



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

NYPL RESEARCH LIBRARIES



3 3433 00865101 4



New Candidates

Digitized by Google
XTHA

J Van Buren
A NEW

CONDUCTOR GENERALIS:

BEING

A SUMMARY OF THE LAW

RELATIVE TO THE DUTY AND OFFICE

OF

JUSTICES OF THE PEACE,

SHERIFFS, CORONERS, CONSTABLES, JURYMEN, OVERSEERS
OF THE POOR, &c. &c.

WITH

MANY NEW AND IMPROVED SUBJECTS,

ALPHABETICALLY ARRANGED;

COMPRISING

A VARIETY OF PRACTICAL FORMS.

ALL WHICH HAVE BEEN CAREFULLY COLLATED WITH THE NEW REVISED
LAWS OF THE STATE OF NEW-YORK; AND WILL BE FOUND USEFUL TO
CITIZENS, LAWYERS AND MAGISTRATES.

BY GENTLEMEN OF THE BAR.



ALBANY:

PUBLISHED BY E. F. BACKUS.

No. 67, State Street.

1819. 4

69

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the twenty-third day of February, in the forty-third year of the Independence of the United States of America, **E. F. BACKUS**, of the said district, hath deposited in this office the title of a book, the right whereof he claims as Proprietor, in the words following, to wit :

“ **A NEW CONDUCTOR GENERALIS** : being a Summary of the Law
“ relative to the Duty and Office of Justices of the Peace, Sheriffs, Coroners,
“ Constables, Jurymen, Overseers of the Poor, &c. &c. with many New and
“ Improved Subjects, alphabetically arranged ; comprising a variety of Prac-
“ tical Forms. All which have been carefully collated with the New Revised
“ Laws of the State of New-York ; and will be found useful to Citizens, Law-
“ yers, and Magistrates. By **GENTLEMEN OF THE BAR**.

In conformity to the Act of the Congress of the United States, entitled “ An Act for the encouragement of Learning, by securing the copies of Maps, Charts and Books to the authors and proprietors of such copies, during the time therein mentioned.” And also to an act, entitled “ an Act supplementary to an Act, entitled an act for the encouragement of learning, by securing the copies of Maps, Charts and Books to the authors and proprietors of such copies during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

JAMES DILL,

Clerk of the southern district of New-York.

. By **E. Trenor**, Assistant Clerk.

Stone & Corss, Printers, Hudson.

PREFACE.

THE following revised and enlarged work is given to the public, in the hope that it will be useful. Many new subjects have been added. Great care has been taken to have the work correct. But it will probably be found to contain many errors; some arising, possibly, from the occasional absence of the editor, while the work was in the press; others, from the nature of the compilation. That it is extremely difficult to preserve accuracy in a work, abounding with references, is well known to those who have had any concern with undertakings of the kind.

Some subjects, which are regulated chiefly by the statutes of the state, have been purposely omitted. The wild spirit of reformation, which has of late pervaded our legislative halls, has rendered unstable, and subjected to frequent change, almost every law in our statute books. It is therefore become, in a considerable degree, unsafe to incur the expense of digesting and publishing many subjects, which would facilitate the inquiries, and ease the duties of the magistrate. Indeed, some of those contained in the following work may, and probably will, be abrogated, or materially altered, during the present session of the legislature.

In collating the statutes, some portions of them may have been omitted, which ought to have been inserted. If so, the apology for the omission must be found in the difficulties incident to the compilation of works of this kind.

• *February 26th, 1819.*

I N D E X.



A.

ABATEMENT of indictment, by misnomer or want of addition, p. 312.

Abettors, 17.

ABJURATION, 17.—Oath of, 318.

Abortion, causing of, 198.

Acceptance of bills of exchange, forging of, 170.

ACCESSARIES, 17.—Before the fact, 18.—After the fact, 20—How proceeded against, 21. To murder, indictable in the county where accessory, 202.

Accidents, homicide by, 192.

Acknowledgement of recognizance, or bail in the name of another, 397.—Of deeds in the name of another, 106.—Of deeds, how taken, *ib.*—Of neglect or misdemeanor in the officer taking it, 107.—Forms thereof, *ib.*

Actions, popular, see Informations.

ADDITION, 23.—See also misnomer, 312.

Adjournment of sessions, 414. Of appeals, 372.

Affirmations, when admitted, 138. 318.

ADULTERY, 24.

AFFRAY, 24.—How suppressed by private persons, *ib.*—How by constables, 25.—How by justices of peace, *ib.*—How punished, *ib.*—Form of a warrant against affrayers, 26.

Aldermen, see Justices of Peace, 277.

Ale-houses, see Taverns, 244.

Allegiance, oath of, 318.

Amendment of matters of form at sessions, 413.

APPEAL, 26.—From orders concerning apprentices, 30.—Concerning paupers, 369.—Form of notice, 381.

APPRENTICES AND SERVANTS,—laws concerning, 26.—Disorderly persons may be bound, 109.—Settlement of, 354.—Form of an indenture of a poor apprentice, 31.—Forms of proceedings on differences between masters and apprentices, 26.

APPOINTMENT, 33.

ARRAIGNMENT, 33, 418.—Of accessaries, 22.

ARBITRATION & AWARD, 42.

ARREST, 34.—Of members of legislature, 385.—Of voters at elections, *ib.*—Of persons whose names are not known, 89. 204.—Of sabbath breakers, 208.—Of persons in another county, 36. 89.—The like in case of bastards, 57, 8.—See Warrant.

ARSON, 41.

ASSAULT & BATTERY, 40.—How punished, 40.—Or compounded, 418.—By a slave, 437.—Felonious assaults, 408.—Form of warrant for, 41.—Indictment for, *ib.*—The like, with intent to ravish, 396.

Assembly, members of, privileged from arrest, 385.—Riotous or unlawful, 404.

Attainder, 472.

AWARD, 42.—Good or not, 46.—What may be submitted to arbitration, 43.—The several kinds of submission, *ib.*—Forms thereof, 49.—Form of an award, 51.—Of an umpirage, 52.

B.

BAIL, 52.—Of accessaries, *ib.*—
 Personating, 397.—Bail by ha-
 beas corpus, 182.—Bail on bench
 warrants, 388.—Form of taking
 bail, 54.—See Recognizance,
 397.
Baron and feme, as accessaries,
 21.—Baron and feme in gen-
 eral, 454.
BARRATRY, 55.—Form of a war-
 rant for, 57.
BASTARDY, 57.—Maintenance of,
 61.—Settlement of, 63.—Forms
 of proceedings in bastardy 63.
Battery, 40.—See Assault and
 Battery.
Bawdy houses, 294.—See Lewd-
 ness.
Beasts, impounding of, 382.—See
 Distress, 115.
Beggars, 108.
Behavior good, security for, 461.
Bench warrant, form of, 391.
BIGAMY, 68.
Bill of exceptions, will not lie to
 sessions, 413.—Of exchange, or
 notes, stealing them, 293.—See
 Forgery.—Of credit, see coun-
 terfeiting.
BLASPHEMY, 70.
Bonds, forging, 170.—Stealing,
 293.
Breach of peace, see assaults and
 other proper titles.—Of pound,
 see Distress, Rescue.—Of pri-
 son, see Escapes, Prison Break-
 ing.
BRIBERY, 70.—At Elections, *ib.*
BRIDGES, see highways, 184.
BURGLARY, 71.—How laid in the
 indictment, 73. 223.—Form of
 warrant for, 73.—Of indict-
 ment, 74.
Burning of houses, &c. 41.—Of
 woods, 476.
**BUYING OR SELLING PRETENDED
 TITLES**, 74.
**Buyers and receivers of stolen
 goods**, 442.

C.

Capacity of guilt, 206, 230, 292.
Capias, see Process.
Caption of indictment, see Indict-
 ment.
Carnal knowledge of infants, 394.
CARRIER, 76.
Cattle, see Estray, Distress.
Certificate, public, see Counter-
 feiting.—Of a pauper's settle-
 ment, 360.—Form thereof, 379.
 Of the age and ability of slaves
 manumitted, 433.—To author-
 ize carrying slaves out of the
 state, 436.
CERTIORARI, 79.—Form to re-
 move an indictment, 83.—Re-
 turn thereof, *ib.*
Challenge of jurors, 267.—How
 tried, 272.—Form of, 277.
CHAMPERTY, 307.
Chancemedley, see Homicide.
Charges of commitment, how
 borne, 90.—Of prosecution, 139.
CHEATS, 84.—Form of warrant
 for, 86.
Children, deflouring, 394.—Set-
 tlement of, 343.—Born of slaves
 to be free, 432.—In what cases
 to remain servants, *ib.*
Civilly dead, who is, 442.
CLERGY, 86.
Clerk of oyer and terminer and
 sessions, instructions for, 415.
 Their fees, 479.
COIN, counterfeiting, 87.—Form
 of a warrant for, and to seize
 implements, &c. *ib.*
Combination, see Conspiracy.
**Commissioners for acknowledg-
 ing deeds**, 107.—Of highways,
 186.
COMMITMENTS, 88.—Charges of,
 for offences, how borne, 90.—
 Warrant of, for want of surety
 in case of bastardy, 65.—For
 not obeying an order of bastar-
 dy, 67.—For felony, 147.
Common barrator, see Barratry.
 —Informer, see Information.—

- Nuisance, see Nuisance.—
 Scold, 315.
 Compounding, of informations, 243.
 Concealment of felony, 147.
 Confession of prisoners, 93.—
 How far good evidence, 135.
 Congress, members of, privileged from arrest, 385.
 CONSPIRACY, 94.
 CONSTABLE, 95.—How chosen and sworn, *ib.*—Refusing to serve, *ib.*—How far arrest justified by justice's warrant, 288.—How indemnified, 97.—How reimbursed expenses of carrying of offenders to gaol, 91.—Of removing paupers, 363.—The nature of the office in general, 96.—His duty concerning affrays, 24. Arrests, 34, 35. 39.—Bastards, 59.—Immorality, 211.—Committing offenders, 90.—Distress for rent, 113.—Hue and cry, 205.—Private lotteries, 300.—Sessions, 414.—Wrecks, 476.—His fees, 479.
 Construction of penal statutes, 240.
 CONVICTION, 97.—Summons necessary before, 97.—General Form of, 98.—Under the act for suppressing immorality, 212.—The act for regulating inns and taverns, 257.
 CORONER, 99.—His oath, 319.—How sworn, 321.—His office, power and duty, in case of treasure found, 100.—In case of hue & cry, 205.—Of wrecks, 477.—When to act as sheriff, 101. 263.—Forms of proceedings, 102.—His fees, 480.
 Correction, house of, 109. 176.
 Correction of apprentices, 26.—Of children, 191.—Of servants, *ib.*
 Costs, when recoverable, 240.—On trial of traverse of forcible entry and detainer, 160.
 COUNTERFEITING, 105.—Of public certificates or bills of credit, 105.—Coin, 87.—See Forgery.
 Crimes punishable in the state prison, 489.—Against nature, how punished, *ib.*
 CRIER, his fees, 480.
 Cursing and swearing, see Immorality.
 D.
 Damages, where given by statute, costs are also recoverable, 240.
 Damages done by beasts, 105.—Distress for, *ib.*
 Death, civil, 442.
 Deceit, see Cheat.
 DEEDS, forging of,—106. 167.—Acknowledging them in the name of another, 106.—Form of acknowledgment, 106.—Of certificate of proof, 107.
 DEMURRER, 109.
 Detainer, forcible, 153.
 Discontinuance of process, 388.
 Discretionary power, what, 284.
 DISORDERLY PERSONS, 108.—When placed out at service, 109.
 DISTRESS, 109.—Practical directions, to make, 116.
 District Attorney, his oath, 319.—How sworn, 321.—To issue oyer and terminer precepts, 260.—His fees, 481.
 DOGS, 119.—Killing sheep, *ib.*—Attacking travellers, 120.—Form of order, &c. 120.
 Doors, in what cases they may be broken open, 36. 123. 204.—To make distress, 113.
 Duress, see Gaols.
 Dwelling-houses, breaking into, 203.—Burning, 41.—Robbing of, 203.—See Burglary.
 E.
 Election, process not to be served on voters during, 385.—Bribery at, 70.
 Elizors, when appointed, 263.
 Emancipation, of children from their parents, so as to gain settlements, 346.—Of slaves, 341.

- Embezzlement by servants, 291.**
Embracery, 308.
Engrossing, see Forestalling.
Entry, forcible, 151.
Error, in form, amendable at sessions, 413.
ESCAPES, 120.—Gaolers permitting, 179.—Form of indictment for, 126.—See also Rescous, Prison Breaking.
ESTRAYS, 126.
ESTREAT, 127.—Form of, 128.
EVIDENCE, 129.—Form of subpoena, 140.—And ticket, 140.—Warrant for a witness, 143.—Of a recognizance to appear and give evidence, 141.—The like to prosecute and give evidence, 143.
EXAMINATION, in case of bastardy, 63.—Forms thereof, 63.—Of prisoners, 141. 142.—Of witnesses, *ib.*—Forms of, 143.
Exceptions, bill of, will not lie to the sessions, 413.
Execution, criminal, 401.—Award of, 402.—Plea in bar, *ib.*
Excise, see Taverns.
Expences of prosecutions, 139.—Of witnesses, *ib.*
EXTORTION, 143.

F.

- False pretences, 85.**
Fees of officers, 479.
Felo de se, 194.
Felonious homicide, 194.—By self murder, *ib.*—By manslaughter, 194.—By murder, 196.
FELONS, to bear charges of commitment if able, 146.—May be sent to be tried in their proper counties, 146.—Standing mute, 314.—Allowed process for witnesses, 137.
FELONY, 145.—Accessaries in, 17.—Misprision of, 147.—Escape of offenders, 121.—Punishment, 124.
Feme covert, crimes by, 454.—Settlement of, 347.
FENCES, 148.

- FENCE VIEWERS, their duty in case of beasts distrained, 115. Their oaths, 148.**
Fines, when they may be altered, 258.—When expences of witnesses and prosecutors to be paid from them, 139.
Firemen not compellable to serve as jurors, 262.
Firing of woods, 476.
FISHERY, 150.
Forcible abduction and marriage, 395.
FORCIBLE ENTRY AND DETAINER, 151.—Forms of proceedings, 160.
FOREIGN LAWS, 163.
Foreign pleas, how tried, 146.
Foreigners, settlement of, 358.
FORESTALLING, 166.—Form of indictment for, 167.
FORFEITURES, of estate, except for treason, abolished, 167.—On penal statutes, 164.
FORGERY, 167.
Fornication, see Bastardy, Lewdness.
Fortune tellers, 108.
Frauds, 84.
Fruit, stealing of, 292.
FUGITIVES FROM JUSTICE, 172.

G.

- GAMING, 173. 398.**
GAOL, AND GAOLER, 175.
Good behavior, see Surety of the Good Behavior.
Goods, see Stolen Goods.
Grand jury, 260.—Foreman to administer oaths to witnesses, 260.—Process to summon grand juries to courts of oyer and terminer, how issued, 262. 386.—To courts of sessions, *ib.*—Forms thereof, 392.
Grand larceny described, 289.

H.

- HABEAS CORPUS, 180.**
HIGHWAYS, 184.—Commissioners of, 186.—Overseers of, 187.

HOMICIDE, 189.—In the act of arresting, 38.—How to be justified, excused or alleviated, 189.—Justifiable, 190.—Excusable, 192.—Felonious, 194.
HORSE RACING, 202.
HOUSE BREAKING, 203.—In the night, 71.—Robbing of, 203.—Burning of, 41.
House of correction, see Gaols.
HUE AND CRY, 203.—Form of warrant to levy, 205.
Husband running away from his wife or children, 63. 340.
Husband and wife as accessaries, 21. 469.—Crimes by, 469.—As witnesses, 130. 471.

I. J.

IDIOTS AND LUNATICS, 206.
Idle and disorderly persons, 108.
Imbezzlement by servants, 291.
IMMORALITY, 208.—Form of proceedings and convictions in cases of, 212.
Imprisonment, see Gaols, 175.—State Prison, 439.
Indenture for binding apprentices by overseers of the poor, 31.
INDICTMENT, 213.—When to be sent to supreme court or oyer and terminer, 413.—Of felony, may be sent to be tried in the proper county, 146.—Form of, for an assault, 41.—Burglary, 74.—Escape, 126.—Extortion, 145.—Forcible entry, 160.—Forestalling, 197.—Encroachment upon the high way, 189.—Obstructing highway, 189.—Larceny, 294.—Keeping disorderly houses, 295.—Libel, 300.—Maintenance, 309.—Nuisance, 318.—Rape, 396.—Assault, with intent to ravish, *ib.*—Rescue, 403.—Riot, 407.—Robbery, 409.
Indorsement of bills and notes, forging of, 170.—Of warrants to be served in another county, 36. 286.—In case of bastardy, 63.—Form of, 392.

Infamous, who shall be deemed, 129. 174.
INFANTS, 230.—Carnal knowledge of, 394.—Abduction of, 395. 475.—Evidence by, 130.—Misdemeanors by, 231.
INFORMATION, compounding of, 242.—Criminal, 232.—*Qui tam*, 235.—*Ex officio*, 232.—Before justices, 98.—Of witnesses and accusers, 136. 141.—Form thereof, 142.—Form of information for felony, 147.—*Qui tam*, 243.
INNS AND TAVERNS, 244. see Taverns.
Inquests, when taken by justices, 101. 283.—Of coroner, 101.—Forms of, 103.—On a forcible entry, 151.—Form, 162.
Insurrections, sheriff to suppress them, 423.—See Treason.
Judges of supreme court, see Supreme Court.
JUDGMENT, in criminal cases, 257.
Jugglers, 108.
JURIES, 259.—How fined, 275.—Proclamation therefor, 414.—Form of precept for, 392.
Jury, trial by, 259.—Of matrons, 261.
JUSTICES OF PEACE, 277.—Their fees, 481.
Justifiable homicide, 190.

K.

Killing, what amounts to homicide, 190.

L.

LARCENY, 289.—Of larceny in general, *ib.*—From the house, 203.—From the person, 409.
LEWDNESS, 294.—Form of indictment for keeping disorderly house, 295.
Levant and couchant, what, 111.
Levying war against the people, 465.
LIBELS, 295.—Form of indictment for, 300.

Liberate, see **Warrant**.
Licence, to retail liquors, 246.—
 To tavern keepers, *ib.*—Forms
 thereof, 256.
Limitation of actions, indict-
 ments, &c. on penal statutes,
 289.—For immorality, 211.
Lord's day, civil process not to
 be served on, 389.—See **Im-
 morality**.

LOTTERIES, 300.
Lunatics, 206.

M.

Mad persons, may be confined by
 order of two justices, 207.
Magistrates, see **Justices of
 Peace**.
MAIMING, 303.
Mainprise, 52.
Maintenance, 304.—By buying
 of titles, 74.—Form of indict-
 ment for, 309.—Of poor in gen-
 eral, 334.—Of bastards, 63.—
 Of children, 339.—Of parents,
ib.—Of servants and slaves,
 341. 437.
Malice, express, 198.—Implied,
 198.—Prepenae, 200.
Malicious prosecution, 228.
MANDAMUS, 310.
Manslaughter, 194.
Mariners, settlement of, 358.
Markets, forestalling of, 166.
Marriage, forcible, 395.—Settle-
 ment by, 347.
**Marrying in the life time of form-
 er husband or wife**, 68.
Master and servant, see **Appren-
 tices**, 26.—**Slaves** 431.
Matrons, jury of, 261.
Mayhem, see **Maiming**, 303.
Mayor, see **Justices of Peace**,
 277.
Medietate, jury of, 261.
**Members of congress and state
 legislature**, when privileged
 from an arrest, 385.
Minors, 250.
Misadventure, homicide by, 192.
MISDENEANOR, 311.
Misfortune, killing by, 192.

MISNOMER, 312.
MISPRISON, 312.—Of felony
 147.—Of treason, 470.
Mittimus, see **Commitment**, 88.
Money, counterfeiting, 105.
Murder, 196.
MUTE, Standing, 314.

N.

Names, the effect of misnomer,
 312.
Necessity, homicide by, 193.
Nature, crime against, how pun-
 ished, 439.
Notes of hand, stealing of, 293.
 —forging of, 170.
Nurture, how long children to
 continue with the mother for,
 344.
NUISANCE, 314.—Form of in-
 dictment for, 318.

O.

OATHS, 318.—how administered,
 321.—By foreman of grand jury,
 260.—Of allegiance and ab-
 juration, 318.—Of office, 319.
Perjury in, 318.—See also **Evi-
 dence**.
Obstructing of process, 36. 193.
Offences under grand larceny,
 how tried, 422.
OFFICERS, civil and military, to
 be sworn, and how, 321.—
Town officers, how appointed
 by justices of peace, 322.—
Form of such appointment,
 324.—Of their being sworn,
 323.—Arrest by, see **Arrest**.—
**Killing them in execution of
 their office**, 193.—**Their fees**,
 479.
Orders, of bastardy, see **Bastards**.
 —Of removal, see **Poor**.—Of
 sessions on appeals, see **Poor**.
Overseers, their oath, 320. 446.—
How sworn, 321.—**Guardians
 of poor apprentices**, 335.—See
Apprentices.—For their duty
 in regard to the poor, see **Poor**.
 See also **Bastards**, **Slaves**.

Oyer and terminer, precept to summon grand jury for, how issued, 263.—FORM thereof, 393.—May direct writs into any county, 387.—Manner of proceeding at, see Sessions.—Indictments against prisoners in gaol not tried at sessions, sent to, 413.

P.

Panel of jurors, see Juries, 259.

Pardon, by whom granted, 401.

Effect thereof, 401.

Parents leaving their families, 340.—Deemed disorderly persons, 108.

Parent and child, maintenance of, 339.

Paupers, see Poor, 334.

Peace, surety of, 454.—FORM of oath and warrant for, 465.

PEDLERS, &c. 325.

Penal statutes, construction of, 243.—As to costs, 240.—Limitation of actions upon, 239.

Peremptory challenge, 269.—When made, 419.

PERJURY, 327.

Petty jury, see Juries, 259.

Petty larceny, see Larceny, 289.

PHYSICIANS & SURGEONS, 333.

Plaint, in replevin, 116.

Pleas, in bar of execution, 402.—Of misnomer, or want of addition, see Misnomer, 312.

Poisoning, 200.—Indictable in the county where the party dies, 202.

Polls, challenge to, see Juries, 259.

Polygamy, see Bigamy, 68.

POOR, 334.—Overseers of, 335.

Raising taxes, 336.—Relieving and maintaining them, 337.—Of relations maintaining each other, 339.—Of relieving deserted families, 340. See also Disorderly Persons.—Slaves, 431.—Children born of slaves, 341. 435.—SETTLEMENT of, 343.—By birth, *ib.*—By pa-

rentage, 344.—By marriage, 347.—By residence and notice, 348.—By renting a tenement, 349.—By serving an office, 351. By paying public taxes, 352.—By apprenticeship and service, 354.—By estates, 356.—By residence of mariners and foreigners, 358.—Having no known settlement, 359.—Of receiving and entertaining strangers, 359.—Of certificates, 360.—REMOVAL of, 363.—Returning after removal, 367. See also Disorderly Persons.—Unable to be removed, 368.—Appeals, 369.—Who may appeal, 371.—Notice of, *ib.*—Adjournment, 372.—Stating a special case, *ib.* 373.—Certiorari, 374.—Orders unappealed from, 374.—FORMS of orders, contracts and proceedings relating to the poor, 376.

Poor laws, as to apprentices and servants, 27.—As to bastards, 59.

Popular actions, see Informations Qui tam, 235.

Posse committatus, raising of, 36. 205. 423.—Neglecting to join, 205.

POUNDS & POUND-MASTERS, 381. See Distress, 113.

Pregnancy, plea of, 261. 401.—Trial of, 261.

PRESENTMENT, 382.

Pretended titles, buying or selling of, 74.

Principal and accessory, see Accessary, 17.

Principal challenge, see Juries.

PRISON BREAKING, 383.—See also Escape.—Commitment to, 89. 176.—See State Prison, 439.

Prisoners, how to be treated, 177. To have process for witnesses, 137. 469.

PRIVILEGE, of members of congress, 385.—Of the legislature, *ib.*—Of voters during election, *ib.*—Of parties and witnesses, *ib.*

Procedendo, see **Certiorari**.

Process, 386.—Discontinuance of, 388.—On informations *quittam*, 236.—Civil, not to be served on Sunday, 389.—Obstructing its execution, 191.

Profaneness, see **Immorality**.

Promissory note, forging of, 170.

Proof, of deeds, 106.—**Form**, 107. See **Evidence**.

Prosecution, expenses of, 139. 146.—Malicious, 228.

Prostitutes, common, 109.

PUBLIC DEFAULTERS, 393.

Punishment, see **Judgment**, **State Prison**.—See also the heads relating to each particular offence.

Q.

Quakers, permitted to affirm, 318.

Not compellable to serve as jurors on trials for treason or murder, 262.

Qui tam informations, see **Informations**.

Quick with child, 261.

R.

RAFFLING, 393.

RAPE, 394.—**Form** of indictment for, 396.—The like for an assault with intent to commit a rape, *ib*.

Rasure in a deed, see **Forgery**.

Ravishment, 394. 472.

Rebellion, see **Riots**, **Treason**.

Recaption of goods, 151.

Receivers of stolen goods, 442.

RECOGNIZANCE, 397. **FORMS**, 399.

For the peace or good behaviour, 467.—To appear and give evidence, 141.—To prosecute, 143.—In case of bastardy, 65. 67.—To answer to an indictment, 230.—For tavern keepers, 257.

Record, stealing of, 293.—Forging of, see **Forgery**.—Of forcible entry and detainer, **Form** of, 161.

Recorder, see **Justices of Peace**.
Reference to arbitration, see **Award**, 42.

Removal of poor, see **Poor**, 334.

Rent, see **Distress**.

Replevin will not lie in case of distress for taxes or fines, 134.

—See **Distress**, 109.

Representatives, when privileged from arrest, 385.

REPRIEVE, PARDON & EXECUTION, 400.—How granted, *ib*.

RESCUE, 402.—Indictment for, 403.—See also **Distress**, **Escapes**.

Resistance of officers, 38.

Respite, 401.

Restitution of stolen goods, 444.

RIOT, 404.—Indictment for, 407.

Riotous assemblies, 404.

Roads, see **Highways**, 184.

Robbery, 407.—From the house, 73.—See also **House Breaking**,

203.—From the person, 407.—

Form of indictment for, 409.

ROUTS, 404.

S.

Sabbath, serving process on, 389.

Sabbath breaking, 208.

Sale of distress, see **Distress**, 109.

—Of articles on Sunday, see **Immorality**, 208.

Scandal, see **Libels**, 295.

SEARCH WARRANT, 410.—**Form** thereof, 412.—And of complaint therefor, 412.

Security for the peace or good behavior, see **Surety**, 454.

Seduction of women children, 394. 474.

Self defence, 193.—**Homicide in**, *ib*.

Self murder, 194.

Senators, when privileged from arrest, 385.

Servants, 26.—**Battery of**, 28.—**Embezzling their master's goods**, 30. 291.—**Larceny by**, *ib*.

SESSIONS, 412.—When to send indictments to supreme court

- or oyer and terminer, 413.—In what cases they have original jurisdiction, 370. 413.—How to proceed at, 415.—Precepts for grand juries, how issued, 260. 413.—FORM threof, 393.
- Settlement of persons, see Poor.
- Sheep, worried or killed by dogs, 119.—Strayed, 126.
- SHERIFFS, 423.—Their oath, 319. How sworn, 321.—Their office and authority, 423.—To have the keeping of gaols, 176.—Their duty in cases of forcible entry and detainer, 156.—Of hue and cry, 205.—Of private lotteries, 301.—Of wrecks, 477.—Of riots and insurrections, 404.—Their fees in criminal cases, 482.
- Simple larceny, 289.
- SLAVES, 431.—How manumitted, 437.—Owner, how discharged from maintaining them, 433. 435.—Children born of, 341. 432.—Importing or exporting, 435. 436.—Selling old, infirm slaves by collusion, 434.—Suffering slaves and servants to beg, 433.—Harboring them, 436.—Dealing with them, 437.—Selling liquor to them, 437.—For what trespasses owners answerable, 433.—Striking a white person, 437.—When good witnesses, 432.—Kidnapping of, 435.—Masters of vessels, &c. 438.—Travellers, &c. 439.—False swearing, &c. 439.
- Special juries, see Juries.
- Special sessions, see Sessions.
- Spiritous liquors, see Inns and Taverns. Slaves.
- Stabbing, 195.
- STATE PRISON, crimes punishable therein, 439.—Persons adjudged to imprisonment therein for life, civilly dead, 442.—Escapes therefrom, 384.
- Statutes penal, 164.
- Stealing securities for payment of money, 293.—See Larceny, 289.
- STOLEN GOODS, receiving, 442. Restitution of, 444.
- Subornation of perjury, 227.
- Subpœna, how and where to be issued, 137.—Form, 140.—To give evidence on appeals, *ib.*—Ticket, *ib.*
- Suicide, 194.
- Summons, necessary before conviction, 99.
- Sunday, serving process on, 389. 209.—See Immorality, 208.
- Supersedeas, of process against persons indicted, 389.—Of an order of removal, 285.—Of sheriff's commission, 424.—Of warrant of peace or good behavior, 457.—FORMS, 55. 469.
- Supreme court justices, may send felons and indictments to be tried in their proper counties, 146.
- SUPERVISORS, 445. 453.
- SURETY OF THE PEACE, 454.—Of the good behaviour, 461.—FORMS of oath, warrant and recognizance therefor, 465.
- Swearing, profane, see Immorality.
- T.
- Tales de circumstantibus, 265.
- Tavern-keepers, selling liquors on Sunday, 209.—See Inns and Taverns.
- Taverns, 244.
- Taxes, for support of the poor, how raised, 336.—Settlement by paying, 352.
- Tenants, see Distress.
- Theft, see Felony, Larceny.
- Theftbote, 147.
- Threatening to beat a person, or burn a house, see Surety of the Peace and good behaviour.
- Title, buying or selling a pretended, 74.
- Town meetings, see Officers, Es-trays.
- Town officers, see Officers.
- TRAVERSE, 468.—Of forcible entry and detainer, 159.—Of indictment, 468.

TREASON, 468.—Misprision of, 470.

V.

Vagrants, 108.

Verdict, see **Juries**.

Venire to bring in defendants, 388.—**Form** of, 390.—See **Juries**.

Vessels, see **Wrecks**.

View, by a jury, 267.

Under Sheriff, 424.

Voluntary escape, 123.—**Voluntary oaths**, not to be countenanced, 328.

W.

Warrant, how endorsed and served in another county, 59. 286.

—**Form**, to apprehend affrayers, 26.—Against masters and apprentices, 32.—For an assault, 41.—For deliverance when prisoner has found bail, 55. 466.—For a barrator, 57.—For the reputed father of a bastard, 63.—For the mother & to summon the reputed father previous to making an order, 66.—To seize his estate if absconded, 68.—The like when husband or parents desert their

families, 378.—For a burglar, 73.—For a cheat, 86.—For a money maker, 87.—Of commitment, 92.—Of commitment for forcible detainer 161.—To enter house to distrain goods, 119.—For a witness to give information, 143.—For felony, 147.—To levy hue and cry, 205.—From the sessions, bench warrant, 391.—To search for stolen goods, 412.—For the peace or good behaviour, 465.—Of commitment for want of sureties, 466.—Of delivery for having found sureties, 467.

WIFE, 472.

Witnesses, 129.—For prisoners, 137.—Their expences, 139.—Two, necessary in treason, 137. 471.—**Form** of subpoena, 140.—Of warrant to give information before a justice, 143.

WOMEN, children, stealing or seducing of, 394.—Forcibly marrying, 475.—Examination of, in case of bastardy, 59.—Guilty of felonies, 473.—Jury of, 261.

WOODS, burning of, 476.

Work house, see **Poor**, 334.

WRECK, 476.

Writings, stealing of, 293.—Forging, see **Forgery**.

Writs, see **Process**, **Warrants**.

ABJURATION.

ABJURATION, is the solemn renunciation, by oath or affirmation, of all allegiance and fidelity to every foreign power. Every officer, whether civil or military, before he enters upon the execution of his office, must take this oath—and subscribe his name to the same. 1 R. L. 583. See oath and affirmation.

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, abettors, and knowing receivers and comforters of traitors, are all principals. 1 *Hale's Hist.* 613.

But yet as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried, before those who 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 [the legislature] that induce those penalties do expressly extend to receivers or comforters, as some do. 1 *H. H.* 613.

It remains, therefore, that the business of this title of accessaries refers only to *felonies*, whether by the common law, or by statute. 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, though 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 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 procurers, counsellors, or abettors, all which import accessaries before, make it evident, that the law-makers did not intend to include accessaries after, which is an offence of a lower degree than accessaries before. 1 *H. H.* 614.

And although it be generally true, that an act of parliament creating a felony, renders consequentially accessaries before and after within the same penalty, yet the special penning of the act of parliament in such cases, sometimes varies the case : Thus the statute of 3 *H. 7. c. 2.* for taking away women, makes the offender, and the procuring and abetting, yea and wittingly receiving also, to be all equally *principal* felonies, and excluded of clergy. Again, the statute of 27 *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 accessory 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 accessory before the fact committed, is he that being absent at the time the felony was committed, doth yet procure, counsel, command or abet, another to commit felony.

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

So also, if divers come to commit an unlawful act, and be present at the time of the felony committed, though 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. *Ib.* 216.

But if one came casually, not of the confederacy, though he hindered not the felony, he is neither principal or accessory, although 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, though not present when it is taken : and so it seems all that are

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, though 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, though 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 accessories after the fact.

Accessory 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 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, though he know him to have been guilty, and that there is a warrant out against him, yet he is not an accessory to the offence; but perhaps in such case he may be indictable for a contempt of the law, in hindering the due course of justice. 2 *Haw.* 311.

Relieves, comforts, or assists the felon.] In the explication of these words, several things are to be considered :

1. Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessory 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 accessory, 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, 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 accessory. 1 *H. H.* 618.

4. In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessory; but if he take money of the felon to suffer him to escape, this makes him accessory: 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 accessory; 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 accessory to the felony. 2 *Haw.* 318.

6. But if a felon be in prison; he that relieves him with necessary meat, drink, or clothes, for the sustentation of life, is not accessory. 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 his escape, or to bribe the gaoler to let him escape, makes the party an accessary ; for though common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *H. H.* 621.

9. The sending a letter in favor of a felon, or advising to labor 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 favor 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 favor him, whereby he escapes, this makes him accessary. 1 *H. H.* 619.

12. 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.

13. 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.

14. 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.*

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 and tried in the county where he was accessary : And the judges of the courts of oyer and terminer and gaol delivery of the county where the offence of the accessary shall be committed, shall make application to the clerk who has the custody of the records where the principal shall be convicted, &c. to certify them whether such principal be attainted, convicted, or otherwise discharged ; which he shall certify under his seal.—1 *H. L.* 495. § 5.

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 accessory 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 accessory is annulled, and no judgment ought to be given against him : But if he be acquitted of the accessory, 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 accessory appear together, and the principal plead the general issue, the accessory 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 accessory not guilty. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer, till that plea be determined ; for if it be found for the principal, the accessory 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.

By stat. of this State, 1 *R. L.* 496. § 6. after the principal is convicted, the accessory may be tried and punished, notwithstanding the principal should be pardoned or otherwise delivered before attainder.

But no person charged as accessory in any indictment can be outlawed before attainder. 1 *R. L.* 165. § 4.

Any person buying or receiving stolen goods, knowing them to be stolen, may be punished as for a misdemeanor ; although the principal felon be not convicted, which will exempt the offender from being punished as accessory after the fact, should the principal afterwards be convicted. 1 *R. L.* 496. § 6.

Any person who shall buy or receive stolen goods of any value whatsoever, knowing them to be stolen, whether the principal be convicted or not, or who shall aid and abet or procure any other person to commit petit larceny, or who shall be accessory to any felony whatsoever after the fact, is punishable by fine and imprisonment, and in the state-prison at hard labor, or either. 1 *R. L.* 410. § 18.

It seemeth not reasonable, where a person is charged as accessory 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 hardships and hazard of two trials for his life for the same offence, which is contrary to the general course of law. 2 *Haw.* 323.

If the principal be erroneously attaind, yet the accessory 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 accessory. 1 *H. H.* 625.

If one person be indicted as principal, and another as accessory, and both be acquitted ; yet the person indicted as accessory may be

indicted as principal, and the former acquittal as accessory is no bar. 1 *H. H.* 625.

But if a person be indicted as principal and acquitted, he shall not be indicted as accessory 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 accessory after, for they are offences of several natures. 1 *H. H.* 626.

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

Principals and accessories *convicted* of any assault, with intent to rob, murder, or commit a rape, shall be punished by fine or imprisonment, or both; and may be fined and imprisoned in the state prison not exceeding seven years. 1 *R. L.* 409. § 9.

ADDITION.

ADDITION is that description of a person, which, when added to his name, serves to designate and distinguish him from others.

By statute it is required:—*That in every original writ of actions personal, and in all indictments and informations, in which the exigent shall be awarded, to the names of the defendants in such writs, indictments, and informations, additions shall be made, of their estate, or degree, or mystery, and of the towns and counties, of which they were, or be conversant. And if by process upon the said writs, indictments, or informations, in which the said additions be omitted, any outlawries be pronounced, they shall be void; and before any outlawries pronounced, the said writs, indictments and informations shall be abated by the exception of the party.*

This statute extends only to cases in which the exigent may be awarded, that is, to cases wherein the defendant may be outlawed, for the exigent is a process which always precedes outlawry.

Process of outlawry does, for the most part, lie in all civil actions which are commenced by original writ sued out of chancery, in which a *capias* may be awarded; and in all indictments for crimes which are of a higher nature than trespass with force and arms—but it lies not in an action, nor, as some say, on an indictment on a statute, unless it be given by such statute either expressly or impliedly. *Jacobs' Law Dictionary*, title *outlawry*.

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 surname, and that, before this act, sufficed. 2 *Inst.* 666.

If there be a corporation aggregate, of many 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 surname. 2 *Inst.* 666.

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 ad-

dition 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.

But where a mandamus was directed to a town clerk, commanding him to record the survey of a road pursuant to the statute, or show cause, and the clerk returned that he did not record the survey because one of the commissioners had signed the survey by the name of Zacheus Higby, whereas he was elected by the name of Zacheus Higby, *junior* ; it was held that the return was insufficient, that the addition of Junior is a mere description of the person, and the omission of it does not affect or invalidate any act or proceeding done by the same person. 7 *John. Rep.* 549.

ADULTERY.

ADULTERY is the only cause, for which, by the laws of the state of New York, the marriage contract can be dissolved. It is a criminal violation of the matrimonial vow—and is severely punished, by the laws of God and man. The party convicted of adultery is prohibited marrying again, during the life time of the other party. The punishment of the wife, is peculiarly severe. The statute enacts—“that a wife, being a defendant and convicted of adultery, &c. shall not be entitled to dower, in the complainant’s real estate, or any part thereof, nor to any distributive share in his personal estate, on his dying intestate.” 2 *R. L.* 199. § 8.

AFFRAY.

AN affray is the fighting of two or more persons in some public place to the terror of the People ; for if the fighting be in private, it is no affray, but an assault. 4 *Blac. Com.* 145.

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

How and by whom affrays may be suppressed.

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.

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

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

There is no doubt but that a justice of the peace may and must do all such things to suppress affrays 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.

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

Warrant to apprehend affrayers.

Ulster County, ss. To any Constable of the said county: Greeting.
WHEREAS *A. I.* yeoman, hath this day made oath before me *J. P.* esquire, one of the justices of the peace for the said county, that on the day of in the year of our Lord one thousand eight hundred and *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, in the name of the people of the state of New York, to command you forthwith to apprehend the said *A. O.* and *B. O.* and bring them before me, or some other of the justices of the peace for the said county, to answer the premises, and to find sureties as well for their personal appearance at the next general sessions of the peace to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said *A. I.* for the said offence, as also for their keeping the peace in the mean time, towards the good people of this state, 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.

See Inns and Taverns.

APPEALS.

ALL appeals of felony—such as appeals of death, of maihem, of rape, of robbery—are abolished. *L. N. Y.* 36. *S. c.* 8. § 21. This abolition is confined to criminal, and does not extend to civil matters. Appeals are allowed in various civil cases. The most important of these, in relation to the peace and morals of society—are, 1. In the case of apprentices and servants—2. In the case of bastardy—and 3. In the case of paupers. The law and practice upon each of these subjects will be found under their respective heads.

APPRENTICES AND SERVANTS.

- I. *Who may be bound, and how.*
 - II. *How punished, or relieved, and for what.*
 - III. *Of indentures and their contents.*
- I. *Who may be bound, and how.*

INFANTS, of their own free will, and with the consent of their father, or if he be dead, with the consent of their mother or guardian, may be bound to serve as clerk, apprentice, or servant, in any profession, trade or employment, until the age of twenty-one years, or for any shorter time. 1 *R. L.* 135. § 2.

Of their own free will.] From this it seems to be inferible, that children should be of an age to exercise some discretion, or at least a choice, before they can be thus bound.

The consent of the parent or guardian is to be signified by their sealing and signing the indenture. *Ib.*

If the father be under any legal disability to give his consent, the mother's will be sufficient. 1 *R. L.* 136. § 3.

An executor, who, by the last will and testament of a father, is directed to bring up a child to some trade or calling, may bind out such child in the same manner the father might if living. 1 *R. L.* 140. §. 14.

Children of Indian women are not to be bound, without the presence and consent of a justice. 1 *R. L.* 135. § 2.

An infant, who has no parent or guardian, may, with the approbation of the overseers, or of any two justices, or a judge of the common pleas, bind himself, if a male, until twenty-one years of age, if a female, until eighteen. *Ib.*

Such approbation to be indorsed on the indenture. *Ib.*

Children, who are become chargeable to the town, or who shall beg for alms, or whose parents are become chargeable, may be bound out by the overseers of the poor, by and with the consent of two justices, the males until twenty-one, females until eighteen. 1 *R. L.* 136. § 4.

And parents refusing to suffer them, may be bound over to the sessions. *Dalt.* 184.

The counterpart of such indenture is to be deposited with the town clerk. 1 *R. L.* 136. § 4.

Infants and other persons, coming from beyond sea, may bind themselves by contract for any time of service not exceeding four years. 1 *R. L.* 137. § 8.

But no contract shall bind infants longer than the age of twenty-one years; except such as are bound to raise money to pay for their passage, who may be bound until the age of twenty-four years. *Ib.*

In these cases the contract must be executed before two credible witnesses, and acknowledged before a city magistrate or justice of the peace. 1 *R. L.* 138. § 8.

And an assignment, in like manner executed, will transfer the contract to a third person for the residue of the term therein mentioned. *Ib.*

Children, born of slaves after the fourth day of July, 1799, are to remain servants, if males, until the age of twenty-eight years, if females until twenty-five, in the same manner as if bound by the overseers of the poor. 2 *R. L.* 203. § 7.

Whoever shall cause an apprentice or journeyman to be bound by oath, bond, or otherwise, not to use his trade or profession after his apprenticeship or term of service expires, or who shall exact or take any sum of money, or other thing, for using the same, shall forfeit 100 dollars. And all obligations, &c. for such restraint will be void. 1 *R. L.* 135. § 1.

It hath been said, that if the master dies, the apprentice goes to the executor or administrator to be maintained, if there are assets; this is said by Judge Reeve not to be law. But that the obligation and trust, being personal, die with the person—and that the apprentice is consequently discharged. *Reeve's Dom. Rel.* 345.

An infant cannot be bound an apprentice, unless he is a party to, and executes the deed or indenture, 8 *John. Rep.* 328.

The grandfather, or grandmother of a poor child, &c. who shall be ordered to support such child, may, with the consent of the overseers of the poor, bind such child an apprentice or servant, if a male, until he is 21, if a female, until she is 18 years of age. 4 *Vol. L. N. Y. a. 72.*

It seems, that the child of a father, who asks and receives alms, for himself and children, may be bound to service by the overseers of the poor. 13 *John. Rep. 291.*

II. How punished or relieved, and for what.

“If any master or mistress shall be guilty of any misuseage, refusal of necessary provisions or cloathing, cruelty, or other ill treatment, so that his or her said clerk, apprentice or servant, shall have any just cause to complain, or the said clerk, apprentice or servant be guilty of any misdemeanor, miscarriage or ill behaviour, or do not perform his or her duty to his or her master or mistress, then the said master or mistress, or the said clerk, apprentice or servant being aggrieved, and having just cause of complaint, shall repair to any justice of the peace within the county, or to the mayor or recorder, or any one of the aldermen of the city, where the said master or mistress dwelleth, who shall take such order and direction between the said master or mistress and his or her clerk, apprentice or servant, as the equity of the case shall require. And if the said justice of the peace, or mayor, recorder or alderman, cannot compound or agree the matter between such master or mistress and his or her clerk, apprentice or servant, then the said justice, or the said mayor, or recorder or alderman, shall take a recognizance of the said master or mistress, in such sum as he shall think proper, to appear at the next general sessions of the peace, to be holden in the said city or county; and upon his or her appearance and hearing of the matter before the said court of general sessions of the peace, the said court may, in their discretion, by rule or order, discharge the said clerk, apprentice or servant, of his or her clerkship, apprenticeship or service, and order all such part of such sum and sums of money as shall have been paid or agreed for, with or in relation to any such clerk, apprentice or servant, as they shall judge proper, to be refunded to the person who paid the same, his or her executors or administrators: And that such order so entered in the minutes of the said court, shall be a sufficient discharge for the said clerk, apprentice or servant from his or her indenture: And if the default shall be found to be in the clerk, apprentice or servant, then the said justices shall cause such punishment, by fine or imprisonment, or both, as for a misdemeanor, to be inflicted upon him or her, as by them shall be thought meet.” 1 *R. L. 158. § 9.*

This section differs in some respects from its corresponding section in the stat. of 5 *El. c. 4.* Yet the following decisions, under that statute, may not be inapplicable to questions hereafter to arise under ours.

Not allowing meat, drink or wages, agreed on; this is a good cause to be allowed by the justice, &c. *F. N. B. 168.* So is beating him unreasonably. *F. N. B. 168. let. 2.*

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

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.

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 discharged 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, in our stat. it is to any 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. 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 [three] justices, after one justice out of sessions hath endeavored 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 limited jurisdiction, and it is expressly 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 obstinacy ; 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 Cill. 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 Esman.* 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.

Servants going away with their master's goods or money, to the value of twenty shillings, with intent to steal them, shall be guilty of felony; but not to extend to apprentices, or persons within the age of eighteen years. 1 *R. L.* 412.

An apprentice or servant, upon whose binding out no money was paid, may be discharged for ill usage from his master, by three justices of the peace or city magistrates. 1 *R. L.* 130 § 10.

In this case the master should be summoned to appear before them, and the service of such summons being proved, they may proceed, whether he be present or not. *Ib.* 138. §. 10.

The charges against the master should be satisfactorily proved on oath. *Ib.*

Two or more justices of the peace or city magistrates, upon complaint on oath of the master, may punish an apprentice or servant for misbehavior in his service, by commitment to the house of correction, or gaol of the county, at hard labor, not exceeding one callendar month, or otherwise, by discharging him. 1 *R. L.* 139. § 11.

Apprentices or servants, who are bound by the overseers, and refuse to serve, may, on complaint of their master, be brought before a justice or city magistrate, and if they still refuse to serve, may be sent to bridewell, or house of correction, or if none, to the gaol of the county, there to remain until they consent to serve according to their indenture. 1 *R. L.* 137. § 6.

Apprentices or servants absenting themselves before their time of service expires, are to make satisfaction, or serve double the time of such absence. But this is not to extend to cases where the master has received money to learn them their trade or profession; nor to be enforced after three years from the expiration of their term of service. 1. *R. L.* 139. § 12.

Any person aggrieved by order or warrant of such justice, or magistrate, may appeal to the next court of sessions. 1. *R. L.* 139. § 13.

III. Of indentures and their contents.

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

And regularly every deed for binding out an apprentice should be indented. But this omission does not render it void. 1. *R. L.* 137 § 7.

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

An indenture, for binding out a poor child, must contain the age of the infant, inserted from the best information the justices and overseers can get; and this shall be taken (in relation to the time of service) to be the true age. 1 *R. L.* 137. § 6.

It must also contain a clause bidding the master or mistress to learn the infant to read and write, and give to it a new bible at the expiration of the time of service. 1 R. L. 136. § 5.

An indenture for putting out an apprentice by the overseers of the poor.

THIS indenture, made the day of in the year of our Lord one thousand eight hundred and Witnesseth, That *A. B.* and *C. D.* overseers of the poor of the town of in the county of and state of New-York, by and with the consent of *E. F.* and *G. H.* two of the 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 town, of the age of years, apprentice to *L. M.* of the same place, 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 statute in that case made and provided: During all which term the said apprentice his said master faithfully shall serve in all lawful businesses according to his power, wit and ability; honestly, orderly and obediently, in all things demean and behave himself towards his said master, and all his, during the said term. And the said *L. M.* doth for himself, his executors and administrators, covenant and grant, to and with the said overseers, and 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 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. Also, that he shall and will cause the said apprentice to be taught and instructed to read and write; and at the expiration of the said term, shall and will give to the said apprentice one new bible. And further, that he shall and will provide for the said apprentice, that he be not any way a charge to the town; but of and from all charge, shall and will save the said town 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 to these presents have hereunto interchangeably set 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, do, as much as in us lies, consent to the putting forth the aforesaid *J. K.* apprentice, according to the intent and meaning of the above indenture.

A warrant against a master for abusing his apprentice.

County of }
ss. } To any constable of, &c.

WHEREAS complaint hath been duly made unto me one of the justices of the peace for the said county, by *A. P.* apprentice to *A. M.* of in the said county, shoemaker, that the said *A. M.* hath misused and ill-treated him, the said *A. P.* by cruel punishment, and beating him the said *A. P.* without just cause, and not allowing unto him sufficient meat, drink, apparel, [or as the case shall be] these are therefore, in the name of the people of the state of New-York, to command you to cause the said *A. M.* personally to appear before me, at the house of in the said county, on the day of at o'clock 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.

County of }
ss. } To any constable of, &c.

WHEREAS complaint hath been duly made unto me one of the 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.

A warrant against an apprentice for departing from his master.

County of ss. To any constable of, &c.

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

The discharge of an apprentice by three justices.

County of }
ss. } **W**HEREAS *R. K. H. R.* and *G. H.* three of the justices of the peace, within and for the county aforesaid, having heard and examined the matter in difference between *R. W.* an apprentice, and *N. L.* of, &c. And it having been proved to us, that at the binding out of the said servant no sum of money was paid—(and that the said master or mistress has been duly summoned to appear before us at this time and place, as the case may be.) And it appearing to us upon oath, that the said *N. L.* hath not allowed his apprentice sufficient meat, &c. and hath several times beaten him very immoderately without any just occasion. We do therefore, for the causes 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.

Order of an apprentice's discharge, at the Sessions.

AT a Court of General Sessions of the Peace, holden at the Court-House, in the town of within and for the county of on the third Tuesday, 17c.

PRESENT,

A. B.
C. D. } Esquires, Justices.
E. F.

UPON the petition of *A. A.* apprentice to *M. M.* of in the said county, Black-Smith, complaining that the said *M. M.* hath misused and ill-treated him the said *A. A.* by beating him immoderately, and without any just cause, [or as the case may be] and praying relief in respect thereof; the said *M. M.* appeared, pursuant to his recognizance entered into before *J. P.* Esq. one of the Justices of the Peace, within and for the said county, to answer to the complaint contained in the said petition; but not having proved any thing whereby to clear himself of the said complaint; and the said *A. A.* on the contrary, having fully proved the said complaint to be true, to the entire satisfaction of the said court: THEREFORE IT IS ORDERED, by the said court, that the said *A. A.* shall be freed, exonerated, and discharged from his said apprenticeship, and he is hereby freed, exonerated, and discharged from the same accordingly.
By the Court.

When it is necessary to order the master to refund money, received in relation to the apprentice, a clause, according to the following form, may be added :

AND, it further appearing to the said court, that the said M. M. had received the sum of _____ from B. A. father of the said A. A. as a consideration for his teaching the said apprentice the said trade of Black-Smith, and for providing for him, during the term of his said apprenticeship, meat, drink, washing, and lodging : THEREFORE IT IS FURTHER ORDERED, by the said court, that the said M. M. do pay back to the said B. A. the sum of _____ being part of the said consideration money, as a compensation for the deficiency, as well of the instruction of the said apprentice, as of his maintenance for the residue of the said term.

APPROVEMENT.

APPROVEMENT is when a person indicted of treason or felony and arraigned for the same doth confess the fact before plea pleaded, and appeals or accuses others his accomplices in the same crime in order to obtain his pardon. In this case he is called an approver, and the party appealed or accused is called the appellee. 4 *Blac. Com.* 330.

But it is in the discretion of the court to permit the approver thus to appeal or not, and in fact this course of admitting approvals has been long disused, for more mischief has arisen to good men, by these kind of approvals upon false and malicious accusations of desperate villains, than benefit to the public, by the discovery and conviction of real offenders. *Ib.*

It has been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness, (or as it is generally termed state's evidence) against his fellows, upon an implied confidence, which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that offence. 4 *Blac. Com.* 331.

ARRAIGNMENT.

ARRAIGNMENT is the calling of the offender to the bar of the court to answer the matter charged upon him. 2 *H. H.* 216.

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

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.* 508.

ARREST.

WHAT is said under this head will be confined to arrests in criminal cases.

An arrest is the apprehending or restraining of one's person, in order to be forth coming, to answer an alledged or suspected crime. 4 *Blac. Com.* 289.

To this arrest all persons whatsoever are without distinction equally liable in all criminal cases—privilege from arrest which is often allowed in civil cases does not extend to criminal; but no man is to be arrested unless charged with a crime which will at least justify holding him to bail when taken. *Ib.*

In considering this subject it will be proper to enquire

- I. *For what cause of suspicion an arrest may be made.*
- II. *By whom it may be made.*
- III. *How it may be made.*
- IV. *What to be done with a person arrested.*

I. *For what cause of suspicion an arrest may be made.*

A justice of the peace has power to issue a warrant to apprehend a person accused of felony though not yet indicted. And he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant, because he is a competent judge of the probability offered to him of such suspicion. But in all cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed without which no warrant should be granted, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. 4 *Blac. Com.* 290.

The causes of suspicion which are generally deemed sufficient to justify the arrest of an innocent person, are the following:—

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.
4. The being in company with one known to be an offender, at the time of the offence, or generally at other times keeping

company with persons of scandalous reputation. 2 *Haw.* 76.
2 *Inst.* 52.

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

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

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

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

II. By whom an arrest may 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.
11 *John. Rep.* 486.

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

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

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

Any private person that is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment if he escapes through the negligence of the standers-by. And they may justify breaking open doors upon following such felon; and if they kill him, provided he cannot be otherwise taken, it is justifiable, though if they are killed in endeavouring to make such arrest, it is murder. 4 *Blac. Com.* 293.

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

But every other person, to whom it is directed, must personally

execute it; yet it seems, that any one may lawfully assist him. 2 *Haw.* 86.

If a warrant be generally directed to all constables, no one can execute it out of his own town; 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 the warrant ought not to be directed to the party, but to some indifferent person, to execute it.

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

III. *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 treason; and that he who so opposes an arrest for felony, is an accessory to the felony. 2 *Haw.* 121.

An arrest in the night is good; else the party may escape. 9 *Co.* 66.

By statute, 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. 1 *R. L.* 149. § 2.

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 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.

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

As to the case of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities but in cases of necessity; and, therefore, that no one can

justify the breaking open of another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and them to give him admittance. 2 *Haw.* 86.

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

1. Upon a *capias* grounded on an indictment for any crime whatsoever; or upon any *capias* 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 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* as 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, upon 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 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, an officer upon any warrant from a justice, either for the peace or good behaviour, or in any case where the people are a party, may by force break open a man's house to arrest the offender. *Dalt. c.* 169.

4. On a warrant to search for stolen goods, the doors may be broken open, if the goods are there, and if they are not there, the consta-

ble seems indemnified, but he that made the suggestion, is punishable. 1 *H. H.* 151.

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

6. On a *capias ut lagatum*, or *capias profine*. 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 people. 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 unreasonable time of night, especially in inns, taverns or ale-houses, the constable or his watch, demanding entrance, and being refused, may break open the doors, to see and suppress the disorder. 2 *H. H.* 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 be broken open to take a person, who is required to take certain oaths by virtue of a statute, because, in such case the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12 *Co.* 128.

But if an officer, to serve a 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 *defendendo*, for the law is his protection. 2 *H. H.* 118.

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

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

But though a private person may arrest a felon, and if he fly so as he cannot be taken without he be killed, it is excusable 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 name of the people, and in such case the party at his peril ought to obey him, though he knoweth him not to be an officer ; and if he have no law 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 ; though 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, and 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 name of the people. 1 *H. H.* 583.

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

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

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

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

IV. *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 ale-house, disorderly and at unreasonable time of night, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, though 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. 2. *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 has 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.

AN assault 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 it will carry, or by any other act done in an angry, threatening manner. A Battery is any injury done to the person of another, in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way. Hence there may be an assault without a battery, but the latter cannot be without the former. 3 *Haw.* (by Leach) 16.

In what cases an assault and battery 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 an assault and battery of another who doth menace or assault him, and attempt to beat him, from his lawful watercourse or highway. *Pult.* 42.

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

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 people wherein he shall be fined according to the heinousness of the offence. 1 *Haw.* 134.

By stat. assaults, with intent to rob, murder, or commit a rape, are punishable by fine and imprisonment, and in the state-prison, at hard labor, or either. 1 *R. L.* 409. § 9.

Warrant for an assault.

King's county, ss. To any constable of the town of, &c.

WHEREAS complaint hath been made before me, J. P. Esquire, one of the justices of the peace, in and for the said county, upon the oath of A. I. of in the said county, taylor, that A. O. of aforesaid, butcher, did, on the day of , violently assault and beat him, the said A. I. at aforesaid, in the county aforesaid: These are therefore, in the name of the people of the state of New-York, 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 the people of the state of New-York, upon their oath presented, that A. O. of in the said county, butcher, on the day of in the year of our Lord, one thousand eight hundred and at aforesaid, in the county aforesaid, and upon A. I. taylor, then and there being in the peace of God and the people of the said state, with force and arms, an assault did make, and him, the said A. I. then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him, the said A. I. to the evil example of all others in like cases offending, and against the peace of the said people, and their dignity.

ARSON.

ARSON is a felony at common law, in maliciously and voluntarily burning the house of another by night or by day. 1 *Haw.* (by Leach) 295.

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 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.

The burning must be done maliciously and voluntarily, for if it be done by accident or negligence, it is not 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 misseeth its aim, and takes effect upon another, it shall have the same construction as if it had been levelled against him who suffers by it. 1 *Haw.* 106.

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 a 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.

A person seized 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 seized or possessed of a house in a town, who burns his own with an intent to burn his neighbor's, but in event burns his own only, is not guilty of felony: But however it is certainly an offence highly punishable, in regard of the malice thereof, and the great danger to the public which attends it; and the offender may be severely fined, and imprisoned, and set on the pillory, and bound to his good behaviour during life. 1 *Haw.* 106.

Any person convicted of wilfully burning an inhabited dwelling-house, shall suffer death by hanging, 1 *R. L.* 407. § 1. and, if convicted of wilful burning a dwelling-house uninhabited, or any house of public worship, or other public building, or any barn, or any grist-mill, shall be adjudged to imprisonment in the state prison for any term not exceeding 14 years; and if a second time convicted of any of the aforesaid last mentioned offences, committed after the first conviction, shall be imprisoned in the state prison for life. 1 *R. L.* 408. § 5.

ARBITRATION AND AWARD.

ARBITRATION is where some matter in dispute is submitted to the judgment of one or more persons chosen by the parties; the persons chosen to whom the matter in dispute is submitted are called arbitrators; and if they have power, in case they cannot agree, to choose a third person to decide the matter, that person is called an umpire. The decision of arbitrators is called an award, and that of an umpire, an umpirage.

In considering the subject of arbitration and award, it will be proper to inquire:

- I. *What may be submitted to arbitrators.*
- II. *The various modes of submission.*
- III. *The parties, or who may submit, and to whom.*
- IV. *The requisites of an award, or umpirage.*

I. *What may be submitted to arbitrators.*

In general, all controversies concerning any personal chattel or personal wrong may be submitted to arbitrators. *Kid.* 53.

But whatever is submitted to arbitrators must be uncertain in its nature. Hence an award is of no avail, when made of debt on a bond for the payment of a sum certain, or of a debt for arrears of rent ascertained by a lease, or of covenant to pay a sum certain, nor of damages recovered by a judgment, for in all these cases the demand is ascertained. And any decision of arbitrators, if according to such demand, would be needless, and if contrary to it, would be unjust. *Kid on Awards*, 51.

But if a demand for a thing certain be joined with a demand for what is uncertain, it may be submitted. *Kid.* 54.

Matters of freehold may be submitted to arbitrators, and they may award a conveyance or release of land, and it will be a breach of the arbitration bond to refuse compliance. But the right of real property cannot pass by any award. 3 *Blac. Com.* 16.

The only difference between a submission of matters of freehold, and of matters of personalty, is that in the latter case a right of property may be transferred and settled as fully as by the agreement of the parties or the judgment of law, while in the former case no right or title can be changed by virtue of the award alone, but only the parties can be ordered to change or transfer it by their own act. *Id.*

Criminal matters, as treasons, murders, felonies, and other offences indictable at the suit of the people, cannot be submitted to arbitrament; for it is for the good of the state that such offenders be made known and punished; and the people in such cases are 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 people. *Complete 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.

II. *The various modes of submission.*

A submission may be either verbal or in writing. Where it is verbal it may simply be an agreement to submit the matters in dispute to the decision of the arbitrators, without an express promise to perform the award, or it may be accompanied by such a promise without the mention of any consideration for it, or it may be with such a promise on a consideration. In all these cases the effect is the same. *Kid.* 10.

When the submission is in writing it is most commonly by mutual bonds, given by the parties each to the other in a certain sum penal, on condition to be void on performance of the award, but it is not essentially necessary that they should be so given; they may be given to a third person, or even to the arbitrator himself, and they may be given by other person than the parties themselves, who will incur the forfeiture if the parties do not perform the award. *Kid.* 11.

The principal difference between a submission by parol and a submission by bond, lies in the revocation and its consequences. In both cases of submission the authority granted to the arbitrators may be revoked at any time before the making of the award, or before the expiration of the time for making it. And after such revocation the arbitrators cannot proceed, or if they do, the party revoking is not bound to perform their award. But if the submission be by bond, a revocation, though it may discharge the party from a liability to perform the award, will nevertheless subject him to the penalty of his bond. Whereas if the submission be by parol, a revocation, if made in time, not only discharges the party from all liability to perform the award, but also from all consequence, whatever. *Kid.* 29. 31.

If the submission be by parol, that is by word, the revocation may be so too, but if the submission be by deed, that is by writing under seal, the revocation must be by deed also. *Kid.* 30.

Performance of an award may be secured by a penalty in the bonds of submission, or by a rule of court.

Submission by rule of court is warranted by statute. 1 *R. L.* 125.

"It shall and may be lawful for all merchants and traders and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action, or suit in equity, by arbitration to agree, that their submission of their suit or controversy to the award or umpirage of any person or persons, should be made a rule of any court of record in this state, which the parties shall choose; and to insert such their agreement in their submission or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made, and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon 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 same affidavit in court, be entered of record in the same court; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party refusing or neglecting to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor, or defendant in such court, and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution, by any order, rule, command or process of any other court, either 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, arbitration or umpirage, 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.

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 statute directing that the prosecution shall be carried on by attachment, the remedy being lost, the award is lost likewise. *Compl. Arb.* 34.

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

If the submission be by rule of court, performance of the award will be enforced, notwithstanding any revocation of the parties or either of them. *Comp. Arb.* 82.

III. *The parties who may submit, and to whom.*

It is a general rule that every one who is capable of making a disposition of his property or a release of his right, may make a submission to arbitrators ; but no one can, who is either under a natural or civil incapacity of contracting. Therefore a married woman cannot be a party to a submission, whatever may be the subject of dispute, whether arising before or after marriage, but the husband may submit for himself and his wife. *Kid.* 35.

On the principle that an infant cannot bind himself for any thing but necessities, it is clear he cannot be a party to a submission, whether the matter in dispute be an injury done to him, as for a battery committed on him, or for a trespass on land, or an injury done by him to another. *Kid.* 35.

But the guardian of an infant may submit to arbitrators on behalf of his ward. 3 *Caines.* 153.

An executor or administrator may submit a matter in dispute between another and himself, in right of his testator or intestate.—*Kid.* 39.

Every one whom the law supposes capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or umpire, for being appointed by the parties themselves, it is their own fault if he be inadequate ; but a person cannot be an arbitrator who is under any natural or civil incapacity as one who is non sane memory, or deaf and dumb, or an infant, or a married woman, or a slave.—*Kid.* 70.

It is highly improper, however common it may be, for a person nominated as arbitrator to consider himself as the agent of the person on whose behalf he was nominated. *Kid.* 75.

It appears however to be no objection to an arbitrator, that he is related to one of the parties, or connected with him in any other way ;

which might raise a presumption of an inclination in his favour ; for by consenting to the nomination of such a person, the other party has shown his opinion that such an inclination will not affect the justice of his determination. *Kid.* 75.

IV. *Of the award and its requisites.*

If the arbitrators consent to their appointment, they should fix upon a time and place for examining the matter referred to them, and give notice thereof to the parties or their attorneys. The parties must attend according to the appointment, either in person or by attorney. *Kid.* 95.

Witnesses may be compelled to attend and give evidence before arbitrators. For it is enacted by statute, "*That it shall be lawful for the justices of the peace in this state to issue subpoenas to compel witnesses to attend, and give evidence before arbitrators. Provided, the party or parties shall prove to the satisfaction of such justice, that a submission to arbitration has been made, and on default of attendance, such witness shall suffer the same penalty as is inflicted for default in attending a justice's court when subpoenaed.*" 25 *Doll. act.* §. 28.

Arbitrators must examine the witnesses and documents produced by the parties. *Kid.* 95.

Arbitrators may adjourn from time to time as often as they please, giving notice, as at first, of the time and place of every subsequent meeting. They must, however, be sure to make their award within the time limited by the submission. *Kid.* 96.

Where no time is limited arbitrators may make their award at what time they please, unless either of the parties specially request them to make an award within a reasonable time, and in case of refusal, revoke his submission, for the parties will not be bound by an award after such revocation. *Kid.* 96.

Where a time is limited by the submission, arbitrators cannot make an award after that time, unless it be prolonged by consent of the parties. *Ib.*

If the arbitrators have power to nominate an umpire, they may do it before they proceed to consider the subject referred to them ; or when a further day is given to the umpire, and the choice of him left to them in general terms, they may choose him at any time after the expiration of their own time, provided it be before the time limited for him. *Kid.* 88. 2 *John. Rep.* 57.

An umpire, whether he be named by the parties in their submission, or nominated by the arbitrators, and whether the time allowed to him be the same with that allowed to the arbitrators, or extend beyond it, may, unless restrained by express words or plain implication, make his umpirage before the expiration of the time allowed to the arbitrators. *Kid.* 90.

One of the principal requisites of an award is that it be according to the submission. *Kid.* 140.

It must not extend to any matter not comprehended within the submission. *Kid.* 141.

Thus if the submission be confined to a particular matter in dispute while there are other things in controversy between the parties

not submitted, an award which extends to any of these latter is void, as far as it respects them. *Kid.* 141.

A submission of one particular matter with divers other matters, is equivalent to a general submission of all questions and controversies between the parties, and under it general releases may be awarded. 2 *Caines*. 521.

Arbitrators may award costs of the arbitration, this power being necessarily incident to the authority conferred on them of determining the cause, and for this reason it is not liable to the objection of being without the submission. *Kid.* 153.

Another branch of the rule, "that the award must conform to the submission," is that it must not extend to any one who is a stranger to the submission. *Kid.* 156.

A distinction is taken between an award that something shall be done by a stranger to the submission, and an award that something shall be done to a stranger by one of the parties to the submission; in the former case the award is void in respect to the stranger, in the latter case it is good, and if the stranger will not accept the act awarded to be done to him, the party's obligation is saved. *Kid.* 160.

Another branch of the general rule, "that the award must be according to the submission," is that it must comprehend every thing submitted, and must not be of parcel only; the purpose of the parties in submitting is to have a final determination of every matter comprehended within their submission: that purpose is not answered when the award comprehends only a part. *Kid.* 171.

This however must be understood with some limitation, for though the words of the submission be more comprehensive than those of the award; yet if it do not appear that any thing else was in dispute between the parties, beside what is comprehended in the award, the award will be good. *Kid.* 172.

Another requisite of an award, is that it be possible and lawful. *Kid.* 185.

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 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.* 1 *Guines*, 304.

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 though 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.

An award in trespass that the said suit shall be no farther prosecuted, is sufficiently final and certain, and a good bar to an action on the case for the same offence. 1 *Caines.* 304.

Another requisite of an award, is, that it be mutual. It must not give an advantage to one party, without an equivalent to the other. The mutuality which is here required, is nothing more than that the thing to be done, should be a final discharge of all future claim by the party in whose favour the award is made against the other, for the cause submitted. *Kid.* 219.

The most frequent complaint of awards for the want of mutuality, is that when something is awarded on one side, there is no release awarded to the other in return, for it is uniformly held that a release would render the award mutual. *Kid.* 220.

But it has been held that an award of payment of a specific sum by one party to the other is final and sufficient without a release. 2 *John.* 57.

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

But though 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.

All the arbitrators must concur in the award, unless it be expressly provided that a part of them may make the award; and where such a proviso is made, all must be present, unless those who do not attend, have proper and sufficient notice, and are wilfully absent. 6 *John.* 39.

An award may be enforced either by action or attachment, according to the nature of the submission.

If the submission be by rule of court, the award may be enforced by attachment. But if the submission be by bond, with a penalty, the award may be enforced, either by an action on the bond for the penalty, or by an action on the award. If the submission be by parol, the award may be enforced by action on it. *Kid.* 276. 280.

An award may be set aside in certain cases.

In case of corruption, or other unfair practice, it is enacted by the aforesaid statute, 1 *R. L.* 126. § 2. 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.

But generally, as the arbitrators are persons of the parties' own choosing, 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 choose 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 choosing, 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, that 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 biased 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 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.* 511.

If the submission is by rule of court, it is necessary that there be a personal demand of the thing awarded; and that 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 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 the supreme court of judicature of the state of New-York. In witness whereof, the said parties to these presents have hereunto set their hands, this day of , in the year, &c.

Arbitration Bond.

K NOW 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 dollars, lawful money of the state of New-York, 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 our Lord, &c.

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

THE condition of the above obligation is such, that if the above bounden A. B. his heirs, executors, and administrators, and every of them, for and on his and their parts and behalf, do and shall well and truly stand to, obey, abide, perform, observe and keep the award, order, arbitrament, final end and determination of A. A. of Esquire, and B. A. of gentleman, arbitrators, indifferently named, elected, and chosen, as well for and on the part and behalf of the above bound A. B. as of the above named C. D. to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands, whatsoever, both 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 to remain in full force and virtue.

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

And the above bound A. B. doth agree and desire, that this his submission be made a rule of the supreme court of judicature of the state of New-York.

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 above bound A. B. his heirs, executors, and administrators, for and on his and their parts and behalf, shall and do well and truly stand to, obey, abide, observe, perform, fulfil and keep the award, order, arbitrament, final end and determination of or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said A. B. as by and on the part and behalf of the above named C. D. to arbitrate, award, order, judge, and deter-

mine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending 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 to the said parties in difference, on or before the day of now next ensuing; then this obligation to be void, otherwise to remain in full force and virtue.

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

Form of an award.

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

Whereas there are several accounts depending, and divers controversies have arisen between of yeoman, of the one part, and of yeoman, of the other part: And whereas, for the putting an end to the said differences, they the said and by their several bonds or obligations, bearing date last past, are reciprocally become bound each to the other, in the penal sum of to stand to, abide, perform, and keep the award, order, and final determination of us the said so as the said award be made in writing, and ready to be delivered to the parties in difference, on or before next ensuing, as by the said obligations and conditions thereof may appear: Now KNOW YE, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burthen of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties, in manner following, that is to say: First, We do award and order, that all actions, suits, quarrels and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premises, to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning the premises. 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 of shall in due form of law, execute each to the other, or to the other's use, general releases, sufficient in the law for the releasing by each to the other his heirs, executors and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the day of last past (*viz. the day of the date of the arbitration bonds.*) In witness whereof, we have hereunto set our hands and seals, the day of, &c.

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.

BAIL is the delivery of a person to his sureties upon their giving (together with himself) sufficient security for his appearance at a time and place certain, he being supposed to continue in their friendly custody, instead of going to gaol. 4 *Blac. Com.* 29.

Bail differs from mainprize chiefly in this, that mainperners are barely sureties of their principal, and cannot lawfully detain or imprison him themselves, in order to secure his appearance—but bail are looked upon as gaolers of the principal's own choosing, and they may seize their principal and surrender him. 2 *Haw.* 185.

In considering the subject of bail, it will be proper to inquire :

- I. *In what cases it may be demanded.*
- II. *By whom it may be granted.*
- III. *Consequence of denying Bail where it ought to be granted, and granting it where it ought to be denied.*
- IV. *How and to what amount Bail is to be taken.*
- V. *How Bail may be discharged.*

I. *In what cases Bail may be demanded.*

Regularly in all offences, either against the common law or statutes that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some statute. 4 *Blac. Com.* 298.

Where imprisonment is part of the sentence against a prisoner, there can be no bail. 4 *Blac. Com.* 298.

By the common law all felonies were bailable, till murder was excepted by statute, so that persons might be admitted to bail before conviction in almost every case. *Ib.*

And by subsequent statutes most cases of felony have been ousted of bail. *Ib.*

Accessaries to felonies are not to be bailed unless they be of good reputation, and when there are strong presumptions of guilt against a person so charged, he is not to be bailed. 2 *Haw.* 102.

Although bail is not allowable in cases of treason or felony, yet this must be understood with reference to justices of the peace, for the supreme court may bail in any case whatever, and for any crime, be it treason, murder, or other offence, according to the circumstances of the case. 4 *Blac. Com.* 299.

II. *By whom Bail may be granted.*

Bail may be granted by justices of the peace or sessions, or by the chancellor or judges of the supreme court.

Bail may be granted by justices of the peace, or by the court of general sessions in the following cases :

Courts of general sessions of the peace, or two justices jointly out of sessions, may bail persons arrested and in gaol for suspicion of felony. 2 *R. L.* 151. § 7. and 507. § 3.

Under the English statute, which allowed justices to bail a prisoner where the suspicion of felony was light, it is laid down, that if the presumption be strong, or the defamation great, the justices may refuse to bail him. *Hale's Pl.* 102.

Justices, as conservators of the peace, may cause to come before them all persons who shall break the peace, and commit them to gaol, or bail them, as the case may require. 2 *R. L.* 506.

Whenever justices of the peace have jurisdiction of a crime, they may bail the person indicted before them of such crime, upon such circumstances for which other courts may bail the person so indicted before them ; for 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 persons indicted before them of such crime. 2 *Haw.* c. 15. § 54.

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

Also it seems agreed, that one justice may, in his discretion, either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstance that the party is most likely to live or die ; for every 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 cognizance. 2 *Haw.* 103.

The justices of the supreme court, as before remarked, have a discretionary power of bailing in all cases. The exercise of this power depends on the circumstances and nature of the case. The exercise of this power is also regulated by the habeas corpus act. See title, *Habeas Corpus.*

III. *The consequences of denying Bail where it ought to be granted, and granting it where it ought to be denied.*

To refuse bail when 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.

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

A justice of Surry 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.

Whenever a person is brought before a justice of the peace, upon an accusation of treason or felony, he must be committed, unless it manifestly appear that no such crime was committed, or that the cause for which alone the party was suspected was totally groundless; in which case only it is lawful to discharge him without bail. 2 *Haw. c.* 15. § 1.

IV. *How and to what amount bail is to be taken.*

By the declaration of rights, 1 *R. L.* 48, excessive bail ought not to be required.

It seems to be agreed that no person ought in any case to be bailed for felony by less than two sureties, and each of these ought to be of ability sufficient to answer the sum in which they are bound. 2 *Haw.* (by Leach) 186.

The sum in which the bail are bound must be at the discretion of the justice or judge, before whom the bail is taken.

If insufficient bail be taken, the justice is liable to a fine. 2 *Haw.* (by Leach) 187.

Form of Bail.

County of } ss. **B**E it remembered, that on the day of in the
A. O. of } year of our Lord one thousand eight hundred and
yeoman, A. B. of yeoman, and B. B. of yeoman, came
before us, John Moore and Richard Burn, esquires, two of the justices of the
peace in and for the said county, and severally acknowledged themselves to
owe to the people of the state of New-York, in manner following: that is to
say, the said A. O. 50 dollars, and the said A. B. and B. B. 25 dollars each,
to be respectively levied of their lands and tenements, goods and chattels,
if default shall be made in the condition following.

John Moore,
Richard Burn.

The condition of this recognizance is such, that if the above bound A. O. shall personally appear at the next general sessions of the peace, to be holden in and for the said county, at the court-house in the town of on the day of next, [or at the next court of oyer and terminer and gaol delivery, to be holden in and for said county, as the case may be] then and there to answer to the said court, 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 the said court, 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 recognizance shall be void.

Or, if the party is in prison, and so absent, the form, according to Lambard, may be thus.

County of } ss. **B**E it remembered, that on the day of in the
before us, John Moore and Richard Burn, esquires, two of the justices
assigned to keep the peace within the said county, at in the said coun-
ty, did come A. B. and B. B. of in the said county, yeoman, and took

in bail, until the next court of oyer and terminer to be holden in the said county, one A. O. of laborer, 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 50 dollars of good and lawful money of the state of New-York, of the goods and chattels, lands and tenements of them and each of them, to the use of the people of the said state, to be levied, if the said A. O. shall not personally appear at the said next court of oyer and terminer, to stand to right concerning the felony aforesaid, according to the law and custom of the said estate. 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,
Rt. BURN.

Form of a warrant for his deliverance.

County of } ss. JOHN Moore and Richard Burn, esquires, two of the justices of the peace within and for the county of
To the keeper of the gaol at in the said county, greeting. Forasmuch as A. O. of laborer, hath before us found sufficient sureties to appear at the next court of oyer and terminer to be holden in the said county, to answer such things as shall be then and there, on the behalf of the people of the state of New York objected against him, and namely, to the felonious taking of (for the suspicion whereof he was taken, and committed to the said gaol.)—We command you, in the name of the people of the said state, 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 of our Lord one thousand eight hundred and

As to discharge of bail.

It is certain, in every bailment, that if the party bailed be suspected by his bail as likely to deceive them, he may be detained by them, and enforced to appear according to the condition of the recognizance, or may be brought by them before the justice of peace, by whom he shall be committed, unless he find new sureties. 2 Haw. c. 15. § 5.

BARRATRY.

I. *What is Barratry.*

II. *How punished.*

I. *What is Barratry.*

COMMON Barratry is the offence of frequently exciting and stirring up suits and quarrels between persons, either at law or otherwise. 4 Blac. Com. 134.

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.

And it is not material whether the courts, wherein such suits are commenced, be of record or not. 1 *Inst.* 368.

But it seems 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 ways privy. 3 *Mod. Rep.* 97, 98.

Also 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.

All kinds of disturbance of the peace, taking or keeping possession of lands in controversy, not only by force, but by subtlety and deceit, and most commonly in suppression of truth and right, and sowing of calumniations, rumors and reports, whereby discord and disquiet may grow between neighbors, are proper instances of barratry. 1 *Inst.* 368.

II. How punished.

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

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

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

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behavior ; 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.

Queens County, ss.

To any Constable of said county,

WHEREAS complaint upon oath hath been made unto me, one of the justices of the peace in and for the said county, that A. O. of in the said county, yeoman, on the day of in the year of our Lord one thousand eight hundred and and on divers other days and times, as well before as afterwards, at aforesaid, in the county aforesaid, and at divers other places within the county aforesaid. was and yet is a common barrator, and daily disturber of the peace of the people of the state of New-York, and also a common brawler, wrangler, fighter, scandalizer, and sower of seditions, suits and discords between his neighbors, and other the people of the said state, to the great damage and disturbance of the said people, and against the peace of the said state, and to the evil example of all others in the like case offending : These are therefore, in the name of the said people, 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 sessions of the peace to be holden for the said county, at on the day of next, then and there to answer unto an indictment on the behalf of the people of the said state, 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 &c.

BASTARDY.

IN considering the subject of bastardy it will be proper to enquire,

- I. *Who are bastards.*
- II. *Proceedings in case of bastardy.*
- III. *Rights and incapacities of bastards.*

A bastard is one that is not only begotten, but born out of lawful matrimony. 1 *Blac. Com.* 454.

All children, born before marriage, are bastards, by our law, and so it is of all children born so long after the death of the husband that by the usual course of gestation, they could not be begotten by him, but this being a matter of some uncertainty, the law is not exact as to a few days. 1 *Blac. Com.* 456.

The question was, in a case which has been reported, 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 physic) 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.

As a bastard may be born before the coverture, or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards, as if the husband be out of the country, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. But generally during the coverture access of the husband shall be presumed, unless the contrary can be shewn, which is such a negative, as can only be proved, by shewing him to be elsewhere. *1 Blac. Com.* 457.

The 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 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; yet 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.*

If there be an apparent impossibility of procreation, on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards. *1 Blac. Com.* 457.

In these cases, where the issue is born within marriage, the presumption is, that they are legitimate, for as the husband has the power, and dominion over his wife, and may by law, keep her within her duty, the presumption is strong, that the husband has access, and that all children born during coverture are legitimate, and this presumption will be upheld until the contrary is most clearly proved, which, in general, can only be done, by showing an impossibility that the child should be the husband's. *1 Bac. Abr.* 318.

If husband and wife be separated by a divorce from bed and board only, the children born during the separation are bastards, for the law will presume the husband and wife conferable to the sentence of separation unless access be proved; but if there be a voluntary separation by agreement, the law will presume access, unless the negative be shown. *1 Blac. Com.* 457.

II. *Proceedings in case of Bastardy.*

By statute (1 R. L. vol. 1. 506,) it is enacted, "That if any woman shall be delivered of a bastard child, which shall be chargeable to any city or town, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable as aforesaid, and shall, in either case, in an examination to be taken in writing upon oath, before any justice of the peace, of any city or of any county wherein such town shall be, charge any person with having gotten her with child, it shall be lawful for such justice, upon application made to him by the overseers of the poor of such city or town, or persons acting as such, or by any one of them, to issue his warrant for the apprehending such person so charged as aforesaid, and for bringing him before such justice, or before any other justice of the peace of such city or county; and the justice before whom such person shall be brought, is hereby authorised and required to commit such person to the house of correction, or common gaol of such city or county, unless he shall give security to indemnify such city or town, or shall enter into a recognizance with sufficient surety, with condition to appear at the next general sessions of the peace, to be holden for such city or county, and to abide or perform such order, as shall be made in pursuance of this act."

Before the child is born, the appearance of the mother before the justice must be voluntary; for by the same statute, the justice cannot send for her in order to be examined, or compel her to answer any question touching her pregnancy, until one month after she is delivered.

By the same statute it is further enacted, that

"If the reputed father resides in another county, the person to whom the warrant is directed must take it to a justice of such other county and get him to endorse it, which will be an authority to take the man in such other county. And if taken there, he must be carried before the justice who indorsed the warrant, or some other justice of that county; and if he be then ready and willing to give security to indemnify the town where the bastard is chargeable, or likely to become so, or enter into a recognizance for his appearance at the next general sessions of the county where such town lies; then the justice is to take the same, and deliver it, with all other proceedings relating to the premises, to such constable, who must deliver them to a justice of the county where the warrant was granted, upon the pain of 125 dollars; but if such security or recognizance be not given, the person so charged must be carried before the justice who granted the warrant, or some other of the same county."

It is also enacted, "That if the woman so charging any person, shall die or be married before she shall be delivered, or if she shall miscarry of such child, or shall appear not to have been with child at the time of her examination, then such person shall, at the next general sessions of the peace to be holden for such city or county, be discharged from his recognizance, or immediately released out of custody, by warrant under the hand and seal of any justice of the peace, of such city or county."

After the birth of a bastard child, an order of maintenance may be made; for by the same statute it is enacted,

"That any two justices of the peace of any city or county, one whereof residing in or near the town, within which any bastard, or child begotten and born out of lawful matrimony shall be born, upon examination of the matter shall, in their discretion, make order for the better relief of every such city or town, and shall likewise, by like discretion, make 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 support of such child as they shall think meet. And if after the same order by them subscribed, under their hands, the mother or reputed father, upon notice thereof, shall not for his or her part observe and perform the said order, then every such party so making default, shall be committed to the house of correction, or for want thereof to the common gaol of such city or county, there to remain without bail, except he or she shall put in sufficient surety to perform the said order, or personally to appear at the next general sessions of the peace, to be holden in and for the city or county where such order shall be taken. And also to abide such order of the said justices of the peace, or a major part of them in their said sessions, as they shall make in that behalf, if they then and there shall make any, and that if at the said sessions the said justices shall make no other order, then to abide and perform the order before made."

On this part of the statute it has been determined, that where security for the maintenance of a bastard child has been duly given by bond, a previous order is not necessary to authorise an expenditure for the support of the child, but the act applies to the case only of a voluntary application for relief, by the pauper himself, and not to indigent and helpless children, or other persons incapable of making application. 1 *John. Rep.* 486.

An order for relief cannot be made under this part of the act, unless on application of the overseers of the poor. *Blac.* 44.

The statute directs that the order shall be made by any two justices, but these words are not restrictive, it may be made by more than two, though not by less. 2 *Salk.* 477.

No order can be made before the child is born. But after that, the justices are not restricted to any time for making the order; for upon motion to quash an order of bastardy, it was resolved, that if the father run away and return, though fourteen years after, yet an order to fix the child on him is good; for there is no statute of limitation in these cases. 1 *Sess. Cas.* 77.

Yet where the reputed father is committed, a justice of the peace, on application in his behalf, shall summon the overseers of the poor to shew cause at a time and place to be mentioned in such summons, why he should not be discharged; and if no order shall appear to have been made within eight weeks after the woman is delivered, the justice shall discharge him. 1 *R. L.* 309. § 6.

The mother of the child, and the putative father, must both be summoned to appear at the time of the examination. *Str.* 475.

A motion was made in the king's bench for an information against the defendants, two justices of Devonshire, for making an order on one *Nicholas Mould*, adjudging him to be the putative father of a bastard child, without summoning him, and also for refusing to hear

his witnesses. On shewing cause, it appeared that he was summoned by a third justice, which the court held to be sufficient; but that the defendant not appearing himself, the justices would not hear his witnesses. And by the court, supposing the man was summoned, and did not appear, the justices are not then bound to hear any evidence for him; and this court will not hear any evidence in behalf of a person, who should attend there, and does not. *Sess. C. V. 192.*

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 trial thereof dependeth chiefly upon the examination and testimony of the mother. *Dalt. c. 11. p. 45.*

The examination must be by two justices, for it 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 the one only examine it, it is well enough, for it is in fact the examination of both. *Salk. 478.*

The town where the child is born only is to be indemnified; and if the bastard has acquired a settlement elsewhere, the father is then discharged. *K. v. Greaves. Nels. Just. Bast.*

An order did not set forth that the child was born in the town; 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 town 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 happens, yet is not within the statute; and that is, where a bastard is born in a town where the mother has 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 seems that the town 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.

The order must set forth every fact which constitutes the ground, or any part of it, on which it is made; for it is a general rule, that where any special power affecting the rights or property of individuals is conferred, it must be strictly pursued, and appear to be so pursued on the face of the proceedings. *3 John. Ca. 107.*

In conformity to this rule, the town or place where the child was born must be set forth in the order. *Dalt. 47.*

So also the order must set forth, that the defendant was summoned. *10 Mod. 4. Dalt. 52.*

An order for the payment of money should direct the payment to be made to the overseers of the poor for the relief of the child. *2 L. Raym. 1198.*

The justices may order a sum of money in gross for the charges the town has already been at to midwife, nurse, &c. For by the statute, the justices are to make order for the relief of the town, and keeping of the child, by payment of money weekly, or other sustentation; and this may be only indemnifying the town for money laid out before the reputed father was found. *1 Salk. 124.*

The sum to be paid weekly should be reasonable. A motion was made in the court of K. B. to quash an order for the smallness of the

sum, namely, two pence a week for the maintenance of the child; and the court were of opinion it should be quashed, unless cause shewn; and they said that although 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.

The order for payment of money should be made, to continue *during so long a time as the child shall be chargeable*: therefore an order that the father should pay so much weekly, without saying for how long, was held nought. *Stile.* 134.

So also, that he should pay so much till further order, was quashed: for that further order might be forty years hence. 2 *Show.* 129.

So an order to pay so much a week till the child shall be fourteen years of age, was held to be bad; for the justices have no power but to indemnify the town, and that is only to oblige him to maintain the child so long as chargeable. 1 *Salk.* 121. 2 *Salk.* 478.

So an order to pay so much a week till the child should be able to get its living by working, was held not to be good; for perhaps the father would take it away and maintain it himself, which he may do if he pleases. 2 *Ventriss.* 210.

An order made by justices in pursuance of this part of the statute, is an adjudication of a court of magistrates of competent authority, and is conclusive upon the defendant, unless appealed from. 9 *John.* 367.

After an order of bastardy by two justices of the peace has been discharged at sessions upon the merits, they cannot make a fresh order upon the same person, for by such order being discharged, he is legally acquitted, and the same fact cannot be drawn in question again. 2 *Ld. Raym.* 1423.

Or if the session on appeal alter, discharge, or confirm the order upon the merits, no other sessions can order contrary thereto, for the order upon the appeal is final. *Cro. Car.* 350.

But wherever an order is quashed merely for want of form, a new order may be made. 1 *William's Justice.* 360.

The justice cannot commit, or compel the putative father of a bastard child to give security to pay the money ordered by them for maintenance, or to appear at the sessions, until after he has omitted paying some part of it. 2 *L. Raym.* 858. 3 *Salk.* 66.

The supreme court will not quash an order relating to a bastard child, unless the reputed father be present in court; and the reason why a personal appearance of the defendant is in all these cases required, is, because the court will compel the defendant to enter into a recognizance to abide the order of the sessions below. 2 *Salk.* 475. *Black. Rep.* 198.

When a recognizance in case of bastardy is forfeited, it is not to be estreated, but the court of sessions, to which it is returned, is to direct the clerk of the county to prosecute a suit upon it, in the court of common pleas of the county where the person recognized can be found; and the money when collected, after deducting the charges of collecting, is to be paid by the clerk to the overseers of the poor of the town, for the indemnification of which the recognizance was taken, to be applied for the relief of the poor thereof. Or the court may order the clerk to compound for the penalty in such manner as the court think proper. 1 *R. L.* 308. § 5.

If the reputed father, or the mother of any bastard child, shall abscond and leave real or personal estate, the overseers of the poor, by warrant from two justices of the peace, may seize the same, and when such seizure is sanctioned by the sessions, may sell the goods and chattels at vendue, and lease the real estate, and apply the avails towards the maintenance of such bastard child. 1 *R. L.* 309. § 8.

And the overseers of the poor are to be accountable to the sessions for the monies arising from such sale, or received by them for the rents and profits of such real estate. 1 *R. L.* 309. § 8.

The mother of a bastard child is entitled to its custody; but if it appear that the child is abused, the court will interfere in behalf of the child, and direct it to be placed elsewhere. 2 *John.* 575.

By statute, bastard children are deemed to be settled in the place of the last legal settlement of their mother. 1 *R. L.* 280.

As to the rights and incapacities of bastards: their rights are few, being only such as they can acquire, for they can inherit nothing, yet they may gain a surname by reputation, though they have none by inheritance. The incapacity of bastard children consists principally in this, that they cannot be heir to any one, neither can they have heirs, but of their own body. 1 *Blac. Com.* 459.

Here follow the various forms and precedents for proceeding in case of bastardy.

Form of an examination of a woman with child of a bastard.

County of } ss. **T**HE voluntary examination of A. M. of in the said county, single woman, taken on oath before me, J. P. Esq. one of the justices of the peace in and for the said county, this day of Who saith, that she is now with child, and that the said child is likely to be born a bastard, and be chargeable to the town of in the said county, and that C. D. of in the said county, blacksmith, is the father of the said child.

Taken and signed the day and year
above written before me,

J. P.

The mark of
† A. M.

Examination after the birth.

County of } ss. **T**HE examination of A. M. of in the said county, single woman, taken on oath before me, J. P. Esq. one of the justices of the peace in and for the said county, this day of Who saith, that on the day of now last past, at the town 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 town of and that C. D. of in the said county, blacksmith, did get her with child of the said bastard child.

Taken and signed the day and year

first above written before me, J. P.

A. M.

Form of a warrant for apprehending the reputed father, before the birth.

County of } ss. To any Constable of the town of in the said county, Greeting.

WHEREAS A. M. of in the said county, single woman, hath, by her voluntary examination, taken in writing, upon oath, before me, J. P. one

of the justices of the peace in and for the said county, this 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 town of _____ in the said county, and that C. D. of _____ in the said county, blacksmith, is the father of the said child; And whereas O. P. one of the overseers of the poor of the town of _____ aforesaid, in order to indemnify the said town in the premises, hath applied to me to issue out my warrant for apprehending the said C. D.—I do therefore hereby command you to apprehend the said C. D. and bring him forthwith before me or some other of the justices of the peace for the said county, to find sufficient surety for his appearance at the next general sessions of the peace to be holden for the said county, then and there to abide and perform such order or orders as shall be made in the premises, and to be dealt withal according to law. Given under my hand and seal, the _____ day of, &c.

The like after the birth.

County of _____ ss. To any constable of the town of _____ in the said county. **W**HEREAS A. M. of _____ in the said county, single woman, hath, by her examination in writing, upon oath, before me, J. P. one of the justices of the peace in and for the said county, declared, that on the _____ day of _____ now last past, in the town 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 town of _____ and hath charged C. D. of _____ in the said county, blacksmith, 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 foregoing precedent to the end.]

A bond to the overseers of the poor.

KNOW all men by these presents, That we, C. D. of _____ in the county of _____ blacksmith, and E. F. and G. H. of the same place, merchants, are held and firmly bound unto I. K. and L. M. overseers of the poor of the said town for the time being, in the sum of _____ dollars, lawful money of the state of New York; to be paid to the said overseers of the poor, or to either of them, or to their certain attorney, successors or assigns. For the which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated this _____ day of, &c.

Whereas A. M. of _____ single woman, in and by her voluntary examination, taken in writing, and upon oath, the _____ day of _____ last past, before J. P. Esq. one of the justices of the peace in and for said county, did declare herself to be with child, and that the said child is like to be born a bastard, and to be chargeable to the said town of _____ and that the above bounden C. D. is the father of the said child.

Or if it is after the birth, say, (omitting the word *voluntary*.)

Did declare, that on the _____ day of _____ last past, at the said town, she was delivered of a (male) bastard child, which is now living, and likely to become chargeable to the said town, and that the above bounden C. D. did get her with child of the said (male) bastard child.

Now, therefore, the condition of the above obligation is such, That if the above bounden C. D. E. F. and G. H. or any of them, their or any of their executors or administrators, do and shall, from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless and indemnify, as well the above named I. K. and L. M. overseers of the poor of the said town, and their successors for the time being, as also all and every other the inhabitants which now are, or hereafter shall be of the said town, of, from and against all and all manner of costs, charges, taxes, rates, assessments, damages and expences whatsoever, for or by reason of the birth, education and maintenance of the said child, or in any wise relating thereto, and of and from all actions,

suits, troubles, and other damages and demands whatsoever touching or concerning the same ; then this obligation to be void, or else to remain in full force and virtue.

Form of a recognizance to appear at the next sessions.

BE it remembered, that on the day of in the year of our Lord one thousand eight hundred and C. D. of in the said county, blacksmith, and E. F. of the same place, merchant, personally came before me, J. P. Esq. one of the justices of the peace within and for the said county of and severally acknowledged themselves to owe to the people of the state of New York, that is to say, the said C. D. the sum of dollars, lawful money of the said state, and the said E. F. the sum of dollars, like lawful money, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of the said people, if default shall be made in the condition following.

Whereas A. M. of single woman, in and by her [voluntary, if previous to the birth, otherwise omit this word,] examination, taken in writing, and upon oath the day of now last past, before one of the justices of the peace in and for the said county, did declare, &c. [*proceeding in the recital as in the bond, observing the distinction between an examination previous to the birth, and that which is taken after.*] The condition of this recognizance is such, that if the above bounden C. D. do and shall appear at 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 pursuant to the act entitled, "An act for the relief of cities and towns from the maintenance of bastard children," passed the 25th day Feb. 1813; then this recognizance to be void, otherwise of force.

Form of a mittimus before the birth, for not finding sureties.

To the sheriff or keeper of the goal of the county of
I HEREBY send you the body of C. D. brought before me this present day, and charged upon the oath of A. M. &c. with having begotten her with child; which child, when born, will be a bastard; and he the said C. D. having refused before me to find sufficient sureties for his good behaviour and personal appearance, at the next general 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, &c.

Form of a supersedeas where security is given after a warrant issued, or the person is in custody.

County of ss. To the sheriff or keeper of
WHEREAS C. D. of hath before me found sufficient sureties for his good behaviour, and personal appearance at the next general sessions of the peace, to be holden in and for the said county, after A. M. single women, 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 town, 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. and if arrested or imprisoned, that you forbear to detain him any longer in your custody, 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.

Form of a warrant for apprehending the mother, and summoning the reputed father, previous to making the order.

County of } ss. To any constable of, &c.

WHEREAS it appears to us and two of the justices of the peace in and for the said county, one of us residing in [or near] the town of in the said county, as well upon the complaint of the overseers of the poor of the said town, as also by the examination of A. M. of in the said county, single woman, this day taken in writing before us [or before Esq. one of, &c.] the said justices; that the said A. M. on the day of in the said town of was delivered of a male bastard child, which is still living and chargeable [or likely to become chargeable] to the said town of and whereas she, the said A. M. hath, in and by her said examination declared, that C. D. of in the said county, blacksmith, did get her with child of the said male bastard child: These are therefore to command you to bring the said A. M. before us, the said justices, at in the said county, on the day of at of the clock in the noon of the same day, to be further examined by us respecting the premises; and we also command you to give notice thereof unto the said C. D. that he likewise may be there at the same time to make his defence; so that we having duly examined the matter of and concerning the premises, may make such order therein as to right doth appertain: and what you shall do in the execution hereof, you are to make known to us at the time and place aforesaid. Given under our hands and seals, &c.

An established form of an order of bastardy.

County of } ss. **T**HE order of J. P. and K. P. Esquires, two of the justices of the peace, in and for the said county, one whereof residing [in or] near the town of in the said county, made the day of in the year of, &c. concerning a (male) bastard child, lately born in the town 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 town 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, in the said town of in the said county, and that the said bastard child is now living and chargeable to the said town of and likely so to continue; and further, that C. D. of in the said county, blacksmith, did beget the said bastard child, on the body of her the said A. M. And whereas the said C. D. hath appeared before us, in pursuance of our summons for that purpose, but hath not shewed any sufficient cause, why he, the said C. D. shall not be adjudged the reputed father of the said bastard child: [Or, And whereas it hath been duly proved to us upon oath, that the said C. D. hath been duly summoned to appear before us, the said justices, to the end we might examine into the matter of and concerning the premises; and whereas he the said C. D. hath neglected to appear before us, according to such summons:] We therefore upon examination of the matter of and concerning the premises, as well upon the oath of the said A. M. as otherwise, do hereby adjudge him, the said C. D. to be the reputed father of the said bastard child.

And thereupon we do order, as well for the better relief of the said town of that the said C. D. 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 town 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 C. D. shall likewise pay, or cause to be paid, to the overseers of the poor of the said town of _____ for the time being, or to some or one of them, the sum of _____ weekly and every week from the day of the date of this present order, 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 town of _____

And we do further order, that the said A. M. shall also pay, or cause to be paid, to the said overseers of the poor of the said town of _____ for the time being, or to some one of them, the sum of _____ weekly, and every week, so long as the said bastard child shall be chargeable to the said town 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.

Notice of the order should be by delivering a fair copy.

Form of commitment for not obeying the foregoing order.

County of _____ ss. To any constable of _____ &c. and to the keeper of _____ &c,
WHEREAS by an order under the hands and seals of us, _____ and _____ two of the justices of the peace in and for the said county of _____ one of us residing in (or near) the town of _____ in the said county, C. D. is adjudged to be the reputed father of a [male] bastard child, lately born of the body of A. M. of _____ single woman, in the said town of _____; and whereas it was in and by the said order ordered, [*here set forth the substance of the order.*] And whereas it appears unto us the said justices, by the oath of E. F. of _____ that the said C. D. had due notice of the said order, a true copy thereof in writing having been personally delivered to him, the said C. D. on the _____ day of _____ last past, by the said E. F.; and whereas the said C. D. hath not observed nor performed the said order—**THESE** are therefore to command you forthwith to take the said C. D. and him safely to convey to the [common gaol] at _____ in the said county, and there deliver him to the keeper thereof, together with this precept. And we do also hereby command you, the said keeper, to receive the said C. D. into your custody in the said [common gaol] and him there safely keep, except he shall put in sufficient surety to perform the said order, or enter into a recognizance to appear at the next general sessions of the peace, to be holden in and for the said county, and also to abide such order as shall be there made by the court concerning the said bastard child, if any such order shall be there made, and if not, then to do and perform the order already made in the premises as aforesaid. Given under our hands, &c,

The condition of a recognizance to appear at the next general sessions.

[*After reciting the order as in the above warrant, and that the reputed father hath neglected to perform the same, proceed ;*]

NOW the condition of this recognizance is such, that if the above bounden C. D. do and shall well and truly observe and perform the said order, or shall personally appear at the next general sessions of the peace, to be holden in and for the said county; and shall then and there abide such order as shall be then made by the court, concerning the said bastard child; if any such order shall be then made, and if no such order shall be then made or taken by the said court, if he the said C. D. do and shall abide and perform the order already made by us as aforesaid, then this recognizance to be void, otherwise in full force and effect.

Form of a warrant to seize the estate of a father of a bastard child, who has absconded.

County of } ss. To the Overseers of the Poor in the town of in
the county of

WHEREAS and overseers of the poor of the said town, have made complaint unto us, and two of the justices of the peace in and for the said county, that C. D. late of the said town of blacksmith, hath run away out of the said town, and that the place of his abode is not known; and that the said C. D. hath left his [male] bastard child aged [three] years, and born in the said town of a charge upon the said town, although he hath an estate sufficient to discharge the said town from the charge thereof; and whereas we, the said justices, having duly examined into the matter of the said complaint, as well upon oath as otherwise, it doth appear unto us, and we do adjudge, that the said complaint is true; and we do also adjudge him, the said C. D. to be the reputed father of the said bastard child—**T**HUSSE are therefore, in the name of the people of the state of New-York, to authorize you the said overseers of the poor of the town aforesaid, to seize and take the goods and chattels, and to let out and receive the annual rents and profits of the lands and tenements of the said C. D. towards the bringing up and providing for the said bastard child; and you are hereby required to attend at the next general sessions of the peace, to be holden in and for the said county, in order that the said seizure may be allowed and confirmed, and you further directed in the premises, according to the statute in such case made and provided. Given, &c.

BIGAMY.

BIGAMY is the having of two husbands or wives at the same time. Polygamy is the having more than two. 4 *Blac. Com.* 168.

By statute, *R. L.* vol. 1. 113. “If any person or persons being married, or who hereafter shall marry, do at any time marry any person or persons, the former husband or wife being alive, then every such offence shall be felony; and the party and parties so offending, shall receive such and the like proceedings, trial, judgment, and execution, in the county where such person or persons shall be apprehended, as if the offence had been committed in the same county where such person or persons shall be taken or apprehended; but neither this act, nor any thing therein contained, shall extend to any person or persons, whose husband or wife shall be continually remaining without the United States of America, by the space of five years together, or whose husband or wife shall have absented him or herself, the one from the other, by the space of five years together, the one of them not knowing the other to be living within that time; nor to any person or persons, who are or shall be, at the time of such marriage, divorced by the sentence, or decree of any court having cognizance thereof; nor to any person or persons, where the former marriage hath been, or shall be, by the sentence or decree of any such court, declared to be void and of none effect. Nor to any person or persons for or by reason of any former marriage had or made, or to be had or made, within the age of consent.”

By the first exception, it is provided, that this act shall not extend
“to any person or persons, whose husband or wife shall be continu-

ally remaining without the United States of America, for the space of five years together."

This exception supposes that the party has notice, that the former husband or wife is living, or at least it will apply to a party having such notice. 1 *H. H.* 693.

But the next exception in the act, which embraces any person whose husband or wife shall have absented him or herself, &c. supposes that the party has not such notice, or rather it applies only to those cases where the party has not such notice. This exception was meant to provide for the case, where both parties are within the United States, the one not knowing the other to be living, or where it is unknown to each party where the other is.

The next exception in the act extends to "*any person or persons who shall be divorced,*" &c.

There is only one case in which a divorce is provided for by statute, and that is the case of adultery. The proceedings for a divorce in such case must be had in a court of chancery. A divorce for any other cause cannot be obtained without application to the legislature.

By the act directing the proceedings in case of adultery, it is provided, that after the dissolution of any marriage has been pronounced by virtue of that act, it shall not be lawful for the party convicted of adultery, to re-marry any person whatsoever; and that every such marriage shall be null and void; but that the other party may make and complete another marriage, in like manner as if the party convicted was actually dead.

If a party convicted of adultery be divorced, and afterwards re-marry, it is not felony; but the only consequence is, that the second marriage is null and void. 3 *Inst.* 89. 1 *H. H.* 694.

The next exception extends to any person whose former marriage shall be declared void. It is proper here to observe, that there are two kinds of divorce; the one total, the other partial; the former dissolves the matrimonial bond, and declares the marriage to have been unlawful and void from the beginning; the latter only separates the parties from bed and board, and is always for some cause which happened after the marriage, as adultery. 1 *Blac. Com.* 440.

If the divorce be total, the parties may re-marry, and such second marriage will neither be unlawful nor void. The only consequence of this divorce is, that the issue of the marriage which is thus dissolved, are bastards. 1 *Blac. Com.* 440.

Another exception in the statute takes in those persons who have been once married, but within the age of consent; the age of consent in a man is fourteen, in a woman twelve, or over. 3 *Inst.* 89.

On a prosecution on this statute, the first and true wife is not to be allowed as a witness against the husband, but the second wife may be admitted to prove the second marriage, for she is not his wife in fact. 1 *H. H.* 693.

In prosecutions for bigamy, the mere confession of the party is not sufficient evidence of the first marriage, but there must be proof of a marriage in fact. 7 *John.* 314.

In ordinary cases, a marriage may be inferred from cohabitation, acknowledgement of the parties, &c. no formal solemnization of marriage being necessary. 4 *John*. 52.

BLASPHEMY.

BLASPHEMY is the denying the being or providence of God; contumelious reproaches of Christ; profane scoffing at the holy scripture, or exposing it to contempt and ridicule. 4 *Bl. Com.* 59.

In a late case which was brought before our court, the defendant was indicted for blasphemy. The charge was, for wickedly, wantonly, and maliciously uttering the following words: "*Jesus Christ was a bastard, and his mother must be a whore.*"

It was held by the court that these words were blasphemous—and that blasphemy against God, contumelious reproaches, profane ridicule of Christ, or the holy scriptures, are offences punishable at the common law, whether uttered by words or writing. 8 *John*. 290.

In this case the court said, "the free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussion on any religious subject is granted and secured; but to revile with malicious and blasphemous contempt the religion professed by almost the whole community, is an abuse of that right." The court fined the defendant five hundred dollars.

BRIBERY.

BRIBERY, in a strict sense, is taken for a great misprision of one in a judicial place, taking any valuable 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. 3 *Haw. c.* 67.

But bribery, in a larger sense, is taken for the receiving or offering of any undue reward by, or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity. *Ib.*

Also, bribery sometimes means the taking or giving of a reward for offices of a public nature. *Ib.*

These sorts of bribery are punishable by fine and imprisonment, and in some case by forfeiture of office. *Ib.*

By the statute regulating elections, "Whoever shall by bribery, menace, or other corrupt means, or device whatsoever, either directly or indirectly, attempt to influence any elector of this state, in giving his vote or ballot, or deter him from giving the same at any election within this state, by virtue of this act, and shall thereof be convicted, such person so offending and convicted, shall forfeit and pay for every such offence, the sum of one thousand two hundred and fifty dollars—and on such conviction, the person convicted shall forever there-

shall be utterly disqualified to hold, exercise, or enjoy any office or place of trust, or profit, within this state."

By another statute "for the prevention of bribery," it is provided, "That if any person shall promise, offer, or give any member of the council of revision, council of appointment, or any commissioner of the land office, or member of the senate or assembly of this state, any money, goods, chattels, chose in action, or other property, with intent to influence his vote on any question brought, or to be brought before the said councils, board, or commissioners, senate or assembly, such person shall be deemed guilty of a high misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding five thousand dollars, or imprisoned in the state prison at hard labour for a term not exceeding ten years, or both, in the discretion of the court."

And, "if any member of the said councils, board of commissioners, senate or assembly, shall give his vote on any question brought as aforesaid, in consequence of such corrupt promise or promises, offer or offers, gift or gifts, such member shall be deemed guilty of a high misdemeanor, and shall, on a conviction thereof, be fined or imprisoned as aforesaid, and shall be forever disqualified from holding a seat in the legislature, or any office of honour, profit, or trust in this state. 2 R. L. 191.

BRIDGES.

See Highways.

BURGLARY.

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.*

There must be an actual breaking. Every entrance into the house by a trespasser, is not a 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. *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.

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

To constitute this crime there must also be an actual entering into the house.

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 building broken must be a house, but this includes churches, and the walls or gates of a walled town. *1 Hawk.* 104.

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.

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. *H. H.* 558, 9.

To break and enter a *shop*, not parcel of 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 actu-

ally in the house, at the very time of the offence committed. 1 *Haw.* 103.

The breaking open in the night-time of a store at the distance of twenty feet from a dwelling house, but not connected with it by any fence or inclosure, is not burglary. 4 *John.* 424.

The breaking and entry must be in the night time. 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.

The breaking and entering must be with intent to commit felony.

There can be no burglary, but where the indictment both expressly alleges, 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. 1 *Haw.* 105.

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

Where a man commits burglary, and 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, though 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.

The punishment for this crime is imprisonment in the state prison. 1 *R. L.* 409.

There is another crime, which though not properly termed burglary, does very much resemble it, and is punishable to the same degree and in the same manner. The Statute describes it in these words; "*feloniously breaking into or taking any goods or Chattels from any dwelling house, any person being therein, and put in fear, or of robbing any dwelling house, any person being therein.*" *Ib.*

Warrant to apprehend a burglar.

County of } ss. To any constable of, &c.

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 the justices of the peace for the said county, that yesterday, in the night, the dwelling house of him, the said A. I. at aforesaid, in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of of the goods and chattels of him, the said A. I. feloniously and burglariously stolen, taken, and carried away from thence; and that he hath just cause to suspect, and doth suspect that A. O. late of in the county of labourer, the said felony and burglary did commit: These are therefore, in the name of the people of the state of New-York, to command

you, that immediately upon sight hereof, you do apprehend the said A. O. and bring him before me, to answer the premises, and to be further dealt with according to law.—Herein fail you not. Given under my hand and seal, the day of in the year of, &c.

Indictment for proper burglary.

County of } ss. **T**HE jurors for the people of this state, upon their oath present, that A. O. late of in the county of labourer, on the day of in the year of, &c. 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 the said people and their dignity.

BUYING OR SELLING PRETENDED TITLES.

IT seems 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 does not think it worth his while to do, and in that consideration sells his pretensions at an under rate: And it seems not 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, 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. *Moore* 751. *Hob.* 115. *Plowd.* 80, 88. 1 *Haw.* c. 86. § 1.

By statute, no person shall buy or sell, or by any ways or means, procure any pretended right or title, or make or take any promise, grant, or covenant, to have any right or title of any person, to any lands, tenements, or hereditaments, unless such person shall so bargain, sell, covenant, or promise the same, or his ancestors, or those by whom he claims the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents and profits thereof, for the space of one whole year next before the said bargain, sale, covenant, or promise made, upon pain that he who shall make any such bargain, sale, covenant, or promise, shall forfeit the value* of the said lands, tenements, or hereditaments; and the buyer or taker thereof, knowing the same, shall also forfeit the value of the said lands, tenements, or hereditaments; the one half of the said forfeitures to be to the use of the people of this state, and the other half to the party that will sue for the same in any court of record, by action of debt, or by information. 1 *R. L.* (1815) 173—4.

* And therefore the plaintiff, in his action, must shew the value at the time of the bargain. *Cro. Car.* 233.

Provided, that it shall be lawful for any person, being in lawful possession, by taking of the yearly rents or profits of any lands, tenements, or hereditaments, to buy or obtain, by any reasonable ways or means, the pretended right or title of any other person thereto. *Id.*

In an action on the above statute, it was held, that when the deed of the grantor conveying such pretended title, describes generally all the right and title to the land in a particular patent, without specifying the precise quantity or bounds, and the grantor has a legal title to and possession of a part, and a part is unoccupied, though another part of the same patent be in the actual possession of one who claims and holds adversely to the grantor; yet taking such a deed is not maintenance, especially where the purchase was made with the advice of counsel; and there are other circumstances to show that there was no intention to purchase a pretended title. *1 John. R. 345.*

If a person, out of possession, conveys land held adversely by another, such conveyance is void, but the title remains in the grantor, so as to enable him to maintain ejectment. *5 John. R. 489. 9 John. R. 55.*

The purchase of land, during the pendency of a suit concerning it, if made with a knowledge of the suit, and not in consummation of a previous bargain, is *champerty*, though not punishable under the statute for buying and selling pretended titles. *8 John. R. 479.*

When a person purchases land, knowing at the time of the purchase that it is held adversely to the person of whom he purchases, by persons claiming by deed, he is liable to an action for the value of the land, and the improvements thereon. *7 John. R. 251.*

In an action on this statute, the plaintiff need not negative the proviso. *4 John. R. 304.*

Under the English statute, the provisions of which are similar to ours, it has been decided:

1. That it is immaterial whether any suit be depending concerning the lands contracted for, or not. *Plowd. 83.*

2. That the statute being public, there is no need to recite it in an action brought upon it, but if you take it upon you to recite it, a material misrecital will be fatal. *Litt. Rep. 369. Plowd. 84. Cro. Car. 233. Dyer. 74.*

3. That in an action against the buyer of a pretended title, it must expressly appear, that the defendant knew that the seller had not been a year in possession; but in such an action by the buyer, the contrary must expressly appear; for otherwise it may be intended that he was *particeps criminis*. *Leon. 167. Litt. Rep. 369. 1 Bur. 300.*

4. That it is not sufficient to shew that the seller had not been in possession a year before, without averring that he had a pretended right or title; for that is the point of the action. *1 Haw. c. 86. § 10.*

5. That a contract for a lease of years, unless fairly made, to try a title in ejectment, is within the statute, whether it were made off the land or upon the land, by a person in or out of possession; and in an action on the statute for making such a lease, there is no need to shew its commencement or end, because the plaintiff is supposed to be a stranger to it. *1 Haw. c. 86. § 12, 13, 14.*

6. That no conveyance by one who has the uncontested possession,

and absolute and undisputed propriety of lands, as by a disseisor having obtained a release from the disseisee, who had the true right, not contested by any other person whatsoever, or by a mortgagor having redeemed his lands, is within the meaning of the statute; because it in no ways savours of maintenance, and can be prejudicial to no one; neither is a lease for the usual rent by one who recovers lands by virtue of an ancient title, within the meaning of the statute; for it was not the intent of the statute to oblige all persons who should recover their lands, to occupy them themselves; but it meant to restrain all persons from transferring their disputed titles to strangers. 1 *Haw. c.* 86. § 15, 16.

7. That whoever has a reversion or remainder vested in him, may lawfully take any conveyance which will strengthen his estate; but cannot take a covenant from a stranger for a conveyance from him; when he shall have recovered the land. *Co. Litt.* 369.

CARRIERS.

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

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. *Ib.*

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. *Ib.*

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

It hath been holden, that a carrier embezzling 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; because such robbery might be, by consent and combination, carried on in such a manner, that no proof could be had of it. 1 *Salk.* 143.

And although it may be thought a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconveniency would be far more intolerable, if he were not so; for it would be in his power to combine with robbers, or to pretend a robbery, or some other 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 he ought to carry them safely. 1 *Bac. Abr.* 343.

And if he be a common carrier, though 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. *Ib.*

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

For the very taking of the goods is a general consideration, though 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 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 special acceptance. 1 *Bac. Abr.* 345.

But if a person, being a common carrier, receives by his book-keep-

er 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 18*s.* *per cent.* for carriage and risque: though the bags contain 400*l.* and the carrier is robbed, he shall be answerable only for 200, for this is a particular undertaking; and as it is by reason of the reward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reasonable he should be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

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

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

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

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

Common carriers in this state are liable for any injury to goods intrusted to their care, unless it be caused by the act of God, or the enemies of the land. 6 *John. Rep.* 160.

So masters and owners of vessels, who undertake to carry goods for hire, are liable, as common carriers, whether the transportation be from port to port, within the state or beyond sea, at home or abroad; and they are answerable as well by the marine law, as by the common law, for all losses not arising from inevitable accidents, or such as could not be foreseen or prevented. 10 *John. Rep.* 1.

A person may be a common carrier of money, as well as of other property. 11 *John. Rep.* 107.

CERTIORARI.

A CERTIORARI is a writ directed to some inferior court or jurisdiction commanding them, to certify a record or other proceedings before them, to the supreme or other superior court.

Under this head it will be proper to inquire,

- I. *In what cases a certiorari is grantable.*
- II. *How to be granted, allowed and served.*
- III. *The effect of it.*
- IV. *The return of it.*

I. *In what cases a certiorari is grantable.*

In the case of *Lawton and others* against certain commissioners of highways.—2 *Caines*, 179. The supreme court say, “It is a position beyond contradiction, that the supreme court has jurisdiction, and may award a certiorari, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute, finally to hear and determine.”

“Wherever new jurisdictions are erected, whether by public or private act of the Legislature, they are subject to the inspection of the supreme court, by writ of error, mandamus, or certiorari. The necessity of a superintending power to restrain and correct partialities and irregularities, which may be committed by inferior officers, is so obvious and indispensable, that the court ought by no means to deny themselves a jurisdiction of such salutary influence.” *Ib.*

Though the general power of the court is indisputable, there are cases where they will not interfere. In the case of a poor rate, they will refuse the writ, as also in the assessment of the land tax, from a regard to the public inconvenience. In cases too depending wholly on the discretion of persons authorized to do an act, this court has refused to interfere. *Ib.*

Again it is said, 3 *John*. 475, “This court (the supreme) has a general superintending power over all inferior courts, and may review and correct all their proceedings, whether on a summary conviction or otherwise.”

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.

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.

Whenever a *certiorari* is by law grantable for an indictment, the court is bound of right to award it at the instance of the people, because every indictment is the suit of the people, and they have a prerogative of suing in what court they please. 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.

But a *certiorari* to remove indictment for forcible entry and detainer is grantable of course, at the instance of defendant without special cause. 6 *John. Rep.* 334.

No *certiorari* shall issue to remove into the supreme court any proceedings had in pursuance of the act concerning apprentices or servants, until after a final determination and judgment thereon by the court of general sessions of the peace. 1 *R. L.* 1813. p. 142.

II. *How to be granted, allowed and served.*

By statute, no writ of *habeas corpus* or *certiorari* shall issue, unless the same be allowed and signed by one of the justices of the court out of which the same shall issue. 1 *R. L.* 1813, p. 140.

No writ of *certiorari*, at the instance of a party indicted for any misdemeanor, in a court of general sessions of the peace, shall issue, during the term of the supreme court, to remove the indictment, before trial thereof, unless the same be granted on motion in open court, and by rule of the said supreme court. *Ib.*

At the instance of a party indicted.] This extends only to *certioraries* 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. 6 *Mod.* 42. 246.

In vacation, writs of *certiorari* may be granted by any justice of the supreme court.

Every person indicted in any court of general sessions, or against whom any judgment or order of such court, or of any justice or justices of the peace, other than in actions for debts or demands between party and party, shall be given or made, for the benefit of any other person, shall, on prosecuting such *certiorari*, and before it is allowed, enter into a recognizance with two sufficient sureties to the people of the state, before a justice of the supreme court, or before such court of sessions, or any one of the justices thereof, in 125 dollars; conditioned that he shall, at the return of the writ, appear and plead to the said indictment in the supreme court, and at his own costs and charges, cause the issue which shall be joined thereon, or on any plea relating thereto, to be tried at the next circuit court, to be held in such county next after the *certiorari* shall be returnable; or if it be in the county where the supreme court shall set, then at the next term of the said court, or at such other time as the supreme court shall appoint, and shall give due notice of such trial to the prosecutor or his attorney as the case may require, and shall appear from day to day in the said supreme court, and not depart without being discharged, and shall pay to the prosecutor the costs, if any, that shall be ordered to the court; and conditioned that he shall at his own costs and charges prosecute such *certiorari* without any wilful delay, and perform such judgment or order as the supreme court shall make in the premises, and pay the party for whose benefit the judgment or order so removed was made, if the same shall be confirmed,

such costs and charges as the court shall direct. 1 *R. L.* 1813, p. 141.

Next circuit court.] But the recognizance shall not be forfeited, unless the prosecutor gives rules according to the course of the court. 2 *Haw.* 292.

The recognizance shall be delivered, together with the *certiorari*, to the justice, justices or court to whom the writ is directed, and be certified with the writ into the supreme court, and there filed, and in case of indictment, the name of the prosecutor, if a civil officer, or the party grieved, shall be indorsed thereon. 1 *R. L.* 141.

And if the person prosecuting the *certiorari* be convicted of the offence charged in the indictment, then the supreme court shall give *reasonable costs* to the prosecutor, being the party grieved. 1 *R. L.* 1813. p. 141.

Also, to the party in whose favour or for whose benefit such judgment or order shall be confirmed, *reasonable costs* to be taxed according to the course of the court, to be recovered by attachment, if not paid within ten days after demand and refusal of payment, proof of which being first made; and the recognizance not to be discharged till the costs are paid. *Id.*

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

If any *certiorari* issue contrary to, or without the party prosecuting the same complying with the provisions of the act, the justices, or court to whom it is directed, *may proceed* as if it had not issued. 1 *R. L.* 141.

May proceed.] 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.

Every *certiorari* directed to any court of general sessions of the peace, shall be delivered in open court. 1 *R. L.* 1813. p. 142.

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 complete their judgment, after a *certiorari* delivered. *Ld. Raym.* 1515.

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

A *certiorari* removes the record itself out of the inferior court; and therefore, if it remove the record against a principal, the accessory cannot there be tried. 2 *Haw.* 825. 3 *Caines*, 86.

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* comes out of a superior court, to the justices, they ought to surcease, although 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.

But if the inferior courts proceed after a *certiorari* is delivered, where by law they ought not, it is a contempt, for which the court will grant an attachment. *Raym.* 186. *Vent.* 66. 1 *Salk.* 144.

As a writ of error can move no record which materially varies from the description set forth in such writ; so neither can a *certiorari*. *Williams' Justice*, 467.

As when the writ describes a record taken before A. B. *justiciario nostro*, and eight others, and the record certified was taken before A. B. and seven others only, or before him and the other eight, and also others besides them; or when the writ describes a record as taken before A. and B. and their fellows, and the record certified is before C. D. and their fellows. 2 *Haw. c.* 27. § 81.

Or when the writ describes an indictment for stealing two horses, and the record certified mentions one horse only; or when the writ mentions orders or indictments against A. B. and C. and those certified are against A. only, or against A. and B. only. 1 *Bac. Abr.* 358. *Haw. c.* 27. § 82, 3, 4 & 5.

