſitting in open court, as well upon the oaths of *A. B. D. D.* carpenters, and *E. F.* and *G. H* bricklayers, as alſo upon the oaths of *J. K.* and *L. M.* two of the moſt ſubſtantial inhabitants of the town of *W.* within the ſaid county of *M.* That on *Monday* the 24th day of *February* laſt paſt, between eight and nine of the clock in the evening of the ſame day, by caſualty and great miſchance, a ſudden and terrible fire did break forth at the ſaid town of *W.* which, by reaſon of the fierceneſs thereof, (within the ſpace of ſix hours) burnt down and conſumed the dwelling houſes, barns, ſtables, cow-houſes, and out-houſes of the above ten of the inhabitants of the ſaid town of *W.* together with their corn, hay, and moſt of their ſeveral goods and houſhold-ſtuff, to the great danger of the bodies of them and their families, and to their exceeding great loſs and impoveriſhment: And that the whole loſs ſuſtained thereby did amount to 3000*l.* and upwards; ſo that the ſaid inhabitants, with their families, are totally impoveriſhed, and are no ways able to ſubſiſt, but muſt neceſſarily periſh, unleſs they ſhall be timely reliev'd by the charitable benevoleuce of well-diſpoſed people. And we do further certifie, That we have taken bond of ſeveral of the inhabitants, that no part of the money collected ſhall be applied to the benefit of any landlords, or other perſons of ability, either in rebuilding his houſe, or otherwiſe, nor that the ſaid inhabitants ſhall aſſign over their collections to any other perſon or perſons whatſoever. *In witneſs whereof*, &c.

PRÆMUNIRE.

NOTWITHSTANDING that *præmunire* is not within the letter of the commiſſion of the peace, yet inaſmuch as it is againſt the peace of the king and of the realm, any juſtice of the peace

peace may, either on his own knowledge, or the complaint of others, cauſe any perſon to be apprehended for ſuch offence; and he may take the examination of the perſon ſo apprehended, and the information of all who can give material evidence againſt him, and put the ſame in writing, and bind over the witneſſes to the king's bench or gaol delivery; and certify his proceedings to the ſame court to which he ſhall bind over ſuch informers. 2 *Haw.* 39. *Hale's Pl.* 168.

By the 27 *Ed.* 3. *c.* 1. called the ſtatute of proviſors, They who ſhall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or which do ſue in any other court, to defeat or impeach the judgments given in the king's courts, ſhall have a day containing the ſpace of two months, by warning to be made to them, by the ſheriffs or other officers, to appear to anſwer in their proper perſons for the contempt: And if they come not at the ſaid day in their proper perſon to be at the law, they, their procurators, attornies, executors, notaries, and maintainers, ſhall from that day forth be put out of the king's protections, and their lands, goods, and chattels forfeit to the king, and their bodies whereſoever they may be found ſhall be taken and impriſoned, and ranſomed at the king's will. And upon the ſame a writ ſhall be made, to take them by their bodies, and to ſeize their goods, lands and poſſeſſions, into the king's hands. And if it be returned, that they be not found, they ſhall be put in exigent, and outlawed.

And by the 16 *R.* 2. *c.* 5. commonly called the ſtatute of *præmunire*, and to which the ſubſequent ſtatutes do refer; both thoſe who purſue, or cauſe to be purſued, in the court of *Rome*, or elſewhere, any proceſſes or inſtruments, or other things whatſoever which touch the king, againſt him, his crown and regality, or his realm; and alſo theſe who ſhall bring, receive, notify, or execute them; and their fautors and abettors, ſhall be out of the king's protection: and their lands and tenements, goods and chattels, forfeit to the king; and they ſhall be attached by their bodies, if they may be found, and brought before the king and his council, there to anſwer; or proceſs ſhall be made againſt them by *præmunire facias*, in manner as it is ordained in other ſtatutes of proviſors.

And in theſe two ſtatutes as above recited, are contained the pains and penalties of what is called a præmunire.

PRESENTMENT.

A Preſentment is that which the grand jury find and preſent to the court, without any indictment delivered to them; which is afterwards reduced into the form of an indictment, and in nothing elſe differs from an indictment.

There are other preſentments of churchwardens, conſtables, ſurveyors of the highways, and juſtices of the peace; all which may be ſeen under their proper titles.

PRISON-

PRISON-BREAKING.

IT ſeemeth that at the common law all priſon breaches, were felonies, if the party were lawfully in cuſtody for any cauſe whatſoever. 2 *Haw.* 123.

But by the following ſtatute, which is called the ſtatute *de frangentibus priſonam*, the ſeverity of the common law is moderated; in the explication of which ſtatute, will be contained the whole learning relating to this ſubject.

The ſtatute is this: *Concerning priſoners which break priſon, the king willeth and commandeth, that none that breaketh priſon ſhall have judgment of life or member, for breaking of priſon only, except the cauſe for which he was taken and impriſoned did require ſuch judgment, if he had been convict thereupon, according to the law and cuſtom of the realm.* 1 Ed. 2. ſt. 2.

Concerning priſoners which break] Therefore if the priſon be broken by a ſtranger, and not by the priſoner, or by his procurement, this is no felony in the priſoner. *Hale's Pl.* 108.

Which break priſon] It ſeems clear, that any place whatſoever, wherein a perſon under a lawful arreſt for a ſuppoſed crime, is reſtrained of his liberty, whether in the ſtocks, or ſtreet, or in the common gaol, or the houſe of a conſtable, or private perſon, is properly a *priſon* within this ſtatute; for impriſonment is nothing elſe but a reſtraint of liberty. 2 *Haw.* 124.

And therefore this extendeth as well to a priſon in law, as to a priſon in deed. 2 *Inſt.* 589.

But there muſt be an actual *breaking*; for if the door be open and he goes out, it is not felony, but a miſdemeanor only. 2 *Inſt.* 589. 2 *Haw.* 125.

But if the priſon be fired without the privity of the priſoner, he may lawfully break it to ſave his life. *Hale's Pl.* 108.

Alſo it ſeems that no breach of priſon will amount to felony, unleſs the priſoner eſcape. 2 *Haw.* 125.

That none that breaketh priſon ſhall have judgment of life or member] That is, ſhall be guilty of felony. But nevertheleſs he is ſtill puniſhable as for a high miſpriſion, by fine and impriſonment; for it cannot be thought the meaning of the ſtatute, in ordaining that ſuch offences ſhall not be puniſhed as capital ones, to intend, that they ſhall not be puniſhed at all. 2 *Haw.* 128.

Nevertheleſs, by the 3 *Ed.* 1. *c.* Thoſe who have broken priſon are not *bailable* by juſtices of the peace; and that for two reaſons: 1. Becauſe it carries a preſumption of guilt. And, 2. Becauſe it is a ſuperadded offence to the former for which they ſtood committed. 2 *H. H.* 133.

Except the cauſe for which he was taken and impriſoned did require ſuch judgment] This is to be intended of a *lawful* cauſe; and therefore *falſe impriſonment* is not within this act. 2 *Inſt.* 590.

Impriſonment

Impriſonment is a reſtaint of a man's liberty under the cuſtody of another, by lawful warrant, in deed, or in law. Lawful warrant is, either when the offence appeareth by matter of record, as when the party is taken upon an indictment; or when it doth not appear by matter of record, as when a felony is done, and the offender by a lawful *mittimus* is committed to gaol for the ſame: But between theſe two caſes there is a great diverſity; for in the firſt caſe, whether any felony were committed or no, if the offender be taken by force of a *capias*, the warrant is lawful, and if he break priſon it is felony, altho' no felony were committed; but in the other caſe, if no felony be done at all, and yet he is committed to priſon for a ſuppoſed felony, and break priſon, this is no felony, for there is no *cauſe*. 2 Inſt. 590.

So that the cauſe muſt be juſt, and not feigned, for things feigned require no judgment: Thus if a man give another a mortal wound, for which he is committed to priſon, and breaketh priſon, and the other dieth of the wound within the year, this death hath relation to the ſtroke; but becauſe relations are but fictions in law, and fictions are not here intended, this priſon-breaking is not felony. 2 *Inſt.* 591.

So that the offence for which the party was impriſoned, muſt be a capital one at the time of the offence, and not become ſuch by a matter ſubſequent. 2 *Haw.* 126.

And the cauſe muſt be expreſſed in the *mittimus*, altho' not ſo certainly as in an indictment, yet with ſuch convenient certainty as it may appear judicially that the offence requireth ſuch judgment; as, not for felony generally, but for felony in ſtealing ſuch a horſe, and the like. 2 *Inſt.* 591.

But if the offence for which the party is committed, be ſuppoſed in the *mittimus* to be of ſuch a nature as requires a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require ſuch a judgment, it ſeems difficult to maintain, that the breaking of the priſon, or a commitment for it, can be felony; for the words of the ſtatute are, *except the cauſe for which he was taken and impriſoned did require ſuch judgment*; and here it appears, that the offence, which is the cauſe of his impriſonment doth not require ſuch a judgment. 2 *Haw.* 126.

But if a man be committed by lawful warrant, for *ſuſpicion* of felony done, if he break priſon, he may be indicted for that eſcape, albeit the commitment be for ſuſpicion of felony, and yet no judgment can be given againſt him for ſuſpicion, but for the felony itſelf, whereof he is ſuſpected. 2 *Inſt.* 592.

And an indictment that ſuch a perſon *feloniouſly broke the priſon* generally, is not good; but it ought to rehearſe the ſpecialty of the matter, that he being impriſoned for ſuch or ſuch a felony, broke the priſon. 2 *Inſt.* 591.

But if the party be only arreſted for, and in his *mittimus* charged with a crime which doth not require judgment of life or member,

as

as petit larceny, or homicide by self defence or by misadventure, and the offence be in truth no greater than the *mittimus* doth suppose it to be, it is clear, from the express words of the statute, that a breaking of the prison cannot amount to felony. 2 *Haw.* 126.

But if a felony be made by a subsequent statute, and an offender is committed thereupon: if he breaks prison, it is felony. For since all breaches of prison were felonies by the common law, which is restrained by this statute in respect only of imprisonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so. *Ha. Pl.* 108. 2 *Haw.* 126.

Also it is said, that the party may be arraigned for prison-breaking, before he be convicted of the crime for which he was imprisoned; for that it is not material whether he were guilty of such crime or not; for the words of the statute are, *for which he was taken and imprisoned.* 2 Haw. 127.

But if he is first indicted and acquitted of the principal felony, he shall not be indicted for the breach of prison afterwards; for it being cleared that he was not guilty of the felony, he is in law as a person never committed for felony, and so his breach of prison is no felony. 1 *H. H.* 612.

But the gaoler shall not be punished as a felon for the party's breach of prison, unless he voluntarily consented to it; but it seems to be a negligent escape in the gaoler, for which he may be punished by fine and imprisonment, because there wanted either that due strength in the gaol, or that due vigilance in the gaoler or his officers, that should have prevented it: and if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *H. H.* 601.

And therefore if a criminal endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

Indictment for breaking out of gaol.

THE *jurors for our lord the king upon their oath present, that* A. O. *late of* ——— *in the county aforesaid, labourer, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at* ——— *aforesaid in the county aforesaid, was arrested, imprisoned, and detained, in the gaol of our said lord the king, for a certain felony by him committed, that is to say, for the feloniously taking and carrying away one black gelding, the property of* ——— *of the value of* ——— *and that he the said* A. O. *on the* ——— *day of* ——— *in the year aforesaid, with force and arms, the aforesaid gaol of our said lord the king at* ——— *aforesaid in the county aforesaid, feloniously did break, and thereby did escape from and out of the said gaol, against the peace of our said lord the king, his crown and dignity,*

PROCESS.

PROCESS.

BY the commiſſion of the peace, the juſtices in ſeſſions have power to *make and continue proceſſes upon indictments, againſt the perſons indicted, until they can be taken, ſurrender themſelves, or be outlawed.*

And by the ſtatute of the 1 *Ed.* 4. *c.* 2. Indictments and preſentments taken in the ſheriff's tourn, ſhall be delivered to the next ſeſſions, who may award proceſs thereupon, in like form as if they had been taken before themſelves.

And the law alſo in ſeveral caſes in expreſs words directs proceſs to be made by juſtices out of ſeſſions; and in other caſes by neceſſary implication: as where a ſtatute doth give power to juſtices out of ſeſſions to inquire, hear, and determine, there they may make proceſs to cauſe the party to come and anſwer, otherwiſe they cannot proceed to hear and determine; and this may be either before or after preſentment or indictment as the ſeveral ſtatutes do require: Before preſentment or indictment it is called a *warrant*; after preſentment or indictment it is properly called *proceſs*. *Dalt.* *c.* 193.

Commonly an indictment, being but an accuſation againſt a man, is of no force but only to put him to anſwer unto it. And hereof all proceſs hath the name, becauſe it *proceedeth* or goeth out upon former matter either original or judicial. *Lamb.* 519.

And it ſeemeth plain, from the nature of the thing, that there can be no need of proceſs, where the defendant is preſent in court, but only where he is abſent. 2 *Haw.* 281.

The proceſs ought to be in the name of the king. And if it iſſue from the king's bench, it ought to be under the teſte of the chief juſtice; and if it iſſue from any other court, there ſeems to be the ſame reaſon, that it ought to be under the teſte of the firſt in the commiſſion. 2 *Haw.* 283.

Upon an indictment in ſeſſions, there muſt be 15 days between the teſte and return of the *venire*, but if the entry be by conſent of parties, the *venire* may be returnable *immediate*, and the trial be the ſame day. 3 *Salk.* 371.

Proceſs on an indictment or appeal of death, is one *capias*, and then an exigent: But in the caſe of any other felony, then by the 25 *Ed.* 3. *c.* 14. two *capias's*, and then an exigent. *Hal. Pl.* 209. 2 *Haw.* 303. *Crown Circ.* 21.

The ordinary proceſſes upon all indictments of treſpaſs againſt the peace, or of other offences againſt penal ſtatutes, not being felony, or a greater offence, are as follows; Firſt, if the offender be abſent, a *venire facias*, which is but in nature of a ſummons to cauſe the party to appear, ſhall be awarded, except where other proceſs is directed by ſome ſtatute. 2 *Haw.* 283.

If it appear by the return to ſuch *venire*, that the party hath lands in the county, whereby he may be diſtrained, the *diſtreſs infinite* ſhall

ſhall be awarded from time to time, till he do appear; and by force hereof he ſhall forfeit on every default ſo much as the ſheriff ſhall return upon him in iſſues. But if a *nihil* be returned on ſuch a *venire*, then three *capias's*, that is a *capias*, *alias*, and *pluries* ſhall iſſue. 2 *Haw.* 283.

Where the inhabitants of a pariſh are indicted or preſented, the proceſs is firſt a *venire*, then a *diſtringas*. *Crown Circ.* 21.

By the 21 *J.* *c.* 4. by which all popular actions on penal ſtatutes are reſtrained to their proper counties, the like proceſs in every popular action, bill, plaint, ſuit, or information, on a penal ſtatute, before the quarter ſeſſions (or higher courts) ſhall be awarded as in an action of treſpaſs *vi & armis* at the common law.

And conſequently, the proceſs in all ſuch ſuits muſt be by attachment or *pone per vadios*, and after by *diſtreſs infinite*, where by the return the party appears to be ſufficient, otherwiſe by *capias*. 2 *Haw.* 284.

If a defendant appear to an indictment of felony, and afterwards before iſſue joined made an eſcape, either from his bail, or from priſon; the common *capias*, *alias*, and *pluries* ſhall be awarded againſt him, unleſs there had been an *exigent* before, in which caſe a new exigent ſhall be awarded. 2 *Haw.* 285.

The *exigent* ſhall not be *awarded againſt acceſſaries*, until the principal ſhall be attainted. 3 *Ed.* 1. *c.* 14. 2 *Haw.* 306.

By the 8 *H.* 6. *c.* 10. *On indictments for treaſon, felony, or trespaſs, againſt perſons dwelling in other counties than where the indictment is taken, before any exigent awarded, preſently after the firſt writ of* capias *awarded and returned, another writ of* capias *ſhall be awarded, directed to the ſheriff of the county whereof the perſon indicted was ſuppoſed to be converſant by the ſame indictment, returnable before the ſame juſtices or others before whom he is indicted, at a certain day, containing the ſpace of* 3 *months from the date of the ſaid laſt writ, where the counties are holden from month to month; and where they are holden from* 6 *weeks to* 6 *weeks, he ſhall have* 4 *months, until the return of the ſame writ: by which writ of ſecond* capias *it ſhall be commanded to the ſame ſheriff to take the perſon indicted by his body, if he can be found within his bailiwick, and if he cannot be found within his bailiwick, that the ſaid ſheriff ſhall make proclamation in two counties before the return of the ſame writ, that he which is ſo indicted, ſhall appear before the ſaid juſtices or others, in the county, liberty, or franchiſe where he is indicted, at the day contained in the ſaid laſt writ of* capias, *to anſwer to the king, of the felony, treaſon, or treſpaſs, whereof he is ſo indicted: After which ſecond writ of* capias *ſo ſerved and returned, if he which is ſo indicted come not at the day of the ſame writ of* capias *returned, the exigent ſhall be awarded. And every exigent and outlawry otherwiſe awarded or pronounced ſhall be void.*

And if any ſuch indictment ſhall be removed by certiorari, then before the exigent awarded, preſently after ſuch firſt capias *returned, another writ*

writ of capias *ſhall be directed as before, returnable before the king in his bench.*

Alſo if any perſon be indicted of felony or treaſon, and at the time of the ſame felony or treaſon ſuppoſed was converſant within the county whereof the indictment maketh mention, the like proceſs ſhall be made againſt the perſon ſo indicted, as hath formerly been uſed; that is, without ſending proceſs into the other county.

But every perſon indicted in the form aforeſaid, after he is duly acquitted by verdict, ſhall have an action upon his caſe, againſt the procurer of ſuch indictment; and if ſuch procurer be attainted thereof, the plaintiff ſhall recover treble damages. Which ſeemeth to be upon account of the diſtance at which he is ſuppoſed to live, from the place where he is indicted, and conſequently his extraordinary trouble in that behalf.

Dwelling in other counties] If the defendant be named of *B.* and late of *C.* there is no need of any *capias* to the ſheriff of the county where *C.* lies, becauſe it appears that the defendant is at preſent converſant at *B.* But if a defendant be named of no certain place at preſent, but only late of *B.* and late of *C.* and late of *D.* being all of them in counties different from that wherein the proſecution is commenced, a *capias* ſhall go to the ſheriff of every one of thoſe counties. 2 *Haw.* 306.

Shall be void] Not utterly void, but only voidable by writ of error. 2 *Haw.* 306.

Mr. *Marrow* ſaith, that by the equity of this ſtatute, if a perſon, indicted in one county is impriſoned in another, the juſtices may award an *habeas corpus* to remove him before themſelves. *Lamb.* 526.

Concerning the execution of the proceſs, it is laid down as a general rule, that where-ever the king is a party to the ſuit (as he certainly is to all informations and indictments,) the proceſs ought to be executed by the ſheriff himſelf, and not by the bailiff of any franchiſe, whether it have the clauſe *non omittas* or not, and whether the defendant be within a franchiſe or in the county at large, for the king's prerogative ſhall be preferred to any franchiſe: But it is ſaid, that this is to be intended only where in the grant of the franchiſe no mention is made of cauſes to which the king is a party. 2 *Haw.* 284.

And if the party be in an houſe, if the doors be ſhut, and the ſheriff (having given notice of his proceſs) demand admittance, and doors be not opened, he may break open the doors and enter to the take the offender. 2 *H. H.* 202.

But no perſon, on the lord's day, ſhall ſerve or cauſe to be ſerved any writ, proceſs, or warrant, order, or judgment (except in caſes of treaſon, felony, or breach of the peace;) but the ſervice thereof ſhall be void, and the perſon ſerving the ſame ſhall be liable to anſwer damages to the party grieved, in the ſame manner as if he had done it without any writ, proceſs, warrant, order, or judgment at all. 29. *C.* 2. *c.* 7. *ſ.* 6.

It

It seems to be agreed, that every suit, whether civil or criminal, and also every process in such suit against jurors, ought to be properly continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and the suffering any such gap or chasm is properly called a *discontinuance*; and the continuing the suit by improper process (as by a *capias* instead of a *distringas*) or by giving the parties an illegal day, is properly called a *miscontinuance*; and if the justices, before whom the matter is depending, do not come on the day to which it is continued, it is said to be *put without day*, and cannot be revived without a re-summons or re-attachment. 2 *Haw.* 298, 300.

Now process may be discontinued several ways. As, 1. Where the second is not tested on the very same day, on which the first is returnable. 2. Where there is a sessions intervening between the teste and the return of a *capias*, that the defendant may not be imprisoned an unreasonable time. But it is no objection to an *exigent*, that it is not returnable the next sessions, because it must allow time for five counties to be holden between its teste and return. 3. Where after issue or demurrer, the court gives the party a day to a distant sessions, without making any continuance to that immediately following. 4. Where the sessions to which the suit is continued is adjourned, and the suit is not adjourned accordingly. 5. Where any of the parties are described in any continuance of the suit, whether on the roll, or by process, by a name or addition variant from those in the original, tho' only in one letter. 6. Where a *venire* or *distringas* are issued, without any award on the roll to warrant them. 2 *Haw.* 298, 299.

And it seems generally to be taken as an undoubted principle, That a discontinuance by suffering a total chasm in the proceedings, whether on the roll, or in the process, by not giving a fresh continuance instantly upon the determination of the precedent, shall never be aided by any appearance or pleading over: But it is holden by the greater number of authorities, that if the original be good, and the defendant present in court, he shall be compelled to answer to such original, let the process whereon he came in, or the execution of it, be never so erroneous or defective, so that it never were discontinued; for the end of process is to compel an appearance, and the end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process, as to let the defendant out of court, in order only to have him brought in again in better form. 2 *Haw.* 300.

The processes (as well of *capias* as of outlawry) may be stayed by a *supersedeas* issuing from other justices (out of sessions) testifying that the party hath come before them, and hath found sureties for his appearance to answer to the indictment, or to pay his fine. *Dalt. c.* 193.

And it seemeth that even any one justice may bail persons indicted at the sessions, for any offence under the degree of felony; for that the statutes relating specially to the power of justices in granting bail, do not in this case seem to take away the power, which one justice had before the making of the said statutes. 2 *Haw.* 103.

Judgment of outlawry is given by the coroner, at the fifth county court, upon the party's not appearing, to the *exigent* (which is a writ commanding the sheriff to cause the defendant *(exigi)* to be *demanded* from county court to county court, until he be outlawed). And such judgment is entered thus, *Therefore by the judgment of the coroner of our lord the king of the county aforesaid, he is outlawed.* 2 Haw. 446.

The word *outlaw (atlaghe) utlagatus*, is not from the Latin *lex*, but from the Saxon *laga*, which signifies *law*. And a person outlawed signifies one that is out of the protection of the king, and out of the aid of the law.

And a man which is outlawed is called outlawed, but a woman which is outlawed is called waived, and not *utlagata*; for that women are not sworn in leets or tornes, as men which are of the age of 12 or more are; and therefore men may be called *utlagati*, that is, *extra legem positi*, but women are *waviatæ*, that is, *derelictæ*, left out or not regarded, because they were not sworn to the law: wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworn to the law, which is intended of the oath of allegiance in the leet. 1 *Inst.* 122.

And hence it is, that a man under the age of 12 years, cannot be outlawed. 1 *Inst.* 128.

Process of outlawry lies in all indictments of treason or felony, and on all returns of a rescous; and also on all indictments of trespass with force and arms; and it seems probable, that it lies on an indictment of conspiracy, or deceit, or any other crime of a higher nature than a trespass with force and arms; but not on any indictment for a crime of an inferior nature, And it seems agreed, that it lies not on any action on a statute, unless it be given by such statute, either expressly, as in the case of a *præmunire*, or impliedly, as where a recovery is given by an action wherein such process lay before, as on a writ of trespass for a forcible entry, on the 8 *H.* 6. *c.* 9. because the statute expressly gives a recovery by such writ, and such process lies in it by the common law. 2 *Haw.* 302, 303.

In every *action personal* wherein any exigent shall be awarded out of any court, one writ of proclamation shall be awarded out of the same court, having day of teste and return as the writ of exigent shall have, directed and delivered of record to the sheriff where the defendant dwells; which writ of proclamation shall contain the effect of the action: And the sheriff shall make one proclamation in the open county court, and another at the general quarter

quarter ſeſſions where the defendant dwells, and another a month at leaſt before the *quinto exactus*, by virtue of the ſaid writ of exigent, at or near the moſt uſual door of the church or chapel where the defendant ſhall be dwelling at the time of the exigent awarded, upon a *ſunday* immediately after divine ſervice. 31 *El. c.* 3.

Alſo, upon iſſuing any exigent out of any of the king's courts, againſt any perſon for a *criminal* matter, before judgment or conviction, there ſhall alſo iſſue a writ of proclamation, bearing the ſame teſte and return, where the perſon in the record of the proceeding is mentioned to inhabit, according to the form of the 31 *El. c.* 3. which writ of proclamation ſhall be delivered to the ſheriff three months before the return of the ſame. 4 & 5 *W. c.* 22. *ſ.* 4.

If there are two coroners in a county, or more, one may execute the writ, as in caſe of an exigent, but the return muſt be in the names of the coroners. 2 *H. H.* 56.

And the return of the outlawry muſt be certain: It muſt ſhew where the county court was held, and in what county; and muſt return the day, and year of the king to every *exactus*. 2 H. H. 203.

And alſo the ſheriff's name and office muſt be ſubſcribed to the return of the exigent. 2 *H. H.* 204.

It is ſaid, that the juſtices in ſeſſions cannot iſſue a *capias utlagatum*, but muſt return the record of the outlawry into the king's bench, and there proceſs of *capias utlagatum* ſhall iſſue. 2 *H. H.* 52.

But in *T.* 10 *J.* The opinion of all the court of common pleas was, that if one be outlawed before the juſtices of the peace on an indictment of felony, they may award a *capias utlagatum*; and ſo was the opinion of *Periam* chief baron, and all the court of the exchequer: for they that have power to award proceſs of outlawry, have alſo power to award a *capias utlagatum*, as incident to their authority and juriſdiction. 12 *Co.* 103.

If a perſon be outlawed at the ſuit of one man, all men ſhall take advantage of this perſonal diſability. 1 *Inſt.* 128.

But ſuch diſability abateth not the writ, but only diſableth the plaintiff, until he obtain a charter of pardon. 1 *Inſt.* 128.

Upon outlawry in treaſon or felony, the offender ſhall loſe and forfeit as much as if he had appeared, and judgment had been given againſt him, as long as the outlawry is in force. 2 *Haw.* 446.

But the outlawry for a miſdemeanor doth not inure as a conviction for the offence, as it doth in caſes of treaſon and felony; but as a conviction of the contempt for not anſwering, which contempt is therefore puniſhed, not by fine as a conviction for the offence, but by forfeiture of goods and chattels for the contempt. *K.* and *Tippin.* 1 *W.* 2 Salk. 494.

The very iſſuing of the exigent, in caſe of treaſon or felony, gives to the king the forfeiture of the goods of the party, from the time of the teſte of the writ of exigent: and the forfeiture by the exigent awarded ſtands, altho' the indictment be quaſhed, until

there be a judgment of reverſal on a writ of error; becauſe the king's title being of record, muſt be avoided by a record. 2 *H. H.* 204, 205.

And as the award of the exigent gives the forfeiture of the goods, ſo the outlawry gives the forfeiture or loſs of the lands of the party outlawed, to wit, in caſe of outlawry of treaſon his lands are forfeited to the king, of whomſoever they are held; and in caſe of outlawry of felony, to the lord by eſcheat, of whom they are immediately holden. 2 *H. H.* 206.

But it muſt be remembred, that the bare judgment of outlawry by the coroner, without the return thereof of record, is no attainder, nor gives any eſcheat; but it muſt be returned by the ſheriff, with the writ of *exigi facias*, and the return indorſed. 2 *H. H.* 206. Or elſe it muſt be removed by certiorari: for the judgment given by the coroner in the county court is not matter of record, that court not being a court of record. 1 *Inſt.* 288.

And by the outlawry all *perſonal* chattels are veſted in the king by forfeiture; but *real* chattels, or freehold eſtates are not veſted in the king, till after inquiſition found. 3 *Salk.* 262.

In ancient times no man could have been outlawed but for felony; the puniſhment whereof was death; and upon this account an outlawed man was called *woolfeſhead*, becauſe he might be put to death by any man, as a wolfe that hateful beaſt might. But in the beginning of the reign of K. *Ed.* 3. it was reſolved by the judges, for avoiding of inhumanity, and of effuſion of chriſtian blood, that it ſhould not be lawful for any man but the ſheriff, having lawful warrant, to put to death any man outlawed, tho' it were for felony; and if he did, he ſhould undergo ſuch pain of death, as if he had killed any other man; and ſo the law continueth to this day. 1 *Inſt.* 28.

If a man be indicted before juſtices of the peace, and thereupon outlawed, and is taken and committed to priſon, the juſtices of gaol delivery may award execution of this priſoner; for they are conſtituted to deliver the gaol. 4 *Inſt.* 169. *Hale's Pl.* 158. 2 *H. H.* 35.

Where clergy is allowable, it ſhall be as much allowed to one who is outlawed, as to one who is convicted by verdict or confeſſion. 2 *Haw.* 343.

But a ſtatute taking the benefit of clergy from thoſe who ſhall be found guilty, does not thereby take it from thoſe who are outlawed. 2 *Haw.* 343.

But by the 3 & 4 W. c. 9. ſ. 2. *If any perſon be indicted of any offence, for which, by any former ſtatute, he is excluded from clergy, upon conviction; if he ſhall be outlawed thereupon, he ſhall not have his clergy.*

By any former ſtatute] Hereby it appears, that this extends not to offences made felonies by ſtatutes ſubſequent to this ſtatute. 2 *Haw.* 348.

Where

Where a perſon is outlawed, the defendant may ſhew all the matter and outlawry returned of record, and demand judgment if he ſhall be anſwered, becauſe he is out of the law, to ſue an action during the time that he is outlawed. 1 *Inſt.* 128.

It ſeems to be a good challenge of a juror, that he is outlawed, either for a criminal matter, or as ſome ſay, in a perſonal action; but not a principal challenge, but only to the favour, unleſs the record of the outlawry be produced. 2 *Haw.* 215, 417.

But it ſeems clear, that outlawry in *a perſonal* action is not a good exception againſt a witneſs, as it is againſt a juror. 2 *Haw.* 443.

An outlawed perſon may make a will, and have executors or adminiſtrators. *Cro. El.* 575.

And an executor may reverſe the outlawry of the teſtator, where he was not lawfully outlawed. 1 *Leon.* 325.

Outlawry may be reverſed ſeveral ways; as by procuring a *ſuperſedas* and delivering it to the ſheriff before the *quinto exactus*, or by ſhewing any matter apparent on record which makes the outlawry erroneous, as the want of an original, or the omiſſion of proceſs, or want of form in a writ of proclamation, or a return by a perſon appearing not to be ſheriff, or a variance between the original and exigent or other proceſs, or by a miſnomer, or want of addition. 2 *Haw. c.* 50.

And upon a writ of error upon an outlawry in felony, the party outlawed muſt render himſelf in cuſtody, and pray the allowance of the writ of error in perſon: and if the outlawry be reverſed, he ſhall be put to anſwer the indictment. 2 *H. H.* 209.

But by the 4 & 5. *W. c.* 18. one outlawed, except for treaſon or felony, need not appear in perſon to reverſe an outlawry, but by an attorney. 2 *Salk.* 496.

There is another kind of proceſs out of a court of record, againſt offenders, called *attachment*, which is generally for contempt; which belongs to title ATTACHMENT.

The proceſs againſt *jurors*, may be ſeen in the title JURY.

And the proceſs againſt *witneſſes*, in title EVIDENCE.

Forms of proceſs; and firſt of a *Venire*.

GEORGE *the third, by the grace of God, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth, To the ſheriff of the county of , greeting. We command you, that you omit not, by reaſon of any liberty in your bailiwick, but that you cauſe* A. O. *of* ——— *in your ſaid county, yeoman, to come before our juſtices aſſigned to keep our peace, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at* ——— *in your ſaid county, on the* ——— *day of* ——— *next enſuing, to anſwer unto us upon certain articles preſented againſt him the ſaid* A. O. *And have you there then this precept. Witneſs* J. P. *and* K. P. *at* ——— *the* ——— *day of* ——— *in the* ——— *year of our reign.*

And

And upon this *venire*, if the defendant be returned sufficient, and maketh default, then a *distringas* shall be awarded, and so the same process infinite, until he come in: But if a *nihil habit* be returned at the first, then after the *venire*, there shall go out a *capias*, *alias*, *pluries*, and *exigent*. Dalt. Sher. 160.

Form of a *Distringas*,

GEORGE *the third, by the grace of God, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and so forth, To the sheriff of the county of* ——— *greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and* distrain A. O. *of* ——— *in your county, yeoman, by all his lands and tenements,* &c. *and that you answer for the issues thereof* &c. *and that you have his body before our justices assigned* [and so on, as before in the *venire*]

But if a *nihil* (as hath been said) be returned at first upon the *venire facias*; then a *capias* shall issue, thus:

GEORGE *the third by the grace of God, of* Great-Britain, France, *and* Ireland, *king defender of the faith, and so forth, To the sheriff of the county of* ——— *greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and* take A. O. *of* ——— *in your county, yeoman, if he shall be found in your bailiwick, and him cause to be safely kept; so that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, at* ——— *in your county, on the* ——— *day of* ——— *next ensuing, to answer unto us concerning divers trespasses, contempts, and offences, of which he is indicted. And have you there then this writ. Witness* J. P. *and* K. P. *at* ——— *the* ——— *day of* ——— *in the* ——— *year of our reign.*

At which day A. S. *esquire, sheriff of the county aforesaid, returned that he is not found in his bailiwick, and he did not come. Therefore it is commanded as before.*

Note; The cause why the entry is made, *and he did not come*, is, because the party may appear voluntarily, and so avoid the attachment or arresting of his body.

The *Alias Capias*.

GEORGE —*To the sheriff* ——— *We command you, as we before commanded you, that you omit not* ——— (as before.)

At which day ——— (as before) *and he did not come. Therefore it is commanded to the sheriff as it hath been often commanded,* &c.

The

The *Pluries capias.*

GEORGE &c. *To the ſheriff, &c. We command you, as we have often commanded you, that you omit not* (as before)

At which day A. S. *eſquire, the ſheriff aforeſaid, returned, that the aforeſaid* A. O. *is not found in his bailiwick, and he did not come. Therefore it is commanded, that you cauſe to be demanded,* &c.

The *Exigent.*

GEORGE &c. *To the ſheriff &c. greeting. We command you, that you cauſe* A. O. *of———in your county, yeoman, to be* demanded, *until, by the law and cuſtom of our kingdom of* England, *he be outlawed, if he ſhall not appear; and if he ſhall appear, that then you take him, and cauſe him to be ſafely kept, ſo that you have his body before our juſtices aſſigned to keep our peace, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in your ſaid county committed, at the general quarter ſeſſions of the peace in your county next after the feaſt of———next enſuing to be held, whereſoever in the ſame county it ſhall happen to be holden, to anſwer unto us of divers treſpaſſes, contempts, and offences, of which he is indicted. And have you there then this writ. Witneſs* J. P. *eſquire at——— in the ſaid county, the——— day of———in the———year of our reign.*

At which day A. S. *eſquire, ſheriff of the county aforeſaid returned, that at the county holden at———the———day of———in the———year of the reign of our lord the king that now is, and ſo at four other counties then next following, there holden, the aforeſaid* A. O. *was demanded, and did not appear. Therefore by the judgment of the coroner of our ſaid lord the king, in the county aforeſaid, he was outlawed.*

The *Capias Utlagatum.*

GEORGE &c. *To the ſheriff &c. greeting. We command you, that you omit not, by reaſon of any liberty in your county, but that you take* A. O. *late of———in your county, labourer, if he ſhall be found within your county, and him cauſe ſafely to be kept, ſo that you have his body before the keepers of our peace and our juſtices aſſigned to hear and determine divers felonies, treſpaſſes and other miſdemeanors in your county committed, at———the———day of———to ſtand right in our court before our juſtices aforeſaid, upon a certain outlawry againſt him the ſaid* A. O. *promulged, at our ſuit, for certain felonies* (or *treſpaſſes*) *whereof he was convicted the———day of———. And have you then there this writ. Witneſs &c.*

Profaneſs. See *BLASPHEMY.*

RAPE.

RAPE.

I. What it is.
II. Evidence on an indictment of rape.
III. Punishment of rape.
IV. Principal and accessary.

I. What it is.

RAPE is, when a man hath carnal knowledge of a woman, by force, and against her will. 2 *Inst.* 180. 1 *Haw.* 108.

Also, if any person shall unlawfully and carnally know, and abuse any woman child, under the age of ten years, whether with her consent or against it, he shall be guilty of felony without benefit of clergy. 18 *El. c.* 7.

The offence of rape is no way mitigated, by shewing that a woman at last yielded to the violence, if such her consent was forced by fear of death, or of duress. 1 *Haw.* 108.

Also, it is not a sufficient excuse in the ravisher, to prove, that the woman is a common strumpet; for she is still under the protection of the law, and may not be forced. 1 *Haw.* 108.

Nor is it any excuse, that she consented after the fact. 1 *Haw.* 108.

And by the 6 *R.* 2. *c.* 6. When any woman is ravished, and afterwards doth consent to the ravisher; they shall both of them be disabled to have any inheritance, dower, or joint feoffment, but the next of blood shall enter. And the next of kin to the woman ravished may have an appeal against the ravisher, notwithstanding such consent; and the defendant shall not be received to wage battel.

It is said by Mr. *Dalton*, that if a woman at the time of the supposed rape do conceive with child by the ravisher, this is no rape; for (he says) a woman cannot conceive except she doth consent. And this he hath from *Stamford* and *Britton*, and *Finch. Dalt. c.* 160.

But Mr. *Hawkins* observes, that this opinion seems very questionable; not only because the previous violence is no way extenuated by such a subsequent consent; but also, because if it were necessary to shew, that the woman did not conceive, the offender could not be tried till such time as it might appear whether she did or not; and likewise because the philosophy of this notion may be very well doubted of. 1 *Haw.* 108.

And L. *Hale* says, this opinion in *Dalton* seems to be no law. 1 *H. H.* 731.

II. Evidence

II. Evidence on an indictment of rape.

The party raviſhed may give evidence on oath, and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed muſt be left to the jury, and is more or leſs credible according to the circumſtances of fact that concur in that teſtimony. 1 *H. H.* 633.

For inſtance, if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made purſuit after the offender; ſhewed circumſtances and ſigns of the injury, whereof many are of that nature, that only women are the moſt proper examiners and inſpecters; if the place, wherein the fact was done, was remote from people, inhabitants, or paſſengers; if the offender fled for it: theſe, and the like, are concurring evidences to give greater probability to her teſtimony, when proved by others as well as her ſelf. 1 *H. H.* 633.

But on the other ſide, if ſhe concealed the injury for any conſiderable time, after ſhe had opportunity to complain; if the place, where the fact was ſuppoſed to be committed, were near to inhabitants or common recourſe or paſſage of paſſengers, and ſhe made no outcry when the fact was ſuppoſed to be done, when and where it is probable ſhe might be heard by others; or if a man prove himſelf to be in another place, or in other company, at the time ſhe charges him with the fact; or if ſhe is wrong in the deſcription of the place, or ſwears the fact to be done in a place where it was impoſſible the man could have acceſs to her at that time, as if the room was locked up, and the key in the cuſtody of another perſon: theſe and the like circumſtances carry a ſtrong preſumption, that her teſtimony is falſe or feigned. 1 *H. H.* 633.

Read. Rape.

Upon the whole; rape, it is true, is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death: but it muſt be remembered, that it is an accuſation eaſily to be made, and hard to be proved, and harder to be defended by the party accuſed, tho' never ſo innocent: Therefore a wiſe jury will be cautious upon trials of offences of this nature, that they be not ſo much tranſported with indignation at the heinouſneſs of the offence, as to be over haſtily carried to the conviction of the perſon accuſed thereof, by the confident teſtimony, ſometimes of malicious and falſe witneſs. 1 *H. H.* 635, 636.

III. Puniſhment of rape.

Of old time rape was felony, for which the offender was to ſuffer death: afterwards the offence was made leſſer, and the puniſhment changed from death to the loſs of thoſe members whereby he offended; that is to ſay, it was changed to caſtration and loſs of his eyes, unleſs

unleſs ſhe that was raviſhed, before judgment demanded him for her huſband. 2 *Inſt.* 180.

Then, by the ſtatute of the 3 *Ed.* 1. *c* 13, it was made a treſpaſs, ſubjecting the offender to two years impriſonment, and a fine at the king's will; and it was again made felony, by the 13 *Ed.* 1. *c.* 34. and at laſt by the 18 *El. c.* 7. was excluded from the benefit of clergy.

And no charter of pardon ſhall be allowed for rape, unleſs the rape be ſpecified therein. 13 *R.* 2. *ſt.* 2. *c.* 1.

And all rapes are excepted out of the general pardon, of the 20 G. 2. *c.* 52.

IV. Principal and acceſſary.

Mr. *Hawkins* ſays, all who are preſent, and actually aſſiſt a man to commit a rape, may be indicted as principal offenders, whether they be men or women. 1 *Haw.* 108.

And ſo, one woman may be a principal to the raviſhment of another.

And L. *Hale* ſays, that by the 18 *El. c.* 7. the principals in rape are ouſted of clergy, whether they be principals in the firſt degree, to wit, he that committed the fact; or principals in the ſecond degree, to wit, preſent aiding and abetting: but acceſſaries, before and after, have their clergy. 1 *H. H.* 633.

Indictment for a rape.

New-Jerſey, Eſſex County. THE *jurors for our lord the the king upon their oath preſent, That* A. O. *late of in the county of yeoman: not having god before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of the reign of with force and arms, at in the county aforeſaid, in and upon one* A. I. *ſpinſter, in the peace of god and of our ſaid lord the king then and there being, violently and feloniouſly did make and aſſault, and her the ſaid* A. I. *againſt the will of her the ſaid* A. I. *then and there feloniouſly did raviſh and carnally know: againſt the peace of our ſaid lord the king, and againſt the form of the ſtatute in ſuch caſe made and provided.*

RECOGNIZANCE.

A Recognizance is a bond of record, teſtifying the recognizor to owe a certain ſum of money to ſome other; and the acknowledging of the ſame is to remain of record; and none can take it but only a judge or officer of record. *Dalt. c.* 168.

And

And these recognizances, in some cases the justices of the peace are enabled to take by the express words of certain statutes: But in other cases (as for the peace, and good behaviour, and the like) it is rather in congruity, and by reasonable intendment of law, than by any express authority given them, either by their commission, or by the statute law. *Crom.* 125. *Dalt. c.* 168.

But whersoever any statute giveth them power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause, they may take a recognizance. Yea, whersoever they have authority given them to cause a man to do a thing, there it seemeth they have in congruity power given them to bind the party by recognizance to do it: and if the party shall refuse to be bound, the justice may send him to gaol. *Dalt. c.* 168.

But he can take no recognizance but only of such matters as concern his office: and if he doth, it seemeth to be void. *Dalt. c.* 168.

Every obligation and recognizance, taken by justices of the peace, must be made to *our lord the king*; on pain of imprisonment of any person that shall take it otherwise. *Dalt. c.* 168.

It must also contain the name, place of abode, and trade or calling, both of principal and sureties, and the sums in which they are bound. *Barl.* Recog.

And it is most commonly subject to a *condition*, which is either indorsed, or under written, or contained within the body of it; upon the performance of which the recognizance shall be void. *id.*

When the parties are to enter into recognizance, call them by their names thus: "You *A. B.* acknowledge to owe to our sovereign "lord the king, the sum of----------And you *C. D.* acknowledge "to owe to our sovereign lord the king, the sum of----------To be "levied of your respective goods and chattels, lands and tene- "ments, for the use of our said lord the king, his heirs and "successors, if default shall be made in the condition following; "That is to say, if you the said *A. B.* shall make default in appearing, *&c.*" But the parties need not sign it. *id.*

And it is usual for the justices to mark at the foot of the examination, *A. B.* in 40 *l.* to appear *&c.* And from such short note to make out a record afterwards. *id.*

Yet the recognizance is a matter of record presently, so soon as it is taken and acknowledged, altho' it be not made up. *Dalt. c.* 168.

Lord *Coke* (1 *Inst.* 260) says, that a record is a memorial or remembrance in rolls of *parchment*, &c. From whence it seemeth that a recognizance ought to be ingrossed on parchment, perhaps for this reason, because the parchment is more durable than paper; but since there is no law which prohibits it to be ingrossed on paper, it seemeth that if it shall be on paper only, and not on parchment, it is good in law.

And

And when it is made up, if the justice shall only subscribe his name, without his seal to it, this is well enough; and that may be in either of these sorts, *Acknowledged before me* J. P. or only to subscribe his name thus, *J. P.* Dalt. c. 176.

The manner of acknowledging recognizances.

King's County, } W. O. *of*, &c. *in* 10 0 0
14*th of* June, } H. O. *of*, &c. *in* 10 0 0
1763. } T. W. *of*, &c. *in* 10 0 0

YOU *W. O. H. O.* and *T. W.* do severally acknowledge to owe to our sovereign lord the king, *ten pounds*, a-piece, to be levied on your respective goods and chattels, lands and tenements, for the use of his majesty, his heirs and successors, if default shall be made in the condition under written.

THE condition of this recognizance is such, That if the said *W. O.* shall personally appear before the justices of the peace at the next general quarter-sessions of the peace, to be held for, &c. and shall then and there answer unto such misdemeanors which shall be objected against him, and that he doth not depart without leave of the court: Then this recognizance to be void.

Recognizance single.

King's County. ss. BE it remembred, That on the twentieth day of *April*, in the third year of the reign of our sovereign lord *George* the third, by the grace of god, of *Great-Britain*, *France*, and *Ireland*, king, defender of the faith, &c. *J. S.* of *H.* in the county aforesaid, carpenter, came before me, *O. T.* esq; one of his majesty's justices of the peace for the said county, and acknowledged himself to be indebted unto our said sovereign lord the king, in *twenty pounds*, of good and lawful money of *England*; to be levied on his goods and chattels, lands and tenement, to the use of our said sovereign lord the king, his heirs and successors, in case default shall be made in the condition following.

THE condition of this recognizance is such, That if the above-bounden *J. S.* shall personally appear at the next general quarter sessions of the peace to be holden in and for the county of *King's*, to answer what shall be then and there objected against him by *S. T.* on his majesty's behalf; and shall, in the mean time, keep the peace towards the said *S. T.* and all other his majesty's liege people; then this recognizance to be void, or else to remain in full force.

'Tis expedient for the justice to keep a book, in which he ought to enter his recognizances, thus,

A. B. of the township of *C.* in the county of *D. E.* to appear at the next assizes (or sessions of the peace, as the case is) to answer *C. D.*

Sureties R. N. *of* B. } 10*l.*
B. W. *of* L. }

The number and sufficiency of the sureties is discretionary in the justice before whom the recognizance is acknowledged; and when once taken, if he is deceived in the ability of the sureties, he may compel the party to put in more; but this is when the recognizance is taken *ex officio*, and not by virtue of a *supplicavit*.

The justices shall certify their recognizances for keeping the peace, to the next sessions, that the party may be called; and if he make

make default, the default shall be recorded, and the recognizance, with the record of the default, shall be sent and certified into the chancery, king's bench, or exchequer. 3 *H.* 7. *c.* 1.

But in cases of felony, the recognizances are to be certified to the general gaol delivery. 1 & 2 *P.* & *M. c.* 13.

The *conditions* of recognizances, in all the variety of cases, are interspersed under their proper titles.

RESCUE.

RESCOUS is an ancient *French* word, coming from *rescourre*, that is, *recuperare*, to recover; and signifies a forcible setting at liberty against law, a person arrested by the process or course of law. 1 *Inst.* 160.

It seems that it is necessary, that the rescuer should have knowledge that the person is under arrest for a criminal offence, if he be in the custody of a private person; but if he be in the custody of an officer, there at his peril he is to take notice of it. 2 *H. H.* 606.

But it is said, that to rescue a felon taken on a general warrant, to answer what shall be objected against him, no cause being expressed in the warrant, is not felony. 1 *H. H.* 578.

Nor unless a felony hath been really done. *Hale's Pl.* 116.

Altho' a *prison breaker* may be arraigned for that offence, before he be arraigned of the crime for which he was imprisoned; yet he, who *rescues* one imprisoned for felony, cannot, according to the better opinion, be arraigned for such offence as for a felony, till the principal offender be attainted; but he may be immediately proceeded against for a misprision, if the king pleases. 2 *Haw.* 140.

And therefore if the principal die before the attainder, he shall be fined and imprisoned. *Hale's Pl.* 116.

Also if the principal be found not guilty, or guilty of a crime not capital, the rescuer ought to be discharged of felony, but he may be fined for the misdemeanor. 1 *H. H.* 598, 599.

An indictment of *rescous*, may set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. 2 *Haw.* 140.

A hindrance of a person to be arrested, that has committed felony, is a misdemeanor, but no felony: But if the party be arrested, and then rescued, if the arrest was for felony, the rescuer is a felon; if for treason, a traytor; if for trespass, fineable. *Hale's Pl.* 116. 2 *Haw.* 140.

There are also special penalties enacted for rescuing offenders against particular statutes, which belong not to this general title.

Altho' the felony for which a man is arrested, be not within clergy; yet the rescuing him is within clergy. 1 *H. H.* 599, 607.

Upon the return of a *rescous*, process of outlawry shall issue. 2 *Haw.* 302.

Restitution

Reſtitution of ſtolen goods.

THERE are three means of reſtitution of goods, for the party from whom they were ſtolen; 1. By appeal of robbery or larceny. 2. By the ſtatute of the 21 *H.* 8. *c.* 11. And, 3. By courſe of the common law. 1 *H. H.* 538.

Upon an appeal of robbery or larceny. If the party were convict thereupon, reſtitution of the goods contained in the appeal, was to be made to the appellant; for it is one of the ends of that ſuit. 1 *H. H.* 538.

And hence it is, that if in appeal of felony or robbery, the appellant omit any of the goods ſtolen from him, they are forfeit and confiſcate to the king. 1 *H. H.* 538.

And this appeal muſt be upon a freſh ſuit; and tho' antiently the law was ſtrict herein, as to the time and manner of the purſuit and apprehending of the felon, yet the law is now more liberal. 1 *H. H.* 540.

For if the felon be taken by any others, as by the ſheriff, yet if the party robbed come within a year after, and give notice of the felony, and enter his appeal, this is a freſh ſuit, if he uſed his diligence ſhortly after the felony to have taken him. 1 *H. H.* 540.

If a felon waive the goods ſtolen, without any purſuit after him, thoſe goods are not in law waived, nor forfeit to the king or lord of a franchiſe; but if he waive them upon a purſuit of him, then they are waived in law, and forfeit to the king or lord of the liberty. 1 *H. H.* 541.

And this forfeiture is not like a ſtray, where tho' the lord may ſeize, yet the party who is the owner may retake them within the year and day; but here the true owner cannot ſeize his own goods, tho' upon freſh ſuit within the year and day. 1 *H. H.* 541.

But yet this is not an abſolute loſs of the owner's goods, but rather an expedient, ſettled by law, to drive the owner to convict the felon by proſecuting his appeal; and therefore if he make freſh ſuit, and proſecute his appeal, and the felon be thereupon convict or attaint, and the freſh ſuit be inquired and found, by verdict or inqueſt of office, he ſhall have reſtitution of the goods ſo waived. 1 *H. H.* 541.

By the ſtatute of 21 *H.* 8. *c.* 11. Which ſtatute introduced a new law for reſtitution; for before this ſtatute there was no reſtitution upon an indictment, but only upon an appeal: Which ſaid ſtatute enacteth as follows;

If any felon do rob or take away any man's money or goods, and thereof be indicted, and arraigned, and found guilty, or otherwiſe attainted, by reaſon of evidence given by the party robbed, or owner of the money or goods, or by any other by their procurement; then the party robbed, or owner of the goods, ſhall be reſtored to ſuch his money or goods: and as well the juſtices of gaol delivery, as other juſtices before

whom

whom the felon ſhall be found guilty, or otherwiſe attained, may award a writ of reſtitution, in like manner as if the felon were attainted on appeal.

Found guilty or otherwiſe attainted] By this it ſeems queſtionable, whether the party, be intitled to reſtitution, upon the defendant's ſtanding mute; in which caſe he is neither found guilty, nor otherwiſe attainted. 2 *Haw.* 332.

Or otherwiſe attainted] If the owner prefers a bill of indictment, which is found, and the felon flies, and is outlawed, the owner ſhall have reſtitution; for he gave evidence upon the indictment, which tho' it be not a conviction, is the ground of the outlawry, which is an attainder. 1 *H. H.* 545.

The party robbed, or owner] Therefore if the ſervant be robbed of the maſter's money, or his ſervant by his procurement, give evidence, and convict the felon, the maſter ſhall have a writ of reſtitution, if it appear upon the indictment and evidence, that it was the maſter's money; for the ſtatute gives reſtitution to the party robbed, or owner. 1 *H. H.* 542.

Or owner] If the teſtator is robbed, and the thief is convict upon the procurement of the executor; ſuch executor ſhall have reſtitution: for this being a beneficial law, ought to be conſtrued beneficially, ſo as to extend to executors and adminiſtrators. 3 *Inſt.* 242.

Shall be reſtored] If goods be ſtolen, and not waived in flight, nor ſeized by the king's officers, or lord of the manor, nor ſold in open market, the owner may take them again, without any writ of reſtitution, or may bring his action for them; and this, altho' he doth not proſecute the offender. 2 *Haw.* 168. *Kely.* 48.

And by the 31 *El. c.* 12. Where *horſes* are ſtolen, and ſold in open market, and the owner claims them again within ſix months, and pays the buyer as much as they coſt him, he ſhall have them again, without proſecution.

But otherwiſe, if the goods be waived by the felon in his flight, or in caſe they be not waived, yet if they be ſeized by the king's officers, or lord of the manor, as ſuſpecting them to be ſtolen; there the party ſhall not have reſtitution, unleſs the felon be convicted at his proſecution. 2 *Haw.* 168. *Kely.* 49.

And in ſuch caſe, he ſhall have no more than what is mentioned in the indictment, though other goods were ſtolen at the ſame time; and the reaſon is, becauſe by ſuch omiſſion, the offender might have eſcaped. *Kely.* 49. 1 *H. H.* 545.

To ſuch his money or goods] A man ſtole cattle, and ſold them in open market; the ſheriff ſeized the thief and the money, and he was convicted and hanged at the proſecution of the owner of the cattle, and he had reſtitution of the money; for though the ſtatute gives power to the juſtices to award reſtitution of the *money or goods ſtolen*, and though the money in this caſe was not ſtolen, yet becauſe it did ariſe by ſtealing, it ſhall be within the equity, though not in the very words of the ſtatute. *Noy* 128.

But

But it hath been a great queſtion, if goods be ſtolen, and by the thief ſold in a market overt, whether the thief being convicted upon the evidence of the party robbed, he ſhall have reſtitution upon this ſtatute of the thing ſold or not, the buyer not being privy to the felony: But lord *Hale* argues ſtrongly, that he ſhall have reſtitution, notwithſtanding the ſale in market overt of the goods ſtolen. 1. Becauſe this act was made to encourage perſons robbed, to purſue malefactors, and therefore they have an aſſurance of reſtitution; and it would be ſmall encouragement if a thief by ſale in a market overt, which is every day almoſt in every ſhop in *London*, ſhould elude it. 2. Becauſe the man that is robbed, is robbed againſt his will, and cannot help it; but the buyer of ſtolen goods may chuſe whether he will buy, or if he buy, may yet refuſe to buy, unleſs well ſecured of the property of the goods, or knowing the owner. 1 *H. H.* 542, 3, 4. 2 *Haw.* 170. *Kely.* 48.

In like manner as if the felon were attainted on appeal] And yet, upon this ſtatute, if the offender be convict upon the evidence of the party robbed, or owner, he ſhall have reſtitution, though there were no freſh ſuit, or any inquiry by inqueſt touching the ſame; and this is conſtant practice, though in caſe of an appeal it be otherwiſe. 1 *H. H.* 545.

Yet if it ſhall appear to the court, that the party hath been guilty of groſs neglect in proſecution; it ſeemeth that in ſuch caſe he ſhall not be intitled to reſtitution. 2 *Haw.* 171.

By courſe of the common law. If the owner takes his goods again of the offender, to the intent to favour him, or maintain him, this is unlawful, and puniſhable by fine and impriſonment; but if he take them again without any ſuch intent, it is no offence. 1 *H. H.* 546.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them; becauſe he hath purſued the law upon him, and may have his writ of reſtitution, if he pleaſe. 1 *H. H.* 546.

RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

I. What is a riot, rout, or unlawful aſſembly.
II. How the ſame may be reſtrained by a private perſon.
III. How by a conſtable, or other peace officer.
IV. How by one juſtice.
V. How by two juſtices.
VI. How by proceſs out of chancery.

I. What

I. What is a riot, rout, or unlawful assembly.

WHEN *three persons or more shall assemble themselves together, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful*; If they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an *unlawful assembly*:

If after their first meeting, they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not; this, according to the general opinion, is a *rout*:

And if they execute such a thing in deed, then it is a *riot*. 1 *Haw.* 155. *Dalt. c.* 136.

Three persons or more] And therefore if the jury do acquit all but two, and find them guilty, the verdict is void, unless they be indicted *together with other rioters unknown*, because it finds them guilty of an offence, whereof it is impossible that they should be guilty; for there can be no riot, where there are not more persons than two. 2 *Haw.* 441.

And infants under the age of discretion are not persons within this description, punishable as rioters. 1 *Haw.* 159.

Note; In 1 *Haw.* 156, 157, 158, the words *more than three persons* are three times over inserted instead of *three persons or more*; which is only marked as an instance, that in a variety of matter, it is impossible for the mind of man to be always equally attentive.

Assemble themselves together] It seems agreed, that if a number of persons being met together at a fair, or market, or church ale, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it: Yet it is said, that if persons innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 *Haw.* 156.

In the execution of some enterprize of a private nature] It seems agreed, that the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private quarrel only; as the inclosing of lands, in which the inha-

bitants of a town claim a right of common, or gaining the poſſeſſion of tenements the title whereof is in diſpute, or ſuch like matters relating to the intereſt or diſputes of particular perſons, and no way concerning the publick; for wherever the intention of ſuch an aſſembly is to redreſs publick grievances, as to pull down all incloſures in general, or reform religion, and the like, it is high treaſon. 1 *Haw.* 157.

Againſt the peace, or to the terror of the people] It ſeems to be clearly agreed, that in every riot there muſt be ſome ſuch circumſtances, either of actual force or violence, or at leaſt of an apparent tendency thereto, as are naturally apt to ſtrike a terror into the people; as the ſhew of armour, threatening ſpeeches, or turbulent geſtures; for every ſuch offence muſt be laid to be done *to the terror of the people*: And from hence it clearly follows, that aſſemblies at wakes, or other feſtival times, or meetings for exerciſe of common ſports or diverſions, as bull-baiting, wreſtling, and ſuch like, are not riotous. 1 *Haw.* 157.

And from the ſame ground it alſo ſeems to follow, that it is poſſible for three perſons or more to aſſemble together with an intention to execute a wrongful act, and alſo actually to perform their intended enterprize, without being rioters; as if a man aſſemble a meet company, to carry away a piece of timber or other thing, whereto he pretends a right, that cannot be carried without a great number, if the number be not more than are needful for ſuch purpoſe, altho' another man hath better right to the thing ſo carried away, and that this act be wrong and unlawful; yet it is of it ſelf no riot, except there be withal threatning words uſed, or other diſturbance of the peace. *Dalt. c.* 137. 1 *Haw.* 157.

Much more may any perſon, in a peaceable manner, aſſemble a meet company, to do any lawful thing, or to remove or caſt down any common nuſance: Thus every private man, to whoſe houſe or land any nuſance ſhall be erected, made, or done, may in peaceable manner aſſemble a meet company, with neceſſary tools, and may remove, pull, or caſt down ſuch nuſance, and that, before any prejudice received thereby; and for that purpoſe, if need be, may alſo enter into the other man's ground. Thus a man erected a wear croſs a common river, where people have a common paſſage with their boats, and divers did aſſemble, with ſpades, crows of iron, and other things neceſſary to remove the ſaid wear, and make a trench in his land that did erect the wear, to turn the water, ſo as they might the better take up the ſaid wear, and they did remove the ſame nuſance; this was holden neither any forcible entry, nor yet any riot. *Dalt. c.* 137.

But in the caſes aforeſaid, if in removing any ſuch nuſance, the perſons ſo aſſembled ſhall uſe any threatning words (as to ſay, they will do it tho' they die for it, or ſuch like words) or ſhall uſe any other behaviour, in apparent diſturbance of the peace, then it ſeemeth to be a riot; and therefore where there is cauſe to remove any

any ſuch nuſance, or to do any like act, it is ſafeſt not to aſſemble any multitude of people, but only to ſend one or two perſons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or caſt down the ſame, and that ſuch perſons tend their buſineſs only, without diſturbance of the peace, or threatning ſpeeches. *Dalt. c.* 137.

Whether the act intended were of itſelf lawful or unlawful] It hath been generally holden, that it is no way material, whether the act intended to be done by ſuch an aſſembly, be of it ſelf lawful or unlawful; from whence it follows, that if three or more perſons aſſiſt a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like in number in a violent and tumultuous manner join together in removing a nuſance, or other thing which may lawfully be done in a peaceful manner, they are as properly rioters, as if the act intended to be done by them were never ſo unlawful. 1 *Haw.* 158.

II. *How the ſame may be reſtrained by a private perſon.*

By the common law, any private perſon may lawfully endeavour to ſuppreſs a riot, by ſtaying thoſe whom he ſhall ſee engaged therein, from executing their purpoſe, and alſo by ſtopping others whom he ſhall ſee coming to join them. 1 *Haw.* 159.

III. *How by a conſtable or other peace officer.*

By the common law, the ſheriff, conſtable, or other peace officers, may and ought to do all that in them lies, towards the ſuppreſſing of a riot, and may command all other perſons to aſſiſt therein. 1 *Haw.* 159.

IV. *How by one juſtice.*

By the 34 Ed. c. 1. *The juſtices of the peace ſhall have power to reſtrain rioters, and to arreſt and chaſtiſe them according to their offence; and cauſe them to be impriſoned and duly puniſhed, according to the law and cuſtom of the realm, and according to that which to them ſhall ſeem beſt to do, by their diſcretions and good adviſement.*

And this ſtatute hath been liberally conſtrued for the advancement of juſtice; for it hath been reſolved, that if a juſtice find perſons riotouſly aſſembled, he alone, without ſtaying for his companions, hath not only power to arreſt the offenders, and bind them to their good behaviour, or impriſon them if they do not offer good bail; but that he may alſo authorize others to arreſt them, by a bare verbal command, without other warrant; and that by force thereof, the perſons ſo commanded may purſue and arreſt the offenders in his abſence, as well as preſence. Alſo it is ſaid, that after

a riot is over, any one juſtice may ſend his warrant, to arreſt any perſon who was concerned in it, and alſo that he may ſend him to gaol, till he ſhall find ſureties for his good behaviour. 1 *Haw.* 160.

But it ſeems to be agreed, that no one juſtice hath any power by force of this ſtatute, either to record a riot upon his own view, or to take an inquiſition thereof after it is over: Alſo if one juſtice, proceeding upon this ſtatute, ſhall arreſt an innocent perſon as a rioter, it ſeemeth that he is liable to an action of treſpaſs, and that the party arreſted may juſtify the reſcuing himſelf, becauſe no ſingle juſtice is by this ſtatute made a judge of the ſaid offence. But if a riot ſhall be committed by perſons armed in an unuſual manner, contrary to the ſtatute of *Northampton*, 2 *Ed.* 3. *c.* 3. and any one juſtice acting *ex officio*, in purſuance of the ſaid ſtatute, ſeize the armour, and impriſon the offender, and make a record of the whole matter, ſuch a record cannot be traverſed, becauſe it is made by one acting in a judicial capacity. And for the ſame reaſon, if a juſtice proceeding on the ſtatute of the 15 *R.* 2. againſt forcible entries and detainers, ſhall upon his own view record a riot, which ſhall be committed in the making of any ſuch forcible entry or detainer, a riot ſo recorded cannot be traverſed. Alſo if a juſtice acting as a judge by any ſtatute whatſoever impowering him ſo to do, make a record upon his view of a riot committed in his preſence, ſuch record ſhall not be traverſed; for the law gives ſuch an uncontroulable credit to all matters of record made by any judge of record as ſuch, that it will never admit of an averment againſt the truth thereof. 1 *Haw.* 160.

But if the rioters are above the number of twelve, the offence is greatly inhanced, and the power of one juſtice very much inlarged, by the act commonly called the riot act, 1 *G. ſt.* 2. *c.* 5. which is required to be read at every quarter ſeſſions and leet: By which it is enacted, That every juſtice, ſheriff, and under ſheriff, and mayor, ſhall on notice or knowledge of any unlawful, riotous, and tumultuous aſſembly of perſons to the number of twelve or more, together with ſuch help as he ſhall command, reſort to the place. *ſ.* 2, 3.

Whereupon he ſhall, amongſt the rioters, or as near to them as he can ſafely come, with a loud voice command, or cauſe to be commanded, ſilence to be, while proclamation is making; and after that, ſhall openly and with loud voice make or cauſe to be made proclamation in theſe words, or like in effect:

Our ſovereign lord the king chargeth and commandeth all perſons being aſſembled, immediately to diſperſe themſelves, and peaceably to depart to their habitations, or to their lawful buſineſs, upon the pains contained in the act made in the firſt year of king George *for preventing tumults and riotous aſſemblies: God ſave the king.* ſ. 2.

And if any perſon ſhall with force and arms wilfully oppoſe, hinder, or hurt any perſon that ſhall begin or go to make the proclamation, whereby the ſame ſhall not be made, he ſhall be guilty of felony without benefit of clergy. *ſ.* 5. And

And if any twelve or more of them shall continue together by the space of one hour after such proclamation made, or after such hindrance (having knowledge thereof), they shall be guilty of felony without benefit of clergy. *s.* 1, 5.

And every justice, sheriff, under sheriff, mayor, high and petty constable, and other peace officer, and every other person of age and ability commanded by them to assist, shall apprehend the offenders, and carry them before a justice, to be proceeded against according to law. And if any rioters be killed or hurt by any the said persons in dispersing or apprehending them, by reason of their resistance, such persons shall be indemnified. *s.* 3.

Also, if any rioters (although under the number of twelve, and whether any proclamation be made or not) shall unlawfully and with force demolish or pull down any church or chapel, or any building for religious worship certified and registered according to the act of toleration, or any dwelling house, barn, stable, or other outhouse, they shall be guilty of felony without benefit of clergy. *s.* 4. And any one justice may proceed against them, as against other felons.

And the hundred, city, or town, shall answer the damages thereof, as in cases of robbery. *s.* 6.

Prosecutions on this act, to be within twelve months after the offence. *s.* 8.

V. How by two justices.

If any riot, assembly, or rout of people, against the law, be made; the justices, three, or two of them at least, and the sheriff, shall come with the power of the county, if need be. 13 H. 4. c. 7. s. 1.

And *the king's liege people being sufficient to travel, shall be assistant to them, upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies; on pain of imprisonment, and to make fine and ransom to the king.* 2 H. 5. c. 8. s. 2.

If any riot, assembly, or rout of people, against the law, be made] It is said, that the justices are not only impowered hereby to raise the power of the county to assist them, in suppressing a riot which shall happen within their own view, or hearing, but also that they may safely do it upon a credible information given them of a notorious riot happening at a distance, whether there were any such riot in truth or not; for it may be dangerous for them to stay till they can get certain information of the fact: But they seem to be punishable for alarming the county in this manner, without some such probable ground of their proceeding, as would induce a reasonable man to think it necessary and convenient. 1 *Haw.* 161.

Assembly] It seems clear from hence, that if the justices in going towards the place where they have heard that there is a riot, shall meet persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful manner, and also

alſo make a record thereof; for the ſtatute extends to all other unlawful aſſemblies whatſoever as well as to riots. 1 *Haw.* 161.

The king's liege people] Except women, clergymen, perſons decrepit, and infants under the age of fifteen. 1 *Haw.* 161.

To reſiſt ſuch riots] And alſo to arreſt the rioters, and conduct them to priſon. 1 *Haw.* 161.

And ſhall arreſt them. 13 H. 4. c. 7. ſ. 1.

And if they ſhall eſcape, they may take them on a freſh purſuit; but they cannot at another time award any proceſs againſt them on the record, but ought to ſend the record into the king's bench, that proceſs may iſſue thereon from thence: Yet there ſeems to be no doubt, but that they may arreſt them for their treſpaſs on the aforeſaid ſtatute of the 34 *Ed.* 3. in order to compel them to find ſureties for their good behaviour, 1 *Haw.* 162.

And the ſame juſtices and ſheriff, or under ſheriff, ſhall have power to record that which they ſhall find ſo done in their preſence againſt the law: by which record the offenders ſhall be convict in the ſame manner and form as is contained in the ſtatute of forcible entries. 13 H. 4. c. 7. ſ. 1.

Shall have power to record] And this they may do, whether the offenders be in cuſtody at the ſame time, or have eſcaped. 1 *Haw.* 161.

Shall be convict] And it ſeemeth to be certain, that the record of a riot, expreſsly mentioned to have happened within the view of the juſtices by whom it is recorded, is a conviction of ſo great authority, that it can no way be traverſed, however little ground of truth there might be to affirm, that any riot at all was committed, or however innocent the parties may be of the fact recorded againſt them. 1 *Haw.* 162.

However it ſeemeth clear, that if in ſuch a record of a riot it be contained, that the party was guilty therein of a felony, or maim, or reſcous, the party ſhall be concluded thereby as to the riot only, and not as to any of the other matters; becauſe the juſtices have by this ſtatute a judicial authority over no other offences, except riots, routs, and unlawful aſſemblies. 1 *Haw.* 162.

And inaſmuch as ſuch a record is a final conviction of the parties, as to all ſuch matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of perſons concerned therein, and the ſeveral kinds of weapons made uſe of by them, and all other circumſtances of the fact; for ſince the parties are concluded from denying the truth of ſuch a record, and have no other remedy to defend themſelves againſt it, but only by advantage of the inſufficiency of what is contained in it, they may juſtly demand the benefit of excepting to it, if it do not expreſsly ſhew, both that they are guilty within the meaning of the ſtatute, and alſo how far they are guilty, and that the juſtices have purſued the power given them by the ſaid ſtatutes: and from the ſame ground it ſeems alſo to follow, that ſuch a record may be excepted

excepted againſt, if it do not appear to have been made by the ſheriff or under ſheriff in concurrence with the juſtices. 1 *Haw.* 162.

And this record ought to remain with one of the juſtices, and ſhall not be left amongſt the records of the ſeſſions, it being made out of ſeſſions, and not appointed to be certified thither. *Dalt. c.* 82.

In the ſame manner and form as is contained in the ſtatute of forcible entries] That is, the ſtatute of the 15 *R.* 2. *c.* 2. And hereupon it is ſaid, that the offenders being under the arreſt of the juſtices, and alſo convicted by a record of their offence, ought immediately to be committed to gaol by the ſame juſtices, till they ſhall make fine and ranſom to the king; which can be aſſeſſed by no other juſtices of peace, except thoſe by whom the record of the offence was made. 1 *Haw.* 162.

And this fine, Mr. *Dalton* ſays, the juſtices ſhall cauſe to be eſtreated into the exchequer, that ſo it may be levied to the king's uſe; and then they are to deliver the offenders again. *Dalt. c.* 82.

But Mr. *Hawkins* ſays, that it hath been queſtioned, whether the juſtices can ſafely diſmiſs the offenders upon their paying ſuch a fine as ſhall be impoſed upon them, without ſome judgment for their impriſonment as well as fine; becauſe it is enacted by the 2 *H.* 5. *c.* 8. that ſuch rioters attainted of great and heinous riots, ſhall have one whole year's impriſonment at the leaſt, without being let out of priſon by bail or mainprize; and that the rioters attainted of petty riots, ſhall have impriſonment, as beſt ſhall ſeem to the king or to his council. 1 *Haw.* 164.

And *if the offenders be departed before the coming of the ſaid juſtices and ſheriff or under ſheriff, the ſame juſtices, three, or two of them, ſhall diligently inquire within a month after ſuch riot, aſſembly, or rout of people ſo made, and thereof ſhall hear and determine according to the law of the land.* 13 H. 4. c. 7. ſ. 1.

The ſame juſtices] It is generally ſaid, that any juſtices of the county may take ſuch an inquiry, whether they dwell near the place where the riot happened, or at a diſtance, or whether they went to view the riot or not; for the ſtatute ought to be conſtrued as largely as the words will bear, in favour of the juſtices power in the ſuppreſſing of ſuch riots; and therefore thoſe words in the ſtatute that *the ſame juſtices ſhall inquire*, ought to be thus expounded, that the ſame juſtices who were before impowered to raiſe the poſſe, ſhall inquire, and that is, any juſtices in the county. 1 *Haw.* 163.

Shall diligently inquire] That is, by a jury: In order to which, it is enacted by the 19 *H.* 7. *c.* 13. that the ſheriff, on their precept directed to him, ſhall, on pain of 20 *l.* return 24 perſons, whereof every of them ſhall have lands and tenements within the ſhire, to the yearly value of 20 *s.* of charter land or freehold, or 26 *s.* 8 *d.* of copyhold, or of both, over and above all charges: And he ſhall return upon every juror in iſſues, at the firſt day 20 *s.* and at the ſecond 40 *s.*

Note;

Note; *Charter land* had its name from a particular form in the charter or deed, which ever since the reign of *H.* 8. hath been diſuſed. 1 *Inſt.* 6.

Within a month] That is, if they do not make inquiry within a month, they are puniſhable for the neglect; yet they may inquire after the month: for the lapſe of a month doth not determine their authority, but only ſubjects them to a penalty. 2 *Salk.* 593.

Shall hear and determine according to the law of the land] And therefore they may award proceſs under their own teſte, againſt thoſe who ſhall be indicted before them of any of the offences abovementioned, according to the form of this ſtatute; and alſo may award the like proceſs for the trial of a traverſe of ſuch an inquiſition; and do all other things in relation thereunto, which are of courſe incident to all courts of record. 1 *Haw.* 163.

And the riot being ſo found by inquiſition, the juſtices muſt make a record thereof in writing of ſuch their inquiry or preſentment found before them; which record alſo is to remain with one of the juſtices. *Dalt. c.* 82.

And *if the truth cannot be found in the manner as is aforeſaid, then within a month then next following, the juſtices, three, or two of them, and the ſheriff or under ſheriff, ſhall certify before the king and his council, all the deed and circumſtances thereof; which certificate ſhall be of like force as the preſentment of* 12 *men; upon which certificate the offenders ſhall be put to anſwer, and ſhall be puniſhed according to the diſcretion of the king and his council.* 13. H. 4. c. 7. ſ. 2.

And if they do traverſe the matter ſo certified, the certificate and traverſe ſhall be ſent into the king's bench to be tried. id. ſ. 3.

And if the offence be not found, by reaſon of any maintenance or embracery of the jurors, then the ſame juſtices and ſheriff or under ſheriff ſhall in the ſame certificate certify the names of the maintainers and embracers, with their miſdemeanors. 19 H. 7. c. 13.

Shall certify] And it ſeemeth certain, that ſuch certificate, being in nature of an indictment at the common law, ought to comprehend the certainty of time, place, and perſons, and other material circumſtances, both of the riot and maintenance. 1 *Haw.* 165.

Before the king and his council] It ſeems clear, by the council being here diſtinguiſhed both from the chancery and king's bench, that the certificate ought to be made to the privy council board, and not to either of thoſe courts, which in ſome ſtatutes relating to judicial proceedings are taken for the king's council. 1 *Haw.* 165.

And the ſaid juſtices and other officers ſhall execute their offices aforeſaid at the king's coſts, in going and continuing in doing their ſaid offices, by payment thereof to be made by the ſheriff by indentures betwixt the ſaid ſheriff and juſtices, and other officers aforeſaid, whereof the ſheriff upon his account in the exchequer ſhall have due allowance. 2 H. 5. c. 8.

In order to the defraying of which, the ſaid ſtatutes directs the fines of the offenders to be inlarged; and thereout the ſheriff may pay

pay the charges of the ſaid juſtices; and of the jury, that is, for their diet; and the ſheriff's fees, and the like. *Dalt. c.* 82.

And *the juſtices dwelling nigheſt in the county, where ſuch riot, aſſembly, or rout ſhall be, together with the ſheriff or under ſheriff, ſhall do execution of the ſaid ſtatute of the* 13 H. 4. *every one upon pain of* 100*l. to the king.* ſ. 4.

The juſtices dwelling nigheſt] Altho' theſe only are liable to this penalty, yet if any others on notice ſhall neglect to ſupply their default, they are finable at diſcretion. 1 *Haw.* 166.

But if any juſtices, who do not dwell neareſt to the place, do actually execute the ſtatute, they excuſe all the reſt. 1 *Haw.* 165.

Dwelling nigheſt in the county] Therefore if they dwell nigheſt, but in another county, they are not in danger of this penalty. 1 *Haw.* 165.

Shall do execution of the ſaid ſtatute] That is, in the whole, and not in part only; as by recording a riot, and not committing the parties. 1 *Haw.* 166.

VI. How by proceſs out of chancery.

By the 2 *H.* 5. *c.* 8. *If default be found in the two juſtices, ſheriff, or under ſheriff, then at the inſtance of the party grieved, a commiſſion ſhall be iſſued under the great ſeal, to inquire as well of the truth of the caſe for the complainant, as of ſuch default.*

And by the 2 *H.* 5. *c.* 9. and 8 *H.* 6. *c.* 14. *Rioters ſhall be taken by writ and proclamation out of chancery, on ſuggeſtion of two juſtices and the ſheriff, of the common fame of ſuch riot.*

Record of a riot on view.

New-York, King's County. BE *it remembered, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *We* J. P. *and* K. P. *eſquires, two of the juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and* A. S. *eſquire, ſheriff of the ſaid county, at the complaint and requeſt of* A. I. *of* ——— *in the county aforeſaid, yeoman, in our proper perſons have come to the manſion houſe of him the ſaid* A. I. *in* ——— *aforeſaid, and then and there do find* A. O. *of* ——— *yeoman,* B. O. *of* ——— *yeoman,* C. O. *of* ——— *yeoman, and other malefactors and diſturbers of the peace of our ſaid lord the king to us unknown, to the number of* 11 *perſons, in a warlike manner arrayed, to wit, with clubs, ſwords, and guns unlawfully, riotouſly, and routouſly aſſembled, and the ſame houſe beſetting, many evils againſt him the ſaid* A. I. *threatning, to the great diſturbance of the peace of our ſaid lord the king, and terror of his people, and againſt the form of the ſtatute in that caſe made and provided. And therefore we the aforeſaid* J. P. K. P. *and* A. S. *the aforeſaid* A. O. B. O. *and* C. O. *do then and there cauſe to be arreſted, and to the next gaol of our ſaid lord the king in the county aforeſaid to be conveyed, by*

our

our view and record of the unlawful assembly, riot, and rout aforesaid convicted, there to remain and every and each of them respectively, until they shall severally and respectively have paid to our said lord the king the several sum of 10l. *each, which we do impose upon them and every of them separately for their said offence. In testimony whereof, to this our present record we do put our seals. Dated at* ——— *aforesaid, the day and year aforesaid.*

Commitment of the rioters upon view.

New-York, King's County. J. P. *and* K. P. *esquires, two of the justices of our said lord the king, assigned to keep the peace within the said county, and* A. S. *esquire, sheriff of the said county; To the keeper of the gaol of our said lord the king at* ——— *in the said county, and to his deputy and deputies there, and to every of them, greeting.*

Whereas upon complaint made unto us by A. I. *of* ——— *yeoman, we did this present* ——— *day of* ——— *go to the house of the said* A. I. *at* ——— *aforesaid, and there did see* A. O. *of* ——— *yeoman,* B. O. *of* ——— *yeoman,* C. O. *of* ——— *yeoman, and other malefactors to us unknown, assembled together in an unlawful, routous, and riotous manner, to the terror of the people, and against the peace of our said lord the king, and against the form of the statute in that case made and provided: We do therefore send you, by the bringers hereof, the bodies of the said* A. O. B. O. *and* C. O. *convicted of the said riot, rout, and unlawful assembly, by our own view, testimony, and record; commanding you in the name of our said lord the king, to receive them into the said gaol, and them and every of them respectively there safely to keep, until they and every of them, shall respectively pay to our said lord the king, the several and respective sum of* 10l. *each, which we have set and imposed upon them, and each and every of them separately for the said offence. Given under our hands and seals at* ——— *aforesaid, in the county aforesaid, the day and year aforesaid.*

ROBBERY.

I. What it is.
II. Widening of highways to prevent robberies.
III. Assaulting with intent to rob.
IV. Levying hue and cry on a robbery committed.
V. Hundred when liable to answer damages.
VI. Manner of bringing the action against the hundred.

VII.

I. What it is.

THERE are two kinds of robbery; from the *person*, and from the *house*: It is the former of these that is treated of under this title: the latter, *viz.* robbery from the house, belongeth to the titles LARCENY and BURGLARY.

Robbery, lord *Coke* says, is derived from the *French de la robe*, both because they bereave the true man of his *robes*, and also for that his money is taken by them from some part of his garment, or robes about his person. But in truth the word seemeth to be much ancienter than the introduction of the *French* into our language; and probably was deduced unto us through the channel of *Saxony* or *Denmark*. *Robber*, in the *Saxon* is *reofere*; in the *Low Dutch*, *roover*: in the *Danish*, *rofuere*; by a transmutation of the letters *b*, *f*, and *v*, frequent in all kindred languages. The *Gothick* translation of the gospels useth *birauboðedun* to signify *they robbed*, from *birauban*, *to rob*; which being stripped of the prefix argumentative is *rauban*. The *Saxons* expressed the same by *bereafodon*, which we still preserve when we say *they bereaved*: and in the northern parts of *England*, the words *robbing* and *reaving* are still used promiscuously to signify rapine and plunder; and when the violent winds do strip a house of its thach or covering, it is called *reoving*.

