C H A P. XVIII.

Of breaking Prison.

SUCH Offences by the Party himself, accompanied with Force, come under the Notion of Prison-breaches; which I shall consider,

1. As they stand by the Common Law.
2. On the Statute de frangentibus Prisōnam, which was made in the first Year of King Edward 2."

Seet. 1. And first as to Prison breaches, as they stood by the Common Law; it seems the better Opinion, that all such Offences were Felonies, if the Party were lawfully in Prison for any Cause whatsoever, whether Criminal or Civil, and whether he were actually in the Walls of a Prison, or only in the Stocks, or in the Custody of any Person who had lawfully arrested him; and it seems not to have been any Way material whether the Prison did belong to the King, or to the Lord of a Manor, not only for that every Person who is under a lawful Imprisonment, may properly enough be called the King's Prisoner; but also because it is allowed, that whoever breaks from any such Imprisonment, since the Statute de frangentibus Prisōnam, is guilty of Felony: From whence it seems clearly to follow, That he must have been in like Manner guilty before that Statute, the Purport whereof is not to make any Offences Felonies which were not so before, but only to restrain some of those which were. And it seems also to be clear, That the Confeffion of such Offence before the Coroner is not traversible by the Common Law, which is not altered as to this Point by the Statute.

Seet. 2. And now I am to consider these Offences, as they stand by the said Statute, for the better Understanding whereof I shall first set down the Words of the Statute, and then endeavour to shew in what Manner they are to be understood.

Sect. 3. And first, the Words of the Statute are as follows, De prisonariis pristōnem frangentibus, Dominus Rex vult & praecipit, quod nullus de cætero, qui pristōnem frangerit, subeat judicium vitae vel membrorum pro fracione pristōnae tantiæ, nisi causa pro qua captus & pristōnatus fuerit, talis judicium requiris, si de illa fuerit judicium & consuetudinem terreo suisset conditiæ, licet temporibus pristōnibus alter fieri confuevit. For the better Understanding of the Construction whereof, I shall consider the following Points.

1. What shall be laid to be a Prison, within the Meaning of this Statute.
2. How far the Imprisonment ought to be well grounded.
3. What shall be laid to be a Breaking of Prison.
4. For what Crime the Party ought to be imprisoned, to make the Offence of breaking the Prison Felony, within the Intent of the Statute.
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5. Whether the Offence of breaking Prison can never amount to High Treason.
6. At what Time, and in what Manner, the Offender is to be proceeded against.
7. In what Manner he is to be indicted.
8. In what Manner those are to be punished for a Breach of Prison, who are within the Benefit of the Statute.

Sect. 4. As to the first Point, viz. What shall be said to be a Prison within the Meaning of the Statute; it seems clear, That any Place whatsoever, wherein a Person under a lawful Arrest for a supposed Crime, is restrained of his Liberty, whether in the Stocks or Street, or in the common Gaol, or the House of a Constable or private Person, or the Prison of the Ordinary, is properly a Prison within the Statute; for Imprisonment is nothing else but a Restraint of Liberty.

Sect. 5. As to the second Point, viz. How far the Imprisonment ought to be well grounded, it is clear, That if a Person be taken upon a Capia awarded on an Indictment or Appeal against him, for a supposed Treason, or Felony, he is within the Statute if he break the Prison, whether any such Crime were in truth committed by him or any other Person or not, for that there is an Accusation against him on Record, which makes his Commitment lawful, he be never so innocent, and the Prosecution never so groundless.

Sect. 6. Also if an innocent Person be committed by a lawful Mitiatus on such a Suspicion of a Felony, actually done by some other, as will justify his Imprisonment, though he be never indicted nor appealed, he is certainly within the Statute if he break the Prison, for that he was legally in Custody, and ought to have submitted to it till he had been discharged by due Course of Law.

Sect. 7. But if no Felony at all were done, and the Party be never indicted or appealed, it seems clear, That no Mitiatus, for such a supposed Crime will make him guilty within the Statute by breaking the Prison, for that his Imprisonment was unjustifiable.