But a writ for the removal of all indictments against A. may remove an indictment against A. and twenty others, so far, at least, as respects him; because in judgment of law it is a several indictment against such defendant; but it is not agreed whether, in such case, the indictment shall be removed, so far as it concerns the other twenty. 2 *Haw. c.* 27. § 83.

IV. The return of it.

According to *Hawkins*, every return ought to be under the seal of the inferior court, or of the justice or justices, to whom it is directed; and if such court have no proper seal, it seems that it may be well made under any other. 2 *Haw. c.* 27. § 70.

Every such return must be made by the very same person to whom the *certiorari* is directed. 2 *Haw. c.* 27. § 71.

A recognizance, taken by a justice of the peace, ought to be certified by such justice *only*, till it be made a record of the sessions; after which it shall be certified in the same manner as the other records of the sessions. *Cro. Jac.* 669.

The *certiorari* may be sometimes to remove and send up the record itself, and sometimes 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.

The person to whom a *certiorari* is directed, may make what return to it he pleases; and the court will not stop the filing of it on

affidavits of its falsity, except only where the public good requires it, as in cases of commissioners of sewers, or for not repairing highways, or for some such special reasons. 2 *Haw. c. 27. § 74.*

And regularly, the only remedy against such false return is an action on the case, at the suit of the parties grieved by it, and an information at the suit of the people. 2 *Haw. c. 27. § 74.*

Whatsoever is put into the return to a *certiorari*, by way of explanation or otherwise, besides what is ordered to be returned, is put in without warrant, and not to be regarded. 2 *Salk. 492.*

However, upon a *certiorari* to remove a conviction by a justice of the peace, a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient, because justices ought, in all cases, to return convictions to the sessions. *K. v. Eaton. 2 Term Rep. 285.*

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.*

Or, as has been the practice, if the writ is not returned by the time it ought to be, a rule may be entered in the common rule-book of the supreme court, ordering the justice to return the writ within twenty days after service of notice of the rule, or that an attachment issue against him; and if it is not returned in that time, on filing an affidavit of service of the notice, a rule for an attachment may be entered absolute.

The return of a *certiorari* may be thus :

First. On the backside of the writ indorse these, or the like words :

The execution of this writ appears in a schedule hereunto annexed :

And that schedule should be on a distinct piece of parchment or paper, and annexed to the writ; and may be thus :

County of } ss. I J. P. one of the justices, the peace within the said county, to keep, and also divers felonies, trespasses, and other misdemeanors committed in the said county, to hear and determine, assigned, by virtue of the writ of the people to me delivered and hereunto annexed, do, under my seal certify unto the justices of the supreme court, the indictment of which mention is made in the said writ, together with all matters touching the same indictment, as in the same writ I was commanded. IN WITNESS whereof, I, the said J. P. have to these presents set my seal.

Given at in the said county, the day of, &c,

To the schedule annex the record of the indictment, and send all up together.

Form of a *certiorari* to remove into the supreme court an indictment of a forcible entry and detainer, from before a justice of the peace.

THE people of the state of New-York, by the grace of God, free and independent. To J. P. Esq. one of the justices, the peace within our county of to keep, and also divers felonies, trespasses, and other misdemeanors committed within our said county to hear and determine, assigned : Greeting. We willing, for certain causes, to be certified of a certain indictment against A. O. for withholding and forcibly detaining a messuage, store and

tenement, (or as the case may be) against the form of the statute, to prevent forcible entries and detainers, whereof the said A. O. named in the said indictment, is indicted before you : We therefore command you, that the indictment aforesaid, with all things touching and concerning the same, with all the names contained in the said indictment, by whatsoever names they may therein be called, before our justices of our supreme court of judicature, at the city-hall of the city of on the day of next, under your seal, you send, together with this writ, that our said justices may further do therein what of right, and according to the laws and customs of our said state, ought to be done. Witness, &c.

The same form will answer to remove an indictment or order, &c. from the court of sessions ; only in the direction, instead of saying, "*To J. P. Esq. one of,*" &c. say, "*To our justices, the peace within our county of to keep, and also divers felonies, trespasses, and other misdemeanors, committed within our said county, to hear and determine, assigned, and to each and every of them, greeting: We willing,*" &c.

Form of a schedule or return, by the court of sessions.

County of } ss. **B**E it remembered, That at the general sessions of the peace, held at in and for the said county of on the day of before A. B.—C. D.—E. F. and others their associates, justices the peace within the said county to keep, and also divers felonies, trespasses, and other misdemeanors committed in the said county, to hear and determine, assigned upon the oath of A. J.—S. J. &c. [*here insert the names of the jurors by whom the bill was found*] good and lawful men of the county aforesaid, then and there sworn, and charged to inquire for the said people, and the body of the said county, it is presented in manner and form, as appears in a certain indictment annexed to this schedule.

CHEAT.

Of cheats punishable by prosecution, there are two kinds,

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

I. *By the common law,*

CHEATS which are punishable by the common law, may in general be described to be deceitful practices, in defrauding, or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty ; as by playing with false dice ; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written ; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment ; or by suppressing a will ; and such like.
1 *Haw.* 188.

It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. 1 *Haw.* 188.

A person, for a counterfeit pass, was adjudged to the pillory, and fined. *Dalt. c.* 32.

On an indictment against the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn instead of it, it was moved to quash the same, because it is only a private cheat, and not of a public nature. It was answered, that being a cheat in the way of trade, it concerned the public, and therefore was indictable. And the court unanimously agreed not to quash it. *T.* 16. *G. 2. K. and Wood. Sess. C. V.* 1. 217.

A person falsely 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 are 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 nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100.

A court of special sessions of the peace has jurisdiction of cheats. 14 *John. Rep.* 371.

To constitute a cheat or fraud an indictable offence at common law, it must be such a fraud as would affect the public; such a deception that common prudence cannot guard against, as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. 7 *John. Rep.* 201.

Thus where A. had a judgment against B. and B. came to A. and said he would settle it by paying money in part, and giving a note for the residue, on which A. drew a receipt in full in discharge of the judgment, and B. got possession of the receipt without paying the money, or giving the note. And the indictment charged him with having obtained the receipt falsely, fraudulently, and deceitfully, and under false acts, colours, and pretences, and under pretence that he had the money in his pocket, and would pay it immediately and give his note for the residue, it was held that there was no false token, but only a false assertion, and that an indictment would not lie. *Ib.*

II. By statute.

If any person shall knowingly, by false pretences, obtain from any other person, any money, goods, or chattels, or other effects whatso-

ever, with intent to cheat or defraud any person, or body politic or corporate, or aid, abet, assist, hire, command, or procure any other person to commit the said offence, shall be punished by fine or imprisonment, or either; and if the court shall deem it proper, that he be imprisoned twelve months or upwards, then in the state-prison not exceeding three years. But for the second offence, imprisonment in the state-prison not exceeding five years. 1 R. L. 1813. p. 410.

Warrant of two justices to apprehend an offender.

County of } ss. To any constable of, &c.

WHEREAS complaint hath been made unto us, whose names and seals are hereunto set, two of the justices of the peace for the said county, upon the oath of A. I. of yeoman, and B. I. of yeoman, that on the day of A. O. of yeoman, did knowingly and designedly, and by false pretences, that is to say, by [here particularize the offence] obtain [here mention the things] from C. I. of contrary to the statute in that case made and provided: These are therefore to command you, upon sight hereof, forthwith to bring the said A. O. before us, at to answer the said complaint, and farther to be dealt withal according to law. Given under our hands and seals, the day of, &c.

CLERGY.

I. Benefit of Clergy.

II. Clergymen.

I. Benefit of Clergy.

ACCORDING to Blackstone, *The privilegium clericale*, or in common speech, *The benefit of clergy*, had its original from the pious regard paid by Christian Princes to the church in its infant state; and the ill use which the Popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church were of two kinds. 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries. 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

But by our statute, it is enacted, *That the privilege or benefit of clergy, formerly allowed in criminal cases, shall be forever abolished.* 1 R. L. 495. § 4.

II. Clergymen.

By the 39th article of the constitution of this state, it is ordained, *That no minister of the gospel, or priest of any denomination whatsoever, shall at any time hereafter, under any pretence or description whatever, be eligible to, or capable of holding any civil or military office or place within this state.*

COIN.

MONEY is an universal medium or common standard, by comparison with which the value of all merchandize may be ascertained; or it is a sign which represents the value of all commodities. 1 *Blac. Com.* 276.

Metals are well calculated for this sign, because they are durable, and are capable of many sub-divisions; and a precious metal is still better calculated for this purpose, because it is the most portable. 1 *Blac. Com.* 276.

A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations; and every particular nation fixes on its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only. 1 *Blac. Com.* 276.

The coining of money is therefore, in all states, the act of the sovereign power. 1 *Blac. Com.* 277.

By statute, if any person shall counterfeit, or cause or procure to be counterfeited, or aid or assist in counterfeiting any of the species of gold or silver coins now current, or hereafter to be current in this state; or shall pass or give in payment, or offer to pass or give in payment the same, knowing the same to be counterfeit, then every such person being thereof convicted, according to due course of law, shall be deemed guilty of felony.

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 false 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.

[See counterfeiting.]

A warrant to apprehend a person for coining money, and to seize his instruments, &c.

County of } ss. To any constable of, &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 warehouse 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 the name of the people of this state, 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 the justices of the peace for this county, to be examined concerning the premises, and to be dealt with according to law. Given, &c.

COMMITMENT.

IF the offence for which any person is arrested, be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice, or warrant under his hand and seal, containing the cause of his commitment, there to abide till delivered by due course of law. But this imprisonment is only for safe custody, and not for punishment; therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships, than such as are absolutely requisite for the purpose of confinement only. 4 *Blac.* 300.

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 mittimusses 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.

For the better understanding whereof, will be considered,

- 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 prisoner.*
- VI. *Commitment discharged.*

I. *Who may be committed.*

All persons apprehended for offences which are not bailable, as 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 gaol, to remain there till he shall comply. 2 *H. H.* 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, though 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, though 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 behavior, felony, or high offences) is but to retain the party till he hath made fine to the people ; and therefore if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt.* c. 170.

II. In what place.

The gaol of the county is the proper place for the commitment of felons ; but by particular statutes, disorderly persons and persons charged with small offences under the degree of petit larceny, or for want of sureties in certain cases, may be committed to the house of correction, or to the common gaol.

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. *Ib.*

And, by statute, if a person, against whom a warrant is issued by a justice of the peace, shall escape, or be in another county, he may be taken, (the warrant being indorsed by a justice of the peace of such other county) and for want of surety, or if the offence is not bailable, be carried back to the county where the warrant is issued. 1 *R. L.* 1813. p. 149.

III. Form of the commitment.

It must be in writing, either in the name of the people, and only tested by the person who makes it, or it may be done by such person in his own name, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

Yet the mention of the name and authority of the justice, in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus, is sufficient warrant to the gaoler ; for it may be supplied by averment, that it was done by the justice. 2 *H. H.* 122.

It should contain the name and surname of the party committed, if known ; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuseth to tell his name. 1 *H. H.* 577.

It is safe, but not necessary, to set forth, that the party is charged upon oath. 2 *Haw.* 120.

It ought to contain the cause, as for treason, or felony, or suspicion thereof ; otherwise, if it contain no cause at all, if the prisoner escape, it is no offence at all ; whereas if the mittimus contained the

cause, the escape were treason or felony, though he were not guilty of the offence ; and therefore for the people's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 *Inst.* 52.

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law. 2 *Inst.* 591.

It ought also 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 supreme court, upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122.

But the want hereof seems not 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 must also have a certain date of the year and day. 2 *H. H.* 123.

IV. *Charges of the commitment.*

By statute, any person who is lawfully committed to the common gaol, for any crime or misdemeanor, having means thereto, shall bear his own reasonable charges for the conveying him to gaol, and the charges also of such as shall be appointed to guard him to the said gaol, and shall so guard him thither : And on refusal, any justice of the peace of the county shall, by writing under his hand and seal, give warrant to any constable of the town where such person shall inhabit, or where he shall have any goods within the county, to sell such and so much thereof as, by the discretion of the said justice, shall satisfy and pay the charges of such commitment. 1 *R. L.* 1813. p. 497.

And if he shall not have goods or money within the county sufficient to bear such charges, the justice, on application of the officer, shall, upon oath, examine into and ascertain the reasonable allowances to be made for his expences and trouble,* and forthwith, without fee or reward, by warrant, order the treasurer of the city or county to pay the same. *Ib.*

V. Gaoler shall receive a prisoner.

Sheriffs and gaolers shall receive felons from constables and other officers without taking any thing therefor, upon pain of fine and imprisonment, and damages to the party grieved. 1 *R. L.* 1813. 423.

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. Commitment discharged.

If a person be brought before a justice, exclusively charged with felony upon oath, the justice cannot discharge him, but must commit him. 2 *H. H.* 121.

And when a person is legally committed for a crime certainly appearing, he cannot be lawfully discharged but by some court or magistrate duly authorised, 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. 1 *Bac. Abr.* 384.

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; if 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 accessory to his supposed offence; and it is impossible that there should be an accessory, 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.

* The allowances for trouble not to exceed six cents for each mile he shall travel to convey the offender to gaol, 1 *R. L.* 497.

Mittimus for felony.

County of } **J.** P. Esquire, one of the justices assigned to keep the peace
 ss. } in the said county, and also to hear and determine divers
 felonies, trespasses, and other misdemeanors in the said county committed :
 To the sheriff or keeper of the gaol at in the said county, and to each of
 them, greeting. Whereas A. O. late of in the said county, laborer, 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 20 dollars, the property of A. P. of in the said county, yeoman : There-
 fore, in the name of the people of this state, 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, &c.

Another.

County of } **J.** P. Esquire, &c. To the keeper of the common gaol at
 ss. } in the said county, or to his deputy there : These
 are, in the name of the people of this state, to charge and command you, that
 you receive into your said gaol, the body of A. O. late of in the said coun-
 ty, 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 gener-
 al 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 here-
 of fail you not. Given under my hand and seal, the day of, &c.

General warrant of commitment.

County of } **J.** P. Esquire, one of the justices assigned to keep the peace
 ss. } within the said county : To the constable of in the
 said county, and to the keeper of at in the said county,
 Greeting : These are to command you, the said constable, in the name of the
 people of this state, 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, &c.

 CONFESSIO.

CONFESSION is two-fold, 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 in capital offences, 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 mercy of the court, and desiring to submit to a small fine ; which admission the court may accept of if they think fit, without putting him to a direct confession. 2 *Haw.* 333.

But no confession whatever shall, before final judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment to faults apparent in the record ; for the judges must, *ex-officio*, take notice of all such faults, and any one, as *amicus curiæ*, may inform them of them. 2 *Haw. c.* 31. § 4.

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.

But the identity of these examinations must be proved at the trial, before they can be read in evidence. *Summary*, 263.

And if they are not proved, they cannot be admitted orally ; as for confession, being the strongest degree of guilt, requires the highest authenticity. *O. B.* 1785. *p.* 862. 2 *Haw.* 8vo. edit. 604. n.

But this confession must be proved to have been obtained without any promise of favor, menace, or undue terror ; for if it is obtained under such impressions, it cannot be received in evidence against the party. 2 *H. H.* 285. *Leach's Cr. L.* 284.

Yet if any facts are afterwards discovered in consequence of such confession, they may be given in evidence, notwithstanding the proof of such confession is inadmissible ; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false ; but facts thus obtained must be fully and satisfactorily proved, independent of, and without calling in, the aid of any part of the confession from which they may have been derived. *Leach's Cr. L.* 248, 329.

But it is an established rule of law, that the mere confession of a crime, without any one single circumstance to corroborate it, is not sufficient to convict a prisoner, unless he should again confess the fact, by pleading guilty to the indictment. *Leach's Cr. L.* 320.

And whenever a man's confession is made use of against him, it must all be taken together, and not by parcels. 2 *Haw. c.* 46. § 5.

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 party be guilty or innocent. 2 *Haw.* 97.

An accessory after the fact, for receiving stolen goods, made a full confession, under promise of favor ; in consequence whereof the property was found in her lodgings, concealed between the sackings of her bed ; the court rejected evidence of the confession, but admitted proof of finding the property, although the discovery was solely made in consequence of the confession. *William's Just.* 519.

In prosecutions for bigamy, the mere confession of the party is not sufficient evidence of the first marriage ; but there must be proof of a marriage in fact. 7 *John. Rep.* 314.

CONSPIRACY.

EVERY confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy at common law ; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whatever. 4 *Blac.* 137. 1 *Haw.* 100.

Journeymen who refuse to work, in consequence of a combination till their wages are raised, may be indicted for a conspiracy. *Ib.*

By statute also it is declared, that all persons who confederate by oath, agreement, or other alliance, falsely and maliciously to indict, or cause to be indicted, or falsely to move or maintain any plea or suit, shall be considered conspirators. 1 *R. L.* 1813. p. 173.

It seems, 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 falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. *Ld. 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. *Ld. Raym.* 378.

It appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it ; from whence it follows, that if all the defendants who are prosecuted for such 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 one person in law : But it is certain, that an action on the case, in the nature of a conspiracy, may be brought against one only : Also it hath been resolved, that if such an action be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. 1 *Haw.* 192.

Also in the case of *K.* against *Kinnersly* and *Moore*, *T. 5 G.* An information was brought, setting forth that the defendants, being evil disposed persons, in order to extort money from my lord *Sunderland*, did conspire together to charge my lord with endeavouring to commit sodomy with the said *Moore*. The defendant, *Kinnersly*, only appears, and pleads to issue, and is found guilty. And now exception was taken in arrest of judgment, that to every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty, and the other possibly may be acquitted. But it was answered, that this is arguing from what has not happened, and probably never will ; for though *Moore* may have an opportunity to acquit himself, and is not concluded by the verdict as *Kinnersly* is, yet as the matter now stands, *Moore* himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be 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.

When three persons were indicted for a conspiracy, and one of them died before trial, and another was acquitted, it was held that the third might be tried and convicted. *2 John. Cas.* 301.

The proper punishment for the crime of conspiracy, is fine and imprisonment.

A conviction of conspiracy renders the party infamous, and destroys his competency as a witness, but it is the infamy of the crime which destroys the competency, and not the nature of the punishment. *Leach's Crown L.* 382. *4 Blac.* 137.

CONSTABLES.

UNDER this head it will be proper to inquire:

- I. *How constables are chosen, &c.*
- II. *The duties of their office.*
- III. *How protected in the discharge of their duties.*

By the act relative to the duties and privileges of towns, *2 R. L.* 1813. *p.* 125, the freeholders and inhabitants of the several towns in this state, who are or shall be qualified by law to vote at town meetings, shall, at their annual town meetings, choose so many constables being inhabitants of the said town, as to the freeholders and inhabitants of said town so met, or the major part of them, shall seem necessary and convenient. And the constables so chosen shall hold their office for one year, and until others shall be chosen in their place. And in case any constable so chosen in any such town, shall refuse to serve, or die, or remove out of the town, or become incapable of serving before the next annual town meeting, then and in every such case it shall be lawful for the freeholders and inhabitants of such town to supply every such vacancy in manner aforesaid, at a special town meeting.

Or if the town shall neglect to choose such officers, or shall not, within fifteen days after such refusal, death, removal, or incapacity happens, choose others in their room, then three justices of the peace in the said county, residing in or near such town, shall nominate, and by warrant under their hands and seals, appoint such of them as the freeholders and inhabitants of such town ought to have chosen as aforesaid.

By the same act it is provided, that every constable chosen or appointed as aforesaid, shall, before he enters upon the duties of his office, and within ten days after his election or appointment, to be approved of by the town clerk, or the supervisor of the town or ward,

execute under his hand and seal before such supervisor or town clerk, and cause to be filed in the office of the clerk of such town, an instrument in writing, by which such constable and his sureties shall jointly and severally agree to pay to each and every person such sum of money, as the said constable shall become liable to pay for or on account of any execution, which shall be delivered to such constable for collection, and on which instrument the said town clerk or supervisor shall endorse, that he approves of the sureties therein named.

Ib.

Before a constable enters upon the execution of his office, and within fifteen days after his appointment, he shall take and subscribe the following oath of office before some justice of the peace. 2 *R. L.* 1813. p. 128.

I, A. B. do solemnly and sincerely promise and swear, that I will, in all things, to the best of my knowledge, understanding and ability, well and faithfully execute and perform the trust reposed in me, as a constable of the town of _____ in the county of _____

And the justice before whom it is taken and subscribed, shall, without fee or reward, certify under the same writing, the day and year when it was taken, and subscribe his name thereto, and then deliver the same to the constable, who shall, within eight days thereafter, transmit or deliver it to the town clerk. 2 *R. L.* 1813. p. 129.

If a constable neglect to take the oath of office, and transmit it to the town clerk, within the time above mentioned, or if he shall neglect to give the security required by law, within the time for that purpose limited, such neglect shall be deemed a refusal to serve. 2 *R. L.* 1813. p. 129.

And if a constable refuses to serve, or if he enters upon the execution of his office before he takes the oath, or before he shall have given such security as shall be required by law, he shall forfeit 62 dollars and 50 cents to the people of the state. 2 *R. L.* 1813. p. 129.

II. *The nature and duties of the office.*

The general duty of a constable is to keep the public peace in their several districts; and to that end they are armed with very great powers of arresting and imprisoning, of breaking open houses, &c. 1 *Blac.* 356.

Constables are, by the common law, conservators of the peace within their several limits. 2 *Haw.* 53. *Com.* 6. *Dalt.* c. 1.

And therefore, if any man shall make an 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 sureties for the peace. *Dalt.* c. 1.

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 authorises a justice of the peace to convict a man of a crime, and to levy a 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.

Constables are also to attend on coroners for executing their warrants. 2 H. H. 59. *Wood's Inst. b. 4. c. 1.*

They ought also to attend upon the justices at the gaol delivery; and also at the sessions of the peace, to return warrants, and present offences. *Cr. Cir. Com. 34.*

III. *How protected in the discharge of their duties.*

If an action is brought against a constable, for any thing done by virtue of his office, he, and also 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. 1 R. L. 145.

And the action shall be laid in the county where the trespass or fact was committed. 1 R. L. 1813. 155.

CONVICTION.

A CONVICTION in the sense in which it is here used, is a summary proceeding in pursuance of some statute, contrary to the course of the common law. 4 *Blac.* 280.

In all cases of summary conviction, there is no intervention of a jury; but the party accused, is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. *Ib.*

Proceedings by summary conviction, were professedly designed for the greater ease of the subject, by doing him speedy justice, and by not harrassing the freeholders with frequent and troublesome attendances to try every minute offence. *Ib.*

Summary convictions are frequently authorized by statute. But this mode of proceeding is always to be construed strictly by the courts, and is not to be adopted, but where the language of the law is positive and unequivocal. 3 *Caines.* 261.

It is a clear and salutary principle, that inferior jurisdictions not proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show their power expressly given them in every instance. 1 *Caines.* 594.

In these convictions, it is necessary that there should be, *first*, an information or charge against the defendant; *secondly*, a summons or notice of such information, in order that he may make his defence; *thirdly*, his appearance or non-appearance; *fourthly*, his defence and confession; *fifthly*, the evidence against him in case he does not confess; and, *sixthly*, the judgment or adjudication. *Williams' Just.* 546.

And in general all these matters must be particularly set forth in the record of the conviction. *Ib.*

General form of conviction.

County of } ss. **B**E it remembered, that on the day of in the year of our Lord one thousand eight hundred and at aforesaid, A. I. of comes before us, J. P. and S. B. Esquires, two of the justices assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and gives us, the said justices, 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 in the county aforesaid, he, the said A. O. after being duly summoned in this behalf before us, the justices aforesaid, appears 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 us, the said justices, if he can say any thing for himself why he should not be convicted of the premises above charged upon him in form aforesaid: And thereupon he says that he is not guilty of the said offence, [*or pleads and says that, as the defence may be*].—Whereupon, one credible witness, to wit, A. W. of yeoman, comes before us, the said justices, and upon his oath, the same oath being by us then and there duly administered, and in the presence as well of the said A. I. as of the said A. O. deposes, swears, and upon his oath aforesaid, affirms and says, that the aforesaid, A. O. on the day of in the year aforesaid, at in the county aforesaid, [*did here again set forth the fact, or so much thereof as it suffices to convict the offender*]. And thereupon the aforesaid A. O. the day of in the year aforesaid, before us, the justices aforesaid, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid is convicted; and for his offence aforesaid has forfeited the sum of of lawful money of the state of New-York, to be distributed as the statute aforesaid directs. In witness whereof, we the said justices, to this present record of the conviction as aforesaid, have set our hands and seals at in the county aforesaid, the day and year first above written.

*If he confesses the fact, then say—*And because the said A. O. has nothing to say, nor can say thing in his own defence touching and concerning the premises aforesaid, but does of his own accord freely and voluntarily acknowledge and confess all and singular the said premises to be true, in manner and form as the same are charged upon him in the said information; and because all and singular the premises being heard, and fully understood, by the said justices, it manifestly appears to us [*or if the party has been summoned, and does not appear, then say*].—Whereupon, on the said day of in the year aforesaid, at in the county aforesaid, he, the said A. O. was duly summoned in this behalf, to appear before us in order to make his defence against the said charge contained in the said information, but the said A. O. neglects to appear before us, and does not appear, nor make any defence against the said charge as aforesaid: Therefore, we, the said justices, on the said day of in the year aforesaid, at in the county aforesaid, do proceed to examine into the truth of the said complaint: And A. W. of a credible witness, comes before us, the justices aforesaid, and upon his oath, &c.

And gives us to understand and be informed.] A conviction ought to be on an information or complaint precedent. *M. 11. W. K. & Fuller. Ld. Raym. 510.*

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 the citizen, as they were settled by the great charter, ought to be taken strictly, and it is necessary that it appear upon the face of such proceedings that the fact was an offence

within the act, and that the justices have proceeded accordingly. *L. Ray.* 581.

And it seems that a conviction on a penal statute, ought expressly to shew that the defendant is not within any of its provisos. *2 Haw.* 250.

But the necessity of this has been denied in some cases. *Strange.* 555.

Being duly summoned.] T. 11. G. K. & 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. *Ld. Raym.* 1406.

And in the case of *K. and Allington, H. 12 G.* on affidavit that no summons was had, the court granted an information against the justice who made the conviction. *Str.* 678.

One credible witness, to wit, A. W. 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 cases where a statute shall specially so direct it.

On his oath aforesaid affirms and says.] In all convictions, being in the nature of judgments, the whole evidence ought to be set forth, or at least so much thereof as is sufficient to warrant the conviction; that the supreme court may judge of the sufficiency thereof; but otherwise it is in orders, which are authoritative.

And for his offence aforesaid hath forfeited.] A conviction for killing a deer was quashed, because it was only he is convicted, without any judgment of forfeiture. *Strange.* 838.

CORONER.

THE office of a coroner is very ancient at the common law. He is called coroner, because he has principally to do with the pleas of the crown. *1 Blac.* 346.

Under this head it will be proper to enquire,

- I. *How Coroners are appointed.*
- II. *Their powers and duty.*
- III. *Precedents for their proceedings.*

I. *How coroners are appointed.*

By the act, concerning coroners, it is enacted, *That in every county in this state, competent men shall be appointed as coroners.* *1 R. L.* 1813. p. 150.

And by the 26th article of the constitution of this state, coroners are to be annually appointed by the Council of Appointment; and no person shall be capable of holding the office more than four years successively.

II. *Their powers and duty.*

The office and power of a coroner, is either judicial or ministerial—*1 Blac. 548.*

His judicial power is ascertained by statute, (1 R. L. 1813, p. 150.) which is in these words : “ *It shall be the duty of every coroner to go to the places where any person be slain, or suddenly dead, or wounded, or where houses are broken open, or treasure is said to be found, and forthwith to command twenty-four good and lawful men, of his county, to appear before him, at such place therein as he shall appoint, and upon their oath, or the oath of any twelve or more of them, and upon the view of the body of any person slain, or suddenly dead, and the proof of witnesses, to enquire how, and in what manner, and when, and where such person was slain or died, and who such person was, and of all the circumstances attending such death ; and who were guilty thereof, either as principal or accessory, and in what manner ; and take and commit every one so found guilty, and also every one suspected of the death of any person, or of doing hurt to any person so as to endanger life, to the gaol of such county ; and to make the like enquiry of persons who shall die in prison, or be killed by misfortune ; and also of treasure found, and who were the finders, or suspected thereof, and to attach such finders, and bind them with at least two sufficient sureties, to appear before the next justices of oyer and terminer and gaol delivery, in such county, to answer the premises : all which matters shall be enrolled by the coroners, and all coroners shall deliver their inquisitions and rolls to such justices, in the respective counties, who shall proceed thereon against the offenders, if they be in gaol, and if not, such justices shall deliver the same into the supreme court, there to be proceeded upon according to law.*” 1 R. L. 1813, p. 150.

The statute further enacts, “ That every coroner, upon any inquisition found before him, whereby any person shall be indicted of murder or manslaughter, or as accessory thereto before the fact, shall put in writing the effect of the evidence given to the jury before him, and line the witnesses to appear and testify against such person at the next court of oyer and terminer and gaol delivery, to be holden in the same county, and shall certify the recognizances taken by him for that purpose, together with the said inquisition and evidence to such court ; and in case any coroner shall neglect to perform any duty required of him by this act, and be thereof convicted before any justices of oyer and terminer and gaol delivery in such county, he shall be fined at the discretion of such justices.” *Ib.*

In taking an inquisition of death, the coroner acts in his judicial capacity, and ought to execute his office in person and not by deputy. *Wood. b. 4. c. 1.*

Where any person comes to an unnatural or violent death, notice of the fact should be given immediately to the coroner *Hale's Pleas. 170.*

It is an indictable offence to bury a man that dies a violent death, before the coroners inquest has sat upon him. 2 *Hawk. note 8.*

And if the township shall suffer the body to lie till putrefaction, without sending for the coroner, they shall be amerced. *Hale's Pl. 170. 2 Hawk. 48.*

When notice is given to the coroner, he is to issue a precept to the constable to summon a jury of twenty four good and lawful men of his county, to appear before him at such a place, to make an inquisition touching the matter. 2 *H. H.* 59.

It ought to appear in every 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 neighboring 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.

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 enquire thereof. *Hale's Pl.* 170. 2 *Haw.* 48.

If the inquisition be quashed in the supreme court, the coroner, by leave of the court, may take up the body again and take a new inquisition. *Str.* 167. *M.* 9 *G.* Case of the coroner of *Wenlock.* *Str.* 533.

By the express words of the statute, he may inquire 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.

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.

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.

If a coroner appear to have been corrupt in taking an inquest, it seems that a *melius inquirendum* shall go to the special commissioners who shall proceed, not on view, but upon testimony ; and the coroner shall have nothing to do with such inquest ; but when the inquest is quashed for want of form, he shall take a new one in like manner as if he had taken none before. 1 *Bac. Abr. Coron. D.*

The ministerial office of a coroner is only as the sheriff's substitute. When just exception can be taken to the sheriff for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant) the process must then be awarded to the coroner, instead of the sheriff. 1 *Blac.* 349.

If a sheriff dies without leaving an under sheriff, or the office of the under sheriff after such death becomes vacant, the coroners of the county are to execute the office until another sheriff is appointed. 1 *R. L.* 1813. p. 421.

Where any process is directed to the coroners of the county gen-

etally, a return made by one of them is good and valid in law, but the act or return of one shall not prejudice the rest. 1 R. L. 1813. p. 151.

If the coroner arrests the sheriff, as he may do on process against him, he cannot deliver him to the common gaol of the county, of which the sheriff has the custody and control, but he must make his own house or other private place the gaol, for the purpose of imprisoning the sheriff; this being a case omitted in the statute book, and the coroner left to the rule of the common law, by which the sheriff might make his own house or any other place a prison. 6 John. Rep. 23.

III. Forms and precedents.

The coroner's precept to summon a jury.

County of }
ss. } To any Constable of, &c.

THESSE are in the name of the people of this state to require you, immediately upon sight hereof, to summon and warn twenty four good and lawful men of 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 _____ at _____ o'clock in the _____ noon of the same day, then and there to enquire of, do, and execute all such things as on the said people's behalf shall be lawfully given them in charge touching the death of A. B. and be you then and there to certify what you shall have done in the premises and further to do and execute what in behalf of the said people shall be then and there enjoined you. Given under my hand and seal the _____ day of &c.

The Jurors oath on Coroners inquest.

You shall diligently inquire and true presentment make, on the behalf of the people of this state, how, and in what manner A. B. (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. G. 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.

The oath of Witnesses.

The evidence which you shall give to this inquest, on the behalf of the people of this state, touching the death of A. D. shall be the truth, the whole truth, and nothing but the truth: So help you God.

Inquisition of murder.

County of }
ss. **A**N inquisition indented, taken at _____ in the county of _____ aforesaid, the _____ day of _____ in the year of our Lord one thousand eight hundred and _____ before me, A. C. gentleman, one of the coroners of the said state 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 the said county, who being sworn and charged to inquire on the part of the people of the said state, 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 our Lord one thousand eight hundred and 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 people, feloniously, voluntarily, and of his own malice aforethought, made an assault; and that the aforesaid A. M. then and there, with a certain sword made of iron and steel, of the value of 50 cents, 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 aforethought, struck and pierced, and gave to the said A. D. then and there, with the sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D. a little above the navel of the said A. D. one mortal wound, of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid A. D. then and there instantly died; and so the said A. M. then and there feloniously killed and murdered the said A. D. against the peace of the said people of this state and their dignity.

And the said jurors further say, upon their oath aforesaid, that A. A. of yeoman, and B. A. of yeoman, were feloniously present with drawn swords at the time of the felony and murder aforesaid in form aforesaid committed; that is to say, on the said day of in the year aforesaid, at aforesaid, in the county aforesaid, at the first hour in the night of the said day, then and there counselling, abetting, and aiding the said A. M. to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of the people of this state and their dignity.

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M.—A. A. and B. A. had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or And the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed, which remain in the custody of B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. C, Coroner.

A. B.
C. D. &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 cents, 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 aforethought, hanged and suffocated; and so the jurors aforesaid, upon their oath 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 aforethought, 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, &c.

An inquisition on one drowned by accident.

that the said A. D. on the day of in the year aforesaid, at the town of aforesaid, in the county aforesaid, going into the river there to bathe himself, it so happened, that accidentally, casually, and by misfortune, he, the said A. D. was in the water of the said river, there suffocated and drowned; of which said suffocation and drowning, he the said A. D. then and there instantly died; and so the jurors aforesaid do say, that the said A. D. in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise. In witness, &c.

An inquisition where one dies a natural death.

that the said A. D. on the day of in the year aforesaid, at the town aforesaid, in the county aforesaid, to wit, in a certain place called was found dead; that he had no marks of violence appearing on his body, and died by the visitation of God in a natural way, and not otherwise. In witness, &c.

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 died of the visitation of God, and then and there, in 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 people of this state, feloniously, voluntarily, and of his malice forethought, made an assault; and that the aforesaid A. D. then and there with a certain knife, of the value of one cent, which he, the said A. D. then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought, did strike, and gave to himself then and there with the knife aforesaid, upon his throat aforesaid, one mortal wound of the breadth of four inches, and the depth of one inch, of which said mortal wound the said A. D. at aforesaid, in the county aforesaid, languished, and languishing lived, from the said day of in the year aforesaid, to the day of and that the said A. D. on the day of aforesaid, in the year aforesaid, at aforesaid, in the county aforesaid, of that mortal wound died. And so the jurors aforesaid, &c.

For killing another in his own defence.

upon their oaths say, that A. K. late of gentleman, at aforesaid, in the said county, on the day of in the year of in the peace of God and of the people of this state, 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 12 1-2 cents, 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.

When any person is indicted before a coroner of murder or manslaughter, or as accessory thereto, before the fact, the recognizance to bind over witnesses may be in the form following:

County of } ss. **T**HE day of in the year of, &c. A. B. came before me, A. C. one of the coroners, &c. and acknowledged himself to be indebted to the people of this state, in, &c.

The condition of this recognizance is such, that if the above bounden A. B. do personally appear at the next court of oyer and terminer and gaol delivery, to be holden in the said county, and then and there testify and set forth his knowledge, touching the death of A. B. and do not depart thence without leave of the said court, then this recognizance to be void, otherwise to remain in full force and virtue.

Acknowledged before me, the day and year above written.

A. C.

COUNTERFEITING.

By the statute to prevent forgery and counterfeiting, it is declared felony for any person to counterfeit or alter any certificate, or other public securities issued by the authority of this state, for payment of money, or acknowledging the receipt of money or goods, so that the same shall appear to be of greater value than they were intended to issue or pass for, or to assist therein, or to pass, or offer to pass or give the same in payment, or procure it to be done, knowing the same to be counterfeit or altered. 1 R. L. 405. § 3.

The same thing is enacted of bills of credit. 1 R. L. 405. § 3.

When any such certificate or bill of credit shall appear to have been altered, the same shall be presumed to have been altered from a less to a greater value, sum or denomination. 1 R. L. 406. § 4.

And the burthen of proving that a certificate or bill of credit charged to have been altered, was not altered from a less to a greater sum, shall be on the defendant charged with altering the same. 1 *R. L.* 406. § 4.

[*Of Counterfeiting other instruments, &c. see FORGERY.*]

[*See Coin.*]

[*For the punishment of this offence, see STATE-PRISON.*]

CURSING.

See IMMORALITY.

DEEDS.

CONSIDERING the intimacy between the duties of a judge of the common pleas, as such, and his duties as a justice of the peace, and that he is authorized by statute to take acknowledgments of deeds and conveyances, it is thought not foreign to the general design of this work to introduce here the following subjects for consideration :

- I. *Of forging or altering deeds.*
- II. *Acknowledging them in the name of another.*
- III. *How to be acknowledged or proved.*
- IV. *Forms of acknowledgment.*

I. *Of forging or altering deeds.*

Forging, altering, or counterfeiting deeds, or uttering them as true, knowing them to be altered or counterfeited, is made felony by statute. 1 *R. L.* 404. [*See Forgery.*]

II. *Acknowledging them in the name of another.*

To acknowledge a deed, or procure it to be acknowledged, in the name of another, is also felony. 1 *R. L.* 405.

III. *How to be acknowledged or proved.*

The officer who takes an acknowledgment must know the person who makes it to be the one described in, and who has executed the deed. 1 *R. L.* 369. § 1.

Or, if he does not know him, he must have satisfactory evidence thereof. *Ib.*

So also when proof of a deed is made by a subscribing witness, the judge taking such proof must know the person who makes it. *Ib.*

Or he must have satisfactory evidence that he is a subscribing witness, and that such witness knew the person who executed the deed. *Ib.*

All which must be inserted in the certificate of such acknowledgment. *Ib.*

And in case of the examination of witnesses, the judge must set forth in the certificate what witnesses were examined, and the substance of their evidence. *Ib.*

When a *feme covert*, residing in this state, acknowledges a deed, she must be examined privately, and apart from her husband. 1 *R. L.* 369. § 2.

But if a *feme covert* not residing in the state, shall join with her husband in a conveyance, the acknowledgment or proof of the deed may be the same as in other cases. *Ib.*

Deeds may be acknowledged before a judge of the supreme court of the United States ;

Or before any of the justices of the supreme court of this state ;

Or before the Mayor or Recorder of New-York, Albany, Hudson, &c.

Or before any judge of the court of common pleas. 1 *R. L.* 369: § 1.

Or before commissioners. 4 vol. *L. N. Y. c.* 44.

And if any judge or other officer within this state, authorized to take the acknowledgment or proof of deeds, shall be guilty of any neglect, misdemeanor or fraudulent practice in the execution of the duties prescribed by the statute, he shall be liable to pay treble damages, with full costs of suit, to the party injured. 1 *R. L.* 371. § 9.

IV. *Forms of acknowledgment.*

Form of an acknowledgment by the grantor and his wife, where they are known to the judge.

BE it remembered, that on the day of, &c. before me, A. B. Esquire, first judge [or, one of the judges] of the court of common pleas in and for the county of personally appeared C. D. and E. his wife, and severally acknowledged the within instrument to be their respective voluntary act and deed, and that they respectively signed, [or, made their marks] sealed and delivered the same to and for the uses and purposes therein mentioned. And the said E, being by me examined privately, and apart from her said husband, acknowledged, that she executed the said instrument freely, without any fear or compulsion of her said husband. And I, knowing the said C. D. and E. his wife, respectively, and that they are the persons described in, and who executed the said instrument, and having examined the same instrument and finding therein no erasures or interlineations other than the words [or, other than those noticed by the witnesses as appears by the note thereof made, as the case may be] do allow the same to be recorded. A. B.

An acknowledgment, where the grantor is not known to the judge, may be in the same form, only instead of saying, "and I knowing the said C. D." &c. say,

And also appeared before me, at the same time, G. H. a person to me known, who being duly sworn, made oath, that he knows the said C. D. and E. his wife, and that they are the same persons described in, and who executed the said deed, [or as the substance of the testimony is] and I being satisfied from the evidence of the said G. H. that the aforesaid C. D. and E. his wife, are the same persons described in, and who executed the said instrument, and having examined, &c. as before.

Form of a certificate of proof to a deed, where the witness is or is not known to the judge.

BE it remembered, that on the day of, &c. before me, A. B. Esquire, one of, &c. personally appeared G. H. one of the subscribing witnesses to the within instrument, who being duly sworn, made oath, that he saw C. D. the within named grantor, sign, [or, make his mark] seal and deliver the said instrument as his voluntary act and deed, and that he knows the said C. D. and that he is the same person described in, and who executed the same instrument, and also that the names of him, the deponent, and of I. K. within subscribed, are of the proper hand writing of the said I. K. and of the deponent respectively, and were subscribed as witnesses to the execution of the said instrument.—And the said G. H. being a person to me known, [or, if the witness is not known to the judge, then say, and also appeared at the same time before me, L. M. a person to me known, who being likewise duly sworn, made oath, that he knows the said G. H. now here present, and that he is a subscribing witness to the said deed ;] and I being satisfied from the evidence aforesaid, that the said [G. H. is a subscribing witness to the said instrument, and that the said] C. D. is the same person described in, and who executed the said instrument, and having examined the same and finding therein no erasures, &c. as before.

DISORDERLY PERSONS.

I *Who shall be deemed disorderly persons.*

II. *How to be dealt with.*

I. *Who shall be deemed disorderly persons.*

BY statute, all persons who threaten to run away and leave their wives and children to the town ;

All who unlawfully return to the town from whence they have been legally removed by order of two justices, without a certificate from the town where they belong ;

All idle persons not having wherewith to maintain themselves ;

All who go about or place themselves in the streets, to beg in the town where they dwell ;

All jugglers ;

All who pretend to have skill in physiognomy, palmistry, or like crafty science, or pretend to tell fortunes, or to discover where lost goods may be found ;

All who run away and leave their wives or children whereby they become chargeable ;

All persons wandering abroad or lodging in taverns, beer-houses, out-houses, market places or barns, or in the open air, and not giving a good account of themselves ;

All persons wandering abroad and begging ;
 All persons not having visible means of livelihood ;
 And all common prostitutes, shall be deemed and adjudged disorderly persons. 1 *R. L.* 1813. p. 114.

II. How to be dealt with.

A justice of the peace may commit disorderly persons, (being convicted before him by his own view, or by confession, or by the oath of one or more credible witness or witnesses) to the bridewell or house of correction, at hard labor, for a time not exceeding sixty days, or until the next general sessions. 1 *R. L.* 1813. p. 114.

When a person has been thus committed by a justice of the peace, to remain till the next general sessions, if the justices at the sessions adjudge him to be a disorderly person, they may, if they think convenient, order him to be detained, at hard labor, for any future time not exceeding six months, and during his confinement to be corrected by whipping, according to the nature of the offence, as they shall think fit. 1 *R. L.* 1813. p. 115. § 3.

Or if his last legal place of settlement cannot be found, the justices at the sessions shall order him to be detained and employed until he can provide for himself, or until the next sessions can place him out in some lawful calling, as servant, apprentice, mariner or otherwise, as they shall think fit. 1 *R. L.* 1813. p. 115.

In counties where there is no bridewell, or house of correction, the common gaol is to be considered the house of correction for the purposes of this act. 1 *R. L.* 115. § 5.

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.* 344.

But regularly, in all cases of felony, where a man pleads a special matter, though he conclude his plea with not guilty to the felony, or do not conclude it, 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 though a man shall lose his land in some cases, for mispleading, yet he shall not lose his life for mispleading. 2 *H. H.* 257.

DISTRESS.

A DISTRESS, is the taking of a personal chattel out of the possession of the wrong doer, into the custody of the party injured, to

procure or compel a satisfaction for the wrong committed. 3 *Blac.* 6.
The term distress, is applied to the thing taken, as well as to the act of taking it.

In considering the subject of distress, it will be proper to inquire,

- I. *For what cause a distress may be taken.*
- II. *What things may be distrained.*
- III. *Time, place and manner of distraining.*
- IV. *How a distress is to be disposed of.*
- V. *Replevin.*

I. *For what causes a distress may be taken.*

A distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment, is an injury to him who is intitled to recover it. 3 *Blac.* 7.

A distress may also be taken for non payment of taxes, assessments and fines, and for penalties imposed by certain acts of the legislature. *Ib.*

Another cause for which a distress may be taken, is damage done by the beasts, or goods, and chattels of another; as where a man finds beasts of a stranger wandering in his ground, damage feasant—that is, doing him hurt, or damage, by breaking his grass or the like, or whose goods or chattels are put upon his land to his injury. In this case the owner of the soil may distrain them till satisfaction be made him for the injury he has thereby sustained. 3 *Blac.* 7.

II. *What things may be distrained.*

As to the things which may be distrained or taken in distress, it may be laid down as a general rule, that all personal chattels may be distrained, unless particularly protected or exempted. Instead therefore of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemption. 3 *Blac.* 7.

And 1st. as every thing which is distrained, is presumed to be the property of the wrong doer, it will follow, that such things wherein no man can have an absolute and valuable property, (as dogs, cats, rabbits, and all animals by nature wild) cannot be distrained. *Ib.*

Whatever is in the personal use or occupation of any man, is for the time privileged and protected from distress, as an axe with which a man is cutting wood; or a horse while a man is riding him; but horses drawing a cart may (cart and all) be distrained for rent arrear. And also, if a horse, though a man be riding him, be taken damage feasant, or trespassing on another's ground, the horse, notwithstanding his rider, may be distrained and led away to the pound. *Ib.*

Valuable things in the way of trade are not liable to distress; as a horse standing in a smith's shop to be shod, or at a common inn, or cloth in a taylor's house, or corn sent to mill or market, for all these are protected and privileged for the sake of trade, and are presumed not to belong to the owner of the house, but to his customers. *Ib.*

But generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or

a stranger, are distrainable by him for rent, for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has his remedy over, by action on the case against the tenant, if by the tenant's default the chattels are distrained so that he cannot render them when called upon. *Ib.*

With regard to a stranger's beasts that are found on the tenant's land, the following distinctions are to be taken: if they are put on with consent of the owner of the beasts, they are distrainable immediately afterwards for rent arrear by the landlord; so also if the stranger's cattle break the fences and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts, for a wrong committed through his negligence. *Ib.*

But if the land be not sufficiently fenced, so as to keep out cattle, the landlord cannot distrain them till they have been levant and couchant on the land, that is, have been long enough there to have laid down and rose up to feed, which in general is held to be one night at least, and then the law presumes that the owner may have notice, whether his cattle have strayed, and it is his own negligence not to have taken them away. 3 *Blac.* 9.

Yet if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner, in this case, though the cattle may have been levant and couchant, yet they are not distrainable for rent, till actual notice is given to the owner, that they are there and he neglects to remove them, for the law will not suffer the landlord to take advantage of his own or his tenant's wrong.

There are also other things privileged by the common law, as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like, which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth. *Ib.*

But utensils and implements of trade, many be distrained where they are not in actual use, and where there is not sufficient property besides upon the premises to satisfy the demand of the landlord. 4 *T. R.* 565.

Beasts of the plough, and sheep, are privileged from distress at common law. While dead goods, or other beasts may be distrained.

And by statute, no man shall be distrained by his beasts of the plough, or sheep, or implements of trade, while other sufficient distress or chattels can be found on the premises, except beasts damage feasant.

Nothing shall be distrained for rent, which may not be rendered again, in as good a plight as when it was distrained, for which reason milk, fruit, and the like cannot be distrained, a distress at common law being only in the nature of a pledge or security, to be restored in the same plight, when the debt is paid.

And by statute, corn in sheaves or cocks, or loose in straw, or hay in barns or racks, or otherwise, may be distrained as well as other chattels. 1 *R. L.* 1813. p. 435.

Things fixed to the freehold, may not be distrained, as caldrons, windows, doors, and chimney pieces, for they savour of the realty. For this reason, also corn growing could not be distrained, till the statute, 1 *R. L.* 1813. 435, empowered landlords, to distrain corn,

grass, or other products of the earth, and to cut and gather them when ripe. 3 *Blac.* 10.

III. *Time, place and manner of distraining.*

All distresses must be made by day, unless in the case of damage feasant, an exception being there allowed lest the beasts should escape before they are taken. 3 *Blac.* 11.

When a person intends to make a distress, he must by himself, or his bailiff, enter on the demised premises, formerly during the continuance of the lease, but now by statute, 1 *R. L.* 1813, *p.* 438, if the tenant holds over, the landlord may distrain within six months after the determination of the lease, provided his own title or interest as well as the tenant's possession, continue at the time of the distress. *Ib.*

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. 2 *Inst.* 107.

And it must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent, the tenant may, before the distress, tender the arrearages; and if the distress be afterwards taken, it is illegal; so if the landlord have distrained, and the tenant make a tender of the arrearages before the impounding of the distress, the landlord ought to deliver up the distress; and if he does not, the detainer is unlawful. 2 *Inst.* 107.

So it is in case of 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 these cases, although 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.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once, and not for a part at one time, and a part at another. But if he distrains for the whole and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress, to complete his remedy. 3 *Blac.* 12.

As to the place where a distress may be taken.] Formerly if the lessor could not find sufficient distress on the premises, he could resort no where else, and therefore tenants who were knavish made a practice to convey away their goods and stock, fraudulently from the house or lands demised, in order to cheat their landlords. 3 *Blac.* 11.

But now by statute, 1 *R. L.* 1813. *p.* 437, the landlord may distrain any goods of his tenant, for rent in arrear, carried off the premises clandestinely, wherever he finds them, within thirty days after, unless they have been bona fide sold for a valuable consideration; and all persons privy to or assisting in such fraudulent conveyance,

forfeit double the value to the landlord. If the goods so removed are secreted in any house, barn, out-house, or other place, so as to prevent a distress for rent, the landlord or lessor may break open such place, and seize such goods as a distress, first calling to his aid the constable or other peace officer of the town, and in case of a dwelling-house, oath being also first made before some justice of the peace, of a reasonable ground to suspect that such goods or chattels are therein, but this seizure must be made in the day-time. 1 *R. L.* 1813. p. 438.

But if the goods be not removed from the premises, or secreted, the landlord cannot break open any gate or inclosure to make distress. 1 *Inst.* 161.

Nor can the lessor enter into the tenant's house unless the door be open. 2 *Bac. Abrid.* 111.

But if the outer door of a house, (or as it seems even a window) be open, a person may break an inner door to make distress. *Ib.*

By statute, no person shall take a distress wrongfully, or in the highway. 1 *R. L.* 1813. p. 434.

But by statute, the landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any way belonging to the premises demised. 1 *R. L.* 1813. p. 435.

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.

Distresses ought not to be excessive, but in proportion to the duty distrained for. 2 *Inst.* 106, 7.

For by statute, distresses shall be reasonable, and not too great; and he that taketh great and unreasonable distresses shall be punished by fine for the excess, and shall answer damages to the party grieved. 1 *R. L.* 1813. p. 434.

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.

IV. *How a distress is to be disposed of.*

When a distress is taken, it must, in the first place, be carried to some pound, and there impounded by the taker. 3 *Blac.* 12.

But in its way to the pound it may be rescued by the owner, in case it was taken without cause, or contrary to law; as if no rent be due, or if the distress be taken in the highway, and the like: in these cases the tenant may lawfully make rescues. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out, for they are then in the custody of the law. 3 *Blac.* 12.

A pound (which signifies any inclosure,) is either pound overt, that is, open over head, or pound covert, that is, close. *Ib.*

By statute, when any beasts are distrained for any cause whatever, they shall be put in open pound in the same county where they shall be taken, and they to whom the beasts do belong may give them their feeding without disturbance, so long as they shall be impounded. 1 *R. L.* 1813. p. 434.

By statute also, 1 *R. L.* 1813. p. 93, no distress of beasts shall be driven out of the town, manor, district or precinct, where such distress is or shall be taken, except that it be to pound overt within the same county, not above three miles distant from the place where the said distress shall be taken. And that no beasts, goods or chattels, distrained or taken by way of distress for any cause whatever, at one time, shall be impounded in several places, whereby the owner or owners of such distress shall be constrained to sue several replevins for the delivery of the said distress, so taken at one time, upon pain that every person so offending shall forfeit to the party grieved, ten pounds and treble damages.

Dead chattels, as household goods, and the like, which may receive damage by the weather, must be put into a house, or other pound covert; otherwise the distrainer is answerable for them if they be damaged or stolen away. 1 *Roll's Abr.* 673.

But beasts, it is said, ought to be put in a public pound; for if they be placed in a *private* pound, the distrainer must keep them at his peril, with provisions, for which he shall have no satisfaction; and if they die for want of sustenance, the distrainer shall answer for them. 2 *Ld. Raym.* 720. 1 *Salk.* 248.

And by statute, any person taking any distress, may impound, or otherwise secure the distress, of whatever nature or kind it be, in such place, or on such part of the premises, as shall be most convenient for the purpose; and may appraise and sell the same, as any person taking a distress for rent may do off the premises; and any person may go to and from the place to view, appraise, and buy, and also to remove the same. 1 *R. L.* 434.

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.

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 may distress again. 1 *Salk.* 248.

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. 1 *R. L.* 1813. p. 436.

But no tenant shall recover in such action, if tender of amends hath been made before the action brought. *Ib.*

The goods, when impounded, being only in nature of a pledge or security to compel satisfaction, the distrainer, at common law, had no power to sell them. But provision is now made by statute for the sale of distress for rent, or for *damage feasant*.

Concerning rent it is enacted as follows : " *That when any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so 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 premises, charged with the rent distrained for, replevy the same, with sufficient security, to be given to the sheriff according to law; that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable, or other officer of the town or place where such distress shall be taken, (who are hereby required to be aiding and assisting therein) cause the goods and chattels so distrained, to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, constable, or other officer as aforesaid, are hereby empowered to summon for that service, and to swear well and truly to appraise the same according to the best of their understanding) and after such appraisement, shall and may lawfully sell, at public vendue, the goods and chattels so distrained for the best price that can be gotten for the same (giving three days public notice) towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale; leaving the overpluss (if any) in the hands of the said sheriff, under-sheriff, constable, or other officer, for the owner's use.*" 1 R. L. 1813. p. 435.

Concerning the sale of distress for damage feasant, the statute provides,

That when any distress shall be made of any beasts doing damage, the person distraining shall, as soon as conveniently may be, and within twenty-four hours, make appl'cation to the two nearest fence viewers in the town to appraise and ascertain the damage; who shall immediately thereupon go to the place where such damage shall be committed, and view the damage done, and appraise, ascertain and certify under their hands, the amount thereof, with their fees for the same; and if any dispute shall arise concerning the sufficiency of the fence, it shall be determined by the same fence viewers, whose decision shall be conclusive; and the person making the distress shall, as soon as he shall think proper, and within forty-eight hours after making such distress, unless the damage shall be sooner paid, cause the beasts to be put in the nearest pound in the same county, where they shall remain until the sum so certified by the fence viewers, with the fees of the pound-master, be paid, or the beasts replevied. 2 R. L. 1813. p. 134. And if the owner of the beasts shall not pay the damage and the fees of the keeper, with reasonable charges for keeping and feeding them, for exceeding three cents for each beast for every twenty-four hours, such beast shall be impounded and fed, within six days after such beasts shall be impounded, or replevy the same, it shall be lawful for the keeper to sell the same at public vendue, giving at least forty-eight hours previous notice of such sale, by advertisement, set up at the pound, and at the nearest public place to the said pound; and out of the monies arising from such sale to pay the said damage, and retain his fees and charges of keeping the same beasts, and of such sale, and return the overplus to the owner. And if no owner shall appear and

claim such overplus, within six calendar months after the sale, the same shall be paid to the overseers of the poor of the city or town where such beasts were impounded, for the use of the poor. 2 R. L. 1813. p. 134.

Cattle damage feasant, cannot be impounded until the damage has been ascertained, and appraised by the fence viewers, according to the directions of the statute. 2 John. Rep. 191.

V. Replevin.

To replevy, is when a person distrained upon applies to the sheriff, or his officers, and has the distress returned into his own possession, upon giving good security, to try the right of taking it in a suit at law, and if that be determined against him, to return the cattle or goods, into the hands of the distrainer.

By statute, if beasts, or goods, or chattels of any person, are taken and wrongfully detained, the sheriff, by writ of replevin out of chancery, or upon complaint thereof to him made, without writ, shall cause them to be replevied, and delivered, without let or gainsaying of the person who took them. 1 R. L. 1813. p. 91.

Formerly pleas in replevin might be held before the sheriff himself; but by statute, writs of replevin must be made returnable either in the supreme court, or common pleas; and plaintiffs, the sheriff must return into the next court of common pleas, to be held in his county, where the like process, shall be had as upon writs of replevin.

Generally, whatever is a subject of distress, may, if wrongfully taken, be replevied.

Replevin, also, lies for any tortious or unlawful taking, and not in cases of distress only. 7 John. Rep. 140.

But, by statute, no replevin will lie in any case of distress for any tax, assessment or fine, to be collected or levied in pursuance of any law of this state; and if any person shall prosecute a replevin in such case, he shall forfeit the sum of fifty pounds, one half to the person who shall prosecute for the same, the other to the people of the state. 1 R. L. 1813. p. 95.

And if a plaintiff in replevin shall make default, and a return of the goods be awarded, he may have a *judicial* writ out of the same court, whereby the sheriff may replevy the goods a second time; and if the plaintiff shall make default again, or for another cause return of the distress shall be awarded, the distress shall remain irrepleviable. But if a distress be taken of a new, and for a new cause, the former process shall be observed. 1 R. L. 1813. p. 93.

Practical directions to make a distress.

If the landlord does not distrain himself, but authorizes another to do so, it is proper for him to give the following warrant:

Mr. A. B.

I DO hereby authorize you to distrain the goods and chattels of T. T. in the house wherein he now dwells, (or on the premises now in his possession) situate in the county of for dollars, being year's rent, due to me for the same on last; and for your so doing this shall be a sufficient warrant and authority, Dated this day of A. L.

On making the distress, seize some articles, and say,

I seize this in the name of the goods and effects in this house (or on these premises) for the sum of dollars, being year's rent, due to me on (or if the distress is not made by the landlord himself, say) due to A. L. the landlord of this house (or these premises) on last, by virtue of an authority from him, the said A. L. to me given for that purpose.

An inventory must then be made of goods sufficient to cover the rent, and also the charges of the distress ; which done, a copy thereof must be made in manner following :

AN inventory of the several goods and chattels distrained by me, A. B. (the distrainer) the day of in the year of our Lord in the dwelling house (or as the case is) of T. T. situate in in the county of by the authority and in the behalf of A. L. of the landlord of the said premises, for dollars, being year's rent, due to him, the said A. L. on last,

In the dwelling-house :

One clock,

One table,

Six chairs,

In the garden :

One iron roller, &c.

At the bottom of which inventory, must be subjoined the following notice to the tenant :

T. T.

TAKE notice, that I have this day (by the authority and on the behalf of your landlord, A. L. if done by a bailiff) distrained on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of dollars, being year's rent due to me (or to the said A. L.) on last, for the said premises, and the said goods and chattels are removed to (or locked up in on the said premises) and there safely impounded. And you, the said T. T. are also to take notice, that unless you pay the said rent, with the charges for distraining the same, within the space of five days from the day of the date hereof, the said goods and chattels will be appraised and sold according to the statute in that behalf made and provided. Given under my hand, this day of A. L.

Witness that a copy hereof was this day left at the

chief mansion-house of the said T. T.

A. W.

The safest way is to remove the goods immediately, unless the tenant consents to let a man remain in possession of them on the premises, and then they need not be removed until the sixth day ; but at that time, unless the tenant requests, and the landlord grants further time for payment of the rent, they must be appraised and sold. When further time is given, the tenant must sign a memorandum to the following effect :

IT. T. do hereby consent, that A. L. my landlord, who, on the day of last, distrained my goods and chattels, for rent in a messuage or dwelling-house, situate in in the county of shall, at my proper costs, continue in possession of my said goods and chattels, in the said messuage or dwelling-house, for the space of days from the day of the date hereof, the said A. L. undertaking to forbear the sale of the said goods and chattels, for the said space of time, in order to enable me to discharge the said rent. In witness whereof I have hereunto set my hand this day of

But on the sixth day, if there is no allowance of further time, and the goods are not replevied, the distrainer must repair to the premi-

ses where the goods are impounded, and if the rent and charges of distress are not paid, a constable and two appraisers (summoned) must attend, to whom, having viewed the goods distrained, the constable is to administer the following oath :

You and each of you shall well and truly appraise the goods and chattels mentioned in this inventory (*the constable holding the inventory in his hand, and shewing it to the appraisers*) according to the best of your understanding : So help you God.

Then indorse on the inventory the following memorandums :

BE it remembered, that on the day A. A. of and B. D. of two sworn appraisers, were duly sworn by me A. C. of constable, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their understanding. A. C. Constable.

Witnesses to such swearing.

E. W.

F. W.

After the appraisers have valued the goods, proceed with another, thus :

WE, the above named A. A. and B. A. being duly sworn by A. C. the constable above named, well and truly to appraise the goods and chattels, mentioned in the within inventory, according to the best of our understanding, and having viewed the said goods and chattels, do appraise and value the same at dollars. As witness our hands, the day of

After which, three day's public notice must be given of the sale of the goods appraised, which notice may be as follows :

Take Notice,

THAT on the day of next, at ten o'clock in the forenoon of the same day, at the dwelling-house of in the town of in the county of the several goods and chattels specified in the inventory hereunto annexed, will be sold at public vendue, to the highest bidder.

An inventory of the articles to be sold should be subjoined to this notice ; or, if more convenient, to insert them in the body of the notice, will answer the same purpose.

The notice should be put up at the usual and most public places of affixing such advertisements, in the town or neighborhood of such sale. And the goods are then to be sold for the best price that can be gotten for the same, and after deducting thereout the amount of the rent in arrear, and all reasonable charges attending the distress, the overplus, if any, is to be returned to the tenant.

If the tenant means to replevy, and prefers proceeding by way of complaint, he must go to the sheriff's office, where he must enter into a bond, with two sureties in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and without delay, and for returning the goods, if return shall be awarded, and upon this the possession of the goods will be restored to the tenant to abide the event of the suit in replevin.

The plaint before the sheriff must be in writing, and in the following form :

County, to wit: A. B. of in the county of yeoman, complains of C. D. of the manor of in the county of gentleman, of a plea of taking and unjustly detaining his beasts, (or, his beasts, goods and chattels, or, his goods and chattels, or, his certain mare, or, his certain silver bowl) and gives security to prosecute his said complaint, and to return the same beasts, if return thereof shall be adjudged.

When goods are removed and concealed by tenants to prevent distress, the landlord with a constable may, in the day time, break doors, and enter suspected places to distrain them; but in case of a dwelling house, oath must be first made before a justice, of reasonable ground to suspect the goods are therein; upon which the justice will issue a warrant for the purpose.

Form of the oath.

County of } ss. **P.** G. of in the said county, gent. maketh oath and saith, that certain goods and chattels of T. T. of yeoman, have been conveyed or carried away from by the said T. T. his servant or servants, agent or agents, or other person or persons, aiding or assisting therein to prevent the said goods and chattels from being taken and seized as a distress, for arrears of rent due to this deponent [or, due to A. L.] for the said and that the said P. G. hath reasonable ground to suspect and doth suspect, that the said goods and chattels are in the dwelling-house of at P. G.
Taken and sworn, at this day of before me, A. J. one of, &c.

Form of the warrant.

County of } ss. To any Constable of, &c.
WHEREAS P. G. of yeoman, hath this day of made oath before me, A. J. one of, &c. that certain goods and chattels of T. T. of yeoman, have been conveyed and carried away from by the said T. T. his servant or servants, agent or agents, or other person or persons, aiding or assisting therein, 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 P. G. hath 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, empowered 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 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, &c.

DOGS.

A DOG, in the act of destroying reclaimed and useful animals—as fowls, sheep, deer, calves—may be killed by the owner or possessor of such animals, if necessary to save them from destruction. 9 *John. Rep.* 233.

Stealing dogs is not felony. 1 *Haw.* 93. But their value may be recovered in a civil action.

If a dog, known to the owner to be vicious, bite a man, an action lies for the injury. 12 *Mod.* 555. So if being accustomed to bite sheep, he bite a horse, or any other domestic animal. *L. Raym.* 110.

To prevent particular injuries by dogs it is provided by statute of this state : " That if any dog shall kill or wound any sheep or lamb, the owner or possessor of such dog, shall pay to the owner of such sheep or lamb, the value thereof, to be recovered with costs of suit, before any justice of the peace of the county where such offence shall be committed." 1 *R. L.* 1813. And if the owner or possessor of such dog, or of any dog, which shall chase or wound sheep, does not kill such dog within *forty-eight* hours after notice, he shall forfeit \$2 50 ; and \$1 25 for every forty-eight hours thereafter, until the dog shall be killed ; unless it appears that it was not in his power to kill the dog. These penalties may be recovered by any person who will sue for them.

" It shall be lawful for any person who shall see any dog chase, worry or wound any sheep or lamb, to kill such dog." 1 *R. L. N. Y.* 1813. 169. But any shepherd or other person may use dogs to drive sheep in his care or owned by him.

If a dog shall attack any person, peaceably travelling on the highway, or any horse in a carriage, or on which any person is mounted, a justice, on complaint, if it appear to him that the complaint is well founded, and that such dog is dangerous, shall order the owner or possessor to kill him ; and if he does not, within forty-eight hours after receiving the order, cause the dog to be killed, he shall forfeit \$2 50, and \$1 25 for every 48 hours thereafter, until such dog be killed, to be recovered and applied in manner aforesaid. *Ib.*

Form of an order to the owner, &c. to kill his dog.

County of } ss. To any Constable of the county of Greeting :

WHEREAS A. B. of &c. [the town or county] has complained to me, that a certain [describe the kind and color of the animal as near as may be] dog, owned or possessed by C. D. of, &c. did, on the day of attack the person of the said A. B. [or the horse in his carriage, or the horse on which the said A. B. was then mounted] as the said A. B. was peaceably travelling on the highway. And whereas upon the oath of the said A. B. of the facts aforesaid, it appears to me, that the complaint of the said A. B. is well founded. The said C. D. is therefore hereby ordered, to kill the aforesaid dog, within *forty-eight hours* after notice of this order. Given under my hand and seal, this day of in the year of our Lord one thousand eight hundred and

J. P.

—*—*—*—
DRUNKENNESS—See IMMORALITY.

DUELLING—See HOMICIDE.

EMBRACERY—See MAINTENANCE.

—*—*—*— ESCAPE.

UNDER this title, we shall consider the doctrine of escapes in criminal cases only.

An escape is where one that is arrested, gaineth his liberty, before he is delivered by due course of law.

There are three kinds of escapes—1. By the person who has the offender in his custody—as when a constable or sheriff suffers a felon to go at large—this is properly an *escape*.—2. Caused by a stranger—as when a person is set at liberty by the force or fraud of a third person, this is called a *rescue*.—3. By the offender himself, and when effected by force is termed *prison breaking*.—*Rescous* and *prison breaking* will be considered under their respective heads. In treating of *escapes*, properly so called, we shall consider,

- I. *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. *The retaking of a prisoner 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. *Escape by the party himself.*

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.

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 therefore, if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him, and suffers him to go at large, it is said, that both of them are guilty of an escape; the first, because he should not have parted with him, till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him. 2 *Haw.* 138.

The law, in relation to escapes, is generally the same, whether such escapes be suffered by private persons, or public officers. 1 *Hale's P. c.* 112.

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.

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. *Ib.*

As the imprisonment must be justifiable, so it must be also for a criminal offence. *Ib.*

So if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were, that he be discharged paying his fees, so that till they be paid, the first imprisonment continued lawful as before : for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor : Yet if a person convicted of a crime, be condemned to imprisonment for a certain time, and also till he pays 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 shall be paid ; but it seems, that this is to be intended where the fees are due to others as well as the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release. 2 *Haw.* 129.

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 ; or to permit a prisoner to go out of the limits of the prison. 2 *Haw.* 129.

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, though 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. If he kill him in the pursuit, he is in like manner guilty of an escape, though he never lost sight of him, and could not otherwise take him, not only because the benefit by the forfeiture on his attainder is lost, but also because the public justice is not so well satisfied by the killing him in such an extrajudicial manner. 2 *Haw.* 130.

If a prisoner be rescued by enemies, the gaoler (or other officer) is

not guilty of an escape; but otherwise, it seems, if by subjects (or citizens;) because there is a legal remedy against them. 2 *Haw.* 198.

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 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. *Id.*

V. *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, new upon fresh suit the officer may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or county, 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.

It is agreed by all the books, that an officer, making a fresh pursuit after a prisoner who hath escaped through his negligence, may retake him at any time after, whether he find him in the same, or in a different county. *Id.*

Wherever any 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, notwith-

standing he retook him immediately after. And it is clear that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, though he could not possibly retake him ; but must in such case be content to submit to such punishment, as his negligence shall appear to deserve. 2 *Haw.* 132.

VI. *Indictment for an escape.*

It seems clear, that every indictment for an escape, whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody for such a crime ; and that he went at large : And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large ; and must set forth, not the felony in general, but the particular kind of felony. But it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape ; for that 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 it 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 attained, for that the felony of the prisoner shall not be tried between the king [the people] and the keeper, because the prisoner is a stranger thereunto ; yet he may be indicted and tried for it as a misprision, before the attainer of the principal offender. 2 *Haw.* 205.

As to other prisoners who are not committed by *order of court*, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, that the person who has them in custody is in no case punishable for their escape, except in some special cases, until it be presented. 2 *Haw.* 203.

VIII. *Punishment of an escape.*

If a felon escapes before arrest, it is not punishable in him as felony. *Hale's. P. c.* 111.

If a private person arrest a felon, and he escape by force from him, it seems that it excuseth the party, because he cannot raise power to assist him ; but if a constable or other officer, hath the custody of a prisoner, bringing him to the gaol, it seems that a simple escape, by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *H. H.* 601.

Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal, actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 *Haw.* 136. 139. 1 *H. H.* 600. 604.

And it seems to be the better opinion, that a sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

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 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 entitled to such custody: for that the crime is in both cases of the same ill-consequence to the public: and there seems to be no reason that a wrongful officer should have greater favor 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 finable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, although in all civil causes, the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape, this 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, though it were such in the gaoler, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false in his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriages of his gaoler. 1 *H. H.* 597. 59.

If any sheriff or keeper of any prison, shall take any sum of money, reward or gratuity whatsoever, or any security for the same, to procure, assist, connive at, or permit any escape of any prisoner in his custody, and shall be thereof lawfully convicted, every such sheriff or keeper shall, for every such offence, forfeit \$1250, and his office, and be forever after incapable of executing the said office. 1 *R. L.* 426.

IX. *Aiding in attempting to escape.*

Any person who shall assist a prisoner, lawfully committed to, or detained in any gaol for felony, in escaping, or attempting to escape, though no escape be made ; or of conveying any disguise, instrument or arms, into any gaol, for the use of such prisoner, with intention to facilitate his escape, though no escape be made or attempted, shall be punished with imprisonment at hard labor in the state-prison, for a term not exceeding ten years, according to the nature and aggravation of the offence. 1 R. L. 412.

[See State-Prison.]

Indictment against a constable for a negligent escape.

County, ss. } **T**HE jurors for the people of the state of New-York, upon their oath present, That on the day of in the year of, &c. at in the county aforesaid, one A. I. of came before J. P. Esquire, then and yet one of the justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed ; and the said A. I. did then and there, on his oath before the same justice, charge, accuse, and give information against one A. O. of aforesaid, yeoman, for a certain misdemeanor, in taking (*here set forth the offence*;) 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 day and year aforesaid, at aforesaid, in the county aforesaid, was delivered to one A. C. then being constable of the said town, 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, afterwards, 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 to go at large, out of the custody of him, the said A. C. to the great hindrance of justice, in contempt of the people of this state, their laws and dignity.

ESTRAY.

ESTRAYS are such useful and domesticated animals, as have wandered away and no one knows the owner thereof; as neat cattle, horses, sheep, hogs, dogs, goats, hens, turkies, and the like. So also are wild geese, when reclaimed and made tame. 10 John. Rep. 102.

Trouver lies for an estray. He who takes up an estray is entitled, at the common law, to his reasonable and necessary expenses only. If an estray be pawned, the owner is not obliged to pay the pawner.

The legislature of this state has provided, "That every person who

has any strayed *neat cattle, horses, or sheep* upon his *inclosed lands*, between the *first* of November and the *first* of April, shall deliver to the clerk of the city or town, a *note in writing*, describing the age, colour, and marks of each animal, with his name and abode." 2 R. L. 231.

The clerk shall *enter* the note, &c. at large in a book kept for the purpose; and shall receive *six cents* per head for neat cattle and horses, and *three cents* for each sheep. *Ib.*

And the person delivering such note, &c. shall have *nine cents* each for the cattle and horses, and *three cents* each for the sheep, and may *detain* the animals until all *reasonable charges for keeping* them are paid, which is to be determined by the fence viewers, or clerk, if the parties cannot agree. *Ibid.*

Every person having any strayed neat cattle, horses, or sheep, after the *first* of May, must, before the *twentieth* of the same month, give notice thereof to an *assessor* of the city or town. *Ib.*

The *assessor* must ascertain the reasonable expenses of *keeping* such strays, for which he will be entitled to *six cents* a mile from his house to where the strays are kept, for travel; and *twenty-five cents* for a certificate of such expenses, to be paid by the person applying. *Ibid.* 232.

If no owner appears to claim the strays on or before the first day of May next after the *entry* of the *note in writing* in the clerk's book, or the owner will not pay for the *notice, entry, certificate, and keeping*, the person having the strays may sell them at public vendue, giving *twenty days* previous notice thereof, by putting up advertisements in three public places in the city or town.

The residue of the monies arising from the sale, after deducting all necessary expenses, are to be paid to the owner of the strays, or to the overseers of the poor for the use of the poor.

The owner of the strays must claim the money in one year after the sale, or he will not be intitled to it; and the sale after that time becomes an effectual bar.

The residue of the money is to be paid over to the overseers in *thirty* days after the expiration of the year, under the penalty of double the sum so remaining. *Ib.*

An estray is not to be used, unless it be necessary, as to milk a cow, but not to ride a horse. *Cro. Jac.* 147—8.

ESTREAT.

WHEN a recognizance becomes forfeited, or a fine, or the like, imposed by a court of record, is not paid, it is *estreated*; that is, the original, or a true copy or account of it sent up to the court of exchequer, that execution may be made of the same.

The clerks of the several courts of record, in this state, shall annually, on the first day of October term, make and deliver into the said court of exchequer, a just and true account and estreat of all fines, forfeitures, issues and amerciaments imposed or adjudged, and of all recognizances forfeited before the first day of September pre-

ceding the first day of the said October term, in the respective courts in which they are clerks, together with the said recognizances. 1 *R. L.* 402.

And when any fines, forfeitures, issues or amerciaments have been paid, or the person committed for the same, the clerk must particularly *note* in his account and estreat, to whom such payment or commitment was made, the *process* that was issued, and to what officer. *Ibid.*

And every clerk who neglects his duty, in any of these particulars, forfeits his office, and becomes accountable for the amount of all the fines, forfeitures, issues, amerciaments, and recognizances that ought to have been estreated. *Ib.*

Every sheriff or other officer, who receives process from the court of exchequer, is bound to shew the same to the debtor or prisoner, and to give him a copy thereof, without fee or reward; and when the money is paid, to *acquit* the debtor, and account for the same. *Ib.*

And if any sheriff or other officer refuses so to do, he shall render treble damages to the party grieved, and be fined at the discretion of the court in which he shall be convicted. *Ib.*

Sheriffs, coroners, and other officers, who have received or become liable for fines, forfeitures, issues, or amerciaments are, annually, on the first day of the May or October term of the supreme court, to render, *on oath*, a just and true account thereof to the court of exchequer. *Ib.*

Form of an estreat.

Columbia county, ss.

AN estreat of all the fines, forfeitures, issues, amerciaments and recognizances, set, lost, imposed, and forfeited to the people of the state of New-York, at (the court of oyer and terminer, &c. or, general sessions of the peace) holden at in and for the said county of on the day of in the year, etc. before etc. etc. Esquires, justices of the peace, assigned to keep the peace in the said county; and also to hear and determine divers felonies, trespasses, and other misdemeanors in said county committed. Ezekiel Gilbert, Esq. clerk of the county aforesaid, then and there attended.

Of A. B. late of laborer, for a trespass and assault, at aforesaid, in the said county, whereof he is indicted and convicted. Fined ten dollars. Paid to R. S., Esq. sheriff, in court. \$ 10 00

Of A. B. of in the said county, yeoman, because he came not now here to answer to such things as should be objected against him on the part of the people, as by a certain recognizance, taken before John Kortz, Esq. one of the justices of the peace, assigned to keep the peace in the said county, he undertook. 100 00

Of C. D. of in the said county, yeoman, one of the pledges of the said A. B. because he had him not to answer as above, 50 00

Of E. F. of in the said county, yeoman, the other of the pledges of the said A. B. for the like, 50 00

Of A. B. of in said county, labourer, for a riot at in said county, whereof he is indicted and convicted. Fined one hundred dollars. (Committed to R. S. Esq. sheriff, and in person,) or, (*Bench warrant* issued, and delivered to M. A. constable of in county, as the case may be.) 100 00

EVIDENCE.

EVIDENCE is either parol, or written. Parol evidence is proof by testimony of witnesses, on oath or affirmation. Written evidence is proof by records and writings, duly authenticated.

The rules of evidence, in *criminal cases*, will be considered under the following heads:

I. *Of witnesses in general.*1. *Incompetent.*2. *Competent.*II. *Of written and other evidence.*III. *Of the confession of the party.*IV. *Of the number of witnesses required.*V. *Of compelling the attendance of witnesses.*VI. *Of the manner of giving evidence.*VII. *Of allowance to indigent witnesses.*I. *Of witnesses in general.*

All persons of sound mind and memory, and who have arrived at years of discretion, except such as are legally *interested*, or have been rendered *infamous*, may be improved as witnesses.

It belongs to the court exclusively to decide upon the *competency* of a witness. When admitted to testify, it is the peculiar province of the jury to judge of his *credibility*. And it would seem to be their duty to reject the positive testimony of an unimpeached witness, if, in the fear of God, they believed it to be false.

1. *Incompetent witnesses.*

Idiots and lunatics, and persons of *non sane memory* cannot be witnesses. Nor can children who have not arrived at the years of discretion. 2 *Hale's Pl.* 278. 4 *Blac.* 24.

INTEREST excludes a witness. A person who is either to be a GAINER OR LOSER in the event of a cause, is *incompetent*. 2 *Haw. P. C.* 46. 1 *Keb.* 836. So a person who is bail for a prisoner, 3 *St. Tr.* 842, but the bail may be changed in order to make him a witness. So in informations on penal statutes, where the informer is entitled to the whole, or part of the penalty, he is an *incompetent* witness, (unless made competent by statute) for he is directly interested in the event of the prosecution. 1 *Stra.* 316.

Persons rendered *infamous* by the conviction of certain crimes, are incompetent witnesses. It is the infamy of the *crime*, and not the *punishment*, which disqualifies them; such as treason, homicide, arson, rape, forgery, perjury, barratry, conspiracy, and all offences comprehended under the denomination of the *crimen falsi*. 2 *Haw. P. C. c.* 46. 2 *Salk.* 690.

A conviction upon a charge of perjury is not sufficient, unless followed by a *judgment*. So upon the conviction of a prisoner for any infamous crime, *judgment* must follow, to incapacitate him as a wit-

ness ; but execution thereof is not necessary. 2 *Salk.* 688. 3 *Cowp.* S. 2 *Inst.* 219.

A man under judgment for an infamous crime, may answer a charge made against himself, but cannot support a complaint, or do any act of a judicial nature upon his own oath. 1 *Salk.* 461. 2 *Str.* 1148.

If the competency of a witness is objected to on the charge of conviction and judgment for an infamous crime, the party making the charge must produce in court the record of the judgment. 2 *Haw. P. C. c.* 46. 4 *St. Tri.* 175.

Husband and wife can, in no case, give evidence for each other : and, as a general rule, are not permitted to testify against each other. There are some exceptions to the last rule.

2. Competent witnesses.

An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath ; for there is no precise or fixed rule as to the time which infants are excluded from giving evidence ; but admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court ; but if they are found incompetent, their testimony cannot be received. *Gib. L. E.* 146. *Leach's C. L.* 346. 2 *Hale* 278.

An infant can in no case be a witness without oath. 1 *Str.* 700. 1 *Atk.* 29.

Outlawry in a personal action is not a good exception against a witness, because they are punished in their properties, and not in the loss of their reputation, and the outlawry has no manner of influence upon their credibility. *Co. Lit. c.* 6.

To prove the first marriage, on an indictment for bigamy, the second husband or wife may be allowed to give evidence, for as the second marriage was void, they were never husband and wife. 2 *Haw. c.* 46.

So either husband or wife may be a witness against the other, 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 ; or where either husband or wife have cause to demand sureties of the peace against the other. 2 *Haw. c.* 46.

But no other degree of kindred, or affection, as that of a parent or child, or the like, will prevent a person from being a witness. *Sid.* 75. 1 *Salk.* 289.

It seems agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges who are to try him. 2 *Haw. c.* 46.

Neither is it any exception to the witness, that he is one of the jurors who is to try the prisoner ; but then he is, if called upon to give his evidence openly in court, and not to be examined privately by his companions. 2 *Haw. c.* 46.

It is no exception against a witness, that he hath confessed him-

self guilty of the same crime, if he have 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. Also it hath been often ruled, that accomplices who are indicted, are good witnesses for the people until they are convicted. 2 *Haw. c.* 45.

But the bare uncorroborated testimony of an accomplice, has seldom been thought of sufficient credit to put a prisoner upon his defence: however, the practice of rejecting an unsupported accomplice is rather a matter of discretion with the court than a rule of law, for the circumstance of his being an accomplice goes to his credit only. *Leach's C. L.* 412.

Also it hath been adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the other. 2 *Haw. c.* 46. § 18.

So if three persons be indicted for perjury on three several indictments, and one pleads not guilty, the other two may be witnesses for him on the trial, for they stand unconvicted, although they be indicted. 1 *Hale.* 305.

A pardon of treason or felony, after a conviction or attainder, restores the party to his credit. *Ib.*

Also a pardon will remove a man's disability to be a witness in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment. 2 *Salk.* 514. 689.

Therefore, if one found guilty on an indictment for perjury, at common law, be pardoned, he will be a good witness, because the king has power to take off every part of the punishment. *Bul. N. P.* 392.

A conviction of perjury doth not disable a man from making an affidavit, in relation to the irregularity of the judgment. *Ib.*

But the party who would take advantage of such conviction or judgment, in exception to a witness, must have a copy of the record of conviction ready to produce in court. *Ib.*

Also a witness shall not be asked any questions, the answering of which might oblige him to accuse himself of a crime; and 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. *Ib.*

Neither are witnesses permitted to give evidence of their own infamy or turpitude. 4 *Inst.* 407.

The governor of the state of New-York has the power of pardoning in all cases, treason and murder excepted. 1 *R. L.* 38. 126.

If a woman give a note or bond to a man, to procure her the love of *J. S.* by some spell or charm, in an indictment for the cheat, she shall be a witness, though it tend to avoid the note, for the nature of the thing allows no other evidence. So if the doing of the act, which his evidence is now to invalidate or set aside, were a mean to obtain his liberty, he shall be a witness, as in case of a bond given by duress. 1 *Bul. N. P.* 288.

So where a defendant was indicted for tearing a note, whereby he promised to pay so much money to *A. B.* who was produced as a witness, and notwithstanding it was objected, that he was going to

swear to set up his own demand, because, if convicted, the court would compel the defendant to give a new note, yet he was admitted. 1 *Stra.* 595.

And in a late case, in which all the former resolutions were thoroughly considered, the court held, that the person who borrowed money on a pawn, was a good witness, in an action for usury against the pawn broker, though the payment of the money borrowed was proved by no other person but himself; for the judgment in this action could not be given in evidence in an action against him for the money lent. *Bul. N. P.* 288.

A person whose signature is forged may be made a competent witness to prove the forgery, by being released from the payment. *Leach C. L.* 159. 4 *John. R.* 296.

And if the liability to pay be not immediate, or apparent on the face of the instrument forged, the person whose name is forged is competent to prove the forgery; for when one *Newland* forged a bank note in the name of *W. Lander*, one of the cashiers, *Lander*, without any release, was admitted to prove that it was not his signature; because the interest, and liability to pay must be immediate, and apparent, either upon the face of the instrument forged, or upon the *voire dire*; but in this case the bank were *prima facie* and first liable; and *Lander*, the cashier, only mediately liable over to the bank upon his security. *Leach's ed. Haw. 2. Vol.* 611.

So also may a person, whose hand is forged, be admitted to prove the forgery under many circumstances, where he is not directly interested in the question; as in *Wells's* case, who was indicted for forging a receipt from a mercer at *Oxford*; the mercer having before recovered the money in an action against *Wells*, was admitted to prove the forgery. *Bul. N. P.* 289.

In all public prosecutions the party injured may be a witness, where there is only fine to the people, and no private advantage arising to himself by such a prosecution. *Gilb. L. Ev.* 126.

Therefore, on an indictment at common law for perjury, the party injured, may be a witness. *Bul. N. P.* 289.

So upon an indictment for an assault and battery, the person beaten may be a witness, because this is a prosecution at the suit of the people, for a breach of the peace; and here the fine is to the people, and no private benefit accrues to the party as the result of such prosecution. *Haw. 351. 2 Rol. Abr.* 685.

And there are other cases, where, from the necessity of the thing, persons interested must be allowed to be witnesses; thus, where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be entitled to restitution: and yet his evidence is admitted. 10 *Mod.* 193.

By statute, no slave shall be a witness in any case, except for or against another slave in criminal cases. 2 *R. L.* 207.

II. Of written and other evidence.

The final sentence, decree, or judgment of any foreign court, which hath competent jurisdiction of the subject determined before them, is *conclusive evidence* in any other court of concurrent jurisdiction. Therefore an acquittal on a criminal charge, in a foreign

country, may be pleaded in bar of an indictment for the same offence in this country. *5 Mod.* 194. *1 Show.* 6.

So the *postea* of a former issue, on an indictment for perjury, is good evidence that there was a *trial*, though not of a *judgment*, for that might have been arrested, or a new trial granted. *1 Stra.* 162. *Barnard, K. B.* 243.

The books of public officers, and of public bodies, which of course are not interested in the event of the trial, are admissible evidence. *Leach Cr. Ca.* 3 ed. 29.

A forged paper, liable to a stamp duty, as a note and the like, may be given in evidence, though *not* stamped, pursuant to the statutes. *Leach Cr. Ca.* 3 ed. 811.

In the case of peace officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters, without producing their appointment; even in the case of murder. *McNally Ev.* 488. *3 Term Rep.* 366.

After a crime hath been *proved* in the county in which it is laid, evidence may be given of other instances of the *same* crime in *another* county, in order to satisfy the jury. *2 Haw. P. C. c.* 46. *Burr.* 646. *Fost.* 196.

The best legal evidence the nature of the case will admit of, is required in all cases, civil and criminal. *2 Term Rep.* 202.

The true meaning of this rule is, that no evidence shall be brought that, from the nature of the thing, supposes still a greater evidence behind in the parties' possession or power; as if a man offer a copy of a deed or will when he ought to produce the original. This carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it. *Bul. N. P.* 294. 226.

But if that original be destroyed, or if it be in the hands of the opposite party, who will not produce it, then in the case of a deed, a counter one, or sometimes a copy of the deed, or copy of the paper, is evidence to be admitted: for though a man in a criminal case is not compellable to produce evidence against himself, and he is left at his entire liberty either to produce any original paper which he has in his possession or not; yet if notice is given him to produce them, and he neglects to do so, the only consequence is, that copies (which must be sworn to be true copies) may be read against him, for if they be not true copies, he has it in his power to prove that by producing the originals. *2 Term Rep.* 202.

Also upon the reason that the best evidence must be produced, an office copy of a record is always admitted as evidence, because the record itself cannot be removed, and a true copy is therefore the best evidence you can have; but a copy of a copy is no evidence. *Bul. N. P.* 294. 226.

Depositions taken by a witness before a justice of the peace, may, at the prisoner's desire, be read at the trial, in order to take off the credit of the witness, by shewing a variance between such deposition and the evidence given in court. And for the same reason it seems agreed, that when 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.

But 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. c. 46.*

It seems agreed, that what a stranger has been heard to say, is, in strictness, no manner of evidence, either for or against the prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross examination. 2 *Haw. c. 46.*

Besides, if the witness be living, what he has been heard to say is not the best evidence. *Bul. N. P. 294. 226.*

It therefore 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 hath been heard to say, may be given in evidence against him, but not for him; therefore a witness for this purpose cannot be called in his defence, but he may cross examine the witnesses on the part of the prosecution, as to any thing which they may have heard him say relating to the fact he is charged with. 2 *Haw. c. 46.*

And it is no evidence in any criminal case, that the defendant said so and so; as for example, that he did persuade a juror to appear, and to do him reasonable favor, or words to that effect; because the court must know the very words, to judge of their force and effect. *Hob. 294.*

So, though hearsay be not allowed as direct evidence, yet what a witness hath been heard to say at another time may be given in evidence, in order either to invalidate or confirm the testimony which he gives in court. 2 *Haw. c. 46.*

Letters, and the like, must be proved to be of the party's hand-writing, and when no body saw the writing, that must be by the comparison of hands; for likeness induces a presumption that they are the same; and every presumption that remains uncontested, hath the force of an evidence. *Bul. N. P. 236.*

And in general cases, the witness should have gained his knowledge from having seen the party write; but under some circumstances that is not necessary; as where the hand-writing to be proved is of a person residing abroad; one who has frequently received letters from him in the course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write; as where a parson's book was produced to prove a *modus*; the parson having been long dead, a witness who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the hand-writing, for it was the best evidence in the nature of the thing, and the parish-books could not be produced. *Bul. N. P. 236.*

Many times juries, together with other matter, are much induced by presumptions; whereof there are three sorts, *violent, probable, and light*: *violent* presumption, from plain circumstances, is, in some cases, taken for full proof; as when a man is stabbed in a house, and another runs out with a bloody knife in his hand, and no one else is in the house at the time: but it is said that a *probable* presumption moveth little; and a *light* one is not to be regarded at all. *Co. Lit. 6.*

As, if a man be found suddenly dead in a room, and another be

found running out in haste, with a bloody sword ; this is a *violent* presumption that he is the murderer. *McNally*, 577. 3 *St. Tri.* 930.

Recent possession, especially of goods not according to the circumstances and habits in life, of the party charged, is a *presumption* against him. So also is every attempt of a prisoner to sustain his defence by *falsehood*. *McNally*, 577. 3 *St. Tri.* 930.

In the case of murder, the declarations of the deceased, after the mortal wound given, may be given in evidence ; but where such declarations are reduced into writing, the writing itself must be produced, and not evidence *viva voce*. 12 *Vin.* 118.

For they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone ; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth : a situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice ; and though the party may not at the time make any particular expressions, indicating a sense of immediate death, yet declarations made under such circumstances, ought to be considered by a jury as being made under the impression of approaching dissolution. *Leach's C. L.* 440

It seems agreed, that *son assault demesne* may be given in evidence on the general issue in an indictment ; though in an action of battery it must be specially pleaded. 1 *Haw. c.* 62. 2 *Haw. c.* 46.

Also the defendant in an information on a penal statute, may give in evidence any exception in his favor, in the body of the act. 1 *Haw. c.* 61. 2 *Haw. c.* 46.

So he may give in evidence any such exception in a *proviso* of the act, because any such exception shews that he did not act against the form of the statute. 1 *Haw. c.* 62. 2 *Haw. c.* 46.

But he cannot give in evidence any clause of exemption in a latter statute, but ought to plead it. 1 *Haw. c.* 62. 2 *Haw. c.* 46.

And it is a general rule, that wheresoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue : for example, A. cannot justify the killing another, therefore he may give the special matter in evidence on the general issue, as that it was *se defendendo*, or the like. 2 *Roll. Ab.* 682. *Coke Lit.* 283.

III. Of the confession of the party.

The confession of the defendant himself, whether taken on an examination before justices of the peace, in pursuance of the statute, upon a bailment or commitment for felony, or taken by the common law, on an examination before a magistrate, for treason or other crime, or spoken in private discourse, has always been allowed to be given in evidence against the party, but not against others. 2 *Haw. c.* 46.

But the identity of these examinations must be proved at the trial before they can be read in evidence ; and if they are not proved, they cannot be admitted orally ; for a confession being the strongest proof of guilt, requires the highest authenticity. 1 *Hale P. C.* 284—5.

And this confession must be proved to have been made without menace, or undue terror. 1 *Hale's P. C.* 284. 5.

And where it is free and voluntary it is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and it is therefore admitted as proof of the crime to which it refers. *Leach's C. L.* 3 edit. 298.

But the human mind, under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail; a confession, therefore, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by the *promise of favor or by threats*, is not admissible evidence. But this is not from a regard to public faith; for no such rule ever prevailed, and it would be as dangerous in practice, as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit; and a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. *Leach's C. L.* 248.

No confession of *treason* is sufficient to authorize a conviction, *unless it be made by the party upon his arraignment in open court*; for the statute *relative to treason*, requires two witnesses to the overt acts of the same treason; "unless the party shall willingly, without violence, *in open court*, confess the same." 2 *Haw. c.* 46. *Fost. C. L.* 240.

And wherever a man's confession is made use of against him, it must all be taken together, and not by parcels. 2 *Haw. c.* 46. *Fost. C. L.* 240.

By statute, justices of peace upon commitment for felony, and coroners upon inquisitions of death, have power to take the examinations of the party accused, *without oath*; and informations of the accusers and witnesses upon oath, all which they are to put into writing and certify to the next gaol delivery. 1 *R. L.* 150. 2 *R. L.* 506.

These examinations and informations, thus taken in writing and returned, may be read in evidence at the trial of such inquisition, or of an indictment for the same felony; if it be made out by oath to the satisfaction of the court that the informer is dead, or so sick that he is not able to travel, or that he is kept away by the means or procurement of the prisoner. 2 *Haw. c.* 46. *Fost. C. L.* 240.

But if they are not reduced into writing, no parol evidence thereof can be received. *Leach's C. L.* 286. 446.

And oath must also be made, either by the justice or coroner that took them, or clerk that wrote them, that they are the very same that were taken and sworn before the coroner or justice, without any alteration whatsoever; and that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination, without any menace or undue terror imposed upon him. 2 *Haw. c.* 46. *Hale's P. C.* 284.

IV. Of the number of witnesses required.

The common law did not require any certain number of witnesses for the trial of any crime whatsoever. 2 *Haw. c. 25*.

And in proceedings before justices of the peace, one witness is in general sufficient, unless the statute, which gives them jurisdiction, directs otherwise.

But in case of perjury, there must be more evidence than a simple oath, otherwise it would be only oath against oath. 13 *Vin. 246*. 10 *Mod. 194*.

And in case of treason, it is enacted by statute, "That no person shall be indicted, tried or attainted of treason, or misprision of such treason, but by and upon the oath and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to the other overt act of the same treason, unless the party indicted and arraigned, or tried, shall willingly, without violence, in open court, confess the same. And if two or more distinct treasons of divers heads or kinds, shall be alleged in one bill of indictment, one witness produced to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed or taken to be two witnesses to the same treason within the meaning of this act." 1 *R. L. N. Y.* 1813. 145.

V. Of compelling the attendance of witnesses.

In prosecutions for *misdemeanors* the defendant may take out *subpoenas* of course, in order to bring in his witnesses. 2 *Haw. c. 46*.

But it seems that at common law he had no right in *capital cases*, to any process against his witnesses, without a special order of the court. 2 *Haw. c. 46*.

But by statute, persons indicted for treason, or misprision of treason, shall have like process of the court where they shall be tried, to compel their witnesses to appear for them at such trial, as is usually granted to compel witnesses to appear against them. 1 *R. L. N. Y.* 1813. 496. 145.

So also by statute, any person arraigned or tried for felony, shall be admitted to make any proof he can produce by lawful witnesses, who shall then be upon oath, for his defence in that behalf, and shall have the like process of the court where he shall be tried, to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to appear against him. *Id.*

The compulsory process to bring in witnesses in criminal cases is, *first*, either by *subpoena*, issued in the name of the people by the justices of the peace, the court where the plea of not guilty is to be tried, or by the prosecutor; or *secondly*, which is the more ordinary and effectual means (on behalf of the prosecution) the justices or coroner that take the examination of the persons 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 contempt.

By statute it is provided, that no seal shall be necessary to the validity of any *subpoena* issued from a court of general sessions of the peace, for witnesses in support of any prosecution, but such *subpoena* shall be issued and subscribed by the person prosecuting, on behalf of the people in such court. 2 *R. L. N. Y.* 1813. 147.

And it is made the duty of the county clerk to issue *subpoenas* under the seal of the courts of common pleas, from the courts of general sessions of the peace, on application of any person against whom a criminal prosecution is pending in any such court, to compel the attendance of witnesses who reside in or out of the county, and for which several services the clerks shall be entitled to the same fees as are allowed for the like process in the courts of common pleas. 2 *R. L. N. Y.* 1813. 147.

It is further the duty of the clerks, as well in *vacation*, as in term, to issue writs of *subpoena*, under the seal of the court, for such witnesses as any defendant, prisoner, or other person, proceeded against in any court of *oyer and terminer* and *general gaol delivery*, or general sessions of the peace, shall require; which writs shall be *tested* of the day of the issue thereof, and *returnable* of any day of the sitting of the court. 1 *R. L. N. Y.* 1813. 497.

Penalty for disobedience, the same as in civil cases. 1 *R. L. N. Y.* 1813. 497.

Criminals, and others in confinement, are to be brought up by writ of *habeas corpus ad testificandum*, when they are wanted as witnesses.

VI. Of the manner of giving evidence.

The evidence, both for and against a prisoner, must be upon oath or affirmation.

If a person shall have conscientious scruples about the present mode of administering oaths by laying the hand on, and kissing the gospels, the person swearing shall, with his hand uplifted, "*swear by the ever living God*," and shall not be compelled to lay the hand on or kiss the gospels. 1 *R. L. N. Y.* 1813. 386.

And every person believing in the existence of a Supreme Being, and a future state of rewards and punishments, who shall have conscientious scruples against taking an oath, shall in all cases when an oath is upon any lawful occasion to be administered, be admitted, instead of taking an oath, to make his solemn affirmation or declaration, in the following form, to wit: "*You, do solemnly, sincerely, and truly declare and affirm*;" which solemn affirmation or declaration shall be equally valid, as if such person had taken an oath in the usual form. 1 *R. L. N. Y.* 1813. 386.

It hath always been held as a settled rule, that in cases of life, no evidence is to be given against a prisoner, but in his presence. 2 *Haw. c.* 46.

So also in all summary proceedings before justices of the peace, under a penal statute, the evidence must be given in presence of the defendant; and it must appear on the record of conviction that the evidence was so given, otherwise it will be irregular. *Cowp.* 241. 2 *Str.* 1240. *Burr.* 1163. 1786. 2 *Term Rep.* 18.

By the practice of the courts, if one be produced and sworn as a witness, either side may examine him to any thing whatsoever. 2 *Bac. Abr.* 296.

But a witness shall not be cross examined, till he has gone through the evidence for the party on whose side he was produced. 2 *St. Tri.* 790. 764.

Neither shall a witness be permitted to read his evidence, but he may look upon his notes, taken at the time when the fact happened, or within a reasonable time after, to refresh his memory. 5 *St. Tri.* 445.

A prisoner cannot call witnesses to disprove what his *own* witnesses have sworn. 2 *St. Tri.* 790. 764.

Either party may, on application to the court, have the witnesses examined apart, and out of the hearing of the others; but this is an indulgence, and not a matter of right. 4 *St. Tri.* 9.

It is a general rule, that in every issue the affirmative is to be proved: a negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed until it be proved; but when the affirmative is proved, the other side may contest it with opposite proof; for this is not properly the proof of a negative, but the proof of some proposition totally inconsistent with what is affirmed; as if the defendant be charged with a trespass, he need only make a general denial of the fact; and, if the fact be proved, then he may prove a proposition inconsistent with the charge, as that he was at another place at the time, or the like. *Bul. N. P.* 298.

The counsel of that party which doth begin to maintain the issue, ought to conclude. *Tri. p. pais.* 220.

VII. *Of allowance to indigent witnesses.*

Witnesses are not bound to attend in civil cases, unless their reasonable expenses are paid, or tendered according to the statute.

In criminal proceedings, the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound, unconditionally, to attend the trial upon which they may be summoned, and be bound over to give evidence. 2 *Haw.* 620.

But it shall be in the power of the court, before whom any person shall have been tried and convicted of any larceny, or other felony, at the prayer of the prosecutor, and on consideration of his circumstances, in open court, to order the treasurer of the city or county in which the offence shall have been committed, to pay unto such prosecutor such sum of money as to the same court shall seem reasonable, not exceeding the expenses it shall appear to the court he was put to in carrying on the prosecution, and making him a reasonable allowance for his time and trouble therein; which order the clerk of the court is to make out and deliver to the prosecutor, upon being paid for the same twelve and a half cents, and the treasurer, on sight, or as soon as he shall have monies sufficient in his hands, shall pay the same. 1 *R. L. N. Y.* 1813. 498.

And that when any poor person shall appear on recognizance in any court to give evidence against another, accused of any larceny, or other felony, it shall be in the power of the court, at the prayer and on the oath of such person, and on consideration of his circumstances, in open court, to order the treasurer of the city or county in which the offence shall have been committed, to pay such sum of money as to the court shall seem reasonable, for his time, trouble, and expenses,

which order the clerk of the court is to make out and deliver to such poor witness, without fee or reward; and the treasurer shall pay the same as aforesaid. 1 R. L. N. Y. 1813. 498.

And when any person shall be convicted of, and fined for any crime or misdemeanor, the court may, in their discretion, allow such expenses to witnesses and prosecutors out of the same fine as such court shall adjudge reasonable, not exceeding 25 dollars. 1 R. L. N. Y. 1813. 498.

If a person from a foreign state shall, at the request of the public prosecutor, attend as a witness to give evidence in any criminal prosecution, it shall be the duty of the court at which such witness shall attend, to order the treasurer, &c. to pay such witness such sum as the court shall think reasonable for his time, trouble, and expense. 1 R. L. N. Y. 1813. 498.

The clerk in this case will be entitled to twelve and a half cents for the order.

Writ of subpoena.

THE people of the state of New-York, to A. B.—C. D. and E. F. [*not putting more than four in one subpoena*] greeting: We command you, that all and singular businesses and excuses being laid aside, you and every one of you, be in your proper persons 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 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 certify the truth, and give evidence before the grand inquest, touching a bill of indictment to be preferred against A. O. in a case of trespass and assault.

Or if it is to give evidence for the prosecution, say,

On our behalf against A. O. in case of trespass and assault.

If for the defendant, say,

Between us and A. O. in a case of trespass and assault.

Or if the people are not a party, say,

In a certain appeal now depending between the overseers of the poor of the town of _____ and the overseers of the poor of the town of _____ touching and concerning the removal of A. P. from the said town of B. to the said town of A.

And then proceed,

And this you, or any of you, are by no means to omit, under the penalty upon each of you of two hundred and fifty dollars. Witness _____ at _____ said, the _____ day of, &c. A. G. Clerk.

'Ticket.

To Mr. A. W.

BY virtue of a writ of subpoena to you directed and herewith shewn to you, you are personally to be and appear before our justices, &c. [*pursuing the form of the subpoena as far as the words, in a case of _____; and this you are not to omit, under the penalty of two hundred and fifty dollars. Dated this _____ day of _____ &c.*]

Form of recognizance.

County of } **B**E it remembered, that on the day of in the year
 ss. } of A. W. of in the said county, yeoman, came
 before me, J. P. Esq. one of the justices assigned to keep the peace in the
 said county, and acknowledged himself to owe to the people of this state
 dollars, lawful money of the said state, under condition that if he shall perso-
 nally appear before the justices, at the next general sessions of the peace, [or
 gaol delivery] to be holden in and for the said county, then and there to give
 evidence in behalf of the said state against A. O. late of who being at-
 tached and suspected of felony, is now committed to the gaol of the said
 county, then this recognizance to be void, otherwise of force.

Or the condition may be thus:

THE condition of this recognizance is such, that if the above bound A. W.
 shall personally appear at the next general sessions of the peace, to be
 holden at in and for the said county, and then and there give such evi-
 dence 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 coun-
 ty, 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.

THE justice has power on examination of a charge of *suspicion of felony*, or *having stolen goods*, to dismiss the prisoner, if he is satisfied that there is no ground for the suspicion. 2 *John. Rep.* 204. This would seem to extend to all criminal cases, and to make it the duty of the justice to discharge the prisoner, where the charge appears to be groundless. The justice, however, should be well satisfied of the innocence of the party accused, before he ventures to exercise this power.

The rule of law in England is different; for, where a felony has been committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty, he cannot discharge, but must bail, or commit the prisoner. *Balt. c.* 164.

“Every justice of the peace, before whom any person shall be brought for any treason or felony, or for *suspicion thereof*, before he commit such person to gaol, shall take the *examination* of such prisoner, and the *information* of those who bring him, relative to the fact, and the same, or so much thereof as shall be material to prove the offence, shall be put in writing by the said justice within *two days* after the said examination, and he shall bind by *recognizance* all the material witnesses against such prisoner, to appear and testify at the next court having cognizance of the offence, and where the prisoner ought to be tried, and shall certify the recognizances, together with the said examinations so reduced to writing, under his hand, into the said court where such witnesses are bound to appear on the first day

of the setting thereof: And if any justice of the peace shall refuse or neglect to take the examinations and recognizances, or to certify the same as aforesaid, the said court, into which the same ought to have been so certified, shall, upon due proof by examination before them, impose such fine upon every justice so refusing or neglecting as to the said court shall seem meet." 2 *R. L. N. Y.* 1813. 507.

Examination, &c.] If the justice, before whom the prisoner is brought, cannot then attend to the examination, he may direct by word of mouth only a constable or other person, to keep the prisoner until he can attend to it. This detainer will be justifiable. 1 *Hale*. 585.

The detention of the prisoner must be reasonable. Three days has been so considered. 2 *Haw.* 119.

The examination of the prisoner should not be upon oath. 1 *Hale*. 585.

If the prisoner confesses the matter, it is advisable to have him subscribe his name to it. *Dalt.* c. 164.

The voluntary confession of a party examined may be given in evidence against him, but not against others. 1 *Hale*. 585. See title *Evidence*.

Information of those, &c.] Or others, whom the justice may call before him to testify. *Dalt.* c. 164. 1 *Hale*. 586.

And this information must be upon oath. *Dalt.* c. 164. 1 *Hale*. 586.

Within two days, &c.] If not reduced to writing within that time it is too late. It cannot be done after. The justice, however, may sign it at any time before the trial, or before the proceeding becomes a record of the court.

So much as shall be material, &c.] The justice should certify and return all the facts and evidence in the case, whether for or against the prisoner. *Dalt.* c. 165.

Bind by recognizance, &c.] The justice may commit such as refuse to be recognized. *Dalt.* c. 164. 1 *Hale*. 586. The parties grieved ought to be bound, not only to give evidence, but to prefer a bill of indictment against the prisoner. *Dalt.* c. 164. 1 *Hale*. 586.

The form of an examination.

County of } THE examination of O. O. late of laborer, taken before
 ss. } J. P. Esq. one of the justices of the peace, in and for the said
 county [or before us and two of, &c.] this day of in the year of
 our Lord The said O. O. being charged before me [or us] by P. R. of
 yeoman, with feloniously stealing, taking, and carrying away, out of the dwell-
 ing house of the said P. R. at on the day of one silver pint pot of
 the value of 5 dollars, and nine pewter plates of the value of 2 dollars and 50
 cents, of the goods and chattels of him, the said P. R. : he, the said O. O. upon
 his examination now taken before me [or us, as the case is] in pursuance of the
 statute in that behalf made and provided, saith, [or confesseth, or denieth]
 That, &c.

Taken before me [or us] J. P.

The form of the information.

County of ss.
 The information of P. R. of yeoman, taken upon oath before me, &c.
 As before.

The form of a recognizance to prosecute and give evidence.

County of } **B**E it remembered, that on the day of in the year of
 ss. } our Lord P. R. of in the said county, yeoman, came
 before me, J. P. Esq. one of the justices assigned to keep the peace in and for
 the said county, and acknowledged himself to owe to the people of this state
 the sum of of good and lawful money of the said state, to be made and lev-
 ied of his goods and chattels, lands and tenements, to the use of the said peo-
 ple, if the said P. R. shall fail in the condition under [*or if it be endorsed, within*]
 written. Acknowledged before me, J. P.

Whereas one O. O. late of labourer, was this day brought before the jus-
 tice above [*or if it be indorsed, within*] mentioned, by the above [*or within*].
 bounden P. R. and was by him charged with the feloniously stealing, taking
 and leading away [*or if it is for stealing cattle, sheep, &c. say, driving away*] at
 in the county aforesaid, one gelding, of a bay colour, of the value of
 of the goods and chattels of him, the said P. R. whereupon he, the said O. O.
 was committed by the said justice to the common gaol at

The condition of the above [*or within*] written recognizance is therefore
 such, that if he, the said P. R. do and shall, at the next general sessions of the
 peace [*or gaol delivery, as the case is*] to be holden in and for the said county,
 prefer, or cause to be preferred, one bill of indictment of the said felony, against
 the said O. O. and shall then and there also give evidence concerning the same,
 as well to the jurors that shall then inquire of the said felony, as also to them
 that shall pass upon the trial of the said O. O. then the said recognizance shall
 be void, or otherwise stand and remain in full force and effect.

The form of a warrant for a witness.

County of ss. To any Constable of
WHEREAS oath hath been made before me, J. P. Esquire, one of the jus-
 tices of the peace in and for the said county, by P. R. of that he, the
 said P. R. was lately robbed at and that he hath good cause to believe that
 W. W. of is a material witness to prove by whom the said robbery was
 committed: These are therefore to require you to cause the said W. W. forth-
 with to come before me, to give such information and evidence as he knoweth
 concerning the said offence, that such further proceeding may be had therein
 as to the law doth appertain. Given under my hand and seal at in the said
 county, the day of

[For forms of commitments, see title COMMITMENT.]

EXECUTION—See *Reprieve, Pardon, and Execution*.

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 tak-
 ing of money by an officer, by colour of his office, either when none
 at all is due, or not so much is due, or when it is not yet due. I
Haw. 170.

And by statute, for the prevention and punishment of extortion, it
 is enacted, *That no judge, justice, sheriff, or other officer whatso-
 ever, ministerial or judicial, shall receive or take any fee or reward,
 to do his office, but such as shall be allowed by the laws of this state:*

and if any doth, he shall restore to the party grieved, double damages. 1 R. L. 111.

And further, If any judge, justice, sheriff, or other officer aforesaid, hath received or taken, or shall receive or take, by colour of his office, any fee or reward whatsoever, not allowed by the laws of this state, for doing his office, and be thereof convicted, either at the suit of the party grieved, in any court of record, or at the suit of the people of this state, in the supreme court, or before justices of gaol delivery, or before justices assigned to hear and determine, or in any court of general sessions of the peace, he shall be punished by fine or imprisonment, or both, according to the discretion of the court in which such conviction shall be had. 1 R. L. 111.

And also by the statute concerning sheriffs, it is enacted, That no sheriffs or other officers, by colour of their office, shall, directly or indirectly, ask, demand, or receive for any service or act to be by them performed, in pursuance of any duty of their office, any greater or more fees than are allowed by law, on pain of forfeiting, for every such offence, to the party grieved, his treble damages, to be recovered with costs of suit, and also the sum of 250 dollars; the one moiety thereof to the people of this state, and the other moiety to the party who shall sue for the same; to be recovered with costs of suit, in any court of record having cognizance thereof, by action of debt, or by information. 1 R. L. 422.

By the words *sheriffs or other officers*, is to be understood escheators, coroners, bailiffs, gaolers, and other inferior officers of the people, whose offices do any way concern the administration or execution of justice, or the common good of the citizen, or for the service of the people. 2 Inst. 210.

An indictment against an attorney for extorting more than his legal fees, must specify how much he received on his own account, and how much for the officers and members of the court. *The people vs. Rust*. 1 Caine's Rep. 133.

It seems that an officer who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion, for without such a premium it would be impossible, in many cases, to have the laws executed with vigour and success. 2 Inst. 210. 3 Inst. 149. 1 Haw. c. 68. § 4.

At common law, extortion is severely punishable at the suit of the people, by fine and imprisonment; and also by a removal from the office in the execution whereof it was committed. 1 Haw. c. 68. § 5: Co. Lit. 368. b.

And this offence may be inquired of before justices of the peace, by an indictment at sessions. 1 Str. 75. 3 Inst. 149.

But the indictment or information must state the fact particularly, and also the time when the offence was committed. 1 Str. 73. 4 Mod. 101. 103.

But although it be omitted to be stated for what the thing extorted was taken, yet it is good after verdict, and in general the court will oblige the party to demur to a defective indictment for extortion: Sid. 91. 5 Mod. 13.

He who assists is equally guilty, for there are no accessaries in extortion. 1 Str. 73.

Indictment for extorting money of a person apprehended to let the party go.

THE jurors for the people of the state of New-York, upon their oath present, that A. C. late of the town of in the county of yeoman, on the day of in the year of our Lord then being one of the constables of the said town, in the county aforesaid, did take and arrest one N. L. spinster, by colour of a certain warrant, commonly called a bench-warrant, which he, the said A. C. then and there had, to apprehend the said N. L. to answer to a certain trespass and assault, whereof the said N. L. then stood indicted, as the said A. C. then and there alleged and pretended, and the said A. C. her, the said N. L. then and there had in his custody, and that the said A. C. afterwards, to wit, on the day and year, at the town aforesaid, unlawfully, corruptly, deceitfully, and extorsively, for wicked gain-sake, and contrary to the duty of his office, did extort, receive, and take of the said N. L. the sum of lawful money of the state of New-York, for discharging the said N. L. out of the custody of him, the said A. C. without conveying her before any justice of the peace for the said county, to answer to the said trespass and assault, whereof she was supposed to stand indicted as aforesaid, in contempt of the said people and their laws, to the evil example of all others in the like case offending, and against the peace of the said people and their dignity.

FELONY, MISPRISION OF FELONY, AND THEFT-BOTE.

FELONY, in the general acceptation of the English law, is, according to *Blackstone*, an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which, capital or other punishment may be superadded, according to the degree of guilt. 1 *Black. Com.* 95.

Hence it follows, that although, by our statutes (except in cases of treason and murder) capital punishments are generally dispensed with, for first offences, and forfeiture of estates abolished; yet the term felony has so far become technical, as to be retained and made use of in our laws, in the same descriptive sense as formerly, designating the crime, and not the punishment.

All offences, therefore, which were by the common law capital, are in some degree or other felony; and some which were not punished with death; as *suicide*, where the party is already dead; *homicide* by chance-medley, or in self-defence; and *petty larceny* or pilfering; all which are (strictly speaking) felonies, as they subjected the committers of them to forfeitures. 4 *Black. Com.* 94, 95.

It is enacted, "That in all cases of conviction for larceny, which may hereafter be had and made, the same shall be adjudged petit larceny, unless the goods so stolen shall be of the value of more than twenty-five dollars." 4 vol. *L. N. F. b.* 315.

Hence it seems, that offences of this description are denominated *petit larceny*, in contra-distinction to other felonies, and in the legal acceptation of the word, are thus to be considered.

But a breach of prison by a person in gaol, on a charge of felony, is itself a felony above the degree of *petit larceny*. 3 *John. Rep.* 449.

So also is it felony in one who attempts to escape by breaking gaol, in consequence of which a prisoner, confined for felony, makes his escape. 12 *John. Rep.* 339.

It is the mind that makes the taking of another's goods to be felony, or a bare trespass only; and the ordinary discovery of a felonious intent is, when the party doth it clandestinely, or being charged with the fact, denies it; but this is by no means the only criterion of criminality, for in cases that may amount to larceny, 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. 1 *Hale*, 509. 4 *Black. Com.* 232.

We shall not attempt to enumerate the particular offences which may be comprehended under the word felony, but refer the consideration of the several kinds of felonies to their respective titles; as for instance, *Homicide, Robbery, Burglary, Larceny, Rape, Counterfeiting, Forgery*, and many others.

Other matters collaterally relating to this subject, and which occur in the prosecution of felons, either in the progress towards their conviction, or subsequent thereto, are treated of under the several titles of *Hue and Cry, Arrest, Examination, Bail, Commitment, Habeas Corpus, Arraignment, Indictment, Confession, Mute, Jurors, Evidence, Judgment, Attainder, Stolen Goods, State-Prison, Pardon, Reprieve, and Execution*.

So that nothing is left for this place, but to take notice of some circumstances common to all felonies.

1. By statute, felons having means thereto, shall bear their own charges for conveying them to gaol, and of those who are appointed to guard them, and shall guard them thither; to be levied by distress, by warrant of a justice. 1 *R. L.* (1813.) 497.

2. Persons injured or aggrieved by any felony committed, may have their action against the felon, in like manner as if the offence had not been felonious; and in no case shall the right of the party injured be merged in the felony, or in any manner affected thereby. 1 *R. L.* (1813.) 499.

3. Foreign pleas, by persons arraigned upon indictments of felony, shall be forthwith tried before the same justices, before whom such person shall be arraigned, and by the same jurors of the same county that shall try the felony, without any further delay in whatsoever county or place the matter of the same pleas be alleged. 1 *R. L.* (1813.) 496.

4. It is not necessary to ask a prisoner, on his arraignment for felony, how he will be tried, nor to charge the jury to inquire whether he fled or not, or what goods or chattels, lands, and tenements the prisoner at any time had. 1 *R. L.* (1813.) 495.

5. The justices of the supreme court may send felons, brought or removed into the supreme court, and the indictments against them, to be tried in the county where the felony was committed. 1 *R. L.* (1813.) 496.

II. Misprision of felony.

Misprision of felony is taken for a concealment of felony, or a procuring of the concealment thereof, whether it be felony by the common law or statute. 1 *Haw. c. 59. § 2.*

And it is said, that silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision: for that a man is bound to discover the crime of another to a magistrate, with all possible expedition. 1 *H. H. 351. 448. 533. 2 H. H. 75. 2 Haw. c. 12.*

It is also said, that a misprision is contained in every felony whatsoever, and that one who is guilty of felony, may be proceeded against for a misprision only. 1 *Haw. c. 20. § 1.*

For this offence any common person is punishable by fine and imprisonment at common law. 3 *Inst. 173.*

And by statute, if a sheriff, coroner, constable, or marshall, shall conceal, or procure to be concealed, any felony, he shall be punished by fine and imprisonment, according to the discretion of any court having cognizance of the offence. 1 *R. L. (1813:) 149.*

III. Theftbote.

Theftbote is where one not only knows of a felony, but takes his goods again, or other amends not to prosecute. 1 *Haw. c. 59. § 5.*

This is frequently called compounding of felony, and formerly was held to make a man accessory. 4 *Black. Com. 134.*

But at this day it is punishable only with fine and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. 1 *Haw. c. 59. § 6.*

However, the bare taking of one's own goods again, which have been stolen, is no offence at all, unless some favor be shewn to the thief. 1 *Haw. c. 59. § 7.*

The form of an information against a person for felony.

County of } ss. } **B**E it remembered, that this day of in the year of our Lord P. R. of in the county of yeoman, in his proper person, comes before me, J. P. Esq. one of the justices of the peace, in and for the said county, and upon oath makes complaint, that on the day of last past, divers goods and chattels of him, the said P. R. of the value of that is to say, [here enumerate the articles stolen] were feloniously stolen, taken and carried away from and out of the dwelling-house of the said P. R. situate at aforesaid, in the said county, and that he hath just and reasonable cause to suspect, and doth suspect, that O. O. late of laborer, feloniously did steal, take and carry away the same; or the said P. R. upon his oath aforesaid, doth depose and say, [here set forth the circumstances of the larceny, and the cause of suspicion, that it may appear to be reasonable.] And thereupon he, the said P. R. prayeth that justice may be done in the premises. P. R.
Before me, J. P.

The form of a warrant for felony.

County of ss. To any Constable of
WHEREAS P. R. of in the county of yeoman, hath this day made complaint upon oath before me, J. P. Esq. one of the justices of the peace

in and for the said county, that on the day of last past, divers goods and chattels of him, the said P. R. of the value of that is to say [here set forth the articles stolen] were feloniously stolen, taken and carried away from and out of the dwelling-house of him, the said P. R. situate at aforesaid, in the said county, and that he hath just and reasonable cause to suspect, and doth suspect, that O. O. late of laborer, feloniously did steal, take and carry away the same: These are therefore, in the name of the people of the state of New-York, to command you forthwith to apprehend him, the said O. O. and to bring him before me, to answer unto the matters contained in the said complaint and information, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, the day of in the year

FENCE VIEWERS, AND FENCES.

- I. *Fence viewers how and when chosen.*
- II. *Oath of office, neglect or refusal to serve, and penalty for such neglect or refusal.*
- III. *Fences, and duty of Fence viewers in relation to them.*

I. *Fence viewers how and when chosen.*

The statute, (2 *N. R. L.* 125. § 1. directs, "That the freeholders and inhabitants of the several towns in this state, who are qualified by law to vote at town meetings, shall assemble together and hold town meetings in their respective towns, on the *first Tuesday in April* in every year, and then and there choose (among other officers) so many FENCE VIEWERS, being inhabitants of the same town, as to the freeholders and inhabitants of said town so met, or the major part of them, shall seem necessary and convenient.

In case such fence viewers shall refuse to serve, die, or remove out of the city or town, before the next annual election, and the city or town shall not choose others in their stead, within 15 days after such refusal, death or removal, then it shall be the duty of any *three* of the justices of the peace of the county, residing in or near such city or town to nominate, and, by warrant under their hands and seals, to appoint others in their stead. 2 *N. R. L.* 127.

This appointment is a judicial act, for the justices must first determine and adjudge that there is a vacancy in the office, and that the town neglected to fill it up. It is not traversable in a collateral action. But the appointment must be made by *three justices*: for if two justices only should appoint them, it would then be a case in which no jurisdiction existed, and the appointment would be null and void. 8 *John. Rep.* 71.

II. *Oath of office, &c.*

I A. B. do solemnly and sincerely promise and swear, (or affirm) that I will, in all things, to the best of my knowledge and ability, faithfully, and impartially, execute and perform the trust reposed in me as a fence viewer in the town (or city) of in the county of

The above oath is to be taken and subscribed before a justice of the peace, who must certify, without fee or reward, the day and year

when the said oath was taken. The person so taking the oath must deliver the same, together with the certificate, within *eight days* thereafter, to the town clerk. 2 *N. R. L.* 128.

Neglect or refusal, &c. If any fence viewer, of any town, shall not take and subscribe such oath as aforesaid, and transmit or deliver the same to the town clerk within the said *eight days*, such neglect shall be deemed a refusal to serve. 2 *N. R. L.* 129.

Penalty, &c. If any fence viewer shall neglect or refuse to take upon him the said office, or shall proceed in the execution thereof, before taking and subscribing the oath as aforesaid, he shall forfeit and pay the sum of 12 dollars and 50 cents, to be recovered with costs before any justice of the peace, by action of debt. 2 *N. R. L.* 130.

