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A

# TREATISE

OF THE

# PLEAS OF THE CROWN;

OR,

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

IN TWO BOOKS.

BY

WILLIAM HAWKINS,

SERJEANT AT LAW.

BOOK THE FIRST.

THE SIXTH EDITION,

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

BY

THOMAS LEACH, ESQ.

OF THE MIDDLE TEMPLE,

BARRISTER AT LAW.

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TO

THE RIGHT HONOURABLE

SIR JAMES EYRE, KNIGHT,

LORD CHIEF BARON

OF HIS MAJESTY'S COURT OF EXCHEQUER.

MY LORD,

THE permiſſion to inſcribe my humble labours to your Lordſhip, is a teſtimony of your Lordſhip's known diſpoſition to encourage even the appearance of uſeful induſtry.

The original Work, as well from the nature of its ſubject, as from its eſtabliſhed merit, ſeems to poſſeſs a natural claim to your Lordſhip's protection. It regards a ſyſtem of law, the moſt ſerious and important in its conſequences to the intereſts of ſociety; the profound knowledge, and firm, but benevolent adminiſtration of which, has eminently diſtinguiſhed your Lordſhip in the eyes of the profeſſion, and of the public.

Your Lordſhip will permit me to join in that reſpect and veneration which is ſo juſtly entertained for your Lordſhip's high judicial character; and particularly to expreſs the honour and gratitude I feel in being allowed to ſubſcribe myſelf,

MY LORD,

Your Lordſhip's

Moſt obedient

and obliged humble ſervant,

THOMAS LEACH.

*SISTER-COURT BUILDINGS,*
*TEMPLE, July 18, 1787.*

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TO THE RIGHT HONORABLE

# *THOMAS* Lord *PARKER*,

## Baron of MACCLESFIELD,

## Lord Chief Juſtice of ENGLAND.

*MY LORD,*

THE following *Treatiſe*, containing that part of the law, which is peculiarly under the adminiſtration of the chief juſtice of *England*, I preſumed, in regard to the ſubject of it, to think of preſenting it to your lordſhip, which your goodneſs having been pleaſed to permit, it is with the leſs uneaſineſs that I venture to make it public; for I could not hope to introduce it into the world with greater advantage than under your protection.

This was the real ground of my ambition, to dedicate it to your lordſhip, and not to give myſelf an opportunity of publiſhing how much I honour thoſe wonderful talents, that have raiſed you to ſo high a ſtation: A private character indeed may be ſet forth to advantage, and many virtues in it be made known by an addreſs of this nature, which might otherwiſe have lain for ever concealed: But your lordſhip's is public and conſpicuous, and can appear no where with ſo much luſtre as when you ſit in judgment, where that vaſt genius you are bleſſed with, ſhines forth to all the world, adorned with all the improvements that human art can furniſh, and ſupported with the greateſt courage and integrity.

And nothing leſs, my lord, could give you that command of all the variety of buſineſs which comes before you, and that facility with which you diſpatch it: The moſt intricate points of law, that have for ages lain in confuſion and obſcurity, when they fall under your lordſhip's conſideration, receive ſuch light, are ſtated and explained with ſuch exact method, and ſuch propriety and beauty *of expreſſion*, that the moſt polite compoſitions *appear not more elegant*, nor the moſt demon-

 ſtrative

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ſtrative more convincing: This, my lord, is the agreeable part of the exerciſe of your authority, being no violence to that general humanity which you delight to ſhew to all mankind: But the duties of your office require you ſometimes to put on another character and to ſhew the awful face of juſtice, to curb the rage of an unruly people, and to fright them into their duty by the terrors of the law; and 'tis with pleaſure all good men ſee your lordſhip purſue the prevailing vices of the age with ſuch zeal and indignation, that crimes no longer appear leſs odious for being faſhionable, nor are they more ſecure from puniſhment for being popular.

Theſe, My lord, are bleſſings which the whole nation ſhares in, and have an influence upon all parts of the civil adminiſtration: But we, who have the honour to attend your lordſhip at the bar, are in a more particular manner to acknowledge our obligations, for that candor and condeſcenſion with which you treat us: The encouragement you give to our weak endeavours, no leſs engages our affections, than your comprehenſive knowledge and clear and accurate judgment command our reverence and eſteem.

Such goodneſs charms all that approach and feel it; and it was with unniverſal joy we ſaw your lordſhip's firmneſs to the preſent eſtabliſhment, and great ſervices to your country, diſtinguiſhed lately by an acceſſion of honor from his majeſty, whoſe wiſdom in conferring his favours has eminently appeared, by the many ſignal benefits the nation has received from thoſe who have the honor to ſerve him. I am with the greateſt reſpect,

*MY LORD,*

*YOUR LORDSHIP's*

*MOST OBLIGED,*

*AND MOST HUMBLE SERVANT,*

WILLIAM HAWKINS.

THE

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# THE AUTHOR's PREFACE.

NOTHING is more common than to hear thoſe who have taken only a ſuperficial view of the crown-law, charge it with numberleſs hardſhips and undiſtinguiſhing rigor; whereas thoſe, who have more fully examined it agree, that it wants nothing to make it admired, for clemency and equity, as well as juſtice, but to be underſtood: It is ſo agreeable to reaſon, that even thoſe who ſuffer by it, cannot charge it with injuſtice; ſo adapted to the common good, as to ſuffer no folly to go unpuniſhed, which that requires to be reſtrained; and yet ſo tender of the infirmities of human nature, as never to refuſe an indulgence, where the ſafety of the public will bear it; It gives the prince no power, but of doing good; and reſtrains the people from no liberty, but of doing evil.

It would be needleſs therefore to ſay any thing of the uſefulneſs of this treatiſe, could I be ſo happy as any way to come up to the deſign of it, which was to vindicate the juſtice and reaſonableneſs of the laws concerning criminal matters, and to reduce them into as clear a method, and explain them in as familiar a manner, as the nature of the thing will bear.

Had any of theſe great men, who formerly have written on this ſubject, gone through the whole law relating to it, all farther attempts of this kind had been unneceſſary. The treatiſe, publiſhed under the name of Sir *Mathew Hale*, is indeed very uſeful, and written in a clear method, and with great learning and judgment; but it is certainly very imperfect in the whole, and ſeems to be only a model or plan of a work of this kind, which is ſaid to have been intended by him.

Sir *Edward Coke*'s third Inſtitute is alſo a treatiſe of great learning, and not unworthy of the hand that produced it; but yet it ſeems by no means a compleat work, many conſiderable heads being either wholly omitted in it, or barely touched upon.

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The treatiſe of Sir *Will. Staundforde* ſeems to be writ with great judgment, but he takes in a very ſmall compaſs, ſcarce mentioning any offences under felonies.

As for the treatiſes of *Lambard*, *Crompton*, *Pulton*, and *Dalton*, they having an eye chiefly to the direction of juſtices of peace; and, treating of the crown-law no farther than as it concerns them, are far from being compleat ſyſtems of it.

Upon the whole, I apprehend that none of the authors before mentioned were ſo perfect, but that, by reducing all the laws relating to this ſubject, under one general ſcheme, they might generally be underſtood with much leſs difficulty than they have hitherto been. This 'twas induced me to write on this ſubject, and I hope to finiſh the whole in two books, propoſing in this firſt to ſhew the nature of criminal offences; and in the ſecond, the manner of bringing offenders to puniſhment.

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THE

# EDITOR's PREFACE

## TO THE THIRD EDITION.

*IN this edition abſtracts of the ſtatutes made ſince the Author wrote relating to the ſubject of this Treatiſe, have been added. Care has alſo been taken to make additional references to the reports publiſhed ſince our Author finiſhed this work, and to Sir* Matthew Hale's Hiſtoria Placitorum Coronæ. *Such references as only tend to confirm what is advanced in the text are thrown into the margin; but where new points or differences ſeemed to occur, it was thought proper to place them, together with the abſtracts of the ſtatutes, by way of addition at the end of each book; by which means the learned ſerjeant's work is kept unmixed with any thing of the editor's; and the pages of this edition are made to correſpond with thoſe of the former, ſo that references to our author from the modern books may be turned to with equal eaſe as before.*

G. L. SCOTT.

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THE

# EDITOR's PREFACE

## TO THE FOURTH EDITION.

*THE ſame method has been obſerved in this edition as by the above* G. L. Scott, *in referring not only to the Statutes, but alſo to the later Reports,* viz. Lord Raymond's, *Sir* John Strange's, *and other authors of the beſt authority, brought down to the preſent time.*

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THE

# EDITOR's PREFACE

## TO THE FIFTH EDITION.

THIS *edition is improved with extracts from the late Mr.* J. Foſter's *Crown Law*; *Caſes* Tempore Hardwicke *Ch. J. Maſter* Burrow's *and Mr. Serjeant* Wilſon's *Reports*; *Mr.* J. Blackſtone's *Commentaries*; *and from the Statutes, to* 10 Geo. III. *incluſive.*

PREFACE

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# PREFACE

## TO THE

## PRESENT EDITION.

THE high eſtimation in which Mr. SERJEANT HAWKINS' Treatiſe of the PLEAS OF THE CROWN has been univerſally held by the Gentlemen of the profeſſion, renders any attempt either to praiſe or to explain the original work unneceſſary. But as the preſent edition is materially different, from all thoſe which have preceded it, the Editor feels it incumbent on him to deſcribe the general deſign upon which he has endeavoured to raiſe this invaluable production from its former ſtate of imperfection.

This admired Treatiſe of Criminal Law, was firſt publiſhed ſoon after the acceſſion of the preſent Royal Family to the throne. The increaſe of commerce, opulence, and luxury, ſince that period, has introduced a variety of temptations to fraud and rapine, which the legiſlature has been forced to repel, by a multiplicity of occaſional ſtatutes, creating new offences and inflicting additional puniſhments.—Theſe ſtatutes, are now, for the firſt time, incorporated with the original text, digeſted into order, and either arranged under the ſeveral titles to which they reſpectively belong, or erected into ſeparate and independent chapters, in the form of Appendix.—To prevent, however, the reputation of the Author from the danger of being injured by any falſe or injudicious inſertion of the Editor, the new matter is carefully diſtinguiſhed by this mark †, at the opening of each ſection.

But while, during this interval, the legiſlature was thus anxiouſly providing new laws, to meet the various emergencies of

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the times, many of the ſtatutes recited in the former editions of this work, either expired, or were repealed:—Of this dead and uſeleſs matter, the Editor has preſerved ſuch portions only, as are made the ſubjects of the author's obſervations.—Theſe obſervations, it is true, are the expoſitions of ſtatutes now extinct; but as they peculiarly form a part of the original compoſition, it would have been a violation of his duty as Editor, to have expunged them, and would have deprived the Author of a proportionate ſhare of the veneration and reſpect with which every part of his work has been uniformly and deſervedly honoured. The preſervation of them indeed may prove eſſentially uſeful; for as many of the new ſtatutes frequently purſue, with very little variation, the language of the old enacting clauſes, the ſound conſtructions that have expounded the one, will ſerve either directly, or by analogy, to illuſtrate and explain the other.

The many other parliamentary alterations which the criminal laws of this country have undergone, during the long courſe of near ſeventy years, are alſo ingrafted into the body of the work; and the whole text is carefully collated with the former editions, and with the printed ſtatutes.

The multiplicity of marginal references, with which this work ſo peculiarly abounds, was continued, in the former editions, without intermiſſion, throughout the page: and the eye was, thereby, forced upon a painful reſearch, to find the letters by which their ſeveral applications were intended to be diſcovered. This obſcurity is removed; and they are now placed oppoſite the reſpective ſections to which they refer.—Theſe references have alſo undergone a careful examination; thoſe which were found to burthen the margin without illuſtrating the text are expunged; and new citations extracted from all the modern reporters are inſerted in their ſtead. But this new arrangement of the references has compelled the Editor to abandon the uſual mode of printing the pages of the old editions in the margin. He has, however, prefixed a table to each volume, which exhibits, at one view, where every page in the former editions begins and ends in the preſent work.

To the text thus formed and brought down to the preſent ſeſſion of parliament, the determinations of the ſuperior courts, deciſions

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deciſions of the judges upon reſerved caſes, and points ruled by authority upon trials, are added as commentaries, and made to accompany the ſections they are deſigned to expound.

Upon this part of the work the Editor is fearful that his zeal not to omit any illuſtration, which, by poſſibility, might be uſeful, may have betrayed him into the error of inſerting many notes, either not ſufficiently compreſſed or ſuperabundant. He flatters himſelf, however, that as many of them are tranſcribed from MANUSCRIPT CASES, which have never before been printed, their novelty will, in ſome meaſure, compenſate both for their length and multiplicity.

The ſources from which he has derived his collection of manuſcript caſes have been various; but he has inſerted thoſe only which appeared to him to poſſeſs unqueſtionable authenticity. If, upon inſpection, any ſhould be found not perfectly correct, it ſhould be remembered, that deciſions upon reſerved caſes of criminal law, are not, like arguments relating to property, open to the acquiſition of attentive induſtry in WESTMINSTER-HALL, but, being, in general, diſcuſſed by the judges themſelves, and the reſolutions delivered at the ſeveral circuits, on which the caſes aroſe, they are to be acquired only by the favour of the judges, or by the private friendſhip of thoſe to whom they may have been communicated. Upon this ſubject the Editor, with a mixture of pride and gratitude, acknowledges the great and liberal aſſiſtance he has received from his profeſſional friends, whoſe kindneſs will, perhaps, be found to form the moſt valuable part of the work.

The Author, in his Preface, declares that it was his intention "to reduce all the laws relating to THE PLEAS OF THE CROWN, "under one general ſcheme, that they might be underſtood "with much leſs difficulty than they had been."—To accompliſh this deſign of his Author, the Editor has anxiouſly endeavoured to form the work into one complete and entire code of *Engliſh* criminal juriſprudence, as it exiſts at this day, upon the records of the law: but he is fearful that his zeal has led him to attempt a performance too difficult for his exertions to attain, as, upon a review of the ſheets, ſeveral alterations and arrangements have ſuggeſted themſelves to his mind, which he conceives would have rendered *the whole more* perfect and complete.

Confident,

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Confident, however, that no pains have been ſpared, and relying that the work has received a real and uſeful improvement from the alterations and additions which have been made, he reſpectfully ſubmits his labours to the judgment, candour, and protection of a learned and liberal profeſſion.

AN

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# AN ANALYSIS

## OF THE FIRST BOOK OF

# The Pleas of the Crown.

ALL perſons whatſoever are liable to be puniſhed as criminal offenders, unleſs they can excuſe themſelves, either,

1 In reſpect of their want of reaſon; or,

2 In reſpect of their ſubjection to the power of others, c. 1.

Offences, conſidered in relation to the perſons againſt whom they are committed, are either,

1 Such as are more immediately againſt God; or,

2 Such as are more immediately againſt man.

Offences more immediately againſt God, are either by common law or by ſtatute.

Thoſe at common law are either capital, or not capital.

The capital are of three kinds.

1 Hereſy, c. 2.

2 Witchcraft, c. 3.

3 Sodomy, c. 4.

Thoſe not capital are either by common law or ſtatute.

Thoſe by common law are of five kinds,

1 Blaſphemies againſt God, c. 5. ſ. 1.

2 Scoffing at the ſcriptures, c. 5. ſ. 2.

3 Impoſtures in religion, c. 5. ſ. 3.

4 Open lewdneſs groſly ſcandalous, c. 5. ſ. 4.

5 Seditious words againſt the eſtabliſhed religion, c. 5. ſ. 6.

Thoſe by ſtatute are two-fold,

1 Such as are againſt religion in general.

2 Such as are againſt the eſtabliſhed church.

Thoſe againſt religion in general are of four kinds,

1 Profanations of the Lord's day, c. 6. ſ. 1, 2, 3.

2 Profane ſwearing and curſing, c. 6. ſ. 4.

3 Drunkenneſs, c. 6. ſ. 5.

4 Reviling the Lord's Supper, c. 6. ſ. 6.

Thoſe againſt the eſtabliſhed church are three-fold.

1 Such as concern all perſons in general.

2 Such as more immediately relate to thoſe of the popiſh religion.

3 Such as more immediately regard proteſtant diſſenters, c. 16.

Thoſe which concern all perſons in general, are either,

1 Againſt the common prayer, c. 7. or,

2 In accepting or holding an office without due conformity to the church, c. 8. or,

3 In

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3 In teaching ſchool without conforming to the church, c. 9. or,
4 In not coming to church. c. 10, 11.

Thoſe relating more immediately to perſons of the popiſh religion, are of four kinds,

1 Popiſh recuſancy, c. 12.
2 The offence of ſaying or hearing of maſs, or other popiſh ſervice, c. 13.
3 The offence of not making a declaration againſt popery, c. 14.
4 The offence of promoting or encouraging the popiſh religion; either,
  1 In giving or receiving popiſh education, c. 15. ſ. 1, 2, 3.
  2 In profeſſing the popiſh religion, c. 15. from ſ. 4. to ſ. 15.
  3 In buying or ſelling popiſh books, c. 15. ſ. 15.

Offences more immediately againſt man, are either more immediately againſt the king, or more immediately againſt the ſubject.

Thoſe more particularly againſt the king, are either capital or not capital.

The capital are either,

1 High treaſon; or,
2 Felonies.

High treaſon is either,

1 Such as is within 25 E. 3. and other ſtatutes grounded upon it, and explaining it; or,
2 Such as depends upon ſubſequent ſtatutes.

Of treaſon within 25 Ed. 3. there are four ſpecies.

1 That which immediately concerns the king, his wife or children, c. 17. ſ. 3, 4, &c.
2 That which concerns his office in the adminiſtration of juſtice, c. 17. ſ. 46.
3 That which concerns his ſeal, c. 17. ſ. 48.
4 That which concerns his coin, c. 17. ſ. 54.

Of high treaſon depending on ſubſequent ſtatutes, there are three ſpecies.

1 Offences in upholding or favouring the power of the pope.
2 Offences againſt the proteſtant ſucceſſion, c. 17. ſ. 85.
3 Offences in liſting men without the king's licence, c. 17. ſ. 86.

Of offences in upholding or favouring the power of the pope, there are five ſpecies.

1 Extolling the pope's power, c. 17. ſ. 72.
2 Putting in ure popiſh bulls, c. 17. ſ. 75.
3 Perverting others, or being perverted to popery, c. 17. ſ. 76.
4 Receiving popiſh orders or education in popiſh ſeminaries, and not ſubmitting, &c. c. 17. ſ. 79.
5 Refuſing a ſecond tender of the oaths, c. 17. ſ. 84.

Felonies more immediately againſt the king, are of five kinds,

1 Offences relating to the coin or bullion.
2 Offences againſt the king's council, c. 18. ſ. 8.
3 The offence of paſſing beyond ſea, to ſerve a foreign prince, c. 18. ſ. 10.
4 The offence of embezzling the king's armour, c. 18. ſ. 12.
5 The offence of relieving a popiſh prieſt. c. 18. ſ. 14.

Of felony relating to the coin or bullion, there are three ſpecies.

1 The offence of debaſing it, c. 18. ſ. 1.
2 The offence of unlawfully diminiſhing it, c. 18. ſ. 2.
3 The offence of endeavouring by extraordinary means to increaſe it, c. 18. ſ. 7.

Of offences more immediately againſt the king, not capital, there are two kinds,

1 *Præmunire*.
2 Miſpriſion.

Offences coming under the notion of *præmunire*, are either,

1 Againſt

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1 Against the prerogative of the crown; or,
2 Against the authority of the king and parliament, c. 19. ſ. 44.

Of offences of this kind against the prerogative of the crown, there are nine ſpecies,

1 Making uſe of papal bulls, c. 19. ſ. 12.
2 Derogating from the king's common law courts, c. 19. ſ. 14.
3 Appealing to Rome from any of the king's courts, c. 19. ſ. 20.
4 Exerciſing the juriſdiction of a ſuffragan, without the appointment of the biſhop of the diocese, c. 19. ſ. 21.
5 Refuſing to elect or conſecrate the perſon nominated by the king to a biſhoprick, c. 19. ſ. 22.
6 Maintaining the pope's power, c. 19. ſ. 23.
7 Bringing in *Agnus Dei*, c. 19. ſ. 24.
8 Contributing to the maintenance of a popiſh ſeminary, c. 19. ſ. 26.
9 Refuſing the oaths, c. 19. ſ. 27.

Miſpriſions more immediately againſt the king are either negative or poſitive.

The negative is commonly called miſpriſion of treaſon, c. 20.

Poſitive miſpriſions of this kind either amount to miſpriſion of treaſon, or do not.

Of ſuch miſpriſions, amounting to miſpriſions of treaſon, there is only one ſpecies; forging foreign coin not current here, c. 20. ſ. 7.

Of ſuch miſpriſions not amounting to miſpriſion of treaſon, there are four kinds,

1 Contempts againſt the king's palace or courts of juſtice, c. 21.
2 Contempts againſt his prerogative, c. 22.
3 Contempts againſt his perſon or government, c. 23.
4 Contempts againſt his title, c. 24.

Of contempts againſt the king's prerogative, there are three ſpecies,

1 Refuſing to aſſiſt him, *for the good of the public*, c. 22. ſ. 2.
2 Preferring the intereſts of a foreign prince to that of our own, c. 22. ſ. 3.
3 Diſobeying the king's lawful commands or prohibition, c. 22. ſ. 4.

Of contempts againſt the king's perſon or government, there are ſix kinds,

1 Charging the government with oppreſſion or weak adminiſtration, c. 23. ſ. 2.
2 Doing an act which impliedly encourages rebellion, c. 23. ſ. 4.
3 Endeavouring to frighten the king into a change of his meaſures, c. 23. ſ. 4.
4 Spreading falſe rumours concerning the kings intentions, c. 23. ſ. 5.
5 Charging him with a breach of his coronation oath, c. 23. ſ. 6.
6 Speaking contemptuouſly of him, c. 23. ſ. 7.

Of contempts againſt the king's title, there are two kinds,

1 Denying his title, c. 24. ſ. 1.
2 Refuſing to take the oaths required by law for the ſupport of his government.

Of offences in refuſing to take ſuch oaths, there are two kinds,

1 The offence of refuſing the oath required by common law, c. 24. ſ. 3.
2 The offence of refuſing the oaths required by ſtatute.

Of offences in refuſing the oaths required by ſtatute, there are two kinds,

1 The offence of refuſing the oaths of allegiance and ſupremacy, c. 24. ſ. 4.
2 The offence of refuſing the oath of abjuration, c. 24. ſ. 6.

Offences more immediately againſt the ſubject, are either capital or not capital.

The capital are either by the common law or by ſtatute.

*Thoſe* by the common law are committed either,

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1 Againſt the life of a man; or,
2 Againſt his goods; or,
3 Againſt his habitation; or,
4 Againſt public juſtice.

Thoſe againſt the life of a man, are either,
1 Caſual, not being occaſioned by the default or procurement of any man, c. 26. or,
2 Such as come under the notion of homicide, being occaſioned by a man, c. 26. ſ. 2.

Of homicides there are two kinds,
1 Such as is committed againſt a man's own life, c. 27.
2 Such as is committed againſt the life of another.

Of homicide againſt the life of another, there be two kinds,
1 Such as amounts not to felony.
2 Such as amounts to felony.

Of ſuch homicide not amounting to felony, there are two kinds,
1 Juſtifiable.
2 Excuſable.

Juſtifiable homicide is either of a public or a private nature.

That of a public nature is of two kinds,
1 Such as happens in the due execution, c. 28. ſ. 4. and,
2 Such as happens in the due advancement of public juſtice.

Of the latter there are two kinds,
1 Such as happens in criminal, c. 28. ſ. 11. and
2 Such as happens in civil cauſes, c. 28. ſ. 17.

Of juſtifiable homicide of a private nature, there are two kinds,
1 Such as happens in killing a wrong-doer, c. 28. ſ. 21.
2 Such as happens in killing an innocent perſon, c. 28. ſ. 26.

Of excuſable homicide there are two *kinds*,
1 Homicide *per infortunium*, c. 29. ſ. 1.
2 Homicide *ſe defendendo*, c. 29. ſ. 12.

Homicide againſt the life of another, amounting to felony, is either with or without malice.

That which is without malice is called manſlaughter or chancemedley, c. 20.

Of ſuch homicide with malice there are two kinds,
1 Murder, c. 31.
2 Petit treaſon, c. 32.

Of murder there are two kinds,
1 Such as is done with expreſs malice.
2 Such as is done with implied malice.

Of murder done with expreſs malice, there are three kinds,
1 Such as happens in duelling, c. 31. ſ. 21.
2 Such as happens in killing another without any provocation; or but upon a ſlight one, c. 31. ſ. 32.
3 Such as happens in killing one whom the perſon killing intended to hurt in a leſs degree, c. 31. ſ. 28.

Murder done with implied malice generally happens in the following inſtances:
1 Where the principal intention is to commit another felony, c. 31. ſ. 41.
2 Where the principal deſign is to commit a bare breach of the peace, not intended againſt the perſon of him who happens to be ſlain, c. 31. ſ. 46.
3 Where the chief motive is to aſſiſt a third perſon, c. 31. ſ. 49.
4 Where the direct deſign is to eſcape from an arreſt, c. 31. ſ. 55.
5 Where the principal purpoſe is to uſurp an illegal authority, c. 31. ſ. 59.
6 Where no miſchief is intended at all, c. 31. ſ. 61.

Of petit treaſon there are three kinds, c. 32.
1 Where a ſervant kills his maſter.
2 Where a wife kills her huſband.
3 Where an eccleſiaſtical perſons kills his prelate.

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Of capital offences at common law againſt the goods of another, there are two kinds.

1 Simple larceny.
2 Mix'd larceny.

Of ſimple larceny there are alſo two kinds.

1 Grand larceny, c. 32. ſ. 1.
2 Petit larceny, c. 32. ſ. 31.

Mix'd larceny is either from the perſon of a man, or from his houſe, c. 36.

Of mixed larceny from the perſon, there are two kinds,

1 Robbery, c. 34.
2 Larceny from the perſon, c. 35.

Alſo there is another offence of this nature called piracy, c. 37.

Capital offences at common law againſt the habitation of a man, are of two kinds,

1 Burglary, c. 38.
2 Arſon, c. 39.

Offences more immediately againſt the ſubject, made capital by ſtatute, are ſuch as are committed,

1 Againſt women, (and of theſe there are two kinds,
  1 Rape.
  2 Forcible marriage.)
2 Againſt the rights of marriage, c. 43.
3 Againſt the members of a man's body, c. 44.
4 Againſt records, c. 45.
5 Againſt cattle, c. 56.
6 By purveyors, c. 47.
7 By ſoldiers and mariners, c. 48.
8 By hunters, c. 49.
9 By deſtroyers of fences, turnpike roads and bridges, c. 50.
10 By gaolers, c. 51.
11 By tranſporters of ſheep or wool, c. 52.
12 By ſervants, c. 53.
13 By Egyptians, c. 54.
14 By cutters of pow-dike, c. 55.
15 By treſpaſſers on the borders and rioters, c. 56.
16 By bankrupts, c. 57.
17 By counterfeiters of bank notes, exchequer bills, ſtamps, South-ſea bonds, lottery orders, &c. c. 58.
18 Againſt property adherent to the freehold. App. 1.
19 Againſt ſhips in diſtreſs, &c. App. 2.
20 By taking fiſh, &c. App. 3.
21 By malicious incendiaries. App. 4.
22 By ſhooting at another, and threatening letters. App. 5.
23 By ſmugglers. App. 6.
24 By buying and receiving ſtolen goods. App. 7.
25 By advertiſing a reward. App. 8.
26 By deſtroyers of garments, hop-binds, and mine engines. App. 9.
27 By deſtroying of looms, &c. App. 10.
28 By not performing quarantine. App. 11.
29 By hindering the exportation of corn. App. 12.
30 By returning from tranſportation. App. 13.
31 By aſſaulting with intent to rob. App. 14.

Offences more immediately againſt the ſubject not capital, are of two kinds,

1 Miſpriſion of felony, c. 59.
2 Other inferior offences.

Such inferior offences are of two kinds,

1 Such as amount to an actual diſturbance of the peace.
2 Such as do not amount to ſuch a diſturbance.

For the prevention of the former of theſe kinds of offences, the law has provided two remedies,

1 By ſurety for keeping the peace, c. 60.
2 By ſurety for the good behaviour, c. 61.

Of the abovementioned offences amounting to the actual diſturbance of the peace, there are two kinds,

1 Such as may be committed by one or two perſons.
2 Such as require a greater number.

Of thoſe which may be committed by one or two perſons, there are four kinds,

1 Aſſaults, c. 62. ſ. 1.
2 *Batteries*, c. 62. ſ. 2.

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3 Affrays, c. 63.
4 Forcible entries and detainers, c. 64.

Of thoſe which require a greater number of perſons there are three kinds,
1 Riots, c. 65. ſ. 1.
2 Routs, c. 65. ſ. 8.
3 Unlawful aſſemblies, c. 65. ſ. 9.

Of ſuch inferior offences not amounting to an actual diſturbance of the peace, there are two kinds,
1 Such as are committed by officers.
2 Such as are committed by common perſons, without any relation to an office.

Of offences of this nature, committed by officers, there are three ſpecies.
1 Neglect or breach of duty, c. 66.
2 Bribery, c. 67.
3 Extortion, c. 68.

Of offences of this nature, committed by private perſons, without any relation to any office, there are two kinds,
1 Such as are infamous and groſsly ſcandalous, proceeding from principles of downright diſhoneſty, malice, or faction.
2 Such as are of an inferior nature, and neither infamous nor groſsly ſcandalous.

Of offences of the firſt ſort, there are ſix ſpecies,
1 Perjury, c. 69.
2 Forgery, c. 70.
3 Cheats, c. 71.
4 Conſpiracy, c. 72.
5 Libels, c. 73.
6 Keeping of a bawdy-houſe, and other unlawful place, c. 74.

Of offences of the latter ſort, there are two kinds,
1 Such as more immediately affect the public.
2 Such as more immediately affect the intereſts of particular perſons.

Of thoſe which more immediately affect the public, there are four kinds,
1 Common nuiſances, c. 75.
2 Monopolies, c. 79.
3 Foreſtalling, engroſſing, and regrating, c. 80.
Of victuals, app.
4 Barratry, c. 81.

The moſt remarkable kinds of common nuiſances are,
1 Such as relate to highways and turnpike roads.
2 Such as relate to public houſes, c. 78.

Thoſe which relate to highways come under a twofold conſideration,
1 As they relate to highways and turnpike roads in general, c. 76.
2 As they relate to bridges in particular, c. 77.

Of the offences above-mentioned more immediately affecting the intereſts of particular perſons there are three kinds,
1 Uſury, c. 82.
2 Maintenance.
3 Buying or ſelling a pretended title, c. 86.
Maintenance is two-fold.
1 *Ruralis*, c. 83. ſ. 2.
2 *Curialis*, c. 82. ſ. 3.
Of maintenance *curialis* there are three ſpecies,
1 General maintenance, c. 83. ſ. 4.
2 Champerty, c. 84.
3 Embracery, c. 85.
Of ſeducing artificers.
Of acting plays without licence.
Of embezzling naval ſtores.
Of exerciſing a trade without ſerving apprenticeſhip.
Of granting fraudulent permits.
Of ſurcharging boats.
Of vagrants.

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## OF

# THE AUTHORS REFERRED TO IN THIS WORK.

### A.

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| A Leyn | *Aleyn's Reports.* |
| And. | *Anderſon's Reports, firſt and ſecond Part.* |
| Aſſ. | *The Book of Aſſizes.* |
| Atk. | *Atkyn's Reports.* |

### B.

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| B. R. H. | *Caſes in the time of Lord Hardwicke.* |
| Bac. Abr. | *Bacon's Abridgment.* |
| Bar. K. B. | *Barnardiſton's Reports in the King's Bench.* |
| Barr. | *Barrington on the Statutes.* |
| Barrow | *Barrow's Supremacy.* |
| Benloe | *Benloe's Reports.* |
| Brac. Bracton | *Bracton, De legibus & conſuetudinibus Angliæ.* |
| Bridg. | *Bridgman's Reports.* |
| Bro. | *Brook's Abridgment.* |
| Bul. | *Bulſtrode's Reports.* |
| Burr. | *Sir. James Burrow's Reports.* |
| Brown | *Brown's Caſes in Chancery.* |
| Bull. N. P. | *Introduction to the Law of Niſi Prius.* |

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| Carth. | *Carthew's Reports.* |
| Caſ. in Parl. | *Sir Bartholomew Shower's Caſes in Parliament.* |
| Caw. Cawley | *Cawley's Law againſt Recuſants.* |
| Comm. | *Blackſtone's Commentaries.* |
| Com. Dig. | *Comyn's Digeſt.* |
| Co. | *Sir Edward Coke's Reports.* |
| Co. Lit. | *Sir Edward Coke's Commentary upon Littleton.* |
| Comb. | *Comberbach's Reports.* |
| C. Eliz. | *Croke's Reports for the reign of Queen Elizabeth.* |
| C. Jac. | *Croke's Reports for the Reign of King James the firſt.* |
| C. Car. | *Croke's Reports for the Reign of King Charles the firſt.* |
| Crom. | *Crompton's Office of a Juſtice of Peace, printed in the Year 1606.* |
| Cowp. | *Cowper's Reports.* |

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| Dav. Davis | *Davis's Reports.* |
| Dy. Dyer | *Dyer's Reports.* |
| Dougl. | *Douglas's Reports.* |
| D. & E. Durnf. & Eaſt | *The Term Reports by Charles Durnford and Edward Hyde Eaſt, Eſquires.* |

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| Fitz. | *Fitzherbert's Abridgment.* |
| Fitzg. | *Fitzgibbon's Reports.* |
| Flet. | *Fleta.* |
| Foſ. | *Foſter's Reports and Diſcourſes upon Crown Law.* |

## G.

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| Gibſ. Gibſon | *Gibſon's Codex Juris Eccleſiaſtici Anglicani.* |
| Godb. | *Godbolt's Reports.* |

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| 1 Jones | *Sir William Jones's Reports.* |
| 2 Jones | *Sir Thomas Jones's Reports.* |
| 1 Inſt. | *Coke upon Littleton.* |
| 2 Inſt. | *The ſecond Part of Coke's Inſtitutes.* |
| 3 Inſt. | *The third Part of Inſtitutes.* |
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| Keb. | *Keble's Reports,* |
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| MS. | *Manuſcript Caſes never before publiſhed.* |

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| Noy. | *Noy's Reports.* |

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| Pal. Palm. | *Palmer's Reports.* |
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| Pl. Com. | *Plowden's Commentaries.* |
| Po. Poph. | *Popham's Reports.* |
| Prin. P. L. | *Eden's Principles of Penal Law.* |
| Pult. | *Pulton, De Pace Regis & Regn.* |

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| Ray. Raym. | *Raymond's Reports.* |
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| Seld. Jan. Ang. | *Jani Anglorum facies altera by Mr Selden, translated into English by Mr. Redman Westcot, and printed in the Year 1682.* |
| Seld. Epin. | *England's Epinomis by Mr. Selden, printed in the Year 1683* |
| Show. | *Shower's Reports.* |
| Sid. | *Siderfin's Reports.* |
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| Str. | *Strange's Reports.* |
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| S. P. C. | *Staundford's Pleas of the Crown.* |

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| Thelo. | *Thelwal's Digest of Writs.* |
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| Watf. Watfon. | *Watfon's Clergyman's Law, Folio Edition.* |
| Win. Winch | *Winch's Reports.* |
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# ERRATA et ADDENDA.

Page 9 chap. 4, dele *berrendum*, &c.

75 line 5, instead of "*with such licence*," read "*without such licence*."

125 note (1), line 2, instead of "*pound*" read "*pond*."

132 sect. 3, after "*B. Tref.* B. 12." in mar. read "*Lucas* 95."

133 sect. 7, lines 3 and 4, instead of "*may be*," read "*is*."

153 sect. 7, line 4, instead of "*if it been*," read "*if it had been*."

164 sect. 18, note (*d*), after "*MS.*" read "*Sed Vide* 1 *Shower* 53."

168 *after* line 16, "read "30 *By return from transportation*—31 *By assaulting with intent to rob*."

172 after sect. 18, "read "*Secondly*."

173 sect. 12, line 18, note in mar. after "*penalties*," read "*vide also upon this subject*."

175 instead of "*ch.* 34," read "*ch* 44."

177 sect. 4, line 11, instead of "*Justice Ingram*," read "*Justice Hungham*."

250* line 5, after "*Edward*," read "*the Fourth*."

290 sect. 54, instead of "*lease now expired*," in mar. read "*lease then expired*."

312 sect. 2, note (1), line 3, after "383," read "12 *Mod.* 314."

386 note (14), line 13, instead of "*inquisition are made*," read "*be made*."

457 line 32, of the text, instead of "*punished or for*," read "*punished as for*."

470 sect. 1, line 2, instead of "*an allowance*," read "*is an allowance*."

526 sect. 13, after "12 *Mod.* 516," in mar. read "2 *Atkins* 340.

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A

# TREATISE

OF

# THE PLEAS OF THE CROWN.

## BOOK THE FIRST.

### CHAPTER THE FIRST.

### OF THE PERSONS WHO MAY BE GUILTY OF CRIMINAL OFFENCES.

THE guilt of offending againſt any law whatſoever, neceſſarily ſuppoſing a wilful diſobedience, can never juſtly be imputed to thoſe who are either incapable of underſtanding it, or of conforming themſelves to it. Therefore, before I come to the ſeveral kinds of offences, I ſhall ſhew what degrees of diſcretion and freedom are required in the commiſſion of them. For the better underſtanding whereof, I ſhall conſider what offenders are excuſeable.—Firſt, in reſpect of their want of reaſon.—Secondly, in reſpect of their ſubjection to the power of others. 1 Hale 15. 4 Comm. 21. Puff. b. 8. c. 3.

*Sect.* 1. As to the Firſt point it is to be obſerved, that thoſe who are under a natural diſability of diſtinguiſhing between good and evil, as (1) infants under the age of diſ- B. Cor. 61. 170. Pult. 125, 126. 129.

Sum. 10. 28. 43. 3 Inſt. 4. Dalt. c. 147. 1 Hale 16. 29. 515. Co. Lit. 247. 4 Co. 124. Hob. 224. 8 St. Tr. 322.

(1) 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; for the law preſumes the human mind has acquired, at this period, a compleat ſenſe of right and wrong. Dr. & St. c. 26. Co. Lit. 79. 171. 247. Dalt. 476. 505.—During the interval between the age of fourteen years and that of ſeven, the mind is *primâ facie* preſumed to be unacquainted with guilt. And theſe preſumptions entertained in favour of innocence, accumulate in an inverſe proportion with the decreaſe and tenderneſs of the offender's years. 1 Hale 25. 27. From this ſuppoſed imbecillity of mind, the protective humanity of the law will not, without anxious circumſpection, permit an infant to be convicted on his own confeſſion. C. Jac. 466. 1 Hale 24. Foſ. 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, the *verdict of a jury* may find him guilty, and judgment of death may be given againſt him. 1 Hale 20. 25. 434. B. Cor. 133. 4 Comm. 23. Foſ. 71. O. B. 1784. p. 971. For *malitia ſupplet ætatem*; and the capacity of contracting guilt is meaſured more by the apparent ſtrength of the offender's underſtanding than by years and days. B. Cor. 74. 4 Comm. 23. But within the age of ſeven years an infant cannot be puniſhed for any capital offence, whatever circumſtances of a miſchievous diſcretion may appear; for *ex preſumptione juris*, he cannot have diſcretion: and againſt this preſumption no averment ſhall be admitted. Mirr. c. 4. ſ. 6. Plowd. 19. 1 Hale 20. Foſ. 349. 4 Comm. 23. Cowp. 222, 223. 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 Hale 19. 514. Foſ. 113. 349. But there is an inſtance of a pardon granted to an infant for homicide committed within the age of ſeven years. Regiſt. 309.

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cretion, ideots and lunaticks, (2) are not punishable by any criminal profecution whatfoever.

(2) Ideocy is a defect of underſtanding, from the moment of birth; Co. Litt. 247. F. N. B. 530. 1 Comm. 304. a perſon therefore, *born* deaf and dumb is *primâ facie* within this definition. 2. Cor. 217. 1 Hale 34.—Lunacy is a partial derangement of the intellectual faculties, the ſenſes returning at uncertain intervals; the offender therefore is only protected from puniſhment for acts done during the prevalence of his diſorder. 1 Hale 31. 4 Comm. 24.—Madneſs is a total alienation of the mind. 1 Hale 30. 4 Co. 124. Theſe defects, whether permanent or temporary, muſt be unequivocal and plain, not an idle frantic humour, or unaccountable mode of action, but an abſolute diſpoſſeſſion of the free and natural agency of the human mind. 8 St. Tr. 322. 1 Hale c. 4. O. B. 1784. p. 257.

2 Roll. 324. F. Cor. 351. Reg. 309. Sum. 43. 3 Inſt. 6. Co. Lit. 247. 4 Co. 124. 1 Hale 36, 37.

*Sect.* 2. Indeed it was anciently holden, in reſpect of that high regard which the law has for the ſafety of the king's perſon, that a madman might be puniſhed as a traitor, (3) for killing or offering to kill the king; but this is contradicted by the later opinions.

4 Comm. 25.——(3) See 33 H. 8. c. 20. repealed by 1 & 2 P. & M. c. 10.

26 Aſſ. 27. Sav. 57. Sum. 10. 1 And. 107. 109. 3 Inſt. 4. 6. 1 Hale 34, 35.

*Sect.* 3. And it ſeems agreed at this day, that if one, who has committed a capital offence, become *non compos* before conviction, he ſhall not be arraigned; and if after conviction, that he ſhall not be executed.

4 St. Tr. 205. 8 St. Tr. 285. 4 Comm. 24, 25. 388.

Pult. 6. 22 Aſſ. 56. (The 12 Anne, c. 23. upon this ſubject which was recited in the former edition is repealed by 13 Geo. 2. c. 24.)

*Sect.* 4. But by 17 *Geo.* 2. c. 5. ſ. 20. (which ſeems agreeable to the ancient common law) it is enacted, "That it ſhall "and may be lawful for any two or more juſtices of the peace "where a dangerous lunatick ſhall be found, by warrant "under their hands and ſeals, directed to the conſtables, "churchwardens, and overſeers or ſome of them, of the "pariſh or place, to cauſe ſuch lunatick ſo to be apprehended, and kept ſafely locked up in ſome ſecure place within "the county, or precinct where the pariſh or place ſhall lie, "as ſuch juſtices ſhall under their hands and ſeals direct and "appoint; and (if ſuch juſtices find it neceſſary) to be there "chained, if the laſt legal ſettlement of ſuch perſon, ſhall "be in any pariſh or place within ſuch county or precinct; "and if ſuch ſettlement ſhall not be there, then ſuch danger- "ous lunatick ſhall be ſent to the laſt legal ſettlement by paſs "(*mutatis mutandis*) as aforeſaid; and ſhall be locked up or "chained by warrant of two juſtices of the county to "which ſuch perſon is ſo ſent (4)."—And, by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatick, be ſuch in truth or not, it ſhall be tried by an inqueſt of office, to be returned by the

1 And. 107. 109. 1 Sav. 50. 56. 57. Sum. 226. 1 Hale 35.

(4) But this act relates only to vagrant lunaticks 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. 52.

ſheriff

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ſheriff of the county wherein the court ſits; (5) and if it be found by them that the party only feigns himſelf mad, and he ſtill refuſe to anſwer, he ſhall be dealt with as one that ſtands mute. (6).

(5) Every perſon of the age of diſcretion is preſumed of ſane memory until the contrary appear, which may be either by the inſpection of the court, 1 Hale 33. Tr. p. Pais 14. O. B. 1783. No. 4.—By evidence given to the jury, who are charged to try the indictment. 3 Bac. Abr. 81. 1 Hale 33. 35. 36. O. B. 1784. No. 288.—Or, being a collateral iſſue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded, returnable *inſtanter*, in the nature of an inqueſt of office. Foſt. 46. Kel. 13. 1 Lev. 61. 1 Sid. 72. 4 Comm. Appen. ſ. 3. And this method, in caſes of importance, doubt, or difficulty, the court will, in prudence and diſcretion, adopt. 1 Hale 35. Sav. 50. 56. 1 And. 154.

(6) By 12 Geo. 3. c. 20. in felony and piracy the judgment ſhall be the ſame, on ſtanding mute, as if the priſoner had confeſſed the indictment or appeal.

*Sect.* 5. And if one who wants diſcretion commit a treſpaſs againſt the perſon or poſſeſſion of another, he ſhall be compelled in a civil action to give ſatisfaction for the damage. 2 R. Abr. 547. 3 Bac. Ab. 131. B. Cor. 6. Hob. 134. Co. Lit. 247.

289. Plow. 364. 2 Inſt. 284. 414. Pop. 141. Brownl. 197. Noy 129. C. Jac. 467. 1 Hale 15, 16. 20. 4 Comm. 22. 2 Comm. 291.

*Sect.* 6. And he who is guilty of any crime whatever, through his voluntary drunkenneſs, ſhall be puniſhed for it as much as if he had been ſober. Crom. 29. Co. Litt. 247. 1 Hale 32. Plow. 19.

4 Comm. 26. 8 St. Tr. 285. 4 Co. 125. Dalt. c. 148.

*Sect.* 7. Alſo 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. Kely. 53. Dalt. p. 533. 1 Hale 617.

*Sect.* 8. And if it appear by the circumſtances, that an infant under the age of diſcretion could diſtinguiſh between good and evil, as if one of the age of nine or ten years kill another, and hide the body, or make excuſes, or hide himſelf, he may be convicted and condemned, and forfeit, *&c.* as much as if he were of full age. But in ſuch a caſe the judges will in prudence reſpite the execution, in order to get a pardon: and it is ſaid, that if an infant apparently wanting diſcretion be indicted and found guilty of felony, the juſtices themſelves may diſmiſs him without a pardon, *&c.* (7) F. Cor. 118. 129. Sum. 44. 65. 12. Aſſ. 30. B. Cor. 6. 61. 133. 136. S. P. C. 16. 27. Dalt. 505. 35. H. 6. 11. 1 Hale 434. 509, 570. Plow. 19. Pult. 125. Foſ. 70.

(7) This authority to diſmiſs him muſt be underſtood of a reprieve before judgment, or that the jury find the priſoner within the age of ſeven years, or not of ſufficient diſcretion to judge between good and evil. 1 Hale 27.

*Sect.* 9. As to the ſecond point, *viz.* How far thoſe are to be excuſed who are under the power of others:—A feme covert is ſo much favoured in reſpect of that power and authority which her huſband has over her, that ſhe ſhall not Leges Inæ 58. S. P. C. 16. 42. 27 Aſſ. 40. Sum. 65. 4 Comm. 28. Kely. 31.

1 Hale 45. 516. 2 vol. 320. B. Cor. 16. 108. Dalt. 134. 157. O. B. 1784. p. 119. 786.

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ſuffer any puniſhment for committing a bare theft (8) in company with, or by coercion of, her huſband.

(8) This exemption extends to burglary, Kely 31. F. Cor. 199. and ſeemingly to robbery, as an offence of a nature certainly not *more* heinous. The reaſon of this rule is ſaid to be "becauſe the "wife cannot know what property her huſband may claim in the goods taken." 10 Mod. 63. If this be the true principle, the caſes of robbery and burglary are in ſome meaſure diſtinguiſhable upon this ſubject; for in burglary, the abſence or preſence of the party is immaterial, but in robbery, preſence is an unavoidable and eſſential ingredient to the crime, and affords to the wife an opportunity of judging in what *ſort of right* the goods are taken.—*Vide, infra.* ſect. 11.

3 Inſt. 108. Sum. 65. 1 Hale 44.

*Sect.* 10. Neither ſhall ſhe be deemed acceſſary to a felony for receiving her huſband, who has been guilty of it, as her huſband ſhall be for receiving her. (9)

(9) Nor a principal, though the huſband's offence be treaſon, for ſhe is *ſub poteſtate viri*, and bound to receive him. Neither is ſhe affected by receiving, jointly with her huſband, any other offender. 1 Hale, 48. For ſhe cannot be admitted as a witneſs to diſcover even collaterally, her huſband's guilt. Brownl. 47. Dalt. 540. 1 Hale 301. O. B. 1785. p. 181.

Sum. 65, 66. Dalt. 104. F. Cor. 199. 383. 2 B. c. 29, 134. 1 Hale 45 516. 2 Comm. c. 29. Lucas 63. Kely 31.

*Sect.* 11. But if ſhe commit a theft of her own voluntary act, or by the bare command of her huſband, or be guilty of treaſon, murder, or robbery, in company with, or by coercion, of her huſband, (10) ſhe is puniſhable as much as if ſhe were ſole.

S. P. C. 10. 19. 142. 4 Comm. 29. *Vide* O. B. 1785. No. 3.

(10) Or receive ſtolen goods of her own ſeparate act, without the privity of her huſband, or, if he, knowing thereof, leave the houſe and forſake her company; ſhe alone ſhall be guilty, as acceſſary. 22 Aſs. 40. Dalt. 157. for the coercion which is ſuppoſed to be conveyed by the command or preſence of the huſband is only a preſumption of law, and like other preſumptions may be repelled. 1 Hale, 516.—In treaſon, 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 ſubject, has forgotten to pay. In murder alſo this privilege is denied, becauſe the offence is repugnant to the laws of nature, which ſhall never be contravened by the refinements of civil ſociety. 4 Comm. 29.

2 Roll. 39. 3 Keb. 34. 1 Sid. 410. Hob. 95. Salk. 384.

*Sect.* 12. Alſo 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.

9 Co. 72. C. Jac. 482. 1 Sid. 210. Moor 813. 2 Keb. 634. Hob. 93. 3 Keb. 34.

*Sect.* 13. And generally 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 the huſband) ſhe may be puniſhed for it without the huſband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the huſband ſhall not be included in it for an offence to which he is no way privy. And if a woman bring a malicious appeal for the death of her huſband, known by her to be alive, ſhe may be impriſoned for the falſe appeal, till ſhe make fine to the king,

8 H. 4. 17. F. Cor. 73. *B. Imp.* 103.

and

and the husband shall go at large. 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. (11) Post. p. 17. 18. f. 31. 39. Bac. Ab. 294. Noy, 103. Sav. 25. 1 Roll. 93. 233.

(11) She may be indicted alone for a riot. Dalt. 447. For selling gin against the injunctions of the 9 Geo. 2. c. 23. Str. 1120. For recusancy. Str. 1120. Hob. 96. 1 Sid. 410. 11 Co. 64. Sav. 25. For being a common scold, *communis rixatrix*. 6 Mo. 213. 239. For assault and battery. Salk. 384. For forestalling. Sid. 410. For usury. Skin. 348. For barratry. Bac. Ab. 280. Com. Roll. 39. Post. 243. For a forcible entry. Post. 147. For keeping a gaming house. 10 Mod. 335. Keeping a bawdyhouse, if the husband does not live with her. 1 Bac. Abr. 294. For trespass or slander. Keilw. 61. R. Abr. 251. Leon. 122. C. Car. 376.

*Sect.* 14. Neither a son nor a servant are excused the commission of any crime whether capital or not capital, by the command or coercion of the father or master. Sum. 66. Moor 813. Dalt. 504. 1 Hale 44.

THERE are other exemptions from punishment, than those which have been mentioned in this chapter.—First, By casualty and misfortune; thus if in the execution of a lawful act, an unintended death or maim ensue, the party stands excused from all guilt. B. Cor. 229. 22 Ass. 71. 1 Hale, 39. Kel. 123. 4 Co. 124. 4 Com. 27.—Secondly, by ignorance or mistake; as when a man intending to do a lawful act, does that which is unlawful. Jones, 15. C. Car. 538. But this must be an ignorance, or mistake in fact, and not in law, for *ignorantia juris quod quisque tenetur scire neminem excusat*. Plow. 343. 1 Hale, 42. 4 Comm. 27.—Thirdly, By compulsion or necessity; as where the act proceeds from the *lawful* coercion of another; or arises from circumstances of unavoidable constraint; or the impulse of a just and well grounded apprehension of death. 1 Hale, 50 54. Plow. 18. 3 Inst. 10. Brac. 16. Reg. 88. N. B. 177. 1 Comm. 131. 4 Comm. 30. And all these circumstances of accident, necessity, or infirmity, must be satisfactorily proved by the prisoner, unless they arise out of the evidence adduced against him. Fol. 255. Ld. Ray. 1493. Str. 773. 1 Hale, 34.

## CHAPTER THE SECOND.

### Of HERESY.

OFFENCES considered in relation to the persons against whom they are committed, are either,—First, such as are more immediately against God, or, Secondly, such as are more immediately against man.—Offences more immediately against God, are either by common law or by statute. Those at common law are either capital or not capital. The capital offences of this nature are of three kinds: Heresy. Witchcraft. Sodomy.—Concerning Heresy, I shall consider, 1. What it is. 2. By whom it is cognizable. 3. How it is punishable. 4 Comm. 41. Beccar. c. 8.

*Sect.* 1. As to the first point, it seems, that among protestants, heresy is taken to be a false opinion, repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the *Christian faith*, or at least of most *high importance*. 4 Comm. 44. 2 Burn. E. L. 258.—3 1 Hale 38 410. 3 Inst

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Sum. 3. 4. 4 Comm. 48.

*Sect.* 2. But it is impoſſible to ſet down all the particular errors, which may properly be called heretical, concerning which there are, and always have been ſo many intricate diſputes. However, the firſt of Elizabeth, which erected the high-commiſſion-court, having reſtrained the ſame from adjudging any points to be heretical, which have not been determined to be ſuch, either by ſcripture, or by ſome one of the four firſt general councils, or by ſome other council, by expreſs words of ſcripture, or by the parliament, with the aſſent of the convocation; it has been ſince generally holden, that theſe rules will be good directions to eccleſiaſtical courts in relation to hereſy.

3 Inſt. 40. Sum. 3.

B. Hereſy paſſim. 8 R. Abr. 226.

*Sect.* 3. As to the ſecond point, *viz.* By whom hereſy is cognizable, it is certain, that the convocation may declare what opinions are heretical: but it hath been queſtioned of late, whether they have power at this day to convene and convict the heretick.

F. N. B. 269. Sum. 5. 2 Hale. 392. Gib. 401. 410. 12 Co. 56, 57, 93. 3 Inſt. 40. 2 St. Tr. 275.

*Sect.* 4. However it is agreed, that every biſhop may convict perſons of hereſy within his own dioceſe, and proceed by church-cenſures againſt thoſe who ſhall be convicted; but it is ſaid, that no ſpiritual judge, who is not a biſhop, hath this power; and it has been queſtioned, whether a conviction before the ordinary were a ſufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the convocation was.

*Sect.* 5. By 24. Hen. 8. c. 9. the arch biſhop of either province may cite any perſon before him for hereſy, if the immediate ordinary either conſent thereto, or do not his duty in puniſhing the ſame.

27 H. 8. 14. 5 Co. 58. Sum. 4. Hob. 236. 3 Inſ. 39. 12 Rep. 56. Finch. 219. 1 Salk. 135.

*Sect.* 6. But it is certain, that a man cannot be proceeded againſt at the common law, in a temporal court, merely for hereſy; yet if in maintenance of his errors he ſet up conventicles and raiſe factions, which may tend to the diſturbance of the publick peace, it ſeemeth that he may in this reſpect be fined and impriſoned, upon an indictment, *&c.* at the common law.

2 Hale, 399. 3 Inſt. 42. Sum. 4. 1 Roll. 110. 2 Bulſt. 300.

*Sect.* 7. Alſo a temporal judge may incidently take knowledge whether a tenet be heretical or not; as where one was committed by force of 2 H. 4. c. 5. for ſaying, that he was not bound by the law of God to pay tithes to the curate; and another for ſaying, that though he was excomunicated before man, yet he was not ſo before God. The temporal courts, on an *habeas corpus* in the firſt caſe, and an action of falſe impriſonment in the other, adjudged neither of the points to be hereſy within that ſtatute; for the king's courts will examine all things which are ordained by ſtatute.

5 Co. 5. 3 And. 191.

*Sect.* 8. Alſo in a *quare impedit*, if the biſhop plead that he refuſed the clerk for Hereſy, it ſeems that he muſt ſet forth the

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the particular point, that it may appear to be heretical, to the court wherein the action is brought, which having conuſance of the original cauſe, muſt by conſequence have a power as to all incidental matters neceſſary for the determination of it; and, without knowing the very point alledged againſt the clerk, will not be able to give directions concerning it to the jury, who (if the party be dead) are to try the truth of the allegation. 1 Leon 192. 3 Lev. 314. 1 Hale 407.

*Sect.* 9. But if a man be proceeded againſt as an heretick in the ſpiritual court *pro ſalute animæ*, and think himſelf aggrieved, his proper remedy ſeems to be to bring his appeal to a higher eccleſiaſtical court, and not to move for a prohibition from a temporal one, which, as it ſeems to be agreed, cannot regularly determine or diſcuſs what ſhall be called hereſy. 5 Co. 28. 27 H. 8. 24.

*Sect.* 10. As to the third point, *viz.* How hereſy is puniſhable, there is no doubt but that at common law one convicted thereof, and refuſing to abjure it, or falling into it again after he had abjured it, might be burnt by force of the writ, *de hæretico comburendo*, which was grantable out of chancery upon a certificate of ſuch conviction; but it is ſaid, that he forfeited neither lands nor goods, becauſe the proceedings againſt him were only *pro ſalute animæ*. F. N. B. 269. 3 Inſt. 43. Sum. 5. Dr. & St. 1. 3. c. 29. Sum. 5.

*Sect.* 11. But at this day the ſaid writ *de hæretico comburendo* is aboliſhed by 29 Car. 2. c. 9. And all the old ſtatutes which give a power to arreſt or impriſon perſons for hereſy, or introduced any forfeiture on that account are repealed. Yet by the common law, an obſtinate heretick being excommunicate is ſtill liable to be impriſoned by force of the writ, *de excommunicato capiendo*, till he makes ſatisfaction to the church. And by 9 & 10 W. 3. c. 32. "If any perſon "having been educated in, or having made profeſſion of the "Chriſtian religion within this realm, ſhall be convicted "in any of the courts of *Weſtminſter*, or at the aſſizes, of "denying any one of the perſons in the holy Trinity to be "God, or of maintaining that there are more Gods than one, "or of denying the truth of the Chriſtian religion, or the "divine authority of the holy ſcriptures, he ſhall for the "firſt offence be adjudged uncapable of any office; and for "the ſecond, ſhall be diſabled to ſue any action, or to be "a guardian, executor or adminiſtrator; or to take by any "legacy or deed of gift, or to bear any office civil or mili- "tary, or benefice eccleſiaſtical, for ever, and ſhall alſo "ſuffer impriſonment for three years, without bail or "mainprize, from the time of ſuch conviction." Sum. 4, 5. Gilb. 353. 12 Co. 44. 1 Salk. 293. B. R. H. 314. 3 Jac. 1. c. 21.

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## CHAPTER THE THIRD.

### Of WITCHRAFT.

3 Inſt. 44. Dalt. p. 513. 514.

OF offenders of this nature there are ſaid to be three kinds. —Firſt, conjurers, who by force of certain magick words endeavour to raiſe the devil, and compel him to execute their commands.—Secondly, witches, who by way of friendly conference are ſaid to bargain with an evil ſpirit to do what they deſire of him.—Thirdly, ſorcerers or charmers, who by the uſe of certain ſuperſtitious forms of words, or by means of images, or other odd repreſentations of perſons or things, *&c.* are ſaid to produce ſtrange effects above the ordinary courſe of nature.

3 Inſt. 44. F. N. B. 269. Summ. 6. S. P. C. 38. C. Eliz. 571.

*Sect.* 2. All theſe were anciently puniſhed in the ſame manner as hereticks, by the writ *de hæretico comburendo* after a ſentence in the eccleſiaſtical court, and a relapſe. And it is ſaid alſo, that they might be condemned to the pillory, *&c.* upon an indictment at common law.

1 Hale 383. 45 Ed. 3. 17. B. Cor. 15.

*Sect.* 3. In the time of king Edward the third, one taken with the head and face of a dead man, and a book of ſorcery, was brought into the king's bench; but there being no indictment againſt him, he was ſworn that from thenceforth he would not be a ſorcerer, and then delivered from priſon, and the head was burnt at his charge: but this method ſeems to be obſolete at this day.

2 Keb. 719.

By 33 H. c. 8. witchcraft and ſorcery were made felony, without clergy.—But acceſſaries after were intitled, 1 Hale 7.

*Sect.* 4. By 1. Jac. 1. c. 12. (the only law now in force againſt theſe offenders) they are divided into two degrees; and thoſe in the firſt degree, and their acceſſaries before, ſhall ſuffer as felons without clergy. Of theſe there are the four following ſpecies. *Firſt*, Such as ſhall uſe any invocation or conjuration of any evil ſpirit: and ſuch ſeem clearly to be within the law, tho' no ſpirit do actually appear.—*Secondly*, Such as conſult, covenant with, entertain, employ, feed, or reward any evil ſpirit to any intent: and theſe are agreed to be within the ſtatute, though nothing farther be done upon ſuch conſultation, *&c.*—*Thirdly*, Such as take up any dead perſon's body, or any part thereof, to be uſed in any manner of witchcraft: and theſe are alſo clearly within the ſtatute, though they do not actually ſo uſe it.—*Fourthly*, Such as exerciſe any witchcraft, inchantment, charm, or ſorcery, whereby any perſon ſhall be killed, deſtroyed, conſumed, or lamed in his or her body, or any part thereof. But none are within this branch who do not actually effect ſuch miſchief.

Sum. 6. 7. 4 Inſt. 45. con.

1 Jon. 143.

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*Sect.* 5. Thoſe in the ſecond degree ſhall for the firſt offence ſuffer a year's impriſonment, and the pillory; and for the ſecond, as felons without clergy. And theſe, by the manifeſt purport of the words of the act, which is very obſcurely penned, ſeem to be divided into the two following ſpecies: *Firſt*, Such as take upon them by witchcraft, inchantment, charm or ſorcery to tell where treaſure is to be found, or where things loſt or ſtolen may be found, or to do any thing to the intent to provoke any perſon to unlawful love, or to hurt or deſtroy any perſon in his or her body, though the ſame be not effected. *Secondly*, Such as ſhall uſe any witchcraft, &c. whereby any cattle or goods of any perſon ſhall be deſtroyed, waſted or impaired: but thoſe, who take upon them to do this, are not within the act unleſs they actually do it. 12 Mod. 556. *Vide* 4 Geo. c. 11. Sum. 8. 3 Inſt. 46.

† But this ſtatute of James is repealed by 9 Geo. 2. c. 5. which enacts, "That no proceeding ſhall be had againſt any "perſon for witchcraft, ſorcery, inchantment or conjuration, "or for charging another with ſuch crimes; and that who-"ever ſhall pretend to exerciſe thoſe acts, or ſhall undertake "to tell fortunes, or pretend by crafty ſcience to diſcover "ſtolen goods, ſhall be impriſoned for one year, ſtand four "times in the pillory, and find ſureties as the court ſhall "think fit." Alſo by 17 Geo. 2. c. 5. "All jugglers, "fortune tellers, gypſies pretending phyſiognomy, palmiſtry, "or the like crafty ſcience, ſhall be deemed rogues and va-"gabonds, and ſuffer as the act directs."

## CHAPTER THE FOURTH.

## Of SODOMY.

*Horrendum illud peccatum!!!*

ALL unnatural carnal copulations, whether with man or beaſt, ſeem to come under the notion of ſodomy, which was felony by the antient common law, and puniſhed, according to ſome authors, with burning; according to others, with burying alive: but at this day by force of 25 H. 8. c. 6. & 5 Eliz. 17. is puniſhed in the ſame manner as other felonies, which are excluded from clergy. (1). 12 Co. 36, 37. 3 Inſt. 58. Puff. ch. 3. Forteſc. 91. 4 Bac. Ab. 569.

(1) According to Britton b. 6. c. 9. theſe unnatural offenders were on conviction committed to the flames. Fleta b. 6. c. 35. buries them alive within the earth, and the Mirrour c. 1. ſ. 14. configns them, with juſt indignation, to ſhameful and eternal oblivion.

*Sect.* 2. In every indictment for this offence, there muſt be the words *rem habuit veneream*, & *carnaliter cognovit*; and 12 Co. 36, 37. 3 Inſt. 58. Qu. 1 Hale 628. 670. *Sed vide*

1 St. Tr. 388. Duffey's caſe 1721. Hollis's caſe, at Lincoln, 1781. Prentice's caſe, Admiralty Seſſ. 1786.

conſequently

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consequently some kind of penetration, and also of emission, must be proved; but any the least degree is sufficient, and emission is *prima facie* an evidence of penetration.

† By the 22 Geo. 2. c. 33. s. 19. "If any person in his "Majesty's fleet commits this crime, their aiders or abbet-"tors, they shall suffer death by court martial."

## CHAPTER THE FIFTH.

## OF OFFENCES AGAINST GOD NOT CAPITAL AT COMMON LAW.

3 Bac. Ab. 38.

OFFENCES more immediately against God not capital are either by the common law or statute. Those by the common law are,

1 Vent. 293.
3 Keb. 607.
2 Str. 834.
4 Comm. 59.
1 Black. 395.

*Sect.* 1. All blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ.

11 Mod. 142.
Str. 416. 788. 834.
1 Bar. K. B. 20.

*Sect.* 2. All profane scoffing at the holy scripture, or exposing any part thereof to contempt or ridicule. 1 Burn. 225. 4 Comm. 41. 3 Burn E. L. 201. Fitzg. 65.

1 St. Tr. 802.
3 Sid. 168.
3 Keb. 620.

*Sect.* 3. Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, *&c.*

Can. 109.
Dalt. 124.
2 Haw. 61.
1 Haw. 132.

*Sect.* 4. All open lewdness grossly scandalous, such as was that of those persons, who exposed themselves naked to the people in a balcony in Covent-garden with most abominable circumstances.

1 Ven. 293.
3 Keb. 621.
Pop. 208.
1 Sid. 168.
Scobell 121.
4 Comm. 64, 65.
Str. 776. 788.
Ld. Ray. 451.

*Sect.* 5. Offences of this nature, because they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime.

2 R. Abr. 187.
C. Jac. 44. 421.

*Sect.* 6. Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace; as these, your religion is a new religion, and preaching is but prattling, and prayer once a day is more edifying.

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# CHAPTER THE SIXTH.

## Of OFFENCES, AGAINST RELIGION.

OFFENCES, by ſtatute, not capital, more immediately againſt GOD, are either ſuch as are againſt religion in general; or againſt the eſtabliſhed church. 4 Comm. 63.

Thoſe againſt RELIGION IN GENERAL, are of ſeveral kinds.

*Sect.* 1. Firſt profanation of the Lord's Day.—By 27 Hen. 6. c. 5. "all manner of fairs and markets upon feaſt "days, or on *Sundays*, (the four Sundays in harveſt ex- "cepted,) ſhall clearly ceaſe, on pain of forfeiting the goods "expoſed to ſale." By 1 Car. 1. c. 1. "there ſhall be no "meetings, aſſemblies, or concourſe of people out of their "own pariſhes on the Lord's day.—Nor any bear-beating, "bull-baiting, interludes, common plays, or other unlawful "exerciſes and paſtimes uſed by any perſon or perſons with- "in their own pariſhes, (*a*) on pain of forfeiting 3 *s.* & 4 *d.* "to the poor for every offence, on conviction, before a "magiſtrate, on view, confeſſion, or the oath of one "witneſs, "to be levied by diſtreſs, or, in default, to be ſet "three hours in the ſtocks." By 3 Car. 1. c. 2. "no pack- "horſe, waggon, cart, wain, nor any drover with cattle, ſhall "travel on the ſaid day on pain of twenty ſhillings.—Nor ſhall "any butcher (*b*) kill, or ſell any victuals upon the ſaid day "on pain of 6 *s.* 8 *d.*" Dalton c. 46. Gibſon 236.

(*a*) This act impliedly allows innocent recreations, within the reſpective pariſhes, after divine ſervice is over. 4 Comm. 63.

(*b*) This is no offence at common law, the indictment therefore muſt conclude *contra formam ſtatuti*. Strange 702. But at ſeſſions it is uſual to indict for the nuiſance in keeping open ſhop. C. C. C. 372.

† *Sect.* 2. By 29 Car. 2. c. 7. "no tradeſman, labourer, or "other perſon, above the age of 14 years, ſhall exerciſe any "wordly buſineſs, labour, or work of their ordinary callings "on the Lord's day, (Works of neceſſity (*c*) and charity only "excepted) on pain of forfeiting 5 *s.* And no perſon ſhall "publickly cry, ſhew forth, or expoſe to ſale (*d*) any "wares, merchandizes, fruit, herbs, goods or chattels what- "ſoever, upon the Lord's day on pain of forfeiture. And "by Par. 2. no drover, horſe courſer, waggon, butcher, "higgler, or their ſervants, ſhall travel or come to his inn or

(*c*) Therefore a baker may bake victuals for dinner for his cuſtomers, 2 Burn 785. But *quære*, as to puddings, pies, bread, and hot rolls, 11 Mod. 114. Cowper 640. But the offender cannot be convicted more than once for any number of acts on the ſame day. Crepps v. Durden. Trin. 17 Geo. 3.

(*d*) By 1 Jac. 1. c. 22. no ſhoe-maker ſhall expoſe to ſale any ſhoes, &c. on pain of 3 *s.* 4 *d.* a pair.

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"lodging on pain of 20 *s.* Nor ſhall any perſon uſe, employ, "or travel with any boat, wherry, lighter, or barge, without "permiſſion from a juſtice, on pain of 5 *s.* And if any perſon "which ſhall travel, be then robbed, no hundred ſhall be "charged. And no perſon upon the Lord's day ſhall ſerve any "writ, proceſs, &c. (except in caſes of treaſon or felony,) but "the ſame ſhall be void and the offender liable in damages." By 13 Geo. 3. c. 80. "no perſon ſhall on a Sunday or on "Chriſtmas day, kill any game, or uſe any gun, dog, net, or "engine for that purpoſe, on pain from 10 *l.* to 20 *l.* for the "firſt offence; from 20 *l.* to 30 *l.* for the ſecond; and being "committed for the third offence till the ſeſſions, unleſs he give "bail." By 21 Geo. 3. c. 4. "every place of publick en-"tertainment or debating, opened upon any part of the Lord's "day, to which admittance ſhall be had for money or tickets, or "by charging an extraordinary price for refreſhments, &c. ſhall "be deemed a diſorderly place, and the viſible keeper ſhall for-"feit 200 *l.* the chairman, 100 *l.* the perſon collecting the "money or tickets, 50 *l.*"

Raymond 256. 5 Modern 449. 2 Salk. 672. 1 Modern 56. Cro. Car. 602. 3 Bac. Abr. 39. Term Reports, 265.

This *qui tam* penalty muſt be ſued for within ſix weeks.

*Sect.* 3. But by 10 & 11 W. 3. c. 24. "Mackrell are per-"mitted to be ſold both before and after divine ſervice, on "*Sundays*." And fiſh carriages (by 2 Geo. 3. c. 15.) ſhall be allowed to paſs whether laden, or returning empty. By 11 & 12 W. 3. c. 21. "Forty watermen may ply on the Thames. "And hackney coachmen and chairmen are permitted by 9 Ann. c. 23. to work within the bills of mortality." By 29 Car. 1. c. 7. "meat may be dreſſed and ſold in inns, cook-"ſhops, or victualling-houſes." "And milk may be cried and "ſold, on the Lord's day, before 9 in the morning, and after "4 in the afternoon."

Appointed by the Watermen's Company.

*Sect.* 4. Secondly, Prophane curſing and ſwearing. By 19 Geo. 2. c. 21. "if any perſon ſhall profanely curſe or ſwear, "and be convicted on oath of one witneſs, or by confeſſion, "or by the hearing of one magiſtrate, he ſhall forfeit, firſt, "Every day-labourer, common ſoldier, ſailor, or ſeaman, 1 *s.*— "2dly, Every other perſon under the degree of a gentle-"man, 2 *s.*—3dly, Every perſon of, or above the degree of a "gentleman, 5 *s.* On a ſecond conviction double; and for "every other, treble the ſum firſt forfeited, for the benefit of "the poor; or being a labourer or gentleman, confined to "hard labour for 10 days, or being a common ſoldier, "or ſailor *in employ*, ſet in the ſtocks for one hour, for "every ſingle offence, and two hours for any greater num-"ber at the ſame time." The conſtable to make infor-mation if the offender be known to him; if unknown he is required to carry him before a juſtice. (*a*) The proſecution

8 Modern 59. Seſſ. Caſ. 356. Sayer 304. Strange 498, 608, 686, 999. Bur. 150, 1036, 2063 Ld. Raym. 1368, 1376, 1387. 10 Modern 213. 1 Burn 401.

(*a*) In other perſons it is in-tirely optional. 4 Burn 299.

N. B. This act directs the form of the conviction. Vide Burn's Juſt. 401.

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must be within eight days. The act to be read in all churches after every quarter day. The magistrate neglecting his duty forfeits five pounds; the constable forty shillings, &c. And by 22 Geo. 2. c. 33. This offence committed in his Majesty's fleet, may be punished at the discretion of a court martial.

*Sect.* 5. Thirdly, Drunkenness, for which by 4 Jac. 1. c. 5. all persons whatsoever forfeit five shillings to the poor; and for which seamen may by 22 Geo. 2. c. 33. be punished by fine, &c. as the court martial shall think fit. C. Car. 285. 1 Burn 40. 1 Jac. 1. c. 9. 7 Jac. 1. c. 10. 21 Jac. 1. c. 7. 1 Car. 1. c. 4.

*Sect.* 6. Fourthly, Reviling the sacrament of the Lord's supper with contemptuous words, &c. for which by 1 Edw. 6. *c.* 1. which was repealed by 1 Mary c. 2. and revived by 1 Eliz. c. 1. the offender shall be imprisoned, fined, and ransomed. 4 Comm. 50.

† By 3 Jac. 1. c. 21. "Whoever shall use the name of the "holy Trinity profanely or jestingly, in any stage play, in- "terlude, or shew shall be liable to a *qui tam* penalty of ten "pounds." By 1 Will. 3. c. 18. s. 17. "Whoever shall deny "in his preaching or writing, the doctrine of the blessed Trinity "shall loose all benefit of the act for granting toleration, &c."

*Sect.* 7. I shall not mention the offences against 2 & 3 Edw. 6. c. 19. & 5 Eliz. c. 5. relating to fasts and fish-days, because it is expressly declared, that those statutes are enacted merely on a political account, and it is made penal to affirm that any eating of fish, or forbearing of flesh mentioned therein, is necessary to salvation, or that it is the service of God. 2 Burn. 185, 186.

## CHAPTER THE SEVENTH.

## Of OFFENCES against the COMMON PRAYER.

OFFENCES against the established church are, First, Such as concern all persons in general; Secondly, Such as more immediately relate to those of the Popish religion; Thirdly, Such as more immediately regard Protestant dissenters.—Those which concern all persons in general are, First, Against the Common Prayer. Secondly, In accepting or holding an office without due conformity to the church. Thirdly, In teaching school without conforming to the church. Fourthly, In not coming to church.

*Sect.* 1. And first of offences against the Common Prayer. As to which it is to be observed, That by 2 & 3 Edw. 6. c. 1. & 6 Edw. 6. c. 1. which were repealed by *1 Mary* 2. c. 2. and revived by 1 Eliz. *c.* 2. *the Common Prayer Book*, was first established under 4 Comm. 50. 1 Lev. 295. Can. 5, 6, 7. Gib. 259. 3 Burn. E. L. 220.

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under ſevere penalties, but the ſame penalties being repeated and enlarged by 1 Eliz. c. 2. and 13 and 14 Car. 2. c. 4. which enacts the uſe of the ſame common prayer with ſome alterations, thoſe ſtatutes of Edward the ſixth, ſeem, at this day, to be of little uſe.

*Sect.* 2. By 1 Eliz. c. 2. ſ. 4, 5, 6. "If any parſon, "vicar or other whatſoever miniſter, that ought to ſay the "ſaid Common Prayer, *&c.* ſhall refuſe to uſe it in ſuch "church, *&c.* or other place where he ſhould uſe to miniſter "the ſame, or wilfully or obſtinately ſtanding in the ſame, "uſe any other form, or ſpeak any thing in derogation of the "ſaid book, or any thing therein contain'd, he forfeits for "the firſt offence one year's profit of all his ſpiritual promo- "tions, and ſhall ſuffer ſix months impriſonment; and for "the ſecond offence ſhall be deprived, *&c.*"

Form of the indictment, 3 Mod. 78.

*Sect.* 3. In the conſtruction of this act it has been reſolved. Firſt, that under the words, "Parſon, vicar, or other whatſoever "miniſter, that ought or ſhould ſay the ſaid Common "Prayer, *&c.*" thoſe clergymen who have no cure are included, as much as thoſe who have one, and that they are puniſhable for uſing any other form, *&c.* inaſmuch as by their ordination they are obliged to officiate in the offices of the church, *&c.* and it is ſaid that they are ſufficiently ſhewn to be in holy orders by the word *clericus* in an indictment.

Dyer 203. 2 Leo. 295.

*Sect.* 4. Secondly, that this ſtatute being not only in the affirmative, but alſo expreſsly ſaving the juriſdiction of eccleſiaſtical courts, does not reſtrain them from proceeding againſt theſe offenders in their own methods, as diſturbers of the unity and peace of the church; and conſequently that ſuch perſons may be deprived by the ſaid court according to the courſe of the ſpiritual law, for the firſt offence.

Gib. 268. 5 Co. Cawdry's Caſe, 5, 6. Pop. 59. 2 R. Abr. 222.

*Sect.* 5. Alſo it is further enacted, by 1 Eliz. c. 2. ſ. 9. "That if any perſon ſhall in plays, ſongs, or other open "words, ſpeak any thing in derogation, depraving or "deſpiſing of the ſaid book, *&c.* Or by open fact compel, "or otherwiſe procure or maintain any miniſter to ſay any "Common Prayer openly, *&c.* in other form: or ſhall by "any of the ſaid means let any miniſter to ſay the ſaid Com- "mon Prayer, *&c.* be ſhall forfeit one hundred marks for the "firſt offence, and four hundred for the ſecond, *&c.* (which if "he pay not within ſix weeks after conviction, he ſhall ſuffer "ſix months impriſonment for the firſt offence, and twelve "for the ſecond) and for the third offence ſhall forfeit all his "goods and chattels, and ſhall ſuffer impriſonment for life."

*Vide* 7 & 8 Sections of this act. The 13 & 14 Car. 2. c. 4. inforced by 5 Ann. c. 5. and 22 Geo. 2. ch. 33 — 2 Shower 53.

*Sect.* 6. It has been made a queſtion in the conſtruction of this clauſe, whether if the party die within ſix weeks, the ſaid forfeiture be not diſcharged, ſince by the act of God the election of paying it, or ſuffering impriſonment in lieu of it, is taken away.

Dyer 203. 231.

CHAP.

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# CHAPTER THE EIGHTH.

## Of OFFENCES in accepting or holding an OFFICE without due CONFORMITY to the CHURCH.

OFFENCES in accepting or holding an office, without due conformity to the church, are of two kinds. First, in not receiving the ſacrament both before and after the acceptance of an office. Secondly, in going to any other place for religious worſhip, than church during the the continuance in an office. 4 Comm. 57.

*Sect.* 1. As to the firſt of theſe offences, it is enacted by 13 Car. 2. ſt. 2. c. 1. ſ. 10. 12. "That no perſon ſhall "be placed, elected or choſen, to any office or place of "mayor, alderman, recorder, bailiff, town-clerk, common-"council-man, or other office of magiſtracy, place of truſt, "or other employment relating to the government of any "city, corporation, borough, cinque port or other port town, "who ſhall not have received the ſacrament, according to 2 Vent. 247. "the rights of the church of England, within one year "next before ſuch election; and that every perſon, ſo placed "or elected, ſhall take the oaths of allegiance and ſupremacy, "at the ſame time when the oath for the due execution of "the ſaid office, &c. ſhall be adminiſtred; and that the ſaid "oaths ſhall be adminiſtred and tendered by thoſe who admi-"niſter the oath of office, and in default of ſuch, by two "juſtices of the peace of the corporation, &c." Which Salk. 428. makes it neceſſary in a return to a *mandamus*, ſetting forth that the party did not take the oaths before the mayor, &c. to add, that he did. not take them before two juſtices of peace, &c. And it is further enacted, "That on default 5 Mod. 316. "hereof, every ſuch election, placing and choice ſhall be 2 Jon. 121. *Sed vide* 3 Burr 249. "void." And it hath been adjudged to be no excuſe, that the oaths were not tendered.

† But now by 5 Geo. 1. c. 6. for eſtabliſhing the peace and quiet of corporations, it is enacted, "That all perſons re-"quired to take the ſaid oath, or ſubſcribe the ſaid declaration, "ſhall be confirmed in their reſpective offices, and be free from "all incapacities and penalties; and none of their acts ſhall "be queſtioned, notwithſtanding their omiſſion to take the "oath, or ſubſcribe the ſaid declaration.—And that ſo much "of the ſaid act as requires the taking or ſubſcribing the "ſame is repealed." And it is further enacted, "That all "perſons in the actual poſſeſſion of any office that were re-"quired by the above act, *to take the ſacrament* within one "year

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" year next before their election into such office shall be con-
" firmed in their respective offices, and be discharged of all
" incapacities, and none of their acts shall be questioned,
" notwithstanding their omission to take the sacrament as
" aforesaid, nor shall they be removed by the corporation, or
" otherwise prosecuted for or by reason of such omission, un-
" less such person be so removed, or such prosecution com-
" menced within six months after the election" (1)

(1) If neither of these events have happened within the time limited, the election becomes absolute and unavoidable. 1 Black 229. Burr. 1013. Cowp. 539. 540. for the statute operates as a protection to the possession and not as a bar to the remedy. *Vide infra* N. (2)

Ch. 24. s. 7.

† However by 1 Geo. 1. st. 2. s. 13. amended by 2 Geo. 2, c. 31 and 9 Geo. 2. c. 26. " All persons who bear any office,
" civil or military, *&c.* shall take the oaths, therein recited, of
(*a*) As recited 6 Geo. 3. c. 53. " allegiance and supremacy (*a*); and the oath of abjuration (*b*).
" Also all persons who were before, shall still continue, oblig-
(*b*) As recited 1 W. & M. c. 1. s. 4. 8. " ed to receive the sacrament. And subscribe the declaration
" against transubstantiation (*c*). And by 11 Geo. 1. c. 4. s. 4.
(*c*) As recited 25 Car. 2. c. 2. s. 9. " mayors, bailiffs, or other chief officers of corporations,
" elected pursuant to the directions of that statute, shall take
2 Burr. 292. 306. " the oaths, by law required, at the time of their admission
" into such office, *before* such officer as shall preside at such
4 Burr. 2132. " election."

3 Burn 257. 4 Mod. 233. 1 Geo. 1. st. 2. s. 13. post. ch. 24. s. 7.

*Sect.* 2. Also it is enacted by 25 Car. 2. c. 2. " That all
" offices, civil and military, except those of inheritance,
" appointing sufficient deputies, and all who have any fee, *&c.*
" by patent from the king, except such as shall be granted
" for valuable consideration for life or years, and not relate
" to any office or place of trust, and also all who have any
" place of trust, or any employment in the king's household,
" shall take the oaths of allegiance and supremacy, and test,

(2) For various decisions upon the corporation and test acts, as they respect the conduct of protestant dissenters *vide* the King v. Read, 2 Mod. 299. Mayor of Guilford v. Clark 2 Ventris 248. The King v. Larwood, Skin. 574. 4 Mod. 269. Salk. 167. Carth. 306. and the King v. Grosvenor, Str. 1193. But in the case of Harrison, Chamberlain of London v. Evans in 1762. the question was very elaborately determined.—In 1748. the corporation of London, by a bye law, imposed a a fine of six hundred pounds, upon every person, who, being elected, should refuse to serve the office of sheriff.—The plaintiff levied debt, in the sheriff's court, against the defendant for this penalty. The defendant pleaded the 13 Car. 2. averring that he was a protestant dissenter within the toleration act, 1 & 2 W. & M. c. 18. of scrupulous conscience; and therefore had not received the sacrament. The plaintiff replied the 5 Geo. 1. c. 6. which confirms members of corporations in their respective offices, although they have not received the sacrament according to the directions of the 13 Car. 2. To this replication the defendant demurred; and judgment was given upon it in favour of the city. The defendant appealed to the court of hustings, where the judgment was affirmed. A special commission of errors was sued out by the defendant directed to Willes, Parker, Foster, Bathurst, and Wilmot; and, after great argument and deliberation, the judgment of the sheriff's court, and the affirmance by the court of hustings, were unanimously reversed: The plaintiff brought a writ of error in parliament; and on the 4th February 1767. Lord Mansfield, with five other judges against Perrot, were of opinion, that, upon the facts admitted by the pleadings in this cause, the defendant Evans, should be allowed to object to the validity of his election to the office of sheriff, in barr to the present action; by reason that he had not taken the sacrament within the time limitted. Append. to Forneaux Letters. 2 Burn. Ecc. L. 168. Cowp. 393. 535.

" the

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" the next term, in the King's Bench, or Chancery, or " Quarter-Seſſions, and receive the ſacrament within three " months, and give in a certificate thereof, proved by two " witneſſes, to the court wherein they take the ſaid oaths. " And in caſe of neglect, ſhall be diſabled to hold the ſaid " offices, &c. and forfeit five hundred pounds, except femes " covert, &c."—But it hath been adjudged, that the perſons ſo diſabled loſe only their right to the profits of their offices from the time of ſuch diſability; but that they loſe nothing veſted in them before. Alſo, it hath been adjudged to be no excuſe for a perſon bound by law to accept a corporation office, that he is diſabled to receive the ſacrament, by having been excommunicated.—And *quære*, if it be any excuſe, that his conſcience will not ſuffer him to take it, being a proteſtant diſſenter, &c. *Vide* note 2. p. 16.

Lutw. 910. 2 Mod. 299. Gibſ. 506. Comb. 315. Sav. 43. And. 200.

*Sect.* 3. Notwithſtanding the words of the firſt of theſe acts are ſo very ſtrong as to make ſuch election, &c. void, and thoſe of the ſecond to make ſuch perſons diſabled in law to all intents and purpoſes whatſoever, to have, occupy, or enjoy the ſaid offices; yet it hath been ſtrongly holden, that the acts of one under ſuch a diſability, being inſtated in ſuch an office, and executing the ſame without any objection to his authority, may be valid as to ſtrangers. For otherwiſe not only thoſe who no way infringe this law, but even thoſe whoſe benefit is intended to be advanced by it, might be ſufferers for another's fault, to which they are no way privy; and one chaſm in a corporation happening thro' the default of one head officer would perpetually vacate the acts of all others, whoſe authority, in reſpect of their admiſſion into their offices, or otherwiſe, may depend on his.

3 Keb. 606, 662, 682, 721. 2 Jon. 81. 137. 2 Lev. 184. 242. 2 Mod. 193. 3 Lev. 116.

*Sect.* 4. By 25 Car. 2. c. 2. ſ. 17. it is expreſsly provided, that " The ſaid act ſhall not extend to conſtables or " churchwardens, or ſuch like inferior civil officers, or to a " bailiff of a manor or lands, or ſuch like private officers." But it hath been queſtioned, whether it extends to the cenſor of the college of phyſicians.

5 Mod. 431. 432. Vide 3 Burn. 258. and 1 Geo. 1. ſ. 2. c. 13. ſ. 20.

*Sect.* 5. As to the ſecond offence of this kind, *viz.* that of going to any other place for religious worſhip than the church, during the continuance of an office, it is enacted, by 5 Geo. 1. c. 4. " That if any mayor, bailiff, or other " magiſtrate, in England, Wales, Berwick upon Tweed, " Jerſey or Guernſey, ſhall knowingly or wilfully reſort to, or " be preſent at any publick meeting, for religious worſhip, " other than the church of England, as by law eſtabliſhed, " in the gown or other peculiar habit, or attended with the " enſign or the enſigns, of or belonging to ſuch his office, " that every ſuch mayor, bailiff, or other magiſtrate, being " thereof convicted by due *courſe of law, ſhall* be diſabled " to hold ſuch *office, or employments, and ſhall* be adjudged " *incapable to bear any publick office or employment* what-" ſoever

(The 10 Ann. c. 2. recited in the former edition is repealed by the 5 Geo. 1. c. 4.)

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4 Comm. 54. "ſoever within England, Wales, Berwick upon Tweed, "Jerſey, or Guernſey."

## CHAPTER THE NINTH.

## OF OFFENCES IN TEACHING SCHOOL WITHOUT CONFORMING TO THE CHURCH.

AS to the offence of teaching ſchool without conforming to the church, ſo far as it concerns all perſons in general, it is enacted by 23 Eliz. c. 1. ſ. 6, 7. "That if "any perſon or perſons, body politick or corporate, ſhall "keep or maintain any ſchool-maſter, who ſhall not repair "to church according to the form of the ſaid ſtatute, or "be allowed by the biſhop or ordinary of the dioceſe, "(who ſhall not take any thing for the ſaid allowance) they "ſhall forfeit for every month ten pounds; and ſuch ſchool-"maſter preſuming to teach contrary to the ſaid act, and "being thereof convicted, ſhall be diſabled to be a teacher "of youth, and ſhall ſuffer impriſonment, without bail or "mainprize, for one year."

*Sect.* 2. And it is further enacted by 1 Jac. 1. c. 4. ſ. 9. "That no perſon ſhall keep any ſchool, or be a ſchool-"maſter, out of the univerſities or colleges of this realm, "except it be in ſome publick or free grammar-ſchool, or in "ſome ſuch nobleman's, or noble woman's, or gentleman's, or "gentle woman's houſe, as are not recuſants, or where the "ſame ſchoolmaſter ſhall be ſpecially licenſed thereunto by the "archbiſhop, biſhop or guardian of the ſpiritualities of that "dioceſe, upon pain, that as well the ſchool-maſter, as alſo "the party that ſhall retain or maintain any ſuch ſchool-"maſter, contrary to the meaning of the ſaid ſtatute, ſhall "forfeit each of them, for every day ſo wittingly offending, "forty ſhillings."

Carth. 464, 465. 1 Vent. 41. Vide 19 Geo. 3. c. 44. Poſt Ch. 16. ſ. 5.

† *Sect.* 3. But it having been doubted whether ſuch perſons as are within the benefit of 1 William & Mary, c. 18. commonly called *the Toleration Act*, are not exempted from the penalties of the abovementioned ſtatutes, it was explained by 12 Anne, ſt. 2. c. 7.—But this act being repealed by 5 Geo. 1. c. 4. the operation of the act of toleration is conſequently revived, by which it is enacted "that neither "the 23 Eliz. c. 1. nor any other law or ſtatute of this "realm, made againſt papiſts, or popiſh recuſants, except "25 Car. 2. c. 2. and 30 Car. 2. ſt. 2. c. 1. ſhall be "conſtrued to extend to any perſon diſſenting from the church "of England that ſhall take the oaths mentioned in the "firſt of William and Mary, and ſubſcribe the declaration "mentioned in the 30 Car. 2. c. 1."

(The 12 Anne was recited in the former edition.)

As to popiſh ſchoolmaſters *in particular. Vide ch. 5. ſ. 3.*

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## CHAPTER THE TENTH.

### Of OFFENCES in not coming to CHURCH.

FOR the better underſtanding of the offences of not coming to church, ſo far as the ſame relate to all perſons in general, except ſuch as are within the indulgence of 1 William & Mary, c. 18. which is commonly called *The Toleration Act*, I ſhall conſider,—Firſt, How far perſons are puniſhable for their own abſence from the church.—Secondly, how far they are puniſhable for ſuffering ſuch abſence in others.

In order to ſhew how far perſons are puniſhable for their own abſence, I ſhall conſider the following particulars: Firſt, What forfeitures of money, lands or goods, ſuch offenders incur. Secondly, In what manner they are to be proceeded againſt for thoſe forfeitures. Thirdly, What other inconveniencies they are ſubject unto. Fourthly, By what means they may be diſcharged.

As to the firſt point, I ſhall conſider, *Firſt*, What forfeitures of money; and, *Secondly*, What forfeitures of lands and goods ſuch offenders are liable unto.

The forfeitures of money, to which they are liable, are threefold; 1. That of twelve pence for the abſence of one Sunday, or other holy-day. 2. That of twenty pounds for the abſence of every month contained in a conviction. 3. That of twenty pounds for the abſence of every month after a conviction.

*Sect.* 1. And firſt, The forfeiture of twelve pence for the abſence of one Sunday, or other holy-day, depends upon 1 Eliz. c. 2. by which it is enacted, "That all perſons inhabiting within this realm, or any other the king's dominions, "ſhall diligently and faithfully, having no lawful or reaſonable excuſe to be abſent, endeavour to reſort to their pariſh "church or chapel accuſtomed, or upon reaſonable let thereof, to ſome uſual place, where common prayer and ſuch "ſervice of God ſhall be uſed, in ſuch time of let, upon every "ſunday, and other days ordained and uſed to be kept as "holy-days, and then and there to abide orderly and ſoberly, "during the time of the common prayer, preaching, or other "ſervice of God, there to be uſed and miniſtered, upon pain "of puniſhment by the cenſures of the church, and alſo upon "pain that every perſon ſo offending ſhall forfeit for every "ſuch offence twelve pence."

By 3 Jac. c. 4. ſ. 27, 28. this forfeiture may be levied by the churchwardens by diſtreſs by warrant of one juſtice.

*Sect.* 2. In the expoſition *of this ſtatute*, the following opinions *have been holden. Firſt, That the* indictment needs

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2 Leon. 5. Godb. 148. 29 El. c. 6. ſ. 5. Gib. 291. 964.

not ſhew that the party had no reaſonable excuſe for his abſence, or that he is an inhabitant within this realm, &c. But that the defendant, if he have any matter of this kind in his favour, ought to ſhew it.

2 Roll. 438, 455. 1 Bulſt. 159. Gib. 358. 292.

*Sect.* 3. *Secondly*, That if the ſpiritual court proceeding upon this ſtatute, refuſe to allow a reaſonable excuſe, they may be prohjbited; but that if they proceed wholly on their own canons, they ſhall not be at all controlled by the common law (unleſs they act in derogation from it) as by queſtioning a matter not triable by them, as the bounds of a pariſh, &c. for they ſhall be preſumed to be the beſt judges of their own laws.

1 Roll. 93. 1 Keb. 491. Godb. 148. Dalt. c. 45. ſ. 106. 1 Sid. 301, 230. Gib. 292. 2 Keb. 124.

*Sect.* 4. *Thirdly*, That he who miſbehaves himſelf in the church, or miſſes either morning or evening prayer, or goes away before the whole ſervice is over, is as much within the ſtatute as he who is wholly abſent; and that he who is abſent from his own pariſh church, ſhall be put to prove where he went to church.

1 And. 129. Hob. 251. 2 Leon. 167.

*Sect.* 5. *Fourthly*, That the offence in not coming to church conſiſting wholly in a non-feaſance, and not ſuppoſing any fact done, but barely the omiſſion of what ought to be done, needs not be alledged in any certain place; for, properly ſpeaking, it is not committed any where.

*Sect.* 6. Secondly, The forfeiture of twenty pounds for the abſence of a whole month contained in a conviction, depends upon 23 Eliz. c. 1. ſ. 5. by which it is enacted "That "every perſon, above the age of ſixteen years, who ſhall not "repair to ſome church, chapel, or uſual place of common Prec. of declaration, Lutwych. 201, 208. "prayer, but forbear the ſame, contrary to the tenor of the "ſaid ſtatute of 1 *Eliz.* ch. 2. and being thereof lawfully "convicted, ſhall forfeit to the king, for every month which "he or ſhe ſhall ſo forbear, twenty pounds."

11 Co. 63. 1 Roll. 94.

*Sect.* 7. In the expoſition hereof it hath been reſolved, *Firſt*, That this ſtatute, by inflicting twenty pounds for a month's abſence, diſpenſes not with the forfeiture of twelve pence given by 1 Eliz. c. 2. for the abſence of one Sunday; for both may well ſtand together, and the twelve pence is immediately forfeited upon the abſence of each particular day.

Lutw. 162, 163. 11 Co. 57. 59. 1 Roll. 89, 90. 233, 234. Dyer 160. 3 Bulſt. 87.

*Sect.* 8. *Secondly*, That theſe words, "being thereof lawfully "convicted," are no more than the law would have implied, if they had not been expreſſed, and therefore operate nothing. From whence it follows, that they neither cauſe the party to forfeit any thing by a conviction, unleſs judgment be given thereon, nor reſtrain the forfeiture to ſuch offences only, as are committed after a previous conviction, inaſmuch as they mean no more than what the law provides of common right in every caſe, *viz.* That the party ſhall forfeit nothing till he be convicted.

11 Co. 58. 60. 1 Roll. 89. 90.

*Sect.* 9. *Thirdly*, That he who is condemned on demurrer, or *nihil dicit*, is ſufficiently convicted within the act; for whoever

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ever is adjudged, is convict, though it follow not that every one, who is convict, is adjudged, &c.

*Sect.* 10. *Fourthly*, That one, who was ſick for part of the time contained in an information upon this ſtatute, ſhall not be at all excuſed by reaſon of ſuch ſickneſs, if it be proved that he was a recuſant, both before and after; for it ſhall be intended that he obſtinately forbore during that time. C. Jac. 529.

*Sect.* 11. *Fifthly*, That the time of a month, intended by the ſtatute ſhall be computed not by the kalendar, but by the number of days, allowing 28 days to each, according to the common rule of expounding ſtatutes, which ſpeak generally of a month. Yel. 100. Eliz. 815. 2 R. Abr. 521. Cawley 61.

A feme covert is within the 1 & 23 of Eliz. and an information lies againſt the huſband. C. Jac. 529.——*Sed vide* Sav. 25.

*Sect.* 12. Thirdly, The forfeiture of twenty pounds for the abſence of every month after a conviction, depends upon 28th commonly called 29 Eliz. c. 6. ſ. 4. & 3 Jac. 1. c. 4. ſ. 8. 3. by which it is enacted, "That every offender being "convicted of not coming to church, contrary to the pur- "port of the ſtatutes above mentioned, ſhall pay twenty "pounds for every month after ſuch conviction, until he ſhall "conform himſelf, and come to church." 3 Lev. 332. Lut. 203. 1117. 2 Mod. 240. 1 And. 294. 11 Co. 63. 3 Keb. 742. 1 Ver. 123. 2 Ver. 711. L. Ray. 77. 210. 343. 571. 382. 1224.

*Sect.* 13. As to the ſecond branch of this head, *viz.* What forfeiture of lands and goods ſuch offenders are liable to, the ſame depends alſo upon 29 Eliz. c. 6. ſ. 4. and 3 Jac. 1. c. 4. ſ. 8, 9. by which it is enacted, "That if the offender "ſhall make default of payment of the twenty pounds, both "for every month contained in the conviction, and alſo for "every month ſubſequent, during which he ſhall not con- "form himſelf to the church, the king ſhall take, ſeize and "enjoy all his goods, and two parts of his hereditaments, "leaſes and farms, leaving the third part only of the ſame "hereditaments, leaſes and farms," to and for the maintenance "and relief of the ſame offender, his wife, children, and family, "notwithſtanding any prior conveyance thereof made by "ſuch offender, with power of revocation, or to the uſe of "himſelf or his family." 29 Eliz. c. 6. ſ. 8.

Alſo by the ſaid ſtatute of 3 Jac. 1. c. 4. ſ. 11. "The king "may refuſe the penalty of twenty pounds a month, though it "be tendered according to law, and thereupon ſeize two parts "of all the hereditaments, leaſes and farms, which at the time "of ſuch ſeizure ſhall be, or afterwards ſhall come to any ſuch "offender, or to any other to his uſe, or in truſt for him or "at his diſpoſition, or whereby or in conſideration whereof he "or his family ſhall be relieved, maintained or kept, leaving "unto him his chief *manſion-houſe, as part of his* third part.

*Sect. 14. In the conſtruction of theſe ſtatutes* the following *points have been reſolved. Firſt*, That the *king* by making *his election given him by 3 Jac. 1.* to ſeize the offender's heredi- 1 Jones 24, 25. Cawl. 171, 172.

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taments, &c. waves the benefit of the twenty pounds a month, and the power of seizing the offender's goods.

12 Co. 1, 2. 1 Leon. 98. 1 Roll. 7.

*Sect.* 15. *Secondly*, That a recognizance or bond taken by such offenders, either in their own names or in the names of others to their use, are within the statute of the 29th of Elizabeth. For the words thereof to this purpose, are "That the king shall "take, seize, and enjoy all the goods, &c." which in an act of parliament will include the whole personal estate; and though a *chose in action* cannot properly be said to be taken or seized, yet may it properly enough be said to be enjoyed.

Owen 37. 1 Leon. 97. Cawl. 107.

*Sect.* 16. *Thirdly*, That no copyhold lands are within 29 Eliz. (and by the same reason it seemeth that they are not within 3 *Jac.* 1.) in respect of the prejudice which would accrue to the lord by the loss of his services, *&c.*

C. Eliz. 845. 2 Roll. 25. Palm. 41. W. Jones 24.

*Sect.* 17. *Fourthly*, That the profits of the land seized by the king by force of 29 *Eliz.* for the non-payment of the twenty pounds a month, ought not to be applied to the satisfaction thereof, but that the lands ought to remain in the king's hands by way of pledge, till the whole forfeiture be paid some other way. But this construction of the statute seeming over severe, it was provided by 3 Jac. 1. c. 4. s. 5. "That the profits of "the said lands should go towards the satisfaction of the "twenty pounds."

Lane 105, 106. Cawl. 169. 12 Co. 1. 2.

*Sect.* 18. It hath been questioned, whether an estate conveyed by another in trust for a recusant, be liable to be seized by force of the said statute of 29 Eliz. because it expressly avoids such conveyances only as are made by the recusant himself *to his own use*, &c. And perhaps if it shall plainly appear, that an estate is settled *bona fide* in trust for a recusant, by some friend of his, upon some other view, and not merely with an intent to evade the statute, it may be reasonable to exempt such a conveyance out of the meaning of it; however it is clear from the express words of 3 Jac. 1. c. 4. s. 11. "That the king, upon his waving the forfeiture of the "twenty pounds a month, may seize two parts of all the "hereditaments, *&c.* which shall come to any such offen- "ders, or to others to their use, or in trust for them:" Also it is said, that the king may seize an estate, which is granted to a recusant in trust for another; and it is certain that the statute has made no express provision for the *cestui que trust*.

Lane 39.

As to the second general head of this chapter, *viz.* in what manner offenders of this nature are to be proceeded against for the forfeitures above mentioned, I shall consider, First How they are to be proceeded against for the said forfeitures of money. Secondly, In what manner for the said forfeitures of lands and goods.—As to the prosecution for the said forfeitures of money, I shall shew 1. How they are to be proceeded against for the said forfeiture of twelve pence for the absence of every Sunday, *&c.* and 2. In what manner

&c.

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for the ſaid forfeiture of twenty pounds for the abſence of every month contained in a conviction, and 3. In what manner for the ſaid forfeiture of twenty pounds for the abſence of every month after a conviction.

*Sect.* 19. And firſt, as to the recovery of the ſaid forfeiture of twelve pence for the abſence of every Sunday. It was enacted by 1 Eliz. c. 2. "That the ſame ſhould be levied "by the church-wardens of the pariſh where ſuch offence "ſhould be done, to the uſe of the poor of the ſame pariſh, "of the goods, lands, and tenements of ſuch offenders, by "way of diſtreſs:" But this being defective in not ſhewing by whom, or in what manner ſuch offenders ſhould be convicted, or by whom the warrant for levying the ſaid forfeiture ſhould be granted, it was farther enacted by 3 Jac. 1. c. 4. ſ. 27. "That it ſhall be lawful for any one juſtice "of the peace of the limit, diviſion or liberty, wherein the "ſaid party ſhall dwell, upon the confeſſion of the party, or "the oath of one witneſs, to call the ſaid party before him, "and if he ſhall not make a ſufficient excuſe, and due proof "thereof, to the ſatisfaction of the ſaid juſtice of peace, that "it ſhall be lawful for the ſaid juſtice of peace to make a "warrant to the church-warden of the ſaid pariſh, where the "ſaid party ſhall dwell, to levy twelve pence for every ſuch "default, by diſtreſs and ſale of the offender's goods, ren-"dering the overplus to the ſaid offender; and that in default "of ſuch diſtreſs, it ſhall be lawful for the ſaid juſtice of "peace to commit every ſuch offender to priſon, until the "ſaid forfeiture ſhall be paid, which ſhall be employed to "the uſe of the poor of the pariſh, wherein the offender ſhall "be reſident or abiding at the time of the offence."

*Sect.* 20. As to the ſecond point, *viz.* In what manner the ſaid offenders are to be proceeded againſt for the ſaid forfeiture of twenty pounds for the abſence of every month contained in a conviction, I ſhall conſider. Firſt, In what manner the ſame may be recovered at the ſuit of the king. Secondly, In what manner at the ſuit of an informer.—And firſt, as to the recovery hereof at the king's ſuit, I ſhall conſider, 1. In what manner it may be recovered at the king's ſuit by way of indictment, 2. In what manner by way of action or information.

*Sect.* 21. And firſt, as to the recovery hereof at the ſuit of the king by way of indictment, it was enacted by 23 Eliz. c. 1. ſ. 9. "That the juſtices of oyer, aſſize, gaol-"delivery, and quarter ſeſſions of the peace, might enquire "of and determine theſe offences, within one year and a day:" 1 Roll. 94. 11 Co. 63. Cawl. 66, 67. 82, 83.

[redacted] Eliz. c. 6. ſ. 2. *it was ordained,* "That all ſuch [redacted] *ſhould be in the King's Bench, or at the aſſizes, gaol-delivery, and not elſewhere:*" However by

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3 Jac. 1. c. 4. ſ. 7. the juriſdiction of the ſeſſions is revived.

Precedent Lut. 203, 1101.

*Sect.* 22. Alſo it is farther enacted by 29 Eliz. c. 6. ſ. 5. and 3 Jac. 1. c. 4. ſ. 7. "That upon an indictment, at the "aſſizes, goal-delivery, or general ſeſſions of the peace, pro-"clamation ſhall be made that the offender render himſelf to "the ſheriff before the next aſſizes, gaol-delivery or ſeſſions; "and that if he ſhall not then appear of record, upon ſuch "default recorded, the ſame ſhall be a conviction in law, as Salk. 145. "if a trial by verdict on the indictment had been recorded." And by ſ. 9. "Every ſuch conviction ſhall be certified into "the Exchequer, &c."

1 Vern. 355. Ray. 434.

*Sect.* 23. In the conſtruction hereof it hath been reſolved, *Firſt*, That ſuch a conviction ſhall not be looked on as a judgment; for the words are, "It ſhall be a conviction in "law, as if a trial, &c. had been recorded:" And conſequently that it cannot be reverſed by writ of error, which cannot be brought on any record, which is not a judgment, and therefore that the party has no other remedy againſt an inſufficient conviction, but to remove it into the Exchequer, Vide Salk. 145. and quaſh it there. Alſo upon the ſame ground it has been 11 Co. 65. holden, that a forfeiture due to the king, by force of ſuch a Ini. ſ. 42. conviction, ſhall not be taken to be within the exception of a general pardon, which excepts all forfeitures, *&c.* converted to a debt by judgment.

Palm. 40, 41. Brid. 123. 3 Lev. 333. Lut. 1117.

*Sect.* 24. *Secondly*, That if the proclamation do not purſue the ſtatute, as if it appoint that the body ſhall be rendered at next ſeſſions, *&c.* whereas by the ſtatute it ought to order a render to the ſheriff, and that before the next ſeſſions, the conviction is inſufficient.

Cawley 164. Pop. 29. Keilw. 180.

*Sect.* 25. *Thirdly*, That an actual perſonal appearance of the defendant at the next ſeſſions, *&c.* will no way avail him, unleſs the ſame be entered of record.

*Sect.* 26. It hath been holden, That a man cannot be convicted by force of this ſtatute upon a default on a proclamation, *&c.* in the King's Bench; becauſe this court is not Heb. 205. mentioned in the ſtatute.—But perhaps this opinion may juſtly be queſtioned, becauſe the court of King's Bench being the ſupreme court of aſſize, and gaol delivery, *&c.* in the Sum. 156. county where it ſits, it ſeems that a ſtatute, by giving any C. Car. 465. power to the courts of aſſize or gaol-delivery, does impliedly 2 Lev. 179. give the ſame to the court of King's Bench, unleſs it have 2 Mod. 128, 129. ſome reſtrictive words to the contrary.

*Sect.* 27. If the defendant do appear, there is no doubt but that the proceedings ought to be according to the common courſe of law upon other indictments in all reſpects, except thoſe which are within the reſtraint of 3 *Jac.* 1. *c.* 4. *ſ.* 16, 17. by which it is enacted, "That no ſuch indictment, "nor any proclamation, outlawry or other proceeding there-"*upon*, ſhall at any time hereafter be avoided, diſcharged or

"reverſed

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" reverſed, by reaſon of any default in form or lack of form " or other defect whatſoever, (other than by direct traverſe " to the point of not coming to church, &c.) but the ſame " indictment ſhall ſtand in force and be proceeded upon; any " ſuch default of form, or other defect whatſoever notwith- " ſtanding, unleſs the party ſo indicted ſhall conform, &c." C. Car. 504. Raym. 434.

*Sect.* 28. However it hath been reſolved, *Firſt*, That the party is only reſtrained from taking advantage of defects in the record itſelf, and that he may plead any collateral matter, as a pardon, or *autrefoits convict*, &c. 11 Co. 59. 65. 1 Roll. 95. C. Jac. 480. 482.

*Sect.* 29. *Secondly*, That he may even reverſe a judgment after verdict for any ſuch defect in the record itſelf, as tends to the king's prejudice, as the omiſſion of a *capiatur*, &c. And that he may reverſe an outlawry for any common defect, upon putting in bail, and traverſing the indictment as to the point of not coming to church, which is very agreeable to the purport of the whole clauſe, the latter part whereof ſeems manifeſtly to qualify the generality of the former. C. Car. 504. 505. Show. 309. 5 Mod. 141. 3 Keb. 591.

*Sect.* 30. Secondly, As to the recovery of the ſaid forfeiture by way of action or information at the king's ſuit, it was enacted by 35 Eliz. c. 1. ſ. 10. " That all and every the " ſaid pains, duties, forfeitures, and payments, ſhall and " may be recovered and levied to her majeſty's uſe, by action " of debt, bill, plaint, information or otherwiſe, in any of " the courts commonly called the King's Bench, Common " Pleas, or Exchequer, in ſuch ſort and in all reſpects, as by " the ordinary courſe of the common laws of this realm, any " other debt due by any ſuch perſon in any other caſe ſhould " or may be recovered or levied, wherein no eſſoin, protec- " tion or wager of law ſhall be admitted or allowed."

*Sect.* 31. It is ſaid, That the principal end of making this clauſe, was to enable the queen to proceed againſt the huſband for the recuſancy of his wife, which ſhe could not do by virtue of any of the former ſtatutes, by which ſhe had no other way of proceeding but by indictment, and conſequently could not charge the huſband for the forfeiture of the wife, becauſe ſhe could not make him a party to the ſuit, as ſhe may by force of this ſtatute. However, it is ſaid, that on a conviction of the wife upon an indictment, the lands and leaſes, which the huſband has in her right, may be ſeized by the Exchequer-proceſs. 11 Co. 61. 6?. Vide ſup. c. 1. ſ. 13. C. Jac. 482. Brillgm. 122. ſeems contrary.

*Sect.* 32. As to the ſecond particular, *viz.* In what manner an informer may proceed for the forfeitures aforeſaid. It is enacted by 23 Eliz. c. 1. ſ. 11. " That all forfeitures of " any ſums of money limited by that act, ſhall be divided into " three equal parts, whereof one third ſhall be to the queen, " to her own uſe, one other third to the queen, for the relief " of the poor in the pariſh where the offence ſhall be com- " mitted to be delivered *by the warrant of* the principal " officers *in the receipt of the Exchequer*, without further 2 Leon. 167. & 29 Eliz. 6. ſ. 7.

" warrant

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" warrant from her Majeſty; and the other third to ſuch " perſon as will ſue for the ſame, in any court of record, by " action of debt, bill, plaint, or information, in which ſuit " no eſſoin, &c. ſhall be allowed; and that every perſon " which ſhall forfeit any ſums of money by virtue of that " act, and ſhall not be able, or ſhall fail to pay the ſame " within three months after judgment thereof given, ſhall be " committed to priſon, there to remain until he have paid " the ſame ſums, or conform himſelf to go to church, and " there do as is aforeſaid."

*Sect.* 33. It has been objected, that this cauſe ſhall not extend to the ſaid forfeiture of twenty pounds a month for not coming to church, becauſe the ſame is by the former part of this ſtatute given expreſsly to the queen, whereas the forfeitures for ſaying or hearing maſs, and keeping an unlicenſed ſchool-maſter, are inflicted by the ſame ſtatute indefinitely, and not expreſsly given to any one. From which it is argued, that this latter clauſe of diſtribution ought only to be applied to the ſaid indefinite clauſes, and not to take from the queen any part of that, which was expreſsly given her before. Yet it has been anſwered and reſolved, that it ſhall equally extend to all; for the limitation of the forfeiture to the queen is mere ſurplus, and no more than the law would have implied, *& expreſſio eorum, quæ tacite inſunt, nihil operatur.*

11 Co. 58.
See 3 & 6 Par.
1 Roll. 89.
11 Co. 58.

*Sect.* 34. Alſo it has been reſolved, that an informer may ſue, not only for the third part which belongs to him, but for the whole penalty in the behalf of himſelf and the king, and that the judgment ſhall be that they ſhall recover, &c.

1 And. 139, 140.
B. 2. c. 26. ſ. 76.

*Sect.* 35. Alſo it has been adjudged, that neither the above mentioned clauſe of 29 Eliz. c. 6. which orders, That all convictions upon 23 Eliz. ſhall be certified into the Exchequer, and alſo that the offender ſhall pay to the queen twenty pounds for every month contained in the indictment, &c. nor the ſaid clauſe in the 35 Eliz. c. 1. by which it is enacted, That all the ſaid pains, &c. ſhall be recovered to the queen's uſe, do take away the ſuit of the informer, againſt one not proceeded againſt by the king, or the third part of the penalty given him by 23 Eliz. For the plain purport of both theſe acts is to further the puniſhment of recuſants, and therefore, inaſmuch as they are in the affirmative, and conſiſtent with 23 Eliz. they ſhall not be conſtrued to abrogate any part of it.

Sup. ſ. 13. 33.
11 Co. 61, 62.
1 Roll. 92, 93.

*Sect.* 36. Moreover it is manifeſt, that 29 Eliz. c. 6. extends only to the king's ſuit by indictment, for the word indictment is mentioned almoſt in every clauſe.

*Sect.* 37. And it alſo follows from hence, that the ſecond paragraph of the ſaid ſtatute of 29 Eliz. which enacts, That convictions for this offence ſhall be only at aſſizes, gaol-*delivery*, or the King's Bench, reſtrains only convictions *upon indictments*, and conſequently does not any way impeach

Hob. 205.
Con. 11 Co. 61.

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the jurisdiction of the Common Pleas or Exchequer, as to informations, &c.

*Sect.* 38. It seems the better opinion upon comparing all the books together, which differ much from one another both in stating the cases, and giving the reasons of the judgments relating to this matter, that a conviction at the king's suit, whether strictly regular or erroneous, may be pleaded to a suit by an informer, because, while it stands in force, it makes the party liable to the forfeiture of twenty pounds a month, and no one ought to be punished twice for the same offence. But it hath been resolved, that an erroneous, and strongly holden, that a regular conviction, by proclamation cannot be pleaded to a new suit by the king, because such a conviction is of no greater effect than a conviction by verdict, and consequently the king may wave it and begin anew.

11 Co. 59. 65. B. 2. c. 26. s. 63. Lutw. 208. 1 Roll. 93. C. Jac. 481. Noy. 117. Lane 60. Palm. 39, 40, 41. 2 Roll. 108. Bridg. 122.

*Sect.* 39. But 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.

C. Jac. 482. Bridg. 120. 122. 2 Roll. 108. Vide sup. c. 1. s. 13. 1 Bac. Abr. 294.

*Sect.* 40. It seems that the ordinary method of recovering the said forfeiture of twenty pounds for every month contained in a conviction, either at the suit of the king, or of an informer, may sufficiently appear from what has been already said; but there is an extraordinary remedy provided by the same statute of 29 Eliz. c. 6. to enforce the party to take care of the payment of the forfeiture of the twenty pounds for every month contained in an indictment, whereon he shall be convicted, by making his lands and goods liable to be seized by the king for the non-payment thereof into the Exchequer, upon such of the terms of Easter or Michaelmas, as shall be next after his conviction. But this extends not to a conviction by way of action, or information, as more fully appears from the two next sections.

*Sect.* 41. As to the third point, *viz.* in what manner the forfeiture of twenty pounds for the absence of every month after a conviction is to be recovered. It seems needless to enquire how far it may be recovered by an action or information for it at the king's suit, inasmuch as the said statutes of 29 Eliz. c. 6. & 3 Jac. 1. have made a most effectual provision for the payment of it, by expressly enacting, "That every "such offender, being once convicted, shall for every month "after such conviction, without any other indictment or con- "viction, pay into the Exchequer twice in the year, *viz.* in "every Easter and Michaelmas term, as much as shall then "remain unpaid, after the rate of twenty pounds for every "month after a conviction, and that for a default herein the "king may seize all the goods, *and two* parts of the here- "ditaments *of such an offender, &c.*"

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Cawl. 102, 103.

*Sect.* 24. But it ſeemeth that theſe clauſes extend not to any conviction upon an information, or action, &c. but only to a conviction upon an indictment; for there is no other ſuit referred to beſides that of indictment. Alſo it is ſaid, that the ſaid clauſes extend to no convictions by verdict or otherwiſe, unleſs judgment be given thereon; becauſe, till then nothing is forfeited. And from the ſame ground it ſeems to follow, that they would not have extended to a conviction by default upon proclamation, if there had been no other words in the ſtatute to this purpoſe, than thoſe by which it is enacted, "That ſuch a default recorded ſhall be as ſufficient a conviction in law of the ſaid offence, whereof the party ſtandeth indicted, as if upon the ſame indictment a trial by verdict thereupon had proceeded and been recorded," which words of themſelves can by no means make ſuch a conviction amount to a judgment after verdict, without which there can be no forfeiture upon any other conviction; and therefore it ſeemeth that the forfeiture cauſed by ſuch a conviction muſt depend upon the other clauſes of the ſaid ſtatutes, and the conſtant tenor of our law books, which ſeem to ſuppoſe that a perſon ſo convicted ſhall be liable to the ſaid forfeitures, as much as one, againſt whom a judgment is expreſsly given.

Vide ſup. f. 8.

Vide inf. f. 56.

See 29 El. 6. f. 6.

3 Jac. 1. c. 4. f. 7, 8, 9.

Caw. 103, 104.

*Sect.* 43. As to the ſecond general branch of this head, *viz.* In what manner offenders of this nature are to be proſecuted for the forfeiture of lands or goods. It appeareth from the 13th, 14th, 15th, 17th, 18th, 40th and 41ſt ſections of this chapter, that the king hath his election either to ſeize all the goods and two parts of the hereditaments and leaſes of the offender upon his making default in the payment of twenty pounds, both for every month contained in an indictment, whereon he ſhall be convicted, and alſo for every month ſubſequent, or elſe to refuſe the ſaid penalty of twenty pounds a month, and thereupon to ſeize two parts of the hereditaments and leaſes of the offender.

*Sect.* 44. It alſo appeareth from what hath been ſaid in the forty-ſecond ſection of this chapter, that the king hath this advantage of ſeizing the lands and goods of the offender upon no other conviction, but ſuch as followeth an indictment, nor even upon ſuch a conviction without a judgment, unleſs it be cauſed by a default upon a proclamation. Therefore I ſhall add no more to this head, except theſe two following obſervations:

2 Inſt. 573. 8 Co. 169. Plow. 486.

*Sect.* 45. *Firſt*, That the king cannot ſeize the lands till it appears by the return of an inquiſition to that purpoſe to be awarded, of what lands, &c. the offender was ſeized, becauſe the king's title to lands ought always to appear of record.

*Sect.*

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*Sect.* 46. *Secondly*, That the king according to the better opinion, may ſeize the goods, but not grant them over, without ſuch an inquiſition. B. Cor. 2. 14. 25. 45. 47. 55. 60. 1 Rol. 7. 2 R. Abr. 184.

*Sect.* 47. As to the third general head of this chapter, *viz.* What diſabilities and other inconveniencies, offenders of this kind are liable unto, it is enacted by 3 Jac. 1. c. 5. ſ. 8. "That no recuſant convict ſhall practiſe either the common "or civil law, or phyſick, or uſe the trade of an apothecary, "or be judge or miniſter of any court, or bear any office in "camp, troop or company of ſoldiers, or in any ſhip, or "fortreſs, but ſhall be utterly diſabled for the ſame, and for-"feit for every ſuch offence one hundred pounds."

*Sect.* 48. Alſo it is further enacted by the ſaid ſtatute of 3 Jac. 1. c. 5. ſ. 22. "That ſuch recuſants, as ſhall be con-"victed at the time of the death of any teſtator, or at the "time of granting of any adminiſtration ſhall be diſabled to "be executors or adminiſtrators; and that no ſuch perſons "ſhall be guardians to any child, &c."

*Sect.* 49. And it is enacted by 23 Eliz. c. 1. "That "every perſon forbearing the church twelve months, ſhall on "certificate thereof into the King's Bench by the ordinary, "a juſtice of aſſize and gaol-delivery, or a juſtice of peace "of the county where ſuch offender ſhall dwell or be, be "bound with two ſufficient ſureties in the ſum of two hun-"dred pounds at the leaſt to the good behaviour, and ſo con-"tinue bound until ſuch offender ſhall conform himſelf, &c."

*Sect.* 50. As to the fourth general head of this chapter, *viz.* by what means offenders of this nature may be diſcharged from the ſaid forfeitures, &c. it is enacted by 23 Eliz. c. 1. ſ. 10. "That every perſon guilty of the above-mentioned of-"fences, who ſhall, before he be thereof indicted, or at his "arraignment or trial before judgment, ſubmit and conform "himſelf before the biſhop of the dioceſe where he ſhall be "reſident, or before the juſtices where he ſhall be indicted, "arraigned, or tried, (having not before made like ſubmiſ-"ſion at any his trial, being indicted for his firſt like offence,) "ſhall upon his recognition of ſuch ſubmiſſion in open aſ-"ſizes, or ſeſſions of the county where ſuch perſon ſhall be "reſident, be diſcharged of all and every the ſaid offences "againſt the ſaid ſtatute, &c."

*Sect.* 51. Alſo it is enacted by 29 Eliz. c. 6. ſ. 6. "That "whenſoever any ſuch offender ſhall make ſubmiſſion, and "become conformable, according to the form limited by the "above mentioned ſtatute of 23 Eliz. c. 1. or ſhall fortune "to die, that then no forfeiture of twenty pounds for any "month, or ſeizure of the lands of the ſame offender, from "and after ſuch ſubmiſſion and conformity, or death, and "full ſatisfaction of all the *arrearages of* twenty pounds "monthly,

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"monthly, before ſuch ſeizure due or payable, ſhall enſue, "or be continued againſt ſuch offender, ſo long as the ſame "perſon ſhall continue in coming to divine ſervice, accord- "ing to the intent of the ſaid ſtatute."

*Sect.* 52. But this ſtatute being thought not to give ſufficient encouragement to ſuch perſons to conform to the church, becauſe by the moſt favourable conſtruction that could be made, it ſtill obliged them to pay ſuch debts as were due to the king by force of a judgment, it was enacted by 1. Jac. 1. c. 4. ſ. 2. "That a recuſant, conforming himſelf according "to the meaning of the above mentioned ſtatutes, &c. ſhall, "during ſuch conformity, be diſcharged of all penalties, which "he might otherwiſe ſuſtain by reaſon of his recuſancy."

2 Roll. 94.

*Sect.* 53. And it hath been reſolved, that ſuch conformity may, by force of this ſtatute, be pleaded, as well to the ſuit of an informer as to that of the king; and that after judgment it will be a good ground for an *audita querela* againſt an informer; and alſo may be pleaded againſt the king before execution awarded.

Raym. 381, 465.
2 Jon. 187.
1 Mod. 213.
1 Roll. 95.
2 Bulſt. 324.

*Sect.* 54. However, there ſeems to be no remedy for ſuch a perſon to get a reſtitution of ſuch of the profits of his lands, as have been actually taken by the king.

Savil. 130.
2 Show. 331.

*Sect.* 55. It ſeemed very doubtful, before 1 Jac. 1. c. 4. how far the lands of an heir were chargeable with the forfeitures incurred by his anceſtor in reſpect of his recuſancy; but this ſeems to be for the moſt part cleared by the 3d, 4th and 5th paragraphs of that ſtatute, by which it is enacted, "That the heir, if he be no recuſant, or were ſuch, and "conform, ſhall be freed from all penalties happening upon "him by reaſon of his anceſtor's recuſancy, unleſs the two "parts of the lands were ſeized by the king in the anceſtor's "life, in which caſe they ſhall continue in the king's hands "till the whole debt ſhall be levied. But it is farther en- "acted, that the king ſhall not extend the other third part "of the lands for the ſaid penalty."

Lane 92, 93. 106.
Cawley 109. 110.

*Sect.* 56. It ſeems by the manifeſt purport of this ſtatute, that the heir of a recuſant, being alſo a recuſant himſelf, has no remedy, but by conforming, to free his fee-ſimple lands from any of the forfeitures incurred by the conviction of his anceſtor, whether the lands were ſeized in the anceſtor's life or not.

However it is ſaid, that the lands in fee-tail, which he claims from ſuch anceſtor, is no way chargeable after the death of the anceſtor, with any forfeitures upon a conviction by proclamation (which has no greater effect than a verdict recorded) but only with ſuch, as are due upon a judgment; which as it is agreed, charge an heir in tail by force of 33 Hen. 8. c. 39. ſ. 29. which makes an heir chargeable with the debts of his anceſtor by judgement, recognizance, obligation, or other ſpecialty. But perhaps, *the authority* of thoſe opinions may juſtly be queſtioned.

Moor 523.
1 Roll. 94.
C. Eliz. 846.
Cawl. 109, 110, 150, 151, 152.

For

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For though a conviction by proclamation amount not to a judgment, yet ſurely it cannot be inferior to an obligation. And, therefore, perhaps, the books cited in the margin are miſreported in this particular, and the more proper diſtinction may be this; that an heir in tail is chargeable only with the forfeitures of thoſe months, which are contained in the indictment itſelf, on which a judgment is afterwards given, or a conviction by proclamation recorded, and not for the months ſubſequent to ſuch conviction, or proclamation, inaſmuch as the firſt ſeem to be debts appearing of record, the latter not. And the ſame diſtinction ſeems applicable to ſuch lands in tail of an heir who conforms, as were ſeized in the anceſtor's life; but it is clear that ſuch only of his lands as were ſo ſeized are in any caſe liable, whether he claim them in fee-ſimple or tail.

Vide ſup. f. 32.

## CHAPTER THE ELEVENTH.

### OF THE OFFENCES OF SUFFERING OTHERS TO BE ABSENT FROM CHURCH.

HAVING ſhewn how far all perſons in general are puniſhable for their own abſence from the church, I am now to ſhew how far they may be puniſhed for the abſence of others; as to which it is enacted by 3 Jac. 1. c. 4. ſ. 32, 33, 34. "That whoſoever ſhall retain or keep in his ſervice, "fee or livery, or ſhall willingly maintain, retain, relieve, "keep, or harbour, in his houſe, any ſervant, ſojourner, or "ſtranger (except a father, or mother wanting, without "fraud, or covin, other habitation, or ſufficient maintenance, "and alſo except a ward, or perſon committed to the cuſtody "of another by authority) who ſhall not go to ſome church "or chapel, or uſual place of common prayer, to hear di-"vine ſervice, but ſhall forbear the ſame for the ſpace of "one month, &c. ſhall for every month, that he ſhall keep "ſuch ſervant, &c. forfeit ten pounds."

4 Can. 52. 3 Burn. E. L. 220.

## CHAPTER THE TWELFTH.

### OF POPISH RECUSANCY.

AND now we are come to offences againſt the eſtabliſhed church more immediately relating to thoſe of the popiſh religion.

For the better underſtanding whereof I ſhall conſider: Firſt, The above mentioned offence of not coming to church, ſo far as it particularly concerns thoſe of this perſuaſion. Secondly, The *offence of ſaying* or hearing *maſs, or other popiſh ſervice.* Thirdly, The offence of not

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making a declaration againſt popery. Fourthly, The offence of promoting or encouraging the popiſh religion.

Skin. 99. Keb. 7. 3 Burn. E. L. 320.

And firſt as to the ſaid offence of not coming to church, ſo far as it particularly concerns thoſe of the popiſh religion; who in reſpect hereof are commonly called popiſh recuſants. I ſhall conſider; *Firſt*, How far ſuch recuſants are puniſhable in their own perſons. *Secondly*, How far they make others liable to be puniſhed.

As to the firſt of theſe points, *viz.* How far ſuch recuſants are puniſhable in their own perſons. It is to be obſerved, that they are not only liable to all the forfeitures and diſabilities and other inconveniences mentioned in chap. 10. but alſo to many particular diſabilities, reſtraints and forfeitures, and other inconveniences to which no others are liable.

Firſt they are put under the following diſabilities. 1. That of bringing an action. 2. That of preſenting to a church. 3. That of bearing any public office, or charge. 4. That of claiming any part of a huſband's perſonal eſtate. 5. That of claiming an eſtate by curteſy, or by way of dower, after a marriage againſt law.

Secondly, They are put under the following reſtraints. 1. From going above five miles from home. 2. From coming to court. 3. From keeping arms. 4. From coming within ten miles of London.

Thirdly, They are liable to the following forfeitures, 1. That of two parts of a jointure or dower. 2. That of twenty pounds for not receiving the ſacrament yearly after conformity. 3. That of one hundred pounds for an unlawful marriage. 4. That of one hundred pounds for an omiſſion of lawful baptiſm. 5. That of twenty pounds for an unlawful burial.

Laſtly, They are ſubject to the following inconveniencies. 1. That their houſes may be ſearched for reliques, whether they be men or women. 2. If they be women and married, that they may be committed, &c.

11 Mod. 357, 366.

*Sect.* 1. As to the firſt of the ſaid diſabilities, *viz.* That of bringing an action. It is enacted by 3 Jac. 1. c. 5. ſ. 11, 12. "That every popiſh recuſant convict ſhall ſtand to "all intents and purpoſes diſabled, as a perſon lawfully ex- "communicated, and as if ſuch perſon had been ſo denounc- "ed and excommunicated according to the laws of this realm "until he or ſhe ſhall conform, &c. And that every perſon "ſued by ſuch perſon ſo diſabled, may plead the ſame in "diſabling of ſuch plaintiff, as if he or ſhe were excom- "municated by ſentence in the eccleſiaſtical court. Except "*the action of* ſuch recuſant do concern ſome hereditament

"or

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"or leaſe, which is not to be ſeized into the king's hands "by force of ſome law concerning recuſancy." 4 Comm. 55. 124.

By 1 Jac. 1. c. 4. provided he conforms according to the meaning of the ſtatutes of 23 Eliz. c. 1. and 28 Eliz. c. 6. he ſhall during ſuch conformity, be diſcharged of all penalties which he might otherwiſe ſuſtain by reaſon of his recuſancy——For the pleading of which ſee Ray. 392. 2 Jones 287. Mod. 213.

*Sect.* 2. In the expoſition hereof it hath been reſolved, *Firſt*, That the plea of ſuch a conviction, like all other pleas in diſability, ought to be pleaded before imparlance, and alſo to conclude with a demand if the plaintiff ſhall be anſwered. Noy, 89. 3 Lev. 208. Latch. 176. Het. 18. Mod. Caſes in L. & E. 43. 381.

*Sect.* 3. *Secondly*, That ſuch plea ought alſo to ſhew before what juſtices the conviction was, that the court may know where to ſend for a certificate thereof, if it be denied; and alſo that the record itſelf, or at leaſt a certificate thereof, ought to be immediately produced, according to the general rule of the law, as to all dilatory pleas grounded upon records. Noy, 89. Latch, 176. 3 Lev. 333, 234.

*Sect.* 4. *Thirdly*. That if after ſuch a plea it be certified that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapſe and be convict again, the defendant cannot plead the ſame in diſability a ſecond time. Hetl. 176.

*Sect.* 5. *Fourthly*, That it muſt appear either from the conviction itſelf, or by proper averments, that the plaintiff is convicted of popiſh recuſancy, becauſe no recuſants, except popiſh ones, are within the ſaid clauſe; however that this is ſufficiently ſet forth by alledging that the plaintiff being *papalis recuſans*, was indicted and convicted *ſecundum formam ſtatuti, &c.* 2 Lut. 1117. 3 Lev. 333, 334, 11, 12.

*Sect.* 6. And ſome have gone ſo far as to hold, that all popiſh recuſants convict may be taken up by the writ, *de excommunicato capiendo*, and that they are not to be admitted as competent witneſſes in any cauſe; but this ſeems to be a conſtruction over ſevere: for inaſmuch as this, like all other penal ſtatutes, ought to be conſtrued ſtrictly, and the words thereof are no more than, that ſuch perſons ſhall ſtand diſabled, &c. as perſons lawfully excommunicate, &c. and the purport thereof may be fully ſatisfied by the diſability to bring any action, it ſeems to be too rigorous to carry them farther. 2 Bul. 155, 156. The ſame point ſeems admitted, 1 St. Tr. 268. 3 St. Tr. 425. Cawley 216. Vide 1 Com. Dig. 10. as to pleading, and 4 Com. Dig. 65. as to the law in general upon this head.

*Sect.* 7. As to the ſecond of the ſaid diſabilities, *viz.* That of preſenting to a church, the ſame being at this day extended by 12 Ann. c. 2. to all perſons making profeſſion of the popiſh religion, I ſhall refer the reader, for the matters relating to this head, to chap. 15. wherein is ſhewn how penal it is, barely to profeſs the ſaid religion; and I ſhall only take notice in this place, that by 1 Will. & Mar. c. 26. ſ. 4. "If the truſtee, *mortgagee, or grantee of any avoidance* "*whereof the truſt ſhall be for any popiſh recuſant* convict, ſhall "preſent 3 Burn. E. L. 252.

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" preſent without giving notice in writing of the avoid-
" ance, to the univerſity, &c. within three months after the
" avoidance, he forfeits five hundred pounds."

26 Geo. 2. c. 30. ſ. 3. 20 Geo. 2. c. 52. ſ. 56.

*Sect.* 8. As to the third of the ſaid diſabilities, *viz.* that of bearing any publick office or charge, it is enacted by 3 Jac. 1. c. 5. ſ. 9. " That no popiſh recuſant convict
" ſhall exerciſe any publick office or charge in the common-
" wealth, but ſhall be utterly diſabled to exerciſe the ſame,
" by himſelf or his deputy."

*Sect.* 9. It is obſervable, that this clauſe is more ſtrongly penned than that which immediately precedes it, relating to all recuſants in general, as to the following particulars: 1. That this extends to all public offices and charges in general, whereas the former extends only to thoſe which are particularly enumerated. 2. That this expreſsly diſables a popiſh recuſant to exerciſe ſuch an office by himſelf or his deputy, but the other ſays nothing at all of the exerciſe of an office by a deputy.

See alſo 7 J. 1. ch. 6.

*Sect.* 10. As to the fourth of the ſaid diſabilities, *viz.* That of claiming any part of a huſband's perſonal eſtate, it is enacted by 3 Jac. 1. c. 5. ſ. 10. " That every woman,
" being a popiſh recuſant convict (her huſband not ſtand-
" ing convicted of popiſh recuſancy) which ſhall not con-
" form herſelf and remain conform'd, but ſhall forbear to
" repair to ſome church or uſual place of common prayer,
" and there hear divine ſervice and ſermon, if any then be,
" and receive the ſacrament of the Lord's ſupper, accord-
" ing to the laws of this realm, by the ſpace of one whole
" year next before the death of her ſaid huſband, ſhall not
" only be diſabled to be executrix or adminiſtratrix of her
" ſaid huſband, but alſo to have or demand any part of her
" ſaid huſband's goods or chattels, by any law, cuſtom or
" uſage whatſoever." And by 3 Jac. 1. c. 5. ſ. 13. " Every
" woman is put under the like diſability, being a popiſh
" recuſant, who ſhall be married otherwiſe than according
" to the church of England."

Vide the marriage acts 26 Geo. 2. c. 33. and 21 Geo. 3. c. 53.

*Sect.* 11. As to the fifth of the ſaid diſabilities, *viz.* that of claiming an eſtate by the courteſy, or by way of dower, &c. it is enacted by 3 Jac. 1. c. 5. ſ. 13. " That every man
" who, being a popiſh recuſant convict, ſhall be married
" otherwiſe than in ſome open church or chapel, and other-
" wiſe than according to the orders of the church of England,
" by a miniſter lawfully authorized, ſhall be diſabled to have any
" eſtate, as tenant by the courteſy; and that every woman,
" being a popiſh recuſant convict, who ſhall be married in
" other form than as aforeſaid, ſhall be diſabled to claim her
" *dower* or jointure, or widow's eſtate, &c".

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*Sect.* 12. As to the firſt of the above mentioned reſtraints, *viz.* That from going above five miles from home, &c. it is enacted by 35 Eliz. c. 2. and 3 Jac. 1. c. 5. ſ. 6, 7. "That "every popiſh recuſant convict ſhall repair to his place of "dwelling, &c. and not remove above five miles from thence, "unleſs he be urged by proceſs, &c. or have a licence from "the privy council, &c. or under the hands and ſeals of four "juſtices of peace, with the aſſent in writing of the lieute- "nant of the county, or of the biſhop, &c. (every licence "of which kind by juſtices of peace muſt expreſs both the "particular cauſe and the time for which it is given, and "ought not to be granted without a previous oath of ſome "reaſonable cauſe,) under pain of forfeiting all his goods "and hereditaments, (whether freehold or copyhold,) for his "life, or of abjuring the realm, if he be not worth twenty "marks a year, or forty pounds in goods, unleſs he recant "before conviction, and alſo continue conformable." 3 Burn. E. L. 162. 165. See Cawl. 128, 129, &c. 207, 208.

*Sect.* 13. Note, that the privy council may grant ſuch licence without any ſpecial cauſe or oath, &c. but that the juſtices of peace cannot. And it hath been reſolved, that in pleading a licence of juſtices of peace, you muſt expreſsly ſhew that it was made under their hands and ſeals, and alſo ſet forth the cauſe in particular for which it was granted, and the time for which it was limited, and that the party was ſworn to the truth of ſuch cauſe, &c. C. Jac. 352. 1 Rol. 108. Moor 836.

*Sect.* 14. It is ſaid, that if the ſame perſon be both a juſtice of peace and a lieutenant, he cannot both join in a licence as juſtice of peace, and alſo give his aſſent as lieutenant, but can only act in one capacity. C. Jac. 352. 1 Roll. 108. Moor 836.

*Sect.* 15. It ſeems that the miles ſhall be computed according to the Engliſh manner, allowing 5280 foot, or 1760 yards to each mile, and that the ſame ſhall be reckoned not by ſtrait lines, as a bird or arrow may fly, but according to the neareſt and moſt uſual way. Cawl. 130, 131. Ci. Eliz. 212.

*Sect.* 16. As to the ſecond of the above mentioned reſtraints, *viz.* That which relates to the coming to court, it is enacted by 3 Jac. 1. c. 5. ſ. 2. "That no popiſh recu- "ſant convict ſhall come into the court or houſe where the "king or his heir apparent ſhall be, unleſs he be commanded "ſo to do by the king, upon pain of one hundred pounds, "&c." And it is farther enacted by 30 Car. 2. ſt. 2. ſ. 5, 6. "That every popiſh recuſant convict, who ſhall come "adviſedly into, or remain in the preſence of the king and "queen, or ſhall come into the court or houſe where they "or any of them reſide, ſhall be diſabled to hold or execute "any office or place of truſt civil or military, or to ſue in "law or equity, or to be an executor, &c. or capable of any "legacy or deed of gift, *and ſhall forfeit for every wilful "offence five hundred pounds, unleſs ſuch perſon* do within

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" the term next after ſuch his coming or remaining, take the " oaths of allegiance and ſupremacy, and make the declaration " againſt tranſubſtantiation and the invocation of ſaints, &c. " in the court of chancery."

*Sect.* 17. As to the third of the above mentioned reſtraints, *viz.* That which relates to the keeping of arms, it is enacted by 3 Jac. 1. c. 5. ſ. 27, 28, 29. " That all ſuch armour, " gun-powder, and munition, of whatſoever kinds, as any " popiſh recuſant convict ſhall have in his own houſe or elſe- " where, or in the poſſeſſion of any other at his diſpoſition, " ſhall be taken from him by warrant of four juſtices of peace " at their General or Quarter Seſſions, (except ſuch neceſſary " weapons as ſhall be allowed him by the ſaid four juſtices, " for the defence of his perſon or houſe) and that the ſaid " armour, &c. ſo taken, ſhall be kept at the coſt of ſuch " recuſant, in ſuch place as the ſaid four juſtices at their " ſaid ſeſſions ſhall appoint: and that if any ſuch recu- " ſant having ſuch armour, &c. or if any other perſon who " ſhall have any ſuch armour, &c. to the uſe of ſuch recu- " ſant, ſhall refuſe to diſcover to the ſaid juſtices, or any " of them, what armour he hath, or ſhall let or hinder the " delivery thereof to any of the ſaid juſtices, or to any other " perſon authorized by their warrant to take the ſame, that " then every perſon ſo offending ſhall forfeit his ſaid ar- " mour, &c. and alſo be impriſoned for three months with- " out bail, by warrant from any juſtices of peace of ſuch " county." And it is further enacted, " That notwithſtand- " ing the taking away ſuch armour, &c. yet ſuch recuſant " ſhall be charged with the maintaining of the ſame, and with " the providing of a horſe, &c. in ſuch ſort as others of his " majeſty's ſubjects." Alſo it is further enacted by 1 W. & M. c. 15. " That no reputed papiſt refuſing to make the " ſaid declaration againſt popery, mentioned in 30 Car. ſhall " keep arms." As it is ſet forth more at large. chap. 14. ſect. 4.

*Sect.* 18. As to the fourth of the above mentioned reſtraints, *viz.* That which relates to the coming within ten miles of London, it is enacted by 3 Jac. 1. c. 5. ſ. 4, 5. " That no popiſh recuſant, &c. ſhall remain within the " compaſs of ten miles of London, under pain of one hun- " dred pounds, except ſuch perſons as, at the time of the " ſaid act, did uſe ſome trade, myſtery, or manual occupa- " tion in London, &c. and ſuch as ſhall have their only " dwelling in London, &c." Alſo reputed papiſts, refuſing to make the declaration mentioned in the precedent ſections, are to be removed from London, &c. by force of 1 Will. & *Mar.* c. 9. which is ſet forth more at large in chap. 14. *ſect.* 3.

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*Sect.* 19. As to the firſt of the above mentioned forfeitures, *viz.* That of two parts of a jointure or dower, it is enacted by 3 Jac. 1. c. 5. ſ. 10. "That every married woman, being a popiſh recuſant convict, (her huſband not ſtanding "convicted of popiſh recuſancy) who ſhall not conform herſelf and remain conformed, but ſhall forbear to repair "to ſome church or uſual place of common prayer, and there "to hear divine ſervice and ſermon, if any then be, and receive the ſacrament of the Lord's ſupper, according to "the laws of this realm, within one year next before the death "of her ſaid huſband, ſhall forfeit to the king the profits of "two parts of her jointure and dower of any hereditaments "of her ſaid huſband, &c."

*Sect.* 20. As to the ſecond of the above mentioned forfeitures, *viz.* That of twenty pounds, &c. for not receiving the ſacrament yearly after conformity, it is enacted by 3 Jac. 1. c. 4. ſ. 2, 3. "That if any popiſh recuſant convict, who "hath conformed himſelf to the church, &c. ſhall not receive "the ſacrament in his own pariſh church, &c. within one year "after his conformity, he ſhall forfeit twenty pounds, and "for the ſecond year forty pounds, and for every year after "ſixty pounds, &c."

*Sect.* 21. As to the third of the above mentioned forfeitures, *viz.* That of one hundred pounds for an unlawful marriage, it is enacted by 3 Jac. 1. c. 5. ſ. 13. "That every popiſh "recuſant convict, who ſhall be married to a woman who is "no inheritrix, otherwiſe than according to the church of "England, ſhall forfeit one hundred pounds."

*Sect.* 22. As to the fourth of the above mentioned forfeitures, *viz.* That of one hundred pounds for the omiſſion of a lawful baptiſm, it is enacted by 3 Jac. 1. c. 5. ſ. 14. "That "every popiſh recuſant who ſhall not cauſe his or her child "to be baptized, within one month after its birth, by a "lawful miniſter, &c. ſhall forfeit one hundred pounds, &c."

*Sect.* 23. As to the fifth of the above mentioned forfeitures, *viz.* That of twenty pounds for an unlawful burial, it is enacted by 3 Jac. 1. c. 5. ſ. 15. "That if any popiſh recuſant, not being excommunicate, ſhall be buried in any "other place than in the church or churchyard, or not according to the eccleſiaſtical laws of this realm, the executors, &c. "of ſuch recuſant, knowing the ſame, or the party that cauſeth "him to be ſo buried, ſhall forfeit twenty pounds, &c."

*Sect.* 24. As to the inconvenience to which all ſuch offenders are liable, *viz. That of having their houſes ſearched for reliques, &c. it is enacted by 3 Jac. 1. c. 5. ſ. 26. "That any two juſtices of peace, and all mayors, bailiffs,*

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" and chief officers of cities and towns corporate, in their " reſpective juriſdictions, may ſearch the houſe and lodgings " of every popiſh recuſant convict for popiſh books and re- " liques; and that if any altar, pix, beads, pictures, or ſuch " like popiſh relique, or any popiſh book, be found in the " cuſtody of ſuch perſon, as, in the opinion of the ſaid juſ- " tices, &c. ſhall be unmeet for him or her to have or uſe, it " ſhall be defaced and burnt, if it be meet to be burnt; and " if it be a crucifix, or other relique of any price, the ſame " ſhall be defaced at the General Quarter-Seſſions in the " county where it ſhall be found, and then reſtored to the " owner."

*Sect.* 25. As to the inconvenience to which ſuch offenders, being femes covert are liable, *viz.* That of being committed, it is enacted by 7 Jac. 1. c. 6. ſ. 28. " That if any " married woman, being a popiſh recuſant convict, ſhall not " within three months after her conviction, conform herſelf, " and repair to church and receive the ſacrament, &c. ſhe " may be committed to priſon by one of the privy council, " or by the biſhop, if ſhe be a baroneſs; or if under that " degree by two juſtices of peace, whereof one to be of the " *Quorum*, there to remain till ſhe perform, *&c.* unleſs the " huſband will pay to the king ten pounds a month for her " offence, or elſe the third part of all his lands, &c. at the " choice of the huſband, &c."

*Sect.* 26. And now I am to conſider in the ſecond place, how far ſuch recuſants make others liable to be puniſhed; as to which it is to be obſerved, That the huſband of a popiſh recuſant convict is not only liable to the forfeiture of ten pounds a month for the abſence of any of his ſervants from church, by force of 1 Jac. 1. which is ſet forth more at large in the foregoing chapter, but is alſo " utterly diſabled," by the ninth paragraph of the ſaid ſtatute, " to exerciſe any " publick office or charge in the common-wealth by himſelf " or by his deputy; (except ſuch huſband himſelf, and his " children, which ſhall be above the age of nine years abid- " ing with him, and his ſervants in the houſhold, ſhall once " every month at leaſt, not having any reaſonable excuſe " to the contrary, repair to ſome church or chapel uſual for " divine ſervice, and there hear divine ſervice; and the ſaid " huſband, and ſuch his children and ſervants, as are of meet " age, receive the ſacrament of the Lord's ſupper, at ſuch " times as are limited by the laws of this realm, and do " bring up his ſaid children in the true religion.")

*Sect.* 27. Alſo it is farther enacted by the ſaid ſtatute of 3 Jac. 1. c. 5. ſ. 26. " That the houſe of one whoſe wife " is a popiſh recuſant convict, may be ſearched by any two " *juſtices* of peace, &c. for popiſh books, &c."

CHAP.

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## CHAPTER THE THIRTEENTH.

### OF OFFENCES IN SAYING OR HEARING MASS, OR OTHER POPISH SERVICE.

AS to the offence in saying or hearing mass, it is enacted by 23 Eliz. c. 1. s. 4. "That every person, who shall say "or sing mass, being thereof lawfully convict, shall forfeit "two hundred marks, and be committed to prison in the next "gaol, there to remain by the space of one year, and "from thenceforth till he have paid the said sum of two "hundred marks; and that every person, who shall willingly "hear mass, shall forfeit the sum of one hundred marks, and "suffer a year's imprisonment." Dyer 203. 4 Comm. 56, 87. 115. 3 Jac. 1. ch. 5. 2 Show. 216.

*Sect.* 2. And it is enacted by 11 & 12 Will. 3. c. 4. s. 2, 3, 4, 5. "That every person, who shall apprehend "any popish bishop, priest, or jesuit, and prosecute him "to conviction for saying mass, or exercising any other "part of the function of a popish bishop or priest, shall re-"ceive one hundred pounds of the sheriff, and that every "such popish bishop, &c. (except, being a foreigner, he be "entered in the secretary's office, and officiate only in the "house of a foreign minister,) shall be adjudged to perpe-"tual imprisonment."

† But by 18 Geo. 3. c. 60. it is enacted "That the above-"mentioned clauses of 11 & 12 Will. 3. are repealed," provided, by s. 5. "that such popish bishop, priest, jesuit "or schoolmaster shall have taken and subscribed the oath, "(in the words as recited in the said statute of Geo. 3.) "before he shall have been apprehended, or any prosecution "commenced against him."

## CHAPTER THE FOURTEENTH.

### OF THE OFFENCE OF NOT MAKING A DECLARATION AGAINST POPERY.

THE offence of refusing to make a declaration against some of the principal doctrines of the popish religion puts all persons under the following restraints: First, From sitting in parliament. Secondly, From holding a place at court. Thirdly, From living within *ten miles* of London. Fourthly, From *keeping arms*. *Fifthly*, It puts them under *a disability of presenting to a church*. A witness shall not be put to answer whether he is or is not a Papist. Dougl. 593.

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*Sect.* 1. As to the firſt of the above mentioned reſtraints, *viz.* That which relates to the ſitting in parliament, it is enacted by 30 Car. 2. ſt. 2. c. 1. "That no peer ſhall vote or make "his proxy in the Houſe of Peers, or ſit there during any "debate; and that no member of the Houſe of Commons, "ſhall vote or ſit there during any debate after the Speaker "is choſen, until ſuch peer or member ſhall take the oaths of "allegiance and ſupremacy, and make a declaration of his "belief that there is no tranſubſtantiation in the ſacrament "of the Lord's Supper; and that the invocation or adoration "of the Virgin Mary, or any other ſaint, and the ſacrifice of "the maſs, as they are now uſed in the church of Rome, are "ſuperſtitious and idolatrous, &c. on pain that every ſuch "offender ſhall be adjudged a popiſh recuſant convict, and "diſabled to hold or execute any office, &c. or from thence- "forth to ſit or vote in either houſe of parliament, to ſue in "law or equity, or to be guardian, executor or adminiſtra- "tor, or capable of any legacy or deed of gift, and ſhall "forfeit for every wilful offence five hundred pounds."

1 Geo. 1. c. 13.

*Sect.* 2, As to the ſecond of the above mentioned reſtraints, *viz.* That which relates to the holding a place at court, it is enacted by the ſaid ſtatute of 30 Car. 2. ſt. 2. ſ. 9. 12, 13. "That every perſon who ſhall be a ſworn ſervant to the king, "ſhall take the ſaid oaths, and make and ſubſcribe the ſaid "declaration in chancery, the next term after he ſhall be ſo "ſworn a ſervant, &c. And that if any ſuch perſon, ne- "glecting ſo to do, ſhall adviſedly come into or remain in "the preſence of the king or queen, or ſhall come into the "court or houſe where they are or any of them reſide, he "ſhall ſuffer all the penalties expreſſed in the foregoing ſec- "tion, unleſs ſuch perſon ſo coming into the king's pre- "ſence, &c. ſhall firſt have licence ſo to do, by warrant "under the hands and ſeals of ſix privy counſellors, by order "of the privy council, upon ſome urgent occaſion therein "to be expreſſed, which licence ſhall not exceed ten days, "and ſhall be firſt filed, &c. in the petty-bag office, for any "body to view without fee, &c. and no perſon be licenſed "for above thirty days in one year."

This clauſe is repealed by 2 Geo. 2. c. 31. ſ. 9.

*Sect.* 3. As to the third of the above mentioned reſtraints, *viz.* That which relates to the living within ten miles of London, it is enacted by 1 Will. and Mar. c. 9. "That "every juſtice of peace in London and Weſtminſter, and "within ten miles thereof, ſhall cauſe to be arreſted, and "brought before him all reputed Papiſts (except foreigners, "being merchants, or menial ſervants to ſome ambaſſador or "public agent, and except all ſuch as uſed ſome trade, myſ- "tery, or ſome manual occupation at the time of the ſaid "act, in London, &c. and alſo except all ſuch perſons as "had

See ch. 22. ſ. 28.

" had their dwelling in London, &c. within ſix months be-
" fore the thirteenth of February 1688, and no dwelling
" elſewhere, and certified their names to the ſeſſions be-
" fore the firſt of Auguſt, 1689) and that every ſuch juſ-
" tice ſhall tender the ſaid declaration to every ſuch perſon,
" and that every ſuch perſon refuſing the ſame, and after-
" wards remaining in London, &c. or within ten miles
" thereof, or being certified to the King's Bench or Quarter
" Seſſions, at the next term or ſeſſions, as having refuſed to
" make the ſaid declaration, and neglecting to make the
" ſame in ſuch court, ſhall ſuffer as a Popiſh recuſant con-
" vict, &c."

*Sect.* 4. As to the fourth of the above mentioned reſtraints, *viz.* That which relates to the keeping arms, it is enacted by 1 Will. and Mar. c. 15. " That any two juſtices
" of the peace may and ought to tender the ſaid declaration
" to any perſon whom they ſhall know or ſuſpect, or have
" information of, as being a Papiſt, or ſuſpected to be ſuch;
" and that no ſuch perſon ſo required, and not making and
" ſubſcribing the ſaid declaration, or not appearing before the
" ſaid juſtices upon notice to him given, or left at his uſual See ch. 12. ſ. 17.
" abode, by one authorized by warrant under the hands and
" ſeals of the ſaid juſtices, ſhall keep any arms or ammuni-
" tion, or horſe above the value of five pounds, in his own
" poſſeſſion, or in the poſſeſſion of any other perſon to his
" uſe (other than ſuch neceſſary weapons, as ſhall be allow-
" ed him by the Quarter-Seſſions for the defence of his houſe
" or perſon) and that any two juſtices of peace, by warrant
" under their hands and ſeals, may authorize any perſon in
" the day time, with the aſſiſtance of the conſtable or his
" deputy or the tithing-man, to ſearch for all ſuch arms, &c.
" and horſes, and ſeize them to the king's uſe; and that the
" ſaid juſtices ſhall deliver the ſaid arms and ammunition at
" the next Quarter Seſſions in open court; and that whoever
" ſhall conceal, &c. or ſhall be aiding to the concealing any
" ſuch arms or horſes, ſhall be committed to the common
" goal, by warrant under the hands and ſeals of any two
" juſtices of peace, and alſo forfeit treble the value; and that
" thoſe who diſcover any ſuch arms or ammunition, ſo as
" the ſame may be ſeized, ſhall have the full value thereof,
" to be awarded to them by the ſeſſions, &c. and that ſuch
" refuſers of the ſaid declaration, &c. ſhall be diſcharged
" whenever they ſhall make the ſame."

*Sect.* 5. As to the above mentioned diſability of preſenting to a church, it is enacted by 1 Will. and Mar. c. 26. That whoever ſhall refuſe to make the ſaid declaration upon ſuch a tender thereof as is preſcribed by the ſaid act, ſhall be diſabled to preſent to *any benefice, &c. but it ſeems* needleſs *to ſet forth the clauſe of the ſaid ſtatute relating* to this matter

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ter at large in this place, inaſmuch, as by 12 Annæ, c. 14. All perſons whatſoever making profeſſion of the Popiſh religion are under the like diſability, as will appear from ch. 15. ſect. 6, 7, &c.

By 4 Geo. 3. c. 2. ſ. 57. Papiſts are made liable to pay double land tax, if they do not not conform in the manner directed by the act.

## CHAPTER THE FIFTEENTH.

## OF OFFENCES IN PROMOTING OR ENCOURAGING THE POPISH RELIGION.

1 Comm. 451. 4 Comm. 55. 115.

OFFENCES in promoting or encouraging the Popiſh religion ſeem to be reducible to the following heads; 1. Giving or receiving Popiſh education. 2. Profeſſing the Popiſh religion. 3. Buying or ſelling Popiſh books.

For the effect and conſequence of a foreign education in a popiſh ſeminary. Vide Str. 318. Comyns 207.

*Sect.* 1. The firſt offence of this kind, *viz.* That of giving or receiving Popiſh education depends upon ſeveral ſtatutes; and firſt it is enacted by 1 Jac. 1. c. 4. ſ. 6. 7. "That "if any perſon or perſons under the king's obedience ſhall "go or ſend, or cauſe to be ſent, any child or any other "perſon under their or any of their government, beyond the "ſeas, out of the king's obedience, to the intent to enter "into, or reſide in, or repair to any college, &c. of any "Popiſh order, profeſſion or calling to be inſtructed, perAndr. 104. Lucas 113. 356. 406. 10 Mod. 113. "ſuaded or ſtrengthened in the Popiſh religion, or in any "ſort to profeſs the ſame, every ſuch perſon ſo ſending ſuch "child, &c. ſhall forfeit 100l. and every ſuch perſon, ſo "paſſing or being ſent, &c. ſhall in reſpect of him or herſelf "only, and not in reſpect of any of his heirs or poſterity, "be diſabled to inherit, purchaſe, take, have or enjoy, any "profits, hereditaments, chattels, debts, legacies or ſums of "money, &c. whatſoever: and that all eſtates, terms, "and other intereſts whatſoever to be made, ſuffered or "done, to the uſe or behoof of any ſuch perſon, or upon "any truſt or confidence, mediately or immediately to or "for the benefit or relief of any ſuch perſon, ſhall be utterly void."

Keb. 263. Vide 3 Bac. Abr. 789. and the caſes, &c. there cited.

*Sect.* 2. And it is farther enacted by 3 Jac. 1. c. 5. ſ. 16. "That if the children of any ſubject within the realm (the "ſaid children not being ſoldiers, mariners, merchants, or "their apprentices or factors) ſhall be ſent or go beyond "ſea, to prevent their good education in England, or for "any other cauſe, without the licence of the king or ſix of "his privy council (whereof the principal ſecretary to be "*one*) under their hands and ſeals, that then every ſuch

"child

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" child ſhall take no benefit by any gift, conveyance, deſcent, " deviſe or otherwiſe of or to any hereditament or chattel, " till ſuch child being of the age of eighteen years or above, " take the oath of obedience before ſome juſtice of peace of " the county, liberty, or limit, where the parent of ſuch " child did and ſhall inhabit: and that in the mean time the " next of kin to ſuch child, who ſhall be no Popiſh recuſant, " ſhall have the ſaid hereditaments, &c. ſo given, &c. until " ſuch child ſhall conform, &c. and take the ſaid oath and " receive the ſacrament; and that after ſuch conformity, &c. " he who hath received the profits of the ſaid hereditaments, " &c. ſhall account for the ſame, and in reaſonable time " make payment thereof, and reſtore the value of the ſaid " goods, &c. And that whoever ſhall ſend ſuch child over " ſeas, ſhall forfeit one hundred pounds."

Vide 11 & 12 Will. 3. c. 4. 18 Geo. 3. ch. 60.

*Sect.* 3. Alſo it is enacted by 3 Car. 1. c. 2. " That if " any perſon under the obedience of the king ſhall go, or " ſhall convey or ſend, or cauſe to be ſent or conveyed, any " perſon out of the king's dominions, into any parts beyond " the ſeas, out of the king's obedience, to the intent to " enter into, or be reſident or trained up in, any priory, " abbey, nunnery, Popiſh univerſity, college or ſchool, or " houſe of Jeſuits, prieſts, or in a private Popiſh family, " and ſhall be there by any Popiſh perſon inſtructed, per- " ſwaded or ſtrengthened in the Popiſh religion in any " ſort to profeſs the ſame, or ſhall convey or ſend, or " cauſe to be conveyed or ſent, any thing towards the " maintenance of any perſon ſo going or ſent, and trained " and inſtructed, as is aforeſaid, or under the colour of any " charity towards the relief of any priory, &c. or religious " houſe whatſoever; every perſon ſo ſending, &c. any ſuch " perſon or thing, and every perſon paſſing or ſent, being " thereof convicted, &c. ſhall be diſabled to proſecute any " ſuit in law or equity, or to be executor or adminiſtrator to " any perſon, be capable of any legacy or deed of gift, or to " bear any office within the realm. And ſhall forfeit all his " goods and chattels, and ſhall forfeit all his hereditaments, " offices and eſtates of freehold, during his life."

The ſecond offence of this kind, *viz.* that of profeſſing the Popiſh religion, is puniſhed with the following diſabilities, *Firſt*, Of taking an eſtate in lands. *Secondly*, Of preſenting to a church.—Alſo it is puniſhed with the following reſtraints, 1. From keeping ſchool. 2. From with-holding a competent maintenance from a Proteſtant child.

*Sect.* 4. As to the firſt of the abovementioned diſabilities, *viz.* That of taking an eſtate *in lands*. *It is* enacted by 11 & 12 *W. 3. c. 4.* " *That every perſon educated in* or profeſſing " *the Popiſh religion, who ſhall not, within* ſix months after " the

1 Atk. 526. 537. 2 Atk. 65. 155. 210. 3 Atk. 155. 457.

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8 Mod. 167. 2 P. Will. 5. 155. 364. 10 Mod. 89. 230. Strange 1096. 1 P. Will. 353. Cowp. 468. 1 Wilſ. 176.

" the age of eighteen years, take the oaths of allegiance and " ſupremacy, and ſubſcribe the declaration againſt popery " mentioned in 30 Car. 2. ſtat. 2. chap. 1. in the Chancery, " or King's Bench, or Quarter Seſſions of the county where " ſuch perſon ſhall reſide, ſhall in reſpect of himſelf or herſelf " only, and not in reſpect of any of his or her heirs or poſ- " terity, be diſabled to inherit or take by deſcent, deviſe or " limitation, in poſſeſſion, reverſion or remainder, any lands, " tenements or hereditaments, in England or Wales, &c. " And during the life of ſuch perſon, and until he take the " ſaid oaths, &c. his next of kin being a Proteſtant, ſhall " enjoy the ſame, without being accountable for the profits, " but ſhall not do wilful waſte under pain of forfeiting treble " damages to the party ſo diſabled: and all Papiſts, or per- " ſons making profeſſion of the Popiſh religion, are diſabled " to purchaſe in their own names, or the names of others, to " their uſe or in truſt for them: and all eſtates, terms and " other intereſt and profits whatſoever, out of lands made to " their uſe, or on any truſt, mediately or immediately, for " their benefit, are void."

9 Mod. 172. 181.—But a Papiſt tenant in tail who ſuffers a recovery to himſelf in fee in order to make a marriage ſettlement; is not a purchaſer within the act. Str. 267.

*Sect.* 5. In the conſtruction hereof it was reſolved by the Houſe of Lords, in Roper's caſe, That the deviſe of the reſidue of money ariſing from the ſale of an eſtate appointed to be ſold for payment of debts, &c. is within the ſtatute.

† But by 18 Geo 3. c. 60. the above clauſe in the ſtatute of William the Third is repealed, and all perſons having or claiming any lands, tenements or hereditaments, under titles not hitherto litigated ſhall enjoy the ſame as if the ſaid act of 11 and 12 Will. 3. c. 4. had not been made, provided always, " that all ſuch perſons, within the ſpace of ſix calendar " months after the paſſing of this act, or of the accruing of " his, her, or their title, being of the age of twenty-one " years; or within ſix months after he, or ſhe ſhall attain the " age of 21 years, or being of unſound mind, or in priſon, or " beyond the ſeas, then within ſix months after ſuch diſability " removed, ſhall take and ſubſcribe the oath in the words as " recited in the ſtatute."—Which oath the courts of Record and Chancery at Weſtminſter, in Wales, Cheſter, Lancaſter, Durham, or any General or Quarter Seſſions of the Peace, of any county or place in England are required to adminiſter and to regiſter.

4 Burn. 23.

Precedent of a title made under theſe ſtatutes. Lut. 1101. 1117. Comyns 182. Gibſon 771. 3 Lev. 332.

*Sect.* 6. As to the ſecond of the above mentioned diſabilities, *viz.* That of preſenting to a church, which by 3 Jac. 1. 5. ſ. 18, 19, 20, 21. and 1 Will. & Mar. c. 26. did extend only to Popiſh recuſants convict, and perſons refuſing to make the declaration againſt Popery, mentioned in 30 Car. 2. ſt. 2. it is enacted by 12 Ann. ſt. 2. c. 14. " That every " Papiſt, or perſon making profeſſion of the Popiſh religion, " &c.

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" &c. and every mortgagee, truſtee, or perſon any ways in-
" truſted by or for ſuch Papiſt, &c. with or without writing,
" ſhall be diſabled to preſent to any benefice, ſchool, or hoſ-
" pital, &c. or to grant any avoidance of any benefice, prebend
" or eccleſiaſtical living; and that in all caſes the Univerſi-
" ties ſhall preſent."

*Sect.* 7. Alſo by force of the ſaid ſtatute, " The ordinary
" may tender the declaration againſt tranſubſtantiation to any
" reputed Papiſt making a preſentation, and upon a refuſal to
" take the ſame, the preſentation ſhall be void: alſo the or-
" dinary may examine every preſentee upon oath, whether
" the perſon who preſented him be the true patron, or only a
" truſtee? And the court wherein a *quare impedit* ſhall be
" brought, may in like manner examine the parties, and a
" bill may be brought in any court of equity to diſcover ſuch
" ſecret truſts, &c. and the anſwer of ſuch perſons upon any
" ſuch examination or bill ſhall be good evidence againſt ſuch
" patron, in reſpect of ſuch a preſentation, but not as to any
" other purpoſe."

† And it is alſo enacted by 11 Geo. 2. c. 17. ſ. 5. " That
" every grant of any advowſon, or right of preſentation,
" collation, nomination, or donation of and to any benefice,
" prebend, or eccleſiaſtical living, ſchool, hoſpital or dona-
" tive, and every grant or any avoidance thereof by any
" Papiſt, or perſon making profeſſion of the Popiſh religion,
" or any mortgagee, truſtee, or perſon any ways intruſted
" directly or indirectly, mediately or immediately, by or for
" any ſuch Papiſt, whether declared by writing or not, ſhall
" be null and void, unleſs ſuch grant ſhall be made *bona fide*,
" and for a full and valuable conſideration to and for, and
" merely and only for the benefit of a Proteſtant purchaſer,
" and every ſuch grantee ſhall be deemed a truſtee, &c. and
" compelled to diſcover, and according to 12 Anne.—And
" that every deviſe thereof, with intent to ſecure the benefit
" to the heirs or family of ſuch Papiſt ſhall be null and void,
" and the deviſee bound to diſcover as aforeſaid."

Vide 24 Geo. 3. ſeſſ. 1. ch. 1. 1 Geo. 1. ſt. 2. ch. 55. 3 Geo. 1. ch. 18.

*Sect.* 8. I do not know that any reſolution hath been given on either of the above mentioned ſtatutes of 1 Will. & Mar. or 12 Ann. However, the expoſitions which were made on 3 Jac. 1. ſeeming to be for the moſt part applicable to theſe latter ſtatutes alſo, I ſhall take notice of the principal of them; as,

*Sect.* 9. *Firſt*, That where a preſentment is *pro hac vice* veſted in the univerſity by reaſon of the patron's being a Popiſh recuſant at the time when the church became void, it ſhall not be diveſted again by his conforming himſelf to the church, or by his death.

11 Co. 57, 58. Conyns 182. 10 Co. 57.

*Sect.* 10. *Secondly*, That ſuch a patron is only diſabled to preſent, and that he continues patron as to all other purpoſes, and *therefore that he ſhall confirm* the leaſes of the *incumbent, &c.*

Cawley 230.

*Sect.*

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1 Jon. 19, 20.

*Sect.* 11. *Thirdly*, That ſuch a perſon by being diſabled to grant an avoidance, is no way hindered from granting the advowſon itſelf in fee, or for life or years, *bona fide*, and for good conſideration.

1 Jon. 20, 21, &c. Hob. 126, 127. Moor 872.

*Sect.* 12. *Fourthly*, That if an advowſon or avoidance belonging to ſuch a perſon come into the king's hands, by reaſon of an outlawry, or conviction of recuſancy, &c. the king, and not the univerſity, ſhall preſent.

*Sect.* 13. As to the firſt of the above mentioned reſtraints, *viz.* that which relates to the keeping ſchool, it is enacted by the ſaid ſtatute of 11 & 12 Will. 3. c. 4. ſ. 3. "That if "any Papiſt, or perſon making profeſſion of the Popiſh re- "ligion, ſhall be convict of keeping ſchool, or taking upon "themſelves the education or government, or boarding of "youth in any place within this realm, or the dominions "thereunto belonging, they ſhall be adjudged to perpetual "impriſonment."

Vide ch. 13. ſ. 2.

† But this clauſe is repealed by 18 Geo. 3. c. 60. provided the party ſhall take and ſubſcribe the oath therein recited, before he ſhall have been apprehended or any proſecution commenced againſt him.

*Sect.* 14. As to the ſecond of the above mentioned reſtraints, *viz.* that which relates to the power of a Popiſh parent over his Proteſtant child, it is enacted by the ſaid ſtatute of 11 & 12 Will. 3. c. 4. "That if any Popiſh parent, in "order to compel a Proteſtant child to a change of religion, "ſhall refuſe to allow ſuch child a ſufficient maintenance, "ſuitable to the degree and ability of ſuch parent, and to "the age and education of ſuch child, the Lord Chancellor "upon complaint may make ſuch order therein, as ſhall be "agreeable to the intent of the ſaid act."

4 Comm. 115.

*Sect.* 15. The third offence of this kind, *viz.* that of ſelling or buying Popiſh books, depends upon 3 Jac. 1. c. 5. ſ. 25. by which it is enacted, "That no perſon ſhall bring "from beyond the ſeas, nor ſhall print, buy, or ſell any "Popiſh primer, ladies pſalters, manuals, roſaries, Popiſh "catechiſms, miſſals, breviaries, portals, legends and lives "of ſaints, containing ſuperſtitious matter, printed or "written in any language whatſoever, nor any other ſuper- "ſtitious books printed or written in the Engliſh tongue; on "pain of forfeiting forty ſhillings for every book, &c. and "the books to be burnt."

See 3 & 4 Ed. 6. c. 10. 13 Eliz. c. 2.

CHAP.

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# CHAPTER THE SIXTEENTH.

## OF OFFENCES AGAINST THE ESTABLISHED CHURCH BY PROTESTANT DISSENTERS.

OBSTINATE nonconformiſts were compellable by 31 Eliz. c. 1. to abjure the realm, and were alſo ſubject to all the penalties mentioned in the tenth and eleventh chapters of this book; and diſſenters were farther reſtrained by 17 Charles the Second, chapter 2. and 22 Charles 2. ch. 1.—But at this day by 1 William & Mary c. 18. ſ. 2. "All perſons diſſenting from "the church," except papiſts, and thoſe who ſhall in preaching or writing deny the doctrine of the Trinity "are exempted "from all penal laws relating to religion," except the twenty-fifth of Charles the Second, chap. 2. by which all officers of truſt are bound to receive the ſacrament according to the uſage of the church of England, and alſo to take the oaths of allegiance and ſupremacy, and the teſt, and alſo except 30 Charles 2. ſt. 2. c. 1. by which the members of both houſes of parliament, and all the king's ſworn ſervants (a) are bound to make a declaration againſt tranſubſtantiation and the invocation of ſaints, and the ſacrifice of the maſs, "provided ſuch diſſenters take the oath of allegiance and "ſupremacy, and make the ſaid declaration againſt tranſub- "ſtantiation, &c. and come to ſome congregation for religi- "ous worſhip, in ſome place regiſtered (1) either in the "biſhop's court or at Seſſions, the doors whereof ſhall be "neither locked, barred, nor bolted."

2 Burn. E. L. 143. 4 Comm. 53. 2 Jones 225, 233, 234.

*Vide ſup.* ch. 8.

(a) This clauſe relating to the king's ſworn ſervants is repealed by 2 Geo. 2. c. 31. Salk. 527.

(1) In regiſtering the certificate, the juſtices are merely miniſterial, and if perſons reſorting to any ſuch meeting houſe, do not bring themſelves within this act, ſuch regiſtring will not protect them from the penalties of the law. 1 Black. 606.—Nor doth this act extend to all perſons who ſhall think fit to ſtile themſelves proteſtant diſſenters. 3 Burn. E. L. 170. therefore if a man be a profeſſed churchman, and only ſometimes go to meetings, the toleration act will not excuſe him. 6 Mod. 190. A miniſter alſo, exerciſing his functions, without being licenced by the biſhop, Lindwood 288. in a chapel of eaſe, according to the rites of the church of England, is not within the act, for by Lord Hardwicke, it was made to protect tender conſciences from penalties, and to extend it to thoſe of the church who act contrary to its rules and diſcipline, would introduce an endleſs confuſion. 2 Atk. 498.

*Sect.* 2. Alſo by ſection 8, 9, 10, 11, 12. "Diſſenting "teachers are tolerated, if they take the ſaid oaths, &c. at the "General or Quarter-Seſſions to be held for the place where "ſuch perſons live, and ſubſcribe the thirty-nine articles of the "church of England, except thoſe few ſcrupled ones con- "cerning church-government and infant-baptiſm." And

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Salk. 572. Burr. 1043.

by 10 Anne c. 2. ſ. 7, 8, 9. "They may qualify themſelves, "as well during a proſecution upon any penal ſtatute, as be- "fore, and being qualified in one county may officiate in "another, upon producing a certificate, and taking the ſaid "oaths, &c. if required."

As to Quakers Vide 8 Geo. 1. c. 6. and 22 Geo. 2. c. 46. ſ. 36.

*Sect.* 3. Alſo by the ſaid ſtatute of 1 William and Mary ſ. 13, 14, 15. Thoſe who ſcruple the taking of any oath, are within the like indulgence, provided they ſubſcribe the aforeſaid declaration, and alſo a declaration of fidelity to the king, and againſt the depoſing doctrine and papal ſupremacy; and alſo profeſs their faith in God the Father, and Jeſus Chriſt his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the holy ſcriptures of the old and new teſtament to be given by divine inſpiration.

3 Lev. 376. Gibſ. 519. *Sed vide* the marriage act. 26 Geo. 2. c. 33. *Infra.*

*Sect.* 4. Since this ſtatute a prohibition lies to the ſpiritual court proceeding againſt perſons for incontinency, who have been married in a licenſed conventicle.

† *Sect.* 5. And by 19 Geo. 3. c. 44. which declares the 1 Will. and Mar. c. 18. to be a public act, "every perſon "diſſenting from the church of England, in holy orders, or "pretended holy orders, or pretending to holy orders, be- "ing a preacher or teacher of any congregation of diſſenting "proteſtants, who, if he ſcruple to declare and ſubſcribe as "aforeſaid, ſhall take the oaths, and make and ſubſcribe the "declaration againſt popery required by the ſaid act of "1 Will. & Mary, to be taken, made and ſubſcribed by "proteſtant diſſenting miniſters, and ſhall alſo make and "ſubſcribe a declaration in the words following '*I A. B. do* '*ſolemnly declare, in the preſence of Almighty God, that I am a* '*chriſtian, and a proteſtant, and as ſuch that I believe that the ſcrip-* '*tures of the old and new teſtament, as commonly received among* '*proteſtant churches, do contain the revealed will of God; and that* '*I do receive the ſame as the rule of my doctrine and practice*' ſhall "be, and every ſuch perſon is hereby declared to be, intitled "to all the exemptions, benefits, privileges and advantages "of 1 Will. & Mary c. 18. and 10 Anne c. 2. and the juſ- "tices of the peace at the General Seſſions of the peace, "where any proteſtant diſſenting miniſter ſhall live, are re- "quired to adminiſter the laſt mentioned declaration to ſuch "miniſter, upon his offering himſelf to make and ſubſcribe "the ſame."—And it is further enacted, "that no proteſtant "diſſenter ſo qualified as aforeſaid, ſhall be proſecuted for "teaching and inſtructing youth, as a tutor or ſchoolmaſter, "in any caſe whatſoever,"—provided always "that this qua- "lification ſhall not intitle ſuch diſſenters to obtain or hold, "the maſterſhip of any college or ſchool of royal founda- "ation, or of any other endowed college or ſchool for the "education of youth, unleſs founded ſince 1 Will. & Mary

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"for the immediate uſe and benefit of proteſtant diſſen-
"ters." (a).

(a) The law ſo far favours diſſenters, as to permit the eſtabliſhment of charities for the ſupport of their miniſters 2 Veſey 273. Burr. 1267. and *they* are exempted by this act § 11. from ſerving upon juries, and upon county, ward, or pariſh offices. And by 19 Geo. 3. c. 44. from ſerving in the militia under 2 Geo. 3. c. 20. The King's bench alſo will grant protection to a proteſtant diſſenting miniſter by mandamus. Burr. 1265. By information alſo for the diſturbance of his congregation. Gib. 304. 1 Mod. 168—And to deſtroy any religious meeting-houſe regiſtered according to the toleration act is felony without clergy. And the hundred made liable to the damages: 1 Geo. 1. ſt. 2. c. 5. L. Ray. 125.——But no marriage can be celebrated, but in ſome church or chapel where banns have uſually been publiſhed; unleſs the parties are Jews or Quakers: 26 Geo. 2. c. 33.—And by Lord Mansfield all the conſequences of the act of toleration ought to be purſued with the greateſt liberality in eaſe of the ſcrupulous conſciences of diſſenters; guarding at the ſame time againſt any prejudice that may ariſe to the reſt of the king's ſubjects from this indulgence and protection. Cowp. 388, 393. 4 Comm. 52.—Reſpecting meeting-houſes in Scotland, *Vide* 10 Anne c. 7. 19 Geo. 2. c. 38. 21 Geo. 2. c. 34.

## CHAPTER THE SEVENTEENTH,

## OF HIGH TREASON.

OF Offences more immediately againſt man; ſome are more immediately againſt the king, others more immediately againſt the ſubject.—Offences more immediately againſt the king are either capital or not capital. The capital offences of this nature are either high treaſon or felonies. Prin. P. L. 118.

*Sect.* 1. And Firſt, Of high treaſon; concerning which, before 25 Edw. 3. c. 2. there was great diverſity of opinions, and many offences were taken to be included in it, beſides thoſe expreſſed in the ſaid ſtatute; as the killing of the king's father, brother or, even of his meſſenger; producing the pope's bull of excommunication, and pleading it in diſabillty; refuſing to accuſe a man in the king's courts, and ſummoning him to appear, and defend himſelf before a foreign prince; and other ſuch like acts tending to diminiſh the royal dignity of the crown. 3 Inſt. 7. B. Trea. 14. 22 Aſſ. 49. 30 Aſſ. 19. Staunf. 2. Prin. P. L. 126. to 130. 1 Hale 76. to 87.

*Sect.* 2. But all treaſons were ſettled by the ſaid ſtatute of 25 Edw. 3. c. 2. which, by 1 Mary, ſeſſ. 1. c. 1. was reinforced, and again made the only ſtandard of treaſon; and all ſtatutes between the ſaid ſtatutes of 25 Edw. 3. and 1 Mary, which made any offences high or petit treaſon, or miſpriſion of treaſon, are abrogated. So that no offence is, at this day, to be eſteemed high treaſon, unleſs it be either declared to be ſuch by the ſaid ſtatute of 25 Edw. 3. or made ſuch by ſome ſtatute ſince the firſt of Mary. Plow. 86. 3 Inſt. 12. 21. 18 Eliz. c. 1.

And therefore I ſhall *conſider, Firſt,* Such offences as are high *treaſon within the ſaid ſtatute of* 25 Edw. 3. or other ſtatutes

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ſtatutes grounded thereon, and explaining the ſame.—Secondly, Such as are made high treaſon by ſubſequent ſtatutes.

1 Hale 87. Sum. 17.

And Firſt, By the ſaid ſtatute of 25 Edw. 3. there are four kinds of high treaſon. *Firſt*, That which immediately concerns the king, his wife, or children. *Secondly*, That which concerns his office in the adminiſtration of juſtice. *Thirdly*, That which concerns his ſeal. *Fourthly*, That which concerns his coin—And theſe three laſt are called interpretative treaſons.

1 H. 4. c. 10. Kely 20. 3 Inſt. 1. 6. 113. 8 Co. 28. Dyer 98. 298. 228. 332. B. Trea. 1, 2, 3. 7. 9. 11. 13. 16. 19. 24. 27. 32. Co. Pla. 360. 3 Co. 2. 10. 4 Co. 57. 7 Co. 33. 13 Co. 54. Sav. 4.

*Sect.* 3. That of the firſt kind is thus declared by the following words of the ſaid ſtatute of 25 Edw. 3. "Whereas "divers opinions have been before this time, in what caſe "treaſon ſhall be ſaid, and in what not, the king, at the re- "queſt of the lords and of the commons, hath made a de- "claration in the manner as hereafter followeth; that is to "ſay,—When a man doth compaſs or imagine the death of "our lord the king.—Or of my lady his queen,—Or of their "eldeſt ſon and heir;—Or if a man do violate the king's "companion,—Or the king's eldeſt daughter unmarried;—"Or the wife of the king's eldeſt ſon and heir;—Or if a "man do levy war againſt our lord the king in his realm,—"Or be adherent to the king's enemies in his realm, giving "them aid and comfort in the realm or elſewhere,—and thereof "be provably attainted of open deed by the people of their "condition."

For the explication of which I ſhall conſider, Firſt, The branch relating to the king and his relations. Secondly, That concerning the levying of war, and adhering to the king's enemies, &c. Thirdly, That concerning an overt act.

As to the branch relating to the king and his relations, I ſhall conſider the following particulars: 1. Who may be guilty? 2. What is the import of the words, "*Compaſs or "imagine the king's death?*" 3. Who is a king within the act? 4. What is the extent of the clauſe concerning the king's relations?

Kellw. 181. &c. 3 Inſt. 4. 8. Calvin's caſe 6. 4 Comm. 29. Sum. 47. Bac. Max. 56. 5 Bac. Ab. 112.

*Sect.* 4. As to the firſt point, *viz.* Who may be guilty? I ſhall take it for granted at this day, That all ſubjects of the age of diſcretion, and of ſane memory, whether they be eccleſiaſtical or temporal, men or women, are included within thoſe general words "When a man doth compaſs, &c."

(*a*) B. Trea. 32. 3 Inſt. 5. 11. Co. Lit. 129. Sum. 10. 15. 1 Hale 96.—100. 5 St. Tr. 23. 6 St. Tr. 87.

*Sect.* 5. Alſo it ſeems clear, that the ſubjects of a foreign prince coming into England, and living under the protection of our king, may, in reſpect of that local ligeance which they owe to him, be guilty of high treaſon (*a*), and indicted that they, *contra dominum regem*, (the words *naturalem dominum ſuum* being omitted) did compaſs, &c. *contra ligeantiæ ſuæ*

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*ſuæ debitum* (*b*). And it is ſaid, that even an ambaſſador committing a treaſon *againſt the king's life*, may be condemned and executed here, and that for other treaſons he ſhall be ſent home.—And it hath been holden, that there is no need of the words *contra ligeantiæ ſuæ debitum* in an indictment for a treaſon, which is made ſuch by ſtatute, and is not a treaſon in its own nature. And that there is no neceſſity for the words *contra ligeum ſupremum dominum ſuum* in any indictment of treaſon.

(*b*) Dyer 145. Hob 271. Salk. 631, 633. Carth. 319. Skin. 360. 425. Foſ. 186. 187. L. Ray, 1. 3 Lev. 396. 4 Mod. 162. 395. 7 Co. 6. 12 Mod. 51. 95. 1 Hale. 59.

*Sect.* 6. But it ſeemeth that aliens, who in an hoſtile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themſelves or in company with Engliſh traitors, cannot be puniſhed as traitors, but ſhall be dealt with by martial law.

B. Trea. 1, 32. 3 Inſt. 11. Con. Daliſ. 32. 7 Co. Rep. 6. 5 Bac, Ab. 112. 5 St. Tr. 23.

*Sect.* 7. It hath been reſolved, That one born a natural ſubject is bound to ſuch an inſeparable allegiance to our king, that howſoever he may endeavour to renounce it, and tranſfer his ſubjection from his natural to a foreign prince, yet if he practiſe what in any other ſubject would amount to high treaſon, he ſhall ſuffer as a traitor.

Dy. 300. 298. Co. Lit. 129. Foſ. 70. 184. 1 Hale 68. 96.

*Sect.* 8. As to the ſecond point, *viz.* the import of the words "Compaſs or imagine the king's death." Since the ſaid ſtatute theſe words have been ſo ſtrictly followed, that where a king has been actually murdered, yet not the killing him, but the compaſſing his death has in the indictment been laid as the treaſon, and the killing as an overt act thereof.

Kely. 8. 1 Hale 107. 119—167. Prin. P. L. 123. Foſ. 193. 196. 3 Inſt. 12.

*Sect.* 9. And ſuch compaſſing the king's death may be manifeſted not only by overt acts of a direct conſpiracy to take away his life, but alſo by ſuch as ſhew ſuch a deſign, as cannot be executed without the apparent peril thereof; as by (*c*) writing letters to a foreign prince, inciting him to invade the realm; or aſſembling men together in order to (*d*) impriſon or (*e*) depoſe the king, or to (*f*) compel him by force to yield to certain demands, or to levy war againſt his (*g*) perſon.

(*c*) Dyer 298. Burr. 646. Sum. 11. 1 St. Tr. 199. 206. 2 Vern. 315. 3 Inſt. 14. 4 St. Tr. 406. 1 Hale 120. (*d*) 3 Inſ. 6. 12. 38. (*e*) Kely 20, 21. 22. Qu. B. Trea. 24. (*f*) 11 Mod. 322. Moor. 621. (*g*) Kely 14, 15. 17. 20. 21, 3 Inſt. 6. 12. 38. Kely 20, 21, 22. Yet this was made a query in B. Trea. 24. 11 Mod. 322. Moor 621. Kely 14, 15. 20, 21.

(1). Every thing wilfully and deliberately deſigned, or attempted to be done, whereby the life of majeſty may be endangered, is an act of compaſſing his death. Foſ. 195. but the guilt commences only when *ſome meaſure* ſhall appear to have been *taken*, to effectuate the guilty purpoſe. Prin. P. L. 121. 1 Hale 119. Kely. 17.

*Sect.* 10. But it is poſſible that it may not be proved by an act, which directly cauſes the king's death; as the glancing of an arrow did that of William Rufus, proving fatal merely through an *unfortunate accident*, and being accompanied *with no unlawful circumſtance*.

3 Inſt. 6. 1 Hale 107.

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Sum. 12. 3 Inſt. 7. 9 Ed. 4. 1. 1 Hale 102. &c. Poſt. 188. 400. 4 Comm. 77.

*Sect.* 11. As to the third point, *viz.* Who is a king within this act? It ſeems agreed, that every king for the time being, in actual poſſeſſion of the crown is a king, within the meaning of this ſtatute. For there is a neceſſity that the realm ſhould have a king, by whom and in whoſe name the laws ſhall be adminiſtered; and the king in poſſeſſion being the only perſon, who either doth or can adminiſter thoſe laws, muſt be the only perſon who has a right to that obedience, which is due to him who adminiſters thoſe laws; and ſince by virtue thereof he ſecures to us the ſafety of our lives, liberties, and properties, and all other advantages of government, he may juſtly claim returns of duty, allegiance, and ſubjection.

1 Hale 61, 102, 103. Sum. 12. Stow, Ann. 418. Fol. 398. 186. 9 Ed. 4. 1. B. Treaſ. 10, 32. 3 Inſt. 7. Dalt. 223.

*Sect.* 12. And this plainly appears even by the prevailing opinions in the time of king Edward the Fourth, in whoſe reign the diſtinction between a king *de jure* and *de facto* ſeems firſt to have begun; and yet it was then laid down as a principle, and taken for granted in the arguments of Bagot's caſe, that a treaſon againſt Henry the Sixth, while he was king in compaſſing his death, was puniſhable afterward Edward the Fourth came to the crown, from which it follows that allegiance was allowed to have been due to Henry the Sixth while he was king, becauſe every indictment of treaſon muſt lay the offence, *contra ligeantiæ debitum.*

9 Ed. 4. 1, 2. B. Judg. 42. C. of Par. 22. Patents 21. Denizen 3. Exempt 4. Judg. 42. F. Aſſ. 29. Deniz. 1. 9 Ed. 4. 1, 2. 11. 9 Ed. 4. 2.

*Sect.* 13. It was alſo ſettled, That all judicial acts, done by Henry the Sixth while he was king, and alſo all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by Edward the Fourth, before he was actually king, was void, even after he came to the crown.

*Sect.* 14. And by the 11 Hen. 7. c. 1. it is declared "That all ſubjects are bound by their allegiance to ſerve their prince and ſovereign lord for the time being, in his wars, for the defence of him and his land againſt every rebellion, power, and might reared againſt him, &c. and that it is againſt all laws, reaſon, and good conſcience, that they ſhould loſe or forfeit any thing for ſo doing;" and it is enacted, "That from thenceforth no perſon that attend on "the king for the time being, and do him true and faithful "allegiance in his wars, within the realm or without, ſhall "for the ſaid deed and true duty of allegiance be convict of "any offence."

Foſter 399. Cuſ. de Normand. 13. Fleta. b. 3. c. 16. ſ. 22.

*Sect.* 15. From hence it clearly follows: Firſt, That every king for the time being has a right to the people's allegiance, becauſe they are bound thereby to defend him in his wars againſt every power whatſoever.

4 Comm. 77. Foſter 188.

*Sect.* 16. Secondly, That one out of poſſeſſion is ſo far from having any right to our allegiance by virtue of any other title, which he may ſet up againſt the king in being, that we are bound by the duty of our allegiance to reſiſt him.

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*Sect.* 17. It is true indeed, that after the reſtoration of king Charles the Second, it was reſolved, that all thoſe who acted againſt, and kept him out of poſſeſſion, in obedience to the powers then in being, were traitors. Foſter 402. Kely. 14.

*Sect.* 18. But it ought to be conſidered, that it was firſt reſolved by the ſame judges, that king Charles the Second was king *de facto* as well as *de jure*, from his father's death; and it is apparent, that no other perſon was in poſſeſſion of any ſovereign power known to our laws. Kely 14, 15. 1 Keb. 315. Foſter 403. 1 Keb. 454. 4 Comm. 77.

*Sect.* 19. However, it is a general unconteſted rule, that upon the death of a king in actual poſſeſſion of the crown, his heir is a king within the act before his coronation. For without a king to execute the laws, juſtice muſt fail; and therefore it is a maxim, that the king never dies. 3 Inſt 7. Sum. 12. 1 Hale 61. 102. Foſ. 188. 189.

*Sect.* 20. A titular king, as the huſband of a queen regnant, ſeems to be within the words, yet it is clearly not within the meaning of this law; and *è converſo*, a queen regnant is not within the ſtrict words, and yet ſhe is undoubtedly within the meaning; for by the words, "Our lord the king," is meant any perſon inveſted with the regal power. 1 Hale 102. 106. 1 Mar. ſt. 3. c. 1. Sum. 12. 3 Inſt. 8. 4 Comm. 76. 77.

*Sect.* 21. By 1 Will. and Mar. ſeſſ. 2. c. 2. ſ. 9. "Every "perſon that ſhall be reconciled to, or hold communion "with, the church of Rome, or profeſs the Popiſh religion, "or marry a Papiſt, ſhall be excluded, and be for ever un- "capable to inherit, poſſeſs, or enjoy the crown of this "realm, &c. And in every ſuch caſe the people of this "realm are abſolved from their allegiance, &c."

*Sect.* 22. As to the fourth point, *viz.* The extent of the clauſe concerning the king's relations, It to be obſerved,—Firſt, That no queen or princeſs dowager is any way within the purview of it. Secondly, That if the companion (by which word is meant the wife) of the king or prince, conſent to an adulterer, ſhe is no leſs guilty of high treaſon than he. Thirdly. That under the words "Their eldeſt ſon and heir," the ſon of a queen regnant is included, and alſo the ſecond ſon after the death of the firſt, and *perhaps* alſo a collateral heir apparent, eſpecially if he be declared ſuch by parliament. (2). Hale 124, &c. Britt c. 22. 3 Inſt. 2. 8. Sum. 12. 4 Comm. 81.

(2) A queen, divorced *a vinculo matrimonii*, is not within this ſtatute, 1 Hale 124; nor is the wife of a king's ſecond ſon, although her iſſue would ſucceed to the throne in preference to the iſſue of the eldeſt daughter; neither doth it ſeem treaſon to violate the eldeſt daughter, that hath been married, ſuch violation not being within the letter, though within the reaſon of the ſtatute Prin. P. L. 124, 125.—The king's eldeſt daughter, if he has no ſon, is neither within the words nor the meaning of "the king's eldeſt ſon," for a ſon may poſſibly be born. It is therefore uſual for the legiſlature to provide for this caſe, 1 Hale 127. And both Coke and Hale are of opinion that a collateral heir apparent is not within the ſtatute until he is ſo declared by parliament 3. Inſt. 9. But a ſecond daughter, the eldeſt being dead, is within the words, "the king's eldeſt "daughter unmarried." *1 Hale 128. Foſter's firſt Diſcourſe.*

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1 Hale 131. 141. 150. 153. Foſter 208.

And now we are come to the Second general branch of this kind of high treaſon, *viz.* That concerning the levying of war, *&c.* and adhering to the king's enemies, &c. In treating whereof I ſhall conſider, Firſt, What acts ſhall be ſaid to amount to a levying of war againſt the king. Secondly, What ſhall be ſaid to be an adherence to the king's enemies.

Foſter 195.

*Sect.* 23. As to the firſt point, it is to be obſerved, that 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 endeavour to reform his government, are ſaid to levy war againſt him; and therefore,

Foſ. 13, 14. 216. 217. 219. 3 Inſt. 16. B. Treaſ. 24. Dalt. c. 89. 1 Hale 49. 139. 146. 296. 168. 169. Moor 621. Sum. 14. 2 And. 5. Kely. 75. 9 St. Tr. 57. 566. Salk. 635.

*Sect.* 24. Thoſe that hold a fort or caſtle againſt the king's forces, or keep together armed numbers of men againſt the king's expreſs command, have been adjudged to levy war againſt him.—But thoſe who join themſelves to rebels, &c. for fear of death, and retire as ſoon as they dare, ſeem to be no way guilty of this offence (3).

(3) The apprehenſion of injury to property either real or perſonal, of whatever extent, or however enormous or impending it may be, will not extenuate the guilt of this offence; for every artful leader of a rebellion might eaſily contrive to furniſh his followers with this excuſe. 8 St. Tr. 56. 4 Comm. 30. 83. The juſt apprehenſion of immediate death, derived from a ſerious force upon the perſon of the offender, and continued in ſuch a manner throughout the period of ſubjection, that the traitor could not attempt an eſcape with probability of ſucceſs, is the true and only circumſtance that will extinguiſh the guilt, and avoid the puniſhment of *conſtrained* treaſon. 9 St. Tr. 566.—And this plea has been very ſtrictly conſtrued; for the officer who commanded at the execution of Charles the Firſt, alledged in vain upon his defence, that he had acted by the command of ſuperiors whoſe power compelled him to obey. 1 Hale 50. Kely 13. And certainly it is not for private individuals, miſguided by ignorance or heated by faction, to determine the proper moment of reſiſtance, Prin. P.L. 131—But whether force or no force; how long that force continued, with every circumſtance tending to ſhew the practicability of an eſcape are facts for the conſideration of a jury. Foſ. 14. 216.

1 Hale 137. 135. 152, 153. Moor 621. C. Car. 583. 589. Pop. 122. 2 And. 4, 5. 3 Inſt. 9. 1 Ven. 250. Sum. 14. Kely. 76. 2 Wilſ. 305. 8 St. Tr. 289. Foſter 209, 210. 211. Dougl. 510.

*Sect.* 25. Thoſe alſo who make an inſurrection in order to redreſs a publick 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 publick 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 reform the law or religion; or to pull down all bawdy-houſes; or to remove all incloſures in general, &c. (4)—But where a number of men

(4) *An attempt by intimidation* and violence to force the repeal of a law, is a levying of war *againſt the king and high* treaſon. Lord Mansfield, Dougl. 570.

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riſe to remove a grievance to their private intereſt, as to pull down a particular incloſure intrenching upon their common, &c. they are only rioters.

*Sect.* 26. 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 high treaſon. But thoſe who are found only to have ſuddenly joined with them in the ſtreets, and to have flung up their hats and hallowed with them, are guilty of no greater offence than a riot at moſt.

1 Hale 136. 138. 1 Sid. 358. 3 And. 66. Pop. 121. 3 Inſt. 9. Sum. 14. Kely. 75. 79. Moor 621. Ld. Raym. 1585. 1 Black. 47.

*Sect.* 27. However it is certain, that a bare conſpiracy to levy ſuch a war cannot amount to treaſon, unleſs it be actually levied. Yet it hath been reſolved, that a conſpiracy (5) to levy war againſt the king's perſon may be alledged as an overt act of compaſſing his death, and that in all caſes, if the treaſon be actually compleated, the conſpirators, &c. are traitors as much as the actors; and (*a*) that there may be a levying of war, where there is no actual fighting.

1 Hale 131. 151. Daliſ. 14, 15. 4 St. Tr. 63, 97. Sum. 13, 14. Dyer 98. Kely. 19, 20. Poſt. ſ. 31. Het. 65. 3 Inſt. 9. 14. (*a*) Salk. 635.

3 Inſt. 11. 1 Hale 165. to 169. Sum. 14. 115. Daliſ. 89, 224. 2 Ven. 31. 315, 316. 5 Bac. Ab. 117. Foſter 342. Prin. P. L. 122. 10 Mod. 322.

(5) By 13 Eliz. and 13 Car. 2. conſpiracies to levy war were declared high treaſon; and ſeveral judgments were given upon thoſe ſtatutes; but they both expired with the reigns they were deſigned to protect. Poſt. 213.

*Sect.* 28. As to the ſecond point, *viz.* what ſhall be ſaid to be an adherence to the king's enemies, &c. this is explained by the words ſubſequent, "Giving aid and comfort to them;" from which it appears, 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, &c. or aſſiſting (*b*) 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. But there is no neceſſity, expreſsly to alledge, that ſuch adherence (*c*) was againſt the king, for it is apparent; (6) yet the ſpecial manner of adherence muſt be ſet forth. And it is ſaid, that the ſuccouring a rebel fled into another realm is not within the ſtatute, becauſe a "rebel is not properly an enemy," and the ſtatute is taken ſtrictly.

(*b*) Salk. 634. Moor 620. Vent. 315. 4 St. Tr. 347, &c. (*c*) 4 St. Tr. 347. 3 Inſt. 12, 13. Salk. 635. 1 Hale 108. 159. Sum. 13. 3 Inſt. 13, 14. B. Treaſ. 24. Foſ. 197. 220. 4 Comm. 82.

(6) Although the ſolemnity of a previous denunciation of war is not always neceſſary or expedient. Bynkerſhoek, p. 1. Yet it is neceſſary to aver, in proceedings on this clauſe of the act, that the perſons adhered to, were the king's enemies, 2 Ventris 316. which fact may be evidenced by its public notoriety. Prin. P. L. 136.—Vide 2 & 3 Ann. 2. 20. ſ. 34.

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Fol. 194. 20. 1 Hale 122. 4. 6 St Tr. 5 St. Tr. 21, 22.

*Sect.* 29. As to the branch relating to an overt act, I shall take it for granted, that some overt act must be alledged in every indictment of high treason, in compassing the death of the king, &c. or levying war, or adhering to the king's enemies; but there hath been some question concerning what shall be said to be such an overt act, as to which I shall consider, —First, What facts amount to such an overt act.—Secondly, Whether any words be sufficient.

10 Mod. 322. 3 Inst. 14. Kely. 20.

*Sect.* 30. As to the first point it seems clearly agreed by all, that conspiring the king's death, and providing weapons to effect it, or sending letters to incite others to procure it, or actually assembling people in order to take the king into their power, and all other such like notorious facts, done in pursuance of a treasonable purpose against the king's person, may be alledged as overt acts to prove the compassing his death.

(a) Kely. 14, 17. (b) Kely. 20 [illegible] 149, [illegible] 228, [illegible] 63. [illegible] 277, [illegible] Kely. 15. 3 St. [illegible] 126. (d) [illegible] nd. 106. (e) 2 Vent. 316. (f) 1 Kel. 22. 3 St. Tr. 977. 3 St. Tr. 228. Prin. P. L. 123.

*Sect.* 31. It has also been adjudged, that the (*a*) levying war against the king's person; or the bare (*b*) consulting to levy such war; or meeting together and (*c*) consulting the means to destroy the king and his government; or (*d*) assembling with others, and procuring them to attempt the king's death; or listing (*e*) men in order to depose the king; or (*f*) printing treasonable positions, as that the king is accountable to the people, and that they ought to take the government into their own hands, &c. or publishing a book to prove that (*g*) the king's government is antichristian and heretical, &c. may be alledged as overt acts to prove the compassing the king's death (7).

Sup. f. 24. (g) 2 Roll. 89, 90. Fol. 346, 11 Mod. 322. 5 Bac. Ab. 117.

(7) Soliciting a prince, in amity with the crown, to invade the realm is an overt act of the *intention* to [illegible] war and may be laid as an overt act of compassing the king's death.—And a correspondence designed to enable the enemy to annoy us or to defend themselves, although intercepted in its first progress, at the post office, is an overt act of both these species of treason. Burrow 646. 10 State Trials Appen. 77. for the treason was compleat on the part of the agent though it had not the effect he intended. Fol. 217, 218. Prin. P. L. 137.

2 Roll 89, C. Car. 125. See the reversal of the attainder of A. Sidney, 1 W. & M. St. c. 7. private acts. 1 Hale 118. 3 St. Tr. 733.

*Sect.* 32. As to the second point, *viz.* Whether any words are sufficient overt acts? It has been holden, That written words in a sermon or other writing may amount to overt acts of compassing the king's death, though the same neither actually were, nor ever were intended to be, preached or published. But this opinion seems to be over severe; for though it be true, that *scribere est agere*, yet surely it cannot with any propriety be said, that to write in such a private manner *est aperte agere*, and it seems rigorous to make that amount to a malicious design against the king, which perhaps

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perhaps was only done by way of amuſement or diverſion (8).

(8) This is Peachum's caſe. The reporter ſays that "many of the judges were of opinion that it was not treaſon;" It therefore weighteth very little; and no great regard hath been paid to it conſtance. Sect. 199. And, if the caſe either be conſidered, in which the conviction of this innocent clergyman was procured, ſtill leſs regard will be paid to it. Vide Bacon's Letters 111, 117. and Hume's Hiſt.

*Sect.* 33. But the great queſtion is, Whether words only ſpoken can amount to an overt act of compaſſing the king's death? Which having been queſtioned by ſome great men, and denied by others, I dare not be peremptory concerning it (9). S. P. C. 2. Kely. 13. 3 Inſt. 5. 14. 140. Sum. 13.

(9) The intentions of the mind cannot be diſcovered but through the medium of ſome plain and unequivocal act; Stamforde therefore inclines to think that a compaſſing "*uttere per parolx*," is not ſuch a ſufficient overt act, from which an inference of the guilty purpoſe ſhould be drawn. S. P. C. 2. Foſter, 202. Lord Coke ſays, *that without an overt act* words may make a man a heretic, but cannot make him a traitor, becauſe they are capable of ſuch an endleſs variety of conſtruction, that few agree in the ſame opinion concerning them. 3 Inſt. 14. 140. Foſter 200. And Lord Hale expreſsly ſays, that bare words are not an overt act of treaſon. 1 Hale 111. 323.

*Sect.* 34. However it ſeems agreed, that words ſpoken only in contempt and diſgrace of the king, and not directly ſhewing any purpoſe to rebel, or any way to hurt his perſon, or diſturb his government, as thoſe which charge him with a perſonal vice, as drunkenneſs, &c. or a perſonal defect, as want of wiſdom or ſteadineſs, &c. ſhall not be ſo far ſtrained as to be made overt acts of compaſſing his death, &c. C. Car. 117. 125. Foſter 200.

*Sect.* 35. Indeed it has been holden, that to affirm that another has a better title than the king is high treaſon, becauſe it tends to draw people from their allegiance, and to create a mutiny, &c. but perhaps this may be queſtioned, becauſe it cannot certainly appear from ſuch words, whether the ſpeaker had a deſign againſt the king's perſon or no? However there can be no doubt, but that ſuch diſcourſes are highly puniſhable, as great miſdemeanors, and tending to raiſe doubts, and diſturb the government. Yelv. 107. 2 Roll. 90. Palm. 426. 1 Black. 37.

*Sect.* 36. All the following words have been adjudged high treaſon, "If king Henry the Eighth will not take back his wife, he ſhall not be king, but ſhall die."—"If the king will arreſt me for high treaſon I will ſtab him."—"If I knew that Perkin Warbeck was the ſon of Edward the Fourth, I would take his part againſt Henry the Seventh." 1 Roll. 175. 14 H. 8. 12. Prin. P. L. 125, 126.

*Sect.* 37. But however the laws may ſtand in relation to ſuch conditional words, or to looſe words ſpoken without relation to any act, yet it ſeems clear that *words joined to an act may explain it*, and that words of perſuaſion to kill the king, or manifeſting an agreement, or conſultation, or directions to Salk. 631. 2 Ven. 315. 4 St. Tr. 30. 31. 95, 172. 1 Hale 115, 116. 1 Roll. 185.

12 Mod. 72. C. Car. 117. 118. 125. 332, 333. 1 Lev. 57. 2 St. Tr. 133. 135. 3 St. Tr. 295. 1001. 1 Keb. 14. 34. *179. 231. Dalt.* 223, 224. 3 Mod. 53. See the precedent cited C. Car. *118. Foſter 202.*

that

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that purpoſe, are ſufficient overt acts of compaſſing his death. And it hath been ſtrongly holden, that any deliberate words, which ſhew a direct purpoſe againſt the king's life, as theſe, "If I meet the king I will kill him," being ſpoken maturely and adviſedly, are ſufficient overt acts of compaſſing or imagining his death. (10)

(10) It is ſaid, Kelynge 13, that in an indictment for "compaſſing the king's death" words may be laid as an overt act of that ſpecies of treaſon, yet Croghan's Caſe, Cro. Car. 339. which he cites as a precedent for this doctrine, is ſaid, by Mr. Juſtice Foſter, 203. by no means to warrant the concluſion, becauſe though the words above mentioned were laid in that indictment, yet it further charged, that the ſpeaker actually came into England for the purpoſe of killing the king. 1 Hale 116.---And it has been laid down on more occaſions than one, ſince the Revolution, that looſe words, not relative to any act or deſign are not overt acts of treaſon. 4 St. Tr. 581. 645. 1 Black. Rep. 37.

Yelv. 107. 197. C. Jac. 276. 406. 413. Hutt. 75. Winch. 124. 1 Bulſt. 148. 3 Bulſt. 225. 1 Roll. 444. Foſter 202, 203, 204.

*Sect.* 38. And ſince the compaſſing or imagining of the king's death is the treaſon, and words be the moſt natural means of expreſſing the imagination of the heart, why ſhould they not be good evidence of it? Beſides, it has been often adjudged, That falſely to charge a man with ſpeaking treaſon is actionable, which could not be, if no words could amount to treaſon, as in the arguments of thoſe caſes it is clearly holden that they may, and not ſo much as made a queſtion.

S. P. C. 2. Sum. 215. Foſ. 205, 207.

*Sect.* 39. Beſides it is certain, that before the 25 Edw. 3. words might amount to treaſon; and it is a general rule, that in doubtful caſes the reaſon of the common law ought to govern the conſtruction of a ſtatute. Alſo there can be no doubt but that he, who by command or perſuaſion induces another to commit treaſon, is himſelf a traitor; (for without queſtion by ſuch means he would be acceſſary to a felony; and it is an uncontroverted rule, that whatever will make a man an acceſſary in felony, will make him a principal in treaſon) and yet he does no act but by words.

5 Inſt. 38. 1 Hale 111. Foſter 201. in notis.

*Sect.* 40. As to Sir Edward Coke's argument from 3 Hen. 7. c. 14. which makes the compaſſing the king's death, or that of any of his council, &c. by the king's ſervants, felony; from whence he infers, that in the judgment of this parliament, the compaſſing the king's death by bare words could not be treaſon before; it may be anſwered, that this argument extends as well to the king's ſervants compaſſing his death by any other act whatever, as to their doing it by bare words; for all are equally within the 3 Hen. 7. and yet none will contend, but that the former hath always been treaſon.

Sum. 13. 1 Hale 1115, 115. 323. 3 Inſt. 14. Foſter 201.

*Sect.* 41. As to the argument, that compaſſing the king's death by bare words cannot amount to treaſon, within 25 Edw. 3. becauſe many late temporary acts of parliament have made it treaſon, which would be needleſs if it were ſo before; it may be anſwered, that the principal end of thoſe ſtatutes was to make it treaſon to charge the king with hereſy

or

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or ſchiſm, or uſurpation, or to affirm that it was lawful to take up arms again him, which the Romaniſts were apt to be guilty of at the beginning of the reformation, and it may be queſtioned whether theſe be overt acts of high treaſon within 25 Edw. 3. Vide 2 Roll. 89. 90.

*Sect.* 42. Indeed it is recited in the preamble of 1 Mary, ſeſſ. 1. c. 1. "That the ſtate of every king conſiſts more aſſuredly in the love of the ſubjects towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preſervation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme puniſhments. And in ſpecial ſuch laws ſo made, whereby not the ignorant but alſo the learned, minding honeſty, are often trapped, yea many times for words only, without other fact or deed done or perpetrated; and thereupon the queen calls to remembrance, that many, as well honourable perſons, as others of good reputation, had then of late, (for words only, without other opinion, fact, or deed) ſuffered ſhameful death, and expreſſes her pleaſure, that the ſeverity of ſuch like extreme dangerous and painful laws ſhall be aboliſhed." And then follows the enacting clauſe, "That from thenceforth none act or offence, "being by act of parliament or ſtatute made treaſon, petit "treaſon, or miſpriſion of treaſon, by words, writing, cy-"phering, deeds, or otherwiſe whatſoever, ſhall be taken, had, "deemed, or adjudged to be high treaſon, petit treaſon, or miſ-"priſion of treaſon but only ſuch as be declared and expreſſed "to be treaſon, petit treaſon, or miſpriſon of treaſon, by 25 Edw. "3. Nor that any pains of death, penalty, or forfeiture, in any "ways enſue to any offender for the doing any treaſon, &c. "other than ſuch as by the ſaid ſtatute of 25 Edw. 3. be or-"dained; any ſtatute ſince the ſaid twenty-fifth year of Edw. "3. or other declaration to the contrary in any wiſe notwith-"ſtanding."

*Sect.* 43. And it muſt be confeſſed, that this ſtatute, *primâ facie*, ſeems very much to favour the opinion, that no words whatſoever can of themſelves amount to overt acts of high treaſon, inaſmuch as one of the principal miſchiefs intended to be redreſſed by it ſeems to be, that men had often ſuffered as traitors for words only; yet the force of this objection will be very much leſſened, if we conſider, that the principal purport of the ſaid ſtatute of 1 Mary ſeems to be, to make the 25 Edw. 3. according to the intention of the makers of it, the only ſtandard of treaſon, and to aboliſh all ſubſequent ſtatutes, which had made many offences treaſon, which were not contained in the ſaid ſtatute of 25 Edw. 3. but no way to extenuate the crimes mentioned in 25 Edw. 3. or to take away the force of any natural expoſition thereof; for the firſt part of the preamble *complains of ſuch laws as* not only in*flicted puniſhments over ſevere for the crimes* intended to be *reſtrained by them, but were alſo penned* in ſuch a manner, Foſter 205. 1 Hale 111. 115. 323.

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as to be often apt to entrap the wiſeſt by bare words. But ſurely this can no way be applicable to 25 Edw. 3. inaſmuch as no puniſhments can be thought extreme for the crimes therein reſtrained, and there can be no danger from that ſtatute of any man's being puniſhed for unwary or innocent words, inaſmuch as there is no colour to ſay, that any words as ſuch, are puniſhed within that ſtatute, but only the moſt wicked imagination of the heart, which may be ſometimes proved by the evidence of words. And it farther appears from the next part of the preamble of the ſaid ſtatute of 1 Mary that it has an eye only to ſuch ſtatutes as are above mentioned, inaſmuch as it complains of perſons having ſuffered ſhameful deaths for words only, without other opinion, fact or deed, which is very applicable to thoſe many ſtatutes in the time of Hen. 8. as 26 Hen. 8. c. 13. and 35 Hen. 8. c. 3. and ſome others, which made bare words high treaſon, many of which were ſo far from purporting a deſign againſt the king's life, that they were ſcarce otherwiſe criminal than as they were prohibited by thoſe ſtatutes. But ſurely this can have no relation to 25 Edw. 3. either in puniſhing a man for ſuch imaginations of the heart as are moſt perverſely wicked, or in ſuffering thoſe imaginations to be proved upon him from his own mouth. Alſo it is farther remarkable, that the enacting clauſe reſtrains only ſuch offences, as are made high treaſon by ſtatutes ſubſequent to 25 Edw. 3. from being adjudged high treaſon by words, writing, cyphering, &c. and ſeems to leave the offences contained in the ſaid ſtatute to the ſame conſtruction which they had before.

2 Shower 411.

3 Inſt. 5. 14. 140. 1 Roll. 106.

*Sect.* 44. As to the authority of Sir Edward Coke in his third Inſtitute, it is of the leſs weight, becauſe he is ſaid to have been ſome time of the contrary opinion.

*Sect.* 45. Neither does it appear to me, That my lord chief juſtice Hale was at all of this opinion; for though in the latter edition of his treatiſe of the Pleas of the Crown, it be ſaid, that compaſſing by bare words is not an overt-act, &c. yet in the firſt edition publiſhed in the year 1678, it is twice ſaid, that it hath been adjudged that words are an overt-act. (11)

Old Bd. 23. 16.

(11) This great queſtion, whether words only ſpoken, can amount to an overt act of compaſſing the king's death, is examined very much at length, and with great perſpicuity by lord Hale in his hiſtory of the Pleas of the Crown from p. 111. to 120. and 312. to 322. and by Mr. juſtice Foſter from p. 196. to 207. in his diſcourſe on high treaſon, both of them concluding, againſt the aſſertions of Kelynge and the doubts of Hawkins, that bare words are not overt acts of treaſon, unleſs "uttered in contemplation of ſome traiterous purpoſe actually on foot, or intended, and *in "proſecution of it.*"

1 Hale 230.

*Sect.* 46. The ſecond kind of high treaſon, concerning the king's office in the adminiſtration of juſtice, is expreſſed in the words following. "If a man ſlay the chancellor, "treaſurer, or the king's juſtices of the one bench or the other, "*juſtices in eyre*, or juſtices of aſſize, and all other juſtices "aſſigned

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" assigned to hear and determine, being in their places during " their offices."

*Sect.* 47. It hath been holden, that this part of the ſtatute ſhall not be extended by equity, to any other high officers of ſtate beſide theſe expreſsly named, nor even to theſe when they are not in actual execution of their offices, nor to any attempt to kill them, nor even to the actual wounding of them, unleſs death enſue. (12)

Sum. 17. 3 Inſt. 18, 58. *Vide* ch. 17. ſ. 8.

[12] Therefore the barons of the exchequer, as ſuch, are not within the protection of this act, 1 Hale 231.—neither do the lord keeper or commiſſioners of the great ſeal ſeem to be within it by virtue of the ſtatutes 5 Eliz. c. 18. and 1 W. & M. c. 21. 4 Comm. 84. *Sed vide* 1 Hale 231.

† But by 7 Anne c. 21. ſ. 8. to ſlay any of the lords of ſeſſion or juſticiary of Scotland, in the exerciſe of their office is high treaſon.

*Sect.* 48. The third kind of high treaſon, relating to the king's ſeal, is ſaid to have been high treaſon at the common law, and is expreſſed in the following words, " And if a " man counterfeit the king's great or privy ſeal."

3 Inſt. 15. S. P. C. 2, 3. 1 Hale 170. 187.

*Sect.* 49. It hath been holden, that theſe words extend to the aiders and conſenters to ſuch counterfeiting, as well as to the actors.

Kely 80. 4 Comm. 83.

*Sect.* 50. But not to an intent or compaſſing to do it, if it be not actually done.

Sum. 18.

*Sect.* 51. Nor to the fixing of the great ſeal to a patent, without a warrant for ſo doing.

Con. Dalt. c. 89.

*Sect.* 52. Nor to the razing of the name of one manor out of a patent, and putting in that of another, nor to any artificial removing of the true writing, and adding matter altogether new: nor, by the better opinion, to the taking off the wax impreſſed with the great ſeal from a true patent, and fixing it to a writing purporting a grant from the king.

Kely. 80. 3 Inſt. 15. 12 Co. 15, 16, 17. 3 Inſt. 15, 16. 2 Keb. 74. B. Treaſ. 3. 17. 48.

*Sect.* 53. Nor to the counterfeiting of the ſign manual, or privy ſignet. But this is made high treaſon by the firſt of Mary, ſt. 2. chapter the ſixth.

1 Roll. 30. 51. 2 Roll. 5[illegible].

† And by 7 Ann. c. 21. ſ. 9. To counterfeit the ſeals uſed and continued in Scotland according to the twenty-fourth article of the union, is high treaſon.

*Sect.* 54. The fourth kind of high treaſon concerning the coin is expreſſed in theſe words, " If a man counterfeits the " king's money, and if a man bring falſe money into this " realm, counterfeit to the money of England, as the money " called luſhburgh, or other like to the ſaid money of Eng- " land, knowing the money to be falſe, to merchandize or " make payment, in deceit of our ſaid lord the king and " his people."

Prin. P. L. 238. 243.

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In treating hereof, I ſhall conſider, Firſt, The branch relating to the counterfeiting of the king's money. Secondly, That concerning the bringing of falſe money into the realm, &c.

In treating of the firſt branch I ſhall ſhew, *Firſt*, What degree of counterfeit money will amount to high treaſon. *Secondly*, What ſhall be ſaid to be the king's money within this act.

1 Hale 213, 214. 229. B. Treaſ. 27. Sum. 19, 20. 127. 3 Inſt. 16. Con. 6 H. 7 13. 3 H. 7. 10. 2 Inſt. 375. 3 Inſt. 17. Brit. f. 10. Fleta. 1. c. 22. Kely 33. Con. Dyer 296. & 213. 1 Hale 233.

*Sect.* 55. As to the point of counterfeiting. It is ſaid, that thoſe who coin money without the king's authority, are guilty of high treaſon within this act, whether they utter it or not; and that thoſe who have the king's authority to coin money, are guilty of high treaſon, if they make it of baſer alloy than they ought; and that thoſe alſo are guilty of the ſame crime, who receive and comfort one who is known by them to be guilty thereof; but that clippers, &c. are not within this ſtatute. (13)

(13) To counterfeit the impreſſion of half a guinea on a piece of gold previouſly hammered, not round, and not paſſable in the condition it then was, is not high treaſon, for the crime is incomplete. 2 Black. 632.

3 H. 7. 10. Sum. 128. B. Treaſ. 19. 1 Hale 214. 373. 375.

*Sect.* 56. But it ſeems, that thoſe, who barely utter falſe money made within the realm, knowing it to be falſe, are neither guilty of high treaſon, nor of a miſpriſion thereof, but only of a high miſpriſion: yet by 8 & 9 Will. 3. c. 26. they are in ſome caſes made guilty of felony, for which ſee the next chapter.

2 Inſt. 577. 3 Inſt. 17. 2 Keb. 36. Dalt. c. 89. 1 Hale 195. 192. 210. to 213.

*Sect.* 57. As to the ſecond point, *viz.* What ſhall be ſaid to be the king's money? It ſeems, That ſuch only as is coined by the king's authority either in gold or ſilver within the realm, and conſequently not braſs farthings, &c. ſhall come under this denomination.

1 Burn 359. 1 Comm. 278. Foſ. 227. 12 Mod. 10. Co. Lit. 107. ch. 18. ſ. 5.

*Sect.* 58. But the miſchiefs intended to be remedied by this ſtatute, having been found by experience not to have been ſufficiently redreſſed by it, as thus reſtrained, the ſame have been farther provided for by ſubſequent ſtatutes.

1 Hale 197. T. Jones 233.

*Sect.* 59. For by 1 Mary, ſeſſ. 2. c. 6. "If any perſon or "perſons falſely forge and counterfeit any ſuch kind of coin of "gold or ſilver, as is not the proper coin of this realm, and is or "ſhall be current within this realm, by the conſent of the "crown, they and their counſellors, procurers, aiders and "abettors ſhall be guilty of high treaſon."

3 Inſt. 17. 1 Hale 376.

*Sect.* 60. And by 14 Eliz. c. 3. "If any perſon or perſons "falſely forge or counterfeit any ſuch kind of coin of gold or "ſilver, as is not the proper coin of this realm, nor permitted "to be current within this realm, they and their procurers,

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" aiders and abettors, ſhall be guilty of miſpriſion of " treaſon."

*Sect.* 61. And it is enacted by 5 Eliz. c. 11. ſ. 2. " That " clipping, waſhing, rounding or filing, for wicked lucre or gain " ſake, of any the proper monies or coins of this realm, or the " dominions thereof,—or of the monies or coins of any other " realm allowed and ſuffered to be current within this realm " or the dominions thereof at this preſent, or that hereafter " at any time ſhall be the lawful monies or coins of this " realm, or of the dominions thereof, or of any other realm, " and by proclamation allowed and ſuffered to be current here " by the crown, or counſelling conſenting and aiding there- " in, ſhall be deemed to be treaſon."

And by the 18 Eliz. c. 1. " If any perſon or perſons ſhall " for wicked or lucre gain ſake, by any art, ways, or means " whatſoever, impair, diminiſh, falſify, ſcale or lighten the " proper monies or coins of this realm, or any the dominions " thereof—or the monies or coins of any other realms allowed " and ſuffered to be current at the time of the offence " committed within England or any the dominions of the " the ſame by the proclamation of the crown, their counſel- " lors, conſenters and aiders ſhall be adjudged offenders in " high treaſon, and loſe and forfeit all their goods and chat- " tels abſolutely, and all their lands, tenements and heredi- " taments during his or their natural lives only: but no " corruption of blood or loſs of dower."

1 Hale 221. 328.

This offence was firſt created treaſon by 3 Hen. 5. c. 6. Prin. P. L. 139.

*Sect.* 62. And by 8 & 9 Will. 3. c. 26. made perpetual by 7 Anne c. 25. " Whoever (other than the perſons employed " in the mint) ſhall knowingly make or mend, or begin or " proceed to make or mend, or aſſiſt in the making or mend- " ing, of any puncheon, counterpuncheon, matrix, ſtamp, " dye, pattern, or mould (14) of ſteel, iron, ſilver or other " metal or metals, or of ſpaud, or fine founders earth, or " ſand, or of any other materials whatſoever, in or upon " which there ſhall be, or be made or impreſſed, or which " will make or impreſs (15) the figure, ſtamp, reſemblance,

Every thing neceſſary to ſhew the defendant had no authority, muſt be negatively averred in an indictment on this ſtatute. Add. P. L. 149. For the form of indictments on this ſtatute, *vide* C. Cir. Com. 167--171.

(14) Hugh Leonard was indicted for having in his poſſeſſion " one mould of lead."—And, as the words " pattern or mould," are omitted in the laſt clauſe of this ſection of the act, it was ſubmitted to the opinion of the judges.—Firſt, whether " a mould" is comprized under the general words " other tool or inſtrument above mentioned." And ſecondly, If it be ſo comprized, whether it ſhould not be deſcribed in the indictment as a " tool or inſtrument," mentioned in the ſtatute.—They were unanimous, Firſt, that this mould was a tool or inſtrument mentioned in the former part of the ſtatute, and therefore comprized under the general words.—And Secondly, that as it is expreſsly mentioned by name in the firſt clauſe, with reſpect to the making or mending, it need not be averred to be a tool or inſtrument ſo mentioned. Black. 809.

(15) So alſo in the ſame caſe, a doubt aroſe whether a mould, having only the reſemblance of the coin inverted, was not an inſtrument which would *make and impreſs* the reſemblance rather than one on which the *reſemblance* was made and impreſſed, (which was the way it was laid in this indictment,) the ſtatute ſeeming to diſtinguiſh between ſuch as will *make or impreſs* the ſimilitude, &c. as a matrix, dye or mould,—and ſuch on which the ſame is *made or impreſſed*, as a puncheon, &c.—A great majority of the judges thought the indictment good, becauſe the *ſtamp* of the coin was *certainly* impreſſed on the mould, but they thought it would have been more accurate had it charged " a mould that would make *and impreſs the ſimilitude*, &c. And in this opinion, ſome who otherwiſe *doubted acquieſced.*—*Black* 822.—But an inſtrument which would make or im*preſs the figure of only part of one ſide of the coin*, is not within the ſtatute. B. R. H. 371.

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" or ſimilitude, of both, or either of the ſides or flats of any " gold or ſilver coin current within this kingdom.—Or ſhall " knowingly make or mend, or begin or proceed to make or " mend, or aſſiſt in the making or mending, of any edger or " edging tool, inſtrument or engine, not of common uſe in any " trade, but contrived for making of money round the edges " with letters, grainings, or other marks or figures, reſem- " bling thoſe on the edges of money coined in his majeſty's " mint—Or any preſs for coinage:—Or any cutting engine " for cutting round blanks, by force of a ſcrew, out of " flatted bars of gold, ſilver, or other metal.—or ſhall knowing- " ly buy or ſell hide or conceal, &c. without lawful authority " or ſufficient excuſe for that purpoſe, knowingly have in " their houſes, cuſtody or poſſeſſion any ſuch puncheon, " counterpuncheon, matrix, ſtamp, dye, edger, cutting in- " ſtrument or other tool or inſtrument before mentioned—— " their counſellors, procurers, aiders and abettors, ſhall be " adjudged guilty of high treaſon—But without corruption of " blood, or loſs of dower."——And by 7 Anne c. 25. ſ. 2. " the proſecution of ſuch as offend againſt this act by making " or mending, or beginning or proceeding to make or mend " any coining tool or inſtrument therein prohibited or by " making of money round the edges with letters or grainings " may be commenced at any time within ſix months."

This is an offence at common law, and puniſhable as a miſdemeanor. B. R. H. 371. Str. 1074.

But an offender attainted upon this ſtatute, ſhall forfeit his lands. Salk. 85.

And by par. 2. " Whoever ſhall knowingly convey or " aſſiſt in conveying out of the mint, any tool or inſtrument " uſed for or about the coining of monies there, or any uſe- " ful part of ſuch tools or inſtruments.—Or whoever (other " than the perſons employed in the mint,) ſhall mark on the " edges any the current coin of this kingdom, or of the di- " miniſhed coin of this kingdom,—or any counterfeit coin " reſembling the coin of this kingdom, with letters or grain- " ings, or other marks or figures like unto thoſe on the edges " of money coined in his majeſty's mint, their counſellors, " procurers, aiders and abettors ſhall ſuffer death as in caſe " of high treaſon."—And by par. 4. " whoever ſhall colour, " gild or caſe over with gold or ſilver, or with any waſh, or " materials producing the colour (16) of gold or ſilver, any coin " reſembling any the current coin of this kingdom.—or any " round blanks of baſe metal, or of coarſe gold, or coarſe ſilver " of a fit ſize and figure to be coined into counterfeit milled mo- " ney reſembling any the gold or ſilver coin of this kingdom.— " Or ſhall gild over any ſilver blanks of a fit ſize and figure, to " be coined into pieces reſembling the current gold coin of " this kingdom, their counſellors, procurers, aiders and abet- " tors ſhall ſuffer death as in high treaſon.

Proſecution to be in three months. ſ. 9.

(16) It has been reſolved upon this clauſe of the ſtatute, that it is immaterial whether the colouring is effected immediately, by ſome external and ſuperficial application, or ariſe latently by *extraction* from the application of *Aqua fortis*, or other chymical power. Rex v. Lacy and *Parker. Of B. 6. Dec.* 1776.

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*Sect.* 63. And by ſ. 5. If any tool, inſtrument or engine uſed or deſigned for coining or counterfeiting gold or ſilver monies, or any part of ſuch tool or engine, ſhall be hid or concealed in any place, or found in the houſe, cuſtody or poſſeſſion of any perſon not then employed in the mint, the ſame may be ſeized and carried forthwith to ſome juſtice of the county or place to be produced in evidence at the trial of the offender; and then defaced and deſtroyed.—And all falſe money which ſhall be ſo produced, ſhall be cut in pieces. Cro. Cir. Com. 171.

*Sect.* 64. † And by 15 Geo. 2. c. 28. it is enacted, "That "if any perſon whatſoever, ſhall waſh, gild, or colour any "of the lawful ſilver coin, called a ſhilling, or a ſixpence, "or any counterfeit (17) or falſe ſhilling or ſixpence, or add to, "or alter the impreſſion, or any part of the impreſſion of ei- "ther ſide of ſuch lawful or counterfeit ſhilling or ſixpence, "with intent to make ſuch ſhilling or ſixpence reſemble or "look like or paſs for a piece of lawful gold coin called a "guinea or a half guinea reſpectively.—Or ſhall file or any "wiſe alter, waſh, or colour any of the braſs monies called half- "pennies or farthings, or add to, or alter the impreſſion, or any "part of the impreſſion of either ſide of a halfpenny or far- "thing, with an intent to make ſuch halfpenny or farthing "reſemble, or look like, or paſs for a lawful ſhilling or ſix- "pence reſpectively. Such offenders, their counſellors, aiders, "abettors and procurers ſhall be guilty of high treaſon." For the rewards given by ſtatute for the apprehending and convicting of felons, *vide* b. 2. c. 12. ſ. 25.—And for diſcoverers who are intitled to pardon. b. 2. c. 37. ſ. 4.

(17) The counterfeit money muſt be like the true money; for the word counterfe't implies reſemblance or likeneſs; and without it, there is very little danger of impoſition or fraud. 1 Hale 184. 215. 5 Bac. Abr. 129.

*Sect.* 65. As to the ſecond branch, concerning the bringing falſe money into the realm, the following particulars are obſervable. First, That the money ſo brought muſt be counterfeited according to the ſimilitude of Engliſh money. But by 1 & 2 Phil. & Mar. c. 11. "It is made high treaſon to bring into "the realm money counterfeited according to the ſimilitude "of foreign coin current here, to the intent to merchandize "therewith." 1 Hal. 225. 228, 229. 317. Sum. 21. S. P. C. 3. Foſter 227.

*Sect.* 66. Secondly, That it muſt be brought by one, who knows it to be falſe.

*Sect.* 67. Thirdly, That it muſt be brought from a foreign nation, and not from Ireland, or other place ſubject to the crown of England, for tho' to ſome purpoſes they be diſtinct from the realm of England, and conſequently money brought from thence may, within the letter of the ſtatute, be ſaid to be brought into the realm, yet inaſmuch as the counterfeiting is puniſhable there by the laws of our king, as much as in England, the bringing money from ſuch places has been conſtrued to be no more within *the act than if* they were actually in *England.* 1 Hale 225, 226. 317. 3 H. 7. 12. S. P. C. 3. 3 Inſt. 18. Sum. 12. B. Treaſ. 10. Dalt. Sh. ſ. 225.

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Sum. 21. 3 Inſt. 18. ch. 18. ſ. 4.

*Sect.* 68. Fourthly, That the bare uttering of ſuch money here, by one who brought it not over, is not within this branch.—But by force of an ancient ſtatute, if falſe money be found in the hands of a ſuſpicious perſon, he may be arreſted till he have found his warrant.

3 Inſt. 18. Sum. 21.

*Sect.* 69. Fifthly, That it is not neceſſary that ſuch falſe money be actually paid away or merchandized withal, for the words are, to merchandize or make payment, &c. which only import an intention to do ſo, and are fully ſatisfied whether the act intended be performed or not. But *quære*, becauſe both Coke and Hale ſeem to hold otherwiſe. However it is clear, that bringing over money counterfeited according to the ſimilitude of foreign coin is treaſon within 1 & 2 Phil. & Mar. c. 11.

*Sect.* 70. Alſo in the ſaid ſtatute of 25 Edw. 3. there is this clauſe, "And becauſe that many other like caſes of treaſon may happen in time to come, which a man cannot think nor declare at this preſent time, it is accorded, that if any other caſe, ſuppoſed treaſon, which is not above ſpecified, doth happen before any juſtices, the juſtices ſhall tarry without any going to judgment of the treaſon, till the cauſe be ſhewed and declared before the king, and his parliament, whether it ought to be judged treaſon or other felony."

1 Hale 308. 3 Inſt. 8. 12 Co. 16.

*Sect.* 71. By virtue of this clauſe, many offences which are not high treaſon within this ſtatute, as the murder of an ambaſſador, &c. were declared by the parliament to be high treaſon. But theſe and all other ſuch like declarations are made void by 1 Mary c. 1. And it ſeems that the parliament have no ſuch power at this day by virtue of the ſaid clauſe, inaſmuch as the ſaid ſtatute of 1 Mary expreſsly enacts, "That no offence ſhall be deemed high treaſon, but only ſuch as is declared and expreſſed to be ſo by 25 Edw. 3." and takes no notice of the ſaid clauſe relating to the parliament.

AND now we are come to offences, which have been made high treaſon ſince the ſaid ſtatute of 1 Mary. And in treating of theſe, we ſhall conſider, Firſt, Offences in upholding or favouring the power of the pope. Secondly, Offences againſt the proteſtant ſucceſſion. Thirdly, Offences of liſting men without the king's licence.

And firſt, Offences in upholding or favouring the power of the pope ſeem reducible to the following heads: *Firſt*, Extolling the pope's power. *Secondly*, Putting in ure popiſh bulls. *Thirdly*, Perverting others, or being perverted to popery. *Fourthly*, Receiving popiſh orders or education in popiſh ſeminaries, and not ſubmitting, &c. *Fifthly*, Refuſing a ſecond tender of the oaths.

Sect.

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*Sect.* 72. And firſt, The offence of extolling the pope's power is made high treaſon by 5 Eliz. c. 1. ſ. 2. 10. by which it is enacted, "That if any perſon within the queen's "dominions, ſhall by writing, cyphering, preaching or teach- "ing, deed or act, adviſedly and wittingly hold or ſtand "with, extol or ſet forth, maintain or defend, the juriſ- "diction of the biſhop of Rome heretofore claimed in this "realm, or by any ſpeech, open deed or act, willingly or "adviſedly attribute any ſuch authority to the ſee of Rome, "he ſhall be guilty of a *præmunire* by the firſt offence, of "high treaſon by the ſecond, but without corruption of blood "or loſs of dower." See 1 Hale 331, 332. Prin. P. L. 144.

*Sect.* 73. It has been holden, That he, who knowing the effect of a book written beyond ſea, brings it over and ſecretly ſells it, and alſo, That he, who by report hearing the contents thereof commends it, and alſo, That he, who knowing its contents ſecretly conveys it to a friend with an intent to pervert him, is in danger of the ſtatute; and it has been reſolved, That he, who having read the book does afterwards in diſcourſing of it, allow it to be good; and alſo, That whoever writes or prints ſuch a book, and after publiſhes it, is clearly guilty: but it is ſaid, That he, who having heard of the contents, barely buys and reads the book, is not within the ſtatute. Dyer 282.

*Sect.* 74. It has alſo been holden, That if one who is convicted and condemned for an offence of this nature, being afterwards demanded by the judges, whether he be ſtill of the ſame opinion? anſwer, that he is, he is guilty of high treaſon, as having adviſedly maintained the pope's power a ſecond time. Two of the judges diſſented from this opinion. Sav. 46.

*Sect.* 75. The ſecond offence of this kind, *viz.* That of putting in ure a popiſh bull, is made high treaſon by 13 Eliz. c. 2. ſ. 2, 3. By which it is enacted, "That if any within "the queen's dominions ſhall put in ure any bull or inſtru- "ment of abſolution or reconciliation obtained from the ſee "of Rome, or ſhall take upon him by colour thereof, to abſolve "or reconcile any perſon, or to grant or promiſe any abſolu- "tion or reconciliation, or ſhall willingly receive any ſuch "abſolution or reconciliation, or ſhall obtain from the ſee "of Rome any bull or writing whatſoever, or publiſh, or "any ways put the ſame in ure, he is guilty of high treaſon. "And by ſ. 4. acceſſaries after the offence incur a *præmu-* "*nire*. And by ſ. 5, 6. Thoſe who within ſix weeks "diſcloſe not an offer of ſuch bulls, &c. to ſome privy coun- "ſellor, &c. are guilty of a miſpriſion of treaſon." Prin. P. L. 144.

*Sect.* 76. The third offence of this kind, *viz.* That of perverting others, or being perverted to popery, is made high treaſon by 23 Eliz. c. 1. ſ. 2. & 3 Jac. 1. c. 4. ſ. 22, 23. by which it is enacted, "That if any one ſhall pretend to have 1 Hale 337, 338. 11 Mod. 56. 114. Rex v. Bolton. Mich. 26 Geo. 3.

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Form of indictment. Cro. Cir. 573.

" power, or ſhall put in practice to withdraw a ſubject from " his natural obedience to the king, or to withdraw them " for that intent, to the Romiſh religion, or to move to pro- " miſe any obedience to any foreign power, or to do any " overt-act to that intent, or to reconcile one to the ſee of " Rome, and if any perſon ſhall by any means be willingly " withdrawn, or promiſe obedience as aforeſaid, he is guilty of " high treaſon."

Cawley 187.

*Sect.* 77. But by 3 Jac. 1. c. 4. " If any perſon who is " reconciled to the ſee of Rome beyond the ſeas, return into " the realm and ſubmit himſelf, &c. and take the oaths " within ſix days after his return, he is excuſed."

The caſe of Campion the Jeſuit and others. Savil 3.

*Sect.* 78. It ſeemeth that the bare pretending to ſuch a power, without any farther act in endeavouring to perſuade perſons from their allegiance, or the bare endeavouring ſo to perſuade them, without any pretence of ſuch a power, is high treaſon within theſe acts.

Hale 336, 337.

*Sect.* 79. The fourth offence of this kind, *viz.* That of receiving popiſh orders or education, &c. is made high treaſon by 27 Eliz. c. 2. ſ. 3. by which it is enacted, " That " if any eccleſiaſtick, born in the queen's dominions, and or- " dained or profeſſed by popiſh authority, ſhall remain in the " queen's dominions, or come from beyond ſea, and not ſub- " mit to ſome biſhop or juſtice of peace within three days, " and take the oaths, &c. he ſhall be guilty of high treaſon."

*Sect.* 80. And by ſ. 15. " If any ſubject, not being an " eccleſiaſtick, ſhall not return from a popiſh ſeminary " within ſix months after a proclamation to that purpoſe in " London, and ſubmit, &c. within two days, he ſhall be " guilty of high treaſon, whenever he ſhall otherwiſe return."

*Sect.* 81. And by ſ. 13. " If any ſubject ſhall know that " any ſuch prieſt is within the realm, and not diſcover him to " ſome juſtice of peace, &c. within twelve days, he ſhall " be fined and impriſoned at the queen's will; and if any " juſtice of peace, &c. to whom ſuch matter ſhall be " diſcovered, ſhall not give information to ſome of the privy " council, &c. within twenty-eight days, he ſhall forfeit two " hundred marks."

Pop. 94.

*Sect.* 82. In the conſtruction of this ſtatute it hath been reſolved, Firſt, That in an indictment grounded on this ſtatute againſt a prieſt remaining here beyond the time limited by the ſtatute, it muſt be alledged, that he was born in the realm, &c. and alſo that he was ordained, &c. by authority challenged or pretended from the ſee of Rome; but that there is no need to ſhew in what place in particular he was born, or whether he were ordained within the realm, or beyond ſea.

Ray. 377.

*Sect.* 83. Secondly, That one in popiſh orders, being in a *ſhip in* order to go to Ireland, and driven by a ſtorm into *England*, and immediately apprehended, is not guilty of high treaſon

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treaſon within this act; for his deſign of going to Ireland was prevented, *& nil efficit conatus, niſi ſequatur effectus*, and he was forced into England by the act of God, and againſt his will; neither can he be ſaid to remain here within the intent of the ſtatute, becauſe he was compelled to it by reaſon of the proſecution.

*Sect.* 84. The fifth offence of this nature, *viz.* that of refuſing a ſecond tender of the oaths, is made high treaſon by 5 Eliz. c. 1. ſ. 11, 12 & 20. by which it is enacted, "That if "any perſon, who ſhall have a charge, cure, or office in the "church, or an office or miniſtry in an eccleſiaſtical court, "or if any perſon who ſhall wilfully refuſe to obſerve the "rites of the church of England, after having been admo- "niſhed by the ordinary, &c. or that ſhall ſay or hear private "maſs, &c. ſhall refuſe a ſecond tender of the oaths, he ſhall "be guilty of high treaſon, but without corruption of "blood."

Vide infra, c. 19. See 1 W. & M. c. 8.

*Sect.* 85. Secondly, offences againſt the proteſtant ſucceſſion made high treaſon are twofold: Firſt, denying the power of the parliament to limit the ſucceſſion of the crown, which is made high treaſon, by 4 Annæ c. 8. ſ. 1, 2. and 6 Annæ c. 7. ſ. 1, 2. whereby it is enacted, "That whoever "ſhall maliciouſly, adviſedly, and directly, by writing or "printing, declare, maintain and affirm, that the pretended "prince of Wales, or any other, hath any right or title to "the crown, otherwiſe than according to 1 Will. & Mary, "ſeſſ. 2. c. 2. or 11 & 12 Will. 3. c. 2. or that the kings "of this realm, by authority of parliament, are not able to "make laws to limit and bind the crown and the deſcent and "government thereof, ſhall be guilty of high treaſon, and "that thoſe that maliciouſly and directly affirm the ſame by "preaching, teaching, or adviſed ſpeaking, ſhall be guilty of "a *præmunire*."

Prin, P. L. 145. See the caſe of John Mathews, convicted and executed upon this ſtatute, 9 St. Tr. 1 c. O B. Oct. Seſſions 1719.

Secondly, Endeavouring maliciouſly, adviſedly, and directly to hinder any perſon, who ſhall be next in ſucceſſion, according to 1 Will. & Mary, and 12 Will. 3. which is made high treaſon by 1 Annæ, c. 17.

*Sect* 86. It is alſo enacted by 13 Will. 3. c. 3. it is recited, "That the ſaid pretended prince of Wales had aſſumed the title of king of Great Britain, in manifeſt violation of the lawful and rightful title to this realm; and that the ſaid traitor may be brought to condign puniſhment," it is ordained, "that he ſtand and be convicted and attainted of "high treaſon."—And it is alſo enacted, "That if any ſub- "jects of the crown of England, ſhall hold any correſpon- "dence whatſoever with the ſaid pretended prince of Wales, "or by 17 Geo. 2. c. 39. *with the ſons of* the ſaid pretender, "*or knowingly with any perſon employed* by him or them,

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" or ſhall remit or pay any money for his or their uſe or ſer-
" vice, ſhall be guilty of high treaſon."

Vide 9 Will. 3. c. 1. 1 Hale 339, 340. and for the offence of enliſting men for the ſervice of any foreign prince vide next chapter ſ. 11.

*Sect.* 87. It is alſo further enacted by 2 & 3 Annæ, c. 20. ſ. 34. " That if any officer or ſoldier ſhall hold correſpondence " with any rebel or enemy, or give them advice or intelli- " gence either by letters, meſſages, ſigns, tokens, or other- " wiſe, or ſhall treat, or enter into any condition with them, " without authority ſo to do, he ſhall be guilty of high " treaſon."

## CHAPTER THE EIGHTEENTH.

## Of FELONIES MORE IMMEDIATELY AGAINST THE KING.

FELONIES more immediately againſt the king are of five kinds:—Firſt, Offences relating to the coin or bullion.—Secondly, Offences againſt the king's council.—Thirdly, The offence of paſſing beyond ſea to ſerve a foreign prince.—Fourthly, Imbezilling the king's armour.—Fifthly, The offence of relieving a popiſh prieſt.

Felonies relating to the coin or bullion (1) are of three kinds: —Firſt, The offence of debaſing it.—Secondly, The offence of unlawfully diminiſhing it.—Thirdly, The offence of endeavouring by extraordinary means to increaſe it.

(1) Bullion is the ore or metal whereof gold is made, and ſignifies with us either gold or ſilver in the maſs. 9 Edw. 3. c. 2. The king by virtue of his prerogative is entitled to all mines from which it is produced. 2 Inſt. 577. Plow. 336. in order to ſupply materials for the coin of the kingdom. 1 Com. 294. This coin muſt be made of ſterling or ſtandard metal, 25 Edw. 3. (Cowp. 279.) It conſiſts at preſent of two carrats of copper, melted with twenty-two carrats of fine gold. And eighteen penny weights of copper, melted with eleven ounces and two penny weights of fine ſilver reſpectively. Ward's Math. 118. 12 Geo. 2. c. 26. Even the king's prerogative Sir Edward Coke thinks, does not extend to the alteration of the ſtandard. 2 Inſt. 577. Hale ſays, it is neither fare nor honourable to debaſe the coin below ſterling, 1 vol. 197. and Blackſtone apprehends that in legimating even foreign coin, the value ſhould be fixed comparatively with our own ſtandard, or the conſent of parliament will be neceſſary, 1 Comm. 278. And the legiſlature appear to have been ever extremely anxious to preſerve the ſtandard of the coin and bullion pure and unadulterated. Vide 13 & 14 Car. 2. c. 31. 8 Will. 3. c. 8. 6 Geo. 1. c. 11. 12 Geo. 2. c. 26. 9 Geo. 3. c. 37. 14 Geo. 3. c. 42. 16 Geo. 3. c. 46. 18 Geo. 3. c. 45. and the references there cited.

4 Com. 98.

3 Inſt. 92, 93.

*Sect.* 1. And firſt, The offence of debaſing the coin or bullion was provided againſt by many ancient ſtatutes, which ſeem to be obſolete at this day; for the importation of ill money was made felony by 17 Edw. 3. n. 15. (which was never printed,) and ſo was the payments of blanks, (which were made of baſe alloy,) by 2 Hen. 6. c. 9. and the coining

or

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or bringing in galley halfpence, ſeſkins or doydekins, by 3 Hen. 5. c. 1. However it is made high treaſon to bring in falſe money, &c. by 25 Edw. 3. and 1 & 2 Ph. & Mar. c. 11.

*Sect.* 2. And it is enacted by 8 & 9 Will. 3. c. 26. ſ. 6. made perpetual by 7 Anne, c. 25. ſ. 3. "That whoever ſhall "blanch copper for ſale, or mix blanched copper with ſilver, "or knowingly buy or ſell, or offer to ſale blanched copper "alone or mixed with ſilver, and ſhall knowingly and fraudu- "lently buy or ſell, or offer to ſale any malleable compoſition or "mixture of metals or minerals which ſhall be heavier than "ſilver, and look, and touch, and wear like ſtandard gold, "but be manifeſtly worſe than ſtandard; or ſhall take, re- "ceive, pay, or put off any counterfeit milled money, or "any milled money whatſoever unlawfully diminiſhed, and "not cut in pieces at or for a lower rate or value than the "ſame by its denomination doth or ſhall import, or was "coined or counterfeited for, ſhall be guilty of felony." 4 Comm. 98. 1 Hale 214.

*Sect.* 3. And by 9 & 10 Will. 3. ſ. 21. "Any perſon to whom "any ſilver money, and by 13 Geo. 3. c. 71. any perſon to whom "any gold money, ſhall be tendered, which ſhall be diminiſhed "otherwiſe than by reaſonable wearing, or which from the ap- "pearance of it, he ſhall ſuſpect to be counterfeited, may cut, "break or deface the ſame; but if the ſame ſhall afterwards "appear to have been lawful money, the perſon who cut, &c. "ſhall take the ſame, at the rate it was coined for; and every "queſtion reſpecting the validity of ſuch coin, ſhall be finally "determined by the chief magiſtrate of the place.—And by "8 & 9 Will. 3. c. 26. ſ. 5. ſuch ſpurious money, produced "in a court of juſtice, ſhall be deſtroyed in open court.

*Sect.* 4. It is alſo further enacted, by 15 Geo. 2. c. 28. ſ. 2. "That whoever ſhall utter or tender in payment any falſe or "counterfeit money knowingly, ſhall ſuffer ſix months impri- "ſonment, and find ſureties for good behaviour for ſix months "more; and on being convicted a ſecond time for the like of- "fence, ſhall ſuffer two years impriſonment and find ſureties, "&c. for two years more; and if the ſame perſon ſhall offend "in like manner a third time, he ſhall ſuffer death without "clergy." It is alſo further enacted by ſ. 3. "That who- "ever ſhall knowingly utter or tender in payment any falſe "or counterfeit money, and ſhall either the ſame day, or "within the ſpace of ten days then next, utter or tender in "payment any more or other falſe or counterfeit money; or "ſhall at the ſame time have in his cuſtody, one or more "pieces of counterfeit money beſides what was ſo uttered or "tendered, ſhall ſuffer one years impriſonment and give ſecuri- "ty, &c. for two years more; and if ſuch perſon ſhall offend "in like manner a ſecond time, he ſhall ſuffer death without "clergy, provided the *proſecution be within* ſix months."— And it *is further enacted by* ſ. 4. "That whoever ſhall make, "*coin, or counterfeit any braſs or copper* money called a "halfpenny 1 Hale 195. 211. 1 Burn. 367.

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" halfpenny or a farthing, their aiders, &c. ſhall ſuffer two years " impriſonment, and find ſurety, &c. for two years more."

*Sect.* 5. And it is further enacted, by 11 Geo. 3. c. 40. " That whoever ſhall make, coin, or counterfeit any of the " copper monies of this realm commonly called an halfpenny " or a farthing, his counſellors, aiders, abettors, and pro- " curers ſhall be adjudged guilty of felony."——And it is further enacted by ſ. 2. " That whoever ſhall buy, ſell, take, " receive, pay, or put off any counterfeit copper money, " not milled down or cut in pieces, at or for a lower rate " or value, than the ſame by its denomination, doth or ſhall " import or was counterfeited for, ſhall be guilty of felony." —And by ſ. 3. " Any one juſtice of the peace, on complaint " upon oath of one witneſs by warrant under his hand may " cauſe the houſes, &c. of ſuſpected counterfeiters to be " ſearched for the tools and implements for coining ſuch " copper monies, in order to produce them in evidence " againſt the offenders as aforeſaid."

O. B. 1784. p. 484.

Poph. 149. Hob. 270.

*Sect.* 6. Secondly, The offence of diminiſhing the coin or bullion of the kingdom has been always thought to be of very ill conſequence, as tending to impoveriſh the nation, and to embarraſs trade, and with an eye to thoſe inconveniences it was made felony by 17 Edw. 3. n 15. (which was never printed) to tranſport ſilver, except plate carried over by great men to ſerve their houſes; alſo the tranſportation thereof was prohibited by many other ſtatutes, as 27 Edw. 3. c. 14. 5 Rich. 2. c. 2. 2 Hen. 4. c. 16. 2 Hen. 6. c. 6. and 3 Hen. 8. c. 1. But this general reſtraint being found by experience to be inconvenient to trade; which by exporting money to one market may bring back ſuch goods, as will more than make up the loſs, from another, it was enacted by 15 Car. 2. c. 7. ſ. 12. " That any perſon might export " any foreign coin or bullion without duty, firſt making an " entry thereof in the cuſtom-houſe."

3 Inſt. 92, 93.

*Sect.* 7. But this licence having been often abuſed by the tranſportation of ſuch ſilver, which having been coined into Engliſh money or wrought into plate, was afterwards melted down into the form of foreign coin or bullion, it was, in order to prevent this miſchief, enacted by 6 & 7 Will. 3. c. 17. ſ. 3. " That none ſhall caſt or make ingots or bars of " ſilver in imitation of Spaniſh under pain of five hundred " pounds." And it is further enacted by the ſaid ſtatute, ſ. 5. " That no perſon ſhall tranſport, or cauſe to be " tranſported, any molten ſilver, but only ſuch as ſhall be " marked or ſtamped at Goldſmith's Hall, &c. nor even " that without a certificate under the hands of one of the " wardens of the Goldſmith's Company, that oath hath been " made by the owner or owners thereof, and likewiſe by " one credible witneſs, that the ſame is lawful ſilver; and " that no part thereof was (before the ſame was molten) the

" amount

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" current coin of this realm, nor clippings thereof, nor plate " wrought within this kingdom, &c."

*Sect.* 8. Alſo it is farther enacted, ſ. 6. " That any officer " of the cuſtom-houſe may ſeize any molten ſilver, which " ſhall be put on board any veſſel, without having ſuch " mark or ſtamp, and alſo ſuch certificate, as is above men- " tioned."

*Sect.* 9. And it is farther enacted, ſ. 7. " That if any " broker, not being a trading goldſmith, or refiner of ſilver, " ſhall buy or ſell any bullion or molten ſilver, he ſhall ſuffer " impriſonment for ſix months without bail."

*Sect.* 10. Alſo it is farther enacted, ſ. 13, 14. " That if " a doubt ſhall ariſe upon bullion ſhipped to be exported, " whether the ſame be Engliſh or foreign, the proof ſhall " lie upon the owner, &c. And that if any perſon ſhall " enter or ſhip any bullion, by the ſaid act allowed to be " exported, other than in the name of the true owner, pro- " prietor or importer, the exporter ſhall forfeit the ſame, or " the full value thereof."

*Sect.* 11. Alſo it is farther enacted by 7 and 8 Will. 3. c. 19. ſ. 6. " That no perſon ſhall ſhip or cauſe to be ſhipped, " any molten ſilver, or bullion whatſoever, unleſs a certifi- " cate be firſt had and obtained from the court of the Lord " Mayor and Aldermen of the city of London, oath having " been made, before the ſaid court, by the owners and two " witneſſes, that the ſame was and is foreign bullion, and " that no part thereof was the coin of this realm or the " clippings thereof, nor plate wrought within the kingdom, " &c. which oath, &c. the ſaid court ſhall (circumſtantially) " certify to the commiſſioners of the cuſtoms, before any " coquet ſhall be granted for ſhipping the ſame; on pain to " the owner of loſs of the goods and forfeiting double the " value. To the captain the ſhip, and 200 l. and if in the " king's ſervice, the loſs of command. To the coquet " officer 200 l. and loſs of office."——

By 20 Geo. 3. c. 18. Gold and ſilver coin may be exported to Ireland.

*Sect.* 12. Thirdly, The endeavours of ſome perſons in making uſe of extraordinary methods for the producing of gold and ſilver, were found by experience to be ſo prejudicial to the publick, both from the laviſh waſte of many valuable materials, and alſo from the ruin of many families, which had been occaſioned by ſuch uſeleſs expences, that it was thought neceſſary to put a check to ſuch practices by ſome ſevere law, and for that purpoſe it was made felony, by 5 Hen. 4. c. 4. " To multiply gold or ſilver, or to uſe the art " or craft of multiplication." And it was holden, That the practiſing to find out the Philoſophers Stone, by which it is imagined that all metals may be made gold, was felony within this ſtatute: but this *reſtraint having* been found to have

1 Hale 644. Dyer 88.

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have no other effect, upon the unaccountable vanity of thoſe who fancied ſuch attempts to be practicable, but only to ſend them beyond ſea, to try their experiments with impunity in other countries, the ſtatute of 5 Hen. 4. was at laſt wholly repealed by 1 Will. & Mary c. 30.

4 Comm. 100. 3 Comm. 332. Ante ch. 17.

*Sect.* 13. As to the ſecond kind of felonies more immediately againſt the king, *viz.* thoſe which are againſt his council, it is enacted by 3 Hen. 7. c. 14. "That if any "ſworn ſervant in the chequer-roll of the king's houſhold, "under the ſtate of a lord, make any confederacy, com- "paſſing, conſpiracy or imagination with any perſon, to "deſtroy or murder the king, or any lord of this realm, or "any other perſon ſworn to the king's council, he ſhall be "guilty of felony."

1 Hale 230. 4 Com. 84.

*Sect.* 14. And it is farther enacted by 9 Annæ, c. 16. "That if any perſon ſhall attempt to kill, aſſault, ſtrike or "wound any privy-counſellor in execution of his office, he "ſhall ſuffer as a felon without clergy."

3 Inſt. 80. Dalt. c. 107. Cawl. 182.

*Sect.* 15. As to the third offence of this kind (*viz.*) That of paſſing beyond ſea to ſerve a foreign prince, it is enacted by 3 Jac. 1. c. 4. ſ. 18, 19, 20, 21. "That every ſubject, "who ſhall go out of the realm to ſerve any foreign prince "or ſtate, or ſhall paſs over the ſeas, and there voluntarily "ſerve any ſuch foreign prince or ſtate, not having before his "going taken the oath of obedience (*a*) ſhall ſuffer as a felon; "and that if any gentleman, or perſon of higher degree, or "any perſon who hath born any office or charge in camp or "army, ſhall go out of the realm to ſerve ſuch foreign prince, "&c. without being bound with two ſureties in a bond, con- "ditioned, that he ſhall not be reconciled to the ſee of Rome, "nor enter into any conſpiracy againſt the king, he ſhall be "a felon."

(*a*) N. B. This oath of obedience is taken away by 1 Will. and Mary, ſeſſ. 1. c. 8. ſ. 2. and the new oaths of allegiance and ſupremacy enjoined in the room thereof. Vide c. 20. ſ. 41.

*Sect.* 16. † And it is enacted by 9 Geo. 2. c. 30. "That "if any ſubject of the crown of Great Britain ſhall within "Great Britain or Ireland, inliſt or enter himſelf, or if "any perſon ſhall procure any ſubject of his majeſty, to "enter or enliſt himſelf, or hire or retain ſuch perſon with "an intent to cauſe him to enliſt or enter himſelf, or pro- "cure any ſubject to go beyond the ſeas, or embark with an "intent, and in order to be enliſted to ſerve any foreign "prince, &c. as a ſoldier, without licence ſo to do under the "ſign manual, (although no enliſting money hath been or "ſhall be actually paid to or received by him, 29 Geo. 2. "c. 17. ſ. 4.) ſuch offender ſhall be guilty of felony without "clergy.—Unleſs within fourteen days he voluntarily diſ- "cover upon oath the perſon by whom he was ſo enliſted, "*inviegled* or enticed as aforeſaid, ſo as he may be apprehend- "ed and convicted."

Sect. 17

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*Sect.* 17. † Alſo it is further enacted by 29 Geo. 2. c. 17. "That if any ſubject of the crown ſhall take or accept of "any military commiſſion or otherwiſe, enter into the mili- "tary ſervice of the French king, as a commiſſioned or non- "commiſſioned officer with ſuch licence as aforeſaid, he ſhall "ſuffer death as a felon without clergy."

And it is alſo enacted, ſ. 5. "That if any ſubject ſhall ac- "cept of commiſſions in the Scotch brigade, in the ſervice of "the States General, &c. he ſhall, within ſix months from "the date of his commiſſion, take and ſubſcribe the oaths of "allegiance and abjuration, and tranſmit a certificate thereof "to the Secretary at War, &c. or on default thereof ſhall for- "feit five hundred pounds, one moiety to the king, the other "to the proſecutor, &c."

Vide alſo 18 Hen. 6. c. 19. 5 Eliz. c. 5. 2 & 3 Edw. 6. c. 2. by which deſertion in time of war is made a capital crime.

And it is further enacted by 1 Geo. 1. c. 47. "That if "any perſon ſhall perſuade a ſoldier to deſert, he ſhall forfeit "the ſum of forty pounds, ſuffer ſix months impriſonment, "and be ſet on the pillory."

For the offence and puniſhment of ſeducing artificers, &c. Vide Index title Artificer.

*Sect.* 18. As to the fourth offence of this kind, *viz.* That of imbezilling the king's armour, it is enacted by 31 Eliz. c. 4. "That if any perſon having the charge or cuſtody of "the king's armour, ordnance, or munition, &c. or of "any victuals provided for the victualling of any ſoldiers or "mariners, &c. ſhall for lucre and gain, or wittingly, ad- "viſedly and of purpoſe to hinder or impeach the king's "ſervice, imbezil, purloin, or convey away any of the ſame "armour, &c. to the value of twenty ſhillings, he ſhall be "judged guilty of felony." But ſuch offender muſt be pro- ſecuted within the year next after the offence done; neither ſhall he forfeit his hereditaments any longer than during his life; nor ſhall his blood be corrupted, or his wife loſe her dower.

4 Comm. 101. 4 Burn 254. 3 Inſt. 78. Cawley 90. The benefit of clergy is taken from this offence and from the offence of ſtealing the king's naval ſtores, to the value of twenty ſhillings, by 22 Car. 2. c. 5. And for the preſervation of the ſtores, and the mode of trial

and puniſhment of peculations under the value of 20 s. Vide 9 & 10 Will. 3. c. 41. 5 Geo. 1. c. 25. 9 Geo. 1. c. 28. 17 Geo. 2. c. 40. ſ. 10. 9 Geo. 3. c. 30. ſ. 15. L. Ray. 1104.

*Sect.* 19. And it is alſo enacted by 12 Geo. 3. c. 24. "That whoever ſhall either within this realm, or in any of "the countries or places thereunto belonging, wilfully and "maliciouſly ſet on fire and burn, or otherwiſe deſtroy, or "ſhall cauſe the ſame to be done, or ſhall aid or aſſiſt in the "ſetting on fire, burning or otherwiſe deſtroying of any of his "majeſty's ſhips or veſſels of war, whether on float or building "in any of his majeſty's dock yards, or building or repairing "by contract in any private yards for the king's uſe.—Or any "of his majeſty's arſenals, magazines, dock yards, rope yards, "victualling offices, or any of the buildings erected therein, or "belonging thereto; or any timber or materials there placed, "for building, repairing, or fitting out of ſhips or veſſels; "—Or any of his *majeſty's military, naval,* or victualling "*ſtores, or other ammunition of war,* or any place or places

"where

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"where an ſuch ſtores or ammunition ſhall be kept or de-
"poſited, ſhall ſuffer death without clergy."

*Sect.* 20. And it is alſo enacted by 22 Geo. 2. c. 33. ſ. 24. "That every perſon in the fleet who ſhall waſte, im-
"bezil, or not carefully preſerve any powder, ſhot, am-
"munition or other ſtores and proviſions, their abettors,
"buyers and receivers, (being perſons ſubject to naval diſ-
"cipline), ſhall ſuffer ſuch puniſhment as by a court martial
"ſhall be found juſt in that behalf."—And by ſ. 25 "Every
"perſon in the fleet who ſhall unlawfully burn or ſet fire to
"any magazine, or ſtore of powder, or ſhip, boat, ketch,
"hoy or veſſel, or tackle, or furniture thereunto belonging,
"not then appertaining to an enemy, pirate or rebel, on con-
"viction by court martial, ſhall ſuffer death."

*Sect.* 21. As to the fifth offence of this kind, *viz.* That of relieving a popiſh prieſt, it is enacted by 27 Eliz. c. 2. ſ. 4. "That whoever ſhall wittingly and willingly receive, re-
"lieve, comfort, aid or maintain any Jeſuit, ſeminary or
"other popiſh prieſt, &c. being at liberty or out of hold,
"knowing him to be ſuch a Jeſuit, &c. ſhall for ſuch offence
"be adjudged a felon without benefit of clergy."

## CHAPTER THE NINETEENTH.

## OF PRÆMUNIRE.

For the hiſtory of Præmunire, ſee 4 Comm. c. 8.

OFFENCES more immediately againſt the king, not capital, come generally under the titles of *præmunire*, miſpriſion, and contempts. In treating of *præmunire* I ſhall conſider,—Firſt, What offences come under this notion.—Secondly, How they are puniſhed.

And firſt, Offences coming under the notion of *præmunire*, ſeem to be reducible to the following general heads; Firſt, Offences againſt the prerogative of the crown. Secondly, Offences againſt the authority of the king and parliament.

Thoſe of the firſt kind ſeem to come under the following particulars; 1. Making uſe of papal bulls. 2. Derogating from the king's common law courts. 3. Appealing to Rome from any of the king's courts. 4. Exerciſing the juriſdiction of a ſuffragan without the appointment of the biſhop of the dioceſe. 5. Refuſing to elect or conſecrate the perſon nominated by the king to a biſhoprick. 6. Maintaining the pope's power. 7. Bringing in *Agnus Dei*. 8. Contributing to the maintenance of a popiſh ſeminary. 9. Refuſing the oaths.

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*Sect.* 1. But inaſmuch as theſe offences depend chiefly upon ſtatutes made for the preſervation of the ſovereignty of the crown from the incroachments of the ſee of Rome, I ſhall, in order to ſhew the reaſonableneſs of theſe laws, take a ſhort view of thoſe uſurpations, which made them neceſſary.

*Sect.* 2. It is the general opinion, that Chriſtianity was firſt planted in this iſland by ſome of the eaſtern church, which is very probable, from the antient Britons obſerving Eaſter always on the fourteenth day of the month, according to the cuſtom of the eaſt. Dav. 83. 88. Seld. Jan. Ang. 27. 4 Comm. c. 8.

*Sect.* 3. But the Saxons being converted about the year 600. by perſons ſent from Rome, and wholly devoted to the intereſt thereof, it cannot be expected that ſuch an opportunity of enlarging the juriſdiction of that ſee ſhould wholly be neglected. Parſons, c. 6. p. 12. to 25. 57 to 60. Barrow 258. to 262. 1 R. Abr. 882. 1 Inſt. 134.

*Sect.* 4. And yet Parſons, in his attempt to anſwer Sir Edward Coke's fifth report concerning the king's eccleſiaſtical authority, is ſcarce able to produce any inſtances of the papal power in this kingdom before the Norman Conqueſt. Indeed he tells us, that four or five perſons were made biſhops by the pope at the firſt converſion, but offers not any example thereof between the year 669 and the conqueſt; and it is certain, that all biſhopricks were then conferred by the king's delivery of a ring and a paſtoral ſtaff. 344. Seld. Ja. Ang. 42, 65.

*Sect.* 5. Neither is he able to produce any inſtance, that looks like an appeal to Rome before the conqueſt, except in the caſe of two biſhops, and he is forced to own, that even one of the biſhops was depoſed by two kings, and could get no relief againſt either of them, notwithſtanding the pope's utmoſt application in his favour. Parſ. c. 6. p. 29, to 32. 50. to 56. Barrow 242. to 258. Seld. Ja Ang. 59. 67, 68.

*Sect.* 6. Nor can he ſhew more than four or five inſtances of exemptions from ordinary juriſdiction, granted or confirmed by popes to religious houſes in thoſe days, which plainly ſhews that this concurrence was not thought neceſſary; and it appears, that our ancient kings, of their own authority, exempted ſome abbeys from epiſcopal juriſdiction; and it hath always been a received rule, even in the times of popery, that the chancellor ſhall viſit a church of the king's foundation, notwithſtanding it be not ſpecially exempted. Parſ. c. 6. p. 37 to 48. 1 H. 7. 25. 21 Ed. 3. 60. 1 Inſt. 144. F. N. B. 42. 27 Ed. 3. 83. 6 H. 7 14. 2 R. Abr. 230, 231.

*Sect.* 7. But the pope, having favoured and ſupported William the Firſt in his invaſion of the kingdom, took that opportunity of enlarging his incroachments, and in this king's reign began to ſend his legates hither; and prevailed at firſt with Henry the Firſt, and afterwards with king John, to give up the donation of biſhopricks; and, in the time of king Stephen gained the prerogative of appeals, and in the time of Henry the Second, exempted all clerks from the ſecular power. Davis 89. Davis 90, 93. 2 Roll. 103. Palm. 25, 26. Seld. Ja. Angl. 67.

*Sect.* 8. Indeed this king *did at firſt ſtrenuouſly* withſtand *theſe innovations, and aboliſhed moſt of them* by the conſtitutions Seld. Epinomis, c. 8. Davis 91.

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tutions of Clarendon: but upon the death of Becket, who, for having violently oppoſed the king, was ſlain by ſome of his ſervants, the pope got ſuch an advantage over the king, that he was never after able effectually to execute thoſe laws.

*Sect.* 9. And not long after this, by a general excommunication of the king and people, for ſeveral years, becauſe they would not ſuffer an archbiſhop to be impoſed upon them, king John was reduced to ſuch ſtraits, that he was obliged to ſurrender his kingdoms to the pope, and to receive them again, to hold of him for the rent of a thouſand marks.

2 Inſt. 584. Davis 95.

*Sect.* 10. And in the following reign of Henry the Third, partly from the profits of our beſt church benefices, which were generally given to Italians, and others reſiding at the court of Rome, and partly from the taxes impoſed by the pope, there went yearly out of the kingdom ſeventy thouſand pounds ſterling.

2 Inſt. 580.

*Sect.* 11. The nation being under this neceſſity was obliged to provide for the prerogative of the prince and the liberties of the people, by many ſtrict laws. And in the reign of Edward the Firſt, religious houſes were prohibited under high penalties, to ſend any thing to their ſuperiors beyond ſeas; and it was declared by parliament, that the pope's taking upon him to diſpoſe of Engliſh benefices to aliens was an incroachment not to be endured; and ſoon after theſe grievances produced thoſe more ſevere laws againſt the above mentioned offences of this nature, the particulars whereof are before ſet forth.

*Sect.* 12. And firſt the offence of making uſe of papal bulls is made a *præmunire* by many ancient as well as later ſtatutes; for it is enacted by 25 Edw. 3. called the ſtatute of proviſors, "That whoever ſhall, by a Papal proviſion, diſ-"turb any patron to preſent to a benefice, &c. ſhall be fined "and impriſoned till he make full renunciation, &c." And it is further enacted by 25 Edw. 3. ſt. 5. c. 22. "That if "any one purchaſe a proviſion of an abbey or priory, he "ſhall be out of the king's protection." And by 38 Edw. 3. & 12 Rich. 2. c. 15 & 13 Rich. 2. ſt. 2. c. 2. "That "whoever ſhall accept a benefice contrary to 25 Edw. 3. "ſhall be baniſhed." And by 13 Rich. 2. ſt. 2. c. 3. "That "whoever ſhall bring a ſentence of excommunication againſt "any perſon, for executing the ſaid ſtatute of 25 Edw. 3. ſhall "ſuffer pain of life and member." And by 16 Rich. 2. c. 5. "That whoever ſhall purchaſe or purſue, or cauſe to be pur-"chaſed or purſued, in the court of Rome or elſewhere, any "tranſlations, proceſſes, ſentences of excommunication, bulls, "inſtruments, or other things, contrary to the tenor of that "ſtatute, which touch the king, againſt him, his crown, "his regality, or his realm, or bring them within this realm, "or receive them, &c. ſhall be out of the king's protection "and their lands and tenements, goods and chattels forfeited

Stat. 6th. Reg. 64. 3 Inſt. 127. 27 Ed. 3. ſ. 1. c. 1. 38 Ed. 3. ſ. 1. c. 4. Stat. 2. c. 1, 2, 3, 4. Seld. in Flet. 10. 4. 3 Rich. 2. c. 3. 7 Rich. 2. c. 12. 12 Rich. 2. c. 15.

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" to the king; and they ſhall be attached by their bodies, " &c." And by 2 Hen. 4. c. 3. " That whoever ſhall " purchaſe from Rome a proviſion of exemption from ordinary " obedience," and by 2 Hen. 4. c. 4. " That whoever " ſhall put in execution bulls purchaſed by thoſe of the order " of Ciſteaux to be diſcharged of tithes, ſhall incur the like " penalty." Alſo offenders of this nature are farther reſtrained by 6 Hen. 4. c. 1. 7 Hen. 4. c. 8. 9 Hen. 4. c. 8. & 3 Hen. 5. c. 4. By which the ſtatutes above mentioned are enforced and explained. And it is farther enacted by 23 Hen. 8. c. 21. ſ. 22. " That whoever ſhall ſue for or execute " any licence, diſpenſation, or faculty, from the ſee of " Rome;" and by 28 Hen. 8. c. 16. (by which all bulls, " briefs, &c. heretofore obtained from Rome, are made void.) " That whoever ſhall uſe, alledge, or plead the ſame in " any court, unleſs they were confirmed by that ſtatute, or " afterwards by the king, ſhall incur the like penaly." Yet it hath been holden, That the alledging of an ancient bull in order to induce another principal matter, whereon to ground a title without claiming any thing from the bull itſelf, is not within this ſtatute. 2 Lev. 251.

*Sect.* 13. By 13 Eliz. c. 2. Thoſe who purchaſe any bull, &c. from Rome, are guilty of high treaſon. But thoſe ancient ſtatutes ſtill continue in force; and it is in the election of the crown to proceed either upon them, or 13 Eliz. Alſo by the ſaid ſtatute of 13 Eliz. " The aiders, comforters, " and maintainers of ſuch offenders after the offence, to the " intent to uphold the ſaid uſurped power, incur a *præmunire*." 1 Hale 643. *Vide ſup.* c. 17. Davis 84.

*Sect.* 14. The ſecond offence of this nature, *viz.* That of derogating from the king's common law courts, is ſaid to have been a high offence at common law, and is made a *præmunire* by many ancient ſtatutes; for by 27 Edw. 3. c. 1. & 38. Edw. 3. of proviſors, " If any ſubject draw any out of " the realm in plea, whereof the cognizance pertains to " king's court, or of things whereof judgments be given in " the king's court, or ſue in any other court, to defeat or " impeach the judgments given in the king's court, he ſhall " be warned to appear, &c. in proper perſon, at a day con- " taining the ſpace of two months; at which, if he appear " not, he and his proctors, &c. ſhall be put out of the " king's protection, his lands and chattels forfeited, his body " impriſoned and ranſomed at the king's will, &c." 2 R. Ab. 176. Raſt. 466. B. 2. c. 48. ſ. 9. 3 Inſt. 125. B. Premu. 3.

*Sect.* 15. And by 16 Rich. 2. c. 5. " Both thoſe who " ſhall purſue or cauſe to be purſued in the court of Rome " or elſewhere any proceſſes or inſtruments, or other things " whatſoever which touch the king, againſt him, his crown, " and regality, or his realm, and alſo thoſe who ſhall bring, " receive, notify, or execute them, and their abettors, &c. " ſhall be put out of the *king's protection*, &c."

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2 Bulſt. 299. 3 Inſt. 125. C. Jac. 336.

*Sect.* 16. In the conſtruction of theſe ſtatutes it was holden, That certain commiſſioners of ſewers for ſummoning one before them who had got a judgment at law, and impriſoning him till he would releaſe it, were guilty of a *præmunire*.

3 Inſt. 123. 4 H. 4. c. 23. 2 Cha. Caſ. 97. D. 201, 301. 1 Lev. 241. Hard. 125. 1 D. Abr. 764. 1 Sid. 463. 1 Mod. 59. 3 Keb. 221.

*Sect.* 17. Alſo there have been formerly many ſtrong opinions, That ſuits in equity to relieve againſt a judgment at law, are within theſe ſtatutes; eſpecially if the end thereof be to controvert the very point determined at law, or to ſeek relief after judgment in a caſe wherein the law may relieve, as againſt exceſſiveneſs of damages, &c. But it ſeems to be generally agreed at this day, That no ſuch ſuit is within the intention of the ſaid ſtatutes.

2 Bulſ. 299. 1 Roll. 190. (c) 3 Inſt. 120, 121, 122. B. Præmun. 5. 12. 16. 31. 15 H. 7. 9. 12 Co. 37. 2 R. Abr. 177. Moor 838. C. Jac. 134.

*Sect.* 18. It hath been ſaid, That ſuits in the admiralty or eccleſiaſtical courts within the realm are within 16 Rich. 2. c. 5. (by force of thoſe words, *or elſewhere*,) if they concern matters, the cognizance whereof belongs to the common law; as where a biſhop deprives an incumbent of a donative, or excomunicates a man for hunting in his parks, &c. or where (*c*) commiſſioners of ſewers impriſon a man for not releaſing a judgment at law.

*Sect.* 19. But it ſeemeth, That a ſuit in thoſe courts for a matter which appears not by the libel itſelf, but only by the defendant's plea, or other matter ſubſequent, to be of temporal cognizance, (as where a plaintiff libels for tithes, and the defendant pleads that they were ſevered from the nine parts, by which they became a lay-fee,) is not within the ſtatute, becauſe it appears not that either the plaintiff or the judge knew that they were ſevered.

*Sect.* 20. The third offence of this nature, *viz.* That of appealing to Rome from any of the king's courts, is made a *præmunire* by 24 Hen. 8. c. 12. and c. 20, 21. and 25 Hen. 8. c. 19. by which it is enacted "That all ſuch appeals as formerly were made to Rome, ſhall from henceforth be made "to the high court of chancery."

*Sect.* 21. The fourth offence of this nature, *viz.* That of exerciſing the juriſdiction of a ſuffragan, without the appointment of the biſhop of the dioceſe, is made a *præmunire* by 26 Hen. 8. c. 14. which ſets forth at large for what towns ſuch ſuffragans may be nominated by the king, and alſo how they may be nominated, conſecrated, and commiſſioned.

*Sect.* 22. The fifth offence of this nature, *viz.* That of refuſing to elect or conſecrate the perſon nominated by the king to a biſhoprick, is made a *præmunire* by 25 Hen. 8. c. 20. ſ. 7. by which it is enacted, "That if any dean and "chapter refuſe to elect the perſon named in the king's letter "for a biſhoprick, and to ſignify ſuch election to the king "within twenty days after the licence ſhall come to their "hands, or if any archbiſhop or biſhop after ſuch election (a

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" nomination by the king in default thereof ſignified unto " them by the king,) ſhall refuſe within twenty days to con- " firm and conſecrate the perſon ſo ſignified to them, they " incur a *præmunire*."

*Sect.* 23. The ſixth offence of this nature, *viz.* That of maintaining the pope's power, is made a *præmunire* upon the firſt conviction, and high treaſon upon the ſecond. 5 Eliz. c. 1.

*Sect.* 24. The ſeventh offence of this nature, *viz.* That of bringing in *Agnus Dei*, is made a *præmunire* by 13 Eliz c. 2. ſ. 7, 8. by which it is enacted. " That if any one ſhall bring " into the realm, &c. any *Agnus Dei*, *croſſes*, pictures, beads, " or ſuch like ſuperſtitious things, pretended to be hallowed " by the biſhop of Rome, &c. and ſhall deliver or offer the " ſame to any ſubject to be worn or uſed in any wiſe; or if " any one ſhall receive the ſame to ſuch intent, and not clear " himſelf by diſcovering the offender, &c. he ſhall incur a " *præmunire*." Cawley 52, 53. Vide 3 Jac. c. 5. ſ. 25. as to the penalty of importing popiſh books. Ante, Ch. 15. ſ. 15.

*Sect.* 25. And ſo ſhall a juſtice of peace in the ſame county, who having any offence in that act declared unto him, ſhall not declare it to a privy counſellor, within ſixteen days. Cawley 54.

*Sect.* 26. The eighth offence of this nature, *viz.* That of contributing to the maintenance of a popiſh ſeminary, is made a *præmunire* by 27 Eliz. c. 2. ſ. 6.

*Sect.* 27. The ninth offence of this nature, *viz.* That of refuſing the oaths, is made a *præmunire* by ſeveral ſtatutes; for by 1 Eliz. c. 1. ſ. 19. it is enacted, " That all eccleſiaſti- " cal perſons, and all eccleſiaſtical and temporal officers, " and all perſons having the king's fees or wages; and by " ſ. 26. That all perſons taking orders, or any degree in any " univerſity within the realm, ſhall take the oath of ſupre- " macy, under pain of loſing their benefices and offices." *N. B.* The 1 Eliz. c. 1. as far as concerns the oaths is repealed by 1 W. & M. c. 8. ſ. 2.

And it is further enacted by 5 Eliz. c. 1. ſ. 5. " That all " the perſons above mentioned who are required by the ſaid " ſtatute of 1 Eliz. c. 1. to take the ſaid oath, and all ſchool- " maſters, publick and private, barriſters, benchers, read- " ers, ancients in any houſe of court, &c. attornies, ſheriffs, " and officers belonging to the common or any other law, " or to the crown, or to any court whatſoever, ſhall take the " ſaid oath in open court, before they ſhall be admitted to " any ſuch vocation or office, &c. And if they belong not to " any court, that then they ſhall take the ſame before ſuch " perſon as ſhall admit them to ſuch vocation, &c. or be- " fore commiſſioners appointed under the great ſeal, &c."—

And it is farther enacted ſ. 6. " That any biſhop " may tender the ſaid oath to *any ſpiritual* perſon within his

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"dioceſe, as well in places exempt as others;" and by ſ. 7. "That commiſſioners may be appointed by the Lord Chancellor to tender the ſame to ſuch perſons as by their commiſſion they ſhall be authorized to tender it unto."

And by ſ. 8. "That if any perſon, compellable by either of the ſaid acts, or appointed by ſuch commiſſioners to take the ſaid oath, ſhall refuſe to take it on a tender thereof, he ſhall incur a *præmunire*."

And by ſ. 9. "That ſuch refuſal ſhall be certified within forty days before the king in his court of King's Bench, by thoſe who have authority to tender the ſaid oath, under the penalty of one hundred pounds; and that the ſheriff of the county wherein the ſaid court ſhall ſit, may impanel a jury, who ſhall inquire of ſuch refuſal, in ſuch manner as if it had happened in the ſame county."

Raym. 212. 1 Ven. 171. 2 Keb. 825.

*Sect.* 28. In the conſtruction of theſe ſtatutes it hath been reſolved: Firſt, That the obligation to take the ſaid oath continued after the death of queen Elizabeth, tho' the ſtatutes ſay nothing of her ſucceſſors; and the like reſolution alſo has been made in relation to the oaths appointed by ſubſequent ſtatutes.

Raym. 445.

*Sect.* 29. Secondly, That in a commiſſion authoriſing perſons to tender the ſaid oath, a general deſcription of the perſons to whom it ſhall be tendered is ſufficient, without naming them particularly by their names.

Dyer 234.

*Sect.* 30. Thirdly, That if the perſon who tendered the oath as biſhop, was not a biſhop at that time, the defendant may give it in evidence upon the general iſſue.

1 Bulſt. 197, 198. 2 Bulſt. 290. 1 Ven. 172, 173.

*Sect.* 31. Fourthly, That the ſaid oath muſt in ſubſtance be taken in the very words expreſſed in the acts, and cannot be qualified with any reſerve whatever: yet it hath been reſolved, That to uſe the words, *In conſcience*, inſtead of, *in my conſcience*, or *ſea* of Rome, inſtead of *ſee* of Rome, makes no material variance.

Raym. 445.

*Sect.* 32. Fifthly, That a certificate of a refuſal of the ſaid oath made to the judges of the ſaid court of the King's Bench by name, and not to the king in his ſaid court, is ſufficient within the meaning of the ſtatute.

Dyer. 234. 363.

*Sect.* 33. Sixthly, That an eccleſiaſtical perſon is well deſcribed in ſuch a certificate by the addition of *legum doctor, & ſacris ordinibus conſtitutus*, without adding *clericus*, &c.

Dyer 234.

*Sect.* 34. Seventhly, That ſuch a certificate being entered of record, as brought into court ſuch a day and year *per* A. B. *Cancellar.* of ſuch a biſhop, is good, without entering that it was ſo brought *per mandatum epiſcopi*.

Dyer 234.

*Sect.* 35. Eighthly, That the trial muſt be by a jury of the county, wherein the oaths were refuſed; for the ſtatute only authoriſes an indictment by a jury of the county, where the court ſits:

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*Sect.* 36. Ninthly, That any miſ-recital of the very words of the oath, in an indictment for not taking it is erroneous. See the books above cited.

*Sect.* 37. By 3 Jac. 1. c. 4. ſ. 13, 14. "Any biſhop, "or two juſtices of peace, whereof one is to be of the quo- "rum, might tender the oath of obedience therein pre- "ſcribed, to any perſon above the age of eighteen years, "being under the degree of nobility, and convicted or in- "dicted of recuſancy, or not having received the ſacrament "twice in the year paſt, and alſo to any ſuſpected ſtranger "who ſhall not purge himſelf upon oath; and ſhall certify "the names of ſuch as take the ſaid oath to the next Quarter- "Seſſions, and commit thoſe who refuſe it till the next Aſſi- "zes or Seſſions, where the ſame ſhall be again tendered; "and if the ſaid perſons, or any other perſons whatſoever of "the age of eighteen years, other than noblemen or noble- "women, ſhall there refuſe to take it, they incur a *præmu- "nire*, unleſs they be femes covert, who ſhall be committed "till they take it." The 3 Jac. 1. c. 4. as far as concerns the oaths, is repealed by 1 W & M. c. 8. ſ. 2. Skin. 11.

*Sect.* 38. By ſ. 41. "The lords of the council in "like manner may tender the ſaid oath to any nobleman or "woman, of the age of eighteen years, who refuſing the "ſame, incur a *præmunire*, femes covert excepted."

*Sect.* 39. By 7 Jac. 1. c. 6. ſ. 2. 26, 27. "All perſons "whatſoever, as well eccleſiaſtical as temporal, of what eſtate, "dignity, pre-eminence, ſex, quality or degree ſoever, he "or ſhe ſhall be, above the age of eighteen years, being in "that act mentioned and intended, ſhall take the ſaid oath; "and any privy counſellor or biſhop, within his dioceſe, "may require any baron or baroneſs, of the age of eighteen "years, and any two juſtices of the peace, whereof one to "be of the quorum, may require any other perſon of that "age to take it.—And if any perſon of or above the ſaid age "and degree ſhall be preſented, &c. for not coming to church, "&c. then three of the privy council, whereof the Lord "Chancellor, &c. to be one, ſhall require ſuch perſon to "take the ſaid oath.—And if any perſon whatſoever, of the "ſaid age and under the ſaid degree, ſhall be preſented, &c. "for not coming to church, &c. or if the miniſter, &c. "ſhall complain to any juſtice of peace, &c. and the "juſtice ſhall find cauſe of ſuſpicion, then any one juſtice of "peace ſhall require ſuch perſon to take the ſaid oath, &c. "And all ſuch perſons refuſing a tender of the ſaid oath, "ſhall be bound over to the Aſſizes or Seſſions, wher, if "they refuſe again, they incur a *præmunire*:" And ſ. 27. "All ſuch refuſers are diſabled to execute any publick place "of judicature, or bear any other office, (being no office of "inheritance or miniſterial function) or to practiſe the "common or civil law, phyſick or ſurgery, or the art of an "apothecary." Vide 16 Geo. 2. c. 30. See Cawley 246, &c.