Sect. 8. Also if a Felony were done, yet if there were no just Cause of Suspicion, either to arrest or commit the Party, it seems clear, That if his Mitiatus be not in such Form as the Law requires, his Breaking of the Prison cannot be Felony, because the Lawfulness of his Imprisonment in such Case depends wholly on the Mitiatus; which if it be not according to Law, the Imprisonment will have nothing to support it. But if the Party were taken up for such strong Causes of Suspicion as will be a good Justification both of his Arrest and Commitment, but happen to be committed by an informal Warrant, it seems, that it may be probably argued, That it will be Felony in him to break the Prison; for if by the ancient Common Law, any private Person might, of his own Authority, justify both an Arrest and Commitment, for Treason or Felony, on a reasonable Cause of Suspicion, as it seems probable from the Terror of all the old Books that he might; and if the Necessity of a Mitiatus from a Magistrate, depend rather on the constant settled Practice of Justices of Peace than any direct Law, it seems difficult to maintain that a Slip in want of Form of such a Mitiatus, should make it lawful for the Prisoner to break the Prison, whereas by the old Law it would have been Felony in such a Case to have broken it, without any such Mitiatus at all. And on the other Side, if the Party be taken up
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up for such flight Causes of Suspicion of a Felony actually done, as will not in Strictness justify the Arrest, yet if the Justice before whom he is brought think them of such Weight as to require a Commitment, and do accordingly send the Party to Gaol by a regular Mittimus, it seems very dangerous for him to break the Prison, for the Practice of Justices of Peace in making such Commitments, being now grown into settled Law, it seems reasonable, that their Mittimus be a good justification of the Imprisonment which it commands, for a Crime within their Jurisdiction regularly brought before them, from whence it follows, That to break from such Imprisonment must be unlawful. And therefore, since it doth not appear, that there hath been any direct Resolution of these Points, perhaps it may be reasonable to understand, what is more generally said by Sir a Edward Coke, and Sir b Matthew Hale, in Relation to this Matter, according to the abovementioned Distinctions.

As to the third Point, viz. What shall be said to be a Breaking of Prison, within the Meaning of this Statute, the following Rules are to be observed.

Sect. 8. 1. There must be an actual c Breaking, for every Indictment for this Offence, as a Felony, must have the Words felonio fregit priso- nam, which seem necessarily to import the Use of some real Force or Violence, and not such only as may be implied by the Construction of Law, in any Act done in Contempt of it; and therefore, if without any Obstruction a Prisoner go out of the Prison Doors, being opened by the Consent or Negligence of the Gaoler, or otherwise escape without using any Kind of Force or Violence, he is guilty of a Misdemeanour only, but not of a Felony, and the Gaoler is punishable in such Manner as shall be set forth more at large in the next Chapter.

Sect. 9. 2. Such Breaking must be either by the Prisoner himself, or by others through his Procurement, or at least with his Privy consent, and he escape through the Breast so made, it seems the better Opinion that he cannot be indicted for the Breaking, but only for the Ecape.

Sect. 10. 3. Such Breaking must not be necessitated by an inevitable Accident, happening without any Fault of the Prisoner, as where the Prisoner is fired by Lightning, or otherwise, without his Privy consent, and he breaks open to save his Life.

Sect. 11. 4. It seems, That no Break of Prison will amount to Felony, unless the Prisoner escape; for if the Breaking of a Prison by a Stranger, in Order to free the Prisoners who are in it, be not Felony, unless the Prisoners go out of it, as it is said 6 that it is not, it seems a fortiori. That such a Breach by the Prisoner himself, who lies under so much stronger a Temptation to it, cannot be Felony unless he do escape.

As to the fourth Point, viz. For what Crime the Party must be imprisoned, to make his Breaking the Prison Felony within the Meaning of the Statute, the following Rules are to be observed.

Sect. 12. 1. It is not material, whether the Offence for which he was imprisoned were capital at the Time of this Statute, or were made so by subsequent Statutes, for since all Breaches of Prison were Felonies H.P.C. 108. by the Common Law, which is restrained by the Statute in Respect only
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of Imprisonment for Offences not capital; when an Offence becomes capital, it is as much out of the Benefit of the Statute, as if it had always been so.

Sec. 13. 2. The Offence for which the Party was imprisoned must be a Capital one at the Time of the Offence, and not become such by Matter subsequent, as where A. is committed a Prison for a dangerous Wound given to B. and breaks the Prison, and then B. dies: for though to some Intents such Offence be esteemed capital from the Time of the first Act, yet inasmuch as it was in Truth but a Trespass at the Time of the Breaking of the Prison, and it was then uncertain whether it would ever become capital, and it becomes such afterwards ab initio, by Fiction only, for some special Purposes, and Fictions of Law are never carried farther than the Necessity of those particular Cases, which were the Cause of the inventing them doth require; they shall never be construed to exempt a Person from the Advantage of a beneficial Law made in Favour of Life, who is clearly within the Letter, and doth not plainly appear to be out of the Meaning of it. However, it seems certain, That such an Offender breaking Prison, while it is uncertain whether his Offence will become capital, is highly punishable for his Contempt, by Fine and Imprisonment, &c.