III. *Fences, and duty of fence viewers in relation to them.*

1. The freeholders and inhabitants of each of the towns in this state are authorized, at the annual town meeting, or at any other town meeting held for that purpose, to make such prudential rules and regulations as the majority of them, having a right to vote, shall judge necessary and convenient, (among other things) for making, maintaining and amending their partition and circular fences for their lands, gardens, orchards and meadows, &c. and for ascertaining and limiting the fees of the fence viewers respectively, and to impose penalties on the offenders against such rules and regulations, not exceeding 12 dollars and 50 cents for each offence. 2 *N. R. L.* 131.

These rules and regulations are to be recorded by the town clerk, in a book kept for the purpose, and shall remain in full force until the same shall be revoked or altered, or new ones made. *Ib.*

2. When the lands or meadows of any two or more persons shall join each other, each of them shall make and maintain a just proportion of the *division fence* between them, except such persons shall choose to let their lands and meadows lay vacant and open. 2 *N. R. L.* 133.

3. And in case any disputes shall arise concerning the part or proportion of the fence to be made and maintained by either party, the same shall be settled by the fence viewers of such place where such lands or meadows shall be situated, or any two of them, whose decision shall be conclusive. *Ib.*

The existence of a dispute about a partition fence is sufficient to enable the fence viewers to interpose. 4 *John. Rep.* 414.

4. And if any person shall neglect or refuse to make and maintain his or her part or portion of such fence, or shall permit the same to be out of repair, every such person shall be liable to, and shall pay, all such damages as shall accrue to his or her neighbors, thereby to be appraised and ascertained by the fence viewers of the same place, or any two of them, not interested therein, and to be recovered with costs in any court having cognizance of the same. 1 *N. L.* 133.

5. And in case the party so neglecting or refusing, shall continue such neglect or refusal, for the space of *one month* after notice and request to make or repair such fence, then and in every such case, it

shall be lawful for the party injured thereby, to make or repair all the said fence at the expense of the party so neglecting or refusing, to be recovered with costs of suit in any court having cognizance of the same. *Ib.*

In an action to recover the defendant's proportion of the expenses of putting up a partition fence, if no dispute had existed, a decision of the fence viewers need not be shewn. 9 *John. Rep.* 136.

And the costs and expenses of repairing, in such case, are not to be settled by the fence viewers. *Ib.*

And with respect to notice, it has been decided, that *parol* proof of a written notice is sufficient. *Ib.*

6. By the 19th section, 2 *N. R. L.* 134. in relation to the *distress of beasts damage feasant*, it is made the duty of the fence viewers, upon receiving notice of the distress, "immediately thereupon to go to the place where such damage shall be committed, and view the damage done, and appraise, ascertain, and certify, under their hands, the amount thereof, with their fees for the same, and if any dispute shall arise concerning the sufficiency of the fence, it shall be determined by the same fence viewers, whose decision shall be conclusive."

If a person impound beasts taken damage feasant, before the fence viewers have ascertained the damages, he will be liable to an action of trespass by the owner. 13 *John. Rep.* 477. 3 *P.* 10 *John. Rep.* 253.

7. The common council of the respective cities of New-York, Hudson, &c. are authorized to make such rules and regulations for making, amending, and maintaining the fences in the said cities respectively, as well partition fences as others, as they shall judge proper and convenient. 2 *N. R. L.* 134.

FISHERY.

BY the common law of England, subjects have a right to fish in all navigable rivers. 1 *Salk.* 357.

So the right of fishing in the sea, or an arm of the sea, is common to all subjects or citizens. *Willes's Rep.* 269.

But in private rivers, not navigable, the right belongs to the lords of the soil on each side. 4 *Burrow.* 2162.

A subject [citizen] may have a prescriptive right to a several fishery in an arm of the sea. 4 *Term Rep.* 439.

And *prima facie* every person has a right to take fish found upon the sea-shore, between high and low water mark. 2 *Bos. & Pull.* 472.

Towns adjoining on, or extending across a navigable river, may own the soil on the flats, or even of the channel, if a grant has been obtained of the government; but the property in the fish, and also in the tide waters, is in the public. 4 *Mass.* 140.

A right of fishing in any water, gives no right or power over the land, as building a hut, &c. 2 *John. Rep.* 357.

Fishing on a Sunday, in the channel of Hudson river, between the city of New-York and Bakers's falls, is a violation of the act of 1797. 58. *ch.* 146. § 4. 4 *vol. L. N. Y.* 149.

FORCIBLE ENTRY AND DETAINER.

FORCE, in a legal sense, imports something of a legal nature, and is in the eye of the law odious, being always attended with some breach of the peace.

It hath been said, and it seems to have been the opinion of ancient writers, that at 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. 1 *Haw. c. 64. § 1.*

And *Hawkins* says, 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 through 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. *Ib.*

However, at this day it seems to be agreed, that all forcible entries and detainers are offences at the common law, for which an indictment will lie; but then it seems that the indictment must not only contain the common technical words *with force and arms*, but also set forth the degree of force, so that it may appear upon the face of the indictment to be an indictable offence, and not a bare trespass, for which the party has a civil remedy. 3 *Bur.* 1698. 1753.

These offences are also restrained by statute, under which it seems best to proceed.

The statute and the law arising thereon, will be considered in the following order:

- I. *What shall be deemed a forcible entry.*
- II. *What shall be deemed a forcible detainer.*
- III. *In respect of what kind of possession a person may be guilty of a forcible entry and detainer.*
- IV. *What persons may be guilty of a forcible entry or detainer.*
- V. *How such offences are punishable: and herein of restitution to the possession.*

I. *What shall be deemed a forcible entry.*

By statute, no person shall make entry into any lands, tenements, or other possessions, but in cases where entry is given by law, and in such case, not with strong hand, nor with multitude of people, but only in peaceable and easy manner. 1 *N. R. L.* 96. § 1.

Although this statute renders the forcible entry of a person having right, indictable, yet it does not extend so far as to authorize an action of trespass against him. 4 *John. Rep.* 150.

A purchaser of land under a *fi. fa.* cannot enter upon the land, being in the actual possession of another, without rendering himself liable to an indictment. 13 *John. Rep.* 340.

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 church or market, or for such like purpose, without doing any act, which, either expressly or impliedly, amounts to a claim of such lands, he cannot be said to make an entry thereunto, within the meaning of the statute. 1 *Haw. c. 64. § 20.*

Yet, in such case, if he make an actual claim, with any circumstances of force or terror, he seems to be guilty of a forcible entry, whether his adversary actually quit his possession or not. 1 *Haw. c. 64. § 21.*

Also all those who accompany a man when he makes a forcible entry, shall be adjudged to enter with him, within the intent of these laws, whether they actually came upon the lands or not. 1 *Haw. c. 64. § 22.*

So also shall those, 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. c. 64. § 23.*

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 the statute, because he no way concurred in, or promoted the force. 1 *Haw. c. 64. § 24.*

To make the entry forcible, it seems clear, that it ought to be accompanied with some circumstances of actual violence or terror, and therefore, an entry which hath no other force than such as is implied by the law in every trespass whatsoever, is not within the statute. 1 *Haw. c. 64. § 25.*

An entry may be said to be forcible, not only in respect of a violence actually done to the person of a man, as by beating of him if he refuse to relinquish his possession, but also in respect of any other violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house. 1 *Haw. c. 64. § 26.*

So also, every entry made with force, that is, either with apparent violence offered to the person of any other, or furnished with weapons or company which may offer fear, though 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 though he do not put the party out of his possession, yet this is a forcible entry. *Dalt. c. 126. § 2.*

But if the entry were peaceable, and they cut or take away any other man's corn, grass, wood, or other goods, without apparent violence or force, though such acts are accounted a disseisin with force, yet they are not punishable as forcible entries. *Dalt. c. 126. § 2.*

Yet if he enter peaceably, and there, by force or violence, cut or take away any corn, grass, or wood, or forcibly or wrongfully carry away any other goods there being; this seemeth to be a forcible entry, punishable by the statute. *Dalt. c. 126. § 2. Cromp. 76.*

But it seems, according to the opinion of *Hawkins*, that an entry is not forcible by the bare drawing up a latch, or putting back the bolt of a door, there being no appearance therein, of its being done by a strong hand or multitude of people; and it hath been holden,

that an entry into a house through a window, or by opening the door with a key, is not forcible. 1 *Haw. c. 64. § 26.*

And wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession of the tenements which he claims, 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 servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening 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 against those who shall make any resistance; as if one say, that he will keep his possession in spite of all men, or the like. 1 *Haw. c. 64. § 27.*

But it seemeth that no entry shall be adjudged forcible, from any threatening 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. c. 64. § 23.*

And if by fair means, a man (whose entry is lawful) shall persuade, or entice them which are within the house, to come out and then he enter peaceably, without multitude, offensive weapons, or other violence; this entry is justifiable. *Dalt. c. 126. § 3.*

So it is, if he shall enter peaceably, and then, by gentle persuasions, send them out that are within the house, and after shut the door and keep them out; this is justifiable, so that afterwards he holdeth it not forcibly, nor useth violence or threatening speeches. *Dalt. c. 126. § 3.*

So it is, if he take a man, being out of his house, and then put or send into the house a servant, or other person, in a peaceable manner, and do hold away the other by imprisonment; this is no forcible entry nor detainer; but a false imprisonment, punishable by action only. *Dalt. c. 126. § 4.*

So also, it shall not be deemed a forcible entry, if a man enter an house to apprehend a felon, or like offender, or if an officer with force enter to do execution; or by warrant of law. *Com. Dig. Tit. Forc. Ent. (a. 3.)*

And it shall not not be deemed a forcible entry, if there be not an actual entry. *Dalt. c. 126. § 3. Com. Dig. Tit. Forc. Ent. (a. 3.)*

II. What shall be deemed a forcible detainer.

A forcible detainer is a violent act of resistance by strong hand of men, weaponed with arms, or other account of fear in the same place or elsewhere, by which the lawful entry of the justices, or any other, is barred or hindered. *Dalt. c. 126. § 4.*

A forcible detainer must be understood of a forcible withholding the possession of lands or tenements, and not of the person of a man. *Ib.*

And it seems that the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; from whence it seems to follow, that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do

some bodily hurt to the former possessor, if he dare return, shall be deemed guilty of a forcible detainer, though no attempt be made to re-enter. 1 *Haw. c. 64. § 30.*

And it hath been said, that he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall attempt to make an entry into it; and that he also is in like manner guilty, who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in. *Ib.*

But it is said, that a man ought not to be adjudged guilty of this offence for barely refusing to go out of a house, and continuing therein in despite of another. *Ib.*

III. *In respect of what kind of possessions a person may be guilty of a forcible entry and detainer.*

It seems clear, that one may come within the danger of the statute by a force done to ecclesiastical possessions, as churches, vicarage houses, and the like, as much as if the same were done to any temporal inheritance. 1 *Haw. c. 64. § 31.*

Also it hath been holden for a general rule, that one may be indicted for a forcible entry into any such incorporeal hereditament, for which a writ of entry will lie, either by common law or statute; but there seems to be no good authority that such an indictment will lie for a common or office. *Ib.*

But it seems agreed, that an indictment of forcible detainer lies against any one, whether he be the tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of any of the above mentioned possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, or the like. *Ib.*

Yet it seems clear, that no one can come within the danger of the statute, by a violence offered to another with respect to a way, or such like easement, which is no possession. *Ib.*

And by the statute to prevent forcible entries and detainers, it is enacted, that this act shall extend as well to tenants for years and guardians, as to such as have estates of freehold. 1 *N. R. L. 98. § 6.*

IV. *What persons may be guilty of a forcible entry and detainer.*

It is clear that the offence may be committed by a single person, as well as by twenty. *Lambarde, 143.*

And if it 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.*

But it seems clear that no one can come within the intention of the statute by any force whatsoever, done by him in entering into a tenement, whereof he himself had the sole and lawful possession, both at and before the time of such entry; as by breaking open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it. 1 *Haw. c. 64. § 32.*

A joint tenant, or tenant in common, may offend against the purport of the statute, either by forcibly ejecting, or forcibly holding out his companions ; for though the entry of such a tenant be lawful, so that he cannot in any case be punished in an action of trespass at the common law ; yet the lawfulness of his entry no way excuses his violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, or the like, is good. 1 *Haw. c. 64. § 33. Cas. B. R. Temp. Hard. 174.*

Also if a man has been in possession of land for never so long a time, by a defeasible title, and another who hath a right of entry thereunto, make a claim, and yet such wrongful possessor still continue his occupation *with force and arms*, he is punishable for a forcible entry and detainer, because all the estate, whereof he was seized before such claim was wholly defeated by it, and his continuance in possession afterwards amounted, in the judgment of law, to a new entry. 1 *Haw. c. 64. § 34.*

And it is said, that an infant, or *feme covert*, may be guilty within the intention of the statute, in respect of such actual violence as shall be done by them in person, but not in respect of what shall be done by others at their command ; because all such commands of theirs are void. 1 *Haw. c. 64. § 35.*

Also it is said, that a *feme covert* may be imprisoned for such offence, but that an infant ought not, because he shall not be subject to corporal punishment, by force of the general words of any statute wherein he is not expressly named. *Id.*

V. How such offences are punishable ; and herein concerning a restitution to the possession.

1. By statute, *If any person be disseised or ejected, or put out of any lands or tenements in forcible manner, or be put out peaceably, and after holden out with strong hand, or after such entry any feoffment or discontinuance in any wise thereof be made to defraud and take away the right of the possessor, the party grieved shall have assize of novel disseisin, or a writ of trespass against the offender, and if he recover, and it be found by due course of law that the defendant entered with force, or after his entry did hold with force, the plaintiff shall recover his treble damages, with costs of suit.* 1 *N. R. L. 98. § 7.*

And these treble damages he shall recover as well for the mesne, or intermediate occupation, as for the first entry : and the plaintiff shall thereupon have a writ of restitution to restore him to his former estate. *Co. Lit. 257. Dalt. c. 129.*

But in an action of forcible entry, grounded on this statute, if the defendant makes 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 suit of the [people] 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. c. 64. § 3.*

2. The party grieved, if he will lose the benefit of his treble damages, may be aided and have the assistance of the justices at the gen-

eral sessions by way of indictment, 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*, 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. c. 64. § 36.*

And the tenement in which the force was made, must be described with convenient certainty, and must set forth that the defendant actually entered, and ousted the party grieved, and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 *Haw. 147. 149, 150.*

But if a man's wife, children, or servants, do continue in the house or upon the land, he is not ousted of his possession; but his cattle being upon the ground, do not preserve his possession. *Dalt. c. 132.*

An indictment for forcible entry was quashed, for not setting forth, that the party was seized 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.*

The indictment must state a seizen in the prosecutor, at the time of the entry. 1 *Caine's Rep. 125.* 2 *Caine's Rep. 98.* 13 *John. Rep. 340.*

It must state an entry either peaceable or forcible, by the defendant; for if it state that he detains only, it will be insufficient. 1 *Caine's Rep. 125.*

And stating that the prosecutor was *disseized*, necessarily implies a previous seizen. 4 *Dallas, 212.*

But in an indictment for forcible entry and detainer, the defendant cannot give title in evidence to prevent restitution. 1 *Dallas, 68.*

The wife of the prosecutor in an indictment for forcible entry and detainer, may be a witness to prove the force, but only the force. *Ib.*

3. Also the party grieved, for a more speedy remedy, may complain to any one justice, or to a mayor, recorder or alderman within their liberties. 1 *N. R. L. 96. § 1. & 8.*

By the statute, *where any person doth make forcible entry into lands, tenements or other possessions, or them hold forcibly, after complaint thereof made to the justices of the peace, or to one of them, by the party grieved; the same justices or justice so warned, within a convenient time, shall go to the place where the force is made, taking the power of the county, if need be, and remove such force, if any there be; and at the costs of the party grieved, cause the act to be executed.* 1 *N. R. L. 96.*

And if they find any that hold such place forcibly after such entry made, the same justices or justice shall record the force, and impose a fine, not exceeding five pounds, upon every of the offenders, and cause them to be taken and put into the next gaol of the same county, there to abide convict, by the record of the same justices or justice, until they shall have respectively paid such fine to the people. *Ib.*

And all the people of the county, as well sheriffs as others, shall be attendant upon the justices to go and assist them to arrest such offenders, upon pain of fine and imprisonment. *Ib.*

After the complaint thereof.] These words do not enforce any necessity of such complaint; for it is holden, that the justice may and ought to proceed, upon any information or knowledge thereof whatsoever; though no complaint at all be brought unto him by any party grieved thereby. *Lamb. 147.*

To the justices of the peace or to one of them.] Although one justice has jurisdiction in these cases, yet it may, according to circumstances, be a proper exercise of his discretion, to call in to his aid one or more other justices.

And go to the place where such force is made.] And *Dalton* says, that if the doors be shut, and they within the house shall deny the justice to enter, he may break open the house to remove the force. *Dalt. c. 44. § 2.*

Where the justice proceeds under the second section of the act, it is not necessary that he should previously go in person, and record the force; because the remedy afforded by this section, is distinct from the remedy afforded by the former section. *4 John. Rep. 198.*

And if they find any that hold such place forcibly.] If the 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, except upon the inquisition, (which they may take in the manner hereafter mentioned) a force be found. *Crompt. 73. Dalt. c. 44. § 2.*

But he ought to arrest and remove all such offenders whom he shall see or find continuing the force. *Dalt. c. 44.*

They shall be taken and put in the next gaol.] It is said, that the justice hath no power to commit the offender to gaol, unless he do it immediately upon his own view of the fact. *1 Haw. c. 64. § 8.*

There to abide convict, by the record of the justices or justice.] Therefore one justice of the peace may make a record of such forcible holding, and such record is not traversable, because in making thereof, he acts not ministerially, but as a judge. *Ib.*

The record of conviction, under the first section of the act, is not traversable; and if it shew that the justice had jurisdiction, and proceeded regularly, it is conclusive, and a bar to any suit brought against the justice. *8 John. Rep. 44.*

And this record, being made out of sessions by a particular justice, may be kept by him, or he may make it indented, and certify the one part into the supreme court, or leave it with the clerk of the sessions, and the other part he may keep himself. *Dalt. c. 44. § 4.*

Until they shall have respectively paid such fine.] And the justices may assess the fine for this offence, either before the time of conviction, or after. *1 Haw. c. 64. § 8. 2 Ld. Raym. 1515.*

For they are not bound to do it upon the spot, but may take a reasonable time to consider of the fine. *2 Ld. Raym. 1515.*

They must also assess the fine upon every offender severally, and not upon them jointly; and the justice ought to escheat the same fine into the exchequer, and from thence the sheriff may be commanded to levy it for the [people's] use. *Dalt. c. 44. § 6.*

But upon payment of the fine to the sheriff, or upon sureties found (by recognizance) for the payment thereof, it seems that the justice

may deliver the offenders out of prison again at his pleasure. *Dalt.* c. 44. § 6.

A fine is required to be imposed against the party, only where there is a conviction, upon view, according to the first section of the act. 4 *John. Rep.* 198.

4. What has before been set forth regards only the removal of the force; and it is to be observed, that the justices have no power to award restitution upon their own view; nor unless the same force be found by the inquiry of a jury: concerning which it is enacted, that *whether the person making such entries be present, or departed before the coming of the same justices or justice, the same justices or justice, in some good town in the same county, next to the tenements so entered, or in some other convenient place, according to their discretion, shall have power to inquire, by the people of the same county, as well of them that make such forcible entries into lands and tenements, as of them which the same hold with force.* 1 *N. R. L.* 96.

And when the justices make such inquiries, they or one of them shall make a precept, to be directed to the sheriff, commanding him, in the name of the people of the state of New-York, to cause to come before them at a certain time and place therein to be specified, not less than two days from the time of issuing thereof, 24 good and lawful men of the same county, duly qualified to serve as jurors in such county on trials in the supreme court, to inquire of such entries: and shall, at the time of making such precept, cause a notice in writing, of the issuing, and of the time and place of the return thereof, to be affixed up in some public and suitable place upon the lands or tenements so entered or holden, or delivered to the party against whom the complaint is made, if such party be on the premises. And the sheriff shall return issues upon every of the jurors at the day of the return of the first precept 20s. and at every day after, the double. 1 *N. R. L.* 97. § 8.

The following is the qualification of the jurors, spoken of above:

"Each of whom (except in the city of New-York) shall have in his own name or right, or in trust for him, or in his wife's right, a freehold in lands, messuages, or tenements, or of rents in fee or for life, of the value of 150 dollars, free from all reprises, debts, demands, or incumbrances whatsoever. 1 *N. R. L.* 327.

If twenty-four persons are sworn on the grand jury, the conviction will be bad. So it will be bad where the defendant, voluntarily appearing, was not permitted to traverse the indictment. 2 *Caine's Rep.* 98.

And if it be found before them (the justices) that any doth contrary to this statute, then the said justices or justice shall cause the lands and tenements, so entered or holden, to be re seized, and put the party so put out, in full possession. And if any person, after such entry, make a feoffment or other discontinuance to any person to have maintenance, or to defraud the possessor of his recovery, if after in assize or other action by inquiry, the same feoffments and discontinuances be duly proved to be made for maintenance, such feoffments or discontinuances shall be void. 1 *N. R. L.* 96.

No other justices but those before whom the inquest was found can award restitution, unless the indictment be removed into the supreme court; and then that court, by the plenitude of its power, can restore. 1 *Haw. c.* 64. § 1.

It is said that a justice may execute his award of restitution in his own proper person, or make his precept to the sheriff to do it. 1 *Haw. c. 64. § 49.*

If the defendant tender a traverse of the force, the justice ought not to make the restitution until it be tried. 1 *Haw. c. 64. § 8. 58.*

But this traverse must be tendered in writing, and not by a bare denial of the fact in words. 1 *Haw. c. 64. § 58.*

And in this case the statute provides, that "if any person who shall be indicted before such justices or justice, upon this act, shall immediately traverse such indictment, then the same justices or justice, shall make a precept to be directed to the sheriff, commanding him, in the name of the people of the state of New-York, to cause to come before such justices or justice, at a certain day, not less than four, nor more than eight days from the time of issuing the precept, and at a certain place therein to be specified, twelve good and lawful men of the same county, qualified as aforesaid, to try the same traverse, and the sheriff shall return issues upon every of them, in manner aforesaid. And if any sheriff be slack, and make no execution duly of such precept, to make such inquiries, or try such traverse, he shall forfeit 20*l.* for every default to the party grieved." 1 *N. R. L. 97. § 3.*

So also, "no restitution upon any indictment of forcible entry, or holding with force, shall be made, if the person indicted, or his ancestors, or those whose estate he has in such lands and tenements, have had the occupation, or been in quiet possession three whole years together next before the day of such indictment found, and his estate therein not ended, which the party indicted may allege for stay of restitution, and restitution to stay until that be tried, if the party complaining shall deny or traverse the same: and the justices or justice shall proceed to try the same in the manner herein before directed." 1 *N. R. L. 97. § 4.*

"If the allegation or traverse, made by the person indicted, be tried against him before such justices or justice, or in the supreme court, in case the proceedings are removed there, before such trial, restitution shall be awarded by the justices or justice, before whom the same shall be tried, or by the supreme court, in the same manner as if no plea or traverse had been made by the person indicted; and the person so convicted, shall pay such costs and damages to the party complaining, as shall be assessed by the justices or justice, before whom the same is tried, or by the supreme court, if the proceedings shall be removed there before such trial as aforesaid; to be recovered and levied, as costs and damages upon judgments in other actions are recovered." 1 *N. R. L. 98. § 5.*

It hath been said, that the justice ought not to award restitution in any case in the defendant's absence, without calling him 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 first having an opportunity of defending himself. 1 *Haw. c. 64. § 60.*

And if a jury find part of an indictment to be true, and part of it to be false; yet if they find so much to be true as will warrant a restitution, the justice ought to restore the party, as where on a forcible entry, and forcible detainer, the jury find that the entry was peaceable, and the detainer only was forcible. 1 *Haw. c. 64. § 59.*

The same justices who have awarded a restitution on an indictment, or any two of them, may afterwards supersede such restitution, upon an insufficiency in the indictment appearing unto them; but no other justices or court whatsoever have such power, except the justices of the supreme court. 1 *Haw. c. 64. § 61.*

For it is certain that a *certiorari* is a supersedeas to such restitution, and wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its test. 1 *Haw. c. 64. § 62.*

Also it is certain that the justices of the [supreme court] having a general superintendant power over all proceedings whatsoever of justices of peace, may set aside any such restitution, if it shall appear to them to have been either awarded or executed against law; as when the indictment whereon it is grounded being removed before them appears to be insufficient, and thereupon is quashed; or the defendant traverses the force and gets a verdict in the supreme court; or whenever it sufficiently appears that the justices of peace have been irregular in their proceedings, as by refusing to try a traverse of force, tendered by the defendant, or the like. 1 *Haw. c. 64 § 63.*

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.*

The granting a *certiorari*, to remove a forcible entry and detainer, is a matter of course. 6 *John. Rep. 334.*

And where a *certiorari* has been issued to return the proceedings, and the justice dies before any return is made, the supreme court will hear and decide the case, on motion and affidavits. 10 *John. Rep. 304.*

The supreme court, on awarding restitution, is not required by statute to impose a fine. 9 *John. Rep. 147.*

Nor is bail required where the indictment is removed, by *certiorari*, from before a justice. 2 *John. Cas. 27.*

And where the indictment is not traversed, or no traverse is returned, costs are not allowed. 1 *Caine's Rep. 125.*

The form of an indictment for a forcible entry and detainer upon the statute. *Cro. Cir. Comp.*

County of } ss. } THE jurors for the people of the state of New-York, upon their oaths present, That E. C. late of the town of in the county of gentleman, on the day of in the year of our Lord was possessed of a certain messuage, with the appurtenances, situate, lying and being in the town of aforesaid, in the county aforesaid, for a certain term of years, then and still to come, and unexpired, and being so possessed thereof, one A. O. late of the said town of in the said county, yeoman, afterwards, to wit, on the said day of in the year aforesaid, into the said messuage, with the appurtenances aforesaid, in the town and county aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said E. C. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there, with force and arms, and with strong hand, unlawfully did expel and put out, and the said E. C. from the possession thereof, so as aforesaid, with force and arms, and with strong hand, unlawfully expelled and put out, the said A. O. him, the said E. C. from the aforesaid day of in the year aforesaid, until the day of the taking this inquisition.

from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously, then and there did keep out, and still doth keep out, to the great damage of the said E. C. and against the form of the statute in that case made and provided.^a

Record of a forcible detainer upon view.

County of } **B**E it remembered, That on the day of in the year of
ss. } our Lord at in the county aforesaid, E. C. complains
to us, E. B.—P. B. and W. P. Esquires, three of the justices, assigned to keep
the peace in the said county, and also to hear and determine divers felonies,
trespasses and other misdemeanors, in the said county committed, that A. O.
late of B. O. late of and C. O. late of into the messuage of him, the said
E. C. being the mansion-house of him the said E. C. situate within the town of
aforesaid, did enter, and him the said E. C. of the messuage aforesaid,
whereof the same E. C. at the time of the entry aforesaid, was seized as of the
freehold of him, the said E. C. for the term of his life, unlawfully ejected,
expelled and amoved, and the said messuage from him, the said E. C. unlawfully,
with strong hand and armed power, do yet hold and from him detain, against the
form of the statute in such case made and provided; whereupon the same E.
C. then, to wit, on the said day of at the town of aforesaid, prayeth
of us, so as aforesaid, being justices, to him 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 E. B.—
P. B. and W. P. Esquires, justices aforesaid, to the messuage aforesaid, per-
sonally have come, and do then and there find and see the aforesaid A. O.—B.
O. and C. O. 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 he, the said E. C. so as is aforesaid,
hath unto us complained: Therefore, it is considered [and adjudged] by us,
the aforesaid justices, that the aforesaid A. O.—B. O. and C. O. of the detain-
ing 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 A. O.—B. O. and C. O. do set and impose severally a
fine of of good and lawful money of the state of New-York, to be paid by
them, severally, to the people of the said state, for the said offences; and do
cause them, and every of them, then and there to be arrested; and the same
A. O.—B. O. and C. O. 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 the said people of the said state, at in the county
of aforesaid, being the next gaol to the messuage aforesaid, there to abide
respectively, until they shall have paid their fines respectively, to the said peo-
ple of the said state, for their respective offences aforesaid. Concerning which
the premises aforesaid, we do make this our record. In witness whereof, we,
the aforesaid E. B.—P. B. and W. P. Esquires, the justices aforesaid, to this
record, our hands and seals do set, at the town of aforesaid, in the county
aforesaid, on the day of in the year of our Lord one thousand eight hun-
dred and

Mittimus for forcible detainer.

County of } **J**. P. Esq. one of the justices assigned to keep the peace with-
ss. } 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 at in the said county, and to his deputy and de-
puties 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, the
said justice, did immediately go to the dwelling-house of the said A. I. at
aforesaid, in the said county, and there found, upon my own view, A. O. late of
laborer, B. O. late of the same place, weaver, and C. O. late of yeo-

man, forcibly, with strong hand and armed power, holding the said house against the peace of the people of this state, 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 my own view, testimony and record, commanding you, in the name of the said people of the said state, to receive them in your said gaol, and there safely to keep them, and every of them respectively, until they shall have respectively paid the several sums of _____ of good and lawful money of New-York aforesaid, to the said people of the said state, which I have set and imposed upon every of them separately, for a fine for their said trespasses respectively. Herein fail not on the pain that will thereon ensue. Given at _____ aforesaid, in the county aforesaid, under my hand and seal, the _____ day of _____ in the year of our Lord _____

Precept to the sheriff to return a jury.

County of } **J.** P. Esquire, one of the justices assigned to keep the peace
ss. } 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: In the name of the people of this state, I command you, that you cause to come before me, at _____ in the county aforesaid, on the _____ day of _____ next ensuing, twenty-four good and lawful men of your county, each of whom shall have in his own name or right, or in trust for him or his wife's right, a freehold in lands, messuages or tenements, or of rents in fee or for life, of the value of one hundred and fifty dollars, free from all reprises, debts, demands or incumbrances whatsoever, to inquire upon their oaths for the said people of the said state, of a certain entry made with strong hand (as it is said) into the messuage of one A. I. at _____ aforesaid, in the county aforesaid against the form of the statute in such case made and provided. And you are to return upon every of the jurors by you in this behalf impannelled, 20s of issues at the aforesaid day. And have you then and there the names of the jurors and this precept. And this you shall in no wise omit, upon the pain that will thereon ensue. Witness the said J. P. at _____ in the county aforesaid, the _____ day of _____ in the year of our Lord _____

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 A. I. yeoman, at _____ in this county; you shall spare no one for favor or affection, nor grieve any one for hatred or ill-will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you. So help you God.

The oath that A. F. your foreman hath taken on his part, you and every of you shall truly observe and keep on your part. So help you God.

The inquisition.

County of } **A**n inquisition for the people of this state, indented and taken
ss. } at _____ in the said county, the _____ day of _____ in the year of our Lord _____ by the oaths of T. J.—S. J. &c. [here set forth the names of the jurors] good and lawful men of the said county, before J. P. Esquire, one of the justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed who say upon their oath aforesaid, that A. I. of _____ aforesaid, yeoman, long since lawfully, and peaceably was seized in his demesne as of fee [if it is leasehold, 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 _____ labourer, B. O. late of _____ weaver, and C. O. late of the same place, yeoman, and other persons 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 dis-

seised, 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 the people of this state, and against the form of the statute in such case made and provided. In witness whereof the said T. J.—S. J. &c. [the jurors] have to this inquisition set their hands and seals the day, year and place first above mentioned.

Precept to the sheriff to make restitution.

County of } J. P. Esq. one of the justices of the people of this state, assign-
ed 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, J. P. the justice aforesaid, at in the county
aforesaid, on this present day of in the year of our Lord upon the
oath of (the jurors) and by virtue of the statute made and provided in cases
of forcible entry and detainer, it is found, that A. O. late of laborer, B. O.
late of weaver, and C. O. late of the same place, 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 the aforesaid messuage with the appurtenan-
ces, 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: There-
fore, in the name of the said people of this state, I charge and command you,
that taking with you the power of the county (if it be needful) you go to the
said messuage and other the premises, and the same, with the appurtenances,
you cause to be re-seised, 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 statute. And this you shall in no wise
omit, under the pain that will thereon ensue. Given under my hand and seal,
at in the said county, the day of in the year of our Lord one thou-
sand eight hundred and

*For form of a certiorari to remove an indictment of forcible en-
try and detainer, see title CERTIORARI.*

FOREIGN LAWS.

IT seems to be agreed, that the *lex loci contractus* (or the laws of the country where a contract is made) governs, as to the nature, construction, and legal effect of the contract. 1 *John. Cas.* 139. 2 *John. Rep.* 235. 3 *John. Rep.* 263. 4 *Dallas*, 327 419.

But not as to the mode of enforcing it. This depends upon the peculiar forms and regulations of the tribunal, in which the injured party chooses to seek redress. *Ib.*

Where a contract is made abroad, grounded on foreign laws, the court here will receive evidence of that foreign law, and give judgment accordingly, on an action brought here, in due form, upon the contract. *Loft.* 154.

But foreign laws are to be proved as facts, if a question arise as to their existence. 1 *Consp.* 161. 2 *Cranch*, 187. 236.

And if foreign laws are not proved to be in writing, as public edicts, they may be proved by parol. 6 *Cranch*, 274.

Foreign statutes cannot be proved by parol. But the common law of a foreign country may be proved by intelligent and respectable witnesses. 1 *John. Rep.* 385.

The revenue laws of foreign states are not regarded by our courts. 1 *John. Rep.* 95.

Penal laws are strictly local; and the penal laws of foreign countries can effect nothing more than they can reach. 1 *Hen. Black.* 123.

FORFEITURES ON PENAL STATUTES.

IN all cases where a penalty of forfeiture is given by statute, without saying to whom it shall lie, whether it be for a nonfeasance or misfeasance, it belongs to the [people.] 3 *Lev.* 290. 4 *Comyn's Dig.* 237. 2 *Str.* 828.

But where a statute giveth a forfeiture or penalty against him who wrongfully detaineth or dispossesseth another of his duty or interest, he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at common law. *Co. Lit.* 159. 8 *Lev.* 290.

And as every statute made against an injury, mischief, or grievance, does impliedly give a remedy; the party injured, if no remedy be expressly given, may have an action upon the statute. 2 *Inst.* 55. 74. 10 *Rep.* 75.

So if a statute command or prohibit a thing for the advantage of a particular person, that person shall have an action upon the statute; to recover satisfaction, for an injury done him contrary thereto. 6 *Mod.* 26.

And if a penalty be given by a statute, but no action for the recovery thereof be given, an action of debt will lie for the penalty; and it can be recovered in no other manner. *Poph.* 175. 1 *Str.* 50.

And if a thing be prohibited by a statute under a certain penalty, and the penalty, or any part of it, be given to him who will sue for the same, any person may bring an action or information for the penalty. 2 *Haw. c.* 26. § 17.

If an action upon a statute giving a penalty, be brought against several defendants, for one and the same offence, only one penalty can be recovered. *Cro. Eliz.* 480.

For when an offence created or made penal by statute is in its nature single, and cannot be severed, then, the penalty shall be only single; because, though several persons join in committing it, it still constitutes but one offence. *Coep.* 612.

Thus the offence created by statute of impounding a distress in a wrong place, though done by many, is still but one act of impounding; it cannot be severed, it is but one offence, and therefore shall be satisfied by one forfeiture. *Cro. Eliz.* 480. *Coep.* 612.

And the same rule applies to summary convictions before justices. 4 *Term. Rep.* 809.

But when the offence is in its nature several, and when every per-

son concerned may be separately guilty of it, then each offender is separately liable to the penalty ; because the crime of each is distinct from the other, and each is punishable for his own crime. *Cowp.* 612.

So also if the words of the act are, that the offenders *shall respectively forfeit*, it makes the forfeiture several upon each offender. *Salk.* 182.

When a statute commands or prohibits a thing of *public concern*, the person guilty of disobedience to that statute, besides being answerable in an action to the party injured, is likewise liable to be indicted for the disobedience. *Cro. Eliz.* 635. 2 *Inst.* 131 163.

But if the thing commanded or prohibited be of a *private nature*, and can only be prejudicial to one or two persons, as if it be to repair the banks of a certain river, for want of having done which the ground of a certain person hath been overflowed, no indictment lies ; the remedy being by an action on the case. 2 *Sid.* 209.

So also, if a statute, although it extend to all persons, do chiefly concern disputes of a private nature, as those relating to distresses between lords and tenants, an offence against the statute is not indictable. 1 *Mod.* 71, 288.

But if a statute inflict a new punishment upon the person guilty of an offence, which was before punishable at common law, the offence is still punishable as it was before the making of the statute. *Fitzg.* 66. 10 *Mod.* 337.

But where a statute creates a new offence, giving a penalty, and directs how it shall be recovered, as if it appoint a particular method of proceeding against an offender, by commitment or information, without mentioning an indictment, no indictment lies ; and *the offence cannot be punished in any other way than that directed by the statute*, because as other methods of proceeding are expressly mentioned, that by indictment seems to be impliedly excluded. *Cro. Jac.* 643. *Show.* 398, 9.

But when the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, then either method may be pursued, and the prosecutor is at liberty to proceed either at common law or by the statute ; because then the particular remedy is *cumulative*, and does not exclude the common law punishment. 2 *Bur.* 803.

And it has been holden, that if a statute creating a new offence and inflicting a penalty, provides that the penalty may be recovered by action, bill, plaint, information, *or otherwise*, an indictment will lie upon the statute. 2 *Haw. c.* 25. § 4.

If an act inflicts a penalty for doing a thing upon a particular day, the committing of like offences upon the same day incurs but one penalty ; thus, a person can commit but one offence on the same day by *exercising his ordinary calling on a Sunday*, contrary to the stat. *Car.* 2. c. 7. And if a justice of the peace proceed to convict him in *more than one penalty for the same day*, it is an excess of jurisdiction for which an action will lie, before the convictions are quashed. *Cowp.* 640.

Forfeitures are to be construed favorably. *Cowp.* 585. 588.

A penalty must be expressly created and imposed ; it cannot be raised by implication. 2 *John. Rep.* 379.

He who first commences a *qui tam* action, has a right to the penalty; and which cannot be divested by any subsequent suit, brought by another. 6 *John. Rep.* 101.

It is not necessary for the plaintiff to negative the exception or proviso, in a penal statute, where it forms no part of his title; but is merely matter of excuse for the defendant. 1 *John. Rep.* 513.

The plaintiff, in a *qui tam* suit, may discontinue it, upon the defendant's paying the costs. For neither the discontinuance, nor the payment of costs is compromising or compounding a popular action, within the meaning of the act to redress disorders by common informers. 2 *John. Rep.* 405.

Where a statute inflicts a penalty, the one moiety of which, when recovered, is to be paid into the treasury of the state, and the other moiety to go to the benefit of the person prosecuting the same to effect; a payment of the penalty to the person prosecuting will discharge the defendant, though the plaintiff has no right to discharge the judgment, or compound with the defendant, without leave of court. 10 *John. Rep.* 118.

FORESTALLING.

THE offence of *forestalling* is described to be the buying or contracting for any merchandize or victuals coming in the way to market; or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; any of which practices make the market dearer to the fair trader. 4 *Black. Com.* 160.

Hawkins says, that all endeavors whatsoever, to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumors, 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 at common law, and that all such offences anciently came under the general notion of forestalling, which includes all kinds of offences of this nature. 1 *Haw. c.* 80. § 1.

By the common law of England, 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.* 169.

And the bare engrossing 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 engrosser 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.

In a late case in England, the common law was fully considered, and Lord Keynon therein states : That if a man goes to market for the purposes of making purchases in the fair course of dealing, with a view of afterwards dispersing the commodities which he collects in proportion to the wants and convenience of the public, whatever profits accrue to him from the transaction, no blame is imputable to him ; on the contrary, if the whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity ; to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price, it is an offence of the greatest magnitude. 1 *East. R.* 157.

Indictment for forestalling.

County of } **T**HE jurors for the people of this state, upon their oath, pre-
ss. } sent, that A. O. late of the town of in the county afore-
said, yeoman, on the day of in the year of our Lord at the town
aforesaid, in the county aforesaid, did buy and cause to be bought of and from
one A. S. twenty oxen, for the sum of 500 dollars, lawful money of the state of
New-York, as he, the said A. S. then and there was driving the said twenty
oxen to the market of to sell the said twenty oxen in the said market, and
before the said twenty oxen were brought into the said market, where the
same should be sold : in contempt of the laws of the said state ; to the evil ex-
ample of all others in the like case offending, against the peace of the people of
this state and their dignity.

FORFEITURE.

BY statute, no conviction or attainder of any person for any offence specified in the act entitled, "*An act declaring the punishment of certain crimes,*" (which includes all cases of murder and felony) except treason, shall work a forfeiture of goods, chattels, lands, tenements or hereditaments, or of any right therein ; and all forfeitures to the people in nature of deodands ; and in cases of suicide, and where any person shall flee from justice, are abolished. 1 *N. R. L.* 495.

[Of forfeiture in case of treason, see title TREASON.]

FORGERY.

FORGERY is an offence at common law, and also by statute. 1 *Haw. c.* 70.

Forgery at common law, is an offence in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature ; as a parish register, or any deed or will, punishable by fine and imprisonment, and such other corporal punishment as the court, in discretion, shall think proper. 1 *Haw. c.* 70. § 1.

But no indictment will lie before justices of peace for forgery at the common law; for their power is created by statute within time of memory, and they have no other authority than what is thereby given them; and the general words of their commissions must be understood of such crimes, as they have power over by the statutes, which created or enlarged their power. 1 *Salk.* 406.

And *Hawkins* apprehends, that the principal reason of this resolution was, that inasmuch as the chief end of the institution of the office, 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. c.* 8. § 38.

Nevertheless, it seems, 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. *Barlow*, 244.

It will, however, be proper, for the better understanding this subject, to consider the law relating thereto, in the following order :

- I. *In what cases the making and altering of a writing shall be said to be so far false and fraudulent, as to amount to forgery.*
 - II. *Of what value or kind the writing must be, to constitute the offence of forgery at common law.*
 - III. *What offences of this kind are made forgery by statute.*
- I. *In what cases the making and altering of a writing shall be said to be so far false and fraudulent, as to amount to forgery.*

Forgery doth not so much consist in the counterfeiting a man's hand and seal, which may often be done innocently, but in the endeavoring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. 1 *Haw. c.* 70. § 2. 2 *Roll. Abr.* 28, 29. 11 *Co.* 27.

Hence it is held to be forgery for a man to make a feoffment of certain lands to J. S. and afterwards to make a deed of feoffment of the same lands to J. D. of a date prior to that of the feoffment to J. S.; for herein he falsifies the date in order to avoid his own feoffment, by making a second conveyance, which at the time he had no power to make. 1 *Haw. c.* 70. § 2.

So it is, if by his first conveyance he had passed only an equitable interest, for good consideration, and had afterwards, by such a subsequent antedated conveyance, endeavored to avoid it. *Moor*, 665.

Also it is forgery for a man who is ordered to draw a will for a sick person, to insert legacies in it of his own head. 1 *Haw. c. 70.* § 2.

So when one finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal, and fixes it under the release. 1 *Haw. c. 70.* § 2.

Also the making any fraudulent alteration of the form of a true deed, in a material part of it, is forgery; as by making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale*, by changing the letter D into an S, or by making a bond for 500*l.* expressed in figures, seem to have been made for 5000*l.* by adding a new cypher. 1 *Haw. c. 70.* § 2.

But as the fraud and intention to deceive by imposing upon the world, that as the act of another which he never consented to, are the chief ingredients which constitute the offence; so it hath been held, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery; because the law looks upon this as the other's own sealing, as done by his approbation and command. *Pult. 46.* 1 *Haw. c. 70.* § 3.

So if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing an instrument in another's name, without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. *Moor, 760.*

Also he cannot be punished as guilty of forgery, who raseth the word *pounds* out of a bond made to himself, and putteth in *marks*, because there is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet it seems to be forgery, if by the circumstances of the case it should any way appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person; and it is holden, that such an alteration, even without these circumstances, is a misdemeanor, though it be not forgery. *Noy. 99. Moor, 655. Salk. 375.* 1 *Haw. c. 70.* § 4.

It seems to be no ways 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. B. as being 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. c. 70.* § 7. 1 *Sid. 142.*

II. Of what nature or kind the hand writing must be, to constitute the offence of forgery at common law.

It is clearly agreed, that at common law the counterfeiting a matter of record is forgery; for since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. 1 *Haw. c. 70.* § 8.

Also, it is agreed to be forgery, to counterfeit any other authentic matter of a public nature, as a privy seal, or license from the court of exchequer to compound a debt, or the like. 1 *Haw. c. 70. § 9.*

It is also unquestionable, that a man may be in like manner guilty of forgery at common law, by forging a deed; and according to the reasoning of *Hawkins*, by forging a will. 1 *Haw. c. 70. § 10.*

As to other writings of an inferior nature, as private letters, or the like, it seems to have been laid down in some of the old books, that the counterfeiting thereof is not properly forgery, therefore, says *Wood (b. S. c. 3.)* it may in some cases be more safe to prosecute such offenders for a misdemeanor; but from the determination of the court in the case of the *King v. Ward, H. 7. 13. G. 1*: the distinction taken by *Hawkins*, seems to be well founded; viz. that the counterfeiting of such writings is a crime, if another receive a prejudice thereby, or if there is but a possibility of prejudice arising therefrom. 3 *Inst. 169.* 1 *Haw. c. 70. § 11.* 2 *Ld. Raym. 1461.* 2 *Str. 747.*

For though the ancient books enumerate certain forgeries at common law, yet none of them say, that the forgeries there particularly specified, were the only forgeries punishable by the common law; and the forging a writing not sealed, may be equally mischievous with the forging a deed, and therefore as to the nature of the offence, it must fall under the same reason; and where there is the same reason, the law is the same. 2 *Ld. Raym. 1464, 5.*

III. What offences of this kind are made forgery by statute.

By the first section of the statute "to prevent forgery and counterfeiting," any person who shall alter, forge or counterfeit any record, charter, deed or writing sealed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, or any note or specialty for the payment of money, and expressed to be payable in goods, wares or merchandizes, indorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt, either for money or goods, or 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, whether such order purports to be the order of the owner of the goods or money specified therein, or of some person who claims an interest in the same, or of any other person with intention to defraud any person, or body politic or corporate whatsoever; or shall utter or publish the same to be true, knowing them to be altered, forged or counterfeited, then every person being thereof convicted according to the due course of law, shall be deemed guilty of felony. 1 *N. R. L. 404.*

Deed or writing sealed.] It is required under the stat. of 5 *El. c. 14*, that the deed, charter, or writing must be sealed, that is, have some impression on the wax; for wax without an impression, is not a seal. 3 *Inst. 169.*

A seal is an impression upon wax or wafer, or some other tenacious substance capable of being impressed. 5 *John. R. 239.*

Knowing the same to be forged.] So it has been held, that he who is truly informed by another that a deed is forged, is in danger of the statute, if he afterwards publish the same to be true, notwithstanding the words of that statute are, *If any one shall publish, &c. knowing the same to be false or forged.* 3 *Inst.* 171. 1 *H. H.* 685.

But according to *Hale*, though such a relation may be an evidence of fact to prove his knowledge; yet it is not conclusive, for possibly there may be circumstances of fact that might make the person relating it, or his relation not credible; so that the knowing must, upon the whole matter, be left to the jury, upon the circumstances of the case. 1 *H. H.* 685.

On an indictment for forging a check, drawn in the name of a co-partnership firm, on a banking company, held not necessary to set out the names of all the parties who composed the copartnership or banking company. 1 *John. Rep.* 320.

All that the prisoner can require is that the nature of his crime and the name of his accuser be set forth with sufficient certainty. 1 *John. Rep.* 321.

It is necessary, upon every prosecution upon the statute, to pursue the very words of it, for which cause it hath been resolved, that an indictment thereon (5 *El. c.* 14.) setting forth the forgery of a writing, indented, without adding that it was sealed, is insufficient. 1 *Haw. c.* 70. § 26.

Under our old statute it was decided that where, by the terms of a forged will, compliance or refusal was *optional*, and the application was rather to the *favour* than the *justice* of the person on whom it was drawn, it was not within the statute. 2 *Johns. Ca.* 343.

The revised laws however have been amended so as to embrace such cases. Our present statute extends to all orders purporting to be made without, as well as with, right or authority, in the person whose name may be forged. 2 *Johns. Ca.* 344.

Forging a paper in the following words: "Mr. S. Sir, let the bearer trade 13 dollars and 25 cts, and you will oblige yours, &c." held to be forging an order for the delivery of goods within the statute. 5 *John. Rep.* 236.

So also forging a paper as follows: "due J. F. one dollar on settlement this day," is forging a note for payment of money. 5 *John. Rep.* 257.

In an indictment for forging a bill of exchange, or bank bill, it is unnecessary to insert the marks, letters or figures used in the margin of the bill for ornament or the more easy detection of forgery, as they form no part of the bill. 3 *Johns. Ca.* 299.

By the second section of the statute, if any person shall forge or counterfeit, or aid or assist in forging or counterfeiting any certificate or endorsement of the acknowledgement or proof of any deed or writing, made by any officer or other person duly authorized to make such certificate or endorsement, by any law of this state, or of the recording of any deed, or writing, made by the secretary of state, or clerk of any county, duly authorized by law to make such certificate or endorsement, or shall knowingly alter any such forged or counterfeited certificate or acknowledgment as true, he shall be guilty of felony. 1 *N. R. L.* 405.

If any person shall counterfeit, or procure or aid in counterfeiting any certificate or public security issued by authority of this state for payment of money, or acknowledging the receipt of goods or money, or any bill of credit heretofore issued by such authority, or shall alter such certificate or bill of credit, so as to appear of a greater value, or shall alter or procure to be altered, or pass or offer to pass any such counterfeit certificate or bill of credit knowing it to be counterfeit, he shall be guilty of felony. *Ib.* § 3.

In all cases where such certificate or bill of credit is altered, it shall be presumed to have been altered from a less to a greater sum, and the burthen of proving it otherwise shall be on the defendant. *Ib.* § 4.

Counterfeiting any of the gold or silver coins now current or hereafter to be current; or passing or offering to pass them knowing them to be counterfeit, is felony. *Ib.* § 5.

The possession, or receiving of such coins from others with intention to pass them, with intention to defraud, knowing them counterfeit, is felony. *Ib.* § 6.

The selling or exchanging or offering to sell or exchange, or wittingly receiving any forged or counterfeited promissory note with intention to have the same passed, to defraud any person, body politic or corporate, is felony. *Ib.* § 7.

The making or procuring to be made any plate for forging or counterfeiting any promissory note for the payment of money is felony. *Ib.* § 8.

The possession of a counterfeit promissory note, for payment of money, with intention to pass the same, knowing it to be forged, and with intention to defraud, is felony. *Ib.* § 9.

Having in possession blank or unfinished notes, in the form of any incorporated bank notes of this or any of the United States, with intent to fill up and complete the same, in order to utter and pass them, to defraud, is felony. *Ib.* § 10.

So also the possession of plates, to counterfeit notes of the like kind, with intention to counterfeit, is felony. *Ib.* § 11.

[For punishment of this offence, see STATE-PRISON.]

FUGITIVES FROM JUSTICE.

BY the constitution of the United States (art. 4. § 2.) it is provided that "a person charged in any state, with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

And further, that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party, to whom such service or labor may be due."

Hence it has been decided that, if a person commits a crime in one state, and flies into another, where he is taken, he is merely a fugitive from justice, and cannot be proceeded against in the state in which he is taken. 2 *Caine's Rep.* 213. 2 *John. Rep.* 477. 479.

GAMING.

IT seems that by the common law, the playing at cards, dice, and the like, when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any offence whatsoever. 2 *Vent.* 175. 5 *Mod.* 13. *Salk.* 100. *Pl.* 10.

But although gaming is not *malum in se*, and may be lawful, yet if a person be guilty of cheating, as by playing with false cards, dice, and the like, he may be indicted for it at common law, and fined and imprisoned, according to the circumstances of the case, and heinousness of the offence. 2 *Bac. Abr.* 620.

Also, all common gaming-houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood. 1 *Haw. c.* 75. § 6.

And by statute, it is made lawful for any two or more justices to cause to come before them, every person whom they shall have just cause to suspect to have no visible estate, profession or calling to maintain themselves by, but who do for the most part support themselves by gaming; and if such person shall not make it appear to the justice, that the principal part of his expenses are not maintained by gaming, he shall give sufficient sureties for his good behaviour for twelve months, or be committed to gaol, there to remain until he find such sureties. 1 *N. R. L.* 152. § 9.

And if he shall, during the time he is so bound, at any one time or sitting, play or bet any money, or other thing, exceeding the sum or value of 2 dollars and 50 cents, it shall be deemed a breach of his good behavior, and a forfeiture of the recognizance. *Ibid.* § 10.

And every person who shall at any time or sitting, by playing at any game, or by betting on the sides or hands of such as do play at any game, lose in the whole the sum of twenty-five dollars, in money or any other thing to such amount, and shall pay or deliver the same or any part thereof, it shall be lawful for him, within three months next thereafter, to sue for and recover the money or value of the things so lost and paid and delivered, or any part thereof, from the winner, with costs of suit, by action of debt founded on this act, in any court of record having cognizance of the same. *Ib.* § 2.

And in such actions, it will be sufficient for the plaintiff to allege in his declaration, that the defendant is indebted to the plaintiff in the monies so lost and paid, or in the amount of the value of the things so lost and delivered, for so much money had and received by such defendant to the plaintiff's use, without setting forth the special matter. *Ib.*

And in case the person who shall lose as aforesaid, shall not within the time aforesaid *bona fide*, and without collusion, sue and prosecute with effect, for the money or other things so lost and paid or delivered, it shall be lawful for any person, by any such action, to sue for and recover the same, and treble the amount or value thereof, with costs of suit against the winner; the one moiety of such forfeiture, when recovered, to be paid to the overseers of the poor of the city or town where the offence was committed, and the other moiety to the person who will sue for the same. *Ib.*

Where an action *qui tam* is brought under the above section, a declaration for so much money had and received to the use of the plaintiff is not sufficient. That form is given to the losing party only. The statute gives no form of declaring where a common informer is plaintiff; and in an action founded on a statute, the plaintiff must state specially the cause of action arising under the statute. 4 *Johns. R.* 193.

The declaration in such case must also state that the party aggrieved neglected to sue within one year, in order to give the plaintiff a right of action. 7 *Johns. R.* 402.

The statute further provides, that the defendant shall be compellable to answer on oath, upon a bill in chancery, for discovering the money or other things so won at play. 1 *N. R. L.* 152. § 3.

But upon the discovery and repayment, or redelivery of the money or other things so to be discovered and repaid or redelivered, the person who shall so discover and repay or redeliver the same, shall be discharged from any further or other payment, forfeiture or penalty, incurred by the playing for, or winning such money or other thing, so discovered and repaid, or redelivered. *Ib.* § 4.

And all sureties for monies won by gaming, or for money lent for gaming, are declared void. *Ib.* § 1.

Under the English statute, of which this is a transcript, it has been decided that the statute only avoids *securities* for money lent to play with, and does not extend to cases of new loans without any security taken, but that such loans may be recovered. 1 *Esp. N. P. Rep.* 18.

And mortgages and conveyances of lands so given as securities, shall enure for the use and benefit of the representatives of the grantor, as if he were dead. 1 *N. R. L.* § 1.

And if any person by any fraud, or unlawful device, or ill-practice whatsoever, in playing at any game, or by bearing a share in the wagers, or adventures in or betting on the sides or hands of such as shall play as aforesaid, win or acquire to himself or to any other, any sum of money or other valuable thing whatsoever, or shall at any one time or setting, win of any one or more persons above the sum of 25 dollars, and be convicted of any of the said offences, upon indictment or information, he shall forfeit five times the value of the money or other things so won as aforesaid; and in case of such ill practice as aforesaid, the person so winning shall be deemed infamous, and shall be imprisoned for six calendar months; and such penalty may be recovered by any person who shall sue for the same, in manner aforesaid, to be appropriated as herein above directed. *Ib.* § 5.

And if any person shall win or lose at play or by betting, at any time, the sum or value of 25 dollars or upwards, or within the space

of twenty-four hours, the sum or value of 50 dollars, he shall be liable to be indicted for the offence at any time within one year; and being thereof convicted, shall be fined five times the value of the sum so lost or won; which fine, after such charges as the court shall judge reasonable to be allowed to the prosecutors and witnesses out of the same, shall be paid to the overseers of the poor of the town where the offence was committed, for the use of the poor thereof. *Ib.* § 6.

And if any person so offending, shall discover another, so that he be convicted, the person discovering shall be discharged from all penalties by reason of such offence, and if he has not been before convicted thereof, shall be an evidence to prove the same. *Ib.* § 7.

And no person, other than the parties in the cause, shall be incapacitated from being a witness, touching any offence against the act by reason of having played, betted or staked at any game prohibited by the act. *Ib.* § 8.

By the act to prevent horse racing and for other purposes, it is enacted, that all and every contract, for or on account of any gaming, by lot or chance, of any kind, or under any description, shall be void. And any person who may have paid any money or other thing, upon the issue of such game, may recover it back, in the same manner, as is provided by the act above considered. 1 *N. R. L.* 223.

Any person who shall raffle for any money, goods, or chattels, shall be liable to pay, for every offence, two dollars, to be recovered with costs before any court having cognizance thereof, and every person who shall set up money, goods or chattels to be raffled for, shall pay two dollars to the use of the poor of the town, and it is the duty of the overseers of the poor to prosecute therefor in their own names. *Ib.*

[See INNS AND TAVERNS.]

GAOL AND GAOLER.

- I. *By what authority gaols may be erected, how repaired, and to whom they belong.*
- II. *To what gaols prisoners are to be committed.*
- III. *Of using gaols as houses of correction.*
- IV. *Regulations of the statute for establishing a proper police within gaols.*
- V. *Concerning debtors.*
- VI. *Of the duty and power of sheriffs and other officers in receiving and keeping prisoners.*
- VII. *Of gaolers permitting escapes, and herein of gaol liberties.*

- I. *By what authority gaols may be erected, how repaired, and to whom they belong.*

GAOLS are of such universal concern to the public, that none can be erected by any less authority than by act of the legislature. 2 *Inst.* 795.

Chief justice Kent says that by the common law the sheriff might make his own house, or any other place a prison. *Latch.* 16. *Anon.* 6 *John. Rep.* 25.

By the 2d and 3d sections of "the act relative to gaols," the legislature have designated the gaols in the respective cities and counties in the state. 1 *N. R. L.* 427.

But the supervisors of every county, as often as shall be necessary, are to cause the court house and gaol in their county to be duly repaired, and for that purpose are to direct to be raised sufficient sums of money for such repairs, as contingent charges of the county, not exceeding 500 dollars in any one year, and shall also cause to be erected within the gaols of their respective counties, or otherwise, so many solitary cells as the court of Common Pleas shall direct, to be appropriated to the reception of convicts, who may be sentenced to punishment therein, to be also levied as the contingent charges of the county. 2 *N. R. L.* 140.

The sheriff has by statute, and so he had by common law, the custody of the gaols and prisons of the county, and the prisoners in the same, and he shall put in such keepers for whom he will answer. 1 *N. R. L.* 422. *Dalton. Sheriff.* p. 5. 6 *John. Rep.* 25.

All prisons or gaols belong to the [people] although an [individual] may have the keeping or custody of them. 2 *Inst.* 100.

II. To what gaols prisoners are to be committed.

The county gaol is the prison for breakers of the peace. 1 *Ld. Raym.* 136.

And 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 dangerously sick, that it would apparently hazard his life to send him to the gaol, or there be evident danger of a rescous. 1 *Haw. c.* 16. § 9.

By statute all convicts who are sentenced to imprisonment for a term less than three years, shall be confined in the gaol of the city or county in which they are sentenced. 1 *N. R. L.* 410.

If process is directed to a coroner against a sheriff, as it is absurd to commit the sheriff to the county gaol, of which he has the custody, and this case is unprovided for by the statute, the coroner must exercise the common law right of sheriffs, and make his own house or any other place a prison. 6 *John. Rep.* 22.

III. Of using gaols as houses of correction.

In counties where there is no bridewell, or house of correction, the common gaol shall be used and considered as a house of correction, for the purpose of confining disorderly persons. And the keepers of the respective gaols or such as they appoint, shall for the time being be keepers of such gaols as houses of correction. 1 *N. R. L.* 116.

IV. Regulations of statute for establishing a proper police within gaols.

1. It shall not be lawful to put or keep prisoners for debt, and felons together in one room, but they shall be kept separately in distinct rooms. 1 *N. R. L.* 425.

2. It shall not be lawful to keep male and female prisoners together, in the same prison rooms, except husband and wife. *Ib.*

3. It shall not be lawful to keep an inn or tavern in any building occupied as a gaol of any of the counties, except in the county of Genessee. 1 *N. R. L.* 433.

4. Sheriffs and gaolers are prohibited from giving or permitting to be given to any prisoners confined on *criminal process* any spirituous liquors, (unless by order in writing of the attending Physician in case of sickness) under penalty of 25 dollars and imprisonment not exceeding a month. *Ib.*

5. Officers having in their custody any person by virtue of any process or warrant whatsoever, are not to carry him to a tavern, or other public victualling or drinking house, without his consent, so as to charge him with any sum of money for drink or victuals, or other thing whatsoever, but what he shall call for of his own accord. 1 *N. R. L.* 418. § 16.

And such officer shall not directly or indirectly demand or receive any other or greater sum than what by law ought to be taken or demanded for such arrest, taking or waiting until such person shall have procured an appearance, found bail, agreed with his adversary, or be sent to gaol; nor take or exact any other reward or gratuity for so keeping such person out of gaol, than what he shall of his own accord voluntarily give; nor receive any other or greater sum for each night's lodging, or other expenses, than what is reasonable and fitting in such cases, or shall be so adjudged by the next justice of the peace, or at the general sessions; and shall not cause the said person to pay for any drink, victuals, or any other thing, than what he shall voluntarily and particularly call for. *Ib.* § 16.

And they shall permit a prisoner, at his own will and pleasure, to send for and have any beer, ale, victuals and other necessary food, when and from whom he pleases, and to have and use such bedding, linen and other things, as he shall think fit, without any detaining or paying for the same, or any part thereof; and shall not demand or receive any other or greater fees for his commitment, release or discharge, than shall be allowable by law, nor any thing for the chamber rent of such prisoner. *Ib.* § 16.

V. Concerning Debtors.

Debtors, in execution, shall be kept in close and secure custody, living at their own costs. 1 *N. R. L.* 418. § 19.

And all persons, either upon contempt or mesne process, or in execution, who shall be committed to any prison, shall be actually detained within such prison until they shall be from thence discharged by due course of law. *Ib.* § 21.

VI. Of the duty and power of sheriffs and other officers in receiving and keeping prisoners.

By statute, sheriffs and gaolers shall receive, without taking any thing therefor, and safely keep in prison, all felons taken by any constable or other officer; and shall not of their own authority let out of prison, on bail or otherwise, any person in their custody, by vir-

tue of any process for treason or felony, or upon condemnation, execution, or *capias utlagatum*, or committed by special order of any court or justices, upon pain of fine and imprisonment, and damages to the party grieved. 1 *N. R. L.* 418. § 12.

All sheriffs and gaolers are to receive into their respective gaols all prisoners who shall be committed by virtue of the process of the United States' courts, and retain them until discharged by due course of law, (the United States supporting those committed for offences,) and the gaoler is liable to the same penalties for escapes, &c. that he would be were such prisoners committed by process of the state courts. *Ib.* § 8.

A gaoler is considered as an officer relating to the administration of justice, and is so far under the protection of the law, that if a person barely threatens him for keeping a prisoner in safe custody, he may be indicted and fined, and imprisoned for it. 2 *Rel. Abr.* 76. 1 *Haw. c.* 21. § 14.

But imprisonment is in most cases only for safe custody, and not for punishment. *Co. Lit.* 260. *a.*

Therefore, a prisoner ought to be used with the utmost humanity. 4 *Black. Com.* 800.

And in regard to the great power gaolers and their officers have (and, while it is exercised with moderation, ought to have) over their prisoners, the law watcheth with a jealous eye over their conduct. *Fost. Cr. L.* 331.

And therefore, if a prisoner under their care dieth, whether by disease or accident, the coroner upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol, and there, upon view of the body, make inquisition into the cause of the death. *Fost. Cr. L.* 321. 1 *H. H.* 432. 2 *H. H.* 57.

And if the death was owing to cruel and oppressive usage on the part of the gaoler, or any officer of his, or, to speak in the language of the law, *to duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress. *Fost. Cr. L.* 322.

The instances of oppression, which may fall within the rule of duress of imprisonment, are as various as a heart, cruelly bent upon mischief, can invent. *Ib.*

But two cases on this subject, from their peculiar circumstances, require to be particularly mentioned.

1. A gaoler, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room; the second prisoner, who had not had this distemper, *of which the gaoler had notice*, caught this distemper, and died of it: this was held to be murder. 2 *Str.* 856.

2. Another straitly confined his prisoner in a low, damp, unwholesome room, without allowing him the common necessities of chamber-pot, &c. for keeping things sweet and clean about him: the prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was holden to be murder in the person guilty of this duress. 2 *Str.* 884. 2 *Ld. Raym.* 1578.

For although the law invests gaolers with all necessary powers for the interest of the commonwealth, they are not to behave with the least degree of wanton cruelty to their prisoners. *Old B. Sess.* 1784. *p.* 1177.

The common law also subjects gaolers to fine and imprisonment, as also to the forfeiture of their offices, for gross and palpable abuses in the execution of their offices, such as suffering prisoners to escape, barbarously misusing them, or the like. 9 Co. 50. Raym. 216. 2 Bac. Abr. 630.

And a gaoler, *in fact*, who takes upon him without any legal authority to keep prisoners, as also feme coverts and infants, are answerable for miscarriages. 2 Inst. 380. 8 Co. 44.

In the case of felony, it is lawful for the gaoler to hamper his prisoner with irons, to prevent his escape. 1 H. H. 601.

And it is said that a gaoler is no way punishable for keeping even a debtor in irons. 2 Haw. c. 22. § 32.

But it is observed by the editor of *Hale's History*, in a note, that this liberty, even in the case of a felon, (and much more in the case of a prisoner for debt) can only be intended, when the officer has just reason to fear an escape; as, when 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. 1 H. H. 601.

And in the dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement. 4 Black. Com. 300.

And if the gaoler shall imprison a man so straitly, by putting him in the stocks, or putting more irons upon him than are needful, or keepeth his victuals from him, whereby the prisoner becometh decrepit, lamed, or otherwise diseased, he shall have an action of the case against the gaoler. F. N. B. 93. h. Dalt. c. 170. § 13.

But gaolers and their officers are, in the just execution of their duty, under the same special protection that other ministers of justice are. And therefore, if, in the necessary discharge of their duty, they meet with resistance, whether from prisoners in *civil or criminal suits*, or from others in behalf of such prisoners, they are not obliged to retreat, as they can with safety, but may freely, and without retreating, repel force by force. Fost. Cr. L. 321.

And if the party so resisting happeneth to be killed, this, on the part of the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide. *Ib.*

On the other hand, if the gaoler, or his officer, or any person coming in aid of him, should fall in the conflict, this will amount to wilful murder in all persons joining in such resistance. *Ib.*

VII. Of Gaolers permitting escapes, and herein of gaol liberties.

By statute, if a sheriff or other officer shall suffer a debtor in execution to escape, he shall be answerable for the debt. 1 N. R. L. 418. § 19.

And if the keeper of a prison suffer a prisoner committed upon contempt or mesne process, or in execution, to go or be at large out

of his prison, except by a writ of *habeas corpus* or rule of court, it is an escape. *Ib.* § 21.

And if any sheriff or keeper of any prison shall take any sum of money, reward, or gratuity whatsoever, or any security for the same, to procure, assist, connive at, or permit any escape of any prisoner in his custody, and be thereof lawfully convicted, he shall forfeit 1250 dollars, and be forever after incapable of executing the said office. *Ib.* § 22.

And no retaking on fresh pursuit shall be given in evidence on a trial for an escape, unless specially pleaded and accompanied with an oath, that it was without the consent, privity or knowledge of the sheriff or keeper, against whom the action is brought; and if such affidavit shall afterwards appear to be false, the sheriff or keeper convicted thereof, shall forfeit 1250 dollars. *Ib.* § 23.

Gaolers wilfully suffering a person committed under the absconding debtor act, to escape, and being thereof convicted, by indictment or information, shall forfeit to the trustees in such case a sum equal to all the sum owing to the creditors of the absconding debtor, provided it does not exceed 2500 dollars. 1 *N. R. L.* 160. § 12.

[*See title ESCAPES.*]

By statute, the judges of the court of common pleas have power, not oftener than once in every year, to alter and appoint a spot of ground adjacent to the gaol of their respective counties, to be denominated the liberties thereof, to be designated by visible marks, and whose extent shall be entered on their minutes; which extent, except in the counties of Franklin, Clinton and Essex, shall not exceed 160 acres, to be laid out in a square, or parallelogram as near as may be. In Clinton, Franklin and Essex, the liberties to be designated as before, and not to extend in any direction more than half a mile from the court house, in each of said counties. 1 *N. R. L.* 428.

[GOOD BEHAVIOUR—*See SURETY, &c.*]

HABEAS CORPUS.

- I. *In what cases the writ of Habeas Corpus may be allowed, and in what not.*
- II. *When and by whom to be allowed.*
- III. *By whom prisoners, brought up on Habeas Corpus are to be bailed or discharged, &c. and in what cases.*
- IV. *Duty of sheriffs and other officers, and penalty for neglect, &c.*

- I. *In what cases the writ of Habeas Corpus may be allowed, and in what not.*

AS a general rule, every person, who is illegally imprisoned, is entitled to the benefit of this writ. In vacation, it is allowable, of

course, in all cases, except in those of prisoners convict, or in execution by legal process, or committed for treason or felony, plainly and specially expressed in the warrant of commitment. But in term time, its allowance rests in the sound discretion of the court, to which the application is made.

This writ is allowable to bring up a daughter from her father, on a letter from her stating, that her father used her severely. 1 *Ld. Raym.* 573.

Or, a man who is in the sheriff's custody, upon a *ne exeat regno*. *Ib.* 696.

Or, to take a child of ten years old, out of the custody of a guardian appointed by the spiritual court, and to deliver her to the person appointed by her father's will. 2 *L. Raym.* 1333. 1 *Stra.* 579.

So, this writ lies to bring up a defendant who has been taken upon an escape warrant, by one not an officer. 3 *Salk.* 149.

So, one in execution in the king's bench may be brought up to *Guildhall*, to give evidence by a habeas corpus *ad testificandum*. 2 *L. Raym.* 851.

But the court refused to allow a writ of habeas corpus to bring up a person, stated to be a soldier enlisted in the army of the *United States*. 1 *John. Cas.* 136.

Nor will the court allow this writ for prisoner at war, taken on board an enemy's privateer ship. 2 *Burr.* 765.

Nor will the court grant a habeas corpus *ad testificandum*, to bring up a prisoner of war. 2 *Doug.* 419, 420.

Nor for an alien enemy, prisoner of war, however ill used or deceived. 2 *Black.* 1324.

II. *When and by whom to be allowed.*

The statute provides, that if any person be imprisoned, in vacation time, he may (if not convict, or in execution by legal process, or committed for treason or felony, plainly and specially expressed in the warrant of commitment) apply in person, or by any one on his behalf, to the chancellor or any judge of the supreme court, for the privilege and allowance of this writ. 1 *N. R. L.* 355. § 3.

And it is made the duty of the chancellor or judge, to whom the application shall be made, upon view of a copy of the warrant of commitment, or upon oath, that such copy is denied upon request in writing by the prisoner, or by any one on his behalf, attested and subscribed by two witnesses, to allow an *habeas corpus* under the seal of the court, whereof he shall be chancellor or judge. *Ib.*

Every such writ, when allowed, must be signed by the person awarding the same, and endorsed with these words—"BY THE STATUTE."

This writ must be directed to the officer or person, in whose custody the prisoner shall be, and made returnable immediately before the chancellor or judge, who issued it. *Ib.*

The application for this must be made, where it can be done, within two terms after the imprisonment of the applicant; because, if he wilfully neglects, for two whole terms after his imprisonment, to pray a habeas corpus for his discharge, it shall not be granted him, in vacation time—the application, in such case must be made to the court. *Ib.*

No citizen of this state committed, *for any criminal matter*, shall be removed from the custody of one officer, into the custody of another, unless it be by legal process.

Or, where the prisoner is delivered to some inferior officer to carry to gaol.

Or, is sent by order of any court, judge or justice, to any house of correction.

Or removal from one place to another within the same county for trial or discharge, in due course of law ;

Or in case of fine, infection, or other necessity. *Ib.* § 7.

After the court of oyer and terminer, or gaol delivery, shall be proclaimed for the county in which any prisoner is detained, no such prisoner " shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act, but upon every such *habeas corpus* shall be brought before such court of oyer and terminer or gaol delivery, which court shall thereupon do what to justice shall appertain." *Ib.* § 8.

But after the court of oyer and terminer or gaol delivery is ended, any prisoner may have a *habeas corpus*, according to the intention of the act. *Ib.* § 8.

No citizen, inhabitant, or resident of this state, shall be sent prisoner to any place whatsoever out of this state, for any crime or offence committed within it. Every such imprisonment is illegal. *Ib.* § 10.

Habeas Corpus at common law, is grantable in the common pleas, as well as in the king's bench. 2 *Black.* 754. 3 *Willson*, 172.

Stacy's case, 10 *John. Rep.* 328. This writ was allowed by a commissioner of the supreme court, and directed to I. C. commander of the navy of the *United States* on Lake Ontario, and to M. L. commanding the troops of the *United States* at *Sacket's Harbor*, and to their subordinate officers, to bring the body of A. &c.

Ferguson's case, 9 *John. Rep.* 239. The allowance of a *habeas corpus*, in term time, is a matter of sound legal discretion. And because it appeared that the party was a soldier in the army of the *United States*, regularly enlisted, and because a judge of the supreme or district court of the *United States* had clear and unquestionable jurisdiction in the matter, the court refused to allow the writ.

The Recorders of New-York, Albany and Hudson, have each, *ex officio*, the same powers of a judge of the supreme court, as to the allowance of a *habeas corpus* in vacation time. 1 *N. R. L.* 331. § 11.

III. *By whom prisoners brought up on Habeas Corpus, are to be bailed, or discharged, &c. and in what cases.*

Upon the service and return of the writ with the prisoner, together with the cause of his imprisonment, before the officer allowing the same ; or, in case of his absence, before any other of them, the chancellor or judge, such officer, before whom the party is brought, shall, within *two days* thereafter, discharge the prisoner, on taking his recognizance, with one or more sureties, in any sum in his discretion, having regard to the quality of the prisoner, and the nature of the offence, for his appearance at the next court where the offence is properly cognizable; and shall also certify, into the same court, the writ, the return thereof, and the recognizance. 1 *N. R. L.* 355; § 5.

If, however, this recognizance be taken in the city of New-York, the whole is to be certified into the police office of the said city. *Ib.*

But, in every case, where it shall appear that the prisoner is detained, upon legal process, out of a court having jurisdiction of *criminal matters*, or by some warrant under the hand and seal of a judge or justice, for some matter or offence, for which by law the prisoner is not bailable, he is to be remanded to prison. *Ib.*

A person committed by a judge or justice, and charged as accessory before the fact to any felony, or upon suspicion thereof, or with suspicion of any felony, plainly and specially charged in the warrant of commitment, shall not be removed or bailed, by virtue of this act. *Ib.* § 9.

The first judge of a court of common pleas may let prisoners to bail upon a *habeas corpus*, with the consent of the Attorney General, or District Attorney. *Ib.* § 12.

A member of the house of commons, committed for a breach of privilege, cannot be discharged on a *habeas corpus* during the session. 2 *Black.* 754. 3 *Willson*, 188.

In the case of *Cable vs. Cooper*, the court say, "It may well be doubted whether the statute gives to a judge or the chancellor, in vacation, a right to discharge a party imprisoned on *civil process*." And the commissioner, "had no power to declare either the execution or judgment void," and, "the moment that he discovered that the prisoner was in custody on a *Ca. Sa.* perfectly valid and regular, upon the face of it, his power to discharge him ceased to all intents and purposes. The statute is peremptory, and he had nothing to do, but to remand him." 15 *John. Rep.* 156.

IV. Duty of sheriffs and other officers, and penalty for neglect, &c.

Every sheriff, gaoler, or other person, to whom any writ of *habeas corpus* shall be directed, for any person in his custody, upon the receipt of the writ, shall, (unless the person so in custody shall be committed for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing up the prisoner, not exceeding 12½ cents per mile, and upon security given by his own bond, to pay the charges of carrying back the prisoner, if remanded, and that he will not escape by the way, *make return of such writ*, according to the exigencies of the writ, and certify the *true cause of his imprisonment*, within *three days* thereafter. But if the distance from the court or officer, be over 20 and not above 100 miles, then within the space of 10 *days*, and if more than 100 miles, then within the space of 20 *days*. 1 *N. R. L.* 354. § 1.

If any person, whose duty it is, shall neglect or refuse to make the return, and obey the writ &c. or upon demand made by the prisoner, or by any one on his behalf, shall refuse to deliver a true copy of the warrant of commitment and detainer of the prisoner, he shall, for the first offence, forfeit to the party grieved 250 dollars, and for the second offence 500 dollars, and if an officer, be incapable to hold his office. *Ib.* § 2.

In *Stacey's case*, before cited, (10 *John. Rep.* 328,) the commanding officer made the following return. *I, M. L. general, &c. do*

return to the within writ, that the within named A. is not in my custody. The court held this return evasive and insufficient; said he ought to have returned that he was not in his *custody, possession or power*, and ordered an attachment immediately against general L. for a contempt.

"I had not at the time of receiving this writ, nor have I since had the body of *A. B. detained* in my custody, so that *I could not* have her, &c." was held a bad return, and an attachment was granted against the party who made it. 5 *Term Rep.* 89.

By the fourth section of the same statute, it is provided, "that any prisoner as aforesaid, may move for and obtain his *habeas corpus* as well out of the court of chancery as out of the supreme court, and if the chancellor or any judge of the supreme court in the vacation time, upon view of the copy of the warrant of commitment or detain-er, or upon oath, that such copy was denied as aforesaid, shall deny to allow any writ of *habeas corpus*, by this act required to be granted, being applied for as aforesaid, he shall forfeit to the party grieved 1250 dollars."

The penalty given by the statute is imposed on individuals acting ministerially out of court, and does not apply to the acts of a court done of record. 5 *John. Rep.* 282.

A person set at large by a *habeas corpus* cannot be reimprisoned for the same offence, and he who knowingly recommitts him for the same offence, or knowingly aids or assists therein, shall forfeit to the party grieved 1250 dollars. 1 *N. R. L.* 355. § 5.

And if any person shall make out or sign or countersign any warrant, for the removal of any prisoner, contrary to the seventh section of the act, as well he, as the officer executing the same, shall, for every offence, forfeit to the party grieved, 500 dollars. *Ib.* § 7.

HIGHWAYS.

THERE are said to be three kinds of ways : 1. A foot way : 2. A foot and horse way, which is also a park or drift way : 3. A foot, horse and cart way. 1 *Inst.* 56.

I. Of public highways.

It is enacted, (2 *N. R. L.* 270. § 24.) *That all public highways heretofore laid out and allowed by any law of this state, and now in use within the counties subject to this act, and of which a record shall have been made in the office of the clerk of the county or town, shall be public highways, and continue such, unless altered in conformity to this act.*

And, *that where any roads have been used as public highways for twenty years or more, the same shall be public highways, although no record thereof has been made, unless they shall be altered in manner aforesaid.* 4 *Vol. L. N. Y. b.* 32.

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 [people] 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 [people] may justify going upon the corn. 1 *Rol. Abr.* 390.

That a road has been used as a public highway for 12 years, is *prima facie* evidence that it was opened by authority, and is to be deemed a public highway, within the cases contemplated by the first section of the act for regulating highways (*Sess. 24. Ch. 186.*) 2 *John. Rep.* 424.

A great variety of rivers, creeks and streams in the state are declared (2 *N. R. L.* 285,) to be public highways. The limits of this work will not permit us to particularize them.

All public roads to be laid out by the commissioners of any town, shall not be less than *four rods* wide. 2 *N. R. L.* 270. § 22.

Where the commissioners are silent as to the width of a road, the court will intend it to be of the legal width. 2 *Caine's Rep.* 179.

II. Of private ways.

Private roads are laid out upon application to the commissioners of the city or town, and when laid, the statute (2 *N. R. L.* 270. § 20,) declares that they " shall be for the use of such applicant or applicants, his or their heirs and assigns, but not to be converted to any other use or purpose than that of a road : *Provided always*, that the occupant or owner of the land through which such road shall be laid out, shall not be prevented making use thereof as a road, if he shall signify his intention of making use of the same, at the time when the jury or commissioners are to ascertain the damages sustained by laying out such road."

All private roads shall not be more than *three rods* wide. 2 *N. R. L.* 270. § 22.

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, and not a highway ; because it belongeth not to all [citizens,] but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance therein. 1 *Haw. c.* 76. § 1.

It seems that those who have the right of way cannot justify going over the adjoining land, unless they are entitled to a way *generally* over the land. 2 *Dougl.* 748.

By common law, those who have the use and benefit of the way, ought to repair it. *Dougl.* 748.

And if a common way to church, vill, or the like, be out of repair, he who ought to repair it may be indicted for it. 6 *Mod. Rep.* 163.

A person on whose application a private road is laid out, has the sole and exclusive right to use it, unless the occupant of the land, at the time when it is laid out, signify his intention to make use of it ; and may maintain an action of *trespass on the case*, against the occupant of the land through which it was laid out, or against any other person making use of it. 14 *John. Rep.* 583.

Commissioners, &c.

By statute, (2 *N. R. L.* 270: § 1.) it is made the duty of the commissioners of highways in the several towns, (except in the city and county of New-York, the counties of Suffolk, Queens, Kings and Richmond,)

To direct the repairing of the roads and bridges, within their respective towns.

To regulate the roads already laid out, and to alter such as a majority of them shall deem inconvenient.

To cause roads not described and recorded, to be described and recorded in the town clerk's office.

To repair highways and bridges.

To require the overseers to warn the people to work highways, &c.

To lay out new roads and to discontinue old ones.

We do not deem it expedient to enter into an analysis of the whole act, but shall confine ourselves to such parts of it as have been adjudicated upon.

By section 26 of the same statute it is enacted, That in every case where a highway has been laid out, and the same hath been encroached upon by any present or former occupant of the land through or by which such highway runs, the commissioners of the town shall, if in their opinion they shall deem it necessary, order the fences to be removed, so that such highway may be of the breadth originally intended: and if such removal shall not be made in sixty days after such notice given, the occupant &c. shall forfeit 50 cents a day thereafter, *Provided nevertheless*, that in case of denial of such encroachment by any occupant, the commissioners shall apply to a justice of the peace of the county for a precept; directed to an overseer of highways of the same town, to summon twelve freeholders thereof, to meet on a certain day, of which day notice shall be given by the overseer to one of the commissioners, and also to the occupant, &c. These freeholders, when sworn, constitute the jury to inquire and certify, whether any, and if any, by whom such encroachment has been made.

Upon this branch of the statute, the supreme court has decided in the case of *Spicer vs. Slade*, (9 *John. Rep.* 359,) that—Before the party can be in default, and liable to the cumulative penalties, &c. the commissioners of highways of the town must have given him a previous notice, or order, of sixty days, to remove his fence. To perform this duty, the commissioners should all meet and deliberate together on the subject of the alleged encroachment; and then, if they, or a majority of them, should deem it necessary, they are to order the fence to be removed, &c. This notice the court say should be precise and particular—"The breadth of the road originally intended, and the extent of the encroachment by the party upon that breadth, and the place or places where, ought to have been specially stated, so that he might be able to obey the order, and know when he had performed his duty."

So also in the case of *Bronson vs. Mann*, (13 John. Rep. 460)—“Where the encroachment is *not denied*, and the commissioners under the 26th section of the act, make an order to remove it, the just construction of the statute requires that all should confer, and then a majority may act; but where, as in this case, the encroachment is denied, and the fact is to be inquired of by a jury, the commissioners act in the characters of informers merely; and the law requires no order, nor any act of the commissioners, after the finding and certificate of the jury.

The finding of the jury is conclusive evidence of the fact of the encroachment.

Overseers, &c.

Their general duty.] The 3d section of the said act requires the “Overseers of highways, to repair and keep in order the highways within the several districts for which they shall be elected, to warn all persons to work on the highways in their respective districts, to come and work when so required to do by the commissioners, or any of them, to collect all fines and commutation money, and to execute all such orders of the commissioners of the town to which they belong, as shall be given by them in conformity to law,” &c.

Persons liable to work on highways, &c.] And by the 4th section of the said act, “All freeholders, and every free male inhabitant, being above the age of twenty-one years, shall be assessed to work on the public works and highways, ministers of the gospel and priests of every denomination excepted.”

Penalty for refusing to work, &c. when warned.] By the 9th section of the same act, it is made “the duty of the overseers of highways, to give at least twenty-four hours notice to all persons assessed to work on the highways, and residing within the limits of their respective districts, of the time and place, when and where they are to appear for that purpose; and if any person so assessed, and duly noticed as aforesaid, shall neglect or refuse to appear in person, or by an able bodied man as a substitute, or to bring with him such implements, carriages or cattle as required, or shall remain idle, or not work faithfully, or hinder others from working, or refuse or neglect to pay the commutation money in lieu of such attendance, such offender shall, for every such offence, forfeit the sum of one dollar: and it shall be the duty of such overseer, and he is hereby required, within six days thereafter, in every case in which he shall deem the excuse for such neglect or refusal insufficient, to make complaint thereof *in writing*, under his hand, to one of the justices of the peace of the town for which he shall be elected, if any there be, and if there be no justice of the peace in such town, then to the next justice of the adjoining town, and the justice to whom such complaint shall be made, shall forthwith issue a warrant, under his hand and seal, directed to any constable of the ward or town where such delinquent shall reside, commanding him to levy such fine on the goods and chattels of such offender,” &c.

The proceedings in this case, by the overseer, on a complaint in writing by him, against a person who has been assessed, and neglects to work, or perform the duty required, are summary.

The overseer is the sole judge of the delinquency of the party. The justice who issues the warrant acts ministerially, and is not bound to give notice of the complaint to the party, or to summon him to appear, or to shew cause against the charge. *5 John. Rep. 474.*

The justice issuing the warrant, and the constable executing it, are mere ministerial officers and have no discretion, and so are not responsible to the injured party. *9 John. Rep. 229.*

Nor is the overseer liable, in a private action, for any error of judgment in the execution of his trust. *10 John. Rep. 470.*

But where an overseer of highways wilfully neglects to repair a bridge within his district, by reason of which the plaintiff's horse falls through, and breaks his leg, an action on the case may be maintained against him, by the party grieved. *15 John. Rep. 250.*

Of Carriages, &c. meeting, &c.

The 41st section of the act aforesaid, enacts, "That in all cases of persons meeting each other on any turnpike road, or public highway, &c. travelling with carriages, sleighs, waggons or carts, the persons so meeting shall seasonably turn, drive and convey their carriages, sleighs, waggons or carts to the right of the centre of the road, so as to enable each other's carriages, sleighs, waggons or carts to pass each other without interference or interruption, under the penalty of five dollars for every neglect or offence, to be recovered by the party aggrieved, in an action of debt, in any court having cognizance thereof, with costs of suit."

Of Nuisances, &c.

There is no doubt but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the people, are public nuisances at common law. *1 Haw. 212.*

And by the common law any one may abate a nuisance to a highway, and remove the materials, but not convert them to his own use. *1 Haw. 214.*

Also it seemeth, that an heir may be indicted for continuing an encroachment, or other nuisance to a highway, begun by his ancestor; because such a continuance thereof amounts, in the judgment of law, to a new nuisance. *Ib.*

A gate erected in a highway is a common nuisance, because it interrupts the people in that free and open passage which they before enjoyed, and were lawfully entitled 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.*

Indictment for encroaching upon a highway, by building there-upon.

County of } **T**HE jurors, for the people of this state, upon their oath pre-
ss. } sent, that A. O. late of carpenter, the day of
in the year of our Lord 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 en-
croached, and doth yet encroach, 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 afore-
said, in the county aforesaid, with force and arms, unlawfully and unjustly
hath continued, and doth yet continue, by reason whereof the common high-
way aforesaid, hath become and is greatly straitened, so that the citizens and
inhabitants of the said state, upon and through the said common highway afore-
said, with their horses, carts, and carriages, cannot go, pass, ride, and labour
as they ought and were wont to do, to the great and common nuisance of all
the citizens and inhabitants of the said state, in and through the said common
highway going, passing, riding, and laboring, and against the peace of the said
people and their dignity.

Indictment for laying timber and other obstructions in the highway.

County of } **T**HE jurors for the people of this state, upon their oath pre-
ss. } sent, that A. O. late of in the county aforesaid, yeoman,
on the day of in the year of our Lord 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 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 plac-
ed, from the aforesaid day of in the year aforesaid, until the day of
exhibiting this information, in and upon the common highway aforesaid, to be,
lie, and remain, hath permitted, and doth still permit, to the greivous and
common nuisance of all the citizens and inhabitants of the said state, upon and
through the common highway aforesaid, going, passing, riding and travelling,
and against the peace of the said people and their dignity.

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 straitened and obstructed, so that the citizens and inhabi-
tants of the said state could not so freely pass and repass about their lawful bu-
siness, through the said common highway there, as they ought and have been
accustomed to.

HOMICIDE.

HOMICIDE, or the killing of any human creature, is of three
kinds, *justifiable, excusable, and felonious*. The first has no share
of guilt at all; the second very little; but the third is the highest
crime against the law of nature that man is capable of committing.
4 Black. Com. 177.

And, for the better understanding these several species of homicide, it will be necessary to consider,

- I. *Justifiable homicide.*
- II. *Excusable homicide.*
- III. *Felonious homicide.*

Previous to the consideration of these matters, it will be proper to premise,

First, That in every charge of murder, *the fact of killing being proved*, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice until the contrary appeareth. And very right it is, that the law should so presume; the defendant in this instance standeth upon just the same foot, that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence, before he can avail himself of them. 2 *Ld. Raym.* 1493. *Fost. Cr. L.* 255.

Secondly, That in every case, where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing or alleviating; the matter of fact, *viz. whether the facts alleged by way of justification, excuse or alleviation, are true*, is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction the law putteth upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court. 2 *Ld. Raym.* 1493. *Fost. Cr. L.* 258.

And in cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict. *Ib.*

But when the law is clear, the jury, under the direction of the court in *point of law*, matters of fact being still left to their determination, may, and if well advised, always will find a general verdict conformably to such direction. *Ib.*

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 colored under pretence of such 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.

By statute it is enacted, That if any evil disposed person shall attempt feloniously to rob or murder any person, in or nigh any highway, or in his mansion house or dwelling place, or feloniously attempt to break any dwelling house in the night, and shall be slain in such felonious attempt, by the person so attempted to be robbed or murdered, or by any person in the dwelling house so attempted to be

burglariously entered, and if so found by verdict, the slayer shall be discharged. 1 *N. R. L.* 67.

So such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature. *Puff. L. N. b. 2. c. 5.*

If rioters, or forcible enterers or detainers, stand in opposition to the justice's 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. *Ib.*

So also, the husband or father may justify killing a man who forcibly attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent; for the one is forcible and felonious, but not the other. 1 *H. H.* 475, 6. 4 *Black. Com.* 181.

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. 3 *Inst.* 56.

Also if a criminal endeavoring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

In civil causes; although 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. *Ib.*

And by statute, if any person happen to kill another in attempting by lawful means to arrest him, for treason or felony done and committed, he shall be discharged. 1 *N. R. L.* 68.

So by statute, if a person in suppressing a riot, or in keeping or preserving the peace, happen to kill another, he shall be discharged. *Ib.*

And by statute, if a person in the lawful defence of his or her husband, wife, parent, child, master, mistress or servant, happen to kill another, he shall be discharged. *Ib.*

And if in lawfully chastising or correcting his child or servant, he happen to kill such child or servant, he shall be discharged. *Ib.*

But if in such correction he exceeds the bounds of moderation, either in the manner, the instrument or the quantity of punishment, and death ensues, it is manslaughter at least; and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, or if they kick him to the ground and then stamp on his belly and kill him, they are guilty of murder. 1 *Haw. c.* 29. § 5.

In all the above cases, the party upon arraignment having pleaded not guilty, the special matter must be found by verdict; whereupon the party shall be dismissed, without any forfeiture, or pardon purchased. 1 *N. R. L.* 67. *Hale's Pl.* 38.

II. *Excusable homicide.*

Excusable homicide is either *per infortunium*, by *misadventure* ; or *se defendendo*, in *self defence*.

1. Homicide *per infortunium*, or by *misadventure*, is when a man, doing a lawful act, without intention of bodily harm to any person, and using proper caution to prevent danger, unfortunately happeneth to kill. *Fost. Cr. L.* 258.

As where a laborer being at work with a hatchet, the head flies off, and kills one who stands by. 1 *Haw.* 73.

So when a person happens to kill another by a gun discharged at wild fowl ; or by an unlucky fall or kick at wrestling, or foot ball, or any such like sports and recreations, this being proved in evidence, the party is guilty of homicide by *misadventure* only. 4 *Bac. Ab.* 676. 1 *Hale's Hist.* 473. 1 *Hawk. c.* 29. *Fost. Cr. L.* 259.

Where workmen throw stones, rubbish, &c. from an house in the ordinary course of their business, by which a person underneath happens to be killed ; if they look out and give timely notice beforehand to those below, it will be accidental death ; if without such caution it will amount to manslaughter at least ; it was a lawful act, but done in an improper manner. *Fost. Cr. L.* 263.

Or where a third person whips a horse on which a man is riding, whereupon he spring 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. *Ib.*

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*. *Ib.*

In order to bring the case within homicide by *misadventure*, the act upon which death ensues must be lawful ; for if the act be unlawful, that is, if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as the circumstances vary the nature of it. *Fost. Cr. L.* 258.

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, although 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, that 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. *Ib.*

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, though that intent extended not to death, and though 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.

Thus, if from circumstances it appeareth, that an injury intended to A. be it by poison, blow, or any other means of death, would have amounted to murder. supposing him to have been killed by it, it will amount to the same offence if B. happeneth to fall by the same means. *Fost. Cr. L.* 26.

But in all the cases above, if it doth only hurt a man, by such an accident, it is nevertheless a trespass ; and the person hurt shall recover his damages ; for though the chance excuse from felony, yet it excuseth not from trespass. 1 *H. H.* 472.

2. Homicide *se defendendo*, or in *self-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, kill the person by whom he is reduced to such an inevitable necessity. 1 *Haw.* 75.

And by statute, if a person kills another in his own defence or by misfortune, and it shall be so found by verdict, he shall be discharged. 1 *N. R. L.* 67. § 5.

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 endangering 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 feloniously assaults him in the highway, may justify the fact, without ever giving back at all. 1 *Haw.* 75.

But if a person upon malice *prepen*se 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.

III. *Felonious homicide.*

1. *Self-murder.*
2. *Manslaughter.*
3. *Murder.*

1. *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. *Hauckins* 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 frantic, or destitute of the use of reason, which will denominate him *non compos*. 1 *H. H.* 412.

Not only he who deliberately kills himself, but also he who, maliciously attempting to kill another, happens to kill himself, is a *felo de se*. 1 *Hawk. c.* 27. § 4.

If one person kills another, though by his own desire and intreaty, yet the person so killed is not a *felo de se*, but he who killed him is a murderer. *Keilw.* 136.

By statute it is declared, that all forfeitures to the people of this state in cases of suicide are abolished. 1 *N. R. L.* 495.

[For proceedings in cases of Suicide, see title *CORONERS.*]

2. *Manslaughter.*

Manslaughter is the unlawful killing of another, without malice, either express or implied, and it happens either *voluntarily*, on a sudden quarrel, or involuntarily, in the commission of an unlawful act, without any deliberate intention of doing any mischief at all, and it differs from murder only in degree and quality. 3 *Inst.* 55. *Dalt. c.* 94. 1 *H. H.* 450. 4 *Black. Com.* 191.

From hence it follows, that upon an indictment for murder, the party offending may be acquitted of murder, and yet found guilty of manslaughter, as is every day's practice. 1 *H. H.* 449.

But as the fact must be done without premeditation, there can be no accessories to this offence. 1 *H. H.* 450.

The learning on this subject being, therefore, in a great degree coincident with that relating to murder, it will be superfluous to enlarge on it in this place.

It is to be observed, however, that the crime of manslaughter amounts to felony, and at common law it was punished by burning in the hand, and a forfeiture of goods and chattels. 4 *Black. Com.* 193. 2 *H. H.* 344.

As these punishments, however, are abolished in New-York, and the punishment of this offence is not particularly pointed out by the statute, it must be included in that clause of the statute which provides, that every offence above petit larceny, not otherwise provided for, shall be punishable with imprisonment in the state-prison not exceeding fourteen years. 1 *N. R. L.* 409.

And there is one species of manslaughter which is punished as murder, by statute; namely, the offence of mortally stabbing another, though done upon sudden provocation. 4 *Black. Com.* 193.

By the English statute (1 *Jac. I. c. 8.*) which has been literally adopted by the legislature of New-York, it is enacted, "that if any person that shall stab or thrust any person that hath not then any weapon drawn, or that hath not then first stricken, so as the person stabbed or thrust shall thereof die within six months, although it cannot be proved the same was done of malice aforethought, it shall be adjudged, taken, and deemed wilful murder." 1 *N. R. L.* 67.

"But this shall not extend to any person who shall kill another in his own defence, or by misfortune, or in any other manner than as aforesaid; nor shall extend to any person who in keeping the peace shall chance to kill another, so as it be not done of purpose; nor to any person who, in correcting his child or servant, shall contrary to his purpose chance to kill it. *Ib.*

It seems to be agreed that this statute is declaratory of the common law, and was made for preventing the inconveniences arising from the forwardness or compassion of juries, who were apt to consider that to be a provocation for extenuating murder, which in law was not. *Foster's C. L.* 298.

In the construction of the statute, the same circumstances which at common law will serve to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded upon that statute. *Ib.*

As where an adulterer is stabbed by the husband in the act of adultery, the case is not within the act; it is manslaughter at common law; for the provocation is greater than flesh and blood, in the first transport of passion, can bear. 1 *Hale*, 486. *Fost. Cr. L.* 298.

So if a man is assaulted by thieves in his house, and the thieves having no weapon drawn, nor having struck him, he stabbeth some of them, this is not within the act; it is justifiable homicide. *Fost. Cr. L.* 298.

Cases of this kind, where the justice or benignity of the common law hath overruled the rigor of the statute, are very numerous, and cannot escape the attention of any attentive reader. *Ib.* 299:

Every person that shall stab or thrust.] Under these words, shooting with any kind of fire arms, or thrusting with a staff or any

other blunt weapon, have been brought within the act; the case of thrusting with a blunt weapon must be supposed to have been within the contemplation of the legislature; otherwise it will not be easy to account for the exception with regard to the correction of children and servants. *Ib.* 300.

Any person that hath not then any weapon drawn, or that hath not then first stricken.] In construing this clause, an ordinary cudgel, or other thing proper for defence or annoyance in the hand of the party, hath been considered as a weapon drawn, so as to take the case out of the statute; but this must be intended of such a cudgel as might probably do hurt, not a small riding rod or cane. *Foster's Cr. L.* 300. 1 *Hale's Hist.* 470.

Also where a person who happens to kill another, was struck by him in the quarrel, before he gave the mortal wound, he is out of the statute, though he himself first gave the blow. 1 *Haw. c.* 30. § 6.

3. Murder.

Murder is where a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the peace of the [people] with malice aforethought, either express or implied. 3 *Inst.* 47.

Sound memory and discretion.] It must be committed by a person of sound memory and discretion; for lunatics or infants are incapable of committing any crime, unless in such cases where they shew a consciousness of doing wrong, and of course a discretion or discernment between good and evil. 4 *Black. Com.* 195.

Unlawfully killeth.] The unlawfulness arises from the killing without warrant or excuse. 4 *Black. Com.* 196.

And there is no particular way of killing another, which is necessary to constitute murder, but it may be committed in as many ways as there are by which an end may be put to life. 2 *Str.* 884.

And not only he who by a wound or blow, or by poisoning, strangling, or famishing, directly causes another's death, but also in many cases, he who by wilfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him. 1 *Haw. c.* 31. § 4.

And such was the case of him who carried his sick father, against his will, in a cold frosty season, from one town to another, by reason whereof he died. 1 *Haw. c.* 31. § 5.

Such also was the case of the harlot, who being delivered of a child, left it in an orchard covered with leaves, in which condition it was struck by a kite and died thereof. 1 *Haw. c.* 31. § 6.

So also was the case of parish officers, who shifted a child from parish to parish, till it died for want of sustenance. *Palm.* 545.

So if a prisoner die by reason of duress and hard usage by the gaoler, it is murder in the gaoler. 1 *H. H.* 466.

And the instances of oppression, which may fall within the rule of duress of imprisonment, are as various as a heart cruelly bent on mischief can invent. *Fost. Cr. L.* 322.

There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; that is, by bearing false witness against another with an express, premedi-

tated design to take away his life, so as the innocent person be condemned and executed; this there can be no doubt is equally murder, *in foro conscientiae*, as the killing with a sword; but the modern law, to avoid the danger of deterring witnesses from giving evidence in capital prosecutions, if it must be at the peril of their own lives, has not yet punished it as such. 4 *Black. Com.* 196, 7.

So also, if a man, either by working upon the passions of another, or possibly 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 *foro humano*, 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.

But in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another; as where one by duress of imprisonment compels a man to accuse an innocent person, who on his evidence is condemned and executed, or where one incites a madman to kill himself or another; or where one lays poison, with intent to kill one man, which is afterwards accidentally taken by another, who dies thereof. 1 *Haw. c.* 31. § 7.

Also, he who *wilfully* neglects to prevent a mischief, which he may and ought to provide against, is answerable for the consequence: as when a man having an ox, which he knows to be mischievous by being used to gore, does not put him in some place of security, but lets him range where persons are likely to pass, and he afterwards kills a man; according to some opinions, amongst which is Lord *Hale's*, the owner may be indicted for manslaughter. By Mr. Justice *Burnet*, it would not be more than manslaughter, and might be less. However, as it is agreed by all, such a person is at least guilty of a very great misdemeanor. And if the owner purposely let loose a dangerous or vicious animal, though it be only to frighten people, and it kill a man, the case may even amount to murder, still more if it were done maliciously. 1 *Hale*, 431. 1 *East. P. C.* 265.

If a physician gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and contrary to the expectation of the physician, it kills him, this is no homicide; and it is the like of a surgeon. 1 *H. H.* 429.

But it hath been holden, that if it be not a regular physician or surgeon who administers the medicine, or performs the operation, it is manslaughter at the least; yet Sir *Matthew Hale* very justly questions the law of this determination. 4 *Black. Com.* 197.

But there must be an actual killing to constitute murder, for it is agreed that no person shall be adjudged by any act whatsoever to kill another, if the party doth not die thereof within a year and a day. 1 *Haw. c.* 31. § 9.

By statute of New-York it is enacted, *That if poison is administered with intent to kill, and death doth not ensue within a year and a day, upon conviction of such offence, the person guilty shall be confined in the state-prison for a term not exceeding fourteen years.* 1 *N. R. L.* 409.

And if a person, hurt by another, die thereof within the year and day, it is no excuse for the other that he might have recovered, if he

had not neglected to take care of himself. 3 *Inst.* 53. *Kely*, 26. 1 *Keb.* 17.

But if the wound be not mortal, but with ill applications of unwholesome salves or medicines the party dies, it seems it is not homicide. 1 *H. H.* 428.

And if a person be indicted of one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol, or by starving; but when they only differ in circumstance, as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe or a hatchet, this difference is immaterial. 4 *Black. Com.* 196.

Any reasonable creature in being, and under the peace of the people.] It is therefore agreed, that the malicious killing of any person, whatsoever nation or religion he be of, or of whatsoever crime attainted, is murder. 1 *Haw. c.* 31: § 15.

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

But the causing of an abortion, by giving a potion to, or striking a woman big with child, is a great misprision only, and not murder, unless the child be born alive, and die thereof, in which case it seems clearly to be murder. 1 *Haw. c.* 31: § 16.

Also, where one counsels a woman to kill her child, when it shall be born, who afterwards does kill it, in pursuance of such advice, he is an accessory to the murder. 1 *Haw. c.* 31: § 17.

With malice aforethought.] The killing must be committed with malice aforethought, to make it the crime of murder. 4 *Black. Com.* 198.

And this term, *malice aforethought*, as descriptive of the crime of murder, is not to be understood in that narrow restrained sense, to which the modern use of the word malice is apt to lead one; namely, a *principle of malevolence towards the deceased in particular*; but the law, by the term malice, in this instance, meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit. *Fost. Cr. L.* 256.

And it may be either express or implied. 4 *Black. Com.* 198.

Express malice is where one, with a sedate, deliberate mind, and formed design, doth kill another. 4 *Black. Com.* 199.

And the evidences of such malice must arise from external circumstances, discovering the inward intention of doing bodily harm to another; as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various according to variety of circumstances. 1 *H. H.* 451.

As where two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that he meant not to kill, but only to disarm his adversary: for since he deliberately engaged in an

act highly unlawful, in defiance of the laws, he must at his peril abide the consequences. 1 *Haw. c. 31. § 21.*

And wherever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or, perhaps, if he have so much consideration as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the advantage by reason of the height of his shoes, or the like. 1 *Haw. c. 31. § 24.*

And if A. on a quarrel with B. tell him he will not strike him, but that he will give B. a pot of ale to strike him, and therefore B. strike, and A. kill him, he is guilty of murder; for he shall not elude the justice of the law by such a pretence to cover his malice. 1 *Haw. c. 31. § 24.*

And at this day it seems to be settled, that if a man assault another with malice prepense, and after he be driven by him to the wall, he kill him in his own defence, he is guilty of murder in respect of the first intent. 1 *Haw. c. 31. § 26.*

But if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field and there one kill the other, he is guilty of manslaughter only, because he did it in the heat of blood. 1 *Haw. c. 31. § 29.*

And such an indulgence is shewn to the frailties of human nature, that where two persons, who have formerly fought in malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge. 1 *Haw. c. 31. § 30.* 1 *H. H. 452.*

But if upon circumstances it appears that the reconciliation was but pretended, and that the hurt done was upon the score of the old malice, then it is murder. 1 *H. H. 452.*

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 accessories. *Hawp. 82.*

It seems to be agreed, that no breach of a man's word or promise; no trespass either on lands or goods; no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard: if he kills him in pursuance of such assault, whether the person slain did at all fight in his own defence or not. *Ib.*

But if a person, so provoked, had beaten the other only in such a manner that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then in fighting with him had killed him, he had been guilty of manslaughter. 1 *Haw. c. 31. § 34.*

So if a person, seeing two others fighting together on a private quarrel, whether sudden or malicious, takes part with one of them and kills the other, it is but manslaughter. 1 *Haw. c. 31. § 35.*

So if two strive for the wall, and one happen to kill the other ; or a man happen to kill another, who, claiming a title to his house, attempts forcibly to enter it ; or to kill one who endeavors unlawfully to arrest him ; or to force him from his possession of a room in a public house ; or if a man immediately kills one whom he finds in bed with his wife ; or that pulls him by the nose ; or fillips him in the forehead, or actually strikes him : in all these cases the party is, at most, only guilty of manslaughter. 1 *Haw. c. 31. § 36.*

So where *A.* the son of *B.* and *C.* the son of *D.* fall out in the fields and fight, *A.* is beaten and runs home to his father all bloody, *B.* presently takes a staff, runs into the fields, being three quarters of a mile distant, and strikes *C.* that he dies ; this is not murder in *B.* because done in a sudden heat and passion. 1 *H. H. 453.*

But in every case of homicide upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. *Post. Cr. L. 296.*

And if a person in cool blood, by way of revenge, deliberately beat another in such manner that he dies of it ; or if a man, upon a sudden provocation, execute his revenge in such a manner as shews a cruel and deliberate intent of doing a personal hurt, he is guilty of murder ; as where the keeper of a park tied a boy that was stealing wood, to a horse's tail and dragged him along the park ; where a master corrected his servant with an iron bar ; and a schoolmaster stamped on his scholar's belly ; so that each of the sufferers died ; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of manslaughter. 1 *Hawk. c. 31. § 38, 39.* 1 *Hale's Hist. 454, 473, 474.*

So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not ; for this is universal malice. 4 *Black. Com. 200.*

Also in many cases where no malice is expressed, the law will imply it. *Ib.*

As if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice ; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight, or no apparent, cause. *Ib.*

Poisoning also implies malice, because it is an act of deliberation: 1 *H. H. 453.*

By statute it is enacted, that all wilful killing by poisoning of any person, shall be deemed wilful murder of malice prepense. 1 *N. R. L. 66.*

And it seems agreed, that wherever a man happens to kill another in the execution of a deliberate purpose of committing any felony, he is guilty of murder ; as where a person shooting at tame fowl, with intent to steal them, accidentally kills a man ; or where one sets upon a man to rob him, and kills him in making resistance ; or where a person shooting at, or fighting with one man, with design to murder him, misses him, and kills another. 1 *Haw. c. 31. § 41.*

And not only where the very act of a person, having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes

him guilty of murder; as was the case of the husband who gave a poisoned apple to his wife, who eat not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof. 1 *Haw. c. 31. § 42.*

So where an officer is killed in the execution of his office, it is murder, and the law implies malice. 1 *H. H. 457.*

For ministers of justice, while in the execution of their offices, are very justly under the peculiar protection of the law; without being so, the public tranquillity could not possibly be maintained, or private property secured; nor in the ordinary course of things, would offenders of any kind be amenable to justice. *Fost. Cr. L. 308.*

Nor is the protection the law affordeth the officer confined to his own person; every man who cometh in aid of him (viz. of such officers as are properly conservators of the peace;) every man lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself. *Fost. Cr. L. 309.*

But it behooveth all such persons to be very careful, that they do not misbehave themselves in the discharge of their duty; for if they do, they may forfeit this special protection. *Fost. Cr. L. 319.*

Yet the killing an officer will in some cases be manslaughter only; as where the warrant by which he acts gives him no authority to arrest the party. 1 *Haw. c. 31. § 57.*

And where a warrant is executed in an unlawful manner; as by breaking open a door or window to arrest a man; or perhaps if he arrest one on a Sunday, since the statute by which all such arrests are made unlawful. 1 *Haw. c. 31. § 58.*

Such killing also as happens by the unadvisedly doing any idle, wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick, among a multitude of people, by which he means no more than to divert himself by putting them into a fright, he is guilty of murder. 1 *Haw. c. 31. § 61.*

By the law of England the killing of a master by his servant, or a husband by his wife, is considered as a crime of a different nature from murder, viz. *petit treason*, but by the statute of New-York, if a servant killeth his master, or a wife her husband, of malice prepense, such offences shall be deemed and adjudged to be, and shall be punished as murder. 1 *N. R. L. 67.*

By statute, every person duly convicted of murder, or of aiding or abetting, or procuring any kind of murder to be committed, or of wilfully burning any inhabited dwelling house, shall suffer death, and be hanged by the neck till such person shall be dead. 1 *N. R. L. 407.*

By statute, when offenders are convicted of murder, and sentenced to suffer death, the court may in its discretion add to the judgment, that their bodies be delivered to a surgeon for dissection. 1 *N. R. L. 175.*

Where any person shall be feloniously stricken 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. 1 *N. R. L. 495.*

When a murder is committed in one county, and a person is an accessory in another county, he may be indicted in the county where he was accessory, on certificate of the conviction of the principal in the county where he committed the murder. 1 *N. R. L.* 495.

HORSE RACING.

BY statute it is declared, that "all racing and running, pacing, or trotting of horses, for any bet or stakes, are common and public nuisances and offences against this state; and the authors, betterers, stakers, stakeholders, parties, contrivers, and abettors thereof, shall be punished by fine and imprisonment, at the discretion of any court having cognizance thereof." 1 *N. R. L.* 222, 223.

"The owner of every horse, &c. which shall be used or employed in horse racing, within this state, by his privity or permission, whereon stakes are held, or wages laid, shall forfeit for every race the value of such horse; and every person concerned in laying any bet or wager on such race, shall forfeit the amount of the bet or wager so made or staked." *Ib.* § 2.

"Such forfeiture may be recovered by action of debt, bill, plaint, or information before any court having cognizance thereof, and shall be applied, the one half to the use of the person prosecuting the same to effect, and the other to the overseers of the poor for the use of the city or town where the race is run, or wager or bet is made." *Ib.* § 3.

"Any person who shall contribute or collect, or solicit others to contribute or collect money, goods, or chattels to make up a purse, plate, or other thing to be run for by any horse, shall forfeit 25 dollars for every offence, to be recovered and applied as aforesaid." *Ib.* § 4.

"Every contract made for or on account of any money or other thing bet or staked, or depending on such race or races aforesaid, shall be void in law; and any person who may have paid any money or other thing upon the issue of such race or races, may recover the same in like manner, as is provided by the 'act to prevent excessive and deceitful gaming'." *Ib.* § 5. See also title GAMING.

"All racing or running of horses during the sitting of any court, within one half mile thereof, whether for a wager, or bet, or not, shall be deemed a misdemeanor, and the parties concerned therein punished accordingly." *Ib.* § 6.

By the abovementioned statute, section 1st. it is made the duty of all officers concerned in the administration of justice, to cause the act to be faithfully executed. *Ib.* 223.

An action to recover back a wager laid on the event of a horse race, is to be brought in the form prescribed by the act to prevent excessive and deceitful gaming, and if the plaintiff in his declaration state that the action had accrued to him according to the form, and as is prescribed by the second and third sections of the act to prevent excessive and deceitful gaming, he will nevertheless be permitted to shew a cause of action, arising under the act to prevent horse ra-

cing. And the action may be brought by the person making the bet, although he acted as the agent or depository of other persons. 13 *John. Rep.* 88.

HOUSEBREAKING.

THIS must be understood where the offence differs from burglary, which must be in the night.*

By statute, every person who shall be convicted of feloniously breaking into, or taking goods or chattels from any dwelling house, any person being therein and put in fear, or of robbing any dwelling house, any person being therein; and every person who shall aid, abet, assist, counsel, hire, or command any person to commit any of the said offences, shall be punished with imprisonment for life in the state-prison. 1 *N. R. L.* 408. § 3.

Breaking into.] This requires an actual breaking, and not entering by the doors being open. 1 *H. H.* 548.

And to constitute the offence, nothing need be actually taken; but then 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. *Ib.*

* See BURGLARY.

HUE AND CRY.

HUE and cry is the pursuit of an offender from town to town, till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are by the common law, as well as by statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 *Inst.* 116. 1 *H. H.* 588. 2 *Haw. c.* 12. § 5.

- I. *Of hue and cry at the common law.*
- II. *Hue and cry in pursuance of the statute.*

I. *Hue and cry at the common law.*

Under this head we shall consider, 1. *By whom the hue and cry is to be levied.* 2. *In what manner to be levied.* 3. *In what manner to be pursued.* 4. *What the persons pursuing it may justify doing.* 5. *How the omission or neglect of doing it is punished.*

1. *By whom hue and cry is to be levied.*] It seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy hue and cry, but is also bound to do it under the pain of fine and imprisonment. 2 *Inst.* 172. 3 *Inst.* 116. 1 *Hale's Hist.* 464.

For levying hue and cry, although 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 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.

2. *In what manner it is to be levied.*] The regular method of levying hue and cry is for the party to go to the constable of the next town, and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether by day or night, to raise his own town and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition, to the constable of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next till the offender be found. 2 *Haw. c.* 12. § 6.

3. *In what manner it is to be pursued.*] The constable is not only to make search in his own vill, but is also to raise all the neighbouring vills, who are all to pursue the hue and cry with horsemen as well as footmen. 2 *Hale's Hist.* 101.

4. *What the persons who pursue it may justify doing.*] In case of hue and cry once raised and levied upon supposal of a felony committed, though in truth there was no felony committed; yet those who pursue hue and cry may arrest, and proceed as if a felony had been really committed. *Ib.*

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 *Hale's Hist.* 102.

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 officer, 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 [people] 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. *Ib.*

And upon hue and cry levied against any person, 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.

And those that pursue the hue and cry, are 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. *Ib.*

If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, or 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. *Ib.*

It seems also that they who are taken freshly upon a hue and cry are not bailable, because they are to be accounted among those who are under violent presumptions of guilt. 2 *Haw. c. 15. § 41.*

5. *How the omission or neglect of doing it is punished.*] There can be no doubt but that by the common law, they who neglect to levy hue and cry (whether officers of justice or others) or who neglect to pursue it when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect. 2 *Hale's H. 104.*

II. Hue and Cry in pursuance of the statute.

But a small part of the English statute law, on this subject, has been adopted by the New-York legislature. The following are the only statutory provisions: "*Where any felony shall be committed, public notice thereof shall be immediately given in all public places near where the same was committed, and fresh pursuit shall be forthwith made after every such felon by sheriffs, coroners, constables, marshals, and all other persons who shall be by them commanded or summoned for that purpose.*" 1 *N. R. L. 149.*

"*And every competent person who will not do so, and be thereof convicted, shall be punished by fine, according to the discretion of the court having cognizance of the offence.* *Ib.*

"*And every such officer who shall conceal, or procure to be concealed, any felony, or who shall not do his duty in the premises, and be thereof convicted, shall be punished by fine and imprisonment, in the like discretion of any court having cognizance of the offence.*" *Ib.*

A warrant to levy hue and cry on a robbery having been committed.

County of ss. To all constables of the said county or elsewhere.
WHEREAS A. I. of in the county of yeoman, hath this day made information upon oath, before me, J. P. Esquire, one of the justices of the peace in and for the said county, that on the present day of in the year of our Lord between the hours of three and four in the afternoon of the same day, at a place called in the said county, in the public 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 the people of this state, 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 lawful money of this state, 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 has 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 forehead; and the other, &c. And that after the said felony and robbery committed, they, the said malefactors and felons, to him, the said A. I. unknown, did fly and withdraw themselves to places unknown, and are not yet apprehended. These are therefore to command you forthwith to raise the power of the towns within your several precincts, and to make diligent search therein for the persons above described, and to make fresh pursuit and hue and cry after them from town to town, and from county to county, as well by horsemen as by footmen; and to give due notice hereof in writing, describing in such notice the persons and the offence aforesaid, unto every next constable on every

side, until they shall come to the sea shore, or until the said malefactors and felons shall be apprehended, and all persons whom you or any of you shall, as well upon such search and pursuit as otherwise, apprehend or cause to be apprehended, as justly suspected of having committed said robbery and felony, that you do carry forth with before some one of the said 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 with according to law. And hereof fail not respectively, upon the peril that shall ensue thereon. Given under my hand and seal, at in the county of the day of

IDIOTS AND LUNATICS.

THE guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never be justly imputed to those who are either incapable of understanding, or of conforming themselves to it. 1 *Haw. c. 1.*

Hence idiots and lunatics, who are under a disability of distinguishing between good and evil, are not punishable by any criminal prosecution whatsoever. *Ib.*

An *idiot* is a fool or madman from his nativity, and one who never has any lucid intervals. *Co. Lit. 247. a. 1 H. H. 29.*

Therefore a person who is born deaf and dumb, is in presumption of law an idiot, and the rather because, he hath no possibility to understand what is forbidden by law to be done, or under what penalties. 1 *H. H. 34.*

But if it can appear, that he hath the use of understanding, which many of that condition discover, by signs to a very great measure, then he may be tried, and suffer judgment and execution, though great caution is to be used therein. *Ib.*

Lunacy is a partial derangement of the intellectual faculties, the senses returning at uncertain intervals; the offender is therefore only protected from punishment for acts done during the prevalence of his disorder. 1 *H. H. 31. Black. Com. 24.*

Madness is a total alienation of the mind, and deprivation of the memory. 1 *H. H. 30.*

All these defects, whether permanent or temporary, must be unequivocal and plain; not an idle, frantic humor, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. 8 *St. Tri. 322. 1 H. H. 30, 1, 2, 3.*

Hence therefore the artificial madness, which is produced by *drunkenness* and intoxication, does not entitle a man to the protection of the law. 3 *William's Just. 2.*

For Sir *Ed. Coke* says, a drunkard, who is *voluntarius demon*, or a voluntary madman, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it. *Co. Lit. 247.*

And he shall be punished for it, as much as if he had been sober. 2 *Haw. c. 1. § 6.*

In presumption of the law, every person of the age of discretion is of sane memory, unless the contrary be proved. 1 *H. H. 33.*

And this may appear either by the inspection of the court—by evidence given to the jury who are charged to try the indictment—or, being a collateral issue, the fact may be pleaded and replied to, ore

tenus, and a *venire* may be awarded returnable *instantly* in the nature of an inquest of office; and this method, in cases of importance, doubt, or difficulty, the court will in prudence and discretion adopt. 1 *Hale*, 34, 5. *Fost. Cr. L.* 40. 1 *Haw.* 3. n. (5.)

And if it be found that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as one that stands mute. 1 *Haw. c.* 1. § 4.

But if one who has committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. 1 *Haw. c.* 1. § 3.

However, although a person who wants discretion is not punishable by any criminal prosecution, yet if he commits a trespass against the person or possession of another, he shall be compelled, in a civil action, to give satisfaction for the damage. 1 *H. H.* 15, 16.

And 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. c.* 1. § 6.

By statute, when persons, by lunacy or otherwise, are furiously mad, and dangerous to be permitted to go abroad, it shall be lawful for two or more justices, where such lunatic is found, by warrant, directed to the constables and overseers of the poor of the city or town, to cause such person to be apprehended and kept safely locked up in some secure place within said city, or within the county in which such town shall be, as such justices shall direct; and if such justices shall find it necessary, to be there chained, if the last legal settlement of such person be in such city or county. 1 *N. R. L.* 116.

And if such settlement be not there, such person shall be sent to the place of his last settlement, in the manner directed by the laws relating to the poor; and shall be locked up or chained, by warrant from two justices of the city or county to which he shall be sent. *Ib.*

And the charges of apprehending, keeping and removing, shall be paid by the overseers of the poor in the manner in and by the said laws directed. *Ib.*

But this act shall not restrain or abridge the power of the chancellor concerning such lunatics; or restrain or prevent any friend or relation of such lunatic from taking them under their own care and protection. *Ib.*

It is said that any one may confine a friend who is mad, and bind and treat him in such a manner as is proper in such circumstances. 1 *Hawk. c.* 60. § 23.

The foregoing act relates only to vagrant lunatics who are strolling up and down the country, and does not extend to persons of rank and condition in the world, whose relations can take care of them properly by applying to the court of *chancery*. 2 *Atk. Rep.* 52.

By statute, the chancellor has the care to provide for the safe keeping of idiots and lunatics, and of their real and personal estates, for their maintenance, and the maintenance of their families, and the education of their children, having regard to the amount and value of their property. 1 *N. R. L.* 147.

For the particular powers vested in the chancellor to carry the above into effect, see the statute at large.

Sanity is to be presumed, and the burthen of proof lies on the party

denying it. But after a general derangement has been shewn, it is then incumbent on the other side to shew, that the party who did the act was sane at the very time it was performed. 5 *John. Rep.* 144.



IMMORALITY.

UNDER this title will be considered the various sections of our statute "for suppressing immorality," in the following order.

- I. *Sabbath breaking.*
- II. *Profane swearing and cursing.*
- III. *Disturbing religious worship.*
- IV. *The proceedings and conviction under the statute.*

I. *Sabbath breaking.*

1. By statute, "there shall be no travelling, servile laboring or working, (works of necessity and charity excepted) shooting, fishing, sporting, playing, horse racing, hunting, or frequenting of tippling houses, or any unlawful exercises or pastimes by any person within this state, on the first day of the week, commonly called Sunday; and every person of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit to the use of the poor of the city or town where such offence shall be committed, the sum of one dollar." 2 *N. R. L.* 193.