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12Co. 130, 131. *Sect.* 40. In the conſtruction of theſe ſtatutes it hath been reſolved, That the juſtices of peace, &c. may ſend their warrant to bring ſuch perſons before them, but that they cannot authoriſe the conſtable to break open the doors to take them.

*Sect.* 41. But by 1 William & Mary c. 8. the oaths of ſupremacy and obedience, preſcribed by theſe acts, were abrogated; and the following oath and declaration ſubſtituted in their room.—"I *A. B.* do ſincerely promiſe and ſwear, "That I will be faithful and bear true allegiance to his "majeſty king George."——"I *A. B.* do ſwear, That I "do from my heart abhor, deteſt and abjure, as impious "and heretical, that damnable doctrine and poſition, that "princes excommunicated or deprived by the pope, or any "authority of the ſee of Rome may be depoſed or murdered "by their ſubjects or any other whatſoever." "And I do "declare, that no foreign prince, perſon, prelate, ſtate, or "potentate, hath or ought to have any juriſdiction, power, "ſuperiority, pre-eminence or authority eccleſiaſtical or civil "within this realm."

Vide 1 Geo. 1. c. 13. 6 Geo. 3. c. 53.

Vide ch. 24. *Sect.* 42. And by ſ. 3, 4, 5. "All perſons who are required to take, or authoriſed to tender the ſaid abrogated oaths, or either of them, are in like manner required and authoriſed to take and tender the ſaid oath and declaration, under the ſame penalties, &c."

Vide ch. 24. ſ. 7. 1 Comm. 368. 4 Comm. 115. 116. 123. *Sect.* 43. By 7 Will. 3. c. 24. "Serjeants at law, "counſellors, attornies, ſolicitors, proctors, clerks or no-"taries, practiſing as ſuch in any court whatſoever, without "taking the ſaid oaths and ſubſcribing the ſaid declaration, "incur a *præmunire*."

*Sect.* 44. And now I am in the ſecond place to conſider thoſe offences againſt the authority of king and parliament, which come under the notion of *præmunire*; as to which it is enacted by 6 Ann. c. 7. "That if any perſon ſhall mali-"ciouſly and directly, by preaching, teaching, or adviſed "ſpeaking, declare, maintain and affirm, that the pretended "prince of Wales, hath any right or title to the crown of "theſe realms, or that any other perſon or perſons hath or "have any right or title to the ſame, otherwiſe than accord-"ing to 1 Will. & Mar. c. 2. and 12 Will. 3. c. 2. and the "acts then lately made in England and Scotland, mutually "for the union of the two kingdoms; or that the kings or "queens of this realm, with the authority of parliament, "are not able to make laws to limit the crown and the deſ-"cent, &c. thereof, ſhall incur a *præmunire*.

4 Comm. 117. 1 Bulſt. 199. *Co. Lit.* 129. 3 *Inſt.* 125. 218. *B.* 2. *p.* 444. *Sect.* 45. As to the ſecond general point of this chapter, *viz.* In what manner offences of this nature are puniſhed. It is to be obſerved, That moſt of the ſtatutes of *præmunire* refer the puniſhment to 16 Rich. 2. c. 5. which enacts, that thoſe

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who offend againſt the purport thereof "ſhall be put out of "the king's protection, and their lands and tenements, goods "and chattels forfeited to our lord the king: and that they "be attached by their bodies, if they may be found, and "brought before the king and his council, there to anſwer to "the caſes aforeſaid, or that proceſs be made againſt them "by *præmunire facias*, in manner as is ordained in other ſta-"tutes of proviſors."

*Sect.* 46. Inaſmuch as this ſtatute expreſsly ſaith, that ſuch offenders ſhall be put out of the king's protection, and alſo the ſtatute of 25 Edw. 3. ſ. 5. c. 22. had farther added, "That any one might do with a purchaſer of the proviſions, "therein prohibited, as with the king's enemy, and that he "who ſhould offend againſt ſuch a one in body, lands, or "goods, ſhould be excuſed," it was formerly holden, That a perſon attainted in a *præmunire* might lawfully be ſlain by any one, as being the king's enemy, and out of the protection of the laws; but the latter opinions ſeem to have diſapproved of this ſeverity. However, it is expreſsly enacted by 5 Eliz. c. 1. ſ. 21, 22. "That it ſhall not be lawful to kill any "perſon attainted in *præmunire*, ſaving ſuch pains of death or "other hurt or puniſhment, as heretofore might, with-"out danger of law, be done upon any perſon that ſhall "ſend or bring into the realm, or within the ſame ſhall "execute, any proceſs, &c. from the ſee of Rome."

Co. Lit. 130. 12 Co. 68. 3 Inſt. 128. B. Cor. 197. Jenk. 199.

*Sect.* 47. But howſoever the law may ſtand in relation to ſuch perſons as are within the exception of this act, it is certain that no perſon whatſoever attainted of any *præmunire* can bring an action for any injury whatſoever; and that no one knowing him to be guilty can with ſafety give him aid, comfort or relief.

1 Inſt. 130. 1 Eliz. 1. c. 39. Poſt. 126. Staunf. 44. Plow. 97. 4 Comm. 118. 3 Jac. 333.

*Sect.* 48. But it hath been reſolved, That thoſe general words in the ſtatute 16 Rich. 2. c. 5. That all the lands and tenements ſhall be forfeited, extend not to land entailed, after the death of the offender.

1 Inſt. 130. 3 Inſt. 126. 2 Lev. 169. B. 2. c. 49. ſ. 28. C. Car. 172. Jones. 217.

*Sect.* 49. Alſo it hath been reſolved, That a ſtatute, by appointing that an offender ſhall incur the penalty and danger mentioned in the 16 Rich. 2. c. 5. does not confine the

1. Ven. 173. For the judgment in *præmunire*, ſee b. 2. c. 48. ſ. 9. to 273.

THE following offences alſo have been made ſubject to the penalties of a *præmunire*.

1. To moleſt the poſſeſſors of abbey lands, granted by parliament to Henry the Eighth and Edward the Sixth, 1 & 2. Ph. & Ma. c. 8. ſ. 40.

2. To take more than the rate of 10 l. for the loan of 100 l. for a year, againſt the injunctions of 5 Ed. 6. c. 20. 13 Eliz. c. 8. Noy. 2. Het. 25. Cro. Jac. 253.

3. To procure any action to be delayed, after notice, otherwiſe than by the regular proceſs of the court. 21 Jac. 1. c. 3. ſ. 4.

4. To obſtruct the proceſs of making gunpowder, or to prevent the importation of the ingredients of which it is made, by virtue of a pretended authority from the crown. 16 Car. 1. c. 21. 1 Jac. 2. c. 8.

5. To ſeize the property of another under colour of purveyance, or impreſs any carriage by way of pre-emption. 12 Car. 2. c. 24.

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the profecution for the offence to the particular proceſs thereby given.

6. To aſſert that both or either houſe of parliament have legiſlative authority without the king. 13 Car. 2. c. 1.

7. To ſend any ſubject of this realm a priſoner beyond the ſeas in defiance of the *habeas corpus* act. 31 Car. 2. ſt. 2.

8. To conſpire to avoid the ſeizure or forfeiture upon the importation of cattle as mentioned in the act. 20 Car. 2. c. 7.

9. To treat of any other matter, at the convention for the election of the ſixteen peers of Scotland, ſave the buſineſs of the election. 6 Anne c. 23.

10. To project any ſcheme by public ſubſcription to the prejudice of great numbers in their trade, and ſimilar to the South-Sea project. 6 Geo. 1. ch. 18. ſee Str. 472. L. Ray. 1361.

11. To ſolemnize, aſſiſt, or be preſent at the forbidden marriage of ſuch of the deſcendants of George the Second, as are prevented by the act, from marrying without the conſent of the crown. 12 Geo. 3. c. 11.

## CHAPTER THE TWENTIETH.

## OF MISPRISION or TREASON.

2 R. 3. 10. S. P. C. 37. B. Cor. 174. Treaſ. 25, 31. Skin. 636. 1 Hale 374, 708. 3 Inſt. 36. 4 Comm. 119. Hudſon of the court of Star Chamber M S S. in Muſ. Brit.

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; 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, if the king pleaſe.

Offences of this kind are generally ſaid to be twofold. Firſt, Negative, which conſiſt in the omiſſion of ſomething which ought to be done.—Secondly, Poſitive, which conſiſt in ſome miſdemeanor actually committed.

*Sect.* 2. The negative miſpriſion more immediately againſt the king is commonly called miſpriſion of treaſon, which is an offence conſiſting in the bare knowledge and concealment of high treaſon, (whether it be ſuch by 25 Edw. 3. or ſubſequent ſtatutes) without any degree of aſſent thereto; and this is declared to be a miſpriſion only by 1 & 2 Mar. c. 10. But at law, any delay in diſcovering high treaſon, whatever excuſes the party might have for it, was deemed an aſſent to it, and conſequently high treaſon.

Hale 48. 371. Sum. 127. Braſt. 118. S. P. C. 37. 3 Inſt. 36.

*Sect.* 3. And at this day, if the concealment of high treaſon be accompanied with any circumſtances which ſhew an approbation thereof, it amounts to high treaſon; as if one, having notice before-hand 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 com-

Sum. 127. Kely 17, 21. 4 Comm. 120.

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pany and heard such discourse, meet the same company a second time, and hear such like discourse, and conceal it.

*Sect.* 4. Also whoever receives and comforts a traitor, knowing him to be such, whether by counterfeiting of coin, (*a*) or otherwise, is himself a principal traitor; for such a receipt of a felon makes the receiver an accessary to the felony, and whatever makes an accessary in felony, makes a principal in treason.

3 H. 7. 10. Sum. 127. 3 Inst. 138. 12 Co. 81, 82. Con. Dy. 296. Inf. B. 2. c. 29. (*a*) Qu. 1 Hale 233, 237, 613.

*Sect.* 5. 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 these to a private person, who is no magistrate.

Kely. 22. Sum. 127. S. P. C. 37.

*Sect.* 6. 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.

Kely. 22.

*Sect.* 7. There is one positive misprision which is made misprision of treason, by 13 Eliz. c. 2. by which it is enacted, That those who forge foreign coin, not current here, their aiders, abettors and procurers are guilty of misprision of treason, &c.

1 Hale 376. 4 Com. 121.

## CHAPTER THE TWENTY FIRST.

## Of CONTEMPTS AGAINST THE KING's COURTS.

OTHER positive misprisions more immediately against the king seem reducible to the following heads.—First, Contempts against his palace or courts of justice. Secondly, Contempts against his prerogative. Thirdly, Contempts against his person or government. Fourthly, Contempts against his title.

*Sect.* 1. And first, Contempts against the king's palace, &c. have always been looked upon as very high misprisions, and by the ancient law before the conquest, Fighting in the king's palace was a capital offence; and by 33 Hen. 8. c. 12. s. 7. "Malicious striking in the king's palace, whereby any blood "shall be shed, is punishable with the loss of hand, perpetual "imprisonment, and fine at the king's pleasure."

3 Hen. 7. c. 14. 9 Ann. c. 16. Steirn de jure Goth. l. 3. c. 3. L. L. Alured cap. 7 & 34. 3 Inst. 140. Pop. 206.

*Sect.* 2. It seems questionable from the construction of this whole act, and the general *tenor of the law*-books, whether *striking in a palace, wherein the king* is not at the

See first part of the act. S. P. C. 38. B. Pain 16. Dalt. c. 90.

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6 Mod. 75, 76. 3 Inſt. 140. 4 Com. 125.

time actually reſident, (1) be within the ſtatute; and it is ſaid that the inſtance which is given in the third Inſtitute, of a perſon's hand being cut off for ſtriking in the tower, is not warranted by the record.

(1) The 3 Jac. 2. The Earl of Devonſhire ſtruck Colonel Culpepper in the *room next to the drawing room* at Whitehall; an information was exhibited in the King's Bench for this miſdemeanor; and, the Earl alledged his priviledge, and refuſed to plead. On argument, the objection was over-ruled, and the Earl fined 30000 *l.* and impriſonment till paid. On error being brought, the houſe of Lords determined, 1. That it was a contempt of priviledge. 2. That the fine was exorbitant and repugnant to Magna Charta. 3. That no peer ought to be impriſoned at any time for the non-payment of a fine to the king. 11 State Trials. 133.

L. L. Ina. c. 6. L. L. Canuti. c. 56. L. L. Alured c. 7. 2 Inſt. 549. 3 Inſt. 140. S. P. C. 38. Dalt. c. 90. 41 Aſſ. 25. 22 E. 3. 18. Dyer 188. See B. 2. c. 48. ſ. 11. Daliſ. 23. 2 R. Abr. 76. Sum. 131. 1 Keb. 751. 12 Co. 71. (*a*) Owen 120. C. Eliz. 405.

*Sect.* 3. However it is certain, That by the common law which continues to this day, ſtriking in Weſtminſter Hall, where the king is only preſent, as repreſented by his judges, and by their adminiſtration diſtributing juſtice to his people, is more penal than any ſtriking in another place in his actual preſence; for the latter is not puniſhed with the loſs of hand, unleſs ſome blood be drawn, nor even then with the loſs of lands or goods: but if a perſon draw his ſword on any judge, in the preſence of the court of king's bench, chancery, common pleas, or exchequer, or before the juſtices of aſſize, or oyer and terminer, whether he ſtrike or not; or ſtrike a juror; or any other perſon, with or without a weapon, he ſhall loſe his hand and his goods, and the profits of his lands during life, and ſuffer perpetual impriſonment, (*a*) if the indictment lay the offence as done *coram domino rege.*

1 Lev. 106. 6 Mod. 172. Noy 104 C. Jac. 367.

*Sect.* 4. Neither can one who is guilty of ſuch offence excuſe the ſame by ſhewing that the perſon ſo ſtruck by him gave the firſt aſſault.

22 E. 3. 13. 3 Inſt. 141. Con. Sum. 131.

*Sect.* 5. Alſo he who reſcues a priſoner from any of the courts above mentioned, without ſtriking a blow, ſhall forfeit his goods and the profits of his lands, and ſuffer impriſonment during life, but not loſe his hand, becauſe he did not ſtrike.

C. Eliz. 405. C. Car. 373. W. Jon. 345. Owen 120. 3 Inſt. 142. Moor 819.

*Sect.* 6. And he who makes an affray in the palace-yard near the ſaid courts, but out of their view, ſhall be impriſoned during the king's pleaſure, and ſeverely fined, but not loſe his hand.

*Sect.* 7. And not only thoſe who are guilty of ſuch an actual violence, but alſo thoſe who diſturb ſuch courts by threatening or reproachful words to any judge ſitting in them, are guilty of a high miſpriſion; and in the time of Edward the Firſt, one William de Bruce, who upon hearing judgment given againſt him in the exchequer, ſaid to the chief baron, "*Roger, Roger, Thou haſt had thy will of me, "which of a long time thou haſt ſought, and I will remember "it,*" was for theſe words impriſoned during the king's pleaſure, and ordered to walk from the king's bench to the exchequer, bareheaded and ungirt, and to aſk forgiveneſs, &c. And in the time of Charles the Firſt, one Harriſon,

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riſon, for ruſhing into the court of common pleas, and ſaying to juſtice Hutton ſitting there, "I do accuſe Mr. juſtice "Hutton of high treaſon," was fined five thouſand pounds, and impriſoned during the king's pleaſure, and ordered to go to all the courts of Weſtminſter Hall with a paper on his head, ſhewing his offence, and to make his ſubmiſſion, &c. And theſe caſes are the more remarkable, becauſe in the firſt, the offender was of a very honourable family; and in the ſecond, a bachelor of divinity, and yet condemned to ſuch corporal puniſhment, the loweſt of which is in judgment of law higher than the greateſt fine whatever.

C. Car. 503, 504. Hutt. 131. Pop. 135.

*Sect.* 8. Alſo all who reflect on the juſtice or honour of thoſe high courts ſeem to be indictable and highly finable; as if one charge an exemplification under the great ſeal to be contrary to the original.

Hob. 220. Moor 563. Pop. 135.

*Sect.* 9. Alſo he who gives another the lie in Weſtminſter Hall ſitting the courts, ſhall be bound to his good behaviour.

1 Lev. 107. 1 Keb. 558.

*Sect.* 10. And, he, who makes an affray in the preſence of any of the king's inferior courts of juſtice, is highly finable, but not puniſhable with loſs of hand, &c.

3 Inſt. 141. 12 Co. 71.

*Sect.* 11. And he who ſpeaks contemptuous and reproachful words to the judge of ſuch a court in execution of his office is immediately fineable by ſuch judge, (*a*) or, as ſome ſay, may be (*b*) indicted, &c. as if one give the lie to a judge of a court-leet in the face of the court, (*c*) or being (*d*) admoniſhed by him to pull of his hat, ſay, "I do not "value what you can do," or tell him in the face of the court that he is (*e*) forſworn, or call him (*f*) fool, &c. or ſay, "If I cannot have juſtice here, I will have it elſe-"where." (*g*)

(*a*) C. Eliz. 78. 2 R. Abr. 78. (*b*) 1 Sid. 144. con. 2. R. Abr. 78. (*c*) Owen 113. Moor 470. C. Eliz. 581. (*d*) Raym. 68. 1 Keb. 451, 465. (*e*) 2 R. Abr. 78. (*f*) C. Eliz. 78. Moor 247. (*g*) 1 Sid. 144. 1 Keb. 508

*Sect.* 12. And it was formerly holden that a man might be indicted for a ſlander of the juſtice of the nation, by reflecting on a ſentence given in any court eccleſiaſtical or temporal, whether directly, as where one ſaid that ſuch a ſentence given by the high commiſſion court, was againſt law; or obliquely, as where one ſaid that ſuch a ſentence was juſt, but that the teſtimonies on which it was founded were falſe, or the affidavits equivocating.

2 R. Abr. 78. 1 Roll. 245.

*Sect.* 13. But it ſeems the better opinion of this day, That a man cannot be indicted for any ſcandalous or contemptuous words ſpoken of or to ſuch officers, not being in the actual execution of their office; for ſuch an offence ſeems rather to proceed from ill breeding than a contempt of the government; and though it may be a cauſe to bind a man to his good behaviour, yet it does not ſeem to be of ſuch conſequence as to be a ſufficient ground for a publick proſecution, as for *an offence againſt the* common peace, &c.

Hob. 202. Moor 819.

2 Ven. 10.

And

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And agreeable hereto it hath been reſolved, That a man ſhall not be indicted for ſaying, "That whenever a burgeſs of ſuch a town puts on his gown, Satan enters into him;" (*i*)—or, That "the mayor and aldermen of ſuch a town are as great villains as any that rob on the highway;" (*k*)—or, That, "the juſtices of peace underſtand no more of the ſtatutes of exciſe than this Jug, nor one of twenty of the parliament-men who made them," (*l*)—or, That, ſuch a juſtice of peace is a fool, an aſs, and a coxcomb, for making ſuch a warrant, and underſtands no more law than a ſlickhill," (*m*)—or, That "he is not fit to be a juſtice of peace; for that he will do right or wrong, according as his affections lead him," (*n*)—or That "ſuch an order is a numſcul order, and that the juſtice deſerves to be hanged who made it;" (*o*)—or That, "ſuch a juſtice of peace is a forſworn wretch, and that he will fling his purſe at him;" (*p*)—or for ſaying to a mayor of a town, "You Mr. Mayor, I do not care a fart for you; You Mr. Mayor, are a rogue and a raſcal," (*q*)—or for ſaying, That, "The juſtices of peace have nothing to do with the exciſe." (*r*)

(*i*) 1 Mod. 35. 2 Keb. 594.
(*k*) 5 Mod. 203.
(*l*) 2 Keb. 494. 5 Mod. 204. 2 Ven. 16.
(*m*) Q. v. Wrightſon, Salk. 698.
(*n*) Q. v. Soley, Salk. 698.
(*o*) Q. v. Legaſley.
(*p*) Q. v. Broxham.
(*q*) 6 Mod. 124. Salk. 697.
(*r*) 1 Ven. 10.

*Sect.* 14. And not only thoſe who diſturb the adminiſtration of juſtice by direct contempts offered to the king's courts, but alſo all ſuch as are guilty of any injurious treatment of thoſe perſons who are under the more immediate protection of thoſe courts are highly puniſhable by fine and impriſonment; as if a man aſſault or threaten his adverſary for ſuing him, or a counſellor or attorney for being employed againſt him, or a juror for giving a verdict againſt him, or a gaoler for keeping a priſoner in ſafe cuſtody.

3 Inſt. 142. Sum. 131. Latch. 220. Barr. 112.
2 R. Abr. 76.

*Sect.* 15. Alſo all who endeavour to ſtifle the truth, and prevent the due execution of juſtice, are highly puniſhable, as thoſe who being examined before the privy council concerning their knowledge of a crime, whereof a third perſon is accuſed, diſcloſe what paſſed in ſuch examination, in order to ſuppreſs a farther diſcovery; and alſo all thoſe who diſſuade, or but endeavour to diſſuade a witneſs from giving evidence againſt a perſon indicted, &c. or who adviſe a priſoner to ſtand mute on his arraignment, &c. And it was anciently holden, that if one of the grand inqueſt diſcover to any perſons indicted, the evidence againſt them, he is an acceſſary to the offence, whether treaſon or felony; and at this day it is agreed, that he is guilty of a high miſpriſion, puniſhable by fine and impriſonment.

Hob. 271.
Raym. 376. Tr. per Pa. 164. Sum. 131. 2 R. Abr. 177. S. P. C. 11. 36. 27 Aſſ. 63. B. Cor. 113. Sum. 131. 3 Inſt. 22. 106. 3 Leon. 207.

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# CHAPTER THE TWENTY SECOND.

## Of CONTEMPTS against the KING's PREROGATIVE.

CONTEMPTS againſt the King's prerogative are of ſo various a nature, that they cannot well be reduced to any certain heads. However, the principal of them ſeem to come under the following particulars: Firſt, Refuſing to aſſiſt the king for the good of the publick. Secondly, Preferring the intereſts of a foreign prince to that of our own. Thirdly, Diſobeying the king's lawful commands or prohibitions. 4 Comm. 125, 126.

*Sect.* 2. Firſt therefore, it is a high offence for any ſubject to deny the king that aſſiſtance for the good of the publick, either in his councils or wars, which by the law he is bound to give him; as for a peer not to (*a*) come to the parliament at the day of ſummons, or to (*b*) depart from thence without the king's licence; or for a (*c*) privy councillor to refuſe to give his advice on an affair of ſtate; or for any (*d*) private ſubject to refuſe to ſerve the king in perſon, if he be able, or to find another, if he be not able, in the defence of the realm, againſt rebels and foreign invaders; or, as ſome ſay, to refuſe to ſerve the king for pay in his wars abroad.

(*a*) Moor 778. Nov 102. (*b*) S. P. C. 38. F. Cor. 161. (*c*) 2 R. Abr. 211. (*d*) 2 R. Abr. 165. B. Tenure 44, 73. 1 Ed. 3. c. 5. 18 Ed. 3. c. 7. 25 Ed. 3. c. 8. 4 H. 4. c. 13. 11 H. 7. c. 1, & 18. C. Car. 11.

153. 257. Crom. Jur. 83. 84. 3 Inſt. 144. Hob. 235. 12 Co. 94. Ante c. 18. ſ. 12.

*Sect.* 3. Secondly, It is ſo high an offence to prefer the intereſt of a foreign prince to that of our own, that it is criminal to do any thing which may but incline a man ſo to do; as to receive a penſion from a foreign prince without the leave of our king.

Vide ante. Ch. 18. ſ. 10.

*Sect.* 4. Thirdly, It is alſo a high crime to diſobey the king's lawful commands or prohibitions; as by obſtinately refuſing obedience to his writs; or contemning a ſummons from his council to appear before them; or not anſwering ſuch queſtions in relation to a matter wherein the intereſt of the ſtate is concerned, as ſhall be propoſed by the privy council; or refuſing to give evidence to a grand jury concerning a crime (for which (*e*) the court may impoſe an immediate fine); or not returning from beyond ſea upon the king's letters to that purpoſe; for which the offender's lands ſhall be ſeized till he return, (and when he does return he ſhall be fined) or aſſembling at a turnament *againſt the king's expreſs prohibition; or going beyond ſea againſt the king's will* expreſsly

(*e*) Salk. 278. Dyer 176. 128. Moor 109. 779. Lane 43. 3 Inſt. 179. Sav. 7, 8. 2 R. Abr. 208. F. N. B. 85. 1 Cha. Ca. 116. 3 Inſt. 178. 4 Comm. 122. 1 Comm. 266.

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preſsly ſignified, either by the writ, *ne exeat regnum*, (which may be directed as well to a layman as to a clergyman, and on the ſuggeſtion of a private as well as of a publick matter) or under the great or privy ſeal or ſignet, or by proclamation.

C. Eliz. 655. B. 2. c. 26. ſ. 2.

*Sect.* 5. Alſo every contempt of a ſtatute is indictable, if no other puniſhment be limited.

TO the foregoing contempts againſt the king's prerogative may be added neglecting to join the *poſſe comitatus*, or power of the county, being thereunto required by the ſheriff or juſtices according to the ſtatute, 2 Hen. 5. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. 4 Comm. 124. Lamb. Eir. 315.

## CHAPTER THE TWENTY THIRD.

## OF CONTEMPTS AGAINST THE KING'S PERSON OR GOVERNMENT.

4 Comm. 123.

ALL contempts againſt the king's perſon or government are very highly criminal, and puniſhable with fine and impriſonment, and ſometimes with the pillory, by the diſcretion of the judges, upon conſideration of all the circumſtances of the caſe. But inaſmuch as it is generally obvious to common ſenſe, in what caſes and to what degree a man is guilty of this offence, and it would be endleſs to enumerate all the particulars, I ſhall content myſelf with glancing at ſome of the moſt general heads; as,

C. Car. 168. 2 Keb. 336.

*Sect.* 1. The charging the government with oppreſſion or weak adminiſtration; as by ſaying, That "merchants are "ſcrewed up here in England more than in Turkey;" or, That "it is a good world when beggarly prieſts are made "lords, &c."

3 Mod. 52. 5 Mod. 363.

*Sect.* 2. The doing an act which impliedly encourages rebellion; as by abſolving perſons at the gallows, who being condemned for high treaſon, ſhew no ſign of repentance, but perſiſt in juſtifying the fact; or by drinking to the pious memory of a perſon executed for high treaſon.

C. Jac. 37. Moor 756. Noy 101.

*Sect.* 3. Endeavouring to frighten the king into a change of his meaſures with threats of the uneaſineſs of his ſubjects; as by ſubſcribing a petition to him, in which it is intimated, that if it be denied, many thouſands will be diſcontented, &c.

C. Jac. 38. Vide the caſe of Alexander Scott, for publiſhing falſe news. O. B. June Seſſions, 1778. No. 504.

*Sect.* 4. Spreading falſe rumours concerning the king's intentions; as that he deſigns to grant a toleration to papiſts, &c.

Noy 105.

*Sect.* 5. Charging him with a breach of his coronation oath.

Sect. 6.

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*Sect.* 6. Speaking contemptuouſly of him; as by curſing him, &c. or giving out that he wants wiſdom, valour or ſteadineſs; or in general, doing any thing which may leſſen him in the eſteem of his ſubjects, and weaken his government, or raiſe jealouſies between him and his people. C. Car. 117, &c.

*Sect.* 7. Alſo it is ſaid to be an offence, for which a man may be indicted, to refuſe in a foreign port to pay the uſual cuſtoms, becauſe it may cauſe a breach between our king and the king of the country. 1 Sid. 143. For other contempts againſt the King's Perſon and Government. Vide Skin. 633. 1 Black. 37.

## CHAPTER THE TWENTY FOURTH.

## OF CONTEMPTS AGAINST THE KING'S TITLE.

CONTEMPTS againſt the king's title are of two kinds,—Firſt, Denying his title.—Secondly, Refuſing to take the oaths required by law for the ſupport of his government.

*Sect.* 1. The firſt offence of this kind, *viz.* That of denying the king's title, hath by ſome been carried ſo high as to be adjudged an overt act of compaſſing his death. However, it is certainly moſt highly criminal, and puniſhable with fine and impriſonment, and alſo ſuch infamous corporal puniſhment, as to the diſcretion of the court ſhall ſeem proper, according to the heinouſneſs of the crime and the circumſtances of the parties. As if a man in writing or diſcourſe ſhall maintain that the king is an uſurper; or that another hath a better title to the crown, *&c.* For ſuch like inſinuations manifeſtly tend to raiſe tumults and diſorders in the ſtate, and to alienate the affections of the people from the prince, and incline them to favour the pretenſions of another; and it is highly preſumptuous for private perſons to intermeddle with matters of ſo high a nature; and it will be impoſſible to preſerve the peace of a government, unleſs ſubjects will quietly ſubmit themſelves to thoſe whom Providence had placed over them, and prefer the publick good to their own private inclinations and opinions. For otherwiſe, whenever the title to the crown ſhall happen to be conteſted, it will be impoſſible to end the difference without perpetual civil broils and diſſenſions, and the prince who prevails will be tempted to eſteem thoſe of the contrary party rather as enemies than ſubjects, if he finds them ready and deſirous to lay hold of all opportunities to diſturb his government, and ſhake off their *forced obedience*. And ſince there is no tribunal but Yelv. 107. 197. 2 Roll. 90. Palm. 424. 4 Comm. 123, 124.

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but that of heaven, to which princes can appeal for the deciſion of their titles, when that ſeems ſo far to have declared in favour of one as to give him quiet poſſeſſion of the throne, the publick peace, which is the end of all government, requires a dutiful ſubmiſſion to him; and it is the higheſt madneſs to give up that eaſe and ſecurity which we may enjoy from a peaceful obedience, in exchange for that diſorder, uncertainty, and bloodſhed, which cannot but be expected from an attempt to wreſt the ſceptre out of the hands of our prince; and it is the higheſt ingratitude to make no other return but diſloyalty and rebellion, for all the happineſs we can enjoy under a juſt adminiſtration; and it is the greateſt of abſurdities to think that the good of the community, for the ſake of which all government was inſtituted, ought not to be preferred before the diſputed title of a particular perſon or family. All we can deſire from government, is the ſecure enjoyment of what we may call our own, and whether this or that competitor to the crown be the inſtrument of this happineſs to us, ſeems little to concern us. Let the title of one out of poſſeſſion of the throne be never ſo plauſible, it muſt have its original foundation from ſome poſitive law; which, when it cannot take effect without involving a nation in diſcord and confuſion, the avoiding whereof is the very end of all laws, it muſt give way to the publick neceſſity of the ſtate; for there can be no human inſtitution whatſoever, but muſt be limited by this implicit reſerve from the firſt principles of reaſon, that wherever the execution of it ſhall be abſolutely inconſiſtent with the happineſs of the people for whoſe ſake it was ordained, it ought ſo far to be ſuſpended.

*Sect.* 2. For this and many other ſuch like reaſons, the law has always had a moſt tender regard for the ſecurity of the prince in poſſeſſion of the crown, and as it has made it high treaſon to compaſs his death, &c. as appears from chapter 17. ſection 11, &c. ſo hath it alſo made it highly penal in any inferior degree to diſturb or diſquiet his government.

4 Comm. 123.

As to the ſecond kind of offences of this nature, *viz.* That of refuſing to take the oaths required by law for the ſupport of the king's government; I ſhall conſider,—Firſt, The offence of refuſing the oaths required for this purpoſe by the common law.—Secondly, The offence of refuſing the oaths required by ſtatute.

*Sect.* 3. As to the firſt particular, it ſeems to be a high contempt at the common law to refuſe to take the oath of allegiance to the king, which all laymen above the age of twelve years are bound to take at the torn or court-leet, &c. and ſurely nothing can be more unreaſonable than to deny the

Finch 241, 242.
2 Inſt. 73.
1 Hale 64. 71.
2 Keb. 314.

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the king, whoſe government we are happy under, all proper aſſurances of our fidelity to him; for how can we expect to enjoy the privileges of ſubjects from one to whom we refuſe to acknowledge ourſelves ſubjects, or hope for protection from one, whom we provoke to eſteem us as his enemies, or blame that government for treating us as malecontents, to which we give ſo juſt a cauſe to ſuſpect our fidelity? If we conſult the law of God, that will tell us, That "the powers that be are "ordained of God." If we will hear the voice of reaſon, that will convince us, that not only the peace and ſafety of the community, but alſo our own preſervation, requires us to pay a dutiful obedience to thoſe who govern us; and can we think it unlawful to engage ourſelves to do what it is our duty to do? If we will conſult the practice of all nations, that will ſhew us, that even conqueſt, which is the weakeſt of all titles, has always been eſteemed to give the conqueror ſuch a right to the obedience of the conquered, that upon his taking them into his protection, they have in all ages been ready to promiſe a reciprocal obedience. And if we will conſult our own laws, we ſhall find them to direct us to pay our allegiance to the king who governs us, as has been fully proved in the chapter of high treaſon.

1 Comm. 367. 4 Comm. 270. 423.

As to the ſecond kind of offences of this nature, *viz.* That of refuſing the oaths required *by ſtatute* for the ſupport of the government, I ſhall conſider,—Firſt, The offence of refuſing the oaths of allegiance and ſupremacy.—Secondly, The offence of refuſing the oath of abjuration.

*Sect.* 4. As to the firſt of theſe offences, *viz.* That of refuſing the oaths of allegiance and ſupremacy, which ſince the reformation of religion have been thought neceſſary to be required from all perſons, eſpecially from thoſe who are intruſted with an office, in order to ſecure our princes from the intrigues of popes, who have often taken upon them to diſpenſe with oaths of allegiance made to ſuch princes whom they are pleaſed to call hereticks, and to perſuade the people that they may lawfully depoſe thoſe who have ſo far incurred the diſpleaſure of the biſhop of Rome, as to be excommunicated by him, it having been ſhewn already in chapter 8. under what penalties officers are bound to take the ſaid oaths, and in chapter 19. ſect. 27, &c. how far all perſons whatſoever are compellable to take them under pain of incurring a *præmunire*, I ſhall only take notice in this place, of the method of proceeding on 1 Will. & Mar. c. 8. by which it is enacted, "That perſons refuſing the ſaid oaths, being ten-"dered to them by perſons lawfully authorized to tender the "ſame, ſhall be committed by the perſons making ſuch a "tender for three months, unleſs they ſhall pay ſuch ſum, "not exceeding 40*s.* as the perſons, who ſhall make ſuch "tender, ſhall require of *them, and if they* refuſe again at the

1 Comm. 368. 2 Inſt. 121. 1 Hale. 64. 4 Comm. 115.

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" the end of the three months, that they ſhall be impriſoned " ſix months, or pay a ſum not above ten or under five " pounds, and alſo find ſureties for their good behaviour " and appearance at the next aſſizes, where if they refuſe the " ſaid oaths, they ſhall be incapable of any office, and con- " tinue bound to their good behaviour, and if they refuſe " the declaration mentioned in 30 Car. 2. they ſhall ſuffer " as popiſh recuſants convict."

*Sect.* 5. It ſeems to be the intention of this ſtatute, to give the government an election to proceed either on the mild method therein preſcribed, or the more ſevere one appointed by the former laws, according to the circumſtances of the caſe, and quality of the offender, &c.

2 Comm. 368. *Sect.* 6. As to the ſecond offence of this kind, *viz.* That of refuſing the oath of abjuration, the ſame depends on thoſe laws, which the nation has been of late under a neceſſity of eſtabliſhing, by adding a new limitation to the law relating to the ſucceſſion of the crown, excluding all Papiſts from a poſſibility of inheriting it; who, if they be true to their engagements to their own religion, cannot but be falſe to thoſe they may make to ours, and can never be expected to execute thoſe laws, which they cannot but think void, as being repugnant to the laws of God; or to defend that faith which they think damnable; or to obſerve thoſe oaths, which ſeem to them to have been ordained for the ſupport of irreligion. And from theſe conſiderations they have been diſabled from inheriting the crown, it ſeeming of abſolute neceſſity in our preſent circumſtances for the good of the community, to make ſuch an alteration in law, which like all other human laws depending merely on the policy of men, ſeems to have nothing in it ſo ſacred as to oblige the people unalterably to abide by it to the hazard of their common ſafety, peace and happineſs, for the ſake whereof it was at firſt ordained. For ſurely, there cannot be ſo much danger to the common good from ſuch an alteration, as muſt needs follow from the government of a prince, whoſe conſcience is under the influence of thoſe, who are implacable enemies to the religion of his country, and who thinks himſelf bound by his duty to God and his church to promote that intereſt, which his people think themſelves under the like obligations to oppoſe. From which unhappy circumſtances nothing can be expected but endleſs factions, diſcords, irreconcilable jealouſies and diſtruſts between prince and people, which, if they break not into an open rupture, will at leaſt be attended with ſuch convulſions and uneaſineſſes, as render a ſtate of government ſcarce one degree more ſecure than a ſtate of anarchy and confuſion.

*Sect.*

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*Sect.* 7. For the remedying of ſuch like inconveniences, it having been thought proper to exclude all papiſts from the crown, it was likewiſe thought expedient to ſecure the preſent ſettlement, by obliging all officers, *&c.* to take the oath of abjuration. As to which it is enacted by 13 Will. 3. c. 6. & 1 Geo. 1. ſt. 2. c. 13. "That all perſons who ſhall be "admitted, &c. into any office civil or military, (not be-"ing an office of inheritance, executed by a lawful deputy) "or ſhall receive any pay, ſalary, fee or wages, by reaſon of "any patent or grant from the king, or that have a com-"mand or place of truſt under the king, &c. or ſhall be ad-"mitted into any ſervice or employment in the king's houſe-"hold or family, or of his royal highneſs George prince of "Wales, or her royal highneſs the princeſs of Wales, or their "iſſue, and all eccleſiaſtical perſons, heads or governors, of "what denomination ſoever, and all other members of col-"leges and halls in any univerſity, that ſhall be of the foun-"dation, or enjoy any exhibition, being of, or as ſoon as they "ſhall attain the age of eighteen years, and all perſons teach-"ing or reading to pupils in any univerſity or elſewhere, and "all ſchool-maſters and uſhers, and all preachers and teachers "of ſeparate congregations, high or chief conſtables, and every "perſon who ſhall act as ſerjeant at law, counſellor at law, "barriſter, advocate, attorney, ſolicitor, proctor, clerk, or "notary, by practiſing in any manner as ſuch, in any court "or courts whatſoever within that part of Great Britain cal-"led England, ſhall, within three months (*a*) after they ſhall be "admitted into or enter upon any ſuch preferment, benefice, "office, or place, or come into ſuch capacity, or take upon "them ſuch practice, employment, or buſineſs, take and ſub-"ſcribe the oaths of allegiance, ſupremacy and abjuration, (*b*) "at one of the courts at Weſtminſter, or at the general quar-"ter-ſeſſions of the peace where they ſhall reſide; or otherwiſe "they ſhall be *ipſo facto* adjudged incapable, and diſabled in "law, to have, occupy, or enjoy the ſaid offices, &c. and if "they ſhall by themſelves, or deputy or truſtee, execute any "the ſaid offices, &c. and ſhall be thereof convict, &c. they "ſhall be diſabled to proſecute any ſuit at law or equity, or "to be guardians, executors, or adminiſtrators, or capable of "any legacy or deed of gift, or to be in any office within this "realm, or to vote at any election for members of parliament, "and ſhall forfeit five hundred pounds, &c."[28]

1 Comm. 363.

(*a*) By 2. Geo. 2. c. 31. 9 Geo. 2. c. 26. 16 Geo. 2. c. 30. the time is enlarged to ſix months and other regulations enacted.

(*b*) After the death of the late pretender who aſſumed the title of king of England by the name of James the Third, it became abſurd to renounce a perſon being dead, therefore the 6 Geo. 3. c. 53. has altered the form of the oath of abjuration ſo as to renounce the deſcendants of the ſaid James. But no proviſion is made for altering in like manner the Quakers form of affirmation.

*Sect.* 8. And it is farther enacted by the ſaid ſtatute, "That "any two juſtices of the peace, or any other perſon or perſons "who ſhall be by the king for that purpoſe ſpecially appointed, "by order in the privy *council or by commiſſion* under the "great *ſeal, may adminiſter and tender* the ſaid oaths to any "perſon

Vide 12 Co. 132.

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(a) It ſeems that a bare ſuſpicion is not ſufficient, but there muſt be ſome good cauſe of ſuſpicion, and that the cauſe of ſuſpicion is traverſable. 3 Burn. 249.

(b) A perſon cannot be ſaid to refuſe the oaths unleſs they be read to him or offered to be read.

"perſon whatſoever, whom they ſhall ſuſpect (*a*) to be dangerous or diſaffected; and that if any perſon, to whom the ſaid oaths ſhall be ſo tendered, ſhall neglect or refuſe (*b*) to take the ſame; or if any perſon, being ſummoned by the ſaid juſtices, &c. in order to take the ſaid oaths, either in proper perſon, or by notice left at his place of abode with one of the family, ſhall neglect or refuſe to appear, &c. ſuch refuſal ſhall be certified at ſeſſions, &c. and from thence to the king's bench or chancery, &c. and every ſuch perſon ſo neglecting to take the ſaid oaths, ſhall be adjudged a poſſh recuſant convict, &c."

3 Burn. 249. But ſee 5 Mod. 316. Salk. 428. Jones 121.

*Sect.* 9. And it is farther enacted by the ſaid ſtatute, "That "if any member of either univerſity ſhall neglect to take and "ſubſcribe the ſaid oaths according to the intent of the ſaid "act, or to produce a certificate thereof, under the hand of "ſome proper officer of the reſpective court, and cauſe the "ſame to be entered in the regiſter of the proper college or hall, "within one month after his having taken and ſubſcribed the "ſaid oaths; and if the perſons in whom the right of election of "ſuch member ſhall be, do neglect to elect ſome fitting perſon "in his ſtead within twelve months, &c. that then the king "may, under the great ſeal or ſign manual, nominate ſome "fitting perſon, qualified according to the local ſtatutes of "ſuch college, &c. and if the head of any college, &c. ſhall "neglect to admit ſuch nominee, by the ſpace of ten days af-"ter ſuch admiſſion ſhall be demanded of him, that then the "local viſitor ſhall admit the ſaid nominee; and if ſuch viſitor "ſhall neglect or refuſe to admit ſuch perſon within the ſpace "of one month after the ſame ſhall be demanded, that then "the court of king's bench may iſſue a writ of mandamus "to ſuch viſitor to admit ſuch nominee, *&c.*"

*Sect.* 10. And it is farther enacted by the ſaid ſtatute, "That no peer ſhall vote or make his proxy, or ſit in the "houſe of peers during any debate, and that no member of "the houſe of commons ſhall vote or ſit during any debate in "the ſaid houſe after the ſpeaker is choſen, until he ſhall have "taken the ſaid oaths, &c. under pain of the diſabilities "and forfeitures above mentioned, *&c.*"

SOMEWHAT ſimilar to the oaths required by the corporation and teſt acts, and the acts above mentioned, are the ceremonies and oaths required previous to being naturalized. 4 Comm. 58. for which, ſee 1 Jac. 1. c. 2. 7 Ann. c. 5. 10 Ann. c. 5. 4 Geo. 2. c. 21. 20 Geo. 2. c. 44. For the declaration againſt popery, vide 30 Car. 2. ſt. 2. c. 1.—For the oaths to be taken by peers of Scotland, and by privy counſellors, vide 6 Ann. c. 23. 1 Geo. 1. c. 4.—For the Moravian affirmation, 22 Geo. 2. c. 30. Quakers profeſſion of belief, 1 Will. 3. c. 18. Quakers affirmation, 8 Geo. 1. c. 6. and for the caſes in which it is allowed to be taken, 5 Mod. 403. Str. 441, 527, 856, 872, 1219.

CHAPTER

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# CHAPTER THE TWENTY-FIFTH.

## OF FELONY.

OFFENCES more immediately againſt the ſubject are either capital or not capital.—The capital are either by the common law, or by ſtatute.

*Sect.* 1. Thoſe by the common law come generally under the title of felony, which, *ex vi termini*, ſignifies, *quodlibet crimen felleo animo perpetratum*, and can be expreſſed by no periphraſis, or word equivalent, without the word *felonice*. Vide Spelm. Gloſſ. verb. Felonia 214. Co. Lit. 391.

*Sect.* 2. Felony is ſaid to be included in high treaſon, and conſequently a pardon of felony diſcharges an indictment of high treaſon, if it want the word *proditorie*. Sum. 11. 3 H. 7, 10. 3 Inſt. 15. 4 Comm. 94, 97.

*Sect.* 3. It is always accompanied with an evil intention, and therefore ſhall not be imputed to a mere miſtake or miſanimadverſion, as where perſons break open a door, in order to execute a warrant, which will not juſtify ſuch a proceeding; *affectio enim tua nomen imponit operi tuo*; *item crimen non contrahitur niſi nocendi voluntas intercedat*. Bract. 1. c, 4. S. P. C. 17. 27.

But the bare intention to commit a felony is ſo very criminal, that at the common law it was puniſhable as felony, where it miſſed its effect through ſome accident no way leſſening the guilt of the offender. But it ſeems agreed at this day, That felony ſhall not be imputed to a bare intention to commit it, yet it is certain that the party may be very ſeverely fined for ſuch an intention. 1 Lev. 146. 1 Sid. 230, 231. Kely. 24. Sum. 61. 5 Mod. 206.

FELONY in the general acceptation of our Engliſh law, comprizes every ſpecies of crime which occaſioned at common law the forfeiture of land or goods. This moſt frequently happens in thoſe crimes for which a capital puniſhment either is, or was liable to be inflicted. All offences therefore now capital are in ſome degree or other felony: and this is likewiſe the caſe with ſome other offences which are not puniſhed with death; as ſuicide, where the party is already dead; homicide, by chance medley or in ſelf-defence; and petit larceny, or pilfering; all which are (ſtrictly ſpeaking) felonies, as they ſubject the committers of them to forfeitures. The definition of felony, therefore, ſeems to be, "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." But felony may be without inflicting capital puniſhment, as in the caſe inſtanced of ſelf murder, excuſable homicide and petit larceny; and it is poſſible that capital puniſhments may be inflicted, and yet the offence be no felony; as in the caſe of hereſy by the common law, which, though capital, never worked any forfeiture of lands or goods; (3 Inſt. 43.) an inſeparable incident to felony. And of the ſame nature is the puniſhment of ſtanding mute, without pleading to an indictment; which is capital but without any forfeiture, and therefore ſuch ſtanding mute is no felony. In ſhort the true criterion of felony is forfeiture. The idea of felony is indeed ſo generally connected with that of capital puniſhment, that we find it hard to ſeparate them; and to this uſage the interpretations of the law do now conform. Therefore if a ſtatute makes any new offence felony, the law implies that it ſhall be puniſhed with death, as well as with forfeiture, unleſs the offender prays the benefit of clergy, *which all felons* are entitled once to have, unleſs the ſame is expreſsly taken *away by ſtatute*. 4 Comm. 94 to 99.

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# CHAPTER THE TWENTY-SIXTH.

## OF CASUAL DEATH AND OF DEODANDS.

OF capital offences at common law more immediately againſt the ſubject, there are three principal kinds: Firſt, Such as are committed againſt his life. Secondly, Such as are againſt his goods. Thirdly, Such as are againſt his habitation.

Book 2d. c. 17. *Sect.* 1. There is another mix'd kind of capital offences, which conſiſts in the hindrance of the due proceſs of public juſtice, which I ſhall conſider in the ſecond book, wherein I ſhall treat of the means of bringing offenders to their due puniſhment.

Bract. l. 3. c. 4. *Sect.* 2. Offences againſt the life of a man come under the general name of homicide, which in our law ſignifies the killing of a man by a man.

1 Hale 471, 472. *Sect.* 3. But before I treat hereof, it may not be improper to conſider the killing of a man merely *per infortunium*, occaſioned by ſome animal or thing without life, without the default or procurement of another man, as where one is killed by a fall from a horſe or cart, *&c.* which, though it be not properly homicide, nor puniſhable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raiſe the greater abhorrence of murder, and the unhappy inſtrument or occaſion of ſuch death is called a deodand, and forfeited to the king, in order to be diſpoſed of in pious uſes by the king's almoner; as alſo are all ſuch weapons whereby one man kills another.

Pult. 125.
5 Co. 110.
3 Inſt. 57, 58.
Comm. 31.
1 Hale 34. 419.

S. P. C. 21.
3 Inſt. 58.
Sum. 34.
Pult. 125.
Dalt. c. 97.
2 Keb. 719, 806.

*Sect.* 4. It ſeems clearly ſettled, that a horſe, *&c.* killing an infant within the age of diſcretion, are as much forfeited as if he were of age: But formerly it was holden, That a horſe or cart, *by a fall from* which an infant was ſlain, were not forfeited, perhaps for this reaſon (1), becauſe the misfortune might rather ſeem owing to the indiſcretion of the infant than any default in the horſe, *&c.* But this diſtinction has not been allowed of late; for the law does not ground the forfeiture on any default in the things forfeited, ſince it extends it to things without life, to which 'tis plain, that no manner of fault can be imputed.

(1) The forfeiture of deodands originated in the blind days of popery and ſuperſtition. They were deſigned to purchaſe, by propitiatory maſſes, an expiation for the ſouls of ſuch as were ſnatched away by untimely death. But the preſumed innocency of childhood rendered ſuch atonement unneceſſary. Therefore no deodand is due, where an infant under the age of diſcretion is killed by a *fall from* any thing that is not in motion, 1 Comm. 300. But if the inſtrument move to the death, either of an infant, or an adult, it is forfeited, or an inquiſition found as a deodand. 3 Inſt. 57. 1 Hale 422.

Sect. 5.

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*Sect.* 5. Alſo by the opinion of our ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a ſteeple, *&c.* may be deodands, but by the latter reſolutions they cannot, unleſs they were ſevered before the accident happened.

S. P. C. 20. Pult. 124. 1 Sid. 206, 207. 1 Lev. 136. Raym. 97. 6 Mod. 187. 1 Keb. 723, 745. Str. 61. Co. Lit. 53. 283.

*Sect.* 6. However, as it is agreed by all, a ſhip in ſalt water, whether in the open ſea or within the body of a county, from which a man falls and is drowned, is not forfeited, becauſe perſons at ſea are continually expoſed to ſo many perils, that the law imputes ſuch misfortunes happening there, rather to them than to the ſhip. Alſo it ſeems clear, that when a man riding on a horſe over a river is drowned through the voilence of the ſtream, the horſe is not forfeited, becauſe not that, but the waters cauſed his death (2): But it is ſaid, that a ſhip by a fall from which a man is drowned in the freſh water ſhall be forfeited, but not the merchandize therein, becauſe they no way contribute to his death. And by the ſame reaſon it ſeems, that if a man riding on the ſhafts of a waggon fall to the ground and break his neck, the horſes and waggon only are forfeited, and not the loading, becauſe it no way contributed to his death; for which cauſe, where a thing not in motion cauſes a man's death, that part thereof only which is the immediate cauſe is forfeited. As where one climbing upon the wheel of a cart while it ſtands ſtill, falls from it and dies of the fall, the wheel only is forfeited: but if he had been killed by a bruiſe from one of the wheels being in motion, the loading alſo would have been forfeited, becauſe the weight thereof made the hurt the greater; and it is a general rule, that wherever the thing which is the occaſion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo; for the rule is, *Omnia quæque movent ad mortem, ſunt deodanda.*

S. P. C. 20, 21. Pult. 124, 125. 3 Inſt. 58. Summary 33. 1 Hale 422. Salk. 220. C. Jac. 483. 2 Roll. 23. Popham 136.

(2) Quere if it had appeared, that the horſe had thrown him.

Sayer 249. F. Cor. 341.

Bract. l. 3. c. 5.

*Sect.* 7. In all theſe caſes, if the party wounded die not of his wound within a year and a day after he received it, there ſhall be nothing forfeited, for the law does not look on ſuch a wound as the cauſe of a man's death, after which he lives ſo long: But if the party die within that time, the forfeiture ſhall have relation to the wound given, and cannot be ſaved by any alienation or other act whatſoever in the mean time.

Sum. 55. S. P. C. 21.

Dalt. c. 97. Plowd. 260. Keilw. 68.

*Sect.* 8. However, nothing can be forfeited as a deodand, nor ſeized as ſuch, till it be found by the coroner's inqueſt to have cauſed a man's death; but after ſuch inquiſition, the ſheriff is anſwerable *for the value of it, and* may levy the ſame

5 Co. 110. Co. Lit. 115. Dalt. c. 97. S. P. C. 21. Pult. 125. See 4 Ed. 1. de Offic. Coronatoris. 1 Hale 418, 419.

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on the town where it fell, and therefore the inqueſt ought to find the value of it. (3)

(3) Upon inquiſitions of this kind the jury generally find the value of the deodand to be as ſmall as poſſible, and even confine that value, according to the circumſtances of the caſe, to the very thing or part of the thing itſelf which cauſed the death, 2 Bac. Abr. 26. This practice the court of king's bench have impliedly ſanctioned, by refuſing to reform it on an application in favour of the crown or its grantee, Foſ. 206. 2 Bar. K. B. 82. Nor can ſuch an inquiſition be taken by the grand jury on default of the coroner. 1 Burr. 19 (and when taken by the coroner, it may be moved and traverſed, 1 Burr. 20. 2 Hale 416.) becauſe it is tranſacted in ſecret, taken *ex parte*, and intended as the platform of an odious ſuperſtitious claim, 4 Inſt. 196. repugnant to the principles of ſound reaſon and true policy. Foſter 266.

## CHAPTER THE TWENTY-SEVENTH.

### OF FELO DE SE.

HOMICIDE properly ſo called, is either againſt a man's own life, or that of another.—In treating of homicide againſt a man's own life, I ſhall conſider: Firſt, in what caſes a man ſhall be ſaid to be a *felo de ſe*. Secondly, what he ſhall forfeit for this offence.

1 Hale 411. Crom. 30, 31. Sum. 28. Dalt. c. 92. 3 Inſt. 54.

*Sect.* 1. As to the firſt point, I ſhall take it for granted, That in this as well as in all other felonies, the offender ought to be of the age of diſcretion, and *compos mentis*; and therefore, that an infant killing himſelf under the age of diſcretion, or a lunatick during his lunacy, cannot be a *felo de ſe*.

3 Mod. 100.

*Sect.* 2. But here I cannot but take notice of a ſtrange notion, which has unaccountably prevailed of late, That every one who kills himſelf, muſt be *non compos* of courſe; for 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.

Plow. 261. Comb. 2, 3.

*Sect.* 3. If this argument be good, ſelf-murder can be no crime, for a madman can be guilty of none: But it is wonderful that the repugnancy to nature and reaſon, which is the higheſt aggravation of this offence, ſhould be thought to make it impoſſible to be any crime at all, which cannot but be the neceſſary conſequence of this poſition, that none but a madman can be guilty of it. May it not with as much reaſon be argued, that the murder of a child or of a parent is againſt nature and reaſon, and conſequently that no man in his ſenſes can commit it? But has a man therefore no uſe of his reaſon, becauſe he acts againſt right reaſon? Why may not the paſſions of grief and diſcontent tempt a man knowingly to act againſt the principles of nature and reaſon in this caſe, as thoſe of love, hatred and revenge, and ſuch like, are too well known to do in others?

*Sect.* 4. However our laws have always had ſuch an abhorrence of this crime, that not only he who kills himſelf with

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a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*. For wherever death is caused by an act done with a murdrous intent, it makes the offender a murderer; and therefore if A. discharge a gun at B. with an intent to kill him, and the gun breaks and kills A. or if A. strike B. to the ground, and then hastily falling upon him wound himself with a knife which B. happens to have in his hand and die, in both these cases A. is *felo de se*, for he is the only agent.

Dalt. c. 144. 44 Ass. 55. B. Cor. 12, 14. 3 Inst. p. 54.

*Sect.* 5. But if B. being so assaulted had been driven to the wall, and holden up a pitch-fork or knife, standing in his defence, and A. had hastily run upon the same and been slain, B. should be adjudged to kill him in his own defence. And for the same reason perhaps in the case above, if B. after he had fallen to the ground, had holden up a knife or sword in his defence, and A. had fallen thereon and been slain, B. should be adjudged to kill him *se defendendo*; for here B. exerts his strength in his own defence, and by so doing occasions the mortal wound received by A.

Staun. 16. Sim. 28, 29. Pult. 119. Crom. 28. 3 Inst. 54. Vide 1 Hale 413. & 493. upon this case; which he contends is misrepresented both by Dalton and Coke, and that it was adjudged homicide per infortunium.

*Sect.* 6. He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head, and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, as being against the laws of God and man; But where two persons agree to die together, and one of them at the persuasion of the other buys ratsbane, and mixes it in a potion, and both drink of it, and he who bought and made the potion, survives by using proper remedies, and the other dies, perhaps it is the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.

Keilw. 136.

Moor 754.

*Sect.* 7. As to the second point, *viz.* What such an offender shall forfeit, it seems clear that he shall forfeit all chattels, real or personal, which he hath in his own right, and also all such chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession, to which he was entitled jointly with another, on any account except that of merchandize; but it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator.

S. P. C. 188, 189. 262, 263. 1 Hale 413. Finch. 216. Sum. 29. Crom. 31. 3 Inst. 55. 19 H. 6. 47. 8 E. 4. 24. Raym. 7. Plow. 243, 259, 262, 323. 4 Comm. 190. 193.

*Sect.* 8. However the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower.

1 Hale 413. Plow. 261, 262.

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5 Co. 110. 3 Inſt. 54. 1 Saund. 362. 1 Hale 414. 1 Sid. 150, 162. 2 Mod. 53.

*Sect.* 9. Alſo no part of the perſonal eſtate is veſted in the king, before the ſelf-murder is found by ſome inquiſition; and conſequently the forfeiture thereof is ſaved by a pardon of the offence before ſuch finding.

3 Mod. 100. 241, 242. Con. 1. Lev. 8. 1 Keb. 67, 68. 4 Comm. 190.

Plow. 260. Sum. 29. 5 Co. 110. 1 Hale 412. 4 Com. 190.

*Sect.* 10. But if there be no ſuch pardon, the whole is forfeited immediately after ſuch inquiſition, from the time ſuch mortal wound was given, and all intermediate alienations are avoided.

Sum. 29. 3 Inſt. 55. 47 Ed. 3. 76. See B. 2. c. 9. ſ. 52. 1 Hale 414 to 417. Far. 16. Salk. 190, 377. Carth. 72. Skin. 45. Stamf. 183. 3 Mod. 80, 238. 1 Mod. 82. 2 Keb. 859. 1 Vent. 181, 182. 2 Vent. 38. 2 Jones 198. 2 Hale 59. Lev. 8. Sid. 150.

*Sect.* 11. And ſuch inquiſitions ought to be by the coroner *ſuper viſum corporis*, if the body can be found; and an inquiſition ſo taken, as ſome ſay, cannot be traverſed.

3 Inſt. 55. Sum. 29. 2 Lev. 141. 1 Hale 414. Carth. 73. 1 Burr. 18. 1 Freem. 430. 2 Roll. 217. 1 Sid. 101, 144.

*Sect.* 12. But if the body cannot be found, ſo that the coroner, who has authority only *ſuper viſum corporis*, cannot proceed, the inquiry may be by juſtices of peace, who by their commiſſion have a general power to inquire of all felonies; or in the king's bench, if the felony were committed in the county where the ſaid court ſits; and ſuch inquiſitions are traverſable by the executor, *&c.*

Salk. 377. 7 Mod. 16. 8 Mod. 82.

*Sect.* 13. Alſo all inquiſitions of this offence being in the nature of indictments, ought particularly and certainly to ſet forth the circumſtances of the fact; as the particular manner of the wound, and that it was mortal, *&c.* and in the concluſion add, that the party in ſuch manner murdered himſelf.

2 Lev. 140, 152. 3 Mod. 100. 12 Mod. 112. Vide Salk. 377.

*Sect.* 14. Therefore if either the premiſſes be inſufficient, as if it be found that the party flung himſelf into the water, *& ſic ſeipſum emergit*, which is nonſenſe, becauſe *emergo* ſignifies only to riſe out of the water: or if there be wanting the proper concluſion, *& ſic ſeipſum murdravit*, the inquiſition is not good.

1 Sid. 225, 259. 3 Mod. 101. 1 Keb. 907.

*Sect.* 15. Yet if it be full in ſubſtance, the coroner may be ſerved with a rule to amend a defect in form.

Fitzg. 6. See 1 Saund. 273. for proceſs from the Crown-Office on ſuch an inquiſition againſt a debtor of a felo de ſe.

## CHAPTER THE TWENTY-EIGHTH.

## OF JUSTIFIABLE HOMICIDE.

HOMICIDE againſt the life of another either amounts to felony, or does not. That which amounts not to felony is either juſtifiable, and cauſes no forfeiture at all, or excuſable, and cauſes the forfeiture of the party's goods.

And

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And firſt of juſtifiable homicide; concerning which I ſhall premiſe theſe general rules.

*Sect.* 1. Firſt, 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. Vid. ſect. 22.

*Sect.* 2. Secondly, There muſt be no malice coloured under pretence of neceſſity; for wherever a perſon who kills another, acts in truth upon malice, and takes occaſion, from the appearance of neceſſity, to execute his own private revenge, he is guilty of murder. 2 Roll. 120. Kely. 28. Sum. 38. Bract. l. 3. c. 4. 21 Edw. 1. de Mal. in Parcis.

*Sect.* 3. Thirdly, According to the opinion of the old books (*a*), which in this reſpect ſeem to be contradicted by others more modern (*b*), it ſeems, that one may ſet forth a fact, amounting to juſtifiable homicide, in a ſpecial plea to an indictment or appeal of murder; and that the ſame being found true, he ſhall be diſmiſſed, without being arraigned, or enforced to plead Not guilty. And indeed it ſeems extremely hard, that a ſheriff or judge who condemn or execute a criminal, *&c.* ſhould be forced, on a frivolous proſecution, to hold up their hands at the bar for it, *&c.* But it is agreed, that no one can plead a fact amounting to homicide *ſe defendendo*, or by miſadventure, but that in ſuch a caſe the defendant muſt plead Not guilty, and give the ſpecial matter in evidence: And it is alſo agreed, that where a ſpecial fact, amounting to juſtifiable homicide, is found by the jury, the party is to be diſmiſſed, without being obliged to purchaſe any pardon, *&c.* (*a*) 22 Aſſ. 55. 27 Aſſ. 41. 37 H. 6. 20, 21. Dalt. 150. B. App. 5, 129. B. Cor. 57, 87, 89. (*b*) 35 H. 6. 11. 58. B. App. 122. 2 Inſt. 316. Co. Lit. 283. Sum. 38. 1 Hale 478.

Juſtifiable homicide is either of a public or private nature. That of a public nature, is ſuch as is occaſioned by the due execution or advancement of public juſtice.—That of a private nature is ſuch as happens in the juſt defence of a man's perſon, houſe, or goods.

And firſt, I ſhall conſider juſtifiable homicide in the due execution of public juſtice. As to which the following rules muſt be obſerved.

*Sect.* 4. Firſt, The judgment, by virtue whereof any perſon is put to death, muſt be given by one who has juriſdiction in the cauſe; for otherwiſe both judge and officer may be guilty of felony. Dalt. c. 9. 1 Hale 497. 10 Co. 76. 22 E. 4. 33. Sum. 35.

*Sect.* 5. And therefore, if the court of common pleas give judgment on an appeal of death, or juſtices of peace on an indictment of treaſon, and award execution, which is executed, both the judges who give, and the officers who execute the ſentence, are guilty of felony, becauſe theſe courts having no more juriſdiction over theſe crimes than mere private perſons, *their proceedings thereon are merely void, and without any foundation.* 4 Comm. 178. 1 Hale 497. 500. 3 Inſt. 48. 5 Rep. 106. Cro. Car. 98. Moor. 333.

*Sect.* 6.

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Sum. 35. Dalt. c. 98. 1 Hale 501.

*Sect.* 6. But if the juſtices of peace, on an indictment of treſpaſs, arraign a man of felony, and condemn him, and he be executed, the juſtices only are guilty of felony, and not the officers who execute their ſentence; for the juſtices had a juriſdiction over the offence, and their proceedings were irregular and erroneous only, but not void.

Co. Lit. 128. 2 Aſſ. 3. S. P. C. 13. 196. 1 Hale 497. 11 H. 4. 12. Plow. 306. 3 Inſt. 131.

*Sect.* 7. Secondly, The judgment muſt be executed by the lawful officer.

*Sect.* 8. Indeed it was formerly holden, that any one might as lawfully kill a perſon attainted of treaſon or felony, as a wolf or other wild beaſt; and anciently a perſon condemned in an appeal of death, was delivered to the relations of the deceaſed, in order to be executed by them.

27 Aſſ. 41. 1 Hale 501. B. App. 69. Cor. 67, 197. Co. Lit. 128. Dalt. c. 98. Sum. 35.

*Sect.* 9. But at this day, as it ſeems agreed, if the judge, who gives the ſentence of death, and, *a fortiori*, if any private perſon execute the ſame, or if the proper officer himſelf do it without a lawful command, they are guilty of felony.

35 H. 6. 58. 1 Hale 454, 501. B. App. 5. S. P. C. 13. Sum. 36, 272. See B. 2. c. 51. Finch. 31.

*Sect.* 10. Thirdly, The execution muſt be purſuant of, and warranted by the judgment, otherwiſe it is without authority; and conſequently if a ſheriff behead a man where it is no part of the ſentence to cut off the head, he is guilty of felony (1).

3 Inſt. 52. 211. 2 Hale 411. 4 St. Tr. 129. Foſter 268.

(1) That is, if the officer varieth from the judgment, of his own head and without warrant or the colour of authority, but not if he is authoriſed by cuſtom or by warrant from the crown. For although the king cannot by his prerogative vary the execution ſo as to aggravate the puniſhment beyond the intention of the law; yet it doth not follow that he, who may remit part of the judgment or wholly pardon the offender cannot mitigate his puniſhment with regard to the pain or infamy of it. Foſter 267.

AND now we are come to juſtifiable homicide in the due advancement of public juſtice, which I ſhall conſider,—Firſt, in relation to criminal,—Secondly, in relation to civil cauſes.

22 Aſſ. 55. B. Cor. 87, 89. S. P. C. 13. 3 Inſt. 221. Dalt. c. 98. Sum. 36. Crom. 30. F. Cor. 142, 258, 261. 1 Hale 489. Foſter 271.

*Sect.* 11. And Firſt, Homicide in the advancement of public juſtice in criminal cauſes may be juſtified in ſeveral caſes; as, firſt, if a perſon, having actually committed a felony, will not ſuffer himſelf to be arreſted, but ſtand on his own defence, or fly, ſo that he cannot poſſibly be apprehended alive by thoſe who purſue him, whether private perſons or public officers, with or without a warrant from a magiſtrate, he may be lawfully ſlain by them.

*Furem ſi aliter capi non poſſit, occidere permittunt. Stornb. de jure Goth.*

See authorities above cited. F. Cor. 179, 261.

*Sect.* 12. Secondly, If an innocent perſon be indicted of a felony, where, in truth no felony was committed, and will not ſuffer himſelf to be arreſted by the officer who has a warrant for that purpoſe, he may lawfully be killed by him, if he cannot otherwiſe be taken; for there is a charge againſt him upon record, to which at his peril he is bound to anſwer.

Sect. 13.

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*Sect.* 13. Thirdly, If a criminal, endeavouring to break the gaol, aſſault his gaoler, he may be lawfully killed by him in the affray. 1 Hale 481, 494. 495, 496.

*Sect.* 14. Fourthly, If thoſe who are engaged in a riot, or a forcible entry, or detainer, ſtand in their defence, and continue the force in oppoſition to the command of a juſtice of peace, &c. or reſiſt ſuch juſtice endeavouring to arreſt them, the killing of them may be juſtified; and ſo perhaps may the killing of dangerous rioters by any private perſons, who cannot otherwiſe ſuppreſs them, or defend themſelves from them, inaſmuch as every private perſon ſeems to be authoriſed by the law to arm himſelf for the purpoſes aforeſaid. Crom. 30. 158. 1 Sum. 37. Staund. 13. 2 Inſt. 52. Poph. 121.

Therefore a ſtranger who interpoſes to part the combatants in an affray, giving notice to them of that intention, and they aſſault him; if in the ſtruggle he ſhould chance to kill, this would be juſtifiable homicide; for it is every man's duty to interpoſe for the preſervation of the public peace, and for the prevention of miſchief. Foſter 272. Vide alſo the Riot Act, 1 Geo. 1. c. 5.

*Sect.* 15. Fifthly, If treſpaſſers in a foreſt, chace, park, or warren, or any incloſed ground wherein deer are kept, will not render themſelves to the keepers upon an hue and cry made to ſtand to the king's peace, but fly from, or defend themſelves againſt them, they may be ſlain by force of the ſtatute *de malefactoribus in parcis*, 21 Ed. 1. ſt. 2. and 3 and 4 Will. & Mary, c. 10. S. P. C. 13. Crom. 30. Dyer 326. 1 Hale 491. 9 St. Tr. 315.

*Sect.* 16. Sixthly, If either of the parties fighting in a combat allowed by law, for the trial of ſome ſpecial caſes, be ſlain, he who kills him is juſtified, and the death of the other is imputed to the juſt judgment of God, who is preſumed to give the victory to him who fights in maintenance of the truth. Dalt. c. 98. Plow. 9. 3 Inſt. 221. 37 H. 6. 21.

BUT in all theſe caſes there muſt be an apparent neceſſity on the officer's ſide, that the party could not be arreſted or apprehended, the riot could not be ſuppreſſed, the priſoners could not be kept in hold, the deer ſtealers could not but eſcape, unleſs ſuch homicide were committed: otherwiſe without ſuch abſolute neceſſity it is not juſtifiable, 4 Comm. 180.

*Sect.* 17. Secondly, Homicide in the advancement of juſtice in civil cauſes, may alſo be juſtified in ſome caſes.—As where a ſheriff, &c. attempting to make a lawful arreſt in a civil action, or to retake one who has been arreſted and made his eſcape, is reſiſted by the party, and unavoidably kills him in the affray. 1 Roll. 189. Foſter 270. Sum. 37. 3 Inſt. 56. Crom. 24. Dalt. c. 98. 1 Hale 494. 4 Comm. 180.

*Sect.* 18. And in ſuch caſe the officer is not bound to give back, but may ſtand his ground and attack the party. Sum. 37. Foſter 292. Strange 499. 6 St. Tr. 195.

*Sect.* 19. But no private perſon of his own authority can arreſt a man for a civil matter, as he may for felony, &c. Com. 30.

*Sect.* 20.

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Sum. 37. 1 Hale 481. Poſt. 161. Foſter 271.

*Sect.* 20. Neither can the ſheriff himſelf lawfully kill thoſe who barely fly from the execution of any civil proceſs.

Puff. L. of N. 455.

AND now I am to conſider juſtifiable homicide of a private nature, in the juſt defence of a man's perſon, houſe, or goods. In treating whereof I ſhall ſhew, Firſt, in what caſes the killing of a wrong-doer may be juſtified by reaſon of ſuch defence. Secondly, where the killing of an innocent perſon may be ſo juſtified.

24 H. 8. c. 5. Dalt. c. 98. 3 Hale 486, 487, 493, 494. Sum. 32. S. P. C. 14. B. Cor. 100, 102. F. Cor. 179, 192, 194, 261, 305. C. Car. 544. 26 Aſſ. 23. Crom. 26. Kely. 128, 129. Foſ. 271, 275. 9 Ann. c. 16. (*a*) Vide ſect. 25.

*Sect.* 21. And firſt the killing of a wrong-doer, in the making of ſuch defence, may be juſtified in many caſes: As where a man kills one who aſſaults him in the highway to rob or murder him; or the owner of a houſe, or any of his ſervants, or lodgers, &c. kill one who attempts to burn it, or to commit in it murder, robbery, or other felony (*a*); or a woman kills one who attempts to raviſh her; (1) or a ſervant coming ſuddenly and finding his maſter robbed and ſlain, falls upon the murderer immediately and kills him; for he does it in the height of his ſurprize, and under juſt apprehenſions of the like attempt upon himſelf:—But in other circumſtances he could not have juſtified the killing of ſuch an one, but ought to have apprehended him, &c.

(1) The injury intended can never be repaired or forgotten; and nature to render the ſex amiable hath implanted in the female heart a quick ſenſe of honour, the pride of virtue which kindleth and inflameth at every ſuch inſtance of brutal luſt. Foſ. 274. Bac. El. 34. Prin. P. L. 211.—So too, the feelings of a parent or a huſband which involuntarily actuate them at the moment to kill the forcible raviſher of a wife or a daughter's virtue, are juſtifiable. 1 Hale 488. And no doubt the forcibly attempting a crime of a ſtill more deteſtable nature may be equally reſiſted by the death of the unnatural aggreſſor. 4 Comm. 181.

Crom. 27. Sum. 56. 1 Hale 405, 440, 441.

*Sect.* 22. Neither ſhall a man in any caſe juſtify the killing another by a pretence of neceſſity, unleſs he were himſelf wholly without fault in bringing that neceſſity upon himſelf; for if a man, in defence of an injury done by himſelf, kill any perſon whatſoever, he is guilty of manſlaughter at leaſt; as where divers rioters wrongfully detain a houſe by force, and kill thoſe who attack it from without, and endeavour to burn it.

Sum. 40, 57. C. Car. 538. Dalt. c. 98. 1 Hale 485, 486, 488. Foſter 273.

*Sect.* 23. Neither can a man juſtify the killing another in defence of his houſe or goods, or even of his perſon, from a bare private treſpaſs; and therefore he that kills another, who claiming a title to his houſe, attempts to enter it by force, and ſhoots at it, or that breaks open his windows in order to arreſt him, or that perſiſts in breaking his hedges after he is forbidden, is guilty of manſlaughter; and he who in his own defence kills another that aſſaults him in his houſe in the day-time, and plainly appears to intend to beat him only, is guilty of homicide *ſe defendendo*, for which he forfeits

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feits his goods, but is pardoned of courſe; yet it ſeems that a private perſon, and, *a fortiori*, an officer of juſtice, who happens unavoidably to kill another in endeavouring to defend himſelf from, or ſuppreſs dangerous rioters, may juſtify the fact, inaſmuch as he only does his duty in aid of the public juſtice.

Pult. 119. Sum. 40. Crom. 28. 3 Inſt. 138. Poph. 121.

*Sect.* 24. And I can ſee no reaſon why a perſon, who without provocation is aſſaulted by another in any place whatſoever, in ſuch a manner as plainly ſhews an intent to murder him, as by diſcharging a piſtol, or puſhing at him with a drawn ſword, &c. may not juſtify killing ſuch an aſſailant, as much as if he had attempted to rob him: For is not he, who attempts to murder me, more injurious than he who barely attempts to rob me? and can it be more juſtifiable to fight for my goods, than for my life? And is it not only highly agreeable to reaſon, that a man in ſuch circumſtances may lawfully kill another, but it ſeems alſo to be confirmed by the general tenor of our law-books, which ſpeaking of homicide *ſe defendendo*, ſuppoſe it done in ſome quarrel or affray; from whence it ſeems reaſonable to conclude, that where the law judges a man guilty of homicide *ſe defendendo*, there muſt be ſome precedent quarrel in which both parties always are, or at leaſt may juſtly be ſuppoſed to have been, in ſome fault, ſo that the neceſſity, to which a man is at length reduced to kill another, is in ſome meaſure preſumed to have been owing to himſelf: For it cannot be imagined, that the law, which is founded on the higheſt reaſon, will adjudge a man to forfeit all his goods, and put him to the neceſſity of purchaſing his pardon, without ſome appearance of a fault. And though it may be ſaid, that there is none in chance-medley, and yet that the party's goods are alſo forfeited by that, I anſwer, that chance-medley may be intended to proceed from ſome negligence, or at leaſt want of ſufficient caution in the party, who is ſo unfortunate as to commit it, ſo that he doth not ſeem to be altogether faultleſs. Beſides, one of the reaſons given in our law-books for which homicide *ſe defendendo* forfeits goods, is becauſe thereby a true man is killed; but it ſeems abſurd, that he who apparently attempts to murder another, which is the moſt heinous of all felonies, ſhould be eſteemed ſuch, when thoſe who attempt other felonies, which ſeem to be much leſs criminal, are allowed to be killed as downright villains, not deſerving the protection or regard of the law.

Bendlow 47. 1 And. 41. Kely. 128, 129. 1 Hale 481, 484. Foſter 274.

Crom. 27, 28. Dalt. c. 98. S. P. C. 15. 3 Inſt. 57. Vide F. Cor. 284, 286, 287. Bacon 33.

S. P. C. 15. Dalt. c. 98. Foſter 288.

*Sect.* 25. However, perhaps in all theſe caſes, there ought to be a diſtinction between an aſſault in the highway and an aſſault in a town. For in the firſt caſe it is ſaid, that the perſon aſſaulted may juſtify killing the other without giving back at all; but that in the ſecond caſe, he ought to retreat as far as he can *without apparently hazarding his life*, in reſpect of the *probability of getting aſſiſtance.* † And by 24 Hen. 8. c. 5. it

N. Bendl. 47. Crom. 27, 28. Dalt. c. 98. Sum. 42. Foſter 273.

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Puff. l. 2. c. 5. Bract. 155. 1 Hale 487. 1 And. 41. Kely. 51. Prin. P. L. 211. 26 Aſſ. 23.

is recited, "Foraſmuch as it hath been in queſtion and ambiguity, that if any evil diſpoſed perſon or perſons do attempt felonioufly to rob or murder any perſon or perſons in or nigh any common high-way, cartway, horſeway, or foot-way, or in their manſions, meſſuages, or dwelling-places; or that felonioufly do attempt to break open any dwelling houſe in the night-time, ſhould happen, in the proſecution of ſuch felonious intent, to be ſlain by him or them whom the ſaid evil doers ſhould ſo attempt to rob or murder, or by any perſon or perſons being in their dwelling houſe, which the ſame evil doers ſhould ſo attempt burgarily to break by night, if the ſaid perſon ſo happening in ſuch caſes to ſlay the offender ſo attempting to commit murder or burglary, ſhould forfeit or loſe his goods or chattles for the ſame, as any other perſon ſhould do that by chance medley ſhould happen to kill another in his or their defence." For the declaration of which ambiguity and doubt, it is enacted, "That whoever ſhall be "indicted or appealed of or for the death of ſuch evil diſpoſed "perſon or perſons attempting to murder, rob, or burgarily to "break manſion houſes as aforeſaid, ſhall not forfeit any lands, "tenements, goods or chattles, but ſhall be thereof, and for "the ſame fully acquitted and diſcharged." (1)

(1) Not only the maſter of a houſe, but a lodger or ſojourner who kills an aſſailant, intending to commit murder or robbery, is within the protection of this ſtatute, Cro. Car. 544. But this reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any houſe in the day-time, unleſs it carries with it an attempt of robbery or arſon. 4 Comm. 180. Vide 1 Hale 488. And although it is the higheſt poſſible invaſion of property, a man is not juſtifiable in killing another whom he taketh in adultery with his wife, for it favours more of ſudden revenge than of ſelf preſervation; but this law hath been executed with great benignity. Ven. 159. Rav. 212. Prin. P. L. 212. If the huſband however, detect the raviſher in the attempt, the wife calling for aſſiſtance, it is excuſable *ſe defendendo*. 1 Hale 486.

Dalt. c. 98. Bac. Elem. c. 5. 4 Comm. 187.

*Sect.* 26. Secondly, Alſo the killing of an innocent perſon, in the defence of a man's ſelf, is ſaid to be juſtifiable in ſome ſpecial caſes, as, if two be ſhipwreck'd together, and one of them get upon a plank to ſave himſelf, and the other alſo, having no other means to ſave his life, get upon the ſame plank, and finding it not able to ſupport them both, thruſt the other from it, whereby he is drowned, it ſeems that he, who thus preſerves his own life at the expence of that of another, may juſtify the fact by the inevitable neceſſity of the caſe.

C. Car. 538. March 5. 1 Hale 42, 43.

*Sect.* 27. If a man be awakened in the night with an alarm that thieves are in his houſe, and ſearching for them in the dark with his ſword drawn, happen to kill a perſon, lying hid in a part of the houſe, who in truth had no ill deſign, and was brought thither by a ſervant in order to aſſiſt in cleaning the houſe, it ſeemeth that he may juſtify the fact, inaſmuch as it hath not the appearance of a fault.

CHAP.

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# CHAPTER THE TWENTY-NINTH.

## OF EXCUSABLE HOMICIDE.

EXCUSABLE homicide is either *per infortunium*, or *se defendendo*.—In treating of which I ſhall firſt ſhew the nature of each of them diſtinctly, and then conſider thoſe properties wherein they both agree. See 1 Hale 38, to 41, 393, 492.

*Sect.* 1. And firſt of homicide *per infortunium*, or by miſadventure, which is where a man in doing a lawful act (1), without any intent of hurt, unfortunately chances to kill another; Sum. 31. 1 Hale 472. St. Tr. 330. Strange 462. Prin. P. L. 214.

(1) Whether the act muſt be ſtrictly lawful to bring the homicide within this deſcription. Vide Fol. 258, 259. 3 Inſt. 56.

*Sect.* 2. As firſt, Where a labourer being at work with a hatchet, the head thereof flies off, and kills one who ſtands by. 6 Ed. 4. 7. B. Cor. 59, 148.

*Sect.* 3. Secondly, Where a third perſon whips a horſe on which a man is riding, whereupon he ſprings out, and runs over a child and kills him, in which caſe the rider is guilty of homicide, *per infortunium*; and he who gave the blow, of manſlaughter. Sum. 58, 59. 1 Hale 476. 4 Comm. 182.

*Sect.* 4. Thirdly, Where a workman, having firſt given loud warning to all perſons to ſtand clear, flings down a piece of timber from a private houſe ſtanding out of the road, and thereby kills one who happens to be underneath:—But if any perſon fling down ſuch a piece of timber idly in play, or even a workman fling it down in the ſtreets of a town, where the danger is apparent in reſpect of the number of people continually paſſing by, he is guilty of manſlaughter. 1 Hale 472, 475. Kely. 40. Bract. l. 3. c. 4. Dalt. c. 96. Sum. 31. B. Cor. 229.

*Sect.* 5. Fourthly, Where a ſchoolmaſter in correcting his ſcholar, or a father his ſon, or a maſter his ſervant, or an officer in whipping a criminal condemned to ſuch puniſhment, happens to occaſion his death. Yet if ſuch perſons in their correction be ſo barbarous, as to exceed all bounds of moderation, and thereby cauſe the party's death, they are guilty of manſlaughter at the leaſt (2), and if they make uſe of an inſtrument improper for correction, and apparently endangering the party's life, as an iron bar, or ſword, &c. or kick him to the ground, and then ſtamp on his belly and kill him, they are guilty of murder. 1 Hale 454, 473, 474. Bract. l. 1. c. 4. Sum. 31. Crom. 28. Dalt. c. 96. Keilw. 136. Skin. 668. Kely 65. 5 Mod. 287, &c. Foſter 262.

(2) So when an officer of the impreſs ſervice fires at a boat in order to bring her to, and kills a man, it is impoſſible that the offender ſhould be made guilty of more than manſlaughter, eſpecially if he fires in the manner uſual upon ſuch occaſions. L. Mansfield, Cowp. 832.

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Keilw. 108. B. Cor. 148. Kely 41. Prin. P. L. 226. 3 Wilſ. 407.

*Sect.* 6. Fifthly, Where one lawfully uſing an innocent diverſion, as ſhooting at butts, or at a bird, &c. by the glancing of an arrow, or ſuch like accident, kills another.

Keilw. 108, 136. Crom. 29. 11 H. 7. 23. Foſter 260.

*Sect.* 7. Sixthly, Where a perſon happens to kill another in playing a match of foot-ball, wreſtling, or ſuch like ſports which are attended with no apparent danger of life, and intended only for the trial, exerciſe and improvement, of the ſtrength, courage, and activity of the parties.

11 H. 7. 23. 3 Inſt. 160. 1 Hale 473. Keilw. 108, 136. Sum. 31. Dalt. c. 96. Hob. 134. Crom. 29. Con. B. Cor. 22. Foſter 261.

*Sect.* 8. Seventhly, Where one kills another in fighting at barriers or tilting by the king's command, which by the better opinion, ſecures him from being guilty of felony, by reaſon of any ſuch unfortunate accident.—† And under the 22. and 23 Car. 2. c. 25. and the 4 and 5 Will. and Mar. c. 23. made for the preſervation of game, where a ſtranger aſſiſting a game-keeper to ſeize nets even upon the ground of a third perſon, and, during the tranſaction, the gun of the ſtranger accidentally goes off, by which one of the poachers is killed, this is only chance medley, for the duty of the game-keeper will authoriſe the treſpaſs of the ſtranger. (*a*)

(*a*) 9 St. Tr. 315.

Sum. 31, 32. 52, 57, 58. Con. Hob. 134. Dalt. c. 98. Aleyn. 12. 1 Hale 472, 473. Foſter 292. Strange 499. 6 St. Tr. 195. 4 Comm. 183.

*Sect.* 9. But if a perſon kill another by ſhooting at a deer, &c. in a third perſon's park, in the doing whereof he is a treſpaſſer; or by ſhooting off a gun (3), or throwing ſtones in a city or highway, or other place where men uſually reſort; or by throwing ſtones at another wantonly in play, which is a dangerous ſport, and has not the leaſt appearance of any good intent; or by doing any other ſuch idle action as cannot but endanger the bodily hurt of ſome one or other; or by tilting or playing at handſword without the king's command; or by parrying with naked ſwords covered with buttons at the points, or with ſwords in the ſcabbards, or ſuch like raſh ſports, which cannot be uſed without the manifeſt hazard of life, he is guilty of manſlaughter.

(3) Therefore where the defendant came to town in a chaiſe, and before he got out of it he fired his piſtols, which by accident killed a woman, King, C. J. ruled it to be but manſlaughter. Str. 481.

Kely. 117. 1 Hale 39. 475.

*Sect.* 10. And if a man happen to kill another in the execution of a malicious and deliberate purpoſe to do him a perſonal hurt, by wounding or beating him; or in the wilful commiſſion of any unlawful act, which neceſſarily tends to raiſe tumults and quarrels, and conſequently cannot but be attended with the danger of perſonal hurt to ſome one or other; as by committing a riot, robbing a park, &c. he ſhall be adjudged guilty of murder.

3 Inſt. 56. Kely. 117. *Sup. c. 27. ſ. 4. Sum. 52.*

*Sect.* 11. And *a fortiori* he ſhall come under the ſame conſtruction, who in the purſuance of a deliberate intention to commit a felony, chances to kill a man, as by ſhooting at tame fowl, with an intent to ſteal them, &c. for ſuch perſons are by

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no means favoured, and they must at their peril take care of the consequence of their actions; and it is a general rule, 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 Hale 475. 6 St. Tr. 222. Prin. P. L. 226.

*Sect.* 12. Neither shall he be adjudged guilty of a less crime, who kills another, in doing such a wilful act, as shews him to be as dangerous as a wild beast, and an enemy to mankind in general; as by going deliberately with a horse used to strike, or discharging a gun, among a multitude of people, or throwing a great stone or piece of timber from a house into a street, through which he knows that many are passing; and it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c. 1 Hale 476. Sum. 32. 44. 3 Inst. 57. Dalt. c. 93. Foster 262. 11 H. 7. 23. a. B. Cor. 229. Dalt. c. 97.

*Sect.* 13. And now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempt be made upon him in his own house,) kills the persons by whom he is reduced to such an inevitable necessity. Vide sup. c. 28. s. 23, 24. Sum. 40, 41. S. P. C. 15. 4 Comm. 184.

*Sect.* 14. And not only he who on an assault retreats to a wall, or some such streight, 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 such a place, that he cannot go back without manifestly indangering his life, kills the other without retreating at all. B. Cor. 125. 43 Ass. 31. 3 Inst. 56. Sum. 41. Kely. 128. Foster 273.

*Sect.* 15. 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. Sum. 41. Crom. 28. S. P. C. 15.

*Sect.* 16. 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. Sum. 41. 3 Inst. 56. Crom. 28. Ante 71. s. 18. 9 St. Tr. 335. Str. 499. 6 St. Tr. 195. Fost. 292.

*Sect.* 17. According to some good opinions, even he who gives another the first blow on a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony. Yet such a person seems to be too much favoured by this opinion, inasmuch as the necessity to which he is at last reduced, was at the first so much owing to his own fault. And it is now agreed, that if a man strike another upon malice prepense, and then fly to the wall, and there kill him in his own defence, *he is guilty of murder.* S. P. C. 15. Crom. 28. See 1 Hale 479, 480. Dalt. c. 98. Kely. 58. Sum. 42. Dalt. c. 98. Foster 276.

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4 Comm. 186, 188.

*Sect.* 18. Thus far of each kind of excuſable homicide diſtinctly conſidered.—And now I am to conſider thoſe properties wherein they both agree.

3 Inſt. 56. 2 Inſt. 149. F. Cur. 116. 4 Comm. 182.

*Sect.* 19. And firſt it ſeems clear, That neither of theſe homicides are felonies, becauſe they are not accompanied with a felonious intent, which is neceſſary in every felony.

11 H. 4. 93. B. Cor. 80. 25 Aſſ. 7. Poſt. ſ. 24. Foſ. 284, 285.

*Sect.* 20. And from hence it ſeems plainly to follow, That they were never puniſhable with loſs of life: and the ſame alſo farther appears from the writ *de odio & atia*, by virtue whereof, if any perſon committed for killing another, were found guilty of either of theſe homicides, and no other crime, he might be bailed; and indeed it ſeems to be againſt natural juſtice, to condemn a man to death, for what is owing rather to his misfortune than his fault.

2 Inſt. 56. S. P. C. 16. 52 Hen. 3. 1 Hale 447.

*Sect.* 21. It is true indeed, that ſome of our beſt authors have argued from the ſtatute of *Marlebridge*, c. 26. which enacts, That, "*Murdrum de cætero non adjudicetur, ubi infortunium tantummodo adjudicatum eſt, &c.*" That before this ſtatute homicides by miſadventure, or *ſe defendendo*, were adjudged murder, and conſequently puniſhed by death.

Bract. 134. Kely. 121. See 1 Hale 425. 448.

*Sect.* 22. But to this it may be anſwered, That murder in thoſe days, ſignified only the private killing of a man by one, who was neither ſeen nor heard by any witneſs, for which the offender, if found, was to be tried by ordeal, and if he could not be found, the town in which the fact was done, was to be amerced ſixty-ſix marks, unleſs it could be proved that the perſon killed was an *Engliſhman*; for otherwiſe it was preſumed that he was a *Dane* or *Norman*, who in thoſe days were often privately made away with by the *Engliſh*. And it being a doubt whether homicide by miſadventure, &c. were to be eſteemed murder in this ſenſe, it ſeems to have been the chief intent of the makers of this ſtatute to ſettle this queſtion.

Bract. 135.

Sum. 98. 99. 2 Inſt. 315. Dalt. c. 98. 1 Hale 477. Or they may be brought up by *habeas corpus*, and bailed.

*Sect.* 23. Secondly, It is certain, however, That notwithſtanding neither of theſe offences be felonies, yet a perſon guilty of them is not bailable by juſtices of peace, but muſt be committed till the next coming of the juſtices of eyre or gaol-delivery.

Reg. 133. 2 Inſt. 42, 315. 9 Co. 56. 4 Inſt. 182. Bract. 123. Fleta b. 1. c. 25. S. P. C. 72. 2 Inſt. 43, 315.

*Sect.* 24. Indeed anciently a perſon, committed for the death of a man might ſue out the writ *de odio & atia*, which by *magna charta*, c. 26. is grantable without fee; and if thereon, by an inqueſt taken by the ſheriff, he were found to have done the fact by miſadventure, or *ſe defendendo*, he might be mainprized by twele men, upon the writ *de ponendo in ballium*. But ſuch writs and enquiries were taken away by the ſtatute of *Glouceſter*, c. 9. and 28 Edw. 3. c. 9. And though perhaps they were again revived by 42 Edw. 3. c. 1. which

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which makes all ſtatutes contrary to *magna charta*, void; yet at this day they ſeem to be obſolete, and indeed uſeleſs, inaſmuch as the party may probably be ſooner delivered in the uſual courſe, by the coming of the juſtices of goal-delivery. 9 Co. 56. Co. Bail and Mainp. c. 10. Foſter 285. and vide 31 Car. 2. c. 2.

*Sect.* 25. Thirdly, it is alſo agreed, That no one can excuſe the killing another, by ſetting forth in a ſpecial plea, that he did it by miſadventure, or *ſe defendendo*, but that he muſt plead Not guilty, and give the ſpecial matter in evidence. And that wherever a perſon is found guilty of ſuch homicide either upon a ſpecial indictment for the ſame, or by a verdict ſetting forth the circumſtances of the caſe on a general indictment of murder or homicide, he ſhall be diſcharged out of priſon upon bail and forfeit his goods: But that upon removing the record by *certiorari* into chancery, he ſhall have his pardon of courſe, without ſtaying for any warrant from the king to that purpoſe, as ſhall be more fully ſhewn in the ſecond book. ch. 37. ſect. 1. Ante c. 28. ſ. 3. 1 Hale 478. 4 H. 7. 2. Keilw. 53. 108. 2 Inſt. 316. S. P. C. 15, 16. F. Cor. 297, 354, 361. Dalt. c. 96, 98. F. N. B. 246. Foſter ch. 4.

## CHAPTER THE THIRTIETH.

## Of MANSLAUGHTER.

HOMICIDE againſt the life of another, amounting to felony, is either with or without malice. Foſter c. 5. Diſ. 2d.

*Sect.* 1. That which is without malice is called manſlaughter, or ſometimes chance-medley, by which we underſtand ſuch killing as happens either on a ſudden quarrel, or in the commiſſion of an unlawful act, without any deliberate intention of doing any miſchief at all. 4 Com. 186, 191. Prin. P. L. 215, 219, 224. 3 Inſt. 55, 57. Dalt. c. 94. Sum. 56, 57. 1 Hale 466.

*Sect.* 2. And from hence it follows, That there can be no acceſſaries to this offence before the fact, becauſe it muſt be done without premeditation. Sum. 217. b. 2. c. 29. ſ. 24.

*Sect.* 3. But the learning relating to this head, being for the moſt part co-incident with that of others, it will be ſuperfluous to inlarge on it here; and therefore I ſhall refer the reader to other chapters for the particular caſe; as to the following chapter of murder from ſection 21 to 32. for thoſe concerning duelling; and to the ſaid chapter, ſections 47, 48, 49. and to chapter 28. ſections 14, 15. for ſuch as happen in a riot, &c. and to chapter 29 from ſection 6 to ſection 13. for ſuch as fall out in the execution of a raſh unlawful action. Co. Lit. 127. Kely. 55. 138. 1 Hale 456.

*Sect.* 4. But there is a particular kind of manſlaughter proper to be conſidered here, from which the benefit of the clergy is taken away by 1 *Jac.* 1. c. 8. "Where any perſon

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"ſon ſhall ſtab or thruſt any perſon or perſons that hath not "then any weapon drawn, or that hath not then firſt ſtricken, "the party which ſhall ſo ſtab or thurſt, ſo as the perſon or "perſons ſo ſtabbed or thurſt, ſhall thereof die within the "ſpace of ſix months then next following, although it can- "not be proved that the ſame was done of malice fore- "thought." (1)

(1) This act is continued by 17 Car. 1. c. 4. "till ſome other act ſhall be made touching the continuance or diſcontinuance thereof."—For the reaſons and occaſion upon which it was paſſed, vide 4 Com. 193. Foſt. 297. L. Ray. 140. 845. 7 Mod. 133. Skin. 668.

1 Bulſt. 87. Kely. 55. 1 Hale 456. Foſ. 298.

*Sect.* 5. It is generally holden, that this ſtatute is but declarative of the common law, and in the conſtruction thereof, the following points have been reſolved.

1 Jon. 340. Vide Skin. 668. where Lord Holt queſtions Bryant's caſe.

*Sect.* 6. Firſt, That wherever 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 gave the firſt blow.

Sum. 58. 1 Hale 468. 2 Hale 344. See b. 2. c. 33. ſ. 98. Styles 86. Salk. 542, 543. Prin. P. L. 232. Foſt. 301. Alleyn 44.

*Sect.* 7. Secondly, That he only who actually gives the ſtroke, and not any of thoſe who may be ſaid to do it by conſtruction of law, as being preſent, and aiding and abetting the fact, are within the ſtatute: from whence it follows, That if it cannot be proved by whom the ſtroke was given, none can be found guilty within the ſtatute.

1 Jones 432. confirmed by Holt in Mawgridge's caſe, Kely. 131. Skin. 668. 3 Lev. 266, 255.

*Sect.* 8. Thirdly, That the killing of a man with a hammer, or ſuch like inſtrument, which cannot come properly under the words thruſt, or ſtab, is not a killing within the ſtatute.—But it ſeems that the diſcharging a piſtol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words, "having a weapon drawn;" for penal ſtatutes are conſtrued ſtrictly againſt the ſubject, and favourably and equitable for him.

See b. 2. c. 25. ſ. 117. Sum. 58, 266. Aleyn 47.

*Sect.* 9. Fourthly, That there is no need to lay the concluſion of the indictment *contra formam ſtatuti*, becauſe the ſtatute makes no new offence, but only takes away the privilege of the clergy from an old one, and leaves it to the judgment of the common law; from whence it follows, That a perſon indicted on the ſtatute, may be found guilty of manſlaughter generally. Alſo from the ſame ground it hath been reſolved, That if both an indictment lay, and a verdict alſo find, a fact to be *contra formam ſtatuti*, which cannot poſſibly be ſo, as that A. and B. aided and abetted *C. contra formam ſtatuti*, yet neither ſuch indictment nor verdict are void, but A. and B. ſhall be dealt with in the ſame manner as they ſhould have been, if thoſe words *contra formam ſtatuti* had been wholly omitted, becauſe the ſubſtance of the indictment being found, they may be rejected as ſurplus and ſenſeleſs: And, *a fortiori*, therefore it is certain, that they ſhall do no hurt to an in-

Cro. Jac. 282.

dictment

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dictment or verdict containing a fact which may be within the ſtatute.

*Sect.* 10. Fifthly, How far the words *contra formam ſtatuti*, ſupply a defect in an indictment, which does not ſpecially purſue the ſtatute, ſee the ſecond book, chapter 25. ſection 116. See 1 Hale 467 to 470.

A PRISONER whoſe caſe may be brought within this ſtatute is commonly arraigned upon two indictments, one at common law for murder, and the other upon the ſtatute Fol. 299. But 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 this ſtatute. Fol. 298. As where a huſband ſtabs an adulterer whom he ſeizes in the act. 1 Vent. 158. Raym. 212. Or where a man is aſſaulted by thieves in his houſe, the thieves having no weapon drawn, nor having ſtruck him; and he ſtabs one of them. Stra. 469. Or where an officer entering violently into the chamber of a gentleman to arreſt him, but without announcing the purpoſe for which he came, is ſtabbed by the gentleman with his ſword. Kely. 136. 1 Hale 470. Styles 467. Or where upon an out-cry of thieves, a perſon who had innocently hidden himſelf in a cloſet, was miſtaken for the thief and ſtabbed in the dark. 1 Hale 42. 474. C. Car. 538. W. Jones 429. Kely. 136. and many other inſtances of theſe kinds which have been held not within the ſtatute.

## CHAPTER THE THIRTY FIRST.

## Of MURDER.

HOMICIDE againſt the life of another, amounting to felony with malice, is either murder or petit treaſon.

*Sect.* 1. And firſt of murder, which anciently ſignified only the private killing of a man, for which by force of a law introduced by king *Canutus* for the preſervation of his *Danes*, the town or hundred where the fact was done, was to be amerced (*a*) to the king, unleſs they could prove that the perſon ſlain were an *Engliſhman*, (which proof was called *Engleſchire*), or could produce the offender, &c. And in thoſe days, the open wilful killing of a man through anger or malice, &c. was not called murder, but voluntary homicide. Dialog. de Scacch. l. 1. c. 10. *Stiern. jure Sueo*, l. 3. c. 3. Glanv. l. 14. c. 3. Foſter 281. Stat. Malbr. c. 26. Prin. P. L. 233. Bract. 134, 135. Kely. 121, &c. 1 Hale c 447. Bract. 121.

(*a*) The amerciament was 46 marks. Wilk. Ang. Sax. 295.

*Sect.* 2. But the ſaid law concerning *Engleſchire*, having been aboliſhed by 14 Edw. 3. c. 4. the killing of any *Engliſhman* or foreigner through malice prepenſe, whether committed openly or ſecretly, was by degrees called murder; and 13 *Rich.* 2. c. 1. which reſtrains the king's pardon in certain caſes, does in the preamble, under the general name of murder, include all ſuch homicide as ſhall not be pardoned without ſpecial words; and in the body of the act expreſſes the ſame by murder, or killing by await, aſſault, or malice prepenſed. And doubtleſs the makers of 23 *Hen.* 8. c. 1. which excluded all wilful murder *of malice prepenſe* from the benefit *of the clergy, intended to include open*, as well as private, *homicide within the word murder.* S. P. C. 18, 19. 1 Hale 448.

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Stamf. l. 1. c. 10. 1 Hale 450. 3 Inſt. 47.

*Sect.* 3. By murder therefore at this day we underſtand the wilful killing of any ſubject whatſoever, through malice forethought, whether the perſon ſlain be an *Engliſhman* or foreigner.

And for the better underſtanding hereof, I ſhall examine the following particulars:—Firſt, In what caſes a man may be ſaid to kill another. Secondly, In what places ſuch killing is within the cognizance of the law. Thirdly, Who are ſuch perſons by killing of whom a man may commit murder. Fourthly, What killing ſhall be adjudged to be malice prepenſe, or murder.

4 Comm. 196. 1 Hale 425, 432. 3 Inſt. 48, 91. Sum. 53. Palm. 548. 1 Inſt. 295. 2 Hawk. c. 29, 31. 9 Str. Tr. 146 to 251.

*Sect.* 4. As to the firſt point, viz. In what caſes a man may be ſaid to kill another; not only he who by a wound or blow, or by poiſoning, ſtrangling, or famiſhing, &c. directly cauſes another's death, but alſo in many caſes, he who by willfully and deliberately doing a thing which apparently endangers another's life, thereby occaſions his death, ſhall be adjudged to kill him.

Crom. 24, 90. Pult. 122. Dalt. c. 93. 1 Hale 431, 432.

*Sect.* 5. 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.

Crom. 24. Dalt. c 93. 1 Hale 432.

*Sect.* 6. Such alſo was the caſe of the harlot, who being delivered of a child, left it in an orchard covered only with leaves, in which condition it was ſtruck by a kite, and died thereof.

(*a*) S. P. C. 36. c. 3 Inſt. 91. Vide 14 Edw. 3. c. 10. (*b*) Dalt. c. 93. Sup. c. 1. ſ. 7. 1 Hale 431, 436, 442, 467. (*c*) Plowd. 474.

*Sect.* 7. And 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, or by himſelf; as where one by dureſs (*a*) of impriſonment compels a man to accuſe an innocent perſon who on his evidence is condemned and executed; or where one incites a (*b*) madman to kill himſelf or another; or where one lays (*c*) poiſon with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof.

9 Co. 81. 1 Hale 430, 431, 617. F. Cor. 311. S. P. C. 17. Crom. 24. Dalt. c. 93. Pult. 122. Sum. 53. Exodus c. 21. v. 29. L. Raym. 143. Pria. P. L. 236.

*Sect.* 8. Alſo he who wilfully neglects to prevent a miſchief, which he may, and ought to provide againſt, is, as ſome have ſaid, in judgment of the law, the actual cauſe of the damage which inſues; and therefore if a man have an ox or horſe, which he knows to be miſchievous, by being uſed to gore or ſtrike at thoſe who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to ſome opinions, the owner may be indicted, as having himſelf feloniouſly killed him; and this is agreeable to the *Moſaical* law. However, as it is agreed by all, ſuch a perſon is certainly guilty of a very groſs miſdemeanour.

Sect. 9.

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*Sect.* 9. Alſo it is agreed, That no perſon ſhall be adjudged by any act whatever to kill another, who doth not die thereof within a year and a day after; in the computation whereof the whole day on which the hurt was done ſhall be reckoned the firſt. Sum. 55. Pult. 123. Dalt. c. 93. S. P. C. 21.

*Sect.* 10. But if a perſon hurt by another, die thereof within a year and a 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. 1 Hale 428. Prin. P. L. 234.

A goaler, knowing a priſoner to be infected with an epidemick diſtemper, confines another priſoner againſt his will, in the ſame room with him, by which he catches the infection, of which the goaler had notice, and the priſoner dies; this is a felonious killing, Stra. 856. 9 St. Tr. 146. So, to confine a priſoner in a low damp unwholeſome room, not allowing him the common conveniencies which the decencies of nature require, by which the habits of his conſtitution are ſo affected as to produce a diſtemper of which he dies; this alſo is felonious homicide. Stra. 884. Ld. Raym. 1578.—For although the law inveſts goalers 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. O. B. 1784. p. 1177. And theſe were deliberate acts of cruelty, and enormous violations of the truſt the law repoſeth in its miniſters of juſtice. Foſter 322.

So alſo, any one who aſſuming to take care of another, refuſes the neceſſary ſubſiſtence, or by any other ſeverity though not of a nature to produce immediate death, as by putting the party in ſuch a ſituation as may poſſibly be dangerous to life or health, if death actually and clearly enſues in conſequence of it, it is murder.—And this mode of killing is of the moſt aggravated kind, becauſe a long time muſt unavoidably intervene before the death can happen, and alſo many opportunities of deliberation and reflection. O. B. 1784. p. 455. and Rex. v. S. Selſ. O. B. Feb. Seſſ. 1776.

So alſo, by the old common law, to bear falſe witneſs, and with expreſs premeditation, by this means to take away the life of another, was held to be murder. Mirr. c. 1. ſ. 19. Brit. c. 5. Bract. l. 3. c. 4. But it is ſaid, that this enormous crime can hardly be ſo conſidered at this day. 3 Inſt. 48. The authority, however, for this opinion, in Foſter 131. is ſaid by no means abſolutely to warrant the concluſion. 4 Comm. 196.

*Sect.* 11. As to the ſecond point, *viz.* In what places ſuch killing is within the conuſance of the law. It ſeems, That the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at common law, becauſe it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, That the death of one who is both wounded and dies beyond ſea; and it is ſaid by ſome, That the death of him who dies here of a wound given there, may be heard and determined before the conſtable and marſhal, according to the civil law, if the king pleaſe to appoint a conſtable. And it ſeemeth alſo to be clear, That ſuch a fact being examined by the privy council, may by force of 33 Hen. 8. c. 23. be tried, in relation to the principal offenders, but not as to the acceſſaries, before commiſſioners appointed by the king in any county in *England*. 3 Inſt. 48. 1 Hale 426. 2 Inſt. 51. Co. Lit. 75. S. P. C. 65. B. App. 153. C. Car. 247. b. 2. c. 23. ſ. 12. 3 Keb. 785. Con. 3 Keb. 715. 1 And. 195.

*Sect.* 12. A murder at ſea was anciently cognizable only by the civil law, but now by force of 27 Hen. 8. c. 4. and 28 Hen. 8. c. 15. it may be tried and determined before the 3 Inſt. 48, 49.

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king's commiſſioners (1) in any county of England according to the courſe of the common law. Yet the killing of one who dies at land of a wound received at ſea, is neither determinable at common law, nor by force of either of theſe ſtatutes: but it ſeems, that it may be tried by the conſtable and marſhal, or before commiſſioners appointed, in purſuance of the aforeſaid ſtatute of 33 Hen. 8. c. 23.

1 Leon. 270. Sum. 54. 3 Inſt. 48. Vide 4 Black. Rep. 459.

(1) Namely, the admiral or his deputy and three or four more (among whom two common law judges are conſtantly appointed, who in effect try all the priſoners) the indictment being firſt found by a grand jury of twelve men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the court of admiralty: The judge of the admiralty ſtill preſiding therein, juſt as the lord mayor preſides at the Seſſions in London. 4 Comm. 266.

† And for preventing any failure of juſtice, and for taking away all doubts touching the trial of murders in the caſes hereinafter mentioned, it is enacted by the 2 Geo. 2. c. 21. "That where any perſon ſhall be feloniouſly ſtricken or poiſoned upon the ſea, or at any place out of *England*, and ſhall die of the ſame ſtroke or poiſoning within *England*;—or where any perſon ſhall be feloniouſly ſtricken or poiſoned at any place within *England*, and ſhall die of the ſame ſtroke or poiſoning upon the ſea, or at any place out of *England*; an indictment thereof found by the jurors of the county of *England* in which ſuch death, ſtroke, or poiſoning ſhall happen reſpectively as aforeſaid, whether before the coroner upon the view of ſuch dead body; or before the juſtices of the peace, or other juſtices or commiſſioners who ſhall have authority to enquire of murders, ſhall be as good and effectual in law as well againſt the principals and acceſſaries as if ſuch felonious ſtroke and death, or poiſoning and death, and the offence of ſuch acceſſaries had happened in the ſame county where ſuch indictment ſhall be found; and the juſtices of gaol delivery and oyer and terminer in the ſame county; and alſo any ſuperior court, in caſe ſuch indictment ſhall be removed, &c. ſhall and may proceed upon the ſame in all points, as they might or ought to do in caſe ſuch ſtroke, poiſoning or death, &c. had happened in the ſame county where ſuch indictment ſhall be found."

*Sect.* 13. It is ſaid by ſome, That the death of one who died in one county, of the wound given in another, was not indictable at all at common law, becauſe the offence was not compleat in either county, and the jury could enquire only of what happened in their own county. But it hath been holden by others, That if the corps were carried into the county where the ſtroke was given, the whole might be enquired of by a jury of the ſame county: And it is agreed, That an appeal might be brought in either county, and the fact tried by a jury returned jointly from each: And at this day, by force of

3 Inſt. 48, 49. 1 Hale 426. B. Cor. 140, 141, 143. Indict. 13, 45. S. P. C. 90. 6 H. 7. 10. Finch. 411. S. P. C. 182. c. 45 Aſſ. 9. B. App. 3, 80, 83, 85, 149.

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of 2 and 3 Edw. 6. c. 24. the whole is triable by a jury of the county where the death ſhall happen, on an indictment found, or appeal brought, in the ſame county.

*Sect.* 14. Alſo by force of 26 Hen. 8. c. 6. a murder in Wales may be enquired of in an adjoining Engliſh county. But appeals muſt ſtill be brought in the proper county.

B. 2. c. 25. f. 39, 40. C. Car. 247, 498, 533. 1 Jon. 255.

1 Lev. 118. Latch. 12, 118. 3 Inſt. 50. 8 Mod. 136, 146. Stra. 502, 553. 6 Mod. 147. Vaugh. 413. Sid. 179. Keb. 621, 663, 677. Wilſ. 320. Atk. 175, 182. Vent. 93.

*Sect.* 15. As to the third point, *viz.* Who are ſuch perſons by killing of whom a man may commit murder. It is agreed, that the malicious killing of any perſon, whatſoever nation or religion he be of, or of whatſoever crime attainted, is murder.

*Sect.* 16. And it was anciently holden, That the cauſing of an abortion, by giving a potion to, or ſtriking, a woman big with child, was murder. But at this day, it is ſaid to be 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, notwithſtanding ſome opinions to the contrary (*a*). And in this reſpect alſo, the common law ſeems to be agreeable to the *Moſaical*, which as to this purpoſe is thus expreſſed, "If men ſtrive and hurt a woman with child, ſo that her "fruit depart from her, and yet no miſchief follow, he ſhall "be ſurely puniſhed, according as the woman's huſband will "lay upon him, and he ſhall pay as the judges determine; and "if any miſchief follow, then thou ſhalt give life for life."

Bract. 121. S. P. C. 21. B. Cor. 91. Sum. 53. F. Cor. 146, 183, 263. (*a*) Vide 1 Hale 433. 23 Aſſ. 94. b. 2. c. 29. f. 18. 3 Inſt. 50. 3 Aſſ. 2. B. Cor. 68. Dalt. c. 93. Exodus c. 21. v. 22, 23.

*Sect.* 17. It ſeems alſo agreed, That 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 acceſſary to the murder. † But in the caſe of the murder of baſtard children by the unnatural mother, it is difficult to prove that the child was born alive; and it is therefore enacted by 21 Jac. 1. c. 27. made perpetual by 16. Car. 1. c. 4. "That if any "woman be delivered of any iſſue of her body, male or fe-"male, which being born alive, ſhould by the laws of this "realm be a baſtard, and ſhe endeavour privately, either "by drowning or ſecret burying thereof, or any other way, "either by herſelf, or the procuring of others, ſo to conceal "the death thereof, as that it may not come to light, whether "it were born alive or not, but be concealed, except ſuch "mother can prove by one witneſs that ſuch child was born "dead, ſhe ſhall ſuffer death as in caſe of murder."

Dyer 186. 1 Hale 433, 429. 3 Inſt. 51. Kely. 127. 4 Comm. 198. Barring. 425. Prin. P. L. 16. O. B. 1784. p. 1223.

*Sect.* 18. As to the fourth point, *viz.* What killing ſhall be adjudged of malice prepenſe or murder. It is to be obſerved, That *any formed deſign of doing* miſchief, may be called

Foſt. 256, 257. Kely. 130. 1 Hale 451 to 454.

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called malice; and therefore that not ſuch killing only as proceeds from premeditated hatred or revenge againſt the perſon killed, but alſo in many other caſes, ſuch as is accompanied with thoſe circumſtances that ſhew the heart to be perverſely wicked, is adjudged to be of malice prepenſe, and conſequently murder.

Kely. 129, 130. 1 Hale 455, &c. 9 St. Tr. 715. Prin. P. L. 236.

*Sect.* 19. And according to this notion, I ſhall conſider, Firſt, Such murder as is occaſioned through an expreſs purpoſe to do ſome perſonal injury to him, who is ſlain in particular, which ſeems to be moſt properly called expreſs malice.—Secondly, Such as happens in the execution of an unlawful action, principally intended for ſome other purpoſe, and not to do a perſonal injury to him in particular who is ſlain, in which caſe the malice ſeems to be moſt properly ſaid to be implied.

*Sect.* 20. As to murder in the firſt ſenſe, ſuch acts as ſhew a direct and deliberate intent to kill another, as poiſoning, ſtabbing, and ſuch like, are ſo clearly murder, that I know not any queſtions relating thereto worth explaining.

But the caſes which have borne diſpute, have generally happened in the following inſtances—Firſt, In duelling.—Secondly, In killing another without any provocation, or but upon a ſlight one.—Thirdly, In killing one whom the perſon killing intended to hurt in a leſs degree.

Bulſt. 86, 87. Kely. 129. 10 St. Tr. 139.

*Sect.* 21. As to the firſt inſtance of this kind, it ſeems agreed, that wherever 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 alledging that he was (*a*) firſt ſtruck by the deceaſed; or that he had often (*b*) declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation; 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 thereof.

(*a*) 2 Bulſt. 147. Crom. 22.
(*b*) 1 Roll. 360. 3 Bulſt. 171. Sum. 48. 1 Hale 452, 453. O. B. 1784. N° 776.

3 Inſt. 51. Sum. 48. Kely. 56. 1 Lev. 80. Foſter 297. Oneby's caſe, 9 St. Tr. 22.

*Sect.* 22 And from hence it clearly follows, That if two perſons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or ſuch a conſiderable time after, by which, in common intendment, it muſt be preſumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder.

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*Sect.* 23. 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 diſadvantage by reaſon of the height of his ſhoes, &c. Kely. 56. 27. 1 Sid. 177. Foſter 297. Strange 773. Ld. Ray. 1489, 1493. 1 Lev. 180.

*Sect.* 24. And if A. on a quarrel with B. tell him that he will not ſtrike him, but that he will give B. a pot of ale to ſtrike him, and thereupon B. ſtrike, and A. kill him, he is guilty of murder, for he ſhall not elude the juſtice of the law by ſuch pretence to cover his malice. Sum. 48.

*Sect.* 25. In like manner if B. challenge A. and A. refuſe to meet him, but in order to evade the law, tell B. that he ſhall go the next day to ſuch a town about his buſineſs, and accordingly B. meet him the next day in the road to the ſame town, and aſſault him, whereupon they fight, and A. kills B. he ſeems guilty of murder, unleſs it appear by the whole circumſtances that he gave B. ſuch information accidentally, and not with a deſign to give him an opportunity of fighting. 1 Hale 453. Con. Crom. 22. and Sum. 48.

*Sect.* 26. And at this day it ſeems to be ſettled, That if a man aſſault another with malice prepenſe, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in reſpect of his firſt intent. Crom. 22. Dalt. 93. Sum. 47. Kely. 58, 129.

*Sect.* 27. And it hath been adjudged, That even upon a ſudden quarrel, if a man be ſo far provoked by any bare words or geſtures of another, as to make a puſh at him with a ſword, or ſtrike at him with any other ſuch weapon as manifeſtly endangers his life, before the other's ſword is drawn, and thereupon a fight enſue, and he who made ſuch aſſault kill the other, he is guilty of murder; becauſe that by aſſaulting the other in ſuch an outrageous manner, without giving him an opportunity to defend himſelf, he ſhewed that he intended not to fight with him, but to kill him, which violent revenge is no more excuſed by ſuch a ſlight provication, than if there had been none at all. Crom. 23. Dalt. c. 93. Kely. 61. 131. Ld. Ray. 1489. 9 St. Tr. 62.

*Sect.* 28. But it is ſaid, That if he who draws upon another in a ſudden quarrel, make no paſs at him till his ſword is drawn, and then fight with him, and kill him, he is guilty of manſlaughter only, becauſe that by neglecting the opportunity of killing the other before he was on his guard, and in a condition to defend himſelf, with a like hazard to both, he ſhewed that his intent was not ſo much to kill, as to combat with the other, *in compliance with thoſe* common notions of *honour, which prevailing over reaſon,* during the time that Kely. 55, 61, 131. Ld. Ray. 1493. 10 St. Tr. 518. Foſter 297. 2 Roll 461.

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a man is under the tranſports of a ſudden paſſion, ſo far mitigate his offence in fighting, that it ſhall not be adjudged to be of malice prepenſe.

Sum. 48.
3 Inſt. 51.
1 Hale 453.
3 Bulſt. 17.

*Sect.* 29. And 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 Hale 452.
Crom. 23.
Dalt. c. 93.
Sum. 49.
1 Roll 560.
3 Bulſt. 171.

*Sect.* 30. And ſuch an indulgence is ſhewn to the frailties of human nature, That where two perſons who have formerly fought on 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, unleſs it appear by the whole circumſtances of the fact.

Sum. 51.
Dalt. c. 93.
1 Freem. 514.
O. B. 1784 p. 1043.
1 Hale 443.
Sum. 51.
11 St. Tr. 114.
Prin. P. L. c. 19.

*Sect.* 31. But 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 ſome have gone ſo far as to hold, that the ſeconds of the perſon killed are alſo equally guilty, in reſpect to that countenance which they give to their principals in the execution of their purpoſe, by accompanying them therein, and being ready to bear a part with them: But ſome have thought this rather too ſevere a conſtruction to make a man by ſuch reaſoning the murderer of his friend, to whom he was ſo far from intending any miſchief, that he was ready to hazard his own life in his quarrel.

Foſter 255.
Ld. Ray. 1493.
Kely. 27.
Strange 773.

*Sect.* 32. And now I am to conſider the ſecond inſtance of this kind, viz. ſuch murder as happens in killing another without any provocation, or but upon a ſlight one; as to which it is to be obſerved, that wherever it appears that a man killed another, it ſhall be intended, *prima facie*, that he did it maliciouſly, unleſs he can make out the contrary, by ſhewing that he did it on a ſudden provocation, &c.

Cro. Eliz. 694.
Ld. Ray. 144.
2 Inſt. 557.
(*a*) Kely. 135.
1 Hale 455, 456. 473.
2 Roll. 460, 461.
(*b*) Kely. 131, &c.
Dalt. c. 93.
(*c*) C. Eliz. 779.
Noy 171.
1 Sid. 277.
1 Lev. 189.
Hob. 121.
Con. 1 Jon. 438.
Kely. 55, 61, 131. C. Jac. 296. 12 Co. 87. O. B. 1784. p. 19. Foſter 316. 5 St. Tr. 296. 7 St. Tr. 422. Styles 467.

*Sect.* 33. Alſo it ſeems to be agreed, That no (*a*) breach of a man's word or promiſe, no treſpaſs either to (*b*) lands or goods, no affront by bare (*c*) 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 defence or not; for ſo baſe and cruel a revenge cannot have too ſevere a conſtruction.

*Vide Foſ.* 295.
1 Hale 456.

*Sect.* 34. But if a perſon ſo provoked had beaten the other only in ſuch a manner, that it might plainly appear that he

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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 only.

*Sect.* 35. And of the like offence ſhall he be adjudged guilty, who ſeeing two perſons fighting together on a private quarrel, whether ſudden or malicious, takes part with one of them, and kills the other.

*Sect.* 36. Neither can he be thought guilty of a greater crime, who (*a*) finding a man in bed with his wife, or being actually (*b*) ſtruck by him, or pulled by the noſe, or fillipped upon the forehead, immediately kills him; or, (*c*) who happens to kill another in a contention for the wall; or (*d*) in the defence of his perſon from an unlawful arreſt; or (*e*) in the defence of his houſe from thoſe who claiming a title to it attempt forcibly to enter it, and to that purpoſe ſhoot at it, &c. or in (*f*) the defence of his poſſeſſion of a room in a publick houſe, from thoſe who attempt to turn him out of it, and thereupon draw their ſwords upon him; in which caſe the killing the aſſailant hath been holden by ſome to be juſtifiable: But it is certain, That it can amount to no more than manſlaughter.

(*a*) Kely 137. 1 Vent. 158. Raym. 212. 2 Keb. 829.
(*b*) Kely. 135. 3 Mod. 68.
(*c*) Sum. 57. 3 Inſt. 55.
(*d*) Kely. 137. 1 Hale 457.
(*e*) Sum. 57. Crom. 27. 1 Hale 445.
(*f*) Kely. 51. Prin. P. L. 225.

*Sect.* 37. Nor was he judged criminal in a higher degree, who ſeeing his ſon's noſe bloody, and being told by him, That he had been beaten by ſuch a boy, ran three quarters of a mile, and having found the boy, beat him with a ſmall cudgel, whereof he afterwards died. (1)

Sum. 48. C. Jac. 296. 12 Co. 87. 1 Vent. 159. 1 Hale 453. Godb. 182. Ld Raym. 1498. and Foſt. 294, 295.

(1) Nor was he thought more criminal, who, duped and encouraged by a concourſe of people, threw a pickpocket into a pound, adjoining to the road, in order to avenge the theft by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned; for although this mode of puniſhment is highly injuſtifiable and illegal, yet the law reſpects the infirmities and imbecilities of human nature where certain provocations are given. O.B. 1785. No. 751.—So alſo where three Scotch ſoldiers were drinking together in a public houſe, one of them ſtruck ſome ſtrangers who were drinking in another box with a ſmall rattan; they having uſed ſeveral opprobrious epithets, and reviled the character of the Scotch nation. An altercation enſued; and one of the ſtrangers laid hold of the ſoldier who had ſtricken, and threw him againſt a ſettle. The altercation increaſed, and, when the ſoldier had paid the reckoning, the ſtranger again ſhoved him from the room into the paſſage. Upon this the ſoldier exclaimed, that "he did not mind killing an Engliſhman "more than eating a meſs of crowdy." The ſtranger, aſſiſted by another perſon, then violently puſhed the ſoldier out of the houſe, whereupon the ſoldier inſtantly turned round, drew his ſword, and ſtabbed the ſtranger to the heart. This was adjudged manſlaughter. Lord Mansfield, 5 Burr. 2799. Vide alſo the King v. Snow, tried before Mr, Juſtice Willes, Sum. Aſſ. Northampton, 1786, and Rex v. John Brown for the murder of J. Maccaſter, June 1776. But in theſe, and indeed in every other caſe of homicide upon provocation now great ſoever it be, if there is a ſufficient time for paſſion to ſubſide, and for reaſon to interpoſe, ſuch homicide will be murder, Foſt. 278. 296. 1 Hale, 486. 1 Ven. 158. Ray. 212.

*Sect.* 38. AND now we are come to the third inſtance of this kind, *viz.* Such murder as happens in killing one whom the perſon killing intended to hurt in a leſs degree; as to which it is to be obſerved, That wherever a perſon in cool

Kely. 61, 131. Vide Mary Hazel's caſe. Sum. 49 to 52. O.B. 1785, p. 997.

*Jones 198. Palm. 585.* Str. 771. Ld. Ray. 1489. 1493.

blood,

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blood, by way of revenge, unlawfully and deliberately beats another in ſuch a manner, that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone ſo far.

C. Car. 131. W. Jon. 198. Palm. 545. Kely. 127. Sum. 49. 1 Hale 454. Foſter 292.

*Sect.* 39. Alſo it ſeems, That he, who upon a ſudden provocation, executeth his revenge in ſuch a cruel manner, as ſhews a cruel and deliberate intent to do miſchief, is guilty of murder, if death enſue; as where the keeper of a park, finding a boy ſtealing wood, tied him to a horſe's tail and beat *him*, whereupon the horſe ran away and killed him.

*Sect.* 40. AND now I am to conſider the ſecond general branch of this head, *viz.* In what caſes ſuch killing ſhall Prin. P. L. 226. be adjudged murder which happens in the execution of an unlawful action, principally intended for ſome other purpoſe, and not to do a perſonal injury to him in particular who happens to be ſlain.

And this I ſhall conſider in the following inſtances:—Firſt, Where the principal intention is to commit another felony.—Secondly, Where the principal deſign is to commit a bare breach of the peace, not intended againſt the perſon of him who happens to be ſlain.—Thirdly, Where the chief motive is to aſſiſt a third perſon.—Fourthly, Where the direct deſign is to eſcape from an arreſt.—Fifthly, Where the principal purpoſe is to uſurp an illegal authority.—Sixthly, Where no miſchief is intended at all.

1 Hale 465, 474. Sum. 50. Kely. 117. Prin. P. L. 225. Sum. 46, 50. Dalt. c. 93. Moor 87. Plow. 101.

*Sect.* 41. As to the firſt particular, *viz.* Such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony. It ſeems agreed, That wherever a man happens to kill another in the execution of a deliberate purpoſe to commit any felony, he is guilty of murder; as where a perſon ſhooting at tame fowl, with an 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 a deſign to murder him, miſſes him and kills another.

Plow. 474. 3 Inſt. 51. 1 Hale, 436, 441, 467. 9 Co. 81.

*Sect.* 42. And not only in ſuch caſes 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; and ſuch 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 perſuation, gave part of it to a child who died thereof; ſuch alſo was the caſe of the wife, who mixed ratſbane in a potion ſent by an apothecary to her huſband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation taſted it himſelf, having firſt ſtirred it about. Neither is

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it material in this caſe, That the ſtirring of the potion might make the operation of the poiſon more forcible than otherwiſe it would have been; for inaſmuch as ſuch a murderous intention, which of itſelf perhaps in ſtrictneſs might juſtly be made puniſhable with death, proves now in the event the cauſe of the king's loſing a ſubject, it ſhall be as ſeverely puniſhed as if it had had the intended effect, the miſſing whereof is not owing to any want of malice, but of power.

*Sect.* 43. But if one happen to be poiſoned by ratſbane laid in order to deſtroy vermine, the perſon by whom he is ſo killed is guilty of homicide *per infortunium* only, becauſe his intentions were wholly innocent. Plow. 474. 9 Co. 81. 1 Hale, 431. Sum. 50.

*Sect.* 44. Alſo if a third perſon accidentally happen to be killed by one engaged in a combat with another upon a ſudden quarrel, it ſeems that he who kills him is guilty of manſlaughter only. But it hath been adjudged, That if a juſtice of peace, conſtable, or watchman, or even a private perſon, be killed in endeavouring to part thoſe whom he ſees fighting, the perſon by whom he is killed, is guilty of murder; and that he cannot excuſe himſelf by alledging that what he did was in a ſudden affray in the heat of blood, and through the violence of paſſion; for he who carries his reſentment ſo high, as not only to execute his revenge againſt thoſe who have affronted him, but even againſt ſuch as have no otherwiſe offended him but by doing their duty, and endeavouring to reſtrain him from breaking through his, ſhews ſuch an obſtinate contempt of the laws, that he is no more to be favoured, than if he had acted in cool blood. 1 Hale 441, 446, 457. Sum. 455. 3 Inſt. 52. Dalt. c. 93. F. Cor. 180. Savil 67. Kely. 66. 22 Aſſ. 71. 4 Co. 40. 9 Co. 68. Crom. 25. Foſ. 308, 309.

*Sect.* 45. Yet it hath been reſolved, That if the third perſon ſlain in ſuch a ſudden affray do not give notice (2) for what purpoſe he comes, by commanding the parties in the king's name to keep the peace, or otherwiſe manifeſtly ſhewing his intention to be not to take part in the quarrel, but to appeaſe it, he who kills him is guilty of manſlaughter only, for he might ſuſpect that he came to ſide with his adverſary. Kely. 66, 115. Foſ. 310, 311. Staunf. 13. 1 Hale 442, 460, 461. Ld. Ray. 1296.

(2) If the officer be within his proper diſtrict, and known, or but generally acknowledged to bear the office he aſſumeth, the law will preſume that the party killing had due notice of his intent, eſpecially if it be in the day-time. Foſter 135, 311.

*Sect.* 46. As to the ſecond inſtance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, where the principal deſign is to commit a bare breach of the peace, not intended againſt the perſon of him who happens to be ſlain. It ſeems clear, That regularly, where divers perſons reſolve generally to reſiſt all oppoſers in the commiſſion of any breach of the peace, and to execute it in ſuch a manner as naturally tends to raiſe tumults and affrays, as by committing a violent diſſeiſin with great numbers of people, hunting in a park, *&c.* and in ſo doing happen to kill a man, they *are all guilty of murder; for they* muſt at their 1 Hale 442, 443, 463, 534. Sav. 67. Moor 86. Palm. 35. Crom. 24, 25. Sum. 47. 5 Mod. 289. Dyer 128. S. P. C. 17. Foſter 354. 9 St. Tr. 715.

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peril abide the event of their actions, who wilfully engage in ſuch bold diſturbances of the public peace, in open oppoſition to, and defiance of, the juſtice of the nation. (3)

(3) The fact however muſt appear to have been committed ſtrictly in proſecution of the purpoſe for which the party was aſſembled, Prin. P. L. 234. Therefore if divers perſons be engaged in an unlawful act, and one of them with malice prepenſe againſt *one* of his companions, finding an opportunity, kills him, the reſt are not concerned in the guilt of that act. Kely. 112. becauſe it hath no connection with the crime in contemplation. Prin. P. L. 235. So where two men were beating another man in the ſtreet, a ſtranger made ſome obſervation upon the cruelty of the act, upon which one of the two men gave him a mortal ſtab with a knife. Both the men were indicted as principals in the murder, yet, although both were doing an unlawful act in beating the man, as the death of the ſtranger did not enſue upon that act and it appearing that only one of them intended any injury to the perſon killed, the judges were of opinion that the other could not be guilty either as principal or acceſſary, and upon the caſe of the King v. Thomſon, Kely. 66, 67. he was acquitted. 8. Mod. 164. Trin. 9 Geo. 1. and 12 Mod. 629. Hill. 13 W. 3. Yet ſee 12 Mod. 256.

Crom. 28.
Sum. 56.
1 Hale 440, 441.
Foſter 312.

*Sect.* 47. Yet where diverſe rioters having forcible poſſeſſion of a houſe, afterwards killed a perſon whom they had ejected, as he was endeavouring in the night forcibly to regain the poſſeſſion, and to fire the houſe, they were adjudged guilty of manſlaughter only, notwithſtanding they did the fact in maintenance of a deliberate injury, perhaps for this reaſon, becauſe the perſon ſlain was ſo much in fault himſelf.

Sum. 45.
Dalt. c. 93.
3 Inſt. 52.
Kely. 66.
22 Aſſ. 71.
4 Co. 40.
9 Co. 68.
Crom. 25.

*Sect.* 48. But if in ſuch or any other quarrel, whether it were ſudden or premeditated, a juſtice of peace, conſtable, or watchman, or even a private perſon, be ſlain in endeavouring to keep the peace and ſuppreſs the affray, he who kills him is guilty of murder; for notwithſtanding it was not his primary intention to commit a felony, yet inaſmuch as he perſiſts in a leſs offence with as much obſtinacy, as to go on in it to the hazard of the lives of thoſe who no otherwiſe offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he ſeems to be in this reſpect equally criminal, as if his intention had been to commit a felony.

1 Hale, 437, 446.
Plow. 100, 101.
Crom. 23.
Dalt. c. 93.
Sum. 51, 52.
Savil. 67.
Palm. 30.

*Sect.* 49. As to the third inſtance of this kind, viz. ſuch killing, as happens in the execution of an unlawful action, the principal motive whereof was to aſſiſt a third perſon. It ſeems clear, that if a maſter maliciouſly intending to kill another take his ſervants with him, without acquainting them with his purpoſe, and meet his adverſary and fight with him and the ſervants ſeeing their maſter engaged take part with him, and kill the other, they are guilty of manſlaughter only, but the maſter of murder.

Crom. 26.
Sum. 52, 57.
Dalt. c. 94.
1 Roll. 407, 408.
3 Bulſt. 206.
Cowp. 832.

*Sect.* 50. And therefore it follows, *a fortiori*, that if a man's ſervant or friend, or even a ſtranger, coming ſuddenly, ſee him fighting with another, and ſide with him, and kill the other; or ſeeing his ſword broken ſend him another, wherewith he kills the other, he is guilty of manſlaughter only.

Kely. 67, 86, 87.
Foſt. 318, 319.
12 Mod. 361.

*Sect.* 51. Yet in this very caſe, if the perſon killed were a bailiff, or other officer of juſtice, reſiſted by the maſter, &c.

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in the due execution of his duty, ſuch friend or ſervant, &c. are guilty of murder, whether they knew that the perſon ſlain were an officer or not.

*Sect.* 52. But perhaps it may be objected, That in this laſt caſe there ſeems to be no more malice than in the former; and ſuch third perſon being wholly ignorant that the party killed was an officer, ſeems to be no more in fault than if he had been a private perſon.

*Sect.* 53. To this it may be anſwered, That all fighting is highly unlawful, and that he, who on a ſudden ſeeing perſons engaged in it, is ſo far from endeavouring to part them, as every good ſubject ought, that he takes part with one ſide, and fights in the quarrel, without knowing the cauſe of it, ſhews a high contempt of the laws, and a readineſs to break through them on a ſmall occaſion, and muſt at his peril take heed what he does, and conſequently might perhaps in ſtrict juſtice be adjudged in the foregoing caſes to act with malice, which doth not always ſignify a particular ill will againſt the perſon killed, as appears by many of the above-mentioned caſes; and though ſuch perſon be favoured in reſpect of the ſuddenneſs of the occaſion, where both the quarrel and the perſons are private, yet he muſt not expect ſuch indulgence where the fight, in which he ſo raſhly engages, was begun in open oppoſition to the juſtice of the nation, and a perſon happens to be killed thereby who engaged in maintenance thereof, and on that account is under its more particular care; and may juſtly challenge, that his oppoſers be made examples to deter others from joining in ſuch unwarrantable quarrels.

O.B. 1784, 775. Foſt. 271, 309, 318. 1 Sid. 160. Noy 50. Plow. 100.

*Sect.* 54. But if a man ſeeing another arreſted and reſtrained from his liberty, under colour of a preſs-warrant or civil proceſs, *&c.* by thoſe who in truth have no ſuch authority, happen to kill ſuch treſpaſſers in reſcuing the perſon oppreſſed, he ſhall be adjudged guilty of manſlaughter only, notwithſtanding the injured perſon ſubmitted to them, and endeavoured not to reſcue himſelf, and the perſon who reſcued him, did not know that he was illegally arreſted; for ſince in the event it appears, that the perſons ſlain were treſpaſſers, covering their violence with a ſhew of juſtice, he who kills them is indulged by the law, which in theſe caſes judges by the event, which thoſe who engage in ſuch unlawful actions muſt abide at their peril.

Kely. 60, 137. Cram. 27. Ld. Ray. 1296. Holt 485. But the principles upon which this caſe was decided, are very elegantly and warmly controverted by Mr. Juſtice Foſter, p. 315, to 318.

*Sect.* 55. As to the fourth inſtance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, whereof the direct deſign was to eſcape from an arreſt. It ſeems to be agreed, That whoever kills a ſheriff, or any of his officers, in the lawful execution of a civil proceſs, as on arreſting a perſon upon a *capias*, *&c.* is guilty of murder.

2 Hale, c. 83. Dalt. c. 93 1 Hale, 463. Sum. 45. Crom. 24. Stronge 499. 6 St. Tr. 195. Foſter 29, 139, 308.

*Sect.* 56. Neither is it any excuſe to ſuch a perſon that the proceſs *was erroneous, (for it is* not void by being

9 Co. 68. C. Jac. 80, 485

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1 Hale, c. 457, 458, 462. Foſt. 137, 311, 312, 318. B. 2. c. 13. ſ. 28. 2 Hale, c. 85. 6 Co. 68, 69.

ſo,) or that the arreſt was in the night, or that the officer did not tell him for what cauſe he arreſted him, and out of what court, (which is not neceſſary when prevented by the party's reſiſtance;) or that the officer did not ſhew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a ſpecial one.

C.Car.372, 537. 1 Hale, 56, 457, 460. 1 Jon. 346. 1 Lev. 91. 12 Co. 49. Jones, 429. 4 Inſt. 333.

*Sect.* 57. Yet the killing of an officer in ſome caſes will be manſlaughter only.—As, Firſt, Where the warrant by which he acts gives him no authority to arreſt the party; as where a bailiff arreſts *J. S.* a baronet, who never was knighted, by force of a warrant to arreſt *J. S.* knight.

6 Mod. 173. Sum. 46. Ld. Ray. 1028. Foſter 311, 319. 2 Roll. 137. Palm. 52. 1 Hale 458. 5 Co. 93. 2 Hale 117, 470. Salk. 79.

*Sect.* 58. Secondly, Where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arreſt a man; or perhaps if he arreſt one on a *Sunday* ſince 29 *Car.* 2. *c.* 7. by which all ſuch arreſts are made unlawful.

Peace officers having a *legal* warrant to arreſt for a breach of the peace, may break open doors, after having given due notice and demanded admittance, Foſt. 136. but they cannot juſtify breaking open *outward* doors or windows to execute a civil ſuit, Foſt. 319, 320. Cowp. 3. Therefore, where a man, who had been arreſted, by the artful contrivance of an officer upon civil proceſs, (that of the warrant having been filled up after it had been ſealed) obliged the officer to decamp by ſnapping a piſtol at him three times, but the officers returning to the houſe, accompanied by the plaintiff and the attorney; and all three attempting to force in, the man within fired a gun through the door and ſhot the attorney, it was ruled manſlaughter only, 10 St. Tr. 462. See alſo the arguments in the London Magazine for Auguſt, 1759. Foſt. 311, 312.

Vide Sup. c. 28. ſ. 5.

*Sect.* 59. As to the fifth inſtance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, whereof the principal purpoſe was to uſurp an illegal authority. It ſeems clear, That if perſons take upon them to put others to death, either by virtue of a new commiſſion wholly unknown to our laws, or by virtue of any known juriſdiction, which clearly extends not to caſes of this nature; as if the court of Common Pleas cauſe a man to be executed for treaſon or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder.

Summary 46.

Douglas 200.

*Sect.* 60. But where perſons act by virtue of a commiſſion, which if it were ſtrictly regular would undoubtedly give them full authority, but happens to be defective only in ſome point of form, it ſeems that they are no way criminal.

C. 29. ſ. 12. 3 Inſt. 57. Sum. 44. O. B. 1785, No. 751. 12 *Mod.* 628. *Ld. Ray.* 143. *Prin. P. L.* 236.

*Sect.* 61. As to the ſixth inſtance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, where no miſchief was intended at all. It is ſaid, That if a perſon happen to occaſion the death of another, inadviſedly 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.

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*Sect.* 62. Alſo it hath been anciently holden, That if a perſon not duly authorized to be a phyſician or ſurgeon, undertake a cure and the patient die under his hand, he is guilty of felony; but inaſmuch as the books wherein this opinion is holden, were written before the ſtatute of 23 *H.* 8. which firſt excluded ſuch felonious killing, as may be called wilful murder of malice prepenſe, from the benefit of clergy, it may be well queſtioned, whether ſuch killing ſhall be ſaid to be of malice prepenſe, within the intent of that ſtatute; however it is certain highly raſh and preſumptuous for unſkilful perſons to undertake matters of this nature; and indeed the law cannot be well too ſevere in this caſe, in order to deter ignorant people from endeavouring to get a livelihood by ſuch practice, which cannot be followed without the manifeſt hazard of the lives of thoſe who have to do with them: But ſurely the charitable endeavours of thoſe gentlemen who ſtudy to qualify themſelves to give advice of this kind, in order to aſſiſt their poor neighbours, can by no means deſerve ſo ſevere a conſtruction from their happening to fall into ſome miſtakes in their preſcriptions, from which the moſt learned and experienced cannot always be ſecure.

S. P. C. 16. Fulton 22. Crom. 27. 43 Ed. 3. 33. F. Cor. 163. Britt. c. 5. 4 Inſt. 251.

1 Hale 429, 430.

See Dalt. c. 93. 4 Comm. 197.

For other particulars relating to this head, ſee the chapter of *principals and acceſſaries*, in the ſecond book.

## CHAPTER THE THIRTY-SECOND.

## Of PETIT-TREASON.

AT common law not only the offences ſpecified in the twenty-fifth of Edward the Third, but many others alſo were eſteemed petit treaſons, which are not ſo at this day; as *(a)* piracy by a ſubject; *(b)* diſcovery of the king's counſel by one of the grand jury; *(c)* an attempt by a wife to kill her huſband, *&c.*

3 Inſt. 20, 21.

*(a)* 40 Aſſ. 35. Inf. c. 37. f. 2. *(b)* 27 Aſſ. 63. 3 Inſt. 22.

Dalt. c. 91. *(c)* S. P. C. 10. See 1 Hale 377, to 382.

But by 25 Edw. 3. no offence ſhall be adjudged petit treaſon, except in the following inſtances: Firſt, Where a ſervant kills his maſter; Secondly, Where a wife kills her huſband; Thirdly, Where an eccleſiaſtical man, ſecular, or religious, kills his prelate to whom he owes obedience.

*Sect.* 2. And this ſtatute hath been ſo ſtrictly conſtrued, that no other caſe whatſoever, which cannot be brought within the meaning of theſe words, however it may be in its own nature more heinous, ſhall, by parity of reaſon, be expounded to be within the equity of them; and therefore the murder of a father by a ſon ſhall not be puniſhed as petit treaſon, unleſs the ſon *may by a reaſonable* conſtruction come *under the word ſervant, ſerving* the father for meat, drink, cloaths,

Plow. 86. 3 Inſt. 12. 81. 18. Eliz. c. 1. 11.

Daliſ. 14. 3 Inſt. 20. Sum. 24. Dalt. c. 91. Crom. 19.

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1 Hale, 380. Lamb. 248. cloaths, or wages, in which caſe he ſhall be indicted by the name of a ſervant. (1)

(1) "I am ſorry," ſays an elegant writer upon criminal law, "that parricide is not comprehended within the claſs of petty treaſon, nor ſubjected by our laws to any degree of exemplary notice." Reiterated experience hath given a melancholy refutation to Solon's idea, "that it is impoſſible to commit ſo unnatural a barbarity." Prin. of P. L. 243.

1 Hale, 380. B. Treſ. 8, 12. Plow. 86. 19 H. 6. 47. 3 Inſt. 20. 4 Co. 46.

*Sect.* 3. Yet the murder of a miſtreſs, or of a maſter's wife, has been adjudged petit treaſon within this ſtatute, for notwithſtanding the perſon ſlain can in neither of theſe caſes, in good grammar, come under the word maſter, yet they are clearly within the meaning thereof, being uſed here to ſignify any perſon to whom another ſtands related as a ſervant.

33 Aſſ. 7. B Cor. 116. S. P. C. 10. Plow. 260. 1 Co. 99. Sum. 24. 3 Inſt. 20.

*Sect.* 4. Alſo the murder of a perſon by one who was his ſervant, upon malice conceived during the ſervice, though it be not within the expreſs words, is within the meaning of them, inaſmuch as it is but the execution of the treaſonable intention of the party, while he was a ſervant.

Sum. 24. 3 Inſt. 20, 21, 138. 1 Hale, 379. Dyer 332.

*Sect.* 5. Alſo the procuring, aiding, or abetting, of any of theſe offences, is clearly puniſhable within the meaning of this act, in the ſame manner as it was before; for the plain intent of the ſtatutes is only to reſtrain the judges from proceeding againſt other crimes, as petit treaſons, but no way to alter the law as to theſe.

Sum. 24. 1 Hale 378, 380. Daliſ. 16. Dalt. c. 91. Crom. 19, 20. Dyer 254. B. Cor. 119. 40 Aſſ. 25. Sum. 215. 3 Inſt. 20, 21, 139. Crom. 19. Dy. 128, 332. Moor 91. Daliſ. 16.

*Sect.* 6. And therefore it ſeems agreed, That perſons accuſed of petit treaſon ſhall be conſtrued to be either not guilty at all, or principal or acceſſary, according to the known rules of law in other caſes, and from hence it follows, That if the fact appear to have been done upon a ſudden falling out, or in the party's neceſſary ſelf-defence, *&c.* it cannot be petit treaſon. For inaſmuch as all petit treaſon implies murder, and is the higheſt degree thereof, wherever the circumſtances do not make the offence murder, they cannot make it petit treaſon; and *vice verſa*, generally wherever the circumſtances are ſuch as will make the killing of a ſtranger by a ſtranger murder, they make the killing of a huſband, or maſter, *&c.* petit treaſon. Yet it hath been adjudged, that if a wife or ſervant procure a ſtranger to kill the huſband, or maſter, in the abſence of ſuch wife, or ſervant, neither the procurer nor actor are guilty of petit treaſon, but of murder only; becauſe it is an allowed maxim, *That the offence of an acceſſary can never be of a higher kind than that of the principal*; but it ſeems clear, That if the wife or ſervant be either actually preſent, when the crime is done, or preſent only in judgment of law, as being in the ſame houſe, but not in the ſame room, (in which caſe the hopes of their immediate aſſiſtance encourages and emboldens the murderer to commit the fact, which otherwiſe perhaps he would not have dared to do, and makes them guilty in the ſame degree, as if they

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they had actually ſtood by with their ſwords drawn, ready to ſecond the villainy,) ſuch wife, or ſervant, being principals as much as the ſtranger, are guilty of petit treaſon, and the ſtranger of murder; but it is ſaid, That if a wife procure a ſervant to kill the huſband, both are guilty of petit treaſon: And even if a ſtranger procure a wife, or ſervant, to kill the huſband, or maſter, it ſeems that he may be indicted as acceſſary to petit treaſon. (2)

B. 2. c. 29. ſ. 89.
1 Hale, 382.
Dyer 332.
Crom. 41.
Daliſ. 16.

(2) A wife divorced *cauſa adulterii vel ſævitiæ*, is ſtill within this law, becauſe the bond of matrimony is not thereby diſſolved, and ſhe may again lawfully cohabit with her huſband. But a divorce *cauſa conſanguinitatis vel pre contractus*, entirely diſſolves the nuptial tye, and annihilates the very character of wife. Therefore, a wife *de facto* only, and not *de jure*, cannot commit this crime, for ſhe has no lawful lord to whom ſhe owes ſubjection and obedience. Neither can a huſband be guilty of this crime by killing his wife *de jure*, for there is no reciprocity of obedience and ſubjection.

† *Sect.* 7. A clergyman living and beneficed in one dioceſe who kills the biſhop or metropolitan of that dioceſe, or of the dioceſe where he may be beneficed by diſpenſation; or the biſhop who ordained him, may be guilty of this offence; for a canonical obedience reſults both from inſtitution and ordination. (3)

1 Hale, 378, 382.
4 Comm. 204.

(3) The law conſiders petty treaſon and murder as one offence, differing only in circumſtance and degree; Foſt. 327, and the principles that govern in the caſe of murder, are equally applicable to petty treaſon. 4 Comm. 204. An appeal of death will lie, and *Autrefois acquit*, or attaint in murder is a good bar in petit treaſon and *é converſo*. 2 Hale, 246, 232. 3 Inſt. 213. It is included in a pardon under the name of murder. 1 Hale, 378. And the offender may be indicted either for petty treaſon, murder, or manſlaughter, and tried and found guilty on ſuch indictment, of either of thoſe crimes reſpectively, according as the caſe may appear upon the evidence. 1 Hale, 378. Foſt. 320.

But, if the proſecutor be apprized of the real caſe, he ought to adapt the bill to the truth of the fact. Foſt. 164, 326. For, though the offences are to moſt purpoſes conſidered as ſubſtantially the ſame, yet there is ſome difference with regard to the judgment, and a very material one with regard to the trial. Foſt. 327. The puniſhment is, in a man, to be drawn and hanged, and in a woman, to be drawn and burned. 1 Hale, 382. 3 Inſt. 211. And on the trial, the priſoner is intitled to a peremptory challenge of thirty-five. Foſt. 327. Two witneſſes alſo are required both on the indictment and at the trial. 1 Edw. c. 12. Foſt. 337. And the 5 and 6. Edw. 6 c. 11. by general words extending to all treaſons, requireth that the witneſſes, *if living*, ſhall be examined in perſon upon the trial in open court. Depoſitions therefore taken before the coroner, or informations taken by a juſtice of peace, are not evidence whereon to ground a conviction of petit treaſon, *if the party be living*, though unable to travel, or kept out of the way by the priſoner, or his procurement. Foſt. 337.

† *Sect.* 8. Principals in this offence were firſt debarred the benefit of clergy by 12 Hen. 7. c. 7. and acceſſaries both before and after, by 4 & 5 Ph. & Ma. c. 4.

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# CHAPTER THE THIRTY-THIRD.

## Of SIMPLE LARCENY.

AND now we are come to offences againſt the goods of another, which are generally called larcenies, from the *Latin* word *Latrocinium*, of which there are two kinds: Firſt, Simple larceny; Secondly, Mix'd larceny.

Simple larceny is alſo of two kinds, Firſt, Grand larceny; Secondly, Petit larceny.

*Sect.* 1. Simple grand larceny is a felonious and fraudulent taking and carrying away, by any perſon, of the mere perſonal goods of another, not from the perſon, nor out of his houſe, above the value of twelve pence.

Sum. 60. Dalt. c. 101. 1 Hale 503, 504. Foſter 121.

For the better explication of which definition, I ſhall in order conſider the ſeveral parts of it; as, Firſt, What ſhall be ſaid to be a felonious and fraudulent taking; Secondly, What ſhall be ſaid to be a carrying away; Thirdly, By whom the offence may be committed; Fourthly, What are ſuch goods the taking whereof may be felonious; Fifthly, How far ſuch goods ought to belong to another; Sixthly, Of what value they muſt be.

*Sect.* 2. As to the firſt particular, *viz.* What ſhall be ſaid to be a felonious and fraudulent taking? It is to be obſerved, That all felony includes treſpaſs, and that every indictment of larceny muſt have the words *felonicè cepit*, as well as *aſportavit*; *(a)* from whence it follows, That if the party be guilty of no treſpaſs in taking the goods, he cannot be guilty of felony in carrying them away.

Kely. 24. B. Cor. 45, 48, 58, 137, 160. Sum. 61.

*(a)* If a horſe be ſtolen the indictment ſhould run "*cepit et abduxit.*" If a ſheep, &c. "*cepit et effugavit.*" 1 Hale 504. C. Cir. Com. 320.

*Sect.* 3. And from this ground it hath been holden, That one who finds ſuch goods as I have loſt, and converts them to his own uſe *animo furandi*, is no felon; and *a fortiori*, therefore, it muſt follow, That one who has the actual poſſeſſion of my goods by my delivery, for a ſpecial purpoſe, as a carrier who receives them, in order to carry them to a certain place; or a taylor who has them in order to make me a ſuit of cloaths; or a friend who is intruſted with them to keep for my uſe, cannot be ſaid to ſteal them, by embeziling of them afterwards.

3 Inſt. 102, 103. Sum. 61. 1 Hale, 504. 13 Ed. 4, 9, 10. S. P. C. 25.

*Vide ſect. 6.*

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*Sect.* 4. And herein our law differs from the civil, which, agreeably to the *Moſaical* law, having no capital puniſhment for *bare* theſts, deals with offences of this kind as ſuch, as in ſtrict juſtice moſt certainly it may; but our law which puniſhes all theft with death, if the thing ſtolen be above the value of twelve pence, and with corporal puniſhment if under, rather chuſes to deal with them as civil than criminal offences, perhaps for this reaſon, in the above mentioned caſe, concerning goods loſt, becauſe the party is not much aggrieved where nothing is taken but what he had loſt before; and for this cauſe in the other caſes, concerning the imbeziling of goods delivered to another by the owner, becauſe the party being intruſted with the whole poſſeſſion, it may be preſumed that both the offender and his offence are known, and conſequently the perſon injured is ſuppoſed to have a remedy by action againſt him, from which conſideration ſome have made it part of the definition of larceny, that it be committed without the knowledge of the owner; and it ſeems rigorous to have recourſe to ſevere laws, where probably more gentle ones will be effectual.

S. P. C. 25. See Exod. 22.

Dalt. c. 101. Bract. l. 3. 150. Fleta, l. 1. 36. 2 Hale, 290.

*Sect.* 5. And agreeably hereto, it has been reſolved, That even thoſe who have the poſſeſſion of goods by the delivery of the party, may be guilty of felony by taking away part thereof, with an intent to ſteal it; as if a carrier open a pack and take out part of the goods; or a weaver who has received ſilk to work; or a miller who has corn to grind, take out part with an intent to ſteal it; in which caſes it may not only be ſaid 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)

1 Hale, 505. 13 E. 4. 9, 10. S. P. C. 25. Dalt. c. 102. Kely. 35. 1 R. Abr. 73.

(1) To conſtitute larceny the property muſt be taken from the *poſſeſſion* of the owner; therefore, where A. intending to go a diſtant journey, hires a horſe, fairly 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; O. B. 1784, p. 1294, and thereby gave to A. dominion over the horſe, upon truſt, that he would return him when the journey was performed. O. B. 1786, p. 333, 334.—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; O. B. 1784, p. 294. ſo alſo where a horſe was obtained with the ſame deſign, upon pretence of trying its paces; O. B. 1779, p. 363. O. B. 1784, p. 293. So alſo, to obtain the delivery of money, with deſign feloniouſly to take it away, under the falſe pretence of having found a diamond ring of great value, has been determined by nine judges to be a taking from the poſſeſſion of the owner, and conſequently felony; O. B. 1785. p. 160. So alſo to obtain the delivery of goods under pretence of purchaſing them, and then to run away with them; Ray. 276. And, in general, 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, but inſtead of ſo doing he *converts them, on his way*, to his own uſe, it is a felonious taking; for the *maſter had a right to countermand the delivery* of them, and therefore the poſſeſſion remained in *him at the time of the converſion*; O. B. 1782, No. 375. O. B. 1783, No. 28. So alſo, if a watch

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watch maker ſteals a watch, delivered to him to clean; O. B. 1779, No. 83. Or if one ſteal cloaths delivered for the purpoſe of being waſhed; O. B. 1758, No. 18. Or goods in a cheſt delivered, with the key, for ſafe cuſtody; O. B. 1779, No. 83. Or guineas delivered for the purpoſe of being changed into half guineas; O. B. 1778. No. 52. Or a watch delivered for the purpoſe of being pawned; O. B. 1784, No. 613. In all theſe inſtances the goods taken have been thought to remain in the poſſeſſion of the proprietor, and the taking of them away held to be felony.

3 H. 7. 12.
21 H. 7. 14.
B. Cor. 58, 137.
S. P. C. 25.
Dalt. c. 102.
Moor. 246.
O. B. 1784. p. 292.
Pop. 84.
1 Hale 505, 667.

*Sect.* 6. Alſo it ſeems generally agreed, That one who has the bare charge, or the ſpecial uſe of goods, but not the poſſeſſion of them; as a ſhepherd who looks after my ſheep, or a butler, who takes care of my plate, or a ſervant who keeps the key to my chamber, or a gueſt who has a piece of plate ſet before him in an inn, may be guilty of felony, in fraudulently taking away the ſame; for in all theſe caſes the offence may as properly come under the word *cepit*; the injury to the owner is as great, and the fraud as ſecret, and the villainy more baſe, than if it had been done by a ſtranger. (2)

(2) Therefore, if the clerk to a banker or merchant has the care of money, or if he has acceſs to it for ſpecial and particular purpoſes, and is ſent to the bag or drawer for money, for the purpoſe of paying a bill, or if he is ſent for the purpoſe of bringing money generally out of that bag or drawer, and at the time he brings that money, he clandeſtinely and ſecretly takes out other money for his own uſe, he is as much guilty of a felony as if he had had no permiſſion or acceſs to it whatever. So, if a ſervant be ſent to a library for one particular book and he takes another, or being ſent for a hat, and ſword, and he ſteals a cane; in all theſe caſes it has been ſaid the offenders are guilty of felony; for though the property is delivered, the poſſeſſion of it remains in the true owner; O. B. 1784, p. 1295, 1304. So alſo where a perſon being left in an apartment, pawns the furniture or other property under his care, with a felonious deſign to ſteal it, it is felony; O. B. 1785, p. 717. O. B. 1786, p.

Summary 62.
3 Inſt. 107.
B. Cor. 160.
S. P. C. 25.
O. B. 1786, p. 334.
1 Hale, 505.

*Sect.* 7. Alſo it ſeems clear, That if a carrier, after he has brought the goods to the place appointed, take them away again ſecretly *animo furandi*, 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 Hale, 507.
3 Inſt. 108.
Sum. 63.
Kely. 43.
1 Sid. 254.
Raym. 276.

*Sect.* 8. And not only he who firſt lays his hands on my goods himſelf, but in many caſes he who receives them from another, may be guilty of feloniouſly taking them; as if a perſon intending to ſteal my horſe, take out a replevin, and thereby have the horſe delivered to him by the ſheriff; or if one intending to rifle my goods, gets poſſeſſion from the ſheriff, by virtue of a judgment obtained, without any the leaſt colour or title, upon falſe affidavits, &c. in which caſes the making uſe of legal proceſs is ſo far from extenuating, that it highly aggravates the offence, by the abuſe put on the law, in making it ſerve the purpoſes of oppreſſion and injuſtice.

13 E. 4. 3.
Sum. 64, 69,
S. P. C. 61, 182.
B. App. 84, 100.
B. Coron 71.

*Sect.* 9. Alſo he who ſteals my goods from *J. S.* who had ſtolen them before, may be indicted, or appealed, as having ſtolen them from me, becauſe in judgment of law, the poſſeſſion as well as property always continued in me. And for this cauſe, he who ſteals my goods in the county of B. and carries them to the county of C. may be indicted or appealed in the county of C. as well as that of B. becauſe the poſſeſſion ſtill continuing

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continuing in me, every moment's continuance of the treſpaſs is as much a wrong to it, and may come under the word *cepit*, as much as the firſt taking. Yet a pirate carrying the goods whereof he robbed me at ſea, into any county, cannot be indicted for felony there, becauſe the original taking was not ſuch a felony whereof the common law takes conuſance.

4 H. 7. 5, 6. 1 Hale, 507. 3 Inſt. 113.

† But by 13 Geo. 3. *c.* 31. *ſ.* 4. "Any perſon having ſtolen, "or otherwiſe feloniouſly taken money, cattle, goods, or other "effects in either part of the United kingdom, who ſhall after- "wards have the ſame, or any part thereof, in their poſſeſſion "in the other part of the United kingdom, may be indicted of "larceny in that part where they are ſo found with the pro- "perty as aforeſaid; and by ſect. 5. Receivers may be indicted "in that part of the United kingdom where they ſhall receive, "or have in their poſſeſſion the property ſo ſtolen."

*Sect.* 10. It ſeems not to have been clearly ſettled before 3 & 4 Will. & Mar. *c.* 9. whether a lodger, who ſtole the furniture of his lodgings, were indictable as a felon, inaſmuch as he had a kind of ſpecial property in the goods, and was to pay the greater rent in conſideration of them; but if it had appeared clearly, from the whole circumſtance of the caſe, that the firſt intention of the party in coming to the houſe, was not to have the conveniency of lodging in it, but only, under the colour thereof, to have the better opportunity of rifling it, and to elude the juſtice of the law, by endeavouring to keep out of the letter of it, by gaining a poſſeſſion of the goods with the conſent of the owner, I cannot ſee any good reaſon why ſuch a perſon ſhould not be eſteemed as much a felon as a mere ſtranger, inaſmuch as his whole deſign was to defraud the law, and the conſent of the owner was grounded on a ſuppoſition of his coming as a lodger, and could never have been gained if the truth had appeared, which the party ſhall get no advantage by falſifying: And it brings a contempt upon the juſtice of the nation to ſuffer its laws to be evaded by ſuch little contrivances: However this queſtion is now ſettled by the ſaid ſtatute, which hath enacted and declared, "That if any perſon or perſons ſhall take away with an intent "to ſteal, imbezil or purloin any chattel, bedding or furni- "ture, which by contract or agreement he or they are to uſe, "or ſhall be let to him or them to uſe, in or with ſuch lodg- "ing, ſuch taking, imbeziling, or purloining, ſhall be to "all intents and purpoſes taken, reputed, and adjudged to be "larceny and felony, and the offender ſhall ſuffer as in caſe "of felony." (3)

Of larceny by breach of truſt.

By 4. Geo. 3. c. 2. ſ. 53, houſeholders muſt give an account of their lodgers on pain of 5l.

Kely. 24, 81.

Show. 50, 57.

For indictment on this ſtatute, vide Cro. Cir. Com. 339.

(3) A wife cannot be found guilty with her huſband upon this ſtatute, for ſhe is under his coercion. O. B. 1783, No. 30. Nor without her huſband, if it ſhould appear that the lodgings were let to *him*. O. B. 1761, No. 17. Nor even if it ſhould appear that the lodgings were let jointly to both the huſband and wife, for it ſhall be conſtrued to be the act of the huſband only. O. B. 1758, No. 105. The offender muſt be a lodger at *the time the larceny* is committed. O. B. 1785, No. 74. The indictment *alſo muſt ſet forth the name of the perſon* by whom the lodgings were let. O. B. *1784, No. 747. And the property ſtolen muſt be* ſuch as may reaſonably be conſtrued the furniture *of the ſort of lodging taken.*

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*Sect.* 11. It is recited by 21 Hen. 8. c. 7. "That before the time of the ſaid ſtatute, divers, as well noblemen, as other the king's ſubjects, had, upon confidence and truſt, delivered unto their ſervants their caſkets, and other jewels, money, goods and chattels, ſafely to keep, to the uſe of the ſaid maſters or miſtreſſes, and after ſuch delivery the ſaid ſervants had withdrawn themſelves, and gone away from their ſaid maſters or miſtreſſes, with the ſaid caſkets, jewels, money, goods and chattels, or part thereof, to the intent to ſteal the ſame, and defraud their ſaid maſters or miſtreſſes thereof, and ſometime being with their ſaid maſters or miſtreſſes, had converted the ſaid jewels, money, and other chattels, or part thereof, to their own uſe, which miſbehaviour ſo done, was doubtful in the common law, whether it were felony or not; and by reaſon thereof the aforeſaid ſervants had been in great boldneſs to commit ſuch or the like offences." And thereupon it is enacted, "That "all and ſingular ſuch ſervants, (being of the age of eighteen "years, and not apprentices) to whom any ſuch caſkets, "jewels, money, goods or chattels, by his or their ſaid "maſters or miſtreſſes ſhall from thenceforth ſo be de- "livered to keep, that if any ſuch ſervant or ſervants with- "draw him or them from their ſaid maſters or miſtreſſes, and "go away with the ſaid caſkets, jewels, money, goods or "chattels, or any part thereof, to the intent to ſteal the "ſame, and defraud his or their ſaid maſters or miſtreſſes "thereof, contrary to the truſt and confidence to him or them "put, by his or their ſaid maſters or miſtreſſes, or elſe being "in the ſervice of his ſaid maſter or miſtreſs, without aſſent "or commandment of his maſter or miſtreſs he imbezil the "ſame caſkets, jewels, money, goods or chattels, or any part "thereof, or otherwiſe convert the ſame to his own uſe, "with like purpoſe to ſteal it, That if the ſaid caſkets, "jewels, money, goods, or chattels, that any ſuch ſervant "ſhall ſo go away with, or which he ſhall imbezil with purpoſe "to ſteal it, as is aforeſaid, be of the value of 40s. or above, "That then the ſame falſe, fraudulent and untrue act and "demeanour, from thenceforth, ſhall be deemed and ad- "judged felony, &c."

See 1 Hale, 667, 668.
Dalt c. 102.
Summary 63.

*Sect.* 12. In the conſtruction of this ſtatute the following opinions have been holden: Firſt, That it extends only to ſuch as were ſervants to the owner of the goods, both at the time when they were delivered, and alſo at the time when they were ſtolen.

Dyer 5.
Sum. 62, 63.
3 Inſt. 105.
*Dalt. c. 102.*

*Sect.* 13. Secondly, That it is ſtrictly confined to ſuch goods as are delivered to keep, and therefore that a receiver, who having received his maſter's rents, runs away with them; or a ſervant, who being intruſted to ſell goods, or to receive money due on a bond, ſells the goods, &c. and departs with the money, is not within the ſtatute; but that a ſervant, who receives

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receives his master's goods from another servant to keep for the master, is as much guilty as if he had received them from the master's own hands, because such a delivery is looked upon as a delivery by the master.

*Sect.* 14. Thirdly, That it includes not the wasting or consuming of goods, howsoever wilful it may be; nor the taking away of an obligation, or any other *bare chose in action.* Summary 63. Dalt. c. 102. Dyer 5.

*Sect.* 15. Fourthly, That it extends not to the taking of such things whereof the actual property is not in the master at the time. Therefore, if a servant having money, or corn, *&c.* delivered to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, he is not within the statute; because the property of these things is so far changed, by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them without a trespass. But it is agreed, That if a servant make a suit of cloaths of cloth, or a pair of shoes of leather, delivered to him by the master, and then run away with them, he is within the statute; because the property is no way altered. And even in the first case, whether the *very taking* of the plate or malt, be within the statute or not, yet I can see no reason, why the whole act of the servant taken together, should not be looked upon as a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute: It has been resolved, That a servant who changes his master's money from silver to gold, and then runs away with it, *&c.* is within the statute; and I can see no good distinction between that and the present case. 5 H. 7. 16. Crom. 50. Dalt. c. 102. See Crom. 50. Dalt. c. 102.

*Sect.* 16. The benefit of clergy was taken away from all felonies within this statute, by 27 Hen. 8. c. 17. and restored by 1 Edw. 6. c. 12.—But it is enacted by 12 Ann. Stat. 1. c. 7. "that whosoever shall feloniously steal to the value of "40*s.* or more, being in any dwelling-house, or out-house, "thereto belonging, or shall aid or assist to commit any such "offence, shall be absolutely debarred of the benefit of clergy. "—But this act shall not extend to apprentices under the age "of fifteen years, who shall rob their masters as aforesaid." Vide Bk. 2. c. 33. s. 66, 67.

† *Sect.* 17. To the two foregoing larcenies, *by breach of trust*, by lodgers and *menial* servants, the legislature has added two others, *viz.* By officers or servants employed to transact the business of the bank of England; and by officers, or servants employed in the post-office. As to servants employed by the BANK OF ENGLAND, it is enacted by 15 Geo. 2. c. 13. s. 12. "That "if any officer or servant of the bank of England, being in- "trusted with any note, bill, dividend warrant, bond, deed, or "any security, money, or other effects belonging to the said "Company, or having any bill, dividend warrant, bond, deed, "or any security or effects of any other person lodged or Vide the law of larceny as to the servants of *private Bankers* explained in Sessions paper O. B. p. 1294. and ante p. 136.

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"deposited with the said company, or with him as an officer "or servant of the said company, shall secrete, imbezle, or run "away with the same, or with any part thereof he shall suffer "death without benefit of clergy."

† As to servants employed by the POST-OFFICE, it is enacted by 5 Geo. 3. c. 25. s. 17. and 7 Geo. 3. c. 50. "That "if any deputy, clerk, agent, letter-carrier, post-boy or rider, "or any other officer or person whatsoever employed in re- "ceiving, stamping, sorting, charging, carrying, conveying "or delivering letters or packets, or in any other business re- "lating to the post office, shall secret, embezle, or destroy any "letter, packet or bag of letters, which he shall be intrusted "with, or which shall have come to his possession, containing "any bank note, bank post bill, bill of exchange, exchequer "bill, South Sea, or East India bond, dividend warrant, navy "or victualling or transport bill, ordnance debenture, seaman's "ticket, state lottery ticket or certificate, bank receipt for "payment on any loan, note of assignment of stock in the "funds, letter of attorney for receiving annuity or dividends, "or for selling stock in the funds, or belonging to any com- "pany, society or corporation, or of the Bank, South Sea, "East India or any other company or society or corporation, "American provincial bill of credit, goldsmiths or bankers "letter of credit, or note for or relating to the payment of "money or other bond or warrant, draught, bill, or pro- "missory note whatsoever for the payment of the money, or "shall steal and take any of the same out of any letter or "packet that shall come to his possession, he shall suffer death "without clergy." (4)

Vide the trial of John Mills O. B. 1785, No. 253, convicted upon this statute.

(4) In an indictment on this statute, the offender was charged in the first and third counts, as, "A clerk employed in *charging and sorting* letters. &c." In the second and fourth counts, as, "A person employed in the business relating to the general post-office." It appeared in evidence that he was only a *sorter* and not a *charger* of letters; and the jury, therefore, by the direction of the Court, found a verdict upon the second and fourth counts only. In arrest of judgment it was moved, that the jury having acquitted him on the counts which charged him as "a sorter and "charger," and as he did not appear to be "a person employed by the post-office *in any other business* but that of sorting, which is one of the employments particularly specified in the statute, he could not be convicted, and eleven judges unanimously agreed that judgment should be arrested for the cause above alledged; but they inclined to think the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a sorter only. Rex. v. Shaw. 2 Black. 789.

† By Jac. 1. c. 7. and 17 Geo. 3. c. 56. "Persons employ- "ed in the hat, woollen, linen, fustian, cotton, iron, leather, "fur, hemp, flax, mohair, silk, or dying manufacture, who "shall embezle or clandestinely dye any of the materials with "which they are intrusted, and any person who shall know- "ingly buy, sell, pawn, or dispose of the same, are liable to "be punished by fine, whipping, and imprisonment."

*Sect.* 18. As to the second particular, *viz.* What shall be said to be such a carrying away of the thing stolen, as will bring the case within the word *asportavit*; which is necessary in every indictment of larceny. It seems that any the least

† Inst. 108.
8 Vent. 215.

remaining

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removing 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 an intent to ſteal them, carried them into the hall, and was apprehended before he could get out of the houſe, was adjudged guilty of larceny. So alſo was he who having taken a horſe in a cloſe with an intent to ſteal him, was apprehended before he could get him out of the cloſe: Neither is he leſs guilty who pulls off the wool from another's ſheep, or *(a)* ſtrips their ſkins, with an intent to ſteal them; or he who intended to ſteal plate takes it out of a trunk wherein it was, and lays it on the floor, and is ſurprized before he can carry it off. (5)

7 Aſſ. 39. S. P. C. 26. B. Cor. 107. 3 Inſt. 109. 1 Hale 508. Daſſ. 21. Crom. 36. O.B. Seſſ. 1784, No. 537. Dalt. p. 501. Kely. 31.

*(a)* Rex v. Martyn, Lent Aſſ. for Northampton, 1777.

(5) A man was detected in taking the contents of a bale of goods in a waggon. It appeared that the bale laid horizontally, and that he had ſet it on its end; but as it had not been removed from the *ſpot*, this was held, upon a caſe reſerved, not to be a ſufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a waggon, it was held a ſufficient removal to conſtitute a carrying away. O. B. 1784, p. 734. So a diamond ear-ring ſnatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was held to be a ſufficient aſportation. O. B. 1784, No. 537.

*Sect.* 19. As to the third particular, *viz.* By whom larceny may be committed,—It is certain that a feme covert may be guilty thereof by ſtealing the goods of a ſtranger, but not by ſtealing her huſband's, 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.

Sup. c. 1. ſ. 9, 10, 11. 1 Hale 514, 515, 516. 637, 638. Pult. 127. Sum. 65. B. Cor. 14. 77. Dalt. c. 104. 13 Aſſ. 5. 18 Ed. 3. 32. S. P. C. 94. Crom. 35. See Proverbs c. 6. v. 30. Gro de Jure, b. 2. c. 2. ſ. 6, 7. Puffend. b. 2. c. 6. Britton, c. 10. Mirr. c. 4.

*Sect.* 20. It is ſaid to be no felony for one reduced to extreme neceſſity, to take ſo much of another's victuals as will ſave him from ſtarving; but if ſuch his neceſſity be owing to his unthriftineſs, ſurely it is far from being any excuſe. (6)

(6) A judge ought to be tender in ſuch caſes, and uſe much diſcretion and moderation. 1 Hale 565. But it ſeems to be an unwarranted doctrine, borrowed from the notions of ſome civilians; it ſeems it is now antiquated, the law of England admitting no ſuch excuſe at preſent. 4 Comm. 31. 1 Hale, 54.

*Sect.* 21. As to the fourth particular, *viz.* What are ſuch goods, the ſtealing whereof may amount to felony, the following particulars are to be obſerved.—Firſt, they ought to be no way annexed to the freehold. And therefore it is no larceny, but a bare treſpaſs, to ſteal corn or graſs, growing, or apples on a tree, or lead on a church or houſe, but it is larceny to take them being ſevered from the freehold, whether by the owner, or even by the *thief himſelf, if he ſever them at one time, and then come again at another time* and take them.—

1 Hale, 509, 512. 12 Aſſ. 32. B. Cor. 76. 1 Mod. 89. Sum. 67. Allen 83. 3 Inſt. 109. 2 Keb. 675.

And

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1 Vent. 187. Crom. 37. 18 H. 8, 2. S. P. C. 25. Strange 1137. 2 Comm. 16.

And the general reaſon of this diſtinction (7) between chattels fixed to a freehold and thoſe lying looſe, perhaps may 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 to be ſecured by ſo ſevere laws as the other require.

(7) For an explanation of the principle upon which this diſtinction is founded, vide 4 Comm. 233. 2 Bac. Abr. 470.—But many of the deſcriptions of property which come within this notion of an adherence to the freehold, being thereby placed in a ſituation extremely precarious and unprotected, the legiſlature has from time to time impoſed various penalties upon the ſtealing, injuring, or deſtroying of them. For an account of which vide appendix the firſt, chapter fifty-eight, under the title "Offences to property adherent to the freehold."

Sum. 66, 67. Strange 1133. Seſſ. Caſ. 378. 3 Inſt. 109. B. Cor. 155. S. P. C. 25. Crom. 27. 3 Rep. 33. 4 Comm. 234. Stra. 1136.

*Sect.* 22. Secondly, They ought to have ſome worth in themſelves, and not to derive their whole value from the relation they bear to ſome other thing, which cannot be ſtolen, as paper or parchment on which are written aſſurances concerning lands, or obligations, or covenants, or other ſecurities for a debt or other *choſe* in action. And the reaſon wherefore there can be no felony in taking away any ſuch thing ſeems to be, becauſe, generally ſpeaking, they being of no manner of uſe to any but the owner, are not ſuppoſed to be ſo much in danger of being ſtolen, and therefore need not to be provided for in ſo ſtrict a manner as thoſe things which are of a known price, and every body's money; and for the like reaſon it is no felony to take away a villein, or an infant in ward, &c.

Made perpetual by 9 Geo. 2. c. 18.

† But it is now enacted by 2 Geo. 2. *c.* 25. *ſ.* 3. "That whoever ſhall ſteal or take by robbery, any exchequer orders or tallies, or other orders intitling any other perſon to any annuity or ſhare in any parliamentary fund, or any exchequer bills, bank notes, South Sea bonds, Eaſt-India bonds, dividend warrants of the Bank, South Sea company, Eaſt-India company, or any other company, ſociety or corporation; bills of exchange, navy bills or debentures, goldſmiths notes for the payment of money, or other bonds or warrants, bills, or promiſſory notes for the payment of any money being the property of any other perſon or of any corporation, notwithſtanding any of the ſaid particulars are termed in law a *choſe in action*, ſhall be deemed guilty of felony of the ſame nature and in the ſame degree, and with or without the benefit of clergy, in the ſame manner as it would have been, if the offender had ſtolen or taken by robbery, any other goods of like value with the money due on ſuch orders, tallies, bills, bonds, warrants, debentures or notes, or ſecured thereby, and remaining unſatisfied, and ſuch offender ſhall ſuffer ſuch puniſhment as if he had ſtolen other goods of the like value, with the monies due on ſuch orders, tallies, bonds, bills, warrants, debentures or notes reſpectively, or ſecured thereby, and remaining unſatisfied."

Vide O. B. 1785, No. 253.

† It is alſo further enacted by 5 Geo. 3. *c.* 25. *ſ.* 17. and by 7 Geo. 3. *c.* 50. *ſ.* 2. "That whoever ſhall rob any mail in which

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" which letters are ſent or conveyed by the poſt, of any letter, " packet, or bag of letters, or ſhall ſteal and take from any " ſuch mail, or from any bag of letters ſent or conveyed by " the poſt, or from or out of any poſt-office, or houſe or " place for the receipt or delivery of letters or packets ſent, " or to be ſent by the poſt, any letter or packet, although ſuch " robbery, ſtealing, or taking ſhall not appear or be proved " to be a taking from the perſon, or upon the king's highway, " or to be a robbery committed in any dwelling houſe or any " coach houſe, ſtable, barn, or any out-houſe belonging to a " dwelling houſe; and although it ſhould not appear that any " perſons were put in fear by ſuch robbery, ſtealing, or " taking, yet ſuch offenders ſhall be deemed guilty of felony, " and ſuffer death without the benefit of clergy."

*Sect.* 23. Thirdly, They ought not to be things of a baſe nature, as dogs, cats, bears, foxes, monkeys, ferrets, 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; as he may for ſtealing a hawk, known by him to be reclaimed, not only by force of the ſtatute of 37 *Edw.* 3. 19. but alſo at common law, in reſpect of that very high value which was formerly ſet upon that bird.

Sum. 66. 3 Inſt. 109. 7 Co. 18. 3 H. 8. 3. Crom. 36. Dalt. c. 103. 2 Comm. 393. 1 Hale 512.

† But it is recited by the 10 Geo. 3. *c.* 18. " That the prac- " tice of ſtealing dogs hath of late years greatly increaſed," and it is therefore enacted, " That if any perſon ſhall ſteal " any dog or dogs of any kind or ſort whatſoever from the " owner thereof, or from any perſon entruſted by the owner " therewith, or ſhall knowingly ſell, buy, receive, harbour, " keep or detain any ſuch dog or dogs, on conviction by one " witneſs, or on confeſſion, before two juſtices, they ſhall " forfeit, for the firſt offence, not exceeding 30l. nor leſs " than 20l. together with the charges previous to and attend- " ing ſuch conviction; on default to be committed to the " houſe of correction for not more than twelve, nor leſs than " ſix months, unleſs the penalty be ſooner paid." For the ſecond offence, not exceeding 50l. nor leſs than 30l. and from twelve to eighteen months impriſonment, &c. One juſtice, on information, may grant a warrant to ſearch, &c. and if any ſuch dog, or the ſkin of ſuch dog, be found, the poſſeſſor, if privy, &c. is liable to the penalties aforeſaid. On fourteen days notice, and entering into a recognizance, perſons aggrieved may appeal to the Quarter Seſſions, but no certiorari ſhall be allowed. (8)

(8) Mr. Burn has pointed out ſeveral inaccuracies in this ſtatute, and doubts very much whether from the ſpecial wording of it, it is penal to ſteal a bitch. 1 Vol. 497. It is alſo ſaid, that the particular ſort of dog ſtolen muſt be deſcribed. Addlng. P. S. 221.

*Sect.* 24. As to the fifth particular, *viz.* How far the goods taken away ought to belong *to another*. It ſeems agreed, *That the taking of goods whereof* no one had a property at the

See 1 Hale 512 to 515. B. Cor. 190.

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Sum. 67. 22 Aſſ. 99. 3 Inſt. 108, 109. S. P. C. 25. Dalt. c. 103. F. Cor. 265. Owen. 20.

the time, cannot be felony; and therefore, That he who takes away treaſure-trove, or a wreck, (9) waif, or ſtray, before they have been ſeized by the perſons who have a right thereto, is not guilty of felony, and ſhall be only puniſhed by fine, &c.

(9) For offences by ſtatute in taking treaſure-trove, or robbing a wreck, vide appendix 2. c. 58.

(10) For the penalties impoſed by ſtatute on ſtealing or deſtroying fiſh, vide c. 58, appendix the third. Foſt. 366. 1 Hale 511.

*Sect.* 25. Neither ſhall he who takes a fiſh in a river or other great water, wherein they are at their natural liberty, be guilty of felony, as he may be who takes them out of a trunk or pond, &c. (10)

7 Co. 18. 22 Aſſ. 95. 22 H. 6. 58. 18 Ed. 4. 8. B. Cor. 92, 155, 164. S. P. C. 25. 3 Inſt. 109, 110. 18 H. 8. 2. Dalt. c. 92.

(11) For the offences created by ſtatute in taking or annoying deer, and hares, vide poſt. chap. 49 title "offences by hunters."

*Sect.* 26. Upon the like ground it ſeems clear, That a man cannot commit felony by taking deer, hares, or conies, in a foreſt, chaſe, or warren, or old pigeons being out of the houſe, &c. But it is agreed, That one may commit larceny in taking ſuch or any other creatures *feræ naturæ*, if they be fit for food, and reduced to tameneſs, and known by him to be ſo; and it ſeems the moſt plauſible opinion, That it is felony to ſteal wild pigeons in a dove-houſe ſhut up, or hares or deer (11) in a houſe, or even in a park, incloſed in ſuch a manner that the owner may take them whenever he pleaſes, without the leaſt danger of their eſcaping, in which caſe they are as much in his power as fiſh in a pond, or young pigeons, or hawks in a neſt, &c. in taking of which, for the like reaſon, it ſeems to be agreed, that felony may be committed.

Summary 68. 1 Hale 511. 7 Co. 17, 18. Dalt. c. 103. 3 Inſt. 98, 109. By 31 Hen. 8. c. 12. it is felony to take hawks eggs out of any neſts in the king's lands. This is repealed by the general words of 1 Mary, c. 1.

*Sect.* 27. Alſo it ſeems clear, That one may commit felony by taking away ſwans marked or pinioned, or thoſe which are unmarked, if they be kept in a pond or private river; neither do I ſee why it is not as much felony to ſteal the eggs of ſuch ſwans or hawks, as it is to ſteal their young ones, unleſs it be becauſe 11 Hen. 7. c. 17. has appointed a leſs puniſhment for this offence.

For offences againſt cattle, vide poſt. c. 46.

*Sect.* 28. However, there is no doubt but that the taking of domeſtick beaſts, as horſes, mares, colts, &c. or of any creatures whatſoever, which are *domitæ naturæ*, and fit for food, as ducks, hens, geeſe, turkeys, peacocks, or their eggs, or young ones, may be felony.

Vide 2 Hale. 290. S. P. C. 25. 96, Dyer 99. Dalt. c. 103. Sum. 67. B. 2. c. 23. f. 78.

*Sect.* 29. Alſo it is ſaid, That there may be felony in taking goods the owner whereof is unknown, in which caſe the king ſhall have the goods, and the offender ſhall be indicted for taking *bona cujuſdam hominis ignoti*. 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.

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erefore it is ſaid, That he who takes away the goods of
, or abbey, in time of vacation, may be indicted, in
caſe, for ſtealing *bona capellæ*, being in the cuſtody of
d ſuch; and in the ſecond, for ſtealing *bona domus &*
*&c.* and *a fortiori*, therefore it follows, That he who
oods belonging to a pariſh-church, may be indicted for
*bona parochianorum*. And it hath been adjudged, That
takes off a ſhrowd *(a)* from a dead corpſe, may be in-
as having ſtolen it from him who was the owner thereof
t was put on; for a dead man can have no property.

7 Ed. 4. 14, 15. S. P. C. 95. Dalt. c. 103. 3 Inſt. 110. B. Indict. 33. C Eliz. 145. 179. 1 Hale 512. *(a)* 3 Inſt. 110. 12 Co. 113. Dalt. c. 103. 1 Hale 515. It is ſaid, 2 Hale 290. and 8 Mod. 249. that a property muſt be

ſomebody at the trial, or it ſhall be preſumed in the priſoner from his plea, of not guilty. O. B. 1785. p. 782. and Appendix firſt, Sect. 13. in notis.

30. And there is a ſpecial caſe wherein it is ſaid, man may commit larceny by taking of things, whereof olute property is in himſelf; as if A. *(b)* deliver goods to B. taylor or carrier, *&c.* and afterwards, with an intent to im anſwer for them, fraudulently and ſecretly take them for B. had a ſpecial kind of property in the goods ſo ed to him, in reſpect whereof, if a ſtranger *(c)* had ſtolen he might have been indicted generally as having ſtolen ods, and the injury is altogether as great, and the fraud , where they are taken away by the very owner.

*(b)* 7 H. 6. 43. 5 H. 7. 18. B. Cor. 45. 160. C. Eliz. 336. S P.C. 26. 3 Inſt. 110. Dalt. c. 103. *(c)* Sum. c. 67. Kellw. 70. O. B. 1785. 439.

31. As to the ſixth point, *viz.* of what value the goods muſt be; if they be but of the value of 12 d. or under, ence can be but petit larceny.

22 Aſſ. 39. 1 Hale C. 530. B. Cor. 84. 85. S. P. C. 24. 2 Roll. 78. Dalt. c. 101. 2 Inſt. 189 Kely. 68. Sum. 69, 70. 4 Com. 238. 1 Hale 12. 3 Inſt. 531.

32. Yet if two perſons, or more, together, ſteal goods the value of twelve pence, every one of them is guilty of larceny, for each perſon is as much an offender as if he en alone.

S. P. C. 24. Dalt. c. 101. Sum. 70. Crom. 36. Prin. P. L. 292.

33. Alſo it ſeems the current opinion of all the old That if one at ſeveral times ſteal ſeveral parcels of goods, nder the value of twelve pence, but amounting in the to more, *from the ſame perſon*, and be found guilty there- *the ſame indictment*, he ſhall have judgment of death as nd larceny; but this ſeverity is ſeldom practiſed. (12)

S. P. C. 24. 1 Hale 531. Crom. 36. Dalt. c. 101. Summary 70. 2 Keb. 719

The value of the property ſtolen, muſt not only be, in the whole, of ſuch an amount as the law requires to conſtitute a capital offence; but the ſtealing muſt be to that amount at one and the ſame time. For the law will not permit things ſtolen at different times, which are, in fact, different ſtealing, to be added together; and as no number of petit larcenies will amount to a grand larceny, ſo no number of grand larcenies will amount to a capital offence. O. B. 1784. p. 206.

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In what caſes ſimple larceny is excluded from the benefit of the clergy will be ſhewn hereafter in the ſecond book, in the chapter concerning clergy. (13)

(13) In horſe-ſtealing, principal and acceſſary, 1 Ed. 4. c. 12. 2 & 3 Ed. 6. c. 33. 31 Eliz. c. 12. In ſtealing woollens from the tenters, 22 Car. 2. c. 5. 15 Geo. 2. c. 27. or from the loom, 12 Geo. 1. c. 34. Linen from the bleachers, 4 Geo. 2. c. 16. 18 Geo. 2. c. 27. but the judge may tranſport for 14 years. Cattle, 14 Geo. 2. c. 6. 15 Geo. 2. c. 34. On navigable rivers above 40s. 24 Geo. 2. c. 45. From veſſels wrecked or in diſtreſs, 12 Ann. c. 18. 26 Geo. 2. c. 19. Letters by poſt, 7 Geo. 3. c. 50. Deer, hares, and conies, and fiſh, being armed and diſguiſed, 9 Geo. 1. c. 22. Privately from the perſon above 12d. 8 Eliz. c. 4. women. 3 Hen. 7. c. 2. 39 Eliz. c. 9. Secreting, embeziling, or deſtroying bank notes, 15 Geo. 2. c. 13. 31 Geo. 2. c. 42. Black lead, 25 Geo. 2. c. 10. Naval ſtores. 22 Car. 2. c. 5. Vide Ante, p. 75. ſ. 18. Stealing from booth or tent, 5 and 6 Edw. 6. c. 9.

Summary 69. 1 Hale 503. Foſter 73.

*Sect.* 34. And now we are come to petit larceny, which ſeems to agree with grand larceny in all the particulars above-mentioned, except only the value of the goods; ſo that wherever an offence would amount to grand larceny, if the thing ſtolen were above the value of twelve pence, it is petit larceny, if it be but of that value, or under.

B. Cor. 84. 184. S. P. C. 24. Dalt. c. 101. Crom. 36. Hetley 66. 7 H. 8. 23.

*Sect.* 35. And if one be indicted for ſtealing goods to the value of ten ſhillings, and the jury find ſpecially that he is guilty but that the goods are worth but ten pence, he ſhall not have judgment of death, but only as for petit larceny.

B. Cor. 2. 219. 1 Hale 530. 3 Inſt. 218. App. 72. 143. Summary 70. Con. S. P. C. 24. Dalt. c. 101.

*Sect.* 36. It ſeems that all petit larceny is felony, and conſequently requires the word *felonice*, in an indictment for it. Yet it is certain, That it is not puniſhed with the loſs of life, or lands, but only with the forfeiture of goods and chattels, and whipping, or other corporal puniſhment.

Vide, alſo, 16 Geo. 2. c. 15. 8 Geo. 3. c. 15. 19 Geo. 3. c. 74. 24 Geo. 3. c. 56. reſpecting the tranſportation of offenders. B. 2. c. 33. ſ. 135. &c.

*Sect.* 37. † But it is enacted by 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. "That where any perſon or perſons ſhall be convicted of grand or petit larceny, &c. who by the law ſhall be intitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, it ſhall and may be lawful for the court before whom they are convicted, or any court held, at the ſame or any other place, with the like authority, if they think fit, to order ſuch offenders to be tranſported for the ſpace of ſeven years."

N. B. There are no acceſſaries in petit larceny; therefore if two be indicted, one for privately ſtealing from the perſon a handkerchief to the value of 12d. and another for receiving it, and the principal be found guilty value 10d. only, the acceſſary ought to be diſcharged. Foſter 73.

CHAP.

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# CHAPTER THE THIRTY-FOURTH.

## Of ROBBERY.

MIXT or complicated larceny is ſuch as hath a farther degree of guilt in it, as being a taking from the Perſon of a man, or from his Houſe. Prin. P. L. 287.

Larceny from the perſon of a man either puts him in fear, and then it is called robbery; or does not put him in fear, and then it is called barely, Larceny from the perſon.

ROBBERY is a felonious and violent taking away from the perſon of another, goods or money to any value, putting him in fear. Summary 71. 3 Inſt. 68. 1 Hale 532.

In the explication whereof, I ſhall conſider the following particulars:—Firſt, What taking away will ſatisfy the word *cepit* in an indictment for this offence. Secondly, What ſhall be ſaid to be a taking away from the perſon. Thirdly, What kind of taking ſhall be ſaid to be violent. Fourthly, In what reſpects robbery differs from other larcenies.

*Sect.* 1. As to the firſt point, *viz.* What taking away will ſatisfy the word *cepit* in an indictment for robbery; it ſeems clear, That he who receives my money by my delivery, either whilſt 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. Summary 72. 44 E. 3. 14. 4 H. 4. 3. Dalt. c. 100. S. P. C. 27. Crompton 34. 3 Inſt. 68. F. Cor. 464. O. B. 1784. p. 296.

*Sect.* 2. Neither can he who has once actually compleated 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 (*a*). 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 (*b*), for the continuance of the property in the poſſeſſion of the robber is not required by law (*c*). 3 Inſt. 60. Summary 70. (*a*) Prin. P. L. 286. (*b*) O. B. 1781. No. 1. (*c*) 3 Inſt. 69.

*Sect.* 3. But he who only attacks me in order to rob me, but does not take my goods into his poſſeſſion, though he go ſo far S. P. C 27. Cromp. 34. 3 Inſt. 69. Dalt. c. 100. Sum. 71. 72. 1 Hale 532.

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far as to cut off the girdle of my purſe, by reaſon whereof it falls to the ground, is not guilty of robbery; but highly puniſhable at the common law by fine and impriſonment, &c. for, ſo enormous a breach of the peace.—† This puniſhment however not proving ſufficient to deter offenders, it is made a felony by 7 *Geo.* 2. *c.* 21. "to aſſault another with an intention to rob *him*," for which I ſhall refer to Appendix the fourteenth (*a*) And to cruſh the offence in its earlieſt ſtage, it is enacted by 23 *Geo.* 3. *c.* 88, "that whoever ſhall be apprehended, and any piſtol, hanger, cutlaſs, bludgeon, or other offenſive weapon ſhall be found upon him, with intent feloniouſly to aſſault any perſon, he ſhall be deemed and puniſhed as a rogue and vagabond." (*b*)

(*a*) Page 250, 251.

(*b*) Vide 17 G. 3. c. 5. page 570.

1 Hale 533, 534, 537. 1 And. 116. Purſey's caſe. Crom. 34. Dalt. c. 100. Summary 72. B. 2. c. 29. ſ. 8.

*Sect.* 4. Yet in ſome caſes a man may be ſaid to rob me, where in truth he never actually had any of my goods in his poſſeſſion; as where I am robbed by ſeveral of one gang, and one of them only takes my money, in which caſe, in judgment of law, every one of the company ſhall be ſaid to take it, in reſpect of that encouragement which they give to another, through the hopes of mutual aſſiſtance in their enterprize: Nay 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.

S. P. C. 27. Crom 34. 35. Dalt. c. 100. 5 Inſt. 69. Summary 73. 1 Hale 533. Styles 156. Salk. 613. Carth. 145. B. R. H. 107. Strange 1015. Douglas 197. Comyns 478.

*Sect.* 5. As to the ſecond point, *viz.* What ſhall be ſaid to be a taking away from the perſon. Not only the taking away a horſe from a man whereon he is actually riding, or money out of his pocket, but alſo the taking of any thing from him openly and before his face, which is under his immediate and perſonal care and protection, may properly enough be ſaid to be a taking from the perſon. And 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 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)

(1) Fear is the diſtinguiſhing ingredient between robbery and other larcenies. 3 Inſt. 68. Therefore where a thief clandeſtinely ſtole a purſe; and, on its being diſcovered in his cuſtody, denounced vengeance againſt the party if he ſpoke of it, and then rode away; it was held to be ſimple larceny only, and not robbery; becauſe the fear, excited by the menaces of the thief, was ſubſequent to the act of taking the purſe. 2 Roll. 254. 1 Hale 535. So where ſeveral men find another apparently intoxicated, and ſwearing he ſhall go home, they drag, abuſe, kick him, and clandeſtinely take his money, this is no robbery; for no demand is made of money, nor any fear excited for the purpoſe of obtaining it. Q. B. 1784. p. 797.

*Sect.*

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*Sect.* 6. As to the third point, *viz.* What kind of taking ſhall be ſaid to be violent. 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. (4)

1 Hale 533, 534 Sum. 71, 72. Crom. 34. Dalt. c. 100. O. B. 1784. p. 296.

(4) But it is not neceſſary that the fact of actual fear ſhould either be laid in the indictment, or be proved upon the trial. It is ſufficient if the offence be charged to be done *vi & clenter et contra voluntatem*. And if it appear upon the evidence to have been attended with thoſe circumſtances of violence or terror, which in common experience are likely to induce a man to part with his property againſt his conſent, either for the ſafety of his perſon, or for the preſervation of his character and good name, it will amount to a robbery. Foſter 128. 4 Comm. 242. Donally's caſe. O. B. 1778. p. 197. O. B. 1784. p. 71. 296. 873.—Accordingly, to ſnatch a baſket of linen ſuddenly from the head of another. O. B. 1782. No. 483. *ſed vide contra*. O. B. 1784. p. 71. or to pull an earing from the ear of a lady; O. B. 1784. No. 662. or if an officer feloniouſly take money from a priſoner not to take her to goal, under colour of authority, &c. O. B. 1784. p. 295. Ray. 297. Dalt. 489. without in either caſe having made any expreſs demand, have been ruled ſufficient *acts of violence* to conſtitute the crime of robbery. Prin. P. L. 286.——And to obtain property, by threatening to accuſe another of having been guilty of an unnatural crime, has been held upon the ſolemn opinion of all the judges, to be an act ſufficient to raiſe, in the mind of the party menaced, ſuch a *terror* and apprehenſion of miſchief as to conſtitute the offence by *putting in fear*; O. B. 1784. p. 296. O. B. 1786. p. 522. for the law in *odium ſpoliatoris* will preſume fear where there appears to be ſo juſt a ground for it. Foſter 129. Prin. P. L. 287. Ante. Sect. 1.

*Sect.* 7. And ſome have gone ſo far as to hold, That if a man, meeting another going with his goods to market in order to ſell them, compel him to ſell them to him againſt his will, he is guilty of robbery, though he give for them more than they are worth: But perhaps this opinion is too ſevere, becauſe the grievance to the party ſeems rather to proceed from the perverſeneſs of his humour, than from any real injury done to him; and there ſeems to be no ſuch enormity in the intention of the wrong-doer, as is implied in the notion of felony.

Crom. 34, 35. Dalt. c. 100.

*Sect.* 8. However it is certain, That the claim of property, in the thing taken away, without any colour, is no manner of excuſe.

1 Hale 509. Summary 92.

*Sect.* 9. As to the fourth point, *viz.* In what reſpects robbery differs from other larcenies. —— Firſt, No other larceny ſhall have judgment of death, unleſs the thing ſtolen be above the value of twelve pence; but robbery ſhall have ſuch judgment, how ſmall ſoever the value may be of the thing taken away.

S. P. C. 27. Crom. 33. Dalt. c. 100. Summary 74.

*Sect.* 10. Secondly, Other larcenies whether from the perſon or not, ſhall not be ſuppoſed to be done with violence or terror, but robbery is always laid as done on an aſſault with violence, and putting the party in fear, (a) which is properly thus expreſſed

3 Inſt. 68. Keilyng. 70.

(a) Vide Notes to Sect. 6.

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expreſſed in an indictment, *a perſona* J. S. *violenter, & felonice cepit & aſportavit in magnum prædicti* J. S. *terrorem.*

*Sect.* 11. Thirdly, But they all agree in this, That the offenders had the benefit of the clergy at the common law. But many of them are at this day excluded in many caſes by ſtatute; for which ſee the chapter in the ſecond book concerning clergy. (5)

(5) Principals and acceſſaries before the fact, in this ſpecies of larceny, are debarred of clergy by 23 Hen. 8 c. 1. and acceſſaries after, by 4 Phil. & M. c. 4. if committed in or near about the highways. Moor, 16. 1 Hale, 535. But by 3 & 4 Will. & M. c. 9. it is ouſted of clergy generally, 4 Comm. 243. The words of the 23 Hen. 8. however, are purſued in indictments for this offence. By 4 Will. & Mar. c. 8. a reward of 40l. is given on conviction of any robbery, committed in or upon any highway, paſſage, field, or open place: And by 6 Geo. 1. c. 23. ſ. 8. the ſtreets of London, Weſtminſter, and other places, are deemed highways within the meaning of 4 Will. & Mar. c. 8.—For the reward of ten pounds and proceedings againſt the hundred, ſee 8 Geo. 2. c. 16. 22 Geo. 2. c. 24.

## CHAPTER THE THIRTY-FIFTH.

## Of LARCENY from the PERSON.

Dyer, 224. 2 Roll. 154. Crom. 34. Dalt. c. 100. Raym. 275. 276.

LARCENY from the perſon of a man without putting him in fear, is either done privily without his knowledge, (in which caſe it is excluded from the benefit of the clergy by 8 Eliz. c. 4.) or openly and avowedly before his face; as if one take off my hat from my head, and run away with it, or come into my ſhop and cheapen goods, and run away with them without paying for them, which is agreed not to be robbery, and as it ſeems, is more properly indictable as a treſpaſs than felony, unleſs the offender were either unknown, or immediately fled the country if he were known; otherwiſe I have a remedy againſt him in the ordinary courſe of civil juſtice; and it ſeems rigorous to make ſuch offences capital, which probably may ſufficiently be provided againſt by more gentle methods. (1)

(1) The caſe in Dyer 224. was an indictment *quod vi et armis apud B. in via regia ibidem 40ſ. in pecuniis numerat, &c.* and the judgment was, that it is not robbery if the perſon is not put in fear *as by aſſault and violence.*—The caſe in Roll's Reports is where the fear was excited ſubſequent to the taking, and therefore only larceny. The caſe in Raymond, of running away with goods, after having obtained the delivery, upon pretence of purchaſing them, is expreſly decided to be felony. And Dalton from Crompton only ſays the tortious taking of another's goods without *a title* ſo to do, is but a treſpaſs. Theſe references therefore by no means prove that the offences mentioned are not felonies, if committed with a felonious intent.—Vide Hale's Summary, 73, 74, 75. Kely. 43, 70. 1 Sid. 254.

*Sect.* 2. However it is certain, That all open larcenies from the perſon are within the benefit of the clergy, except ſuch as are committed in a dwelling-houſe, *&c.* to the value of forty ſhillings, from which it is taken away by 12 Ann. c. 7—

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*Sect.* 3. Alſo a private larceny from the perſon ſhall have the benefit of the clergy, unleſs it be laid in the indictment as done *clam* and *ſecrete*, *&c.* in exact purſuance of the words of 8 Eliz. c. 4. 1 Hale 529.

*Sect.* 4. And no ſuch larceny ſhall have judgment of death, but only as of petit larceny, if the jury find the offender guilty under the value of twelve pence; for the ſtatute does not alter the nature of the offence, or make that capital which was not ſo before, but only leaves the offender to the judgment of the common law. Summary 75. Dalt. c. 100. Prin. P. L. 292. 2 Hale 366. Foſter 73.

## CHAPTER THE THIRTY-SIXTH.

### Of LARCENY from the HOUSE.

THE other branch of complicated larceny, is that which is from the habitation of a man, which though it ſeem to have a higher degree of guilt than ſimple larceny, yet I do not find it diſtinguiſhed from it by *the common law*, either as to the circumſtances above mentioned, which are requiſite to conſtitute the offence, or as to the puniſhment. Summary 76. O. B. 1784. No. 233. & p. 1217. 4 Comm. 240. Prin. P. L. 289.

However it is at this day excluded from the benefit of the clergy in many caſes by ſeveral acts of parliament, which I ſhall particularly conſider in the ſecond book in the chapter concerning clergy. (1) Bar. Obſ. 375.

(1) Firſt, In all larcenies *above the value of twelve-pence* committed 1ſt, in a church or chapel, with or without violence, or breaking the ſame, by 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. 1 Edw. 6. c. 12. 5 & 6 Edw. 6. c. 9. & 10.——2d. In a booth or tent in a market or fair, in the day time or in the night, by violence, or breaking the ſame, the owner or ſome of his family being therein, 5 & 6 Edw. 6. c. 9.——3d. In a dwelling-houſe by day, by breaking the ſame, any perſon being therein, 3 & 4 Will. & Mar. c. 9.——4th. In a dwelling-houſe by day, without breaking the ſame, any perſon being therein and put in fear, 3 & 4 Will. & Mar. c. 9.——5th. In a dwelling-houſe by night, without breaking the ſame, the owner or ſome of his family being therein, and put in fear, 23 Hen. 8. c. 1.——Secondly, In all larcenies *to the value of five ſhillings*, committed, 1ſt. By breaking any dwelling-houſe, or any out houſe, ſhop, or ware houſe thereunto belonging, in the day time, although no perſon be therein, 39 Eliz. c. 15. Hale 508. and 522. Kely. 31. O. B. 1785. p. 312. 827.——2d. By ſtealing privately in any ſhop, ware-houſe, coach-houſe, or ſtable, by day or by night; though the ſame be not broke open, and though no perſon be therein, 10 & 11 Will. 3. c. 23. (Foſt. 78. Burr. 379). Laſtly, In all larcenies *to the value of forty ſhillings*, from a dwelling houſe or its out-houſes without breaking in, and whether any perſon be therein or no. 12 Ann. c. 7.

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# CHAPTER THE THIRTY-SEVENTH.

## Of PIRACY.

TO what has been ſaid concerning ſuch larcenies as are felonies by the common law, it may not be improper to add ſomewhat concerning piracy (1) and depredation at ſea, which is a capital offence by the civil law.

(1) The king of England hath not only an empire and ſovereignty over the Britiſh ſeas for the puniſhment of piracy, but, in concurrence with other princes and ſtates, an undoubted juriſdiction and power in the moſt remote parts of the world. If any perſon, therefore, native or foreigner, Chriſtian or Infidel, Turk or Pagan, with whoſe country we are in amity, trade, or correſpondence, ſhall be robbed or ſpoiled in the narrow or other ſeas, whether the Mediterranean, Atlantic, Southern, or any branches thereof, either on this or the other ſide of the Line, it is piracy within the limits and cognizance of the Admiralty Seſſions. Sir. Ch. Hodge's Charge; Old Bailey. 8 Will. 3.

40 Aſſ. 25. Staunf. 10. 2 Hale 369. S. P. C. 10. Summary 77. Co. Litt. 391. 3 Inſt. 112.

*Sect.* 2. It is ſaid, That before 25 Edw. 3. this offence was puniſhed at common law as petit treaſon, if committed by a ſubject, and as felony, if committed by a foreigner: However it ſeems agreed, that after that ſtatute by which all treaſon is confined to the particulars therein ſet down, it was cognizable only by the civil law.

5 St. Tr. 3. 8 Mod. 67, 76. 4 Comm. 71.

*Sect.* 3. But this proving very inconvenient, becauſe by that law no offender ſhall have judgment of death, without his own confeſſion, or direct proof by eye-witneſſes, it was enacted by 28 Hen. 8. c. 15. "That all felonies and robberies, &c. "upon the ſea, or in any haven, river, creek, or place, where "the admiral or admirals have or pretend to have power, "authority or juriſdiction, ſhall be inquired, tried, heard, deter- "mined and judged in ſuch ſhires and places in the realm, "as ſhall be limited by the king's commiſſion or commiſſions "to be directed for the ſame, in like form and condition, "as if any ſuch offence or offences had been committed or "done in or upon the land; and ſuch commiſſions ſhall "be had under the king's Great Seal, directed to the "admiral or admirals, or to his or their lieutenant, de- "puty and deputies, and to three or four ſuch other ſub- "ſtantial perſons, as ſhall be named or appointed by the "lord chancellor of England for the time being, from "time to time and as oft as need ſhall require, to hear and "determine ſuch offences, after the common courſe of the "laws of this land uſed for felonies and robberies, &c. "done and committed upon the land within this realm."

*Sect.* 4. And it is further enacted by the ſaid ſtatute, "That if any perſon or perſons happen to be indicted for "any

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" any ſuch offence done, or hereafter to be done, upon the " ſeas, or in any other place above limited, that then ſuch " order, proceſs, judgment and execution, ſhall be uſed, had, " done and made, to and againſt every ſuch perſon and " perſons ſo being indicted, as againſt felons, &c. for any felony, " &c. upon the land, by the laws of the land is accuſtomed.',

*Sect.* 5. And it is farther enacted by the ſaid ſtatute, " That ſuch as ſhall be convict of any ſuch offence by " verdict, confeſſion, or proceſs by authority of any ſuch " commiſſion, ſhall have and ſuffer ſuch pains of death, " loſſes of lands, goods, and chattels, as if they had been " attainted and convicted of ſuch offence done upon the land, " and alſo that they ſhall be excluded from the benefit of the " clergy."

Vide the chapter of clergy in the ſecond book. 2 Hale 368, 370. Moor 756.

*Sect.* 6. In the expoſition of this act it has been holden,— Firſt, That it does not alter the nature of the offence ſo as to make that which was before a felony only by the civil law, now become a felony by the common law; for the offence muſt ſtill be alledged as done upon the ſea, and is no way cognizable by the common law, but only by virtue of this ſtatute, which, by ordaining that in ſome reſpects it ſhall have the like trial and puniſhment, as are uſed for felony at common law, ſhall not be carried ſo far as to make it alſo agree with it in other particulars which are not mentioned. And from hence it follows, That this offence remains as before of a ſpecial nature, and that it ſhall not be included in a general pardon of all felonies which, as it was, before this ſtatute, to be expounded of no felonies, which are ſuch only by the civil law, ſhall continue ſtill to have the ſame conſtruction.

3 Inſt. 112, 113. Summary 77. C. C. C. 502.

Moor 756. 3 Inſt. 112. Co. Lit. 391.

*Sect.* 7. From the ſame ground alſo it follows, That no perſons ſhall, in reſpect of this ſtatute, be conſtrued to be, or puniſhed as, acceſſaries to piracies before or after, as they might have been if it been made a felony by the ſtatute, whereby all thoſe would incidently have been made acceſſaries in the like caſes, in which they would have been acceſſaries to a felony at common law. And from hence it follows, That acceſſaries to piracy, being neither expreſly named in the ſtatute, nor by conſtruction included in it, remain as they were before, and were triable by the civil law, if their offence were committed on the ſea, but if on the land, by no law until 11 & 12 Will. 3. c. 7. for 2 & 3 Edw. 6. c. 24. which provides againſt acceſſaries in one county to a felony in another, extends not to acceſſaries to an offence committed in no county, but on the ſea; but by the ſaid ſtatute of 11 & 12

3 Inſt. 112. Sum. 77. 215.

Yelv. 134, 138.

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& 12 Will. they are triable in like manner as the principals are by the ſtatute of 28 Hen. 8.

3 Inſt. 112. Co. Lit. 391. Summary 77. B. 2. c. 23. ſ. 12.

*Sect.* 8. From the ſame ground alſo it follows, That an attainder for this offence corrupts not the blood, inaſmuch as the ſtatute only ſays that the offender ſhall ſuffer ſuch pains of death, &c. as if he were attainted of a felony at common law; but ſays not that the blood ſhall be corrupted, &c. (2)

(2) If the indictment be *vi et armis et felonice, &c.* as a robbery at common law, the blood may be corrupted; for piracy upon the ſtatute is robbery, and offenders have been ſo indicted in the King's Bench, and on conviction, executed. But if the indictment be *piratice depradavit* in the ſtyle of the civil law, the attainder corrupts not the blood. And this diſtinction will reconcile the paſſages upon this ſubject in 3 Inſt. c. 49. and Co. Lit. ſ. 745. Vide 1 Hale 355.

3 Inſt. 114. Dyer 241. 308. Summary 78.

*Sect.* 9. Yet it has been reſolved, That an offender ſtanding mute on an arraignment by force of this ſtatute, ſhall have judgment of *pain fort & dure*; for the words of the ſtatute are, "That a commiſſion ſhall be directed, &c. to hear and "determine ſuch offences after the common courſe of the laws "of the land, &c." † But by 12 Geo. 3. c. 20. "Standing "mute in piracy amounts to a conviction, and the court "ſhall award the ſame judgment as on a conviction by ver-"dict or confeſſion."

3 Inſt. 112. S. P. C. 114.

1 Roll. 175.

*Sect.* 10. Secondly, It has been holden, That the indictment for this offence muſt alledge the fact to be done upon the ſea, and muſt have both the words *felonice* and *piratice*: And that no offence is puniſhable by virtue of this act as piracy, which would not have been felony if done on the land, and conſequently that the taking of an enemy's ſhip by an enemy, is not within the ſtatute.

Moor 756. 1 Roll. 175. Summary 77. 3 Inſt. 113.

*Sect.* 11. Thirdly, It is agreed, That this ſtatute extends not to offences done in creeks or ports within the body of a county, becauſe they are, and always were, cognizable by the common law. † But it was doubted whether this ſtatute of 28 Hen. 8. had not taken away the trial of theſe offences before the admiral or his lieutenant or commiſſary, which had occaſioned a total diſuſe of ſuch manner of trial to the encouragement of pirates, who could not be tried by this ſtatute unleſs brought to England, at a great trouble and expence.

And made perpetual by 6 Geo. 1. c. 19.

*Sect.* 12. It is enacted therefore by 11 & 12 Will. 3. c. 7. which was continued by 1 Geo. 1. c. 25. for five years, and from thence to the end of the next ſeſſions of parliament, "That all piracies, felonies and robberies committed in or "upon the ſea, or in any place where the admiral has "juriſdiction, may be tried and determined at ſea or upon the "land, in any of his majeſty's iſlands, or plantations, &c. "to be appointed by the king's commiſſion under the Great

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" Seal, or the ſeal of the Admiralty, directed to any of the " admirals, &c. and ſuch perſons and officers by name, or for " the time being, as his majeſty ſhall think fit, who ſhall have " power jointly or ſeverally, by warrant under hand and " ſeal of any of them, to commit any perſon againſt whom " information of any ſuch offences ſhall be given upon oath, " and to call a court of Admiralty, which ſhall conſiſt of " ſeven perſons at the leaſt, and ſhall proceed in the trial " of the ſaid offenders, according to ſuch directions as are " ſet forth at large in the ſaid ſtatute."

*Sect.* 13. And it is further enacted by the ſaid ſtatute, par. 8. " That if any of his majeſty's natural born ſub- " jects or denizens of this kingdom, ſhall commit any piracy " or robbery, or any act of hoſtility, againſt other his majeſ- " ty's ſubjects upon the ſea, under colour of any commiſſion " from any foreign prince or ſtate, or pretence of authority " from any perſon whatſoever, ſuch offender and offenders, " and every of them, ſhall be deemed, adjudged, and taken " to be pirates, felons and robbers; and they and every " of them, being duly convicted thereof according to this act, " or the aforeſaid ſtatute of king Henry the Eighth, ſhall have " and ſuffer ſuch pains of death, loſs of lands, goods and chat- " tels, as pirates, felons and robbers upon the ſeas ought to " have and ſuffer."

*Sect.* 14. And it is farther enacted by the ſaid ſtatute, " That if any commander or maſter of any ſhip, or any ſea- " man or mariner, ſhall in any place where the admiral hath " juriſdiction, betray his truſt and turn pirate, enemy or rebel, " and piratically and felonioufly run away with his or their " ſhip or ſhips, or any barge, boat, ordinance, ammunition, " goods or merchandizes, or yield them up voluntarily to any " pirate, or bring any ſeducing meſſage from any pirate, " enemy or rebel, or conſult, combine, or confederate with, " or attempt or endeavour to corrupt, any commander, maſ- " ter, officer or mariner to yield up or run away with " any ſhip, goods or merchandize, or turn pirate, or go " over to pirates, or if any perſon ſhall lay violent hands " on his commander, whereby to hinder him from fighting " in defence of his ſhip and goods committed to his truſt, or " that ſhall confine his maſter, or make or endeavour to make " a revolt in his ſhip, ſhall be adjudged to be a pirate, felon " and robber; and being convicted thereof, according to the " direction of this act, ſhall have and ſuffer pains of " death, loſs of lands, goods and chattels, as pirates, felons " and robbers upon the ſeas ought to have and ſuffer."

A captain doubly inſured his ſhip and cargo; and, having run the cargo on ſhore, procured the veſſel to be fraudulently burnt. This is no piracy, by reaſon of the ſpecial truſt repoſed in the offender by his owners. 3 Mod 76, and 67.

*Sect.* 15.

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*Sect.* 15. And it is farther enacted by the ſaid ſtatute, "That all and every perſon and perſons whatſoever, who "ſhall either on the land or upon the ſeas, wittingly or "knowingly ſet forth any pirate, or aid and aſſiſt, or main- "tain, procure, command, counſel, or adviſe any perſon "or perſons whatſoever, to do or commit any piracies or "robberies upon the ſeas; and ſuch perſon or perſons ſhall "thereupon do or commit any ſuch piracy or robbery, then "all and every ſuch perſon or perſons whatſoever, ſo as afore- "ſaid, ſetting forth any pirate, or aiding or aſſiſting, main- "taining, procuring, commanding, counſelling or adviſing "the ſame, either on the land or upon the ſea, ſhall be adjud- "ged to be acceſſary to ſuch piracy and robbery done and "committed; And further, That after any piracy or robbery "is or ſhall be committed by any pirate or robber whatever, "every perſon or perſons, who, knowing that ſuch pirate or "robber has done or committed ſuch piracy and robbery, "ſhall on the land or upon the ſea receive, entertain, or con- "ceal any ſuch pirate or robber, or receive or take into his "cuſtody, any ſhip, veſſel, goods, or chattels, which have "been by any ſuch pirate or robber piratically and felo- "niouſly taken, ſhall be by this ſtatute likewiſe adjudged "to be acceſſary to ſuch piracy and robbery: And that all "ſuch acceſſaries to ſuch piracies and robberies, ſhall be "enquired of, tried, heard, determined and adjudged accor- "ding to the common courſe of the law, according to the "ſaid ſtatute of 28 Hen. 8. as the principals of ſuch piracies "and robberies may be, and no otherwiſe; and being there- "upon attainted ſhall ſuffer ſuch pains of death, loſs of lands, "goods and chattels, and in like manner as the principals "of ſuch piracies, robberies and felonies, ought to ſuffer ac- "cording to the ſaid ſtatute of Hen. 8. which is declared to "be in full force; any thing in this laſt act to the contrary "notwithſtanding."

*Sect.* 16. And by 4 Geo. 1. c. 11. ſ. 7. "All perſons "who ſhall commit any offence for which they ought to be "adjudged pirates, felons or robbers, by 11 & 12 Will. 3. "may be tried and judged for every ſuch offence, according "to the form of 28 Hen. 8. and ſhall be excluded from their "clergy."

† *Sect.* 17. And it is alſo enacted by 8. Geo. 1. c. 24. made perpetual by 2 Geo. 2. c. 28. "That if any com- "mander or maſter of any ſhip or veſſel, or any other perſon, "ſhall any wiſe trade with any pirate by truck, barter, ex- "change, or in any other manner; or ſhall furniſh any pirate, "felon, or robber upon the ſeas with any ammunition, pro-

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" viſion or ſtores of any kind; or ſhall fit out any ſhip or " veſſel knowingly, and with a deſign to trade with, or ſupply, " or correſpond with any pirate, felon, or robber upon the ſeas; " or if any perſon or perſons ſhall any ways conſult, combine, " confederate, or correſpond with any pirate, felon or robber " upon the ſeas, knowing him to be guilty of ſuch piracy, " felony or robbery, ſuch offenders ſhall, in every of the ſaid " caſes, be deemed guilty of piracy, felony and robbery, and " may be tried, &c. according to the proviſions of the 28 " Hen. 8. c. 15, and the 11 and 12 Will. 3. c. 71."

† *Sect.* 18. And it is further enacted by the ſaid ſtatute, " That in caſe any perſon or perſons, belonging to any ſhip " or veſſel whatſoever, upon meeting any merchant ſhip or " veſſel on the high ſeas, or in any port, haven, or creek what- " ſoever, ſhall forcibly board or enter into ſuch ſhip and veſſel, " and, tho' they do not ſeize and carry off ſuch ſhip or " veſſel, ſhall throw over board or deſtroy any part of the " goods or merchandizes belonging to ſuch ſhip or veſſel, " the perſon or perſons who ſhall be guilty thereof, ſhall in " all reſpects be deemed and puniſhed as pirates as aforeſaid."

† *Sect.* 19. And it is further enacted by par. 2. " That " every ſhip or veſſel, which ſhall be fitted out with a deſign " to trade with, or ſupply, or correſpond with any pirate; and " all and every goods and merchandize put on board the ſame " for any purpoſe or intent as aforeſaid, ſhall be, *ipſo facto*, " forfeited, one moiety to the king, the other to the informer, " who may ſue for, and recover the ſame in the Court of " Admiralty."

† *Sect.* 20. And by par. 3. " All perſons who are made ac- " ceſſaries by the 11 and 12 Will. 3. c. 7. ſhall be deemed and " taken to be principal pirates, felons, and robbers, and ſhall " be proceeded againſt accordingly." And alſo, by par. 4. " That all and every offender or offenders convicted of any " piracy, felony or robbery by virtue of this act, ſhall be ex- " cluded from the benefit of clergy. Alſo ſeamen maimed in " fight againſt pirates ſhall receive the rewards in the 23 " Car. 2. c. 11. and be admitted into Greenwich hoſpital. " And maſters or ſeamen not defending themſelves againſt " pirates, or who ſhall utter any diſcouraging words, ſhall, " if the ſhip be taken, forfeit their wages to the owners, and " ſuffer ſix months impriſonment."

† *Sect.* 21. Alſo it is enacted by 18 Geo. 2. c. 30. " That " all perſons, being natural born ſubjects or denizens of his " majeſty, who during any wars have committed any hoſtili- " ties upon the ſea, or in any haven, river, creek, or place, " where

The adherence to the king's enemies was thought to make the offence high treaſon. This ſtatute was made therefore to remove the doubt.

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"where the admiral or admirals have power, authority, or "jurisdiction, against his majesty's subjects by virtue or under "colour of any commission from any his majesty's enemies "upon the sea, or any the places where the admiral hath "jurisdiction as aforesaid, may be tried as pirates, felons, and "robbers in the said Court of Admiralty, on ship board, or "upon the land, in the same manner as persons guilty of "piracy, felony, and robbery are directed to be tried; and on "conviction shall suffer as any other pirates, &c. ought by "virtue of the 11 and 12 Will. 3. c. 7. or any other act, "provided that any person who shall be tried and acquitted, "or convicted according to this act for any of the said crimes, "shall not be liable to be prosecuted for the same crime or "fact, as high treason. But this act shall not prevent any per-"sons who shall not be tried according to it, from being tried "for high treason, by 28 Hen. 8. c. 5."

† *Sect.* 22. And it is further enacted by 32 Geo. 2. c. 25. s. 12. "That in case any commander of any private ship of "war, duly commissioned according to the directions of this "act, or the 29 Geo. 2. c. 34, shall agree with the com-"mander or other person of, or belonging to any neutral or "other ship or ships, vessel or vessels, except those of his "majesty's declared enemies, for the ransom of any such "neutral or other ship, &c. or the respective cargo or cargoes "thereof, or any part thereof, after the same shall have been "taken as prize, and shall, in pursuance of any such agree-"ment or agreements, actually quit, set at liberty, or dis-"charge any such prize or prizes, instead of bringing the "same into some port or ports belonging to his majesty's "dominions, every such offender shall be deemed guilty of "piracy, felony and robbery, and on conviction (in the manner "as the act describes) shall suffer such pains of death, &c. as "pirates, felons, and robbers upon the seas ought to suffer "according to the laws now in being. But it is provided, "that the commander of any private ship of war, upon the "capture of any neutral vessel, *which by any law or treaty shall* "*be liable only to the forfeiture of such contraband goods as shall be* "*on board thereof*, may receive such goods, in case the com-"mander is willing to deliver them, and thereupon quit, set "at liberty, or discharge such neutral ship or vessel."

By 22 Geo. 3. c. 25. all contracts for ransoming any private vessel, &c. captured by the king's enemies are void, and the offender liable to a penalty of 500l. Wood's Inst. 369, 473.

† *Sect.* 23. And for the more speedy bringing of offenders to justice, and to prevent the inconveniencies occasioned by want of frequently holding a session of admiralty for the trial of offences committed on the high seas, it is further enacted, by 30 Geo. 2. c. 25. s. 20. "That a session of oyer and terminer "and gaol delivery, for the trial of offences committed upon "the high seas, within the jurisdiction of the admiralty of

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"England, ſhall be held twice at the leaſt in every year, that is "to ſay, in the ſeveral months of March and October in each "year, at Juſtice Hall in the Old Bailey, London; except at "ſuch times as the ſeſſions of oyer and terminer and gaol de- "livery for the city of London and county of Middleſex ſhall "be appointed to be there held; or in ſuch other places "within *England* as the lord high admiral of Great Britain, or "the commiſſioners for executing the office, or any three or "more of them ſhall, in writing under their hands, directed to "the judge of the court of admiralty for the time being, ap- "point." 4 Comm. 265.

† *Sect.* 24. Any one of the commiſſioners named in the commiſſion of oyer and terminer for trying the offences aforeſaid, and alſo any juſtice of the peace may take informations, upon oath, touching any piracy, felony, or robbery committed as before recited, and, by warrant under hand and ſeal, cauſe the offender to be apprehended and committed to the county gaol, and ſhall bind over all perſons whom they ſhall reſpectively judge neceſſary to appear, proſecute, and give evidence againſt the ſaid offender at the then next admiralty ſeſſions, which information and recognizance ſhall be tranſmitted to the regiſter to be laid before the court, and the marſhal, his deputy, all ſheriffs, and other officers whatſoever for keeping of the peace, &c. are enjoined diligently to obey and execute the precepts and orders of the court.

Vide ſection 21 to 24 of the before recited ſtatute.

For the form of an indictment in piracy, vide Cro. Cir. Com. 500.

## CHAPTER THE THIRTY-EIGHT.

## OF BURGLARY.

AND now we are come to offences againſt the habitation of a man, which are of two kinds, *viz.* Burglary and Arſon. F. Cor. 178, 185, 264. Pulton 132 Staun. 30. 1 Hale 549. Dalt. c. 151. Cicero pro. dom. c. 41. Leg. Can. l. 61. Wilk. Leg. Ang. Sax. p 273.

Burglary is a felony at the common law, in breaking and entering the manſion-houſe of another, or, as ſome ſay, the walls, or gates of a walled town, in the night, to the intent to commit ſome felony within the ſame, whether the felonious intent be executed or not.

Spelman tit. Hamſecken. Sum. 79. 2 Hale 360. 22 Aſſ. 39, 95. B. Cor. 93. 3 Inſt. 63. Crom. 31. 4 Comm. 223.

For the better underſtanding whereof, I ſhall conſider the following particulars:—Firſt, What ſhall be accounted night-time for this purpoſe. Secondly, Whether there muſt be both an

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an actual entry and breaking. Thirdly, What breaking is ſufficient. Fourthly, What entry. Fifthly, In what place this offence may be committed. Sixthly, What degree of guilt is required in the principal intention.

*Sect.* 2. As to the firſt point, *viz.* What ſhall be accounted night-time for this purpoſe; there are ſome opinions, That burglary may be committed at any time after ſun-ſet, and before ſun-riſing; but it ſeems the much better opinion, That the word *noctanter*, which is preciſely neceſſary in every indictment for this offence, cannot be ſatisfied in a legal ſenſe, if it appear upon the evidence, that there was ſo much day-light at the time, that a man's countenance might be diſcerned thereby.

Dalt. c. 151. S. P. C. 30. 3 Inſt. 63. Savil. 47. Crom. 32. 33. 7 Co. 6. 34. Summary 79. 1 Hale 550. Roll. 524. Moor 660. Cro. Eliz. 583. 9 Co. 66. 4 Comm. 224.

*Sect.* 3. As to the ſecond point, *viz.* Whether there muſt be both an entry and breaking. Notwithſtanding ſome looſe opinions to the contrary, there ſeems to be no good cauſe to doubt, but that both are required to compleat this offence; for the words, *fregit* and *intravit*, being both of them preciſely neceſſary in the indictment, both muſt be ſatisfied: And *a fortiori* therefore there can be no burglary, where there is neither of them; as if on a bare aſſault upon a houſe the owner fling out his money.

Dyer 99. S. P. C. 30. 3 Inſt. 64. Summary 80. 1 Hale 551, 555, 556. Con. Dalt. c. 151. Crom. 31. Dalliſon 22. Pult. 132. Foſter 108. O. B. 1785. p. 216.

*Sect.* 4. As to the third point, *viz.* What breaking is ſufficient. It ſeems agreed, That ſuch a breaking as is implied by law in every unlawful entry on the poſſeſſion of another, whether it lie open or be incloſed, and will maintain a common indictment, or action of treſpaſs *quare clauſum fregit*, will not ſatisfy the words *felonice & burglariter fregit*, except in ſome ſpecial caſes, in which it is accompanied with ſuch circumſtances as make it as heinous as an actual breaking. And from hence it follows, That if one enter into a houſe by a door which he finds open, or through a hole which was made there before, and ſteal goods, &c. or draw any thing out of a houſe through a door or window which were open before, or enter into a houſe by the doors open in the day-time, and lie there till night, and then rob and go away, without breaking any part of the houſe, he is not guilty of burglary.—But it is certain, That he would have been guilty thereof if he had opened the window, or unlocked the door, or broke a hole in the wall, and then had entered, &c. or if having entered by a door which he found open, or having lain in the houſe by the owner's conſent, he had but unlatched a chamber door; or if he had come down by the chimney: (in which caſe though it

3 Inſt. 64. Sum. 80. 82. 1 Hale 508, 527, 551, 552, 555. Crom. 34. 32. Dalt. c. 151. Kelynge 67. Hutton 20. C. Car. 65, 225. Dyer 99. 2 Hale 558. 1 And. 114. 115. Dalt. c. 151. Savill. 59. Foſter 107. O. B. 1784. p. 744.

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might be ſaid, That the houſe was open there, and ſo not ually broken; yet it was as much incloſed as the nature of thing would bear.) And according to ſome opinions, he uld have been in like manner guilty, if upon an aſſault de by him upon the houſe, with an intent to rob it, the ner had opened the door in order to drive him off, and reupon he had entered. In which caſe, as ſome ſay, the ning of the door by the owner, being occaſioned by the onious attempt of the other, is as much imputable to him if it had been actually done by his own hands.

O. B. 1784. P. 744.

Cromp. 32. Contra 1 Anderſon 115.

*Sect.* 5. And it has alſo been reſolved, That where divers ſons came to a houſe with an intent to rob it, and ocked at the door, pretending to have buſineſs with owner, and being by that means let in, rifled the houſe, y were guilty of burglary (*a*). Alſo it hath been adged, That thoſe were no leſs guilty, who having a deſign to a houſe, took lodgings in it, and then fell on the landlord l robbed him; for the law will not endure to have its juſtice rauded by ſuch evaſions. And for the like reaſon, *a fortiori*, as been reſolved, That where perſons, intending to rob a uſe, raiſed a hue and cry, and prevailed with the conſtable to ke a ſearch in the houſe, and having got in by that means, th the owner's conſent, bound the conſtable, and robbed inhabitants, they were guilty of burglary. For there can- t be a greater affront to publick juſtice, than to make uſe of gal proceſs as a ſtale for ſuch villainous purpoſes; and there- re the whole act is eſteemed tortious *ab initio*.

(*a*) Le Motts caſe related by Wild to Kelynge 42. Kely. 52, 52, 63, O. B. 1784. No. 541. Crom. 32. Dalt. c. 151. Summary 81. 1 Hale 552. 3 Inſt. 64. 4 Comm. 225

*Sect.* 6. It is recited by 12 Ann. c. 7. "That there d been ſome doubt, Whether the entring into a man- n-houſe, without breaking the ſame, with an intent to mmit ſome felony, and breaking the ſaid houſe in the ght-time to get out, were burglary." And thereupon is declared and enacted, "That if any perſon ſhall enter into the manſion or dwelling-houſe of another by day or by night, without breaking the ſame, with an intent to commit felony, or being in ſuch a houſe, ſhall commit any felony, and ſhall in the night-time break the ſaid houſe to get out of the ſame, ſuch perſon is, and ſhall be taken to be, guilty of burglary, and ouſted of the benefit of clergy, in the ſame manner as if ſuch perſon had broken and entered the ſaid houſe in the night-time, with an intent to commit felony there."

*Sect.* 7. As to the fourth point, *viz.* What entry is ſufficient to this purpoſe. It ſeems agreed, That any the leaſt entry, either with the whole, or with but part of the body, or with any inſtrument, or weapon, will ſatisfy the word *intrarit* in an indictment of burglary; as if one do but put his foot over a threſhold, *or his hand*, or a hook, or piſtol, within

Dalt. c. 151. Summary 81. Kelynge 67. Fulton 132. 1 And. 115. 1 Hale 553, 555. Foſter 108. Crom. 31, 32. 4 Comm. 245.

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within a window, or turn the key of a door which is locked on the inſide, or diſcharge a loaded gun into a houſe, &c. (1)

(1) But quere, if the inſtrument muſt not be introduced for the purpoſe of committing the felony. Therefore, where thieves, having bored a hole *through* the door with a center bit, and part of the chips were found in the inſide of the houſe, yet, as they had neither got in themſelves, nor introduced a hand or inſtrument for the purpoſe of taking the property, the entering was ruled incomplete. O. B. 1785. p. 216.

1 Hale 439, 555. Sum. 80, 81. Foſt. 350, 353. Kely. 111. Crom. 32.

*Sect.* 8. Nay, it is certain, That in ſome caſes one may be guilty of burglary, who never made any actual entry at all; as where divers come to commit a burglary together, and ſome ſtand to watch in adjacent places, and the others enter, and rob, &c. For in all ſuch caſes, the act of one is in judgment of law the act of all.

Con. Sum. 81. Dalton 151. 1 Hale 555.

*Sect.* 9. And upon the like ground, it ſeems difficult to find a reaſon, why a ſervant who confederating with a rogue, lets him in to rob a houſe, &c. ſhould not be guilty of burglary as much as he; for it is clear, That if the ſervant were out of the houſe, the entry of the other would be adjudged to be his alſo; and what difference is there when he is in the houſe? (2)

(2) It has been determined, by all the judges, upon a ſpecial verdict, that it is burglary in both the ſervant and the thief; and not to be diſtinguiſhed from the caſe where one watches at the ſtreet end, while others go in. Strange 881. O. B. 1784, No. 520. 10 St. Tr. 433.

1 Hale 550. 4 Co. 40. 3 Inſt. 64, 67. Sum. 82. 86. 3 Inſt. 64. Bract. 144. B. Cor. 93. 22 Aſſ. 39, 95. Dalt. 151. 27 Aſſ. 38. Foſt. 38, 39. 1 And. 302. S. P. C. 30. Kelynge 27. Popham 42. Prin. P. L. 274. Spel. Gloſſ. Verb. Buglaria.

*Sect.* 10. As to the fifth point, *viz.* In what place this offence may be committed. It ſeems to be the current opinion at this day, That it can be committed only in a dwelling houſe; and that the indictment for it muſt neceſſarily alledge the fact *in domo manſionali*. And Sir *Edward Coke* ſeems to ſay, That the breaking a church, &c. is therefore burglary, becauſe the church is the manſion-houſe of God. But I can find nothing in the more ancient authors to countenance this nicety; for the general tenor of the old books ſeems to be, That burglary may be committed in breaking houſes, or churches, or the walls, or gates of a town. And *Staunforde* and *Anderſon* mentioned precedents of indictments of burglary *in domo* without adding *manſionali*. However the conſtant courſe of late precedents and opinions makes it certainly a very dangerous, if not an incurable fault, to omit the word *manſionalis* in an indictment of burglary in a houſe; and therefore without queſtion, it ought always to be inſerted where the truth of the caſe will bear it. But ſurely it cannot be neceſſary or proper to have any ſuch word in an indictment of burglary in a church, which by all the books above cited, ſeems to be taken as a diſtinct burglary from that in a houſe.

1 Hale 556. Summary 82. Crom. 33. Dalton 151. Mirror 000.

*Sect.* 11. However it is agreed by all, That a houſe wherein a man dwells but for part of the year, or a houſe which one has hired to live in, and brought part of his goods into, but has not yet lodged in, or a chamber in one of the inns of court

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court wherein a perſon uſually lodges, or houſe which a man's wife hires without his privity, and lives in by herſelf without him, may be called his dwelling-houſe; and will ſufficiently ſatisfy the words *domus manſionalis* in the indictment, whether any perſon were actually therein, or not, at the time of the offence.

4 Coke 40. 1 Jones 394. Kely. 43. 46. Pop. 42. 52. 3 Inſtitute 64. Pulton 132. Foſter 177.

*Sect.* 12. Alſo all out-buildings, as barns, ſtables, dairy-houſes, &c. 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 (*a*) from the houſe, it ſeems that it has not been uſual of late to proceed againſt offences therein as burglaries.

3 Inſtitute 64. Dalt. c. 151. B. Cor. 180. Crompton 32. 1 Hale, 558. Summary 82. Kely. 27, 52, 82. 4 Comm. 245.

O. B. 1785, No. 483. (*a*) An out-houſe, occupied with, but ſeparated from, the dwelling houſe, *by an open paſſage eight feet wide*, and not within or connected by *any fence* incloſing both, is not within the *curtilage*. Rex. v. Garland, Eaſt. T. 1776, M. S.

*Sect.* 13. If ſeveral perſons *dwell* in one houſe, as ſervants, gueſts, tenants at will, or otherwiſe, having no fix'd and certain intereſt in any part thereof, and a burglary be committed in any of their apartments; it ſeems clear, that the indictment ſhall lay the offence in the manſion-houſe of the proprietor, &c.—But if one *hire* a diſtinct apartment in a houſe for his lodging for a certain time, and a burglary be committed therein, I can ſee no good reaſon why the indictment may not lay the offence *in domo manſionali* of ſuch lodger; for it ſeems to be agreed, That an indictment for a burglary committed in a chamber in one of the inns of court, may lay the offence *in domo manſionali* of the owner of the chamber; (*b*) and why may not ſuch an apartment, with as much propriety be called the manſion-houſe of him that takes it, during the time that he has a certain intereſt in it? For ſo long as it is ſevered by the leaſe, it ſeems in the eye of the law to be as diſtinct from the other parts of the houſe, as if the perſon who rents it had a freehold or inheritance in it.

O. B. 1785, p. 971. 1 Hale 556. Con. Kely. 83. Crom. 33. Dalt. c. 151. 3 Inſt. 65. Co. Lit. 48. Summary 83.

(*b*) Chambers have ſeparate outward doors, which are the extremity of obſtruction; and are enjoyed as ſeparate property, as eſtates of inheritance; for life, or during reſidence.—So, a houſe divided into ſeparate tenements, with a diſtinct ſtair and door to each, will be ſeparate houſes, as Newcaſtle houſe. Lee v. Gaſtel, Cowper 1.—2 Salk. 532.

*Sect.* 14. As to the objection, That he goes into the houſe by the ſame door with the other inhabitants, and therefore is but an inmate, and the whole ought to be conſidered but as one houſe; I anſwer, That he muſt have ſome way to his apartment as incident to his intereſt in it, and that ſuch way lying through a door which is common to him with others, doth not make the apartment itſelf in any reſpect leſs his own, than a way through a door belonging to himſelf only would have done; (*c*) and if the law be ſo in this caſe, it ſeems to me very reaſonable alſo, That if ſuch a lodger take alſo a cellar in

(*c*) There being only one door in common to all the inhabitants, makes no difference, where the lodger does not ſleep in any part of the houſe; for in that caſe each apartment is a *ſeparate manſion*. Taylor's Caſe. Hil. 27 Geo. 3. M. S. vide Turner's Caſe, O. B. 1784. p. 391.

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the ſaid houſe, a burglary committed in ſuch cellar, may be alledged *in domo manſionali* of the lodger, whether the cellar had any communication with the houſe or not (*a*) for ſince it ſeems to be agreed, That a barn or ſtable, or other out-building near to a houſe, ſhall be looked on as part thereof, why ſhould not ſuch a cellar have the like eſtimation.

(*a*) Provided the owner does not dwell in any part of the houſe.—*Sed quære* for Kel. 83. ſeems contra.

*Sect.* 15. However it is agreed by all, That if one hire a part of a houſe to lodge in, which is actually divided from the reſt, and have a door of its own to the ſtreet, a burglary therein may be alledged *in domo manſionali* of ſuch perſon. (*b*)

(*b*) If the owner live under the ſame roof with the inmates, there muſt be a ſeparate *outer* door or the whole is the manſion of the owner; but if the owner inhabit no part of the houſe, or even if he occupy a ſhop or a cellar in it, but do not ſleep therein it is the manſion of each lodger, although there be but one outer door. Rogers's Caſe, Mich. 13 Geo. 3. M. S.

Hutton 33. 1 Hale 557, 558. vide 13 Geo. 3. c. 38 reſpecting burglary in the work-ſhops of the plate glaſs manufactory.

*Sect.* 16. But if he had taken it as a ſhop or work-houſe for his uſe in day-time only, it ſeems that a felony therein cannot be alledged in a manſion-houſe; not of him that lets it, becauſe it is ſevered by the leaſe from that part of the houſe which belongs to him, nor of him to whom it is let, becauſe he takes it not to lodge in. (*c*)

() If he ſleep in any part of the building, however diſtant that part is from the ſhop, it may be alledged his manſion-houſe; provided the owner does not ſleep under the ſame roof alſo. Carrol's Caſe, Eaſter Term, 1782, M. S.

22 Aſſ. 95. B. Cor. 93. S. P. C. 30. Dalt. c. 151. But by 5 & 6 Edw. 6. c. 9. clergy is taken from this offence.

*Sect.* 17. From what has been ſaid it clearly appears, That no burglary can be committed by breaking into any ground incloſed, or booth, or tent, &c. for there ſeems to be no colour from any authority ancient or modern, to make any offence burglary that is not done either againſt ſome houſe, or church, or the walls, or gates of ſome town.

Dyer 99. Daliſ. 22. 3 Inſt. 65. Kely. 30, 67. Sum. 83, 125. Crom. 32. Con. Dalt. c. 151. 1 Hale 562.

*Sect.* 18. As to the ſixth point, *viz.* What degree of guilt is required in the principal intention of the offender? It ſeems clear, That there can be no burglary but where the indictment both expreſsly alledges, and the verdict alſo finds, an intention to commit ſome felony; for it appear that the offender only meant to commit a treſpaſs, as to beat the party, &c. he is not guilty of burglary. (*d*)

(*d*) A ſervant embezzled money intruſted to his care; left ten guineas in his trunk; quitted his maſter's ſervice; returned; broke and entered the houſe in the night, and took away the ten guineas, and adjudged no burglary. Rex v. Bingley, O. B. Trin. 3 Jac. 2. M. S.

(*c*) King v. Gray, Strange 481, expreſsly in point.

*Sect.* 19. However it ſeems much the better opinion, That an intention *to commit a rape*, (*e*) or ſuch other crime which is made felony by ſtatute, and was a treſpaſs only at common law, will make a man guilty of burglary, as much as if ſuch offence were a felony at common law, becauſe wherever a ſtatute makes any offence felony, it incidentally gives it all the properties of a felony at common law.

c. 48.

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† *Sect.* 20. To remove an inducement for the frequent commiſſion of Burglaries, &c. By 10 Geo. 3. c. 48. "Buyers or Receivers of ſtolen jewels, gold or ſilver plate, watches, where the ſtealing ſhall have been accompanied with a burglary, or a robbery on the highway, ſhall be triable as well before the conviction of the principal, whether he ſhall be in or out of cuſtody, as after—and tranſported for fourteen years." Vide Appendix the Seventh, p. 235.

† *Sect.* 21. And to check this offence in its progreſs. By 23 Geo. 3. c. 88, "If any perſon ſhall be apprehended, having upon him, any picklock key, crow, jack, bit, or other implement, with an intent feloniouſly to break and enter into any dwelling-houſe, ware-houſe, coach-houſe, ſtable, or out-houſe, he ſhall be deemed a rogue and vagabond within the 17 Geo. 2. c. 5." Vide O. B. 1786, p. 485, for an opinion upon this act. N. B. This was a miſdemeanour at common law. Caſes temp. Hardwicke, p. 371.

EVERY man's houſe is conſidered as his caſtle, as well for his defence againſt injury and violence, for his repoſe. 5 Co. 92. To violate this ſecurity is conſidered of ſo atrocious a nature. 4 Com. 6, that the alarmed inhabitant, whether he be the owner or a mere inmate, Cro. Car. 544, is permitted to repel the violence by the death of the aſſailant, without incurring the penalties of even excuſable homicide, 24 Hen. 8. c. 5; and, ſhould the aggreſſor eſcape with impunity from the execution of his guilty purpoſe, the ſword of public juſtice ſtands alſo ready drawn againſt his life. Prin. L. 273. So anxiouſly indeed does the law interpoſe its concern to preſerve inviolate this domeſtic immunity, that the bare intention to commit the felony conſtitutes the eſſence of the crime. Comm. 227. Foſter 109. In this point, burglary ſeems to participate the principles of high treaſon. Brook Ab. Tit. Forfeit. The penal conſequences however are leſs ſevere; The forfeiture of property is not ſo extenſive; and for a courſe of time, the life of the convict was ſaved by the merciful plea of clergy. 4 Comm. But as the increaſe of national opulence preſented richer temptations to the ſpoiler, the interpoſition of additional terrors became neceſſary, therefore by 18 Eliz. c. 7. clergy is taken away from the *offence*. 4 Comm. 366. 2 Hale 364. Poſt. 57. and by 3 & 4 W. & M. c. 9. from acceſſaries before the fact.—By 10 & 11 Will. 3. c. 23. Whoever ſhall convict a burglar is exempted from all parish and ward offices, where the offence was committed. To this the 5 Ann. c. 31. has ſuper-added a reward of forty pounds. And if an accomplice being out of priſon, ſhall convict two or more offenders, he is intitled alſo to a pardon of the felonies as enumerated in the act.

## CHAPTER THE THIRTY-NINTH.

### OF ARSON.

ARSON is a felony at common law, in maliciouſly and voluntary burning the houſe of *another* by night or by day. 1 Hale 556. B. Cor. 135, 155. S. P. C. 36.

And I ſhall conſider: Firſt, What is ſuch a houſe in which arſon may be committed. Secondly, Whether this offence may be committed in the offender's own houſe. Thirdly, How much of the houſe ought to be burnt. Fourthly, With what degrees of malice. 3 Inſt. 66. Dalt. c. 105. 2 Inſt. 188. 4 Comm. 220.

*Sect.* 1. As to the firſt point, *viz.* What is ſuch a houſe which arſon may be committed. It ſeems agreed, That 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 3 Inſt. 67. 4 Co. 20. Dalt. c. 105. 11 H. 7. 1. B. Cor. 226. 3 Inſt. 69. S. P. C. 36.

*Summary 86.* 1 Hale 567, 579. 4 Comm. 221, 366, 310.

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ther they be adjoining to any houſe or not, ſo far ſecured by law, that the malicious burning of them is arſon. And it is ſaid, That in an indictment they are well expreſſed by the word *domus*, without adding *manſionalis*.

1 Hale 568. Summary 86. 3 Inſt. 67. Britt. f. 16. S. P. C. 36. Dalt. c. 105. 1 Burn. 289.

*Sect.* 2. But it ſeems that at this day the burning of the frame of a houſe, or of a ſtack of corn, &c. is not accounted arſon, becauſe it cannot come under the word *domus*, which ſeems at preſent to be thought neceſſary in every indictment of arſon. Yet it is ſaid, That anciently the burning of a ſtack of corn was accounted arſon. † And by the 9 Geo. 1. c. 22. whoever ſhall ſet fire to any houſe, (*a*) barn, or out-houſe; "or to any hovel, cock, mow, or ſtack "of corn, hay, or wood; or ſhall forcibly reſcue any perſon "in lawful cuſtody for the ſame; or ſhall procure another to "join in committing any of the ſaid offences,—ſhall ſuffer "death, without benefit of clergy."—But it is reſolved, (*b*) that this ſtatute only excludes the principal (*c*) offender from his clergy, more clearly than he was excluded before (*d*); and does not alter the nature of the crime, or create any new offence.

(*a*) A priſon the entrance to which is through a dwelling houſe is within this act. Donevan's Caſe Black. 682.

(*b*) Acceſſaries before are excluded by 4 & 5 P. & M. c. 4. But acceſſaries after are ſtill intitled to clergy. 1 Hale 573.

(*c*) The King v. Spalding. Eaſt. T. 1780. Breemes Caſe, Trin. T. 1780. Pedley's Caſe, B. R. upon a ſpecial verdict, Trin. 22 Geo. 3. (*d*) Vide Alex. Poulters Caſe, 11 Coke 29.

Holme's Caſe. 1 Jones 351. C. Car. 377. Sed. vide Foſter 116.

*Sect.* 3. As to the ſecond point, *viz.* Whether arſon may be committed in the offender's own houſe. It ſeems clearly agreed, That one ſeiſed in fee, or but poſſeſſed for years, of a houſe ſtanding by itſelf at a diſtance from all others, cannot commit felony in burning the ſame. (*e*)

1 Hale 568, 569. 3 Inſt. 67. Dalt. c. 105. Cro. Car. 338. Kelynge 29. Foſter 115, 116.

Alſo it ſeems the much ſtronger opinion, That a man ſo ſeiſed or poſſeſſed of a houſe in town, who burns his own with an intent to burn his neighbours, but in the event burns his own only, is not guilty of arſon; for by the general tenor of the books ſpeaking of this offence, it ſeems to be ſuppoſed to be done in the houſe of another, and not of the offender. Neither ſhall any act, which is only a crime in reſpect of the injury which it does, or may do, to another, be made a felony by reaſon of an intention thereby to commit a felony, if ſuch intention be not executed.—However this is certainly an offence highly puniſhable in regard of the malice thereof, and the great danger

(*e*) A leſſee for three years *in poſſeſſion*, under a term for 99 years, originally granted by the perſon ſeiſed in fee, is not guilty of ARSON, by ſetting the houſe on fire. Breeme's Caſe, Trin. 20 Geo. 3. M. S.—Nor a tenant by copyhold *in poſſeſſion*, although the premiſſes burnt, are ſurrendered to the lord to the uſe of a mortgagee, not admitted upon the ſurrender. Rex v. Spalding, Eaſter Term, 1780. *Sed quere* if this point was determined, the indictment only charging that he burnt *his own houſe*, M. S.—Nor can a tenant in poſſeſſion, be guilty of this offence, by ſetting the houſe he is *ſo poſſeſſed of* on fire; for the principle in Holme's Caſe, was intended to protect the perſon in actual poſſeſſion. But Lord Mansfield ſeems to lament, while he is forced to admit the authority of that deciſion. Pedley's Caſe. B. R. Trin. 22 Geo. 3.—It is however determined that a widow, intitled to dower, but no dower aſſigned, from a houſe, the equity of the redemption of which had deſcended from her huſband to her infant children, and for whoſe benefit ſhe had let it and received the rent, is guilty of arſon by burning it in the poſſeſſion of her tenant.—And it was ſaid that if ſhe had been ſeiſed of the freehold, it would ſtill have been felony; from whence it is contended that *a reverſioner who ſhall maliciouſly fire the houſes in poſſeſſion of his tenants under leaſes from himſelf or his anceſtors, will be guilty of Arſon.* Harris's Caſe, Foſter 113, to 116.—And there is a late caſe in which a pauper, who ſet fire to the parith work houſe, was held guilty of Arſon.

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court wherein a perſon uſually lodges, or a houſe which a man's wife hires without his privity, and lives in by herſelf without him, may be called his dwelling-houſe; and will ſufficiently ſatisfy the words *domus manſionalis* in the indictment, whether any perſon were actually therein, or not, at the time of the offence.

5 Co. 40. C. Car. 474. 1 Jon. 394. Kely. 43, 46 52, 54. Pop. 42, 52. 3 Inſt. 64. Skin. 685. Pult. 132. 133. Foſter 177.

*Sect.* 12. Alſo all out-buildings, as barns, ſtables, dairy-houſes, &c. adjoining *(a)* 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 has not been uſual of late to proceed againſt offences therein as burglaries.

3 Inſt. 64. Dalt. c. 151. B. Cor. 180. Crom. 32. 1 Hale, 558, 559. Sum. 82. Kely. 27, 52, 83. 4 Comm. 245.

O. B. 1785, No. 483. *(a)* Vide Rex. v. Garland, Somerſet Lent Aſſ. 1776, before Mr. Baron Eyre, for the diſtance at which an out-houſe is conſidered part of the dwelling.

*Sect.* 13. If ſeveral perſons dwell in one houſe, as ſervants, gueſts, or tenants at will, or otherwiſe having no fix'd and certain intereſt in any part thereof, and a burglary be committed in any of their apartments; it ſeems clear, that the indictment ſhall lay the offence in the manſion-houſe of the proprietor, &c. But if one hire a diſtinct apartment in a houſe for his lodging for a certain time, and a burglary be committed therein, I can ſee no good reaſon why the indictment may not lay the offence *in domo manſionali* of ſuch lodger; for it ſeems to be agreed, That an indictment for a burglary committed in a chamber in one of the inns of court, may lay the offence *in domo manſionali* of the owner of the chamber; *(b)* and why may not ſuch an apartment, with as much propriety be called the manſion-houſe of him that takes it, during the time that he has a certain intereſt in it? For ſo long as it is ſevered by the leaſe, it ſeems in the eye of the law to be as diſtinct from the other parts of the houſe, as if the perſon who rents it had a freehold or inheritance in it. And as to the objection, That he goes into the houſe by the ſame door with the other inhabitants, and therefore is but an inmate, and the whole ought to be conſidered but as one houſe; I anſwer, That he muſt have ſome way to his apartment as incident to his intereſt in it, and that ſuch way lying through a door which is common to him with others, doth not make the apartment itſelf in any reſpect leſs his own, than a way through a door belonging to himſelf only would have done.

O. B. 1785, p. 971. 1 Hale 556. Con. Kely. 83. Vide ſ. 11. Crom. 33. Dalt. c. 151. 3 Inſt. 65. 4 Comm. Co. Lit. 48. Summary 83.

*(b)* From the nature of theſe buildings, they are all as ſeveral houſes, and have ſeparate outward doors, which are the extremity of obſtruction, becauſe the ſtair-caſe is no outer door. Again, they are enjoyed as ſeparate property. In Lincoln's inn they have ſeparate eſtates of inheritance; in the other inns they have eſtates for life, and in colleges as long as they reſide. So, if that which was one houſe originally, comes to be divided into ſeparate tenements, and there is a diſtinct outward door to each, they will be ſeparate houſes, as Newcaſtle houſe. Lee v. Ganſel, Cowper 1.

*Sect.* 14. And if the law be ſo in this caſe, it ſeems to me very reaſonable alſo, That if ſuch a lodger take alſo a cellar in

O. B. 1784, p. 392.

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the ſaid houſe, a burglary committed in ſuch cellar, may be alledged *in domo manſionali* of the lodger, whether the cellar had any communication with the houſe or not; for ſince it ſeems to be agreed, That a barn or ſtable, or other out-building near to a houſe, ſhall be looked on as part thereof, why ſhould not ſuch a cellar have the like eſtimation? *Sed quære*, for Kelynge ſeems to incline to a different opinion.

Kelynge 83.

*Sect.* 15. However it is agreed by all, That if one hire a part of a houſe to lodge in, which is actually divided from the reſt, and have a door of its own to the ſtreet, a burglary therein may be alledged *in domo manſionali* of ſuch perſon. (4)

(4) Even tho' there may be other inmates in the houſe, Ld. Mansfield Hill 14 Geo. 3. and even tho' the owner occupy a ſhop or a cellar under the ſame roof, provided he does not ſleep in either of them; becauſe the lodger has the outward door entirely to himſelf. But if the owner ſleep in any part of the houſe, it muſt be laid as the manſion of the owner, and not of the lodger. Cowp. 8. O. B. 1784, p. 392. 2 Burr. Sett. Caſ. 212, 217.

*Sect.* 16. But if he had taken it as a ſhop or work-houſe for his uſe in the day-time only, it ſeems that a felony therein cannot be alledged in a manſion-houſe; not of him that lets it, becauſe it is ſevered by the leaſe from that part of the houſe which belongs to him, nor of him to whom it is let, becauſe he takes it not to lodge in.

Summary 83. Hutton 33. 1 Hale 557, 558.

† Therefore to protect a riſing manufactory, by 13 Geo. 3. c. 38. ſ. 29. "Whoever ſhall by day or night break into any "houſe, ſhop, cellar, &c. belonging to the plate glaſs manu- "factory, with intent to ſteal, ſhall be tranſported for four- "teen years."

*Sect.* 17. From what has been ſaid it clearly appears, That no burglary can be committed by breaking into any ground incloſed, or booth, or tent, &c. for there ſeems to be no colour from any authority ancient or modern, to make any offence burglary that is not done either againſt ſome houſe, or church, or the walls, or gates of ſome town.

Sum. 82, 83. 22 Aſſ. 95. B. Cor. 93. S. P. C. 36. Dalt. c. 151. Crom. 31. But ſee 5 and 6, Edw. 6. c. 9.

*Sect.* 18. As to the ſixth point, *viz.* What degree of guilt is required in the principal intention of the offender? It ſeems clear, That there can be no burglary but where the indictment both expreſly alledges, and the verdict alſo finds, an intention to commit ſome felony; for if it appear that the offender only meant to commit a treſpaſs, as to beat the party, &c. he is not guilty of burglary. However it ſeems much the better opinion, That an intention *to commit a rape*, or ſuch other crime which is made felony by ſtatute, and was a treſpaſs only at common law, will make a man guilty of burglary, as much as if ſuch offence were a felony at common law, becauſe wherever a ſtatute makes any offence felony, it incidentally gives it all the properties of a *felony* at common law.

Dyer. 99. Daliſ. 22. 3 Inſt. 65. Kely. 30, 67. Sum. 83, 125. Crom. 32. Con. Dalt. c. 151. Infra c. 40. 1 Hale 562, ſ. 3. (d) King v. Gray, Strange 481, expreſsly in point.

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punished but as the first offence; for the gentler method shall first be tried, which perhaps may prove effectual.

*Sect.* 4. As to the second point, *viz.* What is incidentally implied in every statute, making an offence felony. It seems clear, that every such statute does by necessary consequence subject the offender to the like attainder and forfeiture, &c. and also does require the like construction, as to those who shall be accounted accessaries before or after, and to all other intents and purposes, as is incident to a felony at common law. 3 Inst. 47, 59, 90. 1 Hale 704. Crompton 42. Summary 215. Dalis. 11, 22. b. 2. c. 29. s. 13, 14. Salk. 542, 543. Misprision of felony is as well incidental to a felony created by statute, as to one at common law. 1 Hale 652. 2 Hale 708.

*Sect.* 5. Yet where such a statute saves the corruption of blood, it impliedly saves the descent of the land of the offender to his heir. Also where it saves the land to the heir, it prevents the corruption of blood so far. And it is said, That in both cases it saves the wife's dower, because wherever an heir takes as heir, he shall not void a title of dower in respect of the same inheritance. But notwithstanding such a saving, the land shall be forfeited for the life of the offender. 3 Inst. 47. Summary 8. 1 Hale 703.

*Sect.* 6. If one commit an offence which is made felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute. B. Cor. 203.

For a full account of this title, vide 4 Bac. Ab. tit. Statute, and the introduction to Burn's Justice.

## CHAPTER THE FORTY FIRST.

## Of RAPE.

OFFENCES against Women made felonies by statute are of two kinds. First, Rape. Secondly, Of forcible, improvident and clandestine marriage. Bract. c. 28. Leges Gul. l. 19. 1 Hale, c. 58. 4 Comm. c. 15.

In treating of rape, I shall consider, First, What shall be called a rape. Secondly, How it is punished. Wilk. Leg. Ang. Sax. 222, 290. 2 Inst. 433.

*Sect.* 1. As to the first point, It seems that rape is an offence in having unlawful and carnal knowledge of a woman, by force and against her will. But it is said, That no assault upon a woman in order to ravish her, howsoever shameless and outrageous it may be, if it proceed not to some degree of penetration, and also of emission, can amount to a rape; however it is said, That emission is, *primâ facie*, an evidence of penetration. Co. Lit. 123. 4 Co. 39, 47. 2 Inst. 180. 12 Co. 37. 3 Inst. 59. 1 Hale 628. 1 St. Tr. 388. Summary 117. 1 Rush. Coll. p. 2, 94.

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Dalt.c.105,607. B. Par. 55. 5 Ed. 4, 6.

*Sect.* 2. 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. Nor is it any excuſe, that ſhe conſented after the fact, or that ſhe was a common ſtrumpet; for ſhe is ſtill under the protection of the law, and may not be forced. But it was anciently ſaid, to be no rape to force a man's own concubine. Alſo it hath been ſaid by ſome to be no rape to force a woman who conceives at the time; for it is ſaid, That if ſhe had not conſented, ſhe could not have conceived: but this opinion ſeems very queſtionable, not only becauſe the previous violence is no way extenuated by ſuch a ſubſequent conſent, but alſo becauſe, if it were neceſſary to ſhew that the woman did not conceive, the offender could not be tried till ſuch time as it might appear whether ſhe did or not, and likewiſe becauſe the philoſophy of this notion may very well be doubted of.

1 Ruſh. Col. part 2. 100. Bract. 147, 148.

S. P. C. 24. Finch. 204. 1 Hale 628, 731.

Fulton 134. 1 Hale 630, 633. Ruſh. Coll part 2, 100.

*Sect.* 3. It is a ſtrong, but not a concluſive preſumption againſt a woman, That ſhe made no complaint in a reaſonable time after the fact.

Bract. 147. Dalt. c. 107. 1 Hale, 30. Crom. 100. Dyer 304.

*Sect.* 4. It was a queſtion before 18 Eliz. c. 7. Whether a rape could be committed on a child of the age of ſix or ſeven years; but by that ſtatute, "whoſoever ſhall unlawfully and "carnally know and abuſe any woman-child under the age of "ten years, ſhall ſuffer as a felon without clergy."

Vide Cro. Cir. Com. c. 456. 3 Bur. 1696. C. Car. 332.

*Sect.* 5. Upon an indictment for this offence, it is no way material whether ſuch child conſented, or were forced; yet it muſt be proved, That the offender entered into her body, &c.

B. 2. c. 29, ſ. 7, 89. Dalt. c. 107. Hutt. 115. St. Tr. 1, 366.

*Sect.* 6. 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.

Ruſh. v. 2. p. 93. Vide Lord Baltimore's caſe, 4 Burr. 2179.

1 Hale 627. Bract. 147, 148. S. P. C. 21, 22, 23. 2 Inſt. 181. Dalt. c. 99. Crom. 32. con. Co. Lit. 123. Fleta 1, c. 40. 2 Inſt. 180. Quære F. Utl. 49. B. Cor. 169.

*Sect.* 7. As to the ſecond point, *viz.* How rape is puniſhed, it is ſaid, that of old time it was felony, and conſequently puniſhable with death, eſpecially if the party raviſhed were a virgin, unleſs ſuch virgin would accept of the offender for her huſband, in which caſe ſhe might ſave his life by marrying him. But afterwards it was looked upon as a great miſdemeanour only, but not felony; and the offender was puniſhed with the loſs of his eyes and teſticles: And by the ſtatute of *Weſtm.* 1. c. 13. It was reduced to a treſpaſs, ſubjecting the offender to two years impriſonment, and a fine at the king's will. But the ſmalineſs of the puniſhment proving a great encouragement to the offence, it was made felony again, by the ſtatute of *Weſtminſter* 2. c. 34. and by 18 *Eliz.* c. 7. it is excluded from the benefit of clergy.

CHAP.

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# CHAPTER THE FORTY SECOND.

## Of FORCIBLE, † IMPROVIDENT, AND CLANDESTINE MARRIAGES.

THE marrying a woman of ſubſtance by force, and other offences of the like nature, were made felonies by 3 Hen. 7. c. 2. which was enacted in the following words.

*Sect.* 1. "Where women, as well maidens as widows and "wives having ſubſtances, ſome in goods moveable, and ſome in "lands and tenements, and ſome being heirs apparent unto "their anceſtors, for the lucre of ſuch ſubſtances, be often-"times taken by miſ-doers, contrary to their will, and after "married to ſuch miſ-doers, or to other by their aſſent, or de-"filed, to the great diſpleaſure of God, and contrary to the "king's laws, and diſparagement of the ſaid women, and "utter heavineſs and diſcomfort of their friends, and to the "evil enſample of all other: It is therefore ordained, eſtabliſh-"ed and enacted by our ſovereign lord the king, by the ad-"vice of the lords ſpiritual and temporal, and the commons "in the ſaid parliament aſſembled, and by the authority of "the ſame, That what perſon or perſons from henceforth, "that taketh any woman (ſo) againſt her will unlawfully, that "is to ſay, maid, widow, or wife, that ſuch taking, pro-"curing, and abetting to the ſame, and alſo receiving wit-"tingly the ſame woman ſo taken againſt her will, and know-"ing the ſame, be felony: And that ſuch miſ-doers, takers, "and procurators to the ſame, and receitors, knowing the "ſaid offence in form aforeſaid, be henceforth reputed and "adjudged as principal felons: Provided alway, that this act "extend not to any perſon taking any woman, only claiming "her as his ward or bond-woman."

Vide Kely. 81. and the trial of Haagen Swendzen for forcibly marrying Mrs. Rawlins; Mich. 1 Ann. 5 St. Tr. 450.

*Sect.* 2. And by 39 Eliz. c. 9. "All perſons who ſhall be "principals, or procurers or acceſſaries before ſuch offence "committed, are excluded from the benefit of the clergy."

*Sect.* 3. In the conſtruction of the ſaid ſtatute of 3 Hen. 7. c. 2. the following points have been reſolved.—Firſt, That the indictment muſt expreſsly ſet forth, both that the woman taken away had land or goods, or was heir apparent, and alſo that ſhe was married or defiled, becauſe no other caſe is within the preamble of the ſtatute, to which the enacting clauſe clearly refers; for it does not ſay, That what perſon, &c. that taketh any woman againſt her will, but what perſon that taketh any woman *ſo* againſt her will.

See 1 Hale, 660, 661, and 5 St. Tr. 468. Far. 101, 102. Hobart 182. C. Car. 483, 485, 488, 492. Daliſ. 22. 1 And. 115. 3 Inſt. 61. Summary 118. Savil 59. 12 Co. 20, 100, 110.

Sect.

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Hobart 182. C. Car. 485, 489.

*Sect.* 4. Secondly, That the indictment ought alſo to alledge, That the taking was for lucre, becauſe the words of the preamble are ſo, but that it needs not ſet forth, That it was with an intention to marry or defile the party, becauſe the words of the ſtatute neither require ſuch an intention, nor does the want thereof any way leſſen the injury.

Hobart 182. C. Car. 485. 1 Hale 660.

*Sect.* 5. Thirdly, 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 any conſent at all; for till the force was put upon her, ſhe was in her own power.

C. Car. 493. 3 Keb. 193. 2 Vent. 243, 244.

*Sect.* 6. Fourthly, That 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 a woman, whom by ſo baſe means he got into his power.

3 Inſt. 61. Dalſ. 22. S. P. C. 44. Far. 132.

*Sect.* 7. Fifthly, That thoſe who after the fact receive the offender, but not the woman, are not principals within this ſtatute, becauſe the words are, *receiving wittingly the ſame woman ſo taken*, &c. but it ſeems clearly, That they are acceſſaries after the offence, according to the known rules of common law.

C. Car. 482. Summary 119.

*Sect.* 8. Sixthly, That thoſe who are only privy to the marriage, but no way parties to the forcible taking away, or conſenting thereto, are not within the ſtatute.

C. Car. 488. Hobart 183. Summary 119.

*Sect.* 9. Seventhly, That where a woman is taken by force in the county of *A.* and married in the county of *B.* the offender may be indicted and found guilty in the county of *B.* becauſe the continuing of the force there amounts to a forcible taking within the ſtatute. (1)

(1) A woman thus taken away, and forcibly married, may give evidence againſt the offender, for he is no huſband *de jure*. 1 Hale 661. 4 St. Tr. 455. 4 Comm. 209. Gibſ. 418.

† *Sect.* 10. As to improvident marriage it is enacted by 4 & 5 Phil. & Mar. c. 8. "That whoever above the age of "fourteen (by flattery, trifling gifts, and fair promiſes) ſhall "allure and take any woman-child unmarried within the age "of ſixteen, from and againſt the conſent of her guardians, "ſhall ſuffer two years impriſonment, and fine at diſcretion. "If the offender deflower, or marry her, five years impri- "ſonment, and fine as before: and if any female above twelve "ſhall conſent to unlawful matrimony, ſhe ſhall forfeit all

"her

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" her lands to the next of kin, during the life of ſuch perſon " as ſhall ſo contract matrimony." (2)

(2) N. B. This forfeiture extends as well to the infant who conſents, as to the huſband who takes. Brown's caſes Mich. 19 Geo. 3. The marriage muſt be clandeſtine, and to the diſparagement of the heireſs. 3 Mod. 84. If the guardian once conſents, he cannot retract. 2 Mod. 128. 6 Mod. 168. A baſtard under the care of her putative father, is within this act. Str. 1162. The offence is within the juriſdiction of the king's bench. 4 Mod. 145. 2 Lev. 179. 1 Sty. 162. See alſo 12 Car. 2. c. 24. 3 Mod. 24. Vaugh. 177. And that the court will grant an information for procuring an improvident or unequal marriage. Lev. 257. 5 Mod. 221.

† *Sect.* 11. Thirdly, As to clandeſtine marriage. It is enacted by 26 Geo. 2. c. 33. " That if any perſon ſhall ſolemnize " matrimony, except the parties are quakers or Jews, in any " other place than a church or public chapel, where banns " have been uſually publiſhed, unleſs by ſpecial licence from " the archbiſhop of Canterbury; or ſhall ſolemnize matri- " mony without publication of banns, unleſs licence of mar- " riage be firſt had and obtained from ſome perſon or perſons " having authority to grant the ſame, he ſhall be guilty of " felony, and tranſported for fourteen years, and the marriage " be null and void." The proſecution to be within three " years."

† *Sect.* 12. And it is further enacted, par. 16. " That if " any perſon ſhall, with intent to elude the force of this act, " knowingly and wilfully inſert or cauſe to be inſerted in the " regiſter book of ſuch pariſh or chapelry as aforeſaid, any " falſe entry of any matter or thing relating to any marriage; " or falſely make, alter, forge, or counterfeit any ſuch entry " in ſuch regiſter, or any ſuch marriage licence, or ſhall " wilfully deſtroy any regiſter book of marriages, or any part " of ſuch regiſter book, or ſhall cauſe the ſame to be done, " or ſhall aſſiſt in ſo doing, or ſhall knowingly utter or pub- " liſh the ſame as true reſpectively, every perſon ſo offending, " ſhall ſuffer death without clergy."

Vide Douglas 659, for a determination on this ſtatute, which rendered all marriages illegal which had been celebrated during the ſpace of 28 years in any church or chapel built ſubſequent to the paſſing of the act. But by 21 Geo. 3. c. 53. they are rendered valid, and the clergymen who had celebrated ſuch marriages are exempted from the penalties. Bur. 2230. 1 Black. 632. Ray. 752. Salk. 18, 28, 121. 2 Sid. 71.

## CHAPTER THE FORTY-THIRD.

## Of OFFENCES AGAINST THE RIGHTS OF MARRIAGE.

OFFENCES againſt the rights of marriage, at common law, are looked upon as ſpiritual offences, and puniſhable only by the Eccleſiaſtical law, but one of them is made felony, but not excluded from the benefit of the clergy. C. Eliz. 94.

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By 1 Jac. 1. c. 11. it is enacted, "That if any perſon or perſons within his majeſty's dominion of England and Wales, being married, do marry any perſon or perſons, the former huſband or wife being alive, that then every ſuch offence ſhall be felony, and the perſon or perſons ſo offending ſhall ſuffer death as in caſes of felony. And the party and parties ſo offending, ſhall receive ſuch and the like proceeding, trial, and execution, in ſuch county, where ſuch perſon or perſons ſhall be apprehended, as if the offence had been committed in ſuch county, where ſuch perſon or perſons ſhall be taken or apprehended."

*Sect.* 2. But it is provided by the ſaid ſtatute, "That nothing therein contained, ſhall extend to any perſon or perſons whoſe huſband or wife ſhall be continually remaining beyond the ſeas by the ſpace of ſeven years together, or whoſe huſband or wife ſhall abſent him or herſelf, the one from the other, by the ſpace of ſeven years together in any parts within his majeſty's dominions, the one of them not knowing the other to be living within that time."

*Sect.* 3. And it is further provided, "That the ſaid ſtatute ſhall not extend to any perſon or perſons who ſhall be at the time of ſuch marriage divorced by ſentence in the eccleſiaſtical court, or to any perſon or perſons where the former marriage ſhall be by ſentence in the eccleſiaſtical court declared to be void and of no effect: Nor to any perſon or perſons, for, or by reaſon of, any former marriage had or made within age of conſent."

*Sect.* 4. Alſo it is farther provided, "That no attainder for this offence ſhall make or work any corruption of blood, loſs of dower, or diſinheriſon of heir or heirs."

See 1 Hale, 692, to 694. 2 Inſt. 89. Sum. 121, 122. Kely. 27. 2 C. Car. 461, 462.

*Sect.* 5. In the conſtruction of this ſtatute it has been holden, Firſt, That not only thoſe who are divorced *a vinculo matrimonii*, but alſo thoſe who are divorced only *a menſa & thoro cauſa adulterii* or *ſævitiæ*, are within the exception in this ſtatute, notwithſtanding there be not the word *divortiamus*, but only the word *ſeparamus*, in the ſentence; becauſe the ſtatute, being penal, ſhall be conſtrued favourably, and ſuch ſeparations are taken for divorces in common underſtanding.

2 Inſt. 89. 1 R. Abr. 340, 341. Co. Lit. 79.

*Sect.* 6. Secondly, Where either of the parties were within the age of conſent at the time of the firſt marriage, that not only ſuch perſon as was within ſuch age, but alſo the other who was above it, is within the exception of the ſtatute, becauſe the power of diſagreeing to ſuch marriage is equal on both ſides.

1 Hale 692. 1 Sid. 171.

*Sect.* 7. Thirdly, That if the firſt marriage were beyond ſea, and the latter in England, the party may be indicted for it here,

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here, becauſe it is the latter marriage that makes the offence; but if the firſt marriage were in England, and the latter beyond ſea, it is ſaid that the offender cannot be indicted here; — *ſed quere*, why not? for the words of the ſtatute are, "That "the parties ſo offending ſhall receive ſuch and the like "proceeding, trial, and execution, in ſuch county where "ſuch perſon or perſons ſhall be apprehended, as if the "offence had been committed in ſuch county, where ſuch "perſon or perſons ſhall be taken or apprehended." (1) Kely. 80.

(1) On this ſtatute the firſt and true wife is not an admiſſable witneſs againſt her huſband. 1 Hale 692. Even an affidavit made by the firſt wife to poſtpone the trial of an indictment againſt her huſband has been rejected. O. B. Feb. 1786. But vide Adding. P. S. 411. But the ſecond woman is competent, even to prove the marriage, for ſhe is not his wife ſo much as *de facto*. 1 Hale 693. A ſecond huſband, not being privy to the firſt marriage, is intitled to the labour of the ſuppoſititious wife during their cohabitation. 4 Geo. 1. Burn's E. L. 106.

In April, 26 Geo. 3. the Ducheſs of Kingſton was tried for polygamy by the houſe of peers. It was reſolved a ſentence in the eccleſiaſtical court againſt a marriage, in a ſuit for jactitation does not preclude the crown from proving the marriage on an indictment on this ſtatute. And, admitting that ſuch a ſentence were concluſive as to the fact of marriage, the crown may avoid the effect of the concluſion by giving evidence that the ſentence had been obtained by fraud and collution. 11. St. Tr. 262.

## CHAPTER THE FORTY-FOURTH.

## Of OFFENCES AGAINST THE MEMBERS OF A MAN's BODY.

IN treating of offences againſt the members of a man's body, I ſhall conſider, Firſt, What offences of this nature are eſteemed maims. Secondly, How they are puniſhed by the common law. Thirdly, How they are puniſhed by ſtatute. Fleta l. 1. c. 40. Brit. b. 1, c. 25. Bract. 144. 4 Comm. 205.

*Sect.* 1. As to firſt point, It ſeems that 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, is properly maim. S. P. C. 3. 3 Comm. 12. Co. Lit. 126, 128. 3 Inſt. 62, 118.

*Sect.* 2. And therefore the cutting off, or diſabling, or weakening a man's hand or finger, or ſtriking out his eye or foretooth, or caſtrating him, are ſaid to be maims, but the cutting off his ear, or noſe, &c. are not eſteemed maims, becauſe they do not weaken, but only disfigure him. F. Cor. 142, 458. 25 Ed. 3. 94. 4 Comm. 206. &c.

*Sect.* 3. As to the ſecond point, *viz.* How ſuch offences are to be puniſhed, it is to be obſerved, that all maim is felony, and 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 Bract. 144. Fleta l. 1. c. 40. S. P. C. 37. 3 Inſt. 62, 118. Sum. 133. Str. 1100. And. 137.

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the loſs of life or member, but only with fine and impriſonment. (1)

(1) A perſon who maims himſelf that he may have the more colour to beg, may be indicted and fined. 1 Inſt. 127. And by the like reaſon a perſon who diſables himſelf that he may not be impreſſed for a ſoldier. 3 Burn. J. 115.

*Sect.* 4. As to the third point, *viz.* How ſuch offences
See 5 H. 4. c. 5. are puniſhed by ſtatute, it is enacted by 22 & 23 Car. 2. c. 1.
See 37 H. 8. c. 6. "That if any perſon ſhall on purpoſe and of malice fore-
"thought, and by lying in wait, unlawfully cut out, or
"diſable the tongue, put out an eye, ſlit the noſe, cut off
"a noſe, or lip, or cut off or diſable any limb, or member of
"any ſubject of his majeſty, with intention in ſo doing to
"maim or disfigure, in any the manners before mentioned,
"ſuch his majeſty's ſubject, That then and in every ſuch
"caſe the perſon or perſons ſo offending, their counſellors,
"aiders, and abettors, knowing of, and privy to the of-
"fence, as aforeſaid, ſhall be and are by the ſaid ſtatute de-
"clared to be felons, and ſhall ſuffer death as in caſes of
"felony, without benefit of clergy."

*Sect.* 5. But it is provided by the ſaid ſtatute, "That no
"attainder of ſuch felony ſhall extend to corrupt the blood,
"or forfeit the dower of the wife, or the lands, goods or
"chattels of the offender."

*Sect.* 6. If a man attack another of malice fore-thought,
Woodburn and Coke's caſe at the Suffolk aſſizes, 8 Geo. 1. 6 St. Tr. 212. See 9 G. 1. c. 22. in order to murder him with a bill, or any other ſuch like inſtrument, which cannot but endanger the maiming him, and in ſuch attack happen not to kill, but only to maim him, he may be indicted on this ſtatute, together with all thoſe who were his abettors, &c. and it ſhall be left to the jury on the evidence, whether there were a deſign to murder by maiming, and conſequently a malicious intent to maim as well as to kill, in which caſe the offence is within the ſtatute, though the primary intention was murder. (2)

(2) If the maim comes not within any of the deſcriptions of the act, yet it is indictable at common law, and may be puniſhed by fine and impriſonment. Or an appeal may be brought for it at the common law; in which the party injured ſhall recover his damages. Or he may bring an action of treſpaſs; which kind of action hath now generally ſucceeded the place of appeals in ſmaller offences not capital. Vide poſt. 2 vol. 15, 160. But it does not ſeem that in maiming there may be acceſſaries after the fact. Ibid. p. 311.

For offences of maiming cattle, vide Infra. ch. 46. † *Sect.* 7. And it is enacted by 37 Hen. 8. c. 6. "That
"whoever ſhall maliciouſly, unlawfully, and wittingly cut, or
"cauſe to be cut off the ear or ears of any one of the king's ſub-
"jects otherwiſe than by authority of the law, chance-medley,
"ſudden affray, or adventure, ſhall forfeit treble damages to the
"party grieved, by action of treſpaſs, and ten pounds to the
"king, in the name of a fine."

CHAP.

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# CHAPTER THE FORTY-FIFTH.

## Of OFFENCES against RECORDS.

AT common law the embezzling, defacing, or altering any record, without due authority, was an offence highly punishable by fine and imprisonment, &c. and in many cases it was made felony by the following clause of 8 Hen. 6. c. 12. 3 Inst. 71, 72. 1 Hale 646, to 648.

*Sect.* 2. "It is ordered, That if any record or parcel of "the same, writ, return, panel, process, or warrant of attorney, "in the king's courts of Chancery, Exchequer, the one Bench "or the other, or in his Treasury, be willingly stolen, "taken away, withdrawn, or avoided, by any clerk, or by "other person, because whereof any judgment shall be reversed: That such stealer, taker-away, withdrawer, or avoider, "their procurators, counsellors, and abbettors, thereof indicted, and by process thereupon made, thereof duly convict by their own confession, or by inquest to be taken "of lawful men, (whereof the one half shall be of the men of "any court of the same courts, and the other half of the other) "shall be judged for felons, and shall incur the pain of "felony: And that the judges of the said courts, of the "one Bench or of the other, have power to hear and determine such defaults before them, and thereof to make "due punishment, as afore is said."

*Sect.* 3. In the construction of this clause, it hath been holden: First, That it extends only to the courts which are expressly named; and to the court of Chancery, so far only as it proceeds according to the course of the common law. 3 Inst. 71. 1 Hale 646, to 648.

*Sect.* 4. Secondly, That it extends not to such offence by the judges of any court; for whereas it begins with expressly naming clerks which are inferior to them, it shall not be intended to include them under the general words following; however by 8 Ric. 2. c. 4. "Judges as well as clerks are to "pay a fine to the king, and make satisfaction to the party "for falsly entering pleas or rasing rolls, or changing verdicts, "to the disherison of any one." And they are highly punishable at common law for other offences of like nature, as for inserting a bill of indictment not found by the jury among those which were found, and such like. And justice *Ingram* in the reign of *Edward* the First was fined eight hundred marks, for rasing a fine of thirteen shillings and four pence set on a poor man, *and making it six shillings* and eight pence. 3 Inst. 72. 2 R. 3, 10. 3 Mod. 66. B. Cor. 174. B. Tresp. 31. Con. B. present. 23 indict. 14, 50. 3 Inst. 72.

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*Sect.* 5. Thirdly, That not only ſuch an alteration whereby a judgment is actually reverſed, but alſo ſuch whereby it is reverſible, whether it were made before or after the judgment was given, or whether it be or be not afterwards amended by the court, is within this act; for thoſe words in the ſtatute *whereby any judgment ſhall be reverſed*, are taken to have the ſame purport, as if it were ſaid, whereby any judgment ſhall be annulled, or loſe its force or effect; for it is plain, That the ſtatute cannot intend that the judgment muſt be actually reverſed by writ of error, becauſe it ſpeaks of ſtealing or carrying away, or avoiding of records, which makes it impoſſible that the judgment ſhould be reverſed at all, becauſe no writ of error can remove a judgment which appears not. And it has been holden, That if *A. B.* be outlawed by the name of *A. C.* and afterwards the record be raſed, and *A. B.* inſerted, the offence is within the ſtatute, becauſe the record againſt *A. C.* is annulled, and the judgment prevented, which might have been given on a writ of error for this defect.

2 Roll. 81.
2 R. 3. 10. S. P. C. 36. 3 Inſt. 72. 11 Rep. 34.

*Sect.* 6. Fourthly, If the offence were committed partly in one county and partly in another, but not ſo as to amount to a compleat offence within the ſtatute in either, That the party cannot be indicted for a felony, becauſe the counties cannot join in an indictment, and that which is done in one cannot be found in another, but that he may be indicted for a miſpriſion in either county.

2 R. 3. 10, 11. S. P. C. 36. 3 Inſt. 73.

*Sect.* 7. Fifthly, That the act, by making thoſe who are acceſſary before the fact principal felons, does not mean any way to favour thoſe who are acceſſary after, but to leave them to the general conſtruction of the law.

3 Inſt. 72. Con. S. P. C. 44.

*Sect.* 8. Sixthly, That by the laſt clauſe of the act, the juſtices of either bench have a concurrent authority, and that they which ſhall firſt enquire ſhall proceed; and that if the offence were committed in the county where the benches ſit, they need no other commiſſion; but if it were done in another county, that they muſt have a ſpecial commiſſion: And if in London, that they ſhall have a commiſſion in which the mayor ſhall be omitted, for the charters of the city, which require that he ſhall be a principal in every commiſſion, extend not to ſuch cauſes which are ſpecially limited to particular judges.

3 Inſt. 73.
3 Inſt. 72. 2 R. 3. 11.

*Sect.* 9. By 21 *Jac.* 1. c. 26. "It is made felony without the benefit of clergy, but not ſo as to corrupt the blood, to acknowledge or procure to be acknowledged, any fine, recovery, deed inrolled, ſtatute, recognizance, bail, or judgment in the name of any other perſon or perſons not privy or conſenting to the ſame.

*Sect.* 10. In the conſtruction hereof it has been holden, That if a man perſonate another in the county of *A.* in putting in bail before a judge, and the bail be filed in the county of

2 Jon. 64.

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of *B.* the trial ſhall be in the county of *A.* Alſo it ſeems the bare perſonating of bail before a judge is no felony, unleſs the bail be filed; † and if it be not filed the (*a*) acknowledging thereof in another name makes not felony, but a miſdemeanor only. (1)

Contra in the report of the ſame caſe. 1 Ven. 301, 302.

(*a*) 1 Hale 696.

(1) Two people put in bail in feigned names in the Common Pleas, and becauſe there were no ſuch *perſons*, they could not be proſecuted for perſonating bail on this ſtatute; but the court ordered them and the attorney to be ſet in the pillory, which was done accordingly. Strange 384.

*Sect.* 11. Alſo it is enacted by 4 & 5 Will. & Mar. c. 4. "That any perſon or perſons who ſhall before any commiſ- "ſioner authorized to take bail, by virtue of the ſaid ſtatute, "in actions depending in the courts of King's Bench, Com- "mon Pleas, or Exchequer, repreſent, or perſonate any "other perſon or perſons, whereby the perſon or perſons ſo "repreſented and perſonated, may be liable to the payment "of any ſum or ſums of money, or debt, or damages to be "recovered in the ſame ſuit or action, wherein ſuch perſon "or perſons are repreſented and perſonated, as if they had "really acknowledged and entered into the ſame, being law- "fully convicted thereof, ſhall be adjudged felons."