Robbery *is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person, his money or other goods, of any value whatsoever.* 3 Inst. 68.

From his person] Taking a thing in a man's presence, is in law a taking from the person *Hale's Pl.* 73. *Str.* 1015. *K.* against *Francis* and others.

Thus, if one take or drive my cattle out of my pasture, in my presence, this is robbery, if he make an assault upon me, or put me in fear. *Hale's Pl.* 73.

II. Widening of highways to prevent robberies.

Highways leading from one market town to another, shall be enlarged, so that there be neither dyke, tree, or bush, except ashes or great trees, whereby a man may lurk to do hurt, within 200 feet

feet of each ſide. And if by default of the lord, that will not avoid the dyke, underwood, or bruſhes, any robberies be done, the lord ſhall be anſwerable for the felony; and if murder be done, the lord ſhall make a fine at the king's pleaſure. And if a park be taken from the highway, it ſhall be ſet at 200 foot diſtance; or elſe a fence ſhall be made, ſo as offenders may not paſs nor return to do evil. 13 *Ed.* 1. *ſt.* 2. *c.* 5.

It is obſervable, that when this act was made, the country was fuller of wood than it is at preſent.

III. Aſſaulting with intent to rob.

If any perſon ſhall with any offenſive weapon aſſault, or by menaces, or in any forcible or violent manner, demand any money or goods, with a felonious intent to rob him, he ſhall be guilty of felony, and be tranſported for 7 years. 7 *G.* 2. *c.* 21.

If any perſon be indicted, or appealed, for killing any perſon attempting to rob, he ſhall be acquitted. 24 *H.* 8. *c.* 5.

IV. Levying hue and cry on a robbery committed.

Immediately upon robberies committed, freſh ſuit ſhall be made from town to town, and from county to county. 13 *Ed.* 1. *ſt.* 2. *c.* 1.

V. Hundred when liable to anſwer damages.

The hundred where the offence was committed, ſhall be anſwerable for the robberies, and for the damages, if the offender be not taken. 13 *Ed.* 1. *ſt.* 2. *c.* 2. 28 *Ed.* 3. *c.* 11.

But ſuch hundred may recover back half the damages, from any other hundred where freſh ſuit after hue and cry ſhall not be made. 27 *El.* *c.* 13. *ſ.* 2.

If any man be robbed in his houſe, the hundred ſhall not be charged therewith, whether it were done by day or night; becauſe every man's houſe is his caſtle, which he ought to defend; and if any one is robbed in his houſe, it ſhall be eſteemed his own fault. *Dalt.* *c.* 84.

Alſo, a robbery done in the night, ſhall not charge the hundred; but yet if it be in the day time, or there be ſo much day light as that one may ſee a man's face, ſo that the robber may be known, tho' it be before the ſun riſing, or after the ſun ſetting, the hundred ſhall anſwer for it. *Dalt.* *c.* 84.

VI. Manner of bringing the action againſt the hundred.

In order to make the hundred liable, theſe things following muſt be done:

The

The perſon robbed ſhall, with as much convenient ſpeed as may be, give notice thereof, unto ſome of the inhabitants near the place. 27 El. c. 13. ſ. 11.

And tho' that place, where notice is given, be in another hundred or county, yet it is good enough; for a ſtranger may not know the confines of the hundred or county: and that hundred where notice is given muſt make hue and cry, and by that means the hundred where the robbery was committed will ſoon know thereof. *Cro. Ca.* 41, 379. 3 *Salk.* 184.

He ſhall alſo give notice, with as much convenient ſpeed as may be, to a conſtable of the hundred, that is, the high conſtable, or to a conſtable of ſome place near; or leave notice in writing at his houſe, deſcribing therein the felon, and the time and place of the robbery. 8 G. 2. c. 16. ſ. 1.

And every conſtable, to whom ſuch notice ſhall be given, and every high and petty conſtable within the hundred, as ſoon as the ſame ſhall come to his knowledge, by the party robbed, or by any to whom ſuch notice hath been given, ſhall with the utmoſt expedition make and cauſe to be made freſh ſuit and hue and cry after the felons, on pain of 5*l.* with coſts, half to the king and half to him who ſhall ſue. 8 *G.* 2. *c.* 16. *ſ.* 11, 12. Note; the penalty here is but ſmall; but as the not purſuing hue and cry was alſo an offence at the common law, the offender may be indicted at the common law, and thereupon fined and impriſoned.

He ſhall alſo be examined on oath within 20 *days next before the action brought, before a juſtice in or near the hundred, whether he knows any of the robbers: and if he confeſſes that he does, he ſhall before the action brought, be bound over by the ſaid juſtice to proſecute.* 27 El. c. 13. ſ. 11.

He ſhall alſo be examined] That is, the party robbed, who is to bring the action, ſhall be examined. But here note a diverſity. *T.* 2 *Car. Raymund* and hundred of *Oking*. The *ſervant* was robbed of his maſter's goods, and the ſervant made oath before a juſtice, and the maſter brought the action againſt the hundred. By the court; The action well lies for the maſter; and the ſervant's oath is ſufficient, for it was properly in his notice, that he was robbed, and did not know any of the robbers, and the maſter knows it not that he was robbed, or who were the perſons, but by report of his ſervant; and it would be inconvenient, if the maſter ſhould not bring the action, but the ſervant only; for the ſervant might releaſe, or compound, or diſcontinue the ſuit, and ſo the maſter ſhould have the loſs by his falſehood: therefore the maſter ſhall bring the action, and have his ſervant who was robbed, to be his witneſs. *Cro. Car.* 37.

Within 20 *days next before*] And the time of making ſuch oath muſt be laid in the declaration, for that is traverſable. 3 *Salk.* 184.

Before a juſtice] And if the juſtice ſhall refuſe upon his requeſt, to examine him, an action will lie againſt the juſtice; becauſe he doth not act therein as judge of record, but as a miniſter appointed for the examination by the ſtatute. *Cro. Car.* 211. *Whether*

Whether he knows any of the robbers] *H.* 19 *G.* 2. *William King* againſt the hundred of *Biſhop's Sutton.* In an action brought againſt the hundred, the oath proved was, that he had *good reaſon to ſuſpect* the fact was done by *Robert Gibbs* and *William Langford*, both of ſuch a pariſh. And a doubt ariſing at the aſſizes, whether this was ſufficient or not, a caſe was made, and twice argued at the bar. And upon the ſecond argument, the court were of opinion, that the examination did not maintain the action. The oath required is a condition precedent, and for the ſake of the hundred, and to prevent ſcreening the offenders. There is a great deal of difference between *ſuſpecting* and *knowing*: a man who *knows* the offender, may purpoſely ſtop at the word *ſuſpect*; to avoid being bound to proſecute: and though it would be equivocating, yet it would hardly be perjury aſſignable; it being only a ſuppreſſion of part of the truth. He ſhould have ſaid, *I ſuſpect them to be the men, but I do not know it.* It will be dangerous to let them go out of the words of the act; and therefore the plaintiff failed in the action, and paid the coſts of a nonſuit. *Str.* 1247.

VII. Damages how to be levied and applied.

If the plaintiff recover, the ſheriff ſhall ſhew the writ of execution to two juſtices (1 *Q.*) in or near the hundred. 27 *El. c.* 13. *ſ.* 5. 8 *G.* 2. *c.* 16. *ſ.* 4.

The ſaid two juſtices ſhall thereupon cauſe a taxation to be made and levied in 30 days, upon every diviſion within the hundred, by the conſtables, by diſtreſs and ſale. 8 *G.* 2 *c.* 16. *ſ.* 4, 5.

VIII. Reward for apprehending a robber.

Any perſon or perſons apprehending a felon, whereby the hundred becomes indemnified, ſhall have 10 *l.* reward paid by the hundred; the ſame to be aſcertained, levied, and paid, by two juſtices (1 *Q.*) in or near the hundred, in ſuch proportions as they ſhall think reaſonable, within the hundred. 8 *G.* 2. *c.* 16. *ſ.* 9.

And moreover, every perſon who ſhall apprehend a highwayman, and proſecute him till he be convicted of any robbery committed in or upon any highway, paſſage, field, or open place, ſhall have from the ſheriff of the county where the robbery and conviction was made and done, without paying any fee for the ſame, the ſum of 40 *l.* within one month after the conviction and demand thereof made, by tendering a certificate to the ſheriff, under the hand of the judge, certifying the conviction of ſuch felon for a robbery done within the county of the ſaid ſheriff, and alſo that ſuch felon was taken by the perſon claiming the reward. 4 *W.* *c.* 8. *ſ.* 2.

For which certificate ſhall be paid, for writing and drawing thereof, 5 *s.* and no more. 6 *G.* *c.* 23. *ſ* 8.

And if any diſpute ſhall ariſe between the perſons apprehending, touching their right to the reward, the judge ſhall by the ſaid certificate

certificate direct to be paid unto and amongst the parties claiming, in such proportions as to him shall seem just and reasonable. And if the sheriff shall make default of payment, he shall forfeit double, with treble costs. 4 *W.* *c.* 8. *s.* 2.

And as a further reward, such person shall have moreover the horse, furniture, and arms, money, or other goods of the robber, that shall be taken with him, notwithstanding the right of the king, or lord of the manor, or of the person lending or letting the same to hire: but saving the right of them from whom they may have been feloniously taken. 4 *W.* *c.* 8. *s.* 6.

And if a person is killed in endeavouring to apprehend such highwayman, the sheriff shall pay the like sum of 40 *l.* without fee, under the like penalty, to the executors or administrators of the person killed; immediately, upon certificate delivered to him under the hand and seal of the judge of assize for the county where the fact was done, or the two next justices, of such person being so killed: Which certificate, the said judge, or justices, upon proof before them made, shall give immediately without fee. 4 *W.* *c.* 8. *s.* 3.

And the sheriffs shall have the said rewards allowed to him in his accounts. 4 *W.* *c.* 8. *s.* 4.

IX. Pardon for discovering accomplices.

If any person, being out of prison, shall commit any robbery, and afterwards discover two or more persons, who shall commit any robbery, so as two or more be convicted; he shall have the king's pardon for all robberies he shall have committed before such discovery; which pardon shall be likewise a bar against any appeal for such robbery. 1 *W.* *c.* 8. *s.* 7.

X. Principal and accessary in robbery.

All that come in company to rob, are principals, though one only actually do it. *Hale's Pl.* 72.

XI. Punishment of robbery.

Robbery is generally excluded from the benefit of clergy. 3 *Inst.* 68. 2 *Haw.* 351---357. 2 *H. H.* *c.* 48.

And by the 20 *G.* 2. *c.* 52. Robbery is excepted out of the general pardon.

XII. What shall be done with the goods of which a person is robbed.

If the person robbed doth not prosecute the robber; if his goods are waived in flight, or seized by the king's officers, or lord of the manor, he shall not have them restored. *Kely.* 49. But

But if they are not waived in flight, or seized by the king's officers, or lord of the manor, he may take his goods again wherever he finds them, without the formality of restitution being awarded, if they be not sold in open market; and this also, although he doth not prosecute the robber. *Kely.* 48.

But if he shall prosecute the robber to conviction; he shall have restitution, although they have been waived, and seized, and even sold in open market. *Kely.* 48.

Examination of the person robbed, before the action brought.

New-Jersey, Essex County. THE *examination of* A. I. *of*——*in the county aforesaid, yeoman, taken on oath before me* J. P. *esquire. one of his majesty's justices of the peace for the said county, dwelling in* [or, *near to*] *the township of*——*within the said county, the*——*day of*——*in the*——*year of the reign of*——

Who saith, that on Monday *the*——*day of this present month of*——*between the hours of two and three in the afternoon of the same day, at or near a place called*——*he was assaulted in the highway there leading from*——*to*——*by two horsemen, whereof one was a tall lusty man, wearing a black wig, and a blue grey coat, mounted on a bay gelding about fifteen hands high, with a black mane and tail, and star in his forehead; and the other a middle size man, of a swarthy complection, having a large scar on his left cheek, having on a dark brown riding coat, and mounted on a black gelding; and by them robbed in the highway aforesaid of the sum of*——*in money, one silver watch of the value of* 41. *and one pocket book: And that he the said* A. I. *at the time of the said robbery committed, did not know, nor yet doth know, either of the said persons who committed the same: And that he is since informed, that the said highway and place where he was so robbed as aforesaid, are in the township of*——*and within the said county.*

Taken, made, and signed the day and year above written, A. I.

Before me J. P.

Note, the form of a warrant for apprehending a robber upon fresh suit, is inserted under the title *HUE and CRY.*

SEARCH WARRANT.

ALTHO' it is not unusual for the justices to grant general warrants, to search all suspected places for stolen goods, and there is a precedent in *Dalton*, requiring the constable to search *all such suspected places as he and the party complaining shall think convenient*; yet such practice is generally condemned by the best authorities. Thus

This lord *Hale*, in his pleas of the crown, says, a general warrant to search for felons or stolen goods, is not good. *H. Pl.* 93.

Mr. *Hawkins* says, I do not find any good authority, that a justice can justify sending a general warrant, to search all suspected houses in general for stolen goods: because such warrant seems to be illegal in the very face of it; for it would be extremely hard, to leave it to the discretion of a common officer, to arrest what persons, and search what houses he thinks fit; and if a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such a general warrant, which might have the effect of an hundred blank warrants. 2 *Haw.* 82, 84.

Again, lord *Hale*, in his history of the pleas of the crown, expresseth himself thus; I do take it, that a general warrant to search in all suspected places is not good; but only to search in such particular places, where the party assigns before the justice his suspicion, and the probable cause thereof; for these warrants are judicial acts, and must be granted upon examination of the fact. 2 *H. H.* 150.

And therefore, he says, he takes it that those general warrants dormant, which are many times made before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretence of such general warrants, give no more power to the officer or party, than what they may do by law without them. 2 *H. H.* 150.

Likewise, upon a *bare surmise*, a justice cannot make a warrant to break any man's house, to search for a felon, or for stolen goods; for the justices being created by act of parliament, have no such authority granted them by any act of parliament; and it would be full of inconvenience, that it should be in the power of any justice of the peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree soever, either in the day or night, upon such surmises. 4 *Inst.* 177.

But in case of a complaint, and oath made, of goods stolen, and that the party suspects the goods are in such a house, and shews the cause of his suspicion; the justice may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods, and the party in whose custody they are found, and bring them before him, or some other justice, to give an account how he came by them, and further to abide such order as to law shall appertain. 2 *H. H.* 113, 150.

But in that case, lord *Hale* says, it is convenient, that such warrant do require the search to be made in the day time; and tho' I will not affirm (says he) that they are unlawful without such restriction yet they are very inconvenient without it; for many times under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance. 2 *H. H.* 150.

But in case not of probable suspicion only, but of positive proof, it is right to execute the warrant in the night time, lest the offenders and goods also be gone before morning. *Barl. Search War.*

Furthermore, such warrant ought to be directed to the constable, or other publick officer, and not to any private person; tho' it is fit the party complaining should be present and assistant, because he knows his goods. 2 *H. H.* 150.

So much for *granting* a search warrant; Next touching the *execution* of it.

Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by this warrant. 2 *H. H.* 151.

If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. 2 *H. H.* 151.

If the goods be not in the house, yet it seems the officer is excused, that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there, till search made; but it seems the party that made the suggestion is punishable in such case; for as to him the breaking of the door is *in eventu* lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. 2 *H. H.* 151.

On the *return* of the warrant executed, the justice hath these things to do;

As touching the *goods* brought before him, if it appear they were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed, by indicting and convicting the offender to have restitution. 2 *H. H.* 151.

As touching the *party* that had the custody of the goods; if they were not stolen, then he is to be discharged; if stolen, but not by him, but by another that sold or delivered them to him, if it appear that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appear he was knowing they were stolen, he must be commited or bound over to answer the felony. 2 *H. H.* 152.

Form of a search warrant.

New-Jersey, } To any constable of said county.
Essex County. }

WHEREAS *it appears to me* J. P. *esquire, one of the justices of our lord the king, assigned to keep the peace in the said county, by the information on oath of* A. I. *of* ——— *in the county aforesaid, yeoman, that the following goods, to wit,* ——— *have within two days*

days last past, by some person or persons unknown, been feloniously taken, stolen, and carried away, out of the house of the said A. I. *at* ——— *aforesaid, in the county aforesaid; and that the said* A. I. *hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling house of* A. O. *of* ——— *in the said county, yeoman: These are therefore, in the name of our said lord the king, to authorize and require you, with necessary and proper assistants, to enter in the day time into the said house of the said* A. O. *at* ——— *aforesaid, in the county aforesaid, and there diligently to search for the said goods; and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and also the body of the said* A. O. *before me, or some other of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, to be disposed of and dealt withal according to law. Given under my hand and seal at* ——— *in the said county, the* ——— *day of* ——— *in the* ——— *year of the reign of* ———.

SESSIONS.

THE sessions of the peace is a court of record, holden before two or more justices, whereof one is of the *quorum*, for execution of the authority given them by the commission of the peace, and certain statutes and acts of parliament. *Dalt. c.* 185.

It seems that the *general* sessions, and *quarter* sessions, are not synonymous; but that the quarter sessions are a species only of the general sessions, and that such sessions only are properly called general quarter sessions, wich are holden in the four quarters of the year, in pursuance of the statute of the 2 *H.* 5. and that any other sessions holden at any other time for the general execution of the justices authority, which by the said statute they are authorised to hold oftener than at the times therein specified, if need be, may properly be called *general* sessions, and that those holden on a special occasion for the execution of some particular branch of their authority, may properly be called *special* sessions. 2 *Haw.* 42.

By the 12 *R.* 2. *c.* 10. The justices shall keep their sessions in every quarter of the year at least, and by three days, if need be; on pain of being punished according to the discretion of the king's council, at the suit of every man that will complain.

There is no determination by any statute, of any place for the sessions to be kept, so it be within the county. And if a place within the county be incorporated, and have justices of its own, yet the same remains part of the county, and the justices of the county may notwithstanding hold their sessions there, although it may be that they shall not intermeddle with matters arising there, save only such as happen in their sessions, or with relation thereunto. *Dalt. c.* 115.

The perſons who ought to appear at theſe ſeſſions are as follows:

1. The *juſtices of the peace*; theſe without doubt are compellable to appear at the ſeſſions, for without their appearance the ſeſſions cannot be holden. *Dalt. c.* 185.

But a juſtice ought not to join in an order at ſeſſions wherein himſelf is concerned, nor ought his name to be in the caption. An order was quaſhed for that reaſon. 2 *Salk.* 607.

2. The *cuſtos rotulorum*, who hath cuſtody of the rolls of ſeſſions, ought (by the commiſſion) to be there by himſelf, or by his deputy, who is the clerk of the peace. *Dalt. c.* 185.

3. The *ſheriff* alſo, by virtue of the commiſſion, by himſelf or his deputy; to receive the fines, to return jurors, to execute proceſs, and what elſe to his office doth appertain. *id.*

4. All *coroners*. id.

5. The *conſtables of hundreds* (that is, high conſtables) and all other officers to whom any warrant hath been directed, in order to make return thereof. *id.*

6. All *bailiffs of hundreds and liberties*, in reſpect they are bound to give an account of all ſeſſions proceſs. *id.*

7. The *gaoler*; to bring thither his priſoners, and to receive ſuch as may be committed. *Dalt. c.* 185.

8. The *keeper of the houſe of correction*, to give in a kallendar and account of perſons in his cuſtody. *id.*

9. All jurors returned by the ſheriff, by virtue of the aforeſaid precept. And the jurors not appearing according to their ſummons, are puniſhable by loſs of iſſues, which uſually make part of the eſtreats of ſeſſions. *id.*

10. All perſons bound by *recognizance* to anſwer, or to proſecute and give evidence. *id.*

And all perſons may freely attend at the ſeſſions for the advancement of publick juſtice, and for the ſervice of the king. And to this end they are (as it were) invited thither by a certain freedom of acceſs, and by protection from common arreſt; a thing that is incident to every court of record, and without which, juſtice would be greatly hindred. So that if a man come voluntarily to the ſeſſions, either to prefer a bill of indictment, or to give information againſt another, or to tender a fine upon an indictment touching himſelf, or do come compelled to make appearance of ſaving his recognizance, and be arreſted by the ſheriff upon common and original proceſs, in his coming thither, or during his tarrying there; it ſeemeth (Mr. *Lambard* ſays) that (upon examination of the matter under his oath) he ſhall be diſcharged thereof by the privilege of this court, even as it is uſed in the higher courts at *Weſtminſter*. Lamb. 402.

But Mr *Hawkins* puts it more doubtfully, ſaying, it is queſtioned whether the ſeſſions, as alſo all courts of record, may not diſcharge any perſon arreſted, during his journeying to or from ſuch courts, or neceſſary attendance there, by proceſs from any other court: However

However it seems to be agreed, that any such court may discharge a person who shall be so arrested in the face of it. 2 *Haw.* 5.

Where authority is given to two justices to do any act, the sessions may do it, in all cases, except where appeal is directed to the sessions. L. 426.

Justices may issue their warrants for apprehending persons charged of crimes within the cognizance of the sessions, and bind them over to appear there, although the offender be not yet indicted. 1 *H. H.* 579.

If jurisdiction be given to the sessions, to hear and determine, and doth not say by information, this shall be by indictment, and not upon information. *Dalt. c.* 191.

The sessions are not obliged to give any reason of their judgment in the orders they make, no more than any other of the courts of law. 2 *Salk.* 607.

By *Holt* Ch. J. The sessions is all as one day, and the justices may alter their judgments, at any time whilst it continues. 2 *Salk.* 606.

A judge of *nisi prius* by consent of parties may make a rule to refer a cause; but the sessions cannot do so, though by consent. They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other. 2 *Sal.* 277.

It seemeth certain, that the sessions hath no authority to amerce any justice, for his non-attendance at the sessions, as the judges of assize may for the absence of any such justice at the gaol delivery: for 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 therfore it seems to have been holden, that if a justice at the sessions, who is not of the *quorum*, shall use such expressions towards another who is of the *quorum*, for which if he were a private person he might be committed or bound to his good behaviour, yet the sessions hath no authority to commit him, or to bind him to his good behaviour: And yet it seems to be agreed, that if a justice give just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security; for the publick peace requires an immediate remedy in all such cases. 2 *Haw.* 41, 42.

The sessions may proceed to outlawry in cases of indictments found before them; and that by the common law: in cases of popular actions, by the statute of the 21 *J. c.* 4. But they cannot issue a *capias utlagatum*, but must return the record of the outlawry into the king's bench, and there process of *capias utlagatum* shall issue. 2 *H. H.* 52. *Lamb.* 521.

But by the 12 *Co.* 103. They that have power to award process of outlawry, have also a power to award a *capias utlagatum*, as incident to their authority and jurisdiction. Gene-

Generally, the seſſions cannot award an attachment for contempt in not complying with their orders; but the ordinary and proper method is by indictment. *H. 8. G. 2. K.* and *Bartlett. Seſſ. C. V. 2.* 176.

The juſtices are not puniſhable for what they do in ſeſſions. *Stam.* 173.

The manner of proceeding at the ſeſſions, is as follows: Firſt, the juſtices being met, the uſual courſe is with three oyes to proclaim the ſeſſions, and then read the commiſſion of the peace. *Dalt. c.* 185.

Then the grand jury are called and ſworn, and the charge given to them. *id.*

If there be any who are to take the oaths, in order to qualify them for offices, this muſt be done between the hours of 9 and 12 in the forenoon, and not otherwiſe. *25 C. 2. c. 2. ſ. 2.*

Then the recognizances may be called, eſpecially ſuch as are to proſecute and give evidence, that ſo bills may be drawn and prepared. *Dalt. c.* 185.

Altho' it is in many places uſed, to try a man for felony the ſame ſeſſions in which the indictment is found, yet it ſeems highly reaſonable, if the priſoner deſire it to be deferred, and ſhew cauſe probable, to defer it. For that, 1. The ſeſſions are holden oftner than the aſſizes. 2. The ſpeedy trials ſeem to be in favour of the priſoner, and *volenti non fit injuria.* 3. If a traverſe upon an indictment of nuſance be not triable the ſame ſeſſions that it is joined, but a man ſhall have time to provide for it; much more in matter of life, where uſually the party is in priſon, and may well be ſuppoſed leſs able to provide for it, and in the nature of it requires greater conſideration. *Dalt. c.* 185.

And, in another place, it is ſaid, that it is made a doubt, whether a trial can be had of a felon the ſame ſeſſions he pleads, unleſs he conſents to it. *Dalt. c.* 185.

The bills being ready, the parties bound over for that purpoſe are ſworn to give evidence upon the bills; and the courſe is, to bid the evidence go with the grand jury, where they conſider of the bill, and either find it or not find it, and then return it. *id.*

Whilſt the jury is gone out of court, the uſual way is, to proceed upon motions and orders touching ſettlements, baſtardy, nuſances, and the like; and to call perſons bound over to the peace or good behaviour, but it may not be beſt to diſcharge them till the end of the ſeſſions, becauſe bills may be preferred againſt them. *id.*

Upon appeals to be made to the ſeſſions againſt judgments or orders, the juſtices ſhall cauſe any defect of form in ſuch original judgments or orders, to be rectified and amended, and then ſhall proceed upon the merits. *5 G. 2. c. 19. ſ. 1.*

Mr. *Shaw* (Tit. *Seſſions*) ſays, no indictment for a nuſance ſhall be quaſhed or diſcharged, unleſs two juſtices do certify to the court upon their own view, either by certificate under their hands or in perſon,

perſon, that the nuſance is removed; and for this he quotes 3 *Cro.* 584. *Layton*'s caſe. But that caſe only mentions a certificate in general, and the certificate in that caſe was not a certificate of two juſtices, but of ſeveral inhabitants adjoining; and it ſhould ſeem that the ſeſſions may be well ſatisfied of ſuch removal of a nuſance, by other evidence, as well as by that of two juſtices.

Then may be called the perſons bound by recognizance at the laſt ſeſſions, to proſecute their traverſes at the preſent ſeſſions. For if a perſon indicted of a treſpaſs or other miſdemeanor, do appear, and ſhall plead not guilty, and traverſe the indictment, he ſhall enter into recognizance to proſecute his traverſe at the next quarter ſeſſions. For in *Bumſtead*'s caſe, 11 *C.* The whole court was of opinion, that juſtices of the peace may not inquire, try, and determine civil offences, in one and the ſame day; for the party ought to have a convenient time to provide for the trial. *Cro. Car.* 448.

And on a trial of a traverſe, the defendant muſt appear in the court, at the bar, in his proper perſon; and then the indictment is read to the jury; and the proſecutor and his witneſſes are called to give evidence, and are heard; and if the defendant is found guilty, the court ſets a fine upon him adequate to the offence, or other puniſhment as the law directs. *Crown Cir.* 50. 51.

In caſe of treſpaſs and aſſault, the court frequently recommends the defendants to talk with the proſecutor, that is, to make him amends for the injury done him; and if the proſecutor comes and acknowledges a ſatisfaction received, the court will ſet a ſmall fine on the defendant, as 3 *s.* 4 *d.* or 12 *d.* *Cro. Cir.* 52.

Sometimes the proſecutor and defendant agree, before the defendant pleads to the indictment: and then the defendant comes into court in his proper perſon, and pleads guilty to the indictment; and upon proving, by a ſubſcribing witneſs, a general releaſe executed by the proſecutor, the defendant ſubmits to a ſmall fine, ſuch as the court is pleaſed to impoſe. *Cro. Cir.* 52.

There are frequent proſecutions at the ſeſſions for trifling aſſaults, in which caſes it is adviſable for a defendant not to put himſelf to the expence of trying the indictment; but to give notice to the proſecutor, that he intends to plead guilty to the indictment; in which caſe the proſecutor attends the court with his witneſſes, and gives evidence of the nature of the offence; and then the court proceeds to fine the defendant for his miſbehaviour towards the proſecutor: But before that is done, the court will admit the defendant to call ſuch witneſſes as he deſires, and will examine them by way of mitigation. *Cro. Cir.* 54.

And becauſe the arraignment and trial of priſoners is a great part of the buſineſs of the ſeſſions, I will take notice of ſome parts thereof, and proceedings thereupon:

Towards the end of the ſeſſions, when it appears what bills are come in againſt the priſoners, the gaoler being called to ſet his priſoners to the bar, and the crier being called to make a bar, that is,

to

to diſpoſe of the company, that a way be made open from the court to the priſoners, that the court, jury, and priſoners may ſee each other, one of the priſoners is called to; *A. B.* hold up thy hand. *Dalt. c.* 186.

Yet it is not neceſſary that he hold up his hand at the bar, or be commanded ſo to do; for this is only a ceremony, for making known the perſon of the priſoner to the court, and if he anſwers that he is the ſame perſon, it is all one. 2 *Haw.* 308.

Then he is acquainted with the effect of the charge laid againſt him, Thou *A. B.* ſtandeſt indicted, by the name of *A. B.* for that thou ——— (and ſo recite the indictment.) How ſayeſt thou, *A. B.* Art thou guilty of this felony and petit larceny whereof thou ſtandeſt indicted, or not guilty? *Dalt. c.* 185.

If he make no anſwer at all, and will not plead, it is beſt to aſk him three or more times, and to tell him the danger of ſtanding mute, and the grievouſneſs of the judgment of the *peine fort & dure*; and yet if he will ſtand mute, nothing more can be done concerning him till judgment, but to record it. *id.*

But if it be for petit larceny only, he ſhall not be put to his *peine fort & dure*, as in caſe of grand larceny, but he ſhall have the like judgment as if he had confeſſed the indictment. 2 *Haw.* 329.

If he pleads privilege, it hath been adjudged, that where proceedings are merely at the ſuit of the king, as upon indictment, or upon information brought by the attorney general, no privilege ſhall be allowed; but where the proceedings are at the ſuit of the king and of the party, as in caſe of a common informer, there the defendant may have his privilege. 1 *Lutw.* 62.

If he anſwer that he is guilty, then the confeſſion is recorded, and no more done till judgment. *Dalt. c.* 185.

But if he ſay, not guilty, he is then aſked; *culp prit* how wilt thou be tried? *Dalt. c.* 185.

Which was formerly a very ſignificant queſtion, though it is not ſo now; becauſe anciently trial by battel, and trial by ordeal was uſed, as well as by the country, or a jury.

Therefore it is now uſually anſwered, By God and the country. *Dalt. c.* 185.

Mr. *Hawkins* obſerves, that every perſon at the time of his arraignment, ought to be uſed with all the humanity and gentleneſs which is conſiſtent with the nature of the thing, and under no other terror or uneaſineſs than what proceeds from a ſenſe of his guilt, and the misfortune of his preſent circumſtances; and therefore ought not to be brought to the bar in a contumelious manner, as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unleſs there be ſome danger of a reſcous or eſcape. 2 *Haw.* 308.

And the court ought to exhort him to anſwer without fear, and to acquaint him that he ſhall have juſtice done to him. 2 *Inſt.* 316.

Next,

Next, the prisoner having put himself upon his country, the prosecutors are called on their recognizances, to give evidence. *Dalt. c.* 185.

Then the jury are called on their panel, thus, You good men that are returned and impanelled, to try this issue joined between our sovereign lord the king and the prisoner at the bar, answer to your names. *Dalt. c.* 185.

Which done, and they appearing a full jury, a proclamation is made; If any can inform the king's attorney or this court, of any treasons, murders, felonies, or other misdemeanors against *A. B.* the prisoner at the bar, let them come forth, for the prisoner stands upon his deliverance. *Dalt. c.* 185.

Then it is said to the prisoner, You prisoner at the bar, the persons that you shall now hear called, are to pass upon your trial (upon your life and death, if it is a capital offence); if you will challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they be sworn. *Dalt. c.* 185.

Then call the foreman of the jury, and say unto him, Lay your hand on the book, and look upon the prisoner; You shall well and truly try, and true deliverance make, between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to evidence: So help you God.

Then call the second, and so swear him in like manner, and so on to 12, and neither more nor less. 2 *H. H.* 293.

Then count them 12, and say, You good men that are sworn, you shall understand, that *A. B.* now prisoner at the bar, stands indicted, for that he ——— (and so recite the indictment): To which indictment he hath pleaded not guilty, and for his trial hath put himself upon God and the country, which country you are; so that your charge is, to inquire whether he be guilty of the felony or petit larceny, whereof he stands indicted, or not guilty; If you find him guilty, you shall say so, and inquire what goods and chattels he had at the time of the said felony and petit larceny committed, or at any time since: (Or, if it be for felony above petit larceny, ——then, what goods and chattels, lands and tenements he had at the time of the said felony committed, or at any time since:) If you find him not guilty, you shall inquire, whether he did fly for it, and if you find that he fled for it, you shall inquire what goods and chattels he had at the time of such flight. If you find him not guilty, and that he did not fly for it, you shall say so, and no more: and so hear your evidence. 2 *H. H.* 293, 294. *Dalt. c.* 185.

Then call the witnesses and swear them, one by one, thus: *The evidence that you shall give on the behalf of our sovereign lord the king, against* A. B. *prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; So help you God.* Dalt. c. 185.

When

When the witneſſes for the king have been examined, if the priſoner deſires that any witneſſes ſhould be examined for him, they ſhould be examined alſo on oath.

On trials of this nature, the priſoner ſhall not have counſel allowed to him, unleſs a point of law ariſe, proper to be debated; nor a copy of the indictment. 2 *Haw.* 400, 402.

But in offences under felony, a defendant may be heard by his counſel. *Wood. b.* 4. *c.* 5.

Otherwiſe, the court is to be of counſel with the priſoner, and ought to adviſe him for his good, and not take advantages too ſtrictly againſt him. *Dalt. c.* 185.

When the priſoner hath done, and hath been heard all he hath to ſay in his defence, the evidence is ſummed up by the court to the jury. And if they cannot agree on their verdict at the bar, a bailiff muſt be ſworn to keep the jury, thus, *You ſhall ſwear that you ſhall keep this jury, without meat, drink, fire, or candle: you ſhall ſuffer none to ſpeak to them, neither ſhall you ſpeak to them yourſelf, but only to aſk them whether they are agreed: So help you God.* id.

The jury coming back, the priſoner is brought to the bar; then the jury is called; they appearing, ſay, Set *A. B.* to the bar; Who being there; ſay, Look upon the priſoner; how ſay you, is *A. B* guilty of the felony (or as the caſe is) whereof he ſtands indicted, or not guilty? If they ſay, not guilty, bid him down upon his knees. If they ſay, guilty; record it, and bid him be taken away. Then ſay, hearken to the verdict as the court hath recorded it; You ſay, *A. B.* is guilty [or, is not guilty] of the felony whereof he ſtands indicted. *id.*

Then make a proclamation and ſay, All manner of perſons keep ſilence, whilſt judgment is giving againſt the priſoner at the bar, upon pain of impriſonment. Then ſet the priſoner to the bar, and give the ſentence. *id.*

The fees in ſeſſions for traverſing, trying, or diſcharging indictments, diſcharging recognizances of the peace and good behaviour, and the like, do vary according to the cuſtom of the country; and in that place the cuſtom of the place is to be obſerved. *Dalt. c.* 41.

SHERIFF.

SHERIFF *(Shireve)* in *Saxon* is *ſcirgereſa*, from *ſcira*, to *ſhare* or divide, for that the whole realm is parted and divided into *ſhires*; and *gereſa*, the *comes*, earl or governor, in the *Belgick* called *graef* or *grave*. The word *comes*, or *count*, came firſt into *Europe* out of the eaſtern countries, probably from the *Hebrew cône or câne*, which denoteth ſtrength, firmneſs, or ſtability; and the word *county*, in Latin *comitatus*, ſeemeth to be nothing elſe but the diviſion or allotment over which the *comes* or *count* had juriſdiction. And when

when the counts or earls left the cuſtody of the counties, then was the cuſtody thereof committed to the *viſcounts*, or *vicecomites* (which is the *Latin* name for the ſheriffs); ſo called, becauſe they ſupply the place of the *comes* or earl. The *earl* was otherwiſe called by the Saxons *eorl*, *ealdor*, *ealdorman* (elder, or alderman), becauſe they were uſually men of age and experience; by alike derivation as that of *ſenators* among the *Remans*.

The ſheriff (except in *Wales* and *Cheſter*) at the entering upon his office ſhall take the following oath (to be adminiſtred in purſuance of a writ of *dedimus poteſtatem.*)

I A. B. do ſwear, that I will well and truly ſerve the king's majeſty in the office of ſheriff, in the county of ——— *and promote his majeſty's profit in all things that belong to my office, as far as I legally can or may; I will truly preſerve the king's rights, and all that belongeth to the crown; I will not aſſent to decreaſe, leſſen, or conceal the king's right, or the rights of his franchiſes; And whenſoever I ſhall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchiſes, ſuits, or ſervices, or in any other matter or thing, I will do my utmoſt to make them be reſtored to the crown again; and if I may not do it myſelf, I will certify and inform the king thereof or ſome of his judges; I will not reſpite or delay to levy the king's debts, for any gift, promiſe, reward, or favour, where I may raiſe the ſame without great grievance to the debtors; I will do right, as well to poor as rich, in all things belonging to my office; I will do no wrong to any man, for any gift, reward, or promiſe, nor for favour or hatred; I will not diſturb no man's right, and will truly and faithfully acquit at the exchequer, all thoſe of whom I ſhall receive any debts or duties belonging to the crown; I will take nothing whereby the king may loſe, or whereby his right may be diſturbed, injured, or delayed; I will truly return, and truly ſerve all the king's writs, according to the beſt of my ſkill and knowledge; I will take no bailiffs into my ſervice, but ſuch as I will anſwer for, and will cauſe each of them to take ſuch oaths as I do, in what belongeth to their buſineſs and occupation; I will truly ſet and return reaſonable and due iſſues of them that be within my bailiwick, according to their eſtate and circumſtances, and make due panels of perſons able and ſufficient, and not ſuſpected, or procured, as is appointed by the ſtatutes of this realm; I have not ſold or let to farm, nor contracted for, nor have I granted or promiſed for reward or benefit, nor will I ſell or let to farm, nor contract for, or grant for reward or benefit, by myſelf or any other perſon for me, or for my uſe, directly or indirectly, my ſheriffwick, or any bailiwick thereof, or any office belonging thereunto, or the profits of the ſame, to any perſon or perſons whatſoever; I will truly and diligently execute the good laws and ſtatutes of this realm; and in all things well and truly behave myſelf in my office, for the honour of the king, and the good of his ſubjects, and diſcharge the ſame according to the beſt of my ſkill and power: So help me God.* 3 G. c. 15. ſ. 18, 19.

By

By the 4 *H.* 4. *c.* 5. The ſheriff in perſon ſhall continue within his bailiwick, and ſhall not let it to farm.

By the 1 *H.* 5. *c.* 4. Sheriff's officers ſhall not be attornies.

And the ſheriff ſhall return none of his officers upon inqueſts: on pain of 40*l.* half to the king, and half to him that ſhall ſue, in the ſeſſions, or elſewhere. 23 *H.* 6. *c.* 10.

The under ſheriff ſhall be appointed by the high ſheriff, becauſe he ſhall anſwer for him; and he ſhall take the like oath as the high ſheriff, *mutatis mutandis*. 3 *G* *c.* 15. *ſ.* 19.

The new ſheriff being appointed and ſworn, he ought at or before the next county court, to deliver a writ of diſcharge to the old ſheriff, who is to ſet over all the priſoners in the gaol, ſeverally by their names (together with all his writs), preciſely, by view and indenture, between the two ſheriffs; wherein muſt be comprehended all the actions which the old ſheriff hath againſt every priſoner, though the executions are of record. And till the delivery of the priſoners to the new ſheriff, they remain in the cuſtody of the old ſheriff, notwithſtanding the letters patents of appointment, the writ of diſcharge, and the writ of delivery. Neither is the new ſheriff obliged to receive the priſoners, but at the gaol only. But the office of the old ſheriff ceaſes, when the writ of diſcharge cometh to him. *Wood. b.* 1. *c.* 7.

And by the 20 *G.* 2 *c.* 32. The old ſheriff ſhall turn over to his ſucceſſor, by indenture and ſchedule, all ſuch writs and proceſs as ſhall remain unexecuted; and the new ſheriff ſhall execute and return the ſame.

The ſheriff having a juſtice of the peace his warrant directed to him, ſhall execute the ſame; but he need not go in perſon to execute it, but may authorize another to do it. 2 *Haw.* 86.

And it is no excuſe to the ſheriff to return that he could not execute a precept becauſe of reſiſtance; for he may take with him the power of the county. 13 *Ed.* 1 *ſt.* 1. *c.* 30.

Alſo the ſheriff, on ſummons, is bound to attend the ſeſſions of the peace, there to return his precepts, to take the charge of the priſoners, to receive fines for the king, and the like. 2 *Haw.* 41.

And it ſeems clear from the general reaſon of the law, which gives all courts of record a kind of diſcretionary power over all abuſes by their own officers, that the ſheriff is puniſhable by the juſtices in ſeſſions, for defaults in executing their writs and precepts. 2 *Haw.* 142, 143.

Every ſheriff is a principal conſervator of the peace, by the common law, and may *ex officio* award proceſs of the peace, and take ſurety for it: and it ſeems to be the better opinion, that the ſecurity ſo taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation. 2 *Haw.* 33.

But no ſheriff ſhall exerciſe the office of a juſtice of the peace, in any county wherein he is ſheriff; and in ſuch caſe his acts as a juſtice ſhall be void. 1 *Mar. ſeſſ.* 2. *c.* 8. By

By the 14 *Ed.* 3. *c.* 10. and 19 *H.* 7. *c*, 10. The ſheriff ſhall have the keeping of gaols.

And in all *civil* cauſes, as in caſes of impriſonment for debt, the ſheriff or gaoler (at the election of the party) ſhall be anſwerable for eſcapes ſuffered by the gaoler; but if the gaoler ſuffer a *felon* voluntarily to eſcape, this inaſmuch as it reacheth to life, is felony only in the gaoler, but the ſheriff may be indicted, fined, and impriſoned. 1 *H. H.* 597.

If the ſheriff ſhall die before his office ſhall be expired, the under-ſheriff ſhall execute the ſame in the deceaſed ſheriff's name, till a new ſheriff be ſworn, and be anſwerable for the execution thereof, as the deceaſed ſheriff would have been. 3 *G. c.* 15 *ſ.* 8.

[For further particulars, ſee the Office of Sheriff, in the ſecond part of this Book.]

SLANDER.

I Do not find it any where clearly ſettled, how far ſlander, or ſcandalous words are cognizable before juſtices of the peace, by reaſon of the different circumſtances in matters of ſo indeterminate a nature; for the ſame words, when ſpoken of different perſons, and even of the ſame perſon with a different emphaſis and manner of delivering them, may receive a very different interpretation.

In general, it ſeemeth that words which directly tend to a breach of the peace, as if one man challenge another, are cognizable before juſtices of the peace, for which the party may be bound to the good behaviour, and even indicted. 2 *Salk.* 698. 1 *Keb.* 931.

But if they do not tend directly to a breach of the king's peace, but are matters only of private ſlander between party and party, which no way affect the publick adminiſtration of juſtice, as in caſe where the common people are wont to call one another knaves, and rogues, and whores, and thieves; I do not find it aſſerted by any good authority, that juſtices of the peace have any juriſdiction at all in ſuch matters; but the proper remedy ſeems to be in one of theſe two ways, either by a proſecution in the ſpiritual court, or by an action upon the caſe at the common law.

SOLDIERS.

THE ancient military order was, when the king was to be ſerved with ſoldiers for his war,, a knight or eſquire of the county, that had revenues, farmers, and tenants, would covenant with the king by indenture inrolled in the exchequer, to ſerve the king for ſuch a term with ſo many men ſpecially named in a liſt, in his war. 1 *Inſt.* 71.

But

But the preſent regulations concerning the ſoldiery (the militia excepted) are chiefly contained in the yearly acts againſt mutiny and deſertion; the ſubſtance whereof [*as far as any American juſtices have cognizance*] is contained in the following ſections.

I. Articles of war.
II. Inliſting ſoldiers.
III. Muſter.
IV. Carriages.
V. Billeting.
VI. Sued for debt,
VII. Guilty of crimes.
VIII. Deſerting.

I. Articles of war.

The king may form articles of war, for better government of the forces, and conſtitute courts martial, with power to try any crime by ſuch articles of war. 1 *G.* 3. *ſ.* 51.

But no perſon ſhall be adjudged to ſuffer any puniſhment extending to life or limb, by the ſaid articles, except for crimes expreſſed to be ſo puniſhable by this act. *ſ* 52.

II. Inliſting ſoldiers.

When any perſon ſhall be inliſted, he ſhall in four days, but not ſooner than 24 hours, be carried before the next juſtice, or chief magiſtrate of a town corporate (not being an officer in the army), and before him ſhall be at liberty to declare his diſſent to ſuch inliſting; and on ſuch declaration, and returning the inliſting money, and paying 20*s.* for the charges expended on him, he ſhall be forthwith diſcharged, in preſence of ſuch magiſtrate: But if he ſhall refuſe or neglect in 24 hours to return and pay ſuch money as aforeſaid, he ſhall be deemed to be inliſted, as if he had given his aſſent thereto before ſuch magiſtrate. If he declare that he voluntarily inliſted himſelf, the juſtice or chief magiſtate ſhall forthwith certify under his hand, that ſuch perſon is duly inliſted, ſetting forth the place of his birth, age and calling (if known), and that the ſecond and ſixth ſections of the articles of war againſt mutiny and deſertion were read to him, and that he has taken the oath mentioned in the ſaid articles of war: And if any perſon ſo certified as duly inliſted, ſhall refuſe to take the ſaid oath of fidelity before ſuch magiſtrate, the officer from whom he hath received ſuch money, may detain and confine him till he ſhall take it: And every military officer that ſhall act contrary hereto, or offend herein, ſhall incur the like penalty, as is by this act inflicted for making a

falſe

false muster, to be recovered as any penalties by this act are recoverable. *s.* 67.

Which said second and sixth sections of the articles of war are these:

(SECT. II.)

Art. 1. Whatsoever officer or soldier shall presume to use traiterous or disrespectful words against the sacred person of his majesty, his royal highness the prince of *Wales*, or any of the royal family; if a commissioned officer, he shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court martial.

Art. 2. Any officer or soldier who shall behave himself with contempt or disrespect towards the general, or other commander in chief of our forces, or shall speak words tending to his hurt or dishonour, shall be punished according to the nature of the offence, by the judgment of a court martial.

Art. 3. Any officer or soldier who shall begin, excite, cause or join in any mutiny or sedition, in the troop, company, or regiment, to which he belongs, or in any other troop or company in our service, or on any party, post, detachment, or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a court martial shall be inflicted.

Art. 4. Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, does not use his utmost endeavours to suppress the same, or coming to the knowledge of any mutiny, or intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by a court martial with death, or otherwise, according to the nature of the offence.

Art. 5. Any officer or soldier who shall strike his superior officer, or draw, or offer to draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court martial.

(SECT. VI.)

Art. 1. All officers and soldiers, who having received pay, or having been duly inlisted in our service, shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a court martial shall be inflicted.

Art. 2. Any non-commissioned officer or soldier, who shall, without leave from his commanding officer, absent himself from his troop or company, or from any detachment with which he shall be commanded

commanded, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court martial.

Art. 3. No non-commissioned officer or soldier shall inlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company, in which he last served, on the penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, he the said officer so offending shall by a court martial be cashiered.

Art. 4. Whatsoever officer or soldier shall be convicted of having advised or persuaded any officer or soldier to desert our service, shall suffer such punishment as shall be inflicted upon him by the sentence of a court martial.

And the *oath* mentioned in the said articles of war, is as follows:

I swear to be true to our sovereign lord king George, *and to serve him honestly and faithfully, in defence of his person, crown, and dignity, against all his enemies or opposers whatsoever: And to observe and obey his majesty's orders, and the orders of the generals and officers set over me by his majesty.*

And the justice's certificate of the whole may be this:

New-Jersey, Middlesex-County. I *DO hereby certify, that* A. S. *of the age of* ——— *years, born at* ——— *in the county of* ——— *shoemaker, came this day before me* ——— *one of his majesty's justices of the peace for the county of* ——— *and declared that on the* ——— *day of* ——— *now last past, he did voluntarily inlist himself as a private soldier to serve his said majesty king* George *the third, in the regiment of foot commanded by* ——— *and that he now freely consenteth unto the same: And thereupon I do hereby also certify, that he the said* A. S. *is duly inlisted as aforesaid; and that the second and sixth sections of the articles of war against mutiny and desertion were also before me read unto him this day, and that he hath also at the same time taken before me the oath mentioned in the said articles of war. Given under my hand at* ——— *in the said county of* ——— *the* ——— *day of* ———.

But if any person shall receive the inlisting money, knowing it to be such, and shall abscond, or refuse to go before such magistrate, in order to declare his assent or dissent, he shall be deemed to be listed, and may be proceeded against as if he had taken the said oath before such magistrate. 1 *G.* 3. *c.* 68.

III. Muster,

III. Muſter.

Every commiſſary or muſter maſter, upon any muſter to be made, ſhall give convenient notice thereof to the mayor, or other chief officer, of the place where the ſoldiers are quartered; who ſhall be preſent at every ſuch muſter, and give his utmoſt aſſiſtance for the diſcovering of any falſe muſter: And every muſter-maſter neglecting to give ſuch notice, or refuſing the aſſiſtance of ſuch mayor or other officer, ſhall forfeit 50 *l.* and his office. And no muſter roll ſhall be allowed, unleſs ſigned by ſuch mayor or other officer: But if ſuch mayor or officer ſhall not attend, or refuſe to ſign ſuch muſter roll, without giving ſufficient reaſon for ſuch his refuſal; then the commiſſary may proceed to muſter, and ſuch muſter roll ſhall be allowed, tho' not ſigned as aforeſaid, provided that oath be made before a juſtice in 48 hours after ſuch muſter; and the ſaid muſter roll ſhall be then produced, and examined by the ſaid juſtice, who ſhall ſign the ſame, if there appear to be no ſufficient objection to it. *ſ.* 12.

And the commiſſary or muſter maſter ſhall make oath (for which no fee ſhall be taken) before the mayor or chief magiſtrate attending the muſter, if ſuch mayor or chief magiſtrate be a juſtice of the peace, or otherwiſe before a juſtice in the form following; I *A. B.* do ſwear, that I ſaw at the time of making the within muſter, ſuch men or horſes as are borne, and not reſpited, on the muſter roll, for which men or horſes a ſigned certificate or cirtificates are not indorſed on the back of the roll, certifying their being abſent from the muſter, by reaſon of being employed on ſome other duty of the regiment, or by being ſick, in priſon, or furlough, or at graſs, or by a ſigned leave from the colonel or field officer, or officer commanding the regiment, troop, or company:

Which oath the ſaid commiſſary ſhall inſert and ſubſcribe on the back of the muſter roll tranſmitted by him into the office of the commiſſary general of the muſters, *ſ.* 15.

And if any perſon ſhall give a falſe certificate, to excuſe any ſoldier from muſter or other ſervice, on pretence of being employed on ſome other duty of the regiment, or of ſickneſs, being in priſon, or on furlough; he ſhall forfeit 50 *l.* and be caſhiered and diſabled to hold any military office. And no certificate ſhall excuſe the abſence of any ſoldier, but for the reaſons abovementioned, or one of them; and the commiſſary ſhall ſet down on the roll, at the time of taking the muſter, the reaſon of ſuch abſence, and by whom certified; and not to ſet down any ſuch excuſe, without view of ſuch certificate. *ſ.* 9.

And every officer that ſhall make any falſe muſter of man or horſe, and every commiſſary, muſter maſter, or other officer, who ſhall wittingly allow or ſign the muſter roll, wherein any ſuch falſe muſter is contained, or ſhall take any reward for muſtering or ſigning muſter rolls, ſhall be caſhiered and diſabled. *ſ.* 10.

And if any perſon ſhall be falſly muſtered, or offer himſelf to be falſly muſtered; on proof thereof by oath of two witneſſes, before the next juſtice, and on certificate thereof under the hand of the commiſſary, or chief magiſtrate as aforeſaid, he ſhall be committed to the houſe of correction for ten days: And if any perſon ſhall wittingly furniſh a horſe to be muſtered, he ſhall be forfeited to the informer, if he ſhall belong to the perſon furniſhing the ſame; otherwiſe the offender ſhall forfeit to the informer 20 *l.* on oath by two witneſſes, before the next juſtice, by diſtreſs; and if he ſhall have no ſufficient diſtreſs, or ſhall not pay in four days after conviction, he ſhall be committed to the common gaol for three months, or be publickly whipped, at the diſcretion of the juſtice; and the informer, if a ſoldier, ſhall be diſcharged, if he demands it. *ſ.* 13.

But fictitious names, allowed by his majeſty's order upon the muſter rolls, for the maintenance of widows of officers who loſt their lives in the late war, or during the late rebellion, ſhall not be conſtrued a falſe muſter. *ſ.* 11.

IV. Carriages.

For proviſion of carriages for the forces in their march, or for their arms, cloaths, and accoutrements, any juſtice of the peace, being duly required thereunto, by an order from his majeſty, or the general of his forces, or the maſter general, or lieutenant general of his majeſty's ordinance, ſhall on ſuch order being brought and ſhewn unto him, by the quartermaſter, adjutant, or other officer of the regiment, troop, or company ordered to march, iſſue out his warrant to the conſtables or petty conſtables of the diviſion, liberty, hundred, or precinct from, through, near, or to which ſuch forces ſhall be ordered to march; requiring them to make ſuch proviſion for carriages, with able men to drive the ſame, as is mentioned in the ſaid warrant; allowing them ſufficient time to do the ſame, that the neighbouring parts may not always bear the burthen: And if ſufficient carriages cannot be provided within any ſuch liberty, diviſion, or precinct; then the next juſtice (or juſtices) of the county, riding, or diviſion, ſhall on ſuch order as aforeſaid ſo brought or ſhewn to him, iſſue his warrant to the conſtables or petty conſtables of ſuch next county, riding, diviſion, or precinct, for the purpoſes aforeſaid, to make up ſuch deficiency, *ſ.* 38.

Which warrant may be thus:

New-Jerſey, Middleſex County. } To the conſtable of——

BY *virtue of an order from* ——— *general of his majeſty's forces, this day brought and ſhewed unto me* ——— *one of his majeſty's juſtices of the peace for the ſaid county, by* ——— *lieutenant in capt.* ———*'s company of his majeſty's regiment of foot, commanded by* ——— *you*

——you are hereby required to provide——sufficient carriages, with able men to drive the same, within your constablewick, whereby, to remove the arms, cloaths and accoutrements of the said company on their march from Amboy *to* Brunswick, *and with them you are to appear at* Amboy *aforesaid to-morrow precisely at five of the clock in the morning. Herein fail you not, as you will answer the contrary at your peril. Given under my hand and seal at——in the said county, the——day of——in the——year——.*

And the officer, who by virtue of the said warrant is to demand the carriages of the constable to whom it is directed, shall at the same time pay down to him in hand for the use of the persons who shall provide such carriages and men, the sum of 1 *s.* for every mile any waggon with five horses shall travel: and 1 *s.* for every mile any wain with six oxen, or four oxen with two horses shall travel; and 9 *d.* for every mile any cart with four horses shall travel; and so in proportion for less carriages: for which the constable shall give a receipt. *s.* 38.

And such constable, or petty constable, shall appoint such persons having carriages within their respective liberties, as they shall think proper, to provide and furnish such carriages and men. *id.*

And if any military officer shall force any carriage to travel more than one day's journey; or shall not discharge the same in due time for their return home; or shall suffer any soldier or servant (except such as are sick), or any woman, to ride in such carriage; or shall force any constable, by threatnings. to provide saddle horses for themselves or servants; or shall force horses from the owners by themselves, servants, or soldiers; he shall forfeit 5 *l.* proof thereof being made on oath before two justices, who shall certify the same to the paymaster general, or other paymaster of the forces, who shall pay the same, according to the order of the said justices under their hands and seals, who shall deduct the same out of the officer's pay. *id.*

And no waggon, wain, cart, or carriage, shall be obliged to carry above twenty hundred weight. *s.* 42.

And if any high or petty constable shall wilfully neglect or refuse to execute such warrants for providing carriages; or if any person appointed by such constable to furnish any carriage and man, shall refuse or neglect to provide the same; or any other person shall wilfully hinder the execution thereof; he shall forfeit not exceeding 40 *s.* nor less than 20 *s.* to the poor of the parish where such offence shall be committed; the same to be heard and determined by two justices dwelling in or near the place, who shall cause the penalty to be levied by distress. *s.* 39.

V. Billeting.

By the 31 *C.* 3. *c.* 1. No Officer, military or civil, nor any other person whatsoever, shall presume to place, quarter or billet any

ſoldier on any ſubject or inhabitant of this realm, of any degree, quality, or profeſſion whatſoever, without his conſent; and every ſuch ſubject or inhabitant may refuſe to ſojourn or quarter any ſoldier, notwithſtanding any command, order, warrant, or billeting whatever. *ſ.* 54.

VI. Sued for debt;

No volunteer ſhall be taken out of the ſervice, by any proceſs, other than for ſome criminal matter, unleſs for a real debt, or other juſt cauſe of action, and unleſs affidavit be made before a judge of the court, that the original ſum due amounts to 10*l.* a memorandum of which oath ſhall be indorſed on the proceſs; and if he ſhall be otherwiſe arreſted, the judge may diſcharge him, and award coſts. 1 *G.* 3. *ſ.* 62.

But the plaintiff, on notice given in writing of the cauſe of action to ſuch perſon, or left at his laſt place of reſidence before liſting, may file a common appearance, in an action to be brought for any debt, ſo as to intitle him to proceed therein to judgment and outlawry, and to execution, other than againſt his body. *ſ.* 53.

VII. Guilty of crimes.

The king may appoint courts-martial, for trial of the offences of ſoldiers, by the articles of war. *ſ.* 51.

And every officer and ſoldier, who ſhall begin, excite, cauſe, or join in any mutiny or ſedition, or ſhall not uſe his utmoſt endeavours to ſuppreſs the ſame, or ſhall not give immediate notice thereof to his commanding officer, or ſhall deſert, or liſt in any other regiment, or ſhall be found ſleeping on his poſt, or ſhall leave it before relieved, or ſhall hold correſpondence with the enemy, or ſtrike or uſe any violence againſt his ſuperior officer in the execution of his office. or ſhall diſobey his lawful commands, ſhall ſuffer death, or ſuch puniſhment as a court martial ſhall inflict. *ſ.* 1.

But the trial of offences by a court martial ſhall not exempt them from the ordinary proceſs of law. *ſ.* 8.

And if any officer or ſoldier ſhall be accuſed of any capital crime, or of any violence or offence againſt the perſon, eſtate or property of any the king's ſubjects, the commanding officer ſhall uſe his utmoſt endeavour to deliver over ſuch accuſed perſon to the civil magiſtrate; and alſo ſhall be aiding to the officers of juſtice, in ſeizing and apprehending him, in order to bring him to trial; on pain, on conviction before two juſtices, by the oaths of two witneſſes, of being *ipſo facto* caſhiered and diſabled; provided the conviction be affirmed at the next ſeſſions, and a certificate thereof be tranſmitted to the judge advocate, who ſhall certify the ſame to the next court martial. *ſ.* 56.

But no perſon acquitted or convicted of capital offences by the civil magiſtrate, ſhall be puniſhed for the ſame by a court martial, otherwiſe than by caſhiering. *ſ.* 55.

VIII. Deſerting.

VIII. Deserting.

The constable may take up any person reasonably suspected to be a deserter, and carry him before a justice in or near the place, who shall examine such suspected person; and if by his confession, or the oath of one witness, or the knowledge of such justice, he shall be found to be a deserter, the justice shall forthwith cause him to be conveyed to the county gaol, or house of correction, (or the *Savoy* in *London*) and transmit an account thereof to the secretary at war; and the keeper of such gaol or house of correction shall receive the subsistence of such deserter, for his maintenance while he shall be in custody, but shall not be intitled to any fee for his imprisonment. *s.* 47.

But no officer may break open any house to search for deserters, without a justice's warrant; on pain of 20 *l. s.* 50.

And the justice, before whom he is brought, shall issue his warrant to the collector of the land tax, of the parish or township where such deserter shall be apprehended, for paying out of the land tax money by him collected or to be collected, to the hands of him who shall apprehend, or cause to be apprehended, such deserter, the sum of 20 *s.* the same to be allowed on his account. *s.* 48.

And if any person shall knowingly harbour or assist any deserter, he shall forfeit 5 *l.* and if any person shall knowingly buy or exchange or otherwise receive any arms, cloaths, or furniture belonging to the king, from any soldier or deserter, or change the colour thereof, he shall forfeit 5 *l.* and on conviction by the oath of one witness, before one justice, the said penalties shall be levied by distress; half the first penalty to be to the informer; and half of both, to the officer to whom the deserter did belong: and if such person have not sufficient, or shall not pay the penalty in four days, the justice shall commit him to gaol for three months, or cause him to be publickly whipped. *s.* 49.

And by the 1 G. *st.* 2. *c.* 47. If any person (other than inlisted soldiers against whom sufficient remedy is already provided) shall persuade any soldier to desert, he shall on conviction in six months forfeit 40 *l.* to the king, or to any other who shall sue for the same in any court at *Westminster*; and if he shall not have goods worth 40 *l.* or from the other circumstances of the crime, it shall be thought proper, the court may award the offender to prison not exceeding six months, and to stand in the pillory one hour.

STOCKS.

IT is said, that every vill of common right is bound to provide a pair of stocks. 2 *Haw.* 73.

And the constable by the common law, may confine offenders in the stocks, by way of security, but not by way of punishment.

But by divers statutes, the stocks is also appointed for the punishment of offenders in sundry cases, after conviction. STORES.

STORES.

IF any perſon having the charge or cuſtody of any of the king's armour, ordnance, ammunition, ſhot, powder, or habiliments of war, or of any victuals provided for victualling the army, ſhall for lucre or gain, wittingly, adviſedly, and of purpoſe, to hinder his majeſty's ſervice, imbezil, purloin or convey away the ſame to the value of 20*s.* or ſhall felonioufly ſteal or imbezil any of his majeſty's ſails, cordage, or any other of his majeſty's naval ſtores, to the like value of 20*s.* he ſhall (on proſecution within a year) be adjudged guilty of felony without benefit of clergy. 31 *El. c.* 4. 22 *C.* 2. *c.* 5.

And any of the principal officers or commiſſioners of the navy, may iſſue warrants to ſearch for the ſame, and puniſh the offenders by fine not exceeding 20*s.* or impriſonment not exceeding one week, the value of the goods not exceeding 20*s.* and if the offence requires a higher puniſhment, may commit him till he find ſureties to appear in the exchequer, or other court, where the king ſhall queſtion him for the ſame, within one year on proceſs, duly ſerved for that purpoſe on ſuch offender. 1 *G. ſt.* 2. *c.* 25. *ſ.* 3.

And every perſon who ſhall counterfeit the hand of any officer of the navy to any paper whereby his majeſty's naval treaſure may be diſpoſed of, or knowingly produce the ſame, he may be bound over by the ſaid officers and commiſſioners, or any of them until he find ſurety to appear at the next aſſizes or quarter ſeſſions, to be there proceeded againſt according to law. 1 *G. ſt.* 2. *c.* 25. *ſ.* 6.

No perſon other than perſons authorized by contracting with his majeſty's officers, ſhall mark any ſtores of war or naval ſtores with the king's mark, that is cordage of 3 inches and upwards with a white thread laid the contrary way, or any ſmaller cordage with a twine in lieu of white thread laid the contrary way, or any canvas with a blue ſtreak in the middle, or any other ſtores with the broad arrow; on pain of forfeiting the ſame, and 200*l.* with coſts (on conviction at the aſſizes or ſeſſions, 17 *G.* 2. *c.* 40. *ſ.* 10, 11.) half to the king, and half to the informer. 9 & 10 *W. c.* 41.

And ſuch perſon in whoſe cuſtody ſuch goods or ſtores ſo marked (or any timber, thick ſtuff or plank, marked with the broad arrow, 9 *G. c.* 8. *ſ.* 3.) ſhall be found, ſhall forfeit the ſame and 200*l.* with coſts in like manner, and be impriſoned till paid, unleſs he ſhall upon trial produce a certificate from three principal officers of the navy, expreſſing the quantity and on what occaſion he came by them. 9 & 10 *W. c.* 41.

But the judge or juſtices may mitigate the penalty as they ſhall ſee cauſe, and may commit the offender to gaol till payment, or may puniſh him corporally by cauſing him to be publickly whipped, or committed to ſome publick workhouſe to be kept to hard labour for ſix months or a leſs time. 9 *G. c.* 8. *ſ.* 4.

Imbezilling or purloining of armour, ſtores, naval proviſions, and other habiliments of war, are excepted out of the general pardon of the 20 *G.* 2. *c.* 52.

SURETY for the PEACE.

OUT of the *Latin* word *pax*, the *Normans* formed their *paix*, and we (out of that) our *peace*. Lamb 5.

Surety for the peace is the acknowledging a recognizance, or bond, to the king, taken by a competent judge of record, for the keeping the peace. *Dalt. c.* 116.

And this ſurety of the peace, every juſtice of the peace may take and command, by a twofold authority: 1. As a miniſter, commanded thereto by a higher authority: as when a writ of *ſupplicavit*, directed out of the chancery or king's bench, is delivered to him. 2. As a judge, and by virtue of his office, derived from his commiſſion. *Dalt. c.* 116.

Concerning which I will ſhew,

I. For what cauſe ſurety of the peace ſhall be granted.
II. At whoſe requeſt it ſhall be granted.
III. Againſt whom it ſhall be granted.
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I. For what cauſe ſurety of the peace ſhall be granted.

By the commiſſion of the peace, one or more juſtices have power *to cauſe to come before them, all thoſe who to any of the king's people concerning their bodies, or the firing of their houſes, have uſed threats, to find ſufficient ſecurity for the peace or their good behaviour towards the king and his people; and if they ſhall refuſe to find ſuch ſecurity, to cauſe them in the king's priſons to be ſafely kept, until they ſhall find ſuch ſecurity.*

Upon which Mr. *Hawkins* obſerves, that it ſeemeth clear, that wherever a perſon has juſt cauſe to fear, that another will burn his houſe, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him ſuch miſchief, he may demand the ſurety of the peace againſt ſuch perſon, and that every juſtice of the peace is bound to grant it, upon the party's giving

him

him satisfaction upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatned to beat him, or lain in wait for that purpose; and that he doth not require it out of malice, or for vexation. 1 *Haw.* 127.

Also it seems the better opinion, that he who is threatned to be *imprisoned* by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection, that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment; and yet there is no doubt, but that one threatned to be beaten, may demand the surety of the peace. 1 *Haw.* 127.

But if the justice shall perceive that surety is demanded merely of malice, or for vexation only, without any just cause of fear, it seemeth he may safely deny it. As in common experience we find it, that where a person shall upon a just cause come and crave the peace against another, and hath it granted to him; when such other person shall come before the justice, he likewise will crave the peace against the former, and will perhaps surmise some cause; but yet will nevertheless be content to surcease his suit and demand, so as the other will relinquish to have the peace against him: Here the justice shall do well not to be too forward in granting the peace thus required by the latter, but to persuade him, and shew him the danger of his oath which he is to take: but yet if he will not be persuaded, but will take his oath, that he is in fear, where indeed he neither doth fear, nor hath cause to fear, this oath shall discharge the justice, and the fault shall remain on such complainant. *Dalt. c.* 116.

Also, if a man will require the peace, because he is *at variance*, or *in suit* with his neighbour, it shall not be granted *Dalt. c.* 116.

Also, Mr. *Lambard* says, he takes it to be somewhat clear, that a justice may not by the commission award a precept of the peace, in behalf of a man that will require it, because he feareth that he will do harm to his *servants* or *cattle*. Lamb. 83.

And Mr. *Dalton* says, where a man is in fear that another will hurt his servants, or his cattle, or other goods, this surety of the peace shall not be granted by the justice. But in this case *Fitzherbert* saith, the party may have a special writ out of the chancery directed to the sheriff, that he shall cause such person to find surety, that he shall do no hurt or damage to the other man in his body, or to his servants or goods; and if he will not find surety, that then he shall arrest and detain him in prison until he shall find surety. *Dalt. c.* 116.

And the reason why a man may not have sureties of the peace against another, for that he feareth he will do harm to his *servants*, seemeth to be, because it should be the *servant*'s fear in such case, and not the *master*'s; and the servant's own oath before the justice is necessary. And as to his *goods*, it seemeth clear, that no sureties of

of the peace ought to be granted in that case; for the recognizance of the peace when taken, is only that the party shall keep the peace towards the king and all his liege people.

But Mr. *Dalton* says, that if a man shall threaten to hurt his *wife*, or *child*, he thinks he may crave the peace at the justice's hands, by the words of the commission, and that the justice ought to grant it. *Dalt. c.* 116.

Note also, the surety of the peace shall not be granted, but where there is a fear of some present or future danger, and not merely for a battery or trespass that is past, or for any breach of the peace that is past; for this surety of the peace is only for the security of such as are in fear: But the party wronged may punish the offender by indictment; and the justice, if he see cause, may bind over the affrayer. *Dalt. c.* 116. That is, he may bind him over to answer unto the indictment.

II. *At whose request it shall be granted.*

As to this, Mr. *Hawkins* says, It seems to be agreed at this day, that all persons whatsoever, under the king's protection, being of *sane memory*, whether they be natural and good subjects, or *aliens*, or *excommunicate*, or attainted of *treason*, have a right to demand surety of the peace. And it is certain, a *wife* may demand it against her husband threatning to beat her outrageously, and that a *husband* also may have it against his wife. 1 *Haw.* 126. *Crom.* 118.

Upon which Master *Crompton* observeth, that if the wife in such case cannot find sureties, she shall be committed; and so, says he, a man may be rid of a shrew. *Crom.* 118.

And Mr. *Dalton* says, an infant under the age of 14 years, may demand this surety, and it shall be granted him *Dalt. c.* 117.

But as to a person of *non sane memory*, Mr. *Dalton* says, this surety shall neither be granted against him nor to him upon his own request; but yet if there shall be cause, the justice ought to provide for his safety. *Dalt. c.* 117.

III. *Against whom it shall be granted.*

There seems to be no doubt, but that it ought, upon a just cause of complaint, to be granted by any justice of the peace, against any person whatsoever, under the degree of nobility, being of sane memory, whether he be a magistrate or private person, and whether he be of full age, or under age. But infants and femes covert ought to find security by their friends, and not to be bound themselves. And the safest way of proceeding against a *peer*, is by complaint to the court of chancery or king's bench. 1 *Haw.* 127.

IV. *In what manner it shall be granted.*

It seemeth certain, that if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offers

offers ſureties; and from hence it follows *a fortiori*, that he may be commanded by word of mouth to find ſureties, and committed for his diſobedience: But it is ſaid, that if he be abſent, he cannot be committed without a warrant from ſome juſtice, in order to find ſureties, and that ſuch warrant ought to be under ſeal, and to ſhew the cauſe for which it is granted, and at whoſe ſuit (that the party may provide his ſureties), and that it may be directed to any indifferent perſon. 1 *Haw.* 128.

The juſtice may make the warrant, to bring the party before himſelf or ſome other juſtice, or he may make it to bring the party before himſelf only; for he that maketh the warrant for the moſt part hath the beſt knowledge of the matter, and therefore he is the fitteſt to do juſtice in the caſe. 5 *Co.* 59.

As to the granting proceſs of the peace or good behaviour, out of the chancery or king's bench, it is enacted by the 21 *J. c.* 8. that it ſhall not be granted but upon motion in open court, and declaration in writing and upon oath, to be exhibited by the party deſiring ſuch proceſs, of the cauſes for which ſuch proceſs ſhall be granted; the motion and declaration to be mentioned on the back of the writ. And if it ſhall afterwards appear, that the cauſes are untrue, the court may order coſts to the party grieved, and commit the offender till paid.

V. How the peace warrant may be ſuperſeded.

It is ſaid, that if one who fears that the ſurety of the peace will be demanded againſt him, find ſureties before any juſtice of the ſame county, either before or after a warrant is iſſued againſt him, he may have a *ſuperſedeas* from ſuch juſtice, which ſhall diſcharge him from arreſt from any other juſtice, at the ſuit of the ſame party, for whoſe ſecurity he has given ſuch ſurety. 1 *Haw.* 129.

In which *ſuperſedeas* it is not neceſſary to name either the ſureties, or the ſums in which they are bound: but yet it is the better form to expreſs them both. *Dalt. c.* 118.

Alſo, it is ſaid, that an appearance upon a recognizance for the peace may be ſuperſeded, by finding ſureties in the chancery or king's bench, and purchaſing a writ teſtifying the ſame: but this practice having been often abuſed, it is enacted by the 21 *J. c.* 8. that no writs of *ſuperſedeas*, ſhall be granted out of the chancery or king's bench, but upon motion in open court, and on ſuch ſufficient ſureties, as ſhall appear on oath to the court, to be aſſeſſed in the ſubſidy book, at 5 *l.* lands, or 10 *l.* goods; and unleſs it ſhall alſo firſt appear to the court, that the proceſs of the peace or good behaviour is proſecuted againſt him, deſiring ſuch *ſuperſedeas bonâ fide* by ſome party grieved in that court, out of which the *ſuperſedeas* is deſired to be awarded. 1 *Haw.* 129.

VI. How

VI. How the peace warrant ſhall be executed.

It can be executed only by the perſons to whom it is directed, or ſome of them, unleſs it be directed to the ſheriff, who may either by parol, or by precept in writing, authorize an officer ſworn and known, to ſerve it, but cannot impower any other perſon without a precept in writing. 1 *Haw.* 128.

It ſeems generally agreed, that where a perſon authoriſed by warrant of a juſtice of the peace, to compel a man who is ſheltered in an houſe, to find ſureties for the peace or good behaviour, is denied quietly to enter into it, he may juſtify breaking open the doors, in order to take him; but he muſt firſt ſignify to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance. 2 *Haw.* 86.

If the warrant ſpecially direct that the party ſhall be brought before the juſtice who made it, the officer ought not to carry him before any other; but if the warrant be general, to bring him before any juſtice of the place, the officer has the election to bring him before what juſtice he pleaſeth, and may carry him to priſon for refuſing to find ſurety before ſuch juſtice. 1 *Haw.* 128.

And if the party is carried before another juſtice, and not before him who iſſued the warrant, ſuch other juſtice muſt take the ſurety, and bind him by recognizance in all points as the form of the precept doth require. And thereupon ſuch other juſtice, having ſo taken ſurety of the peace, may and ought upon requeſt, to make his *ſuperſedeas* to all officers, and to all other juſtices of the ſame county; and thereby the ſaid party ſhall be diſcharged from finding other ſurety, and from any other arreſt for the ſame cauſe. But by ſuch *ſuperſedeas*, the other juſtice cannot diſcharge the warrant of the firſt juſtice, until the party be bound indeed, nor give any other day to the party to appear. *Dalt. c.* 118.

If the warrant be in the common form, requiring the officer to cauſe the party complained of to come before the juſtice to find ſufficient ſurety, and if he ſhall refuſe ſo to do, to convey him immediately to priſon, without expecting any further warrant, until he ſhall willingly do the ſame, the officer who ſerves it, before he makes any arreſt, ought firſt to require the party to go with him, and find ſureties according to the purport of the warrant; but upon refuſal to do either, that is, either to go before the juſtice, or to find ſureties, he may carry him to the gaol by force of the ſame warrant, without more. 1 *Haw.* 128. *Dalt. c.* 118.

And yet the conſtable, or officer, may bring him in that caſe before the juſtice; and if he refuſes there to give ſureties, he may commit him without any farther warrant or *mittimus*. 2 *H. H.* 112.

Nevertheleſs, notwithſtanding theſe great authorities, it may not be convenient for the juſtice, to leave ſo much to the conſtable's judgment, as to determine what ſhall or ſhall not be deemed a refuſal to find ſuch ſureties; for that the conſtable is conſtituted a judge

judge in such case by no law. And much less doth it seem advisable, to require in the warrant, as is usual, that the constable shall carry the party to gaol, if he shall refuse to find *sufficient* sureties; for it doth not appear, how the constable can any way be deemed a competent judge of that; for it is certain, that he cannot administer an oath to such sureties, or others, whereby to inform himself of such sufficiency.

If the officer do arrest the party, and do not carry him before the justice to find sureties; or upon the refusal of the party, if the officer shall arrest him, and do not carry him to the gaol, in both these cases the officer is punishable by the justices for his neglect, by indictment and fine at their sessions: And also the party arrested may have his action of false imprisonment for the arrest; for where the officer doth not pursue the effect of his warrant, his warrant will not excuse him of that which he hath done, *Dalt. c.* 118.

When the party cometh before the justice, he must offer sureties, or else the justice may commit him; for the justice needeth not to demand surety of him. *Dalt. c.* 118, 169.

If the justice was deceived in the sufficiency of the sureties, he or any other justice, may afterwards compel the party to find and put in other sufficient sureties, and may take a new recognizance for the same. *Dalt. c.* 116, 119.

But if the sureties die, the party principal shall not be compelled to find new sureties. *Dalt. c.* 119. Because their executors or administrators are liable.

Also if a man, that was bound to keep the peace, hath broken his bond, the justices ought of discretion to bind him anew. *Lamb.* 78.

But not until he be thereof convicted by due course of law; for before conviction, he standeth indifferent, whether he hath forfeited his recognizance or not. *Crom.* 125.

VII. What ought to be the form of a recognizance for the peace.

The recognizance which the justice takes for the keeping of the peace, is rather of congruity, than by any express authority given either by the common law, or by statute. *Dalt. c.* 168.

If it is taken in pursuance of a writ of *supplicavit*, it must be wholly governed by the directions of such writ: But if it be taken before a justice, upon a complaint below, it seems that it may be regulated by the discretion of such justice, both as to the number and sufficiency of the sureties, and the largeness of the sum, and the continuance of the time for which the party shall be bound. And it hath been said, that a recognizance to keep the peace, as to any person, for a year, or for life, or without expressing any certain time (in which case it shall be intended for life), or without fixing any time or place for the party's appearance, or without binding him

him to keep the peace againſt all the king's people in general, is good. 1 *Haw.* 129.

However it ſeems to be the ſafeſt way, to bind the party to appear at the next ſeſſions of the peace, and in the mean time to keep the peace as to the king and all his liege people, eſpecially as to the party, according to the common form of precedents. 1 *Haw.* 129.

VIII. How ſuch recognizance ſhall be certified.

If it be taken by a writ of *ſupplicavit*, it needs not be certified till the juſtice receive a writ of certiorari to that purpoſe. But if it be taken upon a complaint below, it muſt be certified, ſent, or brought to the next ſeſſions, by force of the ſtatute of the 3 *H.* 7. *c.* 1, that the party ſo bound may be called. 1 *Haw.* 130.

IX. How ſuch recognizance may be forfeited.

There are divers things which may be done againſt the peace, and divers offences for which an indictment againſt the peace will lie; and yet the committing or doing ſuch offence or act ſhall be no forfeiture of the recognizance for the peace: for that the act that ſhall cauſe a forfeiture of ſuch recognizance muſt be done or intended unto the *perſon* as is aforeſaid, or in terror of the people. Therefore to enter into lands, where he ought to bring his action; or to diſſeize another of his lands; or to enter into lands or tenements with force, being without offer of violence, to any man's perſon, and without publick terror; or to do a treſpaſs in another man's corn or graſs; or to take away another man's goods wrongfully, ſo it be not from his perſon; or to ſteal another man's horſe, or other goods feloniouſly, being not from his perſon: All theſe, and the like, are breaches of the peace, and yet theſe will make no breach of this recognizance, nor breach of the peace within the meaning of the commiſſion of the peace. *Dalt. c.* 121.

More particularly; The recognizance is forfeited, if the party make default of appearance, and the ſame default ſhall be recorded. 3 *H.* 7. *c.* 1.

If the party have any excuſe, for his not appearing, it ſeems that the ſeſſions is not bound peremptorily to record his default, but may equitably conſider of the reaſonableneſs of ſuch excuſe. 1 *Haw.* 130.

And Mr. *Dalton* ſays, in caſe of the ſickneſs of the party, ſo that he cannot appear, he has known that the juſtices upon due proof thereof have forborn to certify or record ſuch forfeiture or default; and that they have taken ſureties for the peace of ſome friends of his preſent in court, until the next ſeſſions; for that the principal intent of the recognizance was but the preſervation of the peace. But he queries how this is warrantable by their oath. *Dalt. c.* 120.

Alſo,

Alſo, there is no doubt, but that it may be forfeited by any actual violence to the perſon of another, whether it be done by the party himſelf, or by others thro' his procurement: as manſlaughter, rape, robbery, unlawful impriſonment, and the like. 1 *Haw.* 130.

Alſo it hath been holden, that it may be forfeited by any treaſon againſt the king's perſon, and alſo by any unlawful aſſembly in terror of the people, and even by words directly tending to a breach of the peace, as challenging one to fight, or in his preſence threatning to beat him. 1 *Haw.* 130.

Otherwiſe it is if the party be abſent; and yet if the party ſo bound ſhall threaten to kill or beat a perſon who is abſent, and after ſhall lie in wait for him to kill or beat him, this is a forfeiture of the recognizance. *Dalt. c.* 121.

However, it ſeems that it ſhall not be forfeited by bare words of heat and choler, as the calling a man knave, teller of lies, raſcal, or drunkard; for tho' ſuch words may provoke a cholerick man to break the peace, yet they do not directly challenge him to it, nor does it appear that the ſpeaker deſigned to carry his reſentment any farther: And it hath been ſaid, that even a recognizance for the good behaviour ſhall not be forfeited for ſuch words; from whence it follows *a fortiori*, that a recognizance for the peace ſhall not. 1 *Haw.* 130.