2. "No person shall expose to sale any wares, merchandize, fruit, herbs, goods, or chattels, upon the first day of the week, commonly called Sunday, except small meat, and milk, and fish, before nine of the clock in the morning, upon pain of forfeiting the goods so exposed to sale, to the use of the poor of the city or town where such offence shall be committed." *Ib.*

"And if any person offending in any of the premises shall be thereof convicted before any justice of the peace for the county, or any mayor, recorder or alderman of the city, where the offence shall be committed, upon the view of the said justice, mayor, recorder or alderman, or confession of the party offending, or proof of any witness or witnesses upon oath, then the said justice, mayor, recorder or alderman, shall direct and send his warrant under his hand and seal, to some constable of the city or county where the offence shall have been committed, commanding to seize and take the goods so exposed to sale as aforesaid and to sell the same, and to levy the said other forfeitures or penalties by distress, and sale of the goods and chattels of such offenders, and to pay the money arising by the sale of such goods, and the said other forfeitures, to the overseers of the poor of the city or town where the offence shall be committed, for the use of the poor thereof." 2 *N. R. L.* 193. 4.

"In case no such distress can be had, then every such offender shall, by a warrant under the hand and seal of such justice, mayor, recorder or alderman, be committed to the common jail of the county for a space of time not exceeding twelve hours." *Ib.*

"If any person shall be found fishing, sporting, horse racing, hunting, gunning, or going to, or returning from any market or landing, with carts, waggons or sleds on Sunday, it shall be lawful for any constable or other citizen to stop every person so offending, and to detain him or her until the next day, and then to carry or convey him or her to some justice of the peace to be dealt with according to law." 2 *N. R. L.* 194.

"But no person going to or from any church or place of worship within 20 miles, or going to call a physician, surgeon, or midwife, or carrying a mail to or from any post-office, or going express by order of any public officer, or shall be removing his family or household furniture, if such removal be not commenced on such day, shall be considered as travelling within the act." *Ib.*

"And if any person charged with having labored or worked on the first day of the week, called Sunday, shall be brought before a justice to answer such charge, and shall then and there prove to the satisfaction of the justice, that he uniformly keeps the last day of the week as holy time, and does not work or labor on that day, then he shall be discharged: Provided the work or labor, with which he is charged, has not disturbed other persons in the observance of the first day of the week as holy time." *Ib.*

"And no tavern-keeper, ale or porter-house keeper, inn-keeper, or any person retailing strong or spirituous liquors, ale or porter, shall sell any such liquors on Sunday, to any person whatsoever, lodgers and travellers tolerated by law excepted."

"And every person offending in the premises, and being thereof duly convicted before a magistrate, upon their view or confession of the party, or upon the oath of one or more credible witnesses, shall forfeit the sum of two dollars and fifty cents." *Ib.*

In the case of *Cripps vs. Durden*, lord Mansfield decided, that under the English statute, which is similar in principle to the New-York statute, only one offence could be committed on the same day. *Cowp. R.* 646.

"No person upon the first day of the week commonly called Sunday, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree, except in cases of treason, felony or breach of the peace, but the service thereof shall be void, and any person so serving or executing the same shall be liable for damages at the suit of the party grieved." 2 *N. R. L.* 195.

In England, where they have a statute similar to the above, a justice issued a warrant to a constable, to make a person 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.

II. Profane swearing and cursing.

1. "If any person shall profanely swear or curse and be thereof convicted by the confession of the party offending, or on the oath of one or more witnesses, or in the manner hereinafter mentioned, before any justice of the peace for any county, or any mayor, recorder,

or alderman of any city in this state, every person so offending shall, for every such offence, forfeit and pay, to the use of the poor of the city or town where the offence is committed, the sum of thirty seven and an half cents." 2 *N. R. L.* 195.

2. "If any person shall profanely swear or curse in the presence and hearing of any justice of the peace for any county, or of any mayor, recorder, or alderman of any city while in the execution of his office, every such justice of the peace, mayor, recorder, or alderman, shall, and he is hereby authorized and required to convict every such offender of such offence without any other proof whatsoever." *Ib.*

3. "In case any person who shall be convicted of profanely cursing or swearing shall not immediately pay the respective sums so forfeited, with the charges of such conviction, or give security to the satisfaction of the justice, mayor, recorder or alderman, before whom such conviction is had, for the payment thereof within six days, then every such offender, being above the age of 16 years, shall by warrant under the hand and seal of such justice, mayor, recorder, or alderman, be confined in the gaol of the county for every offence, or for any number of offences, whereof any such offender is convicted at one and the same time, for a space of time not less than one day, or exceeding three days; but if the offender shall not be above the age of 16 years, and shall not forthwith pay the said forfeitures, or give security for the payment thereof, the parent or master shall pay the same, to be recovered as aforesaid." 2 *N. R. L.* 196.

III. *Disturbing religious worship.*

By statute, "if any person or persons whatsoever, either on the first day of the week called Sunday, or on any other day or time, shall wilfully and of purpose, disquiet, interrupt, or disturb, any assembly of people met for religious worship, by making a noise, or by rude and indecent behaviour, or profane discourse, either within their place of worship or out of it, so near as to disturb the order and solemnity of the meeting, or exhibit any shows or plays, or promote or aid any horse racing, or gaming of any description, or expose to sale any ardent or distilled liquors whatever, or keep or open any huckstershop, upon any part of any highway, within the distance of one mile from the place where any such religious society shall be actually assembled for public worship, or shall obstruct the free passage of any highway, within the distance aforesaid of any place of public worship, every person so offending, and being convicted before any justice of the peace for the county, mayor, recorder or alderman of any city where the offence shall be committed, shall, for every such offence, forfeit and pay to the use of the poor of the town or city where such offence shall be committed, a sum not exceeding twenty five dollars." 2 *N. R. L.* 195.

"In case any person convicted of any of the offences aforesaid, shall not immediately pay the sum forfeited, with charges of conviction, or give security to the satisfaction of the justice, mayor, recorder, or alderman before whom conviction is had, for the payment thereof, within 20 days thereafter, such offender shall, by warrant under hand and seal of said justice, mayor, recorder or alderman, be committed

to the common gaol of the city or county where the offence shall be committed, for a term not exceeding 30 days." *Ib.*

"All judges, mayors, recorders, alderman and justices of the peace, upon the view of any person offending as aforesaid, are authorized to order the offender into the custody of any officer herein after named, or any official member of the church or society so as aforesaid assembled, for safe keeping, until he shall be let to bail, or a trial for such offence can be had according to law." *Ib.*

It is also made, by statute, "the duty of all sheriffs, coroners, marshals, constables, and bailiffs, who shall be present at the public worship of any religious society interrupted or disturbed in manner aforesaid, to apprehend every such person so offending, and take him, as soon as conveniently may be, before any justice of the peace, mayor, recorder or alderman of the city or county wherein such offence shall have been committed, in order that he may be dealt with according to law." 2 *N. R. L.* 195.

IV. *The proceedings and conviction under the statute.*

"Every justice, mayor, recorder or alderman shall, immediately upon information given, upon the oath of any person, cause every offender against this act to appear before him, and upon such information being proved as aforesaid, shall convict such offender in such manner as in and by this act is prescribed." 2 *N. R. L.* 196.

"No conviction by virtue of this act shall be liable to be removed by *certiorari* into the supreme court, but shall be deemed and taken to be final." *Ib.*

"In all actions brought by virtue of this act, the like fees shall be allowed and taken, as in cases of civil suits before justices of the peace, and no more." *Ib.*

"All charges of the information and conviction of any such offenders, shall be paid by the party offending, over and above the penalties inflicted, which charges shall be ascertained and settled by the mayor, recorder, alderman or justice before whom such conviction shall be had, but shall in no case exceed the sum of 25 dollars." 2 *N. R. L.* 197.

"All penalties which shall be adjudged, levied, and collected by virtue of this act, shall be received by the magistrate before whom such conviction and adjudication was had, and shall by him, within *thirty days* after the receipt thereof, be paid over for the use of the poor in the city or town where the same was so levied and collected." *Ib.*

"If the offender shall be imprisoned for the same offence, no charges shall be paid by any person whomsoever." *Ib.*

"No person shall be prosecuted for any offence against this act, unless the same shall be prosecuted within *twenty days* next after the offence committed." 2 *N. R. L.* 197.

"If any action shall be brought against any person for doing or causing to be done any thing in pursuance of this act, the defendant in such action may plead the general issue, and give the special matter in evidence; and if in any such action a verdict or judgment shall be given for the defendant, or the plaintiff become nonsuit or discontinue his action, then the defendant shall have treble costs." *Ib.*

Before the late revision, in 1813, the statute "for suppressing im-

morality," made drunkenness a public offence, and contained similar provisions for its suppression and punishment to those mentioned above; the sections however relating to drunkenness, for some reasons not known to the writer have been expunged from the new act:

[See *old Stat. 1 Rev. L. (K. & R.) 224.*]

I. Form of information.

County of } **B**E it remembered that on the day of in the year of
 ss. } our Lord, 18 E. F. of in said county, gentleman, in-
 forms and makes oath before me, C. D. Esq. one of the justices of the peace in
 and for said county, that on the day of now last part (being the first day of
 the week, commonly called Sunday, *if it be for breach of Sabbath,*) at the town
 of in the said county, he the said E. F. saw A. B. of expose to sale one (or
 two or more, *specifying the number, quantity and kind of goods,*) or travelling, or
 doing servile work or labour, or shooting, fishing, sporting &c. (*as in statute*)
 or heard him swear one (or two or more) profane oath or oaths, or saw him
 obstruct the free passage of the highway in the said town (or city) within the
 distance of one mile from a place of public worship, or wilfully disturb an as-
 sembly of people met for religious worship in said town; (*&c. specifying the*
offence as particularly as is set forth in the form of conviction, infra) contrary to
 the statute in such case made and provided.

II. Form of summons.

County of } **T**O any constable of &c.
 ss. }

WHEREAS information upon oath has this day been made before me, C.
 D. Esq. one of the justices of the peace in and for the said county, by E.
 F. of gentleman, that on the day of (being the first day of the week,
 commonly called Sunday, *if it be for breach of Sabbath,*) he saw, (or heard) A.
 B. of expose to sale one, &c. (*here state the offence particularly as set forth in*
the information) contrary to the statute in such case made and provided. These
 are therefore to command you to cause the said, A. B. forthwith to appear before
 me, to answer the premises, and to be further dealt with according to law.
 Given under my hand and seal at the day of in the year of our Lord, &c.

The above Forms are taken from the form of conviction, given *in-
 fra*, and which is prescribed by the statute, which enacts "that every
 justice of the peace, mayor, recorder or alderman before whom any
 person shall be, by virtue of this act, convicted of any of the offences
 aforesaid, shall cause such conviction to be drawn up in the form
 following." 2 N. R. L. 196.

III. Form of conviction.

City of New-York, (Or Westchester county, or other city or county as the case may
 require,) ss.

BE it remembered, that on the day of in the year of our Lord one
 thousand A. B. was convicted before me, C. D. mayor, (or, recorder,
 or, one of the aldermen of the said city, or, one of the justices of the peace of
 the said county) of crying, or shewing forth, or exposing to sale, one (or two,
 or more, *specifying the number, quantity and kind of goods*) on a Sunday, in the
 said city, (or, the town of in the said county, or, of travelling, or, doing ser-
 vile work or labor, or, of shooting, fishing, sporting, playing, horse racing, hunt-
 ing, or, frequenting tippling houses, or, using some unlawful exercise or pas-
 time) on Sunday; or, of swearing one (or two, or more) profane oath or oaths,
 or, of uttering one (or more) profane curse (or curses) in the said city (or at
 the town of in the said county, as the case may require) or of obstructing

on the day of the free passage of the highway in the city (or town of) within the distance of one mile from a place of public worship, or of wilfully disturbing, on the day of an assembly of people met for religious worship, in the city or town of by making a noise, or by rude and indecent behaviour, or by profane discourse, or by exhibiting shows or plays, or by promoting or aiding horse racing or gaming, (as the case may be) or by exposing to sale ardent or distilled liquors, or of having on the day of kept or opened a huckster's shop upon the highway, within the distance of one mile from the place where such religious society were assembled, for public worship (as the case may require.) Given under my hand and seal the day and year above said.

IV. Form of a warrant on the statute to levy the penalty of one dollar for travelling on a *Sunday*.

County of } WHEREAS A. B. of in the said county, is duly convicted
ss. } before me, C. D. Esquire, one of the justices of the peace in and for the said county, of travelling on a Sunday, contrary to the statute in that case made and provided, whereby he has forfeited, to the use of the poor of the said town, the sum of one dollar. These are therefore to command you forthwith to levy the said sum of one dollar. And also which I have settled and ascertained as, and for the charges of the proceedings, against him, touching his said offence, by distress and sale of the goods and chattels of the said A. B. and to pay the said forfeiture to the overseers of the poor of the said town, for the use of the poor thereof. And you are to certify to me, with the return of this precept, what you shall have done in the execution thereof. Given under my hand and seal, at in the said county, the day of

INDICTMENT.

BY the third article of the bill of rights of the state of New-York, it is declared; "that no citizen of this state shall be taken or imprisoned, for any offence, upon petition or suggestion, unless it be by indictment or presentment of good and lawful men of the same neighborhood where such deeds be done, in due manner or by due process of law." 1 *N. R. L.* 47.

AN INDICTMENT is an accusation at the suit of the people, by the oaths of twelve men, of the same county where the offence was committed, returned to inquire of all offences, in general, in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true. 2 *Haw. c.* 25. 2 *H. H.* 153.

But 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. *Lamb. b.* 4. c. 3. 2 *Haw. c.* 25. [*See Notes.*]

NOTE 1. A presentment is a more comprehensive term than indictment, for regularly an indictment is an accusation given in against a person by the grand inquest for some misdemeanor, whereunto he is put to answer; but presentments not only include such indictments, but also some other informations, whereunto the party is not put to answer, as presentments of *felo de se*, of deaths *per infortuniam*, and many others. 2 *Hale's Hist.* 152.

2. Blackstone says a presentment properly speaking, is the notice taken by the grand jury, of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit (of the people,) as the presentment of a nuisance, a libel and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer to it; 4 *Black. Com.* 301.

And when it is returned by jurors, returned to inquire of that particular offence only which is indicted, it is properly called an *INQUIRY*. 2 *Haw. c. 25*.

The law respecting indictments will be treated of in the following order :

- I. *Concerning the nature of an indictment, and how far it is considered as a prosecution at the suit of the people.*
- II. *What offences are indictable.*
- III. *How an indictment may be found.*
- IV. *Concerning the form of an indictment.*
- V. *Where the offences indicted may be laid jointly, and where severally.*
- VI. *Where an indictment may be quashed.*
- VII. *Mulicious prosecutions.*
- VIII. *Of limitation of time by statute, within which indictments must be found.*

- I. *Concerning the nature of an indictment, and how far it is considered as a prosecution at the suit of the people.*

An indictment is a brief narrative of an offence committed by any person, which the public good requires should be punished ; and therefore it is said to be a prosecution at the suit of the [people] merely. 2 *H. H.* 169.

Hence, from its being the suit of the [people,] it is every day admitted that the party who prosecutes it, is a good witness to prove it. 2 *Haw. c. 25. § 3*.

And it is agreed, that no damages can be given the party grieved upon an indictment, or any other criminal prosecution. 2 *Roll. Abr.* 83. *Cro. Car.* 531. 558. 2 *Haw. c. 25. § 3*.

So where, by statute, damages are expressly given to the party grieved by the offence intended to be redressed, it seems that they cannot be recovered on an indictment grounded on the statute, unless such method of recovering them be expressly given by the statute ; but that they ought to be sued for in an action on the statute, in the name of the party grieved. 1 *Jones*, 580. *Cro. Car.* 448. 1 *Roll. Abr.* 220. 2 *Haw. c. 25. § 3*.

By statute of New-York, " if any felon do rob, or take away any money, goods or chattels, from any person, and the said felon be thereof indicted and found guilty, or otherwise attainted by reason of evidence given by the owner of the said money, goods, or chattels, bills of exchange, bills, or promissory notes for the payment of money, so robbed or taken away, or by any other, by his procurement, then such owner shall be restored to his money, goods or chattels, bills of exchange, bills, or promissory notes for the payment of money ; and the court before whom the felon shall be so convicted, may award writs of restitution for the said money, goods or chattels." 1 *N. R. L.* 497.

So in certain cases of assault and battery and misdemeanours, parties may settle among themselves, and the court in such cases, upon

a compliance with the requirements of the statute, may discharge defendant on payment of costs. 1 *N. R. L.* 499.

[See title ASSAULT AND BATTERY.]

The civil remedy is not merged in the felony, but the party injured may maintain his action against the felon, in the same manner as if the offence had not been felonious. *Ib.*

II. What offences are indictable.

Not only capital offences, such as treason and felonies, are indictable, but likewise all other crimes of a public nature, and *mala in se*, though of an inferior kind, as misprisions, and all other contempts; all disturbances of the peace; all oppressions, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted. 2 *Haw. c.* 25. § 4.

To disobey an order of justices of peace, is therefore an offence at common law, and indictable. *Cowp.* 648.

But it must appear upon the face of the indictment that it is a legal order; for if it is not so, disobedience to it is no crime. *The K. v. White and Elting. Caldecot's Cases*, 187.

But no injuries of a private nature, unless they some way concern the people, can be punished by way of indictment at common law. 2 *Haw. c.* 25. § 4.

Also generally, where a statute either prohibits a matter of public grievance, or commands a matter of public convenience, as repairing the common streets of a town, every such disobedience of such a statute is indictable. *Ib.*

For what the statute says shall not be done, it becomes illegal to do, and is therefore the subject matter of an indictment; and that even without the addition of any corrupt motives; for though the want of corruption may be an answer to an application for an information, which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment, where the judges are bound by the strict rule of law. 4 *Term Rep.* 457.

But if the party hath once been fined on an action on the statute, such fine is, it seems, a good bar to the indictment; because, by the fine, the end of the statute is satisfied. 2 *Haw. c.* 25. § 4.

Also, if a statute extend only to a private person, or if it extend to all persons in general, but chiefly concerning disputes of a private nature, as those relating to distresses made by lords on their tenants, it is said, that offences against such statutes will hardly bear an indictment. *Sid.* 209. *Mod.* 71. 288. *Raym.* 205. 2 *Haw. c.* 26. § 4.

Also, where a statute makes a new offence, which was not prohibited by common law, and appoints a particular proceeding, as by action of debt or information, or the like, without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment. 1 *Haw.* 398. 3 *Mod.* 79. 2 *Bur.* 799.

But when a new offence is created by statute, and a penalty is annexed to it by a separate and substantive clause, it is not necessary

for the prosecutor to sue for the penalty; but he may proceed, by indictment, on the prior clause, on the ground of its being a misdemeanor at common law. 2 *H. H.* 171. 1 *Bur.* 545.

And upon such indictment the party may be fined, but there it seems the fine ought not to exceed the penalty. 2 *H. H.* 171.

Also where a statute adds a new penalty to an offence prohibited also by common law, it is in the election of the prosecutor to proceed either at common law, or on the statute; and if he conclude his indictment *contra formam statuti*, and cannot make it good as an indictment on the statute; yet if it be good as an indictment at common law, it shall stand as such, and the words *contra formam statuti* shall be rejected. 2 *Haw. c.* 25. § 4. 5 *Term Rep.* 163.

To constitute a cheat or fraud an indictable offence at common law, it must be such a fraud as would affect the public; such a deception that common prudence cannot guard against it; as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. 2. *Burr.* 1125. 7 *Johns. Rep.* 204.

Lying in wait near a gaol, by agreement with a prisoner, and carrying him away is not an offence against the statute, but is a misdemeanor at common law. 9 *Johns. Rep.* 70.

Where A. was indicted for aiding and assisting to escape from gaol one P. M. committed "on suspicion of having been accessory to the breaking the house of S. with intent to commit a felony," it was held that the defendant was not indictable under the statute, because P. M. the prisoner was not committed under any distinct and certain charge of felony. 10 *John. R.* 160.

III. How an indictment may be found.

Every indictment is to be found by twelve lawful freemen of the county wherein the crime was committed, returned by the proper officer.

Where twenty-four persons were sworn upon a grand jury, who found the bill, so that more than twelve were necessary to the finding, chief justice Kent thought it a fatal objection to the proceedings. 2 *Caine's R.* 98.

[For particular qualifications of GRAND JURORS, see title JURY.]

They must be *probi et legales homines*; therefore it is a good exception to one returned on a grand jury, that he is an alien, attainted in a conspiracy, or *decies tantum*, or of perjury, or outlawed, or attainted of felony, or *praemunire*. 2 *H. H.* 155.

The grand jury is generally composed of gentlemen of the best figure in the county. 4 *Black. Com.* 302.

As many as appear upon the panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three; that twelve may be a majority. 4 *Blac. Com.* 302.

The grand jury are only to hear the evidence on behalf of the prosecution; and it is said, in case there be probable evidence, they ought to find the bill; because the finding of an indictment is only in the nature of an inquiry or accusation, and the party is to be put on his trial afterwards. 2 *H. H.* 157.

And they are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. 4 *Black. Com.* 303.

But it rather seems, that a grand jury ought to have the same persuasion of the truth of the indictment, so far as their evidence goes, as a petty jury, or coroner's inquest, and that they ought not to rest satisfied merely with *remote probabilities*; as they are sworn to present the truth and nothing but the truth. 4 *St. Tri.* 183. 4 *Black. Com.* 303.

And *Coke* observes, that, as indictments are commonly found in the absence of the party accused, it is necessary there should be substantial proof. 3 *Inst.* 25.

An indictment may be found upon the oath of one witness only, unless it be for treason, in which case two witnesses are required. 2 *Haw. c.* 25. § 129.

The grand jury are sworn to inquire for the body of the county, and therefore, by the common law, cannot regularly indict or present any offence which does not arise within the county for which they are returned. 2 *H. H.* 163. 2 *Haw. c.* 25. § 34.

And therefore it is a good exception to an indictment, that it doth not appear that the offence arose within such county. 2 *Haw. c.* 25. § 34.

And it seems agreed as a general rule, that let the nature of the offence indicted be what it will, whether local or transitory, as seditious words, battery, &c. if it appear upon not guilty to have been committed in a different county from that in which the indictment was found, the party shall be acquitted. 2 *Haw. c.* 25. § 35.

The grand jury therefore cannot regularly inquire of a fact done out of the county, unless particularly enabled by statute. 4 *Black. Com.* 303.

But it seems, by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either. 2 *Haw. c.* 25. § 37.

Also by the common law, if one guilty of larceny in one county carry the goods stolen into another, he may be indicted in either; because the possession continuing constructively in the party robbed, every moment's continuance of the trespass is as much a wrong as the first taking, and the offence is therefore complete in both. 2 *Haw. c.* 25. § 37.

But for a robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not robbery or burglary in that jurisdiction. 4 *Black. Com.* 305.

By statute, "where a man is feloniously struck or poisoned in one county and dies in another, the offender (who before at common law could not be indicted in either, by reason that no complete act of felony was done in any one of them) may be indicted in the county where the party died." 1 *N. R. L.* 495.

So also, "if treason is committed upon the land, out of this state, or upon the sea, it may be inquired of and determined in the supreme court in the county where said court may sit, in the same manner as if it had been committed within the said county." 1 *N. R. L.* 146.

“No person shall be indicted for treason or misprision of treason, but upon the oath of two witnesses, both to the same overt act, or one to one, and the other to another overt act, unless the party indicted confesses the crime in open court.” *Ib.*

Where a theft was committed in Vermont, and the felon fled with the horse into this state, where he was apprehended with the horse in his possession, it was held that he could not be tried in this state for the felony; and the court observed that where the original taking is out of the jurisdiction of this state, the offence does not continue and accompany the possession of the thing stolen, as it does in the case where a thing is stolen in one county, and the thief is found with the property in another county. *2 Johns. R. 477.*

The same principle was also established in the case of the People, *vs. Schenck*, a fugitive from New-Jersey. *2 Johns. R. 479.*

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, *ignoramus*, or we know nothing of it; but now they assert in English, more absolutely, *not a true bill*; or, which is the better way, *not found*; and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. *Black. Com. 305.*

If they are satisfied of the truth of the accusation, they indorse upon it, *a true bill*, anciently *billa vera*; the indictment is then said to be found, and the party stands indicted. *Ib.*

But to find a bill there must at least twelve of the jury agree. And if twelve assent, it is a good presentment, though some of the rest disagree; and then the indictment, when so found, is publicly delivered into court. *4 Black. Com. 306.*

It seems to be generally agreed, that a grand jury must find *billa vera* or *ignoramus* for the whole; and that if they take upon them to find it specially or conditionally, or to be true for one part only and not the rest, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew. *2 Haw. c. 25. § 2.*

But this rule relates only to cases where the grand jury take upon themselves to find part of the same indictment to be true, and part false, and do not either affirm or deny the fact submitted to their enquiry: but when there are two distinct counts, viz. one for a riot, and the other for an assault, and the grand jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding leaves the indictment, as to the count found, just as if there had been originally only that one count. *Cowp. 325.*

IV. Concerning the form of an indictment.

Touching the forms of indictments, there are two things considerable: 1. The caption of the indictment; 2. The indictment itself. *2 H. H. 165.*

FIRST, *As to the caption of the indictment.*] 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 on the file in the court, where it is taken, is only thus, *The jurors for [the people of the state of New-York] 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.

County of ss. At the general sessions of the peace, holden at in and for the county of aforesaid, the day of in the year of our lord one thousand eight hundred and before O. P. J. P. and S. P. Esquires, Judges, and others their associates, Justices of the said people, assigned to keep the peace of the said people, 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 A. B. C. D. &c. [naming all the jurors] good and lawful men of the county aforesaid, then and there sworn and charged to inquire for the said people, and for the body of the county aforesaid, it is presented, that O. O. &c. [setting out the indictment verbatim.]

County of] 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 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 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 day of in the year of our Lord] It hath been adjudged, that if the caption of the indictment describe the sessions holden in the time past, and not in the present, it is insufficient. 2 *Haw.* 255.

And figures to express numbers are not allowable in an indictment ; but numbers must be expressed in words. 2 *H. H.* 170. *Cr. Cri.* 109. *Andr.* 137. *H.* 11. *G.* 2 *K.* and *Haddock.* Or at least in Roman numerals. *Str.* 261. *H.* 6 *G. K.* and *Phillips.*

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 session, and the rest may be supplied by the words and others, their associates. 2 *H. H.* 166.

And although no sessions can be held without one of the justices being of the *quorum*, yet in their 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*, although 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.* 168. *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 twelve, or that some 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 overruled ; because all men shall be intended to be honest and lawful, until the contrary appear. 2 *Haw.* 215.

Then and there sworn and charged.] In contradiction to the opinion expressed in *Ld. Raym.* 710, our court have decided that where an indictment was found at the *general sessions of the peace* of the county, in which the defendant was convicted at the *oyer and terminer*, and the indictment was removed into the supreme court, with a caption stating that the grand jury were sworn, and charged, omitting the words "*then and there*," that this omission was fatal, and the judgment was arrested. 3 *John. Cas.* 265.

In confirmation of the above, *Kent*, justice, cited 1 *Mod.* 26, 2 *Keb.* 583. 1 *Vent.* 60. 2 *Stra.* 901.

There is a distinction between indictment, in inferior courts and the king's bench, (or supreme court.) In the former many words in the caption are held fatal, which are not so in the latter courts. 3 *Johns. Ca.* 267.

SECONDLY, *As to the indictment itself.*] The requisite and most considerable parts of an indictment are, 1. *The name and addition of the party offending* ; 2. *The day and year of the offence committed* ; 3. *The place where it was committed* ; 4. *Upon or against whom committed* ; 5. *The manner of the commission of it* ; 6. *The fact itself, and the nature of it* ; 7. *The conclusion.* 2 *H. H.* 174.

This, saith Hale, is the grammatical order, wherein things are set down in the indictment, and upon these parts most of the considerations and observations touching indictments do arise. 2 *Hale's Hist.* 174.

1. *As to the name and addition of the party offending.*] The name of the party indicted regularly ought to be inserted truly in every indictment. 2 *H. H.* 174.

But the inhabitants of a town may be indicted for not repairing the highway, although no person is particularly named. *Wood, b. 4. c. 5.*

If a man be known by the addition of *junior* to his name, an indictment against him without that addition, is not conclusive that he was not the person indicted, if found by a special verdict that he was the person meant. 2 *Caine's R.* 165.

It is said that no person indicted can take any advantage of a mistaken surname in the indictment, notwithstanding such surname hath no manner of affinity with his true one, and he was never known by it. 2 *Haw.* 230, 1, 2, 3. 2 *H. H.* 176.

But this 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 be presently 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. *Ld. Raym.* 562.

By statute, "in all indictments on which process of outlawry lies,

to the names of the defendant, *additions shall be made of their estate, or degree, or mystery, and of the towns and counties of which they were or be conversant.*" 1 *N. R. L.* 165.

But although 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 allege 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.* 276.

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 *Haw.* 245.

[For the law respecting MISNOMER and ADDITION see title MISNOMER.]

2. *The day and year of the offence committed.*] This is necessary to be contained in the indictment. 2 *Hale's H.* 177.

For it is an undoubted principle that no indictment whatsoever can be good without precisely showing a certain year and day of the material facts alleged in it. 2 *Hawc. c.* 25. § 77.

But if an indictment lay the offence on an uncertain or impossible day, as when it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day which makes the indictment repugnant to itself, it is void; and it hath been adjudged that no defect of this kind can be helped by the verdict. 2 *Haw. c.* 25. § 77.

But it seems to be generally agreed, that the words "*then and there,*" in the subsequent clauses of an indictment, are of the same effect as if the year and day, mentioned in the former part of it, had been expressly repeated. *Haw. c.* 25. § 78.

And if they are omitted, judgment may be arrested. 2 *Str.* 901.

Also, 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.

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 style of the sessions. *Lamb.* 491.

But it is agreed, that a mistake in not laying an offence on the very same day on which it is afterwards proved, upon the trial, is not material upon evidence. 2 *Haw. c.* 25. § 81.

But it is best in the indictment to set down the times as truly as can be, though 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 judgment upon their oaths. *Dalt. c.* 184.

And if an indictment charge a man with having done such a nuisance, such a day and year, and on *divers other days*; it is void only

as to the facts on those days which are uncertainly alleged, and effectual for the nuisance on the day specified. 2 *Haw. c.* 82.

But if it charge a man generally with several offences, at several times, without laying any one of them on a certain day, as with extorting divers sums of money, of divers subjects, for a passage over such a ferry, between such a day and such a day, it hath been adjudged that this is wholly void. 2 *Haw. c.* 25. § 82.

Because every extortion is a separate and distinct offence, requiring a separate and distinct punishment, in proportion to the enormity of it; and if accumulated under a general charge, instead of being singly and certainly laid, it is impossible for the court to adapt the punishment to the measure of the crime. 4 *Mod.* 103.

3. *As to the place where it was committed.*] It is agreed that every indictment at common law must show some place, wherein the offence was committed, which must appear to have been within the jurisdiction of the court in which the indictment was taken, and must be alleged without any repugnance. 2 *Hawk. c.* 25. § 83.

But in some crimes no vill (*or town*) need be named, as upon an indictment of barratry, because he is a barrator every where, and it shall be tried *de corpore comitatus*. 2 *Hale's Hist.* 180.

If the county be put in the margin, and the indictment lays the fact as done at S. in the county aforesaid, it is good, for it refers to the county in the margin. *Id.*

But if there be two counties named, one in the margin, another in the addition of any part, or in the recital of an act of [the legislature,] recited in the premises of the indictment, the fact laid at S. in the county aforesaid, vitiates the indictment; because two counties are named before, and it is uncertain to which it refers. *Cro. Eliz.* 739. 2 *Hale's Hist.* 180.

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.

4. *As to the name of the person upon or against whom the offence was committed.*] 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 certain person, to the jurors unknown, or for stealing goods of a certain person unknown, is good. 2 *H. H.* 181.

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, though sometimes it may be convenient for distinction sake to add it. 2 *H. H.* 182.

And it hath been adjudged not to be necessary in an indictment of death, to allege that the person killed was in the peace of God and of the [people,] &c. though such words are commonly put into indictments; for they are not of substance, and possibly they may not be true, for he might be breaking the peace at the same time. 2 *H. H.* 186.

On an indictment for forging a check, drawn in the name of a partnership firm, on the *President and Directors of the Manhattan Company*, it was held, that it was not necessary to set out the names

of all the partners who composed the copartnership, or the banking company. 1 *Johns. R.* 320.

5. *As to the manner of the commission of the offence.*] An indictment, as defined by Hale, is nothing else but a plain, brief and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the *fact*, and its *nature*, in which, in favour of life, great strictnesses have at all times been required. 2 *Hale's Hist.* 169.

And therefore it is laid down, as a good general rule, that in indictments the special manner of the whole fact ought to be set forth with scrupulous certainty, that it may judicially appear to the court that the indictors have not gone upon insufficient premises. 2 *Haw. c. 25. § 57. Caldecot's Cases* 187.

Hence it hath been held that no periphrasis, or circumlocution whatsoever, will supply those words of art which the law hath appropriated for the description of the offence; as *burglariously* in an indictment of burglary; *feloniously* in an indictment of felony, and the like. 2 *Haw. c. 25. § 55. 2 Hale's Hist.* 183, 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.

And in case of murder, it ought to be stated 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.

And regularly the length and depth of the wound is to be shewn; 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 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. *Ib.*

So also it ought to be stated with what instrument it was done, namely, with a *certain sword*, or the like. 2 *H. H.* 185.

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. *Ib.*

It ought also to be shewn in what hand the offender held the sword or instrument. *Ib.*

According to the English law, the value of the instrument should be set down, or else that it is of no value. *Ib.*

The above rule, however, is in consequence of the instrument or weapon being considered as a deodand forfeited to the king, but as this is not the case in this state, perhaps it would not be fatal to omit the value, &c. in the indictment.

Where an indictment (under the statute) stated that the prisoner, with force and arms, to wit: with knives, hatchets, &c. made an assault upon E. G. *with intent to commit murder upon him*, and did then and there cut, beat, strike, wound, and ill treat the said E. G. to his damage, &c. and against the peace, &c. it was held to be sufficient: It is enough to state with the usual precision the facts ne-

cessary to constitute an assault and battery, and aver the intent with which it was made. 3 *Johns. R.* 511.

And from this certainty required in indictments, it hath been adjudged, that an indictment for burglary is insufficient, if it do not shew that it was done *in the night time*. *Cro. Eliz.* 483.

Therefore the time must be expressed in the indictment, that is to say, it must be stated that the offender, *about the hour of* *in the night of the same day, feloniously and burglariously did break and enter*. 2 *H. H.* 179.

Also, an indictment charging a man disjunctively is void; as that he *murdered, or caused to be murdered; beat, or caused to be beat; forged, or caused to be forged*; for here are distinct offences, and it appears not of which of them the indictors have accused the defendant. 2 *Hawk. c. 25. § 58.*

An indictment accusing a man in general terms is not good, the particular fact laid to his charge must be ascertained. *Ib.*

Hence, if an indictment against a man be for that he is a common thief, or common champertor, conspirator, common malefactor, or common robber, it cannot be good, because every indictment ought to contain the particular matter wherein the offence was committed. 2 *Hale's Hist.* 182.

But common barrator and disturber of the peace, &c. is good, because barratry is an offence known in law, and consists of divers particulars; and the rest that is added thereunto are but aggravations of the offence, for barratry itself is a crime. 2 *Hale's Hist.* 182.

In an indictment for forging a bill of exchange, or bank bill, it is not necessary to insert the marks, letters or figures used in the margin of the bill, for ornament, or the more easy detection of forgeries, as such marks or cyphers form no part of the bill. 3 *Johns. Cas.* 299.

An indictment against one for being a common scold, is good without setting forth the particulars. 2 *Hawk. c. 25. § 59.*

Nor is it necessary to prove the particular expressions used, it is sufficient to prove generally that she is always (as the report says) scolding. 1 *Term R.* 754.

An indictment against a man for that he feloniously took and carried away goods and chattels of another, without showing what in certain, as one horse, one ox, or the like, is not good. *Lambarde*, 496. 2 *H. Hist.* 182.

The value of any thing stolen must also be set down in the indictment, that it may appear whether it be grand or petit larceny. *Lamb.* 497. 2 *H. H.* 183.

The general sessions in New-York has no jurisdiction on indictments for a second offence in committing grand larceny; indictments for second offences, where the punishment is incurred, must set forth the record of the former conviction. 1 *Caine's R.* 37.

The same certainty as in case of theft, and indeed rather more, is required in an indictment for goods, as in trespass for goods, for what will be a defect of certainty in a declaration, will be much more defective in an indictment. 2 *H. H.* 183.

An indictment against an attorney, for extorting more than his legal fees, must state the sum due, and the specific excess. 1 *Caine's Rep.* 181.

The word *unlawfully* has been adjudged not to be necessary in an indictment for a riot, because the fact indicted appears to be unlawful ; and the same may be said of all other indictments at common law : but if a statute, in describing the thing prohibited, use the word *unlawfully*, an indictment thereon is not good without. 2 *Haw. c. 25. § 96.*

At common law, the words *with force and arms* were necessary in indictments for offences which amount to an actual disturbance of the peace, as rescoues, assaults, and the like ; but it seems they were never necessary *where it would be absurd to use them* ; as in indictments for conspiracies, slanders, cheats, escapes, and such like ; or for nuisances in the defendant's own ground. 2 *Hawk. c. 25. § 90.*

But however material these words might have been by common law, yet now it is enacted by statute, that from henceforth the words " with force and arms," or any such words, shall not, of necessity, be put in any inquisition or indictment of treason, felony, trespass or any other offence, nor shall the parties indicted have any advantage in this respect by writ of error, plea, or otherwise. *Ib.*

Yet it is certainly safe and advisable to make use of them when they are proper and pertinent, if it be to no other purpose than to aggravate the offence. 2 *Haw. c. 25. § 90.* 3 *Bac. Abr.* 109.

6. *As to the fact itself, and nature of it.*] An indictment must lay the charge against the defendant positively, and not by way of recital, as with a *whereas* ; and it must expressly allege every thing material in the description of the substance, nature and manner of the crime ; for no intendment shall be admitted to supply a defect of this kind. 2 *Haw. c. 25. § 60.*

Therefore, if an indictment of murder want the words of *malice aforethought*, it is no answer that it hath the words *feloniously murdered*, which imply as much. *Ib.*

So if an indictment of death want an express allegation, that the party received the hurt, laid as the cause of his death, and also that he died thereof, no implication will help it. *Ib.*

Also if an indictment for a feloniously breaking of prison, and commanding J. S. there imprisoned, to escape, do not expressly allege that J. S. did escape, it is no answer that it is fully implied in calling the offence a felonious breaking. *Ib.*

It is also a certain rule, that if one material part be repugnant to another, or if the fact, as laid, be impossible, or absurd, the indictment is void ; as where one is indicted for having forged a writing, in which A. was bound to B. which is impossible if the writing were forged ; or for having disseised J. S. of land, wherein it appears by the indictment itself, that he has no freehold ; or for having murdered J. S. at B. where, by the indictment it appears that J. S. was only wounded at B. and died at C. ; or for selling iron with false weights and measures, which is not only absurd, as supposing that iron could be sold by measures, but inconsistent, in supposing that it was so sold, and yet at the same time sold by weight ; or for feloniously cutting down trees, &c. Yet when the sense is clear, a small impropriety may be dispensed with ; as when one is indicted for having mowed an acre of hay, which is said to be sufficient, and yet that

which was mowed could not, at the same time of the mowing, in strictness be called hay, but grass only. 2 *Haw. c. 25. § 62.*

Also a repugnancy in an indictment in setting forth the offence of the accessory, is as fatal as it is setting forth that of the principal. 2 *Haw. c. 25. § 63.*

Also an indictment of a constable for having voluntarily and feloniously suffered a person arrested by him on suspicion of felony, to escape, without shewing what the felony was, and that it was actually committed, is said to be void, by reason of the uncertainty: but an indictment for knowingly suffering persons convicted of felony, to escape, is said to be good, without finding expressly what the felony was, or that it was committed, if the record of conviction be set forth with convenient certainty; for that shews what the felony was, and that it was committed. 2 *Haw. c. 25. § 66.*

Also an indictment, grounded upon an offence made by statute, must, by express words, bring the offence within the substantial description thereof; 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.*

But there is no necessity in any indictment on a public statute to recite such statute; for the judges are bound *ex officio* to take notice of all public statutes. 2 *Haw. c. 25. § 100.*

Yet if the prosecutor take it upon him to do it, and materially vary from a substantial part of the purview of the statute, and conclude *against the form of the statute*, he vitiates the indictment, because it judicially appears to the court, that there is no foundation for the prosecution, as that whereon it is expressly grounded. 2 *Haw. c. 25. § 101.*

But no advantage can be taken of a variance from any part of a private statute, without shewing it to the court in a proper manner; because otherwise such statute shall be taken to be as it is recited. 2 *Haw. c. 25. § 103.*

It seems also that the misrecital of the title of a statute is fatal. 2 *Haw. c. 25. § 104.*

But there is no need to allege in an indictment, that the defendant is not within the benefit of the provisos of the statute, although the same may be necessary in a conviction; but the party may have the benefit of the proviso on his plea of not guilty, and in like manner shall he have the benefit of any subsequent statute containing an exemption. 2 *Haw. c. 25. § 113. 1 H. H. 170, 1.*

7. *As to the conclusion.*] Regularly, every indictment ought to conclude, *against the peace of the [people of the state,]* and therefore an indictment without such conclusion 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.*

And an indictment that concludes against the peace merely, is sufficient. *Ib.*

It was formerly holden that no indictment grounded on a statute, and concluding *against the form of the statute*, could be maintained as an indictment at common law, if it were not maintainable as an indictment on some statute, because it appears that the prosecution

is grounded on a foundation that will not support it; but the law is now taken to be otherwise; and accordingly, it hath been adjudged, that on a special indictment on the statute of stabbing, the defendant may be found guilty of general manslaughter at common law, and the words *against the form of the statute* rejected as senseless. 2 *Haw. c. 25. § 115.*

But it is agreed that a judgment on a statute shall never be given on an indictment, which doth not conclude *against the form of the statute*. 2 *Haw. c. 25. § 116.*

And if a statute, making an offence, be but temporary, and is made perpetual by another statute, the indictment concluding against the form of the statute is good. 2 *H. H. 173.*

But if the former statute be discontinued, and revived by another statute, the best way is to conclude against the form of the statute: though there is good opinion, that it is good enough to conclude against the form of the first statute. *Ib.*

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 statute. *Ib.*

It is clearly agreed that none of the statutes of amendment extend to criminal prosecutions, and therefore no indictment can be amended, in any case, wherein an amendment is not allowable at common law. 2 *Haw. c. 25. § 97.*

A coroner may by rule amend his inquest by the votes, in matter of form before it is filed, but not after, for then it becomes a record of the court; and the same objection seems to lie against the amendment of it, as of an indictment. *Ib.*

It is the common practice at this day, (says Hawkins) while the grand jury who found the bill 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 *Haw. c. 25. § 98.*

V. *Where the offence indicted may be laid jointly, and where severally.*

Although the offences of several persons cannot but be several, because one's offence cannot be another's, but every man must answer for himself; yet if it wholly arise from a joint act which is in itself criminal, as where several join in keeping a gaming house, or in stealing, or maintenance, or extortion, or the like, the defendants may be indicted jointly and severally; as that *they and each of them did so and so*, or jointly only; for it sufficiently appears, that if all joined in such act, each must be guilty; and therefore some of them may be convicted, and some acquitted.

But where the offences arise from a joint act which in itself is not criminal, but may be so by reason of some personal defect peculiar to some defendant, it seems most proper to indict them severally, and not jointly. 2 *Haw. c. 25. § 89.*

And for this reason indictments have been quashed for jointly charging several defendants for not repairing the streets before their houses; and this is agreeable to the rule of law as to bringing actions on penal statutes, wherein several defendants shall not be joined,

except it be in respect of some one thing in which all are jointly concerned. 2 *Haw. c. 25.* § 89, 90.

But yet where A. B. C. and D. were indicted for erecting four several inns *to the common nuisance*, it was ruled, that for several offences of the same nature, several persons may be indicted in the same indictment; but there it must be laid that *they severally did so and so*: and for want of that word (*severally*) the indictment was quashed. 2 *H. H.* 174.

Also it is said in *Hale*, that twenty persons may be indicted for keeping disorderly houses, or bawdy houses, and they are daily convicted upon such indictments; for the word *severally*, makes them several indictments. *Ib.*

But several defendants cannot be joined in one indictment for perjury; for it is a separate act in each; and one may be desirous to have a *certiorari*, and the other not; and the jury on the trial of all may apply evidence to all, which is but evidence against one. 2 *Str.* 192.

In all cases where a right of peremptory challenge of jurors does not exist, two or more persons may be indicted and tried jointly or separately, in the discretion of the court. 4 *Johns. R.* 296.

Where two prosecutors were joined in the same indictment for an assault and battery, the court held they were distinct offences. 2 *Str.* 870. 2 *Ld. Ray.* 1572.

VI. *Where an indictment may be quashed.*

By the common law, the judges may, in discretion, quash any indictment for any such insufficiency in the body or caption of it, as will make a judgment given on it against the defendant erroneous; but they are in no case bound so to do *ex debito justitiæ*, but may oblige the defendant to plead or demur; and this they generally do where the indictment has been removed by *certiorari*, and a recognizance for procuring the trial of it has been forfeited. 2 *Haw. c. 25.* § 146.

VII. *Malicious prosecutions.*

For destroying and injuring a man's reputation by preferring malicious indictments or prosecutions against him, the law has given a very adequate remedy in damages, either by action of *conspiracy*, or, which is the more usual way, by a special action on the case for a false and malicious prosecution. 3 *Black. Com.* 126.

Therefore if a man be falsely and maliciously indicted of any crime that may prejudice his fame and reputation, he may bring his action. So if he be indicted of a crime that subjects him to peril of life or liberty. So though it touch neither his fame nor liberty; for it is injurious to his property, by putting him to a needless expense. And the action may be brought as well against one who procures others to indict, as against the prosecutor. *Bul. N. P.* 13.

And an action on the case for a malicious prosecution may be founded upon an indictment, whereupon no acquittal can be had. 3 *Black. Com.* 127.

As where a man is falsely and maliciously indicted of a crime which hurts his fame, and which is a scandal to him: though the in-

dictment be insufficient, or an *ignoramus* found ; yet an action lies for the slander, because the mischief of that is effected. *Bul. N. P. 13.*

So an action will lie as well for damage by expense, as by scandal or imprisonment, though the indictment be insufficient ; and therefore it may be brought by a husband for the expense of defending his wife. *Ib.*

The plaintiff must produce and prove a copy of the acquittal on record, and the substance of the evidence given on the indictment, and the charges of the acquittal, and the circumstances which shew the prosecution was malicious and without probable cause ; he may likewise give in evidence the circumstances of the defendant, in order to increase the damages. *Bul. N. P. 13.*

To warrant the granting a copy of an indictment, to ground an action for a malicious prosecution, the malice should appear from circumstances at the trial, declarations out of court, or certificate from the judge that he thinks it ought to be granted, and he may give it though he be off the bench, and has signed one which proves insufficient. *2 Caine's R. 202.*

But though an action do lie for a malicious prosecution, yet it is not to be favored ; and therefore if the indictment be found by the grand jury, the defendant shall not be obliged to shew a probable cause ; but it shall lie upon the plaintiff to prove express malice. *Bul. N. P. 14.*

And the action ought not to be maintained without rank, express malice and iniquity. The grounds of it are, on the plaintiff's side, innocence ; on the defendant's, malice. *Ib.*

And though the plaintiff do prove malice, yet if the defendant shew a probable cause, he shall have a verdict ; and the judge, not the jury, is to determine whether he had a probable cause ; and therefore where the plaintiff, having brought an action against the defendant for a malicious prosecution for perjury, obtained a verdict, upon a motion for a new trial, the court set it aside, (it appearing upon the report of the judge that there was a probable cause,) not as a verdict against evidence, but as a verdict against law. *Ib.*


An action for a malicious prosecution is not cognizable before a justice. *10 Johns. R. 106.*

VIII. Of limitation of time by statute within which indictments must be found.

By statute, " all actions, informations and indictments which shall hereafter be brought for any forfeiture upon any penal statute, whereby the forfeiture is limited to the *people of this state only*, shall be brought within two years after the offence committed ; when the benefit of the forfeiture is limited to *any person who shall prosecute* for the same, or to the *people of this state*, and to any other who shall *prosecute* in that behalf, it shall be brought within one year ; and in default of such pursuit, then the same shall be brought by the *people* at any time within two years after that year ended ; when the benefit of the forfeiture is limited to the *party aggrieved*, it shall be brought within three years. Provided, that when any indictment is limited by any statute to be brought within a shorter time than is

hereby limited, the same must be brought within the time limited by such statute." 1 *N. R. L.* 187.

"All suits, informations, and indictments which shall be brought, or exhibited for any crime or misdemeanor, murder excepted, shall be brought or exhibited within three years next after the offence committed: Provided, that if any person against whom such indictment shall be exhibited, shall not have been an inhabitant within this state, during the said three years, then the same may be brought at any time within three years, during which he shall be an inhabitant within this state. And, provided, that where any indictment for any crime is limited by statute to be brought within a shorter period, than is hereby limited, the same shall be brought within the time so limited." 1 *N. R. L.* 187.

[ For the form of a recognizance to appear and give evidence on an indictment, and also for the form of a recognizance to prosecute and give evidence,—See forms under title EVIDENCE.]

And the condition of a recognizance to answer to an indictment may be as follows:

THE condition of the above recognizance is such, that if the above bound O. O. do and shall personally appear at the next general 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 P. A. of yeoman, for an assault and battery upon him, the said P. A. 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 recognizance to be void, otherwise to remain in full force.

INFANTS.

FROM the observations made on the daily actions of infants, as to their arriving to discretion, the laws and customs of every country have fixed upon particular periods on which they are presumed capable of acting with reason and discretion; hence in our law the full age of man or woman is twenty-one years. 3 *Bac. Abr.* 118.

Yet one having attained years of discretion, that is, the age of fourteen, may be guilty of a capital offence, and equally liable to suffer as a person of the full years of twenty-one. 1 *H. H.* 16. 4 *Blac. Com.* 23.

For on the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society, the law presuming that the human mind has acquired at this period a complete sense of right and wrong. *Co. Lit.* 79. 171. 147. *Dalt.* 476. 505.

But infants under the age of discretion are said not to be punishable by any criminal prosecution whatsoever. 1 *H. c.* 1. § 1.

For during the interval between the age of fourteen years and that of seven, the mind is *prima facie* presumed to be unacquainted with guilt; and these presumptions entertained in favor of innocence, accumulate in an inverse proportion with the decrease and tenderness of the offender's years. 1 *H. H.* 25. 27. 434.

And from this supposed imbecility of mind, the protective humanity of the law will not, without anxious circumspection, permit an infant to be convicted on his own confession. *Cro. Jac.* 466. 1 *H. H.* 24. *Fost. Cr. L.* 70.

Yet if it appear, by strong and pregnant evidence and circumstances, that he was perfectly conscious of the nature and malignity of the crime, as if in murder he hides the body slain by him, makes excuses, or otherwise shews such signs of cunning as demonstrate him capable of discerning between good and evil, the verdict of a jury may find him guilty, and judgment of death may be given against him. 1 *H. H.* 20. 25. 434. 630. *Fost. Cr. L.* 71.

For malice makes up for the want of age ; and the capacity of contracting guilt is measured more by the apparent strength of the offender's understanding than by years and days. 1 *H. H.* 630, 4 *Black. Com.* 23.

Thus a boy of ten and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged ; because it appeared on their trials that the one hid himself, and the other hid the body he had killed ; which, as has been before observed, manifested a consciousness of guilt and a discretion to discern between good and evil. 4 *Black. Com.* 23. 1 *H. H.* 27.

And there was an instance in the last century, where a boy of eight years old was tried at *Abington* for firing two barns ; and it appearing that he had malice, revenge, craft and cunning, he was found guilty, had judgment to be hanged, and was hanged accordingly. 1 *H. H.* 25.

But if an infant be within the age of seven years, he cannot be guilty of felony, whatever circumstances proving discretion may appear ; for in presumption of law he cannot have discretion, and no averment shall be received against that presumption. 1 *H. H.* 27, 8.

And if he be indicted for such an offence as is in its nature capital, he must be acquitted. 1 *H. H.* 20.

Therefore if a child under this age steal the goods or fire the house of another, he cannot be punished for either the larceny or the arson. 1 *H. H.* 19. 514. *Fost. Cr. L.* 113. 349.

As to MISDEMEANORS and offences not capital, in some cases an infant is privileged by his non age ; and herein the privilege is all one, whether he be above the age of fourteen or under, if he be under one and twenty years, but with these differences : 1 *H. H.* 20.


If an infant under the age of twenty-one years be indicted of any misdemeanor, as a riot or battery, he shall be privileged barely by reason that he is under twenty-one years ; but if he be convicted thereof by due trial, he shall be fined and imprisoned ; and the reason is, because upon his trial, the court, *ex officio*, ought to consider and examine the circumstances of the fact, whether he was capable of mischief, and had discretion to do the act wherewith he is charged. 1 *H. H.* 20.

But if the offence charged by the indictment be a mere *nonfeasance* or omission, as not repairing a bridge, or a high way, or the like, then he shall be privileged by his own age, if under twenty-one, though above fourteen years ; for, not having the command of his

fortune till twenty-one, he wants the capacity to do those things which the law requires. 4 *Black. Com.* 22.

So if A. kills B. and C. and D. are present, and do not attack the offender, they shall be fined or imprisoned; yet if C. were within the age of twenty-one years, he shall not be fined nor imprisoned. 1 *H. H.* 21.

An infant may be guilty of a forcible entry, in respect of personal actual violence. 1 *Haw.* 147.

 For the rules to be observed in receiving the testimony of infants, see title EVIDENCE.]

INFORMATION CRIMINAL.

- I. Of the nature and several kinds of informations.
- II. In what cases they lie.
- III. In what manner they are to be laid.
- IV. How informations are to be filed and proceeded on, and the provisions made herein by statute.

I. Of the nature and several kinds of informations.

AN information may be defined an accusation or complaint exhibited against a person for some criminal offence, either immediately against the [people,] or against a private person, which, from its enormity or dangerous tendency, the public good requires shall be restrained and punished; and differs principally from an indictment in this, that an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it. 3 *Bac. Abr. Tit. Inform.*

This mode of criminal allegation cannot be brought in capital cases, nor for misprision of treason. 2 *Haw.* 260.

1. For an offence principally and more immediately against the [people,] an information may be exhibited in the name of the Attorney-General; and such information may be filed without any application or leave of the court, and the party shall be obliged to answer the same; also the statute 4 and 5 *W. S.*, [1 *N. R. L.* 102] which requires a recognizance for payment of costs from persons exhibiting and prosecuting informations, does not extend to informations filed by the Attorney General; and it said that the court will not quash such information on motion, but will oblige the party to demur or plead thereto. 1 *Haw. c.* 26. § 1. 6. *Salk.* 372. 1 *Ld. Raym.* 570.

2. Where by many penal statutes the prosecution upon them is by the acts themselves limited to be by bill, plaint, information or indictment, then, without doubt, the prosecution may be by information as well as by any other of these methods: also of common right, such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded. 2 *H. H. c.* 20. 2 *Haw. c.* 26. § 2.

3. Informations in nature of a *quo warranto* may be, and frequently are exhibited, with leave of the court, for usurping privileges, franchises, &c. which in some respects is a civil suit, as it is used as a proper means to try a right, though it punishes the misdemeanour, such as the usurpation.—3 *Bac. Abr. Tit. Inform.*

But such informations to be filed by leave of the court, at the relation of a private prosecutor, can be against individuals only. The attorney general must inform against the whole body, as a corporation, for a usurpation of unauthorized power. 2. *Burr.* 869.

II. In what cases they will lie.

Hawkins says that it is every day's practice, agreeable to numberless precedents, either in the name of the king's Attorney-General, or of the master of the *Crown-office*, to exhibit informations for batteries, cheats, seducing a young man or woman from their parents, in order to marry them against their consent, or for any other wicked purposes. And an information has been granted for taking away a young woman from her guardian, although chancery has committed the offender for a contempt. 2 *Str.* 1107—and even for taking an infant from her putative father. 2 *Str.* 1162.—Spiriting away a child to the plantations—rescuing persons from legal arrests—perjuries and subornations thereof—forgeries—conspiracies, (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *tales*) and other such like crimes, done principally to a private person, as well as for offences done principally to the king; as for libels—seditious words—riots—false news—extortions—nuisances, (as in not repairing highways, or obstructing them, or stopping a common river)—contempts, as in departing from the parliament without the king's license—disobeying his writs—uttering money without his authority—escaping from legal imprisonment on a prosecution for a contempt—neglecting to keep watch and ward—abusing the king's commission to the oppression of the subject—(*reproaching the office of magistracy, or defaming the character of the magistrates.* *Carth.* 14, 15)—making a return to a *mandamus* of matters known to be false, and in general any other offences against the public good, or against the first and obvious principles of justice and common honesty. 2 *Haw. c.* 26. § 1.

So also an information may be exhibited, for wilful and corrupt oppression, by a justice of the peace in the execution of his office. 1 *Durn. and East.* 658. 692, 3. 2 *Ib.* 190. 3 *Ib.* 388, &c.

By the common law, informations were exhibited for libels, but in New-York it is declared by statute, that “it shall not be lawful to prosecute any person or persons by information, for writing or publishing any libel.” 2 *N. R. L.* 554.

III. In what manner they are to be laid.

As an information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it; whatsoever certainty is requisite in an indictment, the same at least is necessary also in an information. 2 *Haw. c.* 26. § 4.

IV. *How informations are to be filed and proceeded on, and the provisions made herein by statute.*

It seems to be the established practice at this day, not to admit the filing of any information, (except those exhibited in the name of the Attorney-General,) without first making a rule on the persons complained of to shew cause: which rule is never granted but upon motion made in open court, and grounded upon affidavit of some misdemeanor, which, if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution; and if the person on whom such rule is made, having been personally served with it, do not, at the day given him for that purpose, give the court good satisfaction by affidavit, that there is no reasonable cause for the prosecution, the court generally grants the information; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule; as if they purposely absent themselves, or the like. 2 *Haw.* c. 26. § 8.

It is usual to refuse the liberty of filing an information to a suitor, who has incurred similar culpability; as in cases of infamous cheats, or duellists. 1 *Burr.* 316. 548. 3 *Burr.* 1565.

As to the provisions made herein by statute:

“The clerk of the supreme court shall not, without express order given by the court, receive or file any information for any trespass, battery, or other misdemeanor, or seal any process thereupon, before he shall have delivered to him a recognizance from the person procuring such information, to be entered into, to the person against whom such information is to be exhibited, with sufficient security, in the penalty of twenty pounds, that he will effectually prosecute such information, and abide by and observe such order as the court shall direct, (which recognizance any one of the judges of the supreme court is empowered to take;) and the clerk shall make an entry thereof upon record, and shall file a memorandum in some public place in his office.” 1 *N. R. L.* 102.

“And in case any person, against whom any information shall be exhibited for the causes aforesaid, shall appear and plead to issue, and the prosecutor shall not, at his own costs, at or before the second court, (in which the same might be tried) next after issue joined, procure the same to be tried; or if upon such trial a verdict pass for the defendant, or in case the informer procure a *nolle prosequi* to be entered, the court is authorized to award to the defendant his costs, unless the judge before whom such information shall be tried, shall, at the trial, in open court, certify upon record, that there was reasonable cause for exhibiting the same. And in case the informer shall not, within ten days next after the costs taxed and demand made, pay to the defendant the said costs, the defendant shall have the benefit of the said recognizance.” *Ib.* 103.

The following construction hath been given to the various parts of this statute.

1. *The clerk of the supreme court shall not, without express order given by the court, receive or file any information, &c.]* The meaning of this statute is, that the clerk shall not file any information with-

out leave, nor issue process thereupon without recognizance. *Ca: Temp. Hard.* 248.

If process be issued on such information before such recognizance is given, as the statute directs, the same may be set aside and discharged on motion. 3 *Bac. Abr.* 642.

2. *Trespass, battery, or other misdemeanor.*] It is said by *Hawkins*, that these words extend to all informations whatsoever, exhibited by the master of the *crown office*; and though it may be objected that an information in nature of a *quo warranto*, though a proper remedy to try a right, is not within the meaning of the words trespasses, batteries, and other misdemeanors, which may be reasonably construed to intend such other misdemeanors only as are of an inferior nature, like what have been already specified; yet, as this is a remedial law, and ought to be largely construed, and such informations may be as vexatious as any other, and always suppose an usurpation of some franchise, and every such usurpation is a misdemeanor, it hath been settled that this statute doth extend to them. 2 *Haw. c.* 26. § 7.

3. *The court is authorized to award to the defendant his costs, unless the judge before whom such information shall be tried, shall at the trial certify.*] No costs can be had on this statute on an acquittal at a trial at bar, not only because these words seem only to have a view to trials at *nisi prius*, but also because a cause which is of such consequence as to be thought proper for a trial at bar, cannot well be brought within the purview of the statute, which was chiefly designed against trifling and vexatious prosecutions. 2 *Haw. c.* 26. § 11.

And if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs. 2 *Haw. c.* 26. § 12.

4. *Shall at the trial certify.*] If the prosecutor does not apply to the judge at the time of trial for this certificate, and obtain the same, he must at all events pay costs, whether the prosecution were reasonable or not; for the court above is bound of right to award them, whether the acquittal were upon the merits, or only from a slip in point of form, and howsoever notorious the offence might be; for where the court is authorized by statute, to do a matter of justice to the party, upon certain circumstances, it has no discretionary power of considering whether it ought to do it or not, when a case appears within those circumstances; and the statute being general as to all cases, wherein the judge who tries the information doth not certify a reasonable cause, it seems to be wholly left to the judge to consider whether the prosecution were reasonable or not, and it is the prosecutor's folly not to apply to him. 2 *Haw. c.* 26. § 13.

INFORMATION QUI TAM.

ACTIONS brought for forfeitures, created by statute and given at large, to any common informer, or, in other words, to any such person or persons as will sue for the same, are called *popular actions*, because they are given to the people in general.

When one part is given to the [people,] to the poor, or to some public use, and the other part to the informer or prosecutor, the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c. quam pro seipso in hac parte sequitur*," that is, *Who as well for our Lord the King, as for himself in that behalf sues.* 3 *Black. Com.* 160.

These having a great affinity, the consideration of both will fall under the present title, and that in the following order :

I. *In what cases they lie.*

II. *What ought to be the form of them.*

III. *In what courts to be brought, and where laid.*

IV. *Within what time they may be brought.*

V. *What persons are disabled to bring such an information or action.*

VI. *Whether there may be a nonsuit.*

VII. *In what cases there shall be costs.*

VIII. *How the defendant may plead.*

IX. *Whether the penalty of a penal statute may be compounded.*

I. *In what cases they lie.*

They will lie on no statute which prohibits a thing as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it ; because otherwise it goes to the [people,] and nothing can be demanded by the party. 2 *Haw. c.* 26. § 17.

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 the people as for himself.* *Ib.*

Also where a statute prohibits or commands a thing, the doing or omission whereof is both an immediate damage to the party, and also highly concerns the good of the public, the honor of the king, or of his supreme courts of justice, the party grieved may, and, as some say, ought to bring his action on such statute, *as well for our Lord the King, as for himself*, especially if the king be entitled to a fine. *Ib.*

II. *What ought to be the form of them.*

It is agreed that an action or information on a public statute need not recite the statute on which it is grounded, whether the offence be such only because prohibited, or be an evil in its own nature, and whether it be prohibited by more than one statute, or by one only ; for the judges are bound *ex officio* to take notice of all public statutes. 2 *Haw. c.* 25. § 100. *c.* 26. § 18.

But if the prosecutor take upon him to recite the statute, and materially varies from a substantial part thereof, this is fatal, because it does not judicially appear to the court, that there is such a foundation for the prosecution as that whereon it is expressly grounded. *Ib.*

But if any information contain several offences against a statute, and be well laid as to some, and defective as to others, the informer may have judgment for what is well laid; as where the words of the statute are fully pursued in the description of some of the offences, and not of others; or where the time is in part certain, and in part uncertain. 2 *Haw. c. 26. § 19.*

It seems agreed, that every information must be in this form, viz. that the informer *as well for [the people of the state of New-York] as for himself*, even where it is brought on a statute which gives one third part of the penalty to a third person; but there is a great variety in the form of such informations in other respects, for sometimes they say that the action accrues to the informer to demand the forfeiture for the king himself; sometimes that it accrues to the king and to the informer; sometimes that it accrues to the king, and to the informer, and to J. S. viz. when it is divided into three parts; and sometimes they have no clause at all of this kind. 2 *Haw. c. 26. § 20.*

And *Hawkins* doubts if it be not fatal to have any such clause, where the penalty is not recoverable by the information, but requires a subsequent one grounded on the conviction. *Ib.*

And he says, that regularly it is safest for every such information or action to demand the very sum due to the informer, and neither more or less; as it hath been adjudged, that if an action on a statute demand the whole forfeiture for the informer, where the statute gives part of it to the king, it is insufficient; and it hath also been holden, that if the information make no demand at all, or demand more or less for the party than appears to be his due, it is insufficient as to him; though it may perhaps be good as to the share of the forfeiture given to the king. 2 *Haw. c. 26. § 21.*

As for instance, if a common informer were to sue for the single value of money won at play, when 9 *Ann. c. 14*, gives the treble value. *Bul. N. P. 196.*

And where the penalty is given for continuing such a practice for a certain time, or for not doing such an act within such a time, the information must be very particular in bringing the offence within the time prescribed. 1 *Bac. Abr. 39.*

Therefore, in an action on a statute which requires some officers, at one certain time after their admission, and others at another, to qualify themselves by certain acts, it ought expressly to shew the time when the defendant was admitted to his office, and that he neglected to qualify himself in the time limited; and also that he actually exercised his office after such neglect. *Lutw. 162. 2 Haw. c. 26. § 22.*

A declaration for a penalty for selling liquors contrary to the act "to lay a duty on strong liquors, and for regulating inns and taverns," ought to state the town where, time when, quality and quantity of liquor. 3 *Caine's R. 137.*

Defects in a warrant are cured by appearing, and pleading the general issue, and in such case, if the warrant be in the name of an individual, and the declaration *qui tam*, on behalf of himself and others, as the overseers of the poor, the variance will be cured. 2 *Caine's R. 134.*

III. *In what courts to be brought, and where laid.*

1. In all informations, and in all bills, complaints, and declarations in any action or suit, for any offence committed against any penal statute, the offence shall be laid and alleged to have been committed in the county *where such offence was in truth committed*, and not elsewhere; and if the defendant to such information or suit, pleadeth that he oweth nothing, or not guilty, and the plaintiff or informer, upon evidence to the jury, shall not prove both the offence laid in said information, or suit, and that the same was committed *in that county*, the defendant shall be found not guilty. 1 *N. R. L.* 99. § 2.

Provided, that this act shall not extend to the laying or alleging of any offence, in any declaration, bill, plaint, or information, for or concerning any maintenance, champerty, buying of titles, embracery, or extortion, or for or concerning any matter of corrupt usury, or for or concerning any custom, duty, or impost, upon any goods, wares, or merchandize imported into this state; but that every such offence shall or may be laid in any county, at the pleasure of any such informers. *Ib.*

2. The like process in any action, bill, plaint, information, or suit to be commenced, sued, or prosecuted upon any penal statute, shall be had and awarded, as in an action of trespass, with force and arms at the common law. *Ib.* 100. § 4.

And upon every process to be sued out upon any such bill, actions, plaint, or information, to compel the appearance of any defendant, shall be indorsed, as well the name of the party who pursueth the same process, as also the title of the statute upon which the action or information is grounded. *Ib.* 99. § 1.

4. No jury shall be compelled to appear in the supreme court or court of exchequer, for the trial of any issue in any action or information upon a penal statute, for an offence committed above thirty miles from the place where the court shall sit, except where the Attorney-General, for some reasonable cause in that behalf to be shewed, shall require the same to be tried at bar, which request shall be noted on the back of the writ of *distringas*, that the sheriff may signify the same to the jury. *Ib.* § 6.

In the construction of this statute, it is held that proceedings under the 25 dollar act are to be regulated entirely by that act, and that the act relative to common informers (*supra*) does not apply to such proceedings. 2 *Caine's R.* 135.

It is not error in proceedings before a justice for a penalty, that neither the name of the plaintiff, nor the title of the statute on which the process was issued were endorsed on the warrant, agreeably to the directions of the act "to redress disorders by common informers." *Ib.*

It is to be observed, that no information by a common informer may be brought before justices of peace, justices of assize, or justices of oyer and terminer, unless specially directed. *Jones*, 198, *pl.* 8.

For where any penal law gives power to *justices of peace*, of assize, or of oyer and terminer, to hear and determine offences against the statute, and says no more, this is by way of *indictment*, and not by *information*, bill, or plaint, unless this was specially named. *Ib.*

But after a cause is removed into the supreme court by certiorari, it may be tried, either there or in the county, by nisi prius. 2 *Haw. c. 26. § 37.*

Also, where a statute limits suits by an informer *qui tam* to other courts; yet any one may, by construction of law, exhibit an information in the exchequer, for the whole penalty for the use of the [people.] 2 *Haw. c. 26. § 25.*

IV. *Within what time they may be brought.*

By statute, all actions, informations, and indictments on any penal statute, whereby the forfeiture is limited to the people, shall be brought within two years after the offence committed; if limited to any person who shall prosecute, or to the people, and any other who shall prosecute, then within one year; and in default of such pursuit, then to be brought for the people in two years after that year ended; and if limited to the party grieved, then within three years after the offence committed; provided, that where they are limited by the statute to be brought within a shorter time, then they shall be brought within the time so limited. 1 *N. R. L. 186. § 6.*

And upon every information which shall be exhibited, a special note shall be made of the very day, month, and year of the exhibiting thereof, without any antedate, and it shall be taken to be of record from that time forward, and not before; and no process shall be issued on such information, till it be exhibited in form aforesaid. *Ib. 99. § 1.*

In the construction of the statutes of 18 and 31 *Eliz. c. 5.* containing the same rules of limitation, it seems to have been holden:

1. That if an offence, prohibited by any penal statute, be also an offence at common law, the prosecution of it, as an offence at common law, is no way restrained by these statutes. 2 *Haw. c. 26. § 44.*

2. That if a suit on a penal statute be brought after the time limited, the defendant need not plead the statute specially, but may take advantage of it on the general issue. 2 *Haw. c. 26. § 45.*

3. That if an information *qui tam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is nought only as to the informer, but good for the king. 2 *Haw. c. 26. § 46.*

4. That suing out a writ within the year, is a sufficient commencement of the suit to save the limitation of time. *Carth. 232. Show. 553.*

But if the writ was not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited. 3 *Burr. 1241. Bul. N. P. 195.*

And the real day of suing out the writ, which shall be considered as the commencement of the suit, may be shewn in the pleadings. 3 *Burr. 1423.*

V. *What persons are disabled to bring such an information or action.*

It seems to have been held that a corporation cannot be a common informer. 2 *Str. 1241.*

And by statute, "every informer upon any penal statute shall exhibit his suit in proper person, and pursue the same only by himself, or by his attorney, in court, and he shall not use any deputy at all." 1 *N. B. L.* 99. § 1.

Therefore an infant cannot be an informer, for he must sue by guardian. *Bul. N. P.* 196.

VI. *Whether there may be a nonsuit.*

Notwithstanding the [people] cannot be nonsuit in any information or action wherein they are the sole plaintiff, yet any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, and hereby wholly determine the suit as well in respect of the [people] as of himself. 2 *Haw. c.* 26. § 52.

Also the Attorney General may enter a *nolle prosequi*, which has the effect of a nonsuit, to any information or action brought by the [people] only. *Ib.*

VII. *In what cases there shall be costs.*

An informer on a popular statute shall in no case whatsoever have his costs, unless they be expressly given him by the statute. 2 *Haw. c.* 26. § 57.

But wherever a statute gives a certain penalty to the party grieved, he is entitled to his costs within the statute concerning costs, which gives costs in all cases where the party is to recover damages; for otherwise it would be in vain for him to sue, since in many cases the costs would exceed the penalty. 2 *Haw. c.* 26. § 57.

But when the duty is uncertain, as to recover treble damages, as upon the statute of waste, then the plaintiff shall not have any costs. *Bul. N. P.* 333.

For the jury may consider the costs so as to give damages accordingly. 2 *Haw. c.* 26. § 57.

By statute, "if any informer, or plaintiff, on a penal statute, shall willingly delay his suit, or shall discontinue, or be nonsuit, or have the trial or matter passed against him therein, by verdict or judgment of law, then he shall pay unto the defendant his costs." 1 *N. B. L.* 101. § 8.

And the court will not stay proceeding in a *qui tam* action, till costs on a non-pross in a former action, by a different plaintiff, against the same defendant, be paid, because he may, if he please, pursue the costs of the former action. 3 *Williams' Just.* 49.

This statute extends only to common informers, who are to have the benefit of the penalty, and not where the penalty, or part of it, is given to the party grieved. *Salk.* 30. *Bul. N. P.* 134.

And all prosecutors *qui tam* are looked upon as common informers. 2 *Leon.* 116. *Salk.* 30.

Yet if a party grieved brings his action for an offence or wrong personal, immediately supposed to be done to the plaintiff, or whatever the nature of the action may be, if the plaintiff might have costs in case judgment should be given for him, he shall pay them on a nonsuit or verdict against him. 2 *Haw. c.* 26. § 59.

Note.—Where the penalty is given to a common informer, though the party grieved happen to bring the action, he must bring it as a common informer, and shall not have costs. *Bul. N. P.* 333.

VIII. *How the defendant may plead.*

By statute, if any citizen of this state, or of any of the United States, shall be sued or informed against in the supreme court, or court of exchequer, upon any penal law, where such person is bailable, or where, by the leave or favor of the court, he may appear by attorney, then he may, at the time contained in the first process served for his appearance, appear by attorney of the same court, and shall not be urged to a personal appearance, or to put in bail for the answering of such suit. *1 N. R. L.* 100. § 5.

The court will not quash an information upon motion, but the party must either plead, demur, or move in arrest of judgment. *Salk.* 372. *2 Str.* 953.

Neither will the court quash an information filed ex officio by the Attorney-General, although the application is made in behalf of the [people,] for the Attorney-General may stop the proceedings by a *nolle prosequi*. *1 Doug.* 239.

Whenever an action is founded on a penal statute, not guilty, or *nil debet*, are good pleas. *Hob.* 218.

Whenever any suit on a penal statute may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. *2 Haw. c.* 26. § 63.

And if two informations be exhibited on the very same day, it seems that they mutually abate one another, because there is no priority to attach the right of the suit in one informer more than in the other. *Ib.*

It is said by *Hawkins*, that notwithstanding the king has such an interest in every penal statute, that he may proceed in a suit brought upon it by a common informer, after the death, release, or nonsuit of such informer, pending the prosecution; and may also totally prevent any such suit, by first suing for the whole penalty himself; or may totally bar it by a pardon, or release, precedent to its commencement; yet if it be actually commenced before any suit by the king, the informer hath such an interest in the part of the penalty assigned to him by the statute, that the king can no way discharge or suspend the suit, as to such part. *2 Haw. c.* 26. § 64.

Also a conviction or acquittal, *bona fide*, in any action or information on a penal statute, whether by the party grieved, or a common informer, or a release, *bona fide*, from the party grieved, or common informer, after such a conviction, hath always been a good bar of any subsequent prosecution for the same offence. *Ib.*

But the plea must state, that the plaintiff, in the other action, had priority of suit, or, on demurrer, it will be bad. *2 Str.* 1169.

But to prevent collusive recoveries, it is enacted, by statute, that if any person sue with good faith, any action popular, and the defendant plead a recovery in an action popular, or that he before that time barred a plaintiff in such action, the plaintiff may aver that the recovery was by covin; or aver that the plaintiff was barred by

covin; and if such collusion or covin be found, the plaintiff shall recover as if no such action or recovery had been had. And if the defendant be lawfully condemned of such collusion, he shall be imprisoned two years by process of *capias* and outlawry. 1 *N. R. L.* 101. § 7.

And no release of any common person to any such defendant, whether before or after any action popular, or indictment of the same, commenced or made pending the same action, shall be in any wise available to surcease the said action, indictment, process, or execution: Provided, That no plaintiff be received to aver any covin in an action popular where the point of the same action or the covin has been once tried. 1 *N. R. L.* 100. § 7.

It is said, that if a recovery in a former suit be pleaded in bar of any popular action, the plaintiff may, by reason of the express words of the statute, aver, that such recovery was by covin, without shewing wherein the covin consisted. But otherwise, such a general pleading would be vicious. 2 *Haw. c.* 26. § 63.

And the record of the former recovery cannot be given in evidence upon the general issue; but it must be specially pleaded; and then the plaintiff may reply, that there is no such record, or that it was a recovery by fraud to defeat a real prosecutor; which the plaintiff could not be prepared to shew upon the general issue. 1 *Str.* 701.

If the defendant plead the general issue, it is safest to say that he owes nothing to the informer, nor to the [people.] 2 *Haw. c.* 26. § 66.

And if there be more than one defendant, they ought not to plead jointly that they are not guilty, but severally, that neither they, nor any of them, are guilty. 2 *Haw. c.* 26. § 67.

And it is enacted by statute, that if any information, suit or action, shall be brought for any offence committed against the form of any penal law, either on behalf of the people, or by any other, or on behalf of the people and any other, such defendant may plead the general issue, that he is not guilty, or that he owes nothing, and give the special matter in evidence, which shall be as available as if it had been pleaded in bar. 1 *N. R. L.* 99. § 3.

And the court will on motion give the defendant liberty to pay the penalty into court, with costs. *Bul. N. P.* 197.

IX. Whether the penalty of a penal statute may be compounded.

By statute, if any person (except the clerk only for making out process otherwise than is appointed by statute) shall offend in giving out of process, making of composition, or other misdemeanor contrary to the intent and meaning of the act; or shall, by color of process, or without process, upon pretence of any matter of offence, against a penal law, make composition, take money, reward, or promise of reward, for himself or to the use of any other, without the order or consent of some court of record; he being thereof convicted, shall forever be disabled to pursue, or be plaintiff or informer, in any suit or information upon any statute popular or penal, and shall for every offence forfeit forty pounds; the one half to the people, and the other to the party grieved, to be recovered, with costs, in any court of

record, by action of debt, bill, plaint or information; and the justices of oyer and terminer, of gaol delivery, and of the peace in their sessions, are authorized to hear and determine offences committed contrary to this act. 1 *N. R. L.* 102. § 9.

That part of the statute of 18 *Eliz.* c. 5, of which this is an imitation, is said to extend only to common informers. *Bul. N. P.* 196.

Also, it extends to the compounding of suits commenced in courts which have no jurisdiction, as much as if they had a jurisdiction. 2 *Haw. c.* 26. § 79.

By our statute it is enacted, *that this act shall not extend to restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, or suit is specially limited by any statute, and not generally to any person who will sue.* 1 *N. R. L.* 102. § 10.

And it seems that it doth not extend to any suit by the Attorney-General; but only to those brought by common informers. 2 *Haw. c.* 26. § 39.

In the case of *Bradway vs. Le Worthy*, (9 *John. Rep.* 251.) the court say, "It is in the discretion of the court, under the statute, to allow the informer or plaintiff to compound on such terms as they think proper under the circumstances of the case, and it seems to be a general rule of the court of K. B. when they give leave to compound a penal action, to require the king's half of the composition to be paid. This is a very salutary rule, and well calculated to prevent speculations on penal statutes; and we shall be disposed, hereafter, to adopt the principle of this rule, unless some special circumstances shall appear to prevent its application. In the present case, however, leave is given to discontinue, on payment of costs only, without exacting the moiety of the penalty to which, by the statute, the overseers of the poor of the town where the offence was committed, would be entitled."

"In these popular actions, the plaintiff has no right to discharge the judgment, or compound with the defendant, without the leave of the court, or without receiving payment of the judgment," and, "such discharge, so far as it relates to the moiety of the penalty belonging to the people is void, and cannot excuse the escape." 11 *John. Rep.* 476.

Form of an information qui tam, at a general session of the peace.

See Dogherty's Cr. Cir. Com. 404.

County of } **B**E it remembered, that G. B. late of the town of is the
ss. } county of gentleman, who, as well for the people of
the state of New-York as for himself, doth prosecute in this behalf, cometh
before the justices assigned to keep the peace of the said people, in and for
the said county and also to hear and determine divers felonies, trespasses,
and other misdemeanors in the said county committed, at their general
sessions of the peace, holden at the court house in in and for the said county,
on [Tuesday] the day of in the year of our Lord in his proper
person, and as well for the said people as for himself, giveth the court here to
understand, and be informed, that O. O. late of in the county aforesaid,
yeoman, on, &c. [here insert the offence according to the statute] against the form
of the statute in such case made and provided; whereupon the said G. B. as
well for the said people as for himself, prayeth judgment of the court in the
premises; and that the said O. O. may forfeit the sum of according to the

form of the statute aforesaid ; and that he, the said G. B. may have one moiety thereof, according to the form of the said statute ; and also that the said Q. O. may come here into court, to answer concerning the premises ; and there are pledges to prosecute, to wit, *John Doe and Richard Roe* ; and hereupon it is commanded to the said Q. O. that, all other things omitted, and all excuses laid aside, he be in his proper person at the next general sessions of the peace, to be holden for the said county, to answer, as well to the said people as to the said G. B. who, as well for the said people as for himself, doth prosecute of and concerning the premises ; and further to do and receive what the said court shall consider in this behalf.

INNS AND TAVERNS.

THIS matter will be treated in the following order :

- I. *How, and to whom licences may be granted ; and herein—*
 1. *Of Commissioners, &c.*
 2. *Of licences to retail strong and spiritous liquors.*
 - II. *Tavern keepers must enter into recognizance to preserve order, &c. and herein of suppressing licences.*
 - III. *Punishment for keeping tavern without a licence and entering into recognizance ; and herein of retailing liquors without licence.*
 - IV. *Tavern keepers not to suffer gaming, &c.*
 - V. *Of selling liquors to servants and slaves.*
 - VI. *Tavern keepers to put up a sign, provide accommodations, and receive guests, &c. and herein of refusing to entertain a guest.*
 - VII. *When tavern keepers shall be chargeable for things stolen or lost.*
 - VIII. *The tavern keeper's remedies against his guests.*
 - IX. *What debts for tavern expenses are not recoverable.*
 - X. *How offences against the act are to be punished, penalties how collected and applied ; and herein of the effect of a conviction or recovery.*
 - XI. *Form of a resolve of commissioners of the character, qualification, &c. of tavern keepers, licences, recognizance, and conviction.*
-
- I. *How, and to whom licences may be granted ; and herein—*
 1. *Of Commissioners, &c.*
 2. *Of licences to retail strong and spiritous liquors.*
 1. *Of Commissioners, &c.*

These commissioners are the supervisor of each town, and any two justices of the peace resident therein ; or in case there shall not be two justices, or they shall be absent, then such neighbouring justice or justices in the same county as the supervisor shall notify and associate with him for that purpose : But in the city of New-York a

commissioner is appointed by the council of appointment. 1 *N. R. L.* 176. § 1.

The commissioners, except in New-York, Albany, Hudson and Schenectady, shall annually and immediately before they grant any licence, take and subscribe the following oath, before one of the justices of the peace of the county in which they reside. *Ib.*

I, one of the commissioners of excise for the town of in the county of do solemnly swear, in the presence of Almighty God, that I will not on any account or pretence whatsoever, grant any licence to any person within the said town of for the purpose of keeping an inn or tavern, except where it shall appear to me to be absolutely necessary for the benefit of travellers; and that I will, in all cases, while acting as a commissioner of excise, do my duty according to the best of my judgment and ability, without fear, favor or partiality, agreeable to law.

And the person before whom such oath shall be taken and subscribed, shall certify on the back the day and year in which it was taken; and the person taking and subscribing the same, shall, within ten days thereafter, send or deliver it to the clerk's office of the town for which he so acts as commissioner, who shall file the same among the papers in his office. *Ib.* § 2.

And if any person directed by statute to take and subscribe such oath, shall presume to act as commissioner of excise without having taken and subscribed the same, or if he shall neglect to return it to the town clerk to be filed as aforesaid, within the time limited, he shall, for every such neglect or refusal, forfeit ten dollars, to be recovered, with full costs, by any person who will prosecute for the same, before any justice of the county, the one moiety, when recovered, to be paid by the person suing and receiving the same, to the overseers of the poor of the town in which such neglect shall happen, for the use of the said town, and the other moiety for the use of the person so suing for the same. *Ib.*

The commissioner of excise in the city of New-York is to determine the sum which each person applying for a licence to retail strong and spiritous liquors under five gallons, shall pay for the same, not being less than five dollars nor more than fifty, as a duty of excise, which is to be paid to him before the licence is issued. *Ib.* § 4.

And the commissioners in the city of Hudson and the several towns in the state, are to determine the sum which each person applying for a licence shall pay for the same, not being less than five dollars nor more than thirty, as a duty of excise, which, together with seventy-five cents as a fee for granting the same, shall be paid to them before it be issued. *Ib.*

And the commissioners are required to keep an account of the persons to whom licences are granted, and of the sums paid therefor, and to file the same with the town clerk on or before the first day of March in every year, and shall from time to time, without delay, pay the monies so received, to the overseers of the poor of the respective cities and towns for which they are commissioners, to be applied to the relief of the poor thereof. *Ib.*

2. *Of licences to retail strong and spiritous liquors.*

It is made lawful by statute, for the commissioners of excise in the several towns of this state, annually, by writing under their respective hands and seals, and in the cities of New-York, Albany, Hudson and Schenectady, annually, in the manner directed by their respective charters, or by any statute prescribing such manner therein, to grant to the several persons who shall reside in their respective cities and towns, applying for the same, a licence to retail strong or spirituous liquors under five gallons, which said respective licences shall continue in force from the time of granting the same until the first Tuesday of May next ensuing the date thereof, and no longer. 1 *N. R. L.* 176. § 3.

But no licence shall be granted in any of the said cities to retail strong or spirituous liquors for the purpose of keeping an inn or tavern, unless it shall appear to the commissioners thereof, that an inn or tavern at the place at which such permit is applied for is necessary for the accommodation of travellers, and that the person applying for such licence is of good character, all of which shall be inserted in the licence. *Ib.*

And no licence shall be granted in any town, unless three commissioners shall be present at the granting thereof, of which three the supervisor shall always be one, nor until they, or a majority of them then so present, have satisfactory evidence that the person who applies for such licence is of good moral character, and of sufficient abilities to keep an inn or tavern, and that he has accommodations to entertain travellers, and that an inn or tavern is absolutely necessary at the place where such person resides or proposes to keep such tavern, for the actual accommodation of travellers as aforesaid; all of which they, or a majority of them, are directed to put in writing, by way of a resolve of the said board, and severally subscribe the same, and within twenty days thereafter shall return such resolve to the office of the clerk of the town for which they are commissioners, who is directed to file the same and deposit it among the other papers of such town; and all licences obtained, except the aforesaid board of commissioners are so actually present at the granting of the same, shall be considered as absolutely void. *Ib.*

No person shall have a licence to sell any strong or spiritous liquors to be drank in any store or house where merchant's goods are sold, unless he shall take at the same time a licence to keep an inn or tavern, and it shall appear necessary to the commissioners that an inn or tavern ought to be kept at such a place, for the actual benefit and accommodation of travellers as in other cases, nor unless such person shall actually keep the necessary spare bedding, stabling, hay and provender for horses, (except in the city of New-York) and shall conform in all things to the rules prescribed by this act relative to the keepers of inns and taverns; and no strong liquors shall be sold by such person on any pretence, to be drank in the same room where such merchant's goods are sold. 1 *N. R. L.* 176. § 10.

The supervisor may associate more than two justices with him as commissioners of excise, and the act of a majority present will be valid. As where three of the commissioners, or a majority present,

sign the licence, it is sufficient, though the supervisor refuse; it is not indispensable that it should be signed by him. 1 *John. R.* 500.

But a licence granted by two of the commissioners of excise, without the presence and consent of the supervisor, and when they are not assembled for the purpose of granting licences, will be illegal and void; and such a licence, though regular on the face of it, will be no justification of the tavern keeper, in an action against him for the penalty. 2 *Johns. Cas.* 346.

By the words of the statute, the commissioners have a discretionary power vested in them, to determine what persons are proper to be licensed; and under the British statutes, which give the power of granting licences to the justices acting for the division, it has been adjudged that no appeal will lie from their determination. Nor will any *mandamus* lie to the justices to oblige them to grant the licence, even though they should appear to have refused it upon reasons which may be looked upon as very suspicious at least, if not very improper. 2 *Str.* 881.

But if it should be made to appear to the court, from sufficient circumstances laid before them, that the justices have abused this discretionary power, and that their conduct, in refusing a licence, was influenced by *partial, oppressive, corrupt, or arbitrary views*; this would be matter to induce the court to grant an information. 1 *Bur. Rep.* 561.

So an information was granted against the justices for refusing to grant licences, because *the person applying for them would not give their votes for members of parliament as the justices would have had them.* 3 *Bur. Rep.* 1318.

So where two justices refused to grant a licence to a man *merely from a motive of resentment against him*, for having joined in an affidavit made in support of the interest which was adverse and opposite to that which was espoused by these two justices and their friends, the court granted an information against the justices for a misdemeanor: and Lord Mansfield said, the court should never interpose against magistrates, unless they have acted from bad motives and *mala fide*; especially in such a case as this, where they are intrusted with an *absolute discretion*. But for that very reason, this is the strongest case for the interposition of the court, if it appears that they have acted from corrupt motives; and he declared it to be of very dangerous consequence, to permit the due discretion of the justices to be influenced by considerations of this kind. 3 *Bur. Rep.* 1716.

And an information will be granted against a justice of the peace, as well for granting as for refusing a licence improperly. 1 *Term Rep.* 692.

And it has been determined that where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting for a particular purpose, such as a meeting to grant ale licences, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting, but they may all meet together on the first day; and, if, after such appointment, the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and therefore the subject matter of an indictment, without the addition of any corrupt motives. 4 *Term Rep.* 451. 457.

II. *Tavern-keepers must enter into recognizance to preserve order, &c. and herein of suppressing licences.*

No person shall sell by retail any strong or spirituous liquors to be drank in his house, out-house, yard or garden, unless such person shall appear before a justice of the peace of the county, or if in either of the said cities, before the mayor, or in his sickness or absence, the recorder thereof, and enter into a recognizance to the people in 125 dollars, conditioned that such person will not, during the time he shall keep an inn or tavern, keep a disorderly inn or tavern, or suffer or permit any cock-fighting, gaming, or playing with cards or dice, or keep any billiard table, or other gaming table or shuffle board, within the inn or tavern by him to be kept, or within any out-house, yard or garden belonging thereunto, which recognizance shall be lodged by the person before whom it shall be taken, with the clerk of the city or county where it is taken. 1 *N. R. L.* 178. § 6.

And if any person shall be convicted of an offence against this act, it shall be lawful for the courts of general sessions in the respective cities and counties, to suppress the licence of such offender. *Ib.*

But no person who shall be licenced to retail strong liquors, not to be drank in his house, but carried elsewhere, shall be obliged to enter into recognizance as aforesaid. *Ib.*

III. *Punishment for keeping tavern without a licence and entering into recognizance; and herein of retailing liquors without licence.*

If any person shall sell by retail any strong or spirituous liquors without a licence, or shall sell any strong or spirituous liquors to be drank in his house, out-house, yard or garden, without having entered into a recognizance, he shall, for each offence, forfeit 25 dollars. 1 *N. R. L.* 178. § 7.

But no person shall be subject to be prosecuted by virtue of this act, for selling metheglin, currant wine, cherry wine, or cider, to be by him made, and which shall not be drank in his house, out-house, yard or garden. *Ib.*

A tavern-keeper who has a legal and competent licence, is not liable for the penalty for retailing liquors after his licence has expired, and before the time of the next meeting of the commissioners of excise, for the purpose of granting licences. 2 *John. Cas.* 346.

But in an action for retailing liquors without a licence, the defendant cannot justify under a *parol* licence from the supervisor, to whom he has paid the sum required by the act. 11 *John. Rep.* 179.

In an action to recover the penalty given by the 7th section of the act, (1 *N. R. L.* 178.) the plaintiff may unite in his declaration any number of offences, but he can only recover the penalty for a single offence, and it is unnecessary for the plaintiff to prove the day of committing the offence. 13 *John. Rep.* 258.

But where the offence charged in the declaration is the selling of strong or spirituous liquors without a licence, contrary to the first clause of the 7th section of the said act, the plaintiff cannot proceed for the offence specified in the subsequent clause, *viz.* selling liquors

to be drank in the house of the seller without entering into a recognition. 13 *John. Rep.* 428.

A licence to keep a tavern is a personal trust which cannot be assigned to another. Therefore in an action for the penalty given by the 7th section of the act aforesaid, the defendant cannot justify under a licence granted to another person. 14 *John. Rep.* 231.

IV. *Tavern-keepers not to suffer gaming, &c.*

It shall be deemed an offence against the people of this state, for any persons who shall keep a public inn or tavern, to permit or suffer any cock-fighting, playing with cards or dice, or to keep any billiard table, or other gaming table, or shuffle board within his house or within any out-house, yard or garden belonging thereto, or therein to permit any kind of gaming by lot or chance. 1 *N. R. L.* 178. § 8.

V. *Of selling liquors to servants or slaves.*

If any tavern-keeper shall sell any strong or spirituous liquors to any apprentice, servant or slave, knowing or having reason to suspect or believe him to be such, without the consent of his master or mistress, he shall forfeit and lose every debt which such apprentice, servant or slave shall contract for any such liquor; and also for every such offence, forfeit the sum of five dollars, to be recovered with costs of suit, by the master or mistress; and his licence shall be void from the time of such conviction; and he be incapable of receiving any further or other licence for holding any public inn or tavern for the space of three years from the time of such conviction. 1 *N. R. L.* 179. § 11.

And if any inn-holder or tavern-keeper, or any other person, shall take or receive, directly or indirectly, from any such apprentice, servant or slave, any clothing, or any other goods, chattels, wares or merchandize, in payment for any such strong or spirituous liquors, or in pawn or pledge, to secure any such payment, and thereof be convicted by the oath of any one credible witness, such person so offending, besides the payment of the penalty and forfeiture of the debt as aforesaid, shall, within three days after such conviction, restore to the master or mistress all such clothing, or other property, which he shall have so taken or received, or shall pay double the value of the same, to be recovered by such master or mistress, his or her executors or administrators, with costs of suit, in any court having cognizance thereof. 1 *N. R. L.* 179. § 12.

VI. *Tavern-keepers to put up a sign, provide accommodations, and receive guests; and herein of refusing to entertain a guest.*

By statute, every inn holder or tavern-keeper shall, within thirty days after obtaining his licence, put up a proper sign, on or adjacent to the front of his house, with his name thereon, and keep such sign up during the time he shall keep an inn or tavern, under the penalty of one dollar and twenty-five cents for every month's neglect thereof. 1 *N. R. L.* 180. § 15.

And if any person who shall not have a licence shall erect or keep

up such sign, he shall forfeit the like penalty for every week such sign shall be so kept up. *Ib.*

And every keeper of a public inn or tavern (except in the city of New-York) shall keep in his house at least two spare beds for guests, with good and sufficient sheeting and covering for such beds respectively, and provide and keep good and sufficient stabling and provender of hay in the winter, and hay and pasturage in the summer, and grain for four horses or other cattle, more than his own stock, for the accommodation of travellers, upon pain of forfeiting for every neglect of having either of the articles in this clause mentioned, the sum of five dollars. 1 *N. R. L.* 179. § 9.

The duty of inn-keepers extends chiefly to the entertainment and harboring of travellers, finding them victuals and lodgings, and securing the goods and effects of their guests. 3 *Bac. Abr.* 118.

And common inns are so much devoted to the service of the community, that they are obliged to receive all guests that come. 3 *Bur.* 1501.

Therefore 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, he is not only liable to render damages for the injury, in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the [people.] *Dyer's Rep.* 158.

This is to be understood without a reasonable excuse; for if he refuse under pretence that his house is already full of guests, if this be false, an action on the case lies. *Ib.*

But no inn-holder shall be compelled to sell or let any traveller, or other person, have any victuals or lodging, except the party shall first tender and pay ready money for the same, if it be required. *Dalt. c. 7*, who cites 9 *Coke's Rep.* 87. *b.*

Also an inn-keeper is obliged to receive a horse, though the owner does not lodge in his house; for by taking upon him a public employment, he is obliged to serve the public as far as his employment extends; and because by the keeping of the horse the inn-keeper has gain, though it would be otherwise of a trunk, or other dead thing. 1 *Salk.* 388.

And for the security and protection of travellers, inns are allowed the peculiar privilege, that the horse and goods of a guest cannot be distrained. 1 *Inst.* 47.

It is said that inn-holders may be indicted for extorting exorbitant prices. See 3 *Bac. Abr.* 181.

And if he sell corrupt wine or victuals, an action lies against him: also if his servant sell such corrupt wine or victuals, an action on the case lies against the master, though he did not order the servant to sell it to any particular person. *Ib.* 182.

VII. Where Tavern-keepers shall be chargeable for things stolen or lost.

There is in law an implied contract with a common inn-keeper, to secure his guest's goods in his inn. 3 *Black. Com.* 165.

Therefore it is clear that inn-keepers are chargeable for the goods of guests stolen or lost out of their inns, and this without any contract or agreement for that purpose; for the law makes them liable

in respect of the reward, as also in respect of their being places appointed and allowed of by law, for the benefit and security of traders and travellers. *Dyer*, 266. 8 *Coke*, 32. *a. Pop.* 178.

And this duty and burthen enjoined on inn-keepers by law, they cannot discharge themselves of, under pretence of sickness, want of understanding, absence from their houses, or the like. 3 *Bac. Abr.* 182.

But an infant inn-keeper shall not be charged, for his privilege shall be preferred and take place of the custom. *Roll's Abr.* 2.

And it is laid down in *Plowden*, that if an inn is broken open and the goods of guests taken away by the king's enemies, the inn-keeper is not answerable. *Plowd.* 9. *b.*

If a person comes to an inn-keeper, and desires to be entertained by him, which the inn-keeper refuses, because his house is already full; whereupon the party says he will shift among the rest of the guests, and there he is robbed, the host shall not be charged. *Bondloe*, 60. *pl.* 101.

If a man comes to a common inn, and desires that his horse be put to grass, and the host puts him to grass accordingly, and the horse is stolen, the host shall not be charged; because by law he is not bound to answer for any thing out of his inn, but only for those things that are *infra hospitium*. 8 *Coke*, 32.

But if the owner does not require the host to put his horse to grass, but the host does it of his own head, if the horse be stolen, he shall answer for it. *Ib. b.*

Also if the host, upon the command of the guest, puts his horse to grass, and by the voluntary and wilful negligence of the host the horse is stolen; as if the host voluntarily leaves open the gates of the close, by which means the horse strays out and so is stolen or lost, a special action on the case lies. *Roll's Abr.* 4.

If the guest is robbed by his servant, or by one who comes with him, or by one who desires to be lodged with him, he shall have no action against the host; for, it was the folly of the guest to keep such a servant or company, and there is no default of good custody in the host. 8 *Coke*, 32. *a.*

But if the host requires his guest to put his goods in such a chamber, under lock and key, and that then he will warrant their safety, or else not, and notwithstanding the guest suffers them to lie in an outer court, where they are stolen, yet he shall be answerable; because he is charged in law for all things which come to his inn, and he cannot discharge himself of this breach of his duty by such a declaration as this. *Moore*, 78.

So if the host deliver the key of the chamber where the goods are, to the guest, and he leaves the door open, and the goods are stolen, yet an action lies against the host; for at his peril he ought to keep safely the goods of his guests: and it seems the host is answerable, though the guest does not acquaint him what goods he has. 8 *Coke*, 33. *a.*

If a person comes to an inn, and makes a previous contract for lodging for a set time, and does not eat and drink there, he is no guest, but a lodger, and as such is not under the inn-keeper's protection; but if he eats and drinks there, it is otherwise; or if he pays for his diet there, though he does not eat there. 12 *Mod. Rep.* 254.

So if a man comes to an inn with a hamper, in which he hath several goods, and goes away, leaving this with the host, and two days after comes again, but in the time of his absence this is stolen, he shall have no action against the host; for at the time of the stealing he was not his guest; and by the keeping the hamper the host had *no benefit*, and therefore shall not be charged with the loss of it in his absence. *Roll. Abr.* 338. *Cro. Jac.* 188.

But if a man leaves a horse with the host, and goes from the inn for several days, and it is stolen in his absence, the host shall be charged for it; because he had *benefit* by the continuance of it with him, inasmuch as he is to be paid for it; and so the owner is a sufficient guest to maintain an action. *Salk.* 388.

If an host invites one to supper, and the night being far spent, invites him to stay all night; if he is after robbed, yet shall not the host be charged, for this guest was no traveller. 1 *Coke*, 32. b.

So if a man, upon a special agreement, boards or sojourns at an inn, and is robbed, the host shall not answer for it. *Latch*, 127.

If a man's servant, travelling on his master's business, comes to an inn with his master's horse, which is there stolen, the master may have an action against the host, because the absolute property is in him. *Cro. Jac.* 224.

So if A. sends money by his friend, and he is robbed in his inn, A. shall have the action. *Felv.* 162.

If one joint tenant of goods is robbed, both may have the action. *Latch*, 127.

But in all these actions the plaintiff must prove that the defendant kept a common inn, and that he, his son, or servant was a guest at the time, and that the goods were brought within the inn and remained under the care of the defendant. *Bul. N. P.* 73.

Innkeepers are chargeable for the goods of their guests, lost or stolen out of their inns, and to render them liable, it is not necessary that the goods should have been delivered into their special keeping; nor to prove negligence in the innkeeper; as when a sleigh with its contents was put into an out-house appurtenant to the inn, "where it had been usual for the defendant to receive loads of that description," and the doors of the waggon house were broken open, and the grain stolen during the night. 14 *John. Rep.* 177, 5 *Term Rep.* 273.

VIII. *The Tavern-keeper's remedies against his guests.*

Inn-keepers may detain the person of the guest who eats, or the horse which eats, till payment; and thus he may do without any agreement for that purpose: for men that get their livelihood by entertainment of others, cannot annex such disobliging conditions, that they shall retain the party's property, in case of non-payment, nor make so disadvantageous and impudent supposition, that they shall not be paid; and therefore the law annexes such a condition, without the express agreement of the parties. 3 *Bac. Abr.* 185.

For it would be hard to oblige him to sue for every little debt, and a greater hardship that he might not be able to find who was his guest. 8 *Mod. Rep.* 172.

And the privilege of the inn-keeper is so great, that he may even

detain the horse against the right owner, until he is paid : And even though the traveller who brought it was a wrong doer or a robber ; for, supposing that he was a robber, and had stolen the horse, yet if he comes to an inn, and becomes a guest there, and delivers his horse to the inn-keeper, who does not know it, the inn-keeper is obliged to accept the horse ; and then it is very reasonable that he shall have a remedy for payment, which is by retainer, and he is not obliged to consider who is the owner of the horse, but whether he who brings him is his guest or not. 2 *Ld. Raym.* 867.

If a man commit his horse to an inn-keeper, and he puts him to pasture, he may detain the horse until he be satisfied for the meat ; for the pasture of such persons, set up by the law for entertainment, hath the same privilege with the stables. 2 *Roll's Abr.* 85.

If a horse be committed to an inn-keeper, it may be detained only for its own meat, and not for the meat of the guest, or of any other horse ; for the chattels in such case are only in the custody of the law for the debt that arises from the thing itself, and not from any other debt due from the same party ; for the law is open for all such debts, and doth not admit private persons to make reprisals. 3 *Bac. Abr.* 186.

An inn-keeper that detains a horse for his meat cannot use him, because he detains him as in the custody of the law, and by consequence the detention must be in the nature of a distress, which cannot be used by the distrainer. *Moor,* 877.

Nor has an inn-keeper, by the general custom, any power to sell a horse for his meat. 1 *Str. Rep.* 556. 8 *Mod.* 172.

If a horse be committed to an inn-keeper, and he be detained by him for his meat, and the owner take him away, the inn-keeper must make fresh pursuit after him, and retake him, otherwise the custody of him is lost, for he cannot retake him at any other time : for if a distress be rescued, and the party upon fresh pursuit do not retake it, the distress is lost ; for no man that has only a naked custody can make a reprisal, where the thing is out of his custody, for it is in the power of an owner or proprietor, and of him only, to retake such his property, wherever he finds it. 2 *Roll's Rep.* 438.

So if the inn-keeper permits his guest to take away his horse, without paying the expenses, giving him credit for what is due, he cannot afterwards, on his coming in again, detain him for such expenses ; for he has waved the benefit of the custom by his own consent to the departure, and shall never afterwards detain the horse for that expense. 8 *Mod.* 172. 1 *Str.* 557.

If an horse be committed to an hostler, and he detain him for his meat, and after the owner agrees that he shall retain him till he is satisfied ; here he hath not only the custody of him as a distress, but also the property in him as a pledge ; and if the owner take it from him, he shall not only retake it upon fresh pursuit, but wherever he meets it ; because he had a property by such agreement, and a man that hath a property may retake his own where he meets with it.— 2 *Roll's Rep.* 438.

Where a man had a horse at an inn, and directed that the inn-keeper should not give him any more food, for he would not be responsible for it ; the question was, whether for the food, after this direction, given by the inn-keeper to the horse, he who brought the horse thith-

er should be charged or not? And *Holt*, Ch. J. said this was not a discharge; for then any inn-keeper might be deceived, and it is lessening the security of the inn-keeper, who may detain the horse for his keeping. *Skin.* 648. *pl.* 6.

IX. *What debts for tavern expenses are not recoverable.*

By statute, if any inn-holder or tavern-keeper shall trust any person, other than travellers, above the sum of one dollar and twenty-five cents, for any sort of strong and spirituous liquors, or other tavern expenses, he shall lose every such debt, and be incapable of suing for the same, or any part thereof; and if he shall sue therefor, the person sued may plead this act in bar, or give it in evidence under the general issue, and if the plaintiff shall become nonsuit, or a verdict or judgment be given for the defendant, the plaintiff shall pay double costs. 1 *N. R. L.* 180. § 13.

And if any inn-holder or tavern keeper shall take from any person trusted as aforesaid, any note, or other security, in writing, for any sum above one dollar and twenty-five cents, for any strong or spirituous liquors sold or drank at his house as aforesaid, under pretence by which to evade the act, every such note, or other writing, shall be void; and every person who shall be convicted of an offence against this clause of the act, shall forfeit double the sum mentioned in and intended to be secured by such note or other writing, to be recovered by action of debt or information, with costs of suit, in any court having cognizance thereof. 1 *N. R. L.* 180. § 14.

But nothing herein contained shall be construed to debar any inn-holder or tavern-keeper from taking or receiving any money due to him from any lodger in his house, or travellers not residing in the town. *Id.*

X. *How offences against the act are to be punished, penalties how collected and applied; and herein of the effect of a conviction or recovery.*

By statute, every person convicted of any offence against the act shall be punished by fine and imprisonment, or either, at the discretion of the court in which any such conviction shall be had. 1 *N. R. L.* 178. § 8.

And on such conviction the court of sessions may suppress their licence. See the second division of this title.

And by a subsequent section of the statute it is enacted, that all offences committed against any of the provisions of the act, shall be deemed and considered as misdemeanors, punishable by fine and imprisonment, or either of them, at the discretion of the court before which any conviction may be had. 1 *N. R. L.* 181. § 17.

Penalties and forfeitures are also imposed for many of the offences against the statute, as has been noticed in the preceding divisions of this subject; but as the mode in which they are to be recovered and applied, is not directed in each particular case, in which they are incurred, it is enacted generally, That every penalty and forfeiture imposed by the act, may be recovered, with costs of suit, in any court having cognizance thereof, by any person who will prosecute for the same to effect, unless the act has otherwise provided, the one

moiety thereof, not by the act otherwise appropriated, shall, when recovered, be paid to the overseers of the poor of the city or town in which such offence shall happen, for the use of the poor thereof, and the other moiety to the use of the person who will sue for the same. 1 *N. R. L.* 180. § 16.

Every conviction to be had before a justice for offences against this act, is to be drawn up in the manner pointed out by statute, [1 *N. R. L.* 390,] and within thirty days after it is made, filed in the office of the clerk of the city or county where the offence was committed, there to remain as a record.

And such conviction may be pleaded in bar to any other prosecution for the same offence. *Ib.*

And wherever any suit shall be commenced, and a recovery had, for a penalty incurred by selling strong and spirituous liquors without licence, such recovery shall be a bar to all prosecutions for offences of the like nature committed before such recovery. 1 *N. R. L.* 181. § 18.

If the defendant pleads in bar a former conviction for the same offence, he must give in evidence to support his plea, a conviction, drawn up in the form prescribed by the statute, as any variance or defect in the form will render the evidence of such a conviction inadmissible. 6 *John. R.* 101.

The particular day of committing the offence need not be proved; and it will be sufficient for the justice, in making up the record of conviction, to insert the day laid in the declaration, although no particular day was proved. 13 *John. R.* 258.

For the offence of selling liquors on Sunday, except to lodgers and travellers, tolerated by law, see title IMMORALITY.

Concerning officers carrying prisoners to taverns without their consent, see title GAOL and GAOLER.

XI. Form of a resolve of commissioners of the character, qualification, &c. of tavern keepers, licences, recognizance and conviction.

Form of a resolve of commissioners of the character, qualification, &c. of tavern keepers.

County of } At a board of the commissioners of excise for the town of
ss. } in the county of holden at the dwelling house of in the
same town, the day of whereof are present S. S. the supervisor of the said town, and J. P. and S. P. Esquires, justices of the peace for the said county, resident in the said town [or, if not resident in the town, say, associated with the said supervisor, pursuant to the statute in such case made and provided.]

UPON the application of L. L. of the said town of to the said board of commissioners for a licence to keep an inn or tavern in the house in which he now resides [or such place as the licence is applied for] in the town aforesaid and upon due consideration had of the premises, *It is resolved*, that the said L. L. is of good moral character, and of sufficient abilities to keep an inn or tavern, and that he has accommodations to entertain travellers, and that an inn or tavern is absolutely necessary at the place where he resides [or, proposes to keep such tavern] for the actual accommodation of travellers as aforesaid, pursuant to the statute in such case made and provided (we whose names are

hereunto subscribed having satisfactory evidence of the same.) In testimony whereof, we have hereunto severally subscribed our names, the day and year, and at the place aforesaid.

Form of a tavern-keeper's licence.

County of } At a board of the commissioners of excise for the town of
 ss. } &c. [proceeding as above to the end of the caption.]

WE, the said commissioners of excise, do hereby license L. L. of the said town of to keep an inn or tavern at the [or, in the dwelling-house in which he now resides, describing the place for which a licence is granted] and not elsewhere, from the date of these presents until the first Tuesday of May next ensuing, and no longer; [so as the said inn or tavern may be duly kept, and no unlawful games permitted, nor any gaming table or shuffle board be kept within the same, or within any out-house, yard or garden belonging thereunto, against the provision of the statute in such case made and provided, for the observance whereof, by the person hereby licensed, a recognizance hath been entered into pursuant to the said statute; and the said board of commissioners, upon evidence satisfactory to them, (or, the major part of them, as the case may be) have resolved that the said L. L. is of good moral character, and of sufficient abilities to keep an inn or tavern, and that he has accommodations to entertain travellers, and that an inn or tavern is absolutely necessary at the place aforesaid for the actual accommodation of travellers, as the said act directs.] In witness whereof, we have hereunto set our hands and seals, the day and year, and at the place aforesaid.

The licence would be as effectual, perhaps, if all between the last brackets were omitted; for in such case all the *pre-requisites* might be presumed to have been complied with, though not so expressed. By the same reasoning also a licence might be sufficient to leave out the caption here given entirely; and only say,

We, the commissioners of excise for the town of in the county of in pursuance of the act entitled "An act to lay a duty on strong liquors, and for regulating inns and taverns," do hereby license L. L. of the said town of to keep an inn or tavern in the house wherein he now resides, from the date of these presents until the first day of May next ensuing, and no longer. Given, &c.

But the other form is preferred, as it shews on the face of it that these pre-requisites have been observed; besides, to recapitulate the facts which are strictly necessary to the issuing of a licence, in the instrument itself, when thus subject to immediate publicity, may serve as an admonition not altogether useless to those who put their names to it, to look well to the propriety of the act, and to the truth of the facts therein certified.

Form of a licence to retail strong liquors.

BE it known, that we, the commissioners of excise for the town of in the county of have licensed and permitted, and in pursuance of the statute in such case made and provided, do hereby license and permit M. M. of the said town, merchant, to sell by retail, any strong or spirituous liquors under five gallons, (provided the same be not drank in any house, yard or garden of the said M. M.) from the date hereof until the first Tuesday in May next. Given under our hands and seals, this day of

Form of a recognizance.

County of } **B**E it remembered, That on the day of in the year of
 ss. } our Lord L. L. of in the county aforesaid, inn-
 keeper, personally came before me, J. P. Esq. justice of the peace for the said
 county, [or if in a city, mayor, or in his sickness or absence, recorder of the
 said city,] and acknowledged himself to owe to the people of the state of New-
 York the sum of one hundred and twenty-five dollars, to be made and levied
 of his goods and chattels, lands and tenements, to the use of the said people,
 if default shall be made in the condition underwritten.

Whereas the above bounden L. L. is licensed to keep an inn or tavern from
 the present day of until the first Tuesday of May next, in the house
 where he now dwells at aforesaid. Now the condition of this recognizance
 is such, that if the said L. L. shall not, during the time he shall keep an inn or
 tavern, keep a disorderly inn or tavern, or suffer or permit any cock-fighting,
 gaming or playing with cards or dice, or keep any billiard table, or other gam-
 ing table or shuffle board, within the inn or tavern by him to be kept, or with-
 in any outhouse, yard or garden belonging thereunto; then this recognizance
 shall be void, or otherwise remain in full force and effect.

Taken and acknowledged the day and year
 above written, before me, J. P.

Form of conviction, as prescribed by statute. 1 N. R. L. 390.

County of } **B**E it remembered, that on the day of in the year of
 ss. } our Lord one thousand eight hundred and A. B. of
 merchant, [or, farmer, or other addition, as the case may require, and ad-
 ding, being an inn-holder or tavern-keeper, if the case be so] is this day con-
 victed before C. D. mayor [or, recorder, or, one of the aldermen, as the case
 may require] of the said city [or, one of the justices of the peace of the said
 county, as the case may require] of having on the day of last [or, in-
 stant] at in the said city [or, county] sold by retail one quart [or other
 quantity] of rum [or other spirituous liquors] without having such permit [or,
 to be drank in his house, or outhouse, yard or garden without having entered
 into such recognizance,] as is mentioned in the act entitled "An act to lay a du-
 ty on strong liquors, and for regulating inns and taverns," [or, of not having in
 his house, two spare beds for guests, with good and sufficient sheeting and
 covering for such beds respectively, for the accommodation of travellers, or, of
 not having good and sufficient stabling and provender of hay and grain, if in
 winter, and if in summer, of hay or pasturage for four horses, or other cattle,
 more than his own stock, for the accommodation of travellers, according to the
 form of the act, entitled "An act to lay a duty on strong liquors, and for regu-
 lating inns and taverns,"] or, of having on the day of last [or, instant]
 at in the said city [or county] sold one gill [or other quantity] of rum [or
 other strong liquors] to an apprentice [or servant, or slave] of knowing
 or having reason to suspect or believe him to be such, without the consent of
 his master [or, mistress] against the form of the act entitled "An act to lay a
 duty on strong liquors, and for regulating inns and taverns," [or, of having for
 the space of one month [or two, or more, months] neglected to put up, and keep
 such sign up, as is required by the act entitled "An act to lay a duty on strong
 liquors, and for regulating inns and taverns,"] Given under my hand and seal,
 the day and year first above written.

INQUISITIONS, *see* CORONER—INDICTMENT.

JUDGMENT.

IT seems to be generally agreed, that a man can no other way be
 attainted of treason or felony at this day, but only by judgment, by
 express sentence, or by outlawry. 2 *Haw. c. 48. § 25.*

And of judgments, by express sentence, there are two kinds. *First*, such as are fixed and stated, and always the same for the same species of crimes : *Secondly*, such as are discretionary and variable, according to the different circumstances of each case. 2 *Haw. c.* 48. § 1.

And in fixed and stated judgments, the law makes no difference between a common or ordinary case, and one attended with extraordinary circumstances. 2 *Haw. c.* 48. § 2.

1. *As to fixed and stated judgments.*] Where, by statute, peculiar punishments are appointed for particular offences, 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 direct. *Dalt. c.* 188.

2. *As to judgments by express sentence which are discretionary and variable.*] *Hawkins* observes in general, that 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 behavior for a certain time, as shall seem most proper and adequate to the offence, from the consideration of the baseness, enormity, and dangerous tendency of it ; the malice, deliberation and wilfulness, or the inconsideration, suddenness, and surprise with which it was committed ; the age, quality, and degree of the offence, and all other circumstances which may any way aggravate or extenuate the guilt. 2 *Haw. c.* 48. § 14.

But it is to be observed, that the court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in court. 2 *Haw. c.* 48. § 17.

And 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. c.* 48. § 18.

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. c.* 48. § 20.

As to judgment of OUTLAWRY.] This judgment is given by the sheriff, at his county court, upon the party not appearing to the exigent, which is a writ commanding the sheriff to cause the defendant to be demanded, from county court to county court, until he be outlawed. 2 *Haw. c.* 48. § 21. 1 *N. R. L.* 165.

And it seems agreed, that when a judgment of outlawry for treason or felony appears of record, by the sheriff's return of the exigent, the party is as much attainted, and shall forfeit and lose as much as if sentence had been given against him upon verdict or confession. 2 *Haw. c.* 48. § 22. 1 *N. R. L.* 165.

But if such outlawry appear to the court to be erroneous, whereof any one, as *amicus curiæ*, may inform them, the party shall have counsel assigned him to take advantage of the error ; but if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only, and not void, the proper execution shall be awarded against him, but no sentence pronounced, because the outlawry is a judgment, and no man shall have two judgments for one offence. 2 *Haw. c.* 48. § 23.

Arrest of judgment, &c.] That a judge ordered a juror to be withdrawn, in a criminal case, in no cause for arresting the judgment on a subsequent trial for the same offence. 2 *Caine's Rep.* 100.

But if in a criminal case a juror hath been withdrawn without the consent of the defendant, at the instance of the public prosecutor, in order to enable him to obtain further testimony, and the defendant is tried again on the same indictment, and found guilty, judgment will be arrested. *Ib.* 304.

The arresting of judgment, after a conviction on an indictment for a felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. 13 *John. Rep.* 351.

And *per Spencer, J.*] The effect of arresting a judgment is the same as quashing an indictment before trial. *Ib.*

JURIES.

THE trial *per pais*, or by a jury of one's country, is justly esteemed one of the greatest excellencies of our constitution; and *Blackstone* observes, that it is the most transcendent privilege which any subject can enjoy, or wish for; that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.

This privilege is confirmed to us by the 41st article of the constitution of this State, wherein it is ORDAINED, *That trial by jury, in all cases in which it hath heretofore been used in the Colony of New-York, shall be established, and remain inviolate forever.*

And the same privilege is guaranteed to us by the constitution of the United States, which declares, *that the trial of all crimes, except in cases of impeachment, shall be by jury.*

Anciently there were several other methods of trial, such as by battle, ordeal, and the like, yet these, from the inconveniencies attending them, have been laid aside, and the trial by jury alone cultivated and improved, as the best method of investigating the truth. 3 *Bac. Abr. Tit. Juries.*

I. *Grand juries.*

II. *Petit Juries and others.*

III. *Persons exempted from serving on juries.*

IV. *Concerning the jury process and the manner of selecting and convening the jury.*

V. *Of special juries.*

VI. *Concerning the challenge of jurors, and herein;*

1. *Of challenges to the array.*

2. *Challenges to the polls.*

3. *At what time to be taken.*

4. *How tried.*

VII. *How jurors are to be chosen and sworn on trials.*

VIII. *How to be kept and discharged; and herein of giving in their verdict.*

IX. *How fined and punished for defaults and misdemeanors.*

I. Grand juries.

Juries are distinguished into grand and petit juries ; and the grand jury may consist of thirteen or more ; for these being the grand inquisitors of the county, every indictment and presentment by them must be found by twelve at least ; but it is not necessary that all above that number should concur in such presentment or indictment. *3 Bac. Abr.* 232.

By statute, the sheriff, at certain days and places which any two or more justices, with one of the judges of the common pleas, shall make known to him, shall cause to come before the courts of general sessions of the peace, twenty-four good and lawful men of the same county, to enquire, for the people of the state and the body of the said county. *1 N. R. L.* 327.

The usual practice is, for the clerk of the court of sessions to make out a precept or summons for the grand jury, which is signed by a judge of the common pleas, together with two or more justices, and then delivered to the sheriff, a reasonable time before court, for him and his deputies to summon the jurors.

But for courts of oyer and terminer, the district attorney is to issue the precept as soon as conveniently may be after every circuit is appointed to be held within his district, and at least fifteen days before the time of holding the same. *1 N. R. L.* 349.

Though the sheriff is commanded to cause to come, *twenty-four* good and lawful men, &c. yet the officer cannot properly swear more than twenty-three grand jurors ; for if a number amounting to two full juries or more should be sworn, it might happen that a complete jury of twelve might find a bill to be true, though other twelve or more of the same jury might reject it as untrue ; which would be inconvenient and absurd. *2 Bur.* 1088.

Those returned to serve on the jury must be *good and lawful men*, and ought to be of the same county where the crime was committed ; and therefore it is a good exception at common law to one returned on a grand jury, that he is an alien, or that he is outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor ; but these exceptions must be taken before the indictment is found. *3 Bac. Abr.* 232. *S.*

They must also be freeholders, but to what amount in general is uncertain, which seems to be *casus omissus*, and proper to be supplied by the legislature as the qualifications of the petit jury are. *4 Black. Com.* 302.

By statute, the foreman of a grand jury is authorised to administer the usual oath or affirmation to witnesses who come to give evidence to the grand jury whereof he is foreman. *1 N. R. L.* 525.

II. Petit Juries and others.

By statute, it shall not be lawful for more than thirty-six nor less than twenty-four jurors to be summoned for the trial of issues in the supreme court, or in any circuit court, sittings, court of oyer and terminer and gaol delivery, mayor's court, court of common pleas, or general sessions of the peace, unless otherwise directed by one of the judges of such court. *1 N. R. L.* 327.

And all jurors who shall be returned upon trials of issues in the said courts, other than strangers, upon trials *per medietatem lingue*, shall be above the age of twenty-one, and under the age of sixty years, and shall each of them have, in his own name or right, or in trust for him, or in his wife's right, in the same county, a freehold in lands, messuages or tenements, or of rents in fee or for life, of the value of one hundred and fifty dollars, free of all reprises, debts, demands or incumbrances whatsoever. And in the cities of New-York, Albany or Hudson, a freehold of the value aforesaid, or a personal estate of the like nature, free from all reprises, debts, demands, or incumbrances whatsoever. *Ib.*

And the want of such qualification shall be good cause of challenge; and the juror shall be discharged upon such challenge, on his own allegation and oath thereof. *Ib.*

Juries and inquests between aliens and citizens of the United States, and whether this state be interested or not, except in cases of treason, the one half shall be citizens of this state, and qualified as aforesaid, and the other half aliens, if so many there be in the city or county where such jury or inquest is to be taken, and who shall be indifferent between the parties; and if there be not so many aliens or strangers, then as many as shall be found, who shall be indifferent, and the remainder, of citizens qualified as aforesaid. 1 *N. R. L.* 334. § 24.

But it seems agreed, that there is no need that any of those who find an indictment against an alien, should be aliens. 2 *Haw. c.* 43. § 36.

Where a woman alleges pregnancy to prevent the award of execution, the sheriff or marshal 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. 2 *Haw. c.* 51. § 9.