Sec. 14. 3. If the Party be only arrested for, and in his Mutilatus charged with a Crime which does not require Judgment of Life or Member, as Petit Larceny, or Homicide fe defendendo, or by Misdemeanor, and the Offence, in Truth, be no greater than the Mutilatus doth suppose it to be, it is clear, from the express Words of the Statutes That a Breaking of the Prison cannot amount to Felony. And if the Offence for which the Party is committed, be supposed in the Mutilatus to be of such a Nature as requires a capital Judgment, yet if in the Event it be found to be of an inferior Nature, and not to require such a Judgment, it seems difficult to maintain, That the Breaking of the Prison on a Commitment for it can be Felony; for the Words of the Statute are, Nisi Causa pro qua captus & imprisonatus fuerit, tale judicium requirit; and here it appears, That the Offence, which is the Cause of his Imprisonment, doth not require such a Judgment; and it is hard to say, That a Mutilation of the Nature of the Crime, by the Person who makes the Arrest or Mutilatus, should so far prejudice the Party, as to make his Escape amount to Felony by Reason of such Mutilation, which otherwise would have been but a Trespass. Also it seems to be agreed, That if a Person be committed for a Supposed Felony, where no Felony hath been done, he is not guilty of Felony for breaking the Prison; from whence it clearly appears, That in that Case the Law doth not so far regard the Charge contained in the Mutilation, where there is no good Ground to support it, as in Respect thereof to exclude the Party from the Benefit of the Statute; and yet in that Case the Party is as much accused of a capital Offence as in the Case in Question; so that it is clear That the Law doth not so much regard the Hainousness of the Charge against the Party, as of the very Crime which is the Subject of the Charge: And this will farther appear, if it be considered, That the Accusation cannot be laid to be the Cause which requires Judgment of Life or Member, but the Offence which supports the Accusation; and if there be no such Offence, there is, in Truth, no Cause which requires such a Judgment. On the other Side, if the Offence, which was the Cause of the Commitment, be in Truth of such a Nature as requires a capital Judgment, but in the Mutilation be supposed to be of an inferior Degree; it may probably be argued, That the Party's Break-
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ing of the Prison is Felony within the Meaning of the Statute; for the Cause of his Arrest and Commitment is the Fact for which he was arraigned and committed, and that does in Truth require Judgment of Life, tho' the Nature of it be mistaken in the Mutumus, which does no Way alter the Judgment of Law in Relation of the Guilt of it. But there appearing no express Resolution of these Points, and the Authors who have expounded this Statute seeming rather to incline to a different Opinion, I shall leave these Matters to the Judgment of the Reader.

Sect. 15. 4. It is not material, Whether the Party who breaks his Prison, were under an Accusation only, or actually attainted of the Crime charged against him; and yet the Words of the Statute are se causa judiciwm requirit: And it cannot be properly said, That the Offence of one attainted doth require such a Judgment, (for that there ought not to be a second Judgment against one already condemned) but only that it did require it; and it is a settled Rule, That all Statutes are to be construed strictly in Favour of Life, and that no parallel Case, which comes within the same Mishief, shall be construed to be within the Purview of it, unless it can be brought within the Meaning of the Words: Yet considering that the manifest Purport and Meaning of the Words of the Statute taken all together, is no more than this, That the Breaking of Prison shall not be a capital Offence, unless the Crime for which the Party was in Prison be also a capital Offence; and it is frequent, in the Construction of penal Laws, to bring Persons within the Purview of them by being within the Meaning of the Words, tho' not in strict Grammar properly within the very Letter; and it would be extremely hard to imagine, that the Makers of the Statute could intend a greater Favour to Persons appearing to be guilty, and actually under the Condemnation of the Law, than to Persons under an Accusation only: There can be no Doubt, but that the Persons attainted, breaking Prison, are as much guilty within the Meaning of the abovementioned Exception as any others.

Sect. 16. As to the fifth Point, viz. Whether the Offence of breaking Prison can ever amount to High Treason, it seems clear, That a Person committed for High Treason becomes guilty of Felony only, and not of High Treason, by breaking the Prison and escaping fignly, without letting out any other Prisoner; for that no Offence is to be construed High Treason, which is not either within the Purview of 25 Ed. 3. or of some subsequent Statute relating to Treason; but if other Persons committed also for High Treason escape together with him, and his Intention in breaking the Prison were to favour their Escape as well as his own, he seems to be guilty of High Treason in Respect of their Escape, for that there are no Accessories in High Treason; and such Afliance given to Persons committed for Felony, will make him who gives it an Accessory to the Felony, and by the same Reason a Principal in the Case of High Treason. But this Offence coming more properly under the Notion of Rescues than of the Breaking of Prison, shall be more fully considered in the Chapter concerning Rescues.

Sect. 17. As to the sixth Point, viz. At what Time and in what Manner the Offender is to be proceeded against, it is said, That he may be arraigned for this Offence before he be convicted of the Crime for which he was imprisoned; for that it is not material whether he was guilty of such Crime or not, neither is he punishable as an Accessory in Respect thereof, but as a principal Offender in Respect of the Breach of Prison.
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Prison it self; on which Account this Cause differs from that of a Reflex or voluntary Escape, as shall be shewn more at large in the following Chapter.