Alſo, there are ſome actual aſſaults on the perſon of another, which do not amount to a forfeiture of ſuch recognizance; as if an officer, having a warrant againſt one who will not ſuffer himſelf to be arreſted, beat or wound him in the attempt to take him; or if a parent in a reaſonable manner chaſtiſe his child; or a maſter his ſervant, being actually in his ſervice at the time; or a ſchoolmaſter his ſcholar; or a gaoler his priſoner; or even a huſband his wife, as ſome ſay; or if one confine a friend who is mad, and bind and beat him, in ſuch manner as is proper in his circumſtances; or if a man force a ſword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby ſtay him from inciting a dog againſt a third perſon; or if a man beat another (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs him of his lands or goods, or the goods of another delivered to him to be kept, and will not deſiſt upon his laying his hands gently on him, and diſturbing him; or if a man beat, or as ſome ſay, wound, or maim one who makes an aſſault upon his perſon, or that of his wife, parent, child, or maſter, eſpecially if it appears that he did all he could to avoid fighting before he gave the wound; or if a man fight with, or beat one who attempts to kill any ſtranger; or if a man even threaten to kill one, who puts him in fear of death, in ſuch a place where he cannot ſafely fly from him; or if one impriſon thoſe whom he ſees fighting, till the heat is over. 1 *Haw.* 130, 131.

X. *Haw.*

X. How the recognizance being forfeited ſhall be proceeded on.

It is ſaid, that the juſtices cannot in any caſe proceed againſt the party, for a forfeiture of his recognizance, either in reſpect of his not appearing, or breaking the peace; but that the recognizance it ſelf, with the record of default of appearance, ought to be removed into ſome of the courts at *Weſtminſter*, who ſhall proceed by *ſcire facias* upon ſuch recognizance: And ſo it ought to be, if it be preſented by the jury, or great inqueſt, that the party hath forfeited his recognizance, by breach of the peace. 1 *Haw.* 130. *Dalt. Old Ed. c.* 70.

XI. How ſuch recognizance may be diſcharged.

He who is bound to the peace, and to appear at a certain day, muſt appear at that day, and record his appearance, altho' he who craved the peace cometh not to deſire that it may be continued; otherwiſe the recognizance cannot be diſcharged. *Dalt. c.* 120.

If the recognizance be made to keep the peace generally, without any time or day limited, it ſhall be conſtrued to be during the party's life, and this the juſtice may do upon reaſonable cauſe: but if ſuch ſurety be ſo taken, during the offender's life, neither the king, nor the juſtice, nor the party, can releaſe or diſcharge it: And therefore the juſtice muſt be well adviſed, how he granteth ſuch ſurety. *Dalt. c.* 119, 120,

But it ſeems to be agreed, that it may be diſcharged by the death or demiſe of the king in whoſe reign it was taken, or of the principal party who was bound thereby, if it were not forfeited before. 1 *Haw.* 129.

Alſo, it hath been holden, that it may be diſcharged by the releaſe of the party at whoſe complaint it was taken, being certified together with it; but this may juſtly be queſtioned, becauſe the recognizance is not to the ſubject but to the king; and conſequently cannot be diſcharged by the ſubject, who is not a party to it: however, ſuch a releaſe will be a good inducement to the court, to which ſuch a recognizance ſhall be certified, to diſcharge it. 1 *Haw.* 129.

And if a man be bound to keep the peace towards the king and all his people, but not towards any perſon certain, and to appear at ſuch a ſeſſions, the court at that ſeſſions may make proclamation, that if any man can ſhew cauſe, why the peace granted againſt ſuch a one ſhall be continued, he ſhall ſpeak; and if no perſon cometh to demand the peace againſt him, or to ſhew cauſe why it ſhould be continued, then the court may diſcharge him. But if a man be bound as aforeſaid, and *eſpecially to keep the peace towards a certain perſon*, there tho' ſuch perſon cometh not to deſire the peace may be continued, yet the court by their diſcretion may bind him over till

till the next ſeſſions, and that may be to keep the peace againſt that perſon only if they ſhall think good; for it may be that the perſon who firſt craved the peace is ſick, or otherwiſe letted, ſo as he cannot come to that ſeſſions to demand the continuance of the peace further. *Dalt. c.* 120.

Alſo it is certain, that ſuch a recognizance cannot be pardoned or releaſed by the king, before it is broken; becauſe the ſubject hath a kind of intereſt in it; but being forfeited, then the king, and no other, may releaſe and pardon the forfeiture. 1 *Haw.* 129.

And it is ſaid, that the ſureties are not diſcharged by their death; but that their executors or adminiſtrators (as hath been ſaid) do continue bound. 1 *Haw.* 129. *Dalt. c.* 120.

Likewiſe, if the party be impriſoned for default of ſureties, and after, he that demanded the peace againſt him happen to die; it ſeemeth the juſtice may make his liberate or warrant for the delivery of ſuch priſoner, for after ſuch death, there ſeemeth no cauſe to continue the other in priſon. Alſo, any juſtice may, upon the offer of ſuch priſoner, take ſurety of him for the peace, and may thereupon deliver him. *Dalt. c.* 118.

SURETY FOR THE GOOD BEHAVIOUR.

A MAN may be compelled to find ſureties, both for the good behaviour, and for the peace; and yet the good behaviour includeth the peace: and he that is bound to the good behaviour, is therein alſo bound to the peace. *Dalt. c.* 122.

This ſurety for the good behaviour being of near affinity to ſurety for the peace, both as to the manner in which it is to be taken, ſuperſeded, and diſcharged, it ſeemeth not to require a particular conſideration, ſave only as to theſe two points;

I. For what miſbehaviour it is to be required.
II. For what it ſhall be forfeited.

I. For what miſbehaviour it is to be required.

It doth not appear, that the conſervators of the peace at common law had any power as touching the *good behaviour*, further than as it hath a relation to the *peace*; and not as it is contra-diſtinguiſhed from it. And it ſeemeth, that the power which the juſtices of the peace do exerciſe at this day, in relation thereunto, doth ſolely depend upon the commiſſion of the peace, and the ſtatute of the 34 *Ed.* 3. *c.* 1. (Except in ſome ſpecial inſtances wherein the power of binding to the good behaviour is given to them by particular ſtatutes, which pertain not to this general title.)

The

The words in the commiſſion are theſe: *We have aſſigned you, jointly and ſeverally, and every one of you, our juſtices to keep our peace----and to cauſe to come before you, or any of you, all thoſe who to any one or more of our people, concerning their bodies, or the firing their houſes, have uſed threats, to find ſufficient ſecurity for the peace, or their good behaviour, towards us and our people; and if they ſhall refuſe to find ſuch ſecurity, then them in our priſons, until they ſhall find ſuch ſecurity, to cauſe to be ſafely kept.*

The ſtatute of the 34 *Ed.* 3. *c.* 1. as to this matter runs thus: *In every county ſhall be aſſigned for the keeping of the peace, one lord, and with him three or four of the moſt worthy in the county, with ſome learned in the law; and they ſhall have power to reſtrain the offenders, rioters, and all other barrators, and to purſue, arreſt, take, and chaſtiſe them according to their treſpaſs or offence; and to cauſe them to be impriſoned and duly puniſhed, according to the law and cuſtoms of the realm, and according to that which to them ſhall ſeem beſt to do by their diſcretions and good adviſement; and alſo to inform them, and to inquire of all thoſe that have been pillors and robbers in the parts beyond the ſea, and be now come again, and go wandring, and will not labour as they were wont in times paſt; and to take and arreſt all thoſe that they may find by indictment, or by ſuſpicion, and to put them in priſon: and to take of all them that be not of good fame, where they ſhall be found, ſufficient ſurety and mainprize of their good behaviour towards the king and his people, and the other duly to puniſh, to the intent that the people be not by ſuch rioters or rebels troubled nor endamaged, nor the peace bleminſhed, nor merchants nor other paſſing by the highways of the realm diſturbed, nor put in the peril which may happen of ſuch offenders.*

This ſtatute ſeems to have had in view chiefly the diſorders to which the country was then liable, from great numbers of diſbanded ſoldiers, who having ſerved abroad in the wars of that victorious king, were grown ſtrangers to induſtry, and were rather inclined to live upon rapine and ſpoil. *Barl.* 524.

But whatever the natural and obvious ſenſe of it may be, when compared with the hiſtory and circumſtances of thoſe times, it is certain it hath been carried much farther by conſtruction, and the purport of it hath been extended by degrees, until at length there is ſcarcely any other ſtatute, which hath received ſuch a largeneſs of interpretation.

And that I may proceed with clearneſs in a matter ſo eſſential to the office of a juſtice of the peace, I will ſet down the ſeveral expoſitions which have been given of this ſtatute from time to time, by learned men; and then raiſe ſuch obſervations thereupon, as the ſubject will naturally ſuggeſt.

The firſt unfolding of the ſenſe of this ſtatute which hath occurred, was in the caſe of Sir *Richard Croftes*, and Sir *Richard Corbet*, in the ſecond year of the reign of king *Hen.* 7. wherein it was reſolved by all the judges for that purpoſe aſſembled, that he who is bound to the good behaviour, ought not to do any thing

which ſhall be cauſe of breach of the peace, or to put the people in fear, dread, or trouble; and ſo ſhall be intended of all things which concern the peace: But not in miſdoing of other things, which touch not the peace. Yet a diverſity was obſerved, between a breach of the peace, and a breach of the good behaviour; for the peace is not broken without an affray or battery, but the good behaviour may be forfeited by the number of people a man has, and by their harneſs, or weapons, and the like, altho' they break not the peace. 2 *H.* 7. 2.

The ſecond inſtance, and upon which much ſtreſs hath been laid, was in the 13th year of the ſame king. In treſpaſs of aſſault, battery, and impriſonment, at *D.* the defendant ſaith, that one *Alice B.* had a houſe in the ſame town, and kept there ſuſpicious people, to wit, of common bawdry, and that the plaintiff oftentimes reſorted to the ſame houſe ſuſpiciouſly, with women of bad fame and name, whereby the conſtable of the ſame town, required the defendant to aid him to arreſt the plaintiff to find ſurety of his good behaviour: whereby the defendant came with the ſaid conſtable at the hour of 12 in the night, and him found ſuſpiciouſly in the ſame place; whereupon he took him, and put him in ward: And it was holden by all the juſtices to be a good juſtification; for they ſaid, that it is lawful for every conſtable to take ſuſpected perſons, which wake in the night, and ſleep in the day, or that keep ſuſpicious company. 13 *H.* 7. 80.

In the next place, Sir *Anthony Fitzherbert*, who lived in the reign of K. *Hen.* 8. ſaith, that it ſeemeth that one juſtice may, by the commiſſion, iſſue a warrant againſt a perſon to find ſurety of the good behaviour, by his diſcretion, as well as two juſtices may; and the words of the ſtatute of the 34 *Ed.* 3. are to the ſame effect: Otherwiſe, he ſays, damage may happen to ſome of the king's ſubjects, if the party be not attached, before that two juſtices have made the precept; yet (he ſays) the common uſage is, to make ſuch precept of the good behaviour in the name of two juſtices, and it is good to obſerve this direction. *Fitzh.* 7. *Crom.* 122.

In the next place, it is proper to take notice of a caſe adjudged in a court of king's bench, in the 30th of Q. *Eliz.* reported by lord *Coke*, 4 *Inſt.* 181. which was thus: At a ſeſſions at *Bridgewater*, in the county of *Somerſet*, one *William King* with ſureties was bound by recognizance to appear at the next general ſeſſions of the peace in the ſame county, and in the mean time to be of the good behaviour towards the queen and all her people. And after at the next ſeſſions, *William King* appeared, and was indicted for ſlanderous words ſpoken ſince his binding, to wit, for ſaying at one time, to *Edward Kyrton*, eſquire, *Thou art a pelter, thou art a lyar, and haſt told my lord lies.* And he was further indicted, that ſince the ſaid recognizance, *the cloſe of one* John Wich *with force and arms he broke and entred, and the cattle of the ſaid* John *depaſturing in the*

ſaid

ſaid cloſe unlawfully vexed and chaſed. And afterwards at another time he ſaid to the ſaid *Kyrton, thou art a drunken knave.* Which indictment was removed into the king's bench. And hereupon it was debated divers times both at the bar and the bench, whether admitting all that is contained in the indictment to be true, any thing therein was in judgment of law a breach of the ſaid recognizance. And it was reſolved, that neither any of the words, nor the treſpaſs, were any breach of the good behaviour, for that none of them did tend immediately to the breach of the peace; for tho' the ſaid words *thou art a liar, thou art a drunken knave,* are provocations, yet they tend not immediately to the breach of the peace; as if *William King* had challenged *Kyrton* to fight with him, or had threatned to beat or wound him, or the like; theſe tend immediately to the breach of the peace, and therefore are breaches of the recognizance of the good behaviour. And this diverſity (lord *Coke* ſays) was juſtly collected upon the coherence and context of the ſtatute of the 34 *Ed.* 3. whereby juſtices are aſſigned for keeping of the peace, and to reſtrain the offenders, rioters, and all other barators, and to chaſtiſe them according to their treſpaſs and offences, and to inquire of pillors and robbers in the parts beyond the ſeas, and be now come again, and go wandring and will not labour: And thus much for the puniſhment of offences againſt the peace after they be done. Then followeth an expreſs authority given to the juſtices, for prevention of ſuch offences before they be done, namely, *and to take of all them that be not of good fame* (that is, that be defamed and juſtly ſuſpected and intend to break the peace), *where they ſhall be found, ſufficient ſurety and mainprize of their good behaviour towards the king and his people* (which muſt concern the king's peace, as is alſo provided by the words ſubſequent) *to the intent that the people be not by ſuch rioters troubled or endamaged, nor the peace blemiſhed, nor merchants nor other paſſing by the high-ways diſturbed, nor put in the peril that may happen of ſuch offenders.* And as for the treſpaſs; altho' every wrongful treſpaſs is by force and arms, and againſt the peace, yet theſe are not taken to be ſuch as ſhall make a breach of the good behaviour.

After this Mr. *Lambard,* who wrote towards the beginning of the reign of K. *James* 1. ſaith thus: Surety of the good abearing is of great affinity with that of the peace; as being provided for preſervation of the peace, as that other is; for in the commiſſion of the peace, they are both conveyed under one tract of ſpeech, againſt ſuch as threaten to hurt mens bodies, or fire their houſes: which things (he ſays) are now commonly prevented by ſurety of the peace only.

And in the 2 *H.* 7. 2. (above recited) the ſurety of the good abearing is ſet forth to reſt in this point chiefly, that a man do nothing that may be cauſe of a breach of the peace; and that it doth not conſiſt in the obſervation of things that concern not the peace; and that it ſhould differ from ſurety of the peace in this,

that where the peace is not broken without an affray, or battery, or ſuch like, this ſurety may be broken by the number of a man's company, or by his or their weapons or harneſs.

And herewithal (he ſays) do alſo agree certain precedents in the king's bench.

But all this notwithſtanding, he thinks that a man may reaſonably affirm, that the ſurety of the good abearing ſhould not be reſtrained to ſo narrow bounds.

In proof of which, he proceeds to comment on the abovementioned ſtatute of the 34 *Ed.* 3. enabling the keepers of the peace *to take of all them that be not of good fame, where they ſhall be found ſufficient ſurety and mainprize of their good abearing, towards the king and his people*: So that if a man be defamed, he may by virtue hereof be bound to his good behaviour at the diſcretion of the juſtices. Now the doubt reſteth in this; to underſtand concerning what matters this defamation muſt be: and this (he thinks) may be partly gathered out of the ſaid ſtatute; for after it hath firſt given power to the wardens of the peace to arreſt and chaſtiſe offenders (that is to ſay, againſt the peace, rioters, and barators) then it willeth them to *inquire of ſuch as having been robbers beyond the ſea, were come over hither, and would not labour as they were wont*; and laſtly, it authorizeth them, *to take ſurety of the good behaviour of ſuch as be defamed*, namely, for any of thoſe former offences; for ſo it ſtandeth well together, that they ſhall both puniſh ſuch as have already ſo offended, and ſhall alſo provide, that others ſhall not likewiſe offend.

But he ſays, the further this bond of the good abearing doth extend, the more regard there ought to be taken in the awarding of it; and therefore (ſays he) altho' the juſtices have power to grant it, either by their own diſcretion or upon the complaint of others, even as they may that of the peace, yet I wiſh rather, that they do not command it but only upon ſufficient cauſe ſeen to themſelves, or upon the complaint of other very honeſt and credible perſons.

And then being about to ſet forth the form of a warrant, and of a recognizance for the good behaviour, he ſays,——And here, foraſmuch as one juſtice alone, and out of ſeſſions, may both by the firſt clauſe of the commiſſion, and alſo by the opinion of *Fitzherbert*, grant this ſurety of the good abearing (altho' the common practice be, that two ſuch juſtices do join in that doing, whereof alſo *Fitzherbert* hath very good liking) I will not ſtick to ſet forth the common forms as well of the precept as of the recognizance of the ſame, wherein if I ſhall uſe the names of two juſtices, you muſt take that to be done according to the common faſhion, and not of any neceſſity in law. For as I would more gladly uſe the aſſiſtance of a fellow juſtice in this behalf, if I may conveniently have it; ſo if that may not be gotten, I would not greatly fear, when good cauſe ſhall require, to undertake the thing myſelf alone.

And

And beſides this, he ſays, you may ſee admitted by the opinion of the court, 13 *H.* 7. that if a man in the night ſeaſon, haunt a houſe that is ſuſpected for bawdry, or uſe ſuſpicious company, then may the conſtable arreſt him to find ſurety for his good abearing; for bawdry is not merely a ſpiritual offence, but mixed, and ſounding ſomewhat againſt the peace of the land.

And therefore (ſays he) it ſhall not be amiſs at this day, in my ſlender opinion, to grant ſurety of the good abearing, againſt him that is ſuſpected to have begotten a baſtard child, to the end that he may be forthcoming when it ſhall be born; for otherwiſe there will be no putative father found, when the juſtices ſhall after the birth come to take order for his puniſhment. *Lamb.* 115---119.

In the next place, Mr. *Pulton*, who lived about the ſame time with Mr. *Lambard*, writeth thus: The ſurety of the good abearing is ordained for the preſervation of the peace, and it doth differ in nothing from that of the peace, but that there is more difficulty in the performance of it, and the party bound may ſooner ſlide into the peril and danger of it. The ſurety of good abearing is moſt commonly granted in open ſeſſions, or by two or three juſtices; or, upon a *ſupplicavit*, and great cauſe ſhewed and proved, it is granted in the chancery or king's bench. And tho' one juſtice alone may grant it if he will, yet it is ſeldom done ſo, unleſs it be to prevent ſome great, ſudden, and imminent enormity or danger. The ſurety of the peace is moſt times taken at the requeſt of one for the preſervation of the peace chiefly againſt one. But the ſurety of the good abearing is oftentimes granted at the ſuit of divers, and thoſe muſt be men of credit, and to provide for the ſafety of many; for the effect and purport thereof is, that the party bound ſhall demean himſelf well in his port, behaviour, and company, and do nothing that may be the cauſe of breach of the peace, or in putting the people in fear or trouble: And it is chiefly granted againſt common barators, common rioters, common quarrellers, common peace breakers, and perſons greatly defamed for reſorting to houſes ſuſpected to maintain incontinency or adultery, and againſt thoſe that be generally feared to be robbers or ſpoilers of the king's people, or which do endamage, diſturb, trouble, or put in peril paſſengers by the way. *Pult.* 18.

Afterwards Mr. *Dalton*, who wrote towards the latter end of king *James* the firſt his reign, ſays, The ſurety of the good behaviour is of great affinity with that of the peace, and is provided chiefly for the preſervation of the peace; and that it is moſt commonly granted either in the open ſeſſions, or by two or three juſtices out of ſeſſions. Yet by the words of the commiſſion, as alſo by the common opinion of the learned, one juſtice alone, out of ſeſſions, may grant this ſurety of the good behaviour. But this is not uſual, unleſs it be to prevent ſome great and ſudden danger; eſpecially againſt a man that is of any good eſtate, carriage or report. And it ſhall be good diſcretion in the juſtices, that they do not grant it,

but

but either upon ſufficient cauſe ſeen to themſelves, or upon the ſuit or complaint of others, and the ſame very honeſt and credible perſons. *Dalt. c.* 123.

In the next place, Mr. *Hawkins*, who wrote in the reign of K. *George* the firſt, ſaith thus: There ſeem to have been ſome opinions, that the ſtatute, ſpeaking of thoſe that be *not of good fame*, means only ſuch as are defamed, and juſtly ſuſpected, that they intend to break the peace, and that it doth not any way extend to thoſe who are guilty of other miſbehaviours not relating to the peace. But this ſeems much too narrow a conſtruction; ſince the abovementioned expreſſion of perſons of *evil fame*, in common underſtanding, as properly includes perſons of ſcandalous behaviour in other reſpects, as thoſe who by their quarrelſome behaviour give juſt ſuſpicion of their readineſs to break the peace; and accordingly it ſeems always to have been the better opinion, that a man may be bound to his good behaviour for many cauſes of ſcandal, which give him a bad fame, as being contrary to good manners only; as for haunting bawdy houſes with women of bad fame; or for keeping bad women in his own houſe; or for ſpeaking words of contempt of a ſuperior magiſtrate, as a juſtice of the peace, or mayor, tho' he be not then in the actual execution of his office; or of an inferior officer of juſtice, as a conſtable, and ſuch like, being in the actual execution of his office.

However it ſeems the better opinion, that no one ought to be bound to the good behaviour, for any raſh, quarrelſome, or unmannerly words, unleſs they either directly tend to a breach of the peace, or to ſcandalize the government, by abuſing thoſe who are intruſted by it with the adminiſtration of juſtice, or to deter an officer from doing his duty: and therefore it ſeems, that he who barely calls another rogue, or raſcal, or teller of lies, or drunkard, ought not for ſuch cauſe to be bound to the good behaviour.

However, ſays he, I cannot find any certain preciſe rules, for the direction of the magiſtrate in this reſpect; and therefore am inclined to think, that he has a diſcretionary power to take ſuch ſurety of all thoſe whom he ſhall have juſt cauſe to ſuſpect to be dangerous, quarrelſome, or ſcandalous; as of thoſe who ſleep in the day, and go abroad in the night; and of ſuch as keep ſuſpicious company; and of ſuch as are generally ſuſpected to be robbers, and the like; and of eves-droppers; and common drunkards; and all other perſons, whoſe miſbehaviour may reaſonably be intended to bring them within the meaning of the ſtatute, as perſons of evil fame, who being deſcribed by an expreſſion of ſo great latitude, ſeem in a great meaſure to be left to the judgment of the magiſtrate. But if he commit one for want of ſureties, he muſt ſhew the cauſe with convenient certainty. 1 *Haw.* 132.

And thus the ſenſe of the ſtatute hath been extended, not only to offences immediately relating to the peace, but to divers miſbehaviours not directly tending to a breach of the peace; inſomuch as

as it is difficult to define how far it ſhall extend, and where it ſhall ſtop.

Mr. *Dalton* in order to determine the ſame with ſome kind of certainty, hath (notwithſtanding his opinion as abovementioned) inſerted a number of inſtances, wherein ſureties of the good behaviour may be granted; and they are theſe that follow:

1. Againſt rioters.
2. Barators.
3. Common quarrellors, and common breakers of of the peace.
4. Such as lie in wait to rob, or ſhall be ſuſpected to lie in wait to rob, or ſhall aſſault, or attempt to rob another, or ſhall put paſſengers in fear or peril; or ſhall be generally ſuſpected to be robbers by the highway.
5 Such as are like to commit murder, homicide or other grievances, to any of the king's ſubjects in their bodies.
6. Such as ſhall practiſe to poiſon another: one inſtance of which may be the poiſoning their food; thus Mr. *Dalton* granted the good behaviour againſt one who had bought ratſbane, and mingled it with corn, and then caſt it amongſt his neighbours fowls, whereby moſt of them died.
7. Such as in the preſence or hearing of the juſtice, ſhall miſbehave himſelf in ſome outrageous manner of force or fraud.
8. Such as are greatly defamed for reſorting to houſes ſuſpected to maintain adultery, or incontinency.
9. Maintainers of houſes commonly ſuſpected to be houſes of common bawdry.
10. Common whoremongers and common whores; for bawdry is an offence temporal as well as ſpiritual, and is againſt the peace of the land,
11. Night walkers, that ſhall eves-drop mens houſes, or ſhall caſt mens gates, carts, or the like, into ponds, or commit other outrages and miſdemeanors in the night, or ſhall be ſuſpected to be pilferers, or otherwiſe like to diſturb the peace, or that the perſons of ill behaviour, or of evil fame or report generally, or that ſhall keep company with any ſuch, or with any other ſuſpicious perſon in the night.
12. Suſpected perſons who live idly, and yet fare well, or are well aparelled, having nothing whereon to live; unleſs upon examination they ſhall give a good account of ſuch their living.
13. Common gameſters, eſpecially if they have not whereon to live.
14. Such as raiſe hue and cry without cauſe.
15. Libellers.
16. Putative father of a baſtard child.
17. Such as perſuade or procure the putative father to run away, or the mother to be conveyed away, whereby ſhe leaveth her child to the charge of the town.
18. Such as abuſe a juſtice's warrant, or ſhall abuſe him or the conſtable in executing their office. Nay, it ſeemeth (he ſays) that he

he who ſhall uſe words of contempt, or contrary to good manners, againſt a juſtice of the peace, tho' it be not at ſuch a time as he is executing his office, yet he ſhall be bound to his good behaviour.

19. Such as charge another before a juſtice with felony, riot, or forcible entry, and yet will not proſecute or give evidence.

20. In general, whatſoever act or thing is of it ſelf a miſbehaviour, is cauſe ſufficient to bind ſuch an offender to the good behaviour. *Dalt. c.* 124.

To which others have added other inſtances: As,

21. Forcible entry. 1 *Haw.* 124.

22. Mr. *Hawkins* ſays, that he hath heard it agreed in the court of king's bench, that a writing full of obſcene ribaldry, without any kind of reflection upon any one, is not puniſhable at all by any proſecution at common law; yet it ſeems, he ſays, that the author may be bound to his good behaviour, as a ſcandalous perſon of evil fame. 1 *Haw.* 195.

23. A man did beat a woman in *Weſtminſterhall*, and he was bound to the good behaviour; and ſo (ſays Mr. *Crompton*) he may be bound to the peace or good behaviour, where he ſtriketh a perſon in the preſence of the juſtices in ſeſſions. *Crom.* 124.

24. A man was bound to the good behaviour by the court of king's bench, for aſſaulting and threatning a perſon ſo, that he could not attend a court in a ſuit there, without great coſt. And ſo it ſeemeth that it may be done, where one cometh to the ſeſſions, about a traverſe to be tried there, or to prefer a bill of indictment, if he be aſſaulted or threatned. *Crom.* 125.

I have omitted to make any remarks in the progreſs of theſe authorities, being willing to exhibit them together in one view; I proceed now to take notice of ſuch obſervations as do occur upon the whole.

Firſt, it appears from hence, that the univerſal practice of one juſtice binding to the good behaviour, is but of a modern date; altho' the law for it is the ſame now, that it was near 400 years ago: and that it was a long time doubted, whether one juſtice alone could require ſureties of the good behaviour. But here a diſtinction ought to be made, between the power given by the commiſſion of the peace, and the power given by the abovementioned ſtatute: As to the commiſſion, there ſeemeth to be no foundation for any doubt, but that thereby one juſtice alone may require ſuch ſureties; for the words are expreſs, *we have aſſigned you, jointly and ſeverally, and every one of you*; but then that extends only to two inſtances, namely, to *the threatening of a perſon concerning his body, or the firing of his houſe*. As to the ſtatute, the doubt ſeems to have ariſen upon this: in that having appointed who ſhall be aſſigned for juſtices, it then directeth, that *They ſhall have power to reſtrain offenders*; and it is holden, as Mr. *Lambard* hath obſerved, that if no power be expreſly given by any ſtatute to any one juſtice alone, he cannot otherwiſe compel the obſervation thereof, than by the help

help of his fellow juſtices. And Mr. *Hawkins* ſpeaking hereof in the caſe of riots, ſays, that if one juſtice alone, proceeding upon this ſtatute, ſhall arreſt *an innocent perſon* as a rioter, it ſeemeth that he is liable to an action of treſpaſs, and the party arreſted may juſtify the reſcuing of himſelf; becauſe no one ſingle juſtice is by this ſtatute made a judge of the ſaid offence: Yet, nevertheleſs, he ſays, by a favourable conſtruction which this ſtatute hath received for the advancement of juſtice, it hath been reſolved, that any one juſtice, upon this ſtatute, *if he finds the perſons riotouſly aſſembled*, may, without ſtaying for his companions, arreſt the offenders, and bind them to their good behaviour.

Secondly, It ſeemeth from what hath been rehearſed, that the words, *not of good fame*, were generally underſtood for a long time, to refer to ſuch offences only as have a relation to the peace, and not to other things which concern not the peace.

Thirdly, That one great in-let to the larger, and at length almoſt unlimited interpretation of the words, was the caſe above-mentioned 13 *H.* 7. wherein it was adjudged to be lawful to arreſt a man for the good behaviour, for frequenting a ſuſpected bawdy houſe, with women of bad fame. And this is the reaſon which Mr. *Dalton* gives for many of his inſtances above ſpecified, namely, that they are more properly againſt the peace, than this ſame caſe of avowtry.

Fourthly, That when once the gap was opened for the admiſſion of other offences not immediately relating to the peace, they flowed in and multiplied. Thus, in the caſe of baſtardy, having ſome affinity with the other of frequenting bawdy houſes, Mr. *Lambard* thought, that with equal reaſon, the reputed father of a baſtard child might be bound to the good behaviour; and in a few years after, Mr. *Dalton* delivers it abſolutely, that he may be ſo bound.

Fifthly, That therefore the natural and received ſenſe of any ſtatute ought not to be departed from without extreme neceſſity; for that one conceſſion will make way for another, and the latter will plead for the ſame right of admiſſion as the former.

Sixthly, That notwithſtanding the aforeſaid inſtances given by Mr. *Dalton* and others, it may not be ſafe in all caſes to rely upon every one of them without diſtinction; not only becauſe it is almoſt impoſſible for any two caſes to be exactly alike in all their circumſtances, but, alſo becauſe in fact divers of them at different times have been adjudged otherwiſe, and others have not prevailed without much difficulty and contradiction in the courts above, and perhaps were at length admitted rather from the conveniency and reaſonableneſs of the thing itſelf, and from an indulgence uſually allowed to thoſe gentlemen who ſerve their country without gain, and oftentimes with much trouble, than from any clear, poſitive, and expreſs power given to them by the commiſſion, or by the ſaid ſtatute.

Seventhly,

Seventhly, That notwithstanding all which hath been said, perhaps the case before recited, concerning the frequenting of a suspected bawdy house, will not wholly support the weight which so many authors have laid upon it. For the question, whether a justice of the peace had cognizance of the offence, by virtue of the commission of the peace, or of the statute of the 34 *Ed.* 3. was no part of the dispute; for it was an arrest by the constable *ex officio*, as a conservator of the peace at common law, and without any warrant from a magistrate: And the question was not, whether the constable might require sureties for the good behaviour, as a thing different from sureties for the peace, but whether in that case he could arrest at all or not.

And if the authority of this case shall be abated, several of the abovementioned instances will abate in proportion.

Eighthly, It is to be observed, that others of the aboveſaid instances, were established upon matters originally determined in court of king's bench, and Mr. *Crompton* himself doth refer to the authority and practice of that court in several instances. *Crom.* 120. But it doth by no means follow from what the justices of the court of king's bench may do, that justices of the peace may do the like; for their authority is circumscribed and limited by their commission and the statute law.

Ninthly, That it will perhaps abate some other of the foregoing instances, if we attend to this consideration; that there is a great difference between what the justices in sessions may do, after conviction by a jury, for an offence committed, and what a single justice out of the sessions may do, before an offence is committed, and to prevent the same from being committed; or what a single justice may do, upon a summary conviction before him, for an offence, as directed by some special act of parliament. The truth is, binding to the good behaviour was a discretionary judgment at the common law, given by a court of record, for an offence at the suit of the king, after a common law conviction by verdict of twelve men. Trial by his peers is the *Englishman*'s birthright by the great charter, and cannot be taken away but by an authority equal to that which established it, that is, by act of parliament; and therefore where an act gives a summary conviction before a justice of the peace, and inflicts a punishment upon such conviction, such statute must be pursued both as to the conviction and punishment. And it seemeth incongruous, that a justice of the peace shall have power to bind a man to the good behaviour, for an offence which he himself hath no power to hear and determine; for that is, in effect, giving judgment, and awarding execution, when it doth not, and cannot legally appear to him, that the person is guilty.

Tenthly, That therefore upon the whole it may be proper to conclude, that the magistrate in this article of the good behaviour, cannot exercise too much caution and good advisement; that in matters

matters which the law hath left indefinite, it is better to fall short of, than to exceed his commission and authority; that to bind a man to the good behaviour upon the statute of *evil fame* in general, may not always be with safety; not only because upon an action brought it may be hard to prove such evil fame, but also because in fact it is not always true, for many a good man hath been evil spoken of: That altho' in some cases, a justice of the peace may have a *discretionary* power (as Mr. *Hawkins* expresseth it) yet he must remember withal, that it is a *legal* discretion, as Mr. *Barlow* terms it, in which in favour of liberty great tenderness is to be used; or, as lord *Coke* hath defined it, discretion is a knowledge or understandanding to discern between truth and falshood, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to our wills and private affections; and such discretion ought to be limited and bounded with the rules of reason, law, and justice. 5 *Co.* 100. 10 *Co.* 140.

II. For what it shall be forfeited.

This hath been handled in part as it fell in with the former section: And agreeable to the doctrine there laid down, Mr. *Dalton* says that he who is bound to the good behaviour, ought to demean himself well in his carriage and in his company, not doing any thing which shall be a cause of breach of the peace, or to put the people in fear, dread, or trouble; and so shall be intended of all things which concern the peace, but not in misdoing of other things which touch not the peace. *Dalt. c.* 122.

And Mr. *Hawkins* saith, It hath been laid down as a general rule, that whatever will be a good cause to bind a man to his good behaviour, will forfeit a recognizance for it; but this hath since been denied, and indeed seems by no means to be maintainable, because the statute in ordering persons of evil fame to be bound in this manner, seems in many places chiefly to regard the prevention of that mischief which they may be justly suspected to be likely to do; and in that respect requires them to secure the publick from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them or not; and it would be extremely hard in such cases to make persons forfeit their recognizance, who yet may justly be compellable to give one, as those who keep suspicious company, or those who spend much money idly, without having any visible means of getting it honestly, or those who lie under a general suspicion of being rogues, and the like. 1 *Haw.* 132, 133.

However it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited; but also for some others, for which such a recognizance cannot be forfeited: as for going armed with great numbers, to the terror of the people, or speaking words

words tending to ſedition; and alſo for all ſuch actual miſbehaviours which are intended to be prevented by ſuch a recognizance, but not for barely giving cauſe of ſuſpicion of what perhaps may never actually happen. 1 *Haw.* 133.

The juſtice, at the inſtance of the party, before he grants his warrant, is to adminiſter an oath to the perſon who requires the ſame; which oath is to the following effect:

You ſwear, that you are in fear of your life, or ſome perſonal injury to be done to you by, &c. *and that you do not demand the peace of him for any malice or revenge, but for your own ſafety and the cauſes aforeſaid.*

This oath being adminiſtered, the juſtice may grant his warrant to bring the party offending before him: which warrant being directed to a ſworn officer, he need not ſhew it to the party, but he ought to inform him of the contents, and then he may juſtify breaking open doors to take him. *Dalt.* 578.

Warrant for the peace, or good behaviour, in the king's majeſty's name,

New-York, Suffolk County. GEORGE *the third, by the grace of god, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth: To our ſheriff of the county of* Suffolk, *to the conſtable of* Southold, *in the ſaid county, and to all and ſingular our bailiffs and other miniſters in the ſaid county, as well within liberties as without, greeting:*

Foraſmuch as A. I. *of* ——— *in the ſaid county, yeoman, hath perſonally come before* William Nicoll, *eſq; one of our juſtices aſſigned to keep the peace within the ſaid county, and hath taken a corporal oath, that he the ſaid* A. I. *is afraid that* A. O. *of* ——— *in the ſaid county, yeoman, will beat* [*wound, maim, or kill*] *him the ſaid* A. I. *and hath therewithal prayed ſurety of the peace againſt him the ſaid* A. O. [Or, if for the good behaviour, ——— *hath taken a corporal oath, that* A. O. *of* ——— *in the ſaid county, yeoman, hath threatned to beat him the ſaid* A. I. or, *to burn the houſe of him the ſaid* A. I. *and hath therewithal prayed ſurety of the good behaviour againſt him the ſaid* A. O.] *Therefore we command and charge you, jointly and ſeverally, that immediately upon the reciept thereof, you bring the ſaid* A. O. *before the ſaid* William Nicoll, *to find ſufficient ſurety and mainprize, as well for his perſonal appearance at the next general quarter ſeſſions of our peace, to be holden at* Southold, *or elſewhere, in and for the ſaid county, as alſo for our peace in the mean time to be kept towards us and all our liege people, and chiefly towards the ſaid* A. I. *that is to ſay, that he the ſaid* A. O. *ſhall not do, nor by any means procure or cauſe to be done any of the ſaid evils, to any of our ſaid people, and eſpecially to the ſaid* A. I. [Or, if for the good behaviour, ——— *as alſo for his good behaviour in the mean time, towards us and*

and all our liege people, and especially towards him the said A. I.] *Witness the said* William Nicoll, *at* Brookhaven, *in the said county, the* ——— *day of* ——— *in the* ——— *year of our reign,*

If the justice shall think fit that he shall be immediately carried to gaol, for default of sureties, without being brought before him, or any other justice, this clause may be inserted, *viz.* ——— *and especially towards him the said* A. I. *And if he the said* A. O. *shall refuse so to do, that then immediately, without expecting any further warrant, you him safely convey, or cause to be safely conveyed, to our common gaol in the said county,* (or, *to the house of correction at* ——— *in the said county), there to remain until he shall willingly do the same: So that he may be before our said justices at the said next general quarter sessions of our peace, then and there to answer unto us for his contempt in this behalf. And see that you certify your doings in the premises, to our said justices at the said sessions, bringing then thither this precept with you.*

Warrant for the peace, or good behaviour, in the name of the justice himself.

Essex, *ss.* To the constable of, *&c.* and to the keeper of *&c.*

WHEREAS A. B. *of,* &c. *hath this day made oath before me, That he hath been grievously threatned by* C. D. *of,* &c. *and is afraid that the said* C. D. *will beat or wound him, he being in fear of his life, whereupon he hath prayed surety of the peace against him: These are therefore in his majesty's name, to command you to apprehend the said* C. D. *and bring him before me, or some other justice of the peace of this county, to find sufficient security for his personal appearance at the next general quarter-sessions of the peace to be holden for the county aforesaid, then and there to abide and do what shall be enjoined by the said court; and also in the mean time to keep the peace, and especially towards the said* A. B. *And if the said* C. D. *shall refuse so to do, then you are hereby required to convey him to the gaol of,* &c. *aforesaid, and to deliver him safely to the keeper thereof: commanding also you the said keeper, to take the said* A. B. *into your custody, and him there to keep, until he shall find security for the peace as aforesaid. Given,* &c.

Another warrant for the peace, or good behaviour,

New-Jersey, Middlesex County. } To any of the constables of Woodbridge, in the said county.

FORASMUCH *as* A. I. *of* Woodbridge *aforesaid, in the county aforesaid, yeoman, hath personally come before me* James Parker, *esquire, one of the justices of our lord the king assigned to keep the peace within the said county, and hath taken his corporal oath, that* A. O. *of* Woodbridge *aforesaid, in the county aforesaid, yeoman, hath assaulted,*

aſſaulted, beaten, and wounded him the ſaid A. I. *and further hath threatned him concerning his body, inſomuch that he the ſaid* A. I. *is afraid that the ſaid* A. O. *will beat, wound, maim, or kill him the ſaid* A. I. *or do to him ſome other bodily harm; and thereupon he the ſaid* A. I. *hath prayed ſecurity of the peace,* [or, *of the good behaviour*] *to be had or granted to him againſt the ſaid* A. O. *Theſe are therefore to require you in the name of our ſaid lord the king, immediately upon the ſight hereof to bring the ſaid* A. O. *before me, to find ſufficient ſureties for his perſonal appearance at the next general quarter ſeſſions of the peace to be holden in and for the ſaid county, then and there to anſwer the premiſſes, and in the mean time that he the ſaid* A. O. *keep the peace,* [or, *ſhall be of the good behaviour,*] *towards our ſaid lord the king, and all his liege people, and eſpecially towards the ſaid* A. I. *Given under my hand and ſeal at* Woodbridge *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of the reign of our ſaid lord* George *the third, of* Great-Britain, France, *and* Ireland, *king.*

Note; The warrants above ſet forth, ſo far as they concern the good behaviour, are framed upon the clauſe in the commiſſion, impowering one juſtice to bind to good behaviour certain offenders therein mentioned. The following warrant for the good behaviour ſimply, as contradiſtinguiſhed from the peace, is formed on the ſtatute of the 34 *Ed.* 3. ſo often abovementioned.

Warrant for the good behaviour, on the 34 *Ed.* 3. *c.* 1. from *Lambard* and *Dalton.*

New-Jerſey, Eſſex County. William Winder, *eſquire, and* Richard Honeywood, *eſquire, juſtices of our lord the king, aſſigned to keep the peace within the ſaid county, To the ſheriff of the ſaid county, to the conſtables of the townſhip of* Newark, *in the ſaid county, and to all and ſingular bailiffs, conſtables, and other officers of our ſaid lord the king, as well within liberties as without, in the ſame county, greeting.*

Foraſmuch as we are given to underſtand, by the information, teſtimony, and complaint of many credible perſons, that A. O. *of* Newark, *in the county aforeſaid, gentleman, and* B. O. *of the ſame, yeoman, are not of good name and fame, nor of honeſt converſation, but evil doers, rioters, barators, and diſturbers of the peace, of our ſaid lord the king, ſo that murder, homicide, ſtrifes, diſcords, and other grievances and damages amongſt the lieges of our ſaid lord the king concerning their bodies are likely to ariſe thereby; Therefore on the behalf of our ſaid lord the king, we command you and every of you, that you omit not by reaſon of any liberty within the county aforeſaid, but that you attach, or one of you do attach the aforeſaid* A. O. *and* B. O. *ſo that you have them before us or others our fellows, juſtices of our ſaid lord the king, aſſigned to keep the peace within the county aforeſaid, as ſoon as they can be taken* [or, *before the juſtices of our ſaid lord the king, aſſigned to keep the peace*

peace within the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter sessions of the peace to be holden in and for the said county] to find then before us (or the said justices) sufficient surety and mainprise for their good behaviour towards our said lord the king, and all his people, according to the form of the statute in such case made and provided. And this you shall in no wise omit, on the peril that shall ensue thereon. And have you before us, or before the said justices [at the sessions aforesaid] this precept. Given under our seals at Newark *in the county aforesaid, the ——— day of ——— in the ——— year of the reign of our said lord.———*

Recognizance for the peace or good behaviour.

Pennsylvania, Chester County. BE *it remembered, that on the ——— day of ——— in the ——— year of the reign of our lord* George *the third, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and so forth,* A. O. *of ——— in the county aforesaid, yeoman,* A. S. *of the same place, yeoman, and* B. S. *of the same place, yeoman, came before me* Thomas Carleton, *esquire, one of the justices of our said lord the king, assigned to keep the peace within the said county, and acknowledged themselves to owe to our said lord the king, to wit, the said* A. O. *the sum of* 20l. *the said* A. S. *the sum of* 10l. *and the said* B. S. *the sum of* 10l. *of good and lawful money of* Pennsylvania, *to be respectively made and levied of their several goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he the said* A. O. *shall fail in performing the condition endorsed* [or *underwritten.*]

Acknowledged before me
Thomas Carleton.

The condition of this recognizance is such, that if the within bounden [or, *above bounden*] A. O. *shall personally appear at the next general quarter sessions of the peace to be holden in and for the county aforesaid, to do and receive what shall then and there be injoined him by the court, and in the mean time shall keep the peace,* [or, *be of the goood behaviour,* or, *shall keep the peace and be of the good behaviour*] *towards the king and all his liege people, and especially towards* A. I. *of ——— in the said county, yeoman; then the said recognizance shall be void, or else remain in its force.*

[*For taking recognizances. See title* RECOGNIZANCE.]

Mittimus for want of sureties.

Pennsylvania, Bucks County. } To the constable of *Chester*, and to the keeper of the gaol, in the said county.

WHEREAS A. O. *of ——— in the said county, yeoman, is now brought before me* Thomas Carlton, *esquire, one of the justices of our lord the king, assigned to keep the peace in and for the said county,*

county, requiring him to find ſufficient ſureties to be bound with him in a recognizance for his perſonal appearance at the next general quarter ſeſſions of the peace to be holden in and for the ſaid county, and in the mean time to keep the peace [or, *be of the good behaviour*] *towards our ſaid lord the king, and all his liege people, and eſpecially towards* A. I. *of*———*in the ſaid county, yeoman; and whereas he the ſaid* A. O. *hath refuſed and doth now refuſe before me to find ſuch ſureties: Theſe are therefore in the name of our ſaid lord the king, to command you the ſaid conſtable, forthwith to convey the ſaid* A. O. *to the common gaol of our ſaid lord the king, at*———*in the ſaid county, and to deliver him to the keeper thereof there, together with this precept: And I do, in the name of our ſaid lord the king, hereby command you the ſaid keeper, to receive the ſaid* A. O. *into your cuſtody in the ſaid gaol, and him there ſafely to keep, until he ſhall find ſuch ſureties as aforeſaid. Given under my hand and ſeal at* Chicheſter *in the ſaid county the*———*day of*——*in the*———*year of the reign of our ſaid lord* George *the third of* Great-Britain, France, *and* Ireland, *king.*

The form of a *ſuperſedeas.*

New-York, Ulſter-County. ROGER Wilſon, *eſquire, one of the juſtices of our lord the king, aſſigned to keep the peace within the county aforeſaid, To the ſheriff, bailiff, conſtables, and other the faithful miniſters and ſubjects of our ſaid lord the king within the ſaid county, and to every of them, greeting.*

Foraſmuch as A. O. *of*--------*in the ſaid county, yeoman, hath perſonally come before me at* Kingſton *in the ſaid county, and hath found ſufficient ſurety, that is to ſay,* A. S. *of*-------*yeoman, and* B. S. *of*-------*yeoman, either of the which hath undertaken for the ſaid* A. O. *under the pain of* 20 l. *and he the ſaid* A. O. *hath undertaken for himſelf under the pain of* 40 l. *that he the ſaid* A. O. *ſhall perſonally appear at the next general quarter ſeſſions of the peace to be holden in and for the ſaid county, then and there to do and receive what ſhall be injoined him by the ſaid court, and in the mean time ſhall well and truly keep the peace* [or, *be of the good behaviour*] *towards our ſaid lord the king, and all his liege people, and eſpecially towards* A. I. *of*-------*yeoman; Therefore on behalf of our ſaid lord the king I do command you, and every one of you, that you utterly forbear and ſurceaſe to arreſt, take, impriſon, or otherwiſe by any means for the ſaid cauſe to moleſt the ſaid* A. O. *and if you have, for the ſaid occaſion, and for none other, taken or impriſoned him the ſaid* A. O. *that then him you deliver, or cauſe to be delivered and ſet at liberty, without further delay. Given at* Kingſton *aforeſaid, in the county aforeſaid, under my ſeal, this* ----*day of*-----*in the*----- *year of the reign of*-----

ſuperſedeas may be alſo in the name of the king, under the teſte of the juſtice, thus;

the third, by the grace of God, &c. To the ſheriff, &c. Foraſmuch as A. O. *hath come before* Edward Wilſon, *eſq; aſſigned to keep the peace within our ſaid county, and hath ſure command you, and every of you, that ye forbear,* dward Wilſon *at* Kingſton *in the county aforeſaid, year of our reign.*

Releaſe

Releaſe of the ſurety for the peace, or good behaviour.

New-York, Ulſter-County. BE *it remembered, that on the----day of------in the----- year of------the aforeſaid* A. I. *hath come before me the ſaid* Edward Wilſon, *eſquire, and freely remiſed and releaſed, as much as in him lieth, the aforeſaid ſecurity of the peace* [or, *of the good behaviour*] *by him prayed before me againſt the abovenamed* A. O. *In witneſs whereof, I the ſaid* Edward Wilſon *have hereunto ſet my ſeal. Given,* &c.

This is to be written under the recognizance; and if the juſtice only ſign, without ſealing it, it is well enough, eſpecially where the recognizance is without ſeal.

Or, the releaſe may be by itſelf, thus:

New-York, Ulſter-County. BE *it remembered, that* A. I. *of------in the ſaid county, yeoman, on the------ day of--------in the-----year of the reign of--------- came before me* William Tatham, *eſquire, one of the juſtices of our lord the king, aſſigned to keep the peace within the ſaid county, at* Kingſton *in the ſaid county, and there remiſed and freely releaſed to* A. O. *of-------in the ſaid county, yeoman, the ſurety of the peace* [or, *good behaviour*] *by him the ſaid* A. I. *before me prayed againſt the ſaid* A. O. *Given,* &c.

Or, if it is before another juſtice, then ſay,-------*the ſurety of the peace,* [or, *good behaviour*] *which he has againſt* A. O. *of-----in the ſaid county, yeoman. Given,* &c.

But note, that none of theſe releaſes will diſcharge the recognizance, or the appearance of the party bound thereby; but that he muſt appear according to the condition of the recognizance, for the ſafeguard of his recognizance.

Liberate to diſcharge one committed for want of ſureties.

New-York, Orange-County. JOSEPH Gale, *eſquire, one of the juſtices of our lord the king, aſſigned to keep the peace in the county aforeſaid, To the keeper of his majeſty's gaol at------in the ſaid county, greeting.*

Foraſmuch as A. O. *in the priſon of our ſaid lord the king, in your cuſtody now being, at the ſuit of* A. I. *of-------in the ſaid county, yeoman, for the want of his finding ſufficient ſureties for his perſonal appearance at the next general quarter ſeſſions of the peace, to be holden in and for the ſaid county, and his keeping the peace* [or, *being of the good behaviour*] *in the mean time, towards our ſaid lord the king, and all his liege people, and eſpecially towards the ſaid* A. I. *hath found before me ſufficient ſureties, to wit,* A. S. *of------- yeoman, and* B. S. *of-------yeoman, either of which hath undertaken for the ſaid* A. O. *under the pain of* 20 l. *and he the ſaid* A. O. *hath undertaken for himſelf under the pain of* 40 l. *that he the ſaid* A. O. *ſhall and will perſonally appear at the next general quarter ſeſſions of the peace to be holden in and for the ſaid county, and ſhall well and truly keep the peace* [or, *be of the good behaviour*] *in the mean time, towards our ſaid lord the king, and all his liege people, and eſpecially towards the ſaid* A. I. *Therefore on the behalf of our ſaid lord the king I do command you, that if the ſaid* A. O. *do remain in the ſaid gaol, for the ſaid cauſe, and for none other, then you forbear to grieve or detain him any longer, but that you deliver him thence, and ſuffer him to go at large, and that, upon the pain that will fall thereon. Given under my ſeal at* Goſhen *in the ſaid county, the ----day of------in the -------year of the reign of our ſaid lord* George *the third, of* Great-Britain, France, *and* Ireland, *king.*

SWEARING.

BY the canons of the church, If any offend their brethren by ſwearing, the churchwardens ſhall preſent them; and ſuch notorious offenders ſhall not be admitted to the holy communion, till they be reformed. *Can.* 109.

And by the ſtatute of the 19 *G.* 2. *c.* 21. It is enacted as follows:

If any perſon ſhall profanely curſe or ſwear, and be thereof convicted on confeſſion, or oath of one witneſs, before one juſtice (or mayor,) he ſhall forfeit as follows: That is to ſay,

Every day labourer, common ſoldier, or common ſeaman, 1 *s.*

Every other perſon, under the degree of a gentleman, 2 *s.*

And every perſon of or above the degree of a gentleman, 5 *s.*

And for a ſecond offence after conviction, double; and for every other offence after a ſecond conviction, treble. *ſ.* 1.

Which ſaid penalties ſhall go to the poor of the pariſh where the offence was committed. *ſ.* 10.

If ſuch perſon ſhall curſe or ſwear in the preſence and hearing of a juſtice (or mayor); he ſhall convict him without other proof. *ſ.* 2

If in the preſence and hearing of a conſtable, if he is *unknown* to ſuch conſtable, the ſaid conſtable ſhall ſeize and carry him forthwith before the *next* juſtice (or mayor of a town corporate), who ſhall convict him upon the oath of ſuch conſtable.

If he is *known* to ſuch conſtable, he ſhall ſpeedily make information before ſome juſtice (or mayor) in order that he may be convicted. *ſ.* 3.

So that the conſtable, if it is in his hearing, is required to proſecute; but any other perſon alſo may proſecute if he pleaſes.

And ſuch juſtice (or mayor) ſhall immediately on ſuch information on the oath of the conſtable, or of any other perſon, cauſe the offender to appear before him; and on proof of ſuch information, convict him: and if he ſhall not immediately pay down the penalty, or give ſecurity to the ſatisfaction ſuch of juſtice (or mayor); he may commit him to the houſe of correction, to be kept to hard labour for ten days. *ſ.* 4.

Alſo the charges of the information and conviction, ſhall be paid by the offender, if able, over and above the penalties; which charges ſhall be aſcertained by ſuch juſtice (or mayor). *ſ.* 11.

But for the information, ſummons, and conviction, no more ſhall be paid to the juſtice's clerk, than 1 *s.* *ſ.* 15.

And if he ſhall not immediately pay ſuch charges, or give ſecurity to the ſatisfaction of ſuch juſtice (or mayor); he may commit him to the houſe of correction, to be kept to hard labour for ſix days, over and above ſuch time for which he may be committed for non-payment of the penalties; and in ſuch caſe, no charges of information and conviction ſhall be paid by any perſon. *ſ.* 11.

The

The conviction shall be in the words and form following;

Be it remembered, that on the———day of———in the——— year of his majesty's reign, A. B. *was convicted before me (one of his majesty's justices of the peace for the county aforesaid; or before me ———mayor of the city or town of———within the county of——) of swearing one or more profane oath or oaths. Given under my hand and seal the day and year aforesaid.* s. 8.

[In several of the *American* colonies, there are particular laws about swearing, which must be the justices guide in those colonies.]

Information.

New-Jersey, Morris County. THE *information of* A. I. *of———in the county aforesaid, yeoman, made on oath this———day of———in the———year of the reign of———before me* J. P. *esquire, one of his majesty's justices of the peace for the said county: Who saith,*

That on———the———day of———now last past, at———in the township of———in the county aforesaid, he heard A. O. *of———in the said county yeoman, swear one profane oath in these words,* to wit, &c.

Summons,

New-Jersey, Morris County. } To the constable of-------

WHEREAS *information hath this day been made before me* J. P. *esquire, one of his majesty's justices of the peace for the said county, upon the oath of* A. I. *of———yeoman, that on———the———day of this present month of———he heard* A. O. *of——— in the said county, yeoman, at———in the township of———in the said county, swear one profane oath. These are therefore to command you to cause the said* A. O. *forthwith to appear before me to answer the premisses, and be further dealt withal according to law. Given under my hand and seal at———in the said county, the———day of in the———year of———.*

Commitment.

New-York, Queen's County. } To the constable of *Flushing* in the said county, and to the keeper of the house of correction at in the said county.

WHEREAS A. O. *of———in the said county, day labourer is and stands convicted this day before me———one of his majesty's justices of the peace for the said county, of swearing one profane oath, on the———day of this present month of———at* Flushing *in the said county, whereby he hath forfeited the sum of* 1s. *to the poor of the said township of* Flushing, *and whereas the said*

A. O. *hath refuſed and doth refuſe to pay down the ſaid ſum of* 13. *for the uſe of the poor aforeſaid, and alſo hath refuſed and doth refuſe to give ſatisfactory ſecurity to pay the ſame; Theſe are therefore to require you the ſaid conſtable to convey the ſaid* A. O. *to the houſe of correction at* ——— *aforeſaid, and to deliver him to the keeper thereof together with this warrant: And I do hereby command you the ſaid keeper to receive him the ſaid* A. O. *into your cuſtody in the ſaid houſe of correction, and there to detain and keep him to hard labour for the ſpace of ten days. And for ſo doing this ſhall be your ſufficient warrant. Given under my hand and ſeal at* ——— *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of the reign of* ———

TORN.

THE ſheriff's torn is the king's court of record, holden before the ſheriff, for redreſſing of common grievances within the county. 2 *Haw.* 55.

And foraſmuch as the ſheriff did go in circuit twice every year, throughout every hundred within the county, it was called *tour*, or *tourn*, which ſignifieth a circuit or perambulation. 2 *Inſt.* 70.

[Neither torns nor court-leets, are held in *America*.]

TRAVERSE.

TRAVERSE took its name from the *French de traverſe*, which is no other than *de tranſverſo* in *Latin*, ſignifying, *on the other ſide*; becauſe as the indictment on the one ſide chargeth the party, ſo he on the other ſide cometh in to diſcharge himſelf. *Lamb.* 540.

To traverſe an indictment then, is to take iſſue upon the chief matter thereof; which is the ſame as if one ſhall ſay, *to make contradiction*, or *to deny the point of the indictment*: As in a preſentment againſt a perſon for a highway overflowed with water, for default of ſcouring a ditch, which he and they whoſe eſtate he hath in certain lands there, have uſed to ſcour or cleanſe; ſuch perſon may traverſe either the matter, to wit, that there is no highway there, or that the ditch is ſufficiently ſcoured; or otherwiſe, he may traverſe the cauſe, to wit, that he hath not that land, or that he and they whoſe eſtate he hath have not uſed to ſcour the ditch. *Lamb.* 541.

And foraſmuch as in the record of one traverſe, there is at once diſcovered, the ſtyle of the ſeſſions, the indictment, the proceſs to anſwer, the traverſe itſelf, the verdict, and judgment thereupon, the proceſs of execution, the yielding of the parties, and the aſſeſſment of their fines, ſo that it alone may ſerve inſtead of all, it is judged requiſite to inſert the ſame as follows:

New-Jerſey,

New-Jersey, Somerset County. HERETOFORE, *to wit, at the sessions of the peace held at* Bridgewater *in the county aforesaid, on the first* Tuesday *in* April, *in the* ——— *year of the reign of* George *the third, by the grace of God, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and so forth, before* J. P. *and* K.P. *esquires, and others their associates, justices of our said lord the king, assigned to keep the peace in the county aforesaid, as also to hear and determine divers felonies, trespasses and other misdemeanors in the same county committed, by the oath of twelve jurors it is presented, that* John Long *of* ——— R. M. *of* ——— *and* T. L. *of* ——— *with divers others unknown, evil doers and disturbers of the peace of our said lord the king, in a warlike manner arrayed, joined and assembled, on the* ——— *day of* ——— *in the night of the same day, in the year aforesaid, with force and arms, to wit, with swords, staves, clubs, guns, and other arms, as well offensive as defensive, at* Bedminster, *in the field of one* Charles Graham, *unlawfully, riotously, and routously broke and entered, and eight waggon loads of hay, to the value of* ——— *then and there being, of the goods and chattels of the said* C. G. *then and there unjustly and unlawfully took and carried away, against the peace of our said lord the king, and against the form of the statute in that case made and provided: Whereupon it was commanded to the sheriff, that he should not omit,* &c. *but cause them to come to answer. And afterwards, to wit, on the* Tuesday *aforesaid, in the year aforesaid, before the aforesaid justices came the aforesaid* J. L. R. M. *and* T. L. *in their proper persons, and having had the hearing of the indictment aforesaid, severally say, that they are thereof not guilty, and of this they put themselves upon the country; and* Adam Martin, *who for our lord the king in this behalf prosecutes, in like manner* &c. *Therefore let there come thereupon a jury before the justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine* &c. *at the sessions of the peace at* Bridgewater *&c. on the second* Tuesday *in* July, *then next to be holden, And who,* &c. *To recognize,* &c. *Because as well* &c. *The same day is given as well to the aforesaid* A. M. *who prosecutes,* &c. *as to the aforesaid* J. L. R. M. *and* T. L. *&c. To which sessions of the peace holden at* B. *aforesaid, in the county aforesaid, on the aforesaid day* &c. *before* ——— *and their associates, justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors in the same county committed, came as well the aforesaid* A. M. *who prosecutes* &c. *as the aforesaid* J. L. R. M. *and* T. L. *in their proper persons. And the jurors aforesaid, by the sheriff of the county aforesaid for this impanelled, and demanded, to wit,* A. B. C. D. *&c. likewise did come, who say the truth concerning the premisses being tried and sworn, say upon their oath, that the aforesaid* J. L. R. M. *and* T. L. *are guilty, and every of them is guilty of the trespass, contempt, and riot aforesaid, in the indictment above specified, in manner and form as against them is above supposed. Therefore it is considered by the court, that the aforesaid* J. L. R. M. *and* T. L. *be taken to satisfy our lord the king of*

their fines, by occaſion of the treſpaſs, contempt and riot aforeſaid. Which J. L. R. M. *and* T. L. *then and there preſent in court, prayed that they to a fine with our ſaid lord the king, by the occaſion aforeſaid, may be admitted; and thereof they put themſelves ſeverally upon the mercy of our lord the king. And the fine of the ſame* J. L. *by the juſtice aforeſaid is aſſeſſed, at* 3 l. 6 s. 8 d. *and the fine of the ſame* R. M. *is aſſeſſed at* 20 s. *and the fine of the ſame* T. L. *is aſſeſſed at* 5 l. *of good and lawful money of* New-Jerſey, *to the uſe and behoof of our ſaid lord the king.* Lamb. 543.

Every defender indicted for a miſdemeanor, ſhould give full eight days notice of trial to the proſecutor, before the aſſizes, if the trial is to be there; if at the ſeſſions, it is uſual to give two or three days notice. *Cr. Circ.* 20, 48.

TREASON.

TREASON, according to lord *Coke*, is derived from *trahir*, to betray; and *trahiſon* by contraction *treaſon*, is the betraying itſelf. 3 *Inſt.* 4.

Treaſon, generally ſpoken, is intended, not of petit treaſon, but of high treaſon only. 1 *H. H.* 316.

Notwithſtanding that treaſon and miſpriſion of treaſon are not within the letter of the commiſſion of the peace, yet inaſmuch as they are againſt the peace of the king, and of the realm, any juſtice of the peace may, either upon his own knowledge, or the complaint of others, cauſe any perſon to be apprehended for any ſuch offence. And ſuch juſtice may take the examination of the perſon ſo apprehended, and the information of all thoſe who can give any material evidence againſt him, and put the ſame in writing; and alſo bind over ſuch who are able to give any ſuch evidence, to the king's bench, or gaol delivery, and certify his proceedings to ſuch court. 2 *Haw.* 39. *Hal. Pl.* 168. 1 *H. H.* 372.

And having committed the offender (for he is by no means bailable by juſtices of the peace, 3 *Ed.* 1. *c.* 15. 2 *Haw.* 99.) it may be adviſable for him to ſend an account immediately, of all the particulars, to a ſecretary of ſtate.

By the ſtatute of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. (which lord *Hale* calls a *ſacred* act; and lord *Coke* an *excellent* act, and the king who made it a *bleſſed* king, and the parliament a *bleſſed* parliament;) All treaſons which had been uncertain before, were ſettled. Which act, by the 1 *Mar. ſeſſ.* 1. *c.* 1. is reinforced, and again made the only ſtandard of treaſon; and all ſtatutes, between the ſaid ſtatutes of the 25 *Ed.* 3. and 1. *Mar.* which made any offences high or petit treaſon, or miſpriſion of treaſon, are abrogated; ſo that no offence is at this day to be eſteemed high treaſon, unleſs it be either declared to be ſuch by the ſaid ſtatute of the 25 *Ed.* 3. or made ſuch by ſome ſtatute ſince the 1 *Mar.*

And

And therefore I shall first consider such offences as are high treason within the said statute of the 25 *Ed.* 3. and then such as are made treason by statutes subsequent to the said statute of the 1 *Mar.*

The words of the statute of the 25 *Ed.* 3. as to this matter, are as follows:

Whereas divers opinions have been before this time, in what case treason shall be laid, and in what not; the king, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth; that is to say, When a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion (that is his wife, 3 *Inst.* 9.) *or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere; and thereof be probably* (proveablement, proveably) *attainted of open deed, by the people of their condition. And if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into the realm, counterfeit to the money of* England, *knowing the money to be false; and if a man slay the chancellor, treasurer or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices.*

And by the statute of the 1 *Mar. sess.* 1. *c.* 1. (which lord *Hale* calls another excellent law) *No act, deed or offence being by act of parliament made treason, by words, writing, ciphering, deeds, or otherwise whatsoever, shall be adjudged to be treason, but only such as be declared by the said statute of the* 25 Ed. 3. And this (he says) at one blow laid flat all the numerous treasons at any time enacted since the 25 *Ed.* 3. 1 *H. H.* 308.

Of open deed] Lord *Coke* (3 *Inst.* 14, 140.) seems to be of opinion, upon the said act of the 25 *Ed.* 3. that bare *words* are not a sufficient *overt act*, or *open deed*, whereby to convict a person of treason; but that they are misprision of treason only. So also lord *Hale* (1 *H. H.* 111, 118. and elsewhere throughout) seemeth to think, that words, unless put into writing, are not regularly an overt act. But Mr. *Hawkins* (1 *Haw* 39.) argues the contrary, and amongst other reasons for his opinion, he observes, that to charge a man with speaking treason is unquestionably actionable, which could not be, if no words could amount to treason: also, that as in case of felony, he who by command or persuasion induceth another to commit felony, is an accessary in felony, so he who does the same in treason, is a principal traytor (there being no accessaries in treason, but all being principals;) and yet such person doth no act but by words.

And it has been the constant practice, ever since the revolution at least, where a person by treasonable discourses hath manifested a design to murder or depose the king, to convict him upon such evidence. And in *Lowick*'s case, *Holt* Ch. J. declared, that *express words*

words were not neceſſary to convict a man of high treaſon; but if from the tenor of his diſcourſe the jury is ſatisfied he was engaged in a deſign againſt the king's life, this is ſufficient to convict the priſoner. *Read.* Treaſ. 156.

In high treaſon, as hath been ſaid before, there are no acceſſaries, but all are principals; and therefore whatſoever act or conſent will make a man acceſſary to a felony before the act done, the ſame will make him a principal in caſe of high treaſon. 3 *Inſt.* 9, 21.

By the 7 *W.* *c.* 3. No perſon ſhall be proſecuted for high treaſon, but within three years after the offence committed; except in the caſe of deſigning to aſſaſſinate the king's perſon.

And by the 31 *C.* 2. *c.* 2. Perſons committed for high treaſon, ſhall be indicted the next term, or next aſſize; otherwiſe they ſhall be let to bail, unleſs it appear to the court, upon oath, that the witneſſes for the king could not be produced in that time; and in ſuch caſe, they ſhall be indicted the ſecond term or aſſize, or elſe diſcharged.

Perſons indicted for high treaſon whereby corruption of blood ſhall he made, or for miſpriſion of ſuch treaſon (except for counterfeiting the coin, the great ſeal, privy ſeal, privy ſignet, or ſign manual) ſhall have a copy of the indictment (but not the names of the witneſſes) delivered to them five days before trial. 7 *W.* *c.* 3.

And they ſhall have copies of the panel of the jurors delivered to them, two days before trial, 7 *W.* *c.* 3.

And ſhall have proceſs of court to compel their witneſſes to appear. 7 *W.* *c.* 3.

And moreover, after the death of the perſon pretending to be king of *England* by the name of *James* the third, when a perſon is indicted for high treaſon, or miſpriſion of treaſon, both a copy of the indictment, and liſts of the jurors, and alſo of the witneſſes, ſhall be delivered to the party indicted, ten days before trial. 7 *An.* *c.* 21. *ſ.* 11.

And ſuch perſons ſhall have two ſuch counſel as they ſhall deſire aſſigned them by the court, who ſhall have acceſs to them at reaſonable times. 7 *W.* *c.* 3.

And they ſhall be allowed to make their defence by witneſs on oath. 7 *W.* *c.* 3.

And they ſhall not be attainted but on the oath of two witneſſes, either both of them to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon; unleſs they ſhall confeſs, or ſtand mute, or refuſe to plead, or challenge peremptorily above 35 of the jury. 7 *W.* *c.* 3.

The judgment for high treaſon (not relating to the coin) is, That he ſhall be carried back to the place from whence he came, and from thence to be drawn to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out, and burnt before his face, and his head cut off, and his body divided into four quarters, and his head and quarters diſpoſed at the king's pleaſure. 2 *Haw.* 443. The

The judgment of a woman for high treaſon, is to be drawn and burnt. 3 *Inſt.* 211.

In the ſaid judgment is implied forfeiture of lands and goods to the king, loſs of dower, and corruption of blood. 3 *Inſt.* 211.

Petit treaſon.

Moreover there is another manner of treaſon, when a ſervant ſlayeth his maſter, or a wife her huſband; or when a man ſecular or religious ſlayeth his prelate, to whom he oweth faith and obedience. 25 Ed. 3. ſt. 5. c. 2.

High treaſon is againſt the king, petit treaſon againſt the ſubjects. 3 *Inſt.* 20.

No perſon ſhall be convicted of petit treaſon, but on the oath of two witneſſes, or confeſſion. 1 *Ed.* 6. *c.* 12. *ſ.* 22.

The judgment againſt a man for petit treaſon is, that he ſhall be drawn to the place of execution, and there hanged by the neck till he be dead: The judgment againſt a woman is, that ſhe ſhall be drawn to the place of execution, and there burnt. 2 *Haw.* 444.

The conſequence of attainder, is, forfeiture of lands (to the lord of the fee), and of goods; loſs of dower; and corruption of blood. 2 *Haw. c.* 49.

Altho' there can be no acceſſaries in high treaſon, yet in petit treaſon there may be acceſſaries both before and after. 3 *Inſt.* 21.

And acceſſaries before the fact are ouſted of clergy, by ſeveral ſtatutes; but acceſſaries after the fact have their clergy in all caſes of petit treaſon, for no ſtatute takes it from them. 2 *H. H.* 342.

Miſpriſion of treaſon.

Miſpriſion cometh from the *French* word *mepriſs*, which properly ſignifieth neglect or contempt: And miſpriſion of treaſon, in legal underſtanding, ſignifieth, when one knoweth of any treaſon, tho' no party or conſenter to it, yet conceals it, and doth not reveal it in convenient time. 3 *Inſt.* 36. 1 *H. H.* 371.

The judgment of miſpriſion of treaſon is, to be impriſoned during life, to forfeit all his goods forever, and the profits of his lands during life. 3 *Inſt.* 36.

Every man therefore that knoweth a treaſon, ought with all ſpeed to reveal it to the king, his privy council, or other magiſtrate. *H. Pl.* 127.

But it ſeemeth that miſpriſion of petit treaſon is not ſubject to the judgment of miſpriſion of high treaſon, but only is puniſhable by fine and impriſonment, as in the caſe of miſpriſion of felony. 1 *H. H.* 375.

TREASURE

TREASURE FOUND.

TREASURE trove, or treaſure found, is *where any gold or ſilver, in coin, plate, or bullion, hath been of ancient time hidden, whereſoever it be found, whereof no perſon can prove any property, it doth belong to the king, or to ſome other by the king's grant, or preſcription.* 3 Inſt. 132.

Gold or ſilver] For if it be of any other metal, it is no treaſure; and if it be no treaſure, it belongs not to the king, for it muſt be *treaſure* trove. 3 *Inſt.* 132.

Whereſoever it be found] Whether it be of ancient time hidden in the ground, or in the roof or walls, or other part of a caſtle, houſe, building, ruins, or elſewhere, ſo as the owner cannot be known. 3 *Inſt.* 132.

Belong to the king] The reaſon whereof is a rule of the common law, that ſuch goods whereof no perſon can claim any property, belong to the king; as wrecks, ſtrays, and the like. 3 *Inſt.* 132.

Larceny cannot be committed of ſuch things whereof no man hath any determinate property, tho' the things themſelves are capable of property, as of treaſure trove, or wreck till ſeized; tho' he that hath them in point of franchiſe, may have a ſpecial action againſt him that takes them. 1 *H. H.* 510.

The puniſhment for concealment of treaſure trove, is by fine and impriſonment. 3 *Inſt.* 133.

And it belongeth to the coroner to inquire thereof. 3 *Inſt.* 133.

Concerning which it is enacted by the 4 *Ed.* 1. *ſt.* 2. that *a coroner being certified by the king's bailiff's, or other honeſt men of the country, ſhall go to the places where treaſure is ſaid to be found.* And it is further enacted in the ſame ſtatute, that *the coroner ought to inquire of treaſure that is found, who were the finders, and likewiſe who is ſuſpected thereof; and that may be well perceived, where one liveth riotouſly, haunting taverns, and hath done ſo of long time; hereupon he may be attached for his ſuſpicion, by* 4, *or* 6, *or more pledges, if he may be found.*

Alſo it ſeems to be agreed, that all ſeiſures of treaſure trove, belonging to the king, may be inquired of in the ſheriff's torn: But it ſeems queſtionable, whether a preſcription in a court leet to inquire of ſuch ſeizure belonging to the lord of it, being a ſubject, be good or not, ſince it is againſt the general rule of the law, for the leet to take cognizance of treſpaſſes done to the private damage of the lord, becauſe that would make him his own judge. 2 *Haw.* 67.

VAGRANTS.

THIS title conſiſteth chiefly of the ſtatute of the 17 *G.* 2. *c.* 5. commonly called the vagrant act: but in the progreſs thereof, the other ſtatutes relating to vagrants are inſerted in the places where they properly fall in. *I. Idle*

I. Idle and diſorderly perſons.

By the 7. *J. c.* 4. Idle and diſorderly perſons ſhall be ſent to the houſe of correction; and by the 17 *G.* 2. *c.* 6. idle and diſorderly perſons are thus deſcribed: 1. All perſons who threaten to run away, and leave their wives or children to the pariſh. 2. All perſons who ſhall unlawfully return to the pariſh or place from whence they have been legally removed by order of two juſtices, without bringing a certificate from the pariſh or place whereunto they belong. 3. All perſons who not having wherewith to maintain themſelves, live idle without employment, and refuſe to work for the uſual and common wages given to other labourers in the like work, in the pariſh or places where they are. 4. All perſons going about from door to door, or placing themſelves in ſtreets, highways, or paſſages, to beg or gather alms in the pariſhes or places where they dwell——All theſe ſhall be deemed idle and diſorderly perſons. And it ſhall be lawful for one juſtice to commit ſuch offenders (being thereof convicted before him, by his own view, or confeſſion, or oath of one witneſs) to the houſe of correction, to be kept to hard labour not exceeding one month. And any perſon may apprehend, and carry before a juſtice, any ſuch perſon going about from door to door, or placing themſelves in ſtreets, highways, or paſſages to beg alms in the pariſhes or places where they dwell; and if they ſhall reſiſt, or eſcape from the perſon apprehending them, they ſhall be puniſhed as rogues and vagabonds. And the ſaid juſtice, by warrant under his hand and ſeal, may order any overſeer where ſuch offender ſhall be apprehended, to pay 5 *s.* to any perſon in ſuch pariſh or place ſo apprehending them, for every offender ſo apprehended; to be allowed in his accounts, on producing

producing the juſtice's order, and the perſon's receipt to whom it was paid: And if the overſeer ſhall refuſe or neglect to pay the ſame, the ſaid juſtice on oath thereof, may by his warrant order the ſame to be levied by diſtreſs and ſale of his goods: and in ſuch caſe he ſhall not be allowed the ſame in his accounts. *ſ.* 1.

Note; This is another, and a quite different reward, from that which was given afterwards for apprehending rogues and vagabonds; the latter being 10*s.* and this but 5*s.* the latter paid by the county, but this paid by the pariſh, as a puniſhment for ſuffering their poor to beg, altho' within their own pariſh; for if they beg out of their pariſh, they incur a further degree of guilt, becoming thereby rogues and vagabonds.

II. Rogues and vagabonds.

An infant under the age of 7 years, ſhall not be ſaid to be a rogue and vagabond; but ſhall be removed to its place of ſettlement, as other poor perſons not vagrants. *Black.* 276.

But perſons who ſhall be deemed rogues and vagabonds, are by the 17 *G.* 2. *c.* 5. theſe that follow:

1. All perſons going about as patent gatherers, or gatherers of alms, under pretences of loſs by fire, or other caſualty.

2. Perſons going about as collectors for priſons, gaols, or hoſpitals.

3. Fencers.

4, Bearwards.

5. Common players of interludes, and all perſons who ſhall for hire, gain, or reward, act, repreſent, or perform, or cauſe to be acted, repreſented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the ſtage, or any part therein, not being authorized by law.

6, Minſtrels.

7. Jugglers.

8. All perſons pretending to be gypſies, or wandring in the habit or form of *Egyptians.*

And by the 1 & 2 *P.* & *M.* *c.* 4. If any perſon ſhall bring into the realm any perſons calling themſelves, or commonly called *Egyptians*; he ſhall forfeit 40 *l.* half to the king, and half to him that ſhall ſue. And if any of the ſaid perſons called *Egyptians*, ſo brought into the realm, ſhall continue within the ſame for one month, he ſhall (on conviction in the county where he was apprehended) be adjudged guilty of felony without benefit of clergy, and ſhall not be tried by a jury *per medietatem linguæ.* But this not to extend to any child not above 13 years of age; nor to charge any perſon as acceſſary to the ſaid felony.

And by the 5 *El.* *c.* 20. Every perſon (tho' not brought from beyond ſea) who ſhall be found in any company of vagabonds, commonly called, or calling themſelves *Egyptians*, or counterfeiting, transforming,

transforming, or disguising themselves by their apparel, speech, or other behaviour like unto them, and shall continue in the same at one time, or at several times, by the space of one month, shall on conviction in the county where he was apprehended, be adjudged guilty of felony without benefit of clergy, and shall not be tried by a jury *per medietatem linguæ*. But this not to extend to any child within 14 years of age.

9. Or pretending to have skill in physiognomy, palmestry, or like crafty science, or to tell fortunes.

10. Or using any subtil craft to deceive and impose on any of his majesty's subjects.

11. Or playing or betting at any unlawful games or plays.

12. All persons who run away, and leave their wives or children, whereby they become chargeable to any parish or place.

13. All petty chapmen, and pedlars, wandring abroad, not being duly licensed, or otherwise authorized by law.

14. All persons wandring abroad, and lodging in ale-houses, barns, outhouses, or in the open air, not giving a good account of themselves.

15. All persons wandring abroad and begging, pretending to be soldiers, mariners, or seafaring men.

But this shall not extend to soldiers wanting subsistence, having lawful certificates from their officers, or the secretary at war; or to mariners or seafaring men licensed by some testimonal or writing under the hand and seal of some justice of the peace, setting down the time and place of their landing or discharge, and the place to which they are to pass, and the names of the chief towns or places through which they are to pass, and limiting the time of their passage, while they continue in the direct way to the place to which they are to pass, and during the time so limited.

Which exception hath a reference to the statute of the 39 *El. c.* 17. which is as follows.

All idle and wandring soldiers or mariners, or idle persons which shall be wandring as soldiers and mariners, shall settle themselves in some service, labour, or other lawful course of life, without wandring, or otherwise repair to the places where they were born, or to their dwelling places if they have any, and there remain, betaking themselves to some lawful trade or course of life; on pain to be reputed as felons, and to suffer as in case of felony without benefit of clergy. *S.* 2.

And every idle and wandring soldier or mariner, which coming from his captain from the seas, or from beyond the sea, shall not have a testimonial under the hand of a justice of the peace, of or near the place where he landed, setting down therein the place and time when and where he landed, and the place of his dwelling or birth, unto which he is to pass, and a convenient time therein limited for his passage, or having such testimonial, shall wilfully exceed the time therein limited, above 14 days; and also as well every such idle and wandring soldier or mariner, as every other

other idle perſon wandring as ſoldier or mariner, which ſhall forge or counterfeit any ſuch teſtimonial, or have with him any ſuch teſtimonial forged or counterfeited, knowing the ſame to be counterfeited or forged; in all theſe caſes, every ſuch act or acts to be felony without benefit of clergy. *ſ.* 3.

And the juſtices of aſſize, and juſtices of the peace in ſeſſions, may hear and determine all ſuch offences, and execute the offenders convicted before them, as in caſes of felony is accuſtomed; except ſome honeſt perſon valued at the laſt ſubſidy to 10 *l.* in goods, or 40 *s.* in lands, or elſe ſome honeſt freeholder, as by the ſaid juſtices ſhall be allowed, will be contented before ſuch juſtices to take ſuch offender into his ſervice for one whole year, and then before the ſaid juſtices will be bound by recognizance of 10 *l.* if he keep not the ſaid perſon for one whole year, and bring him to the next ſeſſions for the peace and gaol delivery next enſuing after the ſaid year; and if any ſuch perſon retained depart within the year, without the licence of him that ſo retained him, he ſhall be guilty of felony without benefit of clergy. *ſ.* 4.

But if any ſuch idle and wandring perſon ſhall fall ſick by the way, ſo that by reaſon of his weakneſs he cannot travel to his journey's end within the time limited in his teſtimonial, he ſhall not be within the danger of this ſtatute, ſo as he ſettle himſelf in ſome lawful courſe of life as aforeſaid, to repair as aforeſaid to the place where he was born or was laſt abiding, within convenient time after the recovery of his ſickneſs, and there remain as aforeſaid. *ſ.* 5.

And if any ſuch ſoldier or mariner coming from the ſeas, ſhall not at the time of his landing, or in his travel to the place whereunto he is to repair, going the direct way [have wherewithal to maintain himſelf in his journey], he may reſort to ſome juſtice next adjoining to the place of landing or way, and make known unto him his poverty; who upon perfect notice thereof had, may licenſe him to paſs the next direct way to the place where he is to repair, and to limit him ſo much time only, as ſhall be neceſſary for his travel thither; and in ſuch caſe, purſuing the form of ſuch licence, he may for his neceſſary relief in his travel, aſk and take the relief that any perſon ſhall willingly give him. *ſ.* 7.

Note; the above words [*have wherewithal to maintain himſelf in his journey*] are inſerted in order to make up the ſenſe, the ſtatute being evidently imperfect without ſome ſuch like words; and the parliament roll itſelf in this place is in like manner imperfect: and yet this is the ſole clauſe in any act of parliament, by which power is given to a juſtice of the peace to licenſe any perſon to beg; and of which ſuch evil uſe is often made by profligate perſons, in counterfeiting ſuch licences, and thereby abuſing the country.