So upon the writ *de ventre inspiciendo*, there shall be a jury of women to try if a woman be *ensient*. *Tri. per Pais*, 86.

III. *Persons exempted from serving on juries.*

It seems to be agreed, that all persons whose attendance is required in the superior courts of justice, such as counsellors, attorneys, and other officers of the courts, are so far privileged as not to be summoned on juries. *Dyer*, 314.

It is said in Bacon's abridgement, that members of the House of Commons seem not to have any privilege to be exempt from serving on juries; however, in the case of Sir *Edward Bainton*, who was returned on a jury in *B. R.* the court would not force him to be sworn against his will, he being a parliament man, and the parliament then sitting. 3 *Bac. Abr.* 260.

Clergymen are usually excused, out of respect to their functions. *Fitz. Nat. Brev.* 166. *B.*

By statute non-commissioned officers or privates, of any company of grenadiers, light infantry, artillery and riflemen, of the militia of this state, and the commissioned officers of artillery in the city of New-York who shall produce a certificate, dated within three months of the then present time, signed by the commanding officer, of such

company or regiment, that he belongs to such company, shall not be compelled to serve on any grand or petit jury within this state.— 1 *N. R. L.* 335. § 28.

Nor shall the firemen belonging to any company of firemen established by law in any city, town or village, so long as they continue firemen. *Ib.*

The inspectors also of the state-prison, the wardens of the port of New-York, and the commissioners of the health office, are exempted by statute from serving on juries, so long as they continue inspectors, wardens or commissioners. 1 *N. R. L.* 335. § 28.

So also are the agents, superintendants and workmen of the Albany glass factory, belonging to the Hamilton glass manufacturing society, during the time they are so employed. *Ib.*

And in case of many public officers, not particularly exempted by statute, when they make it appear that their attendance is immediately necessary in the discharge of their duty, the court may exercise its discretion, and excuse them from serving on the jury for that time. 3 *Will. Just.* 64. *n.*

So in case of indisposition of a juror or his family, or other peculiar circumstances, the court may exercise a like discretion and discharge him.

By statute it is enacted, that no Quaker, or reputed Quaker, shall be compelled to serve as a juror upon the trial of any indictment for treason or murder. 1 *N. R. L.* 335. § 28.

It seems that the sheriff cannot return any privilege of exemption, but each particular juror must come and demand it. *Tri. per Pais.* 87.

IV. Concerning the jury process, and the manner of selecting and convening the jury.

It seems agreed, that a person not duly summoned and returned, is not obliged to serve in a jury. 3 *Bac. Abr.* 235.

The first process for convening the jury in civil causes is the *venire facias*, and after the *venire* a writ of *habeas corpora juratorum* or *distringas* issues, but most usually a *distringas*; for the *venire* being in the nature of a summons, if the jury did not appear thereon, they commonly proceed on the strongest process. *Tri. per pais*, 64.

But by statute, the names of the persons contained in the panel annexed to the *venire facias juratores*, need not be inserted in the writs of *habeas corpora juratorum* or *distringas*, subsequent to such *venire*, but it shall be sufficient to insert in the mandatory parts of such writs of *habeas corpora juratorum*, “the bodies of the several persons named in the panel to this writ annexed;” and in the mandatory parts of such writs of *distringas*, “the several persons named in the panel to this writ annexed,” or words of like import, and to annex to such writs panels containing the same names, places of abode and additions, as were returned in the panels to such *venire*. 1 *N. R. L.* 330.

The *venire facias* for trial of issues in any action, civil or criminal, in any court of record, shall be awarded of the body of the proper county where the issue is triable, except where foreign juries shall be deemed necessary, in which case, it shall be awarded of the body

of the county from which such foreign jury shall be directed to come. 1 *N. R. L.* §26.

The process in the supreme court to bring in the jury in criminal matters, issues in the name of the people under the seal of the court and test of the chief justice, and ought always to bear test after the issue joined between the people and the prisoner. 2 *H. H.* 260.

And for the courts of oyer and terminer, the district attorney is to issue process for the jury as soon as conveniently may be, after a circuit is appointed to be held within his district, and at least fifteen days before the time of holding the same. This precept also is to be in the name of the people and tested in the name of the chief justice ; provided that if his office be vacant, it shall be tested in the name of the next senior justice. And it may be tested on any day of term preceding the vacation in which the court is to be held. 1 *N. R. L.* § 340. § 16.

But for the courts of general sessions of the peace, it is enacted by statute, that the sheriff shall cause to come so many good and lawful men of the same county, duly qualified to serve as jurors, as the said justices shall direct, by whom the truth of the matter may be the better known and inquired into of all crimes and misdemeanors, to be tried at the said courts. 2 *N. R. L.* 150. § 4.

Nothing is said in this act of the manner in which this process shall be issued ; and the usual practice is, for the clerk of the court to make out the precept, and two or more justices, together with one of the judges of the common pleas, to sign the same.

To the end, that jurors duly qualified may always be returned, it is enacted by statute, that the *venire facias juratores* for the impanelling of jurors in any of the counties, except New-York, shall have in the body thereof, the words following, that is to say : “ *twelve free and lawful men of your county, each of whom shall have in his own name or right or in trust for him, or in his wife's right, a freehold in lands, messuages or tenements, or of rents in fee or for life, of the value of one hundred and fifty dollars, free from all reprises, debts, demands or incumbrances whatsoever,*” and the residue shall be in the usual form. 1 *N. R. L.* §27.

The sheriff is the proper officer by whom the jury process is to be executed, unless he be partial ; that is, such a one as from his consanguinity or affinity, his being under the power of either party, or the like, cannot be presumed to be an indifferent person, as every officer who hath any way to do with the administration of justice ought to be ; and in every such case the process shall be directed to the coroners, if they are impartial, or to those of them who are so. in case some of them lie under the aforementioned prejudices ; and in case all the coroners are partial, or not indifferent, then the *venire* shall be directed to two elizors named by the court, and against whom, for that reason, no challenge can be taken. *Co. Lit.* 158. a. *Bro. tit. Chal.* 153.

The names of jurors for the trial of causes in the several courts of record in this state, except in the city and county of New-York. and the mayor's courts of Albany and Hudson, shall be drawn openly and publicly by the clerks of the several counties, at least fourteen days before the setting of the court, and the several clerks must give ten days notice of the time and place of such drawing. 1 *N. R. L.* §28.

And the names contained on such slips of paper shall be the persons who are to be summoned to serve as jurors at the then next court, unless any of them shall be dead, or shall have changed their place of residence to any other city or county, or be absent from such city or county, or not qualified within the knowledge of such sheriff, officer, clerk or judge, to serve as jurors. *Ib.*

In which case, the clerk shall immediately destroy such slips of paper, and proceed to draw out of the said box until the panel shall be completed. 1 *N. R. L.* 328. § 11.

And the clerk shall immediately make out and certify, under his hand, a panel of the names of such jurors so drawn out, with their respective places of abode and additions, and deliver the same to the sheriff. *Ib.*

And the slips of paper containing the names of the jurors named in the panel, shall by the said clerk be put together, and carefully locked up in some safe place until after the end of the term or session of the court at which such jurors are to appear. *Ib.*

And the clerk shall, as soon as may be, after the end of the court, put such of the slips of paper, containing the names of the persons who appeared, and were not excused from serving or discharged, into another box, to be by him provided and kept for that purpose; and shall destroy such slips of paper, containing the names of such as appeared and were adjudged not to be qualified, or were privileged or exempted from serving on juries. *Ib.*

And such clerk shall return to the box from which they were drawn, such slips of paper, containing the names of jurors who made default in appearing, or were excused from serving. *Ib.*

And the clerk shall proceed in like manner, to draw out of the said box, until all the slips of paper shall be drawn out of such first box; after which, he shall proceed in like manner to draw the names out of the other box, returning them into the first box, and proceed in like manner as often as occasion shall require. *Ib.*

The clerk of the supreme court, circuit, sittings, and of oyer and terminer, in the city of New-York, shall, within one week after the end of such court, deliver to the town clerk of the said city, a list of the jurors who appeared in such court, of which they are respectively clerk; and also a list of such as made default, and of such as were excused, and of such as were discharged by reason of being privileged or not qualified. 1 *N. R. L.* 329. § 12.

And the clerk of the supreme court at Albany shall do the like. *Ib.*

The cities of Albany, Hudson and Schenectady, are considered as towns, for all the purposes intended by this act. 1 *N. R. L.* 329. § 13.

And in those cities this duty is to be performed by the supervisors and assessors. *Ib.*

And in the city of New-York, by the mayor, aldermen and commonalty of the city, in common council convened. *Ib.*

And the supervisor, town clerk, and assessors of the several towns shall, annually, on or before the first day of July, cause the names of each person, residing in their respective cities and towns, and qualified, and of sufficient ability and understanding to serve on juries in the several courts before mentioned, and not contained in either of

the said boxes, with their places of abode, and additions, to be certified in writing, and transmitted to the clerk of the county. 1 *N. R. L.* 329. § 13.

And the clerk shall thereupon cause such names, with the places of abode and additions, to be written on separate slips of paper and put into the box out of which the names of the jurors are next to be drawn. *Ib.*

And it is made the duty of the town clerks, to transmit a copy of the names of all such persons which are contained on the said slips of paper, as are dead, removed out of the county, or not qualified to serve as jurors, to the clerk of the county, at least once in every year, who shall thereupon destroy the several slips of paper containing such names. 1 *N. R. L.* 329. § 13.

The sheriff or other officer to whom the jury process is directed, after the clerk has made and certified the panel, is to summon the several persons named in it, at least eight days previous to the setting of the court, and is to make return in what manner he has served such process. 1 *N. R. L.* 328. § 11.

And in all cases where the sheriff shall not be able to summon a juror personally, by reason of absence from home, a summons in writing, left at his usual place of abode, within the time prescribed for that purpose, with some person of suitable age and discretion, shall be deemed a sufficient notification. 1 *N. R. L.* 331. § 19.

And if a sufficient number of jurors do not appear at any of the courts mentioned in the act, or after appearance of a full jury by challenge the jury is like to remain untaken, for default of jurors, such court is authorized, upon motion in behalf of the people, or of any party, to command the sheriff to name and appoint, as often as shall be requisite, so many of such other persons of the said county, qualified to serve on such juries, and to add and annex their names to the former panel, as shall make up a full jury for the trial of every such issue. 1 *N. R. L.* 330. § 14.

The sheriff, or other officer to whom any process shall be directed for the trial of issues in the said courts, except in cases of special juries, shall annex a panel of the same jurors, with their places of abode and additions, to all the writs or process returnable at the same court. *Ib.*

And it shall be the duty of the sheriff, or other officer, to furnish any person applying, with a copy of the panel of jurors. *Ib.*

Upon the grand jury, there may be, and usually are, more than twelve, as has been before observed; but upon a trial by a petit jury, it can be no more nor less than twelve, and all assenting to the verdict. 2 *H. H.* 161.

Although by the words of the *venire*, the sheriff is only to return twelve, yet, by statute, as was mentioned in the second division of this title, not more than thirty-six, nor less than twenty-four, are to be summoned, unless otherwise directed by one of the judges of the court. 1 *N. R. L.* 327. § 9.

V. Of special juries.

Special juries are appointed on motion and application to the court or that purpose.

Struck juries are not allowed unless on the order of the court, when they deem it necessary by reason of the importance or intricacy of the case. 1 *N. R. L.* 333. § 22.

And whenever the court so deem it necessary, it is made lawful, by statute, for the supreme court, court of common pleas, or mayor's court, in which the cause is depending, to order the clerk of the county to return into the office of the clerk of the court, or if he be the clerk of the court, there to have ready in his office, at a certain day, a book, containing the names of the persons in his county qualified to serve as jurors on such trial. *Ib.*

The party applying, then gives notice to the opposite party, and to the clerk of the court, or his deputy, of the time and place; at which the clerk attends with the said book, and, in presence of the parties, copies out the names of forty-eight such persons as he thinks most indifferent between the parties and best qualified to try the cause; out of which the party applying first strikes out one, and the opposite party another, and so alternately until each shall have struck out twelve, and the remaining twenty-four are returned. *Ib.*

If only one party attends the striking, the clerk is to strike part for him who is absent. *Ib.*

Provided, that if the clerk shall be interested in the cause, or related to either of the parties, or it shall appear probable to the court that he is not indifferent between them, they shall nominate two proper persons, who are indifferent, to strike the jury, and they shall perform all that is required to be done by the clerk. *Ib.*

And in order to prevent improper applications for struck juries, it is enacted, that the party who shall apply for such jury shall pay the fees for striking, and not have any allowance for the same upon the taxation of costs. *Ib.*

And also that struck jurors shall be paid by the party at whose request such jury shall be struck, or his attorney, and every such juror may bring his suit for the recovery thereof, against such party, or his attorney. 1 *N. R. L.* 334. § 23.

It is said in *Buller*, upon a like statute for striking juries, 3 *G.* 2, that from the penning of the act, it appears to extend only to the trial of any issue joined, therefore the court will not grant a special jury upon a writ of inquiry. *Bul. N. P.* 304.

And it is said, there cannot be a special jury in capital cases, for the party must have the advantage of challenging twenty without cause shewn; and as, in the case of special juries, the number is reduced to twenty-four, if there should be a special jury, it would take away the advantage which the party has of a peremptory challenge. 21 *Vin. Abr.* 301. *pl.* 5.

In intricate or important causes, a struck jury will be allowed. 1 *Caine's R.* 498.

It will be allowed in an action for a libel against a public officer, on an affidavit that the libel was of him in his official character, and that it was false. 1 *John. R.* 61.

So where a representative in congress is libelled with respect to his official conduct. 4 *John. R.* 482.

A view is grantable in such cases where the title is in question; and in such cases it may be granted on motion, on a bare suggestion, without any affidavit. 2 *Salk.* 665.

And to this purpose it is enacted, that in any action in the supreme court, court of common pleas or mayor's court, where it shall appear to the court, that it is necessary that the jurors shall have a view of the place in question, they may order special writs of *distringas* or *habeas corpora juratorum* to issue, by which the sheriff shall be commanded to have six out of the first twelve 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 said writ. 1 *N. R. L.* 332. § 21.

And in such case, if there is not a struck jury, and the parties shall not agree by writing on the jurors who are to have the view, so many of the jurors who are returned to try the cause as shall be necessary to go upon the view, but not less than six, shall be balloted in presence of a judge ; and their names shall be first written on the panel ; and at the trial such of them as have had the view and do appear, shall be first sworn before any drawing ; and so many only shall be drawn to be added to the viewers as shall make up the number twelve. *Ib.*

But the usual way of granting views, as practised in the courts in England, is in the parties entering into a rule by consent, that in case no view be had (as if no jurors attend) or if a view be had by any other jurors whomsoever, (though not being six of the first twelve) yet the trial shall proceed, and no objection be made on account thereof, or for want of a proper return. 1 *Bur.* 256.

The tenant is entitled to a view in all cases except where restrained by the statute. 1 *John. Cas.* 237. So is the demandant. *Ibid.* 335.

When the tenant demands a view, the demandant must sue out the writ of view, and cause view to be given, or be nonsuited. *Ibid.* 395.

It is said in *Wickham v. Watters*, (Colman 49.) that the affidavit on moving for a view, must state that boundaries are in question.

VI. Concerning the challenge of jurors ; and herein

1. Of Challenges to the array.
2. Challenge to the polls.
3. At what time to be taken.
4. How tried.

When the trial is called on, the jurors are to be sworn as they appear, unless they are challenged. 3 *Black. Com.* 357. 4 *Black. Com.* 352.

Jurors must be free from all exception and wholly disinterested. 2 *John. R.* 194.

And challenges are of two kinds, viz. either to the array, or to the polls. *Co. Lit.* 156. *Bul. N. P.* 306.

Challenges to the array are at once an exception to the whole panel, in which the jury are arranged, or set in order by the sheriff in his return. 3 *Black. Com.* 359.

And this kind of challenge is two fold, either a principal cause of challenge, or to the favor. *Co. Lit.* 156.

A principal cause of challenge is grounded on such a manifold presumption of partiality, that if it be found true it unquestionably sets aside the array or the juror. *Co. Lit.* 156.

And there are many principal causes of challenge to the array, viz. if the sheriff, or other officer, be of kindred or affinity to the plaintiff or defendant, if the affinity continue; if the officer return any juror at the denomination of either party, 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. *Co. Lit.* 156.

So 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, or arbitrator in the same matter, the array may be well challenged. *Co. Lit.* 156.

So if a sheriff return the jury to try an indictment in which he is prosecutor, the array may be well challenged; but this is an objection which must be made by way of challenge, and cannot be moved in arrest of judgment. *Leach's Cr. L.* 105.

And when a citizen may challenge the array for unindifferency, there the [people; being a party, may also challenge for the same cause. *Co. Lit.* 156.

The array challenged on both sides shall be quashed. *Ib.*

If either party be apprehensive that the other side will challenge the array on account of relationship, or interest in the sheriff, the right way in order to save time, is for him to suggest such matter to the court, and pray a venire to the coroners; and if all of them be interested, then to elizors, to be appointed by the court. If upon shewing cause, the party admit the fact, the process shall be directed accordingly. If the other party deny the fact, the process shall be directed to the sheriff, and the other party shall not be admitted afterwards to challenge the array on that account. *Co. Lit.* 157. *Dyer*, 367. *Bul. N. P.* 306.

If the suggestion be, that the sheriff is related to the other party, or interested on the other side; if that be denied, the court will order it to be tried, and then direct process according to the event of such trial. *Bul. N. P.* 306.

As to a challenge to the array for favor :—This being no principal challenge, it must be left to the discretion and conscience of the triers. *Co. Lit.* 156.

As if either of the parties be tenant to the sheriff, or if the sheriff have an action of debt against either of the parties, these are causes of challenge to the favor only; for the sheriff thereby is not under the party's influence, but the party under his. *Ib.*

So affinity between the son of the sheriff and the daughter of the party, or the like, is no principal challenge, but to the favor; but if the sheriff marry the daughter of either party, or the like, this as hath been said is a principal challenge.

So if a sheriff who is a party in a cause, serve the venire, it is a good ground of challenge to the array. *5 John. R.* 133.

So a challenge lies to the *array*, for any partiality or default in the clerk, in selecting and arraying the jury : as if he draw seventy-two names, and then designate thirty-six for the circuit court, and the other thirty-six for the common pleas. 9 *John. R.* 260.

2. Challenge to the polls.

A challenge to the *polls* is, as has been before observed, a challenge to the particular jurors.

And these challenges are either peremptory, or for *cause* shewn.

A *peremptory* challenge is so called, because a person may challenge peremptorily, upon his own dislike, without shewing any cause. *Co. Lit.* 156.

But a prisoner must take all such challenges himself, even in such cases wherein he may have counsel. 2 *Haw. c.* 43. § 4.

By the common law, in all capital cases (in which only peremptory challenges were allowed) the prisoner could challenge thirty-five peremptorily. *Lamb. b.* 4. c. 14.

But by statute, persons arraigned for any crime punishable with death, or with imprisonment for life, shall be admitted to a peremptory challenge of twenty jurors, and no more. 1 *N. R. L.* 496. § 9.

And by the statute, relative to treason, it is enacted, that if any person, arraigned for treason or misprision of treason, shall peremptorily challenge above the number of thirty-five, such challenge shall be disallowed, and the trial proceed as if no such challenge had been made. 1 *N. R. L.* 146. § 5.

A challenge to the polls, for *cause* shewn, is either principal, or to the favor. *Comyn's Dig. tit. Chal. (c. 2.)*

A principal challenge is, 1. *Propter defectum* ; or for a defect, as if a jurymen be an alien. *Co. Lit.* 156. 3 *Black. Com.* 362.

If he be a slave or bondman, this is defect of liberty. *Ib.*

So if the juror be within the age of twenty-one, or over sixty, it is good cause of challenge. 1 *N. R. L.* 327. § 9.

But the principal deficiency, saith Sir *Wm. Blackstone*, is defect of *estate*, sufficient to qualify him to be a juror. 3 *Black. Com.* 362.

This depends upon statute, and is pointed out in the second division of this title.

2. *Propter affectum* ; or for suspicion of bias or partiality : Jurors ought to be free from every objection ; and by the words of the writ, such by whom the truth of the matter may be the better known, and who are in no wise of kin, either to the plaintiff or defendant ; which words contain all causes of objection, from partiality or incapacity, consanguinity and affinity. 3 *Bac. Abr.* 258.

Therefore, if the juror be of blood or kindred to either party, this is a principal challenge ; for the law presumeth that one kinsman doth favor another before a stranger, and how far soever he is of kindred, yet the challenge is good. *Co. Lit.* 157.

So if he has declared his opinion, touching the matter before hand, that the party is guilty, or will be hanged, or the like ; this is a good cause of challenge. 2 *Haw. c.* 43. § 28.

So, by statute, an indictor of any person for any crime or offence whatsoever, upon the inquest for the trial of such person, may be challenged for that cause. 1 *N. R. L.* 496. § 10.

And although it be upon the trial of another indictment or action, wherein the same matter is either in question, or happens to be material, though not directly in issue. 2 *Haw. c. 43. § 27.*

And if a man that is one of the grand jurors be returned upon the petit jury, do not challenge himself, he shall be fined. 2 *H. H. 309.*

But it hath been adjudged to be no good cause of challenge, that the juror hath found others guilty on the same indictment; for the indictment is in judgment of law several against each defendant, for every one must be convicted by particular evidence against himself. 2 *Haw. c. 43. § 29.*

It hath been allowed a good cause of challenge, on the part of a prisoner, that the juror hath a claim to the forfeiture, which shall be caused by the party's attainder or conviction. 2 *Haw. c. 43. § 28.*

So if the juror hath part of the land that dependeth upon the same title, it is a principal challenge. *Co. Lit. 157.*

So if he has done any act by which it appears that he cannot be impartial; as if he take information of the case before he be sworn; or eat or drink at the charge of either party after he be returned, these are principal causes of challenge. *Co. Lit. 157. 2 H. H. 326.*

But it is not a principal challenge to a juror, but only to the favor, that the prosecutor was lately entertained at his house. 3 *Salk. 81.*

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. *Co. Lit. 157.*

But an arbitrator chosen by both parties, whether he have treated of the matter or not, or chosen by one party, if he has never treated thereof; or a commissioner chosen by one party for examination of witnesses, cannot be challenged principally; but for such cause, one may be challenged for favor. *Co. Lit. 158. 9 Co. 71. a.*

Neither is it a principal challenge that the juror is a fellow servant with either party, but only to the favor. *Co. Lit. 157.*

If either party labor the juror, and give him any thing to give his verdict, this is a principal challenge. *Ib.*

But if either party barely labor the juror to appear to do his conscience, this is no challenge at all, but lawful for him to do it. *Ib.*

Actions brought either by the juror against either of the parties; or by either of the parties against him, which imply malice or displeasure, are causes of principal challenge; other actions which do not imply malice or displeasure, are but to the favor. *Co. Lit. 156. b. (t.)*

It is a good cause of challenge to a juror that he has previously given his opinion on the question in controversy between the parties. 1 *John. Rep. 316.*

But not for merely saying, "that if the reports of the neighbours were correct, the defendant was wrong and the plaintiff was right." 8 *John. Rep. 445.*

3. Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit and renders him infamous. 3 *Black. Com. 363.*

As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, or the like; or to be branded, whipt, or stigmatized; or if he be

outlawed, or hath been attainted of *præmunire*, or forgery. 3 *Black. Com.* 363, 4.

And it hath been holden that such exceptions are not solved by a pardon. 2 *Haw. c.* 43. § 25.

But it seems that none of the above cited challenges are principal ones, but only to the favor, unless the record of the outlawry, judgment or conviction be produced, if it be a record of another court ; or the term be shewn, if it be a record of the same court. 2 *Haw. c.* 43. § 25. *Co. Lit.* 157. b.

As to challenges to the polls for favor.] Although a juror is not under the influence of either side, or has not given apparent marks of partiality, yet there may be sufficient reason to suspect he may be more favorable to one side than the other ; and this is a challenge to the favor. The causes of favor are infinite, and in these inducements to suspicion of favor, the question is whether the juryman is indifferent as he stands unsworn ; for a juryman ought to be perfectly impartial to either side ; for otherwise his affection will give way to the evidence of one party, and an honest but weak man may be so much biassed, as to think he goes by his evidence, when his affections add weight to the evidence. Now since the writ expects those by whom the truth may be best known, it excludes all those who are apparently partial without any trial, because they are not under the qualifications in the writ, since the truth cannot be unknown to them ; but where the partiality is not apparent, but only suspicious, then the juror is to be tried whether favorable or not, that is, whether he comes within the description of the writ : and if the triers think he does, then he is to be set aside. *Co. Lit.* 157. b. 3 *Bac. Abr.* 258, 9.

3. At what time to be taken.

It is laid down as a rule that there can be no challenge either to the array, or polls, before a full jury appears ; for if there be not a full jury, the cause will remain for defect of jurors ; therefore if a full jury do not appear, the party who intends to challenge the array may pray *a tales*, and afterwards challenge the jury. *Hob.* 235. *Bul. N. P.* 307.

But the challenge to the array must be made before any of the jury are sworn. *Ib.*

So if you would challenge the polls, you must do it before the juryman is sworn. *Bul. N. P.* 307.

For it is laid down as a rule, that no juror can be challenged without consent after he hath been sworn, either in a criminal or civil cause, unless it be for some cause which happened since he was sworn. 2 *Haw. c.* 43. § 1.

After a challenge to the array, the party may challenge the polls ; but after a challenge to the polls, there can be no challenge to the array. *Co. Lit.* 158. a.

And he who hath several causes of challenge against a juror must take them all at once. *Ib.*

Also if a juror be challenged by one party and found indifferent, the other party may challenge him afterwards. *Ib.*

And in cases where peremptory challenges are allowed, if the pri-

once challenge a juror for a cause which is held insufficient, he may afterwards challenge him peremptorily. *Ib.*

The challenge to the array must be in writing; but when the challenge is to the polls, it is a short way by a verbal challenge. *Tri. per Pais*, 172.

When the [people] are party, the defendant that challengeth for cause, must shew his cause presently. *Co. Lit.* 158.

And by statute, when the attorney-general in behalf of the state, or he who shall in any case prosecute for the people, shall challenge a juror for any cause, he shall immediately assign and shew the cause of such challenge; and the truth thereof shall be tried as challenges of other parties ought to be tried. 1 *N. R. L.* 334. § 25.

But if a juror be challenged between party and party, and there be enough of the panel besides, the cause of challenge need not be shewn, unless the other side challenges all the rest. *Tri. per Pais*, 143.

4. How tried.

A principal cause of challenge being grounded on a manifest presumption of partiality, sets aside the array or the juror, without any other trial than its being made out to the satisfaction of the court. *Co. Lit.* 157. b. 3 *Bac. Abr.* 266.

But a challenge to the favor, when the partiality is not apparent, must be left to the discretion of the triers. *Ib.*

If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two attorneys, sometimes 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 favor of partiality, then by any other two assigned thereunto by the court. 2 *H. H.* 275.

If the facts alleged in the challenge are admitted, the court decides upon them; but if denied, two triers are appointed by the court out of the panel, or perhaps, any two other persons named by the court. 9 *John. Rep.* 260.

As to a challenge to the polls; if a juror be challenged before any juror is sworn, two triers shall be appointed by the court; and if he be found indifferent, and sworn, he and the two triers shall try the next challenge; and if he be tried and found indifferent, then the two first triers shall be discharged, and the two jurors tried and found indifferent shall try the rest. 2 *H. H.* 275.

If the plaintiff challenge ten, and the prisoner one, and the twelfth be sworn, then he that remains shall have added to him one chosen by the plaintiff and another by the prisoner, and they then shall try the challenge; and if six be sworn, and the rest challenged, the court may assign any two of the six to try the challenges. *Ib.*

The truth of the matter alleged as cause of challenge, must be made out by witness, to the satisfaction of the triers; also the juror challenged may on a *voir dire* be asked such questions as do not tend to infamy or disgrace; such as whether he hath a freehold, whether he hath an interest in the cause; and in a civil cause, whether he hath given his opinion beforehand upon the right, which he might

have done as arbitrator between the parties. *Co. Lit.* 158: *Tri. per Pais*, 158. *Salk.* 153.

But in no case can a juror be asked whether he hath been whipped for larceny, or convict of felony, or whether he ever was committed to bridewell for a pilferer, or whether he is an outlaw, or the like ; because these kind of questions tend to make a man discover that of himself which tends to his shame, infamy and disgrace. *Keeling*, 9. *Tri. per Pais*, 158. *Salk.* 153.

VII. *How jurors are to be chosen and sworn on trials.*

By statute, the name of every person summoned and impanelled, with his place of abode and addition, shall be written on distinct pieces of paper or parchment, as near as may be of equal size, and shall be delivered to the clerk by the sheriff or his agent, and shall by direction of the clerk be rolled up, all as near as may be in the same manner, and put into a box ; and when an issue is brought on to be tried, the clerk, or some indifferent person, shall in open court draw out twelve of the papers, one after another ; and if any person drawn shall not appear, or be challenged and set aside, then such further number as shall make up twelve who do appear ; and the said twelve men so first drawn and appearing and approved, shall be sworn and be the jury to try the cause ; and their names being marked in the panel, shall be kept apart in some other box, till the jury have given in their verdict, and the same is recorded, or the jury discharged ; and then the said names shall be rolled up again and returned to the former box, and so as often as any issue remains to be tried. 1 *N. R. L.* 331. § 20.

But the names of such as shall be drawn and shall not appear, or be challenged and set aside, shall, immediately after the jury in such case be sworn, be rolled up again and returned to the same box with the names at that time undrawn. *Ib.*

And if any issue shall be brought on to be tried, before the jury in any other cause shall have brought in their verdict or be discharged, the court may order a jury to be drawn in manner aforesaid out of the names remaining in the said first box. *Ib.*

In capital cases the sheriff returns the panel of the jury, who being called and appearing, the prisoners are told by the clerk, that these good men now called and appearing, are to pass on their lives and deaths, therefore if they will challenge any of them they are to do it as they come to the book, and before they they are sworn ; and if no challenge hinder, the jury are commanded to look on the prisoner, and then severally twelve of them are sworn. 2 *H. H.* 293.

Although there be several prisoners at the bar for capital offences, and the oath is general to try and true deliverance make between the [people of the state of New-York] and the prisoners at the bar ; yet the jury is to inquire of no more than what they are particularly charged with ; and when they go from the bar, and have brought in their verdict touching these particulars charged upon them, then if the same jury pass upon the remaining prisoners, yet they are to be called over again, the prisoners reminded of their challenges,

and the jury sworn *de novo* upon the trial of the rest of the prisoners. 2 *H. H.* 294.

VII. How to be kept and discharged; and herein of giving their verdict.

An officer of the court ought always to be placed at the door of the box where the jurors sit, to prevent any one having communication with them. *Bul. N. P.* 308.

And when the jurors depart from the bar, a constable ought to be sworn in civil as well as criminal cases, to keep them together, and not to suffer any to speak with them. 2 *H. H.* 296. *Palm.* 380.

The court may permit them to take with them letters patent and deeds under seal; and the exemplification of witnesses in chancery if dead, but not a writing without seal, unless by consent of parties: but though the jury take with them patents, deeds, &c. without leave of the court, or writings without seal, books, &c. without consent of court or party, it shall not avoid the verdict, though they be taken by the delivery of the party for whom the verdict was given. *Bul. N. P.* 308.

So though one of the jury shew a writing, which was not given in evidence to his companions. *Ib.*

But it is said the jury may give a verdict without testimony, when they themselves have consance of the fact. *Tri. per Pais*, 209. 279. 1 *Vent.* 67.

But if they give a verdict on their own knowledge, they ought to tell the court so. However, 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.* 45.

But if they examine witnesses by themselves, though the evidence be in effect the same which was given in court, yet it will avoid the verdict. *Cro. Eliz.* 189. *Bul. N. P.* 308.

So if the party for whom the verdict is given, or any for him, deliver a letter or other writing not given in evidence, it shall avoid the verdict. *Bul. N. P.* 308.

But 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.

The jury must be kept together without meat, drink, fire, or candle, till they are agreed. *Co. Lit.* 227. b.

And the court may from time to time be adjourned till such agreement. *Salk.* 201. 7 *Mod.* 1.

And it is fineable for the jury to eat at their own charge after they are departed from the bar; but it will not avoid the verdict, as it will if they eat at the charge of him for whom the verdict was given before they are agreed on the verdict. *Bul. N. P.* 308.

But they may eat at his charge after a privy verdict. *Ib.*

And 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 may be necessary for him and his fellows. al-

so, 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. and Stud.* 158.

And if the case so happen, that the jury can in no wise agree, as if there be eleven agreed, and but one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven, no, nor yet the refuser fined or imprisoned ; for men are not forced to give their verdict against their judgment. *2 H. H.* 297.

For 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 immediately, 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. and Stud.* 158.

It seems to have been anciently an uncontroverted rule, that a jury, sworn and charged in a capital case, cannot be discharged, without the prisoner's consent, till they have given a verdict ; and notwithstanding some authorities to the contrary in the reign of *Car. 2.*, this hath been holden for clear law, both in the reign of *Jac. 2.*, and since the revolution. *2 Haw. c. 47. § 1. Fost.* 22.

And it seems to have been always agreed, that in all capital cases the jury must give their verdict openly in court, and cannot give a privy verdict. *2 Haw. c. 47. § 2.*

Also it is settled, that the jury may give a special verdict in any criminal case, whether capital or not capital, as well as in a civil. *2 Haw. c. 47. § 3.*

And by statute, no jury shall in any case be compelled to give a general verdict, so that they find a special verdict and shew the truth of the fact, and require the aid of the court or justices. *1 N. H. L.* 335. § 27.

But if the jury will take upon themselves the knowledge of the law, they may ; yet it is the safest way to find the special matter where the case is doubtful. *Co. Lit.* 228.

After the verdict is 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. *Co. Lit.* 227.

On a trial for a misdemeanor, if the jury cannot or will not agree, they may be discharged without the consent of the defendant. *2 John. Cas.* 275.

IX. How fined and punished for defaults and misdemeanors.

The court may proceed by way of attachment against jurors for misdemeanors ; but herein it is observable, that jurors may be considered either in a ministerial capacity, viz. as persons bound to attend the court, in order to perform the duty for which they are returned, until they are discharged ; or in a judicial capacity, viz. as judges of the fact which is to be tried or inquired by them. *2 Haw. c. 22. § 13.*

And as applying to the former capacity, it is enacted by statute, that every grand or petit juror, whose duty it shall be to attend any court of record, and who shall refuse or neglect to attend according-

ly, shall be liable to be fined by such court in a sum not exceeding twenty-five dollars. 1 *N. R. L.* 330. § 18.

And when such fine is imposed, the court shall cause immediate proclamation of it to be made; and if such delinquent juror shall not during the sitting of the court, shew a satisfactory excuse for his default or non-attendance, the fine shall be estreated. *Ib.*

But in case of a summons of a juror in writing, the court shall suspend the imposing a fine for his non-attendance until the next term or sessions, to the end that he may have time to make it appear that he was absent from home at the time such summons was left at his place of abode, and did not return in season to attend at the said court. 1 *N. R. L.* 331. § 19.

And to the end, that such defaulting juror may have notice, the clerk shall forthwith transmit to the sheriff, a list of their names, who shall without delay notify them of their respective defaults and liability to a fine on that account. *Ib.*

If a grand or petit juror be called, and, being present, refuse to appear, or, having appeared, withdraw himself before he be sworn, or refuse to be sworn, the court may of common right set a fine upon him at their discretion. 8 *Co.* 38. b. 41. a. 2 *Inst.* 242. 2 *H. H.* 309.

So if, after they are sworn, they refuse to give any verdict at all. *Vaugh.* 152.

So if they endeavour to impose upon the court, as when a petit jury offer a verdict to the court as agreed by their whole number, when in truth some of them have not agreed to it; or when they agree to two verdicts, and first, to offer one of them to the court, and to stand to it if the court should express no dissatisfaction to it; but if the court shall dislike it, then to give the other. 2 *Haw. c.* 22. § 17.

So for misbehaving themselves after their departure from the bar; as when they do not all keep together till they have given their verdict, or when any of them carry any thing eatable with them in their pockets, or eat or drink, or otherwise refresh themselves without leave of the court, before they have given in their verdict, though they were agreed on it, and were also all the time in custody of the officer appointed to take care of them. 2 *Haw. c.* 22. § 18.

Also if the jurors cast lots for their verdict, it shall be set aside; and that although it may be according to the evidence and the opinion of the judge: and they shall be fined for the contempt. 3 *Keb.* 805. 2 *Lev.* 149. 205. 2 *Jones,* 83. 1 *Str.* 642.

But the court cannot receive an affidavit from any of the jurymen, that the jury were divided in opinion, and tossed up, and that the plaintiff's friends won; in all of whom such conduct is a very high misdemeanor, but in every such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through the window, or by some such other means. 1 *Term. Rep.* 11.

But affidavits of jurors in exculpation of themselves and in support of their verdict, are admissible. 4 *John. Rep.* 487.

Jurors are likewise punishable for sending for, or receiving instructions from either of the parties concerning the matter in question, and therefore much more for receiving a bribe. 2 *Haw. c.* 22. § 19.

Also if a juror shall take any thing to give his verdict, and thereof be found guilty in any court of record, either at the suit of the party

or any other that will sue for himself, or for himself and the people, he shall pay *ten times as much* as he has taken, with costs of suit, half to the people, and half to him that shall sue. And if the party to the plea shall bring such suit and recover, he shall recover also his damages by the assessment of the inquest; and if the juror shall not have whereof to make satisfaction in manner aforesaid, he shall be imprisoned for one year. 1 *N. R. L.* 334. § 26.

So if a juryman have a piece of evidence, and after the jury are sworn and gone together, he sheweth it to them, this is a misdemeanor or finable in a jury; but it avoids not the verdict. *Cro. Eliz.* 616. 2 *H. H.* 306.

But it is no offence in a juror to exhort his companions to join him in such a verdict as he thinks right. 1 *Haw. c.* 83. § 8.

2. As to the punishment of jurors in their judicial capacity: 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 the 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 fear, or any passion whatsoever. 1 *Haw. c.* 72. § 5.

By the common law, an attain lay against a jury for a false verdict in a *civil cause*; but now by statute, all attainments upon untrue verdicts are abolished. 1 *N. R. L.* 526. § 39.

If a man assault or threaten a juror, for giving a verdict against him, he is highly punishable by fine and imprisonment. 1 *Haw. c.* 21. § 14.

The form of a challenge to the array, according to a precedent in *Coke's entries*.

AND now at this day, to wit, _____, come the aforesaid A. the plaintiff, and B. the defendant, by their attorneys, and the jurors were impanelled and demanded, and came, and thereupon the aforesaid B. challengeth the array of the panel aforesaid, because he saith that the panel was arrayed by one L. S. Esq. now, and at the time of making the array aforesaid, sheriff of the said county of _____, which said sheriff is a kinsman of the aforesaid A. the plaintiff, to wit, [here set forth the degree of affinity with convenient certainty.] and this he is ready to certify. wherefore 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 removed.

JUSTICES OF THE PEACE.

THE common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. 1 *Black. Com.* 349.

Therefore it will be considered under this title:

- I. *Who are conservators of the peace by the the common law.*
- H. *Of the qualifications, appointment, commission and oath of justices of the peace.*

III. *Their authority and jurisdiction pursuant to the commission of the peace, and the general statutes relating to them. And herein*

1. What authority they have in relation to offences punishable with death, or with imprisonment in the state-prison for life.
2. What in relation to inferior offences.
3. How far they have power to proceed on indictments not taken before themselves.
4. By what justices the jurisdiction must be exercised.
5. How far a justice of a county may act out of it.

IV. *Regulation of their fees.*

V. *How far protected in the execution of their office; and herein of their punishment for misdemeanors.*

I. *Who are conservators of the peace by the common law.*

The chancellor and every justice of the supreme court have, as incident to their offices, a general authority to keep the peace throughout the state, and to award process for the surety of the peace, and to take recognizance for it. *Com. Dig. Tit. Just. of Peace. (a. 4.) 2 Haw. c. 8. § 2. Dalt. c. 1. Cromp. 6.*

All courts of record, as such, have power to keep the peace within their own precincts; and the justices of gaol delivery may take surety of the peace from a person committed for not finding such surety. *Lamb. b. 1. c. 3. 2 Haw. c. 8. § 3.*

Also every sheriff is a principal conservator of the peace within his own county; and formerly he might, *ex officio*, award process and take security for it. *2 Haw. c. 8. § 4.*

But his authority now is little more in this respect than that of constables. If however, a man break the peace in his presence, or shall threaten to kill, beat or hurt another, or be in a fury ready to break the peace, he 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 sureties for the peace. *Dalt. c. 1.*

Also a coroner is another principal conservator of the peace, and may bind any one to the peace who shall make an affray in his presence; but he is said to have no authority to grant process for the peace; and it seems that the security taken by him for the peace is not to be looked on as matter of record, but as matter in pais only, except where it is taken by him as judge in his own court for an affray in his presence. *Crom. 6. 2 Haw. c. 8. § 5.*

II. *Of the qualifications, appointment, commission and oath of justices of the peace.*

By statute it is enacted, that in every county of this state, *fit and discreet* men shall from time to time be appointed and commissioned justices, to keep the peace in the same counties respectively. *2 N. H. L. 506. § 1.*

No other qualification seems to be required by law than that they shall be *fit and discreet* men.

They are appointed by the council of appointment, and hold their offices during the pleasure of the council.

But there are other officers who are invested with the powers of justices of the peace, though not appointed as such by the council of appointment; as the mayor, recorder, and aldermen of certain cities.

And these powers are held by such city officers either by a particular grant in the charter, or by statute. 2 *Ld. Raym.* 1030.

Such officers are also recognized in the acts of our legislature generally, as possessing the powers of justices of the peace within their respective cities.

The mayor, recorder and aldermen of the cities of New-York, and Albany have each the like powers as justices of the peace, except that the recognizances and examinations taken in the city of New-York, must be returned into the police office, and not to the court of sessions. 2 *R. L.* 508. § 6.

No more than five judges, of any court of common pleas, in any county, including the first judge, nor more than four justices of the peace in any town, in this state, can now be appointed. The judges however may be commissioned as justices of the peace if need be. The office of assistant justice is abolished. 4 *Vol. L. Ses.* 41. c. 60.

The commission of justices of the peace is in the following words, to wit :

The People of the State of New-York, by the Grace of God, Free and Independent: To A. B. C. D. &c. Greeting:

K NOW YE, that WE have appointed and assigned; and by these Presents, do appoint and assign, you and every of you, jointly and severally, JUSTICES to keep our Peace, in our county of _____ and to keep, and cause to be kept, all *Laws and Ordinances*, made or to be made, for the good of the peace, and for the conservation of the same, and for the quiet rule and government of the citizens and inhabitants of our said state, in all and every the articles thereof, in our said county, as well within liberties as without, according to the force, form and effect of the same laws and ordinances; and to chastise and punish all persons offending against the form of those laws and ordinances, or any of them, in the county aforesaid, in such manner, as, according to the form of those laws and ordinances, shall be fit to be done; and to cause to come before you, or any or either of you, all those persons who shall break the peace, or have used, or shall use *threats*, to any one or more of the citizens or inhabitants of our said state, concerning their bodies, or the *fring* of their houses or barns, to find sufficient security for the peace, or their good behavior towards the people and inhabitants of our said state; and if they refuse to find such security, then them imprison, until they shall find such security, to cause to be safely kept.

And further, WE have also appointed and assigned you, the said Justices, or any three or more of you, to inquire, by the oath of *good and lawful men*, of our county aforesaid, by whom the truth may be the better known, of all and all manner of *larcenies, thefts, trespasses, forestallings, regratings, engrossings and extortions whatsoever*, and of all and singular other *crimes and offences*, of which Justices of the Peace may or ought lawfully to inquire, by whomsoever, and after what manner soever, in the county aforesaid, done or perpetrated, or which shall happen to be there done or attempted: And also, of all those who in the said county have gone or rode, or hereafter shall presume to go or ride, in companies with armed force, against the peace, to the disturbance of the citizens and inhabitants of our said state: And also, of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim, or cut, or kill, any citizen or inhabitant of our said state: And also, of all victuallers and innholders, and all and singular other persons, who have offended or attempted to

offend, or hereafter shall presume or attempt to offend in the said county, in the abuse of weights or measures, or in the sale of victuals, against the form of the laws and ordinances of our said state, or any of them, made for the common good of our said state, and the citizens and inhabitants thereof: *And also*, of all sheriffs, bailiffs, constables, gaolers and other officers whatsoever, who, in the execution of their offices about the premises, or any of them, have unduly demeaned themselves, or hereafter shall presume to behave themselves unduly, or have been, or hereafter shall happen to be careless, remiss or negligent, in the county aforesaid; and of all and singular articles and circumstances, and all other things whatsoever, that concern the premises, or any of them, by whomsoever, and after what manner soever, in the said county, done or perpetrated, or which shall hereafter 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 Justices of the Peace in the said county, made or taken and not determined; and to make and continue processes thereupon, against all and singular the persons so indicted, or who, before you, shall happen to be indicted, until they be taken, surrender themselves, or be out-lawed; and to hear and determine all and singular the larcenies, thefts, trespasses, forestallings, regratings, engrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws, ordinances and statutes of our said state, as in the like case it has been accustomed or ought to be done; and the same offenders and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures and other means, according to the laws and customs of our said state, and the form of the ordinances and statutes aforesaid, it has been accustomed or ought to be done, to chastise and punish.

You, therefore, and every of *you*, are diligently to attend the keeping of the peace, laws and ordinances, and all and singular other the premises, and at certain days and places, which you, or any three or more of you shall, in that behalf appoint, or by law shall be appointed, are to inquire into the premises, and hear and determine all and singular the premises, and perform and fulfil the same in form aforesaid; doing therein what to justice appertaineth according to the laws and ordinances aforesaid: Saving to US our *Amerciaments*, and other things to US thereof belonging.

And the sheriff of our county of aforesaid, at certain days and places, which you, the said justices of the peace of the said county, or any three or more of you shall make known to him, shall cause to come before you, the said justices of the peace of the said county, so many such good and lawful men of his bailiwick or county, as well within liberties as without, by whom the truth of the matter in the premises shall be the better known and inquired into: For all and singular which this shall be your COMMISSION. for and during our good pleasure, to be signified by our Council of Appointment.

In testimony whereof, WE have caused these our letters to be made patent, and the Great Seal of our said state to be hereunto affixed: *Witness*, our trusty and well beloved Esquire, Governor of our said state, General and Commander in Chief of all the Militia, and Admiral of the Navy of the same; by and with the advice and consent of our said Council of Appointment.

By the 28th article of our constitution, new commissions shall be issued to judges of the county courts, (other than to the first judge) and to justices of the peace, once at the least in every three years.

The office of these justices, as has been observed, is held during the pleasure of the council; and is determinable by divers means, but most usually the following:

First; by superseding the commission by writ of *supersedeas*, which, when served, suspends the power of the justices to whom it is directed.

Secondly; by implication, as by leaving out of such new commission the names of the former justices; which virtually, though si-

lently, discharges all those that are not included therein. 1 *Black. Com.* 353.

Thirdly ; by the accession of another office : as where a justice of the peace is chosen sheriff of the county ; for by the 26th article of the constitution, a sheriff is incapable of holding any other office at the same time.

Also if a justice of peace be made a coroner of the county, this it seems is a discharge of his authority of justice. *Dalt. c. 3. § 10.* 1 *Black. Com.* 358.

And the reasons which *Dalton* gives why a sheriff, independent of any express prohibition, ought not to exercise the authority of a justice, will apply with almost equal force to a coroner, since in many cases he is to act in the same ministerial capacity as the sheriff. The reasoning is thus : The office of a judge being to command, and of a minister to execute the commandment, if one man shall be both judge and minister, it would follow that the coroner ought to command himself, or that he should (in the cases above alluded to) as an officer, serve his own precept made as justice or judge, which cannot be. *Dalt. c. 3. § 10.*

It is required by statute, that every justice of the peace, before he enters upon the execution of his office, shall take the oath of allegiance to this state, and the following oath of office : 1 *N. R. L.* 383. § 3.

I, J. P. do solemnly swear and declare, that I will, to the best of my knowledge and ability, execute the office of justice of the peace within and for the county of _____ according to the constitution and laws of the state of New-York, in defence of the freedom and independence thereof, and for the maintenance of liberty and the distribution of justice among the citizens and inhabitants of the said state, without any fear, favor, partiality, affection, or hope of reward. So help me God.

These oaths must be taken and subscribed before the Lieutenant Governor, judges of the supreme court, secretary of state, attorney-general, mayor, recorder or clerk of a city, or a judge or clerk of a county, who shall take such subscriptions on rolls to be provided for that purpose, containing proper captions, with the oaths written at length thereon, and subscribed with the proper hand writing of the persons taking the oaths ; which rolls shall be deposited and kept in the office of the clerk of the county. 1 *N. R. L.* 385. § 10.

And by the 6th article of the constitution of the United States it is required that all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support that constitution.

And if a justice shall execute his office without having first taken the oaths prescribed by law, and the oath to support the constitution of the United States, he shall forfeit his office and be removed therefrom, and such neglect is declared by statute to be a misdemeanor, indictable and punishable by fine and imprisonment. 1 *N. R. L.* 385. § 11.

In addition to the above, the following oath is required to be taken by justices of the peace :

I, A. B. do solemnly swear or affirm (as the case may be) that I have not been engaged in a duel, by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner in violation of the act entitled, "an act to suppress duelling," since the first day of July, in the year of our Lord one thousand eight hundred and sixteen; nor will I be so concerned directly or indirectly in any duel during the continuance of the said act, and while an inhabitant of this state."

Wilfully swearing false in the premises, is declared perjury. 4 Vol. L. Sess. 40. ch. 1. § 2.

III. *Their authority and jurisdiction pursuant to the commission of the peace, and the general statutes relating to them.*

It seems certain that by virtue of their commission they may execute all statutes whatsoever, made for the better keeping of the peace. 2 Haw. c. 8. § 28.

And it is enacted by statute, that they shall have power, jointly and severally, to cause to be kept all laws made for the preservation and good of the peace. 2 N. H. L. 506. § 1.

And besides the statutes relating to the peace, there are others which are committed to the charge and care of justices by the express words of such statutes; and all such statutes are to them a sufficient warrant and commission of themselves, and are to be executed by them according as the statutes themselves prescribe and set down. Dalt. c. 5.

Having premised this, it will be proper to consider, *First, what authority they have in relation to offences punishable with death, or with imprisonment in the state prison for life:—Secondly, what in relation to inferior offences:—Thirdly, how far they have power to proceed on indictments not taken before themselves:—Fourthly, by what justices the jurisdiction must be exercised:—Fifthly, how far a justice of a county may act out of it.*

First, what authority they have in relation to offences punishable with death, or with imprisonment in the state-prison for life.] As treason, murder, and all other felonies are against the peace of the people, 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 shall take the examination of the person so apprehended, and the information of all those who bring him relative to the fact, and put the same in writing, and also bind over all material witnesses to the court, having cognizance of the offence, and where the prisoner ought to be tried, and certify such recognizances and examinations to the same court. 2 N. H. L. 507. § 2. 2 Haw. c. 8. § 34.

And the statute which directs justices to take such examinations, seems to suppose them to have a general power of committing all persons, accused of such offences; and the general practice has

been agreeable hereto. It is said that *justices of peace may take the examination of persons brought before them FOR ANY KIND OF FELONY whatsoever, and commit them to prison ; and also take the information of the prosecutors upon oath, and bind them over to prosecute : and to commit those who shall refuse to be so bound, if it appear that they can give material evidence.* 2 *Haw. c. 8. § 33.*

And by statute, courts of general sessions of the peace may take indictments of treason, misprision of treason, murder, felony, and of all other crimes and misdemeanors whatsoever, committed in the same city or county ; but it shall not be lawful for any such court to hear and determine indictments for treason, misprision of treason, murder or other felony or crime, punishable with death, or with imprisonment in the state prison for life, but shall cause the indictments for the same to be delivered to the supreme court, or court of oyer and terminer or gaol delivery to be held in such city or county, there to be determined according to law. 2 *N. R. L. 507. § 3.*

Secondly, what authority justices of peace have in relation to inferior offences.] The powers given to justices of the peace are so various, and extend to such a multiplicity of cases, that it would be impossible in this place to enumerate all the offences in respect whereof they have jurisdiction ; and were it otherwise, it would be unnecessary to do so, as such matters are distinctly treated of in other parts of this work.

It is therefore only intended to treat of their general authority in regard to inferior offences ; and herein it is to be observed, that by the before mentioned statute, courts of general sessions of the peace are empowered to hear, determine and punish according to law, all felonies, crimes, and misdemeanors whatsoever, which are not punished with death or imprisonment for life. 2 *N. R. L. 507. § 3.*

And by statute, justices of peace shall have power, jointly and severally, to cause to be kept all laws made for the preservation of the peace, and to cause to come before them, or any of them, all persons who shall break the peace, and to commit them to gaol, or to bail them, as the case may require ; and also to cause to come before them, all persons who shall threaten to break the peace, or who be not of good fame, to find sufficient security for the peace, or for their good behaviour, or both as the case may require ; and if they refuse to find sufficient security, to commit them to prison, until they shall find the same. 2 *N. R. L. 507.*

And 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 the [statute.] 1 *H. H. 414.*

Thirdly, how far they have power to proceed on indictments not taken before themselves.] By statute, no process or pleas before courts of general sessions of the peace, shall be discontinued by any new commission of the peace, but the same shall stand in full force ; and the justices in such new commissions shall have authority to continue, hear and determine the same, and all that shall depend upon them. 2 *N. R. L. 151. § 6.*

But justices of the peace have no power to proceed on indictments

taken before a coroner, or before justices of oyer and terminer, or gaol delivery, or deliver persons suspected, by proclamation, before an inquisition be taken; but if an inquisition be taken, and an *ignominiam* found, they may deliver him as it seemeth. 2 *H. H.* 46. 2 *Haw. c.* 8. § 31.

Fourthly, by what justices the jurisdiction must be exercised.] Every single justice has regularly a jurisdiction through the whole county, which he alone may exercise for the preservation of the peace; and this jurisdiction he has by virtue of his commission which constitutes him a justice of peace, as well as by statute. 2 *H. H.* 50. 2 *N. R. L.* 506§ 1.

But there are offences which, by particular statutes, may be tried by one or more justices of peace, as forcible entry and detainer; and sometimes such offences as are created by the statute, as breach of Sabbath, and the like.

And the authority of a justice of peace is to be used according to the force, form and effect of the statute. *Com. Dig. tit. Just. of Peace (B. 1.)*

But the justices cannot proceed for an offence against a statute, which creates a new offence not named in the commission; or, by which no jurisdiction is given to justices of peace. *Ib.* § 2 *Str.* 1256.

And 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.

Thus, where a statute empowers two justices finally to hear and determine any offence, or requires two of them to do any judicial act, they must both be present at the execution of it, as in making an order for bastardy, adjudging the settlement of a pauper, and the like; for in all judicial acts, they are to exercise a discretion; and in order thereto they ought both to be present, and confer together for the purpose of a communication on the subject matter on which they are to determine. *Salk.* 478. 88. *Ld. Raym.* 55.

So where two justices are enabled to bail a person, they ought both to be present to do it, and not one of them first to sign the recognizance, and then send it to another. 3 *Will. Just.* 116.

And a single justice cannot bail a person that is committed by order of the sessions; for he that bails must have as high a power as he who commits. 1 *Keb.* 857. 897.

Where a statute refers a matter to the discretion of the justice, it ought to be a *sound discretion*, conformable to law and reason. 4 *Co.* 100. *a.*

And where a statute says the *next* justice, it must be the next, and others without him cannot intermeddle. 2 *Keb.* 559. *Sand.* 263.

But others may join with him; and where it says the justices of peace in or near the place, then any justice of peace in the county will serve. *Salk.* 477. 2 *Keb.* 559.

So if any authority is given to one justice, two or more may execute it. *Dalt. c.* 6. § 8.

And in all cases where justices of peace 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. *Dalt. c.* 115. § 2.

And the justices ought in every case to draw up the conviction in form, and return the original record thereof to the sessions, whether the party appeals or not, or whether an appeal is or is not given, that the [people] may not be deprived of their share of forfeitures. 2 *Term Rep.* 285.

The record of conviction before the justices, in special sessions, ought to state sufficient to show that they have jurisdiction. So also the value of the thing stolen, ought to be stated, and that the party convicted had not given bail within forty-eight hours after being committed, or had consented to a trial before the expiration of that time. 4 *John. Rep.* 492.

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 session of two or more justices, for that one justice hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it; yet the constant and universal practice seems to have altered the law in this particular, and to have given justices an authority in relation to such arrests, not now to be disputed. 2 *Haw. c.* 13. § 16.

Also it seems clear that wherever a statute gives to any one justice of peace 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. 2 *Haw. c.* 13. § 15.

But in ordinary cases, where the offence does not amount to felony, or subject the offender to corporal punishment, it seems to be most advisable to issue a summons in the first instance, and not a warrant, unless the statute which gives the justices jurisdiction directs otherwise. 3 *Will. Just.* 117.

In the case of the parishes of *Pancras* and *Rumbold*, *Tr.* 2 *G.* 1, where two justices reciting that they were surprized, superseded their former order for the removal of a pauper, and commanded the church wardens to return the same to be cancelled: *The court* held such supersedeas to be well sent by the justices, to prevent the charge of an appeal. 1 *Str.* 6.

But the legality of the practice of one magistrate's granting a supersedeas to the warrant of another, is very doubtful. 2 *Term Rep.* 195.

Justices of the peace ought not to execute their office in their own cause; but they ought to 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. *Com. Dig. tit. Just. (I. S.)*

And upon this principle, where a justice of peace was surveyor of the highways, and an order was made at the sessions in a matter which concerned his office, and he joined in making the order, and his name appeared in the caption, it was held bad, and for that reason quashed. 2 *Salk.* 607.

For when a man is a party, he cannot be a judge indifferent. *Dalt. c.* 173.

But if a justice is publicly assaulted, or abused to his face, or his authority otherwise contemned while in the execution of his office, and no other justice be present, it seems that he may make himself

judge, and immediately commit such offender until he shall find sureties for the peace or good behavior, as the case shall require; yet if another justice be present, his assistance should be required to punish the offender. 1 *Str.* 421. 2 *Haw.* 8vo. ed. n. 4.

So if a person uses abusive words to a justice while out of court, in relation to his judicial character, it is not a contempt for which the justice can commit; but he may require the party to find surety of the peace, and for good behaviour, and in default thereof, commit. 10 *John. Rep.* 393.

Also on an appeal from an order for the removal of a pauper, no justice of the peace, who shall reside in the town where the dispute shall happen (except in the city and county of New-York) shall sit in court upon such appeal. 1 *N. R. L.* 285. § 17.

FIFTHLY, how far a justice of a county may act out of it.] Justices of the peace are to execute their authority as justices of the peace within the county wherein they are justices, and cannot regularly do a judicial act out of such county. 2 *H. H.* 50. 2 *Haw.* c. 8. § 92.

Therefore an order of bastardy made by them out of the county, is not binding. 2 *Haw.* c. 8. § 29.

So also if a justice of the peace live or be out of the county wherein he is justice, he cannot in general by his warrant fetch a person out of the county whereof he is justice, to come before him in the county where he is. *Plow.* 37. a. 2 *H. H.* 50.

But it seems that any justice may do a ministerial act out of the county, such as examining a party robbed, whether he knows the felons or not, according to the statute. *Cro. Car.* 211. *Jones*, 239.

Also by the better opinion, recognizances and informations, voluntarily taken before them in any place, are good; for those, says chief justice *Hale*, are acts of voluntary jurisdiction, and may be done out of the county. 2 *H. H.* 51.

But a justice of peace in general cannot imprison a person for not giving a recognizance, or commit a person for a crime; for these are acts of compulsory jurisdiction, which he cannot exercise out of his proper county. *Ib.*

Where offenders escape into a different county from that wherein the justice may properly exercise a jurisdiction, it is enacted by statute, that in case any person against whom a warrant shall be issued, shall escape, or be in any county out of the jurisdiction of the justice granting the warrant, it shall be the duty of any justice of the county where such person shall be, upon proof of the hand writing of the justice granting the warrant, to endorse his name on the same, which shall be a sufficient authority to the person bringing the warrant, and to all persons to whom it was directed, to arrest the offender in the county where the warrant was endorsed. 1 *N. R. L.* 149. § 2.

And no action shall be brought against a justice for endorsing a warrant as aforesaid, but such action may be brought against the justice who granted the warrant, in the same manner as if the offender had been arrested in the county where it was granted. *Ib.*

And it is to be observed, that the justices of peace for a county have, by their commission, an express authority, as well within lib-

erties as without ; from whence it seems clearly to follow, that they may execute their office within a town which has a special commission of the peace for its own limits, unless such commission have a *non intromittant* clause, that no other justices except those named in it, shall any way concern themselves in the keeping of the peace within the liberties of such town. 2 *Haw. c. 8. § 29.* 2 *Str.* 1154.

IV. Regulation of their fees.

The fees to be paid on proceedings before justices of the peace, are particularly limited by statute. For which, as well as for the fees of other officers herein treated of, see the table at the end of this work.

Observing only in this place, that if any person knowingly accept of any other or greater fee for his services than is allowed by statute, he shall, on conviction, pay to the party grieved treble damages, and such fine to the people, as the court, in which such conviction is had, shall think proper to impose, and shall also forfeit and lose his office. 2 *N. R. L.* 30.

V. How far protected in the execution of their office, and herein of their punishment for misdemeanors.

A justice of the peace is under the peculiar protection of the law ; for he is not punishable at the suit of the party, but only at the suit of the [people,] for what he doth as judge, in matters which he hath power by law to hear and determine. 2 *Haw. c. 13. § 20.*

For no action on the case will lie against a judge for what he does as judge. 2 *Roll. Rep.* 199. 14 *Vin.* 579.

But in cases wherein he proceeds ministerially, rather than judicially, or where he exceeds the limits of his jurisdiction, he is liable to an action on the case at the suit of the party, as well as to an information at the suit of the [people.] 2 *Haw. c. 13. § 20.* 2 *Lut.* 1546. *Bul. N. P.* 64.

For an improper and unjust exercise of their discretion ought to be under controul ; but it must be a clear and apparent partiality or wilful misbehaviour to induce the court to grant an information, and not a mere error in judgment. 1 *Bur.* 556.

The supreme court will also grant a *mandamus* to compel the justices of peace to do that which by the duty of their office they ought to do, and there are many instances thereof in the books.

But unless it clearly appears that the justice hath been partially, maliciously, or corruptly influenced in the exercise of his authority, and hath consequently abused the trust reposed in him, the court will not be induced to grant an information. 1 *Bur.* 556. 2 *Doug.* 427.

For the rule is invariable, that the court will never interpose to punish a justice of the peace for a mere error in judgment. 1 *Bur.* 556. 785. 2 *Doug.* 247. 1 *Term Rep.* 653, 692.

And even when a justice acts illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or bad view or ill intention whatsoever, the court will never punish him in the extraordinary course of an information ; but leave the party complain-

ing to his ordinary method of prosecution, by action or by indictment: 2 *Bur.* 1162.

And it seems the justice is not liable to be punished both criminally and civilly; for before the court will grant an information, they will require the party to relinquish his civil action, if any such is commenced: and even in the case of an indictment, and although the indictment is actually found, yet the attorney-general (on application made to him) will grant a *nolle prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time. 2 *Bur.* 719.

No action lies against a justice for a judicial act; as to recover back a fine imposed by him for a contempt. 3 *Caine's Rep.* 170.

A justice, on the examination of a charge of suspicion of felony, or of having stolen goods, if satisfied that there is no ground for suspicion, may dismiss the person accused. 2 *John. Rep.* 203.

A justice is not liable to be sued by witnesses for their fees. 5 *John. Rep.* 351.

But if he issue a warrant against the putative father of a bastard child, on the application of any other person than an overseer of the poor, he does it without authority, and acting ministerially, is liable to the party arrested, notwithstanding a subsequent assent by the overseers to the proceedings. 10 *John. Rep.* 93. see also 3 *John. Cas.* 84.

By statute, if any action be brought against a justice of the peace (or any other person who in his aid or assistance, or by commandment, does any thing touching his office,) concerning any thing done by virtue of his office, the action shall be laid in the county where the fact was committed, and not elsewhere: and it shall be lawful for him to plead the general issue and give the special matter in evidence; and if the verdict pass with the defendant, or the plaintiff become nonsuit, or suffer any discontinuance, the court in which the action shall be brought shall allow the defendant double costs. 1 *N. R. L.* 155. § 1.

A constable cannot justify any arrest by force of a warrant from a justice of peace, which expressly appears on the face of it to be for an offence whereof a justice of peace hath no jurisdiction; as if it be to arrest one for slander, or to bring a person before him at a place out of the county for which he is a justice. 2 *Haw. c.* 13. § 10. *Wood,* 61. 4 *Black. Com.* 291.

But if a justice shall make a warrant for a matter wherein he hath jurisdiction, although it be beyond his authority or without cause, yet it is not disputable by the constable, or other such officer, but must be obeyed; and the officer shall not be punished for executing it. *Dalt.* 579.

In actions brought against the justices for misdemeanors in the execution of their offices, 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: 1 *Sess. Cas.* 372.

Landlord and Tenant. Sep. DISTRESS.

LARCENY.

LARCENY, from the Latin word *latrocinium*, is of two kinds ; first, *simple larceny* ; secondly, *mixed larceny*, or as *Hale* expresses it, larceny accompanied with violence or putting in fear, which is called robbery. 1 *Haw. c.* 33. 1 *H. H.* 503.

Simple larceny is also of two kinds ; first, *grand larceny* ; secondly, *petit larceny*. 1 *Haw. c.* 33.

Simple *grand larceny* is a felonious and fraudulent taking away of the mere personal goods of another, not from the person, nor out of his house, above the value, in *England*, of 12*d.* but as fixed by our statute, of 25 dollars. 4 *Vol. L. N. Y. b.* 315. 1 *Hale*, 503, 4. 1 *Haw. c.* 33. § 1.

And the felonious taking and carrying away of the mere personal goods of another of the value of 25 dollars, or under, if unconnected with any other crime, is *petit larceny* only. 4 *Vol. L. N. Y. b.* 315.

Therefore, according to the principle laid down in *Hawkins*, if one be indicted for stealing goods above the value of 25 dollars, and the jury find specially that he is guilty ; but that the goods are worth but 25 dollars, or any smaller sum, he shall only have judgment as for *petit larceny*. 1 *Haw. c.* 33. § 35.

Yet if two persons, or more, together, steal goods above the value of 25 dollars, 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. c.* 32. § 32.

And it seems to be settled, that the value of the property stolen, must not only be in the whole of such an amount as the law requires to constitute *grand larceny* ; but the stealing must be to that amount at one and the same particular time, for the law will not permit things stolen at different times, which are in fact different acts of stealing, to be added together ; and no number of *petit larcenies* will amount to a *grand larceny*. *Petrie's case*, *Old Bail.* 1784. p. 206. *Leach's Cr. L.* 265.

The nature of the offence is the same, both in *grand larceny* and in *petit larceny* ; but the degrees of their punishment differ. 1 *H. H.* 503.

And it is to be observed, that there are no accessories in *petit larceny*. *Fost. Cr. L.* 76.

I. *Of felonious and fraudulent taking.*

II. *Of the carrying away.*

III. *Who may commit the offence.*

IV. *Of the kind of goods, the taking of which may be felonious.*

V. *Of the property in such goods, and to whom they ought to belong.*

I. *Of felonious and fraudulent taking.*

It is to be observed that all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit*, as well

as *asportavit* ; therefore, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. 1 *Haw. c. 33. § 2.*

Therefore, to constitute larceny, the property must be *taken from the possession* of the owner. *Old Bail. Sess. 1784, p. 1294.*

And upon this ground it hath been holden, that one who finds goods lost, and converts them to his own use, with intent to steal them, is no felon. 1 *Haw. c. 33. § 3.*

In the case of the *People v. Anderson* (14 *John. Rep. 294.*) the court decide, “ that the *bona fide* finder of a lost article, or of a lost trunk containing goods, cannot be guilty of larceny by any subsequent act of his, in concealing or appropriating to his own use the article or the contents of a trunk thus found.”

But when a man's goods are in such a place, where ordinarily they are, or may be lawfully placed, and a person takes them with intent to steal them, it is felony, and the pretence of finding must not excuse. 1 *H. H. 506.*

So if a man's horse be going in his ground, or upon his common, and he takes it with intent to steal it, it is no finding, but a felony. *Ib.*

So 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 take it *damage feasant*, or the lord seize it as an estray, though perchance he hath no title so to do, this is no felonious intention, and therefore cannot be felony. *Ib.*

So a person who has the actual possession of goods for a special purpose, as one who has goods delivered to him to keep ; a carrier who has a box delivered to him to carry to a certain place ; or a tailor who has cloth delivered to him to make into a suit of clothes, cannot be said to steal them by embezzling them afterwards : The party injured must therefore, in these cases, seek redress by civil action, and must abide the folly of his own act in placing confidence in the person who was guilty of the breach of trust. 1 *Haw. c. 33. § 3, 4.*

But though, if I send a box to the carrier, and the carrier sells it, this is not felony ; yet if the box be broken open and the goods in it carried away, it is felony ; for he hath property in the box to carry it to the place appointed, but he hath no property in the goods in the inside, for that I have reserved in my own power, having locked it up out of the power of the carrier to whom it is sent, for no man hath property that is shut out from the command of the thing to which he pretends. *Year Book, 13 E. 4. 9. 10.* 1 *Haw. c. 33. § 5.*

So where a weaver, who has received silk to work ; or a miller who has corn to grind, fraudulently and clandestinely take and embezzle part, it is felony ; for in such case, the possession of such part, distinct from the whole, was gained by their own wrong, and in a manner more base than if it had been done by a stranger. 1 *Haw. c. 33. § 5.*

So if a carrier carries the goods to the place, and then steals them, this is felony ; because the property is determined when the goods are come to the place appointed, and his second taking is in all respects as if he were a mere stranger. *Haw. c. 33. § 7.*

So where A. intending to go a distant journey, hires a horse, fair-

ly and *bona fide*, for that purpose, and evidences the truth of such intention, by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery, and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property, and thereby gave to A. dominion over the horse, upon trust, that he would return him when the journey was performed. *Old Bail. Sess.* 1784, p. 1294. *Ib.* 1786, p. 333, 4.

But if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner in this case parts with the thing itself, he still retains in law the constructive possession of it; therefore, where a man, having feloniously obtained the delivery of a bill of exchange under the fraudulent and delusive pretence of discounting it, converted it to his own use, and it appearing upon the evidence that the owner never meant to part with the possession, it was held to be felony; so also where a horse was obtained with the same design, under pretence of trying its paces, it was held to be felony; so also to obtain the delivery of goods under pretence of purchasing them, and then to run away with them, is felony. 1 *Haw.* 135. *Leach's Cr. L.* 95. 213. 231. 267.

But in cases of this sort, the course has always been to leave it to the jury to determine with what intent the money was obtained, and if they should think it was obtained upon a preconcerted plan to steal it, it will amount to felony. *Cald. Cas.* 295.

Also where the delivery of the property is made for a certain special and particular purpose, the possession is still supposed to reside unparted with, in the first proprietor; therefore, where a master delivers goods to his servant to carry to a customer, who, instead of so doing, breaks open the package and sells them, this is felony; for the offender standing in the relation of a servant, the possession of the goods must be considered as remaining in the master until, and at the time of, the conversion; and the servant by breaking open the package, tortiously takes them from the possession of the owner, and having by the sale converted them to his own use, with intent to steal them, the taking is felonious. 1 *Haw.* 135. *Leach's Cr. L.* 242.

Also, it seems generally agreed, that he who has the bare charge of goods, as a shepherd has of sheep; or a butler of plate; or that has only the special use of goods, as a guest at an inn, and not the possession, may be guilty of larceny in fraudulently taking them away; for the offence comes as properly under the word *cepit*, and the fraud is as secret, and the villany more base, than if it had been done by a stranger. *Moor*, 246. *Poph.* 84. 1 *Hale*, 505. 667. 1 *Haw. c.* 33. § 6.

So, by statute, if servants embezzle their masters' money, goods or chattels to the value of 20s. or above, with intent to steal the same, (although this taking be no trespass) it shall be felony. 1 *N. R. L.* 412.

II. Of the carrying away.

It seems that any the least removing whatsoever of the thing taken from the place where 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 intent to steal them, carri-

ed them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. 1 *Haw. c. 33. § 18.*

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. 3 *Inst. 109.*

Neither is he less guilty who, intending to steal plate, takes it out of a trunk, wherein it is, and lays it on the floor, and is surprised before he can carry it off. 1 *Haw. c. 33. § 18. Kely, 31.*

III. *Who may commit the offence.*

All those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots and lunatics, are not punishable by any criminal prosecution whatsoever, and consequently cannot be guilty of felony. 1 *Haw. c. 1. § 1.*

A *feme covert* cannot commit larceny of her husband's goods from his own possession. *East's Cr. Law. 558.*

But a wife may be guilty of larceny in company with her husband, and both may be indicted. *Ibid. 559.*

Tenants or tenants in common of a chattel cannot be guilty of stealing the same from each other, because the property and possession is in both. *Ibid. 558.*

IV. *Of the kind of goods, the taking of which may be felonious.*

The felonious taking and carrying away must be of the *mere personal goods of another*; for if they are things real, or savor of the realty, larceny at the common law cannot be committed of them. 4 *Black. Com. 232. 1 H. H. 509.*

They ought therefore to be no way annexed to the freehold; and hence it is no larceny, but a bare trespass, to steal corn or grass growing, or apples on a tree, bushes, hedges, stones in a quarry, or the like. 1 *H. H. 510.*

But if they are severed from the freehold, as wood cut, grass in cocks, stones digged out of the quarry, or the like, then felony may be committed by stealing of them, for they are personal goods. 1 *H. H. 510.*

And if even the thief himself intending to steal them, sever them at one time, and then come again at another time, as within an hour or so, and take them away, this is felony; because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel. *Ib.*

And it seems to be a good general rule, that where larceny may be committed of the thing itself, it may also be committed of the produce of that thing, as if a man take the milk from a cow, or pull the wool off from a sheep; this will be larceny, because it is larceny to steal the cow or the sheep itself; but where the thing itself is not the subject of larceny, there larceny cannot be committed of the produce of that thing; and hence it is no larceny, as was before observed, to gather and carry away the fruit from a tree which is growing, because from its adherence to the freehold, it is not larceny to steal the tree itself. 2 *Williams' Just. 568.*

And the general reason, says *Hawkins*, of this distinction between chattels fixed to the freehold and those lying loose, may perhaps be

this ; because the former, not being to be removed without trouble and difficulty, are not so liable to be stolen, and therefore need not be secured by such sanguinary laws as the other. 1 *Haw. c. 33. § 21.*

According to *Hawkins* 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 choses in action. 1 *Haw. c. 33.*

But it is now enacted by statute, that if any person shall steal or take by robbery any bill of exchange, bond, order, warrant, bill or promissory note, for payment of any money, or any certificate, or other public security issued by authority of the United States, or by the authority of the legislature of this state for payment of money, or acknowledging the receipt of money or goods, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars are or may be termed in law a chose in action, it shall be deemed and construed to be felony of the same nature, and in the same degree, and in the same manner as it would have been if the offender had stolen or taken by robbery any other goods of the like value with the money due on such bill, bond, order, warrant or note, or certificate, or other public security, or secured thereby, and remaining unsatisfied. 1 *N. R. L. 174.*

And it is made felony to steal, or willingly take away, whereby any judgment shall be reversed, any record, process, or proceedings in the court of chancery, supreme court, exchequer, or any other court of record, or in the office of secretary of state, or in the office of the clerk of any city or town. 1 *N. R. L. 112.*

And in *England*, where felony is punished with death, it is said that the goods ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, and the like, which howsoever they may be valued by the owner, shall never be so highly regarded by the law that for their sakes a man shall die. 1 *Haw. c. 33. § 23.*

A mere letter is not a subject of larceny, and the taking it away is not a criminal offence. 6 *John. Rep. 103.*

V. Of the property in such goods, and to whom they ought to belong.

It seems agreed that the taking of goods, whereof no one had property at the time, cannot be felony ; and therefore, he who takes away treasure-trove, or a wreck, waif or stray, before they are seized by the persons who have a right thereto, shall only be punished by fine. 1 *Haw. c. 33. § 24.*

Neither can a man, by the common law, commit a felony by taking deer, hares or conies, in a forest, chase or warren, or old pigeons, being out of the house. 1 *Haw. c. 33. § 26.*

But there can be no doubt that the taking of domestic beasts, or any creatures whatsoever, which are of a reclaimed nature, and fit for food, as ducks, hens, geese, turkeys, peacocks, or their eggs or young ones, may be felony. 1 *Haw. c. 33. § 28.*

And a person who takes any other creature *fera naturæ*, if they be fit for food, and reduced to tameness, and known by him to be so, is guilty of felony. *Id.*

Also it is said that there may be felony in taking goods, the owner whereof is unknown; in which case the people 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. c. 53. § 29.*

Therefore it is said, that he who steals goods belonging to a parish church, may be indicted for stealing *the goods of the parishoners.* *Ib.*

Bank bills are chattels, and the word *chattels* denotes property and ownership; so that in an indictment, describing certain bank bills, as *the goods and chattels of P. C.* was held sufficient, without saying they were *the property of P. C.* 13 *John. Rep. 90.*

Of Larceny from the person, see ROBBERY.

Of Larceny from the house, see HOUSE-BREAKING.

An indictment for larceny.

County of *ss.* **T**HE jurors for the people of the state of New-York, upon their oath present, that O. O. late of the town of in the county of laborer, on the day of with force and arms, at the town aforesaid, in the county aforesaid, one silver spoon, of the value of of the goods and chattels of one P. R. two brass candlesticks, of the value of of the goods and chattels of one P. G. and two linen shirts, of the value of of the goods and chattels of one P. S. then and there being found, feloniously did steal, take, and carry away, against the peace of the said people and their dignity.

LEWDNESS.

THE keeping a bawdy house is an offence of a very gross nature, and comes under the cognizance of the temporal law, as a common nuisance, not only in respect to its endangering the public peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes. 3 *Inst. 205.* 1 *Haw. c. 74.*

And in general, all open lewdness, grossly scandalous, is punishable upon indictment at the common law. 1 *Haw. c. 5. § 4.*

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. c. 5. § 5. c. 74.*

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. c. 1. § 12.* 1 *Salk. 384.*

So a lodger who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy house. 1 *Haw. c. 74.*

It seems 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. c. 61. § 2.*

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 for their good behaviour. *Dalt. c. 124. 2 Haw. 61.*

But if a person is indicted for frequenting a bawdy house, it must appear that he knew it to be such a house; and must be expressly alleged 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 herself there: Lord *Raymond* said, it was an odious piece of evidence, and ought not to be heard. *Barl. Just. tit. Bawdy.*

But it is said, a woman cannot be indicted for a being a bawd generally, for that the bare solicitation of chastity is not indictable. *1 Haw. 196. 1 Salk. 382.*

Indictment for keeping a disorderly house.

County of } **T**HE jurors for the people of the state of New-York, upon
ss. § their oath present, that A. O. late of in the said county,
labourer, on the day of in the year of our Lord and at divers other
days and times between that day and the day of the taking of this inquisition,
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 on the said
other days and 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 on the said other days and times, there to be and
remain, drinking, tipling, whoring, and misbehaving themselves, unlawfully
and wilfully did permit, and yet doth permit, to the great damage and common
nuisance of the people of the state of New-York, and against the peace of the
people of the said state, and their dignity.

LIBELS.

I. *What shall be said to be a libel.*

II. *Who are punishable for it.*

III. *How punishable.*

I. *What shall be said to be a libel.*

A LIBEL, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. *1 Haw. c. 73. § 1.*

Alexander Hamilton, in *Croswell's case*, (3 *John. Cases*, 354,) defined a LIBEL to be, "a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent, towards government, magistrates, or individuals;" and the court sanctioned and

adopted this in the case of *Steele vs. Southwick*. 9 *John. Rep.* 214.

But an indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the [citizens] against them, and to excite his relations to a breach of the peace, cannot be supported. 4 *Term. Rep.* 126.

And this species of defamation receives an aggravation, because it is presumed to have been entered upon with coolness and deliberation, and to continue longer and propagate wider and further than any other scandal. 5 *Co.* 125. 2 *Ld. Raym.* 416.

But not only written or printed scandal comes within the notions of a libel, but also any defamation whatever that is expressed either by signs or pictures, as by fixing up a gallows by a man's door, or by painting him in a shameful and ignominious manner. 1 *Haw. c.* 73. § 2.

And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are the most sensibly felt; and since the plain meaning of such scandal as is expressed by signs or pictures is as obvious to common sense, and as easily understood, by every common capacity, and altogether as provoking as that which is expressed by writing or printing; why should it not be equally criminal? 1 *Haw. c.* 73. § 3.

And it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious light; for these equally create ill blood, and provoke the parties to acts of revenge, and breaches of the peace. 5 *Co.* 125. 1 *Keb.* 203. *Moore*, 627. *Rol. Abr.* 87.

Hence it hath been held, that words, though not scandalous in themselves, yet if published in writing, and tending in any degree to the discredit of a man, are libellous, whether such words defame private persons only, or persons employed in a public capacity; in which latter case they are said to receive an aggravation, as they tend to scandalize the government, by reflecting on those who are intrusted with the administration of public affairs; which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also hath a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. 1 *Haw. c.* 73. § 7.

So not only scandal expressed in an open, direct manner, but also such as is expressed in a scoffing and ironical way, amounts to a libel; and the judges are to understand it in the same manner as others do, without any strained endeavors to find out loop-holes, or to palliate the offence, which in some measure would be to encourage scandal. 1 *Haw. c.* 73. § 4.

And from the same foundation it hath also been resolved, that a defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before and follows after, it must

needs be understood to signify such a person, in the plain, obvious and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it 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. c. 73. § 9.*

But it seems that no writing whatsoever is to be esteemed a *libel*, unless it reflects upon some particular person. *Ib.*

Yet if a writing be replete with reflections against the constitution or civil government; or full of obscene ribaldry; or of a tendency calculated to inflame the public mind against a particular body of men; in all these and the like cases, though for the want of particular reflections it may not be in legal contemplation a libel, yet it is considered as a great *misdemeanor*, and may of course be punished as such by information or indictment. 2 *Roll. Abr. 78. 1 Vent. 324. 2 Keb. 657. 621. 841. Cro. Jac. 421. 2 Str. 788. 834.*

It seems to be clearly agreed, that no proceeding in a regular court of justice will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecutions in respect of their application to a court of justice. 1 *Haw. c. 73. § 8.*

And it hath been resolved, that no false or slanderous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices of peace, is libellous: *Ib.*

Also it hath been held, that no presentment of a grand jury can be a libel; for it would be of the utmost ill consequence, any way to discourage them from making their inquiries with that freedom and readiness which the public good requires. *Ib.*

Also it is holden by some, that no want of jurisdiction in the court to which such a complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party. But herein it is said by *Hawkins*, that if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character, under the shew of a legal proceeding, there can be no reason why such mockery of public justice should not rather aggravate the offence, than make it cease to be one, and make such scandal a good ground of indictment at the suit of the people, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not. *Ib.*

So it is libellous to charge a counsellor at law with offering himself as a witness, in order to divulge the secrets of his client. 3 *John. Cas. 198.*

So also it is libellous to publish of a member of congress; that he is a fawning sycophant, a misrepresentative in congress, and a grovelling office seeker; he has abandoned his post in congress in pursuit of an office. 7 *John. Rep. 264.*

So a publication charging the plaintiff with insanity, is libellous. 10 *John. Rep. 443.*

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. 1 *Haw. c. 73. § 10.*

And it is said by *Holt, Ch. J.* that when a libel appears under a man's hand writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot procure the composer, it is hard to find that he is not the very man. 2 *Salk. 419. 1 Ld. Raym. 417. 12 Mod. Rep. 220, 1.*

And it is said not to be material, whether he who disperses a libel knew any thing of the contents or effect of it or not; for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. 1 *Haw. c. 73. § 10.*

And it hath been ruled, that the finding a libel on a bookseller's shelf, is a publication of it by the bookseller; and that it is no excuse to say, that the servant took it into the shop without the master's knowledge; for the law presumes the master to be acquainted with what the servant does. 5 *Bur. 2688.*

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. c. 73. § 10.*

But it hath been resolved, that he who barely reads a libel in the presence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his custody, shall not in respect of any such act be adjudged the publisher of it: But the having in one's custody a written copy of a libel, publicly known, is an evidence of the publication of it. 1 *Haw. 196.*

And 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, in which case the act subsequent is said to explain the intention precedent. *Ib.*

But it seems, 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. 2 *Salk. 419. 1 Haw. c. 73. § 10.*

It seems to be a matter of doubt whether the sending an abusive letter full of provoking language, to another, will bear an action as for a libel, because here is no publication: but it seems to be clearly agreed, that the sending such letter without other publication, is highly punishable, as manifestly tending to a disturbance of the peace. 1 *Haw. c. 73. § 11.*

Sending a letter sealed up is no publication; and a letter is always to be understood as being sealed, unless otherwise expressed. 1 *Caine's Rep. 581.*

And no action will lie without a publication, but an indictment may. *Ibid.*

III. How punishable.

There can be no doubt, but that a person who writes or publishes a libel, is subject to the action of the party injured, in which damages may be recovered proportionable to the injury sustained. *Skin.* 123, 4. *Com. Dig. Tit. "Libel," (C. 3.)* 3 *Bac. Abr. tit. "Libel," (C.)*

Also by the common law, every libeller may be indicted, and if thereupon convicted, shall pay such fine, and also suffer such further punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender. 1 *Haw. c. 73. § 16. Com. Dig. tit. "Libel." (C.)*

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. c. 8. § 38.*

A libeller may also be proceeded against by way of information, wherein if convicted, he will be subject to the like punishment as upon indictment. 1 *Haw. c. 73. § 16. Com. Dig. tit. "Libel." (C. 3.)*

And it seems to be clearly agreed that in an indictment, or information for a libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is; for, as Lord Coke observes, in a settled state of government, the party grieved ought to complain for every injury done him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise. 5 *Co.* 125. 1 *Haw. c. 73. § 6.*

But this rule does not extend where the party grieved proceeds by his action on the case; for that being to repair the party in damages for the injury done him, the defendant may justify the truth of the facts, and shew that the plaintiff has received no injury at all, in the same manner as in a common action of slander for words spoken. *Hob.* 253. • 11 *Mod.* 99. 3 *Black. Com.* 125, 6. *Bul. N. P.* 8.

A libel must be proved to be written or published, in the county laid in the indictment; all matters of crime being local. *Read. Lib. St. Tri. Vol. 3.* 774, 5. *Vol. 4.* 672.

An action for a libel lies against the proprietor of a gazette, edited by another, though the publication was made without the knowledge of such proprietor. 7 *John. Rep.* 260.

So the publisher of a libel is responsible to the party libelled, notwithstanding the libel is accompanied with the name of the author. 10 *John. Rep.* 547.

The jury, upon the trial of an indictment or information for a libel, have a right to determine the law and the fact, in like manner as in other criminal cases. 2 *N. R. L.* 553. § 1.

In every prosecution for writing or publishing a libel, the defendant, upon the trial, may give in evidence the truth of the matter contained in the publication charged as libellous: *Provided always,* That such evidence shall not be a justification, unless upon the trial it shall be further made satisfactorily to appear, that the matter charg-

ed as libellous, was published with good motives and for justifiable ends. *Ibid.* § 2.

No person convicted of writing or publishing a libel shall be sentenced to an imprisonment exceeding the term of eighteen months, or to pay a fine exceeding the sum of five thousand dollars. *Ibid.* § 3.

And no person shall be prosecuted by information for writing or publishing any libel. *Ibid.* § 4.

Indictment for a libel.

County of } **T**HE jurors for the people of the state of New-York, upon
ss. § their oaths 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 falsely and maliciously contriving and intending to bring the people of the said state into hatred and infamy, and to move sedition amongst the said people of the said state, did on the day of in the year of our Lord with force and arms, at aforesaid, in the county aforesaid, falsely, seditiously and maliciously write and publish, and cause to be written and published, a certain false, seditious, and scandalous libel, entitled In which said libel are contained, among other things, divers false, seditious, scandalous and malicious matters, according to the tenor following, to wit, [*here state the libellous words with the necessary innuendoes.*] And in another part of the said libel are contained divers other false, seditious, scandalous and malicious matters, according to the tenor following to the evil example of all others in the like cases offending, and against the peace of the people of this state, and their dignity.

LICENCE. See INNS AND TAVERNS.

LORD'S-DAY. See IMMORALITY,

LOTTERIES.

- I. *Of private lotteries, and herein of the duty of officers in regard to them.*
- II. *Of insurance of lottery tickets, &c.*
- III. *Of fines, forfeitures and penalties, &c. for the violation of the act,*

I. *Of private lotteries, and herein of the duty of officers in regard to them.*

EXPERIENCE has proved that private lotteries occasion idleness and dissipation, and have been productive of fraud and impositions. 2 *N. R. L.* 187.

Therefore it is declared by statute, that every lottery, other than such as shall be authorized by the legislature, shall be deemed a common and public nuisance. 2 *N. R. L.* 188. § 1.

And the justices of the supreme court, of courts of oyer and terminer and gaol delivery, and of the courts of general or quarter sessions of the peace, at their several courts, shall have cognizance of such offence; and are required, in every charge given by them to the

grand jury, strictly to charge such grand jurors *diligently to inquire of, and to present or indict all offences against this act.* *Ib.*

And the court to which an indictment or presentment shall be preferred for such offence, are enjoined to prosecute, or cause the same to be prosecuted, in the usual manner of prosecution; and upon conviction, to adjudge such fines and penalties as are herein after directed, together with the costs of prosecution, and to order execution; and to direct the fines or penalties, when recovered, to be applied in the manner herein after directed. *Ib.*

No person shall set on foot, carry on, promote, draw or make, publicly or privately, any lottery, game or device of chance, of any nature or kind whatsoever, or by whatever name, denomination or title it may be called, known or distinguished, or shall by any such ways or means, expose or set to sale, any houses, lands, tenements or real estate, or any goods, wares, merchandizes, cash or other thing or things whatsoever. 2 *N. R. L.* 188. § 2.

And no person shall sell or barter, or offer to sell or barter, any ticket or tickets of such private lottery, game or device of chance; or purchase the same, or in any other way become adventurer therein, or be any way concerned in any such lottery, game or device of chance, either by printing, writing, or any otherwise publishing an account thereof, or where tickets may be had or obtained for the same, or be in any wise aiding or assisting in the same. *Ib.* § 3.

The justices of the peace, mayors, sheriffs, bailiffs, constables and other civil officers, within their respective jurisdictions, are directed and required to use their utmost endeavors, by all lawful ways and means, to prevent the opening, setting on foot, or drawing of any such unlawful lotteries, games, or devices of chance prohibited by the act. 2 *N. R. L.* 191. § 11.

This act is not to affect any lottery established by Congress, or any act relating to such lottery by any person whomsoever. *Ib.*

II. Of insurance of lottery tickets, &c.

By the 8th section of the act, it is enacted, "that it shall not be lawful for any person or persons whomsoever, to sell the chance or chances of any ticket in any such lottery as aforesaid, or to insure for or against the drawing of any such lottery as aforesaid, or to insure for or against the drawing of any such ticket or tickets, or to receive any money or goods in consideration of any agreement to repay any sum or sums, or to deliver the same or other goods if any such ticket or tickets shall prove fortunate or unfortunate, or any other chance or event relative to the drawing of any such ticket or tickets, whether as to their being drawn fortunate or unfortunate, or the time of their being drawn or otherwise howsoever, or under any pretence, device, form, denomination or description whatsoever, to promise or agree to pay any sum or sums or to deliver any goods, or to do or forbear doing any thing for the benefit of any person or persons whether with or without consideration, on any event or contingency relative or applicable to the drawing of any such ticket or tickets, or the number or numbers of any ticket or tickets, or to publish any proposal for any of the purposes aforesaid." 2 *N. R. L.* 190. § 8.

And no person shall open, set up, exercise or keep, by himself or

others, any office or place for registering the number of tickets, in any public or private lottery, whether of this state or of any other state or country ; nor shall, by writing, printing or otherwise, publish the setting up, opening, or using any such office, or place. 2 *N. R. L.* 190. § 7.

Nothing in this section, however, shall prevent any person from keeping a *check book*, in order to enable him to know what tickets are drawn or undrawn. *Ib.*

It is also unlawful for any person to sell any whole tickets or shares of tickets, in any lottery, unless such person be the owner of such ticket at the time of the sale. *Ib.* § 9.

III. *Of fines, forfeitures, and penalties, &c. for the violation of the act.*

And every bargain, sale or transfer of lands, tenements, hereditaments or real estate, or of goods or chattels, made in pursuance of any such lottery, game or other device, is declared void. 2 *N. R. L.* 189. § 5.

And by the second section of the act, it is further provided, that every person who shall offend in the premises against the true intent and meaning of the act, and thereof be convicted, by the oath of one or more credible witnesses, shall forfeit the amount of the whole sum or value for which such lottery was made ; and if such sum or value shall not be satisfactorily ascertained to the court at the time of trial, then each such offender, so convicted, shall forfeit 500*l.* and be committed to the common gaol of the county until such forfeiture, with the costs of prosecution, be paid ; the one half to the treasurer of this state, for the use of the people of this state, to be applied for the support of government, and the other half to the person who shall have voluntarily given information of such offence, and prosecuted the same to effect ; and for defect of such voluntary informant, then to be paid and applied as the first moiety is directed to be paid and applied. 2 *N. R. L.* 188. § 2.

And every person offending against the third section of the act, shall, on being convicted thereof as before mentioned, forfeit for every such offence the sum of 10*l.* and the costs of prosecution, to be levied and applied in like manner as is directed with respect to the other forfeitures before mentioned. *Ib.* § 3.

And if any person who shall be adventurer, shall become entitled to any prize, he shall forfeit the same, with costs of suit, to such person as shall give information thereof, so that such offender may be convicted in manner before directed. *Ib.* § 4.

And for the recovery of such prize, the person so informing shall be entitled to maintain an action in any court of record, against any person who shall have opened, set on foot, carried on, or made such lottery, game or device of chance, or against any person who shall have sold, or offered for sale, any tickets. *Ib.* § 4.

And if the person so informing be an adventurer only, he shall, upon giving such information, be exempted from the penalty otherwise incurred by the act. *Ib.*

And any person adventuring as aforesaid, whose ticket shall turn out blank, shall, upon giving information as aforesaid, so that the

person who shall have opened, set on foot, carried on, drawn, or made the said lottery, or other game or device of chance, or shall have sold or bartered, or offered for sale or barter, such tickets, may be convicted, be entitled to recover against the person so convicted, double the sum which he adventured, with double costs of suit, by action of debt in any court of record. *Ib.*

And if the person who shall have so opened, set on foot, carried on, drawn or made such lottery, game or device of chance, shall either before or after the drawing or finishing the same, give information thereof, so that the persons who have adventured therein shall be convicted in the manner before directed, he shall not only be exempted from the penalty otherwise incurred by the act, and be entitled to the reward allowed to persons in such case informing, but shall also have a right to retain all such monies or other effects as he may have received by the sale or barter of tickets. *Ib.*

Where any two or more persons shall be concerned in setting on foot, carrying on, drawing or making any such lottery, game or device of chance, or be joint adventurers in the same, the penalties before directed, for such offences, may be recovered against and levied from all, or each, or either of them. 2 *N. R. L.* 190. § 6.

And if any person shall offend against the seventh section of the act, he shall be deemed guilty of a misdemeanor, and shall upon conviction be fined in a sum not exceeding 250 dollars, or be imprisoned for a time not exceeding *three months*, by any court having cognizance thereof. *Ib.* § 7.

The like penalty and punishment are imposed upon persons offending against the eighth section of the act. *Ib.* § 8.

And if any person shall sell tickets or shares of tickets, not being the owner of them at the time of the sale, he shall *forfeit and pay the sum of 25 dollars.* *Ib.* § 9.

The penalty mentioned in the ninth section, may be recovered by action of debt, with costs of suit, in any court having cognizance thereof, by any person, the one moiety, when recovered to be paid to the overseers of the poor, the other, to the use of the person prosecuting. *Ib.* § 10.

A lottery, instituted by the laws of another state, is within the act *to prevent private lotteries*, and a contract for the sale of tickets in such lottery is void. 5 *John. Rep.* 327.

LUNATICS. *See* IDIOTS AND LUNATICS.

MAIMING.

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; such as the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye, or fore-tooth, or castrating him, are said to be maims; but the cutting off his ears, or nose, were not esteemed maims at the common law, because they do not weaken, but only disfigure him. *Co. Lit.* 126. 8. 3 *Inst.* 62. 118.

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. c. 44. § 3.*

But now, by statute, if any person shall on purpose, and of malice aforethought, cut out the tongue, or put out the eyes of any other person ; or, on purpose, and of malice aforethought, and by lying in wait, unlawful cut out or disable the tongue, put out an eye, slit the nose or lip, or cut off or disable any limb or member of any other person, with intention in so doing to murder or kill, or to maim or disfigure, in any the manners aforesaid, such other person, every such offence shall be deemed and adjudged felony ; and every person so offending, and every person who shall aid, abet, counsel, hire or command any person to commit any of the said offences, being thereof convicted or attainted, shall be declared felons. 1 *N. R. L. 168. § 1.*

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 the party injured may bring an action of trespass, and recover his damages. 2 *Haw. 157. 160.*

It does not seem that in maiming there may be accessaries after the fact. 2 *Haw. 311.*

For punishment of this offence, see title STATE-PRISON.



MAINTENANCE.

MAINTENANCE is commonly taken in an ill sense, and in general seemeth to signify an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right, and is said to be two fold. 1 *Hawk. c. 83. § 1.*

1. *Ruralis*, or in the country ; as where one assists another in his pretensions to 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 suit of the [people] 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. c. 83. § 1.*

2. *Curialis*, or in a court 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. 2 *Inst. 212. 2 Rol. Abr. 115. 1. Haw. c. 8. § 3.*

Of this second kind of maintenance, there seems to be 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, (from campi partitio, that is, a division of the land :) *Thirdly*, where one laboreth a jury ; which is called EMBRACERY. 1 *Haw. c. 83. § 3.*

For the better understanding of this subject, it is therefore proper to consider each of these species of maintenance distinctly, viz.

- I. *Maintenance.*
- II. *Champerty.*
- III. *Embracery.*
- IV. *The punishment of these offences.*

I. *Maintenance.*

Maintenance, strictly speaking, is the assisting another person in a lawsuit, without having any privity or concern in the subject. 8 *John Rep.* 228.

It is said, that not only he who assists another with money in his cause, as by retaining counsel for him, or otherwise bearing him out in the whole or part of the expense, but also he who by his friendship or interest saves him that expense, which otherwise he may be put to, is guilty of maintenance; as where one persuades or but endeavors to persuade a man to be of counsel for another *gratis*. 1 *Haw. c. 83. § 4, 5.*

It seems to be an act of maintenance, to open evidence to the jury, or to give evidence officiously without being called upon to do it; or to speak in a cause as one of counsel with the party, or to retain an attorney for him. 1 *Haw. c. 83. § 6.*

But it seems clear, that a man may lawfully go with his neighbor to inquire of a person learned in the law, but that he ought not to give him any money towards carrying on his suit. 1 *Haw. c. 83. § 25.*

And it seems to be maintenance for a man of great power and interest to say publicly, that he will spend 20*l.* on one side, or that he will give 20*l.* to labor the jury; and it hath been said to be maintenance for such a person to come to the bar with one of the parties, and stand by him while his cause is tried, without saying any thing; but a promise to maintain another is not maintenance, unless it be in respect of the public manner in which it is made. 1 *Haw. c. 83. § 7.*

However, it seems to be no maintenance for a man to give another friendly advice, what action is proper for him to bring for such a debt, or what method is safest for him to free him from such an arrest; or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighborly acts of kindness, which seem rather commendable than blame-worthy, to come under the notion of maintenance, which always seems to imply a contentious and over-busy intermeddling with other men's matters, in which respect it is so highly criminal. Yet it is said that a man of great power, not learned in the law, may be guilty of maintenance, by telling another, who asks his advice, that he hath a good title. 1 *Haw. c. 83. § 9.*

Also it is said to be no maintenance to give a man money, who has no suit then depending, unless it plainly appears that it was given him with a design to assist him in a suit intended, which is afterwards actually brought. 1 *Haw. c. 83. § 10.*

But it is certain, that it is as much an act of maintenance to support a man after judgment given, as to do it pending the plea, be-

cause the party grieved may be discouraged thereby from bringing a writ of error, or the like. 1 *Haw. c. 83. § 11.*

It seems clear that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant on an estate tail, or on a lease for life, or years, but also those who have a bare contingent interest in the lands in question, which possibly may never vest, and even those who, by the act of God, have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands; and if a plaintiff, in an action of trespass, alien the lands, the alienee may produce evidence to prove that the inheritance, at the time of the action, was in the plaintiff, because the title is now become his own. 1 *Haw. c. 83. § 12, 13, 14, 15.*

An action for maintenance will not lie against a person for carrying on a suit in the name of another, or in assisting in its prosecution, if he has any legal or equitable interest in the land or subject of controversy. 8 *John. Rep. 220.*

Also he who is bound to warrant lands, may lawfully maintain the tenant in the defence or his title. 1 *Haw. c. 83. § 16.*

Also he who has only an equitable interest in lands or goods, or even in a chose in action, may lawfully maintain another in an action relating thereto. *Ib. § 17.*

And it seems to be agreed, that wherever any person claims a common interest in the same thing, as in a way, church yard, common, or the like, by the same title, they may maintain one another in a suit relating to the same. *Ib. § 18.*

And it is said, that he who is bail for another, may take care to have his appearance recorded, but that he ought not to intermeddle any farther. 1 *Haw. c. 83. § 19.*

Whoever is of kin or affinity to either of the parties, or but related to him by being his god-father, may lawfully stand by at the bar, and counsel and assist him, and pray another to be counsel for him; but he cannot lawfully lay out his money in the cause, unless it be either father or son, or heir apparent to the party, or husband of such an heiress. 1 *Haw. c. 83. § 20. 1 N. R. L. 172.*

Not only the actual lord, but also the *cestui que use* of a seignory, may come with the tenant to a trial in an assize against him; and it seems a plausible opinion that he may also justify laying out his money in defending his tenant's title. 1 *Haw. c. 83. § 21.*

But as to the point, how far a tenant may maintain his lord, it is said, that he may justify coming with his lord and standing with him at the trial; but the books contain nothing more upon this matter. *Ib. § 22.*

It is said that a master may go along with his servant to retain counsel; and may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favor of his cause: Also if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but it is said the master cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse. *Ib. § 23.*

And a person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business, and may go to counsel for him, and shew his evidence to the counsel, or to the jury, and stand by him at the trial, but cannot lawfully lay out his own money in the suit. *Ib.* § 24.

Any one may lawfully give money to a poor man to enable him to carry on his suit; also any one may lawfully go with a foreigner, who cannot speak English, to a counsellor, and inform him of his case. *Ib.* § 26.

A counsellor having received his fee, may lawfully set forth his client's cause to the best advantage, but can no more justify giving him money to maintain his suit, or threaten a juror, than any other person. 2 *Inst.* 564.

Also an attorney, specially retained, may lawfully prosecute or defend an action in the court wherein he is an allowed attorney, and lay out his own money in the suit, and maintain an action against his client, for the money so laid out, by virtue of the retainer, without any special promise; also an attorney so retained, may in like manner maintain his client in a court wherein he is not an allowed attorney; but, as some say, cannot have an action for the money laid out in the suit without a special promise: but an attorney who maintains another is no way justified, by a general retainer, to prosecute for him in all causes; neither can an attorney lawfully carry on a cause for another at his own expense, with a promise never to expect repayment. 1 *Haw.* 83. § 28.

II. Champerty.

By statute, 1 *N. R. L.* 173, it is declared, that "*all persons who move pleas and suits, or cause them to be moved, either by their own procurement or by others, and sue them at their own proper costs for to have part of the land or thing in controversy or demand, or part of the gains, shall be adjudged champertors.*"

The purchase of land during the pendency of a suit, concerning the same, if made with a knowledge of the suit, and not in consummation of a previous bargain is champerty. 8 *John. Rep.* 479.

By statute, 1 *N. R. L.* 173, it is declared, that no officer or other person shall take upon him any business that is or may be in suit in any court, for to have part of the thing in plea or demand, and no person upon any such agreement shall give up his right to another.

1. The court here mentioned has reference to courts of record only. 2 *Inst.* 208.

2. Maintenance in personal actions, to have part of the debt or damages, is as much within that statute, as maintenance in real actions for a part of the land. 1 *Haw. c.* 84. § 6.

3. Maintenance in consideration of rent granted out of land in variance, is within the statute; but rent granted out of other lands is no way within the purview of it. 1 *Haw. c.* 84. § 7.

4. It is not material whether he who brings a writ of champerty did in truth suffer any damage by it; or whether the plea wherein it is alleged be determined or not. 1 *Haw. c.* 84. § 8.

5. The maintenance of a defendant is as much within the mean-

ing of the statute as the maintenance of a plaintiff. 1 *Haw. c. 84.* § 9.

But such grants only, of part of the thing in suit, which are made merely in consideration of the maintenance, are within the meaning of the statute; and not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered. 1 *Haw. c. 84.* § 10.

III. *Embracery.*

It seems, that any attempt whatever, either by the party or his counsel or attorney, or any person whatsoever, to corrupt or influence, or instruct a jury, or any way to incline them to be more favorable to the one side, than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict be true or false. 1 *Haw. c. 85.* § 1—5.

But it seems, that any person who may justify any other act of maintenance, may safely labor a juror to appear and give a verdict according to his conscience, but that no other person can justify intermeddling so far, and no one whatsoever can justify the laboring a juror not to appear. 1 *Haw. c. 85.* § 6.

And the law so far abhors all corruption 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 labor a juror to appear and act according to his conscience. 1 *Haw. c. 85.* § 2.

Also it is said to be an offence savoring of the nature of embracing, to give money to a juror after the verdict, unless it be openly and fairly given to all alike, in consideration of the expenses of their journey, and trouble of their attendance. 1 *Haw. c. 85.* § 3.

So the bare giving of money to another, to be distributed among jurors, savors of embracery, whether any of it be distributed or not; and it is an offence of the like kind for a person, by indirect means, to procure himself, or another, to be sworn on a *tales*, in order to serve one side; also, it is as criminal in a juror, as in any other person, to endeavor to prevail on his companions to give a verdict on one side, by any other arguments besides the evidence produced, and the general obligations of conscience. 1 *Haw. c. 85.* § 4.

IV. *The punishment of these offences.*

It seemeth that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms. 1 *Haw. c. 83.* § 36.

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 of-

fenders against public justice, and adjudged thereupon to such fine and imprisonment, as will be agreeable to the circumstances of the offence. 1 *Haw. c. 83. § 36.*

Also it seemeth, that a court of record may commit a man for an act of maintenance done in the face of the court. *Ib.*

By statute, 1 *N. R. L. 173.* No person, by himself or any other, shall take upon him to maintain the quarrels of others, to the let and disturbance of law, upon pain of being punished by fine and imprisonment, and to lose his office, if he be an officer.

By the 9th section of the above statute, any person guilty of maintenance, shall forfeit two hundred and fifty dollars; one moiety thereof to go to the people, the other to the prosecutor.

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.* *Savil, 41, 2. 1 Haw. c. 83. § 45.*

Champerty is an offence at common law, and as such punishable in the same manner as maintenance. 2 *Inst. 208.*

It is also punishable by statute, with fine and imprisonment. 1 *N. R. L. 172, 3.*

Embracery.] This offence at common law is also punishable in like manner as the two former.

And if an act of embracery were not known before the trial of a cause, so that the party to whose prejudice it was intended, had no opportunity to prevent the ill effects of it by challenging the juror who was practised upon, it will be a good ground to move the court to set aside the verdict. 1 *Haw. c. 85. § 7.*

By statute, 1 *N. R. L. 174,* persons guilty of this offence forfeit two hundred and fifty dollars, one moiety thereof to the people, the other to the prosecutor.

And by the 26th section of the act to regulate the trials of issues, &c. persons giving any thing to jurors to secure their verdict, forfeit *ten times* the amount given, and are liable to be imprisoned for one year. 1 *N. R. L. 334, 5.*

Indictment for maintenance.

County of } **T**HE jurors for the people of the state of New-York, upon
 ss. } their oath present, that A. G. late of in the said county
 of gentleman, on the day of in the year of our Lord at afore-
 said, in the county aforesaid, unjustly and unlawfully maintained and upheld a
 certain suit, which was then depending in the court of the people of the said
 state, before the justices of the supreme court of judicature of the same peo-
 ple, between P. P. plaintiff, and D. D. defendant, of a plea of debt on the part
 of the said P. P. against the said D. D. against the form of the statute in such
 case made and provided, and to the manifest delay and disturbance of justice,
 and in contempt of the people of the said state, and to the great damage of the
 said D. D. and against the peace of the said people, and their dignity.

MANDAMUS.

M A N D A M U S.

I. *What it is.*II. *When allowed, and when not allowed.*I. *What it is.*

A WRIT of mandamus is a command, issuing from the supreme court, directed to any person, corporation, or inferior court, requiring some particular act therein specified, to be done, which appertains to their office and duty. 3 *Blac. Com.* 110.

II. *When allowed, and when not allowed.*1. *When allowed.*

1. To compel judges of the court of common pleas to give judgment. 2 *John. Rep.* 371. 2 *John. Cases*, 215.

2. To command the judges of the court of common pleas to seal a bill of exceptions. 6 *John. Rep.* 279. 2 *John. Cases*, 118. 1 *Caine's Rep.* 511.

3. To admit or restore persons claiming rights or offices belonging to any inferior court; as to restore an attorney. 1 *John. Cases*, 181.

4. To admit or restore persons to every description of corporate office. 2 *Esp. N. P.* 303.

5. To officers to do certain acts; as to the town clerk, &c. 7 *John. Rep.* 549. 8 *John. Rep.* 323.

6. To justices of the peace to execute statutes, &c. *Esp.* 30

7. Also to the county clerk to record a deed duly acknowledged. 14 *John. Rep.* 325.

And it may be issued in some cases, where the party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. 3 *Black. Com.* 110.

A mandamus therefore lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature whether special or temporal; to academical degrees; to the use of a meeting-house, &c.; it lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; to oblige inferior courts and magistrates to do that justice, which without such writ, they are in duty, and by virtue of their offices, obliged to do; and for an infinite number of purposes, which it is impossible to recite minutely. 3 *Black. Com.* 110. 4 *Mod. Rep.* 52. *Carth.* 217.

2. *When not allowed.*

1. When the writ cannot give a complete remedy. 2. When the office is not permanent. 3. When the office is of a private nature. 4. When there is any other legal remedy. 5. When a party is in office by colour of right. 3 *John. Cases*, 79. 10 *John. Rep.* 484.

This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and of the denial of justice by the court, or person complained of; whereupon in order more fully to satisfy the court, that there is a probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of, to shew cause why a writ of mandamus should not issue; and if he shews no sufficient cause, the writ itself is issued, at first in the alternative, either to do this, or signify some reason to the contrary, to which a return or answer must be made at a certain day. 3 *Black. Com.* 111.

And if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a peremptory mandamus to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and the due execution of the writ. 3 *Black. Com.* 111.

If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. *Ib.*

At common law, if a party was aggrieved by the return to a mandamus, his remedy was by an action on the case. But now by our statute it is made the duty of persons to make return to the first writ of mandamus directed to them; upon which being done, the party prosecuting may traverse the material facts in the return, take issue, and demur thereto. 1 *N. R. L.* 107.

If judgment be given for the party suing out the writ, he recovers his damages and costs, to be levied by *Fi. fa.* or *Ca. sa.* and has also a peremptory mandamus. *Ib.*

If damages are thus recovered against any person making return, he is not liable to any other suit. 1 *N. R. L.* 103.

When the proceedings are under the above statute, and at the trial the jury omit to find the damages, the plaintiff may still resort to his action on the case of common law. *Esp.* 687.

Mandamus does not lie to grant a licence to keep an ale house. 2 *Str.* 881.

MANSLAUGHTER. See HOMICIDE.

MISDEMEANORS.

A MISDEMEANOR is an act committed, or omitted, in violation of the public law, either forbidding or commanding it. 4 *Black. Com.* 5.

This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word *crimes* is made to denote such offences as are of a deeper and more obnoxious dye, while smaller faults, and omissions of less consequence, are comprised under the gentler names of misdemeanors only. *Ib.*

MISNOMER.

UNDER this title it will be proper to consider what certainty the law requires in the description of parties in judicial proceedings, and what the effects and consequences are, of an omission or irregularity in this respect.

- I. *What names are required by law.*
- II. *The manner of taking advantage of, and pleading a misnomer, and the effects thereof.*

I. *What names are required by law.*

If the christian name be wholly mistaken, this is regularly fatal to all judicial proceedings. 3 *Will. Just.* 361.

And a misnomer of the defendant's name of baptism, may be pleaded in abatement of an indictment. 2 *Haw. c.* 25. § 69.

But a person *cannot take advantage of a mistaken surname in an indictment*, either by plea in abatement or otherwise, notwithstanding such surname have no affinity with his true one, and he was never known by it. 2 *Haw. c.* 25. § 68.

Any outlawry whatsoever may be avoided by a defendant's coming in upon the *capias ut lagatum*, and pleading a misnomer either of the name or addition in the writ, &c. as by shewing that whereas he is called by such a name of baptism, or surname, and he hath been always known by a different one, and not by that in the writ, &c. *Ib.* 50. § 9.

II. *The manner of taking advantage of, and pleading a misnomer, and the effects thereof.*

A person, though his name is mistaken, is not obliged to take advantage of it; and therefore if he be indicted and acquitted of a crime, and afterwards indicted for the same offence, with some variation of the name or addition, &c. he may make good the variance, by averring, that he was the same person meant in both. 2 *Haw. c.* 25. § 3.

If several persons be indicted for an offence; misnomer, or want of addition of one, quasheth the indictment only as against him, and the rest shall be put to answer, for they are in law as several indictments. 2. *H. H.* 177.

If a party be indicted with a wrong name or addition, and he plead *not guilty*, or answer to that indictment upon his arraignment by that name, he shall not be received afterwards to plead misnomer, or falsity of his addition, for he is concluded, and estopped by his plea by that name, and by that estoppel the gaoler and sheriff that doth execution shall take advantage. *Ib.* 175.

Therefore, he that will take advantage of the misnomer of his christian name, addition or surname, must do it upon his arraignment, and the entry must be special. *Ib.*

The using one name for another.] If advantage be properly taken, it is fatal in legal proceedings, whether they be civil or criminal, 4 *Blac. Com.* 334.

When a christian name is wholly mistaken, as John for Thomas, &c. it may be pleaded that there is no such man, &c. But to plead that the defendant was never called by such a name is ill; for this may be true and yet he might be of that name of baptism. 1 *Salk.* 6.

If the surname in the body of an obligation vary in the spelling, but not much in the sound, from the name subscribed, the obligor may be sued by the name in the subscription without an *alias dictus* as to the name in the obligation. 2 *Caine's Rep.* 362.

When a name appears to be a foreign one, a variance of a letter, which, according to the pronunciation of that language, does not vary the sound, is not a misnomer. 3 *Caine's Rep.* 219.

Misnomer must be plead in abatement; and if advantage is wished to be taken of a misnomer in process, the proper method is to move to set aside the same for irregularity. *Chitty*, 440, 1.

The omission of a letter between the christian and surname of a party is no misnomer. For the law knows only of one christian name. 5 *John. Rep.* 84.

The advantage of the misnomer must be taken at the time of the arraignment. 1 *John. Cas.* 243.

After all, there is little advantage accruing to the prisoner, by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed according to what the prisoner, in his plea, avers to be his true name and addition; for it is a rule upon all pleas in abatement, that he who takes advantage of a flaw must at the same time shew how it may be amended. 4 *Black. Com.* 335.

Therefore, the safest way in criminal cases is to allow the party's plea of misnomer, both as to his surname and christian name; for he that pleads misnomer in either, must in the same plea set forth what his true name is, 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.

And sergeant *Hawkins* says, where an indictment of a capital crime is abated for a misnomer of the defendant's christian name, the court will not dismiss him, but cause him to be indicted *de novo* by his true name, and arraign him again on such new indictment. 2 *Haw. c.* 34. §. 2.

MISPRISION.

THE word misprision, has not any certain signification, but is generally applied to all such high offences as are under the degree of capital, and nearly bordering thereupon. 1 *Haw. c.* 10.

And it is said, that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason, may be proceeded against for a misprision only. *Ib.*

Misprision of FELONY and TREASON, in particular, are treated of under those titles.

MITTIMUS. See BAIL. COMMITMENT.

MURDER. See HOMICIDE.

M U T E.

HE who answers impertinently or ineffectually, or refuses to put himself upon his trial as the law directs, may as properly be said to stand mute as he who makes no answer at all; as where a man refuses to plead a plea in chief, or the general issue, but insists on some frivolous defence, or even to plead a good dilatory plea, and refuses to plead over to the felony, in which case, after such a plea is found against him, he shall not be admitted to plead in chief; and so it is if he plead a good plea in chief, or the general issue, but refuse to put himself upon the inquest. 2 *Haw. c.* 30. § 1.

And it is enacted by statute, that in cases of treason or felony, where the party indicted shall, on being arraigned, obstinately stand mute, and refuse to plead and be tried in due course of law, such obstinately standing mute or refusal to plead and be tried as aforesaid, shall be adjudged to be a denial of the facts charged in the indictment, and the trial shall thereupon proceed in like manner, and the record shall be in the same form, and the same judgment shall be given against the party, if found guilty, as if, on being arraigned, he had pleaded not guilty. 1 *N. E. L.* 494.

 N U I S A N C E.

NUISANCES are of two kinds, *public or common*, which affect the public and are an annoyance to community at large; and *private* nuisances, which affect only the rights of an individual. *Jac. L. D. tit. Nuisance.*

And common nuisances are indictable only, and not actionable, for the damage being common to all, no one can assign his particular proportion of it; or if he could, it would be extremely hard if every citizen were allowed to harass the offender with separate actions. 3 *Black. Com.* 219. 4 *Black. Com.* 167. *Co. Lit.* 56.

Yet this rule admits of one exception; for if a man suffer some extraordinary damage, he shall have a private satisfaction by action; as if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there for this particular damage, which is not common to others, the party shall have his action. 3 *Black. Com.* 220. *Bul. N. P.* 26. *Co. Lit.* 56.

Having premised this, we shall consider :

- I. *What shall be deemed a common nuisance.*
- II. *How the offence must be laid in the indictment.*
- III. *How a nuisance may be removed or abated.*
- IV. *How the offence is punishable.*

I. *What shall be deemed a common nuisance.*

It is clearly agreed, that common bawdy houses are indictable as common nuisances; and it hath been said that all common stages for

rope dancers ; and also all common gaming houses, are nuisances in the eye of the law ; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons. 1 *Haw. c. 75. § 6.* 2 *Bac. 1232.*

All common gaming houses, are nuisances in the eye of the law, being detrimental to the public, &c. *Ib.*

So all disorderly inns or ale-houses are public nuisances, and may, upon indictment, be suppressed and fined ; and inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a sufficient cause ; for thus to prostrate the end of their institution is disorderly behaviour. 4 *Black. Com. 167, 8.* *Cro. Car. 549. Dall. c. 7.*

All mountebanks, and the like, are nuisances. 1 *Hawk. c. 75. § 6.*

It seems that play houses are not in their own nature nuisances, though they may become such. *Ib.*

It is clearly agreed to be a nuisance to dig a ditch or make a hedge overthwart a highway, or to erect a gate, or to lay logs of timber in it ; or generally to do any other act which will render it less commodious. 1 *Haw. c. 75. § 9.* *Vide title HIGHWAYS.*

And as navigable rivers are deemed highways, it is a nuisance to divert part of the river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before. 3 *Keib. 640. 759.* 1 *Haw. c. 75. § 11.*

Also the laying of timber, or placing a floating dock in a common river, though the soil belong to the party, is equally a nuisance as if the soil was not his, if thereby the passage is obstructed. *Bac. Abr. tit. Nu. (A.)* 1 *Haw. 493. n. (1.)*

So also it is a common nuisance to make great noises in the night with a speaking trumpet, to the disturbance of the neighborhood ; or to permit a house near the highway to continue in a ruinous condition. 1 *Str. 704. Salk. 357.*

And the manufacturing of acid spirit of sulphur, whereby the air was impregnated with *noisome and offensive stinks*, in a parish near the highway, and near several dwelling houses, has been adjudged a nuisance ; for Lord Mansfield said, it is not necessary to constitute the offence, that the smell should be *unwholesome* ; it is enough if it renders the enjoyment of life and property *uncomfortable*. 1 *Bur. 333.*

So also a glass-house, or swine-yard, set up in such an inconvenient part of the town, that it cannot but greatly incommode the neighborhood, may be indicted as a common nuisance. *Salk. 458.* 2 *Ld. Raym. 1163.*

Likewise, EAVES DROPPERS, or such as listen under walls or windows, or the eaves of a house ; to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and indictable at the sessions. 3 *Williams' Just. 378.*

So lotteries, not authorized by law, are declared by statute to be common nuisances. 2 *N. R. L. 188.*

Also a common scold is a public nuisance to her neighborhood, and may be indicted for the offence. 6 *Mod. Rep. 213.*

It also seems that the suffering of a mastiff, or other ferocious dog, to go about unmuzzled, is a common nuisance, for which the owner may be indicted. 3 *Will. Just.* 378.

II. *How the offence must be laid in the indictment.*

Annoyances to the interest of particular persons are not punishable by a public prosecution as common nuisances, but are to be redressed by the private actions of the parties aggrieved by them. 1 *Haw. c.* 77. § 2.

And from hence it clearly follows, that no indictment for a nuisance can be good, which lays it to the damage of private persons only: as where it accuses a man of surcharging such a common; or of inclosing such a piece of ground, wherein the inhabitants of such a town have a right of common to the nuisance of all the inhabitants of such a town, or of disturbing a water course 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 *Haw. c.* 75. § 3.

But an indictment for doing a thing which plainly appears immediately to tend to the prejudice of religion or of the people, is good, without expressly laying it as a common grievance. 1 *Haw. c.* 75. § 4.

So an indictment of a common scold by the words, *common scold*, hath been held to be good; though it concluded to the common nuisance of *divers* instead of *all*; because, says *Hawkins*, from the nature of the thing it cannot but be a common nuisance. *Ib.*

And if the law be so in this case, says *Hawkins*, why should not an indictment setting forth a nuisance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude to the nuisance of *divers*, without saying *all the king's subjects*? And perhaps the authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way, wherein the nuisance was alleged, were a highway, or only a private way; and therefore it shall be intended from the conclusion of the indictment that it was in a private way. *Ib.*

On an indictment for a nuisance in keeping gun-powder, in a *certain house near the dwelling houses of divers good citizens, &c.* it was held that the fact so charged did not amount to a common nuisance, but would have amounted to it had it been alleged to have been negligently and improvidently kept. 1 *John. Rep.* 78.

It seems by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either county. 2 *Haw. c.* 25. § 37.

And the court will not quash an indictment for a nuisance, but the defendant must either plead or demur to it. *Dalt. c.* 66. 6 *Mod. Rep.* 145.