4 Blac. Com. 128.

## CHAPTER THE FORTY-SIXTH.

## Of OFFENCES relating to CATTLE.

BY 22 & 23 Car. 2. c. 7. it is made felony, "Malici- "ouſly, unlawfully, and willingly, to kill or deſtroy any "horſes, ſheep, or other cattle of any perſon or perſons what- "ſoever in the night-time, but liberty is given to the offender "to avoid judgment of death, by chuſing judgment of tranſ- "portation for ſeven years; and any three juſtices of peace "for the county, diviſion, city, town corporate, or place, "whereof one to be of the quorum, are authoriſed to enquire "as well by the oaths of twelve lawful men of the ſame "county, as by examination of witneſſes upon oath, or by "any lawful ways or means, which to them ſhall ſeem meet, "of the ſaid offences, and in order thereunto to iſſue out war- "rants, as well for the ſummoning of jurors, as for the ap- "prehending of all perſons, who ſhall or may be ſuſpected "thereof, and to take their examination touching the ſame, "as alſo to cauſe all ſuch other perſons as to them ſhall ſeem "likely to make diſcovery thereof, to appear before them, "and to give information upon oath concerning their know- "ledge of the premiſſes, ſo as no perſon ſo to be examined "ſhall in any wiſe be proceeded againſt for any offence con- "cerning which *he ſhall be ſo examined* as a witneſs, and

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"shall upon such his examination make a true discovery of: "And if any person who shall be thought likely to make "such discovery, being summoned by the said justices, re- "fuse to appear, or to be examined as a witness, he may "be committed by the said justices to the county gaol, till "he shall submit to be examined. Provided, That no per- "son shall be questioned for any offence against the statute, "unless he be proceeded against within six months after the "offence committed."

† *Sect.* 2. And it is enacted by the Black Act, 9 Geo. 1. c. 22. That if any person or persons shall unlawfully and maliciously kill, maim, or wound any cattle; (1) or shall forcibly rescue any person in lawful custody for the same; or shall by gift, or promise of money, or other reward, procure any of the king's subjects to join him or them in such unlawful act; every person so offending shall suffer death, without the benefit of clergy. And by 27 Eliz. c. 13. the hundred are liable to the amount of 200 *l.*

For the surrender clause to which offenders against this act are liable, vide post. c. 49. s. 3. and it is at the option of the prosecutor in what court he will prosecute upon this act.

Black. 733.

(1) On an indictment upon this statute, for killing *a mare* and *a stone colt*, it was objected in arrest of judgment. First, That the word cattle did not necessarily include *horses, mares, and colts*. And Secondly, That the mare and colt were not averred to be cattle within the statute. The judges unanimously agreed, that, as the 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, the 9 Geo. 1. c. 22. was to be considered as an extension of that act, and the offender had judgment of death. 2 Black. 722. 1 Burn. 228.

† *Sect.* 3. And it is further enacted by 14 Geo. 2. c. 6. explained by 15 Geo. 2. c. 34. That whoever shall feloniously drive away, or in any other manner feloniously steal, one or more, sheep, bull, cow, (2) ox, steer, bullock, heifer, calf, or lamb, but no other cattle whatsoever; or shall wilfully kill the same with a felonious intent to steal the whole carcase, or any part thereof; or shall assist or aid to commit the said offence, shall suffer death without benefit of clergy.—And by par. 2. a reward of 10 *l.* shall be paid by the sheriff for taking and convicting the offenders.

O. B. 1785, No. 32.
Ibid. No. 376.

(2) At Warwick summer assizes, 1774, Cooke was indicted upon this statute for stealing a cow, on the evidence it appeared to be a beast of the ox kind, called *a heifer*; never having had a calf. All the judges (absente De Grey, C. J.) were of opinion, that the word heifer is mentioned in the act in contradistinction to a cow; and, therefore, that the evidence did not support the indictment. M.S.

† *Sect.* 4. And by the 37 Hen. 8. c. 6. whoever shall maliciously, unlawfully, and willingly cut out, or cause to be cut out the tongue or tongues of any tame beast or beasts of any other person or persons, the said beast then being in life, shall forfeit treble damages to the party grieved, by action of trespass, and ten pounds to the king, in the name of a fine. (3)

(3) By 9 Geo. 3. c. 39. s. 10. The crown is impowered to prevent the importation of cattle, in order to avoid the danger of introducing a contagious distemper. And by 21 Geo. 3. c. 67. Regulations and penalties are imposed to prevent the mischiefs which may arise from the improper driving of cattle through the streets within the bills of mortality. And for further particulars vide 18 Car. 2. c. 2. 20 Car. 2. c. 7. 32 Car. 2. c. 2. 3 Geo. 3. c. 10.

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*Sect.* 5. But the practice of ſtealing horſes, cows, &c. greatly increaſing, owing to the facility with which they are diſpoſed of to perſons who keep places for ſlaughtering: it is enacted by the 26 *Geo.* 3. *c.* 71. "that no perſon ſhall "uſe any place, for ſlaughtering any horſe, mare, gelding, "colt, filly, aſs, mule, bull, ox, cow, heifer, calf, ſheep, hog, "goat, or other cattle, not be killed for butchers meat, with- "out firſt taking out a licence, at the general quarter ſeſſions; "which ſhall only be granted upon a certificate, under the "hands and ſeals of the miniſter and churchwardens, or over- "ſeers, or the miniſter and two ſubſtantial houſeholders of the "pariſh, that the perſon to be licenced is fit to be truſted "with ſuch buſineſs: which licence in caſe of death, ſhall be "effectual to the widow, or perſonal repreſentative of ſuch per- "ſon until the then next enſuing general quarter ſeſſions."

Preamble.

Perſons keeping a ſlaughter houſe, to take out a licence, &c.

*Sect.* 6. "And every ſuch licence ſhall be ſigned by the juſtices "in ſeſſions, and a copy entered in a book by the clerk of the "peace, for every perſon to ſearch.—And perſons ſo licenſed "ſhall affix over the door where they carry on the buſineſs, "THEIR NAMES, with the words LICENCED FOR SLAUGH- "TERING HORSES, PURSUANT TO AN ACT PASSED IN THE "TWENTY-SIXTH YEAR OF HIS MAJESTY KING GEORGE "THE THIRD."

Perſons licenced to affix to their houſes the words herein mentioned.

*Sect.* 7. "And every occupier of ſuch licenſed ſlaughtering "houſe ſhall, ſix hours previous to the killing any cattle, not "killed for butchers meat, and previous to the fleaing any "cattle, brought there dead, give notice, in writing, to the in- "ſpector, that he may, take the heighth, age, colour, and par- "ticular marks of every horſe, mare, gelding, foal or filly, aſs "or mule, and the colour and particular marks of every cow, "bull, heifer, ox, calf, ſheep, hog, goat, or other cattle, brought "alive or dead for the purpoſes aforeſaid.—And no cattle ſhall "be ſlaughtered, &c. but between eight in the morning and "four in the evening, from *October* to *March*; and between "ſix in the morning and eight in the evening, from *April* to "*September*."

Previous notice to be ſent when horſes, &c. are intended to be ſlaughtered, to the inſpector, who is to take an account of the beaſts.

Times of ſlaughtering, &c.

*Sect.* 8. And further, "that every perſon ſo licenſed, ſhall "enter the name, place of abode and profeſſion of the owner "and of the perſon who ſhall bring the ſame, and the reaſon "why the ſame is brought, for the examination of the in- "ſpector.—And ſuch licenſed perſon ſhall attend with ſuch "entry, before any one juſtice for the county, or place when "required, and ſhall likewiſe produce the ſame at every quarter "ſeſſions."

Accounts to be kept, by the owners of ſlaughtering houſes, of the owners of the cattle brought, &c.

*Sect.* 9. And "that pariſhioners, intitled to chuſe pariſh "officers, ſhall, annually, or oftener, appoint one or more per- "ſons to inſpect every ſuch ſlaughtering houſe, and take ſuch "account there as before directed; and make an entry thereof

Veſtry to appoint inſpectors

"for

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Inſpectors duty.

" for publick inſpection. And the inſpector ſhall affix over his " door, HIS NAME, and INSPECTOR OF HOUSES AND PLACES " FOR SLAUGHTERING HORSES.—In caſe ſuch inſpector have " reaſon to believe, that ſuch cattle, is in a ſerviceable ſtate, or " be ſtolen, or unlawfully come by, he ſhall prohibit the ſlaugh- " tering for eight days; and cauſe an advertiſement to be inſert- " ed in ſome publick newſpaper circulated in the country, twice " or oftener, unleſs the owner ſhall ſooner claim the ſame, or " otherwiſe ſatisfactorily inform the inſpectors, that they ſent the " cattle, to be ſlaughtered.—The expence to be paid by the oc- " cupier of the ſlaughtering houſe, and on refuſal, and conviction, " on the oath of the inſpector, before one juſtice, he ſhall forfeit " double."

Inſpectors may viſit ſlaughtering houſes at all times.

*Sect.* 10. And, par. 6. "Every inſpector in the day; and in " the night, in the preſence of a conſtable, may inſpect any " ſlaughtering houſe."

Perſons bringing cattle refuſing to give an account of themſelves, &c. may be carried before a juſtice.

*Sect.* 11. And par. 7. "If any perſon ſhall offer to ſale, or " bring any cattle to any ſuch ſlaughtering houſe, and ſhall not " be able, or refuſe to give a ſatisfactory account how the ſame " came into their poſſeſſion; or if there ſhall be reaſon to ſuſ- " pect that ſuch cattle are unlawfully obtained, he may be con- " veyed before a juſtice; and if ſuch juſtice ſhall ſuſpect that " ſuch cattle are unlawfully obtained, he ſhall commit ſuch per- " ſon, not exceeding ſix days, to be further examined; and if " upon either examinations, ſuch juſtices ſhall be ſatisfied, that " ſuch cattle are illegally obtained, the juſtice ſhall commit the " offender to the common gaol or houſe of correction, to be " dealt with according to law."

Perſons ſlaughtering horſes, &c. without licence, &c. guilty of felony.

*Sect.* 12. "And if any perſon keeping ſuch houſe, ſhall " ſlaughter any cattle, other than for butchers meat, or ſhall " flea any cattle, brought dead, without ſuch licence, or giving " notice as aforeſaid, or ſhall kill, or flay the ſame, other than " within the hours limited, or ſhall not delay ſlaughtering, ac- " cording to the direction of ſuch inſpector, each perſon ſo " offending ſhall be guilty of A FELONY, and puniſhed by fine " and impriſonment, and ſuch corporal puniſhment, publick or " private whipping, or ſhall be tranſported not exceeding ſeven " years, as the court ſhall direct."

Perſons deſtroying hides, &c. to be deemed guilty of miſdemeanors.

*Sect.* 13. "If any perſon keeping ſuch houſe ſhall, immerſe, " in lime, or any preparation thereof, or rub therewith, or with " any other corroſive matter, or deſtroy or burn the hide or " ſkins of any cattle by him ſlaughtered, killed, or flayed, or ſhall " be guilty of any offence againſt this act, for which no puniſh- " ment is expreſsly provided, ſuch perſon ſhall be guilty of A " MISDEMEANOR."

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# TER THE FORTY-SEVENTH.

## )FFENCES BY PURVEYORS.

IENTLY the king's court was ſupplied with 2 Inſt. 453.
eſſaries from the ancient demeſnes of the crown,
e manured for that purpoſe, and in reſpect thereof
s of thoſe lands had many privileges, which they
; but this method being found to be troubleſome and
ent, was by degrees diſuſed, and afterwards the
to appoint certain officers to buy in proviſions for
ld, who were called purveyors, and claimed many
by the prerogative of the crown, and ſeem to have Noy 101.
e-emption of all ſuch victuals as were brought by
ſell again.

. By *magna charta*, chapter 21. "The king ſhall 28 E. 1. c. 2.
e the timber of any perſon againſt his will, and by 36 E. 3. c. 2, 3, 4, 5, 6
ubſequent ſtatutes, ſeveral offences of purveyors 5 E. 3. c. 2.
ade felonies, as if they took things above the value 2 Inſt. 82.
ve pence againſt the will of the owner, without war- Dalt. c. 107. Crom. 42.
r without ſuch appraiſement as was directed by thoſe 1 Bulſt. 96, 97.
, or without paying for them, *&c.*

But theſe laws having been found by experience
e ſufficiently provided againſt the oppreſſions of *perſons* Moor 762.
*r making proviſions for the king's houſhold, carriages, and* 770, 778.
*eyance for his majeſty*, and ſeveral counties having Noy 101.
nſelves obliged to ſubmit to ſundry rates and taxes,
oſitions to redeem themſelves from ſuch vexations
ſſions, as it is recited by 12 Car. 2. c. 24. ſ. 12. it
ed by the ſaid ſtatute, "That from thenceforth no ſum 1 Hale 644.
f money, or other thing ſhall be taken, raiſed, taxed,
impoſed, paid, or levied, for or in regard of any
n, carriages, or purveyance for his majeſty, his
r ſucceſſors."

. And it is farther enacted by the ſaid ſtatute, par-
hat no perſon or perſons by any warrant, commiſſion, 1 Comm. 287.
ority under the great ſeal, or otherwiſe by colour of 4 Comm. 116.
or making proviſion or purveyance for his majeſty,
queen of England for the time being, or of any the
n of any king or queen of England for the time be-
that ſhall be, or for his, their, or any of their houſ-
all take any timber, fuel, cattle, corn, grain, malt,
raw, victual, cart, carriage, or other thing what-
of any the ſubjects *of his majeſty*, his heirs or ſuc-
*without the free and full conſent* of the owner or

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" owners thereof, had and obtained without menace, or en-
" forcement; nor ſhall ſummon, warn, take, uſe, or require
" any the ſaid ſubjects to furniſh or find any horſes, oxen, or
" cattle, carts, ploughs, wains, or other carriages, for the uſe of
" his majeſty, his heirs or ſucceſſors, or of any queen of Eng-
" land, or of any child, or children of any of the kings or
" queens of England for the time being, for the carrying the
" goods of his majeſty, his heirs or ſucceſſors, or the ſaid
" queens, or children, or any of them, without ſuch full and
" free conſent as aforeſaid; any law, ſtatute, cuſtom, or uſage
" to the contrary notwithſtanding."

4 Comm. 417, 432.

*Sect.* 5. And it is farther enacted, par. 14. " That no
" pre-emption ſhall be allowed or claimed in the behalf of
" his majeſty, or of any of his heirs or ſucceſſors, or of any of
" the queens of England, or of any of the children of the
" royal family, for the time being, in market or out of mar-
" ket, but that it be free to all and every the ſubjects of his
" majeſty, to ſell, diſpoſe, or employ his ſaid goods to any
" other perſon or perſons, as him liſteth; any pretence of
" making proviſion or purveyance of victual, carriages or
" other thing for his majeſty, his heirs, or ſucceſſors, or of
" the ſaid queens, or children, or any pretence of pre-emp-
" tion in their, or any of their behalfs notwithſtanding. And
" if any perſon or perſons ſhall make proviſion or purveyance
" for his majeſty, his heirs or ſucceſſors, or any the queens,
" or children aforeſaid, or impreſs, or take any ſuch carriages,
" or other things aforeſaid, on any pretence or colour of any
" warrant aforeſaid, under the great ſeal, or otherwiſe, con-
" trary to the intent hereof, it ſhall be lawful for the juſtices
" of peace, or ſuch two or one of them as dwell near, and
" to the conſtables of ſuch pariſh or village where ſuch occa-
" ſion ſhall happen, at the the requeſt of the party grieved,
" to commit, or cauſe to be committed, the party or parties
" ſo doing and offending, to gaol, till the next ſeſſions, there
" to be indicted and proceeded againſt for the ſame, *&c.*"

3 Comm. 287. 4 Comm. 116, 417, 432. Both theſe acts are expired, vide 11 & 12 Will. 3. c. 13.

*Sect.* 6. But this abſolute and univerſal reſtraint of all kinds of purveyance having been found by experience inconvenient, it was enacted by 13 & 14 Car. 2. c. 20. which has been often continued by ſubſequent ſtatutes, that the officers of the navy may preſs carriages for the uſe of his majeſty's navy and ordnance, according to the regulations preſcribed by that ſtatute, and the like was enacted by 1 Jac. 2. c. 10. in relation to the king's royal progreſſes, *&c.*

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## CHAPTER THE FORTY-EIGHTH.

### OF OFFENCES BY SOLDIERS AND MARINERS.

OFFENCES by ſoldiers or mariners, made felony by ſtatute, are of three kinds.—Firſt, Wandering without a teſtimonial.—Secondly, Departing from the king's ſervice without licence.—Thirdly, Deſtroying a ſhip.

*Sect.* 1. The firſt of theſe offences depends upon 39 Eliz. c. 17. by which it is enacted, "That all idle and wandering "ſoldiers or marines, or idle perſons which ſhall be wan- "dering as ſoldiers or marines, ſhall ſettle themſelves in ſome "ſervice, labour, or other lawful courſe of life, without wan- "dering, or otherwiſe repair to the places where they were "born, or to their dwelling places, if they have any, and "there remain, betaking themſelves to ſome lawful trade or "courſe of life, as aforeſaid; upon pain, That all perſons "offending contrary to this act, ſhall ſuffer as in caſe of fe- "lony, without clergy."

This ſanguinary law, ſays Sir Will. Blackſtone though in practice deſervedly antiquated ſtill remains a diſgrace to our Statute Book.

*Sect.* 2. And it is farther enacted, "That every idle and "wandering ſoldier or mariner, which, coming from his cap- "tain from the ſeas, or from beyond the ſeas, ſhall not have a "teſtimonial under the hand of ſome one juſtice of the peace, "of, or near, the place where he landed, ſetting down there- "in the place and time, where and when he landed, and the "place of his dwelling or birth, unto which he is to paſs as "aforeſaid, and a convenient time therein limited for his "paſſage, or having ſuch teſtimonial, ſhall wilfully exceed "the time therein limited, above fourteen days: And alſo, as "well every ſuch idle and wandering ſoldier or mariner, as "every other idle perſon wandering, as ſoldier or mariner, "which ſhall at any time hereafter forge or counterfeit any "ſuch teſtimonial, or have with him or them any ſuch teſti- "monial forged, or counterfeited as aforeſaid, knowing "the ſame to be counterfeited or forged, in all theſe caſes, "every ſuch act or acts to be felony, and the offenders to "ſuffer, as aforeſaid, without any benefit of clergy."

*Sect.* 3. And it is farther enacted, "That it ſhall be "lawful for the juſtices of aſſizes, juſtices of gaol-deli- "very, and the juſtices of peace of every county, and all "juſtices of peace in towns corporate, having authority to "hear and determine felonies, to hear and determine all ſuch "offences *in their general ſeſſions*, and to execute the offen- "*ders, which ſhall be convicted* before them, as in caſes of

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" felony is accuſtomed, except ſome honeſt free holder, &c. " will take ſuch offender into his ſervice for one whole " year, and alſo be bound by recognizance of ten pounds, to " keep the ſaid perſon for one whole year, and bring him to " the next ſeſſions for the peace and gaol delivery next en- " ſuing after the ſaid year; and if any ſuch perſon ſo retained, " depart within the year, without the licence of him that ſo " retained him, then, to be indicted, tried, and judged as a " felon, and not to have the benefit of the clergy."

*Sect.* 4. But it is provided by the ſaid ſtatute, " That if " any ſuch idle and wandering perſon, as aforeſaid, ſhall hap- " pen to fall ſick by the way, ſo that by reaſon of his weak- " neſs he cannot travel to his journey's end within the time " limited within his teſtimonial, no ſuch perſon to be within " the danger of this ſtatute, ſo as he ſettle himſelf in ſome " lawful courſe of life, as aforeſaid, or repair as aforeſaid to " the place where he was born, or was laſt abiding, within " convenient time after the recovery of his ſickneſs, and " there remain as aforeſaid."

*Sect.* 5. And it is farther provided by the ſaid ſtatute, " That if ſuch ſoldier or mariner repairing to his place " of birth, &c. cannot get work, he ſhall be ſet to work by " two juſtices of peace."

*Sect.* 6. And it is farther provided, " That if ſuch ſol- 2 Inſt. 729. 4 Burn. 356. 4 Comm. 165. " dier or mariner reſort to ſome juſtice of the peace next " adjoining to his place of landing, or to ſuch his direct way " home, and make known unto the ſaid juſtice his poverty; " that the ſaid juſtice, upon perfect notice thereof had, may licenſe " the ſame ſoldier or mariner to paſs the next and direct way " to the place where he is to repair, and to limit him ſo " much time only, as ſhall be neceſſary for his travel thi- " ther; and that in ſuch caſe his licence being ſo made, " and he purſuing the form of ſuch his licence, ſhall and may, " for his neceſſary relief in his travel, aſk and take the relief " that any perſon ſhall willingly give him."

Vide 4 Burn, 755. † It is alſo enacted by 17 Geo. 2. c. 5. with an exception of the proviſions of 39 Eliz. c. 17. " That all perſons wandering " abroad and begging, pretending to be ſoldiers, mariners, ſea- " faringmen, ſhall be deemed rogues and vagabonds, and pu- " niſhed as the act directs, with whipping, impriſonment, &c."

*Sect.* 7. The ſecond offence of this kind, *viz.* That of departing from the king's ſervice without licence, depends upon ſeveral ſtatutes. For it was enacted by 18 Hen. 6. c. 19. " That ſoldiers retained in the manner preſcribed 1 Inſt. 86. 6 Co. 27. Co. Lit. 71. Dalt. c. 107. 1 Car. 71. 111. 134. " by that act, departing from their captains without licence, " ſhall be guilty of felony;" but this ſtatute is now of little uſe, becauſe the method of retaining ſoldiers therein referred to, is diſuſed.

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8. However by 7 Hen. 7. c. 1. and 3 Hen. 8. c. 5. orce, "If any ſoldier being no captain, immediately ied with the king, who ſhall be in wages and retained, ke any preſt to ſerve the king upon the ſea, or the land beyond the ſea, depart out of the king's e, without licence of his captain, he ſhall ſuffer as n, without the benefit of the clergy. And all juſ- of peace in every ſhire in England, where any offenders be taken, have power to enquire of the offences, and the ſame to hear and determine, as they do of felony, treſpaſſes, and of other offences expreſſed king's commiſſion to them made, as though the ſaid ces were done in the ſame ſhire."

3 Inſt. 86. Dalt. c. 107. 2 And. 151. 3 Mod. 124. See alſo the other books above cited, and 1 Hale, 672, to 680.

9. And by 2 Edw. 6. c. 2. "If any ſoldier ſerving king in his wars, in any his dominions, or on the or beyond the ſeas, or in Scotland, depart with- icence of the lieutenant, or admiral, or captain, &c. booty, or otherwiſe, being in the enemy's coun- or elſewhere in the king's ſervice, or out of any on where he ſhall be appointed to ſerve, he ſhall judged a felon, and excluded from his clergy; and uſtices of every ſhire where ſuch offender ſhall be , may enquire of and determine the offence, &c."

3 Inſt. 86. 6 Co. 67. Vide 27 Geo. 2. c. 9. 21 Geo. 3. c. 65. ſ. 32. reſpecting the puniſhment of ſoldiers in the ſervice of the Eaſt-India Company. And it is decided that a military *officer* in the ſervice of the Company has not a right to reſign his commiſſion at all times, and under any cir- whatſoever, whenever he pleaſes. 4 Burrow. 2421. By 29 Geo. 2. c. 17. ſubjects vice of the French king, as officers or ſoldiers, are guilty of felony without clergy. the annual acts for the puniſhment of mutiny and deſertion.

10. The third offence of this kind, *viz.* That of de- a ſhip, depends upon 22 & 23 Car. 2. c. 11. and ſt. 2. c. 9. by which it is enacted, "That if any in, maſter, mariner or other officer belonging to ſhip, ſhall wilfully caſt away, burn, or otherwiſe y the ſhip to which he belongeth, or procure the ſame done, to the prejudice of the owner or owners f, or of any merchant or merchants that ſhall load thereon, he ſhall ſuffer as a felon, without the be- of clergy, and if the offence were committed in the al's juriſdiction, ſhall be tried in the manner pre- d by 28 Hen. 8. c. 15."

11. Alſo it is further enacted by 4 Geo. c. 12. if any owner of, or captain, maſter, mariner, or other belonging to any ſhip ſhall wilfully caſt away, burn, erwiſe deſtroy the ſhip of which he is owner, or unto he belongeth, or in any manner of wiſe procure the be done, to the *prejudice of any perſon that ſhall* *make any policy of inſurance thereon*, or of any ſhall load goods thereon, he ſhall ſuffer

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† *Sect.* 12. But by 11 Geo. 1. c. 29. ſ. 6. this clauſe is explained and the offenders are ouſted of clergy. And it is further enacted, "That if any of the ſaid offences be committed within the body of a county, the ſame ſhall be tried in "the ſame manner as other felonies ſo committed. And if committed upon the high ſeas, the ſame ſhall be tried, &c. "according to the directions of 28 Hen. 8. c. 15."

For the offences by maſters and mariners amounting to piracy, vide 11 and 12. Will. 3. c. 7. Ante ch. 37. For the puniſhment of ſoldiers and ſeamen convicted of profane curſing and ſwearing, vide 19 Geo. 2. c. 21. 23 Geo. 2. c. 33. Ante ch. 6. ſ. 4. For inferior offences reſpecting wages and deſertion, 2 Geo. 2. c. 36. 23 Geo. 2. c. 26. For the regulation of ſeamens wages under certain penalties, 31 Geo. 2. c. 10. And for the liſting of ſoldiers, &c. 4 Burn 212.

## CHAPTER THE FORTY-NINTH.

## Of OFFENCES BY HUNTERS.

3 Edw. 1. c. 20.
21 Edw. 1. c. 362.
3 Inſt. 76, 77.
Dalt. c. 29.
1 Hale 656 to 659.
2 Roll. 120, 133.
Co. Lit. 370.
2 Burn 263.

IT is recited by 1 Hen. 7. c. 7. "That many great outrages, murders, inſurrections and rebellions had often been occaſioned by perſons in great numbers with painted faces, viſors, and otherwiſe diſguiſed, and riotouſly, and in manner of war arrayed, hunting as well by night as by day;" and thereupon it is enacted, "That as often "as information ſhall be made of any ſuch unlawful huntings by night, or with painted faces, to any of the king's "council, or to any juſtice of peace of the county, of "any perſon ſuſpected thereof, any of the ſame council, "or juſtices, to whom ſuch information ſhall be made, "may make a warrant to arreſt ſuch perſon, and may alſo "examine him of the ſaid hunting, and of the ſaid doers in "that behalf; and if the ſame perſon wilfully conceal the ſaid "huntings, or any perſon with him defective therein, that "then the ſame concealment be felony; and if he then confeſs the truth, and all that he ſhall be examined of, and "knoweth in that behalf, that then the ſaid offences of "huntings be againſt the king but treſpaſs fineable, by reaſon of the ſame confeſſion, at the next general ſeſſions of "the peace to be holden in the ſame county, by the king's "juſtices of the ſame ſeſſions, there to be ſeſſed. And if "reſcous or diſobedience be made to any perſon, having authority to do execution or juſtice by any ſuch warrant, by any "perſon, the which ſo ſhould be arreſted, ſo that the execution of the ſame warrant thereby be not had, that then "the ſame reſcous and diſobedience, be felony; and if any "perſon or perſons ſhall be convict of any ſuch huntings, with "painted faces, viſors, or otherwiſe diſguiſed, to the intent

"they

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" they ſhould not be known, or of unlawful hunting in time of " night, that then the ſame perſon or perſons ſo convict, to have " like punition, as he or they ſhould have, if he or they were " convict of felony."

† *Sect.* 2. It is alſo further enacted by 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 22. " That if any perſon or " perſons being armed with ſwords, fire arms, or other of- " fenſive weapons, and having his or their faces blacked, " or being otherwiſe diſguiſed, ſhall appear in any foreſt, " chaſe, park, paddock, or grounds incloſed with any wall, " pale, or other fence, wherein any deer have been, or ſhall " be uſually kept;—or in any high road, open heath, com- " mon, or down,—or ſhall unlawfully and wilfully hunt, " wound, kill, deſtroy, or ſteal any red or fallow deer—or " unlawfully rob any warren *(a)* or place where conies or hares " are uſually kept:—Or ſhall unlawfully ſteal or take away " any fiſh out of any pond or river.—Or if any perſon or per- " ſons *(whether armed and diſguiſed or not)* ſhall unlawfully and " wilfully hunt, wound, kill, deſtroy, or ſteal any red or fal- " low deer, fed or kept in any places in any of the king's for- " eſts or chaſes, which are or ſhall be incloſed with pales, " rails, or other fences, or in any park, paddock, or grounds " incloſed, where any deer have been or ſhall be uſually kept; " (†) (1) (2) (3) (4) (5);—or ſhall forcibly reſcue any " perſon being lawfully in cuſtody of any officer or other per- " ſon for any the offences before mentioned;—or, if any per- " ſon or perſons ſhall by gift or promiſe of money, or other " reward, procure any of his majeſty's ſubjects to join him " or them in any ſuch unlawful act; every perſon ſo offend- " ing, being thereof lawfully convicted (in any county in " England) ſhall ſuffer death without benefit of clergy—but " not to work corruption of blood, nor forfeiture of land or " goods."

N.B. The ſeveral facts mentioned in this act are not to be taken as being parts of the ſame offence; but are every of them ſeveral offences. Lord Hardwicke, B.R. H. 219.

*(a)* C. Eliz. 548. C. Jac. 195. 2 Bac. Ab. 614

(†) For offences relating to the deſtruction of fiſh, vide ch. 58, Appendix 3.
(1) For offences relating to cattle, vide ch. 46.
(2) For deſtroying of trees, vide ch. 53, app. 1.
(3) For offences by burners of houſes, &c vide ch. 58, app. 4.

(4) For ſhooting at another, vide ch. 58, app. 5. (5) For ſending threatning letters, vide ch. 58, app. 5.

† *Sect.* 3. And, " For the more eaſy and ſpeedy bring- " ing the offenders to juſtice," it is alſo enacted by the ſaid ſtatute, " That if any perſon or perſons ſhall be charged " with being guilty of any of the offences aforeſaid, before " any two or more of his majeſty's juſtices of the peace of " the county where the offence ſhall be committed, by infor- " mation of one or more credible perſons, on oath by them " to be ſubſcribed; the ſaid juſtices ſhall forthwith certify un- " der their hands and ſeals, and return ſuch information to " one of the principal ſecretaries of ſtate; who ſhall lay the " ſame, as ſoon as *conveniently may be*, before the king in " *his privy council; whereupon it ſhall* and may be lawful " for

The ſurrender clauſe. For conſtructions upon a ſimilar clauſe in the Smuggling act, vide the caſe of John Harvey, Foſter 52. And poſt. ch. 58. Appendix 7. ſect. 2.

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" for his majeſty, his heirs or ſucceſſors, to make his order in " ſaid privy council, thereby requiring and commanding ſuch " offender to ſurrender himſelf within the ſpace of forty days " to any of the juſtices of the King's Bench, or to any one " juſtice of the peace, to the end that he may be forthcoming " to anſwer the offence wherewith he ſhall ſo ſtand charged, " according to the due courſe of law; which order ſhall be " printed and publiſhed in the next London gazette, and ſhall " be forthwith tranſmitted to the ſheriff of the county where " the offence ſhall be committed, and ſhall within ſix days " after the receipt thereof, be proclaimed by him or his offi- " cers, between the hours of ten in the morning and two in " the afternoon, in the market places, upon the reſpective " market days, of two market towns in the ſame county, *near* " the place where ſuch offence ſhall have been committed; " and a true copy of ſuch order ſhall be affixed upon ſome " public market place in ſuch market towns; and in caſe ſuch " offender ſhall not ſurrender himſelf purſuant to ſuch order " of his majeſty, his heirs or ſucceſſors, to be made in coun- " cil as aforeſaid, he ſhall, from the day appointed for his " ſurrender as aforeſaid, be adjudged, deemed and taken to " be convicted and attainted of felony, and ſhall ſuffer pains " of death, as in caſe of a perſon convicted and attainted by " verdict and judgment of felony, without benefit of clergy; " and the court of King's Bench, or judges of oyer and ter- " miner, *&c.* for the county where the offence is ſworn in " ſuch information to have been committed, upon pro- " ducing to them ſuch order in council, under the ſeal of the " ſaid council, to award execution againſt ſuch offender in " ſuch manner as if he had been convicted and attainted in " the ſaid court of King's Bench, or before ſuch juſtices of " oyer and terminer, or general gaol delivery reſpectively."

† *Sect.* 4. And it is further enacted, par. 5. " That who- " ever ſhall, after the time appointed, as aforeſaid, for the " ſurrender of any perſon ſo charged upon oath, with any " the offences aforeſaid, be expired, conceal, abet, or ſuc- " cour ſuch perſon, knowing him to have been ſo charged, as " aforeſaid, and to have been required to ſurrender himſelf by " ſuch order, being lawfully convicted thereof, ſhall ſuffer " death without benefit of clergy."

For the inſtances in which the hundred ſhall be liable to the amount of 200l. and for the previous proceedings which are neceſſary to intitle the party to recover, vide 7, 8, 9, and 10 ſections of the act, and *Douglas* 704.

† *Sect.* 5. But this ſhall not hinder any judge, juſtice of the peace, magiſtrate, officer, or miniſter of juſtice, from apprehending or ſecuring ſuch offender, by the ordinary courſe of law: and if he be taken and ſecured before the time of ſurrender, he ſhall have his trial by due courſe of law.

For the rewards for apprehending an offender, vide Bk. 2. c. 13. ſ. 28.

Sect.

† *Sect.* 6. It is enacted by 5 Geo. 1. c. 28. "That whoever shall enter into any park, paddock, or other inclosed ground where deer are usually kept, and wilfully wound or kill any red or fallow deer therein, without licence from the owner or keeper, or shall aid or assist in the committing of any such offence, shall be transported for seven years.

† *Sect.* 7. But by 16 Geo. 3. c. 30. (which repeals, by name, all former statutes, except the statute above mentioned, as far as they relate to deer) it is further enacted, "That whoever shall course or hunt, or shall take in any slip, noose, toil, or snare, or shall kill wound or destroy, or shall shoot at, or otherwise attempt to kill, wound, or destroy,—or shall carry away any red or fallow deer, in any forest, chase, purlieu, or ancient walk, whether inclosed or not, or in any inclosed park, paddock, wood, or other inclosed ground where deer are, have been or shall be usually kept, without the consent of the owner, or without being otherwise duly authorised; or shall be aiding, abetting, or assisting therein or thereunto; every person so offending, by coursing, hunting, shooting at, or otherwise attempting to kill, wound, or destroy; or by aiding therein or thereunto, shall forfeit for every such offence twenty pounds.—And every person so offending by killing, wounding, or destroying, or by taking in any slip, noose, toil, or snare, or by carrying away, or by aiding therein respectively, shall for every deer so wounded, killed, destroyed, taken, or carried away forfeit thirty pounds.—And if the offender in any of the cases aforesaid, shall be a keeper of, or person in any manner intrusted with the custody or care of deer in the forest, chase, purlieu, ancient walk, or inclosed park, paddock, or wood, or other inclosed place where the offence shall be committed, every such offender shall forfeit double the penalty herein inflicted on other offenders.—And whoever after having been convicted of any of the aforesaid offences, shall offend a second time, such second offence; whether it be the same as the first offence, or be any other of the aforesaid offences, shall be deemed felony, and the person guilty thereof, on conviction by indictment, shall be transported for seven years.—And if any offender who hath been convicted under any former statute now in force for hunting and killing deer, &c. shall again commit any of the offences abovementioned, he shall be adjudged to have committed a second offence, under the provisions and penalties of this act."—And, "For the more easy bringing such offenders to punishment, the justice before whom any person shall be convicted for the first time, shall transmit such conviction under his hand and *seal to the next* quarter sessions, to be filed

Holt 214, 215. Carth. 508, 509. Strange 44, 263, 316. 10 Mod. 248, 341, 378. Farres. 129, 134. Salk. 542. C. Car. 340. Sess. Cas. 346. Gib. Cas. 282.

The milder punishment inflicted by this act has been thought a virtual repeal of the punishment inflicted by the black act above recited. O. B. 1784. 1071.

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" filed among the records, by the clerk of the peace, which, " or a true copy thereof, certified and ſubſcribed by the ſaid " clerk, ſhall be ſufficient evidence of the conviction for the " firſt offence."

† *Sect.* 8. It is alſo enacted, par. 4. " That any one " juſtice, on complaint of ſuſpicion, on oath, ſhall, by war- " rant, cauſe the houſe of the perſon ſuſpected to be ſearched, " and if any red or fallow deer, which ſhall have been un- " lawfully killed, or the head, ſkin, or other part thereof, " or any ſlip, nooſe, toil, ſnare, or other engine for the " unlawful taking of deer, ſhall be found, to cauſe the ſame and " ſuch perſon ſo having poſſeſſion; or in whoſe dwelling- " houſe, out-houſe, garden, or other place the ſame ſhall " be found, to be brought before any juſtice having juriſ- " diction, and if ſuch perſon ſhall not produce before ſuch " juſtice the party of whom he received the ſame, or ſatisfy " ſuch juſtice that he came lawfully by ſuch deer, or the " head, ſkin, or other part thereof, or had a lawful occaſion " for ſuch nooſe, ſlip, toil, ſnare or other engine, and did " not keep the ſame for any unlawful purpoſe, he ſhall for- " feit not exceeding 30*l.* nor leſs than 10*l.* at the diſ- " cretion of ſuch juſtice."

And by par. 5. " If the perſon in whoſe poſſeſſion the ſame " ſhall be found ſhall not under the proviſions aforeſaid, be " liable to conviction, any juſtice having juriſdiction may " ſummon before him every perſon through whoſe hand " ſuch deer, &c. &c. ſhall appear, upon the evidence gi- " ven to have paſſed, and if the perſon from whom ſuch " deer, &c. &c. ſhall appear to have been firſt received, " or who having had poſſeſſion thereof ſhall not give proof " to the ſatisfaction of ſuch juſtice that he came law- " fully by the ſame, ſuch perſon ſhall, on every con- " viction, forfeit not exceeding 30*l.* nor leſs than 10*l.*" And by par. 6. " If on the ſearch, by warrant, no deer, " &c. ſhall be found, and it ſhall appear on the oath of one " witneſs that any perſon hath, or hath had any ſuch deer, " &c. &c. in his poſſeſſion, and ſhall be reaſonably ſuſ- " pected to have come diſhoneſtly or unlawfully thereby, " every ſuch perſon, and all others through whoſe hands the " ſame ſhall appear to have paſſed under the like ſuſpicion, may " be proceeded againſt, as if ſuch deer, &c. &c. had been " found in the poſſeſſion, houſe, out-houſe, garden, or place " of ſuch perſon, on ſearch by warrant as aforeſaid."

*Sect.* 9. And it is further enacted par. 7. " That who- " ever ſhall lay ſnares or other engines for the purpoſe of taking " or killing deer, within or upon any foreſt, &c. or in the " ring, or outer-fence, or bank, dividing the ſame from the " adjoining lands;—or in any incloſed park, &c. ſhall, for " the firſt offence, forfeit not exceeding 10*l.* nor leſs than

By the grant of a foreſt, the game of a foreſt doth paſs. Dyer 269.

" 5*l.*

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" 5*l.* and for every other offence not exceeding 20*l.* nor " leſs than 10*l.*"

*Sect.* 10. And it is further enacted by par. 9. " That if any " perſon carrying any gun or other fire-arms, or any ſword, " ſtaff, or other offenſive weapon, ſhall come into any fo- " reſt, chaſe, purlieu, or ancient walk,—or into any incloſed " park, paddock, wood, or into any other ground where deer " are uſually kept, be the ſame incloſed or not incloſed, with " an intent unlawfully to ſhoot at, courſe, or hunt, or to " take in any ſlip, nooſe, toil, ſnare, or other engine, or " to kill, wound, deſtroy or take away, any red or fallow " deer, it ſhall be lawful for every ranger or keeper, or per- " ſon intruſted with the care of ſuch deer, to ſeize and " take from ſuch perſon, in and upon ſuch foreſt, chaſe, " purlieu, ancient walk, park, paddock, wood, or other ground, " to and for the uſe of the owners thereof, reſpectively, all ſuch " guns, fire-arms, ſlips, nooſes, toils, ſnares, or other " engines; and all dogs there brought for courſing deer, in " the ſame and like manner as game-keepers of manors are " empowered by law within their reſpective manors, to ſeize " and take dogs, nets, or other engines in the cuſtody of per- " ſons not qualified by the laws to keep the ſame. And if any " ſuch perſon ſhall there unlawfully beat, or wound any ran- " ger or keeper, or his or their ſervants, or aſſiſtants, in " the execution of his or their offices, or ſhall attempt to reſcue " any perſon in the lawful cuſtody of any ſuch ranger, keeper, " ſervant, or aſſiſtant, every perſon ſo offending on con- " viction by indictment, ſhall be tranſported for ſeven years."

Tranſportation.

Dogs and engines may be ſeized.

## CHAPTER THE FIFTIETH.

## OF OFFENCES BY DESTROYING FENCES, TURNPIKE-GATES, AND BRIDGES.

### (FENCES.)

† IT is enacted by 13 Edw. 1. ſt. 1. c. 46. " That " where ſometime it chanceth that one having " right to approve, doth then levy a dyke or an hedge, " and ſome by night, or at another ſeaſon, when they ſuppoſe " not to be eſpied, do overthrow the hedge or dyke, and it " cannot be known by verdict of the aſſize or jury who did " overthrow the hedge or dyke, and men of the towns near " will not indict ſuch as be guilty of the fact, the towns near " adjoining ſhall be diſtrained to levy the hedge or dyke at " their own coſt, and to yield damages."—And by 3 & 4 " Edw. 6. c. 6. ſuch perſon as *ſhall bring* an aſſize thereupon, " and

† Vide a critical commentary upon this act, 2 Inſt. 475. See alſo caſes upon it, Skinner 93. C. Car. 231. 440, 570. Dyer 47, 316, 330. 4 Co. 38. 11 Co. 74. 1 Roll. 365.

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" and have judgment to recover, ſhall have his damages " trebled, by the judgment of the court."

† *Sect.* 2. And it is farther enacted by 6 Geo. 1. c. 16. " That whoever ſhall break down, throw down, level, or de- " ſtroy any hedges, gates, poſts, ſtiles, railing, walls, fences, " dykes, ditches, banks, or other incloſures of ſuch woods, " wood-grounds, parks, chaſes, or coppices, plantations, " timber trees, fruit or other trees, thorns or quickſets, ſhall " by 6 Geo. 1. ſ. 2. c. 48. be committed to the houſe of cor- " rection for three months, and where there are no houſes of " correction, to any other priſon of the county or place for " four months, and whipped, and on conviction, by two juſ- " tices in open ſeſſions; and ſuch lords of manors, owners " and proprietors of the ſame, that is, are, or ſhall be " damaged thereby, ſhall have the remedy and ſatisfaction " from the adjoining pariſhes and places as is given by the " above recited act of 13 Edw. the Firſt."

For the mode in which the juſtices are directed to proceed, vide the act, and ante ch. 49.

† *Sect.* 3. And it is further enacted by 16 Geo. 3. c. 30. ſ. 8. " Whoever ſhall wilfully pull down or deſtroy, or cauſe to be wil- " fully pulled down or deſtroyed, the pale or pales, or any part of " the walls of any foreſt, chace, purlieu, ancient walk, park, pad- " dock, wood, or other ground where any red or fallow deer ſhall " be then kept, without the conſent of the owner, or perſon " chiefly intruſted with the cuſtody thereof, or being other- " wiſe duly authoriſed, ſhall forfeit and pay the ſum of thirty " pounds, on information upon oath before one juſtice, by " one witneſs, &c. and whoever having been convicted ſhall " offend a ſecond time, ſhall on conviction by indictment, be " tranſported for ſeven years, provided the proſecutions be " within ſix months."

† *Sect.* 4. By 9 Geo. 3. c. 29. ſ. 3. " Whoever ſhall " wilfully or maliciouſly demoliſh, pull down or otherwiſe " deſtroy or damage any fence made for dividing or incloſing " any common, waſte, or other lands or grounds in purſuance " of any act of parliament, or ſhall cauſe or procure the ſame " to be done, he ſhall be guilty of felony, and tranſported for " ſeven years. Proſecution to be commenced in 18 months " after the offence committed."

## (TURNPIKE-GATES.)

† *Sect.* 5. It is enacted by 1 Geo. 2. ſ. 2. c. 19. " That " if any perſon or perſons ſhall, either by day or night, wil- " fully and maliciouſly break down, cut down, pluck up, " throw down, level, or otherwiſe deſtroy any turnpike-gate, " any poſts, rails, wall, or other fence, belonging to any ſuch " turnpike-gate erected to prevent paſſengers from paſſing " by without paying the toll directed to be paid by any act " of

Vide 13 Edw. 1. ſ. 1. c. 46.
1 Geo. 1. ſ. 2. c. 42.
6 Geo. 1. c. 16.
4 Comm. 144.

" of parliament, ſuch offender, on the oath of one witneſs, " before two juſtices, or at ſeſſions, ſhall be ſent to the com- " mon gaol or houſe of correction, to hard labour, for three " months, and be once publickly whipped."

† And it is farther enacted by the ſaid ſtatute, 1 Geo. 1. c. 19. and by 5 Geo. 2. c. 33. " That on conviction of the ſaid of- " fence, by indictment before juſtices of aſſize, oyer and termi- " ner, or gaol delivery for the county, &c. the offender ſhall be " tranſported for ſeven years; and that if ſuch offender ſo con- " victed, commit any of the offences aforeſaid a ſecond time, " or if any perſon or perſons ſhall either by day or night, wil- " fully and maliciouſly pull down or demoliſh any houſe or " houſes, erected for the uſe of any turnpike-gates, ſuch of- " fender, on conviction by indictment, before juſtices of aſ- " ſize, or gaol delivery, ſhall be guilty of felony, and tranſ- " ported for ſeven years. Provided, in both caſes, the pro- " ſecution be within ſix months."

† *Sect.* 6. It is alſo enacted by 5 Geo. 2. c. 33. " That " if ſuch offender ſhall return from tranſportation, as afore- " ſaid, he ſhall ſuffer death without clergy. Vide B. 2. c. 33. tit. tranſportation.

† *Sect.* 7. And it is alſo enacted by 8 Geo. 2. c. 20. " That whoever ſhall be guilty of the offences abovemen- " tioned, or if any perſon or perſons ſhall deſtroy, &c. any " chain, bar, or other fence or fences belonging to any ſuch " turnpike-gate or gates as aforeſaid, or any other chain, " bar, or fence of any kind whatſoever, ſet up or erected to " prevent paſſengers from paſſing without paying toll by act " of parliament, or ſhall forcibly reſcue any perſon or per- " ſons, being lawfully in cuſtody of any officer or other per- " ſon for any of the offences before mentioned, ſuch offender " ſhall ſuffer death without clergy—*Vide* further proviſions by " this act." N. B. The 27 Geo. 2. c. 16. makes 5 Geo. 2. c. 33. 8 Geo. 2. c. 20. perpetual.

† *Sect.* 8. By 13 Geo. 3. c. 84. ſ. 42. " If any perſon " or perſons ſhall commit any of the offences aforeſaid, or " deſtroy any crane, machine or engine made or erected on " any turnpike road, by authority of parliament, for weigh- " ing waggons, carts, or carriages, or ſhall forcibly reſcue, " &c. ſuch offender ſhall be tranſported for ſeven years, or " committed to priſon, not exceeding three years, at the " diſcretion of the court; and unleſs the offender be convict- " ed within twelve months, the hundred ſhall make ſatisfac- " tion for the damages done." 7 Geo. 3. c. 40.

## ( BRIDGES. )

† *Sect.* 9. It is enacted by 9 Geo. 1. c. 29. ſ. 6. for pre- venting the wilful and malicious damaging or deſtroying Weſt- minſter-bridge, or any part thereof, " That if any perſon or " perſons And the ſame is enacted by 31 Geo. 2. c. 22. ſ. 6. reſpecting

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London bridge, and by 12 Geo. 1. c. 36. ſ. 3. reſpecting Fulham Bridge.—But by 20 Geo. 2. c. 22. the diſtinction of Walton bridge. By 23 Geo. 2. c. 37. of Hampton-court bridge. By 24 Geo. 2. c. 36. of Ribble bridge.

"perſons ſhall wilfully and maliciouſly blow up, pull down, or deſtroy the ſaid bridge, or any part thereof, or attempt ſo to do, or unlawfully and without authority remove or take away any works thereto belonging, or in any wiſe direct or procure the ſame to be done, whereby the ſaid bridge, or the works thereof may be damaged, or the lives of the paſſengers endangered, ſuch offender or offenders ſhall be adjudged guilty of felony, and ſuffer death *without* benefit of clergy."

By 28 Geo. 2. c. 45. of Sandwich bridge. By 29 Geo. 2. c. 86. of Blackfryars' bridge. By 29 Geo. 2. c. 73, of Urſe bridge. By 30 Geo. 2. c. 59, of Jeremiah's Ferry. By 30 Geo. 2. c. 63, and 31 Geo. 2. c. 48. of Old Brentford bridge, and by 31 Geo. 2. c. 59. of Trent bridge, is made ſingle felony, and *within* the benefit of clergy.

## CHAPTER THE FIFTY-FIRST.

## OF OFFENCES BY GAOLERS.

1 Hale 640, 641, 601.
S. P. C. 36. C.
3 Inſt. 91.
2 Inſt. 589, 381.

BY 14 Edw. 3. c. 10. "If any keeper of a priſon, or under-keeper, by too great dureſs of impriſonment, and by pain, make any priſoner that he hath in his ward, to become an appellor againſt his will, he is guilty of felony." And it is ſaid to be no way material, whether the approvement be true or falſe, or whether the appellee be acquitted or condemned; but at law this offence was eſteemed a miſpriſion only, unleſs the appellee were hanged by reaſon of the appeal.

GAOLERS, as well *de facto* as *de jure*, are liable to attachment for contempt of court, and to fine, impriſonment, and forfeiture of office for groſs and palpable abuſes; as in treating criminals with barbarity, extorting money, not making lawful deliverance, or ſuffering them to eſcape. 4 Ed. 3. c. 10. 2 Inſt. 43, 53, 381. Co. Lit. 233. 4 Co. 44. 9 Co. 50. Ray. 216. Lev. 71. 2 Hawk. 151. 3 Mod. 143. And if death be the conſequence of their harſh treatment, it is felonious homicide. 3 Inſt. 91. Foſt. 321. By the 3 Hen. 7. they muſt certify the names of their priſoners at every goal delivery, in order to be calendered. By 19 Hen. 7. c. 10. they are liable to heavy fines for ſuffering the eſcape of priſoners committed for ſuſpicion of high or petit treaſon. 12 Mod. 226. By 22 and 23 Car. 2. c. 13. debtors and felons are to be ſeparately lodged on forfeiture of office and treble damages. By 8 and 9 Will. 3. c. 27. to ſuffer an eſcape by bribery, 500l. loſs of office, and diſability, &c. vide poſt. 119. 3 Lev. 288. Ray. 216. By 3 Geo. 1. c. 15. they are reſtrained from purchaſing the office, penalty 500l. &c. By 9 Geo. 1. c. 22. 11 Geo. 1. c. 22. to neglect or refuſe to execute proceſs in the manner directed by the act, 200l. &c. By 5 Geo. 2. c. 30. to ſuffer a bankrupt to eſcape 500l. By 2 Geo. 2. c. 22. and 21 Geo. 2. c. 33. to carry a priſoner for debt to goal againſt his will within 24 hours after he is taken, to exact any gratuity from, or to force any expence upon him, to purloin his bedding, apparel, &c. or to refuſe him or his friends a copy of the clauſes of this act to read, &c. incurs an additional penalty of 50l. and the offender may be indicted for the miſdemeanour. By 24 Geo. 2. c. 40. to permit ſpirituous liquors to be ſold in the goal 100l. By 27 Geo. 2. c. 17. the king's bench is veſted in the crown, and the marſhal made liable, &c. By 32 Geo. 2. gaolers guilty of extortion may be puniſhed in a ſummary way, and for diſobeying the injunctions of the act forfeit 20l. and treble coſts. By 14 Geo. 3. c. 59. to diſobey an order of juſtices made purſuant to the act is liable to fine at the diſcretion of the judges of aſſize, or the juſtices in ſeſſions. See alſo 12 and 12 Will. 3. c. 19. 24 Geo. 3. c. 54, and 47. and 3 Mod. 143, 11 Mod. 51, 79, 80. 12 Mod. 227. 2 Rol. Ab. 76. Jenk. 230. *For the fees of gaolers* vide 2 Geo. 2. c. 22. 3 Geo. 2. c. 27. 8 Geo. 2. c. 24. 21 Geo. 2. c. 33. 32 Geo. 2. c. 28.

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## CHAPTER THE FIFTY-SECOND.

## Of OFFENCES by TRANSPORTERS Of SHEEP or WOOL.

BY ſome old ſtatutes, and 13 & 14 Car. 2. c. 18. the exportation of wool was made felony; but by 7 & 8 Will. 3. c. 28. it is reduced to a miſdemeanor only, and it is ſubjected to ſevere penalties by many late ſtatutes. 3 Inſt. 95, 96. 4 Comm. 154.

*Sect.* 2. It is enacted by 8 Eliz. c. 3. "That no perſon or perſons ſhall bring, deliver, ſend, receive, or take, or procure to be brought, delivered, ſent, or received into any ſhip or bottom, any rams, ſheep or lambs, or any manner of other kind of ſheep, being alive, to be carried and conveyed out of this realm of England, Wales, or Ireland, or out of any of the king's dominions, on pain that every ſuch perſon or perſons, their aiders, abettors, procurers and comforters, ſhall for the firſt offence forfeit all his goods for ever, whereof the one moiety ſhall be to the king, the other moiety to him that will ſue for the ſame." And further, "That every ſuch offender ſhall ſuffer impriſonment by the ſpace of one whole year, without bail or mainprize, and at the year's end, ſhall in ſome open market-town, in the fulneſs of the market, on the market-day, have his left hand cut off, and that to be nailed up, in the openeſt place of ſuch market; and that every perſon or perſons eſtſoons offending againſt this ſtatute, ſhall be adjudged a felon, &c."

† *Sect.* 3. It is enacted by 12 Car. 2. c. 32. "That whoever ſhall export, or cauſe to be exported any ſheep or wool whatſoever; or pack or load, or cauſe to be packed or loaded upon any horſe, cart or other carriage; or load on board, or cauſe to be loaded on board any ſhip or other veſſel, any ſheep or wool, whatſoever, to the intent and purpoſe to export, or cauſe the ſame to be exported, ſhall forfeit the ſame, and twenty ſhillings for every ſheep, and three ſhillings for every pound of wool. And the owners of the ſhip, knowing ſuch offence, ſhall forfeit all their intereſt therein, with the apparel and furniture thereto belonging. And the maſter and mariners knowing thereof, and willingly aiding in ſuch offence, ſhall forfeit all their goods and chattels, and have impriſonment for three months. And if any merchant or other perſon who ſhall be guilty, *ſhall be diſabled to ſue* in law. And by *9 & 10 Will. 3. c. 40 ſ. 9. proſecutions* may be commenced

Vide 6 Geo. 1. c. 21. 11 Geo. 2. c. 21. whereby diſcoverers are indemnified.

Vide 13 and 14 Car. 2. c. 18 ſ. 7. for the penalty of preſſing wool into packages, and laying it in places convenient for exportation.

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" menced by the informer within one year, and by the crown " within three years after the offence committed."

† *Sect.* 4. Alſo, by 7 & 8 Will. 3. c. 28. ſ. 10. " Who- " ever ſhall be aiding in exporting any wool out of this " realm ſhall ſuffer three years impriſonment, and the owner " and aider ſhall pay treble the value of what the inhabitants " ſhall be liable to, (vide ſ. 9.) as alſo treble coſts of " ſuit."

† *Sect.* 5. And it is alſo enacted by 4 Geo. 1. c. 11. " That whoever ſhall be in priſon for want of ſufficient " bail for the unlawful exportation of wool, or by 12 Geo. 2. " c. 21. ſ. 27. for aiding or abetting therein, and ſhall re- " fuſe to appear or plead to a declaration or information to " be delivered to ſuch perſon or perſons, or to the gaoler, " keeper, or turnkey of the priſon at the priſon for the ſaid " offence, by the ſpace of one term, judgment ſhall be en- " tered againſt him by default, and in caſe judgment ſhall be " ſo obtained, or by verdict or otherwiſe, and the defendant " ſhall not pay the ſum recovered for the ſaid offence within " three months after entering up of ſuch judgment, the court " before whom ſuch judgment ſhall be obtained, ſhall by or- " der of court, cauſe ſuch offender to be tranſported for ſeven " years, and if he return before the expiration thereof, he " ſhall ſuffer death without clergy.

† *Sect.* 6. And it is further enacted by 12 Geo. 2. c. 21. ſ. 25, 26. " that whoever ſhall offer or promiſe to give any bribe to " an officer of the cuſtoms, exciſe or ſalt, to connive at or per- " mit, the tranſportation or the concealment of any wool, or " the removing thereof contrary to this act, or any other " made againſt the tranſportation thereof; or to do, conceal, " or connive at any other act whereby any of the proviſions " made by this or any other law, as aforeſaid, may be evaded " or broken, ſhall forfeit, whether the offer or promiſe were " accepted or not, the ſum of three hundred pounds to the in- " former.—And it is further enacted, par. 26. that if any officer " of the cuſtoms, exciſe or ſalt, or any other perſon who ſhall " act in their aid or aſſiſtance, in putting this act in execu- " tion, ſhall be hindred, oppoſed, obſtructed, moleſted, " wounded or beaten, in ſeizing any wool, the offenders, " their aiders and abetters, or any other perſon or perſons " whatſoever being armed with offenſive arms or weapons, or " wearing any vizard, maſk, or other diſguiſe, who ſhall reſ- " cue, or attempt to reſcue any wool which ſhall be ſeized by " any officers as aforeſaid, ſhall be tranſported for any term " not exceeding ſeven years, as the court ſhall think fit.

† *Sect.* 7. Alſo it is further enacted by 19 Geo. 2. c. 34. ſ. 6. " That if any perſons armed, to the number of three or " more

Continued by 22 Geo. 3. c. 51.

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" more shall be assembled to assist in the illegal exportation " of wool prohibited to be exported, or in carrying of wool " in order to exportation, or in rescuing the same after seiz- " ure; or in rescuing an offender herein, or preventing his " being apprehended; or shall be aiding in any of the pre- " misses; or if any person shall have his face disguised when " passing with such goods, or shall forcibly hinder or assault " any officer in seizing the same, or dangerously wound any " such in attempting to go on board any vessel, or shoot at " or wound him when on board in the execution of his office; " shall be guilty of felony without benefit of clergy."

N. B. There are several other felonies in this act against smugglers, for which vide appendix the sixth.

4 Burn. 418, for a full account of this title.

## CHAPTER THE FIFTY-THIRD.

## Of OFFENCES BY SERVANTS.

IT is recited by 33 Hen. 6. c. 1. "That divers household-servants, as well of lords, as of other persons of good degree, had then of late, shortly after the death of their said lords and masters, violently and riotously taken and spoiled the goods which were of their said lords and masters at the time of their death, and the same distributed among themselves;" and thereupon it is enacted, "That after " information made to the chancellor by the executors of any " such person, or two of them, of such riot, taking, and " spoil; the chancellor, by the advice of the two chief justices, " and chief baron, or two of them, may make out writs to " such sheriffs as shall be thought necessary, commanding " them to make such proclamation, as by the said statute is " directed, for the offenders to appear in the King's Bench " at such a day, whereupon, if they make default, they shall " be attainted of felony; but if they appear, they shall be " committed or bailed, till they have answered the said exe- " cutors in such actions, which the said executors will de- " clare against them, or any of them, for the riot, taking, " and spoiling aforesaid."

Ante 91.
1 Hale 667.
4 Burn 118.
This was a process much in use in case of great offences, especially about this king's reign, to convict men sometimes in civil offences, sometimes in cases criminal upon default of appearance, at the return of the proclamation.
1 Hale 654.
3 Inst. 104.

† By 6 Ann c. 31. "If any menial or other servant, through " negligence or careleſsness shall fire, or cause to be fired any " dwelling house or out-house, they shall forfeit 100l. on " conviction by one witness, before one justice, or suffer " eighteen months imprisonment, &c."

Ld. Ray. 99.

See also 12 Geo. 3. c. 73. s. 35. 14 Geo. 3. c. 78. s. 84. And for offences by servants in particular branches of trade, vide 4 Burn 118.

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## CHAPTER THE FIFTY-FOURTH.

### OF OFFENCES BY EGYPTIANS.

3 Inſt. 102. Vide 22 Hen. 8. c. 10. The 5 Eliz. c. 20, recited in the former edition, is repealed by 23 Geo. 3. c. 51, as a law of exceſſive ſeverity, vide 4 Comm. 4, and for the hiſtory of this extraordinary claſs of people, 4 Comm. 165.

BY 1 & 2 Ph. & Mar. c. 4. "All outlandiſh perſons, "called Egyptians, being of the age of thirteen years, "who ſhall be tranſported into this realm of England or Wales, "and continue within the ſame by the ſpace of one month, "ſhall forfeit forty pounds, &c.—" And by 17 Geo. 2. c. 5. "All perſons pretending to be gypſies, or wandering in the "habit or form of Egyptians ſhall be deemed rogues and va-"gabonds, and ſuffer corporal puniſhment and impriſonment, "in the manner the act directs."

## CHAPTER THE FIFTY-FIFTH.

### OF OFFENCES BY CUTTERS OF POW-DIKE, AND DESTROYERS OF SLUICES, &c. ON NAVIGABLE RIVERS.

4 Comm. 243.

IT is recited by 22 Hen. 8. c. 11. which was repealed by 1 Edw. 6. and revived by 2 & 3 Ph. & Mar. c. 19. "That divers perſons had malicioufly at ſundry times cut down, and broken up, divers parts of the dike, called the new Pow-dike, in Marſhland, in the county of Norfolk, and the Broken-dike, otherwiſe called Oldfelde-dike, by Marſhland, in the Iſle of Ely, in the county of Cambridge: By reaſon whereof the ground within the country of Marſhland in the counties aforeſaid, had been many times drowned; and the inhabitants had not only been put to great charges and expences, but alſo had loſt much cattle, and alſo many people had been drowned in their beds." And thereupon it is enacted, "That every "ſuch perverſe and malicious cutting down, and breaking up "of, any part or parts of the ſaid dikes, or of any other bank, "being parcel of the rind and uttermoſt part of the ſaid coun-"try of Marſhland, by any perſon or perſons, otherwiſe than "in working upon the ſaid bank or dikes, for the repairing, "fortifying, and amending of the ſame, ſhall be adjudged fe-"lony, and that the juſtices of peace of the ſaid counties of "Norfolk and Cambridge, within the ſaid iſle, ſhall have full

"power

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" power at their ſeſſions to cauſe enquiry to be made of every " ſuch offence, to award like proceſs, judgment, and exe- " cution, as they have uſed to do upon other felonies, " being felony at common law."

† *Sect.* 2. It is enacted by 1 Geo. 2. ſt. 2. c. 19. ſ. 2. made perpetual by 27 Geo. 2. c. 16. " That whoever ſhall, ei- " ther by day or night, wilfully and maliciouſly break down " or demoliſh any lock, ſluice, or floodgate erected by act of " parliament upon any navigable river, for preſerving or ſecu- " ring the navigation thereof, on conviction, by indictment " within ſix months at the aſſizes, may be tranſported for " ſeven years."

† *Sect.* 3. By 8 Geo. 2. c. 20. made perpetual by 27 Geo. 2. c. 16. " Whoever ſhall wilfully or maliciouſly pull down, " pluck up, throw down, level, or otherwiſe deſtroy any lock, " ſluice, floodgate or other works, on any navigable river, " erected by authority of parliament; or forcibly reſcue any " perſon or perſons in lawful cuſtody for the ſame, ſhall " ſuffer death without benefit of clergy." The offence may be tried in any adjacent county, but without corruption of blood, &c.

† *Sect.* 4. It is alſo enacted by the ſaid ſtatute, par. 2. " That whoever ſhall wilfully and maliciouſly draw or pluck " up any flood-gate, fixed or made in any wear or lock, " erected by authority of parliament, in or upon any navigable " river, for preſerving the navigation thereof, on conviction " by one witneſs, before two juſtices of that or of the adja- " cent county, ſhall be ſent to hard labour for one month in " the houſe of correction;—and the hundred made liable to " the amount of twenty pounds, &c."

† *Sect.* 5. And it is further enacted by 10 Geo. 2. c. 32. " That whoever ſhall unlawfully cut off, draw up, or remove " and carry away, any piles, chalk, or other materials which " ſhall be driven into the ground and uſed for the ſecuring " any marſh, or ſea-walls or banks, in order to prevent the " lands lying within the ſame, from being overflowed and " damaged, ſhall forfeit twenty pounds; one moiety to the " informer, the other to the poor; and in default, by diſ- " treſs, ſhall be kept at hard labour for ſix months." Any one juſtice of the place, on information upon oath, may ſum- mon the offender to appear, or iſſue his warrant to appre- hend him, and upon appearance, or non-appearance, may convict, on confeſſion, or the oath of one witneſs.

† *Sect.* 6. And it is further enacted by the above ſtatute, " That all the proviſions of the Black Act of 9 Geo. 1. c. " 22. for the bringing offenders, their aiders and abettors " to juſtice; for making compenſation to the party injured; " for the reward for apprehending offenders, &c. and for " the more impartial puniſhment of the offences therein

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" mentioned; together with all reſtrictions, limitations, and " mitigations of the ſaid act, ſhall extend to all caſes of offen- " ces by breaking down, or cutting down any bank or banks " of any river, or any ſea-bank, whereby any lands ſhall be " overflowed or damaged."

† *Sect.* 7. And by 6 Geo. 2. c. 37. made perpetual by 31 Geo. 2. c. 42. " Whoever ſhall unlawfully and maliciouſly " break down, or cut down the bank or banks of any river, " or any ſea bank, whereby any lands ſhall be overflowed, " or damaged, ſhall ſuffer death without clergy."

Vide 23 Geo. 3. c. 25.

† *Sect.* 8. By 27 Geo. 2. c. 19. " Whoever ſhall mali- " ciouſly cut, break down, burn, demoliſh, or deſtroy any " bank, mill, engine, floodgate or ſluice, erected, made, " ſupported or maintained for the purpoſe of benefiting the " Bedford level, ſhall ſuffer death without clergy." And further, " Whoever ſhall maliciouſly ſtop, dam up, demoliſh, damage, " or deſtroy any river, drain, water-courſe, door, dam, bridge, " or other works erected for the purpoſes aforeſaid, on con- " viction before two juſtices for the counties and iſles, or " either of them, ſhall forfeit one hundred pounds."

† *Sect.* 9. By 4 Geo. 3. c. 12. ſ. 5. which recites that the laws in being were not ſufficient for the preſervation of banks, floodgates, ſluices, and other works belonging to navigable rivers, and thereupon it is enacted " That who- " ever ſhall wilfully or maliciouſly break, throw down, " damage or deſtroy any banks, floodgates, ſluices, or other " works, or open or draw up any floodgate, or do any other " wilful hurt or miſchief to any navigation erected by au- " thority of parliament, ſo as to obſtruct, hinder, or prevent " the carrying on, compleating, ſupporting, or maintain- " ing ſuch navigation, may be tranſported for ſeven years."

For the penalty of breaking the dams of private fiſheries, vide 37 Hen. 8. c. 6. and 5 Eliz. c. 21. For obſtructing and filling up any haven, road, channel, or navigable river, vide 19 Geo. 2. c. 22. Burr. 656. For offences by bum boats on the river Thames, 2 Geo. 3. c. 28. And for the prevention of thefts on navigable rivers, vide 24 Geo. 2. c. 45.

## CHAPTER THE FIFTY-SIXTH.

## OF OFFENCES BY TRESPASSERS ON THE BORDERS; AND RIOTERS.

4 Jac. 1. c. 1.
7 Jac. 1. c. 1.
3 Inſt. 66. 67.
3 Burn. 231, 232.
4 Comm. 243.

IT is recited by 43 Eliz. c. 13. " That then of late years many of the queen's ſubjects dwelling in the counties of Cumberland, Weſtmorland, and the biſhoprick of Dur- ham, had been taken, ſome from their own houſes, and other in travelling on the highway, or otherwiſe, and been carried away as priſoners, and kept barbarouſly, and cruelly, until they

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they had been redeemed by great ranſoms; and alſo, that then of late time there had been many incurſions, robberies and burning and ſpoiling of towns, villages, and houſes, within the ſaid counties, ſo that divers of the queen's ſubjects, in the ſaid counties, had been enforced to pay a certain rate of money, corn, cattle, or other conſideration, commonly called black-mail, to divers inhabiting upon or near the borders, being men of name, and friended and allied with divers in thoſe parts, who were commonly known to be great robbers, and ſpoil-takers, within the ſaid counties, to the end thereby to be by them protected from the danger of ſuch as uſed to rob and ſteal in thoſe parts;" and thereupon it is enacted, "That whoſoever ſhall at any "time hereafter, without good and lawful warrant or autho- "rity, take any of her majeſty's ſubjects againſt his or their "will or wills, and carry them out of the ſame counties, or "detain, force, or impriſon him or them, as priſoners, or "againſt his or their wills, to ranſom them, or to make "prey or ſpoil of his or their perſon, or goods, upon deadly "feud or otherwiſe: or whoſoever ſhall be privy, conſenting, "aiding, or aſſiſting unto any ſuch taking, detaining or car- "rying away, or procure the taking, detaining, or carrying "away of any ſuch perſon or perſons priſoners as afore- "ſaid: or whoſoever ſhall take, receive, or carry, to the uſe "of himſelf, or wittingly to the uſe of any other, any money, "corn, cattle, or other conſideration, commonly called "black-mail, for the protecting, or defending of him or "them, or his or their lands, tenements, goods, or chat- "tels, from ſuch theſts, ſpoils, and robberies, as is aforeſaid: "or whoſoever ſhall give any ſuch money, corn, cattle, or "other conſideration, called black-mail, for ſuch protection "as is aforeſaid, and ſhall be of the ſaid ſeveral offences, or "of any of them, indicted and lawfully convicted, or ſhall "ſtand mute, or ſhall challenge peremptorily above the num- "ber of twenty before the juſtices of aſſizes, juſtices of gaol "delivery, juſtices of oyer and terminer, or juſtices of peace, "within any of the ſaid counties, at ſome of their general "ſeſſions, within ſome of the ſaid counties to be holden, "ſhall be reputed, adjudged, and taken to be as felons, and "ſhall ſuffer pains of death, without any benefit of clergy, "&c."

† *Sect.* 2. By 13 & 14 Car. 2. c. 22. made a public act by 6 Geo. 2. c. 37. and perpetual by 31 Geo. 2. c. 42. "The juſtices of the peace of the reſpective counties of Cum- "berland and Northumberland, or the major part of them, "at any general ſeſſions, may in open court, make an order "for charging the inhabitants proportionally, for the ſecuring "the ſaid ſeveral counties from the depredations of the *moſs* "*troopers*; ſo as *Northumberland be not* charged above 500l. "*nor Cumberland above* 200l. *a year*: and they may appoint 30 men

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" 30 men in Northumberland, and 12 men in Cumberland, " under reſpective commanders, to apprehend offenders, un- " der pain of fine and impriſonment for neglect of duty. But " *vide* 29 & 30 Car. 2. c. 2. which obliges the juſtices to " take ſecurity, &c."

For the proceſs of apprehending offenders who ſhall eſcape into Scotland, vide 13 Geo. 3. c. 31. And for the riot act 1 Geo. 1. ſ. 2. c. 5. Infra, c. 65. ſ. 56.

† *Sect.* 3. By 18 Car. 2. c. 3. " The benefit of clergy is " taken away from great, known, and notorious thieves, " and ſpoil-takers in the ſaid counties of Northumberland and " Cumberland, for theft done within the ſame; but the juſ- " tices of aſſize may tranſport them for life."

## CHAPTER THE FIFTY-SEVENTH.

## OF OFFENCES BY BANKRUPTS AND INSOLVENT DEBTORS.

(The 4 Ann. c. 17. and 5 Ann. c 22. recited in the former edition are expired.)

IT is enacted by 5 Geo. 2. c. 30. continued by 21 Geo. 3. c. 29. ſ. 8. " That if any perſon or perſons have be- " come bankrupt, or who ſhall at any time hereafter become " bankrupt within the intent and meaning of the ſeveral ſta- " tutes made and now in force concerning bankrupts, or any " of them, and againſt whom a commiſſion of bankrupt un- " der the great ſeal of Great Britain hath been awarded and " iſſued out, or ſhall at any time hereafter be awarded and if- " ſued out, whereupon the perſon or perſons againſt whom " ſuch commiſſion hath iſſued *(a)* or ſhall iſſue, have or hath " been, or ſhall be declared bankrupt or bankrupts, ſhall not " within forty-two days after notice thereof in writing, to be " left at the uſual place of abode of ſuch perſon or perſons, " or perſonal notice, in caſe ſuch perſon or perſons be then in " priſon, and notice given in the London Gazette that ſuch " commiſſion or commiſſions is are or have been iſſued, " and of the time and place of a meeting of the commiſſion- " ers therein named, or the major part of them, ſurrender " him, her, or themſelves to the ſaid commiſſioners named in " the ſaid commiſſion, or the major part of them, and ſign " or ſubſcribe ſuch ſurrender, and ſubmit to be examined " from time to time upon oath, or being the people called " *quakers*, upon the ſolemn affirmation by law appointed for " ſuch people, by and before ſuch commiſſioners, or the ma- " jor part of them, by ſuch commiſſion authoriſed, and in all " things conform to the ſeveral ſtatutes already made and now " in force concerning bankrupts; and alſo upon ſuch his, " her, or their examination, fully and truly diſcloſe and diſcover " all his, her, or their effects *(b)* and eſtate real and perſonal, and " how and in what manner, to whom, and upon what conſidera- " tion, and at what time or times he ſhe or they have or " hath diſpoſed of, aſſigned, or tranſferred any of his, her, or " their

*(a)* There is a particular proviſion in the act to prevent their being maliciouſly ſued out, but the injured trader may likewiſe bring an action on the caſe againſt the officer, 3 Burr. 1419.

*(b)* The commiſſioners cannot break open any but the bankrupt's houſe to ſearch for concealed effects. 2 Strange 847.

" their goods, wares, merchandizes, monies, or other eſtate " and effects, (and all books, papers, and writings relating " thereto) of which he, ſhe, or they was or were poſſeſſed, " or in or to which he, ſhe, or they was or were any ways " intereſted or intitled, or which any perſon or perſons had, " or hath, or have had in truſt for him, her, or them, or for " his, her, or their uſe, at any time before or after the iſſu- " ing of the ſaid commiſſion, or whereby ſuch perſon or per- " ſons, or his, her, or their family or families, hath or have " or may have or expect any profit, poſſibility of profit, bene- " fit or advantage whatſoever, except only ſuch part of his, " her or their eſtate and effects, as ſhall have been really and " *bonâ fide* ſold or diſpoſed of in the way of his, her, or their " trade and dealings; and except ſuch ſums of money as ſhall " have been laid out in the ordinary expence of his, her or " their family or families; and alſo upon ſuch examination " deliver up unto the ſaid commiſſioners by the ſaid commiſ- " ſion authoriſed, or the major part of them, all ſuch part of " his, her, or their the ſaid bankrupt's goods, wares, mer- " chandizes, money, eſtate and effects, and all books, papers, " and writings relating thereto, as at the time of ſuch exa- " mination ſhall be in his, her, or their poſſeſſion, cuſtody or " power, (his, her, or their neceſſary wearing apparel, and the " neceſſary wearing apparel of the wife and children of ſuch " bankrupt only excepted) then he, ſhe, or they the ſaid bank- " rupt or bankrupts in caſe of any default and wilful omiſſion " in not ſurrendering and ſubmitting (1) to be examined as " aforeſaid; or in caſe he, ſhe, or they ſhall remove, conceal, or " embezzle any part of ſuch his, her, or their eſtate real or " perſonal to the value of twenty pounds, or any books of ac- " count, papers, or writing relating thereto, with an intent " to defraud his, her, or their creditors, (and being thereof " lawfully convicted by judgment or information) ſhall be " deemed and adjudged to be guilty of felony, and ſhall ſuf- " fer as felons without benefit of clergy, (2) or the benefit of " any ſtatute made in relation to felons; and in ſuch caſe " ſuch felons goods and eſtate ſhall go and be divided among " the creditors ſeeking relief under ſuch commiſſion."

Vide Cooke's Bankrupt laws, chap. 6.

The Bankrupt's wife cannot be examined, 1 P. Wms. 611.

(1) Vide the caſe *Ex parte* Lingood, 1 Atkins 240.

(2) As this is a ſeverely penal law, reaching the life of the bankrupt, a court of equity will not lend its aid to the proſecution, by ordering the clerk of the commiſſion to attend at the Old Bailey with the proceedings under the commiſſion; but the party muſt prove him both a bankrupt and a felon, within the meaning of the act. Cooke's Bankrupt laws 104, 106. So alſo in the commitment by the commiſſioners, the act muſt be ſtrictly purſued. 1 Salk. 348. 2 Black 1144. 2 Strange 880.

† *Sect.* 2. But it is provided by the ſaid ſtatute, par. 3. " That it ſhall and may be lawful to and for the ſaid chan- " cellor, or lord keeper, or commiſſioners for the cuſtody of " the great ſeal for the time being, to enlarge the time for " ſuch perſon or perſons ſurrendering him, her, or themſelves, " and *diſcloſing and diſcovering his, her,* or their eſtate and " effects

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"effects as aforesaid, as the said lord chancellor, lord keeper, "or such commissioners shall think fit, not exceeding fifty "days, to be computed from the end of the forty-two days, "*(vide the second section of the act)* so as such order for enlarg- "ing the time be made six days at least before the time on "which such person or persons was or were so to surrender "him, her, or themselves, and make such discovery as afore- "said."

Cooke's B. L. 288. 5 Mod. 309. Comb. 391. 2 Black. 1035 1 Atk. 204, 289. L. Raym. 153.

† *Sect.* 3. And it is further enacted, par. 21. "That "whoever shall have accepted of any trust, and shall wil- "fully conceal or protect any part of the bankrupt's estate "and effects from the creditors, and shall not discover the "same within forty-two days after the commission issues, "either to the commissioners or assignees, or submit to be "examined (1) by the commissioners, shall forfeit 100 l. and "double the value of the property concealed.

(1) If a bankrupt absconds, or is likely to run away between the time of the commission issued and the last day of surrender, he may by warrant from any judge or justice of peace, be apprehended and committed to the county goal. 2 Comm. 481. See also Perrott's case. Green 197, 204. Burr. 1123. Cooke's Bank. laws 282, 283, 107.

Explained by 29 Geo. 2. c. 18.

† *Sect.* 4. Secondly, "And whereas several persons who are prisoners for debt, chuse rather to continue in prison and spend their substance there, than discover and deliver up to their cre- ditors their estates and effects," It is therefore enacted by 28 Geo. 2. c. 13. s. 39. "That any one or more of the "creditors of any prisoner at whose suit he or she is detained "in prison, upon 20 days notice in writing to such prisoner "and the person in whose custody he is, to require the keeper "of the prison to bring such prisoner before the justices at "their next general or quarter sessions of the peace, or any "adjournment thereof for the county or place, together with "a copy of the cause of his detainer, and such prisoner shall "then, at the request of a creditor, be obliged to deliver in "upon oath, and subscribe a schedule of his estate and effects "(in the manner directed by the act) to be vested, assigned, "and equally divided for the benefit of his creditors, and on "conviction of wilful perjury therein, or if such prisoner so "brought up as aforesaid shall neglect or refuse to deliver in "and subscribe such schedule within forty days, such offender "shall suffer death without clergy."

## CHAPTER THE FIFTY-EIGHTH.

## OF OFFENCES BY COUNTERFEITERS OF BANK-NOTES, EXCHEQUER-BILLS, STAMPS, SOUTH-SEA BONDS, LOTTERY ORDERS, &c.

*To erase the usual mark made with red ink a- cross the face of*

AND first as to counterfeiters of bank-notes, it is enact- ed by 8 & 9 Will. 3. c. 20. s. 36. "That the forging "or counterfeiting the common seal of the governor and "company

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"company of the bank of England, or of any ſealed bank-"bill, made or given out in the name of the ſaid governor "and company, for the payment of any ſum of money, or of "any bank-note of any ſort whatſoever, ſigned for the ſaid "governor and company of the bank of England, or the al-"tering or raſing any endorſement on any bank-bill, or note "of any ſort, ſhall be adjudged to be felony without benefit "of clergy."

a bank note, to denote that it has been paid, is erafing an *indorſement* within the meaning of this act, 1 Str. 18. 3 P. Wms. 419. — So alſo to alter the amount of the ſum for which a bank note is made, is a forging, and counterfeiting of the bank note. 1 Str. 19. And in forging the name; the cashier whoſe name is ſigned to the note is an admiſſible witneſs to prove it forged. O. B. 1784. p. 345, 837.

† *Sect.* 2. And it is alſo enacted by 11 Geo. 1. c. 9. ſ. 6. "That whoever ſhall alter, forge, or counterfeit any bank-bill "or note of the bank of England, or bank-note of any ſort "whatſoever; or ſhall eraſe or alter the ſame, or any in-"dorſement thereon; or ſhall tender in payment, utter, vend, "exchange, or barter any ſuch altered, forged, or counter-"feited bill or note, or any eraſed or altered bill or note, or "the indorſment thereon; or ſhall knowingly demand to "have the ſame exchanged for ready money, with intention "to defraud, ſhall ſuffer as in *caſes of felony*."

Vide the caſe of Rex v. Elliot, Kent Aſſizes, July 1777, and the caſe of Rex v. Dick, on the forgery of a Scotch Bank note.

† *Sect.* 3. And it is further enacted by 12 Geo. 1. c. 32. ſ. 9. "That whoever ſhall forge, or procure to be forged, "or aſſiſt in forging the name or hand of any of the caſhiers "to any inſtrument or writing whatſoever, for and in order "to obtain the property of any of the ſuitors of the court of "chancery; or any inſtrument or writing made by any of the "ſaid caſhiers with intention to defraud any perſon whatſo-"ever ſhall ſuffer death without clergy."

Moor 666. Shaw 135.

† *Sect.* 4. And it is further enacted by 15 Geo. 2. c. 13. ſ. 11. "That whoever ſhall alter any bank-note, bank-"bill, dividend, warrant, bond or obligation under the com-"mon ſeal of the bank of England, or any indorſement there-"on, or ſhall offer to, or diſpoſe of, or put away the ſame, "or ſhall demand the money, or any part thereof of the "ſaid company, their ſervants, or other perſon knowingly, "to defraud the ſaid company, their ſucceſſors, or any other "perſon, ſhall ſuffer death without clergy."

† *Sect.* 5. And whereas frauds have been committed by forging the notes and bills of the governor and company of the bank of England, notwithſtanding the ſtatutes now in force for puniſhing and ſuppreſſing the ſame, it is therefore enacted by 13 Geo. 3. c. 79. "That whoever (other than "the officers or agents of the ſaid company authoriſed, ap-"pointed and employed for that purpoſe) ſhall make or uſe, "or cauſe or procure to be made or uſed, or knowingly aid "or aſſiſt in the making or uſing; or (without being autho-"riſed as aforeſaid) ſhall knowingly have in their cuſtody or "poſſeſſion *(without lawful excuſe, the proof whereof ſhall*

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" lie upon the perſon accuſed) any frame, mould, or inſtru-
" ment, for the making of paper with the words *Bank of Eng-*
" *land* viſible in the ſubſtance of ſuch paper; or ſhall make
" or cauſe or procure to be made, or knowingly aid or aſſiſt
" in the making any paper in the ſubſtance of which the ſaid
" words *Bank of England* ſhall be viſible—or if any perſon
" (except as before excepted) ſhall by any art, myſtery, or
" contrivance cauſe or procure the ſaid words *Bank of England*
" to appear in the ſubſtance of any paper whatſoever, ſhall
" ſuffer death without benefit of clergy."

† *Sect.* 6. And by par. 2. " Whoever, without being au-
" thoriſed as aforeſaid, ſhall engrave, cut, etch, or ſcrape in
" mezzotinto, or ſhall cauſe or procure the ſame to be done,
" or ſhall aid or aſſiſt in ſo doing, in or upon any plate of
" copper, braſs, ſteel, pewter, or of any other metal, or mix-
" ture of metals, or upon wood or any other material, or any
" plate whatſoever, any promiſſory note, inland bill, or bill of
" exchange, or blank promiſſory note, inland bill, or bill of
" exchange, or part of the ſame containing the words *Bank*
" *of England*, or *Bank poſt bill*, or any word or words expreſ-
" ſing the ſum or amount, or any part of the ſum or amount
" of ſuch promiſſory note, inland bill, or bill of exchange,
" in white letters or figures on a black ground; or ſhall uſe
" any ſuch plate ſo engraved, or any other inſtrument for
" the making or printing of ſuch promiſſory note, &c.—or
" ſhall knowingly have in their cuſtody any ſuch plate or in-
" ſtrument, or ſhall knowingly and wilfully utter any ſuch
" promiſſory note, &c. ſhall be committed to the common
" gaol of the county or place where the offence ſhall be com-
" mitted, for any ſpace not exceeding ſix months.—But this
" act ſhall not extend to perſons carrying ſuch notes for pay-
" ment, &c."

† *Sect.* 7. Secondly, As to counterfeiters of exchequer-bills, it is enacted by 25 Geo. 3. c. 2. " That if any perſon
" or perſons ſhall forge or counterfeit any exchequer-bill
" which ſhall have been made forth by virtue of this act, be-
" fore the ſame ſhall be paid off and cancelled, or any exche-
" quer-bills to be received or made forth in purſuance of
" this act, or any indorſement or writing thereupon or there-
" in, or tender in payment any ſuch forged or counterfeit
" bill, or any exchequer-bill with ſuch counterfeit indorſe-
" ment or writing thereon, or ſhall demand to have ſuch
" counterfeit bill, or any ſuch exchequer-bill with ſuch coun-
" terfeit indorſement or writing thereon or therein, exchang-
" ed for ready money by any perſon or perſons, body or
" bodies politick or corporate, who ſhall be obliged or re-
" quired to exchange the ſame, or by any other perſon or
" perſons whatſoever, knowing the bill ſo tendered in payment
" or demanded to be exchanged, or the indorſement or
" writing thereupon or therein to be forged or counterfeited,

" and

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" and with intent to defraud his majeſty, his heirs and ſucceſſors, or the perſons to be appointed to pay off the ſame, or any of them, or to pay any intereſt thereupon, or the perſon or perſons, body or bodies politick or corporate, who ſhall contract to circulate or exchange the ſame, or any of them, or any other perſon or perſons, body or bodies politick or corporate, then every ſuch perſon or perſons ſo offending, being thereof lawfully convicted, ſhall be adjudged a felon, and ſhall ſuffer as in caſes of felony without benefit of clergy."

† *Sect.* 8. By 9 Geo. 1. c. 12. for the more eaſy transferring certain exchequer annuities, " Whoever ſhall forge or counterfeit, or ſhall procure, &c. or aid in the forging or counterfeiting any order made forth in purſuance of this act, or of the 6 Geo. 1. c. 11. 6 Geo. 1. c. 17. 7 Geo. 1. c. 30. 8 Geo. 1. c. 20. or any aſſignment of ſuch order, or of the annuities payable thereon, or of any receipt or diſcharge to the exchequer for the annuities due, or to grow due on ſuch order, or any authority to transfer ſuch order or annuities. Or ſhall forge, &c. the name of any of the proprietors, &c. or ſhall endeavour to receive ſuch annuities, or any part thereof, by virtue of ſuch forged authority, or ſhall perſonate any true and real proprietor of the ſaid orders, and receiving, or endeavouring to receive the money of ſuch proprietor, as if ſuch offender were the true and lawful owner thereof, ſhall be guilty of felony without clergy."

Vide alſo 4 Geo. 2. c. 9. 9 Geo. 2. c. 28. 11 Geo. 2. c. 29.

† *Sect.* 9. Thirdly, As to counterfeiters of ſtamps, it is enacted by 5 Will. & Mar. c. 21. ſ. 11. which is the firſt act upon the ſubject, " That whoever ſhall counterfeit or forge any ſtamp or mark, to reſemble any ſtamp or mark which ſhall be provided or made in purſuance of this act, or ſhall counterfeit or reſemble the impreſſion of the ſame upon any vellum, parchment, or paper, thereby to defraud their majeſties, their heirs and ſucceſſors, of any of the duties hereby granted, or ſhall utter, vend, or ſell any vellum, parchment or paper, with ſuch counterfeit mark or impreſſion thereupon, knowing ſuch mark or impreſſion to be counterfeited, ſhall ſuffer death without the benefit of clergy."

The following acts have alſo impoſed ſtamp duties, and contain the ſame clauſe againſt the forging or counterfeiting of them.
5 W. and M. c. 21.
6 Will. 3. c. 6.
6 Will. 3. c. 12.
7 Will. 3. c. 36.
8 Will. 3. c. 20.
9 Will. 3. c. 25.
9 Will 3. c. 44.
1 Ann. c. 13.

1 Ann. ſ. 2. c. 22. 4 Ann. c. 12. 4 Ann. c. 16. 5 Ann. c. 8. 5 Ann. c. 19. 6 Ann. c. 5. 8 Ann. c. 9. 9 Ann. c. 21. 9 Ann. c. 23. 10 Ann. c. 19. 10 Ann. c. 26. 12 Ann. ſ. 1. c. 2. 11 Ann. ſ. 2. c. 9. 1 Geo. 1. ſ. 2. c. 12. 3 Geo. 1. c. 9. 5 Geo. 1. c. 19. 6 Geo. 1. c. 4. 6 Geo. 1. c. 21. 11 Geo. 1. c. 8. 11 Geo. 1. c. 30. 11 Geo. 1. c. 33. 2 Geo. 2. c. 23. 9 Geo. 2. c. 32. 11 Geo. 2. c. 19. 16 Geo. 2. c. 26. 18 Geo. 2. c. 22. 20 Geo. 2. c. 45. 23 Geo. 2. c. 25. 23 Geo. 2. c. 26. 29 Geo. 2. c. 12. 29 Geo. 2. c. 13. 30 Geo. 2. c. 19. 30 Geo. 2. c. 35. 2 Geo. 3. c. 36. 5 Geo. 3. c. 35. 5 Geo. 3. c. 46. 5 Geo. 3. c. 47. 6 Geo. 3. c. 46. 7 Geo. 3. c. 44. 8 Geo. 3. 25. 12 Geo. 3. c. 48. 13 Geo. 3. c. 65. 16 Geo. 3. c. 34. 17 Geo. 3 c. 50. 19 Geo. 3. c. 66. 20 Geo. 3. c. 28. 21 Geo. 3. c. 66. 22 Geo. 3. c. 33. 23 Geo. 3. c. 49. 23 Geo. 3. c. 58. 23 Geo. 3. c. 67. 24 Geo. 3. c. 7. 25 Geo. 3. c. 50.

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† *Sect.* 10. But by 13 Geo. 3. c. 56. "Whoever ſhall caſt, forge, or counterfeit any mark or ſtamp (*a*) uſed for making of gold and ſilver plate, in purſuance of 12 Geo. 2. c. 26. or any other act, or ſhall counterfeit any ſtamps or impreſſion to reſemble that uſed by the goldſmiths company, or ſhall tranſpoſe the ſame from one piece of wrought plate to another, or to any piece of baſe metal, or ſhall ſell, exchange, or expoſe to ſale, or export out of this kingdom any wrought plate of gold or ſilver, or any veſſel of baſe metal, with ſuch counterfeited mark thereon, or any mark, ſtamp, or impreſſion which ſhall have been tranſpoſed or removed from any other piece of plate, or be poſſeſſed of any mark or ſtamp which ſhall be forged in imitation as aforeſaid, their procurers, &c. ſhall be tranſported for fourteen years.—And by 24 Geo. 3. c. 53. ſect. 16. to commit this offence in the manner deſcribed by that act, is felony without benefit of clergy."

(*a*) One of the marks is a lion *paſſant*; if therefore an indictment deſcribe the lion to be *rampant*, it is vicious, and the priſoner muſt be acquitted. O. B. 1786, p. 790.

By the 24 Geo. 3. c. 20. the manufactures of Sheffield are excluded from the operation of this act, under the regulation therein mentioned.

† *Sect.* 11. Fourthly, As to counterfeiters of South-ſea bonds, it is enacted by 9 Annæ 21. c. 27. ſ. 51. "That if any perſon or perſons ſhall forge or counterfeit the common ſeal of the South-ſea company; or ſhall forge, counterfeit, or alter any bond or obligation under the common ſeal of the ſaid company, or ſhall offer to diſpoſe of, or pay away any ſuch forged, counterfeited, or altered bond, (knowing the ſame to be ſuch) or ſhall demand the money therein contained, or pretended to be due thereon, or any part thereof, of the ſaid company, or any of their officers, knowing the ſame to be forged, counterfeited or altered, with intent to defraud the ſaid company, or any other perſon or perſons, every ſuch offender ſhall ſuffer as a felon without the benefit of clergy."

6 Geo. 1. c. 4. ſ. 56.
6 Geo. 1. c. 11. ſ. 50.
12 Geo. 1. c. 32. ſ. 9.

† By 8 Geo. 1. c. 22. "Whoever ſhall forge or counterfeit, or procure to be forged or counterfeited, or ſhall knowingly and wilfully aid or aſſiſt in the forging or counterfeiting any letter of attorney, or other authority or inſtrument to transfer, aſſign, ſell, or convey any ſhare or part thereof in any capital ſtock and funds of the South-ſea company; or to receive any South-ſea annuity or dividend, or any part thereof;—or ſhall forge or counterfeit, or procure to be forged or counterfeited, or ſhall knowingly and wilfully aid or aſſiſt in the forging or counterfeiting the name of any of the proprietors of any ſuch ſhare in ſtock, or of any perſons intitled to any ſuch annuity or dividend, or to any ſuch pretended letter of attorney, inſtrument, or authority;—or ſhall knowingly and fraudulently demand, or endeavour to have any ſuch ſhare or ſtock, or any part thereof transferred, aſſigned, ſold, or conveyed, or ſuch annuity or dividend, or any part thereof to be received by

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"by virtue of any ſuch counterfeit or forged letter of attorney, authority, or inſtrument; — or ſhall perſonate any true and real proprietor of the ſaid ſhares, annuities or dividends, and thereby receive, or endeavour to receive the money for the ſame, as if ſuch offender were the lawful owner thereof, ſhall be guilty of felony without clergy."

† *Sect.* 12. Fifthly, As to counterfeiters of lottery orders, it is enacted by 25 Geo. 3 c. 57. "That if any perſon or perſons ſhall forge or counterfeit, or cauſe or procure to be forged or counterfeited, or willingly act or aſſiſt in the forging or counterfeiting any ticket or tickets, certificate or certificates, order or orders, made forth by virtue of this preſent act, or any former act made for eſtabliſhing any lottery or lotteries, or altering any number, figure, or word therein, or utter, vend, barter, or diſpoſe of any ſuch falſe, altered, forged, or counterfeited ticket or tickets, certificate or certificates, order or orders; or ſhall bring any ſuch forged or counterfeited ticket, certificate, or order, or any ſuch ticket, certificate or order, the number whereof, or any figure or words therein ſhall have been altered (knowing the ſame to be ſuch) to the ſaid managers, or any of them, or to the caſhier or caſhiers, or accountant-general of the bank of England for the time being, or to any other perſon or perſons whatſoever, with a fraudulent intention; or ſhall willingly aid, abet, aſſent, hire, or command any perſon or perſons to commit ſuch offence or offences as aforeſaid, ſuch offenders ſhall ſuffer death without clergy."

† *Sect.* 13. And it is alſo enacted "That the managers and directors, or any two or more of them, are authoriſed, required and impowered to cauſe any perſon or perſons bringing or uttering ſuch forged or counterfeit ticket or tickets, certificate or certificates, as aforeſaid; or aiding, abetting, aſſiſting, hireing or commanding any perſon or perſons therein; to be apprehended, and to commit him, her, or them to Newgate, or to the county gaol.—And offenders (not in priſon) diſcovering perſons guilty, are intitled to a reward of fifty pounds, and a pardon."

† *Sect.* 14. Sixthly, As to other forgeries, It is enacted, By 6 Geo. 1. c. 18. ſ. 13. and 14 Geo. 2. c. 37. "Whoever ſhall forge or counterfeit the common ſeal of either the London, or the Royal Exchange Aſſurance corporations, or ſhall forge, counterfeit, or alter any policy, bill, bond or obligation under their common ſeal; or ſhall knowingly offer to diſpoſe of, or pay away any ſuch policy, bill, bond, or obligation; or ſhall demand the money for the ſame, or any part thereof, of or from ſuch of the ſame *corporations as ſhall be mentioned* or referred to therein,

For the offence of forging the teſtimonials of juſtices by a warrant ſubſcribing ſuch name or ſolicitor, vide ante. c. 42. ſ. 2.

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" therein, or any of their officers, ſhall ſuffer death without " clergy."

† *Sect.* 15. By 12 Geo. 1. c. 32. ſ. 9. " Whoever ſhall " forge or counterfeit, &c. the name or hand of the account- " ant-general, regiſter, clerk of the report-office in chancery, " in order to obtain the money of any of the ſuitors of the ſaid " court of chancery;—or any inſtrument or writing made " by ſuch accountant-general, regiſter or clerk, with intent " to obtain the money as aforeſaid;—or ſhall forge or coun- " terfeit any bond or obligation under the common ſeal of the " Eaſt-India company, or any indorſement or aſſignment " thereon, or ſhall knowingly publiſh the ſame, with intention " to defraud any perſon whatſoever, ſhall ſuffer death without " clergy."

Vide O.B. 1784, p. 241. O. B. 1785, p. 654.

† *Sect.* 16. By 2 Geo. 2. c. 25. made perpetual by 9 Geo. 2. c. 18, " Whoever ſhall falſly make, forge, or counter- " feit, or ſhall cauſe or procure, &c. or ſhall wilfully act or " aſſiſt in falſly making, forging, or counterfeiting any deed, (1) " will, teſtament, bond, writing obligatory, bill of exchange, " promiſſory note for the payment of money, indorſement or " aſſignment of any bill of exchange, or promiſſory note for " the payment of money, (2) or any acquittance or receipt either " (3) for money or goods, with intention to defraud any perſon " whatſoever, and by 31 Geo. 2. c. 22. ſ. 78. with intention " to defraud any corporation whatſoever; or ſhall, with the " like intent, knowingly utter or publiſh the ſame as true, " ſhall ſuffer death without clergy."

(1) A deed, forged in the name of a perſon who never had exiſtence, is within the ſtatute; for the ſtatute doth not uſe the words *the dead of any perſon*, or the *deed of another*, or any words of the like import, but *any deed*. Lord Coke's deſcription of forgery, 3 Inſt. 169, viz. " When the act is done in the name of another perſon," is apparently too narrow, and taketh in only that ſpecies of forgery which is moſt commonly practiſed; but there are many other ſpecies of forgery which will not come within the letter of that deſcription. Foſter 116. So alſo where a perſon in poſſeſſion of a promiſſory note, which had been loſt, indorſes it in a fictitious name in order to get it diſcounted, he is guilty of forgery. Rex v. Tuſt, Leiceſter Lent Aſſizes, 1777. M.S.

(2) At Kent Summer Aſſ. 1777. James Elliot was indicted, among other counts, " For forging a promiſſory note for the payment of money, with intention to defraud the Bank, &c." It was intended to counterfeit a bank note, but the inſertion of the word " pounds" was omitted to be put after the ſum; the £. however, was placed as uſual at the corner; there was no water mark, " Bank of England," and the paper was of a thicker quality. The jury thought the ſum mentioned meant pounds, and the priſoner was found guilty. It was objected that it was not a note for the payment of money, becauſe the word deſcriptive of money was omitted. Secondly, That the water mark not being in it, it could not be intended to defraud a corporation. On reference the judges held the conviction good, for that perfect ſimilitude is not neceſſary, but if made with an aptneſs to impoſe, it is ſufficient. The water mark is not eſſential, for the Bank are not obliged to uſe it, and it is enough if the tenor of the note imports a promiſe from the corporation to pay. Trin. Term, 17 Geo. 3. M.S.

(3) In ſetting out a forged receipt in an indictment upon this act, the words " as follows" is a ſufficient averment that the tenor of it is ſet out. And it is only neceſſary to aver a general intent to defraud, without ſtating the manner in which the fraud was to be accompliſhed. Rex v. Powel. Black. 787. So alſo in forgery of a will, it is not neceſſary to charge the priſoner with forging *the laſt will, &c.* To charge it " a paper writing, purporting to be the laſt will, &c." is ſufficient. 2 *Black.* 730.

† *Sect.*

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† *Sect.* 17. By 4 Geo. 2. c. 18. "Whoever ſhall forge, "&c. &c. any paſs, commonly called a Mediterranean paſs, "for any ſhip whatſoever, or ſhall counterfeit the ſeal of of- "fice, or the hand of the lord high admiral, or of any of "the commiſſioners of the ſaid office, to any ſuch paſs;—or "ſhall alter any true paſs made out by the admiralty, or ſhall "knowingly utter and publiſh the ſame as true; the offence "may be tried in any county, and the offender ſhall ſuffer "death without clergy."

† *Sect.* 18. By 7 Geo. 2. c. 22. "whoever ſhall falſly "make, alter, forge, or counterfeit, or cauſe or procure, &c. "or ſhall act or aſſiſt in falſly making, altering, forging, or "counterfeiting any acceptance of any bill of exchange, or "the number or principal ſum of any accountable receipt for "any note, bill, or other ſecurity for the payment of money, "or any warrant or order for payment of money, or delivery "of goods, (4) with intention to defraud any perſon whatſoever; "(and by 18 Geo 3. c. 18. with intention to defraud any "corporation whatſoever)—or ſhall, with the ſame intent, "knowingly utter or publiſh the ſame as true, ſhall ſuffer "death without clergy." O. B. 1784, p. 277, 1011.

(4) A forged order to a ſhop-keeper to let the bearer have goods, concluding "and I will ſee it all paid for," is not a warrant or order within the meaning of this act; for the perſon ſuppoſed to give ſuch warrant or order ſhould have, or claim at leaſt an intereſt in the money or goods which are the ſubject matter of the order. Foſter 120.—So in the caſe of George Williams, at Southampton ſummer circuit, 1775, for forging an order upon Mr. Guildmare, of Goſport, in the name of William Robinſon, for the delivery of twelve barrels of tar; the judges were all of opinion, that, upon the authority of the caſe in Foſter, that it was not within the ſtatute, though moſt of them ſaid, had it been *res integra*, they would have thought otherwiſe.—So, "Pleaſe to ſend ten pounds by the bearer, as I am ſo ill I cannot wait upon you," is not an order within the meaning of the ſtatute. For it is not compulſory; nor ſuch an order, as the party giving it, if genuine, had a right to make. O. B. 1783, p. 835.—But where a perſon having delivered a parcel of ſilver goods to the Goldſmiths company to be aſſayed, two perſons took an opportunity to obtain them by a forged order in the name of the owner, ſuch order is within the ſtatute. O. B. 1784, p. 1271. So alſo where a man purchaſes goods, and takes a ſmall part of them away with him, and coming afterwards to pay for them, receives money in difference out of a draft, ſigned in the name of a perſon unknown, who did not keep caſh with the banker to whom it was directed, all the judges were of opinion it is within the ſtatute. Rex v. Lockett, 1773. M.S.

† *Sect.* 19. By 8 Geo. 2. c. 6. ſ. 31. "Whoever ſhall "forge or counterfeit any entry of the acknowledgment of "any bargainor, in bargain and ſale, in the regiſtry of "York, whereby the freehold or inheritance of any perſon "ſhall be moleſted, ſhall incur the penalties of 5 Eliz."

† *Sect.* 20. By the marriage act 26 Geo. 2. c. 33. ſ. 16. "Whoever with intent to elude the force of this act, ſhall in- "ſert, or cauſe to be inſerted in the regiſter-book, any falſe "entry of any matter or thing relating to any marriage, or "ſhall falſe make, alter, forge, or counterfeit any ſuch entry in "ſuch regiſter,—or any licence of marriage,—or ſhall cauſe "or procure the ſame to be done, &c. or ſhall utter or pub- "liſh the ſame as true,—or ſhall deſtroy any regiſter-book of

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" marriages, with intent to avoid any marriage, or to ſubject " any perſon to the penalties of this act."

By 9 Geo. 3. c. 30. ſ. 5. the treaſurer, comptroller, ſurveyor, clerk of the acts, or any commiſſioner of the navy may act as juſtice, in cauſing the offenders to be apprehended and brought to juſtice; and all officers ſhall obey their warrants accordingly.

O. B. 1784, p. 98.

† *Sect.* 21. By 31 Geo. 2. c. 10. ſ. 24. " Whoever ſhall " perſonate or falſly aſſume the name or character of any of- " ficer, ſeaman, or other perſon, intitled or ſuppoſed to be " intitled to any wages, pay, or other allowance of money, " or prize-money, for ſervices done on board any of his ma- " jeſty's ſhips, or the executor, adminiſtrator, wife, relation " or creditor of any ſuch officer, ſeaman, or other perſon, in " order to receive any of the monies ſo due to ſuch perſon, " and payable for ſuch ſervices as aforeſaid; or ſhall forge or " counterfeit any letter of attorney, bill, ticket, certificate, " aſſignment, laſt will, (5) or any other power or authority what- " ſoever, in order to receive any the monies ſo due to ſuch " perſon, and payable for ſuch ſervices as aforeſaid; or ſhall " take a falſe oath to obtain the probate of any will or letters " of adminiſtration in order to receive the payment of any the " monies as aforeſaid; or ſhall cauſe or procure any of the " ſaid offences to be committed, ſhall ſuffer death without " clergy."

(5) But the production of the probate is concluſive evidence in ſupport of the will. Rex v. Vinant, Mich. 8 Geo. Strange 481, 671, 703. Wils. 75. 11 St. Tr. 213, 219, 233. 1 Vezey 219, 284.

† And by the 9 Geo. 3. c. 30. ſ. 6. " Whoever ſhall know- " ingly utter or publiſh as true, any falſe, forged, or counter- " feited letter of attorney, bill, ticket, certificate, aſſignment, " laſt will, or any other power or authority, in order to re- " ceive the monies due to any officer, ſeaman, or other per- " ſon, who has really, or was ſuppoſed to have ſerved, &c. " with intent to defraud any perſon whatſoever, ſhall ſuffer " death without clergy."

† *Sect.* 22. By 31 Geo. 2. c. 22. ſ. 77. and 4 Geo. 3. c. 25. ſ. 15. " Whoever ſhall forge or counterfeit any letter

O. B. 1785, p. 689.

" of attorney, or other authority or inſtrument to transfer, " ſell, aſſign, or convey any ſhare, or part thereof, of, or in " any the capital ſtock or funds of any body politick or cor- " porate now eſtabliſhed, or which ſhall be eſtabliſhed by any " act of parliament; or to receive any dividend attending any " ſuch ſhare; or to receive any annuity in reſpect whereof " any proprietor ſhall have a transferrable ſhare; or ſhall

O. B. 1784, p. 227.

" forge or counterfeit the name of any proprietor of ſuch ſhare, " annuity, or dividend, or of any the perſons intitled to any ſuch " annuity or dividend, in or to any ſuch pretended letter of " attorney, inſtrument, or authority; or ſhall demand to have " any ſuch ſhare, or part thereof, transferred, aſſigned, ſold, " or conveyed, or any ſuch annuity, dividend, or part there- " of, to be received by virtue of ſuch forged authority; or " ſhall perſonate any true and real proprietor, (5) and thereby en-

(5) The proprietor whoſe ſtock is transferred by ſuch

" deavour

" deavour to receive the money of ſuch proprietor, as if ſuch " offender were the true and lawful owner thereof; or ſhall " procure or aid the commiſſion of any of the ſaid offences, " ſhall ſuffer death without clergy."

forged power of attorney, is not an admiſſable witneſs to prove the forgery. 2 Strange 728.

† *Sect.* 23. By 32 Geo. 2. c. 14. ſ. 9. " Whoever ſhall " forge or counterfeit the mark or hand of the receiver of the " poſt fines due to the crown or its grantees, whereby ſuch " receiver ſhall be defrauded, or any other perſon ſuffer loſs, " or ſhall procure the ſame to be done, ſhall ſuffer death with- " out clergy."

† *Sect.* 24. By 3 Geo. 3. c. 16. " Whoever ſhall perſonate, " or falſely aſſume the name and character of an out-penſioner " of Greenwich hoſpital, in order to receive the out penſion " due to him, or to procure any other to do the ſame, ſhall " be guilty of felony without clergy."

† *Sect.* 25. By 4 Geo. 3. c. 24. ſ. 8. " Whoever ſhall " counterfeit the hand writing of any perſon whatſoever, in the " ſuperſcription of any letter or packet to be ſent by the poſt, " in order to avoid the payment of the duty of poſtage, ſhall " be guilty of felony, and tranſported for ſeven years.

And by Sect. 2. if any officer miſuſe the ſeal of the office he ſhall forfeit five pounds.

IN FORGERY it is incumbent on the proſecutor to give the beſt evidence the caſe admits of, to prove that the forgery charged upon the priſoner is not the hand writing of the perſon whoſe deed or inſtrument it purports to be, before the priſoner ſhall be put upon his defence; and conſequently this proof will become more or leſs difficult in proportion as the perſon, whoſe name or writing is charged to be forged, is more or leſs defined and identified, either by the inſtrument itſelf, or by the repreſentation of the party uttering it. Therefore, where Sponſonby was indicted for forging the name of Pearce, the payee, on the back of a bill drawn by Davis, the court would not permit Pearce to ſay, although he had received advice of ſuch a bill being drawn in his favour, that he was the payee, in whoſe favour Davis had drawn the bill, becauſe Pearce may be the name of many others, who by poſſibility might have indorſed the bill, and as Davis was not preſent to define or identify the payee, the priſoner was diſcharged. O. B. 1784, p. 831. and 1015. So alſo where the name of John Churchill was forged on the back of a bill, the proſecutor proved the hand writing of the drawer, and produced one Henry Churchill, brother to *a* Mr. John Churchill, who ſwore the indorſement was not his brother's hand writing; yet as he could not prove that his brother was the identical perſon to whom the bill was made payable, the evidence was rejected. O. B. 1784, p. 1015. But where the indictment ſtated that the inſtrument forged, " purported to be a bank note," but, in fact, it was very different, and diſtinguiſhable from that ſecurity, the court held that the defect could not be ſupplied, ſo as to ſupport the indictment, by any repreſentations of the party at the time he uttered it. Douglas 300.

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# APPENDIX THE FIRST.

## OF OFFENCES AGAINST PROPERTY ADHERENT TO THE FREEHOLD.

Vide the recital of 43 Eliz. c. 7.

FORASMUCH as the unlawful cutting or taking away of corn growing, robbing of orchards and gardens, digging up or taking away fruit trees, breaking of hedges, pales, or other fences, cutting or ſpoiling of woods or underwoods, and other offences of a ſimilar nature, have become more frequent and common than heretofore.

(a) Vide 37 Hen. 8. c. 6. ſ. 4. In a conviction upon this ſtatute the number and the nature of the trees muſt be ſet forth, 1 Salk. 381. Comy. 131. And a gentleman is within the act if he commits the offences. Ld. Ray. 901. So alſo the manner of ſtealing muſt be ſtated, that the court may judge whether felonious or not, or whether the money ordered to be paid was an adequate recompence to the party injured. Sayer 204, 205.

† *Sect.* 1. It is enacted by 43 Eliz. c. 7. *(a)* "That whoever ſhall cut or unlawfully take away any corn or grain "growing, or rob any orchards or gardens, or break or cut "any hedge, pales, rails, or fence, or dig up or take up any "fruit tree, or trees in any orchard, garden, or elſewhere, "to the intent to take and carry the ſame away, or ſhall cut "or ſpoil any woods or underwoods, poles or trees ſtanding, "not being felony by the laws of this realm, and their pro"curers, receivers, knowing the ſame, on conviction by con"feſſion, or the oath of one witneſs, before one magiſtrate, "ſhall make compenſation at the diſcretion of the magiſtrate, "or be publicly whipped." And by 15 Car. 2. c. 2. The conſtable may ſearch the houſes of ſuſpected wood ſtealers, and carry offenders before a juſtice, and if they do not "then and there give a ſatisfactory account how they came by the wood ſo found in their poſſeſſion," they ſhall be adjudged as convicted of the offences, and liable to the puniſhments of the 43d of Eliz.

Vide Rex v. Aſton, in a conviction upon this ſtatute, "Igitur confideratum eſt per me, *quod convictus eſt*," and the court held there ought to be a judgment quod *ſoris facias* or quod *commiſſum*, &c." for the act gives no *pecuniary* forfeiture. 2 Burr. 1166.

† *Sect.* 2. And it is farther enacted by 1 Geo. 1. c. 48. "That whoever ſhall malicioufly break down, cut up, pluck "up, throw down, bark, or otherwiſe deſtroy, deface, or "ſpoil any timber tree, fruit tree, or any other tree, on con"viction by any two juſtices of the place, or by the juſtices "in ſeſſions, on complaint to them made by an inhabitant "or the owner, &c. ſhall be kept to hard labour for three "months, and whipped once a month; or if there be no "houſe of correction, to any other priſon for four months, "and whipped once in every month by the common hang"man, and afterwards find ſureties for their good behaviour "for two years, and the party grieved may recover damages "and coſts from the inhabitants of the pariſh, &c. in the

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" ſame manner and form as is directed by the 13 Edw. 1. " ſt. 1. c. 46. *(a)* for hedges and dykes overthrown by " perſons in the night, unleſs the offender be convicted in " ſix months by the pariſh."

*(a)* Vide ch. 50, ſect. 1.

† *Sect.* 3. And it is further enacted by 6 Geo. 1. c. 16. " That whoever ſhall cut, take, deſtroy, break, throw down, " bark, pluck up, burn, deface, ſpoil, or carry away any " wood ſprings, trees, poles, wood, tops of trees, underwoods, " coppice woods, thorns or quickſets, without the conſent of " the owner, or perſon chiefly entruſted with the care and " cuſtody thereof, ſhall, on conviction by two juſtices, or " at ſeſſions, be liable to the ſame penalties and puniſhments " as are inflicted by 1 Geo. 1. ſ. 2. c. 48. which conviction " ſhall be final;—and unleſs the ſame be had within ſix " months, ſuch lords of manors, owners and proprietors who " ſhall be injured by the offence, ſhall have ſuch remedy and " receive ſuch compenſation from the pariſhes or places join- " ing on ſuch wood ſprings, &c. as is directed by 13 Edw. 1. " ſ. 1. c. 46."

Vide 4 Burn's Juſtice, 399.

Vide 29 Geo. 2. c. 36. ſ. 8. for ſtealing or deſtroying trees growing in any waſte thereby directed to be incloſed.

† *Sect.* 4. And by the Black act 9 Geo. 1. c. 22. " Whoever ſhall cut down, or otherwiſe deſtroy any trees planted " in any avenue, or growing in any garden, orchard, or " plantation, for ornament, ſhelter, or profit; or ſhall forci- " bly reſcue any perſon in lawful cuſtody for the ſame; or " ſhall by gift, or promiſe of money, or other reward, pro- " cure any of his majeſty's ſubjects to join him or them in " any ſuch unlawful act, ſhall ſuffer death without benefit of " clergy."

† *Sect.* 5. And it is alſo enacted by 6 Geo. 3. c. 36. " That whoever ſhall, in the night time, lop, top, cut down, " break, throw down, bark, burn, or otherwiſe ſpoil or de- " ſtroy, or carry away any oak, beach, aſh, elm, fir, cheſnut, " or aſp timber tree, or by the 13 Geo. 3. c. 33. any pop- " lar, alder, maple, larch, or hornbeam, or other trees ſtand- " ing for timber, or likely to become timber, without the " conſent of the owner—Or ſhall in the night time pluck " up, dig up, break, ſpoil or deſtroy, or carry away, any " root, ſhrub, or plant, of the value of five ſhillings, and " which ſhall be growing, ſtanding, or being in the garden " ground, nurſery ground, or other incloſed ground of any " perſon whomſoever, and their aiders, abetters, or procurers, " and the buyers and receivers of the ſame, ſhall be tranſ- " ported for ſeven years."

O. B. 1784. p. 817. O. B. 1786. No. 116.

† *Sect.* 6. And it is further enacted by 6 Geo. 3. c. 48. " that whoever ſhall wilfully cut or break down, bark, burn, " pluck up, lop, top, crop, or otherwiſe deface, damage, " ſpoil or deſtroy, *or carry away any* timber tree, *viz.* oak,

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" beech, chefnut, walnut, aſh, elm, cedar, fir, aſp, lime,
(a) And by 13 Geo. 3. c. 33. poplar. alder, beach, maple, and hornbeam.
" ſycamore, and birch, (a) or any tree likely to become timber,
" or any part thereof, or the lops or tops thereof, without the
" conſent of the owner, or in any of his majeſty's foreſts or
" chaſes, without the conſent of the ſurveyor, his deputy, or
" perſon intruſted with the care of the ſame, on conviction
" by one witneſs before one juſtice, ſhall forfeit for the firſt
" offence, not exceeding twenty pounds, together with the
The coſts and charges muſt be definitely aſcertained and expreſſed in the conviction, or it will be fatal. Cowp. 60.
" coſts and charges previous to and attending ſuch conviction
" to be aſcertained by the juſtice convicting, and on non-
" payment ſhall be committed to the common gaol, for any
" time not exceeding twelve months, nor leſs than ſix, or un-
" til the penalty and charges ſhall be paid.—For the ſecond
" offence, any ſum not exceeding thirty pounds, and from
" twelve to eighteen months impriſonment as aforeſaid. And
" if any perſon ſo convicted ſhall be guilty of the like offence
Quere. Ought not theſe words " *in like manner*," to be omitted,"
" a third time, and ſhall be thereof convicted *in like manner*
" he ſhall be tranſported for ſeven years."

for can it be imagined that the legiſlature intended a juſtice of peace ſhould, in this ſummary manner, have power to tranſport an offender; and it ſeems implied by ſubſequent words in the act,—" that for the third offence he ſhould be tried by a jury."

† *Sect.* 7. And it is further enacted by the ſaid ſtatute, par. 3. " That whoever ſhall pluck up, or cut, ſpoil, or de-
" ſtroy, or take, or carry away, any root, ſhrub, or plant, out
" of the fields, nurſeries, gardens, or garden grounds, or
" other cultivated lands, of any perſon whomſoever, without
" the conſent of the owners, on conviction by one witneſs,
1 Hale 724. " before one juſtice, ſhall for the firſt offence forfeit not ex-
" ceeding forty ſhillings, together with the charges previous
" to and attending ſuch conviction, to be aſcertained by ſuch
" juſtice, or be committed to hard labour one month, and
" whipped. For the ſecond offence, not exceeding five pounds,
" &c. and hard labour for three months.—And if any perſon
" ſo before convicted ſhall a third time commit the like offence,
" and be thereof convicted, the court before whom he ſhall
" be tried, ſhall have authority to tranſport him for ſeven
" years."

† *Sect.* 8. And by par. 4. " Whoever ſhall go into any
" woods, underwoods, or wood grounds belonging to the
" king's ſubjects, and ſhall there cut, lop, top, or ſpoil, ſplit
" down, or damage, or otherwiſe deſtroy any kind of wood,
" or underwood, poles, ſticks of wood, green ſtubs, or
" young trees, or carry or convey away the ſame; or ſhall
" have in their cuſtody any kind of wood, underwood, poles,
" ſticks of wood, green ſtubs, or young trees, and ſhall not
" give a ſatisfactory account how they came by the ſame, on
" conviction by one witneſs, before one juſtice, ſhall forfeit
" for the firſt offence, and pay immediately on conviction,

" any

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" any ſum not exceeding forty ſhillings, with coſts and " charges as aforeſaid. For the ſecond offence, not exceed- " ing five pounds, &c. and for the third offence, being duly " convicted thereof according to law, ſhall be deemed and pu- " niſhed as an incorrigible rogue: *(a)* and whoever ſhall ob- " ſtruct the apprehending of offenders ſhall forfeit ten pounds, " or ſuffer ſix months hard labour in the houſe of correction."

*(a)* That is, by 17 Geo. 2. c. 5. ſ. 9. he may be committed by the ſeſſions to the houſe of correction, not exceeding two years, nor leſs than three months, to be kept to hard labour, and whipped as the juſtices ſhall order.

† *Sect.* 9. And it is further enacted by 9 Geo. 3. c. 41. ſ. 8. " That the clauſe laſt above recited, ſhall extend to all " his majeſty's foreſts and chaces within the realm, and to all " and every perſon or perſons who ſhall, without legal right " or authority, by night or by day, cut down, deſtroy, take, " carry, or convey away any hollies, thorns, or quickſets " growing or being upon any of the king's foreſts or chaſes, " or within the woods or wood-grounds of any of his ſub- " jects, or who ſhall poſſeſs any hollies, thorns, or quickſets, " and ſhall not give a ſatisfactory account of the ſame, &c. " The conviction to be certified to the general quarter ſeſ- " ſions, and not be liable to be quaſhed for want of form, or " removed by certiorari."

Vide 10 Geo. 3. c. 30. which remedies a miſrecital of the 6 Geo. 3. c. 36, and 48 in this act.

By 4 Geo. 3. c. 31. keepers may ſeize implements of deſtruction for his or their own uſe.

† *Sect.* 10. And it is enacted, by 29 Geo. 2. c. 36. ſ. 8. amended by 31 Geo. 2. c. 41. " That if any perſon ſhall " unlawfully cut, take, deſtroy, break, throw down, bark, " pluck up, burn, deface, ſpoil, or carry away any tree, " growing in any waſte, wood, or paſture, in which any per- " ſon or perſons, or bodies politick or corporate, hath, or " have a right of common, he ſhall incur the like penalty as " by 6 Geo. 1. c. 16."

*Sect.* 11. Alſo it is enacted by the 13 Geo. 3. c. 32. " That whoever ſhall ſteal and take away, or maliciouſly pull " up or deſtroy any turnips, potatoes, cabbages, parſnips, " peaſe, or carrots growing or being in any garden, lands, " or grounds, open or incloſed, on conviction within thirty " days, by confeſſion, or on the oath of one witneſs, before " one juſtice, ſhall forfeit, not exceeding ten ſhillings over " and above the value of the goods ſtolen, to be diſtributed " between, or wholly given to, the owner and the poor; " and on default of payment to be committed to the houſe of " correction not exceeding one month, unleſs ſooner paid. " The owner, or any inhabitant may be a witneſs, but if the " conviction lie upon the oath of the owner, the whole penalty " ſhall go to the poor. And by 31 Geo. 2. c. 35. ſ. 5. " the ſame puniſhment is inflicted upon the ſtealing of mad- " der roots."

" *Sect.*

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Stealing ore out of mines, is not larceny at common law. upon the ſame principle of adherence to the freehold. 4 Comm. 234.

*Sect.* 12. Alſo it is enacted by 25 Geo. 2. c. 10. "That whoever ſhall unlawfully break, or by force enter into any mine, wad-hole of wad, or black cawke, commonly called black lead, or into any pit, ſhaft, adit or vein of wad, black cawke, or black lead, with an intent to take and carry away from thence any wad, black cawke, or black lead; or ſhall unlawfully from thence take and carry away any wad, black cawke, or black lead, although ſuch mine, wad-hole, pit, ſhaft, adit, or vein be not actually broke, or by force entered into by ſuch offender; or ſhall aid, abet, aſſiſt, hire, or command any perſon or perſons to commit ſuch offences as aforeſaid, ſuch offenders ſhall be guilty of felony, and may be committed to the county gaol or houſe of correction for any time not exceeding a year, and publickly whipped; or tranſported for a term not exceeding ſeven years, as the court or judge ſhall think proper."

Vide 29 Geo. 2. c. 30. O. B. 1785. p. 824. Vide the caſe of the King v. Jane Carragan, tried before Glynn, recorder.

† *Sect.* 13. Alſo it is enacted by 4 Geo. 2. c. 32. "That whoever ſhall ſteal, rip, cut or break, with intent to ſteal any lead, iron bar, iron grate, iron palaſadoes, or iron rail whatſoever, being fixed to any dwelling houſe, out houſe, coach houſe, ſtable, or other building uſed or occupied with ſuch dwelling houſe, or thereunto belonging, or to any building whatſoever, (1) or fixed in any garden, orchard, court yard, fence, or outlet belonging to any dwelling houſe or other building; their aiders, abetters, and aſſiſters, or whoever ſhall knowingly buy or receive the ſame, ſhall be guilty of felony, and the court is empowered to tranſport ſuch felons for the ſpace of ſeven years."

(1) Hickman was indicted for ſtealing lead from Hendon Church, which was laid to be the property, Firſt, of the Vicar; Secondly, of the Church Wardens; Thirdly, of the inhabitants and pariſhioners. The property being fixed to the freehold, (vide ante. ch. 33. ſ. 21.) it was doubted whether it could be the ſubject of larceny; and if it could, whether the property reſided as laid in any of the counts in the indictment. The judges were of opinion, Firſt, that "a Church" is included within theſe general words of the act, "or any other building watſoever." Secondly, that the act having made the offence to conſiſt in "*ſtealing from any* dwelling houſe or other building, &c." the charge in the indictment, that it was *ſtole from Hendon Church*, was alone a certain and ſufficient deſcription of the offence to ſupport the indictment; that the reſidence of the property was immaterial; and that the conviction was proper upon the firſt count. O. B. 1785, p. 782.

† *Sect.* 14. And it is further enacted by 21 Geo. 3. c. 68. "Whoever ſhall rip, cut, break or remove, with intent to ſteal any copper, braſs, bell-metal, utenſil or fixture being fixed to any dwelling houſe, out houſe, coach houſe, ſtable, or other building uſed or occupied with ſuch dwelling houſe, or thereunto belonging, or to any other building whatſoever, or fixed in any garden, orchard, court yard, fence or outlet belonging to any dwelling houſe, or other building, —or any iron rails or fencing ſet up, or fixed in any ſquare, court, or other place (ſuch perſon having no title or claim of title thereto); or whoever ſhall be aiding, abetting, or aſſiſting therein, or ſhall knowingly buy or receive the

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" the ſame, although the principal felon has not been con-
" victed of ſtealing the ſame, ſhall be guilty of felony, and the
" court have power to tranſport ſuch offender for ſeven years,
" or to order him or them to be detained in priſon, and
" therein kept to hard labour for any time not exceeding three
" years, nor leſs than one year; and, within that time, if the
" court ſhall think fit, he ſhall be once, or oftener, but not
" more than three times, publicly whipped."

# APPENDIX THE SECOND.

## Of OFFENCES AGAINST SHIPS IN DISTRESS, AND BY PLUNDERERS OF THE WRECK.

† IT is enacted by 12 Ann. ſ. 2. c. 18. " That all magiſ-
" trates and officers of every county, corporation, and port
" town, near the ſea, on information of any ſhip being in
" diſtreſs, ſhall ſummon and call together as many civil offi-
" cers, cuſtom-houſe officers, and other men, as ſhall be thought
" neceſſary for the aſſiſtance and preſervation of the ſaid ſhip,
" and ſhall demand of the ſuperior officers of any ſhip or veſ-
" ſel which ſhall happen to be riding at anchor near the place,
" their aſſiſtance by their boats, and ſuch hands as they can
" ſpare, and on refuſal or neglect thereof, ſuch ſuperior officer
" ſhall forfeit one hundred pounds.—And it is further enacted,
" that if any other perſon than ſuch as ſhall be empowered
" by the magiſtrates as aforeſaid, ſhall enter or endeavour to
" enter on board any ſuch veſſel ſo in diſtreſs, without per-
" miſſion of ſome one ſo employed for the preſervation of the ſaid
" ſhip, ſuch offender may be repelled by force; and if any perſon
" ſhall obſtruct the preſervation, or deface the mark of any goods
" ſaved from the ſaid ſhip, he ſhall within twenty days make
" double ſatisfaction to the party grieved, at the diſcretion of
" the two next juſtices, or in default be committed to hard
" labour for twelve months.—And if any goods that were
" ſtolen or carried off from any ſuch ſhip or veſſel in diſtreſs,
" ſhall be found upon any perſon ſhall not on demand deliver
" up the ſame to the owner, or to his order, he ſhall forfeit
" treble the value."

Made perpetual by 4 Geo. 1. c. 12. but reſtrained from abridging the juriſdiction of the Cinque ports.

† *Sect.* 2. And it is likewiſe enacted by par. 5. " That
" if any perſon or perſons ſhall make, or be aſſiſting in the
" making of any hole in the bottom, ſide, or any other part
" of any ſhip or veſſel ſo in diſtreſs as aforeſaid, or ſhall ſteal
" any pump belonging *to any ſhip or veſſel* ſo in diſtreſs as
" *aforeſaid, or ſhall be aiding or abetting* in the ſtealing ſuch
" pump,

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" pump, or ſhall wilfully do any thing tending to the imme-
" diate loſs or deſtruction of ſuch ſhip or veſſel, ſuch offender
" ſhall ſuffer death without clergy."

† *Sect.* 3. It is alſo enacted by 26 Geo. 2. c. 19. " That
" if any perſon or perſons ſhall plunder, ſteal, take away, or
" deſtroy any goods or merchandize, or other effects from or
" belonging to any ſhip or veſſel which ſhall be in diſtreſs, or
" which ſhall be wrecked, loſt, ſtranded, or caſt on ſhore in
" any part of his majeſty's dominions, (whether any living
(a) Vide 9 Edw. 2. c. 4. 1 Comm. 290. " creature (*a*) be on board any ſuch veſſel or not) or any of
" the furniture, tackle, apparel, proviſion, or part of ſuch ſhip
" or veſſel; or ſhall beat or wound with intent to kill or de-
" ſtroy, or ſhall otherwiſe wilfully obſtruct the eſcape of any
" perſon endeavouring to ſave his or her life from ſuch ſhip or
" veſſel, or the wreck thereof; or if any perſon or perſons
" ſhall put out any falſe light or lights, with intention to
" bring any ſhip or veſſel into danger, ſuch offender ſhall
" ſuffer death without clergy.—Provided, that when goods or
" effects of ſmall value ſhall be ſtranded, loſt, or caſt on ſhore,
" and ſhall be ſtolen without circumſtances of cruelty, out-
" rage, or violence, the offender may be indicted and puniſh-
" ed as for petit larceny. The proſecutions to be carried on
" at the expence of the county, by the clerk of the peace,
" on pain of forfeiting 100l. for refuſing or neglecting the
" ſame."

† *Sect.* 4. And it is further enacted by the ſaid ſtatute,
par. 11, " That if any ſheriff, juſtice, mayor, magiſtrate,
" coroner, and lord of a manor, commiſſioners of the land-tax,
" conſtable, &c. or other perſon lawfully authoriſed, ſhall be
" aſſaulted, beaten, and wounded for, or on account of the
" exerciſe of his or their duty, in or concerning the ſalvage
" or preſervation of any ſhip or veſſel in diſtreſs; or of any
" ſhip or veſſel, goods or effects, ſtranded, wrecked, or caſt
" on ſhore, or lying under water in any of his majeſty's
" dominions, the offender on conviction at the goal delivery,
" or at the general or quarter ſeſſions, ſhall be tranſported for
" ſeven years."

† *Sect.* 5. And it is further enacted, par. 8, " That if the
" fact be committed in Wales, then the proſecution ſhall
" and may be carried on in the next adjoining Engliſh
" county."

At Salop ſummer aſſizes, 1774, Parry and Roberts were convicted upon this ſtatute, for an offence committed in Angleſea. It was moved, in arreſt of judgment, upon the laſt mentioned clauſe, that the trial was erroneous, becauſe Cheſhire, and not Salop, was the next adjoining Engliſh county to Angleſea. To give the priſoners the benefit of the objection, the fact was taken to be ſo; and the ſentence was reſpited. But all the judges were of opinion that the conviction was proper; for Cheſter, properly ſpeaking, is not an Engliſh county; and the words of the ſtatute, being merely a *deſcription of* the law as it exiſted at the time, muſt be conſtrued according to the 26 Hen. 8. c. 6. *ſ. 6. which gives* juriſdiction to the juſtices of gaol delivery, " in the counties *of England next adjoining*

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*joining to the* lordſhip or place in Wales where the offence is committed." It is true that 26 Geo. 2. c. 19. ſ. 8. does not go on to lay in the words of the 26 Hen. 8. "where the king's writ runneth." But the caſe of the King v. Athoe, reported in 8th Modern, ſhews it has been the conſtant practice ever ſince to conſider Salop as the next adjoining Engliſh county. M.S.

# APPENDIX THE THIRD.

## OF OFFENCES IN TAKING, KILLING, OR DESTROYING FISH.

† IT is enacted by 5 Eliz. c. 21. ſ. 2. "That whoever ſhall "break, cut down, cut out, or deſtroy any head or dam "of any ponds, pools, motes, ſtagnes, ſtews, or ſeveral pits "wherein fiſh are or ſhall happen to be put in or ſtored with- "al by the owners or poſſeſſors thereof; or do or ſhall wrong- "fully fiſh in any of the ſaid ſeveral ponds, pools, motes, "ſtews or pits, to the intent to deſtroy, kill, take, or ſteal "away any of the ſame fiſh, againſt the will of the owners, "ſhall ſuffer three months imprisonment, find ſecurity for his "good behaviour for ſeven years, and make compenſation to "the party grieved."

For the offence of treſpaſſing in ponds by endeavouring to take fiſh therein, vide 3 Edw. 1. c. 20. 2 Inſt. 200. vide alſo 31 Hen. 8. c. 2. where this offence was made felony.

† *Sect.* 2. And it is alſo enacted by 4 and 5 Will. 3. c. 23. ſ. 5. "That no perſon, except the owner or occupier of a "fiſhery, ſhall have or keep any net, angle, leep, piche, "or other engine for the taking of fiſh other than the "makers and ſellers thereof for their better conveni- "ency in the ſale of the ſame, and other than the owner and "occupier of any river or fiſhery for the time being;—and "the owner of any river or fiſhery, or his agent or agents, may "ſeize, detain, and keep to his own uſe, all ſuch nets, or "other engines which he ſhall find [illegible], or in the "cuſtody of any perſon whatſoever [illegible] any river or "fiſhery whatſoever, without the conſent of ſuch owner or oc- "cupier:—and any perſon being authoriſed by warrant under "the hand and ſeal of a juſtice [illegible] may "ſearch in the day time, the houſes [illegible] to "keep the ſame, who ſhall be ſuſpected [illegible], "and the ſame and every or any [illegible] "keep to his or their own uſe, or [illegible] "or deſtroy, as things by this act [illegible] "perſons of their degree.—But [illegible] "ermen, &c. authoriſed to fiſh in [illegible] "with lawful nets, &c."

† *Sect.* 3. And it is alſo enacted by 5 Eliz. c. 21. ſ. 7. "That whoever ſhall [illegible]

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" not whatſoever, or any angle, hair nooſe, trail or ſpear, " or ſhall lay any wears, pots, nets, fiſh-hooks, or other en- " gines, or ſhall take any fiſh by any means or device what- " ſoever, in any river, ſtew, pond, mote, or other ſeveral wa- " ters or rivers, or ſhall be aiding or aſſiſting thereunto, with- " out the conſent of the owner, on conviction by confeſſion, " or the oath of one witneſs within a month, before one juſ- " tice, ſhall render compenſation, not exceeding treble damages, " and over and above, pay down immediately any ſum not ex- " ceeding ten ſhillings, to the uſe of the poor, and on default " by diſtreſs, ſhall be impriſoned, not exceeding one month, " in the houſe of correction, unleſs the offender ſhall enter " into a bond to the party injured, with one ſurety not ex- " ceeding ten pounds, never to offend in like manner.—Juſ- " tices may ſeize the nets, &c. but the party may appeal to " the quarter ſeſſions, which ſhall be final, unleſs title to any " land, royalty, or fiſhery is concerned therein."

ſield declared that the offence provided againſt, is the ſtealing of fiſh; taking it without the leave or conſent of the owner. And the words *taking and killing* mean ſtealing It muſt therefore appear that the fiſh killed were not fiſh of the party's killing them, and that they were not killed in his own ponds. 2 Burr. 682.

† *Sect.* 4. And it is alſo further enacted by the Black act, 9 Geo. 1. c. 22. " That whoever being armed with ſwords, " fire arms, or other offenſive weapons, and having his or " their faces blacked, or being otherwiſe diſguiſed, ſhall un- " lawfully ſteal or take away any fiſh out of any river or pond, " or ſhall forcibly reſcue any perſon in lawful cuſtody for the ſame, " or ſhall by gift or promiſe of money or other reward, pro- " cure any of the king's ſubjects to join him or them in any " ſuch unlawful act, ſhall ſuffer death without clergy."

† *Sect.* 5. Alſo it is farther enacted by 5 Geo. 3. c. 14. " That whoever ſhall enter into any park or paddock fenced " in and incloſed, or into any garden, orchard, or yard, ad- " joining or belonging to any dwelling houſe, in or through " which park or paddock, garden, orchard, or yard, any " river, or ſtream of water ſhall run or be, or wherein ſhall " be any river, ſtream, pond, pool, moat, ſtew, or other " water, and by any ways, means, or device whatſoever, " ſhall ſteal, take, kill, or deſtroy any fiſh bred, kept, or pre- " ſerved therein, without the conſent of the owner thereof; " or ſhall be aiding or aſſiſting in committing the ſaid offence; " or ſhall receive or buy any ſuch fiſh knowingly, upon con- " viction by indictment within ſix months, before the juſtices " of gaol delivery where ſuch place ſhall be, ſhall be tranſ- " ported for ſeven years. And any offender making a diſ- " covery of, and convicting his accomplices, is intitled to a " pardon."

† *Sect.* 6. And it is further enacted by the ſaid ſtatute, par. 3, " That whoever ſhall take, kill, or deſtroy, or at- " tempt to take, kill or deſtroy, any fiſh in any river or " ſtream, pond, pool, or other water (not being in any park " or paddock, or in any garden, orchard, or yard, adjoining

" or

"or belonging to any dwelling houſe, but ſhall be in any "other incloſed ground which ſhall be private property) on "conviction by one witneſs, ſhall forfeit five pounds to the "owner for every offence, or be committed to the houſe of "correction not exceeding ſix months. Any one juſtice of "the place, upon complaint on oath, may iſſue his warrant "to bring the offender before him, and the owner may, at "any time within ſix months, recover the penalty by action "at law, &c. But by par. 5. nothing in this act ſhall extend "to any perſon who ſhall have a juſt right or claim to take, "kill, or carry away any ſuch fiſh as aforeſaid.

In a conviction on the above clauſe, the court declared that it ought to appear that the juſtice has juriſdiction; that the complaint was made by the owner; and that the fact was committed without his conſent. That it muſt alſo ſufficiently appear, upon oath, that the river, &c. was private property, and who was the owner of it; that the proviſo in the fifth ſection means to except ſuch perſons as have eſpecial right to fiſh in the fiſhery of another, and that if the owner is the complainer, it would be evidence of his diſſent. 4 Burr. 2282.

# APPENDIX THE FOURTH.

## OF OFFENCES BY INCENDIARIES.

THE CRIME of maliciouſly burning the houſe which another is in the poſſeſſion of, hath been already conſidered under the title ARSON (*a*); I ſhall therefore, in this chapter, recite what other offences, by MALICIOUS INCENDIARIES, are created felonies by ſtatute.

(*a*) Ante, page

† *Sect.* 1. And firſt, to repreſs the daring outrages that formerly prevailed upon the Northern borders of the kingdom, it is, amongſt other offences enacted by 43 Eliz. c. 13. ſ. 2. "That whoever ſhall willfully and of malice, burn or cauſe to "be burned, or aid, procure, or conſent to the burning of "any barn or ſtack of corn, or grain within *Cumberland*, "*Northumberland*, *Weſtmorland*, or *Durham*, ſhall, on con-"viction at the aſſizes, or general ſeſſion of the peace, ſuffer "the pains of death without benefit of clergy."

† *Sect.* 2. But theſe wicked courſes growing into frequent, and ſecret practice in ſeveral parts of the kingdom, it is enacted by 22 & 23 Car. 2. c. 7. "That if any perſon or perſons ſhall "*in the night time*, maliciouſly, unlawfully and willingly burn, "or cauſe to be burnt or deſtroyed, any ricks or ſtacks of "corn, hay, or grain; barns, or other houſes or buildings, "or kilns, the offenders ſhall ſuffer as in *caſes of felony*."

† *Sect.* 3. But this ſtatute having made the crimes therein mentioned, only ſingle felonies, and ſome doubt (*a*) remaining whether the crime of Arſon was not intitled to the benefit of clergy, it was thought expedient to *extend* (*b*) the proviſions of the 22 & 23 Car. 2. c. 7. and it is accordingly enacted. By 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 42. "That if any perſon or perſons ſhall ſet fire to any (1) houſe, "barn, or out-houſe, or to any hovel, cock, mow, or ſtack "of corn, ſtraw, hay, or wood; or ſhall forcibly reſcue any "perſon being in lawful cuſtody for the ſame; or ſhall by "gift, promiſe of money, or other reward procure another "to join him or them in any ſuch unlawful act, every perſon "ſo offending ſhall ſuffer death without clergy."—The perſons injured by this offence may ſue the hundred (2) to the amount of two hundred pounds, and a reward of fifty pounds is offered for apprehending, &c. the offender.

(*a*) Poulter's caſe, 11 Coke 29, and *dictum per* Gould, J. in the caſe of Rex v Breeme, 4 Comm. 223.

(*b*) Vide 2 Black. 722.

(1) A priſon, the entrance to which is through a dwelling houſe, is fully within this act, Rex v. Donnevan. Black. 682.

2 Str. 1247.

(2) The words wilfully and maliciouſly, are not inſerted in the above clauſe of the Black act; and it hath therefore been adjudged, that they need not be laid in a declaration againſt the hundred; for a declaration may follow the ſtatute, however imperfectly expreſſed. But the court thought it probable that an indictment, for the felony itſelf, muſt charge the offence to have been done wilfully and maliciouſly, for otherwiſe it is no crime. Black. 843.

Burning woods.

† *Sect.* 4. And to encourage and protect plantations of woods, It is enacted by 1 Geo. 1. ſt. 2. c. 48. ſ. 4. "That whoſoever ſhall maliciouſly ſet on fire, or burn, or "cauſe to be burned, any wood, underwood, or coppice, or "any part thereof, ſhall ſuffer and be liable to all the penal- "ties and forfeitures as felons by the law now are."

Firing coal-mines.

† *Sect.* 5. It is alſo enacted by 10 Geo. 2. c. 32. ſ. 6. "That whoever during the continuance of the before-men- "tioned act of 9 Geo. 1. ſhall wilfully and maliciouſly ſet on "fire, or cauſe to be ſet on fire, any mine, pit, or delph of "coal, or cannel coal, ſhall ſuffer death without clergy."

Burning mills.

† *Sect.* 6. It is enacted by 9 Geo. 3. c. 29. ſ. 2. "That "whoever ſhall wilfully or maliciouſly burn, or ſet fire to any "wind-ſaw-mill, or other wind-mill, or any water-mill, or "other mill, ſhall ſuffer death without benefit of clergy.— "Provided the proſecution be commenced within eighteen "months after the offence committed."

For the offence of throwing ſquibbs and fire-works, vide 10 & 11 Will. 3. c. 7. For burning garments with aqua fortis, &c. vide 6 Geo. 1. c. 23. App. 9. For burning private ſhips by officers and mariners vide ch. 43. ſect. 10. For burning the public property, as ſhips of war, magazines, ſtores, &c vide ch. 12. ſ. 13, 14. For burning houſes by the negligence of ſervants, vide ante, c. 53. For the offence of threatning to burn houſes, barns, &c. vide 27 Geo. 2. c. 15. For burning and deſtroying engines to draw water out of mines, 9 Geo. 3. c. 29. ſ. 3. For burning wains, or carts loaded, vide 37 Hen. 8. c. 6. ſ. 4. For burning the covert for the red and black game, 4 & 5 Will. and Mary, c. 23. ſ. 11. For burning the covert for preſerving deer, vide 23 Geo. 2. c. 19. ſ. 3.

APPEN-

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# APPENDIX THE FIFTH.

## OF SHOOTING AT ANOTHER, AND OF SENDING THREATENING LETTERS.

† IT is enacted by the Black act, 9 Geo. 1. c. 22. "That if "any perſon or perſons ſhall, wilfully and maliciouſly (1) "ſhoot at (2) any perſon in any dwelling houſe, or other "place; or ſhall forcibly reſcue any perſon in lawful cuſtody "for the ſaid offence; or ſhall by gift, or promiſe of money, "or other reward, procure any other to join with him or "them in ſuch unlawful act, ſuch offenders ſhall be adjudged "guilty of felony, (3) and ſuffer death without the benefit of "clergy."

Vide Arnold's caſe, 8 St. Tr. 290, for ſhooting at Lord Onſlow.

For the form of an Indictment upon this act, Cro. Cir. Comp. 155.

(1) It has alſo been *laid down*, by authority, that the word "maliciouſly" conſtitutes the eſſential part of the offence, and that no act of ſhooting will amount to felony by this ſtatute, unleſs, if death had enſued, ſuch homicide would have been murder. It follows, therefore, that neither an accidental ſhooting, which is neither wilful or malicious; nor a ſhooting in the intemperance of paſſion, upon ſuch a provocation, as would, in law, reduce the crime of homicide to manſlaughter, in which no malice can exiſt; are within the meaning of this ſtatute. O. B. 1786, p. 7, 8.

(2) There muſt be a ſhooting *at* the perſon to conſtitute this felony, O. B. 1781, No. 261. And the ſhooting muſt be with a gun, or other inſtrument, loaded with a leaden bullet, &c.

(3) It has alſo been *determined*, that this ſtatute creates a new felony, which conſequently poſſeſſes all the qualities incidental to a felony at common law. Therefore, if ſeveral perſons aſſociate in the purſuit of the ſame unlawful deſign, and only one of them ſhoot, they are all equally involved in his guilt; for the act of one being conſidered as the act of all, whoever is preſent aiding and aſſiſting, are adjudged principals in the ſecond degree. The Coal heaver's caſe.—At the Lent Aſſizes for Surry, 1785, Gibſon, Mutton, and Wiggs were tried upon two indictments, before Mr. Baron Perryn. The one for burglary, the other upon this ſtatute, and they were found guilty. Garrow moved in arreſt of judgment, and the ſentence was reſpited. But the priſoners having been convicted of the burglary, the judges never gave any opinion. In a caſe ſubſequent to this, however, where one only, among a number, had fired, and the evidence left it in doubt which it was; Mr. Juſtice Aſhhurſt directed the jury to conſider, Firſt, Whether the act of ſhooting *at* another had been committed; Secondly, Whether the priſoners were preſent aiding and aſſiſting; and on a reference, the judges were of opinion, upon the authority of the Coal heaver's caſe, which they recognized as good law, that the direction was proper, and the conviction right. M.S.

† *Sect.* 2. 'It is alſo enacted by the ſaid ſtatute, par. 14. "That every offence that ſhall be done or committed con- "trary to this act, ſhall and may be enquired of, examined, "tried and determined in any (4) county within England, in "ſuch manner and form as if the fact had been therein commit- "ted. But no attainder upon this act ſhall work corruption "of blood, (5) loſs of dower, or forfeiture.

(4) It was determined by the judges, in the caſe of the King v. Rich Martis, 11 Geo. 3. before Mr. Baron Eyre, that this clauſe gives to a *private* proſecutor the option of proceeding in any county; and that there is no neceſſity for a ſpecial commiſſion. M.S.—(5) An eſtate came to a convict on this act, and, as it ſaves corruption of blood, &c. a creditor was permitted to ſerve him with a latitat, in order to obtain a judgment for his debts. Hard. Rep. 1572.

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Threatening letter.

† *Sect.* 3 It is alſo enacted by the ſaid ſtatute 9 Geo. 1. c. 22. "That if any perſon or perſons ſhall knowingly ſend any letter, without any name ſubſcribed thereto; or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing; or ſhall forcibly reſcue any perſon being lawfully in cuſtody of any officer or other perſon for the offences aforeſaid; or ſhall by gift, or promiſe of money or other reward, procure another to join him or them in any ſuch unlawful act, ſuch offender ſhall ſuffer death without benefit of clergy."

For the form of an indictment for this offence, vide Cro. Cir. Com. 153.

1 Burn. 293. O. B. 1785, p. 219. 1 Hale, 567.

† *Sect.* 4. And it is enacted by 27 Geo. 2. c. 15. "That if any perſon or perſons ſhall knowingly (6) ſend any letter without any name ſubſcribed thereto, or ſigned with a fictitious name or names, letter or letters, threatening to kill or murder any of his majeſty's ſubjects, or to burn their houſes, outhouſes, barns, ſtacks of corn or grain, hay or ſtraw, though no money or veniſon, or other valuable thing ſhall be demanded, in or by ſuch letter or letters, or ſhall forcibly reſcue any perſon in lawful cuſtody for the ſame, ſuch offender ſhall ſuffer death without benefit of clergy."

(6) It has been determined, that proof of the priſoners merely delivering a letter of this kind, to another, without any intimation of what was contained in it, for the purpoſe of its being conveyed to the proſecutor, is ſufficient evidence of his ſending it, *knowing the contents*.—And that the offence may be tried by a jury of the county in which the letter was delivered to the proſecutor, although the original delivery, for the purpoſe of conveying it to him, was in a different county. But it ſeems, that the threat contained in it, ſhould be conceived in expreſs and unequivocal terms, and not drawn from it by inference or implication. Rex v. Girdwood, O. B. February ſeſſions, 1776, upon the unanimous opinion of all the judges. M.S. For the threat is the gift of the offence. O. B. Dec. 1784.

No certiorari will lie upon this act to remove an indictment from the juſtices of Middleſex. Cowper 24.

For the offence of ſending a threatning letter to a maſter woolcomber, &c. &c. vide Intra. appendix 10. ſ. 8.

† *Sect.* 5. And it is further enacted by 30 Geo. 2. c. 24. "That all perſons who ſhall knowingly ſend or deliver any letter or writing, with or without a name or names ſubſcribed thereto, or ſigned with a fictitious name or names, letter or letters, threatening to accuſe any perſon of any crime puniſhable by the law with death, tranſportation, or pillory, or any other infamous puniſhment, with a view or intent to extort or gain money, goods, wares, or merchandizes, from the perſon or perſons ſo threatened to be accuſed, ſhall on conviction be put in the pillory, publicly whipped, or fined and impriſoned, or tranſported, not exceeding the ſpace of ſeven years, in the diſcretion of the court."

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# APPENDIX THE SIXTH.

## Of OFFENCES by SMUGGLERS.

† SMUGGLING conſiſts in bringing on ſhore, or in carrying from the ſhore, goods, wares, or merchandize, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited. This offence is productive of various miſchiefs to ſociety. The public revenue is thereby leſſened; the fair trader is injured; and the nation impoveriſhed; rival and perhaps hoſtile ſtates are thereby enriched; and the perſons guilty thereof, being hardened by a courſe of diſobedience to and defiance of law, behave ſo abandoned and daring as not to heſitate at being guilty of the greateſt offences. It is therefore reſtrained by a great variety of ſtatutes (*a*) which inflict pecuniary penalties, and ſeizure of the goods for clandeſtine ſmuggling; and affix the guilt of felony, with tranſportation for ſeven years, upon mere open daring and avowed practices. But the following ſtatute is, for this purpoſe, *inſtar omnium*.

4 Comm. 155. 4 Bac. Abr. 523, 543. 1 Comm. 317. Beccar. c. 33. 8 Mod. 5.

(*a*) 5 Geo. 1. c. 11. 6 Geo. 1. c. 21. 9 Geo. 2. c. 35. 13 & 14 Car. 2. c. 11. 8 Geo. 1. c. 18.

† *Sect.* 1. And it is accordingly enacted, by 19 Geo. 2. c. 34. "That if any perſons, to the number of three or "more, armed with fire-arms or other offenſive weapons, (1) "ſhall be aſſembled (2) in order to be aiding and aſſiſting in the "illegal exportation of wool or other goods prohibited to be "exported, or the carrying of wool or other ſuch goods in "order to ſuch exportation, or in the running, landing, or "carrying away prohibited or uncuſtomed goods or goods "liable to pay any duties which have not been paid or

A priſoner committed upon this act, for aſſiſting in running goods is not within the 18 Geo. 2. c. 28.

O. B. 1784, No. 759.

(1) The weapons muſt be ſuch as are calculated for the purpoſes of offence; therefore, where one man had only a common horſe-whip, although all the reſt of the gang had fire-arms, the Attorney General declined to argue the point, and the priſoner was diſcharged. Str. 1166. So alſo a hatchet has been thought no offenſive weapon within this act, where it was only caught up upon the ſpurr of the occaſion, and belonged to the priſoner in the way of his buſineſs. O. B. 1786, p. 857. So alſo a large ſtick, with three natural prongs and a large head, has been held no offenſive weapon. O. B. 1785, p. 424. But it is impoſſible for the law to draw a preciſe line which will hold in all caſes as to what ſhall, or ſhall not, be called an offenſive weapon. It muſt greatly depend on the circumſtances of the caſe; for it would be going a great deal too far to ſay that nothing but guns, piſtols, daggers, and inſtruments of war ſhould be conſidered as offenſive weapons; bludgeons, clubs, and any thing not in common uſe; pokers, ſhovels, tongs, &c. and even a common walking ſtick, may be offenſive weapons, according to the circumſtances which accompany the uſe of them. It is therefore a queſtion of fact for the jury, Whether the inſtrument was carried for the purpoſes of offence or not? O. B. 1785. p. 780.

(2) It has been laid down, that there muſt be a clear, premeditated aſſembling for the expreſs purpoſe either of landing the goods, or doing the ſeveral acts mentioned in the ſtatute; for it is not the intention of the act to include perſons, who upon a ſudden alarm, join in an attempt to ſeize. Vide O. B. 1784, p. 1071. O. B. 1786, p. 100. O. B. 1780, p. 970.

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O. B. 1785. No. 320.

"secured; or in the illegal relanding of any goods whatsoever which have been shipped or exported upon debenture or certificate; or in rescuing or taking away the same after seizure, from any officer or officers of the customs or excise, or other his majesty's revenue, or other person or persons employed by him or them, or assisting him or them, or from the place where they shall be lodged by him or them; or in rescuing any person who shall be apprehended for any of the offences made felony by this or any other act relating to the revenues of customs or excise; or in preventing the apprehending of any person who shall be guilty of any such offence; or in case any persons to the number of three or more, so armed as aforesaid, shall be so aiding or assisting; or if any person shall have his face blacked, or wear any vizard, mark, or other disguise, when passing with such goods, (3) or shall forcibly hinder, obstruct, assault, oppose or resist any of the officers of the customs or excise, or other his majesty's revenue, in the seizing or securing such goods; or if any person or persons shall maim or dangerously wound any officer of the customs or excise, or any other his majesty's revenue, in his attempting to go on board any ship or vessel within the limits of any of the ports of this kingdom; or shoot at, maim, or dangerously wound him when on board such ship or vessel, and in the due execution of his office or duty, (4) then every person so offending shall be adjudged guilty of felony, and suffer death without benefit of clergy."

Vide Infra, 19 Geo. 3. c. 69. s. 10. by which the offence of obstructing officers is made misdemeanour only.

O. B. 1784, p. 848, 857.

(3) It has been said, that this clause has no regard to the number of persons, nor to their being armed; and that an individual, with his face blacked, passing with such goods, would, in all probability, be deemed within the act. And that the word, *or* being coupled with the preceding sentence, seems also to be a clause which would reach any individual who shall obstruct. O. B. 1784. p. 1071.

(4) On an indictment on this statute the prosecuter must give evidence that the officers acted as revenue officers, and that the goods were uncustomed; but circumstantial proof is sufficient. O. B. 1784, p. 1002. O. B. 1786, p. 100.

† *Sect. 2.* And it is further enacted by the said statute, par. 2. "That if any person or persons shall be charged with "being guilty of any of the offences aforesaid, before any "one or more of his majesty's justices of the peace, or "before one of his majesty's justices of the King's Bench, "if the offence be committed in England; or before the "lord justice general, or one of the lords of justiciary, or any "one or more of his majesty's justices of the peace in Scotland, if the offence be committed in Scotland; by information of one or more credible person or persons, upon oath "by him or them to be subscribed, such justice of the peace, "or justice of the King's Bench, or lord justice general, "lord justice clerk, or lord of justiciary respectively, before "whom such information shall be made as aforesaid, shall "forthwith certify under his hand and seal, and return such "information to one of the principal secretaries of state, who

The 26 Geo. 2. c. 32. 32 Geo. 2. c. 18. 4 Geo. 3. c. 12. which continue this present act of the 19 Geo. 2. c. 34. having created some doubt whether this surrender clause was not repealed, it is declared by 19 Geo. 3. c. 69, to be in full force.

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" is hereby required to lay the ſame as ſoon as conveni-
" ently may be before his majeſty in his privy council; where-
" upon it ſhall and may be lawful for his majeſty, his heirs
" or ſucceſſors, to make his or their order, in his or their
" ſaid privy council, thereby requiring and commanding ſuch
" offender or offenders to ſurrender him or themſelves within
" the ſpace of forty days, after the firſt publication thereof
" in the London Gazette, to the lord chief juſtice, or to any
" other of his majeſty's juſtices of the court of King's Bench,
" or to any one of his majeſty's juſtices of the peace, if the
" offence be committed in England; or to any of the lords
" juſticiary, or to any one of his majeſty's juſtices of the
" peace in Scotland, if the offence be committed in Scot-
" land; who is hereby required upon ſuch offender or offend-
" ers ſurrendering him or themſelves, to commit him or them,
" without bail or main prize, to the county gaol, or to the
" gaol or priſon of the place where he or they ſhall ſo ſurren
" der, to the end that he or they may be forthcoming to anſ-
" wer the offence or offences wherewith he or they ſhall ſtand
" charged, according to due courſe of law, which order the
" clerks of his majeſty's privy council ſhall cauſe to be forth-
" with printed and publiſhed in the two ſucceſſive London
" Gazettes, and to be forthwith tranſmitted to the ſheriff
" of the county where the offence ſhall be committed, who
" ſhall within fourteen days after the receipt thereof, cauſe
" the ſame to be proclaimed, between the hours of ten in
" the morning, and two in the afternoon in the market-places
" upon the reſpective market-days, of two market-towns *(a)* in
" the ſame county, next *(b)* to the place where ſuch offence ſhall
" have been committed, and a true copy of ſuch order ſhall
" be affixed upon ſome public place in ſuch market-towns.
" And in caſe ſuch offender or offenders, ſhall not ſurrender
" him, or themſelves, purſuant to ſuch order of his majeſty,
" his heirs or ſucceſſors, to be made in council as afore-
" ſaid, he, or they ſo neglecting or refuſing to ſurrender him,
" or themſelves as aforeſaid, or eſcaping after ſuch ſurrender,
" ſhall from the day appointed for his or their ſurrender
" as aforeſaid, be adjudged, deemed, and taken to be
" convicted and attainted of felony, and ſuffer death without
" clergy, if the offence be charged to have been committed
" in England; and of a capital crime, and ſuffer death and
" confiſcation of moveables, as in caſe of a perſon found
" guilty of a capital crime, and under ſentence for the ſame, if
" the offence be charged to have been committed in Scotland.
" And that it ſhall be lawful to and for the court of King's Bench,
" or the juſtices of oyer and terminer or general gaol deli-
" very, for the county or place where ſuch perſon ſhall be, to
" award execution againſt ſuch offender and offenders, in ſuch
" manner as if he or they had been convicted and attainted in
" the *ſaid court of King's Bench*, or before ſuch juſtices of

Vide the caſe of George Coffan, who was arraigned upon a ſuggeſtion upon this clauſe, for not ſurrendering. O.B. 1785, No. 462. But, at a ſubſequent ſeſſions, the attorney general chuſing to try him on the indictment only, the court ordered a *nolle proſequi* to be entered on the ſuggeſtion. O.B. 1785, No. 600.

*(a)* The market towns ſhould be ſet forth in the ſuggeſtion by name; for otherwiſe the priſoner can not give a particular anſwer to that part of the ſuggeſtion, nor come properly prepared with his proofs when the iſſues ſhall be tried. Foſter 56. For every law introducing a capital puniſhment, ought to be ſtrictly purſued. 1 Wilſon 165.

*(b)* Vide Infra ſect. 9.

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" oyer and terminer or general gaol delivery reſpectively, if " the offence be charged to have been committed in Eng- " land, and that it ſhall be lawful for the court of Juſticiary, " or the lords Juſticiary in their circuits, to award execution " againſt ſuch offender or offenders in ſuch manner as if he " or they, had been found guilty and condemned in the " ſaid court of Juſticiary, or in the circuit reſpectively."

† *Sect.* 3. And it is further enacted by the ſaid ſtatute, par. 3. " That whoever ſhall after the time appointed as afore- " ſaid, for the ſurrender of any perſon or perſons ſo charged " upon oath, with any of the offences aforeſaid, ſhall be " expired, harbour, receive, conceal, aid, abet, or ſuccour " ſuch perſon or perſons, knowing him or them, to have been " ſo charged as aforeſaid, and to have been required to ſur- " render him or themſelves, by ſuch order or orders as afore- " ſaid, and not to have ſurrendered purſuant to ſuch order or " orders, being proſecuted for the ſame within one year after " the offence committed, and lawfully convicted thereof, ſhall " be guilty of felony, and tranſported for ſeven years."

† *Sect.* 4. And it is further provided, " That nothing, &c. " ſhall hinder any judge, juſtice of the peace, magiſtrate or " officer, from taking ſuch offender and proceeding againſt " him by the ordinary courſe of law. The indictment or " information may be laid in any county in England, but " no attainder ſhall work corruption of blood."

Vide 19 Geo. 3. c. 69.

† *Sect.* 5. The following conſtructions have been held upon this ſtatute, Firſt, That it is certainly neceſſary to ſuggeſt the ſeveral facts and requiſites in the act on the roll, in order to ground a prayer for execution; for they are the ſeveral ſteps which the act requireth to be taken by the crown, in order to bring the priſoner under an attainder: And he may traverſe them all, and the offender will not be affected, unleſs the ſeveral requiſites mentioned in the act have been complied with in his particular caſe; and if he traverſeth all or any of them, the *onus probandi* lies upon the crown; for this is not like the caſe of an attainder by act of parliament, in which the facts are ſettled, the perſon named, and the only queſtion is, Whether the priſoner is the identical perſon attainted.

Foſter 51. 1 Wilſon 364. 4 Bac. Ab. 567. O. B. 1785, p. 646, p. 772.

† *Sect.* 6. Secondly, That if the priſoner would take advantage of the inſufficiency of the ſuggeſtion, *viz.* becauſe the names of the market-towns at which it is enacted the offender ſhall be proclaimed, is not ſet forth—he muſt demur. He cannot take advantage of it on motion.

Foſter 56.

† *Sect.* 7. Thirdly, That if the priſoner pleads, he muſt do it *inſtanter* and *ore tenus*, as is done in indictments; for there can be no inconvenience in his pleading *inſtanter* if he intends

Foſter 56.

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to put the proof of all the matters ſuggeſted on the roll upon the crown.

† *Sect.* 8. Fourthly, that the priſoner is not intitled to a copy of the ſuggeſtion. Foſter 56.

† *Sect.* 9. Fifthly, That the words, "near to the place," are reſtrictive of the ſheriff's power, and that the proclamation muſt be made in the market towns near the place, and not at remote towns, nor at towns even comparatively remote, for though it does not mean at the very next market towns, it would be very dangerous to leave matters of this ſort to the diſcretion of the ſheriff merely. Foſter 57.

† *Sect.* 10. Sixthly, That the proceedings at the trial ſhall be in the ſame form and manner, as before juſtices of gaol delivery.

† *Sect.* 11. It is enacted by 19 Geo. 3. c. 69. ſ. 10. "That "whoever ſhall aſſault, reſiſt, oppoſe, moleſt, obſtruct, or "hinder any officer or officers of the cuſtoms or exciſe in due "ſeizing or ſecuring any coffee, tea, cocoa nuts, chocolate, "foreign brandy, or other foreign ſpirituous liquors, or any "other goods whatſoever, which by any officer or officers "of the cuſtoms or exciſe ſhall or may be liable to be ſeized "by virtue of, or in purſuance of any act now in force; or "ſhall by force or violence reſcue, or ſhall cauſe to be reſcued, "any of the ſaid goods, after the ſame ſhall have been ſeized "by ſuch officer or officers as aforeſaid, or ſhall attempt or "endeavour ſo to do, or after ſeizure ſhall cut, ſtave, break, "or otherwiſe deſtroy or damage any caſks, veſſels, boxes, "or package, wherein the ſame ſhall reſpectively be con-"tained; it ſhall and may be lawful to and for the officers "of the cuſtoms or exciſe, and for all perſons acting in their "aid or aſſiſtance, to ſtop, arreſt, and detain, all and every "the perſon and perſons ſo offending, and him her or them "forthwith to carry before one or more juſtice of peace near "to the place where the ſame ſhall be done, who may com-"mit to the next county gaol till the next general quarter "ſeſſions there to be tried in the manner the act directs." Vide 11 Geo. 2. c. 30. for the penalty of obſtructing officers and for diſpenſing with the production of their depoſition at the trial, &c.

† *Sect.* 12. It is alſo further enacted by 24 Geo. 3. ſt. 2. c. 47. ſ. 11. "That if any perſon or perſons upon the "ſhore, or on board any ſhip, veſſel, or boat, ſhall mali-"ciouſly ſhoot at, or upon any ſhip, veſſel, or boat belonging "to his majeſty's navy, or in the ſervice of the cuſtoms or ex-"ciſe, within the limits of any port, harbour, or creek of "Great Britain, or within four leagues from any part of the "coaſt thereof; or if any perſon or perſons being on ſhore, "or on board any ſhip, veſſel, or boat, ſhall maliciouſly ſhoot "at, or maim, or dangerouſly wound any officer or offi-"cers of his majeſty's navy, or of the cuſtoms or exciſe, N. B. The offender upon this act is alſo ſubject to the ſurrender clauſe before mentioned.

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If an offender against this statute acts under the commands of his superiors without privity, and from a just apprehension that his own life is endangered by disobedience, it is a defence upon which he may be acquitted. O. B. 1786, No. 660.

" whether attempting to go on board, or being on board, or " returning from on board any ship, vessel or boat, or other- " wise acting in the due execution of his or their duty on " shore, or within the limits of any port, harbour, or creek " of Great Britain, or within four leagues of any part of the " coast thereof,—or shall maliciously shoot at, maim, or dan- " gerously wound any person or persons, aiding and assisting " such officer or officers in the execution of his or their " duty as aforesaid, then every person so offending, and all and " every person being aiding, abetting, or assisting therein, " shall be guilty of felony, and suffer death without clergy."

# APPENDIX THE SEVENTH.

## OF OFFENCES IN BUYING AND RECEIVING STOLEN GOODS.

For the mode of proceeding against accessaries vide 1 Ann. st. 2. c. 9. 5 Ann. c. 31. 4 Geo. 1. c. 11, and 2 Hawk. c. 29, passim. Vide Foster 73. and 373. O. B. 1758, No. 11, 12. O. B. 1758, No. 30, 31. O.B. Dec. 1783. Rex v. Smith.

† FORASMUCH as thieves and robbers are much encouraged to commit offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods, it is enacted by 3 Will. & Mar. c. 9. s. 4. and 5 Ann c. 31. s 5. " That whoever shall buy or receive any goods " or chattels, (1) that shall be feloniously taken or stolen from " any other person, knowing the same to be stolen, shall " be taken and deemed an accessary to such felony after the " fact, and shall incur the same punishment as an accessary " to the felony after the felony committed." And by 4 Geo. 1. c. 11. Persons convicted of buying or receiving stolen goods, shall be transported for the term of fourteen years.

(1) A man was indicted for receiving goods and money; he was proved to have received the money, but the goods could not be traced into his hands; therefore, Willes, C. J. directed his acquittal. For the act is confined to the knowingly receiving of *goods* only, and it has been frequently explained, that money could not mean the goods and chattels of a person robbed. O. B. 1779. Vide Infra. But the stealing of Bank notes is made felony by 2 Geo. 2. c. 25, and the offender liable to such punishment as if he had stolen *other goods*. Therefore, the knowing and felonious receivers of this species of property are liable to punishment like other offenders. Rex v. E. Woods. Select Trials, 3 vol. p. 195. And in the case of the King and Tipping, 11 Geo. 3. it was determined by all the judges, that sheep and rams are comprehended within the words "goods and chattels," mentioned in this act. M.S. But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessary; for he may receive them to keep for the true owner, or till they are recovered or restored by law. 1 Hale 620.

† *Sect.* 2. And it is also enacted by 29 Geo. 2. 30. " That " every person who shall buy or receive any lead, iron, copper, " brass, bell-metal, or solder, knowing the same to be unlaw- " fully come by; or shall privately buy or receive any stolen " lead, iron, copper, brass, bell-metal, or solder, by suffer- " ing any door, window, or shutter to be left open or un- " fastened,

"faſtened, between ſun-ſetting or ſun-riſing for that pur-
"poſe; or ſhall buy or receive the ſame, or any of them, at
"any time, in any clandeſtine manner from any perſon or per-
"ſons whatſoever, although the principal felon or felons, has
"not, or have not been convicted of ſtealing the ſame, ſhall,
"on conviction by due courſe of law, be tranſported for four-
"teen years."

† *Sect.* 3. And it is enacted by the ſaid ſtatute, par. 2. "That any one juſtice upon complaint on oath, by any "credible *perſons*, that there is cauſe to ſuſpect *(a)* ſtolen lead, "iron, copper, braſs, bell-metal, or ſolder, to be concealed "in any dwelling-houſe, out houſe, yard, garden, or other "place, by warrant under his hand and ſeal, may cauſe the "ſame to be ſearched, in the day time, and if any of the arti-"cles ſo ſuſpected to be ſtolen ſhall be found therein, the ſame "together with the perſon in whoſe cuſtody it is found, "ſhall be brought before any two juſtices of the county or "place, and if the ſaid perſon ſhall not give an account of the "ſame to the ſatisfaction of the juſtices, or ſhall not within "ſome convenient time, to be ſet by the ſaid juſtices, pro-"duce the party of, or from whom he bought or received ſuch "ſtolen lead, &c. &c. he ſhall be adjudged guilty of a miſ-"demeanor—forfeit for the firſt offence 40*s.* For the ſecond "4*l.* and for every ſubſequent offence 6*l.*"

Juſtices on ſuſpicion may hear and determine.

*(a)* A bare ſurmiſe is not ſufficient. 4 Inſt. 177. 2 Hale 113, 150.

† *Sect.* 4. And it is further enacted by par. 3. "That "every conſtable, headborough, or tithingman, in every "place where they ſhall be officers, and every beadle in his "diſtrict, and every watchman, during ſuch time only as he "is on his duty, ſhall apprehend every perſon who may reaſon-"ably be ſuſpected of having, or carrying, after ſun-ſetting "and before ſun-riſing, any lead, iron, copper, braſs, bell-"metal, or ſolder ſuſpected to be ſtolen, and carry them be-"fore any two juſtices for the county or place, and if ſuch "perſon do not produce the party from whom he bought or "received the ſame, or ſome other credible witneſs to depoſe "upon oath, the ſale or delivery of the ſaid lead, &c. or ſhall not "give a ſatisfactory account how he came by the ſame, he "ſhall be adjudged guilty of a miſdemeanor, and forfeit as "aforeſaid."

Officers empowered to apprehend ſuſpected perſons.

† *Sect.* 5. And it is further enacted, "That on conviction, "any two juſtices may order ſuch lead, copper, braſs, bell-"metal, or ſolder, to be depoſited with the church-wardens "or overſeers of the place where it ſhall be found, or in any "other convenient place, for any time not exceeding thirty "days, and to order the church-wardens and overſeers in "every pariſh within the bills of mortality, to advertiſe the "ſame, and in every other pariſh to give notice by the public "cryer, and by fixing a deſcription of the ſame, and where "depoſited,

How the goods are to be diſpoſed of.

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" depoſited, on the church door, that the ſame may be claimed " by the owner, or ſome reputable perſon in his behalf. And " in caſe any perſon can prove their property in the ſame, " upon oath, to the ſatisfaction of any two juſtices for the " county or place, they ſhall order reſtitution after pay- " ment of the expences, if not, the ſame ſhall be ſold at " the end of the ſaid thirty days, and after deducting the " charges, one moiety ſhall be given to the perſon who ſhall " apprehend the offender, and the other to the poor of the " pariſh where the offence is committed, if it is known where, " or otherwiſe where ſuch conviction ſhall be made."

Private perſons muſt apprehend ſuſpected offenders.

† *Sect.* 6. And it is further enacted by par. 5. " That every " perſon to whom any lead, iron, copper, braſs, bell-metal, or " ſolder, ſhall be brought and offered to be ſold, pawned, or " delivered, ſhall (there being reaſonable cauſe to ſuſpect " the ſame were unlawfully come by) apprehend, ſecure and " carry before a juſtice of the county or place, where the ſame " ſhall be ſo brought or offered, the perſon or perſons ſo " bringing or offering the ſame, together with ſuch lead, " iron, copper, braſs, bell-metal, or ſolder, and ſuch per- " ſons ſo apprehended ſhall be dealt with, and ſuch articles " ſhall be depoſited and diſpoſed of, in the ſame manner as if " the offender had been apprehended by the officers before- " mentioned. And if it ſhall appear upon the oath of any " perſon, notwithſtanding he were concerned in ſtealing the " ſame, if corroborated with other credible circumſtances, to " the ſatisfaction of two juſtices for the county or place where " the ſame ſhall be ſo brought and offered, that there was rea- " ſonable cauſe to ſupect ſuch lead, &c. was unlawfully come " by, and that the perſon to whom the ſame was ſo brought " and offered, did not (having it in his, her, or their power " ſo to do) apprehend, ſecure, and carry before a juſtice " as aforeſaid, the perſon or perſons who ſo brought and of- " fered the ſame, that then the perſon to whom the ſame was " offered, ſhall be deemed guilty of a miſdemeanor."

How the penalties ſhall be levied and applied.

† *Sect.* 7. And it is further enacted, " That all the ſaid for- " feitures ſhall be levied by diſtreſs, by warrant under the " hands and ſeals of any two juſtices, before whom ſuch offen- " der was deemed and adjudged guilty; one moiety to the in- " former, the other to the poor. And on default, the ſaid " juſtices ſhall commit the offender to the common gaol, or " other priſon, or houſe of correction within their juriſdiction, " for one month for the firſt offence, two months for the " ſecond, and for every ſubſequent offence, until ſuch offen- " der ſhall be diſcharged by order of the court of general, or " quarter ſeſſions."

† *Sect.* 8. And it is further enacted by 2 Geo. 3. c. 28. " That whoever ſhall buy, or receive any part of the cargo

" or loading of, or any goods, ſtores, or things of, or belonging to any ſhip or veſſel in the river Thames, knowing the ſame to be ſtolen, or unlawfully come by, or ſhall privately buy or receive any ſuch goods, ſtores, or things, or any part of ſuch cargo or loading, by ſuffering any door, window, or ſhutter to be left open, or unfaſtened, between ſun-ſetting and ſun-riſing for that purpoſe, or ſhall buy or receive the ſame, or any of them, at any time, in any clandeſtine manner, from any perſon or perſons whomſoever, although the principal offender has not been convicted of ſtealing, or unlawfully procuring the ſame, ſhall be tranſported for fourteen years." Buying ſtolen goods from veſſels in the river.

† *Sect.* 9. And it is alſo enacted by 10 Geo 3 c.48. "That every perſon who ſhall buy, or receive any ſtolen jewel, or jewels, or any ſtolen gold or ſilver plate, watch or watches, knowing the ſame to have been ſtolen, ſhall, in all caſes where the ſaid goods ſhall have been feloniouſly ſtolen, accompanied with a burglary actually committed in the ſtealing the ſame, or ſhall have been feloniouſly taken by a robbery on the highway, ſhall be triable as well before conviction of the principal felon, in ſuch felony and burglary, or robbery, whether he ſhall be in or out of cuſtody, as after his conviction, and being convicted thereof, he ſhall be deemed guilty of felony, and be tranſported for the ſpace of fourteen years." Receiving jewels, &c.

† *Sect.* 10. And it is further enacted by 21 Geo. 3. c. 69. "That every perſon who ſhall buy, or receive any pewter pot, or other veſſel, or any pewter in any form or ſhape whatever, knowing the ſame to be ſtolen, or unlawfully come by; or ſhall privately buy, or receive any ſtolen pewter, by ſuffering any door, window, or ſhutter to be left open or unfaſtened, between ſun-ſetting and ſun-riſing for that purpoſe; or ſhall buy or receive the ſame at any time, in any clandeſtine manner from any perſon or perſons whatſoever, although the principal felon, or felons has not, or have not been convicted of ſtealing the ſame, ſhall be tranſported for any time not exceeding ſeven years, or kept and detained in priſon, and therein kept to hard labour, for any time not exceeding three years, nor leſs than one year, and within that time (if the court ſhall think fitting) ſhall be once, or oftener, but not more than three times, publickly whipped." Pewter, tranſportation ſeven years.

† *Sect.* 11. And it is further enacted by 22 Geo. 3. c. 58.—"That in all caſes whatſoever, where any goods and chattels (except lead, iron, copper, braſs, bell-metal, and ſolder) ſhall have been feloniouſly taken and ſtolen, whether the offence of the perſon or perſons, ſo taking or ſtealing the ſame, ſhall amount to grand larceny, or ſome greater of-" Offenders may be tried for the miſdemeanour. Vide B. 2 c. 49.

" fence,

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"fence, or to petit larceny only (except where the perſon or "perſons actually committing the felony, ſhall have been al- "ready convicted of grand larceny, or of ſome greater of- "fence) every perſon who ſhall buy or receive any ſuch "goods and chattels, knowing the ſame to have been ſo "taken or ſtolen, ſhall be held and deemed guilty of, and "may be proſecuted for a miſdemeanor, and ſhall be puniſhed "by fine, impriſonment, or whipping, as the court of Quar- "ter Seſſions, who are hereby empowered to try ſuch offen- "der, or as any other court before which he, ſhe, or they "ſhall be tried, ſhall think fit to inflict; although the prin- "cipal felon, or felons (*a*) be not before convicted of the ſaid "felony, and whether he, ſhe, or they is, or are amenable "to juſtice or not. And in caſes where the felony actually "committed, ſhall amount to grand larceny, or to ſome "greater offence, and where the perſon or perſons actually "committing ſuch felony, ſhall not be before convicted, ſuch "offender or offenders, ſhall be exempted from being puniſh- "ed as acceſſary or acceſſaries, if ſuch principal felon, or fe- "lons ſhall be afterwards convicted."

Vide Rex v. Wilkes and Forſgate.

(*a*) Vide the caſe of William Haſlam, indicted for a miſdemeanour upon this act, where it was determined that the principal felon may even be admitted as an evidence againſt the receiver. O. B. 1786, p. 814.

† *Sect.* 12. And it is further enacted, "That it ſhall be "lawful for any one juſtice of the peace, upon complaint "made before him upon oath, that there is reaſon to "ſuſpect that ſtolen goods are knowingly concealed in any "dwelling-houſe, out-houſe, garden, yard, croft, or other "place or places, by warrant under his hand and ſeal, to cauſe "every ſuch dwelling, or place to be ſearched in the day time, "and the perſon knowingly concealing the ſaid ſtolen goods, "or any part thereof, or in whoſe cuſtody the ſame, or any "part thereof ſhall be found, he, ſhe, or they being privy "thereto, ſhall be deemed guilty of a miſdemeanor, and ſhall "be brought before any juſtice of the peace for the county or "place, and made amenable to anſwer the ſame, by like war- "rant of any ſuch juſtice, and on conviction ſhall be puniſh- "ed as aforeſaid."

Juſtices on ſuſpicion may hear and puniſh.

† *Sect.* 13. And it is further enacted, "That every conſta- "ble, headborough, or tything-man, in every county or place, "where they ſhall be officers, and every beadle within his "ward, or diſtrict, and every watchman while on duty, "ſhall and may apprehend thoſe who may be ſuſpected of con- "veying, after ſun-ſetting, and before ſun-riſing, any goods "or chattels ſuſpected to be ſtolen; and the ſame, together "with ſuch perſon or perſons, as ſoon as conveniently may be, "to convey or carry before any juſtice for the county or place, "to be dealt with according to law, and on conviction, they "ſhall be held guilty of a miſdemeanor, and impriſoned not "exceeding ſix calendar months, nor leſs than three calendar "months."

Officers may apprehend.

Sect.

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*Sect.* 14. It is alſo enacted by the ſaid ſtatute, "That every perſon to whom any goods or chattels which have been feloniouſly ſtolen, or taken, ſhall be brought and offered to be ſold, pawned, or delivered, ſhall on reaſonable cauſe for ſuſpicion, apprehend, and carry before a juſtice for the county or place, where the ſame ſhall be ſo offered, the perſon and perſons bringing, or offering the ſame."

For the pardon allowed to ſuch as ſhall diſcover receivers of ſtolen goods, vide ſecond book, tit, "pardon."

# APPENDIX THE EIGHTH.

## Of the OFFENCES of RETAKING, and ADVERTISING a REWARD for, STOLEN GOODS.

† IT is enacted by 4 Geo. 1. c. 11. ſ. 4. "That wherever "any perſon taketh money, or reward, directly or indirectly, "under pretence, or upon account of helping any perſon or "perſons to any ſtolen goods or chattels, every ſuch perſon ſo "taking money or reward, as aforeſaid, (unleſs ſuch perſon "doth apprehend, or cauſe to be apprehended, ſuch felon who "ſtole the ſame, and cauſe ſuch felon to be brought to his "trial for the ſame, and give evidence againſt him) ſhall be "guilty of felony, and ſuffer the pains and penalties of felony, "according to the nature of the felony committed in ſtealing "ſuch goods, in ſuch and the ſame manner as if ſuch offender "had himſelf ſtole ſuch goods and chattels, in the manner, "and with ſuch circumſtances, as the ſame were ſtolen."—— And by 6 Geo. 1. c. 23. "Whoever ſhall proſecute an of-"fender upon this ſtatute, to conviction of felony, without "benefit of clergy, ſhall be intitled to a reward of forty "pounds."

Poſt. c. 59. ſ. 8. 1 Hale 620. Upon this clauſe the famous Jonathan Wild was convicted and executed, 10 Geo 1.

† *Sect.* 2. And it is further enacted by 25 Geo. 2. c. 36. made perpetual by 28 Geo. 2. c. 19. ſ. 1. "That any perſon "publickly advertiſing a reward, with no queſtions aſked, "for the return of things which have been ſtolen or loſt, or "making uſe of any words in ſuch publick advertiſement, "purporting that ſuch reward ſhall be given, or paid, without "ſeizing, or making enquiry after the perſon producing ſuch "thing ſo ſtolen, or loſt, or promiſing or offering in any ſuch "publick advertiſement, to return to any pawnbroker, or other "perſon, who may have bought or advanced money by way of "loan upon ſuch thing ſo ſtolen, or loſt, the money ſo paid or "advanced, or any other ſum of money, or reward for the re-"turn of ſuch thing; and any perſon printing, or publiſhing "ſuch advertiſement, ſhall reſpectively forfeit the ſum of fifty "pounds for every ſuch offence, to any perſon who will ſue "for the ſame."

Theftbote is an offence at common law, highly criminal, as being a ſort of compounding of felony, and puniſhable by fine and impriſonment. Vide 1 Hale 546. Poſt. c. 59. ſ. 7. B. 2. c. 29. ſ. 30.

For the reſtitution of ſtolen goods to the owner, vide index, "Reſtitution," and 4 Bacon 35.

APPEN-

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# APPENDIX THE NINTH.

## Of OFFENCES by MALICIOUSLY DESTROYING GARMENTS, HOP-BINDS, COAL-MINES, and MINE-ENGINES.

Garments.

† FIRST. It is enacted by 6 Geo. 1. c. 23. ſ. 11. "That if any perſon or perſons, ſhall at any time or "times, wilfully and maliciouſly aſſault any perſon or perſons "in the publick ſtreets, or highways, with an intent to tear, "ſpoil, cut, burn, or deface, and ſhall tear, ſpoil, cut, burn "or deface the garments, or cloaths of ſuch perſon or perſons, "ſuch offenders ſhall be guilty of felony, and tranſported for "ſeven years."

Hop-binds.

† *Sect.* 2. Secondly, It is enacted by 6 Geo. 2. c. 37. ſ. 6. "That if any perſon or perſons, during the continuance of "the 9 Geo. 1. c. 22. (which is made perpetual by 31 Geo. "2. c. 42.) ſhall unlawfully and maliciouſly cut any hop-"binds growing on poles, in any plantation of hops, every "perſon or perſons ſo offending, ſhall ſuffer death without "benefit of clergy."

Coal-mines.

† *Sect.* 3. Thirdly, It is alſo enacted by 13 Geo. 2. c. 21. "That if any perſon ſhall divert, or convey any water into any "coal-work, with deſign to deſtroy, or damage the ſame, "he ſhall pay to the party grieved, treble damages, with "coſts"

Mine engines.

† *Sect.* 4. Fourthly, It is alſo enacted 9 Geo. 3. c. 29. ſ. 2. "That if any perſon or perſons ſhall at any time wilfully or "maliciouſly ſet fire to, burn, demoliſh, pull down, or otherwiſe "deſtroy, or damage any fire-engine, or other engine for "draining water from collieries, or coal mines, or for drawing "coals out of the ſame; or for draining water from any "mine of lead, tin, copper, or other mineral; or any bridge, "waggon-way, or trunk, for conveying coals from any "colliery, or coal mine, or ſtaith for depoſiting the ſame; "or any bridge, or waggon-way for conveying lead, tin, "copper, or other mineral from any ſuch mine, erected or to "be erected, or any fence, or fences, for dividing or incloſing "any common ground, or waſte land, ſet up, provided, or "made in purſuance of any acts of parliament, ſuch offenders "ſhall be tranſported for ſeven years, provided the proſecution "be commenced within eighteen months after the offence "committed."

APPEN-

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# APPENDIX THE TENTH.

## Of OFFENCES in DESTROYING LOOMS, &c. in CERTAIN BRANCHES of MANUFACTURE.

† IT is enacted by 12 Geo. 1. c. 34. ſ. 6. "That whoever ſhall aſſault or abuſe any maſter wool-comber or maſter weaver, or other perſon concerned in any of the woollen manufactures of this kingdom, whereby any ſuch maſter or other perſon ſhall receive any bodily hurt for not complying with, or not conforming, or not ſubmitting to any ſuch illegal by-laws, ordinances, rules or orders *as are mentioned in the act*; or whoever ſhall write, or cauſe to be written, or knowingly ſend, or cauſe to be ſent, any letter or other writing or meſſage, threatning any hurt or harm to any ſuch maſter wool-comber or maſter weaver, or other perſon concerned in the woollen manufacture; or threatning to burn, pull down, or deſtroy any of their houſes or out-houſes, or to cut down or deſtroy any of their trees, or to maim or kill any of their cattle for not complying with any demands, claims, or pretences of any of his or their workmen, or others employed by them in the ſaid manufacture, or for not conforming or not ſubmitting to any ſuch illegal bye-laws, &c. as aforeſaid, ſhall, on conviction, upon *any* indictment, to be found within twelve calendar months after the offence committed, be tranſported for ſeven years.

Maſter wool-comber.

Vide 3 Hen. 8. c. 1.

Vide 29 Geo. 2. c. 33.

30 Geo. 2. c. 19.

† "And by 22 Geo. 2. c. 27, the above clauſe is extended to journeymen dyers, journeymen hot-preſſers, and all other perſons employed in or about any of the woollen-manufactures; or in the making of felts or hats; or in the manufactures of ſilk, mohair, furr, hemp, flax, linnen, cotton, fuſtian, iron, or leather; or in or about any manufactures made up of wool, furr, hemp, flax, cotton, mohair, or ſilk, or of any of the ſaid materials mixed one with another. But by 13 Geo. 1. c. 23. ſ. 17. all proſecutions ſhall be within three months after the offence committed."

Journeymen.

† *Sect.* 2. It is alſo enacted, by 4 Geo. 3. c. 37. ſ. 16. "That whoever ſhall break into any houſe, ſhop, cellar, vault or other place or building, or by force enter into any houſe, ſhop, cellar, vault, or other place or building, with intent to ſteal, cut or deſtroy any linnen yarn, or any linnen cloth, or any manufacture of linnen-yarn, belonging to any manufactures, or the looms, tools, or implements uſed therein; or ſhall wilfully or maliciouſly cut in pieces or deſtroy any ſuch goods, either when expoſed to bleach

Linen yarn.

" or

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" or dry, ſhall ſuffer as in caſes of felony without benefit of " clergy. But this act ſhall not extend to Scotland or " Ireland."

Woollen goods

† *Sect.* 3. And it is enacted by 22 Geo. 3. c. 40. " That " whoever ſhall by day, or by night, break into any houſe " or ſhop, or enter by force into any houſe or ſhop, with " intent to cut or deſtroy any ſerge, or other woollen goods in " the loom, or any tools employed in making thereof; or ſhall " wilfully and maliciouſly cut or deſtroy any ſuch ſerges, or " woollen goods, in the loom, or on the rack; or ſhall burn, " cut, or deſtroy any rack on which any ſuch ſerges, or other " woollen goods are hanged in order to dry; or ſhall wilfully " and maliciouſly break, or deſtroy any tools uſed in the mak- " ing any ſuch ſerges, or other woollen goods, not having the " conſent of the owner ſo to do, ſhall be guilty of felony with- " out benefit of clergy."

Silk goods.

† *Sect.* 4. And it is further enacted by the ſaid ſtatute par. 2. " That whoever, by day or by night, ſhall break into any " houſe or ſhop, or enter by force into any houſe or ſhop, " with intent to cut or deſtroy any velvet, wrought ſilk, " ſilk mixed with any other materials, or other ſilk ma- " nufacture, in the loom, or any warp, or ſhute, tools, " tackle, or utenſils; or ſhall wilfully or maliciouſly cut " or deſtroy any velvet, wrought ſilk, or ſilk mixed with " any other materials, or other ſilk manufacture in the loom, " or any warp or ſhute, tools, tackle, or utenſils prepared or " employed, in, or for the making thereof; or ſhall wilfully " and maliciouſly break or deſtroy any tools, tackle, or uten- " ſils, uſed in, or for the weaving or making of any ſuch " velvet, wrought ſilks, or ſilks mixed with other materials, or " other ſilk goods, or ſilk manufacture, not having the con- " ſent of the owner ſo to do, ſhall be guilty of felony, without " benefit of clergy."

Linnen and cotton goods.

† *Sect.* 5. And it is further enacted by the ſaid ſtatute par. 3. " That whoever, by day or by night, ſhall break into any " houſe or ſhop, or enter by force into any houſe or ſhop, " with intent to cut and deſtroy any linnen or cotton, or linnen " and cotton mixed with any other materials, or other linnen " or cotton manufactures, in the loom; or any warp or ſhute, " tools, tackle, and utenſils; or ſhall wilfully and malici- " ouſly cut, or deſtroy any linnen or cotton, or linnen or cot- " ton mixed with any other materials, or other linnen and " cotton manufactures in the loom, or any warp or ſhute, " tools, tackle, and utenſils, prepared for, or employed in the " making thereof, or ſhall wilfully and maliciouſly break and " deſtroy any tools, tackle, and utenſils, uſed in and for the " carding, ſpinning, weaving, preparing, or making in any

" way

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" way whatever, any ſuch linnen or cotton, or linnen or cotton " mixed with any other materials, or other linnen and cotton " goods, or linnen and cotton manufactures whatſoever, not " having the conſent of the owner ſo to do, ſhall be guilty " of felony without benefit of clergy."

Vide 1 Black. 304, how far Scotch manufacture is the manufacture of England.

# APPENDIX THE ELEVENTH.

## Of OFFENCES in not PERFORMING QUARANTINE.

† IT is enacted by 26 Geo. 2. c. 26. " That all ſhips and " veſſels arriving, and all perſons, goods, and merchan- " dizes coming or imported from any place from whence the " privy council ſhall judge it probable that the infection may be " brought, ſhall be obliged to make their quarantine in ſuch " place, for ſuch time, and in ſuch manner as ſhall be directed " by the king's order in council, ratified by proclamation, or " publiſhed in the *Gazette*, and that during ſuch appointed pe- " riod, no perſon, goods, or merchandizes, ſhall come, or be " brought on ſhore, or go, or be put on board any other ſhip, " or veſſel, without permiſſion, and under ſuch regulations, " as ſhall be ordered by the king in council, as aforeſaid."

Vide 1 Jac. c. 31. 7 Geo. 1. c. 3. 8 Geo. 1. c. 8. continued by 23 Geo. 3. c. 29. ſ. 6. 1 Geo. 2. c. 13. 6 Geo. c. 34. 26 Geo. 2 c. 6. 28 Geo. 2. c. 6. for other proviſions reſpecting quarantine, v de 33 Geo. 2. c. 16.

† *Sect.* 2. And it is further enacted by par. 2. " That if the " plague ſhall appear on board any ſhip, being to the north- " ward of Cape Finiſterre, the commander ſhall immediately " proceed, by 29 Geo. 2. c. 8. to the harbour of St. Helens " Pool, or to ſuch other place as the privy council ſhall ap- " point, and from thence cauſe intelligence of the condition " of his ſhip to be given to the ſecretary of ſtate. But if he " ſhall not be able to make Scilly, or is forced to go up either " of the Channels, he ſhall not preſume to enter with ſuch ſhip " into any port, but ſhall remain in ſome open road, avoid- " ing all intercourſe whatever, with other ſhips, until the " king's pleaſure be known, on pain of being adjudged " guilty of felony without benefit of clergy."

† *Sect.* 3. And it is further enacted par. 3. " That whenever " any country is infected with the plague, or the privy council " ſhall as aforeſaid, have made any order for performing of " *quarantine*, the officer appointed for the purpoſe, ſhall at " a convenient diſtance, as often as any ſhip or veſſel, ſhall " attempt to enter any port or place, demand of the comman- " der every particular (as ſpecified in the act) concerning " the ſame, and in caſe it ſhall appear that any perſon then on " board ſuch ſhip or veſſel, ſhall at the time of ſuch examination

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" be actually infected with the plague, or that ſuch ſhip is " obliged to perform quarantine, having come from any place " viſited with the plague, any of the king's ſhips, &c. may " by force and violence oblige her to repair to the place " appointed for performing quarantine. And in caſe the com- " mander of ſuch ſhip or veſſel, conceal the ſame, he " ſhall ſuffer death without clergy. And in caſe ſuch " commander do not make a true diſcovery in any other of the " particulars directed by the act, he ſhall forfeit 200 l. and if " he do not repair to the place appointed, 500 l. And any " perſons who attempt to quit the veſſel, ſhall be obliged " to return, ſuffer impriſonment for ſix months, and for- " feit 200 l."

† *Sect.* 4. And by par. 8. " If any perſon obliged to " perform quarantine, as aforeſaid, ſhall wilfully refuſe or ne- " glect to repair, within convenient time, after notice, to " the houſe, lazaret, or other place, (as directed by the act to " be provided) or having been placed therein, ſhall eſcape, or " attempt to eſcape out of the ſame before *quarantine* fully per- " formed, it ſhall be lawful for the officer appointed, by force, " to compel his return, and every perſon ſo refuſing, or ne- " glecting to repair after ſuch notice as aforeſaid, into ſuch " houſe, lazaret, or other place; and alſo every perſon actually " eſcaping as aforeſaid, ſhall ſuffer death without clergy."

† *Sect.* 5. And it is further enacted by the ſaid ſtatute, par. 10. " That if any perſon not infected with the plague, nor " liable to perform quarantine, ſhall enter any houſe, la- " zaret, or other place, appointed as the act directs, whilſt any " perſon or perſons infected with the plague, or being under " quarantine ſhall be therein, and ſhall return, or attempt to " return, from thence without permiſſion, by order of privy " council, the officer may compel him to return. And in caſe " ſuch perſon ſhall actually eſcape out of ſuch houſe, lazaret, or " place appointed as the act directs, before the full perfor- " mance of quarantine, he ſhall ſuffer death without clergy. " If the officer neglects his duty, he ſhall forfeit 100 l. and if " he embezzle any goods, he ſhall pay treble damages."

† *Sect.* 6. And it is further enacted par. 18. " That if any " perſon or perſons, ſhall knowingly, or wilfully, con- " ceal from the officers of *quarantine*, or ſhall clandeſtinely " convey any letters, goods, wares, or merchandizes from any " ſhip under *quarantine*, or liable to perform quarantine as " aforeſaid, or from any lazaret, or other place where goods " ſhall be performing *quarantine*, every ſuch offender ſhall ſuf- " fer death without clergy."

APPEN-

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# APPENDIX THE TWELFTH.

## OF HINDERING THE EXPORTATION OF CORN.

† IT is enacted by 11 Geo. 2. c. 22. "That whoever ſhall "wilfully and maliciouſly beat, wound, or uſe any other "violence to or upon any perſon or perſons, with intent to "deter or hinder him or them from buying of any corn or "grain in any market or other place within this kingdom; "or ſhall unlawfully ſtop or ſeize upon any waggon, cart, "or other carriage, or horſe loaded with wheat, flour, meal, "malt, or other grain, in or on the way to or from any city, "market-town, or ſea port of this kingdom, and wilfully and "maliciouſly break, cut, ſeparate, or deſtroy the ſame, or "any part thereof, or the harneſs of the horſes drawing the "ſame; or ſhall unlawfully take off, drive away, kill, or "wound any ſuch horſes, or unlawfully beat or wound the "driver or drivers of ſuch waggon, cart, or other carriage, "or horſe ſo loaded, in order to ſtop the ſame; or ſhall, by "cutting of the ſacks, or otherwiſe, ſcatter or throw abroad "ſuch wheat, flour, meal, malt, or other grain, or ſhall "take, or carry away, ſpoil, or damage the ſame or any part "thereof; on conviction by two juſtices of the peace, or at "ſeſſions, ſhall be ſent to the common gaol, or houſe of cor- "rection, to hard labour, not exceeding three months, nor "leſs than one, and be once publickly whipped during the "ſaid confinement."

To aſſault with intent to hinder a miſdemeanour.

† *Sect.* 2. And it is further enacted, par. 2. "That if any "ſuch perſon or perſons ſo convicted ſhall commit any of the "offences aforeſaid a ſecond time, or if any perſon or perſons "ſhall wilfully and maliciouſly pull, throw down, or other- "wiſe deſtroy any ſtore-houſe or granary, or other place where "corn ſhall be then kept, in order to be exported; or ſhall "unlawfully enter any ſuch ſtore-houſe, granary, or other "place, and take and carry away any corn, flour, meal, or "grain therefrom, or ſhall throw abroad or ſpoil the ſame, or "any part thereof; or ſhall unlawfully enter on board any "ſhip, barge, boat, or veſſel, and ſhall wilfully and malici- "ouſly take and carry away, caſt, or throw out therefrom, "or otherwiſe ſpoil or damage any meal, flour, wheat, or "grain therein, intended for exportation, every perſon ſo "offending, ſhall, on conviction, be tranſported for ſeven "years; and if ſuch convict ſhall return, &c. he ſhall ſuffer "death as a felon, without benefit of clergy; but without "corruption of blood, loſs of dower, or diſinheritance."

A ſecond offence, or to deſtroy any granary, &c. felony.

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The hundred liable.

† *Sect.* 3. And it is further enacted, "That the hundred "where any such offence shall be committed, shall make full "satisfaction and amends, not exceeding one hundred pounds, "to any party injured, or their representatives, for the "damages they sustain by any offender against this act, to be "recovered as directed by the statute of hue and cry, 27 "Eliz. c. 13. But the party shall give notice to a constable "within two days after the fact; and before the expiration of "ten days after such notice, shall give in his examination as "the act directs; and if any one of the offenders be convicted "within twelve months, the hundred is released. No actions, "therefore, shall be brought before the expiration of one "year, nor after the expiration of two years."

# APPENDIX THE THIRTEENTH.

## OF THE OFFENCE OF RETURNING FROM TRANSPORTATION.

Transportation to America.

† ALL offenders convicted of grand or petit larceny, or any other felonious taking, except the buying or receiving of stolen goods, whose crimes are *within* the benefit of clergy, and for which they are liable only to be burned in the hand or whipped; and also all offenders whose crimes, on conviction, exclude them from the benefit of clergy, to whom his majesty shall extend his royal mercy, on condition of *such* transportation, (1) signified under the great seal, by one of the principal secretaries of state, shall, and may be transported to America (2) for seven years; and all offenders convicted of knowingly buying or receiving stolen goods, to whom such conditional mercy shall be extended, generally shall be transported to America for the term of fourteen years, or such other term as shall be made part of such condition. And it is thereupon further enacted, by 4 Geo. 1. c. 11. s. 2. "That if any offender or "offenders so ordered to be transported for any term of seven "years or fourteen years, or other time or times as aforesaid, shall return into any part of Great Britain or Ireland, "before the end of his or their said term, he or she so returning as aforesaid, shall be liable to be punished as any person "attainted of felony without the benefit of clergy, and execution shall and may be awarded against such offender or

(1) If the condition of the king's pardon shall be, that he departs the realm within fourteen days from the day of his discharge from prison, it has been ruled that the daily book which is kept by the clerk of the papers for the prison in which the discharges and commitments are entered, is admissable evidence to prove the time and fact of the discharge, altho' it is the duty of another officer to discharge the prisoners, and the clerk of the papers has no personal knowledge of the fact. O. B. 1785, p. 1137, 1138.

(2) And it has been determined by all the judges, upon a question arising on the fishing act, referred by Mr. Justice Bathurst, that when an act of parliament says generally that an offender shall be transported, without saying where, it shall be to America. O. B. 1785, p. 1142.

"offenders

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" offenders accordingly." Provided nevertheleſs, "That the " king may at any time pardon, and diſpenſe with any ſuch " tranſportation, and allow of the return of any ſuch offender " or offenders from America, upon the terms as deſcribed in " the act."

† *Sect.* 2. And whereas ſome felons ordered for tranſportation, have already, and others may, come on ſhore, and return to Great Britain before they have been actually tranſported to America, or may break gaol, or eſcape before ſuch tranſportation. It is thereupon enacted, by 6 Geo. 1. c. 23. ſ. 6. " That if any felon or felons who ſhall be ordered for " tranſportation, ſhall be afterwards at large within Great " Britain, without ſome lawful cauſe, before the expiration " of the term for which ſuch felon or felons was, were, or " ſhall be ordered to be tranſported, all and every ſuch perſon " and perſons, being thereof lawfully convicted, (3) ſhall " ſuffer death as in caſes of felony, without benefit of " clergy."

(3) If the priſoner, upon his trial, confeſs the fact, and acknowledge he is the man, the court will record his confeſſion. O. B. 1784, p. 56. But, otherwiſe, the record of his conviction muſt be produced; it muſt correſpond with the averments in the indictment, and evidence muſt be given of his identity. O. B. 1785, p. 1137.

† *Sect.* 3. And to the intent that ſuch conviction may be as little trouble as poſſible, It is further enacted by par. 7. " That ſuch offender may be tried either before juſtices of " aſſize, oyer and terminer, or gaol delivery for the county, " city, or place from whence he was ordered to be tranſ- " ported; and that the clerk of the aſſize and the clerk of the " peace where ſuch orders for tranſportation ſhall be made, " ſhall, at the requeſt of the proſecutor, or any other in his " majeſty's behalf, certify a tranſcript, briefly and in few " words, containing the effect and tenor of every indictment " and conviction of ſuch man or woman, and of the order or " contract for his or her tranſportation, to the juſtices of aſſize, " oyer and terminer, or gaol delivery where ſuch man or " woman ſhall be indicted; which ſhall, on production of it, " be a ſufficient proof of the former conviction and order for " tranſportation."

Mode of trial.

† *Sect.* 4. And whereas many felons who have agreed, upon certain conditions, to tranſport themſelves, either for life, or for ſome term or number of years, have already, and may hereafter come on ſhore or return, It is enacted, by 16 Geo. 2. c. 15. " That if any felon or other offender already ordered, " or hereafter to be ordered for tranſportation, or who hath " already, or hereafter ſhall agree to tranſport him or her- " ſelf, on certain conditions, to America, either for life or " any number of years, ſhall be afterwards at large, with- " in any part of Great Britain, without ſome lawful cauſe,

Convicts tranſporting themſelves, &c.

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" before the expiration of the term for which he or ſhe were " ſo ordered to be tranſported, or had ſo agreed to tranſport " him or herſelf; all and every ſuch perſon or perſons being " thereof lawfully convicted, ſhall ſuffer death without benefit " of clergy."

† *Sect.* 5. Whereas offenders excluded from the benefit of clergy are frequently reprieved by the judge who tries them, and, upon his recommendation, may receive mercy on condition of tranſportation to America for life or for the term of fourteen years; it is enacted by 8 Geo. 3. c. 15, "That where, upon ſuch recommendation, ſuch offenders ſhall receive mercy as aforeſaid, ſignified by a principal ſecretary of ſtate, to the judge ſo recommending, it ſhall be lawful for every ſuch judge to make an order for the immediate tranſportation of every ſuch offender, which ſhall be as good and effectual, and be conſidered as if the ſame had been made during the continuance of the aſſizes at which ſuch offender was, or ſhall be convicted." " But if ſuch offender " ſo ordered for tranſportation ſhall be afterwards at large, " within any part of Great Britain, without ſome lawful " cauſe, (4) before the expiration of the term for which ſuch " offender ſhall have been ordered to be tranſported, every " ſuch perſon being thereof lawfully convicted, ſhall ſuffer " death without benefit of clergy, and ſhall be tried in like " manner as *other felons* found at large before the expiration " of their term."

(4) Maximilian Miller was convicted at O. B. January ſeſſions, 1771, and ordered for tranſportation for ſeven years. He obtained mercy, under the ſign manual, on condition of his giving ſecurity to the ſatisfaction of the Recorder to tranſport himſelf for that term. He gave the ſecurity, and was accordingly admitted to bail, but did not go abroad. In December ſeſſions following he was indicted capitally for being at large, &c. He offered the ſign manual in evidence, but that being rejected, he was found guilty, ſubject to the opinion of the judges, Firſt, Whether the ſign manual ought to have been received? Secondly, Whether it could have availed the priſoner, as he had not *ſubſtantially* performed the conditions of his pardon? All the judges, except De Grey, C. J. were unanimous that the evidence ought to have been received; and that the priſoner having complied with the literal import of the condition, by giving the ſecurity, which authorized the judge to bail him, it was a *good cauſe* for him to appear at large, and therefore ought not to have been convicted. Black. 297. It is ſaid, however, that no judicial determination was ever communicated upon this caſe, but that the priſoner was, in fact, remanded to his former ſentence. O. B. 1785, p. 1140, 1145. And this appears to be the practice, vide Patrick Madan's caſe. And the caſe of Aikles, O. B. 1785, No. 902.

Tranſportation beyond the ſeas.

† *Sect.* 6. But America having at length ſeparated from its connection with Great Britain, The puniſhment of felons and other offenders by tranſportation to the plantations, was attended with many difficulties. And it is therefore enacted by 19 Geo. 3. c. 74. " That when any perſon in Eng-

Continued to the 1ſt of June, 1787, by 24 Geo. 3. c. 56.

" land, or Wales, ſhall be lawfully convicted of grand or petit " larceny, or any other crime for which he is liable to be " tranſported to America, ſuch perſon ſhall, if the court ſhall " *think fit*, be ordered to be tranſported to any parts beyond

" the

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" the ſeas, whether the ſame be ſituated in America, or elſe-
" where, in ſuch and the like manner, and for the ſame term,
" as, and for which ſuch perſon is, or ſhall be liable to be
" tranſported to America."

Barrington on the ſtatutes, p. 445, to 447.

† *Sect.* 7. And it is further enacted by the ſaid ſtatute, par. 2. " That when any ſuch perſon, who ſhall be ſo convicted,
" ſhall, in conſequence thereof, be ordered to be tranſported
" to any parts beyond the ſeas. Or if his majeſty ſhall extend
" his mercy to any offender, convicted or attainted of any fe-
" lony excluded from clergy, upon condition of *(a)* tranſporta-
" tion to any parts beyond the ſeas, as aforeſaid, then in any ſuch
" caſes all laws, ſtatutes, uſages, and cuſtoms now in force,
" with regard to tranſportation to America, and their puniſh-
" ment for being afterward at large, within any part of Great
" Britain, before the expiration of the ſeveral terms for which
" they were ordered to be tranſported, or had agreed to tranſ-
" port themſelves, and particularly the ſeveral proviſions con-
" tained in the 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 16 Geo.
" 2. c. 15. and the 8 Geo. 3. c. 15. ſhall take place and be in
" force and enure, with regard to the tranſportation of ſuch of-
" fenders, and with regard to their puniſhment for being after-
" wards at large as aforeſaid, in like manner as if the ſame had
" been repeated, and ſpecially inſerted in this act." (5)

*(a)* For the form in which conditional pardons are now worded, vide B. 2. c. 37.

(5) Aikles was convicted, O. B. January ſeſſions, 1784, of felony *within the benefit of clergy*, and received ſentence of tranſportation, according to the directions of this act, for ſeven years. He received his majeſty's pardon " on condition of departing the realm within fourteen days after his " diſcharge, giving ſecurity to the ſatisfaction of the Recorder ſo to do." He gave the ſecurity required; and in conſequence thereof was diſcharged out of Newgate on the 9th of March, 1785, by virtue of a warrant under the hand and ſeal of the Recorder. On the 26th of May following, he was apprehended, and afterwards indicted for being at large in Great Britain before the expiration of the term, without any lawful cauſe, &c. Upon theſe facts being proved, ſeveral queſtions of law aroſe.—The 16 Geo. 2. c. 15, inflicts death upon the return of any felon " who ſhall have agreed to " tranſport himſelf *to America*." Aikles had only agreed to tranſport himſelf *beyond the ſeas*.—The 19 Geo. 3. c. 74, inflicts death upon the return of any offender convicted of any crime for which he was liable, by the former acts, to be tranſported to America, " who ſhall, *in conſequence thereof*, be ordered " to be tranſported to parts beyond the ſeas." Aikles *had not been tranſported* beyond the ſeas *in conſequence* of a conviction which rendered him liable to be tranſported to America: He had agreed to tranſport himſelf *in conſequence of* the king's pardon, &c; a caſe for which the act has made no expreſs proviſion. The 19 Geo. 3. c. 74. inflicts death upon the return of any offender " convicted of felony, *excluded from clergy*, to whom his majeſty ſhall extend mercy on condition " of tranſportation." But Aikles had received conditional mercy, on conviction of an offence *within the benefit of clergy*. It was therefore contended that the priſoner was not, *immediately*, within the operation of theſe ſtatutes. But Aikles had broken the condition of the king's pardon, in not departing the realm within fourteen days from his diſcharge; and upon the argument in this caſe, it ſeems to be the opinion, that the whole grant was, in conſequence of the violation, a mere nullity and entirely done away. This conſideration gave birth to the queſtions whether the priſoner was not then a perſon within theſe words of 19 Geo. 3. " lawfully convicted of a crime for which he is " *liable* to be tranſported to America, and who, in conſequence thereof, *had been ordered to be* " *tranſported* beyond the ſeas." But it was contended, upon the authority of Miller's caſe before mentioned, that, having complied with a part of the condition, by giving ſecurity, which, though otherwiſe expreſſed, muſt neceſſarily be precedent; the legal diſcharge obtained in conſequence of it, by virtue of the Recorder's warrant, formed a *lawful cauſe for being at large*, which was not interrupted by the violation of the further condition, " that he ſhould depart the realm within fourteen " days, &c." Theſe ſeveral queſtions furniſhed ingenuity with argument, and produced the ſentiments of judges, highly reſpectable indeed, upon points of criminal law; but this queſtion never came to an ultimate deciſion. It appeared upon further evidence, that the priſoner had a real intention to quit the kingdom, which had been defeated by unaffected poverty, diſtreſs, and ill health. The jury, under *the direction of the court*, thought theſe circumſtances amounted to a legal excuſe, and the priſoner *was accordingly acquitted*, and remanded to his former ſentence. O. B. 1785, No. 901.

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Labour on board the hulks.

† *Sect.* 8. It is alſo enacted by par. 27. "That male offenders, convicted of any crime, except petit larceny, for "which they are liable to tranſportation, may in lieu thereof, "if the court ſhall think fit, be puniſhed by being kept on "board ſhips or veſſels, (commonly called the hulks) and employed in raiſing ſand, ſoil, or gravel from the river Thames, "&c. &c. for ſuch term, not leſs than one year, nor exceeding "five years. Or, in caſe ſuch offender ſhall be liable to be "tranſported for fourteen years, not exceeding ſeven years, "as the court ſhall think fit to order and adjudge."

† *Sect.* 9. And it is alſo enacted par. 28. "That where "any male offender ſhall be lawfully convicted of any robbery, "or other felony without benefit of clergy, and mercy, notified in writing, by a ſecretary of ſtate as aforeſaid, ſhall be "extended to ſuch offender, upon condition of being kept to hard "labour, during any ſpecified term, ſuch mercy may be allowed "in the ſame manner, as if there was a conditional pardon, "under the great ſeal, and the court *(a)* may, and ſhall or- *(a)* Vide the act.
"der ſuch offender to be kept to hard labour, as aforeſaid, for "the time ſpecified in the notification from the ſecretary of "ſtate."

N. B. This act inflicts the puniſhment of death upon thoſe who being ordered to hard labour inſtead of being capitally puniſhed, in any of the places of confinement mentioned in the act, ſhall break from their keepers or eſcape.

† *Sect.* 10. It is therefore further enacted by the ſaid ſtatute of 19 Geo. 3. c. 74. "That if any perſon who hath been "ordered to hard labour, inſtead of tranſportation, ſhall break "from the cuſtody of the keepers, or eſcape, they ſhall be "puniſhed by an addition of three years to the term for "which he, or ſhe, at the time of his, or her breach of "priſon, or eſcape was ſubject to be confined, and if ſuch "perſon ſo puniſhed by ſuch addition to the term of con- "finement, ſhall afterwards be convicted of a ſecond eſcape, "or breach of priſon, he or ſhe ſhall be adjudged guilty of "felony, without benefit of clergy."

But, as this part of the act was never carried into execution, the inſertion of it is omitted.

Tranſportation to ſuch places as the king ſhall appoint.

† *Sect.* 11. But the difficulty of immediately finding proper places, beyond the ſeas, for the purpoſes of tranſportation; and it being found impracticable to carry all the proviſions of the 19 Geo. 3. effectually into execution. It is enacted by 24 Geo. 3. ſeſ. 2. c. 56. which has continuance to the 1 June 1787, That where offenders ſhall be convicted at the aſſizes, or ſeſſions, in the manner, and under the circumſtances before mentioned, ſet forth more at large, under title tranſportation at the end of chapter 33, in the ſecond book, "of offences for which ſuch offenders ſhall be "liable to be tranſported, &c. it ſhall, and may be lawful for "the court to order and adjuge, that ſuch offenders ſo convict- "ed, ſhall be tranſported beyond the ſeas, for any term of "*years, not* exceeding the number for which they are liable to

"be

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" be tranſported. And that in every ſuch caſe it ſhall and may " be lawful for his majeſty, by, and with the advice of his pri- " vy council to declare and appoint to what place, or places, " part, or parts beyond the ſeas, either within his majeſty's " dominions, or elſewhere, out of his majeſty's dominions, " ſuch felons, or other offenders ſhall be conveyed or tranſ- " ported."

† *Sect.* 12. And it is further enacted by par. 5. " That if " any offender who ſhall be ſo ordered, by any ſuch court as " aforeſaid, to be tranſported beyond the ſeas, or who ſhall " agree to tranſport himſelf, or herſelf, on certain conditions, " either for life, or any number of years, to any ſuch place, or " places, part, or parts, as ſhall be appointed by his majeſty, " in manner aforeſaid, ſhall be afterwards at large in Great " Britain, or Ireland, without ſome lawful cauſe, before the " expiration of the term for which ſuch offender or of- " fenders, ſhall have been ordered to be tranſported be- " yond the ſeas, or ſhall have ſo agreed to tranſport " himſelf, or herſelf, as aforeſaid, every ſuch offender being " at large, as aforeſaid, being thereof lawfully convicted, ſhall " ſuffer death without benefit of clergy."

Death to return

N. B. The ſame mode of trial is appointed as by ſect. 3. ſupra.

† *Sect.* 13. And it is further enacted by 25 Geo. 3. c. 46. " That when any perſon or perſons, ſhall be lawfully " convicted, before any court competent for the trial of crimes " in Scotland, of any offence for which the puniſhment of " tranſportation may be inflicted, the court may adjudge ſuch " perſon or perſons, to be tranſported beyond the ſeas, in like " manner as is now in uſe, and his majeſty, by and with the " advice of his privy council, may declare and appoint what " place or parts beyond the ſeas, either within his majeſty's " dominions, or elſewhere out of his dominions, ſuch offen- " ders ſhall be conveyed or tranſported."

Offenders in Scotland may be tranſported.

*Sect.* 14. And it is alſo further enacted, " That when " his majeſty ſhall extend his mercy to any offender under " ſentence of death in Scotland upon condition of tranſpor- " tation, ſignified by one of the principal ſecretaries of ſtate, " it ſhall be lawful for any court, having authority, to allow " ſuch offender, the benefit of a conditional pardon, " and (except in caſes where ſuch offender ſhall be autho- " rized by his majeſty to tranſport himſelf) to order the ſame " in the manner the act deſcribes."

Judges may allow a pardon on that condition.

† *Sect.* 15. And it is further enacted, " That if any offen- " der in Scotland, ordered for tranſportation, and ſuch order " cannot be conveniently executed, with reſpect to the place in " ſuch order mentioned, it ſhall be lawful for any two or more of " the judges of the court of Juſticiary, to order that ſuch offen-

To ſuch places as his majeſty ſhall appoint.

" der

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" der ſhall be tranſported to any other part beyond the ſeas, " which ſhall have been appointed by his majeſty as aforeſaid."

Returning, death without clergy.

† *Sect.* 16. And it is enacted by par. 3. " That if any of- " fender or offenders, who ſhall be ſo ordered by ſuch court as " aforeſaid, to be tranſported beyond the ſeas, or who ſhall " agree to tranſport himſelf or herſelf, on certain conditions, " as aforeſaid, or who ſhall be ſo ordered by two judges of " the Juſticiary, ſhall be afterwards at large in Great Britain " or Ireland, without ſome lawful cauſe, before the expiration " of the term for which ſuch offender ſhall have been ordered " to be tranſported beyond the ſeas, or ſhall have ſo " agreed to tranſport himſelf, or herſelf, or ſhall have been " ſo ordered by two juſtices of the court of Juſticiary, as " aforeſaid, every ſuch offender, on being thereof lawfully con- " victed, ſhall ſuffer death as in caſes of felony, without the " benefit of the clergy, by the law of England; and ſuch offen- " der being found at large in Scotland may be tried there be- " fore any court of competent juriſdiction for the trial of the " original offence."

CHAP-

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# APPENDIX THE FOURTEENTH.

## Or ASSAULT WITH INTENT TO ROB.

THE old maxim of the criminal law, that *voluntas reputabitur pro facto* (*a*) continued to prevail in the reign of Henry the Fourth; and it was then agreed that if a man was indicted that *il giſoit deprædando* it was felony (*b*)—But in the ninth year of Edward (*c*), a different doctrine began to be held; and men were no longer puniſhed for crimes which they only meditated, but had not actually committed (*d*); and ſince that time the bare intention to commit a felony has been conſidered as a miſdemeanor only, and puniſhable by fine, impriſonment, &c. (*e*)

(*a*) 25 Edw. 3. pl. 32. 27 Aſſize 38. 1 Hale 532.
(*b*) Year book, 13 Hen 4. 85.
(*c*) Year book, pl. 26. b. S. P. C. 27. b.
(*d*) Reeves' Hiſtory of Engliſh law, 3 vol. p. 413.

(*e*) Plowden 259. Caſes tempus Hardwick, 3 Inſt. 68.

*Sect.* 1. But the puniſhment as a miſdemeanor, not being found ſufficiently terrific to reſtrain the frequency of the offence it is recited by 7 Geo. 2. c. 22. that whereas many of his majeſty's ſubjects have of late frequently been put in fear and danger of their lives, by wicked and ill diſpoſed perſons, aſſaulting and attempting to rob them; and whereas the puniſhment of ſuch offenders is not adequate to the heinouſneſs of the crime, nor ſufficient to deter wicked perſons from ſuch attempts; to the end therefore that all perſons may be deterred from committing ſuch offences, and for the greater puniſhment of ſuch offenders, and for the more effectually preventing the like miſchiefs in future. It is enacted, "that if any perſon or perſons, "with any offenſive weapon, or inſtrument unlawfully and "maliciouſly, ſhall aſſault, or ſhall by menaces, or in or by "any forcible or violent manner, demand any money, goods "or chattels, of or from any other perſon or perſons, with "a felonious intent to rob, or commit robbery upon ſuch "perſon or perſons, that then the offender, &c. ſhall be "adjudged liable to be tranſported for ſeven years."

*Sect.* 2. And it is alſo enacted, "That if ſuch offender "ſhall break gaol, or eſcape before tranſportation, or return "before the expiration of the ſeven years, he ſhall ſuffer death "without benefit of clergy."

Upon

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Upon this act the following conſtructions have been made.

† *Sect.* 3. Firſt, that to compleat the crime not only the aſſault, as by holding a piſtol towards a coachman on his box and telling him to ſtop; but a demand of the money or other property muſt alſo actually be made.—But in this caſe (*a*) it was ſaid by *Mr. Juſtice Chapple*, who tried the priſoner, that the demand need not be made in *expreſs* terms, for that a dumb man may make a demand, as if he ſtop a perſon on the highway, and put his hat into the coach with a piſtol in his hand.

(*a*) The caſe of Peter Perfait, O. B. Dec. Seſſ. 1740. preſent Ch. Juſ. Willes who accorded to Chapples' opinion, and the priſoner was thereupon acquitted, M. S. Vide Haward's caſe, O.B. 1783. No. 538.

† *Sect.* 4. Secondly, that both the aſſault and the demand muſt be made upon the perſon intended to be robbed, for the words of the act are "that if any perſon ſhall aſſault, "&c. and demand the money &c. of any other perſon, with "intent to rob, or commit robbery upon, *ſuch perſon.*" (*b*)

(*b*) Thomas's caſe. O.B. July Seſſ. 1784. by Mr. Juſt. Aſhhurſt.

† *Sect.* 5. Thirdly, that the aſſault muſt be made with an offenſive weapon, and that the evidence muſt prove the aſſault was made with an offenſive weapon of the ſame kind as that which is laid in the indictment.

† *Sect.* 6. Fourthly, that it is not neceſſary that the indictment ſhould charge the intention to have been, in the very words of the ſtatute "to rob or commit robbery"—it is ſufficient if it be laid "with a felonious intent to take his monies from his perſon and againſt his will, feloniouſly to ſteal, take and carry away" but that it would be more correct if the words "by force or violence" were added (*b*)

(*c*) Rook's caſe, O. B. October Seſſ. 1785. Mr. Serjeant Adair, Recorder.

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# CHAPTER THE FIFTY-NINTH.

## OF MISPRISION OF FELONY.

OFFENCES more immediately againſt the ſubject, not capital, are either miſpriſion of felony, or other inferior offences. 3 Inſt. 36. 1 Hale 374, 375, 652, 708.

*Sect.* 1. It is ſaid, that every felony includes miſpriſion of felony, and may be proceeded againſt as a miſpriſion only, if the king pleaſe, as hath been ſhewn already in chapter twenty. 1 B. Treaſ. 25. 2 Rich. 3. 10. S. P. C. 32.

*Sect.* 2. But generally miſpriſion of felony is taken for a concealment of felony, (1) or a procuring of the concealment thereof, whether it be felony by the common law, or by ſtatute. Summary 129. S. P. C. 37. c. 3 Inſt. 139.

(1) Silently to obſerve the commiſſion of a felony, without uſing any endeavours to apprehend the offender, is a miſpriſion. 1 Hale 431, 448, 533. 2 Hale 75. 2 Hawk. c. 12. For a man is bound to diſcover the crime of another, to a magiſtrate, with all poſſible expedition. 3 Inſt. 140. So alſo the concealment of treaſure trove, is miſpriſion of felony. 4 Comm. 121. 3 Inſt. 133.

*Sect.* 3. For this offence every common perſon is puniſhable by fine and impriſonment at common law. And by the ſtatute of Weſtm. 3 Edw. 1. c. 9. "If the ſheriff, coroner, or "any other bailiff within a franchiſe, or without, for reward, "or for prayer, or for fear, or for any manner of affinity, con"ceal, conſent, or procure to conceal the felonies done in their "libe ties; or otherwiſe will not attach nor arreſt ſuch felons, "(there as they may) or otherwiſe will not do their office, for "favour borne to ſuch miſ-doers, and be attainted thereof, "they ſhall have one year's impriſonment, and after "make a grievous fine at the king's pleaſure, if they have "wherewith; and if they have not whereof, they ſhall have "impriſonment of three years." B. Treaſ. 25. 3 Inſt. 173.

*Sect.* 4. By 3 Hen. 7. c. 1. "The juſtices of the peace "of every ſhire of this realm, for the time being, may take "by their diſcretion an inqueſt, whereof every man ſhall have "lands and tenements to the yearly value of forty ſhilllings, at "the leaſt, to enquire of the concealments of other inqueſts "taken before them, and afore other, of ſuch matters and of"fences, as are to be enquired and preſented afore juſtices "of the peace, whereof complaint ſhall be made by bill, or by "bills, as well within franchiſe, as without. And if any ſuch "concealment be found of any inqueſt, as is afore rehearſed, "had or made within the year after the ſame concealment, "every perſon of the ſame inqueſt to be amerced for the con"cealment, by diſcretion of the ſame juſtices of the peace; the "ſaid amerciaments to be ſeſſed in plain ſeſſions."

*Sect.* 5.

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1 Hale 619. S. P. C. 40. 3 Inſt. 134. Summary 130.

*Sect.* 5. To this title of miſpriſion of felony, that of theft-bote ſeems not improperly reducible, which is where one not only knows of a felony, but takes his goods again, or other amends not to proſecute.

F. Cor. 353. 2 Hale 400. 2 And. 47. C. Eliz. 486. 536. B. 2. c. 29. ſ. 16, &c.

*Sect.* 6. This offence is very nearly allied to felony, and is ſaid to have been anciently puniſhed as ſuch. But at this day it is puniſhable only with ranſom and impriſonment, unleſs it were accompanied with ſome degree of maintenance given to the felon, which makes the party an acceſſary after the fact.

B. Cor. 122. 42 Aſſ. Sum. 130. 1 R. Abr. 67. F. Aſſ. 346.

*Sect.* 7. But the bare taking of one's own goods again, which have been ſtolen, is no offence at all, unleſs ſome favour be ſhewn to the thief. (2)

(a) To take any reward for helping any perſon to ſtolen goods, is made felony by 4 Geo. 1. c. 11. And to adverti ſe a reward for the return of things ſtolen, incurs a forfeiture of fifty pounds, by 25 Geo. 2. c. 36. for which vide ante, appendix the eighth.

## CHAPTER THE SIXTIETH.

## OF SURETY OF THE PEACE.

INFERIOR offences more immediately againſt the ſubject not capital, either amount to an actual diſturbance of the peace, or do not.

And firſt I ſhall conſider ſuch offences of this kind, as amount to an actual diſturbance of the peace. But before I deſcend to the ſeveral kinds thereof, it may not be improper firſt to ſhew what ſecurity may be had againſt the breach of the peace, before it happens.

And in order hereto, I ſhall examine how the breach may be ſecured. Firſt, By ſurety for keeping the peace. Secondly, By ſurety for the good behaviour.

Dalt. c. 116. 4 Comm. 248.

As to ſurety for keeping the peace, I ſhall conſider the following particulars: Firſt, In what caſes it ought to be taken *ex officio*. Secondly, At whoſe requeſt it ought to be granted. Thirdly, Againſt whom it ought to be granted. Fourthly, For what cauſe it is grantable. Fifthly, In what manner it is grantable by the courts of Chancery and King's Bench. Sixthly, In what manner it is grantable by a juſtice of peace. Seventhly, In what manner the proceſs for it ought to be executed. Eighthly, How ſuch proceſs may be ſuperſeded. Ninthly, What ought to be the form of a recognizance for this

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this purpoſe. Tenthly, How ſuch a recognizance may be diſcharged. Eleventhly, How ſuch a recognizance ought to be certified and proceeded upon. Twelfthly, How it may be forfeited.

*Sect.* 1. As to the firſt point, *viz.* In what caſes ſurety of the peace ought to be taken *ex officio*; it ſeems, that any juſtice of peace may, according to his diſcretion, bind all thoſe to the peace, who in his preſence ſhall make any 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 perſons 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; and all ſuch perſons who, having been before bound to keep the peace, ſhall be convicted of having forfeited their recognizance. (1)

Dalt. c. 69. 158. Lamb. 77, 78. 9 Ed. 4. 3. B. Peace, 7, 8. Cromp. 135, 142. 21 E. 4. 40. Foſter 138.

(1) Conſervators of the peace alſo may grant ſurety according to their diſcretion. 4 Burr. 2490. And this ſeems to have been the principal duty of a conſervator. 11 St. Tr. 316. A ſecretary of ſtate, therefore, nor a privy counſellor, ever bind to the peace or the good behaviour, for they are not, as ſuch, conſervators of the peace. Lord Holt, indeed, in the caſe of Kendal and Roe, ſo conſidered them; but Lord Cambden affirms that no treatiſe, caſe, record, or ſtatute, has ever called them conſervators of the peace from the beginning of time down to that deciſion. 11 St. Tr. 317.

*Sect.* 2. As to the ſecond point, *viz.* At whoſe requeſt the ſurety of the peace ought to be granted; it ſeems agreed at this day, that all perſons whatſoever under the king's protection, being of ſane memory, whether they be natural and good ſubjects, or aliens, or attainted of treaſon, *&c.* have a right to demand ſurety of the peace.

Dalt. c. 68. Lamb. 78, 79. Crom. 133, 134.

*Sect.* 3. But it has been queſtioned, whether Jews or pagans, or perſons attainted of *præmunire*, have a right to it or not.

Dalt. c. 68. Lamb. 80. 4 Comm. 250.

*Sect.* 4. However it is certain, that a wife may demand it againſt her huſband threatening to beat her outrageouſly, and that a huſband alſo may have it againſt his wife. (2)

Dalt. c. 68. Lamb. 78. Crom. 133. 3 Lev. 128.

Regiſter 89. 3 Keb. ſ. 433. Ld. Hard. caſes, 74. Strange, 1207. F. N. B. 80.

(2) And if the marriage is diſputed, the court will order the recognizance to be worded ſo as not to admit the fact. Str. 1231.

*Sect.* 5. As to the third point, *viz.* Againſt whom the ſurety of the peace ought to be granted, there ſeems to be no doubt but that it ought, upon a juſt cauſe of complaint, to be granted by any juſtice of peace, againſt any perſon whatſoever, under

Dalt. c. 68. Lamb. 81, 82. Cromp. 134. 3 Keb. 433. 2 Lev. 128.

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under the degree of nobility, being of ſane memory, whether he be a magiſtrate or private perſon, and whether he be of full age, or under age, &c. But infants and femes covert ought to find ſecurity by their friends, and not to be bound themſelves; and the ſafeſt way of proceeding againſt a peer is by complaint to the court of chancery or king's bench. (2)

See the books above cited, and Fitz. ſubpœna 20.

(2) It is ſaid the fear of one cannot be the fear of another, and therefore every recognizance muſt be ſeparate. Pult. 18. but in Mich. 23 Geo. 2. B. R. the court allowed three women to file joint articles of the peace againſt three men. The King v. Nettle, &c. MSS.

Dalt. c. 67. Lamb. 82. Crom. 135. 1 Lev. 107. 2 Lev. 228. F. N. B. 801. Reg. 88. Moor. 874. Godb. 215. 1 Keb. 290.

*Sect.* 6. As to the fourth point, *viz.* For what cauſe the ſurety of the peace is grantable; it ſeems clear, that, wherever a perſon has juſt cauſe to fear that another will burn his houſe, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him ſuch miſchief, he may demand the ſurety of the peace againſt ſuch perſon; and that every juſtice of peace is bound to grant it, upon the party's giving him ſatisfaction upon oath, that he is actually under ſuch fear; and that he has juſt cauſe to be ſo, by reaſon of the other's having threatened to beat him, or lain in wait for that purpoſe; and that he does not require it out of malice, or for vexation.

Dalt. c. 67. Lamb. 82, 83. Con. 17 Ed. 4. 4. B. Peace 22. Crom. 134.

*Sect.* 7. 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, &c. 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. (3)

(3) And although the fact from which the fear ariſes be pardoned, the court will receive it as a ground to grant the ſecurity upon. Str. 473.

See 1 Lev. 53. 1 Sid. 67. Skin. 61. Mullineux's caſe. Comb 427. Bac. Ab.

*Sect.* 8. As to the fifth point, *viz.* In what manner ſuch ſurety is grantable by the courts of chancery and king's bench, it is enacted by 21 Jac. 1. c. 8. "That all proceſs for the "peace or good behaviour to be granted or awarded out of "the ſame courts, or either of them, againſt any perſon or "perſons whatſoever, at the ſuit of, or by the proſecution of "any perſon or perſons whatſoever, ſhall be void and of none "effect, unleſs ſuch proceſs ſhall be ſo granted or awarded, "upon motion firſt made before the judge or judges of the "ſame courts reſpectively, (ſitting in open court, and upon "declaration in writing upon their corporal oaths, to be then "exhibited unto them, by the parties which ſhall deſire ſuch "proceſs) of the cauſes for which ſuch proceſs ſhall be "granted or awarded, by or out of the ſaid courts reſpectively, "and unleſs that ſuch motion and declaration be mentioned

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" to be made upon the back of a writ; the ſaid writings there " to be entered and remain of record; and that if it ſhall " afterwards appear unto the ſaid courts, or either of them " reſpectively, that the cauſes expreſſed in ſuch writings, or " any of them, be untrue, That then the judge or judges of " the ſaid courts, or either of them reſpectively, ſhall and " may award ſuch coſts and damages unto the parties grieved, " for their, or any of their wrongful vexations in that behalf, " as they ſhall think fit; and that the party or parties ſo of- " fending, ſhall and may be committed to priſon by ſuch " judge or judges, until he or they pay the ſaid coſts and " damages. (4)

(4) A peer or peereſs cannot be bound over in any other place than the courts of king's bench or chancery. 4 Comm. 251. A peereſs may demand it againſt her lord, as in the caſes of the Marquis of Carmarthen. Foſter 339. Lord Vane, Str. 1202. Earl of Stamford. Hardw. caſes 74. Earl Ferrers. Burr. 631, 703. Lady Strathmore, Eaſ. 25 Geo. 3. Lord Howard, 11 Mod. 169. Alſo 3 Burr. 1922. The articles muſt be verified by the *oath* of the exhibitant; an *affirmation* therefore is not ſufficient. Str. 527. 12 Mod. 243. Nor will the court permit the truth of the allegations to be controverted by the defendant, but will order ſecurity to be taken immediately, if no objections ariſe upon the face of the articles themſelves. Str. 1202. But if on an application for the aſſiſtance of the court to enforce the ſubſequent proceſs, the articles ſhould manifeſtly appear, from the corroborated affidavit of the defendant, to have been a *malicious, voluntary, and groſs perjury*, the court will reſiſt the application, and commit the offender. 2 Burr. 806. 3 Burr. 1922. Nor will the court receive articles of the peace, if the parties live at a diſtance in the country, unleſs they have previouſly made application to a juſtice in the neighbourhood. 2 Burr. 780. And if the court do receive them, the ſecondary may indorſe the attachment, in the ſum required, and order a juſtice of the country to take the ſecurity. 2 Burr. 1039. 1 Black. 233. Or, if very particular circumſtances attend the caſe, the court will compel the juſtices by mandamus. Strange 835. But that this is a ſingular inſtance, vide Sayer 253.

*Sect.* 9. As to the ſixth point, *viz.* In what manner ſuch ſurety is grantable by a juſtice of peace, it ſeemeth certain, That if the perſon to be bound be in the preſence of the juſtice, he may be immediately committed, unleſs he offer ſureties; and from hence it follows, *a fortiori*, that he may be commanded by word of mouth to find ſureties, and committed for his diſobedience; but it is ſaid, that if he be abſent, he cannot be committed without a warrant from ſome juſtice of peace, in order to find ſureties, and that ſuch warrant ought to be under ſeal, and to ſhew the cauſe for which it is granted, and at whoſe ſuit, and that it may be directed to any indifferent perſon. (5)

14 H. 7, 8, 9, 10.
9 Ed. 4, 3.
B. Mainpr. 39.
Lamb. 85, &c.
Dalt. c. 69.
2 Wilſ. 158.

(5) A juſtice cannot enjoin another to keep the peace under a penalty. 3 Com. Dig. 370. Nor commit for not finding ſecurity, until the party has been required, and has refuſed ſo to do. Per Pratt. King v. Wilks, E. 3 Geo. 3.

*Sect.* 10. As to the ſeventh point, *viz.* In what manner the proceſs for the peace ought to be executed. It ſeems needleſs to give a particular account of the execution of the writ of *ſupplicavit*, becauſe I do not find that it is much in uſe at this day, and therefore I ſhall refer the reader for this purpoſe to *Fitzherbert's Natura Brevium*, fol. 80, *&c.* But as to the execution of a warrant of a juſtice, the following rules are to be obſerved. (6)

Reg. 88.
1 Keb. 203, 290.
6 Mod. 43.
2 Peere Will. 202.
Skinner 61.
2 Keb. 305.
1 Sid. 67.
1 Lev. 53.

(6) If there be no proceedings on a ſupplicavit within a year, the recognizance is, of courſe, diſcharged; and if the party be committed after the expiration of that time, he ſhall be diſcharged upon

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very slight security. Fitzg. 268. If taken below, and the party appear pursuant to the condition, no indictment being lodged, he must be discharged. Hard. Ca. But the court in discretion may refuse to discharge a recognizance, even though the exhibitant appear and consent; for a breach against any other person is equally a forfeiture. 11 Mod. 109.

amb. 89.

*Sect.* 11. First, It can be executed only by the persons to whom it is directed, or some of them, unless it be directed to the sheriff, who may either by parole, or by precept in writing, authorize an officer sworn and known, to serve it, but cannot impower any other person without a precept in writing.

L. Quinto. 5 Ed. 4. 12, 13. B. false imp. 18. Dalt. c. 69. Lamb. 90, 91. Crom. 235. 5 Co. 59. 6 Co. 54. 5 Co. 59.

*Sect.* 12. Secondly, If the warrant be made in the common form, directing the officer to cause the party complained of to come before some justice of the peace to find sufficient surety, *&c.* and if he shall refuse so to do, to convey him immediately to prison, without expecting any further warrant, until he shall willingly do the same, &c. the officer who serves it, before he makes any arrest, ought first to require the party to go with him, and find sureties according to the purport of the warrant, but upon his refusal to do either, he may carry him to the gaol by force of the same warrant without more.

Dalt. c. 69. Brook false imprisonment 11. 21 H. 7. 21. Lamb. 94, 95.

*Sect.* 13. Thirdly, 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 peace, *&c.* the officer has the election to bring him before what justice he pleases, and may carry him to prison for refusing to find surety before such justice.

Dalt. c. 69.

*Sect.* 14. As to the eighth point, *viz.* How such process may be superseded. It is said, That if one who fears that the surety of the peace will be demanded against him, find sureties before any justice of the peace of the same county, either before or after a warrant is issued against him, he may have a *supersedeas*, from such justice, which shall discharge him from arrest from any other justice, at the suit of the same party, for whose security he has given such surety. Also it is said, That an appearance upon a recognizance for the peace may be superseded, by finding sureties in the chancery or king's bench, and purchasing a writ testifying the same. But this practice having often been abused by turbulent persons, who deservedly fearing to be bound to the peace or good behaviour, by justices of peace, would procure themselves to be bound thereto in the said courts, upon insufficient sureties, or upon the colourable prosecution of some person who would be ready at all times to release them at their pleasure; whereupon writs of *supersedeas* had been often directed to justices of peace, commanding them to forbear to arrest the parties for such causes; by reason whereof such turbulent persons used to misdemean themselves among their neighbours with impunity, as it is recited by 21 Jac. 1. c. 8. It is thereupon enacted by

Lamb. 112, 113. See 2 R. Abr. 492.

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the ſaid ſtatute, "That all writs of ſuperſedeas, to be granted "out of either of the ſaid courts, ſhall be void, unleſs ſuch "proceſs be granted upon motion in open court firſt made, "&c. upon ſuch ſufficient ſureties, as ſhall appear unto the "judge or judges of the ſame court reſpectively, upon oath, "to be aſſeſſed at five pounds lands, or ten pounds in goods, "in the ſubſidy book, at the leaſt; which oaths, and the "names of ſuch ſureties, with the places of their abode, and "where they ſtand ſo aſſeſſed in the ſubſidy books, ſhall be "entered, and remain of record in the ſame courts: And "unleſs it ſhall alſo firſt appear unto the ſaid judge or judges, "from whom ſuch ſuperſedeas is deſired, That the proceſs of "the peace, or good behaviour, is proſecuted againſt him or "them, deſiring ſuch ſuperſedeas *bona fide*, by ſome party "grieved, in that court, out of which ſuch ſuperſedeas is de"ſired to be ſo awarded and directed."

2 Chan. Rep. 68.

Vide ante, p. 81. 2 Burr. 806.

*Sect.* 15. As to the ninth point, *viz.* What ought to be the form of ſuch a recognizance. If it be taken in purſuance of a writ of *ſupplicavit*, it muſt be wholly governed by the directions of ſuch writ; but if it be taken before a juſtice of peace, upon a complaint below, it ſeems that it may be regulated by the diſcretion of ſuch juſtice, both as to the number and ſufficiency of the ſureties, and the largeneſs of the ſum, and the continuance of the time, for which the party ſhall be bound. And it hath been ſaid, That a recognizance to keep the peace as to *A. B.* for a year, or for life, or without expreſſing any certain time, (in which caſe it ſhall be intended to be for life) or without fixing any time or place for the party's appearance, or without binding him to keep the peace againſt all the king's people in general, is good.

Lamb. 108, 109. Dalt. c. 70.

*Sect.* 16. However, it ſeems to be the ſafeſt way to bind the party to appear at the next ſeſſions of the peace, and in the mean time to keep the peace as to the king, and all his liege people, eſpecially as to the party, according to the common form of precedents.

3 Com. Dig. 311. Lamb. 105. Dalt. c. 124.

*Sect.* 17. As to the tenth point, *viz.* How ſuch a recognizance may be diſcharged. It ſeems agreed, That it may be diſcharged by the demiſe of the (*a*) king in whoſe reign it was taken, or of the (*b*) principal party who was bound thereby, if it were not forfeited before. Alſo it hath been holden, That it may be diſcharged by the (*c*) releaſe of the party at whoſe complaint it was taken, being certified together with it. But this may juſtly be queſtioned, becauſe the recognizance is not to the ſubject, but to the king, and conſequently cannot be diſcharged by the ſubject, who is not a party to it. However, ſuch a releaſe will be a good inducement to the court, to which ſuch a recognizance ſhall be certified, to diſcharge it; and ſo alſo will the non-appearance of the party at

(*a*) B. Peace 15, 17. 1 H. 7. 2, 10.
(*b*) 15 H. 7. 2, 13. 21 Ed. 4. 70. Dalt. c. 71. 1 Lev. 235.
(*c*) Lamb. 116, &c. Crom. 139, 140, 144. 11 H. 7. 12. 11 H. 4. 43. B. a. c. 36. f. 64. c. 37. f. 34. 2 Vent. 134.

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Savil 53. 1 Lev. 235. C. Jac. 282. Yely. 207. 12 Mod. 251. Str. 835. 2 P. Will. 202. 1 Burr. 703. 3 Burr. 1922.

whoſe complaint it was taken, in order to pray the continuance of it; and yet it is ſaid, that the ſeſſions in that caſe may, in their diſcretion, refuſe to diſcharge it. However; it is certain that ſuch a recognizance cannot be pardoned, or releaſed by the king, before it is broken, becauſe the ſubject has a kind of intereſt in it. And it is ſaid, That the ſureties are not diſcharged by their death, but that their executors, *&c.* continue bound as their teſtators, *&c.* were.

Lamb. 111, 112, &c. Dalt. c. 70. Hil. 1 Geo. 1. K. v. Combs agreed.

*Sect.* 18. As to the eleventh point, *viz.* How ſuch a recognizance ought to be certified, and proceeded upon. If it be taken by force of a writ of *ſupplicavit*, it needs not be certified till the juſtice receive a writ of *certiorari* to that purpoſe; but if it be taken upon a complaint below, it muſt be certified, ſent, or brought to the next ſeſſions of the peace by force of 3 Hen. 7. c. 1. that the party ſo bound may be called; and by the ſame ſtatute, "If the party then make default, the "ſame default ſhall be then recorded, and the ſame re-"cognizance with the record of the default, ſhall be certified "into the chancery, king's bench, or exchequer." However, if the party have any excuſe for his not appearing, it ſeems that the ſeſſions is not bound peremptorily to record his default, but may equitably conſider of the reaſonableneſs of ſuch excuſe. And it is ſaid, That the ſeſſions 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 in ſuch caſe ought to be removed into ſome of the king's courts of Weſtminſter-hall, who ſhall proceed by *ſcire facias*, upon ſuch recognizance, and not by indictment, *&c.*

Sayer 253. Dalt. c. 71. Raym. 169, 196. C. Jac. 508. 1 R. A. 900. Parker 54.

3 Bulſt. 120. Whether ſuch ſcire facias muſt ſhew the day on which the ſeſſions was holden,

*Sect.* 19. It ſeemeth that in a *ſcire facias* upon ſuch a recognizance, it is ſufficient to lay the fact alledged for the breach thereof, as having been done *contra pacem*, without uſing the words *vi & armis*.

till which the party was bound to keep the peace. C. Car. 138.

Pl. Peace 20. Dalt. c. 72. Lamb. 127, 128. Sayer 139.

*Sect.* 20. As to the twelfth point, *viz.* How ſuch recognizance may be forfeited. There is no doubt but that it may be forfeited by any actual violence to the perſon of another, whether it be done by the party himſelf, or by others thro' his procurement, as manſlaughter, rape, robbery, unlawful impriſonment, *&c.*

Lamb. 115, &c. Dalt. c. 72. 2 H. 7. 2. ſeems otherwiſe. 18 Ed. 4. 28. 22 Ed. 4. 35. C. Car. 498, 499. See the *ſ.* 5 & 7 *W.* 3.

*Sect.* 21. Alſo it has been holden, That it may be forfeited by any treaſon againſt the perſon of the king, and alſo by any unlawful aſſembly *in terrorem populi*, and even by words directly tending to a breach of the peace, as by challenging one to fight, or in his preſence, threatning to beat him, *&c.*

books cited in the following ſection, and 2 R. Abr. 545. Pl. 2, 3, 4, 5, 6, 7;

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*Sect.* 22. However, it ſeems that it ſhall not be forfeited by bare words of heat and choler, as the calling a man knave, teller of lies, raſcal, or drunkard; for though ſuch words may provoke a cholerick man to break the peace, yet they do not directly challenge him to it, nor does it appear that the ſpeaker deſigned to carry his reſentment any farther. And it has been ſaid, That even a recognizance for the good behaviour, ſhall not be forfeited for ſuch words; from whence it follows *a fortiori*, That a recognizance for the peace ſhall not.

Sayer 140. C. Eliz. 86. Moor 249. 2 Roll. 199, 227. Palmer 126. Infra p. 284.

*Sect.* 23. 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 (*a*) 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 (*b*) parent in a reaſonable manner chaſtiſe his child, or a maſter his ſervant, (*c*) being actually in his ſervice at the time; or a (*d*) ſchoolmaſter his ſcholar, or a (*e*) gaoler his priſoner, or even a (*f*) huſband his wife, as ſome ſay; or if (*g*) one confine a friend who is mad, and bind, and beat him, &c. in ſuch a manner as is proper in ſuch circumſtances; or if a man (*h*) 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 (*i*) I beat one (without (*k*) wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs me of my land, or goods; or the goods of another delivered to me to be kept for him, and will not deſiſt upon my laying my hands gently on him, and diſturbing him; or if a man beat, (*l*) or, as ſome ſay, wound, or maim one who makes an aſſault upon his perſon, or that of his (*m*) wife, parent, child, or maſter; eſpecially if it appear that he did all he could to avoid fighting before he gave the wound; or if a (*n*) man fight with or beat one who attempts to kill any ſtranger; or if a man even (*o*) 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 (*p*) impriſon thoſe whom he ſees fighting, till the heat is over.

(*a*) 2 Ed. 4. 6. 21 H. 7. 39. (*b*) Dalt. c. 72. Crom. 136. (*c*) 38 H. 6. 25. 1 Sid. 176. (*d*) Sum. 32. 1 Sid. 177. 21 Ed. 4. 6. (*e*) Dalt. c. 72. (*f*) Crom. 28. 136. F. N. B. 80. Hetley 149. Con. 1 Sid. 113, 116. (*g*) 22 Aſſ. 58. 2 R. A. 546. 22 Ed. 4. 5. (*h*) C. Jac. 134. 2 R. A. 546. (*i*) 3 H. 4. 6, 9. Lutw. 1483. C. Jac. 236. C. Car. 138. 19 H. 6. 31. 10 E. 4. 6. 21 Ed. 4. 28. Keilw. 92. Yelv. 172. 2 R. A. 548, 549. Pult. 5, 6. Crom. 137. Dalt. c. 72. Inſ. c. 64. ſ. 1. (*k*) 2 R. Abr. 548. (*l*) 42 Aſſ. 21. 27 Ed. 3. 94. 25 Ed. 3. 42. 8 H. 4. 8. 9 Ed. 4. 48. 22 Ed. 4. 6. F. Tort Dem. 57. 1 Sid. 246. Kely. 128. 2 R. Abr. 547. 1 Keb. 884, 921. 2 Inſt. 316. (*m*) 35 H. 6. 50, 51. 19 H. 6. 31, 66. 22 Ed. 4. 6. Crom. 136. Dalt. c. 72. 2 R. Abr. 546. (*n*) 22 H. 8. 2. (*o*) 38 H. 6. 28. 10 Ed. 4. 6. (*p*) 2 R. Abr. 559. 22 E. 4. 45.

*Sect.* 24. According to ſome opinions, a (*q*) maſter ſhall not forfeit ſuch a recognizance for beating another in defence of his ſervant. But it is ſaid, That a (*r*) ſervant is liable to ſuch forfeiture for beating another in defence of his maſter's

(*q*) 2 R. Abr. 546. 19 H. 6. 31, 66. Dalt. c. 72. Crom. 136. Con. 9 Ed. 4. 48. Balk. 405. (*r*) 9 Ed. 4. 48. B. Tref. 189.

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ſon, though he were commanded by the maſter ſo to do, becauſe he is not a ſervant to the ſon; and for the like reaſon it is ſaid, That a (a) tenant ſhall incur the like forfeiture for beating another in defence of his landlord, &c.

(a) Dalt. c. 72. Lamb. 129.

Crom. 136. Dalt. c. 72. C. Eliz. 86. Moor. 249.

*Sect.* 25. But it ſeems agreed, That no one ſhall forfeit ſuch a recognizance by a bare treſpaſs on another's lands, or goods, unleſs it be accompanied with ſome violence to the perſon.

Dalt. c. 22. B. Co. 229. F. Bar. 244.

*Sect.* 26. And it ſeems to be the better opinion, That a man is in no danger of ſuch a forfeiture from any hurt done to another, by playing at cudgels, or ſuch like ſport, by conſent, becauſe the intent of the parties ſeems no way unlawful, but rather commendable, and tending mutually to promote activity and courage. Yet it is ſaid, That he who wounds another in fighting with naked ſwords, does in ſtrictneſs forfeit ſuch a recognizance, becauſe no conſent can make ſo dangerous a diverſion lawful.

Hobart 134. 2 R. Abr. 548.

*Sect.* 27. But it ſeemeth, That a man ſhall not forfeit ſuch recognizance, by a hurt done to another merely through negligence, or miſchance; as where one ſoldier hurts another by diſcharging a gun in exerciſe, without ſufficient caution; for notwithſtanding ſuch perſon muſt, in a civil action, give the other ſatisfaction for the damage occaſioned by his want of care, yet he ſeems not to have offended againſt the purport of ſuch a recognizance, unleſs he be guilty of ſome wilful breach of the peace.

## CHAPTER THE SIXTY-FIRST.

### OF SURETY FOR THE GOOD BEHAVIOUR.

4 Comm. 248, 251, 253.

AND now we are come to ſurety for the good behaviour, which being of great affinity with ſurety of the peace, both as to the manner in which it is to be taken, ſuperſeded, and diſcharged, &c. ſeems not to require a particular conſideration, ſave only as to the following points, Firſt, For what miſbehaviours it is to be required.—Secondly, For what it ſhall be forfeited.

*Sect.* 1. As to the firſt point, it is to be obſerved, That by 34 Edw. 3. c. 1. "Juſtices of peace are empowered "to reſtrain offenders, rioters, and all other barrators, and "to purſue, arreſt, take, and chaſtiſe them, according to "their treſpaſs, or offence; and to cauſe them to be "impriſoned, and duly puniſhed according to the laws and "cuſtoms

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" cuſtoms of the realm, and according to that which to them " ſhall ſeem beſt to do by their diſcretions, and good adviſe- " ment, and alſo to inform them, and to enquire of all thoſe " who have been pillors and robbers in the parts beyond " the ſea, and be now come again, and go wandring, and " will not labour as they were wont in times paſt, and to take " and arreſt all thoſe that they may find by indictment or by " ſuſpicion, and to put them in priſon, and to take of all them Vide Barlow 524. " that be not of good fame, where they ſhall be found, " ſufficient ſurety and mainprize of their good behaviour " towards the king, and his people, and the other duly to pu- " niſh, to the intent that the people be not by ſuch rioters " troubled nor indamaged, nor the peace blemiſhed, nor mer- " chants, nor others paſſing by the highways of the realm diſ- " turbed, nor put in the peril which may happen of ſuch of- " fenders,"

*Sect.* 2. In the conſtruction hereof there ſeem to have been ſome opinions, that the ſtatute, ſpeaking of thoſe that be not of good fame, means only ſuch as are defamed, and juſtly ſuſpected that they intend to break the peace, and that it does not any way extend to thoſe who are guilty of other miſbehaviours not relating to the peace. But this ſeems much too narrow a conſtruction, ſince the abovementioned expreſſion of perſons of evil fame, in common underſtanding, as properly includes perſons of ſcandalous behaviour in other reſpects, as thoſe who by their quarrelſome behaviour give juſt ſuſpicion of their readineſs to break the peace. And, accordingly, it ſeems to have been always the better opinion, That a man may be bound to his good behaviour for many cauſes of ſcandal which give him a bad fame, as being contrary to good manners only; as for (*a*) haunting bawdy-houſes with women of bad fame; or for (*b*) keeping bad women in his own houſe; or for ſpeaking words of contempt of an inferior (*c*) magiſtrate, as a juſtice of peace, or mayor of a town, &c. though he be not then in the actual execution of his office, or of an inferior officer of juſtice, as a conſtable, and ſuch like, being in the actual execution of his office.

4 Inſt. 181. 2 H. 7. 2. 3. 13 H. 7. 10. Pulton 18.

4 Burn 270. Lamb. 115, 116, 117. Dalt. c. 75.

12 Mod. 566. (*a*) 13 H. 7. 1. (*b*) Crom. 140. (*c*) C. Eliz. 78. 1 Levin. 52, 53, 107. 11 Co. 98. 1 Roll. 224. Latch 220. Con. C. Eliz. 689, 449. Palmer 130.

1 Roll, 227, 228. 3 Bulſt. 139, 140. Cro. Car. 409.

*Sect.* 3. However, it ſeems the better opinion, That no one ought to be bound (*d*) to the good behaviour for any raſh, quarrelſome, or unmannerly words, unleſs they either directly tend to a breach of the peace, or to ſcandalize the government, by abuſing thoſe who are intruſted by it with the adminiſtration of juſtice, or to deter an officer from doing his duty; and therefore it ſeems, That he (*e*) who barely calls another rogue, or raſcal, or teller of lies, drunkard, &c. ought not for ſuch cauſe to be bound to the good behaviour.

(*d*) C. Car. 492, 499. (*e*) C. Eliz. 86. Moor 249. Sup. c. 60 ſect. 2. 2 Roll. 295, 227. Palmer 126.

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*Sect.* 4. However, I cannot find any certain preciſe rules for the direction of the magiſtrate in this reſpect, and therefore am inclined to think, that he has a diſcretionary power to take ſuch ſurety of all thoſe whom he ſhall have juſt cauſe to ſuſpect to be dangerous, quarreliſome, or ſcandalous, as of thoſe who ſleep in the day, and go abroad in the night, and of ſuch as keep ſuſpicious company, and of ſuch as are generally ſuſpected to be robbers, *&c.* and of eve-droppers, and common drunkards, and all other perſons, whoſe miſbehaviour may reaſonably be intended to bring them within the meaning of the ſtatute, as perſons of evil fame, who, being deſcribed by an expreſſion of ſo great latitude, ſeem in a great meaſure to be left to the judgment of the magiſtrate. But if he commit one for want of ſureties, he muſt ſhew the cauſe, *&c.* with convenient certainty. (1)

Dalt. 75. 2 Roll. 150. 8 Ven. 22, 23, 84.

(1) Security for good behaviour may be taken. For uſing opprobious words in a court of juſtice, 2 Lev. 107. Accuſing juſtices of ignorance in the Exciſe laws. 1 Vent. 16. Publiſhing an obſcene book. Poſt. 193. For exciting diſcontents in the minds of the people. 2 Vent. 24. For offering medicines to deſtroy a child in the womb. Cro. Eliz. 449. For obſtructing another on his neceſſary way to a court of juſtice. 2 Lill. Reg. 649. For diſturbing a licenced preacher. 1 Mar. ſ. 2. c. 3. For unlawful fiſhing or hunting. 5 Eliz. c. 21. For neglecting church a month. 23 Eliz. c. 1. For hunting or ſtealing deer or conies. 1 Jac. 1. c. 13. ſed vide 16 Geo. 3. c. 30. And it is a uſual part of the judgment in a miſdemeanour. 4 Bac. Ab. 698. But a juſtice of the peace cannot compel the ſecurity upon a general information. Str. 16. And whether a perſon taken upon the warrant of a ſecretary of ſtate for a libel, ſhall give ſecurity for his good behaviour, ſeems unſettled. 2 Wilſ. 29. ſed vide 2 Wilſ. 160. And for a very full account of this title, 4 Burn 269, 283.

Palm. 129, 130. C. Car. 499.

*Sect.* 5. As to the ſecond point, *viz.* For what miſbehaviours ſuch a recognizance ſhall be forfeited, it is laid down as a general rule in the argument of *Stamp* and *Hide*'s caſe, That whatever will be a good cauſe to bind a man to his good behaviour, will forfeit a recognizance for it. Yet this is ſince denied in *Heyward*'s caſe; and indeed 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 caſes 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 publick from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them, or not; and it would be extremely hard in ſuch caſes to make perſons forfeit their recognizance, who yet may juſtly be compellable to give one, as thoſe who keep ſuſpicious company, or thoſe who ſpend much money idly, without having any viſible means of getting it honeſtly, or thoſe who lie under a general ſuſpicion of being rogues, *&c.*

23 H. 7, 10. Dalt. c. 75.

2 H. 7. 2. C. Eliz. 86. Moor 249. 2 Roll 228, 150, 199. C. Car. 499.

*Sect.* 6. However, it ſeems that ſuch a recognizance ſhall not only be forfeited for ſuch actual breaches of the peace, for which a recognizance for the peace may be forfeited, but alſo for ſome others, for which ſuch a recognizance cannot be forfeited; as for going armed with great numbers to the ter-

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ror of the people, or ſpeaking words tending to ſedition, &c. and alſo for all ſuch actual miſbehaviours which are intended to be prevented by ſuch a recognizance, but not for barely giving cauſe of ſuſpicion of what perhaps may never actually happen. 2 Leo. 160. Godb. 622. 22. Lamb. 116, 118. C. Jac. 412.

It may be diſcharged on motion on produing proſecutor's conſent, verified by affidavit. Hardwick's caſes, 158. Or conſenting by counſel. 1 Burr. 703. Sed vide ch. 60. ſ. 17.

## CHAPTER THE SIXTY-SECOND.

## Of ASSAULTS and BATTERIES.

AND now I am come to conſider the ſeveral kinds of actual diſturbances of the peace, and theſe are; either, Such as may be committed by one or two perſons; or, Such as require a great number.

Thoſe which may be committed by one or two perſons, are, Aſſaults and batteries; or, Affrays; or, Forcible entries and detainers.

As to aſſaults and batteries, I ſhall conſider the following particulars: Firſt, What ſhall be ſaid to be an aſſault. Secondly, What ſhall be ſaid to be a battery. Thirdly, In what caſes they may be juſtified. Fourthly, In what manner they are to be puniſhed.

*Sect.* 1. As to the firſt point. It ſeems that 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 the gun will carry, or pointing a pitch-fork at him, ſtanding within the reach of it; or by holding up one's fiſt at him, or by any other ſuch like act done in an angry threatening manner; and from hence if clearly follows, That one charged with an aſſault and battery, may be found guilty of the former, and yet acquitted of the latter. But every battery includes an aſſault, therefore on an indictment of aſſault and battery, in which the aſſault is ill laid, if the defendant be found guilty of the battery, it is ſufficient. Notwithſtanding the many ancient opinions to the contrary, it ſeems agreed at this day, that no words whatſoever can amount to an aſſault. Fulton 4. 6 Mod. 173, 174. 2 R. Abr. 545. 1 Vent. 256. 1 Mod. 3. 1 Keb. 921. 41 Ed. 3. 40. 42 Ed. 3. 7. 45 Ed. 3. 24, 25. 22 Aſſ. 69. 2 R. Abr. 545. 20 Mod. 187. 2 Keb. 545. Law of Evid. 235.

*Sect.* 2. As to the ſecond point, *viz.* What ſhall be ſaid to be a battery. It ſeems that any injury whatſoever, be it never ſo ſmall, being actually done to the perſon of a man, in an angry, or revengeful, or rude, or inſolent manner, as by ſpitting in his face, or any way touching him in anger, or violent- 22 Aſſ. 11. Pult. 3. Lamb. 126. Salk. 384. 6 Mod. 149, 178. 1 Mod. 3.

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3 Lev. 404. Skin. 387. 2 R. Abr. 546.

ly jostling him out of the way, are batteries in the eye of the law. But it is said to be no battery to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants.

6 Mod. 172, 230, 263. 4 Comm. 145. 216. 11 Mod. 43, 52. 2 Salk. 642. L. Ray. 177, 1 Sid. 246. Holt. 699.

*Sect.* 3. As to the third point, *viz.* In what cases an assault and battery may be justified. This is so fully set forth already in the chapter of *Surety of the Peace*, that there seems to be no need of any farther consideration thereof in this place; and therefore I shall only add, That where a man in his own defence beats another who first assaults him, &c. he may take an advantage thereof upon an indictment, as well as upon an action; but with this difference, that in the first case he may give it in evidence upon the plea of Not guilty, and in the latter he must plead it specially.

8 Mod. 282. 1 Bac. Ab. 156.

*Sect.* 4. As to the fourth point, *viz.* How unlawful assaults and batteries are 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, &c. and also to an indictment, at the suit of the king, wherein he shall be fined according to the heinousness of the offence.

Form of indictment, Cro. Cir. 121.

† *Sect.* 5. By 5 Hen. 4. c. 6. and 11 Hen. 6. c. 11. "To assault or affray any of the members of the house of "lords, or house of commons, or other council of the king, "or any of their servants, in their way to, or attendance on "parliament, is punishable, upon non-surrender, on proclamation, with double damages, and fine and ransom at discretion."

4 Comm. 218. 6 Mod. 172. 2 Inst. 492, 620.

† *Sect.* 6. By 9 Edw. 2. c. 3. "If any lay violent hands "on a clerk, he may be indicted before the king for the peace "broken; and sued before the bishop for the spiritual offence."

† *Sect.* 7. By 5 Eliz. c. 4. s. 21. "If any servant assault or "affray his master, mistress, or overseer, he shall suffer imprisonment, not exceeding a year, on conviction before two "justices of the county, or the chief magistrate and two corporators of a town.—And if further punishment should appear necessary, the justices in sessions, or the head magistrate "and four or six corporators in a town, may exercise their "discretion, so that the punishment extend not to life or "limb."

Cro. Cir. 1: 11

† *Sect.* 8. By 9 Ann. c. 16. "To assault and strike any "privy counsellor, in the council, or in any committee "thereof, in the execution of his duty, is death."

† *Sect.* 9. By 9 Ann. c. 14. s. 8. "To assault and beat "any other on account of money won by gaming, in the man-

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"ner deſcribed, is forfeiture of goods, and two years im-
"ſonment."

† *Sect.* 10. By 6 Geo. 1. c. 23. ſ. 11. "To aſſault another in the ſtreet, with intent to ſpoil their cloaths, is tranſportation." Vide O.B. 1781, No. 261. Cro. Cir. 122.

† *Sect.* 11. By 9 Geo. 1, c. 22. "To aſſault another by wilfully ſhooting at him, is felony without clergy." Ante. p. 225.

† *Sect.* 12. By 7 Geo. 2. c. 21. "To aſſault with intent to rob is tranſportation." Ante. p. 148.

† *Sect.* 13. By 12 Geo. 1. c. 24. "To aſſault any maſter woolcomber, or weaver, or other perſon concerned in the woollen manufactory, whereby he ſhall receive any bodily hurt, for not complying with any of the bye laws which are mentioned in the act, or ſhall write or ſend any threatening letter, &c. &c. is tranſportation for ſeven years." Ante. p. 239.

## CHAPTER THE SIXTY-THIRD.

## Of AFFRAYS.

IN treating of Affrays, I ſhall conſider,—Firſt, What ſhall be ſaid to be an affray. Secondly, How far it may be ſuppreſſed by a private perſon. Thirdly, How far by a conſtable. Fourthly, How far by a juſtice of peace. Fifthly, In what manner the ſeveral kinds of affrays may be puniſhed. 4 Comm. 145.

*Sect.* 1. As to the firſt point, It is ſaid, That the word affray is derived from the *French* word *Effraier*, to terrify, and that in a legal ſenſe it is taken for a publick offence, to the terror of the people. From this definition it ſeems clearly to follow, That there may be an aſſault which will not amount to an affray; as where it happens in a private place, out of the hearing or ſeeing of any, except the parties concerned; in which caſe it cannot be ſaid to be to the terror of the people; and for this cauſe ſuch a private aſſault ſeems not to be inquirable in a court leet, as all affrays certainly are, as being common nuſances. 3 Inſt. 158. Dalt. c. 8. Lamb. 125, 126. 4 H. 6. 10. 8 Ed. 4, 5. Summary 135.

*Sect.* 2. 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, 23 Ed. 4. 45. Dalt. c. 8. Lamb. Conſtable, 14.

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ened, carry the perſon, who threatens to beat him, before a juſtice, in order to find ſureties.

Popham 158. 3 Inſt. 158. 1 Sid. 186. 2 Keb. 694. Hob. 120, 215. 2 R. Abr. 78. 2 Burr. 316 Carr & Hankey.

*Sect.* 3. Alſo it is certain, That it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the meſſenger of ſuch a challenge, or even barely to endeavour to provoke another to ſend a challenge, or to fight; as by diſperſing letters to that purpoſe, full of reflections, and inſinuating a deſire to fight, &c.

† By 9 Ann c. 14. ſ. 8. "Whoever ſhall challenge or provoke to "fight any other perſon or perſons whatſoever, upon account of "any money won by gaming, playing, or betting at any of the "games mentioned in the act, ſhall, on conviction by in- "dictment, or information, forfeit all their goods, chat- "tels, and perſonal eſtate, and ſuffer impriſonment without "bail, in the county priſon for two years."

Lamb. 126. 3 Inſt. 160, 76. 2 R. Abr. 78. Summary 137.

*Sect.* 4. But granting that no bare words, in the judgment of law, carry in them ſo much terror as to amount to an affray; yet it ſeems certain, That in ſome caſes there may be an affray where there is no actual violence; as where a man arms himſelf with dangerous and unuſual weapons, in ſuch a manner as will naturally cauſe a terror to the people, which is ſaid to have been always an offence at common law, and is ſtrictly prohibited by many ſtatutes.

For by 2 Edw. 3. it is enacted, "That no man, great nor "ſmall, of what condition ſoever he be, except the king's "ſervants, in his preſence, and his miniſters in executing of the "king's precepts, or of their office, and ſuch as be in their "company aſſiſting them, and alſo upon a cry made for arms "to keep the peace, and the ſame in ſuch places where ſuch "acts happen, be ſo hardy to come before the king's juſtices, "or other of the king's miniſters doing their office, with force "and arms, nor bring no force in affray of peace, nor to go "nor ride armed by night nor by day, in fairs, markets, "nor in the preſence of the juſtices or other miniſters, nor "in no part elſewhere, upon pain to forfeit their armour to "the king, and their bodies to priſon, at the king's plea- "ſure. And that the king's juſtices in their preſence, ſheriffs, "and other miniſters in their bailiwicks, lords of franchiſes, "and their bailiffs in the ſame, and mayors and bailiffs of cities "and boroughs, within the ſame cities and boroughs, and "borough-holders, conſtables and wardens of the peace with- "in their wards, ſhall have power to execute this act: And "that the juſtices aſſigned, at their coming down into the "country, ſhall have power to enquire how ſuch officers "and lords have exerciſed their offices in this caſe, and to "puniſh them whom they find, that have not done that "which pertained to their office," and this ſtatute is farther enforced by 7 Rich. 2. c. 13. and 20 Rich 2. c. 1.

Sect.

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*Sect.* 5. And in the expoſition of it the following points have been holden: Firſt, That any juſtice of peace, or other perſon, who is empowered to execute this ſtatute, may proceed thereon, either *ex officio*, or by force of a writ out of chancery, formed upon the ſtatute, and that if he find any perſon in arms contrary to the form of the ſtatute, he may ſeize the arms, and commit the offender to priſon; and that he ought alſo to make a record of his whole proceeding, and certify the ſame into the chancery, where he proceeds by force of the ſaid writ, or into the exchequer, where he proceeds *ex officio*. F. N. B. 249. 3 Inſt. 161. Dalt. c. 22. Lamb. 168. 182. Daliſ. 23. 2 Bulſ. 330.

*Sect.* 6. Secondly, That where a juſtice of peace, *&c.* proceeds upon the ſaid writ, he may not only impriſon thoſe whom he ſhall find offending againſt the ſtatute in his own view, but alſo thoſe who ſhall be found by an inqueſt taken before him, to have offended in ſuch manner in his abſence. And I do not ſee why he may not do the ſame where he proceeds *ex officio*; for ſeeing the ſaid writ hath no other foundation but the ſaid ſtatute, and is the moſt authentick explication thereof, it ſeemeth that the rules therein preſcribed, ſhould be the beſt direction for all proceedings upon that ſtatute. C. Eliz. 294. Con. Lamb. 179.

*Sect.* 7. Thirdly, That the under-ſheriff may execute the ſaid writ, being directed to the ſheriff, if it name him only by the name of his office, and not by his proper name, and do not expreſsly command him to act in his proper perſon. C. Eliz. 294.

*Sect.* 8. Fourthly, That a man cannot excuſe the wearing ſuch armour in publick, by alledging that ſuch a one threatened him, and that he wears it for the ſafety of his perſon from his aſſault; but it hath been reſolved, That no one ſhall incur the penalty of the ſaid ſtatute for aſſembling his neighbours and friends in his own houſe, againſt thoſe who threaten to do him any violence therein, becauſe a man's houſe is as his caſtle. 24 Ed. 3. 33. 21 H. 7. 39. 3 Inſt. 161. Con. 2 Roll. 78. 2 H. 7. 39.

*Sect.* 9. Fifthly, That no wearing of arms is within the meaning of this ſtatute, unleſs it be accompanied with ſuch circumſtances as are apt to terrify the people; from whence it ſeems clearly to follow, That perſons of quality are in no danger of offending againſt this ſtatute by wearing common weapons, or having their uſual number of attendants with them, for their ornament or defence, in ſuch places, and upon ſuch occaſions, in which it is the common faſhion to make uſe of them, without cauſing the leaſt ſuſpicion of an intention to commit any act of violence or diſturbance of the peace. And from the ſame ground it alſo follows, That perſons armed with privy coats of mail, to the intent to defend themſelves, againſt their adverſaries, are not within the meaning of this ſtatute, becauſe they do nothing *in terrorem populi*. 3 Mod. 117. 2 Bulſt. 330. Crom. 64.

*Sect.* 10. Sixthly, That no perſon is within the intention of the *ſaid ſtatute, who* arms himſelf to ſuppreſs dangerous Pop. 121, 122.

rioters,

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rioters, rebels, or enemies, and endeavours to ſuppreſs or reſiſt ſuch diſturbers of the peace or quiet of the realm; for perſons who ſo arm themſelves, ſeem to be exempted out of the general words of the ſaid ſtatute, by that part of the exception in the beginning thereof, which ſeems to allow all perſons to arm themſelves upon a cry made for arms to keep the peace, in ſuch places where ſuch acts happen.

Lamb. 131. 3 Inſt. 158. Summary 131. 2 Inſt 52. 22 E. 4. 44. Dalt. c. 8. Lamb. 131. Infra ſ. 17.

*Sect.* 11. As to the ſecond point, *viz.* How far an affray may be ſuppreſſed by a private perſon, it ſeems agreed, That any one who ſees others fighting, may lawfully part them, and alſo ſtay them till the heat be over, and then deliver them to the conſtable, who may carry them before a juſtice of peace, in order to their finding ſureties for the peace: Alſo it is ſaid, That any private perſon may ſtop thoſe whom he ſhall ſee coming to join either party; and from hence it ſeems clearly to follow, That if a man receive a hurt from either party in thus endeavouring to preſerve the peace, he ſhall have his remedy by an action againſt him; alſo upon the ſame ground it ſeems equally reaſonable, That if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well juſtify it, inaſmuch as he is no way in fault; and the damage done to the other, was occaſioned by a laudable intention to do him a kindneſs.

3 Inſt. 158. Con. Lamb. 131. Dalt. c. 8.

Lamb. 131. Dalt. c. 8. 3 Inſt. 158. B. F. Imp. 35, 44. Summary 135. 10 H. 7. 20. 2 Inſt. 52.

*Sect.* 12. However it ſeems clear, That if either party be dangerouſly wounded in ſuch an affray, and a ſtander by, endeavouring to arreſt the other, be not able to take him without hurting, or even wounding him, yet he is no way liable to be puniſhed for the ſame, inaſmuch as he is bound, under pain of fine and impriſonment, to arreſt ſuch an offender, and either detain him till it appear whether the party will live or die, or carry him before a juſtice of peace, by whom he either is to be bailed or committed, &c.

2 Inſt. 158. Summary 135. Lamb. 132, 133. Dalt. c. 8. 3 H. 7. 10.

*Sect.* 13. As to the third point, *viz.* How far an affray may be ſuppreſſed by a conſtable. It ſeems agreed, That a conſtable is not only impowered, as all private perſons are, to part an affray which happens in his preſence, but is alſo bound at his peril to uſe his beſt endeavours to this purpoſe, and not only to do his utmoſt himſelf, but alſo to demand the aſſiſtance of others, which if they refuſe to give him, they are puniſhable with fine and impriſonment.

Lamb. 132, 133. Dalt. c. 1, 8. Summary 136. Dalt. c. 1, 8. B. Surety, 23, 36. C. Eliz. 375. 9 Ed. 4. 26.

*Sect.* 14. 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, &c. 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 of the peace, to the end that ſuch juſtice may compel him to find ſureties for the peace, &c. or

he

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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 a case, is to command them under pain of imprisonment to avoid fighting.

Moor 284. 3 H. 4. 9. 22 E. 4. 35. 10 Ed. 4. 18. 5 H. 7. 6. Sav. 97, 98.

*Sect.* 15. 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.

5 H. 7. 6. Summary 136. 1 Roll. 238. 2 Bulst. 329.

*Sect.* 16. And if an affray be in a house, the constable may break open the doors to preserve the peace, and if affrayers fly to a house and he follow with fresh suit, he may break open the doors to take them.

13 Ed. 4. 9. 7 Ed. 3. 12. Dalt. c. 8, 67. Lamb. 133, 134.

*Sect.* 17. 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 of peace, unless a felony were done or likely to be done; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor does it follow from his having power to compel those to find sureties who break the peace in his presence, that he has the same power over those who break it in his absence, inasmuch as in such case it is most proper to be done by those who may examine the whole circumstances of the matter upon oath, which a constable cannot do; yet it is said, That he may carry those before a justice of peace, who were arrested by such as were present at an affray, and delivered by them into his hands.

C. Elis. 375. Owen 105. Summary 92, 136. Lamb. 131. Dalt. c. 8.

*Sect.* 18. As to the fourth point, *viz.* In what manner an affray may be suppressed by a justice of peace; there is no doubt, but that he may and must do all such things to that purpose, which a private man or constable are either enabled, or required by the law to do. But it is said, That he cannot without a warrant authorize the arrest of any person for an affray out of his 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.

Summary 136. Dalt. c. 8. B. F. Imp. 6, 12. 33. 14 H. 8. 7. Moor 468.

*Sect.* 19. Also it seems, That a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for

See 38 Ed. 3. 6, 7.

there

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22 Aſſ. 56. 5 Mod. 84. there does not ſeem to be any good authority, that theſe have any power at all to take ſureties of ſuch an offender; but it ſeems certain, That a juſtice of the peace has a diſcretionary power either to commit him, or to bail him, till the year and day be paſt; but it is ſaid, that he ought to be very cautious how he takes bail, if the wound be dangerous; for that if the party die, and the offender appear not, he is in danger of being ſeverely fined, if he ſhall appear upon the whole circumſtances of the caſe to have been too favourable.

Summary 36. Dalt. c. 8. Popham 153.

*Sect.* 20. As to the fifth point, *viz.* In what manner the ſeveral kinds of affrays are to be puniſhed; it ſufficiently appears from the foregoing part of this chapter, how ſuch affrays as are accompanied with force and arms, are to be dealt with upon the ſtatute of Northampton; and therefore I ſhall only examine in this place, what penalties other affays are liable unto.

As to which it is to be obſerved, That all affrays in general, are puniſhed by fine and impriſonment, the meaſure of which is to be regulated by the diſcretion of the judges according to the circumſtances of the caſe, which very much vary the nature of this crime, and in ſome caſes make it ſo inconſiderable as ſcarce to deſerve to be taken notice of; and in others make it an offence of a very heinous nature.

Aleyn 79.

As in the following inſtances: Firſt, In reſpect of the dangerous tendency thereof. Secondly, In reſpect of the perſons againſt whom it is committed. Thirdly, In reſpect of the place wherein it happens.

Popham 153. 3 Inſt. 158.

*Sect.* 21. And, Firſt, An affray may receive an aggravation from the dangerous tendency thereof, as where perſons coolly and deliberately engage in a duel, which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the juſtice of the nation, as putting men under a neceſſity of righting themſelves; upon which conſiderations, perſons convicted of barely ſending a challenge, have been adjudged to pay a fine of one hundred pounds, and to be impriſoned for one month without bail, and alſo to make a publick acknowledgement of their offence, and to be bound to their good behaviour.

2 Ibid. 186. 2 Keb. 694.

Moor 563.

*Sect.* 22. Secondly, An affray may receive another aggravation from the perſons againſt whom it is committed; as where the officers of juſtice are violently diſturbed in the due execution of their office, as by the reſcous of a perſon legally arreſted, or the bare attempt to make ſuch a reſcous; for all the miniſters of the law, are under its more immediate protection.

*Sect.* 23. Thirdly, An affray may receive a farther aggravation from the place wherein it is committed, and upon this reſpect

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reſpect all affrays in the king's court are ſo ſeverely puniſhed, as hath been ſhewn already in chapter 21, and upon the ſame account alſo, all affrays in a church, or church-yard, have been always eſteemed very heinous offences, as being very great indignities to the Divine Majeſty, to whoſe worſhip and ſervice ſuch places are immediately dedicated. And upon this conſideration, all irreverent behaviour in theſe places hath been eſteemed ſo criminal by the makers of our laws, that they have not only ſeverely puniſhed ſuch diſturbances in them which are puniſhable wherever they happen, as all actual affrays, *&c.* but alſo ſuch, which if they happen elſewhere, are not puniſhable at all; as bare quarrelſome words, and even ſuch which would be commendable if done in another place; as arreſts by virtue of legal proceſs. 12 Co. 101. 1 Keb. 290, 491. 1 Mod. 186.

But, for the better underſtanding hereof, I ſhall conſider the ſeveral ſtatutes made for this purpoſe.

*Sect.* 24. And firſt, it is enacted by 5 & 6 Edw. 6. c. 4. "That if any perſon whatſoever, ſhall by words only quarrel, chide, or brawl, in any church or church-yard, that then it ſhall be lawful unto the ordinary of the place where the ſame offence ſhall be done, and proved by two lawful witneſſes, to ſuſpend every perſon ſo offending; that is to ſay, if he be a layman, *ab ingreſſu eccleſiæ*, and if he be a clerk, from the miniſtration of his office, for ſo long time as the ſame ordinary ſhall by his diſcretion think meet and convenient, according to the fault."

*Sect.* 25. And it is further enacted by the ſaid ſtatute, "That if any perſon ſhall ſmite or lay any violent hands upon any other, either in any church or church-yard; that then *ipſo facto*, every perſon ſo offending ſhall be deemed excommunicate, and be excluded from the fellowſhip and company of Chriſt's congregation."

*Sect.* 26. And it is alſo further enacted by the ſaid ſtatute, "That if any perſon ſhall maliciouſly ſtrike any perſon with any weapon in any church or church-yard, or ſhall draw any weapon in any church or church-yard, to the intent to ſtrike another with the ſame weapon; that then every perſon ſo offending, and thereof being convicted by verdict of twelve men, or by his own confeſſion, or by two lawful witneſſes, before the juſtices of aſſize, juſtices of oyer and terminer, or juſtices of peace in their ſeſſions, by force of this act, ſhall be adjudged by the ſame juſtices before whom ſuch perſon ſhall be convicted, to have one of his ears cut off, &c. and beſides that every ſuch to be, and ſtand *ipſo facto* excommunicated, as aforeſaid."

*Sect.*

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Dyer 275. C. Jac. 462. 1 Ven. 146. Lit. 149. Hett. 86. C. Elis. 979. 1 Burr. 240. 2 Ld. Ray. 850. 10 Mod. 63, 279. 2 Ventris 146. B. R. H. 179. 680, 224. B. Prohib. 14.

*Sect.* 27. And in the expoſition hereof it hath been holden: First, That notwithſtanding the words of the ſtatute be expreſſed, That he who ſmites another in the church, *&c.* ſhall, *ipſo facto*, be deemed excommunicate; yet there ought either to be a precedent conviction at law, which muſt be tranſmitted to the ordinary, or elſe the excommunication muſt be declared in the ſpiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one ſhall incur the penalty thereof, till he be found guilty upon a lawful trial; alſo it muſt be intended in the conſtruction of this ſtatute, that the excommunication ought to appear judicially, for otherwiſe there could be no abſolution. (1).

C. Jac. 367. C. Car. 467. Noy 171.

*Sect.* 28. Secondly, That he who ſtrikes another in a church, *&c.* can no way excuſe himſelf, by ſhewing that the other aſſaulted him.

2 Saund. 13, 14. 1 Sid. 301. 3 Keb. 124. 2 Mod. 168.

*Sect.* 29. Thirdly, That church-wardens, or perhaps private perſons, who whip boys for playing in the church, or pull off the hats of thoſe who obſtinately refuſe to take them off themſelves, or gently lay their hands on thoſe who diſturb the performance of any part of divine ſervice, and turn them out of the church, are not within the meaning of the ſtatute.

This act contains three diſtinct clauſes levelled againſt three diſtinct offences in churches and church yards. Firſt, Quarrelling, chiding, or brawling by words only. Secondly, Smiting or laying violent hands. Thirdly, Striking with a weapon; or drawing one with intent to ſtrike. The eccleſiaſtical court is not prohibited from proceeding upon the two firſt clauſes; but upon the third clauſe there muſt be a previous conviction tranſmitted to the ordinary, *&c.* If they proceed for damages on either clauſe, they ſhall be prohibited. The proceedings of the eccleſiaſtical court and the king's bench being *diverſo intuitu*, the one to puniſh, and the other to amends: 1 Burr. 243. Vide 11 Mod. 200. Cathedral churches and church yards, which belong to them, are within the ſtatute. 1 Leon. 248.

*Sect.* 30. Alſo it is enacted by 1 Mary, ſeſſ. 2. c. 3. "That if any perſon or perſons, of their own power and authority, ſhall willingly and of purpoſe by open and overt word, fact, act, or deed, maliciouſly or contemptuouſly moleſt, let, diſturb, vex or trouble, or by any other unlawful ways and means, diſquiet, or miſuſe, any preacher who ſhall be licenſed, allowed, or authorized to preach by the Queen's highneſs, or by any archbiſhop, or biſhop of this realm, or by any other lawful ordinary, or by any of the univerſities of *Oxford* and *Cambridge*, or otherwiſe lawfully authorized or charged, by reaſon of his or their cure, benefice, or other ſpiritual promotion or charge, in any of his, or their open ſermon, *&c.* or if any perſon or perſons ſhall maliciouſly, willingly, or of purpoſe, moleſt, let, diſturb, vex, diſquiet, or otherwiſe trouble any parſon, vicar, pariſh-prieſt, or curate, or any lawful prieſt, preparing, ſaying, doing, ſinging, miniſtring or celebrating the maſs, or other ſuch divine ſervice, ſacraments, or ſacramentals, as was moſt commonly frequented and uſed in the laſt year of the

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"the reign of the late ſovereign lord king Henry the Eighth, Sacrilegious
"or that at any time hereafter ſhould be allowed, ſet forth, diſtyles.
"or authorized by the queen's majeſty; or if any perſon or
"perſons ſhall unlawfully, contemptuouſly, or maliciouſly, of
"their own power or authority, pull down, deface, ſpoil, or
"otherwiſe break any altar or altars, or any crucifix, or
"croſs, in any church, chapel, or church-yard; every ſuch
"offender and offenders, his or their aiders, procurers or
"abettors, may be apprehended by any conſtable, or church-
"warden of the place where ſuch offence ſhall be committed,
"or by any other officer or perſon then being preſent at the
"time of the ſaid offence; and being ſo apprehended ſhall be
"brought before ſome juſtice of peace by whom they ſhall be
"committed forthwith, and within ſix days the matter ſhall
"be examined by the ſame, together with ſome other juſtices;
"and on proof by two witneſſes, or confeſſion, the offender
"ſhall be committed for three months; and alſo till the next
"quarter ſeſſions, where, if they repent, they ſhall be diſ-
"charged upon giving ſureties for their good behaviour for a
"year, and if they do not repent they ſhall be committed till
"they do."