Lord *Coke*, upon this ſtatute, ſpeaking of the preventing of perſons from wandring without paſſes, or with the ſame counterfeited, obſerves thereupon, that this excellent work (as he calls it) of

of preventing them from wandring abroad without lawful licences, is without queſtion feaſible; for upon the making of the ſaid ſtatute, and a good ſpace after, whilſt the juſtices and other officers were diligent and induſtrious, there was not a rogue to be ſeen in any part of *England*; but when the juſtices and others became remiſs, rogues ſwarmed again. 2 *Inſt.* 729.

But, in truth, the great miſchief ſeemeth to be, the ſuffering theſe perſons to wander at all: Such perſons, above all others, ought to be conveyed immediately from their place of landing or diſcharge, to their place of ſettlement, at the publick charge, for three reaſons; 1. Becauſe, if they be ſailors, they may be uſeful at the ports where they belong. 2. Becauſe otherwiſe, whether they be ſoldiers or ſailors, they become initiated into the trade of begging, which they are never after willing to leave. 3. Becauſe being for the moſt part able and luſty, they are moſt likely to do miſchief in the country.

16. And all other perſons, wandring abroad and begging----ſhall be deemed rogues and vagabonds.

III. Incorrigible rogues.

By the 17 G. 2. *c.* 5. Incorrigible rogues are thus deſcribed:

1. All perſons apprehended as rogues and vagabonds, and eſcaped from the perſons apprehending them, or refuſing to go before a juſtice, or to be examined on oath before ſuch juſtice, or refuſing to be conveyed by ſuch paſs as is herein after directed, or knowingly giving a falſe account of themſelves on ſuch examination, after warning given them of their puniſhment.

2. All rogues or vagabonds who ſhall break or eſcape out of any houſe of correction, before the expiration of the term for which they were committed or ordered to be confined by this act.

3. All perſons who after having been puniſhed as rogues and vagabonds, and diſcharged, ſhall again commit any of the ſaid offences:---All theſe ſhall be deemed incorrigible rogues. *ſ.* 4.

IV. Penalty for not apprehending.

If the conſtable ſhall refuſe or neglect, to uſe his beſt endeavours, to apprehend or convey to ſome juſtice ſuch offender; or if any other perſon, being charged by any juſtice ſo to do, ſhall refuſe or neglect to uſe his beſt endeavours to apprehend and deliver to the conſtable, or to carry ſuch offender before ſome juſtice, where no conſtable can be found; he ſhall, being convicted thereof on view, or oath of one witneſs, before one juſtice, forfeit 10*s.* to the poor, by diſtreſs. 17 G. 2. *c.* 5. *ſ.* 5.

V. Examination.

Where any rogues or vagabonds, apprehended by any conſtable, or ſuch other perſon as aforeſaid, ſhall be brought before a juſtice, he

he ſhall inform himſelf by the examination upon oath of the perſon apprehended, or of any other perſon, of the condition and circumſtances of the perſon ſo apprehended, and of the pariſh or place where he was laſt legally ſettled; the ſubſtance of which ſhall be put into writing, and be ſigned by the perſon or perſons ſo examined; and the juſtice ſhall likewiſe ſign the ſame, and tranſmit it to the next ſeſſions, there to be filed and kept on record. 17 *G.* 2. *c.* 5. *ſ.* 7.

VI. Whipping or impriſonment.

And ſuch juſtice ſhall order ſuch perſon ſo apprehended, to be publickly whipt by the conſtable, petty conſtable, or ſome other perſon, to be appointed by ſuch conſtable or petty conſtabe, of the pariſh or place, where ſuch perſon was apprehended; or ſhall order him to be ſent to the houſe of correction till the next ſeſſions, or for any leſs time, as ſuch juſtice ſhall think proper. 17 *G.* 2. *c.* 5. *ſ.* 7.

VII. Farther puniſhment.

And where any offender againſt this act ſhall be committed to the houſe of correction till the next ſeſſions, and the juſtices at ſuch ſeſſions ſhall on examination of the circumſtances of the caſe adjudge ſuch perſon a rogue or vagabond, or an incorrigible rogue; they may order ſuch rogue or vagabond to be detained in the houſe of correction, to hard labour for any further time not exceeding ſix months, and ſuch incorrigible rogue for any further term not exceeding two years, nor leſs than ſix months; and during his confinement, to be whipped in ſuch manner, and at ſuch times and places, as they ſhall think fit; and ſuch perſon may, if the ſeſſions think convenient, afterwards be ſent away by a paſs; and if ſuch perſon, being a male, is above the age of 12 years, the court may, before he is diſcharged from the houſe of correction, ſend him to be employed in his majeſty's ſervice by ſea or land; and if ſuch incorrigible rogue, ſo ordered by the ſeſſions to be detained in the houſe of correction, ſhall break out or make his eſcape, or ſhall offend again in like manner, he ſhall be guilty of felony, and be tranſported for ſeven years. 17 *G.* 2. *c.* 5. *ſ.* 9.

And by the 13 & 14 *C.* 2. *c.* 12. The juſtices in ſeſſions may tranſport ſuch rogues, vagabonds, and ſturdy beggars as ſhall be duly convicted, and adjudged to be incorrigible. *ſ.* 23.

And by the 17 *G.* 2. *c.* 5. If the child of any vagrant, above the age of ſeven years, ſhall be committed to the houſe of correction, the juſtices in ſeſſions, if they ſee convenient, at any time before ſuch child be diſcharged, may order ſuch child to be placed out as a ſervant or apprentice, to any perſon who is willing to take ſuch child, till ſuch child ſhall be of the age of 21 years, or for a leſs time: And if any offender, who was found wandring with ſuch child

child, ſhall be again found with the ſame child which was ſo placed out, he ſhall be deemed an incorrigible rogue. ſ. 24.

And where any vagrants have been committed to the houſe of correction till the next ſeſſions, if on examination of ſuch perſons, no place can be found, to which they may be conveyed, the ſeſſions ſhall order them to be detained and employed in the houſe of correction, until they can provide for themſelves, or until the juſtices in ſeſſions can place them in ſome lawful calling, as ſervants, apprentices, ſoldiers, mariners, or otherwiſe, either within this realm, or in the plantations in *America*. ſ. 28.

VIII. Conveying.

After ſuch whipping or confinement, the juſtice may, if he things convenient, by a paſs under hand and ſeal, cauſe him to be conveyed to the place of his laſt legal ſettlement; but if it cannot be found, then to the place of his birth; or if he be under the age of 14 years, and have any father or mother living, then to the place of the abode of ſuch father or mother, there to be delivered to ſome churchwarden or overſeer. 17 *G.* 2. *c.* 5. ſ. 7.

And the juſtice ſhall make a duplicate of the paſs and examination, and ſign the ſame; and ſhall afterwards tranſmit the duplicate of the paſs, annexed to the examination, to the next ſeſſions, there to be filed and kept on record: and ſhall annex the duplicate of the examination to the paſs, and ſend it with the ſame; and the ſaid paſs, examination, and duplicate thereof, ſhall and may be read in any court of record as evidence. ſ. 8.

And the juſtice who ſhall make the paſs, ſhall with the paſs cauſe likewiſe to be delivered to the conſtable a note or certificate aſcertaining how they are to be conveyed, by horſe, cart, or on foot and what allowance ſuch conſtable is to have for conveying them. ſ. 10.

And the conſtable who ſhall receive ſuch paſs and certificate, ſhall convey the perſon according to the direction of the paſs, the next direct way to the place where he is ordered to be ſent, if it be in the county, riding, diviſion, corporation, or franchiſe; if not, he ſhall deliver the ſaid perſon to the conſtable of the firſt town, pariſh, or place, in the next county, riding, diviſion, corporation, or franchiſe, in the direct way to the place whither he is to be conveyed, together with the paſs and duplicate of the examination, taking his receipt for the ſame. And ſuch conſtable ſhall without delay apply to ſome juſtice in the ſame county or diviſion, who ſhall make the like certificate, and deliver it to ſuch conſtable, who ſhall with all ſpeed convey ſuch perſon unto the firſt pariſh, town, or place in the next county or diviſion, in the direct way to the place to which he is to be conveyed. And ſo from one county or diviſion to another, till they come to the place to which ſuch perſon is ſent. And the conſtable, who ſhall deliver ſuch perſon to the churchwarden or other perſon ordered to receive him, ſhall

at the same time deliver the said pass, with the duplicate of the examination, taking their receipt for the same. *s.* 11.

And any justice before whom a vagrant shall be carried, may order him to be searched, and his bundles to be inspected by the constable or other officer in his presence; and if it shall appear that such vagrant shall be found to have wherewithal to pay for his passage, either in whole or in part, the justice shall order so much of the money to be paid, or other effects found upon such vagrant to be sold, and employed towards the expence of taking up and passing such vagrant, returning the overplus, after deducting the charges of such sale. *s.* 12.

And the justices in sessions shall limit what rates and allowances, by the mile, or otherwise, shall be made, for conveying or maintaining rogues, vagabonds, or incorrigible rogues; and make such other orders for the more regular proceeding therein, as they shall think proper. *s.* 16.

And if any petty constable, or governor of any house of correction, shall counterfeit any certificate or receipt, or knowingly permit any alteration to be made therein; he shall forfeit 50 *l.* And if he shall not convey, or cause to be conveyed, such vagrants, or not deliver them to the proper person; or if any constable shall refuse to receive any such person, or to give such receipt, he shall forfeit 20 *l.* by distress and sale by warrant of the justices in sessions, where the offence shall be committed; half to the informer, and half to the treasurer, to be applied by him as part of the publick stock; returning the overplus upon demand, charges of distress being first satisfied. 17 *G.* 2. *c.* 5. *s.* 18.

IX. What to be done with at the place to which he is sent.

The parish or place to which any rogue, vagabond, or incorrigible rogue shall be conveyed, shall employ in work, or place in some workhouse or almshouse, the person so conveyed, until he shall betake himself to some service or other employment: And if he shall refuse to work, or not betake himself to some service or other employment, the overseers may cause him to be carried to some justice, to be sent to the house of correction, there to be kept to hard labour. 17 *G.* 2. *c.* 5. *s.* 19.

But if the churchwarden or other person who shall receive any person so sent, shall think the examination to be false, he may carry the person so sent before a justice, who if he see cause, may commit such person to the house of correction till the next sessions; and the justices there, if they see cause, may deal with such person as an incorrigible rogue: But the person so sent, shall not be removed from the place to which sent, but by order of two justices, in the same manner as other poor persons are removed to the place of their settlement. *s.* 11.

X. Lunatick

X. Lunatick vagrants.

Whereas there are ſometimes perſons, who by lunacy or otherwiſe, are furiouſly mad, or ſo far diſordered in their ſenſes, that they may be dangerous to be permitted to go abroad, it ſhall be lawful for two juſtices, where ſuch perſon ſhall be found, by their warrant directed to the conſtables, churchwardens, and overſeers, or ſome of them, to cauſe ſuch perſon to be apprehended, and kept ſafely locked up in ſome ſecure place, within the county, or precinct, as ſuch juſtices ſhall appoint; and, if ſuch juſtices find it neceſſary, to be there chained, if the ſettlement of ſuch perſon be within ſuch county or precinct; and if not, then to be ſent to the place of his laſt legal ſettlement by a paſs, *mutatis mutandis*, and ſhall be locked up or chained, by warrant of two juſtices of the place to which he is ſent: And the reaſonable charges of removing, and of keeping, maintaining and of curing ſuch perſon, during ſuch reſtraint (which ſhall be during ſuch time only as ſuch lunacy or madneſs ſhall continue) ſhall be paid, ſuch charges being firſt proved upon oath by order of two juſtices, directing the churchwardens, or overſeers where any goods, chattels, lands, or tenements of ſuch perſon ſhall be, to ſeize and ſell ſo much of the goods and chattels, or receive ſo much of the annual rents of the lands and tenements, as is neceſſary to pay the ſame; and to account for what is ſo ſeized, ſold, or received, to the next ſeſſions: But if ſuch perſon hath not an eſtate to pay the ſame, over and above what ſhall be ſufficient to maintain his family, then ſuch charges ſhall be paid by the pariſh, town, or place, to which ſuch perſon belongs, by order of two juſtices, directed to the churchwardens and overſeers for that purpoſe, 17 *G.* 2. *c.* 5. *ſ.* 20.

XI. Penalty of lodging vagrants.

If any perſon ſhall knowingly permit any rogue, vagabond, or incorrigible rogue, to lodge or take ſhelter in his houſe, barn, or other outhouſe or building, and ſhall not apprehend and carry him before a juſtice, or give notice to the conſtable ſo to do; and ſhall be convicted thereof by confeſſion, or oath of one witneſs, before one juſtice; he ſhall forfeit not exceeding 40*s.* nor leſs than 10*s.* half to the informer, and half to the poor, by diſtreſs and ſale. And if any charge ſhall be brought on any pariſh or place, by means of ſuch offence, the ſame ſhall be anſwered to the ſaid pariſh or place by ſuch offender, and be levied by diſtreſs and ſale of his goods as aforeſaid; and if ſufficient diſtreſs cannot be found, ſuch offender ſhall be committed to the houſe of correction by the juſtice, for any time not exceeding one month. 17 *G.* 2. *c.* 5. *ſ.* 23.

XII. Children born in vagrancy.

Whereas women wandering and begging are often delivered of children, in pariſhes and places to which they do not belong,

whereby they become chargeable to the ſame, it is enacted, that where any ſuch woman ſhall be ſo delivered, and become chargeable, the churchwardens or overſeers may detain ſuch woman in their cuſtody, until they can ſafely convey her to a juſtice; who ſhall examine her, and commit her to the houſe of correction until the next ſeſſions, who may, if they ſee convenient, order her to be publickly whipped, and detained in the houſe of correction for any further time not exceeding ſix months. And upon application by the churchwardens and overſeers of the place where ſhe was ſo delivered, the juſtices at ſuch ſeſſions ſhall order the treaſurer to pay them ſuch a ſum, as ſhall be adjudged a reaſonable ſatisfaction for the charges ſuch place has been put to on ſuch woman's account. And if ſuch woman ſhall be detained and conveyed to a juſtice as aforeſaid, the child of which ſhe is delivered if a baſtard, ſhall not be ſettled in the place where ſo born, nor be ſent thither for want of other ſettlement, by a paſs, by virtue of this act; but the ſettlement of ſuch woman ſhall be deemed the ſettlement of ſuch child. 17 *G.* 2. *c.* 5. *ſ.* 25.

And that it may appear, that the overſeers have done what was incumbent upon them, in order to avoid ſuch ſettlement, it is requiſite for the juſtice (as he ought to do in all other caſes wherein he acteth as judge) to make a record of the whole proceedings before him; which record (as it ſeemeth) will be the proper evidence in ſuch caſe, if the ſettlement ſhall afterwards be conteſted.

XIII. *Appeal.*

Any perſon aggrieved by any act of any juſtice out of ſeſſions, in or concerning the execution of this act, may appeal to the next general or quarter ſeſſions of the county, riding, liberty, or diviſion, giving reaſonable notice thereof; whoſe order thereupon ſhall be final. 17 *G.* 2. *c.* 5. *ſ.* 26.

[In moſt of theſe *American* provinces, there are particular laws about vagrants, which muſt be the guide to juſtices in thoſe provinces, tho' where there are no laws about them, the laws of *England* take place in general.]

Examination of a vagrant.

New-Jerſey, Salem County. THE *examination of* A. O. *a rogue and vagabond, taken on oath before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, the* ——— *day of* ——— *in the* ——— *year of the reign of* ———

Who on his oath ſaith, that he was born at ——— [and ſo trace out the hiſtory of his life, ſo far forth as to aſcertain his legal place of ſettlement.]

A. O.

+

his mark.

Taken and ſigned the day and year above written, before me the aboveſaid

J. P.

Warrant

Warrant to the conſtable for whipping a vagrant.

New-Jerſey, Salem County. } To the conſtable of———

FORASMUCH *as* A. O. *a rogue and vagabond, was this day found wandring and begging, in the townſhip of———in the ſaid county, not having obtained any legal ſetlement there, and was thereupon apprehended, and is now brought before me* John Bard, *eſq; one of the juſtices of our lord the king, aſſigned to keep the peace within the ſaid county, that he may be puniſhed and dealt withal according to law: Theſe are therefore to command you to ſtrip, or cauſe to be ſtripped, the ſaid* A. O. *naked from his middle upwards, and to whip him or cauſe him to be publickly whipped at the common whipping poſt in your ſaid townſhip; and afterwards to remove and convey the ſaid* A. O. *according to the directions of the paſs herewith delivered to you. Given under my hand and ſeal at* Salem *in the ſame county, the———day of———in the———year———*

Commitment of a vagrant to the houſe of correction.

Pennſylvania, Bucks County. } To the conſtable of *Briſtol* in the ſaid county, and to the keeper of the houſe of correction at *Newtown* in the ſaid county.

FORASMUCH *as* A. O. *a rogue and vagabond, was this day found wandring and begging in the townſhip of———in the ſaid county, not having obtained any legal ſettlement there, and was thereupon apprehended, and is now brought before me* David Pinkerton, *eſq; one of the juſtices of our lord the king, aſſigned to keep the peace within the ſaid county, that he may be puniſhed and dealt withal according to law: Theſe are therefore to command you the ſaid conſtable, to carry the ſaid* A. O. *to the ſaid houſe of correction, and to deliver him to the ſaid keeper thereof, together with this warrant: And I do hereby command you the ſaid keeper to receive the ſaid* A. O. *into your cuſtody in the ſaid houſe of correction, and him there ſafely to keep until the next general quarter ſeſſions of the peace to be holden for the ſaid county: And have you him then there, together with this precept. Given under my hand and ſeal at* Briſtol *in the ſaid county, the———day of——— in the———year of the reign of———*

Vagrant paſs within the ſame juriſdiction.

Penſylvania, Bucks County. } To the conſtable of———in the ſaid county, to receive and convey; and to the overſeers of the poor of the townſhip of———in the ſaid county, or either of them, to receive and obey.

WHEREAS A. O. *was apprehended within the conſtablewick of———aforeſaid, in the county aforeſaid, as a rogue and vagabond,* viz.———*and upon examination of the ſaid* A. O. *taken*

taken before me J. P. *esquire, one of his majesty's justices of the peace in and for the said county (which examination is hereunto annexed) it doth appear, that———These are therefore to require you the said constable to convey the said* A. O. *in the next direct way to the said township of———within the said county, and there to deliver him to some overseer of the poor of the same township of———to be there provided for according to law. And you the said overseers of the poor, are hereby required to receive the said person, and provide for him as aforesaid. Given under my hand and seal the———day of——— in the———year of our lord———*

Vagrant pass from county to county.

New-Jersey, Morris County. } To the constable of——— in the said county of *M.* and also to all constables and other officers whom it may concern, to receive and convey; and to the overseers of the poor of the parish of——— in the county of———or either of them to receive and obey.

WHEREAS A. O. *was apprehended in the township of——— aforesaid, in the county of* M. *aforesaid, as a rogue and vagabond, viz.———and upon examination of the said* A. O. *taken before me* J. P. *esquire, one of his majesty's justices of the peace in and for the said county of* M. *upon oath (which examination is hereunto annexed) it doth appear that——— These are therefore to require you the said constable, to convey the said* A. O. *to the town of——— in the county of——— that being the first town in the next precinct through which he ought to pass in the direct way to the said township of——— in the county of———to which he is to be sent, and to deliver him to the constable or other officer of such first town in such next precinct, together with this pass, and the duplicate of the examination of the said* A. O. *taking his receipt for the same. And the said* A. O. *is to be thence conveyed on in like manner to the said township of———in the county of———there to be delivered to some of the overseers of the poor of the same township of———to be there provided for according to law. And you the said overseers of the poor are hereby required to receive the said person, and provide for him as aforesaid. Given under my hand and seal the——— day of———in the year of our lord———.*

The certificate, according to the directions of the statute, shall be in the form, or to the effect following.

WHEREAS *by a pass,* (reciting the substance or effect of the said pass) *I* (or *we*) *do hereby order and direct the said person* (or *persons*) *to be conveyed on foot* (or, *in a cart,* or *by horse,* &c.) *to the said town* (or *parish*) *of———in———*(or other place, describing it) *in the way to such parish (town,* or *place,* as the case shall be) *in———days time; for which the said constable* (&c.) *is to be allowed*

the

the sum of--------*and no more. Given under my hand* (or *our hands*) *this day* &c.

Warrant to secure a lunatick.

New-Jersey, Essex County. } To the constables, and overseer of the poor of--------.

WHEREAS *it hath been proved before us* ——— *two of the justices of our lord the king, assigned to keep the peace within the said county, upon the oaths of* A. W. *and* B. W. *both of the township of*——*in the county aforesaid, gentlemen, that* A. L. *late of*——*frequently goeth at large in the said township of*————*and that he the said* A. L. *is by lunacy so far disordered in his senses, that he is dangerous to be permitted to go abroad, and that his legal settlement is in the parish of*----------*These are therefore to authorize and require you, and every of you, to cause the said* A. L. *to be apprehended and kept safely locked up in the house of* A. K. *at*----------*in the said county, the said* A. K. *being willing to keep and entertain him the said* A. L. *for a reasonable allowance in that behalf, and the said house being a secure place: And the said* A. L. *is to be kept so locked up only so long as such lunacy or disorder shall continue, and no longer. Given under our hands and seals at*----------*in the said county, the*----------*day of* ----------.

Order to charge the lunatick's estate, with his keeping, maintenance, and cure.

New-Jersey, Suffex county. } To the overseers of the poor of the township of ----------in the said county.

WHEREAS A. L. *late of*----------*in the said county, being a person lunatick, and so far disordered in his senses, that he was, and is dangerous to be permitted to go abroad, hath by warrant under the hands and seals of us*----------*two of his majesty's justices of the peace for the said county, been apprehended and safely locked up in the house of* A. K. *at*----------*in the said county, the said house being a secure place for that purpose: And whereas it appears to us, on the oaths of* C. W. *and* O. P. *overseers of the poor of the township of*----------*that they the said overseers have reasonably expended the sum of*----------*in removing the said* A. L. *to the said house of the said* A. K. *and in keeping, maintaining, and curing him there: These are therefore to authorize and command you, to seize and sell so much of the goods and chattels, and to receive so much of the annual rents of the lands and tenements of him the said* A. L. *within your said township, as shall be necessary to pay the same: And for what shall be so seized, sold, or received by you, you are to account at the next quarter sessions of the peace to be holden for the said county. Given under our hands and seals, at*----------*in the said county, the*----------*day of*--------.

WARRANT.

WARRANT.

FOR a warrant to ſearch for ſtolen goods, ſee *SEARCH WARRANT*.

If a juſtice ſee a felony or other breach of the peace committed in his preſence, he may in his own perſon apprehend the felon; and ſo he may by word command any perſon to apprehend him, and ſuch command is a good warrant without writing: But if the ſame be done in his abſence, then he muſt iſſue his warrant in writing, 2 *H. H.* 86.

Concerning which we will ſhew.

I. For what cauſes it may be granted.
II. What is to be done previous to the granting of it.
III. How far it is grantable on ſuſpicion.
IV. The form of it.

I. For what cauſes it may be granted.

There ſeems to be no doubt, but that a warrant may be lawfully granted by any juſtice, for treaſon, felony, or præmunire, or any other offence againſt the peace: Alſo it ſeems clear, that wherever a ſtatute gives to any one juſtice a juriſdiction over any offence, or a power to require any perſon to do a certain thing ordained by ſuch ſtatute, it impliedly gives a power to every ſuch juſtice to make out a warrant, to bring before him any perſon accuſed of ſuch offence, or compellable to do the thing ordained by ſuch ſtatute; for it cannot but be intended, that a ſtatute giving a perſon juriſdiction over an offence, doth mean alſo to give him the power incident to all courts, of compelling the party to come before him. 2 *Haw.* 84.

But in caſes where the king is no party, or where no corporal puniſhment is appointed, as in caſes for ſervants wages, and the like, it ſeemeth that a *ſummons* is the more proper proceſs; and for default of appearance the juſtice may proceed: and ſo indeed oftentimes it is directed by ſpecial ſtatutes.

II. What is to be done previous to the granting of it.

It is convenient, though not always neceſſary, that the party who demands the warrant be firſt examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing. 1 *H. H.* 582. 2 *H. H.* 111.

Or at leaſt it is ſafe to bind him over to give evidence; leſt afterwards when the offender ſhall be apprehended, or ſhall ſurrender himſelf, the party that procured the warrant be gone. *Dalt. c.* 169.

III. How

III. How far it is grantable on ſuſpicion.

Lord *Hale* proves at large, contrary to the opinion of lord *Coke* (4 *Inſt.* 177.) that a juſtice hath power to iſſue a warrant to apprehend a perſon ſuſpected of felony, before he is indicted; and that, though the original ſuſpicion be not in himſelf, but in the party that prays his warrant. 2 *H. H.* 107---110.

For the juſtices are judges of the reaſonableneſs of the ſuſpicion, and when they have examined the party accuſing, touching the reaſons of his ſuſpicion, if they find the cauſes of ſuſpicion to be reaſonable, it is now become the juſtices ſuſpicion as well as theirs. 2 *H. H.* 80.

And in another place ſpeaking of this opinion of lord *Coke*, he delivers himſelf ſeemingly with a kind of warmth not uſual to him; I think, ſays he, the law is not ſo, and the conſtant practice in all caſes hath obtained againſt it, and it would be pernicious to the kingdom if it ſhould be as lord *Coke* delivers it; for malefactors would eſcape unexamined and undiſcovered, for a man may have a probable and ſtrong preſumption of the guilt of a perſon whom yet he cannot poſitively ſwear to be guilty. 1 *H. H.* 579.

Mr. *Hawkins* likewiſe ſeems to be of the ſame opinion againſt lord *Coke*, but delivereth himſelf with his wonted caution and candour: It ſeems probable, he ſays, that the practice of juſtices of the peace in relation to this matter, is now become a law, and that a juſtice may juſtify the granting of a warrant for the arreſt of any perſon, upon ſtrong grounds of ſuſpicion, for a felony or other miſdemeanor, before any indictment hath been found againſt him; yet inaſmuch as juſtices claim this power rather by connivance, than any expreſs warrant of law, and ſince the undue execution of it may prove ſo highly prejudical to the reputation as well as the liberty of the party, a juſtice cannot well be too tender in his proceedings of this kind, and ſeems to be puniſhable not only at the ſuit of the king, but alſo of the party grieved, if he grant any ſuch warrant groundleſly and maliciouſly, without ſuch a probable cauſe as might induce a candid and impartial man to ſuſpect the party to be guilty. 2 *Haw.* 85.

But a general warrant, upon a complaint of a robbery, to apprehend *all perſons ſuſpected*, and to bring them before a juſtice, hath been ruled void; and falſe impriſonment lies againſt him that iſſues ſuch a warrant. 1 *H. H.* 580. 2 *H. H.* 112.

IV. The form of it.

Mr. *Dalton* ſays, the warrant is the better, if it bear date of the place where it was made. *Dalt. c.* 169.

And lord *Hale* ſays, the place, though it muſt be alledged in pleading, need not be expreſſed in the warrant. 2 *H. H.* 111.

And Mr. *Hawkins* ſays, It is ſafe, but perhaps not neceſſary, in the body of the warrant to ſhew the place where it was made; yet it ſeems neceſſary to ſet forth the county in the margin at leaſt, if it be not ſet forth in the body. 2 *Haw.* 85.

It

It may be directed to the ſheriff, bailiff, conſtable, or to any indifferent perſon by name who is no officer; for the juſtice may authorize 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, for that no other conſtable, and *a fortiori* no private perſon, is compellable to ſerve it. 2 *Haw.* 85. *Dalt. c.* 169. 2 *H. H.* 110.

But in the caſe of an act of parliament, it is ſaid, that if the act directeth that a juſtice ſhall grant a warrant, and doth not ſay to whom it ſhall be directed, by conſequence of law it muſt be directed to the conſtable, and it cannot be directed to the ſheriff, unleſs ſuch power is given in the act. L. *Raym.* 1192. 2 *Salk.* 381.

The warrant may be ſtiled in divers manners: As 1. In the name of the king; and yet the teſte muſt be under the name of the juſtice that grants it out. Or, 2. It may be ſtiled and made only in the name of the juſtice. Or, 3. It may be made without any ſuch ſtile, and only under the teſte of the juſtice, or only ſubſcribed by him. As followeth:

In the king's majeſty's name.

New-York, Suffolk County. GEORGE *the third, by the grace of god, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth: To our ſheriff of the county of* Suffolk, *and to the petty conſtables of the town of* Southold, *in the ſaid county, and to all and ſingular our bailiffs and miniſters in the ſame county, as well within liberties as without, greeting:*

Foraſmuch as A. I. *of*---------*hath come before* J. P. *eſquire, one of our juſtices aſſigned to keep our peace within the ſaid county, and hath* and ſo forth.

(Concluding it in the juſtices name, as thus;) *Witneſs the ſaid* J. P. *at*-------*the*---------*day of*-------.

Note, That whereſoever the warrant is made in the king's name, there it ought to be directed to all miniſters as well within liberties as without; for that the king is made a party: And ſo it may be done in all other warrants, eſpecially for felony, or for the peace or good behaviour, becauſe it is the ſervice of the king. *Dalt. c.* 174.

Or thus, in the name of the juſtice himſelf.

New-York, Ulſter County. J. P. *eſquire, one of the juſtices of our lord the king, aſſigned to keep the peace within the ſaid county; To the ſheriff of the ſaid county, to the conſtables of the town of*-------*within the ſaid county, and to all other the miniſters and officers of our ſaid lord the king within the ſaid county, and to every of them, greeting:*

Foraſmuch as &c. *Given under my hand and ſeal the*---------*day of* &c. Dalt. c. 174.

Regularly

Regularly, the warrant, especially if it be for the peace or good behaviour, or the like, where sureties are to be found or required, ought to contain the special cause and matter, whereupon it is granted, to the intent that the party upon whom it is to be served, may provide his sureties ready, and take them with him to the justice to be bound for him; but if the warrant be for treason, murder, or felony, or other capital offence, or for great conspiracies, rebellious assemblies, or the like, it needs not contain any special cause, but there the warrant of the justice may be to bring the party before him, to make answer to such things or matters generally, as shall be objected against him on the king's behalf. *Dalt. c.* 169. 2 *Haw.* 85. 2 *H. H.* 111.

But Mr. *Lambard* says, every warrant made by a justice of the peace ought to comprehend the special matter upon which it proceedeth; even as all the king's writs do bear their proper cause in their mouth with them: And as for the form that is commonly used, *to answer to such things as shall be objected*, and such like, they were not fetched out of the old learned precedents, but lately brought in by such as knew not, or cared not, what they writ. *Lamb.* 87.

The warrant ought regularly to mention the name of the party to be attached, and must not be left in generals, or with blanks to be filled up by the party afterwards. 2 *H. H.* 114. *Dalt. c.* 169.

The warrant may issue to bring the party before the justice who granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. 1 *H. H.* 582. 2 *H. H.* 112.

It ought to set forth the year and day wherein it is made, that in an action brought upon an arrest by virtue of it, it may appear to have been prior to such arrest; and also in case where a statute directeth the prosecution to be within such a time, that it may appear, that the prosecution is commenced within such time limited. Likewise, where a penalty is given to the poor of the parish where the offence shall be committed, or the like, it ought to specify the place where the offence was committed. 2 *Haw.* 85.

Finally, it ought to be under the hand and seal of the justice who makes it out. 2 *Haw.* 85.

[*In most of these his majesty's provinces, there are peculiar laws made by their respective legislatures, relating to many of the matters treated of in this book; which are in those cases particular guides to justices of peace (provided those laws are not absolutely repugnant to the laws of* England *:) For which reason, it may not be amiss here to observe, That most of the* WARRANTS *and precedents in this book, taken from the English books, run in a strain chiefly suitable to the kingdom of* Great-Britain *only; therefore many places must be altered, as suits the several provinces here; which the discretion of the justices will enable them to do; particularly 'tis proper, that instead of saying,* the statutes in that case made and provided; *to say,* the laws, *or the* act of assembly in that case made and provided; *Also, as these parts are*

are chiefly divided into towns or townships, rather than parishes, as in England; *so their own judgment will enable them to distinguish when to make the difference: And it may be worth while to observe, that several officers here mentioned, go by different names in some of these parts to what they do in* England.----*But as a few examples of that kind may not be unacceptable; we shall here add two or three for that purpose,* viz.

A warrant for defaulters not working upon the high-ways.

Essex, ss. *To the Constable,* &c.

WHEREAS A. B. *one of the overseers of highways of* E. T. *hath made complaint, That* C. D. E. F. *and* G. H. *being duly warned, have made default in appearing to work in repairing the highway as directed, with a team,* &c. *These are therefore in his majesty's name to require you to give notice to the aboveſaid* C. D. E. F. *and* G. H. *to appear before me to-morrow by* 3 *o'clock afternoon, to answer the above complaint,* &c. *Given under my hand this of* 176 J. R.

A warrant of distress for not working as required by overseers of highways.

Essex, ss. *To the Constable,* &c.

WHEREAS A. B. *one of the overseers of highways for* E. T. *hath by his oath, made it appear, That* E. D. E. F. *and* G. H. *were duly warned, and made default in working upon the highway in said town, the said* E. D. *with a team, not having just excuse for such neglect, whereby the said* E. F. *and* G. H. *have forfeited each the sum of* 4 *s.* 6*d. procl. and the said* E. D. *double that sum, in not bringing his team when required; These are therefore in his majesty's name to require you, to make distress on the goods and chattels of each of the above defaulters, and make sale thereof at publick vendue, (returning the overplus if any be) and pay the said fines and costs, according to the act of assembly in such case made and provided. Given under my hand and seal, this day of* 176 J. R.

A warrant to levy the forfeiture on an overseer for neglecting his Duty, in repairing the highways, &c.

Essex, ss. *To the Constables,* &c.

WHEREAS *A. B.* one of the overseers of highways of *E. T.* hath neglected repairing the highway in said *E. T.* having no just excuse for such his neglect, whereby he hath forfeited the sum of *Forty Shillings proc.* These are therefore in his majesty's name, to require you to levy the said sum of *Forty Shillings*, on the goods and chattles of the said *A. B.* and make sale thereof at publick vendue, (returning the overplus if any be) and apply the same as the law in such case made and provided directs. Given under my hand and seal this day of June *J. R.*

A general warrant.

Somerset, ss. *To the Constables,* &c.

WHEREAS complaint, upon oath, hath been made before me, by *A B.* that *C. D.* did assault and beat him: These are, in his majesty's name, to require you to bring the said *C D.* (of whom you shall have notice) before me, or some other his majesty's justices of the peace, to be examined and dealt with according to law. Hereof you are not to fail. Given under my hand and seal, &c.

A

A warrant to search for a loſt child, &c.

Eſſex, ſs. To the Conſtable, &c.

WHEREAS S. R. *has given information, the* G. R. *his infirm child, hath the laſt night, about eight o'clock, wandred away from his Houſe, and is in danger of being loſt in the wilderneſs, to the great grief of his parents: Theſe are therefore, in his majeſty's name, to require you, and every of you, upon ſight hereof, to make an alarm in your ſeveral precincts, and to inform the inhabitants the moſt likely method in finding the above ſaid child, and to return him to his parents, for which this ſhall be your ſufficient warrant. Given, &c,*

WEIGHTS and MEASURES.

WHAT is treated of here, is touching weights and meaſures in general.

I. Of the different kinds of weights and meaſures.
II. Standard of weights and meaſures to be kept in market towns.
III. Mayors and other officers to ſeal and regulate meaſures.
IV. Puniſhment of mayors and other officers for omitting their duty.

I. Of the different kinds of weights and meaſures.

Notwithſtanding the many ſtatutes which have enacted, that there ſhall be but one weight and one meaſure, throughout the realm, there always have been and ſtill are two kinds of weights uſed in *England*, and both warrantable; the one by law, and the other by cuſtom; but they are for ſeveral ſorts of wares or commodities: for there is *troy* weight and *averdupois*. *Dalt. c.* 112.

Troy weight is by law; and thereby are weighed ſilk, gold, ſilver, pearl, and precious ſtones. And this hath to the pound 12 ounces. *Dalt. c.* 112.

Averdupois (which in *French* is as much as to ſay to have full weight) is by cuſtom, yet confirmed by ſtatute; and thereby are weighed all kind of grocery wares, drugs, butter, cheeſe, fleſh, wax, pitch, tar, tallow, wool, hemp, flax, iron, ſteel, lead, and all other commodities which bear the name of garble, and whereof iſſueth a refuſe or waſte; (and alſo bread, by the 8 *An. c.* 18.) And this hath to the pound 16 ounces; and 12 pounds over are allowed to every hundred. *Dalt. c.* 112.

And no leſs do the meaſures alſo differ in different places. Thus Mr. *Dalton* obſerves, that the buſhel of corn in one place is greater than in another; and it ſeems he ſays, that the cuſtom of the place

place is to be obſerved: Yet he makes a *quæry* upon it, becauſe it is contrary to the great charter, and divers other ſtatutes; and cuſtom or preſcription againſt a ſtatute ſeemeth not good. *Dalt. c.* 112.

II. Standard of weights and meaſures to be kept in market towns.

In every city, borough, and market town, a common balance ſhall be, with common weights ſealed, and according to the ſtandard of the exchequer, upon the common coſts of ſuch city, borough, or market town, in the keeping of the mayor, or conſtable; on pain of 10*l.* for ſuch city making default, borough, 5*l.* and market town, 40*s.*

At which balance all the inhabitants may freely weigh without any thing paying; taking nevertheleſs of foreigners, for every draught within the weight of 40*lb.* a farthing, and for every draught betwixt 40*lb.* and 100*lb.* an half penny, and for every draught betwixt 100*lb.* and 1000*lb.* a penny.

And juſtices of the peace, mayors, bailiffs, and ſtewards of franchiſes, may enquire of offenders againſt this ordinance, and do execution of them that be found faulty. 8 *H.* 6. *c.* 5. 11 *H.* 7. *c.* 4.

III. Mayors and other officers to ſeal and regulate meaſures.

The clerk of the market, and where there is none, the mayor, or head officer, or other perſon having benefit of the market, ſhall cauſe to be ſealed all meaſures duly guaged, by the ſtandard which he ſhall have out of the exchequer. 22 & 23 *C.* 2. *c.* 12. *ſ.* 4.

IV. Puniſhment of mayors and other officers for omitting their duty.

If any mayor, lord of the liberty, or other perſon authorized to mark or ſeal meaſures, ſhall neglect or refuſe, being required, to ſeal or mark any buſhel, half buſhel, or peck duly guaged; he ſhall forfeit for the firſt offence 5*l.* and for every other offence 10*l.* on conviction by preſentment or indictment at the county ſeſſions; half to the proſecutor, and half to the poor; to be levied by diſtreſs; and for default of diſtreſs, to be impriſoned by warrant of the ſaid juſtices till payment be made. 22 *C.* 2. *c.* 8. *ſ.* 3, 4.

And if any mayor or other head officer, ſhall ſuffer any other meaſure to be uſed than according to the ſtandard, and ſealed; he ſhall forfeit 5*l.* half to the proſecutor, and half to the poor, on conviction by preſentment or indictment at the county ſeſſions, by diſtreſs; for default of diſtreſs, to be impriſoned by warrant of the juſtices till paid. 22 *C.* 2. *c.* 8. *ſ.* 3.

But

But after all, notwithſtanding the puniſhments aforeſaid, appointed by ſtatute, for ſelling by falſe weights and meaſures; yet the ſame is alſo an offence at the common law, and conſequently may be puniſhed by indictment, fine, aad impriſonment.

WIFE.

T 2 G. 2. *King* and his wife againſt *Jones.* The plaintiff *Jones* declared againſt *Judith Parnell,* upon ſeveral promiſes. She by the name of *Judith King* appears by attorney, and pleads *non aſſumpſit.* And after a verdict for the plaintiff, ſhe and *Edward King* bring a writ of error, and aſſign for error, that ſhe has appeared and pleaded as a feme ſole, whereas at the time of her appearance and plea ſhe was married to the ſaid *Edward King.* But by the court, This is to abate the plaintiff's writ by the act of the defendant, which was never allowed; we muſt take it, that at the time of bringing the action the defendant was a feme ſole, becauſe they pretend to carry it back no farther than the appearance. And plaintiffs would be in a fine condition, if after they have arreſted a woman, ſhe ſhall be allowed to overthrow their proceedings by a ſubſequent marriage. And the judgment was affirmed. *Str.* 811.

A wife, or feme covert, is ſo much favoured in reſpect of that power and authority which her huſband has over her, that ſhe ſhall not ſuffer any puniſhment for committing a bare theft, in company with, or by coercion of her huſband. 1 *Haw.* 2.

But if ſhe commit a theft of her own voluntary act, or by the bare command of her huſband; or be guilty of treaſon, murder, or robbery, in company with, or by coercion of her huſband, ſhe is puniſhable as much as if ſhe were ſole, becauſe of the odiouſneſs and dangerous conſequence of theſe crimes. 1 *Haw.* 2. 1 *H. H.* 47. *Dalt. c.* 157.

And the coercion of the huſband is only a preſumption till the contrary appear; for if upon the evidence it can clearly appear, that the wife was not drawn to it by the huſband, but that ſhe was the principal actor and inciter of it, ſhe ſeems to be guilty as well as the huſband. 1 *H. H.* 516.

A wife ſhall not be deemed acceſſary to a felony for receiving her huſband who has been guilty of it; as her huſband ſhall be for receiving her: becauſe ſhe is under the power of her huſband, and ſhe is bound to receive him. 1 *Haw.* 2. 1 *H. H.* 47.

But a wife may be indicted together with her huſband, and condemned to the pillory with him for keeping a bawdy houſe; for this is an offence as to the government of the houſe, in which the wife has a principal ſhare; and alſo ſuch an offence as may generally be preſumed to be managed by the intrigues of her ſex. 1 *Haw.* 2.

And

And generally, a married woman ſhall anſwer as much as if ſhe were ſole, for any offence not capital, againſt the common law or ſtatute; and if it be of ſuch a nature that it may be committed by her alone, without the concurrence of her huſband, ſhe may be puniſhed for it without the huſband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the huſband ſhall not be included in it for an offence to which he is no way privy: But if a wife incur the forfeiture of a penal ſtatute, the huſband may be made a party to an action or information for the ſame (as he may generally to any ſuit for a cauſe of action given by his wife) and ſhall be liable to anſwer what ſhall be recovered thereupon. 1 *Haw.* 3.

If a wife willingly leave her huſband, and go away, and continue with her advouterer, ſhe ſhall be barred for ever of action to demand her dower. 13 *Ed.* 1. *ſt.* 1. *c.* 34.

M. 12 *G. Morris* and *Martin.* Action for meat and other things provided for the defendant's wife. The defendant proved ſhe went away from him with an adulterer. *Raymond* Ch. J. held, that the huſband ſhould not be charged for neceſſaries for her, tho' the plaintiff who provided for her had no notice; and he ſaid Ch. J. *Holt* always ruled it ſo. *Str.* 647.

T. 12 *G. Mainwaring* and *Sands.* In an action againſt the huſband for a laced head ſold to the wife, it was proved, that the wife lived from her huſband in adultery, and that ſhe told the plaintiff ſhe had a huſband, but that ſignified nothing, for ſhe would pay him her ſelf. *Raymond* Ch. J. held, the defendant not chargeable, and ſaid he ſhould have ruled it ſo, if there had been no actual notice, which only ſtrengthened the caſe. *Str.* 706.

T. 4 *G. Child* and *Hardyman.* Action for linnen ſold to the defendant's wife. Upon *non aſſumpſit*, the delivery was proved. And the defendant proved that ſhe had lived in a very lewd manner; one Mr. *Nott* frequently coming to her at her huſband's houſe, and they were locked up together in a bed-chamber; and other indecencies paſſed between them. And it was alſo proved, that ſhe ſeveral times went to the houſe of this *Nott*, a gentleman in *Wiltſhire*, who lived within three miles of the defendant's houſe. It did not appear farther, than that he diſliked her going and ſtaying at Mr. *Nott's*. But under theſe circumſtances, the huſband and wife continued to live together. Afterwards, ſhe went away from him, and went to *Malborough*, where ſhe reſided for ſome time; but after the leaving her huſband's houſe, it did not appear that ſhe ever ſaw Mr. *Nott*, or lived in a lewd manner. After ſome time, ſhe ſent *Lucas* an attorney to her huſband, to deſire that he would receive her again; the huſband told him, that if ſhe came again, ſhe ſhould never ſit at the upper end of his table, nor have the government of the children, but ſhould live in a garret. Then *Lucas* propoſed to him, to make her an allowance, and propoſed about 80 or 100 *l.* a year, he being worth about 5 or 600 *l.* a year. But that was not complied

complied with; and afterwards she came to *London*, and bought the linen to the amount of 53 *l.* By *Raymond* Ch. J. If a woman elopes from her husband, tho' she does not go away with an adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband *is* not bound. And this hath been so adjudged in 2 or 3 cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he doth not absolutely refuse to receive her again; but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit. *Str.* 875.

M. 18 *G.* 2. *Bolton* and *Prentice.* In *assumpsit* for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again. After this the defendant and his wife cohabited together for a year; when, without any cause appearing, he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress, she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They distinguished this case from the case of *Manby* and *Scot*, 1 *Sid.* 109. for there the wife was guilty of the first wrong in eloping. *Str.* 1214.

Of women carried away (*viz.* violently, or against their wills, 2 *Inst.* 435.) with the goods of their husbands, the king shall have the suit for the goods so taken away, 13 *Ed.* 1. *st.* 1. *c.* 34. That is, it shall be felony. And so, if any man takes another man's wife, with her husband's goods, against the husband's will, this is also felony. *Dalt. c.* 157.

But a wife herself cannot feloniously take her husband's goods, and tho' she so takes her husband's goods, and delivers them to a stranger, yet it is no felony in the stranger. *H. Pl.* 65. 1 *Haw.* 93.

A married woman, by her own act (but not in respect of what is done by others at her command, because all such commands of hers

are void) may commit a forcible entry or detainer; and upon the juſtice's view of the force, ſhe ſhall be impriſoned therefore, and ſhe may be fined in ſuch caſe: but ſuch fine ſet upon the wife, ſhall not be levied upon the huſband; for the huſband ſhall never be charged for the act or default of his wife, but when he is made a party to the action, and judgment given againſt him and his wife. *Dalt. c.* 126. 9 *Co.* 72. 11 *Co.* 61.

Likewiſe if ſhe ſhall commit any riot, or do any treſpaſs or other wrong, ſhe is puniſhable for it; and for a treſpaſs done by the wife, or for a ſcandal publiſhed by her, the action lieth againſt both the huſband and wife, and there the huſband is chargeable to the damages or fine, becauſe he is party to the action and judgment: but if a wife without her huſband be indicted of a treſpaſs, riot, or any other wrong, there the wife ſhall anſwer, and be party to the judgment only; and in ſuch caſe, the fine ſet upon the wife ſhall not be levied upon the huſband; yet after the huſband's death, ſuch damages or fines ſhall then be levied of the wife herſelf; and as for impriſonment, or other corporal pain, it ſhall be inflicted upon the wife only, and not upon the huſband for his wife's act or default. *Dalt. c.* 139.

M. 19 *G.* 2. *Finch* and his wife againſt *Duddin* and his wife. In an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was only taken in execution. She moved to be diſcharged, but upon affidavits of endeavours to take the huſband, and it not appearing there was any deſign to ſcreen him, the court refuſed it, on the authority of *Pitt* and *Meller*.. *Str.* 1237.

Which caſe of *Pitt* and *Meller*, *T.* 15 *G.* 2. was thus: In trover againſt both, and judgment and execution againſt both; the wife petitioned to be diſcharged out of cuſtody; which the court refuſed, unleſs it could be ſhewn, that there was fraud and colluſion between the plaintiff and the huſband, to keep her there. *Str.* 1167.

M. 10 *G. Tarrant* and *Mawr*. The wife libelled in the ſpiritual court for calling her whore, and there being proceedings likewiſe for defamation againſt *her* by the other, the two huſbands enter into an agreement to ſtay proceedings on both ſides; and upon one of the wives going on, the huſband moved for a prohibition: but it was denied: for by the court, the ſuit is by the wife, to recover her fame, and it is not in the power of the huſband to reſtrain her. *Str.* 576.

If a woman receive ſtolen goods into her houſe, knowing them ſo to be; or ſhall lock them up in her cheſt or chamber, her huſband not knowing thereof; if her huſband, ſo ſoon as he knoweth thereof, do forthwith forſake his houſe, and her company, and make his abode elſewhere, he ſhall not be charged for her offence; whereas otherwiſe, the law will impute the fault to him, and not to her. *Dalt. c.* 157.

A proſecution for conſpiracy is not maintainable againſt a huſband and wife only; becauſe they are eſteemed but as one perſon in law, and are preſumed to have but one will. 1 *Haw.* 192. If

If a woman who is a ſervant ſhall marry, yet ſhe muſt ſerve out her time, and the huſband cannot take her out of her maſter's ſervice. *Dalt. c.* 58.

Alſo if a married man and his wife do bind themſelves to ſerve, they ſhall be compelled to ſerve, according to their covenant or agreement. *Dalt. c.* 58.

If the wife maliciouſly kill her huſband, it is petty treaſon; but if the huſband maliciouſly kill his wife, it is but murder. *Dalt. c.* 142.

Huſband and wife cannot be witneſſes for one another; nor regularly againſt one another. 2 *Haw.* 431.

But a wife may demand ſurety of the peace againſt her huſband threatning to beat her outrageouſly, and a huſband alſo may have it againſt his wife. 1 *Haw.* 127.

And in other criminal caſes, the wife may be a witneſs againſt her huſband where ſhe is the party grieved; but not in civil caſes. *Dalt. c.* 164.

A wife cannot be bound herſelf by recognizance, but her ſureties only. *Dalt. c.* 117.

She may ſurrender a leaſe in the court of chancery or exchequer, in order to renew the ſame. 29 *G.* 2. *c.* 31.

WITCHCRAFT.

BY the 9 *G.* 2. c. 5. No proſecution, ſuit, or proceeding, ſhall be commenced or carried on againſt any perſon for witchcraft, ſorcery, inchantment, or conjuration, or for charging another with any ſuch offence, in any court whatſoever. *ſ.* 3.

But if any perſon ſhall pretend to exerciſe or uſe any kind of witchcraft, ſorcery, inchantment or conjuration; or undertake to tell fortunes; or pretend from his ſkill or knowledge in any occult or crafty ſcience, to diſcover where or in what manner, any goods or chattels, ſuppoſed to have been ſtolen or loſt, may be found; every perſon ſo offending, being convicted on indictment or information, ſhall ſuffer impriſonment for a year without bail or mainprize, and once in every quarter of the ſaid year, in ſome market town of the proper county, upon the market day there, ſtand openly on the pillory for one hour, and alſo ſhall (if the court by which ſuch judgment ſhall be given ſhall think fit) be obliged to give ſureties for his good behaviour, in ſuch ſum, and for ſuch time, as the ſaid court ſhall judge proper, according to the circumſtances of the offence, and in ſuch caſe ſhall be further impriſoned until ſuch ſureties be given. *ſ.* 4.

WOMEN.

Concerning women considered as *wives*, or *femes covert*; see title *WIFE*.

Concerning women having two husbands, or men two wives; see title *POLYGAMY*.

Concerning the ravishment of women, see title *RAPE*.

IF any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, he shall be guilty of felony without benefit of clergy. 18 *El. c.* 7.

None shall take by force any maiden within age (that is, the age of 12 years, being the age of consent to marriage, 2 *Inst.* 182.) by her own consent nor without; nor any wife or maiden of full age, nor any other woman against her will; on pain of imprisonment for two years, and after, fine at the king's will. 3 *Ed.* 1. *c.* 13.

If any person take by force, or otherwise, any woman sole, having any substance of lands, tenements, or moveable goods, and inforce her before she be set at liberty, to bind her self to him by statute or obligation; such bond shall be void. 31 *H.* 6. *c.* 9.

Whereas women, as well maidens, as widows, and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, are oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to other by their assent, or defiled,----it is enacted, that what person that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such misdoers, takers, and procurators to the same, and receitors, knowing the said offence, shall be adjudged as principal felons. 3 *H.* 7. *c* 2. And by the 31 *El. c.* 9. Benefit of clergy is taken away from the principals, procurers, and accessaries before.

Upon the face of which said statute of the 3 *H.* 7. these things are required to make the offence felony; 1. That the maid, wife, or widow, have lands, or tenements, or moveable goods, or be an heir apparent. 2. That she be taken away against her will. 3. That the taking was for lucre. And 4. That she be married to the misdoers or to some other by his consent; or be defiled (that is, carnally known.) For if these concur not, and be so laid in the indictment, the misdoer is not a felon within this statute, but otherwise to be punished. 3 *Inst.* 61. 1 *Haw.* 110.

The said act makes not only the takers, but the procurers, and abettors of the felony, and receivers of the woman wittingly, knowing the same, to be all principal felons; the like whereof lord *Coke* says he hath not found in any other statute that he remembers. But by

by a conſtruction of the common law, they that receive the miſdoers, and not the woman, are acceſſaries only. 3 *Inſt.* 61, 62.

But thoſe who are only privy to the marriage, but no way parties to the forcible taking away, or conſenting thereto, are not within the ſtatute. 1 *Haw.* 110.

It is no manner of excuſe, that the woman at firſt was taken away with her own conſent; becauſe if ſhe afterwards refuſe to continue with the offender, and be forced, againſt her will, ſhe may from that time as properly be ſaid to be taken againſt her will, as if ſhe had never given any conſent at all; for till the force was put upon her, ſhe was in her own power. 1 *Haw.* 110.

Alſo, it is not material, whether a woman ſo taken contrary to her will, be at laſt married or defiled with her own conſent, or not; if ſhe were under the force at the time. 1 *Haw.* 110.

In *Fullwood's* caſe, *M.* 13 *C.* it was reſolved, that the woman taken away and married, may be ſworn and give evidence againſt the offender, who ſo took and married her, tho' ſhe be his wife *de facto*. 1 H. H. 661.

If any perſon above the age of 14 years, ſhall unlawfully take or convey, or cauſe to be taken or conveyed, any maid or woman child unmarried, being within the age of 16 years, out of the poſſeſſion and againſt the will of her father, or mother, or guardian; he ſhall ſuffer two years impriſonment, or pay ſuch fine as ſhall be aſſeſſed by the court, half to the king and half to the parties grieved. 4 & 5 *P. & M. c.* 8. *ſ.* 3.

H. 15 *G.* 2 *K.* againſt *Cornforth* and others. The court granted an information againſt the defendants, for taking away a *natural* daughter under 16, under the care of her putative father; being of opinion it was within this ſtatute. *Str.* 1162.

And if any perſon ſhall ſo take away, or cauſe to be taken away, *and deflour*, any ſuch maid or woman child; or ſhall againſt the will or knowledge of the father, or if he is dead, of the mother having tuition of ſuch child, *contract matrimony* with her by letters, meſſages, or otherwiſe; he ſhall be impriſoned for five years, or pay ſuch fine as ſhall be aſſeſſed by the court, half to the king, and half to the parties grieved. *ſ.* 3.

And if any woman child or maiden, being above the age of 12 years, and under 16, ſhall conſent or agree to ſuch perſon ſo making ſuch contract of matrimony; the next of kin to her ſhall have, hold, and enjoy her lands during the life of the perſon ſo contracting. *ſ.* 6.

But by the 26 *G.* 2. *c.* 33. No ſuit ſhall be had in any eccleſiaſtical court in order to compel a celebration of marriage *in facie eccleſiæ*, by reaſon of any contract of matrimony whatſoever, whether *per verba de præſenti*, or *per verba de futuro*. And the marriage of any perſon under the age of 21, without conſent of parents or guardians, ſhall be null and void.

In an appeal by a woman, the appellee cannot wage battel, but muſt put himſelf upon his country. 2 *Haw.* 427.

Peereſſes

Peereſſes ſhall be tried as peers, for treaſon or felony. 20 *H.* 6. *c.* 9.

Women upon ſtanding mute, are liable to *pain fort & dure*, as men are. 2 *Haw.* 331.

A woman being convicted for an offence, for which a man may have his clergy, ſhall ſuffer the ſame puniſhment as a man ſhould ſuffer, that has the benefit of his clergy allowed; that is, ſhall be burnt in the hand, and further kept in priſon as the court ſhall think fit, not exceeding one year. 3 *W.* *c.* 9.

But ſhe ſhall have the benefit of the ſaid ſtatute but once. 4 & 5 *W.* *c.* 24. *ſ.* 13.

The judgment againſt a woman, in caſe of high treaſon is, not the ſame as againſt a man traytor, to be hanged, cut down alive, have the bowels taken out, and the body quartered; but to be drawn to the place of execution and there burned.

And this alſo is the judgment againſt a woman, in caſe of petit treaſon; whereas the judgment againſt a man for petit treaſon is, that he ſhall be hanged:

But in caſe of felony, the judgment is the ſame againſt both man and woman, to be hanged by the neck till dead. 2 *Haw.* 444.

It is clear, that if a woman quick with child be condemned either for treaſon or felony, ſhe may alledge her being with child in order to get the execution reſpited, and thereupon the ſheriff ſhall be commanded to take her into a private room, and to impanel a jury of matrons, to try and examine, whether ſhe be quick with child or not; and if they find her quick with child, the execution ſhall be reſpited till her delivery. But it is agreed, that a woman cannot demand ſuch reſpite of execution, by reaſon of her being quick with child, more than once. 2 *Haw.* 464.

Women are not obliged to appear at the torn or leet. 2 *Haw.* 57.

Mr. *Hawkins* ſeems to be of opinion, that a cuſtom of the inhabitants ſerving the office of conſtable by turns, is good; and that when it comes to the turn of a woman inhabitant ſhe muſt procure one to ſerve for her. 2 *Haw.* 63.

WRECK.

WRECK of the ſea, in legal underſtanding, is applied to ſuch goods, as after ſhipwreck at ſea, are by the ſea caſt upon the land; and therefore the juriſdiction thereof pertaineth not to the lord admiral, but to the common law. 2 *Inſt.* 167.

None of thoſe goods which are called *jetſam* (from being *caſt* into the ſea while the ſhip is in danger, and after periſheth) or thoſe called *flotſam* (from *floating* upon the ſea after ſhipwreck) or thoſe called *lagan* or *ligan* (goods thrown overboard before the ſhipwreck, which ſink to the bottom of the ſea) are to be eſteemed wreck, ſo long as they remain upon the ſea, and are not caſt upon the land by the ſea; but if any of them are caſt upon the land by the ſea, they are wreck. *Wood b.* 2. *c.* 2.

Alſo,

Alſo, by the 3 *Ed.* 1. *c.* 4. *Where a man, a dog, or a cat eſcape quick out of the ſhip, the ſhip or any thing therein ſhall not be adjudged wreck of the ſea.*

A man, a dog, or a cat] Which ſtatute being but declaratory of the common law, theſe three inſtances are only put for examples; for beſides theſe two kinds of beaſts, all other beaſts, fowls, and other living things are underſtood, whereby the property of the goods may be known. 2 *Inſt.* 167, 168.

Eſcape quick out of the ſhip] If a ſhip be ready to periſh, and all the men therein (for the ſafeguard of their lives) leave the ſhip, and after, the forſaken ſhip periſheth; if any of the men be ſaved and come to land, the goods are not loſt. 2 *Inſt.* 167.

By the 17 *Ed.* 2. *The king ſhall have wreck of the ſea throughout the realm.*

And the cauſe wherefore originally wreck was given to the crown, ſtood upon two main maxims of the common law. 1. That the property of all goods whatſoever muſt be in ſome perſon. 2. That ſuch goods as no ſubject can claim any property in, do belong to the king by his prerogative. 2 *Inſt.* 167.

The taking of goods whereof no one had a property at the time, is not felony; and therefore he who takes away a wreck, before it is ſeized by the perſon who has a right thereto, is not guilty of felony, and ſhall only be puniſhed by fine, or the like. 1 *Hawk.* 93, 94. That is to ſay, he is not guilty of felony by the common law; but it is otherwiſe by the ſtatutes here following.

To preſerve ſhips ſtranded, or in diſtreſs, from being plundered by the country people, it is enacted by the 12 *An. ſt.* 2. *c.* 18. and the 26 *G.* 2. *c.* 19. as follows: (Which ſaid act of the 12 *An.* is required to be read in the church four times a year, in all ſea port towns, and on the coaſt.)

The juſtice of the peace, mayor, bailiff, collector of the cuſtoms, or chief conſtable, who ſhall be neareſt to where any ſhip ſhall be ſtranded or caſt away, ſhall forthwith give publick notice for a meeting to be held as ſoon as poſſible, of the ſheriff or his deputy, the juſtices of the peace, mayors, coroners, and commiſſioners of the land tax, or any five of them, who ſhall employ proper perſons for ſaving the ſame; and ſhall command the conſtables neareſt to the ſea coaſts, to call together as many men as ſhall be thought neceſſary to aſſiſt.

And any juſtice of the peace, in the abſence of the high ſheriff, may take ſufficient power of the county.

And they may command all ſhips at anchor near, to aſſiſt; and if the officer of ſuch ſhip ſhall refuſe or neglect, he ſhall forfeit 100 *l.* with coſts, to the officer of the ſhip in diſtreſs.

And to prevent confuſion, and contradictory orders, the perſons aſſembled to ſave any veſſel or goods as aforeſaid, ſhall conform in the firſt place to the orders of the maſter or other officer or owner, or perſons employed by them; and for want of their preſence or directions, then to the orders of the officers of the cuſtoms, next

to

to those of the officers of excise, then of the sheriff or his deputy, then of a justice of the peace, then of a mayor, then of the coroner, then of a commissioner of the land tax, then of a chief constable, then of a petty constable; and any person acting contrary to such orders, shall forfeit not exceeding 5 *l.* to be levied by warrant of one justice, and in case of non-payment, to be committed to the house of correction, not exceeding three months.

And every such sheriff, justice, mayor, coroner, lord of a manor, under sheriff, or commissioner of the land tax, shall have 4 *s.* a day during his attendance, out of the goods saved.

And if any person, not impowered as above, shall endeavour to enter on board such vessel, or shall deface the marks of the goods; he shall within 20 days make double satisfaction to the party grieved, at the discretion of the two next justices; or in default thereof, shall be sent by them to the next house of correction, to be kept to hard labour for 12 months.

And if any person not employed by the master or owner, shall in the absence of persons employed by them, save any vessel or goods, and cause them to be carried for the benefit of the owners into port, or any near adjoining custom house, or place of safe custody, immediately giving notice thereof to a justice, magistrate, custom house or excise officer; they shall be intitled to a reasonable reward for the same, to be adjusted by three neighbouring justices, which may be recovered by action at law: Or the same may be adjusted by the officers abovementioned. And if the said salvage (and the charges of 4 *s.* a day as abovementioned) shall not be paid in 40 days after the services performed, the officer of the customs concerned in the salvage, may borrow or raise so much money as shall pay the same, upon a bill or bills of sale, under his hand and seal, of the vessel or cargo, or part thereof; redeemable nevertheless on payment of the principal, and interest at 4 *per cent.*

And more generally, by another clause it is enacted, that all persons who shall act or be employed in preserving any such vessel or cargo, shall be paid a reasonable salvage, to be adjusted by three neighbouring justices as abovementioned.

And if any person shall plunder, steal, take away, or destroy any goods belonging to such ship in distress, or which shall be wrecked or stranded (whether living creature be on board or not) or any tackle, provision, or part of such ship; or shall beat or wound, with intent to kill, or otherwise willfully obstruct the escape of any person endeavouring to save his life from such ship, or the wreck thereof; or shall put out any false light, with intent to bring any vessel into danger; he shall be guilty of felony without benefit of clergy. Provided that when goods of small value shall be stranded or cast on shore, and stolen without circumstances of cruelty, outrage, or violence; the offenders may be prosecuted for petit larceny only.

And

And if any perſon ſhall make any hole in any ſuch ſhip in diſtreſs, or ſteal any pump belonging thereto, or wilfully do any thing tending to the immediate loſs of ſuch ſhip, he ſhall be guilty of felony without benefit of clergy.

And if oath be made before a magiſtrate, of any ſuch plunder or theft, or of the breaking of any ſuch ſhip, and the examination in writing thereupon taken be delivered to the clerk of the peace, he ſhall cauſe the offender to be forthwith proſecuted for the ſame, either in the county where the fact ſhall be committed, or in any county next adjoining, in which adjoining county any indictment may be laid by any other proſecutor; And the neceſſary charges of ſuch proſecution ſhall be paid by the treaſurer of the county where the fact ſhall be committed, as the juſtices in ſeſſions ſhall order: and if the clerk of the peace ſhall neglect his duty herein, he ſhall forfeit 100 *l.* to him who ſhall ſue.

And one juſtice, upon information on oath, of any part of the cargo or effects of ony veſſel loſt or ſtranded near the coaſts, being unlawfully conveyed or concealed, or of ſome reaſonable cauſe of ſuſpicion thereof, may iſſue his warrant for ſearching as in other caſes for ſtolen goods: And if the ſame be found in any houſe or other place, or in poſſeſſion of any perſon not legally authorized to have the ſame; and the owner or occupier, or perſon in whoſe poſſeſſion the ſame ſhall be found, ſhall not immediately upon demand deliver the ſame; ſuch juſtice, on proof of ſuch refuſal, ſhall commit him to the common gaol for ſix months, or till he ſhall have paid treble value thereof.

And if any perſon ſhall offer to ſale any ſuch goods unlawfully taken away, or reaſonably ſuſpected ſo to have been, the perſon to whom they are offered, or any officer of the cuſtoms or exciſe, or conſtable, may ſeize the ſame; and ſhall with all convenient ſpeed, carry the ſame, or give notice thereof, to one juſtice; and if ſuch perſon ſhall not in ten days make out his property therein, to the ſatisfaction of the juſtice, they ſhall be delivered over to the rightful owner, on payment of reaſonable reward (to be aſcertained by the juſtice) to the ſeizor; and the juſtice may commit ſuch offender to the common gaol for ſix months, or till he ſhall have paid treble value. And if any perſon ſhall diſcover to any juſtice, magiſtrate, cuſtom houſe or exciſe officer, where ſuch goods are wrongfully bought, ſold, or concealed, he ſhall be intitled to a reaſonable reward, to be adjuſted as the ſalvage.

But this ſhall not prejudice the right of any lords of manors, or others, lawfully claiming wreck, or goods *flotſam*, *jetſam*, or *lagan*,

[In ſeveral of theſe his majeſty's *American* provinces, there are laws made by their reſpective legiſlatures, impowering juſtices of the peace to hold courts for the trial of ſmall cauſes, under certain ſums therein ſpecified:---- The methods of proceedings are various in the ſeveral provinces: But many juſtices are often at a loſs for forms in thoſe caſes, eſpecially at their firſt entrance into the office: I have thought it would not be unacceptable to many of them, to give them the following forms of a Summons, Subpœna, Warrant, Execution, and Venire for ſummoning a jury of ſix men, where the law impowers ſuch a proceeding, being ſuch forms as I have uſed myſelf; tho' I entirely leave it to their own diſcretion to alter, amend or vary, as they ſhall think proper.]

I. A Summons for a Debtor.

New-Jerſey, Middleſex County. } *To any Conſtable of the Townſhip of* Woodbridge.

THESE are to require you, purſuant to a law of this province, to ſummon *A. B.* to appear before me, at my dwelling-houſe, in *Woodbridge*, on tueſday the fifth day of *March* next, at four o'clock in the afternoon, then and there to anſwer *C. D.* in a plea of debt and damage, under the value of *Six Pounds* proclamation money: And hereof fail not. *Given under my hand, the twenty-ſeventy day of* February, *in the fourth year of his majeſty's reign*, 1[illegible].

J. P.

II. A Subpœna for an Evidence.

New-Jerſey, Middleſex County. } *To any Conſtable of the Townſhip of* Woodbridge.

THESE are to require and command you, to ſubpœna *A. B.* of the townſhip aforeſaid, in the penalty of *Five Pounds*, proclamation money, to appear before me at my dwelling-houſe in *Woodbridge*, on thurſday the firſt of *March* next, at two o'clock in the afternoon, to give evidence in a caſe depending between *C. D.* plaintiff, and *E. F.* defendant, in behalf of the ———— purſuant to a law of this province; and hereof fail not at your peril. *Given under my hand, the twenty-ſeventh day of* February, *in the fourth year of his majeſty's reign*, 1764.

J. P.

III. A

III. A Warrant for a Debtor.

New-Jersey, Middlesex County. } *To any Constable of the Township of* Woodbridge.

YOU are hereby in his majesty's name, required and commanded to apprehend the body of *A. B.* if to be found within your district, and bring him forthwith before me, or some other of his majesty's justices of the peace for the said county, together with this precept, to answer *C. D.* in a plea of debt, in an action on the case, under *Six Pounds* proclamation money, pursuant to a law of this province. And hereof fail not. *Given under my hand and seal, the first day of* March, *in the fourth year of his majesty's reign,* Annoq; Domini 1764. *J. P.*

IV. An Execution after Judgment.

New-Jersey, Middlesex County. } *To any Constable of the Township of* Woodbridge.

WHEREAS judgment against *A. B.* for the sum of *Three Pounds five Shillings,* proclamation money, was had the twenty-first day of *February* last, before me, at the suit of *C. D.* These are therefore in his majesty's name, to command you immediately to levy distress on the goods and chattels of the said *A. B.* if any to be found within your district, and make sale thereof, according to a law of this province in that case made and provided, to the amount of the said sum; and the same, together with this precept, or what shall be done thereon, to return to me in twenty d[illegible] from the date hereof:---And for want of such goods and chatt[illegible] whereon to levy, you are to convey the said *A. B.* to the ke[illegible]per of the common goal of the said county, who is also hereby c[illegible]manded to receive the said *A. B.* and him in safe custody to keep, until the said sum, and costs accrued, be paid, or till he be thence delivered by due course of law: Hereof fail not at your peril. *Given under my hand and seal, the fifth day of* March, *in the fourth year of his majesty's reign,* Annoq; Domini 1764.

James Parker.

A venire for summoning a jury of six men.

New-Jersey, Middlesex County. } *To any constable of the said county.*

THESE are in his majesty's name to command you, immediately to summon six good and lawful freeholders of the county aforesaid, to appear at my dwelling-house in *Woodbridge,* this day, being the 12th of *February,* at one o'clock in the afternoon, to pass on a trial to be then and there had between *T. T.* plaintiff, and *R. W.* defendant, and to return their names to me, together with this precept, without delay, and hereof fail not at your peril. *Given under my hand and seal this nineteenth day of* February, *in the fourth year of his majesty's reign,* annoq; domini 1764.

J. P.

Form

VI. Form of another Execution in the King's Name.

New-Jersey, Middlesex County. } *GEORGE the third, by the grace of God, of* Great-Britain, France, *and* Ireland, *king, defender of the faith, &c. To all and each of the constables of our Township of* Woodbridge. GREETING.

WE command you, that of the goods and chattels of *A. B.* in your district, you cause to be made and levied the sum of ——— which *C. D.* lately recovered against him, before *E. F.* one of our justices of our said county; as also the sum of ——— of costs, thereupon accrued and adjudged: And after sale of the same, pursuant to the directions of an act of our general assembly of our province of *New-Jersey*, in such case made and provided, forthwith pay the sum aforesaid, unto the said *C. D.* or in his absence unto the said *E. F.* and the overplus, if any be, after deducting the costs aforesaid, together with legal and reasonable charges of execution, return unto the said *A. B.* and for want of goods and chattels whereon to levy, take the body of the said *A. B.* and him convey and deliver unto the keeper of our common gaol of our said county, who is hereby commanded to keep the said *A. B.* in his safe custody, in our said common gaol, until the said sum and costs aforesaid, shall be fully paid, or he be thence delivered by due course of law. *Witness* the said *E. F.* Esq; at *Woodbridge*, in our said county, this fourth day of *March*, in the fourth year of our reign, 1764.

PART II.

PART II.

THE OFFICE and DUTY OF SHERIFFS.

AS to the time when and by whom the realm of *England* was divided into counties, authors ſeem to differ. The word *county* or *ſhire* are certain circuits or parts of the kingdom into which the whole realm was divided, for the more convenient government thereof, and is governed by an officer which we call SHERIFF, ſignifying *præpoſitus*, or governor. And it appears by hiſtory, that *earls of counties* had the guard of the counties long before the conqueſt, and which was derived from the *Romans*; and the *ſheriff* was deputy of the *earl*, and the *Romans* called him, *vice-conſul*. 1 *Inſt.* 168. By the ſtatute 14 *Ed.* 3. *cap.* 7. The judges are to nominate three perſons of every county to be preſented to the king, that he may pick one of them for *ſheriff* or governor of the county. But the ſtat. of 9 *Ed.* 2. reſtrains not the king's power, but he may conſtitute a *ſheriff* without election, or grant it in fee; for all the acts of grace flow from him; and the ſtat. of 14 *Ed.* 3. was made to eaſe the ſovereign of labour, and not to deprive him of power; the election being merely in the king, and the office miniſterial only.

The *ſheriff* takes place of every nobleman in the county during the time that he is *ſheriff*; and though the *ſheriff* be not a juſtice of the peace, yet he is a *conſervator of the peace*, and may impriſon perſons upon good cauſe, as breach of the peace, ſuſpicion of treaſon, felony, freſh-ſuit, or hue-and-cry. Upon foreign Invaſion he may raiſe the county, ſo upon rebellions and inſurrections, and may command any number he thinks fit to aid him. But by his own authority he ſhall not arreſt a man upon ſuſpicion of felony, except there be a felony committed in fact, and he himſelf have ſuſpicion of him. But by the ſtat. 17 *Ric.* 2. *c.* 8. The ſheriff may raiſe the *poſſe commitatus* to ſuppreſs rioters, and commit them to priſon. 13 *H.* 4. *cap.* 7. And if the rioters reſiſt, the ſheriff and his aſſiſtance may juſtify the killing of them, and may arreſt and impriſon all ſuch offenders. If the ſheriff ſee a perſon carry weapons in the high way, *in terrorem populi*, he may commit him, tho' he doth not break the peace in his preſence. And though the king conſtitute

conſtitute a ſheriff *durante beneplacito*, and may determine it at will, yet he cannot determine it in part, nor abridge him in any thing incident to his office, during the time he is ſheriff.

The ſheriff is an officer of that eminence, that he ought to have all right pertaining to his office, and to be favoured in law before any private perſon. And therefore though eſcapes are ſo penal to officers, the judges have always made as benign a conſtruction, as the law will permit, in favour of them; and to the intent that every one may bear his own burthen, they will never judge an eſcape by ſtrict conſtruction. If a ſheriff be ſlain in doing his duty, it is murder in him who kills him, although no former malice was between them; and if there was error in awarding proceſs, or in the miſtake of one proceſs for another, and the officer be ſlain in the execution thereof, the offender ſhall not have advantage of ſuch error, no more than a ſheriff who ſuffers a priſoner to eſcape, ſhall take any advantage thereby. Nor is an officer, if he be reſiſted, bound to fly to the wall, as a private man is. Every man is bound by the common law, to aſſiſt the ſheriff, or his deputy, in the execution of the king's writs, according to law, (for the deputy hath the ſame power as his maſter.)

Every ſheriff is to be reſident in his own perſon within his county during the time he is ſheriff, except he be licenced by the king. 4 *H.* 4. *cap.* 5. A ſheriff of one county hath no power within another county; yet the ſheriff by force of the king's writ, may carry the priſoner through ſeveral counties. And yet though the ſheriff be much favoured and reſpected in the Law, and in the execution of criminals, yet he ſhall be guilty of murder for not obſerving the order of law in putting a condemned man to death. 7 *Rep.* 13. 1 *Jac.*

The ſheriff muſt take the oath and ſacrament (as is now uſual for all officers and miniſters of juſtice) ſtat. *Car.* 2. and the oaths appointed by ſtat. *W.* & *M.*

[For the oath of ſheriff ſee page 395.]

The old ſheriff is ſheriff of the county until the new ſheriff be ſworn; For it is the taking of his oath that doth compleat him in his office. And the arreſt is good by the old ſheriff, till a new commiſſion is ſhewed him, or other ſufficient notice, or a writ *De exoneratione officij* come to his hand. And upon his receipt of ſuch writ, if a new ſheriff be not commiſſioned, the coroner of the county ſupplies the vacancy.

When the new ſheriff is compleat in the office, he muſt take over from his predeceſſor all his priſoners aud writs preciſely by view, and by indenture to be made between them, wherein all the cauſes that he has againſt every priſoner, muſt be ſet forth and delivered, or elſe the new ſheriff is not chargeable with them. But if the old ſheriff die, the new ſheriff in ſuch caſe ſhall at his peril take notice of all executions which are againſt any that he finds in gaol, and of all writs. *Dalt.* 17. *Moore* 688. *Pop.* 85. *Meſme Caſe.* Nor is the ſheriff obliged to receive priſoners from his predeceſſor but in the common

common gaol of the county. And if upon the new sheriff's refusing to receive such prisoners as are not in gaol, the prisoner escape, an action will lie against the old sheriff. And if the old sheriff die, the party who sued execution may help himself, *viz.* By a remanding the body by a *corpus cum causa*, whereby he may be brought to be duly in execution.

The form of an indenture for setting over prisoners and writs, &c.

New-Jersey, Salem County. THIS *indenture made*, &c. *between* A. B. *esq*; *late sheriff of the aforesaid county, of the one part, and* C. D. *esq*; *now sheriff of the said county, of the other part, witnesseth*: *that the said* A. B. *by virtue of his majesty's writ of discharge (of his late office) to him directed, hath delivered and set over unto the said* C. D. *these following writs: That is to say, A* capias *against* W. H. *returnable at the supreme court*, &c. *to answer* J. S. &c. *together with the bodies of* J. N. *in execution, at the suit of* G. H. *for the debt of* twenty two pounds; *and* J. H. *at the suit of* E. F. *in execution for* twelve pounds; *and* R. G. *in execution as well at the suit of* L. M. *for a debt of* fifty pounds, *as also at the suit of* N. K. *for a debt of* forty pounds, &c. *In witness*, &c.

All the writs which are set over in the indenture between the sheriffs, if they have been executed by the old sheriff, then they must be returned by him, or in his name, and endorsed under by the new sheriff, thus:

This writ as endorsed, was delivered to me by A. B. *esq*; *late sheriff, my predecessor, at his going off his office.* *per* C. D. *Vice com'*

Process in some cases may be to the old sheriff, to bring the body of a prisoner, and that is, where before he hath made a return of *cepi corpus & parat' habeo*, and afterwards he is removed, and a new sheriff made; on non-appearance of the prisoner, process shall go to the old sheriff, as *distringas*, &c. The difference is, if the sheriff, at the day, return *cepi corpus*, and have not the body ready, he shall be amerced, and a *distringas* shall be awarded to the coroners. But if the old sheriff, at the day, return *cepi corpus*, and before the day of return he is removed, and a new one is made, the *distringas* here shall be awarded to the new sheriff, if it appear on record that he has taken the body.

A sheriff on a *fieri facias*, seized goods in his hands to the value of the debt, and paid part of the debt, and the goods not being sold, nor the writ returned, the sheriff was discharged; and afterwards sold the residue of the goods without any *venditione exponas*; and *per curia*, the sale is good; for the writ *fieri facias* gave him authority to sell without any other writ. *Cro.* 73. *Ayer & Aden.*

If money be paid to the old sheriff, and he is discharged before the return of the writ, the party shall not be compelled to pay it again, and the plaintiff may have his remedy against the old sheriff. *Cro El.* 209. *Reek & Wilmot.*

If

If an attachment may be granted againſt a ſheriff for contempt, after he is removed out of his office, the juſtices ſaid, they cou'd not do it; for now he is no officer, and cannot now be fined, and without fine they do not uſe to impriſon. 2 *Browl.* 144.

A writ of aſſiſtance for a ſheriff.

George the third, *&c.* To the archbiſhops, biſhops, dukes, earls, barons, knights, freemen, and all others of the county of *B. Greeting:*

WHEREAS *we have granted to our well beloved* A. B. *knight, the office of* SHERIFF *of our county, aforeſaid, with the appurtenances, to enjoy the ſame during our pleaſure, as in our letters patent made to him thereof is more fully expreſſed: We command you, that you be aſſiſting, and give your advice to the ſaid* A. B. *as ſheriff of our county aforeſaid, in all things which belong to that office. In witneſs,* &c.

Of UNDER-SHERIFFS.

AS in former times, the *earls* had the juriſdiction of the counties, and the ſheriff was their deputy, ſo now the *high-ſheriff* comes in the place of the *earl*, and has his deputy or *under-ſheriff*, if he ſee cauſe to depute one, and may diſcharge ſuch deputy, and appoint another when, and as often as he ſees cauſe.

Every under ſheriff, before he meddles with his office, ſhall, before one of the juſtices of aſſize, or two of the juſtices of the peace of the county *(quorum unus)* take the oaths appointed by law, and ſign the teſt, on pain to forfeit treble damages to the parties grieved, if he commit any act contrary to the ſaid oaths, or either of them.

The high-ſheriff in making an under-ſheriff doth implicitly give him power to execute all the ordinary offices of the ſheriff himſelf, that can be transferred by law, as ſerving proceſs, execution, and the like. But in caſes where the words of the writ are, *That the ſheriff ſhall go in his own perſon*, as on a writ of *partition, waſte, redisſeiſin, accedas ad curiam*, there the under ſheriff cannot do it, that is, if exception be taken at the bar before the return be received; but if the ſheriff return, That he was there in proper perſon, and this return be received, and the writ filed, then the court cannot examine it, and the party can have no averment againſt the return, nor can have any error. *Cro. El. Clay's Caſe. Hob. p.* 13.

And though the high-ſheriff may make an under-ſheriff, or not appoint one; or when made remove him at pleaſure; yet during the time he is under-ſheriff, he cannot abridge his power, no more than the king can in caſe of the high-ſheriff himſelf. If the ſheriff will make an under-ſheriff, provided he ſhall not ſerve executions above *twenty pounds*, without ſpecial warrant, this proviſo is void. Nor can the under-ſheriff reſtrain himſelf by covenant.