Sect. 18. It seems clear, That the Sheriff's Return of a Breach of Prison, is not a sufficient Ground to arraign the Prisoner for it, unless he be also indicted.

Sect. 19. As to the seventh Point, viz. In what Manner an Offender is to be indicted for a Breach of Prison, it is certain, That every Indictment of this Kind, to bring the Offender within the Intention of the Statute, must specially set forth his Cause in such a Manner that it may appear that he was lawfully in Prison, and for such a Crime as requires Judgment of Life or Member; and that it is not sufficient to say in general, Quod sedens fugit Prisonam. And it seems, That the same Rules which are required for an Indictment of an Escape, set forth at large in the next Chapter, are generally to be observed in Indictments of breaking Prison.

Sect. 20. As to the eighth Point, viz. In what Manner those are to be punished who are within the Benefit of the Statute, by being freed from that severe Judgment for the Breach of Prison, to which by the Common Law they would have been liable: There seems to be no Doubt, but that whoever breaks from any lawful Imprisonment is still punishable as for a High Mislprison by Fine and Imprisonment; for that every capital Offence doth include in it a Mislprison, and may be proceeded against as such only, if the King please, and it cannot be thought the Meaning of the Statute in ordaining, That such Offences shall not be punished as capital ones, to intend, That they shall not be punished at all.

C H A P. XIX.

Of Escapes suffered by Officers.

HAVING shewn in the precedent Chapters, how far the Party himself, under a lawful Arrest for a Crime charged against him, is punishable for unlawfully freeing himself from such Arrest, without waiting for his Deliverance by due Course of Law, I shall now in the second Place, consider Offences of this Kind in Relation to others. And

1. Such as are without Force.
2. Such as are accompanied with Force.

Such Offences, without Force, come under the Notion of Escapes, which are either,

1. By Officers. Or,
2. By Private Persons.

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As to Escapes suffered by Officers, I shall endeavour to shew the following Particulars.

1. What shall be judged an Escape.
2. Where such Escape is to be esteemed voluntary, and where negligent.
3. Where the Prisoner may be re-taken after an Escape.
4. Whether the Escape is excused by such a Retaking; or by killing the Prisoner, if he cannot be re-taken.
5. In what Manner the Officer suffering an Escape is to be indicted.
6. How an Escape is to be tried and adjudged.
7. How a voluntary Escape is to be punished.
8. How a negligent one.

As to the first Point, viz. What shall be adjudged an Escape, the following Rules are to be observed.

Sec. 1. I. There must be an actual Arrest, and therefore, if an Officer, having a Warrant to arrest a Man, see him shut up in a House, and challenge him as his Prisoner, but never actually have him in his Custody, and the Party get Free, the Officer cannot be charged with an Escape.

Sec. 2. II. As there must be an actual Arrest, such Arrest must also be justifiable, for if it be either for a supposed Crime, where no such Crime was committed, and the Party neither indicted nor appealed, or for such a slight Suspicion of an actual Crime, and by such an irregular Missetim as will neither justify the Arrest nor Imprisonment, the Officer is not guilty of an Escape by suffering the Prisoner to go at large; And it seems to be a good general Rule, That where-ever an Imprisonment is so far irregular, That it will be no Offence in the Prisoner to break from it by Force, it can be no Offence in the Officer to suffer him to escape.

Sec. 3. III. As the Imprisonment must be justifiable, so must it be also for a criminal Matter; and some are said to have holden, that no Escape is criminal, but where the Commitment is for Felony. However it is certain, that the Escape of one committed for Petit Larceny only is criminal; and it seems most agreeable to the general Reason of the Law, That the Escape of a Person committed for any other Crime whatsoever, should also be criminal. for surely, where-ever the publick Justice requires, That a Person be committed for a Crime, it likewise requires, That he be safely kept under such Commitment, and consequently may reasonably demand publick Satisfaction from the Officer to whose Custody he is committed, if he neglect to keep him as he ought.

Sec. 4. IV. As the Imprisonment must be justifiable, and for some Crime, so must its Continuance, at the Time of the Escape, be grounded on that Satisfaction which the publick Justice demands from such Crime; for if a Prisoner be acquitted, and detained only for his Fees, it will not be criminal to suffer him to escape, though the Judgment were, That he be discharged paying his Fees, so that till they be paid, the first Imprisonment continued lawful, as before, for inasmuch as he is detained, not as a Criminal, but only as a Debtor, his Escape cannot be more criminal, than that of any other Debtor; yet if a Person convicted of a Crime, be condemned to Imprisonment for a certain Time.
and also till he pay his Fees, and, he escape after such Time is elapsed, without paying them, perhaps such Escape may be criminal, for that it was Part of the Punishment, that the Imprisonment be continued till the Fees should be paid; but it seems, that this is to be intended where the Fees are due to others as well as to the Gaoler, for otherwise the Gaoler will be the only Sufferer by the Escape, and it will be hard to punish him for suffering an Injury to himself only, in the Non-payment of a Debt in his Power to release.