*Sect.* 31. It hath been reſolved, That the diſturbance of a 2 Jon. 159. Con. Aleyn 90. 2 Buſſ. 51. miniſter in ſaying the preſent common prayer is within this ſtatute; for the expreſs mention of ſuch divine ſervice, as ſhould afterwards be authorized by queen Mary, doth implicitly include ſuch alſo as ſhould be authorized by her ſucceſſors; for ſince the king never dies, a prerogative given generally to one, goes of courſe to others.

*Sect.* 32. Alſo it is enacted by 1 Will. and Mary, c. 18. ſ. 19. "That if any perſon ſhall willingly and of purpoſe, Diſturbing a congregation. "maliciouſly or contemptuouſly come into any cathedral or "pariſh church, chapel, or other congregation permitted by "the ſaid act, and diſquiet or diſturb the ſame, or miſuſe any "preacher or teacher, ſuch perſons, upon proof before any "juſtice of peace, by two or more ſufficient witneſſes, ſhall "find two ſureties to be bound by recognizance in the penal "ſum of fifty pounds, and on default of ſuch ſureties ſhall be "committed to priſon, there to remain till the next general "or quarter ſeſſions, and upon conviction of the ſaid offence, "at the ſaid general or quarter ſeſſions, ſhall ſuffer the pain "and penalty of twenty pounds."

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# CHAPTER THE SIXTY-FOURTH.

## OF FORCIBLE ENTRIES AND DETAINERS.

Lamb. 135. Dalt. c. 76. Crom. 70.

IT ſeems that at the common law a man diſſeiſed of any lands, or tenements, (if he could not prevail by fair means,) might lawfully regain the poſſeſſion thereof by force, unleſs he were put to a neceſſity of bringing his action, by having neglected to re-enter in due time: And it ſeems certain, That even at this day, he who is wrongfully diſpoſſeſſed of his goods, may juſtify the re-taking 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.

Kellw. 92. Yelv. 172. C. Jac. 236. Sup. c. 60. ſ. 23. 3 Comm. 4. 5. 1 Inſt. 134. Hal. anal. 346.

*Sect.* 2. But this indulgence of the common law, in ſuffering perſons to regain the lands, they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours, and alſo by force to retain their wrongful poſſeſſions; it was thought neceſſary by many ſevere laws to reſtrain all perſons from the uſe of ſuch violent methods of doing themſelves juſtice.

17 H. 7. 17. 21 H. 6. 39. F. N. B. 249. B. Force, 5, 11, 29.

*Sect.* 3. However, even at this day, in an action of forcible entry grounded on thoſe laws, if the defendant make himſelf a title which is found for him, he ſhall be diſmiſſed without any inquiry concerning the force. For howſoever he may be puniſhable at the king's ſuit, for doing what is prohibited by ſtatute, as a contemner of the laws, and diſturber of the peace, yet he ſhall not be liable to pay any damages for it to the plaintiff, whoſe injuſtice gave him the provocation in that manner to right himſelf. (1)

(1) An indictment will lie at common law for a forcible entry, though generally brought on the acts of Parliament. 3 Burr. 1732. But it muſt ſhew upon the face of it ſufficient actual force. 3 Burr. 1762. Form of the indictment at common law, &c. vide Crown Circuit. 255.

*Sect.* 4. Since therefore offences of this nature are made ſuch, not by the common law, but by ſtatute; I ſhall for the better underſtanding thereof, conſider the ſeveral ſtatutes relating to this ſubject,

*Sect.*

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*Sect.* 5. And firſt, I find it agreed, That by 2 Edw. 3. which is commonly called the ſtatute of *Northampton*; if there be any uſe made of arms to ſtrike a terror into the perſons upon whom a forcible entry is made, any juſtice of peace or other officer, who is within the purview of that ſtatute, may both ſeize the arms for the king's uſe, and alſo impriſon the offenders, but not reſtore the party injured to his poſſeſſion; but the ſaid ſtatute having been fully ſet forth in the foregoing chapter, I ſhall proceed to thoſe ſtatutes which more directly relate to this matter. 3 Inſt. 161. Crom. 162. Dalt. c. 80.

*Sect.* 6. And firſt is is enacted by 5 Rich. 2. c. 7. in the following words, "And alſo the king defendeth, That none "from henceforth make any entry into any lands and tene- "ments, but in caſe where entry is given by the law; and "in ſuch caſe not with ſtrong hand, nor with multitude of "people, but only in peaceable and eaſy manner." And if "any man from henceforth do to the contrary, and thereof "be duly convict, he ſhall be puniſhed by impriſonment of "his body, and thereof ranſomed at the king's will."

*Sect.* 7. But this ſtatute being found by experience not ſufficiently to have provided againſt the miſchief intended to be redreſſed by it, inaſmuch as it gave no ſpeedy remedy to the party injured, againſt the wrong-doer, but left him to the common courſe of proceeding by way of indictment or action and made no proviſion at all againſt forcible detainers, it was, thought neceſſary to ſupply theſe defects by other additional laws.

And to this purpoſe it was further enacted by 15 Rich. 2. c. 2. "That the ſaid ſtatute and all others made againſt for- "cible entries, &c. ſhall be fully executed; and farther, That "at all times that ſuch forcible entries ſhall be made, and "complaint thereof cometh to the juſtices of peace, or to any "of them, that the ſame juſtices or juſtice take ſufficient "power of the county, and go to the place where the force "is made; and if they find any that hold ſuch place for- "cibly, after ſuch entry made, they ſhall be taken and put "in the next gaol, there to abide convict by the record of "the ſame juſtices or juſtice, until they have made fine and "ranſom to the king. And that all the people of the county, "as well the ſheriff as others, ſhall be attendant upon the ſame "juſtices, to go and aſſiſt the ſame juſtices to arreſt ſuch "offenders, upon pain of impriſonment, and to make fine to "the king: and in the ſame manner it ſhall be done of them "that make ſuch forcible entries in benefices or offices of holy "church."

*Sect.* 8. In the expoſition of this ſtatute it hath been holden, That one juſtice of peace may make a record of ſuch a 8 Co. 121. Dalt. c. 22.

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Lamb. 151.

forcible holding, and that ſuch record is not traverſable, becauſe the juſtice of peace in making thereof, acts not as a miniſter but as a judge. Alſo it hath (*a*) lately been ſolemnly reſolved in colonel *Leighton's caſe*, That the ſame juſtice may aſſeſs the fine for this offence, either before the time of conviction, or after; but it is ſaid, That ſuch juſtice of peace hath no power to commit the offender to gaol, unleſs he do it immediately upon the fact, or unleſs the offender ſhall afterwards refuſe to find ſureties for his good behaviour. Alſo it was holden by the court in *Leighton's caſe* abovementioned, That if a perſon, againſt whom a complaint ſhall be made as having been guilty of a forcible entry, ſhall either traverſe the entry or the force, or plead that he has been three years in poſſeſſion, the juſtice may ſummon a jury for the trial of ſuch traverſe, for it is impoſſible to determine it upon view; and if the juſtice have no power to try it, it would be eaſy for any one to elude the ſtatute by the tender of ſuch a traverſe, and therefore by a neceſſary conſtruction, the juſtice muſt needs have this power as incidental to what is expreſly given him.

(*a*) B. R. Hill 1708. Salkeld 353. Kellw. 41. 8. Crom. 195, 196. Dalt. c. 22. Moore 848.

Salkeld 353. 2 L. Ray. 1514. 2 Strange 794. Bar K. B. 30, 38, 39. Seſſ. Caſ. 289.

*Sect.* 9. But this ſtatute being likewiſe very defective in many reſpects, as in not giving any remedy againſt thoſe who were guilty of a forcible detainer after a peaceful entry; nor even againſt thoſe who were guilty of both a forcible entry and a forcible detainer, if they were removed before the coming of a juſtice of peace; and in not giving the juſtices of the peace any power to reſtore the party injured by ſuch force to his poſſeſſion; and alſo in not fixing any pain on the ſheriff for not obeying the precepts of the juſtices in the execution of the ſaid ſtatutes; it was farther enacted by 8 Hen. 6. c. 9. "That from henceforth where "any doth make any forcible entry in lands and tenements, "or other poſſeſſions, or them hold forcibly, after complaint "thereof made within the ſame county where ſuch entry is "made, to the juſtices of the peace, or to one of them, by "the party grieved, that the juſtices or juſtice ſo warned, "within a convenient time, ſhall cauſe, or one of them ſhall "cauſe, the ſaid ſtatute to be duly executed, and that at the "coſts of the party ſo grieved."

*Sect.* 10. And it is farther enacted by the ſaid ſtatute, "That though ſuch perſons making ſuch entries be preſent, "or elſe departed before the coming of the ſaid juſtices or "juſtice, notwithſtanding the ſame juſtices or juſtice in ſome "good town next to the tenements ſo entered, or in ſome "other convenient place according to their diſcretion, ſhall "have, and either of them ſhall have, authority and power "to enquire by the people of the ſame county, as well of "them that make ſuch forcible entries in lands and tene-

"ments,

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" ments, as of them which the ſame hold with force. And " if it be found before any of them, that any doth contrary " to this ſtatute, then the ſaid juſtices or juſtice ſhall cauſe " to reſeize the lands and tenements ſo entered or holden as " afore, and ſhall put the party ſo put out, in full poſſeſſion " of the ſame lands and tenements, ſo entered or holden as " before."

*Sect.* 11. And it is farther enacted by the ſaid ſtatute, " That when the ſaid juſtices or juſtice make ſuch enquiries " as before, they ſhall make, or one of them ſhall make, their " warrants and precepts to be directed to the ſheriff of the " ſame county, commanding him of the king's behalf, to " cauſe to come before them, and every of them, ſufficient " and different perſons, dwelling next about the lands ſo en- " tered as before, to enquire of ſuch entries, whereof every " man which ſhall be impanelled to enquire in this behalf, " ſhall have land or tenement of the yearly value of forty ſhil- " lings by the year, at the leaſt, above reprizes, and that the " ſheriff return iſſues upon every of them at the day of the " firſt precept returnable, twenty ſhillings, and at the ſecond " day forty ſhillings, and at the third time an hundred ſhil- " lings, and at every day after the double. And if any ſhe- " riff or bailiff within a franchiſe having return of the king's " writ, be ſlack, and make not execution duly of the ſaid " precepts to him directed to make ſuch enquiries, that he " ſhall forfeit to the king twenty pounds for every default, " and moreover ſhall make fine and ranſom to the king. And " that as well the juſtices or juſtice aforeſaid, as the juſtices " of aſſizes ſhall have power to hear and determine ſuch de- " faults of the ſaid ſheriffs and bailiffs, at the ſuit of the king, " or of the party grieved, *&c.*"

*Sect.* 12. And it is farther enacted by the ſaid ſtatute, " That mayors, juſtices or juſtice of peace, ſheriffs and bai- " liffs of cities, towns and boroughs having franchiſe, have " in the ſaid cities, towns and boroughs, like power to re- " move ſuch entries, and in other articles aforeſaid, riſing " within the ſame, as the juſtices of peace, and ſheriffs in " counties and countries aforeſaid have."

*Sect.* 13. But it is provided by the ſaid ſtatute, " That " they who keep their poſſeſſions with force in any lands and " tenements, whereof they or their anceſtors, or they whoſe " eſtate they have in ſuch lands and tenements, have continu- " ed their poſſeſſions in the ſame by three years or more, be " not endamaged by force of this ſtatute."

*Sect.* 14. And the ſaid proviſo was farther enforced and explained by 31 Eliz. c. 11. by which it is declared and enacted,

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" That no reſtitution upon any indictment of forcible entry, " or holding with force, be made to any perſon, if the perſon " ſo indicted, hath had the occupation, or been in quiet poſ- " ſeſſion, for the ſpace of three whole years together, next be- " fore the day of ſuch indictment ſo found, and his eſtate there- " in not ended; which the party indicted may alledge for ſtay " of reſtitution, and reſtitution to ſtay till that be tried, if the " other will deny or traverſe the ſame. And if the ſame alle- " gation be tried againſt the ſame perſon ſo indicted, he is to pay " ſuch coſts and damages to the other party, as ſhall be aſſeſ- " ſed by the judges or juſtices before whom the ſame ſhall be " tried; the ſame coſts and damages to be recovered and levied, " as is uſual for coſts and damages contained in judgments " upon other actions."

Crom. 161, 166.

*Sect.* 15. In the conſtruction of theſe ſtatutes it was holden, That if a leſſee for years, or copyholder were ouſted, and the leſſor, or lord, diſeiſed, and ſuch ouſter as well as diſſeiſin were found in an indictment of forcible entry, the court might in their diſcretion award a reſtitution of poſſeſſion to ſuch leſſee or copyholder, which was by neceſſary conſequence a reſeiſin of the freehold alſo, whether the leſſor or lord had deſired or oppoſed it. But it was a great queſtion, Whether a leſſee for years, or a copyholder, being ouſted by the leſſor or lord, could have a reſtitution of their poſſeſſion within the equity of 8 Hen. 6. the words whereof as to this purpoſe are, " that the juſtice ſhall re-ſeiſe the lands *&c.*" by which it ſeems to be implied. That the party muſt be ouſted of ſuch an eſtate therein, whereof he may be ſaid to be ſeiſed, which muſt be a freehold at leaſt.

Yelv. 81. Con. 1 Leon. 327.

Lamb. 155. Crom. 71. Dalt. c. 77. Savil 68. Farres. 123.

*Sect.* 16. But to remove this doubt, it is enacted by 21 Jac. 1. c. 15. " That ſuch judges, juſtices, or juſtice of the " peace, as by reaſon of any act or acts of parliament then " in force, were authorized and enabled upon enquiry, to give " reſtitution of poſſeſſion unto tenants of any eſtate of free- " hold, of their lands or tenements, which ſhall be entered " upon with force, or from them withholden by force, " ſhall by reaſon of that act, have the like, and the ſame " authority and ability from thenceforth (upon indict- " ment of ſuch forcible entries, or forcible withhold- " ing before them duly found) to give like reſtitution of " poſſeſſion unto tenants for term of years, tenants by " copy of court-roll, guardians by knights-ſervice, tenants " by elegit, ſtatute-merchant and ſtaple, of lands or tene- " ments, by them ſo holden, which ſhall be entered upon " by force, or holden from them by force."

Latch. 182. See Co. Lit. 61.

*Sect.* 17. But it hath been holden, That a tenant by the verge, is not within this ſtatute, becauſe he is not within the expreſs words; *ſed quære*, for ſince ſuch perſon hath no other evidence

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evidence of his title; but by the copy of court-roll, he ſeems at leaſt to be within the meaning, if not within the words of the ſtatute; however it ſeems clear, That if a leſſor eject his leſſee for years, and afterwards be forcibly put out of poſſeſſion again by ſuch leſſee, he hath no remedy for a reſtitution by force, of any of the above-mentioned ſtatutes, for he cannot have it by 8 Hen. 6. becauſe he always continued ſeiſed of the freehold, and clearly he is not within 21 Jac. 1. c. 15.

Vide Salk. 587. Crom. 71. 166. Dalt. c. 77.

*Sect.* 18. However there ſeems to be no doubt, but that a juſtice of peace, *&c.* may, in either of the ſaid caſes, remove the force, and commit the offender, *&c.*

Lamb. 155. Crom. 71. Dalt. c. 75. 2 Keb. 495.

*Sect.* 19. Having thus ſet forth the ſeveral ſtatutes relating to this ſubject, together with the miſchiefs which occaſioned them, and the ſeveral defects of each of them, I ſhall, for the better underſtanding of them all in general, proceed to examine the following particulars. Firſt, What ſhall be eſteemed an entry within theſe ſtatutes. Secondly, What entry is to be adjudged forcible. Thirdly, What detainer, Fourthly, In reſpect of what kind of poſſeſſions one may be guilty of ſuch forcible entry or detainer. Fifthly, What perſons may be guilty thereof. Sixthly, What ought to be the form of a record grounded upon theſe ſtatutes. Seventhly, Of what kind of poſſeſſions a reſtitution is to be awarded. Eighthly, To whom ſuch reſtitution ought to be made. Ninthly, By whom, and in what manner, it is to be awarded and given. Tenthly, In what caſes it may be barred by the continuance of a poſſeſſion for three years. Eleventhly, For what other cauſes it may be ſtayed. Twelfthly, How it may be ſuperſed before it is executed. Laſtly, How it may be ſet aſide after it is executed.

Strange 443. 794. Ld. Ray. 1514.

*Sect.* 20. As to the firſt point, *viz.* What ſhall be eſteemed an entry within theſe ſtatutes. It ſeems certain, That if one who pretends a title to lands, barely go over them, either with, or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for ſuch like purpoſe, without doing any act, which either expreſly or impliedly amounts to a claim of ſuch lands, he cannot be ſaid to make an entry thereinto within the meaning of theſe ſtatutes.

Crom. 70. Dalt. c. 77.

*Sect.* 21. Yet in ſuch caſe, if he makes an actual claim with any circumſtances, of force or terror, he ſeems to be guilty of a forcible entry within 1 & 15 Rich. 2. whether his adverſary actually quit his poſſeſſion or not.

Crom. 69. Dalt. c. 77. Con C.Car 486. 2Com.Dig.363.

*Sect.* 22. 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.

Crom. 69. Dalt. c. 77 B. 2. c. 29. ſ. 4.

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Crom. 69. Dalt. c. 77. Co. Lit. 256.

*Sect.* 23. 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.

Crom. 69. Dalt. c. 77. 2 H. 7. 16.

*Sect.* 24. But he who barely agrees to a forcible entry made to his uſe, without his knowledge or privity, ſhall not be adjudged to make an entry within theſe ſtatutes, becauſe he no way concurred in, or promoted the force.

Lamb. 142, &c. Dalt. c. 77. Co. Lit. 257. Hale 138. 1 Sid. 101. 1 Lev. 90.

*Sect.* 25. As to the ſecond point, *viz.* What entry is to be adjudged forcible, it ſeems clear, that it ought to be accompanied with ſome circumſtances of actual violence or terror; and therefore that an entry which hath no other force than ſuch as is implied by the law, in every treſpaſs whatſoever, is not within theſe ſtatutes.

And therefore for the better underſtanding hereof, I ſhall conſider; Firſt, In reſpect of what acts of violence an entry may be adjudged forcible. Secondly, In reſpect of what circumſtances of terror.

Sum. 136, 138, 2 Roll. 2. Noy 136, 137.

*Sect.* 26. As to the firſt of theſe particulars, It ſeems to be agreed, That 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 him if he refuſe to relinquiſh his poſſeſſion, but alſo in reſpect of any other kind of violence in the manner of the entry, as by breaking open the doors of a houſe, whether any perſon be in it at the ſame time or not, eſpecially if it be a dwelling-houſe, and perhaps alſo by any act of outrage after the entry, as by carrying away the party's goods, &c. which being found in an aſſiſe of novel diſſeiſin, will make the defendant a diſſeiſor with force, and ſubject him to fine and impriſonment. And according to ſome opinions, an entry may be ſaid to be forcible from the bare drawing up of a latch, or pulling back the bolt of a door; but ſurely ſuch inconſiderable circumſtances as theſe, which commonly paſs between neighbour and neighbour, without any offence at all, can never bring a man within the meaning of theſe ſtatutes, which ſpeak of entries with ſtrong hand, or multitude of people; and it hath been holden, That an entry into a houſe through a window, or by opening a door with a key, is not forcible. And it is ſaid, That if one find a man out of his houſe, and forcibly withhold him from returning to it, and ſend perſons to take peaceable poſſeſſion thereof, in the party's abſence, yet he is not guilty of a forcible entry, inaſmuch, as he did no violence to the houſe, but only to the perſon of the other. But perhaps this opinion may juſtly be queſtioned, becauſe though the force be not actually done upon the land, nor in the very act of the entry, yet ſince it is uſed with an immediate intent to make ſuch entry, and is the only

30 Aſſ. 50. 21 H. 7. 17. 2 Inſt. 235, 236. Dalt. Crom. 70.

Moor. 656. Lamb. 143.

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cauſe it met with no oppoſition, ſurely it cannot be ſaid, that the entry is without force, which whether it be upon, or off the land, ſeems equally within the ſtatute.

*Sect.* 27. As to the ſecond particular, *viz.* In reſpect of what circumſtances of terror an entry may be adjudged forcible; it is to be obſerved, That wherever a man either by his behaviour or ſpeech, at the time of his entry, gives thoſe who are in poſſeſſion 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, *&c.*

Summary 128. Lamb. 142, &c. Dalt. c. 77. 10 H. 7. 12. Crom. 69. See the books above cited.

*Sect.* 28. But it ſeemeth that no entry ſhall be judged 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.

B. Dureſs, 12, 16. 1 Inſt. 253. Dalt. c. 77.

*Sect.* 29. However it is clear, That it may be committed by a ſingle perſon, as well as by twenty.

Lamb. 143.

*Sect.* 30. As to the third point, *viz.* What detainer is to be adjudged forcible, it ſeemeth certain, 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 adjudged guilty of a forcible detainer, though no attempt be made to re-enter; 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; 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 deſpight of another.

Summary 138. Lamb. 145. Crom. 70, 73. Summary 139. Dalt. c. 77. C. Jac. 199.

*Sect.* 31. As to the fourth point, *viz.* In reſpect of what kind of poſſeſſions one may be guilty of a forcible entry or detainer within thoſe ſtatutes, it ſeems clear, That one may come within the danger thereof by a force done to eccleſiaſtical poſſeſſions, as *(a)* churches, *(b)* vicaridge-houſes, *&c.* as much as *if the ſame were* done to any temporal inheritance;

(a) 1 Sid. 101. 1 Lev. 90. 1 Keb. 418. (b) C. Jac. 41.

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also it hath been holden for a general rule, That one may be indicted for a forcible entry into any such incoporeal hereditament, for which a *(c)* writ of entry will lie, either by the common law, as for *(d)* rent, or by statute, as for *(e)* tithes, *&c.* But I do not find any good authority, That such an indictment will lie for a *(f)* common or *(g)* office; but it seems agreed, That an indictment of forcible detainer lies against any one, whether he be the tertenant or a stranger, who shall forcibly disturb the lawful *(h)* 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, *&c.* Yet it seems clear, That no one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement, which is no possession. Also it seemeth, That a man cannot be convicted upon view, by force of 15 Rich. 2. of a forcible detainer of any such tenement, wherein he cannot be said to have made a precedent forcible entry, because that statute gives the justices a jurisdiction of no other forcible detainer, but what follows a forcible entry.

(c) C. Car. 201.
(d) 20 H. 6. 11. 22 H. 6. 33. B. Force, 7. C. Car. 201.
(e) C. Car. 201.
(f) C. Car. 486. Dalt. c. 77.
(g) C. Jac. 18.
(h) Crom. 69. Lamb. 144. Dalt. c. 77.
1 Mod. 73. 2 Keb. 709.
Vide Inf. f. 40.

*Sect.* 32. As to the fifth point, *viz.* Who may be guilty of a forcible entry or detainer within these statutes; it seems clear, That no one can come within the intention thereof 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 door 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; or by forcibly entering into the land in the possession of his own lessee at will. *Sed quære.*

Moor. 786. C. Jac. 18. 2 Keb. 495.

*Sect.* 33. But it seems clear, That a jointenant, or tenant in common, may offend against the purport of these statutes, either by forcibly ejecting, or forcibly holding out his companion, for though the entry of such a tenant be lawful *per my & per tout*, 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 the violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, &c. is good.

8 Ed. 4. 9, 19. 10 H. 7, 27. King & Marrow, 9 Geo. 2. B. R. H. 174.
Latch. 224. Palmer 419.

*Sect.* 34. Also if a man have 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 against the purport of these statutes, because all the estate whereof he was seised before such claim, was wholly defeated by it, and

Co. Lit. 256, 257. Crom. 69. Lamb. 160, 161. Dalt. c. 77.

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and his continuance in poſſeſſion afterwards amounted in the judgment of law to a new entry.

*Sect.* 35. It is ſaid, That an infant or feme covert may be guilty within the intention of theſe ſtatutes, 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: 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 expreſly named.

Dalt. c. 77. Crom. 69. Co. Lit. 357.

1 Hale 21. B. Imp. 43, 45.

*Sect.* 36. As to the ſixth point, *viz.* What ought to be the form of a record grounded upon theſe ſtatutes, it hath been reſolved, Firſt, That it is ſufficient in the caption of ſuch an indictment, to ſay, that it was taken before *A. B. & C. D. Juſticiariis ad pacem Domini Regis conſervandam aſſignatis*, without ſhewing that they had authority to hear and determine felonies and treſpaſſes; for the ſtatute enables all juſtices of peace, as ſuch, to take ſuch indictments.

Palmer 277. C. Jac. 633.

*Sect.* 37. Secondly, It hath alſo been reſolved, That the tenement in which the force was committed, muſt be deſcribed with convenient certainty, for otherwiſe the defendant will neither know the ſpecial charge to which he is to make his defence, neither will the juſtices or ſheriff know how to reſtore the injured party to his poſſeſſion; and from hence it follows, That an indictment of a forcible entry into a (*a*) tenement (which may ſignify any thing whatſoever,) (*b*) wherein a man may have an eſtate of freehold, or into a houſe (*c*) or tenement, or into two cloſes of meadow (*d*) or paſture, or into a rood (*e*) or half a rood of land, or into (*f*) certain lands belonging to ſuch a houſe, or into ſuch a houſe, without ſhewing in what (*g*) town it lies, or into a (*h*) tenement with the appurtenances called *Trupenny* in *D.* is not good. But it hath been reſolved, That an indictment for a forcible entry *in (i) domum manſionalem, ſive meſſuagium, &c.* is good, for theſe are words equipollent: Alſo that ſuch an indictment for an entry into a (*k*) cloſe, called ſerjeant *Hern*'s cloſe, *&c.* without adding the number of acres, is good, for here is as much certainty as is required in an ejectment. And it hath been adjudged, that ſuch indictment may be void as to ſuch part thereof only which is uncertain, and good for ſo much as is certain, and therefore that an indictment for a forcible entry into a houſe, and certain acres of land thereto belonging, may be quaſhed as to the land, and ſtand good as to the houſe.

Dalt. c. 88. 8 Mod. 66. 12 Mod. 417.

(*a*) Dalt. 15. 2 Roll. 46. 2 R. Abr. 80. 3 Leon. 102. (*b*) Co. Lit. 6. (*c*) 2 R. Abr. 40. 1 Roll. 334. C. Jac. 633. Palmer 277. (*d*) 2 R. Abr. 81. (*e*) 1 Bulſt. 201. (*f*) 2 Leon. 186. 3 Leon. 102. B. Forc. Ent. 23. (*g*) 2 Leon. 186. (*h*) 2 R. Abr. 80. (*i*) C. Jac. 633. Palmer 277. (*k*) C. Eliz 458. 2 R. Abr. 80.

2 Leon. 186. 3 Leon. 102.

*Sect.* 38. Thirdly, It hath been alſo reſolved, That an indictment on 5 or 15 Rich. 2. needs not ſhew who had the freehold at the time of the force, becauſe thoſe ſtatutes ſeem

St. 21 Jac. 1. 2 Keb. 495. 3 Bulſt. 71.

equally

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1 Ven. 23. 25. 2 Sid. 102, 306. 2 Mod. 273.

equally to punish all force of this kind, without any way regarding what estate the party had on whom it was made; yet it seems, That such an indictment ought to shew that such entry was made on the possession of some person, who had some estate in the tenements, either as a freeholder or lessee for years, &c. for otherwise it doth not appear, that such entry was made injurious to any one. But it is said, That an indictment on 8 Hen. 6. must shew, that the place wherein the force was committed was the freehold of the party grieved at the time of such force; and therefore, That it is not sufficient to say that the defendant with strong hand, &c. entered into such a house, *existens liberum tenementum J. S. &c.* without saying, *adtunc existens liberum tenementum J. S.* for otherwise it may be intended, that it was his freehold at the time of the indictment only, and not at the time of the force; and according to the general opinion, an indictment on that statute cannot warrant an award of restitution, unless it find, that the party was seised at the time. Yet it is said, That the want of such an express finding may be supplied by such words as necessarily imply, that the party was seised at the time of the force; as where it is expressly laid that the defendant disseised *J. S. &c.* which is impossible, unless he had been seised of the freehold at the same time; and it hath been said, That it is sufficient in such an indictment to say that the party was *possessionatus pro termino vitæ*, without using the word *seisitus*, &c. for the same propriety of expression is not required in indictments as pleadings; *sed quære*. Also it is said, That if it do appear either in such an express or implicit manner, that the party injured had the freehold of the land at the time of the force, it is not necessary to shew farther what estate in particular he had therein, or by what title he claims the same; for it is not the title, but the possession, which is in question. And upon the like ground it hath been adjudged, That an indictment on the said statute for entering on my farmer, and forcibly expelling him, and disseising me, is good, without shewing what estate such farmer had; for it is sufficient to shew that he had the possession, and the injury complained of is the forcible disseisin done to me, which, being the main point of the indictment, if it be sufficiently set forth in substance, the indictment is good; yet in this very case the want of shewing that such farmer was ousted, would have been an incurable fault; because his possession being my possession, unless he were ousted, I could not be disseised. Also it hath been holden, That as an indictment on 8 Hen. 6. must shew that the party who is put out of possession was seised of a freehold, in order to bring him within the purview of that statute, so also an indictment on 21 Jac. 1. c. 15. must shew, That the party injured was possessed of such an estate, as will bring him within the provision of that act; and upon this ground it hath been resolved, That such an indictment, setting forth in general,

1 Ven. 89. 2 Keb. 495. Salk. 260. Sayer 142, 225.

Hetley 93. Latch 109. 2 Keb. 477, 499. Lut. 1543. 2 Keb. 191. C. Eliz. 754. Noy 131. 2 Roll. 65. 2 Sid. 102. Con. Yelv. 28. 2 Buitt. 177. Show. 272. Con. 1 Ven. 306. 3 Leon. 102. Alien 49. Palmer 277, 426. Con. 2 R. A. 80. Cro. Jac. 214, 633, 939.

2 R. Abr. 80.

Yelv. 165.

Farres 123.

1 Ven. 306.

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general, That the party was poſſeſſed, or that he was poſſeſſed for a certain term, without adding, that it was for years, is not good; for in the firſt caſe it may be intended, That he was poſſeſſed only by virtue of a leaſe at will; and in the ſecond, That he was poſſeſſed of a term for life; in neither of which caſes he is within the benefit of 21 Jac. 1. c. 15. Yet it hath been ſaid, That the poſſeſſion of ſuch an eſtate, as is within that ſtatute, is ſufficiently ſet forth in the reciting part of an indictment, as thus, *quod cum J. S.* was poſſeſſed for a certain term of years, and being ſo poſſeſſed, was by ſtrong hand, &c. put out of poſſeſſion, &c. without any direct allegation of ſuch a poſſeſſion.

1 Sid. 102. 1 Mod. 73. 2 Keb. 709. Salk. 260. Farres 123. 1 Mod. 73.

*Sect.* 39. Fourthly, it hath been reſolved, That a repugnancy in ſetting forth the offence in an indictment upon any of theſe ſtatutes, is an incurable fault; and upon this foundation it hath been adjudged, That an indictment on 8 Hen. 6. ſetting forth, that the defendants *paciſicè intraverunt, &c. & eum adtunc & ibidem vi & armis diſſeiſiverunt*, or that *J. S.* was ſeiſed and poſſeſſed, is void; and it hath alſo been adjudged, That an indictment on 21 Jac. 1. ſetting forth, That the party injured was poſſeſſed of a term for years, or of a copyhold eſtate, and that the defendants with ſtrong hand ouſted and diſſeiſed him, is void, becauſe it is abſurd and contradictory to ſet forth a diſſeiſin of ſuch an eſtate whereof it is impoſſible that any man can be diſſeiſed; alſo it hath been holden, That an indictment on 8 Hen. 6. ſetting forth a diſſeiſin of land, *adtunc & adhuc exiſtens liberum tenementum J. S.* is void for its repugnancy, inaſmuch as it implies, That *J. S.* always continued in poſſeſſion, which, if it be true, makes it impoſſible that he could be diſſeiſed at all; but ſome have ſaid that this ſeeming repugnancy may be reconciled, by intending that the diſſeiſee might re-enter after the time of the diſſeiſin, and before the finding of the indictment; however it ſeems clear, That if the words *adhuc extratenet* be added, ſuch a repugnancy cannot be helped by any intendment; and that no reſtitution can be awarded on ſuch an indictment, whether thoſe words *adhuc extratenet* be in it or not, becauſe the party grieved appears by the indictment itſelf to have had the freehold at the time of the finding thereof.

Aleyn 50. Show. 272. 1 Vent. 108. Popham 205. Raymund 67. 1 Keb. 423, 428, 435, 472. 2 Roll. 318. Show. 272. 2 Bulſt. 171. 1 Sid. 102.

*Sect.* 40. Fifthly, It hath been reſolved, That an indictment of a forcible detainer, without ſhewing that the defendant made an entry into the ſame lands, is not good, becauſe the ſtatute doth not prohibit one who hath always been in poſſeſſion, to maintain the ſame with force. And it ſeems clear, That a conviction of a forcible detainer upon view, by force of 15 Rich. 2. cannot be good, unleſs it ſhew that the defendant was alſo guilty of a forcible entry, for the words of that ſtatute are, "That at all times that ſuch forcible entries are made, and complaint thereof cometh to the juſtices,

2 R. Abr. 80. Palm. 195, 196. 197. C. Jac. 19, 32. C. Car. 91.

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" tices, &c. that the ſame juſtices, &c. ſhall go, &c. and if " they find any that hold ſuch place forcibly, after ſuch entry " made, &c." by which it is plain, That the juſtices have no juriſdiction by force of this ſtatute, but where the entry, as well as detainer, was forcible: Yet in *Leigton's* caſe it was reſolved, That ſuch a forcible entry is ſufficiently ſet forth in the complaint recited in ſuch a conviction; and it is plain, That the ſtatute could not intend that the forcible entry ſhould be viewed, becauſe it is to precede the proceedings of the juſtices; but perhaps it is the better opinion, That an indictment upon 8 Hen. 6. ſetting forth an entry and forcible detainer, without ſhewing whether the entry were forcible or peaceable, is good; for there is no *medium* between a forcible and peaceable entry; and an entry not alledged to have been forcible, ſhall be intended to have been peaceable, or if not ſo, yet it ſeems to be no way material, whether it ſhall be taken to have been forcible or peaceable, becauſe in either caſe it is equally within the ſtatute, the words whereof as to this purpoſe are, " Where any doth make forcible entry in lands and tene- " ments, or other poſſeſſions, or them hold forcibly;" by which it appears, That a forcible detainer is a diſtinct offence from that of a forcible entry, and no way depending on it; and my lord chief juſtice Holt ſeemed to be of this opinion in *Leighton's* caſe above-mentioned. However it ſeems to be certain, That if a bill both for a forcible entry and forcible detainer be preferred to a grand jury, and found *ignoramus* as to the entry with force, and *billa vera* as to the detainer, it will not warrant an award of reſtitution, but is void, becauſe the grand jury cannot find a bill true for part, *(a)* and falſe for part, as a petit jury may.

B.R.Hill.1708.
2 R. Abr. 80.
Yelv. 99.
C. Jac. 151.
1 Sid. 97, 99, 414.
2 Keb. 505.
Vide inf. ſ. 59.
B. 2. c. 25. ſ. 2.
*(a)* Vide Rex v. Fieldhouſe, Cowper 325.

*Sect.* 41. Sixthly, It hath been reſolved, That no indictment can warrant an award of reſtitution, unleſs it find that the wrong-doer both ouſted the party grieved, and alſo continueth his poſſeſſion at the time of the finding of the indictment; for it is a repugnancy to award reſtitution of poſſeſſion to one who never was in poſſeſſion, and it is vain to award it to one who doth not appear to have loſt it.

Salk. 260.
B. Force, 13.
Lamb. 153.
Dalt. c. 81.
Summary 140.
Hard. Ca. 174.
Savil 68.
Strange. 474.

*Sect.* 42. Seventhly, It hath been reſolved, that the time and place of the diſſeiſin are ſufficiently ſet forth in an indictment, alledging, That the defendant *tali die intravit, &c. & ipſum A. B. manu forti diſſeiſivit*, without adding the words *adtunc & ibidem*; for inaſmuch as the entry and diſſeiſin are both of them of the ſame nature, and the one of them naturally tends to cauſe the other, it is implied, that they both happened at the ſame time; and the forcible entry being the principal offence within the purview of theſe ſtatutes, and the diſſeiſin being only added to ſhew that the party grieved hath a right to a reſtitution, as to which the day of the diſſeiſin is no

C. Jac. 41, 151.

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way material, it ſeemeth to be over nice to require a preciſe exactneſs in ſetting it forth; neither can it be to any purpoſe to alledge that the diſſeiſin was at the ſame place with the entry, ſince it appears from the nature of the thing, that it could not but be ſo. Yet in an indictment of murder, it is perhaps a fatal miſtake, not expreſly to ſhew the day and place of the ſtroke, as well as of the aſſault, becauſe theſe offences are of different kinds, the one being only a treſpaſs, and the other a felony, and may well be intended to have happened at different times and places, and the giving of the ſtroke being the principal offence, ought to be ſet forth with the moſt exact certainty. B. 2. c. 23. ſ. 88. Dyer 68.

*Sect.* 43. Eighthly, It hath been reſolved, That a diſſeiſin is ſufficiently ſet forth, by alledging, That the defendant entered, *&c.* into ſuch a tenement and diſſeiſed the party, without adding, either the words (*a*) *illicitè*, or (*b*) *expulit*, (*c*) *inde*, for the word *diſſeiſivit* implies as much. Sayer 225. (*a*) Noy 125. (*b*) C. Jac. 32. (*c*) C. Eliz. 86. Con. Noy 120.

*Sect.* 44. Ninthly, It hath been reſolved, That an indictment which purſues the words of the ſtatute in alledging an entry, *&c.* to have been made *manu forti*, needs not expreſly alſo to ſay, That it was made *vi et armis*, becauſe that is implied. Alſo it is ſaid, That as the want of thoſe words will not vitiate an indictment, which purſues the ſtatute, ſo neither will the uſing of them make good an indictment which does not purſue it; yet it hath been reſolved, That ſuch an indictment may be good without mentioning any complaint, though the ſtatute ſeems to require it; for it is ſaid, That thoſe words in the ſtatute are put in *cauſa abundanti*; and that if a juſtice of peace have by any means whatſoever notice of a forcible entry or detainer, he may and ought to proceed againſt the ſame according to the ſaid ſtatute, as being a diſturbance of the publick peace, the preſervation whereof was the chief end of theſe ſtatutes. 11 Mod. 235. C. Eliz. 461. Latch. 224. 2 Bulſ. 258. B. 2. c. 25. ſ. 92. Con. 1 Keb. 572. 2 Keb. 133, 135. 1 Vent. 265. 3 Burr. 1732. 3 Burr. 1699. 7 Ed. 4. 18. Dalt. 25.

*Sect.* 45. As to the ſeventh point, *viz.* Of what kind of poſſeſſions a reſtitution is to be awarded; it ſeems that it ought only to be awarded for the poſſeſſion of ſuch tenements as are viſible and corporeal; for no one who hath a right to ſuch as are inviſible and incorporeal, as rents, commons, &c. can be put out of poſſeſſion thereof, but only at his own election, by a fiction of law, in order to enable him to recover damages againſt the perſon who hath wrongfully diſturbed him in the enjoyment of them; for ſuch things being mere creatures of the law, and depending entirely upon the conſtruction thereof, are always in the poſſeſſion of thoſe whom the law adjudges to have a right to ſuch poſſeſſion, and conſequently all the remedy that can be deſired againſt a force offered to a Dalt. c. 81. Lamb. 153. Co. Lit. 323.

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man in respect of such like possessions, is to have the actual force removed, and the offenders punished for the same, which may be done by the force of 15 Rich. 2. &c.

*Sect.* 46. As to the eighth point, *viz.* To whom such restitution ought to be made; it hath been holden, That it shall only be given to him who is found by the indictment to have been put out of an actual possession, and consequently that it shall not be awarded to one who was only seised in law, as to an heir upon whom a stranger abateth upon the death of the ancestor, before any actual entry made by such heir; and from the same ground it followeth, That it shall not be granted to an heir upon an indictment, finding a forcible entry made upon his ancestor.

Dalt. c. 83. Lamb. 153.

Lamb. 154. Dalt. c. 83. Vide C. Jac. 199.

*Sect.* 47. It hath been holden by some, That if a disseisee re-enter peaceably upon the disseisor, and continue for some time peaceably upon the tenements in dispute, and afterwards detain them with force, the disseisor shall not be restored upon an indictment finding the said force, because his possession was at first peaceably defeated, and at the time of the force, he had, in the judgment of law, no possession at all. But I cannot be persuaded that this opinion is agreeable to the intention of the said statutes, the principal end whereof seems to be to oblige all persons to refer themselves to the courts of justice, for the decision of their claims to the possession of land, and to restrain them from disturbing the public peace, by such endeavours to right themselves; but if such a practice as this should be allowed, it would be easy to evade the effect thereof by refraining from violence at first, and then forcing the party to leave the possession of the premisses after a short continuance thereon in peace; neither do I see any difference between such a continuance for the space of three days, and a continuance for three hours or minutes, inasmuch as the subsequent force is in each case equally within the mischief intended to be provided against by the statutes; and seeing the statutes of 8 Hen. 6. and 31. Eliz. c. 11. have expressly provided, That those who have been in possession for three years, shall not be put out of possession by an indictment of forcible entry or detainer; it seems plainly to be implied, That no one shall have the like advantage, in respect of a possession for a shorter time.

Crom. 162, 163.

*Sect.* 48. It will be needless in this place to shew of what kind of hereditaments, or of what kind of estate therein, the party who is to be restored must be found to have been seised or possessed, because this may sufficiently appear by what hath been said in the foregoing part of this chapter.

*Sect.* 49. As to the ninth point, *viz.* By whom and in what manner such restitution may be awarded and given; there is no doubt, but that the same justice, before whom an

Comyns 61.

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indictment of forcible entry or detainer ſhall be found, may grant an award of reſtitution to the party; and it is ſaid, That he may execute the ſame either in his own proper perſon, or make his precept to the ſheriff to do it. Dalt. c. 82. Dyer 187. 12 Mod. 495.

*Sect.* 50. But it ſeems clear, That neither juſtices of peace, nor any other court whatſoever, have authority to grant a reſtitution upon a conviction of any force taken by them upon view, unleſs the ſame be found by an indictment, according to the direction of 8 Hen. 6. c. 9. or 21 Jac. 1. c. 15. (2) Alſo it ſeems to be agreed, That no other juſtices of peace, except thoſe before whom ſuch an indictment ſhall be found, have any power, either at ſeſſions, or out of it, to make any award of reſtitution; and that no other court whatſoever can perſonally reſtore the party without a precept to the ſheriff. 1 Sid. 156. 1 Keb. 88. 1 Ven. 308. Dyer 187. Dalt. c. 82. Lamb. 184.

(2) Vide 3 Coſt. Dig. 366. where it is ſaid that a juſtice of peace or ſheriff may break open a houſe to make reſtitution.

*Sect.* 51. Alſo it hath been reſolved, that juſtices of oyer and terminer have no power, either to inquire of a forcible entry or detainer, or to award reſtitution on any ſuch indictment; becauſe when a new power is created by ſtatute, and certain juſtices are aſſigned to execute it, it cannot regularly be executed by any other; and inaſmuch as juſtices of oyer and terminer have a commiſſion entirely diſtinct from that of juſtices of peace, they ſhall not from the general words of their commiſſion, *Ad inquirend' de omnibus tranſgr' & de omnibus aliis articulis & cauſis cont' formam quorumcunque ſtatutorum fact' ſive perpetrat'*, be conſtrued to have any ſuch powers as are ſpecially limited to juſtices of peace. Yet it hath been reſolved, That the juſtices of the King's Bench may award reſtitution upon an indictment of forcible entry or detainer removed before them, becauſe the ſaid juſtices having a ſupreme and ſovereign juriſdiction over all matters of a criminal and publick nature, have always been eſteemed to have power in all cauſes of this nature, being brought judicially before them, to give the parties ſuch remedies in relation thereto, as they ſhall appear to have a right to demand, either by common law, or by ſtatute. Kellw. 159. Daliſ. 25. 9 Co. 118. 11 Co. 65. Farres 138. 7 Ed. 4. 18. 4 H. 7. 18. Dalt. c. 82.

*Sect.* 52. The ſheriff, if need be, may raiſe the power of the county to aſſiſt him in the execution of a precept of reſtitution, and therefore, if he make a return thereto, that he could not make a reſtitution by reaſon of reſiſtance, he ſhall be amerced. Lamb. 157. Dalt. c. 82.

*Sect.* 53. As to the tenth point, *viz.* How ſuch reſtitution ſhould be barred by the continuance of a poſſeſſion for three years; it appears from the above-mentioned proviſo of 8 Hen. 6. and alſo by 31 Eliz. c. 11. That any one indicted upon theſe ſtatutes, may alledge ſuch poſſeſſion to ſtay the award of reſtitution; in the conſtruction whereof it hath been holden, That ſuch poſſeſſion muſt have continued without in- Salkeld 260. Carthew 496. 12 Mod 263. Farres 138. Dalt. c. 79. Crompton 71. Summary 139. Dyer 141. 22 H. 6. 18.

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B. Force, 22, 29. 1 Inſt. 256. Raymond 85. 1 Sid. 149.

terruption during three whole years next before the indictment; and therefore that he who having been in poſſeſſion of land for three years or more, is forcibly ouſted, and then reſtored by force of the ſtatute of 8 Hen. 6. cannot juſtify a forcible detainer, till he have been in poſſeſſion again for three years after ſuch reſtitution; and alſo for the ſame reaſon it hath been ſaid, That he who under a defeaſible title hath been never ſo long in poſſeſſion of land to which another hath a right of entry, cannot juſtify ſuch a detainer at any time within three years after a claim made by him who hath ſuch a right, becauſe all defeaſible eſtates in the land are wholly defeated by ſuch a claim, and the ſubſequent continuance in poſſeſſion amounted to a new entry.

Fitz. c. 79. 22 H. 6. 18. Crompton 71.

*Sect.* 54. There have been ſome opinions, That the three years poſſeſſion muſt be of a lawful eſtate, and conſequently that a diſſeiſor's continuance in quiet poſſeſſion for never ſo many years, ſhall not juſtify a forcible detainer; but it ſeems neceſſary to make a diſtinction between a detainer againſt him who has a right of entry, and a detainer againſt a ſtranger, or one who by his laches has loſt his right of entry; for I do not ſee why three years continuance of a defeaſible poſſeſſion ſhould not juſtify a detainer by force againſt a ſtranger, inaſmuch as he cannot take advantage of another's right, and bare poſſeſſion is a good title againſt all perſons, except him who hath the right, and cannot be lawfully defeated by any other. Alſo if one who has the mere right to lands, have ſo long neglected to recover the poſſeſſion thereof, till in judgment of law he hath no more right to ſuch poſſeſſion, till he have recovered it by action, than a mere ſtranger, there doth not ſeem to be any reaſon that he ſhould have more advantage againſt a forcible detainer, than if he were a mere ſtranger.

Holding over by force, where the tenants title was under a leaſe now expire, is ſaid to be a forcible detainer. Cro. Jac. 199.

4 Comm. 149.

*Sect.* 55. Alſo it hath been holden, That a peaceable continuance in poſſeſſion for three years after a forcible entry, under any title whatſoever, will not juſtify a forcible detainer, inaſmuch as the poſſeſſion was at firſt gained by force. But I cannot think this a reaſonable conſtruction of the ſaid ſtatutes, for the force in the detainer being after three years quiet poſſeſſion, ſeems juſtifiable by the expreſs words of the ſtatute; and where the force uſed in gaining a poſſeſſion is afterwards wholly laid aſide, there ſeems to be no colour to ſay, That it makes the ſubſeqent poſſeſſion leſs quiet or peaceable than it would have been, if there had been no force at all uſed at the firſt.

1 Keb. 538. K. v. Burges. Salkeld 261.

*Sect.* 56. It ſeems clear from the expreſs purview of the ſaid ſtatute of 31 Eliz. c. 11. That wherever the defendant pleadeth ſuch a poſſeſſion in bar of reſtitution upon ſuch an indictment, either before the juſtices of peace, or in the king's bench, no reſtitution ought to be awarded till the truth of the

plea

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plea be tried; and it hath been holden, That the plea of such a poſſeſſion is good, without ſhewing under what title, or of what eſtate ſuch poſſeſſion was, becauſe it is not the title, but the poſſeſſion only, which is material in this caſe. 1 Sid. 149. Raym. 84. 1 Ven. 265.

*Sect.* 57. It ſeems that from the wording of 31 Eliz. c. 11. if one who has been in poſſeſſion for three years, be ouſted, and the ſame day re-enter with force, and alſo be indicted for ſuch re-entry on the very ſame day, it may be queſtioned whether the proſecutor ought to have reſtitution, inaſmuch as the words of the ſtatute are, "That there ſhall be no "reſtitution, &c. if the perſon indicted have been in quiet "poſſeſſion for three years next before the day of the indict-"ment found;" and here the defendant hath been in poſſeſſion three years before the day of the indictment, though not three years before the indictment, inaſmuch as he was ouſted the ſame day. But if it be conſidered, That the circumſtance of finding the indictment on that day no way affects the merits of the caſe, or leſſens the offence any more than if it were found in any other day; and that reſtitution muſt have been awarded if it had been found on another day; and that the miſchief complained of in the preamble is, that perſons were by colour of ſuch indictments often turned out of their poſſeſſions which they had quietly enjoyed for three years next before ſuch indictments found, which does not extend to the defendant in the preſent caſe, I rather incline to think, that reſtitution might be awarded to the proſecutor in this caſe, inaſmuch as it clearly appears, That the defendant's poſſeſſion hath not had three years uninterrupted continuance within the intent of the ſtatute. 4 Comm. 148. 1 Burr. 119.

*Sect.* 58. As to the eleventh point, *viz.* For what other cauſes ſuch reſtitution may be ſtayed; it ſeemeth to be ſettled at this day, That if the defendant tender a traverſe of the force, which muſt be done in writing, and not by a bare denial of the force by parol, the juſtice ought not to make any reſtitution, till the traverſe be tried; in order whereunto he muſt award a *venire facias*, whereon a jury muſt be returned, on whoſe verdict the award of reſtitution ought to depend. 1 Keb. 343. 2 Keb. 49, 57. 1 Sid. 284. Salk. 567, 568. Caſes, tempus Hardwicke, p. 175.

*Sect.* 59. It hath been reſolved, That if ſuch a jury find part of the indictment to be true, and part of it to be falſe; yet if they find ſo much thereof to be true as will warrant a reſtitution, the juſtice ought to reſtore the party: as where, on an indictment of forcible entry and forcible detainer, the jury find that the entry was peaceful, and the detainer was only forcible. 1 Sid. 97, 99. 1 Keb. 427.

*Sect.* 60. As the juſtice is bound to ſtay the award of reſtitution, upon the defendant's tendering a traverſe of the force, ſo it hath alſo been ſaid, That he ought not to make ſuch an award in any caſe in the defendant's abſence, without calling him to anſwer for *himſelf*; *for it is* implied by natural juſtice, in the Salk. 68. Alyn. 78.

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the conſtruction of all laws, That no one ought to ſuffer any prejudice thereby, without having firſt an opportunity of defending himſelf.

Dyer 187. Summary 140. Crom. 165. Dalt. c. 81, 84.

*Sect.* 61. As to the twelfth point, *viz.* How ſuch a reſtitution may be ſuperſeded before it is executed; there is no doubt but that the ſame juſtices, by whom a reſtitution is awarded upon an indictment of forcible entry or detainer found before them, may alſo afterwards, upon an inſufficiency of the indictment appearing unto them, ſuperſede the ſame before it is executed: And it hath alſo been ſaid, That if ſuch an indictment be taken, and reſtitution awarded by four or five juſtices, that two or even one of the ſame juſtices may ſuperſede the execution thereof, as well as more or all of them. But it ſeems to be agreed, That no other juſtices, or other court whatſoever, have ſuch power, except the King's Bench.

Cr. Eliz. 915. Yelv. 32.

C. Eliz. 915. Yelv. 32. Moor. 677. 1 Keb. 93. Summary 141. Strange 474.

*Sect.* 62. However it is certain, that a *certiorari* from the King's Bench is a *ſuperſedeas* to ſuch reſtitution; for every ſuch *certiorari* has theſe words *coram nobis terminari volumus & alibi*, and conſequently it wholly cloſes the hands of the juſtices of peace, and avoids any reſtitution which is executed after the *teſte*, but does not bring the juſtices of the peace, &c. into a contempt, unleſs they proceed after the delivering thereof.

Sayer 176.

*Sect.* 63. As to the thirteenth point, *viz.* How ſuch reſtitution may be ſet aſide after it is executed; it is certain, That the juſtices of the King's Bench, having a general ſuperintendent power over all the 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 where the indictment whereon it was 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 King's Bench, or wherever 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, &c.

Savil 68. Sum. 140, 141. C. Eliz. 31. Sup. f. 58.

Noy 119. Yelv. 99. C. Jac. 148, 149.

*Sect.* 64. Yet if an indictment on theſe ſtatutes be removed into the King's Bench, and the defendant having been turned out of poſſeſſion by the grant of reſtitution to the proſecutor by the juſtices of peace, traverſe the force in the King's Bench, and then the offence be pardoned by a general pardon, the court cannot proceed on the trial, notwithſtanding the defendant would wave the benefit of the pardon, becauſe it appears judicially, That the king can have no benefit of a fine from the defendant if the verdict paſs againſt him; and the court will never falſify an indictment, which is found

B. 2. c. 37. f. 61.

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by the oaths of twelve men, by bare affidavits; and conſequently in this caſe the defendant can have no remedy to ſet aſide the reſtitution by controverting the truth of the indictment.

*Sect.* 65. Neither can a defendant in any caſe whatſoever, *ex rigore juris*, demand a reſtitution, either upon the quaſhing of the indictment, or a verdict for him on a traverſe thereof, &c. for the power of granting a reſtitution is veſted in the King's Bench, only by an equitable conſtruction of the general words of the ſtatutes, and is not expreſly given by thoſe ſtatutes; and is never made uſe of by that court, but when upon conſideration of the whole circumſtances of the caſe, the defendant ſhall appear to have ſome right to the tenements, the poſſeſſion whereof he loſt by the reſtitution granted to the proſecutor.

Raymond 85. 1 Keb. 343, &c. 2 Keb. 505. Summary 141. C. Eliz. 916. Salk. 587. Dyer 123. 2 Keb. 571. Savil 68.

*Sect.* 66. The court of King's Bench hath been ſo favourable to one, who, upon his traverſe of an indictment upon theſe ſtatutes being found for him, hath appeared to have been unjuſtly put out of his poſſeſſion, that they have awarded him a re-reſtitution, notwithſtanding it hath been ſhewn to the court, that ſince the reſtitution granted upon the indictment, a ſtranger hath recovered the poſſeſſion of the ſame land in the lord's court.

8. Eliz. 41.

For the form of the indictment vide 2 Burn's juſtice 220.

## CHAPTER THE SIXTY-FIFTH.

## Of RIOTS, ROUTS, and UNLAWFUL ASSEMBLIES.

IN treating of riots, routs, and unlawful aſſemblies, I ſhall conſider, Firſt, What ſhall be called a riot, rout, or unlawful aſſembly. Secondly, How they may be ſuppreſſed and puniſhed by the common law. Thirdly, How by ſtatute.

12 Mod. 510.

*Sect.* 1. A RIOT ſeems to be a tumultuous diſturbance of the peace, by three perſons, (*a*) or more, aſſembling together of their own authority, with an intent mutually to aſſiſt one another, againſt any who ſhall oppoſe them, in the execution of ſome enterprize of a private nature, and afterwards actually executing the ſame in a violent and turbulent manner, to the terror of the people, whether the act intended were of itſelf lawful or unlawful. (*b*)

(*a*) Vide 2 Ven. 251. Salk. 594, 595. Dalt. c. 85, 86, 87. Crom. 61, &c. Fulton 25, &c. 3 Inſt. 176. Summary 137. 3 Mod. 141.

(*b*) See Salk. 594. Popham 202. 1 Ld. Ray. 484. 12 Mod. 262, 509. Strange 196. 11 Mod. 115, 116, 117. 1 Black. 350.

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For the better underſtanding whereof, I ſhall conſider the following particulars:—Firſt, How far ſuch an aſſembly may become riotous through the want of legal authority expreſſed or implied, or be excuſable by reaſon of ſuch authority.—Secondly, How far the intention with which the parties aſſemble together muſt be unlawful.—Thirdly, With what kind of violence or terror the intended enterprize muſt be executed.—Fourthly, How far the grievance intended to be redreſſed muſt be of a private nature.—Fifthly, Whether the unlawful execution of an act in its own nature lawful may not make an aſſembly riotous.

*Sect.* 2. As to the firſt point it ſeems, That wherever more than three perſons (1) 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. (A) 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 *(a)* ſheriff or *(b)* conſtable, or perhaps even for a private *(c)* 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. Alſo it ſeems to be the duty of a *(d)* ſheriff, or other miniſter of juſtice, having the execution of the king's writs, and being reſiſted in endeavouring to execute the ſame, to raiſe ſuch a power as may effectually enable them to overpower any ſuch reſiſtance; yet it is ſaid not *(e)* 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.

(1) The words "more than three perſons," are three times over (ſ. 2. 5. 7.) inſerted inſtead of "three perſons or more," an inſtance, that in a variety of matter it is impoſſible for the mind of man to be always equally attentive. 4 Burn. 88.

(A) Burr. 1262, K. v. Scott and Harris. 1 Black. 550.

*(a)* 2 And. 67. Popham 121.

*(b)* 3 H. 7. 10.

*(c)* Pop. 121. Moor 656. Infra c. 47. ſ. 8.

*(d)* 2 Inſt. 193.

*(e)* 3 Inſt. 161. 3 Inſt. 193. Hob. 62, 264.

*Sect.* 3. As to the ſecond point, *viz.* How far the intention with which ſuch perſons aſſemble together muſt be unlawful; it ſeems agreed, That if a number of perſons being met together at a fair or market, or church-ale, or any other lawful or innocent occaſion happen on a ſudden quarrel to fall together by the ears, they are not guilty of a riot, but of ſudden affray only, of which none are guilty but thoſe who actually engage in it, becauſe the deſign of their meeting was innocent and lawful, and the ſubſequent breach of the peace, happened unexpectedly without any previous intention concerning it. Yet it is ſaid, That if perſons, innocently aſſembled together, do afterwards upon a diſpute happening to ariſe among them, form themſelves into parties, with promiſes of mutual aſſiſtance, and then make an affray, they are guilty of a riot, becauſe upon their confederating together with an intention to break the peace, they may

Lamb. 179, &c. Dalt. c. 86. Crom. 61, 62. 6 Mod. 43. Skinner 118. Salkeld 595.

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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: However it ſeems clear, That if in an aſſembly of perſons met together on any lawful occaſion whatſoever, a ſudden propoſal ſhould be ſtarted of going together in a body to pull down a houſe or incloſure, or to do any other act of violence to the diſturbance of the public peace, and ſuch motion be agreed to, and executed accordingly, the perſons concerned cannot but be rioters, becauſe their aſſociating themſelves together for ſuch a new purpoſe, is no way extenuated by their having met at firſt upon another. Alſo it ſeems to be certain, That if a perſon ſeeing others actually engaged in a riot, do join himſelf unto them, and aſſiſt them therein, he is as much a rioter as if he had at firſt aſſembled with them for the ſame purpoſe, inaſmuch as he has no pretence that he came innocently into the company, but appears to have joined himſelf unto them, with an intention to ſecond them in the execution of their unlawful enterprize; and it would be endleſs, as well as ſuperfluous, to examine whether every particular perſon engaged in a riot, were in truth one of the firſt aſſembly, or actually had a previous knowledge of the deſign thereof.

Vide Rex v. John Royce, Burrow 2073.

6 Modern 43.

*Sect.* 4. As to the third point, *viz.* With what kind of violence or terror, the intended enterprize muſt be executed, it hath been holden, That it 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, *&c.* 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.

Dalt. c. 85. Lamb. 175. 3 Inſt. 176.

*Sect.* 5. However, it ſeems to be clearly agreed, That in every riot there muſt be ſome ſuch circumſtances either of actual force or violence, or at leaſt of an apparent tendency thereto, as are naturally apt to ſtrike a terror into the people; as the ſhew *(a)* of armour, threatening ſpeeches, or turbulent geſtures; for every ſuch offence muſt be laid to be done *in terrorem populi*:(2) And from hence it clearly follows, That aſſemblies at wakes, or other feſtival times, or meetings for exerciſe of common ſports or diverſions, as bull-baiting, wreſtling, and ſuch like, are not riotous. And from the ſame ground alſo it ſeems to follow, That it is poſſible for more than three perſons (3) to aſſemble together, with an intention

*(a)* Lamb. 178. Dalt. c. 87. 3 H. 7. 1. 6 Mod. 141. 2 Keb. 558. Com. 1. Roll. 169. 3 Burr. 1995. 11 Mod. 170. Lamb. 179.

(2) Vide the opinion of *Holt, C. J.* in the caſe of the Queen v. Soley, 11 Modern 115.

(3) It ſhould be "three perſons or more," vide note (1) to ſection 2.

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Pulton 25. 3 Keb. 578. Hobart 91.

Lambard 178. Crompton 62. *Quære.*

6 Mod. 141. 3 Keb. 558. Con. 1 Mod. 13. 3 Ven. 369, 380. 11 Modern 116.

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 hath a pretended right, and afterwards do carry it away without any threatening words, or other circumſtances of terror. And from the ſame ground it ſeems alſo to follow, That perſons aſſembled together in a peaceful manner to do a thing prohibited by ſtatute, as to celebrate maſs, *&c.* and afterwards peacefully performing the thing intended, cannot be ſaid to 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.

*Sect.* 6. As to the fourth point, *viz.* How far the grievance intended to be redreſſed muſt be of a private nature; it ſeems agreed, That the injury or grievance complained of, and intended to be revenged or remedied by ſuch an aſſembly, muſt relate to ſome private quarrel only; as the incloſing of lands in which the inhabitants of 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 intereſts or diſputes of particular perſons, no way concerning the publick; for wherever the intention of ſuch an aſſembly is to redreſs publick grievances, as to pull down all incloſures in general, or to reform religion, or to remove evil counſellors from the king, &c. if they attempt with force to execute ſuch their intentions, they are in the eye of the law guilty of levying war againſt the king, and conſequently of high treaſon, as appears from chapter ſeventeen, ſection twenty-five.

Quære and vide Salk. 594, 595. Crom. 64, 66. Dalton c. 87.

*Sect.* 7. As to the fifth point, *viz.* Whether the execution of an act in its own nature lawful, may make an aſſembly riotous; it hath been generally holden, That it is no way material whether the act intended to be done by ſuch an aſſembly, be of itſelf lawful, or unlawful; from whence it follows, That if more than three perſons (4) 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 number in a violent and tumultuous manner join together in removing a nuſance, 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 publick peace: However the juſtice of the quarrel in which ſuch an aſſembly doth engage, is certainly a great mitigation of the offence.

(4) It ſhould be "three perſons or more," vide 1. ſt. 2.

3 Modern 3. 11 Mod. 117. 2 Show. 236. 12 Mod. 648.

*Sect.* 8. A ROUT ſeems to be, according to the *general opinion*, a diſturbance of the peace by perſons aſſembling together with an intention to do a thing, which if it be executed

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ted will make them rioters, and actually making a motion towards the execution thereof: But by ſome books, the notion of a rout is confined to ſuch aſſemblies only, as are occaſioned by ſome grievance common to all the company; as the inclaſure of land in which they all claim a right of common, &c. However inaſmuch as it generally agrees with a riot as to all the reſt of the above-mentioned particulars, requiſite to conſtitute a riot, which have been already fully explained, except only in this, That it may be a compleat offence without the execution of the intended enterprize, it ſeems not to require any farther explication.

Lamb. 175, 176. Crom. 61. Dalt. c. 85. B. Riots, 4, 5. Pulton 25.

*Sect.* 9. AN UNLAWFUL ASSEMBLY, according to the common opinion, is a diſturbance of the peace by perſons barely aſſembling together, with an intention to do a thing, which if it were executed would make them rioters, but neither actually executing it, nor making a motion toward the execution it. But this ſeems to be much too narrow a definition. For any meeting whatſoever of great numbers of people with ſuch circumſtances of terror, as cannot but endanger the publick peace, and raiſe fears and jealouſies among the king's ſubjects, ſeems properly to be called an unlawful aſſembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner in order to conſult together concerning the moſt proper means for the recovery of their intereſts; for no one can foreſee what may be the event of ſuch an aſſembly.

Crompton 61. B. Riots, 4. Pulton 25. Dalt. c. 95.

Hobart 92. Salk. 594, 595. 1 Ven. 369, 380.

*Sect.* 10. Alſo an aſſembly of a man's friends for the defence of his perſon, againſt thoſe who threaten to beat him, if he go to ſuch a market, &c. is unlawful; for he who is in fear of ſuch inſults, muſt provide for his ſafety by demanding the ſurety of the peace againſt the perſons by whom he is threatened, and not make uſe of ſuch violent methods, which cannot but be attended with the danger of raiſing tumults and diſorders to the diſturbance of the public peace. Yet an aſſembly of a man's friends in his own houſe, for the defence of the poſſeſſion thereof, againſt thoſe who threaten to make an unlawful entry thereinto, or for the defence of his perſon againſt thoſe who threaten to beat him therein, is indulged by law; for a man's houſe is looked upon as his caſtle.

21 H. 7. 30. Lamb. 179, 180. Summary 137. Crom. 64. B. Riots, 1. 5 Co. 91. 11 Mod. 116.

*Sect.* 11. As to the ſecond point, *viz.* How far offences of this nature may be ſuppreſſed and puniſhed by the common law; it ſeems clear, That every ſheriff, under-ſheriff, and alſo every other peace officer, as conſtables, &c. may and ought to do all that in them lies towards the ſuppreſſing of a riot, and may command all other perſons whatſoever to aſſiſt them therein. Alſo it is certain, That any private perſon may lawfully endeavour to appeaſe all ſuch diſturbances by ſtaying thoſe whom he ſhall ſee engaged therein from executing

Popham 121. 3 H. 7. 1. 10. Vide ſupra.

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ing 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 of a common affray, ſurely *a fortiori* they may do it towards the ſuppreſſing of a riot: Alſo it hath been holden, That private perſons may arm themſelves in order to ſuppreſs a riot; from whence it ſeems clearly to follow, that they may alſo make uſe of arms in the ſuppreſſing of it, if there be a neceſſity for their ſo doing. However it ſeems to be extremely hazardous for private perſons to proceed to thoſe extremities; and it ſeems no way ſafe for them to go ſo far in common caſes, leſt under the pretence of keeping the peace, they cauſe a more enormous breach of it, and therefore ſuch violent methods ſeem only proper againſt ſuch riots as ſavour of rebellion, for the ſuppreſſing whereof no remedies can be too ſharp or ſevere.—However it is enacted by 1 Geo. 1. c. 5. "That if more perſons than twelve being unlawfully, riotouſly and tumultuouſly aſſembled, twelve or more of them "ſhall continue together, and not diſperſe themſelves within "one hour after proclamation made in purſuance of that ſtatute, that then every peace officer of the place where ſuch "aſſembly ſhall be, and all perſons who ſhall be commanded "to be aſſiſting to ſuch officer, may and ought to apprehend "all ſuch rioters, and carry them before ſome juſtice of peace; "and that if any ſuch rioter ſhall happen to be killed, maimed, "or hurt by reaſon of their reſiſting ſuch officer, *&c.* the officer ſhall be diſcharged, *&c.*" But the ſtatute being wholly in the affirmative, cannot be thought to take away any part of the authority in the ſuppreſſing of a riot, which was before that time given either to officers or private perſons by the common law or by ſtatute.

Popham 121. Kelyng 76.

A perſon preſent aiding and abetting rioters is a principal in the ſecond degree, under this act of parliament. 4 Burr. 2073.

Vide Douglas, p. 700. n. (1) (2)

*Sect.* 12. 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; and anciently, if they were undertaken in contempt of the king's expreſs prohibition of their meeting, under pain of forfeiture of lands, &c. they ſeem to have been puniſhable with ſuch forfeiture.

Crompton 61. Dalt c. 46. C. Car. 507.

3 R. Abr. 208.

*Sect.* 13. It hath been holden, That the perſons of whom a corporation conſiſts, being guilty of a riot, are puniſhable in their natural, but not in their politic capacity; for the corporation itſelf cannot be in fault, becauſe it is inviſible, and exiſts only in ſuppoſition of law. Yet there are ſome precedents by which it appears, that corporations have been amerced, (5) and their liberties ſeized into the king's hands, for ſuffering a dangerous riot to happen within their juriſdiction without uſing their endeavours to ſuppreſs it.

21 Ed. 4. 13, 14. Dalt. c. 88.

C. Car. 252. 2 Hale 155.

(5) Vide the King v. Kennet, Lord Mayor of London, during the riots in the year 1738.

Sect.

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*Sect.* 14. Women are punishable as rioters, but infants under the age of discretion are not.

As to the third point, *viz.* How far offences of this nature may be suppressed and punished by statute; I shall consider, How far they may be suppressed and punished by one justice of peace. And, How far by two or more.

*Sect.* 15. As to the first of these points, it is enacted by 34 Edw. 3. c. 1. "That justices of peace shall have power "to restrain offenders, rioters, and all barrators; and to "pursue, arrest, take and chastise them according to their "trespass and offence; and to cause them to be imprisoned, "and duly punished, &c."

*Sect.* 16. And this statute has been liberally construed for the advancement of justice; for it hath been resolved, That if a justice of peace find persons riotously assembled, he alone without staying for his companions hath not only power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer good bail, but that he may also authorise others to arrest them by a bare parol command without other warrant, and that by force thereof the persons so commanded, may pursue and arrest the offenders in his absence as well as presence. It is also said, That if a justice of peace be sick, and hear that persons are riotously assembled, he may send his servants to arrest them and bring them before him; and that if he hear that persons are riotously together in a certain place, and go thither and find none there, he may leave his servants behind him with a command to arrest them, when they shall come. Also it is said, That after a riot is over, any one justice of peace may send his warrant to arrest any person who was concerned in it, and also that he may send him to gaol, till he shall find sureties for his good behaviour.

14 H. 7. 9. Lamb. 181, &c. Dalt. c. 45. B. Peace. 7. Pulton 28. Crom. 62, 63, 64, 65, 195. Kellwood 41.

*Sect.* 17. But it seems to be agreed, that no one (*a*) justice of the peace hath any power by force of this statute, either to record a riot upon his own view, or to take an inquisition thereof after it is over. Also if one justice of peace proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing of himself, because no single justice of peace is by this statute made a judge of the said offence. (*b*) But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of *Northampton*, and any one justice of peace acting *ex officio*, in pursuance of the said statute, seize the armour and imprison the offender, and make a record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity, as appears more at large in the chapter

(*a*) B. Peace, 7. Kellw. 41. Lamb. 181, &c. Pulton 26. Summary 139. Crom. 61, 63, 65. Dalt. c. 46. Con. B. Judges 10.

(*b*) 8 Co. 121. Dalt. c. 22, 46.

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of affrays; and for the ſame reaſon, if a juſtice of peace proceeding on the ſtatute of 15 Rich. 2. againſt forcible entries and detainers, ſhall upon his own view record a riot, which ſhall be committed in the making of any ſuch forcible entry or detainer, a riot ſo recorded cannot be traverſed, as hath been ſhewn in the foregoing chapter. Alſo if a juſtice of peace acting as a judge, by virtue of any ſtatute whatſoever impowering him ſo to do, make a record upon his view of a riot committed in his preſence, ſuch record ſhall not be traverſed; for the law gives ſuch an uncontroulable credit to all matters of record, made by any judge of record as ſuch, that it will never admit of an averment againſt the truth thereof.

Crompton 65. Lambard 317. Vide inf. f. 25.

Pult. 25, 26. Lambard 314. Crompton 62.

*Sect.* 18. It hath been queſtioned, Whether a juſtice of peace be authorized by virtue of the above-mentioned ſtatute of 34 Edw. 3. c. 1. to raiſe the power of the county to ſuppreſs a riot; but it ſeemeth, That by being made a conſervator of the peace, he hath by an implication of law, all ſuch powers in relation thereto, as are incident to the office of a conſervator of the peace by the common law; and conſequently, That he hath a right of demanding the aſſiſtance of others to enable him to preſerve the peace in the ſame manner, as every ſheriff and conſtable are impowered to demand ſuch aſſiſtance by the common law; However there ſeems to be no reaſon to doubt, but that every juſtice of peace is authorized by 17 Rich. 2. c. 8. to raiſe the power of the county to repreſs a riot; for by the ſaid ſtatute it is enacted, "That "as ſoon as the ſheriffs, and other the king's miniſters," under which words all juſtices of peace ſeem clearly to be included, "ſhall hear of a riot, rout, or other aſſembly againſt "the peace, they with the power of the county where ſuch "caſe ſhall happen, ſhall diſturb ſuch malice with all their "power, and ſhall apprehend all ſuch offenders, and put them "in priſon, until due execution of the law be made of them; "and that the lords and other liege people of the realm ſhall "attend, with their whole ſtrength and power, the ſheriffs "and miniſters aforeſaid."

3 H. 7. 10. 3 Inſt. 158. Vide ſupra.

*Sect.* 19. As to the ſecond point, *viz.* How far offences of this nature may be ſuppreſſed and puniſhed by two or more juſtices of peace; it is enacted by 13 Hen. 4. c. 7. "That if "any riot, aſſembly, or rout of people againſt the law, be "made in parties of the realm, that the juſtices of peace, "three or two of them at the leaſt, and the ſheriff or under-"ſheriff of the county where ſuch riot, aſſembly or rout, "ſhall be made hereafter, ſhall come with the power of the "county (if need be) to arreſt them, and ſhall arreſt them; "and the ſame juſtices and ſheriff, or under-ſheriff, ſhall have "power to record that which they ſhall find ſo done in their "preſence againſt the law. And that by the record of the "ſame juſtices and ſheriff, or under-ſheriff, ſuch treſpaſſers

"and

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" and offenders ſhall be convict in the manner and form as is " contained in the ſtatute of forcible entries."

*Sect.* 20. In the conſtruction this ſtatute, compared with the above-mentioned ſtatute of 17 Rich. 2. c. 8. and alſo with the ſtatute of 2 Hen. 5. c. 8. it hath been holden, That all perſons whatſoever, and even noblemen, and all others of what condition or degree ſoever they may be, except women, clergymen, perſons decrepit, and infants under the age of fifteen years, are bound under pain of fine and impriſonment, upon reaſonable warning to attend the juſtices and ſheriffs in the execution of the ſaid ſtatute, and not only to arreſt the rioters, but alſo to conduct them to priſon.

Pulton 29. Dalt. c. 46. Crom. 63. Lamb. 316, 315.

*Sect.* 21. Alſo it hath been holden, That thoſe who attend the juſtices in order to ſuppreſs a riot, may take with them ſuch weapons as ſhall be neceſſary to enable them effectually to do it, and that they may juſtify the beating, wounding, and even the killing of ſuch rioters as ſhall reſiſt, or refuſe to ſurrender themſelves.

Pop. 120, 121. Crompton 62. Dalton c. 46. Lambard 316.

*Sect.* 22. It is ſaid, That the juſtices of peace are not only impowered by the ſaid ſtatute, to raiſe the power of the county to aſſiſt them, in ſuppreſſing a riot which ſhall happen within their own view or hearing, but alſo, that they may ſafely do it upon a credible information given them of a notorious riot happening at a diſtance, whether there were any ſuch riot in truth or not; for it may be dangerous for them to ſtay till they can get certain information of the fact: But they ſeem to be puniſhable for alarming the country in this manner, without ſome ſuch probable ground of their proceeding, as would induce a reaſonable man to think it neceſſary and convenient.

Lamb. 315, 316, 318, 319. Dalt. c. 46. Pulton 29. Crom. 64.

*Sect.* 23. It ſeems clear from the ſaid ſtatute, That if the juſtices, *&c.* in going towards the place where they have heard that there is a riot, ſhall meet perſons coming from thence riotouſly arrayed, they may arreſt them for being aſſembled together in ſuch an unlawful manner, and alſo make a record thereof, *&c.* for the ſtatute extends to all other unlawful aſſemblies whatſoever, as well as to riots.

Dalt. c. 46. Lamb. 316. Crom. 63.

*Sect.* 24. Alſo it ſeems clear, That after the juſtices have had a view of a riot they may make a record thereof, whether the offenders be in cuſtody at the ſame time, or have eſcaped: And it is ſaid that the juſtices may lawfully, upon a freſh purſuit, arreſt ſuch of the offenders as ſhall have eſcaped, but that they cannot at another time award any proceſs on ſuch a record, and therefore that they ought to ſend it into King's Bench, if any of the offenders eſcape from a freſh purſuit, and that proceſs ſhall iſſue againſt them from thence: However there ſeems to be no doubt, but that any of the ſame juſtices who have recorded a riot, or *any other juſtice* of peace, may at any time by virtue

Lamb. 318. Dalt. c. 46. Pulton 29. 8 Co. 121.

Vide inf. f. 29.

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of the abovementioned ſtatute of 34 Edw. 3. c. 1. arreſt thoſe who have been notoriouſly guilty of a riot, in order to compel them to find ſureties for their good behaviour.

Raymond 386. Crom. 65. 63. Dalton c. 46.

*Sect.* 25. It ſeemeth to be certain, That the record of a riot expreſly mentioned to have happened within the view of the juſtices by whom it is recorded, is a conviction of ſo great authority, that it can no way be traverſed, however little ground in truth there might be to affirm that any riot at all was committed, or however innocent the parties may be of the fact recorded againſt them. And it is ſaid, That if any one be bound by recognizance to keep the peace, and on a *ſcire facias* thereon ſuch a record of a riot be produced againſt him, he ſhall not only be concluded thereby from pleading the general iſſue, but alſo from pleading any matter of juſtification whatſoever.

Fulton 29. Lamb. 316, 317.

Lambard 317. Dalton c. 130.

*Sect.* 26. However it ſeemeth clear, That if in ſuch a record of a riot it be contained, that the party was guilty therein of a felony, or maim, or reſcous, the party ſhall be concluded thereby as to the riot only, and not as to any of the other matters, becauſe the juſtices of peace, have by this ſtatute, a judicial authority over no other offences except riots, routs, and unlawful aſſemblies.

Lambard 316. Dalton c. 46.

*Sect.* 27. And inaſmuch as ſuch a record is a final conviction of the parties as to all ſuch matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of perſons concerned therein, and the ſeveral kinds of weapons made uſe of by them, and all other circumſtances of the fact; for ſince the parties are concluded from denying the truth of ſuch a record, and have no other remedy to defend themſelves againſt it, but only by taking advantage of the inſufficiency of what is contained in it, they may juſtly demand the benefit of excepting to it, if it do not expreſly ſhew, both that they are guilty within the meaning of the ſtatute; and alſo how far they are guilty, and that the juſtices have purſued the power given them by the ſaid ſtatute, and from the ſame ground it ſeems alſo to follow, That ſuch a record may be excepted againſt, if it do not appear to have been made by the ſheriff or under-ſheriff in concurrence with the juſtices.

Lambard 319. Raymond 386. Con. Dalt. c. 46.

Lambard 317. Dalton c. 46.

*Sect.* 28. It is ſaid that the offenders being under the arreſt of the ſaid juſtices, and alſo convicted by a record of their offence, ought immediately to be committed to gaol by the ſame juſtices, till they ſhall make fine and ranſom to the king, which can be aſſeſſed by no other juſtices of peace, except thoſe by whom the record of the offence was made; and by 2 Hen. 5. c. 8. ſuch fine ought to be larger than it was wont to be before that ſtatute, for the ſupport of the charges of the ſaid juſtices, &c. whereof payment ought to

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be made by the ſheriff, by indenture thereof between him and them.

*Sect.* 29. It is farther enacted by the ſaid ſtatute of 13 Hen. 4. c. 7. that if it ſhall happen, "That ſuch treſpaſſers "and offenders be departed before the coming of the ſaid juſ-"tices and ſheriff, and under-ſheriff, that the ſame juſtices, "three, or two of them ſhall diligently inquire within a "month after ſuch riot, aſſembly, or rout of people ſo made, "and thereof ſhall hear and determine according to the law "of the land."

*Sect.* 30. Alſo it is farther enacted by 19 Hen. 7. c. 13. "That the ſheriff having a precept directed to him to return "a jury in purſuance of 13 Hen. 4. c. 7. ſhall return twen-"ty-four perſons dwelling within the ſhire where ſuch riot, "rout, or unlawful aſſembly ſhall be ſo committed and done, "whereof every of them ſhall have lands and tenements "within the ſame ſhire, to the yearly value of twenty ſhil-"lings of charter-land or freehold, or twenty-ſix ſhillings "and eight-pence of copyhold, or of both, over and above "all charges, for to enquire of the ſaid riot, rout, or unlaw-"ful aſſembly. And that he ſhall return upon every perſon "ſo by him impanelled, in iſſues at the firſt day twenty ſhil-"lings, and at the ſecond day forty ſhillings, if they appear "not, and be ſworn to inquire of the premiſſes at the firſt "day. And that the ſheriff for every default, &c. ſhall for-"feit twenty pounds, &c."

*Sect.* 31. It is not clearly ſettled, whether the month, within which the juſtices of peace are confined to take their inquiry by force of theſe ſtatutes, muſt be reckoned according to the computation of a lunar, or ſolar month; however, it ſeems to be agreed, That if the juſtices give their charge to the jury, and it is ſaid, that if they do but award a precept for the returning of the jury, within a lunar month, they may take the verdict afterwards, for the cauſe being regularly attached in them within the time preſcribed by the ſtatute, ſhall be proſecuted as all other caſes ought, with ſuch convenient diſpatch as to the judges thereof ſhall ſeem proper; and the ſtatute, by obliging the juſtices to make ſo ſpeedy an enquiry, meant not to hurry them in the execution of it.

1 Sid. 186. 1 Keb. 695. Vide ſupra. Lamb. 322. Dalt. c. 46. Pulton 29. 6 Mod. 141. Salkeld 593.

*Sect.* 32. It is generally ſaid, That any juſtice of the county may take ſuch an enquiry, whether they dwell near the place where the riot happened, or at a diſtance, or whether they went to view the riot or not; for the ſtatute ought to be conſtrued as largely as the words will bear, in favour of the juſtices power in the ſuppreſſing of ſuch riots; and therefore thoſe words in the ſtatute, that the ſame juſtices, &c.

Lamb. 322, 327. Dalton c. 46. Pulton 29. Cromp. 62, 63, ſeems contrary.

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shall enquire, ought to be thus expounded, That the same justices who were before impowered to raise the *posse*, &c. shall inquire; and it is clear, That any justices in the county are within that part of the statute which gives that power; neither is it any way reasonable to construe the last clause of the said statute, whereby the justices who who dwell nigheſt, are bound to execute the statute under pain of one hundred pounds, in such a manner as to restrain the jurisdiction of those who by the foregoing part of the said statute are authorised to execute it; for if such an exposition should prevail, the negligence of the justices who happen to dwell nigheſt would make the statute wholly ineffectual.

See Sect. 44.

*Sect.* 33. It seems clear from the wording of the above-mentioned clause, that the sheriff ought not to join with the justices in taking of such an inquiry, as he ought to do in making a record of a riot upon view.

Lambard 381. Raymond 386. Salkeld 593. Carthew 383.

*Sect.* 34. Also it seems clear from these words in the statute of 13 Hen. 4. c. 7. "That the same justices shall hear "and determine, &c." that they may award process under their own *teste*, against those who shall be indicted before them of any of the offences above-mentioned, according to the form of the said statute; and also that they may award the like process for the trial of a traverse of such an inquisition, and do all other things in relation thereunto, which are of course incident to all courts of record.

Lamb. 323, 328. Dalt. c. 46, & c. 132. Pulton 26 Crompton 67.

*Sect.* 35. But it hath been questioned, whether the justices can safely dismiss the offenders upon their paying such a fine as shall be imposed upon them, without some judgment for their imprisonment as well as fine, inasmuch as the statute of 2 Hen. 5. c. 8. is express, That all rioters attainted of great and heinous riots shall have one whole year's imprisonment at the least, without bail, &c. and that rioters attainted of petit riots, shall have imprisonment, as best shall seem to the king or to his council.

Dalt. c. 46. Crompton. 61.

*Sect.* 36. Formerly, if the fine imposed upon rioters by justices of peace had been too favourable, it was a common practice for the court of Star-chamber afterwards to impose such other fine as might, together with that which was assessed by the justices of peace, be proportionable to the heinousness of the offence; and this was said not to be a double punishment for the same offence, but only on award of due penalty at several times.

Crompton 63. Pulton. 24. Dalton c. 46. See 1 Leon. 282.

*Sect.* 37. It is farther enacted by the said statute of 13 Hen. 4. c. 7. "That if the truth cannot be found in the "manner as is aforesaid, then within a month then next fol- "lowing, the justices, three, or two of them, and the she- "riff, or under-sheriff, shall certify before the king and

"his

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" his council all the deed and the circumſtances thereof: " which certificate ſhall be of like force as the preſentment " of twelve men; upon which certificate he ſaid treſpaſſers " and offenders ſhall be put to anſwer, and they which ſhall " be found guilty, ſhall be puniſhed according to the diſcre- " tion of the king and his council. And if ſuch treſpaſſers " and offenders do traverſe the matter ſo certified, the ſame " certificate and traverſe ſhall be ſent into the King's Bench, " there to be tried and determined, as the law require h; and " if they appear not before the king and his council, or in " the King's Bench, upon ſuch proceſs and proclamation for " their appearance as are required by the ſaid ſtatute, they " ſhall be attainted of the riot, *&c.*"

*Sect.* 38. And it is farther enacted by 19 Hen. 7. c. 13. " That if a riot, *&c.* be not found by the jury by reaſon of " any maintenance or embracery of the jurors, then the ſame " juſtices, *&c.* over and above ſuch certificate which they muſt " and are bound to make by the ſaid ſtatute of 13 Hen. 4. " c. 7. ſhall in the ſame certificate certify the names and " miſdemeanors of ſuch maintainers, &c. on pain that every " of the ſaid juſtices, *&c.* ſhall forfeit twenty pounds, if they " have no reaſonable excuſe for not certifying the ſame; which " certificate ſo made ſhall be of like force as if the ma ter " were found by verdict of twelve men; and every perſon " duly proved to be ſuch a maintainer, *&c.* ſhall forfeit " twenty pounds, *&c.*"

*Sect.* 39. In the conſtruction of theſe ſtatutes it hath been holden, That the certificate required by the above mentioned ſtatutes may be made, either by the juſtices, *&c.* who went to ſee the riot, or by thoſe who took the inquiry; but it ſeems to be moſt proper, That wherever ſuch an inquiſition is taken, ſuch certificate ſhould be made by ſuch juſtices who made the inquiry, becauſe they having had the examination of the fact, muſt needs be beſt able to judge of the circumſtances thereof, and in that reſpect are the moſt proper perſons to ſupply the defects of the inquiry: However, the ſaid ſtatute of 19 Hen. 7. c. 13. which is grafted on 13 Hen. 4. c. 7 ſeems clearly to imply, That ſome juſtices are bound in a more eſpecial manner to make ſuch certificate than any others, by impoſing the penalty of twenty pounds on thoſe who neglect to make it as they are bound by 13 Hen. 4. c. 7. which part of the ſtatute ſeems to be moſt reaſonably applied to thoſe juſtices who took the inquiry, or in caſe that no inquiry was taken, to thoſe juſtices who endeavoured to take one, but by the fault of others were hindred from taking it; for there was no need of ſuch an additional penalty on the neighbouring juſtices who were bound before to do their duty in executing 13 Hen. 4. c. 7. under

Lamb. 323, 326. Pulton 29. Dalton c. 46.

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under pain of forfeiting one hundred pounds, as will be ſhewn, ſection forty four, &c.

Pulton 29. Lambard 324. Dalton c. 46.

*Sect.* 40. Alſo it is generally ſaid, That ſuch a certificate muſt be made within a month after the inquiry; and this ſeems to be a very reaſonable conſtruction where an inquiry has actually been made; but it may happen that no inquiry at all may be taken, either through the default of the ſheriff in not returning a jury, or the obſtinacy of the jurors in refuſing to appear, or the rebellious humour of the people in not ſuffering the juſtices to do their duty; in all which caſes a certificate ſeems to be required, both by the intent and letter of the ſtatute, the words whereof as to this purpoſe are, "If the "truth cannot be found in the manner as is aforeſaid, then "within a month then next following, the juſtices, &c. ſhall "certify, &c.". And therefore in theſe caſes it ſeems proper to make a certificate of the obſtructions, which prevented the taking of ſuch an inquiry, within a month after they happen.

Lambard 324. Con. Cromp. 63. Dalt. c. 46. & 103. B. Præm. 1.

*Sect.* 41. It ſeemeth clear from the plain words of the ſtatute, That the certificate ought to be made to the privy council board, which is clearly diſtinguiſhed, both from the Chancery, and alſo from the King's Bench, which in ſome ſtatutes relating to judicial proceedings, are taken for the king's council.

Pulton 29. Crompton 63. Lamb. 325, 326. Dalton c. 46.

*Sect.* 42. It is ſaid, That if there be variance between the inquiſition and certificate, that ſhall be taken which is moſt for the king's advantage; and therefore if the inquiſition be of a riot by ten perſons, and the certificate of a riot by twenty, or by ten in harneſs; or of a battery joined with a riot; that the certificate ſhall be preferred, becauſe the fine to the king ſhall be the greater; but if they differ only as to the time, it is ſaid that the inquiſition ſhall be preferred.

Dalton c. 46. & c. 130. Lamb. 321, 322.

*Sect.* 43. Alſo it ſeemeth certain, That ſuch a certificate, being in nature of an indictment at common law, ought to comprehend the certainty of time, place, and perſons, and other material circumſtances, both of the riots and maintenance, &c. but perhaps it need not expreſs the additions of the offenders.

*Sect.* 44 It is farther enacted by the ſaid ſtatute of 13 Hen. 4. c. 7. "That the juſtices of peace dwelling nigheſt in every county where ſuch riot, aſſembly, or rout of people ſhall be made hereafter, together with the ſheriff or under-ſheriff of the ſame county, and alſo the juſtices of aſſiſes, for the time that they ſhall be there in their ſeſſion, in caſe that any ſuch riot, aſſembly, or rout be made in their preſence, ſhall do execution

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execution of this ſtatute, every one upon pain of one hundred pounds, to be paid to the king as often as they ſhall be found in default of the execution of the ſame ſtatute."

*Sect.* 45. In the conſtruction of this clauſe the following opinions have been holden: Firſt, That no juſtice of peace is in danger of incurring the penalty thereof, unleſs he dwell in the county wherein a riot happens. Lambard 236. Crompton 63. Dalton c. 46.

*Sect.* 46. Secondly, That if any juſtices of peace, who do not dwell neareſt to the place, do actually execute the ſtatute, they excuſe all the reſt. Dalton c. 46. Lambard 326 Crompton 63.

*Sect.* 47. Thirdly, That if the juſtices whoſe dwelling was neareſt at the time of the riot, or one of them, happen to die within the month, thoſe whoſe dwelling is thereby become the neareſt are bound to execute the ſtatute in the ſame manner as the others were. Pulton 30. Crompton 62.

*Sect.* 48. Fourthly, That notwithſtanding thoſe juſtices only, who dwell neareſt, are liable to the penalty of the ſtatute, yet if any others on notice neglect to ſupply their default, they are finable at diſcretion. Lambard 327. Dalton c. 46. Pulton 30.

*Sect.* 49. Fifthly, That if the two juſtices, or one of them, do their duty in executing, or endeavouring to execute the ſtatute, they ſhall not incur any penalty through a default of the ſheriff, *&c.* either in refuſing to appear, or to return a jury, *&c.* Crompton 63. Lambard 327. Dalton c. 46. Pulton 30.

*Sect.* 50. Sixthly, That the ſaid juſtices, *&c.* ſhall not avoid the penalty by executing the ſtatute in part only, as by recording a riot without committing the parties. Crompton 61.

*Sect.* 51. Seventhly, That no juſtice, *&c.* is ſubject to the penalty of the ſaid ſtatute on account of a petit riot, but only of ſuch as are notorious, and in nature of inſurrections and rebellions. Dalton. c. 46.

*Sect.* 52. Eighthly, That if a juſtice of peace, &c. had no expreſs notice given him of the riot, he ſhall be excuſed, unleſs it were ſo very flagrant, that by common intendment, every one dwelling near it could not but have notice thereof. Dyer 210. Lambard 328. Pulton 28. Crompton 62. Dalton c. 46.

*Sect.* 53. Ninthly, That the acquieſcence or agreement of the parties aggrieved is no excuſe to the juſtices, becauſe they ought, *ex officio*, to make the inquiry, and make proclamation whether any will give evidence for the king, &c. and may bind ſuch of the parties grieved, as ſhall refuſe to proſecute their complaint, to their good behaviour. Crompton 62. Lambard 322. Pulton 28. Dalton c. 46. Crompton 64.

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*Sect.* 54. Alſo it is farther enacted by 2 Hen. 5. c. 8. "That upon any default of the ſaid juſtices, &c. touching the execution of 13 Hen. 4. a commiſſion ſhall be awarded at the inſtance of the party grieved, to enquire as well of the truth of the caſe, as of the default of the ſaid juſtices, &c. and that the ſaid commiſſioners ſhall preſently return into Chancery the inqueſts before them taken; and that the jurors, who ſhall make inquiry, ſhall be worth 10l. *per annum*, and ſhall be returned by the coroners, if the ſheriff, ſuppoſed to be in default, continue in his office, &c." See the ſtatute.

*Sect.* 55. And it is farther enacted by 2 Hen. 5. c. 9. and 8 Hen. 6. c. 14. "That the lord chancellor, upon complaint made to him, that a dangerous rioter is fled into places unknown, and alſo upon a ſuggeſtion under the ſeals of two juſtices of peace and the ſheriff, that the common fame and voice runneth in the county of the riot, may award a *capias* againſt the party, returnable in Chancery, upon a certain day, &c. and afterwards a *writ of proclamation* returnable in the King's Bench, &c."

*Sect.* 56. But all the penalties of the above-mentioned ſtatutes having been found by experience not to be ſufficient to reſtrain the rage of the populace from breaking out into dangerous tumults, whenever they happen to be perſuaded that they lie under any real or pretended grievance, it was thought neceſſary to make a farther proviſion againſt ſuch inſolent diſturbances of the peace, by more ſevere laws; and to this end it was enacted by 1 Geo. 1. c. 5.—— "That if any perſons to the number of twelve, (5) or more, being unlawfully, riotouſly, and tumultuouſly aſſembled together, to the diſturbance of the public peace, and being required or commanded by any juſtice of peace, ſheriff of the county, or under-ſheriff, or by the mayor, bailiff or bailiffs, or other head-officer or juſtice of the peace of any city or town corporate, where ſuch aſſembly ſhall be, by proclamation to be made in the king's name, immediately to diſperſe themſelves, and peaceably to depart to their habitations, or to their lawful buſineſs, under the pains of the ſaid ſtatute, ſhall afterwards unlawfully, riotouſly, and tumultuouſly continue together by the ſpace of one hour after ſuch proclamation made, or after a wilful let or hindrance of a juſtice of peace, &c. from making the ſame proclamation, ſhall be adjudged felons without benefit of clergy, &c."

4 Burr. 2073. (5) It is not perfectly clear from the penning of the act, whether it is neceſſary that there ſhould have been twelve or more rioters in order to entitle the party injured to his action againſt the hundred. (Vide ſect. 59.) But, according to the moſt obvious conſtruction, that number is not neceſſary to conſtitute the felony created by ſection 4. Douglas 709.

*Sect.* 57. And it is farther enacted by the ſaid ſtatute, "That if any perſon or perſons, ſhall with force and arms "wilfully

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" wilfully and knowingly oppoſe, obſtruct, or in any manner " wilfully and knowingly let, hinder, or hurt any perſon, &c. " who ſhall begin to proclaim, or go to proclaim, according " to the proclamation appointed by the ſaid ſtatute, whereby " ſuch proclamation ſhall not be made, they ſhall be adjudged " felons without benefit of clergy."

*Sect.* 58. And it is farther enacted by the ſaid ſtatute, " That if any perſons unlawfully, riotouſly and tumultuouſly " aſſembled together, to the diſturbance of the public peace, " ſhall unlawfully and with force demoliſh or pull down, or " begin to demoliſh or pull down any church or chapel, or " any building for religious worſhip, certified and regiſtered " according to 1 Will. & Mar. c. 18." which is commonly called The Toleration Act, " or any dwelling-houſe, barn, " ſtable, or other out-houſe, they ſhall be adjudged felons with- " out benefit of clergy." N. B. Vide the trials of the rioters in the year 1780.

*Sect.* 59. And it is farther enacted by the ſaid ſtatute, " That whenever any ſuch church, &c. ſhall be demoliſhed, " &c. by any ſuch rioters, &c. the inhabitants of the " town or hundred wherein the riot happened, ſhall be " bound to make good the damage, &c." Vide Cowper 485.

† *Sect.* 60. And it is recited by 9 Geo. 3. c. 29. " That " whereas ſome doubts have ariſen whether the ſaid act of 1. Geo. " 1. ſ. 2. c. 5. extends to the pulling down and demoliſhing " of mills," thereupon it is enacted, " That if any perſon or " perſons, unlawfully, riotouſly, and tumultuouſly aſſembled " together, to the diſturbance of the public peace, ſhall un- " lawfully, and with force demoliſh, or pull down, or begin " to demoliſh or pull down any wind ſaw-mill, or other wind- " mill, or any water-mill, or other mill, which ſhall have been " or ſhall be erected, or any of the works thereto reſpectively " belonging; ſuch offender ſhall ſuffer death without clergy;" provided the proſecution be commenced within eighteen months after the offence committed. For the riotous deſtruction of fences, trees, &c. vide 6 Geo. 1. c. 16. ante. p. 215.

† *Sect.* 61. It is enacted by 13 Car. 2. c. 5. " That no " perſon or perſons whatſoever, ſhall ſolicit, labour, or pro- " cure, the getting of hands, or other conſent of any per- " ſons above the number of twenty, to any petition, com- " plaint, remonſtrance, declaration, or other addreſs to the " king, or both, or either houſes of parliament, for altera- " tion of matters eſtabliſhed by law in church or ſtate, " unleſs the matter thereof have been firſt conſented unto, and " ordered by three or more juſtices of that county, or by the " major part of the grand jury of the county, or diviſion Noy 101. 2 Croke 37. Moor 755. 4 Comm. 147.

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" of the county, where the ſame matter ſhall ariſe at their pub-
" lic aſſizes, or general quarter ſeſſions, or if ariſing in Lon-
" don, by the lord mayor, aldermen, and common council
" aſſembled; and that no perſon or perſons whatſoever, ſhall re-
" pair to his majeſty, or both, or either the houſes of parliament
" upon pretence of delivering any petition, complaint, remon-
" ſtrance, or declaration, or other addreſſes accompanied with
" exceſſive number of people, nor at any one time with above
" the number of ten people upon pain of incurring a penalty
" not exceeding one hundred pounds and three months im-
" priſonment, on conviction, by two witneſſes, within ſix
" months, at the King's Bench aſſizes, or quarter ſeſſions.
" But this act ſhall not prevent the preſentation of any pub-
" lic or private grievance, to any member of parliament,
" by any number not exceeding twenty, or to the king,
" for any remedy to be had thereupon." (6)

(6) N. B. By 1 Will. and Mary, ſeſſ. 2. c. 2. ſ. 1. article 5, uſually ſtyled the Bill of Rights, it is enacted, " That it is the right of the ſubjects to petition the king, and that all commitments and " proſecutions for ſuch petitioning are illegal." On the trial of Lord George Gordon, it was contended that this article had virtually repealed the above ſtatute of Charles; but Lord Mansfield declared it was the unanimous opinion of the court, that neither that, nor any other act of parliament had repealed it; and that it was in full force. Douglas 592, 593.

## CHAPTER THE SIXTY-SIXTH.

## OF OFFENCES BY OFFICERS IN GENERAL.

OFFENCES under the degree of capital, more immediately againſt the ſubject, not amounting to an actual diſturbance of the peace, are either; Such as are committed by officers; Or, Such as are committed by common perſons without any relation to an office.

Offences by officers ſeems reducible to the following heads; Firſt, Neglect, or breach of duty. Secondly, Bribery, Thirdly, Extortion.

Co. Lit. 233, 234.

*Sect.* 1. As to the firſt of theſe offences, I take it to be agreed, That in the grant of every office whatſoever, there is this condition implied by common reaſon, that the grantee ought to execute it diligently and faithfully: For ſince every office is inſtituted, not for the ſake of the officer, but for the good of ſome other, nothing can be more juſt, than that he, who either neglects or refuſes to anſwer the end for which his office was ordained, ſhould give way to others who are both able and willing to take care of it.

Vide the caſe of the King v. Bambridge, Mich. term, 25 Geo. 3. or an information for misfaiſance, as accountant at the pay-office, Whitehall

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And therefore it is certain, That an officer is liable to a forfeiture of his office, not only for doing a thing directly contrary to the design of it, but also for neglecting to attend his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those, by or for whom he was made an officer. And some have gone so far as to hold, That an office concerning the administration of justice, or the common-wealth, shall be forfeited for a bare non-user, whether any special damage be occasioned thereby or not: But this opinion doth not appear to be warranted by any resolution in point, and the (a) authorities which are cited to maintain it, do not seem to come up to it. However it cannot but be very reasonable, That he who so far neglects a publick office, as plainly to appear to take no manner of care of it, should rather be immediately displaced, than the publick be in danger of suffering that damage, which cannot but be expected some time or other from his negligence.

9 Co. 50. Co. Lit. 233. 2 Roll. 153. l. 30. 2 And. 119. Hard. 130. Modern 193. 1 Sid. 81. C. Car. 491.

(a) 39 H. 6. 32. 20 Ed. 4. 5. 22 Ass. 54. 2 H. 7. 11. Plowden 379. L. Quin. Ed. 4. 27. 11 Ed. 4. 1.

*Sect.* 2. But it would be endless to enumerate all the particular instances, wherein an officer may be discharged or fined; and it also seems needless to endeavour it, because they are generally so obvious to common sense, as to need no explication; for what can be more plain, than that a gaoler deserves to be discharged and fined, for (b) voluntarily suffering his prisoners to escape, or for (c) barbarously misusing them? What can be more evident, than that a (d) sheriff is justly punishable for persuading a jury to underprize goods in the execution of a *fieri facias*, &c. And therefore I shall leave the particular cases of this nature to every man's own judgment, which from the consideration of the general rules above-mentioned, and the various circumstances of every case, will easily discern how far each offence of this kind deserves to be punished.

(b) 9 Co. 50. (c) Raym. 216. (d) C. Jac. 426.

See 4 Comyns digest tit. Officer.

## CHAPTER THE SIXTY-SEVENTH.

## Of BRIBERY.

IN treating of bribery, I shall consider, What it is. And How it is punishable.

*Sect.* 1. And first, 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

3 Inst. 145.

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doing his office, or by colour of his office, but of the king only.

3 Inſt. 149. Hobart 9. - C. Jac. 65. 1 Levinz 40. 3 Modern 26. 2 Salkeld 605. 11 Modern 193.

*Sect.* 2. But bribery in a large ſenſe is ſometimes 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 publick juſtice in order to incline him to do a thing againſt the known rules of honeſty and integrity; for the law abhors any the leaſt tendency to corruption in thoſe who are any way concerned in its adminiſtration, and will not endure their taking a reward for the doing a thing which deſerves the ſevereſt of puniſhments. (1)

(1) Therefore, to bribe perſons, either by giving money, or promiſes to vote at elections of members of corporations, which are erected for the ſake of public government, is an offence for which an information will lie. 2 Ld. Ray. 1377. 1 Black. 383. But the court will grant an information for this offence very cautiouſly, ſince the additional penalties by ſtatute. 1 Black. 386. Infra. ſect. 7.

3 Inſt. 148.

*Sect.* 3. Alſo bribery ſometimes ſignifies the taking or giving of a reward for offices of a public nature; and ſurely nothing can be more palpably prejudicial to the good of the publick, than to have places of the higheſt concernment, on the due execution whereof the happineſs of both king and people doth depend, diſpoſed of not to thoſe who are moſt able to execute them, but thoſe who are moſt able to pay for them; nor can any thing be a greater diſcouragement to induſtry and virtue, than to ſee thoſe places of truſt and honour, which ought to be the rewards of thoſe who by their induſtry and diligence have qualified themſelves for them, conferred on ſuch who have no other recommendation but that of being the higheſt bidders; neither can any thing be a greater temptation to officers to abuſe their power by bribery and extortion, and other acts of injuſtice, than the conſideration of the great expence they were at in gaining their places, and the neceſſity of ſometimes ſtraining a point to make their bargain anſwer their expectation.

Vide Noy 102. Moor 781.

For which reaſons, among many others, it is expreſly enacted by 12 Rich. 2. c. 2. "That the chancellor, treaſurer, keeper of the privy ſeal, ſteward of the king's houſe, the king's chamberlain, clerk of the rolls, the juſtice of the one bench and of the other, barons of the Exchequer, and all other that ſhall be called to ordain, name, or make juſtices of the peace, ſheriffs, eſcheators, cuſtomers, comptrollers, or any other officer or miniſter of the king, ſhall be firmly ſworn that they ſhall not ordain, name, or make any of the above-mentioned officers, for any gift, or brocage, favour or affection, nor that none which ſueth by himſelf, or by others, privily or openly,

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" openly, to be in any manner of office, ſhall be put in " the ſame office, or in any other, but that they make all " ſuch officers and miniſters, of the beſt and moſt lawful " men, and ſufficient to their eſtimation and knowledge."

Alſo by 4 Hen. 4. c. 5. " No ſheriff ſhall let his bailiwick to farm to any man, for the time that he occupieth " ſuch office, &c."

Alſo it is enacted by 5 & 6 Edw. 6. c. 16. " That if any " perſon ſhall bargain or ſell, or take any reward, or promiſe " of any reward for any office, or the deputation of any office, " any way concerning the king's revenue, or the keeping of his " caſtles, or the adminiſtration or execution of juſtice, (unleſs " it be ſuch an office as had been uſually granted before the " making of the ſaid act by the juſtices of the King's Bench " or Common Pleas, or by juſtices of aſſize) that then every " ſuch perſon ſo ba gaining or ſelling, or taking ſuch reward, " or promiſe, &c. ſhall not only forfeit his right to ſuch office, " or to the nomination thereof, but alſo every perſon who " ſhall give any ſuch reward or promiſe, &c. ſhall be adjudged " a diſabled perſon in law, to have or enjoy ſuch office, &c." Vide Noy 102. Moor. 781.

*Sect.* 4. In the conſtruction of this ſtatute of 5 & 6 Edw. 6. the following points have been reſolved: Firſt, That the offices of chancellor, regiſter, and commiſſary in eccleſiaſtical courts, are within the meaning of the ſtatute, inaſmuch as thoſe courts, do not only determine matters which are brought before them, merely *pro ſalute animæ*, but alſo have the deciſion of diſputes concerning the lawfulneſs of matrimony and legitimation of children, which touch the inheritance of the ſubjects, and alſo hold plea of legacies and tithes, *&c.* in which reſpects they are courts of juſtice; but it hath been adjudged, that no office in fee is within the ſtatute. C. Jac. 269. 3 Inſt. 148. Salkeld. 468. 2 Levins 289. 2 Vent. 187. 467.

*Sect.* 5. Secondly, That one, who makes a contract for an office contrary to the purport of the ſaid ſtatute, is ſo far diſabled to hold the ſame, that he cannot at any time during his life be reſtored to a capacity of holding it by any grant or diſpenſation whatſoever. 2 Levinz 151. Hobart 75. Co. Lit. 234. C. Car. 361. C. Jac. 386.

Thirdly, That a bond by a deputy of an office to pay a certain ſum at all events, is within the ſtatute, and conſequently totally void, though it alſo contain other conditions which, if they ſtood by themſelves would be good; but not a bond to pay half the profits or a certain ſum out of the profits of the office for a deputation. Salk. 466, 468. 6 Modern 234. 3 Co. 32. C. Eliz. 529, 530. 1 And. 107, 150.

Fourthly, That the ſtatute extends not to offices in the Plantations. Salkeld 411. Quere 2 Mo.

Sect.

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3 Inſt. 145. 1 Hale 262. 1 Leon. 295. C. Jac. 65. 1 Ruſh. Coll. 31.

*Sect.* 6. As to the ſecond point, *viz.* How bribery is puniſhable; it is ſaid, That at common law, bribery in a judge, in relation to a cauſe depending before him, was looked upon as an offence of ſo heinous a nature, that it was ſometimes puniſhed as high treaſon before the 25 Edw. 3. and at this day it is certainly a very high offence, and puniſhable, not only with the forfeiture of the offender's office of juſtice, but alſo with fine and impriſonment, *&c.*

3 Inſt. 148. (2) This was the caſe of the Earl of Middleſex, who had been raiſed by Buckingham's intereſt from the rank of a London merchant. to be lord high treaſurer of England, but having incurred the diſpleaſure of his patron, the favorite vowed revenge, and employed all his credit with the commons to procure the impeachment of the treaſurer; but the charges againſt him were neither numerous nor important, the whole meaſure very diſſatisfactory to the king, and the fine was remitted upon the acceſſion of Charles the firſt. Parl. Hiſt. vol. 6. p. 191.

*Sect.* 7. Alſo all the other above-mentioned kinds of bribery, taken in a large ſenſe, ſeem to be puniſhable with fine and impriſonment, *&c.* And in the time of king James the Firſt, the earl of M. lord high treaſurer of England, being impeached by the commons for refuſing to hear petitions referred to him by the king, till he had received great bribes, and for other ſuch like miſdemeanours was, by ſentence of the lords, deprived of all his offices, and diſabled to have any for the future, or to ſit in the parliament, and was fined fifty thouſand pounds, and impriſoned during the king's pleaſure. (2)

AN ATTEMPT to induce a man to adviſe the king, under the influence of a bribe, is criminal, though never carried into execution. 4 Burr. 2499. Offering money to a privy counſellor to procure the reverſion of an office in the gift of the crown, has been adjudged a miſdemeanour, and puniſhable by information. Rex v. Vaughan.

(3) But if it appears to be a void election, an action for this penalty is not maintainable. L. Ray. 904.

† *Sect.* 8. And it is enacted by 7 & 8 Will. 3. c. 7. "That all contracts, promiſes, bonds, and ſecurities whatſoever, made or given to procure any return of any member to ſerve in parliament, or thing relating thereunto, ſhall be adjudged void; and that whoever makes or gives ſuch contract, ſecurity, promiſe, or bond, or any gift or reward, to procure a falſe or double return, ſhall forfeit 300l. One third to the king; one third to the poor; one third to the informer; to be recovered by action or information." (3)

3 Burr. 1 270. 1304. 1 Black. 351, 356, 524, 541.

† *Sect.* 9. And it is further enacted by 2 Geo. 2. c. 24. "That if any perſon having, or claiming a right to vote at any election for members of parliament, ſhall aſk, receive, or take any money, or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatſoever, to give his vote, or to refuſe or forbear to give his vote in any ſuch election, or if any perſon by himſelf,

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"himſelf, or any perſon employed by him, doth or ſhall by any "gift or reward, or by any promiſe, agreement, or ſecurity "for any gift or reward, corrupt or procure any perſon or "perſons, to give his or their vote or votes, or to for- "bear (a) to give his or their votes in any ſuch election, "ſuch offender ſhall for every offence, forfeit 500l. together "with full coſts of ſuit, by action or information at Weſt- "minſter. And any perſon offending in any of the ſaid caſes, "from and after judgment has been ſo obtained againſt him, "or by ſummary action, or proſecution, or being any other- "wiſe lawfully convicted thereof, ſhall be for ever diſabled to "vote in any election for members of parliament, or to hold, "exerciſe, or enjoy any office, or franchiſe as a member of "any city, borough, town corporate, or cinque port, as if "he was dead."

(a) It is not neceſſary that the party ſhould actually forbear in conſequence of the procurement. 3 Wilſ. 292.

*Sect.* 10. But it is further enacted, "That if ſuch offender, "within twelve months next after ſuch election, diſcover any "other offender ſo that he be thereupon convicted, ſuch offen- "der ſo diſcovering and not having been before that time con- "victed of any offence againſt this act, ſhall be indemnified and "diſcharged from all penalties and diſabilities which he ſhall "then have incurred by any offence againſt this act. Provided "the proſecutions be commenced within two years, which "commencement ſhall be (by 9 Geo. 2. c. 38.) the actual "arreſt, ſummons, or ſervice of proceſs." (4)

(4) This ſtatute does not take away the common law proceſs by indictment, or information for bribery at elections for members of parliament. But, as the offender would be equally liable to the penalties of the ſtatute, vide 1 Black. 524, the court will not grant an information until the two years are expired, 3 Burr. 1335, except in particular caſes, founded on particular reaſons. 3 Burr. 1340. And it ſeems as if the court would adjourn paſſing ſentence on a conviction *by indictment*, on the defendant's entering into a recognizance to appear on the day when the time limited for bringing the qui tam action will expire, 3 Burr. 1359; but the court will not, after that time has elapſed, prolong the judgment on account of the defendant's having indicted one of the witneſſes, upon whoſe teſtimony he was convicted, becauſe being ſo much intereſted he could not be admitted a witneſs. 3 Burr. 1388. 1 Black. 404. Nor will they ſtay the judgment on the poſtea in an action for this injury, on affidavits that the defendant is a diſcoverer. 3 Wilſon 35. Nor will they grant a new trial, becauſe a witneſs was *particeps criminis*. Sayer 290. But they will grant a new trial, if upon a ſpecial caſe, the jury have not found who was the firſt diſcoverer, although they find that the defendant produced a judgment by which it appeared that he had obtained a verdict againſt a third perſon upon this act; for it does not follow concluſively, that the perſon who obtains the verdict is neceſſarily the diſcoverer. 4 Burr. 2504, 2469. And it has been determined, that the perſon who makes an affidavit of the fact upon which another obtains a verdict, is the true diſcoverer. 4 Burr. 2286. And although a verdict is not a conviction until it be compleated by a judgment, yet, after it is ſo compleated, which the court will grant leave to do, it will relate back to the time of the original diſcovery. Ibid. 1 Black. 665. Vide alſo the Cricklade caſe, one volume, octavo, publiſhed by E. Brooke, 1785. Alſo 22 Geo. 3. c. 31.

If the elector is bribed by a friend of the candidate's, and exchanges a note to inſure the vote, it is bribery within the act, although the elector voted for the oppoſite party. 3 Burr. 1235. 1 Black. 317. And ſo alſo is laying a wager with the voter that he does not vote for a particular candidate. Loft. 552. vide alſo Allen v. Hume, Mich. 26 Geo. 3. And by giving the elector money, he admits his right to vote, and ſhall not be permitted afterwards to controvert it. 3 Burr. 1580. Nor is it neceſſary that the candidate ſhould have declared himſelf at the time the bribe was given, becauſe aſking a vote for him, under the title of the candidate's friend, makes him a candidate. Coomb v. Pitt, 5 Geo. 3. 1 Black. 523. Nor it is neceſſary that the perſon bribed ſhould actually have a

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right to vote. 3 Wilſ. 55. But in an action the declaration muſt ſtate *what* the defendant received or took as a reward, and whether money, or what particular ſpecies of reward, and not indefinitely and diſjunctively, "that he took a gift or reward," and being upon a criminal charge, this defect is not helped by verdict, 4 Burr. 2471.

## CHAPTER THE SIXTY-EIGHTH.

## OF EXTORTION.

IN treating of Extortion, I ſhall conſider, What ſhall be called Extortion; How it ſhall be puniſhed.

Co. Lit. 368. 10 Coke 102. 3 Inſt. 149. C. Car. 438, 448. Hutton 53. 3 Inſt. 68. 1 Ray. 149. 11 Mod. 80, 137. Salkeld 382.

*Sect.* As to the firſt point it is ſaid, That extortion in a large ſenſe ſignifies any oppreſſion under colour of right; but that in a ſtrict ſenſe, it ſignifies the taking of money by any officer, by colour of his office, either where none at all is due, or not ſo much is due, or where it is not yet due.

2 Inſt. 209. Co. Lit. 368. 42 Ed. 3, 4, 5. 2 R. Abr. 266. Cro. Cir. 250. 4 Inſt. 274. Moor 523. 2 Inſt. 209.

*Sect.* 2. It is ſaid, That at the common law, which was affirmed by the ſtatute of Weſtminſter, 1. c. 26. it was extortion for any ſheriff or other miniſter of the king, whoſe office did any way concern the adminiſtration or execution of juſtice, or the common good of the ſubject, to take any reward whatſoever for doing his office, except what he received from the king. And ſurely this was a moſt excellent inſtitution, highly tending to promote the honour of the king, and the eaſe of the people, and hath been always thought to conduce ſo much to the public good, that all preſcriptions whatſoever which have been contrary to it, have been holden to be void; and upon this ground it hath been reſolved, That the preſcription, by virtue whereof the clerk of the market claimed certain fees for the view and examination of all weights and meaſures, &c. was merely void.

21 H. 7. 17. 2 Inſt. 210. 2 Inſt. 176. 2. P. C. 49.

*Sect.* 3. But it hath been holden, That the fee of twenty pence, commonly called the bar-fee, which hath been taken, time out of mind, by the ſheriff, of every priſoner who is acquitted, and alſo the fee of one penny, which was claimed by the coroner of every viſne, when he came before the juſtices in Eyre, are not within the meaning of the ſtatute, becauſe they are not demanded by the ſheriff or coroner for doing any thing relating to their offices, but claimed as perquiſites of right belonging to them, whether they do any thing or not. But there ſeemeth to be no neceſſity for this diſtinction, for it cannot be intended to be the meaning of the ſtatute to reſtrain

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ſtrain the courts of juſtice in whoſe integrity the law always repoſes the higheſt confidence, from allowing reaſonable fees for the labour and attendance of their officers. For the chief danger of oppreſſion is from officers being left at their liberty to ſet their own rates on their labour, and make their own demands; but there cannot be ſo much fear of theſe abuſes, while they are reſtrained to known and ſtated fees, ſettled by the diſcretion of the courts which will not ſuffer them to be exceeded, without the higheſt reſentment. (1)

21 H. 7. 17. Co. Lit. 368.

(1) For the fees allowed to the ſeveral officers, vide 3 Com. Dig. 323, 324. 1 Modern 5. 11 Modern 89. Ld. Ray. 4. 103. 9 and 10 Will. 3. c. 41. 29 Eliz. c. 4. 3 Jac. 1. c. 7. 10 & 11 Will. 3. c. 23. ſ. 8. 3 Geo. 1. c. 15. 17 Geo. 3. c. 26. ſ. 6. Cro. Cir. 253.

*Sect.* 4. Alſo it having been found by experience, That generally it is vain to expect that any officers who depend upon a known fixed ſalary, without having any immediate benefit from any particular inſtances of their duty, ſhould be ſo ready in undertaking, or diligent in executing them, as they would be, if they were to have a preſent advantage from them; it hath been thought expedient to permit them to take certain fees in many caſes, but it is certain that they are guilty of extortion, if they take any thing more. Alſo it hath been reſolved, That a promiſe to pay them money for the doing of a thing which the law will not ſuffer them to take any thing for, is merely void, however freely and voluntarily it may appear to have been made; for if once it ſhould be allowed, That ſuch promiſes could maintain an action, the people would quickly be given to underſtand how kindly they would be taken, and happy would that man be who could have his buſineſs well done without them. (2)

3 Inſt. 149. 2 Inſt. 210. Co. Lit. 368. 1 R. Abr. 6, 26, 41. 1 Roll. 313. Noy 76. 1 Jones 65. C. Eliz. 654. Moor. 468, 523. C. Jac. 103.

(2) It is extortion to oblige an executor to prove a will in the biſhop's court, and to take fees thereon, knowing the ſame to have been proved in the prerogative court. Strange 73. Or in a ſheriff's officer to admit a priſoner to bail, upon an agreement to receive a certain ſum, when the priſoner ſhould pay to a third perſon another ſum of money. 2 Burr. 924. To arreſt a man in order to obtain a releaſe from him. 8 Mod. 189. In a gaoler to obtain money from his priſoner by any colourable means. 8 Mod. 226. Str. 575. Or in a church warden *colore officii*. 1 Sid. 307. In a miller, if he takes more for toll than is due by cuſtom. Ld. Ray. 149. Or a commiſſary for abſolution. 3 Leo. 268. Or a ferryman more for his ferry. 4 Mod. 101. Or to ſeize upon the place where a fair is held; and by building ſtalls, to force an exorbitant price for them. Ld. Ray. 150. Or in an under ſheriff to refuſe to execute proceſs till his fees are paid. Salk. 330. Or to take a bond for his fee before execution is ſued out, Hutt. 53. Or for a coroner to refuſe his view until his fees be paid. 3 Inſt. 149.

*Sect.* 5. As to the ſecond point, *viz.* How extortion ſhall be puniſhed; there is no doubt, but that at common law it is ſeverely puniſhable at the king's ſuit, by fine and impriſonment; and alſo by a removal from the office, in the execution whereof it was committed. Alſo extortion in ſheriffs, eſcheators, bailiffs, gaoler, the king's clerk of the market, and other inferior miniſters and officers of the king, whoſe offices do

11 Mod. 82. 2 R. Abr. 32, 33, 75. Raym. 315. 2 Inſt. 209. 3 Leo. 268. 3 Edw. 1. c. 26. 1 Strange 74.

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do any way concern the adminiſtration or execution of juſtice, or the common good of the ſubject, or for the king's ſervice, hath a farther additional puniſhment by the above-mentioned ſtatute of Weſtminſter, by which it is enacted, "That no ſheriff, nor other king's officer, ſhall take any "reward to do his office, but ſhall be paid of that which "they take of the king, and that he who ſo doth, ſhall "yield twice as much, and ſhall be puniſhed at the king's "pleaſure." (3)

(3) And an action lies to recover the double value. 3 Com. Dig. 323. But the indictment which may be brought at the ſeſſions, Str. 73, or information, muſt ſtate the fact particularly. 3 Leo. 268. 25 Edw. 3. ſt. 3. c. 9. 11 Mod. 80. It muſt alſo ſpecify the time when the offence was committed. 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. Sid 91. And, in general, the King's Bench will oblige the party to demur to a defective indictment for extortion. 5 Mod. 13. And whatever may be the ſum, if there is proof only of a ſhilling taken, the defendant is guilty; for the taking is the offence, and not the contract. L. Ray. 149. And he alſo who aſſiſts is equally guilty; for there are no acceſſaries in extortion. Str. 73. Extortion may be laid in any county, by the 31 Eliz. c. 5. Sed vide 2 Hawkins, ch. 26. ſ. 50.

## CHAPTER THE SIXTY-NINTH.

## OF PERJURY.

OFFENCES under the degree of capital, more immediately againſt the ſubject, not amounting to an actual diſturbance of the peace, which may be committed by private perſons, without any relation to an office; are either, Such as are infamous, and groſly ſcandalous, proceeding from principles of downright diſhoneſty, malice or faction. Or, Such as are of an inferior nature, and neither infamous, nor groſly ſcandalous.

Thoſe of the firſt kind ſeem to be reducible to the following heads: Perjury, and ſubornation of perjury. Forgery. Cheats. Conſpiracy. Keeping of a bawdy-houſe. And Libels.

And firſt of perjury, and ſubornation of perjury, of both which there are two kinds. Firſt, By the common law. Secondly, By ſtatute.

Com. Dig. tit. Juſ. of Peace. B. 102.

PERJURY, by the common law, ſeemeth to be a wilful falſe oath, by one who being lawfully required to depoſe the truth in any proceeding in a courſe of juſtice, ſwears abſolutely in a matter of ſome conſequence to the point in queſtion, whether he be believed or not.

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For the better underſtanding whereof, I ſhall conſider the following particulars:

Firſt, How far this offence muſt be wilful. Secondly, In what kind of proceedings it may be committed. Thirdly, In what caſes an oath may be ſaid to be ſo far lawfully adminiſtred, that he who takes it may become guilty of perjury. Fourthly, In what kind of oaths perjury may be committed. Fifthly, How far the oath muſt be falſe. Sixthly, Whether the matter of the oath muſt be abſolute. Seventhly, How far things ſworn ought to be material to the point in queſtion. Eighthly, How far the falſe oath muſt be credited.

*Sect.* 2. As to the firſt particular, *viz.* How far this offence muſt be wilful; it ſeemeth that no one ought to be found guilty thereof without clear proof, That the falſe oath alledged againſt him was 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 and corrupt perjury, which is of all crimes whatſoever the moſt infamous and deteſtable.

5 Mod. 350. 10 Mod. 195. Salkeld 513. 3 Inſt. 163.

*Sect.* 3. As to the ſecond particular, *viz.* In what kind of proceedings this offence may be committed. 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; and it ſeems to have been holden by ſome, that all ſuch falſe oaths as are taken before perſons authorized by the king to examine witneſſes in relation to any matter whatſoever, wherein his honour or intereſt are concerned, are alſo puniſhable as perjuries. And ſurely there can be no offence of this nature which will not juſtly deſerve a public proſecution, inaſmuch as if it ſhould once prevail, it would make it impoſſible to have any law whatſoever duly executed, and expoſe the lives, liberties, and properties, of the moſt innocent, to the mercy of the greateſt villains. And therefore 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 (*a*) equity, or ſpiritual (*b*) court, or any other (*c*) lawful court, whether the proceedings therein be of record or not (*d*) or whether they concern the intereſt of the king

C. Eliz. 168. 169. Noy 128. 2 R. Abr. 257. Hobart 62.

(*a*) C. Eliz. 907. Skinner 327. 1 Sid. 418. 1 R. Abr. 40. 5 Mod. 348.

(*b*) C. Eliz. 185, 609. 2 Roll. 410. 1 R. Abr. 40. 1 Leon. 131. Con. Dy. 243. (*c*) 2 R. Abr. 257. 1 R. Abr. 41. Winch. 3. 5 Mod. 348. Hutt. 34. 1 Mod. 55. Yelv. 27. C. Eliz. 297, 342, 348, 905. (*d*) 12 Co. 101. C. Jac. 212. Con. C. Jac. 120. 3 Inſt. 164. Vide ſect. 18.

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or ſubject. And it is ſaid to be no way material, whether ſuch falſe oath be taken in the face of a court, or perſons authorized by it to examine a matter, the knowledge whereof is neceſſary for the right determination of a cauſe; and (e) therefore, That a falſe oath before a ſheriff, upon a writ of enquiry of damages, is as much puniſhable as if it were taken before the court on a trial of the cauſe.

(e) 1 R. Abr. 39.

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 which is to be given in the cauſe; as where a (f) perſon who offers himſelf to be bail for another knowingly, and wilfully ſwears that his ſubſtance is greater than it is. 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 (g) takes a falſe oath before a juſtice of peace, in order to induce him to compel another to find ſureties for the peace, &c. or where a perſon forſwears himſelf (h) before commiſſioners appointed by the king to enquire of the forfeitures of his tenants eſtates, &c. whereby he makes them liable to be ſeized by exchequer proceſs.—Alſo it hath been ſaid, That a falſe oath is puniſhable as perjury, in ſome caſes, wherein the king's honour or intereſt is concerned, though it do not concern the adminiſtration of juſtice; as where one ſwears a falſe oath concerning the poſſeſſion of lands, before commiſſioners appointed by the king to inquire of ſuch perſons whoſe titles to the lands in their poſſeſſion are defective, and want the ſupply of the king's patents: And this is certainly an offence of a very heinous nature, (i) tending not only to fruſtrate the king's gracious purpoſe, but to abuſe his goodneſs by inducing him to grant his patents to thoſe who are out of poſſeſſion, and no way within the intent of the commiſſion, which, inſtead of quieting the poſſeſſions of the ſubjects, cannot but end in the greateſt diſturbance of them.

(f) C. Car. 146.

(g) 2 Roll. 410. 2 R. Abr. 77.

(h) Noy 100. Moor 627.

(i) Hobart 62.

However 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 a falſe oath taken by one upon the making of a bargain, that the thing ſold is his own, is not puniſhable as perjury.—Alſo from what hath been ſaid it appears, That the notion of perjury is confined to ſuch publick 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

Con. 1 Ven. 369. 370.

3 R. Abr. 257.

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clearly follows, That no officer publick or private, 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.

2 R. Abr. 257. 3 Inſt. 166.

*Sect.* 4. As to the third particular, *viz.* In what caſes an oath may be ſaid to be ſo far lawfully adminiſtered, that he who takes it may become guilty of perjury by ſwearing falſly. It ſeemeth clear, That no oath whatſoever taken before (*a*) perſons acting merely in a private (*b*) capacity, or (*c*) before thoſe who take upon them to adminiſter oaths of a publick nature, without legal authority for their ſo doing, or (*d*) before thoſe who are legally authorized to adminiſter ſome kinds of oaths, but not thoſe which happen to be taken before them, or even (*e*) 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 perjuries in the eye of the law, becauſe they are of no manner of force, but are altogether idle. (1)

(*a*) 2 R. Abr. 257. 3 Inſt. 165. Yelv. 72. (*b*) Cro. El. 169. (*c*) 1 Sid. 274. 2 R. Abr. 257. Latch. 38, 132. (*d*) Yelv. 111. 3 Inſt. 166. See 4 Inſt. 97. 29 Car. 2. 25. 2 Roll. 427. 4 Inſt. 278. (*e*) Sid. 148. (1) *Qu.* If any magiſtrate is juſtifiable in taking a voluntary affidavit in any extrajudicial matter. Vide 15 Geo. 3. c. 39. 3 Burn. 244.

And from the ſame ground it ſeemeth alſo clearly to follow, That no falſe oath in an affidavit, made before perſons falſly pretending to be authorized by a court of juſtice to take affidavits in relation to matters depending before ſuch court, can properly be called perjury, becauſe no affidavit, is any way regarded, unleſs it be made before perſons legally intruſted with a power to take it, as being both of ſufficient ability to aſk all proper queſtions of the party who ſhall make ſuch affidavit, and alſo of ſuch integrity as not to ſuffer any thing to be inſerted therein, to the truth whereof the party hath not ſworn. And though it may be ſaid, That an affidavit taken before perſons falſly pretending to be commiſſioned for ſuch purpoſe by the courts of juſtice, doth directly tend to impoſe upon ſuch courts, and may poſſibly happen through ſurprize to be read, and may alſo in its own nature be altogether heinous, as if it had been made before perſons regularly impowered to take it; yet inaſmuch as it is of itſelf of no manner of validity, and is no otherwiſe regarded, than as it hath the appearance of being ſworn before perſons legally commiſſioned, without which it would have no manner of credit, it ſeemeth that offences of this nature are moſt properly puniſhed by ſeverely chaſtiſing thoſe who uſurp ſuch an authority of adminiſtering of oaths, without any legal warrant.

4 Comm. 137. 3 Inſt. 165.

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However, it hath been adjudged, That a falſe oath, taken before perſons, who, having been commiſſioned to examine witneſſes, happen to proceed after the demiſe of the king who gave them their commiſſion, and before notice thereof may be puniſhed as perjury; for it would be of the utmoſt ill conſequence to make ſuch proceedings void; and therefore though all ſuch commiſſions be in ſtrictneſs legally determined by the demiſe of the king, who gave them, without any notice; yet for the neceſſity of the caſe, whatever is done under them before ſuch notice, muſt be ſuffered to ſtand good; for otherwiſe the moſt innocent and moſt deſerving ſubjects would be unavoidably expoſed to numberleſs proſecutions for doing their duties, without any colour of a fault. And *Quære*, Whether a perjury in a court whoſe proceedings are afterwards reverſed by error, may not ſtill be puniſhed as perjury, notwithſtanding ſuch reverſal. (2)

C. Car. 97, 98, 99.

1 Ven. 181.

(2) In the caſe of the King v. Alford, Summer aſſizes for Somerſet, 1776, the defendant was indicted for perjury in a cauſe tried at the aſſizes before Mr. Juſtice Willes. The caption of the indictment recited the names of the judges who were in the commiſſion, and charged, "That at the "ſaid trial, before the honourable Edward Willes *one of the juſtices* aforeſaid, the defendant took his "corporal oath, &c. He the ſaid Edward Willes then and there *having competent authority to ad-* "*miniſter an oath* to the defendant in that behalf," the priſoner was found guilty. But Mr. Baron Eyre, who tried the cauſe, doubted of the authority of *one commiſſioner* to adminiſter the oath; the record of *niſi prius*, which was read in evidence, ſtating, in the uſual form, that the trial was before both the judges and therefore, Another doubt aroſe whether the evidence maintained the indictment. On reference, the firſt Hilary term, 1777, the judges were unanimous, that either of the judges may adminiſter the oath; conſequently there was no variance, and the conviction good. M.S.

*Sect.* 5. As to the fourth particular, *viz.* In what kind of oaths perjury may be committed. It ſeemeth clear, That a man may be in danger of being guilty thereof, 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 (*a*) law or (*b*) equity, having power to purge him upon oath concerning his knowledge of the matters in diſpute, or in his (*c*) affidavit concerning ſome collateral matter, wherein the parties own oaths are allowed to be taken. 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, and in many caſes is not puniſhable at all *in foro humano*, as ſhall be ſet forth more at large in the chapter of conſpiracy.

(*a*) 1 R. Abr. 40. 83. C. Eliz. 609.
(*b*) 1 Leon. 127. C. Eliz. 155. 545. 1 R. Abr. 40. 69. 1 Sid. 244.
(*c*) 1 Roll. 79. Noy 128. 3 Mod. 358. Moor 656. 2 Keble 452. 2 R. Abr. 77.

*Sect.* 6. As to the fifth particular, *viz.* How far the matter of the oath which may amount to perjury, muſt be falſe. It (*d*) is ſaid not to be material whether the fact which is ſworn, be in itſelf true or falſe; for howſoever the thing ſworn may happen to prove agreeable to the truth, yet if it

(*d*) Palm. 294. Hetley 97. 2 R. Abr. 77. 3 Inſt. 166. Cro. 3. Mod. 222.

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were not known to be ſo by him who ſwears to it, his offence is altogether as great as if it had been falſe, inaſmuch as he wilfully ſwears, That he knows a thing to be true, which at the ſame time he knows nothing of, and impudently endeavours to induce thoſe before whom he ſwears to proceed upon the credit of a depoſition, which any ſtranger might make as well as he.

*Sect.* 7. As to the ſixth particular, *viz.* How far the oath muſt be abſolute. It is ſaid, 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.

*Sect.* 8. As to the ſeventh particular, *viz.* How far the thing ſworn ought to be material to the point in queſtion? It ſeemeth clear, That if the oath for which a man is indicted of perjury, be wholly foreign from that purpoſe, or altogether immaterial, and neither any way pertinent to the matter in queſtion, not tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the ſubſtantial part of the evidence, it cannot amount to perjury, becauſe it is merely idle and inſignificant. As if upon a trial, in which the queſtion is, whether ſuch a one was *compos* or not, a witneſs introduces his evidence by giving a hiſtory of a journey which he took to ſee the party, and happens to ſwear falſly in relation to ſome of the circumſtances of the journey. 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; where in truth *A.* did not bring them all 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 that manner of bringing them was only a circumſtance. And upon the ſame ground it is ſaid to have been adjudged, That where a witneſs being aſked, whether ſuch a ſum of money were paid for two things in controverſy between the parties? anſwered, That it was, where in truth it was paid only for one of them by agreement, ſuch witneſs ought not to be puniſhed for perjury; becauſe as the caſe was it was no way material whether it were paid for one or both. Alſo it is ſaid to have been reſolved, That a witneſs who ſwore that one drew his dagger and beat and wounded *J. S.* where in truth he beat him with a ſtaff, was not guilty of perjury, becauſe the beating only was material. 1 Freem. 506. 1 Sid. 274. Vide inf. ſ. 22. Aleyn 79. 1 R. Abr. 141. 78. C. Eliz. 500. Salkeld 514. Noy 36. 2 Roll. 245. C. Car. 521. Hobart 53. Carth. 422. 5 Mod. 345, 348. 3 Inſt. 164. 2 Roll. 41. 369. 2 Roll. 42. Hetley 97.

But perhaps in all theſe caſes it ought to be intended, That the queſtion was put in ſuch a manner, that the witneſs might

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reasonably apprehend that the sole design of putting it, was to be informed of the substantial part of it, which might induce him thro' inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly, That the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds, I cannot but think the opinion of those judges very reasonable, who held, That a witness was guilty of perjury, who in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw thirty or forty sheep in the said close, and that he knew them to be the defendant's, because they were marked with such a mark, which he knew to be the defendant's mark, where in truth the defendant never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and though it signified nothing to the merits of the cause, whether the sheep had any mark at all or not, yet inasmuch as the assigning such a circumstance in a thing immaterial had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it should not be equally punishable. But I cannot find this matter any where thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which from the consideration of the circumstances of each particular case, may generally without any great difficulty discern whether the matter in which perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not.

2 Roll. 368. Palmer 382.

But it is said in *Siderfin*, speaking as I suppose of an answer in chancery, that a man may be guilty of perjury at the common law by swearing a thing not material. But surely this ought not to be understood in so great a latitude, as if it were meant that every falsity in such an answer must needs be perjury, howsoever foreign, circumstantial and trivial the point wherein it is assigned may be, which is directly contrary to what seems to be clearly taken for granted in other books. And therefore perhaps

1 Siderfin 274.

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perhaps where it is ſaid that a man may be guilty of perjury in a thing not material, no more may be meant, but that he may be as well guilty thereof, by anſwering to a matter not charged in the bill, as by anſwering to the matters therein contained, which may alone be ſaid to be material, becauſe the defendant is not obliged in his anſwer to take notice of any thing elſe. Or elſe perhaps the meaning may be, That in a proſecution for perjury at common law, ſetting forth a falſe oath in ſuch an anſwer, relating to the thing ſaid to be in variance, the falſity ſhall be intended *prima facie* to have been ſome way material in the cauſe, unleſs the contrary be proved by the other ſide: Whereas in all proſecutions upon the ſtatute, it is neceſſary expreſly to ſhew in what manner the falſe oath is material to the cauſe in queſtion, becauſe that ſtatute, extending only to ſuch perjuries whereby ſome perſon is grieved, cannot maintain a proſecution which does not bring the caſe within the purview of it, by ſhewing that ſome one was grieved by the injury complained of, which he could not be, unleſs the thing ſworn were ſome way material. However it ſeemeth to be clear, That a man may as well be guilty of perjury by a falſe oath tending to extenuate or aggravate the damages, as by an oath which is direct to the fact in iſſue. (3)

Vide inf. c. 23.

C. Jac. 212. 12 Co. 101. 2 Leon. 198.

(3) 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. Ld. Raymond 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. Ld. Raymond 889. And it is incumbent on the proſecutor to prove the materiality of the perjury. Q. B. 1784, p. 305.

*Sect.* 9. As to the eighth particular, *viz.* How far the falſe oath muſt be credited, It hath been holden not to be material upon an indictment of perjury at common law, whether the falſe oath were at all credited, (4) 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 *publick juſtice*.

3 Leon. 230. 2 Leon. 211.

(4) But on the trial the oath will be taken as true, until it be diſproved; 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 at leaſt. Q. B. 1786. p. 812. 10 Modern 195. Nor ſhall the party prejudiced by the perjury be admitted as a witneſs to prove it. Ld. Raymond 396.

*Sect.* 10. 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 ſeemeth clear, That if the perſon incited take ſuch an oath, do not actually take it, the perſon by whom he was ſo incited

1 R. Abr. 41, 57, 79. Yelv. 72. C. Jac. 58. C. Car. 337. 2 Keb. 399.

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3 Mod. 122. Farres 101. Vide p. 328. For a further punishment inflicted by 2 Geo. 2. c. 25. Vide also p. 335. sect. 29.

ed 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.

Of perjury by 5 Eliz. c. 9.

*Sect.* 11. Thus far of perjury, and ſubornation of perjury by the common law. And now I ſhall proceed to examine in what manner theſe offences are reſtrained by ſtatute; as to which it is to be obſerved, that it is enacted by 5 Eliz. c. 9. "That whoever ſhall unlawfully and corruptly procure any witneſs, or witneſſes by letters, rewards, promiſes, or by any other ſiniſter and unlawful labour or means whatſoever, to commit any wilful and corrupt perjury, in any matter or cauſe whatſoever, depending in ſuit and variance, by any writ, action, bill, complaint, or information, in any wiſe concerning any lands, tenements, or hereditaments, or goods, chattels, debts or damages, in any of the king's courts of Chancery, Whitehall, or elſewhere, within any of the king's dominions of England or Wales, or the marches of the ſame, where any perſon or perſons ſhall have authority by virtue of the king's commiſſion, patent, or writ, to hold plea of land, or to examine, hear, or determine, any title of lands or any matter or witneſſes concerning the title, right, or intereſts of any lands or tenements, or hereditaments, or in any of the king's courts of record, or in any leet, view, or frank-pledge or law-day, ancient demeſne-court, hundred-court, court-baron, or in the court or courts of Stannary in the counties of Devon or Cornwal, or ſhall unlawfully and corruptly procure or ſuborn any witneſs or witneſſes, who ſhall be ſworn to teſtify *in perpetuam rei memoriam*, ſhall for ſuch offence, being thereof lawfully convicted or attainted, forfeit the ſum of forty pounds. And if any ſuch offender ſo being convicted or attainted, ſhall not have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every ſuch perſon ſhall ſuffer impriſonment by the ſpace of one half year without bail or mainprize, and ſtand upon the pillory the ſpace of one whole hour, in ſome market-town next adjoining to the place where the offence was committed, in open market there, or in the market town itſelf where the offence was committed."

*Sect.* 12. Alſo it is further enacted by the ſaid ſtatute, par. 5. "That no perſon being ſo convicted or attainted, ſhall from thenceforth be received as a witneſs in any court of record, in any of the king's dominions of England, Wales, or the marches of the ſame, till ſuch judgment againſt him ſhall be reverſed by attaint, or otherwiſe; and that upon every ſuch reverſal, the party

grieved

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" grieved ſhall recover damages againſt the party who did " procure the ſaid judgment ſo reverſed to be firſt given, &c." See 1 Sid. 216.

*Sect.* 13. And it is farther enacted, par. 6. " That if " any perſon or perſons ſhall either by the ſubornation, " unlawful procurement, ſiniſter perſuaſion, or means of " any other, or by their own act, conſent, or agree- " ment, wilfully, and corruptly commit any manner of " wilful perjury, by his or their depoſition, in any of " the courts before mentioned, or being examined *ad per-* " *petuam rei memoriam*, That then every ſuch offender being du- " ly convicted or attainted, ſhall forfeit twenty pounds, and " have impriſonment by the ſpace of ſix months without " bail or mainprize; and the oath of ſuch an offender " ſhall not from thenceforth be received in any court of " record in England or Wales, until ſuch judgment ſhall " be reverſed, &c. on which reverſal the party grieved ſhall " recover damages in the manner before mentioned."

And it is farther enacted, par. 7. " That if ſuch offen- " der ſhall not have goods or chattels to the value of " twenty pounds, That then ſuch perſon ſhall be ſet on the " pillory in ſome market place within the ſhire, city, or " borough, where the offence ſhall be committed by the ſhe- " riff or his miniſters, if it ſhall fortune to be without any " city or town corporate, and if it happen to be within any " ſuch city or town corporate, then by the head officer of ſuch " city, &c. where he ſhall have both ears nailed, &c."

*Sect.* 14. And it is further enacted, par. 8, 9. " That " one moiety of the ſaid forfeiture ſhall be to the king, and " the other moiety to ſuch perſon as ſhall be grieved, hinder- " ed, or moleſted, by reaſon of any of the offences be- " fore mentioned, that will ſue for the ſame, &c. and that as " well the judge and judges of every ſuch of the ſaid courts " where any ſuch ſuits ſhall be, and whereupon any ſuch " perjury ſhall be committed, as alſo the juſtices of aſſize " and gaol-delivery, and juſtices of the peace at their quar- " ter ſeſſions, (5) both within the liberties and without, " may enquire of, hear, and determine all offences againſt " the ſaid act."

(5) Proſecutions upon this ſtatute [illegible] by indictment than by indictment at common law, are very ſeldom brought, eſpecially at the ſeſſions; and at common law, juſtices of the peace have no juriſdiction over the offence. 2 Hawk. c. 8. ſ. 83. Strange, 1085. The fitter and moſt uſual mode therefore is by indictment at the aſſizes, or in the King's Bench. 3 Burn. 294.

*Sect.* 15. But it is provided, par. 11. " That the ſaid " act ſhall no way extend to any ſpiritual, or eccleſiaſtical " court, but that every ſuch offender as ſhall offend in form " as aforeſaid, ſhall be puniſhed by ſuch uſual and ordi- " nary laws *as are uſed in the ſaid courts.*"

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Punishment of perjury.

*Sect.* 16. Also it is provided, par. 13. "That the said "statute shall not restrain the authority of any judge, having absolute power to punish perjury before the making "thereof, but that every such judge may proceed in the "punishment of all offences, punishable before the making "of the said statute in such wise as they might have done, and "used to do, to all purposes, so that they set not upon "the offender less punishment than is contained in the said "act." From whence it seemeth undoubtedly to follow, that the court of King's Bench, &c. proceeding upon an indictment, or information of perjury, or subornation of perjury at common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any enquiry concerning the value of his land or goods.

Offenders may be transported. Vide infra sect. 29. for the punishment of persons convicted of perjury, &c. acting as attornies.

† And by 2 Geo. 2. c. 25. made perpetual, by 9 Geo. 2. c. 8. "Besides the punishment already to be inflicted by "law for so great crimes, it shall be lawful for the court "or judge before whom any person shall be convicted of "wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person "to be sent to some house of correction within the same "county, for a time not exceeding seven years, there to be "kept to hard labour during all the said time; or otherwise to be transported for a term not exceeding seven "years, as the court shall think most proper."

But for the better understanding of the other parts of this statute, I shall consider the following particulars: First, How far the very words of the statute must be pursued in a prosecution grounded thereon. Secondly, In what kind of oaths one may incur the danger thereof. Thirdly, How far the false oath must appear to have been prejudicial to some person.

2 Leon. 211. 214. Shower 190. C. El. 105. 147. Savil 43. 3 Leon. 230. Hetly. 12. Holt 534. Skinner 403.

*Sect.* 17. As to the first of these particulars it hath been holden, That in every prosecution on this statute the words thereof must be exactly pursued, and therefore that an indictment or action on the said statute, alledging that the defendant deposed such a matter *falso & deceptive*, or *falso & corrupte*, or *falso & voluntarie*, without expressly saying, that he did it *voluntarie & corrupte*, is not good; and that such a defect cannot be supplied by adding the words *contra formam statuti*, or concluding *& sic voluntarium, & corruptum commisit perjurium:* Also it hath been holden, That it is necessary expressly to alledge that the defendant was sworn, and therefore that it is not sufficient to say, that *tacto per se sacro evangelii falso deposuit.*

Sect.

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*Sect.* 18. However 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, notwithſtanding the words of the ſtatute are, "If any perſon either by the ſub-"ornation, unlawful procurement, ſiniſter perſuaſion, or "means of any other, or by their own act, conſent, or "agreement, commit wilful perjury, &c." for inaſmuch as there is no medium between the two branches of this diſtinction, ſo that all perjury whatſoever muſt needs come within one of them; and it is no way material under which of them it doth come, it is a reaſonable expoſition to look on the ſaid words as put into the ſtatute *ex abundanti*, ſeeing they expreſs no more than the law muſt needs have implied without them; from whence it follows, That they operate no more than if they had not been expreſſed, and conſequently ſhall not oblige the proſecutor neceſſarily to purſue them, which would put him under the difficulty not only of proving the perjury, which alone is material, but alſo of ſhewing it to be within one of the branches of the ſaid diſtinction, which is nothing to the purpoſe. 3 Bulſt. 147. Vic. ap. C. 10. s. 8.

*Sect.* 19. As to the ſecond of the above mentioned particulars, *viz.* In what kind of oaths one may incur the danger of this ſtatute, it hath been reſolved, That no one can be guilty of perjury within the meaning thereof, in any caſe wherein a man may not poſſibly be guilty alſo of ſubornation of perjury within the ſame ſtatute; for it is very reaſonable to give the whole ſtatute the ſame conſtruction; nor can it well be intended, that the makers thereof, who expreſly inflict a greater penalty on ſubornation of perjury, than on the perjury itſelf, ſhould mean to extend the purview of the law in relation to what they eſteemed the leſſer crime, farther than in relation to that which they eſteemed the greater; from whence it hath been argued and determined, That becauſe that part of the ſtatute, which concerns ſubornation of perjury, extends only to ſubornation of perjury in "Matters "depending in ſuit by writ, action, bill, plaint, or informa-"tion, in any wiſe concerning lands, tenements, or here-"ditaments, or goods, chattels, debts, or damages, &c." therefore the following clauſe concerning perjury itſelf, though it be penned in more general words, ſhall come under the ſame reſtriction. And from hence it clearly follows, That no perjury upon an *indictment or criminal information*, can bring a man within the danger of the ſtatute, becauſe they are omitted in the abovementioned clauſe. Alſo upon this ground it ſeems eaſy to account for the judgment in *Price's caſe*, who being indicted for a perjury ſuppoſed to be committed by him in an information for the king, which as I ſuppoſe muſt be intended to have been a criminal one, was diſcharged upon an 5 Co. 99. C. Jac. 120.

exception

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3 Inſt. 164.

exception taken to the indictment; but if the information whereon the ſaid perjury was ſuppoſed to have been committed, had been of a civil nature, I do not ſee any reaſon why it ſhould not be as well within the meaning, as it ſeems to be expreſly within the words of the ſtatute; for ſurely the opinion, That the king cannot by indictment, which is his own proper ſuit, puniſh his own witneſs, who ſwears for him, cannot be agreeable to law, becauſe however the perjury of ſuch a witneſs may ſeem to tend to promote the king's intereſt in relation to the cauſe which happens to be in diſpute, yet certainly it is as heinous a crime in its own nature, and as much an abuſe to juſtice, and of the ſame ill conſequence to the publick, and conſequently as worthy of the king's reſentment, as if it had been taken againſt him.

But he is puniſhable for the ſame by indictment at common law. Bur. Manſf. 1189.

*Sect.* 20. Alſo it hath been reſolved, That this ſtatute extends to no other perjury except that of a witneſs, not only becauſe the clauſe concerning ſubornation, to which the ſubſequent clauſe concerning perjury has a reference, relates to perjury by witneſſes only, but alſo becauſe the clauſe concerning perjury, mentions only perjury committed by perſons in their examinations, *ad perpetuam rei memoriam*, or elſe in their depoſitions in ſome of the courts above mentioned, which in common ſpeech are taken for ſuch oaths only as are taken by a witneſs; and from hence it follows, That no one can come within the ſtatute by reaſon of any falſe oath in an *(a)* anſwer to a bill in Chancery, or in *(b)* ſwearing the peace againſt another, or in a *(c)* preſentative made by him as homager of a court-baron, or by reaſon of a falſe *(d)* wager of law, or for taking a falſe oath before *(e)* commiſſioners appointed by the king to make an inquiry concerning his title to certain lands.

*(a)* 5 Eliz. 148. 2 Leon. 201. Dalſon 84. Yelv. 120.
*(b)* 2 R. Ab. 77.
*(c)* 2 Leon 201.
*(d)* 1 Noy 7, 108. Finch 450.
*(e)* Moor 627.

2 R. Ab. 77. 1 Roll 79. 3 Keble 345.

*Sect.* 21. Alſo it hath been ſaid, That he who makes a falſe affidavit againſt a man in a court of juſtice is not within this ſtatute. But perhaps the books wherein this opinion is holden, ought to be intended only of ſuch affidavits which no way relate to a cauſe depending in ſuit before ſuch court; for if they be of ſuch a nature, That either of the parties in variance be grieved, hindered, or moleſted in reſpect of their cauſe in ſuch court by reaſon of the perjury; as where a trial is put off, or a judgment or execution ſet aſide upon a falſe affidavit; the offence ſeems to be not only within the meaning of the ſtatute, but alſo within the very letter of it, unleſs the words, witneſſes and depoſitions are confined to ſo ſtrict a ſignification, as to bear no kind of application to any other perſon or oaths, except thoſe which are made uſe of upon the trial of the iſſue in queſtion, for which I cannot find any good authority. However partly perhaps from this notion, and partly

Vide 2 Leon. 40. 1 R. Ab. 30, 42.

becauſe

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cauſe the ſtatute ſpeaks expreſly only of depoſitions in the urts above mentioned, it hath been queſtioned, Whether falſe oath before a ſheriff upon a writ of enquiry of damages, within the ſtatute or not? But if it be conſidered, That e party to whoſe prejudice ſuch a falſe oath is taken as much aggrieved by it, as if it had been taken in the very urt, and the principal judgment of the cauſe depends upon ch an inquiry; and the depoſitions made before the ſheriff, ay as properly be ſaid to be depoſitions in the court, by hich the ſheriff is commiſſioned to take the inquiry, as epoſitions taken before juſtices of *niſi prius*, upon a trial f an iſſue joined in a ſuperior court, which are undoubtdly within the meaning of the ſtatute; and alſo inaſmuch s thoſe who give evidence before a ſheriff upon ſuch an nquiry may, in the common uſe of words, be as properly alled witneſſes, as thoſe who give evidence before the court n which an iſſue is joined, it ſeemeth to be the more plauible opinion, that ſuch a perjury is within the ſtatute: But ince it is diſputable, whether it be ſo or no, and it is certain that it is perjury at common law, and that in all caſes whatſoever where a man takes a falſe oath, which is not perjury within the ſtatute, but is looked on as perjury at common law, he is ſtill puniſhable for it by indictment or information at the common law, it is certainly moſt adviſeable to proſecute ſuch an offender at the common law, and not upon the ſtatute.

Obſ on the ſtat. 71.

See the authorities above cited.

C. Jac. 1.

King v. Thorngood, Trin. 9 Geo. 1. The defendant made an affidavit in the Common Pleas, and confeſſed it was falſe; the court recorded his confeſſion, and ſentenced him to the pillory. It was objected that this court has no juriſdiction, and that he ought to be brought before the court by indictment, but theſe objections were over-ruled, becauſe any court may punith ſuch an offence committed in *facie curiæ*, under this act of 5 Eliz. c. 9. 8 Mod. 179.

*Sect.* 22. As to the third particular, *viz.* How far the falſe oath muſt appear to have been prejudicial to ſome perſon, it hath been collected from the above mentioned clauſe which giveth an action to the party grieved by the offences mentioned in the ſtatute, That no falſe oath is within the meaning thereof, which does not give ſome perſon a juſt cauſe of complaint; and upon this ground it hath been ſaid, That he who ſwears a thing which is true, but not known by him to be ſo, is not within the ſtatute, becauſe howſoever heinous his offence may be in its own nature, yet, when it proves in the event to be in maintenance of the truth, it cannot be ſaid to give him a juſt cauſe of complaint, who would take advantage againſt another from his want of legal evidence to make out the juſtice of his cauſe.

3 Inſt. 166. Vid. ſup. ſ. 5. Hetley 97. *Contra.*

*Sect.* 23. Alſo from the ſame ground it ſeemeth clearly to follow, That no falſe oath can be within the ſtatute, unleſs

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Vide ſup. f. 8, & 3 Inſt. 167.

leſs the party againſt whom it was ſworn ſuffered ſome kind of diſadvantage by it, for otherwiſe it cannot be ſaid that any one was grieved, hindered, or moleſted by it; and therefore it is certain, That in every proſecution upon the ſtatute, it is neceſſary to ſet forth the record of the cauſe wherein the perjury complained of is ſuppoſed to have been committed; and alſo to prove at the trial of the cauſe, that there is actually ſuch a record, by producing the record itſelf, or a true copy thereof, which muſt agree with that which is ſet forth in the pleadings, without any material variance; for otherwiſe it cannot legally appear, That there ever was ſuch a ſuit depending, wherein the party might be prejudiced in the manner ſuppoſed. Alſo it ſeems to be agreed, That it is neceſſary not only to ſet forth the point wherein the falſe oath was aſſigned, but alſo to ſhew in what manner it conduced to the proof or diſproof of the matter in debate between the parties; and it hath been adjudged, That an indictment ſetting forth a ſuit concerning the manor of *Dale*, and aſſigning a falſe oath concerning the manor (*Manerium prædictum innuendo*) is not good, becauſe it no otherwiſe appears, That the falſe oath did concern the manor of *Dale*, but by the *Innuendo*, which is not a ſufficient averment. Alſo upon the ſame ground it ſeems to be ſafeſt in a proſecution upon the ſtatute for a falſe oath in Chancery, to ſet forth the bill and anſwer, That the plaintiff may appear to have been aggrieved by it; and for the ſame reaſon it ſeemeth alſo, That you ought, in ſuch a proſecution of a witneſs in Chancery, to ſet forth the interrogatory in particular, and to ſhew how it was material. Alſo it hath been reſolved, That as in an action on the ſtatute brought by one perſon, it muſt appear, That the falſe oath was prejudicial to the plaintiff; ſo in an action by more than one, it muſt appear to have been prejudicial to every one of the plaintiffs: And it hath been ſaid, That it is not ſufficient to ſhew that the falſe oath cauſed the court to make an award againſt the plaintiff, unleſs it alſo appear that ſuch an award was prejudicial to him, and therefore where the plaintiff at a trial in ejectment challenged a juror, and proved his challenge by a falſe oath, by reaſon whereof the inqueſt was not taken, and conſequently the poſſeſſion of the defendant, who had a defeaſible title, continued longer than it otherwiſe would have done; it hath been adjudged, That ſuch a defendant cannot have an action on the ſtatute againſt ſuch witneſs, becauſe in truth he gained an advantage by the perjury. Alſo it hath been holden, That it is not ſufficient to ſhew that the perjury, for which an action is brought upon the ſtatute, was actually prejudicial to the plaintiff, unleſs it be alſo ſhewn to have been made in ſome cauſe which may properly be ſaid to have been depending

Co. Ent. 164. 6 Mod. 168. 2 Roll. 76. 1 Keb. 452. 935, 941. Raym. 202. 2 Leon. 12. 2 Roll 427. C. Car. 351, 352, 353. 1 Keb. 452. C. Eliz. 428.

2 Keb. 935, 941.

Sid. 106.

2 Leon. 12. 3 Leon. 68.

2 Leon. 40.

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pending in ſuit between him and the perſon for whom e witneſs was examined; and therefore it hath been holden, hat where A. brought a bill in Chancery againſt B. and e lord keeper, by an order made C. to be as a party the bill againſt B. and afterwards a commiſſion went forth examine witneſſes between B. and C. upon which D. ing produced as a witneſs on the part of C. ſwore directly r him againſt B. whereupon a decree was made againſt . yet B. cannot have an action on the ſtatute, becauſe . was not a party to the ſuit, but came in *a latere*, by 1 order; and it is ſaid, That the words of the ſtatute are, where one is grieved by a depoſition in a ſuit between party and party;" but perhaps the authority of this opinion may juſtly be queſtioned, not only becauſe the words f the ſtatute whereon it is grounded are miſtaken, but alſo ecauſe the offence ſeems in truth to be both within the neaning and letter of the law, ſince thereby a perſon is grieved in reſpect of a cauſe depending in ſuit in a court nentioned in the ſtatute: However there ſeems to be no doubt, but that a perjury which only tends to increaſe or leſſen the damages to be given to a plaintiff, is as much within the ſtatute, as any perjury which goes directly to the point of the iſſue: Alſo it ſeemeth to be ſettled, That perjury in a cauſe wherein an erroneous judgment is given, is a good foundation of a proſecution upon the ſtatute, while ſuch judgment ſtands unreverſed. Yelv. 2 Leon. 198. 1 Keb. 9. Raymond 74. 1 Sid. 148. 2 Keb. 718, 854. 1 Keb. 531.

† *Sect.* 24. It is enacted by 8 Geo. 1. c. 6. "That if any perſon making ſuch affirmation or declaration as is appointed by this act, ſhall be lawfully convicted of wilful, falſe and corrupt affirming or declaring any matter or thing, which if ſworn in the common or uſual form, would have amounted to wilful and corrupt perjury; every perſon ſo offending ſhall incur and ſuffer ſuch and the ſame pains, penalties and forfeitures as are inflicted or enacted by the laws againſt perſons convicted of wilful and corrupt perjury." Quakers.

† *Sect.* 25. It is alſo enacted by 31 Geo. 2. c. 10. ſ. 24. "That whoſoever ſhall willingly and knowingly take a falſe oath, or procure any perſon to take a falſe oath, to obtain the probate of any will or wills, or to obtain letters of adminiſtration in order to receive the payment of any wages, pay, or other allowances of money, or prize money, due, or that were ſuppoſed to be due, to any officer, ſeaman, or other perſon intitled, or ſuppoſed to be intitled, to any wages, pay, or other allowances of money or prize money, for ſervice due on board of any ſhip or veſſel of his majeſty, &c. or the executor, adminiſtrator, wife, relation or kindred of any ſuch officer or ſeaman, or other perſon who Probate of wills. O. B. 1784. 909.

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" has really ſerved, or was ſuppoſed to have ſerved on board " of any ſhip or veſſel of his majeſty, &c. ſhall be deemed " guilty of felony, and ſuffer death without benefit of " clergy." (6)

(6) By 28 Geo. 2. c. 13. ſ. 14. For the relief of inſolvent debtors, if any ſheriff or other officer perjure himſelf, in taking the oaths directed by the act, he ſhall forfeit 500 l.—And if the offence be committed by a priſoner, or other perſon enabled and intending to take the benefit of the act, it is felony without clergy.—Vide, alſo, 23 Geo. 3. c. 31. reſpecting perjury of freeholders at elections for Cricklade.

Form of the indictment.

† *Sect.* 26. It is recited by 23 Geo. 2. c. 11. " Whereas by reaſon of difficulties attending proſecutions for perjury and ſubornation of perjury, thoſe heinous crimes have frequently gone unpuniſhed." For remedy whereof it is enacted " That in every information or indictment for wilful and corrupt perjury, 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 or perſons to have a competent authority " to adminiſter the ſame) together with the proper averment " or averments to falſify the matter, or matters wherein the " perjury or perjuries is or are aſſigned; without ſetting forth " the bill, anſwer, (7) information, indictment, declaration, " or any part of any record or proceeding, either in law or " equity other than as aforeſaid; and without ſetting forth the " commiſſion or authority of the court, or perſon or perſons before whom the perjury was committed."

(7) In perjury in an anſwer in Chancery it is not neceſſary to prove the identity of the perſon who ſwore the oath; it is ſufficient if the hand writing be proved and that the jurat was ſubſcribed by the maſter as being ſworn before him. 2 Burrow 1189. See vide C. B. 1784. p. 912.

† *Sect.* 27. It is alſo further enacted by par. 2. " That " in every information or indictment for ſubornation of perjury, or for corrupt bargaining or contracting with others " to commit wilful and corrupt perjury, it ſhall be ſufficient " to ſet forth the ſubſtance of the offence charged upon the " defendant without ſetting forth the bill, anſwer, information, indictment, declaration, or any part of any record or " proceeding either in law or equity, and without ſetting " forth the commiſſion or authority of the court, or perſon " or perſons before whom the perjury was committed, or was " agreed or promiſed to be committed." (8)

(8) In general the court will oblige the defendant to plead or to demur to even a defective indictment for this offence. 2 Hawk. c. 25. ſ. 146. They are alſo very cautious in granting a *certiorari* to remove it. 2 Hawk. c. 27. ſ. 28. And Lord Thurlow refuſed permiſſion to amend an anſwer, where an indictment for perjury had only been threatened, even where the party, having no intereſt, could not be ſuppoſed to make the falſe oath intentionally.—Brown's Caſes in Chancery, 419. For it is the province of the grand jury to judge of the intention. Vaux v. Lord Waltham. And what the grand jury may find, the court will never expunge. B. R. H. 203.

Sect.

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† *Sect.* 28. And the better to prevent great offenders from escaping punishment by reason of the expence attending such prosecutions, It is further enacted by p. 3. "That it shall "and may be lawful to and for any of his majesty's justices "of assize, or nisi prius, or general gaol delivery, or of any "of the great sessions of Wales, or of the counties palatine; "and they are hereby authorised (sitting the court or within "twenty four hours after) to direct any person examined as a "witness upon any trial before him or them, to be prosecuted "for the said offence of perjury, in case there shall appear to "him or them a reasonable cause for such prosecution, and that "it shall appear to him or them proper so to do; and to assign "the party injured, or other person undertaking such prosecu-"tion, counsel, who shall, and are hereby required to do their "duty without any fee, gratuity, or reward for the same." Such prosecution is also exempted from tax or duty and fees of court, and the clerk of the assize is ordered to give the prosecutor a certificate of the same, being directed, with the counsels names, &c.

The court may order perjured witnesses to be prosecuted.

† *Sect.* 29. And it is further enacted by 12 Geo. 1. c. 29 s. 4. "That if any person who hath been, or shall be con-"victed of wilful and corrupt perjury, or subornation of per-"jury, (9) shall act or practise as an attorney or solicitor, or "agent in any suit or action, in any court of law, or equity, "in England, the judge or judges of the court where such "suit or action is or shall be brought, shall, upon complaint "or information thereof, examine the matter in a summary "way (10) in open court, and if it shall appear to the "satisfaction of such judge or judges, that the party hath "offended contray to this act, such judge or judges, shall "cause such offender to be transported for seven years."

Attornies.

(9) Or of forgery or common barratry.

(10) Vide 2 Bar. K. B. 34.

## CHAPTER THE SEVENTIETH.

## Of FORGERY.

OF Forgery there are two kinds: First, By common law. Secondly, By the statute.

Britt. 16. Fleta 2. c. 22.

*Sect.* 1. Forgery by the common law seemeth to be an offence in falsly and fraudulently making or altering any matter of record; or any other authentick matter of a publick 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.

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For the better underſtanding whereof, I ſhall endeavour to ſhew: Firſt, In what caſes the making or altering of a writing, ſhall be ſaid to be ſo far falſe and fraudulent, as to amount to forgery. Secondly, That a man may be guilty of forgery in reſpect of all the above mentioned writings, and no other.

*Sect.* 2. As to the firſt particular, it is ſaid to be poſſible for a man knowingly to make a deed in his own name, and alſo to ſign and ſeal it himſelf, which yet in judgment of law, may be no better than a downright forgery; as if a man make a feoffment of certain lands to J. S. and afterwards make a deed of feoffment of the ſame lands to J. D. of a date prior to that of the feoffment to J. S. in which caſe he is ſaid to be guilty of forgery, becauſe he knowingly falſifies the date, in order to defraud his own feoffee, by making a ſecond conveyance which at the time he had no power to make. Alſo it is ſaid, That his crime would have been no leſs, if by his conveyance he had paſſed only an equitable intereſt for good conſideration, and had afterwards by ſuch a ſubſequent antedated conveyance endeavoured to avoid it. Alſo in many other caſes a writing may be ſaid to be forged where neither the hand nor ſeal of any one are forged; as where one being directed to draw up a will for a ſick perſon, doth inſert ſome legacies therein of his own head; or where 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; or where one inſerts into an indictment the names of thoſe againſt whom in truth it was not found; or where one makes any fraudulent alteration of the form of a true deed in a material part of it; 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 five hundred pounds, expreſſed in figures, ſeem to have been made for five thouſand, by adding a new cypher. But Sir Edward Coke ſeems to ſay, That a deed ſo altered may more properly be called a falſe than a forged writing, becauſe it is not forged in the name of another, nor his ſeal nor hand counterfeited. But I ſee no good reaſon why ſuch an alteration of a deed ſhould not as properly be called forgery, as the entire making of a new deed in another's name; for in both caſes not only the fraud and villainy are the very ſame, but alſo a man's hand and ſeal are falſly made uſe of to teſtify his aſſent to an inſtrument, which after ſuch an alteration is no more his deed than a ſtranger's. Alſo the notion of forgery doth not ſeem ſo much to conſiſt in the counterfeiting

a man's

3 Inſt. 169. Fulton 46. 27 H. 6. 3. Moor 655, 759. Noy 101. 3 Inſt. 170. Cun. Dyer 288.

3 Inſt. 172.

3 Modern 66. 3 Modern 192. Fitzgibbon 261. 12 Mod. 493, 496. Strange 69.

3 Inſt. 169. Moor 619.

3 Inſt. 169.

Vide Moor 619. 3 Modern 66.

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a man's hand and ſeal, which may often be done innocently, but in the endeavouring 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, as appears by the foregoing caſes in this ſection, to moſt of which Sir Edward Coke himſelf ſeems to agree.

Vide 2 R. Ab. 78, 79. 11 Coke 27.

Foſter 116.

*Sect.* 3. But it ſeemeth to be clear, 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 on this as the other's own ſealing.

Pulton 46. 21 H. 6. 4.

*Sect.* 4. Alſo it hath been adjudged, That he ſhall not be puniſhed for forgery who raſeth out the word *libris* out of a bond made to himſelf, and putteth in *Marcis*, becauſe here 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 is ſaid, That it would 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. Alſo it is holden, That ſuch an alteration, even without theſe circumſtances is a miſdemeanor, though it be no forgery.

Noy 99. Moor 655. Salk. 375.

*Sect.* 5. It hath been reſolved, That a man ſhall not be adjudged guilty of forgery for writing a will for another without any directions from him, who becomes *non compos* before it is brought to him; 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.

*Sect.* 6. It is ſaid, That regularly a man cannot commit an act of forgery by a bare nonfeaſance, as by omitting a legacy out of a will, which he is directed to draw for another. Yet it hath been holden by ſome, even in this very caſe, That if the omiſſion of a bequeſt to one cauſe a material alteration in the limitation of a bequeſt to another, as where the omiſſion of a deviſe of an eſtate for life to one man cauſeth a deviſe of the ſame lands to another to paſs a preſent eſtate, which otherwiſe would have paſſed a remainder only, he who makes ſuch an omiſſion is guilty of forgery. In this caſe the firſt enquiry ſhould be, with what intention the omiſſion was made.

Moor 760. Noy 101.

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*Sect.* 7. It ſeemeth to be no way material, whether a forged inſtrument be made in ſuch a manner, That if it were in truth ſuch as it is counterfeited for, it would be of validity, or not; and upon this ground it hath been adjudged, That the forgery of a protection in the name of A. 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 Sid. 142.

And now I am to ſhew in the ſecond place, That a man may be guilty of forgery at common law, in reſpect of any of the above-mentioned writings, and of no other.

*Sect.* 8. And firſt it is clear, That one may be guilty thereof by the common law, by counterfeiting a matter of record; for ſince the law gives the higheſt credit to all records, it cannot but be of the utmoſt ill conſequence to the publick, to have them either forged or falſified.

1 R. Abr. 65, 76. Yelv. 146. C. Eliz. 178. 3 Mod. 66. 8 Mod. 192. 12 Mod. 493, 496. Strange 69.

*Sect.* 9. Secondly, Alſo there ſeemeth to be no doubt, but that one may be guilty of this crime by the common law, by forging any other authentick matter of a publick nature, as a (*a*) privy ſeal, or a (*b*) licence from the barons of the Exchequer to compound a debt, or a (*c*) certificate of holy orders, or a (*d*) protection from a parliament man.

(*a*) 1 R. Abr. 68. C. Car. 326. 1 Jones 325. (*b*) 1 R. Abr. 65. 2 Bulſ. 137. (*c*) 1 Lev. 138. (*d*) 1 Sid. 142.

*Sect.* 10. Thirdly, It is alſo unqueſtionable, That a man may be in like manner guilty of forgery at common law, by forging a (*e*) deed, and ſurely there cannot be any reaſon to doubt, but that one may be equally guilty by forging a (*f*) will, which cannot be thought to be of leſs conſequence than a deed. But I do not find this point any where directly holden.

(*e*) 1 R. Abr. 66. Raymond 81. Owen 47. 1 Sid. 278. 3 Leon. 170. (*f*) Moor 760. Noy 101. Dyer 302. It is now made forgery by 2 Geo. 2. c. 25. ante, p. 210.

*Sect.* 11. As to other writings of an inferior nature, it ſeems to have been generally laid down as a (*g*) rule, That the counterfeiting of them is not properly forgery; (*h*) and ſome have gone ſo far as to hold, That the forging another's hand, and thereby receiving rent due to him from his tenants, is not puniſhable at all; and therefore it cannot but be more ſafe to proceed againſt offences of this nature, as cheats than as forgeries; but ſurely it cannot be proved by any good authority, That ſuch baſe crimes are wholly diſregarded by the common law, as not deſerving a publick proſecution; for the opinion in the books above cited, That they are puniſhable by no law, ſeems by no means to be maintainable, ſince many of them are moſt certainly puniſhable by force of 33 Hen. 8. c. 1. which is ſet forth at large in the following chapter. Neither can it be a convincing argument, That they are not puniſhable at common law, (*i*) becauſe

(*g*) 1 Roll. 431. 2 Sid. 16, 155, 451. 3 R. Abr. 66. Winch. 40, 90. 3 Leon. 231. 1 Leon. 101. C. Eliz. 296. 853. 3 Bulſ. 265. (*h*) C. Eliz. 166. 1 Yelv. 146. 2 Bulſt. 265. (*i*) P. N. B. 96, 99, 100.

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becauſe they are of a private nature; ſince deeds concerning private matters are alſo of a private nature, as much as other writings concerning ſuch matters; yet no one will ſay, That the making a falſe deed concerning a private matter is not puniſhable at common law. But perhaps it may be reaſonable to make this diſtinction between the counterfeiting of ſuch writings, the forgery whereof hath been already ſhewn to be properly puniſhable as forgery, and the counterfeiting of other writings of an inferior nature, that the former is in itſelf criminal, whether any third perſon be actually injured thereby or not, but that the latter is no crime, unleſs ſome one receive a prejudice from it. (1)

(1) Vide Barnard, K. B. 10. Ld. Raym. 1461. 2 Bac. Abr. 568. Where theſe opinions were very fully conſidered in the caſe of the King v. John Ward, of Hackney; and in which it was determined that to forge a releaſe or acquittance for the delivery of goods; although not under ſeal, was forgery at common law. Vide alſo Lord Raym. 737. 5 Mod. 137. Raym. 81. and Strange 747.

*Sect.* 12. THUS far of Forgery by common law.—And now I am to conſider forgery by the ſtatute, which depends upon 5 Eliz. c. 14. by which it is enacted, "That if any perſon or perſons upon his or their own head and imagination, or by falſe conſpiracy and fraud with others, ſhall wittingly, ſubtilly, and falſly forge or make, or ſubtilly cauſe, or wittingly aſſent to be forged or made, any falſe deed, charter, or writing ſealed, court roll, or the will of any perſon or perſons in writing, to the intent that the ſtate or freehold or inheritance of any perſon or perſons of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or intereſt, of any perſon or perſons, of, in, or to the ſame, or any of them, ſhall, or may be moleſted, troubled, defeated, recovered or charged; or ſhall pronounce, publiſh, or ſhew forth in evidence, any ſuch falſe and forged deed, charter, writing, court roll, or will, as true, knowing the ſame as falſe and forged, as is aforeſaid, to the intent above remembered, (except being an attorney, lawyer, or counſellor, he ſhall for his client, plead, ſhew forth, or give in evidence ſuch falſe and forged deed, &c. to the forging whereof he was not party nor privy) and ſhall be thereof convicted either upon action or actions of forgery of falſe deeds, to be founded upon the ſaid ſtatute, at the ſuit of the party grieved or otherwiſe, according to the order and due courſe of the laws of this realm, &c. ſhall pay unto the party grieved his double coſts and damages to be found or aſſeſſed in that court where ſuch conviction ſhall be, and alſo ſhall be ſet upon the pillory in ſome open market town, or other open place, and there have both his ears cut off, and alſo his noſtrils ſlit and cut, and ſeared with a hot iron, &c. *and ſhall* forfeit to the king the whole iſſues

Of Forgery by 5 Eliz. c. 14.

See Fulton 45, 46.

Par. 13.

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" and profits of his lands and tenements, and ſuffer per-
" petual impriſonment, &c."

*Sect.* 13. And it is farther enacted by the ſaid ſtatute, par. 3. " That if any perſon or perſons, upon his or their " own head or imagination, or by falſe conſpiration or fraud " had with any other, ſhall wittingly, ſubtilly and falſly forge " or make, or wittingly, ſubtilly, and falſly cauſe or aſſent " to be made and forged, any falſe charter, deed or wri-" ting, to the intent that any perſon or perſons ſhall, or may " have, or claim any eſtate or intereſt for a term of years, " of, in, or to any manors, lands, tenements, or heredita-" ments, not being copyhold, or any annuity in fee-ſimple, " fee-tail, or for term of life, lives or years, or ſhall as " is aforeſaid, forge, make, or cauſe, or aſſent to be made or " forged, any obligation, or bill obligatory, or any acquittance, " releaſe, or other diſcharge of any debt, accompt, action, " ſuit, demand, or other thing perſonal; or ſhall pronounce, " publiſh or give in evidence, (except as before excepted) any " ſuch falſe or forged charter, deed, writing, obligation, bill " obligatory, acquittance, releaſe, or diſcharge, as true, know-" ing the ſame to be falſe and forged, and ſhall be thereof " convicted by any of the ways and means aforeſaid. he " ſhall pay unto the party grieved his double coſts and " damages, to be found and aſſeſſed in ſuch court, where
Lutw. 190. " the ſaid conviction ſhall be had, and ſhall be alſo ſet upon " the pillory in ſome open market town, or other open " place, and there have one of his ears cut off, and alſo " ſhall ſuffer impriſonment for one year, &c."

A ſecond offence felony without clergy.

*Sect.* 14. And it is farther enacted by the ſame ſtatute, par. 7 & 8, " That if any perſon or perſons being convicted " or condemned of any of the offences aforeſaid, by any " of the ways or means above limited, ſhall after any ſuch " his or their conviction or condemnation, eſtſoons commit or " perpetrate any of the ſaid offences in form aforeſaid, that " then every ſuch ſecond offence ſhall be adjudged felony with-" out benefit of clergy, ſaving to all perſons other than " the ſaid offenders, and ſuch as claim to their uſes, all " ſuch rights, &c. which they ſhall have to any the here-" ditaments of any ſuch perſon, ſo as is aforeſaid convicted " or attainted, at any time before, &c. ſaving alſo the dower " of ſuch offender's wife, and the right of his heirs.

*Sect.* 15. And it is further enacted by the ſaid ſtatute, " par. 10. " That all juſtices of oyer and terminer, and juſ-" tices of aſſize, ſhall have power to inquire of, hear and de-" termine the offences aforeſaid."

*Sect.* 16. But it is provided, par. 9, 12, & 16. " That " this act or any thing therein contained, ſhall not extend to

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" any ordinary or his commiſſary, &c. for putting their ſeal " of office to any will to be exhibited unto them, not know- " ing the ſame to be falſe or forged, or for writing of the ſaid " will or probate of the ſame, nor to any proctor, &c. of any " eccleſiaſtical court, for the writing, ſetting forth, or plead- " ing of any proxy made according to the eccleſiaſtical law, " &c. for the appearance of any perſon being cited to appear " in ſuch court; nor to any archdeacon, or official, for put- " ting their authentick ſeal to the ſaid proxy or proxies, nor to " any eccleſiaſtical judge for admitting the ſame; nor to any " perſon who ſhall plead or ſhew forth any deed or writing ex- " emplified under the great ſeal of England, or under the ſeal " of any other authentick court of this realm; nor to any per- " ſon who ſhall cauſe any ſeal of any court to be ſet to " any ſuch deed, charter, or writing enrolled, not knowing " the ſame to be falſe or forged."

In the conſtruction of this ſtatute the following points have been holden, 1 Hale 682, 683

*Sect.* 17. Firſt, That a falſe cuſtomary of a copyhold manor, made in parchment under the ſeals of ſeveral tenants of the manor, and containing in it divers falſe cuſtoms, apparently tending to the diſheriſhon of the lord, and falſly pretending by its title to be ſet forth by the conſent of all the tenants, and allowance of the lord, is within the firſt branch of forgery mentioned in the ſtatute, as being a ſealed writing made to the intent to moleſt the inheritance of the lord. Dyer 322. 3 Leon. 108.

*Sect.* 18. Secondly, That the forgery of a leaſe for years, or of a grant of a rent-charge for years, in the name of one who is ſeiſed of a freehold or inheritance, is alſo within the ſaid firſt branch of the ſtatute, becauſe the ſaid branch is penned in general words extending to any moleſtation whatſoever of ſuch eſtate, without mentioning any eſtate or intereſt, in the claim whereof ſuch moleſtation ſhall conſiſt; and from this ground it follows, that thoſe words in the ſecond branch of forgery mentioned in the ſtatute, " To " the intent that any perſon ſhall claim any eſtate or in- " tereſt for term of years, &c." are meant only of ſuch forgeries which relate to ſuch an eſtate or intereſt in *eſſe* before. 3 Inſt. 17. Noy 42.

*Sect.* 19 Thirdly, That the forgery of a will in writing of one poſſeſſed of ſuch an eſtate, mentioning a bequeſt thereof, is within the ſaid ſecond branch of the ſtatute, as being a falſe writing, made to the intent that ſome perſon may claim an eſtate for years; notwithſtanding the ſaid branch makes no expreſs mention of a will, as the firſt doth. Dyer 302.

*Sect.* 20. Fourthly, That the forgery of a leaſe of lands in Ireland is not within either of the branches of the ſtatute. 3 Leon. 170.

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3 Leon. 170.

*Sect.* 21. Fifthly, That the forgery of a deed containing a gift of mere perſonal chattels, is alſo no way within the ſtatute, the words whereof to this purpoſe are, "If any perſon "ſhall forge any obligation or bill obligatory, or any aquit-"tance, releaſe, or other diſcharge of any debt, account, "action, ſuit, demand, or other thing perſonal."

See C. 42, & 62. 1 Freeman 398. 15 H. 7 15. 2 R. Abr. 466. Cun. 3 Inſt. 171.

*Sect.* 22. Sixthly, That the forgery of a ſtatute-merchant or of a recognizance in the nature of a ſtatute-ſtaple, by acknowledging them in the name of another are within the ſtatute, as being obligations, becauſe they muſt have the ſeal of the party, by the expreſs words of the ſtatutes, which appoint in what manner ſuch ſtatute or recognizance ſhall be taken. But that the forgery of the ſtatute-ſtaple is no way within the ſtatute, becauſe it needeth not the ſeal of the party, but only the ſeal of the ſtaple provided for it.

3 Inſt. 171. 1 Hale 685.

*Sect.* 23. Seventhly, 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 the ſtatute be, "If any one ſhall publiſh, &c. "ſuch falſe and forged deed, &c. knowing the ſame to be "falſe or forged."

3 Inſt. 172.

*Sect.* 24. Eighthly, That the double damages to be awarded to the party grieved by a forged releaſe of an obligation, &c. ſhall be governed by the penalty, and not by the true debt appearing in the condition.

3 Inſt. 172.

*Sect.* 25. Ninthly, That one who hath been convicted of publiſhing a forged deed, may become guilty of felony by forging another deed afterwards, as well as by publiſhing any ſuch deed, notwithſtanding the ſecond offence be not of the very ſame nature with the firſt; for the words of the ſtatute are, "If any perſon being convicted or condemned of any of the "offences aforeſaid, &c. ſhall after any ſuch conviction or "condemnation, eftſoons commit any of the ſaid offences."

11 Modern 3. Holt 326. 3 Keb. 356. 367. 3 Inſt. 169. See 1 Keb 849. 2 Keb. 129. Other caſes of this kind. 2 Keb 245, 501, 532. Fitzgerald 150.

*Sect.* 26. Tenthly, That notwithſtanding it be neceſſary in every proſecution upon the ſtatute ſtrictly to purſue the very words of it, (for which cauſe it hath been reſolved, That an indictment ſetting forth the forgery of a writing indented, without adding that it was ſealed, is ſufficient;) yet there is no neceſſity that the tranſlation of ſuch words be made in proper claſſical Latin, ſo that it be intelligible; and upon this ground it hath been adjudged, That an indictment, ſetting forth that the defendant *ſuper caput ſuum proprium* did forge, &c. meaning thereby to expreſs that he did it of his own head, is ſufficient.

*Sect.*

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*Sect.* 27. Eleventhly, That upon indictment of treſpaſs, forgery, and publication of a deed, a verdict finding the defendant guilty *de tranſgreſſione & forgeria prædictis prout ſuperius in indictamento ſupponitur*, is ſufficient, becauſe theſe words *de tranſgreſſione prædict'* include the whole. Alſo perhaps ſuch a verdict may be ſufficient for another reaſon, becauſe the offence is equally within the ſtatute, and the puniſhment the very ſame, whether the party be guilty both of the forgery and publication, or of one of them only.

1 Ven. 23, 24. Salkeld 342. 375. 2 Lev. 111. 221. 3 Keble 353.

For other determinations upon upon this ſtatute, vide 2 Bac. Abr. 571. 8c3. Barnard, K. B. 163, 441, 461. and the caſe of the King v. Crooke. Beſides this general act, a multitude of others, ſince the revolution, when paper credit was firſt eſtabliſhed, have, in a variety of inſtances, inflicted capital puniſhment, on the crime of forgery. For which vide ante chapter fifty eight.

Keb. 707, 748, Strange 901.

## CHAPTER THE SEVENTY-FIRST.

## OF CHEATS.

OF Cheats puniſhable by publick proſecution, there are two kinds: By the common law, and By ſtatute.

*Sect.* 1. And firſt it ſeemeth, that thoſe which are puniſhable at 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 (*a*) playing with falſe dice; or by (*b*) 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 (*c*) perſwading 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, &c. or by (*d*) ſuppreſſing a will, or by (*e*) levying a fine in another's name, or (*f*) ſuing out an execution upon a judgment for him, or acknowledging an action in his name, without his privity, and againſt his in which caſes, by ſome good (*g*) opinions the record may be vacated.

(*a*) 2 Roll. 107. C. Jac. 497, 498. 2 R. Abr. 78. 1 Keble 849. Par. Cafe 6. Modern 42. Farreſley 40. (*b*) 1. Sid. 312. (*c*) 1 Sid. 431. (*d*) Noy 103. (*e*) Noy 99. Moor 630. C. Eliz. 531. 1 Modern 76. 2 Jones 64. (*f*) Noy 99. (*g*) See the books above cited, but 2 R. Abr. 803. & 12 Co. 223. are contrary.

*Sect.* 2. It (*h*) 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,

(*h*) 6 Mod. 103. Salkeld 379. 3. Modern 18. Blackerby 79. L. Ray. 1078. Sell. Caſ. 201.

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Vide Wheatley's Caſe, Burr. 1125 Black. 273.

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.

See the authorities cited in ſect. 1. And the acts recited infra. ſect. 8 and 9.

*Sect.* 3. Some of the above-mentioned offences are puniſhable not only with fine and impriſonment, bnt alſo with farther infamous puniſhment, (as cheating with falſe dice, eſpecially if the offender be a common gameſter) others are puniſhable with fine and impriſonment only, by the diſcretion of the judges, which is regulated by the circumſtances of each particular caſe; and ſome of them are made felonies by 21 Jac. c. 26. as appeareth from chapter forty-five.

(1) Changing corn by a miller and returning bad corn inſtead of it, is puniſhable by indictment; for being in the way of trade it is deemed an offence againſt the publick, 1 Seſſ. Ca. 217. So alſo to run a foot race fraudulently, and by a previous underſtanding with the ſeeming competitor to win money. 6 Mod. 42. So alſo if an indented apprentice enters himſelf as a ſoldier, and receives the bounty, and is diſcharged on his maſter's demanding him, he may be indicted. The King v. Jones, Lent Aſſ. Coventry, 1777.

1 Hale 506. 2 Seſſ. Caſ. 27. Strange 866. Bar. K. B. 298, 331. Salkeld 379. 6 Modern 105, 111, 301, 311. 9 St. Tr. 67.

*Sect.* 4. Offences of this kind by ſtatute depend upon 33 Hen. 8. c. 1. by which it is enacted, "That if any perſon or "perſons ſhall falſly and deceitfully obtain or get into his or "their hands or poſſeſſion, any money, goods, chattels, "jewels, or other things of any other perſon or perſons, "by colour and means of any privy falſe token, or counterfeit "letter made in another man's name, to a ſpecial friend or "acquaintance, for the obtaining of money, &c. from ſuch "perſon, and ſhall be thereof convicted by witneſs taken "before the lord chancellor, or before the juſtices of aſſize, "or before the juſtices of peace of any county, city, borough, "town, or franchiſe, in their general ſeſſions, or by action "in any of the king's courts of record, every ſuch offender ſhall ſuffer ſuch puniſhment by impriſonment, ſetting upon the pillory, or otherwiſe by any corporal pains "except pains of death, as ſhall be appointed by thoſe before "whom he ſhall be ſo convict."

Dalton 32.

*Sect.* 5. And it is farther enacted by the ſaid ſtatute, "That "as well the juſtices of aſſiſe for the time being, as alſo two "juſtices of peace in the ſame county, whereof the one to be "of the *quorum*, may call and convene by proceſs, or otherwiſe, to the ſaid aſſiſes, or general ſeſſions, any perſon being ſuſpected of any of the offences aforeſaid, and to commit or bail him till the next aſſiſes or general ſeſſions, &c."

3 Inſt. 122. C. Car. 564.

*Sect.* 6. Sir Edward Coke is of opinion, That the offender cannot be fined in a proſecution upon this ſtatute, becauſe it is expreſly ordained, That ſome corporal puniſhment ſhall be inflicted, and no other is mentioned; however, there is a precedent in Croke's Reports, by which it appears, That one convicted on ſuch a proſecution hath been adjudged not only to ſtand

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ſtand on the pillory, but alſo to pay a fine of five hundred pounds, and to be bound with good ſureties to his good behaviour. (2)

(2) In indictments upon this ſtatute, the falſe token made uſe of muſt be ſet forth. Str. 1127. And it has been held a falſe token to uſe for the purpoſes of deceit a counterfeit paſs. Dalt. 91. Or a pretended power to diſcharge ſoldiers. 1 Latch 202. Or to obtain goods upon pretence of being of age and then pleading infancy. Or to produce papers purporting to be orders from abroad, and under the pretence of being a merchant to obtain goods. Sayer 206. Or to exchange a ſpurious wine for a genuine commodity under the pretence of being a merchant and broker. 6 Mod. 302. Or to ſell the fleſh of an unbated bull as for ſtrong beer. Sayer 147. Or to ſell any commodity by a falſe meaſure. Burr 1125. But ſelling beer ſhort of the juſt and due meaſure is not an indictable offence. 1 Wilſon 301. Sayer 146. 1 Black. 274. Nor ſelling gum of one denomination for that of another. Sayer 205. Nor ſelling wrought gold as and for gold of the true ſtandard, provided the offender is not a goldſmith. Cowper 323.

† *Sect.* 7. It is alſo enacted by 30 Geo. c. 24. "That all perſons who knowingly and deſignedly by falſe pretences ſhall obtain from any perſon, money, goods, wares, or merchandizes with intent to cheat and defraud any perſon or perſons of the ſame, ſhall on conviction be put in the pillory, or publickly whipped, or fined and impriſoned, or tranſported, not exceeding the ſpace of ſeven years, as the court ſhall in diſcretion think fit."

O. B. 1785. No. 989.—Vide annotations to Adding. P. S. p. 272. N. B. No *certiorari* lies upon this ſtatute. Cowper 24.

† *Sect.* 8. It is alſo enacted by 16 Car. 2. c. 7. "That if any perſon ſhall by any fraud, unlawful device, or other ill practice in playing at cards, dice, tables, tennis, bowls, ſkittles, ſhovelboard; or by cock-fighting, horſe-racing, dog-matches, foot-races, or other paſtimes, or games, or by bearing a ſhare in the ſtakes, or by betting on the ſide of ſuch as ſhall play, act, ride, or run as aforeſaid, win any ſum or other valuable thing, he ſhall forfeit treble the value in the manner the act directs."

2 Abr. Eq. Caſ. 184. Skinner 344. 1 Levinz 244. Ld. Raym. 69. 2 Levinz 44. 4 Com. Dig. 70.

† *Sect.* 9. It is alſo further enacted by 9 Ann c. 14. "That if any perſon ſhall by any fraud or ſhift, cozenage, circumvention, deceit or unlawful device, or ill practice whatſoever, in playing at cards, dice, tables, tennis, bowls, or any the games aforeſaid, or bearing a ſhare in the ſtakes, or betting on the ſides of ſuch as do play, win any ſum of money, or other valuable thing, on conviction by information or indictment, he ſhall forfeit to ſuch as ſhall ſue for the ſame, five times the value, be deemed infamous, and ſuffer corporal puniſhment as in caſes of perjury."

Vide Strange 1048. The King v. Lookup, where it was determined that the court cannot ſet a fine upon the offender on a conviction upon this act; that the only judgment they can give is, *that he is convicted*, &c.

CHAP.

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# CHAPTER THE SEVENTY-SECOND.

## Of CONSPIRACY.

FOR the better underſtanding the nature of Conſpiracy, I ſhall conſider who may be ſaid to be guilty of it, and in what manner ſuch offenders are to be puniſhed.

*Sect.* 1. As to the firſt point, there can be no better rule than the ſtatute of 33, or rather 28 Edw. 1. the intent whereof was to make a final definition of conſpirators, to which purpoſe it declareth, "That conſpirators be they that do "conſeder or bind themſelves by oath, covenant, or other "alliance, that every of them ſhall aid and bear the other "falſly and maliciouſly to indict, or cauſe to indict, or falſly "to move and maintain pleas, and alſo ſuch as cauſe children within age to appeal men of felony, whereby they are "impriſoned and ſore grieved; and ſuch as retain men in "the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the takers "as to the givers. And ſtewards and bailiffs of great lords, "who by their ſeigniory, office, or power, undertake to bear "or maintain quarrels, pleas, or debates that concern other "parties than ſuch as touch the eſtate of their lords or "themſelves."

2 Inſt. 562. Reg. 234. a. 135 Godb. 444.

*Sect.* 2. From this definition of conſpirators it ſeems clearly to follow, That not only thoſe who actually cauſe an innocent man to be indicted, and alſo to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conſpirators, but that thoſe alſo are guilty of this offence, who barely conſpire to indict a man falſly and maliciouſly, whether they do any act in proſecution of ſuch conſpiracy or not. For the words of the ſtatute ſeem expreſly to include all ſuch confederacies under the notion of conſpiracy, whether there be any proſecution thereof or not. And if ſuch a confederacy be within the letter of the ſtatute, there ſeems to no manner of reaſon to ſay, That they are not alſo within the meaning of it, ſince it is a high contempt of the law, barely to engage in ſuch an aſſociation to abuſe it, to ſerve the purpoſes of oppreſſion and injuſtice. Neither can it be a ſevere conſtruction which will bring a crime ſo evidently contrary to the firſt principles of common honeſty, within the meaning of a law, the words whereof do plainly ſeem to extend to it.

L. Ray. 1169. 8 Mod. 321. Burr. 930. 994. 3 Comm. 570.

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And therefore I cannot but queſtion the accuracy of that deſcription of conſpiracy which is given in the third Inſtitute, whereby the lawful acquittal of the party grieved is required to make the offenders guilty of this crime. It is true indeed, That a bare conſpiracy to indict a man will not maintain a writ of conſpiracy at the ſuit of the party grieved, becauſe it doth not do him any actual damage. Alſo it muſt be confeſſed, That it is often laid down as a general rule, and taken for granted, That no ſuch conſpiracy is a good foundation for ſuch a writ, unleſs the plaintiff be lawfully acquitted. And it is certain, That there is no formed writ of conſpiracy in the regiſter for a malicious indictment or appeal; but what ſuppoſes ſuch indictment or appeal to have been actually brought, and the party to have been legally diſcharged. From whence it follows, That no one can have the benefit of any ſuch writ in the regiſter, who upon a falſe accuſation, is put to the trouble and vexation of being apprehended, examined, or committed, &c. without being ever indicted or appealed. However it is certain, That an acquittal by verdict is not always neceſſary to maintain ſuch a writ, for it appears by the regiſter itſelf that where one brought ſuch a writ in the uſual form, having it in the words *quouſque acquietatus fuiſſet*, &c. againſt one who had been non-ſuited in a malicious appeal of felony brought againſt him, his writ was abated, becauſe ſuch a non-ſuit would not make good the words *quouſque acquietatus fuiſſet*, and yet he afterwards brought a new writ, wherein he uſed the words *quietus receſſit*, inſtead of *acquietatus fuiſſet*, and recovered. And why may not a new writ as well be formed in any other caſe, which is as much within the miſchief of the ſtatute as this? Or what colour can there be to ſay, That the malicious putting of a man to the unreaſonable charge, ſcandal, and trouble, of a criminal proſecution, which is ſo palpably groundleſs, as not to have probability enough to induce a grand jury to find an indictment, ſhould not be as good a foundation of complaint, and a grievance as much within the meaning of the ſtatute, as the putting one to the charge and vexation of a groundleſs action, either in a temporal or ſpiritual court, for which it appears by the *(a)* regiſter, That a writ of conſpiracy doth lie without making uſe either of the words *acquietatus fuiſſet*, or *quietus receſſit*? Neither can it be ſaid, That the opinion I contend is wholly unſupported by authority, as appears from the Poulterer's caſe in *(b)* Coke's ninth report.

3 Inſt. 143. Ld. Ray. 378. 10 Mod. 219. F. N. B. 114. 1 Dan. Abr. 218, 213. S. P. C. 173, 174, 175. B. Corone 89. B. Appeal 68. 1 R. Abr. 110, 111, 114. 9 Co. 56, 57. Regiſter 134. 1 Jon. 93, 94. Salkeld 21. 6 Modern 261. Bull N. P. 14. 10 Modern 219. B. Corone 6. 33 H. 6 1. See S P.C. 174. Vide 2 Inſt. 407, 562. 1 Ventris 47.

(a) Regiſt. 134. F. N. B. 116. Finch 306. 2 Inſt. 562. 1 Keb. 254. (b) 9 Co. 56.

However ſince it is certain, That an *(c)* action on the caſe in the nature of ſuch writ doth lie for a falſe and malicious proſecution, for any crime, whether capital, or not capital, though it doth not proceed to an actual indictment, or appeal, and that the ſame damages may be recovered in ſuch action as in a writ of conſpiracy, it hath been thought needleſs to inquire, whether ſuch writ may be maintained for ſuch a pro-

(c) 1 Jon. 93, 94. 1 Leon. 107. C. Eliz. 70, 134. Palm 315. C. Jac. 130, 357, 490. Latch 79. C. Car. 15.

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2 Roll. 256. 237. 2 Bulſt. 270, 271. 3 Roll. 109. 2 R. Ab. 112, 213. Ray 135, 180. Con. 1 Bulſt. 185.

a proſecution or not. But howſoever the law may ſtand in relation to writs of conſpiracy, there ſeems to be no manner of reaſon, that the ſtated form of ſuch writs ſhould any way reſtrain a proceeding by way of indictment or information againſt perſons which are apparently within both the letter and meaning of the ſtatute. (1)

Yelv. 116. Hutt. 49. C. Eliz. 563. 9 Co. 57. 563. 9 Co. 57. 5 Mod. 394, 4995. 1 Salkeld, 13. Dauv. 208. Strange 691.. 1 Ray 374. Bull N. P. 14. Holt. 4, 150.

(1) In an action for a malicious proſecution, it is incumbent on the plaintiff to ſhew that the original ſuit, whereſoever inſtituted, is at an end. For otherwiſe he might recover in the action, and afterwards be convicted upon the original ſuit. Douglas 205. For this purpoſe he muſt produce and prove, a copy of the acquittal on record, the ſubſtance of the evidence, the charges of acquittal, and the circumſtances which ſhew the proſecution was malicious and without probable cauſe. Bull Niſi Prius, 13, 14.

(d) 1 Lev. 62, 126. 1 Sid. 174. 1 Keble 350. (e) 1 Lev. 62. 1 Mod. 185, 186. 1 Sid. 68. 1 Keble 254. (f) 27 Aſſ. 44. 9 Co. 56. 3 R. Abr. 77. See Moor 788. Salkeld 174. 1 Ventris 303, 304. 6 Mod. 185. 8 Mod. 320. 11 Mod. 55. Carth. 416. Foſter 221.

Alſo it ſeems certain, That a man may not only be condemned to the pillory, but alſo to be branded for a falſe and malicious accuſation, but ſince it doth not appear to have been ſolemnly reſolved, that ſuch an offender is indictable upon the ſtatute, it ſeems to be more ſafe and adviſeable to ground an indictment of this kind upon the common law, than upon the ſtatute, ſince there can be no doubt, but that all confederacies whatſoever, wrongfully to prejudice a third perſon, are highly criminal at common law, as where divers perſons confederate (d) together by indirect means to impoveriſh a third perſon, or (e) or falſly and maliciouſly to charge a man with being the reputed father of (f) a baſtard child, or to maintain one another in any matter, whether it be true or falſe. (2)

(2) Journeymen confederating and refuſing to work unleſs for certain wages may be indicted for a conſpiracy, notwithſtanding the ſtatutes which regulate their work and wages do not direct this mode of proſecution, for the offence conſiſts in the conſpiring, and not in the refuſal, and all conſpiracies are illegal although the ſubject matter of them may be lawful.--- Vide the caſe of the Tub-women v. the London Brewers. 8 Mod. 11. 320. So alſo a bare conſpiracy to do a lawful act to an unlawful end is a crime, although no act be done in conſequence thereof. 8 Mod. 321. And the fact of conſpiring need not be proved on the trial, but may be collected by the jury from collateral circumſtances. 1 Black. Rep. 392. Strange 144. And if the parties concur in doing the act, although they were not previouſly acquainted with each other, it is conſpiracy. Lord Mansfield in the caſe of the priſoners in the King's Bench. Hillary Term. 26 Geo. 3.

(g) Palm. 45. 3 Keble 141. Style 157. 1 R. Abr. 110. 9 Coke 26. Yelv. 46, 117. C. Eliz. 563. 2 Bulſ. 270, 271. Cro. Jac. 357. Hutt. 3, 9.

*Sect.* 3. Neither doth it ſeem to be any juſtification of a confederacy to carry on a falſe and malicious proſecution, That the indictment or appeal, which was preferred, or intended to be preferred, in purſuance of it, was (g) inſufficient, or that the court wherein the proſecution was carried on, or deſigned to be carried on, had no juriſdiction of the cauſe, or that the matter of the indictment did import no manner of ſcandal, ſo that the party grieved was in truth in no danger of loſing either his life, liberty, or reputation. For notwithſtanding the injury intended to the party againſt whom ſuch a confederacy

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racy is formed, may perhaps be inconſiderable; (*b*) yet the aſſociation to pervert the law in order to procure it, ſeems to be a crime of a very high nature, and juſtly to deſerve the reſentment of the law.

(*b*) Reg. 134. F. N. B. 116. 3 Aſſize 13. 11 H. 7. 25, 26. 1 R. Abr. 112. 2 Mod. 52, 326.

Con. 2 Keb. 881. W. Jones 94. 2 Cr. 130. Vide the caſe of the King v. Riſpal. 1 Black. Rep. 368. Burr. 1320.

*Sect.* 4. Neither (*a*) is it any plea for one who is proſecuted for ſuch an unlawful confederacy, That nothing more was intended by him, but only to give his teſtimony in a legal courſe of juſtice againſt the party to whoſe prejudice ſuch confederacy is ſuppoſed to have been formed; for notwithſtanding it may be ſaid, That it would be a great diſcouragement to legal proceedings to make perſons liable to a criminal proſecution, for barely intending to give their evidence, and it would be a pre-judging of a cauſe to try the truth of the teſtimony intended to be given in it before the cauſe itſelf is determined; yet the law will rather venture this miſchief, than ſuffer ſo flagrant a villainy to go unpuniſhed. However if there be any probability, That the principal cauſe will ever be tried, it ſeems proper to apply to the court to ſtay the trial of the confederacy till the merits of the principal cauſe be determined.

(*a*) 9 Co. 55, 56, 57. 12 Co. 23, 90, 91, 92. C. Eliz. 70, 71. 134. 1 Leon. 107. 1 R. Abr. 113, 114, 115. Winch. 28, 54. Latch 79, 80. Con. 1 R. Abr. 10. F. N. B. 115. 27 H. 8. 2.

*Sect.* 5. Yet (*b*) it ſeems to be certain, That no one is liable to any proſecution whatſoever, in reſpect of any verdict given by him in a criminal matter, either upon a grand or petit jury. For ſince the ſafety of the innocent, and puniſhment of the guilty, doth ſo much depend upon the fair and upright proceeding of jurors, it is of the utmoſt conſequence, that they ſhould be as little as poſſible under the influence of any paſſion whatſoever. And therefore, leſt they ſhould be biaſſed with the fear of being harraſſed by a vexatious ſuit, for acting according to their conſciences, (the danger of which might eaſily be inſinuated, where powerful men are warmly engaged in a cauſe, and thoroughly prepoſſeſſed of the juſtice of the ſide which they eſpouſe) the law will not leave any poſſibility for a proſecution of this kind.

(*b*) 27 Aſſ. 77. 27 Aſſ. 12. 9 H. 6. 44. Bridg. 130, 131. 21 E. 3. 17. 47 E. 3. 17. 12 Co. 23, 24. Reg. 134. F. N. B. 115. 27 H. 8. 2. S. P. C. 172, 173. L. Ray. 469. 12 Co. 23, 24. Vaugh. 135.

It is true indeed, the jurors were formerly ſometimes queſtioned in the Star-Chamber, for their partiality in finding a manifeſt offender not guilty; but this was always thought a very great grievance; and ſurely as the law is now ſettled by Buſhel's caſe, there is no kind of proceeding againſt jurors in reſpect of their verdicts in criminal matters allowed of at this day. As to the objection, That an attaint lies againſt a jury for a falſe verdict *in a civil cauſe*, and that there is as much reaſon to allow of it in a criminal one, it may be anſwered, That in an attaint, a man's property is only brought into queſtion a ſecond

F. N. B. 105, 106.

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a ſecond time, and not his liberty or life; and alſo it may be generally preſumed, That a jury is likely to be equally influenced with the fear of an attaint from either of the contending parties, whereas if any ſuch examinations of their proceedings were allowed in criminal cauſes they might be often in great danger of one ſide, by incurring the reſentment of a powerful proſecutor, and provoking him to call their conduct into queſtion for their ſuppoſed partiality; but they could have little to fear from an injured criminal who would ſeldom be in circumſtances to make his proſecution formidable.

12 Coke 24. See Vaugh. 138, 139. 22 Ed. 4. 18. 21 Ed. 4. 67. S. P. C. 173.

*Sect.* 6. And as the law has exempted jurors from the danger of incurring any puniſhment in reſpect of their verdict in criminal cauſes, it hath alſo freed the judges of all courts of record from all proſecutions whatſoever, except in the parliament, for any thing done by them openly in ſuch courts as judges. For the authority of a government cannot be maintained, unleſs the greateſt credit be given to thoſe who are ſo highly intruſted with the adminiſtration of publick juſtice; and it would be impoſſible for them to keep up in the people that veneration of their perſons, and ſubmiſſion to their judgments, without which it is impoſſible to execute the laws with vigour and ſucceſs, if they ſhould be continually expoſed to the proſecutions of thoſe whoſe partiality to their own cauſes would induce them to think themſelves injured. Yet if a judge will ſo far forget the dignity and honour of his poſt, as to turn ſolicitor in a cauſe which he is to judge, and privately and extrajudicially tamper with witneſſes, or labour jurors, he hath no reaſon to complain, if he be dealt with according to the ſame capacity, to which he ſo baſely degrades himſelf.

12 Co. 24.

Carth. 416. 1 R. Abr. 105, 112, 112, 115. L. Cor. 89.

*Sect.* 7. It appears not only from the words of the ſtatute, but alſo from the plain reaſon of the thing, That no confederacy whatſoever to maintain a ſuit can come within the danger of the ſtatute, unleſs it be both falſe and malicious. For it would be a moſt dangerous diſcouragement of all legal proſecutions, if thoſe who engage in them upon a probable ground, ſhould be in danger of being found guilty of ſo heinous a crime upon their not being able to bring their ſuits to their intended effect. And from hence it clearly follows, That if the defendants to an indictment or appeal in murder be found guilty of homicide *ſe defendendo*, or by miſadventure, or get off by pleading the king's pardon, their proſecutors are in no danger of being puniſhed as conſpirators. And from the ſame ground it alſo follows, That if the defendants in a writ of conſpiracy can ſhew a probable cauſe of ſuſpicion, they ſhall be diſcharged; as where being accuſed of a conſpiracy for indicting a perſon of larceny, they can

S. P. C. 173. 22 Aſſ. 77.

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ſhew that a larceny was committed at ſuch a time and place, and that the party charged by them for ſuch larceny was found by them at the ſame time and place, with ſuſpicious circumſtances; or where perſons being charged with a conſpiracy for indicting another for felonioufly carrying away a woman with great violence, and numbers are able to prove that they ſaw the perſons whom they ſo accuſed riding armed in a warlike manner, and following after thoſe who in truth actually did the felony, and that it was the common report of the country that they were all of the company. But ſome have ſaid, That there is a neceſſity to plead ſuch matter ſpecially, and that it cannot be given in evidence on the general iſſue.

1 Leon. 107. C. Eliz. 134. Kelw. 81, 83. 20 H. 7. 11.

20 H. 7. 11. Kelw. 81. C. Eliz. 134. 1 Leon. 107.

*Sect.* 8. It plainly appears from the words of the ſtatute, That one perſon alone cannot be guilty of conſpiracy within the purport of it; from whence it follows, That if all the defendants who are proſecuted for ſuch a conſpiracy be acquitted but one, the (*a*) acquittal of the reſt is the acquittal of that one alſo. Alſo upon the ſame ground it hath been holden, That no ſuch proſecution is maintainable againſt a (*b*) huſband and wife only, becauſe they are eſteemed but one perſon in law, and are preſumed to have but one one will.

12 Mod. 208. (*a*) 8 H. 4. 6. 28 Aſſ. 12. S. P. C. 173. C. Eliz. 701. 5 Mod. 222. 1 R. Abr. 111. (*b*) 38 Ed. 3. 3. S. P. C. 174.

But it is certain, That an action on the (*c*) caſe in the nature of a conſpiracy may be brought againſt one only. Alſo (*d*) it hath been reſolved, That if ſuch an action be brought againſt ſeveral perſons, and all but one to be acquitted, yet judgment may be given againſt that one only.

(*c*) Carth. 416. 1 R. Abr. 111, 112. F. N. B. 116. C. Jac. 194. C. Car. 239. 3 Mod. 220.

(*d*) 1 R. Abr. 111. 112. C. Eliz. 701. 6 Mod. 170. 1 Saund. 228. Ray. 176, 180. 2 Keb. 497. Str. 144, 193, 1227. 1. Wilſ. 210. 5 Mod. 408. Latch 80, 262. 12 Mod. 209. Buller N. P. 14.

*Sect.* 9. As to the ſecond point, *viz.* In what manner offenders of this nature are to be puniſhed, it is clear, That thoſe who are convicted of conſpiracy at the ſuit of the (*e*) party ſhall only have judgment of fine and impriſonment, and to render to the plaintiff his damages. Alſo it is certain, that he who is convicted at the ſuit of the (*f*) king, of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law, (whereby he is diſabled to be put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the king's courts;) and alſo that his houſes, lands, and goods, ſhall be ſeized in the king's hands, and his houſes and lands eſtreped and waſted, his trees rooted up and raſed, and his body impriſoned. And this is commonly called a villainous judgment, and is given by the common law, and not by any ſtatute, as is ſaid generally in ſome (*g*) books,

(*e*) 24 Ed. 3. 34 b. 3 Inſt. 143. 2 Inſt. 383, 562. S. P. C. 175. (*f*) 24 Ed. 3. 34. 12 Mod. 209. F. N. B. 116. 3 Inſt. 143. 2 Inſt. 562. S. P. C. 173. 27 Aſſize 59. Carth. 416.

(*g*) See the books above cited.

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27 Aſſ. 59. 2 P. C. 175. 46 Aſſ. 11. Burr. 1027. Strange 196.

to be the proper judgment upon every conviction of conſpiracy at the ſuit of the king, without any reſtriction to ſuch as endangered the life of the party. But I do not find this point any where ſettled. (3)

(3) There has been no inſtance of the villainous judgment ſince the reign of Edward the Third. The uſual mode of puniſhment at preſent is by pillory, fine, impriſonment, and ſurety for the good behaviour. Burr. 996, 1027. Str. 196. Crown Cir. 208. The quarter ſeſſions have juriſdiction over this offence. Finch 80. 8 Mod. 321. And on motion in arreſt of judgment the defendant muſt be perſonally preſent in court. Strange 1227. Burr. 931.

## CHAPTER THE SEVENTY-THIRD.

## OF LIBELS.

See 3 Inſt. 174. 9 Co. 53, 59. Moor 813, 627. March 131. 4 Co. 14. Popham 133, 139. Selden tit. libels. 1 Ventris 31. Hob. 253. Carth. 405. 1 Salk. 211. Fitzgib. 221, 253. 2 Wilſon 403. 2 Burr. 980.

IN treating of Libels I ſhall conſider; Firſt, What ſhall be ſaid to be a libel. Secondly, Who are liable to be puniſhed for it. Thirdly, In what manner they are to be puniſhed.

5 Coke 125. 5 Mod. 165, 166, 167. Salk. 418. Str, 422, 791. 12 Mod. 221. Ld. Ray 416. 12 Mod. 2193.

*Sect.* 1. As to the firſt point it ſeemeth, That 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 publick hatred, contempt or ridicule.

5 Coke 125. Skin. 123, 124. Salkeld 418. Ld. Ray. 431. 3 Keb. 378.

*Sect.* 2. But it is ſaid, That in a larger ſenſe the notion of a libel may be applied to any defamation whatſoever, expreſſed either by ſigns or pictures, as by fixing up a gallows againſt a man's door, or by painting him in a ſhameful and ignominious manner.

1 Lev. 139. 5 Coke 125. 12 Coke 35. Raymond 201. Stra. 422, 898. Savil 49. Salk. 49, 418. 1 Sid. 270, 271. 3 Inſt. 174.

*Sect.* 3. 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 publick 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 publick juſtice for injuries of this kind, which of all others are 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?

*Sect.*

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*Sect.* 4. And from the ſame ground it ſeemeth clearly to follow, That ſuch ſcandal as is expreſſed in a ſcoffing and ironical manner, makes a writing as properly a libel, as that which is expreſſed in direct terms; as where a writing in a taunting manner reckoning up ſeveral acts of publick charity done by one, ſays, "You will not play the Jew, nor the hypocrite," and ſo goes on in a ſtrain of ridicule to inſinuate, that what he did was owing to his vain-glory; or, where a writing, pretending to recommend to one the characters of ſeveral great men for his imitation, inſtead of taking notice of what they are generally eſteemed famous for, pitched on ſuch qualities only which their enemies charge them with the want of; as by propoſing ſuch a one to be imitated for his courage, who is known to be a great ſtateſman but no ſoldier; and another to be imitated for his learning, who is known to be a great general, but no ſcholar, *&c.* which kind of writing is as well underſtood to mean only to upbraid the parties with the want of theſe qualities, as if it had directly and expreſly done ſo

Hobart 215. Popham 119. 2 Wilſon 403. 2 Burrow 980. 2 Modern 119. 4 Modern 86. 4 Read. Stat. Law 151. Barn. 305, 289. Seſſ. Caſes 30. Popham 252. Hobart 215. Keble 293. Moor 627. R. Abr. 37. Fitzg. 121. 2 Strange 898.

*Sect.* 5. And from the ſame foundation it hath alſo been reſolved, (*a*) That a defamatory writing expreſſing only one or two letters of a name, in ſuch a manner, that from what goes before and follows after, it muſt needs be underſtood to ſignify ſuch a particular perſon, in the plain, obvious, and natural conſtruction of the whole, and would be perfect nonſenſe if ſtrained to any other meaning, is as properly a libel, as if it had expreſſed the whole name at large; for it brings the utmoſt contempt upon the law, to ſuffer its juſtice to be eluded by ſuch trifling evaſions: and it is a ridiculous abſurdity to ſay, That a writing which is underſtood (*b*) by every the meaneſt capacity, cannot poſſibly be underſtood by a judge and jury.

(*a*) Hurt's Caſe. Trin. 12 Annæ. 3 Modern 68. 12 Modern 139. Ld. Raym. 879.

(*b*) On application for an information ſome friend to the party complaining, ſhould by affidavit ſtate the having read the libel, and that he underſtands and believes it to mean the party. Note in 3 Bac. Abr. 493.

*Sect.* 6. And from the ſame ground it farther doth appear, That it is far from being a juſtification of a libel, that the contents thereof are true, (1) 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.

5 Coke 125. Hobart 253. Moore 627. Strange 498. 3 Bacon 495. 9 St. Tr. 275.

(1) In an action, the truth of a libel may be pleaded in juſtification. Hob. 253. And even on a motion for an information, the truth or falſehood of the libelous matter will conſiderably influence the court either to refuſe or to grant it. Stra. 498. An affidavit therefore, except in particular caſes, is always required from the party applying, ſtating poſitively and directly that the contents of the imputed libel are not true. Dougl. 284, 588. Or the court will leave the injury to be remedied in the ordinary courſe of juſtice by action or indictment. Stra. 498.—But the court will not grant this extraordinary remedy by information, nor ſhould a grand jury find an indictment, unleſs the offence be of ſuch ſignal enormity that it may reaſonably be conſidered

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to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself cannot in true policy be suffered, to interrupt the tranquillity of any well ordered society.—This is a principle so rational and pure that it cannot be tainted by the vulgar odium which has accompanied the derivation of the doctrine from the tyranny of the Star-Chamber; the adoption of it by the worst of courts can never weaken its authority, and without it all the comforts of society might with impunity be hourly endangered or destroyed.——Vide Law of Libels.

5 Coke 125.
1 Sid. 219, 271.
3 Inst. 174.
Cro. Car. 175, 504.
2 Roll. 86.
3 Mod. 139.
Comb. 65.
Carth. 15.
Hard. 470.
Skin. 123.
Keb. 773.
St. Tr. 2977.

*Sect.* 7. Nor can there be any doubt but that a writing which defames private persons only, is as much a libel as that which defames persons intrusted with a publick capacity, inasmuch as it manifestly tends to create ill blood, and to cause a disturbance of the publick peace. However it is certain, That it is a very high aggravation of a libel that it tends to scandalize the government, by reflecting on those who are intrusted with the administration of publick affairs, which doth not only endanger the publick peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.

(*a*) Hardres 470
1 Lev. 240.
2 Sid. 414, 415.
1 Saund. 131.
2 Keb. 832.
(*b*) 4 Coke 14.
(*c*) Dyer 285.
2 Inst. 228.
Bull. N. P. 6.
Moor 627.

*Sect.* 8. But it hath been resolved, That no false or scandalous matter contained in (*a*) petition to a committee of parliament, or in (*b*) articles of the peace exhibited to justices of peace, or in any other (*c*) proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutions, in respect of their applications to a court of justice. And the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them. Also (*d*) it seemeth to have been 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 proper court is not imputable to the party, but to his counsel. Yet if it shall manifestly appear from the whole circumstances of the case, That a prosecution is intirely 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; I cannot see any reason why such a mockery of publick justice should not rather aggravate the offence, than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the king; 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. But it is said, that no

(*d*) 2 Keb. 832.
2 Inst. 228.
2 And. 28.
Moor 143, 705, 820.
Popham 122.
Cro. 4 Co. 14.
4 Com. Dig. 152
Dyer 285.
Yelverton 117.
2 Bulst. 269.
Godbolt 340.
Palm. 145, 180.
Vent. 23.
12 Coke 103.
2 Modern 119.
2 Anderson 28.

presentment

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preſentment of a grand jury can be a libel, not only becauſe perſons who are ſuppoſed to be returned without their own ſeeking, and are ſworn to act impartially, ſhall be preſumed to have proper evidence for what they do, but alſo becauſe it would be of the utmoſt ill conſequence any way to diſcourage them from making their inquiries with that freedom and readineſs which the publick good requires. For which conſiderations, it ſeems reaſonable to exempt them from the fear of any kind of proſecution in reſpect of their inquiries, as has been ſhewn more at large in the chapter of conſpiracy.

See 1 Danv. Abr. 208, 209, 210, 211. and the foregoing Chapter of Conſpiracy.

Moore 627.

*Sect.* 9. However it ſeems clear, That no writing whatſoever is to be eſteemed a libel, unleſs it reflect upon ſome particular perſon; and it ſeems, That a writing full of obſcene ribaldry, without any kind of reflection upon any one, is not puniſhable at all by any proſecution at common law, as I have heard it agreed in the Court of King's Bench; (2) yet it ſeems, That the author may be bound to his good behaviour, as a ſcandalous perſon of evil fame.

Kely 138. Salk. 224. Ld. Ray. 486. 4 Read S. L. 151. Forteſ. 98. Self. Ca. 29. 12 Mod. 139, 218, 220. L. Ray. 879. 2 Strange 934. 1 Vent. 10, 161.

Bar. K. B. 138, 166. See the Chapter concerning Surety for the good Behaviour.

(2) It was ſo agreed in Read's caſe, 11 Mod. 142; But in the caſe of the King v. Curl, Mich. 1 Geo. 2. for publiſhing an obſcene book, the Court were unanimous, that it is a temporal offence; and that Read's caſe was not law. Stra. 788, 834. Vide alſo 4 Burr. 2527.

*Sect.* 10. As to the ſecond point, *viz.* Who are liable to be puniſhed for a libel, it is certain that not only he who compoſes, or procures another to compoſe it, but alſo that he who publiſhes, or procures another to publiſh it, are in danger of being puniſhed for it; and it is ſaid, not to be material whether he who diſperſes a libel knew any thing of the contents or effect of it or not; for nothing could 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 (3) ſafe in diſperſing them. Alſo it hath been ſaid, That if he who hath either read a libel himſelf, or hath heard it read by another, do afterward 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. 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 ſubſe-

Almon's caſe. 5 Bur. 2666. 9 Co. 59. Moor 267, 627, 813. Strange 77. Bull N. P. 6. Fitzgibbon 47. Con. 9 Co. 59. L. Ray. 414, 417, 729. 4 Com. Dig. 152. B. 2. 5 Co. 125. 12 Co. 35. Comb. 359. 5 Mod. 167, 163. Vide Salk. 417, 418, 419, 646, 281. Carthew 405 to 410.

(3) But if a printer is confined in priſon, to which his ſervants have no acceſs, and they publiſh a libel without his privity, the publication of it ſhall not be imputed to him. Woodfall's caſe. Eſſay on Libels. p. 18. Sed. Vide Salmon's caſe, B. R. Hilary 1777, and Rex v. Almon. 5 Burr. 2686.

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quent is ſaid to explain the intention precedent. But it ſeems to be the better opinion, That he who firſt writes a libel dictated by another, is thereby guilty of making it, and conſequently puniſhable for the bare writing; for it was no libel till it was reduced to writing.

(a) 1 Keb. 931. 2 Keb. 261, 58. L. Ray. 341, 417, 486. Skin. 123. 12 Mod. 218. 11 Mod. 99. 3 Bac. Ab. 498. 1 Lev. 139, 240. 12 Co. 34. Pop. 139, 136. Ray. 201. 1 Sid. 270, 444. 3 Mod. 58. Hob. 62, 215. 3 Inſt. 174. 4 Inſt. 180. 181. (b) 5 Mod. 167. 9 Co. 59. 1 Keb. 832. 12 Co. 35. See Fitzg. 47. 12 Vin. Ab. 229. Barn. 306. Seſſ. Ca. 33.

*Sect.* 11. Alſo it hath been reſolved, (*a*) That the ſending of a letter full of provoking language to another, without publiſhing it, is highly puniſhable; and if the bare making of a libel be an offence, whether it be publiſhed or not, as it ſeemeth to be holden in ſome (*b*) books, ſurely the ſending of it to the party reflected upon, muſt be a much greater crime, inaſmuch as it ſo manifeſtly tends to a diſturbance of the peace.

Keb. 832. 1 Saund. 133. 1 Lev. 240. 1 Sid. 414, 415.

*Sect.* 12. Alſo it ſeems to be agreed, That he who delivers a paper full of reflections on any perſon, in nature of a petition to a Committee of Parliament, to any other perſon except the Members of Parliament, may be puniſhed as the publiſher of a libel, in reſpect of ſuch a diſperſing thereof among thoſe who have nothing to do with it.

(c) 9 Co. 59. Moore 813.

(d) 9 Co. 59. Moore 813

(e) Moore 627. 1 Vent 31. 2 Keb. 502. Salk. 418. Carth. 409.

*Sect.* 13. But it hath been reſolved, That he who barely reads a libel in the preſence (*c*) of another, without knowing it before to be a libel, or who hearing a libel read by another (*d*) laughs at it, or who (*e*) barely ſays, That ſuch a libel is made upon ſuch a perſon, whether he ſpeak it with or without malice, or who is only proved to have had a libel in his cuſtody, ſhall not in reſpect of any ſuch act be adjudged the publiſher of it. But the having in one's cuſtody a written copy of a libel publickly known, is an evidence of the publication of it.

Moore 627. 9 Co. 59.

*Sect.* 14. Alſo it hath been holden, That he who repeats part of a libel in merriment without malice, and with no purpoſe of defamation, is no way puniſhable; but it ſeemeth, That the reaſonableneſs of this opinion may juſtly be queſtioned; for jeſts of this kind are not to be endured, and the injury to the reputation of the party grieved is no way leſſened by the merriment of him who makes ſo light of it.

12 Vin. Ab. 88. 1 Keb. 832. 1 Saund. 133. 1 Levinz. 240. 1 Sid. 414, 415. Skin. 124. Hard. 470.

*Sect.* 15. But it ſeemeth to be ſettled, that the bare printing of a petition to a committee of parliament (which would be a libel againſt the party complained of, if it were made for any other purpoſe, than as a complaint in a courſe of juſtice) and

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and delivering copies thereof to the members of the committee, ſhall not be looked upon as the publication of a libel, inaſmuch as it is juſtified by the order and courſe of proceedings in parliament, whereof the King's Courts will take judicial notice.

*Sect.* 16. As to the third point, *viz.* In what manner offenders of this kind are to be puniſhed, there ſeemeth to be no doubt, but that they may be condemned to pay ſuch fine, and alſo to ſuffer ſuch corporal puniſhment, as to the court in diſcretion ſhall ſeem proper, according to the heinouſneſs of the crime, and the circumſtances of the offender.

Cro. Car. 175. 504. 3 Inſt. 174. 2 Inſt. 228. 12 Co. 134. Stra. 934. 8 Mod. 178. Forteſ. 37, 201.

## CHAPTER THE SEVENTY-FOURTH.

## Of the OFFENCE of keeping a BAWDY-HOUSE, OR † AN UNLICENSED PLACE of ENTERTAINMENT.

THE offence of keeping a bawdy houſe being of ſo groſs a nature, and there being alſo ſo few queſtions relating to it worth conſidering, I ſhall paſs it over with theſe following obſervations. Firſt, That it comes under the cognizance of the temporal law, as a common nuiſance, not only in reſpect of its endangering the publick peace, by drawing together diſſolute and debauched perſons, but alſo in reſpect of its apparent tendency to corrupt the manners of both ſexes, by ſuch an open profeſſion of lewdneſs. Secondly, That a feme-covert is puniſhable or this offence (1) as much as if ſhe were ſole, as more fully hath been ſhewn, Chapter the firſt, Section twelve. Thirdly, That a lodger who keeps only a ſingle room for the uſe of bawdry, is indictable for keeping a bawdy-houſe; but that the bare ſolicitation of chaſtity is not indictable. Fourthly, That 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.

2 Rol. 39. 79. 83. 4 Blac. Com. 29. 64. 167. 3 Burn. 95. 2 Ecc. Law. Kitchen 11. 3 Inſt. 205. Salk. 382. 2 Ld. Ray. 1197. Dalt. p. 262. Popham 208. 1 Sid. 168, 410. 2 Burr. 1232. Salk. 384. 10 Mod. 63 336.

(1) Therefore ſhe may have an action for ſaying that ſhe keeps a bawdy-houſe. Sayer 33.

† *Sect.* 2. As to the offence of keeping an unlicenſed houſe. It is enacted by 25 Geo. 2. c. 36. made perpetual by 28 Geo. 2. c. 19.



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Publick places within 20 miles of the metropolis muſt be licenced.

2. c. 19. "That any houſe, room, garden, or other place "kept for publick dancing, muſick, or other publick enter- "tainment of the like kind within the cities of *London* and "*Weſtminſter*, or within twenty miles thereof, without a "licence had for that purpoſe from the laſt preceding Mi- "chaelmas quarter ſeſſions of the peace, for the county or "place, in which ſuch houſe, room, garden or other place "is ſituate, as the juſtices in their diſcretion ſhall think fit, "ſignified under the hands and ſeals of four or more of the "juſtices there aſſembled, ſhall be deemed a diſorderly houſe or "place."

The form of ſuch licence.

† *Sect.* 3. And it is further enacted, "That every ſuch li- "cence ſhall be ſigned and ſealed by the ſaid juſtices in open "court, and afterwards be publickly read by the clerk of the "peace, together with the names of the juſtices ſubſcribing "the ſame; and no ſuch licence ſhall be granted at any ad- "journed ſeſſions; nor ſhall any fee or reward be taken for "any ſuch licence. And it ſhall be lawful for any conſtable "or other perſon authorized by warrant, by a juſtice of the "county or place where ſuch houſe or place ſhall be ſituate, to "enter ſuch houſe or place, and to ſeize every perſon who ſhall "be found therein, in order that they may be dealt with accord- "ing to law. And every perſon keeping ſuch houſe, room, "garden, or other place, without licence as aforeſaid, ſhall "forfeit one hundred pounds to ſuch perſon as will ſue for the "ſame, and be otherwiſe puniſhable as the law directs in caſes "of diſorderly houſes."

How places ſo licenced are to be diſtinguiſhed,

† *Sect.* 4. And it is further enacted, "That there ſhall be "affixed and kept up in ſome notorious place over the door or "entrance of every ſuch houſe or other place, ſo licenſed as "aforeſaid, an inſcription in large capital letters, in the "words following. LICENCED PURSUANT TO ACT OF "PARLIAMENT OF THE TWENTY-FIFTH OF KING GEORGE "THE SECOND; and that no ſuch houſe, room, garden, or "other place, kept for any of the ſaid purpoſes, although li- "cenced as aforeſaid, ſhall be open for any of the ſaid pur- "poſes before five in the afternoon, and that theſe reſtric- "tions ſhall be inſerted in and made condition of the licence, "which ſhall be forfeited on the breach thereof, and revoked "by the next general or quarter ſeſſion, and not be renewed; "nor ſhall any new licence be granted to the ſame perſon or "perſons, or any other perſon on his or their or any of their "behalf, or for their uſe or benefit, directly or indirectly, for "keeping any ſuch houſe, room, garden, or other place, for "any of the purpoſes aforeſaid."

N B. This act ſhall not extend to the theatres royal, nor to any publick entertainments authorized by letters patent from the crown or licence from the Lord Chamberlain. Sect. 6.

† *Sect.* 5. And it is enacted by par. 5. "That, in order to "encourage proſecutions againſt perſons keeping bawdy- "houſes,

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" houſes, gaming-houſes, or other diſorderly houſes, if any " two inhabitants of any pariſh or place paying ſcot and lot " therein, do give notice in writing to the conſtable, or where " there is no conſtable, to any other peace officer of ſuch " pariſh or place of the like nature, of any perſon keeping a " bawdy-houſe, gaming-houſe, or other diſorderly houſe " within the pariſh or place, he ſhall forthwith go, with ſuch " inhabitants to a juſtice of the county or place, and upon " ſuch inhabitants making oath before ſuch juſtice that they " believe the contents of ſuch notice are true, and entering " into a recognizance of 20l. each to give material evidence " againſt the offender, he the ſaid conſtable ſhall enter into a " recognizance of 30l. to proſecute ſuch ſuit with effect at " the next ſeſſions or aſſizes for the county, as to ſuch juſtice " ſhall ſeem meet. And ſuch conſtable or other officer ſhall " be allowed his reaſonable expences, to be aſcertained by " two juſtices, and paid by the overſeers. And in caſe the " offender ſhall be convicted, the owners ſhall immediately " pay ten pound to each of the inhabitants, on pain of for- " feiting in each caſe double the ſum. And if the conſtable " ſhall neglect his duty he ſhall forfeit 20l.

The mode of proſecution.

† *Sect.* 6. And it is further enacted by par. 6. " That upon " ſuch conſtable or other officer entering into ſuch recog- " nizance to proſecute as aforeſaid, the ſaid juſtice ſhall, by " warrant, bring the perſon accuſed before him, and bind him " over to appear at the ſeſſion or aſſizes as aforeſaid, and if he " thinks fit, may likewiſe demand and take ſecurity for ſuch " perſon's good behaviour in the mean time.

Juſtices may ſummon the party, &c.

† *Sect.* 7. And it is further enacted, par. 8. " That every " perſon who ſhall appear, act, or behave, as having the care " and management of any ſuch houſe, ſhall be deemed the " keeper of the ſame, and liable to be puniſhed as the maſter " or miſtreſs, although not in fact the real owner or keeper " thereof. Inhabitants may be witneſſes. The indictment " not removeable by *certiorari*."

Who ſhall be deemed keepers of publick places.

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# CHAPTER THE SEVENTY-FIFTH.

## Of COMMON NUSANCES.

OFFENCES under the degree of capital, more immediately againſt the ſubject, not amounting to an actual diſturbance of the peace, which may be committed by private perſons without any relation to an office, and which are of an inferior nature to the ſix kinds of offences laſt treated of, being neither infamous nor groſly ſcandalous, ſeem to be reducible to the following heads; Firſt, Such as more immediately affect the publick. Secondly, ſuch as more immediately affect the intereſts of particular perſons.

Offences of this kind, more immediately affecting the publick, are four-fold; viz. Common nuiſances. Monopolies. Foreſtalling, ingroſſing, and regrating. And Barratry.

And firſt of common nuiſances. For the better underſtanding whereof I ſhall firſt conſider them in general, and then deſcend to thoſe relating to highways and publick houſes, which ſeem to be the moſt remarkable general heads of this offence.

As to common nuiſances in general I ſhall conſider, *Firſt*, What ſhall be ſaid to be a common nuiſance. *Secondly*, How it may be removed. *Thirdly*, How it may be puniſhed.

2 R. Abr. 83. *Sect.* 1. As to the firſt point it ſeems, That a common nuiſance may be defined to be an offence againſt the publick, either by doing a thing which tends to the annoyance of all the king's ſubjects, or by neglecting to do a thing which the common good requires.

2 R. Abr. 83. Co. Litt. 7. 56. *Sect.* 2. But annoyances to the intereſt of particular perſons are not puniſhable by a publick proſecution as common nuiſances, but are left to be redreſſed by the private actions of the parties aggrieved by them.

1 Sid. 209. Sayer 169. *Sect.* 3. 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

(a) fur-

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(a) surcharging such a common; or of (b) 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 (c) water-course running to the mill of *J. S. ad grave damnum J. S. & tenentium suorum*, without saying *omnium ligeorum Domini Regis*; or of doing a nuisance to a thing no way appearing to be of a publick nature, *ad grave (d) damnum*, or (e) *detrimentum*, or (f) *communne nocumentum omnium ligeorum Domini Regis prope inhabitantium*; yet it hath been resolved, that an indictment for not repairing a bridge by reason whereof it was ruinous, *ita quod ligei Domini Regis per eam transire non possunt*, and concluding, *ad nocumenium eorundem*, is good without using the words *ad nocumentum omnium ligeorum, &c.* for by the king's liege people shall be understood, all his liege people.

(a) 2 R. Ab. 83. 1 Burr. 259. 6 Modern 453. 2 Wilson 37.
(b) 27 Ass. 6. 2 R. Abr. 83. C. Eliz. 90.
(c) 2 R. Ab. 83. 1 Ventr. 26.
(d) 2 R. Ab. 83.
(e) 1 Mod. 107.
(f) 1 Roll. 406. 3 Keb. 28, 284. C Eliz. 414. C. Jac. 382. 1 Saund. 135. C. Eliz. 148. 2 Keble 461. 2 Leon. 183, 184. 9 Coke 113. 1 Ventris 208.

*Sect.* 4. Also it is said, That the law hath so tender a regard for the interest of the king and of religion, That an indictment for doing a thing which plainly appears immediately to tend to the prejudice of either of them, is good, though it does not expresly complain of it as a common grievance; and upon this ground it hath been resolved, That an indictment for converting the king's money to one's own use is good, without more. And upon the same foundation also it hath been holden, That an indictment for breaking and digging up the wall of the church of such a town, *ad nocumentum burgi ligeorum Domini Regis* is good.

27 Ass. 19, 20. 2 R. Abr. 83, 84.

*Sect.* 5. Also it hath been said, That an indictment of a common scold, by the words *communis rixatrix*, which seem to be precisely necessary in every indictment of this kind, is good, though it conclude *ad commune nocumentum diversorum* instead of *omnium, &c.* perhaps for this reason, because a common scold cannot but be a common nusance. And upon the like ground it seems that it may probably be argued, That an indictment for laying logs in the stream of a navigable publick river, *ad nocumentum J. S.* may be maintained, because, it cannot but be a common nusance. And if the law be so in this case, why should not also an indictment setting forth a nusance to a way, and expresly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude *in nocumentum diversorum ligeorum, &c.* without saying *omnium*; for why should such a conclusion be more necessary in an indictment for one kind of nusance than for any other? And perhaps the (g) 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 nusance was alledged, were

6 Mod. 11, 178, 213, 239, 311. Moor 847. Str. 849, 1247. Bar. K. B. 229. 2 Sess. Cas. 26. 2 Keble 410. 1 Keble 161. 13 Mod. 504, 615. 1 Roll. 201. Sayer 167, 301.

(g) C. Eliz. 148. 2 Keble 461. 2 R. Abr. 83. Latch. 183.

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were a highway, or only a private way; and therefor shall be intended from the concluſion of the indictme it was a private way.

3 Inſt. 205. Kitchen 11. 2 Burr. 1232. 1 Modern 76. 2 Keble 846. 3 Keble 464. 5 Modern 142. 3 Vent. 169. 10 Mod. 336. 12 Mod. 342.

*Sect.* 6. There is no doubt but that common bawdy are indictable as common nuſances; alſo it hath been ſaid common ſtages for rope-dancers, and alſo all common g houſes, are nuſances in the eye of the law, as hath be fully ſhewn in the foregoing chapter; not only beca are great temptations to idleneſs, but alſo becauſe they to draw together great numbers of diſorderly perſons cannot but be very inconvenient to the neighbour

1 Roll 109. 5 Mod. 142. See Ruſhworth's Coll. Part 2. Vol. 1 fol. 220, 247. Skin. 625 to 630.

N. B. For the offence of acting plays without licence Vide infra ch. 87.

*Sect.* 7. Alſo it hath been holden, That a common pla may be a nuſance, if it draw together ſuch numbers of or people, *&c.* as prove generally inconvenient to th adjacent; and it ſeems to be a proper diſtinction betwe houſes and the nuſances mentioned in the foregoing That play-houſes having been originally inſtituted wit dable deſign of recommending virtue to the imitation people, and expoſing vice and folly, are not nuſances own nature, but may only become ſuch by accident, as the others cannot but be nuſances.

(*a*) 2 R. Abr. 138, 139. 265. 2 Roll 4, 30. C. Jac. 382, 491. Moor 238. 1 Roll 36, 201. Poph. 143. Con. 5. Co. 104. (*b*) F. N. B. 2. c. (*c*) 16 E. 4. 7 b. Godb. 259. (*d*) Quære Moor 580, & 621. C. Eliz. 548.

N. B. For the nuſance of keeping pigeons, vide 1 Jac. 1. c. 27. and 2 Geo. 3. c. 29.

*Sect.* 8. It hath been reſolved, That neither an o new (*a*) dovecote, whether it were erected by the lo manor, or one of his tenants, is a common nuſance; dovecote were a common nuſance, it could never lawful by any licence or preſcription whatſoever, becau nuſance is a *malum in ſe*; but it is certain, that a do may be juſtified by a preſcription, and that it is ſo fa tenanced by the law, as to be (*b*) demandable in a *pra* fore any land whatſoever which is not built upon, a the owner may juſtify the taking another's (*c*) hawk he ſhall find at his dove-houſe, flying at his pigeons; from hence it ſeems clearly to follow, That though a who builds a dove-houſe without the licence of the lo manor, may perhaps be liable to an action on the ca ſuit of ſuch lord, whoſe prerogative is ſaid to be inc upon by the erecting ſuch a houſe without his licence cannot be puniſhed for it by a publick proſecution.

1 Jon. 221. C. Car. 184. 1 Bulſ. 203. 2 R. Abr. 137. Kit. 11, 23. St. 18 Ed. 2.

*Sect.* 9. But perhaps it may be argued, That if ſoning be good, it will follow from the ſame ground, gate erected in a highway will be alſo no nuſance; bec were, it could not be juſtified by any preſcription, as it i that it may be; but to this it may be anſwered, That th ing of ſuch a gate is therefore a nuſance becauſe it inter people in that free and open paſſage which they before

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id were lawfully intitled to; but where ſuch 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.

*Sect.* 10. It hath been holden, That it is no common nuſance to make candles in a town, becauſe the needfulneſs of them ſhall diſpenſe with the noiſomeneſs of the ſmell; but the reaſonableneſs of this opinion ſeems juſtly to be queſtionable, becauſe whatever neceſſity there may be that candles be made, it cannot be pretended to be neceſſary to make them in a town; and ſurely the trade of a brewer is as neceſſary as that of a chandler; and yet it ſeems to be agreed, That a brew-houſe, erected in ſuch an inconvenient place, wherein the buſineſs cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuſance; and ſo in the like caſe may a glaſs-houſe or ſwine-yard.

2 R. Abr. 139. Cont. 3 Mod. 138. Cro. Car. 510. Morley and Pragnell, 1 Bur. 336. 2 Keb. 500. Vide 1 Danv. 173, 174. Salk. 458, 460. Hutt. 136. Palmer 536. Ventris 26. 2 Ld. Ray. 1163.

*Sect.* 11. It ſeems certain, That it is a common nuſance to divert part of a publick navigable river, whereby the current of it is weakened, and made unable to carry veſſels of the ſame burthen, as it could before. Alſo it hath been holden to be a common nuſance to divide a houſe in a town for poor people to inhabit in, by reaſon whereof it will be more dangerous in the time of infection of the plague. (1)

Noy 103. 3 Keble 640, 759. 11 Modern 3. Fitz. 179. 2 R. Abr. 139. 1 Lut. 169.

(1) Or to make great noiſes in the night with a ſpeaking trumpet to the diſturbance of the neighbourhood, Str. 704. Or permitting a houſe near the highway to continue in a ruinous condition, Salk. 357. Or laying timber in a public river, although the ſoil on which it is laid belong to the party, provided it obſtructs the neceſſary intercourſe, 3 Bac. Ab. 686. Str. 1247. Or to place a floating dock in the river, although beneficial in repairing ſhips. Surry aſſizes at Kingſton, 1785. Or to travel with a cart on a common pack or horſeway, and by plowing it up to render the uſe of it inconvenient, 6 Mod. 145. Or to put a ſhip of 300 tons into Billingſgate Dock, for although it is a common dock, it is only for the reception of ſmall veſſels freighted with proviſions for the London market. 2 Hawk. c. 25. ſ. 35. Or to manufacture acid ſpirit of ſulphur, vitriol, or aqua fortis in the vicinity of dwelling houſes, 1 Burr. 333. Vide alſo 13 Ed. 1. c. 24. 12 Rich. 2. c. 13. 3 W. & M. ſ. 2. c. 8. 30 Geo. 2. c. 22, 31 Geo. 2. c. 17. reſpecting nuiſances in the cities of London and Weſtminſter,

But the fears of mankind, however reaſonable, will not create a nuſance, therefore it is no nuiſance to erect a building for the purpoſes of inoculation. 3 Atkyns 21. 726 750. Nor to lay bricks in the river Thames, in the party's own fiſhery, 3 Burr. 1770. Nor to violate a public law, Black. Rep. 570. Nor to ſtop up a proſpect, 3 Salk. 247. 459. Cro. Eliz. 118. And whether corn ney burrows are a nuſance. See 1 Burr. 259. 6 Mod. 453. See alſo 11 Mod. 7. and 8.

† It is enacted by 9 & 10 Will. 3. c. 7. "That it ſhall not be lawful for any perſon to make or cauſe to be made, or to ſell or utter, or offer or expoſe to ſale any fire-works, or any caſes, moulds or implements for making the ſame, on pain of 5 *l.* on conviction before one magiſtrate, on the oath of two witneſſes. Or for any perſon to permit or ſuffer fireworks to be caſt, thrown, or fired from

Of nuſances in making fire-works.

"out

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" out of or in his, her or their houſe, lodgings or habita-
" tions, or from, out of, or in any part or place thereto
" belonging or adjoining, into any publick ſtreet, highway,
" road, or paſſage, on pain of 20*s.* on conviction as afore-
" ſaid. Or for any perſon to caſt, throw, or fire, or to be
" aiding or aſſiſting therein, on pain of 20*s.* and that every
" ſuch offence is and ſhall be adjudged a common nuſance."

Of nuſances by erecting lotteries, &c.

† It is alſo enacted by 10 & 11 Will. 3. c. 17. " That
" all miſchievous games called lotteries, and all other lotteries,
" are common and public nuſances; and that all grants, pa-
" tents and licences for ſuch lotteries or any other lotteries
" are void and againſt law; and whoever ſhall exerciſe, keep
" open, ſhew or expoſe to be played at, drawn at or thrown
" at, or ſhall draw, play or throw at any ſuch lottery or
" other lotteries either by dice, lots, cards, balls or any other
" numbers or figures, or any way whatſoever, ſhall forfeit
" 500*l.* for every offence, one third to the king, one third to
" the poor, and the other third, together with double coſts, to
" the party that ſhall inform and ſue for the ſame, and the
" parties ſhall alſo be proſecuted as common rogues. And
" whoever ſhall play throw or draw at any ſuch lotteries ſhall
" forfeit 20*l.* in manner aforeſaid."

Of nuſances by bubbling the publick.

† It is alſo enacted by 6 Geo. 1. c. 18. ſ. 19. " That all
" undertakings, attempts, and projects by publick ſub-
" ſcriptions, for adventuring in certain ſchemes of com-
" merce, tending to the common grievance, of his majeſty's
" ſubjects or a great number of them, and the receiving and
" paying of any money upon ſuch ſubſcriptions, &c. and
" more particularly the preſuming to act as a body corpo-
" rate, or to raiſe transferrable funds, or pretending to act
" under any charter formerly granted from the crown for
" any particular or ſpecial purpoſe therein expreſſed, by per-
" ſons making or endeavouring to make uſe of ſuch charter,
" for any ſuch other purpoſe not thereby intended, and all
" acting or pretending to act under any ſuch obſolete char-
" ter, &c. &c. ſhall be deemed a publick nuſance and nu-
" ſances, the offenders made liable to ſuch fines penalties and
" puniſhments as are inflicted on a conviction for common
" and publick nuſances, and moreover to the further pains
" and penalties of *premunire*."

2 R. Abr. 44. C. Car. 184. 1 Jon. 221. 11 Modern 7, 8. Moor 374. 2 R. Abr. 145. Salkeld 459.

*Sect.* 12. As to the ſecond point, viz. How a nuſance may be removed; it ſeemeth to be certain, That any one may pull down or otherwiſe deſtroy a common nuſance, as a new gate, or even a new houſe erected in a highway, &c. for if one whoſe eſtate is, or may be, prejudiced by a private nuſance actually erected, as a houſe hanging over his ground,

or

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or ſtopping his lights, &c. may juſtify the entring into another's ground, and pulling down and deſtroying ſuch a nuſance, whether it were erected before or ſince he came to the eſtate, ſurely it cannot but follow *à fortiori*, that any one may lawfully deſtroy a common nuſance: and as the law is now holden, it ſeems, that in a plea, juſtifying the removal of the nuſance, you need not ſhew that you did as little damage as might be. (*a*)

Yelverton 142. Ld. Raym. 264. 5 Coke 101. 9 Coke 54. Burrows 2156. 1 Roll. 9, 35. B. Nis. 14. 1 Jon. 221. Salkeld 458.

(*a*) Quære, vide Cooper v. Marſhal, 1 Burrow 259, and Rex v. Pappineau. Strange 686.

*Sect.* 13. It hath been adjudged, that if a river be ſtopped, to the nuſance of the country, and none appear bound by preſcription to clear it, thoſe who have the piſcary, and the neighbouring towns, who have a common paſſage and eaſement therein, may be compelled to do it.

37 Aſſ. 18. 2 R. Abr. 137.

*Sect.* 14. As to the third point, viz. In what manner common nuſances may be puniſhed. It is ſaid, (*b*) that a common ſcold is puniſhable by being put into the ducking-ſtool; and there is no doubt, but that whoever is convicted of another nuſance, may be fined and impriſoned. And it is ſaid, That one convicted of a nuſance, done to the king's highway may be commanded by the judgment to remove the nuſance at his own coſts; and it ſeemeth to be reaſonable, That thoſe who are convicted of any other common nuſance ſhould alſo have the like judgment.

(*b*) 6 Mod. 149, 178, 213. 2 R. Abr. 84. 2 Seſſ. Caſ. 39. Vide Strange 686. Rex v. Pappineau, and the caſes there cited.

## CHAPTER THE SEVENTY-SIXTH.

## OF NUSANCES RELATING TO HIGHWAYS.

AND now I am particularly to conſider ſuch nuſances as relate to highways, and publick houſes. And for the better underſtanding of thoſe which concern highways I ſhall conſider: Such as relate to highways in general. And Such as relate to bridges in particular.

For the better underſtanding of nuſances relating to highways in general, I ſhall examine the following particulars:

1. What ſhall be ſaid to be a highway.
2. At whoſe charge and by whom it ought to be repaired.
3. In what manner it is to be inlarged.
4. How the ſurveyors thereof ſhall be appointed.

5. How

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5. How ſuch ſurveyors ought to execute their office.
6. What ſhall be ſaid to be a nuſance to the highway.
7. How ſuch nuſances are to be removed and puniſhed.
8. In what manner thoſe who are charged with any offence relating to the highway, are to be proceeded againſt.
9. How perſons ſo proceeded againſt may defend themſelves.

As to the firſt point, viz. What ſhall be ſaid to be a highway, it is ſaid that there are three kinds of ways: *Firſt*, a footway, which is called in Latin, *iter*. *Secondly*, a pack and prime-way, which is both a horſe and foot-way, and called in Latin, *actus*. *Thirdly*, a cart-way, which contains the other two; and alſo a cart-way, and is called in Latin, *via* or *aditus*, and this is either common to all men, and then it is called, *via regia*, or belongs to ſome city or town, or private perſon, and then it is called, *communis ſtrata*.

Co. Lit. 56. *Communis ſtrata* and *alta via regia* are ſynonimous terms. Str. 44. 10 Modern 383. Andrews 143.

*Sect.* 1. It ſeemeth that any one of the ſaid ways, which is common to all the king's people, whether it lead directly to a market-town, or only from town to town, may properly be called a highway, and that any ſuch cart way may be called the king's highway, and that a nuſance in any of the ſaid ways is puniſhable by indictment in the court-leet; for indictments for (*a*) ſtopping horſeways, and (*b*) footways, have often been allowed, and where others have been quaſhed, no other reaſon has been given for it, but that the way was not called a common way or highway; and in (*c*) books of the beſt authority, a river common to all men is called a highway; and it is laid (*d*) down as a general rule, That nuſances to any way common to all men, are inquirable in the leet, and horſe-cauſeys are taken notice of by (*e*) parliament; and therefore there ſeems to be no reaſon why any way leading from village to village, which does not terminate there, but is alſo a thoroughfare to other towns, may not properly be called a common or highway, or why a nuſance therein ſhould not be indictable, whether it directly leads to a market-town or not; for ſince ſuch a way lies open to all the king's ſubjects, a nuſance therein (*f*) cannot but be a common nuſance, and if it be not puniſhable by indictment it would not be puniſhable at all, inaſmuch as it (*g*) ſeems to be certain, That it is not puniſhable by action, becauſe if one man might bring his action in reſpect of the poſſibility of the damage which he might receive from it, all other men may do the like, which would introduce a multiplicity of actions; and therefore the diſtinction which is taken in ſome (*h*) books concerning this matter, ſeems to be very reaſonable, That every way from town to town may be called a highway, becauſe it is common to all the king's ſubjects,

Palm. 389. 6 Modern 255. B. R. H. 315.

(*a*) C. Eliz. 63.
(*b*) 1 Vent. 208. 2 Keble 178. 3 Keble 26. 6 Modern 255.
(*c*) 27 Aſſ. 23. Fitzh. 279. 2 Com. Dig. 307.
(*d*) Co. Lit. 56. 5 Ed. 4 2.
(*e*) 3 & 4 W. & M. 12. 4 Burr. 2091.

(*f*) Kitchen 35. Palmer 389. 2 Roll. 412.

(*g*) Moore 180. Cro. E. 664. Co. Lit. 56. 27 H. 8. 27.

(*h*) 1 Vent. 189. Kitchen 35. 1 Vent. 203. 3 Keble 28. Ld. Raym. 1174 Salkeld 359.

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ſubjects, but that a way to a pariſh-church, or to the common fields of a town, or to a private houſe, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of ſuch pariſh, houſe, or village only, may be called a private way, but not a highway, becauſe it belongeth not to all the king's ſubjects, but only to ſome particular perſons, each of which, as it ſeems, may have an action on the caſe for a nuſance therein. (1) Co. Lit. 56.

(1) A ſtreet built upon a perſon's own ground, is a dedication of the highway ſo far only as the publick has occaſion for it, viz. for a right of paſſage, and is not to be underſtood as a tranſfer of the abſolute poſſeſſion of the ſoil. Strange 1004.

*Sect.* 2. It hath been holden, that if there be a highway in an open field, and the people have uſed, time out of mind, when the ways are bad, to go by outlets on the land adjoining, ſuch outlets are parcel of the way; for the king's ſubjects ought to have a good paſſage, and the good paſſage is the way, and not only the beaten track; from whence it follows, That if ſuch outlets be ſown with corn, and the beaten track be founderous, the king's ſubjects may juſtify going upon the corn. (2) 1 R. Abr. 390. Cro. Car. 366. Douglas 746 to 749.

(2) So if one grants me a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not paſſable, or becomes very bad, by the owner of the land tearing it up with his carts, ſo that the ſame be filled with water; yet he who has the way cannot dig the ground to let out the water, for he has no intereſt in the ſoil. Godb. 52, 53. But in ſuch caſe he may bring his action againſt the owner of the land for ſpoiling the way, or *perhaps* he may go out of the way, upon the land of the wrong doer, as near to the bad way as he can. But where a private way is ſpoiled by thoſe who have a right to paſs thereon, and not through the default of the owner of the land; it ſeems that they who have the uſe and benefit of the way ought to repair it, and not the owner of the ſoil, unleſs he is bound thereto by cuſtom or ſpecial agreement. 2 Burr. 382. So if I have a private way without a gate, and a gate is hung up, an action lies upon the caſe, for I have not my way as I had before. Litt. R. 267.

*Sect.* 3. It ſeemeth to be agreed, That an ancient highway cannot be changed without the king's licence firſt obtained upon a writ of *ad quod damnum*, and an inquiſition thereon found, That ſuch a change will not be prejudicial to the publick; and it is ſaid, that if one change a highway without ſuch authority, he may ſtop the new way whenever he pleaſes; and it ſeemeth, That the king's ſubjects have not ſuch an intereſt in ſuch new way as will make good a general juſtification of their going in it as in a common highway; but that in an action of treſpaſs brought by the owner of the land againſt thoſe who ſhall go over it, they ought to ſhew eſpecially, by way of excuſe, how the old way was obſtructed, and the new one ſet out; alſo it is ſaid, That the inhabitants are not bound to keep watch in ſuch new way, or to make amends for a robbery therein committed, or to repair it. C. Car. 266, 267. Vaugh 341. 1 Burr. 465. Vide Note (3) infra. C. Car. 267. Yelv. 141, 142.

*Sect.*

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C. Car. 267. 2a Aſſize 93. 3 R. Abr. 390. Vide Taylor v. Whitbread, Douglas 745.

*Sect.* 4. However it is certain, That a highway may be changed by the act of God; and therefore it hath been holden, That if a water which has been an ancient highway, by degrees changes its courſe, and goes over different ground from that whereon it uſed to run, yet the highway continues in the new channel, in the ſame manner as in the old. (3)

(3) An owner of land over which there is an open road may incloſe it by his own authority, but he is bound to leave ſufficient ſpace and room for the road, and he is obliged to repair it till he throws up the incloſure. But if *he* alter or change the road by the legal courſe of a writ of *ad quod damnum*, he is not obliged to repair the new road, unleſs the jury impoſe ſuch a condition upon him; for otherwiſe it ſtands juſt as it did before. Even though it was at firſt open and ſhould be directed by the jury to be incloſed.—And a private act of parliament for incloſing lands, which gives a power in commiſſioners to ſet out new roads by their award is equally ſtrong as to theſe conſequences as a writ of *ad quod damnum*. 1 Burr. 465.

As to the ſecond point, viz. At whoſe charge, and by whom the highway ought to be repaired, I ſhall conſider, What proviſion is made by the common law concerning this matter; and, What by ſtatute.

(a) 1 R. Abr. 390. (b) March 26. 1 Vent. 90, 183, 189. Sum. 144. 3 H. 7. 5. Ld. Raym. 725.

*Sect.* 5. As to the firſt of theſe particulars, it ſeems to be agreed, That of common right, the general charge of repairing all highways lies on the occupiers of the lands in the pariſh wherein they are; but it is ſaid, That the tenants of the lands adjoining are bound to ſcowr their ditches, and there is no doubt but particular perſons may be burthened with the general charge of repairing the highway in two caſes: viz. In reſpect of an incloſure of the land wherein it lies. And In reſpect of a preſcription.

1 R. Abr. 390. Cr. Car. 366. 1 Siderfin 464. Sed Vide 1 Burr. 461 to 466, *contra*. Ld. Raym. 1170

*Sect.* 6. And firſt a particular perſon may be bound to repair a highway in reſpect of an incloſure; as where the owner of lands not incloſed, next adjoining to the highway, incloſes his lands on both ſides thereof, in which caſe he is bound to make a perfect good way, and ſhall not be excuſed for making it as good as it was at the time of the incloſure, if it were then any way defective, becauſe, before the incloſure, the people uſed, when the way was bad, to go for their better paſſage, over the fields adjoining, out of the common track, which liberty is taken away by the incloſure.

1 Siderfin 464.

*Sect.* 7. Alſo it hath been holden, That if one incloſe land on one ſide, which hath been anciently incloſed of the other ſide, he ought to repair all the way, but that if there be not ſuch an ancient incloſure of the other ſide, he ought to repair but half that way: and it is ſaid, That where ever one is bound to repair a highway in reſpect of an incloſure, and

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lays it open again as it was before, he ſhall be freed from the charge of repairing it. (4)

(4) So in a writ of *ad quod damnum*, and inquiſition found thereupon, after the perſon hath once made the road, (and N. B. it is not neceſſary the whole new road ſhould go through his own ſoil,) the pariſhioners ought to keep it in repair; becauſe being diſcharged from the repairing of the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another pariſh, the perſon who ſued out the writ, and his heirs ought to keep it in repair; becauſe the inhabitants of the other pariſh gaining no benefit from the old road being taken away, it would be impoſing a new charge upon them, for which they enjoyed no compenſation. 3 Atk. 772.

*Sect.* 8. Secondly, A particular perſon may be bound to repair a highway in reſpect of a preſcription; (*a*) and it is ſaid, That a corporation aggregate may be compelled to do it by force of a general preſcription, That it ought and hath uſed to do it, without ſhewing that it uſed to do ſo in reſpect of the tenure of certain lands, or for any other conſideration, becauſe ſuch a corporation in judgment of law never dies, and therefore, if it were ever bound to ſuch a duty, it muſt needs continue to be always ſo; neither is it any plea, That ſuch corporation have always done it out of charity; for what it hath always done, it ſhall be preſumed to have been always bound to do; but it is ſaid, That a perſon cannot be charged with ſuch a duty by a general preſcription from what his anceſtors have done, becauſe no one is bound to do what his anceſtors have done, unleſs it be for ſome ſpecial reaſon, as the having land deſcended from ſuch anceſtors, which are holden by ſuch like ſervice, &c. yet it ſeems, That an indictment charging a tenant in fee-ſimple with having uſed of right to repair ſuch a way *ratione tenuræ terræ ſuæ*, is certain enough, without adding, That his anceſtors, or thoſe whoſe eſtate he hath, have always ſo done, for that is implied in ſaying, That he has always uſed to do it *ratione tenuræ ſuæ*. Alſo an occupier, as ſuch, though at will only, is indictable for ſuffering a houſe ſtanding upon the highway to be ruinous, &c. and the words *ratione tenuræ*, &c. if added, are ſurplus.

(*a*) Where the original of a way is accounted for, the preſcription is deſtroyed. Strange 909. 2 Saund. 160. 27 Aſſize 8. 21 Ed. 4. 38. Brook Preſcription 49, 78. Far. 54, 55. 21 Ed. 4. 31. A perſon indicted for not repairing roads *ratione tenuræ* ſhall pay coſts to the proſecutor. 1 Black. 601. See Vide Black. K. v. Cheſhunt contra. Kellw. 52. a. Latch. 206. 3 Salk. 77, 381. 6 Modern 150, 190, 255. Salk. 357. a.

*Sect.* 9. However it ſeemeth certain, That whether a particular perſon be bound to repair a highway by incloſure, or preſcription, &c. yet the pariſh cannot take advantage of it upon the plea of Not guilty to an indictment againſt them for not repairing it, but ought to ſet forth their diſcharge in a ſpecial plea. (5)

1 Mod. 112. 3 Keble 301. 1 Ventris 256. 10 Mod. 150, 382. 12 Modern 15. 198, 409. Ld. Ray. 725, 922, 1162. Strange 179.

(5) The repair of highways lies, of common right, upon the whole pariſh. But if a pariſh lies in two diſtinct counties, an indictment may be brought againſt that part of the pariſh in which the ruinous road lies. 4 Burr. 2511. But it muſt appear upon the face of the indictment by what right the charge is laid upon the particular diviſion of any pariſh which is in one county only. 5 Burr. 2702. As that they have repaired time out of mind. Andr. 276. B. R. H. 259.

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*Sect.* 10. AND now I am to conſider in the ſecond place, at whoſe charge, and by whom the highway ought to be repaired by force of THE STATUTE.

For the better underſtanding whereof, I ſhall examine: Firſt, Who are by ſtatute compellable to work in the repairs thereof in their own perſons, or by others. Secondly, Who may be aſſeſſed to a rate made for the defraying of the extraordinary charges of ſuch repairs. Thirdly, What other proviſions have been made to this purpoſe Fourthly, In what manner the profits of lands ſettled in truſt for the repairs of the highways ſhall be imployed.

Statute duty.

N. B. By 13 Geo. 3. c. 84, ſ. 60. the ſame powers are given to the ſurveyor of turnpike roads, with the conſent of the truſtees.

† As to the firſt point, It is enacted by 13 Geo. 3. c. 78. par. 34. "That the ſurveyor to be appointed, as hereafter men- "tioned, together with the inhabitants (6) and occupiers of "lands, tenements, woods, tithes, and hereditaments, within "each pariſh, townſhip, or place, ſhall at proper ſeaſons in "every year, uſe their endeavours for the repair of the high- "ways, and ſhall be chargeable thereunto, as followeth: "Every perſon keeping a waggon, cart, wain, plough, or "tumbrel, and three or more horſes or beaſts of draught "uſed to draw the ſame, ſhall be deemed to keep a team, "draught, or plough, and be liable to perform ſtatute- "duty with the ſame, in the pariſh, townſhip, or place, "where he reſides, and ſhall, ſix days (7) in every year, (if ſo "many days ſhall be found neceſſary) to be computed from "Michaelmas to Michaelmas, ſend on every day, and at "every place, to be appointed by the ſurveyor for the "amending the highways in ſuch pariſh, townſhip, or place, "one wain, cart, or carriage, furniſhed after the cuſtom "of the country, with oxen, horſes, or other cattle, and "all other neceſſaries fit to carry things for that purpoſe, "and alſo two able men with ſuch wain, cart, or carriage; "which duty ſo performed, ſhall excuſe every ſuch perſon "from his duty in ſuch pariſh, townſhip, or place, in re- "ſpect of all lands, tenements, woods, tithes, or heredita- "ments, not exceeding the annual value of fifty pounds, which "he ſhall occupy therein. And every perſon keeping ſuch "team, draught, or plough, and occupying in the ſame "pariſh, townſhip, or place, lands, tenements, woods, tithes, "or hereditaments of the yearly value of fifty pounds, "over and beyond the ſaid yearly value of fifty pounds, in "reſpect whereof ſuch team-duty ſhall be performed; and "every ſuch perſon occupying to the yearly value of fifty "pounds in any other pariſh, townſhip, or place, beſides "that wherein he reſides, and every other perſon not keep- "ing a team, draught, or plough, but occupying to the "yearly value of fifty pounds, in any pariſh, townſhip, or "place, ſhall, in like manner reſpectively, and for the "ſame number of days, find and ſend one wain, cart, or car- "riage, furniſhed with not leſs than three horſes, or four "oxen and one horſe, or two oxen and two horſes, and two "able

(6) The inhabitants of a pariſh into which a road is turned by turnpike truſtees, are not bound to do ſtatute work thereon 1 Black. 603.

(7) The appointment of the ſix days work muſt ſpecify the particular days. Ld Raym. 858.

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" able men to each wain, cart, or carriage; and in like " manner for every fifty pounds *per annum* reſpectively, which " every ſuch perſon ſhall further occupy, in any ſuch pariſh, " townſhip, or place reſpectively; ſuch wains, carts, or car- " riages, to be employed by the ſurveyor in the repairing and " amending the highways within the pariſh, townſhip, or " place, where ſuch lands, tenements, woods, tithes or " hereditaments, ſhall reſpectively lie; and every perſon " who ſhall not keep a team, draught, or plough, but ſhall " occupy under the yearly value of fifty pounds, in the " pariſh, townſhip, or place where he reſides, or in any " pariſh, townſhip, or place; and every perſon keeping a " team, draught, or plough, and occupying under the yearly " value of fifty pounds, in any other pariſh, townſhip, or " place, than that wherein he reſides, ſhall reſpectively con- " tribute to the repair of the highways, and pay to the ſur- " veyor of ſuch pariſh, townſhip, or place reſpectively, in lieu " of ſuch duty, the ſums following; *viz.* For every twenty " ſhillings of the annual value of ſuch lands, tenements, " woods, tithes, or hereditaments reſpectively, the ſum of " one penny for every day's ſtatute-duty which ſhall be re- " quired and called for by the ſurveyor of ſuch pariſh, " townſhip, or place reſpectively, in every year not exceeding " ſix days duty in the whole, as aforeſaid; and every ſuch " perſon reſpectively ſhall, in like manner, pay the ſum of " one penny for every twenty ſhillings of the annual value " which he ſhall occupy in any ſuch pariſh, townſhip, or " place reſpectively, above the annual value of fifty pounds, " and leſs than one hundred pounds, and ſo for every " twenty ſhillings that each progreſſive and intermediate " annual value of twenty ſhillings, which he ſhall ſo oc- " cupy, ſhall fall ſhort of the further increaſe of fifty " pounds, in every pariſh, townſhip, or place, where ſuch " lands, tenements, woods, tithes, and hereditaments, ſhall " reſpectively lie, for every day's ſtatute-duty ſo to be " required as aforeſaid; which ſaid ſeveral ſums ſhall be " conſidered as compoſitions, and ſhall be paid to the ſur- " veyor of the pariſh, townſhip, or place, in which they " are charged, for the uſe of the highways therein, at the " time ſuch compoſitions are to be paid under the authority " of this act, or within ten days after; or in default of " ſuch payments, ſuch money ſhall be levied by diſtreſs, " and ſale of the goods and chattels of the perſon or per- " ſons refuſing to pay the ſame, in ſuch manner as the for- " feitures for the neglect in performing the ſtatute-duty are " hereby authoriſed to be levied and raiſed: Provided, that " no perſon keeping ſuch team, draught, or plough, and per- " forming the duty with the ſame, as aforeſaid, in the pariſh, " townſhip, or place, where he reſides, and not occupying " within the ſame, to the yearly value of thirty pounds, ſhall " *be obliged to ſend more* than one labourer, with ſuch " *team, draught, or plough.*"

Contribution money.

How the contributions are to be received.

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The duty required from persons who do not keep a team, but keep one or two horses used to draw, or who keep a coach, post-chaise, &c.

† *Sect.* 11. And it is further enacted by the said statute, par. 35. "That every person who shall not keep a team, draught "or plough, but shall keep one or more cart, or carts, and, "one or two horses or beasts of draught only, used to draw in "each of such carts upon the highways, shall be obliged to "perform his statute-duty for the like number of days with "such cart or carts, and horse or horses, or beasts of draught, "and one labourer to attend each cart, or to pay for the lands, "tenements, woods, and hereditaments, which he shall oc-"cupy, according to the rate aforesaid, at the option of the "surveyor; and every person who shall keep a coach, post-"chaise, chair, or other wheel-carriage, and not keep a team, "draught, or plough, nor occupy lands, tenements, woods, "tithes, or hereditaments, of the annual value of fifty pounds, "in the parish, township, or place where he shall reside, shall "pay to the surveyor one shilling in respect of every such "day's statute-duty, for every horse which he shall draw "in any such carriage, or shall pay according to the value "which he shall occupy, according to the rate aforesaid, at "the option of the surveyor; and also every man inhabiting "in any parish, township, or place, and being of the age of "eighteen, and under the age of sixty years, not chargeable "in any of the respects aforesaid for lands, tenements, woods, "tithes, or hereditaments, of the yearly value of four pounds, "or upwards, and not being *bona fide* an apprentice or menial "servant, nor having performed the said duty, or paid the "composition for the same, in any other parish, township, or "place, for that year, shall, by themselves, or one sufficient "labourer for every of them, upon every of the said days on "which they shall be called forth by the said surveyor, to-"gether with the said other labourers, work and labour in "the amendment of the said highways, as they shall be di-"rected by such surveyor; and if the said teams, draughts, "or ploughs, or any of them, shall not be thought needful "by the surveyor on any of the said days, then every such "person who should have sent any such team, draught, or "plough, according to the directions aforesaid, shall, accord-"ing to the notice to be given, as herein after directed, send "unto the said work, for every one so spared, three able men, "there to labour as aforesaid, or to pay to the said surveyor "four shillings and sixpence in lieu thereof; and all such per-"sons as aforesaid shall respectively have and bring with them "such shovels, spades, picks, mattocks, and other tools and "instruments as are useful and proper for the purposes afore-"said; and all the said persons and carriages shall diligently "perform the work and labour to which they shall be ap-"pointed by such surveyor for eight hours in every of the said "days, within such parish, township, or place, or in getting "and carrying materials in and from any other parish, town-"ship, or place, to be employed in the repair of the highways "of the parish, township, or place, for which they shall be "required

Labour from occupiers of less than 4 *l. per annum.*

Three men to be sent, or 4 *s.* 6 *d.* to be paid.

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" required to perform such duty and labour as aforesaid: And " if any person sending a team, as aforesaid, shall not send a " sufficient labourer besides the driver, (except as herein before " mentioned); or if any such labourer, or driver, or any other " labourer, or the driver of any cart, required by this act to " perform statute-duty as aforesaid, shall refuse to work and " labour, during the time above-mentioned, according to the " direction of the surveyor; or if any driver shall refuse to " carry proper and sufficient loads; it shall and may be law- " ful for such surveyor to discharge every such team, cart, or " labourer, and to recover from the owner of every such " team or cart the forfeiture which every such person or per- " sons would have incurred by virtue of this act, in case no " such team, cart, or labourer respectively, had been sent." The hours of working, &c.

† *Sect.* 12. It is also further enacted by the above-mentioned statute, par. 36. " That the surveyor, where the employment " for teams is of such sort that two horses will be sufficient " for one cart, or where a stand cart with one horse shall be " necessary, shall call upon any person liable to send a team, " draught, or plough, by virtue of this act, who keeps one " or more cart or carts, and three or more horses, to send " such cart or carts, horse or horses, to perform his statute- " duty, as the surveyor shall find most convenient, and shall " direct; and the surveyor shall allow every such stand cart " and one horse as half a team, and every cart and two hor- " ses as two-thirds of a team; and if a waggon shall be found " necessary for any particular business, the surveyor may re- " quire the duty, or any part thereof, to be performed with " such waggon, by any person who keeps one; which direc- " tions of the surveyor shall be observed, or the person liable " to perform such duty shall forfeit such sum as the duty so " required of him shall bear, in proportion to the forfeiture " hereby inflicted for every neglect in performing duty with " a team, draught, or plough." Part of a team may be called for.

† And further by par. 37. " Every such surveyor shall, " from time to time, give to, or cause to be left at the " house or usual place of abode of every person or persons " so liable to perform such duty or labour, as in this act di- " rected, four days notice at the least of the day, hour, and " place, upon which each of the said day's duty shall be " required to be performed; and every person or persons " making default in finding and sending each wain, cart, or " carriage, furnished as aforesaid, and such able men with " the same, as herein required, or in performing the said duty " at the time and place, and in the manner, by this act di- " rected, shall, for every such default or neglect in sending " such wain, cart, or carriage, with such men as aforesaid, " forfeit the sum of ten shillings; and for every default in " *sending every cart with* one horse and one man, three Notice and forfeiture.

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The ſurveyor to be impartial.

" ſhillings; and for not ſending every cart with two horſes " and one man, five ſhillings: and every perſon or perſons " making default in ſending any ſuch labourer, and every per- " ſon making default in performing ſuch labour, at the time and " place, and in the manner directed by this act, or in paying " ſuch compoſition-money for the ſame, as herein mentioned, " ſhall, for every ſuch neglect, forfeit the ſum of one ſhilling " and ſixpence; all which forfeitures ſhall be applied for the " uſe of the highways within the pariſh, townſhip, or place, " where the ſame ſhall ariſe; and the ſaid ſurveyor ſhall fairly " and equally demand and require ſuch duty and labour from " every perſon or perſons liable to perform the ſame, according " to the directions of this act, without favour or partiality to " any perſon or perſons whomſoever: and if in any pariſh, " townſhip, or place, it ſhall not be neceſſary to call forth the " whole duty in any year, it ſhall be abated in a juſt and " equal proportion amongſt all perſons liable to the ſame; " and the ſaid ſurveyor may and ſhall, and he is hereby re- " quired, with all convenient ſpeed, after default made in per- " formance of ſuch duty or labour as aforeſaid, to proceed for " the recovery of the penalties or forfeitures hereby inflicted " for the ſame reſpectively, in manner herein-after directed, " ſo that the ſame may be recovered before he makes up his " accounts in the manner directed by this act."

Application of the forfeitures.

Compounding.

† *Sect.* 13. But it is alſo further enacted by par. 38. " That " any perſon or perſons liable to perform the ſaid duty, by " ſending one or more team or teams, draught or draughts, " plough or ploughs, with men, horſes, or oxen, in manner " aforeſaid, ſhall and may compound for the ſame, if he, ſhe, or " they, ſhall think fit, by paying to the ſaid ſurveyor, at the " time, and in the manner, herein after mentioned, ſuch ſum " or ſums of money as the juſtices of the peace for the limit " wherein ſuch pariſh, townſhip, or place, ſhall be, or the " major part of them, at their ſaid ſpecial ſeſſions, to be held " in the firſt week after *Michaelmas* quarter ſeſſions in every " year, ſhall adjudge and declare to be reaſonable, not ex- " ceeding ſix ſhillings, nor leſs than three ſhillings, for each " team, draught, or plough, for each day; and in default of " their adjudging and declaring the ſame, the ſum of four " ſhillings and ſix pence for and in lieu of ever ſuch day's " duty for each team, draught, or plough; and for every cart " and one horſe or beaſt of draught, two ſhillings; and for " every cart with two horſes or beaſts of draught, three ſhil- " lings, for and in lieu of every day's duty; and every inhabi- " tant liable to perform ſuch duty or labour, as aforeſaid, and " not chargeable in any other reſpect, as aforeſaid, ſhall and may " compound for the ſame, if he, ſhe, or they, ſhall think fit, " by paying to the ſurveyor the ſum of four-pence for and in " lieu of every ſuch day's duty or labour reſpectively, at the

" time,

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" time, and in the manner, herein-after directed for the pay-
" ment of compoſition-money.

† Provided by par. 39. " That if it ſhall appear to the juſ- Power of juſtices to direct duty in any part cular parish, &c.
" tices, at their ſpecial ſeſſions, to be held in the week next
" after *Michaelmas* quarter ſeſſions, that, from the directions
" herein before given for the performing and compounding
" the ſtatute-duty, there will be difficulty in procuring the
" neceſſary carriages, or a ſufficient number of labourers, for
" the repair of the highways, in any particular pariſh, town-
" ſhip, or place, within their reſpective limits, without pay-
" ing high and extravagant prices for the ſame, it ſhall and
" may be lawful for ſuch juſtices to order and direct the team-
" duty hereby required, or ſo much thereof as they ſhall think
" fit, to be performed in kind, within every ſuch pariſh,
" townſhip, or place, except in reſpect of ſuch teams as be-
" long to perſons who do not occupy lands, tenements,
" woods, tithes, or hereditaments, of the annual value of
" thirty pounds within the ſame; and alſo to order the la-
" bourers, liable by this act to perform or compound for ſta-
" tute-duty, or ſuch part of them as they ſhall think fit, to
" perform ſix days labour upon ſuch highways in kind, in caſe
" ſo many days duty ſhall be required, upon being paid for
" ſuch labour the uſual and cuſtomary wages given to la-
" bourers in ſuch pariſh, townſhip, or place, deducting there-
" out the ſum of four-pence for each day's duty ſo perform-
" ed, being the compoſition hereby allowed for labourers;
" provided, that if part of ſuch teams or labourers only are
" required, it ſhall be directed by the ſaid order of the juſtices
" in ſome given proportion, as one half, third, or fourth part
" thereof; and the ſurveyor ſhall, in that caſe, at a publick
" veſtry for ſuch pariſh, townſhip, or place, put the names
" of all the perſons liable by this act to ſend ſuch teams into
" one hat or box, and the names of all the perſons liable to
" perform ſuch labour, into another hat or box, and ſome in-
" habitant then preſent ſhall draw out ſuch number from each
" as ſhall be equal to the proportion ſo ordered by the ſaid
" juſtices, and the perſons ſo drawn ſhall perform ſuch duty
" in kind for that year; and that if any ſuch order ſhall be
" made or continued in the ſubſequent year, the ſame method
" ſhall be obſerved, but the names drawn in the preceding
" year ſhall not be put into ſuch hat or box; and in every ſuc-
" ceeding year ſuch method and regulation ſhall be obſerved
" by ſuch ſurveyor, as to render the duty ſo required to be
" performed in kind as equal amongſt the ſeveral perſons liable
" thereto as may be: which order of the ſaid juſtices, ſo far
" as the ſame ſhall be extended, ſhall ſuperſede the ſaid power
" or liberty of compounding, and ſhall be binding and effec-
" tual to all intents and purpoſes whatſoever, and ſhall con-
" tinue in force until it ſhall be diſcharged or varied by the

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" juſtices at ſome ſubſequent ſpecial ſeſſions for the highways " within ſuch limit, to be held in the week next after *Mi-* " *chaelmas* quarter ſeſſions.

Power of mitigation.

† It is alſo further enacted by par. 40. " That where any " perſon ſhall keep a team, draught, or plough, and ſhall " not occupy lands, tenements, woods, tithes, or heredita- " ments, to the value of thirty pounds *per annum*, in the pa- " riſh, townſhip, or place, where he ſhall reſide, but ſhall in " part maintain his horſes and beaſts of draught uſed in ſuch " team upon or from lands which he ſhall occupy in one or " more adjacent pariſh or pariſhes, it ſhall and may be law- " ful for the ſaid juſtices, at ſome ſpecial ſeſſions, to mitigate " and reduce the duty or compoſition ſo required to be per- " formed or paid by ſuch perſon or perſons, in ſuch manner, " and to ſuch ſum, as they ſhall think juſt and reaſonable.

Surveyors to give notice of the time and place for compounding.

† Provided, par. 41. " That the ſaid ſurveyor of every pariſh " townſhip, or place, ſhall, on ſome *Sunday* in *November* in every " year, cauſe ten days notice at the leaſt to be given in the " church or chapel of ſuch pariſh, townſhip, or place, and if " there be no church or chapel, or no ſervice performed " therein, then at the moſt publick place there, and repeat " the like notice in ſuch church, chapel, or place, on the " next ſucceeding *Sunday*, of the time and place when and " where the perſons permitted under the authority of this act, " and inclined to compound for the ſaid duty, in manner " aforeſaid, may ſignify to ſuch ſurveyor their intention to " compound; and all perſons ſignifying the ſame, who ſhall " then, or within the ſpace of one calendar month after- " wards, pay to ſuch ſurveyor the compoſition authoriſed and " allowed by this act, ſhall be diſcharged from the perform- " ance of ſuch duty, which compoſition-money ſhall be em- " ployed by the ſurveyor for the uſe of the highways; and " that no compoſition ſhall be permitted, unleſs the ſame ſhall " be paid at the day, or within the time aforeſaid; but in " caſes where the occupation of any lands, tenements, " woods, tithes, or hereditaments, ſhall be changed, or any " new occupant or inhabitant ſhall come to reſide in ſuch " pariſh, townſhip, or place, after the time appointed for " ſuch compoſition, then the perſon or perſons occupying ſuch " lands, tenements, woods, tithes, or hereditaments, or ſo " reſiding in ſuch pariſh, townſhip, or place, ſhall be allowed " to compound in manner aforeſaid: provided, he, ſhe or they, " ſhall pay the ſaid compoſition-money to the ſaid ſurveyor " within fourteen days after he, ſhe, or they, ſhall enter upon " ſuch lands, tenements, or hereditaments, or ſhall come to " reſide in ſuch pariſh, townſhip, or place; and every tenant " or occupier of any lands, tenements, woods, tithes, or he- " reditaments, who intends to quit the poſſeſſion thereof,

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" within ſix calendar months from the time fixed for making " ſuch compoſition, ſhall and may compound for half the duty " hereby required, and the ſucceeding tenant or occupier ſhall " and may, in that caſe, compound or perform the duty in " kind for the other half thereof; and if the ſurveyor ſhall " receive from any perſon or perſons a compoſition for more " duty than ſhall be required from the other inhabitants and " occupiers within the ſame pariſh, townſhip, or place, for " the ſame year, he ſhall repay ſuch extraordinary compo- " ſition-money to ſuch perſon or perſons, ſo as to bring the " duty to an equality amongſt all ſuch inhabitants and oc- " cupiers.

How the compoſitions ſhall be paid, &c.

" † *Sect.* 14. And it is further enacted by par. 42. where " any perſon ſhall keep a draught or plough, and no carriage, " he ſhall pay to the ſurveyor the ſum of one ſhilling for every " horſe or pair of oxen or neat cattle, uſed in ſuch draught or " plough, for every day's ſtatute-duty on the day ſuch duty is " required to be performed, or pay according to the rate " aforeſaid for the lands, tenements, woods, tithes, and he- " reditaments, which he ſhall occupy in ſuch pariſh, town- " ſhip, or place, at the option of the ſurveyor. And by par. " 43. the inhabitants of every pariſh, townſhip, or place, " at ſome veſtry, or other publick meeting, held purſuant to " this act, may appoint three months in every year, within " which no ſtatute-duty ſhall be performed. One month in " the ſpring, to be called the *ſeed month*; one month in the " ſummer, for the hay harveſt; and one other month in the " ſummer, for the corn harveſt: provided, that notice in " writing, be given of the times ſo appointed to the ſurveyor " of ſuch pariſh, townſhip, or place reſpectively, and alſo to " the ſurveyor of every turnpike road lying within the ſame, " within three days after every ſuch meeting and fourteen days " at leaſt before the beginning of each of ſuch months.

Duty where no carriage is kept.

Of the ſeed month.

† N. B. In the expoſition of the former ſtatutes upon this ſubject, *viz.* The 2 and 3 Philip and Mary, c. 8. ſ. 2. The 22 Car. 2. c. 12. ſ. 8. and 9. The 18 Eliz. c. 10. ſect. 2. and 3. and The 7 and 8 Will. 3. c. 29. the language of which is, with little variation, purſued by the above ſtatute, 13 Geo. 3. c. 78. the following opinions have been holden.

Enumeration of the ſtatutes upon this ſubject recited in the former edition.

*Sect.* 15. Firſt, That (*a*) perſons in holy orders are within the purview of them, in reſpect of their ſpiritual profeſſions, as much as any other perſons whatſoever, in reſpect of any other poſſeſſions, for the words are general, and there is no kind of intimation that any particular perſons ſhall be exempted more than others. (8)

(*a*) 3 Keb. 255, 476. 1 Ventris 273. Watſon 40. 2 Inſt. 704.

(8) But by 30 Geo. 2. c. 25. ſ. 23. perſons ſerving themſelves as privates in the militia are exempted from ſtatute work during the time of ſuch ſervice.

Sect.

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(a) Raym. 186. 3 Keble 567, 468, 568. Vide Dalt. c. 26. 2 Keble 617.

*Sect.* 16. Secondly, *(a)* That he who keeps ſeveral draughts in a pariſh is bound to ſend a team for each draught, whether he occupy any land in the pariſh or not; and in like manner, That he who occupies ſeveral plough-lands, ought to ſend a team for each plough-land, whether he keeps any draught, or not.

(b) Palm. 389. 2 Roll 412.

*Sect.* 17. Thirdly, That *(b)* notwithſtanding the words of the ſtatute extend only to the occupiers of lands, yet if the owner neither occupy them, nor let them, but ſuffer them to lie freſh, he ſhall be charged as much as if he had occcupied them, for there is no reaſon that the publick ſhall ſuffer for his negligence.

Dalt. c. 26.