If

If the under-sheriff make a return amerciable, there the high-sheriff shall be amerced; for the return is made expressly in his name; but if it be a false return, whereupon an action of debt lies, in that case it may be brought against the under-sheriff. *Dr. and Stud. cap.* 42.

As to serving writs, it's said, a known sheriff need not shew his warrant at first, although it be demanded, nor a special under-sheriff without demand; but when he has peaceably submitted to the arrest, he ought to read the writ, or tell him the contents, that he may know at whose suit the process is, out of what court, for what, and of what return, that the party may know what to do. 6 *Rep.* 52. The sheriff must not dispute the authority of the court, tho' the process be erroneous.

If the officer come to arrest a man and he flieth, the officer may pursue him, and take him in another county, but he can't beat him, because he was not arrested.

If a special sheriff, by force of a warrant, on a *capias* in process, enters into the house of *J. D.* the door being open, and there takes *J. E.* against whom the writ is, the process is as well served as to *J. E.* and all strangers. And if any strangers rescue him, he at whose suit he is arrested shall have action against him. 2 *R. Ab.* 272.

A *capias* was returnable on *All-souls-day*, which is *non dies juridicus*, which the sheriff returned, and so let the party go; it is a bad return: The writ was good, and the detaining of the parties lawful, and he was commanded to bring him into court, *Pop.* 205.

If a sheriff arrest a man before a writ be delivered to him, it is a trespass. If a *latitat* returnable the 10th of *July*, come to the sheriff to arrest *J. S.* he may arrest him on the said 10th of *July*, but upon a *capias* in process, he may not arrest the party after the day of return.

An arrest in the house, the door being open, at six o'clock at night, is good enough.

By a late act of parliament, none can be arrested on a *Sunday*, except for treason, felony, or breach of peace.

As to the arresting one person for another; the sheriff had process against one *Adderly*, and he took one *Adderby*; if he was known by one name or the other, it is good, otherwise not. *Moore* 407. *N.* 548.

If a sheriff executes a *capias*, and there is no original to warrant it, he is excusable; but he must take notice, at his peril, of the person and goods that he arrests; for he is not to examine whether the original be sued out or not. But if he arrests *J. S.* instead of *J. N.* he does it without warrant.

An under-sheriff who had two warrants against one at the suit of *J. S.* laid his hands on him, and said, *I arrest you by force of a writ that I have*, but did not shew it him, nor had it in his hands, nor told him at whose suit; yet the court resolved,

1. This arrest, without shewing the warrant and telling at whose suit till the other demanded it, was good and legal.

2. This arreſt, without having the warrant in his hand, and having both warrants about him, is well enough, although he did not ſhew by which of them he arreſted him.

If the ſheriff, bailiff, or other officer, ſay to the perſon againſt whom he has a *capias* or warrant, *I arreſt you in the king's name*, though he lay no hands on him, it ſeems this is a good arreſt, eſpecially if it be a known ſworn officer, and the party at his peril ought to obey him; and if the officer hath no lawful warrant, the party may have an action of falſe impriſonment againſt him. *Co.* 5. 66, 69.

An arreſt in the night is lawful, be it at the king's or another's ſuit. *Co.* 9. 66. *Shep. Abr. part* 2. *p.* 302.

Where ſheriff, bailiff, conſtable, or other ſuch like officer or miniſters of juſtice, in the doing of their offices, as in the *execution of writs, warrants of the juſtices of the peace, keeping the peace, apprehending of felons*, or the like, do require or command others that are no officers, to aſſiſt them in that work or ſervice, ſuch perſons muſt aid and aſſiſt ſuch officer; and then what they do is lawful and juſtifiable therein, as if the officer or officers had done it. 11 *H.* 7. *c.* 15. *Weſtm.* 1. *c.* 9. *Winton* 3 *H.* 7. *Co.* 8. 96.

The ſheriff or bailiff is bound at his peril to arreſt the right perſon againſt whom the warrant is, otherwiſe he is liable to an action of falſe impriſonment. *Shep. part* 2. *p.* 308. *Mine caſe.* 600, 602. *Brow. falſe impriſ.* 38. *Law* 49.

High-ſheriff may be fined, but not impriſoned for the act of under-ſheriff.

Of BAIL.

BAIL is ſo called, becauſe the party bailed is delivered by law into the cuſtody of thoſe that are his bail, and who are to anſwer the party, if they do not produce the principal to do it.

At common law, if the ſheriff had taken any man by the king's writ, he muſt not be delivered but by *breve de homine replegiando*, and was not compellable to take bail. But by the ſtatute of 23 *H.* 6. he is compelled to take bail, and the deſign of the ſtatute is to prevent the extortion of ſheriffs, who uſed to extort great ſums for granting bail. And this ſtatute preſcribes the form of the bail-bond, and enacts, "That no ſheriff nor any of his officers, ſhall "take or cauſe to be taken, or make any obligation for any cauſe "aforeſaid, or by colour of their office, but only to themſelves, "of any perſon, nor by any perſon which ſhall be in their ward, "by the courſe of the law, but by the name of their office, and "upon condition written, *That the ſaid priſoners ſhall appear at the "day contained in the writ or warrant, in ſuch places as the ſaid writ "ſhall require:*" And any other obligation taken by them in any "other form, ſhall be void.

The ſheriff is judge of the ſufficiency of the ſureties, and he may take one or two.

A

A condition was, that if he appeared at *Weſtminſter* ſuch a day to anſwer, &c. The defendant pleads, that before the day of the return of the writ, the term was adjourn'd to *Hartford*, and that there he appeared. The plaintiff demurs. *Per cur'* he ought to conclude his plea, *prout patet per accordum*; for though he appeareth, yet if his appearance be not entered of record, he forfeits his obligation, and he ought to conclude his plea ſo, otherwiſe the plaintiff cannot anſwer thereunto, as to ſay, *nul tiel record. Cro. El.* 466. *Corbit and Cook.*

After the ſtatute 23 *H.* 6. the ſheriff cannot make a ſpecial return in a *capias*, but only a *cepi corpus* or *non eſt inventus*. And though the ſtatute compels him to take bail, yet it does not alter the return.

The return of a *paratum habeo*, is, in effect, no more than he hath the body ready to bring into court when the court ſhall command him. And for ſuch return he is amerciable to the court till he bring in the body.

If a ſheriff refuſe to take reaſonable bail, an action of the caſe lies againſt him; or if a ſheriff refuſe to take bail, he is liable to an action of falſe impriſonment. But if he take inſufficient bail, no action lies againſt him by the party, for he is judge of the bail

An action of the caſe againſt the ſheriff for not taking reaſonable ſureties, not having ſufficient eſtates in the county, and returning *cepi corpus*, and yet not having the bodies ready by the day, lies not; for he is compellable to let to bail; and if he have not the body, he ſhall be amerced. And becauſe he ſhall be amerced, the ſtatute gives him advice to take ſufficient ſureties for his own indemnity. 2 *Sand.* 59. *Poſtern and Hanſen.*

By theſe words in the ſtatute, that *if the ſheriff return a* cepi corpus, *he ſhall be chargeable to have the body by the day of the return*, &c. it is intended only, that he may be amerced to the king for not having the body at a day. 2 *Sand.* 60.

If the defendant appears not to the ſheriff's bond, according to the condition thereof, the plaintiff may, by leave of the ſheriff, ſue the bond in the ſheriff's name; but it's in the plaintiff's election to ſue the ſheriff; and the ſheriff ſhall be amerced, till he aſſign the obligation to the plaintiff. But by the ſtatute 4 & 5 of *Q. Anne*, the plaintiff upon the ſheriff's aſſignments may ſue the bail-bond in his own name, if he ſee cauſe ſo to do.

A bond given to be a true priſoner (as by law he ought) is good, and not within the ſtatute of 23 *H.* 6. But a bond of one in execution, to be a true priſoner, is within the ſtatute and void. So alſo a bond or covenant for fees is void. And ſo is a bond for chamber-rent. 3 *Keb.* 133.

But by the ſtatute of 13 *Car.* 2. *cap.* 2, Perſons arreſted by proceſs out of the king's bench or common pleas, not expreſſing the cauſe of action in the writ, bill or proceſs, and which are bailable by the ſtatute of 23 *H.* 6. ſhall give bail bond not exceeding the ſum of *forty pounds*. If the ſheriff take bond for more, the party ſhall have an action upon the ſtatute againſt the ſheriff; but the bond is not

void. And upon the defendant's appearance at the return, he shall discharge such bail bonds. But this statute extends not to arrests upon *capias utlagat' rescous, contempt* or *privilege*; nor to popular action, or action on any penal law, indictment or information. See more, under title BAIL. Page 45.

Of Return of WRITS.

A Return is but a certificate made by the sheriff to the court from whence the writ issued, of that which he hath done touching the execution of the same writ.

There is a difference between the *teste*, and the return of writs. A return may be on the essoyn day. A writ shall not abate if the return be *quarto die post*. If a man be bound to appear the first day of the term in court, if he appear the first day of the essoyn, and then have his appearance recorded; this is good. 2 *Bulst. Bedo & Piper.*

Deputies are allowed in all ministerial offices; but all returns made by them, are to be made in the name of the principal officer. And the sheriff is to put his name to every return made by him, or the return is to be void 3 *Bulst.* 78. None can make a return of a writ, but such a person who at the time of the return remains an officer to the court.

Against the return of a sheriff, there is not any traverse, averment or answer.

Generally all writs of execution, (except *elegit*) as *capias ad satisfaciend. Habere fac' seisinam, habere fac' possessionem, fieri fac, liberate*, &c. which are the final process, and after which no judgment is given, nor no further process, and when matters *en fait* are only to be done, as, land to be delivered, seisin had, goods sold, &c. are good, though the writs be not returned, or filed, if the execution be duly made.

But in case of an *elegit* otherwise, because the extent is to be made by inquisition, to the intent that the court may be judge of the sufficiency of it, and every inquisition ought to be of record,

If a writ directed to the sheriff be executed, and after a new sheriff is chosen, the new sheriff ought to return the writ in this manner, *viz. Recepi hoc breve prædecessori meo directum, sic indorsatum*; i. e. *I received this writ directed to my predecessor, so endorsed.* But if a writ be not executed by the old sheriff, before he is removed, the writ must be removed to the new sheriff, and by him executed and returned without any mention of his predecessor.

If a *capias* comes to the sheriff to take a man, its no return that he was not found within his bailiwick after the delivery of the writ, *prout sibi constare poterit.* This is not good, but he ought to return expressly, *Quod non est inventus.* 9 *H.* 6. 57.

The sheriff returned a resistance on *Habere fac' seisinam*, and he was amerced 20 marks, because he did not take the *posse commitatus*, and an *alias awarded. Hill.* 19 *Ed.* 2. *Execu.* 147.

It-

It is no good return for the sheriff to say, the party will not pay his fees, and therefore he would not serve his writ, 34 *H.* 6. because he may recover his fees by action, when he has done his duty.

The sheriff of *Yorkshire* returned a protection on arrest. It was set aside *per cur'* in regard the sheriff can return nothing else but *non est inventus*, or *cepi corpus*, at his own peril, and the sheriff was ordered to return his writ on pain. 2 *Keb.* 168.

Where the sheriff takes bail, according to the statute 23 *H.* 6. and returns *cepi corpus*, though the party do not appear at the day, yet the sheriff shall not be charged in an action on the case for a false return. *Siderfin. p.* 22.

Note, A *venire* ought to be delivered to the sheriff four days before the return of it, if the jury dwell forty miles off, and eight days if they dwell further from the place where the trial is to be. *Pract. reg.* 87. 333.

The name of the sheriff ought to be to the *distringas*, and *tales* are of necessity, and to the return of the *habeas corpora*. 12 *E.* 2. *c.* 5.

Tales not returned by the sheriff or his deputy, but by a clerk of the court by general appointment of the sheriff, it is well enough, and the sheriff is answerable for it. 1 *Keb.* 357.

Of Juries, and their returns.

JURORS are of two sorts, juries to enquire are *grand juries* at the assizes or quarter sessions. So *juries* returned before justices of the peace, to enquire of *riots*, *forcible entries*, the sheriff is to summons them.

If it be conceived an indifferent jury will not be returned, the court, on motion, will order the sheriff to attend the secondary of his office with his book of the freeholders, to have an indifferent one returned. *Pract. reg.* 163.

When trial is to be for a thing which concerns the under-sheriff, there the high-sheriff shall return the jury; but if the trial concern the high-sheriff, the coroner shall return the jury. *Pract. reg.* 164.

The sheriff ought not to return *privilege* to be exempt from juries, but to return them summoned, and the party claiming *privilege* ought to appear in person to claim the same, and not the sheriff for him.

But peers in parliament are not to be impaneled, nor tenants in ancient demesn.

By statute 11 *H.* 7. No indictment shall be found by any persons named to the justices, without due return of the sheriff, and by inquest of lawful liege people returned by the sheriff.

The justices of gaol-delivery, or justices of the peace *(Quorum unus)* in open court, may alter the pannel returned by the sheriff, to enquire of the king only, by addition or substraction of any of the jurors so returned; and they have power to command the sheriff to put other in the panel, according to their discretion. And the

sheriff

sheriff ought to return the pannel so reformed, upon penalty of the said act. *Coke* 12 *Rep.*

If any one or more of the jury be returned at the denomination of the party, plaintiff or defendant, the whole array shall be quashed.

If the plaintiff or defendant have an action of battery or debt against the sheriff, or if the sheriff have a parcel of land depending on the same title; or if the sheriff or his deputy be either of counsel or attorney, or servant, or gossip of either party, all the array shall be quashed.

Consanguinity or *affinity* are the principal causes, but its no challenge to the array, if all the jurors be of affinity.

Malice between the sheriff and one of the parties, or that one of the parties has brought an action of debt against the sheriff, is good cause of challenge.

Challenge to polls, *i. e.* to the particular jurors, are of four sorts; 1. *Peremptory*, without shewing any cause, and this for treason is, thirty-five; felony twenty. 2. *Principal challenge* to the polls; so called, because it stands of itself, without leaving any thing to the conscience or discretion of the tryers. 3. Challenger to the poll must shew cause *presently*. After one hath taken challenge to the poll, he cannot challenge the array. 4. If the plaintiff alledge a cause of challenge against the sheriff, the process shall be directed to the coroner; and if any cause against the coroner, then the court shall appoint *elisors*. Sometimes the court appoints two of them that be impannelled.

All challenges must be taken before the jurors are sworn. No challenges shall be admitted against the tryers appointed by the court.

[Much more relating to juries, is under the head JURORS. See page 241.]

Of a writ of enquiry of damages.

IF upon the executing of a *writ of enquiry of damages*, the sheriff refuseth to swear and examine some of the witnesses produced on either part, and yet doth execute the writ, the court will grant a new writ to the party grieved, for the old writ was not well executed. *Pract. Regist.* 348.

A *writ of enquiry of damages*, cannot be executed by a deputy, or bailiff, but by an under-sheriff it may.

If a *writ of enquiry of damages* be returnable the 29th *Sep.* the sheriff may take the inquest and enquire the damages the day of the return, and after he returns it the same day; this writ is well executed. If the inquest be impannelled the essoyn day, and hear their evidence two or three days after; yet this writ is well executed. *Mich.* 11. *Car.* 1.

The jury cannot find *that no trespass is done*, neither may the sheriff make such return; but if the jury will find no damages, the sheriff must make his return accordingly.

A

A return of a writ of enquiry of damages.

THIS *inquisition indented, taken at* C. *in the county of* W. (such a day and year) *before* A. B. *esq; sheriff of the said county, by virtue of a certain writ of our lord the king, to the said sheriff directed, and to this inquisition annexed, by the oath of* R. S. T. G. *&c. (to the number of twelve jurors) who say upon their oaths, that* A. P. *in the writ to this inquisition annexed, named, hath sustained damage by occasion (of the within named trespass) by* H. *in the aforesaid writ named, as in the same writ is mentioned, to* Forty Shillings, *and for the costs and damages of the same,* A. P. *about his suit in that behalf expended, to* Forty Shillings. *In testimony whereof,* &c.

N. B. The sheriff and all the jurors must sign and seal this inquisition.

Of returns of a Devastavit.

THE defendant pleads *plene administravit*, and the verdict is for the plaintiff; this estops the sheriff of the county where the trial was to return *nulla bona*; for he is concluded by the verdict to make any return contrary to it: but the sheriff of another county shall not be so concluded. But the sheriff of the county where the writ is brought ought to return a *devastavit*, and thereupon the plaintiff shall have process into another county. 2 *Leon. N.* 90. *p.* 67.

Of PRISONS. See GAOLS. Page 203.

Of FIERI FACIAS.

FIERI FACIAS is a judicial writ lying for him who hath recovered debt or damage, directed to the *sheriff*, commanding him to levy the same of the defendant's goods: As it lies within a year and a day; but after a year and a day there must be a *scire facias*.

This writ of *fieri facias*, is only against the goods and chattels of a man, *viz.* leases for *years*, corn *growing* or sown upon the land, or moveable goods, as *corn in the barn, houshold goods, money, plate* and *apparel*. *Co.* 1 *Inst.* 296. 6.

Goods pawned, shall not be taken in execution for the debt of him which pawned them, during the time they are pawned. *Kitchin* 226.

The sheriff upon a writ of execution, may not seize and sell to the party a furnace annexed to the freehold, for this would be waste in the lessee. 37 *El. B. C. Day & Austin.*

If one sell any goods to another in the time of action depending against him, these goods shall not afterwards be taken in execution; for they were lawfully bought (if done *bona fide*, and for valuable consideration.) But if a *fieri facias* be directed to make execution of

of goods, and after the *teste* of the writ, and before the sheriff executes it, the party sells his goods *bona fide*, they may nevertheless be taken in execution *(aliter* now by the *statute of frauds and perjuries) Cro. El.* 174.

If the party dies after the writ of execution awarded, and before it be served, the sheriff may serve it on the goods in the hands of the executors: for by the execution awarded, the goods are bound, and the sheriff needs not take notice of his death. *Cro. El.* 181. *Parker & Mos.*

The plaintiff (being sheriff) seizeth the goods in execution by force of a *fieri facias*, and after, before the sale of them, the defendant takes an opportunity to remove them, and converts them to his own use; and the plaintiff (being sheriff) brings his action of *trover*; and adjudged the action lies well. For by the seizure of the goods in execution, the sheriff hath a property in them, so that he may re-seize them and sell them, as well when he is out of his office, as before. *Mod. Rep.* 2. *Sand.* 47. *Willbraham & Snow.*

After the debt levied, the sheriff is debtor to the plaintiff, and capable of a release from him, the action ceasing against the defendant, is *ipso facto*, by the law transferred to the sheriff, having both the judgment to make it a debt, and the levy to make him answerable; and though the action of account will properly lie in this case, yet the same will many times bear both actions, though the money be received by *auter manis*, or the like. *Hob.* 206, 207. *Speak & Richards.*

If the sheriff in executing a *fieri facias*, doth not misbehave himself, he shall not be charged in debt, or *scire facias*; but if upon the *fieri facias*, the sheriff return, that he hath levied the money, and doth not pay it to the plaintiff at the return of the writ, the plaintiff may have a *scire facias* against the sheriff, to shew cause wherefore the money should not be levied of the goods of the sheriff. 2 *Sand.* 344, 345.

So if in *fieri facias*, to levy *two hundred pounds* debt, the sheriff returns, That he had made his warrant to his bailiff, who had seized divers goods to the value of *one hundred and sixty pounds*, and that they were rescued out of his custody, *ita quod*, he could not levy the debt, and that *R. nulla alia habuit bona.* The plaintiff may bring a *scire facias* to have execution against the sheriff for the monies, according to the value returned, and the sheriff shall pay it out of his own proper goods, 1 *Anders.* 247.

On *fieri facias* the sheriff seized several goods, which were mercery ware, and returned *fieri facias ad valentiam*; which return was filed. The sheriff appears and prays to amend the return, because some of the goods were impaired by lying, and he could not get buyers. *per curia.* 1. Such return may not be altered, after it is returned and filed. 2. Where the sheriff returns *fieri facias ad valentiam*, this shall be no excuse of his payment of the money, because he might have returned, he had seized the goods, and that they

they remain *pro defectu emptorum*, and then he may be excuſed, if *bona peritura*, they periſh, *Siderfin. p.* 40. *Needham & Bennet.*

As to amendment of returns, matter of form in a return is amendable, but not matter of fact; which goes to juſtification of impriſonment. 2 *Bulſt.* 259.

If the ſheriff have a *fieri facias* againſt a man's goods and before execution he pay him the money; in this caſe he cannot do execution after, and if he do, an action of treſpaſs or falſe impriſonment lies againſt him. *B. R. p.* 12. *Jac.* 1.

The ſheriff upon a *ſcire facias* cannot deliver the defendants goods to the plaintiff in ſatisfaction of the debt, but muſt return the execution in court. *Cro. El.* 504.

On *fieri facias* againſt *J. M.* who has the goods of *A.* in his poſſeſſion, if the ſheriff ſells his goods, trover or treſpaſs will lie againſt him; and to prevent this, all the ſheriffs in *England* take ſecurity. *Keb.* 693. *Sanders's Caſe.*

Therefore in this caſe, the ſafeſt courſe is for the ſheriff to enquire by a jury, in whom the property of the goods is, or elſe not to meddle with ſuch goods which do not plainly appear to him to be the defendants; and it being found by a jury, that excuſeth the ſheriff.

If goods remain in the ſheriff's hands for want of buyers, and there periſh, the ſheriff ſhall not be chargeable; but if the ſheriff refuſe a buyer, action on the caſe lies. 2 *Keb.* 464.

There is a difference between the ſale of a term on a *fieri facias*, and extent on an *elegit*; for the *elegit* is, that they appraiſe the goods and chattels of the debtor, and extend his lands; and therefore if they are not appraiſed by the jurors, he cannot ſell them *(vid. Dyer, fol.* 100. and ſo in 5 *Rep. Palmer's caſe.)* Execution by *elegit* ought to be *per Inquiſitionem per Stat. W.* 2. *c.* 18. which ſaith, *(per rationable pretium)* which extends to chattels, and *per extentum*, which refers to lands. In *elegit* the goods are to be delivered to the party *per rationable pretium*, but in *fieri facias* the ſheriff muſt ſell the goods. 1 *Keb.* 566. *Glaſwel & Morgan.*

In *elegit* the term may not be extended without ſhewing the certainty of the commencement; for after the debt ſatisfied, the party is to have his term and remainder. But upon *fieri facias* the ſheriff may ſell, and his return is general, *quod fieri feci de bonis & catallis.* 5 *Rep. Palmer's caſe.*

Now the ſheriff is to be careful in the ſale of a term in *elegit*, if he make particular recital, that there be no miſtake. But a general recital is better. As,

In *ejectment*, it was found by ſpecial verdict, that the ſheriff upon an *elegit* impanelled a jury, who found that the defendant was poſſeſſed of a leaſe for a hundred years, which began *Mic.* 2 *& P. ubi revera*; it was found it begun *Mic.* 3 *& 4 P. & M. cujus quidem H. ſtatum interreſſe & terminum in tenementis prædictis predict. Juratores appretiarunt ad* 80*l.* and the ſheriff ſold it to the leſſor of the plaintiff for 80*l.*

Now

Now the inquest found one thing, and he sells another (as this case was) and the sale not being warranted by the inquest, is void. But had the inquest found he had been possessed of such land generally for the term of divers years to come, and they had appraised it for so much, without shewing the certain beginning or determination, it had been well enough; for they shall not be compelled to find a certainty, nor having means to be informed thereof. Or if the sheriff sells all such interest which the defendant had in the same term, the sale had been good. 5 *Rep. Palmers case.*

So in Dr. *Sidenham's* case in *B. R.* the inquest on a *fieri facias* found that the defendant was possessed of such a term, and mistook the date, and the sheriff sold it; the sale was not good. And on the new *fieri facias* the court directed that it should be found, that he was possest of a lease for years generally, and yet continuing, and that he sold it. *Cro El.* 584.

W. had execution out of the king's bench by *scire facias* of a term, which was sold by a bailiff of a liberty. After upon another judgment, the bailiff delivers this term to another, pretending that the first judgment and execution was fraudulent. But *per curia*, it is not well done; for he is not a judge of fraud, and the court will not allow such pretence to sheriffs and officers. *Latch. p.* 53. *Warrington's Case.*

If a sheriff extend or sell a lease, this sale shall bind the king (as to his debt) because it is but a chattel, and there was no coven, 8 *Rep.* 171.

Of writs of possession.

IN all cases where the execution of a judgment, in which the demand is of a thing *certain*, if the sheriff do this thing, he is not any *disseisor*. But where the execution is in the generality, without mentioning of any thing in *particular*, there the sheriff ought to make execution of the right thing, at his own peril, otherwise he shall be a disseisor; for he is bound to take notice of it. As if a man recover in assize divers houses, and after the tenant reverseth it in a *writ of error*, and a *writ of execution* issues to the sheriff, to put him in possession of the houses, which he had lost by the judgment, although the tenants are strangers to the recovery; and for this they ought not to be ousted without *scire facias* against them; yet if he do execution by putting them in possession by force of this writ, he shall not be any disseisor, for that he hath the direct authority of the court to do it, *Pasch.* 15. *Jac. Lloyd & Bethel.*

So in judgment for the casual ejector for seven houses, and an *habere facias possessionem* turns out these seven tenants, and eight other tenants, without any process or plea against them. *per curia*, we will not grant any writ to supersede the execution against the eight tenants; for if it should be, it ought to be *quia erronice*, and there was not any error in the proceeding against them, because there was not any proceedings. But they did advise, that every one should bring

bring treſpaſs againſt the ſheriff, 2 *Siderfin.* 155. So treſpaſs lies againſt the ſheriff, if he does not execute on the right places.

If the ſheriff do deliver more acres than are in a writ, this makes not the writ erroneous, but in ſuch caſe, action on the caſe lies againſt the ſheriff for doing it; or an aſſize againſt him that hath the poſſeſſion delivered to him for the ſurpluſage of the land. But if the writ of *habere facias poſſeſ.* to deliver poſſeſſion to the plaintiff, of lands recovered by him in ejectment, contains more acres of land than were in the declaration, the writ is erroneous. *Pract. Regiſt.* 131, 132.

If a man brings *ejectione firmæ* of forty acres of land, and recovers thirty, and not the reſidue, upon the writ of execution the ſheriff may deliver to him any three or more, in the name of all, without ſetting out the land in metes and bounds, although the plaintiff had not recovered all the acres, whereof he had brought his action, and whereof he had ſuppoſed the defendant tenant.

But if a man be to be put in poſſeſſion of divers meſſuages upon a writ of execution, and the houſes are in poſſeſſion of ſeveral men, he ought to go to every houſe particularly, and to deliver ſeiſin of it; for the delivery of ſeiſin of one, in the name of all is not ſufficient; for he ought to deliver *plenarium ſeiſinam, trin.* 15 *Jac. Floyd & Bethel's caſe.*

In *Formedon* on non-tenure of three meſſuages, the jury found he was tenant of one of the meſſuages, and not of the other, the plaintiff may have judgment, and a writ to the ſheriff to deliver ſeiſin; and the plaintiff at his peril is to ſhew to the ſheriff what meſſuage it was the jury did intend; for the jury is not tied to ſet bounds to it. *Cro. El.* 256. *Scriven & Prince.*

Upon *habere facias poſſeſſionem* the ſheriff returned, That in execution of the ſaid writ he came to the houſe recovered, and removed out all the perſons he could find, and delivered to the plaintiff poſſeſſion, and departed; and ſoon after three perſons ſecretly lodged in the houſe, expelled the plaintiff: On notice whereof he returned again to the houſe, to put the plaintiff in full poſſeſſion, but the others reſiſted him, ſo that without peril of his life he could not do it. 1 *Leon. p.* 145. *Upton & Wells.* On this return the court awarded a new execution.

A writ of *habere facias poſſeſſionem* was directed to the ſheriff; a *writ of error* was brought, and a *ſuperſedeas* granted, directed to the ſheriff to ſtay execution: and the *ſuperſedeas* was ſhewed to the ſheriff as he was going to do execution, yet he refuſed to obey it, and did execution notwithſtanding. This is a great contempt in a ſheriff, and the court ordered a writ of *reſtitution* to be granted. 2 *Bulſt.* 194. *Thomas & Owen.*

N. B. The ſheriff in caſes where land is recovered, is to put the party in poſſeſſion and ſeiſin by a twig, clod, &c. of an houſe by a key, &c. of rent by corn or graſs growing on the land, out of which the rent iſſues. 6 *Rep.* 52.

It is no good return, that another is tenant of the land by right, or that he has nothing in the land.

Seiſin

Seisin of the land in one vill, in the name of all the land in three vills, is good.

A return of a *fieri facias.*

BY *virtue of the within writ, I have caused to be made of the goods and chattels of the within named* A. B. *the within named* two hundred pounds, *the which* two hundred pounds, *I have ready at the time and place within contained, to render unto the within named* C. D. *as within I am commanded.* J. S. Vice Com'.

A return of a *scire facias.*

BY *virtue of the within writ to me directed, by* A. B. *and* C. D. *good and lawful men of my bailiwick, I have made known unto* J. S. *That he be before his majesty's justices,* &c. *at the time and place within written, to,* &c. *as within I am commanded.* J. S. Vice Com'

A return of a *habere facias possessionem.*

BY *virtue of the within writ to me directed (such a day and year within written) I have caused the within named* A. B. *to have possession of his within written term of, and in, the tenements within written, with the appurtenances, as I am within commanded.*

J. S. Vice Com'.

A return of a *habere facias seisinam.*

BY *virtue of the within writ to me directed, I do hereby make known unto the within justices, That (such a day and year within written) I have caused the within named* A. B. *to have full seisin of one messuage with the appurtenances in* M. *within named, in all things as by the said writ I am commanded.* J. T. Vice Com'.

The sheriff makes his warrant to a bailiff, to take the body of, &c. upon a *capias satisfaciend,* and before the warrant executed, the sheriff receives a *supersedeas,* and the bailiff having notice, proceeds; yet the arrest is not lawful, but the bailiff is excusable in trespass. *Moore p.* 677. *Prince & Allington.*

Of E L E G I T S.

ELEGIT is a judicial writ, given by the statute *W.* 2. *cap.* 18. either upon a recovery for debt or damage, or upon a recognizance in any court. By this writ the sheriff shall deliver to the plaintiff: *omnia catalla debitoris (exceptis bobus & aratris carucæ) mediatatem terrarum,* and this must be done by inquest taken by the sheriff, for the valuation of the goods and lands ought to be first found by the inquisition of a jury. *W.* 2. *cap.* 18. gives the *elegit:* so that in *elegit* the sheriff may take in execution the money of the lands of the conisor, &c. and all his goods and chattels, (except as aforesaid) and was to deliver them to the conisee, or he who recovers

covers, upon a reasonable extent or price, until the debt be satisfied; and the sheriff shall deliver him the seisin of the land, and he is called *tenant by elegit*, and shall do no waste. 4 *Rep.* 47.

The *elegit*, as to goods, is in effect but a *fieri facias*; and therefore if there be no lands, and execution be upon goods, and they are not sufficient, he may have a *capias*, *aliter* if lands be extended.

As to what things may be extended, or not, you must know, That all goods and chattels, in which are included leases for years, shall be extended (except oxen and beasts of the plow) the moiety of the lands.

Rent seck, where there is not any reversion, cannot be delivered *ut liberum tenementum*.

Annuity certain is extendable by *elegit*, *Cro. Jac.* 78.

Lands in *ancient demesne* may be delivered in execution by the sheriff, by force of an *elegit* out of the king's court.

If lands descend to an infant, the sheriff may cease to extend.

A lessee had a lease to the value of *One Hundred Pounds*, and after the teste of the *elegit*, and before the sheriff had executed the *elegit*, assigns his term to one, who assigns over to the plaintiff in the *scire facias*; and afterwards the sheriff executes the *elegit*, and delivers lease to the plaintiff *tenend. &c.* for the satisfaction of the debt, which came to but 43 *l.* *Per cur.* The sheriff could not deliver the lease at another value than what the jury had found it at. And the sale made by the sheriff is as strong as if it had been made in open market, and all the goods and chattels are bound after the *teste* of the *elegit*, and cannot be sold by the owner after. 1 *Brownlow* 38. *Conyers & Brandling.*

Upon *elegit* there needs no *liberate*. *Aliter* upon a *statute*.

In every *elegit* the sheriff must return, and set out the monies distinctly, unless they be tenants in common, and in that case he must return the special matter.

On inquisition of a lease, which is but a chattel, the sheriff may sell it as goods; but if he extends it, there shall be no other benefit than as of a common extent.

Two persons recovered severally against one in debt; he who had the first judgment sued first an *elegit*, and had the moiety of the land delivered in execution; afterwards the other sued the *elegit*, and the sheriff prayed the advice of the court. *Per Cur.* He shall deliver the moiety of that money which he had at the time of the writ awarded. *Cro. Eliz.* 482. *Huit & Cogan.*

Actual possession ought not to be delivered on *elegit*, the sheriff ought only to deliver seizure, to enable the plaintiff to maintain an ejectment, and the tenant may plead on the ejectment; else the tenant wou'd be turned out unheard, and be remediless; yet if actual possession be delivered, it is remediless. 3 *Keb.* 243. *Jefferson & Dawson.*

In *Elegit* the Sheriff ought to deliver the moiety by metes and bounds. *Hutton. p.* 16.

Upon *Elegit* the sheriff ought to return the extent, and also that he hath delivered the lands.

Elegit

Elegit needs not to be returned: Therefore if the sheriff by force of an *Elegit*, delivers to the party the moiety of the lands of the defendant, and does not return the writ; if now the plaintiff will bring action of debt, *de Novo*, the defendant may plead in bar the execution aforesaid, though the writ of execution was not returned. *Earl of Lieceſter's caſe*, 1 *Leon. p.* 280.

The sheriff returns upon *Elegit*, that the party had not any lands, but only within the liberty of St. *Alban's*, and that *J. R.* bailiff there, hath the execution and return of all writs, who enquired and returned an extent by inquisition, and that the bailiff delivered the moiety to the party, and the plaintiff by virtue of the extent entered. *Per cur.* 1. The bailiff may make such inquisition by warrant from the sheriff. 2. When a jury by the inquisition find the seisin and value of the land, the jury shall extend all the land; and the bailiff in a franchize, and the sheriff where there is none, shall deliver the moieties, and not the jury. *Cro. Car.* 317. *Sparrow and Matterſoch.*

On an *Elegit*, averring no goods were seized, it hath been held, no *ſcire facias* lieth; but upon a *Fieri facias*, bare seizure is an execution. 2 *Keb.* 789. 821. *Smith and Mildmay.*

An extent upon a *ſtatute merchant*. The plaintiff put the coniſee in poſſeſſion of parcel of a house and lands, and suffered the coniſor to continue in the rest of the house; by reason whereof the coniſor kept the poſſeſſion of the whole, and held the coniſee out. The coniſee, to the intent he might have a full and perfect poſſeſſion of the whole, caused the sheriff that he did not return the writ of *extent*, on which it is entered on the roll, *Quod Vicecomes nihil inde fecit nec miſit breve:* An *Alias breve extendi facias* may well be awarded. And the sheriff, cannot return, that the land was formerly extended by the old sheriff, because by the entry upon the roll it appears, that no execution was done; but if the entry be not, the same is an execution for the party, tho' it be not returned. 2 *Leon.* 12. *N.* 20. *Coleſhill and Haſtings.*

If more than a moiety be delivered upon the *Elegit*, 'tis for the whole. *Siderf. p.* 91.

The Sheriff may extend or sell a lease, and this sale shall bind the king. because but a chattel, and no coven in case. 8 *Rep. Sir George Fleetwood's caſe.*

Where the sheriff extends a manor by the name of acres, land, meadow, woods, no advowson passeth.

If one extends a *ſtatute ſtaple* at the suit of *A.* the sheriff extends the lands, and takes the goods, and seizeth them into the hands of the king; but does not make livery; and after a *writ of prerogative* of the king issues out of the exchequer, and commands the sheriff to levy the king's debt of *B. viz. One Hundred Pounds*, of the goods of the debtor; and if he had not sufficient, then to extend the lands; and this is delivered to the sheriff after the first *writ of extent*, but that was not returned. The sheriff ought in this case to execute the *extent* for the king's debt, because the property of the goods

and

and lands were not in *A.* before they were delivered to him by *liberate*; and the goods being seized into the hands of the king for the use of the party, were privileged from all other executions but that of the king. 2 *Roll. Ab.* 158. *Dyer* 67.

Where the officer without any warrant or authority, shall levy any duty for the king, and after shall account for the same in the exchequer, or otherwise pay the same to the king's use, there the officer seemeth chargeable but as a trespasser; but if he shall convert the same to his own proper use, it is felony.

N. B. When lands are extended and the debtor in prison, the creditor out of the profits of the lands is to find the debtor bread and water in prison.

By virtue of the writ on the *statute merchant*, the sheriff may deliver the lands and goods presently, upon the *extent*, to the party. But by the writ on the *statute staple*, or recognizance in the nature of it, he is to extend the lands and goods, and to seize them into the hands of the king; but not to deliver them to the party without a *liberate*.

The proceedings in a *statute merchant*, is a *capias*, and if the sheriff thereupon return a *cepi corpus*, then he shall remain in prison a quarter of a year, within which time he may sell his goods and lands to pay his debts, and this by the express words of the *statute* of 15 *H.* 7. *c.* 16. But if the sheriff return, *non est inventus*, execution shall be granted of his lands and goods.

But in a *statute staple* and recognizance, the first process is to take his body, lands and goods, all in one writ, which is a more speedy remedy than the *statute merchant*.

Now on a *statute staple* and recognizance, the writ of execution upon the return of the conisor dead, is to extend the lands, *nec non catalla*, which were of the conisor at the time of his death: And this is the constant course, as appears by the records of *extents*, which are in the rolls.

On *extent* of a *statute merchant*, the sheriff returns, That the body cannot be found, and that he had extended the lands, and delivered them to the plaintiff. *Reg.* 146.

Extent on a *statute merchant* issued out against *R.* the conisor, the sheriff returned, That the conisor, was possest of divers goods, and seized of lands, which he delivered to the conisee, and that the conisee accepted the land. But because the sheriff did not return, That he had not any other lands, goods or chattels, it was adjudged insufficient, and a new writ awarded; though some held it was well enough in the case of a conisor, but not in the case of a purchaser. 1 *Brownl.* 37. *Fletcher and Robinson.* If the conisor be returned dead, execution shall be granted against the executor, without *scire facias* to have execution of his goods, so against the heir and tertenants.

If the sheriff does not return the *capias*, or return *tarde*, or that he directed it to a bailiff of a franchise, he shall be punished, and yield damages to the party grieved, according to the *statute de Mercatoribus*. *W.* 2. *c.* 39.

The

Two Inquisitions taken at several days by several juries, upon one *statute merchant*, were adjudged naught. One was taken of the lands, the other for the lands and goods. 1 *Brownl.* 38.

If another had these lands in execution by *Elegit*, or is in by descent; in such cases the sheriff shall return the special matter, *i. e.* In the first case, That he hath extended the land of the defendant, but he cannot deliver the same to the plaintiff, for that another had the same in *extent* before.

The sheriff having an *extent* upon a *statute*, may gather the goods all into one place, to be viewed and appraised by the jurors, and he is not a trespasser. *Mo.* 563.

Of returns on Scire Facias.

SCIRE FACIAS is a judicial writ directed to the sheriff, *&c.* and is usually to warn a man to come and shew cause to the court, why execution of a judgment shall not be done.

Conisor in a recognizance dies, *scire facias* goes against his executors and heirs of his land, *&c.* The sheriff returns, That he had no executor, *& scire feci W. H. Filio & Hæredi predict. M. (le conisor)* This return agrees not with the writ, yet it may be good. 3 *Rep.* 15. *Sir William Herbert's case.*

Scire Facias on a recognizance in chancery against *D.* who was returned dead: Then a second *scire facias* issued against the heir of *D.* and against the tenants of the land of *D.* which he had *tempore recognitionis, vel postea.* The sheriff returned *D.* tertenant, and omitted to return any thing against the heir. This is a non-return of the sheriff, and not a mis-return, and is not aided by any of the statutes.

The tenant without the heir ought not to be charged: Therefore the heir ought to be summoned; for the heir may have a release to plead, or other matter to bar the execution. Or if the heir be within age, the parol shall demur, and the tertenant shall have the advantage thereof: And a new *scire facias* issued *ad informand. Curiam*, and the return was, That he had not any lands in his bailiwick that descended to his heir, nor any heir within his bailiwick, and good enough; though it had been better if he had returned who was heir, and that he was warned, or that there was not any heir within the said county. *Cro. Car.* 295. *Eyer & Taunton.*

The writ commands the sheriff to give notice to the tenants of the land in fee-simple, and the sheriff returns not, *That those which he had returned were tenants of the land in fee-simple*; and so the words of the writ are not answered. 1 *Brownl. Rep.* 145, 146.

The sheriff may return twenty-four tertenants of the whole, and every tenant may plead in discharge of himself, or he may return, That each is tertenant of so many acres.

Of

Of Rescous, *and in what case action lies against the sheriff for a* Rescous.

IF in the arresting, the party is rescued being on execution or mean process, no action for this lies against the sheriff. And if the prisoner be arrested on mean process, and as he is bringing to the gaol is rescued, no action lies against the sheriff, for the sheriff cannot be supposed to have the *posse comitatus* upon every mean process; *aliter* if it be upon execution, there *caveat vicecomes.* But if he be arrested upon mean process, and brought to the gaol, then its no good return for him to say, *The gaol was broken, and he was taken away from him.*

The rescuer shall be doubly punished by the king, and by the party, or sheriff; he shall be fined to the king, and attachment shall issue out against him; and the party shall have a writ of *rescous* against him, and so shall the sheriff too. 2 *Keb.* 340. *Hopping's case. Cro. Car.* 109. *Myn and Coughton's case.*

No *rescous* can be on a *scire facias* for goods, but in such case the party shall have action on the case. And a rescous lies only upon a *capias*, which lies against the person, for which *Vide Cro. Car. Sly & Finch's* case; which is as follows:

Scire facias was brought against *Finch* sheriff of *Glocester*, for that the plaintiff having brought a *fieri facias* directed to *Finch*, he returned, That he had taken goods into his hands to the value of *seventy two pounds*, and had sold as much of them as amounted to *eleven pounds*, and the residue remained *pro defectu emptorum*, till such a day, at which time he putting them to sale, they were rescued from him. Upon which return the *scire facias* was brought to shew cause why the remaining debt shall not be levied on his goods. To this the defendant demurs. All agreed that the return is not good. And *per Curiam* he is chargeable by this return. If he had returned only, *quod remanent pro defectu emptorum*, therein he had done his office; and in such case, on the election of a new sheriff, a writ shall issue to sell the goods, and to deliver the money to the new sheriff. But when he saith further, That they were rescued out of his hands, therein he hath misdemeaned himself. And by *Dodderige*, the sheriff hath charged himself by this return, as well in regard of his misdemeanor, as also that he hath his remedy against the rescousers; nor can the court award a writ of *venditioni exponas*, because it's against his own return.

By *Hutton*, upon mean process the sheriff never had remedy for the rescous, but he shall return the rescous. And upon execution he shall not return the rescous, but have an action, and the party is not prejudiced; for he shall have an action against the sheriff, though in point of law the party is liable.

Of ESCAPES.

ESCAPE is, where one man that is arrested, or imprisoned on the arrest, comes to his liberty before he is delivered by order of law.

If a man in execution be suffered to go at large out of the county, or within the county, or within the town where the prison is, and though it be upon bail, it is an escape; for he ought to be kept *in arctâ custodia. Plowd.* 36. *b. Plat's case.*

If a sheriff remove prisoners without command, for ease, delight or benefit of them, it is an escape. To suffer a prisoner to walk in the town, though with a keeper, it is an escape, unless it be by a *habeas corpus* from a court of justice.

Upon this point of the prisoners going at large, there is a diversity to be well heeded, *viz.* Between one in *execution*, and one only taken by a *capias*; for when the sheriff is commanded by writ to have the body at *Westminster* such a day, he may be keeper of him in another county, or in what place he please.

But if one in execution at the suit of the king, or of a common person, and by the licence of the lord chancellor or treasurer, be suffered to go into the country with a keeper, to gather money, the sooner to pay the king; this is an escape; for the king himself cannot license a man in execution to go so at large. *Dyer* 12 & 13 *Eliz.* 297.

If one be in execution at the suit of the king in the *Fleet*, the warden may suffer him to go to his council with his keeper, but not so in the case of a common person.

A man is in execution for debt, and a woman being warden of the *Fleet*, marries the prisoner: This is an escape, for that he cannot be his own prisoner, nor a prisoner to his wife.

It was referred by the king to the judges. *Trin.* 12 *Car.* 1. Whether in regard of the plague, *habeas corpora* may be granted for the prisoners in execution, in the prisons of the *king's bench* and *Fleet*, upon judgment in the *king's bench* and *exchequer?* And it was certified by them to the lord keeper, That if upon *habeas corpus* granted, to gaoler suffers the prisoners to go at large, that this is an escape, and that no *habeas corpus* ought to be by law for that purpose. Which the king well approved of.

The sheriff delivers a prisoner upon a void *audita querila*. This is no escape, and there the prisoner may be taken again in execution. But if a *scire facias* had in it the words of *audita querila*, it's against law, and is an escape. *Mo.* 344. *N.* 479. *Collin's case.* 1 *Roll Rep.* 383.

If a man recover against *Baron* and *Feme*, and take both in execution, and the wife is suffered to escape; though the husband continues in prison, yet debt lies in this escape against the sheriff; in which all the debt shall be recovered. 2 *Bulst.* 320. 1 *Roll. Abr.* 810.

But if the sheriff takes a man in execution, as on a *capias ad satisfaciend*, and he is rescued before he brings him into prison, tho' he returns the rescous, yet this shall not excuse him, for that he is to take the *posse comitatus*, and the party cannot have a new execution. *Proby & Lumly.*

If the prison be broken by the king's enemies, this shall excuse the sheriff from escape, for the gaoler could not resist them; and he

he can have no remedy over. But if a priſon be broken by rebels and traitors within the realm, ſo as the priſoners eſcape, this ſhall not excuſe the eſcape; for the gaoler may have his remedy over.

But if priſoners eſcape by ſudden fire, this ſhall excuſe the ſheriff, for it is the act of god. *Dyer Pl.* 66.

If a man upon a *capias ad ſatisfaciend*, be taken in execution, and after reſcues himſelf from the ſheriff, and eſcapes, the plaintiff may have a new *capias* againſt him, and take him again, the firſt writ not being returned or filed, nor any record made of the award; and this on a *ſcire facias* after a year; becauſe he ſhall not take advantage of his own wrong. 1 *Roll. Abr.* 904. *Mounſon & Clayton.*

So if one in execution eſcape, and the ſheriff makes freſh purſuit after him, and takes him again, although it be a long time after and in another county, yet he ſhall be in execution, becauſe he ſhall not take advantage of his own wrong.

A priſoner eſcapes, the gaoler makes freſh purſuit, and before he hath taken him the priſoner dies: This is the act of God; and yet becauſe it was once an eſcape, the action of eſcape lies againſt the gaoler. *Peph. p.* 186.

Upon eſcape, the ſheriff may not in freſh purſuit, enter into the houſe of *J. N.* and break the cheſt of *J. D.* to ſearch for the priſoner. 2 *Roll Abridg.* 564.

All priſoners are ſuch, either by matter of record or matter of fact.

By matter of record, when one preſent in court is committed to priſon by the court. There, if the gaoler have him not ready, it's an eſcape without more enquiry (unleſs he has reaſonable excuſe) and the judges will ſet the fines preſently.

By matter of fact a man is a priſoner when he is arreſted by the ſheriff, bailiff, conſtable, *&c.* and eſcapes, there the jury ought to find it, and preſent it before the juſtices, and then the juſtices aſſeſs the fine.

Upon a *capias* for felony, the ſheriff returns *cepi corpus*, and hath not the body at the day, the ſheriff was amerced *fifty pounds* for the eſcape,

By ſome it is felony in the ſheriff to ſuffer a priſoner to eſcape, *Vid. ſtat. de frang. priſonam.* If the gaoler ſuffer the eſcape, it's felony in him, and a forfeiture of his office. 6 *H.* 7. 11. 10 *H.* 7.

If a priſoner in the gaol attempts to eſcape, and having broke his irons, ſtrike the gaoler (coming in the night to his priſoner) and the gaoler ſlayeth him, it is no felony. 22 *Aſſ.* 35.

The ſtat. 4 *Ed.* 1. *de frang. priſonam*, mitigates the rigour of the common law; for before that ſtatute, the breaking of priſon was felony in every caſe; but now it is not felony, but where the party was committed to priſon for felony. 2 *Leon. p.* 161. *Holcroſ's caſe.*

What acts of the sheriff shall amount to false imprisonment.

IF a bailiff arrest one after the writ is returned, false imprisonment lies.

A precept to arrest from an illegal court, will not save an officer from an action of false imprisonment. *Hob. p.* 61.

Trespass, *&c.* will not lie against the sheriff for executing process, though it was erroneous.

Sheriff asks another if his name be *J. H.*? He says, yes: On which he arrests him by a warrant which he had to arrest *J. H.* yet false imprisonment lies, if he be not the right person. *Mo.* 457.

One had a *capias ad satisfaciend*, delivered to the sheriff, who made a warrant to his bailiff to do execution. Afterwards a *supersedeas* was awarded, and delivered by the sheriff, the defendant being his bailiff, who escaped, and the defendant re-took him, and detained him in execution. The second is a false imprisonment: For although the first imprisonment was legal (he having taken him by virtue of a warrant made before the *supersedeas* awarded and delivered) he not having notice of a *supersedeas*, was excusable. But the detainment in prison was afterwards a wrong. For he being the sheriff's servant, and by intendment having time given him sufficient to have notice from his master, ought at his peril to take notice thereof. *Cro. El.* 918.

If a man be in the hands of the under-sheriff in execution for debt, and the debtee tells the sheriff, That the prisoner has satisfied him: If the sheriff release not the prisoner, it's false imprisonment, as in the case reported in *Bulst.* 3. 96, 97. *viz.*

A. in execution at the suit of *B.* afterwards *B.* comes to the sheriff, and tells him, He had made and sealed a release of the debt to the prisoner, and that therefore he should deliver him out of execution. The sheriff does not so, but keeps him still in prison. *B.* brings action of false imprisonment. It lies.

By *Coke*, detinure after this by the space of one hour, is false imprisonment.

Remedy against SHERIFFS, &c.

IF the sheriff in his court quash an *essoyn* erroneously, without the consent of the suitors, action on the case lies against him. 26 *Assize* 45.

If a *distringas* issues to the sheriff to distrain the defendant in the action, by all his lands and chattels, *&c.* and the sheriff returns *Too small issues*, although an averment lies by the stat. *W.* 2. *c.* 44. yet the plaintiff may well have his action on the case against the sheriff, because it appears by the words of the statute, that this is a false return. The statute ordains, that the King shall have the issues, but restrains not any remedy that the plaintiff had at common law. 3. *Car.* 1.

If

If the ſheriff embezzle an *exigent* delivered to him at my ſuit, action on the caſe lies *tam pro Dom. Rege, quam pro meipſo*, 14 *aſſize* 12.

Action on the caſe lies againſt the ſheriff, for that he levied ſuch a ſum of money in a *fieri facias*, at the ſuit of the plaintiff, and brought not the money into court at the day of the return.

It may not be improper here to inſert a bail-bond, and an aſſignment of it by the ſheriff to the plaintiff, purſuant to the ſtatute 4 & 5 *Ann.*

The form of a *Bail-Bond* to the ſheriff.

KNOW *all men by theſe preſents, that we* C. D. *of, &c.* E. F. *of, &c. and* J. D. *are held and firmly bound to* G. H. *Eſq; ſheriff of the county aforeſaid, in* Forty Pounds *of good and lawful money of* Great Britain, *to be paid to the ſaid ſheriff, or to his certain Attorney, his Executors, Adminiſtrators, or Aſſigns; for which payment to be well and truly made, we bind ourſelves, and every of us by himſelf for and in the whole, our Heirs, Executors, and Adminiſtrators, and of every of us, firmly by theſe preſents, ſealed with our ſeals. Dated the---Day of &c. in the year of the reign of our Lord* George *the third, by the Grace of GOD, of* Great Britain, France, *and* Ireland, *King, Defender of the Faith, &c. the third, and in the year of our Lord* 1764.

THE *condition of this obligation is ſuch, that if the above-bound* C. D. *do appear before the Juſtices of our Lord the King at* Weſtminſter, *on the day,* &c. *to anſwer unto* A. B. *Gentleman, of a plea of treſpaſs, and alſo in a plea of debt for* Twenty Pounds *upon demand, then this preſent obligation to be void and of none effect, or elſe to ſtand and remain in full force and virtue.*

Form of the ſheriff's *aſſignment* thereon.

KNOW *all men by theſe preſents, that I* G. H. *Eſq; the Sheriff within named, do hereby for myſelf, my Executors, and Adminiſtrators, aſſign and ſet over unto* A. B. *(the plaintiff named in the condition of the within written bond) his executors and adminiſtrators, the within mentioned bond, purſuant to an act of parliament for the amendment of the law, and the better advancement of juſtice.* In witneſs *whereof I have hereunto ſet my hand and ſeal, this day of,* &c. *in the year of our Lord one thouſand ſeven hundred and ſixty-four.*

The ſheriff's office about partition.

TO execute a writ of Partition, the High Sheriff muſt be upon the land in perſon; and if exception be taken at the bar before the writ be returned and filed, a new writ ſhall be awarded; but if the ſheriff in ſuch caſe returneth, *that he was there in proper perſon*, and this return be received, and the writ filed, the party cannot aver againſt the return, nor ſhall have error. *Cro. El.* 9. *Clay*'s caſe.

The

The office of a goaler, amd concerning eſcapes.

HAVING *here before in this treatiſe upon ſeveral emergencies, occaſion to mention the goalers and keepers of priſons, and the houſes of correction, which as they be neceſſary officers in the commonwealth, ſo is their office full of danger and trouble: For the keepers of Goals give great ſecurity to the ſheriff for his indemnity, for that he is in law charged with all ſuch priſoners committed to his charge. To the end therefore that ſuch as are of a mild and gentle nature may not be abuſed, and may know what they may lawfully do; and that ſuch as are of a more rigid and cruel nature may likewiſe know what they ought not to do: I think it convenient to ſay ſomewhat more (though it will not be much) concerning their duty and office; which is,*

FIRST, that they muſt receive all offenders ſent unto them by *Mittimus*, or other warrant from any of the Juſtices of the Peace of the county, or brought unto them by any conſtable or other known officer, but from any other they are not bound to receive them, nor take them in charge.

But when they have any perſon in actual poſſeſſion, they ſhall be anſwerable for their eſcapes, according to the quality of the offence.

And Mr. *Dalton* tells us, that the Lord Chief Juſtice *Popham* did cauſe one *Staver* (a Goaler at *Cambridge*) to be indicted, arraigned, and hang'd, for an eſcape of a felon ſuffered by him.

But we muſt preſume that this was ſome notorious felon, and that the offence was very capital, and that the eſcape was voluntary, otherwiſe the judgment had been over ſevere, for let a Goaler do what he can, and uſe all poſſible induſtry that can be required or imagined; yet ſuch art may be uſed by a priſoner, and ſuch helps and aſſiſtances may be given him, that he may make an eſcape tho' he be laden with irons, which may be taken off by devices.

This difference therefore is made, *viz.* If the eſcape were by default (which we call a negligent eſcape) the judges and juſtices, &c. may charge the goaler, if they will, or the ſheriff upon the ſtatute. 14 *Ed.* 3. *cap.* 9. and the judges do in theſe caſes make as favourable an expoſition as with conveniency and ſafety they may.

Or elſe voluntary, which two ſorts of eſcapes are thus differenced and defined.

A negligent eſcape, according to Mr. *Stamford*, in his pleas of the Crown, *fol.* 33. is when the party arreſted or impriſoned doth eſcape againſt the will of him that arreſted or impriſoned him, and is not freſhly purſued and taken again before he hath loſt the ſight of him which eſcaped, the penalty whereof ſeemeth to be only a fine at the diſcretion of the judges or juſtices,

And the ſame learned man makes this difference, that if the eſcape be of a priſoner attainted, the fine ſhall be *one hundred pounds*; but if only indicted, *one hundred ſhillings*, and where taken upon ſuſpicion only, ſeems diſpenſable.

A voluntary eſcape is where one doth arreſt, or hath impriſoned another for felony or other offence, and afterwards voluntarily let him go at liberty where he will.

And if the eſcape be willful in the goaler (which is felony in him) the ſheriff ſhall not be bound to anſwer to the felony, but may be fined to the value of his goods, *Stamf. pl. Coron.*

And in caſe of voluntary eſcape, if the arreſt or impriſonment were for *Treaſon*, it ſhall be adjudged treaſon in him, which did voluntarily ſuffer the priſoner to eſcape, and if it were *Felony*, then it ſhall be adjudged felony; and if for *Treſpaſs*, it ſhall be adjudged treſpaſs.

In caſe of treſpaſs or other offences whatſoever (being under treaſon or felony) there is no difference whether the eſcape ſuffered by the officer be voluntary or negligent, but that the officer in both caſes ſhall be fined for the eſcape according to the default, by the diſcretion of thoſe that be judges thereof.

Queen *Elizabeth* pardoned one who killed another; the wife of the man ſlain ſuing an appeal, was detained in priſon at her ſuit; the goaler after ſuffers the man ſlayer voluntarily to go at large, and he made an eſcape, which in Mr. *Plowden* that famous Lawyer, his opinion was, felony in the goaler, though he was no felon as to the Queen, in regard of his pardon from the Queen.

This I believe is a caſe known to few goalers, in regard whereof I thought good to ſet it down, that knowing it, they may be the more circumſpect when ſuch a caſe ſhall happen. *Plowd.* 147.

If a man be wounded, and the ſtriker is voluntarily let go at large by the goaler, and after death enſueth to the perſon hurt, yet this is no felonious eſcape in the goaler. 11 *H.* 4. *ca.* 12.

The voluntary ſuffering him to eſcape who hath killed another, *ſe defendendo*, or by miſadventure, or of him that hath committed petty larceny, ſeemeth to be no felony; for that theſe offences are not felony of death, but he that ſuffereth the eſcape ſhall be fined. *Cromp.* 39. yet there is a quere, for they that ſuffered, are not a judge whether it be felony or not.

If a juſtice of peace ſhall ſend for a felon out of the goal, and ſhall deliver him without bail, this ſeemeth to be a voluntary eſcape, and ſo felony in the juſtice.

If the juſtice of peace or ſheriff ſhall bail one who is not bailable, this is an eſcape in law.

And if one be brought before a juſtice of peace for ſuſpicion of felony, and confeſs it, and yet he ſhall ſuffer the priſoner to go at large without bail, this is a voluntary eſcape in the juſtice.

If a goaler by *dures* of impriſonment and pain, enforce his priſoner to become an *Approver* (that is an accuſer of others as helpers with him in the felony) this is felony in the goaler, although the *Appellee*, or party accuſed, be acquit, or ſhall die before he be arreſted upon the appeal.

If

If a goaler ſhall only procure his priſoner to accuſe another of felony, this is felony, 18 *Ed.* 3. yet the ſtatute *Ed.* 3. ſeemeth to extend only where the goaler ſhall do this by great *dures*, or pain.

And if a priſoner by *dures* of the goaler, cometh to an untimely death, this is murder in the goaler; and the law implieth malice in reſpect of the cruelty: and for this cauſe if any man dieth in priſon, the Coroner ought to ſit upon his body, to enquire whether his death came by the *dures* of the goaler. *Briton, Ca.* 11. *de Priſons, fol.* 18.

If it ſhall be further demanded, how priſoners for treaſon or any other offence ought to be uſed in priſon, the learned *Bracton* will tell you: That laying men in chains, was againſt the law; for that a *Priſon* was a place to keep, not to to puniſh priſoners. *Lib.* 3. *fol* 154.

And in another place he ſaith, when a priſoner is to be brought before a judge, he ought not to be brought manacled, tho' ſometimes for fear of eſcaping, they be ſhackled. And *Briton* ſaith, If felons come in judgement to anſwer, they ſhall be out of Irons, and all manner of bonds, ſo that their pains ſhall not take away any manner of reaſon, nor them conſtrain to anſwer, but at their free will. *Cap.* 5. *fol.* 14.

And *Fleta* ſaith, That albeit it be lawful for the ſheriff to keep offenders in priſon, yet not to puniſh them, but to keep them.

And the *Mirror* ſaith, It is an abuſe that priſoners be charged with Irons, or put to any pain before they be attainted. *Ca.* 8. *ſect.* 1.

And whereas in the eighth year of the reign of *Ed.* 2. a precedent is brought, that a prieſt was arraigned and put himſelf upon his country, and ſtood at the bar in irons, but by command of the judge, he was freed from his irons. Sir *Ed. Coke*, who voucheth it, ſaith, There is no difference in law between a prieſt and a layman, as to irons, and thereupon concludes,

That where the law requires that a priſoner ſhould be kept in *ſalva & arcta cuſtodia*, yet that that muſt be without pain or torment to the priſoner.

And Sir *Ed. Coke* (who cites theſe opinions in the concluſion of his diſcourſe of petty treaſon) ſaith, That it is againſt *Magna Charta ca.* 29.

And that all the ancient authors are againſt pain or torment to be inflicted upon the priſoner before his attainder, nor after, but according to the judgment, and that there is no opinion in the law-books, or any judicial record, for the maintenance of tortures or torments.

But how theſe opinions will ſecure a gaoler againſt his priſoners (who will venture hard for their liberty rather than lie in a ſtrait priſon) becauſe I cannot determine, muſt be left to their diſcretion, who muſt anſwer for their eſcapes.

The

The Office and Duty of the Clerk of Assize and Clerk of the Peace:

SHEWING,

The Manner and Form of Proceedings at the Assizes and General Goal-Delivery, and at the Court of General Quarter-Sessions of the Peace.

WHEN the judges set out for any county, to hold the assize, the sheriff sends his bailiff to the edge of the county, to bring them the best way to the place where the assize is to be held; and before they come there, the sheriff with his under-sheriff and bailiffs, with their white staves, and his livery-men with their halberts in their hands, and attended with the chief of the gentry of the county, do wait upon the judges at the usual places, and conduct them to their lodgings at the town where the assizes are appointed to be held. When the judges have reposed themselves at their lodgings, the sheriffs and bailiffs with their white staves, and livery-men with their halberts, two by two, wait on the judges to church, where the minister reads prayers, &c. and from thence to the usual place, where the assizes or general goal-delivery are held.

When the court is set, the clerk of assize must make three proclamations, and cause the cryer to say as follows, *viz.*

O yes, O yes, O yes, my lord the king's justices do strictly charge and command all manner of persons to keep silence, and hear the king's majesty's commission of assize and nisi prius, *openly read, upon pain of imprisonment.*

Which being read, the clerk must say, *God save the king*, and the cryer with a loud voice repeat it after the clerk.

Then the clerk delivers a roll of all the justices of the peace to the judge, and then causes the cryer to make proclamation and say, *All justices of the peace for this county of* H. *answer to your names at the first call, and save your fines.*

Then the clerk must name them as they are returned in the calender.

When the justices are all called, the clerk shall cause the cryer to make proclamation and say, *All sheriffs and coroners of our sovereign lord the king, within this county of* H. *answer to your names as you shall be called, every man at the first call, and save your fines.*

Then the clerk shall cause the cryer to call the chief constables, petty constables, &c. which being done, the clerk must cause the cryer to make proclamation and say, *All justices of the peace, sheriffs, coroners and other officers, that have taken any inquisition or recognizances, whereby*

whereby you have let any man to bail, put in your records thereof forthwith, that my lords the king's juſtices may proceed thereon.

Then the gaoler muſt give the clerk of aſſize an account what priſoners have been bailed by any juſtices of the peace after they were committed, that the clerk may call the juſtices that bailed them for their recognizance.

Then muſt the clerk cauſe the cryer to make another proclamation, and ſay,

You good men that be returned to enquire for our ſovereign lord the king, and the body of this county of H. *anſwer to your names, every man at the firſt call, and ſave your fines.*

If there do not appear enough to make up a jury, then muſt the clerk call them over again, *A. B.* gent. (the cryer repeating the ſame after him) and if he do not appear, the ſheriff or his bailiff certifying the court, upon oath, that he was ſummoned, and no reaſonable excuſe appearing to the court, he muſt be fined. But if any reaſonable excuſe appear to the court, the clerk ſhall mark him, *ſpared.*

If it ſo happen, that a full jury do not appear at the ſecond call, the ſheriff muſt return ſome of the freeholders of the ſame county, that are preſent, or ſuch as he ſhall meet with.

Note, There ought to be at leaſt thirteen upon a grand jury, that there may be a caſting vote, and there is commonly fifteen, ſeventeen, nineteen, and ſo from that number to twenty three.

Then the grand jury muſt be called in order, every man by his name, and addition, as they are returned. When the jury is full, the clerk ſhall ſwear them after this manner: The foreman by himſelf muſt lay his right hand on the book, and the clerk ſhall give him the oath, as followeth, *viz.*

You, as foreman of this inqueſt, for the body of this county of H. *ſhall diligently enquire, and true preſentment make, of all ſuch matters and things as ſhall be given you in charge. The king's counſel, your fellows and your own you ſhall keep ſecret; you ſhall preſent no man for hatred, envy or malice, neither ſhall you leave any man unpreſented for love, fear, favour or affection, or hope of reward; but you ſhall preſent things truly, as they come to your knowledge, according to the beſt of your underſtanding.* So help you God.

The reſt of the grand jury, by three at a time, in order, are ſworn as followeth:

The ſame oath which your foreman hath promiſed to obſerve and keep on his part, you, and every one of you do promiſe to obſerve and keep on your parts. So help you God.

When the grand jury are all thus ſworn, then the clerk doth ſay to the cryer, *count theſe.* And as the clerk doth name them, the cryer ſhall count them. Which being done, the clerk ſhall ſay, *Good men and true, ſtand together and hear your charge.*

Then the clerk ſhall direct the cryer to make proclamation and ſay, *The king's juſtices do ſtraitly charge and command all manner of perſons to keep Silence whilſt the charge is in giving to the grand jury, upon pain of impriſonment.*

Then

Then the chief justice gives the charge to the jury.

Whilst the charge is giving, the clerk shall file the recognizances and figure them in order to prosecute, and those to answer upon another file, and the informations and examinations upon another File.

When the charge is given, two constables are ordered to attend upon the grand jury.

Then the clerk shall order the cryer to make another proclamation, and say, *All manner of persons that are bound by recognizance to prosecute and prefer any bills of indictment against any prisoners, or others, let them come forth and prosecute, or else they shall forfeit their recognizances.*

When any persons are to give evidence to the grand jury, the clerk shall swear them after this manner.

The evidence which you shall give to the grand inquest, shall be the truth, the whole truth, and nothing but the truth. So help you God.

And if upon the evidence given the grand jury have cause to find an indictment, they write on the back side thereof, *a true bill*; but if they have not sufficient evidence to find the indictment, they write on the back side thereof, *Ignoramus.*

When the court rises, the clerk directs the cryer to make three proclamations, and say, *All manner of persons that have appeared here this day before the king's justices, at these assizes and general gaol-delivery, may take their ease at present, and attend here again at two o'clock in the afternoon* (or to-morrow in the forenoon). And then he says, *God save the king.*

When the court sits in the afternoon (or the next morning) the clerk shall cause the cryer to make three proclamations, and call the court after this manner.

All manner of persons, who are adjourned over to this hour, and have any thing here to do before my lords the king's justices of assize and general goal-delivery, let them now draw near and give their attendance, and they shall be heard.

Then (if the court see cause) they send for the grand jury; and when they appear, the clerk shall call them by their names, and then ask them, if they be agreed of any bills of indictments, or presentments? If they say *yea*, the clerk shall bid them present them to the court, and upon the delivery of them, the clerk shall say, *These indictments or presentments, you do find, and are content the court shall put the presentments into form, altering no matter of substance?* Then the grand jury shall say, *yea*: And so they shall go together again. Then the clerk out of respect to them, shall bid the constables to *make way for the gentlemen of the grand inquest.*

Then the cryer makes proclamation again, and shall say, *My lords the king's justices do straitly charge and command all persons to keep silence, for now they will proceed to the pleas of the crown, and the arraignment of prisoners upon life and death. And all persons that are bound by recognizance to give evidence against any prisoners that shall be at the bar, draw near and give your evidence, upon pain of forfeiting your recognizances.*

If

If any prisoners be let to bail, and not in prison, then the clerk shall cause the crier to call him in this manner.

A. B. *of the parish of* C. *labourer, come forth, save thee and thy bail, or else thou forfeitest thy recognizance.* If he appears not, then call the sureties on this manner; D. E. *and* E. F. *bring forth* A. B. *whom you undertook to have here this day, or else you forfeit your recognizance.*

If he appears not, then the clerk passeth by that indictment, and calleth to the goaler to set forth the prisoner named in the next indictment. And when he is at the bar, the clerk saith unto him,

A. B. *hold up thy hand.* Which done, he then shall say, *Thou standest here indicted by the name of* A. B. *of,* &c. *for that thou,* &c. (And so read all the indictment) and then ask him, *What sayest thou? Art thou guilty of this felony whereof thou standest indicted, or not guilty?* If he saith, *Not-guilty,* the clerk shall say, *Culprest,* and then shall ask him, *How wilt thou be tried?* If he say, *By God and the country,* the clerk shall say, *God send thee a good deliverance*; and shall write in the indictment, *po. se.*

If the prisoner upon his arraignment shall confess his fact, the clerk shall write over his head in the indictment (*cogn.*) and so he is set by till the time of giving judgment.

And if the prisoner upon his arraignment will not confess the felony, whereof he stands indicted, nor plead *not guilty* thereunto, but stand mute; or otherwise will plead such matter, as shall be no direct answer to the offence: in these cases he shall be put to his pennance for contemning of the law, and refusing the ordinary trial devised by the law, and the clerk shall write over his head in the indictment, *stat mutus,* and he must be set by till judgment be given, unless he will plead in the mean time, *guilty,* or else put himself upon his country.

Upon the prisoners pleading *not guilty,* and putting himself upon the country, the cryer, by direction of the clerk, shall call the petty jury thus:

You good men that are returned to enquire between our Sovereign Lord the King, and the prisoner at the bar, answer to your names, every man at the first call, upon pain and peril that shall fall thereon.

And then he shall call every one of them in order by his name.

The jury appearing, the clerk says, *You the prisoner at the bar, hear what is said unto you: these good men that were last called, and do now appear, are those that shall pass between our Sovereign Lord the king, and you, upon your life and death. If therefore thou wilt challenge them, or any of them, thou mayst challenge them as they come to the book to be sworn, before they are sworn, and thou shalt be heard.*

If the prisoner be arraigned for *high-treason,* he may challenge peremptorily, in favour of his life, thirty five, without shewing cause; but if he be arraigned for *petit-treason, murder, felony,* he cannot challenge peremtorily above twenty; but if he shall challenge above twenty, and under thirty-six, he shall not forfeit his goods and chattels.

Then

Then the clerk ſhall direct the cryer to make proclamation, and ſay,

If any man can inform the king's juſtices, or the king's attorney, or this inqueſt now to be taken, between our ſovereign lord the king and the priſoner at the bar, of any treaſon, murder, felony or other miſdemeanor, committed or done by the priſoner at the bar, let them come forth and they ſhall be heard; for the priſoner ſtands now at the bar upon his deliverence. And all others that are bound by recognizances to give any evidence againſt the priſoner at the bar, let them come forth and give their evidence, or elſe they forfeit their recognizances.

Then muſt the clerk call the jury to be ſworn, every man ſeverally, and bid every one look upon the priſoner and ſwear them ſeverally on this manner:

You ſhall well and truly try, and true deliverence make, between our ſovereign lord the king, and the priſoner at the bar, whom you have in charge, and a true verdict ſhall give according to your evidence. So help you God.

When all are ſworn, the clerk ſhall ſay to the cryer, *count theſe*; and then he calls every one of the jury over by their names, and the cryer counts them. That done, the clerk muſt aſk them, *If they be all ſworn?* If they ſay, *yea*; then he muſt call to the priſoner, and bid him, *hold up his hand*; and then ſay to the jury, *look upon the priſoner, you that be ſworn, and hearken to his cauſe. You ſhall underſtand, that he ſtands indicted by the name of* A. B. &c. (as in the indictment) *for that he*, &c. (and reads the indictment.) That done, the clerk ſhall ſay, *Upon this indictment he hath been arraigned, and upon his arraignment he hath pleaded* not guilty, *and upon his trial he hath put himſelf upon God and the country, which country you are: So that your charge is to enquire, whether he be guilty of this felony whereof he ſtands indicted, or not guilty. If you find him guilty, you ſhall enquire what lands, tenements, goods or chattels he had at the time of the felony committed, or at any time ſince. If you find him* not-guilty, *then you ſhall enquire if he did fly for it, or not: If you find that he did fly for it, then you ſhall enquire what goods and chattels he had at the time that he did ſo fly for it, or at any time ſince. If you find him not guilty, nor that he did fly for it, you ſhall ſay ſo, and no more. And hear your evidence.*

Then muſt the clerk direct the cryer to call the witneſſes. That being done, and the witneſſes for the king do appear, the clerk ſhall bid them lay their right hands upon the book, and give them this oath, *viz.*

The evidence that you, and every of you, ſhall give to this inqueſt againſt A. B. *the priſoner at the bar, ſhall be the truth, the whole truth, and nothing but the truth.* So help you God.

When all the witneſſes for the king have been heard, then if the priſoner deſires, that any witneſſes ſhall be heard for him, they muſt be called alſo, but they ſhall ſpeak without oath, unleſs the fact be under felony, or that ſome ſtatute direct the ſame.

After

After the jury have heard their evidence, and the judge has ſummed up the ſame to them, the clerk ſhall ſwear a conſtable in this manner:

You ſhall well and truly keep every perſon ſworn of this jury together, in ſome convenient room, without meat, drink, fire, candle or lodging; and you ſhall not ſuffer any perſon whatſoever to ſpeak to them, or any of them; neither ſhall you your ſelf ſpeak to them, until ſuch time as they be agreed of their verdict, unleſs it be to aſk them, if they be agreed of their verdict. So help you God.

Then the conſtable attends the jury to ſome convenient place, where they may conſult of their verdict, and continue at the door till they be all agreed.

When they have agreed on their verdict, they return to the court, and the clerk calls them over by their names, and aſks them, *If they be all agreed of their verdict?* If they ſay, *Yea*; he aſks, *Who ſhall ſay for them?* they ſay, *the foreman.* Then he calls the priſoner to the bar, and bids him hold up his hand. Then he ſays to the jury, *look upon the priſoner, you that be ſworn; what ſay you, is he guilty of the felony whereof he now ſtands indicted, or not guilty?* If they ſay, *guilty*, then the clerk aſks them, what lands or tenements, goods or chattels, he had at the time of the felony committed, or at any time ſince: If the jury find any, then the goods muſt be recorded. But their common anſwer is, *none to our knowledge.* Then the *clerk* ſaith, *look to him, gaoler.*

If the jury ſay, *not guilty*, then the clerk muſt ſay to the priſoner, *down upon your knees and ſay, God ſave the king and this honourable bench.*

When the clerk has entered their verdict, he muſt ſay to the Jury, *Gentlemen, hearken to your verdict as the court has recorded it.* And then reads it to them in this manner: *You ſay that* A. B. *is guilty of the felony whereof he ſtands indicted. And ſo you ſay all.*

When the judge is ready to give judgment, the clerk of aſſize cauſeth the goaler to ſet the priſoner found guilty at the bar, and ſaith unto him;

A. B. *Thou may'ſt remember, that before this thou haſt been indicted for this felony by thee done and committed: thou haſt been arraigned, and pleaded not guilty; and for thy tryal thou haſt put thyſelf upon God and thy country, which country hath found thee guilty; what canſt thou ſay for thy ſelf, why, according to the verdict paſs'd againſt thee, thou ſhouldeſt not have judgment to ſuffer death? What ſayeſt thou* A. B.

Then if he prays his clergy, and may have it by law, the ordinary muſt be called to ſhew him the book, and when he has ſhewed it to him, the clerk muſt ſay, *Legit ut clericus, vel non.* If the ordinary ſays, *Legit*, then the form of the entry muſt be, *et tradito ei libro, legit ut clericus*; and then muſt the priſoner be burned in the hand. But if the ordinary ſaith, *non legit ut clericus*, the priſoner muſt be executed.

The

The Court are the proper judges of the criminal's reading. *Shaw, Vol.* 1. 191.

Memorand. That all indictments upon riots, trespasses and other misdemeanours, under the degree of felony, must be tried after the felons. And those that are found guilty, the judge imposeth a fine upon them, or other punishment, as he findeth the nature of the offence.

If a woman be indicted and arraigned of felony, it is no plea for her to say, she is with child; but she must plead to the indictment, *guilty*, or *not guilty*. And if she be found guilty, then she may alledge that she is with child. And then the clerk of assize may order the sheriff to return an inquest of twelve women before the justices. And when the sheriff hath returned them, the clerk shall call over their names, and when they all appear, he shall swear them severally after this manner:

You, as Fore-Matron of this jury, shall swear, that you will search and try the prisoner at the bar, whether she be quick with child, of a quick child, and thereof a true verdict shall return, according to the best of your judgment. So help you God.

Then shall he give to the rest of them (every one by herself) this oath:

The same oath that your fore-matron hath taken on her part, you shall also take and observe on your part. So help you good,

When they are all sworn, the constable shall convey the jury and prisoner to a chamber. where they shall search and try if she be quick with child, *&c.*

When they have agreed upon their verdict, they shall return to the court, and deliver in their verdict in the same manner as is before related.

If they find that the prisoner is quick with child of a quick child, then execution shall be stayed till she be delivered; but if they find that she is not quick with child of a quick child, she shall be hanged presently, for it will not avail her to be young with child.

Then the clerk shall direct the gaoler to set those prisoners only to the bar who are to die; that done he shall cause the cryer to make proclamation, and say,

My lord the king's justices do straitly charge and command all manner of persons to keep silence, while they prooceed to give judgement against the prisoner at the bar.

Judgment being given, and other trials over, and the judge having heard such grievances as are complained of unto him, concerning misdemeanors and the like, the cryer maketh three proclamations to adjourn the assizes, and saith,

All manner of persons, that have here appeared before the king's justices at these assizes and general gaol delivery for this county of H. *may depart at present, and attend at, &c.* God save the king.

Note, The proceedings on the *nisi prius* are the same with the proceedings at the court of assize, only the words *nisi prius* must be added; as for example, in calling the jury, *You good men of the* nisi prius, *summoned to appear here this day*, &c.

The

The court of General Quarter-Seſſions *of the* Peace *is held after the ſame manner as the* Aſſizes, *only altering the term.*

THE juſtices of the ſaid court of quarter ſeſſions of the peace are to hear and determine by jury, or otherwiſe, according to their power, of cauſes within their commiſſion, and the ſtatutes referred to their charge.

The court being ſet, the clerk ſhall cauſe the cryer to make proclamation, and ſay,

Hiis majeſty's juſtices of the peace do ſtraitly charge and command all manner of perſons to keep ſilence, and hear his majeſty's commiſſion of the peace openly read, upon pain of impriſonment.

Then the clerk ſhall cauſe proclamation to be made three times *viz.*

All manner of perſons that will ſue or complain, or have any thing here to do at this court of general quarter-ſeſſions, holden here this day, before his Majeſty's juſtices of the peace for this county of H. *draw near and give your attendance, and you ſhall be heard.*

Then he ſhall cauſe another proclamation to be made, *viz.*

A. B. *high-ſheriff of the county of* H. *return the precepts and other proceſs to you directed and delivered, returnable here this day, that his Majeſty's juſtices of the peace may proceed thereon.*

Then he ſhall make another proclamation, and call the conſtables by their names, to anſwer at the firſt call, and ſave their fines.

Then the clerk ſhall cauſe another proclamation to be made, and ſay,

All juſtices of peace, and other officers, who have any inquiſitions, or recognizances, whereby you have let any perſons to bail, or taken any examinations, or other things, ſince the laſt ſeſſions, put in your records thereof; that the King's juſtices of the peace may proceed thereon.

Then he ſhall make another proclamation, *viz.*

You good men that be returned to enquire for our Sovereign Lord the King, and the body of this county of H. *anſwer to your names, every man at the firſt call, and ſave your fines.*

When the grand jury is full, he ſhall cauſe the foreman to lay his right hand on the book, and take the oath as in p. 506.

When the jury is ſworn, the clerk ſhall cauſe proclamation to be made, and ſay,

His Majeſty's juſtices of the peace do ſtraitly charge and command all manner of perſons to keep ſilence whilſt the charge is giving, upon pain of impriſonment.

The charge given by the judge of the court many times varies, according to the circumſtance of the county where the court is held.

Then muſt the clerk direct the cryer to make proclamation, and ſay,

All manner of perſons that be bound over by recognizance to proſecute or prefer any bill of indictment againſt any perſon or perſons, before his majeſty's juſtices of the peace. let them come forth and proſecute, or elſe they ſhall forfeit their recognizances.

Whe

When any evidence appears, he shall in presence of the court lay his hand on the bible, and the clerk shall swear him in this manner:

The evidence which you shall give to the grand inquest shall be the truth, the whole truth, and nothing but the truth. So help you God.

Then shall the clerk proceed in the same manner as is directed in page 507.

When any persons are discharged upon their appearance upon process, the clerk of the peace shall forthwith put such persons out of process and enter their names in his book, and shew the same to the court, before another process shall be called.

When all processes be discharged, then the traverses shall follow next in course.

When the parties do appear who stand indicted of *trespasses, mayhems, batteries, riots, routs, conversions,* and the like offences, the party indicted shall not hold up his hand at the bar, but the clerk shall call the person indicted, and when he appears, shall say unto him.