Sec. 5. V. It is an Escape, in some Cases, to suffer a Prisoner to have greater Liberty than by the Law he ought to have; as to admit a Peron to Bail, who by Law ought not to be bailed, but to be kept in close Custody, or to permit a Prisoner to go out of the Limits of the Prison: Yet some seem to have holden, That in this kind it shall not be adjudged an Escape, unless the Prisoner be found to have had an Intention to escape, but it will be difficult to maintain, That the Offence of the Gaoler can depend on the Intention of the Prisoner.

Sec. 6. VI. If the Gaoler so closely pursues the Prisoner, who flies from him, that he retakes him without losing Sight of him, the Law looks on the Prisoner so far in his Power all the Time as not to adjudge such a Flight to amount at all to an Escape: But if the Gaoler once loses Sight of the Prisoner, and afterwards retakes him, he seems in Strickness to be guilty of an Escape; and a fortiori therefore, if he kill him in the Pursuit, he is in like manner Guilty, though he never lost Sight of him, and could not otherwise take him, not only because the King loses the Benefit he might have had from the Attainder of the Prisoner, by the Forfeiture of his Goods, &c. but also because the Publick Justice is not so well satisfied by the killing him in such an extrajudicial Manner.

Sec. 7. VII. While the Privileges of Sanctuaries were allowed, if a Sheriff conducting a Prisoner to Gaol, had brought him in the way, through the Limits of such a Franchise, the Prisoner had claimed the Privilege of it, and by that Means got Free, it seems that the Sheriff was guilty of an Escape, for that it was his Fault, by bringing his Prisoner that way to Gaol, to give him an Opportunity of claiming the Franchise.

Sec. 8. VIII. Also while the Law allowed those who had the Benefit of the Clergy, to free themselves from Prison in certain Cases, by making their Purgation before the Ordinary, it was an escape in the Ordinary, to suffer such Persons to deliver themselves by it, in such Cases in which they ought not to have been admitted to it.

Sec. 9. IX. If a Prisoner be rescued by Enemies, the Gaoler is not guilty of an Escape, as he would have been by the better Opinion, if he had been rescued by Subjects, because there is a legal Remedy against them.

Sec. 10. As to the second Point, viz. Where such Escape is to be esteemed voluntary, and where negligent, There can be no Doubt, but that where-ever an Officer, who hath the Custody of a Prisoner, charged with and Guilty of a Capital Offence, doth knowingly give him his Liberty, with an Intent to save him, either from his Trial or Execution, he is guilty of a voluntary Escape, and thereby involved in the Guilt of the same Crime in which the Prisoner was guilty, and stood charged with. And it seems to be the Opinion of Sir Matthew Hale, That in some Cases an Officer may be adjudged guilty of such Escape, who hath not such Intent, but only means to give his Prisoner that Liberty which
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Of Escapes suffer'd by Officers.

which by the Law he hath no Colour of Right to give him, as where a Gaoler bails a Prisoner who is not bailable. But it seems agreed, That a Person who hath Power to bail, is guilty only of a negligent Escape, if by bailing one who is not bailable; neither can I meet with any Authority in other Books, to support the abovementioned Opinion, That the Bailing of one who is not bailable, by one who hath no Power to bail, must necessarily be deemed a voluntary Escape; but the contrary Opinion seems more agreeable to the Purview of 5 Ed 3. 8. set forth more at large in the subsequent Part of this Chapter: Also there are some Cases wherein an Officer seems to have been found to have knowingly given his Prisoner more Liberty than he ought to have had, as to go out of the Prison on his Promise of Returning, or to go among his Friends, to find some who would warrant Goods to be his own, which he is suspected to have stolen, and yet seems to have been only adjudged guilty of a negligent Escape. But it must be confessed, That in these Cases, the Prisoner was only accused of Larceny; and it doth not appear, whether he were bailable or not, and generally the old Cases concerning this Subject, are so very briefly reported, that it is very difficult to make an exact State of the Matter from them; however thus much seems clear, That if in the Cases abovementioned, the Officer were only guilty of a negligent Escape, in suffering the Prisoner to go out of the Limits of the Prison, without any Security for his Return, he could not have been guilty in a higher Degree, if he had taken Bail for his Return; from which it seems reasonable to infer, That it cannot be in all Cases a general Rule, that an Officer is guilty of a voluntary Escape by bailing his Prisoner, whom he hath no Power to bail; but that the Judgment to be made of all Offences of this Kind, must depend on the Circumstances of the Case, as the Heinousness of the Crime with which the Prisoner is charged, the Notoriety of his Guilt, the Improbability of his returning to render himself to Justice, the Intention of the Officer, the Motives on which he acted, &c.