*Sect.* 18. Fourthly, That it is no excuſe for the inhabitants of a pariſh, being indicted at common law for not repairing the highways, That they have done the full work required of them by ſtatute; for ſince theſe ſtatutes are wholly in the affirmative, and made in aid of the common law, and to ſupply the defects thereof, they ſhall not be conſtrued to abrogate any proviſion thereby made for theſe purpoſes.

Chapter 26.

N. B. DALTON is of opinion, that he who keeps a draught and but two horſes, ought to attend therewith at the times appointed, and that if he carry with them ſuch loads as they are able to draw, he ſhall be excuſed.

How the funds of turnpike roads may be applied to the ſtatute repair of the highways.

† *Sect.* 19. And whereas there may be *turnpike roads* in ſuch a ſtate and condition of repair, that the ſtatute duty required to be performed upon them may be diſpenſed with, *&c. &c.* It is therefore enacted by 13 Geo. 3. c. 84. ſect. 58. "That the juſtices at any ſpecial ſeſſions, upon application to "them made by the ſurveyor of any place, in which ſuch "turnpike road lies, may ſummon the clerk and ſurveyor of "ſuch turnpike road to appear before them, at ſome other "ſpecial ſeſſions, and then and there to produce before them "a ſtate of the revenues and debts belonging to ſuch turn-"pike road, and ſuch juſtices may then and there enquire into "the ſtate and condition of the repairs thereof, and alſo of "ſuch other highways, and if it ſhall appear to them, upon "full and clear evidence, that the whole or any part of ſuch "ſtatute duty may be conveniently diſpenſed with from ſuch "turnpike roads, without endangering the ſecurities for the "money advanced upon the credit of the tolls thereof, and "that ſuch ſtatute duty is wanted for the repairs of the other "highways within ſuch pariſh, townſhip, or place, the ſaid "juſtices may order the whole or part of ſuch ſtatute duty to "be performed upon the highways, not being turnpike, with-"in ſuch pariſh, townſhip, or place, under the direction of "the ſurveyor thereof, during ſuch time as to them ſhall ſeem "juſt and reaſonable."

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† *Sect.* 20. As to the ſecond point, *viz.* Who may be aſſeſſed to a rate made for the defraying of the extraordinary charges of ſuch repairs, it is recited by the above mentioned ſtatute of 13 Geo. 3. c. 78. par. 30. "That in ſome pariſhes, townſhips, or places, there may not be ſufficient materials for the repair of the highways within the ſame, nor within the waſte lands, common grounds, rivers or brooks, of any other pariſh, townſhip, or place, lying within a convenient diſtance from ſuch highway, by reaſon whereof the ſurveyor of ſuch highway may be forced to buy ſuch materials, and to make recompence and ſatisfaction to the owner or occupier of incloſed lands, for damage which may be done by getting and carrying thereof: and whereas no proviſion is made for raiſing a fund to reimburſe the expences thereof, and alſo ſuch expences as the ſaid ſurveyors may incur, by erecting guide-poſts, or other poſts or ſtones, and by making or repairing ſuch trunks, tunnels, plats, bridges, or arches, as aforeſaid, and by rendering ſatisfaction for damages done to lands by the making of new ditches or drains, nor for the ſalary to be paid by ſuch pariſh, townſhip, or place, to ſuch ſurveyor, as aforeſaid;" it is therefore enacted, "That upon application by ſuch ſurveyor to the juſtices of the peace, at their "ſpecial ſeſſions, and oath made of the ſum or ſums of money which he hath *bona fide* laid out and expended, or which "will be required for the purpoſes aforeſaid, the ſaid juſtices, "or any two or more of them, ſhall, and they are hereby "impowered, by warrant under their hands and ſeals, to "cauſe an equal aſſeſſment to be made, for the purpoſes "aforeſaid, upon all occupiers of lands, tenements, woods, "tithes, and hereditaments, within ſuch pariſh, townſhip, "or place, where ſuch money ſhall be ſo expended or laid "out; and the ſame ſhall be made and collected by ſuch perſon or perſons, and allowed in ſuch manner, as the ſaid "juſtices, by their order at ſuch ſeſſions, ſhall direct and appoint in that behalf; and the money thereby raiſed ſhall be "employed and accounted for according to the direction of "the ſaid juſtices, for the purpoſes aforeſaid; and the ſaid "aſſeſſment ſhall be levied in ſuch manner as herein-after "mentioned: provided nevertheleſs, That no ſuch aſſeſſment to be made for thoſe or any of thoſe purpoſes, in any "one year, ſhall exceed the rate of ſixpence in the pound, of "the yearly value of the lands, tenements, woods, tithes, "and hereditaments, ſo to be aſſeſſed."

The 22 Car. 2. c. 10, 11. The 3 and 4 Will. and Mar. c. 12. The 7 and 8 Will. 3. c. 29. ſ. 4. which were here recited in the former edition of this work are repealed by 7 Geo. 3. c. 42.

(9) An order for impoſing a rate was quaſhed, becauſe it did not appear but that the ſtatute duty was ſufficient, and becauſe only the occupiers of land were charged, whereas others are equally liable. Str. 315. Sed Vide Forſt. 327.

† *Sect.* 21. And it is further enacted by the above mentioned ſtatute of 13 Geo. 3. c. 78. par. 45. "That if upon application of the ſurveyor of the highways for any pariſh, "townſhip, or place, to the juſtices of the peace for the limit wherein ſuch pariſh, townſhip, or place, lieth, at their "general

Vide the caſe of the King v. Inh. of Newton in Cheſhire.

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In what manner an aſſeſſment may be made.

" general or quarter ſeſſions of the peace, or at ſome ſpecial " ſeſſions for the highways, the ſaid juſtices ſhall be fully ſa- " tisfied, by proof upon oath, that the duty directed to be " performed, and the money authoriſed to be collected and " received, has been performed, applied, and expended, ac- " cording to the directions of this act, or ſhall be fully ſatis- " fied that the common highways, bridges, cauſeways, " ſtreets, or pavements, belonging to ſuch pariſh, town- " ſhip, or place, are ſo far out of order that they cannot be " ſufficiently amended and repaired, paved, cleanſed, and " ſupported, by the means herein-before preſcribed, (notice " being firſt given of ſuch intended application at the church " or chapel of ſuch pariſh, townſhip, or place, on ſome *Sun-* " *day* preceding ſuch quarter or ſpecial ſeſſions; or if the " place be extraparochial, notice in writing being firſt given " of ſuch intended application to ſome of the principal inha- " bitants reſiding in ſuch extraparochial place, a week at leaſt " before ſuch general or ſpecial ſeſſions); and then, and in " any of the ſaid caſes, an equal aſſeſſment upon all and " every the occupier of lands, tenements, woods, tithes, and " hereditaments, within any ſuch pariſh, townſhip, or place, " ſhall or may be made and collected by ſuch perſon and per- " ſons, and allowed in ſuch manner, as the ſaid juſtices, by " their order, at ſuch general or ſpecial ſeſſions, ſhall direct " and appoint in that behalf; and the money thereby raiſed " ſhall be employed and accounted for, according to the or- " ders and directions of the ſaid juſtices, for and towards the " amending, repairing, paving, cleanſing, and ſupporting " ſuch highways, cauſeways, ſtreets, pavements, and bridges, " from time to time, as need ſhall require.

Not to exceed 9d. in the pound.

† *Sect.* 22. And it is further enacted by the ſame ſtatute, par. 46. " That the aſſeſſment herein-laſt before authoriſed, and " the aſſeſſment herein-before authoriſed, for buying mate- " rials, making ſatisfaction for damages, erecting guide-poſts, " and paying the ſurveyor's ſalary, (vide poſt.) ſhall not to- " gether in any one year exceed the rate of nine-pence in the " pound of the yearly value of the lands, tenements, woods, " tithes, and hereditaments, ſo to be aſſeſſed.

N. B. The proviſions of 3 & 4 W. & M. upon this ſubject were recited in the former edition, but that ſtatute is repealed by 7 Geo. 3. c. 42.

† *Sect.* 23. As to the third point, *viz.* What other proviſions have been made to this purpoſe, it is enacted by the ſaid ſtatute of 13 Geo. 3. c. 78. par. 47. " That no fine, iſſue, " penalty, or forfeiture, for not repairing the highways, or " not appearing to any indictment or preſentment for not re- " pairing the ſame, ſhall hereafter be returned into the Court " of Exchequer, or other court, but ſhall be levied by and " paid into the hands of ſuch perſon or perſons reſiding in or " near the pariſh, townſhip, or place, where the road ſhall " lie, as the court impoſing ſuch fines, iſſues, penalties, or " forfeitures, ſhall order and direct, to be applied towards the

" repair

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" repair and amendment of ſuch highways; and the perſon " or perſons ſo ordered to receive ſuch fine ſhall, and is here- " by required to receive, apply, and account for the ſame, " according to the direction of ſuch court, or, in default " thereof, ſhall forfeit double the ſum received; and if any " fine, iſſue, penalty, or forfeiture, to be impoſed on any " ſuch pariſh, townſhip, or place, for not repairing the high- " ways, or not appearing as aforeſaid, ſhall hereafter be levied " on any one or more of the inhabitants of ſuch pariſh, town- " ſhip, or place, that then ſuch inhabitant or inhabitants " ſhall and may make his or their complaint to the juſtices of " the peace, at their ſpecial ſeſſions; and the ſaid juſtices are " hereby impowered and authoriſed, by warrant under their " hands and ſeals, to cauſe a rate to be made, according to " the form and manner herein laſt before preſcribed, for the " reimburſing ſuch inhabitant or inhabitants the monies ſo le- " vied on him or them as aforeſaid; which rate ſo made, " and confirmed by any two juſtices, ſhall be collected and " levied by the ſurveyor of the highways of ſuch pariſh, town- " ſhip, or place, ſo preſented or indicted, as aforeſaid; and " the ſaid ſurveyor ſhall, within one month next after the " making and confirming the rate aforeſaid, collect, levy, " and pay unto ſuch inhabitant or inhabitants the money ſo " levied on him or them as aforeſaid." (10)

Fines, &c. how levied and applied.

(10) If a pariſh conſiſting of two diſtricts, which are bound to repair ſeparately, be convicted for not repairing the road in one of the diſtricts, the other diſtrict having no notice of the indictment, the court will conſider it as being ſubſtantially the conviction of the one diſtrict, and if the fine be levied on an inhabitant of the other, will grant a *mandamus* for a rate to be levied on the diſtrict bound to repair the indicted part of the road. But the mandamus muſt be ſpecial, ſuggeſting that the part of the highway, which was the ſubject of the indictment, lay wholly in the townſhip indicted, and that the two townſhips were ſeparately bound to repair their reſpective parts of the highway, in order to afford the indicted townſhip an opportunity of traverſing the facts. Douglas 422. Strange 211.

*Sect.* 24. Alſo the later ſtatutes (*a*) which have impoſed any penalties on ſurveyors of the highways, or others, for any offences relating to the highways, have generally ordained that the whole, or part thereof, ſhall be applied to the repairs of the highways of the places wherein the offence ſhall be committed, as will more fully appear in the ſubſequent part of this chapter.

(*a*) This relates to the ſtatutes now repealed.

† *Sect.* 25. As to the fourth point, *viz.* In what manner the profits of lands ſettled in truſt for the repairs of the highways ſhall be employed, it is enacted by the above mentioned ſtatute of 13 Geo. 3. c. 78. par. 52. " That where any lands " have been, or ſhall be given, for the maintenance of cauſe- " ways, pavements, highways, and bridges, all ſuch perſons " who are, or ſhall be enfeoffed or truſted with any ſuch " lands, ſhall let them to farm at the moſt improved yearly " value, without fine; and that the juſtices of the peace, in " their

The 22 Car. 2. c. 12. ſ. 2. recited in the former edition is repealed by 7 Geo. 3. c. 42.

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On payment of money aſſeſſed the ground to be deemed a publick highway.

" and likewiſe ſuch recompence as they ſhall think reaſonable,
" for the making of new ditches and fences on the ſide or
" ſides of the ſaid highways that ſhall be ſo enlarged or diver-
" ted, and alſo ſatisfaction to any perſon or perſons, bodies
" politick or corporate, that may be otherwiſe injured by the
" enlarging or diverting the ſaid highways reſpectively: and
" upon payment or tender of the money ſo to be awarded and
" aſſeſſed to the perſon or perſons, bodies politick or corpo-
" rate, intitled to receive the ſame, or leaving it in the hands
" of the clerk of the peace of ſuch limit, in caſe ſuch perſon
" or perſons, bodies politick or corporate, cannot be found,
" or ſhall refuſe to accept the ſame, for the uſe of the owner
" of, or others intereſted in, the ſaid ground, the intereſt of
" the ſaid perſon or perſons, bodies politick or corporate,
" in the ſaid ground, ſhall be for ever diveſted out of them,
" and the ſaid ground, after ſuch agreement or verdict as
" aforeſaid, ſhall be eſteemed and taken to be a publick high-
" way, to all intents and purpoſes whatſoever; ſaving never-
" theleſs to the owner or owners of ſuch ground all mines,
" minerals, and foſſils, lying under the ſame, which can or
" may be got without breaking the ſurface of the ſaid high-
" way; and alſo all timber and wood growing upon ſuch
" ground, to be fallen and taken by ſuch owner or owners
" within one month after ſuch order ſhall have been made, or
" in default thereof, to be fallen by the ſaid ſurveyor or ſur-
" veyors, within the reſpective months aforeſaid, and laid
" upon the land adjoining, for the benefit of the ſaid owner
" or owners: and where there ſhall not appear ſufficient
" money in the hands of the ſurveyor or ſurveyors, for the
" purpoſes aforeſaid, then the ſaid two juſtices, in caſe of
" agreement, or the ſaid court of quarter ſeſſions, after ſuch
" verdict as aforeſaid, ſhall order an equal aſſeſſment to be
" made, levied, and collected, upon all and every the occu-
" piers of lands, tenements, woods, tithes, and hereditaments,
" in the reſpective pariſhes, townſhips, or places, where ſuch
" highways ſhall lie, and direct the money to be paid to the
" perſon or perſons, bodies politick or corporate, ſo intereſted,
" in ſuch manner as the ſaid juſtices, or court of quarter ſeſ-
" ſions reſpectively, ſhall direct and appoint: and the money
" thereby raiſed ſhall be employed and accounted for, accord-
" ing to the order and direction of the ſaid juſtices, or court
" of quarter ſeſſions reſpectively, for and towards the purcha-
" ſing the land to enlarge or divert the ſaid highways, and for
" the making the ſaid ditches and fences, and alſo ſatisfaction
" for the damages ſuſtained thereby; and the ſaid aſſeſſment,
" if not paid within ten days after demand, ſhall, by order of
" the ſaid juſtices, or court of quarter ſeſſions reſpectively,
" be levied by the ſaid ſurveyor, in the manner herein-after
" mentioned: provided that no ſuch aſſeſſment to be made

Where there is not money ſufficient aſſeſſments may be raiſed by order of the juſtices of the quarter ſeſſions.

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" in any one year ſhall exceed the rate of ſixpence in the " pound of the yearly value of the lands, tenements, woods, " tithes, and hereditaments, ſo aſſeſſed." Not exceeding 6d. in the pound.

† *Sect.* 29. And it is further enacted by the ſaid ſtatute, par. 17. " That when any ſuch new highways ſhall be made " as aforeſaid, the old highway ſhall be ſtopped up, and the " land and ſoil thereof ſhall be ſold by the ſaid ſurveyor, with " the approbation of the ſaid juſtices, to ſome perſon or per- " ſons whoſe lands adjoin thereto, if he, ſhe, or they, ſhall " be willing to purchaſe the ſame; if not to ſome other per- " ſon or perſons, for the full value thereof: but if ſuch old " road ſhall lead to any lands, houſe, or place, which cannot, " in the opinion of ſuch juſtices reſpectively, be accommo- " dated with a convenient way and paſſage from ſuch new " highway, which they are hereby authoriſed to order and " lay out, if they find it neceſſary; then, and in ſuch caſe, " the ſaid old highway ſhall only be ſold ſubject to the right " of way and paſſage to ſuch lands, houſe, or place reſpect- " ively, according to the ancient uſage in that reſpect; and " the money ariſing from ſuch ſale, in either of the ſaid " caſes, ſhall be applied towards the purchaſe of the land " where ſuch new highway ſhall be made: and, upon pay- " ment or tender of the money ſo to be agreed for as afore- " ſaid, and upon a certificate being ſigned by the ſaid two " juſtices, or by the chairman of the ſaid court of quarter " ſeſſions, in caſe the ſame ſhall be determined there, deſcrib- " ing the lands ſo ſold, and expreſſing the ſum ſo agreed for, " and directing to whom the ſame ſhall be paid, and upon the " purchaſer's taking a receipt for ſuch purchaſe-money from " the perſon intitled to receive the ſame, by an indorſement " on the back of ſuch certificate, the ſoil of ſuch old high- " way ſhall become veſted in ſuch purchaſer and his heirs; " but all mines, minerals, and foſſils, lying under the ſame, " ſhall continue to be the property of the perſon or perſons " who would, from time to time, have been intitled to the " ſame, if ſuch old highway had continued there. Old highway and ſoil may be ſold by the ſurveyor, ſubject to ancient right of way and paſſage. Mines and minerals reſerved to the owners.

† *Sect.* 30. And it is alſo enacted, par. 18. " That in caſe ſuch " jury ſhall give in and deliver a verdict for more monies, " as a recompence for the right, intereſt, or property, of any " perſon or perſons, bodies politick or corporate, in ſuch " lands or grounds, or for the making ſuch fence, or for " ſuch damage or injury to be ſuſtained by him, her, or them " reſpectively, as aforeſaid, than what ſhall have been propoſed " and offered by the ſaid ſurveyor, before ſuch application " to the ſaid court of quarter ſeſſions as aforeſaid; that then, " and in ſuch caſe, the coſts and expences attending the " ſaid ſeveral proceedings ſhall be borne and paid by the ſur- Coſts of proceedings by whom payable.

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" veyor of the ſaid highway, out of the monies in his or their " hands, or to be aſſeſſed and levied by virtue and under the " powers of this act; but if ſuch jury ſhall give and deliver " a verdict for no more, or for leſs monies than ſhall have " been ſo offered and propoſed by the ſaid ſurveyor before " ſuch application to the ſaid court of quarter ſeſſions; that " then the ſaid coſts and expences ſhall be borne and paid by " the perſon or perſons, bodies politick or corporate, who " ſhall have refuſed to accept the recompence and ſatisfac- " tion ſo offered to him, her, or them, as aforeſaid."

† *Sect.* 31. And it is alſo further enacted by the ſaid ſtatute, par. 19. " That when it ſhall appear, upon the view (13) of " any two or more of the ſaid juſtices of the peace, that any " publick highway, not in the ſituation herein-before deſcri- " bed, or publick bridleway or footway, may be diverted, " ſo as to make the ſame nearer or more commodious to the " publick, and the owner or owners of the lands and grounds " through which ſuch new highway, bridleway, or footway, " is propoſed to be made, ſhall conſent thereto, by writing " under his or their hand and ſeal, or hands and ſeals, it ſhall " and may be lawful, by order of ſuch juſtices, at ſome ſpe- " cial ſeſſions, to divert and turn, and to ſtop up ſuch foot- " way, and to divert, turn, and ſtop up, and incloſe, ſell, and " diſpoſe of ſuch old highway or bridleway, and to purchaſe " the ground and ſoil for ſuch new highway, bridleway, or " footway, by ſuch ways and means, and ſubject to ſuch ex- " ceptions and conditions, in all reſpects, as herein-before " mentioned with regard to highways to be widened or di- " verted; and where any ſuch highway, bridleway, or foot- " way, herein laſt before deſcribed, ſhall be ſo ordered to be " ſtopped up or incloſed, and ſuch new highway, bridleway, " or footway, ſet out and appropriated in lieu thereof, as " aforeſaid, ſhall and may be lawful for any perſon or perſons " injured or aggrieved by any ſuch order or proceeding, or " by the incloſure of any road or highway, by virtue of any " inquiſition taken upon any writ of *ad quod damnum* to make " his or their complaint thereof, by appeal (14) to the juſ-

(13) The fact of non-repair is traverſable when a juſtice preſents a highway on his own view. Rex v. Juſ Wilts. 1 Black. 467.

(14) Though the appeal is directed to the next quarter ſeſſions, yet the juſtices may adjourn the quarter ſeſſions itſelf to another day, or they may adjourn the particular matter to a ſubſequent ſeſſions. And this appeal was thought by Lord Hardwicke to be a waiver to any objection of ſurprize, with reſpect to the male execution of the writ of *ad quod damnum*; for the ſtatute has put the juſtices in the room of the traverſe, and if the party inſtead of appealing had traverſed the inquiſition and iſſue had been taken on it and a verdict found, he could not have applied to the court of Chancery upon a ſuggeſtion of ſurprize, and a fraudulent and clandeſtine execution of the writ. And even upon ſuch an enquiry, the court will not regard any complaint upon the ground of public inconvenience, for that would be ſetting up a juriſdiction in oppoſition to a juriſdiction appropriated by the act of parliament to the quarter ſeſſions only: but if a jury have manifeſtly done contrary to the general good of the country, it may afford a ſtrong corroborating evidence of ſurprize. 3 Atk. 770.—N. B. It is not neceſſary for the ſheriff to give formal notice of the execution of the writ; it is ſufficient if the jury be ſummoned impartially, and the inquiſition are made in a fair and open manner.

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" tices of the peace, at the next general quarter ſeſſions, " which ſhall be holden within the limit where the ſame ſhall " lie, after ſuch order made, or proceeding had, as aforeſaid, " upon giving ten days notice, in writing, of ſuch appeal " to the ſurveyor and party intereſted in ſuch incloſure, if " there ſhall be ſufficient time for that purpoſe; if not, ſuch " appeal may be made upon the like notice to the next ſub- " ſequent quarter ſeſſions of the peace; which courts of " quarter ſeſſions are hereby reſpectively authoriſed and im- " powered to hear and finally determine ſuch appeal; and " if no ſuch appeal be made, or, being made, ſuch order " and proceedings ſhall be confirmed by the ſaid court, the " ſaid incloſures may be made, and the ſaid ways ſtopped, " and the proceedings thereupon ſhall be binding and con- " cluſive to all perſons whomſoever; and the new highway, " bridleway, or footway, ſo to be appropriated and ſet out, " ſhall be, and for ever after continue, a publick highway, " bridleway, or footway, to all intents and purpoſes what- " ſoever; but no incloſures of ſuch old highways or bridle- " way, or ſtoppage of ſuch footway, ſhall be made, until ſuch " new highways, bridleway, or footway, ſhall be completed, " and put into good condition and repair, and ſo certified by " two juſtices of the peace, upon view thereof, which certi- " ficate ſhall be returned to the clerk of the peace, and in- " rolled amongſt the records of ſeſſions; but from and after " ſuch certificate, ſuch old highways, bridleway, or footway, " ſhall and may be ſtopped up, and the ſoil of ſuch old high- " ways or bridleway ſold, in the manner, and ſubject to the " reſervations and reſtrictions herein-before mentioned with " reſpect to highways to be enlarged or diverted by virtue of " this act: and where any highway, bridleway, or footway, " hath been diverted and turned above twelve months, either " from neceſſity, where the ſame have been deſtroyed by " floods, or ſlips of the ground on which they were made, " or from other cauſes and motives, if new highways, bri- " dleways, or footways, have been made in lieu thereof, " nearer or more commodious to the publick, and the ſame " have been acquieſced in, and no ſuit or proſecution hath " been commenced for the diverting or turning the ſame, " every new highway, bridleway, or footway, ſet out and " uſed in the place of that ſo diverted and turned, ſhall from " henceforth be the publick highway, bridleway, or foot- " way, to all intents and purpoſes whatſoever; and all per- " ſons liable to the repair of any ſuch old highways, bridle- " way, or footway, ſo diverted and turned, or to be diverted " and turned, as aforeſaid, ſhall, in the ſame manner, be and " continue liable to the repair of ſuch new highways, bri- " dleway, or footway, except where any agreement ſhall " have been made relative to ſuch repairs between the parties

Concerning ways diverted above twelve months.

Vide Douglas 749. R. R. H. 2 Shower 28. Levinz 1234. W. Jones 296. Ld. Raym. 725. Godbolt 4, 52. 3 Comm. p. 36. Com. 1 Chimin D. 6.

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" intereſted therein, which hath laid the burthen thereof, " or any part thereof, upon any other perſon or perſons, in " which caſe the ſame ſhall be obſerved."

How the old highways or the lands lying between the fences incloſing the ſame ſhall be diſpoſed of.

† *Sect.* 32. But it is provided by the ſaid ſtatute, par 20. " That no common land, lying between the fences of any " old highway to be ſtopped up or incloſed by virtue of this " act, ſhall be incloſed; and where the land lying between " the fences of ſuch highway, not being common land, ſhall, " upon a medium, exceed thirty feet in breadth, and not ex- " tend to fifty feet in breadth, the ſame ſhall not be ſtopped " up or incloſed, until ſatisfaction ſhall be made to the owner " of ſuch land, for ſo much thereof as ſhall exceed the ſaid " breadth of thirty feet; and if the parties cannot agree in the " ſatisfaction ſo to be made, the ſame ſhall be adjuſted by the " ſaid juſtices, or the jury, if a jury ſhall be impanelled; and if " the land between the fences incloſing ſuch highways, not " being common land, ſhall exceed fifty feet in breadth upon " a medium, or if the ſaid old road, ſo to be diverted or " turned, ſhall lie through the open field or ground belonging " to any particular perſon or perſons, ſuch perſon or perſons, " and alſo the perſon or perſons intitled to the land between the " fences on the ſide of ſuch highway, ſhall reſpectively hold and " enjoy the land and ſoil of ſuch old highway, and pay to the " ſurveyor, for the uſe of the highways, ſo much money as " ſhall be agreed upon between the parties; or if they can- " not agree, ſo much as ſhall be deemed and adjudged by the " ſaid juſtices, or jury, if ſuch jury ſhall be impanelled as " aforeſaid, to be adequate to the purchaſe of it, eſtimating " ſuch highway at thirty feet in breadth, upon an average.

Where old footways are ſtopped up, and new ones laid out, in what manner the owners of the lands ſhall make and receive ſatisfaction.

† *Sect.* 33. And it is further enacted, par. 21. " That " where any footway ſhall be diverted by virtue of this act " through the land belonging to the ſame perſon who owned " the land through which ſuch old footway lay, the ſame ſhall " be adjudged and deemed an exchange only, and no ſatisfac- " tion or compenſation ſhall be made, unleſs the land to be " uſed for ſuch new footway ſhall be of greater length, and " of greater value, than the land uſed for ſuch old footway; " and where the ſaid footway ſhall not be turned through the " lands belonging to the ſame perſon, the damage occaſioned " by ſuch old footway to the lands through which it lay, if the " parties intereſted ſhall not agree in adjuſting the ſame, ſhall " be adjudged by two indifferent perſons, the one to be named by " the owner of the land, and the other by the ſaid two juſtices; " and if the perſons ſo to be nominated cannot agree therein, " they ſhall chuſe ſome third perſon to adjudge the ſame, whoſe " determination ſhall be final; and the money at which ſuch " damages ſhall be aſſeſſed ſhall be applied in making ſatis-

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" faction to the owner or owners of the land through which " ſuch new footway ſhall be made.

† *Sect.* 34. And it is further enacted by the ſaid ſtatute, par. 22. " That if in any pariſh, townſhip, or place, " where any highway ſhall be diverted and turned by virtue " of this act, it ſhall appear to the juſtices, who are hereby " authoriſed to view or inquire into the ſame, that there are " other highways within ſuch pariſh, townſhip, or place, " beſides that ſo to be diverted and turned, which may, with- " out inconvenience to the publick, be diverted into ſuch new " highway hereby authoriſed to be made, or into any other " highway or highways within ſuch pariſh, townſhip, or place, " and the charge of repairing ſuch highway or highways " may be thereby ſaved to ſuch pariſh, townſhip, or place; " it ſhall and may be lawful for ſuch juſtices to order ſuch " highway or highways, which ſhall appear to them unneceſ- " ſary, to be ſtopped up, and the ſoil thereof ſold, in ſuch " manner, and ſubject to ſuch reſtrictions, and ſuch right of " appeal to the party or parties aggrieved thereby, as are " herein-before reſpectively directed and given concerning the " highways to be ſtopped up or incloſed."

Juſtices to order unneceſſary highways to be ſtopped up.

† *Sect.* 35. As to the fourth general Head of this Chapter, *viz.* In what manner the ſurveyors of the highways ſhall be appointed, it is enacted by the 13 Geo. 3. c. 78. ſ. 1. " That upon the twenty-ſecond day of September, in every " year, unleſs that day ſhall be Sunday, and then on the day " following, the conſtables, headboroughs, tythingmen, " churchwardens, ſurveyor of the highways, and houſehold- " ers, being aſſeſſed to any parochial or publick rate of " every pariſh, townſhip, or place, ſhall aſſemble to- " gether at the church or chapel, or if there ſhall be " no church or chapel, then at the uſual place of pub- " lick meetings for ſuch pariſh, townſhip, or place, at " the hour of eleven in the forenoon; and the major part " of them, ſo aſſembled, ſhall make a liſt of the names of " at leaſt ten perſons living within ſuch reſpective pariſhes, " townſhips, or places, who, each of them have an eſtate in " lands, tenements, or hereditaments, lying within ſuch re- " ſpective pariſh, townſhip, or place, in their own right, or " in the right of their wives, of the value of ten pounds by " the year; or a perſonal eſtate of the value of one hundred " pounds; or are occupiers or tenants of houſes, lands, te- " nements, or hereditaments, of the yearly value of thirty " pounds: and if there ſhall not be ten perſons having ſuch " qualifications as aforeſaid, then they ſhall inſert in ſuch liſt " the names of ſo many of ſuch perſons as are ſo qualified, " as above required, together with the names of ſo many of

On the 22d Sept. yearly a liſt of ten perſons to be made, &c.

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" the moſt ſufficient and able inhabitants of ſuch pariſh, town-
" ſhip, or place, not ſo qualified, as ſhall make up the num-
" ber ten, if ſo many can be found; if not, ſo many as ſhall
" be there reſident, to ſerve the office of ſurveyor of the
Qualifications of ſurveyors. " highways: and the conſtable, headborough, or tything-
" man, of ſuch pariſh, townſhip, or place, ſhall, within
A duplicate of ſuch liſt ſhall be tranſmitted to one of the juſtices, and the original liſt to the ſpecial ſeſſions, &c. " three days after ſuch meeting, tranſmit a duplicate of ſuch
" liſt to one of the juſtices of the peace within the limit of
" the county, riding, diviſion, hundred, city, corporation,
" precinct, or liberty, where ſuch pariſh, townſhip, or place,
" ſhall lie, living in or near the ſame; and ſhall alſo return
" and deliver the original liſt, made and agreed upon at ſuch
" meeting, to the juſtices of the peace, at their ſpecial ſeſſions
" to be held for the highways within that limit, in the week
" next after the Michaelmas general quarter ſeſſions of the
Notices to the perſons contained in the liſt. " peace in every year; and ſhall alſo, within three days after
" making the ſaid liſt, give perſonal notices to, or cauſe no-
" tices in writing to be left at the places of abode of, the ſe-
" veral perſons contained in ſuch liſt, informing them of
" their being ſo named, to the intent that they may ſeverally
" appear before the juſtices at the ſaid ſpecial ſeſſions, to ac-
" cept ſuch office, if they ſhall be appointed thereto, or to
" ſhew cauſe, if they have any, againſt their being ap-
" pointed: and the ſaid juſtices are hereby authoriſed and re-
" quired to hold ſuch ſpecial ſeſſions at ſuch convenient place
" or places, within their reſpective limits, as they, in their
The juſtices are to give 10 days notice of holding ſpecial ſeſſions to the conſtables, &c. and may appoint qualified ſurveyors from the liſt, or other inhabitants, &c. " diſcretion, ſhall judge proper; and to give notice of the
" time and place where they intend to hold the ſame, to the
" conſtables, headboroughs, or tythingmen, of every ſuch
" pariſh, townſhip, or place, at leaſt ten days before the
" holding of the ſaid ſeſſion; and the ſaid juſtices, then and
" there, from the ſaid liſts, according to their diſcretion, and
" the largeneſs of the pariſh, townſhip, or place reſpectively,
" by warrant under their hands and ſeals, ſhall appoint (15) one,
" two, or more, of ſuch perſons as aforeſaid, if he or they
(15) The court will not compel the juſtices to appoint a ſurveyor out of the liſt returned to them by the pariſh, if ſuch liſt has been procured by indirect and fraudulent means, at a riotous aſſembly of the lower ſort of people, but they ſeemed to incline very ſtrongly that it was not abſolutely neceſſary that the conſtable, headborough, tythingman, &c. as mentioned in the act, ſhould be preſent, but that the legiſlature only meant it to be a full parochial meeting, without intending that each of theſe bodies ſhould be ſuch eſſential conſtituent parts of it, that the acts of the meeting would be annulled and made void by the abſence of thoſe officers. 4 Burr. 2454. " ſhall, in the opinion of ſuch juſtices, be qualified for the
" office of ſurveyor; if not, one, two, or more of the other
" ſubſtantial inhabitants or occupiers of lands, tenements,
" woods, tithes, or hereditaments, within ſuch pariſh, town-
" ſhip, or place, living within three miles thereof, and with-
" in the ſame county, fit and proper to ſerve the office of
" ſurveyor of the highways for ſuch pariſh, townſhip, or
" place, if any ſuch can be found; which appointment ſhall,
" by the conſtables, headboroughs, or tythingmen aforeſaid,

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" be notified to every perſon ſo appointed by the ſaid juſtices, " within three days after ſuch appointment, by ſerving him " with the ſaid warrant, or by leaving the ſame, or a true " copy thereof, at his houſe, or uſual place of abode; and " every perſon ſo appointed, if he accepts the ſaid office, ſhall " be ſurveyor of the highways for the ſaid pariſh, townſhip, " or place, for the year enſuing, and ſhall take upon him, " and duly execute the office aforeſaid; and the ſaid juſtices " ſhall then and there give ſuch of the ſaid ſurveyors as ſhall " perſonally appear before them a charge, for the better per- " formance of their duty, according to the directions of this " act: and if any of the ſaid perſons, ſo appointed, whoſe " names were contained in ſuch liſt, and who were ſerved " with the ſaid notice, ſhall refuſe or neglect to appear at the " ſaid ſpecial ſeſſions, and accept the ſaid office, if appointed " thereto, in manner aforeſaid, or ſhall not, within ſix days " after being ſerved with ſuch warrant of appointment, " ſignify his acceptance thereof, either in perſon or by " writing, to one of the ſaid juſtices, he ſhall forfeit five " pounds; and in caſe any perſon ſo appointed by the ſaid " juſtices, whoſe name was not contained in ſuch liſt, ſhall " refuſe or neglect to accept the ſaid office, or ſhall not, with- " in ſix days after being ſerved with ſuch appointment, ſhew " to one of the juſtices ſigning ſuch appointment ſuf- " ficient cauſe why he ſhould not ſerve ſuch office, he ſhall " forfeit fifty ſhillings: provided that no perſon who " hath been appointed and ſerved the office of ſurveyor for " one year, ſhall be liable to be appointed ſurveyor for the " ſame pariſh, townſhip, or place, within three years from " the time of ſuch firſt appointment and ſervice, unleſs he " ſhall conſent thereto; but if no ſuch liſt ſhall be made and " returned, or if the ſaid juſtices ſhall make ſuch appoint- " ment as aforeſaid, and the perſon or perſons ſo appointed " ſhall refuſe to ſerve the ſaid office, the ſaid juſtices, or any " two of them, ſhall and may, and are hereby required, at " the ſaid ſpecial ſeſſions, or at ſome ſubſequent ſpecial ſeſ- " ſions, to be held within one month after, to nominate and " appoint ſome other perſon or perſons to be ſurveyor of ſuch " pariſh, townſhip, or place, whom they ſhall judge proper " to execute that office, and ſhall and may fix ſuch ſalary to " be paid to ſuch ſurveyor, to be appointed as herein laſt be- " fore mentioned, out of the ſaid forfeitures, and all other " forfeitures, fines, penalties, aſſeſſments, and compoſitions, " to be paid, levied, and raiſed, under the authority of this " act, within ſuch pariſh, townſhip, or place reſpectively, " as ſuch juſtices ſhall think fit, not exceeding one eighth part " of what ſhall have been raiſed by an aſſeſſment of ſixpence " in the pound, for the uſe of the highways within ſuch pa- " riſh, townſhip, or place, where any ſuch aſſeſſment ſhall

Which appointment ſhall be notified by the conſtables.

And the ſurveyor hold his office for a year.

Penalty on refuſing to ſerve.

No perſon who hath ſerved one year, to ſerve again within 3 years for ſame place, without his conſent.

If no ſuch liſt be made, or the perſon appointed refuſe to ſerve, another perſon may be appointed at a ſubſequent ſpecial ſeſſions, and a ſalary fixed.

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" have been raiſed, and obſerving the ſame reſtriction, as " near as they can, from the beſt information they ſhall be " able to get of the probable amount of ſuch an aſſeſſment, " where none hath been already made; and the ſaid juſtices " ſhall and may, if they think fit, require the conſtables, " headboroughs, tythingmen, and ſurveyor, of every ſuch " pariſh, townſhip, and place, or any of them, to return to " them, at ſuch time and place as they ſhall appoint, an ac- " count, in writing, of the ſum which ſuch aſſeſſment of ſix- " pence in the pound hath raiſed, or will, in his or their " opinion, raiſe within ſuch pariſh, townſhip or place: and " if the conſtables, headboroughs, tythingmen, church- " wardens, ſurveyors of the highway, and ſuch houſeholders " as aforeſaid, of any pariſh, townſhip or place, ſhall ne- " glect or refuſe to make ſuch liſt as aforeſaid; or if the con- " ſtable, headborough or tythingman, of any pariſh, town- " ſhip, or place, ſhall not return the ſaid liſt of names, " when made, and ſuch duplicate thereof as aforeſaid, and " give ſuch notice or notices, and ſerve ſuch warrant or " warrants as in this act is directed; or if the ſaid conſta- " ble, headborough, tythingman, and ſurveyor, or any of " them, ſhall neglect to return ſach account of the amount " of ſuch aſſeſſment as aforeſaid; when ſo required as afore- " ſaid, every conſtable, headborough, tythingman, church- " warden, or ſurveyor, ſo neglecting or refuſing, in any of the " ſaid caſes, ſhall, for every ſuch default reſpectively, forfeit " the ſum of forty ſhillings.

Aſſeſſments to be returned in writing.

Penalty on conſtables.

† And it is further enacted by the ſaid ſtatute, par. 2. " That " in all caſes where the ſaid juſtices, upon neglect, or refuſal " of the perſon ſo nominated ſurveyor as aforeſaid to accept " the ſaid office, ſhall appoint any other perſon for ſuch ſur- " veyor, with a ſalary as aforeſaid, the ſaid juſtices ſhall, and " are hereby required to appoint one ſubſtantial inhabitant of " ſuch pariſh, townſhip, or place, for aſſiſtant to ſuch ſur- " veyor, in the ſeveral matters, and for the ſeveral purpoſes " hereafter mentioned, until the next annual appointment of " ſurveyors, according to the directions of this act; and " if the perſon ſo appointed aſſiſtant ſhall, upon notice of " ſuch appointment, refuſe to accept that office, he ſhall for- " feit the ſum of fifty ſhillings: and, in that caſe, it ſhall and " may be lawful for ſuch juſtices to appoint any other ſub- " ſtantial inhabitant of ſuch pariſh, townſhip, or place, for " aſſiſtant to ſuch ſurveyor, in manner and for the time afore- " ſaid; and if ſuch ſecond appointed aſſiſtant ſhall decline or " refuſe to accept the ſaid office, he ſhall, in like manner, " forfeit the ſum of fifty ſhillings; and the ſaid juſtices ſhall " and may appoint any other perſon, inhabiting in ſuch pariſh, " town-

How the aſſiſtant ſurveyor is to be appointed, penalty for refuſing to ſerve, and the appointment of another in his ſtead.

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" townſhip, or place, aſſiſtant to ſuch ſurveyor, who ſhall be " intitled to the ſaid forfeitures herein laſt before mentioned, " and alſo to ſome further allowance by way of ſalary, (to be " paid as the ſurveyor's ſalary is hereby directed to be paid), " if the ſaid juſtices ſhall think any ſuch ſalary neceſſary, and " ſhall order the ſame, which they are hereby authoriſed to " do: provided, that no perſon ſo appointed aſſiſtant for one " year ſhall be liable to be appointed aſſiſtant for the ſame pa- " riſh, townſhip, or place, within three years next following " ſuch firſt appointment, without his conſent.

The ſurveyor to give bond for the money he ſhall receive.

† And further, by par. 3. " That the ſurveyor of every pa- " riſh, townſhip, and place, who ſhall not reſide therein, but " ſhall be appointed with ſuch ſalary as aforeſaid, ſhall, if re- " quired by the churchwarden, overſeer of the poor, or any " principal inhabitant of the pariſh, townſhip, or place, for " which he ſhall be ſo appointed ſurveyor, at the time of his " appointment, or within fourteen days after, give a bond " upon paper, without ſtamp thereupon, to ſome proper " perſon within ſuch pariſh, townſhip, or place, to be no- " minated by the ſaid juſtices, with ſufficient ſurety, to ac- " count for the money which ſhall come to his hands as ſur- " veyor, according to the directions of this act; which bond " ſhall be good and effectual in law.

How the juſtices ſhall appoint the ſurveyor elected by the inhabitants.

†*Sect.* 36. And it is further enacted by the ſaid ſtatute, par. 5. " That if two parts out of three of thoſe ſo to be aſſembled " in any ſuch pariſh, townſhip, or place, for the nomination " of ſurveyors, ſhall agree in the choice of any particular per- " ſon of ſkill and experience, to ſerve the ſaid office, and in " the ſettling of a certain ſalary for his trouble therein, and " ſhall return the name of ſuch perſon, together with the liſt " herein-before directed, to the ſeſſions, to be held in the " week next after the Michaelmas quarter ſeſſions; the ſaid " juſtices, if they ſhall think proper, may appoint ſuch per- " ſon to be ſurveyor for ſuch pariſh, townſhip, or place, and " allow him the ſalary mentioned in ſuch agreement, which " ſhall be raiſed and paid in the ſame manner as the ſalary " herein-before mentioned is directed to be raiſed and paid; " and in caſe any ſurveyor to be appointed under the authority " of this act ſhall die, or become incapable of executing that " office, before ſuch next ſpecial ſeſſions for appointing ſur- " veyors, the ſaid juſtices, or any two of them, ſhall and " may, at ſome ſpecial ſeſſions, nominate and appoint ſuch " perſon or perſons as they ſhall think proper, to execute the " ſaid office, until ſuch next ſpecial ſeſſions for appointing " ſurveyors, as aforeſaid; and, if ſuch deceaſed ſurveyor had " a ſalary, they may allow the ſame ſalary to his ſucceſſor, in

" pro-

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" proportion to the time he ſhall ſerve the ſaid office; and if " the ſaid juſtices of the peace, at their ſaid ſpecial ſeſſions, " or at any time afterwards, purſuant to the powers of this " act, ſhall appoint more than one perſon for ſurveyor of any " pariſh, townſhip, or place, all and every perſon or perſons " ſo appointed, ſhall be comprehended under the word *Sur-* " *veyor* in every part of this act.

Juſtices of cities, &c. only to allow ſuch ſalaries as ſhall be fixed by inhabitants.

† Provided, by par. 55. " That nothing in this act con- " tained ſhall authoriſe or impower, or be deemed, conſtrued, " or taken to authoriſe and impower, any juſtice or juſtices " of the peace, for any city, town corporate, or borough, to " fix or allow any ſalary to or for any ſurveyor to be appoint- " ed by any ſuch juſtice or juſtices, other than and except ſuch " ſalary as ſhall be ſettled and agreed upon by two parts out of " three of the perſons aſſembled in the pariſh, townſhip, or " place, within ſuch city, town corporate, or borough, for " which ſuch ſurveyor ſhall be appointed, purſuant to the di- " rections of this act.

† *Sect.* 37. As to the fifth general Head of this Chapter, *viz.* In what manner the ſurveyors of the highways ought to execute their office, it is enacted by the ſame ſtatute of 13 Geo. 3. c. 78. ſ. 4. " That the aſſiſtant, ſo to be no- " minated and appointed, (16) ſhall aſſiſt the ſaid ſurveyor, " whenever requeſted by him, in calling in and attending the " performance of the ſtatute-duty; in collecting the compo- " ſitions, fines, penalties, and forfeitures; in making and " collecting the aſſeſſment; in making out and ſerving the " notices authoriſed by this act; and in ſuch other matters " and things as ſhall be reaſonably required of him by the " ſurveyor, in the execution of his office as ſurveyor, pur- " ſuant to this act: and the ſaid aſſiſtant ſhall account with, " and pay to, the ſurveyor, or to his order, all the money " which ſhall come to his hands as aſſiſtant, by the means " as aforeſaid; and, in default thereof, he ſhall forfeit double " the value of the money by him ſo received, and not ſo paid " and accounted for; and if the ſaid aſſiſtant ſhall wilfully ne- " glect or make default in the performance of any of the duty " required from him by this act, he ſhall forfeit, not exceed- " ing five pounds, nor leſs than forty ſhillings, at the diſcre- " tion of the juſtice or juſtices of the limit within which ſuch " aſſiſtant ſhall be appointed: and the ſaid ſurveyor ſhall ſend " orders, in writing, upon the ſaid aſſiſtant, for the pay- " ment of all ſums due to any perſon or perſons, for work or " materials, which amount to forty ſhillings, or upwards; " and the ſaid ſurveyor ſhall not be reſponſible for any ſum or " ſums of money which ſhall be received by the ſaid aſſiſ- " tant, and ſhall not be actually paid to ſuch ſurveyor, or to " his order as aforeſaid.

(16) Vide Sup. p. 392.

Duty of the aſſiſtant ſurveyor.

*Sect.*

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† *Sect.* 38. And alſo, it is further enacted by the ſaid ſtatute, par. 12. "That the ſurveyors ſhall, as they ſhall judge "proper, view all the common highways, trunks, tunnels, "plats, hedges, ditches, banks, bridges, cauſeways, and pave- "ments, within the pariſh, townſhip, or place, for which they "ſhall be appointed ſurveyors; and in caſe they ſhall obſerve "any nuiſances, encroachments, obſtructions, or annoyances, "made, committed, or permitted, in, upon, or to the preju- "dice of them, or any of them, contrary to the directions of "this act, they ſhall give, or cauſe to be given, to any perſon "or perſons, doing, committing, or permitting the ſame, per- "ſonal notice, or notice in writing, to be left at his, her, or "their uſual place or places of abode, ſpecifying the particu- "lars wherein ſuch nuiſances, defaults, obſtructions, or an- "noyances, conſiſt; and if ſuch nuiſances, obſtructions, or "annoyances ſhall not be removed, and the ditches, drains, "gutters, and water courſes aforeſaid effectually made, ſcour- "ed, cleanſed, and opened, and ſuch trunks, tunnels, plats, "and bridges, made and laid, and ſuch hedges properly cut "and pruned, within twenty days after ſuch notice of the ſame "reſpectively given as aforeſaid, then the ſaid ſurveyors ſhall "remove ſuch nuiſances, obſtructions, or annoyances, and "open, cleanſe, and ſcour ſuch ditches, gutters, and water "courſes, and make or amend ſuch trunks, tunnels, plats, or "bridges, and cut and prune ſuch hedges, for the benefit and "improvement of the ſaid highways; and the perſon or per- "ſons ſo neglecting to make or open and cleanſe ſuch ditches, "gutters, or water courſes, or to cut or prune ſuch hedges, "during the time aforeſaid, after ſuch notice given, ſhall for- "feit, for every foot in length, which ſhall be ſo neglected, the "ſum of one penny; and the ſaid ſurveyors ſhall be reimbur- "ſed what charges and expences they ſhall be at in removing "ſuch nuiſances, obſtructions, or annoyances, and making or "opening, cleanſing and ſcouring, ſuch ditches, gutters, and "water courſes, and in making or amending ſuch trunks, "tunnels, plats, or bridges, and in cutting and pruning ſuch "hedges reſpectively, by the perſon or perſons who ought to "have done the ſame, over and above the ſaid forfeiture; and "in caſe ſuch perſon or perſons ſhall, upon demand, refuſe or "neglect to pay the ſaid ſurveyor his charges and expences "occaſioned thereby reſpectively, and alſo the ſaid forfeiture "of one penny *per* foot, then the ſaid ſurveyor ſhall apply to "any juſtice of the peace, and, upon making oath before him "of notice being given to the defaulter in manner aforeſaid, "and of the ſaid work being done by ſuch ſurveyor, and of the "expences attending the ſame, the ſaid ſurveyor ſhall be re- "paid by ſuch perſon or perſons all ſuch his ſaid charges as "ſhall be allowed to be reaſonable by the ſaid juſtice; or, in "de-

Surveyors duty in view of highways, in reſpect to nuiſances, &c.

Vide Salk. 357. Where it was adjudged on the 22 Car. 2. c. 12. par 12. that the juſtices ought to fix the particular days, and not generally appoint the time between ſuch a day and ſuch a day.

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" default of payment thereof on demand, the ſame ſhall be " levied in ſuch manner as the penalties and forfeitures hereby " inflicted are directed to be levied."

How highways by tenure, &c. may be ordered to be repaired.

† *Sect.* 39. And it is further enacted by the ſaid ſtatute, par. 23. " That every ſurveyor ſhall give information upon " oath to the ſaid juſtices, or any two or more of them, of all " ſuch highways, and of all bridges, cauſeways, or pavements, " upon ſuch highways, as are out of repair, and ought to be " repaired by any perſon or perſons, bodies politick or corpo- " rate, by reaſon of any grant, tenure, limitation, or appoint- " ment, of any charitable gift, or otherwiſe howſoever; and " the ſaid juſtices ſhall limit a time for repairing the ſame, of " which notice ſhall be given by the ſaid ſurveyor to the occu- " pier or occupiers of the lands or tenements liable to the bur- " then of ſuch repairs, or to ſuch other perſon or perſons, bo- " dies politick or corporate, as are chargeable with the ſame; " and if ſuch repairs ſhall not be effectually made within the " time ſo limited, the ſaid juſtices ſhall, and are hereby requi- " red to preſent ſuch highways, bridges, cauſeways, or pave- " ments, ſo out of repair, together with the perſon or perſons, " bodies politick or corporate, liable to repair the ſame, at " the next general quarter ſeſſions of the peace for the limit " wherein ſuch highway ſhall lie; and the juſtices at ſuch " quarter ſeſſions may, if they ſee juſt cauſe, direct the pro- " ſecution to be carried on at the general expence of ſuch li- " mit, and to be paid out of the general rates within the " ſame."

Vide 1 Black. 602.

Juſtices may order which highways ſhall be firſt repaired.

† And it is further enacted by the ſaid ſtatute, par. 25. " That " the ſaid juſtices, at any ſpecial ſeſſions to be held by virtue " of this act, may, by writing under their hands and ſeals, or- " der and appoint thoſe highways (not being turnpike road), " which in their opinion do moſt want repair within their ju- " riſdiction, to be firſt amended, and at what time, and in what " manner, the ſame ſhall be amended; according to which or- " der, if ſuch there be, all and ſingular the reſpective ſurveyors " of the ſaid highways are hereby required to proceed within " their reſpective liberties."

Direction poſts where and how to be erected.

† And, for the better convenience of travellers where ſeveral highways meet, it is further enacted in par. 26. " That the " ſaid juſtices, at ſome ſpecial ſeſſions to be held for the pur- " poſes of this act, ſhall iſſue their precept to the ſurveyor of " the highways for any pariſh, townſhip, or place, where ſe- " veral highways meet, and there is no proper or ſufficient di- " rection poſt, or ſtone, already fixed or erected, requiring him " forthwith to cauſe to be erected or fixed, in the moſt conve-

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" nient place where ſuch ways meet, a ſtone or poſt, with in-
" ſcriptions thereon, in large legible letters, painted on each
" ſide thereof, containing the name or names of the next mar-
" ket town or towns, or other conſiderable place or places,
" to which the ſaid highways reſpectively lead; and alſo at the
" ſeveral approaches or entrances to ſuch parts of any high-
" ways as are ſubject to deep or dangerous floods, graduated
" ſtones or poſts, denoting the depth of water in the deepeſt
" part of the ſame, and likewiſe ſuch direction poſts, or ſtones,
" as the ſaid juſtices ſhall judge to be neceſſary, for the guiding
" of travellers in the beſt and ſafeſt tract through the ſaid floods
" or waters; and the ſaid ſurveyor ſhall be reimburſed the ex-
" pences of providing and erecting the ſame reſpectively out
" of the monies which ſhall be received by him or them, pur-
" ſuant to the directions of this act; and in caſe any ſurveyor
" ſhall, by the ſpace of three months after ſuch precept to him
" directed and delivered, neglect or refuſe to cauſe ſuch ſtones
" or poſts to be fixed, as aforeſaid, every ſuch offender ſhall
" forfeit the ſum of twenty ſhillings."

† *Sect.* 40. And, for the better repairing, and keeping in repair, the ſaid highways, and providing of materials for that purpoſe, it is enacted, by par. 27. " That it ſhall and may be lawful to and " for every ſurveyor, to be appointed as aforeſaid, to take and " carry away, or cauſe to be taken and carried away, ſo much " of the rubbiſh or refuſe ſtones of any quarry or quarries, ly-" ing and being within the pariſh, townſhip, or place, where " he ſhall be ſurveyor, (except ſuch as ſhall have been got by " the ſurveyor of any turnpike road), without the licence of " the owner or owners of ſuch quarries, as they ſhall judge ne-" ceſſary for the amendment of the ſaid highways, but not to " dig or get ſtone in ſuch quarry without leave of the owner " thereof; and alſo that it ſhall and may be lawful for every " ſuch ſurveyor, for the uſe aforeſaid, in any waſte land or com-" mon ground, river or brook, within the pariſh, townſhip, or " place, for which he ſhall be ſurveyor, or within any other pa-" riſh, townſhip, or place, wherein gravel, ſand, chalk, ſtone, or " other materials, are reſpectively likely to be found, (in caſe ſuf-" ficient cannot be conveniently had within the pariſh, town-" ſhip, or place, where the ſame are to be employed, and ſuffi-" cient ſhall be left for the uſe of the roads in ſuch other pa-" riſh, townſhip, or place), to ſearch for, dig, get, and carry " away the ſame, ſo that the ſaid ſurveyor doth not thereby di-" vert or interrupt the courſe of ſuch river or brook, or pre-" judice or damage any building, highway, or ford, nor dig or " get the ſame out of any river or brook within the diſtance of " one hundred feet above or below any bridge, nor within " the like diſtance of any dam or wear; and likewiſe to gather " ſtones lying upon any lands or grounds within the pariſh, " townſhip,

Materials where and in what manner to be taken.

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"townſhip, or place, where ſuch highway ſhall be, for ſuch "ſervice and purpoſe, and to take and carry away ſo much of "the ſaid materials as by the diſcretion of the ſaid ſurveyor "ſhall be thought neceſſary to be employed in the amendment "of the ſaid highways, without making any ſatisfaction for the "ſaid materials; but ſatisfaction ſhall be made for all damages "done to the lands or grounds of any perſon or perſons, by "carrying away the ſame, in the manner herein after direct-"ed, for getting and carrying materials in incloſed lands or "grounds; but no ſuch ſtones ſhall be gathered without the "conſent of the occupier of ſuch lands or grounds, or a licence "from a juſtice of peace for that purpoſe, after having ſum-"moned ſuch occupier to come before him, and heard his rea-"ſons, if he ſhall appear and give any, for refuſing his con-"ſent."

Without making ſatisfaction.

But ſatisfaction to be made for damages done in taking them away.

† Provided, by par. 28. "That nothing in this act contain-"ed, relative to the gathering or getting of ſtones, ſhall ex-"tend to any quantity of land, (being private property,) cover-"ed with ſtones thrown up by the ſea, commonly called "*beach*."

Not to extend to ſtones thrown up by the ſea, called Beach.

† *Sect.* 41. And it is further enacted by the ſaid ſtatute, par. 29. "That every ſuch ſurveyor, for the uſe aforeſaid, may ſearch "for, dig, and get ſand, gravel, chalk, ſtone, or other mate-"rials, if ſufficient cannot conveniently be had within ſuch "waſte lands, common grounds, rivers, or brooks, in and "through any of the ſeveral or incloſed lands or grounds of "any perſon or perſons whomſoever, within the pariſh, town-"ſhip, or place, where the ſame ſhall be wonted, or by li-"cence from two juſtices of the peace, at a ſpecial ſeſſions, "within any other pariſh, townſhip, or place, adjoining or ly-"ing near to the highway for which ſuch materials ſhall be re-"quired, if it ſhall appear to ſuch juſtices that ſufficient mate-"rials cannot be conveniently had in the pariſh, townſhip, or "place, where ſuch highways lie, or in the waſte lands or "common grounds, rivers or brooks, of ſuch adjacent pariſh, "townſhip, or place, and that a ſufficient quantity of mate-"rials will be left for the uſe of the pariſh, townſhip, or place, "where the ſame ſhall be, (ſuch lands or grounds not being "a garden, yard, avenue to a houſe, lawn, park, paddock, or "incloſed plantation), and to take and carry away ſo much of "the ſaid materials as by the diſcretion of the ſaid ſurveyor "ſhall be thought neceſſary to be employed in the amendment "of the ſaid highways; the ſaid ſurveyor making ſuch ſatisfac-"tion for the damage to be done to ſuch lands or grounds by "the getting and carrying away the ſame, as ſhall be agreed "upon between him and the owner, occupier, or other perſon "intereſted in ſuch lands or ground reſpectively, in the pre-"ſence,

If ſufficient materials cannot be found in waſte lands, &c. the ſurveyor may take them from ſeveral or incloſed lands or grounds.

Making ſatisfaction to the owners.

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" fence, and with the approbation of two or more ſubſtantial " inhabitants of ſuch pariſh, townſhip, or place; and in " caſe they cannot agree, then ſuch ſatisfaction and re- " compence ſhall be ſettled and aſcertained by order of one or " more juſtice or juſtices of the peace of the limit where ſuch " land or ground ſhall lie: and in ſuch places, where, from " the want of other materials, burnt clay may be ſubſtituted in " the place thereof, it ſhall and may be lawful for the ſurveyor " to dig clay in ſuch places as he is hereby authoriſed to dig " chalk or gravel, and to dry the ſame upon the lands adjoin- " ing, and to burn the ſame upon any waſte lands or common " grounds, and to carry ſuch clay in ſuch manner as other ma- " terials are allowed to be carried by this act, upon making " ſuch ſatisfaction for the damages within the ſeveral incloſed " lands or grounds where ſuch clay ſhall be placed or carried, " as herein directed with regard to other materials: provided, " that when the owner of any ſuch incloſed lands ſhall have " occaſion for any ſuch materials lying within the ſame for the " repair of any highway, or other roads or ways upon his " eſtate, or which he ſhall be under obligation to repair, and " ſhall give notice to ſuch ſurveyor that he apprehends there " will not be ſufficient for thoſe purpoſes, and alſo for the uſe " of the publick highways; then, and in every ſuch caſe, the " ſurveyor ſhall not be permitted to dig or take ſuch materials " without the conſent of ſuch owner, or an order of two juſ- " tices of the peace, after having ſummoned and heard the ſaid " owner or occupier, or his ſteward or agent; which juſtices " are hereby authoriſed to enquire into the nature and circum- " ſtances of the caſe, and to permit or reſtrain ſuch power, in " ſuch manner, and under ſuch directions, as to them ſhall " ſeem juſt." (17)

In what manner ſatisfaction is to be ſettled.

Clay may be got and burnt into materials for repairing the highways.

(17) In an order for this purpoſe, it is not neceſſary that the name of the ſurveyor ſhould be mentioned, nor that any certain number of days notice ſhould appear to have been given to the occupier of the lands. Which notice, it is ſufficient to ſtate, was *left at his place of abode*. And notice to the occupier, and not to the owner, is enough. But is it neceſſary expreſſly to allege, that materials, &c. were not to be found; and alſo, what materials cannot be found in the waſtes, and what may be found in the private ſoil; for they cannot dig and try for it in the private ſoil; nor can they dig all over the eſtate for all materials, and the ſatisfaction ought to be awarded to the owner or occupier, or both, according to the caſe. 1 *Burr.* 382.

† *Sect.* 42. Alſo, it is enacted, par. 31. " That if any ſur- " veyor, or perſon employed by him, ſhall, by reaſon of the " ſearching for, digging, or getting any gravel, ſand, ſtones, " chalk, clay, or other materials for repairing any highways, " make, or cauſe to be made, any pit or hole in any ſuch lands " or grounds, rivers or brooks, as aforeſaid, wherein ſuch ma- " terials ſhall be found, ſuch ſurveyor, perſon or perſons, ſhall " forthwith cauſe the ſame to be ſufficiently fenced off, and " ſuch fence ſupported and repaired, during ſuch time as the " ſaid pit or hole ſhall continue open, and ſhall, within three " days

If pits or holes are made in getting materials, the ſurveyor ſhall cauſe them to be filled up or fenced off.

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" days after ſuch pit or hole ſhall be opened or made, where " no gravel, ſtones, or materials, ſhall be found, cauſe the " ſame to be forthwith filled up, levelled, and covered with " the turf or clod which was dug out of the ſame; and where " any ſuch materials ſhall be found, within fourteen days af- " ter having dug up ſufficient materials in ſuch pit or hole, " cauſe the ſame to be filled up, ſloped down, or fenced off, " and ſo continued; and every ſurveyor ſhall, within twenty " days after he ſhall be appointed to that office, cauſe all the " ſaid pits and holes which ſhall then be open, and not likely " to be further uſeful, to be filled up or ſloped down, in man- " ner aforeſaid; and if they are likely to be further uſeful, he " ſhall ſecure the ſame by poſts and rails, or other fences, to

Or forfeit 10 s. for every neglect.

" prevent accidents to perſons or cattle: and in caſe ſuch ſur- " veyor, perſon or perſons, ſhall neglect to fill up, ſlope down, " or fence off, ſuch pit or hole, in manner and within the time " aforeſaid, he or they ſhall forfeit the ſum of ten ſhillings

And for every neglect after notice

" for every ſuch default: and in caſe ſuch ſurveyor, perſon or " perſons, ſhall neglect to fence off ſuch pit or hole, or to ſlope " down the ſame, as herein before directed, for the ſpace of " ſix days after he or they ſhall have received notice for either " of thoſe purpoſes from any juſtice of the peace, or from

A ſum not exceeding 10 l. nor leſs than 40 s.

" the owner or occupier of ſuch ſeveral ground, river, or " brook, or any perſon having right of common within ſuch " common or waſte lands, as aforeſaid, and ſuch neglect and " notice ſhall be proved upon oath before one or more of the " ſaid juſtices of the peace, ſuch ſurveyor, perſon or perſons, " ſhall forfeit and pay any ſum not exceeding ten pounds, nor " leſs than forty ſhillings, for every ſuch neglect; to be de- " termined and adjudged by ſuch juſtice or juſtices, and to be " laid out and applied in the fencing off, filling up, or ſloping " down, ſuch pit or hole, and toward the repair of the roads " in the pariſh, townſhip, or place, where the offence ſhall " be committed, in ſuch manner as the ſaid juſtice or juſtices " ſhall direct and appoint; which forfeiture, in caſe the ſame " be not forthwith paid, ſhall be levied as other forfeitures are " herein after directed to be levied."

How materials for another pariſh ſhall be removed.

† Provided by par. 32. " That no ſtone, gravel, or materials, " to be dug for the uſe of any other pariſh, townſhip, or place, " than that wherein the ſame are found, ſhall be removed or " carried from the place where they ſhall be ſo dug at any " other time than between the firſt day of April and the firſt " day of November, or in the time of hard froſt in the winter " ſeaſon."

Damaging mills, &c.

† *Sect.* 43. And it is further enacted, by par. 33. " That if " any perſon ſhall dig, or cauſe to be dug, materials for the " highways, contrary to the direction of this act, whereby " any

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" any bridge, mill, building, dam, highway, ford, mines, " or tin-works, may be damaged or endangered; every of- " fender therein ſhall forfeit, for every ſuch offence, any ſum " not exceeding five pounds, nor leſs than twenty ſhillings, at " the diſcretion of the court or juſtices, before whom com- " plaint thereof ſhall be made."

† *Sect.* 44. Alſo it is enacted by the ſaid ſtatute, par. 48. " That the ſurveyor ſhall collect the ſeveral aſſeſſments, for- " feitures, penalties, ſums of money, and compoſitions, to be " received and taken by virtue of this act, within the year " for which he is appointed ſurveyor, and ſhall keep one or " more book or books, in which he ſhall fairly enter a juſt, " true, and fair account of all ſuch money as ſhall have come " to his hands, or to the hands of the ſaid aſſiſtant, and to " whom, and on what occaſion, he ſhall have paid or applied " the ſame; and ſhall alſo enter in ſuch book or books a liſt " or liſts of all ſuch ſums of money as ſhall then remain due " and owing from any perſon or perſons, in reſpect of the pay- " ments, compoſitions, aſſeſſments, penalties, or forfeitures, " to be collected, received, or taken, for and in reſpect of " the ſaid highways, by virtue of this act; and the ſaid ſur- " veyor ſhall alſo enter an account of all tools, materials, im- " plements, and other things provided, by order of the inha- " bitants, at a veſtry, or other publick meeting, for the repair " of the ſaid highways, at the publick expence of ſuch pa- " riſh, townſhip, or place; and ſhall produce ſuch books, and " the aſſeſſments made within that year unto the inhabitants " to which they belong, at a veſtry or other publick meeting " to be held for that purpoſe, within fifteen days before the " ſaid ſpecial ſeſſions ſo to be held in the week next after Mi- " chaelmas quarter ſeſſions, as aforeſaid, to the intent that the " ſaid accounts, aſſeſſments, and liſts, may be inſpected by " the inhabitants; and every ſuch ſurveyor ſhall, after the ſaid " books and aſſeſſments ſhall have been produced at ſuch meet- " ing, take the ſame to ſuch juſtice of the peace for the limit " wherein ſuch pariſh, townſhip, or place, doth lie, and on " ſuch day, and at ſuch hour, as ſhall be agreed upon at ſuch " meeting, ſome day after the ſaid meeting of the inhabitants, " and before ſuch laſt-mentioned ſpecial ſeſſions, and then and " there verify ſuch account, or any part thereof, upon oath, " if required; and ſuch juſtice may allow ſuch account, if he " finds it juſt, or poſtpone it until ſuch ſpecial ſeſſions, if he " finds cauſe for ſo doing, in which caſe it may be ſettled and " allowed at ſuch ſpecial ſeſſions (18) after the parts objected

The ſurveyor's duty is to keep books, and enter the accounts of all money paid and received.

And alſo of all money remaining due.

Alſo of all tools, materials, &c.

And ſhall produce his accounts at a veſtry meeting.

And afterwards before a juſtice of peace, who may allow them.

Or they may be further examined and allowed, or diſallowed, at the ſpecial ſeſſions.

(18) The general quarter ſeſſions have no original juriſdiction reſpecting the paſſing the ſurveyor's account, and paying over the balances to the ſucceſſor. Therefore, where an order for this purpoſe was made at the general quarter ſeſſion, even by the conſent of the ſpecial ſeſſion it was quaſhed; for conſent cannot give original juriſdiction to a court that has only an appellate juriſdiction. 2 Burr. 746.

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" to by ſuch juſtice ſhall have been explained and verified by " proper evidence, to the ſatisfaction of the juſtices at ſuch " ſpecial ſeſſions; and in caſe any articles contained in ſuch " accounts ſhall not be explained and proved to the ſatisfaction " of ſuch juſtices, they may diſallow the ſame; and when- " ever the ſaid accounts ſhall be ſo ſettled and allowed, or " diſallowed, as aforeſaid, all ſuch books and aſſeſſments ſhall " be tranſmitted to the churchwarden or overſeer of the poor " for ſuch pariſh, townſhip, or place, reſpectively, or, if the " place be extraparochial, then to ſome principal inhabitant " thereof, to be kept for the uſe of ſuch pariſh, townſhip, or

Books, materials, tools, &c. to be delivered to the ſucceeding ſurveyor.

" place; and the ſaid ſurveyor ſhall forthwith deliver a du- " plicate of ſuch book and account, together with all ſums of " money as ſhall remain in his hands, and likewiſe all tools, " materials, implements, and other things, as aforeſaid, to " the ſucceeding ſurveyor for ſuch pariſh, townſhip, or place, " in caſe any new ſurveyor ſhall be appointed, or retain the " ſame in his hands, and account for them in his next ac- " count, if he ſhall be continued ſurveyor for ſuch pariſh, " townſhip, or place, in the ſucceeding year; and the ſuc- " ceeding ſurveyor is hereby required to recover, collect, and " receive, all ſuch ſums of money which ſhall be due and ow- " ing as aforeſaid, by all ſuch ways and means, as fully and " effectually, to all intents and purpoſes, as the preceding ſur- " veyor could, might, or ought to have recovered, collected,

New ſurveyor authoriſed to collect the arrears, &c.

The ſurveyor liable to forfeitures for neglect of duty.

" or received the ſame: and in caſe ſuch ſurveyor ſhall ne- " glect to provide ſuch book or books, or to enter ſuch re- " ſpective accounts and liſts therein, or to deliver the ſaid " book or books, and ſuch duplicate thereof, and ſuch aſſeſſ- " ments, tools, materials, implements, and other things, in " manner aforeſaid, he ſhall, for every ſuch offence, forfeit " not exceeding five pounds, nor leſs than forty ſhillings; and " in caſe he ſhall make default in the paying or accounting " for the money ſo remaining in his hands, within the time, " and according to the directions aforeſaid, he ſhall forfeit " double the value of the money which ſhall be adjudged by

If ſurveyor dies, his executors, &c. ſhall account in the ſame manner.

" the ſaid juſtices to be in his hands; and in caſe any ſuch " ſurveyor ſhall die before ſuch reſpective accounts and liſts " ſhall be made out, or ſuch monies, books, aſſeſſments, " tools, materials, and implements, ſhall be ſo delivered and

Fees to be paid to the juſtices clerks.

" paid, the executors or adminiſtrators of ſuch ſurveyor ſhall " make out, pay, and deliver the ſame, in like manner, and " under the like penalty, as ſuch ſurveyor is hereby required " and made ſubject and liable to; and every ſurveyor ſhall " pay to the juſtices clerks, for the appointment and charge, " the ſum of one ſhilling; for the bond ſixpence; and for the " account ſo to be examined and taken, and for the oath ſo " to be adminiſtered, the ſum of one ſhilling, and no more; " and if any perſon or perſons ſhall receive any greater ſum

" or

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for the buſineſs aforeſaid than herein before mention- ſhall forfeit the ſum of ten pounds for every offence."

45. And it is alſo enacted, by par. 50. "That a ſufficient quantity of ſtone, gravel, chalk, or materials, cannot be provided and carried by the la- rs and teams required by this act to perform ſtatute the ſurveyor ſhall contract for the getting and carry- ereof, (in the preſence of the ſaid aſſiſtant, if any ſuch e appointed), at a meeting to be held for that purpoſe, ich ten days notice in writing ſhall be given, by fixing ne upon the door of the church or chapel of the pa- townſhip, or place, or if there be no church or cha- t the moſt publick place there; which notice ſhall the work to be done, and the time and place for thereof; and if any ſurveyor ſhall have any part, or intereſt, directly or indirectly, in any ſuch con- or in any other contract or bargain for work or mate- o be made, done, or provided, upon, for, or on ac- of any of the highways, roads, bridges, or other works ever, under his care or management, or ſhall, upon wn account, directly or indirectly, let to hire any or ſell or diſpoſe of any timber, ſtone, or other ma- , to be uſed or employed in making or repairing ſuch bridges, or other works, as aforeſaid, (unleſs a li- in writing, for the ſale of any ſuch materials, or to hire any ſuch team, be firſt obtained from ſome juſ- the peace within that limit), he ſhall forfeit, for eve- offence, the ſum of ten pounds, and be for ever after ble of being employed as a ſurveyor with a ſalary, the authority of this act."

How materials may be contracted for.

And it is further enacted, by par. 51. "That if any or of the highways, after his acceptance of the ſaid ſhall neglect his duty in any thing required of him by t, for which no particular penalty is impoſed, he ſhall , for every ſuch offence, any ſum not exceeding five s, nor leſs than ten ſhillings, at the diſcretion of the or juſtices having juriſdiction therein."

Penalty upon the ſurveyor.

alſo, by par. 54. "That the juſtices of the peace of ies, corporations, boroughs, and other places, are required to put in execution every part of this act their reſpective juriſdictions."

Juſtices of cities to put the act in execution.

47. And it is recited, by par. 44. of the ſaid ſtatute, ereas, by ſeveral acts of parliament concerning

Where the ſurveyor receives money due to the turnpike roads, he ſhall pay it to the treaſurer.

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" to by ſuch juſtice ſhall have been explained and verified by
" proper evidence, to the ſatisfaction of the juſtices at ſuch
" ſpecial ſeſſions; and in caſe any articles contained in ſuch
" accounts ſhall not be explained and proved to the ſatisfaction
" of ſuch juſtices, they may diſallow the ſame; and when-
" ever the ſaid accounts ſhall be ſo ſettled and allowed, or
" diſallowed, as aforeſaid, all ſuch books and aſſeſſments ſhall
" be tranſmitted to the churchwarden or overſeer of the poor
" for ſuch pariſh, townſhip, or place, reſpectively, or, if the
" place be extraparochial, then to ſome principal inhabitant
" thereof, to be kept for the uſe of ſuch pariſh, townſhip, or
Books, materials, tools, &c. to be delivered to the ſucceeding ſurveyor.
" place; and the ſaid ſurveyor ſhall forthwith deliver a du-
" plicate of ſuch book and account, together with all ſums of
" money as ſhall remain in his hands, and likewiſe all tools,
" materials, implements, and other things, as aforeſaid, to
New ſurveyor authoriſed to collect the arrears, &c.
" the ſucceeding ſurveyor for ſuch pariſh, townſhip, or place,
" in caſe any new ſurveyor ſhall be appointed, or retain the
" ſame in his hands, and account for them in his next ac-
" count, if he ſhall be continued ſurveyor for ſuch pariſh,
" townſhip, or place, in the ſucceeding year; and the ſuc-
" ceeding ſurveyor is hereby required to recover, collect, and
" receive, all ſuch ſums of money which ſhall be due and ow-
" ing as aforeſaid, by all ſuch ways and means, as fully and
" effectually, to all intents and purpoſes, as the preceding ſur-
" veyor could, might, or ought to have recovered, collected,
The ſurveyor liable to forfeitures for neglect of duty.
" or received the ſame: and in caſe ſuch ſurveyor ſhall ne-
" glect to provide ſuch book or books, or to enter ſuch re-
" ſpective accounts and liſts therein, or to deliver the ſaid
" book or books, and ſuch duplicate thereof, and ſuch aſſeſſ-
" ments, tools, materials, implements, and other things, in
" manner aforeſaid, he ſhall, for every ſuch offence, forfeit
" not exceeding five pounds, nor leſs than forty ſhillings; and
" in caſe he ſhall make default in the paying or accounting
" for the money ſo remaining in his hands, within the time,
" and according to the directions aforeſaid, he ſhall forfeit
" double the value of the money which ſhall be adjudged by
If ſurveyor dies, his executors, &c. ſhall account in the ſame manner.
" the ſaid juſtices to be in his hands; and in caſe any ſuch
" ſurveyor ſhall die before ſuch reſpective accounts and liſts
" ſhall be made out, or ſuch monies, books, aſſeſſments,
" tools, materials, and implements, ſhall be ſo delivered and
Fees to be paid to the juſtices clerks.
" paid, the executors or adminiſtrators of ſuch ſurveyor ſhall
" make out, pay, and deliver the ſame, in like manner, and
" under the like penalty, as ſuch ſurveyor is hereby required
" and made ſubject and liable to; and every ſurveyor ſhall
" pay to the juſtices clerks, for the appointment and charge,
" the ſum of one ſhilling; for the bond ſixpence; and for the
" account ſo to be examined and taken, and for the oath ſo
" to be adminiſtered, the ſum of one ſhilling, and no more;
" and if any perſon or perſons ſhall receive any greater ſum

" or

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" or fee for the buſineſs aforeſaid than herein before mention-
" ed, he ſhall forfeit the ſum of ten pounds for every offence."

† *Sect.* 45. And it is alſo enacted, by par. 50. " That
" where a ſufficient quantity of ſtone, gravel, chalk, or
" other materials, cannot be provided and carried by the la-
" bourers and teams required by this act to perform ſtatute
" duty, the ſurveyor ſhall contract for the getting and carry-
" ing thereof, (in the preſence of the ſaid aſſiſtant, if any ſuch
" ſhall be appointed), at a meeting to be held for that purpoſe,
" of which ten days notice in writing ſhall be given, by fixing
" the ſame upon the door of the church or chapel of the pa-
" riſh, townſhip, or place, or if there be no church or cha-
" pel, at the moſt publick place there; which notice ſhall
" ſpecify the work to be done, and the time and place for
" letting thereof; and if any ſurveyor ſhall have any part,
" ſhare, or intereſt, directly or indirectly, in any ſuch con-
" tract, or in any other contract or bargain for work or mate-
" rials to be made, done, or provided, upon, for, or on ac-
" count of any of the highways, roads, bridges, or other works
" whatſoever, under his care or management, or ſhall, upon
" his own account, directly or indirectly, let to hire any
" team, or ſell or diſpoſe of any timber, ſtone, or other ma-
" terials, to be uſed or employed in making or repairing ſuch
" roads, bridges, or other works, as aforeſaid, (unleſs a li-
" cence, in writing, for the ſale of any ſuch materials, or to
" let to hire any ſuch team, be firſt obtained from ſome juſ-
" tice of the peace within that limit), he ſhall forfeit, for eve-
" ry ſuch offence, the ſum of ten pounds, and be for ever after
" incapable of being employed as a ſurveyor with a ſalary,
" under the authority of this act."

How materials may be contracted for.

† 46. And it is further enacted, by par. 51. " That if any
" ſurveyor of the highways, after his acceptance of the ſaid
" office, ſhall neglect his duty in any thing required of him by
" this act, for which no particular penalty is impoſed, he ſhall
" forfeit, for every ſuch offence, any ſum not exceeding five
" pounds, nor leſs than ten ſhillings, at the diſcretion of the
" juſtice or juſtices having juriſdiction therein."

Penalty upon the ſurveyor.

† And alſo, by par. 54. " That the juſtices of the peace of
" all cities, corporations, boroughs, and other places, are
" hereby required to put in execution every part of this act
" within their reſpective juriſdictions."

Juſtices of cities to put the act in execution.

† *Sect.* 47. And it is recited, by par. 44. of the ſaid ſtatute,
That whereas, by ſeveral acts of parliament concerning

Where the ſurveyor receives money due to the turnpike roads, he ſhall pay it to the treaſurer.

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turnpike roads (19), a certain part of the duty called ſtatute duty is or may be directed to be performed on ſuch roads, and it may happen in ſome places, that the ſeveral perſons liable thereto may have compounded for the ſame. It is therefore further enacted, "That in all ſuch caſes, the ſurveyor of "highways, where ſuch compoſition ſhall have been made, "ſhall pay to the treaſurer or ſurveyor of ſuch turnpike roads "a certain part of the compoſition money ſo received, to be "proportioned according to the number of days duty which "ſuch perſon or perſons was or were liable to perform on "ſuch turnpike road; which money ſhall be laid out and ex- "pended on ſuch part of the ſaid turnpike road as lies within "the pariſh, townſhip, or place, from which it was received, "and not elſewhere; and if ſuch ſurveyor of the highways "ſhall refuſe or neglect to pay to the treaſurer or ſurveyor of "ſuch turnpike road ſuch part of the ſaid compoſition money "ſo received by him, within twenty days after he ſhall have "received the ſame, upon demand made by ſuch treaſurer or "ſurveyor, the ſame ſhall and may be levied on the goods and "chattels of ſuch ſurveyor, in ſuch manner as penalties and "forfeitures are by this act authoriſed to be levied."

(19) Vide the end of this chapter.

How the ſame ſhall be applied.

As to the ſixth general Head of this Chapter, *viz.* What ſhall be ſaid to be a nuſance to the highway, I ſhall conſider: What ſhall be ſaid to be ſuch a nuſance at common law, and what by ſtatute.

*Sect.* 48. As to the firſt point, there is no doubt but that all injuries whatſoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act, which will render it leſs commodious to the king's people, are publick nuſances at common law.

Kitch. 34, 35.

*Sect.* 49. Alſo it ſeemeth to be clear, That it is no excuſe for one who layeth ſuch logs in the highway that he laid them only here and there, ſo that the people might have a paſſage by windings and turnings through the logs: yet it is ſaid to be no nuſance for the inhabitants of a town to unlade billets, *&c.* in the ſtreet before their houſes, by reaſon of the neceſſity of the caſe, unleſs they ſuffer them to continue there an unreaſonable time, after they are unloaded.

2 R. Abr. 137, 265.

2 R. Abr. 137.

*Sect.* 50. There is no doubt but that it is a nuſance at common law to erect a new gate in a highway, as hath been more fully ſhewn in the precedent chapter. Alſo it ſeemeth clear, That it is a like nuſance to ſuffer the ditches adjoining to a highway to be foul, by reaſon whereof it is impaired, or to ſuffer the boughs of trees growing near the highway to hang over

8 H. 7. 5. Kitch. 34, 35. 8 H. 7. 5.

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over the road, in ſuch a manner as thereby to incommode the paſſage.

‡ *Sect.* 51. As to the ſecond point, *viz.* What ſhall be ſaid to be a nuſance to the highway by ſtatute; not only all the above mentioned nuſances, which are ſuch at common law, are eſteemed alſo nuſances by ſtatute, but there is alſo one particular nuſance which is made ſuch by ſtatute, and doth not ſeem to be taken notice of by common law, and that is the drawing of a travelling carriage with more than ſix horſes in length (*a*), the permitting whereof hath occaſioned the carrying of ſuch exceſſive loads in ſuch carriage, that the weight thereof hath in many places rendered the roads unpaſſable.

(*a*) For the number now permitted to be drawn, vide infra, ſect. 65.

As to the ſeventh general Head of this Chapter, *viz.* How ſuch nuſances are to be removed and puniſhed, I ſhall conſider the following particulars: Firſt, In what order hedges and ditches, adjoining to the highway, ought to be kept. Secondly, How far all trees and buſhes are to be removed from the highway. Thirdly, In what manner all other annoyances obſtructing the highway are to be removed. Fourthly, How far all perſons are puniſhable for taking away things made uſe of for the benefit of the highway. Fifthly, How far they may be puniſhed for drawing a carriage with more than five horſes in length.

*Sect.* 52. As to the firſt particular, *viz.* In what order hedges and ditches, adjoining to the highway, ought to be kept. It is ſaid, That he who hath lands next adjoining to a highway, is bound of common right to ſcour his ditches; but it is ſaid, that he who hath lands next adjoining to ſuch lands, is not bound by the common law ſo to do, without ſome ſpecial preſcription for that purpoſe; and perhaps it is the better opinion, That he who hath trees next adjoining to the highway, and hanging over it to the annoyance of the people, is bound by the common law to lop the ſame: and it ſeems clear, That any perſon may juſtify the lopping ſuch trees, ſo far as to avoid the nuſance.

8 Hen. 7. 5. Kitch. 34, 35. Dalton, c. 26. 114. Summary, 144.

† *Sect.* 53. However it is enacted by 13 Geo. 3. c. 78. par. 7. "That the poſſeſſors of the land next adjoining to "every highway ſhall cut, prune, and plaſh their hedges, and "alſo cut down or prune and lop the trees growing in or near "ſuch hedges or other fences, (except thoſe trees planted for "ornament or ſhelter, as hereafter mentioned) (*b*) in ſuch man- "ner that the highways ſhall not be prejudiced by the ſhade "thereof reſpectively, and that the ſun and wind may not be "excluded from ſuch highway to the damage thereof, within "ten days after notice given by the ſurveyor for that purpoſe, "or the ſurveyor ſhall make complaint thereof to ſome juſtice

Trees adjoining to highways, whom and in what manner to be cut and pruned.

(*b*) Vide infra, ſect. 59.

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" of the limit, who ſhall ſummon the poſſeſſor of the ſaid " lands to ſome ſpecial ſeſſions, to anſwer to the ſaid com- " plaint; and if it ſhall appear to the juſtices, that ſuch poſ- " ſeſſor had not complied with the requiſites of this act, the " ſaid juſtices, upon hearing the ſurveyor and thepoſſeſſor of " ſuch land, or his agent, (or in default of his appearance, " upon having due proof of the ſervice of ſuch ſummons), " and conſidering the circumſtances of the caſe, may order " ſuch hedges to be cut, plaſhed, and pruned, and ſuch trees " to be cut down, or pruned in ſuch manner, as may beſt " anſwer the purpoſes aforeſaid; and if the poſſeſſor of ſuch " lands ſhall not obey ſuch order within ten days after due " notice thereof, he ſhall forfeit two ſhillings for every " twenty-four feet in length of ſuch hedge which ſhall be ſo " neglected to be cut and plaſhed, and two ſhillings for every " tree which ſhall be ſo neglected to be cut down or pruned, " and lopped."

On default, the ſurveyor may prune, &c. at the coſt of the defaulter.

† *Sect.* 54. And it is further enacted, " That the ſurveyor, " in caſe of ſuch default, ſhall cut, prune, and plaſh ſuch " hedges, and cut down or prune and lop ſuch trees, in the " manner directed by ſuch order; and ſuch poſſeſſor ſhall be " charged with, and pay, over and above the ſaid penalties, " the charges and expences of doing the ſame; or, in default " thereof, ſuch charges and expences ſhall be levied, together " with the ſaid forfeitures, upon his or her goods and chattels, " by warrant from a juſtice of peace, in ſuch manner as is " authoriſed for forfeitures incurred by virtue of this act."

Occupiers to make drains and ditches, &c.

† *Sect.* 55. And it is further enacted, par. 8. " That " ditches, drains, or watercourſes, of a ſufficient depth and " breadth, for the keeping all highways dry, and conveying " the water from the ſame, ſhall be made, ſcoured, cleanſed, " and kept open, and ſufficient trunks, tunnels, plats, or " bridges, ſhall be made and laid where any cartways, horſe- " ways, or footways, lead out of the ſaid highways into the " lands or grounds adjoining thereto, by the occupier of ſuch " lands or grounds; and every perſon who ſhall occupy any " lands or grounds adjoining to, or lying near ſuch highway " through which the water hath uſed to paſs from the ſaid " highway, ſhall open, cleanſe, and ſcour, the ditches, wa- " tercourſes, or drains, for ſuch water to paſs without ob- " ſtruction; and that every perſon making default, after ten " days notice by the ſurveyor, ſhall forfeit ten ſhillings."

Where the old ditches, &c. are not ſufficient, new ones are to be made.

† *Sect.* 56. And it is further enacted, by par. 14. " That " where the ditches, gutters, or watercourſes, ſhall not be " ſufficient to carry off the water which ſhall lie upon and " annoy the highways, the ſurveyors, by the order of any one

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" of the ſaid juſtices, ſhall make new ditches and drains in and " through the lands and grounds adjoining or lying near to " ſuch highways, or in and through any other lands or " grounds, if it ſhall be neceſſary, for the more eaſy and ef- " fectually carrying off ſuch water from the ſaid highways, " and alſo to keep ſuch ditches, gutters, or watercourſes, " ſcoured, cleanſed, and opened; and the ſurveyors, and " their workmen, are authoriſed to go upon the lands, for the " purpoſes aforeſaid."

† *Sect.* 57. And it is further enacted, " That the ſurveyors " ſhall make proper trunks, tunnels, plats, bridges, or arches, " over ſuch ditches, gutters, or watercourſes, for the conve- " nient uſe and enjoyment of the lands or grounds through " which the ſame ſhall be made, and keep the ſame in repair, " and make ſatisfaction to the owner or occupier of ſuch " lands which are not waſte or common, for the damages " ſuſtained thereby; to be ſettled and paid in ſuch manner as " the damages for getting materials in ſeveral or incloſed " lands or grounds are hereafter directed to be ſettled and " paid." Surveyors to make trunks, &c.

*Sect.* 58. As to the ſecond particular, *viz.* How far all trees and buſhes are to be removed from the highway, it appears from the above mentioned *(a)* ſtatute of Wincheſter, Chapter 5. " That no ſmall tree or buſh, whereby a man may " lurk to do hurt, ought to be ſuffered to ſtand within two " hundred foot of either ſide of a highway leading from one " market-town to another." *(a)* Vide ſupra, Sect. 26.

† *Sect.* 59. And it is farther enacted, by 13 Geo. 3. c. 7. par. 6. " That no tree, buſh, or ſhrub, ſhall be per- " mitted to ſtand or grow in any highways withinthe di- " ſtance of fifteen feet from the centre thereof (except " for ornament or ſhelter to the houſe, building or court yard " of the owner thereof); or hereafter to be planted within the " diſtance aforeſaid; but the ſame ſhall be reſpectively " cut down, grubbed up, and carried away by the owner or " occupier of the land or ſoil, where the ſame doth or ſhall " ſtand or grow, within ten days after notice to him, or his " ſteward or agent, given by the ſaid ſurveyors, or any of " them, on pain of ten ſhillings." No tree, buſh, or ſhrub, to grow within 15 feet of the centre, &c.

† *Sect.* 60. But it is alſo provided by the ſaid ſtatute, par. 13. " That no perſon ſhall be compelled, nor any ſur- " veyor permitted to cut or prune any hedge, than between " the laſt day of December and the laſt day of March; and " that nothing in this act contained ſhall oblige any perſon to " fell any timber trees, in hedges, at any time whatſoever, Times of cutting hedges, and felling trees, &c.

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" except where the highways ſhall be ordered to be enlarged, " or to cut down or grub up any oak trees growing within " ſuch highway, or in ſuch hedges, except in the months of " April, May, or June, or any aſh, elm, or other trees, in " any other months thanin the months of December, Ja- " nuary, February, or March.

*Sect.* 61. As to the third particular, *viz.* In what manner all other annoyances obſtructing the highway are to be removed; it ſeems clear, That by the common law any one may abate a nuſance to a highway, and to remove the materials, but not convert them to his own uſe, as hath more fully been ſhewn in the precedent Chapter. Alſo it ſeemeth, That an heir may be indicted for continuing an incroachment, or other nuſance to a highway, begun by his anceſtor, becauſe ſuch a continuance thereof amounts in the judgment of law to a new nuſance.

1 Jones 222.

Vide 4 Aſſize 3. 37 Ed. 3. 9. b. 2 Rol. Abr. 137. B. 4. 142, K. L.

† *Sect.* 62. But the common law, not having been thought to have provided ſufficiently againſt miſchiefs of that kind, it is enacted by the above mentioned ſtatute of 13 Geo. 3. c. 78. par. 9. " That if any perſon ſhall lay, in any highway, any " ſtone, timber, ſtraw, dung, or other matter, or in making, " ſcouring, or cleanſing, the ditches or watercourſes, ſhall " permit the ſoil or earth dug out of ſuch ditches, drains, or " watercourſes, to remain in ſuch highway, in ſuch manner " as to obſtruct or prejudice the ſame, for the ſpace of five " days after notice thereof by the ſurveyor, he ſhall forfeit " ten ſhillings."

Penalty for nuſances obſtructing highways.

† And it is further enacted, par. 10. " That if any ſtone " or timber, or any hay, ſtraw, ſtubble, or other matter, " for the making of manure, or on any other pretence what- " ſoever, not tolerated by this act, ſhall be laid in any high- " way, within the diſtance of fifteen feet from the centre " thereof, and ſhall not, within five days after notice by the " ſurveyor, or ſome perſon aggrieved thereby, be removed, " the owner or poſſeſſor of the lands adjacent, or any other " perſon whomſoever, by order from ſome juſtice, may re- " move the ſaid ſtone, timber, hay, ſtraw, dung, or other " matter, and have, take, and diſpoſe of the ſame, to his " and their own uſe."

If not removed after notice, how to be diſpoſed of.

† And by par. 11. for preventing obſtructions in the ſaid highways, " That if any perſon ſhall wilfully ſet, place, or " leave, any waggon, cart, or other carriage, or any plough " or inſtrument of huſbandry, in any of the ſaid highways, " (except during the reaſonable time of loading or unloading, " and ſtanding as near the ſide of ſuch highway as poſſible) ſo as to " in-

Obſtructions to highways by carriages, &c.

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" interrupt or hinder the free paſſage of any other carriage, " or of his majeſty's ſubjects, every perſon ſo offending ſhall " forfeit ten ſhillings."

† *Sect.* 63. And it is further recited by the above-mentioned ſtatute of 13 Geo. 3. c. 78. par. 64. " That whereas inconveniences have ariſen from making hedges or other fences, and from ploughing or breaking up the ſoil of lands or grounds near the middle or centre of highways: for remedy thereof," it is therefore enacted, " That if any perſon ſhall " incroach, by making any hedge, ditch, or other fence, on " any highway, not being turnpike road, within the diſtance " of fifteen feet from the middle or centre thereof, or ſhall " plough, harrow, or break up the ſoil of any land or " ground, or in ploughing or harrowing the adjacent lands " ſhall turn his plough in or upon any land or ground " within the diſtance of fifteen feet from the middle or centre " of any highway, where the breadth of ſuch highway is " formed and marked, or deſcribed with certainty, and does " not exceed in breadth thirty feet, he ſhall forfeit forty " ſhillings to ſuch perſon who ſhall make information of " the ſame; and the ſurveyor may cauſe ſuch hedge, ditch, " or fence to be taken down, or filled up, at the expence of " the perſon to whom the ſame ſhall belong: and any juſtice " of the limit, upon proof to him upon oath, may levy as " well the expences of taking down ſuch hedges, as the " ſeveral penalties hereby impoſed, by diſtreſs and ſale of the " offender's goods and chattels."

Penalty of incroaching upon highways.

Incroachment to be taken down by ſurveyor.

† And by par. 63. of the ſaid ſtatute for preventing obſtructions, which frequently happen by ſtopping of carriages on or near publick bridges, it is further enacted, " That if any " perſon collecting any tolls payable for paſſing over any " publick bridge with carriages or cattle of any kind ſhall " keep any victualling-houſe, alehouſe, or other place of " publick entertainment, or ſhall ſell, or permit to be ſold " therein, any wine, beer, ale, cyder, ſpirituous liquors, or " other ſtrong liquors, by retail, he, being convicted by one " witneſs, or his own confeſſion, before any juſtice of the " limit, ſhall forfeit five pounds."

Alehouſes not ſuffered on bridges where tolls are kept.

† *Sect.* 64. As to the fourth particular, *viz.* How far all perſons are puniſhable for taking away things made uſe of for the benefit of highways, it is recited by the above-mentioned ſtatute of 13 Geo. 3. c. 78. par. 53. " That whereas in ſome places it hath been and may be found neceſſary to ſecure horſe cauſeways and foot cauſeways, by poſts, blocks, or great ſtones, fixed in the ground, or by banks of earth caſt up, or otherwiſe, from being broken up and ſpoiled with waggons, wains, carts, or carriages; and as ſeveral evil-diſpoſed perſons do or may wilfully or wantonly pull up,

Penalty for damaging banks, cauſeways, poſts, blocks, &c. &c.

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up, cut down, and remove or damage the ſaid poſts, blocks, and great ſtones, ſo fixed, or to be fixed, as aforeſaid, and drive carriages upon ſuch banks and cauſeways, or againſt the ſides thereof, and alſo dig or caſt down the ſaid banks, which are the ſecurities and defence of the ſaid cauſeways, whereby the cauſeways or banks are often ruined and deſtroyed; and ſuch evil-diſpoſed perſons do or may break, damage, or throw down the ſtones, bricks, or wood, fixed upon the parapets or battlements of bridges, and do or may pull down, deſtroy, obliterate, or deface, any mile ſtone or poſt, graduated or direction poſt or ſtone, erected or to be erected upon any highway:" It is enacted, "That every "perſon guilty of any ſuch offence, ſhall, upon complaint to "any juſtice where the ſame ſhall be proved to be done, by "the oath of one witneſs, or upon view of the juſtice him-"ſelf, forfeit not exceeding five pounds, nor leſs than ten "ſhillings; and in default of payment, ſhall be committed "to the houſe of correction of ſuch limit, to be whipped, "and kept to hard labour not exceeding one calendar month, "nor leſs than ſeven days. (20)

(20) The ſame proviſions are made in reſpect to turnpike roads by 13 Geo. 3. c. 84.

*Sect.* 65. As to the fifth particular, *viz.* How far perſons may be puniſhed for drawing a carriage with more than five horſes in length, it is enacted, by 13 Geo. 3. c. 78. par. 56. "That no waggon, having the ſole or bottom of the fellies "of the wheels of the breadth of nine inches, ſhall go or be "drawn with more than eight horſes; and that no cart, "having the ſole or bottom of the fellies of the breadth of "nine inches, ſhall be drawn with more than five horſes; "and that no waggon, having the ſole or bottom of the "fellies of the breadth of ſix inches, and rolling on each ſide "a ſurface of nine inches, ſhall go or be drawn with more "than ſeven horſes; and that no ſuch waggon rolling a ſur-"face of ſix inches only, ſhall go or be drawn with more "than ſix horſes; and that no cart, having the ſole or bot-"tom of the fellies of the wheels of the breadth of ſix inches, "ſhall go or be drawn with more than four horſes; and that "no waggon having the ſole or bottom of the fellies of leſs "breadth than ſix inches, ſhall go or be drawn with more "than five horſes; and that no cart having the ſole or bot-"tom of the fellies of leſs breadth than ſix inches, ſhall go "or be drawn with more than three horſes upon high-"ways, not being turnpike roads, under pain, that the ow-"ner of ſuch waggon or cart reſpectively ſhall forfeit five "pounds, and the driver not being the owner, ten ſhillings, "for every horſe or beaſt which ſhall be ſo drawing above the "number hereby ſo reſpectively limited, to the ſole uſe and "benefit of the informer:—But carriages moving upon wheels

Limitations of the number of horſes for carriages with different wheels.

The 6 Anne c. 29.
9 Anne c. 18.
1 Geo. 1. c. 11.
5 Geo. 1. c. 12.
Recited in the former edition repealed by the 7 Geo. 3. c. 42.

4 Burr. 2258. Stevens v. Duſſey.

"or

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" or rollers, of the breadth of ſixteen inches on each ſide " thereof, with flat ſurfaces, are hereby allowed to be drawn " with any number of horſes, or other cattle." (*a*)

(*a*) Vide appendix at the end of this ch. how theſe carriages are favoured in the payment of tolls.

† But it is provided, by par. 57. of the ſaid ſtatute, " That " no proſecution ſhall be commenced before a juſtice by in- " formation, for any forfeiture incurred by the owner or dri- " ver of any carriage, having a greater number of horſes " therein than are allowed by this act, unleſs within three " days after the offence committed; and that no action ſhall " be commenced for any ſuch offence, unleſs within one " calendar month; and that neither ſuch information or " action, unleſs notice ſhall be given by the informer to the " driver of every ſuch carriage, on the day upon which the " offence ſhall be committed, of an intention to complain of " ſuch offence; and if it ſhall appear to the juſtice, that the " offender lives ſo remote as to make it inconvenient to " ſummon him to appear, the juſtice may leave the informer " to his remedy by action at law."

Proſecutions for ſuch additional horſes how to be carried on.

† And it is further provided, by par. 58. " That the general " quarter ſeſſions, to be held in the week after *Michaelmas*, " may licenſe an increaſe of horſes in carriages up any ſteep " hill, or on any road not turnpike, over and above the " number herein-before limited, if, upon inquiry into the " ſtate and condition of ſuch roads, they ſhall find any addi- " tional number of horſes neceſſary; and, from time to time, " at any *Michaelmas* quarter ſeſſions, to revoke, alter, or vary " the ſame, as they ſhall think fit."

Juſtices at ſeſſions may licence an additional number of horſes.

† And it is further provided, by par. 59. " That if it ſhall " appear upon the oaths of credible witneſſes, to the ſatiſ- " faction of any juſtice, or of court of juſtice authoriſed to " enforce the execution of this act, that any carriage could " not, by reaſon of deep ſnow or ice, be drawn by the num " ber of horſes or beaſts allowed; ſuch juſtice, or court " reſpectively, are hereby required to ſtop all proceedings " for the recovery of any penalty incurred by drawing with " a greater number than are hereby allowed; provided that " the regulations concerning the number of horſes, and " wheels of carriages, ſhall not be deemed or conſtrued to " extend to carriages, employed only in carrying any one " ſtone, block of marble, cable rope, or piece of metal, or " piece of timber, or to ſuch ammunition or artillery as ſhall " be for his majeſty's ſervice; and that two oxen or horned " cattle ſhall, for all the purpoſes of this act, be conſidered as " one horſe."

Juſtices may ſtop proceedings for forfeiture in reſpect of additional horſes.

Vide Stevens and Dufty, 4 Burr. 2260.

Carriages excepted out of this act.

Two oxen equal to one horſe.

† And by par. 60. for the better diſcovery of offenders, it is enacted, " That the owner of every waggon, wain, cart, " coach,

The owner's name, &c. to be painted on all carriages.

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" coach, poſt-chaiſe, or other carriage let to hire, ſhall cauſe " to be painted, upon ſome conſpicuous part of his waggon, " wain, or cart, and upon the pannels of the doors of all " ſuch coaches, poſt chaiſes, or other carriages, before the " ſame ſhall be uſed upon any publick highway, his chriſtian " and ſurname, and the place of his abode, in large legible " letters, and continue the ſame thereupon ſo long as ſuch " waggon, cart, coach, poſt-chaiſe, or other carriage, ſhall " be uſed upon any ſuch highway; and the owner of every " common ſtage waggon or cart, employed in travelling ſtages " from town to town, ſhall, over and above his or her chriſtian " and ſurname, paint, or cauſe to be painted, on the part, " and in the manner aforeſaid, the following words, " COM- " MON STAGE WAGGON or CART, as the caſe may be, " upon pain of forfeiting a ſum not exceeding five pounds, " nor leſs than twenty ſhillings."

Drivers of carriages puniſhable for miſbehaviour or negligence, in order to prevent accidents.

*Sect.* 66. And it is further recited by the ſaid ſtatute of 13 Geo. 3. c. 78. par. 61. " That whereas many bad accidents happen, and great miſchiefs are frequently done upon the ſtreets and highways, by the negligence or wilful miſbehaviour of perſons driving carriages thereon;" it is therefore further enacted, That if the driver of any cart, " car, dray, or waggon, ſhall ride upon any ſuch carriage " in any ſtreet or highway, not having ſome other perſon " on foot, or on horſeback, to guide the ſame, (ſuch car- " riages as are conducted by ſome perſon holding the reins " of the horſe or horſes drawing the ſame excepted); or if " the driver of any carriage whatſoever on any part of any " ſtreet or highway ſhall, by negligence, or wilful miſbeha- " viour, cauſe any hurt or damage to any perſon or carriage " paſſing or being upon ſuch ſtreet or highway, or ſhall quit " the highway, and go on the other ſide the hedge or fence " incloſing the ſame; or wilfully be at ſuch diſtance from " ſuch carriage, whilſt it ſhall be paſſing upon ſuch high- " way, that he cannot have the direction and government of " the horſes or cattle drawing the ſame; or ſhall, by negli- " gence or wilful miſbehaviour, prevent, hinder, or interrupt " the free paſſage of any other carriage, or of his majeſty's " ſubjects, on the ſaid highways; or if the driver of any empty " or unloaded waggon, cart, or other carriage, ſhall refuſe or " neglect to turn aſide and make way for any coach, chariot, " chaiſe, loaded waggon, cart, or other loaded carriage; or " if any perſon ſhall drive, or act as the driver, of any ſuch " coach, poſt-chaiſe, or other carriage let for hire, or wag- " gon, wain, or cart, not having the owner's name as before " required, painted thereon, or ſhall refuſe to diſcover the " true chriſtian and ſurname of the owner of ſuch reſpective " carriages; being convicted by his own confeſſion, the view of

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" a juſtice, or the oath of one witneſs, before any juſtice of " the limit, ſhall forfeit not exceeding ten ſhillings, in caſe " ſuch driver ſhall not be the owner of ſuch carriage; and in " caſe the offender be owner, then not exceeding twenty " ſhillings: and in either caſe, ſhall, in default of payment, " be committed to the houſe of correction, not exceeding one " month, unleſs the ſame ſhall be ſooner paid; and every " ſuch driver may, with or without any warrant, be appre- " hended by any perſon who ſhall ſee ſuch offence commit- " ted, and ſhall be immediately conveyed to a peace officer, " in order to be conveyed before ſome juſtice; and if any " ſuch driver ſhall refuſe to diſcover his name, the juſtice be- " fore whom he ſhall be taken, or to whom any ſuch com- " plaint ſhall be made, may commit him to the houſe of " correction not exceeding three months, or proceed againſt " him for the penalty aforeſaid, by a deſcription of his per- " ſon and the offence, and expreſſing in ſuch proceedings " that he refuſed to diſcover his name."

† *Sect.* 67. As to the eighth general Head of this Chapter, viz. In what manner thoſe, who are charged with any offence relating to the highway, are to be proceeded againſt: It is enacted by the above-mentioned ſtatute of 13 Geo. 3. c. 78. par. 70. " That the forms of proceedings in the ſchedule " ſhall be uſed, upon all occaſions, with ſuch additions or " variations only as may be neceſſary to adapt them to the " particular exigencies of the caſe; and that no objection " ſhall be made, or advantage taken, for want of form in " any ſuch proceedings." The forms of proceeding.

† *Sect.* 68. And it is further enacted, by par. 71. " That " the juſtices ſhall, at every ſpecial ſeſſions to be held in the " week next after the *Michaelmas* general quarter ſeſſions, " ſhall procure and deliver a printed abſtract of the moſt " material parts of this act to every ſurveyor to be then ap- " pointed, as the charge hereby directed to be given; who " ſhall ſeverally pay ſixpence for the ſame." Printed abſtracts to be given to the ſurveyors.

† *Sect.* 69. And it is further enacted by the ſame ſtatute, par. 73. " That all penalties and forfeitures, and all coſts " and charges, (the manner of levying and recovering of " which is not hereby otherwiſe particularly directed), ſhall " be levied by diſtreſs and ſale of the goods and chattels of " the offender, by warrant under the hand and ſeal of ſome " juſtice for the limit where ſuch offence ſhall happen, or " ſuch order for payment of ſuch coſts or charges ſhall be " made, rendering the overplus to the party after deducting " the charges of making the ſame; which warrant ſuch juſ- " tice is hereby impowered to grant, upon conviction by " confeſſion, Forfeitures, coſts and charges may be levied by diſtreſs, &c.

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"confeſſion, or the oath of one witneſs, or upon order made
In what manner to be applied. "as aforeſaid; and when ſo levied, ſhall be paid, the one
"half to the informer, and the other half to the ſurveyor
"where ſuch offence ſhall happen; to be applied towards
"the repairs, unleſs otherwiſe directed by this act; but in
"caſe the ſurveyor ſhall be the informer, then the whole
"ſhall be employed towards the repair of ſuch highway:—
"And in caſe ſuch diſtreſs cannot be found, and ſuch penal-
"ties or coſts and charges, ſhall not be forthwith paid, ſuch
"juſtice is hereby authoriſed, by warrant under his hand or
"ſeal, to commit ſuch offender to the common gaol or
"houſe of correction of the limit where the offence ſhall be
"committed, or ſuch order as aforeſaid ſhall be made, for
"any time not exceeding three months, unleſs the ſaid pe-
"nalty, coſts, and charges, ſhall be ſooner paid; and if ſuch
How to proceed when the offender lives within another juriſdiction. "offender ſhall live out of the juriſdiction of the juſtice, any
"juſtice of the limit wherein ſuch perſon ſhall inhabit, upon
"requeſt to him for that purpoſe made, and upon a true
"copy of the conviction, and order for the payment of
"ſuch coſts and charges, produced and proved by a credi-
"ble witneſs upon oath, may, by warrant under his hand and
"ſeal, cauſe the penalty mentioned in ſuch conviction, and
"the coſts and charges mentioned in ſuch order, or ſo much
"thereof as ſhall not have been paid, to be levied, by diſtreſs
"and ſale of the goods and chattels of ſuch offender; and if
"no ſufficient diſtreſs can be had, commit ſuch offender
"to the common goal, or houſe of correction of ſuch limit,
"for the time, and in manner aforeſaid."

† Provided by par. 74. "That no warrant of diſtreſs, unleſs
Warrant of diſtreſs when to be iſſued. "otherwiſe directed by this act, ſhall be iſſued for levying
"any penalty, coſts or charges, until ſix days after the of-
"fender ſhall have been convicted, and an order made and
"ſerved upon him or her for payment thereof."

† *Sect.* 70. And it is further enacted, par. 77. "That
Convictions how to be made. Strange 182. 10 Modern 150. "no conviction ſhall be made unleſs upon confeſſion, or the
"oath of one witneſs, or the view of a juſtice in the caſes
"before-mentioned; and that any inhabitant ſhall be deemed
"a competent witneſs."

† *Sect.* 71. And it is farther enacted by the ſaid ſtatute,
(21) Vide Kelynge 34. Str. 900, 944. B. R. H. 99. Seſſ. Caſ. 179, 415. Strange 1209. Barn. K.B. 111, 445. 1 Black. 467. 13 Geo. 3. c. 78. ſ. 24. "That every juſtice of aſſize,
"juſtices of the counties palatine of Cheſter, Lancaſter, and
"Durham, and of the great ſeſſions in Wales, ſhall have
"authority by this ſtatute, upon his or their own view, and
"every juſtice of the peace, either upon his own view, (21)
"or upon information upon oath to him given by any ſurveyor
"of the highways, to make preſentment, at their reſpective
"aſſizes or great ſeſſions, or in the open general quarter ſeſ-

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" ſions, of ſuch reſpective limit, of any highway, cauſeway,
" or bridge, not well and ſufficiently repaired and amended, or
" of any other default or offence committed and done contrary
" to the proviſion and intent of this ſtatute; and that all de-
" fects in the repair thereof ſhall be preſented in ſuch juriſdic-
" tion where the ſame do lie, and not elſewhere; and that
" no ſuch preſentment, nor any indictment for any ſuch de-
" fault or offence, ſhall be removed by *certiorari*, or other-
" wiſe, out of ſuch juriſdiction, till ſuch indictment or pre-
" ſentment be traverſed, and judgment thereupon given, (22)
" except where the duty or obligation of repairing the ſaid
" highways, cauſeways, or bridges, may come in queſtion;
" and that every ſuch preſentment made by any ſuch juſtice of
" aſſize, counties palatine, great ſeſſions, or of the peace,
" upon his own view, or upon ſuch information having been
" given to ſuch juſtice of the peace, upon the oath of ſuch
" ſurveyor of the highways, as aforeſaid, ſhall be as good,
" and of the ſame force, ſtrength, and effect, in the law, as
" if the ſame had been preſented and found by the oaths of
" twelve men; and that for every ſuch default or offence ſo
" preſented, as aforeſaid, the juſtices of aſſize, counties pa-
" latine, and great ſeſſions, at their reſpective courts, and
" the juſtices of the peace, at their general quarter ſeſſions,
" ſhall have authority to aſſeſs ſuch fines as to them ſhall be
" thought meet: ſaving to every perſon and perſons that ſhall
" be affected by any ſuch preſentment, his, her, or their lawful
" traverſe to the ſame preſentment (23), as well with reſpect
" to the fact of non-repair as to the duty or obligation of re-
" pairing the ſaid highways, as they might have had upon
" any indictment of the ſame, preſented and found by a grand
" jury; and the juſtices of the peace, at their general quar-
" ter ſeſſions, or the major part of them, may, if they ſee
" juſt cauſe, direct the proſecutions upon ſuch preſentments
" as ſhall be made at the quarter ſeſſions, as aforeſaid, to be
" carried on at the general expence of ſuch limit, and to be
" paid out of the general rates within the ſame.

Juſtices of aſſize and of the peace, &c. to preſent highways, &c. out of repair.

(23) It is now ſettled that the juſtices are compellable by mandamus to receive a general traverſe to a preſentment of a highway being out of repair, made by a juſtice of peace upon view. Burr. 1532. 4 Modern 38. Show. 270. 1 Black. 468.

(22) This clauſe is copied from a ſimilar clauſe in 22 Car. 2. c. 12. ſ. 4. and upon the authority of the King v. Farewell. 2 Strange 1209, which was an application for a *certiorari* to remove an indictment upon that highway act, it was reſolved Trin. 14 Geo. 3. that a *certiorari pro rege* lies upon 13 Geo. 3. c. 78. ſ. 24. before traverſe of the indictment and judgment thereupon: for the King does not traverſe, and therefore the words "till ſuch indictment be traverſed," ſhew very plainly that this clauſe was not intended to take away the writ of *certiorari* at the inſtance of the Crown—and although a private perſon is the real proſecutor, *yet in theſe caſes* that circumſtance makes no diſtinction; for it was calculated merely to prevent delay on the part of defendants. Rex v. Inhabitants of Bodenham. Cowper 78.

*Sect.* 72. It hath been holden in the expoſition of this clauſe, That the party againſt whom ſuch a preſentment ſhall be made, cannot take any traverſe to the want of repair of ſuch highway; but it is agreed, That he may plead that ſome other

Kellw. 34. Crom. 131. Dalt. c. 26. 1 Black. 467.

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other perſon ought to repair the ſame, and traverſe his own obligation to do it. Neither can I ſee upon what reaſon the former opinion is grounded, that he cannot traverſe the want of repair of ſuch highway; for ſince the ſtatute expreſsly ſaves to every perſon who ſhall be touched by any ſuch preſentment, his lawful traverſe to the ſame, as he might have to an indictment of treſpaſs or forcible entry;" and ſince it ſeems clear, That every defendant to any ſuch indictment may traverſe the whole matter alledged againſt him, as hath been ſhewn more at large, Chap. 64. Sect. 58. why may he not as well have the ſame benefit in the preſent caſe? And though the record of a juſtice of peace acting by force of any ſtatute, as a judge, be not traverſable; yet it ſeems hard by ſuch a general rule, to make any record not traverſable, which by the expreſs words of the ſtatute, which authoriſes the making of it, is allowed to be traverſable: it is true indeed, That a preſentment in a court-leet is not traverſable, unleſs it touch the party's freehold: but I do not ſee why ſuch a preſentment in purſuance of this ſtatute ſhould have the like privilege ſince the ſtatute hath no mention of ſuch preſentments in courts-leet, but gives the like traverſe as is allowed by law upon any indictment of treſpaſs, &c.

See Carth. 212, 213.
Sup. c. 64. ſ. 18.
5 Hen. 7.
Dyer. 13.

Aſſeſſments may be levied by diſtreſs.

† *Sect.* 73. And it is alſo enacted, 13 Geo. 3. c. 78. by par. 68. "That if any perſon ſhall refuſe or neglect to pay any "aſſeſſment within ten days after demand thereof made, the "ſame ſhall be levied by any perſon authoriſed by warrant un- "der the hand and ſeal of one juſtice, having juriſdiction "therein, by diſtreſs and ſale of the goods and chattels of the "perſon ſo refuſing or neglecting, rendering the overplus, the "neceſſary charges of making ſuch diſtreſs and ſale being firſt "deducted; and in default of ſuch diſtreſs, any ſuch juſtice "may commit the perſon to the common gaol, until he ſhall "have paid the ſum ſo aſſeſſed, and the coſts and charges oc- "caſioned by ſuch neglect or refuſal.

† And by par. 69. "That the ſurveyor ſhall be deemed, "in all caſes, a competent witneſs, notwithſtanding his ſa- "lary may ariſe in part from the forfeitures and penalties "hereby inflicted."

How the proſecutor may proceed, for a forfeiture above 40 s.

† *Sect.* 74. And it is alſo enacted by par. 75. "That "every proſecutor or informer may, at his election, ſue for, "and recover any penalty of forty ſhillings or upwards, (the "manner of recovery thereof not being particularly directed "by this act), either in the manner herein-before directed, "or by action at law, in any of his Majeſty's courts of re- "cord, by action of debt, in which it ſhall be ſufficient to "declare that the defendant is indebted, as deſcribed in the

"act

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" act, and the plaintiff, if he recovers, ſhall have double " coſts."

† *Sect.* 75. Provided, par. 76. " That there ſhall not be " more than one recovery for the ſame offence; and that ten " days notice in writing be given to the party offending pre- " vious to the commencement of ſuch action; and that the " ſame be brought and commenced within one calendar month " after the offence for which ſuch action is brought, ſhall " have been committed." Limitation of actions and notice.

† *Sect.* 76. And it is further enacted, par. 79. " That " where any diſtreſs is levied, the diſtreſs itſelf ſhall not be " deemed unlawful, nor the party making the ſame a treſ- " paſſer, on account of any default or want of form in any " proceedings relating thereto, nor ſhall the party diſtraining " be deemed a treſpaſſer *ab initio*, on account of any irregu- " larity which ſhall be afterwards done by the party diſtrain- " ing, but the perſon aggrieved by ſuch irregularity, may " recover full ſatisfaction for the ſpecial damage in an action " on the caſe." Special damage but diſtreſs not unlawful for want of form.

† *Sect.* 77. And it is further enacted, par. 65. " That " the court before whom any indictment or preſentment (24) " ſhall be tried, may award coſts to the proſecutor, to be " paid by the perſon ſo indicted or preſented, if it ſhall appear " that the defence was frivolous; or to award coſts to the " perſon indicted or preſented, to be paid by the proſecutor, " if it ſhall appear that ſuch proſecution was vexatious." (24) A perſon indicted for not repairing roads *ratione tenuræ*, ſhall on ſubmitting, pay coſts to the proſecutor. Rex v. Wingfield, 6 Geo. 3. 1 Black. 600.

† And it is further enacted, par. 66. " That if the inha- " bitants ſhall agree, at a veſtry or publick meeting, to pro- " ſecute any perſon by indictment, or to defend any indict- " ment or preſentment preferred againſt any pariſh, town- " ſhip, or place, the ſurveyor may charge in his account the " reaſonable expences incurred in carrying on or defending " ſuch reſpective proſecutions, after the ſame ſhall have been " agreed to by ſuch inhabitants at a veſtry or publick meet- " ing, or allowed by a juſtice within the limit where ſuch " highway ſhall be; which expences ſhall be paid out of the " fines, forfeitures, compoſitions, payments, and aſſeſſments.',

† And it is further enacted, par. 67. " That in all caſes " where a veſtry or publick meeting of the inhabitants is di- " rected by this act, there ſhall be publick notice given of " the day, hour, and place, of holding the ſaid meeting, at " the church or chapel of ſuch pariſh, townſhip, or place, " on the Sunday next preceding ſuch meeting, and alſo no- " tice thereof in writing, ſpecifying the purpoſe of ſuch meet- " ing, fixed at the ſame time upon the door of ſuch church

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" or chapel, and the ſame ſhall not be held till three days " at leaſt after ſuch notice given; and if there be no church " or chapel, the like notice of ſuch meeting ſhall be given " in writing, and put up at the moſt publick place therein " three days at leaſt before ſuch meeting."

Forfeiture for oppoſing the execution of the act.

† And it is further enacted, par. 72. "That in caſe any " perſon ſhall reſiſt or make forcible oppoſition againſt any " employed in the due execution of this act, or make any " reſcue of the cattle or other goods diſtrained; or if any " conſtable, headborough, or tithingman, ſhall refuſe or neg- " lect to execute or obey any warrant or precept granted by " any juſtice, purſuant to the directions of this act; being " convicted by a juſtice, ſhall forfeit not exceeding ten " pounds, nor leſs than forty ſhillings; to be paid to the " ſurveyor (25) where the offence was committed, to be laid " out in the repair of the highways: and in caſe he do not " forthwith pay, or ſecure to be paid, the ſaid forfeiture after " ſuch conviction, ſuch juſtice may commit ſuch perſon to " the common gaol or houſe of correction of the limit, to " remain not exceeding three months, unleſs the ſaid for- " feiture ſhall be ſooner paid."

(25) Vide 1 Black. 603.

*Sect.* 78. It is enacted by the ſaid ſtatute of 13 Geo. 3. c. 78. ſ. 24. "That all defects of repairs of cauſeys, pave- " ments, highways or bridges, ſhall be preſented in the county " only where ſuch cauſeys, &c. lie, and not elſewhere; and " that no ſuch preſentment, or indictment ſhall be removed " by *certiorari*, or otherwiſe, out of the ſaid county, till ſuch " indictment or preſentment be traverſed, and judgment there- " upon given."

2 Strange 1209. 2 Strange 944. See B. 2. C. 27. S. 37, 46, 47. Cowper 78.

*Sect.* 79. And it is farther enacted by the ſaid ſtatute, ſection 81. "That all matters concerning highways, cauſeys, " pavements, and bridges, mentioned in the ſaid act, ſhall be " determined in the county where the ſame do lie, and not " elſewhere; and that no preſentment, indictment, or order, " made by virtue of the ſaid act, ſhall be removed by *certiorari* " out of the ſaid county into any other court."

Queen v. Bramby Mic. 10 Ann. Strange 849, 900, 944, 1209. Bar. K. B. 111, 236, 445. Caſ. Temp. King &c. 99. Seſſ. Caſes 163, 329.

*Sect.* 80. Yet it hath been reſolved, That if the quarter ſeſſions, under pretence of the juriſdiction given them by theſe ſtatutes, take upon them to do a thing manifeſtly ex- ceeding their authority, as to make an order on ſurveyors of the highways, to make up their accounts before a ſpecial ſeſ- ſions, their proceedings may be removed by *certiorari* into the King's Bench, and there quaſhed; for the quarter-ſeſſions have no manner of power given them to intermeddle origi- nally with ſuch accounts, but only by way of appeal. (26)

(26) And if the proſecutor has enlarged the rule for ſhewing cauſe why the order ſhould not be *quaſhed*, he cannot afterwards object to the iſſuing of the *certiorari*. 2 Burr. 745.

*Sect.*

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† *Sect.* 81. And it is further enacted, par 78. "That any "justice may administer an oath to any person for the better "discovery and execution of the several matters or things "herein-before authorised or directed to be examined, en- "quired into, or performed by such justice." Oaths.

† And it is further enacted, par. 62. "That any two "justices are hereby impowered, to hold any special ses- "sions, besides that which is herein-before directed, for exe- "cuting the purposes of this act; and to adjourn the same "from time to time, as they shall think fit, causing notice "to be given of the time and place of holding such special "sessions, and of the adjournments thereof, to the several "justices acting and residing within such limits, by the high "constable, or other proper officer within the same." Justices may hold special sessions on notice.

† *Sect.* 82. As to the ninth general head of this chapter, *viz.* In what manner persons proceeded against for any of the above mentioned offences may defend themselves; it is enacted by the said statute, 13 Geo. 3. c. 78. par. 81. "That "any person aggrieved by any person, in the execution of "this act, and for which no particular method of relief hath "been appointed, may appeal to the general quarter sessions, "such appellant giving notice in writing of such appeal, and "of the matter thereof, to the person against whom such "complaint shall be made, within six days after the cause of "such complaint arose, and within four days after such no- "tice, entering into recognizance before some justice within "such limit, with one surety, conditioned to try such appeal "at, and abide the order of, and pay such costs as shall be "awarded by the quarter session; and every person having "received notice of such appeal, shall return all proceedings "before them to the general quarter sessions, on pain of five "pounds; and the said session, upon due proof of such notice "and recognizance, shall hear and finally determine such "appeal in a summary way, and award costs to the parties "appealing or appealed against, to be levied as before direc- "ted; and the determination of such quarter session shall be "final and conclusive, and no proceedings shall be quashed "or vacated for want of form, or removed by *certiorari*, or "any other writ or process whatsoever, (except as herein- "before mentioned), into any court of record at *Westminster*, "provided that no such appeal shall be made against any "conviction for any penalty, unless the person convicted "shall, at the time of such conviction, if present, if not, "within six days after, give notice of his intention to appeal, "and at the same time enter into recognizance with suffi- "cient sureties to pay such penalty, in case such conviction "shall be affirmed; and upon his giving such security, the Appeal may be made to the quarter sessions. Proceedings not to be quashed for want of form, nor to be removed by *certiorari*.

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" further proceeding for ſuch penalty ſhall be ſuſpended until " ſuch appeal ſhall be heard and determined."

Limitation of actions, and mode of pleading.

General iſſue.

Treble coſts.

† And it is further enacted, by par. 82. " That every " action or ſuit ſhall be commenced or proſecuted within " three calendar months after the fact committed, and not " afterwards; and ſhall be brought within the county where " the fact was committed, and the defendant may plead the " general iſſue, and give this act, and the ſpecial matter, in " evidence. And if brought after the time limited, or be " laid in any other place than as aforementioned, the jury " ſhall find for the defendant; or if the plaintiff ſhall become " nonſuit, or diſcontinue after the defendant ſhall have ap- " peared, or if, upon demurrer, judgment ſhall be given " againſt the plaintiff, the defendant ſhall recover treble " coſts."

Plaintiffs not to recover if tender of amends is made.

† But it is alſo provided by par. 80. " That no plaintiff " ſhall recover for any irregularity, treſpaſs, or wrongful pro- " ceedings, if tender of ſufficient amends ſhall be made before " ſuch action brought; and in caſe no ſuch tender ſhall have " been made, the defendant by leave of the court at any time " before iſſue joined, may pay into court ſuch ſum of money " as he ſhall ſee fit. But nothing in this act contained ſhall " extend to the city of *Briſtol*, or to the pariſh of *Whitechapel*, " and Saint *John*, *Wapping*, nor to abridge the powers of " the commiſſioners of ſewers, &c."

N. B. (27) This obſervation was applied to the former ſtatutes upon this ſubject.

*Sect.* 83. Alſo it ſeems to be implied in the conſtruction of theſe (27) as well as of all other penal ſtatutes, That no one ought to be convicted of any offence againſt them, without having notice of the accuſation made againſt him, and an opportunity of defending himſelf. And therefore I ſhall take it for granted, that generally no one ought to be puniſhed for any of the above mentioned offences, without being called upon to anſwer for himſelf, and having liberty to traverſe the matters alledged againſt him; it is true indeed, That it is generally holden, That no traverſe can be taken againſt a preſentment by a juſtice of peace of his own knowledge, as to the want of repair; yet this opinion ſeems juſtly queſtionable for the reaſons alledged in the ſeventy-ſecond ſection of this chapter.

*Sect.* 84. However it is certain, That in all other caſes, whoever is indicted or preſented in any court, except a court-leet, for any offence relating to the highways, may traverſe the whole matter alledged againſt him in ſuch indictment or preſentment. But it ſeemeth to be agreed, That he, who is preſented for ſuch an offence in a court-leet, can only traverſe it ſo far as it concerns his freehold, as by charging him with

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with being bound to ſuch repairs in reſpect of the tenure of his lands, &c. for which purpoſe it is certain that he may remove it by a *certiorari* into the King's Bench, and there traverſe it. Alſo there is no doubt, but that after conviction, or upon a demurrer or confeſſion, any one may take exceptions to any ſuch indictment or preſentment in any court for the want of legal form; but the court in diſcretion will very rarely ſuffer a man to take ſuch exceptions before ſuch conviction or confeſſion, without a certificate and affidavit that the ways are in good repair.

5 H. 7. 4. Dyer 14. Finch 386. Anderſon 234. 1 Keble 256, 291, 829. 2 Keble 715, 728.

*Sect.* 85. Therefore, for the better underſtanding in what caſes it may be ſafe to demur to, or confeſs an indictment or preſentment of this kind, I ſhall lay down the following rules concerning them.

*Sect.* 86. Firſt, That it is (*a*) ſafeſt in every ſuch indictment to ſhew both the place from which, and alſo the place to which the way ſuppoſed to be out of repair doth lead, yet exceptions for want of ſuch certainty have ſometimes been (*b*) diſallowed; however it ſeems certain, that there is no neceſſity to ſhew (*c*) that a highway leads to a market town, becauſe every highway leads from town to town.

(*a*) 2 R. Abr. 81. Palmer 420. (*b*) 2 Keble 715, 728. 3 Keble 89, 644. Vide 4 Burr. 2091. Lucas 383. where an objection of this kind is diſallowed. 1 Brownl. 9. (*c*) Palmer 389. 2 Roll. 412. BRH. 316.

*Sect.* 87. Secondly, That it is neceſſary (*d*) in every ſuch indictment expreſsly to ſhew in what place the nuſance complained of was done, for which (*e*) cauſe an indictment for ſtopping a way at *D.* leading from *D.* to *C.* is not good; for it is impoſſible that a way leading from *D.* ſhould be in *D.* and no other place is alledged. (28)

(*d*) 3 Keble 644. (*e*) 2 R. Abr. 81. Cowp. 111.

(28) So alſo in a preſentment the highway muſt be alledged to lie in the pariſh, otherwiſe the pariſh is not bound to repair. Cowp. 111. Str. 181. But, in an indictment for a nuſance, it is not neceſſary to mention the *termini* of a highway. Str. 44. Alſo if there be two vills in a pariſh, it is not neceſſary in an indictment for a nuſance to ſhew in which vill the nuſance lies. Sayer 119.

*Sect.* 88. Thirdly, That every ſuch indictment ought alſo certainly to ſhew what part of the highway the nuſance did extend, as by ſhewing how many foot in length, and how many foot in breadth it contained, or otherwiſe the defendant will neither know of the certainty of the charge, againſt which he is to make his defence, neither will the court be able from the record to judge of the greatneſs of the offence, in order to aſſeſs a fine anſwerable thereunto; and upon this ground it hath been adjudged, That an indictment for ſtopping a certain part of the king's way at *K.* is naught, for the uncertainty thereof. Alſo it hath been reſolved, that the place wherein ſuch a nuſance is alledged, is not ſufficiently aſcertained in ſuch an indictment,

C. Jac. 324. Latch 183. 2 R. Abr. 81.

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2 R. Abr. 81. dictment, by ſhewing that it contained ſo many foot in length, and ſo many in breadth, by eſtimation. (29)

(29) An indictment for a nuſance in laying ſoil in a highway is not bad for want of the length and breadth of the nuſance being ſet out. *Per* Lee C. J. Trin. 27. Geo. 2. Sayer 98. Nor for a nuſance in digging two grips or ditches in a common footway. Sayer 167. Nor for a nuſance that a certain highway and bridge are in a ruinous condition. Sayer 301.

Salkeld 359. 6 Modern 255, Contra Sayer 168, 169. (a) C. Eliz. 63. (b) See 2 R. A. 83. 1 Ventris 208. Popham 206. 2 Keble 728. (c) 1 Vent. 208. 3 Keble 28.

*Sect.* 89. Fourthly, That every ſuch indictment muſt ſhew, That the way wherein a nuſance is alledged, is a way common to all the king's people; for which cauſe it hath been reſolved, That an indictment for a nuſance to (*a*) horſeway, without adding that it is a highway, is naught: and upon the ſame ground it ſeemeth alſo, That an indictment for a nuſance to a common footway to the church of *D.* for (*b*) all the pariſhioners of *D.* is not good; yet it (*c*) ſeems, That if thoſe laſt words, *viz.* "For all pariſhioners of *D.*" had been omitted, ſuch an indictment might be maintained.

(d) Noy 93. 3 Keble 855. The contrary adjudged Paſch. 5 Geo. 1. the King v. Corrack. Vide Vent. 331, according. 2 Keble 514.

*Sect.* 90. Fifthly, That it is not ſafe in an indictment againſt a common perſon for not repairing a highway, which he ought to have done in reſpect of the tenure of certain lands, barely to ſay that he was bound to repair it *ratione tenuræ terræ*, without adding (*d*) *ſuæ*. (30) Alſo it is ſaid, That in an indictment againſt a (*e*) biſhop, &c. for not repairing a highway, in reſpect of certain lands, it ought to be ſhewn in what capacity he ought to repair it, becauſe otherwiſe it cannot be known in what capacity the proceſs is to be awarded againſt him.

Raymond 182. (*e*) 3 Keble 58. (30) If a man be charged to repair *ratione tenuræ*, he may throw it upon the pariſh by the general iſſue. Stra. 184. And it hath been held, upon conſideration that *ratione tenuræ* is ſufficient without *ſuæ*. Strange 187.

11 Modern 56. 3 Anderſon 234. Popham 206.

*Sect.* 91. Sixthly, That in every ſuch indictment the fact alledged againſt the defendant muſt be expreſſed in ſuch proper terms, that it may clearly appear to the court to have been a nuſance; and for this cauſe it hath been reſolved, That a preſentment for diverting a highway is not good, becauſe a highway cannot be diverted, but muſt always continue in the ſame place where it was, howſoever it be obſtructed, and a new way made in another place.

2 Roll. Abr. 79, 81.

*Sect.* 92. Seventhly, That an indictment againſt a man for ſtopping a highway in his own land is good, without laying the offence done *vi & armis*. Alſo it is ſaid, That a preſentment that a highway in ſuch a place is decayed by the defaults of the inhabitants of ſuch a town, is good without naming any perſon in certainty. But it hath been adjudged, That an indictment againſt particular perſons muſt ſpecially charge them every one; for which cauſe it hath been reſolved, That an indictment againſt ſeveral for not repairing their ſtreets, that they, *& eorum uterque*, did not repair them, is not good.

Sect. 93.

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*Sect.* 93. Eighthly, That the defendants ought not to plead *quod non debent reparare*, without ſhewing who ought. 1 Sid. 140. Carthew 213. 11 Modern 273. 12 Modern 13. Salkeld 358. 8 Modern 163.

*Sect.* 94. That the defendants ſhall not be diſcharged by ſubmitting to a fine, but a diſtringas ſhall go *in infinitum* till they repair.

## APPENDIX THE FOURTEENTH. (a)

(a) Vide ante, page 244.

## OF TURNPIKE ROADS.

THE turnpike roads of England are placed under the management and direction of certain bodies of truſtees, who are uſually named and appointed by the reſpective acts of parliament which are occaſionally paſſed for the purpoſe of making, repairing, and ſuſtaining the particular roads therein ſpecified. But the powers of theſe ſtatutes being confined to ſeparate and diſtinct objects, it was thought expedient to paſs ſome general laws which ſhould apply in common to all truſtees and turnpike roads in general, throughout the kingdom. Theſe laws I ſhall endeavour to comprize under the following particulars: Vide Scott's Digeſt of the highway and turnpike road acts paſſim.

1. As to truſtees.
2. As to weighing engines; the weight allowed; and tolls.
3. As to carriages.
4. As to exemptions from toll.
5. As to ſtatute duty and repairs.
6. As to materials for repairs.
7. As to nuſances.
8. As to ſubſcribers and mortgagees.
9. As to officers in general.
10. As to repairing altered roads.
11. How far the powers of the highway act may be adopted.
12. As to the modes of proceeding.

† *Sect.* 1. Firſt, As to truſtees, it is recited, that many miſchiefs have ariſen from mean perſons acting in that capacity, in the execution of thoſe acts of parliament, as have incautiouſly omitted to direct that truſtees ſhall be poſſeſſed of property to a certain value: it is therefore enacted by the general turnpike act, 13 Geo. 3. c. 84. (1) ſ. 44. "That no truſ- "tee ſhall be qualified for that office, unleſs he ſhall, in his Truſtees, how to be qualified.

(1) By 21 Geo. 3. c. 20. this act is extended to all acts of parliament which have been made ſince, and which ſhall hereafter be made for the amending or repairing any particular turnpike roads in England.

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" own or his wife's right, be in the actual poſſeſſion or receipt " of the rents and profits of lands, tenements, or hereditaments of the clear yearly value of 40l. or poſſeſſed of or " intitled to a perſonal eſtate worth 800l. or ſhall be heir apparent to a landed eſtate of 80l. a year; and unleſs (not " being ſuch heir apparent) he ſhall take and ſubſcribe the " oath in the act recited, before two or more of the truſtees " appointed by ſuch act; and if he ſhall preſume to act as a " truſtee, without being thus qualified, he ſhall forfeit 50l. " to any perſon who ſhall ſue for the ſame, who ſhall recover, without any other proof or evidence, that ſuch perſon hath acted as a truſtee, except ſuch perſon ſhall prove " that he is qualified in the manner above mentioned."

No publican can be a truſtee.

*Sect.* 2. And it is further enacted, par. 46. " That no " perſon who ſhall keep any victualling-houſe, ale-houſe, or " other houſe of publick entertainment, or who ſhall ſell any " wine, cyder, beer, ale, ſpiritous, or other ſtrong liquors " by retail, ſhall be capable of acting as a truſtee, or of " holding any place of truſt or profit under the truſtees, or " of collecting the tolls. But no ſuch perſon ſhall be precluded from farming ſuch tolls, provided he employs a " perſon to collect them, who ſhall not be under ſuch " incapacity."

What ſhall be evidence of a truſtee.

And it is further enacted, par. 64. " That in all caſes " where any action ſhall be brought againſt any truſtee, evi- " dence of acting as ſuch, together with the act of parliament by which he or they were appointed, or the order, or " a copy of the order for the appointment or election, &c. " ſhall be ſufficient proof his being truſtee."

Their meetings regulated.

† *Sect.* 3. And it is further enacted by the ſaid ſtatute, par. 49. amended and explained by 18 Geo. 3. c. 63. " That " in all caſes, where the truſtees appointed by any act of parliament, ſhall not meet on the day appointed for their firſt " meeting by any ſuch act; or on any day appointed by adjournment; or have not adjourned in the manner directed " by any ſuch act; or when the day appointed for the firſt " meeting of the truſtees has elapſed before the paſſing of any " ſuch act; any five or more of the truſtees appointed to execute ſuch act, ſhall and may, in any or either of the caſes " aforeſaid, cauſe notice under their hands to be affixed on " all the turnpike gates, which ſhall be then erected on the " roads for which they are truſtees; or if no turnpike gate " ſhall be then erected, ſhall cauſe the like notice to be affixed " in ſome conſpicuous place, in one of the market towns near " the roads directed to be repaired, and alſo ſhall publiſh in " ſome newſpaper circulated in that part of the country, at

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"least *twenty days* before the intended meeting appointing the "truſtees to meet at the place where the laſt preceding meeting was appointed to be held; or at the place directed for "the firſt meeting of ſuch truſtees, if no preceding meeting "ſhall have been held, and the ſaid truſtees, when met in "purſuance of ſuch notice, ſhall and may carry ſuch act or "acts into execution, in the ſame and as full and ample a "manner, as if no ſuch neglect or omiſſion had happened, "or ſuch act had been paſſed previous to the time appointed "for the firſt meeting; and ſuch truſtees had met accordingly."

† *Sect.* 4. But it is provided by 13 Geo. 3. c. 84. ſ. 50. "That no meeting of ſuch truſtees ſhall be adjourned for any "longer time than three calendar months, from the day on "which ſuch adjournment ſhall be made; and that no buſineſs ſhall be done at any meeting before ten in the forenoon; "and no adjournment ſhall be made to any hour later than "two in the afternoon, on which ſuch meeting ſhall be appointed to be held; and that every act agreed upon at ſuch "meeting ſhall be ſigned, at the meeting, by a competent "number of truſtees, or otherwiſe ſuch meeting, adjournment, and act reſpectively, ſhall be void." In what manner the meetings ſhall be adjourned.

† *Sect.* 5. And it is further enacted, par. 51. "That if the truſtees abuſe or exceed their power, by erecting, or continuing any gate or turnpike, where they have not any "power by virtue of any act, the juſtices of the limit where "any ſuch gate or turnpike ſhall be erected or continued, in "their general quarter ſeſſions aſſembled, upon complaint of "ſuch abuſe or exceſs of power in ſuch truſtees, ſhall in a "ſummary way hear and determine the ſame, and thereupon "to order the ſheriff of the county, who is hereby authoriſed "and required to execute ſuch order to remove the ſame." If they exceed their power in erecting gates, the juſtices may order the gates to be removed.

† *Sect.* 6. And it is further enacted, par. 84. "That where any oath is required to be taken by this act, the juſtices of any "limit, or the truſtees of any turnpike road, as the caſe may be, according to their ſeveral juriſdictions, are empowered "to adminiſter the ſame." May adminiſter oaths. Vide highway act, Sect. 78. Ante, p. 419.

† *Sect.* 7. And whereas there are no powers given to the truſtees to let or farm out the tolls ariſing upon turnpike roads, and in many caſes where the particular acts have given ſuch power, they are not executed in the moſt beneficial manner for ſuch roads; it is therefore enacted, par. 31. "That any "ſeven truſtees, at a publick meeting, may let to farm the "tolls of the ſeveral gates erected upon their reſpective turnpike roads, viz. The truſtees ſhall cauſe notice to be given "of Truſtees may farm out the tolls. Under particular directions and reſtrictions.

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Vide ante, p. 397.

" upon the turnpike roads under their care, with proper inſcriptions and figures thereon, denoting the names and " diſtances of the principal towns and places on each reſpective road, and from time to time ſhall repair ſuch ſtones " and poſts, and keep and continue legible the inſcriptions " thereon reſpectively."

May erect weighing engines.

*Sect.* 16. Secondly as to weighing engines; the weight allowed, and additional toll. It is further enacted by the ſaid ſtatute, par. 1. " That all truſtees appointed by any " act of parliament for any turnpike road in England, " or any five or more of them, at ſome publick meeting, " if they ſhall think proper, at as many turnpike gates as they " ſhall erect (3) for the receiving toll; or upon any part " of the road within their reſpective juriſdictions, and at " ſuch a diſtance as they ſhall think expedient, ſhall and may " cauſe to be erected a crane, machine, or engine, proper for " weighing of carts, waggons, or carriages, conveying of any " goods or merchandize whatever; and by writing ſigned by " them, or any five or more of them, ſhall and may order " every ſuch carriage which ſhall paſs loaded through every " ſuch gate or bar, to be weighed with the loading thereof."

(3) But it hath been adjudged that toll-gates ſhould not be erected in the middle of great towns, ſo as to obſtruct the neceſſity intercourſe. 1 Burr. 377.

But it is provided by ſect. 34. " That no toll gate ſhall " be erected on the ſide of any turnpike road, unleſs ordered " by the truſtees, at a meeting, of which 21 days publick " notice ſhall have been given in writing affixed upon all the " toll gates, erected on ſuch roads, and alſo in ſome publick " news-paper circulated in that part of the country, ſpecifying the place where ſuch ſide gate is propoſed to be erected, " and unleſs nine truſtees at leaſt (being a majority of thoſe " preſent) ſhall ſign the ſaid order at ſuch meeting; and that " no perſon ſhall be liable to pay toll at any toll gate erected, " or to be erected, acroſs or on the ſide of any turnpike road, " or be ſubject to any penalty for any carriage, horſe or beaſt, " which ſhall only croſs ſuch road, and ſhall not paſs above " 100 yards thereon, except over ſome bridge erected at a conſiderable expence by the truſtees of ſuch turnpike road."

The burthen with which carriages are allowed to paſs.

† *Sect.* 17. And it is further enacted, by par. 1. " That the " truſtees ſhall take, over and above the tolls, a certain ſum for " every 112 lb. which every ſuch waggon or cart, together " with the loading ſhall weigh over and above the following " weights: To every four-wheel carriage, having fellies of " 16 inches, 8 tons in ſummer, and 7 in winter.—To every " waggon or wain, having the axletrees thereof of ſuch " different lengths that the diſtance from wheel to wheel of " the nearer pair of the ſaid wheels be not more than 4 " feet 2 inches, to be meaſured at the ground, and that " the diſtance from wheel to wheel of the other pair

" thereof

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" thereof be ſuch, that the fore and hind wheels of ſuch wag-
" gons and wains ſhall roll only one ſingle ſurface or path of
" 16 inches wide at the leaſt; on each ſide of the ſaid waggons
" or wains, and having the fellies thereof of the breadth of 9
" inches from ſide to ſide at the bottom or ſole thereof, 6 tons
" 10 hundred in ſummer, and 6 tons in winter.—To every wag-
" gon or four-wheeled carriage, having the ſole or bottom of
" the fellies of the wheels of the breadth of 9 inches, 6 tons in
" ſummer, and 5 tons 10 hundred in winter.—To every cart,
" having the fellies of the ſame dimenſions, 3 tons in ſummer,
" and 2 tons 15 hundred in winter.—To every waggon, having
" the ſole or bottom of the fellies of the wheels of the breadth
" of 6 inches, 4 tons 5 hundred in ſummer, and 3 tons 15 hun-
" dred in winter.—And to every ſuch waggon ſo conſtructed
" as to roll and actually rolling a ſurface of 11 inches, by the
" wheels thereof, 5 tons 10 hundred in ſummer, and 5 tons in
" winter.—To every cart, having fellies of the wheels of the
" ſame dimenſions, 2 tons 12 hundred in ſummer, and 2 tons
" 7 hundred in winter.—To every waggon, having the ſole or
" bottom of the fellies of the wheels of leſs breadth than 6 inches,
" 3 tons 10 hundred in ſummer, and 3 tons in winter.—And
" to every cart, having the fellies of the wheels of the ſame di-
" menſions, 1 ton 10 hundred in ſummer, and 1 ton 7 hun-
" dred in winter.—And for the ſeveral purpoſes aforeſaid, it ſhall
" be deemed ſummer from the 1 May to 31 October both inclu-
" ſive, and winter from 1 Nov. to 30 April, both inclusive."

† *Sect.* 18. And by 14 Geo. 3. c. 82. " All truſtees or any
" five or more of them are impowered to take and receive
" over and above the tolls already granted, the following ſums
" of money: For every 112lb. which any waggon, cart, or
" carriage, together with the loading, ſhall weigh at any
" weighing engine, over and above the weights allowed as
" above, *viz.*—For the 1ſt, and 2 cwt. 3 *d.* each.—For every
" cwt. ſuch over weight above 2 cwt. and not exceeding 5 cwt.
" 6 *d.*—For every cwt. of ſuch over weight above 5 cwt. and
" not exceeding 10 cwt. 2*s.* 6*d.*; for every cwt. of ſuch
" over weight above 10 cwt. and not exceeding 15 cwt. 5*s.*—
" For every cwt. of ſuch over weight above 15 cwt. 20*s.*
" The money ariſing from ſuch additional tolls to be applied
" to the roads where they are collected. But the truſtees
" within 10 miles of *London*, *Weſtminſter*, and *Southwark*, are
" empowered at their general or quarterly meetings to lower
" the additional tolls hereby directed to be taken as aforeſaid,
" as to them ſhall ſeem fit."

The additional toll to be paid for extra weight.

† *Sect.* 19. And it is further enacted by 13 Geo. 3. c. 84.
ſ. 9. That any truſtee, creditor, clerk, treaſurer, or ſurveyor,
on ſuſpicion of fraud, may cauſe any carriage liable to be
weighed which ſhall have paſſed through any toll-gate where
ſuch

Truſtees, &c. may perſonally cauſe carriages to return to the weighing engine.

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"such weighing engine shall be erected, and shall not have "passed above 300 yards beyond such toll-gate, to return to "such weighing engine, and be then weighed with the load- "ing which passed through such gate in the presence of the "said trustees, creditor, clerk, treasurer, or surveyor, upon "requiring the driver thereof to drive back to such weighing "engine, and upon tendering him 1*s.* for so doing, which "shall be returned to the person paying the same, if the weight "shall be found excessive."

† *Sect.* 20. And it is further enacted by 13 Geo. 3. c. 84. s. 2. "That every toll-gate keeper, where such engine shall be "erected, shall weigh all such carriages as he shall suspect to "be loaden with greater weights, and receive the additional "tolls, upon pain of forfeiting 5*l.*"

Trustees shall make places for the carriages to turn.

And it is further enacted by par. 4. "That the trustees "shall cause the surveyors to make convenient places for "turning such carriages where such weighing engine shall be "erected, within 300 yards of such toll-gate, on each side "thereof, if the ground will admit of the same. And a list "of the names of all the trustees, creditors, the clerk, trea- "surer, and surveyor, shall be put up in the house where "such weighing engine shall be placed, to be inspected by "the owner or driver of every such carriage: and if the "driver refuse to return, he shall forfeit 40*s.* and any peace "officer or other person being present upon such refusal, "may drive such carriage back, in order to be weighed as "aforesaid."

The names of the trustees, &c. shall be affixed in the house.

Driver refusing to return, 40*s.* &c.

Carriages exempted from being weighed.

† *Sect.* 21. But it is enacted by 14 Geo. 3. c. 82. "That "no waggon, cart, or carriage employed in husbandry, or "carrying only manure or lime for the improvement of land; "as hay, straw, fodder, or corn unthreshed, (excepting hay "or straw carried for sale), shall be weighed at any weighing "engine."

Justices upon complaint made, may order weighing engines to be erected where they think proper.

† *Sect.* 22. And it is provided by 13 Geo. 3. c. 84. s. 7. "That the justices at general quarter sessions, upon complaint "by any justice or two creditors, or two trustees, that such "turnpike road is much damaged by excessive weights, and "that no engine hath been erected upon the same, may sum- "mon the clerk, surveyor, and treasurer of such turnpike "road, to their next general quarter sessions, to shew cause "why the same should not be erected at or near such gates, "upon such turnpike roads as shall be described in such sum- "mons; and if at such subsequent sessions the said clerk, "surveyor, and treasurer, some or one of them, shall not "appear, or appearing, shall not shew sufficient cause against "the erecting thereof, the said justices, at such quarter ses-

"sions,

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" ſions, may order one or more weighing engine at ſuch " place; a copy of which order ſhall be forthwith delivered to " the clerk of ſuch road; and the truſtees, at their next meet- " ing, after their clerk ſhall have been ſerved with ſuch " copy of the order, may contract with proper perſons for " the making and erecting the ſame; and the treaſurer ſhall " pay the expences thereof, out of the money which ſhall " then be, or next come into his hands from the tolls ariſing " upon ſuch turnpike road."

† *Sect.* 23. It is alſo provided by ſaid ſtatute, par. 8. " That " when turnpike roads meet at or near the ſame place, the " truſtees reſpectively ſhall fix upon ſome convenient place " to erect a weighing engine upon, which will accommodate " all ſuch roads, and proportion the expences thereof, and " forfeitures at ſuch engine, amongſt all ſuch turnpike " roads."

Where two or more roads meet, truſtees may erect one weighing engine to accommodate them.

† *Sect.* 24. And it is further enacted, par. 9. " That the " truſtees or their leſſee ſhall not make compoſition for tolls, " in reſpect of any carriage, or horſes, or beaſts of draught, " drawing the ſame, unleſs they have the fellies of the wheels " of the breadth of ſix inches, or more."

Truſtees not to make compoſition for tolls, unleſs waggons, &c. have the fellies of wheels of ſix inches broad.

† *Sect.* 25. And it is further enacted, par. 10. " That if " any perſon ſhall unload goods from any carriage, (except " ſuch carriages as are before excepted), before the ſame ſhall " come to any turnpike gate or weighing engine, or ſhall " load upon ſuch carriage, (except as aforeſaid), after the ſame " ſhall have paſſed any ſuch turnpike or weighing engine, any " goods, taken from any horſe, or other carriage, belonging " to, or hired, or borrowed by the ſame waggoner or carrier, " in order to avoid the payment of the additional duties, as " aforeſaid; and if any perſon ſhall ſo unload, in order to " carry conſiderable quantities of goods through any turnpike " gate, in one and the ſame day, and thereby pay leſs toll at " ſuch turnpike gate than would have been paid if ſuch goods " had not been ſo unloaden, on conviction before one juſtice, " upon the oath of one witneſs, he ſhall forfeit five pounds. " And each and every driver, not being the owner, who " ſhall ſo offend, on conviction, as aforeſaid, ſhall be com- " mitted to the houſe of correction for one month."

5 *l.* penalty on unloading goods before coming to any gate or weighing engine.

† *Sect.* 26. And it is further enacted by par. 11. " That " if the owner of any carriage, or the driver travelling on " any turnpike road, where any toll gate or weighing engine " is erected, ſhall drive or turn out of the ſame into any other " road, in order to avoid being weighed, or paying toll, and

Penalty for avoiding the weighing engine.

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" ſhall afterwards proceed with ſuch carriage into, and on the " ſame turnpike road, every ſuch owner or driver, convicted " as aforeſaid, ſhall forfeit, if he be the owner, any ſum not " exceeding 5 *l.* nor leſs than 20 *s.*; and if he be the driver, " and not the owner, not exceeding 50 *s.* nor leſs than 10 *s.* " for every ſuch offence."

(4) N. B. By ſect. 67. of this act, two oxen or neat cattle are to be conſidered as equal to one horſe, in the ſame manner as by the highway act. Sect. 59. Vide ante, p. 411.

(5) By ſect. 68. carriages to have names and deſcriptions on them, in the ſame manner as directed by the highway act. Sect. 60. Ante, p. 412. Vide Burrow 2258.

† *Sect.* 27. Thirdly, As to carriages, It is enacted, by 13 Geo. 3. *c.* 84. *ſ.* 13. " That no four wheeled carriage, " having the bottom of the fellies nine inches broad, ſhall " be drawn on any turnpike road with more than eight horſes. " (4) Nor any two wheeled carriage, having wheels of the " breadth aforeſaid, with more than 5 horſes. And the " horſes ſhall draw in pairs, (except an odd horſe in any " team, and except where the number of horſes ſhall not ex- " ceed 4). And alſo, that no four wheeled carriage, (5) ha- " ving the bottom of the fellies, of the breadth of 6 inches, " ſhall be drawn in any turnpike road with more than 6 " horſes; and that no two wheeled carriage, having wheels " of the breadth laſt mentioned, ſhall be drawn with more " than 4 horſes; and no four wheeled carriage, having fel- " lies leſs than 6 inches, with more than 4 horſes; and no " two wheeled carriage, having fellies leſs than 6 inches, " with more than three horſes; and the owner ſhall forfeit " 5 *l.* and the driver, not being the owner, 20 *s.* for every of- " fence, to any perſon who ſhall ſue for the ſame."

Rollers with flat ſurfaces may be drawn with any number of horſes. And by 14 Geo. 3. *c.* 81. *ſ.* 5. all ſuch carriages ſhall only pay half the tolls directed by this act.

† *Sect.* 28. Provided, by par. 14. " That all carriages " moving upon rollers of 16 inches on each ſide thereof, with " flat ſurfaces, may be drawn with any number of horſes, or " other cattle."

Proſecutions not to be commenced, unleſs information be laid within three days after the offence is committed.

† *Sect.* 29. Provided always, by par. 15. " That no pro- " ſecution ſhall be commenced before a juſtice by informa- " tion, for any forfeiture incurred by the owner or driver ha- " ving a greater number of horſes, unleſs ſuch information be " laid within three days after the offence committed; and no " action, unleſs commenced within one calendar month; and " neither ſuch information or action, unleſs notice be given by " the informer to the driver on the day the offence ſhall be " committed, of an intention to complain of ſuch offence; " and if the offender lives ſo remote as to make it inconve- " nient to ſummon him, the juſtice may diſmiſs the com- " plaint, and leave the informer to his remedy by action at " law."

Penalty for taking off horſes, &c.

† *Sect.* 30. And it is further enacted, par. 17. " That if " any perſon ſhall take off any horſe, or other beaſt of " draught, from any carriage, or ſhall alter the diſtance of the

" wheels

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" wheels before the ſame ſhall come to any of the turnpikes, " with intent to avoid any toll forfeiture or penalty for draw- " ing with a greater number of horſes, or beaſts of draught, " than is hereby allowed on conviction before one juſtice, " upon the oath of one witneſs, ſhall forfeit 5 *l.*"

† *Sect.* 31. And it is further enacted, par. 18. " That if " it ſhall appear to the truſtees, or any ſeven of them, at any of " their publick meetings, by the oath of one witneſs, experi- " enced in levelling, that any part of the riſe of any hill ſhall " be more than 4 inches in a yard, they may allow ſuch " number of horſes as they ſhall judge neceſſary, not exceed- " ing 10, for waggons with 9 inch wheels, nor 6, for carts " with 9 inch wheels, and not exceeding 7, for waggons " with 6 inch wheels, nor 5, for carts with 6 inch wheels; " and not exceeding 5, for waggons with wheels of leſs " breadth than 6 inches, nor 4, for carts with wheels of leſs " breadth than 6 inches. And in caſe it ſhall appear to the ſaid " truſtees, in manner aforeſaid, that the whole riſe of any hill " taken together ſhall be more than 4 inches in a yard upon " an average, the ſaid truſtees, or any ſeven of them, may " allow ſuch number of horſes as they ſhall think fit to be uſed " in ſuch waggons and carts reſpectively, for the purpoſe only " of drawing the ſame up ſuch hill or hills, as aforeſaid, the " length and extent of ſuch hill or hills to be ſpecified in ſuch " order of allowance, and the termination at each end thereof " to be marked by a poſt or ſtone, to be erected at ſuch reſpec- " tive boundaries; and the ſaid order of allowance ſhall be " certified by the ſaid truſtees, or their clerk, to the next ge- " neral quarter ſeſſions, of the limit within which ſuch hill or " hills ſhall reſpectively be ſituated: and if the facts ſhall be " proved upon the oath of one witneſs to the ſatisfaction of " the bench, the ſaid order ſhall be confirmed and filed, or " otherwiſe vacated and quaſhed: and from and after ſuch " confirmation and filing, no perſon ſhall be liable to any pe- " nalty or forfeiture for uſing ſuch number of horſes as ſhall " be ſo allowed in drawing any waggon or cart up ſuch hill " or hills reſpectively; and the ſaid juſtices, at any ſubſequent " quarter ſeſſions of the peace, may reconſider the ſaid order " of allowance, and to diſcharge the ſame, if they think " fit."

They may allow ſuch number of horſes as they think fit, up hills riſing more than 4 inches in a yard, to be ſpecified in the order of allowance.

But a juſtice of the peace, or any court of juſtice, may ſtop all proceedings for theſe penalties, if it appears by one witneſs that the additional horſes were neceſſary by reaſon of the ſnow, &c. as by 13 Geo. 3. c. 84. ſ. 59. recited ante, p. 411.

† *Sect.* 32. And it is further enacted, par. 20. " That no " carriage, having the bottom of the fellies of leſs breadth than " 9 inches, ſhall paſs upon any turnpike road drawn by horſes " in pairs, other than, and except ſuch carriages, having the " fellies of 6 inches, as ſhall be authoriſed to be drawn in " any other manner by the order of truſtees, within their di- " ſtrict, made at a publick meeting, conſiſting of ſeven truſtees

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" or more, which order the ſaid truſtees may revoke at any " ſubſequent meeting, and afterwards make a new one fixed " in writing upon every toll gate within ſuch diſtrict, and " except carriages drawn by two horſes only."

† *Sect.* 33. And it is alſo enacted, par. 59. " That the " juſtices of the peace for Wales, at their general quarter ſeſ- " ſions, to be held in the week after Michaelmas, may licenſe " an increaſe of the number of horſes to be employed in draw- " ing carriages on turnpike roads within their reſpective juriſ- " dictions, over and above the number herein before limited, " if the ſtate of the roads make ſuch an increaſe neceſſary, " which order they may revoke, alter or vary at any ſubſe- " quent Michaelmas ſeſſion."

For the manner in which they are to be marked vide ante, p. 412.

† *Sect.* 34. And it is further enacted, par. 21. " That in " caſe any perſon ſhall drive any carriage not being marked " according to the directions of this act, or drawn by more " than the number of horſes, or beaſts of draught, hereby " reſpectively authoriſed, any conſtable, tythingman, ſurveyor, " or other perſon, may apprehend and take ſuch perſon before " a juſtice where the offence ſhall be; and, on conviction by " confeſſion, or the oath of one witneſs, ſhall forfeit not ex- " ceeding 5 *l.* nor leſs than 10 *s.*"

† *Sect.* 35. And it is further enacted, par. 2. " That " the truſtees appointed by any act of parliament for repairing " particular roads, or any five or more, within their reſpec- " tive diſtricts, at the firſt meeting after this act, do miti- " gate, leſſen, and reduce the high and extraordinary tolls " impoſed by ſuch certain particular acts, to an equality with " the tolls and duties impoſed by this act reſpectively."

Waggons, &c. moving on rollers, of the breadth of 16 inches on each ſide, with flat ſurfaces, to paſs toll free for one year, and then after paying one half of the toll.

† *Sect.* 36. Fourthly. As to exemptions from tolls: " It is " enacted, by 13 Geo. 3. c. 84. ſ. 26. and by 14 Geo. 3. " c. 82. ſ. 5. That all carriages, moving upon rollers, of the " breadth of 16 inches on each ſide, with flat ſurfa- " ces, ſhall paſs upon any turnpike road, through any toll- " gate or bar, toll-free, upon paying only ſo much of the " tolls and duties as ſhall not exceed one-half of the full toll " or duty payable by this or any turnpike act, for all wag- " gons, wains, or carts, having the fellies of the wheels of " the breadth or gauge of 6 inches from ſide to ſide, or for " the horſes or beaſts of draught drawing the ſame, and " not rolling a ſurface of 16 inches on each ſide; and " that no more than half toll ſhall be paid in reſpect of wag- " gons having the fellies of the wheels thereof of the breadth " of 9 inches, and rolling a ſurface of 16 inches on each ſide."

† *Sect.*

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† *Sect.* 37. Provided alſo, by 13 Geo. 3. c. 84. par. 27. Carriages to which the act does not extend.
" That nothing therein contained ſhall extend to any chaiſe-
" marine, coach, landau, berlin, chariot, chaiſe, chair, calaſh,
" or hearſe, or to the carriage of ſuch ammunition or artillery
" as ſhall be for his majeſty's ſervice, or to any cart or carri-
" age drawn by one horſe, or two oxen, and no more; or to
" any carriage, having the ſole or bottom of the fellies of the Vide 4 Burrows 2260.
" wheels thereof of the breadth of 9 inches, which ſhall be la-
" den with one block of ſtone, one piece of marble, one cable
" rope, one piece of metal, or one piece of timber."

† *Sect.* 38. Provided alſo, by par. 28. " That if any per- Penalty on perſons fraudulently taking the benefit of any exemption, is not to exceed 5*l.*
" ſon ſhall take the benefit of any exemptions, under any act
" for the repair of any turnpike road, in any fraudulent or
" colluſive manner whatſoever, he ſhall forfeit not exceeding
" 5*l.* nor leſs than 40*s.* for every ſuch offence."

† *Sect.* 39. And it is enacted by 18 Geo. 3. c. 63. " That Baggage waggons exempted.
" no toll ſhall be taken for any horſes belonging to officers
" or ſoldiers upon their march, or upon duty, or for any hor-
" ſes, cattle, or carriages employed in carrying their arms or
" baggage, or any ſick, wounded, or diſabled officers or ſol-
" diers; and no carriages ſo employed ſhall be weighed, or
" the owner or driver liable to any forfeiture for carrying
" greater weight than allowed by law."

† *Sect.* 40. And it is further enacted by ſaid ſtatute 13 No exemption from toll by former acts to be claimed by any perſon, unleſs where carriages with ſix inch fellies are uſed.
Geo. 3. c. 84. ſ. 24. " That no perſon ſhall take exemption
" from toll, in reſpect of any carriage, or horſe drawing
" the ſame, and carrying any particular kind of goods, un-
" leſs ſuch carriages have the ſole of the bottom of the fel-
" lies of the breadth of 6 inches, or upwards, (other than
" and except carts and carriages employed in carrying corn, Carts, &c. employed in huſbandry excepted.
" or grain in the ſtraw, hay, ſtraw, fodder, dung, lime for
" the improvement of land, or other manure, or any imple-
" ments of huſbandry only); but that the uſual toll, toge-
" ther with the additional tolls hereby required to be taken
" for carriages having the bottom of the fellies of leſs breadth
" than 6 inches, as aforeſaid, and for and in reſpect of hor-
" ſes or beaſts of draught, drawing the ſame, (except as
" before excepted), ſhall be paid as if no exemption, or leſs
" toll, had been allowed, and as fully as all other carriages,
" and horſes drawing the ſame."

† *Sect.* 41. Provided, par. 25. " That no perſon be al- No benefit to be taken of exemptions, unleſs the fellies lie flat.
" lowed to take the benefit of any ſuch exemptions, or to
" have the privilege herein-before given of compounding in
" reſpect of any carriage having the fellies of the wheels
" thereof of the breadth of 6 inches, or upwards, unleſs the
" fellies and the tire of ſuch fellies ſhall lie flat.—And by 16

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" Geo. 3. c. 39. ſ. 2. the fellies or tire whereof ſhall not " deviate more than one inch from a flat ſurface ſhall be " taken to be flat, according to the intent and meaning of " this act."

† *Sect.* 42. And it is further enacted by 13 Geo. 3. c. 84. ſ. 60. " That no toll ſhall be collected for carriages ſolely " employed in carrying materials for the repair of any turn- " pike road or public highway, or for going to or returning " from ſuch employment."

The mail coaches exempted from toll.

† *Sect.* 43. And it is further enacted by 25 Geo. 3. c. 57. " That all carriages of what deſcription ſoever, or horſes " which ſhall be employed in conveying from one part of this " kingdom to another, the mail or packet which ſhall be " made up under the authority and direction of the poſt-maſ- " ter general, or his deputies, ſhall be exempted, freed, and " diſcharged from the payment of any tolls whatſoever, that " ſhall or may be demanded for the paſſage of carriages or " horſes through any turnpike, toll-gate, or bar, at which " any toll is collected by any act or acts of parliament now " in force; and all turnpike keepers or toll collectors are " hereby directed and required to permit ſuch carriages and " horſes to paſs through all and every turnpike, toll-gate, or " bar, without demanding any toll or duty for ſo doing."

All ſtatute-duty to be performed in the pariſh, &c. where it ariſes.

† *Sect.* 44. Fifthly. As to ſtatute duty, it is enacted by 13 Geo. 3. c. 84. ſ. 32. " That ſurveyors ſhall cauſe the " ſtatute-duty required by the reſpective turnpike acts, and " the compoſitions ariſing from the ſame, to be performed, " laid out, and expended, upon the turnpike road lying within " the pariſh, townſhip, or place, from which ſuch duty ſhall " be required, and not elſewhere, and ſhall forfeit 40 *s.* for " every miſapplication thereof; and that where there are " two or more turnpike roads under ſeveral acts of parlia- " ment within the ſame pariſh, townſhip, or place, and the " ſtatute-duty ſhall exceed three days duty in the whole; " two juſtices ſhall at ſome ſpecial ſeſſions, adjuſt the ſtatute- " duty betwixt ſuch turnpike roads and the other highways in " ſuch pariſh, townſhip, or place, the ſaid juſtices previouſly " ſummoning the clerks and ſurveyors of ſuch turnpike roads, " and likewiſe the ſurveyors of the highways, who are hereby " reſpectively required to attend ſuch ſummons."

If more turnpike roads than are in the ſame pariſh, and the ſtatute-duty required to them exceeds three days, the juſtices may adjuſt the proportions.

† *Sect.* 45. Sixthly. As to materials for repairs, it is enacted by par. 61. " That no ſurveyor ſhall gather any ſtones for " the uſe of the highways, upon or from the common fields or " incloſed lands or grounds of any perſon, without the con- " ſent of the occupiers of ſuch lands or grounds, or a licence " from a juſtice of the limit where ſuch lands or grounds lie " for

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" for that purpoſe after having ſummoned ſuch occupier to " come before him and heard his reaſons, if he ſhall appear " and give any for refuſing his conſent."

† *Sect.* 46. And it is provided par. 65. " That ſatis- " faction ſhall be made by the truſtees of turnpike roads for " all ſuch materials as are got in ſeveral or incloſed lands (6) " or grounds in the ſame manner as ſatisfaction is to be made " reſpecting materials for the highways by virtue of 13 Geo. " 3. c. 78. ſ. 29."

(6) Vide the caſe of Rex v. Manning. 1 Burrow 377 to 383. Vide the clauſe at length. Ante p. 398. ſect. 41.

† *Sect.* 47. And by par. 36. " The ſurveyor of turnpike " roads with the approbation of the truſtees, may, under the " like circumſtances contract for the getting and carrying ma- " terials and ſhall be liable to the ſame penalties for having any " ſhare in ſuch contract, as the ſurveyor of highways may do " by 13 Geo. 3. c. 78. ſ. 50, recited at large in the preceding " chapter, page 403, ſection 45.

† *Sect.* 48. Seventhly. As to nuſances it is enacted by par. 37. " That if the ſurveyor or other perſon having the care of " any turnpike road, ſhall knowingly ſuffer to be or remain, " for four days in any part thereof, within ten feet on " either ſide of the middle of ſuch road any poſt, heaps " of ſtones, rubbiſh or earth, ſet up or raiſed on or above the " ſurface of the ſaid road, by which the paſſage thereof ſhall or " may be obſtructed, impeded, confined or ſtraitened, (other " than and except poſts, blocks, ſtones, or banks of earth fix- " ed in the ground, or raiſed for ſecuring horſe or foot roads or " paſſages for water, and all direction poſts and ſtones) ſuch " ſurveyor or other perſon ſhall forfeit 40*s.*"

Truſtees may direct proſecution for nuſances.

N. B. For nuſances by perſons making incroachments within 30 feet of the centre of the road, or ploughing within 15 feet thereof, by which they incur the penalty of 40*s.* The ſame clauſe is enacted by the 38th ſection of this act as is enacted by the 64th ſection of the highway act for which vide Ante p. 409. ſection 63.

† *Sect.* 49. Eighthly. As to ſubſcribers and mortgagees, it is enacted by par. 35. " That if any perſon ſhall agree to ad- " vance any ſum of money, to be employed in the making " or repairing any turnpike road, or highway intended to be " made turnpike, and ſhall ſubſcribe his, her, or their name " or names to any writing for that purpoſe; every ſuch " perſon ſhall be liable to pay every ſum or ſums of money " ſo ſubſcribed, according to the purport of ſuch writing; " and in default of payment thereof within twenty-one " days after the ſame ſhall become payable, according to " the purport of ſuch writing; and ſhall be demanded by " the perſon to whom the ſame is made payable by ſuch " writing; or if no perſon be named therein for that " purpoſe by the treaſurer, every ſuch treaſurer or other

Subſcribers and mortgagees.

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" perſon may ſue for and recover the ſame in any of his ma-
" jeſty's courts of record by action of debt, &c."

Mortgagees ſhall account for the monies they receive for tolls.

† *Sect.* 50. And it is further enacted by the ſaid ſtat. par. 52. " That every mortgagee that hath taken or been in poſ-
" ſeſſion of any toll, gate, or bar ſet up or erected on any
" turnpike road, or of any lands or tenements, the rents and
" profits whereof are appropriated to the repair of any part of
" any turnpike road ſhall within 14 days after he, ſhe, or they
" ſhall have received notice in writing from the truſtees of
" ſuch turnpike road or any 5 of them, render upon oath to
" be adminiſtered and taken by and before one juſtice or any
" one truſtee an exact account in writing, to ſuch truſtees, or
" to any perſon appointed by them or any 5 of them to be
" named in ſuch notice, of all monies received by ſuch mort-
" gagee or by any other perſon for their uſe and benefit or by
" their authority, at ſuch toll, gate or bar or otherwiſe, and of
" what they have expended in keeping or repairing the ſame;
" and in caſe they ſhall neglect to render ſuch account when
" required, in the manner herein directed, they ſhall ſeverally
" forfeit and pay to the ſaid truſtees, 10*l.* to be recovered by
" the ſaid truſtees, or any 5 or more of them, or by the trea-
" ſurer or clerk to the ſaid truſtees in a ſummary manner be-
" fore one juſtice to be applied to the uſe of the reſpective
" road whereupon ſuch toll, gate or bar ſhall be placed.

Penalty for holding over.

† *Sect.* 51. And it is further enacted by par. 53. " That if
" any ſuch mortgagee, ſhall keep poſſeſſion of any toll, gate or
" bar, or receive the tolls and duty thereof or of any ſuch rents
" or profits as aforeſaid after ſuch mortgagee ſhall have received
" the full ſum of money due on his mortgage and the intereſt
" thereof with coſts, ſuch mortgagee ſhall forfeit to the truſ-
" tees double the ſum of money he ſhall have received over and
" above the ſum due as aforeſaid, with treble coſts of ſuit;
" to be recovered by the ſaid truſtees, or by the treaſurer or
" clerk to ſuch truſtees by action of debt, &c. in any of his
" majeſty's courts of record; and applied as above men-
" tioned."

If the gate-keeper, who is diſcharged, refuſes to deliver up poſſeſſion of the houſe, &c. the juſtices may, by warrant, order him to be removed, with his goods.

† *Sect.* 52. Ninthly. As to officers in general, it is enacted, par. 54. " That if any toll-gatherer or gate-keeper,
" who ſhall be diſcharged by the truſtees, ſhall refuſe to de-
" liver up the poſſeſſion of the houſe, &c. within two days af-
" ter notice of his diſcharge; or if the wife or family of any
" ſuch, who ſhall die, ſhall refuſe within 4 days after ſuch
" new appointment ſhall be made, as aforeſaid; any juſtice
" by warrant ſhall order the conſtable, or other peace officer,
" to remove the perſons, together with their goods, out of
" ſuch houſe, and to put the new-appointed officer into the
" poſſeſſion thereof."

† Sect.

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† *Sect.* 53. And it is further enacted, par. 55. "That the gate-keeper or toll gatherer, and every ſurveyor ſhall, when required, by notice, in writing, from any 5 of the truſtees, render upon oath, before one juſtice or truſtee a true account in writing, of all monies received on account of ſuch turnpike road, not before accounted for, under the penalty of 5*l.* to be recovered in a ſummary manner before any one juſtice, and applied to the uſe of the reſpective road on which ſuch toll-gate ſhall be placed."

Gate-keepers and ſurveyors to account upon oath, when required by the truſtees, or forfeit 5l.

† *Sect.* 54. And be it further enacted, par. 56. "That no gate-keeper or other perſon renting the tolls and reſiding in any toll-houſe, ſhall be removeable by any juſtices, in purſuance of any laws for the regulation of the poor, unleſs he become chargeable to the pariſh; and that no ſuch gate-keeper, or perſon as aforeſaid, ſhall thereby gain a ſettlement; and that no tolls nor any toll-houſe, nor any perſon in reſpect of ſuch tolls or toll-houſe ſhall be aſſeſſed to the poors rate, or any other publick or parochial levy whatſoever."

No gate-keeper to be removed as a pauper, unleſs actually chargeable, &c. nor ſhall gain a ſettlement, nor be aſſeſſed, &c.

† *Sect.* 55. And it is further enacted, par. 57. "That if any toll-gatherer or gate-keeper ſhall ſuffer any carriage to paſs through any toll gate or bar with any greater number of horſes, or beaſts of draught, or with any carriage conſtructed or drawn in any other manner than is before directed, or without ſuch names and deſcriptions painted thereon as are hereby directed, and ſhall not within one week proceed for the recovery of the forfeiture or penalty in the manner directed by this act, he ſhall forfeit 40 *s.*"

Gate-keepers permitting horſes, or carriages otherwiſe than allowed by the act, or without proper inſcriptions, &c. forfeit 40 s.

† *Sect.* 56. And it is further enacted, by par. 45. "That all officers, appointed by any act for the repair of turnpike roads, their executors or adminiſtrators, ſhall, within 10 days after notice in writing by the truſtees, or any 5 or more of them deliver up all books, accounts, papers, or writings whatſoever, relative to the execution of ſuch reſpective offices on pain of forfeiting 20 *l.*

Clerks, treaſurers, &c. to deliver up their accounts.

† *Sect.* 57. And it is further enacted, par. 65. "That every treaſurer and ſurveyor ſhall, within one month after his appointment, give a bond to the truſtees, with ſurety, in ſuch penalty as the ſaid truſtees ſhall direct, for the paying and accounting for all money in his hands, or which he ſhall afterwards receive, as treaſurer or ſurveyor, according to the directions of the ſeveral acts of parliament reſpecting ſuch turnpike road, which bond ſhall be wrote upon paper without any ſtamp thereupon."—But by 23 Geo. 3. c. 18. ſ. 15. this exemption from ſtamps is repealed.

Treaſurers and ſurveyors ſhall give bond with ſurety to the truſtees, for the money in their hands.

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Vide ſect. 72.

N B. Upon what evidence convictions are to be made, and who are good witneſſes. Vide a ſimilar clauſe 13 Geo. 3. ſ. 77. & 78. Ante, p. 414.

† *Sect.* 58. It is alſo enacted, p. 73. "That every conſtable, "headborough, or tythingman, refuſing or neglecting to put "this act into execution, or to account for and deliver any "forfeiture or penalty, according to the directions of this act, "and every ſurveyor, toll gatherer, and all other perſons em- "ployed for the repairing roads, as ſhall receive ſalaries or re- "wards, who ſhall wilfully neglect for one week after the of- "fence committed to lay ſuch information upon oath before "a juſtice for the limit wherein ſuch offence was committed, "ſhall, upon due information upon oath before one juſtice, "forfeit 10*l.*"

† *Sect.* 59. And it is further provided, par. 74. "That "any juſtice may act in the execution of this act, notwith- "ſtanding he may be a creditor or a truſtee for repairing or "amending the roads on which any offence contrary to this "act was committed."

† *Sect.* 60. And it is further enacted, par. 75. "That who- "ever ſhall reſiſt or make forcible oppoſition to any perſon "employed in the due execution of this act, or any particular "act made for amending any particular highway, or ſhall aſ- "ſault any collector in the execution of his office; or ſhall paſs "through any turnpike gate, rail, or chain, or other fence, "ſet up by authority of parliament, without paying the toll "appointed to be paid at ſuch gate or other fence, or make "reſcue of cattle, or any other goods diſtrained by virtue of "this act, or if any conſtable, headborough, or tythingman, "ſhall refuſe or neglect to execute any warrant granted by "any juſtice, purſuant to the directions of this act, he ſhall, "on conviction as above, forfeit not exceeding 10*l.* nor leſs "than 40 *s.* in the manner directed by 13 Geo. 3. c. 78. "ſ. 72."

Perſons liable to repair old highways turned or ſtopped up, ſhall be liable to repair a part of the new highway equal to the burthen of the old one.

† *Sect.* 61. Tenthly, As to the repair of altered turnpike roads, it is recited by the ſaid ſtatute, par 63. "And "whereas parts of highways or turnpike roads have been, or "may be, diverted and turned by legal authority, to make "the ſame nearer or more commodious to the publick; and "doubts have ariſen, whether the inhabitants, or any particu- "lar perſon, is liable to repair the old highway or road, ſo "deviated from by ſtatute duty, tenure, or otherwiſe, ought "to repair, or contribute to the repair of the whole, or ſome, "and what part or proportion of ſuch new highway or road. "For obviating which doubts, and preventing diſputes about "the ſame, be it enacted, par. 63. "That the inhabitants of "every pariſh, townſhip, or place, and perſons liable as afore- "ſaid, to the repair of any ſuch old highway or road, ſhall re- "ſpectively be and continue in the ſame manner liable to the

"repair

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" repair of ſuch new highway or road, or ſo much thereof as " ſhall be equal to the burden and expence which he ſhall be " exonerated, by turning the ſame, as aforeſaid,; and that if " the parties cannot agree, the ſame ſhall be viewed by two " juſtices, and ſettled, adjuſted, and determined by them; and " from and after ſuch determination of the juſtices, the inha- " bitants, or the perſon liable to repair, ſhall bear all charges " and expences of indictments and proſecutions for not repair- " ing the ſame: and if it ſhall be found more convenient to " fix a groſs ſum, or an annual ſum, to be paid by any ſuch " inhabitants or perſon, inſtead of fixing the part or propor- " tion of ſuch new highway or road, to be repaired by him, " the ſaid juſtices may, with the conſent of ſuch perſon, and of " the inhabitants intereſted therein, obtained at a veſtry or " publick meeting held for that purpoſe, and alſo of the truſ- " tees at a publick meeting, if it be turnpike road, order and " direct the ſame accordingly; which order ſhall be, and for " ever after continue, binding to all perſons whomſoever."

And if the parties cannot agree, it ſhall be viewed and ſettled by two juſtices of the peace. A groſs or annual ſum may be paid, if the parties agree thereto.

† *Sect.* 62. And it is further enacted, par. 33. " That " when the inhabitants ſhall be indicted or preſented for not " repairing any highway, being turnpike road, and the court " ſhall impoſe a fine, the ſame ſhall be proportioned, with the " coſts and charges, between the inhabitants of the pariſh, " townſhip, or place, and the truſtees of ſuch turnpike road; " and the court ſhall order the treaſurer to pay the ſum ſo pro- " portioned, if it ſhall appear that the ſame may be paid " without endangering the ſecurity of the creditors who have " advanced their money upon the tolls to be raiſed thereupon."

Where turnpike roads are indicted, the court may proportion the fine and coſts between the inhabitants and the truſtees.

Without endangering the ſecurity of the creditors.

† *Sect.* 63. Eleventhly, How far the powers of the high- way act may be adopted, it is recited by the ſaid ſtatute, par. 70. " That whereas the powers given by ſeveral turnpike " acts are ineffectual for the purpoſes of digging, providing, " and carrying materials, for the uſe of the turnpike roads " therein deſcribed, and alſo for the purpoſes of enlarging, di- " verting, and turning ſuch turnpike roads, and ſtopping up, " ſelling, and diſpoſing of the old roads ſo to be diverted and " turned; and alſo for the making, opening, and cleanſing of " ditches and drains, and the cutting and pruning of hedges " and trees; and alſo for the calling forth and compelling the " performance of the ſtatute duty which ſhall belong to ſuch " turnike roads: and whereas more ample powers have been " given in the acts for highways in general, (which highways " comprehend and include turnpike roads); be it therefore " enacted, That the ſurveyors ſhall, with the approbation of " the truſtees of every turnpike road, apply any part of the " tolls and ſtatute duty in the execution of all act or acts of " parliament, for the amendment and preſervation of the high- " ways,

When the powers for providing materials, enlarging and turning turnpike roads, making drains, pruning hedges and trees, and calling forth the ſtatute duty, are ineffectual. And where more ample powers for theſe purpoſes are given by the highway act. The ſurveyor of turnpike roads, with the approbation of the truſtees, may execute and enforce theſe powers upon and for the benefit of the turnpike

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roads, upon the terms, and under the reſtrictions in the highway act.

" ways, and ſhall execute the ſame upon turnpike roads re-
" ſpectively, for the ſeveral purpoſes aforeſaid."

† *Sect.* 64. Twelfthly, As to the modes of proceeding, it is enacted, by par. 72. in the words of the highway act, ſect. 70.

(1) Ante, p.413.

(1) " That the forms of proceeding contained in the ſchedule
" ſhall be uſed, and no objection or advantage ſhall be taken
" for want of form.—And by par. 74. the evidence upon which
" convictions are to be made is the ſame as by the highway
(2) Ante, p.414, ſect. 76.
" act, ſect. 77, and 78. (2)—And by par. 7. the manner in
" which penalties and forfeitures are to be levied and recover-
" ed by diſtreſs, is the ſame preciſely as the highway act, ſect. 73.
(3) Ante, p.413, ſect. 69.
" (3)—By par. 77. the time for iſſuing the warrant is the
" ſame as, by the highway act, ſect. 74.
(4) Ante, p.414.
(4)—By par. 78. and
" 79. the application of the forfeitures are to be applied to the
" turnpike roads, and how forfeitures under 40 *s.* may be re-
" covered, is the ſame as, by the highway act, ſect. 75. excepting
" that the turnpike act gives full coſts, and the highway act
(5) Ante, p.417.
" double coſts, *&c.* (5)—The ſame notice to be given, as, by
(6) Ante, p.417, ſect. 75.
" the highway act, ſect. 76. (6)—By par. 80. the party grieved
" may recover ſatisfaction, as, by highway act, ſect. 79.
(7) Ibid. ſect. 76.
" (7)—By par. 81. tender of amends the ſame as ſect. 80.
(8) Ante, p.419, ſect. 82.
" (8)—By par. 82. and 83. the appeal the ſame as, by high-
" way act, ſect. 81.
(9) Ante, p.420.
(9)—By par 85. the limitation, mode of
" pleading, and coſts the ſame as, by highway act, ſect. 82."

Informations for penalties, in order to favour the offender, are deemed fraudulent and void.

† *Sect.* 65. And it is further enacted by the ſaid ſtatute 13 Geo. 3. c. 84. par. 48. That whereas fraudulent contrivances may be practiſed by offenders, their friends, and others, to evade the juſt recovery of forfeitures and penalties, by ſetting up colourable proſecutions, be it enacted, " That juſtices, where any information or conviction ſhall be
" ſet up by way of defence, or to defeat any information or
" proceeding on any forfeiture or penalty, inflicted as afore-
" ſaid, to examine into the real merits; and if it ſhall appear
" that the ſame was done to favour the offender, ſuch infor-
" mation or conviction ſhall be deemed to be fraudulent, and
" null and void; and every ſuch juſtice or juſtices ſhall deter-
" mine and convict, as if no information or conviction had
" been made, proſecuted, or obtained."

CHAP.

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# CHAPTER THE SEVENTY-SEVENTH.

## OF NUSANCES RELATING TO BRIDGES.

AND now I am in the ſecond place to conſider nuſances relating to bridges in particular; for the better underſtanding whereof I ſhall examine: How publick bridges are to be repaired by the common law. And how by the ſtatute.

By the great charter 9 H. 3. c. 15. No town nor freeman ſhall be diſtrained to make bridges nor banks, but ſuch as of old time and of right have been accuſtomed. See alſo 2 Inſt. 701. 2 Burr. 267.

As to the firſt point, I ſhall conſider, Firſt, In what manner, and by whom ſuch bridges are to be repaired by common law. Secondly, In what manner perſons bound to ſuch repairs are to be proceeded againſt.

*Sect.* 1. As to the firſt of theſe particulars it ſeemeth to be clear, That thoſe who are bound to repair ſuch bridges, muſt make them of ſuch heighth and ſtrength, as ſhall be anſwerable to the courſe of the water, whether it continue in the old channel, or make a new one; and that they are not puniſhable as treſpaſſers for entring on any adjoining land, for ſuch purpoſe, or for laying thereon the materials requiſite for ſuch repairs. Alſo it ſeemeth to be clearly (*a*) ſettled, That of common right the charge of repairing all common bridges, lies upon the county wherein they are, unleſs part thereof be within a franchiſe; in which caſe it is ſaid, That ſo much as is within the franchiſe, ſhall be repaired by thoſe of the franchiſe.

43 Aſſize p. 43. Dalton c. 14.

(*a*) 2 Inſt. 701. Summary 143. C. Car. 365. 6 Modern 337. Salk. 358, 359.

*Sect.* 2. Alſo it ſeemeth to be (*b*) certain, That ſuch charge may be caſt upon a corporation aggregate, either in reſpect of a ſpecial tenure of certain lands, or in reſpect of a ſpecial preſcription, and that it may be caſt upon any other perſons (1) by reaſon of ſuch a ſpecial tenure as hath been ſhewn more at large under the ſecond general head of the precedent chapter. But it is (*c*) ſaid, That a man ſhall not be bound to repair a new bridge built by himſelf, for the common

(*b*) 2 Inſt. 700. 701. Summary 143. Dalton c. 14. Far. 54, 55.

(*c*) 2 Inſt. 701. 6 Modern 307. Salkeld 359. C. Car. 365. 2 Black. 685. Burr. 2594.

(1) Therefore a tenant at will of a houſe which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the houſe, yet if it become dangerouſly ruinous to the neceſſary intercourſe of the bridge, as tenant at will only, he is bound, *by reaſon of his poſſeſſion*, to repair it, ſo far as to prevent the public being prejudiced. Lord Raym. 856.

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good: but that the county ſhall be bound to repair it, if it become of publick convenience. (2)

(2) Therefore where a particular diſtrict rebuilt a foot-bridge over a more convenient part of the ſtream, and converted it into a bridge for horſes, carts, and carriages; as the diſtrict was not bound by cuſtom to build or repair ſuch a bridge, but a foot-bridge only, and as they built a quite different bridge, in a different place, which proved of common publick utility to the county, the Court were unanimous, that the county, and not the diſtrict, were bound to repair it. Burr. 2554. Black. 684.

*Sect.* 3. As to the ſecond particular, *viz.* In what manner perſons bound to ſuch repairs, are to be proceeded againſt; it ſeemeth to be clear, (*a*) That any particular inhabitant or inhabitants of a county, or tenant or tenants of land charged to the repairs of ſuch a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine aſſeſſed by the court for the default of ſuch repairs, and ſhall be put to their remedy at law for a contribution from thoſe who are bound to bear a proportionable ſhare in the charge, for the neceſſity of the caſe requires the greateſt expedition in caſes of this nature.

(*a*) 1 Jon. 273. Popham 162. 6 Modern 307. Salkeld 358. 12 Modern 198, 409. Ld. Raym. 725, 792, 844, 856, 858, 1169, 1175, 1249. 11 Modern 56. F. N. B. 225. Regiſter 268. 2 Inſt. 700. Hard. 131.

(*b*) 2 Lev. 112. Popham 192. 43 Aſſize 37. 8 Modern 120. 43 Aſſize 37. E. Preſentment, 22, and 29.

*Sect.* 4. Alſo it hath been (*b*) reſolved, That it is not ſufficient for the defendants to an indictment for not repairing a bridge, to excuſe themſelves by ſhewing either that they are not bound to repair the whole, or any part of the bridge, without ſhewing what other perſon is bound to repair the ſame; and it is ſaid that in ſuch caſe the whole charge ſhall be laid upon ſuch defendants, by reaſon of their ill plea.

See 1 Sid. 140.

*Sect.* 5. It is ſaid, That where ſuch defendants plead, that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverſe to the charge againſt themſelves, the attorney general in this ſpecial caſe may take a traverſe upon a traverſe, and inſiſt that the defendants are bound to the repairs, and traverſe the charge alledged againſt *A. B.* and

2 Levinz 212.

that an iſſue ought to be taken on ſuch ſecond traverſe; and that the attorney general may afterwards ſurmiſe, that the defendants are bound to repair it, and that the whole matter ſhall be tried by an indifferent jury, &c. (3)

(3) But the indictment ought to ſhew what ſort of bridge it is, whether for carts and carriages, or for horſes, or foot-men only. Ld. Raym. 1175. And if the duty to repair ariſes by reaſon of the tenure of certain lands, the indictment muſt ſhew where thoſe lands lie. 2 Hale 184. And for the form of an indictment, vide 1 Burn 281.

6 Modern 307. Burrows 859.

*Sect.* 6. It ſeems that no inhabitant of a county ought to be a juror for the trial of an iſſue, whether the county be bound to ſuch repairs or not, but it is ſaid that he may be a good witneſs. (4)

(4) The ſame objection may lie againſt the juſtices where they are all intereſted. In which caſe the trial ſhall be in the next county. Vide Burrow 859, 860. But by 1 Ann. an inhabitant may be a witneſs. Vide poſt. ſect. 20.

*Sect.*

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*Sect.* 7. As to the ſecond point, *viz.* In what manner ſuch bridges are to be repaired by ſtatute. It is enacted by 22 Hen. 8. c. 5. "That the juſtices of peace in every ſhire of this "realm, franchiſe, city, or borough, or four of them at the "leaſt, whereof one to be of the *quorum*, may inquire, hear, "and determine, in their general ſeſſions, of all manner of "annoyances of bridges broken in the highways, to the da- "mage of the king's liege people, and to make ſuch proceſs "and pains upon every preſentment afore them, for the refor- "mation of the ſame, againſt ſuch as owen to be charged for "the making or amending of ſuch bridges, as the king's "juſtices of his bench uſe commonly to do; or as it ſhall "ſeem by their diſcretions to be neceſſary and convenient for "the ſpeedy amendment of ſuch bridges."

2 Inſt. 701, 702. 6 Modern 255.

A remedy to repair decayed bridges. 13 Coke 33. Popham 192.

*Sect.* 8. And it is farther enacted, par. 2 and 3. "That "where it cannot be known and proved what hundred, "riding, wapentake, city, borough, town or pariſh, nor what "perſon certain, or body politick, ought of right to make "ſuch bridges decayed, by reaſon whereof ſuch decayed "bridges, for lack of knowledge of ſuch as owen to make "them, for the moſt part lie long without any amendment, "to the great annoyance of the king's ſubjects; in every "ſuch caſe the ſaid bridges, if they be without city or town- "corporate ſhall be made by the inhabitants of the ſhire or "riding, within which the ſaid bridge decayed ſhall happen "to be: and if it be within any city or town-corporate, then "by the inhabitants of every ſuch city or town-corporate "wherein ſuch bridges ſhall be. And if part of any ſuch "bridges ſo decayed happen to be in one ſhire, riding, city "or town corporate, and the other part thereof in another "ſhire, riding, city or town-corporate, or if part be within "the limits of any city or town-corporate, and part without, "or part within one riding, and part within another, that "then in every ſuch caſe the inhabitants of the ſhires, ridings, "cities or towns-corporate, ſhall be charged and chargeable "to amend, make and repair ſuch part and portion of ſuch "bridges ſo decayed, as ſhall lie and be within the limits of "the ſhire, riding, city or town-corporate, wherein they be "inhabited at the time of the ſame decays."

Juſtices may proceed againſt defaulters.

*Sect.* 9. And it is farther enacted, par. 4. "That in every "ſuch caſe where it cannot be known and proved what per- "ſons, lands, tenements, and bodies politick owen to make "and repair ſuch bridges, that for ſpeedy reformation and "amending of ſuch bridges, the juſtices of the peace within "the ſhires or ridings, wherein ſuch decayed bridges being "out of cities and towns-corporate, and if it be within "cities or towns-corporate, then the juſtices of peace within "every ſuch city or town corporate, or four of the ſaid juſti-

Juſtices may tax the inhabitants. Vide 1 Keble 422.

"ces

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Vide infra. 12 Geo. 2. Which ſeems to make this part of the act uſeleſs.

" ces at the leaſt, whereof one to be of the *quorum*, within " the limits of their ſeveral commiſſions and authorities, may " call before them the conſtables of every town and pariſh, " being within the ſhire, riding, city or town-corporate, as " well within liberty as without, wherein ſuch bridges or " any parcel thereof ſhall happen to be, or elſe two of the " moſt honeſt inhabitants within every ſuch town or pariſh " in the ſaid ſhire, riding, city or town-corporate, by the " diſcretion of the ſaid juſtices of peace, *&c.* And at and " upon the appearance of ſuch conſtables or inhabitants the " ſaid juſtices of peace, *&c.* with the aſſent of the ſaid con- " ſtables or inhabitants, may tax, and ſet every inhabitant in " any ſuch city, town or pariſh, within the limits of their " commiſſions and authorities, to ſuch reaſonable aid and ſum " of money, as they ſhall think by their diſcretions convenient " and ſufficient for the repairing, re-edifying, and amending " of ſuch bridges, and after ſuch taxation made, the ſaid " juſtices ſhall cauſe the names and ſums of every particular

Two collectors to be made. Sed vide infra. 1 Ann. c. 18. &c.

" perſon ſo by them taxed, to be written in a roll indented: " and ſhall alſo have power and authority to make two col- " lectors of every hundred, for collection of all ſuch ſums of " money by them ſet and taxed, which collectors receiving " the one part of the ſaid roll indented, under the ſeals of " the ſaid juſtices, ſhall have power and authority to collect " and receive all the particular ſums of money therein con- " tained, and to diſtrain every ſuch inhabitant as ſhall be " taxed, and refuſe payment thereof, in his lands, goods and " chattels, and to ſell ſuch diſtreſs, and of the ſale thereof " retain and perceive all the money taxed, and the reſidue, " (if the diſtreſs be better) to deliver to the owner thereof: " and that the ſame juſtices, or four of them, within the limits " of their commiſſions and authorities, may alſo name and ap-

(5) The office of ſurveyors, for the ſake of con- veniency, is uſually annexed by the juſtices to the office of the high conſta- bles. 1 Burn 280.

" point two ſurveyors (5) which ſhall ſee every ſuch decayed " bridge repaired and amended from time to time as often as " need ſhall require, to whoſe hands the ſaid collectors ſhall " pay the ſaid ſums of money, taxed and by them received, " and that the collectors and ſurveyors, and every of them, and " their executors and adminiſtrators, and the executors and " adminiſtrators of them, and every of them, from time to " time, ſhall make a true declaration and account to the juſtices " of peace of the ſhire, riding, city, or town corporate, wherein " they ſhall be appointed collectors or ſurveyors, or to four " of the ſame juſtices, whereof one to be of the quorum, of " the receipts, payments and expences of the ſaid ſums of mo- " ney: and if they or any of them refuſe that to do, that then " the ſame juſtices of peace, or four of them, from time to " time by their diſcretions, ſhall have power and authority to " make proceſs againſt the ſaid collectors and ſurveyors, and

" every

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" every of them, their executors and adminiſtrators, and the " executors and adminiſtrators of every of them, by attach- " ments under their ſeals, returnable at the general ſeſſions " of peace: and if they appear, then to compel them to ac- " count, as is aforeſaid; or elſe if they, or any of them, re- " fuſe that to do, then to commit ſuch of them as ſhall refuſe " to ward, there to remain without bail or mainpriſe, till the " ſaid declaration and account be truly made."

Juſtices may make proceſs into every ſhire.

*Sect.* 10. And it is farther enacted, par. 5. " That where " any bridge or bridges lying in one ſhire or riding, and ſuch " perſons inhabitants, bodies politick, lands or tenements, " which owen to be charged with the making and amending " of ſuch bridges, lien and abiden in another ſhire or riding, " or where ſuch bridges been within any city or town corpo- " rate, and the perſons inhabitants, bodies politick, lands or " tenements, that owen to make or repair any ſuch bridges " lien and been out of the ſaid cities and towns corporate, in " every ſuch caſe the juſtices of peace of the ſhire, city, or " town corporate, within which ſuch decayed bridges, or any " part thereof, ſhall happen to be, ſhall have power to enquire, " hear and determine all ſuch annoyances, being within the " limits of their commiſſions and authorities. And if the an- " noyance be preſented, then to make proceſs into every ſhire " within this realm, againſt ſuch as owen to make or amend " any ſuch bridges ſo preſented before them to be decayed, to " the annoyance and let of the paſſage of the king's ſubjects, " and to do further in every behalf in every ſuch caſe, as they " might do by authority of the ſaid act, in caſe that the per- " ſons, *&c.* which owen to be charged to the amending or " making of ſuch bridges, *&c.* were in the ſame ſhire, *&c.* " where ſuch annoyance ſhall happen to be. And that all " ſheriffs, and bailiffs of liberties and franchiſes, ſhall truly " ſerve and execute proceſs as ſhall come to their hands from " the ſaid juſtices of peace, afore whom any preſentment ſhall " be had for any ſuch annoyance, according to the tenor and " effect of the ſaid proceſs to them directed, *&c.* on pain to " make ſuch fine as ſhall be ſet on them by the diſcretion of the " ſaid juſtices."

Which the ſheriffs ſhall ſerve.

Cinque Ports excepted.

*Sect.* 11. But it is provided, par. 6. " That nothing in " the ſaid act contained ſhall be prejudicial to the liberties of " the five ports, or members of the ſame."—And for reformation of annoyance of bridges within the ſaid ports and members, it is farther enacted, par. 7. " That the warden, mayors, and " bailiffs elected, and jurats of the ſame ports, and every of " them, have power and authority to enquire, hear, and de- " termine all manner of common annoyances of bridges within " the ſame ports and members, and to make ſuch proceſs, pains,

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"taxations, and all other things within the ſame ports and "members, as the juſtices of the peace may do in other ſhires "or places out of the ſame ports, by virtue of the ſaid act in "every behalf."

Allowance to collectors.

*Sect.* 12. And it is farther enacted, par. 8. "That the ſaid "juſtices, *&c.* may allow ſuch reaſonable coſts and charges to "the ſaid ſurveyors and collectors, as by their diſcretion ſhall "be thought convenient."

Of roads at the ends of bridges.

*Sect.* 13. And it is farther enacted, par. 9. "That ſuch "part and portion of the highways in every part of this realm, "as well within franchiſe as without, as lie next adjoining to "any ends of any bridges within this realm, diſtant from any "of the ſaid ends by the ſpace of 300 foot, be made, repaired, "and amended, as often as need ſhall require; and that the "juſtices of peace in every ſhire of this realm, franchiſe, city, "or borough, or four of them at the leaſt, whereof one to be "of the quorum, within the limits of their commiſſions and "authorities, may enquire, hear, and determine in their gene-"ral ſeſſions, all manner of annoyances of and in ſuch high-"ways, ſo being and lying next adjoining to any ends of "bridges within this realm, diſtant from any one of the ends "of ſuch bridges 300 foot, and to do in every thing concern-"ing the making, repairing, and amending ſuch highways, *&c.* "in as large and ample manner as they might and may do to "and for the making, repairing, and amending of bridges, by "virtue of the ſaid act."

2 Inſt. 701. Salk. 359. 6 Mod. 255, 256.

† *Sect.* 14. In the conſtruction of this ſtatute the following opinions have been holden: Firſt, That no private bridges are within the purview thereof, but only ſuch as are common in the highways, where all the king's liege people have or may have paſſage.

2 Inſt. 701, 702.

*Sect.* 15. Secondly, That unleſs the juſtices of the peace of a county, or town, *&c.* be four in number, and one of them of the quorum, they have no manner of juriſdiction by virtue of this ſtatute; but it is ſaid, That the juſtices of the peace of the county, in which ſuch town, being not a county of itſelf, and wanting ſuch a number of juſtices, ſhall lie, may, by virtue of the firſt clauſe of the ſtatute, determine all annoyances of bridges within ſuch town, *&c.* if it be known what perſons in certain are bound to repair the ſame: but if it be not known, it ſeems that ſuch annoyances are left to the remedy of the common law, becauſe the clauſe, which in ſuch caſe authoriſes the juſtices of the peace to tax all the inhabi-

tants,

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tants, ſeems expreſsly to confine the power of taxing the inhabitants of ſuch towns to their own juſtice, &c.

*Sect.* 16. Thirdly, That all houſholders dwelling in any county or town, &c. whether they occupy any lands or not; and alſo all perſons who have lands in their own poſſeſſion or manurance, whether they dwell in the ſame county, &c. or not; and alſo all bodies politick, either reſiding in, or having lands in their own hands in a county, &c. are liable to be taxed as inhabitants, within the meaning of the ſtatute. 2 Inſt. 703.

*Sect.* 17. Fourthly, That the taxation to be made in purſuance of the ſtatute ought to be aſſeſſed diſtinctly on each inhabitant, and not on a whole hundred, pariſh, or town in general. 2 Inſt. 704. Vide 1 Keb. 91.

*Sect.* 18. Fifthly, That all privileges of exemptions and diſcharges from contribution to the repairs of decayed bridges, whether ſuch exemptions were originally derived from charter or act of parliament, or any other foundation whatſoever, are taken away by the expreſs words of the ſtatute, "That the juſtices, &c. ſhall tax and ſet every inhabitant." 2 Inſt. 704.

*Sect.* 19. It hath been queſtioned whether a borough, which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 Keble 68.

† *Sect.* 20. And to prevent more money being raiſed than is neceſſary, and to direct the application of what is raiſed, it is enacted, by 1 Anne, ſt. 1. c. 18. "That the juſtices in ſeſſions ſhall have full power, upon due preſentment to them made that any bridge within their reſpective juriſdictions is out of repair, and which by them hath uſually been or ought to have been repaired, to aſſeſs every town, pariſh, or place within their reſpective commiſſions in the uſual proportions toward the repair of bridges, to be levied and collected by the conſtables or by ſuch other perſon or perſons, as the ſaid juſtices in ſeſſions ſhall direct, and paid by the ſaid collectors to the high conſtables of every hundred in 6 days after they ſhall have received the ſame, and the high conſtables ſhall in 10 days after the receipt thereof pay the ſame to ſuch perſon as the ſaid juſtices ſhall, in ſeſſions, appoint to be treaſurers of the ſame (allowing the ſaid perſons not exceeding 3 d. in the pound) to be employed and accounted for according to the orders and directions of the ſaid juſtices for and towards the amending of ſuch decayed bridges and the highways at the end of ſuch bridges as need ſhall require, which aſſeſſments ſhall be levied by diſtreſs within 10 days after demand, and every conſtable or other" Vide the next ſection where the charges are directed to be paid out of the county rate. Moore 103. 2 Hale 181.

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" perſon who ſhall neglect to aſſeſs, collect, or pay the money " as aforeſaid, ſhall forfeit 40s. and every treaſurer that ſhall " pay any money but by the order of the juſtices as aforeſaid, " ſhall forfeit 5 *l.* and all fines, iſſues, penalties or forfeitures " upon any preſentment or indictment for not repairing, &c. " ſhall be paid into the hands of the treaſurer for the purpoſes " aforeſaid, and not into the exchequer. And all queſtions " concerning the repairs aforeſaid, ſhall be determined in the " ſame county wherein they lie, and no preſentment or indict- " ment ſhall be removed by *certiorari* (*a*) out of the county " into any other court, except the right of repairing by pri- " vate perſons (or by 5 & 6 Will. & Mary, c. 11. the right " between pariſhes came in queſtion) and on which queſtion " inhabitants are admiſſable witneſſes. The general iſſue " may be pleaded and this act and the 22 Hen. 8. may be " given, with any ſpecial matter in evidence, and the plaintiff " ſhall be liable to pay double coſts."

(*a*) A *certiorari* lies upon an order of juſtices concerning a private bridge, purſuant to a private ſtatute; but they ought to return the act upon which their order is founded. Dalt. 504. And it has been determined that this act of Queen Ann extends only to bridges where the county is charged to repairs and that where a private perſon or pariſh is charged the 5 and 6 Will. 3. c. 11. hath allowed the granting a *certiorari*. Strange 900.

The expence of repairing bridges to be raiſed by a county rate.

† *Sect.* 21. It is alſo enacted, by 12 Geo. 2. c. 29. ſ. 13. for the more eaſy aſſeſſing, levying and collecting the county rates, " That no part of the money to be raiſed and collected " in purſuance of this act ſhall be applied to the repairs of any " bridges, &c. until preſentments be made by the reſpective " grand juries, at the aſſize, great ſeſſions, general gaol deli- " very, or general or quarter-ſeſſions of the peace, held for " the county or place of the inſufficiency, inconveniency, or " want of reparation of their bridges, &c. &c."

Juſtices may contract for the repair of bridges.

† *Sect.* 22. Alſo, it is further enacted, par. 14. " That " when any public bridges, ramparts, banks or cepts or other " works are required to be repaired at the expence of any " county or place, the juſtices of the peace at their grand " or quarter ſeſſions reſpectively, or the greater part of them " then and there aſſembled, if they think proper and conve- " nient, after preſentment to be made as aforeſaid of the want " of reparation of ſuch bridges, ramparts, banks or cepts, " may contract and agree with any perſon or perſons for re- " building, repairing and amending the ſame, and all other " works which are to be repaired and done by aſſeſſment in " the reſpective counties or places, for any term or terms of " years not exceeding ſeven years at a certain annual ſum, " payment or allowance for the ſame; ſuch contractor or " contractors giving ſufficient ſecurity for the due perform- " ance thereof to the clerk of the peace or other officer of the " place reſpectively; and ſuch juſtices at their reſpective " general or quarter ſeſſions ſhall give public notice of their " intention

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" intention of contracting as aforeſaid; and ſuch contracts " ſhall be made at the moſt reaſonable price propoſed; and " all contracts when agreed to, and all orders relating thereto " ſhall be entered in a book to be kept by the clerk of the " peace or other officer reſpectively for that purpoſe, and kept " among the records of the place, to be from time to time in- " ſpected by any of the ſaid juſtices within the limits of their " commiſſions and by any perſon or perſons employed con- " cerning the ſame without fee or reward."

† *Sect.* 23. It is alſo further enacted, by 14 Geo. 2. c. 33. " That the juſtices of the peace of any county or place, at " their general ſeſſions or general quarter ſeſſions aſſembled or " the major part of them, ſhall have power to purchaſe of, or " agree, or contract with any perſon or perſons, bodies poli- " tick or corporate for any price or parcel of land adjoining " or near to any county bridge within the limits of their reſ- " pective commiſſions, for the more commodious enlarging, " or convenient rebuilding of the ſame; which pieces or " parcel of land ſhall not exceed one acre in the whole for " any ſuch bridge and ſhall from time to time be paid for by " the reſpective county treaſurers out of any monies raiſed or " to be raiſed by virtue of 12 Geo. 2. c. 29; ſuch treaſurers " being thereunto authoriſed by orders under the hands and " ſeals of the juſtices at ſeſſions or the major part of them; " which lands ſo purchaſed ſhall be conveyed as the ſaid juſ- " tices in ſeſſions ſhall appoint, in truſt, for the uſes and pur- " poſes of enlarging or rebuilding ſuch bridges reſpectively."

Juſtices may purchaſe the adjoining land to rebuild.

## CHAPTER THE SEVENTY-EIGHTH.

### Of NUSANCES relating to PUBLIC HOUSES.

FOR the better underſtanding of nuſances relating to public houſes, I ſhall conſider: In what manner they are prevented and reſtrained by the common law, and in what manner by ſtatute.

*Sect.* 1. As to the firſt point it ſeems to be agreed, That the keeper of an inn may, by the common law, be indicted and fined, as being guilty of a publick nuſance (*a*) if he uſually harbour thieves, or perſons of ſcandalous reputation, or (*b*) ſuffer frequent diſorders in his houſe, or take exorbitant prices, or ſet (*c*) up a new inn in a place, where there is no manner of need of one, to the hindrance of other ancient and well

(*a*) Palm. 374. 2 Roll. 345.
(b) Sum: 146. Cro. Car. 549.
Dalton c. 7.
(c) Sum. 146.

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governed inns, or (a) keep it in a place in reſpect of its ſituation wholly unfit for ſuch a purpoſe.

(a) 2 Hale 174. Dalt. c. 7. Palm. 374. 2 Roll. 345.

*Sect.* 2. And it ſeems alſo to be clear, That 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 (b) lodging, upon his tendering him a reaſonable (c) price for the ſame, he is not only liable to render (d) damages for the injury in an action on the caſe at the ſuit of the party grieved, but may alſo be (e) indicted and fined, at the ſuit of the king. Alſo it is ſaid, That he may be compelled by the conſtable (f) of the town to receive and entertain ſuch a perſon as his gueſt, and that it is no way (g) material whether he have any ſign before his door or not, if he make it his common buſineſs to entertain paſſengers.

(b) Palm. 374. 2 Roll. 345. (c) 10 H. 7. 8. 39 H. 6. 18. 19. 9 Coke 87. (d) Dy. 158. B. Ac. ſur. caſ. 76. 92. (e) H.P.C. 146. Dalton c. 7. (f) 5 E. 4. 2. (g) Palm. 374. 2 Roll. 345, 346. 8 Co. Calev's caſe. Blackerby 169. Cro. Eliz. 622. Brownlow 254. Keilw. 50. 11 and 12 Will. 3. c. 15. ſ. 2. 1 Salk. 388. Moor 877. 12 Mod. 255. Clayt. 97. Godbolt 346. Carth. 150. Shower 268.

*Sect.* 3. It ſeems to have been always clearly (b) agreed, That he who has an inn by preſcription, may lawfully enlarge it upon the ſame land which has been uſed with it, either by erecting new buildings thereon, or turning ſtables into chambers of entertainment, and that he ſhall have the ſame privilege in ſuch new parts of his houſe as in any of the old.

(b) 2 Roll. A. 84. 85.

*Sect.* 4. Alſo it ſeems to be (i) ſettled at this day, That any perſon may lawfully ſet up a new inn, unleſs it be inconvenient to the publick in ſome of the reſpects taken notice of in the firſt ſection, and that he has no need of any licence from the king for this purpoſe, for the keeping of an inn is no franchiſe, but a lawful trade, open to every ſubject. But if an inn degenerate into an ale-houſe, by ſuffering diſorderly tippling, it ſhall be deemed as ſuch.

(i) 2 Rol. A. 84. Salk. 45. 2 Roll. 345. Palm. 367, 374. 2 Keb. 506. 1 Bulſ. 109. Salk. 45. Blackerby 170. Godbolt 345. Hutton 100. Cro. Jac. 528.

But it is ſaid by Dalton, that inn keepers ought to have licence and be bound by recognizance for keeping good order as ale-houſe keepers are.

Dalton 56. 133. 204. Vide 455. ſect. 12.

And by the commiſſion of the peace, two juſtices, one whereof ſhall be of the quorum, may inquire of innholders, and of all and ſingular other perſons, who ſhall offend in the abuſe of weights and meaſures, or in the ſale of victuals, againſt the form of the ordinances in that behalf made.

1 Burrow 22.

*Sect.* 5. As to the ſecond point, *viz.* In what manner nuſances of this kind are prevented and reſtrained by ſtatute, it is enacted by 12 Edw. 2. c. 6. "That no officer in city or "in borough, that by reaſon of his office ought to keep aſ- "ſizes of wines and victuals, ſo long as he is attendant to "that

Vide F. N. B. 172. Regiſter 184. Raſt. 686.

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" that office, ſhall not merchandize for wines nor victuals, " neither in groſs nor by retail; and if any be convict of " ſuch offence, the merchandize ſhall be forfeited to the king, " and the third part thereof delivered to the party that ſued " for the ſame, &c."

*Sect.* 6. And it is farther enacted by 6 Rich. 2. c. 9. " That no victualler ſhall have, exerciſe, or occupy any ju- " dicial office in any town, but only where no other perſon " ſufficient may be found to have the ſame office. In which " caſe yet the ſame judge, for the time that he ſhall continue " in the ſaid office, ſhall utterly omit and abſtain himſelf and " his from the exerciſe of victualling, upon pain of forfeit- " ing his victuals ſo ſold." Repealed by 7 Rich. 2. c. 11.

*Sect.* 7. And it is farther enacted by 3 Hen. 8. c. 8. " That as often as any victualler choſen to bear any office " within any city, borough, or town-corporate, which for the " time that he ſhall ſtand and be in ſuch office ſhould have the " aſſeſſing and correction for ſelling of victuals, that then two " diſcreet and honeſt perſons of the ſame city, borough, or " town-corporate, not being victuallers, nor any of them " being a victualler, ſhall be choſen by the commonalty of the " ſame city, borough, or town-corporate, in like form as " the ſaid officer ſhall be choſen: which two perſons, with " the ſaid officer, ſhall be ſworn truly to ſeſs and ſet the prices " and aſſizes of victual there, for the time that any ſuch vic- " tualler ſhall abide in the ſame office: And that then it ſhall " be lawful to all and every of the ſaid officers, after the ſame " victuals be ſet and ſeſſed by the ſame officer, and the ſaid " two perſons, or one of the ſame two perſons, the other be- " ing abſent, to merchant and ſell wines, and all other vic- " tual in groſs, and at retail, during the time that he ſhall be " in any ſuch office, without any thing therefore to forfeit: " The ſaid ſtatute, act, and ordinance of 12 Edw. 2. or any " other act or acts, ordinance, or ſtatute to the contrary made " in any wiſe notwithſtanding."

*Sect.* 8. Alſo it is enacted by 21 Jac. 1. c. 21. " That all " hoſtlers or inn-holders ſhall ſell their horſe-bread, and their " hay, oats, beans, peaſe, provender, and alſo all kind of vic- " tual, both for man and beaſt, for reaſonable gain, having " reſpect to the prices for which they ſhall be ſold in the mar- " kets adjoining, without taking any thing for litter." Vide C. Jac. 609. 610. 2 Roll. 225, 226.

And it is farther enacted by the ſaid ſtatute, " That " every hoſtler and innkeeper dwelling in any town or village, " being a thoroughfare, and no city, town-corporate, or mar- " ket town, wherein any common baker, having been an ap- " prentice to the trade for ſeven years, is dwelling, may make Carthew 150. Skin. 291. Raymond 162. Roll. Ab. 95. 9 Hen. 6. 53.

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"within his houſe horſe-bread ſufficient, lawful, and of due "aſſize, according to the price of grain or corn; any thing "in the ſaid ſtatute contained to the contrary notwithſtanding."

And it is farther enacted, "That if the horſe-bread, "which any of the ſaid hoſtlers or innholders ſhall make, be "not ſufficient, lawful, and of due aſſize, according to the "price of grain and corn, as aboveſaid; or that if any of "them ſhall offend in any thing contrary to this act, the juſ-"tices of aſſize, juſtices of oyer and terminer, juſtices of "peace, in every ſhire, liberty or franchiſe within this "realm, ſheriffs in their turns, and ſtewards in their leets, "may inquire, hear, and determine the ſaid offences of the "ſaid hoſtlers and innholders, who ſhall be fined for the firſt "offence, according to the quantity of the offence, and for "the ſecond offence ſhall be impriſoned for one month, and "for the third ſhall ſtand upon the pillory, *&c.*"

Before this ſtatute it was lawful for any one to keep an alehouſe without licence, for it was a means of livelihood which any one was free to follow. But if it was diſorderly kept it was indictable as a nuſance. Salk. 45.

*Sect.* 9. And it is enacted by 5 and 6 Edw. 6. c. 25. "That the juſtices of peace within every ſhire, city, borough, "town-corporate, franchiſe, or liberty within this realm, or "two of them at the leaſt, whereof one to be of the *quorum*, "ſhall have full power and authority within every ſhire, city, "*&c.* to remove, diſcharge, and put away common ſelling of "ale and beer in common ale-houſes and tippling-houſes."

Dalton c. 7. Hutt 100. Sum. 147. Ld. Ray. 1303. 1405.

*Sect.* 10. And it ſeems to have been the general opinion in the conſtruction of this clauſe, that an alehouſe keeper ſuppreſſed in purſuance of it, cannot be afterwards licenſed again but in open ſeſſions.

Salk. 45.

*Sect.* 11. And it is further enacted by the ſaid ſtatute of 5 and 6 Edw. 6. c. 25. ſ. 1. 6 and 26 Geo. 2. c. 31. "That "none ſhall be admitted or ſuffered to keep any common "alehouſe or tippling-houſe, except in fairs, but ſuch as ſhall "be allowed in the open ſeſſions, or by two juſtices of peace, "whereof one to be of the *quorum*. (1)

(1) The clauſe excepting fairs, in the ſeveral acts, ariſes from the neceſſity of the thing, reſpecting the accommodation of perſons reſorting thither. But thoſe who ſhall brew ſuch ale or beer to be ſold by them in fairs, muſt take care to give notice to the gaugers that the ſame may be ſurveyed; for though they are exempted from taking licence, they muſt nevertheleſs pay the duties of exciſe. And this indulgence ſeemeth to be intended only in the place where the common fair is held; and not in any private houſe, which may be within the limits of the town where ſuch fair ſhall be kept, eſpecially where there are licenſed ale-houſes ſufficient. 1 Burn. 25.

† *Sect.*

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† *Sect.* 12. But it is recited by 2 Geo. 2. c. 28. ſ. 11. That many inconveniences have ariſen from perſons being licenſed to keep inns and common alehouſes (1) by juſtices of the peace, who living remote from the places of abode of ſuch perſons, may not be truly informed as to the occaſion or want of ſuch inns or common alehouſes or the characters of the perſons applying for licence to keep the ſame; it is therefore enacted by the 26 Geo. 2. c. 31. ſ. 4. "That "no licences for the purpoſes aforeſaid, ſhall be granted but "on the firſt day of September yearly, or within twenty "days after; and that ſuch licence ſhall be made for one year "only to commence on the twenty-ninth day of the ſaid "September; and that the day and place for granting ſuch "licences ſhall be appointed by two or more of the juſtices "acting for the diviſion (2) (where the perſon to be licenſed "dwells) by a warrant under their hands and ſeals at leaſt ten "days before ſuch meeting, directed to the high conſtable or "high conſtables of the ſaid diviſion requiring him or them "to order his or their reſpective petty conſtables or other "peace officers to give notice to the ſeveral innkeepers and "alehouſe keepers within their reſpective conſtablewicks of "the day and place of ſuch meeting; and all licences here-"after granted at any other time or place ſhall be null and "void to all intents and purpoſes whatſoever.—But by ſect. "16. this act ſhall not extend to alter the time or times "of granting ſuch licences for keeping of common inns or "ale-houſes in any city or town-corporate. (3)

The manner and time of granting licences.

12 Mod. 254. 2 Seſſ. Ca. 183. Andrews 81.

For the penalties of writing licences without being legally ſtamped. Vide 1 Ann ſt. 2. c. 22. ſ. 6. 9 Ann c. 23. 6 Geo. 1. c. 21. ſ. 56. 29 Geo. 2. c. 12. ſ. 20.

(1) Houſes for the accommodation of perſons who reſort to the ſeveral watering places in the kingdom, where their reſpective owners, their gueſts lodge, board, dreſs their victuals, ſupply them with ale, beer and other liquors and entertain their horſes at 8 *d.* a day, but ſell to no other perſons are not inns nor ale-houſes within this act.

(2) But it is not neceſſary to ſet forth ſpecially in the licence that it was granted at a general meeting of the juſtices holden for the diviſion; and therefore a conviction for keeping an ale-houſe without ſuch licence, is not good upon the evidence of the licence only but there muſt be other evidence. 2 Seſſ. Ca. 183. Andrews 81.

(3) In cities and towns-corporate ſuch certificate is ſuppoſed not to be neceſſary by reaſon of the propinquity of the perſons to be licenſed. 1 Burr. 27.

† *Sect.* 13. And it is alſo enacted by the ſaid ſtatute, "That upon granting licences by juſtices of the peace to any "perſon to keep an alehouſe, inn, victualling houſe, or to "ſell ale, beer, and other liquors by retail, every ſuch perſon "ſhall enter into a recognizance to the king in the ſum of 10 *l.* "with two ſufficient ſureties each in the ſum of 5 *l.* or one "ſufficient ſurety in the ſum of 10 *l.* under the uſual condi-"tion for maintenance of good order and rule within the "ſame; and in caſe the perſon applying for ſuch licence ſhall "be hindered through ſickneſs or infirmity or any other rea-"ſonable cauſe to be allowed by the ſaid juſtices, to attend in

Juſtices authoriſed to grant licences upon the party entering into a recognizance.

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" perſon at the meeting of the ſame juſtices for granting the " ſaid licences that it ſhall be lawful for them to grant " ſuch licence upon two ſufficient ſureties entering into ſuch " recognizance each in the penalty of 10*l.* for performance " of the condition of the ſaid recognizance. (4)

(4) The court of King's Bench has no power to review the reaſons upon which juſtices of the peace form their judgments in granting licences, by *way of appeal from ſuch judgments or over-ruling the diſcretion intruſted to them.* But if it clearly appears that the juſtices have been partially, maliciouſly, or corruptly influenced in the exerciſe of this diſcretion and have conſequently abuſed the truſt repoſed in them; they are liable to proſecution by indictment or information or even poſſibly by action if the malice be very groſs and injurious. But, if their judgment be wrong, and their heart and intentions be pure, God forbid, that *they ſhould be puniſhed.* Lord Mansfield. Burrow 556. But on the contrary, if juſtices have acted from bad motives and *mala fide*, in granting licences, the circumſtance of their being intruſted with an abſolute diſcretion forms the ſtrongeſt caſe for the interpoſition of the court. Burrows 1716. 1786. A *mandamus* therefore will not lie to compel the juſtices to grant a licence. 1 Barnard K. B. 402. 1 Burrows 556. But the court, on affidavits importing a charge of corruption will call upon them to ſhew the reaſons whereby they guided their diſcretions and will grant a rule to ſhew cauſe why they ſhould not grant the licence, and if they do not ſhew ſufficient cauſe the court will grant information. And for inſtances of granting and refuſing informations. Vide Strange 881. Burrows 653. 1317.

(5) The juſtices may ſuppreſs by order, without either information or conviction or ſhewing cauſe. For conviction is only neceſſary where the penalty is proceeded for, which ought to be by *ſcire facias* Ld. Raymond 1303. 1405. Vide Strange 631. contra.

*Sect.* 14. And it is farther enacted, by 5 and 6 Edw. 6. c. 25. ſ. 3. " That the juſtices of peace of every ſhire, " city, borough, *&c.* may at their quarter-ſeſſions by preſentment, information, or otherwiſe by their diſcretion, inquire of all ſuch perſons as ſhall be allowed to keep any " ale-houſe or tippling-houſe, and that be bound by recognizance, as is aboveſaid, if any of them have done any act " whereby they have forfeited the ſame recognizance: And " the ſaid juſtices ſhall upon every ſuch preſentment or information, award proceſs againſt every ſuch perſon ſo preſented or complained upon before them, to ſhew why he ſhould " not forfeit his recognizance, and may alſo hear and determine the ſame by all ſuch ways and means, as by their diſcretion ſhall be thought good." (5)

Juſtices may take away licences unleſs cauſe be ſhewn that the conditions of the recognizance have been fulfilled.

(6) If the juſtice convicts without a ſummons he is liable to an information for the miſdemeanor. Strange 678. L. Ray. 1307. Self. Caſes 353. L. Ray. 1303. L. Ray. 1405.

† *Sect.* 15. And it is further enacted by 26 Geo. 2. c. 31. ſ. 7. " That any juſtice of the peace of any county, riding, " city, liberty, or town-corporate wherein ſuch licence ſhall " be granted, upon complaint or information that ſuch licenſed perſon hath done or committed any act, offence or " miſdemeanor, whereby in the judgment of the ſame juſtice " ſuch recognizance may be forfeited, or the condition thereof " broken may by ſummons (6) under his hand and ſeal require " ſuch perſon ſo complained of, or informed againſt to appear at the next general or quarter-ſeſſions of the peace for " the ſaid county, riding, city, liberty or town-corporate " then and there to anſwer to the matter of ſuch complaint or " information; and alſo may bind the perſon or perſons who " ſhall make ſuch complaint or information or any other perſon or perſons in a recognizance to appear at ſuch general " or quarter-ſeſſion and give evidence againſt ſuch perſon ſo " complained

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" complained of or informed againſt; and the juſtices of the " peace in their general or quarter ſeſſions ſhall have power to " direct the jury which ſhall attend at ſuch ſeſſions for the " trial of traverſes or ſome other jury of twelve honeſt and " ſubſtantial men to be then and there impannelled by the " ſheriff, without fee or reward, to inquire of the miſde- " meanor charged in the ſaid complaint or information; and " if ſuch jury ſhall find that the perſon ſo complained of or in- " formed againſt hath done any act whereby the condition of " his recognizance is broken, ſuch act being ſpecified in ſuch " complaint or information, it ſhall be lawful for the court of " ſeſſion to adjudge ſuch perſon guilty of the breach of ſuch " recognizance (7) which verdict and adjudication ſhall be " final to all intents and purpoſes, and thereupon the ſaid juſ- " tices ſhall order the recognizance entered into by ſuch of- " fender to be eſtreated into the court of exchequer to be le- " vied for his majeſty's uſe; and that the ſaid perſon the con- " dition of whoſe recognizance ſhall be ſo adjudged to be " broken and forfeited, ſhall from and after ſuch adjudica- " tion be utterly diſabled to ſell any ale, beer, cyder, perry, " ſpirituous liquors or ſtrong waters for the ſpace of three " years, and any licence granted to ſuch perſon during ſuch " term ſhall be void and of none effect—But the juſtices may " adjourn the hearing and trial to the then next general or " quarter-ſeſſions where the ſame ſhall be finally determined."

(7) There are two modes of ſuppreſſing a licenſed ale-houſe: Firſt, by proceeding on a breach of the condition of the recognizance; (but the party having another trade or being a bailiff can be no cauſe in ſuch caſe.) Secondly, by indictment, and then there muſt be ſuch diſorders proved, as will amount to a nuſance. Salk. 45. for, except for diſorder, the juſtices cannot ſuppreſs a licenſed ale-houſe. Salk. 471. But where an ale-houſe is ſuppreſſed by indictment as a common nuſance; it is as to the perſon, not the houſe, for that may be licenſed to a better man. Hutt 100.

† " And by par. 11. If any perſon ſhall be diſabled by con- " viction to ſell ale, beer, cyder or perry; he ſhall by the " ſame conviction be diſabled to ſell any ſpirituous liquors, " any licence before obtained for that purpoſe notwithſtand- " ing, and every licence granted to him for ſelling ale, beer, " cyder, perry or ſpirituous liquors ſhall be void, and if he " ſhall ſell during ſuch diſability he ſhall be puniſhed, or for " ſelling without licence, and a certificate from the clerk of " the peace (which he ſhall grant without fee) of ſuch convic- " tion ſhall be legal evidence."

*Sect.* 16. And it is farther enacted, by 5 and 6 Edw. 6. c. 25. ſ. 4. " That if any perſon, other than ſuch as ſhall be " allowed by the ſaid juſtices, ſhall obſtinately, and upon his " own authority, take upon him to keep a common ale- " houſe, or tippling-houſe, or ſhall contrary to the com- " mandment

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" mandment of the ſaid juſtices, or two of them, uſe com-
" monly ſelling of ale and beer, except in fairs; that then the
" ſaid juſtices, or two of them, whereof one to be of the
" *quorum*, ſhall for every ſuch offence commit every ſuch
" perſon ſo offending, to the common gaol within the
" ſaid ſhire, city, borough, &c. there to remain without
" bail or mainprize by the ſpace of three days; and before
" his deliverance the ſaid juſtices ſhall take his recognizance
" with two ſureties, That he ſhall not keep any common
" alehouſe, tippling-houſe, or uſe commonly ſelling of ale
" or beer, as by the diſcretion of the ſaid juſtices ſhall ſeem
" convenient."

The exciſeman's book to be proof of a perſon being an alehouſe-keeper.

† *Sect.* 17. And it is farther enacted by 26 Geo. 2. c. 31. ſ. 9. " That where any juſtice of the peace ſhall ſuſpect that
" any alehouſe-keeper, victualler, or retailer, ſells ale, beer,
" cyder, or perry, without ſuch licence, it ſhall and may be
" lawful for ſuch juſtice to call ſuch ſuſpected perſon before
" him, and alſo any exciſe-officer or gauger to produce before
" ſuch juſtice his ſtock book, or other account which ſuch
" officer keeps, of the charge or ſurvey of ſuch ſuſpected per-
" ſon in reſpect of any of the liquors aforeſaid; and likewiſe
" to examine ſuch exciſe-officer or gauger upon oath touch-
" ing the manner in which ſuch officer ſurveys or charges
" ſuch ſuſpected perſon in reſpect of any liquors aforeſaid, or
" how or in what manner ſuch ſuſpected perſon actually pays
" the duties for any of the ſaid liquors; and if it ſhall appear
" by ſuch ſtock book or other account, or by the examination
" of the ſaid officer or gauger, that ſuch perſon ſo ſuſpected
" of ſelling any of the liquors aforeſaid, is ſurveyed as a vic-
" tualler or retailer, and is charged with the ſame duties that
" victuallers and retailers are uſually charged with, and pay
" for any of the liquors aforeſaid, and is not intitled to the
" allowance or abatement given to common brewers, then
" and in ſuch caſe ſuch ſuſpected perſon ſhall be deemed an
" alehouſe-keeper, victualler, retailer, or ſeller of any of the
" liquors aforeſaid, to all intents and purpoſes, as if the ſame
" had been proved by two witneſſes."

Juſtices may examine perſons ſuſpected not to be licenſed.

† *Sect.* 18. And it is farther enacted, par. 10. " That if
" any perſon ſhall make information before any one juſtice,
" and ſhew probable cauſe that he ſuſpects that any perſon
" ſells ale, beer, or other liquors, without a licence from two
" juſtices, it ſhall be lawful for ſuch juſtice to call ſuch ſuſ-
" pected perſon before him, and alſo to ſummon any other
" perſon as evidence, to prove the charge againſt ſuch ſuſ-
" pected perſon; and if ſuch perſon ſo ſummoned ſhall refuſe
" to appear, or when appearing ſhall refuſe to be examined
" upon oath, and give evidence as aforeſaid, ſuch perſon or
" perſons

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"persons shall forfeit the sum of 10*l.* to be levied by dis-
"tress, &c. for the use of the poor where the offender shall
"live." (8)

(8) The justices may suppress an unlicensed alehouse at discretion, for on the denial of a licence no appeal lies. And on the commitment of the owner of such unlicensed house, the want of a licence can only come in question, and not the reason why it was denied. Salk. 46.

*Sect.* 19. And it is farther enacted, by 3 Car. 1. c. 3. "That if any person shall upon his own authority, not being "thereunto lawfully licensed, take upon him to keep a com-
"mon alehouse or tippling-house, or use commonly selling of
"ale, or beer, cyder, or perry, except in fairs, every such
"person shall for every such offence forfeit twenty shillings
"to the use of the poor of the parish where such offence shall
"be committed; the same offence being viewed by any
"mayor, bailiff, or justice of peace, or other head officer
"within the several limits, or confessed by the party so of-
"fending, or proved by the oath of two witnesses, to be
"taken before any mayor, bailiff, or other head officer, or
"any justice of peace, being within the limits of their com-
"mission." (9)

8 Modern 175. Strange 555. Sess. Cas. 264.

(9) The remainder of this section which was recited in the former edition, prescribed the form in which the penalty should be levied, but as this part seems to be virtually repealed by 5 Geo. 3. c. 46. which prescribes the amount and the manner of levying the penalties for this offence, I have omitted to insert it. Vide infra, sect. 39. page 464.

† *Sect.* 20. And it is farther enacted by 26 Geo. 2. c. 31. s. 4. "That the said recognizance, with the condition thereof,
"fairly written or printed, shall forthwith, or at the next
"general or quarter sessions of the peace at farthest, after
"granting such licences, be sent or returned to the clerks of
"the peace, or persons acting as such, for every county,
"riding, city, liberty, or town-corporate in *England*, wherein
"such licences shall be granted, under the hands of the jus-
"tices of peace, before whom such recognizances were taken,
"to be by the said clerks of the peace, or such other person
"acting as such, duly entered or filed amongst the records
"of the sessions of the peace; and for every such licence
"granted without taking such recognizance, and for every
"such recognizance taken, and not sent or returned as
"aforesaid, every justice of the peace signing such licence,
"shall forfeit 3*l.* 6*s.* 8*d.* and by sect. 6. the forfeiture for
"granting licences without taking recognizances, shall be
"together with costs to him who shall sue."

The clerk of the peace to return the recognizances to the sessions.

† *Sect.* 21. And it is also further enacted, by par. 5. "That the clerks of the peace shall keep a register or calen-
"dar of all the recognizances so sent or returned, and shall
"deliver to the justices at their general meetings in Septem-
"ber, every year, for granting licences in each division,
"or place, a true copy of such register or calendar; and
"that

Of which they shall deliver an account to the justices at their yearly meetings.

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" that for every recognizance there ſhall be paid to the juſ-
" tices clerk, taking ſuch recognizances to the clerk of the
" peace, as a fee for recording, and for making and deliver-
" ing copies as aforeſaid, one ſhilling, and no more, by the
" perſon licenſed, over and above the fees payable to the ſaid
" juſtices clerks."

Conviction of unlicenſed perſons to be returned, &c.

† *Sect.* 22. And it is further enacted by par. 13. " That
" every conviction of any offender for ſelling ale, beer, or
" other liquors without ſuch licence, or after being diſabled
" to ſell as aforeſaid, ſhall be certified by the juſtice of peace
" making the ſame, to the next general or quarter ſeſſions to
" be filed and entered among the records of the ſaid ſeſſion:
" and there ſhall be added that the ſame is the firſt, ſecond or
" third conviction.—Provided always, that the offender who
" ſhall be puniſhed by virtue of this act, ſhall not be pu-
" niſhed for the ſame offence by virtue of any former act,
" and *è converſo*. Nor ſhall this act extend to the two uni-
" verſities."

The manner of obtaining a licence for a houſe not licenſed before.

† *Sect.* 23. And it is further enacted by the above-men-
tioned ſtatute 26 Geo. 2. c. 31. par. 2. for the better pre-
venting diſorders in alehouſes, " That no licence ſhall be
" granted to any perſon (except in cities and towns corpo-
" rate, ſ. 16.) not licenſed the year preceding, unleſs ſuch
" perſon produce at the general meeting of the juſtices in
" September, a certificate under the hands of the parſon,
1 Burr. 557, 558. " vicar, or curate, and the major part of the churchwardens
" and overſeers, or elſe of three or four reputable and ſub-
" ſtantial houſeholders and inhabitants of the pariſh or place
" where ſuch alehouſe is to be, ſetting forth that ſuch perſon
" is of good fame, and of ſober life and converſation; and
" it ſhall be mentioned in ſuch licence that ſuch certificate
" was produced, otherwiſe ſuch licence ſhall be null and
" void." (10)

(10) In cities and towns corporate ſuch certificate is ſuppoſed not to be neceſſary, by reaſon of the propinquity of the perſon to be licenſed. 1 Burn 27. Yet it is diſcretionary in the juſtices whom they will licenſe, and a mandamus will not lie to compel the juſtices, becauſe the reaſons why it was denied reſide with themſelves. Str. 881.

How in caſes of death the licences may be made good.

† *Sect.* 24. And it is further enacted by ſaid ſtatute, par. 3.
" That if any licenſed perſon ſhall die, or remove from an
" alehouſe, it ſhall be lawful for the perſon ſucceeding to
" ſuch houſe, to keep on the ſaid alehouſe during the reſidue
(11) By 29 Geo. 2. c. 12. ſ. 23. the neceſſity of this certificate is diſpenſed with in the repreſentatives of the party dying. " of the term of ſuch licence, on condition that within thirty
" days after ſuch death or removal, ſuch perſon obtain ſuch
" certificateas aforeſaid, (11) to be ſigned by ſome neighbour-
" ing juſtice, in order to its being produced at the next
" general meeting in September; and if ſuch certificate be

" not

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" not ſo obtained and ſigned within the ſaid thirty days, then " immediately from and after the expiration thereof, ſuch " licence ſhall be null and void; and no licence ſhall entitle " any perſon to keep an alehouſe in any other place than " that in which it was firſt kept by virtue of ſuch licence; " and ſuch licence with regard to all other places, ſhall be " null and void."

Vide infra, ſect. 35.

† *Sect.* 25. And it is further enacted by 26 Geo. 2. c. 13. ſ. 11. " That no juſtice of the peace being a common brewer " of ale or beer, innkeeper or diſtiller, or a ſeller of or dealer " in ale or ſpirituous liquors, or intereſted in any of the ſaid " trades, or being a victualler or malſter, ſhall be capable, " or have any power to grant licences for ſelling ale or beer, " or any other liquors, but the ſame ſhall be void."

No juſtice who deals in malt or ſpirituous liquors, ſhall interfere in granting licences.

† *Sect.* 26. And by 4 Jac. 1. c. 4. " If any perſon ſhall " ſell or deliver any beer or ale to any perſon that ſhall then " ſell beer or ale, as a common tippler, or alehouſe keeper, " the ſame perſon not having a licence to ſell ale or beer, " (except it be for the uſe of his houſehold only); he ſhall " forfeit for every barrel 6 *s.* 8 *d.* and ſo proportionally for " other quantities; half to the poor, and half to him that " ſhall ſue in ſeſſions by action of debt, information, in- " dictment, or preſentment.

Forfeiture for ſelling in an unlicenſed houſe.

† *Sect.* 27. It is enacted by 2 Geo. 2. c. 28. ſect. 10. " That no perſon or perſons whatſoever ſhall ſell brandy or " other diſtilled liquors by retail, to be drank in his, her, or " their houſe or houſes, but ſuch perſons only as ſhall be " thereunto licenſed, in the ſame manner, and liable to the " ſame laws, as common alehouſe keepers."

Sellers of ſpirituous liquors to be licenſed in the ſame manner as alehouſe keepers.

† *Sect.* 28. And by the 10 Geo. 2. c. 17. ſect. 10, 11. " No perſon or perſons ſhall be enabled to ſell made wines, to " be drunk in his, her, or their houſe or houſes, unleſs firſt " licenſed by two juſtices of the county, or place where the " ſame are ſold; and no ſuch licence ſhall be granted but to " perſons who ſhall keep publick victualling houſes, inns, " coffeehouſes, or alehouſes."

Seller of wines alſo muſt be licenſed. For the ſtamp-duties on wine licences, vide 9 Anne, c. 23. —30. Geo. 2. c. 19. and 31 Geo. 2. c. 31. ſ. 7.

† *Sect.* 29. And it is further enacted by 16 Geo. 2. c. 8. ſect. 8. " That no perſon ſhall preſume to retail any brandy, " rum, arrack, uſquebaugh, geneva, aquavitæ, or any other di- " ſtilled ſpirituous liquors, or ſtrong waters mixed or unmix- " ed, by whatever name they may be called, publickly or pri- " vately, without firſt taking out a licence (12) for that purpoſe, " within ten days at leaſt before they ſhall retail the ſame, and " for which they ſhall pay 20 *s.*: which licence, if taken out " within the bills of mortality, ſhall be under the hands and " ſeals of two of the commiſſioners of exciſe, &c. But if " taken

Sellers of ſtrong waters, &c. muſt be licenſed. (12) Vide 1 Burn 32. for an obſervation on the double licence required for retailing *malt* liquors and *ſpirituous* liquors, and the attempt made by the exciſe office to

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keep their juriſdiction diſtinct from the juſtices.

" taken out without the limits aforeſaid, then ſuch licence " ſhall be executed under the hands and ſeals of the ſeveral " collectors and ſupervifors of exciſe within their reſpective di- " ſtricts; and a freſh licence ſhall be taken out ten days at " the leaſt before the expiration of the twelve months after the " taking out of the firſt licence, and in the ſame manner to " renew ſuch licence from year, to year on pain of 10 *l.* or " two months hard labour, until paid, on conviction by one " juſtice. And by 24 Geo. 2. c. 40. ſect. 11. and 26 Geo. 2. " c. 13. ſect. 8. it ſhall in no caſe be mitigated below 5 *l.*— " And by 29 Geo. 2. c. 12. ſect. 22. ſuch perſon ſhall be " firſt licenſed to ſell ale or ſpirituous liquors, by two or more " juſtices of the peace."—

By 2 Geo. 2. c. 28. ſ. 10. Juſtices of the peace and other officers ſhall have the ſame juriſdiction over ſuch retailers of ſpirituous liquors as they have over alehouſe keepers.

† *Sect.* 30. And by 17 Geo. 2. c. 17. ſect. 22. " Every " perſon who ſhall retail ſpirituous liquors mixed or unmixed, " to be drank in any quantity whatſoever, in any place to " him belonging, or ſhall retail, or ſend the ſame abroad in " leſs than two gallons, ſhall be deemed a retailer.—And by " ſect. 19. no ſuch licence ſhall be granted, except to ſuch " perſons only who keep taverns, victualling houſes, inns, " coffeehouſes, or alehouſes; and all other licences ſhall be " void; and if any licenſed perſon ſhall exerciſe the trade of " a diſtiller, grocer, or chandler, or keep a brandy ſhop for " ſale of ſpirituous liquors, the licence ſhall be void."

Sellers of leſs than two gallons to be deemed retailers. Vide 11 Geo. 2. c. 26. ſ. 10. where clandeſtine ſellers are deemed retailers. And 9 Geo. 2. c. 23. ſ. 16. where giving liquors to ſervants, or apprentices fetching goods from ſhops, is deemed retailing. Vide alſo ſect. 11. reſpecting paying wages in ſpirituous liquors.

To what kind of publick-houſekeepers licences ſhall be only granted.

† *Sect.* 31. And by 24 Geo. 2. c. 40. ſect. 12. and 26 Geo. 2. c. 13. ſect. 9. " No licence ſhall be granted " within the limits of the head office of exciſe in London, " but to ſuch as occupy tenements of 10 *l.* a-year, and pay " pariſh rates for the ſame, or in places where the occupiers " of houſes are not rated to the church and poor, then to ſuch " perſons as pay rent of 12 *l.* a-year, and not otherwiſe, nor " to perſons in any other part of the kingdom but ſuch as " pay to the church and poor: and no licence ſhall be of any " avail longer than he ſhall be ſo qualified."

Puniſhment on Perſons ſelling diſtilled liquors without licence.

† *Sect.* 32. And by 24 Geo. 2. c. 40. ſect. 13. and 9 Geo. 3. c. 6. " All the diſtilled liquors that ſhall be then, " or at any time within ſix months after conviction of ſuch " unlicenſed perſon, found in the cuſtody, houſe, or other " place occupied therewith, whether it be in his own occupa- " tion or not, ſhall, by warrant of the ſaid commiſſioners, or " of one juſtice, be ſeized and ſtaved, or otherwiſe deſtroyed. " And if any perſon ſhall offend again in like manner, the " commiſſioners, or juſtices before whom he ſhall be convict- " ed of ſuch ſubſequent offences, may inflict the penalties by " any

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" any former law to be inflicted for ſuch offence, and alſo " commit the offender to the houſe of correction, not ex- " ceeding three months."

Officers by warrant may break open doors, &c.

† *Sect.* 33. And by 24 Geo. 2. c. 40. ſect. 41. " The " commiſſioners, or one juſtice on oath of any offence againſt " this act, or any other act, for retailing of ſpirituous liquors, " may grant a warrant to any of the peace officers, or other " pariſh officers, to enter and ſearch the houſes and other " places where the offence ſhall be ſworn to have been com- " mitted, or in the occupation of the perſons ſworn to be " guilty thereof, and they may break open the doors if not " opened on demand, and ſeize all ſuch diſtilled ſpirituous li- " quors as they ſhall there find, and detain the ſame till the " offence ſhall he heard and determined; and if the offender " be convicted, the liquors ſhall be forthwith ſtaved; and if " he be not convicted, the ſame ſhall be reſtored."

The penalty of retailing diſtilled liquors without a licence, increaſed.

† *Sect.* 34. And whereas the aforeſaid penalty of 10 *l.* is ſometimes inſufficient to deter offenders, it is therefore enacted by 13 Geo. 3. c. 56. " That whoever, for himſelf, or by " any other perſon for his benefit, ſhall preſume to retail any " diſtilled ſpirituous liquors, or ſtrong waters, without firſt " taking out a licence for that purpoſe, in the manner before " preſcribed and directed, ſhall forfeit 50 *l.* for each offence, " to be ſued for, levied, recovered, and mitigated by any law " of exciſe now in force, or by action of debt or information " at Weſtminſter, half to the king, half to the proſecutor: " but this penalty ſhall not either by the commiſſioners or " juſtices be reduced below 5 *l.*"

The repreſentatives of a publican may uſe the unexpired term of the licence, without the certificate required by 26 Geo. 2. c. 31. Vide ante ſect. 24.

† *Sect.* 35. And it is further enacted by 29 Geo. 2. c. 12. ſect. 32. " That if any perſons ſo licenſed to ſell ale, beer, or " other exciſeable liquors, ſhall die or remove from the ale- " houſe, or other place wherein ſuch ale, beer, or other li- " quors, ſhall, by virtue of ſuch licence, be ſold, it ſhall and " may be lawful for the executors, adminiſtrators, and aſſigns " of ſuch perſon ſo dying or removing, who ſhall be poſſeſſed " of ſuch houſe or place, or the occupier thereof, to ſell ale, " beer, or other liquors therein, during the reſidue of the " term for which ſuch licence ſhall have been granted to the " perſon ſo dying or removing, without any certificate from " any juſtice of the peace, or any new licence to be had and " obtained in that behalf, any thing in 26 Geo. 2. or any " other law to the contrary notwithſtanding."

How houſes which become empty may be licenſed.

† *Sect.* 36. And it is further enacted by ſaid ſtatute, ſect. 24. " That in caſe any alehouſe in England ſhall become " empty or unoccupied after the general day appointed for li- " cenſing, (the occupier whereof was duly licenſed the year " preceding)

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" preceding) it ſhall be lawful for any two of his majeſty's " juſtices of peace at a petty ſeſſions to grant a new licence " to any new tenant or occupier to open ſuch houſe, as an " alehouſe, or victualling houſe, and to ſell ale there till the " next general licenſing day, ſo as the ſaid licence be ſtamped " as directed by the act: ſuch new tenant or occupier obtain- " ing ſuch certificate as is directed and preſcribed by 26 Geo. " 2. c. 31. But this act not to extend to licences granted " by commiſſioners of exciſe."

Priſon keepers ſelling liquors deemed ale-houſe keepers.

† *Sect.* 37. And by ſect. 26. " Every perſon who ſhall re- " tail ale, beer, or other liquors, in any priſon, or houſe of " correction, or workhouſe, ſhall be deemed keepers of com- " mon alehouſes and tippling houſes, unleſs they ſhall obtain " a licence according to law."

Sellers of ſpirituous liquors muſt have ale licences alſo.

† *Sect.* 38. And by 29 Geo. 2. c. 29. ſect. 22. " Neither " the commiſſioners of exciſe, or any of the collectors or ſu- " perviſors, or any other officers appointed to deliver licences " to the retailers of any ſpirituous liquors or ſtrong waters, " ſhall grant or deliver any ſuch licence to any perſon who " ſhall not produce a licence, granted to him by juſtices of " the peace to ſell ale, beer, and other exciſeable liquors, " and ſtamped according to 9 Anne, c. 23."

All the former penalties upon perſons ſelling liquors without licence for that purpoſe, made uniform.

† *Sect.* 39. And whereas by the laws now in force, per- ſons ſelling ale or beer, or other exciſeable liquors by retail, without licence, are liable and ſubject by different laws to different penalties and puniſhments, which has occaſioned much confuſion, and an ill and improper uſe has been made thereof in many inſtances: for the prevention thereof it is enacted by 5 Geo. 3. c. 46. ſect. 22. " That every perſon " lawfully convicted of ſelling ale or beer, or other exciſeable " liquors by retail, without being duly licenſed ſo to do, ſhall, " for every ſuch offence, forfeit and undergo the ſeveral pe- " nalties and puniſhments herein after mentioned, and pro- " vided in that behalf, inſtead and in lieu of the ſeveral pe- " cuniary and corporal puniſhments which they are now liable " or ſubject to by any law now in force; that is to ſay, for the " firſt offence the ſum of 40 *s.* and alſo the coſts and expence " of convicting ſuch offender; and in caſe ſuch ſum, together " with the charges and expences of convicting ſuch offender, " ſhall not be paid within the ſpace of fourteen days next " after ſuch conviction, that then the offender ſhall ſuffer im- " priſonment for one month, unleſs the ſaid penalty, and the " coſts, charges, and expences of ſuch conviction ſhall be " ſooner paid; for the ſecond offence 4 *l.* *&c.* and, if not paid " within a week, two months impriſonment; and for the " third, and every other offence, the ſum of 6 *l.* *&c.* and, if " not

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"not paid in three days, three months impriſonment. All "which ſaid coſts and expences ſhall be aſſeſſed, ſettled, and "aſcertained by the juſtice or juſtices of the peace before "whom ſuch offenders ſhall reſpectively be convicted; and all "the penalties, forfeitures, &c. ſhall go, half to the king, "and the other half to the informer; together with all ſuch "coſts, charges, and expences, to be aſſeſſed or aſcertained "as aforeſaid."

† *Sect.* 40. And it is farther enacted by 5 Geo. 3. c. 46. ſect. 23. "That it ſhall be lawful for any one or more juſtice "or juſtices of the peace of the county or place, to hear "and determine the ſame offences in a ſummary way; which "ſaid juſtice or juſtices of the peace are hereby authoriſed and "required, upon any information exhibited, or complaint "made in that behalf, to or before him or them, to ſummon "the party or parties accuſed, and alſo the witneſſes on ei-"ther ſide, (if they ſhall be required to ſummon any ſuch "witneſſes) and upon the appearance or contempt of the "party or parties accuſed, by not appearing, to proceed to "examine and hear the matter in a ſummary way; and al-"ſo to examine ſuch witneſſes on oath as ſhall be produced "therein, and to give his or their judgment thereon; and in "caſe he or they ſhall convict the party or parties ſo accuſed, "or complained againſt, of the offence laid to his, her, or "their charge, and ſuch party or parties ſhall refuſe or ne-"glect to pay the penalty or penalties, for which he, ſhe, or "they ſtand convicted, within the time herein before men-"tioned for that purpoſe, together with the coſts of ſuch con-"viction or convictions, to be aſſeſſed, ſettled, and aſcertain-"ed as aforeſaid; that then it ſhall be lawful for every ſuch "juſtice and juſtices to iſſue a warrant under their hands and "ſeals, for the apprehending and committing to priſon any "ſuch offender, for ſuch time, and in ſuch manner, as the "nature of the offence ſhall require, according to the true "intent and meaning of this act."

Juſtices may hear and determine the offence.

N. B. The number of witneſſes neceſſary toward the conviction is not here mentioned, and therefore this ſeemeth to reſt as it was before, on the ſtatute of 3 Car. 1. c. 3. which directs the conviction to be on confeſſion of the offender, or oath of *two* witneſſes. 1 Burn 24.

† *Sect.* 41. And it is further enacted, par. 24. "That "whoever ſhall be ſummoned as a witneſs before ſuch juſtice "touching the matters aforeſaid, either on the part of the "proſecution, or the party accuſed, and ſhall neglect or re-"fuſe to appear at the time and place to be for that purpoſe "appointed, without a reaſonable excuſe to be allowed of by "ſuch juſtice; or appearing ſhall refuſe to be examined on "oath and give evidence before ſuch juſtice, ſhall forfeit "twenty ſhillings, to be levied and paid in ſuch manner, and "by ſuch means as are herein before directed as to other "penalties."

Penalty on witneſſes not obeying ſummons.

N. B. This penalty is but ſmall, and might defeat the intention of the act; for by the witneſs paying 20 s. the offender may chance to eſcape the payment of 2, 4 or 6 l. beſides charges. But there is a penalty of 10 l.

clauſe in the ſtatute of 26 Geo. 2. c. 31. which impoſes on the like offence a

‡ Burn 24.

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How persons aggrieved may appeal.

† *Sect.* 42. But by par. 25. "Persons aggrieved by the "conviction or judgment of any justice or justices of the "peace, for any of the offences aforesaid, and shall give secu- "rity to the satisfaction of such justice, *&c.* for payment of "penalty, costs and expences, to be expressed in the warrant "of distress on such conviction, may appeal to the next quar- "ter sessions, unless the same be held within six days or less "next after such conviction; and in that case to the justices "assembled at the next sessions after such sessions, and not "afterwards: and the judgment of such sessions shall be final "and conclusive. And if such appeal be frivolous and vexa- "tious, the party grieved by the same shall have costs, *&c.* "not exceeding 5*l.*"

N. B. There seems to be a mistake in setting forth that the costs shall be expressed in the warrant of distress; for no power of distress is given: The meaning seems to have been that the same shall be expressed in the conviction; as specified in the form prescribed by the act. 1 Burn 25. But by 9 Geo. 3. c. 6. this act shall not extend to alter any acts made since the 8 Geo. 2. c. 18. relating to the selling of spirituous liquors by retail without licence.

Salkeld 45.

Publicans are not to encourage tippling in their houses.

*Sect.* 43. Also it is enacted by 1 Jac. 1. c. 9. and 4 Jac. 1. c. 15. and 21 Jac. 1. c. 7. and 1 Car. 1. c. 4. "That if "any inn-keeper, victualler, or alehouse-keeper, or any "keeper of a tavern, or one who sells wine in his house, and "also keeps an inn, or victualling in his house, do permit or "suffer any person, whether such person be an inhabitant of "the place where such inn, *&c.* shall be, or not to continue "drinking or tippling in any inn or victualling-house, *&c.* "other than such as shall be invited by any traveller, and "shall accompany him only during his necessary abode there; "and other than labouring and handicraftsmen in cities, and "towns-corporate, and market towns upon the usual work- "ing days, for one hour at dinner-time, to take their diet in "an alehouse; and other than labourers and workmen, who "for the following of their work by the day, or by the great, "in any city, town-corporate, market-town, or village, shall "for the time of their said continuing in work there, so- "journ, lodge, or victual in any inn, alehouse, or other "victualling-house; or other than for urgent and necessary "occasions, to be allowed by two justices of peace, That "then every such inn-keeper, *&c.* shall forfeit ten shillings "to the use of the poor of the parish where such offence shall "be committed; the same offence being viewed and seen by "any mayor, bailiff, or justice of the peace within their se- "veral limits, or found by verdict on a trial upon an indict- "ment at assizes, sessions, or court-leet, or proved by the "oath of (*a*) one witness to be taken before any mayor or "bailiff, *&c.* or any one justice of the peace, or by the vo- "luntary confession of any offender, after which confession "the oath of such offender shall be taken, and be a sufficient "proof against any other offending at the same time."

4 Jac. 1. 5.

(*a*) 21 Jac. 1. 7.

*Sect.*

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How the penalty for so doing is to be levied.

*Sect.* 44. And it is farther enacted by the said statute of 1 Jac. 1. c. 9. par. 3. "That the said penalty of ten shillings "shall be levied by the constables or church-wardens of the "parishes where the offence shall be committed, by way of "distress, and for default of satisfaction within six days, the "same to be presently appraised and sold, and the surplusage "to be delivered to the party of whom the distress was taken, "and for want of sufficient distress the party offending to be "by the said mayor, &c. committed to the common gaol, "there to remain till the said penalty be paid. And if the "said constables or church-wardens do neglect their duty in "levying the said penalties, or in default of distress do neg-"lect to certify the same within twenty days to the said "mayor, &c. every person so offending shall forfeit forty "shillings, to the use of the poor of the parish where such "offence shall be committed, to be levied by distress of goods, "by warrant from any one justice of peace, &c. to be taken "and detained six days; within which, if payment be not "made, the same goods to be appraised and sold, &c."

How this offence may be punished in the universities.

*Sect.* 45. But it is provided by the said statute of 1 Jac. 1. c. 9. "That the punishment of such as shall offend against "the same, within either of the two universities, or the pre-"cincts or liberties of the same, shall be done upon the of-"fenders, and justice ministred in this behalf; according to "the intent of the said law, by the governors, magistrates, "justices of the peace, or other principal officers of either of "the said universities, to whom in other cases the administra-"tion of justice, and correction and punishment of offenders "by the laws of this realm and their several charters doth "belong; and that no other within their liberties, for any "matter concerning the said law contrary to their several "charters, do intermeddle, and that all penalties to be for-"feited by virtue of the said act, within either of the uni-"versities or the liberties or precincts of the same, shall be "levied by the officers or ministers of either of the said "universities, to be from time to time in that behalf ap-"pointed by the vice-chancellors thereof for the time being "respectively, and that all powers and authorities given by "the said act, shall by the governors, magistrates, and prin-"cipal officers aboveſaid, of either of the said universities, "be duly executed within either of the said universities, &c."

The punishment of drunkards.

*Sect.* 46. And it is farther enacted by 4 Jac. 1. c. 5. and 21 Jac. 1. c. 7. "That whoever shall be drunk, and within "(*a*) six months after such offence shall be convict thereof "either on an indictment at assizes or sessions, or court-leet, "or before any (*b*) justices of peace in any county, or any "justice of peace, or other head officer in any city or town-"corporate,

(*a*) 4 Jac. 1. c. 5. par. 11.

(*b*) 21 Jac. 1. 7. 4 Jac. 1. 5.

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" corporate, upon view or confeſſion or by oath of one wit-
" neſs, ſhall forfeit 5*s.* to be paid within one week after
" conviction, to the church-wardens of the pariſh where
" the offence ſhall be committed, *&c.* and if ſuch perſon ſhall
" refuſe or neglect to pay the ſaid forfeiture, the ſame ſhall be
" levied of his goods by warrant or precept from the ſaid
" court, or judge before whom the ſame conviction ſhall be:
" and if the offender be not able to pay the ſaid ſum of 5*s.*
" he ſhall be committed to the ſtocks for every offence, there
" to remain ſix hours; and if he ſhall be convicted a ſecond
(*a*) Par. 6. " time of the like offence, he ſhall be bound to the (*a*) good
" behaviour, with two ſureties in a recognizance of 10*l.*
" And if any conſtable or other inferior officer of the place
" where the offence ſhall be committed, *&c.* do neglect the
" due correction of the ſaid offender, or the due levying of
" the ſaid penalties, he ſhall forfeit 10*s.* to the uſe of the
" poor, *&c.* to be levied by way of diſtreſs, by warrant from
" any mayor, *&c.*"

The puniſhment of repeated tippling.

*Sect.* 47. And it is farther enacted by the ſaid ſtatute of 4 Jac. 1. c. 5. and 21 Jac. 1. c. 7. and 1 Car. 1. c. 4. " That if any perſon ſhall remain or continue drinking or tip-
(*b*) 1 Ca. 1. 4. " pling in any inn, victualling-houſe, alehouſe or (*b*) tavern,
(*c*) 21 Jac. 1. 7. " *&c.* whether he be an (*c*) inhabitant of the place at the time
Supra Sect. 17. " of ſuch drinking or not; and the ſame be viewed by any
" mayor, or other head-officer or juſtice of peace, or con-
" feſſed by the offender, or proved by one witneſs in the
" manner preſcribed for the above mentioned offence of ſuf-
(*d*) 4 Jac. 1. 5. Par. 11. " fering tippling in public houſes, unleſs it be in ſuch caſes
" as are excepted in the above mentioned act, relating to the
Supra Sect. 20. " ſaid offence of ſuffering tippling, *&c.* Every perſon ſo of-
" fending, and being convict within ſix months, ſhall forfeit
" 3*s.* and 4*d.* to the uſe of the poor of the pariſh where the
" offence ſhall be committed, to be levied by way of diſtreſs
" in ſuch manner as the above mentioned forfeitures for
" drunkenneſs are to be levied: And if any ſuch offender be
" not able to pay the ſaid forfeiture, any mayor, head officer,
" juſtice of peace, or court where any ſuch conviction ſhall
" be, may ſet him in the ſtocks for four hours."

Officers to be charged on oath to preſent ſuch offences.

*Sect.* 48. And it is farther enacted by the ſaid ſtatute of 4 Jac. 1. c. 5. ſ. 7. " That all conſtables, church-wardens,
" headboroughs, tithingmen, aleconners and ſidemen ſhall
" in their ſeveral oaths incident to their ſeveral offices, be
" charged in like ſort to preſent the offences contrary to the
" ſaid ſtatute."

Eccleſiaſtical juriſdiction.

*Sect.* 49. But it is provided by the ſame ſtatute, par. 8. " That nothing therein contained ſhall in any wiſe abridge
" the

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" the eccleſiaſtical juriſdiction." And it is farther provided, par. 9. " That no offender, who hath once been puniſhed " for his offence againſt any article of the ſaid act, by any " the ways or means before limited, ſhall be eſſoons puniſhed " for the ſame offence by any other ways or means." Only one puniſhment.

*Sect.* 50. And it is farther provided, par. 10. " That " nothing in the ſaid act contained ſhall be prejudicial to ei- " ther of the univerſities, but that the chancellor, maſter, " and ſcholars, *&c.* may as fully uſe and enjoy all their ju- " riſdictions, rights, privileges, and charters, as before the " ſaid ſtatute they had or might have done; any thing in the " ſaid act to the contrary notwithſtanding." Not to prejudice the rights of the univerſities.

*Sect.* 51. And it is enacted by 7 Jac. 1. c. 10. " That " if any perſon being an alehouſe-keeper, ſhall be lawfully " convicted for any offence committed againſt any of the " branches of either of the ſaid acts of 1 Jac. 1. c. 9. or 4 " Jac. 1. c. 5. he ſhall for the ſpace of three years next en- " ſuing the ſaid conviction, be utterly diſabled to keep any " ſuch alehouſe." Additional puniſhment. Vide Ld. Raym. 1303. 1405.

† *Sect.* 52. It is alſo enacted by 30 Geo. 2. c. 24. ſ. 14. " That if any perſon or perſons licenſed to ſell any ſorts of " liquors, or who ſhall ſell or ſuffer the ſame to be ſold in his, " her, or their houſe, or houſes, or in any out-houſes, ground, " or apartments thereto belonging, ſhall knowingly ſuffer " any gaming with cards, dice, draughts, ſhuffle board, " miſſiſippi, or billiard tables, ſkettles, nine pins or with any " other implement of gaming by any journeymen, labourers, " ſervants or apprentices; on conviction by confeſſion, or on " the oath of one witneſs, before any juſtice of the county " or place within ſix days after the offence committed, he " ſhall forfeit 40*s.* and for every like offence afterwards 10*l.* " to be levied by warrant of diſtreſs, and three fourths thereof " paid to the poor and the other fourth to the party on whoſe " information the offender ſhall be convicted." Publicans not to ſuffer gambling by ſervants in their houſes on penalty of 10*l.*

† *Sect.* 53. And it is further enacted, " That if any ſuch " perſons ſhall ſo game as aforeſaid, and complaint thereof ſhall " be made on oath to a juſtice of the place, he may iſſue his " warrant to a conſtable to apprehend and carry ſuch offender " before a juſtice of the county, and on conviction as afore- " ſaid, he ſhall forfeit from five to twenty ſhillings, or be " committed to hard labour." And the parties who ſo game are liable to pay from 5 to 20

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# CHAPTER THE SEVENTY-NINTH.

## OF MONOPOLIES.

FOR the better underſtanding the nature of the offence of procuring or making uſe of a monopoly, I ſhall conſider: Firſt, What ſhall be ſaid to be a monopoly: Secondly, In what manner the procuring, or making uſe thereof, are reſtrained by the common law: Thirdly, In what manner by ſtatute.

3 Inſt. 181. Noy 182. 4 B. C. 159.

*Sect.* 1. As to the firſt point, it ſeemeth that a monopoly an allowance by the king, to any perſon or perſons, of the ſole buying, ſelling, making, working, or uſing of any thing, whereby any perſon is ſought to be reſtrained from any freedom which he had before, or hindered from his lawful trade. (1)

(1) Monopoly and ingroſſing differ only in this, that the firſt is by patent from the king, the other by act of the ſubject between party and party, but are both equally injurious to trade and the freedom of the ſubject, and therefore are equally reſtrained by the common law. Skinner 169.

As to the ſecond point it ſeemeth, That the procuring or making uſe of ſuch monopolies, is reſtrained by the common law two ways. Firſt, By declaring all grants of this kind to be void. Secondly, By making thoſe who procure or make uſe of, them liable to be fined.

3 Mod. 132. 127. 76. 11 Co. 87. 1 Roll. 4. 2 Roll. 174. Godb. 254. 2 Inſt. 63. 47. 10 Mod. 131. See Skinner 132 to 137. 165 to 173. 197 to 204. 223 to 220.

*Sect.* 2. And firſt it is ſaid, That all grants of this kind relating to any known trade are made void by the common law, as being againſt the freedom of trade, and diſcouraging labour and induſtry, and reſtraining perſons from getting an honeſt livelihood by a lawful employment, and putting it in the power of particular perſons to ſet what prices they pleaſe on a commodity; all which are manifeſt inconveniencies to the publick. (2)

East India Com. v. Sandys.

(2) The king, and none but the king, Skinner 224. by his charter, may conſtitute fraternities for the management of foreign and domeſtic trade. 8 Co. 125. who may make by-laws in reſtraint, if they be for the regulation of trade." See Com. Dig. by-law, b. 3. c. 3. Trade E. D. 1. D. 4. 10 Mod. 139.

(a) 2 R. Abr. 214. 3 Inſt. 182. 2 Inſt. 61.

*Sect.* 3. And upon this ground it hath been (a) reſolved That the king's grant to any particular corporation of the ſole importation,

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importation of any merchandize is void, whether such merchandize be prohibited by statute or not. (3)

(3) Hence also it seems, that the king's charter, empowering particular persons to trade to and from such a place is void, so far as it gives such persons an exclusive right of trading and debarring all others: and it seems now agreed that no king can exclude a subject from trade but an act of parliament. Ray. 489. Chan. Ca. 165. Vernon 127. Skinner 165. 3 Mod. 126. 3 Bacon 627. c. 3. Trade 4.

*Sect.* 4. And for the like reasons also it hath been resolved, That the grant of the sole (*a*) ingrossing of wills and inventories in a spiritual court, or of the sole (*b*) making of bills, pleas and writs in a court of law, to any particular person, is void.

(*a*) 2 R. Abr. 214
(*b*) 1 Jones 231. 2 R. Abr. 214. 3 Mod 75. Vern. 120. 10 Mod. 107. 131. 133.

*Sect.* 5. Also it hath been adjudged, That the king's grant of the sole making, importing, and selling of (*c*) playing cards, is void, notwithstanding the pretence that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is in itself lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than by any other employment.

(*c*) 11 Co. 84, 85, &c. Mod. 671. Noy 173, &c. 2 Inst. 47. Vide 2 Atkins 484.

*Sect.* 6. But it seemeth clear, That the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented or first brought into the realm by the grantee, as shall be shewn more at large in the 14th, 15th, and 16th sections of this chapter. Also it seems to be the better opinion, That the king may grant to particular persons the sole use of some particular employments, (as of printing the holy scriptures and law books, (4) &c.) whereof an unrestrained liberty might be of dangerous consequence.

Noy 182, 183. 1 Mod. 256. 3 Keb. 792. 3 Mod. 75.

(4) The reasons given are, that the invention of printing was new; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, and none could make proclamations but the king. And as to law books, that the king was the maker of judges, serjeants, and officers of law; and that law books are printed in a particular language and character, &c. 3 Bac. Abr. 627. in notis. 2 Ch. Ca. 62. Skinner 234. (1 Burn E. L. 4 I. Basket's Case). 1 Vernon 120. 275. Carth. 90. Carter 89. 1 Mod. 256. 3 Cro. 227. 10 Mod. 107.

*Sect.* 7. Secondly, Also it is holden, That the procuring or making use of an unlawful monopoly is farther restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offence, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom. And it is said, That there are precedents of prosecutions of this kind in former days; but I cannot find any modern instance thereof.

3 Inst. 181. 2 Inst. 47. 62.

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*Sect.* 8. As to the third point, *viz.* In what manner the procuring and making uſe of a monopoly are reſtrained by ſtatute, it is declared and enacted by 21 Jac. 1. c. 3. "That "all monopolies, and all commiſſions, grants, licences, char- "ters and letters patents to any perſon or perſons, bodies po- "litic or corporate whatſoever, of or for the ſole buying, ſel- "ling, making, working, or uſing of any thing within this "realm, or Wales, or of any other monopolies, and all pro- "clamations, inhibitions, reſtraints, warrants of aſſiſtance, "and all other matters whatſoever any way tending to the in- "ſtituting, ſtrengthening, furthering, or countenancing of "the ſame, or any of them, are altogether contrary to the "laws of this realm, and ſo are and ſhall be utterly void, and "of none effect, and in nowiſe to be put in ure or execu- "tion."

*Sect.* 9. And it is farther enacted, par. 2. "That all "perſons, bodies politick and corporate whatſoever, ſhall be "diſabled and uncapable to have, uſe, exerciſe, or put in ure "any monopoly, or any ſuch commiſſion, grant, or licence, "&c. or other thing tending as aforeſaid, or any liberty, "power, or faculty, grounded or pretended to be grounded "upon them, or any of them."

*Sect.* 10. And it is farther declared and enacted, par. 3. "That all monopolies, and all ſuch commiſſions, grants, and "licences, &c. and all other things tending as aforeſaid, and "the force and validity of them, ought to be, and ſhall be "examined, heard, tried, and determined, by and according "to the common laws of this realm, and not otherwiſe."

3 Inſt. 182, 183. 2 Atk. 484.

*Sect.* 11. In the conſtruction of this clauſe it hath been holden, That all matters of this kind ought to be tried in the courts of common law only, and not at the council table, or in the court of Chancery, or any other court of like nature. (5)

(5) Chancery will never eſtabliſh a right claimed under a cha- 'n the Crown, till there has been an action at law to try the right. 2 Atkins 484.—But it the higheſt point of the Lord Chancellor's juriſdiction to cancel the king's letters patent under the Great Seal. 4 Inſt. 88. And where a patent is granted to the prejudice of the ſubject, the king of right is to permit him upon his petition to uſe his name for the repeal of it in a *ſcire facias* at the king's ſuit. 3 Levinz. 221. Dyer 197. 8 Coke, Prince's Caſe. 11 Coke 74. 2 Ventris 344. 6 Mod. 229. But queſtions concerning the effect and extent of letters patent can only be tried in the king's courts. Cowp. 173.

*Sect.* 12. And it is farther enacted, par. 4. "That if any "perſon ſhall be hindered, grieved, diſturbed, or diſquieted, "or his goods or chattels any way ſeized, attached, diſtrain- "ed, taken, carried away, or detained, by occaſion or pre- "text of any monopoly, or of any ſuch commiſſion, grant "or

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" or licence, &c. or other matter or thing tending as afore-
" ſaid, and will ſue to be relieved in any of the premiſes, he
" ſhall have his remedy for the ſame at the common law, by
" action grounded on the ſaid ſtatute, to be heard and deter-
" mined in the King's Bench, Common Pleas, or Exche-
" quer, againſt the party by whom he ſhall be ſo hindered or
" grieved, &c. or by whom his goods ſhall be ſo ſeized or at-
" tached, &c. wherein every ſuch perſon, which ſhall be ſo
" hindered or grieved, &c. or whoſe goods ſhall be ſo ſeized
" or attached, &c. ſhall recover three times ſo much as the
" damages which he ſuſtained by means of ſuch hindrance,
" &c. and double coſts; and in ſuch ſuits, or for the ſtaying
" or delaying thereof, no eſſoin, protection, wager of law,
" aid, prayer, privilege, injunction, or order of reſtraint, ſhall
" be in anywiſe prayed granted, admitted, or allowed, nor
" any more than one imparlance: and if any perſon ſhall,
" after notice that the action depending is grounded upon the
" ſaid ſtatute, cauſe or procure any action at the common
" law grounded thereon, to be ſtayed or delayed before judg-
" ment, by colour or means of any order, warrant, power,
" or authority, ſave only of the court wherein ſuch action
" ſhall be depending, or after judgment ſhall cauſe or pro-
" cure the execution to be ſtayed or delayed, by colour or
" means of any order, warrant, power or authority, ſave on-
" ly by writ of error or attaint, that then the ſaid perſon or
" perſons ſo offending ſhall incur a præmunire."

*Sect.* 13. It is ſaid, That the firſt branch of this laſt clauſe relating to the delaying of cauſes of this kind before judgment, not only extendeth to the Privy Council, Chancery, Exchequer Chamber, and the like, but alſo to thoſe who ſhall procure any warrant from the king for ſuch purpoſe; and it is ſaid, That the latter branch relating to the delaying of execution after judgment extendeth even to the judges of the court where the cauſe is depending. 3 Inſt. 238.

*Sect.* 14. But it is provided, par. 6. " That no declara-
" tion in the ſtatute mentioned ſhall extend to any letters pa-
" tents and grants of privilege for the term of fourteen years,
" or under, of the ſole working or making of any manner of
" new manufactures within this realm," (under which words manufactures newly brought into the realm from beyond ſea are included, though they were not new there) " to the true
" and firſt inventor and inventors of ſuch manufactures,
" which others, at the time of making ſuch letters patents
" and grants, ſhall not uſe, ſo as alſo they be not contrary
" to the law, nor miſchievous to the ſtate, by raiſing prices
" of commodities at home, or hurt of trade, or generally in-
" convenient; the ſaid fourteen years to be accounted from Sa'k. 447.

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" the date of the firſt letters patents, or grant of ſuch privi-
" lege, but that the ſame ſhall be of ſuch force as they ſhould
" be, if the ſaid act had never been made, and of none
" other."

3 Inſt. 184. *Sect.* 15. It hath been reſolved, That no new invention concerning the working of any manufacture is within the meaning of this exception, unleſs it be ſubſtantially new, and not barely an additional improvement of an old one.

3 Inſt. 184. 12 Mod. 281. *Sect.* 16. Alſo it hath been holden, That a new invention to do as much work in a day by an engine, as formerly uſed to employ many hands, is not within the ſaid exception, be-
(6) Vide Ark-wright's caſe. cauſe it is inconvenient in turning ſo many labouring men to idleneſs. (6)

3 Inſt. 184. Comb. 125. *Sect.* 17. Alſo it ſeemeth clear, that no old manufacture in uſe before can be prohibited in any grant of the ſole uſe of any ſuch new invention.

*Sect.* 18. And it is farther provided, par. 7. " That no-
" thing in the ſaid act contained ſhall extend to any grant or
" privilege, power, or authority whatſoever before the ſaid
" act, made, granted, allowed, or confirmed by any act of
" parliament, ſo long as the ſame ſhall continue in force."

*Sect.* 19. And it is farther provided, par. 9. " That no-
" thing in the ſaid act contained ſhall be in anywiſe prejudi-
" cial to any city, borough, or town corporate within this
" realm, concerning any grants, charters, or letters patents
" to them made, or concerning any cuſtom uſed by or
" within them, or unto any corporations, companies, or
" fellowſhips of any art, trade, occupation, or myſtery, or
" to any companies or ſocieties of merchants within this
" realm, erected for the maintenance, enlargement, or or-
" dering of any trade or merchandize: but that the ſame
" charters, cuſtoms, corporations, &c. and their liberties and
" immunities ſhall be of ſuch force and effect as they were
" before the making of the ſaid act, and of none other, any
" thing before in the ſaid act contained to the contrary in
" anywiſe notwithſtanding."

*Sect.* 20. And it is farther provided, par. 10. " That
" nothing in the ſaid act contained ſhall extend to any letters
" patents, or grants of privilege, concerning printing; nor
" to any commiſſion, grants, or letters patents, concerning
" the digging, making, or compounding of ſaltpetre, or
" gunpowder,

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" gunpowder, or the caſting or making of ordnance, or ſhot " for ordnance; nor to any grant or letters patents of any " office erected before the making of the ſaid ſtatute, and " then in being, and put in execution, other than ſuch of- " fices as had been decried by proclamation: but that all " ſuch grants, &c. ſhall be of the like force and effect, and " no other, as if the ſaid act had never been made."

*Sect.* 21. But it is enacted by 16 Car. 1. c. 21. " That " it ſhall be lawful for all perſons, as well ſtrangers as natu- " ral born ſubjects, to import any quantities of gunpowder " whatſoever, paying ſuch cuſtoms and duties for the ſame " as by parliament ſhall be limited: and that it ſhall be " lawful for all his majeſty's ſubjects of this his realm of " England, to make and ſell any quantities of gunpowder at " his pleaſure, and alſo to bring into this kingdom any quan- " tities of ſaltpetre, brimſtone, or any other materials for the " making of gunpowder: and that if any perſon ſhall put in " execution any letters patents, proclamation, edict, act, or- " der, warrant, reſtraint, or other inhibition whatſoever, " whereby the importation of gunpowder, ſaltpetre, brim- " ſtone, or other the materials afore mentioned, ſhall be " anywiſe prohibited or reſtrained, he ſhall incur a præmu- " nire."

1 Jac. 2. c. 8. 5 Geo. 1. c. 26. 11 Geo. 1. c. 23. 4 Geo. 2. c. 29. 15 Geo. 2. c. 32. 28 Geo. 2. c. 38. 29 Geo. 2. c. 26.

*Sect.* 22. And it is farther provided by the ſaid ſtatute of 21 Jac. 1. c. 3. ſ. 11, 12. " That nothing in the ſaid act " contained ſhall extend to any commiſſion or grant con- " cerning the digging, compounding, or making of allum, " or allum mines, &c. nor concerning the licenſing of the " keeping of any tavern or ſelling of wines, to be ſpent in " the manſion-houſe, or other place, in the tenure or occu- " pation of the party ſelling the ſame; and a farther provi- " ſion is made in the latter part of the ſtatute, for ſome par- " ticular grants to particular corporations and perſons, as " Newcaſtle upon Tyne, &c."

*Sect.* 23. But it is ſaid, That the ſaid clauſe relating to allum was needleſs, becauſe all ſuch mines belong of courſe to the perſons in whoſe grounds they are, and therefore no privilege concerning them can be granted but in the king's own ground. 3 Inſt. 185.

† *Sect.* 24. And for the encouragement of learned men to compoſe and write uſeful books, and to prevent their being ruined by the piracy of bookſellers, it is enacted by 8 Ann. c. 19. " That the author of any book or books, and his " aſſignee or aſſigns, ſhall have the ſole right and liberty of " printing and reprinting ſuch book or books for the term of " fourteen

Vide the caſe of Maſon v. Murray for publiſhing Gray's Poems.

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"fourteen years, to commence from the day of firſt publiſh-
"ing the ſame, and no longer; and if any other perſon what-
"ſoever, within the time granted by this act, ſhall print, re-
"print, or import, any ſuch book without the conſent of the
"proprietor firſt obtained in writing, ſigned in the preſence
"of two or more credible witneſſes, or ſhall knowingly ſell,
"publiſh, or expoſe to ſale, any ſuch book or books, with-
"out conſent as aforeſaid, the offender ſhall forfeit every
"ſheet of the ſame to the proprietor, who ſhall forthwith
"damaſk or deſtroy the ſame, and alſo forfeit one penny for
"every ſheet found in the cuſtody of ſuch offender; half to the
"king, and half to the proſecutor who will ſue for the ſame
"in any of the courts at *Weſtminſter*."

N. B A muſical compoſition is a writing within this ſtatute. Bach v. Longman. Cowper 623. But it is ſaid that charts are not within this ſtatute. per Ld. Mansfield, Sayer's caſe. Brown 83. An abridgement of any literary performance which ingeniouſly preſerves the whole ſenſe of the work, and thereby renders it a more uſeful production, is held to poſſeſs original merit, and does not trench upon the property of its firſt author. Loft 775. So alſo it is ſaid that there may be originality in caſting an index, or pointing out a ready method of finding a place in a map. 2 Brown's Chancery Rep. p. 84. And qu. if a man makes a new ſurvey of roads from actual meaſurement.

† *Sect.* 25. And it is further enacted, par. 2. "That this
"act ſhall not extend to any book or books printed without
"ſuch conſent, unleſs the title to the copy of the whole
"of ſuch book or books, and every volume thereof, ſhall
"before publication be entered in the regiſter book of the
"company of Stationers, in ſuch manner as hath been uſual,
"which regiſter book ſhall at all times be kept in the hall
"of the ſaid company, and unleſs ſuch conſent of the pro-
"prietor be in like manner entered as aforeſaid, for every
"of which ſeveral entries, ſix-pence ſhall be paid and no
"more; which regiſter may be reſorted to, and inſpected
"without fee or reward; and the clerk of the ſaid company
"ſhall give a certificate under his hand of ſuch entry, for
"which he ſhall receive ſix-pence. And it is further enac-
"ted, That if the clerk of the ſaid company refuſe in the
"preſence of two witneſſes to make ſuch entry and grant
"ſuch certificate, he ſhall forfeit 20*l.* to the proprietor, who
"in ſuch caſe, notice being firſt duly given of ſuch refuſal,
"by an advertiſement in the Gazette, ſhall have the like be-
"nefit as if ſuch entry and certificate had been duly made
"and given."

Vide 15 Geo. 3. c. 54. ſ. 6.

† *Sect.* 26. And it is provided by par. 5. enforced by the 15 Geo. 3. c. 54. ſ. 6. "That nine copies of the whole of each
"book or books, and every volume thereof, upon the beſt pa-
"per, that ſhall be printed, publiſhed, or reprinted and pub-
"liſhed with additions, ſhall by the printer thereof, be actually
"delivered to the warehouſe-keeper of the ſaid company of
"Stationers,

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By 12 Geo. 2. c. 36. continued by 22 Geo. 3. c. 13. s. 4. whoever shall import or sell books first written and printed in this kingdom and reprinted abroad, shall forfeit 5*l.* and double the value of the books. But this act shall not extend to books containing any extracts from English authors, &c. Vide also 27 Geo. 2. c. 28.

'Stationers, at the hall, before publication, for the use of the 'libraries of the several universities, &c. on pain of forfeiting 'besides the value of the said printed copies, the sum of five 'pounds, for every copy not so delivered, as also the value of 'the said printed copy not so delivered, and if not delivered 'by the said warehouse-keeper to the universities accordingly 'within ten days after demand, the offender shall forfeit 5*l.* '&c. But this act shall not prohibit the importation of fo- 'reign books. Action to be brought in three months, de- 'fendants may plead the general issue."

† *Sect.* 27. And it is further provided by the said statute, par. 11. "That after the expiration of the said term of four- "teen years, the sole right of printing or disposing of copies "shall return to the authors thereof, if they are then living, "for another term of fourteen years." (7)

The contingent interest of authors.

(7) In the case of Millar v. Taylor, it was insisted, "That there is a *real* property remaining in authors, or in their assigns, after the publication of their works, independant of and not taken away or circumscribed by the above statute. No question perhaps ever underwent a more learned or elaborate discussion; or created on its several points, a greater diversity in the opinions of the Judges. It was held by Lord Mansfield, Aston and Willes contra Yates, that authors and those claiming under them, possess as a common law right, not interrupted by the statute, a perpetuity in their works after publication. And the same doctrine was confirmed by decree in Chancery, in the case of Becket v. Donaldson. But on appeal to the House of Lords this decree was reversed, and the doctrine now established is that the common law right of authors and their assigns is interrupted by 8 Ann. c. 19. that they have not the sole and exclusive copy right in perpetuity, after having published their compositions, but that they have it for fourteen years from the publication, and after the expiration of that term, the right parted with, returns to the authors, *if living*, or to their assigns, for another fourteen years." 5 Com. Dig. 570. 4 Burrow from 2303. to 2417. But if the author assigns by general words "all his interest, &c." in the copy right, he conveys not only his absolute interest for the first fourteen years, but his contingent interest also of the other fourteen years, which result to him, if living, upon the expiration of the first term. Carnan v. Bowles, in Chancery, Trin. 26 Geo. 3. Vide also Rennet v. Thompson, in the Exchequer.

† *Sect.* 28. And it is also enacted by 8 Geo. 2. c. 13. "That every person who shall invent and design, engrave, "etch, or work in mezzotinto, or chiaro oscuro, or from "his own works and invention shall cause to be designed "and engraved, etched or worked in mezzotinto or chiaro "oscuro, any historical or other print, shall have the sole "right of printing and reprinting the same, for the term of "fourteen years, to commence from the day of the first (1) "publishing thereof, which shall be truly engraved with the "name of the proprietor on each plate, and printed on every "such print; and if any person, within the time limited by "this act, shall engrave, etch, or work as aforesaid, or in "any other manner copy or sell, or cause to be engraved, "etched or copied and sold, in the whole or in part, by "varying, adding to, or diminishing from the main design, "or shall print, reprint, or import for sale any such print or "parts

Engravings.

(1) To secure the property under this act, the proprietor must engrave *both* his name *and* the day of first publishing the print, on the plate and print the same on the print. Sayer *qui tam* v. Dicey, 3 William 60.

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" parts thereof, without the conſent of the proprietor firſt " had in writing, ſigned by him in the preſence of two wit- " neſſes; or ſhall knowingly publiſh, ſell, or expoſe to ſale, " or otherwiſe in any manner diſpoſe of the ſame, *&c. &c.* " ſuch offender ſhall forfeit the plate and every impreſſion " thereof, and alſo five ſhillings for every print found in his " cuſtody, or ſold or expoſed to ſale by him, half to the king, " half to the proſecutor, if ſued in three months. But this " act ſhall not extend to the purchaſer of plates."— And by 17 Geo. 3. c. 57. proprietors of prints may bring action on the caſe, and recover damages and double coſts againſt perſons copying their prints, in the whole or in part by varying, adding, or diminiſhing without conſent.