Thou standest here indicted by the name of F. E. *in the parish of* G. *in this county, labourer, for that thou,* &c. (and so read the indictment) And then shall ask him, *What sayest thou? art thou guilty of this trespass whereof thou standest indicted, or not guilty?*

If he shall say, *not guilty,* and shall traverse the indictment, then he shall enter into recognizance to prosecute his traverse at the next quarter-sessions; which recognizance shall be taken after this manner:

F. E. *Thou dost acknowledge thy self indebted unto our sovereign lord the king in the sum of,* &c. *to be levied of thy lands and tenements, of thy goods and chattels, and this upon condition, that thou shalt appear at the next general quarter sessions of the peace, to be holden before his majesty's justices of the peace for this county, and shalt then and there prosecute thy traverse, which is taken, with effect; and shall not depart the Court without licence.*

But if the party will not confess the offence whereof he stands indicted, or will not plead *guilty,* or will plead such matters as shall be no answer to the indictment, judgment shall be entered against him, according to the usual course used in actions at Common Law.

Note, That the party indicted may, by his counsel. before plea pleaded, take exceptions to the insufficiency of his indictment; and if the court shall quash the same for *error,* the clerk of the peace ought forthwith to indorse the cause of the *error,* wherefore the indictment was quashed, on the back-side thereof; but if the court shall see cause when the indictment is quashed, they may give order that a new indictment be drawn against the offender.

Then the clerk shall call the parties bound by recognizance to prosecute their traverse; and if any of them do not appear, then the cryer shall call him thrice, and say,

A. B. *come forth and profecute thy traverſe with effect or elſe thou forfeiteſt thy recognizance.*

Then the clerk ſhall cauſe the cryer to call the profecutor three times, in this manner:

D. L. *come forth and profecute thy indictment againſt* A. M. *and thou ſhalt be heard.*

If the profecutor do not appear to profecute his indictment, and affidavit be made in court that he had timely notice of the tryal, the jury ſhall be ſworn, and the clerk ſhall charge them with the indictment, concluding thus:

That to this indictment he hath pleaded not-guilty, *and for his tryal has put himſelf upon his country, which country you are: And none appearing to prove the fact againſt him, unleſs you do know upon your own knowledge, that* A. B. *is guilty of the matter of fact charged in the indictment, you ſhall find him* not-guilty.

And upon ſuch verdict the court ſhall diſcharge him. But if the profecutor do appear, the clerk ſhall cauſe the cryer to call the jury in this wiſe:

You good men that be returned to enquire and try this iſſue of traverſe between our ſovereign lord the king and A. M. *anſwer to your names at the firſt call, upon pain and peril that ſhall fall thereon.*

When the jury is full, the clerk ſhall ſay, *A. M. look to your challenges.*

Then he ſhall ſwear the jury, every man ſingly by himſelf, laying his right hand on the book, thus:

You ſhall well and truly try the iſſue of traverſe between our ſovereign lord the king, and A. M. *for a treſpaſs whereof he ſtands indicted, according to your evidence.* So help you God.

When all the jury is ſworn, the clerk ſhall read their names, and the cryer ſhall count them. Then he ſhall aſk them, *If they be all ſworn?* if they ſay, *yea,* he ſhall bid them, *ſtand together and hear their charge.*

Then the clerk cauſes the cryer to make proclamation in this manner:

If any perſon can inform his majeſty's juſtices of the peace, the king's attorney, or this inqueſt now to be taken, of any treſpaſs or other miſdemeanor acted or committed by A. M. *come forth and give your evidence, or elſe he ſhall be diſcharged.*

Then the clerk ſhall read the indictment, and charge the jury as the indictment is, what they are to enquire. Then ſhall the indictment be opened by counſel, and the witneſſes called to prove the matter of fact, which witneſſes ſhall be ſworn by the clerk after this manner:

The evidence which you ſhall give to this inqueſt againſt A. M. *ſhall be the truth, the whole truth, and nothing but the truth.* So help you God.

In all tryals the counſel of the profecutor ſhall conclude the evidence, and the judge of the court ſhall give the directions to the jury. Then ſhall the jury depart to ſome convenient place to agree upon

upon their verdict, with a conſtable, to whom the clerk ſhall adminiſter this oath, *viz.*

You ſhall well and truly keep every perſon ſworn of this inqueſt, together in ſome private room, without meat, drink, candle or lodging; and you ſhall not ſuffer any perſon whatſoever to ſpeak to them, or any of them; neither ſhall you yourſelf ſpeak to them, until they have agreed on their verdict, unleſs it be to aſk them, whether they have agreed of their verdict. So help you god.

When they have agreed on their verdict, and returned into court to deliver the ſame, the clerk ſhall call them ſeverally by their names, and aſk them, *if they have agreed on their verdict?* if they ſay, *yea*, then he ſhall ſay, *who ſhall ſay for you?* if they anſwer, *our foreman*, then he ſhall ſay to the jury,

What ſay you? is A. M. *guilty of the treſpaſs, or riot, or rout,* &c. *whereof he ſtands indicted, or not-guilty?*

If they ſay, *guilty*, or if they ſay, *not-guilty*, then the clerk ſhall record the verdict, and then ſay to the jury, *hearken to the verdict as the court has recorded it.*

And then he ſhall repeat it in this manner: *you ſay that* A. M. *is guilty of the riot, treſpaſs,* &c. *whereof he ſtands indicted: and ſo you ſay all.*

When a perſon has entered into recognizance for the appearance of another, if the delinquent do not appear, the clerk ſhall cauſe the cryer to call them in this wiſe:

A. M. *of the pariſh of* ------ *Cordwainer, come forth, ſave thee and thy bail, or elſe thou forfeiteſt thy recognizance.*

But if the delinquent do appear upon the recognizance, then the clerk ſhall enter a *comparuit*, and then call the proſecutor thus:

D. E. *come forth and proſecute the peace againſt* A. M. *or elſe he ſhall be diſcharged.*

And if the proſecutor doth not appear after he hath been thrice called, the delinquent ſhall be diſcharged of courſe.

If a perſon be bound to appear, or bound to his good behaviour for a certain time, and during that time do keep the peace towards the king and his people, then proclamation ſhall be made in open court in this manner:

If any perſon can ſhew any lawful cauſe why the peace granted againſt J. B. *ſhall be continued, let him come forth, and he ſhall be heard, for he ſtands upon his diſcharge.*

And if none come to proſecute, he ſhall be diſcharged.

When the juſtices proceed to give judgment upon offenders, the clerk ſhall cauſe proclamation to be made, and ſay,

"His majeſty's juſtices of the peace do ſtraitly charge and com-"mand all manner of perſons to keep ſilence while they proceed to "give judgment againſt the priſoners at the bar."

Note, That every judgment which ſhall be given, and every fine which ſhall be aſſeſſed, ought to be openly pronounced and declared

by the court, to the end it may advance the more good to the prince in profit, to the juſtices in credit, and to the people in example.

When the juſtices have heard all ſuch grievances as are complained of unto them concerning miſdemeanors, and the like, the cryer ſhall make three proclamations, and adjourn the ſeſſions, ſaying,

"All manner of perſons that have any thing more to do at this quarter-ſeſſions of the peace, holden before his majeſty's juſtices of "the peace for the county of *H.* may depart hence at this time, "and keep their day again here at-----

GOD ſave the KING.

A GUIDE TO JURIES.

To all honeſt JURY-MEN.

GENTLEMEN,

IN *a word*, you *are* England's Ephori *and* Tribuni: *The boundaries of* prerogative *and* privilege, *and the living bulwark of the Laws. Your* Honour *is eclipſed, and unaccountably* § *ſhrunk. The* office *yet is great: Here's demonſtrated the great privilege you be, that it may be ſeen how much all* Engliſh-men *ought, in intereſt, to value and encourage you. Here's ſet forth* what *and how you may do, and* what *and* how *you may not do, under what penalties: Alſo the hiſtory of the whole. The king is graciouſly pleaſed to declare,* He will govern by law: *It's fit you ſhould know how to govern yourſelves according to law. This is conciſe, and a breviate, rather than a book. It's chiefly about criminal cauſes, where the king's name is uſed for that of the plaintiff, becauſe moſt difficult and greateſt concern: But is ſerviceable and ſufficient for others too.*

§ Learned Dr. *Cowel*, in word *jury*, ſpeaks of *juries* being (in his own words) *aſſeſſors and aſſiſtants to the judges of the court* (anciently) *in a kind of equality; whereas now* a-days, ſaith he, *they attend them in great humility*, &c. Citing alſo *Lamb. & Cuſt.* of *Normandy* agreeing with them.

IT is one of the miſerable follies of depraved human nature, that it commonly ſlights preſent enjoyments, and rarely rates the good things it poſſeſſes at their true value, till 'tis depriv'd of them: This grand privilege of trials *per pais*, by our country, that is, by JURIES, as it ſeems to have been as ancient as the Government, or firſt form of policy in *Great Britain*; for it was not unknown to the ancient *Britains* (as appears by their books and monuments of antiquity) practi'd by the *Saxons* [See king *Ethelred*'s laws in *Lambert*, p. 218. and *Coke*, 1 part Inſt. fol. 155.] and confirmed ſince the invaſion of the *Normans*, by *magna charta*, and continual uſage; ſo it is a thing in the higheſt moment, and an eſſential felicity to all *Engliſh* ſubjects. For, look abroad in *France*, *Spain*, *Italy*, or, indeed, almoſt where you will, and obſerve the miſerable condition of the inhabitants, either entirely ſubjected to the arbitrary luſts of tyrants, who plunder, diſmember, or ſlay them, according as the humour takes them, and many times without the leaſt provocation, meerly for ſport, and to gratify a ſavage cruelty; or at beſt, you will behold them under ſuch laws, as render their lives, liberties and eſtates, liable to be diſpoſed of, at the diſcretion of ſtrangers appointed their judges, moſt times mercenary, and creatures of prerogative; ſometimes malicious and oppreſſive, and too often partial and corrupt. Or ſuppoſe them never ſo juſt and upright, yet ſtill has the ſubject no ſecurity againſt ſubornation.

tions, and the attacks of malicious, false, and unconscionable witnesses: yea, when there is no sufficient evidence, on meer suspicions, they are obnoxious to the tortures of the rack, which often make an innocent man confess himself guilty, meerly to get out of present pain: Or if he do with invincible courage endure the question, as they call those torments, he is many times so spoiled in his limbs, as he scarce ever is his own man again.

Whereas such has been the goodness of God, and prudent care of our ancestors, that to our inestimable happiness, we were born, and live under a mild and righteous constitution, where all these mischiefs may be prevented; where none can be legally condemned, either by the power of superior enemies, or the rashness or ill-will of any judge, nor by the bold affirmations of profligate evidence.

Of what date juries be, is the same to say, as when was *England* first inhabited, altogether uncertain. But that their antiquity here in *England* runs to and beyond the *Norman* conquest, among the *Danes*, the *Saxons*, and the *Britains*, is most certain.

The *Saxons* conquering the *Britains*, mixed their customs with the *British*, so the *Danes* those *British* and *Saxon* ones with theirs, and the *Normans* all these with theirs; every conquerer making some alteration. Yet this law was, and from time to time hath been preserved and continued an inheritance indisputable and sacred unto us through all revolutions, without any interruption.

None but must acknowledge this of all others, the best and most effectual way to find out truth. There is no other way or art in the whole world, says *Fortescue*, so remote from all danger of subornation and corruption. p. 75.

Aaron had, it's true, in plain letters of gold, *Urim* and *Thummim*, wrote on his breast, signifying what he either had, or ought to have had, viz. "ability in parts, and integrity in practice." But have always all other judges since had such parts and practices? Their interests, ambition, pleasures, or other passions and frailties influenced them too much, rather sufficient enough to render them, as the prophet *Isaiah*, c. 33. v. 15. says, *Idols with eyes, ears and mouths*, viz. *Such as would neither hear the people's complaints, regard the oppressed, nor pronounce a just judgment.* Judges having places and preferments so extraordinary honourable and profitable: And what's their tenure? Even during pleasure, a term for so long as they do nothing but what and as pleases, &c. and do every thing which and as does please, &c. And whose pleasure must it be? Truly every ones too, that any-how has or can make any interest, &c. Thus a short syllogism proclaims them little other than bond slaves to such men's pleasures, and menaces the people with the worst of all miseries, law-oppression, oppression under colour of law; unless it be conceiveable men's pleasures were to have the judges give sentence against them. Judges also were all lawyers we know, used just before to take fees, it's the more therefore to forget it now. Judges are concerned in so many causes, they are subject to be tempted the oftner, and every temptation is the greater, because they know, if they would yield, their gain might be so often. Judges are so few, it's plain they may the easier be corrupted. Judges cannot want courage, they think themselves liable to no action, &c. in any case, do what they will, but are absolutely dispunishable. *Co.* 12. 24, 25. *Hutton.* Whereas a jury on the other side, if it err, in many cases it's liable to an attaint, the greatest punishment they know on this side death. A jury consists of many persons. Those which be jury-men in one case, yet may be in few more. They be men of other professions, used never in any case to take fees, &c. They are not prejudiced with fear of losing their Offices, &c.

And

And to further manifeſt the difference of tryal by judges, and of this by juries, jury-men all are, and muſt be free of, and from all manner of bondage, obligations, affections, relations, paſſions, intereſts, and other prejudices whatſoever, (as indeed it is ill fiſning in muddy and troubled waters:) *legales*, one's peers or equals. *Mag. Ch. c.* 29. *Weſt.* 1. *c.* 6. Of full twenty-one years old, not outlawed, never attainted or convicted of treaſon, felony, falſe-verdict, perjury, any conſpiracy at king's ſuit, nor ever adjudged to the pillory, tumbrel, &c. whereby rendered infamous; nor any alien (unleſs an alien be tryed, &c.) But ſuch others as be moſt nigh, moſt ſufficient, and leaſt ſuſpicious. 28. *E.* 1. *c.* 9. *F. B. N.* 165. *Dy.* 59. 34 *E.* 3. *c.* 4. *Regiſt.* 177. 8. *E.* 3. 30.

They muſt be every one ſworn every ſeveral tryal, by a particular oath, If any of the grand jury be as aforeſaid, any wiſe amiſs, what they do is quaſhed and made void on bare motion to the court. If any of the petty jury happen ſo, the party by challenging of them, as they appear to be ſworn, either ſets aſide the *pannel*, viz. all of them, or may any of them, by taking exception to the poll, viz. to them ſeverally, as the caſe falls out; and peremptorily, without ſhewing any cauſe, may challenge and ſet aſide as many as he will, under thirty-ſix, in caſe of high-treaſon, or miſpriſion of high-treaſon; or under twenty-one, in caſe of any felony. And ſhewing any ſuch cauſe as aforeſaid, as many as he will, in any caſe whatſoever. *Co. L.* 156. Now they are ſuch elect and choice men, becauſe of the great truſt repoſed in them: and muſt be equals, that the defendant may the better ſpeak to, and expoſtulate with, or reflect upon them, if they do amiſs. And that they may not be over-awed, by his being greater than them; whereas greater things confound and aſtoniſh us, and things above us dazzle our eyes. Nor be careleſs or perfunctory for his being much leſs than them We are apt to ſlight things beneath us, as ſmall and contemptible, or inconſiderable. And muſt be of the neighbourhood, that coming from nigh where the queſtion ariſes, the defendant, in all probability, may have the better knowledge of them, to except againſt, or to approve of them; and ſuch may alſo the more likely know ſomewhat themſelves of the party, of the matter, of the credit of the witneſſes, and all circumſtances. *Co. L.* 78. Thus if the place happen diſputable, whence the jury ſhall come, they ſhall come from whence the matter is like beſt to be known, 21. *E.* 4. 8. Beſides, in this way of or by jury, where life or member is concerned, or in any danger, and in all other criminal cauſes, is required two tryals of the party before he can be ſaid guilty, or any judgment can be given againſt him: and the party muſt alſo be found to be guilty on both theſe trials, elſe all is nothing. The grand-jury muſt firſt examine the matter, and the petty-jury after examine all again, to prevent and ſecure againſt all ſurprizes of the party, and miſtakes or errors in the jury. And any thing now which any jury can be ſaid to do, muſt have the joint conſent of twelve, *Weſt.* 2. *c.* 13. elſe it's in conſtruction of law, not the doing of the jury, but of private perſons, and void. 6 *H.* 4. 2. 21 *E.* 3. The grand-jury conſiſts of more perſons commonly than twelve, but as aforeſaid twelve agreeing, it's enough, and ſo many of them muſt. So that by the law of juries twenty-four men in all, firſt and laſt, find one guilty, &c. before the judgment can be given, or one can be puniſhed for the fault one's accuſed of. And beſides, every man of the latter jury, even all the whole twelve, muſt all and every of them agree, and be of that one and only mind; (much to ſuſpect, unleſs one be certainly and plainly guilty. It's more for all twelve, than for twenty-nine out of thirty to agree.) Any of the grand-jury giving in a preſentment or indictment, without eleven more of the ſame mind, and agreeing with him, ought to

he

be imprisoned, 40. *Ass.* 10, which also for any one of the petty-jury to do none will deny but to be worse. A judge was hanged for giving judgment on the verdict of eleven jury-men, *Mir.* 296. But on the other side, the judges are not so many at a tryal scarce ever, the major part of them agreeing, it's enough; their tryal would be but one, or once only; they are never sworn at the trial, nor ever at all, but only once, and that exceeding generally; they cannot any of them be excepted against, or challenged (though anciently might) be they never so great strangers professed enemies and otherwise ill qualified, and though the king be party, yet he chooses them himself against one.

Besides, if judges had power of both determining the matter of fact, and also the matter of law, as must, if there were no juries, their latitude of erring, *&c.* must then be the greater, and their doing wrong or mischief might be the more, inasmuch as they might wrong one then in both the fact and law; and their encouragement so to do, would be improved, since then it must be harder to detect them, as whether erred in the fact, or in the law, or partly in both; like as it's easier seeking a bush than a wood: And as it's said, opportunity makes many a whore. But were judges presumed saints, and never so upright, *&c.* yet who can imagine but at a tryal, when witnesses are all examined, and evidence all given, the jury being so many persons, and probably knowing something of the matter before, they may all assisting one another, better observe, remember, and judge upon the whole matter, than any one or two, *&c.* others, though called judges? Certainly one may do more with help than without. So the proverb is, two to one is odds at foot-ball: And, the fewer may the more easily deceive, or be deceived. It's natural for man to err. None's without fault, and the surest foot may slip.

Vise. St. *Albans*, *Apb.* 8. says, That's the best law, which leaves the least to the arbitrariness of a judge; and *Bract.* 119. says, Judges represent the king's person, they are his officers, and act in his stead (and hence concludes) they ought not at all be concerned in causes of life or member, *&c.* (where the king is party) for, says he, The king is thus judge as it were in his own cause.

Thus appears what is the difference of judges and juries, and something of the reason why the parliament has all along been so zealous for trials by juries, as no fewer than fifty-eight several times since the *Norman* conquest, hath established and confirmed the tryal by juries; no one privilege else nigh so often remembred in parliament.

Now, for the power and authority of juries, and how the wisdom of the law hath entrusted and enabled them in this tryal. The law says, in trials, whether any complaints are made, or any matter is alleged to be true or not, the judges ought not, nor can say, nor have any thing at all to do therewith, but the jury only. All the whole, or most they can do, or at least ought, is only after and upon what the jury, or the parties themselves agree first to be true. What the jury does, is called, The telling only of what is the law. Thus it is, that every finding of the jury as their verdict, *&c.* must be positive, what the fact and party's intent, *&c.* was, and not saying only what their evidence is, that it was; for the judges can't even so far meddle with, or take conusance of the matter of fact, as but to say, then the fact, case, *&c.* is so and so, if you agree your evidence to be so and so, and accordingly give judgment. *Co.* 9. *Dowman's c. Co.* 10. As *A.* delivers *B.* goods, and after demands them again of *B.* but he refuses to deliver them again; if *A.* sues *B.* for finding these goods, and converting them to his own use; the judges will tell the jury, since *B.* refuses to re-deliver them, this is evidence enough

enough to find him guilty of converting them to his own use, &c. and is in law a conversion. But if the jury gave their verdict, &c. specially, as that *A.* delivered *B.* the goods, and after re-demanded them, but *B.* refused the delivering of them back, without saying positively *B.* converted them to his own use, or not saying generally, we find for the plaintiff, which is *tantamount*, the judges cannot say and judge *B.* guilty, &c. but must discharge him. So where in a tryal, fraud is pretended by one party done, &c. by the other, the judges will tell the jury, such and such parts of the evidence prove the fraud, or in construction of law are fraud. But if the jury give their verdict specially, that such and such things are true, (which the judges said prove the fraud) and not saying positively there was frand, the judges cannot say or judge fraud, nor take the least notice of any thing as such. In the case of *Roger Mortimer* in parliament, *Anno. . E.* 3. it was adjudged there, 28 *E.* 3. *p.* 10. that the matters he was accused of, tho' they were notorious, and known to them all in parliament, and all people else, yet they could not give judgment upon this, nor any time ought they to proceed on any knowledge of their own. One condemned of trespass in the common-pleas, the judges seeing him in court, and knowing him never so well, yet it was adjudged, if he deny himself to be the same person, they cannot say he is, and so cause him to be apprehended; because they cannot judge of any thing, nor take notice, but only of what is upon Record before them, 33 *H.* 6. 5c. Thus if *A* be indicted of stealing 5 *s.*‖ the jury may give a verdict, that he is guilty of stealing the *five shillings*, but only to the value of *ten-pence*; and the judges here cannot say, the *five shillings* were more worth or less, though never so apparent. King *Henry* the fourth asking judge *Gascoyn*, what if he saw *A.* kill *D.* and the jury will find not that *A.* killed *D.* but that *E.* did? He answered, I can only reprieve *E.* and then intercede with your majesty for his pardon. *Pl.* 83. The infamous *Empson* and *Dudley*, proceeding to judge as judges, of matters upon information by witnesses, &c. otherwise than by juries; this was one indelible blot in their escutcheon, though they had an act of parliament, 11 *H.* 7. *c.* 3. to warrant them in so doing: *Ander.* 1. 156. When a prisoner is arraigned, he says, he puts himself on God and his country, (neither of which are the judges) for his trial; which country is the jury. So it is manifest, juries have the sole power and conusance of the matter of fact, as whether a thing be true or not, &c. and the judges have at most only to do with matters of law.

‖ In *Henry* the third's time, 1 *s.* was as much as 40 *s.* now, and before then, more; yet the law was then, one must steal above the value of 1 *s.* to be guilty of felony: So that merciful juries now value by the ancient shilling, and save many not guilty of above the value of 40 *s.* present money.

Jury-men have also the determination of law, but with this difference from that of fact, that it's necessary they determine the matter of fact. But they may either refuse to meddle with any thing of law, and leave it to the judges, or at their election, may take upon them knowledge of the law, and determine both fact and law themselves. *Lit.* § 368. and so is every day's experience, whereof see more anon, speaking of general verdicts, and special verdicts. Only if a jury give a verdict, setting forth specially or particularly how the matter was, and then draw an ill conclusion as to the matter of law thereupon, the judges will judge against, and so make the judgment of the jury in the matter of law void. *Hob.* 53. As suppose *A.* be indicted of murdering *D.* the 10th of *Feb.* &c. and the jury give their verdict. that *A.* gave the wound at *E.* the 5th of *Feb.* and that *D.* died at *F.* the 10th of *Feb.* and conclude, that *A.* murdered *D.* at *E.*

E. or on the 5th of *Feb.* Now the law saying the murder was on, and at the place and time, when and where the party died, the judges will judge against the judgment of the jury, *Co.* 4, 42. So *Anno* 1654. in *B. R.* between the protector and *Somner*, the court said, the jury had concluded contrary to their premises, finding he had killed two men on the road, but calling it manslaughter, *se defendendo*, and so the judges ordered him to be tried again.

Thus we see, judges are unessential and needless in a trial by a jury, further than to assist it, by answering and informing what the law is, where difficulties arise, or at least the primitive constitution might be thus. Like as also yet they be in the house of lords, or when any trial is by the lords, but assistants only, when consulted, and no parties of or at the trial, &c. The very form of special verdicts to this day, looks as if it were so. As in murder, the jury find and give their verdict (first) how and in what manner particularly the fact was committed, and then say, but whether upon the whole matter aforesaid, the killing aforesaid of *J. S.* be murder, (in construction of law) the jury is ignorant, and therefore ask the advice of the court; and (further saying) if upon the whole matter aforesaid, it seem to the judges and court, that it is murder, then the jury on their oath, say, the said *J. N.* is guilty in manner and form as by the indictment against him is supposed. And if upon the whole matter, &c. it seem &c. that it is not murder, then, &c. *J. N.* is not guilty in manner, &c. *Co.* 9. 65. So all the judges do is but advice, tho' in matter of law; and it's the jury only that judges one guilty or not guilty of murder, &c. and whether it be murder, or what one is guilty of, by the advice and assistance only of the judges, without their being any wise any parties of or in giving such judgment. And the reason, and only reason, why it ever seems otherwise, may rise hence, that the judges of *Westminster-Hall* keep the said inferior courts to their due bounds, methods and order. And the lords keep the judges to theirs, when amongst them; but there's no body does in *Westminster-Hall.*

It perhaps may be pardonable in councellors, because for their fees, and not pretending authority: But why judges, though apt to indulge, improve, and extend their own power and jurisdiction, should offer to brow-beat, threaten, order, impose upon, or wheedle, flatter, tempt, insinuate with, or any wise lead, persuade, direct, incline or dispose juries, how to find their verdict, unless only directing them so far as juries require of them, it's hard to say. People daily rob, and so have done, on *Salisbury-Plain*, but it's ne'er the more lawful. Thus are judges trumpets, and juries the eccho, let who will blow. Thus are juries but an empty name: thus is turned topsy-turvy all the whole thing of juries. Thus might the judges draw, and ingross to themselves the whole power in the trial, and be in effect judges and juries too. Thus is the trial by juries a colour, a sham, and really no trial at all by jury. Was this allowable by law, we should never have had any; the having them would thus be only an unnecessary trouble, *&c.* whereas the law never sets up or requires any thing so vain or fruitless.

But some will say, the jury can do nothing, but on the evidence given in court, which the judges hear as well as the jury, and so may see the truth, and know how the verdict ought to be, as well as the jury, and consequently they may instruct, and assist the jury. It's true, they may be helpful, and they may assist, but however, it's no matter for their being as aforesaid, too officious. And besides, as aforesaid, that the jury is neigbours of the fact, of the party, of the witnesses, &c. but the judges strangers; and the jury be more persons, and the judges fewer, &c. The jury also is not bound up to the evidence only given in court, or that the judges

judges hear, but may go upon their own private knowledge. Suppose *A.* sues *B.* on a bond for *Ten pounds*, and *B.* pleads payment, but a trial proves nothing: the judges themselves say to the jury, you must find for *A.* unless you know the money is paid yourselves: which shews, the jury may find for *B.* if they know the money is paid, tho' the judges knew nothing of it. 4. *H.* 7. 29. So *Heb.* So if one be arraigned, and no witnesses produced against him, the court says the like, as was seen one *Hil. Features* term, 71, in *B. R. Bradly's* case, and by daily practice. They use their own knowledge besides, and often against the evidence in court. *Cro. El.* 616. *Crowe's* and *Short's* case. So in *Plowd.* 410, 411. So a great case adjudged in *B. R. Hill.* 21 *C.* 1. And another there, 21 *C.* 1. And so says *Staff.* If a jury know any thing themselves, it's as much as by evidence, 130. So *Plowden* says, a petty jury is sometimes bound to give their verdict, tho' they have no evidence. *f.* 12. Hence in all cases at common law, one witness is accepted of as sufficient; and doubtless any verdict is good, though in such cases, without any evidence given in court, because the jury is presumed to know somewhat of themselves. Whereas in all other countries in the world, where juries are not used and here when the trial is without a jury, there must be at least two, as hereafter shall be said more at large. *Moor* says, a jury-man delivered his companions a certain paper concerning the question out of court, yet the verdict was adjudged good. *case* 656. Besides, if it happen they have no other evidence but what the judges know as well as they, yet they ought by, and according to the true purport and meaning of their oaths, to proceed on it in their own sense, and as they apprehend or understand it themselves, and no otherwise, though the judges differ with them: else how can they discharge their conscience? And it often falls out, they may differ. No two lawyers, nay, judges, reading or hearing the very same cause, but presently make different inferences, deductions, collections, conclusions and arguments, yea, the same persons at different times; like as the philosophers hold our senses and sentiments as different as physiognomies. And why should *A.* impose his opinion on *B.* rather than *B.* on *A?* so of judges and juries. One cannot see by another's eyes. And this is certain, every thing any jury does, as a jury, is on oath, and they swear to be true by virtue of the oath first administred them. So that upon the whole, one may see a judge ought not to meddle at all with the jury: if he differ not with them, it's needless and troublesome; if he differ, they are not to mind him; take it which way one will.

But perhaps it will be urged, that this must be understood only as to trying matter of fact, and that however, as to matter of law, the jury ought always to be advised and governed by the judges, though not as to matter of fact: No, no further than a mannerly deference is payable to the judges, as more learned in the laws, for if the judges say, or any witnesses swear the law to be so and so, no jury is by law bound, or any wise obliged beyond their own reason, &c. at least to believe them in it, 9 *H.* 6. 38. *Finch* 58. If an attaint be brought against a jury, it's no excuse, that the verdict is according to the judge's directions. *Cro. El.* 309. 18.

Now says a timerous ignorant juror, *Oh! but whether the law be thus or not, the judges will punish the jury if they do not comply with them.* This sure would be pretty! A jury, perhaps forsworn, and liable to an attaint, if they do comply, and punishable if they do not: no, no, the law (which is nothing but improved and refined reason,) was never so unreasonable as to suffer this. *A.* levied a fine of lands to *D.* and *D.* paid *A* the purchase money: but after, *A.* said, he was then at levying the fine under the age of one and twenty years old, and therefore the fine was void. The law says, *the judges shall determine by looking on the party, whether he were*

were of full age or not, and the jury shall not; (the true reason being, that if the party seem of full age, though he be not, he shall not avoid the fine, to prevent cheating, &c. Whereas, if the jury were to try it, they must not go according to the seeming, but real true age, and so if he want but a day of one and twenty years, he must thus be adjudged under age, as much as if he wanted twenty years, and *D.* should be cheated.) This fine was after reversed by king's-bench, because *A.* did appear, and was also proved by four witnesses to be under age: but the validity of the fine coming afterwards to be disputed in common pleas, on a trial by jury, tho' the court told the jury, that notwithstanding some witnesses prove to you that *A.* was of full age at levying the fine, yet you ought not to heed them, for the judges have the sole and only power of determining whether of full age or not, and the judges of the king's bench have already determined it; nevertheless, the jury being somewhat extraordinary, and not so very leadable men, gave their verdict contrary to the direction of the court, and as if *A.* were then of full age: and an attaint being after brought against the jury, the jury was acquitted and commended, *Dy.* 201, & 301. And the jury is the more justifiable in it, since the judges first altered the law, in trying by witnesses, and not only by inspection, as juries also do, which in tryals by witnesses are, as aforesaid, the more competent, &c. Of this nature is a memorable case of *Bushel*, reported by lord chief justice *Vaughan*, where *Meade* and *Penne*, two quakers, were indicted at the *Old Bailey* for their meetings; and the jury whereof *Bushel* was the foreman, would not find them guilty: the court being mighty angry, fined and committed the jury, alledging for cause, that they, (the jurors) against the law of the realm, against full and manifest evidence, and against the direction of the court in matter of law, to them in court openly given and declared, had acquitted the said *Meade* and *Penne*: but upon long and serious debate, it was after adjudged, the committment, fining, &c. was unlawful, and accordingly the jury were discharged, &c. Another time also a juryman dissenting from all the rest, and that no less than two days, the judges asked him, *what he would do?* says he, *Rather starve and die in prison than consent*; the court fined and committed him; but on better consideration, discharged him without more ado: all the court can do, being only to (carry them in carts, if in the circuit, along with them and) keep them without meat, drink, &c. till they agree, 41 *Ass.* 11. says *Mir. jurors ought not to be threatned, but to be free, differing in opinion*, &c. 273 And it was resolved in parliament, *anno* 1677. *That the precedents and practice of fining, &c. juries, in or for giving their verdicts, are illegal.* And *Keeling*, chief justice of *B. R.* was called to question in parliament for such practices.

Coke upon *Lit. f.* 369. says, *If any labour a jury, instruct them, or put them in fear, or the like, it's punishable, as maintenance or embracery, either at the king's suit, or the parties*; and perhaps, it would puzzle one to shew, why a judge is not within this law; for how can he be said to do this as a judge, when to do so is no part of his office? And why should any usage alter the case here, any more than in other cases of breaking the laws? it's much too, any judge should offer such a thing, considering he that judges without a jury, certainly judges without authority: and he that judges with a jury, but governed or led by him, judges only by colour of a jury, and by colour of authority; and thus makes himself forsworn in and by the oath taken at his being created judge; makes all the jury forsworn; violates the greatest privilege of the subject; infringes the most often confirmed law of the kingdom; and also does particularly the party offended, the greatest wrong imaginable; in as much as by colour of law, he makes all the jury accessaries to the whole.

Hence

Hence it's improbable any judge shoulst offer the contrary: but however, a jury in any indictment, presentment, or information, ought, and may give their verdict, &c. according to their own conscience, without any fear of punishment one way or other.

And in any other case, as where the king is no party, but an attaint happens to lie, they may be punished no other way. Also no punishment whatever lies for or against a jury, which consists of above twelve men, 24 *H.* 7. 13. Nor does attaint ever lie where the witnesses are not on oath, or for going against what any such witness says; nor in any appeal of maim, murther, or felony, *F. N. B.* 107. Nor does ever any action lie against any jury for going against their evidence: and where an attaint is brought, it must be tried by a jury of twenty four men.

The only cases the judges have any power over juries in, are, where in their behaviours they become guilty of any such thing as the judges may justly call an unlawful contempt, 4 *E.* 4. 27. 36 *H.* 6. 27. Or be guilty of embracery, 5 *E.* 3. *c.* 10. as receiving bribes, promises, &c. before or at the trial, &c. *Or in case of concealment, the justices of the peace of every shire, &c. may take by their discretion an inquest, &c. to enquire of the concealments of other inquests taken before them and before others, of such matters and offences as are to be inquired and presented before justices of peace, whereof complaint shall be made by bill or bills, &c. And if any such concealment be found of any inquest, &c. had or made within one year, &c. The justices may amerce or fine them at discretion.*

The grand jury may not discover evidence given them, *inst.* 3. 107. *Mich.* 15 *Jac.* in *B. R: Smith* and *Hill's* case, 27 *Ass.* 63. *Lamb.* 402. *Chron.* 207, 272. *Finch* 29. So the petty jury, if without licence of court, depart any whither upon any occasion whatsoever, after sworn, before verdict given; or that while, but especially after evidence given, eat or drink: or out of court receive any evidence from either side, may expect fine and imprisonment.

Thus much for what a jury may do; now something more how, and what it ought to do. The oath itself, but that it's so general, would else be instruction as well as obligation sufficient.

The scripture teaches one his duty upon an oath; it says, *One must swear in truth, in justice and judgment, Jer. c. 4. Deut. c. 16. Exod. c. 20. Dan. c. 5. Levit. c. 14. Zach. c. 13. Acts. c. 5.* and the *Proverbs* in several places. *In truth*, with one's eyes, neither in a telescope or microscope; not proceeding by appearance or seemingness of things, not by adding or diminishing, not by aggravating or palliating, not by equivocation or reservation, not by representing or accepting the matter otherwise than really and truly it is; not presenting, &c. things, &c. doubtful, or not certainly true, as true; not ommitting any thing certainly true, but always as the naked truth is, so and so. In *judgment*, not at a venture, as by casting dice, &c. not as matter of form, not rashly perfunctorily, or negligently passing or running over things; not by implicit faith, or in complimental obedience, &c. not upon trust or belief, further than with and upon good and great deliberation, considerateness, reasoning, and satisfaction according to one's own conscience, and because one's mature and settled judgment is so and so. In *justice*, proceeding fairly, impartially, and according to the merits of the cause, without charging one with murder that's guilty but of manslaughter; and without malice, fear, hope, pity, favour, affection, passion, corruption, or private or sinister end or design: but all throughout purely, because it is so and so more than otherwise. And consonant to scripture, as well as generally in all other things, so also in this are even morals and politicks. The wise men (so called) of *Greece*, were called so from their living prudently, justly, and honestly, such also are they *Aristotle* calls so, 1 *Metaph.* &c.

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The *Stoicks* say, *He's the wise man that sticks to truth; and abhors and banishes every thing else, not so much as admitting of any stories, fictions,* &c. *whatsoever.* *Machiaval* says, *judges must not be moved for the power of any one, nor for any one's sake, one way or other, nor with pity or ill will, but always go according to law, truly and without bias.* Justinian *speaking of judges, says, they must be inoffensive to God, the king, and the law. No acclamations of the people, no honours of the king, neither of these move them. Against the common good or an oath, no man will stir an inch, if honest, though it be for a friend's sake.* Judge Hales *is a friend as* Hales, *but none as a judge. What a judge does at the request of his friend, is really and truly no friendship, but is making himself and friend both guilty of a crime.* The *Areopagites* were judges that heard causes only in the dark, that they might take notice what was said, and not who spoke. And what is said of judges by these authors, must by us in like manner be applied to juries. The book whereon swearing one lays one's hand, is God's everlasting truth, and most holy word; so that if one forswears one's self, one virtually in so doing utterly forsakes God, and his mercy and truth. Says a learned man, part of the oath is, *So help me God, viz.* I pray God he will never help me, if I shall not sincerely and faithfully keep this my oath. *Cajetanus*, says, 2 *Qu.* 98. *Perjury is of its nature a contempt of God.* And as the proverb says, *it's ill jesting with edg'd tools.*

By the oath of the *grand jury*, one's bound to observe as well the charge that shall be given by the court, as the form of the oath itself. But this it's plain must be understood, so far as the charge is according to law, and not contrary or repugnant to the oath itself, and no further or otherwise.

Anciently the charge was given in writing to the *Jurors*, *Brit.* 9. *Bract. l.* 3. *c.* 1. *Dalton p.* that the jury might easier remember it, their minds be refreshed, and perhaps, themselves edified, &c.

What the *grand jury* does, is by way either of presentment or indictment. By *presentment*, when they know of a crime or fault themselves, and give a short note of the party's name, place of abode, and fault, without form, referring it to the court to put it into form. By *indictment*, when the party and fault are ready brought them in parchment, drawn up in form: and indeed, the most true difference is only, that the one is in form, and the other not.

In an indictment, first they must consider and understand it well and thoroughly. They must consider, if the fault, as alledged, with the circumstances and aggravations, amount to and be a real fact or not, and also worth complaining of, for *the law minds not every little thing*, and this is daily experienced in indictments and actions of case. If it be no fault, or one not worth complaining of, which in law, as aforesaid, is all one, they reject the bill, and meddle no more with it. If they find it a fault and considerable, as aforesaid, then they consider, if they know it true so of themselves; which if they do, or other evidence satisfie them it is, they indorse, or write on the back side of it, *billa vera*, this bill is true; but if they do not know it themselves, nor be satisfied by the evidence, then instead of *billa vera*, they write *ignoramus*, we know not: and afterwards thus deliver all the indictments into court.

The clerks of the court, to get fees, and perhaps, some others for one sinister end or other, will be apt to say, that the *grand-jury* ought to find an indictment, or make a presentment against any supposed offence or offender, tho' they have but colour of evidence, or a probability of the thing being true, and that what they do is but matter of course, and a ceremony; matter of form, barely an accusation, &c. But that this is not so indeed, is apparent; for what end then is a grand-jury? only for show.

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The law would certainly then have never required one to be at all. We see they are obliged to be sworn, and they are as much on their oath, as any other jury, which then should be the contrary. The very form of the oath teaches us better, The oath is, *diligently enquire*, &c. not *negligently*, &c. *True presentment make*, not *probable*, &c. *Nothing for lucre*, &c. not excepting the clerks, &c. *According to evidence* not *presumption*: *the whole truth, and nothing else but the truth*, which how can be at such a rate as the clerks speak of.

But then they object, that these words, *according to the best of one's knowledge*, are added. If they be, it's against law, *Mir.* 304. *Brit.* 12. 135. And altering an oath, is imposing a new one, which cannnot be without an act of parliament, *inst.* 2. 479, 658, 719. But however, may jurors in in such case wink, &c. that they may not know, &c. These words are *best of*, &c. and not *worst*; they are *knowledge*, not *ignorance*; they imply the *best* one can know or find out: and not only what one already does know, for then what need the word *best*? And besides, they relate to the word *enquire*, as well as any other word, &c. So the more one considers them, the less one shall find they really alter the oath.

Then say they, all the *grand-jury* does, is but presenting in form, and not in form as aforesaid, and is only suppositions as it were, and nothing positive or certain, grounding themselves only on this, that the form of the indictment is, *the jury upon their oath present*, instead of *the jury upon their oath say*; and so infer, that if any thing in the presentment or indictment be false, yet it's no perjury. Alas! to see men in extremity, what hold they'll catch at! could *Argus* himself have seen this exception? no, unless blind. *Present* and *say* are undoubtedly here, and in such like cases, synonimous terms. To *present* on oath, is to give the court to understand on oath: and to *say* on oath, is to tell the court on oath; and an infinite of indictments be *say* instead of *present*. *Rast.* 263. *Kitch.* 100. *Co.* 9. 114. And *Fleta* goes so far, as to call an indictment a verdict, *f* 113. The words also of the oath be, *to truly present*, and not say. And Lord *Coke* plainly calls the grand-jurymen all wilfully forsworn and perjured, if they wrongfully find an indictment, *inst.* 3. 33.

Then say they, *this is no tryal, but in order to bring to tryal, and the party is at no prejudice if the bill be found.* It's true, it's no determinative tryal that finally concludes either party, because it's but one of two, which every one accused of a crime must have as aforesaid. But its so much a trial, as learned *Fleta*, *f.* 113. looks upon it no less one than any other. The form of their indictment is the same of that of a verdict. All things are, or ought to be alike in the whole proceedings, and to differ nothing but the one to be before the other, and the latter to be final, the other not. The stat. of 23 *H.* 8. *c.* 23. enacts, *one shall be indicted of high treason in what county the king pleases.* And the stat. 1, 2. *P. M. c.* 10. says, *that tryals for treason shall be according to common law*: This act repeals the other, though it speaks only of trials, and the other of indictments, *anderf.* 1. 104. 105. *Inst.* 3. 27. which shews an indictment is a trial. One of the grand jury can't be afterwards on the other: and why? says the law; for he has once already found the party guilty, and if he should not again, he must perjure himself, *Brit.* 12, 25 *E.* 3. *c. E.* 4. 4. *Stanf.* 158. It puts the defendant to disgrace, trouble, damage, danger of life, &c. It makes him liable to an outlawry, to imprisonment, &c. and to every thing but very death, &c. the final judgment itself. It gains credit, and gives authority to another jury to find one guilty. It produces this effect, that if the other jury find one guilty never so wrongfully, no attaint lies against them, nor other punishment: and what's the reason? The law says, *because he is found guilty not by these other twelve only, but in all, by twenty four or more,*

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this latter and the other jury too. Attaint. 64. 60. *H.* 4. 23. *b.* 14. *H.* 7. 13. So if one be indicted, any one may bring an appeal, tho' never so wrongfully, &c. againſt him, whereas he that brings one againſt any one that was never indicted of the ſame offence, may be liable to great puniſhment, if wrongfully brought, *Stanf.* 172. *b.* 40 *E.* 3. 42.

Suppoſe one ſhould aſk any honeſt man this queſtion: were he not on his oath, yet would he find an indictment of courſe, &c. to expoſe one, and put him to ſuch inconveniences as aforeſaid? Certainly, ſays he, no. And the monſter that would, does it wrongfully, becauſe he is not certain he does otherwiſe. And being on his oath, as aforeſaid, it's not only doing wrong, but tainting himſelf crimſon red in perjury too; ſure a malicious way of doing wrong. It's doing wrong alſo by colour of law and pretended authority, the greateſt miſchief and injuſtice, ſays the lord *Coke*, of all others, *inſt.* 2. 48. The damage, &c. too in all theſe caſes is the greater yet, that the party can very ſcarcely, if at all, expect any reparation or amends; whereas in all other caſes he may eaſily. For againſt the grand-jury, or any of them, no action lies, in as much as doing what they do on their oaths, the law will not preſume, &c. any malice, &c. in them. And though one be indicted at the inſtance, or upon the endeavours of another perſon, (all the jury, as aforeſaid, being ſworn to ſecrecy,) can one eaſily diſcover, and prove who this perſon is, what he did, and prove it at a trial; which yet one muſt do fully, if they expect any thing but making bad worſe. And might one recover damage, &c. yet it's damage to be put to the trouble and hazard of the recovery. Well therefore, ſays *Fleta*, *f.* 52. *It's an exceeding neceſſary thing, that the grand jury ſhould make diligent examination, before they preſume any thing, either in caſe of life or limb.* And Juſtice *Dalton* ſays, *no leſs care or concern at all lies on the grand-jury, than does on the petty jury.*

The law (to ſee its nature, how it inclines generally, that one may the better gueſs in this manner) it is not with us like thoſe of *Draco*, it's as tender of the lives, liberties, and credits of the people (none can deny in all caſes elſe) as a mother of her child, and why then not in this alſo? It will preſume nothing diſhoneſt, &c. in any one, or any time, but it will, and always does preſume all perſons and things honeſt, true innocent, &c. till the contrary be proved, *C. L.* 71. *b.* As *Lamb.* ſays, *laws cry often clemency and forgiveneſs as well as juſtice.* And ſays *Coke*, *inſt.* 2. 315, *like the laws of ſcripture, whence it was firſt derived, which ſhews mercy is not oppoſite to, but part of juſtice*, 1. *John* i. 9. *Pſal.* lxxi. 1, 2. The laws of *England*, the laws of mercy. And ſays a great man, *juſtice leans that way which is the milder.* One brings an appeal, if the jury be doubtful, the defendant ſhall be acquit, and the appellor impriſoned, *Fleta*, 52. *Mir.* 224, 273. So a jury being doubtful if one were a villain or not, was therefore free, *Fleta* 238. Says *Cicero, they do well, that forbid one doing a thing when dubious, whether right or wrong; for where it's right, the thing is neceſſarily as clear as the ſun*: but any doubt ſpeaks the thing not to be ſo. As if a phyſician give ſome phyſick, he muſt give one that he is ſure will do one good, or no harm, and not what he doubts may do one harm. It's alſo plain, if I doubt, I muſt not ſay, I am certain, (as *billa vera*) but I know not certainly (as *ignoramus*) elſe I tell a lie. It's very remarkable too about all indictments, the jury only ſays, either *it's true*, or *we know not*, and never that *it is not true*; which ſhews, if they be doubtful, or not ſatisfied, the indictment muſt be indorſed not *billa vera*, we know it is true, but *ignoramus*, we do not know it is true. And the law does not put it upon the grand-jury, to ſay the bill is not true, if they do not find it, though it does put it upon them to ſay poſitively, the bill is true, if they find it, and ſo encourages the finding indictments *ignoramus*. *Forteſc.* ſays, *it's better twenty*

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ill men were unjuſtly ſaved, than one unjuſtly condemned, 62. For mercy and pity is on the one ſide, but on the other injuſtice and cruelty. Says *Bract. It's ſafer giving an account of one's being merciful, than otherwiſe.* The *Saxons* in doubtful caſes only appealed to God for diſcovery, and left all only to him, *viz.* Where the caſe was doubtful, if guilty or not, or clear and manifeſt proofs wanted, they had four ſorts of trial. *Spec. Sax. l.* 1. Firſt, *Camp-Fight*, or by *Battel*. Secondly, *Fire-Ordeal*, by holding red-hot iron in his hands, or walking bare-foot over it. Thirdly, *hot water-ordeal*, by putting one's arms up to the elbows, in ſeething hot water. Or, fourthly, *cold water ordeal*, by caſting one into the water with a rope under his arms. Whereof the three laſt were uſed, one or other of them, where the party was moſt vehemently ſuſpected; *Verſtegauus* and others. But pope *Stephen* the 2d. by his decree utterly aboliſhed them all, and afterwards ſo did the parliament, 3 *H.* 3. *Memb.* 5. Judging it more fit the party ſhould be acquitted than proſecuted, where the caſe was doubtful. So that one muſt know beyond all doubt, before they ſay, *Billa vera*, elſe ſay, *Ignoramus*, which is in Engliſh, we doubt, we do not know, we are not certain if it be true, *Inſt.* 4. 64. And ſays *Brit. If a jury doubt at any time, they muſt find for the defendant*, 245, 230, 136, 219, 213. Judge *Frebern* was hanged for judging one to death, where the jury were doubtful in their verdict, *Mir.* 298. Antiently if a jury indicted an innocent man, another might be impanelled to go upon this jury, as offenders, *&c. Mir.* 101. *Jurors that falſely indict any one, be guilty of wilfully killing men*, *Mir.* 34, 36. They ſhall be reputed and adjudged infamous, and ſuffer corporal puniſhment, that find an indictment againſt an innocent perſon, *ibid.* 251, 252. Or, if an innocent perſon be adjudged to death, *&c.* if they could have holpen it, *ibid.* 256. An appeal lay againſt a jury in ſuch caſes, *ibid.* 136. *Brit.* 14. 137, 237. If they any wiſe offend ſo, *ignorantly*, yet this excuſes not at all, unleſs they could not poſſibly know better, *ibid.* 257. And negligence in, or of knowing better, makes their fault the worſe, *ibid.* And the greateſt oracle of our laws, *Co. L.* 115, 391, 45, 54, 113. has it, *That whatever was law, is yet, unleſs altered by act of parliament, which this never was.* Whereas on the other ſide, if a grand jury do not find the bill againſt any one, there can be no harm then to any body, but another indictment may ſome time be brought when there's better evidence, or a worſe jury. For though one's life, *&c.* ſhall come but once in danger, or on trial, before the petty-jury, it may yet a thouſand times before the grand-jury, for they never ſay the party is not guilty, but at moſt ſay *Ignoramus*, as aforeſaid.

Any thing any jury does, ought to be *Quoddam Evangelium*, like what they laid their hands on, taking their oath. When they write *Billa vera* on an indictment, they undeniably compare the truth of the contents therein, to the truth of the goſpel, and this upon oath. Thus one would admire how it comes to paſs, that they of the grand-jury ſhould often hear but one ſide: Their oath, it's apparent, is againſt this: It ſays, *Preſent the whole truth*, not concealing or omitting any part of it; which implies as well all one ſide can inform them as the other. And ſo appears by leſs ſtrong caſes far, an attaint lies againſt a jury (ſwearing *to well and truly try the iſſue between the parties*) when every word of the verdict may yet be true, only it not being the whole truth. It proceeds, and ſays, *And nothing elſe but the truth*, which how can poſſibly, or any jury-man be ſatisfied in, unleſs they hear both parties? It ſays, *You ſhall diligently enquire*, &c. not by halves, or but hearing one ſide only. It's a maxim, *He that judges or determines any thing, when but one ſide only is heard, does unjuſtly*: And the judgment, or determination, tho' in itſelf be never ſo juſt or right, yet ſhall he no wiſe be

accounted a just judge, &c. It is a common saying, *One tale is good, till another is told?* One at this rate, might be indicted for a cut purse, when but an honest glover; so might chyrurgions, sheriffs, bailiffs, jailors, hangmen, attornies, &c. for but doing what belongs to their several and respective professions, as the matter may be managed, and yet saying nothing but the truth neither, only not the whole truth. Is there not in all determinations else, the *hearer* and *defendant*, as well as *complainant?* Thus erred Judah the son of Jacob, in judging *Thamar* to be burnt, upon report, when she was unheard, *Gen.* 38, 24, 25, 26. So was Joseph falsly accused of lying with his mistress, and cast into prison, *Gen.* 39, 19, 20. So was *Mephibosheth* falsly accused by *Ziba*, and deprived of all he had, 2 *Sam.* 16. Which being all precedents, and damned in scripture, must, or shall any one be so hardy as to embrace and follow them now? Either one's guilty or not; if he be, let him yet have fair play for his life, &c. If not, why should he then be indicted? So that, why should he not be heard? Else one's condemned first, and heard after; or indeed hanged first, and tried after, or little less. The true intent of the law herein seems, as if men were to be handled not thus, but that the defendant should be heard at first, and if he then could give satisfaction, &c. he might be at no further trouble, &c. And if he could not, that he should have such trouble, &c. and having notice thus, might prepare himself the better, and so not be surprized at the final and concluding trial, or have any colour of pretence that he was surpriz'd, or any wise unprepared at this trial. This method being most honourable for the king and the law, and also most safe for the people. And the reason why it was ever otherwise, seems barely a result of some artifice of the clerks, to get themselves money, imposing on the juries; or from this, that presentments being made without the party heard, therefore the jury thought they might find an indictment likewise. Whereas, they ought always to distinguish; for a presentment is on their own knowledge, when they know all the whole matter, even what the defendant can say for himself; but an indictment is found upon witnesses, which tell their tale to a hairs breadth, &c. as makes the most for the side they are produced of. And at length after some few precedents, it has now grown into practice: All can be pretended why it should be so now, is but practice and precedent. And when it's against justice, against truth, against any one's judgment, sure one ought rather to correct than approve of, or follow such practice or precedent. At least wise a grand jury ought to hear both parties, if present, or easily, or conveniently to be heard.

It would likewise amaze one, to see how the clerks, for their gain, or others for other ends, have often prevailed with jurors to find a bill true, &c. when in all the circumstances of aggravation, or most of them, false, if not in the fact it self; and those circumstances too altering the very fact, as alledged about, as much as white feathers would a black crow.

Considering how true presentments, indictments, and verdicts ought to be, and that the whole truth, and nothing but the truth must, or may be in them: That the jury undertake the bill is altogether true, not only as to the substance, &c. or in general, but even in every particular, all the circumstances, aggravations, and every individual word, (for if it be not true in the least word, it's not true, but false, and perjury.) *Stanf.* says well, *f.* 96. b. *To perform the duty of one on the grand jury, it's necessary to learn and know what's called treason, what felony, &c. and what not:* Hence also one learns, one must not in an indictment call, or suffer felony to be called treason; manslaughter, murder; nor one crime by the name of another: Or mention, or suffer to be menti-

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oned, words ſpoke, or things done, other or after another manner than really or truly were ſaid or done; and therefore the judges give the grand-jury to this day, their charge ſo diſtinguiſhing, particular, and directive of all, and all manner of crimes, their natures, and how to call them, &c.

When the clerks draw an indictment, information, &c. they'll not only alledge and inſert in it the very fact, &c. one is accuſed of, but craftily, and full of art, ſtuff and load it, into the bargain with ſeveral fictitious and ſlight allegations of their own, to ſwell up, and aggravate the matter; as circumſtances of malice, or deſign, &c. in the party, when they did the fact, ſpoke the words, &c. So that ſometimes from a mouſe, a mountain; from nothing, or what's inconſiderable, it will in ſuch a dreſs ſhew and ſtrut like a giant, a monſter, &c. And all this forſooth, they'll call matter of form, and then endeavour to perſuade a jury, if they find the chief matter, or that part which they'll call the matter of ſubſtance, true, they muſt of courſe find all the reſt, which *they* pleaſe to call matter of form, true alſo. This uſual way of wording indictments is ſo notorious, dangerous, hurtful and grievous, that it ſeveral times, and in all ages, has been complained of by all perſons whatſoever, except the clerks and proſecutors themſelves, whilſt clerks and proſecutors. It has been a complaint in and of parliament, by king, lords, and commons: See 4 *H.* 4. *c.* 2. 37 *H.* 8. *c.* 8. This is that whereof may be ſaid, as was in *Curtin Hertſey*'s caſe; *It's the part of the devil himſelf to make a ſmall fault be, or ſeem a great one.* But no complaint, no argument will, or can prevail with a covetous clerk, getting fees, or a malicious proſecutor, troubling whom he has envy or malice againſt, to reſiſt their advantage. And as the true circumſtances of any crime do always, or moſtly aggravate or alleviate it, and all thoſe ſuggeſted thus by the clerk, if the bill, &c. be found by the jury (tho' pretended only matter of form) become thus as true, and the judges muſt adjudge a puniſhment accordingly, as if all were really true: Thus is a trap ſet to catch the jury and defendant; the jury to perjure themſelves, and wrong the defendant, and the defendant to be adjudged of a crime, when perhaps guilty of none, or at leaſt of a worſe crime then truly he is. A jury therefore, ought firſt to conſider, as aforeſaid, if the matter of ſubſtance, or chief matter, be criminal at all; and if it be, then if conſiderable: And if it be not criminal, or conſiderably criminal in it ſelf; then if the circumſtances, as alledged, make it ſo: and if not, then to reject it. If it be conſiderably criminal, with or without the circumſtances, then conſider if you know it of your ſelves, or by evidence be ſatisfied it is true, both it ſelf and the circumſtances; If the matter it ſelf be not true, you reject the bill (for where's no body, is certainly no ſhadow:) If the matter be true, but the difficulty be about the circumſtances, then conſider if they be material; if not, you find the bill; if they be, then conſider if they be conſiſtent, or the matter will bear them; if not, then reject the bill, &c. or at leaſt ſtrike them out of the bill, &c. If they be, then conſider if they be true on your own knowledge, or by the evidence given you; if they be, then find the bill, &c. if not, they muſt be ſtruck out, or the bill returned, *Ignoramus.* Every jury muſt go by *probata*, what's proved, as well as *allegata*, what is only alledged. Where one's accuſed of knowingly keeping a dog wont to worry ſheep, &c. the knowledge muſt be proved as well as the reſt, *Cockram* and *Davies*, *c. B. R.* 17 *G.* 1. So the lord *Shaftſbury*, when he ſued lord *Digby*, for maliciouſly ſpeaking ſuch and ſuch words, he proved the malice as well as words. If one pleads a feoffment by deed, and the other denies it, it muſt be proved to be by deed, *Co. L.* 281. *b.* So if one be indicted of murder, as that he with

malice fore-thought, killed such a one, the malice fore-thought must be proved; for in these cases the killing might be either by chance, as the glance of an arrow, &c. by giving physick, by a champion in trial of battle, by a hangman doing his office, or by one *non compis mentis*, &c. In which cases is no malice, and therefore the indictment not to be found: So the words might be spoke in jest, or a thousand ways, and not maliciously. So one might keep such a dog, and not know he was such, and the fault would then be none at all in him. The law also may several times be broke in the letter, yet without any fault; if the intent of the law be not broke: As when things are done to avoid a great inconveniency, or by compulsion, or for necessity, or by involuntary ignorance. &c. And in these and such like cases, the party ought not to be indicted, tho' the matter be true in itself. The *Romans* had a law. *He should dye that climbs over the wall in the night*; yet one doing so to discover their enemies, was by the senate adjudged innocent, and rewarded. So it's lawful with us, to pull down another's house when a fire happens, or in time of war, to prevent a greater mischief. So one being to appear to a writ, but hindred by floods, sickness, &c. does not, he is excused. One forces and uses one's hand to kill a third person, he is only guilty: So an infant, or one *non sanæ memoriæ*, kills another, it's excusable. So that where any fact or words in an indictment might be as well under any of these circumstances, as what other the clerk or prosecutor is pleased to alledge; these alledged must be proved, for it's plain, they are not necessarily implied. And yet if a man should do any wise thus, the clerks will draw up the indictment or information, as if none of these circumstances were in the case, but that it was maliciously, in contempt of the laws, &c. So it seems hard a man should be hanged for stealing under a necessity, where the taking is upon absolute necessity indeed; and it's not the party's fault, but misfortune, he fell into such necessity: And especially if the party whom the taking is from, have not the like necessity for the thing, or the person that takes, be very serviceable or profitable to the kingdom or common good, &c. yet he must be, though the thing so taken be not of the value of *thirteen-pence*, if the jury agree he did it feloniously; whereas one guilty of perjury, though he does one a hundred thousand times more harm, shall only suffer an inconsiderable rebuke. And why should a jury in this case find it done feloniously? This was done under force and necessity, to preserve a man's life, &c instead of an house, &c. and what's said felonious, must be *felleo animo*, with an ill affected mind, with a mind not barely to do the thing, but an itching also to do mischief; (only this itching indeed shall be presumed, unless cause appear to the contrary.) As if one takes a thing out of another's possession, claiming it with some colour as his own, &c. this is adjudged no felony: Why? for not being done with any felonious intent, as appears by his claiming, &c. So the like stealing, as aforesaid, was not for mischief's sake at all, but for necessity, &c. Thus *David*, against the law, took and eat that bread which was provided for the table of God only, *Exod. c.* 29. 1 *Kings* 21. Our Saviour and his apostles plucked off, and eat the ears of another's corn, *Mat.* 12. And he, because he had need of an ass, took that which was none of his, but another's; and had *Lazarus*, ready to perish, taken *Dives*'s crumbs against his will, &c. yet it seems he had no more sinned than he misbehaves himself, that he does what the lord bids, and the steward forbids, under the rules aforesaid. A jury therefore not observing the rules aforesaid, gives a verdict not only against the present and immediate defendant, but also in him even against *David*, *Christ*, &c. represented thus in his case. In the civil law (that of the admiralty particularly) if a distressed ship takes water by force,

force, of another where is plenty, it's no theft; because of the neceſſity, ſo adjudged ſeveral times. If an indictment mention one ſeditiouſly, and deſigning to diſturb the government, and to withdraw from the king the love of his ſubjects, and ſaid of him ſuch and ſuch words; here the words might, perhaps, be ſpoken within the privilege of diſcourſe in parliament, or in a jocular way, or ironically, when one means the contrary; or by way of ſuppoſition, in argument, or when one meant a contrary thing, or no harm at all; and this perhaps too explained at the ſame time in other words accordingly, or the words in the indictment be but part of the ſentence, &c. or tranſpoſed, or ſome how elſe altered. So if a complaint be, that one falſly and maliciouſly, and without deſigning to break his credit and ruin his trade, called ſuch a one a bankrupt; here, perhaps, he was a bankrupt then, or no tradeſman at all; therefore in theſe and ſuch caſes, the circumſtances alleged not being imply'd neceſſarily, though the fact or words were ſpoke, they muſt be proved. But to inſtance ſome caſes adjudged by the judges themſelves: If *A.* bring an appeal againſt *B.* and *B.* is after acquited; now, ſhould *B.* indict *A.* for maliciouſly, *&c* bringing the appeal, the indictment ought not to be found, if *B.* were indicted before of the ſame fault, he was after appealed againſt for, becauſe his being before indicted, proves there was at leaſt colourable reaſon why the appeal was brought, and not malice only, *Coron* 178. 49 *E.* 3. 42. A Chyrurgion was indicted, for that he by negligence in curing one's hand, maimed it, the negligence muſt be proved, 48 *E.* 3. 6. 11 *H.* 6. 18. So in actions for words, which holds the ſame law as in indictments, &c. *A.* ſues *B.* for falſly and maliciouſly calling him, being an heir, a baſtard; action will not lye, if *B.* pretend himſelf heir, for then it was not maliciouſly, but only as it were in order to get or claim the land, &c. And it's lawful thus to ſlander another, juſtifying one's own title, *Co.* 4. 10. So *Molton* ſues *Clapham*, for that a ſuit depending between them, upon reading certain affidavits in court, *Clapham* openly then and there, falſly and maliciouſly ſaid, there is not a word true in the affidavits, and that he would prove it by forty witneſſes; here the words, though they were agreed falſe, yet not being ſpoke maliciouſly, but out of another deſign, as in his defence, &c. as aforeſaid, action does not lye, *B. R.* 14 *C.* 1. *Rot.* 459. So a councellor calling one a thief at a trial, the like; for it's not malicious, &c. if material for the cauſe he manages. *Montagues c.* So where *A.* ſays to his friend *B.* that *C* hath the *French pox*, therefore adviſing him not to keep him company; for he ſpoke as advice to a friend, and not maliciouſly, *James* and *Rudley*'s *C.* 40, 41. *El. in B.* And thus is further ſeen the cauſe or occaſion of ſpeaking words, or doing any thing, muſt be conſidered as well as the words or fact: And ſays *Coke*, *This is a general rule*, *Co.* 4. 14. Alſo it's another rule, All offences in fact or word, ought in conſtruction to be made the leaſt of poſſible. Where an indictment, &c. is grounded upon a ſtatute, then every little word muſt be proved that is alſo in the ſtatute, though ſeeming implyed, or little more than immaterial; this *all agree*. For want of theſe, and ſuch like obſervations, one *Thomas Burdett*, Eſq; was condemned, hanged and beheaded at *Tyburn*, in *Edward* the fourth's time, when the matter proved was only, that he being abſent, the king hunted in his park, and killed a white buck, which Mr. *Burdett* fancied above the reſt of his deer, and that Mr. *Burdett* hearing of this, wiſhed the buck's horns in his belly that adviſed the king ſo to do, *Speed's hiſt.* 700. Much like was it alſo with one *Walter Walker*, who was beheaded in *Smithfield*, *anno* 1476. when all proved againſt him, was only that he (living at the ſign of the *Crown* in *Cheapſide*, *London*) ſaid to his child, to pacifie him when he cried, *Peace*,

Peace, peace, child, thou ſhalt be heir of the crown. But who can open ſome jury-men's eyes, to ſee how like an ox led to the ſlaughter they be impoſed upon, and cheated, to cheat others of their lives, fortunes, and all that's dear to them; though by their example too of acting thus, they make precedents, and give countenance to after juries to be like themſelves, and conſequently expoſe and render themſelves, they know not how ſoon, in the ſame predicament, and to be puniſhed as the criminal was they puniſhed. *Or by the evidence given you.* Evidence is only ſuch a teſtimony that makes ſomewhat relating to the iſſue or matter in queſtion clear, manifeſt and plain to the jury. And thus is it, all the witneſſes or teſtimony in the world of things impoſſible, repugnant, inconſiſtent, &c. can be no more than *bare teſtimony*, and cannot any wiſe amount to, or be called *evidence*. Herein the jury may conſider the credit and authority of the evidence, and the matter or extent of what is evidenced. *Firſt*, If the matter proved amount to ſuch plain and full proof as is required. An indictment laid againſt three perſons, may not be found againſt all three, when the evidence is only againſt one or two of them, nor if laid againſt one perſon for three faults, may it be found againſt that one for all the three matters, when but one or two of them are proved; nor when the evidence is but to part of a matter or fault, may the indictment be found for the whole; but, as aforeſaid, all found muſt be proved: Indictments, &c. as aforeſaid, brought upon, or referred to *any ſtatute*, the words of the ſtatute mentioned in ſuch indictment, &c. muſt be proved very ſtrictly, even to a tittle; the proof muſt hit the bird in the eye. As one indicted on the ſtatute, for *maliciouſly diſturbing a miniſter at divine ſervice*, every one of theſe words muſt be proved; ſo for *willfully and corruptly forſwearing one's ſelf*; ſo *for one's gain keeping a gaming-houſe*. But in other caſes, as at *common law*, if the proof and words in the indictment, &c. differ either in the *matter*, or the *form*, or *manner*, inconſiderably, or ſo as the difference be not ſomewhat conſiderable or material; as aforeſaid; ſuch is indeed no difference in law, nor by the jury to be taken as any. In the *matter*, as in a complaint for theſe words, *B. is a maintainer of thieves, and a ſtrong thief himſelf*; here the word *ſtrong* ſignifying little or nothing, need not be proved ſpoken, *Dy.* 21. 75. But if the allegation and proof materially differ, otherwiſe; as for theſe words, *If* B. *might have his will, he would kill all the true ſubjects in* England, *and the king too.* Now, the proof being that the defendant ſaid, *I think in my conſcience, that if* B. &c. the beſt opinions in this caſe are, that this is not ſufficient proof; for the words alleged are more poſitive and abſolute, and move credit more in one's ears than thoſe proved, and ſo are not in effect the ſame, but materially differ. So of theſe words: B. *procured eight or ten witneſſes of his neighbours to perjure themſelves*; the proof being only that the defendant ſaid, B. *had cauſed eight or ten*, &c. This is no proof, for one may be a *cauſe*, and yet not a procurer, there being remote cauſes, as well as others ſo nigh, as that of procuring. Such a cauſe as this *B.* might be, though only plaintiff or defendant in a ſuit, for had there been no ſuit, there could be no perjury. And the moſt favourable and innocent ſenſe of words is to be taken, and no other. As for the *manner*, an indictment being for murder *by poyſon*; if the proof be, it was *not by poyſon*, but a weapon, burning or drowning, *&c.* this will not do; for the matter proved, is of another nature proved than alleged; but if the difference were only thus, that the poyſon alleged was of one ſort, and that proved, of another; this being immaterial, (both agreeing it was by poyſon) the proof may ſerve. So murder alleged to have been committed by a *dagger*, the proof being it was *by a ſword* or *bill* may ſerve; but proof *by poyſoning* will

not

not do. If an assault and battery be alleged to have been at *A.* the proof being it was *not* at *A.* but *B.* may serve, provided the offence be neither greater or lesser, whether committed at *A.* or *B.* But if the place alleged aggravate the fault, it's otherwise; or if both places be not in the same county. So of the like difference in time alleged and proved. Now, as to the credit and authority of what is witnessed: *It's no proof or evidence to a jury, which is against their own knowledge, nor any other but that only, which confirms them in what they did know, or acquaints them with what they did not know.* The only reason, said my lord high steward, at lord *Cornwallis's* trial, why a prisoner is allowed no council in matter of *fact*, or in any thing but matter in *law*, when *life* or *member* is concerned, is this: *The evidence whereby he shall be condemned, ought to be so plain and evident, that all the council in the world may be presumed able to say nothing against it, or in his defence. Nothing ought so much as raise a suspicion*, says *Horne*, *but what comes from* grave and good people, *those which be* credible, *and heed what they say*, Mir. 200. *And not from others, as ill-tongued, ill-disposed*, &c. *Bract. Brit. Stanf.* The great lord *Coke*, says, *Of old time (as yet*, says he, *indeed it ought to be) any indictment was not to be found but on credible witnesses, and plain and direct proof; and never upon probabilities or inferences*, &c. *Inst.* 2. 384. And he likewise says, *Inst.* 3. 25. *It's most necessary, as many hold, there should be* two *good witnesses produced to the grand-jury to prove every indictment: And the proof*, says he, *ought to be* more *clear than* light. Every jury must always remember, they may presume nothing but *innocency*; and *innocency*, &c. *they ought*, until the contrary be proved. Of presumption and argumentive verdicts, &c. finding one guilty, there be several very sad examples. One the lord *Coke* tells of, is, *There being two brothers, one dies, leaving an estate, and an only child; the other educates it; and one night correcting it, it cried*, good uncle, do not kill me, *and next morning it was gone no body knew whither. This brother is accused of its death, upon evidence of the matter aforesaid, that he beat it; it was young, about nine years old; it cried as aforesaid; it was never heard of since, and that the uncle enjoys an estate by this. The jury found him guilty, and he was hanged; but about a year after, it returned safe and well*, Inst. 3. 232. The scripture enjoins the use always of *two* witnesses at least, when yet the punishment *then and there* was so much less than *now with us*, for the crimes to be punished; *Deut.* 17. 6. 16. 19. 15. In some cases there must be more than two witnesses, but never fewer. The general rule is, *two or three witnesses be enough, if liable to no exception: Any one* person may invent or contrive any story for malice or envy, or other end, to take away another's life, &c. And who can disprove or detect him? But it's not so easy for *two* to do it; yet *two* may possibly also agree and contrive an evidence together, and so form it, and frame circumstances, all agreed of be-forehand between them, that being false, it may yet seem very plausible; *The children of this world be wiser than the children of light. Jezebel* had *two* witnesses against *Naboth*; and two witnesses were against chaste *Susanna*, to prove her adultery, yet both had false evidence against them. *Susanna* was acquitted, only because the witnesses differed what tree it was under. In all trials whatsoever in *England*, either at civil law, or common law, where is no jury, there all will confess, there must be two witnesses at least, *Co L.* 6. b. And always that witnesses are to be joined to the jury, they must be two at least, *ibid.* And in any law any where, must be always two witnesses at least, and no place can be pretended of otherwise, except only *England*. And that it should be so *here*, even when there is a jury too, see 48 *Ass.* 5. 48. *E.* 3. 30. And so is expressly, *Mir. c.* 3. &c. *Co. L.* 6. b. *Inst.* 3. 26. And so it was agreed in *B. C. Trin.* 9. *El.* And the only reason why

why it should be otherwise, is as aforesaid, that the jury be presumed to know themselves, to the value of one witness more. But if it so fall out that realy they know nothing themselves; then, should they find one guilty upon a single testimony, they make that law, which otherwise could not be law, and find one guilty the law would have acquitted; and thus a trial by a jury would be less safe and more destructive than any other in all the whole world again. The jury thus make *one* witness as good as a *thousand*; for had a thousand witnessed, the jury could have done no more. This would occasion great mischiefs, perjuries, and other inconveniencies. *A.* then being sufficiently malicious or interested, and so designing *B*'s death; an *Italian* would poison, *Spaniard* stab, *French-man* pistol him; but being an *English-man*, and expecting such a credulous officious jury, as aforesaid, to help him, will sure choose to *swear* him to death; for *A.* has his malice better answer'd. *B.* thus not only loses his life, but also his credit, estate, and what not? Besides attainting his blood, and utterly disgracing all his relations; and at last, how shall *A.* be discovered in it? He is infinitely more safe this way than any other. Or, suppose one should come out of the moon and by chance should discover him, he knows he is safe of his life, he shall not die by our law: If any body happen too that will be at the trouble, charges, hazard and danger, to prosecute him never so severely. But by the statute, he shall forfeit *forty pounds*, or at his election, stand a while in the pillory, and half a year be in prison; this is all. Likewise a cunning rogue, suppose he robs one, *&c.* and no witness by; if one offer to prosecute him, let him prosecute first, and he hangs one *thus* into the bargain, and saves himself honourably. Or were there one or two witnesses by, but he first prosecutes, and swears against all; it will go hard with them all.

It's said of the *Egyptians*, they had no punishment for lying, and so had no measure in it: But thus *our* law *tempts*, as well as *scarce at all punishes perjury*. A Jury, tho' they have two or more witnesses, ought also to consider and examine their circumstances. Amongst the *Turks*, only such may be witnesses as are free-men, can say their prayers, have some knowledge in law, and be known of civil life and conversation, *&c. Boschiner Academ.* 19. By the laws of *Scotland* (for most part always like ours) none shall be witness under *fourteen* years old; furious people, officers of the same court, women, adulterous persons, thieves, poor, whipt for any offence, infamous, convict and ransomed from justice, kinsfolks, companions or parties of the same crime, clergy against laity; nor any one's tenant, bailiff, servant, or any other of his robe, council, retinue, *&c.* nor any known adversary, nor any person excommunicate, or imprisoned for, or accused of a crime. *St.* 2. *Rob.* 1. By *our* laws none ought to be a witness that is indicted of treason or felony, and not acquitted; persons excommunicate, outlawed, or otherwise defamed, nor judges in any case where they shall be concerned as judges, *Brit.* 39. Persons outlawed or otherwise infamous, 11 *H.* 7. 41. A husband or wife cannot be witness for, or against one another, *Co. L.* 6. b. nor against any other in the same cause, *Stanf.* 26. b. Except in criminal cases where he or she is the party offended, and swears only for the king, and no other evidence can be expected. The confession of a criminal gotten by fright, or any artifice used upon him, or made before he comes to his trial, is no evidence against him. The common law was so strong in this point, that till 2, 3, *P. & M. c.* 10. no justice of peace could examine a criminal; in short,

Ask his estate, fame, and religion,
Quality, sex, age and discretion.

But the judges use to determine *who* shall be sworn, and *what* shall be produced as *evidence* to the jury, and the jury what *credit or authority* the fame's

fame's worthy of, *Co. L.* 6. b. One that's burnt in the hand for felony is by ſome held to be a witneſs in law; for, the crime, ſay they, is purged, ſo if pardoned by the king. And ſome hold many of thoſe aforeſaid, are in law good witneſſes, as *poor* men; but the jury may conſider, ſuch may eaſier be biaſſed or corrupted, as he had not ſo much to loſe or forfeit for a crime, and therefore lies under ſeveral neceſſities and temptations a rich man does not, *&c.* In *Solomon's* proverbs, *c.* 30. praying againſt poverty, the reaſons alleged are, *Leſt being poor, one ſhould ſteal, and take the name of the lord in vain.*

As for ſervants, *&c.* they are under the ſame circumſtances commonly of poor men, and worſe, for they are more apt to do any thing in obedience, or favour, or elſe out of malice, *&c.* againſt or for their lord, *&c.* Before the conqueſt, the oath of a *Thane* (one of like degree then, as a yeoman is now,) was in law equivalent to the oath of ſix villains, pagans, &c. (ſervants that were bound) *Lamb.* 56. 200. as for perſons any wiſe infamous, ſuch will not value or ſtand upon their credit, or but the leſs, ſince they have little or none to loſe, *and over ſhoes over boots.* As for criminal perſons, it's a maxim, *be that has been once wicked, or in one thing, may be ſuſpected again, or in another thing:* hence where a defendant is ſuppoſed in law guilty but of a contempt, treſpaſs, deceit or injury; he ſhall not wage his law, for the law will not believe *him*, though they would believe another againſt *whom* is an action of debt, detinue or account, *Co. L.* 295. As for one under 14 years old, ſuch are, as our law ſays, not arrived at diſcretion: ſuch may miſtake, be influenced, *&c.* and ſo all the reſt. But it were not amiſs, if juries heard all perſons, weighing their teſtimony as ought. A jury ſhould miſlike any witneſs alſo, that in his evidence varies, delivers himſelf in any paſſion, ſpeaks at random, or not cautiouſly, or ſeems to ſide with or againſt either party, or to argue, or to offer proving negatives. None can ſwear a negative, nor may be admitted to give teſtimony directly againſt an affirmative, 48 *E.* 3. 30. A jury may take notice of particular ſtatutes, patents, judgments, and other records given in evidence, and may go againſt eſtoples, concluſions, &c. ſo it be according to the very truth; for they muſt ſpeak the truth in all caſes, *Co.* 4. 53. It's much the jury does not always examine witneſſes *themſelves.* If he that examines them be corrupted, or any wiſe ill affected, he may eaſily miſlead the whole courſe of evidence, he may countenance which ſide he will pleaſedly, hearing the one ſide on one ſort, but the other not without brow-beating and uneaſineſs; he may frighten, diſcountenance, divert, puzzle, diſtract, or otherwiſe abuſe a witneſs; he may flatter, wheedle, prompt, aſk leading queſtions, direct, &c. and thus darken and perplex the truth.

How does a jury diſcharge it's conſcience thus? The jury is the only judges alſo of what is ſaid, and how the verdict ſhall be given, and they whoſe conſciences are to be ſatisfied, and certainly know beſt what they want to know, &c. unleſs they walk by implicit faith, therefore be the moſt proper to aſk the queſtions.

All that is aforeſaid, ſhall alſo the rather be as propoſed, conſidering how the law is now altered, as to accuſers, judges, witneſſes, counſellors, ſolicitors, &c. Anciently, *All perſons that indicted any other; were to be ſufficient, reſponſible,* &c. Co. 5. 120. *Accuſers gave ſecurity to anſwer damages, if the accuſation proved falſe,* Mir. 19. Fines were ſet on appellors, 11 *R.* 2. Fines 2. 15 *E.* 3. If *A.* brought an appeal in any caſe, and was either barred, or non-ſuited, or his writ abated, he was fined and impriſoned *immediately, without the defendant's trouble.* 8 *H.* 4. 17. 20. *Brit.* 245. 32. Appellee acquit, the appellor was by the ſame judgment, without

without more trouble, impriſoned a year and a day, and was to repair the damages of credit, trouble, charges, &c. of the appellee, beſides undergo a grievous ranſom or fine to the king; and ſo was it of abettors or encouragers of the proſecution, *Fleta* 53. It was death to appeal innocent perſons of any mortal crime, till *H.* 1. brought it to corporal puniſhment, and ſatisfying the party grieved his damages, *Mir.* 250, 251. So that lawyers were puniſhed for aſſizing the accuſer, and a year and a days impriſonment inflicted on a ſerjeant, lawyer, attorney, or clerk, to uſe deceit or coluſion in a court, or conſent to it, either in favour of the court, or any perſon elſe, *Fleta*, 87. Councellors were to be ſuſpended practice, if they tendered falſe delays, falſe witneſſes knowingly, uſed deceits, fictions, or untruths to the court: And were to ſwear not to maintain or defend any wrong or falſity, *Mir.* 121, 122. And it's by a kind conſtruction they be not yet liable in ſeveral caſes to be puniſhed, as barretors, maintainers, &c. An aſſize did lie againſt councellors, attornies, &c. by whoſe ill practice or means any one loſt but a freehold in land, *Mir.* 154, 209. So witneſſes have formerly been puniſhed ſeverely. In the ſcripture, by *Moſes*'s law, it was eye for eye, and tooth for tooth, life for life, &c. againſt falſe witneſſes, *Deut.* 19. 21. By the law *Cornelia* amongſt the *Romans*, a witneſs that occaſioned another's death by falſe teſtimony, loſt his head, if one of the greater quality, elſe he was hanged on the croſs, or given to wild beaſts. *Simler.* Before the conqueſt, that of *Moſes*, was moſtly ſo with *us*, only ſometimes it was baniſhment, *Ll. Ed. c.* 3. *Falſe judges, and falſe witneſſes are guilty of wilfully killing men. Mir.* 34, 36. After it came to the cutting out of tongues, *Mir. c.* 4. As for judges, they were accounted diſſeiſſours, if they wronged any one in his title, *Brit.* 147. In *Scotland, a judge convicted of having thrice ill judged, loſes his office, and is adjudged infamous*, Stat. Rob. 1. c. 28. *Whoſoever gives a falſe judgment, ſhall forfeit his* were, *(what's life is worth,) unleſs he can prove on oath he could judge no better, Lamb.* 162, 164. Judges if condemned one to death againſt their knowledge, or by ignorance of, or in what they ought not, as judges, be ignorant of, they are murderers, &c. and to die as ſuch, *Mir.* 256. King *Alfred*'s law was, *That falſe judges, becauſe they diſhonour God, whoſe vicars they be, (the ſcripture calls them God's) and the king, which raiſes them to ſuch an honourable ſeat, as the chair of God; they ſhall (firſt) make ſatisfaction to the party grieved, forfeit what elſe they have, and ſuffer further puniſhment at the king's will and pleaſure. And if they falſly put to death any, then to die themſelves, and always at leaſt to ſuffer like for like, Mir.* 265. 1301. Appeal of one's death lay againſt a judge, for judging one falſly or wrongfully to death, *Mir.* 136. Preſentments were made againſt chancellors, judges, &c. for breaking their oath, *Mir.* 144. There were forty four judges hanged in one year for wrongful judgments, *Mir* 296. &c. And ſay's the ſame book, *It's an abuſe, that all things are not ſo now.* 296. What became of *Treſilian* and *Belknap*, of later years? But now the law ſeems clear otherwiſe, as we have little or no puniſhment againſt chancellors, judges, councellors, attornies, clerks, witneſſes, &c. yet were juries *then* ſo cautious, as aforeſaid, with and againſt them, where *now* therefore how many times more jealous and cautious, have they reaſon, and ſhould they be.