Sect. 11. Neither is it a certain Rule, That an Officer, who unlawfully, knowingly, and willingly suffer a Capital Offender to escape, is in all Cases to be adjudged guilty of a voluntary Escape; for where an Ordinary suffered a Clerk, attainted, being committed to his Custody, to free himself from Imprisonment, by making his Purgation, he might be truly said, to have suffered such Prisoner to escape unlawfully, knowingly, and willingly, and yet it seems, b that he was guilty only of a negligent Escape, for that he did not save the Prisoner from Execution, which was excused by the Privilege of the Clergy, but only from the Imprisonment.

Sect. 12. As to the third Point, viz In what Cases a Prisoner may be re-taken after an Escape; it seems to be clearly agreed, by all the Books, c That an Officer making a fresh Pursuit after a Prisoner, who hath escaped through his Negligence, may re-take him at any Time after, whether he find him in the same, or in a different County. And it is said generally in some Books, c That an Officer who hath negligently suffered a Prisoner to escape, may re-take him where ever he finds him, without mentioning any fresh Pursuit; and indeed, since the Liberty gained by the Prisoner is wholly owing to his own Wrong, there

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seems to be no Reason he should take any manner of Advantage from it. But where a Gaoler hath voluntarily suffer'd a Prisoner to escape, it is said by some, 2 That he can no more justify the re-taking him, than if he had never had him in Custody before, because by his own free Consent he hath admitted, that he hath nothing to do with him. And it seems to be held by Sir William Scamond, 3 That after a Gaoler hath been fined for suffering a Prisoner negligently to escape, he cannot afterwards re-take him; but the Book 4 on which alone he seems to ground his Opinion, doth not fully come up to it; for the Purport of it seems to be no more than this, That a Gaoler's Re-taking of a Prisoner, after he hath been fined for an Escape, shall be to no Purpose, for that it is contrary to the Record, by which it appears, that the Prisoner hath been at large; by which it seems only to be intended, That a Gaoler, who hath been fined for an Escape, shall not avoid the Judgment of his Fine by re-taking the Prisoner; But I do not see how it can be collected from hence, that it cannot justify the Re-taking him.

Sec. 13. As to the fourth Point, viz. How far an Escape is excused by re-taking the Prisoner, or by killing him, if he cannot be re-taken; perhaps it is the better Opinion, 4 That where-ever a Prisoner, by the Negligence of his Keeper, gets so far out of his Power that the Keeper loses Sight of him, the Keeper is liable at the Discretion of the Court, notwithstanding he re-took him immediately after; for it seems agreed, That this is to be adjudged a negligent Escape, which implies an Offence, and confectionly that it must be punishable. It is True indeed, that in an Action against a Gaoler, for suffering one arrested in a Civil Action to Escape, it is a good Excuse for the Gaoler, that before the Action brought, he re-took the Prisoner upon fresh Suit, which is well maintained by the Hearing, that he pursued him immediately after Notice of the Escape, though it were some Hours after it, and re-took him; but it does not from hence follow, that the like Excuse will serve for the negligent Escape of a Criminal, because this is a Offence against the Publick, but the other is only a private Damage to the Party: Neither will it be the like Hardship to the Officer to be expose'd to such Punishment as the Court, in Discretion shall think fit, to impose upon him for the negligent Escape of a Criminal, as it would be to be liable to an Action of Escape, for suffering a Person in his Custody, in a Civil Action, to Escape; for that in the former Case the Court would moderate his Fine according to the Circumstances of the whole Matter, and would certainly mitigate, if not wholly excuse it, if he should appear to have taken all Reasonable Care: But in the other Case, if he should be liable to an Action, his Judgment would not lie in the Discretion of the Court, but he would be bound to pay the whole Debt, for which the Party was in his Custody, if the Escape should be adjudged against him. However it is certain, that it will be no Advantage to a Gaoler to re-take his Prisoner, after he has been fined for the Escape, as hath been shewn in the Precedent Section; also it is clear, that he cannot excuse himself by killing a Prisoner in the Pursuit, though he could not possibly re-take him; but must, in such Case, be content to submit to such Fine as his Negligence shall appear to deserve.