† *Sect.* 29. And by 15 Geo. 3. c. 53. " The univerſities " in *England* and *Scotland*, and the colleges of *Eaton*, *Weſt-* " *minſter*, and *Wincheſter* reſpectively, ſhall have for ever the " ſole liberty of printing and reprinting, but it muſt be at " their own printing preſs, all ſuch books as ſhall at any " time heretofore have been, (or having not been heretofore " publiſhed or aſſigned) ſhall at any time hereafter be be- " queathed or otherwiſe given by the author or authors of the " ſame reſpectively, or the repreſentatives of ſuch author or " authors to or in truſt for the ſaid univerſities or colleges, " or to or in truſt for any college or houſe of learning within " the ſame, unleſs the ſame have been or ſhall be given for " any term of years or other limited term. And whoever " ſhall print or ſell the ſame contrary to this act ſhall, pro- " vided the books be entered within two months after the " bequeſt, in the manner the act directs, forfeit the ſame, " and alſo one penny for every ſheet, one half to the king, " the other to the proſecutor. But the univerſities may ſell " copy right in like manner as any author."

## CHAPTER THE EIGHTIETH.

### OF FORESTALLING, INGROSSING, AND REGRATING, AND OTHER OFFENCES OF THE LIKE NATURE.

FOR the better underſtanding the nature of Foreſtalling, Ingroſſing and Regrating, and other ſuch like offences, I ſhall conſider, How ſuch offences are treated by the common law. And how by ſtatute.

As

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As to the firſt point, I ſhall conſider: What is eſteemed an offence of this kind by the common law. And how ſuch offence is puniſhable by the common law.

*Sect.* 1. As to the firſt of theſe particulars it is ſaid, That all endeavours whatſoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by ſpreading falſe (*a*) rumors or by (*b*) buying things in a market before the accuſtomed hour, or by buying and ſelling again the ſame thing in the ſame (*c*) market, or by any other ſuch like deviſes, are highly criminal at common law, and that all ſuch offences anciently came under the general notion of foreſtalling, which included all kinds of offences of this nature.

(*a*) 43 Aſſ. 18. 3 Inſt. 195, 196. B. Indictment, 40. Preſentment 18.
(*b*) Crom. 18.
(*c*) Crom. 80.

*Sect.* 2. And ſurely there can be no attempt of this kind, but muſt be looked upon as a high offence againſt the publick, inaſmuch as it ſo apparently tends to put a check upon trade to the general inconvenience of the people, by putting it out of their power to ſupply themſelves with a commodity, without an unreaſonable expence, which often proves extremely oppreſſive to the poorer ſort, and cannot but give juſt cauſe of complaint to the richeſt.

*Sect.* 3. But it hath been reſolved, That any merchant, whether he be a ſubject or a foreigner, bringing victuals, or any other merchandize into the realm, may ſell the ſame in groſs, but that no perſon can lawfully buy within the realm any merchandize in groſs, and ſell the ſame in groſs again, becauſe by ſuch means the price will be inhanced, for the more hands any merchandize paſſeth through, the dearer it muſt grow, becauſe every one will make his profit of it: and if ſuch practices were allowable, a rich man might ingroſs into his hands a whole commodity, and then ſell it at what price he ſhould think fit; which is of ſuch dangerous conſequence, that the bare ingroſſing of a whole commodity with an intent to ſell it at an unreaſonable price, is an offence indictable at the common law, whether any part thereof be ſold by the ingroſſer, or not.

3 Inſt. 196. Summary 138.

C. Car. 231, 232.

*Sect.* 4. 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.

3 Inſt. 196. Summary 138.

*Sect.* 5. As to the ſecond particular, *viz.* In what manner offences of this kind are puniſhable by the common law; it is ſaid, That by an antient ſtatute the offender was to be grievouſly amerced for the firſt offence; for the ſecond, to be condemned to the pillory; for the third, to be impriſoned; and

3 Inſt. 196.

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for the fourth to be compelled to abjure the vill: And there ſeems to be no doubt, but that at this day all offenders of this kind are liable to a fine and impriſonment, anſwerable to the heinouſneſs of their offence, upon an indictment at common law.

As to the ſecond point, *viz.* In what manner theſe offences are treated by ſtatute, I ſhall conſider; what particular proviſions have been made relating to this matter.

The particular proviſions of this nature are five-fold; 1. The obliging all victuallers to ſell at a reaſonable price. 2. The allowing all foreigners free liberty of importing and ſelling victuals. 3. The giving the great officers of ſtate a power to tax the price of victuals. 4. The prohibiting conſpiracies to raiſe the price of victuals. 5. The prohibiting all foreſtalling, ingroſſing, and regrating.

How butchers ſelling unwholeſome meat are to be puniſhed, vide 1 vol. Runnington's ſtatutes p. 187. c. 7. By 4 Hen. 7. c. 3. they ſhall not kill beaſts in walled towns. By 23 Hen. 8. c. 8. they ſhall not kill calves but within the time preſcribed. By 22

*Sect.* 6. The firſt of the ſaid proviſions depends upon 23 Edw. 3. c. 6. by which it is enacted, "That butchers, "fiſhmongers, regrators, hoſtlers, brewers, bakers, poul- "terers, and other ſellers of all manner of victual, ſhall be "bound to ſell the ſame for a reaſonable price, having reſ- "pect to the price that ſuch victual ſhall be ſold at in the "places adjoining; ſo that ſuch ſellers have moderate gains, "reaſonably to be required, according to the diſtance of the "place from whence the ſaid victuals be carried; on pain to "forfeit double the value, *&c.* And the chief officers of "towns are required to ſee this ſtatute executed, on pain of "paying the treble value of the thing ſold, *&c.*"

Hen. 8. c. 6. they are prohibited from keeping tan-houſes. By 1 Jac. 1. c. 22. they are not to kill calves under five weeks old. By 5 Ann c. 34. ſ. 2. they are not to ſell cattle to one another in London. By 7 Ann c. 6. may ſell dead calves or ſheep.

*Sect.* 7. The ſecond of the above-mentioned proviſions depends upon 6 Rich. 2. c. 10. and 11 Rich. 2. c. 7. and 1 Hen. 4 c. 17. by which it is enacted, "That all "manner of aliens, being of the amity of the king, coming "into any town of the realm with fiſh, or other victual, "ſhall be under the king's eſpecial protection, and may cut "their fiſhes and victuals in pieces, and in part, or in all, at "retail, or in groſs, as to them beſt ſhall ſeem, to ſell and "make their profit, *&c.*"

And it is farther enacted by 14 Hen. 6. c. 6. "That if "any man diſturb any alien to ſell his fiſh in groſs, or at re- "tail, in part or in whole, contrary to the above mentioned "ordinances, and thereof be duly attainted at the ſuit of the "king, or of the party, he ſhall forfeit 10*l.* *&c.*"

*Sect.*

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*Sect.* 8. The third of the above mentioned proviſions depends upon 25 Hen. 8. c. 2. by which it is enacted, "That "to remedy the frequent riſe of the price of cheeſe, butter, "capons, hens, chickens, and other neceſſary victuals for "man's ſuſtenance, by ingroſſing and regrating the ſame; "the Lord Chancellor and other high officers of ſtate, *&c.* "may, upon complaint of any inhanſing of the prices of "ſuch victuals without ground or reaſonable cauſe, in any "part of the king's dominions, ſet and tax reaſonable prices "of ſuch victuals: And that after proclamation made of ſuch "prices, all farmers, owners, broggers, and all other victual-"lers whatſoever, having or keeping any ſuch victuals to the "intent to ſell ſhall ſell the ſame to ſuch of the king's ſubjects "as will buy them at ſuch prices as ſhall be taxed by ſuch pro-"clamation, under the pains to be limited in the ſaid procla-"mation."

Vide alſo 24 Hen. 8. c. 3. 25 Hen. 8. c. 1. 27 Hen. 8. c. 9. which enjoin that butchers meat ſhall be ſold by the pound, &c. But by 33 Hen. 8. c. 11. it may be ſold by weight or otherwiſe.

*Sect.* 9. But it is provided, "That the officers of cities, "boroughs, or towns-corporate, and all other perſons hav-"ing authority to ſet prices of ſuch victuals, may ſet ſuch "prices in ſuch manner as if the ſaid act had not been "made."

*Sect.* 10. The fourth of the above mentioned proviſions depends upon 2 and 3 Edw. 6. c. 15. by which it is enacted, "That if any butchers, brewers, bakers, poulterers, cooks, "coſter-mongers or fruiterers, ſhall conſpire, covenant, pro-"miſe, or make any oaths, that they ſhall not ſell their vic-"tuals but at certain prices; or if any artificers, workmen or "labourers, do conſpire, covenant, or promiſe together, or "make any oaths, that they ſhall not make or do their works, "but at a certain price or rate; or ſhall not enterpriſe, or "take upon them to finiſh what another hath begun, or ſhall "do but a certain work in a day, or ſhall not work but at cer-"tain hours and times; every ſuch perſon ſo conſpiring, *&c.* "ſhall forfeit for the firſt offence 10 *l.* and if he pay not the "ſame within 6 days, ſhall ſuffer 20 days impriſonment; and "for the ſecond offence ſhall forfeit 20 *l.* *&c.* and for the "third, 40 *l.* *&c.* And if any ſuch conſpiracy, covenant, or "promiſe be made by any ſociety, brother-hood, or company, "of any craft, myſtery or occupation of the victuallers above "mentioned, with the preſence or conſent of the more part "of them, that then immediately upon ſuch act of conſpira-"cy, *&c.* over and beſides the particular puniſhment before "appointed, their corporation ſhall be diſſolved; and that "the ſaid offences ſhall be determined at the aſſizes, ſeſſions "of the peace, or court-leet."

Vide 5 Eliz. c. 4.

† But by 2 Geo. 3. c. 14. "No brewer, innkeeper, "victualler or other retailer of ſtrong beer or ale ſhall be "ſued

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"sued impleaded or moleſted by indictment, information, po-
"pular action or otherwiſe, for advancing the price of ſtrong
"beer or ale in a reaſonable degree. And it is alſo enacted
"that if any brewer, innkeeper, victualler or retailer of beer
"or ale ſhall mix or cauſe, or ſuffer to be mixed in any veſſel,
"tub, meaſure, or otherwiſe, any ſtrong beer, ale or ſtrong
"worts with any ſmall beer or ſmall worts or with water af-
"ter the gauge of ſuch ſtrong beer, ale, or ſtrong worts
"ſhall have been taken by an officer of exciſe he ſhall forfeit
"fifty pounds."

† *Sect.* 11. The fifth of the above mentioned proviſions, *viz.* the prohibiting all foreſtalling, ingroſſing and regrating, depended chiefly upon 3 and 4 Edw. 6. c. 21. 5 and 6 Edw. 6. c. 14. altered by 5 Eliz. c. 5. ſ. 13. 5 Eliz. c. 12. and 13 Eliz. c. 25. ſ. 31. But it is recited by 12 Geo. 3. c. 71. "That it has been found by experience that the reſtraints laid by ſeveral ſtatutes upon the dealing in corn, meal, flour, cattle and ſundry other ſorts of victuals by preventing a free trade in the ſaid commodities, have a tendency to diſcourage the growth and to enhance the price of the ſame, which ſtatutes if put in execution would bring a great diſtreſs upon the inhabitants of many parts of this kingdom and in particular upon thoſe of the cities of London and Weſtminſter, and thereupon it is enacted that the "3 and 4 Edw. 6. c. 21.—The 5 and 6 Edw. 6. c. 14.—"The 2 and 3 Philip and Mary, c. 3 —The 5 Eliz. c. 5. and "c. 12.—The 15 Car. 2. c. 8. and ſo much of 5 Ann c. 31. "as relates to butchers ſelling cattle alive or dead, within "London and Weſtminſter and within 10 miles thereof, and "alſo all acts for the better inforcement of the ſame, being de-"trimental to the ſupply of the labouring and manufacturing "poor of this kingdom ſhall be and the ſame are hereby de-"clared to be repealed."

2 Burn's Juſtice 231.

† *Sect.* 12. But as the ſtatute 5 and 6 Edw. 6. c. 14. particularly deſcribes the ſeveral offences of foreſtalling, ingroſſing, and regrating, which ſtill continue offences at common law, it may be of uſe to recite it, notwithſtanding it is repealed; as it contains a parliamentary deſcription of thoſe offences.

An indictment on this clauſe muſt charge expreſsly that the goods bought were coming to the market to be ſold.

1 Rolle's Rep. 421.

† *Sect.* 13. For it is enacted by par. 1. of the ſaid ſtatute, "That whoſoever ſhall buy or cauſe to be bought, any mer-"chandize, victual, or any other thing whatſoever coming "by land or by water toward any market or fair to be ſold in "the ſame, or coming toward any city, port, haven, creek, "or road of this realm or Wales, from any parts beyond the "ſea to be ſold, or make any bargain contract or promiſe for

"the

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" the having or buying of the ſame, or any part thereof ſo
" coming as is aforeſaid before the ſame ſhall be in the mar-
" ket, fair, city, or port, &c. ready to be ſold, or ſhall make
" any motion by word, letter, meſſage or otherwiſe to any
" perſon or perſons for the enhancing of the price or dearer
" ſelling of any thing above mentioned, or elſe diſſuade,
" move, or ſtir any one coming to the market or fair, to ab-
" ſtain or forbear to bring or convey any of the things above
" rehearſed to any market, city, or port, &c. to be ſold ſhall
" be deemed.—A FORESTALLER."

† *Sect.* 14. And it is enacted by par. 2. " That whoſo- Vide Owen 135.
" ever ſhall by any means regrate, obtain, or get into his
" hands or poſſeſſion in any fair or market, any corn, wine,
" fiſh, butter, cheeſe, candles, tallow, ſheep, lambs, calves,
" ſwine, pigs, geeſe, capons, hens, chickens, pidgeons, co-
" nies or other dead victual whatſoever, that ſhall be brought
" to any fair or market to be ſold, and do ſell the ſame again
" in any fair or market holden in the ſame place or within 4
" miles thereof ſhall be taken for—A REGRATOR."

† *Sect.* 15. And by par. 3. " Whoſoever ſhall ingroſs or
" get into his hands by buying, contracting or promiſe taking,
" other than by demiſe, grant, or leaſe of land, or tithes,
" any corn growing in the fields or any other corn or grain,
" butter, cheeſe, fiſh, or other dead victual whatſoever,
" within the realm of England to the intent to ſell the ſame
" again ſhall be reputed—AN UNLAWFUL INGROSSER."

*Sect.* 16. In the conſtruction of the laſt mentioned clauſes
the following opinions have been holden. I. That (*a*) ſalt is (*a*) Inſt. 195. Sum. 152.
a victual within the meaning of it, not only becauſe it is of Cro. Car. 231.
neceſſity of itſelf for the food and health of man, but alſo be-
cauſe it ſeaſoneth and maketh wholeſome beef, pork, and
other victuals, in which reſpect it ſeemeth itſelf to come under
the notion of victual, and ſeemeth to be ſo underſtood by the
makers of 13 Eliz. 12. c. 25. as appears from par. 21. of
that ſtatute.

*Sect.* 17. II. That (*b*) ſuch victual only as is neceſſary for (*b*) 3 Inſt. 195.
the food of man is within the purview of it; and therefore Sum. 152.
that apples, and cherries, and ſuch like fruits, are not within Cro. Car. 231.
the intent of it; for the words are, corn, or grain, butter, Owen 135.
cheeſe, fiſh, or other dead victuals, which words are ſaid to Cro. Jac. 214.
import the ſame as if it had been ſaid, or other dead victuals
of like quality: Alſo it is ſaid, That there is not any thing
prohibited within the ſtatute, but what hath a proviſo, how
in ſome kind it might be brought; and therefore ſince
there is not any ſuch proviſo for apples, that they never were

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intended to be reſtrained: And agreeably hereto it hath been holden, That neither (*a*) hops nor (*b*) malt are within the meaning of the ſtatute.

(*a*) C. Car. 231.
(*b*) 3 Inſt. 196. Sum. 152. Con. Owen 135. 1 Roll 12.

*Sect.* 18. III. That the buying of corn, with an intent to make (*c*) ſtarch of it, and then to ſell it, is not within the ſaid clauſe, becauſe it is not bought to be ſold again in the ſame nature in which it was bought, but to be firſt altered by a trade or ſcience, and then ſold again. And for the like reaſon it ſeemeth to be the better (*d*) opinion, That the buying of corn in order to make meal of it, and then to ſell it, is no way within the ſaid clauſe; and that the buying of (*e*) barley with an intent to make it into malt, and then to ſell it, had no need of the exception made for it in the ſaid ſtatute.

(*c*) Bridg. 5, 6. Owen 135.
(*d*) Moore 595. Cro. Car. 231. Con Owen 135.
(*e*) C. Car. 231. 3 Inſt. 196. See c. 33. ſ. 13, 18. Con. Owen 135.

*Sect.* 19. IV. That there is no neceſſity in an information or indictment grounded on the ſaid clauſe for ingroſſing any victual therein mentioned, to ſay (*f*) That the defendant did not come by it by a demiſe of land, &c. but that the defendant, if he have any ſuch matter to alledge in his defence, may give it in evidence.

(*f*) 1 Jon. 157.

*Sect.* 20. V. That in every ſuch information, &c. the words of the ſtatute muſt be preciſely purſued, and therefore that it is not ſufficient to ſay, That the defendant bought ſo much corn, &c. becauſe the words are, "ſhall ingroſs, or get "into his hands, by buying, &c."

2 Lev. 35.

*Sect.* 21. And it is farther enacted by the ſaid ſtatute of 5 and 6 Edw. 6. c. 14. par. 4, 5, 6. "That whoever ſhall "offend in any of the things before recited, and be thereof "duly convicted, ſhall for the firſt offence ſuffer impriſon- "ment for two months, and forfeit the value of the goods ſo "by him bought or had; and for the ſecond offence ſhall ſuf- "fer impriſonment for one half year, and forfeit the double "value of the goods, &c. and for the third offence ſhall be "ſet on the pillory, and forfeit all his goods, and be commit- "ted to priſon during the king's pleaſure."

*Sect.* 22. And from hence it ſeems clearly to follow, as well as from the general rules of law, That no information for any of the above mentioned offences againſt the ſaid ſtatute, can be good, without ſhewing in certain the quantity of the thing in relation to which the defendant is ſuppoſed to have incurred the penalty, not only becauſe otherwiſe the judgment to be given on ſuch an information can never be pleaded in bar of any other, becauſe it cannot appear that both of them were brought for the ſame thing, but alſo becauſe it cannot appear to the court what forfeiture the defendant ought

2 Bulſ. 317. Cro. Car. 381. 6 Mod. 32. Vide alſo Cro. Car. 314. 1 Roll. 11, 12. 1 Jones 320.

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ought to incur, unleſs the extent of the offence, which is to be the meaſure of it, be ſpecially ſet forth: And for theſe reaſons it hath been adjudged, That an information for ingroſſing corn, the quantity whereof is expreſſed by the word *cumulus* only, is not good; yet it is ſaid, That an indictment for ingroſſing *magnam quantitatem frumenti*, is ſufficient.

## APPENDIX THE FIFTEENTH.

## OF REGULATING THE PRICE OF VICTUALS, &c.

THE ſtatutes againſt the offences of foreſtalling, ingroſſing, and regrating contained particular exceptions to the general reſtraints which they impoſed. Theſe exceptions related to corn, butter, cheeſe, cattle, beer, cyder, mum, fiſh, wine, oil, ſugar, ſalt, fiſhmongers, victuallers, butchers, poulterers, badgers, drovers, leſſors, ſhipping and caſtles, and towns-corporate. Of the foregoing catalogue thoſe exceptions which relate to fiſh, fiſhmongers, victuallers, butchers, poulterers, leſſors, ſhipping and caſtles and towns-corporate are repealed. But as the intention of the legiſlature both in enacting and in repealing theſe ſtatutes, in accommodation to the emergencies of different periods of time, was to regulate the price of victuals, and to prevent them from being exorbitantly raiſed upon, or improperly introduced to the public, by the reſpective dealers therein; I ſhall endeavour to collect the ſeveral ſtatutes which relate to the regulation under the following arrangement.

1. As to the meaſure of corn.
2. As to bread.
3. As to beer.
4. As to butter and cheeſe.
5. As to cattle and butchers.
6. As to fiſh.
7. As to bacon and pork.
8. As to hay and ſtraw.
9. As to fruit.
10. As to honey and wax.
11. As to the meaſure of coals.

N. B. For the regulation of wood cut up for fuel vide 43 Eliz. c. 14. 9 Ann c. 15. and 10 Ann c. 6.

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† *Sect.* 1. And firſt, As to the meaſure of corn. It is enacted by 22 Car. 2. c. 8. ſ. 2. "That whoever ſhall ſell any "ſort of corn or grain, ground or unground, or any kind of "ſalt, uſually ſold by the buſhel, by any other, than by Win-"cheſter meaſure, marked in his majeſty's exchequer, and "ſealed as the act directs, containing eight gallons to the "buſhel and no more or leſs, and the ſaid buſhel ſtricken "even by the wood or brim of the ſame by the ſeller, ſhall "forfeit 40*s.* for every offence, on conviction, before one "juſtice, by one witneſs; to be levied by the church-war-"dens, *&c.* by diſtreſs and ſale; and in default impriſon-"ment till paid."

† *Sect.* 2. And by par. 3. "If any mayor or other head "officer ſhall knowingly permit the ſame, on conviction at the "ſeſſions, he ſhall forfeit 5 *l.* half to the proſecutor and half "to the poor by diſtreſs, or impriſonment till paid."

† *Sect.* 3. And it is further enacted, by 22 and 23 Car. 2. c. 12. "That whoever ſhall ſell or buy any corn ground or "unground or ſalt by the bag without meaſuring being there-"unto required or in any other manner than as above directed "and that without ſhaking of the ſaid buſhel or meaſure by "the buyer, ſhall forfeit beſide the above penalty, all the corn, "grain or ſalt bought or ſold contrary to this act, or the va-"lue thereof, to the party complaining."

N. B. Notwithſtanding theſe ſtatutes the meaſure of corn differs in many places the buſhel being greater in one place than another,

† *Sect.* 4. And it is further enacted, par. 3. "That the "proof ſhall lie upon the defendant to make it appear by the "oath of one witneſs that he ſold or bought the ſame lawfully, "or, if he fail he ſhall forfeit as before mentioned, and which "ſhall be diſtributed by the juſtice, half to the poor and half to "the informer." (1)

and it is ſaid that an ancient and uninterrupted cuſtom, for this is good. Barlow, 578.

(1) For the mode by which the averaged price of corn is to be aſcertained, vide 10 Geo. 3. c. 39. And for the ſame in London and Eſſex 21 Geo. 3. c. 50. For regulations reſpecting its importation 22 Car. 2. c. 13. 15 Car. 2. c. 7. 5 Geo. 2. c. 12. 6 Geo. 3. c. 17. 13 Geo. 3. c. 43. 16 Geo. 3. c. 39. 18 Geo. 3. c. 25. 19 Geo. 3. c. 29. For regulating its exportation, vide 1 W. and M. c. 12. 1 Geo. c. 7. 11 Geo. 2. c. 22. 13 Geo. 3. 43. ſ. 5. 14 Geo. 3. c. 64. 14 Geo. 3. c. 5. and 11 and 26. 16 Geo. 3. 37. 18 Geo. 3. c. 16.

General aſſize and price of bread.

† *Sect.* 5. Secondly. As to BREAD, it is enacted, by 31 Geo. 2 c. 29. par. 2. "That the court, or perſons here-"in authoriſed to ſet the aſſize and weight of bread, and "the price for the ſame ſhall ſo do as often as they ſhall "think proper; and that in every aſſize, reſpect ſhall be had, "to the price which the grain, meal, or flour, ſhall bear in "the public markets, in or near the place for which ſuch aſ-"ſize ſhall be ſet; making reaſonable allowance to makers "for their charges and profit."

*Sect.*

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† *Sect.* 6. And it is further enacted by par. 3. "That "where an aſſize ſhall be ſet no perſon ſhall there ſell bread, "except wheaten and houſehold, otherwiſe brown bread, "and ſuch other ſort as ſhall be publicly allowed by the court, "or perſons aforeſaid; but where it hath been uſual to make "bread with the meal of rye, barley, oats, beans, or peaſe, "or with the meal of any ſuch different ſorts of grain mixed "together, or the court or perſons ſhall allow ſuch bread "to be made, ſuch bread ſhall and may be there made and "ſold; and offenders on conviction by confeſſion, or the "oath of one witneſs, before any magiſtrate within his ju-"riſdiction, ſhall forfeit not exceeding forty nor leſs than "twenty ſhillings."

An aſſize ſet, no other ſort of bread (wheaten and houſehold excepted) to be made for ſale; under penalty of forfeiting not exceeding 40 s. nor leſs than 20 s.

† *Sect.* 7. By par. 4. "The aſſize and weight of the ſeve-"ral ſorts of bread for ſale, and the price ſhall be ſet and "aſcertained according to the following tables mark'd No. 1. "and 2."

Aſſize and price to be according the tables.

N. B. Part the firſt, or the aſſize table contains the price of the buſhel of wheat Wincheſter meaſure, from 2 s. 9 d. to 14 s. 6 d. the buſhel, the allowance of the magiſtrates or juſtices to the baker, for baking being included. So that (for example) if the price of wheat in the market is 5 s. the buſhel and the magiſtrates allow 1 s. 6 d. the buſhel to the baker for baking, find 6 s. 6 d. and even therewith will be found the weights of the ſeveral loaves; but if the price in the market is 3 s. and the allowance 1 s. then the weight of the loaves will be found even with 4 s.

N. B. Part the ſecond, or the priced table, contains the price of the buſhel of wheat, Wincheſter meaſure from 2 s. 9 d. to 14 s. 6 d. the buſhel the allowance for baking being included; and alſo the prices of the peck, half peck, and quartern, wheaten and houſhold loaves, ſo that (for example) if the price of wheat in the market is 5 s. the buſhel, and the magiſtrates allow 1 s. 6 d. for baking, find 6 s. 6 d. and even therewith will be found the prices of the ſeveral loaves.

It was thought ſufficient to inſert the weight of a penny-loaf, as the weight of all other loaves may thereby be eaſily calculated.

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# TABLE No. I.

## OF BREAD MADE OF WHEAT.

| Price of the bushel of wheat & baking. | | Weight. The penny loaf. | | | | Prized Bread. Quartern loaf. | | | | Halfpeck loaf. | | | | Peck loaf. | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Wheaten | | Houſhold | | Wheaten | | Houſhold | | Wheaten | | Houſhold | | Wheaten | | Houſhold | |
| s. | d. | oz. | dr. | oz. | dr. | s. | d. | s. | d. | s. | d. | s. | d. | s. | d. | s. | d. |
| 2 | 9 | 22 | 4 | 29 | 4 | 0 | 3¼ | 0 | 2½ | 0 | 6½ | 0 | 4¾ | 1 | 0½ | 0 | 9½ |
| 3 | 0 | 20 | 4 | 27 | 1 | 0 | 3½ | 0 | 2¾ | 0 | 7 | 0 | 5¼ | 1 | 1¾ | 0 | 10¼ |
| 3 | 3 | 18 | 9 | 25 | 4 | 0 | 3¾ | 0 | 2¾ | 0 | 7½ | 0 | 5½ | 1 | 3 | 0 | 11 |
| 3 | 6 | 17 | 6 | 23 | 3 | 0 | 4 | 0 | 3 | 0 | 8 | 0 | 6 | 1 | 4 | 1 | 0 |
| 3 | 9 | 16 | 6 | 21 | 6 | 0 | 4¼ | 0 | 3¼ | 0 | 8½ | 0 | 6½ | 1 | 5 | 1 | 1 |
| 4 | 0 | 15 | 4 | 20 | 4 | 0 | 4½ | 0 | 3½ | 0 | 9 | 0 | 6¾ | 1 | 6¼ | 1 | 1¼ |
| 4 | 3 | 14 | 4 | 19 | 1 | 0 | 4¾ | 0 | 3¾ | 0 | 9¼ | 0 | 7¼ | 1 | 7½ | 1 | 2½ |
| 4 | 6 | 13 | 9 | 17 | 15 | 0 | 5 | 0 | 3¾ | 0 | 10¼ | 0 | 7¼ | 1 | 8½ | 1 | 3½ |
| 4 | 9 | 12 | 12 | 17 | 1 | 0 | 5½ | 0 | 4 | 0 | 10¼ | 0 | 8 | 1 | 9¼ | 1 | 4¼ |
| 5 | 0 | 12 | 1 | 16 | 6 | 0 | 5¾ | 0 | 4¼ | 0 | 11½ | 0 | 8½ | 1 | 11 | 1 | 5 |
| 5 | 3 | 11 | 9 | 15 | 7 | 0 | 6 | 0 | 4½ | 1 | 0 | 0 | 9 | 2 | 0 | 1 | 6 |
| 5 | 6 | 11 | 2 | 14 | 10 | 0 | 6¼ | 0 | 4¾ | 1 | 0½ | 0 | 9 | 7 | 1 | 1 | 7 |
| 5 | 9 | 10 | 8 | 14 | 4 | 0 | 6¾ | 0 | 5 | 1 | 1¼ | 0 | 9¾ | 2 | 2½ | 1 | 7½ |
| 6 | 0 | 10 | 2 | 13 | 9 | 0 | 7 | 0 | 5¼ | 1 | 1¼ | 0 | 10¼ | 2 | 3¼ | 1 | 8¼ |
| 6 | 3 | 9 | 11 | 13 | 1 | 0 | 7¼ | 0 | 5½ | 1 | 1¾ | 0 | 10¾ | 2 | 4¼ | 1 | 9¼ |
| 6 | 6 | 9 | 4 | 12 | 10 | 0 | 7½ | 0 | 5½ | 1 | 3 | 0 | 11 | 2 | 6 | 1 | 10 |
| 6 | 9 | 9 | 0 | 12 | 1 | 0 | 7¾ | 0 | 5¾ | 1 | 3½ | 0 | 11½ | 2 | 7 | 1 | 11 |
| 7 | 0 | 8 | 11 | 11 | 9 | 0 | 8 | 0 | 6 | 1 | 4 | 1 | 0 | 2 | 8 | 2 | 0 |
| 7 | 3 | 8 | 7 | 11 | 2 | 0 | 8¼ | 0 | 6¼ | 1 | 4 | 1 | 0 | 2 | 9 | 2 | 1 |
| 7 | 6 | 8 | 3 | 10 | 11 | 0 | 8 | 0 | 6½ | 1 | 5 | 1 | 1 | 2 | 10 | 2 | 2 |
| 7 | 9 | 7 | 14 | 10 | 6 | 0 | 8¼ | 0 | 6¾ | 1 | 5 | 1 | 1½ | 2 | 11¼ | 2 | 2¾ |
| 8 | 0 | 7 | 10 | 10 | 2 | 0 | 9¼ | 0 | 6¾ | 1 | 6¼ | 1 | 1¾ | 3 | 0½ | 2 | 3½ |
| 8 | 3 | 7 | 5 | 9 | 15 | 0 | 9½ | 0 | 7 | 1 | 7 | 1 | 2 | 3 | 2 | 2 | 4 |
| 8 | 6 | 7 | 2 | 9 | 9 | 0 | 9¾ | 0 | 7¼ | 1 | 7½ | 1 | 2½ | 3 | 3 | 2 | 5 |
| 8 | 9 | 6 | 15 | 9 | 4 | 0 | 10 | 0 | 7½ | 1 | 8 | 1 | 3 | 3 | 4 | 2 | 6 |
| 9 | 0 | 6 | 13 | 8 | 15 | 0 | 10¼ | 0 | 7¾ | 1 | 8½ | 1 | 3½ | 3 | 5 | 2 | 7 |
| 9 | 3 | 6 | 9 | 8 | 12 | 0 | 10¼ | 0 | 8 | 1 | 9 | 1 | 3¾ | 3 | 6¼ | 2 | 7¼ |
| 9 | 6 | 6 | 7 | 8 | 8 | 0 | 10¼ | 0 | 8¼ | 1 | 9¼ | 1 | 4¼ | 3 | 7½ | 2 | 8¼ |
| 9 | 9 | 6 | 4 | 8 | 5 | 0 | 11 | 0 | 8¼ | 1 | 10¼ | 1 | 4¾ | 3 | 8½ | 2 | 9½ |
| 10 | 0 | 6 | 1 | 8 | 2 | 0 | 11½ | 0 | 8¾ | 1 | 11 | 1 | 5 | 3 | 10 | 2 | 10 |
| 10 | 3 | 5 | 15 | 7 | 15 | 0 | 11¾ | 0 | 8¼ | 1 | 11½ | 1 | 5½ | 3 | 11 | 2 | 11 |
| 10 | 6 | 5 | 13 | 7 | 12 | 1 | 0 | 0 | 9 | 2 | 0 | 1 | 6 | 4 | 0 | 3 | 0 |
| 10 | 9 | 5 | 11 | 7 | 9 | 1 | 0¼ | 0 | 9¼ | 2 | 0½ | 1 | 6 | 4 | 1 | 3 | 1 |
| 11 | 0 | 5 | 9 | 7 | 5 | 1 | 0¼ | 0 | 9 | 2 | 1 | 1 | 7 | 4 | 2 | 3 | 2 |
| 11 | 3 | 5 | 6 | 7 | 3 | 1 | 0¾ | 0 | 9¾ | 2 | 1 | 1 | 7 | 4 | 3 | 3 | 2¼ |
| 11 | 6 | 5 | 3 | 7 | 1 | 1 | 1 | 0 | 10 | 2 | 2 | 1 | 7 | 4 | 4 | 3 | 3½ |

Price

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| Price of the bushel of wheat & baking. | | Weight. The Penny loaf. | | Prized Bread. Quartern loaf. | | Half peck. | | Peck loaf. | |
|---|---|---|---|---|---|---|---|---|---|
| | | Wheaten | Houſhold | Wheaten | Houſhold | Wheaten | Houſhold | Wheaten | Houſhold |
| s. | d. | oz. dr | oz. dr. | s. d. | s. d. | s. d | s. d. | s. d. | s. d. |
| 11 | 9 | 5 2 | 6 15 | 1 1½ | 0 10 | 2 3 | 1 8 | 4 5 | 3 4 |
| 12 | 0 | 5 1 | 6 13 | 1 1¾ | 0 10½ | 2 3½ | 1 8½ | 4 7 | 3 5 |
| 12 | 3 | 4 15 | 6 10 | 1 2 | 0 10½ | 2 4 | 1 9 | 4 8 | 3 6 |
| 12 | 6 | 4 14 | 6 8 | 1 2¼ | 0 10¾ | 2 4½ | 1 9½ | 4 9 | 3 7 |
| 12 | 9 | 4 13 | 6 5 | 1 2½ | 0 11 | 2 5 | 1 10 | 4 10 | 3 8 |
| 13 | 0 | 4 11 | 6 4 | 1 3 | 0 11¼ | 2 5¼ | 1 10¼ | 4 11¼ | 3 8½ |
| 13 | 3 | 4 9 | 6 3 | 1 3¼ | 0 11½ | 2 6½ | 1 10½ | 5 1 | 3 9 |
| 13 | 6 | 4 8 | 6 1 | 1 3½ | 0 11¾ | 2 7 | 1 11 | 5 2 | 3 10 |
| 13 | 9 | 4 7 | 5 15 | 1 3¾ | 0 11¾ | 2 7½ | 1 11½ | 5 3 | 3 11 |
| 14 | 0 | 4 5 | 5 13 | 1 4 | 1 9 | 2 8 | 2 0 | 5 4 | 4 0 |
| 14 | 3 | 4 4 | 5 11 | 1 4½ | 1 0¼ | 2 8½ | 2 0½ | 5 5 | 4 1 |
| 14 | 6 | 4 3 | 5 9 | 1 5 | 1 0½ | 2 9 | 2 1 | 5 6 | 4 2 |

*Note*, The wheaten loaves are three-fourths of the weight of the houſehold loaves; and if the magiſtrates or juſtices ſhall think fit to allow of any white loaves of the price of one penny or two pence, they are to weigh at all times three-fourths of the weight of the wheaten loaves of the ſame price.

Note, The prices of the houſehold loaves are always three-fourths of the prices of the wheaten loaves; and where it ſhall be thought proper to allow of half quartern loaves, the prices of ſuch loaves (if ſold ſingly) are to be half a farthing higher than is allowed by this table, when it ſhall ſo happen that the farthing is ſplit.

And magiſtrates and juſtices within their reſpective juriſdictions being to ſet the aſſize and fix the price of the ſeveral loaves of bread having reſpect to the price which the grain, meal or flour ſhall bear in the markets. But no proviſion being made, how they ſhould know what price the reſpective ſorts of meal and flour ſhould be eſteemed to bear in proportion to the price of wheat they are therefore to take notice that the peck loaf of each ſort of bread is to weigh, when well baken, 17 lb. 6 oz. averdupois, and the reſt in proportion; and every ſack of meal or flour is to weigh 2 cwt. 2 qrs. net; from every ſack of meal or flour there ought to be produced, on the average, 20 ſuch peck loaves of bread; and, by obſerving the ſaid rule, magiſtrates and juſtices may at all times know if the baker hath more or leſs than the allowance they intend to give him.

TABLE

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# TABLE II.

## OF BREAD MADE OF SEVERAL GRAINS,

The first column contains the prices of the bushel of Grain, baking included: which prices are adapted so as to serve either for the Winchester bushel of rye, of barley, of oats, of beans, of maslin *alias* miscellany, consisting of two-thirds wheat and one-third rye; the price of either of which bushels in the market being known, the magistrates are to add the intended allowance thereto; the amount of which being found in column No. I. the weight which the several loaves ought to be of, will be found under column No. II. and the price of the respective peck loaves (which are to weigh 17 lb. 6 oz. each) under No. I.

Note, Where bread is allowed at any time to be made for sale of pease only, the assize and price thereof are to be set and fixed from the bean columns; and where bread is ordered to be made for sale of a coarse sort of maslin or miscellany grain, consisting of one-third rye, one-third barley, and one-third either pease or beans, the assize and price thereof are to be set and fixed from the barley columns.

Note also, That this table is framed for bread to be made of the whole produce of the said several grains, except the bran or hull thereof only.

| No. I. | No. 2. | | | | | | | | No. 3. | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Price of the bushel and baking. | Weight of the penny loaf. | | | | | | | | Price of the peck loaf. | | | | | | | |
| | Rye. | | Barley. | | Oats. | | Beans. | | Maslin. | | Rye. | | Barley. | | Oats. | | Beans. | | Maslin. | |
| s. d. | oz. | dr. | oz. | dr. | oz. | dr. | oz. | dr. | oz. | dr. | s. | d. | s. | d. | s. | d. | s. | d. | s. | d. |
| 1 0 | 52 | 8 | 67 | 8 | 31 | 4 | 83 | 12 | 70 | 0 | 0 | 4½ | 0 | 4½ | 0 | 9 | 0 | 3½ | 0 | 4 |
| 1 3 | 50 | 0 | 54 | 0 | 25 | 0 | 67 | 0 | 56 | 0 | 0 | 5½ | 0 | 5½ | 0 | 11 | 0 | 4 | 0 | 5 |
| 1 6 | 41 | 10 | 45 | 0 | 24 | 14 | 55 | 12 | 46 | 10 | 0 | 6½ | 0 | 6½ | 1 | 1½ | 0 | 5 | 0 | 6 |
| 1 9 | 35 | 11 | 38 | 9 | 17 | 14 | 47 | 14 | 40 | 0 | 0 | 7¼ | 0 | 7¼ | 1 | 3¼ | 0 | 5¾ | 0 | 7 |
| 2 0 | 31 | 4 | 33 | 12 | 15 | 10 | 41 | 14 | 35 | 0 | 0 | 8¾ | 0 | 8¾ | 1 | 5¼ | 0 | 6¾ | 0 | 8 |
| 2 3 | 27 | 13 | 30 | 0 | 13 | 14 | 37 | 4 | 31 | 2 | 0 | 10 | 0 | 9¼ | 1 | 7¼ | 0 | 7½ | 9 | 0 |
| 2 6 | 25 | 0 | 27 | 0 | 12 | 8 | 33 | 8 | 28 | 0 | 0 | 11 | 0 | 10½ | 1 | 10 | 0 | 8¼ | 0 | 10 |
| 2 9 | 22 | 11 | 24 | 9 | 11 | 6 | 30 | 7 | 25 | 6 | 1 | 0 | 0 | 11½ | 2 | 1 | 0 | 9¼ | 0 | 11 |
| 3 0 | 20 | 13 | 22 | 8 | 10 | 7 | 27 | 14 | 23 | 5 | 1 | 1 | 1 | 0½ | 2 | 2½ | 0 | 10 | 1 | 0 |
| 3 3 | 19 | 4 | 20 | 12 | 9 | 10 | 25 | 12 | 21 | 8 | 1 | 2¼ | 1 | 1½ | 2 | 4½ | 0 | 10¼ | 1 | 1 |
| 3 6 | 17 | 13 | 19 | 4 | 8 | 15 | 23 | 15 | 20 | 0 | 1 | 3¼ | 1 | 2¼ | 2 | 6¼ | 0 | 11¼ | 1 | 2 |
| 3 9 | 16 | 11 | 18 | 0 | 8 | 5 | 22 | 5 | 18 | 10 | 1 | 4¼ | 1 | 3¼ | 2 | 8¼ | 1 | 0¾ | 1 | 3 |
| 4 0 | 15 | 10 | 16 | 14 | 7 | 13 | 20 | 15 | 17 | 8 | 1 | 5¾ | 1 | 4¾ | 2 | 11¼ | 1 | 1¼ | 1 | 4 |
| 4 3 | 14 | 12 | 15 | 14 | 7 | 6 | 19 | 11 | 16 | 8 | 1 | 6¾ | 1 | 5¾ | 3 | 0¾ | 1 | 2¼ | 1 | 5 |
| 4 6 | 13 | 14 | 15 | 0 | 6 | 15 | 18 | 10 | 15 | 9 | 1 | 8 | 1 | 7 | 3 | 2¾ | 1 | 3 | 1 | 6 |
| 4 9 | 13 | 2 | 14 | 4 | 6 | 9 | 17 | 11 | 14 | 12 | 1 | 8¾ | 1 | 8 | 3 | 5¼ | 1 | 3¾ | 1 | 7 |
| 5 0 | 12 | 8 | 13 | 8 | 6 | 4 | 16 | 12 | 14 | 0 | 1 | 10 | 1 | 9 | 3 | 8 | 1 | 4¼ | 1 | 8 |
| 5 3 | 11 | 14 | 12 | 14 | 5 | 15 | 15 | 15 | 13 | 5 | 1 | 11¼ | 1 | 10 | 3 | 11 | 1 | 5¼ | 1 | 9 |
| 5 6 | 11 | 5 | 12 | 4 | 5 | 11 | 15 | 3 | 12 | 11 | 2 | 0¼ | 1 | 11 | 4 | 1 | 1 | 7¾ | 1 | 10 |
| 5 9 | 10 | 13 | 11 | 12 | 5 | 7 | 14 | 9 | 12 | 2 | 2 | 1¼ | 2 | 0 | 4 | 3 | 1 | 7¾ | 1 | 11 |
| 6 0 | 10 | 6 | 11 | 4 | 5 | 3 | 13 | 15 | 11 | 10 | 2 | 2¾ | 2 | 1 | 4 | 5 | 1 | 8 | 2 | 0 |
| 6 3 | 10 | 0 | 10 | 13 | 5 | 0 | 13 | 6 | 11 | 3 | 2 | 3¾ | 2 | 2 | 4 | 7¼ | 1 | 8¼ | 2 | 1 |
| 6 6 | 9 | 10 | 10 | 6 | 4 | 13 | 12 | 14 | 10 | 12 | 2 | 5 | 2 | 3 | 4 | 9 | 1 | 9¼ | 2 | 2 |
| 6 9 | 9 | 4 | 10 | 0 | 4 | 10 | 12 | 6 | 10 | 6 | 2 | 6 | 2 | 4 | 5 | 0 | 1 | 10¼ | 2 | 3 |
| 7 0 | 8 | 15 | 9 | 10 | 4 | 7 | 11 | 15 | 10 | 0 | 2 | 7 | 2 | 5 | 5 | 1½ | 1 | 11¼ | 2 | 4 |

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† *Sect.* 9. And it is farther enacted par. 5. "That every assize shall be set in averdupoize weight, of sixteen ounces to the pound, and not troy weight, and in the several proportions directed by the tables, or as near as may be; and that the said tables shall extend as well to bread made with wheat mixed with other grain, as to bread made with other grains than wheat, publickly licensed to be made into bread; and that the assize of all such mixed bread shall be set and ascertained as near as may be, to the said tables."

Assize to be set in averdupoize weight, directed by the tables.

† *Sect.* 10. And it is further enacted, par. 6. "That the prices which the several kinds of grain, meal, and flour, shall, *bona fide*, sell for in *London*, in open and publick market, shall be certified on oath, on some certain day in every week, as the mayor and aldermen shall appoint, by the meal weighers of *London*, or such persons as the said court shall direct; and shall also on some certain day in every week, to be appointed by the said court, be entered by such persons in writing, and kept at the town clerk's office in the said city: And the next day after every such price shall be so certified, the assize and weight of all sorts of bread to be sold within the limits of their jurisdiction, and the price to be paid for the same, shall be set by the said court of mayor and alderman, if the said court shall then sit, and if not, then by the mayor of the said city; and that the assize so set in *London* shall take place as the said court shall order, and be in force for *London* and the liberties thereof, and the weekly bills of mortality (the city of *Westminster* and liberties thereof, the borough of *Southwark*, and weekly bills of mortality in the county of *Surry* excepted) until another assize in *London* shall be set; and that the assize so set, shall, with all convenient speed be made public in such manner as the said court of mayor and aldermen shall direct: but before any advance or reduction shall in any week be made by the said court or the mayor in the price of bread, the meal weighers or other persons shall leave in writing at the common hall of the company of Bakers in *London*, a copy of every return of the price of grain, meal, and flour, which they shall make, and enter in such book as aforesaid, some time of the same day on which such meal weighers or other persons shall make every such return and entry; to the intent that the said company of Bakers may the morning of the next day after every such return and entry made, and before any assize shall be set, have an opportunity to offer to the mayor and aldermen, and if such court shall not then sit, to the mayor, all such objections as the said company of Bakers shall think fit against any advance or reduction being that day made."

Return to be made weekly to the court of aldermen of London, of the prices which the grain fell for to be entered in a book in the town clerk's office; the assize to continue till a new assize be set.

The meal-weighers are to leave at the Bakers Hall a copy of the returns.

† *Sect.*

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The court and magiſtrates, &c. in other cities, towns, and boroughs, may, cauſe returns to be made; the prices to be entered and certified; the aſſize to be ſet within 2 days after; and to continue (not exceeding 7 days.)

† *Sect.* 11. And it is further enacted, par. 7. "That the court of mayor and aldermen of every other city, and where there ſhall be no ſuch court, or when the ſame ſhall not ſit, the chief magiſtrate of every other city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magiſtrate, or two juſtices where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrates; ſhall ſeverally and reſpectively, cauſe the reſpective prices which the ſeveral ſorts of grain, meal, and flour, proper to make bread allowed to be made in every ſuch other city, town corporate, borough, town, or place, ſhall, *bona fide*, ſell for, in the reſpective publick markets in or near to every ſuch other place, to be certified upon oath, unto ſuch magiſtrates as aforeſaid, in ſuch manner in every week, as any ſuch reſpective court or magiſtrates ſhall appoint; and the price ſo certified ſhall be entered by the perſon who ſhall certify the ſame in ſome book, kept by him for that purpoſe; and within two days after the aſſize and weight of bread, ſhall be be ſet by the perſons and in the juriſdictions as aforeſaid reſpectively, the ſame ſhall take place on ſuch day in every week, and be in force for ſuch time, not exceeding ſeven days from the ſetting of every ſuch aſſize, and ſhall be made public in ſuch manner, as ſuch magiſtrates as aforeſaid ſhall within their reſpective juriſdictions direct."

Two or more juſtices may ſet an aſſize and cauſe returns to be made.

† *Sect.* 12. And be it further enacted, par. 8. "That if any two juſtices of counties ſhall ſet an aſſize, it ſhall be lawful for them to cauſe the price which grain, meal, and flour, fit to make bread, ſhall, *bona fide*, ſell for in the reſpective publick corn markets, in or near the place or places reſpectively, to be certified on oath (*a*) to them at their reſpective places of abode, in any ſuch county, on ſuch day in every week as they ſhall appoint, by the reſpective clerks of the market, or ſuch other perſon as any ſuch two juſtices ſhall appoint; and that the price of grain, meal, and flour, ſo returned, ſhall be entered by the perſon who ſhall return the ſame, in ſome book kept by him for that purpoſe; and within two days after the price and aſſize of bread may be by any two juſtices ſet for any time not exceeding fourteen days from every ſetting thereof; and the aſſize which ſhall be ſo ſet, ſhall commence and be in force at ſuch time, and be made publick (*b*) in ſuch place or places, for which the ſame ſhall be ſo ſet, as the ſaid juſtices ſhall direct."

(*a*) For the form of the certificate which muſt be ſigned with the name of the perſon who returns it, vide the act, ſect. 11. And 1 Burn 243.

(*b*) For the form of the publication, vide the act, ſect. 12. And 1 Burn 244.

Bakers may ſee the returns that they may object to the aſſize.

† *Sect.* 13. And be it further enacted, par. 9. "That any baker ſhall have liberty, the day after every return ſhall be made, and entered in the book, to ſee the entry without

"paying

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" paying any thing; to the intent that he may have an op-
" portunity on the ſaid next day to offer to any ſuch court,
" mayor, bailiffs, aldermen, or other chief magiſtrate or ma-
" giſtrates, or juſtices, as aforeſaid, before any ſuch aſſize
" ſhall be ſet, ſuch objections as any ſuch baker can rea-
" ſonably make againſt any advance or reduction being
" made."

Not liable to fees.

† *Sect.* 14. And be it further enacted, par. 9. " That no
" maker of bread for ſale ſhall pay any fee or reward for any
" aſſize of bread being ſet, altered, or publiſhed."

Half peck and quartern loaves to weigh, and be ſold, in due proportion to the peck loaf.

† *Sect.* 15. And it is further enacted, par. 11. " That the
" half peck and quarter of a peck loaves of wheaten and
" houſehold bread are to weigh in proportion to the weight
" a peck loaf of wheaten or houſehold bread ought to weigh,
" and are to be ſold according to the price a peck loaf of
" wheaten or houſehold bread reſpectively is to be ſold; and
" whenever any bread ſhall be ordered to be made with the
" meal or flour of rye, barley, oats, peas, or beans, either
" alone, or mixed, the aſſize of ſuch bread ſhall be made pub-
" lick in ſuch manner as the ſaid magiſtrate, who ſhall ſet
" ſuch aſſize, ſhall direct."

Where bread of a certain denomination and value ſhall be ordered.

† *Sect.* 16. And it is alſo enacted, par. 13. " That in
" places where any ſixpenny, twelvepenny, and eighteenpen-
" ny loaves ſhall be allowed, no peck, half peck, or quarter
" of a peck loaves ſhall be permitted at the ſame time to be
" there made or ſold, upon pain of any ſum not exceeding
" forty, nor leſs than twenty ſhillings."

Seſſions may fix the juriſdiction of any place within a certain diſtrict.

† *Sect.* 17. And it is further enacted, par. 14. " That if
" the juſtices of any county or diviſion ſhall, at ſeſſions, think
" fit to fix, that any hundred, or other place in ſuch county
" or diviſion, ought to be conſidered as in any one particular
" hundred, riding, or diviſion, of ſuch county, riding, or di-
" viſion, in order that the aſſize of bread for ſuch particular
" hundred or place may extend to or comprize ſuch other
" hundred or place it ſhall be lawful for them ſo to do; but
" by ſo doing, no juſtice ſhall be excluded from acting as a
" juſtice in any hundred, riding, or diviſion of any ſuch coun-
" ty in which any ſuch particular towns, diſtricts, or places
" ſhall lie, or the aſſize for them ſhall be ſet."

Entry to be made by every clerk of the market, &c.

† *Sect.* 18. And it is likewiſe enacted, par. 15. " That an
" entry ſhall be made by every clerk of the market, or other
" perſon, of every return, and of the rate at which the price,
" aſſize, and weight of bread ſhall be ſet or fixed within the
" juriſdiction

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" juriſdiction of every ſuch clerk of the market, or other " perſons, which any inhabitant ſhall inſpect without fee."

No alteration unleſs price of grain, ſhall vary 3 d. in the buſhel from the laſt return.

† *Sect.* 19. And be it alſo enacted, par. 16. " That after " an aſſize ſhall be ſet, no alteration ſhall be made therein in " any ſubſequent week, either to riſe the ſame higher, or to " ſink the ſame lower, unleſs the price of wheat, or other " grain, ſhall be returned as having roſe three pence each bu- " ſhel, more than the laſt return made, or having fallen three " pence each buſhel lower than the ſaid laſt return; no pro- " viſion being made by the ſaid aſſize tables for altering any " aſſize upon ſuch an event."

Forfeiture of any meal weigher, clerk, &c. who ſhall neglect his duty, and any peace officer, who ſhall diſobey.

† *Sect.* 20. And it is likewiſe enacted, par. 17. " That " if any perſon appointed to certify or return the price of " grain, meal, and flour, ſhall neglect any matters required to " be done by him, or ſhall deſignedly make any falſe certifi- " cate or return; or if any peace-officer ſhall neglect to obey " any warrant in writing delivered to him under the hand and " ſeal of any magiſtrate, or to do any other act requiſite to " be done by him, ſhall forfeit not exceeding five pounds, nor " leſs than twenty ſhillings."

Penalty for refuſing to diſcloſe the true prices of grain, meal, and flour, or for giving in a falſe or colluſive price.

† *Sect.* 21. And it is further enacted, par. 18. " That in " caſe any dealers in corn, grain, meal, or flour, on reaſonable " requeſt by the meal weighers of London, or by the clerks of " the markets, or other perſons, appointed to give in and cer- " tify the prices of grain, meal, and flour, ſhall refuſe to make " known the true real prices the ſeveral ſorts of grain, meal, " and flour, ſhall be *bona fide* bought at, or ſold, by or for " him, her, or them reſpectively, at any corn market, with- " in the juriſdiction of any ſuch perſons aforeſaid, or ſhall " knowingly give in any falſe or untrue price of any grain, " meal, or flour, bought or ſold, or agreed ſo to be, or any " price which hath been made by any deceitful means, on " being convicted by the oath of one witneſs, or ſolemn af- " firmation, or on confeſſion, ſhall forfeit not exceeding ten " pounds, nor leſs than forty ſhillings."

What ſhall be done where any falſe return ſhall be ſuſpected.

† *Sect.* 22. And it is further enacted, par. 19. " That if " any ſuch court, magiſtrate, or juſtices, as aforeſaid, who " ſhall have ordered any return, ſhall, within three days af- " ter ſuch return made, ſuſpect that the ſame was not truly " and *bona fide* made, it ſhall be lawful to ſummon before them " reſpectively, any perſon who ſhall have bought or ſold, or " ſhall be ſuſpected to have bought or ſold, or agreed to buy " or ſell, any grain, meal, or flour, or who ſhall be thought " to be likely to give any information concerning the pre- " miſes, and to examine them reſpectively upon their ſeveral " oaths, touching the rates and prices the ſeveral ſorts of " grain,

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" grain, meal, and flour, or any of them, were there really " and *bona fide* bought at, or ſold for, or agreed ſo to be by " him, her, or them, reſpectively, at any time within ſeven " days preceding the ſummoning: and if any perſon ſo ſum- " moned ſhall neglect to appear, (and proof be made on oath " of ſuch ſummons having been duly ſerved) or if any perſon " ſo ſummoned ſhall appear, and neglect or refuſe to anſwer " lawful queſtions, on being convicted by the oath of one " witneſs, or confeſſion, before any ſuch court, magiſtrate, " or juſtices, ſhall forfeit not exceeding ten pounds, and not " leſs than forty ſhillings: and if any perſon, ſo examined on " oath, ſhall forſwear himſelf, ſuch perſon ſhall be liable to " be proſecuted as for perjury, by indictment or information, " provided that the party ſo ſummoned be not obliged to tra- " vel above five miles from the place of his abode."

Party not obliged to travel above 5 miles.

† *Sect.* 23. And it is further enacted, par. 20. " When- " ever any court, as aforeſaid, magiſtrate, or juſtices, ſhall " order any bread to be made with the meal of any other " grain than wheat, or to be mixed with wheat, or to be made " with the meal of any other ſort of grain, either ſeparate or " mixed together, all perſons ſhall make bread for ſale with " ſuch mixed meal, or of ſuch weight and goodneſs, and ſhall " ſell the ſame at ſuch prices, as ſuch court, magiſtrates, or " juſtices, ſhall direct, upon pain of any ſum not exceeding " five pounds, nor leſs than forty ſhillings."

Bakers to make the bread of ſuch weight goodneſs, and price, as ſhall be directed.

† *Sect.* 24. And it is further enacted, par. 21. " That the " ſeveral ſorts of bread ſhall be well made, according to the " goodneſs of the ſeveral ſorts of meal, whereof the ſame ought " to be made, and that no allum, or any mixture or ingredi- " ent whatſoever (except only the genuine meal, common " ſalt, pure water, eggs, milk, yeaſt, and barm, or ſuch leaven " as ſhall be allowed by the court, or perſon who ſhall have " ſet an aſſize of bread where any ſuch leaven ſhall be uſed, " and where no ſuch aſſize ſhall have been ſet, then ſuch " leaven as any magiſtrate or juſtice ſhall allow, ſhall be uſed " in making dough, or any bread to be ſold, upon pain that " every perſon (other than a ſervant or journeyman) who ſhall " knowingly offend, and be convicted by confeſſion, or by " oath of one witneſs, before any ſuch magiſtrate or juſtice, " ſhall forfeit not exceeding ten pounds, and not leſs than " forty ſhillings, or ſhall be committed to the houſe of cor- " rection, or ſome priſon of the county or place where the of- " fence ſhall be, to hard labour, not exceeding one calendar " month, nor leſs than ten days. And if any ſervant ſhall of- " fend, he ſhall forfeit, not exceeding five pounds, and not leſs " than twenty ſhillings, or be apprehended and committed as " aforeſaid; and it ſhall be lawful for the magiſtrate or juſtice, " before

No adulteration or mixture, except the genuine meal or flour, ſalt, water, eggs, milk, yeaſt, and barm, or ſuch leaven as ſhall be occaſionally allowed.

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" before whom any ſuch offender ſhall be convicted, out of the " money forfeited, to cauſe the offender's name, place of " abode, and offence, to be publiſhed in ſome newſpaper, " which ſhall be printed or publiſhed in or near the county, " city, or place, where any ſuch offence ſhall have been " committed."

The penalty of adulterating corn, meal, or flour.

† *Sect.* 25. And it is further enacted, par. 22. " That no " perſon ſhall put into any corn, meal, or flour, ground, " dreſſed, bolted, or manufactured for ſale, any mixture or " thing whatſoever, or ſhall knowingly ſell, offer, or expoſe " to or for ſale, any meal of one ſort of grain as or for the " meal of any other ſort of grain, or any thing as or for, or " mixed with, the meal of any grain, which ſhall not be the " real and genuine meal of the grain the ſame ſhall import to " be, upon pain of forfeiting any ſum not exceeding five " pounds, nor leſs than forty ſhillings."

Penalty where bread ſhall be of a different mixture of corn than what it importeth to be of, or is allowed.

† *Sect.* 26. And it is further enacted, par. 23. " That no " perſon ſhall put into any bread made for ſale, any mixture " of meal of any other ſort of grain than of the grain the " ſame ſhall import to be, and allowed to be made of, or any " larger or other proportion of any other or different ſort of " grain, or the meal thereof, than what ſhall be allowed, or " any mixture or thing in lieu of flour, which ſhall not real- " ly be the genuine flour the ſame ſhall import and ought to " be, upon pain of forfeiting not exceeding five pounds, nor " leſs than twenty ſhillings."

Penalty for making bread under weight, &c.

† *Sect.* 27. And it is further enacted, par. 24. " That if " any perſon ſhall make, ſend out, ſell, or expoſe to or for " ſale, any bread deficient in weight, he ſhall forfeit not ex- " ceeding five ſhillings, nor leſs than one ſhilling, for every " ounce deficient; and for every loaf found wanting leſs than " an ounce not exceeding two ſhillings and ſixpence, nor leſs " than ſixpence, ſo as ſuch bread which ſhall be complained " of for wanting weight in any city, town-corporate, bo- " rough, liberty, or franchiſe having juriſdiction thereof, or " within the bills of mortality ſhall be brought before ſome " magiſtrate, and weighed, within twenty-four hours after, " and ſo as ſuch bread which ſhall be ſo complained of as " in any hundred, riding, diviſion, liberty, rape, wapen- " take, or place, ſhall be brought before ſome juſtice of ſuch " place, and weighed within three days after, unleſs ſuch de- " ficiency wholly aroſe from ſome accident, or was occaſioned " by ſome contrivance or confederacy."

All bread to be fairly marked.

† *Sect.* 28. And it is further enacted, par. 25. " That " every baker ſhall cauſe to be fairly marked on every loaf of " wheaten bread a large Roman W. and upon every loaf of " houſehold or brown bread a large Roman H. ſo as the ſame

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" may, on the view thereof, be aſcertained under what deno-
" mination of bread every ſuch loaf was made, (except ſuch
" loaves which ſhall be raiſed by the deſire of any perſon who
" ſhall order the ſame, on pain of forfeiting not exceeding
" twenty, nor leſs than five ſhillings."

† *Sect.* 29. And it is further enacted, par. 26. " That no
" perſon ſhall take for any bread a higher price than ſhall be
" aſcertained by the court, magiſtrate, or juſtices, autho-
" riſed to ſet the price and aſſize, nor refuſe to ſell any to
" any perſon who ſhall tender ready money for the ſame, at
" the price ſuch bread, by the aſſize, ſhall be fixed at, when
" he ſhall have any ſuch bread in his houſe or poſſeſſion, to
" be ſold, more than ſhall be requiſite for the immediate
" neceſſary uſe of his own family or cuſtomers; and it
" ſhall be incumbent on ſuch baker to prove the contrary,
" upon pain of forfeiting not exceeding forty, nor leſs than
" ten ſhillings."

Bakers taking a higher price or refuſing to ſell.

† *Sect.* 30. And it is hereby likewiſe enacted, par. 26.
" That if any perſon ſhall offer to ſale any bread of an infe-
" rior quality to wheaten bread, at a higher price than houſe-
" hold bread ſhall be ſet at by the aſſize, he ſhall forfeit, by
" confeſſion, or the oath of one witneſs, twenty ſhillings."

Bread inferior to wheaten not to be higher than houſehold.

† *Sect.* 31. It is further enacted by par. 27. and by 32 Geo. 2.
c. 18. ſ. 2. " That any magiſtrate or juſtice, and alſo any
" peace officer, authoriſed by warrant of any ſuch magiſtrate
" in the day-time, may enter into any houſe, ſhop, ſtall, bake-
" houſe, warehouſe, or out-houſe, of or belonging to any ba-
" ker, or ſeller of bread, to ſearch for, view, weigh, and
" try, all or any the bread which ſhall be there found: and
" if any bread, on any ſuch ſearch, ſhall be found to be
" wanting, either in the goodneſs of the ſtuff whereof the
" ſame ſhall be made, or to be deficient in the due baking
" or working thereof, or ſhall be wanting in the due weight,
" or ſhall not be truly marked according to the directions of
" this act, or ſhall be of any other ſort of bread than ſhall be al-
" lowed to be made by virtue of this act; any ſuch magi-
" ſtrate or peace officer may ſeize the ſame, and diſpoſe there-
" of as he ſhall think fit."

The houſes, ſhops, &c. of bakers may be ſearched, and the bread weighed.

† *Sect.* 32. And it is further enacted, par. 28. " That if
" information ſhall be given on oath to any magiſtrate or
" juſtice that there is cauſe to ſuſpect that any miller who
" grinds any grain for reward, or any perſon who doth dreſs,
" bolt, or in any wiſe manufacture any meal or flour for ſale,
" or any maker of bread for ſale, doth mix up with, or put
" into, any meal or flour ground or manufactured for ſale, any
" mixture,

Where any miller, mealman, or baker, ſhall be ſuſpected of adulterating; the magiſtrate, &c. upon information on oath, may enter the premiſes him-

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ſelf, and ſearch, or may grant a ſearch warrant to ſome peace officer; and ſuch meal and flour as ſhall be deemed adulterated, may be ſeized.

" mixture, ingredient, or thing whatſoever, not the genuine " produce of the grain ſuch meal or flour, ſhall import and " ought to be, or whereby the purity of any meal or flour, " in the poſſeſſion of any ſuch miller, mealman, or baker, is " or ſhall be in anywiſe adulterated; then ſuch magiſtrate " or juſtice, and alſo any peace officer, authoriſed by warrant " in the day-time, on information may enter into any houſe, " mill, ſhop, bakehouſe, ſtall, bolting houſe, paſtry, ware- " houſe, or out-houſe, of or belonging to any ſuch miller, " mealman, or baker, and to ſearch and examine; and if on " any ſuch ſearch it ſhall appear that any offence hath been " committed, contrary to this act; then any magiſtrate, ju- " ſtice, or officer authoriſed as aforeſaid reſpectively, may ſeize " and take any meal or flour which ſhall be deemed, on any " ſuch ſearch, to have been adulterated, and all mixtures and " ingredients which ſhall be found and deemed to have been " uſed, or intended to be uſed, in or for any ſuch adultera- " tion; and ſuch thereof as ſhall be ſeized by any peace offi- " cer or officers authoriſed as aforeſaid, ſhall be carried to " ſome magiſtrate or juſtice; and if any magiſtrate or juſtice, " who ſhall make any ſeizure in purſuance of this act, or to " whom any thing ſeized under the authority of this act ſhall " be brought, ſhall adjudge that any mixture or ingredients, " not the genuine produce of the grain which ſuch meal or " flour ſo ſeized, ſhall import and ought to be, ſhall have " been put into any ſuch meal or flour, or that the purity " of any ſuch meal or flour ſo ſeized, was adulterated " by any mixture or ingredient put therein; then, every ſuch " magiſtrate or juſtice, is hereby required to diſpoſe of the " ſame as he ſhall think proper."

And the miller, mealman, or baker, forfeit, not exceeding ten pounds, nor leſs than 40s.

† *Sect.* 33. And it is further enacted, par. 29. " That " every miller, mealman, baker, or ſeller of bread as afore- " ſaid, in whoſe houſe, mill, ſhop, bake-houſe, ſtall, bolting- " houſe, paſtry, warehouſe, out-houſe, or poſſeſſion, any mix- " ture or ingredient ſhall be found, which ſhall be adjudged " by any magiſtrate or juſtice to have been lodged there, *with* " *an intent* to have adulterated the purity of meal, flour, or " bread, ſhall, on being convicted by confeſſion, or the oath " of one witneſs, *forfeit* not exceeding ten pounds, nor leſs " than forty ſhillings;—unleſs that ſuch mixture or ingredients " was or were not brought or lodged with any deſign or intent " to have been put into any meal or flour, or to have adulte- " rated therewith the purity of any meal or flour, but that " the ſame was in the place for ſome other lawful purpoſe."

Exception.

" And the magiſtrate out of the money forfeited, may cauſe " the offender's name, place of abode, and offence, to be " publiſhed, in ſome news paper in or near the county, city

" or

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" or place, where any ſuch offence ſhall have been commit-
" ted."

† *Sect.* 34. And it is further enacted, par. 30. " That if
" any perſon ſhall wilfully obſtruct any ſearch or ſeizure, or
" ſhall oppoſe any ſuch ſearch being made, or the carrying
" away any ſuch ingredients as aforeſaid, or any bread which
" ſhall be ſeized, as not being made purſuant to this act, he
" ſhall forfeit not exceeding five pounds, nor leſs than twenty
" ſhillings."

Obſtructing any ſearch or ſeizure.

† *Sect.* 35. Provided always, par. 31. " That no miller,
" mealman, or baker, ſhall act as a magiſtrate, or juſtice of
" the peace, under this act, on pain of fifty pounds to any
" perſon who will ſue for the ſame, by action of debt, *&c.*
" at Weſtminſter, or by ſummary complaint before the court
" of Seſſion in Scotland."

No miller, mealman, or baker, to act as a magiſtrate.

† *Sect.* 36. Provided alſo, par. 32. " That if any baker ſhall
" make complaint to any magiſtrate by the oath of one wit-
" neſs that any offence ſhall have been occaſioned through
" the wilful neglect of any ſervant, then ſuch magiſtrate may
" iſſue his warrant for bringing ſuch ſervant before any ſuch
" magiſtrate, or any magiſtrate or juſtice of the county or
" place where the offender can be found, and examine into
" the complaint; and, on proof thereof upon oath, by any
" order under his hand, may adjudge what ſum ſhall be paid
" by ſuch ſervant to his maſter or miſtreſs, by way of recom-
" pence for the money he or ſhe ſhall have paid by reaſon
" of the wilful neglect of any ſuch ſervant; and if any ſuch
" ſervant ſhall neglect on his conviction to make immediate
" payment, he ſhall be committed to the houſe of correction, or
" ſome other priſon of the county or place in which any ſuch
" ſervant ſhall be apprehended or convicted, to be there kept
" to hard labour not exceeding one calendar month, unleſs
" payment ſhall be made before the expiration of the ſaid
" term."

Where the penalty was occaſioned by the journeyman or ſervant, a recompence to be paid to the maſter.

† *Sect.* 37. And it is further enacted, by par. 33. " That
" the mayor of London, or any alderman within the liberties
" thereof, and any other juſtice, or any one of them, within
" their reſpective juriſdictions, may hear and determine, in a
" ſummary way, all offences againſt this act, and ſummon
" any offender; and in caſe the party ſhall not appear or
" offer ſome reaſonable excuſe for his default, then upon oath
" by one witneſs of any offence committed contrary to this
" act, any ſuch magiſtrate ſhall iſſue his warrant for appre-
" hending the offender; and upon the appearance, or in caſe
" he ſhall not appear, on notice being left at his uſual place
" of abode, or if he cannot be apprehended, then ſuch ma-

Offences heard and determined in a ſummary way, and offenders may be ſummoned.

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" giſtrate is authoriſed to proceed to make inquiry touch-
" ing the matters complained of, and to examine any wit-
" neſs who ſhall be offered on either ſide, on oath, as afore-
" ſaid, and ſhall convict or acquit the party accuſed; and if
" the penalty, on any ſuch conviction, ſhall not be paid with-
" in twenty-four hours after, every ſuch magiſtrate ſhall
" thereupon iſſue a warrant, directed to any peace officer
" within their reſpective juriſdictions, to make diſtreſs; and
" if any offender ſhall convey away his goods, or ſo much
" thereof that the penalty cannot be levied, then ſome ma-
" giſtrate within whoſe juriſdiction the offender ſhall have
" removed his goods, ſhall back the warrant, for levying the
" diſtreſs; and if within five days from the diſtreſs being taken,
" the money forfeited ſhall not be paid, the goods ſeized ſhall
" be appraiſed and ſold, and for want of ſuch diſtreſs, then
" every ſuch magiſtrate, on the application of any proſecutor,
" and proof made of the conviction and non-payment of the
" penalty and charges, by warrant under his hand and ſeal,
" ſhall commit every ſuch offender to the common gaol or
" houſe of correction of the city or place where ſuch offender
" or offenders ſhall be found, for one calendar month, unleſs
" payment ſhall be made of the ſaid penalty, coſts and charges,
" before the expiration of the ſaid one calendar month.—
" And all ſuch penalties and forfeitures, when recovered,
" ſhall be paid to the informer."

† *Sect.* 38. But by 32 Geo. 2. c. 18. the generality of this application of the forfeiture to informers is reſtrained, and it is enacted, " That the penalties not *particularly* diſ-
" poſed of by 31 Geo. 2. c. 29. where the conviction is by
" confeſſion or the oath of one witneſs, ſhall be, *one moiety* to
" the informer; and the other moiety, together with all pe-
" nalties incurred on the weighing, trying, or ſeizing of any
" bread by any magiſtrate or juſtice ſhall be applied for the
" better carrying the ſaid act into execution, as ſuch magi-
" ſtrate or juſtice ſhall think fit."

Power to ſummon material evidences.

† *Sect.* 39. And it is further enacted, par. 34. " That if
" it ſhall be made out by the oath of any credible perſon,
" that any one is likely to give material evidence on behalf
" of the proſecutor or the perſon accuſed, and will not vo-
" luntarily appear before ſuch magiſtrate to be examined,
" every ſuch magiſtrate is authoriſed to ſummons every ſuch
" witneſs; and if any perſon ſo ſummoned ſhall neglect to
" appear, and no juſt excuſe ſhall be offered, then (after proof
Witneſſes to be examined on oath.
" by oath of ſuch ſummons having been duly ſerved) every
" ſuch magiſtrate is authoriſed to iſſue his warrant under his
" hand and ſeal, to bring and examine upon oath every ſuch
" witneſs: and if on his appearance he ſhall refuſe to be

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" examined on oath concerning the premiſſes, without offer-
" ing any juſt excuſe, any ſuch magiſtrate may, by warrant,
" commit any perſon ſo refuſing to the public priſon of the
" county or place in which he ſhall be, there to remain not
" exceeding fourteen, nor leſs than three days."

† *Sect.* 40. And it is further enacted, par. 37. " That no *certiorari*, &c.
" *certiorari*, letters of advocation, or of ſuſpenſion ſhall be
" granted to remove any conviction, or other proceedings
" had thereon in purſuance of this act."

† *Sect.* 41. Provided, par. 38. " That if any perſon ſhall Perſons aggrieved may appeal to the next ſeſſions.
" think himſelf aggrieved, he ſhall have liberty to appeal to the
" next general or quarter ſeſſions for the county or place, Appellant is to enter into recognizance, to hear and determine the matter, and award coſts.
" upon entering into a recognizance at the time of convic-
" tion, with two ſufficient ſureties, in double the ſum which
" he ſhall have been adjudged to pay, upon condition to
" proſecute ſuch appeal with effect, and to be forthcoming
" to abide the judgment and determination of ſaid next gene-
" ral or general quarter ſeſſions, who ſhall finally deter-
" mine the matter of every ſuch appeal, and award coſts
" to be paid by either party: and if the judgment ſhall be
" affirmed, ſuch appellant ſhall immediately pay down the
" ſum he ſhall have been adjudged to forfeit, with ſuch
" coſts as the ſeſſions ſhall award to the proſecutor or in-
" former, for the expences ſuſtained by ſuch appeal; and
" in default of paying the ſame, any two ſuch juſtices,
" or any one magiſtrate or juſtice of the peace, having
" juriſdiction in the place into which any ſuch appel-
" lant ſhall eſcape, or where he ſhall reſide, ſhall commit
" every ſuch appellant to the common gaol of the county
" or place where he ſhall be apprehended, until he ſhall make
" payment; but if the appellant make good his appeal, coſts
" ſhall be awarded to the appellant againſt ſuch informer,
" and which coſts may be recovered by the appellant againſt
" any ſuch informer, in like manner as coſts given at any
" general or general quarter ſeſſions of the peace are reco-
" verable."

† *Sect.* 42. Provided, par. 39. " That if any ſuch conviction Appeal to the ſeſſions following.
" ſhall be made within ſix days before any general or general
" quarter ſeſſions for the county or place where ſuch conviction
" ſhall have been made, then the party aggrieved ſhall, on en-
" tering into a recognizance as before directed, appeal either
" to the then next or the next following ſeſſions."

† *Sect.* 43. And it is further enacted, par. 40. " That every Limitation of actions.
" action or ſuit brought againſt any magiſtrate or any peace

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Vide the reaſons for extending the protection of this ſtatute, to perſons acting under the preſent act. 1 Burn's Juſtice, p. 256.

" officer, for any thing done under this act, ſhall be commenced within ſix months next after the fact committed, and " ſhall be laid in the county, city, or place, where the matter " ſhall ariſe; and that the 24 Geo. 2. c. 44. ſo far as relates " to the rendering the juſtices more ſafe in the execution of " their office, ſhall extend to the magiſtrate acting under this " act; and that no action or ſuit ſhall be had, nor any writ ſued " out, or copy of any writ be ſerved upon, any peace officer, " until ſeven days after notice in writing, given to or left for " him at his place of abode, by the attorney for the party " intending to commence ſuch action; which notice ſhall " contain the name and place of abode of the perſon intending to bring ſuch action, and alſo of his attorney, and likewiſe the cauſe of action or complaint: And any peace

Officer may make tender of amends.

" officer may, at any time within ſeven days after any ſuch " notice, tender, or cauſe to be tendered, any ſum of money, " as amends for the injury complained of, to the party complaining, or to the attorney named in any ſuch notice; and, " if not accepted, the defendant may plead ſuch tender in bar, " together with the general iſſue, or any other plea, with " leave of the court in which the action ſhall be commenced; " and if, upon iſſue joined on ſuch tender, the jury ſhall find " the amends tendered to have been ſufficient, they ſhall find " a verdict for the defendant; and in ſuch caſe, or if the " plaintiff become nonſuit, diſcontinue, or judgment ſhall be " given for the defendant upon demurrer, or if any action or " ſuit ſhall be brought after the time limited, or ſhall be " brought in any other place than as aforeſaid, then the jury " ſhall find for the defendant, and he ſhall be intitled to " coſts: But if the jury ſhall find that no ſuch tender was " made, or not ſufficient, or againſt the defendant, they ſhall " give the plaintiff ſuch damages as they ſhall think proper; " and the plaintiff ſhall recover coſts."

Perſons may plead the general iſſue; and obtain treble coſts.

† And it is further enacted, " That the defendant may " plead the general iſſue, and give this act, and the ſpecial " matter in evidence; and if a verdict ſhall be recorded for " the defendant, or if the plaintiff ſhall be nonſuited, or diſcontinue his action, after the defendant ſhall have appeared; or if judgment ſhall be given, upon a verdict or demurrer, againſt the plaintiff, the defendant ſhall recover " treble coſts."

Proſecution in 3 days.

† *Sect.* 44. Provided, par. 41. " That no perſon ſhall be " convicted, for any of the before-mentioned offences, unleſs " the proſecution be commenced within three days next after " the offence committed."

† *Sect.*

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† *Sect.* 45. "This act shall not extend to prejudice any "right or custom of the city of London, or the practice "there used, or any right or custom of any lord or lords "of any leet, to set, inquire, and punish, the breach of assize "of bread, or the right of any clerk of the market." General reservation of rights.

† *Sect.* 46. "Nor to prejudice the ancient right or custom of "the dean of Westminster, or the high steward of Westmin- "ster, and the liberties thereof, to set, ascertain, and appoint "the assize and weight of all sorts of bread; but they may "respectively set, ascertain, and appoint, according to the "meaning of this act, the assize and weight of all sorts of "bread which shall be made, sold, or exposed to sale, in "Westminster, and the liberties thereof; and shall and may "inquire and punish the breach of every such assize and "weight of bread, as fully and freely in all respects, as they, "or any of them have heretofore been accustomed to." Reservation of rights of Westminster, to set an assize of bread, within the city and liberty.

† *Sect.* 47. "Nor to prejudice the right of Oxford or Cam- "bridge, or of their clerks of the market, to set the assize "and weight of all sorts of bread, *&c.*" Oxford and Cambridge, to set an assize.

† *Sect.* 48. But the provisions of the foregoing statute of 31 Geo. 2. c. 29. being found defective, when an assize of bread is not set, it is accordingly enacted by 3 Geo. 3. c. 11. par. 1. "That although no assize of bread shall be set in "pursuance of the said act, no loaf called or deemed assize "loaf in the tables of the assize and price of bread in the "said act referred to, shall be made for sale, in any place "where any loaf of the bread called or deemed prized loaf, "in the said tables of the assize and price of bread, that is to "say, no assize loaves of the price of three-pence, and prized "loaves called half quartern loaves, nor assize loaves of the "price of six-pence, and prized loaves called quartern loaves, "nor assize loaves of the price of twelve-pence, and prized "loaves called half peck loaves, nor assize loaves of the "price of eighteen pence, and prized loaves called peck "loaves, shall, at the same time, in any place be made for "sale, sold, or carried out for sale, or be offered or exposed "to or for sale, or allowed to be sold, on pain of forfeiting "not exceeding forty, nor less than ten shillings." No assized and prized bread to be made at the same time in the same place.

† *Sect.* 49. And it is further enacted, par. 2. "That the "justices at any general or quarter session, or at any petty "session, shall appoint which of the sorts of assize or prized "loaves shall be allowed to be made and sold; and also what "other sorts of bread, and grain, shall be allowed to be "made and sold within their respective jurisdictions, or any "part thereof; and every order which shall be so made, shall "be entered in a book provided for that purpose, and in- Quarter or petty session may appoint the sorts of assize or prized loaves, and what other bread shall be made.

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"ſpected by the makers of bread for ſale, in the day-time, "without fee; and after the making every ſuch order, the "juſtices who ſhall make the ſame ſhall cauſe a copy to be "affixed up in ſome market or other publick town within the "diviſion or place in which ſuch order is to be obſerved; or "elſe ſhall cauſe a copy to be inſerted in ſome public news- "paper publiſhed in the county or place, or ſome part there- "of in which every ſuch order is to be obſerved."

A copy to be publiſhed.

Sorts of aſſize bread of wheat to be allowed.

† *Sect.* 50. Provided, par. 3. "That no juſtices ſhall "allow any ſorts of aſſize bread made of the flour or meal of "wheat, other than wheaten and houſhold bread, and loaves "of white bread of the price of two-pence, or under."

Proportion as to weight, between the white and wheaten bread, and the wheaten and houſhold aſſize bread.

† *Sect.* 51. And it is further enacted, par. 4. "That "every maker of bread for ſale ſhall obſerve the proportion "between white and wheaten bread, and wheaten and houſ- "hold aſſize bread, as to weight, as is mentioned in the ſaid "aſſize tables; that is to ſay, every white loaf of the price of "two-pence, or under, ſhall always weigh three parts in four "of the weight of the wheaten loaf of the like price; and "every wheaten aſſize loaf of bread, of whatſoever price the "ſame ſhall be, ſhall always weigh three parts in four of the "weight of every houſhold aſſize loaf of bread of the like "price; and that every houſhold aſſize loaf of bread, of "whatever price the ſame ſhall be, ſhall always weigh one "third part more than every wheaten aſſize loaf of the like "price, on pain of forfeiting not exceeding forty ſhillings."

The price in the peck loaf, and half peck, and its other ſubdi- viſions, in the wheaten, and in houſhold bread.

† *Sect.* 52. And it is further enacted, par. 5. "That "every peck, half peck, quarter of a peck, and half quarter "of a peck loaf, of the meal or flour of wheat, and called "wheaten bread, ſhall always be ſold in proportion to "each other reſpectively, as to price; and that every peck, "half peck, quarter of a peck, and half quarter of a peck "loaf made for ſale, of the meal or flour of wheat, and "called houſhold bread, ſhall always be ſold in proportion "to each other, and for one fourth leſs in price than the "loaf made for ſale with the meal or flour of wheat, called "wheaten bread, of the ſame denomination, on pain of for- "feiting not exceeding forty, nor leſs than ten ſhillings."

The weight of the peck loaf, and its ſubdivi- ſions, in every ſort of bread; the time to be weighed before a juſtice, within 24 hours, and in other places

† *Sect.* 53. And it is further enacted, par. 6. "That the "ſeveral loaves after mentioned, ſhall weigh in averdupois "weight as follows; that is to ſay, every peck loaf, ſeventeen "pounds ſix ounces; every half peck loaf, eight pounds ele- "ven ounces; every quarter of a peck loaf, four pounds "five ounces, and one half ounce; and every half quarter of "a peck loaf, two pounds two ounces and three quarters; "on pain of forfeiting not exceeding five ſhillings, nor leſs

"than

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" than one ſhilling for every ounce wanting; and for leſs " than one ounce, not exceeding two ſhillings and ſix-pence, " nor leſs than ſix-pence; ſo as all ſuch bread in any city, " town corporate, borough, liberty, or franchiſe, or the ju- " riſdiction thereof, or within the weekly bills of mortality, " ſhall be brought before ſome juſtice and weighed, within " twenty-four hours after the ſame ſhall have been baked, " or found in any perſon's cuſtody for ſale, and elſewhere, " within three days, unleſs it ſhall be made out, that ſuch " deficiency wholly aroſe from ſome unavoidable accident, or " was occaſioned by ſome contrivance or confederacy."

within 3 days; unleſs deficiency be accounted for.

† *Sect.* 54. And it is further enacted, par. 7. " That no " perſon ſhall offer to ſale any bread of an inferior quality to " wheaten-bread, at an higher price than houſhold bread, " upon pain of forfeiting not exceeding twenty ſhillings."

Bread inferior to wheaten, not to be ſold higher than houſhold.

† *Sect.* 55. And it is further enacted, par. 8. " That on " the ſaid wheaten or houſehold bread ſhall be imprinted a " large Roman (W), and on houſehold a large Roman (H), " except loaves raſped by the deſire of the perſon who ſhall " order the ſame, on penalty of forfeiting not exceeding " forty, nor leſs than ten ſhillings; unleſs it wholly aroſe " from ſome unavoidable accident, or was occaſioned by " contrivance or confederacy."

A large Roman (W) to be imprinted on all wheaten bread and a large Roman (H) on houſhold.

† *Sect.* 56. And it is further enacted, par. 9. " That " every loaf made of any other grain than wheat, ſhall be " marked with ſome letter or letters, not more than two, " as the general or quarter ſeſſion, or any petty ſeſſion " ſhall direct; which order ſhall be entered in ſome book " which any maker of bread may peruſe, without fee; " and ſuch juſtices ſhall cauſe a copy to be put up in ſome " publick town within the diviſion, or ſhall cauſe a copy " thereof to be inſerted in ſome publick newſpaper publiſhed " in the county; and if the juſtices ſhall neglect, then the " maker of all ſuch bread ſhall, in every place where no ſuch " order ſhall be made, cauſe every loaf of ſuch bread to be " marked with any two diſtinct capital letters as he ſhall think " fit, (except loaves raſped by deſire) on pain of forfeiting, " not exceeding forty nor leſs than five ſhillings, for every " loaf of ſuch bread which ſhall not be ſo marked as herein " before is firſt directed."

Bread made of any other grain than wheat, to be impreſſed with ſuch letters as the juſtices ſhall order.

An entry to be made free for inſpection.

Where the juſtices neglect to make ſuch order, the maker is to make every ſuch loaf with a diſtinct capital letters.

Penalty.

† *Sect.* 57. And it is further enacted, by par. 10. " That " any juſtice, or peace officer by warrant of ſuch juſtice, may " enter any place belonging to any baker, to ſearch, view, " weigh, examine, and try, all or any bread which ſhall be " there found; and if any bread ſhall on examination thereof, " by any juſtice, or on the oath of one witneſs, be found de-

Juſtices, or peace officers may enter houſes, and ſearch, &c.

" ficient

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Bread found defective in the weight, or not marked, &c. may be seized.

" ficient in weight, or not marked, or be deficient in the due " baking or working thereof, or be wanting in the goodneſs " of the ſtuff, or to have been made with any mixture of " meal or flour of any other grain than the ſame ſhall import " to be made with, or to be made with any other proportion " of grain, or to be made with any ingredient which ought " not to be put therein; or to be made with any thing in lieu " of flour, or that any ſuch bread ſhall be made with any lea- " ven not allowed, every juſtice and officer as aforeſaid, ſhall " ſeize ſuch bread, and to diſpoſe thereof to poor perſons, " unleſs the default wholly aroſe from accident, or contrivance " or confederacy, upon pain of forfeiting not exceeding five " pounds, nor leſs than twenty ſhillings."

Penalty of oppoſing.

† *Sect.* 58. And it is further enacted by par. 11. " That " if any perſon ſhall in any wiſe oppoſe any ſearch, view, " weighing, trying, or ſeizing of any bread, he ſhall forfeit " not exceeding forty, nor leſs than twenty ſhillings."

No miller, mealman, or baker, may act as a juſtice.

† Provided, by par. 12. " That no miller, mealman, or " baker, ſhall be allowed to act as a juſtice under this act, " on pain of fifty pounds, to whoever will inform or ſue for " the ſame at Weſtminſter, *&c.* or by way of ſummary com- " plaint, before the court of Seſſion in Scotland."

Default of ſervants.

† Provided, par. 13. " That if any baker ſhall make " complaint to any juſtice, by the oath of one witneſs, that " any offence which ſhall have been occaſioned by default of " any ſervant, every ſuch juſtice may iſſue his warrant for " bringing ſuch ſervant before any ſuch juſtice, or any juſtice " of the county or place where the offender can be found, " and examine into the matter; and on proof upon oath, is

Satisfaction.

" to adjudge and order what ſum of money ſhall be paid to " his maſter or miſtreſs, for the money he or ſhe ſhall have " paid, by reaſon of the default of ſuch ſervant; and if ſuch

Non-payment.

" ſervant ſhall refuſe on his conviction immediate payment, " then any ſuch juſtice may cauſe every ſuch ſervant to be

Commitment.

" committed to the houſe of correction, or ſome other priſon " of the county or place in which he ſhall be apprehended, to " be kept to hard labour, not exceeding one calendar month, " unleſs payment ſhall be made."

Ante p. 499. l. 37.

† *Sect.* 59. By the 14, 15, 16. parts of this ſtatute, it is enacted, " That juſtices ſhall hear and determine the ſeveral " offences; and that the penalties and forfeitures ſhall be re- " covered, as by the before recited act 31 Geo. 2. c. 29. ſ. " 34. 35. 36. is therein directed."

Ante p. 501.

† *Sect.* 60. By par. 17, 18, 19. " No *certiorari* ſhall be " granted to remove any conviction or other proceedings had " thereupon

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" thereupon; and the like liberty of appeal is precisely given " as by 31 Geo. 2. c. 29. s. 37, 38, 39."

† *Sect.* 61. By par. 20, 21, 22. The same limitation of actions; protection to justices and officers, *&c.* costs, *&c.* is enacted in the precise words of 31 Geo. 2. c. 29. s. 40, 41.

† *Sect.* 62. And it is likewise enacted by par. 23. " That " no person shall be convicted under this act, unless the pro- " secution be commenced within three days; and that no per- " son convicted upon this act, shall be subject or liable to be " prosecuted for the same offence under any other law." Limitation of prosecutions.

† *Sect.* 63. By par. 24. The penalties and forfeitures are to be distributed, as directed by 32 Geo. 2. c. 18. (*a*). The rights of the universities are saved in the same words as by 31 Geo. 2. c. 29. s. 44, 45. (*a*) Ante p. 500.

*Sect.* 64. But as by the foregoing acts of 31 Geo. 2. c. 29. and 3 Geo. 3. c. 11. two sorts of bread, made of wheat only, are allowed to be made for sale, *viz.* wheaten and household; it is enacted by 13 Geo. 3. c. 62. " That of " the flour of wheat, which flour, without any mixture or " division, shall be the whole produce of the grain, the bran " or hull thereof only excepted, and which shall weigh three- " fourth parts of the weight of the wheat whereof it shall be " made, may be at all times made and sold, and shall be cal- " led A STANDARD WHEATEN BREAD." Standard wheaten allowed.

*Sect.* 65. And it is further enacted, par 2. " That the " bakers shall mark every loaf thereof with the capital letters " S. W. and that the same may be sold although no assize of " bread be set of the weight, and in the proportions follow- " ing; that is to say, that every standard wheaten peck loaf " shall always weigh 17 lb. 6 oz. avoirdupois, every half " peck loaf 8 lb. 11 oz. and every quartern loaf 4 lb. 5 oz. " and one half of an ounce avoirdupois; and that every peck " loaf, half peck loaf, and quartern loaf, shall always be sold, " as to price, in proportion to each other respectively; and " that where wheaten and household bread, made as the law " now directs, shall be sold at the same time, together with " this standard wheaten bread, they be sold in respect of and " in proportion to each other, as followeth; that is to say, " that the same weight of wheaten bread as costs eight " pence, the same weight of this standard wheaten bread shall " cost seven pence, and the same weight of household bread " shall cost sixpence, or seven standard wheaten assized loaves, " shall weigh equal to eight wheaten assized loaves or to " six Weight, price, and proportions.

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"six household assized loaves of the same price, as near "as may be."

Standard wheaten not to be sold as prized loaves at one time.

† *Sect.* 66. And it is hereby further enacted, par. 3. "That the said standard wheaten bread be not sold as prized "loaves, at one and the same time, together with assized "loaves of the same standard wheaten bread."

Magistrates to set the assize.

† *Sect.* 67. And it is further enacted, par. 4. "That every "magistrate, or others authorised to set the assize and fix the "price of bread, are authorised to set the assize on, or fix "the price of the standard wheaten bread aforesaid, according "to the following table."

The Assize Table.

| Price of the bushel of wheat and baking. | | Small Bread. | | | | | | Large Assize Bread. | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Penny. | | | Two Pence. | | | Sixpence. | | | Twelvepence. | | | Eighteen Pence. | | |
| s. | d. | oz. | dr. | | lb. | oz. | dr. | lb. | oz. | dr. | lb. | oz. | dr. | lb. | oz. | dr. |
| 2 | 9 | 25 | 4 | | 3 | 2 | 9 | 9 | 7 | 11 | 18 | 15 | 5 | 28 | 7 | 0 |
| 3 | 0 | 23 | 3 | | 2 | 14 | 5 | 8 | 12 | 0 | 17 | 6 | 2 | 26 | 1 | 1 |
| 3 | 3 | 21 | 6 | | 2 | 10 | 12 | 8 | 0 | 5 | 16 | 0 | 11 | 24 | 1 | 0 |
| 3 | 6 | 19 | 14 | | 2 | 7 | 12 | 7 | 7 | 3 | 14 | 14 | 5 | 22 | 15 | 8 |
| 3 | 9 | 18 | 9 | | 2 | 5 | 1 | 6 | 15 | 4 | 13 | 14 | 7 | 20 | 13 | 11 |
| 4 | 0 | 17 | 6 | | 2 | 2 | 12 | 6 | 8 | 4 | 13 | 0 | 9 | 19 | 8 | 13 |
| 4 | 3 | 16 | 6 | | 2 | 0 | 11 | 6 | 2 | 2 | 12 | 4 | 4 | 18 | 6 | 7 |
| 4 | 6 | 15 | 7 | | 1 | 14 | 4 | 5 | 12 | 11 | 11 | 9 | 6 | 17 | 6 | 1 |
| 4 | 9 | 14 | 10 | | 1 | 13 | 4 | 5 | 7 | 13 | 10 | 15 | 10 | 16 | 7 | 7 |
| 5 | 0 | 13 | 14 | | 1 | 11 | 13 | 5 | 3 | 7 | 10 | 6 | 13 | 15 | 10 | 4 |
| 5 | 3 | 13 | 4 | | 1 | 10 | 8 | 4 | 15 | 7 | 9 | 14 | 4 | 14 | 14 | 5 |
| 5 | 6 | 12 | 10 | | 1 | 9 | 4 | 4 | 11 | 13 | 9 | 7 | 11 | 14 | 3 | 8 |
| 5 | 9 | 12 | 1 | | 1 | 8 | 3 | 4 | 8 | 9 | 9 | 1 | 1 | 13 | 9 | 10 |
| 6 | 0 | 11 | 9 | | 1 | 7 | 3 | 4 | 5 | 8 | 8 | 11 | 1 | 13 | 0 | 9 |
| 6 | 3 | 11 | 2 | | 1 | 6 | 4 | 4 | 2 | 12 | 8 | 5 | 8 | 12 | 8 | 3 |
| 6 | 6 | 10 | 11 | | 1 | 5 | 6 | 4 | 0 | 3 | 8 | 0 | 5 | 12 | 0 | 8 |
| 6 | 9 | 10 | 5 | | 1 | 4 | 10 | 3 | 13 | 13 | 7 | 11 | 9 | 1 | 9 | 6 |
| 7 | 0 | 9 | 15 | | 1 | 3 | 14 | 3 | 11 | 9 | 7 | 7 | 3 | 11 | 2 | 12 |
| 7 | 3 | 9 | 9 | | 1 | 3 | 3 | 3 | 9 | 8 | 7 | 3 | 1 | 10 | 12 | 9 |
| 7 | 6 | 9 | 4 | | 1 | 2 | 9 | 3 | 7 | 10 | 6 | 15 | 4 | 10 | 6 | 13 |
| 7 | 9 | 9 | 0 | | 1 | 1 | 15 | 3 | 5 | 13 | 6 | 11 | 0 | 10 | 1 | 7 |
| 8 | 0 | 8 | 11 | | 1 | 1 | 6 | 3 | 4 | 2 | 6 | 8 | 4 | 9 | 12 | 7 |
| 8 | 3 | 8 | 7 | | 1 | 0 | 14 | 3 | 2 | 9 | 6 | 5 | 2 | 9 | 7 | 11 |
| 8 | 6 | 8 | 3 | | 1 | 0 | 6 | 3 | 1 | 1 | 6 | 2 | 2 | 9 | 3 | 3 |

Price

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## The Aſſize Table continued.

| Price of the buſhel of wheat and baking. | Small Bread. | | | | Large Aſſize Bread. | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Penny. | | Two Pence. | | Sixpence. | | | Twelvepence. | | | Eighteen Pence. | | |
| s. d. | oz. | dr. | lb. | oz. | dr. | lb. | oz. | dr. | lb. | oz. | dr. | lb. | oz. | dr. |
| 8 9 | 7 | 15 | 0 | 15 | 14 | 2 | 15 | 11 | 5 | 15 | 5 | 8 | 15 | 0 |
| 9 0 | 7 | 12 | 0 | 15 | 7 | 2 | 14 | 5 | 5 | 12 | 11 | 8 | 11 | 0 |
| 9 3 | 7 | 8 | 0 | 15 | 0 | 2 | 13 | 1 | 5 | 10 | 3 | 8 | 7 | 4 |
| 9 6 | 7 | 5 | 0 | 14 | 10 | 2 | 11 | 14 | 5 | 7 | 13 | 8 | 3 | 11 |
| 9 9 | 7 | 2 | 0 | 14 | 4 | 2 | 10 | 12 | 5 | 5 | 9 | 8 | 0 | 5 |
| 10 0 | 6 | 15 | 0 | 13 | 14 | 2 | 9 | 11 | 5 | 3 | 7 | 7 | 13 | 2 |
| 10 3 | 6 | 13 | 0 | 13 | 9 | 2 | 8 | 11 | 5 | 1 | 6 | 7 | 10 | 1 |
| 10 6 | 6 | 10 | 0 | 13 | 4 | 2 | 7 | 12 | 4 | 15 | 7 | 7 | 7 | 3 |
| 10 9 | 6 | 7 | 0 | 12 | 15 | 2 | 6 | 13 | 4 | 13 | 10 | 7 | 4 | 6 |
| 11 0 | 6 | 5 | 0 | 12 | 10 | 2 | 5 | 15 | 4 | 11 | 13 | 7 | 1 | 12 |
| 11 3 | 6 | 3 | 0 | 12 | 6 | 2 | 5 | 1 | 4 | 10 | 2 | 6 | 15 | 4 |
| 11 6 | 6 | 1 | 0 | 12 | 1 | 2 | 4 | 4 | 4 | 8 | 9 | 6 | 12 | 13 |
| 11 9 | 5 | 15 | 0 | 11 | 13 | 2 | 3 | 8 | 4 | 7 | 0 | 6 | 10 | 8 |
| 12 0 | 5 | 13 | 0 | 11 | 9 | 2 | 2 | 12 | 4 | 5 | 8 | 6 | 8 | 4 |
| 12 3 | 5 | 11 | 0 | 11 | 6 | 2 | 2 | 1 | 4 | 4 | 2 | 6 | 6 | 2 |
| 12 6 | 5 | 9 | 0 | 11 | 2 | 2 | 1 | 6 | 4 | 2 | 12 | 6 | 4 | 2 |
| 12 9 | 5 | 7 | 0 | 10 | 14 | 2 | 0 | 11 | 4 | 1 | 7 | 6 | 2 | 2 |
| 13 0 | 5 | 6 | 0 | 10 | 11 | 2 | 0 | 1 | 4 | 3 | 0 | 6 | 0 | 4 |
| 13 3 | 5 | 4 | 0 | 10 | 8 | 1 | 15 | 8 | 3 | 14 | 15 | 5 | 14 | 7 |
| 13 6 | 5 | 2 | 0 | 10 | 5 | 1 | 14 | 14 | 3 | 13 | 13 | 5 | 12 | 1 |
| 13 9 | 5 | 1 | 0 | 10 | 2 | 1 | 14 | 5 | 3 | 12 | 11 | 5 | 11 | 0 |
| 14 0 | 4 | 15 | 0 | 9 | 15 | 1 | 13 | 13 | 3 | 11 | 9 | 5 | 9 | 6 |
| 14 3 | 4 | 14 | 0 | 9 | 12 | 1 | 13 | 4 | 3 | 10 | 9 | 5 | 7 | 13 |
| 14 6 | 4 | 13 | 0 | 9 | 9 | 1 | 12 | 12 | 3 | 9 | 8 | 5 | 6 | 5 |

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# THE PRICE TABLE.

| The Price Table. Prized Bread. Quartern Loaf. | | Halfpeck Loaf. | | Peck Loaf. | | The price of the bushel of wheat and baking. | The Price Table. Prized Bread. Quartern Loaf. | | Halfpeck Loaf. | | Peck Loaf | | The price of the bushel of wheat and baking. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| s. | d. | s. | d. | s. | d. | s. d. | s. | d. | s. | d. | s. | d. | s. d. |
| 0 | 2 | 0 | 5¼ | 0 | 11 | 2 9 | 0 | 8¾ | 1 | 5½ | 2 | 11 | 8 9 |
| 0 | 3¼ | 0 | 6 | 1 | 0 | 3 0 | 0 | 9 | 1 | 6 | 3 | 0 | 9 0 |
| 0 | 3½ | 0 | 6½ | 1 | 1 | 3 3 | 0 | 9¼ | 1 | 6½ | 3 | 1 | 9 3 |
| 0 | 3¾ | 0 | 7 | 1 | 2 | 3 6 | 0 | 9½ | 0 | 7 | 3 | 2 | 9 6 |
| 0 | 3¾ | 0 | 7½ | 1 | 3 | 3 9 | 0 | 9¾ | 0 | 7½ | 3 | 3 | 9 9 |
| 0 | 4 | 0 | 8 | 1 | 4 | 4 0 | 0 | 10 | 0 | 8 | 4 | 4 | 10 0 |
| 0 | 4¼ | 0 | 8½ | 1 | 5 | 4 3 | 0 | 10¼ | 1 | 8½ | 3 | 5 | 10 3 |
| 0 | 4½ | 0 | 9 | 1 | 6 | 4 6 | 0 | 10½ | 1 | 9 | 3 | 0 | 10 6 |
| 0 | 4¾ | 0 | 9½ | 1 | 7 | 4 9 | 0 | 10¾ | 1 | 9½ | 3 | 7 | 10 9 |
| 0 | 5 | 0 | 10 | 1 | 8 | 5 0 | 0 | 11 | 1 | 10 | 3 | 8 | 11 0 |
| 0 | 5¼ | 0 | 10½ | 1 | 9 | 5 3 | 0 | 11¼ | 1 | 10½ | 3 | 9 | 11 3 |
| 0 | 5½ | 0 | 11 | 1 | 10 | 5 6 | 0 | 11½ | 1 | 11 | 3 | 10 | 11 6 |
| 0 | 5¾ | 0 | 11½ | 1 | 11 | 5 9 | 0 | 11¾ | 1 | 11½ | 3 | 11 | 11 9 |
| 0 | 6 | 1 | 0 | 2 | 0 | 6 0 | 1 | 0 | 2 | 0 | 4 | 0 | 12 0 |
| 0 | 6¼ | 1 | 0½ | 2 | 1 | 6 3 | 1 | 0¼ | 1 | 0½ | 4 | 1 | 12 3 |
| 0 | 6½ | 1 | 1 | 2 | 2 | 6 6 | 1 | 0½ | 2 | 1½ | 4 | 2 | 12 6 |
| 0 | 6¾ | 1 | 2 | 2 | 3 | 6 9 | 1 | 0¾ | 2 | 1 | 4 | 3 | 12 9 |
| 0 | 7 | 1 | 0½ | 2 | 4 | 7 7 | 1 | 1 | 2 | 2 | 4 | 4 | 13 0 |
| 0 | 7¼ | 1 | 2½ | 2 | 5 | 7 3 | 1 | 1¼ | 2 | 3 | 4 | 5 | 13 3 |
| 0 | 7½ | 1 | 3 | 2 | 6 | 7 6 | 1 | 1½ | 2 | 3 | 4 | 6 | 13 6 |
| 0 | 7¾ | 1 | 3½ | 2 | 7 | 7 9 | 1 | 1¾ | 2 | 2½ | 4 | 7 | 13 9 |
| 0 | 8 | 1 | 4 | 2 | 8 | 8 0 | 1 | 2½ | 2 | 4 | 4 | 8 | 14 0 |
| 0 | 8¼ | 1 | 4½ | 2 | 9 | 8 3 | 1 | 2¼ | 2 | 4½ | 4 | 9 | 14 3 |
| 0 | 8½ | 1 | 5 | 2 | 10 | 8 6 | 1 | 2½ | 2 | 5 | 4 | 10 | 14 6 |

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† *Sect.* 68. And it is enacted par. 5. "That all perſons "ſelling the ſaid bread, ſhall be liable to the penalties, as they "are liable to by the laws now in being, for any miſdemea- "nor or neglect, in reſpect to making, marking, ſelling, or "expoſing to or for ſale, wheaten or houſehold bread." Penalties.

† *Sect.* 69. Provided, par. 6. "That if any information "ſhall be laid againſt any baker for making, marking, baking, "or expoſing to or for ſale, any bread, purporting to be the "ſtandard wheaten bread aforeſaid, made of flour, not being "the whole produce of the wheat, the bran or hull thereof "only excepted, and weighing three fourth parts of the weight "of the wheat whereof it was made, and ſuch baker ſhall "prove that he bought the ſaid flour, as and for ſuch flour as "aforeſaid, of the miller or mealman, naming his name and "place of abode; the baker ſhall ſtand clear and acquitted, "and the miller or mealman ſhall pay the penalties of adulte- "rating corn, meal, or flour, by 31 Geo. 2. c. 5, 6." The miller or mealman ſelling adulterated flour, ſhall forfeit the penalties directed by act 31 Geo. 2.

† *Sect.* 70. And it is further enacted by par. 7. "That "when any magiſtrate, ſhall have ſet an aſſize on or fixed the "price of the ſaid ſtandard wheaten bread, they may omit the "ſetting an aſſize upon, or fixing the price of any other ſort "of bread." An aſſize on the price of ſtandard wheaten bread, fixed, the price of any other ſort may be omitted.

† *Sect.* 71. And it is further enacted by par. 8. "That "the juſtices at any general or quarter-ſeſſion may prohi- "bit for three months, unleſs they ſhall ſee cauſe ſooner to re- "voke the order for ſuch prohibition, at any adjourned quar- "ter, or ſpecial ſeſſions makers from making for ſale, any other "ſorts of bread, of a ſuperior quality, and ſold at a higher "price than the ſtandard wheaten bread: provided, that no "ſuch order for ſuch prohibition be in force, until one calen- "dar month after the date thereof; and every order ſhall be "entered in a book, to be inſpected by the makers without pay- "ing any fee: And after the making every ſuch order the "juſtices ſhall cauſe a copy to be affixed in ſome market, or "other public town, within the diviſion, or inſerted in ſome "public newſpaper, publiſhed in the county, or place." Quarter ſeſſions may prohibit, for 3 months, other bread than ſtandard wheaten.

† *Sect.* 72. Provided, par. 9. "That within London, "and the liberties thereof, the company of bakers, and in any "other place, any baker may offer all ſuch objections as ſuch "company of bakers think fit againſt ſuch prohibition at the "time when ſuch juſtices ſhall have under conſideration the "ordering ſuch prohibition as aforeſaid." Company of bakers of London, &c. may offer objections.

† *Sect.* 73. Provided par. 10. "That nothing ſhall pre- "vent the magiſtrates and others, who are authoriſed to ſet "an aſſize on bread, from allowing any white loaves or "wheaten Wheaten loaves of the price of 1d. or 2d. may be made.

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"wheaten loaves of the price of one penny, or two pence, to "be made and ſold according to the table contained in 31 Geo. "2. ſ. 10."

No aſſize on coarſer bread, at a lower price.

† *Sect.* 74. And whereas there may be many places where the inferior claſſes are uſed to bread made of wheat, of a coarſe and cheaper ſort than the ſtandard wheaten bread, be it hereby further enacted by par. 11. "That any baker may "make ſuch inferior bread, provided he ſell at a price under "that of the houſehold bread, as directed by 31 Geo. 2."

Bread coarſer ſold at the aſſized houſhold bread price, liable to penalties.

† *Sect.* 75. And it is further enacted, by par. 12. "That "when and where any baker ſhall ſell ſuch inferior bread by "weights and prices whereat the houſehold bread aforeſaid is "at that time aſſized, or priced, or ſold, he ſhall be liable to "the ſame as bakers are now by law liable to for any of the "like miſdemeanor."

Powers of the magiſtrates.

† *Sect.* 76. And it is further enacted, par. 13. "That "every magiſtrate ſhall have all powers relative to aſſizing, "pricing, and regulating the ſtandard wheaten bread and "puniſhing as they have by any law now in being relative to "any bread whatſoever."

No compoſition to be uſed.

† *Sect.* 77. Thirdly, As to ALE AND BEER. It it enacted by 1 Will. 3. ſeſſ. 1. c. 24. ſ. 17. "That no common brewer, "or retailer of ale or beer, ſhall uſe therein any molaſſes, "coarſe ſugar, or any compoſition or extract thereof, on "pain of forfeiting the ſaid liquor, and alſo 100*l.* half to "the king, and half to the proſecutor, if ſued for in ſix "months."

Penalty.

† *Sect.* 78. And it is enacted by 10 & 11 Will. 3. c. 21. "ſ. 34. "That if any common brewer or retailer ſhall com-"mit the ſaid offence, or ſhall receive into his cuſtody any "quantity of the ſaid materials exceeding ten pounds, he "ſhall forfeit 100*l.* to be recovered and mitigated by the "laws of exciſe, and the ſervant or aſſiſtant therein 20*l.* "in like manner, and in default of payment ſhall be impri-"ſoned three months."

† *Sect.* 79. And it is further enacted by 9 Ann. c. 12. par. 24. 26. "That no common brewer, innkeeper, or vic-"tualler, ſhall uſe any broom, wormwood, or other bitter "ingredient (to ſerve inſtead of hops) in any beer or ale for "ſale (except infuſing the ſame after it is brewed and tunned) "to make broom or wormwood ale or beer) on pain of 20*l.* "half to the proſecutor, &c. to be levied by the laws of "exciſe."

† *Sect.*

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† *Sect.* 80. And it is further enacted by 12 Ann. ſtat. 1. c. 2. "That no common brewer or retailer of beer or ale, "ſhall uſe any ſugar, honey, foreign grains, Guinea pepper, "eſſentia bina, cocculos Indicus, or any unwholeſome ingre- "dients, in the brewing of ale or beer, or mix any of them "therewith, on pain of 20*l.* to be diſtributed, recovered and "mitigated as aforeſaid."

N. B. As to inhancing the price of ale; vide 2 and 3 Edw. 6. c. 15. and 2 Geo. 3. c. 14. before recited.

† *Sect.* 81. And it is enacted by 8 Eliz. c. 9. "That "magiſtrates both in counties and in corporations, ſhall fix "the price of all ale and beer veſſels yearly, at their Eaſter "ſeſſions."

† *Sect.* 82. And it is further enacted by 12 Car. 2. c. 24. ſ. 34. and 1 Will. 3. ſt. 1. c. 24. ſ. 5. "That within the "bills of mortality every barrel of beer ſhall contain 36 gal- "lons, and every barrel of ale 32 gallons, and that in all "other places every barrel of ale or beer ſhall meaſure 34 "gallons."

† *Sect.* 83. And it is further enacted by 11 & 12 Will. 3. c. 15. "That all retailers of ale and beer ſhall retail the ſame "by a ſtandard meaſure, to be marked by a magiſtrate, upon "penalty of any ſum between 10*s.* and 40*s.* and if they "refuſe to ſpecify the quantities ſold, they ſhall loſe the pri- "vilege of detaining the goods of their gueſts in ſatisfaction "of the reckoning."

Vide Blackerby, 10. 1 Burn's Juſtice 392.

† *Sect.* 84. And it is further enacted by 1 Will. & Mary, ſeſſ. 1. c. 22. "That ale, beer, cyder and mum, may be ex- "ported upon paying the duties." But by 2 Geo. 3. c. 14. which recites the above act of Will. 3. "If any merchant or "maſter of any ſhip or veſſel, or other perſon, ſhall cauſe or "ſuffer any of the ſaid liquors, ſo exported as merchandize, "to be unſhipped, unladen, or laid on land, or put into any "other ſhip or veſſel within Great Britain, they ſhall forfeit "the ſame, and alſo 50*l.* for every caſk of ſuch reſpective "liquors ſo unſhipped, *&c.*" (1)

(1) N. B. For the exciſe and other regulations reſpecting ale, beer, cyder, perry, mum, ſider, theglin, meads, ſweets, verjuice, and vinegar, vide 2 Burn's Juſtice, p. 38 to 46.

† *Sect.* 85. As to the article of BUTTER and CHEESE, it is recited by 13 and 14 Car. 2. c. 26. That as butter is one of the principal commodities of the product of this kingdom, and is not only of univerſal uſe at home, but that great quantities are exported, it is thereupon enacted, "That every kilder- "kin of butter ſhall contain 112 lb. every firkin 56 lb. and

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" every pott 14 lb. reckoning 16 ounces to the pound, and " excluſive of the tare of the kilderkin, firkin, or pott; that " new and old butter ſhall not be mixed; nor any whey " butter packed or mixed with butter made of cream, but " that every package ſhall contain the ſame quality through- " out; that no butter ſhall be ſalted with any great ſalt, nor " more ſmall ſalt mixed with it than is neceſſary for its pre- " ſervation, on pain of forfeiting the ſame, and ſix times the " value of every different pound of butter."

By 12 Car. 2. c. 2. ſ. 9. No butter or cheeſe to be imported from Ireland.

† *Sect.* 86. And it is further enacted, par. 3. " That no " perſons whatſoever ſhall repack for ſale any butter upon " pain of double the value. And whoever ſhall pack butter, " ſhall pack his butter into good and ſufficient caſks, &c. " and ſhall ſet upon every firkin and caſk when the ſame is " thoroughly ſeaſoned in water, a continuing viſible mark of " the juſt weight of the empty caſk, and when filled with " butter the firſt letter of his chriſtian and ſurname at length, " with an iron brand; on pain of 10*s.* for every cwt. of " butter, and ſo in proportion, for a greater or leſs quantity. " And every potter ſhall ſet upon every pott which he ſhall " make for the packing of butter, the juſt weight of ſuch " pott when burnt, and his chriſtian and ſurname as aforeſaid, " on pain of one ſhilling for every pott he ſhall omit ſo to " mark; and every farmer or packer of butter, two ſhillings " for every pott he uſes ſo omitted to be marked, one half to " the poor, the other to the proſecutor, to be recovered by " action of debt, indictment, information, or preſentment, " (if commenced within four months after the ſale) either in " the ſeſſions of the peace, or in the court of record of the " place where the offence is committed."

† *Sect.* 87. And it is further enacted by 4 Will. & Mary, c. 7. " That after the factor or buyer hath bought and con- " tracted for the ſaid commodity, and approved by ſearching " and weighing the ſame, if he think fit, the ſeller ſhall not " be liable to any of the penalties above ſpecified, but that the " ſaid factor, or buyer, ſhall mark the ſaid butter, or the " caſk wherein it is, and in caſe the ſame ſhall be afterwards " exchanged or opened, the caſk changed, or any bad butter " mixed with good butter, or any other fraud be committed " by the ſeller, the offender, on conviction by one witneſs " before one juſtice, ſhall forfeit 20*s.* for every ſuch firkin " and offence."

† *Sect.* 88. And to the end the trade for butter and cheeſe may not be engroſſed by particular perſons, it is enacted, " That every warehouſe-keeper, weigher, ſearcher, or ſhip- " per of butter and cheeſe, at any port or place in this king- " dom, ſhall receive all butter and cheeſe brought to them

" for

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" for any of the cheeſemongers free of the city of London, " or other perſon making the ſaid commodities, and ſhall take " care and ſhip the ſame, without preference on the next " veſſel for London, unleſs the owners order the contrary, at " the rate of 2*s.* 6*d.* a load, and no more, on pain of 10*s.* " for every firkin of butter, and 5*s.* for every wey of cheeſe. " And the ſaid weigher ſhall keep a book of receiving and " ſhipping the ſame, *&c.*" (2)

(2) By 3 Hen. 6. c. 4. 18 Hen. 6. c. 3. Butter and cheeſe may be exported to any place.—By 6 Hen. 6. c. 8. The wey of cheeſe ſhall be of a certain weight.—By 2 Ph. & Mary, c. 5. 13 Eliz. c. 25. ſ. 2. A licence is to be granted on the exportation.—By 21 Jac. 1. c. 22. Juſtices may reſtrain the purchaſing of them.—By 32 Car. 2. c. 2. ſ. 9. The importation of foreign butter and cheeſe is reſtrained.—By 8 Geo. 1. c. 27. The packing of butter in the city of York is regulated.—By 17 Geo. 2. c. 8. The ſame at New Malton.—By 13 Geo. 3. c. 5. ſ. 2. Cheeſe may be imported for a limited time, duty free.

† *Sect.* 89. Fifthly, As to CATTLE, *&c.* It is enacted by 31 Geo. 2. c. 40. ſ. 11. " That no ſaleſman or other broker " or factor who ſhall be employed to buy or ſell any ſort of " cattle for others, by commiſſion, or for reward to be paid, " or taken by himſelf or any ſervant or agent, ſhall directly or " indirectly, for his own account, buy any live ox, bull, " cow, ſteer, bullock, heifer, calf, ſheep, lamb, or ſwine, " in London, or within the bills of mortality, or at any place " while any ſuch cattle ſhall be on the road, or be driving, " bringing, or coming up, or offered to or for ſale in Lon- " don, or within the bills of mortality (other than ſuch cat- " tle which any ſuch ſaleſman, broker, or factor ſhall actually " purchaſe for the neceſſary uſe or proviſion of his family, " and ſhall actually uſe accordingly), and that no ſuch ſaleſ- " man, broker, or factor, ſhall ſell or expoſe, or offer to or " for ſale on his own account, in London, or within the " bills of mortality, either by himſelf, or his ſervant or agent, " any live ox, bull, cow, ſteer, bullock, heifer, calf, ſheep, " lamb or ſwine, upon pain, on every conviction, of forfeiting " double the value of any live cattle which he ſhall ſo buy or " ſell on his own account; provided the proſecution be com- " menced within three days after the offence committed."

† *Sect.* 90. " On complaint made on oath, the juſtice of " the diſtrict is to ſummon, *&c.* the offender and the wit- " neſſes, and, on the parties appearing or not appearing, there- " upon is to proceed to hear the complaint in a ſummary " way, and on ſuch payment of the forfeiture on conviction, " is to iſſue his warrant for the levying thereof by diſtreſs and " ſale, and for want of diſtreſs, to commit the offender for " any time not exceeding one month, nor leſs than ten days, " unleſs payment be ſooner made. And a witneſs refuſing " to be examined, may be committed not exceeding ten days. " Appeal may be made by the ſeller if aggrieved, to the " quarter ſeſſions, on giving ſecurity and notice, and the de- " termination of the ſeſſions to be final."

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† *Sect.* 91. Sixthly, As to FISH I ſhall examine the ſize and preſervation of them. 2. The rules for fiſhing in and near the ſea. 3. Their importation.

† *Sect.* 92. It is ſaid that fiſh ponds, or waters wherein fiſh are kept and nouriſhed, being a matter of profit and tending to the increaſe of victuals any man may of common right erect them; and it is therefore provided by 3 Edw. 1. c. 20. "That if any be attainted at the ſuit of the party of treſpaſſing in parks or ponds, great and large amends ſhall be awarded, the offender ſuffer 3 months impriſonment, make fine at the diſcretion of the court, and find ſurety not to offend again, &c.

Vide 2 Inſt. 200

† *Sect.* 93. As to the firſt particular, it is enacted by 1 Geo. 1. ſt. 2. c. 18. ſ. 14. "That no perſon ſhall cauſe any thing to be done in the Severn, Dee, Wye, Teame, Tees, Ribble, Merſey, Dun, Air, Ouſe, Swaile, Calder, Wharf, Eure, Darvent, or Trent whereby the ſpawn of any ſalmon, or any ſalmon not 18 inches from the eye to the extent of the middle of the tail ſhall be taken or killed. Or ſhall ſet any thing acroſs the ſaid rivers whereby the ſalmon may be hindered from paſſing up to ſpawn. Or ſhall from 31 July to 12 November (except in the Ribble, where they may be taken between the 1 Jan. and 15 Sep.) take any ſalmon of any kind; or ſhall after every 12th November fiſh there for ſalmon with any net leſs than 2½ inches in the meſh, on pain of forfeiting the fiſh, (*a*) nets, and 5 l. on conviction, within one month, on view, confeſſion, or one witneſs by diſtreſs: and to be diſtributed half to the informer and half to the poor, on default hard labour for any term between one and three months and ſuch other corporal puniſhment as the juſtice ſhall think fit.

(*a*) As it is not ſaid who ſhall have the fiſh, they are forfeited to the king. 2 Burn 321.

† *Sect.* 94. And it is further enacted, par. 15. "That no ſalmon out of the ſaid rivers ſhall be ſent to London under 6 lb. weight, on pain that the ſender, buyer, and ſeller ſhall forfeit 5 l. and the fiſh, to be levied and diſtributed on conviction as aforeſaid, or to ſuffer impriſonment as aforeſaid for three months unleſs ſooner paid. But by ſ. 17. an appeal may be to the next ſeſſions."

† *Sect.* 95. And it is enacted by 13 Edw. 1. ſt. 1. c. 47. "That no ſalmon ſhall be taken in any water where ſalmon are taken between 8th September and the 11th of November, nor ſhall any young ſalmon be taken at mill pools (by 13 Rich. 2. ſ. 1. c. 19.) in any other places from *Mid April* to Midſummer, on pain of having the nets and engines burnt, for the firſt offence, for the ſecond impriſonment for a

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" quarter of a year, for the third a whole year, and ſo on as " the treſpaſs ſhall increaſe; and overſeers ſhall be aſſigned (*a*) " to inquire of the ſame."

(*a*) 2 Inſt. 477.

† *Sect.* 96. And it is further enacted by 13 Rich. 2. ſt. 1. c. 19. " That no perſons ſhall put into any waters at any " time of the year any nets called *ſtalkers*, nor any other en- " gines whatever by which the fry or breed of ſalmons, lamp- " reys or any other fiſh may be deſtroyed, on pain as afore- " ſaid.—And all waters in *Lancaſhire* ſhall be put into defence " as to taking of ſalmon from Michaelmas to Candlemas and " in no other time of the year."

† *Sect.* 97. And it is enacted by 17 Rich. 2. c. 19. " That " the juſtices of peace, and the lord mayor of London on the " Thames and Medway, ſhall ſurvey the offences in both the " acts laſt above mentioned, and ſhall ſurvey and ſearch all " the wears in ſuch rivers, that they ſhall not be very ſtraight " for the deſtruction of ſuch fry and brood, but a reaſonable " wideneſs after the old aſſize uſed and accuſtomed, and they " ſhall appoint under conſervators who ſhall be ſworn to make " like ſurvey, ſearch and puniſhment, and they ſhall enquire " in ſeſſions as well by their office, as at the information of " the under conſervators of all defaults aforeſaid, and ſhall " cauſe them which ſhall be thereof indicted to come before " them, and if they be thereof convict, they ſhall have im- " priſonment and fine at the diſcretion of the juſtices; and " if the ſame be at the information of an under conſervator " he ſhall have half the fine."

† *Sect.* 98. It is enacted by 1 Eliz. c. 17. made perpetual by 3 Car. 1. c. 4. " That no perſon of whatever eſtate, de- " gree or condition, by any ways or means whatſoever ſhall " take and kill any young brood, ſpawn or fry of eels, ſalmon, " pike, or of any other fiſh, nor ſhall take or kill any ſalmons " or trouts not being in ſeaſon, nor any pike or pikerel not " being in length 10 inches or more; nor any ſalmon not be- " ing in length 16 inches or more; nor any trout not being " in length 8 inches or more; nor any barble not being in " length 12 inches or more, nor ſhall any fiſh be taken with " any manner of net or by any other engine or device what- " ſoever but only with a net or trammel whereof every meſh " or mark ſhall be two inches and a half broad, angling ex- " cepted."

Whether the penalty is 20 l. or 20 s for this offence. Vide 2 Burn's Juſtice 323.

† " But it is provided that ſuch nets and other engines as " have been uſed for the taking of ſmelts, loches, minnows, " bullheads, gudgeons or eels may ſtill be in all ſuch places " where ſuch fiſh have been uſed to be taken and killed, ſo that

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" ſuch perſons do not take, kill or deſtroy with ſuch nets any " other fiſh contrary to the meaning of this act."

† The lord admiral of England. The mayor of London. " The lord of every leet in England or Wales, or in default " of being preſented at the leet, the juſtices of aſſize, &c. " and all perſons lawfully intitled to have any conſervation of " rivers, ſtreams or waters, are impowered to enquire into of- " fences againſt this act by the oaths of 12 men or more, and " to hear and determine the ſame within their reſpective juriſ- " dictions, and all fines, &c. reſulting from the ſeveral con- " victions; ſhall be to the uſe of ſuch perſons as heretofore " lawfully had or were intitled to the ſame."

† *Sect.* 99. And it is further enacted by 33 Geo. 2. c. 27. " That no perſon ſhall take, or knowingly have in his poſſeſ- " ſion either in the water or on ſhore, or ſell, or expoſe to " ſale any ſpawn, fry or brood of fiſh, or any unſizeable fiſh, " or fiſh out of ſeaſon, or any ſmelt not 5 inches long. And " any perſon may ſeize the ſame together with the baſkets and " package, and charge a conſtable or other peace officer with " the offender and with the goods, and ſhall carry them before " a juſtice, and on conviction before ſuch juſtice, the ſame " ſhall be forfeited and delivered to ſuch proſecutor, and the " offender ſhall beſides forfeit 20 s. half to proſecutor and half " to the poor where the offence is committed, on default, by " diſtreſs, to be committed to hard labour not exceeding 3 " months unleſs ſooner paid. But the juſtice may remit any " portion equal to or within one half of the ſaid penalty."

† *Sect.* 100. And by 2 Hen. 6. c. 15. " If any perſon ſhall " faſten any nets over rivers, to ſtand continually day and " night he ſhall forfeit 5 l."

† *Sect.* 101. As to the ſecond particular. And it is further enacted by 3 Jac. 1. c. 12. " That any perſon who ſhall " erect any new wear along the ſea ſhore or in any haven, " harbour or creek or within 5 miles of the mouth thereof, or " ſhall take ſpoil or deſtroy any ſpawn, fry or brood of any " ſea fiſh in any device whatſoever, ſhall forfeit 10 l. for every " offence, half to the king, half to the informer; and if any " perſon ſhall within the diſtance of the places aforeſaid fiſh " with any draw net or drag net under three inches meſh, viz. " one inch and a half from knot to knot except for the taking " of ſmoulds in Norfolk only, or with any net with canvaſs or " other engine or device whereby the ſpawn, fry or brood of " ſea fiſh may be deſtroyed, ſhall forfeit the net and 10 s. to be " levied by diſtreſs. But it is provided that nothing in this " act ſhall reſtrain the taking of herrings, pilchards, ſprats or " laviderian

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" laviderian with nets of a leſſer meſh, and further that it ſhall " not extend to Angleſea." (3)

(3) For the preſervation of fiſh in the Severn. See 30 Car. 2. ſt. 1. c. 9. a private act.

† *Sect.* 102. And by 1 Geo. 1. ſt. 2. c. 18. " Whoever " ſhall uſe at ſea upon the Engliſh coaſt, any haul net, drag " net, or ſet net for catching any fiſh, except herrings, pil- " chards, ſprats or laviderian, of leſs than three inches and a " half meſh, from knot to knot; or which hath a falſe or dou- " ble bottom; or ſhall put one net behind another; he ſhall, " on conviction before one juſtice, on the oath of two witneſ- " ſes, in one month after the offence forfeit the ſame and 20 l. " half to the informer and half to the poor, by diſtreſs, and for " want of ſufficiency to be committed for 12 months, and " the nets to be burnt. But an appeal may be made to the " next ſeſſion."

† *Sect.* 103. It is alſo enacted by the ſaid ſtatute 1 Geo. 1. ſt. 2. c. 18. " That if any perſon ſhall bring to ſhore or " expoſe to ſale any fiſh leſs than the following ſizes from the " eyes to the extent of the tail, *viz.* Brelt or turbot 16 inches, " brill or pearl 14. Codlin 12. Whiting 6. Baſs and " mullet 12. Sole, place and dab 8. Flounder 7. he ſhall " forfeit the fiſh to the poor and 20 s. half to the informer and " half to the poor, to be levied as aforeſaid, and for default or " inſufficiency to be ſeverely whipped and kept to hard labour " from 6 to 14 days. Appeal to next ſeſſions."

† *Sect.* 104. But it is enacted by 33 Geo. 2. c. 2. " That " brett, turbot, brill or pearl, although under the ſaid dimen- " ſions, may be expoſed to ſale ſo as the ſame be not ſold by " retail for above 6 d. per pound; and if any greater price " ſhall be demanded or taken; or ſuch fiſh ſhall not be weigh- " ed or meaſured if required, the ſame ſhall be forfeited and " the offender ſhall pay 20 s. to be recovered, &c. as before " directed. And the money paid for the purchaſe of ſuch " fiſh ſhall be returned to the party."

† *Sect.* 105. It is enacted by 9 Geo. 2. c. 33. ſ. 4. " That " no perſon ſhall take, kill or deſtroy any lobſters on the coaſt " of Scotland from the 1ſt of June, to the 1ſt of September, " on pain of 5 l. on conviction, before two juſtices, of the " ſhire on the coaſt where the offence ſhall be commit- " ted." (4)

(4) For further particulars relating to the price of fiſh within the bills of mortality. Vide 10 and 11 Will. 3. c. 24. ſ. 11. 9 Ann c. 26. 22 Geo. 2. c. 49. 29 Geo. 2. c. 39. 30 Geo. 2. c. 21.

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† *Sect.* 106. As to the third particular reſpecting the importation of fiſh, it is enacted by 18 Car. 2. c. 2. "That if "any ling, herring, cod or pilchard, ſalmon, eels or congers, taken by foreigners ſhall be imported or expoſed to "ſale, any perſon may ſeize the ſame, to be divided equally "between the informer and the poor."

† *Sect.* 107. And it is further enacted, by 1 Geo. 1. c. 18. and 9 Geo. 2. c. 33. "That no fiſh taken by or received "of any foreigner, except proteſtants inhabiting in England "ſhall be imported (except eels, ſtockfiſh, anchovies, ſturgeon, botarge or caveas, lobſter, and turbot) on pain of "100 l. and the maſter of the veſſel 50 l. half to the poor "and half to the informer who ſhall ſue in 12 months in any "of the courts at Weſtminſter." (5)

(5) For the law reſpecting the ſalting of fiſh. Vide 2 Burn's Juſtice, 112 to 128. and for the Britiſh herring fiſhery. Vide 28 Geo. 2. c. 14.

† *Sect.* 108. Seventhly, As to BACON and PORK, it is enacted, by 18 Car. 2. c. 2. "That if any beef, pork, or bacon, for "ſale, ſhall be imported, they may be ſeized, and ſhall be forfeited, one half to the poor, and the other to the perſon who ſhall "ſeize the ſame: and by the 20 Car. 2. c. 7. thoſe who "ſhall ſeize the ſame are indemnified."

† *Sect.* 109. And it is further enacted, by 12 Car. 2. c. 4. ſ. 11. "That when beef, pork, and bacon, do not exceed, "*viz.* beef, 5 *l.* the barrel, pork 6 *l.* 10 *s.* the barrel, and ba"con 6 *d.* a pound in price, at the ports from whence they "are laden; and at the time of their lading, the ſame may "be ſhipped, carried out, and exported."

† *Sect.* 110. And by 22 Car. 2. c. 13. ſ. 4. "Beef, pork, "and bacon, may be exported by native or foreigner, al"though the ſame do exceed the prices above mentioned at "the ports, &c. at the time of their lading."

† *Sect.* 111. And it is further enacted, by 3 Will. and Mary, c. 8. "That all ſorts of beef, pork, or hogs fleſh, "may be exported into any part of the world in amity with "the Crown, free from any cuſtom or impoſition what"ſoever."

† *Sect.* 112. By 4 Will. and Mary, c. 5. ſ. 2. "Four "pence ſhall be paid for every pound of bacon imported." Vide 3 and 4 Will. and Mary c. 8.

† *Sect.* 113. By 5 Will. and Mary, c. 2 ſ. 4. "The ſaid "ſum ſhall be paid from the firſt day of the ſeſſion."

† *Sect.*

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† *Sect.* 114. And by 3 Geo. 2. c. 20. ſ. 16. "Beef or "pork ſalted with foreign ſalt ſhall receive on exportation "1 s. 6 d. *per* barrel."

† *Sect.* 115. Eighthly, As to HAY and STRAW, it is enacted, by 2 Will. and Mary, ſeſſ. 2. c. 8. ſ. 16. "That every "truſs of old hay brought or offered to be ſold within the bills "of mortality, between 1 Auguſt and 1 June, ſhall contain "and be the full weight of 56 lb. at leaſt; and that every "truſs of hay brought, or offered to be ſold, as aforeſaid, be- "tween 1 June and 1 Auguſt, being new hay of that ſum- "mer's growth, ſhall be and contain the full weight of 60 lb. "and old hay of any former year's growth the weight of "56 lb. as aforeſaid; and if any hay ſhall be brought, or "offered to be ſold, as aforeſaid, whereof any truſs ſhall be "of leſs weight than aforeſaid, the perſon ſo bringing or of- "fering ſuch hay to be ſold, ſhall forfeit for every truſs, not "being the full weight, eighteen pence." For the regulation of the hay-market at Weſtminſter Vide 8 and 9 Will. 3. c. 17.

† *Sect.* 116. And it is further enacted, by 31 Geo. 2. c. 40. "That all ſtraw which ſhall be ſold or delivered in, or "brought to, or expoſed to ſale in London, or within the "bills of mortality, ſhall be ſold and delivered in bundles or "truſſes, firmly bound up, and of the full weight of 36 lb. "of good and ſound ſtraw, excluſive of any other thing "which ſhall be put therein; and whoever ſhall bring into, "or expoſe to ſale, in London, or within the bills of morta- "lity, or in any place within the diſtance of thirty miles "from the extent of any part of the limits of the ſaid bills of "mortality, when ſtraw ſhall be ſold in bundles or truſſes, "any bundle or truſs of ſtraw which ſhall be of leſs weight "than 36 lb. of good and ſound ſtraw, or which ſhall be in "the inſide of a different quality or goodneſs from which on "the outſide it ſhall appear to be, ſhall forfeit twenty pence "for every offence, and the ſum of one ſhilling for every "bundle or truſs of ſtraw."

† *Sect.* 117. And it is further enacted by ſaid ſtatute, par 2. and 3. "That every truſs of hay ſhall be made up in like "manner as the ſtraw aforeſaid, and that ſuch hay only as "ſhall be good, ſhall be deemed and taken to be the hay "which is to make up the weight every truſs of hay by law "ought to be; and alſo that the pair of bands with which "any truſs of hay ſhall be bound, ſhall not exceed the weight "of 5 lb. upon pain of forfeiting for every offence one ſhil- "ling."

† *Sect.* 118. And it is further enacted by par. 4. "That "whoever ſhall bind hay contrary to the directions of this "act, ſhall forfeit three pence for every bundle or truſs of "hay

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" hay or ſtraw, if objected to within twenty-four hours by " the proprietor."

N. B. For the regulation of the markets with reſpect to the ſale of theſe articles. Vide the 6, 7, 8, 9 and 10 ſections of the act.

† *Sect.* 119. And it is further enacted by par. 5. " That " no perſon who ſhall act as a common ſaleſman in ſelling " hay or ſtraw for any other perſon for gain or reward, or by " commiſſion in London, or within the bills of mortality, " ſhall directly or indirectly buy any hay or ſtraw on his own " account, other than what he ſhall purchaſe to ſpend for his " own uſe; and if any ſuch perſon ſhall buy any hay or ſtraw " on his own account to ſell again, or ſhall ſell in London, " or within the bills of mortality, any hay or ſtraw which " ſhall have been brought by him on his account ſhall forfeit " one ſhilling for every truſs."

† *Sect.* 120. Ninethly, As to FRUIT, it is enacted, by 1 Ann. ſtat. 1. c. 15. ſ. 1. " That the meaſure commonly called " *water* meaſure ſhall be round, and in diameter 18 1-half " inches within the hoop, and 8 inches deep, and no more, " and ſo in proportion for any greater or leſſer meaſure; and " that every ſuch meaſure, by which apples and pears are ſold, " ſhall be heaped as uſually; and that whoever ſhall buy or " ſell apples or pears by or with any other meaſure, ſhall for- " feit ten ſhillings for every offence, half to the informer, " and half to the poor, on conviction by one witneſs, before " one magiſtrate, to be levied by warrant of diſtreſs. But " this act ſhall not extend to meaſures ſealed and allowed " by the company of fruiterers of London, which are uſed in " the ſaid city, or within three miles thereof."

N. B. By 8 Geo. 1. c. 20. there was an additional duty of 2 s. a buſhel continued for 7 years. By 11 Geo. 1. c. 7.

† *Sect.* 121. And it is further enacted by 10 Geo. 2. c. 27. " That upon all apples imported into Great Britain ſhall be " paid, over and above the duties already impoſed, an addi- " tional duty of two ſhillings a buſhel, and ſo for any greater " or leſs quantity, to be paid down in ready money by the im- " porters at the time of landing the ſame, which duty ſhall be " applied in the like manner as other duties upon the ſame " article."

† *Sect.* 122 Tenthly, As to HONEY AND WAX, it is enacted, by 23 Eliz. c. 8. " That whoever, in the making and melt- " ing of wax, ſhall mix or mingle the ſame with roſin, tallow, " turpentine, or any other deceitful thing, to the intent to ſell " the ſame, or to offer the ſame to be ſold or uttered for wax, " ſhall forfeit the ſame; and if the ſame ſhall happen to be " ſold before the corruption is diſcovered, the melter, mingler, " or corrupter, or the cauſer or procurer thereof, ſhall forfeit " for every lb. 2 s. half to the queen, half to the party decern- " ed, if he will ſue for it, or any other perſon that will ſue " for the ſame in any of the queen's courts of record."

† *Sect.*

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† *Sect.* 123. And it is further enacted, par. 2. "That every melter and maker up of unwrought wax ſhall have a ſtamp of the breadth of ſixpence, wherein two letters ſhall be plainly graven, ſignifying his name and ſurname, with which every piece of wax ſhall be printed or ſtamped triangle in three places, upon the outſide of the upper part of every piece ſo melted and caſt, on pain to forfeit the value of every piece of cake ſold, or offered to be ſold, and not ſo ſtamped or marked."

† *Sect.* 124. And it is further enacted, par. 3. "That whoever ſhall melt, mix, work, or ſell any wrought wax, or any ſtuff or wares wrought with wax, ſhall have a ſtamp or ſeal ſet to his work, that it may be known who were the workers thereof, on pain of forfeiting the ſame, half to the queen, or party deceived, *&c.* as before mentioned."

† *Sect.* 125. And it is further enacted, "That all barrels, kilderkins, and firkins filled with honey by the maker and filler, ſhall be marked with two letters ſtanding for his name and ſurname, each letter of an inch and a half in length at leaſt, burnt upon the head of the caſk with a hot iron, upon pain of 6 *s.* 8 *d.* for every package ſold, or offered to be ſold, and not ſo marked."

† *Sect.* 126. And it is further enacted, "That whoever ſhall fill and ſell, or cauſe to be filled and ſold, or offered to be ſold, any barrel, kilderkin, or firkin, with honey, for or in the name of a barrel, kilderkin, or firkin, containing leſs than 32 wine gallons the barrel, 16 wine gallons the kilderkin, and 8 wine gallons the firkin, ſhall forfeit for every half gallon ſo lacking, five ſhillings. And whoever ſhall corrupt the honey ſo ſold with any deceitful mixture ſhall forfeit the barrel or veſſel, and the honey therein, to be divided between the queen and the proſecutor."

† *Sect.* 127. But it is provided, "That this act ſhall not extend to perſons ſelling the wax of their own bees, in ſmall pieces in open market, nor to ſervants employed by their maſters in mingling, *&c.* ſo as they will confeſs the ſame."

† *Sect.* 128. "And whoever ſhall counterfeit any of the ſtamps or marks above mentioned, or ſhall uſe the marks of another, ſhall forfeit 5 *l.* to be recovered and divided as aforeſaid, and for non-ſufficiency of payment to be ſet on the pillory in the next market town, and ſuffer three months impriſonment."

† *Sect.* 129. Eleventhly, As to COALS, it is enacted, by 1 Ann, ſtat. 2. c. 17. "That the coal buſhel ſhall be made

"round

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"round with a plain and even bottom, nineteen and one half "inches in diameter, and to contain one *Winchester* buſhel, "and one quart of water. A braſs ſtandard of which bu- "ſhel ſhall be kept in the Exchequer."

† *Sect.* 130. And it is enacted by 16 and 17 Car. 2. c. 2. "That all ſea coal brought into the Thames ſhall be ſold by "the chaldron, containing 36 buſhels heaped up, and ac- "cording to the buſhel ſealed for that purpoſe at Guildhall, "and ſo for a greater and leſſer quantity; and that all other "ſorts of coals, ſold by weight and not by meaſure, ſhall be "ſold after the proportion of 112 lb. *averdupois* to the hun- "dred weight, upon pain of forfeiture, and of double the va- "lue, on conviction by one juſtice where the offence ſhall "be committed, half to the proſecutor, and half to the poor, "or to the ſurveyor of the highways as the magiſtrate ſhall "direct."

† *Sect.* 131. And it is further enacted by 17 Geo. 2. c. 35. "That any three juſtices ſhall be empowered to ſet the prices "of ſea coals, as they, from time to time, ſhall judge rea- "ſonable, allowing a competent profit to the retailer, be- "yond the price paid by him to the importer, *&c.*; and if "any engroſſer or retailer of ſuch coals ſhall refuſe to ſell as "aforeſaid, the juſtices taking a conſtable, may enter the "wharf, *&c.* and ſell the ſame, returning the produce to "ſuch engroſſer or retailer, deducting the charges; but no "intereſted perſon ſhall be engaged in ſetting ſuch price as "aforeſaid." (6)

(6) For the regulation reſpecting coals within the bills of mortality, vide 3 Geo. 2. c. 26. 11 Geo. 2. c. 15. 19 Geo. 2. c. 35. 20 Geo. 2. c. 49. 23 Geo. 2. c. 26. 32 Geo. 2. c. 25. 2 Geo. 3. c. 23. 21 Geo. 3. c. 24.

## CHAPTER THE EIGHTY-FIRST.

## OF BARRATRY.

Minſhew. Dufr-ſne. Spelman.

IN treating of Barratry, I ſhall conſider: Firſt, Who ſhall be ſaid to be a Barrator. Secondly, In what manner ſuch an offender is to be proceeded againſt. Thirdly, To what puniſhment he is liable.

Dalt. p. 38. Co. Lit. 368. 3 Coke 36. 3 Croke 527.

*Sect.* 1. As to the firſt point it ſeems, That a Barrator is a common mover, exciter, or maintainer of ſuits or quarrels, either in courts, or in the country.

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*Sect.* 2. And it is ſaid not to be material, whether the courts wherein ſuch ſuits are commenced, be of record or not, or whether ſuch quarrels in the country relate to a diſputed title of poſſeſſions or not; but that all kinds of diſturbances of the peace, and the ſpreading of falſe rumours and calumnies, whereby diſcord and diſquiet may grow among neighbours, are as proper inſtances of barratry, as the taking or keeping the poſſeſſion of lands in controverſy. Co. Lit. 368. 8 Coke 36.

*Sect.* 3. But it hath been holden, That a man ſhall not be adjudged a barrator in reſpect of any number of falſe actions brought by him in his own right. However if ſuch actions be merely groundleſs and vexatious without any manner of colour, and brought only with a deſign to oppreſs the defendants, I do not ſee why a man may not as properly be called a barrator for bringing ſuch actions himſelf, as for ſtirring up others to bring them. 1 R. Abr. 355. 3 Modern 98. 8 Coke 36.

*Sect.* 4. 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 way privy. 3 Mod. 97, 98.

*Sect.* 5. Alſo it ſeems clear, That no one can be a Barrator in reſpect of one act only; for every indictment for ſuch crime muſt charge the defendant with being *communis barratator*. 8 Coke 36.

*Sect.* 6. It ſeems to have been holden, That a feme covert cannot be indicted as a common barrator; but this opinion ſeems juſtly queſtionable; for ſince a feme covert is as capable of exciting quarrels, in the frequent repetition whereof the notion of barratry ſeems to conſiſt, as if ſhe were ſole, why ſhould ſhe not as properly be indictable for it? 2 Rolle 39. See chap. 1. ſect. 13.

*Sect.* 7. As to the ſecond point, *viz.* In what manner offenders of this kind are to be proceeded againſt, it is enacted by 34 Edw. 3. c. 1. "That in every county ſhall be aſſigned "for the keeping of the peace one lord, and with him three "or four of the moſt worthy of the county, *&c.* and that "they ſhall have power to reſtrain offenders, rioters, and all "other barrators, and to purſue, arreſt, take, and chaſtiſe "them, according to their treſpaſs or offence; and ſo cauſe "them to be impriſoned and duly puniſhed according to the "law and cuſtoms of the realm, and according to that which "to them ſhall ſeem beſt to do by their diſcretions and good "adviſement, *&c.*"

*Sect.* 8. It ſeemeth from theſe words, That juſtices of peace (as ſuch) have cognizance of barratry without any other commiſſion, *ſed quære*; for the contrary opinion ſeems to have been holden in Rolle's Reports. Con. B. 2. c. 8. ſ. 38, 39. Yelverton 46. 2 Rolle 131.

*Sect.*

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1 Modern 288. 1 Sid. 282. C. Jac. 526.

*Sect.* 9. However it ſeems clear, that no general indictment of this kind, charging the defendant with being a common oppreſſor, and diſturber of the peace, and ſtirrer up of ſtrife among neighbours, is good, without adding the words *communis barractator*, which is a term of art appropriated by the law to this purpoſe.

(a) 2 R. Ab. 79. 82. C. Jac. 527. C. Car. 340. 2 Keb 409, 410. C. Eliz. 148.

*Sect.* 10. (a) Alſo it ſeemeth to be certain, That an indictment of Barratry concluding *contra formam ſtatuti*, is good, though no ſtatute be made directly againſt it, but only for the puniſhment of it, ſuppoſing it an offence at common law.

(b) 2 Keb. 410. C. Eliz. 195. Con. Lat. 194. 2 Hale 180. Palmer 450. 1 Rolle 295.

*Sect.* 11. (b) Alſo 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 in 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.

(c) C. Jac. 527.

*Sect.* 12. (c) But it hath been reſolved, That ſuch an indictment is not good, without concluding *contra pacem*, &c. for this is an eſſential part of it.

(d) 5 Mod. 18. 1 Ld. Ray. 490. 12 Mod. 516.

*Sect.* 13. (d) Alſo it ſeemeth to be ſettled practice, not to ſuffer the proſecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters, which he intends to prove 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.

Hutton 104.

Vide 1 Dan. Ab. 111, 113.

*Sect.* 14. As to the third point, *viz.* In what manner offenders of this kind are to be puniſhed. It is ſaid, That if they be common perſons, they are to be fined and impriſoned, and bound to their good behaviour; and if they be of any profeſſion relating to the law, that they ought alſo to be farther puniſhed, by being diſabled to practiſe for the future.

## CHAPTER THE EIGHTY-SECOND.

## OF USURY.

OFFENCES, under the degree of capital, more immediately againſt the ſubject, not amounting to an actual diſturbance of the peace, which may be committed by private perſons

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perſons without any relation to an office, and which are neither infamous nor groſſly ſcandalous, and more immediately affect the intereſts of particular perſons, ſeem to be reducible to the following heads: Uſury. Maintenance. And The offence of buying or ſelling pretended titles.

In treating of USURY, I ſhall conſider: Firſt, What it is. Secondly, How it is reſtrained by common law. Thirdly, How by ſtatute.

*Sect.* 1. And firſt it ſeems, that uſury, in a ſtrict ſenſe, is a contract upon the loan of money to give the lender a certain profit for the uſe of it, upon all events, whether the borrower make any advantage of it, or the lender ſuffer any prejudice for the want of it, or whether it be repaid on the day appointed, or not.

Wood's Inſt. B. 3. p. 425. 3 Inſt. 151. B. Uſury, 12. 2 Strange, 1243. 4 Comm. 156. 2 Comm. 455.

*Sect.* 2. And in a larger ſenſe it ſeemeth, That all undue advantages taken by a lender againſt a borrower come under the notion of uſury, whether there were any contract in relation thereto, or not; as where one in poſſeſſion of land, made over to him for the ſecurity of a certain debt, retains his poſſeſſion after he hath received all that is due from the profits of the land.

Gibſ. 1070. Cowper 793.

*Sect.* 3. But it hath been reſolved, That an agreement to pay double the ſum borrowed, or other penalty on the non-payment of the principal debt at a certain day, is not uſurious, becauſe it is in the power of the borrower, wholly to diſcharge himſelf, by repaying the principal according to the bargain.

2 R. Abr. 801, 802. 26 Edw 3. 71. 2 Inſt. 89. 5 Rep. 69. Cowper 113.

*Sect.* 4. As to the ſecond point, *viz.* How uſury is reſtrained by the (*a*) common law. It is ſaid, That anciently it was holden to be abſolutely unlawful for a chriſtian to take any kind of uſury, and that whoſoever was guilty of it, was liable to be puniſhed by the cenſures of the church in his lifetime; and that if after death any one was found to have been an uſurer while living, all his chattels were forfeited to the king, and his lands eſcheated to the lord of the fee.

(*a*) 3 Inſt. 151. 2 R. Abr. 800, 801. 2 Inſt. 506, 507. Palm. 293, 294. Tempus Hardwick 420.

*Sect.* 5. Alſo it ſeemeth to have been the opinion of the makers of ſome late acts of parliament, as 5 Edw. 6. c. 20. 13 Eliz. c. 8. ſ. 5. and 21 Jac. 1. c. 17. ſ. 5. That all kinds of uſury are contrary to good conſcience.

2 Ventris 42. 2 Vern. 145. Eq. Ca. Ab. 288.

*Sect.* 6. (*b*) And agreeably hereto it ſeemeth formerly to have been the general opinion, That no action could be maintained on any promiſe to pay any kind of uſe for the forbear-

(*b*) 2 R. Abr. 801. 26 Ed. 1. 71. 1 R. Abr. 18.

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2 Roll. 239, 240, 469. Palm. 293.

forbearance of money, becauſe that all ſuch contracts were thought to be unlawful, and conſequently void.

(a) 1 R. Abr. 25. 2 R. Abr. 782, 802. Winch. 114, 120. C. Jac. 378, 379. 1 Ven. 198, 199. 3 Keble 15. C. Car. 273.

Exod. c. 22. v. 25. Levit. c. 25. v. 36. 37. Deuter. c. 23. v. 19, 20.

*Sect.* 7. But it ſeems to be generally agreed at this day, (*a*) That the taking of reaſonable intereſt for the uſe of money is in itſelf lawful, and conſequently that a covenant or promiſe to pay it, in conſideration of the forbearance of a debt, will maintain an action: For why ſhould not one who has an eſtate in money be as well allowed to make a fair profit of it, as another who has an eſtate in land? And what reaſon can there be, that the lender of money ſhould not as well make an advantage of it as the borrower? Neither do the paſſages in the *Moſaical* law, which are generally urged againſt the lawfulneſs of all uſury, if fully conſidered, ſo much prove the unlawfulneſs, as the lawfulneſs of it; for if all uſury were againſt the moral law, why ſhould it not be as much ſo in reſpect of foreigners, of whom the Jews were expreſly allowed to take it, as in reſpect of thoſe of the ſame nation, of whom alone they were forbidden to receive it? From whence it ſeems clearly to follow, That the prohibition of it to that people was merely political, and conſequently doth not extend to any other nation.

37 H. 8. c. 9. 13 Lliz. c. 1.

B. R. H. 233. 2 Strange 1043.

*Sect.* 8. As to the third point, *viz.* How uſury is reſtrained by ſtatute. It is enacted by 12 *Annæ*, c. 16. "That "no perſon whatſoever, ſhall upon any contract take, di- "rectly or indirectly, for loan of any money, wares, mer- "chandize, or other commodities whatſoever, above the va- "lue of five pounds, for the forbearance of one hundred "pounds for a year, and ſo after that rate for a greater or "leſſer ſum, or for a longer or ſhorter time; and that all "bonds, contracts, and aſſurances whatſoever, for payment "of any principal, or money to be lent, or covenanted to be "performed upon or for any uſury, whereupon or whereby "there ſhall be reſerved (*b*) or taken above the rate of five "pounds in the hundred, as aforeſaid, ſhall be utterly "void."

(*b*) Though the reſervation be of ſo much if requeſted; and the requeſt is never made.

3 Atk. 154. 3 Keble 259, 260. 1 Vent. 253. 3 Wilſ. 250.

AND it is further enacted, "That all and every perſon or "perſons whatſoever, which ſhall upon any contract take, "accept, and receive, by way or means of any corrupt bar- "gain, loan, exchange, chevizance, ſhift, or intereſt of any "wares, merchandize, or other thing or things whatſoever, "or by any deceitful way or means, or by any covin, engine, "or deceitful conveyance, for the forbearing or giving day of "payment for one whole year, of and for their money or "other thing, above the ſum of five pounds for the forbear- "ing of one hundred pounds for a year, and ſo after that rate "for

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"for a greater or leſſer ſum, or for a (a) longer or ſhorter "term, ſhall forfeit and loſe for every ſuch offence the treble "value of the money, wares, merchandize, and other things "ſo lent, bargained, exchanged, or ſhifted."

(a) Vide C. Jac. 25. Moor 644. Noy 41. C Car. 283. 4 Leonard 43. C. Eliz. 20. Douglas 224. 3 Leo. 205. 2 Leo. 38.

And note, That the treble value is not forfeited, unleſs ſomething be taken above the legal rate. But the very contract alone avoids the ſecurity. (1)

(1) *G.* borrowed 100*l.* of *B.* on his bond conditioned to repay the ſame at ſix months, with 5 per cent. per ann. and gave two guineas to *B.* at the time the money was advanced, as a premium for the loan. The principal, and 2*l.* 10*s.* intereſt, were repaid at the end of ſix months. Under the firſt branch of the ſtatute, the bond is void; but under the ſecond the uſury was not compleat till the half year's intereſt was received, for the penalty is incurred only by *taking*, *accepting*, and *receiving* more than legal intereſt. Douglas 225. 3 Wilſon 262. 2 Black. 796. For to conſtitute the offence three things muſt concur: 1. A contract between the parties. 2. Monies, or other things lent. 3. Above 5 per cent. per ann. *received* by the lender for forbearance. 3 Wilſon 362. 4 Burn 2252.

*Sect.* 9. And it is farther enacted by the ſaid ſtatute, "That every ſcrivener, broker, ſolicitor, and driver of bar-"gains, for contracts, who ſhall take or receive, directly or "indirectly, any ſum or ſums of money, or other reward or "thing, for brokage, ſoliciting, driving or procuring the "loan, or forbearing of any ſum or ſums of money, over and "above the rate or value of five ſhillings for the loan, or "forbearing of one hundred pounds, for a year, and ſo rate-"ably; or above twelve pence, over and above the ſtamp "duties, for making or renewing of the bond or bill for loan, "or forbearing thereof, or for any counterbond or bill con-"cerning the ſame, ſhall forfeit for every ſuch offence twenty "pounds, with coſts of ſuit, and ſuffer impriſonment for half "a year; the one moiety of all which forfeitures ſhall be to "the queen, the other to him that will ſue for the ſame, in "the ſame county where the ſeveral offences are committed, "&c."

And the contract is void. Carth 252.

The expoſitions which were made of the former ſtatutes of uſury being equally applicable to this, which is penned almoſt in the very ſame words, I ſhall take notice of the principal of them.

1 Atk. 340. 1 Ves. 142.

*Sect.* 10. Firſt, That a contract made before the ſtatute is no way within the meaning of it, and therefore that it is ſtill lawful to receive ſix *per cent.* in reſpect of any ſuch contract.

14 Geo. 3. c. 79. Daliſ. 72. Con. Raym. 197.

*Sect.* 11. Secondly, That a bond made to ſecure a juſt debt payable with lawful intereſt, ſhall not be avoided by reaſon of a corrupt agreement between the obligors, to which the obligee was no way privy: As where *A.* being indebted to *B.* in 100*l.* agrees to give him 30*l.* for the forbearance of that

Salkeld 344. Com. 4, 6. 5 Com. Dig. 610. 2 And. 121. Moor 752. C. Jac. 32, 33. Yelverton 47, 2 Butt. 1077.

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7 Modern 118. 2 Strange 1249. L. Nis P. 27. Carthew 356.

that 100 *l.* for a year, and gives him a bond of 60 *l.* for payment of the 30 *l.* and for the payment of the 100 *l.* enters into a bond of 200 *l.* together with *B.* for the payment of a true debt of 100 *l.* due from *B.* to *C.* (2)

(2) But a bill of exchange for 200 *l.* for which goods inſtead of money had been colourably advanced, is void, although in the hands of an innocent indorſee, for a valuable conſideration, and without notice of the uſurious contract of the original parties. Douglas 708 to 716.

1 Modern 69. 3 Keble 142. 2 Modern 307. 1 Saund. 294. Raym. 196. 2 Keble 525, 690. 3 Salkeld 390. 1 Bulſ. 17. 2 Roll. 398. Cowper 114. Ray. 196. 1 Freem 253.

*Sect.* 12. Thirdly, That the receipt of higher intereſt, than is allowed by the ſtatute, by virtue of an agreement ſubſequent to the firſt contract, does not avoid an aſſurance fairly made, and agreeable to the ſtatute, but only ſubjects the party to the forfeiture of treble value; for the words are, "That all aſſurances for the payment of any principal, *&c.* whereupon or whereby there ſhall be reſerved or *taken* above the rate of 5 *l.* in the hundred, *&c.* ſhall be utterly void."

Expreſsly confirmed by Lord Mansfield, in Floyer v. Edwards, Cowper 114. Yet Lord Hardwicke ſaid, That if a mortgage be drawn for only 5 per cent. and the mortgagee afterwards take above the legal intereſt, the deed would be void upon the word *take*. 3 Atkins 154.

Noy 37. 1 Leon 96.

*Sect.* 13. Fourthly, That in an aſſurance for the payment of fifty ſhillings for the uſe of 100 *l.* for ſix months, the computation ſhall be by calendar and not by lunar months, becauſe by the latter the intereſt would exceed the rate allowed by the ſtatute.

1 Bulſ. 17, 20. Yel. 30, 31. Noy 171. 2 Keble 690. Con. 1 Leon. 96

*Sect.* 14. Fifthly, That the receipt of intereſt before the time when it is in ſtrictneſs due, being voluntarily paid by the debtor for the greater convenience of the creditor, or for any other ſuch like conſideration, without any manner of corrupt practice, or any previous agreement of this kind at the making of the firſt contract, does not make the party liable to the forfeiture of the treble value.

4 Leon. 208. 3 Will. 390, 396. 1 Bulſ. 36. 1 Ard. 121. C. Jac. 253, 6 S. 617, 618. Noy 151. 2 Lev. 7, 9. Vin. 2 R. Abr. 782. H. 1.

*Sect.* 15. Sixthly, That the grant of an annuity for lives not only exceeding the rate allowed for intereſt, but alſo exceeding the known proportion for contracts of this kind, in conſideration of a certain ſum of money, is not within the meaning of the ſtatute, unleſs there were ſome underhand bargain for the ſecurity of the repayment of the principal or conſideration-money.

1 Vez. 164. 17 Geo. 3. c. 26. 1 Atk. 359, 361. C. Eliz. 27. 642, 643. 2 Black. 859. Cowp 728. Confirmed by Ld. Thurlow, Hil. 21 Geo. 3. Brown's Rep. Chan. 93. Ld. Irnham v. Child.

C. Jac. 208, 509. Hard. Jay v. Kent. 1 Keble 539, 718.

*Sect.* 16. Seventhly, That no contract is uſurious, by which the lender runs the hazard of loſing all his money, both principal and intereſt: As where on the loan of a certain ſum for a year, for the victualling of a ſhip, it is agreed, That if the

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the ſhip return, the lender ſhall have ſo many thouſand fiſhes at ſuch a rate, which exceeds the intereſt allowed by the ſtatute, and if the ſhip never return, or if it periſh by unavoidable caſualties of ſea, fire, or enemies, that then he ſhall have nothing: or where on the loan of 30 *l.* a bond is given for the payment of 100 *l.* on the marriage of a daughter of one of the parties; provided, That if either of them ſhould die before, that then nothing ſhould be paid: but it is clear, That if the intereſt only be hazarded on ſuch a contract, and the whole principal ſecured, the whole is uſurious. Alſo it hath been reſolved, That an agreement to pay more than the lawful intereſt for the loan of a certain ſum at ſuch a day, if *A. B.* ſhall be then alive, and if he ſhall be dead, then to pay ſuch a ſum which is leſs than the principal, is void by the ſtatute; for if ſuch a contingency would exempt the caſe out of the ſtatute, by the ſame reaſon twenty lives might be added, and the ſtatute wholly evaded. (3)

1 Atk. 340. 2 Roll. 48. 2 Roll. 48. 2 Black. 853. 1 Lev. 54. 1 Sid. 27. Showers Rep. 8. 3 Keble 304. Said to be good law. 1 Atk. 341. Vide C. Eliz. 741. 2 Roll. 48. C. Jac. 503. Cowp 794. 5 Coke 70. 1 Atk. 340. Moor 397. C. Eliz. 642, 643, 741. Lutw. 468. Carth. 68. Comb. 25. 1 Show. 8.

(3) Therefore a loan of 5000 *l.* to be paid 1000 *l.* on the death of *A.* in the life-time of *B.* is not uſurious. 1 Atk. 339, 350.—If the contingency goes to the intereſt only, though real and not colourable, and notwithſtanding it be a hazard, yet it is uſurious. If the contingency relates to both principal and intereſt, and a higher rate of intereſt is taken, the courts have there enquired whether it were colourable or not, for if I lend 100 *l.* to have 120 *l.* at the year's end upon a caſualty, if the caſualty goes to the intereſt only, and not to the principal, it is uſury, for the party is ſure to have the principal again, come what come will. But if the principal and intereſt are little in hazard, it is not uſury. *A gave credit* to *B.* for jewels to a certain amount. *B.* not being able to raiſe money upon them, deſired that *A.* would exchange them for old plate. *A.* ſaid old plate was as good as money, and accordingly gave him the value of as much old plate as was leſs by 100 *l.* than what the jewels had been ſold for; *for the whole amount of which B. was to ſtand indebted.* The Court thought this did not come under the deſcription of uſury. Johnſon qui tam v. Pickett, &c. B. R. Eaſt. 1785. But ſee 1 Atk 351. But if theſe loans are merely colourable, they may be uſury. 1 Atk. 341. And it is the intent of the agreement, and not the expreſſion, that determines it to be a loan, or a riſque. 1 Atk. 346. And where more than 5 *per cent.* is taken, if the ſubſtance of the contract be a borrowing and a lending, a ſlight colourable contingency only will not take it out of the ſtatute. Cowper 770.

*Sect.* 17. Eighthly, That an aſſurance made in purſuance of a fair agreement for ſuch intereſt as is allowed by the ſtatute, ſhall not be avoided by the fault of the ſcrivener, who draws it up in ſuch a manner as to bring it within the expreſs letter of the ſtatute: As where the parties agree, That 5 *l.* ſhall be paid for the loan of 100 *l.* for a year, and the ſcrivener, in drawing the bond for it, doth, without the knowledge of the parties, who are illiterate perſons, make the 5 *l.* payable at the end of half a year: or where on the fair loan of 100 *l.* agreed to be paid with common intereſt, a mortgage is made for the 100 *l.* with a proviſo, that it ſhall be void on payment of 105 *l.* at the end of one year, without any covenant for the mortgagor to take the profits till default be made of payment, ſo that in ſtrictneſs the mortgagee is intitled both to the intereſt and profits.

C. Jac. 677, 678. 2 Roll. 414, 415. Het 11. 1 Jon. 396. C. Car. 501. 2 Ven. 83. 3 Wilſ. 396. Hard. 418. 1 Freem. 264. 2 Mod. 307. 2 R. Abr. 793. 798, 5.

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5 Co. 70. Cowper 114. 115.

*Sect.* 18. Ninth, That the loan of money for lawful intereſt allowed by the ſtatute, ſhall not be conſtrued to be within the purview of it, in reſpect of any expectations which the lender may have of a voluntary gratuity to be given him by the borrower, if there be no kind of agreement relating to it.

5 Co. 69. C. Jac. 509. Cowper 113. 2 Bur. 715. C. Eliz. 643. 1 Lut. 462. 2 Bur. 891. 1 Atk. 342. 1 Atk. 351. 5 Co. 69. See Mo. 397. 2 And 16. 1 Atk. 250. Cowper 794. 2 Strange 1243.

*Sect.* 19. Tenth, That the reſervation of a greater ſum than is allowed by the ſtatute for intereſt, upon the non-payment of the principal at the end of the year is not uſurious within the ſtatute, becauſe it is in the power of the borrower to avoid the payment of the money ſo reſerved, by paying the principal at the day appointed; yet it ſeemeth clear, that if it were originally agreed, that the principal money ſhould not be paid at the time appointed, and that ſuch clauſe was inſerted only with an intent to evade the ſtatute, the whole contract is void; for the conſtruction of caſes of this nature muſt be governed by the circumſtances of the whole matter, from which the intention of the parties will appear in the making of the bargain, which, if it was in truth uſurious, is void, however it may be diſguiſed by a ſpecious aſſurance. (4)

(4) To all queſtions in whatever reſpect repugnant to the ſtatute, the nature and ſubſtance of the tranſaction, and the view of the parties muſt be aſcertained to ſatisfy the court that there is a *loan and borrowing*, and where the real truth is *a loan of money*, the wit of man cannot find a ſhift to take it out of the ſtatute, and though the ſtatute mentions only "for loan of monies, wares, merchandizes and other commodities," yet any other contrivance, if the ſubſtance of it be *a loan* will come under the word "indirectly," Cowper 115. 796. Douglas 712. If a man borrows under the colour of buying, it is uſurious. Ibid. 116. But if goods are ſold to be paid for at the expiration of three months, or to allow the ſeller ſuch an additional profit as exceeds the legal rate of intereſt, yet it is not uſury. Floyer v. Edwards. Plumb. v. Carter. Cowp. 112. 116.

(*a*) 3 Co. 80. 9 Co. 35. 1 Jon. 203. 1 Roll 41. 42. 2 Ven. 83. 168. 2 Leon. 166. Con. C. Eliz. 25, 588. 1 Sid. 182. (*b*) Salk. 22. Skin. 411. 412. Lut. 273. Cro. Eliz. 588.

*Sect.* 20. Eleventh, That a fine (*a*) levied, or judgment ſuffered, in purſuance of an uſurious contract, may be avoided by an averment of the corrupt agreement, as well as any common ſpecialty, or parol contract. And in an *aſſumpſit* (*b*) if it appear, either upon the evidence, or from the plaintiff's own expreſs ſhewing in his declaration, that the contract was uſurious, he cannot recover. But a ſpecialty cannot be avoided by uſury appearing on evidence or on the face of the condition, but it muſt be pleaded.

Or the court may direct an iſſue to try the uſurious contract. Cowper 728. Strange 1243. B. R. H. 233.

(*c*) C. Jac. 252. 508. 2 Roll. 48. 2 Lev. 8. (*d*) Lutw. 273. 466.

*Sect.* 21. Twelfth, That it is not (*c*) material whether the payment both of the principal and alſo or the uſurious intereſt be ſecured by the ſame (*d*) or by different conveyances, but that all writings whatſoever for the ſtrengthening ſuch a contract, are void.

*Sect.* 22. Thirteenth, That a contract reſerving to the lender a greater advantage than is allowed by the ſtatute, is equally

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equally within the meaning of it, (*e*) whether the whole be reſerved by way of intereſt, or in part only under that name, and in part by way of rent for a houſe, let at a rate plainly exceeding the known value.

(*e*) C. Jac. 440 Cowp. 795. Doug. 223. Noy 151. 3 Will. 250. 2 Blac. 792. Eliz. 20.

*Sect.* 23. Fourteenth, That a ſecond bond made after the forfeiture of a former, and conditioned for the receipt of intereſt according to the penalty of the forfeited bond, is as much within the ſtatute as if it had been made before the forfeiture; for if ſuch a practice ſhould be allowed, nothing could be more eaſy than to elude the ſtatute; and though the whole penalty be due in ſtrictneſs to the obligee, yet the true principal debt is in conſcience no greater after the forfeiture of the bond than it was before.

3 Keble 142. Con No. 2.

*Sect.* 24. Fifteenth, That in pleading an uſurious contract by the way of bar to an action, you muſt ſet forth the whole matter eſpecially, becauſe it lay within your own privity; but that in an information on the ſtatute for making ſuch a contract, it is ſufficient to ſet forth the corrupt bargain generally, becauſe matters of this kind are ſuppoſed to be privily tranſacted, and ſuch information may be brought by a ſtranger.

1 And. 49. 1 Sid. 285. 3 Modern 35. 1 Keble 629. Noy 143. Cro. Jac. 440. Vide C. Car. 501. Precedents. 2 Ven. 81. Lutw. 468. Co. En. 168. Clift 185. Bro. V. M. 255. Jones 413. Cowp. 72.

*Sect.* 25. Sixteenth, (*f*) That in every ſuch information it is neceſſary expreſsly to ſet forth the place, where the corrupt bargain was made. (5)

(*f*) 1 Leon. 96, 97.

(5) The time alſo is eſſential, and muſt be exactly laid, but if it is the true time it is ſufficient if laid under a videlicet. Cowper 114. Therefore on a draft dated the 14th, but not ſigned till the 16th, and the day was laid on the 14th, it was held bad. So alſo the time muſt be preciſely proved. Therefore where the time of payment was laid to be on a particular day, and it appeared that the time of payment was two years it was held a fatal variance, for the contract muſt be proved as it is laid. Cowper 671.

*Sect.* 26. Seventeenth, That if an uſurious contract in the county of *D.* be pleaded in bar to an action on a bond ſaid to be made in the county of *E.* the trial ſhall be in the county of *D.* becauſe the ground of the matter is the uſurious contract, and the bond is confeſſed by the plea.

1 Leon 148, 149.

*Sect.* 27. Eighteenth, That he who hath agreed to pay money upon an uſurious contract, ſhall not be admitted to give evidence upon an information againſt the uſurer, unleſs he have paid off the whole debt; for by ſuch means a man might avoid his own act and deed.

Hardreſs 331. Co. Lit. 6. b. 2 Roll. 685. 2 Raym. 191. b. 2. c. 46. ſ. 24. 1 Vent. 49. 1 Salk. 285.

2 Str. 1043. Strange 633. 498. And it has been decided that the borrower who repays the money is, himſelf, a good witneſs to prove ſuch repayment, and alſo the uſurious contract. Abrahams *qui tam* v. Bunn. 4 Burrow 2256. Vide alſo De Grey's opinion, 3 Wilſon 262. And the borrower may be a witneſs, though the money is not repaid if the uſury neither affects the debt or avoids the contract, and where the matter is doubtful the objection ſhall only go to the credit and not to the competency. Ibid. See the caſe of Fitzroy v. Guillim, Durnford and East 153.

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1 Leon. 95. 96. 2 Strange 1243. 1043. 1 Wilſon 286. Vide 1 Modern 174. whether an indictment will lie on 12 Ann. alſo Strange 816. Ld. Ray. 1144. 2 Salk. 682. And whether the proſecutor may compound. Barnes 118.

*Sect.* 28. Nineteenth, That an information for an uſurious contract on a loan of money, cannot be ſupported by evidence of ſuch a contract on a bargain concerning wares ſold.

The plaintiff may reply *quod non corrupte agreatum fuit. Quod licite bargainizavit* with a traverſe of the corrupt agreement. Cl. Aſſ. 324. So on a note, the plaintiff may reply, that the note was given for a juſt debt, *abſque hoc* that is agreed *modo & forma*, as the defendant pleads. Hardr. Caſes 287.

On a bill to ſet aſide an uſurious contract the defendant may demur to the diſcovery of what intereſt he agreed to take, becauſe he cannot ſet that forth without diſcloſing the very intereſt he has taken. 2 Atk. 393.

The bank may borrow money at more than 5 *per cent.*

† *Sect.* 29. It is enacted by 3 Geo. 1. c. 8. ſ. 39. "That "the governor and company of the Bank of England ſhall "have authority to borrow or take up money upon any con- "tracts, bills, bonds, or obligations, under their common ſeal, "or upon credit of their capital ſtock or otherwiſe for any time "or to be paid upon demand and at ſuch rate of intereſt as "they ſhall think fit although the ſame ſhall happen to exceed "the rate of intereſt allowed by law, and to give ſuch ſecuri- "ty to the lenders as they ſhall approve."

† *Sect.* 30. And by 14 Geo. 3. c. 79. which was made to explain the 12 Ann before recited, it is further enacted, "That all mortgages and ſecurities made and executed in "Great Britain of or concerning any lands, tenements, here- "ditaments, ſlaves, cattle, or other things lying or being in "any of the colonies, plantations or dominions of the *Weſt* "*Indies*, or any eſtate or intereſt therein to any of the king's "ſubjects, for ſecuring the re-payment of the ſum of money "thereon reſpectively really and *bona fide* advanced and lent "with intereſt for the ſame; and all ſecurities for the ſame; "and all transfers and aſſignments of the ſame executed in "Great Britain ſhall be good and valid; and that none ſhall "be liable to the penalties of 12 Ann by receiving or taking "intereſt for the money really advanced on ſuch mortgage, "ſecurity, bond, covenant, transfer and aſſignment at the "rate of intereſt allowed and eſtabliſhed by the law of the "place where the mortgaged premiſes ſhall lie or are, and "by par. 2. if the premiſes ſhall lie in Ireland, intereſt may be "taken on ſecurities executed as aforeſaid not exceeding ſix "*per cent. per annum.*"

CHAP.

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# CHAPTER THE EIGHTY-THIRD.

## OF 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: Co. Lit. 368. 2 Inſt 208. 212. 563.

*Sect.* 2. Firſt, *Ruralis*, or in the country; as where one aſſiſts another in his pretenſions to certain lands, by taking or holding the poſſeſſion of them for him by force or ſubtilty, or where one ſtirs up quarrels, and ſuits in the country, in relation to matters wherein he is no way concerned: And this kind of maintenance is puniſhable at the king's ſuit by fine and impriſonment, whether the matter in diſpute any way depended in plea or not, but is ſaid not to be actionable. Co. Lit. 36. 2 Inſt. 213. 1 Ric. 2. c. 4. 2 Ric. 115.

*Sect.* 3. Secondly, *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. Pult. 25. 2 Inſt. 212. 563. 2 R. Abr. 115. 77.

Of this ſecond kind of maintenance there ſeem 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. Thirdly, where one laboureth a jury, which is called Embracery. Co. Litt. 36

For the better underſtanding of the firſt of the abovementioned ſpecies, I ſhall examine: Firſt, what ſhall be ſaid to amount to an act of maintenance. Secondly, in what reſpects ſome ſuch acts may be juſtified. Thirdly, how far offences of this kind are reſtrained by the common law. Fourthly, how far by ſtatute.

*Sect.* 4. As to the firſt point, it ſeemeth clear, That whoever aſſiſts another with money to carry on his cauſe, as by retaining one to be of counſel for him, or otherwiſe bearing him out in the whole or part of the expence of the ſuit, may properly be ſaid to be guilty of an act of maintenance,

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nance, as it ſeems to be taken for granted in the (a) books cited in the margin.

(a) 28 H. 6, 7. 12. 34 H. 6. 25, 26. 9 E. 4. 32. 21 H. 7. 40. 6 E. 4, 5. 19 E. 4. 3. 31 H. 6. 9. B. Maint. 7. 14. 17. 20. 24. 43. 44. 52. 2 R. Abr. 118. 6 Mo. D. 2. Rol. 77.

*Sect.* 5. Alſo it is ſaid, That not only he who lays out his money to aſſiſt another in his cauſe, but alſo that he who by his friendſhip or intereſt ſaves him that expence which he might otherwiſe be put to, or but endeavours ſo to do, is alſo guilty of maintenance; as where (b) one perſuades, or but endeavours to perſuade a man to be of counſel for another *gratis*.

(b) 28 H. 6, 7. 12. 34 H. 6. 25. 9 E. 3. 32 Main. 6, 7, 20.

*Sect.* 6. Alſo it is ſaid, That all ſuch perſons may properly be called maintainers, who give, or but endeavour to give, any other kind of aſſiſtance to either of the parties, in the management of the ſuit depending between them: as (c) by opening the evidence to the jury; or by (d) giving evidence officiouſly without being called upon to do it; or by ſpeaking in the cauſe as (e) one of counſel with the party; or by (f) retaining an attorney for him; or (g) perhaps for barely going along with him to enquire for a perſon learned in the law.

(c) 22 H. 6, 5. Main. 14. C. Eliz. 735. (d) 28 H. 6. 6. 11 H. 641. Main. 5, 51. Main. 10. 2 R. Abr. 118. (e) Het. 78, 79. (f) 1 R. Abr. 593. (g) 19 E. 4, 3. 12 E. 4. 14. Het. 79.

*Sect.* 7. Alſo it hath been ſaid, That thoſe ſhall come under the like notion, who give any public countenance to another in relation to any ſuch ſuit; as where one of great power and intereſt ſays (h) publicly, that he will ſpend twenty pounds on one ſide, or that he will give twenty pounds to labour the jury, whether in truth he ſpend one penny or not; or where ſuch a perſon (i) comes to the bar with one of the parties, and ſtands by him while his cauſe is tried, whether he ſay any thing or not; for ſuch kinds of practices do not only tend to diſcourage the other party from going on in his cauſe, but alſo to intimidate juries from doing their duty. But it ſeems, that a bare (k) promiſe to maintain another, is not in itſelf maintenance, unleſs it be either in reſpect of the public manner in which, or the power of the perſon by whom, it is made.

(h) 22 H. 6. 5. Main. 14. Main. 8. (i) 22 H. 6. 6. 11 H. 6. 39. 19 E. 4. 3. Main. 51. (k) 9 H. 7. 18. B. Champ. 9.

*Sect.* 8. Alſo it is ſaid to be as much maintenance for a (l) juror, as for any other perſon, to ſolicit a judge to give judgment according to the verdict, becauſe after a juror has given his verdict, he has nothing more to do: But it is ſaid to be

(l) B. Main. 40. 18 H. . . 1. 2. 17 E. 4. 5. B. Main. 39.

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no maintenance for a juror to exhort his companions to join with him in giving ſuch a verdict as ſeems to him to be right.

*Sect.* 9. However it ſeems clear, (*m*) That a man is in no danger of being judged guilty of an act of maintenance, for giving another friendly advice, what action is proper for him to bring for the recovery of a certain debt, or what method it is ſafeſt to take 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 neighbourly 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 in other mens 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 has a good title.

(*m*) 12 E. 4. 14. 19 E. 4. 3. 22 H. 6. 5. B. Main. 17. 3 R. Abr. 118. 2 Inſt. 564. Moor 6. F. Main. 22. 2 Roll. 281. Co. Litt. 364. 2 Leon. 43.

*Sect.* 10. Alſo it hath been ſaid, that no one can be guilty of maintenance, in reſpect of any money given by him to another before any ſuit is actually commenced; yet if it plainly appear, that it was given merely with a deſign to aſſiſt him in the proſecution or defence of an intended ſuit, which afterwards is actually brought; ſurely it cannot but be as great a miſdemeanor in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the ſuit, though perhaps it may not in ſtrictneſs come under the notion of maintenance.

3 H. 6. 54. F. Main. 18. B. Main. 2.

If a mortgagee, not a party in the ſuit, advances money to ſupport the title it is not maintenance. 3 P. W. 375.

*Sect.* 11. However it is certain, That one may as properly be ſaid to be guilty of maintenance, within the meaning of the words *ad huc manu tenet*, in an action of maintenance, for ſupporting another after judgment, as for doing it hanging the plea; becauſe the party grieved may be diſcouraged thereby from bringing a writ of error or attaint.

47 Ed. 3. 10. B. Champ. 2.

As to the ſecond point, *viz.* In what reſpects ſome acts of this kind may be juſtified, I ſhall conſider the following particulars: Firſt, how far they are juſtifiable in reſpect of an intereſt in the thing in variance. Secondly, how far in reſpect of kindred or affinity. Thirdly, how far in reſpect of other relations. Fourthly, how far in reſpect of charity. Fifthly, how far in reſpect of the profeſſion of the law.

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*Sect.* 12. As to the firſt of theſe particulars, *viz.* How far ſome acts of this kind are juſtifiable in reſpect of an intereſt in the thing in variance, it ſeemeth to be clearly agreed, that if (*a*) a tenant in tail, or for life, be impleaded, he in remainder or reverſion may lawfully maintain the defence of the ſuit with his own money: And upon the like ground it ſeems to be clear, that if in an action of treſpaſs, *&c.* brought by or againſt a (*b*) leſſee for years, the inheritance come into queſtion, the leſſor may lawfully maintain his leſſee, and give (*c*) evidence to prove the inheritance in himſelf; for though the judgment which may be given againſt the leſſee cannot directly bind his inheritance, yet the verdict may be a prejudice to his title, being given on a ſuppoſal of his not having a good one: alſo it hath been admitted as clear law, that if one ſeiſed in fee of certain land, bring an action of treſpaſs *quare clauſum fregit*, and then alien the land, and afterwards in the trial of the cauſe it be queſtioned whether the inheritance at the time of the ſuppoſed treſpaſs belonged to the plaintiff or defendant, the alienee may lawfully produce evidence to prove that the inheritance was in the plaintiff, becauſe the plaintiff's title is now become his own.

(*a*) 19 E. 4. 3.
9 H. 6. 64.
B. Main. 3, 53.
2 R. Abr. 117.

(*b*) 6 E. 4. 2.
2 R. Abr. 117.
B. Main. 33.
39 H. 6. 20.
Main. 28.

(*c*) 14 H. 6. 7.
B. Main. 23.
2 R. Abr. 117.

*Sect.* 13. Alſo it hath been ſaid, that not only thoſe who have a certain intereſt, but alſo that thoſe who have a bare contingency of ſuch an intereſt in the lands in queſtion, which poſſibly may never come *in eſſe*, may in like manner lawfully maintain another in an action concerning ſuch lands; from whence it follows, That if I grant to *B.* that if my leſſee for life ſhall die during my life, that then he ſhall have the land for ten years, and after my leſſee be impleaded, *B.* may maintain him.

9 H. 6. 4.
2 R. Abr. 117.

*Sect.* 14. And it hath been ſaid, That not only thoſe who have a contingency of ſuch an intereſt, which it is in no man's power to bar them of, if the contingency happen, may juſtify ſuch maintenance, but that thoſe alſo ſhall have the ſame privilege, who by the act of God have the immediate poſſibility of ſuch an intereſt, though it be in the power of another to deprive them of it; and therefore that an heir apparent, or the huſband of ſuch heir, may lawfully maintain the anceſtor in an action concerning the inheritance of the land whereof he is ſeiſed in fee.

22 H. 7. 2.
19 Ed. 4. 3.
21 H. 6. 16.
2 Inſt. 564.
2 R. A. 115.

*Sect.* 15. But it is ſaid, That the grantee of a reverſion, before the late ſtatute for amendment of the law which made all attornment needleſs, could not maintain the tenant of the land without attornment, becauſe his poſſibility was wholly created by the act of the party, and could not be executed but by the voluntary attornment of the tenant, which there

9 H. 6. 64.
2 R. Abr. 117.
34 H. 6. 39.

was

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is no remedy to compel him to make by the common law; t. perhaps the authority of this opinion may be queſtionable, ecially if ſuch grant were made for good conſideration: r ſince thoſe who have only an equitable intereſt in lands, ıy lawfully maintain others in actions relating to thoſe ıds, as ſhall more fully be ſhewn in the ſeventeenth ſection; d ſince the grantor in equity ſhall ſtand intruſted for the ıntee after the grant, and the tenant may be enforced by ;ourt of equity to attorn to him, I do not ſee any good ıſon why ſuch grantee ſhould be eſteemed ſuch a ſtranger to : land, that he may not lawfully defend an action concern- ; it, in the event whereof he is ſo nearly concerned.

*Sect.* 16. But it ſeems clear, that he who is bound to ırrant lands, may lawfully maintain the tenant in the de- ıce of his title, becauſe he is bound by the warranty to ren- r other lands to the value of thoſe which ſhall be evicted.

11 H. 6. 47. B. Main. 51. 2 R. Abr. 118.

*Sect.* 17. Alſo it ſeems to be agreed, that he who hath an uitable intereſt in lands or goods, or even in a choſe in ac- n, may lawfully maintain another in an action relating thereto; d therefore it ſeemeth to be clear, that a man may lawfully intain (*a*) thoſe who are infeoffed of lands in truſt for him, an action concerning thoſe lands, and that if he ſell them another, the vendee ſhall have the ſame privilege; alſo it th been (*b*) reſolved, that where *A.* was bound as a ſurety : *B.* and *B.* thereupon made a deed of gift of certain ſheep *A.* in order to ſave him harmleſs from the ſaid bond, with implied truſt that the ſheep ſhould be returned to *B.* if *A.* ould not be damnified, and afterwards an action was brought ainſt *A.* for the taking of ſheep, *B.* might juſtify the main- ning of him in reſpect of the ſaid truſt: alſo it ſeemeth to (*c*) certain, that the aſſignee of a bond, or other choſe in tion, being made over to him for good conſideration, in ſa- ifaction of a precedent debt, due *bona fide* to him, and not erely in conſideration of the intended maintenance, may ei- er maintain the obligee in an action brought by him for the bt, or commence an original action in his name, for he hath equitable intereſt in the debt.

(*a*) 34 H. 6. 30. 15 H. 7. 2. 2 E. 4. 2. B. Main. 19, 30.
(*b*) Noy 100. Moor 620. See 39 H. 6. 19. 6. 20. F. Main. 14.
(*c*) 34 H. 6. 30. 15 H. 7. Noy 52. C. Eliz. 552. 1 Sid. 21. B. Main. 9.

*Sect.* 18. Alſo it ſeemeth to be (*d*) agreed, that wherever ıy perſons claim a common intereſt in the ſame thing, as in way, church yard, or common, *&c.* by the ſame title, ıey may maintain one another in a ſuit relating to the ſame.

(*d*) 18 E. 2. 4. B. Main. 41. Hob. 92. 2 R. Abr. 118. Noy 99. Moor 562. 788. 1 Roll. 57.

*Sect.* 19. It is ſaid, That he who is (*e*) bail for another, ıay take care to have his appearance recorded, but that he ught not to intermeddle any farther.

(*e*) 34 H. 6. 26. 34 H. 6. 6. 18 Ed. 4. 12.

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*Sect.* 20. As to the ſecond of the ſaid particulars, *viz.* How far ſome acts of this kind are juſtifiable in reſpect of kindred or affinity, it ſeems to be agreed, that whoever is in any way of kin or affinity to either of the parties, ſo long as the ſame (*a*) continues, or but related to him by being his (*b*) godfather, may lawfully (*c*) ſtand by him at the bar, and counſel and aſſiſt him, and alſo pray another to be of counſel to him, but that he cannot juſtify the laying out of any of his own (*d*) money in the cauſe, unleſs he be either (*e*) father, or ſon, or heir apparent to the party, or the huſband of ſuch an heireſs.

(*a*) 20 H. 6. 6 Ed. 4. 5. 14 H. 7. 2.
(*b*) 6 Ed. 4. 5. F. Main. 16.
(*c*) 21 H. 6. 25. 31 H. 6. 41. 42. 22 H. 6. 2. 19 Ed. 4. 32. 9 H. 6. 64. 9 Ed. 4. 32.
(*d*) 19 Ed. 4. 5. 8 Inſt. 564.
(*e*) 21 H. 6. 16. 8 Inſt. 564. Vide ſup. ſ. 14.

As to the third of the ſaid particulars, *viz.* How far ſome acts of maintenance are juſtifiable in reſpect of other relations, I ſhall conſider. 1 How far a lord may maintain his tenant. 2. How far a tenant may maintain his lord. 3. How far a maſter may maintain his ſervant. 4. How far a ſervant may maintain his maſter. 5. How far one neighbour may maintain another.

*Sect.* 21. As to the firſt point it ſeems certain, that not only the (*f*) lord, but alſo the *ceſtui que uſe* of a ſeigniory, may come with the tenant to a trial in an aſſize againſt him, and ſtand by him and aſſiſt him, and alſo pray the ſheriff to return an indifferent jury: Alſo it ſeemeth, that the (*g*) lord of a town in an action brought againſt the inhabitants, wherein a right to a common burying-place, claimed by them, is brought into queſtion, may maintain them in the defence of their right, by ſhewing authentic evidence thereof to the jury: And in ſome (*h*) books it is ſaid generally, that the lord may maintain his tenant, without ſaying, how far he may do it; and I do not find it any where expreſsly holden, that the lord may juſtify laying out his own money in defence of his tenant's title; but it ſeemeth the better opinion, that he may as well juſtify it as any other of the abovementioned acts of (*i*) maintenance; for the lord, by accepting a man for his tenant, ſeemeth to take him under his immediate (*k*) protection; and inaſmuch as the lands were originally derived from the lord, and he hath the continual benefit of the ſervices due from them, the law in many caſes of (*l*) common right, obliges him to warrant them unto his tenant, and where it doth not oblige him, ſurely it will at leaſt permit him to do it: But it ſeems clear, that he cannot maintain him in reſpect of any lands not holden of him.

(*f*) 11 H. 6. 39. b. 40. 2 R. Abr. 117. B. Main. 50.
(*g*) 18 Ed. 4. 2. B. Main. 50.
(*h*) 9 H. 6. 64. B. Main. 3.
(*i*) Co. Lit. 65.
(*k*) Co. Lit. 101, 384. 11 H. 6. 42. 2 R. Ab. 117.
(*l*) F. Main. 85.

*Sect.* 22. As to the ſecond point, *viz.* How far a tenant may maintain his lord, it is ſaid, that he may juſtify (*m*) coming with his lord, and ſtanding with him at a trial; but I cannot

(*m*) 11 H. 6. 42. 2 R. Abr. 116.

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not find any thing more relating to this matter in any of the books.

*Sect.* 23. As to the third point, *viz.* How far a maſter may maintain his ſervant, it is ſaid, that the maſter may go along with his (*a*) ſervant, or with his (*b*) chaplain, being retained to live in his houſe with him, in order to (*c*) retain counſel, and that he may pray one to be of counſel for him, and alſo that he may go with him to the (*d*) trial and ſtand with him and aid him while the cauſe is tried, but ought not to ſpeak in the court in favour of his cauſe. Alſo it is ſaid, that if my ſervant be arreſted in an action of (*e*) debt, I may aſſiſt him with money in order to keep him out of priſon, that I may have the benefit of his ſervice: But it is ſaid that the maſter, in real actions, cannot juſtify laying out money for his ſervant, unleſs he hath ſome of his wages in his hand; which, if the ſervant be willing, the maſter may ſafely lay out on his behalf.

(*a*) Het. 79.
(*b*) 19 H. 6. 30.
(*c*) 28 H. 6. 7. 12 b. 13. 34 H. 6. 25. 26. B. Main. 6, 14. F. Main. 20. Con. F. Main. 13.
(*d*) 19 H. 6. 30. 11 H. 6. 42. 2 R. Abr. 116. Het. 79.
(*e*) 21 H. 7. 40. Moor 814. B. Main. 24. 31 H. 6. 9. 19 Ed. 4. 3. 2 R. Abr. 116. Het. 79. B. Main. 44. 52.

*Sect.* 24. As to the fourth point, *viz.* How far a ſervant may maintain his maſter, it ſeemeth clear, that a perſon generally retained by another as his ſervant to do all manner of ſervices, and not for a (*f*) particular occaſion only, may juſtify (*g*) riding about to ſpeed his buſineſs, and going to (*h*) counſel in his behalf, and ſhewing his evidences to the counſel or to the jury, and (*i*) ſtanding by him at a trial between him and another; but it is certain, that he cannot lawfully lay out any of his own (*k*) money to aſſiſt the maſter in his ſuit.

(*f*) 39 H. 6. 5. 6. Con. Keil. 50.
(*g*) 19 E. 4. 3.
(*h*) 19 H. 6. 31.
(*i*) 11 H. 6. 42.
(*k*) 3 H. 6. 53. 54. 11 H. 6. 10, 11.

*Sect.* 25. As to the fifth point, *viz.* How far one neighbour may aſſiſt another, it ſeems clear, that a man may lawfully go with his (*l*) neighbour to inquire for a perſon learned in law, but that (*m*) he ought not to give him any money towards carrying on his ſuit.

19 E. 4. 3. 12 Ed. 4. 14.
(*l*) 19 E. 4. 3. 2 R. Ab. 118.

*Sect.* 26. As to the fourth inſtance wherein ſome acts of this kind are juſtifiable, *viz.* That relating to charity, it ſeems to be (*m*) agreed, that any one may lawfully give money to a poor man to enable him to carry on his ſuit. Alſo it hath been adjudged, that any one may ſafely go with a (*n*) foreigner who cannot ſpeak Engliſh to a counſellor, and inform him of his caſe.

(*l*) 21 H. 6. 16. 1, H. 6. 64. 22 H. 6. 64. 22 H. 6. 35. B. Main. 14.
(*m*) 19 E. 4. 3. 34 H. 6. 25. 15 H. 7. 2. B. Main. 7.

As to the fifth inſtance wherein ſome acts of this kind may be juſtified, *viz.* that relating to the profeſſion of the law, I ſhall conſider, Firſt, how far they are juſtifiable in a counſellor. Secondly, how far in an attorney.

*Sect.*

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(a) 1 H. 6. 10. 11. 2 R. Abr. 116. 2 Inſt. 564. (b) F. Main. 8. 22 H. 6. 6.

*Sect.* 27. As to the firſt point, there is no doubt but that a (*a*) counſellor, having received his fee, may lawfully ſet forth his client's cauſe to the beſt advantage; but it is certain, that he can no more juſtify (*b*) giving him money to maintain his ſuit, or threatening a juror, than any other perſon.

(c) 13 H. 4. 16. Keilw. 50. Hob. 117. 2 Inſt. 564. 2 R. Abr. 116. F. Main. 21. (d) 3 Mod. 98. Vide 2 Danv. 487, 12, 13, 14. Winch. 52. 2 Jon. 208. C. Car. 159. 294. Con. C. Eliz. 415, 459, 760. Moor 366. 2 R. Abr. 114, 115. (e) 2 R. Abr. 114.

*Sect.* 28. As to the ſecond point, there is no doubt but that an attorney may (*c*) lawfully proſecute or defend an action in the court wherein he is an allowed attorney, in the behalf of any one by whom he ſhall be ſpecially retained, and that he may aſſiſt his client, by laying out his own money for him to be repaid again, and alſo may maintain an action againſt him for the ſame by virtue of ſuch a retainer, without any ſpecial promiſe. And it is ſaid, alſo, that attornies may juſtify ſuch maintenance in other courts, wherein they are not (*d*) allowed attornies, but that they cannot have an action for the money ſo laid out without a ſpecial promiſe, and that they are more juſtified by a general (*e*) retainer to proſecute for another all his cauſes, than if they were not retained at all; and it is certain that they ought not to carry on a cauſe for another at their own expence, with a promiſe never to expect a repayment. And it ſeems juſtly queſtionable, whether ſolicitors who are no attornies, can in any caſe juſtify the laying out their money in another's ſuit.

2 R. Abr. 115. Winch. 53. 2 Inſt. 214.

*Sect.* 29. However it is certain, that no counſellor or attorney can juſtify the uſing any deceitful practice, in maintenance of a client's cauſe, and that they are liable to be ſeverely puniſhed for all miſdemeanors of this kind, not only, by the common law, but alſo by ſtatute; for it is enacted by Weſtminſter 1. c. 29. "That if any ſerjeant, pleader, or "other, do any manner of diſceit or colluſion in the king's "court, or conſent unto it, in diſceit of the court, or to be"guile the court or the party, and thereof be attainted, he "ſhall be impriſoned for a year and a day, and from thence"forth ſhall not be heard to plead in that court for any man. "And if he be no pleader, he ſhall be impriſoned in like man"ner by the ſpace of a year and a day at the leaſt. And if the "treſpaſs require greater puniſhment, it ſhall be at the king's "pleaſure."

11 E. 4. 3. B. Diſc. 28.

*Sect.* 30. In the conſtruction of this ſtatute the following points have been holden. Firſt, That counſellors, &c. who are not ſworn, are as much within the meaning of it as ſerjeants, &c. who are ſworn.

2 Inſt. 215, 216. Dyer 249. 2 Inſt. 215. F. N. B. 98.

*Sect.* 31. Secondly, That all fraud and falſhood, tending to impoſe upon or abuſe the juſtice of the king's courts, are within the purview of it, as in the following inſtances:

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*Sect.* 32. First, Where an attorney ſues out an *habere facias ſeiſinam*, falſely reciting a recovery in a real action, where in truth there was no recovery at all, and by colour thereof puts the ſuppoſed tenant in the action out of his freehold.

*Sect.* 33. Secondly where one brings a *præcipe* againſt a poor man, knowing that he had nothing in the land, on purpoſe to get the poſſeſſion from the true tenant. 2 Inſt. 215.

*Sect.* 34. Thirdly, where one procures an attorney to appear for a man, and confeſs judgment without any warrant. 41 E. 3. 1. 2 Inſt. 215.

*Sect.* 35. Fourthly, where one pleads a falſe plea, known to be utterly groundleſs, and invented merely with a deſign to delay juſtice, and abuſe the court; and therefore it is ſaid, that if a client deſire his attorney to plead ſuch a plea, the attorney ought to enter upon the roll, *non ſum veraciter informatus, ideo nihil dicit.* Dyer 361. 10 E. 4. 9.

*Sect.* 36. As to the third general point of this chapter. How far offences of this kind are reſtrained by the common law? 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; and therefore it is ſaid, that all offenders of this kind are not only liable to an (*a*) 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 (*b*) indicted as offenders againſt public juſtice, and adjudged thereupon to ſuch fine and impriſonment, as ſhall be agreeable to the circumſtances of the offence. Alſo it ſeemeth, that a court of record may commit a man for an (*c*) act of maintenance done in the face of the court. 2 Inſt. 208, 212. (*a*) 11 H. 6. 11. 2 Inſt. 208. 2 R. Abr. 114. 8 H. 5. 8. (*b*) 2 R. Abr. 114. 2 Inſt. 208, 212. (*c*) Hct. 79.

*Sect.* 37. As to the fourth general point of this chapter. How far offences of this kind are puniſhed by the ſtatute? It is enacted by 1 Edw. 3. c. 14. which was farther enforced by 20 Edw. c. 4. "That none of the King's miniſters, nor no "great man of the realm, by himſelf nor by other, by ſending "of letters, nor otherwiſe, nor none other great nor ſmall, "ſhall take upon them to maintain quarrels nor parts in the "country, to the lett and diſturbance of the common law."

*Sect.* 38. And it is farther enacted by 1 Rich. 2. c. 4. "That none of the King's counſellors, officers or ſervants, "nor any other perſon within the realm of *England*, of what"ſoever eſtate or condition they be, ſhall take or ſuſtain any "quarrel by maintenance, in the country or elſewhere, upon "grievous pain, that is to ſay, the ſaid counſellors and the

"king's

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" king's great officers, upon a pain which ſhall be ordained by " the king himſelf, by the advice of the lords of his realm; " and other leſs officers and ſervants of the king's as well in " the exchequer, and all his other courts and places, as of his " own meiny, upon pain to loſe their offices and ſervices, and " to be impriſoned, and then to be ranſomed at the king's " will, every of them according to their degree, eſtate, and de- " ſert: and all other perſons through the realm, upon pain of " impriſonment, and to be ranſomed as aforeſaid."

F. Main. 24, *Sect.* 39. In the conſtruction of theſe ſtatutes the following points have been holden: firſt, that maintenance of a ſuit in a court baron is as much within the purview thereof as maintenance in a court of record,

9 H. 6. 53, 54. B. Main. 1. F. Main. 18. *Sect.* 40. Secondly, that *nul tiel record* is a good plea to an action of maintenance brought on theſe ſtatutes; and therefore, that he who barely aſſiſts another in taking out an original, which never is returned, is not liable to any ſuch action.

Fitz. Maintenance 17, 26. *Sect.* 41. Thirdly, that it is not material, whether the plaintiff in an action on the ſaid ſtatutes were nonſuited, or recovered in the action wherein the maintenance is ſuppoſed.

Reg. 182. b. *Sect.* 42. Alſo it is certain, that he who fears that another will maintain his adverſary, may by way of prevention have an original writ grounded on the ſaid ſtatute prohibiting him ſo to do.

2 Mod. 322. *Sect.* 43. Alſo all perſons are prohibited to give or receive any liveries or badges for maintenance, under ſevere penalties, by 1 Rich. 2. c. 7. 7 Hen. 4. c. 14. 13 Hen. 4. c. 3. 8 Hen. 6. c. 4. and 8 Edw. 4. c. 2.

*Sect.* 44. And it is further enacted by 32 Hen. 8. c. 9. " That no perſon whatſoever ſhall unlawfully maintain, or " cauſe or procure any unlawful maintenance in any action, " demand, ſuit or complaint in any of the king's courts of " the chancery, *Whitehall*, or elſewhere, where any perſon " ſhall have authority by virtue of the king's commiſſion, pa- " tent or writ, to hold plea of lands, or to examine, hear or de- " termine any title of lands, or any matter of witneſſes, con- " cerning the title, right, or intereſt of any lands, tenements, " or hereditaments; and alſo that no perſon whatſoever do un- " lawfully retain, for maintenance of any ſuit or plea, any per- " ſon or perſons, or embrace any freeholders or jurors, or ſub- " orn any witneſs by letters, rewards, promiſes, or any other " ſiniſter labour or means, for to maintain any matter or cauſe, " or to the diſturbance or hindrance of juſtice, or to the pro-

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" curement, by occaſion of any manner of perjury by falſe verdict " or otherwiſe, in any manner of courts aforeſaid, upon pain " to forfeit for every ſuch offence ten pounds; the one moi- " ety thereof unto the king, and the other moiety to him that " will ſue for the ſame by action of debt, &c.

*Sect.* 45. It ſeemeth that in an information on this ſtatute it is not ſufficient to ſay, that the defendant maintained the party, without adding that he did it unlawfully. Savil 41, 42.

*Sect.* 46. Alſo it is ſaid to have been adjudged, That maintenance of a ſuit in a ſpiritual court, is neither within this nor any of the other abovementioned ſtatutes concerning maintenance. Noy 68. C. Eliz. 594.

*Sect.* 47. Alſo it hath been holden, that in an information on this ſtatute, it is neceſſary to ſhew that a plea was depending, and therefore that it is not ſufficient to ſay that a bill was exhibited. Savil 41, 42.

## CHAPTER THE EIGHTY-FOURTH.

## OF CHAMPERTY.

AND now we are come to the ſecond ſpecies of maintenance, called champerty, which is the unlawful maintenance of a ſuit in conſideration of ſome bargain to have part of the thing in diſpute, or ſome profit out of it. 2 Inſt. 208. Co. Lit. 368.

*Sect.* 2. Having ſhewn in the precedent chapter what ſhall amount to an act of maintenance, and how far all maintenance in general, and conſequently champerty, is puniſhable by the common law; I ſhall only take notice in this place, how far this offence in particular is reſtrained by ſtatute, and to that end ſhall ſet down in order the ſeveral ſtatutes relating to it, and ſhew in what manner they have been expounded.

*Sect.* 3. And firſt, it is enacted by the ſtatute of Weſtminſter 1. c. 25. " That no officers of the king by themſelves " nor by other, ſhall maintain pleas, ſuits, or matters hang- " ing in the king's courts, for lands, tenements, or other " things, for to have part or profit thereof by covenant made " between them: and he that doth, ſhall be puniſhed at the " king's pleaſure." 3 Edw. 1ſt.

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2 Inſt. 208. *Sect.* 4. In the conſtruction of the ſtatute theſe following opinions have been holden. Firſt, that by the king's courts, therein mentioned, are intended only his courts of record.

F. N. B. 172. 2 Inſt. 209. 563. *Sect.* 5. Secondly, that under the word "covenant," which in a ſtrict ſenſe ſignifieth only an agreement by deed, all kinds of promiſes and contracts of this kind are included, whether they be made by writing or parol.

47 Aſſize 5. 47 Ed. 3. 9. *Sect.* 6. Thirdly, that maintenance in perſonal actions to have part of the debt or damages, is as much within this ſtatute, as maintenance in real actions for a part of the land.

F. N. B. 172. 2 Inſt. 209. 47 Ed. 3. 9. 47 Aſſ. 5. 9 H. 7. 18. F. Champ. 4. *Sect.* 7. Fourthly, that maintenance in conſideration of a rent granted out of land in variance, is within this ſtatute, but that rent granted out of other lands is no way within the purview of it.

B. Champ. 2. *Sect.* 8. Fifthly, that it hath been holden not to be material, whether he who brings a writ of champerty, did in truth ſuffer any damage by it, or whether the plea wherein it is alledged be determined or not.

(*a*) 21 E. 3. 52. 30 Ed. 3. 3. 4. 2 R. Abr. 113. 31. *Sect.* 9. Sixthly. That the (*a*) maintenance of the tenant or defendant is as much within the meaning of the ſtatute, as the maintenance of a demandant or plaintiff.

(*b*) 1 H. 7. 2. B. Champ. 6. *Sect.* 10. Seventhly, that (*b*) 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.

*Sect.* 11. And it is farther enacted by the ſtatute of Weſtminſter 2. c. 49. "That the chancellor, treaſurer, juſtices, nor "any of the king's counſel, no clerk of the chancery, nor of "the exchequer, nor any juſtice or other officer, nor any of "the king's houſe, clerk, nor lay, ſhall not receive any church, "nor advowſon of a church, land nor tenement in fee, by "gift or by purchaſe, or to farm, nor by champerty, nor "otherwiſe, ſo long as the thing is in plea before the king, or "before any of his officers, nor ſhall take no reward thereof. "And that he that doth contrary to this act, either himſelf, "or by another, or make any bargain, ſhall be puniſhed at "the king's pleaſure, as well he that purchaſeth, as he that "doth ſell."

*Sect.*

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*Sect.* 12. In the conſtruction of this ſtatute the following opinions have been holden. Firſt, that it extendeth only to the officers therein named, and not to any other perſons. 2 Inſt 484, 485.

*Sect.* 13. Secondly, that it ſo ſtrictly reſtrains all ſuch officers from purchaſing any land, hanging a plea, that they cannot be excuſed by a conſideration of (*a*) kindred or affinity, and that they are within the meaning of the ſtatute, by barely making ſuch a purchaſe, whether (*b*) they maintain the party in his ſuit or not; (*c*) whereas ſuch a purchaſe for good conſideration, made by any other perſon, of any ter-tenant, is no offence, unleſs it appear that he did it to maintain the party. (*a*) 2 Inſt. 485. (*b*) 2 Inſt. 484. 50 Aſſ. 3. B. Champ. 8. F. Champ. 6. (*c*) 22 E. 3. 10. b. 52. 2 Inſt. 484. F. N. B. 172. D. E.

*Sect.* 14. And it is farther enacted by 28 Edw. c. 11. in the following words, "becauſe the king hath heretofore ordained by ſtatute. That none of his miniſters ſhall take no plea for maintenance, by which ſtatute other officers were not bounden before this time, the king will that no officer, nor any other, (for to have part of the thing in plea) ſhall not take upon him the buſineſs that is in ſuit; nor none upon any ſuch covenant ſhall give up his right to another; and if any do and be attainted thereof, the taker ſhall forfeit unto the king ſo much of his land and goods, as doth amount to the value of the part that he hath purchaſed for ſuch maintenance. And to obtain this, whoſoever will, ſhall be received to ſue for the king before the juſtices before whom the plea hangeth, and the judgment ſhall be given by them. But it may not be underſtood hereby, that any perſon ſhall be prohibited to have counſel of pleaders, or of learned men in law, for his fee, or of his parents and next friends." See alſo 33 Ed. 1. ſt. 3. 1 Rich. 2. c. 9. 1 Inſt. 369.

*Sect.* 15. In the conſtruction of this ſtatute the following points have been holden. Firſt, that a (*d*) conveyance executed, hanging a plea in purſuance of a bargain made before, is not within the meaning of it. (*d*) 50 Aſſ. 15. 8 E. 4. 13. 2 Inſt. 563. F. Champ. 13. F. N. B. 172.

*Sect.* 16. Secondly, That champerty in any action at (*e*) common law, whether it be real, perſonal, or mixt, is within this ſtatute: Alſo it ſeems the better opinion, that the purchaſe of and while a ſuit of (*f*) equity concerning it is depending, is within the purview of it. (*e*) 28 Ed. 39. 47 Caſtile 5. 2 Inſt. 563. (*f*) Mich. 655. Cor. 2 R. Abr. 113.

*Sect.* 17. Thirdly, that a (*g*) leaſe for life, or years, or a voluntary gift of land, hanging a plea, is as much within the ſtatute as a purchaſe for money. (*g*) 8 E. 4. 13. F. Champ. 10. F. N. B. 172.

*Sect.* 18. Fourthly, that a ſurrender made by a (*h*) leſſee to his leſſor is not within the meaning of this ſtatute; for ſince the leſſor may lawfully maintain his leſſee without ſuch a ſurrender, (*h*) F. N. B. 172. 2 Inſt. 564.

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render, as hath been more fully ſhewn in the precedent chapter, ſurely *a fortiori* he may do it after the ſurrender.

(a) 2 Inſt. 564. F. N. B. 172.

*Sect.* 19. Fifthly, that no (*a*) conveyance, or promiſe thereof, relating to lands in ſuit, made by a father to his ſon, or by any anceſtor to his heir apparent, is within the ſtatute, ſince it only gives them the greater encouragement to do what by nature they are bound to do.

(b) 13 H. 7. 17. B. Champ. 3.

*Sect.* 20. That the (*b*) giving of part of the land in ſuit, after the end of it, to a counſellor for his wages, is not within the meaning of it, if it evidently appears, that there was no kind of precedent bargain relating to ſuch gift; but it ſeems (*c*) dangerous to meddle with any ſuch gift, ſince it cannot but carry with it a ſtrong preſumption of champerty.

(c) 2 Inſt. 564.

Vide 2b. p 382.

† *Sect.* 21. And it is enacted by 31 Eliz. c. 5. "that the "offence of champerty may be laid in any county at the plea- "ſure of the informer."

## CHAPTER THE EIGHTY-FIFTH.

## OF EMBRACERY.

FOR the better underſtanding of the nature of embracery, I ſhall conſider, firſt, What kind of maintenance comes under the notion of embracery. Secondly, What acts of this nature are altogether unlawful. Thirdly, In what circumſtances ſome kinds of them may be lawful. Fourthly, How far this offence is reſtrained by the common law. Fifthly, How far by ſtatute.

(a) F. N. B. Co. Lit. 369. Moor 815. 4 Comm. 140. (b) 21 H. 6. 20. 22 H. 6. 5. 37 H. 6. 31. 8 Dec Tant. 10, 11, 13. Co. Lit. 369. Moor. 815.

*Sect.* 1. As to the firſt point it ſeems clear, that (*a*) any attempt whatſoever to corrupt, or influence, or inſtruct a jury, or any way to incline them to be more favourable to the one ſide than to the other by money, 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, (*b*) whether the jurors on whom ſuch attempt is made give any verdict or not, or whether the verdict given be true or falſe.

(c) 13 H. 4. 16. Moore 806. C. Eliz. 816. Co. Lit. 159. 369.

*Sect.* 2. (*c*) 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

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and therefore it will not ſuffer a mere ſtranger, ſo much as to labour a juror to appear and act according to his conſcience.

*Sect.* 3. Alſo it is ſaid, that generally the giving of money to a juror (*a*) after the verdict, without any precedent contract in relation to it, is an offence favouring of the nature of embracery; becauſe if ſuch practices were allowable, it would be eaſy to evade the law, by giving jurors ſecret intimations of ſuch an intended reward for their ſervice, which might be of as bad conſequence as the giving of money before-hand. But it ſeems clear, that the giving of jurors ſuch a reaſonable recompence, as is uſually allowed them for their expences in travelling, &c. and which may fairly be expected by them from either ſide that ſhall prevail, is no way criminal, becauſe if no ſuch allowance were to be expected, it would be often difficult to prevail with perſons to ſerve on a jury at their own charge; and therefore by experience it hath been found neceſſary to permit the parties to give jurors ſome amends for their charges.

(*a*) 39 Aſſ. 19. B. Dec. Tan. 14.

*Sect.* 4. It hath been adjudged, that the bare (*b*) giving of money to another to be diſtributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually ſo diſtributed or not; alſo it is (*c*) clear, that it is as criminal in a juror, as in any other perſon, to endeavour to prevail with his companions to give a verdict for one ſide by any practices whatſoever, except only by arguments from the evidence which was produced, and exhortations from the general obligations of conſcience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatſoever to ſecure a verdict, are high offences of this nature; as where perſons by (*d*) indirect means procure themſelves or others, to be ſworn on a *tales* in order to ſerve one ſide.

(*b*) 22 H. 6. 5. 28 H. 6. 7. 12. 31 H. 6, 8, 9. B. Main. 6. 14.
(*c*) 17 Ed. 4, 5. 18 Ed. 4. 4. B. Main. 32, 39.
(*d*) 1 Saund. 301.

*Sect.* 5. As to the ſecond point, *viz.* What acts of this kind are altogether unlawful. It ſeems clear, that neither the party himſelf, nor his counſel, nor attorney, nor any perſon whatſoever, can juſtify any indirect practices of influencing a jury, either by giving (*e*) or promiſing them money, or (*f*) menacing them, or, (*g*) inſtructing them in the cauſe beforehand, &c.

(*e*) 13 H. 4. 16. 17. 11 H. 6. 11. 2 R. Abr. 116. 6. 3.
(*f*) 19 H. 6. 31. 13 H. 4. 17.
(*g*) 2 Bulſt. 25. Noy 102. Co. Lit. 362. Moor 815.

*Sect.* 6. As to the third point, *viz.* In what circumſtances ſome acts of this nature may be lawful. It ſeemeth clear, that any perſon who may juſtify any other act of maintenance, may ſafely labour a juror to (*b*) appear and give a verdict according to his conſcience, but that no other perſon can juſtify inter-

(*b*) Dyer 48. Co. Lit. 157, 369. Moore 813. Noy 102.

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intermeddling ſo far, and that no one whatſoever can juſtify the labouring a juror (*a*) not to appear.

(*a*) Hob. 294.

*Sect.* 7. As to the fourth point, *viz.* How far offences of this kind are reſtrained by the common law, there can be no doubt but that they ſubject the offender either to an indictment or action, in the ſame manner as all other kinds of unlawful maintenance do by the common law. Alſo it ſeemeth, that 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.

*Sect.* 8. As to the fifth point, *viz.* How far offences of this kind are reſtrained by ſtatute. It is enacted by 5 Edw. 3. c. 10. "that if any juror, in aſſizes, juries or inqueſts, take "of the one party or of the other, and be thereof duly attainted, "that hereafter he ſhall not be put in any aſſizes, juries or in- "queſts, and nevertheleſs he ſhall be commanded to priſon, "and further ranſomed at the king's will. And the juſtices "before whom ſuch aſſizes, juries, and inqueſts ſhall paſs, "ſhall have power to enquire and determine according to this "ſtatute."

*Sect.* 9. And it is farther enacted by 34 Edw. 3. c. 8. That "in every plea, whereof the inqueſt or aſſize doth paſs, if "any of the parties will ſue againſt any of the jurors, that "they have taken of his adverſary or of him, for to give "their verdict, he ſhall be heard, and ſhall have his plaint by "bill preſently before the juſtices, before whom they did "ſwear, and that the juror be put to anſwer without any de- "lay; and if they plead to the country, the inqueſt ſhall be "taken main enant. And if any man other than the party "will ſue for the king againſt the juror, it ſhall be heard and "determined as afore is ſaid. And if the juror be attainted at "the ſuit of other than the party, and maketh fine, the party "that ſueth ſuch have half the fine; and that the parties to "the plea, ſhall recover their damages by the aſſeſſment of "the inqueſt. And that the juror ſo attainted have the priſon "of one year, which impriſonment the king granteth, that it "ſhall not be paſſioned for any fine; and if the party will "ſue by writ, before other juſtices, he ſhall have the ſuit in "the form aforeſaid."

*Sect.* 10. And it is further enacted by 38 Edw. 3. c. 12. "That if any jurors in aſſizes ſworn, and other inqueſts to "be taken between the king and party, or party and party, "do any thing take by them or other, of the party, plaintiff,

"or

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" or defendant, to give their verdict, and thereof be attainted " by process contained in the said statute of 34 Edw. 3. be " it at the suit of the party that will sue for himself, or for the " king, or any other person, every of the said jurors shall pay " ten times as much as he hath taken. And that he that will " sue shall have the one half, and the king the other half. And " that all the embraceors to bring or procure such inquest in " the country to take gain or profit shall be punished in the " same manner and form as the jurors. And if the juror or " embraceor so attainted, have not whereof to make gree in " the manner aforesaid, he shall have the imprisonment of one " year: and the intent of the king, of great men, and of the " commons is, that no justice nor other minister shall enquire " of office, upon any of the points of this article, but only at " the suit of the party, or of other, as as afore is said." See also the 32 Hen. 8. c. 9. sec 3. 6. Infra 554.

*Sect.* 11. In the construction of these statutes the following points have been holden: First, That all actions of *debts tantum* being founded on an offence supposed to have been committed in some former action appearing upon record, it will be a good plea in bar, either that there is no (*a*) such record at all, or that there is not any such (*b*) record by which it may appear that the juror was sworn, and that it is a good (*c*) exception in abatement of the writ, that there is a variance in the first record from that in the declaration in the present action; yet it is said, that it is not necessary to (*d*) shew the whole record in certain, but only so much of it as conveys the plaintiff to his action.

(*a*) 5 Ed. 4. 3. B. Dec. Tant. 2. 11.
(*b*) 37 H. 6. 31. B. Dec. Tant 13.
(*c*) 9 H. 6. 1. B. Dec. Tant. 1.
(*d*) 34 H. 6. 4.

*Sect.* 12. Secondly, That it is not (*e*) sufficient to shew that the defendants took money in order to embrace a jury, without shewing also that they actually disposed of it accordingly.

(*e*) 37 H. 6. 31. F. N. B. 171.

*Sect.* 13. Thirdly, that the (*f*) plaintiff must shew in certain how much was received, or otherwise the court will not know for what sum to give judgment.

(*f*) Pl. Com. 85.

*Sect.* 14. Fourthly, That the giving of money to a juror (*g*) after the verdict is not within the statute, unless there were some precedent contract relating to it.

(*g*) 39 Ass. 19. B. Dec. Tant 14.

*Sect.* 15. Fifthly, That it is not (*h*) material whether the jurors gave any verdict or not, or if they did give one, whether it were true or false.

(*h*) 21 H. 6. 31. 37 H. 6. 31. B. Dec. Tant 10. 13 F. N. B 171. Co. Lit. 369. Dyer 95.

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40 Ed. 3. 3. 36 H. 6. 28. B. Dec Tant. 3, 4 F. N. B. 171 Finch 255. 21 H. 6. 20.

*Sect.* 16. Sixthly, That all the jurors and embraceors may be joined in one action, notwithſtanding they ſeverally received different ſums, becauſe all was received in order to give the ſame verdict, which could not but be the entire act of all the jurors. But it ſeems, that each defendant ought to plead ſeverally, that he did not take money in the manner as the plaintiff hath declared.

(*a*) B Dec Tant 1 18 Savil. 42.

*Sect.* 17. Seventhly, That the (*a*) defendants ought not to plead generally not guilty, but that they ought ſpecially to deny the taking of the money, *&c.*

(*b*) 41 E. 3. 15. 44 E. 3. 36. B. Dec Tant. 5, 7.

*Sect.* 18. Eighthly, That the plaintiff ſhall be paid the moiety of the money due to him on a judgment in *decies tantum* before the king, becauſe the king's moiety is not due as a debt but as a fine; and wherever the king is intitled to a fine from the ſuit of a ſubject, the plaintiff ſhall firſt be ſatisfied.

(*c*) 7 H. 4, 2, 3. 43 E. 3. 16. B. Dec Tant. 9, 19.

*Sect.* 19. Ninthly, That the huſband (*c*) alone may bring a *decies tantum*, for an embracery in a former action brought by him and his wife, becauſe by a *decies tantum* money only is to be recovered wherein the wife can claim no ſhare.

(*d*) 41 Ed. 3, 9. B. Dec Tant. 4. 1 R. Abr. 579.

*Sect.* 20. Tenthly, That he who buys land to maintain a ſuit at a lower price than it is known to be worth, is as much within the ſtatute, for ſo much as the (*d*) land is worth more than he gave, as if he had received it in money.

(*e*) 5 E. 4. 2. 3. b. 2. c. 26. 64. B. Dec Tant. 15. C. Eliz. 158, 583. 11 Co. 65. 3 Inſt. 194. (*f*) 44 E. 3. 36. B. Dec Tant. 7.

*Sect.* 21. Eleventhly, That this being a popular action may be barred by the (*e*) king's releaſe, being made before any action brought, but that it cannot be barred by the releaſe of the party grieved; and from the ſame ground alſo it follows, that the party grieved needs not in ſuch action declare of any damages done to him by the embracery; but if he do, it is ſaid that he (*f*) ought to lay them ſeverally againſt each defendant, or elſe that his writ ſhall abate, unleſs he will releaſe them: but perhaps there may be good reaſon to queſtion this opinion, for why may not the damages be as well recovered, as the action jointly laid againſt all the defendants.

(*g*) 44 E. 3. 12. 47 E. 3, 4. B. Dec. 6, 8.

(*h*) 47 E. 3. 4.

*Sect.* 22. Twelfthly, That no (*g*) proceſs of outlawry lies in this action, but only a *capias* or diſtreſs infinite, upon a *nihil* returned, and that ſuch diſtreſs ought to be of the lands which the defendants had at the time of the writ of *decies tantum* purchaſed, and not of thoſe which they had at the time of the inqueſt; and that no *capias* (*h*) into a foreign county lies againſt the jurors, becauſe it ſhall be preſumed that they are in the county wherein they were returned on the jury; but clearly this reaſon can no way be extended to the embraceors: and perhaps it may be overfavourable to carry it ſo far in relation

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lation to the jurors, eſpecially ſince the diſtreſs infinite can only affect the lands which they had at the time of the *decies tantum*, before which they may poſſibly have ſold thoſe which they had at the return of the *venire*; and why ſhould not the ſheriff's preſent return that the defendants have nothing in the county, over-balance the preſumption chiefly grounded on the former return, with which the preſent is not inconſiſtent, being made at a ſubſequent time.

Vide 6 E. 4. 11. a. 2 R. Abr. 277.

## CHAPTER THE EIGHTY-SIXTH.

## Of the OFFENCE of BUYING or SELLING a PRETENDED TITLE.

FOR the better underſtanding the offence of buying or ſelling a pretended title, I ſhall conſider: how it is reſtrained by common law. And, how by ſtatute.

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

Moore 751. Hobart 115. Plowden 80. 88.

*Sect.* 2. As to the ſecond point, *viz.* How far offences of this kind are reſtrained by ſtatute. It is recited by 1 Rich. 2. c. 9. "That many perſons having true title to lands, and alſo in perſonal actions were wrongfully delayed of their rights and actions, by means that the defendants did commonly make gifts and feoffments of their lands in debate, and of their goods, to lords, and other great men, againſt whom the ſaid purſuants for menace that was made to them, neither could nor durſt make their purſuits: and alſo that many perſons often times uſed to diſſeiſe others, and anon after

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after ſuch diſſeiſin to make divers feoffments, ſometimes to lords and other great men to have maintenance, and ſometimes to perſons unknown, to the intent to delay the ſaid diſſeiſees, &c. And it is thereupon enacted, "that from "thenceforth no gift, or feoffment, of lands, tenements, or "goods, be made, by ſuch fraud or maintenance; and that if "any be in ſuch wiſe made, they ſhall be holden for none "and of no value; and that the ſaid diſſeiſees ſhall from "thenceforth have their recovery againſt the firſt diſſeiſor, as "well of the lands and tenements, as of their double damages, without having regard to ſuch alienations, ſo that the "diſſeiſees commence their ſuits within the year next after "the diſſeiſin done."

B. Feoffments *de terris*, 1, 19. Co. Lit. 369.

*Sect.* 3. In the conſtruction of the ſtatute it hath been holden: that feoffments of this kind are only void in reſpect of the diſſeiſees, but that they are effectual between the feoffor and feoffee, &c.

† And it is enacted by ſtat. 13. Ed. 1. c. 49. "that no "perſon of the king's houſe ſhall buy any title whilſt the thing "is in diſpute; on pain of both the buyer and ſeller being puniſhed at the king's pleaſure."

Ll. Raym. 537.

*Sect.* 4. And it is further enacted by 32 H. 8. c. 9. "that no "perſon or perſons whatſoever ſhall bargain, buy, or ſell, or "by any ways or means, obtain, get, or have any pretended "rights or titles, or take, promiſe, grant, or covenant to have "any right or title, of any perſon or perſons, in, or to any manors, lands, tenements, or hereditaments, but if ſuch perſon "or perſons, which ſhall ſo bargain, ſell, give, grant, covenant "or promiſe the ſame, their anceſtors, or they by whom he "or they claim the ſame, have been in poſſeſſion of the ſame, "or of the reverſion or remainder thereof, or taken the rents "or profits thereof, by the ſpace of one whole year next before "the ſaid bargain, covenant, grant, or promiſe made; upon "pain that he that ſhall make any ſuch bargain, ſale, promiſe, "covenant, or grant, to forfeit the whole value of the lands, "tenements or hereditaments ſo bargained, ſold, promiſed, "covenanted, or granted, contrary to the form of this act. "And the buyer or taker thereof, knowing the ſame, to forfeit alſo the value of the ſaid lands, tenements, or hereditaments ſo by him bought, or taken as is aboveſaid. The "one half of the ſaid forfeitures to be to the king, and the "other half to the party that will ſue for the ſame in any of the "king's courts of record, by action of debt, bill, plaint, or "information. In which action, bill, plaint, or information, "no eſſoin, protection, wager of law, nor injunction ſhall "be allowed."

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*Sect.* 5. But it is provided by the ſaid ſtatute, "that it ſhall "be lawful to any perſon, being in lawful poſſeſſion, by tak- "ing of the yearly farm, rents, or profits, of, or for any "manors, lands, tenements, or hereditaments, to buy, ob- "tain, get, or have by any reaſonable way or means, the pre- "tended right or title of any other perſon or perſons, hereafter "to be made to, of, or in ſuch manors, lands, tenements, "or hereditaments, whereof he or they ſhall ſo be in lawful "poſſeſſion, any thing in the ſaid act contained to the contrary "notwithſtanding."

*Sect.* 6. And it is farther provided, "that the ſaid ſtatute "ſhall not extend to charge any perſon with any of the above- "mentioned penalties, except ſuch perſon be ſued for the "offence within one year."

In the conſtruction of this ſtatute the following opinions have been holden:

*Sect.* 7. I. That it is not material whether any ſuit be depending concerning the lands contracted for, or not, whereas the ſtatutes ſet forth in the precedent chapters extended only to contracts concerning lands which were actually in ſuit. Plowd. 83.

*Sect.* 8. II. That in an action on this ſtatute, the plaintiff needs not recite it, becauſe the judges are bound *ex officio* to take notice of it, being of a public nature; but that if he do recite it, he muſt, at his peril, take care to recite it certainly, becauſe it is the ground of his action; and the court will not aid him by intending that there is another ſtatute to maintain his action, different from that whereon he himſelf hath founded it. Lit. Rep. 369. B. 2. c. 25. ſ. 101. Plowd. 84. C. Car. 233. Dyer 74. Con. 1 And. 76.

*Sect.* 9. III. That in ſuch an action againſt the buyer of a pretended title, it ought expreſsly to appear, that the defendant did know that the ſeller had not been in poſſeſſion the year before; and *vice verſâ*, that in ſuch an action by the buyer the contrary ought to appear, for otherwiſe it may be intended, that he was *particeps criminis*, and therefore ought not to have any ſhare of the penalty. 1 Leon. 167. 1 Burr. 300.

*Sect.* 10. IV. That it is not ſufficient to ſhew, that the ſeller had not been in poſſeſſion, &c. a year before, without expreſsly averring that he had a pretended right or title, becauſe that is the point of the action. Lit. Rep. 369. Dyer 74. Plowd. 80, 88. C. Car. 233.

*Sect.* 11. V. That is not (*a*) ſufficient to ſet forth the value of the land at the time of the conveyance executed, without ſhewing the value at the time of the bargain, becauſe the foreiture is governed by the latter. (*a*) C. Car. 238.

*Sect.*

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(a) 4 Co. 26. Co. Lit. 369. Moore 655. Plowd. 88, 88. Dy. 74, 374. (b) Co. Lit. 369. Con. Mo. 266. Dyer 374. (c) Co. Lit. 369.

*Sect.* 12. VI. That a contract for (*a*) cuſtomary right to a copyhold eſtate, or for a leaſe for (*b*) years, is as much within the ſtatute as a contract for the fee ſimple; for the words of the ſtatute are, *any right or title*, and ſuch contracts are as much within the miſchief intended to be redreſſed by the ſtatute as any others can be: but it is (*c*) ſaid, that a leaſe for years made with an intent to try the title in ejectment, is not within the meaning of the ſtatute, becauſe it is in a kind of courſe of law, unleſs it be made to a powerful man to ſway the cauſe.

Plowd. 81, 85. Dyer 74.

*Sect.* 13. VII. That in an action for the making ſuch a leaſe for years, is it not neceſſary preciſely to ſet forth the commencement and end of it, becauſe the plaintiff is ſuppoſed to be a ſtranger to it.

1 Leon. 166. 1 And. 76, 77.

*Sect.* 14. VIII. That a leaſe for years by one out of poſſeſſion being made off the land, is as much within the ſtatute as if it had been made upon the land, though it be wholly void in law; for it is a leaſe in reputation, and taken for ſuch among the vulgar, and tends as much to diſquiet the poſſeſſion as if it had been effectual in law.

B. Main. 38. Plowd. 88, 89. Co. Lit. 369.

*Sect.* 15. IX. That no conveyance made by one, who hath the uncontеſted poſſeſſion, and undiſputed abſolute propriety of lands, is any way within the meaning of the ſtatute, becauſe it no way favours of maintenance, and can be prejudicial to no one; from whence it follows, that a diſſeiſor obtaining the releaſe of the diſſeiſee, or a mortgagor redeeming his land, are in no danger of the ſtatute in reſpect of any contract by them made, concerning ſuch land after ſuch releaſe or redemption.

Plowd 88, 89. Moor 655.

*Sect.* 16. X. That one who gains the poſſeſſion of lands, by virtue of a judgment at law in affirmance of an ancient title, cannot come within the meaning of this ſtatute in reſpect of any leaſe made of ſuch lands; for it can never be imagined, that it was the intent of the ſtatute to oblige all perſons who ſhould recover their lands, to occupy them themſelves, which would be generally inconvenient, and often wholly impracticable; and therefore it muſt be admitted from the neceſſity of the caſe, that ſuch perſons may lawfully leaſe their lands and houſes to proper tenants, to be manured and occupied for the uſual rents: But if it ſhall appear, that the title to ſuch lands is ſtill conteſted notwithſtanding ſuch recovery, and that ſuch leaſe was in truth deſigned for the maintenance of the title, I can ſee no reaſon why it ſhould not be as much within the ſtatute as any caſe whatſoever. However there ſeems to be no doubt, but that if a diſſeiſee enter upon a diſſeiſor, being in poſſeſſion of the land under a pretended title, and immediately

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ſell it to a ſtranger, he is as much within the ſtatute as if he had been out of poſſeſſion at the time of ſuch ſale; for notwithſtanding his entry was lawful, and he had both the abſolute property and poſſeſſion of the land, yet inaſmuch as the diſſeiſor claims a title to it, which is yet in diſpute, ſuch a ſale by the diſſeiſee ſeems within the intent of the ſtatute, which meant abſolutely to reſtrain all perſons from transferring their diſputed titles to any ſtranger whatſoever. But it is ſaid, that ſuch a ſale by a father to his ſon and heir apparent, is excepted out of the general purview of the ſtatute, by common reaſon, which by the ties of nature as well as of intereſt, obliges ſuch a ſon to maintain his father; yet it hath been holden that ſuch a ſale to a brother of the half blood is within the ſtatute.

1 Leon. 166, 167. Bac Co. Lit. 369. ſeems contrary.

Savil 95, 96. 1 Leon. 167. Modern 656.

*Sect.* 17. XI. It is ſaid that the abovementioned proviſo, that "one, who is in lawful poſſeſſion by taking the yearly rents or "profits of lands, *&c.* may lawfully buy the pretended right "of any other perſon by reaſonable means," is no more than the law would have implied, if it had not been expreſſed; for ſuch a contract cannot poſſibly be to the wrong of any one, and tends rather to quiet ſuits than to promote them. And from the like reaſon alſo it is ſaid, that a diſſeiſor may lawfully get the releaſe of the diſſeiſee, though his poſſeſſion was unlawful; and it ſeems clear, that ſuch a releaſe cannot come within the meaning of the ſtatute, if the diſſeiſee had the true right, and no other had any pretence of title to the land; for in ſuch caſe it is clear, that the end of the releaſe is not for maintenance, but for the ſettlement of all diſputes: But if ſuch a diſſeiſee had had but a conteſted title, and ſuch releaſe were intended only to enable the diſſeiſor to defend himſelf with the dubious title of his diſſeiſee, ſurely it cannot but be as much within the meaning of the ſtatute, as any conveyance to one wholly out of poſſeſſion. However it ſeems clear, that thoſe inſtances in the ſaid proviſo, by which it is ſhewn how it ſhall appear, that the perſons who are permitted to contract for pretended titles are in poſſeſſion, as by the receiving of rent, *&c.* are only put for examples, and that thoſe, who are any way whatſoever lawfully ſeiſed in poſſeſſion, reverſion, or remainder, are within the benefit of the proviſo; but it ſeems clear, that they can only juſtify the taking ſuch a conveyance as will ſtrengthen the eſtate whereof they are ſeiſed, and that they cannot take a covenant from a ſtranger to convey the land to them, when he ſhall have recovered it on a pretended right, becauſe ſuch a covenant ſeems clearly to favour as much of maintenance, as if they had been ſtrangers to the land.

1 Leon. 167. Savil 94, 96.

Co. Lit. 369.

Co. Lit. 369. b.

† *Sect.*

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Vide 2 Hawk. page 382.

† *Sect.* 18. And it is enacted, by the 31 Eliz. c. 5. f. 4. "That the offence of buying titles may be laid in any county, at the pleasure of the informer."

## APPENDIX THE SIXTEENTH.

## CHAPTER THE EIGHTY-SEVENTH.

## OF SEDUCING ARTIFICERS.

In the cases of Rex v. Medcalf and Rex v. Knight, who were convicted by confession, upon this statute, on *one* information for seducing four different artificers the court held that they could inflict but *one* punishment it being but *one* information. Burr. 2026.

IT is enacted by 5 Geo. 1. c. 27. "that whosoever shall contract with, entice, endeavour to persuade or solicit any "manufacturer or artificer of, or in wool, iron, steel, brass, "or any other metal; clock-maker, watch maker, or any "other artificer or manufacturer of Great Britain, to go out "of this kingdom into any foreign country, out of the king's "dominions. on conviction by indictment or information at "Westminster, or at the assizes, or at the quarter sessions, "shall be fined not exceeding 100*l.* and suffer three months "imprisonment; and whoever shall offend a second time shall "be fined at the discretion of the court, imprisoned twelve "months, and in both cases be confined until the fine be "paid. Provided the prosecution be within twelve months."

† *Sect.* 2. And it is further enacted "that if any of his ma-"jesty's subjects within this kingdom, being such artificer or "manufacturer as aforesaid, shall go into any country out of "the king's dominions, there to use or exercise, or to teach "any of the said trades, or manufactures to foreigners, or "who shall be so abroad, using or exercising the said trades "or manufactures beforementioned, and shall not return into "and continue in this realm, within six months next, after "warning shall be given to him by the ambassador, envoy, "resident, minister, or consul of the crown of Great Britain "in the country in which such artificer shall be, or by any "person authorised by any of them, or by a secretary of state, "he shall be incapable of taking any legacy devised to him; "or of being executor or administrater; or of taking any "lands, tenements, or hereditaments, by descent, devise, or "purchase; and also forfeit all his estate real and personal to "his majesty's use; be deemed an alien, and out of the king's "protection."

† *Sect.* 3. It is also enacted "that upon complaint on oath "to any justice of the peace, that any person is endeavouring

"to

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" to ſeduce any ſuch artificer, or manufacturer as aforeſaid. " Or that ſuch artificer or manufacturer hath contracted, pro- " miſed, or is preparing to go abroad as aforeſaid, he may " ſend his warrant to bring the offender complained of before " him or ſome other juſtice of the ſame county, and if it ſhall " appear by the oath of one witneſs, or by confeſſion that " ſuch perſon is guilty of any of the offences aforeſaid, the " juſtice may bind him over with ſureties to appear at the " next aſſizes, or quarter ſeſſion, and in caſe he ſhall refuſe " to give ſuch ſecurity, he ſhall be committed to the county " gaol until delivered by due courſe of law. And if con- " victed upon any indictment, of any ſuch promiſe, contract or " preparation to go abroad as aforeſaid; he ſhall give ſatis- " factory ſecurity not to go abroad, and be impriſoned until " the ſame is given."

† *Sect.* 4. To render the intent of the above recited ſtatute more effectual. It is enacted by 23 Geo. 2. c. 13. " that who- " ever ſhall contract with, entice, perſuade, or endeavour to " perſuade, ſolicit, or ſeduce any manufacturer, workman, or " artificer of, or in wool, mohair, cotton, or ſilk, or of, or in " any manufactures made up of theſe materials, or any " of the ſaid materials mixed one with another, or of, or in " iron, ſteel, braſs, or any other metal, or any clock-maker, " watch-maker, or any other manufacturer, workman, or " artificer, of or in any other of the manufactures of Great " Britain or Ireland into any foreign country not within the " dominions of or belonging to the crown of Great Britain, " on conviction or information at Weſtminſter, or by indict- " ment at the aſſizes for the county, if in England, or the " court of juſticiary, or any circuit court in Scotland, or by " indictment or information in the king's bench in Ireland, " ſhall forfeit for every artificer 500 *l.* ſuffer impriſonment in " the county gaol for 12 calendar months, and until the for- " feiture ſhall be paid. And on a ſecond or ſubſequent con- " viction for the like offence, the offender ſhall forfeit one " thouſand pounds, and be confined for two years as aforeſaid, " proſecution to be within twelve calendar months."

By Aſton J. the puniſhment directed by this act is *peremptory* and no *diſcretion* is left in the court. Burrow 2026.

† *Sect.* 5. In the caſe of Rex *v.* Cater, who was convicted upon theſe ſtatutes of ſeducing a *coach ſpring maker*, *Lord Mansfield* ſaid that this latter act ſeemed to be a repeal of the former act; for it was made to ſupply its deficiencies.

4 Burrow 2026, and the caſes there cited.

† *Sect.* 6. And it is enacted by 22 Geo. 3. c. 60. " that " whoever ſhall contract with, entice, perſuade, or endea- " vour to ſeduce or encourage any artificer, or workman, " concerned or employed, or who ſhall have worked at, or " been employed in printing callicoes, cottons, muſlins, or " linens

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" linens of any ſort, or in making or preparing any blocks " plates, engines, tools, or utenſils for ſuch manufactory, to " go out of Great Britain to any parts beyond the ſeas, and " ſhall be convicted thereof upon indictment or information " in the court of king's bench at Weſtminſter, or by indict- " ment at the aſſizes, court of juſticiary, or circuit court in " Scotland, as the caſe may be; ſhall for every artificer, forfeit " 500*l.* and ſuffer impriſonment in the common gaol for 12 " calendar months, and until ſuch forfeiture be paid. And " in caſe of a ſubſequent offence of the ſame kind, every per- " ſon ſo offending again, ſhall, upon the like conviction, for- " feit 1000*l.* and be confined two years as aforeſaid, half " to the king, and half to the informer. But the proſe- " cution muſt be in 12 months after the offence committed."

† *Sect.* 7. And it is further enacted, by 25 Geo. 3. c. 67. " That whoever ſhall contract with, entice, perſuade, or en- " deavour to ſeduce or encourage any artificer or workman " concerned or employed, or who ſhall have worked at or " been employed in the iron or ſteel manufacturers in this " kingdom, or in making or preparing any tools or utenſils for " ſuch manufactory, to go out of Great Britain to any parts " beyond the ſeas (except to Ireland) and ſhall be convicted " by indictment or information in King's Bench or by indict- " ment at the aſſizes, gaol delivery, or quarter ſeſſions for the " county or place wherein ſuch offence ſhall be committed, or " the offender ſhall live or reſide, or by indictment in the court " of juſticiary, *&c.* in Scotland, as the caſe may be, ſhall for " every artificer forfeit and be puniſhed in the manner laſt be- " fore directed; proſecutions to be within 12 months." (1)

(1) *N. B.* For employing artificers in certain branches of manufacture, for the regulation of their wages; and for the puniſhments of their diſobedience. Vide 4 Burn's Juſtice, 124 to 177.

## APPENDIX THE SEVENTEENTH.

## CHAPTER THE EIGHTY-EIGHTH.

### OF ACTING PLAYS WITHOUT LICENCE.

IT is enacted by 10 Geo. 2. c. 28. " That every perſon " who ſhall for hire, gain, or reward, act, repreſent or " perform, or cauſe to be acted, repreſented or performed " any interlude, tragedy, comedy, opera, play, farce, or " other entertainment of the ſtage, or any part or parts " therein, in caſe ſuch perſon ſhall not have any legal ſettle- " ment in the place where the ſame ſhall be acted, repreſent- " ed

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" ed or performed without letters patent or licence from the " chamberlain ſhall be deemed a rogue and vagabond, and " ſuffer accordingly, unleſs, having or not having a legal " ſettlement, he ſhall for every ſuch offence forfeit fifty " pounds."

A copy of all dramas to be ſent to the chamberlain.

† *Sect.* 2. And it is further enacted, " That no perſon " ſhall for hire, gain or reward, act, perform, repreſent, or " cauſe to be acted, performed or repreſented any entertain- " ment of the ſtage, or any new act, ſcene, or other part ad- " ded to any old interlude or other entertainment of the " ſtage, or any new prologue or epilogue unleſs a true copy " thereof be ſent to the Lord Chamberlain, fourteen days, at " leaſt, before the acting, repreſenting or performing there- " of, together with an account of the play-houſe or other " place where the ſame ſhall be, and the time when the ſame " is intended to be firſt acted; ſigned by the manager, or one " of the managers of ſuch play-houſe or company of actors " therein, on pain of fifty pounds."

The acting of which he may prohibit.

† *Sect.* 3. And it is further enacted, " That the Lord " Chamberlain ſhall in his diſcretion, prohibit the acting, " performing, or repreſenting any interlude, tragedy, come- " dy, opera, play, farce, or other entertainment of the " ſtage, or any act, ſcene or part thereof or any prologue, or " epilogue; and every perſon offending againſt ſuch prohibi- " tion or againſt the proviſion of the foregoing ſection, ſhall " forfeit 50 *l.* and the manager's licence, if one was granted, " ſhall alſo be null and void."

No plays to be acted in public houſes.

† *Sect.* 4. And it is alſo enacted, " That if any enter- " tainment of the ſtage as above deſcribed ſhall be acted, re- " preſented or performed in any houſe or place where wine, " ale, beer or other liquors ſhall be ſold or retailed, the ſame " ſhall be deemed to be acted for gain, hire, and reward."

How the penalties may be recovered.

† *Sect.* 5. And it is further enacted, " That all pecuniary " penalties ſhall be recovered in a ſummary way before two " juſtices for the county or place where any ſuch offence ſhall " be committed, by confeſſion, or on the oath of one witneſs " or in any of the courts of record at Weſtminſter by action, " *&c.* Or before the court of ſeſſion in Scotland, according " to the locality of the offence, to be levied by diſtreſs and " ſale, for the equal benefit of the informer, and the poor, " and for want of diſtreſs the offender ſhall be committed to " any houſe of correction for the county or place, not ex- " ceeding ſix months. But an appeal may be made to the " next quarter ſeſſions, whoſe order ſhall be concluſive. Pro- " ſecution to be within ſix months, and the ſpecial matter " may be given in evidence on the general iſſue."

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# APPENDIX THE EIGHTEENTH.

## CHAPTER THE EIGHTY-NINTH.

## OF EMBEZZLING NAVAL STORES.

THE evidence, upon profecutions for ſtealing and embezzling the king's ſtores, ſeldom amounting to more than that "ſuch goods are marked with the king's mark, and found in the cuſtody and poſſeſſion of the perſon accuſed. And this want of direct proof, that the offender actually carried away the goods, tending to encourage this evil practice, it is enacted by 9 and 10 Will. 3. c. 41. ſ. 1. "That it ſhall not be lawful to or for any perſon or perſons "whatſoever, other than perſons authoriſed by contracting "with his majeſty's principal officers or commiſſioners of the "navy, ordnance, or victualling office for his majeſty's uſe, "to make any ſtores of war, or naval ſtores whatſoever, with "the marks uſually uſed to, and marked upon his majeſty's "ſaid warlike and naval or ordnance ſtores; that is to ſay, "any cordage of three inches and upwards, wrought with a "white thread laid the contrary way, or any ſmall cordage, "to wit, from three inches downwards with a twine in lieu "of a white thread, laid the contrary way as aforeſaid, or any "canvaſs wrought or unwrought, with a blue ſtreak in the "middle, or any other ſtores with the broad arrow, by ſtamp, "brand, or otherwiſe; upon pain of forfeiting ſuch goods, "and the ſum of 200l. together with coſts of ſuit; one moi-"ety to the king, the other moiety to the informer, to be re-"covered in any of his majeſty's courts of record at Weſt-"minſter."

For the offence of embezzling the king's armour, vide ante P. 75.

In what manner they ſhall be marked.

† *Sed.* 2. And it is farther enacted par. 2. "That ſuch per-"ſon or perſons in whoſe cuſtody, poſſeſſion, or keeping, ſuch "goods or ſtores marked as aforeſaid, ſhall be found, (*a*) not "being employed as aforeſaid; and ſuch perſon or perſons "who ſhall conceal ſuch goods or ſtores marked as aforeſaid, "being indicted and convicted of ſuch concealment, or of "having ſuch goods found in his cuſtody, poſſeſſion, or keep-"ing, ſhall forfeit ſuch goods, and 200l. with the coſts of the "proſecution, to be equally divided between the king and the "informer, and alſo ſuffer impriſonment until payment there-"of, unleſs ſuch perſon ſhall, upon his trial, produce a certifi-"cate under the hand of three or more of his majeſty's prin-"cipal officers or commiſſioners of the navy, ordnance, or "victuallers, expreſſing the numbers, quantities, or weights "of ſuch goods as he or ſhe ſhall then be indicted for, and the "occaſion and reaſon of ſuch goods coming to his or "her hands or poſſeſſion. And by par. 4. the com-"miſſioners

Penalty for having them in cuſtody.

(*a*) The goods muſt be found in the cuſtody of the offender; for it is their being ſo found and not their having them, which conſtitutes the offence. Ld. Ray. 1105.

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" miſſioners, upon ſelling any ſuch ſtores, are empowered to grant ſuch certificates, expreſſing the quantities of ſuch ſtores, and the time when and where they were bought of the ſaid commiſſioners, within 30 days after their ſale and delivery. And the ſaid purchaſer may alſo grant certificates to the perſons to whom *they* may ſell the ſaid ſtores." Unleſs under a certificate. Which the commiſſioners may grant.

† *Sect.* 3. And it is further enacted by 1 Geo. 1. ſ. 2. c. 25. ſ. 6. "That if any perſon ſhall counterfeit the hand of any officers of the navy to any paper whereby his majeſty's treaſure may be diſpoſed of, or ſhall knowingly produce the ſame, he ſhall be bound over by the ſaid officers and commiſſioners, or any of them, until he find ſurety to appear at the next aſſizes, or quarter ſeſſions, to be there proceeded againſt according to law." Counterfeiting certificates.

† *Sect.* 4. And it is farther enacted par. 5. "That if any be ſued for diſcovering or ſeiſing ſuch ſtores, the general iſſue may be pleaded, and the ſpecial matter given in evidence. And in caſe upon the trial of ſuch iſſue, the defendants ſhall prove the goods were marked as aforeſaid, and the plaintiff ſhall not prove he was employed as aforeſaid, and had ſuch certificate as aforeſaid, and did ſhew the ſame to the defendant before ſuit brought, the defendant ſhall be acquitted and receive treble coſts, unleſs the defendant, upon the ſight of ſuch certificate did not deliver back all ſuch goods and ſtores ſo ſeized in as good plight and condition as they were at the time of ſuch certificate ſhewn." How proſecutions may be defended.

† *Sect.* 5. And it is farther enacted by 9 Geo. 1. c. 8. ſ. 3. "That if any perſon or perſons ſhall be lawfully convicted of having in his, her, or their cuſtody, any timber, thick ſtuff, or plank marked with the broad arrow, or concealing any timber, thick ſtuff or plank ſo marked, he ſhall ſuffer as an offender againſt 9 and 10 Will. 3. c. 41, above recited." Extended to timber, thick ſtuff and plank.

† *Sect.* 6. But it is provided by par. 4, "That any judge before whom any offender ſhall be convicted of any crimes before recited, enacted or mentioned in *this* act, may mitigate the penalty for the ſame." Judges may mitigate the penalty.

† *Sect.* 7. And it is further enacted par. 5. "That if any diſpute ariſe between the perſons upon whoſe informations or oaths any offender againſt this act, or the 9 and 10 Will. 3. c. 41. ſhall be proſecuted and convicted, touching any right or title to any of the forfeitures or penalties beforementioned, or any part thereof, the judge or juſtice convicting ſhall examine and ſettle the ſame." How diſputes reſpecting the forfeiture ſhall be ſettled.

† *Sect.* 8. And it is farther enacted by 17 Geo. 2. c. 40. ſ. 10. "That any judge at the aſſizes, or juſtices of the peace, Before whom the offence may be tried.

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(a) For the form of the indictment. Vide Crown Cir. Compn. 358.

" at the general quarter ſeſſions, may hear, try, and determine, " by indictment (a) or otherwiſe, all or any the crimes or of- " fences mentioned in the ſaid recited act of 9 and 10 Will. " 3. c. 41. and 9 Geo. 1. c. 8. And that the ſaid juſtices of " aſſize or quarter ſeſſions may impoſe any fine, not exceed- " ing 200l. on ſuch offender, one moiety to the king, and " the other moiety to the informer; and may mitigate the " ſaid penalty and forfeitures, inflicted by the ſaid recited acts, " or either of them, and commit the offender to the common " gaol till paid. Or in lieu thereof may puniſh ſuch offender " corporally, by cauſing him to be publickly whipped, and com- " mitted to ſome houſe of correction to hard labour for three " months, or for leſs time as to ſuch judge of aſſize, or quar- " ter ſeſſion ſhall ſeem meet."

Commiſſioners, &c. may act as magiſtrates.

† *Sect.* 9. And it is further enacted by 9 Geo. 3. c. 30. ſ. 5. " That the treaſurer, comptroller, ſurveyor, clerk of the acts, " or any commiſſioner of the navy for the time being, may " act as juſtices of the peace, to all intents and purpoſes in " cauſing any perſon or perſons who ſhall be charged with " ſtealing or embezzling any naval ſtores, the property of his " majeſty, to be apprehended, committed and proſecuted for " the ſame."

## APPENDIX THE NINETEENTH.

## CHAPTER THE NINETIETH.

## OF EXERCISING A TRADE WITHOUT SERVING AN APPRENTICESHIP.

4 Modern 145. 2 Keb. 403. Cro. Car. 3:6. Hobart 184. Styles 223. 2 Roll. 576.

IT is enacted by 5 Eliz. c. 4. ſ. 31. " That it ſhall not " be lawful to any perſon or perſons, other than ſuch as " now do lawfully uſe or exerciſe any art, myſtery or manual " occupation, to ſet up, occupy, uſe or exerciſe any craft, " myſtery, or occupation now uſed or occupied within the " realm of England or Wales; except he ſhall have been " brought up therein ſeven years at leaſt as an apprentice in " the manner and form as the act deſcribes; nor to ſet any " perſon to work in ſuch myſtery, art, or occupation being " not a workman at this day; except he ſhall have been ap- " prentice as is aforeſaid; or elſe having ſerved as an appren- " tice as is aforeſaid, ſhall or will become a journeyman, or be " hired by the year; on pain of forfeiting for every default " forty ſhillings for every month; one moiety to the crown, " the other to the proſecutor; to be ſued for in any court of

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" record; before juſtices of oyer and terminer; any other " juſtices, one to be of the quorum or preſident and council, " by action of debt, information, bill of complaint or other- " wiſe, &c. &c."

Moor 886. b. Eliz. 499. 1 Salk. 370. 611. L. Raym. 767. 6 Mod. 220.

An information *qui tam* may be brought at the quarter ſeſſions upon this ſtatute. Farren v. Williams. Cowper 369.

This ſtatute extends to pariſhes. 1 Burr. 366. and to reſtrain the uſe of any trade which was then uſed or is mentioned in the third ſection of the act. 8 Co. 129. Salk. 611. As a draper Hard. 54. 2 Keb. 403. Sty. 223. Ironmonger C. Car. 316. Soap maker, knife haft maker. Hard. 54. Brewer 2 Cro. 178. Palmer 543. Baker 2 Roll. 376. Taylor 1 Lev 243. Upholſterer Salk. 611. Point maker Cro. Car. 516. Spurrier 2 Cro. 179. Tyler 4 Mod. 145. Fellmonger Salk. 611. Tanner 2 Burr. 1035. Barber 1 Lev. 87. 2 Lev. 226. Cook 8 Co. 129. Nor is the freedom of the city any releaſe from the reſtraint. 1 Saund. 311. Even if the party be alien or demizen. Hutton 132. Or has ſerved as apprentice to another trade. Show. 266. Sed Vide 4 Leonard 9. 2 Bulſ. 190. Or though the widow of a qualified trader. Noy. 5. unleſs ſhe aſſiſted her huſband ſeven years. Carth. 163. Nor does a ſervice beyond the ſeas releaſe the reſtraint unleſs the ſervant was indented. Salk. 67. Sed Dub. So an unqualified maſter cannot employ a qualified ſervant. Show. 241. 3 Mod. 315. Salk. 610. Carth. 163. And when the indenture is exempted from the ſtamp duty of 8 Ann c. 9. ſ. 32. Vide 1 Wilſ. 129.

But this ſtatute does not extend to trades where no ſkill is required. 2 Bulſ. 190. 1 Roll. 10. Salk. 611. 1 Vent. 326, 346. 2 Lev. 230. Cro. Car. 499. And if an unqualified maſter has exerciſed the trade for ſeven years without interruption he ſhall not be ſued. 2 Wilſ. 168. Nor is a dormant partner, though unqualified, within the penalties of the act. 2 Wilſ. 40. 1 Burr. 2. Nor a journeyman 4 Burr. 2449.

## APPENDIX THE TWENTIETH.

## CHAPTER THE NINETY-FIRST.

## OF GRANTING FRAUDULENT PERMITS.

IT is enacted by 6 Geo. 1. c. 21. ſ. 11 and 12. " That " all diſtillers, makers or ſellers of, or dealers in *ſpirituous* " *liquors* (*a*) either Britiſh or foreign, ſhall make an entry " in writing, of the places made uſe of by them reſpective- " ly for the keeping or ſelling of ſuch commodities, at the of- " fice of exciſe within the limits whereof ſuch place ſhall be " ſituated, and alſo of all *ſuch ſpirituous* liquors as ſhall be " therein at the time of making ſuch entry, on pain of for- " feiture and penalty of 20 *l.*"

(*a*) Viz. brandy; arrack, rum, ſpirits or ſtrong waters.

† *Sect.* 2. And it is further enacted, par. 13. " That " none of the ſaid commodities ſhall be brought into ſuch en- " tered place without firſt giving notice thereof to the officer " of exciſe of the diviſion; and producing to, and leaving " with, the ſaid officer an *authentic certificate*, that the duties " have been actually paid, or that the ſame has been condemn-

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" ed as forfeited.—Or was part of the ſtock of ſome import-
" er or dealer whoſe warehouſe or place ſhall be entered as
" aforeſaid, expreſſing the quantity and quality thereof; and
" at what port or place the duties were ſo paid, or the commo-
" dity ſo condemned, or *of whoſe ſtock the ſame was part* upon
" pain of forfeiture."

† *Sect.* 3. And it is further enacted, par. 15. " That no *ſuch*
" *commodities* ſhall be ſold, uttered, or expoſed to ſale, either
" by wholeſale or retail, but in ſome or one of the ſaid ware-
" houſes or places as aforeſaid, on pain of 40 *s.* a gallon, *&c.*"

† *Sect.* 4. And it is further enacted, par. 16. " That
" the officers of exciſe where ſuch commodities ſhall be ſo
" ſold, ſhall *upon the requeſt of the ſeller*, without fee or re-
" ward, give to the reſpective buyers thereof certificates in
" writing ſigned by the ſaid officer or officers expreſſing the
" quantities ſo ſold, and the name and names of the reſpec-
" tive buyers, and ſellers thereof; and that the duty on ſuch
" article ſo ſold has been paid, or that the ſame has been con-
" demned as forfeited; or was part of ſuch dealer's ſtock as
" aforeſaid:—to ſatisfy the officer of exciſe of the reſpective
" diviſions to which the ſame is intended to be carried."

† *Sect.* 5. And it is further enacted, par. 17. " That
" no *ſuch commodities*, exceeding the quantity of one gallon,
" ſhall be removed or carried from any part of this kingdom
" to another, by land, or by water, without ſuch *permit or cer-*
" *tificate*, on pain of forfeiture."

† *Sect.* 6. And it is further enacted, par. 18. " That
" whoever ſhall have in cuſtody above the quantity of ſixty-
" three gallons ſhall be deemed a dealer."

† *Sect.* 7. But as dealers have frequently practiſed the trick of taking out falſe permits for the purpoſe of protecting and conveying ſuch commodities which they had clandeſtinely run on ſhore; it is further enacted, by 11 Geo. 1. c. 30. ſ. 10. " That the ſaid commodities (*a*) ſhall be removed with-
" in a certain time to be ſpecified in ſuch permit, and that the
" permit ſhall be returned to the officer from whom the ſame
" was had, and that in caſe, upon taking an account of the
" ſtock of the perſon, from or out of whoſe ſtock the com-
" modities mentioned in ſuch permit are authoriſed to be re-
" moved, there ſhall not appear a ſufficient decreaſe to an-
" ſwer the removal mentioned in ſuch permit, the perſon
" from whoſe ſtock ſuch permit granted the removal, ſhall
" forfeit the like quantity as ſhall be mentioned in ſuch per-
" mit as aforeſaid."

(*a*) Coffee, tea, and chocolate.

† *Sect.*

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† *Sect.* 8. And it is further enacted, "That no perſon "ſhall demand, take, or receive any permit as aforeſaid, "without ſpecial direction in writing, of the perſon, or his "*known* ſervants, from, or out of, whoſe ſtock the ſaid com- "modities are ſo to be removed, on pain of 50 *l.*"

† *Sect.* 9. By 23 Geo. 3. c. 70. ſ. 3, 4, 5. directions are given in what manner permits ſhall be taken out, and what particulars ſhall be ſpecified in the requeſt notes from the trader for that purpoſe.

† *Sect.* 10. The commiſſioners of exciſe for England and Scotland are alſo directed by the ſaid ſtatute, par. 8 "To "provide moulds for making of paper to be uſed for permits, "which paper ſhall have the words EXCISE OFFICE, vi- "ſible in the ſubſtance of ſuch paper; and the ſaid commiſ- "ſioners ſhall alſo provide plates engraved with certain marks, "ſtamps and devices, to be varied from time to time as they "ſhall think proper, for the printing, marking and ſtamping "of the ſaid paper."

† *Sect.* 11. And it is further enacted by the ſaid ſtatute, 23 Geo. 3. c. 30. ſ. 9. "That if any perſon or perſons "whatſoever (not being authoriſed by the reſpective commiſ- "ſioners ſo to do) ſhall make or cauſe or procure to be made, "or ſhall knowingly aid or aſſiſt in the making or without "being authoriſed or appointed as aforeſaid, ſhall knowingly "have in his, her or their cuſtody or poſſeſſion, without law- "ful excuſe (the proof whereof ſhall lie upon the perſon "accuſed) any frame, mould or inſtrument for the making "of paper with the words, EXCISE OFFICE viſible in the "ſubſtance of ſuch paper; or ſhall make, or cauſe, or pro- "cure to be made, or knowingly aid or aſſiſt in the making "any paper, in the ſubſtance of which the words, EXCISE "OFFICE ſhall be viſible; or if any perſon (except as before "excepted) ſhall by an act, myſtery or contrivance, cauſe or "procure the ſaid words, EXCISE OFFICE to appear viſible "in the ſubſtance of any paper whatever—Or if any perſon "or perſons whatever (not being appointed as aforeſaid) ſhall "engrave, cut out, or make, or ſhall cauſe or procure to be "engraven, caſt, cut, or made any plate or plates or other "thing with any mark, ſtamp, or device thereon, in imitation "of, or to reſemble any mark, ſtamp, or device made and "uſed by the direction of the ſaid commiſſioners of exciſe, or "the major part of them reſpectively, in manner as afore- "ſaid (*a*) for the purpoſe of printing, ſtamping, and mark- "ing of the paper to be uſed for a permit or permits to ac- "company *any* exciſeable commodity or commodities remov- "ing or removed from one part of this kingdom to any other

(*a*) Vide the 8th ſection of the act.

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" part thereof in purſuance of the ſeveral ſtatutes requiring " ſuch permit, any perſon ſo offending in any of the caſes " aforeſaid, ſhall on conviction be adjudged a felon, and ſuf- " fer death without benefit of clergy."

† *Sect.* 12. And it is farther enacted by the ſaid ſtatute par. 10. " That if any perſon or perſons whatſoever, ſhall counter- " feit or forge or cauſe to be conterfeited, or forged any per- " mit for the removal of any exciſeable commodity from one " part of this kindgom to any other part thereof, for the re- " moval of which a permit or certificate is by any act or acts " of parliament now in force required;—or if any perſon or " perſons ſhall knowingly or willingly give any falſe or untrue " permit, or ſhall knowingly or willingly accept or receive " any falſe or untrue permit with any ſuch exciſeable commo- " dity to be removed, or removed as aforeſaid; or if any " perſon or perſons ſhall fraudulently alter or eraſe any per- " mit after the ſame ſhall have been given or granted by the " proper officer of exciſe, or if any perſon or perſons ſhall " knowingly or willingly publiſh or make uſe of any ſuch " permit ſo counterfeited, forged, falſe, untrue, altered, or " eraſed; every perſon ſo offending ſhall (in lieu of any for- " mer penalty) for each and every ſuch offence forfeit five " hundred pounds to be recovered in any court of record at " *Weſtminſter*, or in the court of exchequer in *Scotland*."

† *Sect.* 13. And it is further enacted, par. 11. " That " if *any officer of exciſe or other inland duties* ſhall deliver out, " or ſuffer to be delivered out, any paper having the words, " EXCISE OFFICE viſible in the ſubſtance thereof either be- " fore or after the ſtamp or mark ſo to be provided as aforeſaid " (*a*) ſhall be printed thereon, or before the ſame ſhall be fil- " led up agreeable to the requeſt note, brought from any " trader for the purpoſe of having a permit for the removal " of ſome exciſeable commodity; or if any *ſuch officer* ſhall " knowingly give or grant any falſe or untrue permit; or " ſhall make any falſe or untrue entry in the counter-part or " counter-parts of any permit or permits by him given or " granted for the removal of any exciſeable commodity " from the ſtock of any dealer therein; or ſhall knowingly " and willingly receive or take any exciſeable commodity " whatſoever into the ſtock of any ſuch dealer, brought in " with any falſe, forged, or untrue permit, or ſhall knowing- " ingly permit or ſuffer the ſame to be done, directly or in- " directly, contrary to the true intent and meaning of the " ſeveral ſtatutes (*b*) in ſuch caſe made and provided, every " ſuch officer ſo offending ſhall, on conviction, be adjudged " guilty of felony and ſhall be tranſported, not exceeding " ſeven years."

(*a*) Vide ſupra ſection the 9th.

(*b*) Vide the caſe of James Wirth, convicted upon this clauſe Old Bailey ſeſſions. 16 January, 1767.

APPEN-

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## APPENDIX THE TWENTY-FIRST.

## CHAPTER THE NINETY-SECOND.

### OF SURCHARGING BOATS, &c.

FOR preventing the loſing of lives of perſons paſſing on the river Thames between Graveſend and Windſor, it is enacted by 10 Geo. 2. c. 31. ſ. 8. "That no perſon or "perſons who ſhall work or navigate any tilt boat, row-barge, "or any other boat or wherry for hire or gain ſhall receive, "take into or carry in any ſuch tilt, or row-barge at one and "the ſame time any more than 37 paſſengers, and three "more paſſengers only by the way—nor ſhall receive take "into or carry in any other boat or wherry any more than "eight paſſengers and two more only if called in by the way, "nor ſhall receive take into or carry in any ferry-boat or "wherry allowed to work on *Sundays* any more than eight "paſſengers at one and the ſame time; on pain of 5 *l.* for "the firſt offence 10 *l.* for the ſecond offence, and for the "third offence ſhall be diſabled to work any boat or veſſel, "*&c.* and be diſfranchiſed of the waterman's company for "twelve months, on conviction by one witneſs before one "magiſtrate."

† *Sect.* 2. And it is further enacted, "That in caſe any "greater number of perſons ſhall be received, taken into, or "carried in any ſuch tilt boats, row-barges, ferry boats, or "other boats or wherries than are reſpectively allowed to be "carried as aforeſaid and any paſſenger or paſſengers ſhall "then be drowned, every ſuch perſon or perſons who ſhall "work or navigate ſuch tilt boats, row-barges, ferry-boats, "or other boats or wherries offending therein, ſhall be *deem-* "*ed guilty of felony and tranſported as felons.*"

## APPENDIX THE TWENTY-SECOND.

## CHAPTER THE NINETY-THIRD.

### OF VAGRANTS.

IT is enacted by 17 Geo. 2. c. 5. "That all perſons "who threaten to run away and leave their wives or "children to the pariſh—And all perſons who ſhall unlaw- "fully return to ſuch pariſh or place from whence they have "been legally removed by order of two juſtices without a "certificate from the place whereunto they belong.—And "all

Idle and diſorderly perſons.

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" all perſons who, not having wherewith to maintain themſelves, live idle without employment, and refuſe to work for the uſual and common wages given to other labourers for the like work in the pariſhes or places where they are. And all perſons going about from door to door or placing themſelves in the ſtreets, highways or paſſages to beg or gather alms in the pariſhes or places where they dwell ſhall be decreed—IDLE AND DISORDERLY PERSONS."

† *Sect.* 2. And it is further enacted, "That any juſtice may commit ſuch offender, on conviction before him, by his own view, their confeſſion, or the oath of one witneſs, to the houſe of correction not exceeding one month."

(*a*) For which the juſtice may order the overſeer to pay him 5 s. vide 4 Burr. 335.

† *Sect.* 3. And any perſon may apprehend (*a*) and carry before a juſtice any ſuch perſons going about from door to door or placing themſelves in ſtreets, highways or paſſages to beg or gather alms in the pariſhes or places where they dwell; and if they reſiſt or eſcape they ſhall be puniſhed as—ROGUES AND VAGABONDS.

Rogues and vagabonds.—For another ſpecies of rogues and vagabonds. Vide 23 Geo. 3 c. 88. ante page 148. and 165.

† *Sect.* 4. And it is further enacted, par. 2. "That all perſons going about as patent gatherers or gatherers of alms, under pretences of loſs by fire or other caſualty—or going about as collectors for priſons, gaols, or hoſpitals; all fencers or bearwards, all common players of interludes, all perſons who ſhall for hire, gain or reward, act, repreſent or perform, or cauſe to be acted, &c. any entertainment of the ſtage or any part or parts thereof not being authoriſed by law, all minſtrels (*b*) and jugglers, all perſons pretending to be gypſies, or wandering in the habit or form of Egyptians, (*c*) or pretending to have ſkill in phyſiognomy, palmeſtry, or like crafty ſcience, or pretending to tell fortunes, or uſing any ſubtle craft to deceive and impoſe upon any of his majeſty's ſubjects, or playing or betting at any unlawful games or plays; and all perſons who run away and leave their wives and children whereby they become chargeable to any pariſh or place—and all petty chapmen and pedlars wandering abroad without licence, and all perſons wandering abroad and lodging in alehouſes, barns, out-houſes, or in the open air not giving a good account of themſelves—and all perſons wandering abroad and begging, pretending to be ſoldiers, mariners, ſea-faring men, (*d*) or pretending to go to work in harveſt.—And all other perſons wandering abroad and begging ſhall be deemed—ROGUES AND VAGABONDS."

(*b*) Vide 4 Burns Juſtice 333. and ante p. 198.

(*c*) Vide 4 Burn's Juſtice, 335.

(*d*) This ſhall not extend to the 31 Eliz. c. 17. Vide ante page 183.

Incorrigible rogues.

† *Sect.* 5. And it is further enacted, par. 4. "That all and gatherers convicted according to 13 Geo. 1. c. 23.—"And

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" And all perſons apprehended as rogues and vagabonds, and " eſcaped from the perſons apprehending them, or refuſing to " go before a juſtice, or to be examined upon oath, or refu- " ſing to be conveyed by ſuch paſs as this act mentions, or " knowingly giving a falſe account of themſelves upon ſuch " examination, after warning given them of their puniſhment. " And all rogues and vagabonds who ſhall break or eſcape out " of any houſe of correction when confined by virtue of this " act. And all perſons who after having been puniſhed as " rogues and vagabonds and diſcharged ſhall again commit any " of the ſaid offences ſhall be deemed—INCORRIGIBLE " ROGUES."

† *Sect.* 6. And it is further enacted, par. 5. " That any " perſon may apprehend the offender and carry him before a " juſtice (*a*) and in caſe he ſhall be charged by a juſtice ſo to " do, and ſhall not uſe his beſt endeavours for ſuch purpoſe he " ſhall forfeit ten ſhillings."

(*a*) For which the juſtice may order a reward of 10 *s.* to be paid by the county.

† *Sect.* 7. And it is further enacted, par. 6. " That " two juſtices ſhall meet four times in the year or oftner if " need be, in their reſpective diviſions, and by warrant com- " mand the conſtable, &c. to make a general privy ſearch in " one night, for the apprehending of ROGUES AND VAGA- " BONDS. And every juſtice on information ſhall iſſue his " warrant to apprehend rogues and vagabonds within his ju- " riſdiction.

Privy ſearch.

† *Sect.* 8. And it is further enacted, par. 7. " That the " juſtice ſhall inform himſelf by the examination on the oath " of the perſon ſo apprehended, or of any other perſon, of " the condition and circumſtances of ſuch perſon and where " he was laſt legally ſettled; the ſubſtance of which ſhall be " put into writing and ſubſcribed by the perſon examined, and " by the juſtice who ſhall tranſmit the ſame to the next quar- " ter ſeſſion—And ſuch juſtice ſhall order the perſon ſo appre- " hended to be *publickly* whipped (*b*) and ſent to the houſe of " correction until the next quarter ſeſſion or for any leſs time, " or convey him by paſs under hand and ſeal to the laſt place " of legal ſettlement; but if it cannot be found then to the " place of birth, or if ſuch perſon be under the age of four- " teen years, and have any father or mother living then to " their place of abode there to be delivered to the pariſh " officers, a duplicate of which paſs and examination ſhall " be filed at the next quarter ſeſſions."

Examination.

Puniſhment.

(*b*) Vide 22 Hen. 8. c. 12. 39 Eliz. c. 4.

† *Sect.* 9. And it is further enacted, par. 9. " That " where any offender ſhall be committed till the next ſeſſion, " and the juſtices ſhall adjudge ſuch perſon a rogue and vaga- " bond, or an incorrigible rogue they may order him to be " detained

Further puniſh- ment.

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Tranſportation.

" detained in the houſe of correction not exceeding ſix " months, and ſuch incorrigible rogue for any further time " not exceeding two years nor leſs than ſix months, and " whipped, and afterwards be ſent away by ſuch paſs *mutatis* " *mutandis* as aforeſaid.—And if ſuch perſon *being a male* is " above the age of twelve years the ſeſſion may ſend him to " be employed in his majeſty's ſervice either by ſea or land. " And in caſe any ſuch incorrigible rogue ſhall break or " eſcape from the houſe of correction, or ſhall offend again in " like manner he ſhall be tranſported for ſeven years."

† *Sect.* 10. And it is enacted by 13 and 14 Car. 1. c. 12. " That the juſtices in ſeſſions may tranſport ſuch rogues, va- " gabonds, and ſturdy beggars, as ſhall be convicted and ad- " judged to be incorrigible."

Vagrant children.

† *Sect.* 11. And it is alſo enacted by 17 Geo. 2. c. 5. ſ. 28. " That if the child of any vagrant above ſeven years " of age ſhall be committed to the houſe of correction, the " juſtices in ſeſſions may order ſuch child to be placed out as a " ſervant or apprentice untill the attainment of 21 years or " for a leſs time, and if any offender found wandering with " ſuch child, ſhall be again found with the ſame child ſo placed " out, he ſhall be deemed an INCORRIGIBLE ROGUE."

† *Sect.* 12. And it is further enacted, " That where any " vagrants have been committed to the houſe of correction " till the next ſeſſions, if on examination of ſuch perſons no " place can be found, to which they may be conveyed, the " ſeſſions ſhall order them to be detained and employed in ſuch " houſe of correction until they can provide for themſelves, " or until the juſtices in ſeſſions can place them in ſome law- " ful calling as ſervants or apprentices, ſoldiers, mariners or " otherwiſe."

† *Sect.* 13. And it is further enacted, par. 10. " That " the juſtice who ſhall make the paſs, ſhall at the ſame time " deliver to the officer appointed to convey *the vagrant* a note " or certificate (*a*) aſcertaining how they are to be conveyed, " by horſe, cart, or on foot, and what allowance ſuch officer is " to have, according to the rates appointed by the ſeſſion. " By ſect. 16. Which rates the juſtices are authoriſed to " make as they ſhall think proper."

(*a*) The act preſcribes the form of the certificate

Conveying of vagrants.

† *Sect.* 14. And it is further enacted, par. 11. " That the " officer ſhall convey the perſon accordingly, the next direct " way to where he is ordered to be ſent, if in the ſame county, " riding, diviſion, corporation or franchiſe; if not he ſhall " deliver the perſon to the conſtable of the firſt place in the " next county, &c. &c. in the direct way to the place whi- " ther he is to be conveyed, together with the paſs and dupli- " cate of the examination, taking his receipt for the ſame.

And

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" And ſuch conſtable ſhall immediately apply to ſome juſtice " of the diviſion who ſhall make the like certificate and deli- " ver it to ſuch conſtable who ſhall with all ſpeed convey ſuch " perſon unto the firſt pariſh, town or place in the next coun- " ty or diviſion in the direct way to the place to which he is " to be conveyed. And ſo from one county or diviſion to " another, till they come to the place to which ſuch perſon is " ſent, and the conſtable who ſhall deliver ſuch perſon to the " churchwarden or other perſon ordered to receive him, ſhall " at the ſame time deliver the ſaid paſs with the duplicate of " the examination, taking their receipt for the ſame."

Vagrants may be ſearched.

† *Sect.* 15. And it is further enacted, par. 12. " That " any juſtice may order the vagrant to be ſearched, and his " bundles to be inſpected in his preſence; and if he ſhall be " found to have ſufficient for his paſſage, either in whole or " in part, the juſtice ſhall order ſo much of the money to be " paid, or, if other effects, to be ſold towards taking up and " paſſing ſuch vagrant, &c."

Duty of the conſtables.

† *Sect.* 16. And it is further enacted, par. 17. " That if " any petty conſtable ſhall bring to any high conſtable ſuch " certificate as aforeſaid, together with a receipt or note " from the conſtable to whom the perſon was delivered, the " ſaid high conſtable ſhall pay the rates aſcertained by ſuch " certificate, taking the petty conſtable's receipt; the high " conſtable to be allowed the ſame on paſſing his accounts, on " his delivering up ſuch certificate and receipt, and giving his " own receipt for the ſame to ſuch treaſurer; the ſame to be " allowed the treaſurer in his accounts on delivering up the " vouchers as aforeſaid, and if the high conſtable ſhall refuſe " or neglect to pay the ſame on demand, it ſhall be lawful for " one juſtice, by his warrant, to levy double the ſum by diſ- " treſs, and thereout to allow the petty conſtable the ſum aſ- " certained by the certificate and ſuch other recompence for " his trouble, loſs of time, and expences as the juſtice ſhall " think fit; the overplus to be returned to the conſtable on " demand. And in cities, towns corporate and other places " where there is no high conſtable, the petty conſtable ſhall be " allowed what he ſhall ſo pay purſuant to ſuch certificate in " his accounts on delivering up ſuch vouchers; or if any maſ- " ter of a houſe of correction ſhall deliver ſuch certificate " and receipt to the treaſurer, the treaſurer ſhall pay the ſame " to him taking his receipt for the ſame and be allowed the " ſame in his accounts, &c."

Expences of conveying.

† *Sect.* 17. And it is enacted by 26 Geo. 2. c. 34. ſ. 2. " That when the high conſtable hath not money in his hands " ſufficient to anſwer the ſaid expences the treaſurer ſhall pay " the

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" the ſame to ſuch petty conſtable on his producing the certi-
" ficate and ſuch other vouchers as aforeſaid."

Penalty of counterfeiting certificate.

† *Sect.* 18. And it is further enacted, by 17 Geo. 2. c. 5. ſ. 18. " That if any petty conſtable or governor of any houſe " of correction ſhall counterfeit any ſuch certificate or re-
" ceipt, or knowingly permit any alteration to be made there-
" in he ſhall forfeit 50*l.* And if he ſhall not convey ſuch
" vagrants, or not deliver them to the proper perſon; or if
" any conſtable ſhall refuſe to receive any ſuch perſon, or to
" give ſuch receipt he ſhall forfeit 20*l.* by diſtreſs and ſale by
" warrant of the juſtices in ſeſſions where the offence ſhall
" be committed; half to the informer and half to the trea-
" ſurer, to be applied by him as part of the public ſtock."

Vagrant to be ſet to work.

† *Sect.* 19. And it is further enacted, par. 19. " That
" the pariſh or place to which any rogue, vagabond, or in-
" corrigible rogue ſhall be conveyed ſhall employ in work, or
" place in ſome work-houſe or almshouſe the perſon ſo con-
" veyed until he ſhall betake himſelf to ſome ſervice or other
" employment, and if he ſhall refuſe to work, &c. the over-
" ſeers may carry him before ſome juſtice to be ſent to the
" houſe of correction to hard labour."

Vide the caſe of Rex v. Ringwood. Burr. Settl. Caſes 840.

† *Sect.* 20. And it is further enacted, par. 11. " That
" if the churchwarden or other perſon who ſhall receive any
" perſon ſo ſent ſhall think the examination to be falſe he
" may carry the perſon ſo ſent before a juſtice, who, if he ſee
" cauſe may commit ſuch perſon to the houſe of correction
" till the next ſeſſions; and the juſtices there *may* deal with
" ſuch a perſon as an incorrigible rogue. But he ſhall not be
" removed from the place to which he is ſent, but by order of
" two juſtices, in the ſame manner as other poor perſons are
" removed to the place of their ſettlement."

Scottiſh vagrants

† *Sect.* 21. And it is further enacted by the ſaid ſtatute, par. 13. " That the conſtable of any pariſh or place within
" the counties of *Cumberland*, *Northumberland*, *Durham*, or
" the town of *Berwick* ſhall, on any perſon being ſo delivered
" to him by a paſs and examination, whoſe place of legal ſet-
" tlement is in *Scotland* deliver the examination to the clerk
" of the peace; and convey ſuch perſon with the paſs, and
" deliver him to ſome conſtable or other officer of the next
" pariſh, diſtrict or place within the next adjoining ſhire,
" ſtewartry or place, taking his receipt for him; and if any
" ſuch vagrant, after being ſo conveyed into Scotland ſhall
" be found wandering, begging or miſbehaving himſelf in
" England he ſhall be deemed an incorrigible rogue."

Iriſh vagrants.

† *Sect.* 22. And it is further enacted, par. 14. " That
" any maſter of a veſſel bound for Ireland, the Iſles of Man,
" Jerſey, Guernſey or Scilly ſhall, on warrant to him direct-
" ed

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"ed, under the hand and ſeal, of a juſtice of the place "where ſuch veſſel ſhall lie, take on board ſuch vagrant as "ſhall be expreſſed in the warrant, and convey him to ſuch "place; and for the charges thereof the conſtable who "ſerves him with the warrant ſhall pay him ſuch rate by "the head, as the juſtices in ſeſſions ſhall appoint, and ſuch "maſter ſhall on the back of the warrant ſign a receipt for "the money ſo paid, and alſo for the vagrant ſo delivered. "Which warrant ſo indorſed ſhall be produced to the juſtice "who ſigned and ſealed the ſame, and, upon his allowance "thereof, under his hand, the money ſo paid ſhall be re-paid "by the county, as other money for conveying vagrants. "And ſuch maſter neglecting or refuſing to tranſport ſuch "vagrants, or to indorſe the receipt, ſhall forfeit 5 *l.* to the "poor of the pariſh or place where the offence ſhall be com-"mitted, to be levied by diſtreſs and ſale of the ſhip or any "goods within the ſame, by warrant of one juſtice, return-"ing the overplus on demand after the penalty and charges of "the ſame are ſatisfied. But no maſter ſhall be compelled to "take on board more than one vagrant for every 20 tons "burthen."

How ſuch vagrants ſhall be conveyed.

† *Sect.* 23. And it is further enacted, par. 20. "It ſhall "be lawful for any two juſtices where any dangerous luna-"tic or mad perſon ſhall be found by warrant under their "hands and ſeals, directed to the conſtables, churchwardens "and overſeers of the poor of the pariſh or place, or ſome of "them, to cauſe ſuch perſon to be apprehended and kept "ſafely locked up in ſome ſecure place within the county or "precinct, as ſuch juſtices ſhall under their hands and ſeals "direct and appoint; and (if neceſſary) to be there chained, "if the laſt legal ſettlement of ſuch perſon ſhall be within "ſuch county or precinct; and if ſuch ſettlement ſhall not "be there, then ſuch perſon ſhall be ſent to the place of his "or her laſt legal ſettlement by a paſs *mutatis mutandis* as "aforeſaid, and ſhall be locked up or chained by warrant of "two juſtices of the county or precinct to which ſuch per-"ſon is ſo ſent; and the reaſonable charges of removing, "and of keeping, maintaining and curing ſuch perſons dur-"ing ſuch reſtraint (which ſhall be only during ſuch lunacy "or madneſs) ſhall be ſatisfied and paid (being firſt proved "upon oath) by order of two juſtices directing the church-"wardens or overſeers where any goods, chattels, lands or "tenements of ſuch perſon ſhall be, to ſeize and ſell ſo much "of them or receive ſo much of the annual rents of the lands "and tenements as is neceſſary to pay the ſame and to account "for what is ſo ſeized, ſold, or received to the next quarter "ſeſſions. But if ſuch perſon hath not an eſtate to pay or "ſatisfy the ſame, over and above what ſhall be ſufficient to "maintain

How lunatick vagrants may be diſpoſed of,

N. B. This act ſhall not reſtrain any former rights over the perſons of lunaticks.

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" maintain his or her family, then ſuch charges ſhall be paid " by the place to which ſuch perſon belongs by order of two " juſtices directed to the churchwardens and overſeers."

Penalty of lodging vagrants.

† *Sect.* 24. And it is further enacted, par. 23. " That " if any perſon ſhall knowingly permit any rogue, vagabond, " or incorrigible rogue to lodge or take ſhelter in his houſe or " barn or other out-houſe or building and ſhall not apprehend " and carry him before a juſtice, or give notice to the conſta- " ble ſo to do; and ſhall be convicted thereof by confeſſion, " or oath of one witneſs, before one juſtice, he ſhall forfeit " not exceeding 40 *s.* nor leſs than 10 *s.* half to the inform- " er and half to the poor by diſtreſs and ſale; and if any " charge ſhall be brought on any pariſh or place by means of " ſuch offence, the ſame ſhall be anſwered to the ſaid pariſh " or place by ſuch offender and be levied by diſtreſs and ſale " of his goods as aforeſaid: And if ſufficient diſtreſs cannot " be found, ſuch offender ſhall be committed to the houſe of " correction by the juſtice, for any time not exceeding one " month."

Children born in vagrancy.

† *Sect.* 25. And it is further enacted, par. 25. " That " where any woman ſhall be delivered of a child or children " and become chargeable to the pariſh or place, the church- " wardens or overſeers may detain her until they can ſafely " convey her to a juſtice; who ſhall examine her and commit " her to the houſe of correction until the next ſeſſions, who " may order her to be publickly whipped and detained for any " further time not exceeding ſix months, and upon applica- " tion by the churchwardens and overſeers of the place where " ſhe was ſo delivered, the juſtices at ſuch ſeſſions ſhall order the " treaſurer to pay them a reaſonable ſum, for the charges " ſuch place has been put to on her account, and if ſhe ſhall " be detained and conveyed to a juſtice as aforeſaid; the " child of which ſhe is delivered, if a baſtard, ſhall not be " ſettled where ſo born, nor be ſent thither for want of other " ſettlement, by a paſs, by virtue of this act; but the ſettle- " ment of ſuch woman ſhall be deemed the ſettlement of ſuch " child."