The law conſidering the great burthen that lies upon the conſciences of jury-men, has favoured them with this liberty. They may, as aforeſaid, take upon them the knowledge of what the law is in the matter, or upon the truth of the fact, as well as the knowledge of the fact, and ſo give in a verdict generally, *that the defendant is guilty or not.* Or they may give in *only* the matter of fact, particularly how they find it to be, and then leave it to the judges to determine. Or, they may acquaint the

the judges, how the matter of fact ſtands, and then aſk the judges their opinion, as to the matter of law, and then determine the whole matter *themſelves*. The grand-jury ſtrikes out of the indictment what they are not certain is true; or may any wiſe alter it to what they be certain is true: Or, if any thing be in it they be doubtful of, they may ſuperſcribe it, *Ignoramus*, at their election in all theſe caſes. Thus if a jury find the words not ſpoke, or the fact not done with, and according to the aggravations and circumſtances in an indictment, &c. mentioned? They ought either *not find* the indictment, (for one not being guilty as the indictment mentions, is conſequently not guilty of that indictment, but rather ſeems if guilty at all, guilty of ſome other matter than which he ſtands indicted of, and ſo of ſome other indictment only; and then let the proſecutor, if ſo fond to trouble his neighbours, bring ſuch other) or *ſtrike out* what they have not ſufficient evidence of, as they do often in indictments of murder, (which ſay the defendant of *his malice fore-thought-feloniouſly killed and murdered* ſuch a one) ſtrike out the words *of his malice fore-thought* and *murdered*, having no evidence of the malice, but ſufficient of the reſt, and then indorſe it, *billa vera*, and ſo find the bill *manſlaughter*, inſtead of *murder*. So was it of an indictment againſt lord *Chandois* and count *Arundel* his ſecond, in a duel. In like manner, when the evidence proves a fact done only by miſchance, defending one's ſelf, in time and place of war; when a defendant was not *compos mentis*; an officer doing his duty, &c. the grand-jury alter the indictment accordingly. So of the petit-jury, only it does not alter the indictment, &c. but inſtead of altering murder to manſlaughter, &c. as aforeſaid, in the indictment, they only ſay, guilty of manſlaughter, and not of murder; or guilty of chance-medly, *Se defendendo*, &c. Or they may tell the court particularly and plainly, how they find the truth in, and of the whole matter to be, ſo far as concerns the fact, or what was done or ſaid. As in caſes of words, what were ſpoke, where, to what intent, &c. and ſo leave it to the court to judge on it according to law, and to tell what the law is thereupon, and ſo be diſcharged themſelves, which is called giving a *ſpecial* verdict. Suppoſe *A.* bring an action of debt on a bond againſt *D.* as heir of *C.* and *D.* pleads he hath nothing from *C.* to pay any thing with; and *A.* replies, that he has, &c. and ſo the iſſue is joined (or what the jury be to try, is) whether *D.* has any thing, as aforeſaid, or not, *A.* proves that *D.* had before the action, brought ſomething ſo, but aliened by fraud and ill practice, to deceive *A.* of his debt. Now, they finding the matter or caſe to be thus indeed, and the law being (for there is a ſtatute, 13 *El.*) that ſuch aliening ſhall be void, and conſequent, the heir chargeable nevertheleſs: They may, if they will, as aforeſaid, either take upon them to know the law, and in this, or any caſe, ſay *generally*, they find for *A.* Or not take notice of the law, but *only* of the *matter*, and ſo tell the court how, and what they find the matter to be; and thus leave it to the court to judge in law, whether they ought to be found for, and this is their moſt ſafe way. To this end was the ſtat. of *Weſt.* 2. *c.* 3. that if the jury doubt on the evidence what the law is, and therefore what to do, they might leave it to the judges to determine. But, ſays *Coke*, *This ſtatute is only in affirmance of the common law*, *Inſt.* 2. 425. 13 *E.* 1. 39. See a *ſpecial* verdict in caſe of *murder*, *Co.* 4. 44. So in a caſe about murder, the jury tells the court, they find the killing it ſelf to be true, but not the killing feloniouſly, as mentioned in the indictment, and ſo aſk the opinion of the court, if it be murder, *Co.* 9. 69. So the jury found the parties indicted for *riotouſly* tearing the petition, guilty of tearing the petition, but not of the *riot*, &c. It's true, it's doubted in *Moor. c.* 1002. whether in a writ of right a jury may give a ſpecial verdict

verdict. But as there is no reaſon, that if the cauſe be indifferently plain, as to the law, the jury themſelves ſhall not put an end to it, giving a *general* verdict, as *guilty* or *not-guilty*, &c. without ſo much further charge, loſs of time, increaſe of trouble, as otherwiſe muſt needs follow; yet on the other hand, there is as little why, if there be difficulty in law upon the caſe, that they being moſtly unlearned in law, ſhould be bound to find *generally* guilty or not, &c. and ſo find and ſay on a ſudden what is the very law, as well as fact, when ſome ſuch caſes have ſeveral years puzzled all the judges to reſolve. And it's againſt all reaſon, that the election of giving a ſpecial verdict, or general verdict, ſhould be in the judges too; for the jury beſt knowing themſelves, their own capacities and ſtrength, do therefore beſt know when they meet with difficulties to them in law, and ſo when to give the one or other: And accordingly are the beſt opinions that the jury may *chuſe*, be the action, &c. real, perſonal, or mixt, civil, criminal, publick or private; and be the iſſue general or ſpecial, or in any caſe whatſoever: And that the judges muſt accept of, and cannot refuſe ſuch verdict. 13 *E.* 1. 30.

Either the jury may at any time alter their opinion or verdict, &c. before recorded in court, *Fitz. J. of P.* 114. *Co. L.* 227.

All ſaid any where above of grand-juries, may be applied to the *other* juries; and no body will offer to deny, but *other* juries ought to be as ſtrict, circumſpect, and careful, &c. as aforeſaid, tho' they would pretend otherwiſe of grand juries.

A petit jury may abridge a fault a grand jury finds one guilty of, but can't enlarge it: As one indicted of *murder*, may by the petit jury, be found guilty of *manſlaughter*, *chance-medly*, &c. inſtead thereof; but one being indicted of *manſlaughter*, can't by the petit jury be found guilty of *murder*, or any *greater* crime than *manſlaughter*.

A petit jury cannot give any verdict againſt any one, where life or member is in queſtion or danger, but only in the court, whilſt alſo it's ſitting, &c. though in other caſes it may.

To the immortal honour of a great judge in the law, in a trial in *London*, in *February*, this preſent year 1764, the jury were told from the bench, "that if they pleaſed to take it upon themſelves, they were "judges as well of law as fact,---And, that they were not anſwerable "to any power whatſoever for the verdict they might bring in, but "God and their own conſcience.

An Abſtract of MAGNA CHARTA, *or the* GREAT CHARTER *made in the Ninth Year of King* HENRY *the Third, and confirmed by King* EDWARD *the Firſt, in the Twenty-eighth Year of his Reign; being ſo much thereof, as remains now in force.*

HENRY, *By the grace of God, king of* England, *lord of* Ireland, *duke of* Normandy *and* Guyan, *and earl of* Anjou; *To all arch-biſhops, biſhops, abbots, priors, earls, barons, ſheriffs, provoſts, officers, and to all bailiffs, and other our faithful ſubjects which ſhall ſee this preſent charter, greeting. Know you, that we unto the honour of almighty God, and for the ſalvation of the ſouls of our progenitors and ſucceſſors, kings of* England, *to the advancement of our holy-church, and amendment of our realm, of our meer and free will, have given and granted to all arch-biſhops, biſhops, abbots, priors, earls, barons, and to all free-men of this our realm, theſe liberties following, to be kept in our kingdom of* England *for ever.*

A confirmation of liberties.

FIRST, we have granted to all the freemen of our realm, for us and our heirs for ever, theſe liberties under-written, to have and to hold to them and their heirs for ever.

II. *How ſureties ſhall be charged to the king.*

WE, or our bailiffs, ſhall not ſeize any land or rents for any debt, as long as the preſent goods and chattels, of the debtor do ſuffice to pay the debt, and the debtor himſelf be ready to ſatisfy therefore. 2. Neither ſhall the pledges of the debtor be diſtrained, as long as the principal debtor is ſufficient for the payment of the debt. 3. And if the principal debtor fail in the payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges ſhall anſwer for the debt. 4. And if they will, they ſhall have the lands and rents of the debtor, until they be ſatisfied of that which they before paid for him, except that the debtor can ſhew himſelf to be acquitted againſt the ſaid ſureties.

III. *The liberties of* London, *and other cities and towns, confirmed.*

THE city of *London* ſhall have all the old liberties and cuſtoms which it hath been uſed to have. Moreover, we will and grant, that all other cities and boroughs, towns, and the barons of the five ports, and all other ports, ſhall have all their liberties and free cuſtoms.

IV. *Common pleas ſhall not follow the king's court.*

COMMON pleas ſhall not follow our court, but ſhall be holden for ſome place certain.

V. *Where*

V. *Where and before whom assizes shall be taken. Adjournment for difficulty.*

ASSIZES of *novel disseisin* and *mortdancester*, shall be taken but in the shires, and after this manner; If we be out of this realm, our chief justices shall send our justices through every county once in the year: Which, with the knights of the shire, shall take the said assizes in those counties. (2.) And those things that at the coming of our aforesaid justices, being sent to take those assizes in the counties, cannot be determined, shall be ended by them in some other place in their circuit. 3. And those things which for difficulty of some articles cannot be determined by them, shall be referred to our justices of the bench, and there shall be ended.

VI. *Assizes of darrein presentment.*

ASSIZES of darrein presentment, shall be always taken before our justices of the bench, and there shall be determined.

VII. *How men of all sorts shall be amerced, and by whom.*

A FREE-MAN shall not be amerced for a small fault, but after the manner of the fault; and for a great fault, after the greatness thereof, saving to him his contenement. 2. And a merchant likewise, saving to him his merchandize. 3. And any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. 4. And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. 5. Earls and barons shall not be amerced, but by their peers, and after the manner of their offence. 6. No man of the church shall be amerced after the quantity of his spiritual benefice, but after his lay-tenement, and after the quantity of his offence.

VIII. *Making of bridges and banks.*

NO town nor freeman shall be destrained to make bridges nor banks, but such as of old time, and of right have been accustomed to make them in the time of king *Henry* our grandfather.

IX. *Defending of banks.*

NO banks shall be defended from henceforth, but such as were in defence in the time of king *Henry* our grandfather, by the same places, and the same bounds as they were wont to be in his time.

X. *Holding pleas of the crown.*

NO Sheriff, constable, escheator, coroner, nor any other our bailiffs, shall hold pleas of our crown.

XI. *The king's debtor dying, the king shall be first paid.*

IF any that holdeth of us *lay fee* do die, and our sheriff or bailiff do shew our letters patents, of our summons for debt, which the dead man did owe to us: It shall be lawful to our sheriff or bailiff, to attach and inrol all the goods and chattels of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men; so that nothing thereof be taken away, until we be clearly paid off the debt. 2. And the residue shall remain to the executors, to perform the testament of the dead.

3. And

3. And if nothing be owing to us, all the chattels ſhall go to the uſe of the dead (ſaving to his wife and children the reaſonable parts.)

XII. *How long felons lands ſhall be holden to the king.*

WE will not hold the lands of them that be convict of felony but one year and one day, and then thoſe lands ſhall be delivered to the lords of the fee.

XIII. *In what place wears ſhall be put down.*

ALL wears from henceforth ſhall be utterly put down in *Thames* and *Medway*, and thro' all *England*, but only by the ſea coaſts.

XIV. *In what caſe a* præcipe in capite, *is not grantable.*

THE writ that is called *præcipe in capite*, ſhall be from henceforth granted to no perſon of any freehold, whereby any freeman may loſe his court.

XV. *There ſhall be but one meaſure throughout this realm.*

ONE meaſure of wine ſhall be through our realm, and one meaſure of ale, and one meaſure of corn, that is to ſay, the quarter of LONDON. 2. And one breadth of dyed cloth, ruſſets, and haberjects, that is to ſay, two yards within the liſts. 3. And it ſhall be of weights as it is of meaſures.

XVI. *Inquiſition of life and member.*

NOTHING from henceforth ſhall be given for a writ of inquiſition, nor taken of him that prayeth inquiſition of life or of member; but it ſhall be granted freely, and not denied.

XVII. *Wager of law ſhall not be without witneſs.*

NO bailiff, from henceforth, ſhall put any man to his open law, nor to any oath, upon his own bare ſaying, without faithful witneſſes brought in for the ſame.

XVIII. *None ſhall be condemned without trial. Juſtice ſhall not be ſold or deferred.*

NO freeman ſhall be taken or impriſoned, or be diſſeiſed of his freedom, or liberties, or free cuſtoms, or be outlawed, or exiled, or any otherwiſe deſtroyed; nor we will not paſs upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. 2. We will ſell to no man, we will not deny or defer to any man, either juſtice or right.

XIX. *Merchants, ſtrangers, coming into this realm, ſhall be well uſed.*

ALL merchants, (if they were not openly prohibited before) ſhall have their ſafe and ſure conduct to depart out of *England*, to come into *England*, to tarry in, and go through *England*, as well by land as by ſea, to buy and ſell without any manner of evil tools, by the old and rightful cuſtoms, except in time of war. 2. And if they be of a land making war againſt us, and be found in our realm at the beginning of the wars, they ſhall be attached without harm of body and goods, until it be known unto us or our chief juſtice, how our merchants be intreated there in the land making war againſt us. 3. And if our merchants be well intreated there, theirs ſhall be likewiſe with us.

XX. *Tenure of a barony coming into the king's hand by eſchete.*

IF any man hold of any eſchete, as of the honour of *Wallingford*, *Nottingham*, *Boloin*, or of any other eſchetes which be in our hand, and are baronies, and die; his heirs ſhall give none other relief,

relief, nor do none other ſervice to us, than he ſhould to the baron, if it were in the barons hand. 2. And we in the ſame wiſe ſhould hold it as the baron held it; neither ſhall we have, by occaſion of any baron or eſchete, any eſchete, or keeping of any of our men, unleſs he that held the barony or eſchete, otherwiſe held of us in chief.

XXI. *Lands ſhall not be alienated to the prejudice of the lord's ſervice.*

NO freeman, from henceforth, ſhall give or ſell any more of his lands, but ſo, that of the reſidue of the lands, the lord of the fee may have the ſervices due to him, which belongeth to the fee.

XXII. *In what only caſe a woman ſhall have an appeal of death.*

NO man ſhall be taken or impriſoned upon the appeal of a woman, for the death of any other than of her huſband.

XXIII. *No land ſhall be given in mortmain.*

IT ſhall not be lawful, from henceforth, to any one, to give his lands to any religious houſe, and take the ſame land again, to hold of the ſame houſe. Nor ſhall it be lawful for any houſe of religion to take the lands of any, and to leaſe the ſame to him of whom he received it: If any, from henceforth, give his lands to any religious houſe, and thereupon be convict, the gift ſhall be utterly void, and the land ſhall accrue to the lord of the fee.

Notes on MAGNA CHARTA.

THIS excellent law holds the firſt place in our ſtatute books; for though there were, no doubt, many acts of parliament long before this, yet they are not now extant; 'tis called MAGNA CHARTA, or the *great charter*, not in reſpect of its bulk, but in regard of the great importance and weight of the matters therein contained, it is alſo ſtiled *charta libertatum regni*, the charter of the liberties of the kingdom; and upon great reaſon (ſaith *Coke* in his proem) it is ſo called from the effect, becauſe it makes and preſerves the people free.

Though it run in the ſtile of the king *as a charter*, yet, (as my lord *Coke* well obſerves in the 38th chapter) it appears to have paſſed in parliament; for then there was a fifteenth granted to the king, by the biſhops, earls, barons, free-tenants and people, which could not be but in parliament, nor was it unuſual in thoſe times, to have acts of parliament in a form of a *charter*, as you may read in the prince's caſe. *Co. Rep. l.* 8.

Likewiſe, tho' it be ſaid here, that *the king hath given and granted theſe liberties*; yet they muſt not be underſtood as mere *emanations* of royal favour, or new bounties granted, which the people could not juſtly challenge, or had not a right unto before: For the lord *Coke*, at divers places aſſerts, and all lawyers know, that this charter is, for the moſt part, only *declaratory* of the principal grounds of the fundamental laws and liberties of *England*; no new freedom is hereby granted, but a reſtitution of ſuch as lawfully they had before, and to free them of what had been uſurped and incroached upon them by any power whatſoever; and therefore you may ſee this charter often mentions their rights and liberties, which ſhews they had them before, and that the ſame were now confirmed,

As

As to the occaſion of this charter it muſt be noted, that our anceſtors, the *Saxons*, had with a moſt equal poize and temperament, very wiſely contriv'd their government, and made excellent proviſion for their liberties, and to preſerve the people from oppreſſion; and when *William* the *Norman* made himſelf maſter of the land, though he is commonly called the *conqueror*, yet in truth he was not ſo; and I have known ſeveral judges that would reprehend any gentleman at the bar, that caſually gave him that title: For though he killed *Harold* the uſurper, and routed his army, yet he pretended a right to the kingdom, and was admitted by compact, and did take the oath to obſerve the *laws* and *cuſtoms*.

But the truth is, he did not perform that oath ſo as he ought to have done; and his ſucceſſors, *William Rufus*, king *Stephen*, *Henry* the firſt, and *Richard* likewiſe, made frequent incroachments upon the liberties of the people; but eſpecially king *John* made uſe of ſo many illegal devices to drain them of money, that wearied with intolerable oppreſſions, they reſolved to oblige the king to grant them their liberties, and to promiſe the ſame ſhould be obſerved; which king *John* did, in *Running-Mead* between *Stains* and *Windſor*, by two *charters*, one called, *charta libertatum*, the charter of liberty (the form of which you may read in *Math. Paris*, Folio 246. and is in effect, the ſame with this here recited) the other the *charter of the foreſt*, copies of which he ſent into every county, and commanded the ſheriffs, &c. to ſee them fulfilled.

But by ill counſel he quickly after began to violate them as much as ever; whereupon diſturbances and great miſeries aroſe, both to himſelf and the realm.

The ſon and ſucceſſor of this king *John*, was *Henry* the third, who in the ninth year of his reign, renewed and confirmed the ſaid charters, but within two years after cancelled them, by the pernicious advice of his favourites, and particularly *Hubert de Burgh*, whom he had made lord chief juſtice; one that in former times had been a great lover of his country, and well-deſerving patriot, as well as learned in the laws; but now, to make this a ſtep to his *ambition* (which ever rideth without reins) perſuaded and humoured the king, that he might avoid the charters of his father king *John* by *Dureſſe*, and his own charter, and *Charta de Foreſta* alſo; for that he was within age when he granted the ſame: Whereupon the king in the eleventh year of his reign, being then of full age, got one of the great charters, and of the forreſt into his hands; and by the council principally of this *Hubert* his chief juſtice, at a council held at *Oxford*, unjuſtly *cancelled both the ſaid charters*, (notwithſtanding the ſaid *Hubert de Burgh* was the *primier* witneſs of all the temporal lords, to both the ſaid charters; whereupon he became in high favour with the king, inſomuch that he was ſoon after, (*viz.* the 10th of *December*, in the thirteenth year of that king) created (to the higheſt dignity that in thoſe days a ſubject had) to be an earl, *viz.* of *Kent*. But ſoon after (for flatterers and humoriſts have no ſure foundation) he fell into the king's heavy indignation, and after many fearful and miſerable troubles, he was juſtly, and according to law, ſentenced by his peers in an open parliament, and juſtly degraded of that dignity which he unjuſtly had obtained by his counſel, for cancelling *Magna Charta*, and *Charta de Foreſta*.

In this great charter, all the ancient *liberties* and *cuſtoms* of *London*, are confirmed and preſerved, which is likewiſe done by divers other ſtatutes, as 14 *E.* 3. *c.* 2, &c. The 13th paragraph ſays,

NO FREEMAN SHALL BE TAKEN, *&c.* which deſerves to be written in letters of gold; and I have often wondred, the words thereof are not inſcribed in capitals on all our courts of judicature, town-halls,

and moſt publick edifices: They are the *elixir* of our *Engliſh* freedoms, and ſtore-houſe of all our liberties. And becauſe my lord *Coke*, in the ſecond part of his inſtitutes, has many excellent obſervatious, I ſhall here recite his very Words. This containeth nine ſeveral Branches.

1. *That no man be taken or impriſoned*, but *per legum terræ*, that is, by the *common law*, *ſtatute law*, or *cuſtom* of *England*: For theſe words, *per legum terræ*, being towards the end of this chapter, do refer to all the precedent matters in this chapter; and this hath the firſt place, becauſe the *liberty of a man's perſon* is more precious to him, than all the reſt that follow, and therefore it is great reaſon that he ſhould, by law, be relieved therein, if he be wronged, as hereafter ſhall be ſhewed.

2. *No man ſhall be diſſeiſed*; that is, put out of ſeiſin, or diſpoſſeſſed of his freehold; that is, lands or livelihood, or of his liberties or free-cuſtoms; that is, of ſuch franchiſes and freedoms, and free-cuſtoms, as belong to him by his free-birth-right, unleſs it be by the *lawful judgment*; that is, *verdict* of his equals (that is, of men of his own condition) or by the *law of the land*; that is, (to ſpeak it once for all) by the due courſe and proceſs of law.

3. *No man ſhall be outlawed*, made an *exlex*, put out of the law, that is, deprived of the benefit of the law, unleſs he be outlawed according to the law of the land.

4. *No man ſhall be exiled* or baniſhed out of his country, that is, no man ſhall *loſe his country*, unleſs he be exiled according to the *law* of the *land*.

5. *No man ſhall in any ſort be deſtroyed*, unleſs it be by the verdict of his equals, or according to the *law* of the *land*.

6. No man ſhall be condemned at the king's ſuit, either before the king in his bench, where the pleas are *coram rege*, nor before any other commiſſioner or judge whatſoever; but by the judgment of his peers, that is, equals, or according to the law of the land.

7. We ſhall ſell to no man juſtice or right.

8. We ſhall deny to no man juſtice or right.

9. We ſhall defer to no man juſtice or right.

Each of theſe we ſhall briefly explain.

1. No man *ſhall be taken*, that is, reſtrained of liberty, by petition or ſuggeſtion to the king or his council, unleſs it be by indictment or preſentment of good and lawful men, where ſuch deeds be done. This branch, and divers others parts of this act, have been notably explained and conſtrued by divers acts of parliament.

2. *No man ſhall be diſſeiſed, &c.* Hereby is intended, that lands, tenements, goods and chattels, ſhall not be ſeized into the king's hands, contrary to this great charter, and the law of the land; nor any man ſhall be diſſeiſed of his lands or tenements, or diſpoſſeſſed of his goods or chattels, contrary to the law of the land.

A cuſtom was alledged in the town of *D.* that if the tenant ceaſe by two years, that the lord ſhould enter into the freehold of the tenement, and hold the ſame until he was ſatisfied of the arrearages: It was adjudged a cuſtom againſt the law of the land, to enter into a man's freehold in that caſe, without action or anſwer.

King *Henry* VI. granted to the corporation of *Dyers* within *London*, power to ſearch, &c. And if they found any cloth died with *logwood*, that the cloth ſhould be forfeit: And it was adjudged, that this charter concerning the forfeiture, was againſt the law of the land, and this ſtatute. For no forfeiture, can grow by letters patents.

No man ought to be put from his livelihood without anſwer.

3. *No man outlawed*, This is, barred to have the benefit of the law. And note, to this word *outlawed*, theſe words, *unleſs by the law of the land*, do refer [*Of his liberties.*] This word had three ſignifications.

1. As

1. As it hath been ſaid, it ſignifieth the *laws* of the realm, in which reſpect, the charter is called, *charta libertatum*, as aforeſaid.

2. It ſignifieth the *freedom the ſubjects of England* have: For example, The *company* of *merchant taylors* of *England*, having power, by their *charter*, to make ordinances, made an ordinance, that every brother of that ſociety ſhould put the one half of his *cloaths* to be dreſſed by ſome *cloth workers* free of the ſame *company*, upon pain to forfeit *ten ſhillings*, &c. And it was adjudged, that this ordinance was againſt law, becauſe it was againſt the liberty of the ſubject; for every ſubject hath freedom to put his cloaths to be dreſſed by whom he will. And ſo it is, if ſuch or the like grant had been made by his *letters patents*.

3. *Liberties* ſignifie the *franchiſes* and *privileges* which the ſubjects have of the gift of the king, as the *goods* and *chattels* of *felons*, *outlaws*, and the like, or which the ſubject claims by preſcription, as *wreck*, *waiſe*, *ſtray*, and the like.

So likewiſe, and for the ſame reaſon, if a grant be made to any man, to have the ſole making of cards, or the ſole dealing with any other trade, that grant is againſt the liberty and freedom of the ſubject, that before did, or lawfully might have uſed that trade, and conſequently againſt this great *charter*.

Generally *all monopolies* are againſt this great *charter*, becauſe they are againſt the liberty and freedom of the ſubject, and againſt the *law* of the *land*.

4. *No man exiled*; That is, baniſh'd, or forced to depart or ſtay out of *England*, without his conſent. By the *law* of the *land*, no man can be exiled or baniſhed out of his native country, but either by authority of the parliament, or in caſe of abjuration for felony by the *common law*; and ſo when our books, or any record, ſpeak of exile, or baniſhment, other than in caſe of abjuration, it is to be intended to be done by authority of parliament, as *Belknap* and other judges, &c. baniſhed into *Ireland*, in the reign of *Richard* II.

This is a beneficial law, and conſtrued benignly; and therefore the king cannot ſend any ſubject of *England*, againſt his will, to ſerve him out of this realm, for that ſhould be an exile, and he ſhould *perderepatriam*: No, he cannot be ſent againſt his will, into *Ireland*, to ſerve the king or his deputy there, becauſe it is out of the realm of *England*: For if the king might ſend him out of his realm to any place, then, under pretence of ſervice, as ambaſſador, or the like, he might ſend him into the fartheſt part of the world, which being an exile, is prohibited by this act.

5. *No man deſtroyed*; That is, fore-judged of life or limb, or put to torture, or death, every oppreſſion againſt law, by colour of an uſurped authority, is a kind of deſtruction. And the words *aliquo modo* (any otherwiſe) are added to this verb *deſtroyed*, and to no other verb in this chapter, and therefore all things, by any manner of means, tending to deſtruction, are prohibited; as if a man be accuſed or indicted of treaſon or felony; his lands or goods cannot be granted to any, no not ſo much as by promiſe, nor any of his lands or goods ſeized into the king's hands before he is attainted: For, when a ſubject obtaineth a promiſe of a forfeiture, many times undue means, and more violent proſecution is uſed for private lucre, tending to deſtruction, than the quiet and juſt proceeding of the law would permit, and the party ought to live of his own until attainder.

6. *By lawful judgment of his peers*; That is, by his *equals*, men of his own rank and condition. The general diviſion of perſons, by the law of *England*, is, either *one that is noble*, and in reſpect of his nobility of the lords houſe of parliament, or *one of the commons*, and in reſpect thereof, of the houſe of commons in parliament. And as there be divers degrees

of nobility, as dukes, marqueſſes, earls, viſcounts and barons, and yet all of them are comprehended under this word *peers*, and are peers of the realm: So of the commons, there be knights, eſquires, gentlemen, citizens, and yeomen, and yet all of them of the commons of the realm. And as every of the nobles is one a peer to another, though he be of a ſeveral degree, ſo it is of the commons, and as it hath been ſaid of men, ſo doth it hold of noble women, either by birth or marriage.

And forasmuch, as this judgment by peers is called *lawful*, it ſhews the antiquity of this manner of trial: It was the ancient accuſtomed legal courſe, long before this charter.

Or by the law of the land: That is, by due proceſs of law, for ſo the words are expreſly expounded by the ſtatute of 37 *E.* 3. *chap.* 8. And theſe words are ſpecially to be referred to thoſe foregoing, to whom they relate. As none ſhall be condemned without a lawful trial by his peers, ſo none ſhall be taken, impriſoned, or put out of his freehold, without due proceſs of law, that is, by the indictment, or preſentment of good and lawful men of the place, in due manner, or by writ original of common-law.

Now, ſeeing that no man can be taken, arreſted, attached, or impriſoned, but by due proceſs of law, and according to the law of the land, theſe concluſions hereupon do follow:

1. That the perſon or perſons which commit any, muſt have lawful authority.

2 It is neceſſary that the warrant, or *mittimus*, be lawful, and that muſt be in writing under his hand and ſeal.

3. The cauſe muſt be contained in the warrant, as for treaſon, felony, &c. Suſpicion of treaſon, or felony, or the like particular crime: For if it do not thus ſpecifie the cauſe, if the priſoner brings his *habeas corpus*, he muſt be diſcharged, becauſe no crime appears on the return: Nor is it in ſuch caſes any offence at all, if the priſoner make his eſcape; whereas if the *mittimus* contain the *cauſe*, the eſcape would reſpectively be treaſon or felony, tho' in truth he was not guilty of the firſt offence. And this mentioning the cauſe, is agreeable to ſcripture, *Acts* 5.

4. The warrant, or *mittimus*, containing a lawful cauſe, ought to have a lawful *concluſion*, &c. And him ſafely to keep until he be delivered by *law*, &c. and not until the party committing ſhall farther order.

If any man, by colour of any authority, where he hath not any in that particular caſe, ſhall preſume to arreſt or impriſon any man, or cauſe him to be arreſted or impriſoned, this is againſt this act, and it is moſt hateful, when it is done by countenance of juſtice. King *Edward* VI. did incorporate the town of St. *Albans*, and granted to them to make ordinance, &c. they made a by-law, upon pain of impriſonment, and it was adjudged to be againſt this ſtatute of *magna charta*; ſo it had been if ſuch an ordinance had been contained in the patent it ſelf.

We will ſell to no man, deny to no man, &c. This is ſpoken in the perſon of the king, who in judgment of *law*, in all his courts of juſtice, is preſent. And therefore every ſubject of this realm, for injury done to him in perſon, lands or goods, by any other ſubject, *eccleſiaſtical* or *temporal*, whatever he be, without exception, may take his remedy by the courſe of the law, and have juſtice and right for the injury done him; freely, without ſale; fully, without denial; and ſpeedily, without delay; for juſtice muſt have three qualities; it muſt be *free*; for nothing is more odious, than juſtice ſet to ſale: *Full*, for juſtice ought not to limp, or be granted by piece-meel: And *ſpeedily*, for delay is a kind of a denial: And when all theſe meet, it is both juſtice and right.

We will not deny or delay any man, &c. Theſe words have been excellently expounded by latter acts of parliament, that by no means com-

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mon right, or common *law*, ſhould be diſturbed or delayed; no, tho' it be commanded under the *great ſeal*, or *privy ſeal*, *order*, *writ*, *letters*, *meſſage*, or *commandment whatſoever*, *from the king or any other*; and that the juſtices ſhall proceed, as if no ſuch writs, letters, order, meſſage, or other commandment were come to them: All our judges ſwear to this; for 'tis part of their oaths; ſo that if any ſhall be found wreſting the *law*, to ſerve a court-turn, they are perjur'd as well as unjuſt. The *common-law* of the realm, ſhould by no means be *delayed*, for the *law* is the ſureſt ſanctuary that a man can take, and the ſtrongeſt fortreſs to protect the weakeſt of all: The *law* is a moſt ſafe head-piece, and no man is deceived whilſt the law is his buckler: But the king may ſtay his own ſuit, as a *capias pro fine*, for the king may reſpite his fine and the like.

All protections that are not legal, which appear not in the regiſter, nor warranted in our books, are expreſly againſt this branch, *nulli deferemus*, we will not delay any man: As a protection under the great ſeal, granted to any man, directed to the ſheriffs, &c. and commanding them that they ſhall not arreſt him, during a certain time, at any other man's ſuit, which hath words in it, ſuch as: *By our prerogative, which we will not have diſputed*; Yet ſuch protections have been argued by the judges, according to their oath and duty, and adjudged to be void. As *Mich.* 11. *H.* 7. *Rot.* 324. a protection granted to *Holmes*, a vintner of *London*, his factors, ſervants and deputies, &c. Reſolved to be againſt law, *Paſch.* 7. *H.* 8. *Rot.* 66. ſuch a protection diſallowed, and the ſheriff amerced for not executing the writ, *Mich.* 13 & 14 *Eliz.* in *Hitchcok's* caſe, and many others of latter time: And there is a notable record of ancient time, in 22 *E.* 1. *John de Marſhal's* caſe.

Juſtice or right: We ſhall not ſell, deny or delay, juſtice and right; neither the end, which is juſtice, nor the mean whereby we may attain to the end, and that is the law: Right is taken here for law, in the ſame ſenſe that juſtice often is ſo called. 1. Becauſe it is the *right line*, whereby juſtice diſtributive is guided and directed; and therefore all the commiſſioners of *oyer* and *terminer*, of gaol-delivery of the peace, &c. have this clauſe; *To do juſtice and right according to the rule of the law and cuſtom of* England; and that which is called common-right, in 2 *E.* 3. is called common-law, in 14 *E.* 3. &c.

2. The law is called *rectum*, becauſe it diſcovereth that which is tort, crooked or wrong; for as right ſignifieth law, ſo tort, crooked or wrong, ſignifieth injuries; and injury is againſt right; *A right line is both declaratory of it ſelf and the oblique.* Hereby the crooked cord of that which is called diſcretion, appeareth to be unlawful, unleſs you take it as it ought to be, *Diſcretion is to diſcern by the law what is juſt.*

3. It is called *right*, becauſe it is the beſt *birth-right* the ſubject hath, for thereby his goods, lands, wife and children, his body, life, honour and eſtimation, are protected from injuries: *A greater inheritance deſcends to us from the laws, than from our progenitors.*

Thus far the very words of that oracle of our law, the ſage and learned *Coke*, which ſo fully and excellently explains this incomparable law, that it will be ſuperfluous to add any thing farther thereunto. And by ſtat. 35 *Ed.* 1. *c.* 2. it is expreſly declared, *That if any judgment be given from that forwards, againſt any of the points of* magna charta, *they ſhall be anull'd and holden for nought.*

A Treatiſe on the law of deſcents in fee-ſimple; by William Blackſtone, *Eſq; barriſter at law, vinerian profeſſor of the laws of* England.

DESCENT, or hereditary ſucceſſion, is the title whereby a man on the death of his anceſtor acquires his eſtate by right of repreſentation, as his heir at law. An heir therefore is he upon whom the law caſts the eſtate immediately on the death of the anceſtor: and an eſtate, ſo deſcending to the heir, is in law called the inheritance.

The doctrine of deſcents, or law of inheritances in fee-ſimple, is a point of the higheſt importance, and is indeed the principal civil object of the laws of *England*. All the rules relating to purchaſes, whereby the legal courſe of deſcents is broken and altered, perpetually refer to this ſettled law of inheritance, as a *datum* or firſt principle univerſally known, and upon which their ſubſequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly underſtood without a previous knowledge of the law of deſcents in fee-ſimple. One may well perceive, that this is an eſtate confined in it's deſcent to ſuch heirs only of the donee, as have ſprung or ſhall ſpring from his body; but who thoſe heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldeſt, youngeſt, or other ſon alone, or all the ſons together, ſhall be his heir; this is a point, that we muſt reſult back to the ſtanding law of deſcents in fee-ſimple to be informed of.

In order therefore to treat a matter of this univerſal conſequence the more clearly, I ſhall firſt endeavour to point out who is the legal heir, in all poſſible circumſtances that can occur, provided there is no ſpecial impediment to obſtruct his title; which will include the whole doctrine of the law of DESCENTS: and ſhall afterwards conſider the ſpecial impediments that may divert or totally deſtroy the general courſe of inheritance; which will bring under our conſideration the doctrine of the law of ESCHEATS, as a kind of appendix to the former.

But, as both of theſe doctrines depend not a little on the nature of kindred, and the ſeveral degrees of conſanguinity, it will be previouſly neceſſary to ſtate, as briefly as poſſible, the true notion of this kindred or alliance in blood.

Conſanguinity, or kindred, is defined by the writers on theſe ſubjects, "*vinculum perſonarum ab eodem ſtipite deſcendentium*, the connexion or relation of perſons deſcended from the ſame ſtock or common anceſtor. This conſanguinity is either lineal, or collateral.

Lineal conſanguinity is that which ſubſiſts between perſons, of whom one is deſcended in a direct line from the other; as between *John Stiles* (the *propoſitus* in the table of conſanguinity) and his father, grandfather, great-grandfather, and ſo upwards in the direct aſcending line; or between *John Stiles* and his ſon, grandſon, great-grandſon: and ſo downwards in the direct deſcending line. Every generation, in this lineal direct conſanguinity, conſtitutes a different degree, reckoning either upwards or downwards: the father of *John Stiles* is related to him in the firſt degree, and ſo likewiſe is his ſon; his grandfire and grandſon in

in the second; his great-grandsire, and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil, and canon, as in the common law. *Co. Litt.* 23. *b.*

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees. He has two in the first ascending degree, his parents; he has four in the second, the parents of his father and the parents of his mother; he has eight in the third, the parents of his two grandfathers and two grandmothers; and, by the same rule of progression, he has an hundred and twenty eight in the seventh, a thousand and twenty four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man has above a million of ancestors, as common arithmetic will demonstrate. And as many ancestors as a man has, so many different bloods is he said to contain in his veins. *Co. Litt.* 12. *b.* This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor, but differing in this, that they do not descend from each other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the trunk, the *stipes*, or common stock, from whence these relations are branched out. As if *John Stiles* hath two sons, who have each a numerous issue, both these issues are lineally descended from *John Stiles* as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related; why? because both are derived from one father: *Titius* and his first cousin are related; why? because both descend from the same grandfather: and his second cousins claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other.

The method of computing these degrees in the canon law, which our law has adopted, *Co. Litt.* 23. *b.* is as follows. We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. As, in case of *Titius* and his brother, they are related in the first degree; for from the father to each of them is counted only one: *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, his own grandfather, the father of *Titius*.

The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or CANONS OF INHERITANCE, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

The

The first rule is, that

I. *Inheritances shall lineally descend to the issue of the person last actually seised* in infinitum; *but shall never lineally ascend.*

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis.* Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, who in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son.

We must also remember, that no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, or what is equivalent thereto in incorporeal hereditaments; and not he who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases, which will be mentioned in the ensuing treatise, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. So that the seisin of any person makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *Seisina facit stipitem.*

When therefore a person dies so seised, the inheritance first goes to his issue: as if there be *Geoffrey*, *John*, and *Matthew*, grandfather, father, and son; and *John* purchases land and dies; his son *Matthew* shall succeed him as heir, and not the grandfather *Geoffrey*, to whom the land shall never ascend, but shall rather escheat to the lord. *Litt.* §. 3.

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the *Jewish* law, on failure of issue the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother. And, by the laws of *Rome*, in the first place the children or lineal descendants were preferred; and on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters; though by the law of the twelve tables the mother was originally, on account of her sex, excluded. Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good reason, may appear from considering as well the rule itself, as the occasion of introducing it into our laws.

We

We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor; after which the land by the law of nature would again become common, and liable to be seised by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law. Nor is the admission of parents to the inheritance of their children at all dictated by natural reason, as the admission of children most certainly is to that of their parents, where any succession is permitted: for, as the progenitors received not their being from their offspring, they have therefore no reason to expect from that quarter the means of support and subsistence.

It may farther be alleged in defence of this exclusion, that those who introduced and gave a sanction to this law were themselves fathers; and, considering them as such, this establishment conveys to us a very high idea of their magnanimity, honour, and parental affection. Of their magnanimity: because a gift of lands from the parents to the children is so much the more generous and conveyed with the better grace, the farther the distance is, at which they have placed the possibility of a resumption, or of the inheritance's returning to themselves. Of their honour: which was too delicate to admit their children upon such a footing of equality, as that they might be mutually heirs to each other; or even to entrust themselves with the maintenance and care of that offspring, by whose death they might possibly be gainers. Of their parental affection: in that they regarded the loss of their children as the greatest misfortune that could possibly befal them, for which no estate could be a recompence: they would not therefore anticipate their affliction, by supposing a thing so contrary to nature as that the parent should outlive the child; nor make provisions in their own favour in consequence of so melancholy a contingency, which even those laws that allow the ascent of inheritances have denominated *triste et luctuosa successio*. These reasons, drawn from the consideration of the rule itself, seem to be more satisfactory than that quaint one of *Bracton*, adopted by sir *Edward Coke*, which regulates the descent of lands according to to the laws of gravitation.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law, that *successionis feuditalis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also in the *French* law to this day. Our *Henry* the first indeed, among other restorations of the old *Saxon* laws, restored the right of succession in the ascending line: but this soon fell again into disuse; for so early as *Glanvil*'s time, who wrote under *Henry* the second, we find it laid down as established law, that *haereditas nun quam ascendit*; which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and, taken in that light, there are some arguments in it's favour, besides those which are drawn from the reason of the thing. For if the feud, of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the

the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions; which was founded as well upon the personal merit of the vasal, which might be transmitted to his children but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vasal would be but indifferently qualified to succeed him in his feodal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an antient feud; and therefore could not go to the father, because, if it had been an antient feud, the father must have been dead before it could have come to the son. Thus whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed.

A second general rule or canon is, that,

II. *The male issue shall be admitted before the female.*

Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat complaisantly expressed it, the worthiest of blood shall be preferred. *Hal. H. C. L.* 235. As if *John Stiles*, hath two sons, *Matthew* and *Gilbert*, and two daughters, *Margaret* and *Charlotte*, and dies; first *Matthew*, and (in case of his death without issue) then *Gilbert*, shall be admitted to the succession in preference to both the daughters.

This preference of males to females is entirely agreeable to the law of succession among the *Jews*, and also among the states of *Greece*, or at least among the *Athenians*; but was totally unknown to the laws of *Rome*, (such of them, I mean, as are present extant) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the *Roman* and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex; but shall only observe, that our present preference of males to females seems to have arisen entirely from the feodal law. For though our *British* ancestors, the *Welch*, appear to have given a preference to males, yet our subsequent *Danish* predecessors seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance. But the feodal law of the *Saxons* on the continent (which was probably brought over hither, and first altered by the law of king *Canute*) gives an evident preference of the male to the female sex. "*Pater aut mater, defuncti, filio non filiae hereditatem relinquent. . . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hereditas pertinent.*" It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king *Henry* the first, it is not (like many *Norman* innovations) given up, but rather enforced. The true reason of preferring the males must be deduced from feodal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were

were moſt ſtrictly retained; it only poſtpones them to males: for, tho' daughters are excluded by ſons, yet they ſucceed before any collateral relations: our law, like that of the *Saxon* feudiſts before-mentioned, thus ſteering a middle courſe, between the abſolute rejection of females, and the putting them on a footing with males.

A third rule, or canon of deſcent, is this; that

III. *Where there are two or more males in equal degree, the eldeſt only ſhall inherit; but the females altogether.*

As if a man hath two ſons, *Matthew* and *Gilbert*, and two daughters, *Margaret* and *Charlotte*, and dies; *Matthew* his eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of *Gilbert* the ſecond ſon and both the daughters: but, if both the ſons die without iſſue before the father, the daughters *Margaret* and *Charlotte*, ſhall both inherit the eſtate as coparceners.

This right of primogeniture in males ſeems antiently to have only obtained among the *Jews*, in whoſe conſtitution the eldeſt ſon had a double portion of the inheritance; in the ſame manner as with us, by the laws of king *Henry* the firſt, the eldeſt ſon had the capital fee or principal feud of his fathers poſſeſſions, and no other pre-eminence; and as the eldeſt daughter had afterwards the principal manſion, when the eſtate deſcended in coparcenary. The *Greeks*, the *Romans*, the *Britons*, the *Saxons*, and even originally the feudiſts, divided the lands equally; ſome among all the children at large, ſome among the males only. This is certainly the moſt obvious and natural way; and has the appearance, at leaſt in the opinion of younger brothers, of the greateſt impartiality and juſtice. But when the emperors began to create honorary feuds, or titles of nobility, it was found neceſſary (in order to preſerve their dignity) to make them impartible, or (as they ſtiled them) *feuda individua*, and in conſequence deſcendible to the eldeſt ſon alone. This example was farther enforced by the inconveniencies that attended the ſplitting of eſtates; namely, the diviſion of the military ſervices, the multitude of infant tenants incapable of performing any duty, the conſequential weakening of the ſtrength of the kingdom, and the inducing younger ſons to take up with the buſineſs and idleneſs of a country life, inſtead of being ſerviceable to themſelves and the publick, by engaging in mercantile, in military, in civil, or in eccleſiaſtical employments. Theſe reaſons occaſioned an almoſt total change in the feodal inheritances abroad; ſo that the eldeſt male began univerſally to ſucceed to the whole of the lands in all military tenures: and in this condition the feodal conſtitution was eſtabliſhed in *England* by *William* the conqueror.

Yet we find, that ſocage eſtates frequently deſcended to all the ſons equally, ſo lately as when *Glanvil* wrote, in the reign of *Henry* the ſecond; and it is mentioned in the mirror as a part of our antient conſtitution, that knights fees ſhould deſcend to the eldeſt ſon, and ſocage fees ſhould be partible among the male children. However in *Henry* the third's time we find by *Bracton*, that ſocage lands, in imitation of lands in chivalry, had almoſt entirely fallen into the right of ſucceſſion by primogeniture, as the law now ſtands: except in *Kent*, where they gloried in the preſervation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the ſons; and except in ſome particular manors and townſhips, where their local cuſtoms continued the deſcent, ſometimes to all, ſometimes to the youngeſt ſon only, or in other unuſual methods of ſucceſſion.

As to the females, they are ſtill left as they were by the antient law; for they were all equally incapable of performing any perſonal ſervice: and

and therefore, one main reaſon of preferring the eldeſt ceaſing, ſuch preference would have been injurious to the reſt: and the other principal purpoſe, the prevention of the too minute ſubdiviſion of eſtates, was left to be conſidered and provided for by the lords, who had the diſpoſal of theſe female heireſſes in marriage. However, the ſucceſſion by primogeniture, even among females, took place as to the inheritance of the crown; wherein the neceſſity of a ſole and determinate ſucceſſion is as great in the one ſex as the other. And the right of ſole ſucceſſion, though not of primogeniture, was alſo eſtabliſhed with reſpect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldeſt ſhall not of courſe be counteſs, but the dignity is in ſuſpenſe or abayance till the king ſhall declare his pleaſure; for he, being the fountain of honour, may confer it on which of them he pleaſes. In which diſpoſition is preſerved a ſtrong trace of the antient law of feuds, before their deſcent by primogeniture even among the males was eſtabliſhed; namely, that the lord might beſtow them on which of the ſons he thought proper: ----"*progreſſum eſt, ut ad filios deveniret, in quem, ſcilicet dominus hoc vellet beneficium confirmare.*"

A fourth rule or canon of deſcents, is this; that

IV. *The lineal deſcendants*, in infinitum, *of any perſon deceaſed, ſhall repreſent their anceſtor; that is, ſhall ſtand in the ſame place as the perſon himſelf would have done, had he been living.*

Thus the child, grandchild, or great-grandchild (either male or female) of the eldeſt ſon ſucceeds before the younger ſon, and ſo *in infinitum*. And theſe repreſentatives ſhall take neither more nor leſs, but juſt ſo much as their principals would have done. As if there be two ſiſters, *Margaret* and *Charlotte*; and *Margaret* dies, leaving ſix daughters; and then *John Stiles*, the father of the two ſiſters dies, without other iſſue: theſe ſix daughters ſhall take among them exactly the ſame as their mother *Margaret* would have done, had ſhe been living; that is, a moiety of the lands of *John Stiles* in coparcenary: ſo that, upon partition made, if the land be divided into twelve parts, thereof *Charlotte* the ſurviving ſiſter ſhall have ſix, and her ſix nieces, the daughters of *Margaret*, one a piece.

This taking by repreſentation is called a ſucceſſion *in ſtirpes*, according to the roots; ſince all the branches inherit the ſame ſhare that their root, whom they repreſent, would have done. And in this manner alſo was the *Jewiſh* ſucceſſion directed; but the *Roman* ſomewhat differed from it. They allowed the right of repreſentation, but diſtinguiſhed and refined upon that right. If any perſons of equal degree with the perſons repreſented were ſtill ſubſiſting, then the inheritance ſtill deſcended *in ſtirpes*: as if one of three daughters died, leaving ten children, and then the father died; the two ſurviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them, as repreſentatives of their mother deceaſed. But if all the perſons related to the deceaſed in the firſt degree, were dead, leaving iſſue, then their repreſentatives in equal degree became themſelves principals, and ſhared the inheritance *per capita*, that is, ſhare and ſhare alike; they being themſelves now the next in degree to the anceſtor, in their own right, and not by right of repreſentation. As if there be three ſiſters, the only children of *Titius*, and they all die in the life time of *Titius*, one ſiſter leaving three daughters, another two, and the third one only; the grand fathers inheritance by the *Roman* law was divided into ſix parts, and one given to each of theſe ſix grandchildren; whereas the

the law of *England* in this caſe would ſtill divide it only into three parts, and diſtribute it *per ſtirpes*, thus; one third to the three children who repreſent one ſiſter, another third to the two who repreſent the ſecond, and the remaining third to the one child who is the ſole repreſentative of her mother.

This mode of repreſentation is a neceſſary conſequence of the double preference given by our law, firſt to the male iſſue, and next to the firſtborn among the males, to both which the *Roman* law is a ſtranger. For if all the deſcendants of three daughters were in *England* to claim *per capita*, in their own rights as next of kin to the grandfather, without any reſpect to the ſtocks from whence they ſprung, and thoſe deſcendants were partly male and partly female; then the eldeſt male among them would exclude not only his own brethren and ſiſters, but all the iſſue of the other two daughters; or elſe the law in this inſtance muſt be inconſiſtent with itſelf, and depart from the preference which it conſtantly gives to the males, and the firſtborn, among perſons in equal degree. Whereas, by dividing the inheritance according to the roots or *ſtirpes*, the rule of deſcent is kept uniform and ſteady: the iſſue of the eldeſt ſon excludes all other pretenders, as the ſon himſelf (if living) would have done; but the iſſue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the ſame: and among theſe ſeveral iſſues, or repreſentatives of the reſpective roots, the ſame preference to males and the ſame right of primogeniture obtain, as would have obtained at the firſt among the roots themſelves, the ſons or daughters of the deceaſed. As if a man hath two ſons, A and B, and A dies leaving two ſons, and then the grandfather dies; now the eldeſt ſon of A ſhall ſucceed to the whole of his grandfather's eſtate: and if A had left only two daughters, they ſhould have ſucceeded alſo to equal moieties of the whole, in excluſion of B and his iſſue. But if a man hath only three daughters, C, D, and E; and C dies leaving two ſons, D leaving two daughters, and E leaving a ſon and daughter: here, when the grandfather dies, the eldeſt ſon of C ſhall ſucceed to one third, in excluſion of the younger, the two daughters of D to another third in partnerſhip; and the ſon of E to the remaining third, in excluſion of his ſiſter. And the ſame right of repreſentation, guided and reſtrained by the ſame rules of deſcent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly eſtabliſhed in the time of *Henry* the ſecond, when *Glanvil* wrote, and therefore, in the title to the crown eſpecially, we find frequent conteſts between the younger (but ſurviving) brother, and his nephew (being the ſon and repreſentative of the elder deceaſed) in regard to the inheritance of their common anceſtor: for the uncle is certainly nearer of kin to the common ſtock, by one degree, than the nephew; though the nephew, by repreſenting his father, has in him a right of primogeniture. The uncle alſo was uſually better able to perform the ſervices of the fief; and beſides had frequently ſuperior intereſt and ſtrength, to back his pretenſions and cruſh the right of his nephew. Yet *Glanvil*, in this caſe, ſeems to declare for the right of the nephew by repreſentation; provided the eldeſt ſon had not received a proviſion in lands from his father, (or as the civil law would call it) had not been foriſfamiliated, in his lifetime. King *John*, however, who kept his nephew *Arthur* from the throne, by diſputing this right of repreſentation, did all in his power to aboliſh it throughout the realm: but in the time of his ſon, king *Henry* the third, we find the rule indiſputably ſettled in the manner we have here laid it down, and ſo it has continued ever ſince. And thus much for lineal deſcents.

A fifth rule is, that,

V. *On failure of lineal deſcendants, or iſſue, of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the blood of the firſt purchaſor; ſubject to the three preceding rules.*

Thus if *Geoffrey Stiles* purchaſes land, and it deſcends to *John Stiles* his ſon, and *John* dies ſeiſed thereof without iſſue; whoever ſucceeds to this inheritance muſt be of the blood of *Geoffrey* the firſt purchaſor of this family. The firſt purchaſor, *perquiſitor*, is he who firſt acquired the eſtate to his family, whether the ſame was transferred to him by ſale, or by gift, or by any other method, except only that of deſcent. The feudiſts frequently ſtile him *conquiſitor* or *couquaeſtor*; which, by the way, was the appellation aſſumed by *William* the *Norman*, to ſignify that he was the firſt of his family who acquired the crown of *England*, and from whom therefore all future claims by deſcent muſt be derived; though now from our diſuſe of the feodal ſenſe of the word, together with the reflexion on his forcible method of acquiſition, we are apt to annex the idea of victory to this name of *conquaeſtor* or conqueror.

This is a rule almoſt peculiar to our own laws, and thoſe of a ſimilar original. For it was entirely unknown among the *Jews*, *Greeks*, and *Romans*: none of whoſe laws looked any farther than the perſon himſelf who died ſeiſed of the eſtate; but aſſigned him an heir, without conſidering by what title he gained it, or from what anceſtor he derived it. But the law of *Normandy* agrees with our law in this reſpect: nor indeed is that agreement to be wondered at, ſince the law of deſcents in both is of feodal original; and this rule or canon cannot otherwiſe be accounted for than by recurring to feodal principles.

When feuds firſt began to be hereditary, it was made a neceſſary qualification of the heir who would ſucceed to a feud, that he ſhould be of the blood of, that is lineally deſcended from the firſt feudatory or purchaſor. In conſequence whereof, if a vaſal died poſſeſſed of a feud of his own acquiring, or *feudum novum*, it could not deſcend to any but his own offſpring; no, not even to his brother, becauſe he was not deſcended, nor derived his blood, from the firſt acquirer. But if it was *feudum antiquum*, that is, one deſcended to the vaſal from his anceſtors, then his brother, or ſuch other collateral relation as was deſcended and derived his blood from the firſt feudatory, might ſucceed to ſuch inheritance. To this purpoſe ſpeaks the following rule; "*Frater fratri ſine legitimo haerede defuncto, in beneficio quod eorum patris "fuit, ſuccedat: ſin autem unus e fratribus a domino feudum acceperit, et "defuncto ſine legitimo haerede, frater ejus in feudum non ſuccedit.*" The true feodal reaſon for which rule was this; that what was given to a man, for his perſonal ſervice and perſonal merit, ought not to deſcend to any but the heirs of his perſon. And therefore, as in eſtates-tail, (which a proper feud very much reſembled) ſo in the feodal donation, "*Nomen haeredis, in prima inveſtitura expreſſum, tantum ad deſcendentes ex "corpore primi vaſalli extenditur; et non ad collaterales, niſi ex corpore "primi vaſalli ſive ſtipitis deſcendant:* the will of the donor, or original lord, (when feuds were turned from life eſtates into inheritances) not being to make them abſolutely hereditary, like the *Roman allodium*, but hereditary only *ſub modo*; not hereditary to the collateral relations, or lineal anceſtors, or huſband, or wife of the feudatory, but to the iſſue deſcended from his body only.

However, in proceſs of time, when the feodal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum*

feudum antiquum; that is, with all the qualities annexed of a feud derived from his anceſtors; and then the collateral relations were admitted to ſucceed even *in infinitum*, becauſe they might have been of the blood of that is deſcended from, the firſt imaginary purchaſor. For ſince it is not aſcertained in ſuch general grants, whether this feud ſhall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely, as a feud of indefinite antiquity; that is, ſince it is not aſcertained from which of the anceſtors of the grantee this feud ſhall be ſuppoſed to have deſcended; the law will not aſcertan it, but will ſuppoſe *any* of his anceſtors, *pro re nata*, to have been the firſt purchaſor: and therefore it admits *any* of his collatoral kindred (who have the other neceſſary requiſites) to the inheritance, becauſe every collateral kinſman muſt be deſcended from ſome one of his lineal anceſtors.

Of this nature are all the grants of fee-ſimple eſtates of this kingdom; for there is now in the law of *England* no ſuch thing as a grant of a *feudum novum*, to be held *ut novum*; unleſs in the caſe of a fee tail, and there we ſee that this rule is ſtrictly obſerved, and none but the lineal deſcendants of the firſt donee (or purchaſor) are admitted: but every grant of lands in fee ſimple is with us a *feudum novum* to be held *ut antiquum*, as a feud whoſe antiquity is indefinite; and therefore the collateral kindred of the grantee, or deſcendants from any of his lineal anceſtors, by whom the lands might have poſſibly been purchaſed, are capable of being called to the inheritance.

Yet, when an eſtate hath really deſcended in a courſe of inheritance to the perſon laſt ſeiſed, the ſtrict rule of the feodal law is ſtill obſerved; and none are admitted, but the heirs of thoſe through whom the inheritance hath paſſed: for all others have demonſtrably none of the blood of the firſt purchaſor in them, and therefore ſhall never ſucceed. As, if lands come to *John Stiles* by deſcent from his mother *Lucy Baker*, no relation of his father (as ſuch) ſhall ever be his heir of theſe lands; and, *vice verſa*, if they deſcended from his father *Geoffrey Stiles*, no relation of his mother (as ſuch) ſhall ever be admitted thereto: for his father's kindred have none of his mother's blood, nor have his mother's relations any ſhare of his father's blood. And ſo, if the eſtate deſcended from his father's father, *George Stiles*; the relations of his father's mother, *Cecilia Kempe*, ſhall for the ſame reaſon never be admitted, but only thoſe of his father's father. This is alſo the rule of the *French* law, which is derived from the ſame feodal fountain.

Here we may obſerve, that, ſo far as the feud is realy *antiquum*, the law traces it back, and will not ſuffer any to inherit but the blood of thoſe anceſtors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, *George Stiles*, inherited it from his father *Walter Stiles*, or his mother *Chriſtian Smith*; or if it appear that his grandfather was the firſt grantee, and ſo took it (by the general law) as a feud of indefinite antiquity; in either of theſe caſes the law admits the deſcendants of any anceſtor of *George Stiles*, either paternal or maternal, to be in their due order the heirs to *John Stiles* of this eſtate: becauſe in the firſt caſe it is really uncertain, and in the ſecond caſe it is ſuppoſed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of iſſue in the laſt proprietor, the eſtate ſhall deſcend to the blood of the firſt purchaſor; or, that it ſhall reſult back to the heirs of the body of that anceſtor, from whom it either really has, or is ſuppoſed by fiction of law to have originally deſcended: according to the rule laid down in the *Yearbooks*, *Fitzherbert*,

Fitzherbert, *Brook*, and *Hale*; "that he who would have been heir to the "father of the deceaſed" (and, of courſe, to the mother, or any other purchaſing anceſtor) "ſhall alſo be heir to the ſon.

The remaining rules are only rules of evidence, calculated to inveſtigate who that purchaſing anceſtor was; which, *in feudis vere antiquis*, has in proceſs of time been forgotten, and is ſuppoſed ſo to be in feuds that are held *ut antiquis*. A ſixth rule or canon then is, that

VI. *The collateral heir of the perſon laſt ſeized muſt be his next collateral kinſman, of the whole blood.*

Firſt, he muſt be his next collateral kinſman, either perſonally or *jure repraeſentationis*; which proximity is reckoned according to the degrees of conſanguinity before mentioned. Therefore, the brother being in the firſt degree, he and his deſcendants ſhall exclude the uncle and his iſſue, who is only in the ſecond. And herein conſiſts the true reaſon of the different methods of computing the degrees of conſanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards conſanguinity principally with reſpect to ſucceſſions, and therein very naturally conſiders only the perſon deceaſed, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of perſons through whom the claim muſt be derived from him; and makes not only his great-nephew but alſo his firſt-couſin to be both related to him in the fourth degree; becauſe there are three perſons between him and each of them. The canon law regards conſanguinity principally with a view to prevent inceſtuous marriages, between thoſe who have a large portion of the ſame blood running in their reſpective veins; and therefore looks up to the author of that blood, or the common anceſtor, reckoning the degrees from him: ſo that the great-nephew is related in the third canonical degree to the perſon propoſed, and the firſt couſin in the ſecond; the former being diſtant three degrees from the common anceſtor, and therefore deriving only one fourth of his blood from the ſame fountain with the *propoſitus*; the latter, and alſo the *propoſitus*, being each of them diſtant only two degrees from the common anceſtor, and therefore having one half of each of their bloods the ſame. The common law regards conſanguinity principally with reſpect to deſcents; and, having therein the ſame object in view as the civil, it may ſeem as if it ought to proceed according to the civil computation. But as it alſo reſpects the purchaſing anceſtor, from whom the eſtate was derived, it therein reſembles the canon law, and therefore counts it's degrees in the ſame manner. Indeed the deſignation of perſon (in ſeeking for the next of kin) will come to exactly the ſame end (though the degrees will be differently numbered) whichever method of computation we ſuppoſe the law of *England* to uſe; ſince the right of repreſentation (of the father by the ſon, &c.) is allowed to prevail *in infinitum*. This allowance was abſolutely neceſſary, elſe there would have been frequently many claimants in exactly the ſame degree of kindred, as (for inſtance) uncles and nephews of the deceaſed; which multiplicity, tho' no inconvenience in the *Roman* law of partible inheritances, yet would have been productive of endleſs confuſion where the right of ſole ſucceſſion, as with us, is eſtabliſhed. The iſſue or deſcendants therefore of *John Stiles*'s brother are all of them in the firſt degree of kindred with reſpect to inheritances, as their father, when living, was; thoſe of his uncle in the ſecond; and ſo on; and are called to the ſucceſſion in right of ſuch their repreſentative proximity.

The right of repreſentation being thus eſtabliſhed, the former part of the preſent rule amounts to this; that, on failure of iſſue of the perſon

person last seised, the inheritance shall descend to the issue of his next immediate ancestor. Thus if *John Stiles* dies without issue, his estate shall descend to *Francis* his brother, who is lineally descended from *Geoffrey Stiles*, his next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of *John Stiles*, the lineal descendant of his grandfather *George*, and so on *in infinitum*. Very similar to which was the law of inheritance among the ancient *Germans*, our progenitors: "*Haeredes succesſoresque sui cuique* "*liberi, & nullum testamentum: si liberi non sunt, proximus gradus in possessione,* "*fratres, patrui, avunculi.*"

Now here it must be observed that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the *Jewish* law, which in this respect entirely corresponds with ours, the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c, but in right of representation, as the sons of the father, grandfather, &c. of the deceased. In order then to ascertain the collateral heir of *John Stiles*, it is first necessary to recur to his ancestors in the first degree; and if they have left any other issue besides *John*, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third, and fourth; and so upwards *in infinitum*, till some ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of *John Stiles* must derive his descent; and in such derivation the same rules must be observed with regard to sex, primogeniture, and representation, that have just been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for, if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus, the blood of *John Stiles*, being composed of those of *Geoffery Stiles* his father and *Lucy Baker* his mother, therefore his brother *Francis*, being descended from both the same parents, hath entirely the same blood with *John Stiles*; or, he is his brother of the whole blood. But if, after the death of *Geoffery*, *Lucy Baker* the mother marries a second husband, *Lewis Gay*, and hath issue by him; the blood of this issue being compounded of the blood of *Lucy Baker* (it is true) on the one part, but of that of *Lewis Gay* (instead of *Geoffery Stiles*) on the other part, it hath therefore only half the same ingredients with that of *John Stiles*; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised

without iſſue; ſtill B ſhall not be heir to this eſtate, becauſe he is only of the half blood to A, the perſon laſt ſeiſed: but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the perſon laſt actually ſeiſed. *H. H.* 238.

This total excluſion of the half blood from the inheritance, being almoſt peculiar to our own law, is looked upon as a ſtrange hardſhip by ſuch as are unacquainted with the reaſons on which it is grounded. But theſe cenſures ariſe from a miſapprehenſion of the rule; which is not ſo much to be conſidered in the light of a rule of deſcent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we muſt again remember, that the great and moſt univerſal principle of collateral inheritances being this, that an heir to a *feudum antiquum* muſt be of the blood of the firſt feudatory or purchaſor, that is, derived in a lineal deſcent from him; it was originally requiſite, as in gifts in tail it ſtill is, to make out the pedigree of the heir from the firſt donee or purchaſor, and to ſhew that ſuch heir was his lineal repreſentative. But when, by length of time and a long courſe of deſcents, it came (in thoſe rude and unlettered ages) to be forgotten who was really the firſt feudatory or purchaſor, and thereby the proof of an actual deſcent from him became impoſſible; then the law ſubſtituted what Mr. juſtice *Wright* calls a *reaſonable* in the ſtead of an *impoſſible* proof: for it remits the proof of an actual deſcent from the firſt purchaſor; and only requires, in lieu of it, that the claimant be next of the whole blood to the perſon laſt in poſſeſſion; (or derived from the ſame couple of anceſtors) which will probably anſwer the ſame end as if he could trace his pedigree in a direct line from the firſt purchaſor. For he who is my kinſman of the whole blood can have no anceſtors beyond or higher than mine, but what are equally my anceſtors alſo; and mine are *vice verſa* his: he therefore is very likely to be derived from that unknown anceſtor of mine, from whom the inheritance deſcended. But a kinſman of the half blood has but one half of his anceſtors above the common ſtock the ſame as mine; and therefore there is not the ſame probability of that ſtanding requiſite in the law, that he be derived from the blood of the firſt purchaſor.

To illuſtrate this by example. Let there be *John Stiles*, and *Francis*, brothers by the ſame father and mother, and another ſon of the ſame mother by *Lewis Gay* a ſecond huſband. Now, if *John* dies ſeiſed of lands, but it is uncertain whether they deſcended to him from his father or mother; in this caſe his brother *Francis*, of the whole blood, is qualified to be his heir, for he is ſure to be in the line of deſcent from the firſt purchaſor, whether it were the line of the father or the mother. But if *Francis* ſhould die before *John*, without iſſue, the mother's ſon by *Lewis Gay* (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his deſcent from the firſt purchaſor, who is unknown, nor has he that fair probability which the law admits as preſumptive evidence, ſince he is to the full as likely *not to be* deſcended from the line of the firſt purchaſor, as *to be* deſcended: and therefore the inheritance ſhall go to the neareſt relation poſſeſſed of this preſumptive proof, the whole blood.

And, as this is the caſe *in feudis antiquis*, where there really did once exiſt a purchaſing anceſtor, who is forgotten; it is alſo the caſe *in feudis novis* held *ut antiquis*, where the purchaſing anceſtor is merely ideal, and never exiſted but only in fiction of law. Of this nature are all grants of lands in fee-ſimple at this day, which are inheritable as if they deſcended from ſome uncertain indefinite anceſtor, and therefore any of the collateral kindred of the real modern purchaſor (and not his own offſpring only) may inherit them, provided they be of the whole blood; for

for all ſuch are, in judgment of law, likely enough to be derived from this indefinite anceſtor: but thoſe of the half blood are excluded, for want of the ſame probability. Nor ſhould this be thought hard, that a brother of the purchaſor, though only of the half blood, muſt thus be diſinherited, and a more remote relation of the whole blood admitted, merely upon a ſuppoſition and fiction of law; ſince it is only upon a like ſuppoſition and fiction, that brethren of purchaſors (whether of the whole or half blood) are entitled to inherit at all: for we have ſeen that in *feudis ſtricte novis* neither brethren nor any other collaterals were admitted. As therefore *in feudis antiquis* we have ſeen the reaſonableneſs of excluding the half blood, if by a fiction of law a *feudum novum* be made deſcendible to collaterals as if it was *feudum antiquum*, it is juſt and equitable that it ſhould be ſubject to the ſame reſtrictions as well as the ſame latitude of deſcent.

Perhaps by this time the excluſion of the half blood does not appear altogether ſo unreaſonable as at firſt ſight it is apt to do. It is certainly a very fine-ſpun and ſubtile nicety: but, conſidering the principles upon which our law is founded, it is neither an injuſtice nor a hardſhip; ſince even the ſucceſſion of the whole blood was originally a beneficial indulgence, rather than the ſtrict right of collaterals: and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could poſſibly have enjoyed before. The doctrine of whole blood was calculated to ſupply the frequent impoſſibility of proving a deſcent from the firſt purchaſor, without ſome proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpoſe it anſwers, for the moſt part, effectually enough. I ſpeak with theſe reſtrictions, becauſe it does not, neither can any other method, anſwer this purpoſe entirely. For though all the anceſtors of *John Stiles*, above the common ſtock, are alſo the anceſtors of his collateral kinſman of the whole blood; yet, unleſs that common ſtock be in the firſt degree, (that is, unleſs they have the ſame father and mother) there will be intermediate anceſtors below the common ſtock, that may belong to either of them reſpectively, from which the other is not deſcended, and therefore can have none of their blood. Thus, though *John Stiles* and his brother of the whole blood can each have no other anceſtors, than what are in common to them both; yet with regard to his uncle, where the common ſtock is removed one degree higher, (that is, the grandfather and grandmother) one half of *John*'s anceſtors will not be the anceſtors of his uncle: his *patruus*, or father's brother, derives not his deſcent from *John*'s maternal anceſtors; nor his *avunculus*, or mother's brother, from thoſe in the paternal line. Here then the ſupply of proof is deficient, and by no means amounts to a certainty: and, the higher the common ſtock is removed, the more will even the probability decreaſe. But it muſt be obſerved, that (upon the ſame principles of calculation) the half blood have always a much leſs chance to be deſcended from an unknown indefinite anceſtor of the deceaſed, than the whole blood in the ſame degree. As, in the firſt degree, the whole brother of *John Stiles* is ſure to be deſcended from that unknown anceſtor; his half brother has only an even chance, for half *John*'s anceſtors are not his. So, in the ſecond degree, *John*'s uncle of the whole blood has an even chance; but the chances are three to one againſt his uncle of the half blood, for three fourths of *John*'s anceſtors are not his. In like manner, in the third degree, the chances are only three to one againſt *John*'s great uncle of the whole blood, but they are ſeven to one againſt his great uncle of the half blood, for ſeven eighths of *John*'s anceſtors have no connexion in blood with him. Therefore ſo remote a poſſibility of the deſcent of the half blood from the firſt purchaſor,

chaſor, compared with that of the whole blood, in the ſeveral degrees, has occaſioned a general excluſion of the half blood in all.

But, while I thus illuſtrate the reaſon of excluding the half blood in general, I muſt be impartial enough to own, that, in ſome inſtances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a man has two ſons by different venters, and the eſtate on his death deſcends from him to the eldeſt, who enters, and dies without iſſue; now the younger ſon cannot inherit this eſtate, becauſe he is not of the whole blood to the laſt proprietor. This, it muſt be owned, carries a hardſhip with it, even upon feodal principles: for the rule was introduced only to ſupply the proof of a deſcent from the firſt purchaſor; but here, as this eſtate notoriouſly deſcended from the father, and as both the brothers confeſſedly ſprung from him, it is demonſtrable that the half brother muſt be of the blood of the firſt purchaſor, who was either the father or ſome of the father's anceſtors. When therefore there is actual demonſtration of the thing to be proved, it is hard to exclude a man by a rule ſubſtituted to ſupply that proof when deficient. So far as the inheritance can be evidently traced back, there ſeems no need of calling in this preſumptive proof, this rule of probability, to inveſtigate what is already certain. Had the elder brother indeed been a purchaſor, there would have been no hardſhip at all, for the reaſons already given: or had the *frater uterinus* only, or brother by the mother's ſide, been excluded from an inheritance which deſcended from the father, it had been highly reaſonable.

Indeed it is this very inſtance, of excluding a *frater conſanguineus*, or brother by the father's ſide, from an inheritance which deſcended *a patre*, that *Crag* has ſingled out, on which to ground his ſtrictures on the *Engliſh* law of half blood: and, really, it ſhould ſeem, as if the cuſtom of excluding the half blood in *Normandy* extended only to exclude a *frater uterinus*, when the inheritance deſcended *a patre*, and *vice verſa*. Thus alſo it remained a doubt with us in the time of *Bracton*, and of *Fleta*, whether the half blood on the father's ſide were excluded from the inheritance which originally deſcended from the common father, or only from ſuch as deſcended from the reſpective mothers, and from newly purchaſed lands. And the rule of law, as laid down by our Forteſcue, extends no farther than this; *frater fratri uterino non ſuccedet in haereditate paterna*. It is moreover worthy of obſervation, that by our law, as it now ſtands, the crown (which is the higheſt inheritance in the nation) may deſcend to the half blood of the preceding ſovereign, ſo as it be blood of the firſt monarch, purchaſor, or (in the feodal language) conqueror, of the reigning family. Thus it actually did deſcend from king *Edward* the ſixth to queen *Mary*, and from her to queen *Elizabeth*, who were reſpectively of the half blood to each other. For the royal pedigree being always a matter of ſufficient notoriety, there is no occaſion to call in the aid of this preſumptive rule of evidence, to render probable the deſcent from the royal ſtock; which was formerly king *William* the *Norman*, and is now (by act of parliament) the princeſs *Sophia* of *Hanover*. Hence alſo it is, that in eſtates-tail, where the pedigree from the firſt donee muſt be ſtrictly proved, half blood is no impediment to the deſcent: becauſe, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be deſirable for the legiſlature to give relief, by amending the law of deſcents in this ſingle inſtance, and ordaining that the half blood might inherit, where the eſtate notoriouſly deſcended from its own proper anceſtor, but not otherwiſe; or how far a private inconvenience ſhould be ſubmitted to, rather than a long eſtabliſhed rule ſhould be ſhaken; it is not for me to determine.

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The rule then, together with it's illuſtration, amounts to this; that, in order to keep the eſtate of *John Stiles* as nearly as poſſible in the line of his purchaſing anceſtor, it muſt deſcend to the iſſue of the neareſt couple of anceſtors that have left deſcendants behind them; becauſe the deſcendants of one anceſtor only are not ſo likely to be in the line of that purchaſing anceſtor, as thoſe who are deſcended from both.

But here another difficulty ariſes. In the ſecond, third, fourth, and every ſuperior degree, every man has many couples of anceſtors, increaſing according to the diſtances in a geometrical progreſſion upwards, the deſcendants of all which reſpective couples are (repreſentatively) related to him in the ſame degree. Thus in the ſecond degree, the iſſue of *George* and *Cecilia Stiles*, and of *Andrew* and *Eſther Baker*, the two grandſires and grandmothers of *John Stiles*, are each in the ſame degree of propinquity; in the third degree, the reſpective iſſues of *Walter* and *Chriſtian Stiles*, of *Luke* and *Frances Kempe*, of *Herbert* and *Hannah Baker*, and of *James* and *Emma Thorpe*, are (upon the extinction of the two inferior degrees) all equally entitled to call themſelves the next kindred of the whole blood to *John Stiles*. To which therefore of theſe anceſtors muſt we firſt reſort, in order to find out deſcendants to be called to the inheritance? In anſwer to this, and to avoid the confuſion and uncertainty that muſt ariſe between the ſeveral ſtocks, wherein the purchaſing anceſtor muſt be ſought for, the ſeventh and laſt rule or canon is, that

VII. *In collateral inheritances the male ſtocks ſhall be preferred to the female; that is, kindred derived from the blood of the male anceſtors ſhall be admitted before thoſe from the blood of the female:---unleſs where the lands have, in fact, deſcended from a female.*

Thus the relations on the father's ſide are admitted *in infinitum*, before thoſe on the mother's ſide are admitted at all: and the relations of the father's father, before thoſe of the father's mother; and ſo on. And in this the *Engliſh* law is not ſingular, but warranted by the examples of the *Hebrew* and *Athenian* laws, as ſtated by *Selden* and *Petit*; though among the *Greeks*, in the time of *Heſiod*, when a man died without wife or children, all his remote kindred (without diſtinction) divided his eſtate among them. It is likewiſe warranted by the example of the *Roman* laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor *Juſtinian* aboliſhed all diſtinction between them. It is alſo agreeable to the cuſtomary law of *Normandy*, which indeed in moſt reſpects agrees with our law of inheritance.

However, I am inclined to think, that this rule of our laws does not owe it's immediate original to any view of conformity to thoſe which I have juſt now mentioned; but was eſtabliſhed in order to effectuate and carry into execution the fifth rule or canon before laid down; that every heir muſt be of the blood of the firſt purchaſor. For when ſuch firſt purchaſor was not eaſily to be diſcovered after a long courſe of deſcents, the lawyers not only endeavoured to inveſtigate him by taking the next relation of the whole blood to the perſon laſt in poſſeſſion; but alſo, conſidering that a preference had been given to males (by virtue of the ſecond canon) through the whole courſe of lineal deſcent from the firſt purchaſor to the preſent time, they judged it more likely that the lands ſhould have deſcended to the laſt tenant from his male than from his female anceſtors; from the father (for inſtance) rather than from the mother; from the father's father, rather than the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expreſſion) through the male line; and gave it to the next relations on the ſide of the father, the father's father, and ſo upwards; imagining with

with reaſon, that this was the moſt probable way of continuing it in the line of the firſt purchaſor. A conduct much more rational than the preference of the *agnati* by the *Roman* laws: which, as they gave no advantage to the males in the firſt inſtance or direct lineal ſucceſſion, had no reaſon for preferring them in the tranſverſe collateral one: upon which account this preference was very wiſely aboliſhed by *Juſtinian*.

That this was the true foundation of the preference of the *agnati* or male ſtocks, in our law, will farther appear, if we conſider that, whenever the lands have notoriouſly deſcended to a man from his mother's ſide, this rule is totally reverſed, and no relation of his by the father's ſide, as ſuch, can ever be admitted to them; becauſe he cannot poſſibly be of the blood of the firſt purchaſor. And ſo, *e converſo*, if the lands deſcended from the father's ſide, no relation of the mother, as ſuch, ſhall ever inherit. So alſo, if they in fact, deſcended to *John Stiles* from his father's mother *Cecilia Kempe*; here not only the blood of *Lucy Baker* his mother, but alſo of *George Stiles* his father's father, is perpetually excluded. And, in like manner, if they be known to have deſcended from *Frances Holland* the mother of *Cecilia Kempe*, the line not only of *Lucy Baker*, and of *George Stiles*, but alſo of *Luke Kempe* the father of *Cecilia*, is excluded. Whereas when the ſide from which they deſcended is forgotten, or never known, (as in the caſe of an eſtate newly purchaſed, to be holden *ut feudum antiquum*) here the right of inheritance firſt runs up all the father's ſide, with a preference to the male ſtocks in every inſtance; and, if it finds no heirs there, it then, and then only, reſorts to the mother's ſide; leaving no place untried, in order to find heirs that may by poſſibility be derived from the original purchaſor. The greateſt probability of finding ſuch was among thoſe deſcended from the male anceſtors; but upon failure of iſſue there, they may poſſibly be found among thoſe derived from the females.

This I take to be the true reaſon of the conſtant preference of the agnatic ſucceſſion, or iſſue derived from the male anceſtors, through all the ſtages of collateral inheritance; as the ability for perſonal ſervice was the reaſon for preferring the males at firſt in the direct lineal ſucceſſion. We ſee clearly, that, if males had been perpetually admitted, in utter excluſion of females, the tracing the inheritance back through the male line of anceſtors muſt at laſt have inevitably brought us up to the firſt purchaſor: but, as males have not been *perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally poſtponed* to males; the tracing the inheritance up through the male ſtocks will not give us abſolute demonſtration, but only a ſtrong probability of arriving at the firſt purchaſor; which, joined with the other probability, of the wholeneſs or entirety of blood, will fall little ſhort of a certainty.

Having thus endeavoured to ſtate the general law of DESCENTS, I proceed next to ſubjoin a few hints with regard to the ſpecial impediments which may obſtruct this general law. Which will bring under our conſideration the doctrine of ESCHEATS.

Eſcheat, it is well known, was one of the fruits and conſequences of feodal tenure. The word itſelf is originally *French* or *Norman*, in which language it ſignifies chance or accident, and thereupon denotes an obſtruction of the deſcent, and conſequent determination of the tenure, by ſome unforeſeen contingency; in which caſe the land naturally reſults back, by a kind of reverſion, to the original grantor or lord of the fee.

The law of eſcheats is founded upon this ſingle principle, that the blood of the perſon laſt ſeiſed is, by ſome means or other, utterly extinct and gone: and, ſince none can inherit an eſtate but ſuch as are of his blood

blood and conſanguinity, it follows as a regular conſequence, that when ſuch blood is extinct, the inheritance itſelf muſt fail; the land muſt become what the feodal writers denominate *feudum apertum*; and muſt reſult back again to the lord of the fee, by whom, or by thoſe whoſe eſtate he hath, it was given.

Eſcheats are frequently divided into thoſe *propter defectum ſanguinis*, and thoſe *propter delictum tenentis*: the one ſort, if the tenant dies without iſſue; the other, if his blood be attainted. But both theſe ſpecies may well be comprehended under the firſt denomination only; for he that is attainted ſuffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one inſtance and expires in the other: or, as the doctrine of eſcheats is very fully expreſſed in *Fleeta*, "*dominus capitalis feodi loco haeridis habetur, quoties* "*per defectum vel delictum extinguitur ſanguis tenentis.*"

Eſcheats therefore ariſing merely upon the deficiency of the blood, whereby the deſcent is impeded, their doctrine will be better illuſtrated by conſidering the ſeveral caſes wherein hereditary blood may be deficient, than by any other method whatſoever.