Sec. 14. As to the fifth Point, viz. In what Manner the Officer, suffering an Escape, is to be indicted, it seems clear, That every Indictment for an Escape, whether negligent or voluntary, must expressly shew, that the Party was actually in the Defendant's Custody for a Crime, Action, or Commitment for it; and that it is not sufficient
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cient to say, that he was in the Defendant's Custody, and charged with such a Crime; for that a Person in Custody may be so charged, and yet not be in Custody by Reason of such Charge: And it seems also, That every such Indictment must expressly shew that the Prisoner went at large, which is most properly expressed by the Words extra ad Iurum. Also it seems necessary, to shew the Time when the Offence was committed, for which the Party was in Custody, not only that it may appear, that it was prior to the Escape, but also that it was subsequent to the last general Pardon. Also it seems clear, That every Indictment for a voluntary Escape, must allege that the Defendant feloniously and voluntarily, A. B. ad Iurum iussus est; and must also shew the Species of the Crime for which the Party was imprisoned, for it is not sufficient to say in general, That he was in Custody for Felony, &c. for that no one can be punished in this Degree, but as involved in the Guilt of the Crime for which the Party was in his Custody; and therefore the particular Crime must be set forth, that it may appear, that the Principal is attainted for the very same Crime, if it were Felony, or that it was in Truth committed, if High Treason. But it seems questionable, whether such Certainty, as to the Nature of the Crime, be neccessary in an Indictment for a negligent Escape, for that it is not material in this Case, whether the Person who escaped were guilty or not.  

Seft. 15. As to the sixth Point, viz. In what Manner an Escape is to be tried and adjudged, it is to be observed, That where Persons being present in a Court of Record, are committed to Prison by such Court, the Keeper of the Gaol is bound to have them always ready, whenever the Court shall demand them of him; and if he shall fail to produce them at such Demand, the Court will adjudge him guilty of an Escape, without any farther Inquiry, unless he have some reasonable Matter to allege in his Excuse, as that the Prison was set on fire, or broken open by Enemies, &c. for he shall be concluded, by the Record of the Commitment, to deny that the Prisoners were in his Custody; And some have held, That if a Gaoler say nothing in Excuse of such an Escape, it shall be adjudged voluntary; but I cannot find any Resolution to this Purpofe; and where it stands indifferent, whether an Escape be negligent or voluntary, it seems difficult to maintain that it ought to be adjudged a Crime of so high a Nature, without a previous Trial.  

Seft. 16. As to other Prisoners who are not so committed, but are in the Custody of a Gaoler, Sheriff, Constable, or other Person, by any other Means whatsoever, it seems agreed, That the Person who has them in Custody in no Case punishable for their Escape, except in some special Cases, until it be presented; for the better Understanding whereof I shall endeavour to shew,

1. Before whom such Presentments are to be made.
2. In what Cases they are traverfable.

Seft. 17. As to the first Point, it is enacted by the Statute of Westminster 1. Chap. 3. That nothing be demanded nor taken, nor levied by the Sheriff, nor by any other, for the Escape of a Thief, or Felon, until it be judged for an Escape by the Justices in Eyre; and that he: who does otherwise, shall restore to him or them that have paid it, as much as he or they have taken or received, and as much also unto the King.  

Mm  Seft. 18.
Of Escapes suffered by Officers. Book II.

Sect. 18. It hath been adjudged, * that this Statute restrains not the Court of King's Bench from receiving such Preventas, for that its Jurisdiction includes in it that of Justices in Eyre, and this Court is it left, the Highest Court of Eyre.

Sect. 19. It is farther enacted, by 31 Ed. 3. 14. That the Escape of Thieves and Felons, and the Chattle of Felons, and of Fugitives, and also Escapes of Clerks Convicted, out of their Ordinary's Prisn, from henceforth to be judged before any of the King's Justices, shall be levied from Time to Time, as they shall fall, as well of the Time past as Time to come. By which it seems to be implied, that other Justices, as well as those in Eyre, may take Cognizance of Escapes; and it is certain, That Justices of Gaol-Delivery may punish Justices of Peace for a negligent Escape, in admitting Persons to Bail, who are not bailable.

Vide supra
Ch. 6. S. 10,
S. P. C. 35.
Letter B.

Sect. 20. And it is farther enacted, by 1 Ric. 3. Chap. 3. That Justices of Peace shall have Authority to inquire in their Sessions, of all Manner of Escapes of every Person arrested and imprisoned for Felony.

Sect. 21. As to the second Particular, In what Cases such Preventas are traversable; it is laid down as a Rule by Sir William Staunton, That where-ever an Escape is possible, the Prevention of it is traversable; but where the Offence is amerciable only, there the Prevention is of it felt conclusive; such Amercements being reckoned among those minima de quibus non curat lex; and this Diffinition seems to be well warranted by the Old b Books; and in what Cases Escapes are liable, and where amerciable only, shall be considered in the following Part of this Chapter, Sect. 24. 35.