Mr. Burn ſays, the juſtice muſt make a record of the whole proceeding in order to give the ſame in evidence if the ſettlement ſhould be afterwards conteſted.

Note. By ſect. 22. whoever ſhall neglect his duty, or reſiſt the execution of this act ſhall forfeit not exceeding 5 *l.* nor under 20 *s.* By ſect. 33. the charges of apprehending, conveying, and maintaining offenders ſhall be included in the county rate. By ſect. 26. an appeal is given to the next quarter ſeſſions which ſhall be final. And by ſect. 34. the power of *ſpecial franchiſes* with regard to vagrants, is excepted from this act.

A TABLE

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# A TABLE OF PRINCIPAL MATTERS, CONTAINED IN THE FIRST VOLUME.

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34 But if they proceed for damages on any of the clauſes they ſhall be prohibited, *&c.* *ibid.*
35 Cathedrals and their cymetries are within the act *ibid.*
36 By 1 Mary, c. 3. to diſturb any licenſed preacher, to break any part of the church is impriſonment for three months, *&c.* 273
37 How ſuch offender ſhall be tried *ibid.*
38 To diſturb a reader of the common prayer is within the act *ibid.* f. 31
39 By 1 W. and M. c. 18. to diſturb any *tolerated* preacher incurs a penalty of 50 *l.* on conviction before any juſtice on the oath of two witneſſes f. 32
40 To make an affray in any of the king's inferior courts of juſtice is highly finable 89 f. 10

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1 By 13 Eliz. c. 2. whoever ſhall bring any into the realm *to be worn*, ſhall be guilty of *premunire* *Page* 81 f. 24
2 And if a juſtice, on information, does not diſcover the offence to a privy councillor in fifteen days he ſhall be equally guilty f. 25

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2 By 1 Geo. 1. all officers civil or military ſhall take the oath of allegiance, *&c.* 16
3 By 25 Car. 2. c. 2. all officers who hold places of truſt, *&c.* ſhall take the oath, *&c.* f. 2
4 Allegiance is ſo inſeparable from a natural-born ſubject that he cannot by *any means* renounce it 51 f. 7
5 By 11 Hen. 7. c. 1. it is declared that all ſubjects are bound by *their allegiance* to ſerve the king in his wars and that none ſhall for the true duty of his allegiance be convict of any offence 52 f. 14

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6 Therefore every king *for the time being* has a right to his people's allegiance *Page* 52 f. 15
7 A king *out of poſſeſſion* has no right to allegiance f. 16
8 The people are bound to reſiſt him *ibid.*
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10 By 1 W. and M. c. 2. the people of England are abſolved from their allegiance to a Popiſh ſucceſſor f. 21
11 By 1 Will. and M. whoever ſhall refuſe the oaths of allegiance, *&c.* ſhall be committed, *&c.* 95 f. 4

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1 By 1 Will. 3. c. 14. no brewer or retailer ſhall uſe any molaſſes, coarſe ſugar, *&c.* on pain of forfeiture and penalty of 100*l.* 312 f. 77
2 By 10 and 11 Will. 3. c. 21. if they ſhall receive above the weight of ten pounds of ſuch articles into their cuſtody they ſhall forfeit 100*l.* and the ſervant or aſſiſtant therein 20*l.* f. 78
3 By 9 Ann. c. 12. They ſhall not uſe any broom, wormwood, &c. on pain of 20*l.* f. 79
4 By 12 Ann c. 2. no ſugar, honey, foreign grains, Guinea pepper, eſſentia bine, coculus Indicus, &c. ſhall be uſed on pain of 20*l.* 513 f. 80
5 By 8 Eliz. c. 9. magiſtrates ſhall fix the price of ale and beer veſſels f. 81
6 Within the bills of mortality beer barrels ſhall contain 36 gallons and all barrels 32 gallons, and in other places 34 gallons f. 82
7 Ale and beer ſhall be retailed by a ſtandard meaſure f. 83
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1 Living in England owes a local allegiance 50 f. 5
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3 Aliens, whether in amity or not, who invade the kingdom in a hoſtile manner ſhall be tried by martial law *Page* 50 f. 6
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1 By 22 Geo. 2. c. 33. Every perſon in the fleet who ſhall waſte or deſtroy ammunition ſhall be puniſhed by court-martial 76 f. 20

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1 By 1 Jac. 1. c. 4. the *proteſtant* heir ſhall not be liable to penalties incurred by the *recuſancy* of the anceſtor, unleſs the king had ſeized two thirds of the lands in the anceſtor's life time 30 f. 55

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2 But if the heir be alſo a recuſant the eſtate is liable to the forfeitures of the anceſtor unleſs he conform *Page* 30 ſ. 56
3 Lands in the fee tail claimed from anceſtor are not liable *ibid.*
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1 By 3 Jac. 1. c. 5. no recuſant convict ſhall uſe the trade of apothecary 29 ſ. 47
2 Exempted from ſelling ſpirituous liquors 461

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1 By 5 Eliz. c. 4. no perſon ſhall exerciſe a trade nor employ any perſon therein *unleſs he has* ſerved ſeven years *as* an apprentice, upon pain of 40 *s.* a month *Page* 564, c. 90
2 Conſtructions upon the above ſtatute 565 (N)

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ARMED and DISGUISED.

1 Whoever, being armed and diſguiſed, ſhall ſteal fiſh out of a river or pond, or reſcue an offender ſhall ſuffer without clergy 222 ſ. 4
2 Or ſhall appear in any incloſed place where deer are kept—or in any high road, &c. or ſhall deſtroy any fallow deer, or rob any warren 187 ſ. 2
3 Or ſhall aſſemble to the number of three, for the purpoſe of ſmuggling 227 ſ. 1
4 In *what manner* the offenders muſt be armed 228 (N) 1

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1 An innocent perſon *indicted* not ſubmitting to *an arreſt by warrant*, if unavoidably killed, the officer is juſtified 106 ſ. 12
2 Homicide during an affray in conſequence of *an arreſt* in a civil action may be juſtified if the officer is reſiſted 107 ſ. 17
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4 What homicide, in endeavouring to eſcape from an arreſt ſhall be deemed murder ſ. 55

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1 By 2 Edw. 3. whoever ſhall ride armed, ſhall forfeit their armour and be impriſoned 266 ſ. 4
2 The power of juſtices upon this act 267 ſ. 5
3 By 3 Jac. 1. c. 5. No popiſh recuſant convict ſhall keep arms, &c. 36 ſ. 17
4 By 31 Eliz. c. 4. whoever ſhall embezzle the king's armour to the

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1 By 12 Geo. 3. c. 24. whoever ſhall damage or deſtroy the king's arſenals ſhall ſuffer death without clergy 75 ſ. 19

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1 Is maliciouſly burning the houſe of *another* 165 c. 39
2 Not only a manſion, but any houſe, with the out-buildings may be ſubjects of this offence 166
3 So alſo barns full of corn whether adjoining the houſe or not ſ. 1
4 And the word *domus* is ſufficient without *manſionalis* *ibid.*
5 But burning the *frame* of a houſe or a *ſtack* of corn is not arſon ſ. 2
6 But by 5 Eliz. c. 13. to burn corn in the four northern counties is felony without clergy *ibid.*
7 And by 22 and 23 Car. 2. c. 7. to burn in the night corn, grain, hay or barns or other houſes is felony *ibid.*
8 It is not arſon to burn a houſe of which a man is in poſſeſſion, or ſeized in fee, even though in a town and with intent to burn other houſes (but a pauper may be guilty of this offence for burning the publick workhouſe, &c.) ſ. 3
9 For no *intention* to do an injury is felonious *ibid.*
10 But it may be puniſhed as a miſdemeanor *ibid.*
11 And barely ſetting the houſe on fire, will not conſtitute this crime, unleſs it *burn* 167 ſ. 4.
12 If a man burn the houſe of *A.* and thereby happen to burn the houſe of *B.* he may be indicted for burning the houſe of *B.* *ibid.* ſ. 5
OF MALICIOUS INCENDIARIES *app.* 4 223
13 By 37 Hen. 8. c. 6. ſ. 4. to burn any cart loaded with fuel incurs 10 *l.* and treble damages 223 *ap.* 4
14 By 4 and 5 W. and M. c. 23 to burn the *covert* for red or black game within the time ſpecified, impriſonment for one month, &c. *P.* 223 ſ. 2
15 By 28 Geo. 2. c. 19. to burn the *covert* for deer or game, any ſum between 5 *l.* and 40 *s.* *ibid.*
16 By 1 Geo. 1. c. 48. to burn any wood or coppice is felony 224 ſ. 3
17 By 9 Geo. 1. c. 22. to burn any houſe, barn or out-houſe, or any hovel, cock, mow, or ſtack of corn, ſtraw, hay or wood, or to reſcue an offender is felony without clergy *ibid.* ſ. 4
18 A priſon within the protection of this act *ibid.* (N) 1
19 But a leſſee for years cannot be guilty by burning the houſe in which he is in poſſeſſion *ibid.* (N) 1
20 How a *declaration* and an *indictment* differ, upon this act *ibid.* N) 2
21 By 10 Geo. 2. c. 32. to ſet fire to any coal-mine, felony without clergy *ibid.* ſ. 5
22 By 9 Geo. 3. c. 29. to burn any mill, felony without clergy; but the proſecution muſt be within eighteen months *ibid.* ſ. 6
23 For other offences by burning *ibid.* (N)

## ARTIFICERS.

1 The OFFENCE OF SEDUCING them 558 c. 8.
2 By 5 Geo. 1. c. 27. to ſeduce artificers in wool or metal, or any clock or watch maker into any foreign country incurs a penalty of 100 *l.* and three months impriſonment ſ. 4
3 The court can inflict but *one* penalty on *one* information, although againſt *ſeveral* offenders *ibid.* (N)
4 Or if ſuch artificer, uſing his trade abroad, ſhall not return home on notice given him he ſhall loſe his *liberam legem*, &c. ſ. 2
5 On complaint to a juſtice that any perſon is endeavouring to ſeduce ſuch artificer, &c. he may bind him over to the quarter ſeſſions, and on conviction he

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he ſhall be impriſoned till he gives ſecurity *Page* 559
6 By 23 Geo. 2. c. 13. to ſeduce any manufacturer in wool, mohair, cotton or ſilk, &c. or any artificer as above mentioned, incurs a penalty of 500*l.* and impriſonment for twelve months for the firſt offence, and 1000*l.* and two years for the ſecond ſ. 4
7 A coach ſpring maker is within this ſtatute ſ. 5
8 By 22 Geo. 3. c. 60. to ſeduce any workman in the printing callicoes, muſlins, cottons, &c. incurs the ſame puniſhment 560
9 By 25 Geo. 3. c. 67. to ſeduce any perſon employed in the iron and ſteel manufacture; or in the making of the tools and utenſils incurs the ſame puniſhment ſ. 7

## ASSERTION.

1 To aſſert that both or either houſe of parliament have a legiſlative authority without the king is *præmunire* 86
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## ASSAULT and BATTERY.

1 An aſſault is an attempt, with violence, to do a corporal injury to another 263 c. 62
2 As by ſtriking at him; or pointing an offenſive weapon; holding up a fiſt, &c. or any other act done in an angry manner *ibid.* ſ. 1
3 But no words whatſoever can amount to an aſſault *ibid.*
4 An offender may be found guilty of the aſſault and acquitted of the battery *ibid.*
5 A battery is *any* injury actually done to the perſon of another; as ſpitting in his face; treading on his toes; joſtling him in a revengeful manner *ibid.* ſ. 2
6 Every battery includes an aſſault; therefore if the aſſault be ill laid and the battery good, it is ſufficient *ibid.* ſ. 1
7 It is no battery for an officer to lay his hand gently upon the perſon he is about to arreſt *Page* 264
8 How a battery may be juſtified *ibid.* ſ. 3
9 *Son aſſault demeſne* may be taken advantage of on an indictment, as well as in an action; it may be given in evidence under not guilty in the firſt and muſt be pleaded, ſpecially in the latter *ibid.*
10 How aſſaults and batteries are puniſhed 264 ſ. 4
11 Aſſaulting peers or members of parliament *ibid.* ſ. 5
12 Aſſaulting clergymen *ibid.* ſ. 6
13 Aſſaulting a maſter or miſtreſs *ibid.* ſ. 7
14 Aſſaulting a privy councillor *ibid.* ſ. 8
15 Aſſault for money won at play ſ. 9
16 Aſſaulting in the ſtreets with intent to ſpoil cloaths 265 ſ. 10
17 To aſſault by ſhooting at another *ibid.* ſ. 11
18 Aſſaulting with intent to rob *ibid.* ſ. 12
19 Aſſaulting a maſter woolcomber, &c. *ibid.* ſ. 13
20 To aſſault or threaten an adverſary for ſuing him, or the attorney, counſel, or jurors in the cauſe, or a gaoler for detaining a priſoner is a contempt 90 ſ. 14
21 A priſoner aſſaulting his gaoler may be lawfully killed by him in the affray 107 ſ. 13
22 In a *bare aſſault* upon a houſe, if the owner fling out his money it is no burglary 160 ſ. 3
23 But otherwiſe if upon the aſſault the door be opened and *he* enter the houſe 161
24 To aſſault with intent to hinder the exportation of corn, &c. is a miſdemeanor 243

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1 An unlawful aſſembly is a diſturbance of the peace by perſons barely aſſembling 257

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2 An aſſembly of a man's friends for the defence of his perſon, &c. is unlawful *Page* 297
3 But ſuch an aſſembly in a man's houſe for the defence of it is lawful ſ. 10
4 How unlawful aſſemblies ſhall be ſuppreſſed, &c. ſ. 11

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1 Is eſſential to every indictment for larceny 134 ſ. 2
2 What ſhall be ſaid a ſufficient *aſportation* 135, (N)1 139ſ. 18

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1 To forge or counterfeit the common ſeal, &c. of the London or Royal Exchange Aſſurance Offices felony without clergy 209 ſ. 14
2. Deſtroying a ſhip to obtain the aſſurance is felony without clergy. 185

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1 Anciently it *was thought* that any one might kill *an attainted* perſon 106 ſ. 8
2 But it is now determined to be murder 121 ſ. 15
3 An attainder in piracy corrupts not the blood 153 ſ. 7

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1 An attorney may proſecute or defend in the court where he is inrolled on a ſpecial retainer 542 ſ. 28
2 He may lay out his own money in the cauſe and maintain an action to recover it *ibid.*
3 How they may proceed in other courts *ibid.*
4 If any attorney be guilty of deceit, colluſion or impoſition he ſhall be diſqualified and impriſoned 542 ſ. 29
5 As where he ſues out an habere fac. *ſeiſinam* falſely reciting a recovery *Page* 543 ſ. 32
6 As where he brings a *precipe* againſt a poor man, who had no title, in order to get poſſeſſion ſ. 33
7 Or if he appear and confeſs judgment without warrant ſ. 34
8 Or pleads a falſe plea to impoſe on the court ſ. 35

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1 By 7 Geo. 2. c. 21. whoever ſhall aſſault another by menace, or in a violent manner demand their property with an intent to rob ſhall be tranſported for ſeven years 148
2 How the offence muſt be laid and proved *ibid.* (N)2

AVOIRDUPOIS WEIGHT. — *See Bread.*

*AUDITA QUERELA.*

1 Conformity upon 1 Jac. 1. c. 4. is a good bar on an *audita querela* againſt an informer 305 ſ. 53

AUTHORS.

1 By 8 Ann. c. 19. authors or their aſſigns ſhall have the ſole right of printing their works for fourteen years, &c. 476
2 A muſical compoſition is within the act *ibid.* (N)
3 So an abridgment, or an index may be within it, but *quere* as to a chart *ibid.*
4 But every volume before publication muſt be entered in Stationer's Hall, in the manner deſcribed ſ. 25
5 And nine copies ſhall be left there for the univerſities, &c. ſ. 26
6 And after the expiration of the ſaid fourteen years the right ſhall return to the authors, *if living*, for another fourteen years 477 ſ. 27
7 The caſe of literary property (N)7

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8 Mode of aſſigning the property ſo as to protect the contingent intereſt of authors *Page* (N) 7
9 By 8 Geo. 2. c. 13. the property of engravings is ſecured to their inventors for fourteen years 477 ſ. 28
10 But the *name* of the proprietor, and *the day of* publication muſt be engraved on the plate (N) 1
11 By 17 Geo. 3. c. 57. proprietors of prints may bring an action on caſe, &c. for altering, adding to, or diminiſhing the prints 478
12 By 15 Geo. 3. c. 53. the univerſities and colleges may print their own books, &c. at their own preſs ſ. 29

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1. IMported may be ſeized. *P.* 520 ſ. 108
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3 May be exported although they do not exceed the prices mentioned. ſ. 110
4 How they may be exported to places in amity with the crown. ſ. 111
5 The duties to which they are ſubject. ſ. 112 to 114

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1. A juſtice of the peace may either bail or commit one who has dangerouſly wounded another, till the year and day be paſt; but he ought to be cautious if the wound be dangerous. 270
2 A juſtice of the peace cannot bail in homicide *per infortunium* or *ſe defendendo*, but muſt commit till the aſſizes; but the offender may be brought up by *habeas corpus* and bailed. 114
3 Anciently they might have been bailed by 12 men upon the writ *de odio et atia.* ſ. 24
4 Whoever is bail for another may take care to have his appearance recorded, without being guilty of maintenance *Page* 539 ſ. 19
5 By 21 Jac. 1. c. 26. to acknowledge, or procure to be acknowledged, any recognizance, bail, &c. in the name of any other perſon without their conſent, is felony 178 ſ. 9
6 In putting in bail before a judge, if a man *perſonate* another in one county, and the bail be filed in another, the trial ſhall be where the perſonating was committed 179
7 The bare perſonating or acknowledging is no felony, but a miſdemeanor, unleſs the bail be filed *ibid.*
8 Bail put in in *feigned names*, and no ſuch *perſons* exiſt, the offender cannot be proſecuted for *perſonating*; but he may be ſet in the pillory 179 (N) 1
9 By 4 & 5 W. & M. c. 4. perſonating bail, before commiſſioners authorized to take bail in actions depending in the courts at Weſtminſter, by which the perſon perſonated ſhall be made liable to pay, &c. is felony. 179 ſ. 11

BAILIFF.

1 Of a corporation is within 13 Car. 2. c. 1. muſt take the oaths. 15 ſ. 1
2 By 5 Geo. 1. c. 4. he ſhall not be preſent at any other place of worſhip than in the church in his *official* habit, &c. 17 ſ. 5
3 By 8 Hen. 6. c. 9. bailiffs of a franchiſe, not returning the king's writ upon forcible entry, ſhall forfeit 20 *l.* 277 ſ. 11

BAILMENT.

1 *Bailment* of goods to another for a ſpecial purpoſe, gives *the bailee* ſuch a *poſſeſſion* of them that he cannot be guilty of felony in ſtealing them while the *poſſeſſion* continues 134 ſ. 3
2 But if *the bailee* take away *part* of what is bailed to him, he may be guilty of felony, for his poſſeſſion was of *the whole*, as one entire thing, and not of any diſtinct and ſeparate part 135
3 The *bailment* alſo muſt be fairly and honeſtly obtained; for, if it appears

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8 No indictment good without the words *communis barractator* P 526 f. 9
9 But *contra formam ſtatuti* will not vitiate an indictment for barratry, although the ſtatute only goes to the puniſhment f. 10
10 It need not be charged to be done at any particular place f. 11
11 But it muſt conclude *contra pacem* f. 12
12 The parties muſt interchange a note of the particular matters to be given in evidence f. 13
13 The puniſhment of this offence f. 14

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1 Shall take the oaths, &c. in open court, before they ſhall be admitted to the vocation 81 f. 27
2 By 7 Will. 3. c. 24. barriſters practiſing as ſuch in any court whatſoever, without taking the oaths, &c. and ſubſcribing the declaration incur a *premunire* 84 f. 43
3 By 13 Will. 3. c. 6. and 1 Geo. 1. c. 13. every perſon who ſhall act as barriſter, &c. in any courts in England ſhall, within three months, &c. ſubſcribe the oaths at Weſtminſter, or at the general ſeſſions of the peace where they reſide, or they ſhall *ipſo facto* be rendered incapable of the ſaid office, and *on conviction*, ſhall be diſabled to ſue, &c. or to vote, &c. and forfeit 500 *l.* 97
4 By St. Weſt. 2. c. 49. none of the king's council, &c. ſhall receive any freehold while the thing is in plea 546 f. 11
5 A barriſter receiving part of land *for his wages*, after the ſuit is determined is not within 28 Edw. 1. c. 11. againſt champerty 548 f. 20
6 A barriſter cannot juſtify indirect practices to influence a jury 549 f. 5
7 A counſel, *having received his fee*, may lawfully ſet forth his client's cauſe to the beſt advantage, but he cannot give him money to maintain his ſuit 542 f. 27
8 Barriſters are liable to puniſhment for any deceitful practice f. 29
9 By St. Weſt. 1. c. 29. if they *beguile* the court or the party, they ſhall be *diſbarred* and impriſoned, &c. *Page* 562 f. 29
10 And counſellors not ſworn are as much within this act as ſerjeants, &c. 530

BARON AND FEME.——*Vide Feme Covert.*

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1. If the king's miniſters make money of baſer alloy than they ought, they and their receivers and comforters are within the ſtatute of treaſons 62 f. 55
2 To utter baſe money knowingly is a high miſpriſion at common law f. 56
3 By 8 and 9 W. 3. c. 26. whoever ſhall make baſe coin reſemble the current money of England, or ſhall waſh or colour, &c. any round blanks of baſe metal for that purpoſe, their aiders, &c. are guilty of high treaſon. 64
4 By 1 and 2 P. and M. c. 11. to import baſe foreign coin current here is high treaſon 65 f. 65
5 The perſon importing muſt know it to be falſe f. 66
6 If *baſe money* be found on a ſuſpicious perſon he may be arreſted 66 f. 68
*Vide Coin.*

BASTARD.

1 By 21 Jac. 1. c. 27. if a woman be delivered of a baſtard child, and privately endeavour to conceal the death of it ſo as to prevent it being known whether it be born alive or not, except the mother can prove, by one witneſs, that ſuch child was born dead ſhe ſhall ſuffer as in caſe of murder 121 f. 17
2 No baſtard children born in vagrancy, ſhall gain a ſettlement by birth, or be ſent to the place where born for want of other ſettlement; but the ſettlement of the mother ſhall be the ſettlement of ſuch child 576 f. 25

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## BATTERY.—*Vide Aſſault.*

1 Every battery includes an aſſault P263 ſ. 1
2 If the aſſault be ill laid the defendant may be found guilty of the battery *ibid.*
3 A battery is any injury, however ſmall, done to *the perſon* of another ſ. 2
4 But one may juſtify *laying his hands gently on another* for a lawful purpoſe 264
5 How battery may be juſtified and puniſhed ſ. 3, 4
6 Surety of the peace may be required for a threatened battery 254 ſ. 7

## BAWDY HOUSE.

1 An inſurrection to deſtroy *all* bawdy houſes is high treaſon, from the *generality* of the intention. 54 ſ. 25
2 The offence of keeping a bawdy houſe is a common nuſance 357 c. 74
3 A *feme covert* is puniſhable with her huſband for this offence, or without him, if he does not live with her 4 ſ. 12(N)11
4 A lodger who keeps only a ſingle room for this purpoſe is indictable as the keeper of a bawdy houſe 357
5 This offence is liable to fine, impriſonment and ſuch *infamous* puniſhment as the court ſhall think fit *ibid.*
6 But the bare ſolicitation of chaſtity is not indictable *ibid.*
7 A man may be bound to his good behaviour for haunting bawdy houſes with women of bad fame. 261 ſ. 2
8 How offenders may be apprehended and proſecutions carried on 358 ſ. 5

## BEACH.—*Vide Trees.*

## BEARS.

1 Bears, or other things of a baſe nature, are not ſo regarded by the law, that a man ſhould die for their ſakes, and therefore cannot be the ſubject of larceny. *Page* 143 ſ. 23

## BEASTS.

1 The felonious taking of domeſtick beaſts, as horſes, mares, colts, &c. or any creatures *domitæ naturæ* as poultry, &c. may be the ſubject of larceny. 144 ſ. 28
2 But animals of a baſe nature as dogs, bears, foxes, &c. or any animals *feræ naturæ* and unreclaimed, cannot be the ſubject of larceny. 143

## BEER.—*Vide Ale. Brewer.*

## BEHAVIOUR.

1 A juſtice of the peace may commit one guilty of a forcible entry if he refuſe to give ſurety for his good behaviour 276
2 The author of an obſcene writing may be bound to his good behaviour as a perſon of evil fame 355 ſ. 9.
3 By 34 Ed. 3. c. 1. juſtices of peace are required to take of all them that be not of good fame, ſufficient ſurety for their good behaviour 261
4 But this means of ſuch only as intend to break the peace ſ. 2
5 Or thoſe who by quarrelſome behaviour give juſt ſuſpicion of their readineſs to break the peace *ibid.*
6 As for offences *contra bonos mores*, as frequenting bawdy houſes, ſpeaking contemptuouſly of a magiſtrate though not in the execution of his office; or of a conſtable or other inferior officer in the diſcharge of his duty *ibid.*
7 But this ſurety cannot be required for barely calling another names ſ. 3
8 This power in the magiſtrate is diſcretionary and he may take the ſurety of all whoſe behaviour involves them in the deſcription of perſons of *evil fame* 262 ſ. 4
9 But if he commit for want of ſurety he muſt ſhew the cauſe with convenient certainty. *ibid.*

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10 Inſtances in which this ſurety has been taken *Page* 262 (N) 1
11 A recognizance for ſuch ſurety may be forfeited by a commiſſion of the offence intended to be prevented by it f. 5.
*Vide Contempts, No.* 16. 20.—*Conſpiracy, No.* 20.

BEGGARS.

1 Soldiers or ſailors wandering as beggars without a teſtimonial from a juſtice ſhall be guilty of felony without clergy. 183 c. 48
2 Beggars pretending to be ſoldiers or ſailors ſhall be deemed rogues and vagabonds 184 f. 6
3 All perſons going about from door to door, or placing themſelves in ſtreets, highways, or paſſages, to beg or gather alms in the pariſhes or places where they dwell are to be deemed idle and diſorderly perſons 5
4 One juſtice may, on conviction by one witneſs, &c. &c. commit ſuch offender to hard labour for a month. *ibid.*
5 Any perſon may apprehend *ſuch beggars* and carry them before a juſtice, if they reſiſt or eſcape, they ſhall be puniſhed as rogues and vagabonds *ib.*
6 The juſtice may order the overſeer of the pariſh to give the perſon apprehending ſuch beggar a reward of 5*s.* *Vide Vagrants.* *ibid.*

BELL METAL,—*Vide Stolen Goods.*

BENEFIT OF CLERGY. *Vide Felonies.*

BENT.

1 By 15 and 16 Geo. 2. c. 33. whoever ſhall deſtroy bent on the ſea coaſts ſhall forfeit 20*s.* *ibid.*

BIGAMY.

1 By 1 Jac. 1. c. 11. if any married perſon, ſhall marry another perſon, the former huſband or wife being alive, ſhall be guilty of felony 174
2 The offenders may be tried in the county where they are apprehended but it is no felony *Page* 174
3 If the huſband or wife ſhall be continually remaining beyond the ſeas by the ſpace of ſeven years together. f. 2
4 Or ſhall be abſent the one from the other for the ſpace of ſeven years, within the kingdom, the one not knowing the other to be alive within that time. *ibid.*
5 Or if either of them ſhall be divorced or the marriage declared void by the ſpiritual court at the time of the ſecond marriage. f. 3
6 Or if either of the parties are within the age of conſent. *ibid.*
7 But this offence ſhall not incur attainder, corruption of blood, loſs of dower, or diſheriſon f. 4
8 A divorce, *a vinculo matrimonii*, and alſo *a menſa et thoro cauſa adulterii* & *ſævitiæ* is within the exception of this ſtatute. f. 5
9 Where one of the parties is within the age of conſent, the other is thereby alſo exempted from the felony. f. 6
10 If the firſt marriage be beyond ſea, and the latter in England, the party may be indicted for it in England f. 7
11 And *quere* if he may not though the firſt marriage be in England, and the ſecond beyond ſea f. 8
12 The firſt and true wife is not an admiſſable evidence againſt her huſband 175(N)1
13 She cannot even make an affidavit to poſtpone the trial. *ibid.*
14 But the ſecond *woman* is a competent witneſs. *ibid.*
15 A ſecond huſband, without privity of the firſt marriage, is intitled to the profits of *the woman's* induſtry *ibid.*
16 The production of the ſentence in a ſuit for jactitation does not preclude the proof of the marriage (N)
17 If ſuch a ſentence were concluſive evidence againſt the fact of marriage, yet it may be impeached by fraud or colluſion. *ibid.*

*Vide Marriage.*

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BILLS.—*Vide Forgery. Choſes in Action.*

1 By 2 Geo. 2. c. 25. it is felony without clergy to forge, or cauſe to be forged, or to aſſiſt in forging, any bill of exchange or promiſſory note for the payment of money, or any indorſement thereon. *Page* 210 ſ. 16
2 And by 7 Geo. 2. c. 22. to forge, &c. any acceptance, or number, or principal ſum thereon. 241 ſ. 18
3 So alſo by 31 Geo. 2. c. 10. to forge, &c. any bill to receive the monies due to any ſeaman, &c. 212 ſ. 21
4 Or by 9 Geo. 3. c. 30. knowingly to utter the ſame. *ibid.*

BILLS OF MORTALITY.—*Vide page* 233. *Chairman. Cattle No.* 8. 21. *Bread.*

BILLINGSGATE.—*Vide Nuiſances.*

BIRCH.—*Vide Trees.*

BISHOP.—*Vide Præmunire. Popery.*

1. Every biſhop may convict for hereſy within his own dioceſe, and proceed to puniſh by church cenſures. 6 ſ. 4
2 But no *other* ſpiritual judge can. *ibid.*
3 By 24 Hen. 8. c. 9. the archbiſhop of either province may cite the offender, if the immediate ordinary conſents, or if he neglects his duty. ſ. 5
4 By 11 and 12 Will. 3. c. 4. whoever ſhall convict a *popiſh biſhop* of ſaying maſs, ſhall receive 100 *l.* and the offender be condemned to perpetual impriſonment.—But this is repealed by 18 Geo. 3. c. 60. provided the offender ſhall have taken the oath therein preſcribed before any proſecution commenced. 39 ſ. 2

BITCH.—*Vide Dog.*

BLACK ACT.

1 By 9 Geo. 1. c. 22. it is felony without clergy *to appear*, ARMED AND DISGUISED in any incloſed grounds where deer, hares, or conies are uſually kept. *Page* 187
2 Or in any high road, open heath, common, or down. 187 ſ. 2
3 Or to hunt, wound, deſtroy, or ſteal any fallow deer. *ibid.*
4 Or to rob any warren where hares or conies are uſually kept. *ibid.*
5 Or to ſteal or take away any fiſh out of any river or pond. 222 ſ. 4
6 It is alſo felony without clergy, *whether armed and diſguiſed or not* to hunt, wound, deſtroy or ſteal any fallow deer in any of the king's incloſed parks or foreſts. (*Sed Vide* 16 *Geo.* 3. c. 30. *p.* 189) 187
7 Or to break down the head of any fiſh-pond whereby the fiſh ſhall be loſt or deſtroyed. 212 ſ. 4
8 Or to kill, maim, or wound any cattle. 180 ſ. 2
9 Or to cut down or deſtroy any trees planted in any avenue or growing in any garden, orchard, or plantation, for ornament, ſhelter or profit. 215 ſ. 4
10 Or to ſet fire to any houſe, barn, out-houſe, or to any hovel, cock, mew, a ſtack of corn, ſtraw, hay, or wood. 224 ſ. 4
11 Or to maliciouſly ſhoot at any perſon in any dwelling-houſe or other place. 225
12 Or to ſend any letter, without any name ſubſcribed thereto, or ſigned with a fictitious name demanding money, veniſon, or other valuable thing. 226 ſ. 3
13 Or to forcibly reſcue any perſon, in cuſtody for any of the above offences. 224 ſ. 4
14 Or to procure, by gift or promiſe of reward, any perſon to join in committing any ſuch unlawful act. *ibid.*
15 Any two juſtices may receive information on the oath and ſubſcription of one witneſs, which they ſhall tranſmit to a ſecretary of ſtate, who

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is to lay the ſame before the king and council, where an order may be made for *the offender to ſurrender* himſelf, after proclamation at two market towns, at the time and in the manner directed by the act; and if he neglect to ſurrender he ſhall be deemed convicted of felony without clergy; and the king's bench or goal delivery, on production of the order of council, may award execution againſt the offender. *Page* 187 ſ. 88

16 And whoever ſhall *abet* an offender after the time limited for his ſurrender is expired, ſhall, *on conviction*, be guilty of felony without clergy. 188 ſ. 4

17 But the ſurrender clauſe ſhall not ſuperſede the power of magiſtrates to apprehend the offender by the ordinary proceſs of law. 185 ſ. 5

18 But if he is apprehended by the ordinary proceſs, it ſhall *avert* the conſequences of the ſurrender clauſe, and the offender ſhall be tried by the common law.

19 The hundred is made liable to the extent of 200*l.* for the offences mentioned, No. 8, 9, 10.

20 But the perſons injured muſt give notice to ſome of the inhabitants, within two days after the offence is committed and be examined within four days after, touching their knowledge of the offence.

21 The action to be within one year; and if the offender be convicted within ſix months after the offence, the hundred is exonerated.

22 Juſtices may iſſue their warrants to ſearch for ſtolen veniſon.

23 Perſons wounded, or if killed, their executors, &c. are intitled to 50*l.* for apprehending and convicting an offender

24 This act to be openly read at the quarter ſeſſions, &c.

*N. B. For the clauſes not referred to this book ſee, vide the act.*

BLACK LEAD.

1 By 25 Geo. 2. c. 10. to enter a black lead mine by force, and take away wad, cawke, or lead, &c. their aiders and abettors ſhall be tranſported for ſeven years, or whipped. *P.* 218 ſ. 12

BLASPHEMY.

1 All blaſphemies againſt God, or contumelious reproaches of our Saviour, are offences at common law, puniſhable by the temporal judges with fine, impriſonment, and infamy. 10 ſ. 1

*Vide Religion.*

BLOOD.—*Vide Corruption of Blood.*

BLACK MAIL.

1 By 43 Eliz. c. 13. whoever inhabiting near the borders of Cumberland, Weſtmoreland or Durham, ſhall take any perſons or goods and impriſon them till ranſom made, &c. &c. ſhall ſuffer death without clergy. 201

BLUDGEON.—*Vide Vagrant.*

1 By 23 Geo. 3. c. 88. a perſon apprehended with a bludgeon or other offenſive weapon upon him, with intent felonioufly to aſſault another, ſhall be deemed a rogue and vagabond. 148

BOATS.

1 By 10 Geo. 2. c. 31. no perſon ſhall carry in a *tilt boat*, &c. more than 37 paſſengers and 3 by the way. Nor in any *other boat*, more than 8 paſſengers and two by the way. Nor on a Sunday more than 8 perſons over the ferry. 569

2 And if any greater number ſhall be taken, and any paſſenger in a boat ſo *ſurcharged* ſhall be drowned, the navigator of the boat ſhall be *tranſported as a felon*. 53

3 No perſon ſhall uſe any boat or barge on a Sunday without the allowance of

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of ſome juſtice of peace, on pain of 5 l. *Page* 11 ſ. 3
4 But 40 watermen may be appointed by the Watermens Company to ferry boats over the Thames on a Sunday. 12

*Vide* 2 *Geo.* 3. *c.* 28. *for thefts by bum boats on the Thames.*

BOND.—*Vide Uſury, Extortion.*

1 Stealing *an obligation* is not within 21 Hen. 8. c. 7. 139 ſ. 14
2 Nor is the ſtealing a bond, felony by the common law. ſ. 22
3 But by 2 Geo. 2. c. 25. the ſtealing of bonds and certain other choſes in action, is made ſuch felony as ſtealing the property they ſecure would be. 142
4 Thoſe who have an equitable intereſt in a bond, may maintain another for the recovery of it. 539 ſ. 17
5 A bond is within 29 Eliz. c. 6. which authorizes the king to take the goods of a perſon abſenting himſelf from church on default of paying the 20 l. a month. 22 ſ. 14
6 By 9 Ann. c. 27. to forge South Sea bonds is felony without clergy. 208 ſ. 11
7 By 7 & 8 Will. 3. bonds given to procure the return of a member to parliament, are void; and the giver thereof ſhall forfeit 300 *l.* 314 ſ. 8
8 A bond, by a deputy to pay a certain ſum at all events, is bribery, and void. 313
9 But not a bond to pay half the profits, or a certain ſum out of the profits of the office for a deputation. ſ. 5
10 The *obligee* may raſe out *libris* and inſert *marcis*, without being guilty of forgery. 337 ſ. 4
11 By 2 Geo. 2. c. 25. to forge any bond or writing obligatory is felony without clergy. 210 ſ. 16
12 To make a bond for 500 *l.* ſeem to be a bond for 5000 *l.* by adding another cypher was forgery at common law. 336 ſ. 2
13 But forging a bond containing a mere gift of perſonal chatels is not within 5 Eliz. 342 ſ. 21

BONA.

1 *Bona capellæ* is a good deſcription in an indictment for ſtealing the goods of a chapel; *bona domus et eccleſiæ* for ſtealing the goods of an abbey; *bona parochianorum* for ſtealing the goods of a pariſh church. *Page* 144

*Vide goods and chattels. Indictment. Reſtitution.*

BOOKS.

1 By 3 Jac. 1. c. 5. no perſon ſhall import, print, buy, or ſell any Popiſh books on penalty of 40 *s.* for every book, and the books to be burnt. 46 ſ. 15
2 The 8 Ann. c. 19. made to encourage the writing of uſeful books. 475 ſ. 24
3 The author of any book or his aſſigns, ſhall have the excluſive copy-right for 14 years, to commence from the day of publication; and whoever ſhall invade that right ſhall forfeit all the impreſſions and one penny for every ſheet found in his cuſtody. 476
4 A muſical compoſition is *a book* within the meaning of this act. *ibid.* (N)
5 But the author may conſent, by writing in the preſence of two witneſſes, that another ſhall print ſuch books. *ibid.*
6 But this act ſhall not extend to any book or books printed without ſuch conſent, unleſs the title to the copy of the whole of ſuch books be regiſtered at Stationers hall. 476 ſ. 25
7 Directions how the ſame ſhall be regiſtered, if the clerk of the company refuſe to regiſter, he ſhall forfeit 20 *l.* and the author, on publiſhing the ſame in the gazette ſhall have the ſame benefit as if the work had been regiſtered. *ibid.*
8 Nine copies of all books ſo regiſtered ſhall be left at Stationers-hall for the uſe of the Univerſities, &c. ſ. 26
9 After the firſt 14 years the copy-right ſhall return to the authors, if living, for another 14 years. ſ. 27

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10 The caſe of literary property; and the mode of aſſigning copy-right ſo as to protect the contingent intereſt of authors. *Page* 476 (N) 7
11 By 15 Geo. 3. c. 53. the Univerſities of Great Britain; and Eaton, Weſtminſter, and Wincheſter, ſhall have *for ever* the excluſive right of printing *at their own preſs*, their *own* books. 478 ſ. 29
12 But they may ſell the copy-right in like manner as any author. *ibid.*
13 The king may grant the excluſive right of printing the ſcriptures and law books. 471 ſ. 6

BORDERERS.—*Vide Black Mail.*

1 For the offences of black mail. And of moſs troops, &c. Vide 200 to 202

BRAWLING.—*Vide Affrays.*

1 A *feme covert* may be indicted as *communis rixatrix*. 5 (N) 11
2 By 5 and 6 Edw. 6. c. 4. whoever ſhall *brawl*, &c. in a church or churchyard, the ordinary, on proof by two witneſſes may ſuſpend a layman *ab ingreſſu eccleſiæ*, and a clerk from *miniſtration*. 271 ſ. 24
3 This is a diſtinct and ſubſtantive offence; in the puniſhment of which, the ſpiritual court ſhall not be prohibited except they proceed to damages. 272 (N)
4 Cathedrals and their burying places are within this ſtatute. *ibid.*

BREAD.

1 In ſetting the aſſize, reſpect ſhall be had to the price of grain, &c. in the public markets. 486
2 Where there is an aſſize, only wheaten and houſehold bread, or ſuch bread as ſhall be allowed, ſhall be ſold. 487
3 The aſſize and price of bread ſhall be according to the tables. *ibid.* ſ. 7
4 Explanation of the tables. 487 to 490
5 The aſſize to be in avoirdupoize weight. *Page* 491
6 A return to be made weekly to the court of aldermen of London of the prices of grain, &c. in the London markets, to be entered in a book for the inſpection of the bakers. ſ. 10
7 And the aſſize ſhall be ſet the next day by the ſaid court, if ſitting; if not by the lord mayor. *ibid.*
8 The meal-weighers ſhall leave a copy of the returns at Bakers Hall. *ibid.*
9 The ſame power, &c. given to the court of aldermen of every other city, who ſhall cauſe the prices of grain, &c. to be returned and *within two days* ſhall ſet an aſſize to continue in force *for ſeven days*. 492
10 In counties, two juſtices are authoriſed to ſet an aſſize, &c. ſ. 12
11 Bakers may inſpect the returns of the prices of grain in order to enable them to object to the aſſize. ſ. 13
12 No baker ſhall pay any fee for an aſſize. ſ. 14
13 Half peck and quartern loaves of wheaten and houſehold, to weigh in proportion to the peck loaf, &c. 493 ſ. 15
14 Where ſmaller loaves ſhall be allowed, no peck, half peck or quartern loaves ſhall be ſold. ſ. 16
15 The ſeſſions may fix the juriſdiction of any place within their diſtrict. ſ. 17
16 An entry of the prices of grain, &c. to be made by every clerk of the market. ſ. 18
17 But no alteration ſhall be made in the price of bread unleſs the price of grain ſhall vary 3 *d.* per buſhel from the laſt ration. 494 ſ. 19
18 Forfeiture on every meal weigher who ſhall neglect his duty, and on every officer who ſhall diſobey. ſ. 20
19 Penalty for refuſing to diſcloſe the true price of grain, or for giving in a falſe price. ſ. 21
20. If a falſe return or price ſhall be ſuſpected, the magiſtrates may examine the party and fine him 10*l.* 495
21. But the party ſummoned ſhall not be obliged to travel above five miles from his place of abode. *ibid.*

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22 Bakers ſhall make the bread of ſuch weight, goodneſs, and price as ſhall be directed on pain of 40s. *P*495 ſ. 23
23 Penalty for adulterating bread. ſ. 24
24 Penalty for adulterating corn. ſ. 25
25 Penalty where the bread ſhall be of a different mixture of corn than what it imports. ſ. 26
26 Penalty for making bread under weight. ſ. 27
27 Every loaf of wheaten bread to be marked W. and every loaf of houſehold H. 497
28 Bakers taking higher than the fixed price, or refuſing to ſell their bread forfeit between 10*l.* and 40*s.* ſ. 29
29 Bread inferior to wheaten not to be higher than houſehold. ſ. 30
30 Any magiſtrate, or peace officer by warrant, may ſearch the houſes of bakers, for bread wanting weight, or adulterated, &c. or not truly marked, and ſeize the ſame. ſ. 31
31 How adulterated meal or flour, &c. may be ſearched for and ſeized. ſ. 32
32 The offender ſhall forfeit not exceeding 10*l.* nor leſs than 40*s.* ſ. 33
33 And the magiſtrate may cauſe the offender's name to be publiſhed. ſ. 33
34 Whoever ſhall oppoſe or hinder ſuch ſearch ſhall forfeit not exceeding 5*l.* nor leſs than 20*s.* 499 ſ. 34
35 But no miller, mealman, or baker ſhall act as a magiſtrate under pain of 50*l.* ſ. 35
36 How maſters may be recompenſed who pay penalties for the default of their ſervants. ſ. 36
37 Offences may be heard and determined in a ſummary way, &c. ſ. 37
38 How the penalties ſhall be applied 500 ſ. 38
39 Magiſtrates authoriſed to ſummon witneſſes, &c. ſ. 39
40 No *certiorari* to be allowed 501 ſ. 40
41 The manner in which perſons aggrieved may appeal to the ſeſſions. *ibid.* ſ. 41
42 If the conviction be within ſix days of the ſeſſions, the party grieved may appeal to the ſubſequent ſeſſion. ſ. 42
43 Limitation of actions. ſ. 43, 47
44 By 3 Geo. 3. c. 11. although no aſſize be ſet, no loaf ſuch as aſſized and priced loaves are ordered to be by the tables, ſhall be made at the ſame time and in the ſame place. *Page* 501 ſ. 48
45 But theſeſſions may order the ſort of bread which ſhall be made. ſ. 49
46 The ſorts of aſſized wheaten bread ſ. 50
47 Proportion as to weight between the white and wheaten bread and the wheaten and houſehold aſſize bread. ſ. 51
48 The price of the peck loaf, and half peck, and other ſubdiviſions in the wheaten and in the houſehold bread. ſ. 52
49 Every peck loaf ſhall weigh 17 lb. 6 oz. every half peck 8 lb. 11 oz. every quarter peck, 4 lb. 5½ oz. every half quarter peck 2 lb. 2¾ oz. ſ. 33
50 And offenders ſhall forfeit not exceeding 5s. nor leſs than 1s. for every ounce wanting, and for leſs than one ounce not exceeding 2s. 6d. nor leſs than 6d. 505
51 But ſuch deficient bread muſt in the bills of mortality be weighed within 24 hours before ſome juſtice, and elſewhere within three days. *ibid.*
52 No wheaten bread of a higher price than houſehold bread to be ſold on pain of 20s. ſ. 54
53 To be marked as before. *Vide No.* 27. ſ. 55
54 Bread made of any other grain than wheat to be impreſſed with ſuch letters as the juſtice ſhall order, &c. ſ. 56
55 Juſtices or peace officers may ſearch, &c. *Vide No.* 30, 43. ſ. 57, 63
56 By 13 Geo. 3. c. 62. A STANDARD WHEATEN BREAD ſhall be made. 507 ſ. 64
57 Which ſhall not be ſold as *prized* loaves together with *aſſized* loaves. 508
58 The *aſſize* table for ſuch bread. 509
59 The price table for the ſame. 510
60 Which ſhall be regulated by the laws before mentioned. ſ. 68, 76

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## BREACH of the PEACE.

1 Seditious words, againſt religion, are indictable, *as tending* to a breach of the peace. *Page* 10 ſ. 6
2 In what caſes ſuch homicide, as happens in the execution of an unlawful action where the principal deſign was a breach of the peace, ſhall be conſtrued murder. 127 ſ. 46, 49
3 An *ineffectual* attack upon another for the purpoſe of robbing him, is puniſhable by fine and impriſonment as a breach of the peace. (Vide attempt to rob) 147. ſ. 3
4 A libel only *tends to* a breach of the peace.

## BREACH of TRUST.

1 A mere breach of truſt is no felony by the common law. 134. c. 33
2 By 3 and 4 W. & M. c. 9. whoever ſhall ſteal any of the furniture *let and intruſted to* him with any lodgings ſhall be guilty of felony 137 ſ. 10
3 By 21 Hen. 8. c. 7. ſervants, above eighteen years of age, and not apprentices, who ſhall go away with jewels, &c. delivered to them by their maſters or miſtreſſes to keep to the intent to ſteal the ſame, contrary to the truſt and confidence repoſed in them; or ſhall, being in the ſervice of their maſters, embezzle the ſame without aſſent, &c. to the amount of 40s. are guilty of felony. (Clergy ouſted by 12 Ann. c. 7.) 138 ſ. 11
4 The offender muſt have been a ſervant to the owner of the goods both at the time they were delivered and at the time they were ſtolen ſ. 12
5 The goods muſt be delivered to keep; therefore if the ſervant receive money on his maſter's account and go away with it, he is not within the act; but otherwiſe if he receive the goods from another ſervant, &c. ſ. 13
6 Neither a waſting or conſuming of goods, nor a *choſe in action* are within the act. ſ. 14
7 The goods muſt be the property of the maſter at the time; but cloaths &c. delivered to the ſervant no way changes the property. *Page* 138 ſ. 15
8 By 7 Jac. 1. c. 7. manufacturers in woollens embezzling the wool or yarn delivered to them to manufacture ſhall be whipped, &c. ſ. 16
9 By 15 Geo. 2. c. 13. ſervants of the BANK embezzling the property they are entruſted with, are guilty of felony without clergy. 139, 140
10 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. ſervants of the poſt-office embezzling any letter containing a ſecurity for the payment of money; or ſtealing the ſame out of any letter that ſhall come to *his poſſeſſion* ſhall ſuffer death without clergy. 140
11 A caſe upon an indictment on this act. *ibid.* (N) 4
12 By 17 Geo. 3. c. 56. ſervants in a variety of manufactures, are puniſhed as the acts direct, for purloining the property entruſted to them by their employers. 140

BREAKING.—*Vide Burglary. Forcible Entry.*

## BREWERS.

1 No brewer ſhall conſpire to raiſe the price of victuals. 481 ſ. 10
2 No brewer ſhall uſe any molaſſes, courſe ſugar, or any extract or compoſition thereof, in the making beer, &c. 512 ſ. 77
3 Or receive into his cuſtody any quantity of the ſaid materials exceeding 10 *l.* on penalty of 100 *l.* ſ. 78
4 Nor ſhall he uſe any broom, wormwood, or other bitter, inſtead of hops, on pain of 20 *l.* ſ. 79
5 Nor any ſugar, honey, foreign grains, Guinea pepper, eſſentia bine, cocculus Indicus, &c. on pain of 20 *l.* ſ. 80
6 By 2 Geo. 3. c. 14. no brewer, &c. ſhall be ſued for advancing the price of beer in a reaſonable degree, and if he ſhall mix any ſmall beer or wort with

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with ſmall, he ſhall forfeit 50*l.* *Page* 481, 482

## BRIDGES.

1 What particular bridges it is made felony to deſtroy. 193ſ. 9
2 None ſhall make bridges except by cuſtom. 443
3 Perſons bound to repair them muſt make them of ſufficient height and ſtrength according to the courſe of the water. ſ. 1
4 No one ſhall be deemed guilty of treſpaſs for entering lands or laying down materials on the grounds of another, for ſuch purpoſe. *ibid.*
5 The repair of bridges lies upon the county unleſs ſuch part as is within a franchiſe, if there be no ſpecial tenures or preſcriptions to the contrary. *ibid.*
6 A corporation or other perſon may be liable either by tenure or preſcription. ſ. 2
7 But a man is not bound to repair a new bridge built by himſelf for the common good. *ibid.*
8 But a tenant at will of a houſe adjoining a bridge is bound to repair his houſe in reſpect of his poſſeſſion. (N) 1
9 And if a particular diſtrict bound to repair one kind of bridge, build another kind, of more general utility, the county ſhall repair it. 444 (N) 2
10 Any individual who is liable to repair a bridge may be made a defendant for not repairing, and ſhall pay ſuch fine as ſhall be aſſeſſed; but he may have a remedy over againſt thoſe who are equally liable for their contribution. ſ. 3
11 A plea that the defendant is not bound to repair is bad, unleſs it ſhew who is ſo bound. ſ. 4
12 If the defendant traverſe the charge of repair, the attorney general may take a traverſe upon the traverſe and *ſurmiſe* that the defendants are bound to repair, but no inhabitant ſhall be upon the jury. ſ. 5, 6
13 The indictment muſt alledge the *kind* of bridge and if the obligation ariſes from *tenure*, it muſt ſtate where *the lands* lie. *Page* 444 (N)
14 By 22 Hen. 8. c. 5. the ſeſſions are empowered to inquire, hear and determine annoyances of broken bridges in the highways and to order their repair. 445 ſ. 7.
15 Where it cannot be known who are bound to repair, bridges without a city or town corporate ſhall be repaired by the county; if within, then by the city or town; and if the bridge ſhall be part in city or county and part in another, each ſhall repair the part accordingly. ſ. 8
16 The mode in which aſſeſſments ſhall be made and levied for the repair of bridges. The manner in which the juſtice may iſſue proceſs, &c. 446, 447
17 Juſtices may allow the collectors reaſonable charges. 448 ſ. 12
18 How the highways at the ends of bridges, within the ſpace of 300 feet ſhall be kept in repair. ſ. 13
19 No private bridges are within the purview of the above act. ſ. 14
20 How far the power of the juſtices extends under this act. ſ. 15
21 Who ſhall be conſidered as inhabitants within the words of the act. 449 ſ. 16
22 The aſſeſſment to be made diſtinctly on each inhabitant. ſ. 17
23 From which no inhabitant can claim any exemption not even by charter or act of parliament. ſ. 18
24 It is queſtionable whether a burough which hath no bridge be not liable to contribute to the repair of the county bridges. ſ. 19
25 By 1 Ann. c. 18. the ſeſſions upon any decayed bridge being preſented, may levy a tax for the repair. ſ. 20
26 All queſtions concerning the repair of bridges ſhall be determined in the county where they lie. 405
27 Except the right of repair either to private perſons or pariſhes ſhall come in queſtion. *ibid.*

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28 But *a certiorari* lies upon an order of juſtices concerning a *private bridge*. *Page* 450 (N) 2
29 And the act of Queen Ann extends only to bridges which the county is bound to repair. *ibid.*
30 The 12 Geo. 2. c. 29. authorizes the levying of the county rate, and orders that the repairs of bridges ſhall be paid therefrom. ſ. 21
31 But no part of the money ſhall be applied to the repair of bridges, until preſentment by the grand jury at the aſſizes or ſeſſions. *ibid.*

## BRIBERY.

1 Definition of this offence at common law 311 c. 67.
2 By 12 Rich. 2. c. 2. the great officers of ſtate ſhall be ſworn not to appoint any of the king's officers for reward. 312
3 By 4 Hen. 4. c. 5. no ſheriff ſhall *let* his bailiwick to farm. 313
4 By 5 and 6 Edw. 6. c. 16. whoever ſhall procure an office by bribery ſhall be diſabled to hold, &c. 313
5 No office in fee is within this act; but the office of chancellor, regiſter, or commiſſary of the eccleſiaſtical courts, are *ibid.*
6 No perſon once diſabled can be again reſtored by any grant or diſpenſation. *ibid.* ſ. 5
7 A colourable bond by a deputy of an office is void; but a bond to pay half the profits, or a ſum certain for a deputation is good. *ibid.*
8 The above ſtatute does not extend to the plantations. *ibid.*
9 Anciently, bribery in a judge was puniſhed as treaſon; and now all bribery is liable to deprivation, fine and impriſonment. 314
10 The Earl of Middleſex fined 5000 l. for bribery. ſ. 7
11 An attempt to influence another by means of a bribe is highly criminal; and offering money to a privy councillor for an office is puniſhable by information. *ibid.* (N)
12 By 7 and 8 Will. 3. c. 7. all ſecurities to procure a ſeat in parliament is void; and the giving of ſuch a bribe incurs a penalty of 300 l. *Page* 314 ſ. 8
13 But if the election is void, no action lies for this penalty. ſ. 8 (N) 1
14 By 2 Geo. 2. c. 24. Candidates or voters, giving or receiving a bribe for a vote at elections forfeit 500 l. &c. ſ. 9
15 But if the offender, within twelve months, diſcover another offender ſo as *he* be convicted, the diſcoverer not having himſelf been previouſly convicted, he is indemnified, but no proſecution ſhall be after two years. *ib.* ſ. 10
16 This ſtatute does not take away the common law proceſs by indictment or information. *ibid.* (N) 4
17 But the court will not grant information except on ſpecial grounds till after the two years are expired. *ibid.*
18 And perhaps they will remit ſentence on an indictment upon a recognizance to appear at the end of the two years. *ibid.*
19 But after that time they will not ſuſpend the ſentence becauſe one of the witneſſes is indicted for perjury. *ibid.*
20 Nor on affidavits that the offender was a diſcoverer. *ibid.*
21 Nor will they grant new trial becauſe a witneſs was a party in the offence. *ibid.*
22 But they will, in order to aſcertain who was the diſcoverer. *ibid.*
23 Having obtained a verdict is not concluſive proof of being a diſcoverer. *ibid.*
24 For a perſon, who makes an affidavit, on which another obtains a verdict, may be the true diſcoverer. *ibid.*
25 A verdict, only when compleated by a judgment is a conviction, and the court will grant leave to complete it, and it will then relate back to the original diſcovery. *ibid.*
26 A colourable note or laying a wager is bribery within the act, although that

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the receiver voted for the oppoſite party. *Page* 314 ſ. 10
27 The bribery precludes the candidate from denying the right of the elector to vote. *ibid.*
28 A man may be guilty although he has not *then* declared himſelf a candidate. *ibid.*
29 It is not neceſſary that the party bribed ſhould be in fact an elector. *ibid.*
30 The declaration for the penalty muſt ſtate the ſort of bribe that was given or received, and not alledge generally "that he took a gift or reward". 316 (N)
31 This defect not helped by verdict. *ibid.*

BUBBLES.

1 To project any ſcheme by public ſubſcription, to the prejudice of national trade, &c. ſimilar to the South Sea project, incurs a *præmunire* by 6 Geo. 1. c. 18. 86 (N) 10
2 And alſo puniſhed as a common nuſance. 364

BUILDING.—*Vide Freehold. Dwelling Houſe. Looms.*

BULLION

1 Is the ore of gold, but it ſignifies, in general, either gold or ſilver in the maſs. 70 (N) 1
2 The king is intitled to all mines in which it is found. *ibid.*
3 Debaſing bullion provided againſt by ancient ſtatutes. ſ. 1
4 By 6 & 7 Will. 3. c. 17. none ſhall caſt ingots of ſilver, in imitation of Spaniſh bars, on pain of 500l. 72 ſ. 7
5 None ſhall export any molten ſilver, without being marked at Goldſmiths Hall, and a certificate from one of the wardens, that oath had been made by the owner, and one witneſs, that the ſame was lawful ſilver, &c. *ibid.*
6 All ſilver ſhipped without ſuch mark and certificate may be ſeized. 73 ſ. 8
7 No broker, not a goldſmith or refiner, ſhall buy or ſell any molten ſilver on pain of ſix months impriſonment. *Page* 73 ſ. 9
8 All bullion to be entered out in the name of the owner, who ſhall prove whether it be Engliſh or foreign. ſ. 10
9 By 7 & 8 Will. 3. c. 19. no bullion ſhall be ſhipped except certificate ſhall be obtained from the Mayor and Aldermen of London, on oath of the owner and *two witneſſes*, that the ſame is foreign bullion, &c. *ibid.* ſ. 11
10 The certificate to be *circumſtantially* certified to the commiſſioners of cuſtoms, before any *cocket* ſhall be granted. *ibid.*
11 On default the owner ſhall forfeit the bullion, and double value. The captain of the ſhip 200l. &c. The cocket officer 200l. and loſs of office. *ibid.*

*Vide Coin. Multiplication.*

BULLS.

1 By 13 Eliz. c. 2. whoever ſhall put in uſe any Popiſh bull or inſtrument of abſolution, ſhall be guilty of high treaſon. 67 ſ. 75
2 Acceſſaries after ſhall be guilty of præmunire. *ibid.*
3 Whoever does not diſcloſe the offer of ſuch *bulls*, within ſix weeks, are guilty of miſpriſion of treaſon. *ibid.*
4 By a variety of ſtatutes, the making uſe of Papal bulls is a *præmunire*. 78 ſ. 12, 14
5 It is in the election of the crown to proceed againſt the offender, either for the præmunire or high treaſon. ſ. 13

BULLOCK.—*Vide Cattle.*

1 By 14 Geo. c. 6. and 15 Geo. 2. 2. c. 34. whoever ſhall ſteal, &c. or kill, with intent to ſteal, any bullock, &c. &c. ſhall ſuffer death without clergy. —(N. B. A reward of 10l.) 180 ſ. 3

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## BURGLARY.


1 Is a felony at common law, in breaking and entering the *manſion houſe* of another in the night *with intent* to commit felony. *Page* 159. c. 38

2 The word *noctanter*, which is abſolutely neceſſary in every indictment for burglary, is ſatisfied by the degree of darkneſs which may prevent the offender's face from being known. 160. ſ. 2

3 There muſt be both an actual breaking, and an entry to complete this offence; for it muſt be laid *fregit et intravit*, which will not be ſatisfied, except in ſome ſpecial caſes, by the notional breaking implied by law in every treſpaſs. ſ. 3

4 Therefore, if a houſe be aſſaulted, and the owner fling out his money, it is no burglary. *ibid.*

5 What breaking is ſufficient. ſ. 4

6 It muſt be more than that which is ſuppoſed in a common treſpaſs. *ibid.*

7 An entrance by an open door, or through a hole, or open window, is not a burglary. *ibid.*

8 But if the thief had opened the door, or the window, or made the hole, or had been in the houſe by the owner's conſent and had unlatched a door therein, or had gone down a chimney, it is burglary. *ibid.*

9 Or if he had aſſaulted the houſe, with intent to rob, and the owner had opened the door, and, thereupon, he had entered, it is burglary. 161

10 So, where divers intending to rob a houſe, knock at the door and by that means obtain entrance. ſ. 5

11 So alſo, with the ſame intent, to take lodgings and then to fall upon the landlord. *ibid.*

12 Or under pretence of ſearching for felons to obtain entrance by authority of a conſtable. *ibid.*

13 By 12 Ann. c. 7. to enter a houſe by night or day with a felonious intent without breaking it and to *break out of it in the night*, is burglary. *ib.* ſ. 6

14 What entry is ſufficient. ſ. 7

15 The leaſt entry with any part of the body, as a foot over the threſhold, or with an inſtrument, weapon, or a hand, or hook, or a piſtol within a window, or to turn the key of a door, or to lift up a latch, are ſufficient entrances to ſatisfy the word *intravit*. *Page* 161, 162

16 But the thing with which the entry is made, muſt be introduced for the purpoſe of committing the felony; and therefore where a center bit was uſed for *breaking* through a door which it had actually perforated, yet as it did not appear that any hand or inſtrument had *entered* for the purpoſe of committing the felony it was *held* inſufficient. 162 (N) 1

17 Thoſe who watch on the outſide while others enter, are equally guilty though they never enter at all. *ibid.* ſ. 8.

18 So if a ſervant who is in the houſe open the door *feloniouſly*, for the thief to enter, both of them are guilty of burglary. ſ. 9 and (N)

19 In what place burglary may be committed. ſ. 10

20 Burglary may be committed by breaking, &c. houſes, churches, or the gates of a walled town; and in houſes, the word *manſionalis* is indiſpenſibly neceſſary. *ibid.*

21 A houſe wherein a man only dwells for part of the year; or which he has actually hired, but not moved into; or a chamber in an inn of court, or a houſe hired by a man's wife for her ſeparate reſidence without his knowledge, for it is the huſband's houſe; are all of them ſufficient to ſatisfy the words *domus manſionalis*. 163

22 And all out-buildings adjoining to the houſe or within the curtilage, are included. *Vide Garland's Caſe*. ſ. 12

23 The indictment muſt lay it to be the houſe of the leſſee or firſt tenant, and not of any of the inmates, except they have the intire poſſeſſion. ſ. 13

24 But a chamber in an inn of court is the houſe of the inmate, becauſe there, Chambers are all as ſeveral houſes, &c. *ibid.*

25 The author contends for a different doctrine, and that it may be laid and

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houſe of the lodger, *ſed quere*, if the owner dwell therein. *Page* 163, ſ. 64
26 If the lodging be actually divided from the reſt of the houſe, and have a ſeparate door, it is certainly the houſe of the lodger. ſ. 15
27 Even though there are other inmates, or though the landlord occupy a cellar under the ſame roof, if he does not ſleep in the houſe. *ibid.* (N)4
28 But if a place be taken only as a work-ſhop, and no one ſleeps therein, it is not a manſion. ſ. 16
29 Therefore to break into the plate glaſs manufactories, is tranſportation by 13 *Geo.* 3. *c.* 38. *ibid.*
30 No burglary can be committed by breaking ground incloſed, or a booth or tent. ſ. 17
31 The indictment muſt ſtate, and the verdict find *an intention* to commit felony. ſ. 18
32 For if the intent was treſpaſs only, it is no burglary. *ibid.*
33 But where the felony intended, is made ſo by ſtatute, that is ſufficient. *ibid.*
34 By 10 Geo. 3. c. 48. to receive jewels, &c. obtained by burglary, is tranſportation, &c. 165 ſ. 19 235 ſ. 9
35 By 23 Geo. 3. c. 88. to be found with implements for houſe-breaking is a miſdemeanor. ſ. 20
36 A man's houſe is conſidered as his caſtle; he may kill an aſſailant with impunity. (N)
37 The manner in which burglary partakes of the nature of treaſon. *ibid.*
38 Clergy is taken away in burglary from principals by 18 Eliz. c. 7. and from acceſſaries before the fact, by 3 & 4 Will. & M. c. 9.
39 Whoever ſhall apprehend a burglar is exempted by 10 & 11 Will. 3. c. 23. from pariſh and ward offices, and the 5 Ann. c. 31. has ſuperadded a reward of forty pounds—and an accomplice who ſhall convict two offenders is intitled to a pardon. *ibid.*

## BURIAL.

1. By 3 Jac. 1. c. 5. if any Popiſh recuſant, ſhall be buried otherwiſe than according to the laws of this realm, his repreſentatives, or the perſon cauſing ſuch burial ſhall forfeit 20*l.*

## BURNING.—*Vide Arſon.* *Page* 66.

1 To burn the houſe of which another *is in poſſeſſion* is arſon. 165 c. 39
2 By 43 Eliz. c. 13. any corn or grain in the four Northern counties is felony without. 223 ſ. 2
3 By 22 and 23 Car. 2. c. 7. any corn, grain or hay, &c. tranſportation. 224
4 By 37 Hen. 8. c. 6. any wain or cart loaded with coals, &c. 223
5 By 4 and 5 W. and M. c. 23. any covert for the red and black game, whipping and hard labour. ſ. 2
6 By 28 Geo. 2. c. 19. any covert for deer and game, &c. ſhall forfeit from 40*s.* to 5*l.* *ibid.*
7 By 1 Geo. 1. c. 48. any wood, underwood, or coppice, &c. is felony. 224, ſ. 3
8 By 9 Geo. 1. c. 22. any houſe, barn, or out-houſe, &c. is felony without clergy. ſ. 4
9 By 10 Geo. 2. c. 32. any coal mine is death without clergy. ſ. 5
10 By 9 Geo. 3. c. 29. any wind, water, or other mill, is felony without clergy. ſ. 6
11 By 6 Geo. 1. c. 23. aſſaulting with intention to burn the garments of another, in the public ſtreet is tranſportation. 238
12 By 22 & 23 Car. 2. c. 11. & 1 Ann. c. 9. to burn any ſhip to the prejudice of the owners, or freighters. 4 Geo. 1. c. 12. to the prejudice of the underwriters, felony without clergy. 185 ſ. 10, 11
13 By 12 Geo. 3. c. 24. to burn the king's ſhips of war, or any of the arſenals, or the ſtores, &c. therein, felony without clergy. 75 ſ. 19
14 By 6 Ann. c. 31. ſervants burning, *by negligence*, any dwelling-houſe, &c. forfeit 100*l.* 197 c. 53
15 By 27 Geo. 2. c. 15. threatening by anonymous or fictitious letters, to burn houſes, barns, &c. is felony without clergy. 226 ſ. 4

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BUSHES.—*Vide Highways.*

1 By 13 Ed. 1. no buſh, &c. whereby a man may lurk to do hurt, ſhall ſtand within 200 feet of either ſide of a highway leading from town to town. But this ſhall not extend to aſhes or great trees. *Page* 382 ſ. 26
2 And if any felony be done by not removing ſuch buſhes, the lord ſhall anſwer. *ibid.*
3 By 13 Geo. 3. c. 78. no buſh, &c. ſhall grow within 15 feet from the center of any highway, except for ſhelter, ornament, or profit. 407 ſ. 59

BUTCHER.

1 Shall ſell meat by the pound. 481 (N)
2 Or by weight, *or otherwiſe.* *ibid.*
3 Butchers ſhall not conſpire not to do their work but at a certain rate, or not to finiſh what they have begun. ſ. 10
4 Cannot ſell meat on a Sunday. 11 (N)
5 But this is no offence at common law, and therefore the indictment muſt conclude *contra formam ſtatuti*, viz. 3 Car. 1. c. 1. *ibid.*
6 The uſual method is to indict for the nuſance. *ibid.*

BUTTER and CHEESE.

1 Every kilderkin of butter ſhall contain 112 lb. every firkin 56 lb. and every patt 14 lb. reckoning 16 ounces to the lb. 514
2 No old and new butter ſhall be mixed, nor whey butter packed with cream, butter, &c. &c. *ibid.*
3 No butter for ſale ſhall be repacked, ſ. 86
4 The manner in which the package ſhall be marked, &c. *ibid.*
5 How the factor or buyer ſhall make the packages. ſ. 87
6 Warehouſe-keepers ſhall ſhip all butter and cheeſe that ſhall be directed to their care, to the London market, without preference. 515

BUTLER.

1 A butler, &c. who has the *bare charge*, or the *ſpecial uſe* of his maſter's goods, may be guilty of felony in taking them away. *Page* 136 ſ. 6

BUYING and RECEIVING.—*Vide ſtolen goods.*

BUYING TITLES.—*Vide pretended Titles.*

C.

CABBAGES.

1 By 13 Geo. 3. c. 32. to ſteal or deſtroy cabbages, &c. in a garden, incurs a penalty of 10*l.* 217. ſ. 11

CALENDAR.

1 By 3 Hen. 7. Gaolers muſt certify their priſoners to the gaol delivery to be calendared. 194. (N)

CALLICO.—*Vide Cotton.*

CANONICAL OBEDIENCE.—*Canonical Purgation.*

1 By 2 Hen. 4. c. 1. to purchaſe from the Pope an exemption from canonical obedience, incurs *præmunire.* 79
2 Canonical obedience reſults to the metropolitan, both from inſtitution and ordination. 133. ſ. 7

CANUTUS.—*Vide Engliſeſhire.*

CAPACITY of GUILT.—*Vide Crimes. Age. Infancy.*

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## CAPIAS.

1 By 14 Geo. 3. c. 86. a *capias* may iſſue againſt any perſon proſecuted for ſmuggling. *Page* 227

CAPIATUR.—*Vide Writ. Proceſs.*

CAPITAL OFFENCES.—*Vide Felonies without Clergy.*

## CAPTAIN.

1 If any captain, &c. ſhall wilfully caſt away, burn or otherways deſtroy his ſhip, to the prejudice of the owners, the freighters, or the underwriters, he ſhall ſuffer death without clergy. 185. ſ. 10, 11
2 A captain or other officer in the Eaſt India company's ſervice cannot reſign his commiſſion at all times and under any circumſtances. *ibid.* (N)
3 By 29 Geo. 2. c. 17. Engliſh captains or other officers entering into the ſervice of the French king are guilty of felony without clergy. *ibid.*
4 The puniſhment of captains who ſhall carry bullion unlawfully. 73. ſ. 11
5 Burning his ſhip to defraud the underwriters is not piracy. 155. (N)
6 What acts of a captain amount to piracy. ſ. 14
7 The penalty on the captain for the unlawful tranſportation of wool. 195

## CAPTION.

1 The caption of an indictment on the ſtatutes of forcible entry need not ſhew that the juſtices had authority to hear and determine felonies and treſpaſſes. 283. ſ. 36

## CARDS.—*Vide Dice.*

1 The king's grant for the ſole making, importing and ſelling, of playing cards is void. 471. ſ. 5
2 The playing with them is, in itſelf, lawful and innocent. *Page* 471

CARRIAGES.—*Vide Purveyors. No. Highways. Turnpike Roads.*

## CARRIERS.

1 A carrier who receives goods to carry to a certain place, cannot be ſaid to ſteal them by embezzling them afterwards. 134. ſ. 3
2 But if a carrier open a package and take out part of the goods, with *intention* to ſteal, he is guilty of felony; for he had no poſſeſſion of ſuch *part* diſtinct from the whole. 135. ſ. 5
3 No carrier ſhall travel on a Sunday. 11, 12

## CARNAL.

1 All unnatural carnal copulations with man or beaſt come under the notion of ſodomy. 9. c. 4
2 The carnal knowledge of a woman, by force, and againſt her will conſtitutes a rape. 169. c. 41
3 By 18 Eliz. c. 7. ſ. 4. if any perſon ſhall carnally know and abuſe any woman child under the age of ten years, he ſhall ſuffer as a felon without clergy. 170
4 By the ſame ſtatute *rape* is alſo excluded. *ibid.*

## CARNALITER COGNOVIT.

1 Are neceſſary in every indictment of rape. 9. ſ. 2

## CARROTS.

1 By 13 Geo. 3. c. 32. to ſteal or deſtroy any carrots, &c. in a garden or land incloſed, on conviction in 30 days in a ſummary way forfeits 10*s.* 217. ſ. 11.

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CASTRATION.—*Vide Maim.*

1 Was anciently puniſhed with death. *Page* 175. ſ. 3

CASUALTY.

1 If caſual death happens from the proſecution of a *lawful* act, the party is guiltleſs. 5 (N)

CASUAL DEATH.—*Vide Deodand.*

1 Whatever thing *moves* toward the caſual death of any perſon is forfeited as a deodand. 100. c. 26

CASTIGATORY.—*Vide Scold, Cucking Stool.*

CATTLE.—*Vide Slaughter Houſe.*

1 By 22 & 23 Car. 2. c. 7. to deſtroy horſes, ſheep, or other cattle, in the night, is death or tranſportation, in the option of the offender, and may be tried by a jury before three juſtices of the peace. 179 c. 46
2 By 9 Geo. 1. c. 22. whoever ſhall kill, maim, or wound, any cattle, ſhall be guilty of felony without clergy. 180
3 A mare or ſtone colt is within the meaning of the word *cattle*. *ibid.* (N)
4 By 27 Eliz. c. 13. the hundred is liable to the amount of 200l. *ibid.* ſ. 2
5 By 14 Geo. 2. c. 6. and 15 Geo. 2. c. 34. whoever ſhall ſteal, or kill with that intent, one or more ſheep, bull, cow, ox, ſteer, bullock, heifer, calf, or lamb, but no other cattle whatſoever, ſhall be deprived of the benefit of clergy. *ibid.* ſ. 3
6 The word *heifer* in this act is uſed in contradiſtinction to the word *cow*; therefore evidence of the one will not ſupport an indictment for ſtealing the other. *ibid.* (N) 2
7 By 37 Hen. 8. c. 6. whoever ſhall cut out the tongue of any tame beaſt, or of any perſon, they being alive, ſhall pay treble damages, and forfeit ten pounds. *Page* 180 ſ. 4
8 No ſaleſman within the bills of mortality, ſhall buy or ſell cattle on his own account, or on the road coming to market. 515 ſ. 89
9 How ſuch offenders ſhall be puniſhed. 90
10 By 9 Geo. 3. c. 39. the crown may prevent importation of cattle upon ſuſpicion of the contagion. 180
11 By 21 Geo. 3. c. 67. the driving of cattle within the bills of mortality is regulated. *ibid.*
12 By 26 Geo. 3. 71. ſlaughtering cattle without licence or notice, &c. is felony. 180

CENSOR.

1 It is queſtioned (1 *Carth.* 478.) whether the cenſor of the college of phyſicians is within the meaning of the the teſt act, 25 Car. 2. c. 2. 17 ſ. 4

CEPIT.

1 What will ſatisfy the word *Cepit* in an indictment of robbery. 147

CERTIFICATE.

1 Of the oath required by 1 Eliz. c. 1. ſ. 19. made to the King's Bench, is ſufficient; in which an eccleſiaſtic need not be ſtiled *clericus*; and the bringing of it need not be ſaid *per mandatum epiſcopi*. *Sed quære* If this ſtatute as to the oath is not repealed by 1 Will. and Mary, c. 8. 81. ſ. 27. 82. ſ. 33, 34, 35

CERTIORARI.

1 A *certiorari* from the King's Bench, is a ſuperſedeas to reſtitution in a forcible entry. 292. ſ. 62
2 By 1 Ann. c. 18. concerning the repair of bridges no *certiorari* ſhall be allowed, 450

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3 Nor by 8 Geo. 2. c. 20. for punishing destroyers of turnpikes. *P.* 193 s. 7
4 Nor by 12 Geo. 2. c. 29. for assessing county rates. 450 s. 21
5 Nor on 19 Geo. 2. c. 21. against cursing and swearing. 12 s. 4
6 Nor on 23 Geo. 2. c. 13. against seducing artificers. 559 s. 4
7 Nor on 25 Geo. 2. c. 36. against bawdy houses. 357 s. 2
8 Nor on 29 Geo. 2. c. 40. against stealing lead, iron, &c. 232 s. 2
9 Nor on 30 Geo. 2. c. 21. for preserving fish in the Thames. 519
10 Nor on 30 Geo. 2. c. 24. for restraining gaming in public houses. 469
11 Nor on 31 Geo. 2. c. 29. for the regulation of bread. 486
12 Nor on 2 Geo. 3. c. 30. for preventing thefts in bumb-boats.
13 Nor on 10 Geo. 3. c. 18. against dog stealers. 143

## CHAIN.—*Vide Fences.*

## CHAIRMEN.

1 By 9 Ann. c. 23. Hackney chairmen and coachmen are permitted to ply within the bills of mortality on a Sunday. 12

## CHALLENGE.

1 To challenge another; to carry a challenge, or to provoke a challenge is a very high offence, punishable by fine and imprisonment. 266. s. 3
2 By 9 Ann. c. 14. s. 8. to challenge another on account of money won at play, incurs a forfeiture of goods and two years imprisonment. *ibid.*
If death ensues in consequence of a challenge it is murder. 123. s. 24.

## CHAMPERTY.—*Vide Maintenance. Embracery. Buying a pretended Title.*

1 Is a species of maintenance. 545. c. 84
2 By 3 Edw. 1. c. 25. no officers of the king shall maintain suits in the king's courts, by covenant for profit. *Page* s. 3
3 This means his courts of record only. 546. s. 4
4 The word covenant signifies all kinds of promises and contracts whether by writing or parol. s. 5
5 This act applies as well to personal as to real actions. s. 6
6 Rent out of *land in variance* is within the act; not otherwise. s. 7
7 In a *writ of Champerty* damage is not essential or whether the plea be determined or not. s. 8
8 The maintenance is equal whether of the plaintiff or the defendant. s. 9
9 But such grants only as are made *in consideration* of the maintenance are within the act. s. 10
10 By 3 Edw. 1. c. 49. no judicial *officers*, &c. shall receive freehold in Champerty, pending a plea. s. 11
11 This statute only extends to the officers therein named. s. 12
12 And they shall not purchase pending plea however they may be related to the party, and although they do not maintain him. 547. s. 13
13 By 28 Ed. 1. c. 11. none shall take upon him any suit, or covenant to give up his right to another, &c. s. 14
14 A conveyance executed, hanging a plea, in consequence of a previous bargain, is not within the act. s. 15
15 Champerty may be in actions, real, personal, or mixed, or in suits in equity. s. 16
16 The voluntary gift of a chattle interest pending a plea is within the act. s. 17
17 A surrender by lessee to lessor is not within it. s. 18
18 Nor any conveyance of lands by father to son, ancestor to heir apparent. 548. s. 19
19 A gift of part of the land, to a counsellor *for his wages* after the suit is determined is not within the act, unless in consequence of a previous bargain. s. 20
20 By 31 Eliz. c. 5. Champerty may be laid in any county. s. 21

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CHANCE MEDLEY. — *Vide Manſlaughter.*

1 Homicide without malice, is *ſometimes* called chance medley which ſignifies killing on a ſudden quarrel, or in the commiſſion of an unlawful act. *Page* 115. ſ. 1
2 And being without premeditation there can be no acceſſaries before. ſ. 2
3 Where the treſpaſs of a ſtranger authoriſed by the duty of a gamekeeper will reduce homicide to chance medley. 112. ſ. 8

CHANCERY.

1 It is agreed, contrary to former opinions, that ſuits in chancery to be relieved againſt a judgment at law, are not within the ſtatute of 16 Rich. 2. c. 5. &c. 80. ſ. 17
2 The proviſions of 21 Jac. 1. c. 3. reſpecting ſuits to be relieved againſt monopolies, extends to the court of chancery, &c. 473. ſ. 31

CHANCELLOR.

1 By 25 Edw. 3. if a man ſlay the chancellor, being in his place, during his office, it is high treaſon. 60, 61
2 On information to the chancellor, &c. of ſervants riotouſly ſpoiling their deceaſed maſter's goods, a proclamation may be iſſued, and if they do not appear, they ſhall be attainted of felony. 197

CHAPLAIN.

1 A maſter may accompany his *domeſtic chaplain* to retain counſel, or to engage counſel, and may ſtand by him at his trial without being guilty of maintenance, &c. 541. ſ. 23

CHARMERS.—*Vide Witchcraft.*

1 Charmers or ſorcerers *were* thoſe who by certain incantations pretended to produce ſupernatural events. *Page* 8
2 This offence was puniſhable as witchcraft, and by the writ *de heretico comburendo*, on relapſe after ſentence. ſ. 2
3 One taken with the head of a dead man, &c. brought into the king's bench and ſworn, that he would no longer be a ſorcerer. ſ. 3
4 The degrees of ſorcery deſcribed and puniſhed by 1 Jac. 1. c. 12. repealed by 9 Geo. 2. c. 5. &c. 8, 9

CHACE.—*Vide Hunters, Fences.*

1 By 6 Geo. 3. c. 48. and 13 Geo. 3. c. 33. whoever ſhall deſtroy the kind of trees therein named in any of his majeſty's chaces ſhall be fined, &c. for the two firſt offences and tranſported for the third. 216
2 By 9 Geo. 3. c. 41. the above act extends to underwoods, &c. and to all the king's chaces within the realm. 207
3 The puniſhment of ſuch as ſhall deſtroy the banks, ditches, or fences of chaces. 192
4 The puniſhment for unlawfully hunting fallow deer in any chace, &c. 189

CHASTITY.—*Vide Homicide.*

1 A woman may juſtify murder in defence of it. 108 (N) 1
2 So a huſband is juſtified in protecting the chaſtity of his wife. *ibid.*
3 It is the pride of nature, and moſt lovely characteriſtic of the ſex. *ibid.*
4 But the bare ſolicitation of chaſtity is not an indictable offence. 357, c. 74
5 Nor is the actual violation of a daughter's chaſtity conſidered as an injury, unleſ

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unleſs in the character of a ſervant, her ſervice is thereby loſt. *Page*

CHEATS.

1 Cheating conſiſts in defrauding or endeavouring to defraud another of his known right, by means of ſome artful device, contrary to the plain rules of honeſty. 343, c. 71
2 But an impoſition effected by means of a *bare naked lie*, without the intervention of any artful contrivance, is not cheating, puniſhable criminally. 344 ſ. 2
3 Common cheating is puniſhable with fine and impriſonment. ſ. 3
4 By 33 Hen. 8. c. 1. whoever ſhall falſely and deceitfully obtain the goods, &c. of another, by colour and means of any *falſe privy token* ſhall be corporally puniſhable in any degree under death, as pillory, &c. ſ. 4
5 The offence may be tried at ſeſſions; and the juſtices may convene ſuſpected offenders. ſ. 5
6 An inſtance of an offender being fined under the act: *ſed vide Coke*'s opinion (3 Inſt. 123) that it cannot be done. ſ. 6
7 Caſes, &c. determined upon this act. 345 (N) 2
8 By 30 Geo. 2. c. 24. whoever ſhall *by falſe pretences* obtain the property of another, *with intent* to cheat and defraud any perſon, he ſhall be publicly whipped, or fined and impriſoned, or tranſported, as the court ſhall think fit. 345 ſ. 7
N. B. No *certiorari* lies on this ſtatute (N)
9 By 16 Car. 2. whoever ſhall *win* any ſum or valuable thing, by any fraud or ill practice, ſhall forfeit treble value, &c. &c. ſ. 8
10 By 9 Ann. c. 14. the offender ſhall forfeit five times the value, be deemed infamous, and ſuffer corporal puniſhment, as in caſes of perjury. ſ. 9
11 But the judgment can only be *quod convictus eſt*, and the fine muſt be recovered by action. *ibid.* (N)

CHEESE.—*Vide Butter.*

CHEQUER ROLL.

1 By 3 Hen. 7. c. 14. If any of the chequer roll of the king's houſhold under the ſtate of a lord, make confederacy to deſtroy or murder the king, or any of the ſworn council, he ſhall be guilty of treaſon. *Page* 74. ſ. 13

CHILD.—*Vide Baſtard. Marriages. Vagrants.*

1 A child under the age of ſeven years cannot be puniſhed for any criminal offence. 1 (N) 1
2 But he may be compelled, in a civil action, to make compenſation.
3 How far a thing ſhall be forfeited as a deodand for the death of a child. 100
4 By 4 and 5 P. & M. c. 8. to allure or take away a woman child, is two years impriſonment, &c. 172

CHOSE in ACTION.

1 Is not within 21 Hen. 8. c. 7. for puniſhing ſervants who ſteal the *goods* delivered to them by their maſters. 139. ſ. 14
2 By 15 Geo. 2. c. 13. if any of the ſervants of the bank ſhall embezzle certain choſes in action, with which they are intruſted, they ſhall be guilty, without clergy. ſ. 17
3 By 5 Geo. 3. c. 25. the ſame is inflicted on ſervants of the poſt office. 140
4 By the common law, *a choſe in action* cannot be the ſubject of larceny. 142
5 But by 2 Geo. 2. c. 25. whoever ſhall ſteal certain ſecurities therein named, notwithſtanding they are termed in law, choſes in action, ſhall be guilty of felony of the ſame nature and degree, as they would be for

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taking the money thereby ſecured. *Page* 142 ſ. 22

CHRISTIANITY. — *Vide Church. Religion. Hereſy. Popery. Trinity.*

1 The puniſhment of thoſe who ſhall deny the truth of the chriſtian religion, &c. 7. ſ. 11
2 Chriſtianity is part of the common law of England. *ibid.*
3 Publiſhing a book to prove the king's government antichriſtian, &c. may be alledged as an overt act of compaſſing his death. 56. ſ. 31

CHRISTMAS DAY.

1 By 13 Geo. 3. c. 80. to kill game, &c. on Chriſtmas day incurs fine, &c. 12

CHURCH.—*Vide Popery.*

1 The puniſhment of abſenting from it. 19. c. 10
2 By 1 Eliz. c. 2. all perſons, having no reaſonable excuſe, ſhall reſort to their pariſh church, or ſome other place of worſhip upon every Sunday, and there behave decently during divine ſervice, upon pain of twelve pence for every offence. ſ. 1
3 By 3 Jac. 1. c. 4. this forfeiture may be levied by the church wardens by diſtreſs or warrant of a juſtice. (N)
4 It is incumbent on the defendant to ſhew the reaſonable excuſe, and needs not be regularly alledged in the indictment. 20
5 If the ſpiritual courts refuſe a reaſonable excuſe, or derogate from the common law, they may be prohibited. ſ. 3
6 Whoever miſbehaves, or quits church during ſervice, is as much within the penalty as if he had been wholly abſent. ſ. 4
7 Whoever is abſent from his pariſh church ſhall be put to prove where he was. *ibid.*
8 The offence of abſence need not be averred in any certain place, for being a non-feaſance, it is not *committed* any where. *Page* 20 ſ. 5
9 By 23 Eliz. c. 1. all perſons above 16 years of age who ſhall offend againſt the tenor of the 1 Eliz. c. 2. ſhall, being lawfully convicted, forfeit 20 *l.* for every month they ſhall ſo abſent themſelves from church. ſ. 6
10 This penalty of 20 *l.* a month does not diſpenſe with that of 12 *d.* for every Sunday. ſ. 7
11 The words, "lawfully convicted" would have been implied by law. ſ. 8
12 No forfeiture accrues unleſs judgment follow conviction. *ibid.*
13 A condemnation on *demurrer*, or *nil dicit*, is ſufficient. 21
14 A recuſant ſhall not be excuſed from theſe penalties on account of ſickneſs. ſ. 10
15 The month intended by the ſtatute ſhall be computed by the number of days, allowing 28 to each month. ſ. 11
16 A *feme covert* is within theſe ſtatutes. (N)
17 By 29 Eliz. c. 6. and 3 Jac. 1. c. 4. every offender *convicted* of the above ſtatutes, ſhall pay 20 *l.* for every month, after ſuch conviction until he conform and come to church. ſ. 12
18 If the offender neglect to pay the forfeitures in the conviction, and the penalties of theſe ſtatutes, the king may ſeize his perſonal, and two thirds of his hereditaments, leaſes and farms, notwithſtanding any prior conveyance. ſ. 13
19 By 3 Jac. 1. c. 4. the king may refuſe the 20 *l.* a month, and ſeize the hereditaments, &c. leaving the manſion houſe as part of the third part. ſ. 13
20 But this election waives the benefit of the 20 *l.* a month, and the ſeizure of the goods. ſ. 14
21 A bond may be taken as the goods of the offender. 22. ſ. 15
22 But no copyhold lands are liable to be ſeized. ſ. 16
23 By 3 Jac. 1. c. 4. the profits of the lands ſhall go to ſatisfy the 20 *l.* ſ. 17
24 *Quere* if the king may ſeize an eſtate conveyed *bona fide* by another in truſt for

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for a recuſant. He may ſeize an eſtate granted to a recuſant in truſt to another. *Page* 21 ſ. 18
25 How the penalties ſhall be recovered. *ibid.*
26 By 3 Jac. 1. c. 4. One juſtice, on confeſſion, or oath of one witneſs may iſſue a warrant to the church warden where the offender dwells to levy the twelve pence on the offender's goods, by diſtreſs, for the uſe of the poor. 23. ſ. 19
27 The recovery of the 20 *l.* contained in the conviction may be recovered at the ſuit of the king by indictment in the king's bench, aſſizes, or ſeſſions. 23, 24
28 And if the offender do not appear upon proclamation, he ſhall ſtand convicted. ſ. 22
29 But ſuch a conviction is no judgment, and therefore cannot be reverſed by writ of error, but muſt be moved into the exchequer and quaſhed, nor ſhall ſuch a forfeiture be within the exception of a general pardon. ſ. 23
30 If the proclamation do not purſue the ſtatute, the conviction will be inſufficient. ſ. 24
31 An appearance, unleſs entered of record, is not ſufficient. ſ. 25
32 *Quere* if default to a proclamation will amount to a conviction in the king's bench. ſ. 26
33 On appearance of the defendant, the proceedings ought to be according to the common law. ſ. 27
34 By 3 Jac. 1. no ſuch indictment ſhall be avoided for defect, other than by direct traverſe to the point of not coming to church, *unleſs the defendant conforms.* 25
35 But the party may plead any collateral matter as a pardon, or *autre fois acquit*, &c. ſ. 28
36 He may reverſe a judgment after verdict for a defect to the king's prejudice. ſ. 29
37 By 35 Eliz. c 1. the ſaid forfeitures may be recovered by action of debt, &c. at Weſtminſter. ſ. 30
38 This ſtatute was made to proceed againſt the huſband for the recuſancy of the wife, which could not be done by the indictment given by the former ſtatute. *Page* 24, ſ. 31
39 On an indictment the huſband could not be charged for the forfeiture of his wife. *ibid.*
40 But his lands, &c. in her right, may be ſeized on her conviction. *ibid.*
41 How informers may proceed. ſ. 32
42 By 23 Eliz. c, 1. forfeitures are diſtributed $\frac{1}{2}$ to the queen, $\frac{1}{3}$ to the poor, $\frac{1}{3}$ to the informer, by action of debt, &c. 26
43 Offenders refuſing to pay within three months after judgment, ſhall be committed until they pay or conform. *ibid.*
44 This clauſe extends to the 20 *l.* a month. ſ. 33
45 An informer may ſue for his own third part or for the whole penalty. ſ. 34
46 An informer may ſue for the forfeitures againſt one not proceeded againſt by the king. ſ. 35
47 The 29 Eliz. c. 6. extends only to indictments, but does not take away the juriſdiction of the common pleas or exchequer, as to information. ſ. 36, 37
48 A conviction at the king's ſuit may be pleaded to a ſuit by an informer. 27. ſ. 38
49 It is doubtful whether the conviction of a feme covert can be pleaded to an information againſt her and her huſband. ſ. 39
50 The right of ſeizure, given to the king by 29 Eliz. c. 6. does not extend to a conviction by action or information. ſ. 40
51 How the 20 *l.* a month after conviction ſhall be recovered. ſ. 41
52 By 29 Eliz. c. 6. & 3 Jac. 1. the offender, once convicted, ſhall pay 20 *l.* a month without any other indictment or conviction, into the exchequer every Eaſter and Michaelmas term, or the king may ſeize, &c. ſ. 41
53 But this clauſe extends to no convictions without judgment be given thereon. 28
54 How it extends to conviction for default of appearance on proclamation. *ibid.*

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55 In what manner proſecutions ſhall be againſt the offender's land and goods. *Page* 27, ſ. 43, 44
56 No ſeizure can be made till inquiſition found. ſ. 45
57 The king cannot, without inquiſition, grant over the offender's goods. 29. ſ. 46
58 By 3 Jac. 1. c. 5. no recuſant convict ſhall be diſabled from following *any profeſſion, or being executors*, adminiſtrators, or guardians, on pain of 100 *l.* ſ. 47, 48
59 By 23 Eliz. c. 1. every perſon forbearing church twelve months ſhall on certificate thereof to the king's bench, be bound to good behaviour in 200*l.* at leaſt. ſ. 49
60 How the forfeiture may be diſcharged. ſ. 50
61 By 23 Eliz. c. 1. offenders conforming in the manner the act directs ſhall be diſcharged of all forfeitures. ſ. 50
62 By 29 Eliz. c. 6. an offender who conforms, or ſhall fortune to die, no 20 *l.* a month or ſeizure ſhall be made, while he continues to attend divine ſervice. 30
63 And by 1 Jac. 1. c. 4. a recuſant conforming according to the above ſtatutes ſhall be diſcharged of all penalties which he might ſuſtain by reaſon of his recuſancy. ſ. 52
64 This conformity may be pleaded againſt an informer as well as the king, by *audita querela* after judgment againſt an informer, and before execution againſt the king. ſ. 53
65 But the profits which have been ſeized ſhall not be reſtored. ſ. 54
66 The inheritance of the proteſtant heir ſhall not be liable to the recuſancy of his anceſtor, unleſs the two parts of the lands were ſeized during the life of the anceſtor. ſ. 55
67 But a recuſant heir muſt conform to free his fee ſimple lands from the conviction of his anceſtor, whether the lands were ſeized or not. ſ. 56
68 How lands in fee tail may be ſeized by force of a judgment or proclamation. *ibid.*
69 By 3 Jac. 1. c. 4. whoever ſhall retain in his ſervice any inmate who ſhall not go to ſome church or chapel where the common prayer is uſed, &c. for one month, ſhall forfeit 10*l.* a month. *Page* 31. c. 11

## CHURCH WARDENS.

1 By 3 Car. 1. c. 3. the penalties for keeping alehouſes without licence to be levied by the church wardens to the uſe of the poor. 466
2 By 21 Jac. 1. c. 7. the churchwardens oath enlarged to preſent offences contrary to 1 Jac. 1. c. 9. for reſtraining tippling. 467
3 By 11 Geo. 2. c. 26. church wardens, &c. required to carry hawkers of brandy, &c. before juſtices.
4 They may levy the forfeiture of 12*d.* for not coming to church. 19
5 They are excepted out of the teſt act of 25 Car. 2. c. 2. ſ. 17. 17. ſ. 4
6 They may whip boys for playing in the church, or pull off the hats of thoſe who refuſe to take them off, or may gently turn out diſturbers of divine ſervice, without incurring the penalties of 5 & 6 Edw. 6. c. 4. 272. ſ. 29

## CISTEAUX.

1 By 2 Hen. 4. c. 4. to put in execution bulls purchaſed by thoſe of the order of Ciſteaux to be diſcharged tithes, is præmunire. 79

## CLANDESTINE.—*Vide Marriage. Smuggling.*

## CLERGY.—*Vide Felonies.*

## CLERGYMEN.

1 By 1 Eliz. c. 2. clergymen refuſing to uſe the common prayer, or ſpeaking in derogation of it, forfeit

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year's profit, and ſuffer ſix months impriſonment for the firſt offence, and deprivation for the ſecond. *Page* 14. ſ. 2

2 How they may be deſcribed in a certificate on 5 Eliz. c. 1. for refuſing the oaths. 82 ſ. 33

3 Are within the ſtatute of highways. 377 ſ. 15

4 Are ſufficiently ſhewn in an indictment, to be in holy orders by the word, *clericus*. 14 ſ. 3

CLIPPING.—*Vide Coin.*

1 Clippers of the coin are not within the ſtatute of treaſons. 62 ſ. 55

2 By 5 Eliz. c. 11. clipping, &c. any of the monies of this realm, or foreign money, ſuffered to be current *by proclamation* is made high treaſon. 63 ſ. 61

3 By 18 Eliz. c. 1. whoever, *for lucre*, ſhall diminiſh, lighten, &c. &c. any of the monies as aforeſaid, ſhall be guilty of high treaſon, loſe goods, &c. &c. and lands during life, but no corruption of blood. *ibid.*

4 Aiders, conſenters, and abettors, are equally guilty. *ibid.*

CLOATHS.

1 Maliciouſly to deſtroy the garments of another in the public ſtreet is tranſportation. 238

COALS.

1 The coal buſhel ſhall be round, and 19½ inches in diameter, and contain one Wincheſter buſhel and one quart of water. 524

2 All ſea coal brought into the Thames, ſhall be ſold by the chaldron of 36 buſhels; and coals ſold by weight ſhall in proportion be 12 lb. *avoirdupois* to every cwt. ſ. 130

3 Any three juſtices may ſet the price of ſea coal, and if any perſon ſhall refuſe to ſell, they may enter the place and ſell the ſame. *Page* 524, ſ. 131

COAT ARMOUR.—*Vide Affrays.*

COERCION. *Vide Coverture, Treaſon.*

COIN.—*Vide High Treaſon.*

1 By 25 Ed. 3. c. 2. to counterfeit the king's money is high treaſon 61 ſ. 54

2 Thoſe who coin the king's money, without authority, are guilty within this clauſe, whether they utter it or not. 62 ſ. 55

3 So alſo are the authoriſed *minters*, if they coin it of baſer alloy than the ſtandard. *ibid.*

4 Receivers and comforters alſo are equally guilty, but clippers are not within *this* act. *ibid.*

5 But to compleat the crime, the counterfeiting muſt be ſuch as to render the coin paſſable. (N) 13

6 And uttering falſe money is neither treaſon nor miſpriſion thereof within *this* act. ſ. 56

7 And only gold and ſilver coined within the realm, by the king's authority, is "the king's money." ſ. 57

8 But by 1 Mar. c. 6. to counterfeit the gold or ſilver coin, *not of the realm*, made current *by conſent* of the crown, or to aid or abet therein, is high treaſon. ſ. 59

9 And by 14 Eliz. c. 3. to counterfeit gold or ſilver coin, not of the realm, nor permitted to be current, or to aid or abet therein, is miſpriſion of treaſon. ſ. 60

10 By 5 Eliz. c. 11. clipping, waſhing, rounding or filing, for lucre or gain, any of the proper monies of this realm, or of any other realm made current *by proclamation*, or aiding therein, is declared high treaſon. 63 ſ. 61

11 By 18 Eliz. c. 1. to impair, diminiſh, falſify, ſcale, or lighten, by any art or means, for *lucre or gain*, any *ſuch* monies, or to aid or conſent

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ſent thereto, is high treaſon, with loſs of goods abſolutely, lands during life only, but no corruption or loſs of dower. *Page* 63. f. 61.

12 By 8 & 9 Will. 3. c. 26. whoever, except the minters, ſhall make, &c. any puncheon, counterpuncheon, matrix, ſtamp, dye, pattern, or mould, in or upon which ſhall be made, or which will make, the figure, ſtamp, reſemblance, &c. (*infra*, No. 17.) of both or either of the ſides of any current gold or ſilver coin, ſhall be guilty of high treaſon. 64

13 Whoever ſhall make or mend, &c. any edger, or edging tool, inſtrument, or engine, not of common uſe in any trade, but contrived for marking the edges of money, with ſuch letters or grainings, as thoſe on money coined in the mint, ſhall be guilty of high treaſon. *ibid.*

14 Whoever ſhall make or mend, &c. any preſs for coinage, or any cutting engine, for making blanks, by force of a ſcrew, out of flatted bars of gold or ſilver, ſhall be guilty of high treaſon. *ibid.*

15 Whoever ſhall, *knowingly*, have any ſuch puncheon, counterpuncheon, matrix, ſtamp, dye, edger, cutting inſtrument, or other tool or inſtrument before mentioned, ſhall be guilty of high treaſon. *ibid.*

16 The words "pattern or mould," (*Vide infra* No. 12) are omitted in the above clauſe, (No. 15.) but it has been determined, that they are comprized in the words "tool or inſtrument;" and that the *ſpecial* term is ſufficient in an indictment, without averring the thing to be a tool or inſtrument within the act. 63 (N) 14

17 It is alſo determined that if the *ſtamp* of the coin is impreſſed or formed, in, or upon any of the inſtruments enumerated in the act, it is immaterial whether it be laid in the indictment as an inſtrument on which the reſemblance of the coin is made, or an inſtrument which will make the reſemblance (*Vide ſupra* No. 12. But it is better to lay the fact according to the ſtatute. [illegible]

18 Counſellors, procurers, aiders, &c. are within this act, but no corruption of blood or loſs of dower ſhall enſue. *Page* 64

19 By 7 Ann. c. 25. proſecutions upon the above ſtatute, for making, &c. the tools or inſtruments therein prohibited, or for milling the edges of money, ſhall be commenced within ſix months. *ibid.*

20 By 8 & 9 Will. 3. c. 26. f. 2. to convey or aſſiſt in conveying any coining tools out of the *mint*, is high treaſon. *ibid.*

21 Or to mark the edges of any of the current, diminiſhed, or counterfeit coin of the kingdom, with the *uſual* letters or grainings, or to counſel or aſſiſt therein, is high treaſon. *ibid.*

22 Whoever ſhall colour, gild, or caſe over, with gold or ſilver, or with any waſh, or materials producing the colour of gold or ſilver, any of the current coin, or blanks of baſe metal of a fit ſize to be coined into counterfeited milled money; or ſhall aid or abet therein, are declared guilty of high treaſon. *ibid.*

23 It has been adjudged immaterial whether the colouring be *put on*, or made to *ariſe out of* the ſubject coloured. (N) 16

24 Coining tools or inſtruments found in the cuſtody of any perſon not a *minter* may be ſeized, carried before a juſtice, produced at the trial, and there deſtroyed. 65

25 By 15 Geo. 2. c. 28. to waſh, gild, or colour, or to add to, or alter the impreſſion of any ſhilling or ſix pence real or counterfeited, with intent to make them reſemble, either a guinea or half guinea, is high treaſon. f. 64

26 So alſo to file, alter, waſh, or colour any halfpenny or farthing with intent to make them reſpectively reſemble either a ſhilling or a ſixpence is high treaſon. *ibid.*

27 Counſellors, aiders, abetters and procurers are within this ſtatute. *ibid.*

28 The counterfeit money muſt be in the *likeneſs and ſimilitude* of the lawful money. (N) 17

29 By

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29 By 25 Ed. 3. c. 2. to bring falſe money into the realm, counterfeit according to the ſimilitude of the money of *England*, to merchandize, or make payment with, is high treaſon. *Page* 61. 65
30 By 1 & 2 P. & M. c. 11. to bring into the realm, money, counterfeit to foreign coin current here, is high treaſon. *ibid.*
31 The party bringing muſt know it to be falſe. f. 66
32 It muſt be from a foreign nation, and not from any place ſubject to the Britiſh throne. f. 67
33 The bare uttering is not within theſe ſtatutes. 66
34 By ancient ſtatute a ſuſpected perſon may be arreſted for having falſe money. f. 68
35 And *quære*, if the money need to be actually merchandized with, or paid away (*Vide* No. 29, 30.) f. 69
36 The ſtandard of coin is 2 car. copper to 22 car. of gold, 18 dwts. copper to 11 oz. 2 dwts. ſilver. 70 (N) 1
37 The ſtandard can only be altered by parliament. *ibid.*
38 By 9 & 10 W. 3. c. 21. and 13 Geo. 3. c. 71. Gold or ſilver money diminiſhed, or counterfeit may be cut by the perſon to whom tendered. But at his riſque if it prove otherwiſe. 71. f. 3
39 By 15 Geo. 2. c. 28. Knowingly to utter any falſe or counterfeit money incurs, for the firſt offence, ſix months impriſonment and ſurety for ſix months more. For the ſecond offence 2 years impriſonment and ſurety for 2 years. The third offence is death. f. 4
40 To tender in payment any *ſuch* money, twice within ten days, or to have one or more pieces thereof in cuſtody, beſides what is tendered, is, for the firſt offence, two years impriſonment and two years ſecurity. The ſecond offence is death without clergy. *ibid.*
41 The proſecution muſt be within ſix months. *ibid.*
42 To coin or counterfeit a ½ or ¼ is two years impriſonment. 72
43 But by 11 Geo. 3. c. 40. to commit, or to aid or aſſiſt in this offence is felony. *Page* 72, f. 5
44 To buy, ſell, take, receive, pay, or put off any counterfeit copper money not cut in pieces, at a lower rate or value than it imports to be of, or was counterfeited for, is felony. *ibid.*
45 A juſtice on the oath of one witneſs may iſſue a warrant to ſearch for coining inſtruments, &c. *ibid.*
46 By 13 Eliz. c. 2. thoſe who forge foreign coin not current here, their aiders, &c. are guilty of miſpriſion of treaſon. 87 f. 7

COLONIES.—*Vide Tranſportation.*

## COLLATERAL.

1 A collateral iſſue may be pleaded and replied to *ore tenus*, and a *venire* awarded, returnable *inſtanter*. 3 (N) 5

## COLLUSION.

1 If any ſerjeant, pleader, or other, be guilty of colluſion, how he ſhall be puniſhed. 542 f. 29

COMBINATIONS.—*Vide Conſpiracy.*

COMBUSTIO DOMORUM.—*Vide Arſon.*

## COMBAT.

1 The victor, in a judicial combat, is juſtified from the imputation of murder, and the reaſon of it. 107 f. 16

## COMMAND.

1 A forcible entry, committed by the command of an infant or feme covert,

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will not involve them in the guilt. *Page* 283 ſ. 35

COMPOS MENTIS.——*Vide Non Compos.*

COMMMISSIONERS.—*Vide Bankrupt.*

COMMON.

1 A common is not within the ſtatutes of forcible entry. 282

COMMON COUNCIL MAN.

1 Is within the corporation act of 13 Car. 2. 15 ſ. 1

COMMON LAW COURTS.

1 Have no cognizance of *mere* hereſy; but if the conſequences of it become injurious to the public peace, the offender may be indicted. 6 ſ. 6
2 They may incidentally take cognizance of hereſy, in judging of offences ordained by ſtatute. ſ. 7
3 On a *quare impedit*, if the cauſe be hereſy, the biſhop muſt ſpecify it particularly, that the temporal court may direct the jury accordingly. ſ. 7
4 But a perſon agrieved for hereſy in a ſpiritual court, cannot move for a prohibition. ſ. 9
5 To draw any out of the realm, in plea, which belongs to the common law courts, or to ſue in other courts to defeat the judgments given there, incurs præmunire. 79 ſ. 14, 15

COMMONS.

1 To aſſert that the houſe of commons or the houſe of lords, have legiſlative authority without the king, is treaſon. 69

COMMON WEALTH.

Offences againſt it are;
1 Imbezzling of Records. 177
2 A goaler forcing his priſoners to appear. 194
3 Obſtructing lawful proceſs. } Bk. 2.
4 Eſcaping from cuſtody. } Bk. 2.
5 Priſon Breach. } Bk. 2.
6 Reſcous. } Bk. 2.
7 Returning from tranſportation. 244
8 Theſt bote. 252. 257
9 Knowingly receiving ſtolen goods. 232
10 Common Barratry. 524
11 Maintenance. 535
12 Champerty. 545
13 Compounding of informations.
14 Conſpiracy. 346
15 Perjury. 318
16 Bribery. 311
17 Embracery. 548
18 Extortion. 310

COMMON PRAYER.

1 The firſt eſtabliſhment of it. 13, 14
2 By 1 Eliz. c. 2. miniſters neglecting to uſe it, or ſpeaking in derogation of it, forfeit one year's profit, and ſuffer 6 months impriſonment for the firſt offence, and deprivation for the ſecond. 14 ſ. 2
3 Clergymen without *a cure* are within this act. ſ. 3
4 In an indictment, the word *clericus* is ſufficient to ſhew they are within holy orders. *ibid.*
5 This ſtatute does not reſtrain the ſpiritual court from proceeding againſt offenders, as diſturbers of the unity and peace of the church, &c. ſ. 4
6 Alſo by 1 Eliz. c. 2. to detract the ſaid book in plays, ſongs, &c. or to procure a miniſter to alter the form, or to let any other miniſter ſay a different form of prayer, is a forfeiture of 100 marks, or ſix months impriſonment for the firſt offence, 400 marks, or twelve months impriſonment for the ſecond if not paid in ſix weeks,

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weeks, and for the third loſs of goods and impriſonment for life. *Page* 400 ſ. 5

7 *Quære* whether the impriſonment ſhall enſue if the offender die without paying the penalty within ſix weeks. ſ. 6

8 To diſturb the reading of the common prayer is within the penalties of 1 Mary, ſ. 2. c. 3. 272 ſ. 30

## COMPANION.

1 By 25 Edw. 3. if a man do violate *the King's Companion*, he is guilty of high treaſon. 50

2 By the king's companion is meant his wife. *ibid.*

## COMPUTATION.

1 A month ſhall be computed by the number of days, allowing 28 days to each, according to the common rule where a month is generally ſpoken of. 21 ſ. 11

2 But an aſſurance for payment of money with intereſt, ſhall be computed by calendar months, for otherwiſe it would be uſury. 530 ſ. 13

3 How miles ſhall be computed. 35 ſ. 15

4 In murder within a year and a day, the whole day on which the hurt was done, ſhall be reckoned firſt. 119 ſ. 9

COMPASS.—*Vide High Treaſon.*

## CONCEALMENT.

1 Concealment, or procuring the concealment of felony, whether by common law or by ſtatute, is miſpriſion. 251 ſ. 2

2 The concealment of treaſure *trove* is miſpriſion. (N) 1

3 By 3 Edw. 1. c. 9. ſheriff, coroner, or bailiff, &c. who ſhall conceal, conſent, or procure to conceal the felonies done in their liberties, ſhall be fined and impriſoned at the king's pleaſure. ſ. 3

4 By 3 Hen. 7. c. 1. juſtices may ſummon a jury to enquire of the concealments made by other inqueſts, &c. *Page* 251 ſ. 4

## CONIES.

1 In a foreſt, chace, or warren, not the ſubject of larceny at common law. 144 ſ. 26

2 By 9 Geo. 1. c. 22. to rob any place where conies are kept, being armed, and diſguiſed, is felony without clergy. 187

## CONFORMITY.

1 The offence in accepting or holding an office without due conformity to the church. 15 c. 4

2 Non-conformity in officers conſiſts in not receiving the ſacrament and in attending other worſhip than the church. *ibid.*

3 The offence of teaching ſchool without conformity to the church. 18 c. 9

4 For non-conformity of papiſts, &c. *Vide Church. Diſſenters.*

CONSERVATORS.—*Vide Conſtable.*

## CONSPIRACY.

1 A definition of conſpiracy. 346 c. 72

2 Barely to conſpire to indict another maliciouſly, whether any thing be done in proſecution of ſuch intent, or not, is conſpiracy. ſ. 2

3 But a bare conſpiracy to indict another, will not maintain *the writ of conſpiracy*. 347

4 Nor can *the writ* be brought, unleſs the party indicted be acquitted. *ibid.*

5 But, perhaps, *a writ* may be formed to meet the caſe of a perſon falſly indicted who has not been acquitted. *ibid.*

6 And

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6 And it is certain that an *action on the caſe in the nature of ſuch a writ* doth lie for a malicious proſecution, although it doth not proceed to an indictment. *Page* 347
7 And an indictment or information may be brought for conſpiracies within the ſtatute of Edward the Firſt (vide p. 346) 348
8 In an action for a malicious proſecution, the plaintiff muſt ſhew that the original ſuit is at an end. *ibid.* (N) 1
9 It is ſafeſt to form an indictment at common law, for a malicious accuſation. 48
10 And for this offence a man may be not only ſentenced to the pillory but branded. *ibid.*
11 At common law, all confederacies wrongfully to prejudice a third perſon are criminal. *ibid.*
12 The offence conſiſts in the conſpiracy; and it is criminal to conſpire to do a lawful act. *ibid.*
13 The fact of conſpiring need not be directly proved; it may be collected from collateral circumſtances. *ibid.* (N) 2
14 And if the parties concur in doing the act, although unacquainted with each other, it is conſpiracy. *ibid.*
15 The inſufficiency of the indictment; want of juriſdiction in the court; or the improbability of injuring the defendant, is no juſtification in conſpiracy for a malicious proſecution. ſ. 3
16 Nor is it any plea that the party only intended to give evidence in the regular and legal courſe of juſtice. 349 ſ. 4
17 But no juror is liable, to any proſecution, in reſpect to any verdict given by him, either upon a grand or petit jury. ſ. 5
18 Judges of record alſo, are freed from all proſecution for any thing done by them as judges. 350 ſ. 6
19 Yet if a judge turn ſolicitor; tampers with witneſſes, or labor jurors, he may be puniſhed. *ibid.*
20 Conſpiracy, upon the ſtatute (Vide p. 346) muſt be both falſe and malicious. *Page* 350 ſ. 7
21 Therefore, if the defendants in a writ of conſpiracy, can prove a probable cauſe, they ſhall be diſcharged. *ibid.*
22 But *quere* if it can be given in evidence on the general iſſue. *ibid.*
23 One perſon cannot be guilty of conſpiracy upon the ſtatute. ſ. 8
24 Therefore husband and wife cannot be indicted alone, for they are but one; and the acquittal of all but one, is an acquittal of all. *ibid.*
25 But an action on the caſe in the nature of a writ of conſpiracy, may be brought againſt one only. *ibid.*
26 And if brought againſt ſeveral, and all but one be acquitted, yet judgment may be given againſt him. *ibid.*
27 A conſpirator convicted at the ſuit of the party ſhall pay damages, and have fine and impriſonment. ſ. 9
28 When at the ſuit of the king, *the villainous judgment* was formerly given. *ibid.*
29 But this is obſolete; and the puniſhment is pillory, fine, impriſonment and ſurety for behaviour. 352 (N) 3
30 Quarter ſeſſions have juriſdiction, in conſpiracy. *ibid.*
31 On motion to arreſt judgment, the defendant muſt be perſonally preſent. *ibid.*

## CONSENT.

1 In bigamy, if *either* of the parties are within the age of conſent, *both* of them are protected, by the exception, from the penalties of 1 Jac. 1. c. 11. 174 ſ. 6

## CONTEMPTS.

1 Againſt the king's palace. 87 c. 21
2 Fighting therein, was anciently, a capital offence. ſ. 1

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3 By 33 Hen. 8. c. 12. ſtriking and drawing blood therein is puniſhed with loſs of the hand, perpetual impriſonment, and fine at pleaſure. *Page* 87 ſ. 1
4 But *quere* if the king be not reſident therein at the time of the offence. 88
5 The inſtance in 3 Inſt. 140, for ſtriking in the tower is not warranted by the record. *ibid.*
6 And *quere* if a peer can be impriſoned by the king's bench for the non-payment of a fine, *if it be exorbitant*, for this offence. (N) 1
7 Againſt the king's courts. 88 ſ. 3
8 Striking therein, where the king is only conſtructively, is an offence at common law, and more penal than ſtriking where he is actually preſent. *ibid.*
9 For to draw a ſword in the preſence of one of the judges therein, whether he ſtrike or not, or to ſtrike a juror or other perſon, loſes hand, goods, profit of lands, and if laid as *coram domino rege*, it is perpetual impriſonment. *ibid.*
10 To which *ſon aſſault demeſne*, is no juſtification. ſ. 4
11 To reſcue a priſoner from any of the courts, is loſs of goods, profits of lands, and impriſonment for life, and if he ſtrike, loſs of hand. ſ. 5
12 An affray near the ſaid courts, is fine and impriſonment. ſ. 6
13 Threatning, or reproachful words to a judge on the bench, is a high miſpriſion. ſ. 7
14 To reflect on the juſtice and honour of thoſe *high* courts, is an indictable offence. 89
15 Whoever gives the lie in Weſtminſter-hall, ſitting the courts, ſhall be bound to good behaviour. ſ. 9
16 To make an affray in the preſence of the king's inferior courts is fineable, but no loſs of hand. ſ. 10
17 To ſpeak reproachfully to the judge of ſuch a court in the execution of his office, is fineable immediately, and *perhaps* indictable. ſ. 11
18 Formerly ſlandering the juſtice of the nation was indictable. ſ. 12
19 But now the offender may only be bound to good behaviour, except the offence was committed againſt *ſuch officers* in the actual execution of office. *Page* 89 ſ. 13
20 Inſtances of this kind for which a man ſhall *not* be indicted. 90
21 But the injurious treatment of perſons under the protection of the king's courts is a contempt. ſ. 14
22 To ſuppreſs the truth during an examination is a contempt of court. ſ. 15
23 So alſo to diſſuade a witneſs from giving evidence againſt a priſoner. *ibid.*
24 Or to adviſe a priſoner to ſtand mute. *ibid.*
25 If a grand jury diſcover to a perſon indicted, the evidence againſt him, it is high miſpriſion. *ibid.*
26 Contempts againſt the prerogative. 91 c. 22
27 Refuſing to aſſiſt the king for the national good. ſ. 2
28 As for a peer to neglect a ſummons to parliament. *ibid.*
29 Or to depart from thence without licence. *ibid.*
30 Or for a privy councillor to refuſe his advice. *ibid.*
31 Or for a private ſubject to refuſe to defend the kingdom againſt foreign invaſion. *ibid.*
32 Preferring the intereſt of a foreign prince; or to receive a penſion from him without leave, is contempt of prerogative. ſ. 3
33 To diſobey what the law enjoins. ſ. 4
34 As refuſing obedience to writs, &c. *ibid.*
35 Or not anſwering the privy council in matters of ſtate. *ibid.*
36 Or refuſing to give evidence to the grand jury. *ibid.*
37 Or not returning from beyond ſea, upon notice. *ibid.*
38 Or going beyond ſea againſt a *ne exeat regnum*. *ibid.*
39 So alſo every contempt of a ſtatute is indictable, if no other puniſhment be limited. 92 ſ. 5
40 Neglecting to join the *poſſe comitatus* is a contempt. (N) 1
41 Contempts

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41 Contempts againſt the king's perſon. *Page* 96 c. 23
42 Spreading falſe rumours concerning the king's intentions. ſ. 4
43 Charging him with a breach of his coronation oath. ſ. 5
44 Speaking contemptuouſly of him. 93 ſ. 6
45 Of contempts againſt the government. 92 c. 23
46 As charging it with oppreſſion or weak adminiſtration. ſ. 1
47 Or abſolving perſons at the gallows. 2
48 Or drinking to *the pious memory* of a traitor, &c. *ibid.*
49 Or endeavouring to frighten the king into a change of meaſures. ſ. 3
50 And *perhaps* to refuſe the cuſtom in a foreign port. 93 ſ. 7
51 Contempts againſt the king's title. 93 c. 24
52 How far the offence of denying his title is a contempt. 93. 94
53 How far refuſing to take the oath of allegiance is a contempt of the king's title, at common law. 94, 95
54 How far refuſing to take the oaths of allegiance, ſupremacy, and abjuration, *as directed by ſtatute*, is a contempt, &c. 95 to 99

## CONSTABLE.

1 Conſtables are not within the teſt act. 25 Car. 2. c. 2. 17 ſ. 4
2 Every high and petty conſtable is a conſervator of the peace, by common law, within their ſeveral limits. c. 63 ſ. 14

## CONTINGENCY.

1 How far a perſon who has only a contingent intereſt may maintain another in a ſuit on the ſubject on which the contingency is to operate. 538 ſ. 14, 15

## CONTRA PACEM.

1 The words *contra pacem* are eſſentially neceſſary in an indictment for barratry. *Page* 526, ſ. 11

## CONVENTICLES.

1 Eſtabliſhed for diffuſing heretical tenets can only become the ſubject of indictment at common law, when they raiſe factions which may tend to diſturb the public peace. 6 ſ. 6
2 By 1 Mary, ſ. 2. c. 3. certain diſturbers of licenſed conventicles, are directed to be puniſhed in a ſummary way. 272 ſ. 9
3 The King's Bench will grant an information for diſturbing proteſtant diſſenters conventicles. 49 (N) 1

## CONVICTS —*Vide Tranſportation.*

## CONVICTION.—*Vide Hereſy, Felony by Statute.*

1 It is always implied by law, that there muſt be a conviction before puniſhment. 20 ſ. 8
2 A conviction is of no effect unleſs judgment be given thereon. *ibid.*
3 For every judgment implies a conviction; but a conviction does not imply a judgment. 21
4 A party has no remedy againſt an inſufficient conviction but to move it into the ſuperiour court, and quaſh it. 24
5 What conviction will be ſufficient for abſenting from church. 24
6 How far a conviction may be pleaded in bar to a ſubſequent proſecution. 25
7 An additional puniſhment for a ſecond offence, can never be inflicted, unleſs there has been a previous conviction for the firſt offence. 67 ſ. 74 168 ſ.

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## CONVOCATION.


1 The convocation may declare what opinions are heretical. *Page* 6 f. 3
2 But cannot convict a heretick. *ibid.*


## COPY.—*Vide Books. Authors.*


1 Copying a libel has been held concluſive evidence of publication; except ſome ſubſequent act is done to explain the precedent intention. 355 f. 10


## COPYHOLD.


1 Not liable to be ſeiſed for recuſancy. 22 f. 16


## CORONATION OATH.


1 To charge the king with a breach of his coronation oath is a contempt againſt his perſon. 96 f. 5


## CORPORATION.


1 Muſt repair their own bridges. 445 f. 8
2 Aggregate, may be bound to repair bridges, either by ſpecial tenure, or preſcription. 443 f. 2
3 May be compelled to repair highways by force of a general preſcription. 369 f. 8
4 May ſet the price of victuals notwithſtanding the 25 Hen. 8. c. 2. 481 f. 8
5 Are puniſhable for riot in their natural, but not in their public capacity. 298 f. 13
6 How they may be puniſhed for ſuffering riots. *ibid.*
7 The corporation act. 16


## CORN.


1 To aſſault with intent to hinder the exportation of corn, is a miſdemeanor puniſhable by hard labour for three months, &c. &c. 243 app. 12
2 To commit the offence a ſecond time, or to deſtroy any ſtore-houſe or granary in which corn is lodged for the purpoſe of exportation; or to ſpoil the grain therein, is tranſportation for ſeven years. *Page* 243 f. 2
3 The hundred liable to the damage not exceeding 100 *l.* 244 f. 3
4 Puniſhment for ſelling corn otherwiſe than by the Wincheſter buſhel. 486
5 If any magiſtrate ſhall permit it to be otherwiſe ſold, he ſhall forfeit 5 *l.* *ibid.* f. 2
6 The manner in which corn ſhall be meaſured. f. 3 & 4
7 By 22 and 23 Car. 2. c. 7. to burn ſtacks or ricks of corn, &c. is felony. 166 f. 2
8 And by 43 Eliz. c. 13. if committed in any of the four Northern counties it is felony without clergy. *ibid.*
9 By 9 Geo. 1. c. 22. whoever ſhall ſet fire to any ſtack of corn ſhall ſuffer death without clergy. 224


## CORONER.—*Vide Deodand, Inquiſition.*


1 There can be no forfeiture as a *deodand*, nor can any thing be ſeiſed as ſuch, till it be found by the coroner's inqueſt to have cauſed a man's death. 101 f. 8
2 But after the coroner has made his inquiſition, which ought to find the value, the ſheriff is anſwerable for it and may levy for it on the town *where it fell.* 101, 102
3 If the coroner neglect to make an inqueſt, it cannot be taken by the grand jury. (N) 37
4 When taken by the coroner it may be moved and traverſed. *ibid.*
5 The perſonal eſtate of a *felo de ſe* is not veſted in the king until the coroner has taken his inqueſt. 104
6 Such inquiſitions ought to be by the coroner, *ſuper viſum corporis*, if the body can be found. *ibid.* f. 10
7 And it is ſaid *this kind* of inquiſition cannot be traverſed. *ibid.* f. 11
8 The coroner has only authority *ſuper viſum corporis*, and if the body cannot be found, the inquiſition may be taken

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taken by the King's Bench, or by a juſtice of the peace. *Page* 104 ſ. 12
9 And *their* inquiſition may be traverſed. *ibid.*
10 The manner in which their inquiſitions ought to find the fact. ſ. 13, 14
11 If they be full in ſubſtance, the coroner may be ſerved with a rule to amend defect of form. ſ. 15
12 For murder or manſlaughter, the party is always arraigned and tried upon the coroner's inqueſt, as well as upon the indictment.

## COSTS.

1 By 5 Eliz. c. 14. the defendant convicted of forgery, ſhall pay double coſts. 339
2 By 21 Jac. 1. c. 3. there ſhall be double coſts againſt monopoliſers. 474

## COTTONS.—*Vide Forgery.*

1 The puniſhment for cotton manufacturers aſſaulting or abuſing their maſters. 239
2 By 22 Geo. 3. c. 40. whoever ſhall enter by force any place, with intent to deſtroy any callico, cottons, &c. in the loom, or ſhall actually cut the ſame out, or deſtroy any of the utenſils, &c. ſhall be guilty of felony without benefit of clergy. 240, 241
3 By 4 Geo. 2. c. 16. and 18 Geo. 2. c. 18. to ſteal cottons from bleaching or printing grounds, is felony without clergy, but the judge may tranſport for 14 years 146 (N) 13

## CORRUPTION OF BLOOD.

1 Where a ſtatute ſaves the corruption of blood, it impliedly ſaves the deſcent of the land of the offender to the heir. 169. ſ. 5
2 It is the immediate conſequence of an attainder.
3 This conſequence is ſaved by a variety of ſtatutes.
4 The blood of a *felo de ſe* is not corrupted. *Page* 103. ſ. 8

## COVENANT.

1 The word "covenant" in 3 Edw. 1. againſt champerty, includes promiſe either by writing or parol. 546. ſ. 5

## COVENTRY ACT.—*Vide Main.*

1 By 22 & 23 Car. 2. c. 1. whoever ſhall, by lying in wait, diſable the tongue, put out the eye, ſlit the noſe, cut off the lip, or any limb or member of another *with intent* to maim or diſfigure, he, his aider, &c. ſhall ſuffer death without clergy. 176

## COUNCIL and COUNSELLOR. *Vide Barriſter.*

1 By 5 Eliz. c. 14. counſellors ſhall not be puniſhed for ſhewing a falſe deed in evidence.
2 By 3 Jac. 1. c. 5. no popiſh recuſant ſhall be a counſellor.
3 If a privy councillor refuſe the king his advice, it is a contempt of the prerogative. 91. ſ. 2

## COUNTERFEITER.—*Vide Treaſon. Felony. Forgery.*

## COUNTY.

1 By 33 Hen. 8. c. 23. traitors or principal murderers, by order of the privy council may be tried, by ſpecial commiſſion, in *any* county. 119. ſ. 11
2 By 27 Hen. 8. c. 4. and 28 Hen. 8. c. 15. a murder done at ſea, may be tried in any county. *ibid.* ſ. 12
3 By 2 Geo. 2. c. 21. Principals and acceſſaries to a murder, where the ſtroke, &c. is at ſea, and the death on land, or *e converſo*, may be tried in the county where either the death or ſtroke ſhall be. 120

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4 By 2 & 3 Edw. 6. c. 24. a wound in one county, and the death in another, ſhall be tried in the county where the death ſhall happen. *Page* 121
5 By 26 Hen. 8. c. 6. a murder in Wales may be tried in the next adjoining Engliſh county. *ibid.* ſ. 14
6 But appeals muſt be brought in the proper county. (*Sed vide* 2 Geo. 2. c. 21.) *ibid.*
7 Larceny in one county, and the goods carried into another county, the offender may be indicted in either. 136. ſ. 9
8 But in a robbery at ſea, the pirate cannot be indicted in the county to which he carries the goods taken. 137
9 By 13 Geo. 3. c. 31. Larceny in Scotland may be tried in any county where the goods are found, &c. and *e converſo.* *ibid.*
10 Which ſhall be conſidered as the next adjoining Engliſh county to Wales. 220, 221

COURTS.—*Vide Tranſportation.*

COVERTURE.

1 The coverture of a woman protects her from puniſhment for committing bare thefts in company with, or coercion of her huſband. 4
2 This exemption extends to burglary, and *ſeemingly* to robbery. *ibid.* (N) 8
3 It alſo protects her from being an acceſſary in felony by receiving her guilty huſband. ſ. 10
4 And in treaſon, from being deemed a principal by ſuch reception. (N) 9
5 But coverture will not protect a wife for a theft committed of her own voluntary act, &c. ſ. 11
6 Nor will it protect her from the conſequences of treaſon, murder, *or robbery* (quere) under any circumſtances. *ibid.*
7 Nor for receiving ſtolen goods without her huſband's privity. (N) 10
8 Nor is it any protection to a malicious appeal. ſ. 13
9 And in general, coverture is no protection for any offence *not capital*, againſt the common law or ſtatute. *Page* 4. ſ. 13
10 A wife cannot commit larceny of the goods of her huſband, by reaſon of the coverture. 141. ſ. 19
11 Coverture no protection in forcible entry. 283. ſ. 35

CREEKS.—*Vide Piracy.*

1 Of felonies committed therein. 152. c. 37

CRIMES.

1 What perſons may be guilty of them. 1
2 Neither infants, ideots or lunatics can be puniſhed for crimes. 2
3 Formerly held, that a mad man might be puniſhed for treaſon. *ibid.*
4 Whoever is guilty of a crime through drunkenneſs ſhall be puniſhed. 3
5 Whoever incites a mad man to commit a crime, is a principal offender. ſ. 7
6 How far a *feme covert* is puniſhable for crimes. 4
7 A crime committed by a ſon or a ſervant ſhall not be excuſed by the command either of parent or maſter. 8
8 How thoſe who charge another with the crime of witchcraft ſhall be puniſhed. 9

CROWN.

1 Every king in actual poſſeſſion of the crown, is a king within 25 Ed. 3. c. 2. 52
2 The crown deſcends to the heir within this act, before his coronation. 53 ſ. 19
3 By 1 W. & M. c. 2. Papiſts are rendered incapable to poſſeſs or enjoy the crown of this realm. ſ. 21

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4 Soliciting a prince, in amity with the crown, to invade the realm, is treaſon. *Page* 56
5 By 4 Ann. c. 8. to maintain that the pretended prince of Wales, or any other, hath any title to the crown otherwiſe than acording to 1 W. & M. c. 2. or 11 & 12 W. 3. c. 2. or that the kings of this realm, by authority of parliament, are not able to limit and bind the crown, &c. is high treaſon. 69 ſ. 85

CROW.

1 By 23 Geo. 3. c. 88. any perſon apprehended with a crow, intending to break any houſe, &c. ſhall be deemed rogue and vagabond. 165

CUCKING STOOL,

1 Sometimes called Ducking Stool, the uſual puniſhment for a *common ſcold*. 365

CURSING.

1 By 19 Geo. 2. c. 21. for profane curſing and ſwearing, every labourer, common ſoldier, or ſailor, ſhall forfeit 1 *s.* every other perſon under the degree of a gentleman, 2 *s.* every perſon of above that degree, 5 *s.* 12 ſ. 4
2 On a ſecond conviction the penalties ſhall be double, and for every other conviction treble the ſum firſt forfeited. *ibid.*
3 If not immediately paid or ſecured, the offender being a labourer or gentleman ſhall be ſent to the houſe of correction for 10 days, and a common ſoldier or ſailor in employ ſhall be ſet in the ſtocks for two hours, &c. *ibid.*
4 A juſtice may convict on his own hearing, or on confeſſion, or the oath of one witneſs. *ibid.*
5 The conſtable muſt inform if he knows the offender, if not, he muſt apprehend. *ibid.*
6 This act to be read in all churches after every quarter day. *ibid.*

CUTLASS.

1 By 23 Geo. 3. c. 88. perſons apprehended with a cutlaſs with intent to aſſault another ſhall be deem rogue and vagabond. *Page* 1

CUT PURSE.—*Vide Larceny. Privately Stealing.*

CUTTING.—*Vide Maim. Hop Bin Coventry Act.*

CYPHERING.

1 By 5 Eliz. c. 1. whoever, by writi cyphering, &c. ſhall extoll the Pop juriſdiction, ſhall be guilty of a *pr munire*. 67 ſ.

D.

DAMAGES.

1 The double damages given by 5 Eli c. 4. for forging a releaſe of an ob ligation, &c. ſhall be governed b the penalty. 342 ſ. 2

DEAD BODY.

1 To take a dead body from the grave to be uſed in witchcraft was with 1 Jac. 1. c. 12. now repealed.

DEADLY FEUD.

1 By 43 Eliz. c. 13. to burn any barn or ſtack of corn or hay, or to prey o make ſpoil of the perſons or goods o the ſubject upon *deadly feud* in th four Northern counties is felony with out clergy.

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DEATH.—*Vide Homicide. Caſual Death. Deodand.*

## DEBATING.

1 By 21 Geo. 3. c. 49. all houſes for publicly debating, &c. on any part of the Lord's day to which perſons ſhall be admitted for money, or by charging an unuſual price for refreſhments, &c. ſhall be deemed a diſorderly houſe, and the keeper, maſter, and director thereof, ſubject to fine and impriſonment. *Page* 12

## DEBTS.

1 A Popiſh heir has no other mode of exonerating the inheritance from the debts due by the recuſancy of his anceſtor than to conform. 30 ſ. 56

## DEBTORS.

1 Inſolvent, may be brought to the quarter ſeſſions and obliged to deliver a ſchedule of their eſtate and effects, and for pejury therein, or in refuſing, for 40 days, to deliver ſuch ſchedule, guilty of felony without clergy. 204 ſ. 4

## DECEITS.

1 Deceitful practices, to defraud another of his known right *by means of artful devices*, contrary to the plain rules of common honeſty, are puniſhable at common law. 343

2 Inſtances of this ſpecies of deceit. *ibid.*

3 The deceit muſt be accompanied with *an artful contrivance*, and not wholly depend *on a bare naked* lie. 344

4 By 33 Hen. 8. c. 1. deceitfully to obtain the property of another by any privy falſe token, or fictitious letter, &c. ſhall be liable to any *corporal puniſhment* ſhort of death. *Page* 344 ſ. 4

5 The offender may be tried before the chancellor, or at the aſſizes, or quarter ſeſſions, &c. *ibid.*

6 And there has been an inſtance of a perſon fined 500*l.* upon this ſtatute. 345

7 Inſtances of what ſhall be conſidered a privy falſe token. (N 2

8 By 30 Geo. 2. c. 24. to obtain property *by falſe pretences*, with intent to cheat another, ſubjects the offender to pillory, whipping, fine, impriſonment or tranſportation. ſ. 7

9 By 16 Car. 2. c. 7. deceitfully to defraud another at any of the games mentioned in the act, ſubjects the offender to forfeiture, &c. of treble value. ſ. 8

10 By 9 Ann. c. 14. to win money by any deceitful practice, ſubjects the offender to five times the value won, renders him infamous, and liable to puniſhment as in caſes of perjury. ſ. 9.

11 No counſellor or attorney can juſtify uſing *any* deceitful practice in maintenance of a client's cauſe. 542 ſ. 29

12 By ſt. Weſt. 1. c. 29. if any ſerjeant, pleader, or other, do any manner of deceit or colluſion in the king's court, &c. he ſhall be diſqualified, &c. &c. *ibid.*

## DECIES TANTUM.

1 By 38 Edw. 3. c. 12. if any juror take bribe to give their verdict, he ſhall pay *ten times as much* as he hath taken, half to any who will ſue for the ſame as directed by 34 Edw. 3. c. 8. 551

2 It is a good plea in bar to actions of *decies tantum*, that there was no ſuch cauſe as that in which it is alledged the juror was bribed. ſ. 11

3 A variance between the firſt record and the declaration on this ſtatute will abate the writ. *ibid.*

4 But only ſo much of the record need be ſtated as is neceſſary to give the plaintiff his action. *ibid.*

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5 The declaration muſt ſhew that the bribe was given to the juror. *Page* 551 ſ. 12
6 So alſo the preciſe ſum given muſt be ſtated. ſ. 13
7 But money given after verdict, is not within the act, unleſs in conſequence of a previous contract. ſ. 14
8 Whether a verdict was, or was not given, is immaterial. ſ. 15
9 If ſeveral be joined in one action they ſhould plead ſeparately. 552
10 Which ſhould be a ſpecial denial if not receiving the money and not the general iſſue. ſ. 17
11 The plaintiff ſhall be paid his moiety or a *decies tantum* before the king, &c. ſ. 18
12 The huſband may ſue alone, although the offence were committed in a ſuit to which both huſband and wife were parties. ſ. 19
13 No colourable purchaſe of land ſhall evade the ſtatute. ſ. 20
14 This action may be barred by the king's releaſe, *before action brought by the informer.* ſ. 21
15 Outlawry lies not in *decies tantum*, only *a capias*, and diſtreſs infinite. ſ. 22
16 And no *capias* lies in a foreign country. *ibid.*
17 The penalty can only affect lands had at the time of the *decies tantum*, &c. ſ. 53

## DECLARATION.

1 How far it is criminal to refuſe the declaration againſt Popery. c. 14

## DEER.

1 By the common law, deer *feræ naturæ*, and roving at large, are not the ſubject of larceny. 144 ſ. 26
2 But if ſhut up in a houſe, or even incloſed in a park in ſuch a manner as the owner may retake them whenever he pleaſes, felony may be committed by taking them. *ibid.*
3 By 9 Geo. 1. c. 22. if any p appear *armed and diſguiſed* i cloſed place wherein any kept, or ſhall unlawfully hu ſtroy any fallow deer; o *armed and diſguiſed or not*, ſh ſteal any red deer in the cloſed chaſes or foreſts, ſh without clergy.
4 The offender may be procla not ſubmitting, he ſhall be guilty of felony without cler
5 By 5 Geo. 1. c. 28. who enter into any incloſed grou deer are uſually kept, and hunt or kill any red or fa without licence from the o ſhall be tranſported for ſev
6 By 16 Geo. 3. c. 30. whoe kill, &c. or *attempt* to kill, or deſtroy, or ſhall ſteal a deer, or ſhall aid therein, ſh 20*l.* for attempting, &c. killing, &c. if a keeper, dou on a ſecond conviction *of any* offences, the offender ſhall ported.
7 Juſtices may ſearch for the ſk of ſtolen deer, and if any b and the party ſhall not giv factory account how he becam ſed of it, he ſhall forfeit any tween 10*l.* and 30*l.*
8 And if the perſon in whoſe the ſame ſhall be found ſhal liable to conviction, the juſti ſummon all thoſe through who ſuch ſkin, &c. ſhall have pa
9 Whoever ſhall *lay* ſnares for de forfeit from 5*l.* to 10*l.* for offence, and from 10*l.* to 2 every other.
10 And whoever ſhall come an any ancient walk, incloſed grou *intent* to ſhoot at or to take a the rangers may ſeize guns a in the ſame manner as game-
11 And if any ſuch perſon ſh beat or wound any ranger, &c

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assistants in the execution of his office, or shall attempt to rescue any offender, he shall be transported for 7 years. *Page* 191 s. 10

DEFAMATION.—*Vide Libel.*

DEFENCE.

1 A man in defence of his person may justify killing another who assaults him feloniously. 109 s. 24
2 But *quære*, if the assault is made where the person may safely retreat. s. 25
3 By 24 Hen. 8. c. 5. whoever shall be indicted for killing another attempting murder, robbery, or burglary, shall be fully acquitted and discharged. 110

DEMOLITION.

1 By 1 Geo. 1. c. 5. Riotously, tumultuously, and forcibly, to demolish or to pull down, or to begin to demolish or pull down, any church, chapel, or meeting-house, or any dwelling-house, barn, stable, &c. &c. is felony without clergy. 308
2 By 9 Geo. 3. c. 29. the above act is extended to the demolition of all kind of mills. 309

DEODANDS.

1 Is a forfeiture to the king of the instrument which occasions the death of another. 100
2 Especially such as occasions casual death. *ibid.*
3 As where one is killed by a fall from a horse, cart, or other thing. *ibid.*
4 And it is due for the death of infants as well as adults
5 The origin of this forfeiture. *ibid.*
(N) 1
6 Fixtures, as a wheel of a mill, &c. may be a *deodand*. 101
7 But a ship is not. *ibid.*
8 And only the very particular part of the thing which causes the death, is forfeited. *Page* 101
9 Nothing forfeited if the party die not within the year and day. *ibid.* s. 7
10 Nor till after inquisition. s. 8
11 But it is an odious claim and not favoured by the courts 102 (N) 3

DEROGATION.

1 To derogate from the king's common law courts is præmunire. 79 s. 14
2 The punishment for speaking in derogation of the common prayer. 14 s. 5

DESERTION.

1 By 1 Geo. 1. c. 47. if any person shall persuade a soldier to desert, he shall forfeit 40*l.* 75
2 By 18 Hen. 6. c. 19. desertion was made felony, but this statute is obsolete. 184
3 By 3 Hen. 8. c. 5. Desertion is felony without clergy. 185
4 By 2 Edw. 6. c. 2. if any soldier shall depart without licence, &c. &c. he shall be guilty of felony without clergy. *ibid.*

DETAINER.—*See Forcible Entry.*

DEMURRER.

1 Judgment on demurrer *or nihil dicit* is a sufficient conviction on the 23 Eliz. c. 1. for the penalty of 20*l.* a month for absenting from church. 20 s. 9

DENIZEN.—*Vide Allegiance.*

DENYING.

1 It is a high contempt to deny the king's title. 93

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## DEPRAVING.

1 The punishment for depraving the book of common prayer. *Page* 14 *l.* 5

## DEPRIVATION.—See *Spiritual Courts.*

1 Ministers, offending against the 1 Eliz. c. 2. respecting the use of the common prayer, may be deprived by the spiritual court for the first offence. 14 *l.* 4

## DEPUTY.

1 A bond by a deputy of an office to pay a certain sum, at all events, is bribery. But a bond to pay half the profits, or a certain sum out of the profits of an office, for a deputation, is not. 313

## DICE.

1 Playing with false dice, is an indictable offence. 343 c. 71
2 It is punishable with *infamy*, fine and imprisonment. 344 *l.* 3
3 By 16 Car. 2. c. 7. if any person shall defraud another by playing at dice, &c. or by betting on the side of such as do play, he shall forfeit treble what is won. 345 *l.* 8
4 By 9 Ann. c. 14. he shall forfeit five times the value, be deemed infamous, and suffer as in cases of perjury. *l.* 9

## DIMINUTION.

1 By 18 Eliz. c. 1. to impair, *diminish*, falsify, scale, or lighten the coin, &c. is high treason. 63

## DISABILITY.

1 Those who are under a *natural disability* of distinguishing between good and evil; as infants under the age of discretion, ideots, and lunaticks, are not punishable by any criminal prosecution whatsoever. *Page* 1, 2
2 But in trespass, this disability shall not excuse from making a civil compensation for the injury. 3. *l.* 5
3 In what cases a *feme covert* is *disabled* from committing crimes, by the command or coercion of her husband.
4 The disabilities to which a man is reduced by the offence of Popish recusancy. 32 to 35
5 Disabling a man of those parts which abate his courage, &c. or which prevent his fighting, are held maims. 175

## DISCOVER.

1 What discovery is necessary to exempt a person from the crime of treason. 87
2 What discovery will indemnify against the penalty for bribery at elections. 315

## DISCRETION.—*Vide Infancy. Lunatick. Ideot.*

1 Where the human mind is incapable of discretion, it is also incapable of guilt. 1
2 Infants under the age of discretion are not punishable by any criminal prosecution. 1
3 The law presumes them to have acquired discretion on the attainment of fourteen years of age. (N) 1
4 But from seven to fourteen years of age, if they appear to possess discretion they are liable to punishment. *ibid.*
5 But within the age of seven years, no discretion shall be presumed, whatever circumstance may appear. *ibid.*
6 Ideots and lunaticks are supposed to be without discretion. *ibid.*
7 But every person of the age of discretion is presumed of sane memory unless the contrary appear. 3 (N) 5
8 In what cases the magistrate may exercise his discretion in taking surety for the good behaviour. 261
9 The measure of punishment for slanderers to be regulated by the discretion of the judges. 270. *l.* 21
10 How

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10 How far the king's bench may exerciſe a diſcretion over the conduct of the juſtices granting a reſtitution of forcible entry. *Page* 292. ſ. 63 to 66
11 Perſons wanting diſcretion who commit a treſpaſs againſt another ſhall make reparation in damages. 3. ſ. 5
12 The indiſcretion of drunkenneſs is no excuſe from puniſhment. ſ. 6

## DISFIGURING.—*Vide Maim.*

1 Cutting off the ear, noſe, or the like, of another are not *maims* by the common law, becauſe they do *not weaken*, but only *diſfigure* the party. 176
2 By 22 & 23 Car. 2. c. 1. whoever ſhall, by lying in wait, cut out or diſable the tongue, &c. or any limb or member of another with *intent to maim or to diſfigure him*, his aiders, abettors, &c. ſhall be guilty of felony, *ſans* clergy. *ibid.*

## DISGUISE.—*Vide Black Act. Smuggling.*

## DISMEMBERING.—*Vide Maim.*

## DISOBEDIENCE.

1 It is a high contempt to diſobey the king's lawful commands and prohibitions. 91

## DISPENSATION.

1 No diſpenſation whatſoever ſhall reſtore an offender againſt 5 & 6 Edw. 6. c. 16. to a capacity to hold the office he has contracted for. 313. ſ. 5

## DISSEISIN.—*Vide Forcible Entry.*

1 It is fatal to an indictment of forcible entry to alledge a *diſſeiſin* of ſuch eſtates of which a perſon cannot be diſſeiſed as a leaſe for years, a copyhold, &c. 285. ſ. 39
2 So alſo if it ſtate the diſſeiſin to be of land *adtunc & adhuc exiſtens liberum tenementum*, I. S. &c. *ibid.*
3 But *quere* if this repugnancy may not be reconciled by intending that the diſſeiſee might re-enter after the diſſeiſin and before the indictment. *Page* 285. ſ. 39
4 In what manner the time and place of the diſſeiſin in forcible entry are ſufficiently ſet forth. 286. ſ. 42 to 45

## DISSENTERS.

1 May by virtue of the toleration act, 1 W. & M. c. 18. refuſe to take the oaths of office required by the corporation and teſt acts of 13 Car. 2. c. 1. and 25 Car. 2. c. 2. and may refuſe to ſerve the office of ſheriff, upon account of not chuſing to take the oaths, &c. notwithſtanding they be duly elected; and the 5 Geo. 1. c. 6. confirms officers in their offices who have not qualified as above required. 16 (N) 2
2 Diſſenters taking the oaths directed by 30 Car. 2. are not within 23 Eliz. c. 1. 18 ſ. 3
3 Proteſtant diſſenters exempted by the toleration act from all penal laws relating to religion, except 25 Car. 2. c. 2. and 30 Car. 2. c. 1. provided they take the oaths, &c. and attend a regiſtered place of worſhip, &c. 47
4 In regiſtering ſuch place, the juſtices are merely miniſterial; and if the parties are not within the certificate, they are not protected. 47 (N) 1
5 Nor will the act protect any but real diſſenters. *ibid.*
6 Diſſenting teachers tolerated *ibid.* ſ. 2
7 May qualify, pending proſecution. 48
8 Thoſe who ſcruple to take the oaths are within the protection, provided they ſubſcribe the declaration. *ibid.* ſ. 3
9 Spiritual courts cannot proceed againſt perſons maimed in a licenſed conventicle. 40. ſ. 4
10 Diſſenting miniſters or teachers who ſcruple to take the oaths are to ſubſcribe the declaration directed by 19 Geo. 3. c. 44 *ibid.*
11 But this does not intitle them to hold the maſterſhip of any royal college, &c. *ibid.*
12 How far the law favours diſſenters and how the act of toleration is to be conſtrued. 49

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DISORDERLY HOUSES.—*Vide Bawdy houſe. Debating. Lord's Day.*

DISORDERLY PERSONS. — *Vide Vagrants.*

DITCHES.—*Vide Highways.*

1 By the common law, the tenant of the *lands adjoining* to highways are bound to ſcower their ditches. *Page* 368 ſ. 5
2 But not thoſe who have lands next adjoining to ſuch lands, unleſs by preſcription. 405 ſ. 52
3 By 13 Geo 3. c. 78. ſ. 30. all occupiers of lands are liable to be rated toward the making tunnels for ſcowring of ditches. 379 ſ 20
4 Surveyors of the highways may order all nuiſances in, or obſtructions of ditches, &c. to be removed, on perſonal notice thereof to the occupier, and if not removed within twenty days, the ſurveyor ſhall remove them at the expence of the occupier who ſhall pay one penny a foot, &c. 395
5 The poſſeſſors of land next adjoining every highway, ſhall make ditches, &c. of a ſufficient depth and breadth, for keeping the highways dry, and ſhall ſcour and cleanſe the ſame, and make ſufficient trunks, tunnels, &c. on pain of 10*s.* after ten days notice by the ſurveyor. 406 ſ 55
6 The ſurveyor, by order of one juſtice, ſhall make new ditches and drains in and through the adjoining lands, or any other lands if neceſſary; and to keep ſuch ditches, &c. ſcoured, &c. the ſurveyor, with proper workmen, may go upon the lands. 407
7 Surveyors ſhall make proper trunks, &c. over ſuch ditches, for the convenient uſe of the lands; keep the ſame in repair; and make ſatisfaction to the owner for the damage ſuſtained thereby. ſ. 57
8 If any perſon, in making, cleanſing, or ſcovering the ditches, ſhall permit the ſoil thrown out, to obſtruct or prejudice the highway, for five days after notice by the ſurveyor, he ſhall forfeit 10*s.* 408 ſ. 62
9 If any perſon ſhall encroach on the highway, by making any ditch within 15 feet from the centre, &c. &c. he ſhall forfeit 40*s.* and the ſame ſhall be filled up again at the expence of the offender. *Page* 409
10 How far the powers given by the highway acts relating to ditches, &c. may be extended to turnpike roads. 441

## DIVORCE.

1 Perſons divorced *a vinculo matrimonii*, or even *a menſa et thoro cauſa adulterii vel ſævitiæ* may marry again without incurring the penalties of bigamy by 1 Jac. 1. c. 11. 174 ſ. 5
2 And for this purpoſe the word *ſeparamus* without the word *divortiamus* in the ſentence will be ſufficient. *ibid.*

DIVINE SERVICE.—*Vide Church. Abſence.*

## DOGS.

1 It is no felony at common law to ſteal dogs, becauſe they are things of a baſe nature. 143
2 But by 10 Geo. 3. c. 18. whoever ſhall ſteal dogs from the owner, or from any perſon intruſted with them by him, or ſhall knowingly buy, ſell, receive, harbour, or detain ſtolen dogs, or ſhall have the ſkin thereof in his cuſtody is liable to certain pecuniary penalties, &c. *ibid.*
3 *Quere*, Whether the ſtealing a bitch is within the penalties of this act. (N)
4 The particular ſort of dog ſtolen muſt be deſcribed. *ibid.*

## DOORS.

1 The conſtable may break open doors to ſuppreſs an affray, and if the offenders fly and take refuge in a houſe, he may break open the doors to apprehend them. 269 ſ. 16

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## DOVE COTE.


1 A dove cote, either erected by the lord or his tenant, is not a common nuiſance. *Page* 362 ſ. 8
2 It may be juſtified by preſcription. *ibid.*
3 It is demandable in a præcipe before any land whatſoever which is not built upon. *ibid.*
4 The owner of a dove cote may juſtify taking another's hawk flying at his pidgeons. *ibid.*
5 But a tenant is liable to an action on the caſe for building a dove cote without licence from the lord. *ibid.*
6 But by 1 Jac. 1. c. 27. and 2 Geo. 3. c. 29. the keeping pidgeons as therein prohibited, is a nuiſance. *ibid.*


## DOWER.


1 The wife of a *felo de ſe* is not barred from her dower by the felony of her huſband. 103 ſ. 8
2 A title to dower from a houſe of which a wife is truſtee, is not a ſufficient poſſeſſion to avoid the guilt of arſon if ſhe ſet fire to it during the term of her leſſee. 166(N)
3 A ſtatute which ſaves corruption of blood; or land, to the heir, impliedly ſaves the wife's dower. 169 ſ. 5


## DROVERS.—*Vide Saleſman. Cattle.*


1 By 29 Car. 2. c. 7. no drover, horſe courſer, waggoner, butcher, or higgler, ſhall travel, or come to their inn on the Lord's day, on pain of 20*s.* 11 ſ. 3


## DRUNKENESS.


1 A voluntary drunkard ſhall be puniſhed for the crimes committed during his intoxication, as much as if he were ſober. 3 ſ. 6
2 By 4 Jac. 1. c. 5. the offence of drunkenneſs incurs a penalty of 5*s.* to the poor. *Page* 13 ſ. 5
3 By 22 Geo. 2. c. 33. ſeamen ſhall be puniſhed for this offence in the diſcretion of a court-martial. *ibid.*
4 A publican permitting drunkenneſs in his houſe, ſhall forfeit 10*s.* 466 ſ. 43
5 By 21 Jac. 1. c. 7. drunkards ſhall forfeit 5*s.* 467, 468
6 The puniſhment inflicted on repeated tippling. 468


## DUCKING STOOL.


1 A common ſcold is puniſhable by the ducking ſtool. 365


## DUEL.—*Vide Challenge. Affray.*


1 If two perſons meet and fight in cool blood upon a precedent quarrel, and one is killed, the other is guilty of murder. 122 ſ. 21
2 And it is no excuſe that the deceaſed ſtruck firſt; or that the killer had often declined to meet him; and was only prevailed upon by his importunity; or that he only intended to vindicate his reputation; or that he only meant to diſarm his adverſary. *ibid.*
3 So, if two quarrel and appoint a diſtant time to fight, as from night to morning, or from morning to the afternoon, it may reaſonably be preſumed the blood was cooled in the interval. ſ. 22
4 And the ſame conſtruction ſhall be made upon a ſudden quarrel, if it appear that either of the parties was maſter of his temper at the time.
5 And not only the principals, but the ſecond to the killer alſo is guilty of murder. 124 ſ. 31
6 But *it ſeems* that the ſecond to the perſon killed *ſhould yet* be involved in his guilt. *ibid.*
7 And barely to challenge to a duel, by letters, words, or provoking language, or

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or to be the meſſenger thereof, is a very high miſdemeanor. *Page* 266 ſ. 3
8 By 9 Ann. c. 14. ſ. 8, to challenge or provoke another to fight, on account of money won at play, is forfeiture of goods and impriſonment 2 years. 266

## DURESS.

1 In what caſes it will exempt from the guilt of treaſon. 54, ſ. 24(N)3

DUTIES.—*Vide Smuggling. Permits.*

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## E

## EAR.

1 BY 5 & 6 Edw. 6. c. 4. to ſtrike with a weapon in a church or church yard, is loſs of an ear, &c. 271
2 By 2 and 3 Edw. 6. c. 15. againſt combinations among victuallers, &c. the offender ſhall loſe an ear, &c. &c. 481
3 Cutting off a man's ear is not mayhem by the common law. 175 ſ. 2
4 But by 22 and 23. Car. 2. c. 1. if done with intent to maim or diſfigure the perſon, it is felony without clergy. 176 ſ. 4
5 By 37 Hen. 8. c. 6. if a man ſhall maliciouſly cut off the ear of another, he ſhall forfeit treble damages and 10*l.* *ibid.* ſ 7.
6 By 5 Eliz. c. 14. againſt forgery of deeds relating to real eſtates, the offender ſhall have both his ears cut off, and for any forgery relating to a term of years, &c. he ſhall loſe one ear, &c. 339, 340

## EASEMENT.

1 An caſement, as a right or way or the like, is not that ſort of poſſeſſion which is within the ſtatutes againſt forcible entries. *Page* 282

## EAVES DROPPERS.

1 Eaves droppers are ſuch as liſten under windows, or the eaves of a houſe, to hearken after diſcourſe, and thereupon to frame ſlanderous and miſchievous tales to the common nuiſance, are preſentable at the leets, indictable at ſeſſions, and puniſhable by fine and finding ſurety for good behaviour. 262 ſ. 4

## ECCLESIASTICAL.

1 A force done to eccleſiaſtical poſſeſſions, as churches, vicarage houſes, &c. is as much within the ſtatutes againſt forcible entries, as if it were done to any temporal inheritance. 281 ſ. 31
2 All perſons eccleſiaſtical or temporal, are liable to puniſhment for high treaſon. 505. 4
3 The juriſdiction of the eccleſiaſtical court is ſaved by the ſtatute againſt rippling. 468 ſ. 49
4 So alſo it is ſaved by 5 Eliz. c. 9. againſt perjury and ſubornation. 327 ſ. 15
5 The 1 Eliz. c. 2. againſt miniſters not uſing the common prayer, alſo ſaves the juriſdiction of the eccleſiaſtical court. 14 ſ. 4
6 The 5 Eliz. c. 14. againſt forging deeds, wills, &c. ſhall not extend to any officers of the eccleſiaſtical court, who ſhall officially ſet his name to any ſuch writing, &c. 341
7 The offices of chancellor, regiſter, and commiſſary in eccleſiaſtical courts are within 12 Rich. 2. c. 2. againſt buying offices. 315 ſ. 4
8 How far ſuits in the eccleſiaſtical courts are within the 16 Rich. 2. c. 5. which puts all thoſe out of the king's protection who ſhall ſue out proceſs in the court of Rome *or elſewhere.* 80 ſ. 18, 19.

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9 In proceedings in the eccleſiaſtical court againſt hereticks, the appeal is to higher ſpiritual courts, and not to thoſe of common law for a prohibition. *Page* 7 ſ. 9
10 In what caſes the eccleſiaſtical courts may be prohibited from proceeding on 1 Eliz. c. 2. for abſence from church. 19 ſ. 1
11 The juriſdiction of the eccleſiaſtical court over the offence of hereſy. 6, 7
12 A ſuit in the eccleſiaſtical court is not within the ſtatutes againſt maintenance. 545 ſ. 46
13 How far an affirmative ſtatute ſaving the juriſdiction of the eccleſiaſtical courts, leaves them open to inflict ſpiritual penalties on offenders. 14 ſ. 4

EDUCATION.—*Schools.*

1 By 1 Jac. 1. c. 4. to ſend any child abroad, for the purpoſe of being educated in the Popiſh religion, incurs a penalty of 100 *l.* 42 ſ. 1
2 And the perſons ſo ſent ſhall be diſabled to inherit, &c. *ibid.*
3 By 3 Jac. 1. c. 5. if the children of any Engliſh ſubject not being mariners, &c. &c. ſhall be ſent abroad to prevent their good education in England, they ſhall be diſabled, &c. unleſs they take the oath of obedience, &c. and the perſon ſending ſuch child ſhall forfeit 100 *l.* 43
4 By 3 Car. 1. c. 2. if any perſon ſhall go abroad to be ſtrengthened in the Popiſh religion, they ſhall forfeit all goods, hereditaments, &c. &c. 43 ſ. 3

EFFUGAVIT.

1 In what caſe neceſſary in an indictment for larceny. 134. ſ. 2

EGGS.

1 Larceny may be committed by taking the eggs of any ſwans *marked and pinioned.* 144 ſ. 27
2 But by 1 Hen. 7. c. 17. a leſſer puniſhment is appointed for this offence, *ibid.*
3 And there is no doubt but that the taking the eggs of ducks, hens, &c. is felony. *Page* 144. ſ. 28

EGYPTIANS.

1 Of the age of 13 years remaining in England one month forfeit 40 *l.* 198 c. 54
2 Perſons pretending to be Egyptians deemed rogues and vagabonds. *ibid.*

ELECTION.—*Vide Bribery.*

1 If a ſtatute ordain a forfeiture, or impriſonment, at the election of the party, *quere* if the party die within the time limited for the payment, whether the forfeiture be diſcharged. 14 ſ. 6
2 It is in the election of the crown to either proceed upon the old ſtatutes which make purchaſing *bulls* from Rome high treaſon, or upon 13 Eliz. c. 2. which reduced the offence to *præmunire.* 79 ſ. 13
3 So alſo government may proceed againſt *nonjurors* either on the ſtatutes of *præmunire* or on the modern and milder ſtatutes. 96 ſ. 5
4 By 13 Car. 2. c. 1. members of corporations muſt have received the ſacrament within one year before their election. 15
5 But by 5 Geo. 1. c. 6. ſuch election is good notwithſtanding the omiſſion of receiving the ſacrament. 15, 16
6 By 11 Geo. 1. *the oaths* ſhall be taken before the perſon who preſides at the election of corporate officers. 16
7 To refuſe to elect the perſon nominated by the king to a biſhoprick *is præmunire.* 80 ſ. 22
8 If either of the univerſities neglect to elect a member in the place of one diſqualified by not taking the oath, &c. the king may appoint. 98 ſ. 9
9 In what manner ſurveyors of the highways ſhall be elected. 389

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## ELOPEMENT.


1 By 4 and 5 Phil. and Mary, c. 8. whoever above the age of 14 ſhall induce a woman child of 16 years unmarried to elope from and againſt the conſent of her guardians, ſhall ſuffer two years impriſonment and fine at diſcretion. *Page* 172 ſ. 10

2 And if the offender deflower or marry her, five years impriſonment and fine as before. *ibid.*

3. And if any female above 12 ſhall conſent to unlawful matrimony, ſhe ſhall forfeit all her lands to the next of kin during her life. 172, 173

4 This forfeiture extends as well to the infant who conſents, as to the huſband who takes. 173 (N) 2

5 The marriage muſt be *clandeſtine* and to the diſparagement of the heireſs. *ibid.*

6 If the guardian once conſents, he cannot retract. *ibid.*

7 A baſtard under the care of her putative father, is within this act. *ibid.*

8 The offence is within the juriſdiction of the King's Bench. *ibid.*

9 And the court will grant an information againſt the offender. *ibid.*


## ELM.—*Vide Trees.*

## EMBEZZLEMENT.


1 By 31 Eliz. c. 4. if any perſon having the charge of the king's ſtores, ſhall embezzle the ſame to the value of 20 *s.* he ſhall be guilty of felony. 75 ſ. 18

2 By 22 Car. 2. c. 5. the benefit of clergy is taken from this offence. *ibid.* (N)

By 7 Jac. 1. c. 7. if any manufacturer of wool, &c. ſhall embezzle any wool or yarn delivered to him to work, he ſhall be whipped, &c &c. 139 ſ. 17

By 17 Geo. 3. c. 56. how ſervants in the hat, woollen, linen, fuſtian, cotton, iron, leather, fur, hemp, flax, mohair, ſilk &c. dying manufactures, embezzling the materials entruſted to their care ſhall be puniſhed. *Page* 140

5 By 3 & 4 W. & M. c. 9. if any perſon ſhall take away the furniture of their lodging, with intent to embezzle it, they ſhall ſuffer as in caſe of felony. 137 ſ. 10

6 By 21 Hen. 8. c. 7. if any ſervant ſhall embezzle his maſter's jewels, money, goods, &c. intruſted to his care, to the amount of 40 *s.* he ſhall be guilty of felony. *(Vide Larceny.)* 138 ſ. 11

7 By 15 Geo. 2. c. 13. if any officer of the bank ſhall embezzle any part of the property intruſted to his care, he ſhall ſuffer without benefit of clergy. 139, 140

8 By 5 Geo. 3. c. 25. ſervants of the poſt offices embezzling any letter or packet, or bag of letters, containing any ſecurity for money, ſhall ſuffer death without clergy. 140

9 For the offence of embezzling naval ſtores. *(Vide Naval Stores.)* 562

10 What puniſhment ſhall be inflicted for embezzling of records. *(Vide Records.)* 177 c. 45


## EMBRACERY.


1 Every *corrupt* attempt to influence a jury in their verdict, although no verdict is given, is embracery. 548 c. 85

2 Even a ſtranger ſhall not deſire a juror *to appear and act conſcientiouſly.* 549

3 Giving money to a juror after verdict, *favours* of this offence. ſ. 3

4 But not if it be their uſual allowance. *ibid.*

5 Giving money *to another* to diſtribute among *them*, is of the nature of embracery, although not diſtributed. ſ. 4

6 Nor ſhall even a juror *practiſe* on his companions. *ibid.*

7 Procuring to be a juror for partial purpoſes, is criminal. *ibid.*

8 It is altogether unlawful for any perſon to tamper with a jury. ſ. 5

9 But whoever may juſtify any other act of maintenance may deſire a juror to appear. ſ. 6

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10 The offender is liable to either an indictment or an action. *Page* 550 f. 7
11 And if the party prejudiced is ignorant of the embracery ſo as to prevent his challenging the juror, it is a good cauſe to ſet aſide the verdict. *ibid.*
12 By 5 Ed. 3. c. 10. the juror corrupted ſhall be diſqualified and impriſoned, and *the court* are empowered to enquire of the offence. f. 8
13 By 34 Ed. 3. c. 8. the parties who ſhall ſue embraced jurors, ſhall be heard immediately by *the court*, and the juror put to plead *maintenant*, &c. f. 9
14 By 38 Ed. 3. c. 12. every juror or embraceror attempted upon the above ſtatute, ſhall pay *ten times as much* as he receives; half to him that will ſue, &c. or be impriſoned for one year. 551 f. 10
15 What may be pleaded in *bar*, or *abatement*, to a *decies tantum*. f. 11
16 In *decies tantum* it muſt be ſhewn that the money was given to the juror. f. 12
17 The plaintiff muſt ſhew how much the juror received. f. 13
18 Money given after the verdict, is not within the act, unleſs in conſequence of previous agreement. f. 14
19 And it is immaterial whether a verdict was given or not. f. 15
20 All the jurors or embracerors may be joined in one action, but they ought to plead ſeverally. 552 f. 16
21 They ought ſpecially to deny taking the money. f. 17
22 The proſecutor's half of the fine ſhall be paid before the king's. f. 18
23 A huſband alone may bring *decies tantum* for embracery, where he and his wife were parties. f. 19
24 The difference between money given for land, and the real worth of the land ſhall be conſidered as money received. f. 20
25 This action may be barred by the king's releaſe, but not by the parties. f. 21
26 How the party may declare in *decies tantum*. *ibid.*
27 Outlawry does not lie in this action. f. 22
28 What proceſs does lie. *ibid.*
29 No *capias* into a foreign county lies againſt *the jurors* *Page* 552 f. 22

## EMISSION.

1 In ſodomy, there muſt be evidence of emiſſion as well as penetration; but emiſſion is *prima facie* evidence of penetration. 9, 10
2 No aſſault, with intent to raviſh, can amount to a rape, unleſs it proceed to ſome degree of penetration, and alſo of emiſſion; but evidence of emiſſion is *prima facie* evidence of penetration. 169

## ENDS of BRIDGES.

1 How the roads at the ends of bridges ſhall be repaired. 448, 451

## ENEMY.—*Vide Treaſon.*

1 No perſons can be guilty of an affray by aſſembling and arming, in order to oppoſe enemies. 268
2 If a man be adherent to the king's enemies in his realm, he is guilty of high treaſon. 50 f. 3
3 Alien enemies, invading the kingdom in a hoſtile manner, are to be dealt with by martial law. 51 f. 6
4 What ſhall be ſaid to be an adherence to the king's enemies. 55 f. 28
5 How far intercepted letters to the enemy are proofs of high treaſon. 56 (N) 7
6 By 22 Geo. 2. c. 33. to deſtroy any ſhip, &c. not appertaining to the enemy, &c. is death, on conviction by a court martial. 76

## ENGLISH COUNTY.

1 Salop is conſidered as the next adjoining Engliſh county to Wales. 220, 221

## ENGINES.—*Vide High Treaſon.*

1 By 8 & 9 Will. 3. c. 36. whoever ſhall make or mend any engine, not

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of common uſe in any trade, but contrived for marking of money round the edges with letters, &c. Or any cutting engine, for cutting round blanks, by force of a ſcrew, out of flatted bars, &c, ſhall be guilty of high treaſon. *Page* 64
2 If any ſuch engine ſhall be elſewhere found than in the cuſtody of the king's minters, they may be ſeiſed, carried before a juſtice, and deſtroyed. 65
3 By 9 Geo. 3. c. 29. to burn, deſtroy, or damage, any engine, for drawing water from collieries, is tranſportation for ſeven years. 238 ſ. 4
4 How, and by what authority, weighing engines, for turnpike roads, ſhall be erected. 428

ENGLESHCHIRE.

1 Anciently murder ſignified privately killing; therefore CANUTE paſſed a law for the preſervation of his *Danes*, that the town where the fact happened, ſhould be *amerced*, unleſs it was proved that the perſon ſlain was an *Engliſhman*, and this proof was called *Engliſhchire*. 114 ſ. 22. 117 ſ. 1
2 This law aboliſhed by 14 Ed. 3. c. 4. *ibid.* ſ. 2

ENQUEST.—*Vide Inquiſition. Armour.*

ENGROSSING.

1 Is enhancing, by any means, the prices of merchandize and victuals. 479. ſ. 1 and 2
2 Importers of merchandize may ſell in groſs; but no perſons can buy and ſell in groſs within the realm. ſ. 3
3 A *bare* intent to ſell an engroſſed commodity at an unreaſonable price is indictable at common law whether any part be ſold or not. ſ. 3
4 Corn cannot be ſold in the ſheaf. ſ. 4
5 How this offence was anciently puniſhed. ſ. 5
6 At this day offenders are liable to fine and impriſonment. 480
7 By 23 Edw. 3. c. 6. all dealers in victuals ſhall ſell the ſame for a reaſonable price on pain of double value. 480 ſ. 6
8 Butchers ſelling unwholeſome meat how puniſhed. *Page* 480
9 Reſtrained from killing beaſts in walled towns. *ibid.*
10 When calves ſhall be killed. *ibid.*
11 Aliens in amity may ſell the victuals they import. ſ. 7
12 Penalty for preventing them. *ibid.*
13 By 25 Hen. 8. c. 2. the chancellor and other great officers of ſtate may, upon complaint of their being inhanced, fix and regulate the price of victuals. 481
14 By 2 & 3 Edw. 6. c. 15. none ſhall conſpire not to ſell victuals, or not do work but at certain prices; and thoſe who ſhall ſo conſpire to leave work unfiniſhed, or only to do certain work in a day; or, at certain hours, &c. they ſhall forfeit, &c. ſ. 10
15 And if ſuch conſpiracy ſhall be formed by the major part of any of the companies mentioned, their incorporation ſhall be thereby diſſolved. *ibid.*
16 By 2 Geo. 3. c. 14 no victualler or publican ſhall be ſued for advancing the price of malt liquors in a reaſonable degree. 482
17 No brewer ſhall mix ſtrong beer or worts with ſmall beer or ſmall worts, on pain of 50*l.* *ibid.*
18 The ſtatutes againſt foreſtalling, ingroſſing and regrating repealed. ſ. 11
19 Whoever ſhall buy victuals *in their way* to market, is a foreſtaller. ſ. 13
20 Whoever ſhall buy victuals and ſell them again in the ſame market, or within 4 miles thereof is a regrator. ſ. 14
21 Whoever ſhall get into his hands any victual, grown or produced by another is an ingroſſer. ſ. 15
22 Salt is comprehended under the word victuals. ſ. 16
23 But hops, malt, apples, pears, &c. are not. ſ. 17
24 Nor can a perſon ingroſs by buying corn in order to make ſtarch of it; or to make malt, or meal. ſ. 18
25 In what manner the indictment or information ſhould be framed. ſ. 19, 20, 22
26 The puniſhment by ſtatute, for this offence. ſ. 21

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ENLISTING.—*Vide Soldier.*

1 By 9 Geo. 2. c. 30. whoever ſhall enliſt himſelf, or procure another to enliſt, or hire another with intent to cauſe him to enliſt, or procure another to embark in order to be enliſted to ſerve any foreign prince without licence, &c. although no enlifting money be paid, is felony without clergy unleſs within 14 days the offender diſcover his ſeducer. *Page* 74 ſ. 16

2 By 29 Geo. 2. c. 17. to enliſt into the military ſervice of the French king as an officer without licence, is felony without clergy. 75

3 To enliſt as a commiſſion officer into the Scotch brigade in the Dutch ſervice is a forfeiture of 500 *l.* *ibid.*

ENTICING.—*Vide Artificers.* — *Soldiers.*

ENTERTAINMENT. — *Plays.*— *Lord's Day.*

ENTRY.—*Forcible Entry. Burglary.*

1 The words *fregit & intravit* are both eſſentially neceſſary in an indictment for burglary; and both muſt be ſatisfied. 160

2 Any the leaſt *entry*, either with the whole or with but part of the body, or with any inſtrument or weapon will ſatisfy the word *intravit*; as if one do but put his foot over the threſhold, or his hand, or a hook or a piſtol within the window. 161

3 But the entry made, or *thing* introduced, muſt be for the purpoſe of committing felony. 162

4 Therefore an entry made with an inſtrument for the purpoſe of breaking, and not for the felonious purpoſe, is not ſuch an *entry* as will ſatisfy the word *intravit*. *ibid.* (N) 1

5 An actual *entry* in all caſes is not neceſſary. ſ. 8

6 An *entry* obtained by fraud or colluſion is ſufficient. *Page* ſ. 9

7 What acts of violence ſhall conſtitute *a forcible entry* within the ſtatutes of forcible entry and detainer. 276 to 280

8 The manner in which the copy right of authors muſt be entered at Stationer's Hall, in order to protect their property in the copy. 476

ENTAIL.

1 The forfeiture of all lands and tenements by 16 Rich. 2. c. 5. *for præmunire*, extends not to land entailed after the death of the offender. 85. ſ. 48

EQUITY.

1 Whoever hath an equitable intereſt in lands or goods may lawfully maintain another in an action relating thereto. 539. ſ. 17

ERASURE.

1 Eraſing the name of one man out of a patent, and putting in that of another, or any artificial removing of the true writing altogether new, &c. from any inſtrument to which the ſeal is affixed, is not within the ſtatute of treaſons as counterfeiting the king's great and privy ſeal. 61. ſ. 52

2 By 11 Geo. 1. c. 9. to eraſe or alter a bank note or any indorſement, &c. thereon, is felony without clergy. 205

3 And to obliterate the red mark uſually made on payment, is an eraſure. *ibid.*

4 It is not forgery under the 5 Eliz. to eraſe the word *libris* from a bond and inſert *martis* inſtead thereof. 337. ſ. 4

ERECTION.—*Vide Nuiſance.*

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## ERROR.

1 What ſpecies of error may properly be called heretical. *Page* 6. ſ. 2
2 A writ of error cannot be brought on any record which is not a judgment. 24. ſ. 23
3 Error, tending to the king's prejudice may be aſſigned on a conviction for not coming to church; but no other error. 25. ſ. 29

## ESTREAT.—*Vide Recognizance.*

## ESCAPE.—*Vide Homicide. Execution. Quarantine.*

1 An officer may juſtify homicide of a priſoner who reſiſts, being retaken upon an eſcape without giving back at all. 107. ſ. 17
2 Of homicide where the direct deſign is to eſcape from an arreſt. 129. ſ. 55
3 If a bankrupt is likely to eſcape, he may be committed. 204. (N) 1
4 By 26 Geo. 2. c. 26. if any perſon ſhall eſcape out of the houſe, lazaret, or place appointed for the performance of *quarantine*, he ſhall ſuffer death without clergy. 242. ſ. 5

## ETCHING.—*Vide Forgery.*

1 By 13 Geo. 3. c. 79. to etch, &c. in mezzotinto, upon any material, any bill containing the words BANK OF ENGLAND, or BANK POST BILL, &c. is impriſonment for ſix months. 206
2 By 8 Geo. 2. c. 13. whoever ſhall *etch*, &c. in *mezzotinto* or *chiaro oſcuro* any original print, ſhall have the ſole right of printing and reprinting the ſame, &c. 477
3 By 23 Geo. 3. c. 30. to etch, &c. the words EXCISE OFFICE in any paper for granting permits, is felony without clergy. 565

## EVASION.

1 No woman, by uſing fraudulently, the proceſs of the law, in order to obtain the goods of another, ſhall excuſe the party from the guilt of larceny. *Page* 136. ſ. 8
2 Nor ſhall the evaſion of having been entruſted with the goods, avail, if they were originally obtained with a felonious intention. *ibid.* ſ. 10
3 Nor will the obtaining a felonious entrance into a houſe upon pretence of buſineſs evade the guilt of burglary. 161. ſ. 5
4 So alſo, in libels, no artful method of appearing to conceal the intended defamation, by initial letters, &c. ſhall evade the puniſhment. 353. ſ. 5
5 So alſo if *A.* tell *B.* that he will give him a pot of ale to ſtrike him; and thereupon *A.* kills *B.*—this ſhall not evade the guilt of murder; if it appears to have been deſigned. 123. ſ. 24
6 In like manner if on a challenge *A.* refuſes to meet *B.* but tells him he ſhall go next day to ſuch a place, and they there meet and fight, this ſhall not evade the law, if death enſues. ſ. 25

## EVIDENCE.—*Vide Witneſs.*

1 Opening the evidence to the jury, in favour of one of the parties, is ſaid to be a ſpecies of maintenance. 536 ſ. 6
2 In *ſe defendendo*, and manſlaughter, the ſpecial matter *ſhall* be given in evidence on the general iſſue. 105 ſ. 3
3 So alſo in homicide by miſadventure. 115
4 A borrower ſhall not be admitted an evidence againſt an *uſurer*, until he has paid off the whole debt. 533 ſ. 27
5 But the borrower is a good evidence to prove the repayment of the money, and

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and alſo the uſurious contract. *Page* 533 (N)
6 So he may give evidence, though the money is not repaid, if the queſtion neither affects the debt nor avoids the contract. *ibid.*
7 Where the intereſt of a witneſs is doubtful, the objection ſhall only go to the *credit* of his evidence, and not to his competency. *ibid.*
8 Entrance for *goods* will not ſupport an information for uſury, for the loan of *money*. 534
9 To diſſuade, or endeavour to diſſuade, a perſon from giving evidence againſt a perſon indicted, is a contempt of court. 90 ſ. 15
10 Refuſing to give evidence before the grand jury, concerning a crime, is a contempt of the king's prerogative, for which the court may impoſe an immediate fine. 91 ſ. 4
11 What ſhall be evidence of a perſon's being a truſtee for a turnpike road. 424
12 Upon what evidence convictions for offences againſt the highway and turnpike acts, ſhall be made. 440
13 How far the exciſeman's book ſhall be evidence of a perſon being an alehouſe-keeper. 458

EVIL.—*Infancy. Diſcretion.*

1 The period at which the human mind is preſumed capable of diſtinguiſhing between good and evil. 1 (N) 1

EVIL SPIRITS.—*Witchcraft. Charmers. Sorcery.*

EXCISE.

1 A man may be bound to good behaviour for accuſing juſtices of ignorance of the exciſe laws. 262 (N) 1
2 The exciſeman's book ſhall be proof of a perſon's being an alehouſe keeper. 458
3 How retailers of exciſeable liquors ſhall be licenſed. 461, &c.
4 How licences ſhall be granted within the limits of the exciſe office in London. *Page* 462
5 Commiſſioners of the exciſe empowered to mitigate penalties. 463

EXCHANGE.—*Vide Bills.*

EXCUSE.

1 In homicide it is no excuſe for the ſlayer that the deceaſed might have recovered if he had not neglected to take care of himſelf. 119 ſ. 10
2 If a perſon be ſick for part of the time contained in an information, on 23 Eliz. c. 1. for 20*l.* for every month's abſence from church, he ſhall not be excuſed on account thereof, if it be proved he was a recuſant. 21 ſ. 10
3 A perſon in holy orders is not thereby excuſed from the duties impoſed by the highway act. 377 ſ. 15
4 Making a winding paſſage through logs laid on a highway, will not excuſe from the penalty of the nuiſance.
5 It is no excuſe from the guilt of defamation, that the perſon only read the libel in the jeſt. 356 ſ. 14
6 In what caſes juſtices are excuſed for not executing the ſtatute 13 Hen. 4. c. 7. againſt rioters. 307
7 The ſtat. 23 Eliz. c. 1. inflicting 20*l.* for every month's abſence from church, does not excuſe the offender from the forfeiture of 12*d.* given by 1 Eliz. c. 2. for the abſence of one Sunday. 20 ſ. 7.
8 All excuſes from the charge of repairing decayed bridges, by reaſon of privileges of exemption, whether derived from charter or act of parliament, are taken away, 22 Hen. 8. c. 5. 449 ſ. 18

EXCHEQUER.

1 On 2 Ed. 3. againſt riding armed, the juſtices ought to record their proceedings,

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ceedings, and *where he proceeds ex officio* certify the ſame into the *Exchequer*. *Page* 267
2 How far the ſtatute of monopolies extends to the Exchequer. 473

EXCUSABLE HOMICIDE.

1 Excuſable homicide is either *per infortunium* or *ſe defendendo*. 111
2 PER INFORTUNIUM is by miſadventure where a man, in doing a lawful act, without an injurious intention, happens to kill another. ſ. 1
3 As where the head of a hatchet flies off and kills. ſ. 2
4 Or where a horſe whipped by a third perſon, runs over a child. ſ. 3
5 Or where a workman, *after proper notice*, flings timber from a houſe, &c. ſ. 4
6 Or where death enſues from *moderate* correction, &c. ſ. 5
7 Or where an arrow glances and happens to kill. 112
8 Or where death happens in playing at foot ball. ſ. 7
9 Or where one kills another in fighting at *barriers*, by the king's command. ſ. 8
10 Or where the gun of a ſtranger, attending a game keeper, who is warding off poachers from the ground of a third perſon, and the gun accidentally goes off and kills one of the poachers, for the duty of the gamekeeper will authorize the treſpaſs of the ſtranger. *ibid.*
11 SE DEFENDENDO is where one who has no other poſſible means of ſaving his life from the force of a ſudden attack, kills the perſon by whom he is reduced to ſuch an inevitable neceſſity. 113 ſ. 13
12 And he who, on an aſſault, retreats as far as ſafety will permit, and then kills his aſſailant, is judged to act upon unavoidable neceſſity. ſ. 14
13 So alſo, if his ſituation be ſuch, either from the violence of the aſſault, or from the nature of the place, that he cannot retreat without endangering his life. *ibid.*
14 And though he wound the aſſailant in retreating, yet if he give him no mortal wound, till his farther retreat is ſtopped, it is only *ſe defendendo*. *Page* 113 ſ. 15
15 An officer reſiſted in the execution of his duty, and a private perſon feloniouſly attacked on the highway, may juſtify the killing without giving back at all. ſ. 16
16 And it *is ſaid*, tho' even he who gives another the firſt blow, *without malice*, and afterwards do what he can to avoid killing him, is not guilty of felony,—*Sed quære*. ſ. 17
17 Homicide *per infortunium* and *ſe defendendo*, are not felonies; were always bailable by *the King's Bench, &c.* and never puniſhable with the loſs of life. 114
18 They are not bailable by *juſtices of peace*, but the offenders muſt be committed till the next aſſizes. ſ. 23
19 Anciently they might have been *mainprized* by the writ *de odio et atia*, but this this obſolete. 114, 115
20 Theſe offences cannot be juſtified by ſpecial pleading, but the ſpecial matter may be given in evidence on *Not Guilty*. ſ. 25
21 If the offender be acquitted of the indictment, or found not guilty on a ſpecial verdict, he ſhall be diſcharged upon bail, and forfeit his goods. *ibid.*
22 But that by removing the record by *certiorari*, into Chancery, he ſhall ſhall be pardoned of courſe, without waiting for the king's warrant. *ibid.*

EXCOMMUNICATION.

1 By the common law, an excommunicated heretic may be impriſoned by the writ *excommunicato capiendo*. 7. ſ. 11
2 By 5 & 6 Edw. 6. c. 4. whoever ſhall ſmite, or lay violent hands upon another in a church or church yard ſhall *ipſo facto* be deemed excommunicate. 271. ſ. 25
3 And whoever ſhall maliciouſly ſtrike another with any weapon in a church or church yard, or draw the ſame with

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intent ſo to ſtrike, ſhall, on con-
n as the ſtatute directs, have one
ears cut off, and ſtand *ipſo fac-*
ommunicated. *Page* 272 ſ. 26
notwithſtanding the words *ipſo*
there muſt be either a precedent
tion at law, tranſmitted to the
ry, or elſe the excommunica-
muſt be declared in the ſpiritual
*on proof of the offence* there. 272
Jac. 1. c. 1. every popiſh re-
convict ſhall ſtand diſabled, &c.
ſons excommunicated, to all in-
and purpoſes. 32 ſ. 1
hey cannot be apprehended up-
*communicato capiendo.* 33 ſ. 6
mmunication muſt always ap-
judicially, otherwiſe there can
abſolution. 272

EXECUTION.

e conviction of an infant, with-
years of diſcretion, for a capi-
ence, the judges will, in diſ-
n, reſpite the execution in order
cure a pardon. 3 ſ. 8
Common Pleas, on an appeal of
, or juſtices of the peace on an
ment of treaſon, award execu-
and the execution is according-
e, the judges who award, and
ficer who executes, are guilty
my. 105 ſ. 5
a treſpaſs, if the juſtices of peace
n for felony, and award exe-
, the juſtice only, and not the
, is guilty. 106
ution muſt be done by the law-
ficer. ſ. 7
private perſon do execution, or
proper officer himſelf do it
ut lawful command, it is felony.
ſ. 9
execution muſt be purſuant of,
warranted by the judgment;
ore if a ſheriff behead a man
that is no part of the ſentence,
guilty of felony. ſ. 10
cing cannot vary the execution,
to aggravate the puniſhment.
(N) 1
L. L.

8 How homicide, in execution of pub-
lic juſtice, is juſtified. *Page* 105
9 If a convict becomes *non compos* after
conviction, he ſhall not be executed.
2 ſ. 3

EXEMPTION.

1 Perſons in holy orders are not exempt-
ed from contributing to the repair of
the highways, in reſpect of their ſpi-
ritual poſſeſſions.
2 Carriages employed in huſbandry are
exempted from being weighed at the
engines on turnpike roads. 430 ſ. 21
3 What other kind of carriages are ex-
empted from the payment of tolls on
turnpike roads. 434, 435

EXERCISE.

1 To exerciſe the juriſdiction of a ſuf-
fragan, without the appointment of
the biſhop of the dioceſe, is præmu-
nire. 80 ſ. 21

EXERCISING a TRADE.—*Vide Ap-
prenticeſhip. Trade.*

EXILE.—*Vide Tranſportation.*

EX OFFICIO—*Affrays. Riding
Armed.*

EXPORTATION.—*Vide Smuggling.*

1 By ſome old ſtatutes the exportation of
wool was made felony. 195
2 By 7 & 8 Will. 3. c. 28. it is redu-
ced to a miſdemeanor. *ibid.*
3 By 8 Eliz. c. 3. no perſon ſhall ex-
port rams, ſheep, or lambs, alive,
on pain, their aiders, &c. of forfei-
ture of goods, impriſonment for a
year, loſs of land, &c. for the firſt
offence. For the ſecond the offender
ſhall be guilty of felony. ſ. 2

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4 By 12 Car. 2. c. 32. whoever ſhall export any ſheep or wool, or load the ſame, &c. for ſuch purpoſe, ſhall forfeit the goods, and 20 *s.* for every ſheep, and 3 *s.* for every pound of wool. *Page* 195 ſ. 3

5 How the owners of the ſhip, the maſters and mariners, and the merchant, ſhall be puniſhed. *ibid.*

6 By 9 & 10 Will. 3. c. 40. proſecutions may be commenced by the informed within one, and by the crown within three years. 195, 196

7 By 7 & 8 Will. 3. c. 28. whoever ſhall aid in the exportation of wool ſhall ſuffer three years impriſonment, and pay treble the value, the inhabitants, &c. are liable to, &c. 196 ſ. 4

8 By 4 Geo. 1. c. 11. whoever ſhall be in priſon for the exportation of wool, or for aiding therein, and ſhall refuſe to plead to the proſecution within one term, judgment ſhall be entered; and in caſe the penalty be not paid in three months, the offender ſhall be tranſported. ſ. 5

9 By 12 Geo. 2. c. 21. whoever ſhall bribe, or offer, or promiſe ſo to do, to any revenue officer, to connive at the tranſportation or concealment of wool, ſhall forfeit 300 *l.* ſ. 6

10 And if any officer, or his aſſiſtant, ſhall be obſtructed in ſeizing any wool, the offenders, their aiders, or any other perſon, *being armed and diſguiſed*; or who ſhall attempt to reſcue any wool, ſeized by ſuch officers, ſhall be tranſported for ſeven years. ſ. 6

11 By 19 Geo. 2. c. 34. if any perſons armed, to the number of three, ſhall be aſſembled to aſſiſt in the illegal exportation of wool, or ſhall reſcue, &c. or if any perſon ſhall have his face diſguiſed, when paſſing with ſuch goods, or ſhall obſtruct the ſeizing, &c. he ſhall be guilty of felony without clergy. 196, 197

12 Formerly the exportation of *all coin and bullion* was prohibited. 72 ſ. 6

13 By 15 Car. 2. c. 7. any perſon may export any *foreign coin* or bullion. *ibid.*

14 But by 6 & 7 Will. 3. c. 17. whoever ſhall make ingots of ſilver, in imitation of the Spaniſh, ſhall forfeit 500 *l.* *Page* 72 ſ. 7

15 And no perſon ſhall export any molten ſilver, unleſs ſtamped at *Goldſmith's Hall*, under a certificate, that oath was made by the owner and one witneſs, that the ſame is lawful ſilver, and that no part thereof was the coin, or clipping thereof, or the plate of the kingdom. 72, 73

16 Officers are authoriſed to ſeize all ſilver without ſuch mark and certificate. 73 ſ. 8

17 If any broker, not a goldſmith or refiner, ſhall buy or ſell any bullion, or molten ſilver, he ſhall be impriſoned ſix months. 73 ſ. 9

18 The owner ſhall prove the bullion to be foreign if a doubt ariſe. ſ. 10

19 No bullion to be entered or ſhipped, but in the name of the true owner, proprietor, or importer, on pain of forfeiture. *ibid.*

20 By 7 & 8 Will. 3. c. 19. no perſon ſhall ſhip any bullion or molten ſilver whatſoever, unleſs on a certificate from the Lord Mayor and Aldermen of the city of London, of oath having been made before the court as aforeſaid. (*Vide ſupra*, No.) ſ. 11

21 the ſaid court ſhall certify the ſame *circumſtantially* to the commiſſioners of the cuſtoms before any cocquet, &c. ſhall be granted. *ibid.*

22 The penalties on the owner, captain, and cocquet officer, for acting contrary this act. *ibid.*

23 For the acts relating to the exportation of corn. 486 (N) 1

24 By 2 Geo. 3. c. 14. whoever ſhall cauſe any ale or beer, exported as merchandiſe, to be unſhipped, or relanded, &c. they ſhall forfeit the ſame, and 50 *l.* for every caſk. 513, 484

25 For the exportation of beef and pork. 520

## EXPOSITION,

1 It is a general rule, that in doubtful caſes, the reaſon of the common law ought

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ought to govern the construction of a statute. Page 58 s. 39
2 An affirmative statute saving a particular jurisdiction, shall be so construed as not to abridge the powers of the jurisdiction saved. 14 s. 4.
3 An affirmative subsequent statute shall be construed concurrent with a former statute, with which it is consistent. 26
4 In what cases the meaning of a statute shall controul the words. 201
5 Where a statute shall be construed by equity. 278
6 Where a statute begins by naming inferior persons, it shall not be taken to extend to superiors. 177 s. 4
7 Where a statute expresses what the law would have implied, the words of the statute shall not operate. 20 s. 8. 33
8 A statute taking away clergy from an offence, alters not the nature of it. 112. 151
9 Statutes for the preservation of the public peace, shall be construed liberally. 299

*Vide Statute, Piracy, Indictment, Preamble.*

EXTOL.

1 By 5 Eliz. c. 1. advisedly and wittingly to extol and set forth the jurisdiction of the Pope is *præmunire*. 67

EXTORTION.

1 Is any oppression, but especially an officer obtaining money colourably, where none or not so much is due, or where it is not yet due. 316. c. 68
2 No fees shall be taken but of the king, by any officer concerned in the administration or execution of justice, &c. s. 2
3 A prescription by a clerk of the market claiming fees for the view of weights and measures is void. *ibid.*
4 The danger of oppression from officers, ancient fees, as the bar fee by a sheriff, &c. which they claimed, and an enumeration of the statutes by which their fees are now settled. 316; Page 317 (N) 1
5 Officers guilty of extortion who take other fees than they are allowed. *ibid.* s. 4
6 A promise to pay them more than they are intitled to take is void. *ibid.*
7 It is extortion to oblige an executor to prove a will twice over, and to take fees thereon; or to procure a gratuity to become bail for a prisoner; or to arrest a man and procure a release; or to obtain money from a prisoner by any colour of office. *ibid.* (N) 2
8 It is extortion for a miller to take more than is due by custom; or for a commissary to take more than his right for absolution; or a ferryman for ferrying; or to force an exorbitant price for places at a fair; or in an under sheriff to refuse execution of process without his fees; or to take a bond for them, or for a coroner to refuse a view. *ibid.*
9 Extortion, by the common law, is punishable with deprivation, fine, and imprisonment. And by the statute of Westminster, the offender shall yield twice as much as he takes. 318
10 The indictment or information must state the fact particularly. *ibid.* (N) 3
11 The sessions may try the indictment. *ibid.*
12 An action lies for the double value. *ibid.*
13 Defects cured by verdict, and the party will be forced to demur. *ibid.*
14 Proof of the smallest possible taking is sufficient; for it is the taking and not the contract which constitutes the crime. *ibid.*
15 Aiders are principals, and the offence may be laid in any county. *ibid.*

EXTRA WEIGHT.

1 What additional toll shall be paid for extra weight on turnpike roads. 429

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## EYRE.

1 By the 25 Edw. 3. c. 2. it is high treaſon to ſlay the juſtices *in eyre* or juſtices of aſſize aſſigned to hear, &c. being in their places during their offices. *Page* 61
2 But not attempt to kill them, or the actual wounding unleſs death enſue, will amount to this crime. *ibid.*

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## F.

FACE BLACKED.—*Vide Smuggling.*

## FAIRS.

1 BY 5 & 6 Edw. 6. c. 25. & 26 Geo. 2. c. 31. no perſon, except in fairs, ſhall keep an unlicenſed alehouſe. 455. f. 11
2 Thoſe who brew ale in fairs muſt give notice to the gaugers that it may be ſurveyed. *ibid.* (N)
3 This indulgence only extends to the place where the common fair is held. *ibid.*
4 By 5 & 6 Edw. 6. c. 9. to break open a booth or tent in any market or fair, the owner, his wife, &c. being therein, is felony without clergy.
5 By 27 Hen. 6. c. 5. no fair ſhall be held on the principal feſtivals, Good Friday, or any Sunday, except the fairs in harveſt. 4

FALL.—*Vide Deodand.—Homicide.*

FALSE DICE.—*Vide Dice.—Cheats.*

FALSE TOKENS.—*Vide Cheat. Deceit.*

1 By 33 Hen. 8. c. 1. falſely to obtain the property of another by means of any privy falſe token is a miſdemeanor. 344
2 What ſhall be conſidered a privy falſe token. *Page* 345. (N) 2

FALSE MONEY.—*Vide Coin.*

## FALSE NEWS.

1 Spreading falſe news is an indictable offence. 92 f. 4

FALSE OATH.—*Vide Perjury.*

## FAME.

1 By 34 Edw. 3. c. 1. juſtices of peace are impowered to reſtrain and to take (*inter alia*) of all them that be *not of good fame* ſufficient ſurety for their good behaviour. 261
2 It has been thought that this means only ſuch as are *defamed* and juſtly ſuſpected of an intention to break the peace. f. 2
3 But evil fame as properly includes perſons of ſcandalous behaviour in other reſpects as thoſe who give ſuſpicion of their readineſs to break *the peace.* *ibid.*
4 Therefore for thoſe cauſes of ſcandal which give a man *a bad fame,* as being *contra bonos mores* only, may be bound to his good behaviour. *ibid.*
5 And alſo all perſons whoſe miſbehaviour may reaſonably be intended to bring them within the meaning of perſons of *evil fame,* the great latitude of which leaves it to the judgment of the magiſtrate. 262
6 A libel is any malicious defamation, expreſſed in any manner ſo as to be generally underſtood. 32. c. 73

FARTHINGS.—*Vide Half-penny.*

1 It is not high treaſon to coin or counterfeit braſs farthings. 62. f. 57
2 By 15 Geo. 2. c. 28. whoever ſhall coin or counterfeit any braſs or copper money called a half penny or farthing,

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thing, their aiders, &c. ſhall ſuffer 2 years impriſonment, and find ſurety for two years more. *Page* 71, 72
3 By 11 Geo. 3. c. 40. whoever ſhall coin or counterfeit a half-penny or a farthing, his aiders, &c. ſhall be guilty of felony. 72. ſ. 5
4 Whoever ſhall buy, ſell, take, receive or put off any counterfeit copper money not cut in pieces for lower than its nominal value ſhall be guilty of felony. *ibid.*
5 The houſes of ſuch counterfeiters may be ſearched. *ibid.*
6 Whoever ſhall alter (in the way mentioned) a farthing, with intent to make it *reſemble* a fixpence, his aider, &c. ſhall be guilty of high treaſon. 65

FAST DAYS.

1 By 2 & 3 Edw. 6. c. 19. & 5 Eliz. c. 5. it is made penal to affirm that any eating of fiſh or forbearing of fleſh mentioned therein is neceſſary to ſalvation that it is the ſervice of God. 13. ſ. 7
2 By 27 Hen. 6. c. 5. no fair or market ſhall be held on the principal faſt days, except the fair Sundays in harveſt, on pain of forfeiting the goods expoſed to ſale. 11

FEES.—*Vide Extortion.*

1 By 26 Geo. 2. c. 14. & 27 Geo. 2. c. 16. the fees of juſtices clerks are regulated.
2 By 23 Geo. 2. c. 26. ſ. 10. the fees of records out of the exchequer regulated.
3 By 3 Geo. 1. c. 13. ſ. 16. certain fees of ſheriffs are ſettled.

FEE SIMPLE and FEE TAIL.—*Forgery by* 5 *Eliz.*

1 The recuſant heir of a recuſant anceſtor has no remedy but by conforming to free his fee ſimple lands from the forfeiture incurred by his anceſtor's conviction, whether the lands were ſeiſed in the anceſtor's life-time or not. *Page* 30. ſ. 56
2 But the fee-tail lands which the heir claims from the anceſtor is not chargeable after his death on any conviction by proclamation, &c. ſ. 57
3 Lands entailed are not within the ſtatute of *præmunire* after the death of the offender. 85. ſ. 48

FEAR.—*Vide Robbery.*

1 Larceny from the perſon by *putting in fear* is called robbery. 147
2 Money delivered in conſequence of an oath, compelled by fear is robbery. *ibid.* ſ. 1
3 Fear is the diſtinguiſhing ingredient between robbery and other larcenies. *ibid.* (N) 3
4 Therefore if the fear be exerted ſubſequent to the *taking*, it is larceny, but not robbery. *ibid.*
5 So where no fear is impreſſed for the purpoſe of obtaining the property. *ibid.*
6 But it is not neceſſary that the fact of actual fear ſhould either be laid in the indictment or proved upon the trial. 149 (N) 4
7 Proof of ſuch acts as may reaſonably be ſuppoſed to excite fear and apprehenſion in the human mind are ſufficient, if the party parts with his money under the influence of them. *ibid.*
8 For in *odium ſpoliatoris* the law will preſume fear where there appears a juſt ground for it. *ibid.*
9 How fear is properly expreſſed in an indictment. 150

FELONY.

1 Capital offences, by the common law, come generally under the title of felony; which ſignifies *quodlibet crimen felleo animo perpetratum.* 99. c. 25
2 It can be expreſſed by no *periphraſis* without the word *felonicè.* *ibid.* t. 1

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3 Felony is included in high treaſon; and a pardon of felony pardons treaſon, if the word *proditorie* be omitted. *Page* 99 ſ. 2
4 It is always accompanied with an evil intention. ſ. 3
5 It ſhall not be imputed to a mere miſtake or miſ-animadverſion. *ibid.*
6 Anciently the bare *intention* to commit felony was conſidered as felonious. *ibid.*
7 But now felony ſhall not be imputed to a bare intention to commit it. *ibid.*
8 But the party may be very ſeverely fined for ſuch an intention. *ibid.*
9 Felony in general ſignifies every ſpecies of crime which occaſioned at common law the forfeiture of land or goods. *ibid.* (N)
10 All offences, now capital, are in ſome degree or other, felony. *ibid.*
11 But offences may be felonies without being capitally puniſhed. *ibid.*
12 The true definition of felony is "an offence which occaſions a total forfeiture of 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." *ibid.*
13 Capital puniſhment may be inflicted and yet the offence be no felony. *ibid.*
14 The true criterion of felony is forfeiture. *ibid.*
15 But by common uſage of the law the term felony is inſeparably applied to capital puniſhments. *ibid.*
16 Therefore if a ſtatute make an offence felony, the law implies that it ſhall be puniſhed with death and forfeiture. *ibid.*
17 Where a ſtatute decrees an offence to undergo judgment of life and member, the offence becomes a felony though that word be omitted. 168. ſ. 1
18 But felony ſhall not be implied from any doubtful or ambiguous words in a ſtatute. *ibid.* ſ. 2
19 Therefore if a ſtatute only prohibit under pain of forfeiture, &c. the offence ſhall be conſidered a miſdemeanor only. ſ. 3
20 Where a ſtatute makes a ſecond offence felony or ſubject to a heavier puniſhment than the firſt, it muſt be after conviction. *Page* 168, 169
21 What ſhall be incidentally implied in every ſtatute which makes an offence felony. 169. ſ. 4 & 5
22 If one commit an offence made felony by ſtatute, and the ſtatute be repealed he cannot be puniſhed for the felony. ſ. 6
23 For miſpriſion of felony. 251

## FELONIES WITHIN CLERGY.

### *Aſſault.*

1 Aſſaulting perſons with intent to tear or ſpoil their clothes, 6 Geo. 1. c. 23. ſ. 11. 238

### *Bridges.*

2 Deſtroying Walton bridge, 20 Geo. 2. c. 22. Hampton Court bridge, 23 Geo. 2. c. 37. ſ. 12. Ribble bridge, 24 Geo. 2. c. 36. ſ. 34. Sandwich bridge, 28 Geo. 2. c. 55. Wye bridge, 29 Geo. 2. c. 73. Black Friars bridge, 29 Geo. 2. c. 86. Jeremy Ferry's bridge, 30 Geo. 2. c. 59. Old Brentford bridge, 30 Geo. 2. c. 63. ſ. 19. 31 Geo. 2. c. 46. Trent bridge, 31 Geo. 2. c. 59. 193, 194

### *Bail.*

3 Perſonating bail before commiſſioners in the country, 4 W. & M. c. 4. ſ. 4. 178. ſ. 9. 179. ſ. 11

### *Common.*

4 Deſtroying fences ſet up for incloſing common or waſte land, by act of parliament, 9 Geo. 3. c. 29. ſ. 3. 192 ſ. 4

### *Copper.*

5 Removing copper, braſs, &c. from any dwelling houſe, &c. with intent to ſteal; aſſiſting, or buying ſuch goods, knowing them to be ſtolen, 21 Geo. 3. c. 68. 218 ſ. 14

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6 Deſtroying granaries, the ſecond offence, 11 Geo. 2. c. 22. *Page* 143

*Cuſtoms.*

7 Aſſembling armed to the number of three for running goods, 9 Geo. 2. c. 35. ſ. 10. 227, app. 6
8 Perſons deemed ſmugglers according to the deſcription of 9 Geo. 2. c. 35. ſ. 13. *ibid.*
9 Harbouring offenders againſt the laws of cuſtoms, 19 Geo. 2. c. 34. ſ. 3. 24 Geo. ſeſſ. 2. c. 47. ſ. 12. 231

*Dikes.*

10 Cutting them in marſh land, 22 H. 8. c. 11. 2 & 3 Ph. & M. c. 19. 198

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11 Fiſhing in another's pond with intent to ſteal, 31 H. 8. c. 2. 221 in margin.

*Foreign State.*

12 Serving it without taking oath of allegiance, 3 Ja. 1. c. 4. ſ. 18. 74 ſ. 15

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13 Of bank bills, 11 Geo. 1. c. 9. ſ. 6. 205 ſ. 2
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15 Forcing priſoner to become approver, 14 Ed. 3. c. 10. 194 c. 51

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16 Stealing one, 37 Ed. 3. c. 19. 143 ſ. 23

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17 In the night or in diſguiſe, 1 H. 7. c. 7. 186

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19 Receiving jewels and plate, knowing them to have been ſtolen, 10 Geo. 3. c. 48. 235 ſ. 9

*Iron Bars.*

20 Stealing them, fixed to buildings, 4 Geo. 2. c. 32. 218 ſ. 13

*King.*

21 Conſpiring, or imagining to deſtroy him, or any of his council, 3 H. 7. c. 14. 74 ſ. 13

*Labourers.*

22 Confederacies of maſons to prevent the Statutes of labourers, 3 H. 6. c. 1.

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23 Entering mines of black lead with intent to ſteal, 25 Geo. 2. c. 10. ſ. 1. 218 ſ. 12
24 Stealing it fixed to buildings, 4 Geo. 2. c. 32. 218 ſ. 13
25 Receivers of lead ſo ſtolen. *id.* ſ. 3.
26 Buying or receiving lead, iron, copper, &c. knowing it to be ſtolen, 29 Geo. 2. c. 30. 232 ſ. 2

*Locks.*

27 Perſons guilty of demoliſhing them, or of ſluices or floodgates, 1 Geo. 2. ſt. 2. c. 19. 199 ſ. 2.

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28 And after cutting out tongues or putting out eyes, 5 H. 4. c. 5. 176 ſ. 7

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29 Solemnizing it clandeſtinely, 26 Geo. 2. c. 33. ſ. 8. 173 ſ. 11

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30 Tranſportation of ſilver, or importation of falſe money, 17 Ed. 3. *Page* 70. ſ. 1

31 Blanching copper or putting off counterfeit money, 8 & 9 W. 3. c. 26. ſ. 6. 71. ſ. 2

32 Counterfeiting copper halfpence or farthings, 11 Geo. 3. c. 40. ſ. 1. 72. ſ. 5

33 Receiving or paying counterfeit copper money, *ibid.*

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34 In mariners hindering commanders from fighting, 22 & 23 Car. 2. c. 11. ſ. 9. 185. ſ. 10

35 Officer or ſoldier upon or beyond the ſea raiſing mutiny, diſobeying or reſiſting ſuperior, 2 & 3 Ann. c. 20. ſ. 35.

*Palaces.*

36 Entering into king's houſe, with intent to ſteal, 33 H. 8. c. 12. ſ. 27.

*Pewter.*

37 Buying or receiving pewter pots, or other pewter, knowing them to be ſtolen, 21 Geo. 3. c. 69. 235. ſ. 10

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38 Frauds reſpecting the poſtage of letters, 5 Geo. 3. c. 25. ſ. 19. 7 Geo. 3. c. 50. ſ. 3. 140

*Priſoner.*

39 Aſſiſting one committed for treaſon or felony (except petty larceny) to attempt an eſcape, 16 Geo. 2. c. 31. Bk. 2.

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40 Perſons infected with it going abroad, 1 Jac. 1. c. 31. ſ. 7. 241

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41 By 1 Ja. 1. c. 11. *Page* 174

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42 Withdrawing them, 8 H. 6. c. 12. 177

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44 Stealing furniture from lodgings (if under 12 *d.*) 3 W. & M. c. 9. ſ. 5. 127. ſ. 10

45 Aſſault with intent to rob, 7 Geo. 2. c. 21. ſ. 1. 148

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46 Taking their maſters goods at their death, 33 H. 6. c. 1. *Quere* if in uſe. 197

47 Aſſaulting, &c. Maſter wool-comber or weaver, 12 Geo. 1. c. 34. ſ. 6. 239

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51 Committing frauds in the ſtamp duties on vellum, parchment, paper, and cards, 12 Geo. 3. c. 48.

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52 Buyers or receivers of them, 5 Ann. c. 31. ſ. 5. *Page* 232
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9 Before the fact in procuring any fine, recovery, deed inrolled, ſtatute, recognizance, bail or judgment to be acknowledged in the name of another, 21 Ja. 1. c. 26. 178. ſ. 9
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11 Before the fact in burglary, ſhoplifting, &c. 3 & 4 W. & M. c. 9. 151
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24 Not ſurrendering, or not ſubmitting to be examined, or concealing or imbezzling their eſtates, 5 Geo. 2. c. 30. 202

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40 By 25 H. 8. c. 6. 2 & 3 Ed. 6. c. 29. Revived by 5 El. c. 17. 9. c. 4

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42 Houſes or barns with corn, 23 H. 8. c. 1. 25 H. 8. c. 3. 22 & 23 Car. 2. c. 7. 43 El. c. 13. 9 Geo. 1. c. 22. 166. 324

*Challenge of Jurors.*

43 Challenging above 20, if the indictment be for ſuch offence for which the offender would have been excluded clergy, if convicted by verdict or confeſſion, 25 H. 8. c. 3. 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9.

*Cloth.*

44 Stealing it from the rack or tenters, 22 Car. 2. c. 5. ſ. 3. 146
45 Perſons tranſported for ſtealing cloth, &c. from rack, &c. returning, 15 Geo. 2. c. 27. *ibid.*

*Coals.*

46 Firing collieries, 10 Geo. 2. c. 32. 224

*Corn.*

47 Perſons tranſported for deſtroying granaries, returning, 11 Geo. 2. c. 22. ſ. 2. 143

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FELONIES WITHOUT CLERGY CONTINUED.

*Cottons.*

48 Selling cottons with forged ſtamps, 14 Geo. 3. c. 72. ſ. 10. *Page* 212

*Cumberland.*

49 Forcibly carrying ſubjects out of Cumberland, Northumberland, Weſtmorland, and Durham, and taking or giving black mail, burning corn, &c. 43 El. c. 13. ſ. 2. 200. c. 56

50 Notorious thieves, or ſpoil takers in Northumberland, or Cumberland (or to be tranſported at diſcretion of judge,) 18 Car. 2. c. 3. 202. ſ. 3

*Cuſtoms.*

51 Perſons liable to tranſportation for offences againſt the cuſtoms, offending again, after having taken the benefit of the indemnifying act, 9 Geo. 2. c. 35. ſ. 7. 18 Geo. 2. c. 28. ſ. 7.

52 Perſons convicted of wounding cuſtom-houſe officers, returning from tranſportation, 6 Geo. 1. c. 21. ſ. 35. 9 Geo. 2. c. 35. ſ. 28. 247

53 Shooting at any ſhip belonging to the navy, or in the ſervice of the cuſtoms or exciſe, or ſhooting at or wounding any officer of the navy, cuſtoms, or exciſe, in the exerciſe of his duty, 24 Geo. 3. ſeſſ. 2. c. 47. ſ. 11. 232. ſ. 12

54 Perſons guilty of felony under the ſaid act not ſurrendering on proclamations and notice in the Gazette, id. ſ. 12. 228. ſ. 2

55 Perſons convicted of harbouring ſuch offenders having been ſentenced for tranſportation returning before their time, *id.* ſ. 13. 247

*Deer.*

56 Perſons convicted of ſecond offence in hunting and taking them away, or for coming armed into a foreſt with intent to ſteal them, 16 Geo. 3. c. 30. *Page* 189

*Deeds inrolled.*

57 Acknowledging them in the name of another, 21 Ja. 1. c. 26. 178 ſ. 9

*Fens.*

58 Deſtroying, &c. any of the works in Bedford Level, 27 Geo. 2. c. 19. 200 ſ. 8

*Fines.*

59 Acknowledging them in the name of another, 21 Ja. 1. c. 26. 178 ſ. 9

*Forgeries.*

60 Of deeds on ſecond conviction, 5 El. c. 14. ſ. 7. 340 ſ. 14

61 Teſtimonials of juſtices by ſoldiers or mariners, 39 El. c. 17. ſ. 3. 183

62 Deeds, will, bill of exchange, note, indorſement, or receipt, on firſt conviction, 2 Geo. 2. c. 25. ſ. 1. 210

63 Authorities to transfer ſtock, or perſonating proprietors, 8 Geo. 1. c. 22. 208

64 Extended to funds eſtabliſhed ſince by 31 Geo. 2. c. 22. ſ. 80. 212

65 Order for payment of annuities, or perſonating proprietor, 9 Geo. 1. c. 12. ſ. 4. 9 Geo. 2. c. 34. ſ. 8. 207 ſ. 8

66 New ſtamps or receipts for monies payable on indentures, 8 Ann. c. 9. ſ. 41. 207

67 Hand of accountant-general, regiſter, clerk of report office, or caſhier of bank, 12 Geo. 1. c. 32. ſ. 9. 210 ſ. 15

68 Eaſt India bonds, 12 Geo. 1. c. 32. ſ. 9. *ibid.*

69 South Sea common ſeal, bonds, receipts, warrants for dividends, 9 Ann. c. 21. ſ. 57. 6 Geo. 1. c. 4. ſ. 56. 6 Geo. 1. c. 11. ſ. 50. 12 Geo. 1. c. 32. ſ. 9. 200

70 Mediterranean paſſes, 4 Geo. 2. c. 18. 211


71 Entry

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71 Entry of acknowledgment of bargainor in regiſtry of York, ſecond offence, 8 Geo. 2. c. 6. ſ. 31. *Page* 211 ſ. 19

72 Stamp for marking gold and ſilver, 31 Geo. 2. c. 32. ſ. 15. 208

73 Policy of Royal Exchange and London Aſſurances, 6 Geo. 1. c. 18. ſ. 13. 209

74 Debentures, 5 Geo. 1. c. 14. ſ. 10. 213

75 Marks on leather, 9 Ann. c. 11. ſ. 44. 5 Geo. 1. c. 2. ſ. 9.

76 Marks on linen, 10 Ann. c. 19. ſ. 97. 4 Geo. 3. c. 37. ſ. 26.

77 Regiſter or licence of marriage, 26 Geo. 2. c. 33. ſ. 16. 211 ſ. 20

78 Common ſeal of bank, or bank notes, 8 & 9 W. 3. c. 20. ſ. 36. 11 Geo. 1. c. 9. ſ. 6. 15 Geo. 1. c. 13. ſ. 11. 205

79 Exchequer bills, &c. 7 & 8 W. 3. c. 31. ſ. 78. 9 W. 3. c. 2. ſ. 3. 5 Ann. c. 13. 3 Geo. 1. c. 8. ſ. 40. 6 Geo. 1. c. 4. ſ. 91. 9 Geo. 1. c. 5. ſ. 19. 11 Geo. 1. c. 17. ſ. 6. 30 Geo. 2. c. 3. ſ. 156. 33 Geo. 2. c. 1. ſ. 156, &c. 206 ſ. 7

80 Lottery orders. 209 ſ. 12

81 Stamps, 5 W. & M. c. 21. ſ. 11.—9 & 10 W. 3. c. 25. ſ. 59.—9 Ann. c. 23. ſ. 34.—10 Ann. c. 19. ſ. 115, 163.—10 Ann. c. 26. ſ. 72.—5 Geo. 1. c. 2. ſ. 9.—6 Geo. 1. c. 21. ſ. 60.—29 Geo. 2. c. 12. ſ. 21.—29 Geo. 2. c. 13. ſ. 5.—30 Geo. 2. c. 19. ſ. 27.—32 Geo. 2. c. 35. ſ. 17.—2 Geo. 3. c. 36. ſ. 8.—5 Geo. 3. c. 35. ſ. 6.—5 Geo. 3. c. 46. ſ. 40.—5 Geo. 3. c. 47. ſ. 8.—7 Geo. 3. c. 44. ſ. 5.—16 Geo. 3. c. 34. ſ. 15.—17 Geo. 3. c. 50. ſ. 25.—20 Geo. 3. c. 28.—23 Geo. 3. c. 49. ſ. 20.—23 Geo. 3. c. 58. ſ. 11.—24 Geo. 3. c. 54. ſ. 16.—25 Geo. 3. c. 50. ſ. 19.—25 Geo. 3. c. 55. ſ. 15.—25 Geo. 3. c. 51. ſ. 15.—25 Geo. 3. c. 79. ſ. 17.—25 Geo. 3. c. 48. ſ. 10. *Page* 207 ſ. 9

82 Seamens' tickets, wills, &c. 9 Geo. 3. c. 30. ſ. 6. 212

83 Hand of receiver of preſines, 32 Geo. 2. c. 14. ſ. 9. 213 ſ. 23

FELONIES WITHOUT CLERGY CONTINUED.

84 Acceptance of bills of exchange, or accountable receipts, 7 Geo. 2. c. 22. *Page* 211 ſ. 18.

85 Acceptance of bills of exchange to defraud corporations, 18 Geo. 3. c. 18. *ibid.*

86 Warrant, or order for payment of money or delivery of goods, 7 Geo. 2. c. 22. *ibid.*

*Fuſtian.*

87 Stealing it from bleaching grounds, 4 Geo. 2. c. 16. 18 Geo. 2. c. 27. 146

*Helping to ſtolen Goods on Reward.*

88 In ſome caſes, unleſs the helper apprehends the offender, 4 Geo. 1. c. 11. 237 *app.* 8

*Hops.*

89 In cutting hop-binds, 6 Geo. 2. c. 37. ſ. 6. 238 ſ. 2

*Horſe-ſtealing.*

90 By 37 H. 8. c. 8. ſ. 2. 1 Ed. 6. c. 12. ſ. 10. 2 & 3 Ed. 6. c. 33. 146

*Judgments.*

91 Acknowledging them in the name of another, 21 Ja. 1. c. 26. 178 ſ. 9

*Letter.*

92 Robbing the mails, or ſtealing letters from poſt offices, 5 Geo. 3. c. 25. ſ. 18. 7 Geo. 3. c. 50. ſ. 2. 140

*Letters threatening.*

93 Sending them, or reſcuing ſuch offenders, 27 Geo. 2. c. 15. 225

*Linen.*

94 Stealing it from bleaching grounds, 4 Geo. 2. c. 16. 18 Geo. 2. c. 27. 146

95 Break-

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15 Breaking into ſhop, &c. to ſteal or deſtroy linen yarn or implements, 4 Geo. 3. c. 37. *Page* 239 ſ. 2
16 Or to cut or deſtroy linen or cotton, 22 Geo. 3. c. 40. ſ. 2. 240 ſ. 3

*Maiming.*

17 Any perſon malicioufly lying in wait, 22 & 23 Car. 2. c. 1. 176 ſ. 4

*Marſhes.*

18 Firing engines for draining them, the ſecond offence, 11 Geo. 2. c. 34. 14 Geo. 2. c. 24. 21 Geo. 3. c. 18. 200 ſ. 8

*Mariners.*

99 Wandering without teſtimonial of juſtices, 39 El. c. 17. ſ. 2. 183
100 Departing within the year from the ſervice of thoſe who took them to ſave them from execution, 39 El. c. 17. ſ. 4. 184

*Mills.*

101 Riotous aſſembling and deſtroying Mills, 9 Geo. 3. c. 29. ſ. 1, 2. 309 ſ. 60

*Money.*

102 Uttering falſe monies the third time, &c. 15 Geo. 2. c. 28. ſ. 2, 3. 71 ſ. 4

*Murder.*

103 By 12 H. 7. c. 7. 23 H. 8. c. 1. 25 H. 8. c. 3. 28 H. 8. c. 1. 1 Ed. 6. c. 12. 117

*Mute.*

104 Standing mute, or not anſwering directly, 25 H. 8. c. 3. 1 Ed. 6. c. 12. 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. 1 Ann. c. 9.
105 Perſons arraigned for felony or piracy, and ſtanding mute, ſhall be convicted. 12 Geo. 3. c. 20. 3 (N) 6

FELONIES WITHOUT CLERGY CONTINUED.

*Outlawry.*

106 For offences not within the benefit of clergy. 1 Ed. 6. c. 12. 4 & 5 Ph. & M. c. 4. 8 El. c. 4. 18 El. c. 7. 22 Car. 2. c. 5. 3 & 4 W. & M. c. 9.

*Perjury.*

107 Perſons convicted of wilful and corrupt perjury, eſcaping, breaking priſon, or returning from tranſportation, 2 Geo. 2. c. 25. ſ. 2. *P.* 328

*Pick-pocket.*

108 Taking *clam & ſecrete* from the perſon above the value of 12 *d.* 8 El. c. 4. 150

*Piracy.*

109 By 11 & 12 W. 3. c. 7. 4 Geo. 1. c. 12. 8 Geo. 1. c. 24. 152 c. 7
110 Perſon laying violent hands on his commander, to hinder him from fighting, &c. to ſuffer as pirate, 11 & 12 W. 3. c. 7. ſ. 9. *ibid.*
111 Trading with pirates, 8 Geo. 1. c. 24. 156 ſ. 17

*Plate.*

112 Fraudulent marking of plate or counterfeiting the ſtamp, made felony without clergy, by 31 Geo. 2. c. 32. ſ. 15. altered to tranſportation. 13 Geo. 3. c. 59. 208

*Poiſoning.*

113 Of malice prepenſed, 1 Ed. 6. c. 12. ſ. 13.

*Popiſh Recuſants.*

114 Refuſing to abjure, or not departing the realm within a time limited, or returning without the king's leave, 35 El. c. 1. ſ. 3. and c. 2. ſ. 10.




Prieſts

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*Prieſts and Jeſuits.*

115 They who receive, relieve, or maintain them knowingly, 27 El. c. 2. ſ. 4. Page 76

*Priſoners.*

116 Taking the benefit of inſolvent acts and forſwearing themſelves, 28 Geo. 2. c. 13. ſ. 17. 1 Geo. 3. c. 17. ſ. 26. 204 ſ. 4

117 Refuſing to deliver up their effects, or concealing to the value of 20*l.* 28 Geo. 2. c. 13. ſ. 39. 1 Geo. 3. c. 17. ſ. 46. *ibid.*

118 Perſons tranſported for aſſiſting priſoners to eſcape, and returning, 16 Geo. 2. c. 31. Eſcaping a ſecond time from confinement, to hard labour in lieu of tranſportation, 16 Geo. 3. c. 13. ſ. 15. 245

*Privy Councillors.*

119 They who attempt to kill, or do ſtrike or wound them in the execution of their office, 9 Ann. c. 16. 74 ſ. 14

*Proceſs.*

120 Perſons diſguiſed abetting rioters who oppoſe the execution of proceſs in pretended privileged places, 9 Geo. 1. c. 28. ſ. 3. Bk. 2

*Quarantine.*

121 Not performing it, 7 Geo. 1. c. 3. 8 Geo. 1. c. 8. 1 Geo. 2. c. 13. 6 Geo. 2. c. 34. 26 Geo. 2. c. 6. 241 app. 11

122 Maſter of ſhip offending againſt directions of 26 Geo. 2. c. 6. ſ. 2. 241

123 Concealing the having infected perſons on board, 28 Geo. 2. c. 6. ſ. 3. 242

124 Refuſing to perform quarantine, 26 Geo. 2. c. 6. ſ. 8. 242

125 Sound perſons entering lazaret, and eſcaping before they have performed quarantine, 26 Geo. 2. c. 6. ſ. 10. Page 242

126 Superintendant of quarantine neglecting duty, 26 Geo. 2. c. 6. ſ. 17. *ibid.*

127 Concealing or clandeſtinely conveying letters or goods, 26 Geo. 2. c. 6. ſ. 18. *ibid.*

*Rape.*

128 Carnally knowing woman child under the age of ten years, 18 El. c. 7. ſ. 4. 170 ſ. 4

*Reſcue.*

129 Reſcuing convicts from tranſportation, 6 Geo. 1. c. 23. ſ. 5,

130 Reſcuing any perſon committed for, or found guilty of murder, or going to execution, or during execution, 25 Geo. 2. c. 37. ſ. 9. Bk. 2

131 Perſons tranſported for reſcuing the body of ſuch offenders, after execution from the ſheriff or ſurgeon, &c. and returning, 25 Geo. 2. c. 37. ſ. 10. *ibid.*

*Rebels.*

132 Pardoned and returning from tranſportation, or going into the dominions of France or Spain, 20 Geo. 2. c. 46. ſ. 1. 244 app. 15

133 Perſons aiding them to ſuch purpoſes, 2 Geo. 20. c. 46. ſ. 2.

134 Or holding correſpondence with them, or with perſons employed by them, by letters or otherwiſe, 20 Geo. c. 46. ſ. 3.

*Recognizance.*

135 Acknowledging it in the name of another, 21 Ja. 1. c. 26. 178 ſ. 9.

*Recovery.*

136 Acknowledging it in the name of another, 21 Ja. 1. c. 26. *ibid.*

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FELONIES WITHOUT CLERGY CONTINUED.

*Rioters.*

136 Aſſembled to the number of twelve and continuing together one hour after proclamation, 1 Geo. 1. ſt. 2. c. 5. ſ. 1. *Page* 308
137 Pulling down buildings, 1 Geo. 1. ſt. 2. c. 5. ſ. 4. 308 ſ. 56
138 Or hindering proclamation being made, 1 Geo. 1. ſt. 2. c. 5. ſ. 5. *ibid.*

*Robbery.*

139 Of churches, or ſacrilege, 23 H. 8. c. 1. 25 H. 8. c. 3. 1 Ed. 6. c. 12. 5 & 6 Ed. 6. c. 9 & 10. 151
140 In or near the highway, 23 H. 8. c. 1. 25 H. 8. c. 3. 1 Ed. 6. c. 12. 150
141 In booths or tents in any fair or market, 5 & 6 Ed. 6. c. 9. 151
142 In dwelling houſes, ſhops, warehouſes, coach houſes, or ſtables, 23 H. 8. c. 1. 25 H. 8. c. 3. 1 Ed. 6. c. 12. 5 & 6 Ed. 6. c. 9 & 10. 39 El. c. 15. 3 & 4 W. & M. c. 9. 10 & 11 W. 3. c. 23. 12 Ann. c. 7. *ibid.*
143 On board any veſſel, or on any wharf, to the value of 40s. 24 Geo. 2. c. 45. 146
144 Stealing furniture, &c. from lodgings (if above 12 d. value) 3 & 4 W. & M. c. 9. ſ. 5. 137. ſ. 10
145 Stealing exchequer orders, tallies or other orders intitling perſon to annuity or ſhare in any parliamentary fund, or exchequer bills, bank notes, South Sea bonds, Eaſt India bonds, dividend warrants of bank, South Sea, Eaſt India, or other company, bills of exchange, navy bills, or debentures, goldſmiths notes, or other bonds or warrants, bills or promiſſory notes, &c. is felony the ſame as if the money ſecured by ſuch bonds, &c. had been ſtolen, 2 Geo. 2. c. 25. ſ. 3. *And ſee* 31 *Geo.* 2. c. 22. ſ. 81. 142
146 Offenders ordered to be tranſported for aſſault with intent to rob, breaking gaol or eſcaping, 7 Geo. 2. c. 21. ſ. 2. *Page* 148

*Sacrilege.—See Robbery.*

*Sheep-ſtealing.*

147 By 14 Geo. 2. c. 6. extended to bull, cow, &c. by 15 Geo. 2. c. 34. 180. ſ. 3

*Smuggling.*

148 By 8 Geo. 1. c. 18. 227. ap. 6
149 Aſſembling armed for running of goods, 19 Geo. 2. c. 34. ſ. 1. 227. ap. 6
150 Perſons tranſported for aſſiſting in running goods, and returning, 9 Geo. 2. c. 35. ſ. 10. *ibid.*
151 Perſons convicted of running goods, returning from tranſportation, 8 Geo. 1. c. 18. ſ. 6. *ibid.*

*Sea.*

152 Treaſons, robberies, felonies, murders, and confederacies, done upon the ſea, 28 H. 8. c. 15. ſ. 3. 152

*Seamen.*

153 Perſonating them to receive their pay, 31 Geo. 2. c. 10. ſ. 24. 212. ſ. 22

*Ships.*

154 Deſtroying them wilfully, 22 & 23 Car. 2. c. 11. ſ. 12. 1 Ann. ſt. 2. c. 9. 4 Geo. 1. c. 12. 11 Geo. 1. c. 29. 185. 186

*Shooting.*

155 Shooting at another by 9 Geo. 1. c. 22. 225

*Soldiers.*

156 Departing without licence, 7 H. 7. c. 1. 3 H. 8. c. 5. 2 & 3 Ed. 6. c. 2. ſ. 6. 185. ſ. 8, 9
157 Wandering without teſtimonial from juſtices, 39 El. c. 17. ſ. 2. 184
158 De-

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FELONIES WITHOUT CLERGY CONTINUED.

168 Departing within the year from the ſervice of thoſe who took them to ſave them from execution, 39 El. c. 17. ſ. 4. *Page* 184
159 Inliſting or cauſing others to inliſt in foreign ſervice, 9 Geo. 2. c. 30. 74. ſ. 16
160 Accepting commiſſion from the French king.—Continuing in the French ſervice after 29 September 1757.—Contracting to inliſt in foreign ſervice, 29 Geo. 2. c. 17. 75. 75 ſ. 17

*South Sea Company.*

161 Officer or ſervant embezzling their effects, 24 Geo. 2. c. 11. ſ. 3.

*Stamps.*

162 Counterfeiting ſtamps on ſilks, callicoes, linens, or ſtuffs printed in Great Britain, 13 Geo. 3. c. 56. on printed cottons, 14 Geo. 3. c. 72. ſ. 8. 208
163 On wrought plate, 24 Geo. 3. c. 54. ſ. 16. 208

*Statute.*

164 Acknowledging it in the name of another, 21 Ja. 1. c. 26. 178. ſ. 9

*Stores.*

165 Imbezzling them to the value of 20s. or offending againſt 31 El. c. 4. concerning imbezzlement of ſtores, 22 Car. 2. c. 5. ſ. 3. 75. ſ. 18
166 Burning or otherwiſe deſtroying ſhips of war, buildings in dockyards, &c. or military ſtores, 12 Geo. 3. c. 24. 75. ſ. 19

*Tranſportation.*

167 Felons returning within the time, 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 16 Geo. 3. c. 15. 24 Geo. 3. c. 12. ſ. 11. 244 to 250

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*Turnpikes.*

168 Deſtroying them, or locks, ſluices, or floodgates, or reſcuing ſuch offenders, 8 Geo. 2. c. 20. And ſee 13 Geo. 3. c. 84. ſ. 42. *Page* 198 c. 55
169 Deſtroying toll gates, weighing engines, &c. or reſcuing offenders, 13 Geo. 3. c. 84. ſ. 42. 192. ſ. 5

*Wool and Woollen Manufactures.*

171 Unlawful exporters returning after tranſportation, 4 Geo. 1. c. 11. ſ. 6. 195. c. 52
172 Oppoſing officers of cuſtoms, exciſe, &c. in ſeizing wool, 12 Geo. 2. c. 21. ſ. 26. *ibid.*
173 Deſtroying woollen goods, or rack, or tools, 12 Geo. 1. c. 34. ſ. 7. See Cloth. Bk. 2
*173 Entering by force any houſe with intent to deſtroy any woollen goods or tools uſed for manufacturing, 22 Geo. 3. c. 40. ſ. 1. 239

*Women.*

174 Stealing them, and marrying or defiling them, having lands or goods, or being heirs apparent, 39 El. c. 9. 171
175 After conviction of an offence that was within clergy, ouſted of it on conviction of any other felony, 3 & 4 W. & M. c. 9.

*Wreck.*

176 Making holes in ſhip in diſtreſs, or ſtealing pump, 12 Ann. ſt. 2. c. 18. ſ. 5. 219
177 Plundering ſhipwrecked goods, or beating, &c. with intent to kill, or otherwiſe obſtructing the eſcape of any perſon from ſuch ſhip, or putting out falſe lights with intent to bring any ſhip into danger, 26 Geo. 2. c. 19. 220

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FELONIOUS HOMICIDE.--*Murder. Manſlaughter.*

1 There are only two ſpecies of felonious homicide, *viz.* murder and manſlaughter. *Page* 115
2 Theſe are either with or without malice. *ibid.* c. 30
3 That without malice is called manſlaughter, and ſometimes chance medley. *ibid.* ſ. 1
4 This is ſuch a killing as happens upupon a ſudden quarrel; or in the commiſſion of an unlawful act, without any deliberate intention of doing miſchief. *ibid.*
5 There can be no acceſſaries to manſlaughter, becauſe it muſt be done without premeditation. 115
6 Felonious homicide, with malice, is either murder or petit treaſon. 117 c. 31

FELO DE SE.

1 Homicide may be againſt a man's own life. 102 c. 27
2 To commit the crime of *ſelf-murder*, the offender muſt be of the age of diſcretion, and *compos mentis*. 102 ſ. 1
3 The common concluſion that a *ſelf murderer* muſt *ipſo facto* be *non compos mentis*, as being contrary to nature and all ſenſe and reaſon, is abſurd. ſ. 2
4 Its repugnancy to the duties of humanity rather aggravates, than exculpates the offence. ſ. 3
5 The murder of a child or parent is as much againſt reaſon and nature. *ibid.*
6 The abhorrence of the law reſpecting this crime. 102, 103
7 One who maliciouſly attempts the death of another, and in purſuance thereof, unwillingly kills himſelf, is *felo de ſe*. 103
8 Wherever death is cauſed by an act done with a murderous intent, it makes the offender a murderer. *ibid.*
9 This rule illuſtrated. *ibid.* ſ. 5
10 To kill another by deſire, is murder, and the perſon killed is not *felo de ſe*. ſ. 6
11 But where two perſons take poiſon, and one ſurvive, he who purchaſed the poiſon is not a murderer, though the one who dies is a *felo de ſe*. *P.* 103 ſ. 6
12 A *felo de ſe* ſhall forfeit all chattels, real or perſonal, on his own right; all chattels poſſeſſed jointly with his wife or in her right; and all bonds, &c. perſonal things in action which belong to himſelf—and perhaps entire chattels in poſſeſſion to which he is jointly entitled with another, *except merchandize*, but he ſhall forfeit only a moiety of joint chattels which may be ſevered, and nothing as executor or adminiſtrator. ſ. 7
13 The blood of a *felo de ſe* is not corrupted, nor his lands of inheritance forfeited; nor his wife barred of dower. ſ. 8
14 No part of the perſonal eſtate is veſted in the king before inquiſition found. 104. ſ. 9
15 But after inquiſition, the forfeiture relates back to the time the wound was given. ſ. 10
16 Inquiſition ought to be *ſuper viſum corporis* which cannot be traverſed. ſ. 11
17 If the body cannot be found, juſtices of peace or the king's bench, if in the county where it ſits, may take inquiſition, and this inquiſition may be traverſed. ſ. 12
18 How ſuch inquiſitions ought to ſtate the facts. 13, 14
19 They are in the nature of indictments. *ibid.*
20 If they be full in ſubſtance, defect of form may be amended. ſ. 15
*Vide Coroner. Corruption of Blood. Dower. Forfeiture. Inquiſition. Pardon. Year and Day.*

FEME COVERT.

1 A feme covert, favoured in reſpect of her huſband's authority over her, ſhall not be puniſhed for committing a bare theft in company with or by coercion of her huſband. 3, 4
2 This exemption extends to burglary and perhaps to robbery. 4 (N) 8

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3 A feme covert ſhall not be deemed an acceſſary to a felony for receiving her huſband who has been guilty of it. *Page* 4. ſ. 10
4 Nor ſhall ſhe be deemed a principal for ſuch reception, if the huſband has been guilty of treaſon. (N) 9
5 Neither is ſhe affected by receiving, jointly with her huſband, any other offender. *ibid.*
6 She cannot be admitted as a witneſs even *collaterally* to diſcover her huſband's guilt. *ibid.*
7 But if a *feme covert* commit a theft of her own voluntary act, or by the *bare* command of her huſband (*quere*) or be guilty of treaſon, murder, or (*quere*) robbery, in company with or by coercion of her huſband ſhe is puniſhable. 4. ſ. 11
8 Or if ſhe receive ſtolen goods without her huſband's privity, or if he, knowing it, diſclaims her, ſhe may be puniſhed as acceſſary. *ibid.* (N) 10
9 A wife may be indicted together and condemned to the pillory with her huſband for keeping a bawdy houſe 4. ſ. 12
10 Therefore an action will lie for ſaying ſhe keeps a bawdy houſe. 357 (N) 1
11 Generally a feme covert ſhall anſwer for any offence not capital. 4. ſ. 13
12 If the offence be of a nature which ſhe may commit alone, the huſband need not be joined in the indictment, provided he is no way privy. *ibid.*
13 If a woman bring a falſe appeal of death, ſhe ſhall be impriſoned alone. 4, 5
14 But for a forfeiture, the huſband may be made liable, by joining him in the proſecution. 5
15 Several offences for which a woman may be indicted alone, enumerated. 5. N) 11
16 A *feme covert* is within the 1 & 23 of Eliz. impoſing penalties on abſence from church; and an information lies againſt the huſband. 22. ſ. 11 (N)
17 It is very doubtful whether the conviction of a *feme covert* upon an indictment can be pleaded to an information againſt her and her huſband. 27
18 The huſband is not liable to pay a forfeiture recovered againſt his wife upon an indictment. *Page* 27

## FENCES.

1 The offence of levying dykes by approvers. 191, c. 50
2 By 6 Geo. 1. c. 16. to deſtroy fences round woods or plantations, is three months correction and the pariſh liable to the damage. 192. ſ. 2
3 By 16 Geo. 3. c. 30. to deſtroy the fences of deer parks, is tranſportation. *ibid.* ſ. 3
4 By 9 Geo. 3. c. 29. to deſtroy fences of waſte lands incloſed, tranſportation. *ibid.* ſ. 4
5 By 4 Geo. 2. c. 32. to break with intent to ſteal any lead, iron bar, paliſade, or rail fixed to a dwelling houſe or its appurtenances or any other buildings, tranſportation. 218. ſ 13
6 A church is within the words of this act. *ibid.* (N) 1

## FERÆ NATURÆ.

1 Larceny may be committed of animals *feræ naturæ* if they be fit for food and reduced to tameneſs; and known by the offender to be ſo. 144. ſ. 26
2 But otherwiſe, larceny cannot be committed of them, becauſe animals *feræ naturæ* are goods whereof no particular perſon has a property. 143 ſ. 24

## FERN.—*Vide Burning.*

1 By 4 & 5 W. & M. c. 23. (for preſerving the red and black game) no perſons ſhall burn on the mountains, &c. any fern, &c. between 2d. Feb. and 24th. June, on pain of impriſonment. 224 (N)
2 By 28 Geo. 2. c. 19. (for preſerving deer and game) no perſon without right or legal licence, ſhall burn, &c. any furze, furze, or fern upon any

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foreſt or chaſe, on pain of from 40 s. to 5 l. *Page* 224

FIDELITY.—*Vide Oaths.*

FIHGHTING.—*Vide Duel. Murder. Affray. Riot. Piracy.*

FIRE.—*Vide Arſon. Burning. Incendiaries.*

1 By 6 Ann c. 31.—12 Geo. 3. c. 73. ſ. 35.—14 Geo. 3. c. 78. ſ. 84. if any menial or other ſervant, through negligence ſhall fire or cauſe to be fired any dwelling houſe or out-houſe they ſhall forfeit 100 l. on conviction by one witneſs, &c. or ſuffer eighteen months impriſonment. 197. c. 53

F I R.—*Vide Trees.*

FIREWORKS.

1 By 9 & 10 W. 3. c. 7. to make, ſell or expoſe to ſale any fireworks, or any caſes, moulds, or implements for making them, incurs a penalty of 5 l. 363
2 If any perſon ſhall, or ſhall ſuffer fire works to be *let off* in or from their houſe in any public ſtreet or highway, they ſhall forfeit 20 s. 364
3 And every ſuch offence ſhall be adjudged a common nuiſance. *ibid.*

FIRE ENGINE.

1 By 9 Geo. 3. c. 29. to damage or deſtroy any fire engine belonging to any colliery, on conviction within eighteen months, incurs a penalty of tranſportation. 238. ſ. 4

F I S H.

By 5 Eliz. c. 21. to deſtroy fiſh in ponds, &c. incurs three months impriſonment, ſecurity for ſeven years, and compenſation to the party grieved. *Page* 221
2 By 4 & 5 W. 3. c. 23. no perſons, except fiſhermen and the owners of fiſheries ſhall keep nets, &c. ſ. 2
3 By 22 & 23 Car. 2. c. 25. no perſon ſhall uſe any net, &c. in the fiſhery of another without the conſent of the owner. ſ. 3
4 By 9 Geo. 1. c. 22. whoever, *armed and diſguiſed* ſhall ſteal fiſh, or reſcue an offender, ſhall ſuffer without benefit of clergy. 222 ſ. 4
5 By 5 Geo. 3. c. 14. whoever ſhall enter into any incloſed place belonging to a dwelling houſe where a ſtream of water ſhall run, and ſteal or deſtroy fiſh, or buy them, &c. ſhall be tranſported for ſeven years. ſ. 5
6 And to ſteal or deſtroy fiſh, in any incloſed ground being private property incurs a penalty of 5 *l.* on conviction in a ſummary way. ſ. 6
7 Lord Mansfield's opinion upon this act. 223. (N)
8 By 3 Ed. 1. c. 20. treſpaſſers in fiſh ponds ſhall ſuffer three months impriſonment, &c. 516. ſ 92
9 No ſalmon unleſs eighteen inches from the eye to the tail, or the ſpawn of ſalmon ſhall be deſtroyed in certain rivers, &c. ſ. 93
10 No ſalmon under 6 lb. weight ſhall be ſent to London. ſ. 94
11 No ſalmon to be taken from April to Midſummer. ſ. 95
12 No nets called ſtalkers ſhall be uſed. ſ. 96
13 By 17 Rich. 2. c. 19. The lord mayor of London ſhall preſerve the fiſh in the Thames and Medway. ſ. 97
14 What *ſizes* other fiſh ſhall be of before they are taken. 519 ſ. 98
15 Of the kind of nets which may be uſed. *ibid.*
16 How offendersmay be puniſhed. 518
17 No perſon ſhall take or have poſſeſſion of any unſizeable fiſh, or fiſh out of ſeaſon, or any ſmelt, not 5 inches long. ſ. 99
18 No perſons ſhall faſten nets over rivers to ſtand both day and night. 100

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19 The penalty and rules for fiſhing on the coaſts of the ſea. *Page* 101, 102
20 No fiſh under certain ſizes ſhall be ſold except the ſame be ſold for or under 6 d. a pound. 103, 104
21 Within what time lobſters ſhall be taken. 105
22 Rules reſpecting the importation of fiſh. 520

## FINGER.

1 Cutting off, or diſabling, or weakening a man's hand or finger, is eſteemed *a maim*. 175 ſ. 2
2 It is puniſhable with fine and impriſonment. 176
3 By 22 & 23 Car. 2. c. 1. to diſable any limb or member, with intention to maim and diſfigure, is death without clergy. ſ. 4

## FLEET.

1 By 22 Geo. 2. c. 33. every perſon in the *fleet* who ſhall waſte, embezzle, or not carefully preſerve any powder, ſhot, ammunition, or other ſtores and proviſions, their abettors, buyers and receivers, being perſons ſubject to naval diſcipline ſhall be puniſhed at the diſcretion of a court martial. 76 ſ. 20
2 And every perſon in the fleet who ſhall burn or ſet fire to any magazine, or ſtore of powder, or ſhip-boat, &c. &c. or the tackle thereto belonging, not then appertaining to an enemy, pirate, or rebel, on conviction by court martial, ſhall ſuffer death. *ibid.*
3 Whoever, in his majeſty's fleet, ſhall be guilty of profane curſing and ſwearing, they ſhall be puniſhed by the diſcretion of a court martial. 13
4 A court martial alſo ſhall condemn any perſon in the fleet guilty of ſodomy, to death. 10

## FLOUR.—*Vide Bread.*

## FLOUNDERS.—*Vide Fiſh.*

## FOOTWAY—*Vide Nuiſance. Highway.*

1 There are three kinds of ways, 1ſt. a footway; 2d. a pack and prime way, which is both a horſe and a footway; 3d. a cart way. *Page* 366
2 A nuiſance in a footway is puniſhable at the leet. *ibid.*

## FORCE.—*Vide Robbery. Black Act.*

1 To withſtand the authority of the king, in a violent and forcible manner, is an overt act of levying war. 54 ſ. 23
2 What degree of force a man muſt endeavour to reſiſt to excuſe him from the guilt of treaſon. *ibid.* (N) 3
3 By 25 Geo. 2. c. 10. by force to enter into any black lead mine, with intent to take and carry away any cawke, &c. is puniſhable by whipping or tranſportation. 218
4 Forcibly to enter any place with intent to deſtroy the looms, &c. in the linen, woollen, cotton, and ſilk, &c. manufacture, is felony without clergy. 239, 240

## FORCIBLE ENTRY AND DETAINER.

1 By common law, a man, within proper time, might regain *his poſſeſſion* by force; and he may now juſtify the retaking of his *goods*, wrongfully withheld. 274 c. 64
2 But ſuch a repoſſeſſion of *lands* is now reſtrained. ſ. 2
3 On an action for a forcible entry, if the defendant proves his title to the lands, &c. he ſhall not pay damages to the plaintiff for *the force*; but he may be puniſhed as a diſturber of the public peace. ſ. 3
4 An indictment lies at common law for a forcible entry; but the actual force muſt be charged. *ibid.* (N) 1
5 By 2 Ed. 3. if arms which ſtrike a terror, are uſed in making the entry, the

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the perſons authorized by that ſtatute (*Vide* page 266) may ſeize the arms and impriſon the offenders; but they cannot reſtate the party injured to his poſſeſſion. *Page* 275 ſ. 5
6 By 5 Rich. 2. c. 7. whoever ſhall make entry into lands, with *ſtrong hand*, and with multitude of people, ſhall ſuffer impriſonment. *ibid.* ſ. 6
7 By 5 Rich. 2. c. 2. Juſtices, with the power of the county, may commit ſuch as hold forcibly after an entry made. ſ. 7
8 And he ſhall make a record of the fact, which is not traverſable, becauſe he acts not as a miniſter but as a judge. ſ. 8
9 He may alſo aſſeſs the fine for the offence. *ibid.*
10 But the commitment muſt be upon *a view* of the fact, or for want of finding ſufficient ſureties. *ibid.*
11 If the party traverſe the entry, or the force, or plead three years poſſeſſion, the juſtice may ſummon a jury and try the traverſe. *ibid.*
12 By 18 Hen. 6. c. 9. juſtices are empowered to examine the offence, and put the party intitled into full poſſeſſion. ſ. 9 & 10
13 For which purpoſe they may direct the ſheriff to impannel a jury, each having 40*s.* a-year. 277 ſ. 11
14 Penalty on jurors or ſheriff neglecting their duty. *ibid.*
15 This power extended to all magiſtrates. ſ. 12
16 But this power ſhall not extend to diſpoſſeſs thoſe who have had poſſeſſion for three years. ſ. 13
17 By 31 Eliz. c. 11. this ſecurity confirmed, &c. the party may alledge the three years peaceable occupation in bar of reſtitution. But the fact, on being traverſed, may be tried by the juſtice, who may award coſts, &c. 278
18 If a leſſee or copyholder be ouſted, and the leſſor, or lord, diſſeized, reſtitution to the leſſee, or copyholder, is a reſeiſin of the freehold. ſ. 15
19 By 21 Jac. 1. c. 15. the court may grant reſtitution to termors, copyholders, tenants by *elegit*, ſtatute merchant and ſtaple. *Page* 278 ſ. 16
20 *Quære*, If a tenant by the verge be within the ſtatute.
21 A leſſor who ejects his leſſee, and is then forcibly put out of poſſeſſion, is not within any of the ſtatutes. 279
22 But in either of the laſt caſes, the juſtice, may remove the force and commit the offender. ſ. 18
23 What ſhall be eſteemed an entry. ſ. 19
24 The bare treſpaſs by a pretender to the lands, although armed, &c. unleſs he actually claim by circumſtances of force and terror is not an entry. ſ. 20
25 Aiders are principal offenders, although they do not actually enter. ſ. 22
26 One who continues forcibly, under a defeaſable title againſt him who has a right of entry, is within the ſtatutes. 280
27 But not one who barely agrees to a forcible entry, made to his uſe. ſ. 24
28 What entry is forcible. ſ. 25
29 It muſt be with actual *violence and terror*; not ſuch as the law implies in treſpaſs. ſ. 26
30 What degree of *violence* is neceſſary. *ibid.*
31 What circumſtances will amount to *terror*. 281
32 What DETAINER ſhall be adjudged forcible. ſ. 30
33 A forcible entry or detainer may be committed upon eccleſiaſtical poſſeſſions, as well as upon temporal, or incorporeal hereditaments, for which entry will lie; but not upon a way or eaſement. 282
34 Who may be guilty of this offence. ſ. 32
35 What ought to be the form of a record, upon the ſtatutes of forcible entry. ſ. 36 to p. 287 ſ. 44
36 Of what kind of poſſeſſion reſtitution is to be awarded. *ibid.* ſ. 45
37 To whom and in what manner ſuch reſtitution ought to be made. 288 ſ. 46
38 By whom and in what manner ſuch reſtitution may be awarded and given. ſ. 49



39 How

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39 How reſtitution ſhould be barred by a continuance of poſſeſſion for three years. *Page* 289 ſ. 53
40 For what other cauſes ſuch reſtitution may be ſtayed. 291 ſ. 59
41 How ſuch a reſtitution may be ſuperſeded before it is executed. 292 ſ. 61
42 How ſuch a reſtitution may be ſet aſide after it is executed. ſ. 63

## FORCIBLE MARRIAGE.

1 By 3 Hen. 7. c. 2. whoever ſhall take a maid, widow, or wife, againſt her will, their abettors, procurers, and knowing receivers, ſhall be reputed principal felons. 171 c. 42
2 By 39 Eliz. c. 9. all principals, or procurers, or acceſſaries, before ſuch offence, are excluded from clergy. ſ. 2
3 The indictment muſt ſet forth that the woman had lands, or goods, or was heir apparent, and alſo that ſhe was married or defiled. ſ. 3
4 So alſo it ought to ſtate, that the taking was for lucre. 172 ſ. 4
5 If a ſubſequent force is uſed, it is immaterial whether the original taking was voluntary or not. ſ. 5
6 Receivers are not principals unleſs they receive the woman; but a reception of the man only will make an acceſſary after the fact. ſ. 7
7 A ſubſequent conſent will not purge the offence, if the original taking be forcible. ſ. 6
8 *Privies*, who are no way *parties*, are not within the ſtatute. ſ. 8
9 A woman taken in one county and married in another, the offender may be tried in the laſt county. ſ. 9
10 A woman forcibly taken, may give evidence againſt the offender, although ſhe be married to him. (N) 5

## FORDS.—*Vide Highways.*

## FORE-TEETH.

1 It is ſaid that ſtriking out a man's fore teeth, ſhall be puniſhed by fine and impriſonment, as a *maim*, becauſe he is rendered thereby leſs able, in fighting, to *annoy* his adverſary. *Page* 175 c. 44

## FOREIGN.—*Vide Coin.*

1 What places ſhall be conſidered as foreign. 65 ſ. 67

## FOREIGN EDUCATION. — *Vide Education.*

## FOREIGN PRINCE.—*Enliſting.*

1. By 3 Jac. 1. c. 4. whoever ſhall go out of the realm, and, or to, ſerve a foreign prince or ſtate, not having before taken the oath of obedience, ſhall ſuffer as a felon. 74 ſ. 15
2 And if any gentleman, or officer, ſhall do ſo, without being bound by two ſureties, not to be reconciled to the ſee of Rome, or enter into any conſpiracy againſt the king, he ſhall ſuffer as a felon. *ibid.*
3 By 9 Geo. 2. c. 30. whoever ſhall enliſt himſelf, or procure another to enliſt himſelf, or to go abroad, or on board of ſhip, with intent to enliſt himſelf in the ſervice of a foreign prince, without licence, ſhall ſuffer death without clergy. ſ. 16
4 By 29 Geo. 2. c. 17. if any ſubject ſhall accept of any commiſſion in the ſervice of the French king, without licence, ſhall ſuffer death without clergy. 75 ſ. 17
5 Whoever ſhall enter into the Scotch brigade, in the ſervice of the States General, and ſhall not, within ſix months from the date of his commiſſion, take, and ſubſcribe, the oaths of allegiance and abjuration, and tranſmit a certificate thereof, to the ſecretary at war, ſhall forfeit 500*l.* half to the king, and half to the proſecutor. *ibid.*
6 Summoning a man to appear and defend himſelf, before a foreign prince, was antiently high treaſon. 40

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7 And writing letters to a foreign prince, inviting him to invade the realm, is now high treaſon. *Page* 51
8 Soliciting a foreign prince, in amity with the crown, to invade the realm, is an overt act of *the intention* to levy war, and may be laid *as an overt act of compaſſing the king's death.* 56 (N) 7
9 It is ſo high an offence to prefer the the intereſt of a foreign prince, that it is criminal to do any thing which may incline a man ſo to do. 91 ſ. 3

FORESTALLING.—*Vide Engroſſing.*

## FORFEITURE.

1 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. 5
2 An offender executed by virtue of the writ *de hæretico comburendo*, forfeits neither land nor goods. 7 ſ. 10
3 The limitation of a forfeiture to the crown, in a ſtatute, is mere ſurplus. 26 ſ. 33
4 Whether a forfeiture is ſaved by the death of the party within the time limited for the payment of it. 14 ſ. 6
5 What ſhall be forfeited by *ſilo de ſe.* 103 ſ. 7
6 The forfeiture is ſaved by a pardon before inquiſition found. 104
7 After inquiſition, the forfeiture ſhall relate back to the time the mortal wound was given. *ibid.*
8 Nothing ſhall be forfeited as a deodand unleſs the party die within a year and a day. 101 ſ. 7
9 But if he die within the time, the forfeiture ſhall relate back to the time of the wound. *ibid.*

## FORGERY.

1 Forgery is either by the common law or ſtatute. 335. c. 70
2 At common law, it conſiſts in falſly and fraudulently making or altering any matter *of record*; or any other *authentic* matter of *a public nature*; as a pariſh regiſter, any deed, or will. *Page* 335. c. 70. ſ. 1
3 The puniſhment is fine, impriſonment, and any corporal puniſhment. *ibid.*
4 If a man make a feoffment to one, and afterwards make a feoffment to another of the ſame lands, of *a date prior to the firſt*, it is forgery. 336
5 So alſo if he had paſſed only an equitable intereſt. *ibid.*
6 If a perſon, in drawing the will of another, inſert legacies of his own head, it is forgery. *ibid.*
7 If one finding anothers name at the bottom of a letter, and cauſes the writing to be cut off and a general releaſe to be written over the name, and then takes off the ſeal and fixes it to the releaſe, it is forgery. *ibid.*
8 To inſert in an indictment the names of thoſe againſt whom in truth it was not found, is forgery. *ibid.*
9 So alſo to make any fraudulent alteration of the form of a true deed in a material part of it. *ibid.*
10 As by making a leaſe of the manor of *Dale* appear to be a leaſe of the manor of *Sale* by changing the D into S. *ibid.*
11 Or by making a bond for 500 l. appear to be for 5000 l. by an additional cypher. *ibid.*
12 Sir Edward Coke's opinion that a deed ſo altered is rather *falſe* than *forged*, controverted and denied to be law. *ibid.*
13 For forgery does not ſo much conſiſt in counterfeiting the hand and ſeal, as in endeavouring to give an appearance of truth to a mere deceit and falſity; and by force of ſuch falſity to give it an operation which in juſtice it ought not to have. 337
14 But a man who writes a deed in another's name and ſeals it in his preſence, and *by his command* is not guilty of this offence. *ibid.* ſ. 3
15 Neither ſhall an obligee be puniſhed *for forgery* who eraſes the word *heirs* and inſerts *marcis*; for it is alone prejudicial to himſelf. ſ. 4

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16 But if it ſhould appear that this alteration was to prejudice a third perſon it is forgery; and otherwiſe it is *a miſdemeanor*. *Page* 337. ſ. 4

17 To write a will *officiouſly* is not forgery; although the teſtator becomes *non compos* before it is brought to him; for it is not writing without privity; but giving an inſtrument or falſe appearance, that conſtitutes forgery. ſ. 5

18 Non feaſance, as by leaving a legacy out of a will, is not forgery. ſ. 6

19 But perhaps otherwiſe if the omiſſion of one bequeſt cauſe a material alteration in the limitation of a bequeſt to another. *ibid.*

20 But in this caſe the firſt enquiry ſhould be, with what intention the omiſſion was made. *ibid.*

21 It is not material whether the forged inſtrument be made in ſuch a manner that if it were in truth what it is counterfeited for, it would be of validity or not. 338

22 All matters of record, from their high public importance, may become the ſubjects of forgery. *ibid.* ſ. 8

23 So alſo may a privy ſeal, a licence from the *exchequer* to compound a debt, a certificate of holy orders, and a protection from a parliament man. ſ. 9

24 It is unqueſtionable that a man may be guilty at common law by forging *a deed*; and moſt probably by forging *a will*, but this is not ſettled. ſ. 10

25 It is laid down generally that the counterfeiting other writings of an inferior nature is not properly forgery. ſ. 11

26 As an order on a tenant to receive rent. *ibid.*

27 But they are puniſhable as cheats. *ibid.*

28 The diſtinction is that, the counterfeiting of writings of an *authentic public nature* is in itſelf criminal whether any third perſon be actually injured thereby or not; but that the counterfeiting of other writings of an inferior and *private nature* is no crime, unleſs ſome one receive a prejudice thereby. 339

29 OF FORGERY BY STATUTE. *Page* 339 ſ. 12

30 By 5 Eliz. c. 14. whoever ſhall falſely forge any deed, charter or writing ſealed, court roll, or the will of any perſon in writing to the intent that the eſtate, or freehold, or inheritance, to any lands, tenements, or hereditaments, freehold, or copyhold, or the right, title, or intereſt of any perſon therein, ſhall be moleſted, &c. or ſhall knowingly utter the ſame with the like intent, on conviction, by action of damages to the party grieved, ſhall pay double coſts and damages, be ſet in the pillory, have his ears cut off, his noſtrils ſlit and *ſeared*; forfeit all the profits of his lands, and ſuffer perpetual impriſonment. 339, 340

31 But the uttering ſhall not extend to any attorney, lawyer, or counſellor, who ſhews ſuch deed in evidence for his client. 339

32 And if ſuch forgery be of any charter, deed, or writing, with intent to claim any eſtate or intereſt for a term of years in any premiſes not being copyhold—or any annuity in fee-ſimple, fee tail, or for term of life or years—or if ſuch forgery be of any obligation, bill obligatory, acquittance, releaſe or diſcharge of any debt, account, &c. of any thing perſonal, the offender ſhall pay double damages, &c. and be ſet on the pillory as aforeſaid, have one of his ears cut off, and ſuffer impriſonment for one year, &c. 340

33 And whoever ſhall be convicted of any of the ſaid offences a ſecond time, he ſhall be guilty of felony without benefit of clergy. *ibid.* ſ. 14

34 But this conviction ſhall not corrupt the blood or bar the deſcent of lands, or dower, nor extend to the ſealing, &c. of ſuch inſtruments in the ſpiritual courts. *ibid.* 341

35 All juſtices of oyer and terminer and aſſize have juriſdiction over this offence. ſ. 15

36 A falſe cuſtomary of a copyhold manor is within the firſt branch of this act. 342, ſ. 17

37 So

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37 So alſo is a leaſe for years or a grant of a rent charge for years in the name of one who is ſeized of a freehold or inheritance. *Page* 341 ſ. 18

38 The ſecond branch of the act means only ſuch forgeries as relate to an eſtate or intereſt in *eſſe* before. 341. ſ. 18

39 A will of one poſſeſſed of ſuch eſtate mentioning a bequeſt thereof is within the ſecond branch, although the wills are not mentioned. ſ. 19

40 The forgery of a leaſe of lands in Ireland is not at all within the ſtatute. ſ. 20

41 Nor is *a deed* containing a gift of mere perſonal chattels. 342, ſ. 21

42 But a ſtatute merchant, or a recognizance in nature of ſtatute ſtaple, are within the meaning of the word *obligation*—But a ſtatute ſtaple itſelf is not, for it does not require a ſeal. ſ. 22

43 To publiſh a deed, after *information* of its falſity, is an uttering within the act. ſ. 23

44 The double damages (*Vide Supra.* No.) ſhall be governed by the penalty and not by the true debt appearing in the condition. ſ. 24

45 A ſecond conviction for a forgery of a different nature from the firſt, will make the offender guilty of the felony. ſ. 25

46 The proſecution muſt ſtrictly purſue the words of the ſtatute. ſ. 26

47 But an indictment ſetting forth that the writing was indented without adding it was ſealed is ſufficient. *ibid.*

48 And *ſuper caput ſuum proprium* is a good *legal* tranſlation of the words "upon his own head." *ibid.*

49 A verdict finding *de tranſgreſſione & forgeria, predictus prout ſuperius indictamento ſupponitur* is ſufficient. 343

50 But the legiſlature have inflicted *death*, in the firſt inſtance, on the crime of forgery in the following caſes. *ibid.* (N)

51 By 8 & 9 Will. 3. c. 20.—To forge the *common ſeal* of the bank of England—or any *ſealed* bank bill in the name of the directors—or any bank note whatſoever ſigned for them—or to eraſe the indorſement on any bank bill or note. *Page* 204, 205

52 And to efface *the red ink mark* uſually made upon them when paid, is *eraſing* an indorſement within this act. *ibid* (N)

53 So alſo to alter the amount of the ſum is held to be forgery. *ibid.*

54 And the caſhier *whoſe name is ſigned* is an admiſſable witneſs to prove the forgery. *ibid.*

55 By 11 Geo. 1. c. 9.—To utter or demand the money for any ſuch forged, or altered bank bill or note with intention to defraud is *ſingle felony.* ſ. 2

56 By 12 Geo. 1. c. 32. to forge the name of any of the caſhiers to any inſtrument in writing whatſoever to obtain the property of any of the ſuitors in chancery, or any perſon whatſoever, is felony without clergy. ſ. 3

57 By 15 Geo. 2. c. 13. to alter any bank note, bank bill, dividend warrant, bond or obligation under the common ſeal of the bank, or any indorſement thereon, or to utter the ſame with intention to defraud any perſon, is death. ſ. 4

58 By 25 Geo. 3. c. 2. to forge any exchequer bill, before the ſame ſhall be paid off and cancelled, or any exchequer bills to be received, or any indorſement thereon, &c. with intent to defraud, &c. is death. 207

59 By 9 Geo. 1. c. 12. to forge any exchequer order for the payment of annuities—or the name of any of the proprietors, &c. is felony without clergy. *ibid.* ſ. 8

60 To forge any ſtamp or mark, ordered to be made by the ſeveral ſtamp acts (*which are enumerated*) on any vellum, parchment, or paper, *with intention to defraud his majeſty* is felony without clergy. *ibid.* ſ. 9

61 By 13 Geo. 3. c. 56. to forge the ſtamp or mark uſed in making gold and ſilver plate in purſuance of 12 Geo. 2. c. 26. is tranſportation for fourteen years. 208

62 But

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62 But by 24 Geo. 3. c. 53. to commit this offence in the manner therein deſcribed, is death without clergy. *Page* 208 ſ. 10

63 One of the marks is a lion *paſſant*, and if the indictment deſcribe the lion to be *rampant* it is fatal. (N)

64 By 24 Geo. 3. c. 20. the manufacturers of Sheffield are exempted from the injunctions of theſe acts. (N)

65 By 13 Geo. 3. c. 56. to forge the ſtamps on ſilks, callicoes, linens and ſtuffs printed in Great Britain is felony without clergy.

66 By 14 Geo. 3. c. 72. ſ. 8. to forge the ſtamps on printed cottons, is death.

67 By 9 Ann. ſt. 1. c. 27. ſ. 51. to forge the common ſeal of the South Sea company or any bond or obligation under the ſame, or to utter, &c. is felony without clergy. 208 ſ. 11

68 By 8 Geo. 1. c. 22. to forge any letter of attorney, or other authority to transfer any ſhare of South Sea ſtock, or to receive any dividends or part thereof—or the name of any of the proprietors, &c. is felony without clergy. 208, 209

69 By 25 Geo. 3. c. 57. to forge any lottery orders, &c. is felony without clergy. 209. ſ. 12, 13

70 By 6 Geo. 1. c. 18. and 14 Geo. 2. c. 37. to forge the common ſeal of the London or Royal Exchange Aſſurance, or any policy, bill, bond or obligation under the ſame, &c. is death. 209 ſ. 14

71 By 12 Geo. 1. c. 32. to forge the hand of the accountant general, regiſter, clerk of the report office in chancery, to obtain the money of any of the ſuitors is death. 210 ſ. 15

72 By 4 Geo. 2. c. 18. to forge a Mediterranean paſs, is felony without clergy. 211 ſ. 17

73 By 8 Geo. 2. c. 6. to forge any entry of acknowledgment of any bargainer in bargain and ſale in the regiſtry of York whereby the freehold or inheritance ſhall be moleſted, incurs the penalties of 5 Eliz. (*Vide Supra.* No.) 211. ſ. 19

74 By 26 Geo. 2. c. 33. to forge any marriage regiſter, or any licence of marriage. *Page* 211, 212

75 By 31 Geo. 2. c. 10. to forge any letter of attorney, bill, ticket, certificate, aſſignment, laſt will, or any other power or authority whatſoever in order to receive the monies or wages due to any ſeamen, &c. is death without clergy. 212

76 By 9 Geo. 3. c. 30. to utter the ſame with intention to defraud any perſon whatſoever is felony without clergy. 212

77 By 31 Geo. 2. c. 22. & 4 Geo. 3. c. 25. to forge any letter of attorney, or other authority or inſtrument to transfer, ſell, aſſign or convey any ſhare of any capital ſtock or funds—or to receive any dividend attending ſuch ſhare—or any annuity—or ſhall forge the name of any proprietor, &c. he ſhall ſuffer death without clergy. 212, 213

78 By 32 Geo. 2. c. 14. to forge the mark or hand of the receiver of the poſt fines is death *ſans* clergy. 313

79 By 4 Geo. 3. c. c. 24. to counterfeit the *frank* upon any letter is tranſportation 7 years. *ibid.* ſ. 25

80 By 2 Geo. 2. c. 25. to forge, &c. any deed, will, teſtament, bond, writing obligatory, bill of exchange, promiſſory note for the payment of money, inderſement or aſſignment thereon, or any acquittance or receipt either for money or goods, with intention to defraud any perſon, or by 31 Geo. 2. c. 22. any corporation, or ſhall utter, &c. is felony without clergy. 210 ſ. 16

81 By 7 Geo. 2. c. 22. to forge, &c. 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 the payment of money or delivery of goods with intention to defraud any perſon, or by 18 Geo. 3. c. 18. any corporation, is death without clergy. 211 ſ. 18

82 Forgery may be committed in the name of a perſon who never had exiſtence. 210 (N) 1

83 Lord

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Coke's definition of forgery *supra*. (No.) is too narrow. *Page* 201
perſon finds a promiſſory note, dorſes it in a fictitious name er to get it diſcounted—this is f. *ibid.*
rgery perfect ſimilitude is not ry, if made with an aptneſs to e, it is ſufficient. (N)
*water mark* is not eſſentially ry in a forgery of a bank note. *ibid.*
follows" is a ſufficient aver- hat the tenor of a forged re- s ſet out. (N) 3
only neceſſary to aver a gene- nt to defraud, without ſetting he particular manner in which ud was to take effect. *ibid.*
rgery of a will it is not neceſ- charge it "the laſt will" "a vriting purporting to be the laſt s ſufficient. *ibid.*
ſpecies of "order for the nt of money or the delivery ods" may be the ſubject of f. 211 (N) 4
evidence is neceſſary to prove of a bill of exchange, &c. 213 (N)

ORNICATION.

en lewdneſs, groſsly ſcandalous, iſhable by the temporal judges, and impriſonment, &c. 10
*Vide Bawdy-houſes.*

ST.—*Vide Fern. Black Act. Deer Hunters.*

paſſers in any foreſt, &c. will der themſelves to the keepers, ay be ſlain by force of the ſta- *maleſactoribus in parcis.* 107 f. 15

UNE-TELLERS.—*Vide Vagrants.*

Geo. 2. c. 5. whoever ſhall un- e to tell fortunes, or pretend by crafty ſcience, to diſcover ſtolen goods, ſhall be impriſoned for one year, ſtand four times in the pillory, and find ſurety as the court ſhall think fit. *Page* 9
2 By 17 Geo. 2. c. 5. all jugglers, fortune-tellers, &c. &c. ſhall be deemed rogues and vagabonds. *ibid.*

FOSSILS.—*Vide Highways.*

FOXES.—*Vide Larceny.*

FRAUDS. *Vide Cheats. Deceit. Permits.*

FREEHOLD.

1 The goods of which larceny may be committed, ought to be no way annexed to the freehold. 141 f. 21
2 Therefore it is no larceny at common law to ſteal corn or graſs growing, or apples on a tree, or lead on a church. *ibid.*
3 But by 43 Eliz. c. 7. to cut corn or grain growing, to rob orchards, to break the fences or trees therein, to the intent to take the ſame away, or to cut woods, underwoods, poles, &c. *not being felony by the laws of this realm*, is made puniſhable at diſcretion. 214
4 By 15 Car. 2. c. 2. the houſes of ſuch offenders may be ſearched. *ibid.*
5 By 1 Geo. 1. c. 48. to deſtroy any timber or fruit tree, is fine and impriſonment. *ibid.*
6 By 6 Geo. 1. c. 16. to deſtroy any wood ſprigs, trees, poles, thorns, quickſets, &c. is liable to the ſame puniſhment. 215
7 By 9 Geo. 1. c. 22. to deſtroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, ſhelter, or profit, is felony without clergy. f. 4
8 By 6 Geo. 3. 36. whoever, *in the night*, ſhall damage or deſtroy any timber, tree, &c. or any ſhrub or plant, of the value of 5*s*. &c. &c. ſhall be tranſported ſeven years. f. 5

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9 By 6 Geo. 3. c. 48. whoever ſhall deface or damage any timber tree, in any of the king's foreſts, ſhall forfeit 20*l.* &c. for the firſt offence; thirty pounds, &c. for the ſecond; and for the third, be tranſported for ſeven years. *Page* 216

10 And whoever ſhall cut or deſtroy any ſhrub, root, or plant, in any cultivated lands, ſhall forfeit, not exceeding, 40*s.* for the firſt offence; 5*l.* for the ſecond; and for the third he may be tranſported for ſeven years. *ibid.*

11 By 13 Geo. 3. c. 32. whoever ſhall ſteal or deſtroy any turnips, potatoes, cabbages, parſnips, peaſe, or carrots, growing in any garden: or by 31 Geo. 2. c. 35. any madder roots, ſhall forfeit 10*s.* 217 ſ. 11

12 By 25 Geo. 2. c. 10. whoever ſhall break into a black lead mine, or being there, ſhall ſteal any lead, cawke, &c. *may be* tranſported for ſeven years. 218

13 By 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. whoever ſhall break, with intent to ſteal any lead, iron bar, iron grate, iron palliſadoes, or iron rail; or any copper, braſs, or bell-metal utenſil, or fixture, being fixed to any dwelling-houſe, &c. &c. he may be tranſported for ſeven years. 218, 219

FREGIT.—*Vide Burglary.*

FRENCH KING.—*Vide Foreign Prince.*

FRUIT.—*Vide Freehold. Larceny.*

1 By what meaſure it ſhall be ſold. 522 ſ. 120

2 The duty on apples and pears. ſ. 121

FUNDS.—*Vide Forgery.*

FURZE.—*Vide Fern.*

## G.

## GAMING.

1 ALL common gaming-houſes are indictable as nuiſances. *Page* 362 ſ. 6

2 By 10 & 11 Will. 3. c. 17. all miſchievous games, called lotteries, by (*inter alia*) dice, lots, cards, &c. are declared nuiſances, and whoever ſhall keep ſuch lottery, ſhall forfeit 500*l.* &c. 364

3 By 9 Ann. c. 14. ſ. 8. to aſſault and beat any perſon on account of monies, won by gaming is forfeiture of goods, and two years impriſonment. 264, 265, 266

4 By 16 Car. 2. c. 7. to uſe any fraud or unlawful device, in playing at any paſtime or game, or by bearing a ſhare in the ſtakes, or by betting on the ſide of ſuch as ſhall play, incurs a forfeiture of treble the value. 345

5 By 9 Ann. c. 14. if any perſon ſhall by any fraud or ſhift, deceit, ill practice, &c. in playing at any of the games mentioned in the act, or by bearing ſtakes, or by betting, &c. won any ſum of money, or other valuable thing, on conviction, by information or indictment, he ſhall forfeit five times the value, be deemed infamous, and ſuffer corporal puniſhment, as in caſes of perjury. 345 ſ. 9

## GAOLER.

1 To threaten or aſſault a gaoler for keeping a priſoner in ſafe cuſtody, is a contempt of the law, and highly puniſhable by fine and impriſonment. 90 ſ. 14

2 If a criminal, in endeavouring to break the gaol, aſſault his gaoler, he may be lawfully killed by him *in the affray.* 107 ſ. 13

3 If a gaoler, by *dureſs* of impriſonment, compel a man to accuſe an innocent perſon, who, on his evidence, is condemned and executed, this is homicide in the gaoler. 118 ſ. 7

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4 A gaoler knowing a priſoner to be infected with an epidemical diſtemper, confines another priſoner againſt his will, in the ſame room with him, by which he catches the infection, and is ſuffered to continue there and die, this is a felonious killing. *P.* 119 (N)

5 So alſo, to confine a priſoner in a damp room, denying him the conveniences which decency requires, by which filth he catches a diſtemper and dies, it is felonious. *ibid.*

6 Gaolers are not to behave with wanton cruelty to their priſoners, *ibid.*

7 By 14 Ed. 3. c. 10. if any gaoler, or under-keeper, by dureſs, make any priſoner to become an appeller, againſt his will, he is guilty of felony. 194

8 It is immaterial whether the approvement be true or falſe, or whether the appellee be acquitted or condemned. *ibid.*

9 An enumeration of all the ſtatutes relating to gaolers, with the ſubſtance of the ſubjects of them. *ibid.* (N)

10 How a gaoler ſhould be puniſhed for miſuſing his priſoner. 311 f. 2

## GARDENS.

1 By 43 Eliz. c. 10. to rob any orchard or garden; to break the fences therein; or to dig or take up any fruit tree, on conviction, by one witneſs, before one magiſtrate, the offender ſhall make compenſation, or be publicly whipped. 214

2 By 1 Geo. 1. c. 48. whoever ſhall deſtroy any fruit tree, ſhall be confined to hard labour for three months, &c. &c. *ibid.*

3 By 9 Geo. 1. c. 22. whoever ſhall deſtroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, ſhelter, or profit; or ſhall reſcue any offender, or procure any perſon to commit ſuch offence, he ſhall ſuffer death without clergy. 215

4 By 6 Geo. 3. c. 36. whoever, in the night time, ſhall pluck up or deſtroy any root, ſhrub, or plant, of the value of 5*s.* growing, or being in a garden ground, nurſery, or other incloſed ground, their aiders, &c. ſhall be tranſported for ſeven years. *Page* 215

5 By 6 Geo. 3. c. 48. whoever ſhall pluck up or deſtroy any root, ſhrub, or plant, out of any field, nurſery, garden, or garden grounds, or other cultivated lands, ſhall forfeit, not exceeding, 40*s.* for the firſt offence; not above 5*l.* for the ſecond; and for the third ſuffer tranſportation ſeven years. 216

6 By 13 Geo. 3. c. 32. whoever ſhall ſteal, or maliciouſly deſtroy any turnips, potatoes, cabbages, parſnips, peaſe, or carrots, or by 31 Geo. 2. c. 35. any madder roots, growing or being in any garden, *or lands*, on conviction by one witneſs, before one juſtice, within 30 days, ſhall forfeit, not exceeding 10*s.* and the value of the things taken or deſtroyed, &c. &c. 217

7 By 4 Geo. 2. c. 32. to rip, with intent to ſteal, any lead, iron bar, iron grate, iron paliſadoe, or iron rail, whatſoever, or by 21 Geo. 3. c. 68. any copper, brats, bell-metal utenſil, or fixture, being in any garden, orchard, court, yard, fence, or outlet belonging to any dwelling-houſe or other building, their aiders, &c. or ſhall buy or receive the ſame, ſhall be guilty of felony, and may be tranſported for ſeven years, or impriſoned for one year, and whipped three times, &c. 218, 219

## GARMENTS.

1 By 6 Geo. 1. c. 23. to aſſault any perſon in the public highway with intent to ſpoil their cloaths or garments is tranſportation for ſeven years. 238

2 If the aſſault therefore is made in the playhouſes or other building it is not within the act. *Fieldings penal Laws.*

## GATE.—*Vide Fences.*

1 Erecting a new gate in a highway is a nuiſance becauſe it intercepts that free

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free, open, and legal paſſage, the people before enjoyed. *Page* 362 ſ. 9. 404 ſ. 50

2 But where a gate has continued time out of mind it ſhall be intended that it was ſet up at firſt by conſent, or laying out the road, in which caſe the people never had a free paſſage. 363

3 A gate that is a common nuiſance may be pulled down by any perſon. 364 ſ. 12

4 By 6 Geo. 1. whoever ſhall break down the gates, &c. of ſuch places as the act deſcribes ſhall be committed to the houſe of correction, &c. 192 ſ. 2

5 The puniſhment for deſtroying turnpike gates. 192, 193

GAZETTE.—*Vide Smuggling. Quarantine.*

GENERAL ISSUE.

1 May be pleaded on the ſtatute 19 Geo. 2. c. 21. againſt profane curſing and ſwearing. 12 ſ. 4

2 On 13 Geo. 3. c. 78. for regulating highways. 420

3 On 13 Geo. 3. c. 84. for turnpike roads. 442

4 On 9 & 10 Will. 3. c. 7. concerning ſquibbs. 224

5 On 9 & 10 Will. 3. c. 41. againſt embezzling naval ſtores. 562

6 On 6 Ann. c. 31. for preventing fire. 197

7 On 30 Geo. 2. c. 24. againſt gaming. 469

8 On 17 Geo. 2. c. 5. of vagrants. 576

9 On 29 Geo. 2. c. 30. for ſtealing iron. 232

10 On 31 Geo. 2. c. 29 & 40. bread. 486 ſ. 5

11 On 31 Geo. 2. c. 40. hay. 521. ſ. 116

GESTURES.—*Vide Manſlaughter.*

1 No affront by bare words or geſtures, however falſe, malicious, or aggravated, is ſufficient provocation to excuſe from the guilt of murder. *Page* 124 ſ. 33

GOD.—*Vide Religion. Lord's Day. Common Prayer.*

1 All blaſphemies againſt GOD, as denying his being or providence, or reproaching JESUS CHRIST; or falſely pretending to extraordinary commiſſions from GOD are high offences, by the common law, puniſhable with fine, impriſonment, and ſuch infamous corporal puniſhment as the court ſhall direct. 10 c. 5

2 By 9 & 10 Will. 3. c. 32. denying any one of the perſons in the holy Trinity to be God, or maintaining that there are more gods than one, &c. on conviction, at Weſtminſter or aſſizes, renders the offender incapable of any office for the firſt—diſabled to ſue, &c. for the ſecond offence. 7 ſ. 11

GOLD.—*Vide Coin.*

1 The king by his prerogative is intitled to all gold mines. 70

2 Endeavours to find out the *Philoſophers ſtone* being found prejudicial, the 5 Hen. 4. c. 4. made it felony to uſe the craft of multiplication, but is repealed by 1 W. & M. c. 30. 73, 74

3 By 8 & 9 Will. 3. c. 26. whoever ſhall blanch copper, &c. or deal in any malleable compoſition or mixture of metals, which ſhall be heavier, and look and touch like ſtandard gold he ſhall be guilty of felony. 71. ſ. 2

4 The ſtandard of gold conſiſts in two carrats of copper melted with 22 carrats of fine gold. 70 (N) 1

5 The king cannot by his prerogative alter the ſtandard. *ibid.*

GOLDSMITH.—*Vide Bullion.*

1 By 6 & 7 Will. 3. c. 17. no molten ſilver ſhall be ſtamped unleſs it be marked and ſtamped at Goldſmith's Hall

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Hall, and certified under the hand of one of the wardens of the goldſmiths that oath had been made by the owner and one credible witneſs that no part thereof was the current coin of the kingdom, nor the clippings thereof, nor plate, &c. *Page* 72, 73
2 No braker not being a trading goldſmith or refiner of ſilver ſhall buy or ſell any bullion on pain of ſix months impriſonment. 73 ſ. 9

GOODS.—*Vide Stolen Goods. Uſury.*

GOOD BEHAVIOUR.—*Vide Behaviour. Surety. Recognizance.*

1 By 34 Edw. 3. c. 1. juſtices of peace are empowered to reſtrain offenders, rioters, &c. and to take and arreſt all thoſe they found by indictment *or ſuſpicion*, and put them in priſon—and to take of all them that be not of *good fame* ſufficient ſurety and mainprize for their good behaviour. 261
2 Perſons of evil fame includes perſons of ſcandalous behaviour in other reſpects than thoſe relating to the peace. *ibid.* ſ. 2
3 A man may be bound to good behaviour for offences *contra bonos mores*, as haunting bawdy houſes with women of bad fame; keeping bad women in one's houſe; ſpeaking contemptuouſly of a juſtice or a mayor, though not in the execution of office, and alſo of a conſtable in the execution of his office. *ibid.*
4 But no one ought to be bound to good behaviour for raſh, quarrelſome, or unmannerly words, unleſs they tend to break the peace, or abuſe the government. *ibid.* ſ. 3
5 But there are no preciſe rules and the magiſtrate has a diſcretionary power. 262
6 Surety may be taken of all he may juſtly ſuſpect to be dangerous, quarrelſome or ſcandalous, as thoſe who ſleep in the day and wake in the night; or keep ſuſpicious company, reputed robbers, &c. caves droppers, common drunkards; and all perſons whoſe conduct renders them *of evil fame*. *Page* 262
7 A variety of inſtances enumerated in which ſurety for behaviour has been taken. *ibid.* (N) 1
8 By 1 Mary ſt. 2. c. 3. it may be required of perſons *convicted* of diſturbing divine ſervice. 309
9 By 5 Eliz. c. 21, 22 & 23 Car. 2. c. 25. for offences againſt the game laws. 187
10 By 43 Eliz. c. 23. for entertaining outlawed felons.
11 By 1 Jac. 1. c. 31. for going abroad infected with the plague. 241
12 By 3 Jac. 1. c. 13.—5 Geo. 1. c. 15. for unlawfully hunting in parks. 187
13 By 4 Jac. 1. c. 5. & 21 Jac. 1. c. 7. on conviction a ſecond time for drunkenneſs. 465
14 By 1 Will. & M. c. 8. for refuſing to take the oaths. 97, 98
15 By 5 Will. & Mary, c. 13. of felons after pardon.
16 By 9 Ann. c. 14. of perſons unlawfully gaming. 266
17 By 1 Geo. 1. c. 21. diſorders in dock yards.
18 By 1 Geo. 1. c. 48. deſtroying timber. 214 ſ. 2
19 By 9 Geo. 2. c. 5. pretending witchcraft. 9
20 By 8 Geo. 2. c. 20. turnpikes. 193 ſ. 7
21 By 9 Geo. 2. c. 35. aſſiſting in running goods. 227

GOVERNMENT.

1 All contempts againſt the king's government are criminal and puniſhable with fine, impriſonment and ſometimes pillory at the diſcretion of the court. 92 c. 23
2 As charging the government with oppreſſion or weak adminiſtration. ſ. 1
3 Or doing an act which *impliedly* encourages rebellion. ſ. 2
4 Endeavouring to change the meaſures of government by alarming the king's mind. ſ. 3

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5 Spreading falſe rumours reſpecting the government. P. 92. c. 23. ſ. 4
6 Charging the king with a breach of his coronation oath. ſ. 5
7 Doing any thing which may weaken the government. 93 ſ. 6
8 And it is ſaid that to refuſe in a foreign part to pay the uſual cuſtom is a contempt of government for which a man may be indicted. ſ. 7
9 The public peace is the end of all government. 94

GRADUATED STONES. — *Vide Highways.*

GRAMMAR SCHOOL.

1 By 1 Jac. 1. c. 4. no perſon ſhall keep any ſchool or be a ſchool-maſter out of the univerſities or colleges of this realm except it be in ſome public or free grammar ſchool, &c. on pain of 40s. 18 ſ. 2

GRAIN.—*Vide Granary. Bread.*

GRANARY.

1 By 11 Geo. 2. c. 22. whoever ſhall deſtroy any ſtorehouſe, granary, or other place where corn ſhall be then kept in order to be exported; or ſhall unlawfully enter any ſuch place and take and carry away any corn, flour, meal or grain therefrom or ſhall throw abroad or ſpoil the ſame, ſhall be tranſported for ſeven years. 243 ſ. 2
2 The hundred liable to the amount of 100l. 244

GRAND JURY.