III. *How a nuisance may be abated or removed.*

Hawkins says, it seemeth to be certain, that any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house, erected in a highway, or the like, for if one whose

estate is, or may be prejudiced by a *private* nuisance, actually erected, as a house hanging over his ground, or stopping his lights. may justify the entering into another's ground and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate, it cannot but follow much more that any one may lawfully destroy a *common* nuisance : And as the law is now holden, it seems that in a plea, justifying the removal of the nuisance, a man need not shew that he did as little damage as need be. 1 *Haw. c. 75. § 5. Salk. 459.*

But so much of the thing only that causes the nuisance, ought to be removed. 1 *Bur. 267.*

As if part of a house be a nuisance, this part only shall be abated. *Jones, 222. 16 Vin. Abr. 38.*

And when the house or other thing, (so far as the nuisance is) is abated, 'tis not lawful to *destroy the materials*, but they shall remain to the owners of them, and to him that made the nuisance. *Ib.*

And it hath been adjudged, that if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighboring towns who have a common passage and easement therein, may be compelled to do it. 1 *Haw. c. 75. § 13.*

The court will not grant a writ to prostrate a nuisance, until the record of conviction below be regularly made out and returned. 1 *John. Cas. 336.*

IV. *How the offence is punishable.*

All common nuisances are indictable at the sessions. 2 *Haw. c. 10. § 58.*

And an offender being convicted, shall be fined, and committed till he pay it. 1 *Shaw, 689. Wood's Inst. b. 3. c. 3. p. 443.*

And it is said that one convicted of a nuisance, done to the highway, may be commanded by the judgment to remove the nuisance at his own costs. 1 *Haw. c. 75. § 14.*

And it seems to be reasonable, says *Hawkins*, that those who are indicted of any other common nuisance should also have the like judgment. *Ib.*

But where a man is indicted for a nuisance, the court never admits him to a small fine, till the nuisance is removed, which must be proved by oath, or by the certificate of two justices. *Dalt. c. 66.*

And the court said, in the case of the *Q. v. Leich, E. 3 Ann.* that they never quash indictments for nuisances ; but if a nuisance be removed, and the party confess it, the removal will be a great mitigation of the fine, and in that case it may be proper to offer affidavits to lessen the offence to the court, but not otherwise. 6 *Mod. Rep. 145.*

A master is punishable for a nuisance done by his servant ; as for instance, if the servant throws dirt in the highway, the master is indictable ; for he is responsible for all acts done by his servant in the course of, and proper for his employment, though he hath no express command of his master, for it shall be intended that he had authority from his master. 1 *Ld. Raym. 164.*

General indictment for a nuisance.

County of } **T**HE jurors for the people of the state of New-York, upon their
 ss. } oath present, that A. O. late of in the county of yeo-
 man, on the day of in the year of our Lord and on divers other days
 and times, between that day and the day of the taking of this inquisition, with
 force and arms, at in the said county, [*here set forth the nuisance*] and the
 same so as aforesaid, done, doth yet continue and suffer to remain; to the great
 damage and common nuisance of all the citizens and inhabitants of the said
 state, to the evil example of all others in the like cases offending, and against
 the peace of the people of this state, and their dignity.

OATHS, &c.

AN oath is a solemn calling or appealing to Almighty God as a witness of the truth of what we affirm or deny, in the presence of those who are duly authorized to administer it to us; and it is called corporal, because in taking it the party is obliged to lay his hand on, and kiss the holy gospel. 3 Co. Inst. 168.

At common law it is a high contempt to refuse to take the oath of allegiance; for allegiance is the tie or ligamen which binds the citizen to the government: a duty paramount to every other, and which is binding upon the citizen, so long as the government affords him the protection of the laws. Co. Lit. 68. 1 Black. Com. 366.

But to those who shall declare they have conscientious scruples about the present mode of administering oaths, by laying the hand on and kissing the gospels, it is made lawful, by statute, to administer it in the following form, to wit; The person swearing shall, with his hand uplifted, *swear by the ever living God*, and shall not be compelled to lay the hand on or kiss the gospels. 1 N. R. L. 382. § 15.

And persons believing in the existence of a Supreme Being, and a future state of rewards and punishments, who shall have conscientious scruples against taking an oath, shall, in all cases where an oath is upon any lawful occasion to be administered; be admitted instead of taking an oath, to make a solemn affirmation or declaration, in the following form, to wit: "*You do solemnly, sincerely, and truly declare and affirm;*" which shall be equally valid as if such person had taken an oath in the usual form. 1 N. R. L. 382. § 16.

And every person guilty of falsely and corruptly affirming and declaring as aforesaid, shall incur and suffer the like pains and penalties as persons convicted of wilful and corrupt perjury. *Ib.*

Oath of allegiance as prescribed by statute. 1 N. R. L. 383.

"**I** do solemnly, without any mental reservation or equivocation whatsoever, swear and declare, that I renounce and abjure all allegiance and subjection to all and every foreign king, prince, potentate and state, in all matters ecclesiastical as well as civil, and that I will bear faith and true allegiance to the state of New-York, as a free and independent state." So help me God.

Oath of office for judicial officers. 1 N. R. L. 383.

"I do solemnly swear and declare, that I will, to the best of my knowledge and ability, execute the office of [*here describe the office*] according to the constitution and laws of the state of New-York, in defence of the freedom and independence thereof, and for the maintenance of liberty and the distribution of justice among the citizens and inhabitants of the said state, without any fear, favor, partiality, affection or hope of reward." So help me God.

Oath of Sheriff, Coroner, and Marshal of Hudson, and their deputies. 1 N. R. L. 383.

"I sheriff, [*or, coroner, or, under sheriff, or, one of the deputies of the sheriff, as the case may be*] of the city and county of [*or, of the county of as the case may be*] do solemnly swear and declare, that I will well and truly serve the people of the state of New-York, in the office of sheriff [*or, as the case may be*] of the said county [*or, city and county*] during my continuance therein; and will faithfully and truly execute, or cause to be executed, [*the words or cause to be executed to be omitted in the oath of under sheriff or deputy*] all writs and precepts which shall be delivered to me, or come to and remain in my hands for that purpose, according to the best of my knowledge, skill and judgment, and that I will not corruptly or unjustly use or exercise the said office during the time that I shall remain therein, neither will I directly or indirectly accept, receive or take, by any color, means or device whatsoever, or consent to the taking any manner of fee or reward whatsoever, of or from any person or persons whomsoever, for the summoning, impanelling or returning of any inquest, jury or *tales*, in any court for the people of this state, or between party and party, other than such fees or reward as now are or hereafter shall be allowed by law for the same; and that I will not directly or indirectly exact or demand any manner of fee or reward whatsoever, from any person or persons whomsoever, for serving or returning any writ, precept or process, whatsoever, or for any other service whatsoever in my said office, other than such fees or reward as now are or hereafter shall be allowed by law; but that I will demean myself honestly and impartially in all things that shall belong to the duty of my said office, according to the best of my knowledge, skill and ability." So help me God.

Oath of attorney general or district attorney. *Ibid.* 383.

"I appointed attorney general [*or, district attorney*] do solemnly swear, that I will, in all things to the best of my knowledge and ability, perform the trust reposed in me." So help me God.

Oath of register or clerk of a court, or clerk of a city or county. *Ibid.* 384.

"I register [*or, clerk, or, one of the clerks*] of the court of [*or, clerk of the county, or, city and county, or, city, as the case may be*] do solemnly swear and declare, that I will justly and honestly keep the records, parchments, papers and writings committed to me by virtue of my said office, and which shall be from time to time hereafter committed unto me, and in all things, to the best of my knowledge and understanding, faithfully and honestly perform the duty of my said office, and the trust reposed in me, without favor or partiality." So help me God.

By the act to suppress duelling, 4 Vol. L. sess. 40, ch. 1, § 1, it is made the duty of every person who shall be elected or appointed to any office or place, civil or military, under this state, except town officers, &c. to take the following oath:

" I A. B. do solemnly swear or affirm (as the case may be) that I have not been engaged in a duel, by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner, in violation of the act entitled " an act to suppress duelling," since the first day of July, in the year of our Lord one thousand eight hundred and sixteen, nor will I be so concerned, directly or indirectly, in any duel, during the continuance of the said act, and while an inhabitant of this state."

Oath of supervisor.

" I do solemnly and sincerely promise and swear, that I will in all things, to the best of my knowledge and ability, faithfully and impartially execute and perform the trust reposed in me as supervisor of the [here insert the name of the place] in the county of [here insert the name of the county] and that I will not pass any account or any article thereof wherewith I shall think the said county is not justly chargeable, nor will I disallow any account or any article thereof, wherewith I shall think the said county is justly chargeable." So help me God.

Oath of town clerk.

" I town clerk of the town of in the county of do solemnly and sincerely promise and swear, that I will faithfully and honestly keep all the books, records, writings and papers, by virtue of my said office of town clerk committed, and which shall from time to time be committed unto me, and in all things, to the best of my knowledge and understanding, well and faithfully perform the duties of my said office of town clerk, without favour or partiality." So help me God.

Oath of assessor.

" I do solemnly and sincerely promise and swear, that I will honestly and impartially assess the several persons and estates within the [here insert the name of the place] in the county of [here insert the name of the county] and that in making such assessments I will, to the best of my knowledge and judgment, observe the directions of the several laws of this state, directing and requiring such assessments to be made." So help me God.

Oath of commissioner of highways.

" I do solemnly and sincerely promise and swear, that I will in all things, to the best of my knowledge and understanding well and faithfully execute the trust reposed in me as a commissioner of highways for [here insert the name of the town and county] without favor or partiality." So help me God.

Oath of overseer of the poor, and constable.

" I do solemnly and sincerely promise and swear, that I will in all things, to the best of my knowledge, understanding and ability, well and faithfully execute and perform the trust reposed in me as an overseer of the poor, [or, constable] of the [here insert the name of the place] in the county of ."
" So help me God.

Oath of overseer of highways and fence viewer.

" I do solemnly and sincerely promise and swear, that I will in all things, to the best of my knowledge and ability, well, faithfully and impartially execute and perform the trust reposed in me as an overseer of highways, [or, a fence viewer] in the town of in the county of ."
" So help me God.

OFFICERS.

- I. *Of civil and military officers taking the oaths required by law.*
- II. *Of the appointment of town officers by justices of the peace.*
- III. *Of their being sworn—refusing to serve, or acting before they are qualified.*

I. *Of civil and military officers taking the oath required by law.*

IT is required by statute, that every person appointed to any office, civil or military, before he enters upon the execution of his office, shall take and subscribe the oath of allegiance to this state, and the oath of office as prescribed by the statute. 1 *N. R. L.* 382.

Shall take the oaths. Under these words it has been adjudged, that the party must take the oaths at his peril; and that the magistrate [or person who is to administer the oath] need not tender to him, but he must tender himself to the magistrate and demand them; and if it be refused, must sue a *mandamus*, and the magistrate is punishable; if the law were otherwise, it would be in the power of the magistrate to elude the act in favour of the party. *Salk.* 428.

The commissioners before whom these oaths may be taken, are,

The Lieutenant-governor of the state;

The Chancellor;

The Judges of the Supreme court;

The Secretary of State, and Attorney-General;

The Mayors, Recorders, and Clerks of the several cities; and

The Judges and Clerks of the respective counties in the state.

And the said commissioner, after administering the oath, shall cause the person taking the same to subscribe his name thereto, on a roll, containing a proper caption, with the oath written at length, which shall be deposited, as follows: "Those containing the oaths and subscriptions of any governor, lieutenant-governor, president of the senate, member of the senate or assembly, chancellor, judge of the supreme court, judge of the court of probates, or any officer of either of the said courts, or attorney-general, or secretary of this state, or district attorney, or military officer, whose office shall extend into more than one county, shall be deposited and kept in the office of the secretary of this state; and those containing the oaths and subscriptions of the respective county officers, both civil and military, shall be deposited and kept in the office of the clerk of the same county." 1 *N. R. L.* 385. § 10.

And by the sixth article of the constitution of the United States, it is required that all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support that constitution.

And if any officer, civil or military, in this state, shall execute his office without having first taken and subscribed the oaths or affirma-

tions required by law, and the oath to support the constitution of the United States, he shall forfeit his office, and be removed therefrom ; and such neglect is declared to be a misdemeanor indictable and punishable by fine and imprisonment. 1 *N. R. L.* 385. § 11.

But this shall not extend to any county treasurer, supervisor, town clerk, commissioner of highways, overseer of highways, assessor, collector, constable, or other town officer. 1 *N. R. L.* 386. § 14.

And it is not necessary for any commissioner of oyer and terminer and gaol delivery, who, at the time of acting as such, shall hold any judicial office in the state, to take any of these oaths, but every other person named in such commission must take and subscribe the oath of allegiance, and the oath prescribed to be taken by judicial officers. 1 *N. R. L.* 386. § 17.

But no proceeding whatever before any commissioner named in such commission shall be void, or in any manner impeached, by reason that any commissioner therein named shall not have taken any oath in that act mentioned. *Ib.*

And the clerk of each county shall, on or before the fifteenth day of January in every year, at the expense of the state, give information to the person administering the government, of such persons as shall have taken or neglected to take the oaths required by law, and also of all vacancies in such county by death, removal, or otherwise, in any office, civil or military. 1 *N. R. L.* 385. § 12.

And if any commissioner shall not make a return of the rolls within six months after he shall have administered the said oaths, he shall forfeit to the people of the state 25 dollars, to be sued for and recovered, with costs of suit, before any court having cognizance of the same, by the clerk of the county, one moiety of which, when recovered, shall, by the clerk, be paid to the treasurer of the county, to be disposed of as the board of supervisors shall direct ; and it shall be lawful for the clerk to retain the other moiety for his own use. 1 *N. R. L.* 386. § 13.

II. *Of the appointment of town officers by justices of the peace.*

If any city or town shall neglect to choose such officers, or any of them, as are directed to be chosen at annual town-meetings ; or in case any of the officers chosen shall refuse to serve, or die, or remove out of the city or town for which he shall be chosen, or become incapable of serving before the next annual town-meeting, and the city or town shall not, within fifteen days next after such refusal, death, removal, or incapacity happens, choose another in his room, it shall be lawful for any three justices of the peace in the same county, residing in such city, or in or near such town, and they are required by statute to nominate, and by warrant under their hands and seals, to appoint all and every such officers as the freeholders and inhabitants of such city or town ought to have chosen ; and each officer so appointed shall hold his office for so long time, and have the same powers, and be liable to the same penalties, as if he had been elected by the freeholders and inhabitants of such city or town. 2 *N. R. L.* 127. § 5.

In or near such town.] It seems that any justice of the county may act, *if there be none nearer*; the expression *in or near*, which is loose and indefinite, appearing to intend no more than the next. *Salk.* 473. 480. 1 *Bur. Rep.* 446.

Such officers must be appointed *under the hands and seals* of the justices, as the statute requires; and no parol evidence of such appointment can be given, but the same must be produced, in order that it may appear whether it be a sufficient appointment. 1 *Str. Rep.* 101.

And the justices must sign and seal the appointment in the presence of each other; for the appointment is a judicial act, in which the justices are to exercise their discretion by conferring with each other on the subject. 3 *Term Rep.* 38. 3 *Will. Just.* 568, 9. n.

III. *Of town officers being sworn—refusing to serve, or acting before they are qualified.*

Each supervisor, town clerk, assessor, commissioner of highways, overseer of highways, overseer of the poor, constable, and fence viewer, elected or appointed, shall, before he enters upon the execution of his office, and within fifteen days after such election or appointment, take and subscribe an oath before some justice of the peace, in the form prescribed by statute. 2 *N. R. L.* 128. § 7. *See Oaths, &c.*

And the justice before whom such oath shall be taken and subscribed, shall, without fee or reward, certify under the same the day and year when it was taken, and subscribe his name thereto, and then deliver it to the person taking the same oath, who shall, within eight days thereafter, transmit or deliver it to the town clerk. *Ib.*

And if any supervisor, assessor, commissioner of highways, overseer of highways, overseer of the poor, constable or fence viewer, shall not take and subscribe such oath, and transmit or deliver the same to the town clerk within the time limited, or if any collector or constable shall not give such security as is by law required, within the time for that purpose limited, such neglect shall be deemed a refusal to serve, and the town may thereupon proceed to a new choice. *Ib.*

And if any person chosen or appointed supervisor, town clerk, assessor, collector, commissioner of highways, overseer of the poor, or constable, shall refuse to take upon him, or to serve in such office, or if any such supervisor, town clerk, assessor, commissioner of highways, or overseer of the poor, shall proceed in the execution of such office before he shall have taken and subscribed such oath, or if any such collector or constable shall proceed in the execution of his office before he shall have given the security required by law, then and in every such case the person so neglecting or refusing or doing, shall forfeit to the people of this state the sum of sixty-two dollars and fifty cents, to be recovered by action of debt or information, in any court of record. 2 *N. R. L.* 129. § 9.

And the attorney-general is required to prosecute for, and pay the same, when recovered, to the treasurer of the state, for the use of the people. *Ib.*

Provided, that nothing in the statute shall be construed to com-

pel any quaker, or reputed quaker, to act as an assessor or collector, who shall affirm that he hath conscientious scruples about executing the duties of such office. 2 *N. R. L.* 130. § 9.

And if any person chosen or appointed an overseer of highways, fence viewer or pound master, shall neglect or refuse to take upon him the said office, or if such overseer of highways or fence viewer shall proceed in the execution of his office, before he shall have taken and subscribed his oath as aforesaid, he shall, in every such case, forfeit and pay the sum of twelve dollars and fifty cents, to be recovered with costs, before any justice of the peace by action of debt; the one moiety to the use of the poor of the town for which such officer was chosen or appointed, the other, with costs of suit, to the use of any person who shall prosecute the same to effect. 2 *N. R. L.* 130. § 10.

A public officer, who is required by law to act, in certain cases, according to his judgment or opinion, sworn to discharge his duties, and subject to penalties for the neglect of them, is not liable to a party for an omission arising from mistake, or want of skill, if acting *bona fide*. 2 *Caine's Rep.* 312.

Nor is a mere ministerial officer responsible for the issuing, or the execution of process, so long as the officer, under whose authority the process was awarded, had jurisdiction over the subject matter. 9 *John. Rep.* 229.

Judges of all courts of record, from the highest to the lowest, and even jurors, are exempt from prosecution for acts done by them in their judicial character, and within their jurisdiction. *Per Kent. C. J.* 5 *John. Rep.* 282.

But where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non judge*, and all concerned, in such void proceedings, are held to be liable in trespass. *Id.*

The acts of an officer, *de facto*, who comes into office by color of title, are valid, as it concerns the public, or third persons, who have an interest in his acts. 7 *John. Rep.* 549. 9 *John. Rep.* 135.

And a mere ministerial officer has no right to decide on the acts of such officer, *de facto*, or adjudge them to be null. 7 *John. Rep.* 549.

Neglect of duty, as an inspector of an election, is indictable at common law. 2 *John. Cas.* 277. n.

So the oppression of officers in executing process, is indictable. 5 *John. Rep.* 125.

Form of an appointment of a town officer, by three justices of the peace.

County of } WE, J. P. E. P. and S. P. Esquires, three of the justices of the
ss. } peace in and for the said county, residing in [or, near, or,
the said E. J. and F. J. residing in] the town of in the said county, [and
the said S. J. residing near the said town, as the case may be] do hereby
nominate and appoint A. S. being a freeholder and inhabitant of the said town
of to be supervisor [or as the case may be] for the same town, according
to the direction of the statute in that case made and provided. Given under
our hands and seals the day of

OVERSEERS OF THE POOR. See POOR.

PARDON. See REPRIEVE, PARDON AND EXECUTION.

PEDLERS, &c.

- I. Concerning licences, how and by whom granted, &c.
- II. Concerning the duties to be paid therefor.
- III. Penalty for trading without licence, or refusing to produce it when required.
- IV. Concerning their apprehension and punishment.

I. Concerning licences, how and by whom granted, &c.

EVERY hawker, pedler, and petty chapman shall take a licence from the Secretary of this state, which licence shall be issued in the month of April, in each year, and at no other time. 2 N. R. L. 229. § 2.

To obtain a licence, the hawker, pedler, or petty chapman must deliver to the secretary, a note in writing, under his hand, or the hand of some one authorized by him, how and in what manner he will travel and trade, whether on foot, with a horse, a carriage or boat, and upon paying to the treasurer, the necessary sum, according to such notification, and upon producing the treasurer's receipt, countersigned by the comptroller, "the said secretary shall issue such licence to be signed as aforesaid, to the person or persons making such payment, permitting him or her to travel with his or her wares and merchandizes, for sale, for the term of one year, according to such notification, and shall renew the same yearly, in like manner, if applied for," and for which licence, the person to whom the same shall be granted, shall pay to the said secretary, for his services, two dollars, and no more, over and above the duties, and such licence shall be good and effectual. *Ib.*

A certified list of the names of the persons so licenced must be transmitted, by the secretary, before the tenth day of May, in each year, to the several county clerks, "whose duty it shall be immediately, upon the receipt thereof, to send a transcript of such list to every judge and justice of the peace, who shall at the time be in commission in and for said county." *Ib.* § 5.

II. Concerning the duties to be paid therefor.

Every hawker, pedler and petty chapman, &c. going and travelling, either on foot, with a horse, or otherwise, within the state (except as is herein excepted) and carrying for sale any goods, wares or merchandize, of the growth, produce, or manufacture of any foreign country, without the jurisdiction of the United States, shall annually pay into the treasury of the state, the following duties, to wit, for every person so travelling:

1. On foot, the sum of fifty dollars;
2. With a single horse, or other beast bearing or drawing a burden, the sum of eighty dollars;
3. With a waggon, cart, sled, or other carriage, drawn by more than one horse or beast, the sum of one hundred dollars;
4. Or, in any boat or boats navigating any of the waters within the bounds of this state, the sum of eighty dollars. 2 N. R. L. 228. § 1.

III. *Penalty for trading without licence, or refusing to produce it when required.*

When and as often as any hawker, pedler, or petty chapman shall be found trading or disposing of goods, as aforesaid, *without*, or *contrary to*, such licence, such person shall, *for every such offence*, forfeit and pay the sum of 25 dollars, to be recovered on the complaint of any one, before any justice of the peace, in a summary way, with costs of suit, one half of the penalty, when recovered, to be paid to the informer, and the other, to the overseers of the poor. 2 *N. R. L.* 229. § 4.

And if any offender who shall be so trading, on demand made by any justice of the peace, sheriff, constable, or any other person within this state, shall refuse to produce, or show his licence therefor, he shall forfeit the sum of ten dollars, to be paid to the overseers of the poor, and on neglect or refusal to pay the same, the justice before whom such offender shall be convicted, shall by warrant under his hand and seal, commit such offender to the gaol of the county, where the offence shall be committed, *for the term of one month.* *Ib.*

IV. *Concerning their apprehension and punishment.*

Any person may apprehend hawkers, pedlers, or petty chapmen, or other trading persons, who shall be found trading *without licence* contrary to the true intent and meaning of this act, and to bring them before any justice of the peace, of the county or town where such offender shall be, who is authorized, either upon the confession of the offender, or by proof of one or more credible witnesses, upon oath, that he had so traded as aforesaid; and if no such licence shall be produced by the offender, the justice shall, for every such offence, by warrant under his hand and seal, directed to any constable of the town wherein such conviction shall be had, cause the sum of 25 dollars, with costs, to be forthwith levied by distress and sale, at public vendue, of the offender's goods, wares and merchandize, which costs, not exceeding 5 dollars, shall be ascertained and allowed by the justice. 2 *N. R. L.* 250. § 7.

If a pedler, &c. refuses to produce his licence, when demanded of him by any person, for such refusal, he shall forfeit and pay the sum of five dollars, with costs, to the person who demanded the licence, to be levied as aforesaid; and although he may produce his licence when brought before the justice, yet this will not excuse him. *Ib.* § 8.

All suits upon this act must be brought within 60 days after the offence committed. *Ib.*

And if a pedler &c. refuses to shew his licence, or to make known his name, the plaintiff shall not be liable to pay to the defendant any costs for the misnaming of such defendant, nor shall the plaintiff, constable, nor justice be liable to any action for falsely imprisoning such defendant. *Ib.* § 9.

Persons sued for executing this act may plead the general issue, and give the special matter in evidence, and if the plaintiff become *nonsuit*, or *discontinue*, or if a verdict or judgment pass against him, the defendant shall recover *treble costs*, and have execution as in other cases. *Ib.* § 6.

If any person forge a licence, or travel with a forged licence, he shall be deemed guilty of forgery, and being convicted thereof, shall be punished accordingly. *Ib.* § 5.

PERJURY.

THIS subject will be considered in the following order.

I. *What is perjury, and subornation of perjury, and herein—*

1. Of perjury.
2. Of subornation of perjury.

II. *Of the proceedings and punishment, and herein—*

1. Of the proceedings.
2. Of the evidence.
3. Of the punishment.

1. *What is perjury and subornation of perjury, &c.*

1. *Of perjury.*

Perjury, by the common law, seems to be a wilful false oath, by one who being lawfully required to depose the truth on any proceeding in a court of justice, swears wilfully, absolutely, and falsely, in a matter of some consequence to the point in question, whether he be believed or not. 1 *Haw. c.* 69. § 1. 3 *Inst.* 163. 1 *Term. Rep.* 69.

It is necessary, to constitute the offence of perjury, that the false oath 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 surprize, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary or corrupt perjury. 5 *Mod. Rep.* 350. 10 *Mod. Rep.* 195. *Salk.* 513. 3 *Inst.* 163. 1 *Haw.* 172.

It seems to be clearly agreed, that all such false oaths as are taken before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries. 1 *Haw. c.* 69. § 3.

And it hath been holden, that not only such persons are indictable for perjury, who take a false oath in a court of record, upon an issue therein joined, but also all those who forswear themselves in a matter judicially depending before any court of equity, a spiritual court, or any other lawful court, whether the proceedings therein be of record or not, or whether they concern the interest of the king or subject. *Ib.*

And it is said to be no way material, whether such false oath be taken in the face of a court, or persons authorised by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause; and therefore a false oath before a sheriff, upon a

writ of inquiry of damages, is as much punishable as if it were taken before the court on a trial of the cause. *Ib.*

Also it seemeth, that any false oath is punishable as perjury, which tends to mislead the court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment to be given in the cause ; as where a person who offers himself to be bail for another, knowingly and wilfully swears that his substance is greater than it is. *Ib.*

Also it hath been resolved, that not only such oaths as are taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice, are properly perjuries ; as where one takes a *false oath before a justice of the peace*, in order to compel another to find sureties for the peace, or the like. *Ib.*

But it seemeth certain, that no oath whatsoever in a mere private matter, howsoever wilful or malicious it may be, is punishable as perjury in a criminal prosecution, for private injuries are left to be redressed by private actions ; and upon this ground it hath been holden, that if a man makes a bargain for any thing, and *voluntarily swears* the thing to be his own, or that he had good title to it, though it be false, yet it is not perjury for which he may be indicted, because it is not done in any judicial proceeding. 1 *Haw. c. 69. § 3. 3 Rol. Abr. 257. 16 Vin. 307.*

It also appears, that the notion of perjury is confined to such public oaths only, as affirm or deny some matter of fact, contrary to the knowledge of the party ; and therefore that it doth not extend to any *promissory oaths* whatsoever ; from which it clearly follows, that *no justice of peace, or constable, or other officer* who is sworn to execute his office duly, and who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury in respect of such oath ; yet it is certain that his offence is highly aggravated by being contrary to his oath, and therefore that he is liable to the severer fine on that account. 3 *Rol. Abr. 257. 3 Inst. 166. 16 Vin. 307. 1 Haw. c. 69. § 3.*

No oath whatsoever, taken, before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without any legal authority, or before those who are legally authorised to administer some kind 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 ever amount to perjury. 1 *Haw. c. 69. § 4.*

For the law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath ; or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or criminal prosecution ; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them ; for which reason it is much to be questioned, how far any magistrate is *justifiable* in taking a *voluntary affidavit* in any extrajudicial matter ; since it is more than possible, that by such idle oaths a man may frequently in *foro conscientiae* incur the guilt, and at the same time evade the temporal penalties of perjury. 4 *Black. Com. 137.*

It seems clear, that a man may be in danger of being guilty of per-

jury, not only in respect of a false oath taken by him as a witness for another, but also in respect of a false oath taken by him in his own cause, either in an answer to questions put to him in a court of law or equity, having power to purge him upon oath, concerning his knowledge of the matters in dispute, or in his affidavit concerning some collateral matter, wherein the parties' own oaths are allowed to be taken. 1 *Haw. c. 69. § 5.*

But it seems that a juror who gives a verdict contrary to manifest evidence, is not properly guilty of perjury within the above mentioned description, because he is not sworn to depose the truth, but only to give a true judgment upon the deposition of others. *Ib.*

It is said not to be material, whether the fact which is sworn, be in itself true or false ; for however the thing sworn may happen to prove agreeable to the truth, yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavors 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. c. 69. § 7.*

It is laid down by *Coke* and *Hawkins* generally, that no oath shall amount to perjury unless it be sworn absolutely and directly ; and therefore that he who swears a thing according as he thinks, remembers, or believes, cannot, in respect of such an oath, be found guilty of perjury. 3 *Inst. 166.* 1 *Haw. c. 69. § 7.*

But in two modern cases in *England*, one in the court of *C. P.* and the other in the court of *K. B.* it was said to be a mistaken notion, that a person could not be convicted of perjury for deposing an oath according to his belief ; and that if a man swears that *he believes* a fact to be true, *which he must know to be false*, he may be indicted for perjury. 3 *Wils. Rep. 427.* 2 *Black. Rep. 881.* *Leach's Cr. L. 304.*

It seemeth clear, that the thing sworn ought to be some way material to the point in question ; for if it be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant ; as where a witness introduces his evidence with an impertinent preamble of a story concerning previous facts, no way relating to what is material, and is guilty of a falsity as to such facts. 1 *Haw. c. 69. § 8.*

Also it hath been adjudged that where a witness being asked by a judge, whether *A.* brought a certain number of sheep from one town to another altogether ? answered that he did so ; when in truth *A.* did not bring them together, but part at one time and part at another ; yet such witness was not guilty of perjury, because the substance of the question was, whether *A.* did bring them at all or not, and the manner of bringing them was only a circumstance. *Ib.*

Also it is said to have been resolved, that a witness who swore that one drew his dagger and beat and wounded *J. S.* when in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. *Ib.*

But it seems a reasonable opinion that a witness may be guilty of perjury in respect to a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence ; as if in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close, and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's, when in truth the defendant never used any such mark ; for he giving such a special reason for his remembrance, could not but make his testimony more credible than it would have been without it. *Ib.*

And 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. 1 *Ld. 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. 2 *Ld. Raym.* 889.

No indictment for perjury will lie on an oath administered out of this state, although by a judge of this state. 1 *John. Rep.* 498.

But perjury may be assigned in an oath erroneously taken, especially while the proceedings in which it was taken remain unreversed ; as, if a justice issue an attachment on the oath of the creditor, the proceeding is erroneous, but the party nevertheless may be indicted for perjury. 10 *John. Rep.* 167.

II. Of subornation of perjury.

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 takes such oath* ; 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. 1 *Haw. c.* 69. § 10.

By statute, if any person shall unlawfully and corruptly procure any witness, by any means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause depending, or to depend in the court of chancery, or in the court of probates, or in any court of record, or before any judge, justice of the peace, mayor, recorder or alderman, or shall unlawfully and corruptly procure any witness who shall be sworn to testify *in perpetuam rei memoriam*, he shall be adjudged guilty of subornation of perjury. 1 *N. R. L.* 171. § 1.

And if any person, either by the subornation of another, or by his own act or consent, shall wilfully or corruptly swear or affirm falsely, in any of the courts aforesaid, or before any person having competent authority to administer such oath or affirmation, every such person shall be adjudged guilty of wilful and corrupt perjury. *Ib.*

II. Of the proceedings and punishment, &c.

1. Of the proceedings.

It seems to be settled that *justices of peace have no jurisdiction over perjury at the common law*, for as the chief end of the institution

of the office of these justices was for the preservation of the peace against *personal* wrongs and *open violence*; and the word *trespass* in the commission, in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace. 2 *Haw. c. 8. § 38.*

It is enacted by statute, that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, either at the common law or upon that act, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, averring such court or person to have a competent authority to administer the same, together with the proper averments to falsify the matter wherein the perjury was assigned, without setting forth any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. 1 *N. R. L. 171. § 2.*

And that in every indictment or information for subornation of perjury, either at common law or upon that act, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth any part of any record or proceedings, either in law or equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed. 1 *N. R. L. 171. § 2.*

In the construction of the statute of 5 *Eliz. c. 9*, it seems to have been holden:

'That every indictment or action on that statute must exactly pursue the words of it, and therefore, if it allege that the defendant deposed such a matter *falsely and deceitfully*, or *falsely and corruptly*, without saying *wilfully and corruptly*, it is not good, and that such a defect cannot be supplied by adding the words *against the form of the statute*, or concluding, *and so a wilful and corrupt perjury did commit*. 1 *Haw. c. 69. § 17.*

But it hath been resolved, that it is not necessary to shew whether the party who is accused of perjury did take the false oath through the subornation of another, or without any such subornation, though the words of that statute are, *if persons by subornation, &c. or their own act, &c. shall, &c.* for there being no medium between the branches of this distinction, they seem to be put in out of abundant caution, and to express no more than the law would have implied, and therefore operate nothing. 1 *Haw. c. 69. § 18.*

It seems necessary to aver in an indictment for perjury, that the particular question [concerning which the false oath was taken] became and was a material question, and if it wants this allegation, it will be a decisive objection. 1 *Ld. Raym. 257.* 2 *Ld. Raym. 889. Holt, 535.* 1 *Term Rep. 67, 8.* 5 *Term Rep. 318.*

And it is incumbent on the prosecutor to prove the materiality of the perjury. *Old Bai. 1784. 305.*

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, inasmuch as this is not a prosecution grounded on the damage to the party, but on the abuse of public justice. 1 *Haw. c. 69. § 9.*

Although by the common law the court may, in discretion, quash any indictment for any such insufficiency as would make any judgment whatsoever, given upon any part of it, erroneous; yet it seems that the judges are in no case bound, of right, to quash an indictment, but may oblige the defendant either to plead or demur to it, and this they generally do, where it is for a crime of an enormous or public nature, as perjury, or the like. 1 *Haw. c. 25. § 146.*

It seems also that the court will not ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury; for such crime deserves all possible discountenance, and the *certiorari* might delay, if not wholly discourage the prosecution. 2 *Haw. c. 27. § 28.*

And the court of chancery hath refused permission to amend an answer where an indictment of perjury had only been threatened, even though the party having no interest, could not be supposed to make the false oath intentionally; for it is the province of the grand jury to judge of the intention, and what the grand jury will find, the court will never expunge. *Brown's Cas. Can. 410. Cas. K. B. temp. Ld. Hard. 203. 1 Haw. n. 8.*

It is made lawful by statute for any judge of the supreme court, either at the supreme court or any circuit court, and for the justices of the courts of oyer and terminer and gaol delivery, sitting the court, or within twenty-four hours thereafter, to direct any person examined as a witness, upon any trial at such court, to be prosecuted for perjury, if there shall appear to him or them reasonable cause for such prosecution, and that the same would be proper, and to assign the party injured, or other person undertaking such prosecution, counsel, who shall do their duty without fee or reward for the same. 1 *N. R. L. 172. § 3.*

And every such prosecution shall be carried on without payment of any fees to any officer of the court, who might otherwise claim the same; and the clerk attending when such prosecution is directed, shall, without any fee or reward, give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, and the name of the counsel assigned him by the court, which certificate shall be proof that such prosecution was directed; but no such direction or certificate shall be given in evidence on the trial. *Ib.*

It may be proper here to observe, that as every man is still punishable by indictment or information at the common law, where he takes a false oath which is looked on as perjury at the common law, and as a prosecution upon the statute is more difficult than by indictment at the common law, it seems to be most adviseable to prosecute such an offender at the common law, and not upon the statute; and this now is the usual course of proceeding. See 1 *Haw. c. 69. § 21. 1 Black. Com. 138. Dalt. c. 70.*

2. Of the evidence.

But on the trial the oath will be taken as true, until it be disprov-

ed : and therefore to convict a man of perjury, a probable credible witness is not enough, for the evidence must be strong, clear, and more numerous on the part of the prosecution than the evidence on the other side ; therefore the law will not permit a man to be convicted of perjury, unless there are two witnesses. *Old Bai. Ses.* 1786. p. 812. 10 *Mod. Rep.* 185. 1 *Ld. Raym.* 396.

3. Of the punishment.

The punishment of perjury and subornation of perjury at common law, has been various : it was anciently death ; afterwards banishment or cutting out of the tongue ; then forfeiture of goods ; and now it is fine and imprisonment, and never more to be capable of bearing testimony. 3 *Inst.* 163. 4 *Black. Com.* 138.

But by statute, it is punishable with imprisonment at hard labor in the state-prison ; and the court before whom the conviction shall be had, shall, upon consideration of all the circumstances of the case, adjudge the person convicted to imprisonment in the said prison at hard labor for any term not exceeding ten years, according to the nature and aggravation of the offence. 1 *N. R. L.* 412. § 20.

And by the statute to prevent perjury, every person convicted of subornation of perjury, or of wilful and corrupt perjury, shall not thereafter be received as a witness to be sworn in any matter or cause whatsoever, until the judgment given against him be reversed. 1 *N. R. L.* 171. § 1.

And it seems to be a good cause of challenge to a juror that he hath been convicted of perjury. 2 *Haw. c.* 45. § 25.

POLYGAMY. See BIGAMY.

PHYSICIANS AND SURGEONS.

I. How licensed.

II. Penalty for practising without license.

I. How licensed.

THE medical societies in the several counties of the state are respectively empowered, to examine all students who shall present themselves for that purpose, and to give diplomas, under the hand of the president, and seal of the society ; which diploma shall be sufficient to empower the person so obtaining the same to practise physic or surgery, or both, as shall be set forth in the said diploma. 2 *N. R. L.* 221. § 9.

II. Penalty for practising without license.

“ Any person, who shall practise physic or surgery, without being regularly licensed, shall forfeit and pay 25 dollars for each offence of which he may be duly convicted, to be recovered with costs of suit before any justice of the peace of the county where such pe-

nalty shall be incurred, by any person who will prosecute for the same; and the justice, before whom such conviction may be had, shall pay the same to the overseers of the poor of the town where the conviction shall be had, for the use of the poor thereof, whose duty it shall be to prosecute for the same: *Provided*, the person so practising without license, who shall not receive any fee for the same, shall be exempt from the penalty of this act: *And provided also*, that nothing in this act contained shall be construed to extend to debar any person from using or applying for the benefit of any sick person, any roots, bark or herbs, the growth or produce of the United States." 2 *N. R. L.* 223. § 20.

In the case of *Sheldon v. Clark* [1 *John. Rep.* 513,] the court say, "the averment that the defendant practised physic contrary to the statute was sufficient; and it was incumbent on the defendant, by his plea, to have brought himself within some of the provisions of the act."

The 12th section of the act forbids any person to practise physic or surgery without a diploma, and declares that, "if any person shall so practise without a diploma, he shall forever thereafter be disqualified from collecting any debt incurred by such practice in any court in this state," and it has been decided, that the true construction of the 12th and 20th sections of the act, taken together, is, "that no person commencing to practise without license, after the date of the act, shall be capable of suing for services rendered, or medicines furnished as a physician or surgeon; and that every person so practising without license, is subject to a penalty of 25 dollars, unless he proves that he practised gratuitously, or that he administered only roots, bark, or herbs, the growth or produce of the United States." 14 *John. Rep.* 370.

P O O R.

EVERY city and town must support and maintain their own poor. 1 *N. R. L.* 279. § 1.

And in all cases where any of the present poor in any county of this state, are maintained by the whole county, or by more than one town, they must continue to be so maintained. *Ib.* 292. § 32.

And in case of the division of any town, the supervisors and overseers of the poor of the several towns, created by such division, must divide and apportion the money for the support of the poor, and the poor belonging to the town so divided, *in proportion to the last tax list*: "and the poor so apportioned shall be deemed to belong to the town to which they may be thus apportioned; and in case any poor person who shall have been an inhabitant of any town so divided, and legally settled therein, shall return into either of the said towns, such poor person shall be maintained *by the town, including the part of the town so divided*, in which such poor person was last legally settled or had resided." *Ib.* 282. § 11.

In the case of the *overseers of Washington v. overseers of Stanford*, (3 *John. Rep.* 193.) it appeared that "the towns of Washington and Stanford were formerly one town by the name of Washing-

ton. By an act of the 12th of March, 1793, the town of *W.* was divided, and a part thereof erected into a new town by the name of *S.* and the poor of the former town were divided according to the act, between *W.* and *S.* *Huddleston*, (the pauper) was born in *W.* before it was divided, and in that part of it included in the present town of *W.* At the time the town was divided, he resided in that part of it now called *S.* but was not then chargeable ;” and the court decided, that the pauper’s settlement was in *W.* ; and per *Van Ness J.* “ that birth gives a settlement is not to be disputed, as a general rule : indeed this is assumed as a fixed principle by our statute. *Huddleston*, who became a pauper in 1806, was chargeable therefore in the town in which he was born, which is the present town of *Washington*, unless he has obtained a legal settlement elsewhere.”

Per *Spencer J.* “ In my opinion the town of *W.* is bound to support them (*Huddleston*, his wife and children) as paupers chargeable on that town.” “ Birth is not one of the means mentioned in the statute of acquiring settlement, but the statute presupposes that it gave settlement, and it has accordingly been holden, that the town where a pauper is born is chargeable with his maintenance until he acquires some other settlement.”

The residence of the pauper in *S.* was not considered as gaining him a settlement there, within the intention of the act, and the order of sessions was affirmed.

The further consideration of this subject will be in the following order.

- I. *Of overseers of the poor.*
- II. *Of raising taxes for the support of the poor.*
- III. *Of relieving and maintaining the poor.*
- IV. *Overseers’ accounts.*
- V. *Of the settlement of the poor.*
- VI. *Of receiving and entertaining strangers.*
- VII. *Of certificates.*
- VIII. *Removal of the poor.*
- IX. *Of appeals.*
- X. *Precedents of proceedings under the poor laws.*

I. *Of overseers of the poor.*

Two overseers of the poor are to be chosen in each town at annual town meetings ; and they are to be freeholders and inhabitants of the same town: 2 *N. R. L.* 125. § 1.

And in case any of them refuse to serve, or die, or remove out of the city or town for which they are chosen, or become incapable of serving before the next annual town meeting, others may be chosen to supply such vacancy at a special town meeting, to be notified and held for that purpose. *Ib.* 126. § 1.

Or if the city or town neglect to choose them, or to supply any such vacancy, within fifteen days after it happens, three justices of the peace are to appoint them, by warrant under their hands and seals. *Ib.* 127. § 5.

Overseers of the poor are declared to be the guardians of such poor children as are bound out pursuant to statute, to take care that the

terms of the indentures or contract, and the agreements therein contained, be fulfilled, and that such child be not ill used; and they are directed to inquire into the same, and to redress any grievance in such manner as is prescribed by law. 1 *N. R. L.* 136. § 5.

An appointment of overseers made on a *Sunday*, will be quashed. *Coup.* 139.

If the appointment of the overseers be made by *two* justices only, it will be bad; so it will be bad, if made by three, *separately*; for, where magistrates are to execute a judicial act, they must meet and execute it together. 3 *Term Rep.* 38.

As our statute, like the English, requires the appointment to be made under the *hands and seals* of the justices, *parol* evidence will not be admitted to prove an appointment of overseers. 1 *Str.* 101.

The statute also authorizes and directs the overseers, to loan out, on lawful interest, the money that shall come into their hands, as overseers of the poor, over and above the sum which the overseers, supervisor and town clerk, for the time being, or a majority of them, shall deem necessary for the support of the poor of such town, during the time the overseers shall continue in office, to any inhabitant of the town, who may apply for, and give good security for the repayment of the same, which security shall be approved of by the supervisor or town clerk. 1 *N. R. L.* 289. § 27.

And the overseers shall procure, at the public charge, a book, wherein the names of all poor persons, ordered to be relieved as aforesaid, shall be registered, with the day and year when they were first admitted to have relief, the weekly or other sum or sums of money allowed by the order for their relief, and the cause of such necessity; and no person shall be entered in the poor books, or receive relief from the overseers without such order. 1 *N. R. L.* 289. § 28.

And in case any overseer shall enter in the poor books, and relieve any poor person without such order, he shall forfeit and lose the money and goods paid and distributed to such poor person, nor shall any allowance be made to him for the same in passing his account. *Ib.*

II. Of raising taxes for the support of the poor.

By statute, the majority of the freeholders and inhabitants, assembled at annual town meetings, shall determine and agree upon such sums as they may think proper, for the purpose of maintaining their poor in the ensuing year, of which the town clerk shall make full and proper entries in the town book, and shall, as soon as conveniently may be, deliver a true copy of such entry, certified under his hand, to the supervisor of the town, who is required to lay the same before the supervisors of the county, at their then next meeting, in order that the same may be raised in such town for the support and maintenance of the poor thereof. 1 *N. R. L.* 287. § 23.

And these sums may be raised as well at a special as the annual town meeting. 4 *Vol. L. N. Y. b.* 176. § 1.

III. 1. *Of relieving and maintaining the poor.*

2. Of relations maintaining each other.
3. Of relieving deserted families.
4. Of children born of slaves, in certain cases.
5. Of the families of soldiers and sailors.

1. *Of relieving and maintaining the poor.*

By the statute for the relief and settlement of the poor, passed the 3th April, 1813, it is enacted, that every city and town shall support and maintain their own poor. 1 *N. R. L.* 279. § 1.

And when a poor person belonging to a city or town, shall apply for relief to any overseer of the poor of such city or town, the overseer shall make application to a justice of peace of the city or of the county in which such town shall be, which justice and overseer shall inquire into the state and circumstances of the person applying, and if it shall appear to them that the person is in such indigent circumstances as to require relief, then the justice shall give an order in writing to the said overseer, to make such allowance weekly, or otherwise, to any such poor person as they, in their discretion shall think the necessities of such poor person shall require; and the overseers shall make no other or further allowance than what by the order shall be directed; which order shall be a sufficient voucher for the payment of so much money by the overseers, and shall be allowed in adjusting their accounts. *Ib.* 287. § 25.

And if any poor person not belonging to, or not having gained a settlement in any city or town, shall apply for relief, as aforesaid, the overseer shall proceed in the like manner as is above directed, and if the overseer and justice, to whom the application is made, shall find that such poor person is not able to maintain himself, and that he is so sick, or otherwise debilitated, that it would be improper immediately to remove him, or when it shall be found impossible to make any order of removal, the justice shall give an order, in writing, to the overseer for the support of such poor person, in like manner as if he belonged to the city or town, which order shall be a sufficient voucher for the payment of so much money by the overseer, and shall be allowed in the adjustment of his accounts. *Ib.*

Upon this section of the act, it has been decided, that the act does not require two justices to unite in making the order, but if it be made by two, or more, instead of one, that circumstance cannot weaken it, nor are the overseers or either of them, to unite in making it, for the order is to be made in writing by the justice upon the overseer. Nor is it requisite that the overseer and justice should inquire together, into the condition of the pauper, because they are not to do any joint act. The order is to be the exclusive act of the justice. 3 *John. Rep.* 324, 325.

So the justice, it seems, may designate the physician to attend upon the pauper; and the overseer will have no right to act in opposition to the order. 12 *John. Rep.* 352.

Where security is given by a bond for the maintenance of a bastard child or helpless pauper, a previous order of a justice of the

peace is not necessary : and the party, giving the bond, and having made a payment in pursuance of it, is concluded from alleging that the child's settlement was elsewhere. 1 *John. Rep.* 486.

Under the British statute, which directs that orders be taken for the *necessary relief of the lame, impotent, &c. and others, being poor, &c.* it has been determined, that the justices have no power to order the overseers to pay any money but for the relief of the poor ; and that they therefore cannot order them to pay money to a surgeon or to a nurse for attending a pauper. 1 *Bott. Const's. ed.* 355.

For such persons have a remedy by acting against the officers by whom they were employed. 2 *Barnard*, 207. 247.

And it has been determined, where an order of relief was to pay unto the person in whose favor it was made, the sum of one shilling and six-pence *weekly, and every week*, that the sum thus ordered to be paid was due at the beginning of the week. 1 *Term Rep.* 316.

And by section twenty-three it is further made the duty of the overseers, to keep the accounts of money expended, under the latter clause of the section, separate and distinct from other expenditures, and these are declared to be a public and necessary county charge. 1 *N. R. L.* 288.

And whenever any poor person, legally settled in a city or town, and maintained at the public charge, shall become *lunatic or insane*, it shall be lawful for the overseers, by and with the consent of the common council of the city, or of two justices of the peace of the county, to contract with the governors of the New-York hospital, for the maintenance and care of such lunatic, on such terms as they may deem meet, and to transport such lunatic to the hospital. *Ib.* § 26.

And the overseers shall enter in the poor books, the name of such lunatic, the weekly or other sum agreed to be paid for his or her support, and the costs and charges of removing such lunatic to and from the hospital. *Ib.*

The *settlement* of such lunatic shall remain the same as before removal ; and none but *lunatic or insane* persons can be removed to the hospital. *Ib.*

And it is made lawful for the overseers of the poor of Albany and Hudson, with the consent of the common council ; and for the overseers of the poor of any town, and two or more justices of the county, with the consent of the major part of the freeholders and inhabitants of such town, to be signified at their annual town meeting, and at the charge of the town, to be ascertained, assessed and levied as aforesaid, to build, purchase or hire, some fit and convenient dwelling-house or houses in such town for the lodging and accommodation of the poor thereof ; and also to purchase necessary materials for setting such poor persons to work, and there to maintain and employ them, and to take the benefit of their labor and services, for the better maintenance and relief of such poor persons who shall be there kept and maintained, and to appoint such keepers from time to time as they shall think proper. 1 *N. R. L.* 290. § 29.

And in case any poor person claiming relief, where such house or houses shall be so provided, shall refuse to be lodged, kept to work and maintained therein, they shall be put out of the poor book, and shall not be entitled to receive any relief from the overseers. *Ib.*

And where any town may be too small to build, purchase or hire

such house or houses, it is made lawful for the overseers and justices, with the consent of the major part of the freeholders and inhabitants of two or more towns within any county, to be signified at their annual town meetings, to unite in building, purchasing or hiring such house or houses for the keeping and maintaining of the poor of such towns; and also to purchase necessary materials for setting them to work, and there to maintain and employ them, and to take the benefit of their labor and services for the better maintenance and relief of the poor therein, and to appoint such keepers thereof from time to time as they shall think proper. *Ib.*

And in case any poor person claiming relief of any of the towns so uniting, shall refuse to be lodged, kept to work and maintained as aforesaid, they shall be put out of the poor book, and shall not be entitled to receive any relief from the overseers of any such town. *Ib.*

And it is also made lawful for the overseers and justices of any town, with the consent of the major part of the freeholders and inhabitants of a town where such house is built, purchased or hired for the purposes aforesaid, to be signified at such annual town meeting, to contract with the overseers of the poor and justices of any other town, for the lodging, maintaining and employing of any poor person belonging to such other town, as to them shall seem meet. *Ib.*

And in case any such poor person shall refuse to be lodged, maintained and employed in any house so contracted for, they shall be put out of the poor book, and shall not be entitled to ask or receive any relief from the overseers. *Ib.*

If a pauper, wanting relief, refuses to go into the poor house, the overseers may refuse the payment of any allowance that may be ordered by the justice. *Caldecot*, 76. 1 *Bott. Const's ed.* 358.

But it has been settled, under the statute of 9 *Geo. 1. c. 7.* which, like this of ours, denies relief to such poor persons as refuse to go into the poor house, that it only extends to the person for whom the relief is asked; and therefore, that persons applying for relief for their infant children, *but not for themselves*, were entitled to such relief if they refused to go into the poor house. 3 *Will. Just.* 683. *Caldecot's Cas.* 68. 3 *Term Rep.* 637.

So a person who applies to the parish for relief for one of his children, but not for himself, is entitled to such relief, though he refuse to go into the workhouse. 1 *Doug.* 331—333.

2. Of relations maintaining each other.

By statute, the father and grandfather, mother and grandmother, being of sufficient ability, of any poor, blind, lame, or decrepit person, not being able to maintain himself, and becoming chargeable to any city or town; and the children and grandchildren, being of sufficient ability, of every poor, old, blind, lame or impotent person, not being able to maintain himself, and becoming chargeable as aforesaid, shall, at their own charge, relieve and maintain every such poor person in such manner as the justices of the city or county where such sufficient person shall dwell, at their general sessions, shall order and direct, on pain of paying one dollar and twenty-five cents for each

person so ordered to be relieved, for every week such order shall not be obeyed. 1 *N. R. L.* 286. § 21.

And to be sued for and recovered with costs of suit by the overseers of the city or town to which such poor person shall be chargeable, for the use of the poor thereof, in the manner directed with respect to costs and charges upon an appeal. *Ib.*

This statute extends only to natural relations, and not to relations in law. 1 *Bott. Const's ed.* 577. 2 *Ld. Raym.* 1454. 1 *Str.* 190.

And therefore a man is not obliged to maintain his son's wife, nor his wife's children, nor his wife's mother. 1 *Str.* 190. *Fortes.* 313. 1 *Bott. Const's ed.* 524, 5.

Neither doth the statute extend to reputed relations: therefore the reputed grandfather of a poor orphan cannot be ordered to maintain it; for if the child be a bastard, it is clearly not within this clause of the statute. 2 *Bulst.* 344.

And it seems that in default of one relation, another may be compelled to relieve the pauper; as where the father is living and unable, the grandfather is chargeable. 16 *Vin.* 423.

The justices of the city or county where the party dwells on whom the order is made, have an exclusive jurisdiction. 2 *Bulst.* 344.

And the order must state that the person on whom it is made is within the jurisdiction of the sessions; for it is a general rule, that where a statute gives a jurisdiction, the justices ought to shew the person to be within the jurisdiction which they have exercised over him. 1 *Bott. Const's ed.* 317.

It must state also that he is of sufficient ability. *Cases of Set.* § 2.

Also the order must adjudge that the person to be relieved is poor, or, &c. and unable to maintain himself, and chargeable to the town; otherwise he will not appear to be within the statute. 1 *Ld. Raym.* 699. 16 *Vin.* 424. *Foley*, 47. *Set. Poor*, 11.

If the order of maintenance is not obeyed, the party upon whom it is made, may be indicted for his disobedience. 2 *Bur. Rep.* 799.

3. Of relieving deserted families.

It is made lawful by statute for the overseers of the poor, where any father or husband shall run away and leave his wife or children, or any widow, her child or children, a charge to the town, to apply to any two justices of the city or county where any estate, real or personal, of such father, husband or widow may be, and by warrant of the said justices (who are required to issue the same) to seize the goods and chattels, and to let out and receive the annual rents and profits of the real estate, towards the maintaining the wife or children so left; and as soon as the seizure shall be allowed and confirmed by the sessions, it shall be lawful for the said overseers, or any two of them, as often as the case may require, to sell so much of the goods and chattels at public vendue, and to receive so much of the said rents and profits as shall be ordered by the sessions, and to apply the money arising thereupon towards the maintenance of such poor family or person so left. 1 *N. R. L.* 286. § 22.

And the overseers are to be accountable to the general sessions for all such monies, rents and profits. *Ib.*

If the justices and overseers of the poor, seize the property of a person under this section of the act, on the ground of his having run away, leaving his wife and children a charge to the town, it is an admission of his being legally settled in that town, and they are concluded by the proceeding from ordering his removal afterwards to another town. 14 *John. Rep.* 365.

4. *Of children born of slaves, in certain cases.*

By statute, every child born of a slave after the fourth day of July, 1799, is to remain the servant of the owner of its mother, if a male, until the age of twenty-eight years, if a female, until the age of twenty-five, in the same manner as if bound by the overseers of the poor. 4 *Vol. L. N. Y. b.* 156. § 4.

And if any person, who is entitled to the services of such child, shall neglect to teach it to read, or to school it, as the act directs, "the overseers of the poor of the city or town, may, and it shall be their duty, forthwith to bind out such child, until it shall have arrived at the age of 21 years, in the manner described by the 4th and 5th sections of the act concerning apprentices and servants." *Ib.* § 5.

So also the owners are to bind out, in manner aforesaid, every such child, released from servitude, by reason of the name, age and sex of the child not having been recorded in the clerk's office of the city or town, according to the provisions of the act. *Ib.* § 6.

And the children of slaves, born between the 4th day of July, 1799, and the 31st day of March, 1804, and who shall have been duly abandoned, previous to the last mentioned day, shall continue to be provided for at the expense of the state, according to the then existing laws; and no contract, by any overseers of the poor, for the support of any person so abandoned, made before the 26th day of March, 1802, according to the then existing statutes, shall be affected by this act. *Ib.* § 19.

And all persons heretofore manumitted by the state, and formerly the slaves of persons whose estates have been forfeited, and who were slaves at the time of such forfeiture, and who then and since have resided, and still reside in this state, and are unable to support themselves, shall be maintained as paupers, by the overseers of the poor of the city or town in which they shall reside, at the expense of the state. 4 *Vol. L. N. Y. a.* 37.

5. *Of the families of soldiers and sailors.*

It shall not be lawful to remove from any city or town, the family of any person who is or may be called into militia service of this state, or of the United States, during the time of his actually being in such service, and for thirty days thereafter, except when such family shall have moved into such city or town since such person was ordered into such service. 3 *vol. L. N. Y. c.* 14. § 1.

And the overseers of the poor of the city or town, in which the family resided at the time such person was ordered into the service, shall afford the same relief to his family during his absence, as aforesaid, as if he was legally settled in such city or town. *Ibid.* § 2.

And the expense of supporting the family of such person, not legally settled in the city or town, and *all the expense of supporting the family of any person who has or may enter into the army or navy of the United States, or into the regular service of this state, who has no legal settlement in this state, shall be a charge upon the city or county in which they are found to reside; and the city or county treasurer of such city or county may charge the expense thereof in his account with the state treasury, which the comptroller is hereby directed to allow.* *Ib.* § 3.

IV. Overseers' accounts.

Overseers of the poor, as has been already mentioned, are to procure, at the public charge, a book, wherein the names of all poor persons ordered to be relieved shall be registered. 1 *N. R. L.* 289. § 28.

And they are required to enter in the said poor books all monies received, laid out and disbursed by them for the use of the poor, and also all matters transacted by them relating to their office. *Ib.*

On every last Tuesday, next preceding the annual town-meeting, in March, these books of accounts are to be laid before the town clerk, supervisor, and justices, to be audited, who are to make report thereof at the next annual town-meeting, that such further provision for the poor may be made as may be found necessary. *Ib.*

Overseers of the poor shall annually, within fifteen days after the termination of their offices, exhibit to their successors a just and true account of all the monies by them respectively received and expended for the use of the poor, and in what manner, together with an account of the earnings of the poor by them employed; which the overseers, together with the supervisor and justices, residing in the city or town, or the major part of them, shall, as soon as conveniently may be, examine and audit; and the overseers so going out of office shall, on auditing such accounts, pay all the balance in their hands to their successors; they shall also, at the time of exhibiting their accounts, deliver to their successors all books of accounts, registers, and other papers relating to the poor; and if any one shall refuse or neglect to exhibit such account, pay over such monies as remain in his hands, or to deliver up such books, registers, and papers, he shall forfeit 250 dollars over and above the balance remaining in his hands; to be recovered with costs by the overseers, for the use of the poor. 1 *N. R. L.* 291. § 30.

And if, upon auditing such accounts, there shall appear to be a balance due to the overseers going out of office, or either of them, the same shall be paid by their successors out of the first monies which shall come into their hands as overseers. *Ib.*

And it shall be lawful for the overseers to recover against their predecessors in office, and each of them, their executors or administrators, all such sums of money as shall appear upon such audit to be due from them respectively, to the city or town, in an action for money had and received, to the use of such city or town, with costs of suit, in any court having cognizance thereof, or to have actions of account against any former overseers, his executors or administrators. *Ib.* § 31.

And no such action shall be abated or discontinued by death, or expiration of the office of any such plaintiffs, but shall be prosecuted by their survivors and successors in office. *Ib.*

And such suit shall always be brought by and in the name of the overseers for the time being. *Ib.*

And the obligations taken by overseers of the poor, for securing the payment of money loaned, are to be audited and allowed as so much money, and paid over to their successors in office, who are authorized to collect the same in their own names, and with the approbation of the supervisor or town clerk, to reloan the same. *Ib.* § 27.

Mandamus lies to compel overseers of the poor to deliver over books and accounts to their successors in office. 1 *Wills*. 305.

V. Settlement of the poor.

1. By birth.
2. By parentage.
3. By marriage.
4. By residence and notice.
5. By renting a tenement.
6. By serving an office.
7. By payment of public taxes.
8. By apprenticeship and service.
9. By estate.
10. By residence of mariners and foreigners.
11. Concerning those whose settlement cannot be discovered.

1. Of settlement by birth.

By statute, a bastard child shall be deemed and adjudged to be settled in the city or town of the last legal settlement of its mother. 1 *N. R. L.* 280. § 3.

It is agreed that a *legitimate* child gains no settlement by its birth, where the place of the parent's last legal settlement is known; but that such child must follow the settlement of the parent. *Carth.* 433.

But where the place of the parent's last legal settlement is not known, the place of the child's birth is *prima facie* the place of its settlement until a settlement by parentage, or otherwise, can be found out. *Foley*, 265. 14 *John. Rep.* 333.

Therefore, on a question respecting the settlement of a person, if the appellants prove the place of the birth, this is proving a primary place of settlement, and sufficient to throw the burthen of proving a different place of settlement by parentage, or otherwise, upon the respondents. 2 *Bott. Const's ed.* 16, 17.

And the primary settlement by birth, may be vacated by the parents' gaining a new settlement; as where a child was born at *Cummer*, the father, while the child was under seven years of age, removes to, and gains a settlement in *Milton*; it was held to be a settlement for the child also. 6 *Mod. Rep.* 87.

An adult who leaves her father's house, and goes into service, becomes thereby emancipated, and is not entitled to a settlement gained afterwards by the father. 6 *Term Rep.* 247.

So also a son, of age, and married, continuing to live with his father, does not follow a settlement subsequently acquired by the father in another parish, to which the son also accompanied him as part in fact of his household. 1 *East*, 526.

2. Of settlement by parentage.

If the settlement of the parents be known, there the children are settled, let the birth be where it will. 3 *Salk.* 259. *Fortes.* 313. 1 *Sess. Cas.* 18. *Comb.* 380.

And there is no difference in this respect between an idiot and any other poor child. 2 *Salk.* 427.

And though the father die before the child is born, yet the child shall be settled where the father was settled before his death. 19 *Vin.* 382.

Also it has been held, that though the place of a poor child, when the father has got no settlement, is the place of its settlement; yet where the father has gained a settlement, his children, though born in another parish, shall be looked upon 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 require, as in his life time, supposing they have gained no settlement of their own. 1 *Str.* 580. 2 *Ld. Raym.* 1332. *Comb.* 380.

And this right which children have to the father's settlement, is not taken away after his death, by their mother's gaining a new settlement in her own right by marriage. *Carth.* 449. 2 *Salk.* 482. *Bur. Set. Cas.* 3.

And upon this principle, the children of the first husband, if the place of his settlement is unknown, shall go to the place where the mother was last legally settled in her own right, and not to the place of her second husband's settlement. *Bur. Set. Cas.* 2.

But nurse children may be sent with their mother for nurture; as in the case of the *Q. v. Cunmer, Tr.* 1 *Ann.*—*Powell, J.* said that if a widow having children under seven years of age, marry a husband of another parish, they shall go with her for nurture, but shall not gain a settlement there, and shall return when they are seven years old; for she cannot gain a settlement for them, being under coverture, and she only gains a settlement for herself, as being part of her husband's family. *Salk.* 528.

So in another case it was said, that if after the husband's death, the wife shall marry 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 husband's family, and therefore gain no settlement thereby in the parish where the father-in-law is settled. 2 *Ld. Raym.* 1473.

Also it has been agreed, that when children are sent with their mother for nurture, they are to be supported at the expense of the parish where their legal settlement is. *Bur. Set. Cas.* 2.

But if the father remove into a different town, and there gain a new settlement, his children under the age of seven years, and such other of them as have not gained settlements in their own right, shall have the settlement thus newly acquired; for where legitimate children have gained no settlement, but continue part of the father's family, they shall follow the father's settlement. *Salk.* 528. 2 *Sess. Cas.* 150. *Foley*, 257.

And if nurse children be removed to a place, as their father's primary settlement, it is incumbent on the town to which they are removed, upon an appeal against the order of the removal, to shew that their derivative settlement has been changed by a new settlement, subsequently gained by the father. 1 *Term Rep.* 164.

As a legitimate child has a right to its parents' settlement, the father's shall take effect first; but where the father has none, the child must go to its mother's settlement; for in such case, if the mother's settlement can be found, the child shall have the benefit of it. *Bur. Set. Cas.* 2. 367. 482. *Fortes.* 314. 2 *Sess. Cas.* 112, 13. *Foley,* 251, 2.

And the mother's settlement shall not only be the settlement of her own children, but of her grandchildren also, if their respective fathers have no settlement. 2 *Ld. Raym.* 1473. *Bur. Set. Cas.* 49. 64.

As where a woman settled at *St. Katharine's*, married a man who never gained a settlement; by whom she had a son born at *Bethnal Green*, which son afterwards married a woman settled in the parish of *St. Leonard Shoreditch*, and had several children by her. It was contended, that an acquired settlement is to be preferred to a derivative one, and that therefore these children ought to follow the acquired settlement of their mother; and not their father's, which was only a derivative one from their grandmother. But the distinction was not allowed, for the court said, there is no difference between an acquired and derivative settlement. And the rule laid down was this, that the child's settlement follows that of its father, if the father's can be found; and that no recourse shall be had to the mother's settlement until that of the father can be traced no farther; and these children were adjudged to be settled at *St. Katharine's*. *Bur. Set. Cas.* 482.

Also if the mother, after her husband's death, acquire a new settlement in her own right, such new settlement is communicated to such of her children as have not gained a settlement for themselves; as where a man, legally settled at *St. Katharine's*, died, and left a widow with six children; the widow afterwards gained a settlement in *St. George's* by renting a tenement there: the question was, whether the children should be settled where the father was last settled, or have a settlement with their mother in *St. George's*?—By the court. There is no distinction between the settlement of children with the father or mother, for they are as much her's as the father's, and nature obliges her as much as the father to provide for them; so does the law; and the reason why children shall not gain a settlement where the wife gains a settlement only by intermarriage, is, it is not her family, but her husband's, and she cannot give the children sustenance without the husband's leave; these children certainly gain a settlement with their mother. 2 *Ld. Raym.* 1474.

But a mother, during the life of her husband, cannot communicate a settlement to her children, different from that which they derive from their father by parentage, although the father has run away; for the father, whilst alive, is the head of the family; and the children must derive their settlement through him. Nor can a *feme covert*, by residence, gain a settlement for her husband. 2 *Bott. Const's ed.* 36. 2 *Sess. Cas.* 182.

It is agreed, that children shall continue with their parents as nurse children and part of their family, until seven years of age, and that during that time, they of necessity must follow the settlement of the parent, and cannot gain one in their own right; but after seven years of age, they may gain a settlement by their own act. 2 *Salk.* 470. 2 *Bott. Const's ed.* 25. *pl.* 50. *Cas. Set. & Rem.* 17.

As by apprenticeship, or residence; or by any other means, whereby an independent settlement may be acquired.

And, therefore, when children are removed in consequence of their father's settlement, their ages must be set out, to shew they are of such tender years as not to have gained a settlement for themselves, or there must be an express adjudication of their having gained no other settlement. 2 *Salk.* 470. 2 *Bott. Const's ed.* 25.

And a child, who, on the removal of his father into another town, is left behind, and continues to work for himself, is divided from his father's family, and cannot derive a new settlement from any that his father may subsequently acquire. 1 *Str.* 438.

So a son who, when 19 years of age, leaves his father's family and goes into another town, where he marries and has children, is emancipated, and cannot derive a new settlement from any that may be subsequently gained by his parent. 2 *Str.* 831. 2 *Sess. Cas.* 129. 2 *Bott. Const's ed.* 41.

So if a son, after 21 years of age, marry and live separate with his wife and family from his father, in the same town, he is so far emancipated, that the father cannot communicate to him any new settlement subsequently acquired. *Bur. Set. Cas.* 270.

So if a son enlist himself as a soldier, he thereby emancipates himself from his father's family, and the father cannot communicate to him any new settlement that he may subsequently gain. *Bur. Set. Cas.* 638.

But a son, who, at 15 years of age, binds himself apprentice for four years, serves out his time, and works about the country in the way of his business, but who goes to his father's house whenever he pleases, keeps his holiday clothes there, and considers it as his home, is not emancipated from his father's family. *Bur. Set. Cas.* 806.

And a nine or ten year's residence of a child, by the direction of his father, in a friend's house, for the purpose of support, is not to be considered an emancipation, so as to prevent his following his father's settlement. *Caldecot's Cas.* 284.

So a boy hired out by his father several years successively, and never living with him, but the father receiving his wages, is not emancipated; but continues to follow the father's settlement acquired after the hiring out. 2 *Bott. Const's ed.* 54.

So a child who leaves its father's family when only five years old, and lives with different relations till ten, is not emancipated; but shall follow the settlement of the father, if it has not gained one in its own right. 3 *Term Rep.* 114.

For a child is not emancipated so as to lose the benefit of any new settlement acquired by his father, until he comes of age, or marries, or until he has gained a settlement in his own right, or until he has contracted a relation (as in the case of a soldier) inconsistent with the idea of his being part of his father's family. *Id.*

And, though a child be emancipated by any of the means aforesaid,

yet, unless he gains a settlement in his own right, he shall have the settlement which the parent had at the period of emancipation. *Bur. Set. Cas.* 444.

The settlement of a person attainted, acquired before the attainder, is communicated to his children born afterwards. 6 *Term Rep.* 116.

3. *Of settlement by marriage.*

Where a marriage is legal, the settlement of the husband shall, by the intermarriage, be immediately communicated to the wife. 3 *Salk.* 256. *Bur. Set. Cas.* 367.

A cohabitation as man and wife for 30 years, is such a presumption of marriage, as will entitle the children of the parties to the settlement of their parents. 2 *Bur. Set. Cas.* 508.

And on the removal of a woman to her supposed husband's settlement, the illegality of the marriage may be proved by the man himself, or by his real wife, and the justices are to judge of their credibility. 2 *Bott. Const's ed.* 81.

But the fact of marriage cannot be inquired into after an order of removal, stating the parties to be husband and wife, if such order be not appealed against. *Bur. Set. Cas.* 168. 2 *Bott. Const's ed.* 74.

And if a man and woman be certified as husband and wife, the legality of their marriage cannot be controverted by the certifying town. *Bur. Set. Cas.* 253. 2 *Str.* 1233. 2 *Sess. Cas.* 391.

And it is not necessary, for this purpose, to prove a marriage in fact; evidence of cohabitation, reputation, and other circumstantial proof, is sufficient. 4 *Bur.* 2057. *Black. Rep.* 632.

And it has been agreed, that a wife is to be sent to her husband's settlement, though she never lived with him. 1 *Sess. Cas.* 111.

So a widow was removed to the deceased husband's settlement, though she had never been there, and it was held well. 3 *Sess. Cas.* 116.

And an adjudication of the husband's settlement is sufficient to send the wife with him. 1 *Str.* 527.

And during the coverture, the wife cannot gain a different settlement from her husband's. *Bur. Set. Cas.* 412.

But if the husband have no settlement, the wife's maiden settlement is not extinguished by the coverture. *Cas. Set. and Rem.* 89. 1 *Sess. Cas.* 80. *Fortes.* 217.

But is only, as it were, suspended during the time that she continues under the power and protection of her husband, and is maintained and supported by him. *Fortes.* 217. *Bur. Set. Cas.* 367.

Therefore, when left by her husband, she may be removed to the place where her settlement was before marriage; and this, whether the husband be living or dead. *Foley*, 288. *Bur. Set. Cas.* 367, 8. 1 *Str.* 693.

And the wife may be removed, alone, to her husband's settlement, unless it appear that they are thereby separated from each other. 1 *Str.* 544.

As if the husband was in the town from which she was removed; which, it seems, would vitiate the order; but this must appear, for

the court are not to intend a thing to be wrong unless it appear so. 1 Str. 544. Bur. Set. Cas. 153. 162.

And the removal of a woman, *as a wife*, imports that it is to the husband's settlement; and if the order is not appealed from, it is conclusive. Caldecot's Cas. 42. 1 Doug. 45.

But the wife cannot be removed from her husband to the town in which she is settled in *her own right*, though the husband has no settlement; for it is not like the case of the husband being dead, or having left his wife. Bur. Set. Cas. 813.

An order of removal of J. S. and B. his wife, made upon the *examination of the wife*, adjudged that they lately came into the parish of K. and are likely to become chargeable to it, and were last legally settled in M. is good upon the face of it, and conclusive upon the parish of M. as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as B. S. *single woman*, from M. to B.—M. cannot shew in evidence that the marriage was null and void. 7 East. 377.

4. Of settlement by residence and notice.

By statute, if any person (other than those who shall have obtained a legal settlement by renting a tenement, executing an office, paying taxes, serving as an apprentice or servant, or by purchase of an estate; or who shall be legally settled by residence—in case of mariners or foreigners) shall, within forty days after coming into any city or town to reside, deliver a notice in writing to any two overseers of the poor of such city or town, of the house or place of his abode, and the number and names of his family, if he have any, (which notice the overseers are required to cause to be registered within forty-eight hours after receipt thereof, in the book kept in such city or town for the accounts of the poor) and the overseers shall not, within twelve months after such notice, cause such persons to be removed out of such city or town, in the manner mentioned in the statute, then the person so giving notice, shall be deemed and adjudged to be legally settled in such city or town. 1 N. R. L. 280. § 5.

And if any overseer shall refuse or neglect to register, or cause to be registered, such notice, in the time and manner aforesaid, he shall, for every such refusal or neglect, forfeit five dollars to the use of the party aggrieved, to be recovered, with costs of suit, in any court having cognizance thereof. 1 N. R. L. 280, § 6.

It is clear, from the words of this act, that it does not prevent persons from gaining a settlement by any of the other means thereby permitted, without notice; as by renting a tenement, executing an office, &c.

And under the British statute, concerning notice, &c. it has been held, that a person coming into a town to reside upon his own estate is not within the act, and consequently cannot be removed; for a man having land in a parish will not enable him to give notice for the purpose of gaining a settlement; but if a person live in a parish where he has land, he may gain a settlement without notice; for the statute never meant to banish men from the enjoyment of their own lands. Salk. 524.

The notice for the purpose of gaining a settlement must be in wri-

ting; for the words of the statute being positive, no collection of facts, however strong, can be tantamount to a notice in writing. *Foley*, 110. 23. 2 *Salk*. 476. 2 *Str*. 835.

And it must not only be in writing, but the other ceremonies required by the statute, must be observed. 5 *Mod. Rep.* 454.

As to the time and manner of residence, it has been held, that living forty days successively was not necessary; and *Fortescue*, J. said, that living forty days off and on, is making the case stronger than living forty days together in a parish. 2 *Ses. Cas.* 40. 1 *Str.* 579.

So it was held that forty days' residence in the whole, though not successive, is sufficient to gain a settlement. *Bur. Set. Cas.* 125.

5. Of settlement by renting a tenement.

By statute, every person who shall have come to inhabit in any city or town, and shall actually and *bona fide* have rented and occupied a tenement, of the yearly value of thirty dollars or upwards, for two years, and actually paid such rent, shall be deemed and adjudged to have obtained a legal settlement in such city or town. 1 *N. R. L.* 279. § 2.

And by a subsequent provision in the statute, no certificate person shall be prevented from gaining a settlement under this clause of the act. 1 *N. R. L.* 283. § 14.

It is enacted (4 *Vol. L. N. Y. b.* 176. § 2,) "that from and after the passing of this act, no person removing from, or out of any other state, or from Upper or Lower Canada, to reside or inhabit in any city or town within this state, shall be deemed or adjudged to have gained a settlement in such city or town, unless such person, shall actually and *bona fide* have rented and occupied a tenement, of the yearly value of one hundred dollars or upwards, for four years, and actually have paid such rent."

This act was passed April 5th, 1817. The provisions of this act will be found, also, under succeeding divisions of this subject. The adjudications of the supreme court, in relation to this matter, have been founded upon the old law.

It has been held, that a water mill, a piece of pasture ground, and a house within the rules of a prison, are tenements. *Salk*. 536. 3 *Term Rep.* 772. 1 *Bott. Const's ed.* 146.

So the hiring of twenty cows at so much *per annum* each, with privilege to feed them in particular fields for a certain part of the year, during which time no other cattle were to depasture there, has been held to be a tenement under the British statute. 4 *Term Rep.* 671.

So the renting of unfurnished lodgings at so much a year, is a tenement, although the apartments are not distinct from the house. 2 *Bott. Const's ed.* 152.

So a shop occupied separately from the house to which it belongs, is a tenement. *Bur. Set. Cas.* 798.

Also a furnished room, with fire found, rented by the week for a particular purpose, and the landlord to have the use of it at other times, is held to be a tenement. 2 *Bott. Const's ed.* 154.

But these cases have been decided under the statute of 13 and 14

Car. 2. c. 12, by which a man who comes to settle in any tenement under the yearly value of 10*l.* may be removed in 40 days, otherwise he gains a settlement. So that there may be cases where a tenement, sufficient to gain a settlement under that act, might not be considered sufficient under ours, which requires two [four] years occupancy; but as the words *yearly value* are in both statutes, it is conceived that the cases will generally apply to both.

For the criterion of this method of gaining a settlement seems to be the ability to rent a tenement of the value pointed out by statute. *Bur. Set. Cas. 798.*

And giving security for the rent does not alter the case; for he that has credit to give security, has credit to pay the rent. *1 Ses. Cas. 320. Bur. Set. Cas. 107.*

But this again seems to apply to our statute, only as to what shall be considered a sufficient *renting by the tenant*; for it is further required by the act (and in this it differs from the British statute) that *he shall actually have paid such rent.*

Under the British statute, it has been held, that the tenement necessary to gain a settlement need not be entire; and it is not necessary that it should be taken all of the same landlord; for in the tenant it is but one, and the statute is satisfied, he being of ability to be trusted with a tenement of the described value. *Cas. Set. & Rem. 86. 1 Sess. Cas. 73. Foley. 79.*

And it has been held in *England*, that an entire tenement of the value, &c. lying in different parishes, will gain the tenant a settlement in that parish in which the house stands. *1 Str. 57. 529. 2 Str. 849. 2 Sess. Cas. 130.*

Also that two distinct tenements, taken at different times, and one being in one parish and another in another, will, if they be together of the value of 10*l.* a year, (the value required by the British statute) give the tenant a settlement in that parish in which he resides. *Bur. Set. Cas. 44. 588. 677. 744.*

So, though the tenement is afterwards underlet in part, or in whole, to, and occupied jointly with, another person. *Bur. Set. Cas. 756.*

But if the tenement be occupied by several tenants jointly, each must have an interest in it to the value required, a year: Therefore a house of 16*l.* a year, or a farm of 14*l.* a year, occupied jointly by two persons, each paying half the rent, were held not to be sufficient to gain either of them a settlement. *Bur. Set. Cas. 311. 2 Bott. Const's ed. 184.*

But a farm of 52*l.* a year, rented, occupied, and managed jointly by two tenants, is a tenement of sufficient value to each of them. *Bur. Set. Cas. 398.*

If the renting be fraudulent, though the value be sufficient, it will not gain a settlement. *1 Term Rep. 261.*

It has already been observed, that by the statute of 13 and 14 *Car. 2. c. 12*, a man coming to settle in any tenement under the yearly value of 10*l.* may be removed within 40 days, otherwise he gains a settlement.

And by 9 and 10 *Will. 3. c. 30*, no person who shall come into a parish by certificate, shall be adjudged by any act whatsoever to have procured a legal settlement, unless he *really* and *bona fide* take a lease of a tenement of the value of 10*l.* or, &c.

The reasoning upon these statutes and upon which the foregoing resolutions have gone, seems to be, that, if a person be of sufficient ability to occupy a farm or tenement of the value required, it is the intention of the act to exclude the presumption of his being likely to become chargeable; that whether the taking was distinct or entire, it is the same thing; for his ability is the same, and in him, as has been stated, it is constructively but one tenement: and that whether the taking was in one parish or in two, makes no difference, for he contributes to the poor for the whole somewhere; and the statute has not fixed it to be a tenement in the same parish.

For the better application of these cases, and of this reasoning, to cases hereafter to arise, it may be well again to observe, that by our statute it is required that the person, in order to gain a settlement, *shall actually and bona fide have rented and occupied a tenement of the yearly value of 100 dollars or upwards, for four years, and actually paid such rent.*

Shall actually and bona fide have rented and occupied. &c.] The word "*actually*," as it is here connected with *bona fide*, seems to be nearly synonymous with "*really*," in the British statute, and used with a view to strengthen the expression that the renting, &c. must be *fairly done*; and therefore that it does not bear upon the word "*occupied*," so as to vary its meaning, in a derivative sense, from the common legal acceptation of the word *occupation*, when used to signify *use* or *tenure*; as we say, such land is in the *tenure* or *occupation* of such a man, that is, in his *possession* or *management*.

For four years.] From the time here required, it seems to be inferable, that the ability of the person at the time to rent a tenement of the value required, is less a *criterion* in determining his settlement, than under the British statute, which requires only forty days' residence; yet from the nature of the thing, it appears to be a consideration by no means to be excluded, in any fair construction of the act.

Living on, and working a farm of the yearly value of 100 dollars, in *shares*, for above *two years*, is a renting and paying rent, and the party thereby gains a *legal settlement* in the town. 14 John. Rep. 365.

6. Of settlement by serving an office.

By statute, every person who shall have come to inhabit in any city or town, and shall for himself or on his own account have executed any public annual office or charge in such city or town during one whole year, shall be adjudged to have obtained a legal settlement in such city or town. 1 N. R. L. 279. § 2.

And no person coming to reside by virtue of a certificate is thereby prevented from gaining a settlement under this provision of the act. 1 N. R. L. 283. § 14.

On the 5th of April 1817, it was enacted as follows: "That from and after the passing of this act, no person removing from or out of any other state, or from Upper or Lower Canada, to reside or inhabit in any city or town within this state, shall be deemed or adjudged to have gained a settlement in such city or town, unless such person *shall have executed some public office in such city or town during three whole years.*" 4 Vol. L. N. F. b. 176. § 2.

The party must be legally placed in the office, or he cannot gain a settlement by serving it. *Bur. Set. Cas.* 520.

And a person who serves the office for another, does not thereby gain a settlement; for the statute expressly says, that the office must be executed *for himself and on his own account.* 19 *Vin.* 579.

But though the party who executes the office for another (in cases where it can be legally done) does not thereby gain a settlement, yet he for whom it is executed does. *Caldecot's Cas.* 252.

It is clear that all common annual town officers are first and most obviously within the meaning of the act.

And it seems also, that those who are appointed to execute any other public *annual office or charge* in a town pursuant to any general statute regulations, are equally within the act: such, for instance, as persons appointed to carry into effect rules adopted at town meetings, concerning common lands, fences, and cattle running at large, &c.

For it has been adjudged under the British statute, (which is precisely like this of ours, except that *parish* is used in the place of *city or town*;) that serving the office of *hog-ringer* for a whole parish, being an annual office will gain a settlement. 4 *Term. Rep.* 807.

It seems that *the office need not be a town office, but a public annual office in the town*; as where the sessions had adjudged the settlement of a poor person at *Bisham*, because, when he lived there he executed the office of collector of duties, &c. It was moved to quash it, *because this was not a parish office*, (it being by appointment of commissioners;) besides, it was not stated in the order that this was an annual office, as it must be to give a settlement within the express words of the act.—By the court. The reason why the executing offices gives a settlement without notice, is, because of the notoriety of the thing, of which the parliament thought it impossible but the parish should have notice: *It needs not be a parish office, but a public annual office in the parish*; and as to its not being said that this man executed it for a year, we must take it he did, because it appears, on looking into the statute, that the power to the commissioners is to appoint a person who shall be collector of the duties a year, and then give in his account. It hath been held a settlement in the case of a land tax, and why not in this?—Order confirmed. 1 *Str.* 411. *Foley*, 124.

But executing the office of schoolmaster to a charity school, established by a private donation, was held not to be a settlement, *because a schoolmaster was not an office, but an employment.* *Wils.* 87. 2 *Str.* 1225. *Bur. Set. Cas.* 244.

Executing the office of constable settles a certificate man, 2 *Str.* 1014, but he must be sworn into office, else he gains no settlement by executing it. 2 *Str.* 1199.

7. Of settlement by payment of public taxes.

By statute, every person who shall have come to inhabit in any city or town, and shall have been charged with and paid his share towards the public taxes of such city or town for the space of two years, shall be adjudged to have obtained a legal settlement in such city or town. 1 *N. R. L.* 279. § 2.

Provided, " That the assessment and performance of labor on any highway in any city or town, shall not be considered a tax within the meaning of this act. *Ib.*

It has been determined under the statute of 3 *W. & M.* c. 11, (which in this respect is substantially like ours) that an inhabitant of a parish by paying a tax assessed for the repairs of a *county bridge* does not thereby gain a settlement ; for in such case the whole county is liable, and he pays as one of the county, and not as an inhabitant of the town where he lives. *Cas. Set. & Rem.* 1.

But the payment of a land tax, though not a parochial tax, has been held a *public tax* within the meaning of that statute, when charged and paid within a parochial limit. *Comb.* 410. *Cald. Cas.* 24.

But to entitle the party to a settlement, he must be both assessed to and pay the tax. *Bur. Set. Cas.* 644. 2 *Salk.* 523.

But the assessment, though illegal and void, will, if it be paid, be good for the purpose of gaining a settlement. 19 *Vin.* 386.

So also if the assessment be made on the house, and not expressly on the person occupying it ; or on the occupier of such house, or the farmer of such lands, it is sufficient. 2 *Salk.* 478. 8 *Mod.* 38. *Bur.* 1062.

And if the assessment continue in the rate book in the name of a former tenant, deceased, it is sufficient ; for it is not necessary that the tenant should be rated by *name* ; if he is *virtually* rated and paid it is sufficient. *Cald. Cas.* 85. 103.

And it has been held, that when the land tax rate is paid by the tenant, and no other person is put on the rate, he shall be considered as rated. *Cald. Cas.* 374.

And where both the landlord's and tenant's name appear upon the rate, it is *prima facie* a rating of the tenant ; for the land tax is a tenant's tax, as between him and the public. *Ib.* 276.

But whether the landlord or tenant be rated is a question of fact, to be found by the justices at their sessions. 3 *Term Rep.* 505.

And evidence of the rating may be given without the production of the original rate. *Bur. Set. Cas.* 826.

If the tenant be assessed, and he pay, he will thereby gain a settlement, although it is re-paid to him by his landlord, or allowed in his rent. *Ib.* 415. 488.

And though the landlord expressly agree to pay all taxes, yet if the tenant is rated and pays, he thereby gains a settlement, though he pay it for the landlord, who afterwards re-pays it to him. *Ib.* 522.

And if the rate be paid by a friend of the tenant, in order to save his goods from distress, this, though it is not done at the express instance of the tenant, but only by one of the family, was held equal to payment by the tenant himself. 3 *Term Rep.* 550.

But if the landlord be assessed, payment by the tenant is not sufficient, although the tax is demanded of him ; for the act requires both a *charge* and *payment*, and here is only payment, without charge. *Bur. Set. Cas.* 73. 2 *Sess. Cas.* 122.

Also, if the rate be made *upon the occupier*, payment thereof by the landlord will not gain the landlord a settlement. *Cald. Cas.* 365.

To gain a settlement in a town by residing there, and being charged with, and *paying* taxes in such town for two years, it must appear that the taxes have been actually paid by the pauper, or by an

other at his request. It is not enough that the pauper has paid a tax one year, and that the collector has paid his tax the next year, without his request or authority. Such payment by the collector, being *voluntary*, would give him no right of action against the person charged with the tax, and therefore can never be said to be a payment by the pauper. 14 *John. Rep.* 87.

8. *Of settlement by apprenticeship and service.*

By statute, every person who shall have been bound an apprentice or servant by indenture, or by any deed, contract or writing not indented, and shall, in consequence of such binding, have served a term not less than two years in any city or town, shall be deemed and adjudged to have obtained a legal settlement in such city or town. 1 *N. R. L.* 279. § 2.

The above clause was amended, April 5th, 1817, as follows "That from and after the passing of this act, no person removing from or out of any other state, or from Upper or Lower Canada, to reside or inhabit in any city or town within this state, shall be deemed or adjudged to have gained a settlement in such city or town, unless such person shall have been bound an apprentice or servant by indenture, or by deed, contract or writing, not indented, and shall in consequence of such binding, have served a term not less than seven years." 4 *Vol. L. N. Y. b.* 176. § 2.

If an apprentice be bound to one who has no right to take an apprentice, yet the apprentice will gain a settlement under such an indenture by his service. 3 *Vin.* 29.

Therefore if a person is bound apprentice to a master who is an infant under age, yet the indenture of apprenticeship is not absolutely void on account of the infancy of the parties, but only voidable; and the apprentice serving under the indenture is entitled to the benefit of the apprenticeship, and may consequently gain a settlement thereby. 4 *Term Rep.* 196.

So where a poor boy of fourteen years of age bound himself apprentice for seven years to a weaver—it was argued that as this was not a binding according to the statute, the indenture was void, because an infant could not bind himself; and therefore the pauper could not gain a settlement under it.—But by the whole court. It did gain him a settlement; for an infant may make an indenture for his own benefit. *Foley*, 154.

Under the words *by any deed, contract or writing not indented*, it has been held under the British statute, that the binding must be *by deed*. *Bur. Set. Cas.* 272.

An apprentice is, from the nature of the contract, to remain with the master; he cannot be removed from him by any act, or upon any complaint of the overseers. 3 *Will. Just.* 207. n.

Service, without any fixed time for its continuance, and under a verbal agreement for the payment of wages, does not gain a settlement. 3 *John. Rep.* 15.

But a binding by a voidable indenture, and a service under it for two years, gives the apprentice a settlement in the town in which he served; and it is not competent for the town to object to the validity of the binding. 13 *John. Rep.* 245.

It has also been held in a case where there was a legal binding, though for a less term than is required by that statute (although like ours, it declares all indentures, &c. which are not made conformable to it to be void to all intents and purposes) that it was sufficient to gain the party a settlement; and the court said the indenture was not void, but only voidable by the parties themselves, and by them only if they thought fit to take advantage of it; and not by a third person; it can only be avoided by the master or servant who were parties to it; but not by the parish who have had the benefit of the service of the apprentice. 2 *Str.* 1066. *Bur. Set. Cas.* 91.

And so in another case, though the binding was defective in omitting part of the form required by statute; as where a pauper was bound apprentice by the parish until her age of 21. "When the statute in such case required the binding to be *till she shall come to the age of one and twenty years, or the time of her marriage.*—By the court. It is not void for want of the alternative of marriage; though perhaps not obligatory upon the parties; for it would be extremely hard that a poor child who had served many years under an indenture of apprenticeship, should lose the benefit of her settlement, because the justice's clerk who made the indenture happened to be either ignorant or negligent. *Bur. Set. Cas.* 248.

But it has been held that a parish apprentice cannot gain a settlement under indentures to which the two justices have assented *separately*; for they are for this defect absolutely void. 3 *Term Rep.* 380.

But the assent of two magistrates is sufficiently signified by one of them first signing alone and being afterwards present when the other signs. 8 *Term Rep.* 454.

A binding, and forty days' inhabitation in a parish, gains a settlement under the British statutes; and thereupon it has been adjudged not to be necessary that a person should inhabit forty days together; as where it was stated that *he was up and down three quarters of a year* with his master, the court said there was room to intend he was resident forty days. 1 *Str.* 579. *Cas. Set. & Rem.* 119.

And under that statute, it has also been held, that inhabitation, at different periods, though a new settlement may have intervened, may be connected so as to make a forty days' residence under the indentures; and the settlement shall be in that place where the pauper last lodged. 2 *Bott. Const's ed.* 559. 1 *Term Rep.* 281.

Therefore, by a similar construction, it may be said, that the two [four] years' service required by our statute, need not be together; but that two [four] years' service in the whole in any town, though at different periods, will gain a settlement.

And that the settlement shall be in the town where *two* [four] years' service in consequence of the binding is last completed.

And the settlement does not depend on the settlement of the master; but will be gained, although the master has no settlement. 2 *Salk.* 533.

An apprentice, while the indentures subsist, is *sui juris*, and therefore cannot serve another person without his master's consent. *Bur. Set. Cas.* 441. 542.

But if he serve a third person by an express license from his mas-

ter, it is a service of the original master under the indentures. *Molan's Rep.* 165.

So if he be permitted by his master to work for his own benefit, it shall be considered as a service under the indentures, and the settlement shall be in the town where the service is. *Bur. Set. Cas.* 802. 1 *Str.* 10.

But if he run away from a second master, to whom he has been assigned, and return to the place in which the first master resides, his continuance there as an hired servant, unless it be with the express consent of the master, shall not be considered as service under the indentures. *Bur. Set. Cas.* 182.

But if the master, upon the departure of the apprentice from his service, give him a character to another person, with a view to his being hired as a servant, this shall be considered as a consent to the service. 2 *Bott. Const's ed.* 593.

So if the first master, on his giving the apprentice leave to get another master, recommends him to a particular person in the same trade, a service with that person shall be considered as a service under the indentures. 3 *Term Rep.* 605.

And it is sufficient, although the consent of the master be not given until the service with the second master has commenced. 2 *Bott. Const's ed.* 599.

So also if an apprentice be assigned by the second master to a third, his service is held to be still under the indentures. *Bur. Set. Cas.* 226.

If the master dies, the apprenticeship is thereby determined, it being a personal trust between the master and servant. *Bur. Set. Cas.* 320.

But if the apprentice, on the master's death, goes with the consent of his executors and lives with another person before the term of the apprenticeship expires, it has been held to be a service under the indentures. *Cald. Cas.* 60. 62. 1 *Doug.* 70, 1.

But the indentures cannot be discharged by the consent of the apprentice, if he be under age, for his consent to this purpose is of no validity. *Bur. Set. Cas.* 441.

If the binding is made pursuant to statute, it seems to make no difference whether the person be bound as apprentice or servant; for in either case he comes under the same regulations in this respect.

A contract of apprenticeship may be formed without using the term "apprentice." 8 *Term Rep.* 379.

An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and her master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture. 9 *East.* 295.

9. Of settlement by estate.

By the common law, no person can be removed from his own landed estate, however inconsiderable its value may be; and this law still continues, provided such estate comes to him by inheritance, limitation or devise; or by any operation of law. 3 *Will. Just.* 437. *Salk.* 524.

But by statute it is enacted, that no person shall be deemed to gain a settlement in any city or town, by virtue of any purchase of any estate or interest in such city or town, whereof the consideration for such purchase shall not amount to the sum of seventy-five dollars, *bona fide* paid, for any longer or further time than such person shall inhabit in such estate, and shall thereafter be liable to be removed to the city or town where such person was last legally settled before the said purchase and inhabitancy therein. 1 *N. R. L.* 280. § 4.

And by a subsequent provision in the statute, no certificate person shall be prevented from gaining a settlement by purchasing a freehold of the value of seventy-five dollars or upwards. 1 *N. R. L.* 283. § 14.

By a statute passed April 5th, 1817, it is enacted, "That from and after the passing of this act, no person removing from or out of any other state, or from Upper or Lower Canada, to reside or inhabit in any city or town within this state, shall be deemed or adjudged to have gained a settlement in such city or town, unless such person shall have purchased a real estate in such city or town, of the value of two hundred and fifty dollars, and actually shall have paid for the same." 4 *Vol. L. N. Y. b.* 176. § 2.

It has been clearly settled that the statute of 9 *Geo. 1. c. 7.* (which is like ours in this respect) extends only to cases where a consideration is paid in money, and not to voluntary grants. *Bur. Set. Cas.* 386. 560. 2 *Bott. Const's ed.* 547. 3 *Term. Rep.* 251.

So the surrender of an old lease, and the taking of a new one, was held not a purchase within the statute. *Cald. Cas.* 209.

But a person does not gain a settlement by purchasing an estate, if the grantor has reserved the use and occupation of the whole premises for life; for it is then only the purchase of an estate in remainder, and not a *present interest*, which is necessary to confer on the purchaser a settlement. 4 *Term. Rep.* 177.

If an estate be granted for a pecuniary consideration, and such consideration does not amount to [250 dollars] it will not gain a settlement. 1 *Term Rep.* 241.

But if a man purchase a tenement for [250 dollars] he will gain a settlement, although the greater part of the purchase money was advanced by a friend to whom he mortgaged the premises as a security. *Bur. Set. Cas.* 57.

But the purchase of an estate, subject to a mortgage, is not sufficient for the purpose of gaining a settlement, unless the money actually paid for the equity of redemption amounts to [250 dollars.] 2 *Term Rep.* 12.

And if the original purchase be under [250 dollars] no subsequent improvements will be sufficient for the purpose of gaining a settlement. *Bur Set. Cas.* 553.

But as the party purchasing is incapable of acquiring a settlement, if the consideration money is under [250 dollars,] so also are his children incapable of gaining any derivative settlement in respect of the estate. *Bur. Set. Cas.* 511.

But if the consideration expressed in the deed be under [250 dollars,] *parol evidence* may be given to shew that the real consideration was to the amount required by statute. 3 *Term Rep.* 474.

But accession to an estate will not gain a settlement. 1 *Str.* 476.

Where an estate has been enjoyed nearly *twenty years* without any interruption or claim, the court will not permit the title to the possession to be examined in a settlement case. 6 *Term Rep.* 554.

The term *purchase*, in the English statute, has been decided to mean, a "pecuniary consideration;" therefore a voluntary conveyance, from a father to a son, in consideration of *natural love and affection* and of 10*l.* is not a purchase, and a residence upon it will not give a settlement. 3 *Term Rep.* 251.

Unless the consideration for the purchase of an estate, amounts to 75 dollars (\$250 now) *bona fide* paid, the purchaser will not gain a settlement for any longer time than he inhabits the estate. 10 *John. Rep.* 229.

And whether any or what consideration has been paid may be shown by the overseers, notwithstanding the consideration expressed in the deed of the estate. *Ib.*

And it seems that a mortgage by the pauper to the vendor of the premises sold, to secure the purchase money, is not such a payment of the consideration as will gain a settlement. *Ib.*

So a settlement is not gained by purchase, if no estate known or valid in law passes by the conveyance: as if lands are sold as part of the patent of A. situate in the town of B. and the lands do not lie in that patent, no settlement is gained in B. 11 *John. Rep.* 7.

So also a mere *contract* for the purchase of land will not acquire a settlement. The term "purchase" used in the act, implies that a title must be given; and the consideration to the amount of 75 (now 250) dollars, must be paid. 14 *John. Rep.* 200.

But it is not necessary that the sum of 75 (now 250) dollars should be paid on account of the principal of the purchase money; if part of it has been paid on account of the interest, it will be sufficient to give the purchaser a settlement. 14 *John. Rep.* 470.

And although a title must pass to the purchaser in order to give him a settlement, yet it is not necessary that it should be a legal title; as where the pauper pays the consideration, but the deed is taken in the name of a third person, the equitable estate of the former will gain him a settlement. *Ib.*

So a man seized *jure uxoris*, of land purchased by his wife, gains a settlement by virtue of such purchase. 14 *John. Rep.* 472.

10. Of settlement by residence of mariners and foreigners.

By statute it is enacted, that all mariners coming into this state, and having no settlement in this state, or in any other of the United States of America, and every other healthy able bodied person, coming directly from some foreign port or place into this state, shall be deemed and adjudged to be legally settled in the city or town in which he shall have first resided for the space of one year. 1 *N. R. L.* 280. § 2.

But this section does not apply to any person coming into the city of New-York, from any other state within the United States, unless such person shall first prove to the satisfaction of the commissioners of the alms house and bridewell of said city, that after his arrival therein, he has acquired such requisites to constitute a settlement, as are necessary by the laws of the state from whence he came. *Ib.*

11. *Concerning those whose settlement cannot be discovered.*

If the settlement either by parentage, birth or otherwise, cannot be discovered, it seems that the party ought to be relieved by the town in which he happens to fall chargeable. For where a travelling woman, having a small sucking child, was apprehended for felony, sent to gaol and executed; and the place of the birth of this child not being known, it was sent to the town where the mother was apprehended. This was held right; for that town ought not to have sent the child to gaol, the child being no malefactor. *Dalt. c. 73. § 27.*

So a child left and deserted by its parents, shall be maintained and provided for by the place where it is found; for where a child was left in *Christ's Hospital*, two justices made an order on the overseers of the poor of the parish to receive and maintain the child. This order was quashed, because it was not said that the parents were unknown, or that it was likely to become chargeable. *2 Salk. 485.*

VI. *Of receiving and entertaining strangers.*

If any inhabitant shall receive or entertain in his dwelling house, out house or family, any person who hath not gained a settlement within this state, for fifteen days, without giving notice in writing to one of the overseers of the poor of such city or town, of the name, quality, condition and circumstances of the person so entertained, according to the best of the knowledge of such inhabitant, he shall forfeit *five dollars*, to be recovered, with costs, by any person who will sue for the same; one half, when recovered, to be paid to the overseers, the other to the person who shall sue for the same. *1 N. R. L. 281. § 8.*

And if the person so entertained, shall have remained in any city or town longer than forty days, any two justices of the city or of the county in which such town shall be, may cause such of the inhabitants who shall have entertained such stranger during the term of fifteen days without giving information as aforesaid, to be brought before them, and such inhabitant shall enter into bond to the overseers of the poor, and their successors, in 250 dollars, conditioned that such stranger shall not become a charge to such city or town. *Ib.*

And in case any of them, being, in the opinion of such justices, of sufficient ability, refuse, it shall be lawful for such justices, by warrant under their hands and seals, directed to any constable of such city or town, to cause them to be committed to gaol, there to remain until they consent to become bound as aforesaid. *Ib.*

But if the person so entertaining such stranger, shall not, in the opinion of the justices, be of sufficient ability to become bound, or if they shall not think fit to take such bond, they shall cause such stranger to be conveyed from constable to constable, until he shall be transported to the place of his last settlement, if within this state. *Ib.*

It is further enacted, "That if any person or persons shall bring or remove, or cause to be brought or removed, any poor or indigent person into any city or town within this state, and there leave such poor or indigent person, not having a legal settlement therein, and without legal authority so to do, such person or persons shall forfeit the sum of twenty-five dollars, to be sued for and recovered in an action of debt, by and in the name of the overseers of the city or town

where such indigent or poor person was left, with costs of suit, for the use of the poor thereof." 4 Vol. L. N. Y. b. 177. § 4.

Overseers of the poor who have expended money under an order of two justices, for the maintenance of a pauper, cannot maintain an action on the case against a person who brought the pauper into the town, having no legal settlement in the state, for the amount so expended; but their remedy is under the statute, (1 N. R. L. 281. § 8,) to recover the penalty given in such case. 11 John. Rep. 167.

VII. Of certificates.

By statute, if any person who shall think proper to remove out of any city or town within this state into any other, there to inhabit or reside, and shall at the same time procure and deliver to the overseers, or any one of them, a *certificate*, under the hands and seals of the overseers of the poor, or any two of them, of the city or town of such person's last legal settlement, attested by two or more credible witnesses, thereby owning or acknowledging the person mentioned in such certificate to be an inhabitant legally settled in the city or town mentioned in such certificate (which certificate shall be either acknowledged by the overseers giving the same, or shall be duly proved by the witnesses who shall have attested the execution thereof, or one of them, before any justice of the peace of the city, or of the county wherein the town from whence the certificate shall come shall be, and shall be approved of and subscribed by such justice,) then it shall be lawful for every such person, with his family, if any, upon the delivery of such certificate, to remain in any such city or town to which he shall remove as aforesaid, and to follow any employment within the same; and the overseers shall deliver the certificate to the town clerk of the city or town in which such person shall come to reside as aforesaid, who is required to file and record the same. 1 N. R. L. 283. § 12.

And a certificate, so acknowledged or proved and allowed, shall be deemed in all courts whatsoever within this state, as duly proved, and shall be taken and received as evidence without any other proof thereof. *Ib.*

And whenever any person with his family, if any, or any part thereof, so remaining by virtue of the certificate, shall become chargeable, or be obliged by sickness, or otherwise, to ask relief of the city or town into which he was received as aforesaid, then, and not before, it shall be lawful for any two justices of the city or county into which he was received, to remove and convey him, with his family and children, though born in such city or town, and servants and apprentices not having otherwise acquired a legal settlement there, to the city or town from which such certificate was brought, the overseers of which are in such case required and obliged to receive and provide for him and his family. 1 N. R. L. 283. § 13.

And no person shall be deemed or adjudged, by any act whatsoever of such person, to have gained a legal settlement in any city or town during the time he shall reside there by virtue of such certificate, unless he shall bona fide purchase a freehold of the value of 250 dollars or upwards, or bona fide have rented and occupied a tenement of the yearly value of 100 dollars or upwards, for two [four]

whole years, or shall have executed a public annual office or charge, in such city or town for one whole year. 1 *N. R. L.* 284. § 14. *See also 4 Vol. L. N. Y. b.* 176. § 2. *and the fifth division of this subject.*

And the overseers removing back any certificate person, shall be reimbursed such reasonable charges as they may have been put to in maintaining and removing him, by the overseers of the city or town to which he is removed; the charges having been first ascertained and allowed by two or more justices of the city or county in which the town from which he is removed shall be; to be levied, in case of refusal of payment, by distress and sale of their goods and chattels, by warrant under the hands and seals of any two justices of the city or county where the overseers reside, who are required to issue the same, directed to some constable of such city or town, returning the overplus, if any, after deducting all lawful costs and charges of such sale. 1 *N. R. L.* 284. § 15.

If the person is unable to be sent back by sickness, &c. he is to be provided for by the overseers of the town to which he belongs, as in other cases of like nature. *See the eighth division of this title.*

It is wholly in the discretion of the overseers to grant or refuse a certificate, and they cannot be compelled thereto. 2 *Sess. Cas.* 128.

Nor are the justices obliged to approve and sign the certificate granted by the overseers; for they have a discretion to allow or disallow it, if it be liable to objection. *Bur. Set. Cas.* 581.

And the justices may not only allow a certificate, but they may also attest it as witnesses. 1 *Str.* 94.

And a certificate which appears to be *legally approved*, shall be presumed to have been attested. 1 *Str.* 402.

And as the statute does not require any particular direction of the certificate, it is equally conclusive, although it be misdirected. *Bur. Set. Cas.* 171. 2 *Str.* 1163.

And, if one of the attesting witnesses cannot write, proof by the other who can, *that he was present* with such witness, and did see the overseers sign, is sufficient. *Bur. Set. Cas.* 725.

And when a certificate is above thirty years old, it has been held to prove itself, although all the formalities required by the statute do not expressly appear to have been observed. 2 *Term Rep.* 466. 5 *Term Rep.* 259.

From the words of the act, unless the certificate is signed by at least two overseers of the town granting it, it is not valid.

And the certificate is conclusive on the town, although not delivered till after the removal. *Cald. Cas.* 64.

But the delivery of a certificate shall not have the effect of vacating a settlement previously gained in the certificated town. 5 *Term Rep.* 154.

And the certificated persons cannot be removed until they become actually chargeable; for the strongest probability that they will become chargeable is no cause of removal. 2 *Salk.* 530. *Bur. Set. Cas.* 392.

A certificate concludes the town as to all the facts therein mentioned. 1 *Str.* 186. *Bur. Set. Cas.* 253. 2 *Str.* 1233.

But the certificate is only conclusive on the certifying town, as to the town to which it is directed. 2 *Salk.* 531. 4 *Term Rep.* 251.

Therefore a certificated person may gain a settlement in a third town. 2 *Str.* 1147. *Bur. Set. Cas.* 186. 269. 381.

Not only the persons mentioned in the certificate, but all legitimate children, born while it continues in force, are virtually included therein. *Bur. Set. Cas.* 182. 259.

So also a second wife, married after the granting of it, is to be considered as included therein. 5 *Term Rep.* 266.

A certificate, however, only includes the certificated man, his wife, and those children who live with him; but does not extend to grandchildren. 4 *Term Rep.* 797.

And where the son of a certificated person becomes emancipated from his father's family, he ceases to be under the protection of the certificate, and may gain a settlement in the certificated town in like manner as any other uncertificated person. 5 *Term Rep.* 583.

But if a certificate be granted to a man and his children, naming such children particularly, the certificated town is protected thereby, although one of the children afterwards marries and lives separate from the father. 5 *Term Rep.* 258.

And if a son, born under a certificate, after emancipation from his father's family, becomes chargeable, he shall be sent to the town from whence his father came, by certificate, if he has gained no settlement in his own right; notwithstanding his father may have acquired a new settlement, and thereby avoided the certificate. 1 *Wils.* 183. *Bur. Set. Cas.* 270.

A certificate is discharged by the certificated person gaining a new settlement in another town. *Bur. Set. Cas.* 428.

Also, a certificate is discharged by the certificated person becoming chargeable, and being removed back to the certifying town. *Bur. Set. Cas.* 373. 741.

It is also discharged by the certificated person's voluntarily leaving the town to which he was certified, without any intention of returning thereto. *Bur. Set. Cas.* 402. *Doug. Rep.* 417. 1 *Term Rep.* 354. 5 *Term Rep.* 526.

But the certificate is not vacated by a voluntary absence, if the party afterwards returns voluntarily to the same house in the certificated town, and to a branch of the same family there residing. *Cald. Cas.* 144.

Also the granting a second certificate to a pauper, will discharge a former one given by the same town. 2 *Bott. Const's ed.* 74. 1 *Term Rep.* 218.

Also the certificate is discharged by the party's gaining a settlement by purchasing an estate, renting a tenement, or executing an office. See the statute.

But the town, in order to get rid of the certificate, must clearly shew some matter whereby it has been discharged; for the court cannot presume such discharge from other facts. 1 *Term Rep.* 241.

A certificate to the head of a family, though it includes his legitimate children living with him, does not extend to his illegitimate children. 7 *Term Rep.* 136. *Ib.* 361.

And where a certificate is granted by the parish of A. to the parish of B. acknowledging C. and D. his wife, and their children to be

their parishioners, it is conclusive as between A. & B. though D. were not the legal wife of C. 8 Term Rep. 465.

VIII. 1. Removal of the poor.

2. Of their returning after removal.

3. Of persons unable to be removed.

By statute, "if any overseer of the poor of any city or town shall have reason to believe that any stranger who shall have come to reside in such city or town, and who shall not have obtained a legal settlement therein, is likely to become chargeable to such city or town, such overseer shall apply to any two justices of the peace of such city, or of the county in which such town shall lie, and inform them thereof; and the justices being so or otherwise informed, or suspecting such stranger to be of insufficient ability, or likely to become a charge to such city or town, are required to issue their warrant to a constable of such city or town, thereby commanding him to bring such stranger before them at such time and place as they in their warrant shall appoint; and the said justices shall examine every stranger so brought before them, and any other person they may think necessary, upon oath, relating to the abilities and last place of legal settlement of such stranger; and if they shall find him likely to become a charge to such city or town, they shall order and direct him by a certain day to remove to the place of his former settlement, and on neglect or refusal to comply with the order, the said justices shall issue a warrant under their hands and seals, directed to any constable of such city or town, who is required to execute such warrant, thereby commanding him to convey or transport such stranger to the constable of the next city or first town in the adjoining county, or if within the same county, to the town where the pauper was last legally settled, through which such stranger shall have been suffered to wander unapprehended, and so from constable to constable, or in such other manner, by the nearest and most convenient route, as the said justices shall think fit to direct, to the place of legal settlement of such stranger, if the same shall be within this state. 1 N. R. L. 281. § 7.

And in case it shall appear that the pauper first came into this state through the city of New-York, and it shall not appear that the said pauper has acquired a settlement in this state, then, and in such case it shall be lawful for the said justices, to direct by the said warrant, that the said pauper be transmitted from constable to constable, or otherwise, to the city of New-York. *Ib.*

An order of removal, stated to have been made on complaint of the *poor-master*, is good, although there are no such officers, for the justices may act on information obtained from any source, or on their own suspicion. 1 John. Rep. 54.

And if the order state that the justices cannot find that the pauper had any legal settlement, and expressly find that he came from S. it is a sufficient adjudication to authorize them to order his removal to that place. *Ib.*

But an order of removal must contain an adjudication, that the pauper had a legal settlement at, or came last from the town to which he is ordered to be removed. *Ib.* 330.

And where an order of removal has been made, and the pauper accordingly removed, and maintained by another town, and no appeal from the order, the justices by whom it was granted cannot, afterwards, supercede it. 2 *John. Rep.* 105.

And by statute, if any person (after the 5th of April, 1817) shall come from any other state, or from Upper or Lower Canada, to reside in any city or town within this state, and if any two justices of such city or town, upon examination, according to the provisions of the seventh section of the act, (for the relief and settlement of the poor) shall find that such person is likely to become chargeable to such city or town, and hath not gained a legal settlement in any city or town in this state, it shall be lawful for such justices, at their discretion, to order that such person be removed directly to the place where such person was last legally settled without this state. 4 *Vol. L. N. Y. b.* 176. § 3.

And if any person be removed by virtue of the statute, from one city or town to another, the overseers of the city or town to which he shall be removed, are required to receive him; and if any of them refuse or neglect so to do, he shall, if thereof convicted by the oath of two witnesses, forfeit and pay for each offence 25 dollars, to the use of the poor of the city or town from which such person was removed, to be recovered, with costs, in any court having cognizance thereof, by the overseers of the city or town from which such person was so removed. 1 *N. R. L.* 282. § 10.

Provided that no person, nor any child belonging to such person, shall gain a settlement in the city or town to which he or they shall be so removed, but his or their settlement shall remain as before such removal. *Ib.*

Shall forfeit 25 dollars.] An indictment will also lie for not receiving a pauper removed by a order of two justices; for the power of removing being given by statute, the not receiving him is a disobedience of that statute; and whoever refuses to obey a statute is indictable, unless another remedy is provided. *Sayer's Rep.* 168. 1 *Bott. Const's ed.* 300.

Persons bringing with them a certificate from the town in which they are settled, owning them to be inhabitants legally settled there, are not to be removed before they become actually chargeable, as will be seen under the preceding head.

And persons aggrieved by any judgment or order of the justices, or by warrant of removal, may appeal to the next session. *See the next division.*

The two justices who make the order of removal must be both present at the time; for it being a judicial act, wherein they are to exercise a discretion, they ought, in order thereto, to confer together, and form a joint opinion at the same time. *Salk.* 478. 488. 1 *Ld. Raym.* 55. 2 *Black. Rep.* 1017.

But though the order be signed by two justices, separately, it is only voidable on appeal, and not absolutely void. 4 *Term Rep.* 596.

And justices, if they make an order improvidently, may issue a supersedeas. 1 *Str.* 6.

And it seems that the two justices cannot remove more than one family by the same order. 1 *Str.* 671.

The authority of the justices must appear on the face of the order; that is, it must state that they are *justices of the peace within and for the county*. *Cas. Set. & Rem.* 27. 2 *Salk.* 474. 2 *Sess. Cas.* 76.

And the order must state that the pauper hath actually come into the town; for the justices have no power to send a person away by an order, unless he has actually intruded into the town. *Cas. Set. & Rem.* 16.

The statute requires that the pauper shall be brought before the justices before he is removed.

But it seems not necessary, in all cases, that the pauper should be examined; for in case of an infant of tender years, it would be impossible; but if it can be, it is fit it should be done. *Cald. Cas.* 179. 1 *Term Rep.* 164.

And the examination must be taken by two justices, and those the same that sign the order of removal. 2 *Str.* 1092. 2 *Salk.* 488. *Bur. Set. Cas.* 136.

But an examination taken, and an order of removal signed by two justices, separately, and in different counties, is not void, but only voidable by appeal to the next sessions. 4 *Term Rep.* 596.

And the examination should be upon oath; but where an order was said to be *upon due examination*, the court held it sufficient; for when it is said in an order to be upon due examination, it shall be intended to be upon oath, according to the statute. 2 *Sess. Cas.* 40.

So where the order is said to be *upon due consideration*, that implies a *due examination*, and therefore it is well. 2 *Sess. Cas.* 45.

After the examination, it seems, by the statute, that the justices must order the pauper by a certain day to remove to the place of his former settlement, and on neglect or refusal to comply with such order, *then* [and not before] they shall issue their warrant, &c. 1 *N. R. L.* 280. § 7.

As to the ADJUDICATION:—If a person is sent to a particular place, as to the place of his last legal settlement, the order must expressly adjudge it to be the place of his last legal settlement. 2 *Salk.* 479.

So an order removing a woman to *H.* stating that it appeared, on her oath, that her husband was last legally settled there, was quashed; because there was no judgment of the justices concerning the last legal settlement, but only the oath of the woman. 2 *Salk.* 478.

So where it was set forth that *Middleham* was the last legal settlement of the father, therefore they send the son there, and it appeared he was ten years of age. The order was quashed: there being no adjudication that *M.* was the place of the child's last legal settlement: and at that age the son might have gained a settlement separate from that of his father. *Foley*, 271.

So where an order adjudged that *J. S.* was settled at *B.* and therefore the justices remove his widow and children to *B.* The court quashed the order; for the wife may get a settlement after the death of her husband. 1 *Sess. Cas.* 45.

So where an exception was taken, that there was an adjudication of the place to which he was removed being his last legal settlement,

but only "*we order him to be removed to A. as the place of his last legal settlement.*" And for this fault the order was quashed. 1 Str. 73.

So an order was quashed, because there was no adjudication; it only said, that "*we, on examination, do believe the same to be true.*" And a man may believe a thing upon uncertain evidence. 1 Sess. Cas. 151.

So where two justices sent a person to B. adjudging in the order that he was last legally settled there, *according to their knowledge.* BY THE COURT. They should have said that he was last settled there. An order of removal is a judgment which must be certain and positive; the pauper might have been settled elsewhere, and the justices not know it. The order was quashed. Cas. Set. & Rem. 32.

However, an adjudication of *last settlement* and *last legal settlement* is the same thing; because, by every new settlement the precedent is discharged. 2 Salk. 473.

But where an order adjudged that the *last legal place* of the pauper was at W. omitting the word *settlement*—THE COURT held this no adjudication of a settlement; and that the order could not be made good by implication. 2 Sess. Cas. 19.

In *England* the justices have no authority by virtue of their statutes, under which these adjudications have been had, to remove a pauper but to the place where he was last legally settled.

But by our statute, if the pauper has no place of legal settlement within this state, or if the justices shall not be able to discover where the last place of legal settlement was, they shall direct that he be conveyed to the city or town from whence he last came; and in these cases the order should state the facts accordingly.

The order must also adjudge that the party removed is *likely to become chargeable*; and an order was quashed, because it was only said to be complained by the overseers that he is likely to become chargeable, but not adjudged so by the justices. 2 Salk. 491.

So, where the order adjudged that the pauper is likely to become chargeable, *as we are credibly informed.* It is the belief of another, and no adjudication. Cas. Set. & Rem. 38.

So an order, stating that a woman and six children had intruded, and would become chargeable if permitted to abide, was quashed; for this is uncertain, it may be five or ten years afterwards. Cas. Set. & Rem. 39.

So an adjudication that he *may become chargeable*, was held insufficient; for the statute only enables justices to remove persons *likely to become chargeable.* 1 Str. 77.

It must also be stated in the *adjudicating* part of the order, to *what place* the pauper is likely to become chargeable; and stating it in the reciting part of the order is not sufficient. 2 Sess. Cas. 73. Bur. Set. Cas. 39. 138.

But where an order stated that the pauper and his family *have become chargeable*; it was held that *have become chargeable*, must mean *are become chargeable*, and therefore sufficient. Bur. Set. Cas. 680. 2 Bott. Const's ed. 778.

And if the order be to remove a certificate man, it must be *adjudged* that he is *actually chargeable*, and this is matter of substance that

cannot be supplied by amendment at sessions. 2 *Salk.* 530. *Bur. Set. Cas.* 163. 2 *Str.* 1158.

But it is not necessary on the removal of a certificate person, to state in the order that the certificate was allowed. 1 *Sess. Cas.* 161.

And in an order removing a man and his family, the persons composing his family ought to be particularly named and described; thus an order to remove a man and his wife and family was quashed; because it did not appear what was meant by his family, and some of them might have gained a settlement in the place, though he had not. 2 *Salk.* 485. 1 *Str.* 114.

And it has been laid down as a RULE, that every order that concerns the removal of a father and his children, ought to shew the ages of the children; that it may appear to the court, that by reason of their infancy they have not gained a settlement in their own right; as by apprenticeship or service, &c. but have only a relative settlement from their father. Seven years is an age that the court would presume a child would gain a settlement in his own right; but if it appears upon the order, that the child was above seven years old, the order must set forth that such child hath not gained a settlement in his own right; and if the child hath gained no settlement, then his father's settlement is derived to him. 2 *Sess. Cas.* 74.

But if there is an express adjudication that children were last legally settled in a town, their ages need not be set forth in the order. *Cas. Set. & Rem.* 41. *Bur. Set. Cas.* 138.

And the order must state the name of the pauper removed, or describe him as a person unknown. *Cas. Set. & Rem.* 57.

An order of removal must be directed to one of the constables of the city or town from which the pauper is removed. *See the statute.* 2 *Salk.* 493.

If the county be named in the margin, it is sufficient if there be a clear reference to it in the body of the order. *Bur. Set. Cas.* 138. 198.

An order removing "M. F. wife of P. F. a Scotchman who never gained a settlement in England," and their children to the place of her last legal settlement, which order was stated on the face of it to be made, on examination of the husband, and with the consent of him and his wife, was holden good. 5 *East.* 118.

2. Of paupers returning after removal.

By statute, "all persons who shall unlawfully return to the city or town, from whence they shall respectively have been legally removed, by order of two justices of the peace, without bringing a certificate from the city or town whereto they respectively belong, shall be deemed disorderly persons; and on conviction before one justice, on view, or by confession, or by the oath of one credible witness, may be committed to bridewell, or house of correction, at hard labor, for sixty days, or until the next sessions; and otherwise treated and punished as disorderly persons. 1 *N. R. L.* 114. § 1.

But these statutes only affect those persons who return in a state of vagrancy; for where a pauper was removed from a parish and on the same day returned back to a tenement of the yearly value, &c. which he had before rented and resided on for some years, but without making any new agreement with his landlord, the court were of

opinion that he had a right to return, for that an order of removal only prevents a return in a state of vagrancy. 2 *Term Rep.* 709.

And a pauper who returns after an order of removal, cannot be committed under the statute, before he has been heard in his defence. *Cas. Temp. Ld. Hard.* 124.

And the conviction of a pauper for returning after an order of removal, must state the town to which he returned. *Bott. Const's ed.* 741.

And the justices may commit a pauper, who returns after an order of removal, although the order may have been removed by *certiorari*, if it be affirmed. 5 *Mod. Rep.* 163.

S. Persons unable to be removed.

If any poor person shall remove or come out of any city or town, where he is legally settled into any other, and shall be taken sick or lame, so that he cannot be conveniently removed back to the place of his last legal settlement, then the overseers of the city or town into which he shall come, or one of them, shall give notice in writing to the overseers of the city or town out of which he shall have come as aforesaid, of his name, condition and circumstances, and request such overseers, or one of them, to take care of, relieve and maintain him during his illness, and also to provide for his funeral, if he should die there; and if any such overseer, having notice as aforesaid, shall neglect or refuse so to do, it shall be lawful for any two justices of the city, or of the county in which such town shall be, where such poor person had his last legal place of settlement, upon complaint made to them, to cause all such sums of money as shall be necessarily expended in the maintenance of such poor person in his sickness or lameness, or on his funeral, to be levied by distress and sale of the goods and chattels of the overseers so neglecting or refusing after such notice given, by warrant, under the hands and seals of such justices, who are required to issue the same, directed to some constable of the city or town where such overseers reside, returning the overplus, if any there be, after deducting all lawful costs and charges of such sale; and the money so recovered, shall be paid to the overseers, or to one of them, of such city or town where such poor person shall be sick, lame or die as aforesaid. 1 *N. R. L.* 284. § 16.

In *Voorhis v. Whipple and Hawes*, (7 *John. Rep.* 89,) on *certiorari* to two justices of the peace, it has been decided, that the pauper's last legal place of settlement must be adjudicated upon, and ascertained, previous to the issuing of the warrant.