I, II, III. The firſt three caſes, wherein inheritable blood is wanting, may be collected from the rules of deſcent before laid down and explained, and therefore will need very little illuſtration or comment. Firſt, when the tenant dies without any relations on the part of any of his anceſtors: ſecondly, when he dies without any relations on the part of thoſe anceſtors from whom his eſtate deſcended: thirdly, when he dies without any relations of the whole blood. In two of theſe caſes the blood of the firſt purchaſor is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land ſhall eſcheat to the lord of the fee: for the lord would be manifeſtly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any perſon ſhould be ſuffered to ſucceed to lands, who is not of the blood of the firſt feudatory, to whom for his perſonal merit the eſtate is ſuppoſed to have been granted.

IV. A monſter, which hath not the ſhape of mankind, but in any part evidently bears the reſemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of it's body, yet if it hath human ſhape, it may be heir. This is a very antient rule in the law of *England*; and it's reaſon is too obvious, and too ſhocking, to bear a minute diſcuſſion. The civil law agrees with our own in excluding ſuch births from ſucceſſions: yet accounts them, however, children in ſome reſpects, where the parents, or at leaſt the father, could reap any advantage thereby; (as the *jus trium liberorum*, and the like) eſteeming them the misfortune, rather than the fault, of that parent. If therefore there appears no other heir than ſuch a prodigious birth, the land ſhall eſcheat to the lord.

V. Baſtards are incapable of being heirs. Baſtards, by our law, are ſuch children as are not born either in lawful wedlock, or within a competent time after it's determination. Such are held to be *nullius filii*, the ſons of nobody; for the maxim of law is, *qui ex damnato coitu naſcuntur, inter liberos non computantur*. Being thus the ſons of nobody, they have no blood in them, at leaſt no inheritable blood; conſequently, none of the blood of the firſt purchaſor: and therefore, if there be no other claimant than ſuch illegitimate children, the land ſhall eſcheat to the lord. The civil law differs from ours in this point, and allows a baſtard to ſucceed to an inheritance, if after it's birth the mother was married to the father: and alſo, if the father had no lawful wife or child, then even if the concubine was never married to the father, yet

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ſhe and her baſtard ſon were admitted each to one twelfth of the inheritance: and a baſtard was likewiſe capable of ſucceeding to the whole of his mother's eſtate, although ſhe was never married; the mother being ſufficiently certain, though the father is not. But our law, in favour of marriage, is much leſs indulgent to baſtards.

There is indeed one inſtance, in which our law has ſhewn them ſome little regard; and that is uſually termed the caſe of *baſtard eigne* and *mulier puiſne*. This happens when a man has a baſtard ſon, and afterwards marries the mother, and by her has a legitimate ſon, who in the language of the law is called a *mulier*, or as *Glanvil* expreſſes it in his *Latin, filius mulieratus*: the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldeſt ſon is baſtard, or *baſtard eigne*; and the younger ſon is legitimate, or *mulier puiſne*. If then the father dies, and the *baſtard eigne* enters upon his land, and enjoys it to his death, and dies ſeiſed thereof, whereby the inheritance deſcends to his iſſue; in this caſe the *mulier puiſne*, and all other heirs, (though minors, feme-coverts, or under any incapacity whatſoever) are totally barred of their right. And this, 1. As a puniſhment on the *mulier* for his negligence, in not entering during the *baſtard*'s life, and evicting him. 2. Becauſe the law will not ſuffer a man to be baſtardized after his death, who entered as heir and died ſeiſed, and ſo paſſed for legitimate in his lifetime. 3. Becauſe the canon law (following the civil) did allow ſuch *baſtard eigne* to be legitimate, on the ſubſequent marriage of his mother: and therefore the laws of *England* (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid ſuch a regard to a perſon thus peculiarly circumſtanced, that, after the land had deſcended to his iſſue, they would not unravel the matter again, and ſuffer his eſtate to be ſhaken. But this indulgence was ſhewn to no other kind of baſtard; for, if the mother was never married to the father, ſuch baſtard could have no colourable title at all.

As baſtards cannot be heirs themſelves, ſo neither can they have any heirs but thoſe of their own bodies. For, as all collateral kindred conſiſts in being derived from the ſame common anceſtor, and as a baſtard has no legal anceſtors, he can have no collateral kindred; and, conſequently, can have no legal heirs, but ſuch as claim by a lineal deſcent from himſelf. And therefore if a baſtard purchaſes land, and dies ſeiſed thereof without iſſue, and inteſtate, the land ſhall eſcheat to the lord of the fee. *Co. Litt.* 244.

VI. Aliens alſo are incapable of taking by deſcent, or inheriting; for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reaſons ſtrictly feodal. Though, if lands were ſuffered to fall into their hands who owe no allegiance to the crown of *England*, the deſign of introducing our feuds, the defence of the kingdom, would be defeated. Wherefore if a man leaves no other relations but aliens, his land ſhall be eſcheat to the lord.

As aliens cannot inherit, ſo far they are on a level with baſtards; but, as they are alſo diſabled to hold by purchaſe, they are under ſtill greater diſabilities. And, as they can neither hold by purchaſe, nor by inheritance, it is almoſt ſuperfluous to ſay that they can have no heirs, ſince they can have nothing for an heir to inherit: but ſo it is expreſsly held, becauſe they have not in them any inheritable blood.

And farther, if an alien be made a denizen by the king's letters patent, and then purchaſes lands, (which the law allows him to do) his ſon, born before his denization, ſhall not inherit thoſe lands; but a ſon born afterwards may, even though his elder brother be living: for the father, before denization, had no inheritable blood to communicate to

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his eldeſt ſon; but by denization it acquires an hereditary quality, which will be tranſmitted to his ſubſequent poſterity. Yet, if he had been naturalized by act of parliament, ſuch eldeſt ſon might then have inherited; for that cancels all defects, and is allowed to have a retroſpective energy, which ſimple denization has not.

Sir *Edward Coke* alſo holds, that if an alien cometh into *England*, and there hath iſſue two ſons, who are thereby natural born ſubjects; and one of them purchaſes land, and dies; yet neither of theſe brethren can be heir to the other. For the *commune vinculum*, or common ſtock of their conſanguinity, is the father: and, as he had no inheritable blood in him, he could communicate none to his ſons; and when the ſons can by no poſſibility be heir to the father, the one of them ſhall not be heir to the other. And this opinion of his ſeems founded upon ſolid principles of the ancient law; not only from the rule before cited in the notes, that *ceſtuy, que doit inheriter al pere, doit inheriter al fits*; but alſo becauſe we have ſeen that the only feodal foundation upon which newly purchaſed land can poſſibly deſcend to a brother, is the ſuppoſition and fiction of law, that it deſcended from one of his anceſtors; but in this caſe as the immediate anceſtor was an alien, from whom it could by no poſſibility deſcend, this ſhould deſtroy the ſuppoſition, and impede the deſcent, and the land ſhould be inherited *ut feudum ſtricte novum*; that is, by none but the lineal deſcendants of the purchaſing brother; and, on failure of them, ſhould eſcheat to the lord of the fee. But this opinion hath been ſince overruled: and it is now held for law, that the ſons of an alien, born here, may inherit to each other. And reaſonably enough upon the whole: for, as (in common purchaſes) the whole of the ſuppoſed deſcent from indefinite anceſtors is but fictitious, the law may as well ſuppoſe the requiſite anceſtor as ſuppoſe the requiſite deſcent.

VII. By attainder alſo, for treaſon or other felony, the blood of the perſon attainted is ſo corrupted, as to be rendered no longer inheritable.

Great care muſt be taken to diſtinguiſh between forfeiture of lands to the king, and this ſpecies of eſcheat to the lord; which, by reaſon of their ſimilitude in ſome circumſtances, and becauſe the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever elſe the offender poſſeſſed, was the doctrine of the old *Saxon* law, as a part of puniſhment for the offence; and does not at all relate to the feodal ſyſtem, nor is the conſequence of any ſigniory or lordſhip paramount: but, being a prerogative veſted in the crown, was neither ſuperſeded nor diminiſhed by the introduction of the *Norman* tenures; a fruit and conſequence of which eſcheat muſt undoubtedly be reckoned. Eſcheat therefore operates in ſubordination to this more antient and ſuperior law of forfeiture.

The doctrine of eſcheat upon attainder, taken ſingly, is this: that the blood of the tenant, by the commiſſion of any felony, (under which denomination all treaſons were formerly comprized) is corrupted and ſtained, and the original donation of the feud is thereby determined, it being always granted to the vaſal on the implied condition of *dum bene ſe geſſerit*. Upon the thorough demonſtration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the eſtate inſtantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguiſhed and blotted out for ever. In this ſituation the law of feodal eſcheat was brought into *England* at the conqueſt; and in general ſuperadded to the antient law of forfeiture. In conſequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert

revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, for only a year and a day, after which time it goes to the lord in a regular course of escheat, as it would have done to the heir of the felon in case the feodal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seem to be the old *Saxon* tenure) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason.

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 *Ed.* VI. *c.* 12. enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the antient law of forfeiture operates; for it is expressly provided by the statute 5 & 6 *Ed.* VI. *c.* 11. that the wife of one attaint of high treason shall not be endowed at all.

Hitherto we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all he now has should escheat from him, but also that he should be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit. *Co. Lit.* 13. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king so long as the offender lives. 3 *Inst.* 47.

There is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The chanel, which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the antient law of feuds, which allowed that the grandson might be heir to his grandfather, tho' the son in the intermediate generation was guilty of felony. But by the *law of England* a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor any other ancestor, at least on the part of their father. *Co. Litt.* 391. *b.*

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender, but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this

this ſon can never inherit to his father, or father's anceſtors; becauſe his paternal blood being once thoroughly corrupted by his father's attainder, muſt continue ſo: but if the ſon had been born after the pardon, he might inherit; becauſe by the pardon the father is made a new man, and may convey new inheritable blood to his afterborn children. *Co. Litt.* 392.

Herein there is however a difference between aliens and perſons attainted. Of aliens, who could never by any poſſibility be heirs, the law takes no notice: and therefore we have ſeen, that an alien elder brother ſhall not impede the deſcent to a natural-born younger brother. But in attainders it is otherwiſe: for if a man hath iſſue a ſon, and is attainted, and afterwards pardoned, and then hath iſſue a ſecond ſon, and dies; here the corruption of blood is not removed from the eldeſt, and therefore he cannot be heir; neither can the youngeſt be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a poſſibility of being heir; and therefore the younger brother ſhall not inherit, but the land ſhall eſcheat to the lord; tho' had the elder died without iſſue in the life of the father, the younger ſon born after the pardon might well have inherited, for he hath no corruption of blood. So if a man hath iſſue two ſons, and the elder in the lifetime of the father hath iſſue, and then is attainted and executed, and afterwards the father dies, the lands of the father ſhall not deſcend to the younger ſon: for the iſſue of the elder, which had once a poſſibility to inherit, ſhall impede the deſcent to the younger, and the land ſhall eſcheat to the lord. Sir *Edward Coke* in this caſe allows, that if the anceſtor be attainted, his ſons born before the attainder may be heirs to each other; and diſtinguiſhes it from the caſe of the ſons of an alien, becauſe in this caſe the blood was inheritable when imparted to them from the father: but it is ſaid that ſons, born after the attainder, ſhall not inherit to each other; for they never had any inheritable blood in them.

Upon the whole it appears, that a perſon attainted is neither allowed to retain his former eſtate, nor to inherit any future one, nor to tranſmit any inheritance to his iſſue, either immediately from himſelf, or mediately through himſelf from any remoter anceſtor; for his inheritable blood, which is neceſſary either to hold, to take, or to tranſmit any feodal property, is blotted out, corrupted, and extinguiſhed for ever: the conſequence of which is, that eſtates, thus impeded in their deſcent, reſult back and eſcheat to the lord.

This corruption of blood, thus ariſing from feodal principles, but extended infinitely farther than thoſe principles will warrant, has been long looked upon as a peculiar hardſhip; both becauſe the eſtabliſhment of the feodal ſyſtem in this kingdom was founded at firſt upon a fiction; and alſo becauſe, the ſubſtantial part of thoſe tenures being now done away, it ſeems unreaſonable to reſerve one of their moſt inequitable conſequences; namely, that the children ſhould not only be reduced to preſent poverty, but be laid under future difficulties of inheritance, on account of the guilt of their parents. And therefore in moſt (if not all) of the new felonies, created by parliament ſince the reign of *Henry* the eight, it is declared that they ſhall not extend to any corruption of blood. And by the ſtatute 7 *Ann. c.* 21., the operation of which is poſtponed by the ſtatute 17 *Geo. II. c.* 39, it is enacted, that, after the death of the preſent pretender and his ſons, no attainder for treaſon ſhall extend to the diſinheriting any heir, nor the prejudice of any perſon, other than the offender himſelf.

There is one more incapacity of taking by deſcent, which, not being productive of any eſcheat, is not reducible to the method laid down in the preceding treatiſe. It is enacted by the ſtatute 11 & 12 *Wil. III. c.* 4. that every papiſt who ſhall not abjure the errors of his religion by taking the

the oaths to the government, and making the declaration againſt tranſubſtantiation, within ſix months after he has attained the age of eighteen years, ſhall be incapable of inheriting, or taking, by deſcent as well as purchaſe, any real eſtates whatſoever; and his next of kin, being a proteſtant, ſhall hold them to his own uſe, till ſuch time as he complies with the terms impoſed by the act. This incapacity is merely perſonal; it affects himſelf only, and does not deſtroy the inheritable quality of his blood, ſo as to impede the deſcent to others of his kindred.

Before I conclude this head, of eſcheat, I muſt mention one ſingular inſtance in which lands held in fee-ſimple are not liable to eſcheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the caſe of a corporation: for if that comes to be diſſolved by any accident, the donor or his heirs ſhall have the land again in reverſion, and not the lord by eſcheat: which is perhaps the only inſtance where a reverſion can be expectant on a grant in fee-ſimple abſolute. But the law, we are told, doth tacitly annex a condition to every ſuch gift or grant, that if the corporation be diſſolved, the donor or grantor ſhall re-enter; for the cauſe of the gift or grant faileth. This is indeed founded upon the ſelf-ſame principle as the law of eſcheat: the heirs of the donor being only ſubſtituted inſtead of the chief lord of the fee; which was formerly very frequently the caſe in ſubinfeudations, or alienation of lands from one vaſal to another, till that practice was reſtrained and remedied by the ſtatute of *Quia emptores*, 18 *Ed I. ſt.* 1, to which this very ſingular inſtance ſtill in ſome degree remains an exception. *Co. Litt.* 13.

Theſe are the ſeveral deficiencies of hereditary blood, recognized by the law of *England*, which, ſo often as they happened under the feodal policy, occaſioned lands to eſcheat to the original proprietary or lord, to be by him applied to his own uſe, or granted out to a freſh feudatory, as he ſhould think proper. We have chiefly conſidered them at preſent as the means whereby an obſtruction is formed to the general courſe of deſcents; and taken in that light, they form no improper ſupplement to a diſcourſe, of which the law of inheritance is the firſt and principal object.

Of

Of maxims and general rules, from JACOB's LAW GRAMMAR.

A MAXIM in law is ſaid to be a propoſition, of all men confeſſed and granted, without any argument or diſcourſe. And *maxims* are generally certain rules or poſitions, that are the concluſions of reaſon, and therefore ought not to be denied or impeached. They are alſo principle and authorities, and part of the common law of the land. *Terms de Ley.* Sir *Edward Coke* in his inſtitutes, gives the *Latin* etymology of this word, and ſays that they are called maxims. Of maxims and general rules the books of law are full; but the chief of the *Latin maxims*, affecting life, liberty or property, with uſeful obſervations thereon, are ſuch as follow.

1. *Actus Dei nemini facit injuriam:* The act of God does injury to no man. The reaſon of our law is ſo much ruled by *religion*, that it will not permit the act of God to prejudice any: Therefore if an Houſe is blown down by tempeſt, the tenant is excuſed in waſte; but if he expreſsly covenant to repair, there an action lies. *Noy.* If a defendant dies in execution for debt, the plaintiff in the action ſhall have a new writ of execution, becauſe the defendant's death is the act of God. And otherwiſe the plaintiff would loſe his debt without any default in him.

2. *Actus legis nulli facit injuriam:* The act of the law doth injury to none. For if land, out of which a rent-charge is granted, be recovered by elder title, and thereby the rent-charge becomes avoided; yet the grantee ſhall have a writ of annuity. *Dyer.* This is becauſe the rent-charge is made void by courſe of law.

3. *Actus me invito factus, non eſt meus actus:* An act done againſt my will is not my act. As where a perſon is compelled for fear of impriſonment, to make a bond, deed, or other writing; the compulſion will render the ſame void, as if it had never been made. 1 *Inſt.* And not only a deed, but a marriage procured by dureſs, is likewiſe voidable; for all acts ought to be voluntary, and the law hath a ſpecial regard to the ſafety and liberty of perſons. If one obliges another to ſurrender his eſtate, it amounts to a diſſeiſin of him. 14 *Aſſiſ.*

4. *Actio perſonalis moritur cum perſona:* A perſonal action dies with the perſon. In caſe one commit a treſpaſs, or a battery be done to a man, and he that did it or the other die, the action is gone. *Noy max.* A leſſee for years makes deſtruction on the lands let, and then dies, no action will lie againſt his executor or adminiſtrator for waſte done before their time. Alſo an action of debt lies not againſt executors upon a ſimple contract, for the eating and drinking of the teſtator; for that action dies with him. And becauſe the executors cannot wage their law or deny it, as the teſtator might have done. 9 *Rep.*

5. *Accuſare nemo ſe debet niſi coram Deo:* No man ought to accuſe himſelf, unleſs it be before God. An oath is not lawful whereby any perſon may be compelled to confeſs, or accuſe himſelf, &c. Likewiſe a perſon may not ſwear for himſelf, but only where he has particular power by ſome ſtatute. 4 *Rep.* The law will not enforce any one to ſhew or ſay what is againſt him: for which reaſon an offender, tho' ever ſo culpable, may plead *not guilty.*

6. *Aliquis non debeat eſſe judex in propria cauſa:* No perſon ought to be a judge in his own cauſe. It is unreaſonable for perſons to be at the ſame time judges to give ſentence, miniſters to make ſummons, and parties to have a ſhare in debts, &c. to be recovered. *Dyer.* And therefore

fore a lord of a manor having cognizance of all kinds of pleas, cannot hold plea to what himself is a party; nor may justices of peace act in any matter relating to themselves; except in certain parish business, by a late statute. 16 *Geo.* 2. But an inn-keeper in his own case, may detain a guest's horse until satisfaction be made for standing, and other charges: And a person may retake his own goods, of which he is dispossessed, &c. One cannot generally be witness in his own cause; for it is presumed by the law that he will be partial in speaking for his advantage. 1 *Inst.*

7. *Ambiguum pactum contra venditorum interpretandum est:* An ambiguous deed or contract is to be expounded against the seller or grantor. So that if a man having a warren in his lands, grants the same land for life, without mentioning the warren, yet the grantee shall have it with the land. For otherwise the grantor should have excepted such warren out of the deed or grant. *Bacon.* But words shall be taken in the most favourable sense for the speaker; as in an action against a man for saying of the plaintiff that he hath forsworn himself, it may be construed to be in common conversation. And the action is only maintainable where it is said he hath forsworn himself in a court of record. 4 *Rep.*

8. *A verbis legis non est recedendum:* we ought not to go from the words of the law. The judges may not make any interpretation of a statute, against the express words thereof; for nothing can so well declare the intent of the makers of an act of parliament, as their direct words in it themselves. 5 *Co. Rep.* All acts of parliament and letters patent must be construed one part with another, and all the parts of them together; and the words are to be taken in a lawful and rightful sense, and applied to the advancement of the remedy, &c. 1 *Inst.* But cases out of the letter of a statute, yet being within the same mischief, shall be within the remedy the statute provides.

9. *Bastardus, nullius est filius; aut filius populi:* A bastard is the son of none, or the son of the people. As a bastard is born out of marriage, his father is not known by the law; therefore he shall not inherit or be heir to any person, and for that he is in the law as no man's issue; and he can have no heir but of his own body; because of the uncertainty who is related to him. 1 *Inst.* The bastard of a woman is said to be no child, where the mother gives lands to him as such; but having by time gained a name of reputation, he may take a remainder, as a reputed son; and may himself purchase by his reputed name, &c. *Dyer.* In case a child is born only a day after marriage, between parties of full age, it is no bastard, but supposed to be the husband's: So if a man takes a wife big with child by another, who was not her husband. *Roll. Abr.* And if the husband be within the four seas, that by intendment of law, he may converse with his wife, and she hath issue, the child cannot be proved a bastard. These cases are, unless there be an apparent impossibility, that the husband should be the father of it; as if he has lost his genitals, &c. 1 *Co. Inst.*

10. *Caveat actor:* Let the actor take care what he does. If a landlord gives his acquittance to his tenant for the last rent due, all rent in arrear is presumed to be satisfied. And in case a person bound by bond pays a lesser sum before the day appointed, or at another place than is limited, and the obligee or lender of the money then and there receiveth it, that is a good satisfaction. 1 *Inst.* Acceptance of rent affirms, and makes a voidable lease to have continuance, and if where a tenant or lessee assigns over his term, the landlord accepts the rent of the assignee, knowing of the assignment, he cannot afterwards sue the lessee for rent. 3 *Rep.* An executor paying debts on simple contract, before those of a higher nature on judgments, &c. is liable to the payment of all. *Plowden.* And taking any of the goods of the deceased, makes a man executor in his own wrong, and answerable.

11. *Causa & origo est materia negotii:* The cause and beginning is the matter of the business. Although the law gives power to a person to enter a tavern; the lord to distrain his tenants beasts; him in reversion to view if waste be done; a commoner to enter into the land to see his cattle, &c. Yet if he that enters the tavern commits a trespass, or the lord that distrains for rent, &c. kills the distress, or if he who enters to view waste breaks the house, or the commoner cut down trees; in these and the like cases, the law will judge that they entered for that purpose, and they shall be trespassers from the beginning. 8 *Rep.*

12. *Cessante causa, cessat effectus:* The cause ceasing, the effect also ceaseth. Where a woman married is divorced from her husband, she shall have her goods given in marriage, not being spent; for they were given in advancement of the woman, and the cause and consideration of that gift is defeated. *Dyer.* In an action where a debt is the cause of execution, on lands or goods, if the plaintiff releases to the defendant all debts, the discharge of the debt, discharges the execution which is the effect of that cause. If an office be granted to a person, to perform certain business, and he fails in his duty, the office shall cease and determine. *Plowd.*

13. *Conjunctio maris & fœminæ est de jure naturæ*; The conjunction of man and wife is of the law of nature. The bodies and minds of persons are both joined in matrimony; in contracting which, the consent of the mind is chiefly regarded: Wherefore it is said, that the parties consent, and not the compulation, makes the marriage. 1 *Inst.* All persons may lawfully marry, that are not near of kin and prohibited by the *Levitical* degrees; and the age of consenting thereto is fourteen years in the man, and twelve in the woman: If they marry before, at those ages they may disagree to it. *Danvers's abr.* A husband and wife are accounted in law but as one person: And by marriage the man is intitled to all his wife's real and personal estate: As the husband is the woman's head, all she hath is her husband's; but then he is liable to the payment of her debts. *Finch.* An action of debt lies against the husband for goods sold to the wife; the law presumes they come to his use: But a wife may not make any contract, without the husband's consent, except it be for necessary things for her family, &c. if she do otherwise, it will not be binding to him. 2 *Inst.* The wife is *sub potestate viri*, and therefore her acts shall not bind herself, unless she levy a fine of lands, &c.

14. *Consuetudo manerii & loci est observanda:* The custom of the manor and place is to be observed. It is the custom of manors must direct what a copyholder ought to do, or ought not to do; but copyhold estates shall not have the collateral qualities that estates of the common law have, without a special custom. 1 *Co. Inst.* According to the general custom, if a copyholder commit waste, either permissive or voluntary; or do not pay his rent to the lord, being demanded on the land; or if he refuse to do suit of court. Or in case he makes a lease of his estate, for longer time than a year, without licence from the lord, &c. either of these will be forfeitures of copyhold estates.

15. *Cuicumque aliquis quid concedit, concedere videtur & id sine quo res ipsa esse non potest:* To whomsoever any one shall grant any thing, he grants that without which it cannot be. If lands are granted to a man, he has an implied covenant for peaceable enjoying the same, and the law allows him a way thereto, without being expressly mentioned. 1 *Inst.* And where a person grants all the timber trees growing in his woods, the grantee may come upon the ground, and cut them down, and carry them through all his land, though the grass receive injury by the carriage. For trees are proper to be carried by carts, and when a man has title to the principal thing, he shall always justify the necessary circumstances

ſtances. *Plowden.* A tenant at will ſowing corn on the ground, if he be ouſted by the leſſor, ſhall have free entry, egreſs and regreſs, for cutting and carrying away the ſame. And in caſe he be diſturb'd therein, he may bring an action and recover damages.

16. *Cui licet quod majus, non debet quod minus eſt non licere:* To whom it is lawful to do the greater, to him 'tis not unlawful to do the leſſer thing. Where there is a cuſtom that lands may be granted to any one in fee-ſimple; here the grant to a perſon and the heirs of his body, or for life, is within that cuſtom. 5 *Rep.* A perſon who has an office to him and his heirs, may make an aſſignee, and conſequently a deputy.

17. *Dilationes in lege ſunt odioſæ:* Delays are odious in the law. The delaying of juſtice is an obſtruction to and a kind of denial of it; and pleas that are dilatory ſhall not be received, unleſs ſufficient probable matter is ſhewn for it, or the truth of them be proved by *affidavit.* If a plaintiff forbears to bring his cauſe to trial, the defendant is not to be delayed, but may take out a writ of *venire facias,* directed to the jury to try the cauſe; by what is termed *Proviſo. Old natura brev.* In criminal caſes, where perſons are committed to priſon for capital offences, as treaſon, felony, &c expreſſed in the warrant, on prayer in open court the firſt week of the term, or day of ſeſſions, they are to be brought to trial. If they are not indicted the next term or ſeſſions, upon motion made the laſt day of ſuch term, &c. they ſhall be admitted to bail, unleſs the king's witneſſes are not ready. And in caſe they are not tried the ſecond term, &c. they may be diſcharged. *Habeas corpus* act, 31 *Car* 2.

18. *Dormit aliquando jus, moritur nunquam:* A right ſometimes ſleeps, but never dies. In the eye of our law, right is of ſuch a high eſtimation, that the law preſerves it from death and deſtruction; for tho' trodden down it may be, 'tis never trod out. *Coke.* A right to land it is held cannot die; indeed a releaſe of a perſon's right tenures by way of extinguiſhment, but then it's ſo underſtood in reſpect of him that makes a releaſe, &c.

19. *Dominium a poſſeſſione cæpiſſe dicitur:* Right and dominion is ſaid to have its beginning from poſſeſſion. According to this maxim, a long and quiet poſſeſſion eſtabliſhes a right; but then it muſt exceed the memory of man; and if there be proof of record, or in writing to the contrary, tho' it exceeds the knowledge or memory of any one living, yet 'tis judged within memory. 1 *Co. Inſt.* The reaſon why a peaceable poſſeſſion, without contradiction, makes aright in law, is that thereby there may be certainty of titles to eſtates. In a writ of right the limitation of time is made ſixty years, by 32 *H* 8.

20. *Expreſſum facit ceſſare tacitum:* A matter expreſſed cauſes that to ceaſe, which by intendment of law was implied and not expreſſed. A man makes a leaſe rendring rent, and the words of reſervation are expreſs to the leſſor only, the heir ſhall not have it; but if no perſon be ſaid to whom the rent ſhall be paid, this by implication ſhall be to the leſſor and his heirs. *Dyer.* An expreſs covenant qualifies the generality of a covenant in law, and reſtrains it by the aſſent of the parties, ſo that it ſhall extend no farther than it is expreſſed in the covenant. But a warranty in law is not deſtroy'd by an expreſs warranty; as if one grants a leaſe, reſerving a certain rent, in which he binds himſelf and his heirs to warranty of the land, &c. There the warranty expreſs'd ſhall not make that in law ceaſe, or be of no effect, but the leſſee may chooſe which he pleaſes. 4. *Rep.*

21. *Fortior & potentior eſt diſpoſitio legis, quam hominis:* the diſpoſition of the law, is of greater force than the diſpoſition of man: This is explained in ſurrenders of eſtates. As if a perſon having granted a leaſe of lands for years, to begin at *Lady-Day* next, he cannot make a ſurrender of his future

future interest, because there is no reversion wherein it may be drowned. Though in case the lessee before *lady-day* take a new lease of the same lands, *&c.* for years, either to begin presently or at *lady-day*, this is a *surrender in law* of the former lease and interest. 10 *Co. Rep.*

22. *Furiosus furore suo punitur*: A madman or lunatick is punish'd by his madness. If a madman kill another, he hath not broken the law altho' he hath broken the word of it; because he had not any memory or understanding, but meer ignorance which comes from the hands of God. *Plowden.* And therefore such madman has favour shewn him by reason of his disability; he shall not suffer for any felonious act; nor can the punishment of a lunatick without his mind and discretion, be an example to others. 1 *Inst.* A madman, in a *civil* cause, cannot promise or contract for any thing, or do any business; and this is because he understands not what he does: All his acts may be avoided, either by the king, who has the care of the estates of lunaticks, or by his heirs. But if a man *non compis mentis* levy a fine, or suffer a recovery of lands, *&c.* these being matters of record, shall bind himself, his heirs and executors. 4 *Rep.*

23. *Hæres legitimus est quem nuptiæ demonstrant*: He is lawful heir whom marriage demonstrates so to be. A child born within marriage, tho' ever so soon after, is in law legitimate, and heir to the husband: But an alien may not be heir, tho' born in lawful wedlock. In case a child be born in second marriage, within nine months after the first husband's death, he may be heir either to the first or second husband. *Bracton.* A bastard is excluded from being heir; and a monster without human shape, cannot be heir to a person; but an hermaphrodite, if there be any such, may take lands, *&c.* as heir according to that sex which is most prevalent. 1 *Co. Inst.* The eldest son, after the death of his father, is his heir: And if there be grandfather, father and son, and the father dies before the grandfather, the grandson shall be heir; who is termed *hæres jure repræsentationes*, because he represents his father's person. *Broke abr.* Till the death of the ancestor one is called heir apparent; and by the common law, a person cannot be heir to goods and chattels. There is an *ultimus hæres*, on the escheat of lands, for want of lawful heirs; which is the lord of whom held.

24. *Ignorantia juris non excusat*: The ignorance of the law doth not excuse one. Ignorance of the law, even in infants being of the years of discretion, shall be no excuse, if they commit crimes; and altho' it be invincible, as where a person affirms that he has done all that in him lies to know the law. *Doctor and Stud.* For every man is bound at his peril to take notice what the law of the realm is. If any person takes upon him to know the law, and thro' ignorance openly affirms that a void lease, *&c.* is good, to the prejudice of another's title; he may have an action against him, and recover damages 1 *Rep.*

25. *Ignorantia facti excusat*: Ignorance of the fact excuseth. A person buys a horse in a fair or market, of one that had no property in him; if this were unknown to the buyer, he has good right to the horse, and his ignorance shall excuse him. But here, if he had known the seller had no right, the buying in open market would not have excused. Where an illiterate ignorant man seals a deed, and it is read to him false, that makes the same void. 2 *Co. Rep.*

26. *Impotentia excusat legem*: The law excuses impotency. This maxim regards the infirmities of persons, where the law excuseth their not doing certain acts; as of men in prison, out of the realm, ideots and lunaticks, persons blind and dumb, *&c.* 1 *Inst.* Legal imprisonment, without any covin, shall be a good excuse for a person's non-residency, by reason of his impotency. If a disseisee be an infant, feme covert, or in prison, *&c.* and the disseisor dies seised of the land, it shall be no

diſcent to take away an entry, becauſe of impotency in ſuch perſons. *Finch.* And their right of action is ſaved, till their impediments are removed, where others are bound by the ſtatutes of limitation.

27. *Injuria illata in corpus non poteſt remitti:* Injuries to the body cannot be remitted or forgiven. Our law carefully provides for puniſhing forcible injuries, between perſon and perſon, becauſe they are moſt contrary to the repoſe of the kingdom, on which the publick felicity depends. And the life and member of every ſubject are under the king's protection, to the intent they may ſerve him and their country when occaſion requires. *Coke.* So tender is this part of our law, that if one do but menace another, with a weapon or ſtaff, or in caſe he ſtretch forth his arm, or give any other token, whereby his intention of ſtriking appears; it is actionable: They are in legal conſtruction deemed an aſſault, tho' no ſtroke be given.

28. *In omnibus quidam, maxime tamen in jure æquitas eſt:* In all things, but eſpecially in the law, there is equity. The laws themſelves deſire to be rulèd by equity; which is ſaid to be a correction of the law, wherein it is any way wanting by reaſon of the generality of it. *Pl.* The ſtat. of *Glouceſter* gives an action of waſte againſt tenants for life or years; and by the equity of it, this action lies againſt him that holds land for one year only, or twenty weeks, &c. And if a leſſor come upon the ground of a leſſee, it ſhall be intended that he came to ſee whether waſte were done. For equity turns all to the beſt, and makes every act lawful, when it is indifferent if it be ſo or not. *Finch.* If a perſon does make a feoffment to a future uſe, the feoffee ſhall be ſeiſed of the lands, &c. to the uſe of the feoffer and his heirs in the mean time; and this is by equity.

29. *In omnibus fere minori ætati ſuccurritur:* In all caſes generally there is favour ſhewed to perſons within age. No man or woman before the age of twenty-one years can alien or ſell any lands, goods or chattels, or bind themſelves by deed, ſo careful is the law of their intereſt; unleſs it be for eating, drinking, ſchooling, phyſick, and other neceſſaries. 1 *Inſt.* An infant is permitted to do any thing for his own advantage, but not to his prejudice; he may make a purchaſe, which is intended for his benefit, tho' at full age he may either agree to or waive it. Infants may buy things, but cannot borrow money even to buy cloathes; for the law will not truſt them with money, but at the peril of the lender, who muſt ſee the ſame thus laid out. 1 *Salk.* A preſentation to a benefice is to be made by an infant within the ſix months, being a thing of neceſſity, otherwiſe lapſe ſhall incur againſt him; and he muſt perform a condition annexed to an eſtate by his anceſtor, or ſhall be barred of the right to the lands. In ſome caſes alſo an infant is impleadable at law, and for his contempt ſhall receive the ſame puniſhment as a man of full age. *Dyer.*

30. *Jus ſanguinis, quod in legitimis ſucceſſionibus ſpectatur, ipſo nativitatis tempore quæſitum eſt:* The right of blood, which is regarded in lawful ſucceſſions or inheritances, is found in the very time of nativity. It is therefore *jus primogenituræ*, or right of elder-brotherſhip, is principally reſpected: And 'tis a maxim, that the next of the worthieſt blood ſhall ever inherit: As the male and all deſcents from him, before the female; and the female, of the part of the father, before the male or female of the mother's part, &c. 1 *Inſt.* Among the males, the eldeſt brother and his poſterity, inherits lands in fee-ſimple before any younger brother.

31. *Lex neminem cogit ad impoſſibilia:* The law compelleth no man to impoſſibilities. If the condition of a bond be poſſible at the time of making it, and before it can be performed, becomes impoſſible by the act either of God, or the law, or of the obligee, &c. the obligation is

not

not forfeited. But where a condition for payment of money is made impoſſible in reſpect of time; as if it be to pay the ſame on the thirtieth of *February*, and there is no ſuch day, it is due and payable preſently. 1 *Co Inſt.* Where a man is bound by a recognizance or bond with condition for his appearance the next term in ſuch a court, and before the day the cognizor or obligor dies, the obligation will be ſaved; becauſe it is impoſſible the condition ſhould be performed. So in caſe a leaſe be granted for twenty years, upon condition that the leſſee dwells upon the lands the whole term, and he lives but ten years, the executors ſhall enjoy the lands; for the condition is become impoſſible. *Doderige.* A condition of a bond to go to *Rome* in a few hours, is void and impoſſible; but it is ſaid the obligation may be good.

32. *Legis conſtructio non facit injuriam:* The interpretative conſtruction of law ſhall wrong no perſon. In caſe an executor of a will grants all his goods and chattels, the goods which he hath as executor ſhall not paſs, for that would be a wrong to the teſtator's eſtate. 10 *Edw.* 4. And where tenant in tail, or for life, makes a leaſe generally, it ſhall be taken for the life of the leſſor or grantor, or elſe it would be wrongful to him in reverſion. Tho' if a perſon ſeiſed in fee, make any leaſe for life, without mentioning for whoſe life, it ſhall be conſtrued for the life of the leſſee. 1 *Inſt.*

33. *Lubricum linguæ non facile in pœnam eſt trahendum:* The raſhneſs of the tongue is not eaſily puniſhed. This is where words are ſpoken in a paſſion; for in all caſes words of heat, as to call a man rogue, villain, knave, &c. unleſs it be ſaid in ſuch an affair, or to a certain perſon, will bear no action at law. 4 *Rep.* But if one reproaches another with ſome henious crime; calls a perſon thief, a merchant bankrupt, ſays of an attorney he deals corruptly, or calls any one a perjured man; an action of the caſe lies for damages, becauſe theſe ſlanders are of great import, and concern a man's life, eſtate and condition. To call a perſon baſtard, that is heir to an eſtate; or ſay a man has the *French* diſeaſe, &c. when he is courting a woman, are held actionable. *Danvers's Abr.*

34. *Mutata forma prope interimitur ſubſtantia rei:* The form being changed, the ſubſtance of the thing is deſtroyed. In caſe a perſon cuts down another's timber trees, and ſquares them to make beams for a houſe, he may ſeize the ſame before they are thus uſed. Tho' if they are laid in the building, they may not be ſeized by the owner, for their nature is then altered, and they are become part of the houſe; yet the party ſhall have his action for the damage. *Doderige.* And where a man gets the barley of another, and makes it into malt, it cannot be taken again by the former owner, tho' its form is not loſt; becauſe it is become a thing of another nature and uſe.

35. *Neceſſitas non habet legem:* Neceſſity hath no law. Where a fire happens in the ſtreet of a town, any perſon may juſtify the pulling down the wall, or houſe of another, to prevent the ſpreading thereof; as it is a caſe of neceſſity. And if ſeveral perſons are in danger of drowning, by the caſting away of a ſhip, or boat, one to ſave his life may thruſt another from a plank, or a boat's ſide, &c. tho' ſuch other be thereby drown'd. *Bacon.* According to our antient books, if a man ſteals victuals meerly to ſatisfy his preſent hunger, it is neither felony nor larceny, being for the neceſſity of preſerving life. *Staundford.* But this having encouraged thefts, 'tis now adjudged otherwiſe; and the privilege of neceſſity ſhall not prevail againſt the common wealth. The great lord *Coke* ſays, *Neceſſitas eſt lex temporis.* 8 *Rep.*

36. *Nihil magis conſentaneum eſt, quam ut iiſdem modis res diſſolvatur quibus conſtituitur:* Nothing is more agreeable to equity, than that every thing ſhould be diſſolv'd by the ſame means it was firſt conſtituted. Every

contract and agreement must be releaſed by a matter of as high a nature as that was; ſo that a deed in writing under hand and ſeal, can only be releaſed by ſome other writing, ſigned and ſealed, *&c.* 5 *Rep.* And therefore an obligation or matter in writing, cannot be diſcharged by an agreement by word. Where an eſtate is veſted in the king by matter of record, it may not be diveſted out of him but by the like matter: And an act of parliament ſhall not be avoided but by parliament. *Plowden.*

37. *Nullus commodum capere poteſt de injuria ſua propria*: No man ſhall take advantage of his own wrong. If a man be bound in a bond to appear at a day before juſtices, on which day the obligee caſts him in priſon, ſo as he cannot come; no benefit ſhall be had of this bond. *Noy.* In caſe a leſſor and leſſee of lands for years, join in cutting down of timber, the leſſor ſhall not puniſh the leſſee for ſuch waſte; and take advantage of his own wrong by joining therein. An appeal of an infant may not ſtay for his full age, which would be taking advantage of his own wrong. 27 *H.* 8.

37. *Nullum iniquum in jure præſumendum eſt*: No injurious thing is to be preſumed in the law. All things are taken to be lawfully done, till proof is made to the contrary; and fraud ſhall never be intended or preſumed by the law, unleſs it be expreſsly averred. Where no fraud is found by the jurors in a feoffment, the judges ſhall not adjudge the ſame fraudulent; and altho' jurors have found circumſtances and preſumptions to intitle the finding of fraud, it is but evidence, and not any matter upon which the court may judge thereof. 10 *Rep.* For the office of the jurors is to adjudge upon the evidence concerning matters of fact, and thereupon to give their verdict; and not leave things to the judgment of the court, which do not appear to them.

39 *Omne actum ab agentis intentione eſt judicandum*: Every act is to be judged from the intention of the agent. 'Tis held in contracts and obligations, the intention of the parties is the chief thing that the law regards; for ſuch words as ſhew the aſſent of parties, and have ſubſtance in them, are ſufficient. A bond run thus, Know all men by theſe preſents, that I *A.* am held and bound to *B.* in twenty pounds, to be paid to the ſaid *A*, *&c.* This obligation was adjudged good, for the parties intention appears. *Plowden.* The law will likewiſe take one word for another in deeds, to ſupply the intention of perſons; as where a man has a remainder of lands, if he grants it to another, by the name of a reverſion, the grant is good, notwithſtanding the miſ-terming of the thing. 1 *Inſt.* In wills, the intent of the teſtator ſhall generally be obſerved.

40. *Poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*: The poſſeſſion of the brother, of a fee-ſimple, makes the ſiſter to be heir. A man has iſſue a ſon and a daughter by one woman or venter, and a ſon by another, then dies ſeiſed of lands in fee ſimple, and the eldeſt ſon enters into the lands, after which he dies without having any iſſue. Here the ſiſter ſhall have the land, and not the younger ſon or brother, tho' he be heir to the father; but there muſt be an actual entry upon the land, otherwiſe it goes to the younger brother. 1 *Co. Inſt* The poſſeſſion of a brother of an eſtate-tail, ſhall not make the ſiſter heir; for the younger ſon of the half venter it deſcends to, who ought to have it *per formam doni.* Plowden.

41. *Prohibetur ne quis faciat in ſuo, quod nocere poſſit in alieno; & ſic utere tuo ut alienum non lædas*: It is forbidden that any one ſhould do that in his own, which may injure another; and ſo uſe your own, that you do not hurt others. Where a man doth any thing upon his own ground to the particular damage of his neighbour, 'tis accounted a nuſance; and an action lies for it, or the ſame may be abated or removed by the perſons

perſons that are prejudiced thereby. *Wood.* If a man has an houſe that has good lights, and a ſtranger having lands adjoining, builds a new houſe on his lands ſo near, that the windows of the other are darkned by it; 'tis an offence actionable. As is alſo the ſetting up or making a houſe of office, dye-houſe, lime-pit, *&c.* ſo near to another's houſe, that the ſmell thereof annoys him, or is infectious, or if the corruption of the water of the pits, hurts his water, or graſs, or deſtroys fiſh in a river, *&c.* 3 *Inſt.*

42. *Proximus ſum egomet mihi:* Every one is next to himſelf. In caſe of wills, where an executor is appointed, he may pay himſelf a legacy before any other; and among debts of equal degree, the executor may pay his own debt firſt. *Noy.* Executors are nearer to the teſtator, and do more repreſent his perſon, than the heir does the anceſtor; this is held, becauſe if an executor be not named in a mortgage, yet the law appoints him to receive the money. But the heir ſhall not receive it, unleſs he be named, 1 *Inſt.*

43. *Publicum bonum privato eſt præferendum:* The publick good is to be preferred before private intereſt. A woman intitled to dower ſhall not be indowed of a caſtle of defence, for that is *pro bono publico*: but as to caſtles for private uſe and habitation, 'tis otherwiſe. The inhabitants of a village may make by-laws for repairing a church, or highway, or any ſuch thing as is for the publick good generally; and the greater part ſhall bind all of them, without cuſtom. 5 *Rep.* And corporations have power to make ordinances, for the government of their bodies politick, and better execution of the laws of the realm: But they may not do ſo, without a cuſtom or charter, unleſs it be for things concerning the publick good.

44. *Quælibet conceſſio fortiſſime contra donatorem interpretenda eſt:* Every man's grant ſhall be taken moſt ſtrongly againſt himſelf. Whenever a deed is uncertain, and the words of it are ambiguous, it ſhall be conſtrued moſt ſtrongly againſt the grantor therein; as if a man grants an annuity out of land, and he hath no land at the time of the grant, it ſhall nevertheleſs charge his perſon. And where any deed made to a perſon, is good for part, and for ſome part thereof not good, that which is for the benefit and advantage of the grantee, ſhall ſtand good in law. 1 *Co. Inſt.* But although grants are taken ſtrongly againſt the makers, yet no wrong muſt be done by it; and a man may not be obliged by his own act and deed to do ſome things which are againſt law. For if a huſbandman be bound not to till or ſow his land, the obligation is contrary to the common law, and void. 11 *Rep.*

45. *Qui facit per alium facit per ſe:* What one does by another he does by himſelf. If a man impowers another by letter of attorney to ſell and alien his land, and he doth ſo, it is his alienation by him; and where a perſon gives authority to his bailiff to ſell cattle, and he doth it, this will be his ſale by the bailiff. *Plow.* Where any perſon has a bailiff or ſervant, who is known to be ſuch, and he ſends him to market to buy goods, his maſter ſhall be chargeable with the payment, if the things come to his uſe. In caſe he ſells his maſter's cloth, and warrants it to be good, or of a certain length, it is not ſo, an action lies againſt the maſter only, and not the ſervant. *Noy.* And if a perſon commands one to do a treſpaſs, or to beat another, he ſhall be himſelf a treſpaſſer.

46. *Qui ſentit onus, ſentire debet & commodum:* He who bears the burden, ought to receive the profit. A man ſeiſed of lands in fee hath iſſue a daughter and dies, his wife being with child of a ſon; the daughter enters and ſows the lands, and then the ſon is born, and his next friend enters, here the daughter ſhall have the corn growing on the ground. *Perkins.* Alſo a tenant for life, or in dower, having ſown corn upon the

the land, may deviſe the ſame growing at the time of their deaths; and their deviſees ſhall have it. 7 *Aſſiſ.*

47. *Qui ſentit commodum, ſentire debet et onus:* He that reaps the profit ought to bear the burthen. If a perſon grant a rent-charge for life out of his land, and afterwards conveys the land to others, in every one of whoſe time the rent is behind, and then the grantee dies, his executor may bring action of debt againſt all of them for rent due in their time; as they all have the profit of the land. 4 *Rep.* And an aſſignment on a leaſe, the leſſee who hath covenanted to repair, may have an action of covenant againſt the aſſignee, for ſuffering a houſe to decay; becauſe he that enjoys the profit, muſt bear the burden and charges. Where perſons enjoy benefit by making banks of a river, they are to contribute to the repairs therof. 5 *Rep.*

48. *Quod initio vitioſum eſt, tractu temporis non convaleſcet:* That which in the beginning is vicious, cannot by tract of time be made good. In caſe a biſhop makes a leaſe of church lands for four lives, which is contrary to the ſtatute, tho' one dies in his life time, ſo as now there are but three, and afterwards the biſhop dieth, yet it ſhall not bind his ſucceſſor. For here the leaſe ſo made, had a bad and unlawful beginning, it being for more lives than the act allows, and therefore cannot be brought to a good end. 10 *Co. Rep.* If an infant or feme covert, that is a married woman, makes a will and publiſhes the ſame, and afterwards dieth being of full age or ſole, both theſe wills notwithſtanding will be void and of no effect. And this is becauſe the foundation, *viz.* the making and publiſhing are void. *Plowden.*

49. *Quod eſt inconveniens, et contra rationem non eſt permiſſum in lege:* Whatever is inconvenient, and contrary to reaſon, is not permitted in the law. It is likewiſe a maxim, that what is contrary to reaſon, is unlawful: and hence it is ſaid that all poſitive laws, which are contrary to the laws of nature, and of reaſon, are no laws at all. Therefore if a town hath cuſtoms, which are againſt law and reaſon, and thoſe cuſtoms are confirmed by act of parliament; ſuch confirmation ſhall not make them to be good and binding. 1 *Inſt.* But no perſon ought, out of his own private opinion, to be wiſer than the law.

50. *Quod alias bonum et juſtum eſt, ſi per vim vel fraudem petatur, malum et injuſtum eſt:* What otherwiſe is good and juſt, if it be acquired by force or fraud is evil and unjuſt. And if it be mixed therewith, it is the ſame thing; for where a man by will deviſed tenements to ſuperſtitious uſes, and alſo to good and charitable uſes; it was adjudged that the commixture of the evil uſe with the good, infected the good uſe and deſtroyed it. 3 *Rep.* At the common law forcible entry into houſes or lands, &c. was no crime, where a perſon had title, and entry was lawful. But by ſtatute, none ſhall enter into lands or tenements, but in a peaceable manner, tho' they have title of entry, upon pain of impriſonment, &c. 5 *Richard* 2. In this caſe, juſtices of peace have authority to commit offenders till they pay a fine, and to reſtore the poſſeſſion; or an action of treſpaſs may be brought, and treble coſts recovered. 2 *Inſt.*

51. *Rex eſt vicarius, & miniſter dei in terra, omnis quidem ſub eo, & ipſe ſub nullo niſi tantum ſub deo:* The king is the miniſter of God upon earth; every one is under him, and he under none, but only God. *Bracton.* All the lands in *England* are ſaid to be holden either mediately or immediately of the king; and all eſtates for want of heirs, or by forfeiture, on committing crimes, eſcheat to the king, as lord paramount. 1 *Co. Inſt.* Lands in the king's poſſeſſion are free from tenure; for a tenant is he who holds of ſome lord by ſervice, and the king cannot be a tenant, becauſe he hath no ſuperior but God: Neither may the king be joint-tenant with any, for none can be equal with him. 8 *Rep.* The king's

grant

grant is taken ſtrongly againſt a ſtranger, and more favourable for the king; contrary to the grants of a common perſon: And if the king grants land in fee-ſimple, upon condition that the grantee do not alien or ſell the ſame, it is good; tho' void in others. *Plow.* Where the right or title of the king and the ſubject concur and meet together, his title ſhall be preferred; and the king's title is not to be tried, without warrant from the king, or aſſent of his attorney general. 2 *Inſt.* No diſtreſs can be made upon the king's poſſeſſion; but he may diſtrain out of his fee in other lands, &c. and may take diſtreſſes in the highway: The king may alſo diſtrain for the whole debt or rent due of one tenant, where the eſtate is let to ſeveral. In whoſe hands ſoever the goods of the king come, their lands are chargeable, and may be ſeized for the ſame; and the king is not bound by the ſale of his goods in open market. The debts of the king ſhall be ſatisfied, before thoſe of a ſubject, for which there is a *prerogative writ*, and until his debts be paid, he may, by writ protect his debtor from the arreſt of others; but altho' the king's debt is to be firſt paid, that muſt be when it is in equal degree with the ſubject's. *Cro. Car.* No preſcription of time runs againſt the king; he is not within the ſtatutes of limitation; an entry ſhall not bar him; nor will any judgment be final againſt him, but with a *ſalvo jure regis*. The king cannot be nonſuit, as he is ſuppoſed to be preſent in all his courts; and he may have ſuch proceſs in his ſuit, as no other perſon but himſelf can have: And an action lies not againſt the king, but a petition in ſtead of it, to him in the *chancery*. *Finch.* Our king is the fountain of honour and juſtice; all ſtatutes are to have his royal aſſent, and in calling or diſſolving parliaments, declaring war and peace, &c. his proclamation has the effect of a law. Alſo acts of parliament are not binding to the king, unleſs they concern the common-wealth, or he be ſpecially named. 1 *Eliz.* But notwithſtanding the king's prerogative is ſo large, as we find that to be law almoſt in every caſe of the king, that is law in no caſe of the ſubject: Yet the king may not by petition or bill, &c. diſpoſe of any man's lands or goods, Nor ſhall he take that he hath a right to, which is in the poſſeſſion of another, but by due courſe of law. He may not command a man to priſon, againſt the writs and proceſſes of law, *Nihil poteſt rex quam quod de jure poteſt*. Forteſc. For the law is the rule of the king's prerogative, which does not extend to any thing injurious to others. 12 *Rep.* And as the ſubject owes to the king his true and lawful obedience; ſo the king is to defend the laws, and protect the bodies and goods of his ſubjects.

52. *Salus populi ſuprema eſt lex*: The health and welfare of the people is the chiefeſt law. According to this maxim, there is a ſovereign power in the people, or ſtates of the kingdom, to examine into and reinſtitute the regal eſtate, where kings act arbitrarily, and againſt the rights and liberties of the people. *Britannick conſtit.* The main end of government, is the common good of the ſubject; and by the ſame law which ordains our kings, the meaneſt of the people enjoy the liberty of their perſons and property in their eſtates, which it is every man's concern to preſerve to the utmoſt. *Forteſcue.* In caſes that are for the general good of the people, a man can juſtify doing of a wrong; as in time of war, a perſon may erect bulwarks on another man's lands: And hence it is, one may at any time raze an houſe that is burning, for the ſafeguard of neighbouring houſes. *Plowden.* Trade being for the benefit and good of the people, bonds to reſtrain the exerciſe of it, are held void; and the inſtruments of a man's trade or profeſſion may not be diſtrained, as the books of a ſcholar, ax of a carpenter, &c. But this is underſtood when other things may be taken as a diſtreſs. 1 *Inſt.*

53. *Semel*

53. *Semel malus ſemper præſumitur eſſe malus*: Thoſe who once are evil, are always preſumed to be ſo. This has been underſtood, *in eodem genere mali*, in the ſame kind of evil; as perjured perſons, who have once forſworn themſelves, and thereof are convicted, will not be afterwards admitted to give evidence in any cauſe, becauſe they have once ſo offended. And no infamous perſon, or one attainted of falſe verdict, or conſpiracy, or convicted of forgery, or felony, or that has ſtood in the pillory, &c. ſhall be allowed to be a witneſs. 1 *Co. Inſt.* But if a man convicted of felony, or who hath ſtood in the pillory, be afterwards pardoned, it reſtores him to his credit as a new man, and he may be a good evidence. 2 *Hawk.*

54. *Subſtantia prior & dignior eſt accidente*: The ſubſtance is more worthy, and before the accident. No declaration or count in a ſuit of law ſhall abate, ſo long as the matter of action is fully ſhewed in ſubſtance in the declaration: and the writ, as is provided by the ſtatute 36 *Ed.* 3. And no judgment ſhall at any time be arreſted or ſtayed in any court of record for want of any matter of form, in the declaration, plea, &c or for any defect whatſoever, except only matter of ſubſtance, which ſhall be ſhewed publickly to the judges of the ſaid courts. 18 *Eliz.* After verdict is given in an action, in the courts at *Weſtminſter*, the judgment ſhall not be reverſed by writ of error, for any faults either in form or ſubſtance, in any bill, or writ, &c. or for variance therein from the declaration or other proceedings, by 5 *Geo.* 1.

55. *Ubi major pars eſt, ibi eſt totum*: Where the major part is, there by the law is the whole. The only way of determining the acts of many, is by the major part, or a majority; as the major part of members of parliament enact laws, and the majority of electors chuſe the members of parliament; and the act of the major part of any corporation, is accounted the act of the corporation. 19 *Hen* 7.

56. *Veritis nihil veretur niſi abſcondi*: Truth fears nothing but to be concealed. And truth is nothing elſe but an affection of our ſpeech, and actions agreeing with the mind; but is properly called *veracitas*, that is ſpeaking of truth: Of which 'tis to be underſtood, that it is afraid of nothing more than to be obſcured. *Plowden.* Fraud and covin are ſo mixt with truth, as they often deceive and put a falſe gloſs upon the worſt things; tho' the law will never permit them to ſuppreſs the truth, where it can be diſcovered. And in all caſes it labours to make a diſcovery, and cenſure corruptions.

57. *Vigilentibus non dormientibus leges ſubveniunt*: The law helps thoſe that are watchful, and not thoſe that are ſleepy and negligent. For want of being watchful, and by negligence a right may be loſt; as where an action is not brought within the times appointed by the ſtatute of limitation, 20 *Jac.* 1. which ordains, that writs or actions of ejectment, to recover lands, &c. are to be ſued within twenty years after the title did ariſe, or the parties will be barred. All actions of debt, upon the caſe, (except for words) actions of accounts, (other than concerning merchandize) of detinue, trover and treſpaſs, muſt be commenced within ſix years after the cauſe of action; and all actions of aſſault and battery, wounding and impriſonment, muſt be brought within four years; and for ſlander within two years, after cauſe of action, and not afterwards.

Of ACTIONS and REMEDIES.

ACTION of *debt*, is a ſuit given by law where a man oweth another a certain ſum of money, by obligation, or bargain for a thing ſold, or by contract, &c. and the debtor will not pay the debt, at the day agreed; then the creditor ſhall have this action againſt him for the ſame.

If money be due upon any ſpecialty, action of debt only lieth; for no other action may be brought for it: And where a man contracts to pay money for things which he hath bought, and the ſeller takes bond for the money, the contract is diſcharged; ſo that he ſhall not have action of debt upon the contract, but on the bond, *Nat. Br.* 268.

The uſual action of debt, which conſiſts of divers particular branches, lies in all theſe caſes. 1. For money due on bond, or bill. 2. For rent due from tenants. 3. For goods or money delivered. 4. For an attorney's expences. 5. For permitting a priſoner to eſcape. 6. Upon a judgment or arbitrament

1. In a bond where ſeveral are bound ſeverally, the obligee may have action of debt againſt all the obligors together, or all of them apart, and have ſeveral judgments and executions; tho' he ſhall have ſatisfaction but once: But when the bond is joint, and not ſeveral, all the obligors muſt be ſued that are bound; and one is not obliged to anſwer without the reſt. Alſo if a bond is made to three, to pay money to one of them, they muſt alſo join in the action, for they are but as one obligee. *Dyer* 19, 310. *Yelv.* 177.

If there be ſeveral days mentioned for payment of money on a bond, the obligation is not forfeited, nor can be ſued, until all the days are paſt: Yet in ſome caſes, the obligee may bring action of debt for the money due by the bond preſently, tho' it be not forfeited; and by ſpecial wording the condition, an obligee may be able to ſue the penalty on the firſt default. A man is bound to pay 20 *l.* in manner following, that is to ſay, 10 *l.* on one day, and 10 *l.* on another, after the firſt day action of debt lies for 10 *l.* it being a ſeveral duty. 1 *Co. Inſt.* 292. 2 *Danv. Abr.* 501.

Action of debt is generally proſecuted on a bill, bond or leaſe, &c. And in debt on ſingle bill, a defendant may plead payment before the action brought in bar thereof; and on bond, he may bring in the principal, intereſt and coſts, pending the action, and thereupon be diſcharged. 4 & 5 *Ann.*

2. An action of debt lies for rent in arrear, upon a leaſe for life or years; at common law it lay not on leaſes for life, but now by ſtatute it may be had. 8 *Ann. c.* 17. If tenant in fee-ſimple, or fee tail die, his executor may have action of debt by the ſtat. 32 *H.* 8. for arrears of rent incurred in the life-time of ſuch tenants, or he may diſtrain for the ſame; but before this act the executor had no remedy. 1 *Cro.* 471.

If a rent or leaſe for years is reſerv'd and made payable at four quarter days, the leſſor may have action of debt after the firſt day of failure; for every quarters rent is a ſeveral debt, and diſtinct actions may be brought for each quarter. 5 *Rep.* 81. 2 *Ventr.* 129. An aſſignee of rent, upon a leaſe for years, ſhall have debt for it: And action of debt will lie againſt a leſſee, for rent due after the aſſignment of the leaſe; for the perſonal privity of contract continues, tho' the privity of eſtate is gone: But 'tis otherwiſe, if a landlord once accepts the rent of the aſſignee, knowing of the aſſignment. 1 *Lev.* 22.

When a leaſe is ended, the duty in reſpect of the rent remains, and debt lieth by reaſon of privity of contract between leſſor and leſſee. 2 *Cro.* 227.

3. Action

3. Action of debt lieth upon a parol contract by word only, and so doth action on the case: And in some cases, debt will lie, altho' there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law. But action of debt lieth not against executors, upon a simple contract made by the testator: Tho' it lies for the arrearage of an account against executors, of receipts by the testator. 2 *Saund.* 343. 9 *Rep.* 87.

If goods or money are delivered to a third person for my use, I may have action of debt, or account on them. And where money is delivered to a person, to be re-delivered again, the property is altered, and debt lies: But where a horse, or any goods are thus delivered, there action of detinue lieth. Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the husband's use: And if one delivers meat, drink or cloaths to an infant, and he promises to pay for them, action of debt or on the case will lie against the infant; but what is delivered, must be averr'd to be for the necessary use of the infant. 2 *Danv. abr.*

A man agrees with a taylor to make him a suit of clothes, for a certain price; the taylor may bring a general action of debt against him for the money; but if the price is not agreed on, action of the case only lies, or special action of debt on the special contract. *Wood's Inst.* 544.

4. An attorney shall have an action of debt against his client, for money which he hath paid to any person for such client, for costs of suit, or to his counsel, &c. And an action of debt, or case, lies for an attorney for his fees, against him that retained him in his cause: But attornies are not to demand more than their just fees; nor to be allowed any extraordinary fees to counsel, without tickets signed by them, &c. And 'tis said to be a good plea to an action brought by an attorney for his fees, that the plaintiff did not give the defendant any bill of charges, according to the stat. *Mich.* 22 *Car. B. R. stat.* 3 *Jac.* 1. *c.* 7.

If a client, when his business in court is dispatch'd, refuseth to pay the officer his court fees; the court on motion will grant an attachment against him, on which he shall be committed until the fees are paid. 1 *Lill. Abr.* 598.

But officers guilty of extortion shall render treble value: And an action may be brought against attornies for extortion, and the party grieved shall have treble damages and costs. 3 *Ed.* 1. &c.

5. Action of debt lies against a gaoler permitting a prisoner committed in execution to escape, for thereupon the law makes the gaoler debtor: And where the party is not in execution, there action on the case lieth for damages suffered by the escape. 1 *Saund.* 218.

If a prisoner escape who was in execution, his creditor may retake him by *capias ad satisfaciendum*; or bring action of debt on the judgment, or a *scire facias* against him, &c. for he hath still an interest in the body, as a pledge for the debt. If the prisoner makes a tortious escape, the person at whose suit he was taken in execution, may have an *alias cap.* to take him again; or action of the case against the sheriff: But if the sheriff voluntarily permit the escape, debt may be brought against the sheriff. 1 *Ventr.* 269.

Debt lieth against a sheriff, for money levied in execution: And if a defendant in execution is rescued, the sheriff is liable for the whole debt, and is to have his remedy against the rescuer. *Dy.* 241.

6. A person may have action of debt upon an arbitrament; but not for debt referred to arbitration, which must be action on the case. Action of debt shall be brought for money adjudg'd to be paid by arbitrators, declaring on the award; and also upon the bond for not performing it. *Brownl.* 55.

2. The

2. The *action upon the case*, is a general action that is given for redress of wrongs and injuries, done without force, and which by law are not provided against. It is said to have its name, on account of the whole cause or case being set forth in the writ; and there is no other action lies in the case. By statute 'tis ordained, that this action shall be had, rather than any persons shall depart the king's courts remediless; wherein there may be the like process, as in actions of debt or trespass. 13 *Ed.* 1. In general, action of the case lies for *nonfeasance*, where a person omits that which he ought to do, according to promise, to the damage of another; and for *malefeasence*, when one does something, which ought not to be done; and *misfeasance*, where a thing is undertaken, or the law requires a person to do it, and he doth it otherwise than he should. *Croke Car.* The actions are as various under these heads, as the torts and injuries upon which they are founded. For deceits in contracts, bargains and sales; as where one sells another adulterated wine, corn full of sand or gravel, wares by false weights or measures, &c. warrants a horse to be sound, or clothes to be of such a length, and they are not so, action upon the case will lie. 1 *Danvers abr.* So for any private nusance or annoyance to a person's house, water, way, light or air, by building, diverting, stopping, &c. whereby he is endamaged. 2 *Roll.*

3. The *action of account*, is an action that lies against a person, who by reason of his office or business undertaken, is to render an account to another, but refuses to do it; as a bailiff or receiver to a lord and others. This action is now not so much used as formerly, there being no damages given by it.

4. The *action of covenant*, is such as is brought, where a man is bound by covenant in a deed, entered into by him and other persons to do, or not to do some act or thing agreed between them, when he hath broke the same. In case it be agreed, that one person shall pay 100 *l.* to another for certain lands, this is a mutual real covenant; and action of covenant lies, if the other party refuseth to convey, &c. 2 *Mod.* On a bond action of covenant lies, for it proves an agreement; tho' when only a hand is to a writing, and no seal thereto, covenant does not lie; but action of the case upon breach of the agreement. 2 *Danvers.*

5. The *action of detinue*, is an action that lies against one who has got goods or other things delivered to him to keep, and he afterwards refuseth to deliver them. For any thing certain and valuable, wherein one may have property, detinue will lie; in which action the thing detained is generally recovered, and not damages; tho' if a man cannot recover the thing itself, he shall recover the damages for it, and also for the detainer. 1 *Inst.* If on the delivery of goods, the person to whom they are delivered dies, action of detinue may be brought against his executors, or any one to whose hands they come: And where the goods are delivered over to another, this action shall be immediately had against the second person. And notwithstanding the party deliver the things to a person that has right to the same, yet 'tis said he is chargeable. 2 *Danv.*

6. The *action of trover and conversion*, which comes from the *French trouver, invenire*, is a special action of the case that lies against a person, who having found another's goods, refuses to deliver them upon demand. Or it is where a man has in his possession the goods of another by delivery to him, or otherwise, and the person so possessed, sells or makes use of them without the owners consent. And this action lies for the recovery of damages to the value of the goods, &c. 2 *Lilly.* It is called trover and conversion, because the plaintiff in the action surmises, that he lost such and such goods, and that the defendant found them, and at such a place converted them to his own use. But here the losing is only

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a mere ſuggeſtion, and in no reſpect material. If a perſon find goods, and doth refuſe to deliver them to the owner on demand, this is a converſion in law; yet he may anſwer, that he does not know whether the perſon demanding is the right owner or not, and then it is held to be no converſion. 1 *Danvers abr.* Altho' a defendant tenders the goods or things, after a demand and refuſal made, or even if they come into the plaintiff's poſſeſſion, neither of theſe will purge the wrong, or make ſatisfaction to the plaintiff for detaining of the goods. For they ſhall only go in mitigation of the damages, but not to the right of the action of trover, which the party is ſtill intitled to. *Mod. caſ.*

7. The *action of ſlander*, is an action of the caſe brought for words, where a perſon is injured in his reputation. And for any words ſpoke of another, which affect his life or liberty, office, trade, or tend to his loſs of preferment in marriage, or ſervice, or to his diſinheritance, or which occaſion any particular damage, this action lies. *Dyer.*

8. The *action of aſſault and battery*, is an action that lies for treſpaſs againſt a man's perſon, where an injury is done to another in a violent manner: And ſuch offence is alſo indictable, tho' it is uſual not to proſecute an indictment, but to bring this action only for damages. *Terms de Ley.* But if a perſon be aſſaulted or beaten, and he hath no witneſſes to prove the fact, the party inſtead of his action for the battery, may bring an information in the crown office againſt the agreſſor, and there he ſhall be fined to the king. 'Tis held that the leaſt touching of another perſon in anger, is a battery, which may be committed either by puſhing, jolting, or filliping upon the noſe, &c. and ſpitting in a man's face, is battery; if not done by accident. *Dalton.* The laying hands gently on one is not battery to found an action; the law will not preſume any damage in ſuch caſe, and the defendant may juſtify *molliter manus impoſuit*. If a perſon is beaten by another, he may likewiſe return it, and plead that the plaintiff's battery was occaſioned by his own firſt aſſault, whereupon the defendant ſhall go quit, and the plaintiff be amerced. 2 *Inſt.* For the battery of the perſon's wife, child or ſervant, the huſband, father and maſter ſhall have this action.

9. The *action of treſpaſs*, is that action as generally lies for any wrong or damage, which is done with force and arms by one private man to another; and it is ſometimes againſt the perſon and ſometimes againſt his lands and goods. The action of treſpaſs lieth where any one makes an entry on another's lands, and there does damage; alſo *treſpaſs vi & armis* may be brought by a perſon who has the poſſeſſion of goods, or of a houſe or land, if he be diſturb'd in his poſſeſſion. 2 *Rolls abr.* To enter into an houſe againſt the will of the owner, is treſpaſs for which action lies; but a man may lawfully come into the houſe of another, to demand money, &c. yet it has been held, that if a perſon has a horſe in another man's ground, and he enters therein to take it away without leave, action of treſpaſs lies againſt him. 4 *Shep.*

10. The *action of waſte*, is an action that is brought where any waſte or deſtruction is made either in houſes, lands, or woods, &c. by tenants for life or years, to the damage of the heir or him in reverſion or remainder. 1 *Inſt.*

11. The *action of ejectment*, is now the common action for trial of titles, and recovering of lands, &c. illegally held and kept from the right owner. For it is become an action in the place of many real actions, ſuch as writs of right, *formedons*, &c. which are very difficult as well as tedious and expenſive. There is no arreſt required in this action, as now generally proſecuted; but if there be not a tenant in poſſeſſion, as where a houſe or land is empty, and no perſon can be found to whom the declaration may be delivered: In that caſe the plaintiff muſt proceed by

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ſealing a leaſe upon the land, &c. And an original writ is to be ſued out againſt the perſon who ejected the leſſee, and then ouſter and ejectment, &c. 1 *Lilly*. The uſual courſe of proceeding in ejectment is to draw a declaration only, and feign therein a leaſe for three, five, or ſeven years, to him that would try the title, and alſo feign a caſual ejector or defendant, and then deliver the declaration to the ejector, who ſerves a copy of it on the tenant in poſſeſſion. And at the ſame time gives notice at the bottom, for him to appear and defend his title, or that he the feigned defendant will ſuffer judgment by default, whereby the true tenant will be turned out of poſſeſſion of the lands. To this declaration, the tenant is to appear the beginning of the next term by his attorney, and conſent to a rule to be made defendant inſtead of the caſual ejector, and take upon him the defence, wherein he muſt confeſs *leaſe*, *entry*, and *ouſter*, and at the trial ſtand upon the title only. But if the tenant in poſſeſſion does not appear, and enter into the ſaid rule in time, after the declaration ſerved, then on affidavit being made of the ſervice of the declaration, with the notice to appear as aforeſaid, the court will order judgment to be entered againſt the caſual ejector by default, and thereupon the tenant by writ is turn'd out of his poſſeſſion. In caſe ſuch tenant appears to the action, having by his attorney filed common bail, and entered into the rule aforementioned, he is made defendant in the declaration, and put into the place of the ejector. And then the defendant's attorney muſt plead not guilty, and the attorney for the plaintiff draws up the iſſue in the cauſe, a copy whereof and of the declaration is to be deliver'd to the attorney for the defendant, whereupon notice is given of trial. In order to which, the writ of *venire*, &c. is to be made out and returned, and the record made up by the plaintiff's attorney, beginning with the declaration; then the *breviate* of the cauſe, is to be prepared, in which, after a ſhort recital of the declaration and plea, the plaintiff's title is to be ſet forth from the perſon laſt ſeized in fee of the premiſſes, under whom the leſſor claims down to the client, the plaintiff proving the deeds, &c. And after the trial the proceedings are as in other caſes. 1 *Lilly's Abr.* By a late ſtatute, thoſe tenants to whom declarations in ejectment are delivered for any lands, &c. are to give their landlord's notice thereof, on pain of forfeiting three years rent. And the court where ſuch ejectment ſhall be brought, may ſuffer the landlord to make himſelf defendant, by joining with the tenant, if he appears; but if he does not, judgment ſhall be ſigned. Tho' in caſe the landlord deſires to appear by himſelf, and conſents to enter into the like rule as the tenant, if he had appear'd, ought to have done; the court ſhall permit him ſo to do, and order a ſtay of execution, &c. 11 *Geo.* 2.

Wherever a defendant is barred in any real action concerning lands, either by judgment upon verdict, demurrer, or confeſſion, &c. he may bring an action of a higher nature, and try the ſame right again, as it concerns the inheritance. But in perſonal actions, a debt, &c. a bar is perpetual; for the plaintiff cannot have his action of a higher nature, but his only remedy is by error or attaint; and ſometimes in the chancery.

Of Fictions, Intendments, and Preſumptions.

1. A FICTION, or feigned conſtruction of the law, is when in a ſimilitudinary and colourable way the law conſtrueth a thing otherwiſe than it is in truth: And therefore *fictions* were formerly termed an *abuſe* of the law; but have been a long time thought neceſſary, and allowed of in ſeveral caſes. As a common recovery is *fictio juris*, or a formal

formal device for the docking of an eſtate-tail, &c. that was contrived, when thoſe eſtates came to be inconvenient, and could not be altered for any good end or purpoſe. The ſeiſin of the conuſee in a fine, is alſo but a *fiction* of law, it being only an invented form of conveyance to paſs eſtates: And in the action of ejectment, there is both a fictitious leaſe to try the title, and a feigned caſual ejector; yet this is the moſt common real action. Likewiſe if a bond is made at a place beyond ſea, it may be pleaded to be done there in *Iſlington* in the county of *Middleſex*, by fiction of law, in order to try the ſame here, &c. 1 *Co. Inſt.* But the law ought not in caſes to allow of fictions, where it may be otherwiſe really ſatisfied; and there is to be equity and poſſibility in every legal fiction. And it is obſerved, that no fiction ſhould unlawfully work any damage, or injury to another. 10 *Rep.*

2. *Intendment*, in our law, ſignifies the underſtanding, intention and true meaning of a thing; which ſupplies what is not fully expreſſed or apparent. So that where a thing is doubtful, intendment may make it out; likewiſe many things ſhall be intended after a verdict, in a cauſe; but intendment cannot ſupply the want of certainty, in a charge laid in an indictment for any crime, &c. which muſt be expreſsly found. 2 *Hawkins.* A thing may be neceſſarily intended by ſomething that goes before or follows it; and where in a ſuit an indifferent conſtruction may bear two intendments, it is a rule in law to take it ſtrongly againſt the plaintiff. In caſe a perſon be bound by bond to another, and it is not expreſſed to whom the money ſhall be paid, or even if ſaid to the obligor, the law will intend it to be payable to the obligee, who lent it. And where no time of payment is limited, the law intends that the money is to be paid immediately. 2. *Lilly.* In deeds and contracts, the intents of parties is much regarded by the law; yet it ſhall not take place againſt the direct rules of law: and in conveyances of eſtates, our law does not admit them regularly to paſs by intendment and implication. Tho' in deviſes of lands, they are allowed with due reſtrictions, that is to ſay, where the deviſee muſt neceſſarily have the thing deviſed by will, and no other perſon whatſoever can have it. *Vaughan.* No intendment or implication ſhall be allowed againſt an eſtate limited by expreſs words, to drown the ſame.

3. *Preſumption*, denotes in law an opinion or belief of things, ſo ſtrong as to amount to proof and evidence thereof. Where all the witneſſes to a deed of a feoffment or other conveyance of lands are dead, there violent preſumption, which ſtands for a proof, is continual and quiet poſſeſſion. If where a defendant pleads payment to a bond, the debt appears by the bond to have been of a very long ſtanding, and no demand can be proved to have been made, nor intereſt paid for many years; it ſhall be preſumed that the bond is paid, though the plaintiff has it in his cuſtody, 1 *Co. Inſt.* Alſo if rent be in arrear for twenty years or upwards, and the landlord does give a receipt for the laſt year's rent due, 'tis in our law preſumed that all the reſt is ſatisfied. And ſo in ſome other inſtances, tho' preſumption is what may be doubted of, yet it ſhall be accounted true, if the contrary be not proved. In a criminal caſe, if a perſon is found killed in a houſe, and at the ſame time a man is ſeen to come out there with a bloody knife or ſword, and no other perſon was then in the houſe; this is a violent preſumption which will be admitted for evidence, that that man was the murderer. But here a precaution is given, that on ſuch preſumption or circumſtantial evidence, without other proof by witneſſes, the court ought not to judge haſtily. 1 *Inſt.*

THE

CONCLUSION.

THE materials for this Book having ſtretch'd it to ſize beyond what it was at firſt apprehended, we muſt now bring it to a concluſion as briefly as poſſible; and here we ſhall only juſt add a few lines, with obſerving, that there are ſeveral acts of parliament made in *Great Britain*, which extend peculiarly to theſe colonies, in which there may be ſome matters cognizable by our juſtices, yet they have been little noted in the engliſh books: in particular, an act paſſed in the ninth year of the late queen *Anne*, entitled, *An act for eſtabliſhing a general poſt-office for all her majeſty's dominions*, in the 30th ſection it is enacted, All ſums not exceeding 5*l.* that ſhall be due from any perſon for letters, or which ſhall be received for the carriage of letters without anſwering the ſame to the receiver general, ſhall be recovered before juſtices of the peace in the ſame manner as ſmall tithes: And ſuch debt ſhall be preferable in payment before any debt to any private perſon.

Now tho' we are happily yet free from tythes in theſe colonies, and the treating of them in this book was quite needleſs, yet as the juſtices are obliged, when occaſion, to take notice of the above law relating to the poſt-office, it may not be amiſs to give them the method of the recovering ſmall tythes by law in *England*.

Stat. 7 & 8 *W. c.* 6. If any perſon ſhall fail in the payment of the ſame, by the ſpace of 20 days after ſuch demand; the perſon to whom the ſame ſhall be due, may make complaint in writing to two juſtices of the peace, neither of whom is patron to the church or chapel, nor intereſted in the tythes. *ſ.* 1.

Hereupon the ſaid juſtices ſhall ſummon in writing under their hands and ſeals, by reaſonable warning, every perſon againſt whom ſuch complaint ſhall be made. *ſ.* 2.

And after appearance, or default of appearance, (the warning or ſummons being proved upon oath) the ſaid juſtices ſhall proceed to hear and determine the complaint; and ſhall in writing under their hands and ſeals, adjudge the caſe, and give ſuch compenſation, as they ſhall judge to be juſt and reaſonable; and alſo ſuch coſts and charges, not exceeding 10*s.* as upon the merits of the cauſe ſhall appear juſt.

Of which adjudication notice ſhall be given to the party complained of. *ſ.* 3.

And if any perſon ſhall refuſe or neglect by the ſpace of ten days after ſuch notice given, to pay or ſatisfy ſuch ſum adjudged; the conſtables and churchwardens, or one of them, ſhall by warrant under the hands and ſeals of the ſaid juſtices, diſtrain his goods, and after detaining them three days (if the money, together with reaſonable charges for making and detaining the diſtreſs, be not paid in the mean time) ſhall publickly ſell the ſame, and pay to the party complaining the ſum adjudged, retaining to themſelves ſuch reaſonable charges for making and keeping the diſtreſs, as the ſaid juſtices ſhall think fit. *ſ.* 3.

Summons for poſtage of letters.

Pennſylvania, } To any conſtable of Briſtol.
Bucks County, }

WHEREAS *complaint in writing hath been made unto us-----two of his majeſty's juſtices of the peace for the ſaid county, by* A. I. *of-----in the ſaid county, d. poſt-maſter, that* A. O. *of-----in the ſaid county, yeoman, doth ſtand indebted for poſtage of letters to his office, in the ſum of three pounds, lawful*

lawful money, which he refuſes to pay. Theſe are therefore to command you forthwith, upon ſight hereof, to ſummon the ſaid A. O. *to appear before us at the houſe of------in-------in the ſaid county, on* ſaturday *the------day of this preſent month of-------at the hour of----- in the forenoon of the ſame day. To anſwer unto the ſaid complaint. And be you then and there to certify what you ſhall have done in the premiſes. Given under our hands and ſeals, at-----in the ſaid county, the-----day of-------in the------year of---------.*

Likewiſe juſtices are obliged to give their aſſiſtance to cuſtom-houſe officers on all occaſions, when noticed, to prevent or detect illicit trade, or the defrauding the king of his legal duties.

One juſtice, by oath of two witneſſes, may commit any perſon aſſiſting in the landing or ſhipping prohibited goods, or for which any duty is payable, if ſuch perſon have no warrant; or if no officer be preſent, there to remain till he find ſureties for his good behaviour, and till he be diſcharged by due courſe of law.

A warrant againſt thoſe who abuſe or reſiſt a cuſtom-houſe officer, and a mittimus to ſend the offender to gaol.

City of Perth-Amboy, ſs. } To the conſtable of ſaid City, and to the keeper of the common gaol there.

WHEREAS *complaint hath been made unto me, upon the oath of* A. B. *of* M. &c. *an officer of his majeſty's cuſtoms, that* C. D. *and* E. F. *of* M. *aforeſaid, yeomen, did lately, with force and arms, reſiſt the ſaid* A. B. *at* K. *in your county, being then in the execution of his ſaid office: Theſe are therefore in his majeſty's name, to command you to apprehend the ſaid* C. D. *and* E. F. *and to deliver them to the keeper of the common gaol of this city, together with this precept; hereby alſo commanding you the ſaid keeper, to take into your cuſtody the ſaid* C. D. *and* E. F. *and them ſafely to keep until the next quarter-ſeſſions which ſhall be held for the ſaid city: there to be puniſhed according to the ſtatute in that caſe made and provided. And hereof fail not at your perils. Given under my hand and ſeal,* &c.

R. B.

FINIS.

Saml Elliot

Evidence

You shall well and truly try the matter in difference between A B Plaintiff and C D. Defendant and a true verdict give according to evidence so help you God

You shall well and truly try this matter in difference between A B. Plaintiff and C D. Defendant and a true verdict shall give according to evidence

you Shall well and truly try this matter in Differance between A B Plaintiff and C D Defendant, and a true verdict Shall Give according to Evidence.

So help you God

A F

Such oath as A F the Foreman of this jury hath for his Part Taken you and Every of you Shall well and Truly observe and keep on your part Respectively: — So help you God

12 67
25
92

you Each of you Sweer that the Evide[illegible] you Shall give in the Case now under Consi[illegible] Shall be the Truth the whole truth & not th[illegible]

you Swear that you sincerely [illegible] that if you this case agt A B Should be by Summons only you [illegible] be in Danger of loosing your debt or [illegible]