1 The grand jury cannot find a bill true for part, and falſe for part, as petty jury may. 286
2 But an indictment of *two counts* one for a riot, indorſed by the jury *ignoramus*, the other for an aſſault returned *bills vera*, is good.—*R. v. Fieldhouſe.* *Page* 286
3 The court may impoſe an immediate fine on a perſon who refuſes to give evidence before the grand jury concerning a crime. 91 ſ. 4

GRAND LARCENY.—*Vide Larceny.*

1 Grand larceny is a felonious and fraudulent *taking and carrying away*, the mere perſonal goods of another not from the perſon, nor out of his houſe, above the value of 12d. 134

GRANT.—*Vide Monopoly. Gunpowder.*

1 On a forfeiture of goods for "abſence from church" the king cannot *grant* the goods over, till inquiſition found. 29 ſ. 46
2 All grants of monopolies relating to any known trade are void by the common law. 470 ſ. 2
3 By the common law the king's grant to any particular corporation of the ſole importation of any merchandize is void. 470, 471
4 The grant of the ſole ingroſſing of wills, and inventories in a ſpiritual court, or of the ſole making of bills, pleas, and writs in a court of law to any particular perſon, is void. 470 ſ. 4
5 A grant for the ſole making, importing, and ſelling of playing-cards, is void. ſ. 5
6 Nothing can exclude a ſubject from trade, but an act of parliament. (N) 3
7 But the king may grant to any one the ſole uſe of any art invented, or firſt brought into the realm by the grantee. ſ. 6
8 The king may grant to particular perſons the ſole uſe of ſome particular employments; as printing the holy ſcriptures, law-books, &c. *ibid.*
9 By 21 Jac. 1. c. 3. all grants of monopolies are declared void. 472
10 All perſons diſabled to uſe them. ſ. 9

11 And

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11 And the force and validity of ſuch grants ſhall be heard and determined by the common law. *Page* 472 ſ. 10
12 How perſons aggrieved by ſuch grants ſhall be relieved. 472, 473
13 But this ſtatute ſhall not extend to *grants of privilege*, for the term of fourteen years, for the ſole working or making of any new manufacture, within this realm, to the true and firſt inventors. *ibid.* ſ. 14
14 Manufactures newly brought into the realm, are within this grant of privilege. *ibid.*
15 But it is provided that ſuch grants ſhall not be contrary to law, nor miſchievous to the ſtate, &c. *ibid.*
16 Nor ſhall they, in any wiſe prejudice the grants, to corporations or companies, &c. 474 ſ. 19
17 Sundry other exceptions out of this ſtatute. ſ. 20, 22

GRASS.

1 It is no larceny, by the common law, to ſteal corn or graſs growing, but a bare treſpaſs. 143

GRAVERS.—*Vide Engravings.*

GRAVESEND.

1 For the offence of ſurcharging boats, paſſing and navigated between Graveſend and Windſor. 569

GREAT SEAL.

1 By 23 Ed. 3. c. 2. if a man do counterfeit the king's great or privy ſeal, he ſhall be guilty of high treaſon, 61 ſ. 40
2 This extends to aiders and conſenters as well as to actors. ſ. 49
3 But no attempt to counterfeit either of them, will amount to this crime. ſ. 50
4 Nor is fixing the great ſeal to a patent, without a warrant for ſo doing, high treaſon. ſ. 51
5 Nor is any alteration of the matter of an inſtrument, to which the ſeal is affixed, a counterfeiting of it. *Page* 61 ſ. 52
6 By 7 Ann. c. 21. to counterfeit the ſeals uſed in Scotland is high treaſon. *ibid.*

GROUSE.—*Vide Fern.*

GRUDGE.—*Vide Homicide.*

1 If two perſons fight, *on malice*, are reconciled, and after fight again, it ſhall not be *preſumed* that they fought upon the *old grudge*. 124 ſ. 38

GUAGER.—*Vide Public-Houſe.*

GUEST.

1 A gueſt who has a piece of plate ſet before him in an inn, may be guilty of felony in fraudulently taking it away. 136 ſ. 6
2 If an inn-keeper refuſe either to receive a traveller, as *a gueſt*, into his houſe, or to find him victuals or lodging, upon his tendering him a reaſonable price for the ſame, he may be ſued by action for damages, and alſo indicted and fined at the ſuit of the king. 452 ſ. 2
3 And it is ſaid that the conſtable may compel him to receive ſuch gueſt. *ibid.*

GUDGEONS.—*Vide Fiſh.*

1 The uſual nets for taking them may be uſed, provided they are not uſed for fiſh prohibited to be taken by ſuch nets. 517

GUILT.—*Vide Infant. Lunatic. Feme Covert.*

1 Thoſe who, from weakneſs or infirmity of mind, are incapable of underſtanding what the law is; and thoſe who,

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who, from their ſubjection to the power of others, are incapable of conforming to its dictates, ſhall not be found guilty for their diſobedience. *Page* 1

2 But a voluntary cauſe of diſobedience, as drunkenneſs, will not excuſe the guilt of an offender. 3 ſ. 6

3 Caſualty and misfortune are exemptions from guilt. 5 (N)

4 So alſo are ignorance and miſtake, compulſion and neceſſity. *ibid.*
But every offender muſt prove theſe exemptions, unleſs they ariſe from the evidence againſt him. *ibid.*

GUINEA.—*Vide Coin.*

1 The impreſſion of a guinea being made on a piece of hammered gold, not round, and in an impaſſable ſtate, is not a counterfeiting of the current coin. 62 ſ. 55 (N) 13

2 By 15 Geo. 2. c. 28. to waſh, gild, or colour any lawful or counterfeit ſhilling, or a ſixpence, or add to, or alter the impreſſion of either ſide of ſuch ſhilling or ſixpence, with intent to make the ſame reſemble, or look like, or paſs for a guinea or a half guinea, or to aid or counſel therein, &c. is high treaſon. 65 ſ 64

GUINEA PEPPER.—*Vide Ale and Beer*, No. 4.

GUN-POWDER.

1 By 21 Jac. 1. c. 3. againſt grants of monopolies, it ſhall not extend to grants concerning digging, making or compounding of ſaltpetre, or gunpowder, &c. 474, 475

2 By 16 Car. 1. c. 21. *all perſons* may import, make, and ſell gunpowder, or the materials thereof, notwithſtanding any inhibition. 475

GUN.

1 To fire a gun among a multitude of people, is evidence of a felonious intent, and, if death enſue, it will be murder. *Page* 113 ſ. 12

GYPSIES.—*Vide Egyptians.*

H.

HABEAS CORPUS.

1 A man committed by the ſpiritual court, for hereſy, may ſue out a *Habeas Corpus* to the King's Bench. 6 ſ. 7

HABIT.

1 By 5 Geo. 1. c. 4. if any mayor, bailiff, or other magiſtrate, ſhall wilfully reſort to any other place of divine worſhip than the church, in the gown or any other peculiar habit of his office, &c. &c. he ſhall be diſabled. 17, 18

HABITATION.—*Vide Houſe. Burglary. Arſon. Affray.*

HACKNEY COACHMEN.

1 By 9 Ann. c. 23. hackney coachmen are permitted to work within the bills of mortality on a Sunday. 18

HALFPENNY.

1 By 15 Geo. 2. c. 28. whoever ſhall counterfeit a halfpenny or farthing, their aiders, &c. ſhall ſuffer two years impriſonment, and find ſurety for two years more. 71, 72

2 By 11 Geo. 3. c. 40. whoever ſhall coin a halfpenny or a farthing, his aiders, &c. ſhall be guilty of felony. 72

3 By 15 Geo. 3. c. 28. to file, clip, waſh, or colour; or to add to, or alter the impreſſion of a halfpenny or farthing,

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farthing, with an intent to make them look like, or paſs, for either a ſixpence or a ſhilling, or to aid, &c. is high treaſon. *Page* 65 ſ. 64

HAND.—*Vide Maim. Finger.*

HARES.—*Vide Lord's Day. Black Act. Hunters.*

HARBOUR. *Vide Jeſuit. Church.*

1 By 3 Jac. 1. c. 4. whoever ſhall harbour, in his houſe, any ſervant, ſojourner, or ſtranger, &c. who ſhall not go to church, &c. ſhall forfeit 10*l.* a month. 31 c. 11

HAWKS.

1 Hawks reclaimed may be the ſubject of larceny, not only at common law, in reſpect of the great value of this bird, but by force of 37 Ed. 3. c. 19. 143 ſ. 23
2 But the ſtealer muſt know them to be reclaimed. *ibid.*
3 For not poſſeſſing *animus revertendi*, they are to be conſidered *feræ naturæ*, and therefore common property. 144 ſ. 26
4 So alſo it ſeems felony to ſteal the eggs or the young of reclaimed hawks, *ſed quere.* But the 1 Hen. 7. c. 17. has appointed a leſs puniſhment to this offence. ſ. 27

HAY and STRAW.

1 By 2 W. & M. c. 8. every truſs of old hay, for ſale within the bills of mortality, between 1ſt. Auguſt and June, ſhall weigh 56 lb. and new hay from June to Auguſt, 60lb. on pain of 16*d.* a truſs. 521 ſ. 115
2 By 31 Geo. 2. c. 40. all ſtraw within the bills of mortality, ſhall be ſold in bundles weighing 36 lb. on pain of 1*s.* for every bundle deficient. *Page* 521 ſ. 116
3 And every truſs of hay ſhall be ſound and good, and both the bands not exceed the weight of 5 lb. on pain of 3*d.* for every bundle. ſ. 117
4 No ſaleſman ſhall buy hay or ſtraw on his own account, other than for his own conſumption, on pain of 1*s* for every truſs. ſ. 118

HEALTH.—*Vide Quarantine.*

HEARING MASS.

1 By 23 Eliz. c. 1. every perſon who ſhall ſay or ſing maſs, ſhall forfeit 200 marks, &c. And every perſon who ſhall hear maſs 100 marks, &c. 39 c. 13.
2 By 11 & 12 Will. 3. c. 4. whoever ſhall apprehend a popiſh prieſt, and convict him for ſaying maſs, ſhall receive 100*l.* ſ. 2
3 But by 18 Geo. 3. c. 60 the penalty is repealed, provided the party take the oath there enjoined. ſ. 3

HEDGE STEALING.—*Vide Freehold.*

HEIFER.—*Vide Cattle.*

HEIR.

1 By 1 Jac 1. c. 4. the heir, if he be no recuſant, or if he be ſuch, and conforms, ſhall be freed from all penalties incurred by his anceſtor's recuſancy, unleſs two parts of the lands were ſeized by the king in the anceſtor's life, and then they ſhall ſo continue till the whole debt be levied; but he ſhall not extend the other third part of the lands. 30 ſ. 55
2 The heir has no remedy but conforming to free his fee-ſimple lands, whether ſeized in the anceſtor's life or not. ſ. 56

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3 But his lands in fee tail, from ſuch his anceſtors, are not chargeable on a conviction of ſuch anceſtor by proclamation. *Page* 30 ſ. 56
4 On a conviction by judgment, they are chargeable by force, 33 Hen. 8. c. 9. *ibid.*
5 But the above opinions ſeem queſtionable. *ibid.*
6 Perhaps an heir tail is chargeable only with the forfeitures of thoſe months which are contained in the indictment, and not for the months ſubſequent to the conviction. 31
7 The heir apparent may maintain his anceſtor. 538 ſ. 14 & 15
8 The ſon of a queen regnant is included under the words, "eldeſt ſon and heir," in the ſtatute of treaſons; and alſo the ſecond ſon after the death of the firſt; but a collateral heir is not. 53 ſ. 22 (N) 2

HEIRESS.—*Vide Marriage.*

1 The puniſhment of ſtealing an heireſs. 171, 172

HELPING to STOLEN GOODS.—*Vide ſtolen Goods.*

HERESY.

1 Hereſy, among proteſtants, is a falſe opinion repugnant to ſome of the eſſential doctrines of revealed religion. 5 c. 2
2 The particular errors called hereſy, are intricate and innumerable. 6
3 The reſtraints upon the high commiſſion court, that no points ſhould be adjudged heretical, but thoſe ſo determined either by ſcripture, ſome of the general councils, or parliament, are good guides to the ſpiritual courts. *ibid.*
4 The convocation may declare what opinions are heretical. 6 ſ. 3
5 But it is queſtionable if they can convene and convict a heretic. *ibid.*
6 Every biſhop, in his dioceſe, may convict and proceed by church cenſures. *Page* 6 ſ. 4
7 But no other ſpiritual judges can. *ibid.*
8 For a conviction before the ordinary would not warrant the writ *de heretico comburendo.* *ibid.*
9 By 24 Hen. 8. c. 9. the archbiſhop of either province may cite any perſon before him for hereſy, if the immediate ordinary conſents, or if he neglect his duty in puniſhing the ſame. ſ. 35
10 Proceedings cannot be had, at common law, in the temporal courts, merely for hereſy. ſ. 6
11 If the public peace will probably be diſturbed by the mode of maintaining the errors of hereſy, the offender may be indicted. *ibid.*
12 A temporal judge may incidentally take notice of hereſy. ſ. 7
13 As on a habeas corpus, or an action for falſe impriſonment. *ibid.*
14 Certain aſſertions adjudged not hereſy. *ibid.*
15 In *quare impedit* if the biſhop plead that he refuſed the clerk for hereſy, he muſt ſet forth the particular point. 6, 7
16 A temporal court having conuſance of the original cauſe, may decide whatever is incidental, &c. 7
17 In hereſy, the appeal muſt be to a higher ſpiritual tribunal: the party aggrieved cannot apply for a prohibition. ſ. 9
18 How hereſy was anciently puniſhed. ſ. 10
19 The writ *de heretico comburendo* aboliſhed. *ibid.*
20 It did not incur a forfeiture of either land or goods. *ibid.*
21 All the ſtatutes authoriſing forfeiture or impriſonment for hereſy, are repealed. ſ. 11
22 Yet now a heretic may be taken upon *excommunicato capiendo.* *ibid.*
23 By 9 & 10 W. 3. c. 32. denying any of the perſons in the Trinity to be God; maintaining there are more gods than one; denying the truth of *Chriſtianity*,

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*Chriſtianity*; or the divinity of the ſcriptures, renders the offender incapable in law, &c. &c. and liable to three years impriſonment. *P.* 7 ſ. 11

HÆRETICO COMBURENDO.

1 Formerly hereticks were burnt by force of this writ. 7 ſ. 10
2 But by 29 Car. 2. c. 9. this writ is aboliſhed. ſ. 11
3 Witches anciently burnt by force of this writ. 8 ſ. 2

HIDES.—*Vide Slaughter Houſe.*

1 By 26 Geo. 3. c. 71. to diſfigure any hide, &c. at any ſlaughtering houſe, authoriſed by this act, without a certificate, or before notice to the inſpector, is a miſdemeanor. 181 ſ. 13

HIGGLER.

1 Not permitted to travel on a Sunday. 11, 12

HIGH SEAS.—*Vide Piracy.*

HIGH TREASON.—*Vide Treaſon.*

HIGHWAYS.—*Vide Turnpike Roads.*

1 HIGHWAYS are either foot ways, park ways, or court ways, &c. 366
2 A common river is a public highway. ſ. 1
3 A horſe cauſeway is a highway. *ibid.*
4 A thoroughfare is a highway. *ibid.*
5 Every way common to all ſubjects from town to town is a public highway. *ibid.*
6 But 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, is a private way and not a highway. 367
7 The building of a ſtreet is a dedication of the highway to the public; but the ſoil ſtill remains in the owner. *ibid.* (N) 1
8 If a highway through an open field be impaſſable, the people may go by outlets; even over corn ſowed thereon. *Page* 367 ſ. 2
9 The grantee of a way may remove obſtructions therein. *ibid.* (N) 2
10 But he cannot dig trenches to let off water from the way, which the grantor has cauſed; for he has no intereſt in the ſoil. *ibid.*
11 But he may have an action for ſpoiling the way; and perhaps may go on an outlet of the wrongdoer. *ibid.*
12 If a private way be ſpoiled by the grantee, he ſhall repair it, and not the grantor, unleſs the grantor has bound himſelf ſo to do. *ibid.*
13 An ancient highway cannot be changed without an *ad quod damnum* and inquiſition thereof. ſ. 3
14 A way changed without ſuch authority may be ſtopped up. *ibid.*
16 And treſpaſs will lie for going on *ſuch* new way. *ibid.*
17 Neither are inhabitants bound to watch, anſwer for robbing in, or to repair *ſuch* new road. *ibid.*
18 But if a *river* change its courſe, the highway continues in the new channel, in the ſame manner as in the old. 368
19 The owner of land through which a road runs is obliged to repair unleſs he incloſes. (N) 3
20 But not a road changed by *ad quod damnum*, except the jury impoſe ſuch obligation upon the perſon who brings it. *ibid.*
21 The ſame conſequences alſo reſult from the power given by ſtatute, to commiſſioners. *ibid.*
22 Generally the occupiers of lands are bound to repair the highways in the pariſh where ſuch lands lie. ſ. 5
23 But the tenants whoſe lands adjoin the road, are bound to ſcour their ditches. *ibid.*
24 Private perſons may be burthened to repair highways either in reſpect to the occupation of lands; or by preſcription. *ibid.*
25 In reſpect to lands; as where the owner incloſes the lands through which the highway lies. ſ. 6

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26 And if the adjoining lands belong to ſeveral owners, each are equally obliged to repair. *Page* 368 ſ. 7
27 But if the owner throws down the incloſure, he is thereby releaſed from the burthen of repair. 369
28 In an *ad quod damnum* the pariſhioners ſhall repair the new road. (N) 4
29 But another pariſh, who gain no benefit from the change of the road ſhall not repair, although it goes through part of ſuch pariſh; but the perſon ſuing out the writ and his heirs ſhall repair ſuch part of the road. *ibid.*
30 A corporation may be bound to repair by force of a general preſcription. ſ. 8
31 Nor is it any excuſe that they did uſe to repair it *out of charity*. *ibid.*
32 But a private perſon cannot be bound by a general preſcription. *ibid.*
33 A tenant in fee may be bound *ratione tenuræ*. *ibid.*
34 A tenant at will may be indicted for ſuffering a houſe on the highway to grow ruinous. *ibid.*
35 But if the pariſh be indicted, where a particular perſon is bound, either by tenure or preſcription, they cannot diſcharge themſelves under the general iſſue, but muſt plead it ſpecially. *ibid.* ſ. 9
36 A pariſh in two counties; the indictment may be againſt that part only where the highway lies. (N) 5
37 But an indictment againſt a particular diviſion of a pariſh, muſt ſhew how ſuch diviſion are bound to repair. *ibid.*
38 Of HIGHWAYS BY STATUTE, 13 Geo. 3. c. 78. 370
39 Occupiers of 50*l.* a year keeping a team of three horſes, ſhall ſend the ſame to do ſtatute duty for ſix days in every year. *ibid.*
40 And ſo for another ſix days in every year, for every 50*l.* a year which he ſhall occupy over and above the ſaid 50*l.* *ibid.*
41 So alſo every perſon who ſhall occupy 50*l.* in any other pariſh than that in which he reſides. *ibid.*
42 So alſo every perſon occupying 50*l.* a year, but not keeping a team, ſhall ſend a team, &c. *Page* 370
43 Perſons, not keeping a team, but occupying under 50*l.* a year, either where he does or does not reſide, ſhall pay to the ſurveyor within ten days in lieu of the duty, for every 20*s.* a year, he ſhall occupy, one penny for every day's duty, &c. 371
44 Perſons keeping a team and not occupying 30*l.* a year ſhall only ſend one man with their teams.
45 Whoever ſhall keep a cart and horſe, and not a team, ſhall ſend the ſame and one labourer, or pay compoſition as aforeſaid, at the option of the ſurveyor. 372
46 Perſons above eighteen and under ſixty years of age not occupying 4l. a year; not being apprentices or menial ſervants, if they have not otherwiſe performed or committed ſhall by themſelves or by deputy perform the ſix days duty. *ibid.*
47 Whoever ſhall keep a coach or other carriage, and not a team, nor occupy 50*l.* a year ſhall pay one ſhilling for every days ſtatute duty, for every horſe drawn in ſuch carriage; or the compoſition as aforeſaid; at the option of the ſurveyor.
*47 If the carriages required are not neceſſary; the owners ſhall ſend three men or pay 4*s.* 6*d.* in lieu thereof. *ibid.*
48 The labourers ſhall furniſh *themſelves* with proper inſtruments for the ſtatute labour, and ſhall, with the teams and carriages, work eight hours a day. *ibid.*
49 If perſons do not ſend a ſufficient labourer, beſides the driver, or if they ſhall diſobey the ſurveyor he may diſcharge them and recover the forfeiture from the owner, as if the ſame had not been ſent. 373
50 A ſtand cart and one horſe to be accounted half a team; every cart and two horſes as two thirds of a team. *ibid.*
51 If the duty require it, the ſurveyor may order it to be performed with a waggon. *ibid.*

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52 The ſurveyor ſhall give four days notice to the occupiers, &c. when and what ſtatute duty is required. *Page* 373
53 Default in ſending the carriage, team and men forfeit 10*s.* for every cart with one horſe and one man, 3*s.* every cart with one horſe and two men 5*s.* every labourer 1*s.* 6*d.* 374
54 The forfeitures to be applied to the highways. The ſurveyor to be impartial. *ibid.*
55 But the ſtatute duty may be compounded as the juſtices ſhall direct, not exceeding the rates mentioned in the ſtatute. 374
56 But if a neceſſity ſhould ariſe in any particular place, the juſtices may ſuperſede the liberty of compounding and order the ſtatute duty to be performed in kind; and lots ſhall be drawn which of the inhabitants ſhall ſo perform it. 375
57 The juſtices may mitigate the compoſition, where part of the occupation lies in another pariſh. 376
58 The manner in which the ſurveyors ſhall give notice of the time and place for compounding, and how ſuch compoſitions ſhall be paid. 377
59 Where a draught or plough is kept and no carriage, one ſhilling ſhall be paid for every horſe or pair of oxen. *ibid.* ſ. 14
60 The inhabitants may appoint three months in the year in which no ſtatute duty ſhall be performed. *ibid.*
61 The livings of the clergy are within this ſtatute. ſ. 15
62 Lands ſuffered to *lie freſh*, neither occupied or let, are liable to perform the duty. ſ. 17
63 The performance of the ſtatute duty is no anſwer to an indictment for not repairing. ſ. 18
64 The manner in which the funds of *turnpike roads* may be applied to the ſtatute duty of highways. ſ. 19
65 Perſons ſerving in militia are exempted from ſtatute duty. 377 (*a*)
66 ASSESSMENT OF RATES. 379 ſ. 20
67 The ſeſſions may order a rate, not exceeding 6*d.* in the pound, to defray the expences of procuring materials, &c. for the repairs. 379
68 But ſuch an order is bad unleſs it ſhew that the ſtatute duty was not ſufficient; and if it charge the occupiers of lands only; for others are alſo liable. *Page* 379 (N) 9
69 But if the funds are exhauſted, or are inſufficient for the maintenance of the highways, the ſeſſions may cauſe an equal aſſeſſment for that purpoſe, provided the ſaid rate of 6*d.* and this aſſeſſment do not in any one year exceed nine pence in the pound. 380 ſ. 22
70 All forfeitures ſhall be paid into the hands of ſuch perſons as the court inflicting them ſhall direct for the benefit of the highways on penalty, for the miſapplication of double the ſum received 381
71 If any forfeiture is levied upon a particular inhabitant for the default of, or on account of the pariſh, the ſeſſions may cauſe a rate to be levied within one month by the ſurveyor for reimburſing him. *ibid.*
72 The court alſo will grant a *mandamus* for a rate to reimburſe a particular diſtrict, for a fine paid on the conviction of another diſtrict in the ſame pariſh, both bound to repair; but ſuch *mandamus* muſt be ſpecial. (N) 10 *ibid.*
73 Feoffees or truſtees of lands granted for the repair of highways ſhall let them to the beſt advantage; and the ſeſſions may enquire into the management thereof. 382
74 No ſhelter for robbers to conceal themſelves to remain near the highways. ſ. 26
75 Every public cartway ſhall be twenty feet wide; and every horſe way eight wide. ſ. 27
76 Two juſtices, upon view, may order highways to be widened or diverted; ſo as not to exceed thirty feet in breadth; and ſo as not to pull down any building, or incroach on any garden, court or yard. 383
77 The ſurveyor ſhall make ſatisfaction to the owners for the ground which ſhall be neceſſary for the widening or diverting ſuch highway. *ibid.*

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78 If they refuſe to treat, or cannot be found, or will not accept the ſatisfaction offered by the ſurveyor; the ſeſſion upon certificate ſhall impannel a jury who ſhall aſſeſs the value, not exceeding forty years purchaſe; and upon tender thereof, or leaving the ſame with the clerk of the peace, the ground ſhall be for ever diveſted and become a public highway. *Page* 384

79 But all ſubterraneous property of value which can be acquired without injuring the ſurface of the highway is ſaved to the owners of the land. *ibid.*

80 And all timber and wood thereon ſhall be felled within a month and laid upon the adjoining land for the benefit of the owner. *ibid.*

81 And where the funds in the hands of the ſurveyor are not ſufficient for theſe purpoſes the ſeſſions may order a rate not exceeding 6d. in the pound yearly accordingly. *ibid.*

82 The old highway to be ſold, in which a preference is to be given to the occupiers of the adjoining lands. 385

83 And if it lead to any land, houſe, or place, the ſale ſhall be ſubject to ſuch right of paſſage. *ibid.*

84 And upon tender or payment of the money (as deſcribed) the land ſhall veſt in the purchaſer, ſaving the right of all ſubterranean property to thoſe who would otherwiſe have been intitled. *ibid.* ſ. 29

85 If the jury ſhall aſſeſs a greater ſum than what the ſurveyor offered, the coſts ſhall be paid from the ſurveyor's fund; if a leſs ſum, they ſhall be paid by the owners of the land. ſ. 30

86 Two juſtices may divert any highway, not in the ſituation before deſcribed, if the owners of the land through which the new road is to paſs will conſent, and may purchaſe, ſtop up, and ſell, as in roads to be widened or diverted. 386 ſ. 31

87 Perſons aggrieved by any ſuch proceeding, or by any *ad quod damnum* for this purpoſe, may appeal to the next ſeſſions, &c. 387

88 No old way ſhall be ſtopped up before the new way is compleated. *Page* 387

89 New highways which have been peaceably acquieſced in for 12 months ſhall become incontrovertible. *ibid.*

90 No common land lying between the fences of any old highway ſhall be incloſed. 388

91 Land, between the fences not being common, exceeding 30 and not extending to 50 feet in breadth, ſhall not be ſtopped till ſatisfaction is made to the owners for all the land exceeding 30 feet. 388 ſ. 32

92 And if the old road ſhall have paſſed through common land, or if the ſpace between the fences, the land not being common, ſhall exceed 50 feet in breadth, the reſpective owners of ſuch land ſhall hold and enjoy the old highway, making ſatisfaction for the ſame. *ibid.*

93 Where a footway is diverted through a different part of the ſame lands, no ſatisfaction ſhall be made except the new road ſhall be longer, or that part of the land of greater value. ſ. 33

94 If the footway ſhall not go through the ſame perſon's lands, ſatisfaction ſhall be made to the owner of the new land by the award of two perſons and an umpire. *ibid.*

95 Two juſtices upon view may ſtop up and ſell, or may divert all highways which are uſeleſs and burthenſome to the pariſh. 389 ſ. 34

96 OF THE SURVEYOR. 389 c. 35

97 The officers and pariſhioners ſhall aſſemble yearly on the 22d. September at 11 o'clock in the forenoon. *ib.*

98 But the preſence of the officers is not eſſential to the legality of the meeting. (N)6

99 The majority ſhall make a liſt of ten pariſhioners each poſſeſſing a real eſtate of 10*l.* a year or who rent 30*l.* a year, or worth 100*l.* perſonally. *ib.*

100 If a ſufficient number of qualified pariſhioners cannot be found, the deficiency ſhall be ſupplied by the moſt able inhabitants. 390

101 Within three days after, the conſtable ſhall tranſmit a copy of the liſt to the juſtice of the diviſion, and ſhall

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ſhall ſend the original liſt to the ſpecial ſeſſions, after Michaelmas ſeſſion and give perſonal notice to the ten perſons named to appear at ſuch ſpecial ſeſſion to accept (if appointed) of the office of ſurveyor, or *ſhew cauſe to the contrary.* *Page* 390

102 The juſtices at ſuch ſpecial ſeſſions ſhall appoint one, two or more ſurveyors from the ſaid liſt, preferring ſuch as are qualified, which ſhall be notified to the perſons choſen who ſhall be ſurveyors for the enſuing year. 391

103 But if the liſt has been riotouſly procured, the juſtices may reject it. (N) 15

104 If any named in the liſt refuſe to ſerve, they ſhall forfeit 5 *l.* *ibid.*

105 And upon default the juſtices may appoint inhabitants of the county living within three miles of the pariſh, and if they refuſe, they ſhall forfeit 50 *l.* *ibid.*

106 A ſurveyor who has ſerved one year ſhall not be appointed for three years afterwards. *ibid.*

107 If no liſt is returned, or if default ſhall be made by ſuch as they appoint, two juſtices at ſpecial ſeſſion may in their diſcretions appoint a ſurveyor, with a ſalary to be paid from the forfeiture, but not to exceed one-eighth of the 6 *d.* rate. *ibid.*

108 The juſtices may order the collector to return an account of the ſaid aſſeſſment. 392

109 Officers neglecting their duty in the premiſes ſhall forfeit 40 *s.* *ibid.*

110 Where a ſurveyor with a ſalary is appointed, the juſtices ſhall alſo appoint an aſſiſtant, who ſhall forfeit 40 *s.* if he refuſes to ſerve; and another ſhall be appointed liable to 50 *s.* for refuſing; and they may then appoint one with a ſalary. *ibid.*

111 An aſſiſtant who has ſerved one year ſhall not be again appointed for three years without he conſents thereto. 392

112 The ſurveyor ſhall give bond if required. *ibid.*

113 Two parts in three of the pariſhioners aſſembled as aforeſaid may recommend a ſurveyor with a ſalary to the juſtices. *Page* 392

114 If the ſurveyor dies or becomes incapable during the interval of the ſeſſions, two juſtices may appoint a perſon to officiate untill the ſeſſion. *ibid.*

115 More ſurveyors than one to be comprehended under the word ſurveyor. 394

116 The ſalaries of ſurveyors in cities, &c. muſt be approved by two thirds of the pariſhioners. *ibid.*

117 DUTY OF SURVEYOR. 394 ſ. 37

118 The aſſiſtant ſhall obey the ſurveyor; and account to him for the monies he receives on pain of double the value, and for any neglect he ſhall forfeit not more than 5 *l.* nor leſs than 40 *s.* *ibid.*

119 The ſurveyor ſhall draw upon the aſſiſtant for all ſums amounting to 40 *s.* but he ſhall not be anſwerable unleſs his drafts are paid. *ibid.*

120 Surveyors ſhall view the highways and give notice to remove obſtructions; and if not done within 20 days, the ſurveyor may do it at the coſt of the party who ſhall forfeit one penny for every foot. 396

121 The ſurveyor ſhall, upon oath, inform two juſtices of highways, bridges, cauſeways, &c. out of repair, which any particular perſons are bound to repair. *ibid.*

122 And if they are not repaired, upon notice to the owners, they ſhall be preſented at the ſeſſions. *ibid.*

123 Juſtices may order which of the highways ſhall be firſt repaired. *ibid.*

124 How, where, and in what manner the ſurveyor ſhall erect direction poſts, &c. 397

125 Where and in what manner the ſurveyor may get materials for the repairs. *ibid.* ſ. 40

126 How materials ſhall be obtained where there are not ſufficient within the pariſh. 398 ſ. 41

127 The ſurveyor ſhall fence off all pits and holes made in digging materials. 399 ſ. 42

128 How materials dug for the uſe of a different pariſh than that in which they lie ſhall be removed. 400

129 The

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129 The penalty for damaging mills, &c. *Page* 400 ſ. 43
130 In what manner the ſurveyor ſhall keep his accounts. 401 ſ. 44
131 The ſurveyor may contract for materials. 402 ſ. 45
132 Surveyors neglecting their duty ſhall forfeit between 10 and 5 *l.* 402 ſ. 46
133 Juſtices of cities, &c. may execute this act. *ibid.*
134 If the ſurveyor receives money due to the turnpike roads, he ſhall pay it to the treaſurer. ſ. 47
135 Of NUISANCES *to highways.* 405
136 The adjoining lands are bound to ſcour the ditches and to lop the trees. ſ. 52
137 The ſurveyor ſhall give ten days notice to the landholders next adjoining the road to cut and prune their hedges, and upon default the juſtices may order the ſame to be done and if ſuch order is not complied with in ten days, the ſurveyor ſhall cut and prune at the expence of the owner of the land who ſhall pay over and above 2 *s.* for every 24 feet of hedge and 2 *s.* for every tree. 406
138 The landholder ſhall make proper ditches, drains, and keep them properly ſcoured and in repair on pain of 10 *s.* ſ. 55
139 And where the old ditches, &c. are not ſufficient the ſurveyor ſhall order new ones to be made. 407
135 No ſmall tree or buſh, whereby a man may lurk, ſhall ſtand within 200 feet of either ſide of a highway. 407 ſ. 58
136 No tree, buſh, or ſhrub, ſhall grow within 15 feet from the center of any highway, unleſs for ornament, &c. ſ. 59
137 The ſeaſon in which hedges ſhall be pruned, and trees felled. ſ. 60
138 Whoever ſhall lay any thing in a highway, for five days, ſo as to obſtruct or injure the ſame, ſhall forfeit 10 *s.* 408 ſ. 62
139 And if not removed within five days after notice, by the ſurveyor, it ſhall be ſold. ſ. 62
140 Obſtructions by carriages, unleſs for a reaſonable time to unload, forfeit 10 *s.* *Page* 409
141 Penalty for incroaching upon highways. ſ. 63
142 No alehouſes ſuffered on bridges. *ibid.*
143 Penalty for damaging banks, cauſeways, &c. &c. 64
144 HORSES AND CARRIAGES ON HIGHWAYS. 410 ſ. 65
145 Juſtices, at ſeſſions, may licenſe an additional member, and ſtop proceedings for the forfeiture. 411
146 The owner's name, &c. to be painted on all carriages. 412
147 The penalty for the negligent or impertinent behaviour of drivers. *ibid.* ſ. 66
148 The forms to be obſerved in proceedings. 413 ſ. 67
149 Abſtracts of 13 Geo. 3. c. 78. to be given to the ſurveyor. ſ. 68
150 Forfeitures, &c. to be levied by diſtreſs, &c. ſ. 69
151 How convictions ſhall be made. ſ. 70
152 OF PRESENTING HIGHWAYS, 414 ſ. 71
153 Juſtices of aſſize upon view; and juſtices of peace upon view, or information, on oath, by the ſurveyor, may preſent at the aſſizes, great ſeſſions of Wales, or quarter ſeſſions, any highway, cauſeway, or bridge, out of repair, within the juriſdiction and county where they lie. (*Vide* No. 176.) 415 & 418 ſ. 78 & 79
154 No ſuch preſentment, nor any indictment ſhall be removed by *certiorari*, until traverſe and judgment. *ibid.*
155 But on the part of the *proſecution* it may be removed before traverſe and judgment; for the reſtriction was to prevent delay by *defendants.* *ibid.* (N) 22
156 But if the right to repair is in queſtion, the defendant may remove the proceedings. 415
157 And every *ſuch preſentment* ſhall have equal force as if it had been found by a jury. *ibid.*
158 Saving the right of traverſe, as to the fact of non-repair, as well as to the right of repairing. *ibid.*

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159 The juſtices are compellable by *mandamus* to receive a general traverſe. *Page* 415 (N) 23
160 The juſtices may order the proſecution to be at the expence of the limit, and on conviction may fine the offender. *ibid.*
161 The right to traverſe confirmed. ſ. 72
162 ASSESSMENTS may be levied by diſtreſs, and the ſurveyor to be a competent witneſs. ſ. 73
163 How the proſecutor may proceed for a forfeiture *above forty ſhillings*. ſ. 74
164 Ten days notice before action commenced and none to be brought after a month has expired. 417 ſ. 75
165 No diſtreſs unlawful, or the party a treſpaſſer for want of form. ſ. 76
166 The court may award coſts to either party according to the circumſtances ſ. 77
167 A defendant indicted for not repairing *ratione tenuræ*, ſhall, on ſubmiſſion, pay coſts. *ibid.* (N) 24
168 The pariſhioners may agree to bear the charges of any proſecution or defence. ſ. 77
169 But public notice ſhall be given of every meeting of the pariſh. *ibid.*
170 Forfeiture for oppoſing the execution of the act. 418
171 If the quarter ſeſſions exceed their authority; as to order a ſurveyor to make out his accounts before a ſpecial ſeſſions, ſuch proceedings may be removed by *certiorari*, and quaſhed; for their power, in ſuch caſe, is not original but appellate. ſ. 80
172 Juſtices are empowered to adminiſter oaths, in reſpect to highways. 419
173 On giving fit notice they may hold a ſpecial ſeſſions. *ibid.*
174 OF DEFENDANTS, &c. *ibid.* ſ. 82
175 Perſons aggrieved may appeal to the quarter ſeſſions, giving notice thereof, within ſix days after the cauſe aroſe, and entering into a recognizance with one ſurety, within four days after the notice. *ibid.*
176 On notice of ſuch appeal, all proceedings to be returned to the ſeſſions, on pain of 5 *l.* *ibid.*
177 The ſeſſions ſhall hear the appeal in a ſummary way, and decide *finally*; and award coſts as the deciſion ſhall be. *Page* 419
178 Limitation of actions, &c. 420
179 No one ſhall be convicted without being ſummoned. ſ. 83
180 An indictment for not repairing an highway ought to ſhew the place from which and to which it leads. ſ. 86
181 But an objection for want of this has been diſallowed. Note marg.
182 If for a nuiſance it muſt expreſsly ſhew the place where it was done. ſ. 87
183 So for want of repair the highway muſt be ſhewn to lie in the pariſh bound to repair. *ibid.*
184 How an indictment for not repairing *ratione tenuræ*, muſt alledge the offence. 422 ſ. 90
185 The defendants ought not to plead *quod non debent reparare* without ſhewing who ought. 423 ſ. 93
186 Defendant ſhall not be diſcharged on paying the fine, but a *diſtringas* ſhall go till they repair. ſ. 94

HIGHWAYMEN.—*Vide Robbery. Attempt to rob.*

HOGS.—*Vide Nuiſance.*

HOLIDAY.—*Vide Church.*

HOLLIES.—*Vide Trees. Freehold.*

HOMICIDE.—*Vide Felo de ſe. Murder. Manſlaughter.*

1 Homicide is an offence either againſt a man's own life or that of another. 102 c. 27
2 Homicide againſt the life of another, is either juſtifiable, excuſable, or felonious. 104 c. 28
3 Juſtifiable homicide cauſes no forfeiture at all. *ibid.*
4 Excuſable homicide cauſes forfeiture of *goods*. *ibid.*
5 Felonious homicide is murder or manſlaughter. *ibid.*

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6 JUSTIFIABLE HOMICIDE muſt be owing to ſome unavoidable neceſſity, and the party killing muſt be free from all manner of fault. *Page* 105
7 There muſt be no malice covered under the pretence of neceſſity. *ibid.* ſ. 2
8 *If a ſpecial juſtification* can be pleaded in homicide; and the plea is found for the defendant, he ſhall be diſmiſſed and neither put to plead not guilty, or to purchaſe his pardon. *ib.* ſ. 3
9 Juſtifiable homicide is either in the due execution or advancement of public juſtice, or in the juſt defence of a man's perſon, houſe, or goods. *ibid.*
10 The judgment by which a perſon is executed muſt be given by one who has juriſdiction, or it will not juſtify either the judge or the officer. ſ. 4
11 If common pleas give judgment of death, or juſtices of peace award execution in treaſon, and it is done, both judges and officers are guilty of felony. ſ. 5
12 But if juſtices of peace, on indictment of treſpaſs, arraign for felony, and the priſoner is executed, the juſtices only, and not the officers are guilty. 106 ſ. 6
13 The judgment muſt be executed by the lawful officer. 106 ſ. 7
14 If the judge who ſentences, or any private perſon, or even the officer without lawful warrant, executes *an attainted perſon*, they are, (contrary to former opinions) guilty of felony. ſ. 8, 9
15 The execution muſt be purſuant of and warranted by the judgment. ſ. 10
16 But the king's warrant may remit the ignominious part of the puniſhment and the officer is juſtified in doing execution accordingly. (N) 1
17 Any perſon may juſtify killing another who has been guilty of felony and cannot otherwiſe be taken. ſ. 11
18 So an officer may juſtify the killing an innocent perſon, indicted of felony, if he cannot otherwiſe be taken. ſ. 12
19 If a criminal, endeavouring to break gaol, aſſault his gaoler, he may be lawfully killed by him. 107 ſ. 13
20 Rioters, &c. reſiſting the endeavour of a juſtice to arreſt them, the killing them may be juſtified. *Page* 107 ſ. 14
21 So alſo may a private perſon, in defence of himſelf againſt them. *ibid.*
22 And ſo perhaps if he cannot otherwiſe ſuppreſs them. *ibid.*
23 A ſtranger, aſſaulted by combatants whom he endeavoured to part, who kills one of them may juſtify it if they knew his interpoſition was for that purpoſe. (N)
24 Treſpaſſers in deer parks, &c. not ſurrendering to the keeper, may be *juſtly* ſlain by him by force of the ſtatute 21 Edw. 1. c. 2, 3, & 4 W. & M. c. 10. ſ. 15
25 In trial by battle, if one combatant kill the other he is juſtified. ſ. 16
26 But in all theſe caſes the killing is not juſtifiable unleſs it was unavoidable. (N)
27 If a ſheriff, endeavouring to retake upon an eſcape in civil proceſs and kills the perſon *in the affray* it is juſtifiable. ſ. 17
28 The officer in ſuch a caſe is not bound to give back. ſ. 18
29 But no private perſon can juſtify homicide in arreſting a man on civil proceſs, as he may in felony. ſ. 19
30 Nor can the ſheriff lawfully kill thoſe who baſely fly. 108 ſ. 20
31 Killing a wrong-doer in defence of a man's perſon, houſe, or goods may be juſtified. ſ. 21
32 As where a man kills one on the highway who aſſaults to rob or murder him. *ibid.*
33 Or if the owner or any of his inmates kills one who attempts *a felony* on it. *ibid.*
34 A woman may juſtify killing the man who attempts to raviſh her. *ibid.*
35 A ſervant, who finding his maſter ſlain, and apprehends the like event to himſelf, may juſtify killing the murderer. *ibid.*
36 A parent or a huſband may juſtify killing the *forcible* raviſher of a wife or daughter's virtue. *ibid.* (N)
37 But the perſon juſtifying muſt be wholly free from fault. ſ. 22
38 A man

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38 A man cannot juſtify killing another in defence of his houſe or goods, or even of his perſon, from a *bare private treſpaſs*. *Page* 108 ſ. 23
39 The queſtion argued whether it is not juſtifiable to kill when the treſpaſs is violent and indicates an intention to murder. 109 ſ. 24
40 A diſtinction taken between an aſſault on the highway and in a town. ſ. 25
41 By 24 Hen. 8. c. 5. thoſe who are indicted for *the death* of perſons attempting to murder, rob or burglariouſly to break into manſion houſes ſhall incur no forfeiture and be diſcharged. 110
42 Not only the maſter of a houſe but a lodger or ſojourner who kills an aſſailant is within the protection of the ſtatute. *ibid.* (N)
43 This reaches not any crime unaccompanied with force, nor to the breaking open any houſe in the day time unleſs it imports an intention to commit robbery or arſon. *ibid.*
44 A man is not juſtified in killing another whom he taketh in adultery with his wife. *ibid.*
45 In what caſe the killing *an innocent perſon* for the preſervation of a man's own life is ſaid to be juſtifiable. ſ. 26, 27
46 Excuſable homicide is either *per infortunium* or *ſe defendendo*—*Sed vide ante* EXCUSABLE HOMICIDE.

## HONEY AND WAX.

1 By 23 Eliz. c. 8. to mingle any roſin, tallow, turpentine or other deceitful thing in the melting of wax incurs a penalty of 2 *s.* a lb. 522 ſ. 122
2 If any melter ſhall neglect to ſtamp his name on the outſide of every piece of melted wax he ſhall forfeit every piece ſo unſtamped. 523 ſ. 123
3 Every ſeller alſo who ſhall ſtamp his name thereon that it may be known who were the workers thereof. ſ. 124
4 Every package of honey ſhall be marked with the name of the filler on pain of 6 *s.* 8 *d.* a package. *Page* ſ. 125
5 Whoever ſhall fill honey leſs than 32 wine gallons the barrel—16 the kilderkin—8 the firkin, ſhall forfeit 5 *s.* for every half gallon deficient. ſ. 126
6 But theſe penalties ſhall not extend to perſons ſelling wax, &c. from their own bees, nor to ſervants, &c. ſ. 127
7 Whoever ſhall counterfeit the marks aforeſaid ſhall forfeit 5 *l.* ſ. 128

## HOPS.

1 Hops were not within the ſtatutes againſt foreſtalling. 488

## HOP BINDS.

1 By 6 Geo. 2. c. 37. maliciouſly to cut any hop binds growing on poles in any plantation of hops is felony without clergy. 238 ſ. 2

## HORSE BREAD.

1 How hoſtlers and innkeepers ſhall be puniſhed for making or ſelling horſe bread of an inſufficient weight or quality. 454

HORSE CAUSEWAYS.—*Vide Highways.*

## HORSE COURSER.

1 No horſe courſer ſhall travel, or come to his inn on the lord's day on pain of 20 *s.* 11, 12

HORSES.—*Vide Purveyors. Highways.*

1 The taking of horſes, &c. may be felony. 144 ſ. 28
2 If in a field and the felonious taker be apprehended before he gets out, it is a ſufficient aſportation. 141

HORNBEAM.—*Vide Trees.*

HOSTLER.—*Vide Innholder.*

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HOSTILITY.—*Vide Treaſon. Piracy.*

## HOUSEHOLDER.

1 All houſeholders dwelling in any county or town whether they occupy lands or not are within the ſtatute of bridges. *Page* 449

## HOUSE.

1 In what caſes larceny from the houſe is debarred of clergy. 151 c. 36
2 To break and enter feloniouſly the manſion houſe of another in the night is burglary. 159
3 What is ſuch a houſe in which burglary may be committed. 162, 165
4 The anxiety with which the law protects a dwelling houſe. 165 (N)
5 The ſpecies of houſe in which arſon may be committed. 166
6 What part of the houſe muſt be burnt to complete the crime. *ibid.*
7 The puniſhment of ſervants in negligently ſetting fire to a houſe. 197
8 How far it is lawful for a man to aſſemble his friends in the defence of his houſe. 267 ſ. 8. 297 ſ. 10
9 How far a conſtable may enter a houſe to ſuppreſs an affray therein. 269 ſ. 16
10 It is felony riotouſly to pull down, or begin to pull down a houſe. 308, 309
11 In what caſes a man may juſtify homicide in defence of his houſe. 109, 110

## HUNGER.

1 Hunger is no excuſe for theft. 141
2 A tenderneſs to be exerciſed upon this occaſion. *ibid.* (N) 6

HUSBAND.—*Vide Feme Covert.*

1 A wife may demand ſurety of the peace againſt her huſband threatening to beat her outrageouſly. 253 ſ. 4
2 A huſband may have it alſo againſt his wife. *Page* 253 ſ. 4
3 Caſes in which it has been granted to peers and peereſſes. 255 (N) 4
4 A huſband and wife conſidered as one perſon in law. 141 ſ. 19
5 The huſband of an heireſs apparent may lawfully maintain the anceſtor in an action concerning the inheritance of the land whereof he is ſeized in fee. 538 ſ. 15
6 The huſband alone may bring a *ſtatim tantum* for embracery in an action by huſband and wife. 552 ſ. 19
7 What property a huſband is ſeized of in right of his wife, he ſhall forfeit as *ſole de ſe.* 103 ſ. 7
8 A huſband may juſtify the killing the *forcible* raviſher of his wife's virtue. 108 (N)
9 But not if he take them in *flagrante* adultery. 110 (N) 1
10 If a wife procure a ſervant to kill her huſband they are both guilty of petty treaſon. 133
11 If a ſtranger procure a wife to kill her huſband he may be indicted as acceſſary to the treaſon. *ibid.*
12 A wife cannot be found guilty with her huſband in the ſtatute 3 & 4 W. & M. c. 9. againſt robbing lodgings. 137 (N) 3
13 If the lodgings were let to the huſband ſhe cannot be found guilty at all. *ibid.*
14 And if let jointly, the taking ſhall be conſtrued to be by the huſband. *ibid.*
15 A huſband is not liable to pay the forfeiture on an indictment againſt the wife for abſence from church. 27 ſ. 39

## HUNTERS.

1 Riotouſly aſſembled with painted viſors, &c. may be obliged to ſurrender upon pain of felony. 186 c. 49
2 By 9 Geo. 1. c. 22. to appear diſguiſed, or to kill fallow deer—to rob a warren—a coney burrow, or to ſteal fiſh from a pond *being armed and diſguiſed*, &c. &c. Or to kill deer in any incloſed place, or to reſcue another in cuſtody for

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for theſe offences is felony without clergy. *Page* 187
3 Offenders may be forced to ſurrender or be adjudged guilty of felony. *ibid.* ſ. 3
4 Thoſe who prevent ſuch ſurrender equally guilty. 188
5 By 5 Geo. 1. c. 28. whoever ſhall enter any park where deer are kept, without licence, ſhall be tranſported. 189 ſ. 6
6 By 16 Geo. 3. c. 30. to kill, deſtroy, or ſtate any fallow deer forfeits 30*l.* if by a keeper double; and the ſecond offence is tranſportation. *ibid.* ſ. 7
7 Juſtices may ſearch the houſes of ſuſpected offenders. 190
8 The puniſhment of laying ſnares for deer. *ibid.* ſ. 9
9 To enter an incloſed park armed, &c. tranſportation. 191
10 Dogs and engines may be ſeized by keepers. *ibid.* ſ. 10

HUSTINGS.

1 In what caſe the court of huſtings may be appealed to from the ſheriffs court. 16 (N) 2

I. J.

JACTITATION.

1 A ſentence of *jactitation* in the eccleſiaſtical court, is not concluſive evidence againſt a former marriage, on an indictment for polygamy, on the 21 Jac. 1. c. 11. 175 (N)
2 And, admitting it to be concluſive, yet the validity of it may be impeached, by evidence that it was obtained by fraud and colluſion. *ibid.*

IDENTITY.

1 When the fact of identity is a collateral iſſue, it may be pleaded and replied to *ore tenus*; and may be tried by the principal jury, or on a *venire*, returnable *inſtanter*. *Page* 3 (N) 5

IDEOT.

1 An ideot is one whoſe underſtanding is defective from his birth. 2 (N) 2
2 A perſon born deaf and dumb is, *prima facie*, an ideot. *ibid.*
3 Ideots are not puniſhable by any *criminal* proſecution whatſoever. 1, 2
4 If an ideot commit a treſpaſs againſt the perſon or poſſeſſion of another, he may be compelled to make ſatisfaction in damages. 3 ſ. 5

JESUIT.—*Vide Papiſts.*

1 By 27 Eliz. c. 2. whoever ſhall receive, relieve, or comfort, &c. any jeſuit, &c. ſhall be deemed a felon without clergy. 76 ſ. 21

JEWS.

1 It hath been queſtioned whether Jews, &c. have a right to demand ſurety of the peace. 53 ſ. 3

IGNOMINY.

1 The king may remit the ignominious part of a judgment.

IGNORAMUS.—*Vide Grand Jury.* No. 2.

IMAGINING.—*Vide Treaſon.*

IMBEZZLEMENT.—*Vide Embezzlement. Larceny. Naval Stores.*

IMPLICATION.—*Vide Felony Statute.*

IMPLIED MALICE.—*Vide Murder. Manſlaughter.*

1 Is when homicide happens in the execution of an unlawful action, principally intended for ſome other pur-

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pose, and not to do a personal injury to him in particular who is slain. *Page* 122

## IMPORTATION.

1 Aliens may import their fish or other victual, without molestation. 480 s. 7
2 Merchandize imported, may be sold in gross. 479 s. 3
3 Such importations not within the statute of ingrossing, &c. *ibid.*
4 The crown may stop the importation of cattle, to prevent the the introduction of disease. 180

## IMPOSTORS.

1 Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying the people with false denunciations, are punishable by the *temporal judges* with fine and imprisonment, &c. 10

IMPRISONMENT.—*Vide Gaoler.*

INCAPACITY.—*Vide Officers. Discretion. Infants. Ideots, &c.*

INCENDIARIES.—*Vide Arson. Burning.*

INCHANTMENT.—*Vide Witchcraft.*

INCLOSURE.—*Vide Black Act. Deer. Hunters. Fish.*

INCORRIGIBLE ROGUES.—*Vide Vagrants.*

INDICTMENT.—*Vide Contra pacem. Vi et armis.*

1 In an indictment for forcible entry, *tali die intravit, &c. et ipsum A. B. manu forti dissaisivit*, are sufficient without adding *ad tunc et ibidem.* *Page* 286 s. 42
2 But in murder it is a fatal mistake not expressly to shew the day and place of the stroke, as well as of the assault. 287
3 In an information or indictment on a penal statute, the words of the statute must be precisely pursued. 484 s. 20, 28. 342 s. 25
4 In what manner the words of the statute of treasons have been pursued in indictments 51 s. 6
5 How an indictment against a popish priest must be framed. 68 s. 82
6 In an indictment for not taking the oath, any misrecital of the very words of the oath is erroneous. 83 s. 56
7 In an indictment on 8 Eliz. c. 4. the prisoner shall have his clergy saleo laid *clam et secretè*. 151
8 An indictment for forcible marriage ought to alledge that it was *vir lucri*. 172 s. 4
9 An indictment on a statute need not shew that the defendant is within the benefit of an exception. 20, 21 484
10 An indictment is not vitiated by false Latin unless it be unintelligible or nonsensical. 342. 104
11 How forgery on the statute may be set forth. 343
12 What is necessary in an indictment for nuisance. 361. 422
13 It is justifiable to kill an innocent person, *indicted*, if he fly from process. 106 s. 12
14 A person may be indicted in one county for goods stolen in another. 136, 137
15 In what county forcible marriage may be indicted. 171, 172
16 Every indictment of larceny must have the word *cepit* as well as *asportavit*, 134

IDLE and DISORDERLY.—*Vide Vagrants.*

INDORSEMENT.—*Vide Forgery.*

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FAMY.—*Vide Libel.*

INFANT.

ought to find ſecurity for the by their friends, and not be themſelves. *Page* 254
the age of diſcretion not to be d criminally. 1
be dealt with if they can diſ- between good and evil. 3 ſ. 8
ble to make a civil ſatisfaction *ibid.*
guilty of a forcible entry in of actual perſonal violence. 283 ſ. 35

ION.—*Vide Murder. Quarantine.*

OR COURT.—*Vide Hereſy.*

INFIDELS.

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IATION.—*Vide Indictment.*

OTS.—*Vide Bullion.*

re for making *ingots* in imi- f *Spaniſh bars.* 72 ſ. 7.

SSING.—*Vide Foreſtalling.*

HABITANT.

abitants are to be taxed to ir of bridges. c. 77. ſ. 16

ATES.—*Vide Burglary.*

INN and INNHOLDER.

1 An innkeeper may be indicted at common law for *the nuiſance* of harbouring thieves, or ſuffering diſorders, or taking exorbitant prices, or if he open a new inn unneceſſarily, &c. *Page* 451 c. 78
2 If he refuſe to entertain a traveller, &c. he is liable to an action by the party grieved. 452
3 The conſtable may compel the reception of a gueſt. *ibid.*
4 How he may enlarge or build a new inn, upon the *ſcite* of an old one. ſ. 3
5 They muſt ſell their victuals and provender at reaſonable rates. 480
6 In what manner they may make horſe bread. 453 ſ. 8

INN of COURT.

1 Burglary may be committed in a chamber in an inn of court—the reaſon of it. 163

INQUEST of OFFICE.—*Vide Coroner. Forfeiture.*

1 In what manner lunacy may be tried by an inqueſt of office. 3 ſ. 4

INQUISITION.—*Vide Madmen. Lunacy.*

INSOLVENTS.—*Vide Bankrupts.*

1 By 28 Geo. 2. c. 13. inſolvent priſoners guilty of perjury, in delivering a ſchedule of their effects in the manner the act deſcribes, ſhall ſuffer death without clergy. 204 ſ. 4

INSURANCE.—*Vide Ships. Mariners.*

INTAIL.—*Vide Remainder.*

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## INTENTION.


1 There can be no felony without an evil intention. *Page* 99
2 Originally the bare intention to commit a felony, was felonious. *ibid.*
3 In burglary there muſt be an intention to commit felony. 164 ſ. 18
4 How far the intention with which perſons aſſemble, will be unlawful, in order to conſtitute a *riot*. 294 ſ. 3
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## INTICING.—*Vide Enliſting.*

## INTRUSION.—*Vide Forcibly Entry.*

## INSTRUMENT.


1 High treaſon to make, or to have a coining inſtrument in cuſtody. 64


## INVOCATION.


1 Formerly the invocation of an evil ſpirit was felony. 8


## IPSO FACTO.—*Vide Church. Excommunication.*

## IRELAND.


1 Ireland is not a foreign nation as to the bringing counterfeit money from it. 65 ſ. 67
2 How far a popiſh prieſt going to Ireland, but driven again on the Engliſh coaſt by a ſtorm, is guilty of high treaſon. 68, 69
3 Forgery of a leaſe of lands in Ireland, is not within 5 Eliz. c. 14. 341 ſ. 20


## IRON.—*Vide Freehold. Stolen Goods.*

## IRONY.


1 How to be underſtood in a libel. 353


## IRREVERENCE.


1 A churchwarden is juſtified in *laying hands* on any perſon guilty of irreverent behaviour during divine ſervice. *Page* 272


## ISSUE.—*Vide Pleading. General Iſſue*

## JUDGE.


1 Bribery in a judge formerly puniſhed as high treaſon. 314 ſ. 6
2 It is now a very high miſdemeanor. *ibid.*
3 The Earl of Middleſex fined for bribery. ſ. 7
4 Judges of all courts of record are freed from all proſecutions whatſoever, *as judges*, except in parliament. 350 ſ. 6
5 Judges are not within 8 Hen. 6. c. 12. againſt altering records. 177 ſ. 4


## JUDGEMENT.


1 How far it is *præmunire* to impeach a judgment given at common law. 79, 80
2 Whether the *villainous* judgment ſhall be inflicted for conſpiracy. 351
3 No inſtance of it ſince the reign of Edw. 3. 352


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1 How far it is felony in the officer to execute a convict where the judge has no juriſdiction. 105, 106
2 It is no juſtification of confederacy to carry on a malicious proſecution, that the court had no juriſdiction of the cauſe. 348, 349
3 No want of juriſdiction in a court, to which ſcandalous matter is introduced, will make it libellous. 354, 355
4 The quarter ſeſſions have juriſdiction in conſpiracy. 352

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JURORS.—*Vide Preſentment.*

1 Whoever ſhall ſtrike a juror, &c. in court, ſhall loſe his hand, his goods, the profit of his lands, and ſuffer perpetual impriſonment. *Page* 88 f. 3
2 A juror who gives a verdict contrary to manifeſt evidence, is not thereby guilty of perjury. 322 f. 5
3 Jurors not liable to any proſecution whatſoever, in reſpect to their verdict, *in a criminal matter.* 349 f. 5
4 They were formerly queſtioned in the *Star Chamber.* *ibid.*
5 But *attaint* lies againſt jurors for a falſe verdict in a *civil cauſe.* *ibid.*
6 In queſtions of repairing bridges no inhabitant ought to be a juror. 444 f. 6
7 It is *maintenance* for a juror to *ſolicit* a judge for judgment, after he has given his verdict. 536 f. 8
8 A juror may exhort his companions to give ſuch a verdict as he thinks right, 537

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2 How far they have juriſdiction in the offence of abſenting from church. 23, 24

JUSTICES of PEACE.

1 The power of juſtices of the peace to bind perſons to their good behaviour, is indefinite and diſcretionary. 262

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1 Truth is no juſtification of a libel. 353, 354
2 The reaſon of it. *ibid.* (N)

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K.

KALENDAR.—*Vide Computation.*

KILLING.—*Vide Murder.*

KING.—*Vide Treaſon. Contempt.*

1 EVERY offence tending to the prejudice of the king, is indictable. *Page* 361 f. 4
2 A prerogative given to one king goes to his ſucceſſors. 83 f. 28
3 The reaſon is, that the king never dies 273 f. 31
4 A miſtake to his prejudice may be aſſigned for, even where nothing elſe can. 25 f. 29
5 The king's title to land muſt always appear upon record. 28 f. 45

KING's BENCH.—*Vide Diſcretion. Forcible Entry. Church. Certificate. Riots.*

1 The king's bench has a ſupreme juriſdiction over all criminal matters. 289, 292

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LAMB.—*Vide Cattle.*

LAND.

1 THE king's title to it muſt always appear upon record. 28 f. 45
2 In recuſancy, the king cannot ſeize lands, till inquiſition found. *ibid.*

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## LARCENY.


1 Larceny is either ſimple or mixed; ſimple larceny is either grand or petty. *Page* 134 c. 33

2 Simple grand larceny is the taking and carrying away of goods, neither from the perſon nor the houſe, above the value of 12 d. *ibid.* ſ. 1

3 Every indictment of larceny muſt have the *felonicè cepit* as well as *aſportavit*. *ibid.* ſ. 2

4 As all felony includes treſpaſs, if the party be guilty of no treſpaſs in *taking* the goods, he cannot be guilty of felony in *carrying them away*. *ibid.*

5 One who finds goods and converts them to his own uſe *animo furandi* is no felon. *ibid.* ſ. 3

6 One who has the *actual poſſeſſion* of goods *by delivery*, cannot be guilty of felony in embezzling them afterwards. *ibid.*

7 A reaſon given for this rule of law. 135

8 But if thoſe who have the *poſſeſſion* of goods by delivery take away part thereof with intent to ſteal it, it is larceny. *ibid.* ſ. 5

9 For the poſſeſſion of a part diſtinct from the whole was gained by wrong, and not delivered by the owner. *ibid.*

10 To conſtitute larceny the property muſt be taken from *the poſſeſſion* of the owner. *ibid.* (N) 1

11 And if the felonious deſign be hatched ſubſequent to the delivery of the goods it is no felony. *ibid.*

12 But if the delivery of the goods be obtained with a *premeditated* deſign to ſteal them, the *poſſeſſion* ſhall ſtill be ſuppoſed to reſide, unparted with, in the owner. *ibid.*

13 And where the delivery of goods to another, is only made for the ſpecial purpoſes *of the perſon who delivers them*, and is not made to the uſe of the *perſon to whom they are delivered*, the *poſſeſſion* is conſtrued to remain with the owner, and the taking of them away is felony. *ibid.*

14 Inſtances of convictions upon this rule. *ibid.*

15 It is felony to take away goods of which a perſon has the *bare charge, or the ſpecial uſe*, as a ſhepherd of ſheep, &c. *Page* 136 ſ. 6

16 If a carrier, after he has brought goods to the place appointed, take them away again ſecretly, *animo furandi*, he is guilty of felony. *ibid.* ſ. 7

17 If goods be obtained under colour of the proceſs of law, the taking of them feloniouſly away is larceny. ſ. 8

18 A perſon who ſteals goods from one who had ſtolen them before, may be indicted for ſtealing the goods of the real and true owner. ſ. 9

19 An indictment for larceny may be brought, either in the county where the goods were ſtolen, or in the county where they are found. *ibid.*

20 But if goods ſtolen at ſea, be taken into any county, the thief cannot be indicted for felony there, becauſe the original taking was not felony at common law. 137

21 By 13 Geo. 3. c. 31. Perſons ſtealing goods in either part of the united kingdom may be indicted in the other part of the united kingdom where they are found, &c. *ibid.*

22 It was felony by common law to ſteal furniture from lodgings, *if the lodgings were taken as a cloak only*, to rifle them. *ibid.* ſ. 10

23 By 3 & 4 W. & M. c. 9. whoever ſhall take away with intent to ſteal, embezzle, or purloin any chattel, bedding or furniture let to them with their lodgings, ſhall ſuffer as in caſe of felony. *ibid.*

24 A wife cannot be found guilty *with her huſband* upon this ſtatute; nor without, if the lodgings were let to him; and a joint taking ſhall be conſtrued his act only. (N) 3

25 The offender muſt be a lodger at the time the larceny is committed. *ibid.*

26 The indictment muſt ſet forth the name of the perſon by whom the lodgings were let. *ibid.*

27 The property ſtolen muſt be ſuch as may reaſonably be conſtrued furniture of the lodgings taken. *ibid.*

28 By 21 Hen. 8. c. 7. "If any ſervant, above eighteen years of age, and

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and not an apprentice, ſhall withdraw and go away from his maſter with any caſkets, jewels, money, or goods delivered to him to keep, to the intent to ſteal the ſame—or being in his maſter's ſervice, ſhall, without his aſſent, convert the ſame to his own uſe with a like intent, if above the value of 40*s.* he ſhall be guilty of felony." *Page* 138 ſ. 4

29 The offender muſt be ſervant, both at the time of the delivery of the goods, and at the time they are taken. ſ. 12

30 It is *ſtrictly* confined to ſuch *goods as are delivered to keep.* ſ. 13

31 A ſervant who receives goods from another ſervant, to keep for his maſter, is within the ſtatute. 139

31 No waſting of goods is within the act, nor any obligation or other *choſe in action.* ſ 14

32 The things taken muſt be the property of the maſter *at the time.* 139 ſ. 15

33 What things ſhall be conſidered as ſuch property. *ibid.*

34 By 12 Ann. c. 7. the benefit of clergy is taken away from the offence of ſtealing the value of 40*s.* out of any dwelling or out-houſe, *generally*, excepting perſons under the age of 15 years. ſ. 16

35 By 7 Jac. 1. c. 7. thoſe who ſhall embezzle yarn, &c. &c. delivered them to work, ſhall be whipped, &c. on conviction by two juſtices. ſ. 17

36 By 17 Geo. 3. c. 56. the ſame puniſhment extended to ſervants in the hat, woollen, linen, fuſtian, cotton, iron, leather, fur, hemp, flax, mohair, ſilk, and dying manufactures. 140

37 By 15 Geo. 2. c. 13. if any ſervant of the bank, entruſted with the effects of the company, &c. ſhall ſecrete, embezzle, or run away with the ſame, he ſhall ſuffer death without clergy. 139, 140

38 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. if any ſervant, &c. of the poſt office, ſhall ſecrete or deſtroy any letter intruſted to, or coming to, his care, containing any ſecurity for the payment of money, he ſhall ſuffer death without clergy. *Page* 140

39 How an indictment upon this act muſt charge the offender. (N) 4

40 What *carrying away* will ſatisfy the word *aſportavit.* 140 ſ 18

41 The leaſt removal is ſufficient though not quite carried off. 140, 141

42 As taking ſheets from a bed into a hall; or a horſe at graſs, though not out of the field; or goods from the head to the tail of a waggon; or an ear-ring from a lady's ear, though it lodge in her hair, &c. *ibid.* (N) 5

43 But a bale lying horizontally, and ſet on its end, but not moved from *the ſpot*, is no aſportation. *ibid.*

44 To pull off the wool from another's ſheep, or to ſtrip their ſkins, or to take plate from a trunk, and lay it on the floor, are ſufficient aſportations. *ibid.*

45 Larceny may be committed by a *feme covert*, in ſtealing the goods of a ſtranger. ſ. 19

46 But not if ſhe take her huſband's goods. *ibid.*

47 A man may be guilty of larceny by taking away a wife with her huſband's goods on her. *ibid.*

48 Hunger and neceſſity is no excuſe for larceny. ſ. 20

49 Larceny cannot be committed of property any way annexed to the freehold. ſ. 21

50 Therefore, only a treſpaſs to ſteal corn or graſs growing, apples on a tree, lead from a houſe or church, unleſs they were ſevered at *one time* and taken away *at another.* *ibid.*

*(Sed vide Corn and Lead.)*

51 The reaſon of this diſtinction. 143

52 By the common law a *choſe in action* is not capable of being *feloniouſly* ſtolen. ſ. 22

53 By 2 Geo. 2. c. 25. ſtealing any of the *ſecurities* therein named, is made ſuch felony, as ſtealing goods of the like value would be. *ibid.*

54 By 5 Geo. 3. c. 25. to rob any mail, or to ſteal any letter or packet, is death without clergy. 142. 143

55 Larceny cannot be committed of things of a baſe nature, as dogs, cats, bears,

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bears, foxes, &c. &c. But by 10 Geo. 3. c. 18. a puniſhment is inflicted on *dog*-ſtealing. *Page* 142, 143 ſ. 23

56 Larceny may be committed of a *reclaimed* hawk, both at common law and by 37 Ed. 3. c. 19. *ibid.*

57 The property of which larceny is committed, muſt belong *to another*. ſ. 24

58 To take treaſure *trove*, wreck, waif, or ſtray, is not felony, unleſs firſt ſeiſed by the perſon intitled to them. *(Sed vide Shipwreck.)* 144

59 Fiſh at their natural liberty cannot be the ſubject of larceny at common law. *(Vide Fiſh.)* ſ. 25

60 Nor deer, hares, or conies, in a foreſt, chace, or warren; *(Vide Hunters—Black Act.)* nor old pigeons, being out of the houſe, &c. ſ. 26

61 But it is felony to ſteal creatures *feræ naturæ*, fit for food and reduced to tameneſs. *ibid.*

62 So, alſo, wild animals ſo incloſed that the owner may take them whenever he pleaſes. *ibid.*

63 It is felony to take ſwans marked, or pinioned, and unmarked, if in a private river or pond.—But *quære*, as to their eggs or young ones. *ibid.* 27

64 Horſes, or any creatures *domitæ naturæ*, and fit for food, as ducks, &c. or their eggs or young ones may be the ſubjects of larceny. ſ. 28

65 Felony may be of goods, the owner of which is unknown, and the indictment ſhall be *cujuſdam hominus ignoti*. ſ. 29

66 Stealing the goods of a chapel, church, or pariſh, may be laid *bona capellæ—bona domus et eccleſiæ—bona parochianorum*. 145

67 In ſtealing a ſhroud from a *dead corpſe*, the property muſt be laid in the owner of it when it was put on. *ibid.*

68 In what caſe a man may be guilty of larceny in taking goods, the abſolute property of which is in himſelf. ſ. 30

69 The value muſt exceed 12*d.* or the ſtealing will be only petty larceny. ſ. 31

70 If two perſons ſteal goods above the value of 12*d.* each of them will be guilty of grand larceny. *Page* 145 ſ. 32

71 The ſtealing to above the value of 12*d.* muſt be at the ſame time, not ſeparate acts of ſtealing; for the law will not permit things ſtolen at different times to be added together, in order to conſtitute either grand larceny or a capital offence. ſ. 33 (N) 12

72 Caſes in which larceny is excluded from clergy. 140

73 Petty larceny is ſtealing goods of, or under the value of 12*d.* ſ. 34

74 All petty larceny is felony, and requires the word *feloni. è*, but it is only puniſhed with forfeiture of goods, and whipping, &c. ſ. 36

75 If the indictment be for ſtealing to the value of 10*s.* and the jury find a general verdict *guilty*, but that the goods were worth but 10*d.* it is only petty larceny. ſ. 35

76 By 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. perſons convicted of grand or petit larceny, intitled to clergy, and liable to be burned in the hand, &c. may be tranſported for ſeven years. ſ. 37

77 There are no acceſſaries in petty larceny. (N)

## L A W.

1 In what inſtance the law of *Moſes* agrees with the common law of England in the crime of murder. 121

2 How the common law differs with the law of *Moſes*, in reſpect to certain larcenies. 135

3 The *Moſaical* law rather proves the lawfulneſs, than the unlawfulneſs, of uſury. 528

4 If the court, in time of peace, put a man to death, by *martial law*, both the judges and officers are guilty of murder. 130 ſ. 59

5 Aliens *invading* the kingdom, ſhall be tried by martial law. 51 ſ. 6

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## LAW BOOKS.

1 The king may grant the exclusive right to print law books—the reason of this privilege. *Page* 471 f. 6 (N) 6

## LAWYER.—*Vide Counsellor. Barrister. Attorney.*

## LAYMAN.

1 The punishment of *a layman* for making an affray in the church. 271
2 The punishment of *a layman* for depraving the common prayer. 13, 14

## LAZARETS.—*Vide Quarantine.*

## LEAD.—*Vide Freehold. Stolen Goods.*

## LEET.

1 All affrays are inquirable at the leet. 265 f. 1.
2 The reason why the leet has no jurisdiction over a *private* assault. *ibid.*
3 A nuisance in *any* way is punishable by indictment in the court leet. 366 f. 1
4 A presentment for not repairing an highway, in the court leet, is not traversable, unless it concern the freehold. 416
5 As being bound to such repairs in respect of the tenure of his lands, &c. 421

## LETTERS.—*Vide Post-Office.*

1 By 5 Geo. 3. c. 25. & 7 Geo. 3. c. 50. servants of the post-office embezzling any letter, packet, or bag of letters intrusted to his care, containing any security for the payment of monies, are guilty of felony without clergy 140
2 And whosoever shall rob any mail of, or steal any letter, packet, or bag of letters sent or conveyed [illegible] office, shall suffer death [illegible] gy.
3 By 9 Geo. 1. c. 22. whoever shall send any anonymous or *fictitious* letter demanding money, venison, or other valuable thing, shall suffer death without clergy. 226
4 By 27 Geo. 2. c. 15. to send any *such* letter threatening to kill or murder another, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money, &c. be demanded, shall suffer death without clergy. *ibid.*
5 Constructions upon this statute. (N) 6
6 By 30 Geo. 2. c. 24. to send any such letter threatening to accuse any person of any crime, punishable with death or transportation or pillory, or other infamous punishment, with a view to extort money, goods, &c. shall be pilloried, &c. or transported. *ibid.*
7 It is a very high offence to challenge another, by letter, to fight a duel, or to carry such a letter. 266
8 Sending a letter full of provoking language without publishing it, is highly punishable. 356

## LETTERS PATENT.—*Vide Monopoly. Grant.*

## LEVYING WAR.—*Vide Treason.*

## LEWDNESS.

1 All *open* lewdness, grossly scandalous, is indictable as tending to subvert religion and morality. 10 f. 4, 5

## LIBEL.

1 A libel is a malicious defamation in printing or writing, or expressed by signs, or by pictures. 352 c. 73
2 It is severely punished because of its direct *tendency* to a breach of the peace. *ibid.* f. 3

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3 So alſo ſcandal written in a ſcoffing or ironical manner, is libellous. *Page* 353 ſ. 4

4 So alſo a defamatory writing, expreſſing only one or two letters of a name, but ſignificant of a particular perſon, is a libel. ſ. 5.

5 A friend of the party libelled, muſt prove that he underſtood its meaning, &c. *ibid.* ſ. 6

6 It is no juſtification of a libel that the contents are true ſ. 6

7 The reaſons for this maxim. *ibid.* (N) 1

8 A writing which defames private perſons, is equally libellous as if the object of the defamation was a public character. 354 ſ. 7

9 But libels againſt public characters are moſt heinous. *ibid.*

10 But no ſcandalous or impertinent matter contained in public or in legal proceedings will amount to a libel, even if the court has no juriſdiction. ſ 8

11 Yet if it manifeſtly appear that the ſole intention of the ſuit was for the purpoſes of defamation, it may be otherwiſe. *ibid.*

12 But no preſentment of a grand jury ſhall ever be eſteemed libellous. 355

13 Nor can any writing be libellous unleſs it reflect upon ſome perſon. *ibid.*

14 But writing an obſcene book may be puniſhed by the temporal courts. *ibid.* (N) 2

15 Thoſe who compoſe a libel may be puniſhed as well as thoſe who publiſh it, and ſo may thoſe who procure it to be compoſed or publiſhed. ſ. 10

16 Ignorance of the contents is no juſtification for diſperſing a libel. *ibid.*

17 And if a perſon either read or hear a libel, and afterwards maliciouſly read or repeat it, or lend it to another, he is guilty of publication. *ibid.*

18 Copying a libel is *prima facie* evidence of publication. *ibid.*

19 If ſervants publiſh a libel during their maſter's impriſonment, they having no poſſible acceſs to him, the crime ſhall not be imputed to the maſter, unleſs *ſome* privity appear. ibid. (N) 3

20 The *amanuenſis* of a libel is guilty of making it. *Page* 356

21 Sending a provoking letter to another, is highly puniſhable. ſ. 11

22 Sending a libel to the party defamed is a publication. *ibid.*

23 So a defamatory petition, if delivered to any but a member of parliament, is a publication. ſ. 12 & 15

24 But barely to read a libel without a previous knowledge that it was a libel; or hearing it to laugh at it as a libel; or only to have a libel in one's cuſtody, is not puniſhable, ſ. 13

25 But the cuſtody of a copy of a libel, publicly known, is evidence of publication. *ibid.*

26 And, *quære*, if he who only repeats a libel in jeſt and merriment, is thereby guilty. *ibid.* 14

27 A libel is puniſhable by fine and corporal puniſhment in the diſcretion of the court. 357


## LICENCE.


1 How far neceſſary to enable recuſants to go above five miles from home. 35. 40

2 In what caſes a dove-cote cannot be built by a tenant without licence from the lord 362

3 The penalty of going abroad without licence. 74. 185

4 By 26 Geo. 2. c. 33. it is felony without clergy to forge a marriage-licence. 173

5 The manner in which retailers of ale, beer, ſpirituous liquors, ſtrong waters, and made wines ſhall be licenſed (*vide public-houſes*). 454 to 464


## LIE.


1 He who gives *the lie* to another in Weſtminſter-Hall, ſitting the courts, ſhall be bound to his good behaviour. 89 ſ. 9

2 Obtaining money, &c. by no artful contrivance, but merely on a *bare naked lie* is not puniſhable criminally. 344

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LIFE.—*Vide Homicide. Excuſable. Murder. Manſlaughter.*

LIGEANCE.—*Vide Allegiance. Treaſon.*

LINEN.—*Vide Callico.*

LIMBS.—*Vide Maim.*

LIP.—*Vide Maim.*

1 In what caſes it is felony to cut off another's lip. *Page* 175, 176

LITERARY PROPERTY.—*Vide Books. Authors.*

## LIVERY.

1 To give liveries for maintenance is highly criminal. 544 ſ. 43

## LOCKS.

1 It is felony, without clergy, to deſtroy locks, &c. on navigable rivers. 198 c. 55

LODGER and LODGINGS.—*Vide Larceny. Burglary.*

1 It was doubtful at common law, whether robbing lodgings, *fairly taken*, of the furniture let with them, was felony. 137
2 If the lodgings were taken with an *original deſign* to ſteal the furniture, the taking was felonious. *ibid.*
3 By 3 & 4 Will. & Mar. c. 9. if any perſon ſhall take away with intent to ſteal any chattel or furniture, which by contract ſhall be let to him with lodgings, he ſhall ſuffer as in felony. *ibid.*
4 A wife cannot be found guilty *with her* huſband on this ſtatute. *Page* 137 (N) 3
5 Nor without him, if the lodgings were let to him. *ibid.*
6 If the lodgings were let jointly, it ſhall be conſidered as the taking of the huſband only. *ibid.*
7 The offender muſt be a lodger *at the time* of the felony. *ibid.*
8 The indictment muſt ſtate the name of the perſon by whom the lodgings were let. *ibid.*
9 The property ſtolen muſt be *the furniture* of the lodgings, or ſuch other thing, and may reaſonably be conſtrued to have been let with them. *ibid.*
10 The apartment of a lodger is his *manſion houſe*, and may be ſo laid in burglary, provided the landlord does not ſleep under the ſame roof. 164
11 If the landlord ſleep under the ſame roof, and the lodger's apartment is divided from the reſt of the houſe and has a ſeparate door, it may be laid as the manſion houſe of the lodger. 164

## LONDON.

1 The charters of the city which require that the lord mayor ſhall be the principal in every judicial commiſſion, extend not to ſuch cauſes as are limited by ſtatute to particular judges. 178 ſ. 8.

## LORD.

1 How far the lord may maintain the ſuit of his tenant. c. 83 ſ. 21
2 The licence of the lord where neceſſary to enable his tenant to build a dove-cote. 362

## LORD's DAY.

1 No perſons to aſſemble out of their own pariſhes for any ſport whatſoever, nor any unlawful paſtimes to be uſed by perſons in their own pariſhes on Sunday, on pain of 3*s.* 4*d.* 11 ſ. 1
2 No market to be held on any ſeſtival

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the four Sundays in harveſt excepted. *Page* 11 ſ. 2
3 No perſon ſhall publicly cry or ſell goods, except milk before nine in the morning, and mackrel out of church-time. ſ. 2 12 ſ. 4
4 No common carrier, drover, &c. ſhall travel on this day, on pain of 20*s.* nor any boat or barge, unleſs allowed by a juſtice, on pain of 5*s.*—nor any game be deſtroyed—nor any houſe opened for publicly debating. 11 & 12 ſ. 4
5 But works of neceſſity or charity may be performed—meat may be dreſſed and ſold by victuallers—dinners may be baked by bakers, but *quære*, as to rolls. 11 ſ. 3 (N) 2
6 Fiſh carriages may travel on the Lord's day, and forty watermen may ply upon the Thames, hackney coaches may work within the bills of mortality. 12

LOOMS.

1 Deſtroying them, in certain branches, of manufactures, made felony without clergy. 230 ſ. 2. 231 ſ. 3, 4 & 5

LOTTERY ORDERS.

1 By 25 Geo. 3. c. 57. the counterfeiting of lottery orders or tickets made felony without clergy. 209
2 The managers may act as magiſtrates in apprehending offenders. *ibid.*
3 A reward of 50*l.* for diſcovering, &c. of offenders, and a pardon to accomplices, *ibid.*

LOVE.

1 Such as took upon them to do any thing tending to provoke unlawful love were puniſhable by the 1 Jac. 1. c. 12. for witchcraft—but that act is repealed by 9 Geo. 2. c. 5. and pretenders to ſuch arts are puniſhable by 1 year's impriſonment, and ſtanding four times in the pillory, &c. 9

LUNATICS.—*Vide Madmen.*

1 Not puniſhable criminally. *Page* 2
2 Lunacy only, a partial derangement of mind. 2 (N) 2
3 Vagrant and dangerous lunatics may be ſecured by the juſtices of the place where they are found. 2 ſ. 4

LUNAR MONTH.—*Vide Computation.*

M.

MACKREL.

1 MAY be ſold on Sunday. 12

MADMAN.

1 Madneſs is a total alienation of the mind. 2 (N) 2
2 Anciently madmen were puniſhed for treaſons againſt the life of Majeſty. 2 ſ. 2
3 At preſent, madmen are not puniſhable by any *criminal* proſecution whatſoever. 2 ſ. 1
4 If a priſoner become mad at any interval between commitment, arraignment, trial, conviction, judgment, or execution, all ſubſequent proceedings againſt him ſhall ſtop. 2 ſ. 3
5 But the madneſs muſt be plain and unequivocal, not any idle frantic humour. 2 (N) 2
6 How the fact of madneſs ſhall be tried. 3 (N) 5
7 By 17 Geo. 2. c. 5. vagrant madmen, whoſe diſorder is dangerous, may be ſecured and confined by an order of juſtices. 2 ſ. 4
8 A madman may be compelled to make ſatisfaction by a civil action. 3 ſ. 5
9 Madneſs induced by intoxication is no excuſe for the commiſſion of crimes. *ibid.* ſ. 6
10 Whoever incites a madman to commit a crime, is a principal offender. *ibid.* ſ. 7

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11 It is no forfeiture of a recognizance for the peace, to confine a friend who is mad. *Page* 259 f. 23
12 The concluſion that ſelf-murderers muſt be madmen, is ill founded. 102 f. 3

## MAGIC.—*Vide Witchcraft.*

## MAIL.—*Vide Poſt Office. Larceny.*

## MAIM.

1 Maim is an injury to the perſon of another, by which he is rendered leſs able to defend himſelf, or annoy his adverſary. 175 f. 1
2 As weakening a man's hand or finger, ſtriking out his eye or foretooth, or caſtrating him. f. 2
3 But cutting off an ear, noſe, &c. are not *maims*, for it does not *weaken*, but only *diſfigures*. *ibid.*
4 All maim is felony. f. 3
5 How caſtration and other maims were anciently puniſhed. *ibid.*
6 A man who maims himſelf, either to induce pity, by begging, or to avoid inliſting as a ſoldier, may be indicted and fined. 176 (N) 1
7 By 37 Hen. 8. c. 6. to cut off another's ear, otherwiſe than by law, chance medley, ſudden affray, or adventure, forfeits treble damages and 10*l.* to the king. *ibid.* f. 7
8 By 22 & 23 Car. 2. c. 1. by lying in wait, to cut off or diſable any limb, or member of another, *with intent to maim or diſfigure him*, or to aid, &c. therein, is felony without clergy. 176 f. 4
9 But no corruption of blood, loſs of dower, or forfeiture, &c. ſhall enſue. f. 5
10 If the offender *maims*, he is within the above ſtatute though the primary intention was to *murder*, and not merely *to maim*. f. 6
11 If the offence be not within the act, the offender may be indicted or appealed for maim, at common law, or an action of treſpaſs (which is moſt uſual) may be brought for damages. (N) 2
12 There are no acceſſaries after the fact in maim. *Page* 176

## MAINTENANCE.

1 Is an unlawful upholding of quarrels, to the hindrance of common right. 535 c. 83
2 And is either *ruralis*, or aſſiſting one in his pretenſions to another's land, &c. in the country, which is puniſhable by *the king*, with fine and impriſonment. f. 2
3 Or *curialis*, in a court of juſtice, by officiouſly intermeddling in ſuits no way belonging to the party. f. 3
4 To aſſiſt with money, or to retain counſel for another, *ſeems* to be maintenance. f. 4
5 So it is ſaid, that to perſuade a counſel to aſſiſt another's cauſe, is maintenance. 536 f. 5
6 So to open the evidence to the jury, or to give evidence uncalled for, or to ſpeak as counſel, or to retain an attorney, &c. is maintenance. f. 6
7 So if a powerful patron threaten to ſpend money in another's cauſe, &c. f. 7
8 So if a juror ſolicit a judge to give judgment, &c. f. 8
9 But it is not maintenance to give another friendly advice what action to bring, or to recommend an attorney, &c. 537 f. 9
10 Nor even to give another money before a ſuit is commenced, except it be given for that purpoſe. f. 10
11 But *maintenance* may be as well after judgment, as pending the plea. f. 11
12 A remainder man, or reverſioner, may maintain the ſuit of the tenant in tail, or for life. 538 f. 12
13 So the *leſſor* may maintain his *leſſee*, if the inheritance come in queſtion, *ibid.*
14 So the alienee may maintain the title of thoſe under whom he claims. *ibid.*
15 So a leſſee, in future, upon a contingency, may maintain thoſe who poſſeſs the *term*. f. 13

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26 So the heir apparent may maintain the anceſtor. *Page* 538 ſ. 14
27 And now ſince 4 Ann. c. 16. ſ. 9. which make all attornments needleſs, the grantee of a reverſion may maintain the tenant in poſſeſſion. ſ. 15
28 A *warrantor* is bound to maintain the tenant. 539 ſ. 16
29 Whoever has an equitable intereſt, even to a *choſe in action* may maintain another in a ſuit relating thereto. ſ. 17
30 So where perſons claim a common intereſt in the ſame thing, they may maintain each other. ſ. 18
31 And he who is bail for another, may interpoſe to have his appearance recorded, but not further. ſ. 19
32 A father, or heir apparent, or the huſband of an heireſs, may maintain ſuits reſpectively—but a godfather cannot advance money, &c. 540 ſ. 20
33 So the lord, or *ceſtui que uſe* of a ſeigniory, may maintain the tenants, &c. ſ. 21
34 And the tenant may *ſtand by* his lord at the trial. ſ. 22
35 A maſter may retain counſel for his ſervants, and ſtand by them at the trial, but he cannot ſpeak for them. 541 ſ. 23
36 But the maſter cannot lay out money for his ſervant in *real actions*, as he may do to keep him from gaol in other actions, unleſs the ſervant conſent that his wages ſhall be ſo employed. *ib. d.*
37 But a ſervant cannot cannot lay out his own money in his maſter's ſuit. ſ. 24
38 A man may go with *his neighbour* to counſel, but he cannot ſupport him with money in his ſuit. ſ. 24
39 But a man may lawfully *give money* to a poor perſon to carry on his ſuit. ſ. 24
40 A counſellor may defend his client, but he cannot give him money to ſupport his cauſe, or threaten a juror in his behalf. 542 ſ. 27
41 An attorney *retained*, may conduct his client's cauſes in the courts of which he is an attorney, &c. but they cannot expend money for another without the expectation of repayment—and, *quære*, if *ſolicitors* can lay out money for a client. *Page* 542 ſ. 28
42 No counſellor or attorney can juſtify any deceitful practice in maintaining a client's cauſe. ſ. 29
43 And by ſtat. Weſt. they may be diſqualified, impriſoned for a year and a day, and otherwiſe puniſhed at the king's pleaſure. *ibid.*
44 Counſellors, &c. who are not ſworn, are equally within the ſtatute. ſ. 30
45 All fraud and falſehood tending to impoſe upon or abuſe the court, are within it. ſ. 31
46 Or where an attorney ſues out a falſe writ, or brings a *precipe* againſt a poor man, &c. or procures judgment without warrant, or pleads a *falſe* plea. ſ. 32 to 35
47 All maintenance is prohibited by the common law; the offenders are anſwerable in damages, and may alſo be indicted and fined and impriſoned. ſ. 36
48 A court of record may commit for maintenance in the face of the court.
49 By 1 Ed. 3. c. 14. none by ſending letters, or otherwiſe, ſhall maintain ſuits and quarrels.
50 By 1 Rich. 2. c. 4 maintenance by the king's ſervants, ſhall be puniſhed at *his pleaſure*—other leſs officers ſhall be impriſoned and diſqualified, and all other perſons by fine and ranſom. 544
51 Maintenance in a court baron, is within this act. ſ. 39
52 *Nul tiel record* a good plea to maintenance. ſ. 40
53 A perſon is not liable for taking out *an original* which is never returned. *ib.*
54 It is immaterial whether the plaintiff recovered, or was nonſuited. ſ. 41
55 Whoever fears that another will maintain his adverſary, may have a writ to prohibit him. ſ. 42
56 All perſons are prohibited from giving badges, &c. for maintenance. ſ. 43
57 By 32 Hen. 8. c. 9. none ſhall maintain any action where any perſon ſhall have authority to hold plea of

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of lands—nor embrace any freeholders, or jurors, or witneſſes, on pain of 10*l.* &c. *Page* 544 ſ. 44

48 On information on this ſtatute muſt alledge that the maintenance was "unlawfully" committed. 545 ſ. 45

49 Maintenance of a ſuit in a ſpiritual court, is not within any of the above ſtatutes. ſ. 46

50 So it muſt ſhew that a plea was depending. ſ. 47

## MALICE.

1 Arſon cannot be committed unleſs the burning be malicious. 167 ſ. 5

2 But malice againſt one ſhall be conſtrued as malice toward all. *ibid.*

3 What ſhall be conſtrued malice expreſs and implied. 118

4 *Malitia aggreditur perſonam.* 103, 113, 126, 132

## MALT.

1 Whether making corn into malt will alter the property. 139

2 Neither malt, nor corn bought to be malted, within the ſtatutes againſt foreſtalling. 484

## MALUM IN SE.

1 Every nuiſance is *malum in ſe* 362 ſ. 8

2 Every monopoly is *malum in ſe.* 471

## MANSION HOUSE —*Vide Burglary.*

1 *Domus maſionalis* and *meſſuagium* are equipollent. 283

2 In arſon it is not neceſſary to lay the offence as in a *manſion houſe*, *domus* is enough. 166

## MANSLAUGHTER.

1 Homicide *without malice* is called manſlaughter, and ſometimes *chance medley.* 115 c. 30

2 It is that killing which happens either on a ſudden quarrel, or in the commiſſion of an *unlawful act*, without an intention of miſchief. *Page* 115 ſ. 1

3 It muſt be done without premeditation, therefore there can be no acceſſaries before. *ibid.* ſ. 2

4 The ſpecial matter cannot be pleaded, but muſt be given in evidence on the general iſſue. 105 ſ. 3

5 To kill another, who claiming title to a houſe, attempts to enter it by force, or ſhoots at it, or who breaks a window to make an arreſt, or hedges, after being forbidden—is manſlaughters 108 ſ. 23

6 In ſelf defence, where the circumſtances would otherwiſe *juſtify* the homicide, if the party kill the aſſailant without apparent neceſſity, it is manſlaughter. 109

7 If a huſband kill the man, with whom he finds his wife committing adultery it is only manſlaughter. 110 (N) 1

8 If a workman fling down a piece of timber *in play*, or in the frequented ſtreets, and it happen to kill, it is manſlaughter. 111 ſ. 4.

9 So if a parent or a maſter correct a child or a ſervant in a barbarous or immoderate manner, or make uſe of an unuſual or improper inſtrument for the purpoſe. ſ. 5

10 Therefore if an officer of the impreſs ſervice firing at a boat *in the uſual manner*, happen to kill, *at moſt* it is only manſlaughter. *ibid.* (N) 2

11 If death enſue by ſhooting at deer in a *third perſon's park*, or ſhooting a gun, or throwing ſtones in a place of public reſort, or by doing any idle action likely to create bodily hurt, or playing with ſwords, or firing piſtols in a highway, &c it is manſlaughter. 112 ſ. 9 (N) 3

12 If he who draws upon another in a ſudden quarrel, make no paſs at him till *his* ſword be drawn, and then fight with him and kill him, he is guilty of manſlaughter only. 123 ſ. 28

13 If two fall out, agree to fight, fetch weapons, and during the heat of blood one kill the other it is manſlaughter. 124 ſ. 29

14 In-

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14 Indulgencies are ſhewn to the frailties of human nature. *Page* 124 ſ. 30
15 But no infidelity, treſpaſs, words, geſtures, or provoking circumſtances, however malicious or aggravated will reduce the crime of murder to manſlaughter. ſ. 33
16 But upon ſuch provocation if it plainly appear that he meant only to chaſtiſe, and not to kill—or if he had reſtrained himſelf till the other was on his guard, and then in fighting kill, it is only manſlaughter. 125
17 So alſo if one, ſeeing two fight, takes part with one of them and kills the other—or where a man finding a man in bed with his wife, or being actually ſtruck by another, or pulled by the noſe, &c. immediately kills him. ſ. 35, 36
18 It has been held manſlaughter only to kill another in contending for the wall; or in defence of his perſon from an *unlawful* arreſt, or of his houſe from a forcible entry; or if the poſſeſſion of a public room; or to revenge an injury done to a child: or in ducking another as a *pick-pocket*; or in defence of national character, &c. 125 ſ. 36, 37 and (N) 1
19 If a third perſon happen to be killed by one engaged in a combat with another, it is manſlaughter only. 127 ſ. 44, 45
20 If a ſervant ſeeing his maſter engaged, take his part and kill the adverſary it is manſlaughter only. 128 ſ. 49, 50
21 If an officer be killed in attempting to execute an *unlawful* writ, it is only manſlaughter. 130 (N)
22 By 1 Jac. 1. c. 8. a certain ſpecies of manſlaughter converted into murder, (*vide Murder*. No.) 115 to 117

MANUFACTURER.—*Vide Artificer.*

MARINER.—*Vide Piracy.*

1 How mariners in the king's fleet, are puniſhable for ſodomy. 10
2 How for profane curſing and ſwearing. *Page* 12, 13
3 Mariners burning any magazine of powder, or any veſſel, or boat, or the tackle or furniture, ſhall ſuffer death. 76
4 By 39 Eliz. c. 17. idle mariners wandering againſt the injunctions of this act, ſhall ſuffer as felons without clergy. 183, 184
5 By 17 Geo. 2. c. 5. perſons begging as mariners, ſhall be deemed rogues and vagabonds 184
6 If any mariner, &c. ſhall wilfully deſtroy the ſhip, &c. &c. to which he belongs, ſhall ſuffer death without clergy. 185, 186

MARKET TOWN.—*Vide Hiſtory. Engroſſing.*

MARRIAGE.

1 By 3 Hen. 7. c. 2. whoever ſhall take away and defile, or marry any woman having ſubſtance, for lucre thereof, againſt her will, and to her diſparagement, or abet the ſame, or receive the woman, ſhall be guilty of felony. 171
2 By 39 Eliz. clergy is taken from principals and acceſſaries before. ſ. 52
3 The ſeveral determinations made upon theſe acts. ſ. 3 to ſ. 10
4 By 4 & 5 Phil. & Mary c. 8. whoever ſhall allure a girl under 16 and unmarried from her guardians, ſhall be fined and impriſoned two years. 172 ſ. 10
5 If the ſeducer deflower or marry her, he ſhall ſuffer 5 years impriſonment, and fine at diſcretion. *ibid.*
6 If any female above 2 years of age conſent to unlawful matrimony, ſhe ſhall forfeit all her lands to the next of kin, &c. 172, 173
7 Various determinations upon this ſtatute. 173 (N) 2
8 By 26 Geo. 2. c. 33. to ſolemnize matrimony in any other place than where banns have been uſually publiſhed, unleſs by ſpecial licence, and except

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except the parties are Jews or Quakers, &c. is felony and tranſportation 14 years. *Page* 173 ſ. 11
9 To counterfeit, alter, or deſtroy any marriage regiſter, is death without clergy. ſ. 12
10 The forfeiture for a popiſh marriage. 34 37

MARSHAL.—*Vide Conſtable. Murder.*

MASTER.

1 Not juſtified in beating his ſervant in a cruel and barbarous manner or with an improper inſtrument. 111
2 A miſtreſs is included under the word "maſter," in 25 Edw. 3. reſpecting petty treaſon. 132
3 A maſter chaſtiſing a ſervant in actual ſervice, is not an aſſault, for which a recognizance of the peace ſhall be forfeited. 259
4 A ſervant may juſtify beating another in defence of his maſter. 260
5 How far a maſter may *maintain* his ſervant. 541

MASS.

1 By 23 Eliz. c. 4. to ſay or ſing maſs, incurs a forfeiture of 200 marks, and to hear maſs, 100 marks and a years impriſonment. 39
2 By 11 & 12 Will. 3. c. 4. whoever ſhall apprehend a popiſh prieſt for ſaying maſs, ſhall receive 100 *l.* and the offender ſhall ſuffer perpetual impriſonment. *ibid.*
3 But by 18 Geo. 3. c. 60. this puniſhment is repealed, provided the offender takes the oath therein preſcribed. *ibid.*

MEAL.—*Vide Bread.—Baker.*

MEMBER.—*Vide Maim.*

MESSUAGE.—*Vide Burglary.—Forcible Entry.*

MILES.—*Vide Computation.*

MILLER.

1 In what caſe a miller may be guilty of larceny *Page* 135

MILLS.

1 By 9 Geo. 3. c. 29. maliciouſly to burn or deſtroy any mill, is felony without clergy. 224
2 Riotouſly and tumultouſly to demoliſh or begin to demoliſh any mill or the works thereto belonging, is felony without clergy. 309

MINES.

1 To ſteal property from mines not larceny by the common law, becauſe of its adherence to the freehold. 141, 142
2 All mines of gold and ſilver belong to the king, 70
3 By 25 Geo. 2. c. 10. to break into any black lead mine, or into any pit or ſhaft, or unlawfully to take away any lead from a mine, without forcibly entering it, is whipping, &c. or tranſportation. 218
4 By 9 Geo. 3. c. 29. to damage or deſtroy mine engines, is tranſportation for ſeven years. 238
5 How far the king may grant an exclusive right to allum mines 475

MISBEHAVIOUR.—*Vide Behaviour.*

MISCHANCE.—*Vide Homicide. Murder. Manſlaughter.*

1 A hurt by miſchance forfeits not a recognizance for the peace; but it is no excuſe in a civil action. 260. ſ 27

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## MISPRISION.—*Vide Theftbote.*


1 Miſpriſion ſignifies all ſuch high offences, as are nearly bordering upon capital. *Page* 86 c. 20
2 A miſpriſion is contained in every treaſon or felony. *ibid.*
3 The king may proceed for the miſpriſion only *ibid.*
4 Miſpriſion is either negative or poſitive. *ibid.*
5 Miſpriſion of treaſon conſiſts in the *bare* knowledge or concealment of high treaſon f. 2
6 What ſpecies of aſſent will convert miſpriſion into high treaſon. f. 3,4, 5
7 A perſon who is *only told* that there will be a rebellious riſing without he *knows* of the circumſtances, is not bound to make diſcovery of ſuch information. 87 f. 6
8 By 13 Eliz. c. 2. to forge foreign coin not current, or to aid therein, is miſpriſion of treaſon. f. 7
9 Thoſe who *barely utter* falſe money knowingly, were only guilty of *a miſpriſion* at common law. (*Vide* coin.) 62 f. 56
10 Miſpriſion of felony is the concealment, or procuring the concealment of a felony, either by common law or ſtatute. 251 f. 2
11 Silently to obſerve the commiſſion of felony, is miſpriſion. (N) 1
12 Concealment of *treaſure trove* is miſpriſion of felony. *ibid.*
13 By 3 Edw. 1. c. 9. officers procuring or concealing felonies done in their liberties, or who will not arreſt the offenders, ſhall be impriſoned one year, and make grievous fine, or ſuffers three years impriſonment. f. 3
14 By 3 Hen. 7. c. 1. an inqueſt may be taken to enquire of concealments, &c. f. 4
15 Cauſing an abortion is only a high miſpriſion. 121 f. 16


## MISTAKE.


1 Cannot amount to a felonious intention 99 f. 3


## MIXTURE.—*Vide Bullion. Coin.*

## MONEY.—*Vide Coin.*

## MONKEY.


1 No felony to ſteal a monkey. *P.* 143


## MONOPOLY.


1 Monopoly is a grant from the king of the excluſive right of property in any thing. 470 f. 1
2 It only differs from ingroſſing, in that the one is the grant of the king, and the other the act of the ſubject. (N) 1
3 Both monopoly and ingroſſing are equally reſtrained by the common law. *ibid.*
4 All ſuch grants are void and the perſon who procures them is liable to be fined. 470
5 Becauſe they are againſt the freedom of trade, and detrimental to the publick. f. 2
6 But the king may inſtitute mercantile fraternities, with power to make bye laws for the regulation of, not to reſtrain trade. (2)
7 But he cannot grant the ſole importation of any particular merchandize. 471
8 Nor give individuals an excluſive right to trade within certain limits. (1)
9 For nothing but an act of parliament can reſtrain the freedom of trade. *ibid.*
10 An excluſive grant of the ſole ingroſſing of wills or making pleas, writs, &c. &c. is void. f. 4
11 Or of making, importing, and ſelling playing cards. f. 5
12 But the king may grant for a reaſonable time, the ſole property of any new invention. f. 6
13 Or the ſole uſe of ſome particular employments, as printing the holy ſcriptures, law books, &c. *ibid.*

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14 The reaſon of this privilege. *Page* 471 N) 4
15 Monopolizers *were* liable to fine and impriſonment. ſ. 7
16 By 21 Jac. 1. c. 3. all grants of monopolies or proclamations tending thereto are declared void. 472
17 Corporations diſabled to put any ſuch grants in force. ſ. 9
18 All ſuch grants, &c. ſhall be tried by the rules of the common law. ſ. 10
19 The trial muſt be in the courts of common law, and not in chancery, or in the council. ſ. 11
20 Therefore chancery will never eſtabliſh a right under a charter from the crown, until the validity of ſuch charter has been tried at law. (N. 5
21 But the court of chancery will cancel letters patent. *ibid.*
22 The uſe of the king's name, in *ſcire facias*, to repeal letters patent is of common right. *ibid.*
23 The effect and extent of patents can only be tried in the king's courts. *ib.*
24 Any perſon injured by the grant of a monopoly, may ſue for treble damages at law. 473
25 If any perſon after notice of ſuch action grounded on 21 Jac. ſhall obtain an injunction, or after judgment ſhall ſtop execution, he ſhall incur a *præmunire*. *ibid.* ſ. 13
26 But this ſhall not extend to letters patent for 14 years to the authors of new inventions, provided ſuch letters be not contrary to law, or of pernicious tendency. ſ. 14
27 The invention muſt be ſubſtantially new, and not an improvement only. 474
28 And *quere* if an invention which tends to deſtroy the neceſſity of manual labour can be the ſubject of a patent. ſ. 16
29 No old manufacture can be prohibited, or granted by a patent as for a new invention. ſ. 17
30 But the 21 Jac. c. 3. ſhall not extend to prejudice the privileges of corporations, &c. ſ. 19
31 Nor to any grants concerning the digging, making or compounding of ſalt-petre or gunpowder; or the caſting of ſhot for ordnance; or to offices in being *and exe ution* before the ſtatute not ſuppreſſed by proclamation. *Page* 475
32 By 16 Car. 1. c. 21. all perſons natives or aliens, may import gunpowder, and all ſubjects may make and ſell gunpowder or any of its ingredients, and if any perſons ſhall pretend an authority to the contrary, he ſhall incur a *præmunire*. ſ. 21 & 23
33 But by 21 Jac. 1. this ſhall not extend to any grant, &c. for digging allum mines or the making allum,—nor to licences for taverns ſelling wines, &c. ſ. 22
34 By 8 Ann. c. 19. the author of any book and his aſſigns, ſhall have an excluſive right to print the ſame for 14 years from the day of the publication. ſ. 24
35 And whoever ſhall print, or import, or expoſe to ſale the ſame without the author's written conſent, ſigned in the preſence of two witneſſes, ſhall forfeit 1 *d.* a ſheet. 466
36 A muſical compoſition, an ingenious abridgment; a uſeful index, &c. are ſecured to the author by this ſtatute. (N)
37 But the books ſo intended to be protected by this act, muſt be entered at Stationers Hall. ſ. 25 & 26
38 And after the ſaid 14 years the right of printing, &c. ſhall return to the authors, *if living*, for a further term of 14 years. ſ. 27
39 The caſe of literary property conſidered. (N) 7
40 The manner in which an author muſt aſſign his right with reſpect to the *contingent intereſt*. *ibid.*
41 By 8 Geo. 2. c. 13. engravings are ſecured to their proprietors for 14 years. ſ. 28
42 But to ſecure the property the proprietor's name *and* the day of *firſt* publiſhing the print, muſt not only be engraved on the plate but printed on the print. (N) 1
43 And

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43 And whoever ſhall offend againſt this act, ſhall forfeit 5 *s.* for every engraving. *Page* 478
44 But this act ſhall not extend to the purchaſers of plates. *ibid.*
45 By 17 Geo. 3. c. 57. Proprietors of prints may recover damages and double coſts againſt thoſe who ſhall copy them without conſent. *ibid.*
46 By 15 Geo. 3. c. 53. the univerſities of *Great Britain*, and the colleges of *Eaton*, *Weſtminſter*, *and Wincheſter*, ſhall have the excluſive right to print *their own books* at their *own printing-preſſes*. ſ. 29

MONTH—*Vide Computation.*

MOSS TROOPERS.—*Vide Borderers.*

MULTIPLICATION.

1 Of gold and ſilver, or practiſing to find out the philoſopher's ſtone, was formerly felony. 73, 14

MUM.—*Vide Publick Houſes.*

MURDER.

1 Felonious homicide *with malice*, is either MURDER, or petty treaſon. 117, c. 31.
2 Murder anciently ſignified the *private* killing of a man. ſ. 1
3 The *open wilful killing* was called voluntary homicide. *ibid.*
4 The law concerning *Engleſchire*. ſ. 1 & 2
5 How a pardon of murder muſt be worded. ſ. 2
6 By 23 Hen. 8. c. 1. all wilful murder *of malice prepenſe* excluded from the benefit of clergy. *ibid.*
7 MURDER is the *wilful* killing of another through *malice aforethought*. 118
8 Whenever death is cauſed by an act done with a *murderous intent* it makes the offender a murderer. 103
9 Whenever a perſon who kills another acts upon malice, however coloured by the *appearance of neceſſity*, it is murder. *Page* 105 ſ. 2
10 Whether facts amounting to juſtifiable homicide may be ſpecially pleaded to an indictment or appeal of murder. *ibid.* ſ. 3
11 How far the judge who paſſes ſentence muſt have juriſdiction over the offence, and in what manner the officer muſt purſue the judgment, in executing a convict, to avoid the guilt of murder. 105, 106
12 It is juſtifiable to kill a man who is attempting to murder. 109, 110
13 If a parent or maſter deſtroy the exiſtence of a child or ſervant by unmerciful and barbarous correction, or by uſing an inſtrument improper and likely to occaſion death—it is murder. 111 ſ. 5
14 Homicide done in the execution of *an unlawful and malicious* act is murder. 112 ſ. 10
15 Accidentally to kill a man by ſhooting at poultry *with intent to ſteal* them is murder. 112, 113
16 It is murder to kill, by going *deliberately* with a horſe uſed to ſtrike, or by diſcharging a gun among a *concourſe* of people; or by throwing a ſtone or a piece of timber from a houſe into a *frequented* ſtreet, &c. 113 ſ. 12
17 If a man ſtrike another upon malice prepenſe, and then fly to the wall and there kill him; yet he is guilty of murder. 113 ſ. 17
18 By 1 Jac. 1. c. 8. where any perſon ſhall ſtab another, *that hath not then any weapon drawn*, or that hath *not then firſt ſtricken*; and the perſon ſtabbed ſhall die thereof within ſix months, the perſon ſtabbing ſhall loſe the benefit of clergy, though no malice aforethought be proved. 115, 116
19 The ſeveral conſtructions which have been made upon this act. 116, 117
20 Homicide may be committed not only by thoſe means which are *directly* mortal, but alſo by ſuch as only probably

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bably and eventually will occaſion death. *Page* 118 ſ. 4
21 As expoſing a ſick man to the inclemency of winter; or a child to the ravages of a bird of prey; or an innocent man to the falſe accuſations of another, on which he is condemned and executed; or to incite a madman either to deſtroy his own life or that of another; or to lay poiſon for one man and it is taken by another; or to place a priſoner in a room with another who has an infectious diſeaſe; or to deſtroy the conſtitution by denying a priſoner the decencies of nature, &c. &c. And *perhaps* by ſuffering a miſchievous animal to roam abroad. ſ. 5, 6, 7, 8 & (N) 10
22 But no perſon, by any act, ſhall be ſaid to kill another unleſs he die within a year and a day. 119
23 How the year and day ſhall be computed. *ibid.*
24 If the perſon die within the year and day it ſhall be no excuſe that he might have recovered if he had been taken proper care of. 119 ſ. 10
25 Where the wound and death are both out of the kingdom, or the one in the kingdom and the other abroad, it could not be tried by the common law; but this is remedied by 2 Geo. 2. c. 21. 119, 120
26 Death in England of a wound given abroad, may be examined by the conſtable and marſhal, and by 33 Hen. 8. c. 23. if examined by the privy council, the principals may be tried in any county by commiſſioners. 119 ſ. 11
27 A murder at ſea anciently cognizable by the civil law. ſ. 12
28 Now by 27 Hen. 8. c. 4. & c. 15. it may be tried before the king's commiſſioners, according to the common law. 119, 120
29 How the killing of one who dies at land of a wound received at ſea ſhall be tried. 120
30 By 2 & 3 Edw. 6. c. 24. where the wound is given in one county and the death happens in another, it is triable where the death happens. 121
31 By 26 Hen. 8. c. 6. a murder in Wales may be tried in the next Engliſh county. *Page* 121 ſ. 14
32 The *malicious* killing of any perſon, whatſoever nation or religion he be of, or of whatſoever crime attainted is murder. ſ. 15
33 Cauſing an abortion was anciently held to be murder. ſ. 16
34 At this day it is only a great miſpriſion, &c. &c. *ibid.*
35 But where one counſels a woman to kill her *unborn* child and ſhe does it accordingly when it is born, he is an acceſſary to murder. 121 ſ. 17
36 And by 21 Jac. 1. c. 27. to conceal the birth of a dead baſtard child ſhall be evidence of having murdered it. *ibid.*
37 Any formed deſign of doing miſchief may be called malice. 121, 122
38 Where two perſons meet on a precedent quarrel, in cool blood, and fight and one of them is killed this is murder 122 ſ. 21
39 And in duelling wherever the circumſtances afford the preſumption that the blood was cool at the moment of the homicide it is murder. ſ. 22, 23
40 No pretence under which malice may be covered ſhall elude the juſtice of the law. 123, ſ. 24, 25
41 If a man aſſault another with *malice*, and then fly, but on being followed kill his antagoniſt, it is murder. ſ. 26
42 To reſent provocation in a manner manifeſtly endangering life, is murder if death enſues. ſ. 27
43 In duelling not only principals but ſeconds alſo are guilty of murder if the fight prove fatal. 124 c. 21
44 No words, geſtures, &c. will excuſe from the guilt of murder. ſ. 33
45 Death occaſioned by beating another deliberately and vindictively is murder, although death was not intended. 126, ſ. 38, 39
46 Wherever a man happens to kill another in the execution of a deliberate purpoſe to commit a felony, he is guilty of murder. 126, ſ. 41

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47 So also it is murder where not only the act of felony *immediately* causes the death, but where it occasionally causes such a misfortune. *Page* 126 c. 42

48 To kill a magistrate, &c. who *interposes* in a quarrel in order to suppress it, is murder. 127, 128 s. 44, 48

49 Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing happen to kill a man, they are all guilty of murder. s. 46

50 But the fact must appear to have been committed strictly in prosecution of the purpose for which the party were assembled. 128 (N) 3

51 How far a person may alleviate murder, by interposing to release another from *unlawful* confinement. 129

52 To kill a sheriff or any of his officers, in the *lawful* execution of civil process is murder, although the process be erroneous. 129 s. 55, 56

53 How far homicide in an attempt to usurp unlawful authority, shall be construed murder. 130 s. 59

54 Death occasioned by any idle wanton action, likely to endanger life, is murder. s. 60

55 A physician or surgeon, whose ignorant administration of medicine, may have occasioned the death of the patient, is not thereby guilty of murder: tho' anciently held otherwise. 131

## MUTE.

1 By 12 Geo. 3. c. 20. standing mute in felony or piracy, either on an indictment or appeal, amounts to conviction. 154

## N.

## NAVAL STORES.

1 BY 9 & 10 Will. 3. c. 41. no persons, except the officers authorized by the king shall make cordage of more than three inches, with a *white thread*—or of less than three *with a twine* laid the contrary way—nor any canvas with a *blue streak*—or any other stores with *the broad arrow*, on pain of forfeiting the goods and 200*l*. *Page* 562

2 Whoever shall have the possession of such stores, without a certificate, &c. shall forfeit 200*l*. s. 2

3 The commissioners who sell old stores, may grant such certificate to buyers, who may also grant the same to those who purchase again. 563 *ibid.*

4 Whoever shall counterfeit, or produce a false certificate, shall be bound over, by the commissioners, to the quarter sessions. s. 3

5 The manner in which any person prosecuted for executing this act may be defended. s. 4

6 By 9 Geo. 1. c. 8. this offence is extended to timber, thick stuff, and plank. s. 5

7 The court may mitigate the penalties, and settle the distribution of them. s. 6, 7

8 Power given to judges of assize, or justices at session, to determine the offence, and mitigate the penalty to public whipping and hard labour for three months. 564

9 By 9 Geo. 3. c. 30. the officers of the king's yards, and the commissioners of the navy, are authorized to act as justices of the peace, in apprehending, &c. offenders. s. 9

## NAVIGABLE RIVERS.

1 To destroy any lock, sluice, or floodgate erected thereon by authority of parliament, is transportation. 199 s. 2

2 By 8 Geo. 2. c. 20. the same offence ousted of clergy. *ibid.* s. 3

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3 To draw up any floodgate, on any wear upon a navigable river, is hard labour for a month. *Page* 199 ſ. 4
4 To draw up piles, &c. for ſecuring any marſh or ſea banks, incurs a *qui tam* penalty of 20*l.* &c. *ibid.* ſ. 5
5 The puniſhment and regulations of the black act extended to caſes of deſtroying ſea banks. 200
6 To break the bank of any river whereby lands ſhall be overflowed, is felony without clergy. *ibid.* ſ. 7
7 To deſtroy the *Bedford Level*, felony without clergy. *ibid.* ſ. 8
8 By 4 Geo. 3. c. 12. to deſtroy the works upon *any* navigation, ſo as to impede the carrying on of the ſame, is tranſportation. *ibid.* ſ. 9
9 Offences by obſtructing of havens; by bumb boats on the Thames; and by thefts on navigable rivers. *ibid.* (N)

NECESSITY.

1 Neceſſity, however extreme, is no *legal* excuſe for ſtealing, 141 ſ. 20
2 Where neceſſity will excuſe the coming of a popiſh prieſt into the realm. 68, 69
3 How far neceſſity is an excuſe for crimes. 5 (N)
4 To what extent it muſt ariſe to excuſe high treaſon. 54 (N) 3
5 How far neceſſity will juſtify, excuſe, or alleviate homicide, &c.
6 In what caſes it ſhall excuſe a nuiſance. 363, 404

NEIGHBOUR.

1 How far one neighbour may maintain another. 541 ſ. 25
2 Where one is guilty of nuiſance by incommoding his neighbour. 362, 363
3 Where the neighbouring towns muſt cleanſe a river. 365

NETS.—*Vide Fiſh.*

NIGHT.—*Vide Burglary. Cattle.*

NIGHT-WALKERS.

1 They may be bound to their good behaviour. *Page* 262

NOBLEMAN.

1 May keep an unlicenced tutor in his houſe. 18

NOSE.—*Vide Maim.*

NON-CONFORMITY.—*Vide Church Diſſenters.*

NON-COMPOS.—*Vide Madmen.*

1 An offender, becoming ſo before conviction, ſhall not be arraigned; nor, if after an arraignment ſhall he be tried, and if after conviction he ſhall not be executed. 2 ſ. 2
2 But he ſhall anſwer for a treſpaſs againſt the perſon or poſſeſſion of another. 3 ſ. 5.
3 A perſon becoming *non compos* by voluntary drunkenneſs, ſhall be puniſhed for his crimes, the ſame as if he were ſober, unleſs the intoxication has permanently diſordered the underſtanding. 3 ſ. 6

NON-JUROR.—*Vide Oaths.*

NON FEASANCE.

1 An offence conſiſting of a *non-feazance* needs no *venue*. 20 ſ. 5
2 In what caſe a non-feazance will amount to a forcibly entry, though not to a forcible detainer. 280, 281
3 A man cannot commit an act of forgery by a bare non-feazance. 337 ſ. 6

NON-USER.

1 Whether it be a ground for diſcharging an officer. 311

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## NOTICE.

1 It is implied in all penal ſtatutes, that the defendant muſt have notice of the accuſation againſt him. *P.* 420 ſ. 83

## NORTHERN BORDERS.—*Vide Rioters.*

## NUISANCE.

1 A common nuiſance is an offence againſt the public by doing any thing injurious to *all* the king's ſubjects, or by omitting to do that which the common good requires. 360 c. 75

2 Therefore *private* annoyances, are not the ſubject of *public* proſecution, the injury muſt be repaired in a *civil* action. ſ. 2

3 Conſequently where the indictment charges the damage of private perſons only, it is bad. 361

4 It muſt be laid *ad communne nocumentum*; unleſs the ſubject neceſſarily imports a public grievance. ſ. 4, 5

5 The indictment of a common ſcold muſt be *communis rixatrix*. ſ. 5

6 Common bawdy-houſes are indictable as common nuiſances. 362 ſ. 6

7 So rope-dancing, common gaming-houſes, unlicenſed play-houſes. ſ. 7

8 But neither an old, nor a new dove-cote are nuiſances; for the erecting them may be juſtified by preſcription, &c. ſ. 8

9 And a gate acroſs a highway which has ſo continued time out of mind is no nuiſance, for the preſcription ſhall be intended.—But a new gate ſo erected may be abated as a nuiſance. ſ. 9

10 Tallow boilers, brewhouſes, glaſs-houſes, ſwine-yards, a manufactory for acid ſpirit of ſulphur, &c. erected in improper places, may be nuiſances. 10

11 To divert the courſe of a navigable river, and *perhaps* to multiply inmates during the prevalence of a contagion, are nuiſances. 11

12 To diſturb the neighbourhood with a ſpeaking trumpet, to ſuffer a houſe to grow dangerouſly ruinous (ſee *p.* 369,) to obſtruct the intercourſe of a public river, to damage a public highway, to put an improper ſhip into Billingſgate dock, are nuiſances. *Page* 363 (N) 1

13 But an hoſpital for innoculation is not a nuiſance, nor to lay bricks in a private fiſhery in the Thames, nor to violate a public law, nor to obſtruct a proſpect. *ibid.*

14 And *quere* if a coney burrow is a nuiſance. *ibid.*

15 By 9 & 10 W. 3. c. 7. to make or let off fireworks publicly, is a nuiſance. 364

16 By 9 & 10 Will. 3. c. 17. all private lotteries, &c. are public nuiſances. *ibid.*

17 By 6 Geo. 1. c. 18. ſ. 19. all public *bubbles* are nuiſances. *ibid.*

18 Any one may pull down a common nuiſance. ſ. 11

19 And may juſtify a *treſpaſs* for that purpoſe. 365

20 And the plea need not ſtate that the party did as little damage as poſſible. *ibid.*

21 Thoſe who have the fiſhery of a river, or thoſe who have a paſſage or eaſement therein, ſhall be obliged to abate a nuiſance on ſuch river, tho none are bound to do it by preſcription. ſ. 13

22 A common ſcold is puniſhable by the ducking-ſtool. ſ. 14

23 The puniſhment of common nuiſance is fine and impriſonment. *ibid.*

24 And the offender ſhall be ordered by the judgment to abate the nuiſance at his own coſts. *ibid.*

25 NUISANCES TO HIGHWAYS. 366 and 404

26 Are puniſhable by indictment in the court leet. *ibid.* ſ. 1

27 A common river is a highway. *ibid.*

28 A thoroughfare is a highway. *ibid.*

29 Nuiſances in highways are not puniſhable by action. *ibid.*

30 Every way from town to town may be called a highway. *ibid.*

31 To dig a ditch, or make a hedge athwart a highway, or to lay logs of wood therein, even though a paſſage *may* be obtained by windings and turnings

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turnings through them, or doing any other act which renders the paſſage incommodious, or by ſuffering the ditches to be foul, or boughs to overlay the road are nuiſances. *Page* 404
32 But it is no nuiſance to unload billets, unleſs they are ſuffered to remain an unreaſonable time. *ibid.*
33 To nuiſances to highways by THE STATUTE, *vide* Highways, No. to No.
34 An heir may be indicted for a nuiſance begun by his anceſtor and continued by him. 408 ſ. 61
35 An indictment for a nuiſance muſt ſhew where it was done. 421 ſ. 87
36 But it is not neceſſary to mention the *termini* of the highway in which it was done, nor where there are two vills is it neceſſary to ſhew in which it lies. (N) 20
37 For other matters relative to the neceſſary allegation of the indictment. 422
38 Nuiſances to turnpike roads. 437 ſ. 48
39 Nuiſances to bridges. 443

## O.

## OATHS.

1 BY the corporation act 13 Car. 2. c. 1. no member of any corporation ſhall be eligible, who ſhall not have received the ſacrament within one year before his election. 15
2 Every member of any corporation ſhall take the oaths of allegiance and ſupremacy, with the oath of office, or the election ſhall be void. *ibid.*
3 But by 5 Geo. 1. c. 6. all perſons required to take the ſaid oaths, or to ſubſcribe the declaration, ſhall be confirmed in their offices, notwithſtanding their omiſſion ſo to do. *ibid.*
4 And all perſons in office required to take the ſacrament, ſhall not be incapacitated by omiſſion after ſix months. 15, 16
5 By 2 Geo. 2. c. 31. and 9 Geo. 2. c. 26. all officers, civil and military, ſhall take the oaths of allegiance, ſupremacy, and abjuration. *Page* 16
6 By 11 Geo. 1. c. 4. officers of corporations ſhall take the oaths by law required, at the time of their admiſſion. &c. *ibid.*
7 By 25 Car. 2. c. 2. all officers, civil and military, except of inheritance appointing deputies; and all who have any fee, &c. by patent, except ſuch as do not relate to any place of truſt; and all who have employ in the king's houſe, ſhall take the oaths of allegiance, ſupremacy, and teſt, &c. upon pain of diſability and forfeiture of 500*l.* &c. 16, 17
8 Conſtructions and caſes upon this act. *ibid.*
9 The above act ſhall not extend to conſtables or churchwardens, or ſuch like inferior civil officers, or to a bailif of a manor, or ſuch private officers, 17 ſ. 4
10 By 5 Eliz. c. 1. clergymen and recuſants refuſing a ſecond tender of the oaths, are guilty of high treaſon. 69 ſ. 84
11 By 1 Eliz. c. 1. 5 Eliz. c. 1. 3 Jac. 1. c. 4. 7 Jac. 1. c. 6. 1 W. & M. c. 8. and 7 Will. 3. c. 24. all eccleſiaſtical perſons, temporal officers, and certain other perſons in any public employ, ſhall take the oaths or be liable to the penalties of *præmunire*. 81 ſ. 27 to p. 84 ſ. 44
12 Several determinations upon the above ſtatutes. *ibid.*
13 By the common law, all laymen above the age of 12 years, are bound to take the oaths of allegiance. 94 ſ. 3
14 The reaſon of this obligation. 94, 95
15 The reaſon for requiring the oaths of allegiance and ſupremacy. 95 ſ. 4
16 By 1 W. & M. c. 8. the penalty of 40*s.* or three months impriſonment, is inflicted on thoſe who ſhall refuſe a tender of the oaths, and if they refuſe at the end of the three months, a further penalty, &c. 95, 96

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17 It is in the option of government to adopt the milder punishment inflicted by this act, or the more severe one inflicted by the former statutes. *Page* 96
18 The reason of enjoining the oath of abjuration. *ibid.* s. 6
19 By 1 Geo. 1. c. 13. all officers civil or military, or in the service of the royal family, all ecclesiastics, members of colleges, of 18 years of years of age—and all schoolmasters, preachers, high constables, and lawyers, shall, within three months after admittance, &c. take the oaths of allegiance, supremacy, and abjuration, or be disabled in law, &c. and forfeit 500 *l.* 97
20 Any two justices, &c. may tender the oaths, and on refusal, the offender shall be adjudged a popish recusant convict. 98
21 How the members of the universities shall take the oaths, and what punishment they shall suffer. *ibid.* s. 9
22 No peer shall vote or make proxy, or sit in the house, nor any member in the house of commons, until he shall have taken the said oaths. s. 10
23 The oaths which the law requires to be taken previous to being naturalized. *ibid.* (N)
24 The oaths required to be taken by the peers of Scotland. *ibid.*
25 By 22 Geo. 2. c. 30. the form of the Moravian affirmation is prescribed. *ibid.*
26 By 1 Will. 3. c. 18. and 8 Geo. 1. c. 6. the form of the Quakers profession and affirmation prescribed. *ibid.*
27 Money delivered in consequence of *an oath*, extorted by fear, is robbery. 148
28 He that demands surety of the peace must shew his grievance upon oath. 254.

## OBSCENITY.

1 Obscenity, tending to subvert religion and morality, punishable by indictment at common law. 10
2 Obscene writings *formerly* held not libellous. *Page* 355
3 The author of obscene writings may be bound to his good behaviour. *ibid.*

OCCUPIERS.—*Vide Highways. Burglary. Arson.*

## ODIO et ATIA.

1 A man committed for homicide might, anciently, sue out *de odio et atia*. 114, 115

OFFENCE.—*Vide Church. Crimes. Riot.*

OFFICE and OFFICERS.—*Vide Conformity.*

1 In what cases an office becomes forfeited by negligence, non-user or corruption. 310, 311
2 Public offices are not to be bought or sold. 312
3 How officers shall be punished for concealing offences. 251
4 What officers are bound to receive the sacrament. 15
5 Recusants are disabled to hold an office. 29, 34, 38, 40
6 How far execution must be performed by proper officers. 106
7 Victuallers, how far disabled to be officers. 452, 453
8 In what cases officers are protected in the execution of their duty. 117
c. 31, *passim.*

ORCHARDS.—*Vide Freehold.*

ORDERS.—*Vide Clergymen. Common Prayer. Highways.*

OVERT ACT.—*Vide Treason.*

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OUT BUILDINGS.—*Vide Burglary.*

OWLING.—*Vide Exportation.*

P.

PACKET.—*Vide Letters. Poſt Office.*

PALACE.—*Vide infra.*

PALLISADES.—*Vide Fences.*

1 BY 4 Geo. 2. c. 32. whoever ſhall break, with intent to ſteal, any iron palliſade, or other iron, fixed to any dwelling, or to any outhouſe, uſed with ſuch dwelling, or to any orchard or yard, &c. or ſhall aid or aſſiſt in ſo doing, ſhall be guilty of felony. *Page* 218
2 A church is within this act. *ibid.*

PAPISTS.

1 By 3 Jac. 1. c. 5. popiſh recuſants convict are *diſabled* in law as perſons excommunicated, except the action concern ſome hereditament not ſeized by the king. 32, 33
2 By 1 Jac. 1. c. 4. this diſability continues only till they conform according to the 23 Eliz. c. 1. and 28 Eliz. c. 6. 33 (N)
3 How a defendant ſhall take advantage of an action by ſuch diſabled papiſt. 33 ſ. 2 to 7
4 By 1 W. & M. c. 26. and 12 Ann. c. 2. papiſts are *diſabled* to preſent to a church. 33 ſ. 7 and *p.* 44, 45
5 But he continues patron to all other purpoſes than that of preſentation. 45 ſ. 10
6 By 3 Jac. 1. c. 5. papiſts are *diſabled* from bearing any public charges, or office in the ſtate. 34
7 Obſervations upon this clauſe. *ibid.*
8 By 3 Jac. 1. c. 5. a female papiſt is *diſabled* from claiming any part of a huſband's perſonal eſtate, or any eſtate by way of courteſy or dower. *Page* 34 ſ. 10, 11
9 By 35 Eliz. c. 2. papiſts are *reſtrained* from going above five miles from home, without licence. 35
10 Who ſhall grant, and how ſuch licence ſhall be pleaded. *ibid.*
11 By what computation the diſtance ſhall be reckoned. *ibid.*
12 By 3 Jac. 1. c. 5. and 30 Car. 2. c. 5. papiſts are *reſtrained* from appearing at court. 35
13 By 3 Jac. 1. c. 5. papiſts are *reſtrained* from keeping arms, and from coming within ten miles of London. 36
14 By 3 Jac. 1. c. 5. feme covert papiſt, whoſe huſband is not convicted of recuſancy, who ſhall not conform within one year, ſhall forfeit two parts of her jointure. 37
15 By 3 Jac. 1. c. 5. a papiſt who has conformed, who ſhall not receive the ſacrament within one year ſhall forfeit 20*l.* for the firſt, 40*l.* for the ſecond, and 60*l.* for every other year. *ibid.*
16 By 3 Jac. 1. c. 5. every papiſt who ſhall marry otherwiſe than according to the church ſhall forfeit 100*l.* *ibid.*
17 By 3 Jac. 1. c. 5. every papiſt who ſhall not baptize his child by a lawful miniſter ſhall forfeit 100*l.* *ibid.*
18 By 3 Jac. 1 c. 5. every papiſt, not excommunicated, who ſhall bury other than in a church or churchyard, ſhall forfeit 20*l.* *ibid.*
19 By 3 Jac. 1. c. 5. magiſtrates may ſearch the houſes of papiſts for popiſh relicks and deface them. 38
20 By 7 Jac. 1. c. 6. a feme covert papiſt who ſhall not conform within three months after conviction ſhall be committed unleſs her huſband pay 20*l.* a month, &c. *ibid.*
21 In what caſes the huſband of a feme covert papiſt is not only liable to the forfeiture, but utterly diſabled. *ibid.*
22 By 23 Eliz. c. 1. whoever ſhall perform *maſs*, ſhall forfeit 200 marks, and

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and whoever ſhall hear *maſs* 100 marks, or ſuffer impriſonment. *Page* 39

23 By 11 & 12 Will. 3. c. 4. whoever ſhall apprehend a popiſh prieſt for ſaying maſs ſhall receive 100*l.* and the prieſt ſhall ſuffer perpetual impriſonment. *ibid.*

24 But by 18 Geo. 3. this penalty is repealed, *provided* the prieſt has complied with the injunctions of *this* act. *ibid.*

25 By 30 Car. 2. c. 1. thoſe who refuſe to make a declaration againſt popery, are reſtrained from ſitting in parliament, and from holding a place at court. 40

26 By 1 Will. & Mar. c. 9. thoſe who refuſe the declaration are reſtrained from living within ten miles of London, from keeping arms, and from preſenting to a church. *ibid.*

27 By 1 Jac. 1. c. 4. whoever ſhall ſend another abroad for the purpoſe of receiving a popiſh education, ſhall be diſabled in law and forfeit 100*l.* 41

28 By 3 Jac. 1. c. 5. whoever ſhall ſend a child abroad to prevent their good education in England, *without* licence, ſhall forfeit 100*l.* and ſuch child ſhall be diſabled to take, &c. 42

29 By 3 Car. 1. c. 2. to enter into any popiſh ſeminary abroad, or to cauſe another ſo to do, diſables the offender in law, and incurs the forfeiture of his eſtates during life. *ibid.*

30 By 11 & 12 Will. 3. c. 4. a ſevere puniſhment is inflicted on profeſſed papiſts unleſs by 18 Geo 3. c. 60. they have complied with the injunction of the laſt mentioned act. 44

31 By 3 Jac. 1. c. 5. and 1 W. & M. c. 26. profeſſed papiſts are reſtrained from preſenting to a church. 45

32 By 11 Geo. 3. c. 7. every grant by them of any eccleſiaſtical benefice is void unleſs made to a proteſtant purchaſer. *ibid.*

33 Expoſition made on the above ſtatute, 3 Jac. 1. c. 5. 45, 46

34 By 11 & 12 Will. 3. c. 4. popiſh ſchoolmaſters are to be perpetually impriſoned, except they conform to the 18 Geo. 3. c. 60. *Page* 46

35 By 11 & 12 Will. 3. c. 4. the chancellor may make ſuch order as he thinks agreeable to the act upon any popiſh parent who ſhall compel a proteſtant child to change his religion, or who ſhall not allow ſuch child a ſufficient maintenance. *ibid.*

36 By 3 Jac. 1. c. 5. whoever ſhall import or buy popiſh books or relicks ſhall forfeit 40*s.* *ibid.*

37 By 23 Eliz. c. 1. and 3 Jac. 1. c. 4. to become perverted, or to pervert others to the ſee of Rome is high treaſon. 67, 68

38 By 27 Eliz. c. 2. to become *ordained* by popiſh authority, is high treaſon. 68

## PARDON.

1 The judges will, in prudence, reſpite the execution of an infant in order to procure a pardon. 3 *f.* 8

2 A king out of poſſeſſion cannot grant a pardon. 5*f*

3 In what caſe a forfeiture is not within a general pardon. 24 *f.* 23

4 A pardon of felony diſcharges an indictment of high treaſon, if it want the word *proditorie*. 99 *f.* 2

5 The forfeiture of perſonalty for ſuicide, is ſaved by a pardon of the offence before inquiſition found. 104

6 A defendant where homicide is found either *excuſeable*, or juſtifiable, ſhall be diſmiſſed without a pardon. 105, 115

7 What crimes cannot be pardoned without ſpecial words. 117

8 A pardon of felony extends not to piracy. 153

9 There can be no pardon of a recognizance of the peace before it is broken. 257

10 In what caſe the benefit of a general pardon cannot be waived. 292, 293

PARISH.—*Vide Nuiſance. Highways.*

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## PALACE.


1 In what cases contempts against the king's palaces, are punishable. P. 87
2 How far popish recusants are restrained from coming within the king's palaces. 35


## PARKS.


1 By 21 Edw. 1. c. 2. & 3 & 4 W. & M. c. 10. trespassers in parks, *resisting* the keepers, may be slain by the keepers with impunity. 107
2 How far the power of a park-keeper will justify the trespass of a stranger, in homicide, on the grounds of a third person. 112
3 By 9 Geo. 1. c. 22. to appear, armed and disguised, in any deer-park, &c. is felony without clergy. 187
4 To hunt or wound any fallow deer in any inclosed deer-park, whether armed and disguised or not, is felony without clergy. *ibid.*
5 By 16 Geo. 1. c. 28. to enter any deer park, and hunt, kill, or wound any fallow deer, is transportation. 189
6 By 5 Geo. 3. c. 30. to steal deer from any inclosed deer-park, or to aid therein, incurs different pecuniary penalties for the two first offences, and transportation for the third. *ibid.*
7 This statute *is said* to have virtually repealed the punishment inflicted by 9 Geo. 1. c. 22. *ibid.* (N)
8 The manner of apprehending and trying offenders upon this act. 189, 190
9 Whoever armed with an offensive weapon, shall enter into any deer park, with intent to destroy the deer, and shall beat or wound the keeper, or his assistants, he shall be transported. 191
10 By 6 Geo. 1. c. 16. whoever shall destroy the fences of parks, shall be committed for 3 months, &c. &c. 122
11 By 16 Geo. 3. c. 30. whoever shall destroy the fences of deer parks, shall for the *second offence* be transported. *Page* 122
12 By 6 Geo. 3. c. 48. to destroy timber in the king's parks, forests, or chases, is transportation for the third offence. 216
13 By 9 Geo. 3. c. 41. to destroy any underwoods, &c. in the king's parks, or forests, &c. is punishable by fine and imprisonment, &c. 217
14 By 5 Geo. 3. c. 14. to enter into any inclosed parks, in or through which there is a river, stream, or pond, &c. and steal fish, or to aid in so doing, or to buy or receive such stolen fish, is transportation for seven years. 224


*Vide Murder. Hunters. Black Act. Deer.*

## PARLIAMENT.


1 By 25 Edw. 3. c. 2. the parliament only shall declare new treasons. 66
2 To declare maliciously and by *writing*, that the crown of the kingdom cannot be limited by parliament, is *high treason*, and to affirm the same *by speaking*, is *præmunire*. 69
3 By 30 Car. 2. c. 1. none shall vote in parliament without making the declaration, and taking the oaths. 40, 98
4 In what cases petitions to parliament may be deemed libels. 354, 356


## PARRICIDE.


1 There is no extraordinary punishment by the law of *England*, for the crime of parricide.


## PARSNIPS.


1 By 13 Geo. 3. c. 32. to steal parsnips growing, incurs a forfeiture of 10*l.* &c. &c. 207


PARSON.—*Vide Church.*

PATENT.

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PATENT.—*Vide Monopoly.*

PATRON.—*Vide Papiſt.*

PEACE.—*Vide Behaviour.*

1 Of what deſcription of perſons, a juſtice of the peace, may *ex officio*, and at diſcretion demand *ſurety of the peace*. *Page* 253
2 It was the principal duty of a conſervator to demand ſurety of the peace. *ibid.* (N) 1
3 Neither a ſecretary of ſtate, nor privy councillor, are conſervators of the peace. *ibid.*
4 All perſons *whatſoever*, under the king's protection, may demand ſurety of the peace. *ibid.* ſ. 2
5 It *has been* queſtioned, whether Jews, pagans, or convicts in *præmunire*, have a right to it. ſ. 3
6 A wife may demand it againſt the outrageous *threats* of her huſband; and a huſband may demand it againſt his wife. ſ. 4
7 If the marriage be diſputed, the court will frame the recognizance, ſo as not to admit the fact. *ibid.* (N) 2
8 A juſtice of peace ought to grant it, on demand, againſt any perſon, under the degree of nobility, of ſane memory, whether a magiſtrate or private perſon, and whether of age or not. 254
9 Infants and *femes covert*, ought to find ſecurity by their friends. *ibid.*
10 The ſafeſt way againſt *a peer*, is by application to the chancery or king's bench. *ibid.*
11 *Quere*, If a joint recognizance may be taken for ſurety of the peace. *ibid.* (N) 2
12 For what cauſes ſurety of the peace is grantable. 254
13 By 21 Jac. 1. c. 8. all proceſs for the peace or good behaviour, to be granted out of the chancery or king's bench, muſt be upon motion, in open court, upon the oath of the party requiring it, &c. &c. &c. *P.* 254, 255
14 In what caſes, under what circumſtances, and in what form the court of king's bench will grant ſurety of the peace. 255 (N) 4
15 In what manner ſurety of the peace is grantable by a juſtice of the peace. *ibid.* ſ. 9
16 Of the execution of the writ of *ſupplicavit*. ſ. 10
17 The warrant of a juſtice of the peace upon ſurety of the peace, can be executed only by thoſe to whom it is directed, unleſs directed to the ſheriff, &c. 256
18 In what caſe the officer may carry the party to gaol, without another warrant. ſ. 12
19 How the officer ſhall return the warrant if it be general, and how if it be ſpecial. ſ. 13
20 In what manner proceſs upon ſurety of the peace may be ſuperſeded. ſ. 14
21 By 21 Jac. 1. c. 8. all writs of *ſuperſedeas* muſt be granted upon motion, in open court, and ſurety, &c. 257
22 What ought to be *the form of the recognizance* entered into upon filing articles of the peace. 257 ſ. 15, 16
23 A recognizance of the peace may be diſcharged by the demiſe of the king, or the party, if not previouſly forfeited. ſ. 17
24 But a releaſe of the party at whoſe complaint it was taken, is only an *inducement* with the court, to diſcharge it. *ibid.*
25 The diſcontinuance of a recognizance is a ground for diſcharging it. 258
26 A recognizance cannot be pardoned or releaſed, before it is broken. *ibid.*
27 The executors of ſureties to a recognizance, continue bound for their teſtators. *ibid.*
28 A recognizance, *by ſuplicavit*, need not be certified without *certiorari* is brought. *ibid.* ſ. 18

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29 A recognizance of the peace, taken below, muſt be certified to the next ſeſſion by force of 3 Hen. 7. c. 1. *Page* 258
30 If the party then make default, the recognizance then ſhall be certified into the ſuperior court. *ibid.*
31 But the ſeſſions have a diſcretion, upon cauſe ſhewn, to excuſe his default. *ibid.*
32 The ſeſſions cannot proceed for the forfeiture.—But upon eſtreating the recognizance, the courts at *Weſtminſter*, ſhall proceed to recover it by *ſcire facias*, and not by indictment. *ibid.*
33 *Quere* if the *ſcire facias* muſt ſhew the day on which the ſeſſions were holden. *ibid.* (N)
34 A recognizance of the peace may be forfeited by any actual violence *to any perſon whatſoever*. *ibid.* ſ. 20
35 Or by any treaſon againſt the king; or unlawful aſſembly; or even by words tending to a breach of the peace. *ibid.*
36 But bare words of heat and choler, is not a cauſe of forfeiture. 259
37 There are alſo many actual aſſaults on the perſon of another which do not amount to a forfeiture of ſuch recognizances. 259, ſ. 233
38 A variety of ſuch aſſaults enumerated. *ibid.*
39 A ſervant is liable to ſuch a forfeiture, for beating another in defence of his maſter's ſon—but not in defence of his maſter. 259, 260
40 Nor can a tenant beat another in defence of his landlord. 260
41 But a bare treſpaſs, without violence, is not a cauſe of forfeiture. *ibid.* ſ. 25
42 Violence in any athletick ſport, as cudgels, &c. is not a cauſe of forfeiture, but a wound given in *playing* with *naked ſwords* is. ſ. 26
43 A wound given by miſchance or negligence, is no cauſe of forfeiture. ſ. 27
44 Such a recognizance ſhall not be forfeited except for ſome *wilful breach of the peace*. *ibid.*

PEACE OFFICERS.—*Vide Riot. Affray. Murder. Armour Officers.*

PEACOCK.

1 In what caſe it is felony to ſteal one. *Page* 144

PEERS.

1 It is a contempt for a peer not to come to parliament on the day of ſummons; or to depart from it without licence. 91
2 How far ſurety of the peace may be demanded for or againſt a peer. 254, 255

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1 In what caſes an offence, which is evidently within the meaning of the words, but out of the expreſs letter of a penal ſtatute, ſhall be conſtrued to be within the purviews of it. 53, 65, 132, 138, 178, 303, 304
2 Penal ſtatutes ſhall be conſtrued *equitably* for the ſubject and *ſtrictly* againſt him. 53, 61, 116, 131, 138, 139

PENITENTIARY-HOUSES.—*Vide Tranſportation.*

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1 To receive a penſion from a foreign prince without the king's permiſſion, is highly criminal. 91

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## PERMITS.


1 The offence of granting them fraudulently. *Page* 565 c. 91
2 By 6 Geo. 1. c. 21. all dealers in ſpirits, &c. ſhall make an entry of their ſtocks and places of ſale. ſ. 1
3 No ſtock ſhall be brought in before notice is given to the officer, and a certificate of the duty being paid, or that it has been condemned, or of the perſon's ſtock from whence it is brought. 566
4 None to be ſold but in ſuch entered places. ſ. 3
5 Officers to give ſellers a certificate to the buyer, expreſſing the quantity, names, &c. &c. ſ. 4
6 No quantity above one gallon to be removed without *a permit*. ſ. 5
7 Whoſoever ſhall have above 60 gallons, ſhall be deemed a dealer. ſ. 6
8 By 11 Geo. 1. c. 30. Such ſpirits ſhall be removed within the time limited in the permit, which ſhall be returned to the officer, and if the ſtock of the perſon removing ſuch ſpirits ſhall not appear to be proportionately decreaſed, he ſhall forfeit the quantity to be removed, ſ. 7
9 No perſon ſhall receive ſuch permit without direction in writing from the perſon *removing*, or his *known* ſervant. 567
10 By 23 Geo. 3. c. 70. the manner and form of granting *permits*, upon requeſt notes are directed, &c. ſ. 9
11 The commiſſioners ſhall provide paper for *permits* with the words *exciſe-office* viſible thereon—and plates, &c. for printing the ſame. ſ. 10
12 And whoever, unauthoriſed, ſhall make, &c. or aſſiſt in making, &c. any frame or inſtrument for making ſuch paper,—or ſhall make or aſſiſt in making ſuch paper,—or ſhall make or aſſiſt in making any plate, &c. for printing ſuch paper to be uſed for permits, ſhall be guilty of *felony without clergy*. 567, 568
13 And whoever ſhall forge, or counterfeit any permit, or give, accept, or receive any falſe or untrue permit, or alter, or eraſe any true permit,—or make uſe of the ſame, ſhall forfeit 500 *l.* *Page* ſ. 12
14 And if *any officer of exciſe, or other inland duties*, ſhall deliver out any ſuch paper as aforeſaid, with the words *exciſe office* viſible, &c.—or if any *ſuch officer* ſhall grant an *untrue permit*, or make an untrue entry thereof, &c. he ſhall be tranſported for ſeven years. ſ. 11


## PERSON.—*Vide Larceny. Robbery.*

## PERJURY.


1. Is the taking abſolutely, a wilful falſe oath, required in any judicial proceeding, and material to the point in queſtion, whether it is believed or not 318 c. 69
2 It muſt be deliberately taken, and not the effect of ſurpriſe, inadvertency, or miſtake. 319 ſ. 2
3 It muſt be taken before thoſe who are empowered to adminiſter juſtice; and who have a competent juriſdiction of the ſubject matter. *ibid.* ſ. 3
4 As before perſons authorized by the king to examine witneſſes; or in a court of record upon iſſue therein; or before any court of equity, ſpiritual, or other lawful court whether of record or not; or before perſons authorized by ſuch courts, as the ſheriff upon a writ of enquiry. 319, 320
5 So it is perjury, to ſwear to a greater ſubſtance than a man poſſeſſes, in juſtifying bail; it may be committed, in ſwearing the peace againſt another before a juſtice; or reſpecting forfeitures, or defective titles to land before commiſſioners. 320
6 But no oath of a mere private nature can be the ſubject of perjury. *ibid.*
7 Neither can any promiſſory oaths; and therefore official oaths, for the true performance of duty cannot be puniſhed as perjuries, but ſuch an offender is liable to a ſevere fine. 321

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8 No perſon can be indicted for perjury in a falſe oath, adminiſtered by a perſon who has not competent and lawful authority in the ſubject matter, on which the oath is taken. *Page* 321 ſ. 4
9 Therefore *quere* if even a magiſtrate is juſtifiable in adminiſtering a voluntary oath upon an extrajudicial matter. *ibid.* (N) 1
10 No oath adminiſtred by perſons under an aſſumed authority from courts of juſtice can be the ſubject of perjury. 321
11 But perjury may be committed in oaths adminiſtered under the authority of a commiſſion, after it is determined by the demiſe of the crown. 322
12 And *qu.* if perjury may not be committed in proceedings which are afterwards reverſed for error. *ibid.*
13 Perjury may be aſſigned on an oath ſtated to have been taken before one of the judges of aſſize, although the caption recites the commiſſion in which both are named, and the record of *Niſi prius* prove it to have been taken, as the form is, before them both. *ibid.* (N) 2
14 In what oaths perjury may be committed. *ibid.* ſ. 5
15 It is not material whether the fact ſworn be true or falſe. ſ. 6
16 It is ſaid the oath muſt be abſolute (but this has been determined otherwiſe, and a man who ſwears that "he believes" any thing to be true, which he knows to be falſe, is guilty of perjury. ſ 7
17 The oath muſt be material to the matter in queſtion. ſ. 8
18 But, *quære*, if it be not directly material, yet ſo circumſtantial as to biaſs the opinion of the jury, whether it *ſhould* not be puniſhed as perjury. 324
19 A defendant in ſwearing to an anſwer in equity, may be guilty of perjury although the fact to which he ſwears is not required to be anſwered by the bill. 325
20 So perjury may be committed in an oath tending to extenuate or aggravate the damages, as well as in an oath which is direct to the iſſue. *ibid.*
21 The degree of materiality is not neceſſary to be proved, nor is it neceſſary for the evidence to be ſuch as will intitle the party to recover; but it is incumbent on the proſecutor to prove the materiality. *Page* 325 (N) 3
22 It is not neceſſary that the oath ſhould be believed, or that the party ſhould be injured by it. *ibid.* ſ. 9
23 But on a proſecution for the perjury it will be credited until it is diſproved by two witneſſes, for which purpoſe, the party complaining of the perjury, is not an admiſſible witneſs. *ibid.* (N) 4
24 OF PERJURY BY STATUTE. 326 ſ. 11
25 By 8 Eliz. c. 9. whoever ſhall be convicted of perjury, upon that ſtatute, ſhall forfeit 20*l.* ſuffer ſix months impriſonment, be rendered incapable of being a witneſs until the judgment be reverſed; and then he ſhall be liable in damages to the party grieved. 327 ſ. 13
26 If he ſhall not have property to the value of 20*l.* he ſhall have both his ears nailed to the pillory. *ibid.* ſ. 14
27 One moiety of the forfeiture to the king; the other to the party grieved. *ibid.*
28 The quarter ſeſſions may enquire of perjury on this ſtatute. *ibid.*
29 But the juſtices have no juriſdiction over this offence at common law; and indictments are uſually preferred at the aſſizes. *ibid.* (N) 15
30 The ſtatute not to extend to ſpiritual courts. *ibid.* ſ. 5
31 Nor ſhall the ſtatute reſtrain the common law puniſhment, ſo as the judges do not inflict *leſs* than the act preſcribes. 328
32 Therefore the king's bench may inflict fine and pillory, without inquiring of the lands. *ibid.*
33 By 2 Geo. 2. c. 25. judges may, over and above the ſaid puniſhments, order the offender to be ſent to the houſe of correction, or tranſported for any term not exceeding 7 years. *ibid.*
34 In a proſecution on 5 Eliz. the words of the ſtatute muſt be exactly purſued. ſ. 17

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35 It must also expresly alledge that the defendant was sworn. *Page* 329
36 But it need not state, that the perjury was committed by means of subornation, &c. 329
37 But no one can be guilty of perjury upon this act who may not, possibly, be guilty of the subornation. s. 19
38 No indictment, or *criminal* information, lies upon this statute. *ibid.*
39 The statute extends to no other perjury than that committed by *a witness*. 330 s. 20
40 And a *false affidavit* against another in a court of justice is not within the act. s. 21
41 And *qu.* if a false oath upon a writ of enquiry is within it. 331
42 But if the defendant should *in the face of the court*, confess an affidavit to be false, the common pleas has punished the offender under this act. *ibid.* (N)
43 The oath must be to the prejudice of another. *ibid.* s. 22
44 And the party who complains must have been actually grieved by it, and be so proved. 332
45 And *the manner* in which the false oath conduced to the prejudice must be set forth. *ibid.*
46 By a positive *averment*, and not by way of *innuendo*. *ibid.*
47 Therefore where the party is *benefited* by the perjury, the offender cannot be prosecuted on this statute. *ibid.*
48 So also it must appear to have been committed in a cause properly depending between the plaintiff and the party for whom the offender was examined as a witness. 333
49 By 8 Geo. 1. c. 6. perjury may be assigned upon the quakers affirmation. s. 24
50 By 31 Geo. 2. c. 10. perjury to obtain the probate to a seaman's will, or letter of administration to his effects, is DEATH WITHOUT CLERGY. 334
51 By 28 Geo. 2. c. 13. perjury, in sheriffs or officers, upon any of the matters of the act incurs 500*l.*—and if committed by a prisoner, intending to take advantage of the act, is death without clergy. 334 (N) 6
52 How perjury shall be charged and assigned by 23 Geo. 2. c. 11. *Page* 334 (L) 26, 27
53 How the court will treat an indictment seemingly defective. *ibid.* (N) 8
54 The court may order perjured witnesses to be prosecuted, &c. 335 s. 28
55 By 12 Geo. 1. c. 29. attornies who shall practise after having been convicted of perjury, shall be transported for seven years. s. 29

## PERSONATING.

1 By 4 & 5 W. & M. c. 4. whoever shall personate another before commissioners authorised to take bail, so as the personated *may* become liable, shall be guilty of felony. 179
2 By 8 Geo. 1. c. 22. 9 Geo. 1. c. 12. 31 Geo. 2. c. 22. and 4 Geo. 3. c. 25. whoever shall personate a proprietor of any of the public stocks or funds, thereby endeavouring to receive any dividend, or annuity, of such proprietor, as if he were the true proprietor, or who shall assist or aid therein, shall suffer death without benefit of clergy. 207, 208, 212, 213
3 Upon these statutes it was resolved *in Parr's case*, O. B. February sessions, 1787, *(since the body of the work was printed)* that the single act of obtaining a dividend warrant, in the name of a proprietor, without accompanying the act with any attempt to receive the money on the warrant on it, although several hours intervened between the time of obtaining the warrant and the apprehending of the offender, is "endeavoring to receive," &c. within the words of the act.
4 By 31 Geo. 2. c. 10. whoever shall personate the name or character of any seaman, or other person intitled to wages, or other monies for services on board any of the king's ships, or the executor, administrator, wife, relation, or creditor of such person, in order to receive the monies so due to him, shall suffer death without clergy. 212

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## PETITIONING.

1 Endeavouring to frighten the king into a change of meaſures, by tumultuous petitioning, is a high contempt againſt his perſon and government. *Page* 92 ſ. 3
2 By 13 Car. 2. c. 5. no addreſs to the king or parliament, for alteration of any matter of church or ſtate, ſhall be ſigned by more than twenty perſons, unleſs firſt conſented to by three juſtices, grand jury, or lord mayor, &c. on pain of 100*l.* 309
3 By 1 W. & M. c. 2. it is declared to be the right of the ſubjects to petition the king, and that all proſecutions for ſo doing are illegal. 310
4 But this act does not repeal 13 Car. 2. c. 5. *ibid.*
5 How far, and in what caſes a petition to parliament may be deemed libelous. 354, 355

## PETIT TREASON.

1 What was conſidered petit treaſon at common law. 131
2 It is confined by 25 Edw. 3. to a ſervant who kills his maſter, or a wife her huſband, or a prieſt his patron. *ibid.*
3 A ſon who kills his father is not within the act, unleſs he is a ſervant to him. *ibid.* ſ. 2
4 The murder of a miſtreſs is petit treaſon. 132
5 If a ſervant has left his maſter at the time of the murder, yet it is treaſon if the malice were hatched during the ſervice. *ibid.* ſ. 4
6 Aiders and abettors are within the act. *ibid.* ſ. 5
7 But if the fact do not amount to murder, it cannot be petit treaſon. ſ. 6
8 And if a ſtranger murder at the inſtigation of the ſervant, &c. in the abſence of the ſervant, it cannot be petit treaſon. *ibid.*
9 But otherwiſe, if even conſtructively preſent. 133
10 A wife *de facto* only is not within the act. *Page* 133 (N) 2
11 A canonical obedience reſults from ordination, &c. *ibid.* ſ. 7
12 Petty treaſon and murder are of the ſame nature. *ibid.* (N) 3
13 The judgment for this crime. *ibid.*
14 Both principal and acceſſaries are debarred of clergy. 133 ſ. 8

## PHILOSOPHER'S STONE. — *Vide Multiplication.*

1 All perſons at liberty to exerciſe their endeavours to make it. 73 ſ. 12

## PHYSIC.

1 By 3 Jac. 1. c. 5. papiſts are diſabled to practice phyſic. 29
2 How far a raſh and fatal adminiſtration of phyſic ſhall be blameable. 131

## PICKPOCKET.—*Vide Privately ſtealing.*

## PICTURES.

1 Pictures maliciouſly drawn and exhibited may be libelous. 352 ſ. 2

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1 In what caſes felony to ſteal them. 144
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## PIRACY.

1 The right of the king to puniſh it. 152 (N) 8
2 How it was puniſhable at common law. *ibid.* ſ. 2
3 It may now be tried by the king's commiſſion, after the courſe of the common law. *ibid.* ſ. 3
4 Oulled of clergy by 28 Hen. 8. c. 15. 153
5 The offence muſt be alledged to be done at ſea. ſ. 6

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6 The ſtatute does not alter the nature of the offence. *Page* 153
7 Not included in a general pardon of felonies, becauſe it is of a ſpecial nature. *ibid.*
8 How acceſſaries *were* to be tried. ſ. 7
9 They are now triable in the ſame manner as principals. 154
10 An attainder of piracy does not corrupt the blood. ſ. 8
11 Unleſs the indictment be as for a robbery at common law. *ibid.* (N) 2
12 How an offender ſtanding mute ſhall be puniſhed. *ibid.* ſ. 9
13 No piracy unleſs the offence would have been felony if done on land, and the indictment muſt be both *felonicè et piraticè*. ſ. 10
14 The ſtatute extends not to creeks, &c. within the body of a county. *ib.*
15 By 11 & 12 Will. 3. c. 7. the trial of pirates may be either at ſea or upon land at any places abroad. 155
16 To commit hoſtility at ſea under colour of a foreign commiſſion is piracy. *ibid.* ſ. 13
17 Captains or ſeamen betraying their truſt, running away with the ſhip, &c. yielding it up, or confederating with pirates, &c. deemed piracy. ſ. 14
18 Acceſſaries in piracy deſcribed and ouſted of clergy. 156
19 And ſhall be tried as principals are directed to be by 28 Hen. 8. *ibid.* ſ. 16
20 To trade with pirates, or to fit out ſhips for that purpoſe, &c. deemed piracy. 157
21 To board a merchant ſhip and throw the cargo overboard, deemed piracy. *ibid.* ſ. 18
22 Ships fitted out to correſpond with pirates, are forfeited. *ibid.* ſ. 19
23 All perſons made acceſſaries by 11 & 12 Will. 3. deemed principals and excluded from clergy. ſ. 20
24 Seamen, maimed by pirates, intitled to admiſſion to Greenwich Hoſpital, but if they neglect to defend themſelves, they ſhall be impriſoned ſix months and forfeit their wages. *ibid.*
25 Pirates tried for the felony ſhall not be afterwards tried for the high treaſon. 158
26 To ranſom a neutral ſhip or to ſet her free before ſhe is brought into port, deemed piracy. *Page* 158 ſ. 22
27 A ſeſſion of admiralty ſhall be holden twice a year at the Old Bailey or at ſuch other place as three commiſſioners ſhall direct. 159
28 Commiſſioners, juſtices, ſheriffs, &c. impowered to act with reſpect to piracy. *ibid.* ſ. 24

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1 How an indictment for a nuiſance muſt deſcribe the place. 421

## PLAGUE.—*Vide Quarantine.*

## PLANTATIONS.—*Vide Woods. Shrubberies.*

1 By 9 Geo. 1. c. 22, to deſtroy trees planted in any avenue or growing in any garden, orchard, or plantation, &c. is felony without clergy. 215

## PLANTS.

1 By 6 Geo. 3. c. 36. to deſtroy *in the night time*, any root, ſhrub, or plant, of the value of 5*s.* in any incloſed ground, or to aid, &c. is tranſportation ſeven years. 215
2 By 6 Geo. 3. c. 48. to deſtroy any plant, &c. in any cultivated lands is 40*s.* for the firſt offence, 5*l.* for the ſecond, and tranſportation for the third. 216

## PLATE.—*Vide Forgery. Stamps.*

## PLAYS and PLAYHOUSES.

1 By 1 Car. 1. c. 1. there ſhall be no interludes or common plays uſed by any perſons in their own pariſhes on the lord's day. 11
2 By 3 Jac. 1. c. 21. whoever ſhall uſe the name of the Trinity in any play

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play or interlude, profanely or jestingly, shall forfeit 10*l.* *Page* 13
3 A playhouse may become a common nuisance, if it draw together such numbers as become inconvenient. 362
4 By 10 Geo. 2. c. 28. actors of plays in unlicensed houses are deemed rogues and vagabonds, &c. and are liable to a penalty of 50*l.* 560
5 A true copy of all dramatic works shall be sent to the lord chamberlain, fourteen days before representation signed by the manager, &c. on pain of 50*l.* 561
6 The lord chamberlain may prohibit the representation. *ibid.*
7 Plays acted in public houses shall be deemed to be acted for hire, &c. *and liable to the above penalties.* *ibid.*
8 The manner of recovering the penalty. *ibid.*
9 By 17 Geo. 2. c. 5. all common players, deemed rogues and vagabonds. 570

PLEAS.—*Vide Murder.*

1 All pleas *in disability* ought to be pleaded before imparlance, and conclude with a demand if the plaintiff shall be answered. 33 f. 2
2 A plea on 3 Jac. 1. c. 5. against a recusant convict, ought to shew where the plaintiff was convicted, the record of which must be produced. *ibid.* f. 3
3 How such a plea shall be pleaded, if the plaintiff conform. *ibid.* f. 4, 5, 6
4 In pleading a matter grounded on a statute, it must be strictly pursued. 35
5 In what manner a plea in bar to an action for usury shall be pleaded. 533
6 The consequence to an attorney for pleading a matter which he knows to be false. 543

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1 The punishment for destroying them. *Page* 214, 216, 238

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1 Any man may, of common right, erect fish-ponds. 516
2 By 5 Eliz. c. 21. to break down the head of fish-ponds is three months imprisonment and surety for seven years. 221

POPE and POPERY. *Papists. Præmunire. Church. Treason.*

POST-OFFICE.

1 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. if any officer, servant, post-boy, or rider, employed by the post-office, shall secrete or destroy any letter, packet, or bag of letters, which he may be intrusted with, containing any security for money, or shall steal such security out of any letter, he shall suffer death without clergy. 140
2 If the indictment charge the offender as acting in one department of the office, and the verdict find him guilty as a servant in another department, not connected with that charged in the indictment, it is good in arrest of judgment. *ibid.* (N) 4
3 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. whoever shall rob any mail in which letters are sent by the post-office of any letter, packet, or bag, or shall steal any letter, bag, or packet, from any such mail, or from the post-office, or from any of the receiving houses, shall suffer death without clergy. 142

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POSSESSION.—*Vide Treaſon. Larceny. Bailment.*

1 How far the *poſſeſſion* of goods follows *the property.* *Page* 136
2 Where two claim land, the poſſeſſion is in him who has the right. 282, 283
3 How far the poſſeſſion ſecures a man from the guilt of a forcibly entry. *ibid.*
4 When poſſeſſion barrs reſtitution. 289 to 292

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POST FINE.—*Vide Forgery.*

1 To counterfeit the hand of the receiver is felony. 213

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PRETENDED TITLES.

1 The offence of buying or ſelling them. 553 c. 86
2 To buy or ſell any doubtful or diſputed titles to lands, to the intent that the buyer may carry on the ſuit,

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is a high offence at common law. *Page* 553 ſ. 1
3 It is immaterial whether the title be good or bad, or whether the party were in poſſeſſion or not. *ibid.*
4 By 1 Rich. 2. c. 9. no defendant ſhall alienate lands in ſuit, &c. and the diſſeiſee of ſuch lands ſhall recover againſt the original diſſeiſor, if he commence his ſuit within a year and a day. 554
5 Feoffments of this kind are only void in reſpect of the diſſeiſees. ſ. 3
6 By 13 Ed. 1. c. 49. none of the king's houſe ſhall buy any title while the thing is in diſpute. *ibid.*
7 By 32 Hen. 8. c. 9. all ſales of pretended titles to lands, &c. where the party or his anceſtors have been in poſſeſſion of the ſame, or of the remainder or reverſion, or taken the rents one whole year before ſuch ſale, ſhall be void, and the land forfeited, if ſued for within a year. ſ. 4
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10 The plaintiff need not recite this ſtatute in an action on it. ſ. 8
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12 It muſt be averred that *the ſeller* had a pretended title. ſ. 10
13 The value of the land at the time of the bargain muſt be ſet forth. ſ. 11
14 A contract for a cuſtomary eſtate; or for a leaſe for years is within the ſtatute. 566
15 And it is not neceſſary to ſtate the commencement or the end of ſuch leaſe. ſ. 13
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17 A diſſeiſor obtaining a releaſe from a diſſeiſee; or a mortgagor redeeming his land, are not within the ſtatute. ſ. 15
18 One who gains poſſeſſion of land by judgment of law, in affirmance of an ancient title, is not within the act in reſpect of any leaſe made of ſuch lands. *Page* 366 ſ. 16
19 But otherwiſe if the title is ſtill conteſted, and the leaſe was made for the purpoſe of maintenance. *ibid.*
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21 But ſuch a ſale by a father to a ſon is not. *ibid.*
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## PRÆMUNIRE.

1 The offence of *præmunire* ariſes from ſtatutes made to preſerve the ſovereignty of the crown, from the incroachments of Rome. 77
2 The hiſtory of theſe incoachments. 77, 78
3 The ſeveral *ancient ſtatutes* enumerated, by which the making uſe of *papal bulls*, was firſt created *præmunire*. 78, 79
4 By 13 Eliz. c. 2. whoever ſhall purchaſe any *bull* from Rome, is guilty of high treaſon. 79
5 It is in the option of the crown to proceed on the ancient ſtatutes for the *præmunire*, or on the 13 Eliz. for the treaſon. *ibid.* ſ 13
6 By 13 Eliz. c. 2. the aiders of ſuch offenders after the offence incur a *præmunire*. *ibid.*
7 By 27 Edw. 3. c. 1.—38 Edw. 3. c. and 16 Rich. 2. c. 5. it is made præmunire to derogate from the king's common law courts. 79
8 The ſeveral conſtructions which have been made on the above ſtatutes. 80
9 By 24 Hen. 8. c. 12. 20, 21. & 25 Hen. 8. c. 19. to appeal to *Rome*, from any of the king's courts is *præmunire*. *ibid.*
10 By 26 Hen. 8. c. 14. exerciſing the juriſdiction of a *ſuffragan* without leave of the biſhop is *præmunire*. *ibid.*

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81 By 25 Hen. 8. c. 20. refuſing to conſecrate a biſhop is *præmunire*. *Page* 80

12 By 5 Eliz. c. 1. maintaining the pope's power, is made a *præmunire* upon the firſt conviction, and high treaſon on the ſecond. 81

13 By 13 Eliz. c. 2. it is made *præmunire* to bring in any *agnus dei*, croſſes, or ſuch ſuperſtitious reliques. *ibid.*

14 Whoever ſhall receive ſuch *reliques* to wear, without diſcovering the offender, ſhall incur *præmunire*. *ibid.*

15 A juſtice ſhall incur the like offence, who, on information, does not diſcover the offender to a privy councillor in 14 days. *ibid.*

16 By 1 Eliz. c. 1. 5 Eliz. c. 1. 3 Jac. 1. c. 4. 7 Jac. 1. c. 6. 1 W. & M. c. 8. and 7 Will. 3. c. 14. refuſing to take the oaths of allegiance, ſupremacy, &c. incures the pains of *præmunire*. 81, 84

17 Several adjudications on the two firſt of the above recited ſtatutes. 82

18 By 6 Ann. c. 7. to affirm that the pretender has any right to the crown, or that the parliament cannot limit the ſucceſſion of it, is *præmunire*. 84

19 By 1 & 2 P. & M. c. 7. to moleſt the poſſeſſors of the abbey lands granted by Henry 8 is *præmunire*. 85 (N)

20 By 21 Jac. 1. c. 3. to procure any action to be irregularly delayed, is *præmunire*. *ibid.*

21 By 16 Car. 1. c. 21. and 1 Jac. 1. c. 8. to pretend authority to obſtruct the importation of gunpowder, &c. is *præmunire*. *ibid.*

22 By 12 Car. 2. c. 24. to be guilty of purveyance incurs *præmunire*. *ibid.*

23 By 13 Car. 2. c. 1. to aſſert that either houſe of parliament has legiſlative authority without the king is *præmunire*. *ibid.*

24 By 31 Car. 2. c. to tranſport a ſubject contrary to the *habeas corpus* act, is *præmunire*. 87

25 By 20 Car. 2. 7. conſpiracies to avoid the ſeizure of cattle in certain caſes is *præmunire*. *ibid.*

26 By 6 Ann. c. 23. to treat other than of the election when aſſembled at *Holyrood Houſe*, is *præmunire*. P. 87

27 By 6 Geo. 1. c. 18. to open *bubbles* ſimilar to the South-ſea project, is *præmunire*. *ibid.*

28 By 12 Geo. 3. c. 11. whoever ſhall ſolemnize, or aſſiſt in, or be preſent at the marriage of any of the deſcendants of Geo. 2. other than ſuch iſſue as ſhall ſpring from connection with foreign families, without the previous conſent of the king ſpecified in the licence, regiſtered in the privy council, ſhall incur the pains of *præmunire*. 86

29 In what manner the offence of *præmunire* ſhall be puniſhed. 84, 85

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1 How far within the ſtatute of treaſons. 53, 54

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1 How far a private perſon may ſuppreſs an affray. 168

PRIVATE WAY.—*Vide Nuiſance. Highway.*

PRIVY COUNCIL.—*Vide Contempts. No.* 30.

1 An inſurrection for the purpoſe of laying violent hands on a privy councillor,

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cillor, *is ſaid* to be high treaſon. *Page* 54 ſ. 25
2 By 3 Hen. 7. c. 14. conſpiracy by the king's ſubordinate ſervants, to murder a privy councillor is felony. 74
3 By 9 Ann. c. 16. to attempt to kill, or wound, a privy councillor in his duty, is felony without clergy. *ibid.*
4 Homicide beyond ſea, being examined by the privy council, may be tried in any county by commiſſion. 119
5 A privy councillor is in danger of *præmunire* by ſtopping an action againſt a monopolift. 473

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1 By 8 Eliz. c. 4. whoever ſhall ſteal from the perſon of another, any goods privily without his knowledge ſhall not be admitted to clergy. 150

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1 In what caſes recuſants may be convicted by proclamation. 24
How offenders againſt the black act, may be obliged to ſurrender on proclamation. 187, 188
3 How ſmugglers may be proclaimed and convicted. 229

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1 In what caſes prohibition will lie for hereſy. 7
2 It does not lie in any proceeding on the ſpiritual law, unleſs ſomething be attempted in derogation of the common law. *ibid.*

PROMISSORY NOTE.—*Vide Forgery.*

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PROTESTANT DISSENTERS. —*Vide Diſſenters.*

PROTESTANT SUCCESSION.

1 By 4 Ann. c. 8. and 6 Ann. c. 7. to maintain *by writing*, that the *pretender* has any right to the crown, or that parliament cannot bind and limit the ſucceſſion thereof, is high treaſon, and to affirm the ſame *by adviſed ſpeaking, is præmunire.* *Page* 69
2 By 1 Ann. c. 7. adviſedly to hinder the acceſſion of any one who is next in ſucceſſion to the throne, according the 1 W. & M. and 12 Will. 3. is high treaſon. *ibid.*
3 By 13 Will. 3. c. 3. the pretender is *attainted* of high treaſon. *ibid.*
4 By 17 Geo. 2. c. 39. to hold correſpondence with him or his ſons, is high treaſon. 69, 70

PROVISIONS.—*Vide Papiſts. Victuals.*

PROSECUTION.—*Vide Conſpiracy.*

PROVOCATION—*Vide Murder. Manſlaughter.*

PUBLICATION.—*Vide Libel.*

PUBLIC HOUSES.

1 Publicans may be indicted for encouraging diſorders; and for refuſing to entertain gueſts. *(Vide Innkeeper.)* 451, 452
2 By 12 Ed. 2. c. 6. no perſon concerned in the *aſſize* of wine or victuals, ſhall be either a publican or victualler. 452, 453
3 By 3 Hen. 8. c. 8. directions are given how the aſſize of wine and victuals ſhall be ſet. 453
4 By 21 Jac. 1. c. 21. publicans and innholders are directed to diſpoſe of

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their commodities, and *horſe bread*, at reaſonable prices. *Page* 453, 454
5 By 5 & 6 Ed. 6. c. 25. two juſtices, one of the *quorum*, ſhall have power to remove, diſcharge, and ſuppreſs common alehouſes. 454 ſ. 9
6 A publican ſuppreſſed upon this act, cannot be licenſed again, except in open ſeſſions. ſ. 10
7 By 5 & 6 Ed. 6. c. 25. and 26 Geo. 2. c. 31. no public houſes ſhall be kept, except in fairs, but by ſuch as ſhall be allowed in open ſeſſions by two juſtices, 1 Q. ſ. 11
8 This exception extends only to the place where the fair is actually held; not to any houſe adjoining to it. *ibid.* (N) 1
9 And beer brewed in fairs muſt pay the exciſe duty. *ibid.*
10 By 2 Geo. 2. c. 28. the reaſons are given for the preſent mode of licenſing public houſes. 455
11 Lodging and boarding houſes, however public, do not require licence. (N) 1
12 By 26 Geo. 2. c. 31. yearly licences ſhall be granted in counties from the 1ſt. to commence 29th of Sept. by two juſtices *of the diviſion*, at ſuch place, as they, by public notice, ſhall previouſly direct. 455
13 Every licenſed publican ſhall be bound in a recognizance of 10*l.* to preſerve proper œconomy and good order. ſ. 13
14 The uncontrouled power of juſtices in granting licences, and the inſtances of miſconduct for which alone the king's bench will examine their proceedings. 456 (N) 4
15 By 5 & 6 Ed 6. c. 25. the quarter ſeſſion, by *preſentment or information*, ſhall enquire into recognizances forfeited, and award proceſs accordingly. ſ. 14
16 The juſtices may *order* a public-houſe to be ſuppreſſed. *ibid.* (N) 5
17 By 26 Geo 2. c. 31. juſtices may take away licences unleſs cauſe can be ſhewn, that the condition of the recognizance has been fulfilled. ſ. 15
18 If the juſtice convicts without ſummoning the party, he is liable to an information. *ibid.* (N) 5
19 But the juſtices cannot ſuppreſs a licenſed public houſe, except for diſorders amounting to a nuiſance, or for a breach of the recognizance. *Page* 457 (N) 7
20 A conviction for a breach of the recognizance diſables the offender to ſell either malt or ſpirituous liquors for 3 years, and renders his licence void. 457
21 By 5 & 6 Ed. 6. c. 25. any two juſtices may commit an unlicenſed publican, until he binds himſelf not to ſell liquors without licence, &c. 457, 458
22 By 26 Geo. 2. c. 31. the exciſe-man's book ſhall be good evidence to prove a man to be an alehouſe-keeper. 458
23 Juſtices may ſummon and examine perſons whom they ſhall ſuſpect to be unlicenſed; and ſuppreſs the houſe. 458, 459
24 The recognizances taken by the juſtices, on licenſing public houſes, ſhall be tranſmitted to the ſeſſions. 459
25 The clerks of the peace ſhall give an account of the recognizances to the juſtices, at their yearly meetings. *ibid.*
26 By 26 Geo. 2. c. 31. no licence ſhall be granted to any perſon not licenſed the preceding year, unleſs ſuch perſon produce a certificate from his pariſh, of the propriety of his character. 460
27 This certificate not neceſſary in licenſing houſes in cities and towns corporate. *ibid.*
28 If a publican die or remove, his licence ſhall continue till the next licenſing day. 460, 461
29 By 26 Geo. 2. c. 13. no juſtice concerned in the ſale of liquors, ſhall be concerned in granting licences. 461
30 By 4 Jac. 1. c. 4. to deliver ale and beer for ſale, to an unlicenſed perſon, incurs a forfeiture of 6*s.* 8*d.* a barrel. *ibid.* ſ. 26
31 By 2 Geo. 2. c. 28. retailers of *diſtilled liquors* ſhall be licenſed in the ſame manner as common publicans. ſ. 27
32 By 10 Geo. 2. c. 17. retailers of *made wines*, who are publicans, ſhall be licenſed by two juſtices. ſ. 28
33 By

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33 By 16 Geo. 2. c. 8. ſellers of *ſtrong waters* ſhall be firſt licenſed by the commiſſioners of exciſe. *Page* 469 ſ. 29
34 But no perſon ſhall be thus licenſed, unleſs previouſly licenſed by two juſtices. 461, 462
35 By 2 Geo. 2. c. 28. juſtices of peace ſhall have the ſame juriſdiction over retailers of ſpirituous liquors as they have over common publicans. 462(N)
36 By 17 Geo. 2. c. 17. whoever ſhall mix liquors for ſale at home, or ſend quantities of leſs than two gallons abroad, deemed retailers. 462 ſ. 30
37 By 11 Geo. 2. c. 26. clandeſtine ſellers deemed retailers. *ibid.* (N)
38 By 9 Geo. 2. c. 23. giving liquors to ſervants or apprentices, &c. deemed retailing. *ibid.*
39 By 24 Geo. 2. c. 40. no licence, in London, ſhall be granted but to occupiers of 10*l.* a year, &c. nor in other places, but to thoſe who pay to *church and poor*. ſ. 31
40 By 9 Geo. 3. c. 6. liquors found in the houſe of an unlicenſed perſon may be ſeized. ſ. 32
41 By 24 Geo. 2. c. 40. Officers, by warrant may break open doors, &c. 463
42 By 13 Geo. 3. c. 56. the penalty of retailing diſtilled liquors without a licence, is increaſed from 10*l.* to 50*l.* ſ. 34
43 By 26 Geo. 2. c. 31. the *repreſentatives* of a publican may uſe the unexpired term of his licence without producing the certificate required by No. 26. ſ. 35
44 In caſe any licenſed houſe becomes empty after the licenſing day, two juſtices at a petty ſeſſions, may grant a licence till the general licenſing day, upon the production of certificate required, No. 26. 464
45 Retailers of liquors in priſons ſhall be deemed common publicans. *ibid.*
46 The commiſſioners of the exciſe ſhall not licenſe any perſon to ſell ſpirituous liquors, who is not previouſly licenſed to ſell ale and beer by two juſtices. *ibid.*
47 By 5 Geo. 3. c. 46. every perſon convicted of ſelling ale and beer, or other exciſeable liquors by retail without licence ſhall forfeit 40*s.* and coſts for the firſt offence 4*l.* for the ſecond, 6*l.* for the third, &c. *Page* 464, 465
48 The manner in which the juſtices may hear and determine the offence. 465
49 The penalty on witneſſes not obeying the ſummons. *ibid.*
50 How perſons aggrieved may appeal. 466
51 By 21 Jac. 1. c. 7. &c. publicans ſhall forfeit 10*s.* for encouraging or permitting tippling in their houſes. *ibid.*
52 How the penalty for ſo doing is to be levied. 467
53 How this offence ſhall be puniſhed in the univerſities. *ibid.*
54 By 4 Jac. 1. and 21 Jac. 1. c. 7. drunkards are puniſhable with a forfeiture of 5*s.* or, on default of payment, with ſix hours confinement in the ſtocks. 467, 468
55 Repeated or continued tippling incurs a forfeiture of 3*s.* 4*d.* or confinement four hours in the ſtocks. 468
56 All officers ſhall be charged to preſent ſuch offence—but one puniſhment only ſhall be inflicted. *ibid.*
57 The juriſdictions of the eccleſiaſtical court and of the two univerſities, is ſaved. 469
58 By 7 Jac. 1. c. 10. if any publican be convicted, on 1 Jac. 1. c. 9. or 4 Jac. 1. c. 5. he ſhall, in addition to the above penalties, be diſabled to keep a publick houſe for three years. *ibid.*
59 By 30 Geo. 2. c. 24. if any licenſed publican ſhall ſuffer labourers, ſervants, &c. to game in his houſe, he ſhall forfeit 40*s.* for the firſt offence, and 10*l.* for every ſubſequent offence. *ibid.*
60 And the parties who ſo game ſhall be liable to pay a penalty from 5*s.* to 20*s.* or be committed to hard labour. *ibid.*

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PUBLIC WORSHIP.—*Vide Church.*

PURLIEU.—*Vide Chace. Foreſt. Park. Deer, &c.*

PURVEYORS.

1 The hiſtory of purveyance and preemption. *Page* 181
2 The principle of it denied by magna charta. *ibid.*
3 Aboliſhed by 12 Car. 2. c. 24. *ibid.*

Q.

QUARE IMPEDIT.

1 IN *a quare impedit*, if the biſhop plead *hereſy*, he muſt ſhew the particular point. 6, 7

QUARRELS.—*Vide Affrays.*

QUARANTINE.

1 By 26 Geo. 2. c. 26. all veſſels, perſons, and goods, coming from a place ſuſpected by the privy council to be *infected* ſhall perform *quarantine*, in ſuch manner as the king ſhall direct, &c. 241
2 If the plague ſhall appear on board any ſhip, being to the Northward of *Cape Finiſterre*, the commander ſhall proceed to *St. Helen's pool*, &c. untill the king's pleaſure be known, on pain of death without clergy. *ibid.*
3 The king's ſhips may force any veſſel obliged to perform *quarantine*, to repair to the place appointed—and if any commander ſhall conceal having the plague on board, he ſhall ſuffer death, without clergy. 242
4 Penalties for not making a true diſcovery of the other particulars directed by the act. *ibid.*
5 Whoever, being ordered to perform *quarantine*, ſhall refuſe to repair to the *lazarets*, or ſhall eſcape or attempt to eſcape therefrom, &c. ſhall ſuffer death, without clergy. *Page* 242
6 And any perſon not infected, nor liable to perform *quarantine*, who ſhall enter into any *lazaret*, or other place for performing quarantine, and ſhall attempt to return, or to make his eſcape therefrom, before the time is expired, he ſhall ſuffer death without clergy. *ibid.*
7 Officers neglecting their duty, forfeit 100*l.* &c. &c. *ibid.*
8 Whoever ſhall clandeſtinely convey any goods or letters, &c. from any ſhip or *lazaret*, performing quarantine, ſhall ſuffer death without clergy. *ibid.*

QUEEN.

1 A queen regnant, is within the meaning of the words, "our lord the king," in the ſtatute of treaſons. 53 ſ. 20
2 A queen dowager is not within the ſtatute. ſ. 22
3 A queen divorced *a vinculo matrimonii* is not within the ſtatute. 53 (N) 2

R.

RAPE.

1 IS the carnal knowledge of a woman by force. 169
2 Nothing leſs than actual penetration and emiſſion can amount to a rape; but emiſſion is *prima facie* evidence of penetration. *ibid.* ſ. 1
3 It is no excuſe that the woman at laſt yielded, or conſented after the fact; or was a common ſtrumpet; or conceived from the fact. 170 ſ. 2
4 But if ſhe make no complaint *at the time*, it is a ſtrong ground for preſuming conſent. *ibid.* ſ. 3
5 By 18 Eliz. c. 7. whoever ſhall carnally know a woman child under ten years

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years of age, ſhall ſuffer as a felon without clergy. *Page* 170 ſ. 4
6 Whether with or without conſent in this caſe, is not material; but penetration muſt be proved. *ibid.* ſ. 5
7 All aiders and aſſiſters, *preſent*, whether male or *female*, are principals. ſ. 6
8 How this offence was formerly puniſhed. ſ. 7
9 By 8 Eliz. c. 7. this offence is excluded from the benefit of clergy. *ibid.*

REALM.—*Vide Contempts*, No. 37, 38.

REASON.—*Vide Madmen.*

REBELS.—*Vide Treaſon.*

1 Private perſons may arm and aſſemble to oppoſe and ſuppreſs rebels. 267, 268, 298

RECOGNIZANCES.—*Vide Public Houſes. Behaviour. Peace.*

RECORD.

1 The embezzling, defacing, or altering any record, is a high offence at common law, puniſhable with fine and impriſonment. 177
2 By 8 Hen. 6. c. 12. if any record or *proceeding* in the king's courts, be ſtolen, whereby any judgment ſhall be reverſed, the offenders, their aiders, &c. ſhall be guilty of felony. *ibid.*
3 The jury ſhall be equally impanneled from officers of any two of the courts in Weſtminſter Hall, to try the indictment. *ibid.*
4 The offence ſhall be tried either by the king's bench, or by the common pleas. *ibid.*
5 The above acts only extends to the exchequer, king's bench, and common pleas; and the chancery as far only as it proceeds according to the common law. *ibid.*
6 The judges are not within the act. *ib.*
7 But by 8 Rich. 2. c. 4. judges as well as clerks ſhall pay a fine for raſing rolls, &c. *Page* 177
8 Judges are puniſhable at common law for falſifying records. *ibid.*
9 Whether it is neceſſary that the alteration of the record ſhould occaſion a reverſal of the judgment. 178
10 If the offence be not compleated in one county, the offender cannot be indicted for the felony, but for the the miſpriſion only. *ibid.*
11 Acceſſaries after are left to the general conſtruction of the law. *ibid.*
12 If the offence be committed in a different county from that in which either of the courts ſit, the court who tries muſt have a ſpecial commiſſion. *ibid.*
13 If committed in London the lord mayor ſhall not be included in the commiſſion. *ibid.*
14 By 21 Jac. 1. c. 26. it is felony without clergy, to acknowledge *a record*, &c. &c. in the name of another. 178 ſ. 9
15 The trial ſhall be in the county where the *perſonating* is committed. 178, 179
16 In perſonating bail, if the bail piece be not filed, it is no felony, but miſdemeanor only. 179
17 By 4 & 5 W. & M. c. 4. to perſonate another before commiſſioners authoriſed to take bail, is felony. *ibid.*
18 In what caſe a record may be avoided by an averment of uſury. 532 ſ. 20
19 *Nul tiel record* a good plea to maintenance. 544
20 In what caſes the record of juſtices, for a riot may be traverſed. 299, 302
21 A record of forcible entry may be traverſed. 270

RECUSANT.—*Vide Papiſt.*

RE-DELIVERY.—*Vide Robbery*, N. 3.

REGRATOR.—*Vide Engroſſing.*

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RELIGION —*Vide Church. Lord's Day. Præmunire. Hereſy.*

## REPUGNANCY.

1 In what caſes it vitiates an indictment. *Page* 285, 286

## RIOTERS.

1 The offence of BLACK MAIL, and how puniſhed. 201
2 Offences by MOSS TROOPERS, how puniſhed. *ibid.* ſ. 2
3 Clergy taken from felonious rioters in Cumberland and Northumberland. 202

## RIOTS, ROUTS, and unlawful ASSEMBLIES.

1 A RIOT is a tumultuous diſturbance of the peace by three perſons or more, &c. &c. 392 c. 65
2 Force and violence in the proſecution of an *illegal* act, makes the offenders rioters. 294 ſ. 2
3 But to effect a *legal act*, even forcibly, by means of numbers, will not make the actors rioters. *ibid.*
4 Yet they are anſwerable for any *needleſs* outrage. *ibid.*
5 If numbers meet together innocently, as at a wake or fair, and a quarrel enſue, they are not rioters, but arrayers. *ibid.* ſ. 3
6 Otherwiſe if they had formed parties under the pledge of mutual aſſiſtance. *ibid.*
7 Eſpecially if the notice of their confederacy be for illegal purpoſes of a *private nature*, as pulling down bawdy houſes, &c. 295
8 And thoſe who join ſuch a confederacy, after it is once formed, are equally guilty. *ibid.*
9 The enterprize muſt be accompanied with ſome *offer* of violence, either to the perſon or poſſeſſion of another. *ibid.* ſ. 4
10 Therefore, riding armed, in a manner conducing to terror, is only an unlawful aſſembly, and not a riot. *Page* 295
11 But the ſhew of armour, threatening ſpeeches, turbulent geſtures, &c. are ſufficient *offers* of violence to maintain that the riot was *in terrorem populi*; for it muſt be ſo laid to be done. *ibid.* ſ. 5
12 But if *any number* aſſemble, without circumſtances of terror to do an act, under a *pretended* right, they are not rioters. 296
13 Nor to *do* an act contrary to the common law or ſtatute; as to celebrate maſs, &c. if they perform it peaceably. *ibid.*
14 If the object of an aſſembling be of a *public nature*, as to pull down *all* bawdy houſes, &c. ſuch rioters will be guilty of treaſon. ſ. 6
15 And *private* redreſs, even where authoriſed by law, muſt be executed in a *peaceable* manner, or the offenders, if to the number of three or more, will be rioters. ſ. 7
16 But, perhaps, the juſtice of ſuch a caſe, though riotouſly purſued, would mitigate the offence. *ibid.*
17 A ROUT, ſeems to be an unlawful aſſembling of perſons with *an intention*, and actually *moving* to do a thing, the execution of which would make them rioters. 296, 297
18 AN UNLAWFUL ASSEMBLY, is an aſſembling with circumſtances of terror, with or without an *intention* to do a riotous act; but neither *executing* it or making any *motion* towards it. 297 ſ. 9
19 For a man cannot *tumultuouſly* aſſemble even his friends for the defence of his *perſon*, as he may for the defence of his *houſe*; but he muſt ſeek his ſecurity by obtaining ſureties for the peace. ſ. 10
20 All peace *officers* may ſuppreſs a riot, and command the aſſiſtance of other perſons for that purpoſe. ſ. 11
21 And as private perſons may ſuppreſs an affray, *a fortiori*, they *may aſſiſt* and arm themſelves, to ſuppreſs a riot. 298

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22 Riots which favour of rebellion, *they* may *certainly* interpoſe to ſuppreſs, for, on ſuch occaſions, no remedy can be too ſharp or ſevere. *Page* 298

23 By 1 Geo. 1. c. 5. if twelve perſons, riotouſly aſſembled, ſhall ſo continue together for one hour after proclamation, they may be apprehended by a peace officer and carried before a magiſtrate; and if the rioter happen to be killed, the officer ſhall be diſcharged. ſ. 11

24 Perſons not actually engaged, but only aiding, &c. are principals in the ſecond degree under this act. *Note in mar.*

25 But this ſtatute does not abridge the authority which either officers or private perſons have at common law. ſ. 11

26 By the common law rioters may be puniſhed, according to the degree of the offence, by fine and impriſonment, pillory and forfeiture of lands. ſ. 12

27 Corporators puniſhable in their natural capacity for ſuffering riots within their juriſdictions. ſ. 13

28 Women are puniſhable as rioters, but not infants wanting diſcretion. 299

29 By 34 Edw. 3. c. 1. *one* juſtice of the peace has authority over rioters; to reſtrain, arreſt, and chaſtiſe them. ſ. 15

30 He may authorize their arreſt *by parol*; and commit for not giving ſureties. ſ. 16

31 But *one* juſtice cannot by virtue of this act record a riot, or enquire of it after it is over; but he may by virtue of the ſtatute of Northampton (*vide p.* 266.) becauſe under the firſt he acts miniſterially, and under the ſecond judicially. ſ. 17

32 And where a juſtice is authorized to make a record, the fact he records is not traverſable. 300

33 By the common law, as a conſervator, and by 17 R. 2. c. 8. a juſtice may raiſe the *poſſe* to ſuppreſs a riot. ſ. 18

34 By 13 Hen. 4. c. 7. *two* juſtices with the ſheriff, may record a riot; and convict the offenders in the manner deſcribed by 34 Ed. 3. c. 1. (*Vide p.* 266.) *Page* 300 ſ. 19

35 And for the purpoſe of ſuppreſſing the riot, they may raiſe the *poſſe*; which even noblemen are obliged to attend, who may arm themſelves with proper weapons. 301 ſ. 20

36 And this they may do, not only upon view, but information of the riot, and upon ſeeing any detached parties of the rioters; yet if they alarm the county frivolouſly, they ſhall be puniſhed. ſ. 22

37 After view they may record the riot, although the rioters are in cuſtody, and upon freſh ſuit may retake any who ſhall eſcape;—but afterwards the record muſt be ſent to the king's bench, and proceſs to retake muſt thence iſſue—they may, however, at any time arreſt rioters to compel ſureties for behaviour. 302

38 If one bound by a recognizance of the peace, be included in the record of the riot, the production of it againſt him is concluſive. ſ. 25

39 But if the record contain a charge of felony, or maim, or reſcous; yet it is concluſive only as to the riot. ſ. 26

40 This record, being a conviction, ought to be certain and very circumſtantial; it ſhould ſhew that the parties are guilty, and how far guilty within the ſtatute; that the juſtices have purſued their power, &c. ſ. 27

41 How ſuch convicted rioters may be puniſhed. ſ. 28

42 By 13 Hen. 4. c. 7. if the rioters are diſperſed before the two juſtices, ſheriff, or under-ſheriff, arrive, the juſtices (without the ſheriff p. 304 ſ. 33.) may, within a month after, enquire, hear, and determine the offence according to law. 303 ſ. 29

43 By 19 Hen. 7. c. 13. the ſheriff, for this purpoſe, is directed to return a jury of 24 perſons, &c. who ſhall be fined for diſobedience. ſ. 30

44 It is not ſettled whether the power of the juſtices is confined to a lunar or calendar month. ſ. 31

45 But this authority extends to *all* the juſtices within the county; who may award

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award proceſs under their own teſte, &c. *Page* 304 ſ. 34
46 It is queſtionable whether the juſtices can diſcharge rioters upon ſubmitting to a fine, without impriſonment. ſ. 35
47 Formerly rioters might be fined both by the juſtices and by the *ſtar chamber*. ſ. 36
48 By 13 Hen. 4. c. 7. the juſtices and ſheriff may certify the record to the privy (*Vide* p. 306 ſ. 41.) council; which ſhall have the effect of a PRESENTMENT, and the offender may be tried thereon: but the certificate may be traverſed and tried in king's bench, and if the offenders do not appear on proclamation, they ſhall be attainted of the riot. 305
49 Puniſhment and proceſs againſt the jury, if they are guilty of maintenance, &c. ſ. 38
50 The certificate may be made by the juſtices who recorded the riot; but it is moſt proper to be made by thoſe who took the enquiry. ſ. 39
51 And if they neglect ſo to do, they ſhall forfeit 20*l*. *ibid.*
52 And the ſaid certificate muſt be made within a month after the enquiry. 306 ſ. 40
53 And if the enquiry is obſtructed, the certificate ſhould contain the cauſes of the obſtruction. *ibid.*
54 If there be any variance between the inquiſition and the certificate, that which is moſt for the king's advantage, ſhall be preferred; but *qu.* if they differ only in the time. ſ. 42
55 And the certificate being in the nature of an indictment, it ſhould be certain and circumſtantial; but *qu.* if the addition of the offenders need be inſerted. ſ. 43
56 And if the juſtices neglect to put 13 Hen. 7. c. 13. into execution, they ſhall forfeit 100*l*. 307
57 But to incur this penalty the juſtices muſt live within the county, and if any juſtice execute the act, it excuſes the reſt. ſ. 45, 46
58 Only thoſe who dwell neareſt the riot, are liable, but if the neareſt juſtice die, the next in vicinity is bound to execute the act; and if any others, on notice, of which the notoriety of the fact is ſufficient, neglect to ſupply their default, they are fineable. *Page* 307 ſ. 47, 48, 49, 52
59 A partial execution of the act will not excuſe from the penalty; but it is only in enormous riots, as rebellion or inſurrections, that they are liable. ſ. 50, 51
60 No acquieſcence of the parties will excuſe the juſtices. ſ. 53
61 How rioters may be outlawed. 308
62 The penalties of the foregoing ſtatutes found ineffectual, therefore by 1 Geo. 1. c. 5. if twelve or more, riotouſly aſſembled, do not diſperſe upon proclamation by the magiſtrate, but ſhall continue together for one hour afterwards, or ſhall hinder the magiſtrate from making the proclamation they ſhall be felons without benefit of clergy. 309 ſ. 56, 57
63 And if *any perſons* riotouſly aſſembled ſhall demoliſh or begin to pull down any church, chapel or any building for religious worſhip regiſtered according to 1 W. & M. c. 18. or any dwelling-houſe, barn, ſtable, or other out-houſe, felony without clergy. ſ. 58
64 The inhabitants or hundred made liable. ſ. 59
65 By 9 Geo. 3. c. 29. the above penalties extended to the riotous demolition of mills. ſ. 60
66 By 13 Car. 2. c. 5. no petition ſhall be ſigned by more than 20 perſons, &c. ſ. 61

## RIDING ARMED.

1 By 2 Edw. 3. none, except the king's attendants, or officers and their aſſiſtants executing his precepts; or upon a cry of arms, ſhall appear armed before any juſtices; nor ride armed in fairs or markets on pain of forfeiting their armour and impriſonment. 266 ſ. 4
2 And all juſtices, magiſtrates, and peace officers are to execute this act upon pain of puniſhment by the judges of aſſize. *ibid.*

3 Pro-

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3 Proceedings may be either *ex officio* or by writ out of chancery, but a record of them ſhould be made and returned, if done *ex officio*, into the exchequer, if by writ, into chancery. *Page* 267 ſ. 5
4 Offenders may be impriſoned not only upon view of the offence; but upon an inqueſt taken of it. *ibid.* ſ. 6
5 The under-ſheriff may execute the writ officially, except it be ſpecially directed. ſ. 7
6 None ſhall wear armour publickly upon pretence of protecting his perſon; but a man may aſſemble his neighbours to protect his houſe without incurring the penalties of the ſtatute. ſ. 8
7 But no wearing of arms is within the ſtatute unleſs they are ſuch as may terrify; therefore the weapons of faſhion as ſwords, &c. or privy coats of mail may be ſafely worn. ſ. 9
8 Neither are thoſe within the intention of it who arm for the purpoſe of ſuppreſſing, dangerous, tumultuous or noiſy inſurrections. 268 ſ. 10

RIVER.

1 It is a common nuiſance to divert part of a navigable river ſo as to weaken its current. 363
2 So alſo to lay timber in a public river ſo as to obſtruct its intercourſe. *ibid.* (N) 1
3 To place a floating dock in a public navigable river however beneficial to the repair of ſhipping is a nuiſance. *ibid.*
4 Who are bound to remove a nuiſance in an inland river. 365
5 A river, common to all men is called a highway. 366

ROBBERY.

1 Robbery is a felonious and violent taking away from the perſon of another, goods or money to any value, putting him in fear. 147 c. 34
2 Property obtained in conſequence of an oath extorted by fear is a ſufficient *taking* to ſatisfy the word *capit*. *Page* 147 ſ. 1
3 Robbery once compleated cannot be purged by a re-delivery of the property taken; the reaſon of this rule of law. *ibid.* ſ. 2
4 An attack in order to rob, is only a miſdemeanour at common law. *ibid.* ſ. 3
5 But by 7 Geo. 2. c. 22. an aſſault with intent to rob is made ſingle felony. 148
6 By 23 Geo. 3. c. 88. any perſon apprehended with *implements* of robbery, with intention to commit the offence ſhall be deemed a rogue and vagabond. *ibid.*
7 If one of *a gang* only take the money yet his *confederates* are all equally guilty. *ibid.*
8 Confederates in robbery may be guilty, although they are not preſent when the property is taken. *ibid.*
9 Taking any thing from the care and protection of another openly and before his face, ſhall be conſidered as a taking from his perſon. *ibid.*
10 This rule illuſtrated. *ibid.*
11 The fear muſt be excited before the property is taken, or the taking will amount to larceny only. *ibid.*
12 An actual aſſault, with a weapon, is not neceſſary in order to excite the ſort of fear that will conſtitute robbery. 149
13 Nor need the fact of actual fear be either laid in the indictment or proved upon the trial. *ibid.* (N) 4
14 It is ſufficient if the offence be charged to be done *violenter et contra voluntatem*. *ibid.*
15 Proof of ſuch circumſtances as are *likely* to induce a man to part with money for the ſafety of his perſon, or preſervation of his character is ſufficient. *ibid.*
16 What acts will amount to *implied* fear. *ibid.*
17 *Quære* if it be robbery to force another to part with his goods at a fair price. 149 ſ. 7

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18 The claim of property in the thing taken will not excuſe from the guilt of robbery. *Page* 149 ſ. 8
19 Robbery ſhall have judgment of death, how ſmall ſoever the value of the thing taken may be; but other larcenies muſt be above 12*d*. ſ. 9
20 Robbery, unlike all other larcenies, muſt be laid to be done violently, &c. 149, 150
21 By 23 Hen. 8. c. 8. principals and acceſſaries before in robbery *committed in or near about the highway*, are ouſted of clergy. 150
22 By 4 P. & M. c. 4. acceſſaries after are debarred. *ibid.*
23 By 3 & 4 Will. & M. c. 9. robbery is ouſted generally. *ibid.*
24 But the words of 23 Hen. 8. are purſued in indictments. *ibid.*
25 By 4 Will. & M. c. 8. thoſe who apprehend and convict robbers, are intitled to 40*l*. &c. &c. *ibid.*
26 By 6 Geo. 1. c. 21. the ſtreets of London are deemed highways within the 4 W. & M. *ibid.*
27 There is alſo a reward of 10*l*. for exonerating the hundred, &c. *ibid.*

ROPE DANCING.—*Vide Nuiſance.*

RUMOURS.

1 Spreading of falſe rumours concerning the king's intentions, as that he intends to grant toleration to papiſts, &c. is a contempt of his perſon and government. 92
2 Spreading falſe rumours to inhance the price of victuals, &c. is highly criminal. 479

S.

SACRAMENT.

1 REVILING the ſacrament of the Lord's Supper with contemptuous words; how puniſhed. 13
2 The conſequence of not receiving it before and after the acceptance of an office. *Page* 15 to 17
3 The offence of popiſh recuſants not receiving it after conformity. 37, 38

SALT PETRE

1 May be freely imported. 475

SATISFACTION.

1 The profits of a recuſant's lands ſhall go in ſatisfaction of the 20*l*. a month. 22

SCANDAL.—*Vide Libel. Conſpiracy.*

1 In malicious proſecution it is no excuſe for the defendant, that the indictment did import no manner of ſcandal. 348

SCIRE FACIAS.—*Vide Peace. Monopoly.*

SCOLD.

1 How an indictment againſt *a common ſcold*, as a *common nuiſance*, muſt be worded. 361
2 In what manner a common ſcold ſhall be puniſhed. 365

SCHOOL and SCHOOLMASTER.

1 By 23 Eliz. c. 1. every ſchoolmaſter who is not a proteſtant, ſhall be allowed by the biſhop, or forfeit 10*l*. a month, and ſuffer impriſonment for one year. 18
2 By 1 Jac. 1. c. 4. no perſon ſhall keep other than a public or free grammar ſchool, except in the univerſities, or in ſome proteſtant family, on pain of 40*s*. &c. *ibid.*
3 By 11 & 12 Will. 3. c. 4. perpetual impriſonment is inflicted on popiſh ſchoolmaſters not conforming to the 18 Geo. 3. c. 60, 46

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4 Homicide by a ſchoolmaſter, in correcting his ſcholar, will be murder or manſlaughter, according to the propriety or impropriety of the mode of correction. *Page* 111
5 The *aſſault* of a ſchoolmaſter in chaſtiſing his ſcholar, is no forfeiture of a recognizance of the peace. 259
6 It is *præmunire* to contribute to the maintenance of a popiſh ſeminary. 81
7 The puniſhment inflicted on giving or receiving a popiſh education. *(Vide Papiſts.)* 42, 43

SCRIPTURE.

1 By 9 & 10 Will. 3. c. 32. denying the ſcriptures to be of divine authority, creates diſability in law, &c. 7
2 Profane ſcoffing againſt the holy ſcriptures, is indictable at common law. 10
3 The king may grant the excluſive right to print the holy ſcriptures. 471

SEA.—*Vide Murder. Deodand. No.* 7. *Piracy.*

SEA BANKS.

1 By 22 Hen. 8. c. 11. to deſtroy the banks which ſecure the dykes in the counties of Norfolk and Cambridge, is felony. 198
2 By 10 Geo. 2. c. 32. *to remove* any of the piles or materials for ſecuring any ſea walls or banks, incurs a penalty of 20*l.* 199
3 The proviſions of the black act, 9 Geo. 2. c. 22. ſhall extend to all offences of deſtroying ſea banks, &c. 200
4 By 6 Geo. 2. c. 37. maliciouſly *to deſtroy* any ſea bank, whereby any lands ſhall be damaged, is felony without clergy. *ibid.*
5 By 15 & 16 Geo. 2. c. 33. to deſtroy the *ſtarr*, or bent, planted on the Northweſt coaſts, for the purpoſe of ſupporting the ſea banks, incurs a penalty of 20*s.*

SEAL.—*Vide Treaſon.*

SELF-DEFENCE—*Vide Manſlaughter.*

SELF-MURDER.—*Vide Felo de ſe.*

SEAMEN.—*Vide Curſing. Mariners.*

SECONDS.—*Vide Murder.*

1 Where the ſeconds to duellers are guilty of murder. *Page* 124

SE DEFENDENDO.—*Vide Excuſable Homicide, No.* 1. 11, &c.

SEDITION.—*Vide Libels.*

1 Seditious conventicles may be ſuppreſſed. 6
2 Seditious words in derogation of the eſtabliſhed religion, are indictable, as tending to a breach of the peace. 10

SEDUCTION.

1 The bare ſolicitation of chaſtity is not an indictable offence. 357
2 But by 4 & 5 Ph. & M. c. 8. whoever ſhall unlawfully convey or take away any woman child unmarried within the age of ſixteen years by *tryfling gifts and fair promiſes*, ſhall be impriſoned two years, and fined at diſcretion. 172
3 A baſtard is within the protection of this act. 173 (N)

SEIZURE.—*Vide Smuggling. Papiſts. Deodand.*

SERVANTS.

1 Servants are not excuſed the commiſſion of any crime, whether capi-

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tal or not capital by the command or coercion of their master. *Page* 5
2 If a servant who *receives* goods from his master to carry to a customer, embezzils and converts them, on his way, he is guilty of felony. 135 (N)
3 A servant who has the care of the key of his master's chamber, is guilty of felony in stealing his property therefrom. 136
4 Servants who having the care of property, or access to it, who steal by means of the opportunity afforded by such care or access, are guilty of felony. *ibid.* (N)
5 By 21 Hen. 8 c. 7. servants stealing the money, jewels, &c. with which they *are intrusted*, shall be deemed felons. 138
6 Several determinations upon this statute. 138, 139
7 This offence ousted of clergy by 12 Ann. c. 7. 139
8 This act shall not extend to apprentices under 15 years of age. *ibid*
9 By 15 Geo. 2. c. 13. servants of the bank of England, embezziling the property they are intrusted with, shall suffer death without benefit of clergy, (*vide Bank of England*). 139, 140
10 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. servants of the post-office robbing any letter, &c. of the securities therein, are guilty of felony without clergy, (*vide post-office*). 140
11 By 7 Jac. 1. c. 7. and 17 Geo. 3. c. 56. servants in the several trades therein mentioned, who embezil the materials delivered to them to manufacture, shall be punished by fine and imprisonment, &c. *ibid.*
12 A servant who opens his master's chamber door in the night to commit a felony, or who opens the house-door to let in a thief, is guilty of burglary. 164
13 By 33 Hen 6. servants who spoil their master's goods, &c. at the time of his death may be proclaimed, and on not appearing may be attainted of felony. 197
14 By 6 Ann. c. 31. menial servants *negligently* setting fire to their masters house shall forfeit 100*l.* &c. 197
15 It is no forfeiture of a recognizance of the peace, &c. for a master to chastise his servant. *Page* 259
16 Nor for beating another in defence of his servant. *ibid.*
17 A servant is liable to such forfeiture for beating another in defence of his master's son. 260
18 A servant may not lay out his own money to *maintain* his master's suit. 541
19 Servants may lawfully defend their master. 128
20 If a servant kills his master, he is guilty of petty treason. 131

SESSIONS.—*Vide High-ways. Public Houses. Bridges.*

SHEEP.—*Vide Cattle.*

1 By 8 Eliz. c. 3. to export rams, sheep, or lambs, incurs forfeiture for the first offence, a years imprisonment and the loss of the left hand for the second, and the third offence is felony. 195

SHEPHERD.

1 A shepherd who has the care of sheep, may be guilty of larceny by taking them feloniously away. 136 f. 6

SHERIFF.

1 A sheriff is punishable for perswading *a jury* to underprize goods in the execution of a *fieri facias* 311
2 The duty and power of sheriffs to suppress riots. 302 to 307
3 In what cases he has power to raise the *posse comitatus*. 289, 294, 297, 300
4 Where he shall be deemed guilty of extortion. 310
5 In what case an under-sheriff may execute a writ directed to the sheriff. 267

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6 If a ſheriff execute a man contrary to the judgment, he is guilty of felony. *Page* 106
7 In what caſes a ſheriff may juſtify homicide in the execution of his duty. 107, 108

## SHIPS and SHIPWRECK.

1 By 12 Ann. c. 18. magiſtrates and officers, upon information of any ſhip being in diſtreſs ſhall appoint what aſſiſtance, &c. is neceſſary for her preſervation, and ſalvage of the goods. 219
2 Whoever refuſes or neglects this duty ſhall forfeit 100*l.* *ibid.*
3 And if any other than ſuch as are appointed, ſhall interfere, they ſhall be reſiſted, &c. *ibid.*
4 If any goods be ſtolen, the perſon on whom they are found, ſhall forfeit treble the value. *ibid.*
5 AND if any perſon ſhall make, or aſſiſt in making, any hole in any ſhip or veſſel in diſtreſs, or ſhall ſteal any pump from her, or aid in ſo doing, or ſhall do any thing tending to the immediate deſtruction of ſuch ſhip or veſſel, he ſhall be guilty of felony without benefit of clergy. 219, 220
6 By 26 Geo. 2. c. 19. whoever ſhall plunder the effects of ſhips in diſtreſs; or ſhall beat, &c. any perſon endeavouring to eſcape therefrom; or put out any falſe lights to deceive ſuch ſhip, ſhall ſuffer death without benefit of clergy. 220
7 But the offender may, if not guilty of violence and cruelty, be proſecuted for larceny only. *ibid.*
8 If any magiſtrate, officer, &c. ſhall be aſſaulted or wounded in endeavouring to ſave goods from ſhipwreck, he ſhall be tranſported for ſeven years. *ibid.*
9 If the offence be committed in Wales, it may be tried in the next adjoining Engliſh county. *ibid.*
10 *Salop* the next adjoining county to *Angleſea*. *ibid.* (N)
11 By 22 & 23 Car. 2. c. 11. and 1 Ann. c. 2. if any perſon ſhall wilfully caſt away or deſtroy the ſhip to which he belongs to the prejudice of the owners or freighters, he ſhall ſuffer death without clergy. *Page* 185
12 If committed in the admiral's juriſdiction the offender may be tried as a pirate. *ibid.*
13 By 4 Geo. 1. c. 12. if this offence is committed to the prejudice of the underwriters, the offender ſhall *ſuffer death*, which by the 11 Geo. 1. c. 21. is explained to mean without benefit of clergy. 185, 186

SHOE-MAKER.—*Vide Lord's Day.*

SHOP.—*Vide Burglary. Larceny.*

1 By 10 & 11 W. 3. c. 23. whoever ſhall privately ſteal from any ſhop to the value of 5*s.* is guilty of felony without clergy. 151 (N)

## SHOOTING AT ANOTHER.

1 By 9 Geo. 1. c. 22. if any perſon ſhall wilfully ſhoot at another, or ſhall reſcue an offender, &c. he ſhall ſuffer death without clergy. 225
2 Conſtructions upon this clauſe. *ibid.* *ibid.* (N)

## SHROUD.

1 He who takes off *a ſhroud* from a dead corps may be indicted as having ſtolen it from him who was the owner thereof when it was put on. 145

## SIGNS.

1 Libel may be either by words, pictures, or ſigns. 352
2 An inn-keeper ſhall be obliged to entertain his gueſt notwithſtanding he does not hang out a ſign. 452

SIGN MANUAL.—*Vide Treaſon.*

SILVER.—*Vide Coin*, No. 7, 8, 9, 12, 25.

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SLANDER.—*Vide Libel. Contempts.*

## SMUGGLING.

1 In what this offence conſiſts. *Page* 227

2 By 8 Geo. 1. c. 18. ſ. 6. whoever ſhall be found paſſing with contraband goods within 20 miles of the coaſt, with more than five perſons in company, or who ſhall be armed, *or* diſguiſed, or who ſhall reſiſt the revenue officers, &c. ſhall be guilty of felony and tranſported for ſeven years. *ibid.*

3 By 19 Geo. 2. c. 34. if three perſons or more armed with offenſive weapons, ſhall aſſemble to aſſiſt in the ſmuggling of goods, or in reſcuing them after ſeizure; or in reſcuing any offender againſt this act; or ſhall actually aſſiſt in ſo doing, ſhall be guilty of felony without clergy. 228

4 And if any *three* perſons ſo armed, ſhall be aiding, or if *any perſon* ſhall be diſguiſed when paſſing with contraband goods, or ſhall obſtruct (*Vide infra* No. 14.) the revenue officers in ſeizing the ſame; or ſhall maim any officer in attempting to board any veſſel; or ſhall ſhoot at him when on board, it is felony without clergy. *ibid.*

5 What ſhall be conſidered an offenſive weapon within this act, is a fact for the determination of the jury. 227 (N) 1

6 The aſſembling (*Vide ſupra*, No. 3.) muſt be for the expreſs purpoſe of aſſiſting in the ſmuggling; perſons who ſuddenly join ſuch an aſſembly upon the alarm are not within this branch of the act. *ibid.* (N) 2

7 The branch of the act (*Vide ſupra*, No. 4.) has no regard to the number of perſons; an individual *with his face blacked*, &c. would *poſſibly* be deemed within the act. 228 (N) 3

8 On the branch for obſtructing (*Vide ſupra*, No. 4.) the proſecutor muſt give *circumſtantial* evidence, that the officers were revenue officers in the execution of their duty, and that the goods were *unaccuſtomed*. *Page* 228 (N) 4

9 Smugglers may be required, upon proclamation, to ſurrender themſelves, and upon neglecting ſo to do, they may be attainted of felony without clergy. 228, 229

10 Of the formalities previouſly neceſſary for this purpoſe. 229

11 How the market towns, at which proclamation is to be made, ſhall be deſcribed in the ſuggeſtion. *ibid.* (N) *a*

12 To harbour a ſmuggler, to prevent his ſurrendering, is tranſportation ſeven years. 230

13 Several determinations which have been made upon this ſurrender clauſe. 230, 231

14 By 19 Geo. 3. c. 69. to obſtruct any revenue officer in ſeizing contraband goods; or to reſcue, or deſtroy, ſuch goods when ſeized, or to attempt ſo to do, is made a *miſdemeanor*.

15 By 24 Geo. 3. c. 47. maliciouſly to ſhoot at any revenue veſſel, or boat, within any port, &c. or within four leagues of the coaſt; or maliciouſly to ſhoot, or maim, or dangerouſly wound, any officer of the navy or revenue, in the execution of their duty; or any perſons aiding ſuch officers, or to abet or aſſiſt therein, is felony without clergy. 221, 222

16 If an offender acts, *by firing a gun*, &c. under the *compulſion* of his captain, and from a well-grounded fear of the ſafety of his life, it is a ground of acquittal. *ibid. note in mar.*

## SODOMY.

1 What it is, and how puniſhable. 9, 10

## SOLDIER.

1 By 2 & 3 Ann. c. 20. if any officer or ſoldier ſhall hold correſpondence with any rebel, or enemy, by letters, meſſages, &c. he ſhall be guilty of high treaſon. 70

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2 To refuſe to ſerve the king againſt invaders, or in his wars abroad, is a contempt of the prerogative. *Page* 91
3 By 39 Eliz. c. 17. ſoldiers wandering without, or with a forged teſtimonial, &c. &c. are guilty of felony without clergy. (VIDE MAIM.) 183
4 By 17 Geo. 2. c. 5. perſons wandering and pretending to be ſoldiers, &c. ſhall be deemed rogues and vagabonds. 184
5 By 18 Hen. 6. c. 19. ſoldiers departing from their captains, without licence, ſhall be guilty of felony. *(obſolete.)* *ibid.*
6 By 5 Hen. 7. c. 1. and 3 Hen. 8. c. 5. if any *common* ſoldier ſhall depart from his captain, without leave, during ſervice, he ſhall be guilty of felony without benefit of clergy. 185
7 By 2 Ed. 6. c. 2. if any ſoldier ſhall deſert during actual ſervice, with booty, &c. he ſhall ſuffer without clergy. *ibid.*
8 By 29 Geo. 2. c. 17. whoever ſhall enter into the ſervice of the French king, as an officer or ſoldier, ſhall be guilty of felony without clergy. 75 & *ibid.* (N)
9 The ſtatutes regulating the conduct of ſoldiers in the ſervice of the Eaſt India Company. *ibid.*
10 By 9 Geo. 2. c. 30. whoever ſhall enliſt, or procure another to enliſt as a ſoldier in the ſervice of any foreign prince, without licence, ſhall ſuffer without clergy. 74
11 To enter into the Scotch brigade, &c. incurs a penalty of 500 *l.* *ibid.*
12 By 1 Geo. 1. c. 47. to perſwade a ſoldier to deſert, incurs a penalty of 40 *l.* ſix months impriſonment, and pillory. 74
13 How ſoldiers convicted of profane curſing and ſwearing ſhall be puniſhed. 12, 13

SON.—*Vide Maintenance. Petty Treaſon.*

1 A ſon is not excuſed the commiſſion of a crime by the command or coercion of a father. 5

SON ASSAULT DEMESNE.—*Vide Aſſault, No. 9. Affrays. Contempt.*

SORCERY.—*Vide Witchcraft.*

1 Sorcerers are thoſe who uſe certain ſuperſtitious forms of words, images, or odd repreſentations to produce preternatural effects. *Page* 8

SOUTH-SEA BONDS.—*Vide Forgery. Perſonating.*

SPECIAL PLEADING.—*Vide Pleading. General Iſſue.*

SPECIAL SESSIONS.—*Vide Public Houſes. Highways.*

SPIRITUOUS LIQUORS.—*Vide Public Houſes.*

SPIRITUAL COURT.—*Vide Eccleſiaſtical.*

STARR.—*Vide Sea Bank.*

STABBING.—*Vide Manſlaughter.*

SQUIBBS.—*Vide Burning.*

STAMPS.—*Vide Forgery. Felonies.*

1 It has been determined that the 23 Geo. 3. c. 49. and 23 Geo. 3. c. 58. which require bills of exchange, &c. to be ſtamped, make no alteration in the crime of forgery: and that a forged bill upon unſtamped paper, is equally a forgery as if it had been ſtamped. *Rex* v. *Hawkeſwood*, 1783.

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STATUTE.—*Vide Penal Statute.*

1 Where a ſtatute expreſſes that which the law would have implied, it ſhall operate nothing: *expreſſio eorum quæ tacite inſunt nihil operatur.* *Page* 20 ſ. 8 p. 26 ſ. 33
2 An affirmative ſtatute ſhall not abrogate any part of a former ſtatute with which it is conſiſtent. 26 ſ 35, 37
3 An affirmative ſtatute ſaving a ſpecial juriſdiction, leaves the mode of proceeding therein unaltered. 14
4 Where a ſtatute makes no new offence, but only takes away a privilege, an indictment thereon need not conclude *contra formam ſtatuti*; and ſhall, if laid, be rejected as ſurpluſage. 116
5 Where the words of a ſtatute are not properly purſued the concluſion *con. for. ſtat.* will not cure the defect. 117
6 Where the meaning of a ſtatute is doubtful, the reaſon of the common law, ought to govern the conſtruction of it. 58 ſ. 39
7 A ſtatute taking away clergy does not vary the *nature* of the offence. 151
8 A ſtatute beginning with inferiors ſhall not be extended to ſuperiors. 117
9 The miſchief complained of in the preamble of a ſtatute ſhall be conſidered in conſtruing the words of the enacting clauſe. 291
10 Statutes for the preſervation of the public peace ſhall receive a liberal conſtruction for the advancement of juſtice. 299
11 In what caſe a ſtatute ſhall be equitably conſtrued. 278
12 Judges are bound *ex officio* to take notice of a public ſtatute. 555
13 Where the body of a ſtatute refers to the preamble, the words of the preamble ought to be purſued. 172
14 Where a ſtatute inflicts judgment of *life and member*, the offence is thereby incidentally made felony. 68
15 But felony ſhall not be inferred where the words of a ſtatute are doubtful. ibid.
16 Where a ſtatute makes a ſecond offence felony, or inflicts an additional puniſhment, a conviction for the firſt is always implied. *Page* 168
17 The conſequences of a ſtatute creating a felony. 169
18 Where a ſtatute ſaves corruption of blood, it impliedly ſaves the deſcent of land, dower, &c. *ibid.*
19 If a ſtatute creating a felony be repealed after the offence is committed, the offender cannot be puniſhed as a felon. *ibid.*
20 The ſame rules of conſtruction ſhall prevail reſpecting acceſſaries by ſtatute, as at common law. 132, 169
21 Whether a ſtatute making an office *void*, may not be conſtrued to make it only *voidable*. 17

STATUTE MERCHANT.—*Vide Forgery.* No. 42.

STEALING.—*Vide Larceny.*

STOCKS.—*Vide Forgery. Perſonating.*

STOLEN GOODS.

1 By 3 W. & M. c. 9. and 5 Ann. c. 31. buyers or receivers of ſtolen goods ſhall be deemed acceſſaries after the fact. 232
2 By 4 Geo. 1. c. 11. they ſhall be tranſported for 14 years. *ibid.*
3 *Quære*, if *money* is within the meaning of the word *goods*, &c. *ibid.* (N) 1
4 By 2 Geo. 2. c. 25. *bank notes* are made *goods* within the meaning of the act. *ibid.*
5 *Sheep and rams* are *goods and chattels* within the act. *ibid.*
6 The *bare* receiving of ſtolen goods *knowingly* makes not an acceſſary, unleſs they are alſo *feloniouſly* received. *ibid.*
7 By 29 Geo. 2. c. 30. whoever ſhall buy or receive ſtolen lead, iron, copper, braſs, bell metal, or ſolder—or ſhall privately take them in at any door—

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door, window-ſhutter, &c. left open after ſunſet, ſhall be tranſported for 14 years, *although the principal felon is not convicted.* *Page* 232, 233
8 If one juſtice upon the oath of credible *perſons* have cauſe to ſuſpect that ſuch ſtolen articles are in the poſſeſſion of any one, he may iſſue a warrant to bring him before two juſtices of the county, and if he do not give a ſatisfactory account how he came by them, he ſhall be fined, &c. 233
9 Officers may ſtop perſons whom they may ſuſpect to be carrying ſuch articles and take them before the juſtices. *ibid.*
10 In what manner ſtolen goods *ſo* reclaimed, ſhall be diſpoſed of. 233,234
11 Private perſons to whom ſuch articles are offered muſt apprehend the offenders. 234
12 How the penalties ſhall be applied and laid. *ibid*
13 By 2 Geo. 3. c. 28. whoever ſhall buy or receive any part of the cargo or property belonging to any veſſel in the river Thames, or privately receive the ſame clandeſtinely, ſhall be tranſported 14 years, *although the principal felon is not convicted.* 234,235
14 By 10 Geo. 3. c. 48. buyers or receivers of ſtolen jewels, plate or watches, obtained by burglary or robbery ſhall be triable before as well as after the principal, whether he be in or out of cuſtody, and tranſported 14 years. *ibid.*
15 By 21 Geo. 3. c. 69. buyers or receivers of ſtolen pewter, may be tried in the ſame manner and tranſported 7 years or confined, not leſs than one nor more than three years, and be three times publickly whipped. *ibid.*
16 By 22 Geo. 3. c. 58 whoever ſhall buy or receive any ſtolen goods, except lead, iron, copper, braſs, bell metal and ſolder, may be tried for *the miſdemeanor*, whether the principal may be amenable to juſtice or not unleſs the principal is then convicted, &c. and puniſhed by fine, impriſonment and whipping as the court ſhall direct. 230
17 Juſtices on information or ſuſpicion may apprehend and convict, &c. &c. (*vide ſupra* No. 8, 9, 10.) *Page* 236, 237
18 By 4 Geo. 1. c. 11. to take a reward upon pretence of helping a perſon to his ſtolen goods, involves the offender in the ſame guilt as if he were the actual thief. 237
19 By 25 Geo. 2. c. 36. to advertiſe a reward for the reſtoration of ſtolen goods incurs a penalty of 50*l.* *ibid.*
20 By 9 Geo. 2. c. 25. to pretend *by crafty ſcience* to diſcover ſtolen goods incurs one years impriſonment, pillory four times, and ſurety at diſcretion. 9

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1 The puniſhment for deſtroying the king's ſtores. 75, 76

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2 How a reſtitution on an indictment of forcible entry may be *ſuperſeded.* 292

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1 In what caſes it is felony to ſteal them or their eggs. *Page* 144

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1 LANDS in tail not forfeited by the general words of a ſtatute. 85

2 How far the land of an heir in tail may be ſeized for the recuſancy of the anceſtor. 30, 31

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1 How far *a tenant* may maintain his lord. 540

2 The word *tenement* too uncertain in an indictment of forcible entry. 283

3 How far perſons are bound *by tenure* to repair highways and bridges. 369, 422, 443

TERROR.—*Forcible Entry. Affray. Robbery.*

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1 By the teſt act 25 Car. 2. c. 2. all officers civil and military, except thoſe of inheritance, &c. &c. ſhall take the oaths of allegiance and ſupremacy and *teſt*, &c. *Page* 16, 17

THEFTBOTE.—*Vide Stolen Goods, No.* 18, 19.

1 Theftbote is nearly allied to miſpriſion of felony. 252

2 It is where one not only knows of a felony, but takes his goods again or other amends not to proſecute. *ibid.*

3 But it is no offence unleſs ſome favour be ſhewn to the thief. *ibid.*

THIEF.—*Vide Larceny.*

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TITLE.—*Vide Contempts. Pretended Title.*

1 In what manner contempts againſt the king's title ſhall be puniſhed, and in what they conſiſt. 93 to 98

2 For the offence of buying or ſelling a pretended title. 553 to 558

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3 By 6 Ann. c. 7. to affirm that the pretender hath any title to the crown, or that any other hath title than according to the ſettlement of 1 W. & M. c. 2. and 12 W. c. 2. is *præmunire.* *Page* 84

TIMBER.—*Vide Trees.*

TOKEN.—*Vide Cheats. Deceits.*

TOLERATION.—*Vide Diſſenter.*

1 By the toleration act 1 W. & M. c. 18. all perſons diſſenting from the church, except papiſts, and thoſe who deny the Trinity, are exempted from all penal laws relating to religion, other than 25 Car. 2. c. 2. and 30 Car. 2. c. 1. 47
2 Diſſenting teachers are tolerated if they take the oaths enjoined by 1 W. & M. and 19 Geo. 3 c. 44. and ſubſcribe the 39 articles, except thoſe relating to church government and infant baptiſm. 48
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1 A deſcription of the offenders liable to tranſportation *to America.* 244
2 By 4 Geo. 1. c. 11. if any ſuch offenders ſhall return before the expiration of his term, he ſhall be guilty of felony without clergy. *ibid.*
3 In what caſe the priſon-book ſhall be evidence to prove the diſcharge of a priſoner under a conditional pardon to tranſport himſelf within a given time from the day of his diſcharge. *ibid.* (N) 1
4 It has been determined that an act of parliament ordering tranſportation generally always means tranſportation to *America.* *Page* 144 (N) 2
5 By 6 Geo. 1. c. 23. if any felon *ordered* for tranſportation ſhall *be at large* before the expiration of his term he ſhall ſuffer death without clergy. 245 ſ. 2
6 If an offender confeſs the fact the court will record his confeſſion. *ibid.* (N) 3
7 To prove the offence the record of his conviction muſt be produced; the averments in the indictment muſt be correſpondent, and evidence muſt be given of the priſoner's identity. *ibid.*
8 In what manner ſuch offender may be tried, and the record of his former conviction certified to the court. 245 ſ. 3
9 By 16 Geo. 2. c. 15. if any felon who has agreed to tranſport himſelf *to America*, ſhall be afterwards at large in Great Britain without lawful cauſe, he ſhall ſuffer without benefit of clergy. *ibid.* ſ. 4
10 By 8 Geo. 3. c. 15. if felons who have been reprieved and afterwards pardoned in the manner the act directs upon conviction of tranſportation ſhall be afterwards at large, &c. &c. they ſhall ſuffer without benefit of clergy. 246 ſ. 5
11 The caſe of *Maximilian Miller* ſtated. *ibid.* (N) 4
12 By 19 Geo. 3. c. 74. on account of the emancipation of the American colonies, convicts are ordered to be tranſported to ſuch parts beyond the ſeas, as the court ſhall think fit. 246 ſ. 6
13 And if they return, they ſhall be ſubject to the penalties inflicted by the acts above mentioned. 247 ſ. 7
14 The caſe of *John Henry Aickles* ſtated. *ibid.* (N) 3
15 Male offenders ordered to labour on board the hulks in lieu of tranſportation. 248
16 If any perſon ordered to hard labour ſhall eſcape before the expiration of his term, he ſhall ſuffer three years additional impriſonment, and for a ſecond eſcape felony, without clergy. *ibid.* ſ. 10
17 The

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17 The penitentiary houſes for the confinement of female offenders never carried into execution. *Page* 248 ſ. 10
18 By 24 Geo. 3. c. 56. offenders liable to be tranſported by the ſtatutes abovementioned, ſhall be tranſported to ſuch places as his majeſty, by the advice of his council ſhall think fit. 248 249
19 And if any convict ſo tranſported, ſhall be found at large, &c. &c. he ſhall ſuffer death without benefit of clergy. 249 ſ. 12
20 By 25 Geo. 2. c. 46. the laws of tranſportation are extended to Scotland. 249, 250
21 By 27 Geo. 3. c. 2. Convicts are ordered to be tranſported to Botany Bay. *Vide Book the ſecond page.* 514

## TRANSUBSTANTIATION.

1 By 12 Ann. c. 14. the ordinary may tender the declaration againſt tranſubſtantiation to any reputed papiſt making a preſentation, and upon refuſal the preſentation ſhall be void. 45 ſ. 7.
2 By 30 Car. 2. c. 1. members of both houſes ofparliament are bound to make a declaration againſt tranſubſtantiation. 47
3 By 1 Geo. 1. c. 2. all perſons who bear any office ſhall (*inter alia*) ſubſcribe againſt tranſubſtantiation. 16

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1 In what caſe the attorney general may take a *traverſe* upon a *traverſe*. 444 ſ 5
2 How preſentments in a court leet are traverſable. 415, 420
3 A juſtice's record of a riot, in what caſes not traverſable. 300, 302
4 A record of a forcible entry not traverſable. 275, 276
5 Whoever has power to try the principal matter may alſo try a traverſe of any incidental matter neceſſary for the determination of it. 276, 290 to 293, 304
6 How an indictment of forcibly entry is to be traverſed, and what is to be done on ſuch traverſe. *Page* 293, &c.
7 In what caſes an inqueſt of ſelf-murder is traverſable. 104

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1 Treaſon is of two kinds; high treaſon and petty treaſon. 49, 131
2 By 33 Hen. 8. c. 20. repealed by 1 & 2 P. & M. c. 10. it was enacted that a madman might be puniſhed as a traitor. 2
3 A wife ſhall not be deemed guilty of treaſon for receiving her huſband who has committed it. 4
4 But if a wife join in or do the act of treaſon, no pleas of coverture or coercion ſhall extenuate her guilt. *ibid.*
5 HIGH TREASON was anciently a crime of a very indefinite and unſettled deſcription; inſtances given. 49 ſ. 1
6 But by 25 Ed. 3. c. 2. reinforced by 1 M. c. 1. all treaſons are ſettled; and ſo remain, except thoſe created ſince 1 Mary (*vide infra*, No. 72.) 49 ſ. 2
7 By 25 Ed. 3. c. 2. to compaſs or imagine the death of the king, queen, or heir—to violate the king's wife, his eldeſt daughter, unmarried, or the wife of his heir—to levy war againſt the king, or to adhere to his enemies in his realm, giving them aid and comfort—on attainder by *open deed*, is high treaſon. 50
8 *All perſons* of the age of diſcretion, and of ſane memory, may be guilty of treaſon. *ibid.*
9 The ſubject of a foreign prince, while reſident in England, may be guilty of treaſon. The manner of laying the charge in the indictment. *ibid.* ſ. 5
10 Even an ambaſſador, for treaſon againſt *the life of majeſty*, may be condemned and executed here. 51
11 But for *other treaſons* he ſhall be ſent home. *ibid.*
12 How the charge may be laid. *ibid.*
13 Alien

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13 Aliens who invade the kingdom cannot be tried *as traitors*, they muſt be dealt with by *martial law*. *Page* 51 ſ. 6
14 If an alien, reſident here, ſhould, during war, go to his native country and there adhere to the king's enemies, *leaving family and effects in England*, he may be dealt with as a traitor.—*Foſter* 185. *ibid.*
15 A natural born ſubject cannot renounce his allegiance; no time or circumſtance can prevent his treachery from being puniſhed. 51 ſ. 7
16 The fact of killing the king may be laid in the indictment as an overt act of compaſſing his death. *ibid.* ſ. 8
17 An enumeration of circumſtances which are conſidered to amount to overt acts of compaſſing the king's death. *ibid.* ſ. 9
18 But the guilt commences only when *ſome meaſure is taken* to effectuate the guilty purpoſe. *ibid.* (N) 1
19 Every thing wilfully and deliberately deſigned, or attempted to be done, whereby the life of majeſty may be endangered, is an overt act of compaſſing his death. *ibid.*
20 But an accident, however fatal, ſhall not be conſidered as an overt act of guilt, even in high treaſon. 51 ſ. 10
21 Every king *in poſſeſſion* of the throne, but no other, not even the rightful ſovereign, is a king within the protection of the ſtatute of treaſons—the reaſons of it. 52
22 The hiſtory of the diſtinction between a king *de jure*, and *de facto*. *ibid.*
23 Allegiance is ſo indiſpenſibly the right of a king *de facto*, that ſubjects are bound by it to reſiſt a king *de jure* only. *ibid.*
24 The abſurdity of conſidering the murderers of Charles the firſt, as traitors to Charles the ſecond, while he was *out of poſſeſſion* and the reſiſtance of him as a king *de jure*, reconciled, by an *ex poſt facto* vote, that he was a king *de facto* though *out of poſſeſſion*. 53
25 Upon the death of a king in actual poſſeſſion, his heir is a king, within the ſtatute before his coronation. *ibid.* ſ. 19
26 It is a maxim that the king never dies. *Page* 53 ſ. 19
27 A *titular* king, as the huſband of a *queen regnant* is not within the ſtatute. 53 ſ. 20
28 A *queen regnant*, though not within the words, is *a king* within the meaning of the act. *ibid.*
29 By 1 Will. & Mar. c. 2. papiſts and thoſe who marry a papiſt are excluded from the throne; and, if they attain it, the people are abſolved from their allegiance. *ibid.* ſ. 21
30 No queen or princeſs dowager is within the ſtatute of treaſons. *ibid.* ſ. 22
31 A *queen conſort*, or the wife of the prince, conſenting to an adulterer, are traitors within the act. *ibid.*
32 The ſon of a queen regnant is a prince and heir within the act. *ibid.*
33 A queen divorced *a vinculo*, &c. is not within the act. *ibid.* (N) 2
34 Nor the wife of a king's ſecond ſon. *ibid.*
35 It is not treaſon to violate the king's eldeſt daughter who hath been married. *ibid.*
36 *Quære* whether a collateral heir apparent be within the ſtatute unleſs ſo declared by parliament. *ibid.*
37 In a forcible manner to reſiſt the king's authority is a levying war againſt him. 54
38 To hold a caſtle againſt his forces, or to ſupport armed numbers againſt his command is a levying of war. *ibid.* ſ. 24
39 But thoſe who join rebels for fear of death, and eſcape from them when opportunity offers are not traitors. *ibid.*
40 The kind of fear, and the extent of the conſtraint which is neceſſary to form this excuſe, and whether it is to be ſtrictly conſtrued. *ibid.* (N) 3
41 The degree of force and practicability of eſcaping, are facts for the conſideration of the jury. *ibid.*
42 How far an inſurrection to redreſs a public grievance ſhall be conſidered high treaſon. 54 ſ. 25
43 An attempt by intimidation and violence to force the repeal of a law is

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a levying of war against the king. *Page* 54 (N) 4
44 An insurrection to remove a grievance in which the insurgents have a special interest is not a levying of war. 55
45 How coadjutors in treason shall be construed within the guilt of the principal offender upon a special verdict. *ibid.* f. 26
46 Those who are found in a special verdict to have suddenly joined the insurgents, and to have flung up their caps and hollowed with them, are only guilty of riot. *ibid.*
47 A conspiracy to levy war cannot amount to treason. f. 27
48 But a conspiracy may be alledged as an overt act of compassing the king's death. *ibid.*
49 There may be a levying of war without actual fighting. *ibid.*
50 By the expired acts of 13 Eliz. and 13 Car. 2. *conspiracy* to levy war was declared high treason. *ibid.* (N) 5
51 Any assistance given to aliens in open hostility against the king; as surrendering a castle, selling arms, cruising with a ship, is *an adherence to the king's enemies.* 55 f. 28
52 It is not necessary to alledge that such adherence was against the king. *ibid.*
53 But the special manner of adherance must be set forth. *ibid.*
54 Succouring *a rebel* in a foreign realm, is not an adherence to the king's *enemies*; for a rebel is not properly an enemy. *ibid.*
55 It is necessary to aver that the persons adhered to were the king's enemies; a fact which may be evidenced by its public notoriety. 55 (N) 6
56 Proclamation of war not always necessary. *ibid.*
57 Some overt act must be alledged in every indictment of treason. 56
58 What may be alledged as overt acts of compassing the king's death. 56 f. 30, 31 and (N) 7
59 Written words has been holden to be an overt act of compassing the king's death. 56 f. 32
60 The great question examined whether words only spoken can amount to an overt act. 57 to 61
61 Words joined to an act may explain it. *Page* 57 f. 37
62 Bare words are not overt acts of treason unless uttered in contemplation of some traiterous purpose actually on foot, or intended, and in prosecution of it. 60 (N) 11
63 By 25 Edw. 3. c. 2. if a man slay the chancellor, treasurer, or the judges in the execution of their offices, it is high treason. 60, 61
64 This branch of the act shall not be extended to other offices than those expressly named, nor to any attempt to kill or actual wounding, unless death ensue. 61 f. 47
65 Neither the barons of the exchequer, nor commissioners of the great seal are within it. *ibid.* (N) 12
66 By 7 Ann. c. 21. to slay the justiciary or lords of session in Scotland, in the execution of their office, is high treason. *ibid.*
67 By 25 Edw. 3. c. 2. to counterfeit the king's great or privy seal is high treason. 61 f. 48
68 Aiders and consenters are within this clause. f. 49
69 No intent to do it will amount to treason. f. 50
70 Fixing the great seal to a patent without a warrant so to do, is not high treason. f. 51
71 No abuse in misusing the impression of the great seal; nor any alteration of the instrument to which it is affixed will amount to a counterfeiting of it. f. 52
72 By 1 Mary, c. 6. counterfeiting the sign manual or privy signet is high treason. f. 53
73 By 7 Ann. c. 21. to counterfeit the seals used in Scotland is high treason. f. 53
74 By 25 Edw. 3. c. 2. to counterfeit the king's money—to bring false money into the realm, like the money of England, is high treason. f. 54
75 To coin money without the king's authority, is high treason within this clause. 62 f. 55
76 Minters making money of improper *alloy* are guilty of high treason. *ibid.*
77 Receivers

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77 Receivers and conferters of the offender are principals. *Page* 62
78 In the counterfeited money muſt be ſimilitude and probable currency or the crime is uncompleat. (N) 13
79 To *utter* falſe money made within the realm is not within the act, (*vide infra*, No.) 62 ſ. 56
80 By 1 M. c. 6. to counterfeit foreign gold or ſilver coin, made current in the realm, or to aid therein, is high treaſon. 62 ſ. 59
81 By 14 Eliz. c. 3. to counterfeit foreign gold or ſilver coin, not made current, is miſpriſion of treaſon. ſ. 60
82 By 5 Eliz. c. 11. to waſh, clip, round, or file, for *gain*, either Engliſh or foreign coin, made current by proclamation, or to aid therein, is high treaſon. 63 ſ. 61
83 By 18 Eliz. c. 1. to impair, diminiſh, falſify, ſcale, or lighten ſuch monies, or to aid therein, is high treaſon, but without corruption of blood. ſ. 62
84 By 8 & 9 W. 3. c. 26. to make or mend any inſtrument or utenſil therein named, which will impreſs the reſemblance of the coin, &c. &c.—or to make any edging tool to grain the edges of money—or any preſs for coinage—or any engine for cutting blanks—or to have ſuch inſtrument, &c. in cuſtody, &c. is high treaſon. 64
85 By 7 Ann. c. 25. the proſecution muſt be within ſix months. *ibid.*
86 By 8 & 9 W. 3. c. 26. to convey any coining inſtrument out of the mint—to mark coin on the edges—to diminiſh the coin, or to aid in ſo doing, is high treaſon. *ibid.*
87 By 8 & 9 W. 3. c. 26. to colour, gild, caſe over, or work any round blanks of baſe metal, to reſemble the current coin, &c. or to make the ſilver coin reſemble the gold, or to aid therein, is high treaſon. *ibid.*
88 To extract a colour from the ſubſtance of the metal, by chemical proceſs, is a *colouring* within the meaning of this clauſe. *ibid.* (N) 16
89 The tools or inſtruments for coining found in the cuſtody of an offender, may be ſeized and deſtroyed. 65
90 By 15 Geo. 2. c. 28. to waſh, gild, or colour any of the ſilver coin, ſo as to make it reſemble the gold coin—or to file, alter, waſh, or colour, any of the braſs monies, ſo as to reſemble the ſilver coin of ſixpences or ſhillings, or to counſel or aid therein, is high treaſon. *Page* 65 ſ. 64
91 There muſt be a ſimilitude, a reſemblance of the true money counterfeited, or the crime is incomplete. (N) 17
92 By 1 & 2 Ph. & M. c. 11. to bring into the realm, money counterfeited according to the ſimilitude of foreign coin current here, is high treaſon. 65 ſ. 65
93 It muſt be known to be falſe. ſ. 66
94 It muſt be brought from ſome country where counterfeiting is not puniſhable by the laws of England. ſ. 67
95 Barely uttering ſuch money, is not high treaſon. 66
96 By 25 Ed. 3. c. 2. if any new caſe, neceſſary to be conſidered as high treaſon, ſhould ariſe, the judges ſhall not give judgment of treaſon upon it, except it has been previouſly declared to be treaſon by act of parliament. 66 ſ. 70
97 How treaſons were made by virtue of this clauſe, but by 1 Mary, no offence ſhall be high treaſon, not ſo declared to be by 25 Ed. 3. ſ. 71
98 By 5 Eliz. c. 1. by writing, or adviſed ſpeaking, to extol or maintain the juriſdiction of THE POPE, is *præmunire* for the firſt offence, and high treaſon for the ſecond. 69 ſ. 72
99 Knowingly to import, commend, or recommend a book, though written beyond ſea, which maintains this juriſdiction is within the ſtatute, &c. &c. ſ. 73
100 To avow the ſame opinion after a firſt conviction, is high treaſon. ſ. 74
101 By 13 Eliz. c. 2. to put in uſe any popiſh bull, or inſtrument of abſolution, or to purchaſe any ſuch, is high treaſon. ſ. 75
102 Acceſſaries after the offence incur *præmunire*. *ibid.*
103 Concealing the offence for ſix weeks, is *miſpriſion of treaſon*. *ibid.*

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104 By 23 Eliz. c. 1. and 3 Jac. 1. c. 4. to become perverted to popery, or to pervert, or endeavour to pervert others to that religion, &c. is high treaſon. *Page* 68 ſ. 76

105 By 3 Jac. 1. c. 4. if any ſuch offender, beyond ſeas, return in ſix weeks, and take the oaths, &c. he is excuſed. ſ. 77

106 The barely pretending to have power to perſwade perſons from their allegiance, is within theſe acts. ſ. 78

107 By 27 Eliz. c. 2. if any Engliſh eccleſiaſtic, ordained a popiſh prieſt, ſhall remain in the realm, and not ſubmit to a juſtice within three days, he ſhall be guilty of high treaſon. ſ. 79

108 If any lay ſubject ſhall not return from a popiſh ſeminary, within ſix months after proclamation, and ſubmit within two days after his return, he ſhall be guilty of high treaſon. ſ. 80

109 To conceal that a popiſh prieſt is in the realm, from a juſtice for twelve days, is fine and impriſonment at diſcretion; if a juſtice ſhall not diſcover it to the privy council within twenty-eight days, he ſhall forfeit 200 marks. ſ. 81

110 An indictment upon the clauſe No. 107, muſt ſhew that the offender was born in the realm, and that he was ordained by papal authority. ſ. 82

111 Such an offender, thrown by winds upon the Engliſh coaſt, in his paſſage to Ireland, is not within the act. 69

112 By 5 Eliz. c. 1. if any perſon performing the duty, or enjoying the preferment of the Romiſh church ſhall refuſe a ſecond tender of the oaths, it is high treaſon. 69 ſ. 84

113 By 4 Ann. c. 8. & 6 Ann. c. 7. to maintain by *writing*, that the pretender, or any other, hath a right to the crown, other than according to 1 W. & M. c. 2. or 11 & 12 W. 3. c. 2. or that parliament cannot limit the deſcent of the crown, is high treaſon. ſ. 85

114 To affirm the ſame by *adviſed ſpeaking*, is *præmunire*. *ibid.*

115 By 1 Ann. c. 7. Endeavouring adviſedly and directly to hinder any perſon who ſhall be next in ſucceſſion, according to 1 W. & M. c. 2. and 12 W. 3. c. 2. is high treaſon. *Page* 85

116 By 13 W. 3. c. 3. the pretender is convicted and attainted of high treaſon. ſ. 86

117 By 13 W. 3. c. 3. and 17 Geo. 2. c. 39. if any ſubject of England ſhall hold any correſpondence with the pretender, or with the ſon or ſons of the pretender, or any perſon employed by them, it is high treaſon. 69 70

118 By 2 & 3 Ann. c. 20. if any officer or ſoldier ſhall hold correſpondence with any rebel or enemy, by any ways or means whatſoever, without authority, it is high treaſon. 70 ſ. 8.


## TREASURE TROVE.


1 He who takes away *treaſure trove* before it has been ſeized by the perſons who have a right thereto, is not guilty of felony, but ſhall be only puniſhed by fine, &c. 144


## TREES.


1 Trees, being affixed to the freehold, could not become the ſubject of larceny at common law. 141 ſ. 21

2 By 43 Eliz. c. 7. to ſteal or deſtroy any trees, which it is not felony at common law to ſteal, is puniſhable by compenſation at diſcretion, and by public whipping. 214

3 In a conviction on this act the number and nature of the trees muſt be ſet out. *ibid.* (N)

4 The manner in which the offence was committed muſt alſo be ſtated. *ibid.*

5 A gentleman who is guilty within this act, is liable to the penalties. *ibid.*

6 By 15 Car. 2. c. 2. the houſes of ſuſpected offenders may be ſearched. 214

7 By 1 Geo. 1. c. 48. to deſtroy any timber, fruit, or other tree, on conviction by two juſtices, is hard labour three months, to be whipped once a month, and find ſurety for two years. *ibid.* ſ. 2

8 The party grieved may recover damages againſt the pariſh. *Page* 214 ſ. 2
9 This act gives no *pecuniary* penalty, the conviction therefore ſhould be *quod foris faciat*, or *quod committitur*, &c. *ibid.* (N)
10 By 6 Geo. 1. c. 16. to ſteal or deſtroy any tops of trees, poles, or underwoods, &c. &c. is puniſhable according to 1 Geo. 1. c. 48. 215 ſ. 3
11 By 6 Geo. 3. c. 36. and 13 Geo. 3. c. 33. to ſteal or deſtroy, *in the night*, any oak, beach, aſh, elm, fir, cheſnut, aſp, poplar, alder, maple, larch, or hornbeam, *timber tree*, is tranſportation for ſeven years. 215 ſ. 5
12 By 6 Geo. 3. c. 48. to deſtroy any timber tree, or any tree likely to become timber, or the lops or tops thereof, incurs a penalty of 20*l.* with coſts and charges, for the firſt offence; 30*l.* for the ſecond; and for the third, tranſportation. 215, 216
13 The coſts and charges muſt be definitely aſcertained in the conviction, or it may be quaſhed. 216 (N)
14 *Qu.* whether the juſtices of peace have not a power to tranſport for the third offence. *ibid.*
15 By 6 Geo. 3. c. 48. to go into the grounds of another, and cut or ſpoil any ſticks of wood, or green ſtubbs, &c. or to have the ſame in cuſtody unſatisfactorily, incurs a penalty of, 1ſt, 40*s.* 2dly, 5*l.* and 3dly, the offender ſhall be deemed an incorrigible rogue. 216, 217
16 To obſtruct the apprehending an offender forfeits 10*l.* 217
17 By 9 Geo. 3. c. 41. the clauſe No. 15, is extended to his majeſty's foreſts and chaces. *ibid.* ſ. 9.
18 By 4 Geo. 3. c. 31. keepers may ſeize the implements for deſtroying ſuch green ſtubbs, &c. to their own uſe. *ibid.*
19 By 29 Geo. 2. c. 36. to deſtroy trees in waſte grounds, incurs the puniſhment of 6 Geo. 1. c. 16. (*Vide ſupra*, *No.* 10.) ſ. 10
20 By 9 Geo. 1. c. 22. to deſtroy trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, ſhelter, or profit; or to reſcue an offender; or to induce any other to join in ſuch offence, is felony without clergy. *Page* 215 ſ. 4
21 By 13 Ed. 1. ſt. 2. no tree ſhall ſtand within a certain diſtance of the highway, which is likely to become a concealment or harbour for robbers. 382 ſ. 26
22 Trees whoſe branches incommode the highway, may be lopped by any perſon, if the owner neglects. 405
23 By 13 Geo. 3. c. 78. the owners of trees near the highways, except trees planted for ornament or ſhelter, &c. are made liable to a penalty for not cutting them. 405, 406
24 In what caſes ſurveyors may cut down trees ſtanding in any highway. 407

## TRESPASS.

1 In what caſes treſpaſſers on the Northern borders are guilty of felony. 200, 201
2 How far the alteration of a man's property will make him liable to a treſpaſs for re-taking it. 139
3 Force is implied in every treſpaſs. 160

*Vide Highways.—Bridges.—Peace. Aſſizes.—Park.*

TRIAL.—*Vide Murder. Piracy. Record. Jury.*

## TRINITY.

1 By 9 & 10 W. 3. c. 32. if any chriſtian ſhall deny any one of the perſons of the holy Trinity to be God; or maintain there are more gods than one; or deny the truth of chriſtianity, or the divine authority of the holy ſcriptures, he ſhall be diſabled to ſue, &c. or bear any offices, &c. and be impriſoned three years. 7
2 Thoſe who deny the Trinity are denied the benefit of the toleration act. 47

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## TRUST.


1 How far a truſt eſtate is liable to be ſeized for recuſancy. *Page* 22
2 Lands ſettled in truſt for the repair of the highways in what manner, and under whoſe directions they are to be managed and employed. 381, 382
3 By 1 W. & M. c. 26. if the truſtee, &c. of any avoidance whereof the truſt ſhall be for a papiſt ſhall preſent without giving notice to the univerſity he ſhall forfeit 100*l.* 33, 34
4 By 12 Ann. c. 14. no truſtee to a papiſt ſhall preſent to any benefice, &c. or the univerſities ſhall preſent. 44, 45
5 By 11 Geo. 2. c. 17, every grant of a benefice, &c. by a truſtee to a papiſt is void, unleſs granted for a valuable conſideration to a proteſtant purchaſer, who ſhall diſcover, &c. as a popiſh truſtee. *ibid.*


## TRUTH.


1 In perjury it is not material whether the fact which is ſworn, be in itſelf true or falſe, it is ſufficient that the ſwearer did not know it to be true. 322, 323
2 It is no juſtification of a libel that the contents of it are true. 353
3 The reaſon why in a libel truth is no juſtification. 353, 354 (N)


## TURKIES.


1 It is larceny to ſteal them. 144


## TURNIPS.


1 Not larceny at common law to ſteal them growing. 141
2 By 13 Geo. 3. c. 32. to ſteal or deſtroy turnips growing, incurs a penalty of 10*l.* &c. 217


## TURNPIKE GATES.


1 By 1 Geo. 2. c. 19. to deſtroy any public turnpike gate, or the rails or fences thereto belonging, ſubjects the offender to hard labour for three months, and to be publicly whipped. *Page* 192, 193
2 By 5 Geo. 2. c. 33. on conviction at the aſſizes, the offender may be tranſported for ſeven years—and if he commit the offence a ſecond time, or ſhall demoliſh any *turnpike houſe*, he ſhall be guilty of felony. 193 ſ. 5
3 In both caſes the proſecution muſt be within ſix months. *ibid.*
4 If ſuch convict return from tranſportation it is death. ſ. 6
5 By 8 Geo. 2. c. 20. whoever ſhall be guilty of the above offences, or deſtroy any chain, &c. placed to prevent perſons from paſſing without paying toll, or ſhall reſcue any offender, he ſhall ſuffer death without clergy. ſ. 7
6 By 13 Geo. 3. c. 84. if any perſon ſhall commit any of the offences aforeſaid; or ſhall deſtroy any crane or machine for weighing carriages, &c. he ſhall be tranſported for 7 years, or committed to priſon not exceeding three years at the diſcretion of the court. ſ. 8
7 In all the caſes above mentioned the hundred ſhall make ſatisfaction. *ibid.*


## TURNPIKE ROADS.


1 They are under the direction of TRUSTEES. *ibid.*
2 Who muſt poſſeſs *realty* of 40*l.* a year, or 800*l.* *perſonally*, or be heir apparent to *realty* of 80*l.* a year. 424
3 And take the oaths directed by 13 Geo. 3. c. 84. before two juſtices. *ibid.*
4 Or they are liable to a penalty of 50*l.* *ibid.*
5 And it is incumbent on the truſtee to prove his qualification. *ibid.*
6 No publican ſhall be a truſtee, or act under them. ſ. 2
7 But a publican may farm the tolls. *ibid.*
8 Acting as a truſtee is evidence of being one. *ibid.*


9 Where

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9 Where the day of meeting has elapſed any five truſtees may appoint a meeting of the whole body, on giving 20 days notice. *Page* 425
10 No meeting ſhall be adjourned longer than three months, and all buſineſs done between ten in the morning and two P. M. ſ. 4
11 If they exceed their power in erecting gates, the juſtices may order the gates to be removed. ſ. 5
12 Truſtees may adminiſter oaths. ſ. 6
13 Seven truſtees may farm out the tolls by auction, upon one month's notice for that purpoſe, and deſcribing the particular tolls to be let, and ſpecifying their produce the preceding year. 426
14 The method in which the bidding at ſuch auction ſhall be conducted. ſ. 8
15 If the farmer of the tolls ſhall take more than the regular rates, he ſhall forfeit 5*l.* and gate keepers ſo doing ſhall forfeit 40*s.* ſ. 9
16 But ſeven truſtees, upon a month's notice, may reduce or advance the tolls as they ſhall ſee convenient. ſ. 10
17 If the toll is mortgaged, then ſuch an alteration requires the conſent of four-fifths of the creditors. 427
18 Five truſtees may direct proſecution for nuiſances, at the expence of the road, provided they can prove the fact. ſ. 11
19 Two truſtees may ſupply the vacancy of toll keeper. ſ. 12
20 The truſtees may agree for proportion of repairs with thoſe who are bound by reaſon of tenure, incloſure, &c. ſ. 13
21 They ſhall hang up tables of the rates of toll, and of the different weights, and number of horſes which carriages are allowed to carry or be drawn with. ſ. 14
22 They ſhall erect mile-ſtones, direction poſts, flood poſts, &c. &c. (*vide* p. 396.) ſ. 15
23 WEIGHING ENGINES. 428 ſ. 16
24 Five truſtees may order weighing engines to be erected at as many gates within their juriſdiction as they ſhall ſee proper. *ibid.*
25 No ſide gate to be erected unleſs by a majority of nine truſtees, on 21 days notice, and no toll for paſſing only 100 yards through the ſame, unleſs over ſome expenſive bridge. *Page* 428
26 The different burthens which carriages are allowed. 429
27 The additional toll which thoſe carriages are to pay for extra weight. ſ. 18
28 Any truſtee, officer, or creditor may cauſe carriages, not paſſed above 300 yards through any gate, to return and be weighed upon tendering the driver 1*s.* which ſhall be refunded if the weight is found exceſſive. 430
29 If the toll keeper neglects to weigh *ſuſpected* carriages, or to receive the additional toll, he ſhall forfeit 5*l.* ſ. 20
30 The truſtees ſhall make places within 300 yards of every gate for carriages to turn. *ibid.*
31 A liſt of the truſtees, creditors, clerk, treaſurer, and ſurveyor ſhall be hung in the houſe of every gate where there is a weighing engine to be inſpected by drivers. *ibid.*
32 If the driver refuſes to return, he forfeits 40*s.* and any peace officer may drive the carriage back to be weighed. *ibid.*
33 No carriage employed in huſbandry or in carrying manure ſhall be weighed. ſ. 21
34 The quarter-ſeſſions, upon complaint, may order weighing engines to be erected. ſ. 22
35 Where two roads meet, the truſtees may agree to erect one weighing engine for the accommodation of both. 431 ſ. 23
36 No compoſition to be made for tolls, unleſs the carriages have fellies ſix inches broad. ſ. 24
37 The penalty for endeavouring to evade the tolls by unloading goods, &c. before the carriage arrives at the weighing onquire. ſ. 25
38 The penalty for endeavouring to avoid the weighing engine. ſ. 26
39 As to CARRIAGES. 432 ſ. 27
40 The

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40 The number of horſes with which carriages are allowed to be drawn according to the breadths of their fellies and the penalties. *Page* 432 ſ. 27
41 Two oxen equal to one horſe. *ibid.* 4
42 Carriages to have names and deſcriptions. 5
43 Carriage rolling 16 inches may be drawn with any number of horſes and ſhall only pay half tolls. ſ. 28
44 No proſecution for penalties unleſs information be made of the offence within three days. ſ. 29
45 The penalty for taking off horſes or altering the diſtance of the wheels to avoid the toll. 433
46 The truſtees may allow a ſufficient number of horſes up hills, riſing more than four inches in a yard. ſ. 31
47 A juſtice on the oath of one witneſs may ſtop proſecution for penalties in drawing with a greater number of horſes than are allowed, if it appear neceſſary by reaſon of deep ſnow, &c. (*vide* p. 411.) *ibid.*
48 Poſts to be placed where additional horſes are allowed. *ibid.*
49 No carriages with leſs than nine inch fellies ſhall be drawn by horſes in pairs, except ſuch as having ſix inch fellies ſhall be permitted by ſeven truſtees, and except carriages drawn by two horſes only. 434
50 Juſtices in Wales may licence an increaſed number of horſes. ſ. 33
51 Any perſon may apprehend the driver of a carriage not marked or drawn by a greater number of horſes, &c. ſ. 34
52 Extraordinary high tolls for particular roads may be reduced. ſ. 35
53 EXEMPTION FROM TOLL. 434 ſ. 36
54 Carriages rolling 16 inches only to pay half the toll of carriages with fellies of ſix inches. *ibid.*
55 No chaiſe marine, coach, landau, berlin, chaiſe, chair, calaſh, or hearſe, nor any royal artillery or ammunition carriage, nor any cart drawn by one horſe or two oxen.
56 Nor any carriage of nine inch fellies carrying one block of ſtone, or piece of timber ſhall be ſubject to the above tolls. *Page* 434 ſ. 37
57 Perſons taking fraudulent advantage of theſe exemptions, ſhall forfeit between 5 *l.* and 40 *s.* ſ. 38
58 No toll ſhall be taken for any horſes of ſoldiers or officers on their march or no duty, nor for any baggage waggons, nor ſhall ſuch carriages be weighed at any engine. ſ. 39
59 But no exemption ſhall be taken by carriages carrying *any particular* kind of goods, unleſs they have fellies of ſix inches, and except carriages carrying corn, or grain in ſtraw, hay, ſtraw, fodder, manure, dung or lime. ſ. 40
60 And no exemption ſhall be taken by carriages of ſix inch fellies, unleſs the tire of ſuch fellies lie flat; and thoſe only which ſhall not deviate more than one inch from a flat ſurface ſhall be taken to be flat. 436
61 No toll ſhall be taken for carriages working the repair of highways or turnpike roads. ſ. 42
62 The MAIL COACHES are exempted from toll. ſ. 43
63 AS TO STATUTE DUTY. 436 ſ. 44
64 The ſurveyors ſhall ſee that the duty required by the ſeveral particular turnpike acts is done, and that the compoſitions ariſing therefrom are applied to the repair of the reſpective roads on penalty of 40 *s.* *ibid.*
65 When two truſt roads lie in the ſame pariſh, and the duty ſhall exceed three days, the juſtices ſhall apportion the ſhares of duty to be borne by each pariſh. *ibid.*
66 MATERIALS FOR REPAIRS. ſ. 45
67 No ſurveyor ſhall gather horſes without the conſent of the owners of the land, or licence from a juſtice, after ſuch owner ſhall have been ſummoned and refuſed to appear. 437
68 Satisfaction ſhall be made for materials. (398) *ibid.* ſ. 46
Materials may be contracted for, but no ſurveyor ſhall have any ſhare therein (p. 403.) ſ. 47
69 NUISANCES. 437 ſ. 48
70 If

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70 If the overſeer of any turnpike road ſhall ſuffer any *nuiſance* (as deſcribed) to remain for four days within ten feet, on either ſide of the middle of ſuch road, he ſhall forfeit 40 *s.* *Page* 437 ſ. 48

71 SUBSCRIBERS and MORTGAGEES. ſ. 49

72 Subſcribers who ſhall ſign any writing, to advance money, ſhall be bound by their ſubſcription, and on default, the treaſurer, on notice, may ſue for the ſame. *ibid.*

73 Mortgagees of the tolls ſhall account, on oath, for all the monies which ſhall ſo come to their hands, after fourteen days notice from five truſtees, for that purpoſe, or forfeit 10 *l.* 429 ſ. 50

74 The penalty for a mortgagee holding over, after his money is repaid. ſ. 51

75 OFFICERS OF TURNPIKE ROADS. ſ. 52

76 If a diſcharged gatekeeper refuſes to deliver up the toll-houſe, &c. within four days after notice of the new appointment, any juſtice may order him to be removed, and put the new toll-keeper in poſſeſſion. *ibid.*

77 Gate-keepers and toll-gatherers, on notice for that purpoſe, from any five truſtees, ſhall account for all the monies they have received upon penalty of 5 *l.* 430

78 No perſon reſiding in any toll-houſe ſhall be removeable as a *pauper*, unleſs chargeable; nor ſhall he thereby gain a ſettlement, or be aſſeſſed to any public or parochial levy. ſ. 54

79 Gate-keepers permitting horſes or carriages, otherwiſe than as allowed, or without the names, inſcriptions, &c. thereon, ſhall forfeit 40 *s.* ſ. 55

80 All officers, their executors and adminiſtrators ſhall, within ten days after notice by five truſtees, deliver up all books, &c. &c. upon pain of 20 *l.* ſ. 56

81 Treaſurers and ſurveyors ſhall give bond for the faithful diſcharge of their duty; but the exemption of ſuch bonds from ſtamps is repealed. ſ. 57

82 Officers who ſhall neglect to put this act (13 Geo. 3. c. 84.) into execution, ſhall forfeit 10 *l.* *P.* 440 ſ. 58

83 Juſtices may act notwithſtanding they are creditors. ſ. 59

84 Puniſhment of ſuch as ſhall reſiſt or make forcible oppoſition to any thing directed by this act. ſ. 60

85 REPAIRING ALTERED ROADS. 440 ſ. 61

86 The inhabitants or perſons who were liable to repair any old road, ſhall continue liable to repair any new road which may be made in lieu of the old one. *ibid.*

87 If the parties cannot agree in what proportion they are liable to repair, it ſhall be ſettled by two juſtices. 441

88 And for which proportion a groſs or annual ſum may be fixed to be paid with the conſent of the parties, at a veſtry for that purpoſe. *ibid.*

89 Where turnpike roads are indicted, the court may ſettle the proportion of the fine and the coſts between the inhabitants and the truſtees ſ. 62

90 But not ſo as to endanger the ſecurity of the creditors. *ibid.*

91 How far the powers of the HIGHWAY ACT may be adopted with reſpect to TURNPIKE ROADS. ſ. 63

92 In what caſes the highway and turnpike acts are ſimilar. 442 ſ. 64

93 Informations for penalties, in order to favour an offender, are fraudulent and void. ſ. 60

## U. V.

VACATING RECORDS.—*Vide Records.*

VAGABONDS.—*Vide Vagrants, No.* 3, 4, 5, 11, &c.

## VAGRANTS.

1 BY 17 Geo. 2. c. 5. all who threaten to abandon their family to the pariſh, or who return after

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removal without certificate, or who refuſe to work, or beg within their pariſhes, are IDLE AND DISORDERLY PERSONS. *Page* 569, 570
2 Such offenders may be committed for a month. 570
3 Any perſon may apprehend ſuch beggars, and if they eſcape they ſhall be puniſhed as rogues and vagabonds. ſ. 3
4 Patent gatherers, bearwards, players, minſtrels, jugglers, gypſies, fortune-tellers, gamblers, abſconders, unlicenſed pedlars, wanderers, and beggars, ſhall be deemed ROGUES AND VAGABONDS. *ibid.* ſ. 4
5 Alſo by 23 Geo. 3. c. 88. whoever ſhall be apprehended with any inſtrument, engine, utenſil, or other offenſive weapon, with intent to commit robbery, or houſe-breaking, ſhall be deemed a ROGUE AND VAGABOND. 148, 165
6 By 17 Geo. 2. c. 5. convicted end gatherers, and rogues and vagabonds, who are refractory, or have eſcaped, or ſhall become rogues and vagabonds a ſecond time, ſhall be deemed INCORRIGIBLE ROGUES. 571
7 Any perſon *may* apprehend an offender, but if charged ſo to do by a juſtice, he *muſt*, or forfeit 10*s*. *ibid.* ſ. 6
8 Two juſtices in each diſtrict ſhall meet four times a year, in order to direct a *privy ſearch* within his juriſdiction. *ibid.* ſ. 7
9 The juſtice ſhall enquire, as well of the perſon apprehended as of others, the laſt place of legal ſettlement, and to commit the examination to the quarter ſeſſions. 571 ſ. 8
10 The vagrant ſhall be publicly whipped and committed, or be conveyed by *a paſs*, &c. &c. a duplicate of which ſhall be filed at the ſeſſions. *ibid.*
11 If the ſeſſion ſhall adjudge a vagrant ſo committed, a rogue and vagabond, or incorrigible rogue, they may ſend him to hard labour for ſix months, and ſuch incorrigible rogue for any further time leſs than two years. 572
12 If above twelve years of age, and a male, they may ſend him to ſea, &c. *Page* 572
13 If ſuch incorrigible rogue ſhall break gaol, or ſhall offend a ſecond time, he ſhall be tranſported for ſeven years. *ibid.*
14 By 13 & 14 Car. 1. c. 22. the ſeſſions may tranſport ſuch vagrants as ſhall be adjudged incorrigible. 572 ſ. 10
15 By 17 Geo. 2. c. 5. if any child, above ſeven years of age, of any vagrant, ſhould be committed, the ſeſſions may place it out as an apprentice; and if the vagrant be found wandering with the ſame child, he or ſhe ſhall be an incorrigible rogue. 572 ſ. 11
16 Convicted vagrants, who cannot be conveyed, &c. may be placed out as ſervants, &c. ſ. 12
17 The juſtices ſhall expreſs, in a certificate to be given to the officer with the paſs, the particular manner in which the vagrant ſhall be conveyed. ſ. 13
18 The manner in which vagrants ſhall be paſſed from one place to another, till they reach their deſtination. 572, 573
19 Vagrants may be ſearched and their property appropriated to defray the expence of their conveyance. 573 ſ. 18
20 The duty of the conſtables, &c. in reſpect to the conveying of vagrants. ſ. 16
21 By 26 Geo. 2. c. 34. if the high conſtable is deficient in funds to diſcharge the expence of conveyance, it ſhall be paid by the treaſurer. 573, 574
22 By 17 Geo. 2. c. 5. to alter the certificate, (*vide ſupra No.* 17.) incurs a penalty of 50*l*. and not to deliver or receive a vagrant, incurs, purſuant to the directions of it, 20*l*. *ibid.* ſ. 18
23 The pariſh to which a vagrant is conveyed ſhall ſet him to work, and on refuſing, he ſhall be committed by a juſtice to hard labour. ſ. 19
24 The

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24 The vagrant may be re-examined by a juſtice of the pariſh to which he is conveyed, and committed as *incorrigible*.—But no vagrant ſhall be *removed* but by *two* juſtices. *Page* 573, 574 ſ. 20

25 But it has been decided, that the pariſh to which a vagrant is *thus* ſent by a paſs, cannot appeal from it to the juſtices.—*R.* v. *Ringwould*. 574 (N)

26 The manner by which *Scottiſh vagrants*, ſhall be paſſed to the place of their laſt legal ſettlement. 574 ſ. 21

27 And if any ſuch vagrant be afterwards found wandering, he ſhall be deemed incorrigible. 574

28 How *Iriſh vagrants* ſhall be conveyed to their native kingdom. 575

29 The authority of juſtices to ſecure and convey lunatic vagrants, &c. 2 & 575 ſ. 23

30 Whoever ſhall harbour a vagrant, without giving notice to the conſtable, ſhall forfeit from 10*s*. to 40*s*. 576 ſ. 24

31 Any female vagrant delivered of a child, chargeable to the pariſh, may be detained by the officers, conveyed before a juſtice, examined, committed till the ſeſſions, and then confined for ſix months, &c. *ibid*. ſ. 25

32 The juſtices ſhall order the pariſh to be reimburſed. *ibid*.

33 If the child be *a baſtard*, it ſhall not gain ſettlement by its birth, but the ſettlement of the mother ſhall be that of the child.

34 The charges of apprehending, &c. &c. to be paid out of the county rate. *i id*. (N)

35 To neglect any of the directions of this act, incurs a penalty from 20*s*. to 5*l*. *ibid*.

VALUE.—*Vide Robbery. Larceny.*

VEGETABLES.

1 By 13 Geo. 3. c. 32. to ſteal or deſtroy any *turnips, potatoes, cabbages, parſnips, peas, or carrots*, growing, incurs a penalty of 10*s*. *Page* 217

VENUE.

1 In an information for uſury, *the place* where the corrupt bargain was made muſt be expreſsly ſet forth. 533

2 Uſury in one county pleaded in bar to a bond in another county, ſhall be tried where the uſury is alleged. *ibid*.

3 An offence which conſiſts in *nonfeaſance*, need not be alleged in any certain place. 20

VERDICT.

1 Where impoſſible matter, found in a verdict, ſhall be rejected. 116 ſ. 9

VICTUALS and VICTUALLER.

1 An inſurrection to bring down the price of victuals, *is ſaid* to be *a conſtructive* levying of war againſt the king, and may be laid as an overt act of high treaſon in compaſſing his death, *qu*. 54

2 *Merchant ſtrangers* may ſell imported victuals in the groſs. 479

3 By 23 Edw. 3. c. 6. all dealers in any kind of victuals ſhall ſell for reaſonable profits, and the chief officers of towns ſhall ſee they do ſo on pain of treble value of the thing exorbitantly ſold. 480

4 How butchers ſelling unwholeſome meat ſhall be puniſhed. *ibid*.

5 By 4 Hen. 7. c. 3. no beaſts ſhall be killed in walled towns. *ibid*.

6 By 21 Hen. 8. c. 8. calves ſhall be killed at certain times only. *ibid*.

7 By 1 Jac. 1. c. 22. no calves ſhall be killed under five weeks old. *ibid*.

8 By 22 Hen. 8. c. 6. butchers ſhall not keep tan houſes. *ibid*.

9 Whether they may ſell to one another. *ibid*.

10 *Aliens amis* may diſpoſe of their victuals. ſ. 7 & 8

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11 By 25 Hen. 8. c. 2. the lord chancellor, &c. may ſet the prices upon victuals. *Page* 481
12 This ſhall not reſtrain officers of cities, &c. having authority to ſet the prices of victuals. *ibid.*
13 By 2 & 3 Edw. 6. c. 15. if any butchers, brewers, bakers, poulterers, cooks, coſters, or fruiterers ſhall *conſpire* to raiſe the price of victuals, &c. they ſhall forfeit, &c. *ibid.*
14 By 2 Geo. 3. c. 14. no brewer, innkeeper, victualler, ſhall be ſued for advancing the price of ſtrong beer and ale in a reaſonable degree. 482

*Vide Engroſſing, Corn, Bread, Beer, Butter, Cheeſe, Cattle, Fiſh, Bacon, Hay, Fruit, Honey.*

VI ET ARMIS.

1 The words *vi et armis* ſhall be implied in an indictment for forcible entry *manu forti.* 287 ſ. 44
2 An indictment for ſtopping a highway in a man's own ground is good without the words *vi et armis,* 422 ſ. 92
3 In *ſcire facias* on a recognizance for the peace *contra pacem* are ſufficient without *vi et armis.* 258 ſ. 19

VIEW.—*Vide Highways,* No. 153 *Public Houſes, Riots. Traverſe.*

VILLEIN.

1 It was no felony, by the common law to ſteal a *villein.* 142

VILLAINOUS JUDGMENT.

1 It is a puniſhment inflicted by the common law. 351 ſ. 9
2 It was formerly inflicted for conſpiracy. *ibid.*
3 It is now obſolete; no inſtance of it ſince Edw. 3d. *Page* 351

VIOLATION.—*Vide Treaſon. Murder.*

VIOLENCE.—*Vide Robbery. Riots. Forcible Entry.*

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1 The puniſhment for ſtealing it. 214

UNIVERSITIES.—*Vide Papiſts. Public Houſes. Preachers. Books.*

UNLICENSED HOUSE.—*Vide Public Houſes. Bawdy Houſes.*

1 Houſes of *public entertainment* within 20 miles of London, deemed diſorderly, unleſs licenſed. 358
2 The form of the licence. *ibid.* ſ. 3
3 Houſes ſo licenſed, to be diſtinguiſhed by AN INSCRIPTION. *ibid.* ſ. 4
4 How offenders may be puniſhed. 359

USURY.

1 Is a contract upon a loan of money, to give the lender a certain profit for the uſe of it at all events. 527 ſ. 1
2 Or in a larger ſenſe, it is all undue advantages taken by a lender againſt a borrower. ſ. 2
3 But an agreement to pay double the ſum borrowed, on non-payment of the principal on a certain day is not uſurious, for the borrower may diſcharge himſelf by performing it. ſ. 3
4 The ancient notion of uſury. ſ. 4 to 7
5 By 12 Ann. c. 16. no perſon upon any contract ſhall take more than 5 *per cent.* for any loan; and all bonds, contracts, and aſſurances for the repayment of the principal, &c. ſhall be void. ſ. 8

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6 Though the reſervation be of ſo much "if requeſted" and the requeſt be never made. *Page* 527 ſ. 8. in notes
7 And whoever upon any contract ſhall take, by way of corrupt loan, or intereſt by any deceitful way above the rate of 5 *per cent. per ann.* ſhall forfeit treble the value. 529
8 *Note*, The treble value is not forfeited unleſs more than the legal rate be taken; but the very contract alone avoids the ſecurity. *ibid.* (N) 1
9 By 12 Ann. whoever ſhall take for brokage more than 5 *s.* for procuring the loan of 100 *l.* &c. ſhall forfeit 20 *l.* ſ. 9
10 A contract made before the ſtatute is not within it. ſ. 10
11 A bond for a juſt debt with lawful intereſt ſhall not be affected by a corrupt agreement between the obligors to which the obligee is not privy. ſ. 11
12 But a bill of exchange given on an uſurious contract is void in the hands of an innocent indorſee even without notice of the uſury. 530 (N) 2
13 A ſubſequent uſury made upon a precedent contract, ſubjects the party to the treble value, but does not avoid the fair ſecurity. ſ. 12
14 Yet *quære* if the party *take* more than legal intereſt. (N)
15 The computation of intereſt ſhall be by calendar and not by lunar months. ſ. 13
16 But intereſt paid before it is due will not make the party liable to treble value unleſs it be corrupt. ſ. 14
17 An annuity above the legal rate of intereſt is not uſurious except it be a *colour* for uſury. ſ. 15
18 No contract is uſurious by which the lender runs the hazard of loſing all his money, both principal and intereſt. ſ. 16
19 But if the intereſt only be hazarded, and the principal ſecure, the whole may be uſurious. *ibid.*
20 So a loan upon a contingency, where the party *may* receive above 5 *per cent.* without the riſk of receiving leſs is, within the ſtatute 12 Ann. *ibid.*
21 If the contingency goes to affect the intereſt only, it is uſurious. *Page* 530 (N) 3
22 If the contingency relates to both principal and intereſt, and above 5 *per cent.* be taken, the court will enquire whether it be colourable or not. *ibid.*
23 But where above 5 *per cent.* obtained by means of exchanging goods, *if a credit is given for them*, it is not uſury. *ibid.*
24 Unleſs it is a *colourable* ſcheme, for it is the intent which ſhall determine whether it be a loan or riſk. *ibid.*
25 And where above 5 *per cent.* is taken, if the ſubſtance of the contract be a borrowing and a lending, a ſlight colourable contingency only will not take it out of the ſtatute. *ibid.*
26 Uſury ſhall not be imputed from any miſtake in drawing up the agreement. ſ. 17
27 No expectation of more than legal intereſt, if there be no kind of agreement relating to it, ſhall be conſtrued uſurious. 532 ſ. 18
28 Nor is the reſervation of more than 5 *per cent.* upon the non-payment of the principal, at the end of the year uſurious—unleſs it appears there was an agreement that the principal ſhould not then be paid. ſ. 19
29 If the uſurious tranſaction is for a *loan of money*, &c. &c. no ſhift or colour whatever ſhall evade the ſtatute. (N) 4
30 If a man *borrows* under colour of buying, it may be uſurious. *ibid.*
31 But if goods are ſold, to be paid for in three months, or to allow the ſeller ſuch an additional profit as exceeds 5 *per cent.* it is not uſury. *ibid.*
32 A fine levied or judgment ſuffered may be avoided by an averment of a corrupt agreement, as well as any ſpecial or parol contract. ſ. 20
33 And in aſſumpſit if it *appear* uſurious, the plaintiff cannot recover—but to a ſpecialty the uſury muſt be *pleaded*. *ibid.*
34 The court may direct an iſſue to try the uſury. (N)

35 It

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35 It is not neceſſary that the principal and intereſt ſhould be ſecured by the ſame writing. *Page* 532 ſ. 21
36 Nor is it neceſſary that the uſury be in the name of intereſt. 533 ſ. 22
37 A ſecond bond given for the amount of a forfeited penalty on a former bond is uſurious. ſ. 23
38 In pleading uſury in bar to *an action* the whole muſt be ſpecially ſet forth —but in an *information* on the ſtatute the corrupt bargain may be ſtated generally. ſ. 24
39 And in ſuch information, the place where, and the time when the bargain was made, muſt be expreſsly alledged and *exactly* proved. ſ. 25 (N)2
40 Where uſury is pleaded in bar to a bond, the trial ſhall be where the uſury is alledged, ſ. 26
41 The party who hath agreed to pay money upon an uſurious contract is not an admiſſible evidence, unleſs he have paid off the whole debt. ſ. 27
42 But he is a good witneſs to prove the repayment of the money borrowed. *ibid.* (N)
43 And the borrower may be a witneſs, though the money is not repaid, if the uſury neither affects the debt, or avoids the contract. *ibid.*
44 And where the matter is doubtful the objection ſhall only go to the credit, and not to the competency. *ibid.*
45 If the borrower of money, upon an uſurious contract, bring an action of trover for goods pledged as a ſecurity for the repayment of the principal, the parties are conſidered *in pari delicto*, and the plaintiff ſhall be nonſuited. 533 (N)
46 The principal money may never be paid, and yet the uſury may be committed. 362
47 An information for uſury on a loan *of money*, cannot be ſupported by evidence of uſury concerning *wares ſold*. 534 ſ. 28
48 What may be pleaded in uſury. *ibid.* (N)
49 What may be anſwered to a bill of diſcovery. *Page*
50 By 3 Geo. 1. c. 8. the bank of England may borrow money at more than 5 *per cent. per annum*. ſ. 29
51 By 14 Geo. 3. c. 70. monies lent on *Weſt India* eſtates may be at 6 *per cent. per annum*. ſ. 30
52 If a bill of exchange drawn on account of an uſurious contract be exchanged for a bond, and an action be brought on ſuch bond, to which the defendant pleads uſury, no indorſer of the bill of exchange is a competent witneſs to prove the uſury—Sutton v. Shelly, Term Rep. 296

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1 To take *waifs* or *ſtray*, before they have been *ſeized*, &c. is not felony by the common law. 144

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2 Which ſhall be conſidered as the next adjoining Engliſh county. 220, 221

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1 Killing an officer whoſe warrant gives him no authority to make *the arreſt*, is only manſlaughter. 130
2 So alſo where a good warrant is executed in an unlawful manner. *ibid.*
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1 A weaver who has *received* ſilk to work may be guilty of larceny by taking it feloniouſly away. *Page* 135

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## WITCHCRAFT.

1 Conjurers, witches, and ſorcerers, diſtinguiſhed and deſcribed. 8
2 They were anciently puniſhed as *heretics*, by the writ *de hæretico comburendo*, &c. *ibid.*
3 In the reign of Ed. 3. a *ſorcerer* was permitted to excuſe himſelf by ſwearing that he would no longer be a ſorcerer. *ibid.*
4 The offenders divided into four kinds by 1 Jac. 1. c. 12. *ibid.*
5 The puniſhment inflicted by that act. 9
6 By 9 Geo. 2. c. 5. no proceedings ſhall be had againſt any perſon for witchcraft, ſorcery, inchantment, or conjuration, &c. *ibid.*
7 Whoever ſhall pretend to exerciſe theſe arts, or to diſcover ſtolen goods, ſhall

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be impriſoned for one year, ſtand four times in the pillory, and find ſureties. *Page* 9

8 By 17 Geo. 1 c. 5. all jugglers, fortune-tellers, and dealers in crafty, *occult* ſcience, ſhall be deemed rogues and vagabonds. *ibid.*

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1 By ſome old ſtatutes the tranſportation of it made felony. 195 c. 52

2 By 8 Eliz. c. 3. no rams, ſheep, or lambs ſhall be exported on pain of *qui tam*, forfeiture of goods, &c. *ibid.* ſ. 2

3 By 12 Car. 2 c. 32. a further penalty is inflicted for exporting ſheep or wool. *ibid.* ſ. 3

4 By 7 & 8 Will. 3. c. 28. puniſhment inflicted on aiders and aſſiſters. 196

5 By 4 Geo. 1. c. 11. the exporters of wool, and their aiders, &c. refuſing to appear to an information may be tranſported, *ibid.* ſ. 5

6 By 12 Geo. 2. c. 21. to bribe an officer to connive at the exportation of wool, forfeits 300 *l.* and to reſiſt an officer preventing the exportation, is felony. *ibid.* ſ. 6

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5 No affront by bare words, &c. however falſe, malicious, or aggravated, can amount to ſuch a provocation as will alleviate homicide, from murder to manſlaughter. 124

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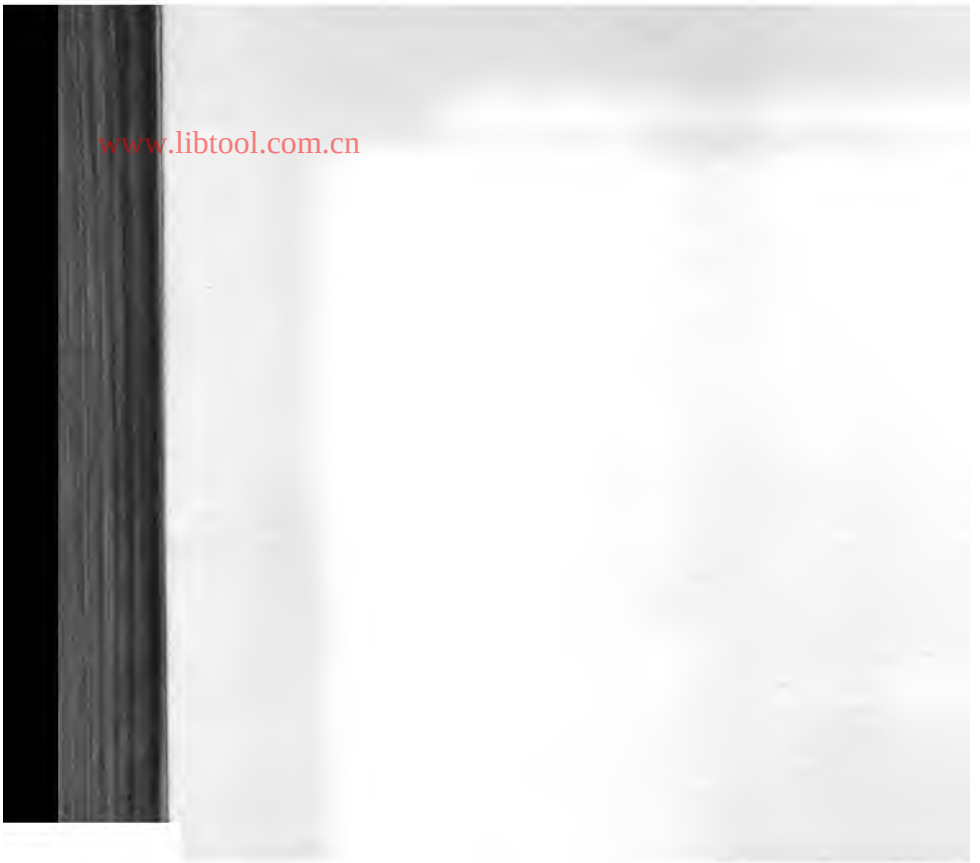
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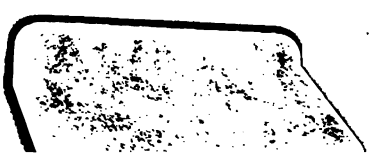

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