The case was this: W. & H. overseers of the poor of R. caused a warrant to be issued against V. one of the overseers of the poor of C. to levy by distress \$34 dollars and 15 cents, for the maintenance of *Carril*, by the overseers of R. after notice to V. No adjudication was made that the pauper's last legal place of settlement was in C.—*Per curiam*. The inducement to the enacting of the 16th section of the act for the settlement and relief of the poor, was, to relieve the town where a pauper happened to be taken sick or lame, so as not to be able to be removed back to the place of his last legal settlement; but in providing for this summary relief to the town actually burdened with the pauper, it presupposes, that the place of his last legal

settlement has been ascertained, according to the provisions of the 7th section, to wit, by an order of two justices, making an adjudication upon the fact, after having themselves examined the pauper on oath. To give the 16th section any other construction would lead to great abuse and oppression. Towns might be charged, if the manner of proceeding in this case is sanctioned, with the payment of large sums of money, unjustly, and without the examination of the pauper himself, which is essentially requisite to find out his last legal settlement. This not having been done in this case, the warrant issued illegally.

The warrant was good or bad when it issued ; and cannot be aided by what took place afterwards. Warrant quashed.

IX. *Of appeals.*

By statute, every person who shall think himself aggrieved by any judgment or order of any justice or justices of the peace, or by warrant of removal of any poor person, may appeal to the NEXT GENERAL SESSIONS of the peace to be holden in and for such city, or in and for the county in which such city or town shall be, where such judgment or order shall be made, or from which such person shall be removed as aforesaid, who are authorized and required to hear and determine such appeals, and to do justice therein, according to the merits of the respective cases. 1 *N. R. L.* 285. § 17.

And no justice of the peace who shall reside in any city or town where any dispute shall happen (except in the city and county of New-York) shall sit in court upon such appeal. *Ib.*

In the city and county of New-York the justices who determine such appeal shall, upon request, state the case specially and at large, that every person who thinks himself aggrieved thereby, may have remedy thereupon in the supreme court. *Ib.* § 18.

And no appeal shall be proceeded upon, unless reasonable notice in writing be given by the overseers of the city or town, or the person who shall make such appeal, unto the overseers, or one of them, of such city or town as shall be affected by such judgment or order, or from which such poor person shall be removed, the reasonableness of which notice to be determined by the sessions to which the appeal is made ; and if it shall appear to them that reasonable notice was not given, then they shall adjourn such appeal to the next general sessions, and then and there finally hear and determine the same. *Ib.* § 19.

And by the statute declaring the powers of the courts of general sessions, it is enacted, that upon appeals against any judgment or order of any justice of the peace, the said courts shall cause all defects of form to be found in such judgment or order, to be amended without costs to the parties concerned ; and after such amendment made, shall proceed to hear the merits of such judgment or order, upon due proof by witnesses or otherwise, and to determine upon the same as if no such defect of form had existed. 2 *N. R. L.* 151. § 5.

But the sessions cannot amend an order in matter of substance ; and therefore it seems they cannot amend any thing that requires examination. *Bur. Set. Cas.* 163.

But the error of inserting the name of one parish instead of an

other, if it appears clearly to have arisen from the mistake of the clerk, has been held *a defect in form that could be amended.* 2 *Bott. Const's ed.* 828.

If the justices, at their general sessions upon appeal concerning the settlement of any poor person, determine in favor of the appellant, that such poor person was unduly removed, then they shall, at the same general sessions, award to such appellant so much money, besides his costs and charges, as shall appear to them to have been reasonably paid and expended by the overseers of the city or town on whose behalf the appeal was made, for or towards the relief of such poor person between the time of such undue removal and the determination of such appeal. 1 *N. R. L.* 285. § 20.

And the supreme court will grant a *mandamus* to the sessions to allow these expenses. 2 *Sess. Cas.* 67.

But the sessions cannot direct the costs of maintaining the pauper to attend the event of another supposed appeal. *Bur. Set. Cas.* 164.

And upon every appeal upon any judgment or order of any justice or justices, concerning the settlement of any poor person, or upon any proof of notice of such appeal to have been given by the overseers of one city or town, or by any other person, to the overseers of any other city or town, or to any other person, though such person did not afterwards prosecute such appeal, the justices at the same general sessions, shall award to the party in whose favor such appeal shall be determined, or to whom such notice did appear to have been given, such COSTS AND CHARGES as by the said justices, in their discretion, shall be thought reasonable, to be paid to the overseers of the city or town, or other person against whom such appeal shall be determined, or who gave notice of such appeal, and did not prosecute the same. 1 *N. R. L.* 285. § 20.

The allowance of these costs is wholly in the discretion of the sessions. 2 *Bott. Const's ed.* 867.

And the sessions cannot order costs on a mere adjournment of an appeal, without hearing it. *Bur. Set. Cas.* 205.

The sessions on quashing an order of removal, may allow costs. 1 *John. Rep.* 330.

But the sessions cannot award costs, or appeals, except when authorized by statute. 9 *John. Rep.* 119.

And if in any of the cases aforesaid, the person ordered to pay such monies and costs and charges, shall reside out of the jurisdiction of such court, it shall be lawful for the overseers to whom such monies were directed to be paid, to sue for and recover the same of the person against whom such award was made, with costs of suit, in an action for monies had and received, to the plaintiff's use, in any court in this state having cognizance thereof. 1 *N. R. L.* 285. § 20.

And a true copy of the award, signed by the clerk, and sealed with the seal of the court, shall be sufficient evidence for the recovery of such monies so awarded. 1 *N. R. L.* 286. § 20.

AUTHORITY OF THE SESSIONS.—The sessions have no authority to make an original order of removal; for the statutes giving an appeal against an order of removal, only authorises the sessions to confirm or quash the order. 2 *Show.* 508.

Therefore, they have no power to confirm or quash an order of removal, unless it be on an appeal. *Bur. Set. Cas.* 276. *Salk.* 479.

And upon the same principle, the sessions, on an appeal from an order of removal, cannot adjudge the pauper's settlement to be in a third town. *Salk.* 475.

Neither can they, at a subsequent sessions, make an order to review a case on which they determined at a preceding sessions. *Salk.* 477.

But they may make a new order, vacating a former order, at any time during the same sessions. *Salk.* 494.

And they may refer the consideration of an appeal to three justices out of sessions, and afterwards adopt the opinion of the referees, with the consent of the parties. *Cald. Cas.* 30.

And if the justices present at the sessions are equally divided in opinion, so that no order can be made, they ought to adjourn the appeal, or continue it over to a subsequent sessions. *2 Sess. Cas.* 193.

But if after all, the justices should continue to be equally divided in opinion, the proper course to obtain a final determination seems to be, for the parties to consent that judgment be pronounced, subject to the opinion of the supreme court, on a special case to be stated for that purpose.

WHO MAY APPEAL.—The pauper removed may appeal against the order as well as the town. *Carth.* 222.

And the order of the sessions need not expressly state that it is on the appeal of the party grieved. *1 Str.* 96.

NOTICE.—According to the statute, no appeal is to be proceeded upon, unless *reasonable notice* be given by the party appealing; the reasonableness of which notice is to be adjudged by the sessions. Now, as all courts have stated rules to go by, it is proper to give such notice, as the practice of the particular sessions to which the appeal is to be made requires.

But although reasonable notice may not have been given, the sessions cannot for this quash the order; it is only a ground for their adjourning the appeal. *Foley*, 261.

Neither can they refuse to receive the appeal on the ground that due notice was not given; for the notice relates only to the hearing, and not to the receiving the appeal. *1 Doug.* 191.

And therefore they are bound to receive an appeal, though no notice has been given; and the supreme court will grant a *mandamus* if they refuse to receive it. *1 Doug.* 191. *Cald. Cas.* 283.

But they are not obliged to adjourn the hearing thereof, if they are satisfied the appellants had sufficient time to come prepared to try it, and to give notice to the respondents. *3 Term Rep.* 150.

NEXT SESSIONS.—According to the statute the appeal must be to the next general sessions; but it has been agreed, that if an order is made before, and not served till after a sessions, the sessions next after an order is served is the next sessions within the act. *2 Bott. Const's ed.* 834. *2 Str.* 831.

And by the *next sessions*, is to be understood the next possible sessions; and it must depend on the particular circumstances of each case, as to what shall be considered the next sessions. *2 Doug.* 192.

And if it appears that there was sufficient time to give notice of, and to lodge the appeal at the next sessions, the justices are not bound to receive it at a subsequent sessions. 2 *Bott. Const's ed.* 838. 3 *Term Rep.* 504.

And the time limited for appealing is not suspended by the matter being referred to arbitrators. *Cald. Cas.* 32.

ADJOURNMENT.—The appeal must be lodged at the next general sessions, but when it is lodged, the sessions may adjourn it. 2 *Salk.* 805. *Comb.* 365.

But when it is adjourned, the style of the sessions ought not to run, *at such a sessions, "held by adjournment;"* but the original meeting of the sessions ought to be set forth, and that it was continued from thence to such further time by adjournment. 2 *Str.* 832. 865.

And the sessions cannot be adjourned without entering a continuance of it. *Str.* 1263. *Bur. Set. Cas.* 293.

STATING A SPECIAL CASE.—If the sessions state a special case for the opinion of the supreme court, they must draw their own conclusions from the facts, and not leave it to the superior court to make the inference. For where an order of sessions drawn up specially, in order to have the opinion of the court, was concluded, "and if the court should be of opinion, then, &c." This was held naught, for the justices ought to determine one way or other, and not make a special conclusion referring to the court. *Salk.* 416.

But though they must determine one way or other, they need not state the reason of their judgment. *Salk.* 607.

And a special case must not state the evidence of the facts, but the facts themselves. *Bur. Set. Cas.* 120.

And fraud is a fact which must be expressly found by the sessions, for the supreme court cannot infer it. 2 *Str.* 1156. *Bur. Set. Cas.* 166. 2 *Sess. Cas.* 189.

And where the sessions expressly find the fact of fraud, it is conclusive. 4 *Term Rep.* 473.

But if the sessions state all the facts from whence they infer fraud, the supreme court may examine the propriety of their conclusions, *Bur. Set. Cas.* 57.

But the sessions are not compellable to state a special case, except in the city of New-York, although in some cases their refusal to do so may be a thing very much to be censured and discommended. *Bur. Set. Cas.* 64.

And though the sessions refuse to state the facts specially, no bill of exceptions will lie; for a bill of exceptions is only to be made use of upon a writ of error; and therefore where a writ of error will not lie, there can be no exceptions. *Bul. N. P.* 316. *Bur. Set. Cas.* 77. *Str.* 1040.

When a case is sent back by the supreme court to be re-stated, if it is as to a fact which requires fresh evidence, the sessions must not state the fact without the examination of evidence. 2 *Bott. Const's ed.* 853.

But if a case be sent back to the sessions, for them to draw a conclusion from the premises stated, they need not examine new evidence. 2 *Bott. Const's ed.* 853.

And the supreme court will not send a case back to be re-stated,

if, from the whole circumstances disclosed, they are satisfied that it will not be productive of any advantage. 2 *Bott. Const's ed.* 856.

Neither will the court order a case to be re-stated on the affidavit of a person, that the clerk of the peace did not state his evidence truly. 2 *Bott. Const's ed.* 860.

It was moved in *K. B.* for setting aside an order of sessions, confirming an order of two justices on appeal; but the court would hear nothing of the merits of the cause; the order of sessions being in such cases final, unless there was an error in the form. 1 *Vent.* 310.

If the sessions do by their order but barely affirm or quash the justices' order, and both orders are removed into the supreme court, the judges have nothing before them to judge upon, but only whether the first order of the justices is valid; and when this is the case, it seems by the practice in *England*, that the following course of proceeding should be observed.

If the sessions reverse the first order, and that being removed, appears to be good, the court must intend it was reversed on the merits, and affirm the order of sessions. 2 *Salk.* 607.

If the sessions reverse the first order, and that being removed, appears not to be good, they must intend it was reversed for form, and affirm the order of reversal. *Id.*

So if the sessions affirm the first order, and that appears to be good, they must affirm the order of sessions. *Id.* [For the court will intend it confirmed on the merits.]

But if the first order appears bad, and the sessions affirm it, the court must reverse it, because it appears naught. *Id.*

And if the sessions confirm the first order, and the order of sessions is bad in point of form, the supreme court can only quash the order of sessions, and direct the justices below to enter a continuance to the next sessions, there to proceed *de novo* and decide the matter; for the supreme court, as a court of error, cannot do what the courts below should do; and the parties, in this case, cannot come *per saltum* to have the original order quashed. 4 *Term Rep.* 71.

But where a special case was stated and referred to a judge of assize, the court of *K. B.* would not, after the judge had given his opinion, interfere; because it would tend to prevent a judge from accepting a reference of the kind. *Bur. Set. Cas.* 793.

But if the sessions do, by their order, state the facts and special circumstances of the case, then the court will judge of the law arising from them: if the justices, therefore, entertain any doubt in regard to the law, the proper course to obtain the opinion of the supreme court seems to be, to state in the order of sessions, which affirms or reverses the original order, the special circumstances of the case; and then the party dissatisfied may, by removing the same by *certiorari*, obtain the judgment of that court, which will either quash or affirm the order of sessions, as they see fit.

And it has been held, that when the sessions entertain a doubt, they may, without consent of parties, order a special case to be made: and where a sessions was inadvertently adjourned, pending

the settlement of a special case, the court of *K. B.* granted a *mandamus* commanding the sessions to complete the case. 2 *Bott. Const's ed.* 862.

CERTIORARI.—A general rule has been made in *England*, that no *certiorari* should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and that if any order be removed before appeal, it should be sent down again; *but if the time of appeal be expired, that case is not within the rule*; and advantage must be taken of that rule upon motion to file the order, for after it is filed it is too late. *Salk.* 147.

A *certiorari* to remove an order appealed against, may be directed to the sessions, although it does not appear that any act has been done at sessions, either to confirm or reverse the order, and may be returned by them; for the justices are supposed to return all the orders they make to the sessions, where they are to be recorded. 1 *Str.* 470.

But by statute, every person against whom any judgment or order of any court of general sessions, or of any justice or justices of the peace (other than judgments in actions for debts or demands between party and party) shall have been given or made for the benefit of any other person, shall, on prosecuting such *certiorari*, and before the allowance thereof, enter into recognizance with two sufficient sureties to the people of the state, before a justice of the supreme court, or such court of sessions, or one of the justices thereof, in the sum of 125 dollars; conditioned, that he shall, at his proper costs and charges, prosecute such *certiorari* to effect, without any wilful delay, and perform such judgment or order, as the said supreme court shall make in the premises, and pay the party for whose benefit the judgment or order so removed was made, if the same shall be confirmed, such costs and charges as shall be directed by the said court. 1 *N. H. L.* 141. § 4.

Of the effect of such *certiorari* upon the proceedings in the court below, and the manner of proceeding, &c. see title **CERTIORARI**.

If a session case be sent down to be re-stated, and the prosecutor abandon it when it is returned, the supreme court will discharge his recognizance for the costs; but if he dispute the amended order they will not. 4 *Term Rep.* 218.

ORDERS UNAPPEALED FROM.—An order of removal unappealed from is final and conclusive; and the pauper cannot be sent back before the appeal is determined. *Foley*, 316.

All the authorities to this point are from cases where persons have been removed, as to the place of their last legal settlement, and not to the place from whence they last came, as is authorized by our statute when the place of settlement is without the state, or cannot be discovered.

So an order removing a man and his wife, as such, if unappealed from, is conclusive upon the town to which they are removed, as to the legality of the marriage. 1 *Sess. Cas.* 154. 3 *Str.* 1172. *Mar. Set. Cas.* 191. 551.

Neither can the fact of marriage be inquired into after an order of removal, stating the parties to be husband and wife, if the order be not appealed against. *Bur. Set. Cas.* 168. *2 Bott. Const's ed.* 74.

And if a pauper be removed by an order of justices, he cannot be removed to a third until after the appeal. *Salk.* 488. *Bur. Set. Cas.* 101.

So an order removing a certificate person from a third town to the certificated town, is conclusive upon the certificated town, if unappealed from. *2 Bott. Const's ed.* 801.

So an order removing a wife is, if unappealed from, as conclusive as if the husband himself had been removed with her. *2 Bott. Const's ed.* 118. 801.

And an order of removal unappealed from, is conclusive against all the world as to the pauper's last legal settlement; therefore a new settlement can only be gained by some act wholly subsequent to his removal. *2 Term Rep.* 598.

But an order of removal is only conclusive as to those who are mentioned in it. *1 Term Rep.* 353.

And an order is not conclusive for want of appeal, if it is deserted and given up by consent. *Bur. Set. Cas.* 658.

And to make an order of removal unappealed from conclusive, it must have been a legal order. *Cald. Cas.* 248. *2 Term Rep.* 709.

REMOVAL AFTER APPEAL.—On an order of removal being reversed, two justices of the appellant town may remove the pauper back to the town from whence he was sent, if he is either unable to return of himself, or will not. *Comb.* 401.

But if an order of removal be confirmed, it is final and conclusive, and the town where the pauper is adjudged to be settled, cannot remove him to a third town, on the ground of his having gained a settlement there previous to the confirmation of the order. *Salk.* 524.

And when upon appeal an order is confirmed, it is final and conclusive to all the world as well as to the parties; for it is an adjudication that this is the place of the party's last legal settlement. *1 Str.* 232. *Salk.* 492. 527.

But if an order of removal be reversed on appeal, it is final to none but the contending towns who were parties to the appeal. *Carth.* 516. *Salk.* 492. 527.

Therefore, if an order of sessions be discharged, yet the pauper may be removed from a third town to the appellant town. *Carth.* 516. *Salk.* 486.

And on an order being reversed on the appeal, the first town may remove again to any town not party to the former removal. *Salk.* 486. 525. *Bur. Set. Cas.* 17. 425.

But if a pauper is settled upon appeal on a certain town, and he is removed from thence by a subsequent order, it must appear that he has gained a new settlement. *2 Bott. Const's ed.* 810. *Bur. Set. Cas.* 394.

But an allowance of the appeal is not a discharge of the original order. *Bur. Set. Cas.* 73.

And if a certificate man be removed before he become chargeable, and the order on appeal be reversed, yet this shall not conclude the certificated town from removing him to the certifying town after he becomes actually chargeable. *Bur. Set. Cas.* 261.

X. *Precedents of proceedings under the poor laws.*

Form of an order for the relief and maintenance of a pauper.

County of ss. To the overseers of the poor of the town of in the
said county, and to each of them.

WHEREAS application hath been made to me, J. P. Esq. one of the justices of the peace within and for the said county of by A. B. one of the overseers of the poor of the town aforesaid, setting forth, that P. P. a poor person, belonging to the said town, had applied to him, the said overseer, for relief. And whereas I, the said justice, and the said overseer, have duly inquired into the state and circumstances of the said P. P. and it appearing to us that the said P. P. is in such indigent and necessitous circumstances as to require the relief herein directed: I, therefore, the said justice, do hereby order you, the said overseers of the poor of the said town of or one of you, to allow and pay unto the said P. P. weekly and every week, upon the Monday in each and every week, the sum of for and towards his support and maintenance, until such time as you 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

Warrant of two justices for the examination of a pauper.

County of ss. To any constable of the town of in the said county.

WE. J. J. and E. J. Esquires, two of the justices of the peace in and for said county, being duly informed that P. P. hath come to reside in the said town, not having obtained a legal settlement therein; not produced any certificate owning him to be settled elsewhere, and that the said P. P. is likely to become chargeable to the said town of do hereby command you to bring the said P. P. before us, at the house of in the said town, on the day of at o'clock in the noon, to be examined concerning his last place of legal settlement. Given under our hands and seals, at the day of

It may also be proper, especially in cases of difficulty and doubt; and to avoid, if possible, the trouble and expense of an appeal, to give notice of the time and place of the intended meeting of the justices, to the overseers, of the place where the settlement is alleged to be, in order that they may be present, if they think fit, when the adjudication is made. This notice may be in the form of a summons, to shew cause, viz.

County of ss. To the overseers of the poor of the town of in the
county of and to each of them.

WHEREAS we, F. J. and S. J. Esquires, two of the justices of the peace in and for the said county of are informed, that P. P. late of hath come to reside in the town of in the said county of not having obtained any legal settlement therein, nor produced any certificate owning him to be settled elsewhere; and that he is likely to become a charge to the said town of These are therefore to summon and require you to be and appear (if you think proper) before us, the said justices, at the house of in the town of in the said county of at the hour of in the noon of the same day, to shew cause why the said P. P. should not be removed from the said town of to your said town of as the place of his last legal settlement. Given under our hands and seals, the day of

If the overseers appear, and attempt to shew cause, pursuant to this summons, it will not take away their right of appealing against the order that may be made.

Order of removal.

County of W. ss. To any constable of the town of A. in the said county greeting.

UPON the information of the overseers of the poor of the town of A. aforesaid, [or. upon due information*] given to us, whose names and seals are hereunto affixed, being two of the justices of the peace in and for the said county of W. that P. P. and M. his wife, and S. P. their son, aged eight years, and D. P. their daughter aged four years, have come to reside in the said town of A. not having obtained a legal settlement therein, nor produced any certificate owning them or any of them to be settled elsewhere, and that the said P. P. M. his wife, and S. and D. their children, are likely to become a charge to the said town of A. We, the said justices, upon due proof made thereof, as well upon the examination of the said P. P. upon oath as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge, that the last legal settlement of them, the said P. P. M. his wife, and S. and D. their children, is in the town of B. in the county of G.

And the said P. P. M. his wife, and S. and D. their children, having been ordered and directed by us, by a certain day now past, to remove to the said town of B. the place of their former settlement, and they having neglected [or refused] to comply with our said order.† We do therefore command you to convey the said P. P. M. his wife, and S. and D. their children, from and out of our said town of A. to the town of _____ and them to deliver to the overseers of the poor there, or to one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original; and the said overseers are required to receive and provide for them as inhabitants of their said town. Given under our hands and seals, the _____ day of _____ in the year of our Lord,

* Under the British statute, all orders of removal are predicated upon complaint of the church-wardens and overseers, &c. without which the justices have no authority to remove a pauper; and a defect of this kind appearing upon the face of the order, is fatal. Hence we find all the British precedents begin "*Upon Complaint,*" &c. But by our statute, if the justices are informed by the overseers, or otherwise, or if they suspect a stranger to be of insufficient ability, or likely to become a charge, &c. they may proceed in order to a removal.

† If the pauper has actually become chargeable, the order may state the fact accordingly; and in such case, it seems the justices need not order him to remove to his former settlement previous to their issuing this warrant to the constable; for the statute only requires such previous order in cases where the pauper is likely to become a charge; not where he is actually chargeable. So the words, "*nor produced any certificate owning him to be settled elsewhere,*" may be omitted where he is actually chargeable.

If the removal is to a different county, the justices are to direct the route.

If the removal is to the first town in the adjoining county, say:

WE do therefore direct, that the said A. B. be conveyed from the said city of Hudson, in the county of Columbia, to the said town of Red-Hook, in the county of Dutchess, through the towns of Livingston and Clermont in the said county of Columbia, by the post road: and we command you to convey the said A. B. from and out of the said city of H. to the said town of R. by the route aforesaid, and him to deliver to the overseers of the poor there, &c. [as before.]

If the removal is to a town or county not adjoining, say :

WE do therefore direct, that the said A. B. be conveyed from the said town of Catskill, in the county of Greene, to the said town of Ghent, in the county of Columbia, through the city of Hudson and the town of Claverack, in the said county of Columbia, by the post road ; and we command you to convey the said A. B. from and out of the said town of C. to the said town of G. and deliver him, together with this warrant, to a constable of the city of H. who is hereby required and commanded to receive the said A. B. and to convey him to the town of G. and to deliver him, together with this warrant, to a constable of the said town of C. who is also hereby required and commanded to receive the said A. B. and to convey him to the said town of G. and him to deliver to the overseers of the poor there, &c. [*as before.*]

If the removal is to a town in another state, proceed as in the "Order of removal," to the words, "*do adjudge the same to be true ;*" then say :

And it appearing to us, as well upon the oath of the said P. P. as otherwise, that neither they, the said P. P. M. his wife, S. and D. their children, or any of them, have any legal place of settlement within this state, but that their settlement is in the town of Pittsfield, in the county of Berkshire, in the commonwealth of Massachusetts ; and we do further adjudge, that the last legal settlement of them, the said P. P. M. his wife, S. and D. their children, is in the said town of Pittsfield, in the county of Berkshire and commonwealth of Massachusetts. And they having been ordered and directed by us, by a certain day now past, to remove to the place of their former settlement, and having neglected or refused to comply with our said order, we therefore do direct and command you to convey and transport the said P. P. M. his wife, and S. and D. their children, ~~hither~~ to the said town of Pittsfield, in the county of Berkshire, and commonwealth of Massachusetts ; and them to deliver to the overseers of the poor there, (if any there be) or to one of them, together with this our order, or a true copy thereof, at the same time shewing them the original. Given under our hands and seals, &c.

A warrant to seize the goods, and let out, and receive the rents of the real estate of husbands or parents, who run away from their families.

County of ss. To the overseers of the poor of the town of in the said county.

WHEREAS it appears unto us, two of the justices of the peace within and for the said county, as well upon the complaint and application of the overseers of the poor of the said town of in the county aforesaid, as upon due proof upon oath before us made, that O. O. late of the said town of yeoman, hath run away from the place of abode and legal settlement at aforesaid, into some other county or place unknown, leaving G. O. his wife, and A. O. and D. O. his infant children, a charge to the said town in which they are settled ; and that the said O. O. hath some estate real or personal, whereby the said town may be eased of the said charge in whole or in part. We, therefore, in the name of the people of the state of New-York, do hereby authorize and command you, the said overseers, to take and seize the goods and chattels, and to let out, and receive the annual rents and profits of the lands and tenements of the said O. O. at aforesaid, so absconding as aforesaid, for and towards the maintaining, bringing up, and providing for his said wife and children, so left as aforesaid ; and with this warrant, you are to appear at the next general sessions of the peace, to be holden for the said county, then and there to certify what you have done in the execution hereof. Given under our hands and seals, at in the said county, the day of

The form of a contract for the maintenance of the poor.

IT is contracted and agreed, this day of by and with the consent of the major part of the freeholders and inhabitants of the town of in the county of signified at their annual town meeting, between A. B. and C. D. overseers of the poor of the said town, and E. P. and J. P. Esqs. two of the justices of the peace within and for the said county, of the one part ; and G. H. in said town, yeoman, of the other part ; that he, the said G. H. shall, and will, during the space of one whole year, to commence from now next ensuing, at his own proper costs and charges, in the house in which he now dwells, [or as the case is] find, provide and allow unto all such poor people, as shall be lawfully entitled to relief and maintenance from the said town, and shall there be brought unto him by the overseers of the poor aforesaid, or either of them, or their successors for the time being, sufficient lodging, meat, drink, clothing, employment and other things necessary for their keeping and maintenance ; and that in consideration thereof, the said overseers of the poor, and their successors respectively, shall pay, or cause to be paid, to the said G. H. the sum of in equal proportions, and the said G. H. to have moreover, and take unto himself, the benefit of the said poor people's work, labor and service, during the said time. In witness whereof, the parties to these presents have hereunto set their hands, the day and year first above mentioned.

The form of an agreement between two or more towns to unite for the purpose of providing a poor-house, and maintaining the poor therein.

IT is agreed this day of by and between A. B. and C. D. overseers of the poor of the town of in the county of and J. P. D. P. and S. P. Esquires, justices of the peace in and for the said county, residing in the said town, and E. F. and G. H. overseers of the poor of the town of in the same county, and J. P. and N. P. Esquires, justices of the peace, in and for the said county, residing in the town of by and with the consent of the major part of the freeholders and inhabitants of their respective towns, signified at their annual town meetings, of the one part, and F. F. of the town of in the said county, yeoman, of the other part ; that the said respective towns of and shall unite in building [or, in purchasing, or, in hiring, as the case is] a certain house, situate at in the said town of now in the occupation of him, the said F. F. for the keeping and maintaining of the poor of the said several towns, and also in purchasing all necessary materials for setting them to work ; and that he the said F. F. shall and will for one whole year, to commence from now next ensuing, at his own proper costs and charges, in the said house, find, provide and allow, &c. [proceeding as in the last.]

Order for the admission of a pauper into the poor-house.

To A. B. keeper of the poor-house at in the county of

YOU are hereby required to receive P. P. a poor person, belonging to the town of in the county of into the said poor-house, and to accommodate and provide for such poor person in a proper manner, according to the rules and establishments of the said house. Given under our hands, this day of

A. B. } Overseers of the poor of
C. D. } the town of

A certificate.

County of ss : To the overseers of the poor of the town of in the county of

WE, the overseers of the poor of the town of in the county of do hereby certify, own and acknowledge that P. P. labourer, is an inhab-

itant legally settled in our town 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. } Overseers of the
C. D. } poor.

Acknowledgement of the certificate before a justice, with his approbation thereof.

I, F. J. Esquire, one of the justices of the peace in and for the said county of do hereby approve of the above written certificate ; and I do likewise certify that A. B. and C. D. overseers of the poor of the said town of whose names and seals are thereunto subscribed and set, have this day respectively acknowledged before me, the said justice, that they did severally sign and seal the same. Given under my hand, this day of

If the certificate is proved before the justice by one of the attesting witnesses, the form may be thus :

I, F. J. one of the justices of the peace in and for the said county of do hereby approve of the above written certificate ; and I do likewise certify, that A. W. one of the witnesses attesting the same, hath this day made oath before me, the said justice, that he, the said A. W. did see the overseers of the poor of the said town of 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. the witnesses attesting the said certificate, are severally of their own proper hand writing. Given under my hand, the day of

The form of an order of removal of a certificate person.

County of W. ss. To the overseers of the poor of the town of A. in the said county of W. and to the overseers of the poor of the town of B. in the county of G.

WHEREAS complaint hath been made by the overseers of the poor of the town of A. aforesaid, in the county of W. unto us, whose names and seals are hereunto affixed, being two of the justices of the peace in and for the said county of W. that P. P. late of the town of B. in the county of G. mason, and M. his wife, and S. P. their son, aged eight years, and D. P. their daughter, aged four years, having for some time last past dwelt in the town of A. aforesaid, under and by virtue of a certificate bearing date the day of in the year of our Lord under the hands and seals of and overseers of the poor of the said town of B. attested by and two credible witnesses, and approved by Esq. one of the justices of the peace in and for the said county of G. according to the statute in such case made and provided, are become chargeable to the said town of A. And whereas it appears to us, as well upon the oath of the said P. P. as otherwise, that neither they, the said P. P. M. his wife, S. and D. their children, nor any or either of them, have gained any legal settlement since the date of the said certificate ; therefore, upon due consideration had of the premises, it appears to us, and we do hereby adjudge, that the said P. P. and M. his wife, and S. and D. their children, are become chargeable to the said town of A. and that the place of the last legal settlement of them, and every of them, is in the said town of B. in the said county of G. These are therefore to authorize and require you, the said overseers of the poor of the said town of A. and each of you, to remove and convey the said P. P. M. his wife, and S. and D. their children, from and out of our said town of A. to the town of B. and to deliver to the overseers of the poor there, or to one of them, together with this our order, or a true copy thereof, at the same time shewing to them this the original : And we do also hereby require you, the said overseers of the poor of the said town of B. to receive and provide for them as inhabitants of your town. Given under our hands and seals, the day of in the year of our Lord

Notice of appeal from an order of removal.

To the overseers of the poor of the town of _____ in the county of _____
PLEASE to take notice, that we, the overseers of the poor of the town of _____ in the county of _____ do intend, at the next general sessions of the peace, to be holden in and for the said county of _____ to commence and prosecute an appeal against an order of S. P. and J. P. Esquires, two of the justices of the peace of the said county of _____ for and concerning the removal of _____ to our said town of _____ Witness our hands this _____ day of _____

A. B. } Overseers of the
 C. D. } poor.

Notice to overseers that a poor person belonging to their town is unable to be removed, and requesting them to provide for him.

To the overseers of the poor of the town of _____ in the county of _____
PLEASE to take notice, that P. P. late of _____ laborer, has lately come [or, removed] out of your said town of _____ where he is legally settled, as we are credibly informed, into our town of _____ and is here taken sick, [or, has become lame, or, broken his leg, or, as the case may be, describing the condition he is in] so that he cannot be conveniently removed back to the said town of _____ and that he is in indigent circumstances, and unable to maintain himself, and is now a charge, [or, is likely to become a charge, as the case may be,] to the said town of _____. You are therefore hereby requested to take care of, relieve and maintain the said P. P. during his illness, and also to provide for his funeral, if he shall die here. Dated this _____ day of _____

A. B. } Overseers of the poor of the
 C. D. } town of _____

POUNDS AND POUND MASTERS.

I. Pounds.

THERE shall be made and kept one or more sufficient pounds in each city and town of this state. 2 N. R. L. 134. § 21.

II. Pound Masters, and herein.

1. Of his appointment and duty.
2. Of disposing of beasts impounded.
3. Of his fees.

1. Of his appointment and duty.

By statute, the freeholders and inhabitants of the several towns in this state, who are qualified to vote, shall, at their respective town meetings, on the first Tuesday in April in every year, choose so many Pound Masters, who shall be inhabitants of the town, as they, or a majority of them, shall deem necessary and convenient. 2 N. R. L. 125. § 1.

And the common councils of the several cities of New-York, Albany and Hudson, may, from time to time, appoint keepers of the

pounds of their respective cities, who shall hold their offices during the pleasure of the said common councils respectively. *Ib.* § 21.

A pound-keeper is bound to receive every thing offered to his custody, and is not answerable, whether the thing were legally impounded or not. 1 *Term Rep.* 62.

2. *Of disposing of beasts impounded.*

If the owner of any beasts impounded for doing damage shall not pay the damage, and the fees of the keeper, or master of the pound, with reasonable charges for keeping and feeding them, not exceeding *three cents* for each beast for every 24 hours, such beast shall be impounded and fed, *within six days* after such beast shall be impounded; or *replevy* the same beasts, *then it shall be lawful for the keeper or master of the pound to sell such beast at public vendue*, giving at least 48 hours previous notice of the sale, by advertisement, set up at the *pound*, and at the *nearest public place* to the pound. 2 *N. R. L.* 134. § 21.

And out of the monies arising from the sale, he shall pay the damages, and retain the fees and charges of feeding and keeping the beast, and of the sale, and return the overplus to the owner of the beast. *Ib.*

But, if no owner shall appear and claim the overplus *within six calendar months* after the sale, the same shall be paid to the overseers of the poor, where such beast was impounded, for the use of the poor of the city or town. *Ib.*

3. *Of his fees.*

The respective keepers of the pounds and the pound masters in each town may take, for all beasts that shall be put into the pound of which he is keeper or master, the following fees, to wit :

For taking in and discharging,
Every horse, gelding, mare or colt, and all neat cattle, *twelve and a half cents* each.
Every sheep, or lamb, *three cents*.
Every hog, shoat or pig, *six cents*.

And these fees shall be paid to the keeper or pound master, by the owner of the beasts impounded, or some person for him, before the beasts shall be released from the pound, unless the keeper or master of the pound shall otherwise agree concerning the same. 2 *N. R. L.* 134. § 21.

P R E S E N T M E N T.

IT is provided by the Bill of Rights, "that no citizen of this state shall be taken or imprisoned, for any offence, upon petition or suggestion, unless it be by indictment or PRESENTMENT of good and lawful men of the same neighbourhood where such deeds be done, in due manner, or by due process of law." 1 *N. R. L.* 47.

A presentment, properly so called, is a notice taken by the grand

jury of any offence from their own knowledge or observation, without any bill of indictment laid before them, at the suit of the people, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer to it. 4 *Black. Com.* 301. See title INDICTMENT.

PRINCIPAL AND ACCESSARY. See ACCESSARY.

PRISON BREAKING.

I. *By common law.*

II. *By statute.*

I. *By common law.*

IT seems, by the common law, that it is felony for any person lawfully imprisoned for any cause whatsoever, whether criminal or civil, to break prison, and escape therefrom; and this whether he were actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him. 2 *Haw. c.* 19. § 1. 1 *H. H.* 607.

In *England* the severity of this law has been moderated by the stat. of 1 *Ed.* 2. st. 2. which commands "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 convicted thereupon, according to the law and custom of the realm."

And upon that statute, to make a felony by breach of prison, these things must concur: 1. The party must be in prison. 2. He must be in prison for felony. 3. He must break that prison. 1 *H. H.* 608.

But as we have no statute of the kind, it will be unnecessary to select any adjudged cases under the English statute, except a few that seem to furnish reasons of pretty general application; as the following.

If without any obstruction a prisoner go out of the prison doors, being opened by the consent or negligence of the gaoler, or otherwise escape without using any kind of force or violence; this, as has been held under the aforesaid statute, may be felony in the gaoler, but is no breach of prison to make felony in the prisoner. 2 *Haw. c.* 18. § 9. 1 *H. H.* 611.

And the breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others, without his procurement or consent, and he escape through the breach so made, it rather seems, that he cannot be indicted for the breaking, but only for the escape. 2 *Haw. c.* 18. § 10. 1 *H. H.* 611.

And if such breaking is necessitated by inevitable accident, happening without any fault of the prisoner, as where the prison is fired by lightning or other accident, without his privity, and he breaks the prison to save his life, this excuseth the felony. 2 *Inst.* 590. 1 *H. H.* 611.

But if the prison were fired by the prisoner himself, or by his procurement, the breaking to save his life is nevertheless felony ; for it was a necessity of his own creating. *Ib.*

Also it seems that no breach of prison will amount to felony, unless the prisoner escape. 2 *Haw. c.* 18. § 12.

In *Duell's case*, (3 *John. Rep.* 449.) the court say, " a breach of prison, by a person in gaol on a charge of felony, is itself a felony above the degree of *petit larceny*, and punishable by imprisonment in the state prison, for a period not exceeding 14 years. The court sentence the prisoner to an imprisonment in the state prison for four years."

II. By statute.

By statute ; in case any person sentenced to imprisonment in the state prison for any term of years shall break the said prison and escape from thence, and be retaken, such person being thereof convicted, shall be deemed guilty of felony, and shall be adjudged to imprisonment and hard labor in the state prison, for double the term of time specified in the original judgment against him, to commence from the period of the last conviction, notwithstanding the time for which he was to have been imprisoned may, when he shall be retaken, have expired. 1 *N. R. L.* 411. § 15.

And if any person adjudged to be imprisoned in the said prison, otherwise than for life, shall escape from the same, then as often as he shall so escape and be retaken, and again imprisoned, the period for which he was adjudged to be imprisoned shall always be deemed to commence anew from the day when he shall, after having escaped, be retaken and imprisoned again in the said prison, which day shall be ascertained by the inspectors of the said prison ; and he may be so retaken and imprisoned again, after the term for which he was to have been imprisoned has expired. *Ib.* § 16.

And if any person imprisoned in the said prison, otherwise than for life, shall attempt to escape, or shall aid any other in escaping or attempting to escape, he shall be deemed guilty of a misdemeanor, and shall on conviction, be adjudged to be imprisoned in the said prison, for such further term, not for life, after the determination of the term for which he had, at the time when the said misdemeanor was committed, been adjudged to be imprisoned, as the court shall in their discretion deem proper. *Ib.* § 18.

And if any person shall in any manner howsoever, aid or assist any person confined in the said prison, in escaping or attempting to escape from the same, he shall be deemed guilty of a misdemeanor, and shall on conviction thereof in due form of law, be adjudged to be imprisoned in the said prison at hard labor, for such term of time as the court in which such conviction may be had, shall in their discretion deem proper, not exceeding ten years. *Ib.* 412. § 19.

See title ESCAPES. See also GAOL & GAOLER.

P R I V I L E G E .

I. *Of members of congress and of the state legislature.*

II. *Of other officers and persons.*

I. *Of members of congress and of the state legislature.*

BY Art. 1. § 6. of the constitution of the United States, members of both houses of congress are, in all cases, except treason, felony and breach of the peace, privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same.

But a member of congress is privileged from arrest only while at congress, or *actually* going to or returning from congress. 2 *John. Cas.* 222.

No member of the legislature, his servant or servants, are liable to arrest, on any civil process, while coming to or returning from the place where the legislature sets, to the place of his residence; but the time of coming and returning cannot exceed 14 days. 1 *N. R. L.* 122. § 1.

But this privilege from arrest does not extend to any forfeiture, misdemeanor, or breach of trust, in any office or place of public trust. *Ib.* § 3.

A member of assembly however is not entitled to his privilege, *after he has reached home*, though within the 14 days allowed for his return. 1 *John. Cas.* 415.

II. *Of other officers and persons.*

By statute, 1 *Cong. 2 Sess. c.* 9. § 25. All ambassadors and other public ministers, and their domestics are privileged from arrest and imprisonment.

All freemen who are entitled to vote at elections, are exempt from arrest, upon civil process, during the continuance of the election.

A judge is not liable to arrest by process issuing out of his own court, but must be proceeded against by bill. 8 *John. Rep.* 351.

A witness from another state, who attended the court to prove a will, was arrested on his return home by process out of the mayor's court, and the supreme court, on motion, discharged him from the arrest. 2 *John. Rep.* 294.

A person, under recognizance to appear at a court of general sessions of the peace, was arrested, while attending on that court, on a *capias* from the supreme court, and held to bail, and the court ordered him to be discharged on filing common bail, unless the plaintiff elected to waive the arrest and take out new process. 7 *John. Rep.* 538.

The *parties* to a suit and their *witnesses* are protected from arrest, in coming to, attending upon, and returning from the court. *Tidd's Prac.* 174.

And this privilege extends to all persons, who have any relation to a cause, which calls for their attendance in court, and who attend

in the course of that cause, though not compelled by process ; such as bail, &c. *Ib.* 173. 1 *H. Black.* 636.

Officers of inferior courts are not privileged from arrest by process from the supreme court, beyond the time of their necessary attendance on those courts. 10 *John. Rep.* 463.

An officer is not bound to take notice of the privilege of a defendant ; but if he does, and does not arrest him, or lets him go after he has arrested him, the defendant's privilege will be a good defence in an action against the officer for an escape. 11 *John. Rep.* 433.

A privilege of being sued by bill, and not by writ is personal merely ; and a party who has been sued by writ may waive the privilege, by a subsequent agreement not to take advantage of it. 12 *John. Rep.* 88.

Process issued from a justice court against an attorney or counsellor, and served during the term of the court of which he is an attorney or counsellor, although returnable after the end of the term, may be abated by plea of the defendant's privilege ; and plea in abatement in a justice court need not be verified by affidavit—and *per Platt, J.*—The statute has modified the common law privilege, by subjecting attorneys and counsellors, during vacation, to the jurisdiction of justices ; but the effect of the proviso is to leave them completely under the protection of their common law privileges during the terms of their courts. 15 *John. Rep.* 243.

PROCESS.

THE subject of outlawry has been designedly omitted in this work, on account of its minuteness and length ; and considering that it is a proceeding not very frequently resorted to, or when it is, that it naturally falls to the management of professional men, who are presumed to have the means of information at hand, the present subject will be chiefly confined to general principles relating to process in criminal cases, as well where it leads to outlawry as otherwise ; but will not pursue to its termination the subject of outlawry. Some general forms of process will be subjoined.

Process generally imports the writs which issue out of any court, to bring the party to answer, or for doing execution. *Comyn's Dig. tit. Pro.* (A. 1.)

And it hath its name because it *proceedeth* or goeth out upon formed matter, either original or judicial. *Lamb.* 519.

Where an authority is granted of *oyer* and *terminer*, the power to issue process is incident ; for there cannot be *oyer*, if the party does not appear, or be brought by process. *Comyn's Dig. tit. Pro.* (A. 1.)

So also, where a statute gives power to justices out of sessions to inquire, hear, and determine, they may, by necessary consequence, 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 require :

before presentment or indictment, it is called a *warrant*; after presentment or indictment, it is properly called *process*. *Dalt. c. 193.*

And by the express words of the commission of the peace, the justices in sessions have power to make and continue processes upon indictments against the persons indicted, until they be taken, surrender themselves, or be outlawed.

From what has been premised, it is plain that there can be no need of process when the defendant is present in court, but only when he is absent. *2 Haw. c. 27.*

And justices of the peace can only award process in their proper counties, on indictments taken before them. *2 Haw. c. 27. § 1, 2, 3.*

But courts of sessions are authorized by statute to issue process of *subpoena* to any part of the state. *2 N. R. L. 147. § 10.*

And by statute, courts of oyer and terminer may direct their writs into all the cities and counties in this state, where need shall be, to arrest such person as shall be indicted before them. *1 N. R. L. 340. § 18.*

By the first article of the constitution of this state, all writs and other proceedings shall run in the name of *the people of the state of New-York*, and be tested in the name of the chaucellor or chief judge of the court from whence they issue.

But if there be no chief judge, it seems by the common law that they ought to issue under the teste of the next senior judge. *2 Haw. c. 27. § 8.*

And the precepts directed by statute, to be issued preparatory to courts of oyer and terminer, are to issue under the seal of the supreme court, and be tested in the name of the chief justice, or, if his office is vacant, in the name of the next senior justice, and to be in the name of the people of the state of New-York. *1 N. R. L. 340. § 16.*

And all writs of process which shall issue out of any court of common pleas or general sessions of the peace, may be tested on any day of the term or session on which such court shall sit, and be made returnable on any other day of such term or session to which such court shall continue to sit, or at the next term or session. *2 N. R. L. 147. § 8.*

And the adjournment of the court before the expiration of the term or sessions, shall not affect the teste, return, or service of any writs issued prior to such adjournment. *2 N. R. L. 147. § 9.*

It seems certain, that a *capias* is the first process in all indictments of treason or felony. *2 Haw. c. 27. § 15.*

And two *capias* seem to be required by statute in all indictments of treason before the award of the exigent. *See the statute for regulating outlawries. 1 N. R. L. 165.*

But *Hale* says the process in case of an indictment of any felony, is only one *capias*, and then an exigent. *2 H. H. 195. 2 Haw. c. 27. § 116.*

And if a defendant appear to an indictment of felony, and afterwards, before issue joined, make 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. c. 27. § 19.*

As to an indictment for any crime, whether against the common

law or statute, *under the degree of treason or felony*, except in such case wherein other process is directed by some statute, *Hawkins* says it is clear, that a *venire facias* (which is in nature of a summons to cause the party to appear) is a proper process to be first awarded; and that if it appears by the return to such *venire*, that the party has lands in the county where he may be distrained, the distress infinite shall be awarded from time to time, till he do appear, and by force thereof, he shall forfeit, on every default, so much as the sheriff shall return upon him in issues—but that if a *nihil* be returned on such a *venire*, a *capias*, alias and pluries, shall issue. 2 *Haw. c. 27. § 8, 9.*

But it seems that the issuing of a *venire facias*, previous to the issuing of a writ of *capias*, is not absolutely necessary, and that a sheriff is justified in executing a *capias*, though no *venire* has previously issued. 4 *Term Rep.* 506.

Of the writ of proclamation and proceedings to outlawry in personal actions and cases of indictment, and information for trespasses or misdemeanors, see the statute for regulating outlawries. 1 *N. B. L.* 165.

It is laid down as a practice to be followed, that when bills of indictment are found by the jury to be true, the sessions grant, upon the application of the prosecutors, but not till after the grand jury are discharged, Bench warrants* against the parties indicted, to bring them into court to answer. *Cr. Cir.* 56.

And that if no application is made for a warrant during the sitting of the sessions, the prosecutor may afterwards apply to the clerk of the peace, who will certify† that a bill of indictment is found; upon whose certificate any one of the justices of the [supreme court] or a justice of peace, will grant a warrant to take the party indicted, and will take sureties or bail [if the offence is bailable by them] for his personal appearance at the next session, to plead to such indictment; or will commit him for want of sureties. *Ib.*

When the inhabitants of a town are indicted or presented, the process is, first, a *venire*, then a *distringas*. *Cr. Cin.* 18.

DISCONTINUANCE OF PROCESS.—It seems to be agreed, that every suit, whether civil or criminal, and also any process in such suit against jurors, ought to be continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and that the suffering any such gap or chasm, is properly called a discontinuance; and the continuing of 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. 2 *Haw. c. 27. § 89.*

And process is generally said to be discontinued in the following instances: 1. Where the second is not tested on the very same day on which the first is returnable. 2. Where there is a term (or sessions) between the teste and the return of a *capias*, that the defendant may not be imprisoned an unreasonable time; but it is no

* For form of Bench warrants see the precedents at the end of this subject.

† The form of such certificate may be thus;

These are to certify, that at a general sessions of the peace, holden at the court house at in and for the county of on the day of last past, O. O. was and stands indicted for a trespass and assault on P. G. yeoman, to which indictment the said O. O. hath not as yet appeared or pleaded. Dated this day of, &c.

objection to an exigent, that it is not returnable on the next term or sessions after its teste. Because it must allow time enough for five counties to be holden between its teste and return. 3. Where, after issue or demurrer, the court gives the parties a day to a distant term (or sessions) without making any continuance to that immediately following. 4. Where the term (or 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, though only in one letter. 6. Where a venire or distringas are issued without any award on the roll to warrant them. 2 *Haw. c. 27. § 90, 91, 92, 93, 94. 100.*

Also, by the common law, all causes, whether civil or criminal, are discontinued, or to speak more accurately, put without day, by the justices before whom they were depending not coming on the day, to which they are continued: and it is agreed that a cause so discontinued, cannot be revived without a re-summons or re-attachment.* 2 *Haw. c. 27. § 106.*

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. c. 27. § 107.*

No person upon the first day of the week, commonly called Sunday, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace, but the service thereof shall be void; and any person so serving or executing the same shall be liable for damages at the suit of the party grieved. 2 *N. R. L. 195. § 5.*

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 pay his fine. *Dalt. c. 193.*

* By statute, if a sufficient number of persons authorized to hold courts of common pleas or general sessions, or mayor's courts, shall not attend for that purpose before five o'clock in the afternoon of the day on which such court is to be held, such one or more of them as shall attend, may adjourn the court to the next day; and if a sufficient number do not attend before five o'clock in the afternoon of such next day, such member or members of the same court as shall attend, may adjourn the same court to the next term or session, or for the longest time that such court can by law be adjourned. 2 *N. R. L. 147. § 7.*

For the authority of justices of the peace to take bail on *process*, see title BAIL.

For cases in which doors may be broken to execute *process*, see title ARREST.

Of process to compel the attendance of witnesses, see title EVIDENCE. EXAMINATION.

Forms of process against a party indicted, &c.

A Venire.

THE people of the state of New-York, &c. 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 O. 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, to answer unto us upon certain articles presented against him, the said O. O. And have you there then this precept. Witness J. P. and K. P. at the day of

And upon this *venire*, if the defendant be returned sufficient, and maketh default, then a *distringas* shall be awarded, and so the same process infinite, until he comes in: But if a *nihil habet* be returned at the first, then after the *venire*, there shall go out a *capias*, *alias*, *pluries*, and *exigent*. *Dalt. Sher.* 160.

A Distringas.

THE people of the state of New-York, by the grace of God free and independent; To the sheriff of the county of greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and *distrain* O. 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 has been said) be returned at first upon the *venire facias* then a *capias* shall issue thus:

THE people of the state of New-York by the grace of God free and independent; To the sheriff of the county of greeting: We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same and *take* O. 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, to answer unto us concerning divers trespasses, contempts, and offences, of which he is indicted. And have you then there this writ. Witness J. P. and K. P. at the day of

At which day A. S. Esquire, sheriff of the county aforesaid, returned that he is not found in his bailiwick, and he did not come. Therefore it is commanded as before.

And *Dalton* says, that the reason 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. *Dalt.* 671.

The Alias Capias.

THE people, &c. To the sheriff, &c. We command you, as we before commanded you, that you omit not *[as before]*
At which day *[as before]* and he did not come. Therefore it is commanded to the sheriff as it hath been often commanded, &c.

The Pluries Capias.

THE people, &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 said O. O. is not found in his bailiwick, and he did not come. Therefore it is commanded, that you cause to be demanded, &c.

Next follows, (in proceeding to outlawry) the exigent, writ of proclamation, judgment of the coroners, &c. The forms of which may be found in Burn's or Williams' Justice, and other books which treat of outlawry.

A Bench warrant from the general sessions.

County of } **T**HE court of general sessions of the peace in the said county
ss. } of To the sheriff and constables of the said county and
every of them, greeting : We command you to take O. O. who stands indicted in the said court for a trespass and assault *[here specify the offence]* and him forthwith to bring before us, or one of us, or before some justice of the peace, of said county, to be dealt with according to law. Given at the day of, &c.

A bench warrant from the court of oyer and terminer, where the offence is notailable.

County of } **T**HE court of oyer and terminer and gaol delivery, in the said
ss. } county To the sheriff and constables of county,
and every of them, greeting : We command you to take O. O. who stands indicted for *[here specify the offence]* and him forthwith to commit to the common gaol of county, and there safely to keep him until delivered by due course of law. Given at the day of

Or where brevity is not so much consulted, the form of a bench warrant, forailable offences, may be thus :

THE court of, &c. To, &c. *[as before]* These are, in the name of the people of the state of New-York, to command you, upon sight hereof, to bring before us, justices of the peace in and for the county aforesaid, at the general sessions of the peace, now holden at the court house, in the town of in and for the said county, the body of O. O. for a trespass and assault *[specify the offence]* (if the court shall be then and there sitting) or if not, before us, or some other justices of the peace of the same county, to find sufficient sureties for his personal appearance at this present session, to answer the same, and all such other matters as on the behalf of the people shall be objected against him : and if he cannot be taken during this present session, that then so soon after as he shall be taken, you bring or cause him to be brought, before us, or some other of the justices of the peace of the said county, to find sufficient sureties for his personal appearance at the next general sessions of the peace to be holden for the said county, to answer as aforesaid, and further to be dealt withal according to justice : Hereof you are not to fail, at your peril. Dated in open session, at the court-house aforesaid, this day of

The forms of warrants for different offences before the party is in-

dicted, will generally be found under the respective titles relating to such offences ; as felony, assault and battery, &c.

When a warrant is issued by a justice of the peace against an offender that escapes, or is in another county, a justice of such other county, on proof of the hand writing of the justice granting the warrant, must indorse his name on the same, which will be an authority to arrest the party there. *See title BASTARDY. Also ESCAPE.*

The form of the indorsement may be thus :

County of } **W**HEREAS proof upon oath hath been made before me, J.
M. ss. } P. Esq. one of the justices of the peace in and for the said
county of M. that the name of F. J. to the within written warrant subscribed,
is of the proper hand writing of the said F. J. the justice of the peace within
mentioned ; I do therefore hereby authorize C. C. who brings to me this war-
rant, and all other persons to whom the said warrant is directed, to execute the
same within the said county of M. Given under my hand and seal, this
day of

Form of a precept for summoning grand and petit juries, and other purposes mentioned in the statute, [1 N. R. L. 340.] to be issued under the seal of the supreme court by the district attorneys, preparatory to the holding courts of oyer and terminer, and at least 15 days before the court. *See title JURIES.*

THE people of the state of New-York, by the grace of God free and independent : To the sheriff of the county of greeting : We command you, that you cause to come before the justices of our supreme court, for the time being ; and the judges and assistant justices of our court of common pleas of the said county, for the time being ; or any three or more of them, of whom either of the justices of our said supreme court shall always be one, at the circuit court to be held at twenty-four good and lawful men of the same county, to inquire for us and the body of the same county, and to do and receive all those things, which, on our behalf, shall be then and there enjoined them : and also all the prisoners then being in the goal of the same county, together with their attachments, indictments, and all other minuments any wise concerning those prisoners ; and likewise free and lawful men of your county, each of whom shall have, in his own name or right, or in trust for him, or in his wife's right, a freehold in lands, messuages or tenements, or of rents in fee, or for life, of the value of 150 dollars, free of all reprises, debts, demands or incumbrances whatsoever, by whom the truth of the matter may be the better known and inquired into, and who have no affinity to those prisoners. And we further command you, that you cause to be publicly proclaimed throughout your bailiwick and county, that all those who will prosecute against those prisoners be then and there to prosecute against them as shall be just ; and that you also give notice to all justices of the peace, coroners, bailiffs, and constables within your bailiwick and county, 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, shall appertain to be done. And you the said sheriff, and your under sheriffs, together with your bailiffs and other officers, shall then and there attend in your and in their own proper persons, to do those things, which to your and their offices do or shall appertain in that behalf to be done ; and have you then there the names of the justices of the peace, coroners, jurors, bailiffs, and constables, and of the said prisoners, and this writ. Witness
said supreme court, at the city of the day of in the year of our Lord.

Form of a precept for summoning grand and petit juries, to the sessions, which is usually made out by the clerk of the sessions, and signed in vacation by a judge of the common pleas and two or more justices. *See title JURIES.*

THE people, &c. To the sheriff of the county of greeting: We command you that you cause to come before our justices assigned to keep our peace in the said county, and also divers felonies, trespasses and other misdeeds in the same county perpetrated, to hear and determine assigned, at the court-house in the town of in the said county, on the day of next, twenty-four good and lawful men of the said county, to inquire of all manner of larcenies, thefts, trespasses, forestallings, regratings and extortions whatsoever, and of all and singular other crimes and offences of which justices of the peace may or ought lawfully to inquire, and likewise good and lawful men of your said county, each of whom shall have, in his own name or right, or in trust for him, or in his wife's right, a freehold in lands, messuages or tenements, or of rents in fee, or for life, of the value of one hundred and fifty dollars, free of all reprises, debts, demands or incumbrances whatsoever, by whom the truth of the matter may be the better known and inquired into, of all crimes and misdemeanors to be tried at the said court. And have you then there the names of the said jurors and this writ. Witness J. J. Esq. judge of the court of common pleas, and J. P. and S. P. Esquires, justices of the peace in and for the said county, at the day of

It was designed to insert other forms of jury process, but their being so common and familiar in all courts of record from whence they are issued, it is thought that the use of them in this place would not compensate for the room they would occupy.

PUBLIC DEFAULTERS.

BY statute, "if any officer of this state, entrusted with public monies by virtue of such office, shall fraudulently or corruptly apply any of the same to any purpose or purposes incompatible with the duties of his office, whereby the people of this state shall sustain any loss, the officer so acting shall be considered guilty of a high misdemeanor, and on conviction thereof, shall be fined in a sum not exceeding 10,000 dollars; or imprisoned for a term not exceeding *ten years*, or sentenced to confinement at hard labor, in the state prison, for a term not exceeding *five years*, in the discretion of the court having cognizance thereof, according to the nature and aggravation of the offence." 1 N. R. L. 241.

QUAKERS. *See title OATHS.*

RAFFLING.

BY the 7th section of an act to prevent horse racing, passed the 25th session of the legislature, c. 44, it is enacted, that every person who shall raffle for any sum of money, goods or chattels, shall for

every offence be liable to pay two dollars, to be recovered before any court having cognizance thereof, with costs of suit ; and every person who shall set up any money, goods or chattels to be raffled for, shall be liable to pay ten dollars to the use of the poor of the town in which the offence shall be committed ; and it shall be the duty of the overseers of the poor of such town, and they are hereby authorized to prosecute in their own name therefor. 1 *N. R. L.* 222.

RAPE.

- I. *Of rape.*
- II. *Of the forcible taking and marrying of women.*
- III. *Of the punishment.*
- IV. *Of the evidence.*

I. *Of rape.*

IT seems that rape is an offence in having unlawful and carnal knowledge of a woman, by force, and against her will. 1 *Haw. c.* 41. § 1. 1 *H. H.* 628. 2 *Inst.* 180.

And by statute, if any person shall unlawfully and carnally know any woman-child under the age of ten years, it shall be adjudged a rape and felony. 1 *N. R. L.* 156. § 1.

And upon an indictment for this offence it is no way material whether such child consented, or were forced, for by reason of her tender years, she is incapable of judgment and discretion. 1 *Haw. c.* 41. § 5. 4 *Black. Com.* 212.

So also by statute, if any person shall by force ravish any woman-child of the age of ten years or upwards, or any other woman, it shall be adjudged felony. 1 *N. R. L.* 156. § 1.

It seems, according to *Hale* and *Hawkins*, that 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. c.* 41. § 6. 1 *H. H.* 628. 633.

But it is said that no assault upon a woman in order to ravish her, howsoever shameful and outrageous it may be, if it proceed not to some degree of penetration, and also of emission, can amount to a rape. 1 *Haw. c.* 41. § 1.

A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be guilty of it. 1 *H. H.* 730.

But he may be a principal in the second degree, as aiding and assisting, though under fourteen years, if it appear by sufficient circumstances, that he had a mischievous discretion, as well as in other felonies. *Ib.*

Offences of this nature are not any way mitigated by shewing that the woman at last yielded to the violence, if such her consent was forced by fear of death, or of duress. 1 *Haw. c.* 41. § 2.

Nor is it any excuse, that she consented after the fact, for the previous violence is no way extenuated by such a subsequent consent. *Ib.*

Nor is it any excuse, that the woman is a common strumpet ; for she is still under the protection of the law, and may not be forced. *Ib.*

It seems also to have been the opinion of ancient writers, that it could be no rape, if the woman conceived with child, because if she had not consented, she could not have conceived ; but this, according to *Hale* and *Hawkins*, is not law at this day. 1 *H. H.* 731. 1 *Haw. c.* 41. § 2.

II. Of the forcible taking and marrying of women.

By statute, if any person shall take any woman against her will, unlawfully, and marry her, or cause her to be married to any other person, by the assent of such misdoer, or defiled, every such taking, and the procuring and abetting the same shall be felony, and punishable as in cases of rape. And every taker, procurer and abetter to the same shall be adjudged a principal felon ; provided that nothing in this section shall extend to a person taking a woman, only claiming her as his ward or bond woman. 1 *N. R. L.* 156. § 2.

III. Of the punishment.

Persons convicted or attainted of any manner of rape, or of aiding, abetting, &c. are punishable in the state-prison for life. 1 *N. R. L.* 156. § 2.

IV. Of the evidence.

The party ravished may give evidence on oath, and is in law a competent witness ; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. 1 *H. H.* 633.

For instance, if the witness be of good fame ; if she presently discovered the offence, and made pursuit after the offender ; shewed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors ; if the place, wherein the fact was done, was remote from people, inhabitants, or passengers ; if the offender fled for it ; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. *Ib.*

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, was near to inhabitants, or common recourse of passage or 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 had been 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. *Ib.* 4 *Black. Com.* 213.

Moreover, if the rape be charged to be committed on an infant

under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligation of an oath, or even to be sensible of the wickedness of telling a deliberate lie. 4 *Black. Com.* 214.

Yet when the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under the years of discretion. 1 *H. H.* 625. 4 *Black. Com.* 214.

There may be, therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard, and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe, for one excellence of the trial by jury is, that the jury are the triers of the credit of the witnesses, as well as of the truth of the fact. 4 *Black. Com.* 214.

"It is true," says *Hale*, "that rape is a most detestable crime, and therefore ought severely and impartially to be punished; but it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus: "I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses." 1 *H. H.* 635. 4 *Black. Com.* 214.

Indictment for a rape.

County of } The jurors for the people of the state of New-York, upon
 ss. } their oaths present, that O. 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 our Lord with force and arms, at in the county aforesaid, in and upon one P. R. spinster, (*if it be a child under the age of ten years, in this place add the words following*, an infant under the age of ten years, to wit, of the age of years) in the peace of God and of the people of the said state, then and there being, violently and feloniously did make an assault, and her, the said P. R. against the will of her, the said P. R. (*or if under ten years of age, omit the words, against her will*) then and there feloniously did ravish and carnally know; against the peace of the people of the said state, and against the form of the statute in such case made and provided.

Form of an indictment for an assistant with intent to ravish.

THE jurors for the people, &c. upon their oath present, that O. O. late of, &c. on, &c. with force and arms, at the town aforesaid, in the county aforesaid, in and upon one P. R. spinster, (*if it be upon a child under the age of ten years in this place add the words following*, an infant under the age of ten years, to wit, of the age of years) in the peace of God and of the people of the said state, then and there being, did make an assault, and her, the said P. R. then and there did beat, wound, and ill treat, so that her life was greatly despaired of, with an intent her, the said P. R. against her will, then and there

feloniously to ravish and carnally know (or if it be an infant under the age of ten years, omit the words, 'against her will,' and what follows, and instead thereof say, 'unlawfully and feloniously carnally to know and abuse') and other wrongs to the said P. R. then and there did, to the great damage of the said P. R. and against the peace of the said people and their dignity. (Here it may be proper to add another count for a common assault, if the intent was not perfectly plain; proceeding, "and the jurors aforesaid, upon their oath aforesaid, do further present," &c.)

RECOGNIZANCE.

- I. *What it is, and of acknowledging it in the name of another.*
- II. *By whom and to whom taken, &c.*
- III. *How forfeited.*

I. *What it is, and of acknowledging it in the name of another.*

A RECOGNIZANCE is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act, as to appear at the sessions] to keep the peace, to pay a debt, or the like. 2 *Black. Com.* 341.

And it is declared, by statute, to be felony for any person to acknowledge, or procure to be acknowledged, any recognizance or bail, in the name of another, not privy or consenting to the same. 1 *N. R. L.* 111. § 1.

II. *By whom and to whom taken, &c.*

It is a rule of law, that no one can take any recognizance, who is not either a justice of record, or by commission. 2 *Haw. c.* 8. § 1.

And these recognizances, in some cases, the justices of 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, than by any express authority given them, either by their commission or by statute. *Dalt. c.* 168. § 1.

And wheresoever any statute gives 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. *Ib.*

Also wheresoever they have authority given them to cause a man to do a thing, there it seemeth they have (in congruity) power given them to bind the party by recognizance to do it; and if the party shall refuse to be bound, that then the justice may send him to gaol. *Dalt. c.* 161. 11 *Co. Rep.* 52.

But a justice of peace can take no recognizance, but only for such matters as concern his office. *Dalt. c.* 168. § 3.

And if a justice of peace shall take a recognizance where he hath no authority, it seemeth void. *Ib.*

All recognizances to be taken by justices of peace must be made to the people.

And the place of abode, and the trade or calling, both of the principal and sureties, are to be punctually set down. 2 *Shaw's Just.* 100.

And the principal is to be bound in double the sum which the sureties are bound in. *Ib.*

But the sum is left to the discretion of the justice; except the recognizance be taken in pursuance of a particular statute, and then it must be done as the statute prescribes; yet if no sum be expressed therein, the justice as to such matter is left to his liberty. 2 *Shaw's Just.* 102.

And when it is entered or made up, the condition must be read to the parties bound, calling them by their names, thus:

You, A. B. acknowledge to owe to the people of this state the sum of 50 dollars; and you, C. D. and E. F. (the sureties) and each of you, acknowledge to owe to the people of this state the sum of 25 dollars, to be levied of your several goods and chattels, lands and tenements, to the use of the said people; upon condition, that if you, A. B. shall be and appear at the next general sessions of the peace, &c. [or, as the condition is] then this recognizance to be void, or else remain in full force—are you content? to which the parties severally make answer, Yes, or, We are content.

To which recognizance the justice is to subscribe his name; but the persons bound need not set their names to it. 2 *Shaw's Just.* 100.

For it is witnessed only by the record, and not by the party's seal. 2 *Black. Com.* 341.

And recognizance taken by a justice of peace is a matter of record, so soon as it is taken and acknowledged, although it be not made up, but only entered in his books. *Dalt. c.* 168.

And every recognizance taken for the keeping of the peace, or for good behaviour, shall be certified and sent or brought, by the justice taking the same, to the next general sessions, that the party bound may be called, and if he make default, that the same may be recorded, and the recognizance, with the record of the default, sent and certified, into the exchequer. 2 *N. R. L.* 507. § 1.

But the recognizances in cases of felony shall be certified to the next court, having cognizance of the offence, and where the offender ought to be tried. *Ib.* § 2.

And no recognizance for the appearance of a person to answer for any cause or misdemeanor, or to testify concerning the same, shall be valid unless signed by the party, so recognized, to appear or testify, and such party shall be entitled to receive from the magistrate taking the recognizance, a note or memorandum of the condition of the recognizance, when the same shall be required by such party. 2 *N. R. L.* 140. § 18.

III. How forfeited.

If the condition of such recognizance be broken, or not complied with, it becomes forfeited and absolute, and *estreated* or *extracted* (that is, taken out from among the other records) and sent up to the *exchequer*, to be collected. 4 *Black. Com.* 253.

And if the party do not personally appear on the day on which he is bound to appear, the court will not discharge the recognizance, although the attorney-general consents to it, but they will respite it till the next term. 11 *Mod. Rep.* 200.

And if persons be bound by recognizance, that *J. S.* shall appear on the first day of such a term, to answer to such an information against him, and not depart till he shall be discharged by the court, and afterwards the attorney-general enter a *nolle prosequi* as to that information, and exhibit another, on which the defendant is convicted, and refuses to appear in court after personal notice, the recognizance is forfeited; for being express that the party shall not depart till he be discharged by the court, it cannot be satisfied unless he be forth coming, and ready to answer to any other information exhibited against him while he continues not discharged, as much as to that which he was particularly bound to answer to; but in such case it seems, that the recognizance shall not be forfeited by the party's not appearing in court the first day of every term, after he hath pleaded to the information, as it may be before he hath pleaded. 3 *Haw. c.* 15. § 84.

For neither the defendant nor his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear. *Cas. B. R. Temp. Hard.* 237.

But notwithstanding recognizances are forfeited and estreated where the parties bound do neglect to perform the conditions, yet the court of *exchequer* (where there appears no obstinate or wilful neglect) will grant orders for *quietus*. *Dogh. Cr. Cir. Com.* 67.

So if a recognizance is estreated in the *exchequer*, because not punctually complied with, yet if the party appears and takes his trial next sessions, he may compound for a very small matter in the court of *exchequer*; because the effect, though not the exact form, of the recognizance is complied with. The judges of *oyer and terminer* are the proper judges, whether recognizances ought to be estreated or spared; and it is for the advantage of public justice, that they should have such power, if upon the circumstances of the case they see fit. 10 *Mod.* 278.

And by parity of reason it should seem, that the justices of the peace in sessions should have the like power in respect of offences cognizable there.

Person acquitted or discharged to pay no fees.] By statute, where any person is indicted or recognized to appear in any court, and who may be acquitted by the verdict of a jury, or discharged by proclamation or otherwise, it shall not be lawful to exact or receive any fees from such person so acquitted or discharged. 4 *Vol. L. N. Y. c.* 123.

Form of a recognizance with sureties.

County of } **B**E it remembered, that on the day of in the year
 ss. } of our Lord O. O. of in the said county of
 blacksmith, and T. S. of in the same county, mason, and S. S. of in
 the said county, yeoman, personally came before me, J. P. Esq. one of the jus-
 tices assigned to keep the peace in and for the said county, and severally ac-
 knowledged themselves to owe to the people of the state of New-York; that is
 to say, the said O. O. the sum of 30 dollars, and the said T. S. and S. S. each
 the sum of 25 dollars, separately, of good and lawful money of the said state,

to be made and levied of their goods and chattels, lands and tenements respectively, to the use of the said people, if the said O O shall make default in the condition following, [or hereon indorsed, *as the case is.*]

Acknowledged the day and year above }
written, before me, J. P. }

The condition of the above [or within written] recognizance is such, that if the above bound O. O. do and shall [as the condition is] then the said recognizance to be void, or otherwise remain in full force.

Form of a recognizance without sureties.

County of } BE it remembered, that on the day of in the year of our
ss. } Lord O. O. of in the said county, laborer, personally
came before me, J. P. Esq. one of the justices of the peace in and for the said
county, and acknowledged himself to owe to the people of the state of New-
York 25 dollars, of good and lawful money of the said state: to be levied of
his goods and chattels, lands and tenements, to the use of the said people, if de-
fault shall be made in the condition following.

Acknowledged the day and year above }
written, before me, J. P. }

The condition, &c. is such, &c.

For other forms. See BASTARDY, BAIL, FELONY, JUSTICES, &c.
SESSIONS, SURETY OF THE PEACE, &c. and INNS and TAVERNS.

RENT. See DISTRESS:

REPRIEVE, PARDON AND EXECUTION.

A REPRIEVE is the withholding of a sentence for an interval of time; whereby the execution of the criminal is suspended. 4 *Black. Com.* 394.

The governor has power to grant *reprieves* and *pardons* to persons convicted of crimes, other than *treason* or *murder*, (1 *N. R. L.* 38. 126.) and he may grant the same upon such conditions, and with such restrictions, and under such limitations, as he may think proper. *Ib.*

But in cases of *treason* or *murder* he can only suspend the execution of the sentence, until it shall be represented to the legislature at their subsequent meeting; and the legislature may either direct a further reprieve, or grant a *pardon* to the criminal, or order his *execution*. *Ib.*

I. Reprieve.

In England, every court which has power to award an execution, has also of common right, a discretionary power of granting a reprieve: as where a person pleads a pardon defective in point of form, but sufficiently shewing the king's intention of mercy; or where it is doubtful whether the offence be not included in a general statute pardon; or whether, as it is laid in the indictment, it amounts to so high a crime as that with which the prisoner was charged. 2 *Haw. P. C.* 658.

But in this state it seems, that after the sentence of the law has been pronounced upon the criminal, the authority of the court ceases,

and none but the governor has the power of respiting the execution. The court, for good cause, may defer pronouncing sentence upon the prisoner, who has been found guilty, even until the next sessions. Justice and the principles of humanity, in many cases, require it ; as where the convict suddenly becomes *insane*, or important questions of law arise, that cannot be speedily and satisfactorily solved.

There are many cases in which it appears to be the duty of the governor to grant a reprieve ; as where a woman, convicted of a capital offence, is found to be *quick* with child, (1 *Haw. P. C.* 658.) or an infant under the age of discretion, or an adult, *non compos*, and the like, (1 *Haw. P. C.* 1, 2.) for the humanity of the law will never permit the innocent to suffer for the guilty, or take the life of him, who cannot distinguish between right and wrong, or who, by the providence of God, has been deprived of his reason.

The respite of execution can in no case be extended beyond the session of the next legislature, after judgment has been pronounced upon the criminal.

II. Pardon.

Traitors and murderers can only be pardoned by the legislature.

Convicts for minor offences may be pardoned by the governor, at such time and in such manner as he may think fit.

This pardon may be granted upon various considerations ; as where the jury have convicted upon light, circumstantial testimony, and it remains a serious doubt whether the prisoner committed the offence charged upon him in the indictment.

So if a convict, after his imprisonment, gives evidence, by his good conduct and character, of repentance and reformation.

As a general rule, whenever the circumstances attending the trial, or the person of a party convicted of a capital offence, are such as to warrant a respite of execution ; in minor offences, the party, under the same circumstances, ought to be pardoned.

Where a criminal is sentenced to the state prison for a term of years, or for life, the governor may pardon him, upon condition that he will leave the country. 2 *N. H. L.* 57.

A pardon restores the competency of a party, so that he may be improved as a witness ; although the pardon expressly states, that the party is relieved from his *imprisonment only*, and not from his *legal disability*. 3 *John. Ca.* 333.

When one is sentenced to the state prison *for life*, and pardoned, he is restored, (although the law declares him *civilly dead*) to many of his former rights and privileges.

One Deming was sent to the state prison *for life* ; his wife married ; she and her husband took the guardianship and custody of his children ; D. was pardoned : held that he was entitled to his children. 10 *John. Rep.* 232.

III. Execution.

Execution is the carrying into effect the sentence or judgment of the court, and is the consummation of human punishment.

There are certain cases wherein, though the prisoner be attainted, yet he is not to have execution awarded against him till he be de-

manded what he can say, why execution should not be awarded against him. 2 *Hale*, 407.

The *award of execution*, in legal parlance, means the *judgment or sentence* that is pronounced by the court upon the criminal, who stands convicted of the offence charged upon him, either by his own confession, or the verdict of a jury.

So where a person attainted hath been at large after his attainder, and afterwards is brought into court, it shall be demanded, why execution shall not be awarded against him; and if he deny that he is the same person, it shall be immediately tried by a jury, returned for that purpose. *Ib.* 407. 2 *Haw.* 657.

So also, where the judgment was given at a former session, for in the interval between this and the former session, he may have a pardon to plead. *Ib.* 407. 2 *Haw.* 657.

The court may command execution to be done without any other writ or warrant but an award of the court upon judgment. *Ib.* 407. 2 *Haw.* 657.

Regularly, the officer that is to make the execution, is that officer in whose custody, by law, the prisoner is, at the time of the judgment given; for into his custody he is to be remanded, after judgment pronounced, and there to stay till judgment executed. 2 *Hale*, 410. 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. *Ib.*

The sheriff, or other officer, cannot vary the judgment of the court; as to transport a criminal, who has been sentenced to the state prison for life; or to shoot, or behead a man who has been condemned to be hanged.



R E S C U E.

THE most general notion of rescous is, where a stranger forcibly frees another from an arrest, or some legal commitment. *Co. Lit.* 160. *Fitz. Nat. Brev.* 226.

And the hindrance of a person to be arrested, that has committed felony, is a misdemeanor, but no felony: But if the party be arrested, and then rescued, if the arrest was for felony, the rescuer is a felon; if for treason, a traitor. *Hale's Pl.* 116. 2 *Haw.* 140.

And it is all one whether he be in custody for that account, by a private person or by an officer, or warrant of a justice of peace; for where the arrest of a felon is lawful, the rescue of him is felony. 1 *H. H.* 606.

But unless the prisoner actually go out of the prison, it does not seem to be felony. 2 *Haw. c.* 21. § 3.

It seems 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, then at his peril he is to take notice of it. 2 *H. H.* 606.

But it is said, that to rescue a felon taken on a general warrant, to

answer what shall be objected against him, no cause being expressed in the warrant, is no felony. 1 *H. H.* 578.

Nor unless a felony hath been really done. *Hale's Pl.* 116.

And wherever the breaking of a prison is occasioned by such a necessity as would excuse the party himself breaking the prison, a stranger who rescues him is in like manner excused. 2 *Haw. c.* 21. § 2.

If the person rescued were indicted or attainted of several felonies, yet the escape or rescue makes but one felony. 1 *H. H.* 599.

Process of outlawry lies on all returns of a rescous. 2 *Haw. c.* 27.

And an indictment of rescous must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. 2 *Haw. c.* 19. § 5.

Also he who rescues one imprisoned for felony, cannot be arraigned for such offence *as for felony*, till the principal offender be first attainted; but he may be immediately proceeded against for misprison. 2 *Haw. c.* 21. § 8.

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, 9.

Indictment for a rescue.

County of } **T**HE jurors for the people of the state of New-York, upon their
ss. } oath present, that on the day of in the year of our
Lord J. P. esquire, one of the justices of the said people in and for the
said county of 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, did make, direct, and deliver a warrant or precept
in writing to A. C. of in the said county, one of the constables of the town
of in the county aforesaid; by which said warrant the said A. C. the con-
stable aforesaid, was commanded to take the body of A. O. late of
yeoman, and bring and have him the said A. O. before the said J. P. to be ex-
amined by him the said J. P. concerning an assault said to have been committed
by him the said A. O. upon A. J. of yeoman; which said A. C. the constable
aforesaid, afterwards, that is to say, on the day of in the year afore-
said, at aforesaid, in the county aforesaid, by virtue of the said warrant,
did take and arrest him, the said A. O. for the cause aforesaid, and him the
said A. O. in his custody, by virtue of the said warrant, then and there had; and
that the said A. O. late of aforesaid, in the county aforesaid, yeoman, and
B. O. late of yeoman, well knowing the said A. O. so to be arrested as
aforesaid, afterwards, to wit, on the said day of in the year aforesaid,
at aforesaid, in the county aforesaid, with force and arms, in and upon the
said A. C. the constable aforesaid, then and there being in the peace of God,
and the people, and in the execution of his said office then and there being, did
make an assault, and him the said A. C. did then and there beat, wound and
ill treat, and that the said B. O. him the said A. O. out of the custody of the
said A. C. and against the will of the said A. C. then and there, with force and
arms unlawfully did rescue, and set at large to go where he would; and that
the said A. O. himself, out of the custody of the said A. C. and against the
will of the said A. C. then and there, with force and arms unlawfully did re-
scue, and escape at large, where he would go; in contempt of the constitu-
tion and laws, to the great damage of the said A. C. to the evil example of
all others in the like case offending, and against the peace of the people and
their dignity.

RESTITUTION OF STOLEN GOODS. See STOLEN GOODS.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

I. *What are considered as riots, routs, and unlawful assemblies.*

II. *The suppression and punishment of these offences.*

I. *What are considered as riots, &c.*

BLACKSTONE says, an unlawful assembly is when three, or more, do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, or the game therein; and part without doing it, or making any motion towards it. 4 *B. Comm.* 146.

A rout is when three or more meet to do an unlawful act upon a common quarrel, as forcibly to break down fences upon a right claimed of common or of way; and make some advances towards it. *Ib.*

A riot is when three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as if they beat a man, &c. *Ib.*

And the doing even of a lawful act, as removing a nuisance, if in a violent and tumultuous manner, is deemed to be a riot. *Ib.*

Wherever *three or more persons* use force and violence, in the execution of any design whatever, wherein the law does not allow the use of such force, all who are concerned therein are rioters. 1 *Haw. c.* 65. § 2.

But in some cases wherein the law authorizes force, it is not only lawful, but also commendable to make use of it; as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people, in order with force to suppress rebels, or enemies, or rioters, and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of lands. *Ib.*

Also it seems to be the duty of a sheriff, or other minister of justice having the execution of legal process, and being resisted in endeavoring to execute the same, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain, that they are highly punishable for using any needless outrage or violence therein. *Ib.*

And it seems agreed, that if a number of persons, being met together on any 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. 1 *Haw. c.* 65. § 3.

Therefore on an indictment for a riot against three or more, if a verdict acquit all *but two*, and find them guilty, it is repugnant and

void, unless the indictment charge them with having made such riot, together with divers other persons unknown ; for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty, for there can be no riot where there are no more than two persons. 2 *Haw. c. 47. § 8.*

So where six were indicted for a riot, and two of them died before trial ; two were acquitted, and two only found guilty, yet judgment was given upon this verdict ; for by *Ld. Mansfield* they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot. 3 *Bur. Rep.* 1262.

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. *Ib.*

And if in an assembly of persons lawfully met together, a sudden proposal be stated of going together in a body to do an unlawful act, and such motion be agreed to, the persons concerned are rioters, for their associating together for such new purpose, is no way extenuated by their having at first met upon another. *Ib.*

And if a person seeing others actually engaged in a riot do join and assist them, he also is a rioter. *Ib.*

It hath been holden, that the enterprize ought to be accompanied with some offer of violence, either to the person of a man, or to his possessions, as by beating him, or forcing him to quit the possession of his lands or goods, or the like ; and from hence it seems to follow, that persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one, in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly. 1 *Haw. c. 65. § 4.*

However, it seems clearly to be 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. 1 *Haw. c. 65. § 5.*

For an assembly may meet together with such circumstances of terror as to be a riot. 2 *Salk.* 594, 5. *pl.* 4.

And every such offence must be laid to be done *to the terror of the people.* 1 *Haw. c. 65. § 5.*

From whence it clearly follows, that assemblies at festivals, or meetings for exercise of common sports or diversions, as bull-baiting, wrestling, or such like, are not riotous. *Ib.*

And from the same ground also it seems to follow, that it is possible for three or more persons 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 competent number of people assemble together, in order to carry off a piece of timber to which one of the company has a pretended right, and afterwards do

406 RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

carry it away without any threatening words, or other circumstances of terror. *Ib.*

Also persons assembled together in a peaceful manner, to do a thing prohibited by statute, and afterwards peacefully performing the thing intended, cannot be rioters ; for there seems to be no reason why an assembly should become riotous, barely for doing a thing contrary to statute, any more than for doing a thing contrary to common law. *Ib.*

It seems agreed, that the injury or grievance complained of and intended to be revenged or remedied by such an assembly, must relate to some private quarrel only ; as the inclosing of lands, in which the inhabitants of 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, no way concerning the public. 1 *Haw. c. 65. § 6.*

For whenever the intention of such an assembly is to redress public grievances, and they attempt by force to execute their intentions, they are guilty of high treason. *Ib.*

It is no way material whether the act intended to be done by such an assembly, be of itself lawful or unlawful ; therefore, if three or more persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like in number, in a violent and tumultuous manner, join together in removing a nuisance, or other thing *which may lawfully be done in a peaceful manner*, they are as properly rioters, as if the act intended to be done by them were never so unlawful ; for the law will not suffer persons to seek redress of their private grievances by such dangerous disturbances of the public peace. However, the justice of the quarrel in which such an assembly doth engage, is certainly a great mitigation of the offence. *Ib. § 7.*

II. *The suppression and punishment of these offences.*

By the common law, every sheriff, under-sheriff, and also every other peace officer, as constables, and like officers, may and ought to do all that in them lies towards the suppression of a riot, and may command all other persons whatever to assist them therein. 1 *Haw. c. 65. § 11. Vide 10 John. Rep. 85.*

Also it is certain, that any private person may lawfully endeavor to appease all such disturbances, 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 ; for if private persons may do thus much, as it is most certain that they may, towards the suppressing a common affray, much more may they do it, towards the suppressing of a riot. *Ib.*

Generally offences of this nature are punished at the common law as trespasses, by fine and imprisonment only ; yet sometimes, where they have been very enormous, they have been punished with the pillory. *Ib.*

And if a mayor and commonalty of a town do assemble and make a riot in their common quarrel, this offence shall be adjudged and punished in their natural persons, and not in their body politic. *Lamb. Eiren. 170. c. 5.*

For the corporation itself cannot be in fault, because it is invisible, and exists only in supposition of law. 1 *Haw. c. 65. § 13.*

Yet there are some precedents by which it appears, that corporations have been amerced, for suffering a dangerous riot to happen within their jurisdiction without using their endeavours to suppress it. *Ib.*

Also women are punishable as rioters, but infants under the age of discretion are not. 1 *Haw. c. 65. § 14.*

By statute, justices of the peace are authorized, "to cause to come before them, all persons who shall break the peace, and to commit them to gaol, or to bail them as the case may require; and also to cause to come before them all persons who shall threaten to break the peace, to find sufficient security for the peace or for their good behaviour, or both, as the case may require." 2 *N. R. L. 506.*

Every recognizance so taken is to be certified and sent by the justice taking the same to the next court of general sessions. *Ib.*

In case of refusal to find security the justices are empowered to commit offenders. *Ib.*

Form of an indictment for a riot and assault. *Cr. Cir. Com.*

County of } THE jurors, &c. upon their oath present, that F. C. late of the
ss. } town of in the county of yeoman; T. H. late of the
same place, yeoman; A. H. of the same place, yeoman; and divers other persons (to the jurors aforesaid as yet unknown) on the day of in the year of our Lord with force and arms, at the town aforesaid, in the county aforesaid, did unlawfully, riotously and routously assemble and gather together, to disturb the peace of the said people; and so being then and there assembled and gathered together, in and upon one S. the wife of W. H. in the peace of God and of the said people, then and there being, unlawfully, riotously and routously did make an assault, and her, the said S. then and there unlawfully, riotously and routously did beat, wound and ill-treat, so that her life was greatly despaired of, and other wrongs to the said S. then and there unlawfully, riotously and routously did, to the great damage of the said S. and against the peace of the said people and their dignity.

ROADS. *See HIGHWAYS.*

ROBBERY.

ROBBERY is the felonious and forcible taking, from the person, or in the presence, of another, of goods or money to any value, by violence or putting him in fear. (4 *Black. Com.* 243. *Leach.* 232.)

There must be a taking, otherwise it is no robbery. And this taking must be by force or a previous putting in fear; for this previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies. *Ibid.* 243, 4.

I. *What is or amounts to a robbery.*

II. *The punishment thereof.*

I. *What is or amounts to a robbery.*

Justice Ashhurst defines a robbery to be the stealing or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror, as to induce the party *unwil-*

lingly to part with his property ; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference, for to most men the idea of losing their fame and reputation is equally, if not more terrific, than the dread of a personal injury. *Leach*, 232.

The principal ingredient in a robbery is a man's being *forced* to part with his property ; and a *threat* to accuse a man of having committed the *greatest* of all crimes, is a sufficient force to constitute the crime of robbery by putting in fear. *Ibid*.

He who receives my money by my delivery, either while I am under the terror of his assault, or afterwards, while I think myself bound in conscience to give it to him by an oath to that purpose, which in my fear I was compelled by him to take ; may, in the eye of the law, as properly be said to take it from me, as he who actually takes it out of my pocket with his own hands. 1 *Haw. c. 34. § 1*.

Neither can he who has once actually completed the offence, by taking my goods in such a manner into his possession, afterwards purge it by any re-delivery ; the outrage offered to the rights of society doth not vary in its nature, because ineffectual in its consequences ; therefore where a robber, having taken a purse, returned it again, saying, " if you value your purse, take it, and give me the contents," but was seized before the money was re-delivered, he was found guilty ; for the continuance of the property in the possession of the robber is not required by law. 1 *Haw. c. 34. § 2*.

It is not always necessary, that in robbery there should be strictly a taking from the person, but it sufficeth if it be in his presence, in case it be done with a putting in fear. 1 *H. H. 533*.

Therefore, he who, having first assaulted me, takes away my horse standing by me, or having put me in fear, drives my cattle in my presence out of my pasture, or takes up a purse which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face, may be indicted as having taken such things from my person. 1 *H. H. 533*. 1 *Haw. c. 34. § 5*.

In some cases a man may be deemed to rob another, where in truth he never actually had the other's goods in his possession ; as if several persons come to rob a man, and they are all present, or each taketh the part assigned him ; as some to commit the fact, others to watch at proper distances and stations, to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged, and one only actually take the money, this is robbery in all ; for it was made a common cause with them ; each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprize. 1 *Hale*, 533. *Crompt. Just. 34. 3 Inst. 64. Fost. Cr. L. 350*.

And even though they miss of the first intended prize, and one of them afterwards ride from the rest and rob a third person in the same highway, without their knowledge, out of their view, and then return to them, all are guilty of robbery ; for they came together with an intent to rob, and to assist one another in so doing. 1 *Haw. c. 34. § 4*.

Wherever a person assaults another with such circumstances of terror as put him into fear, and causes him by reason of such fear to

part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. 1 *Haw. c. 34. § 6.*

It is not necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear*; it is sufficient if laid to be done by *violence*. 4 *Black. Com. 244.*

Thus if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. *Ib.*

The following distinction is also to be observed: If any thing is snatched suddenly from the hand, head or person of any one, without any struggle on the part of the owner, or without any evidence of violence being exerted by the thief, it does not amount to a robbery. But if any thing is broken or torn in consequence of the sudden seizure, it would be evidence of such force as would constitute a robbery; as where part of a lady's hair had been torn away by snatching a diamond pin from her head, and an ear was torn by pulling off an ear-ring, each of these cases was determined to be a robbery. *Leach, 238.*

And *larceny* committed with actual force and violence, or with constructive force, by any assault and putting in fear, is a robbery; and in an indictment for such offence, an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. 7 *Mass. 242.*

II. The punishment, &c.

Robbery at common law was punishable with death. But by the statute, the offence is punishable with imprisonment in the state prison for life. 1 *N. R. L. 408.*

By the same statute, every person convicted of an assault with intent to rob, and every person who shall aid, abet, assist, hire, command, or procure any other person to commit said offence, and be thereof duly convicted, shall be punished by fine or imprisonment, or both. And further, the court before whom such person is convicted, may, in their discretion, sentence him to imprisonment in the state prison, for any term of time not exceeding seven years. *Ib. 409.*

Upon conviction of a second offence of like nature, the offender to be imprisoned for any time not exceeding fourteen years. *Ib. 410.*

As to the manner of proceeding in such cases, *vide FELONY, &c. IN SESSIONS, &c.*

Form of an indictment for a robbery.

County of } THE jurors, &c. upon their oath present, that O. O. late of the
ss. } town of in the county of laborer, on the day
of in the year of our Lord, with force and arms, at the town aforesaid, in the county aforesaid, in the public highway, there, (or, if in a field, say, in a certain field and open place, near the public highway) in and upon one P. R. in the peace of God and of the said people then and there being, feloniously did make an assault, and him, the said P. R. in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously did put, and

of the value of of the goods and chattels of the said P. R. from the person and against the will of the said P. R. in the highway aforesaid, then there feloniously and violently did steal, take, and carry away, against the peace of the said people, and their dignity.

SABBATH-BREAKING. See IMMORALITY.

SEARCH WARRANT.

IT seems to be agreed, that a *general warrant to search all suspected places* is illegal in the very face of it, and ought not to be granted. 2 *H. H.* 113. 150. 2 *Haw. c.* 13. § 10. 17.

And it is laid down generally by *Coke*, "that justices of peace have no power, upon a bare surmise, to break open any man's house to search for a felon, or stolen goods, either in the day or night." 4 *Inst.* 176.

But to this opinion, says *Hale*, I can by no means subscribe; it is preparatory to the discovery of felons, and preparing evidence against them, and to the helping persons robbed to their goods; and it is found to be of great use and necessity, and to disuse or discountenance it would be inconvenient to the public. 2 *H. H.* 149.

However, he says it is fit that the following rules should be observed, in respect to the issuing of such warrants.

First; they are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons of suspicion; for these warrants are judicial acts, and must be granted upon examination of the fact. 2 *H. H.* 150.

By article fourth of the amendments to the constitution of the United States, it is declared that no search warrant shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things seized.

This observed, the justice may issue his warrant *to search in such particular places*, whereof the party assigns probable cause of suspicion. 2 *H. H.* 150.

Secondly; it is fit that such warrants to search do express that search be made *in the day time*; for though it is not clear 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 disturbances. *Ib.*

But where the proof is *more than a probable suspicion*, and there is *positive proof*, it is right to execute the warrant in the night time, lest the offenders and goods also be gone before morning. *Shaw's Just. tit. Sear. War.*

Thirdly; they ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, though it is fit the party complaining should be present and assistant, because he knows his goods. 2 *H. H.* 150.

Fourthly ; it ought to command that the goods found, together with the party in whose custody they are found, be brought before some justice of the peace, to the end, that upon further examination of the fact, the goods and party, in whose custody they are found, may be disposed of as to law shall appertain. *Ib.*

A search warrant under the hand and seal of a justice, reciting information on oath that certain goods, describing them, had been stolen by A. and B. and were concealed in the house of C. and commanding the officer to whom it was directed, to enter the said house in the day time and search for the articles stolen and to bring them with C. as the person in whose custody the goods should be found before the justice, is a legal and valid warrant. 10 *John. Rep.* 263.

And a plea of justification under such warrant need not state that it was, in fact, executed in the day time. *Ib.*

Touching the execution of this warrant, *Hale* lays down the following particulars :

First ; 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.

Secondly ; 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 ; and neither the officer nor the party that comes in his assistance, are punishable for it, but may justify it upon the general issue by the statute. 10 *John. Rep.* 263. 1 *N. R. L.* 155.

Thirdly ; *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, viz. lawful if the goods are there ; unlawful if not there. *Ib.*

Upon the return of this warrant executed, the justice before whom it is returned hath these things to do :

First ; 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 hands of the sheriff or the constable, to the end the party robbed may proceed by indicting and convicting the offender, to have restitution, agreeably to the provisions of the statute. 1 *N. R. L.* 497.

Secondly ; 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, 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 that he was knowing they were stolen, it is fit he should be committed or bound over to answer the felony. 2 *H. H.* 151, 2.

For the law relating to the buyers and receivers of stolen goods, see title **STOLEN GOODS**.

Form of a complaint in order to obtain a search warrant.

County of } **B**E it remembered, that this day of P. R. of in the
 ss. } county of yeoman, in his proper person, comes before
 me, J. P. Esq. one of the justices of the peace in and for the said county, and
 upon oath maketh complaint, that on the day of [or, within days,
as the case may be] last past, divers goods and chattels of him, the said P. R.
 of the value of that is to say, were feloniously stolen, taken and carried
 away from and out of the dwelling-house of him, the said P. R. situate at
 aforesaid, in the county aforesaid, by some person or persons unknown; and
 that he hath just and reasonable cause to suspect, and doth suspect, that the
 said goods and chattels, or some part thereof, are concealed in the dwelling-
 house of O. O. of in the said county, laborer; for he, the said P. R. upon
 his oath aforesaid, doth depose and say, that [*here set forth the grounds of sus-
 picion that the same may appear to be reasonable*] and thereupon he, the said P.
 R. prayeth that justice may be done in the premises. R. P.
 Before me, J. P.

Form of a search warrant on the above complaint.

County of ss. To any constable of
WHEREAS P. R. of in the said county, yeoman, hath this day made
 complaint upon oath, before me, J. P. Esq. one of the justices of the
 peace in and for the said county, that within days last past, certain goods
 and chattels of him, the said P. R. to wit: have, by some person or per-
 sons unknown, been feloniously taken, stolen and carried away out of the dwel-
 ling-house of him, the said P. R. at aforesaid, in the county aforesaid; and
 that he, the said P. R. hath probable cause to suspect, and doth suspect, that
 the said goods and chattels, or part thereof, are concealed in the dwelling-
 house of O. O. of in the said county, labourer: These are therefore, in the
 name of the people of the state of New-York, to authorize and require you,
 with necessary and proper assistants, to enter in the day time, into the said
 dwelling-house of the said O. 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, you are to bring the goods so found,
 and also the body of the said O. O. before me, or some other of the justices as-
 signed to keep the peace in and for the county aforesaid, to be disposed of and
 further dealt with according to law. Given under my hand and seal, at in
 the said county, the day of See 10 John. Rep. 263.

SERVANTS. See APPRENTICES—SLAVES.

SESSIONS.

A COURT created by statute, for the indictment of persons gail-
 ty of treason, misprision of treason, murder, or felony, and for the
 trial of crimes and misdemeanors, not punishable with death or im-
 prisonment for life, in the state prison; and is of two kinds.

- I. General Sessions of the peace.
- II. Special Sessions.

I. General Sessions of the peace.

The justices of the peace of each of the counties of this state, the
 city and county of New-York excepted, or any three or more of them;

of whom a judge of the court of common pleas shall always be one, shall have power to hold the courts of general sessions of the peace in the said counties respectively. *2 N. R. L.* 150.

For the times and places of holding said courts, see *2 N. R. L.* from page 142 to 147.

All indictments of or for any treason, misprision of treason, murder, or other felony or crime, which is or shall be punishable with death, or imprisonment in the state prison for life, must be delivered to the next supreme court, or court of oyer and terminer or gaol delivery, to be held in the respective cities and counties, then to be determined according to law. *2 N. R. L.* 150.

All indictments for offences triable and punishable by the court of general sessions, but which are not tried, must also be delivered to the next court of oyer and terminer to be held in their respective cities and counties; and whenever indictments thus sent are not tried in the court of oyer and terminer, they are to be remitted to, and tried in the court from which they came. *Ib.*

The court of general sessions are judges both of law and fact, and a bill of exceptions does not lie to that court. *3 John.* 23.

This court may also discharge a jury without the consent of the prisoner, who may be tried *de novo*: as where a jury being out all night and part of a day, could not agree on a verdict, and the court discharged them without the consent of the party, the discharge was held to be proper, and the prisoner was again arraigned, on the indictment for the same offence. *2 John. Cas.* 275.

But being a court of inferior jurisdiction, the sessions has no power to grant a new trial, after a verdict on the merits; and the supreme court will award a mandamus, to compel them to enter judgment. *1 John. Cas.* 179.

This court has no power to make an original order of filiation and maintenance in cases of bastardy. *10 John. Rep.* 56.

Unless the sessions are authorized specially by statute to award costs, they can in no case award them. *9 John. Rep.* 119.

By the fourth section of the statute, declaring the powers of the courts of general sessions of the peace, the sheriffs of the respective counties in this state, upon notice given them of the holding such sessions, by any two or more of the justices of the peace, together with one of the judges of the court of common pleas, shall summon before said sessions grand and petit jurors for the purpose of indicting and trying offenders. *2 N. R. L.* 150, 1.

On all appeals to the general sessions from the judgments of justices of the peace, defects of form may be amended. *Ib.*

No process or plea in this court is discontinued by any new commission of the peace. *2 N. R. L.* 151.

This court may bail prisoners committed on suspicion of felony. *Ib.*

The persons that are bound to give their attendance at the court of sessions, are as follow:

1. The *justices of the peace*; for the sessions cannot be holden without a competent number of them, who are to return thither such recognizances to answer, prosecute, and to give evidence, as before such justices, in the intervening time between one sessions and another, have been respectively acknowledged and taken. *Cro. Cir. Com.* 34.

But if a sufficient number of persons authorized to hold the court of general sessions shall not attend for that purpose, before five of the clock in the afternoon of that day on which such court is to be held, it shall be lawful for such one or more of them, as shall attend, to adjourn the same court to the next day; and if a sufficient number to hold such court do not attend before five of the clock in the afternoon of such next day; then it shall be lawful for such member or members of the same court as shall attend, to adjourn the same court to the next session thereof, or for the longest time that such court can by law be adjourned. 2 *N. R. L.* 147.

2. The *clerk* of the sessions ought to attend the sessions by himself, or his deputy. *Dalt. c.* 185. § 7. *Cr. Cir. Com.* 54.

3. The *sheriff*, also by himself or deputy, must attend, to return jurors, receive prisoners committed, and the fines imposed by the court. *Ib.*

4. The *constables of towns* ought to be there, and all to whom any warrant has been directed, in order to make return thereof. *Ib.*

5. The *gaoler* ought to be there, to give calendars to the justices, clerk, and other officers of the court, of such persons as are in gaol; and receive such as may be committed for any contempt or offence. *Ib.*

6. The *keeper of the house of correction*, to give calendars as aforesaid, of such disorderly persons as have been committed to his custody. *Ib.*

7. All *jurors* returned by the sheriff, by virtue of the precept to him directed. *Ib.*

8. All *persons bound by recognizance*, to answer, prosecute, and give evidence. *Ib.*

9. All *coroners*. *Ib.*

The jurors not appearing according to their summons, are punishable by loss of issues [or fine,] which usually make up part of the estreats of the sessions; as also the constables and others, by fine to be set on them. *Ib.*

And all persons may freely attend at the sessions for the advancement of public justice, and for the service of the [people;] 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 incident to every court of record, and without which justice would be greatly hindered; 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 for saving his recognizance, and be arrested in his coming thither, or during his tarrying there, [or on his return, 2 *Str.* 987.] it seemeth, according to *Lambarde*, 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. *Lamb.* 402.

At the sessions, offences shall be prosecuted by presentment, information, or indictment. *Comyn's Dig. tit. Just. Pea.* (D. 9.)

But 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.

And the justices of the peace may issue their warrants for appre-

hending 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.

But the sessions have no power to award an attachment for contempt in disobeying their orders; the proper method in such cases being to proceed by indictment for a misdemeanor. 1 *Bott. Const's ed.* 286.

Neither hath the court of sessions any authority to amerce any justice for his non-attendance at the sessions; for it is a general rule, that *inter pares non est potestas*, it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves; and therefore it seems to have been holden, that 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. 2 *Haw. c.* 8. § 57.

Yet it seems to be agreed, that if a justice give just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security; for the public peace requires an immediate remedy in all such cases. *Ib.*

The manner of proceeding at the sessions is as follows :

The justices being met, the crier proclaims the sessions thus :

Hear ye, hear ye, hear ye, All manner of persons who have any business to do at this court of general sessions of the peace, held for the county of may draw near, give their attendance, and they shall be heard.

Then if any new commission of the peace shall have been made out for the county since the last sessions, the clerk should read it openly in court.*

Then the crier says to the sheriff thus :

Sheriff of the county of return the several writs and precepts to you directed and delivered, and returnable here this day, that the justices of the people may proceed thereon; which the sheriff does accordingly. Cr. Cir. Com. 6.

Then another proclamation is made thus :

All justices of the peace, coroners, and other officers, who have taken any inquisition, or recognizances, whereby you have let any person to bail, or taken any examination or other things; put in the records thereof, that the justices of the people may proceed thereon.

Then proclamation is made and the constables called.

*In which case the crier first makes proclamation to the following effect :
Hear ye, hear ye, hear ye, the justices of the people do strictly charge and command all manner of persons to keep silence while the commission of the peace for this county of is openly read, upon pain of imprisonment.

And then proclamation is made for the grand jury thus :

Hear ye, &c. as before, You good men who are here returned to inquire for the people of the state of New-York for the body of the county of answer to your names as you are called, and save your fines.

Then the grand jury are called in order, every one by his name, and when they appear they are sworn.*

The foreman, by himself, takes the following oath, which is administered by the clerk :

You, as foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge : The counsel of the people, your fellows, and your own, you shall keep secret : You shall present no man for envy, hatred, or malice ; neither shall you leave any man unpresented for fear, favor or affection, or hope of reward ; but you shall present all 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 in the following manner :

The same oath which your foreman hath taken, on his part, you, and every of you, shall well and truly observe and keep on your part : So help you God.

When the grand jury are sworn, the crier makes proclamation, and says :

The justices of the people do strictly charge and command all manner of persons to keep silence whilst the charge is giving to the grand jury, upon pain of imprisonment.

Then one of the members of the court gives the charge to the jury.

Note.—In every charge to grand juries, the court are required by statute strictly to charge them diligently to inquire of, and to present or indict all offences against the act to prevent private lotteries, and the act to suppress duelling. 2 *N. R. L.* 188. § 1. 4 *Vol. L. N. Y. b.* 4. § 4.

* If jurors have any reason to offer to the court why they ought to be excused from serving, they should make it before they are sworn.

But if they do not appear when called, the court may impose a fine upon each of them making default, not exceeding 25 dollars ; and this may be repeated from day to day until they attend. And when such fine is imposed, the court must cause immediate proclamation to be made. This may be to the following effect :

Take notice that the court hath imposed a fine of dollars upon each of the following persons, for their non-attendance here this day as grand jurors, to wit : A. B. of the town of gentleman ; C. D. of, &c. naming all that have made default.

And if they do not shew a satisfactory excuse for their default during the sitting of the court, the fine will be estreated. See title Juries.

The same form of proclamation may answer for constables and others, who are fined.

When the grand jury have withdrawn, the course is to call the recognizances, especially such as are to prosecute and give evidence, that so bills may be drawn and prepared. *Dalt. c. 185. § 9.*

Which may be done thus ; after proclamation, say, *all manner of persons that are bound by recognizance to prosecute or prefer any bills of indictment against any prisoner or others, let them come forth and prosecute, or they will forfeit their recognizances.*

And the parties bound over for that purpose, who appear, are sent to the grand jury to give their evidence ; to whom the foreman is authorized to administer the usual oath or affirmation. 1 *N. R. L.* 525. § 27.

After this, it is usual to attend to motions and the ordinary business of the sessions ; and to call persons bound over to the peace or good behaviour ; but they are not to be discharged before the end of the sessions, for fear lest any come to prefer bills against them and they should be gone. *Dalt. c. 185. § 9.*

For the authority of the sessions on appeals, and other particular cases, see the respective titles relating to such subjects.

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 sessions ; for it seems to be agreed, that the justices of the peace may not inquire, try and determine civil offences, in one and the same day, (unless the defendant consents ;) because the party ought to have a convenient time to provide for the trial. *Cro. Car. 448.*

And in such case the party comes into court with his sureties, if any are required ; and the clerk reads the indictment to the party indicted, and says, *Are you guilty or not guilty ?* And the person indicted says, *Not guilty*, which is the manner of pleading the general issue. *Cr. Cir. 41.*

This plea the clerk or attorney-general indorses on the indictment, and then the clerk makes a note of the names and additions of the pledges, and calls the party indicted by his name, and takes the recognizance, thus :

A. B. you acknowledge to owe to the people of this state the sum of C. D. and E. F. (the pledges) you and each of you acknowledge to owe to the people of this state the sum of [generally half the sum in which the principal is bound] to be levied of your respective goods and chattels, lands and tenements, to the use of the said people, upon condition that if you, A. B. shall be and appear at the next general sessions of the peace, to be holden for this county, to try your traverse upon the indictment to which you have now pleaded not guilty, and not to depart the court without leave ; are you content ?

To which they severally make answer *Yes*, or *we are contented* ; and then depart the court for that time.

On the day of trial, the defendant must appear in court, in his proper person. And after the jury are sworn, the clerk reads the indictment to them, and then says : *To which indictment the defendant hath pleaded not guilty : your business, gentlemen, is to inquire whether he be guilty or not guilty, and hearken to your evidence.* *Cr. Cir. 41.*

Then the prosecutor, and all the witnesses that appear to be indorsed on the indictment, 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. *Cr. Cir.* 42, 3.

Assaults and batteries, or other misdemeanors, not charged to have been done riotously, or with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by a civil action, may be accommodated between the offender and the party injured. 1 *N. R. L.* 499. § 19. *See title PROCESS.*

There are also frequent prosecutions at sessions for trifling assaults, in which cases it is advisable for a defendant to plead guilty to the indictment ; and when he does this, the prosecutor, if he thinks proper, gives evidence of the nature of the offence ; and then the court proceeds to fine the defendant for his misconduct towards the prosecutor : but before that is done, the court will permit the defendant to call such witnesses as he desires, and will examine them by way of mitigation. *Cr. Cir.* 45.

The business of the arraignment and trial of prisoners at the sessions for petit larceny ; and other offences of a higher nature, is conducted as follows :

When the grand jury have agreed upon any bills, they bring the same into court ; and the clerk calls every jurymen by his name, who severally answer, to signify they are present ; and the foreman of the jury hands the indictments to the court.

And towards the end of the sessions, or earlier if circumstances should render it expedient, if the persons indicted are attending in court, or are in gaol, the sheriff or gaoler is directed to bring them to the bar ; which being done, the clerk says to one of them, *A. B. hold up your hand.*

Though this holding up of the hand may seem a trifling circumstance, yet it is of this importance, that thereby he appears to be the person indicted, and owns himself to be of that name. 2 *H. H.* 219.

But this being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well ; therefore if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient. 4 *Black. Com.* 323.

Then he is acquainted with the effect of the charge laid against him : *You A. B. stand indicted by the name of A. B. for that you, &c.* So read the indictment through, and then ask the prisoner, *How say you, A. B. are you guilty or not guilty ?* *Dalt. c.* 185. *Cr. Cir.* 12.

If he answer that he is guilty, then the confession is recorded, and no more done till judgment. *Dalt. c.* 185.

If he make no answer at all, and will not plead, it shall be adjudged a denial of the facts charged in the indictment, and the trial shall proceed accordingly. 1 *N. R. L.* 494. § 1. *See title MUTE.*

And if he pleads *not guilty*, it is endorsed on the indictment, as before observed.

But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as misnomer, a former acquittal, former

conviction, a pardon, or the like, then he pleads it without immediately answering to the felony. 2 H. H. 219.

And it is observed by *Hawkins*, 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 the 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. c. 28. § 1.

Although it is sometimes practised 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 probable cause, to defer it. *Dalt. c. 185. § 13.*

And [if not tried] the courts of general sessions may send their indictments against prisoners in gaol, to the courts of oyer and terminer within their respective counties, which have power to try the same, and deliver the gaol. 1 N. R. L. 341. § 21.

When the prisoner is arraigned to be tried by a petit jury, the prosecutors are called on their recognizances to give evidence. *Dalt. c. 188. § 10.*

The clerk [after proclamation] calls the jury on their panel thus : *You good men that are returned and impanelled to inquire* between the people of the state of New-York and the prisoner at the bar, answer to your names, upon the pain and peril that shall fall thereon. Cr. Cir. 12, 13. Dalt. c. 185.*

When the jurors have appeared, the clerk calls the prisoner to the bar, and says to him thus : *These good men that were last called, and have appeared, are those that shall pass between the people of the state of New-York and you : † If, therefore, you will challenge them, or any of them, your time is to speak as they come to the book to be sworn, before they are sworn, and you shall be heard. ‡ Cr. Cir. 13.*

Then the clerk calls the jury to be sworn every man severally; and this is done in the following manner, calling the first juror : ||

You shall well and truly try, and true deliverance make, between the people of the state of New-York and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to evidence : So help you God.

* If the offence is petit larceny, say, *to try this issue of traverse, &c.*

† Upon your life and death, if it is a capital offence, which however cannot be tried at the sessions.

‡ Peremptory challenges are allowed in trials for offences punishable with death or imprisonment for life; but as these offences can only be tried in the higher courts, all challenges in cases triable at the sessions, must be for cause shewn. See title JURIES, div. VI.

|| When the trial is for a capital offence, the clerk calls the prisoner to the bar, and as each juror lays his hand upon the book, and before he is sworn, says, "juror, look upon the prisoner; prisoner, look upon the juror;" and then, if he is not challenged, ~~sworn to him~~, as above; but if for petit larceny, thus :

"You shall well and truly try this issue of traverse, between the people of the state of New-York and the prisoner at the bar, and a true verdict give according to evidence; So help you God."

Then call the second juror, and so swear him in like manner, and so on to twelve.

The crier then counts the jurors, as the clerk reads their names, and asks them if they are all sworn.

Then the clerk calls the prisoner named in the indictment, to the bar, and bids him hold up his hand, and then says to the jury :

Look upon the prisoner, you that are sworn, and hearken to his cause.

A. B. stands indicted by the name of A. B. &c. (reading the whole indictment as he did upon the arraignment) and then says : Upon this indictment he hath been arraigned ; upon his arraignment he hath pleaded not guilty ; and for his trial hath put himself upon his country, which country you are ; so that your charge is to inquire, whether he be guilty of the felony whereof he stands indicted, or not guilty ; if you find him guilty, say so ; if you find him not guilty, say so, and no more, and hear your evidence.

Then the court proceeds to examine the witnesses, upon oath, as well for the people as for the prisoner. Cr. Cir. 14.

And the oath is administered in the following manner :

The evidence that you shall give between the people of the state of New-York and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth : So help you God.

It is usual to allow the prisoner counsel, if he wishes it ; and the court will assign counsel for him if he requests it and is unable to employ any himself.

When the prisoner hath been heard all that he has to say in his defence, the evidence is summed up by the court to the jury ; and if they cannot agree in their verdict at the bar, a constable must be sworn to keep the jury, thus :

You shall keep this jury, in some convenient place, 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, until they are agreed : So help you God.*

When the jury return to the bar, and are agreed on their verdict, the clerk calls them by their names, and asks them *if they are agreed on their verdict, and who shall say for them ;* and calls the prisoner to the bar, and bids him *hold up his hand.* Then says to the jury, *Look upon the prisoner ; you that are sworn, what say you, is A. B. guilty of the felony whereof he stands indicted, or not guilty ?* Cr. Cir. 15.

And after he has recorded the verdict, he says, *Hearken to your verdict as the court has recorded it ; you say A. B. is guilty [or not guilty, as the case is] of the felony whereof he stands indicted ; so you say all.*

When the court is ready to give judgment, the prisoner is set to the bar to receive it.†

* It is sometimes added here, " without leave from the court."

† And in the supreme court or court of oyer and terminer, before sentence is pronounced, in capital cases, proclamation should be made thus : " Hear ye,

Towards the close of the sessions, that is to say, after the grand jury is discharged, such persons in gaol that are not indicted, and such as are, but the bills not found to be true, are delivered by proclamation; and such persons that are bound to appear to answer, and no prosecution exhibited against them, are discharged of their recognizances. *Cr. Cir.* 15. 46.

And the practice is to call the parties bound to answer as they stand entered in the clerk's book, and if they appear, and there be no indictment against them, make proclamation, and say :

*If any person can shew any lawful cause why A. B. C. D. &c. (naming them) should be longer bound, let him come forth and he shall be heard, for they stand upon their discharge.**

And if no one appears after this is three times repeated, they will be discharged on paying their fees. *Cr. Cir.* 46.

But it seems that the court have no power to commit for non-payment of fees; for if there is right, there is remedy; and *indebitatus assumpsit* will lie, if the fee is certain; if uncertain *quantum meruit*. 1 *Ld. Raym.* 703.

If any person has been let to bail and does not appear, he may be called in this manner :

A. B. of the town of laborer, come forth and save yourself and your bail, or you will forfeit your recognizance.

And if he does not appear after being thrice called, call the sureties, thus :

C. D. and E. F. bring forth A. B. your principal, whom you undertook to have here this day or you will forfeit your recognizances.

This also is to be thrice repeated, and if the principal does not appear, the recognizance will be estreated.

When the business of the sessions is over, it is adjourned by proclamation, thus :

All manner of persons that have any further business to do at this court of general sessions of the peace, holden in and for the county of may depart hence and appear here again on the day of next, to which time this court is adjourned.

Note.—The same forms of proclamation and proceedings will in general answer for the court of oyer and terminer, changing the style of the court.

hear ye, hear ye. All manner of persons are commanded to keep silence whilst judgment is given against the prisoner at the bar, upon pain of imprisonment.

* Persons bound to their good behaviour, or to keep the peace, may be discharged in the same manner; or if it be to keep the peace towards the people generally, it may be thus : " If any person can shew any lawful cause why the peace granted against A. B. should be continued, let him come forth, and he shall be heard, for he stands upon his discharge.

Or if it be to keep the peace towards an individual, thus : " C. D. of the town of yeoman, come forth and prosecute the peace against A. B. or he will be discharged."

II. *Special Sessions.*

If any petit larceny, misdemeanor, breach of the peace, or other criminal offence, under the degree of grand larceny, be committed within any of the counties of this state (the city and county of New-York excepted) and the person charged therewith on oath before any justice of the peace shall not forthwith give good and sufficient bail to appear and answer at the next court of general sessions of the peace to be held in and for the said county, such person shall be committed to gaol, or to the custody of a constable of the town where said offender was taken; and in case such offender shall not give bail as aforesaid, within forty-eight hours after being so committed, it shall then be lawful for the justice by whom he was committed, to certify the cause thereof, to any other two justices of the said county and require them to associate with him to try such offender. 2 *N. R. L.* 507, 8.

Being met, the said justices are authorized to hear, and a majority of them to determine the offence. *Ib.*

And upon conviction of the offender, either by his confession or by the oath of one or more credible witnesses, the said justices may impose a fine not exceeding twenty-five dollars, or may imprison him in the county gaol for any time not exceeding six months, or both, as the case may require. *Ib.*

If an inhabitant of the county, the offender is to be discharged after complying with the sentence of the court. *Ib.*

If not an inhabitant of the county he is to be ordered or transported out of the county, to his last place of abode or settlement, if known. *Ib.*

If any person so ordered or transported shall remain in the said county for forty-eight hours, or return thereto within six calendar months after such order or transportation, he shall be fined as aforesaid, or confined as aforesaid, not exceeding three months. *Ib.*

The special sessions may try offenders in less than forty-eight hours, if they require the same. *Ib. Vide 4 John. Rep.* 292.

The sheriffs and constables of the respective counties are bound to execute the sentences of this court, by virtue of warrants executed by the justices or a majority of them. *Ib.*

All expenses incurred in the prosecution and punishment of offenders by this court, which for each offender do not exceed the sum of five dollars, are to be defrayed by the respective counties. *Ib.*

Fines imposed, when paid, are to be applied towards the payment of the expenses of the prosecution, and the remainder, if any, are to be paid into the county treasury. *Ib.*

In the proceedings under this statute, the record of conviction before the justices ought to state sufficient to shew that the justices had jurisdiction. The value of the things stolen ought to be stated, and that the party committed had not given bail within forty-eight hours after being committed, or had consented to a trial before the expiration of that time. 4 *John. Rep.* 292.

Taking away a letter from another, which is of no intrinsic value, or importing any property in possession of the person from whom

it was taken is not larceny, nor any criminal offence of which a special sessions has cognizance. 6 *John. Rep.* 103.

For the indemnity of justices of peace in regard to their acts, either individually or in sessions, see title JUSTICES OF THE PEACE.

For the process of the court of the general sessions, see title PROCESS.

The style of the general sessions is as follows: 4 *Will. Just.* 174.

County of **T**HE general sessions of the peace, holden at the court-house in ss. the town of in and for the said county, on the day of in the year of our Lord before and Esquires, and others, justices of the people assigned to keep the peace in the said county: and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed.

S H E R I F F.

I. *Of Sheriffs generally.*

II. *Of the manner of appointment, qualifications, continuance in office, duties and liability under the statute, and the liability of their sureties.*

III. *Of their duty in the execution of process—and herein—*

1. *Of mesne process.*

2. *Of final process.*

IV. *Of bonds given to sheriffs.*

V. *Their liability in cases of escape, and for the acts of their deputies.*

VI. *Return of process.*

VII. *Fees.*

I. *Of Sheriffs generally.*

A SHERIFF is an officer of great antiquity, trust, and authority; having the custody, keeping, command, and government in some sort, of the whole county committed to his charge and care. *Co. Lit.* 168. *Dalt. Sheriff*, 5.

The sheriff is “*ex officio*” a conservator of the peace, and he may apprehend and commit to prison all persons who break the peace or attempt to break it. 1 *Blac. Com.* 343.

The sheriff may and is bound “*ex officio*” to pursue and take all traitors, murderers, felons and other misdoers, and commit them to goal for safe keeping. *Ib.*

It is the sheriff's duty in case of invasion, rebellion, insurrection, or riot, to raise the *posse comitatus* for the suppression thereof. And this he may do in all necessary cases for the apprehension of felons, or for the execution of process. 1 *Blac. Com.* 343. 4 *Will. Jus.* 590. 1. *N. R. L.* 423. 10 *John. Rep.* 85.

By the statute regulating outlawries, the sheriff, either in person or by deputy, is bound to hold a court at the court house in his county, on the first and third Mondays in every month, for the purpose of demanding persons upon exigents and pronouncing outlawries. 1 *N. R. L.* 165. § 2.

II. *Of the manner of appointment, qualifications, continuance in office, duties and liability under the statute, and the liability of their sureties.*

Sheriffs are appointed by the council of appointment. They must be substantial freeholders, and give such security as is required by statute. *Vide* 1 *N. R. L.* 419. § 1.

And unless the sheriff give the security within twenty days after notice of his appointment he is deemed to have refused to serve. *Ib.* § 3.

For their oath, *vide* 1 *N. R. L.* 383, 4.

By the twenty-sixth article of the constitution of this state, all sheriffs and coroners must be annually appointed, and no person shall be capable of holding either of the said offices, more than four years successively, nor the sheriff of holding any other office at the same time.

But the statute declaring it to be the duty of the council to appoint sheriffs agreeably to the constitution, provides that the sheriff actually in commission, shall continue in and execute all the duties of such office, until a new sheriff shall be appointed in his place, and shall have delivered to him a writ of discharge, if he shall be found in the county. If not in the county the new sheriff must file it in the clerk's office. 1 *N. R. L.* 420. § 4.

The new sheriff being appointed and sworn, he ought, at or before the next county court, to deliver the writ of discharge to the old sheriff, who is to assign 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 has 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. 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 comes to him. *Wood, b. 1. c. 7.*

When an indenture of assignment of prisoners from the old to the new sheriff specified a suit by the name of *A. B. & Co. vs. C.* this was held sufficiently certain, without giving the names of all the plaintiffs at large. It was a sufficient notice to the new sheriff of the execution against the prisoner. 9 *John. Rep.* 85.

It is the duty of the sheriff, as soon as may be, after his appointment and acceptance, to appoint an under sheriff. 1 *N. R. L.* 420. § 5.

In case of the death or removal of the sheriff out of the county, the under sheriff is to act as sheriff. *Ib.*

In case there be no under sheriff the coroners are to act. *Ib.*

In case of the death of the sheriff, the new sheriff must deliver the writ of discharge to the under sheriff; if no under sheriff, to the coroner, or file it in the clerk's office. *Ib.*

And the new sheriff is not considered as sheriff of the county, until the writ of discharge be so served or filed as aforesaid. *Ib.*

The sheriffs of the different counties (except the sheriff of the city and county of New-York, who has the custody of the gaol for the confinement of persons on civil process only) have the custody of the gaols for the imprisonment of persons both on criminal and civil process, and are to appoint gaolers. 1 *N. R. L.* 422. § 7.

It is the duty of sheriffs to receive all prisoners committed by the authority of the United States. *Ib.* § 8.

The sheriff cannot take a prisoner to a tavern without his consent, so as to charge him for any thing there had, which was not called for by the prisoner. *Ib.* 424. § 16.

The sheriff must not demand illegal fees of a prisoner, nor receive any reward for keeping a prisoner out of gaol; and for offending against these provisions of the statute, he shall forfeit his office and treble damages to the party grieved. *Ib.* 424. § 16, 17.

Debtors and felons must not be confined together in the same room. *Ib.*

The sheriff must not confine male and female prisoners (except husband and wife) in the same room. *Ib.*

It is the duty of the sheriff, whenever a copy of a declaration against any prisoner in his custody, is served on him, to deliver the same to the prisoner within ten days after such service; and for the neglect of this duty, he is answerable for all damages in consequence thereof. *Ib.* 426. § 25.

Whenever a recovery is had against any sheriff for any default or misconduct in his office, the justices of the supreme court may order the bond given by such sheriff to be put in suit against him, or any or all of his sureties; and after judgment obtained, the court shall direct so much money to be levied as will be sufficient to pay the damages of the party aggrieved. *Ib.* 421. § 6.

If however the sheriff or his sureties pay the debt and damages, the suit on the bond shall be stayed and be no further prosecuted. *Ib.*

After judgment obtained upon such bond, if any other person be aggrieved, he may also have execution for his debt and damages. *Ib.*

The sureties are in no case liable beyond the penalty of their bond. *Ib.*

III. Of their duty in the execution of process.

1. Of mesne process.

This is issued for the purpose of compelling the appearance of a party in court, and is of two kinds, *bailable* and *not bailable*.

It is the duty of the sheriff to let out of prison and admit to bail, all persons in custody upon process in any personal action, except persons confined in prison by condemnation, execution, *capias utlagatum*, or by special order of any court or justices. *Ib.* 423. § 13.

And when the true cause of action is not expressed in the writ, the sheriff has no authority to require bail, but must discharge the person arrested upon his endorsing his appearance on the writ. *Ib.* 424. § 14.

The arrest must be by corporal seizin, but it is not necessary that the sheriff himself be the hand that arrests, nor in the presence of

the person arrested, nor actually in sight, nor is any exact distance prescribed; it is sufficient if he be near and acting in the arrest. *Tidd*, 192.

When the defendant is rescued upon *mesne* process, the sheriff may return the rescue; but not when the defendant is rescued after he is put in prison, except by public enemies. *Ib.* 208.

2. Of final process.

This is issued for the purpose of obtaining satisfaction of a judgment recovered, and is of two kinds, *capias ad satisfaciendum* and *fieri facias*: The first against the person, the second against the goods and chattels, lands and tenements of the defendant. On the first kind, the sheriff must confine the defendant, or may admit him to bail according to the statute. See division 4th of this title.

On a *fieri facias*, it is the sheriff's duty to take the property of the defendant specified, and sell it at public auction. Six days notice of the sale of personal property, and six weeks notice of the sale of real property, must be given. 1 *N. R. L.* 505.

The sale must be between the hours of nine in the morning and the setting of the sun on the same day. *Ib.*

The personal property of the defendant is not bound until the delivery of the execution to the sheriff, whose duty it is to endorse upon the back of the execution the time of the delivery. *Ib.* 501. § 6.

Wheat or corn growing is a chattel, and may be taken in execution. 2 *John. Rep.* 418.

Bank shares, or shares in a public library, cannot be taken in execution. 9 *John. Rep.* 96.

All purchases made by the sheriff or his deputies, of lands or goods sold under execution are void. 1 *N. R. L.* 506. § 16.

The sheriff must levy on property before the return day of the execution has elapsed. He may levy upon the return day; but after that time his authority ceases, and if he serve the execution after the return day, he is liable in an action of trespass. 4 *John. Rep.* 450. 2 *Caine's Rep.* 243. 9 *John. Rep.* 117.

A sheriff cannot with his own money pay the plaintiff on an execution, and afterwards levy on the property of the defendant by virtue of that execution. 7 *John. Rep.* 426.

Nor can he take a bond or other security, and detain the execution in his hands, and use it afterwards to enforce the payment of the money advanced to him. *Ib.*

Nor can he detain goods taken upon an execution, in his own hands, and satisfy the debt out of his own proper money. *Noy*, 107.

Nor can the sheriff deliver the goods taken to the plaintiff in satisfaction for the debt; they must be sold. 2 *Vent.* 95.

The sheriff must sell for ready money. 6 *Mod.* 83.

If the defendant is a tenant, the sheriff must pay the landlord the rent in arrear, if it do not exceed one year's rent, before he can remove the goods. 1 *N. R. L.* 437.

When the rent is payable quarterly, the landlord is not entitled to the rent for the current quarter, but only to the rent due on the last quarter day. 2 *John. Rep.* 478.

A sheriff is not liable to an attachment for contempt for not acting upon process, which does not come to his personal knowledge. 1 *John. Ca.* 137.

IV. Of bonds given to sheriffs.

Sheriffs are bound to admit to bail persons taken upon *mesne* process, upon their tendering sufficient security. 1 *N. R. L.* 423. § 13.

This security is called a *bail bond*. It is made to the sheriff himself, in the name of his office, and for the defendant's appearance alone. If made in any other manner it is void. *Ib.*

Where a deputy sheriff, instead of taking a bail bond from A. whom he had arrested, took from him a negotiable note made by B. which A. endorsed in blank to the deputy sheriff for his security, and the deputy sheriff afterwards brought an action, as endorser, against the maker of the note; it was held, that the assignment or transfer of the note to the deputy sheriff was illegal and void, being contrary to the statute; and that the maker might avail himself of this fact to defeat the action. 8 *John. Rep.* 98.

The bail bond may be assigned to the plaintiff by the sheriff or officer taking it. 1 *N. R. L.* 519. § 8.

The assignment must be endorsed on the bail bond, under the hand and seal of the officer, in the presence of two or more credible witnesses. *Ib.*

By the 21st section of the act "concerning sheriffs and their duty," &c. it is enacted, that all prisoners, committed either upon *mesne* or final process, shall be actually detained in prison, until legally discharged; and that if the sheriff permits such prisoner to go at large without such prison, except by virtue of a writ of *habeas corpus*, or by rule of court, he shall be deemed to be guilty of an escape. *Ib.* 426.

By the 6th section of the act "relative to gaols," however, it is enacted, that the sheriffs of the respective counties shall permit any prisoner committed on civil process to go at large within the limits of the liberties of the respective gaols, upon his giving a bond with one or more sufficient sureties, in the penalty of double the amount of the sum for which such prisoner is confined, conditioned for such prisoner's remaining a true and faithful prisoner, within the limits of the liberties aforesaid. *Ib.* 429. 2 *John. Cas.* 239.

The sheriff may require new security, if that given prove insufficient, and may recommit the party bailed to close custody, until such new security be given. *Ib.*

The above bond is assignable, and the assignee may bring an action in his own name. *Ib.*

In the taking of bonds *ut supra*, it is preferable to follow the express terms of the statute, in order to reap the full benefit of the provisions therein. For though a bond taken by a sheriff, that a person in execution shall remain a true and faithful prisoner, without having the penalty in double the sum, &c. and without following the words of the statute in the condition, be good at *common law*, it is doubtful whether it is so under the statute, so as to enable the sheriff to assign it, and the assignee to bring an action on it in his own name. 2 *John. Cas.* 239.

So a bond "to be a true prisoner and not to escape," is good, if not for ease and favour. 1 *Saund.* 161.

The general rule seems to be, that a bond taken by the sheriff to induce a less rigorous imprisonment is good, if the indulgence be such as he would otherwise, consistently with his duty, be authorized to grant; but if it confer a privilege inconsistent with his duty, by which the object of the imprisonment, as a means to compel a satisfaction of the plaintiff's demand, may be impaired or defeated, the bond is illegal and void—*per Radcliffe, J.* 2 *John. Cas.* 245.

A bond to save the sheriff harmless from escapes is void. *Plow.* 60.

If any thing be added to the condition prescribed in the act, which is not legal, that which is inserted against the forms of the act, avoids all the rest. 1 *Saund.* 161, n. 1.

A bond to pay money into court at the return of a *fiери facias*, is good. *Ib.*

So a bond to save the sheriff harmless against a false return of a *fiери facias* is good. *Ib.*

V. The liability of sheriffs in cases of escapes, and for the acts of their deputies.

Escapes are of two kinds, voluntary and negligent. 3 *Black. Com.* 415.

Voluntary are those by the consent of the sheriff or keeper; negligent, those where the prisoner escapes without the knowledge or consent of the sheriff or keeper. *Ib.*

The limits or liberties of the gaol are considered as an extension of the walls of the prison; and the same rules of course apply to persons bailed, as to those in actual close confinement. 6 *John. Rep.* 121.

In cases of escapes the sheriff is liable to the plaintiff or party for the debt and damages for which the prisoner was arrested or committed. 1 *N. R. L.* 426.

In an action for an escape and false return on mesne process against a sheriff, the plaintiff can recover no more than he might have done in the original action. *John. Rep.* 215.

After a voluntary escape the sheriff cannot lawfully retake or detain a prisoner; though he may after a negligent escape. 2 *John. Cas.* 3. 15 *John. Rep.* 256.

If the sheriff permit a prisoner to go out of prison, if in close custody, or to leave the limits, if bailed; or if the prisoner leaves the gaol or limits aforesaid, without the consent of the sheriff, even for a moment, it is an escape, for which the sheriff is liable. 2 *N. R. L.* 426. 5 *John. Rep.* 89. 1 *Bos. & Pull.* 24.

The statutes relative to gaol liberties have not altered the common law, as to the liability of sheriffs for escapes, nor taken away their common law rights as to a fresh pursuit and recaption. 10 *John. Rep.* 563.

In case of a negligent escape, that is, when the prisoner goes beyond the liberties of the gaol, without the knowledge or consent of the sheriff, and an action is brought against the sheriff, he may plead a recaption on fresh suit, or a voluntary return of the prisoner before action brought, in bar of the action. 10 *John. Rep.* 549. 563.

And the bail, if sued on the bond for the limits by the assignee,

may have the same pleas as the sheriff when sued for the escape. 10 *John. Rep.* 563.

Where the escape is *voluntary*, the sheriff cannot plead a voluntary return, nor recaption, before action brought. *Esp. Dig.* 611, 12. 2 *John. Cas.* 3.

When an action is brought against a sheriff for an escape, the court will stay proceedings against him, until he can obtain judgment against the sureties on the bond for the limits. 5 *John. Rep.* 357. 1 *N. R. L.* 430.

The sheriff may permit a prisoner in execution to go within the liberties of the gaol without taking security; and if the prisoner without his knowledge goes beyond the limits, but returns again before suit brought; or if he is retaken on fresh suit before action brought, the sheriff is not liable for an escape. 6 *John. Rep.* 121. 7 *Do.* 175.

Where a defendant had been surrendered by his bail, and was permitted by the sheriff to go at large within the liberties of the gaol, on giving security by bond according to the statute, and a *ca. sa.* at the suit of the plaintiff was afterwards delivered to the sheriff, who did not take a new bond, and the defendant on the next day went beyond the liberties; it was held in an action for an escape on the execution, that the mere delivery of the *ca. sa.* was not, *ipso facto, et eo instanti*, an arrest, so as to place the defendant in custody on the execution, and that the sheriff was not liable. 8 *John. Rep.* 379.

When a sheriff was served with an order from the court of common pleas, to discharge a person confined on execution, (which order was granted by the court on the application of the prisoner for the benefit of the act for the relief of debtors with respect to the imprisonment of their persons) and did discharge the prisoner, it was held that he was not liable for an escape. 8 *John. Rep.* 472.

A defendant being in custody on a *ca. sa.* the attorney of the plaintiff on record, without any satisfaction of the judgment, or consent of the plaintiff, consented and desired the sheriff to permit the defendant to go at large, for the purpose of obtaining the means of settling the execution, and the sheriff knowingly suffered the defendant, by the direction of the attorney, to go at large; the sheriff was held to be liable for an escape. The attorney could not discharge the defendant without the consent of the plaintiff. 10 *John. Rep.* 220.

When a sheriff, after he had arrested a defendant on a *ca. sa.* went with him two or three miles out of the direct route to gaol, in order that the prisoner might obtain the means of settling the execution; and also went with him that distance to the prisoner's house, that he might get his necessary apparel, and to see his wife before he went to gaol, it was held not to be an escape, it being no more than a reasonable indulgence from laudable and compassionate motives. *Ib.* 420.

In February, 1807, a sheriff arrested a person on a *cap. ad resp.* returnable in May term following, and the defendant was retained in custody until March, 1807, when a new sheriff being appointed, the prisoner was assigned over to the new sheriff. The writ was returned by the old sheriff, *cepi corpus in custodia*. Soon after the assignment of the prisoner, the new sheriff discharged him, on his giving a bail bond. The plaintiff proceeded to judgment, issued a *ca. sa.* which being returned *non est inventus*, he brought an action against the new sheriff for an escape. It was held, that the new sheriff was

bound to discharge the prisoner, on his giving bail at any time before the return of the *cap. ad resp.* and that he was not liable. 7 *John. Rep.* 137.

The old sheriff had no right to return the writ after he was out of office, but should have delivered it over to the new sheriff. *Ib.*

The deputy being the servant of the sheriff, the acts of the deputy, in his official capacity, are considered the acts of the sheriff. 9 *Co.* 98. *Doug.* 41. 2 *Term Rep.* 154.

The sheriff is liable to the plaintiff, and he only, for the deputy's neglect of duty. *Esp. Dig.* 603.

In this state, it seems that *assumpsit* lies against a deputy upon an express promise to pay money collected by him on execution, to the plaintiff. 7 *John. Rep.* 471.

An action lies against a sheriff for the act of his deputy in taking more fees, on levying an execution, than are allowed by law; and whether the sheriff recognized the act of his deputy or not, need not be shewn. *Ib.* 55.

Where a sheriff arrested a defendant on an execution, and left him in the custody of two brothers of the defendant, and went to serve other process, and did not take him to gaol until the next day; it was held to be an escape for which the sheriff was liable. 9 *John. Rep.* 329.

VI. Return of Process.

By the statute, the sheriff is bound to return all writs to him delivered, which return must be signed by him. 1 *N. R. L.* 423.

If the sheriff do not make return, he is liable not only to attachment and amerciamment, but also to an action on the case for damages. *Ib.*

A return by a deputy sheriff in his own name, as deputy sheriff, is not good; the return should be made in the name of the sheriff. 2 *Caine's Rep.* 61.

When a sheriff is called upon to return a writ in which the property of the goods may come in question, he may inquire how the property is circumstanced, and make his return accordingly. *Esp. Dig.* 616.

And if the property in the goods is found by the jury not to be in the defendant, the sheriff is justified in returning *nulla bona*; and the inquisition is a conclusive defence in an action against him for a false return, unless it be shown that he did not act with good faith. 8 *John. Rep.* 185.

Though if the plaintiff tender the sheriff adequate indemnity, and he unreasonably refuse it, it seems the court would consider him bound to proceed and sell, or reject the defence. *Ib.*

When goods taken in execution on a judgment against B. were claimed by A. as his property, and the officer took an inquisition *ut supra*, it was held to be no justification in an action of trespass brought by A. against the officer, but only went in mitigation of damages. 10 *John. Rep.* 98.

The sheriff ought not to return a writ before the return day. When a sheriff returned a writ *nulla bona*, and it was made before the return day, it was held void, for the defendant may have no goods at the time, yet he may at the time of the return. *Esp. Dig.* 616.

The rule on the sheriff to bring in the body of the defendant, cannot be served until twenty days, after the term in which the writ is returned, have expired : and it seems, that the rule ought not to be entered before the expiration of that time. 15 *John. Rep.* 181.

VII. Fees.

The fees of the sheriff in most cases are regulated by statute. 2 *N. R. L.* 19. 25.

The sheriff is entitled to poundage on a *ca. sa.* 5 *John. Rep.* 252.

He is entitled to fees on a *fi. fa.* though the parties compromise before he sells. 1 *Caine's Rep.* 192.

When a jury was summoned for the circuit, but the sheriff was out of office before the return of the venire, it was held that he was entitled to fees for summoning the jury, but not for the return of the venire. 6 *John. Rep.* 125.

A sheriff is entitled to his reasonable fees and expenses for bringing up a former sheriff on an attachment for a contempt in not returning process. 9 *John. Rep.* 328.

Where a sheriff arrested a person on a *ca. sa.* while he was attending court as a witness, he was not entitled to his fees for the service, as the arrest was void and irregular. 10 *John. Rep.* 93.

A sheriff may look to the attorney in the suit for his fees. 9 *John. Rep.* 114.

For other matters, See ARREST, BAIL, ESCAPE, FELONY, GAOL and GAOLER, and PROCESS.

SLAVES.

- I. Of slaves and servants within the act relative to slaves and servants.
- II. Of the effect of slavery, and of the rights of slaves.
- III. Of the master's power, and liability and duties.
- IV. How and when slaves may be abandoned.
- V. Of importing them into the state, and herein of certain contracts of service.
- VI. Of kidnapping, selling and exporting them.
- VII. Of harboring and trading with them.
- VIII. Of their punishment in particular cases.
- IX. Concerning their manumission, and their support.
- X. Of masters of vessels, and other points, &c.

- I. Of slaves and servants within the act relative to slaves and servants.

EVERY negro, mulatto, or mustee within this state, who was a slave on the 31st of March 1817, shall continue such, unless manumitted according to law. 4 *Vol. L. N. Y.* b, 136. § 1.

Every child born of a slave within this state, after the 4th of July, 1799, shall be free ; but shall remain the servant of the owner of his mother, and the executors, administrators or assigns of such owner, in the same manner as if bound to service by the overseers of the poor, if a male, until the age of twenty-eight years, if a female, until the age of twenty-five years. *Ib.* § 4.

And every child born of a slave within this state, after the 31st of March 1817, shall remain a servant until the age of 21 years, and no longer. *Ib.*

And every negro, mulatto, or mustee within this state, born before the 4th of July, 1799, shall from and after the 4th day of July 1827, be free. *Ib.* § 32.

II. Of the effect of slavery, and of the rights of slaves.

All marriages contracted, wherein both parties are slaves, shall be considered equally valid, as though the parties were free ; and the children of such marriage shall be deemed legitimate ; provided, that nothing herein contained shall be deemed or construed to manumit any such slave or slaves. *Ib.* § 2.

And a slave may be a witness for or against a slave, in a criminal case, but in no other case. *Ib.* § 3.

But one who has been a slave, but has obtained his freedom, is competent to prove facts which took place whilst he was a slave. 1 *John. Rep.* 508.

And every person born a slave, and who has been manumitted, may take and hold real and personal estate, the same as if he had been born free ; and may sue for and recover the same, or for injuries done to it ; but nothing herein will give a cause of action against the former owner of such slave or his representatives. 4 *Vol. L. N. F.* b 136. § 1.

And all complaints, by any servant, born of a slave, and made free by this act, arising under this act, against his master or mistress, and all complaints by any master or mistress against such servant, shall be heard, tried and determined, the same as complaints by and against masters and apprentices, under the laws of this state. *Ib.* § 26.

And a slave brought into this state, and hired out for seven years, becomes free at the expiration of the term. *Ib.* § 12.

So a slave brought into this state, contrary to the intent and meaning of the act, becomes free. *Ib.* § 9.

So any person who has been brought into this state since the 8th of April, 1801, and sold, or transferred, for any period, contrary to the provisions of the act, is declared to be free. *Ib.* § 10.

So a slave or servant, exported, or attempted to be exported, or sent to sea, from this state, is free. *Ib.* § 13.

III. Of the master's rights, and liability, and duties.

1. Of his rights.

All persons residing in this state, who have emigrated from any other of the United States, between the 5th of April, 1800, and the 1st of May, 1810, and who hold, in their own right, slaves which they lawfully brought with them, may retain in service, or hire out, their

slaves, to any citizen of this state for a term not exceeding seven years. 4 Vol. L. N. Y. b 136. § 12.

And every person who has resided *ten years* in the state, and is about to remove permanently therefrom, may carry with him every such slave as shall have been the property of such person during *ten years* next preceding : Provided he makes legal proof of such residence, and property in the slave ; and obtains a licence, from the judge of any county, or mayor, or recorder of any city, (before whom the proof is to be taken,) to carry the slave out of the state. *Ib.* § 14.

And any person coming into this state, with intent to reside permanently therein, may bring with him any slave born since the 4th of July, 1799, and belonging to him : Provided such person shall, within 6 months thereafter, file, with the town clerk, his affidavit in writing containing the name, age and sex of such slave. *Ib.* § 16.

2. Of his liability.

If any person shall wilfully suffer or permit his slave, or servant, (*i. e.* the child of a slave manumitted by this act, &c.) to beg of others victuals, cloathing, or other necessities, he shall forfeit 25 dollars for every such offence, to be recovered by action of debt, in any court having cognizance thereof, by any person who will sue for the same, one half of the forfeiture to be paid to the prosecutor, and the residue to the overseers of the poor. 4 Vol. L. N. Y. b 136. § 20.

And if any person shall, by trespass committed by any such slave or servant, whilst in the employ and custody of the owner, sustain damage to the value of 12 dollars and 50 cents, or under, the owner or master or mistress shall be liable to make satisfaction for the same to the party injured ; to be recovered by action of debt, with costs, in any court having cognizance thereof. *Ib.* § 25.

And if a slave, at the time of manumission, be above the age of 45 years, or within that age, and not of sufficient ability to provide for his support, the owner, and the heirs, executors, administrators and assigns of such owner, shall be liable for his maintenance, in case he shall become a charge to any city or town within this state ; and the overseers of the poor of such city or town may, from time to time, recover the amount of the monies expended for the maintenance of such slave, from such owner, his heirs, executors, and administrators, by an action of trespass on the case, for money expended for his use, in any court having cognizance thereof. *Ib.* § 7.

Provided, that if the owner, at, or immediately before the time of such manumission, shall obtain a certificate, signed by the overseers of the poor where such owner shall reside, (or if in the cities of New-York or Albany, by the mayor and recorder) certifying that such slave appears to be under the age of 45 years, and of sufficient ability to provide for himself, or herself, or that the parent of such slave is willing and able to maintain and provide therefor, and shall cause such certificate to be recorded in the clerk's office of such city or town, such certificate, or certified copy thereof, shall be conclusive evidence of the facts therein contained, and forever exonerate such owner, and his representatives, from the maintenance of such slave. *Ib.*

And in case of the refusal of the overseers, or mayor and recorder to grant such certificate, such owner may apply for the same at the court of general sessions, giving ten day's notice of such application to the said overseers or mayor and recorder. *Ib.*

And it is made the duty of such overseers, mayor and recorder, and court, to grant or refuse such certificate, according to the truth of the case. *Ib.*

And the former owner and his representatives, of slaves, manumitted under the 8th section of the act, are liable for their maintenance. *Ib.* § 8.

And if any person shall by fraud or collusion, sell or pretend to sell or dispose of any infirm slave to any person unable to maintain such slave, the sale shall be void; and the person making the same, shall forfeit 50 dollars for each offence, and shall moreover be deemed the owner of such slave within the meaning of the 7th section; and the forfeitures shall be recovered and applied as is directed by the 20th section of this act. *Ib.* § 21.

In the case of a sale of an infirm slave, alleged to be fraudulent, within the meaning of the 14th section, of the old act, which was in the same words as the 21st section of the present act, and which slave had become a pauper, the court, *per Platt, J.* decided (*Claverack vs. Hudson*. 15 *John. Rep.* 284.) that the term "void," may be construed to mean "voidable," at the election of the justices who make the order.

3. Of his duties:

Every person, being an inhabitant of this state, who is entitled to the service of a child born of a slave, as aforesaid (*See* section 4,) shall, within one year after the passing of this act (March 31, 1817,) or after the birth of the child, deliver to the clerk of the city or town, an affidavit, in writing, containing the name and addition of such person, and the name, age, and sex of the child so born; which affidavit shall be recorded by the clerk, in a book to be kept for that purpose. 4 *Vol. L. N. Y.* b 186. § 6.

And such record shall be good evidence of the age of such child. *Ib.* § 6.

And if such person shall neglect to deliver such affidavit to the clerk, within the space of one year, then the child or servant shall be released from his servitude, at the age of 18 years; and every servant so released shall be bound to service by the overseers of the poor. *Ib.* § 6.

And every such person shall, before such child arrives at the age of 18 years, teach such child to read, so that it may be able to read the holy scriptures; or give it, between the ages of 10 and 18, four quarters' schooling: and if the child shall not be so taught to read, or have such schooling, it shall be released from servitude at the age of 18 years; and bound out *ut supra*. *Ib.* § 5.

And the master or mistress of every servant (born since the 4th of July, 1799, and brought into this state) shall use all reasonable means to teach such servant to read, if under the age of 21 years, as is directed by the 5th section, and shall be subject to the same penalty for neglect, as is therein contained. *Ib.* § 17.

IV. *How and when slaves may be abandoned.*

It shall be lawful for any person, entitled, by this act, to the service of any person born of a slave, to abandon such servant, at any time after he shall be of the age of 21 years, upon complying substantially, with the proviso of the 7th section of this act. 4 *Vol. L. N. Y. b* 136. § 18.

The children of slaves, born between the 4th of July, 1799, and the 31st of March, 1804, and who have been duly abandoned, previous to the last mentioned day, shall continue to be provided for at the expense of the state, according to the then existing laws thereof. *Ib.* § 19.

V. *Of importing them into the state, and herein of certain contracts of service.*

No person held as a slave shall be imported, introduced, or brought into this state, on any pretence whatever, except in certain cases, (*See* § 14, 15, 16, 17.) 4 *Vol. L. N. Y. b* 136. § 9.

And no indenture, bond, or contract for personal service, hereafter made by any person held as a slave without this state, shall be obligatory within this state, on the person so bound to service, but the same is hereby declared to be utterly void. *Ib.* § 11.

And every such indenture, bond, or contract made since the 30th of March 1810, shall likewise be utterly void. *Ib.*

And any person so indented or bound is declared to be free. *Ib.*

A sale under a *feri facias* of a slave brought into this state is valid. 11 *John. Rep.* 68.

But if the purchaser sell him again, such sale is contrary to the act, and void. *Ib.*

VI. *Of kidnapping, selling and exporting them.*

1. *Of kidnapping them.*

If any person shall, without due process of law, seize and forcibly confine, or inveigle, or kidnap any negro, mulatto, mustee, or other person of color, with intent to send or carry him out of this state against his will, or shall conspire with any person, or aid, abet, assist, hire, command or procure any person to commit the said offence, or any captain of a vessel or other person, shall sell, or dispose of in any foreign port or place, any negro, mulatto, mustee, or other person of color, and shall be duly convicted of any of the offences, before any court of oyer and terminer or general sessions of the peace of any county, in, or through, which such negro, mulatto, mustee, or other person of color, has been brought, taken, kidnapped, confined, seized or inveigled, or sold as aforesaid, shall be fined or imprisoned, or both, in the discretion of the court; such fine not to exceed 1000 dollars, and such imprisonment not to exceed 14 years at hard labor in the state prison: and the offender may be imprisoned in the county gaol, if the term of the imprisonment does not require him to be sent to the state prison. 4 *Vol. L. N. Y. b* 136. § 29.

2. *Of selling them.*

No person shall, under any color or pretext whatever, sell as a slave, or transfer, for any period, any person who shall have been imported or brought into this state, after the 8th of April, 1801, as a slave ; and every person so imported, *and sold, or transferred*, shall be free, except in certain cases. (*See* § 12, 15, 16, 17.) 4 *Vol. L. N. Y. b* 136. § 10.

A, the owner of a slave in New-Jersey, removed into this state with a slave and entered into an agreement with B. in this state by which he put the slave to service, until the parties or their executors should agree to annul the agreement, this was held to be a sale within the statute ; but if it had been made by any person acting "*en autre droit*," A. would not have been within the act so as to have subjected the vendor to the penalty, or made the slave free. 2 *John. Cas.* 79.

Where a slave aged 25 years ran away from his master in New-Jersey, and came to New-York, and his master came to New-York, and there entered into an agreement by which he let the slave to a person in New-York for 20 years, for the consideration of 225 dollars giving full power to correct, imprison and exercise all the authority over the slave which the master lawfully could do, it was held to be an importation and sale within the statute and that the slave was therefore free. 2 *John. Cas.* 89.

3. *Of exporting them.*

If any person shall send to sea, or export, or attempt to export, from this state, or send or carry out of, or attempt to send or carry out of this state, (except as is by the act provided,) any slave or servant, every person so exporting, or attempting to export, or sending or carrying out of this state, or attempting to send or carry out of this state, such slave or servant ;

And every person aiding or consenting to such exportation, or attempt to export, or to such sending or carrying out of this state, or to such attempt to send or carry out, shall be deemed guilty of a public offence, and forfeit the sum of 500 dollars, with costs of suit, to be recovered by any person who will sue for the same, in any court having cognizance thereof. 4 *Vol. L. N. Y. b* 136. § 13.

And every slave or servant, so exported or attempted to be exported, or sent to sea, shall be free. *Ib.*

That part of the act which declares the slave exported or attempted to be exported to be free, does not operate unless the master or owner is concerned in the exportation, the penalty, in case of a stranger or third person, acting without the knowledge of the owner, is the forfeiture of 250 dollars. 8 *John. Rep.* 41.

VII. *Of harboring and trading with them.*

1. *Of harboring them.*

1. If any person shall employ, harbor, conceal or entertain, any slave, or such servant as aforesaid, knowing such slave or servant to belong to any other person, without the consent of such owner, such

person shall forfeit to the owner of such slave or servant, the sum of 12 dollars and 50 cents, for every 24 hours, and in that proportion for a greater or less time, which such slave or servant shall have been so employed, harbored, concealed, or entertained. 4 *Vol. L. N. Y. b 136. § 22.*

But such forfeiture shall not in the whole exceed the value of such slave, or of the service such owner is entitled to receive from such servant. *Ib.*

2. And if any person shall be guilty of harboring, entertaining, or concealing, or of assisting to convey away any such slave or servant, and the slave or servant be lost or die, such person shall forfeit to the owner of the slave or servant, the value of the slave, or of the service the owner shall be entitled to receive from such servant. *Ib.*

3. These forfeitures may be recovered by an action of debt, with costs of suit, in any court having cognizance thereof. *Ib.*

An action on the case lies for seducing and harboring the servant or slave of the plaintiff notwithstanding the penalty given by the act, (section 22,) which is a cumulative remedy. 13 *John. Rep. 322.*

2. Of trading with them.

1. If any person shall trade or traffic with any such slave or servant, knowing them to be such, either in buying or selling, without the consent of the owner of such slave, or the master or mistress of such servant, such person shall for every such offence forfeit treble the value of the articles so bought or sold, and also the sum of 12 dollars and 50 cents, to the owner of such slave or servant, to be recovered with costs, against such person, by action of debt, in any court having cognizance thereof; and every contract so made with such slave or servant shall be void. 4 *Vol. L. N. Y. b 136. § 23.*

2. And if any person shall sell any rum or other strong liquor, to any such slave or servant, knowing him or her to be such, without the consent of the owner, master or mistress, he shall forfeit, for every offence, 5 dollars, to be recovered, in the name of the owner, with costs, by action of debt, in any court having cognizance thereof; the one half of which forfeiture to be paid by the owner to the overseers of the poor of the city or town where the offence was committed. *Ib. § 24.*

VIII. Of their punishment in particular cases.

If any such slave shall strike a white person, it shall be lawful, on proof of the same, by the oath of such person, for any justice of the peace to commit the slave to gaol, who shall thereupon be tried and punished as in cases of petit larceny, according to an act, entitled "an act declaring the powers of courts of general sessions of the peace, and the powers and duties of justices of the peace." 4 *Vol. L. N. Y. b 136. § 28.*

IX. Concerning their manumission, and their support.

It shall be lawful for the owner of any slave, to manumit such slave, by last will and testament, or by any instrument in writing under his hand. *Ib. § 7. See supra, III. § 2.*

And all manumissions of slaves made by the people called Quakers, and others, before the 9th day of March, 1798, although not in strict conformity to the statutes then in force, shall be valid from the time the same were made. *Ib.* § 8.

But the owner and his representatives remain liable for the maintenance of such slaves, in case they become chargeable, in the same manner as is mentioned in the 7th section of the act. *Supra.* III. § 2.

Certain slaves (*ut supra*, IV.) duly abandoned previous to the 31st of March, 1804, are to be supported by the state, according to the then existing laws, and no contract, made, by overseers of the poor, before the 26th of March, 1802, for the support of any such slave, according to the then existing laws, shall be affected by this act. § 19.

A manumission made by an infant is voidable. 10 *John. Rep.* 132.

Where A. the owner of a slave gave him a certificate, stating that from and after the decease of A. he manumitted the slave; it was held that the slave, after the death of his master was entitled to his freedom; notwithstanding his master, in his life time, but after giving the certificate, had sold and delivered him to a third person. 5 *John. Rep.* 365.

The owner of a slave gave a written promise, to manumit such slave in eight years, on condition of his faithful service during that period. This was held to be a conditional manumission, obligatory on the part of the master, and of which the slave might avail himself on the performance of the condition. 7 *John. Rep.* 324.

Where the overseers of the poor gave a certificate in writing "that the bearer a slave was under the age of fifty years and of sufficient ability to get his living." At the bottom of which was written "we do hereby manumit the same," and the whole signed by the overseers, but not by the executors of the owner of the slave, and the certificate was recorded in the office of the town clerk, registered at the request of the owner. It was held this certificate, thus registered, was conclusive evidence to charge the town, with the future maintenance of such slave, as a pauper. 9 *John. Rep.* 225.

The manumission of a slave, by two of three joint owners, makes the slave a free man. 14 *John. Rep.* 192.

And it seems necessary to render a manumission effectual, that there be some certificate, or writing delivered by the master to the slave, or to some third person for his benefit, so as to consummate the act of manumission. *Ib.* 324.

X. Of masters of vessels, and other points.

1. Of masters of vessels.

Every master of a vessel who shall knowingly receive on board his vessel, for the purpose of carrying out of this state, any slave, for whose exportation such license as aforesaid (*supra*, III. § 1,) hath not been obtained, or who having ignorantly received on board his vessel such slave, shall suffer such slave to depart from his said vessel, in any place out of this state, shall be deemed guilty of a public offence, and for every such offence, shall forfeit the sum of five hundred dollars, to be recovered with costs of suit, by any person who will sue for the same, by action of debt, in any court having cognizance thereof. 4 *Vol. L. N. Y.* b 136. § 14

And where persons of color, owing service or labor in other states, secrete themselves on board of vessels, the captains or commanders of the vessels, or their agents, may seize any such person of color, and take him before any magistrate of a county, or if in the city of New-York, before the justices of the police office, and upon proof by oath or affirmation, to the satisfaction of the magistrate, that such person of color did, without his consent or knowledge, secrete himself on board his vessel, such magistrate or justice shall give a certificate thereof to the captain, commander or agent, which shall be a sufficient warrant to send the person of color to the place from which he was brought. *Ib.* § 30.

But such person of color, when brought before the magistrate or justice, may prove that he does not owe service or labor in any other state. *Ib.*

2. Travellers may take with them their slaves.

Any person, not an inhabitant of this state, travelling to or from, or passing through the state, may bring and take away with him his slave, provided such slave shall not reside or continue in this state more than nine months. 4 vol. L. N. Y. b 136. § 15.

And any inhabitant of this state going a journey to any other of the United States, may carry with him any slave or servant; but must bring him back, under a penalty of 500 dollars (§ 13,) or prove that he could not be brought back, by reason of some unavoidable accident. *Ib.* § 15.

3. False swearing, and holding to bail.

If any person shall knowingly and wilfully swear falsely, on any oath or deposition, made or taken by virtue of, or pursuant to this act, such false swearing shall be deemed and taken to be wilful and corrupt perjury. *Ib.* § 27.

In any action for the recovery of the penalties under this act, the person or persons sued may be held to special bail. *Ib.* § 31.

STATE PRISON.

PERSONS convicted of the following crimes are punishable, with imprisonment, in the state prison, for life or for some shorter period not less than three years.

I. Imprisonment for life.

Any person, indicted of felony, for stealing goods or chattels, and thereof convicted or attainted, of taking such goods or chattels, by robbery or burglary, shall be imprisoned in the state prison, for life, at hard labor, or in solitude, or both. 1 N. R. L. 408. § 2.

Every person duly convicted or attainted of any manner of rape;
Or of the detestable and abominable crime against nature, committed with mankind or beast;

Or of burglary;

Or of feloniously breaking into or taking away goods or chattels from any dwelling house, any person being therein and put in fear;

Or of robbing any dwelling-house, any person being therein;

Or of robbing any person in any place whatsoever;

Or of any offence specified in the 2. 3. and 5. sections of the act entitled "*An act to prevent forgery und counterfeiting*;"

Or of any offence specified in the act entitled "*An act to prevent malicious maiming*;"

And every person who shall aid, abet, assist, counsel, hire, or command any person to commit any of the said offences, and be thereof duly convicted or attainted, shall be punished with imprisonment for life in the state prison. *Ib.* § 3.

And every person, upon a second conviction of any of the offences specified in section 5. (*post* IV.) shall be punished with imprisonment for life. § 5.

II. Imprisonment for life, or a less period, in the discretion of the court.

Every person duly convicted or attainted of forgery or counterfeiting any record or charter, or deed or will, affecting the title to real estate, or promissory negotiable note, or bill of exchange, or endorsement, or assignment thereof;

Or of publishing the same, when forged or counterfeited, as true;

Or of aiding, abetting, &c. therein, shall be punished with imprisonment for life, in the state prison, or for such term, as the court may, in their discretion, deem proper. 1 *N. R. L.* 408. § 4.

III. Imprisonment for life, or for a term not less than seven years.

Every person convicted of selling or exchanging a forged or counterfeited promissory note, with intention to defraud;

Or of making or engraving a plate for counterfeiting any such note;

Or of having in his possession, with intention to utter or pass the same, any counterfeit promissory note for the payment of money;

Or any unfinished note, in the similitude of a Bank note, &c.

Or any plate for counterfeiting the same, &c. 1 *N. R. L.* 406. § 7, 8, 9, 10, 11, shall be punished with imprisonment in the state prison, for life; or for such term, not less than seven years, as the court, having cognizance of the offence, shall in their discretion deem proper. 1 *N. R. L.* 409. § 6.

IV. Imprisonment not exceeding fourteen years.

Every person convicted or attainted, of wilfully burning any dwelling-house uninhabited;

Or any house of public worship;

Or any public building, or barn, or grist-mill;

Or of any offence specified in the first section of the act entitled "*An act to prevent forgery and counterfeiting*." 1 *N. R. L.* 404.

And every person duly convicted or attainted of any felony, other than such as are before enumerated, and directed to be otherwise

punished, and above the degree of petit larceny; and every person who shall aid, abet, assist, hire or command any person to *burn any inhabited dwelling-house*, or to commit any of the other offences in this section mentioned, and be thereof duly convicted or attainted, shall be adjudged, on a consideration of all the circumstances of the case, to imprisonment in the said prison *for any term not more than fourteen years.* 1 *N. R. L.* 408. § 5

Some of the offences intended in the above section, are—

For stealing a public record, &c. 1 *N. R. L.* 112. § 1.

And for acknowledging a fine, recognizance, bail, &c. in the name of another. 1 *N. R. L.* 111. § 1.

And for taking a woman against her will, unlawfully, and marrying, or defiling her. 1 *N. R. L.* 156. § 2.

And every person convicted of *administering poison to another, with intent to murder*, and where such person shall not die thereof, *within one year and a day.* 1 *N. R. L.* 409. § 7.

Or shall be a second time convicted of an assault, with intent to rob, murder, or commit a rape. shall be imprisoned in the state prison *for any time not exceeding fourteen years.* *Ib.* § 9.

V. Imprisonment indefinite.

Any person, imprisoned in the state prison, otherwise than for *life, attempting, &c. to escape*, and convicted thereof, shall be imprisoned such *further term*, not for life, after the termination of the first term of imprisonment, as the court, in *their discretion*, shall deem proper. 1 *N. R. L.* 411. § 18.

VI. Imprisonment not exceeding ten years.

Any person aiding another in *escaping or attempting to escape* from the state prison, and duly convicted thereof. 1 *N. R. L.* 411. § 19.

Or of the crime of perjury, or subornation of perjury.

Or of aiding, &c. any prisoner, lawfully detained in any gaol for any felony, in escaping, &c. shall be imprisoned in the state prison for any term *not exceeding ten years.* *Ib.* § 20.

So also for false swearing, under the insolvent act. 1 *N. R. L.* 471. § 30.

Under absconding and absent debtors' act. *Ib.* § 13.

Before commissioners, &c. *Ib.* 492. § 17.

In the supreme court. *Ib.* 321. § 12.

Lottery managers. *Ib.* 270. § 2.

Surveyors, &c. *Ib.* 298. § 23.

VII. Imprisonment double the original term.

A convict, for term of years, *escaping* from state prison, and being *retaken and convicted*, shall be imprisoned in said prison *for double the term of time*, specified in the original judgment, &c. 1 *N. R. L.* 411. § 15, 16.

VIII. Imprisonment not exceeding seven years.

Every person, duly convicted, of *having or receiving any counterfeit gold or silver coins, &c. with intention to defraud, &c. knowing &c.* (1 N. R. L. 406. § 6,) shall be imprisoned in the state prison for a term not exceeding seven years. *Ib.* 408. § 8.

And every person convicted of any assault, with intent to rob, murder, or commit a rape, and every person who shall aid, abet, assist, hire, command or procure any other person to commit any of the said offences, and be thereof duly convicted, shall be punished by *fine or imprisonment, or both*; and the court, in their discretion, *instead of, or in addition to the fine*, may adjudge such person to *imprisonment in the said prison, for any term of time not exceeding seven years.* *Ib.* § 9.

So also for *serving any writ or process*, under any other authority than that of the U. S. or of this state, &c. 1 N. R. L. 131. § 1.

IX. Imprisonment not exceeding five years.

Every person, a second time, convicted of *buying or receiving stolen goods, &c.* shall be imprisoned in said prison for any time not exceeding five years. 1 N. R. L. 410. § 13.

X. Imprisonment not exceeding three years.

Every person, convicted of any felony, the punishment whereof is not before provided for;

Or of *knowingly buying or receiving stolen goods*;

Or of *knowingly, by false pretence, obtain, &c. money, goods, or chattels, &c. with intent to cheat, &c. their aiders, and abettors, &c.*

Shall be punished by *fine or imprisonment, or either*; or, instead of, or in addition to, a fine, may, in the discretion of the court, be adjudged to imprisonment, in said prison, *for the term of three years.* 1 N. R. L. 410. § 13.

No person sentenced to imprisonment, for any term of time less than *three years*, shall be liable to be imprisoned in the state prison, but shall be confined in the gaol of the county in which he may be so sentenced. 1 N. R. L. 410. § 14.

In all cases where any person shall be duly convicted or attainted of any felony committed after the 29th day of March, 1799, or of aiding, abetting, hiring or commanding any person to commit any such felony, and shall be adjudged to imprisonment for life in the state prison, such person shall be deemed and taken to be civilly dead to all intents and purposes in the law. 1 N. R. L. 410. § 17.

STOLEN GOODS.

I. *Of buyers and receivers of stolen goods.*

II. *Restitution of stolen goods.*

I. *Of buyers and receivers of stolen goods.*

TO buy or receive stolen goods, knowing them to be stolen, is considered at common law as a mere misdemeanor; and such offence does not make the receiver accessory to the theft, because he received the goods only and not the felon. 1 *H. H.* 620.

And by statute, where any person shall buy or receive any goods or chattels of any value whatsoever, that shall have been feloniously taken or stolen from any other person, knowing the same to be stolen, whether the principal be convicted or not, he shall, being convicted, be punished by fine and imprisonment, or either; or if the court shall deem it proper that instead of, or in addition to a fine, he ought to be imprisoned for three years, they may, in their discretion, adjudge him to imprisonment in the state prison, for the term of three years; and for the second offence, for any time not exceeding five years. 1 *N. R. L.* 410. § 13.

And by the act *regulating certain proceedings in criminal cases*, it is made lawful to prosecute and punish every person buying or receiving any stolen goods, knowing the same to be stolen, as for a misdemeanor, although the principal felon be not convicted, which shall exempt the offender from being punished as accessory after the fact, if the principal shall be afterwards convicted. 1 *N. R. L.* 496. § 6.

Shall buy.] The buying at an under value, *Hale* holds to be presumptive evidence, that the receiver knows they were stolen. 1 *H. H.* 619.

Or receive.] But the bare receiving of stolen goods, knowing them to be stolen, does not make the offence; for he may receive them to keep for the true owner. *Ib.* 620.

Any goods or chattels.] These words do not comprehend any species of personal property of which a man may become possessed, but strictly intend the mere personal goods and chattels of another; therefore it has been settled, that the receiving of money, or even a bank note, cannot be considered as a receiving of goods and chattels within the meaning of these statutes. 8 *Co.* 33. 1 *Bur.* 457. *Leach's Cr. L.* 48. 234. 403.

For though the statute (1 *N. R. L.* 174,) has made notes, and other securities, for payment of money, which are mere choses in action, so far *goods and chattels*, as to make them the subject of larceny, yet it goes no further; it does not say that they shall be considered as goods and chattels to all intents and purposes. See *Leach's Cr. L.* 406.

II. *Restitution of stolen goods.*

By statute, if any felon do rob or take away any money, goods or chattels from any person, and the felon be thereof indicted and found guilty, or otherwise attainted by reason of evidence given by the owner of the said money, goods or chattels, so robbed or taken away, or by any other by his procurement, then such owner shall be restored to his money, goods or chattels, and the court before whom the felon shall be so convicted, may award writs of restitution for the said money, goods or chattels. 1 *N. R. L.* 497. § 14.

And the party's title to such restitution shall be preferred to any subsequent title gained in the goods ; as being waifs or estrays, or even by a sale of them bona fide, made in market overt. 2 Haw. c. 23. § 54.

And, though this may seem somewhat hard upon the buyer, yet the rule of law is that *spoliatus debet, ante omnia restitui* ; especially when he has used all the diligence in his power to convict the felon : And since the case is reduced to this hard necessity, that either the owner or buyer must suffer ; the law prefers the right of the owner, who has done a meritorious act, by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. 4 Black. Com. 363.

And it has been usual for the court, upon conviction of a felon, to order (without any writ,) immediate restitution of such goods, as are brought into court, to be made to the several prosecutors. *Ib.*

Also, without a writ of restitution, the party may retake his goods wherever he happens to find them, so as it be not in a riotous manner, or attended with a breach of the peace, because he hath pursued the law upon the felon, and may have his writ of restitution, if he please. 4 Black. Com. 363. 1 H. H. 546.

Besides, the owner may have this only opportunity of doing himself justice ; for his goods might be afterwards conveyed away or destroyed, if he had no speedier remedy than the ordinary process of the law ; if therefore, he can so contrive it, as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding. 4 Black. Com. 4.

And it has been held under the statute, (21 Hen. 8. c. 11,) which is substantially like this of ours, that the party is even entitled to recover things, which in strictness cannot be said to have been stolen from him, as where the felon sells the thing stolen, or exchanges it for some other thing, and the money taken on the sale, or the thing given in exchange are seized to the king's use : in such case they shall be delivered to the party, on conviction of the felon, though they were never in his possession before ; for it arises from the stealing, and is within the equity, though not within the very words of the statute. 2 Haw. c. 23. § 57. Cro. Eliz. 661. Loft's Rep. 88.

And by statute, in all cases of felony, it is made lawful for the person injured, or aggrieved by such felony to have and maintain his action against the person guilty of such felony, in like manner as if the offence committed had not been felonious ; and in no case whatever shall the right of action of the party injured be deemed to be merged in the felony, or in any manner affected thereby. 1 N. R. L. 499. § 20.

Where a felon is convicted of robbery or larceny, upon the evidence of the owner of the money, goods or chattels, bills or promissory notes, the court before whom the felon shall be convicted may award writs of restitution for the said money, goods or chattels. 1 N. R. L. 497. § 14.

All justices who may recover or obtain possession of stolen property, on receiving satisfactory proof of property from the owner, shall deliver the property to the owner thereof, on his paying all necessary and reasonable expenses incurred for the preservation and sustenance of the property. 4 Vol. L. N. T. b 335. § 4.

The owner of goods stolen who has prosecuted the thief to convic-

tion, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft before conviction. 2 *Term Rep.* 750.

And if the owner of goods loses them by a fraud and not by a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them against a person (as a pawn broker) who has fairly acquired a new right of property in them. 5 *Term Rep.* 175.

STRAY. See ESTRAY. SUBPOENA. See EVIDENCE.

SUNDAY. See IMMORALITY.

SUPERVISORS.

I. *When, and how chosen, &c. and herein*

1. Of the time and manner of choosing them, &c.
2. Of their oath of office.
3. Of refusal to serve, &c. and appointment of others.

II. *Of their annual meetings, and herein*

1. Of the time and place of their meeting.
2. Of the number required to constitute a board.
3. Of the decision of questions.

III. *Of their powers and duties, concerning*

1. The clerk and treasurer of their board.
2. County charges, what are such, &c.
3. Town expenses, what, and how apportioned, and collected, &c.
4. The conveyance of lands.
5. The repairs of court houses and gaols, &c.
6. Equalizing the valuation of real estates, &c.
7. The examination of loan officers' books, &c.
8. Taxing Quakers and Shakers.
9. Making a new return of jurors.
10. The assessment and collection of taxes.

IV. *Of their compensation.*

V. *Penalties for neglect of duty &c.*

I. *When and how chosen, &c. and herein*

1. *Of the time and manner of choosing them, &c.*

THE freeholders and inhabitants, of the several towns in this state, who are qualified by law to vote at town meetings, shall assemble together and hold town meetings, in their respective towns, on the first Tuesday in April in every year, and then and there choose one SUPERVISOR, &c. 2 *N. R. L.* 125. § 1.

But no loan officer of any county within this state, shall, during

his continuance in that office, be eligible to the office of supervisor. *Ib.* 138. § 4.

Every supervisor must be a freeholder.

2. Of their oath of office.

Every supervisor shall take and subscribe an oath in the following form, to wit :

" I do solemnly and sincerely promise and swear (or affirm, as the case may be) that I will in all things to the best of my knowledge and ability, faithfully and impartially execute and perform the trust reposed in me as supervisor of the (here insert the name of the place) in the county of (here insert the name of the county) and that I will not pass any account or any article thereof, wherewith I shall think the said county is not justly chargeable, nor will I disallow any account or any article thereof wherewith I shall think the said county is justly chargeable." (2 N. R. L. 128. § 7.) " And that I am a citizen of the United States, and that I am a freeholder, and an actual resident of the town of (here insert the name of the town) in the county of (here insert the name of the county)." So help me God. 3 Vol. L. N. Y. b 254. § 30.

Note.—The latter clause of this oath must be taken also by every town clerk, assessor, commissioner of highways, and overseer of the poor, in addition to the oath &c. under title OATHS. See also title OFFICERS.

The above oath is to be taken and subscribed before a justice of the peace, and delivered to the town clerk, within eight days thereafter ; with the certificate of the justice, of the day and year when the said oath was taken, &c. 2 N. R. L. 129. § 7.

3. Of refusal to serve, &c. and appointment of others.

1. If any supervisor shall not take and subscribe the oath, and deliver the same to the town clerk, within the time limited, such neglect shall be deemed a refusal to serve, and the city or town may proceed to a new choice according to law. 2 N. R. L. 129. § 7.

2. And if the city or town shall not, within fifteen days after refusal to serve, (or death, removal, or incapacity, as the case may be) choose another in his stead, then, and in every such case, any three justices of the peace in the county, residing in or near the city or town, may nominate, and by warrant under their hands and seals, appoint another in his stead ; who shall hold his office, have the same powers, and be liable to the same penalties, as if he had been elected by the freeholders and inhabitants of the city or town. *Ib.* 127. § 5.

This appointment is a judicial act, for the justices must first determine and adjudge that there is a vacancy in the office, and that the town neglected to fill it up. And the officer is not to enquire, at his peril, into the validity of his appointment. It is sufficient that three justices have authority to make such an appointment in the given case. But if two justices only should appoint him, it would then be a case in which no jurisdiction existed, and the appointment would be null and void. 8 John. Rep. 71.

II. *Of their annual meetings, and herein*

1. *Of the time and place of their meeting.*

The supervisors of the several cities and towns in each county of this state, (other than the city and county of New-York) shall annually *on the first Tuesday of October*, meet together at the court house in each county, if there be but one, and if there be two, at each of them, alternately, and if there be no court house, then at the place where the last court of common pleas shall or ought to have been held, and at such other times and places as they shall find convenient. 2 *N. R. L.* 137. § 1.

2. *Of the number required to constitute a board.*

A majority of the supervisors of any county shall constitute a legal and competent board to transact all business at any meeting of the said supervisors. 2 *N. R. L.* 140. § 7.

And their doors shall be open to all citizens who may wish to attend such meeting. *Ib.*

3. *Of the decision of questions.*

All questions which shall arise at any meeting of the supervisors shall be determined by the opinion of the majority of such supervisors attending the same. *Ib.*

III. *Of their powers and duties, concerning*

1. *The clerk and treasurer of their board.*

1. The supervisors in each county shall, as often as may be necessary, appoint a proper person to be their clerk. 2 *N. R. L.* 138. § 4.

2. And shall also appoint some respectable freeholder of the county to be the treasurer of the county. *Ib.*

3. And the said clerk and treasurer shall respectively hold their offices during the pleasure of the said supervisors. *Ib.*

4. But it shall not be lawful for any member of a board of supervisors, or for any clerk of such board to be appointed to, or to hold and exercise the office of county treasurer. *Ib.*

5. And the said treasurer shall enter the receipts and payments of all monies, which shall come into his hands as treasurer, in a book or books kept for the purpose, and, once in every year, at the annual meeting of the supervisors, or at such other time as they shall direct, shall exhibit to them all such books and accounts and all vouchers relating to the same to be allowed and audited. *Ib.*

6. And the treasurer, before he enters upon the execution of his office, shall enter into a bond to the supervisors, with sufficient sureties, to be approved of by them, and in such sum as they shall direct, conditioned, that he shall well and faithfully execute the office of treasurer in such county, and pay all monies which shall come to his hands as treasurer, according to law, and render a just and true account thereof to the said supervisors, or to the comptroller of this

state, when thereunto required, which shall be deposited in the clerk's office of the county. *Ib.* § 5.

7. And it is made the duty of the supervisors, in case the condition of the bond shall not be complied with, to prosecute, by action of debt, the obligors, or their representatives. *Ib.*

8. And the supervisors may commence an action for money had and received; or an action of account, against the treasurer, his executors, or administrators, for all monies received by him as treasurer, other than for the use of this state. *Ib.*

9. And these actions may be brought in the name of the supervisors generally, and shall not abate, or be discontinued by the death, or expiration of office of any of them. *Ib.*

10. And the monies, so recovered, shall be applied by the supervisors to the payment of the contingent charges of the county, or, if the same or any part thereof were received by the treasurer for the use of the state, and recovered on the bond at the instance of the comptroller, the same shall be paid by the supervisors to the treasurer of this state. *Ib.*

11. And if the treasurer, or his executors, or administrators shall refuse or neglect to deliver the books and papers of his office, to his successor in office, upon oath, being lawfully demanded, he shall forfeit and pay for every such refusal or neglect, 1250 dollars, to be recovered with costs of suit, for the use of the county, in the name of the supervisors, by action of debt, or information. *Ib.* § 6.

2. County charges—what are such, &c.

The supervisors shall examine, settle and allow all accounts chargeable against the county, and ascertain what sum ought to be raised for the payment thereof, and for defraying the public and contingent charges of the county. 2 *N. R. L.* 137. § 1.

The following are county charges:

1. The compensation allowed to the supervisors, and clerk, for their services and expenses. *Ib.* 140. § 9.

2. Repairing the court house and gaol of the county, and erecting solitary cells for the reception of convicts. *Ib.* § 11.

3. The reward given by the supervisors for killing wolves and panthers. *Ib.* § 12.

4. The support and maintenance of the county poor, (1 *N. R. L.* 292. § 32,) and the accounts, &c. to be audited by the supervisors. 4 *Vol. L. N. F.* b 177. § 5.

5. The expenses of erecting or repairing bridges in certain cases. 2 *N. R. L.* 281. § 33.

6. The monies paid to a constable or other officer, for conveying felons to gaol, by the county treasurer, upon the warrant and order of a justice of the peace. 1 *N. R. L.* 498. § 15.

7. All sums of money paid by the treasurer of any city or county, by order of the court, to witnesses from foreign states, and to indigent witnesses and prosecutors, in criminal cases. *Ib.* § 16, 17.

8. The compensation which is allowed by law to the district attorneys of the several counties. 4 *Vol. L. N. F.* c 307. § 6.

9. The charge of prosecuting, punishing and transporting offen-

dars, who have been guilty of offences under the degree of grand larceny, provided all the charges for each offender shall not exceed 5 dollars. 2 *N. R. L.* 508. § 4, 5.

10. But the supervisors shall not audit and allow any account in favor of a justice of the peace for any process or proceedings, for a trespass or assault and battery, or either of them. *Ib.* § 8.

11. Losses sustained by the default of the county treasurer in the discharge of the duties of his office, are chargeable to the county. 3 *Vol. L. N. Y. c* 33. § 5.

3. *Town expenses, what and how apportioned and collected, &c.*

1. The compensation for the services of the assessors, inspectors of election, and commissioners of highways, shall be considered as town expenses; and the supervisors shall audit the accounts of such town officers. 2 *N. R. L.* 137. § 2.

2. The expense, incurred by the supervisor, of furnishing the surveyor general with a map of the town is declared to be a town charge. 2 *N. R. L.* 136. § 31.

3. So also are the rewards offered by a town for the destruction of the Canada thistle. *Ib.* 135. § 24.

4. And also for the destruction of wolves, bears, panthers, wild cats and foxes; and all monies raised for prosecuting and defending the common rights of the town. *Ib.* 132. § 15.

5. And for the support and maintenance of the poor of the town. 1 *N. R. L.* 287. § 23.

6. And for the support and maintenance of common schools in the town. 3 *Vol. L. N. Y. b* 231. § 6, 7.

7. And for making and repairing roads, and bridges, and erecting guide posts, &c. 2 *N. R. L.* 270. § 16. 31. 33, 34.

8. And all losses sustained by the collector of a town or ward, are chargeable on such town or ward. 3 *Vol. L. N. Y. c* 33. § 5.

And the supervisors shall ascertain the amount of each town's proportion of the county costs according to the real and personal estates therein, and as valued by the assessors in the same year, and to such sum add such other sum as they shall find necessary to defray the town expenses, and such further sum as the town shall have voted for the destruction of noxious animals, birds and weeds in the same year, with the sum to be raised in the town for the maintenance of the poor thereof. 2 *N. R. L.* 137. § 2.

And shall cause the same to be raised and levied, together with the taxes to be raised and levied for the use of the state, by adding to the tax of each person liable to pay the same, as the other contingent charges of the towns and counties are levied and collected. *Ib.*

And shall, in their warrants to the collectors of the town, direct the collector to pay the sum raised and collected, for town expenses, into the hands of the supervisor of the town, for the payment of the town expenses, who shall therefor account to the justices and town clerk, on or before the last Monday of September thereafter in each year. *Ib.*

And also, out of the first monies collected to pay to the overseers of the poor the sum raised for the maintenance of the poor of such town, and to pay the residue to the treasurer of the county, on or before the first day of February then next. *Ib.*

4. *The conveyance of lands.*

All conveyances of any lands made to the supervisors of any county in this state, *for the use of such county*, shall be valid, and vest in the supervisors of such county, and their successors in office, the estate and interest intended by such conveyance, and *for the use* therein expressed. 2 *N. R. L.* 140. § 8.

The supervisors of a county are a corporation for special purposes, and with special powers only. And it seems they cannot take lands in trust for any other purpose than *for the use of the county*. 8 *John. Rep.* 425.

5. *The repairs of court houses and gaols, &c.*

It shall be the duty of the supervisors, as often as shall be necessary, to cause the court house and gaol of their county to be duly repaired, and for that purpose they are authorized and required, from time to time, to direct to be raised and levied, on the freeholders and inhabitants of the county, sufficient sums of money for such repairs, not exceeding the sum of five hundred dollars, in any one year. 2 *N. R. L.* 140. § 11.

And shall also cause to be erected or prepared, within the gaol of the county, or otherwise, so many solitary cells as the court of common pleas of the county may direct, which shall be appropriated to the reception of convicts who may be sentenced to punishment therein. *Ib.*

6. *Equalizing the value of real estates, &c.*

The supervisors, at their annual meeting on the *first Tuesday of October* shall examine the assessment rolls of the several towns in the county, and may in their discretion, add to or deduct from the valuations, in any town, such a per centum as may, in their opinion, be necessary to produce a just relation between all the valuations of real estates in the county. 2 *N. R. L.* 511. § 4.

And the said supervisors shall, at their annual meetings in October, and yearly thereafter, after examining and equalizing the valuations of real estates in the county, according to the 4th section of the (above) act, if they find the aggregate of the said valuations of real estates in the county, to fall short of such aggregate as lately taken and corrected under the authority of the United States, add such a per centum to the valuations taken under the authority of this state, as to make them equal to the valuations taken under the authority of the United States. 4 *Vol. L. N. Y.* 6247. § 2.

7. *The examinations of loan officers' books, &c.*

"It shall be the duty of the commissioners for loaning monies, appointed pursuant to the act entitled "an act authorizing a loan of monies to the citizens of this state," passed April 11th, 1808, to exhibit to the boards of supervisors of their respective counties, at the next annual meeting of the supervisors, and annually thereafter, all the mortgages taken by them for loans under the said act, together with their books of account, minutes and vouchers, in order that the said boards of supervisors may ascertain whether the monies committed to the charge of the said commissioners respectively, have been loaned,

and continue to be kept on loan, according to the provisions of said act; 4 Vol. L. N. Y. c 31.

"And it shall be the duty of the said boards of supervisors to examine the said mortgages, accounts and minutes, so to be annually exhibited to them, and thereupon to certify under their hands the state in which they shall find the monies committed to the charge of the said commissioners, and to transmit their certificate by mail, to the comptroller of this state." *Ib.*

8. Taxing Quakers and Shakers.

Every captain of infantry, &c. is to make a list of all persons called Quakers or Shakers, in his beat, who are subject, but refuse to do military duty, and to deliver the list, signed by him, to an assessor of the town, who shall deliver the same to the board of supervisors.

"And the said supervisors shall, at their first meeting after the delivery of such list, cause tax lists to be made out according to such lists so delivered, with warrants thereon under their hands and seals, directed to the collector of the ward or town in which such persons named in such lists respectively reside, for levying within sixty days thereafter, the sum of four dollars, of the goods and chattels of each of the persons named in the said lists." 4 Vol. L. N. Y. c 228. § 42.

9. Making a new return of jurors.

The supervisors and assessors of the town (whenever they shall receive notice from the town clerk, that a new return of jurors is necessary,) shall meet the town clerk, at the time and place appointed by the notice, and "they, or a majority of them so met, shall make an alphabetical list of the names, with the places of abode, and addition, of all persons residing in their respective towns, and qualified, and of sufficient ability and understanding to serve on juries in the several courts mentioned in the act, entitled "an act for regulating trials of issues, and for returning able and sufficient jurors," and shall cause the said list to be delivered to the clerk of the county, by the time, by him to be stated for that purpose, leaving a copy thereof with the clerk of the town to be filed in his office. 4 Vol. L. N. Y. b 198. § 1.

But nothing in this act shall be construed to affect the act of February 25th, 1813, (*Ib.* § 2.) which directs that "the supervisor, town clerk, and assessors of the several towns shall annually, on or before the first day of July, cause to be made and transmitted to the clerk of the county, an alphabetical list of the names, with the places of abode, and addition of all persons residing in their respective cities and towns, and qualified, &c. and not contained in either of the boxes kept by the said clerk for that purpose. 1 N. R. L. 329. § 13.

10. The assessment and collection of taxes.

The supervisors of each county shall, on the first Tuesday of October, meet and examine the assessment rolls of the several towns in the county; and equalize the valuations thereof; "and make such alterations, if any be necessary, in the descriptions of the unseated lands, as to render such descriptions conformable to the provisions of the act;" 2 N. R. L. 510. § 4.

And if they cannot make the alterations, they shall expunge such assessments from the rolls; *Ib.*

And they shall, at their first meeting in October, or before the first day of November thereafter, estimate and set down in the column left for that purpose, opposite to the several sums set down as the value of the real and personal estates in the assessment rolls, the respective sums in dollars and cents, rejecting the fractions of a cent, in all cases where they occur, to be paid as a tax thereon; *Ib.*

And shall also add up and set down the aggregate value of the real and personal estates in the several towns and wards, and shall direct their clerk to make out and transmit to the comptroller of this state a certificate of the said aggregate valuations; *Ib.*

And shall then cause the assessment roll of each town or ward, or fair copy thereof, to be delivered on or before the first day of November in every year, to the collectors respectively of such town or ward, with warrants annexed to the same, under their hands and seals, or the hands and seals of a majority of them, directed to and requiring them respectively to collect from the several persons named in the respective assessment rolls, the several sums mentioned in the last column thereof, or in the last column of each page thereof, if more than one page, opposite their respective names; and authorizing them, in case any shall refuse or neglect to pay, to levy the same by distress and sale of his or her goods and chattels, together with the costs and charges of such distress and sale, and directing them to pay the money, raised for the support of the poor, to the overseers of the poor of the town or ward, and the money raised to defray the other expenses of the town, to the supervisor of the town, and the residue of the money, collected, to the treasurer of the county, on or before the first day of February then next, retaining in their hands respectively out of the same, for their services, five cents upon every dollar they shall collect or levy; *Ib.*

And in case there shall be more than one collector in the town or ward, then the supervisors shall direct and cause the warrant and assessment roll to be delivered to such one of them as they shall judge most suitable and proper; *Ib.*

And as soon as they have sent or delivered the rolls, with the warrants, to the collectors, they shall transmit an account thereof to the treasurer of the county, containing the names of the collectors, the amount of the money they are severally to collect, and distinguish the sums to be collected for the support of the poor, for other town expenses, and for the contingent charges of the county, and the time when they are to account for or pay the same to the county treasurer. *Ib.*

And the supervisors shall, at their annual meetings, certify to the comptroller of the state, the names and places of abode of the town clerks, and the names, additions and places of abode of all the assessors, in their respective counties, who have neglected, without having been prevented by sickness, to perform the duties required of them by this act. *Ib.* § 6.

And in cases where the tax has been rejected by the comptroller, on account of inaccuracy in the description of the real estate on which the tax was laid, or the comptroller shall be of opinion that the

real estate is so imperfectly described that it cannot be located with certainty, the *supervisor* of the town in which the real estate is situated shall, if in his power, add to the assessment roll of such town an accurate description of such real estate; *Ib.* § 15.

And the board of supervisors shall charge such real estate, with the taxes and interest so in arrear, stating however, each year's tax separately, and shall direct the collection thereof; *Ib.*

And in case an accurate description of such real estate cannot be made, the board of supervisors shall cause the amount of the arrears of taxes and interest to be levied and collected, with the tax of the year in which such returns shall be made to them, on the valuation of the estates, real and personal, in the towns in which the taxes were assessed; *Ib.*

And in case any town has been divided since such assessment, then the said taxes and interest shall be apportioned, by the board of supervisors, among the towns included within the limits of the original town, in such equitable manner as they may deem proper. *Ib.*

And where the line dividing two towns intersects a dwelling-house, the owner or occupant of it shall be assessed, by the supervisors, in the town in which the greater part of the house is, and the supervisors shall hear such evidence as may be offered to them as to the fact, and determine accordingly. 4 *Vol. L. N. Y.* a 238. § 12.

No real estate belonging to the United States, or to this state, nor any church, or place of public worship, nor any personal or real estate of a minister or priest not exceeding in value 1500 dollars, nor any college, or incorporated academy, nor any school-house, court-house, gaol, alms house, or property of an incorporated library, shall be taxed by any law of this state. 2 *N. R. L.* 519. § 28.

IV. *Of their compensation.*

The supervisors of each of the counties of this state shall be allowed as a compensation for their services and expenses in attending their meetings in such counties, the sum of *two dollars per day*, and no more; and the clerk of the supervisors shall be allowed for his services such sum, as they shall from time to time direct, which sums shall be raised and levied as part of the contingent charges of the county. 2 *N. R. L.* 140. § 8.

V. *Penalties for neglect of duty, &c.*

If any supervisor shall neglect or refuse to perform any of the duties required of him by this act, or which he shall hereafter be directed or required by law to perform, he shall for every such offence forfeit to the people of this state, the sum of 250 dollars, to be recovered with costs in any court of record, by action of debt, or by information. 2 *N. R. L.* 140. § 10.

SURETY OF THE PEACE.

- I. *What is surety of the peace.*
- II. *Who may crave it.*
- III. *Against whom it may be granted.*
- IV. *In what cases it ought to be granted.*
- V. *The manner of granting it; and herein of executing the peace warrant.*
- VI. *How the peace warrant may be superseded.*
- VII. *In what cases a recognizance for keeping the peace is forfeited; and herein of the proceedings in such cases.*
- VIII. *In what case it may be discharged.*

I. *What is surety of the peace.*

SURETY of the peace is a recognizance entered into to the [people] for keeping the peace. *Bac. Abr. tit. Sur. of the Peace.*

This surety of the peace every justice of the peace may take and command by virtue of his office derived from his commission, as well as by express authority given him by the statute. 2 *N. R. L.* 506. § 1.

II. *Who may crave it.*

It seems agreed, that all persons whatsoever, under the protection of government, being of sane memory, whether they be [citizens] or aliens, or attainted of treason, or the like, or infants under the age of fourteen, have a right to demand surety of the peace. 1 *Haw. c.* 60. § 2. *Dalt. c.* 117.

For, as to a person of non-sane memory, *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.

And by statute, two justices may issue their warrant to secure a lunatic that is dangerous to be permitted to go abroad. 1 *N. R.* 116. § 6.

Also, a wife may demand it against her husband, threatening to beat her outrageously. 1 *Haw. c.* 60. § 3.

And a husband may likewise have it against his wife. 1 *Haw. c.* 60. § 3. 2 *Str.* 1207.

And if the wife, in this case, cannot find sureties, she shall be committed: And thus, *Crompton* observes, a man may get rid of a shrew. *Crompt.* 118.

III. *Against whom it may be granted.*

There seems to be no doubt that it ought, upon a just cause of complaint, to be granted by any justice of the peace, against any person whatsoever, 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. 1 *Haw. c.* 60. § 5.

IV. *In what cases surety of the peace ought to be granted.*

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 every justice of peace is bound to grant it*, upon the party's giving him satisfaction upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the others having threatened to beat him, or lain in wait for that purpose; and that he does not require it out of malice or vexation. 1 *Haw. c. 60. § 6.*

It seems also the better opinion, that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man: and the objection, that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment, and yet there is no doubt, but that one threatened to be beaten, may demand the surety of the peace. 1 *Haw. c. 60. § 7.*

Also, according to *Dalton*, if a man shall threaten to hurt the wife or child of another, he may be compelled by a justice to find surety of the peace. *Dalt. c. 116.*

But it seems that a justice cannot award surety 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. 88.*

For, in respect to the servant, the master's fear cannot be the fear of the servant; and surety of the peace is never granted at the request or upon the fear of a third person; and as to the goods no security can be granted from the nature of the recognizance, which is only that the party shall keep the peace towards the people.

Yet in this case, *Fitzherbert* says, 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.*

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.*

And 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 have his action, or he may punish the offender by indictment; and the justice, if he see cause, may bind over the affrayer to answer unto the indictment. *Dalt. c. 116. § 5.*

And if the justice shall perceive that surety is demanded merely of malice, or for vexation only, without any just cause of fear, he may safely deny it: as in common experience we find, 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 to 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, when 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. § 6.*

And where the justice hath granted the peace to one who in his judgment shall require it only out of malice, or for vexation, he may presently, in good discretion, bind him to the good behavior that so requireth the peace. *Dalt. c. 116. § 6.*

V. The manner of granting surety of the peace; and herein of executing the peace warrant.

By statute, justices of peace shall have power jointly and severally, to cause to be kept all laws made for the preservation and good of the peace, and to cause to come before them, or any of them, all persons who shall break the peace, and to commit them to gaol, or to bail them, as the case may require; and also to cause to come before them, all persons who shall threaten to break the peace, or who be not of good fame, to find sufficient security for the peace, or for their good behaviour, or both, as the case may require; and if they refuse to find sufficient security, to commit them to prison until they shall find the same. *2 N. R. L. 506. § 1.*

From hence it seems, that any justice of the peace may, according to his discretion, bind all those to the peace, who in his presence shall make an affray, or shall threaten to kill or beat any person, or shall contend together with hot words, or shall go about with unusual weapons or attendants, to the terror of the people; and also all such as shall be known by him to be common barrators; and also all those who shall be brought before him by a constable for a breach of the peace in the presence of such constable. *1 Haw. c. 60. § 1.*

Also he that standeth bound to keep the peace, if he has forfeited his recognizance by breach of the peace, may be bound to the peace, and the justice may and ought to bind him anew, and by better sureties, for the safety of the person in danger. *Dalt. c. 116.*

But this must not be done until the party be convicted of the breach of the peace upon his recognizance; for before his conviction it resteth indifferent whether the recognizance be forfeited or no. *Dalt. c. 116. Cromp. 141.*

And it is certain, from the words of the statute, that if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offers sureties.

And it is said that he may be commanded by word of mouth to find sureties, and committed for his disobedience; but that if he be absent, he cannot be committed without a warrant from some justice in order to find sureties; and the warrant ought to be under seal, and to shew the cause for which it is granted, and at whose suit. *1 Haw. c. 60. § 9.*

And it may be directed to any indifferent person. *Id.*

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.

The process of the peace can only be executed 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 empower any other person without a precept in writing. 1 *Haw. c.* 60. § 11.

If the warrant specially direct that the party shall be brought before the justice who made it, the officer ought not to carry him before any other; but if the warrant be general, to bring him before any justice of the peace, the officer has the election to bring him before what justice he pleaseth, and may carry him to prison for refusing to find surety before such justice. 1 *Haw.* 128.

But it does not seem adviseable for the constable to carry the party to prison if he refuses to give sureties before the justice, without a further warrant. 4 *Will. Just.* 784.

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. *Dalt. c.* 118.

It seems generally agreed, that where a person, authorized by warrant of a justice of the peace, to compel a man who is sheltered in an house, to find sureties of 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. c.* 14. § 3. *Dalt. c.* 11.

And 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.

And he that standeth bound to keep the peace, if his sureties be insufficient, the same justice, or any other justice, may compel him to find better 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.

As to the form of the recognizance, it seems to be the safest way to bind the party to appear at the next [general] sessions of the peace, and in the mean time to keep the peace as to all the [good people of the state] and especially as to the party, according to the common form of precedents. 1 *Haw. c.* 60. § 16.

When the recognizance is taken, it must be certified and sent or brought by the justice to the next sessions, that the party bound may be called, &c. 2 *N. R. L.* 507. § 1.

VI. How the peace warrant may be superseded.

It is said that if one find sureties before any justice of the peace, 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. c. 50. § 14.*

And where this surety is granted by another justice, and not by him who issued the warrant, such other justice *may and ought*, upon request, to make his supersedeas to all officers, and to all other justices of the same county; and thereby the party shall be discharged from finding other surety, and from any other arrest for the same cause. *Dalt. c. 118.*

VII. In what cases a recognizance for keeping the peace is forfeited; and herein of the proceeding in such cases.

He who is bound to keep the peace, and to appear at a session of the peace, must appear and record his appearance, otherwise his recognizance is forfeited; and although the party who craved the surety of the peace come not to pray that it may be continued, the justices may at their discretion order it to be continued till another session. *Lamb. 109.*

And the statute directs that recognizances be certified and sent to the next sessions, to the end that the party bound may be called, and if he make default, that the same may be recorded, and the recognizance, with the record of the default, sent and certified into the exchequer. 2 *N. R. L. 507. § 1.*

However, if the party have any excuse for his not appearing, it seems that the sessions is not bound peremptorily to record this default, but may equitably consider of the reasonableness of such excuse: 1 *Haw. c. 60. § 18.*

And Dalton says, in case of the sickness of the party, so that he cannot appear, whereby, in strictness of law, the recognizance is forfeited, he has known that the justices, upon due proof thereof, have forborne 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 the principal intent of the recognizance was but the preservation of the peace. *Dalt. c. 120. § 3.*

And 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 through his procurement, as manslaughter, rape, robbery, unlawful imprisonment, and the like. 1 *Haw. c. 60. § 20.*

Also it has been holden, that it may be forfeited by any treason, 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 threatening to beat him, or the like. 1 *Haw. c. 60. § 21.*

But if the party be absent it is otherwise; 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. § 1.*

However, it seems that it shall not be forfeited by bare words of heat and choler, as the calling a man a knave, teller of lies, rascal or drunkard; for though such words may provoke a choleric man to break the peace, yet they do not directly challenge him to it, nor does it appear that the speaker designed to carry his resentment any fur-

ther: and it hath been said, that even a recognizance for the good behaviour shall not be forfeited for such words: from whence it follows much more that a recognizance for the peace shall not. 1 *Haw. c. 60. § 22.*

Also, there are some actual assaults on the person of another, which do not amount to a forfeiture of such a 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 school-master his scholar; or a gaoler his prisoner, or even a husband his wife, as some say; or if one confine a friend who is mad, and bind and beat him, in such a manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another therewith; or if 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. c. 60. § 23.*

Also, according to some opinions, a master shall not forfeit such recognizance for beating another in defence of his servant. 1 *Haw. c. 60. § 24.*

Also, there are divers things which may be done against the peace, and divers offences for which an indictment will lie; and yet the committing or doing such offence or act shall be no forfeiture of the recognizance for the peace. *Dalt. c. 121. § 8.*

For it is agreed, that no one shall forfeit such recognizance by a bare trespass upon another's land or goods, unless it be accompanied with some violence to the person, or be in terror of the people. 2 *Haw. c. 60. § 25. Dalt. c. 121. § 9.*

Therefore, to enter into lands where he ought to bring his action; or to disseize another of his lands; or to enter into lands or tenements with force, being without offer of violence, to any man's person, and without public terror; or to do a trespass in another man's corn or grass; or to take away another man's goods wrongfully, so it be not from his person; or to steal another man's horse, or other goods feloniously, being not from his person: and all these, and the like, are breaches of the peace, and yet these will make no breach of the recognizance, nor breach of the peace within the meaning of the commission of the peace. *Dalt. c. 121. § 9.*

It is said, that the justices cannot in any case proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace; but that the recognizance itself,

with the record of default of appearance, ought to be removed into the court of [exchequer.] 1 *Haw. c. 60. § 18.* 2 *N. R. L. 507. § 1.*

And so it ought to be if it be presented by the jury, or grand inquest, that the party hath forfeited his recognizance by breach of the peace. *Lamb. 570. Dalt. c. 119. § 7.*

VIII. *In what cases a recognizance for keeping the peace may be discharged.*

The practice of courts of sessions is, to continue a recognizance for breach of the peace from session to session, until it be discharged. 4 *Bac. Abr. tit. Sur. P. 1.*

And if the person who has entered into a recognizance for keeping the peace, die, the recognizance may be discharged. *Sav. 53.*

But the sureties are not discharged by the death of the principal, for their executors and administrators do continue bound. 1 *Haw. c. 60. § 17.*

Also, if the person who has craved the surety of the peace, die, the recognizance may be discharged. *Ib.*

And if the party be then imprisoned for default of sureties, it seems the justice may make his *liberate* or warrant for his delivery. *Dalt. c. 118.*

But it seems, according to the better opinion, that a release from the person upon whose complaint it was entered into, is not a discharge of a recognizance for keeping the peace; for as it was entered into to the [people] and not the [individual,] it is not in his power, who is no party to it, to discharge it; however such a release will be a good inducement to the court to discharge it. 1 *Haw. c. 60. § 17.*

And it is said, by *Hawkins*, that after the condition of a recognizance for keeping the peace is broken, the king may pardon the forfeiture; but cannot release the condition before it is broken, because the person upon whose complaint the recognizance was entered into, has an interest in the condition. *Ib.*

And he who is bound to the peace and to appear at a certain day, must appear at that day and record his appearance, although he who craved the peace cometh not to desire that it may be continued; otherwise the recognizance cannot be discharged. *Dalt. c. 120.*

And though the recognizance be removed by *certiorari*, yet this is no discharge of the obligation to appear. 2 *Haw. c. 27. § 65.*

Also if a man be bound to keep the peace towards the 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 comes to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him. *Dalt. c. 120.*

But if a man be bound as aforesaid, and especially to keep the peace towards a certain person, then, though such person comes not to desire the peace may be continued, yet the court by their discretion may bind him over to 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. *Ib.*

And it is said, by *Dalton*, that if a man be bound to the peace during his life, (which the justice in his discretion, and upon reasonable cause may do,) or generally without any time or day limited, in such case neither the king, the justice of peace, nor the party, can discharge this recognizance during the life of the party so bound, by release or otherwise. *Lamb.* 113. *Dalt.* 120.

For forms, see the end of the next title.

SURETY OF THE GOOD BEHAVIOUR.

- I. *What is surety of the good behaviour.*
- II. *In what cases surety of the good behaviour may be granted.*
- III. *What is a forfeiture of a recognizance for being of good behaviour.*

I. *What is surety of the good behaviour.*

SURETY of the good behaviour is a recognizance entered into to the [people] for being of good behaviour. 4 *Bac. Abr. tit. Sur. of the Good Behavior.*

And a man may be compelled to find sureties both for the good behavior and for the peace; and yet the good behavior includeth the peace; and he that is bound to the good behavior, is therein also bound to the peace. *Dalt. c.* 122.

A recognizance for being of good behavior, does in so many respects resemble a recognizance for keeping the peace, that the going into the particular consideration thereof, would be little more than a repetition of what has been said under the title *surety of the peace.* *Ib.*

But as surety of the good behavior may be granted in some cases where surety of the peace cannot, and as a recognizance for being of good behavior may be more easily forfeited than the other, it will be proper to shew according to the method observed by *Hawkins*, some of the distinctions.

II. *In what cases surety of the good behaviour may be granted.*

This surety of the good behavior is granted by justices of the peace, as well by the authority of the commission as by statute. *Dalt. c.* 123.

The words in the commission are these: "We have assigned you, and every of you, jointly and severally, justices to keep our peace, &c. and to cause to come before you, or any of you, all those who shall use threats to any one or more of the citizens or inhabitants of our state, concerning their bodies, or the firing of their houses or barns, to find sufficient security for the peace, or *their good behavior*

towards the people and inhabitants of our said state ; and if they refuse to find such security, then them in prison, until they shall find such security, to cause to be safely kept."

The statute enacts, That in every county of this state, fit and discreet men shall from time to time, be appointed justices to keep the peace, who shall have power, jointly and severally, to cause to be kept all laws made for the preservation and good of the peace, and to cause to come before them, or any of them, all persons who shall break the peace, and to commit them to gaol, or to bail them, as the case may require ; and also to cause to come before them all persons *who shall threaten to break the peace, or who be not of good fame*, to find sufficient security for the peace, *or for their good behavior*, as the case may require ; and if they refuse to find such security, to commit them to prison until they shall find the same. 2 *N. H. L.* 506. § 1.

[*That be not of good fame.*] In the construction of the statute of 34 *Ed.* 3. c. 1, there seems to have been some opinions that these words mean only such as are defamed and justly suspected that they intend to break the peace, and that it does not any way extend to those who are guilty of other misbehaviors not relating to the peace. 1 *Haw. c.* 61. § 2.

But this seems, according to *Hawkins*, much too narrow a construction, since the above mentioned expression of persons of evil fame, in common understanding, as properly includes persons of scandalous behavior in other respects, as those who, by their quarrelsome behavior, give just suspicion of their readiness to break the peace. *Ib.*

And he adds that it therefore seems to have been always the better opinion, that a man may be bound to his good behavior for many causes of scandal, which give him a bad fame, as being contrary to good manners only. *Ib.*

However, says he, I cannot find any 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 ; and whose behavior 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. 1 *Haw. c.* 61. § 4.

But *Dalton* enumerates the following instances, wherein sureties of the good behavior may be granted :

1. Against common barrators, common quarrellers, and common breakers of the peace.

2. Rioters ; to which may be added those guilty of exciting the people to disobedience to the law. 2 *Vent.* 22, 3, 4.

3. 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.

4. Such as be generally feared or 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 practice to poison another. And *Dalton* men-

tions an instance where he granted the good behavior against one who had bought ratsbane, and mingled it with corn, and then cast it among his neighbor's fowls, whereby most of them died, which was held good cause by the judges of assize; so if a person offer a woman money to buy medicines to destroy a child of which she is pregnant, he may be compelled to find sureties of the good behavior. *Cro. Eliz.* 449.

7. Such as in the presence or hearing of the justice, shall misbehave himself in some outrageous manner of force or fraud.

Thus, a man did beat a woman in *Westminster-hall*, and he was bound to the good behavior; and so, according to *Crompton*, he may be bound to the peace and good behavior, when he striketh a person in the presence of the justices in sessions. *Crompt.* 124.

A man was also bound to the good behavior by the court of king's bench, for assaulting and threatening a person so, that he could not attend the 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 threatened. *Crompt.* 125.

8. Such as are greatly defamed for resorting to houses suspected to maintain adultery or incontinency.

9. Maintainers or keepers 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 eaves drop men's houses, or shall cast men's gates, carts, and 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 are persons of ill behavior, or of evil fame or report generally, or that shall keep company with any such, or with any other suspicious person in the night.

12. Suspected persons who live idly, and yet fare well, or are well apparelled, having nothing whereon to live; unless upon examination, they shall give a good account of such their living.

13. Common haunters of ale-houses or taverns, and common gamesters, especially if they have not whereon to live.

14. Such as raise hue and cry without cause.

15. Libellers.—Also the authors of any writing full of obscene ribaldry, without any kind of reflection upon any one, may be bound to their good behavior. 1 *Haw. c. 3. § 9.*

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 of peace, constable or other officer of the peace in executing his office; and even he who shall use words of contempt, or contrary to good manners, against a justice of peace, though it be not at such time as he is executing his office, shall be bound to his good behavior.

And so shall he who uses words which tend to disturb or deter an inferior officer of justice, as a constable, and such like, being in the execution of his office. 1 *Haw. c. 61. § 2.*

19. Such as shall abuse a justice of peace's warrant; as if one charge another before a justice with felony, riot, or forcible entry; and the justices of peace being assembled to inquire thereof, the party that complained will not prosecute or give evidence.

20. And in general, concludes *Dalton*, whatsoever act or thing is of itself a misbehavior, is cause sufficient to bind such an offender to the good behavior. *Dalt. c. 124.*

Also when a person is convicted of a misdemeanor, it is sometimes a part of the judgment, that he shall find security for his good behavior for a time.

But, according to *Hawkins*, it seems the better opinion, that no one ought to be bound to the good behavior 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, drunkard, or the like, ought not for such cause to be bound for the good behavior. 1 *Haw. c. 61. § 3.*

This surety of good behavior is most commonly granted either in open sessions of the peace, or out of the sessions, by two or three justices of the peace; whereas that of the peace is usually granted by one justice, and out of sessions. *Dalt. c. 123.*

And yet by the words of the commission, [as also of the statute,] one justice of peace alone, and out of sessions, may grant this surety of the good behavior (and that either by his own discretion, or upon the complaint of others) as he may that of the peace. *Lamb. 123. Dalt. c. 123.*

But this is not usual, unless it be to prevent some great and sudden danger; especially against a man that is of good estate, carriage or report. *Dalt. c. 123.*

And the more dangerous this surety is to the party bound, the more regard there ought to be taken in granting it. *Ib.*

Therefore it shall be good discretion in the justices, that they do not grant it, but either upon sufficient cause seen to themselves, or upon the suit and complaint of others, and the same the most honest and credible persons. *Ib.*

Also, as so much is left to their discretion, it behooves them to act in this matter with the greatest caution and consideration; for it is not an arbitrary, but a sound legal discretion with which they are intrusted: a discretion, according to *Coke*, to be exercised upon a knowledge or understanding discerning between truth and falsehood, between right and wrong, between shadow and substance, between equity and colourable glosses and pretences, and not according to our wills and private affections; and this discretion must, he observes, also, be limited and bounded with the rules of reason, law, and justice. 5 *Co. 100.* 10 *Co. 140.*

II. What is a forfeiture of recognizance for being of good behaviour.

It was formerly laid down as a general rule, that whatever will be a good cause to bind a man to his good behavior, will forfeit a recognizance for it; but this hath since been denied; and indeed, adds *Hawkins*, it does by no means seem 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 justly be suspected to be likely to do; and in that respect requires them to secure the public from that danger which may probably be apprehended from their future behavior, 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 recognizances, 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. c. 61. § 5.*

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 recognizance cannot be forfeited; as for going armed with great numbers, to the terror of the people, or speaking words tending to sedition, and the like; and also for all such actual misbehaviors 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. c. 61. § 6.*

And 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.*

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:

Form of the oath of a party demanding surety of the peace.

YOU do swear that you are in fear of your life, or some bodily hurt to be done, or procured to be done you, by O. O. of for that he, the said O. O. hath threatened to beat and do some bodily hurt unto you [or, wound, maim, kill, or otherwise, as the case is,] and that you do not require the surety of the peace from him for any private malice, vexation or revenge, but for the necessary safety of your person.

Warrant for the peace, or good behavior.

County of ss. To any constable of, &c.

WHEREAS P. G. of in the said county, yeoman, hath made oath before me, J. P. Esq. one of the justices of the peace in and for the said county, that he is afraid that O. O. of in the said county, yeoman, will beat, [wound, maim, or kill] him, [or, burn his house,] and hath prayed surety of

the peace [or, of the good behavior, *if it is so*] against the said O. O. These are therefore, in the name of the people of the state of New-York, to command you that immediately upon receipt hereof, you bring the said O. O. before me, or some other justice of the peace of the said county, to find sufficient surety as well for his personal appearance at the next general sessions of the peace, to be holden in and for the said county; as also for his keeping the peace [or, for his good behaviour, *if it is so*] in the mean time towards the good people of this state, and more especially towards the said P. G. Given under my hand and seal, at the day of

The form of a recognizance for the peace, or good behaviour.

County of } **B**E it remembered, that on the day of in the year of
ss. } our Lord O. O. of in the said county, yeoman, F. S. of the same place, tailor, and S. S. of the same place, mason, came before me, J. P. Esquire, one of the justices of the peace in and for the said county, and acknowledged themselves to owe to the people of the state of New-York, to wit, the said O. O. the sum of 50 dollars, the said F. S. the sum of 25 dollars, and the said S. S. the sum of 25 dollars, of good and lawful money of the said state, to be respectively made and levied of their several goods and chattels, lands and tenements, to the use of the said people, if he, the said O. O. shall fail in performing the condition hereon endorsed [or underwritten, *if it is so*.]

Acknowledged before me, J. P.

The condition of this recognizance is such, that if the within [or above] bounden O. O. shall personally appear at the next general sessions of the peace to be holden in and for the county aforesaid, to do and receive what shall then and there be enjoined him by the court, and in the mean time shall keep the peace, [or, be of good behavior] towards the people of the said state, and especially towards P. G. of in the said county, yeoman; then the said recognizance shall be void, or else remain in full force.

The form of a warrant of commitment for want of sureties.

County of ss. To any constable of, &c. and to the keeper of the common gaol in the said county.

WHEREAS O. O. of in the said county, yeoman, is now brought before me, J. P. Esq. one of the justices of the peace in and for said county, and required to find sufficient sureties to be bound with him in a recognizance for his personal appearance at the next general 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 good behavior] towards the good people of the state of New-York, and more especially towards P. G. of in the said county, yeoman: And whereas he the said O. O. hath refused and doth now refuse [or hath neglected and doth now neglect] before me to find such sureties: These are, therefore, in the name of the people of the said state, to command you forthwith to convey the said O. O. to the common gaol of the said county, and to deliver him to the keeper thereof, together with this precept; and I do hereby command you, the said keeper, to receive the said O. 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 the day of

The form of a supersedeas.

County of } **J**. P. Esquire, one of the justices of the peace in and for the
ss. } said county: To the sheriff, bailiffs, constables and others, within the said county, greeting: Whereas O. O. of in the said county, yeoman, hath personally come before me at in the said county, and hath found sufficient surety, that is to say, F. S. of and S. S. of each of which hath undertaken for the said O. O. under the pain of 50 dollars, and he, the said O. O. hath undertaken for himself, under the pain of 100 dollars, that he, the said O. O. shall personally be and appear at the next general sessions of the peace to be holden in and for the said county, then and there to do and receive what shall be enjoined him by the said court; and in the mean time shall

well and truly keep the peace, [*or*, be of the good behavior] towards the good people of the said state, and especially towards P. G. of yeoman : These are therefore, in the name of the said people, to command and strictly enjoin you, and every 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 O. O. and if you have, for the said cause, and for none other, taken and imprisoned him, the said O. O. that then him you deliver, or cause to be delivered and set at liberty, without further delay. Given at aforesaid, in the county aforesaid, under my hand and seal, this day of

The form of a release of the surety for the peace or good behavior, may be to the following effect :

County of } **B**E it remembered, that P. G. of in the said county, yeoman, on the day of in the year of our Lord, came before me, J. P. Esq. one of the justices of the peace in and for the said county, and freely remised and released, as much as in him lieth, the above [*or*, within] security of the peace [*or*, of the good behavior] granted before me against the above [*or*, within] named O. O. P. G.

Acknowledged before me }
this day of J. P. }

Or if the release is by itself, thus :

County of } **B**E it remembered, that P. G. of in the said county, yeoman, on the day of in the year of our Lord came before me, J. P. Esq. one of the justices of the peace in and for the said county, at in the said county, and then and there, so far as in his power lieth, remised and released to O. O. of in the said county, yeoman, the surety of the peace [*or*, of the good behavior] which he hath against him, the said O. O. P. G.

Acknowledged before me, the day }
and year above written. J. P. }

Also, if the party be imprisoned for default of sureties, any justice may, upon the offer of such prisoner, take surety of him, and may thereupon make his LIBERATE or warrant for his delivery. *Dalt. c.* 118.

The form of which may be as follows :

County of } **J**. P. Esq. one of the justices of the peace in and for the said ss. } county : To the keeper of the gaol at in the said county, greeting ; Whereas O. O. in the prison of the people of the said state, in your custody now being, at the suit of P. G. of in the said county, yeoman, for the want of his finding sufficient sureties for his personal appearance at the next general sessions of the peace, to be holden in and for the said county, and for his keeping the peace, [*or*, being of the good behavior] in the mean time towards the good people of the said state, and especially towards the said P. G. hath found before me sufficient sureties, to wit, F. S. of and S. S. of each of whom hath undertaken for the said O. O. under the pain of 50 dollars ; and he, the said O. O. hath undertaken for himself, under the pain of 100 dollars, that he the said O. O. shall and will personally appear at the next general 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 behavior] in the mean time towards the said people and especially towards the said P. G. Therefore, on behalf of the said people, I do command you, that if the said O. O. do remain in the said gaol, for the said cause, and for none other, then you forbear to grieve or detain him 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 hand and seal, at in the said county, the day of

SWEARING PROFANELY. See title IMMORALITY.

T R A V E R S E.

TRAVERSE, from the French word *traverser*, to run across, to deny or contradict, is the denying the chief matter or point in the indictment. 2 *Shaw's Just. tit. Traverse*.

As for instance : 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*.

For the method of trying traverses, See title SESSIONS.

T R E A S O N.

- I. *Of treason against the United States.*
- II. *Of treason against the people of this state.*
- III. *Misprision of treason.*
- IV. *Of the proceedings and trial.*
- V. *Of the judgment and forfeiture.*

I. *Of treason against the United States.*

TREASON against the United States consists only in levying war against them, or in adhering to their enemies, giving them aid and comfort. *Con. U. S. Art. III. § 3*.

To levy war, is to raise, create, make, or carry on war. 4 *Cranch. 470*.

War can only be levied by the employment of actual force. Troops must be embodied ; men must be *openly* assembled. *Ib. 487*.

But arms are not an indispensable requisite to levying war ; nor the actual application of force to the object. *Ib. 488*.

II. *Of treason against the people of this state.*

By statute, if any person do levy war against the people of this state, within this state, or be adherent to the enemies of the people of this state, giving to them aid and comfort in this state, or elsewhere, and be thereof attainted of open deed, such offences, and no other, shall be adjudged treason against the people of this state. 1 *N. R. L. 145. § 1*.

Do levy war against the people.] Under the words, "do levy war against the king," in the stat. 25 *Ed. 3*, not only those who directly rebel against the king, and take up arms in order to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, or endeavor to reform his government, are said to levy war against him. 1 *Haw. c. 17. § 23*.

And therefore, those that hold a fort or castle against the king's forces, or keep together armed numbers of men against express command, have been adjudged to levy war against him. 1 *Haw. c. 17. § 24.*

But those who join themselves to rebels or enemies for fear of death, and retire as soon as they dare, seem no way to be guilty of this offence; it is, however, incumbent on the party who maketh fear and compulsion his defence, to shew to the satisfaction of the court and jury, that the compulsion continued during all the time he staid. *Ib. & Fost. Cr. L. 216.*

But an apprehension, though ever so well grounded, of having houses burnt, or estates wasted, or cattle destroyed, or of any other injury of the like kind, however enormous or impending it may be, will not excuse, in the case of joining or marching with rebels; for every artful leader of a rebellion, might easily contrive to furnish his followers with this excuse. 8 *St. Tri. 56. Fost. Cr. L. 217. 4 Black. Com. 30. 83.*

Those also who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority, attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority, which he by public justice ought to do; which manifestly tends to a downright rebellion:—As where great numbers by force attempt to remove certain persons from the king; or to lay violent hands on a privy counsellor; or to revenge themselves against a magistrate for executing his office; or to bring down the price of victuals; or to force the repeal of a law; or to pull down all bawdy houses; or to remove all inclosures in general. 1 *Haw. c. 17. § 25. 2 Doug. 591.*

But where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure, as trenching upon their common, or the like, they are only rioters. 1 *Haw. c. 17. § 25.*

And in a special verdict, not only those who are expressly found to have been aiding and assisting a rebellious insurrection, but perhaps, also, those who are only found to have acted in the execution of the intended violence, or to have attended the principal offender from the beginning, though they be not found to have known the design of the rising, shall be adjudged guilty of treason. 1 *Haw. c. 17. § 26.*

But those who are found only to have suddenly joined with them in the streets, and to have flung up their hats, and hallooed with them, are guilty of no greater offence than a riot at most. *Ib.*

And it is certain that a bare conspiracy to levy such a war cannot amount to treason, unless it be actually levied. *Ib. § 27.*

Yet it hath been resolved that in all cases, if the treason be actually completed, the conspirators are traitors as much as the actors; and that there may be a levying of war when there is no actual fighting. *Ib.*

[Or be adherent to the enemies of the people.] This kind of treason is explained by the words subsequent giving to them aid and comfort: from the like words in the before mentioned; stat. of 25 *Ed. 3.* it has

been laid down, that any assistance given to aliens in open hostility against the king, as by surrendering a castle of the king's to them for reward, or selling them arms, or the like, or assisting the king's enemies against his allies; or cruising in a ship with enemies, to the intent to destroy the king's subjects, is clearly within this branch. 1 *Haw. c. 17. § 28.*

In treason there are no accessaries, but all are principals; and therefore whatsoever act or consent would make a man accessory to a felony before the act done, the same will make him a principal in the case of treason. 3 *Inst. 9. 21.*

Treason may be committed against the state, as by opposing the laws, or forcibly attempting to overturn or usurp the government, &c. 11 *John. Rep. 549.*

But the offence of adhering and giving aid and comfort to the public enemies of the *United States* is not treason against the people of the state of *New-York*. *Ib.*

And treason against the *United States* is not cognizable in the state courts. *Ib.*

III. *Misprision of treason.*

By statute, concealment, or keeping secret any treason, shall be from henceforth adjudged, deemed and taken to be misprision of treason. 1 *N. R. L. 145. § 2.*

Every man that knoweth treason, ought therefore, with all speed, to reveal it to the executive, or other magistrate.

But if the concealment of treason be accompanied with any circumstances which shew an approbation thereof, it amounts to treason; as if one having notice beforehand, that persons designed to meet, in order to conspire against the government, go into their company and hear their treasonable consultation, and conceal it; or if one who has been once accidentally in such company, and heard such discourse, meet the same company a second time, and hear such like discourse, and conceal it. 1 *Haw. c. 20. § 3.*

Neither can a person who has knowledge of a treason, secure himself by discovering that there will be a rising in general, without disclosing the very persons intending to rise; nor even by discovering of those to a private person who is no magistrate. 1 *Haw. c. 20. § 5.*

But it seems that one who is only told in general, that there will be a rising, without knowing any of the persons or particulars of the design, is not bound to make any discovery at all. *Kel. 22.*

It is said, that as a misprision is contained in every treason whatsoever, any one who is guilty of treason may be proceeded against for a misprision only. 1 *Haw. c. 20. § 1.*

IV. *Of the proceedings and trial.*

By statute, persons may be indicted for treason or misprision of treason, at courts of general sessions of the peace for the city or county in which the offence is committed; but such court cannot hear or determine such indictments, but shall cause them to be delivered to the next supreme court, or court of oyer and terminer or

gaol delivery, to be held in such city or county, there to be determined according to law. 2 *N. R. L.* 150. § 2.

And all offences by the act declared to be treason, which shall be committed upon the land out of this state, or upon the sea, shall and may be inquired of, heard and determined in the supreme court, by good and lawful men of the same county where the court shall set, in like manner as if the said treasons had been committed within the same county. 1 *N. R. L.* 146. § 6.

If any person shall be committed for treason, upon his petition in open court, the first week of the term, or first day of the session, of the court of oyer and terminer, to be tried, shall not be indicted at the next term or court after commitment, he shall, on motion, the last day of court, be let to bail, unless it appear upon oath, that the witnesses against the prisoner could not be produced the same court; and if in that case he shall not be indicted and tried the second term or sessions, he shall be discharged. 1 *N. R. L.* 356. § 6.

Every person indicted for treason or misprision of treason shall, if he or his agent or attorney require it, have a copy of the indictment, with a list of the witnesses to be produced on the trial for proving it, mentioning their names, profession, and place of abode, delivered to him five days before he shall be tried. 1 *N. R. L.* 145. § 4.

And he shall have a copy of the panel of the jurors, certified by the sheriff, delivered to him four days before the trial. *Ib.*

And shall have like process of the court to compel his witnesses to appear as is usually granted to compel witnesses to appear against him. *Ib.*

And the court, or some judge thereof, shall immediately, upon his request, assign to him such and so many counsel, not exceeding two, as he shall desire, who shall have free access to him at all seasonable hours. *Ib.*

And he shall be admitted to make his full defence by counsel, and to make any proof that he can produce for his defence by witnesses on oath. *Ib.*

And he shall not be indicted, tried or 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 the other overt act of the same treason, unless he shall willingly, without violence, in open court, confess the same. 1 *N. R. L.* 145. § 5.

And if two or more treasons, of divers heads or kinds, shall be alleged in one bill of indictment, one witness to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed two witnesses to the same treason, within the act. 1 *N. R. L.* 145. § 5.

And no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment. *Ib.*

And if the person arraigned shall peremptorily challenge above the number of 35 of the jurors, such challenge shall be disallowed, and the trial proceed as if it had not been made. *Ib.*

And all trials to be had for any treason, or misprision of treason, shall be had according to the course of the common law and this act, and not otherwise. 1 *N. R. L.* 145. § 3.

No indictment for the offences aforesaid, nor any process or return thereupon, shall be quashed on the motion of the prisoner, or his counsel, for mis-writing or mis-spelling, unless exceptions concerning the same, be taken and made in court, before any evidence given in open court upon the indictment; nor shall any such mis-writing or mis-spelling, after conviction, be any cause to stay or arrest judgment. 1 *N. R. L.* 146. § 8.

Nevertheless, any judgment upon such indictment shall be liable to be reversed upon a writ of error, in the same manner as if this act had not been made. *Ib.*

V. Of the judgment, and forfeiture.

Every person who shall be duly convicted or attainted of any manner of treason against the people of this state, shall suffer death for the same, and be hanged by the neck until he shall be dead. 1 *N. R. L.* 407. § 1.

And every person lawfully convicted of any manner of treason, shall forfeit to the people of this state all such lands, tenements and hereditaments which he shall have of any estate of inheritance, in his own right, at the time of such treason committed, or at any time after; and also all his goods and chattels, saving to every person and his heirs, other than the offender and his heirs, all such rights and interests, in law or equity, which they, or any of them, shall have at the day of committing such treason, or at any time before, in as ample a manner as if this act had not been made. 1 *N. R. L.* 146. § 9.

And the people of this state, without any office or inquisition to be found, shall be deemed in the actual possession of all the real and personal estate of the person so convicted or attainted, which they ought lawfully to have, and which the offender shall so lose and forfeit. *Ib.*

No attainder of any person of treason, or misprision of treason, shall extend to corrupt the blood of the offender, or to forfeit the dower of his wife. 1 *N. R. L.* 147. § 10.

VAGRANTS. *See* DISORDERLY PERSONS.

VENIRE. *See* JURIES, div. iv. PROCESS.

VERDICT. *See* JURIES. SESSIONS.

WARRANT. *See* ARREST. PROCESS. SEARCH-WARRANT.

Note.—Forms of warrants for many particular cases will be found under their proper titles, to which reference is made in the INDEX, under the word warrant; and of indorsements of warrants under the title PROCESS.

W I F E.

A FEME covert is so much favored 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 the coercion of her husband. 1 *Haw. c. 2.* § 9.

Neither shall she be deemed accessory to a felony for receiving her husband, who has been guilty of it, as her husband shall be for receiving her. 1 *Haw. c. 1. § 10.*

Nor a principal, though the husband's offence be treason; for she is under the power of her husband, and bound to receive him; neither is she affected by receiving, jointly with her husband, any other offender. 1 *Hale, 48.*

Also a wife cannot be guilty of larceny, if she steal her husband's goods, because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife, as he may by taking away the wife by force and against her will, together with the goods of the husband. 1 *Haw. c. 33. § 19.*

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 the coercion of her husband, she is punishable as much as if she were sole. 1 *Haw. c. 1. § 11.*

For the coercion of the husband is only a presumption of law, and like all other presumptions, may be repelled; therefore, 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 her husband. 1 *H. H. 516.*

As if she receive stolen goods of her own separate act, without the privy of her husband; or if he knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory; whereas otherwise the law will impute the fault to him, and not to her. *Dalt. 157.*

And in treason, in particular, no plea of coverture shall excuse the wife; no presumption of her husband's coercion shall extenuate her guilt, for he has no right to that obedience from a wife, which he as a [citizen] has forgotten to pay; and in murder, this privilege is also denied, because the offence is repugnant to the laws of nature, which shall never be contravened by the refinements of civil society. 4 *Black. Com. 29.*

Also a wife may be indicted, together with the 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. 1 *Haw. c. 4. § 12.*

And in general a feme covert 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 her 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. 1 *Haw. c. 1. § 13.*

For a married woman, by her own act, (but not in respect of what is done by others at her command, because all such commands of hers are void) may commit a forcible entry or detainer; and upon the justice's view of the force, she shall be imprisoned therefor, and she may be fined in such case; but such fine set upon the wife shall not

be levied upon the husband ; for the husband shall never be charged for the act or default of his wife, but when he is made a party to the action, and judgment given against him and his wife. *Dalt. c. 126. 9 Co. 72. 11 Co. 61.*

Likewise, if she 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 her action and judgment ; but if a wife without the husband, be indicted of a trespass, riot or any other wrong, then 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 fine 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 the wife's act or default. *Dalt. c. 139.*

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 be generally to any suit for a cause of action given by his wife) and shall be liable to answer what shall be recovered thereon. *Ib.*

And yet it seems very doubtful, whether the conviction of a feme covert, upon an indictment, can be pleaded to an information against her and her husband, because the husband is not liable to pay the forfeiture recovered upon an indictment. *1 Haw. c. 10. § 39.*

But a prosecution for a 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. c. 72. § 8.*

And 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 one be made use of against the other, by reason of the implacable dissonation 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. *Co. Lit. b. 6. 2 Haw. c. 46. § 16.*

Hence it hath been adjudged, that the husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage, on an indictment for bigamy ; but the second husband or wife may be allowed to give evidence, such second marriage being void, and therefore they were never husband and wife. *2 Haw. c. 46. § 16.*

Yet some exceptions have been allowed to this general rule in cases of evident necessity, as in lord *Audley's* case, who held his wife's hands and legs while his servant, by his command, ravished her ; or where a man is indicted for a forcible marriage. *2 Haw. c. 46. § 16.*

Also, if either husband or wife have cause to demand sureties of the peace against the other, the oath of either may be received. *Ib. See title surety of the peace.*

For a wife may demand surety of the peace against her husband's threatening to beat her outrageously. *1 Haw. c. 60. § 3.*

And so may a husband likewise have it against his wife. 1 *Haw. c. 60. § 3. 2 Str. 1207.*

And if the wife in this case cannot find sureties, she shall be committed. *Cromp. 118.*

But the wife herself cannot be bound by recognizance; but by her sureties only. 1 *Dalt. c. 117.*

WITNESSES. See EVIDENCE.



W O M E N.

BY statute, if any person shall take any woman against her will, unlawfully, and marry her, or cause her to be married, to any other person by the assent of such misdoer, or defiled, every such taking, and the procuring and abetting the same, shall be felony, and punishable as in cases of rape. And every taker, procurer and abettor to the same, shall be adjudged a principal felon. Provided, that nothing in this section shall extend to any person taking any woman, only claiming her as his ward or bond woman. 1 *N. R. L. 156. § 2.*

Under the statute of 3 *Hen. 7. c. 2*, it has been resolved, That 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 her consent at all; for till the force was put upon her, she was in her own power. 1 *Haw. c. 42. § 5.*

It has also been resolved, That it is not material whether a woman so taken away, be at last married or defiled with her own consent or not, if she were under the force at the time, because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of the woman, whom by so base means he got into his power. 1 *Haw. c. 42. § 6.*

And also, that where a woman is taken by force in one county, and married in another, the offender may be indicted and found guilty in the latter county, because the continuing of the force there amounts to a forcible taking within the statute. 1 *Haw. c. 42. § 9.*

And also, that the woman may be sworn, and give evidence against the offender, who so took and married her; for he is no husband *de jure*. 1 *H. H. 611.*

For the liability of women to punishment, considered as wives or *femes covert*, see *WIFE*.

How enabled to plead pregnancy, and the effect thereof, see *REPRIEVE, PARDON, and EXECUTION*.

For the offence of ravishing women, see *RAPE*.

For the offence of women having two husbands, or men two wives, see *BIGAMY*.

WOODS.

Firing of woods.

BY statute, if any person shall set fire to the woods in any part of this state, he shall forfeit and pay the sum of ten pounds, to be recovered, with costs of suit, in any court having cognizance thereof, by any person who will sue for the same; the one moiety, when recovered, shall be paid to the overseers of the poor of the town where the offence shall have been committed, for the use of the poor thereof, and the other moiety to the person who will sue for the same to effect. 1 *N. R. L.* 123. § 1.

And such offender shall moreover be liable to all such damages as any person shall sustain by such firing the woods as aforesaid. *Ib.*

Provided that nothing in this act shall be construed to hinder or prevent any person from firing his own woods; but if he suffer such fire to extend beyond his own woods, he shall be subject to the penalty and forfeiture aforesaid, besides being answerable for the damages. 1 *N. R. L.* 123. § 2.

And when the woods shall be on fire, the justices of peace, the supervisor, the commissioners of the highways, and the officers of the militia, (not under the rank of captain) residing in the town, shall, and they are severally authorised and required, to order such and so many of the inhabitants of such town as are liable to work on the highways, and who shall reside within the vicinity of the place where such fire shall be, as they shall severally deem necessary, to repair to the place where such fire shall prevail, and there to assist in extinguishing or stopping the progress of the same. 1 *N. R. L.* 123. § 3.

And if any person so ordered shall refuse or neglect to comply, he shall forfeit and pay the sum of four shillings for every day he shall so neglect or refuse to obey, to be recovered in a summary way, with costs, before any justice of the peace resident in such town. *Ib.*

And the oath of the person having given such order, shall be sufficient evidence whereon to convict any delinquent. *Ib.*

And the forfeiture so recovered shall be applied as a reward to such person or persons as the officers aforesaid, or the major part of them, shall deem best entitled thereto, for superior exertions at the extinguishment, or in stopping the progress of such fire. *Ib.*

And if any person shall wilfully and maliciously set fire, or cause fire to be set, to woodland in any part of this state, he shall be deemed guilty of a misdemeanor, and being convicted thereof by due course of law, shall be punished by fine, not exceeding 100 dollars, or by imprisonment, not exceeding one year, or both, at the discretion of the court before which such conviction shall be had. 4 *Vol. L. N. F.* b 178.

 W R E C K.

BY statute, if a ship, vessel or boat, or any kind of goods, wares or merchandize, shall be cast by the sea on the land, neither such

ship, vessel, or boat, nor any thing in them, nor such goods, wares, or merchandize, shall be adjudged a wreck ; but the ship, vessel, or boat, and every thing therein contained, and such goods, wares, and merchandize, shall be saved and kept by the view of the sheriff or coroner, or other person appointed for that purpose, who shall cause the same to be appraised, and safely keep them, so that if any person within a year and a day, sue for those goods, and prove they were his, or lost in his keeping, they shall be restored to him without delay, upon his paying the charges and expenses of saving and keeping the said goods ; but if not, they shall remain to the people of this state, and shall, after the expiration of the said year and day, be sold at public vendue, by the sheriff, coroner, or other person appointed for that purpose, who shall have found or seized the same, who shall account for the same at the exchequer, deducting the charges and expenses of saving and keeping the same, and of such sale. 1 *N. R. L.* 68. § 1.

And he that doth otherwise, and is thereof convicted, shall yield damages to the party grieved, and shall be punished by fine and imprisonment, or both, at the discretion of the court or justices before whom he shall be convicted. 1 *N. R. R.* 68. § 1.

It is made lawful for the person administering the government, with the council of appointment, from time to time, to appoint such and so many proper persons in each of the counties bordering on the sea, as they may think necessary, to aid and assist all such ships and vessels as may happen to be stranded on the coasts in the same counties ; and such persons are authorised and required to give all possible aid and assistance to all such ships and vessels, and to the people on board of the same ; and to use their utmost endeavors to save the same, and to save, preserve, and secure, for the purposes aforesaid, the cargoes of all such ships and vessels, and all goods and chattels whatsoever, which may at any time be cast by the sea upon the land ; and to employ such and so many men for the purpose, as they may think proper. 1 *N. R. L.* 69. § 2.

And the sheriff, coroner, or other person so appointed, and all persons by them employed, shall have a reasonable allowance out of the same goods, for saving, preserving and keeping them : And the sheriff, coroner, or other person appointed, shall and may detain the same goods until payment thereof. *Ib.*

And in case any dispute shall arise concerning such allowance, the same shall be settled and adjusted by any two or more justices of the peace, dwelling in or near the town or place where the said goods shall be so found or saved. *Ib.*

And if any person shall take away any goods whatsoever, out of any ship or vessel stranded as aforesaid, or any goods cast by the sea upon the land, or found in any bay or creek, and not deliver the same goods to the sheriff or coroner of the county where the same shall be found, or to one of the persons appointed as aforesaid, within forty-eight hours after taking the same, or shall secrete any such goods, or convert them to his own use, he shall yield double damages to the owner of such goods, to be recovered, with costs of suit, in any court having cognizance thereof, and be further punished by fine or imprisonment, or other corporal punishment, at the discretion of the court, not extending to life or limb. 1 *N. R. L.* 69. § 2.

And if any merchant, citizen or stranger, or any other, be robbed of his goods upon the sea, and the goods come into any part of this state, and he will sue to recover them, he shall be received to prove the said goods to be his own, by his marks, or by his cocket, or by good and lawful merchants, citizens or strangers, or others ; and upon such proof, the same goods shall be delivered to him without delay. 1 *N. R. L.* 69. § 1.

And it is made the duty of every sheriff, coroner, justice of the peace, and constable, and the persons so appointed as aforesaid, to present all offences and offenders against this act, at the sessions of the peace in their respective counties ; and the justices of the peace in their sessions, are authorised and required to hear and determine the same. 1 *N. R. L.* 69, 70. § 2.

TABLE OF FEES,

Of officers for services &c. relating to crimes and misdemeanors.

WHERE any person is indicted or recognized to appear in any court within this state, and who may be acquitted by the verdict of a jury, or discharged by proclamation or otherwise, it shall not be lawful for any officer of any court, or minister of justice, to exact or receive any fees from such person so acquitted or discharged, any law, custom or usage to the contrary notwithstanding. 4 Vol. L. N. Y. c 123.

CLERK.

Of the court of Oyer and Terminer and General Gaol delivery, and General Sessions of the Peace, in the city and county of New-York.
2 N. R. L. 18.

	Dolls.	Cts.
For entering an appearance, - - - - -	12½	
A subpoena, - - - - -	25	
Entering an order or rule of court, - - - - -	20	
Copy of an order or rule of court, - - - - -	12½	
Entering a <i>nolle prosequi</i> , or <i>cessat processus</i> , - - - - -	20	
Reading and entering an allowance of a pardon, - - - - -	25	
Swearing a witness, - - - - -	25	
Reading every paper given in evidence, - - - - -	6	
Respiteing a recognizance, - - - - -	6	
Discharging a defendant by proclamation, - - - - -	12½	
Entering defendant's confession, - - - - -	12½	
Entering or filing defendant's plea, - - - - -	12½	
Entering imparlance, - - - - -	12½	
Taking a recognizance, - - - - -	37½	
Entering relinquishment of a plea, - - - - -	12½	
Taking and entering verdict, when for the defendant, - - - - -	20	
Taking and entering special verdict, for each sheet containing seventy-two words, - - - - -	20	
Copies of records, indictments, &c. when required, for every seventy-two words, - - - - -	9	
Entering allowance of <i>habeas corpus</i> , writ of error or <i>certiorari</i> , and returning the same, - - - - -	50	

CONSTABLE.—2 N. R. L. 27.

	Dolls.	Cts.
For serving a warrant, - - - - -	19	
Serving a summons, - - - - -	12½	
Serving a warrant of distress for rent, - - - - -	1	50
Making an inventory of such distress, and draft of notice, and as many copies as may be necessary, - - - - -	1	00

TABLE OF FEES.

	<i>Dolls.</i>	<i>Cts.</i>
For travelling fees, <i>per mile</i> , six cents; fees for levying and selling, for each dollar, two cents, or for levying only, for each dollar, one cent; <i>Provided</i> , that this shall not extend to the city of New-York.		
Mileage for every mile, going only, - - -	6	
Levying a fine or penalty to the amount of two dollars and fifty cents, or under, - - -	12	4
And on all sums above two dollars and fifty cents, at the rate of twelve and an half cents on every two dollars and fifty cents.		
Taking a defendant in custody on a <i>mittimus</i> , -	12	4
Conveying a person to gaol, if within one mile, -	12	4
And for every mile more, going only, - - -	6	

CORONER.—2 N. R. L. 20.

	<i>Dolls.</i>	<i>Cts.</i>
For the view of each body, taking and returning the inquisition, - - - - -	10	00
Drawing every subpoena or warrant, - - -	25	
Drawing every summons for a jury, - - -	37	4
Swearing every witness, - - - - -	6	
Taking every recognizance, twenty five cents, and each coroner shall moreover be allowed all reasonable and necessary expenses, incurred by him for removing any dead body to the place for taking such inquest, and for the use of any house or building in which the same shall be taken.		
Serving writs in all cases, the like fees as are allowed to sheriffs for the like services; and the fees of the coroner, for taking inquests in such county, shall be certified by at least two of the supervisors, and paid by the treasurer of the county, and in the city of New-York, the same shall be paid in the same manner as the other contingent charges in the said city are directed to be paid.		

But in the counties of Richmond, Kings, Queens, and Suffolk, the coroner shall receive, for the view of each body, taking and returning the inquisition, and in lieu of all fees and charges attending the same, the sum of five dollars, and no more.

CRIER.—2 N. R. L. 26.

For the court of sessions.

	<i>Dolls.</i>	<i>Cts.</i>
For calling every action, - - - - -	12	4
Calling a jury, - - - - -	12	4
Calling and swearing a witness, - - - - -	6	
Ringling the bell for every action, - - - - -	9	
Calling a defendant, - - - - -	6	
Making a proclamation for the discharge of a person, - - - - -	6	
Calling a person on recognizance, - - - - -	6	

DISTRICT ATTORNEY.—4 *Vol. L. N. Y. c 30. § 9.*

For drawing every indictment actually agreed to by the grand jury, at the court of oyer and terminer and sessions, 19 cents for every folio of 90 words, and for engrossing, 12½ cents per folio; but no allowance to be made for any indictment which shall be quashed, or upon which the judgment is arrested by reason of its insufficiency.

Every bench warrant actually and necessarily issued to bring in a defendant, 25 cents, but no allowance to be made on more than one warrant on every indictment against several defendants, who reside in the same county, nor a second warrant upon the same indictment, unless the previous warrant shall have been duly returned, not served, after a reasonable time for the service thereof shall have been allowed.

Every *subpœna* actually issued, 25 cents, but no allowance to be made for more than one subpœna for each witness on any one indictment.

Arguing the matter when the defendant shall submit, 1 dollar and 25 cents, but no allowance to be made unless the same is in fact argued.

Every trial, or arguing a demurrer, or in opposition to a motion in arrest of judgment, in the court of oyer and terminer or gaol delivery and sessions, 4 dollars.

The proceedings in outlawry, 12 dollars and 50 cents for each defendant outlawed.

Making up a record by order of a judge, 19 cents for the draft, and 12½ cents for the copy, for each sheet of seventy-two words, and the like compensation if made up at the instance of a defendant, but then to be paid for by such defendant.

And for his services at any court at which the attorney-general shall also attend at the request of the person administering the government of this state, or a judge of the supreme court, 5 dollars for every day he shall so attend.

J U R O R S,

Are entitled to no fees in criminal cases.

JUSTICES OF THE PEACE.—2 *N. R. L. 22.*

	<i>Dolls.</i>	<i>Cts.</i>
For a precept to summon a jury to inquire of a forcible entry or detainer,	-	37½
Administering an oath,	-	12½
Swearing a jury to inquire of a forcible entry or detainer,	-	25
A precept to summon a jury to try a traverse of the force,	-	37½
Swearing a jury to try the traverse,	-	25
Drawing the conviction on a forcible entry or detainer,	-	1 00

RATE OF FEES.

	Dolls.	Cts.
A warrant of restitution, - - -		37½
A <i>mittimus</i> for a fine or forfeiture, - - -		19
A warrant against a person for breach of the peace or misdemeanor, - - -		19
A bond or recognizance, - - -		25
A summons upon a penal law, - - -		12½
Drawing a conviction, - - -		37½
A warrant to levy a penalty, - - -		19

S H E R I F F.—2 N. R. L. 25.

Dolls. Cts.

For every demand of defendant upon an <i>exigent</i> , and every proclamation upon a writ of proclamation, - - -	12½
Summoning a jury to inquire of a forcible entry and detainer, - - -	2 50
Serving writ of restitution from supreme court, without the aid of the <i>posse comitatus</i> , - - -	1 25
And with the aid of the <i>posse</i> , - - -	3 75
And mileage for every mile from the place fixed by law, - - -	6
Serving writ of restitution from the common pleas without the aid of the <i>posse</i> , - - -	1 25
With the aid of the <i>posse</i> , - - -	2 50
And mileage for every miles going only , - - -	6
Serving a notification issued by the comptroller on any person to account for monies received to the use of the people, the like fees as on common process; and all services done by him in his office for the public, whether in the supreme court or elsewhere, the like fees as are allowed for the like services in causes between private parties.	
For removing a prisoner on <i>habeas corpus</i> , in criminal cases, the charges are to be ascertained by the court or judge awarding the writ, and indorsed thereon, not exceeding 12½ cents per mile.	
For transporting one prisoner at one time to the state prison, 25 cents per mile; and for each and every other prisoner, conveyed by him at the same time, 5 cents per mile, in addition to the sum of 25 cents for a single one, and 75 cents per day for keeping each criminal while on the way to the state prison, which allowances shall be in full for services and expenses. 4 Vol. L. N. Y. b 316. § 17.	

W I T N E S S E S.

In what cases witnesses and prosecutors to be allowed and paid for their time and trouble in prosecuting felons, &c. see 1 N. R. L. 498. § 16, 17.

77
31
75