Sect. 22. As to the seventh Point, in what Manner a voluntary Escape is to be punished, it seems to be generally agreed, That such Escape amounts to the fame Kind of Crime, and is punishable in the same Degree, as the Offence of which the Party was guilty, and for which he was in Custody, whether it be Treason, Felony or Trepsas; and whether the Person escaping were actually committed to some Gaol, or under an Arrest only and not committed; and whether he was attainted, or only acquit d of such Crime, and neither indicted nor appelle ; And it is laid to be no Exuse of such Escape, That the Prisoner had been acquitted on an Indictment of Death, and only committed till the Year and Day be passed, to give the Widow, or Heir of the deceased an Opportunity of bringing their Appeal.

Sect. 23. Also such an Escape, suffered by one who wrongfully takes upon him the keeping of a Gaol, seems to be punishable in the same Manner as if he were never so rightfully intituled to such Custody, for that the Crime is in both Cases of the very same ill Consequence to the Publick; and there it seems to be no Reason that a wrongful Officer should have greater Favour than a rightful, and that, for no other Reason but because he is a wrongful one.

Sect. 24. Also if the Warrant of Commitment do plainly and expressly charge the Party with Treason or Felony, but in some other Respect be not strictly formal, yet it seems, That it may be probably argued, That the Gaoler suffering an Escape, is as much punishable as if the Warrant were perfectly right; for it would be highly inconvenient to suffer Gaolers to take Advantage of a Slip of this Kind in Commitments, which, being generally made by Persons of no great Knowledge in the Law, cannot be expected to be always agreeable in its Forms; and therefore, if they be good in Substance, the publick Good seems to require,
Chap. 19. Of Escapes suffered by Officers.

that the Gaoler be as much bound to observe them, as if they were never so exactly made.

Sec. 25. But it seems to be agreed, That no Escape can amount to a capital Offence, unless the Case for which the Party was committed, were actually such at the Time of the Escape; and therefore, if a Gaoler suffer one to escape who is committed for having given a dangerous Wound to another, who afterwards dies of such Wound, yet he is not guilty of Felony, for that the Offence of the Prisoner was but a Trepass at the Time of the Escape; and though by a Fiction of Law it be afterwards, for some Purposes, esteemed a Felony from the Time of the giving of the Wound, yet since it is, in Truth, no Felony till the Death of the Party, it shall be afterwards construed such in Respect of those only who were privy to the Giving of the Wound.

Sec. 26. Also it seems clear, That he who suffers another to escape who was in his Custody for Felony, cannot be arraigned for such Escape as for a Felony, until the Principal be attained; for that he who suffers such Escape, is by the better Opinion, not punishable in this Degree, but as an Accessory to the Felony; and it is a Rule, That no Accessory ought to be tried till the Principal be attained, as shall be more fully shewn hereafter: Yet it seems certain, That one accused of such an Escape, may be indicted and tried for Misprision, before the Attorney of the principal Offender, for that whether such Offender were guilty or innocent it was a high Contempt to suffer him to escape; And if the Commitment were for High Treason, and the Person committed actually guilty of it, it seems, That the Escape is immediately punishable as High Treason also, whether the Party escaping be ever convicted of such Crime or not; for that there are no Accessories in High Treason, but all who are guilty of afflicting the Party guilty of such Crime, in such a Manner as would make them Accessories to a Felony, are accounted Principals in the Treason, as shall be more fully shewn in the Chapter concerning Principal and Accessory.

Sec. 27. Also it seems to be clear, That no one is punishable in this Degree for a voluntary Escape, but the Person only who is actually guilty of it; and therefore, that the principal Gaoler is only liable for a voluntary Escape suffered by his Deputy, for that no one shall suffer capitally for the Crime of another.

As to the eighth Point, viz. In what Manner a negligent Escape is to be punished, I shall endeavour to shew,

1. How such Escape is punishable by the Common Law.

Sec. 28. As to the first Particular, I shall take it for granted at this Day, that whoever de facto occupies the Office of Gaoler is liable to answer for such an Escape; and that it is no Way material whether his Title to the Office be legal or not.

Sec. 29. Also I take it to be the better Opinion, That a Sheriff is as much liable to answer for an Escape suffered by his Bailiff, as if he had actually suffered it himself, and that the Court may charge either the Sheriff or Bailiff for such an Escape; and that if a Deputy-Gaoler be not sufficient to answer a negligent Escape, his Principal must answer for him: But...
But if the Gaoler who suffers an Escape, have an Estate for Life, or Years, in the Office, I do not find it agreed how far he in Reversion is liable to be punished.

Sect. 37. It seems the better Opinion, That one negligent Escape will not amount to a forfeiture of the Gaoler's Office, as one voluntary one will; Yet if a Gaoler suffer many negligent Escapes, it is said, that he puts it in the Power of the Court to oust him of his Office by its Discretion.

Sect. 38. It seems to be certain, That where ever a Person is found guilty upon an Indictment, or Prefentment, of a negligent Escape of a Criminal actually in his Custody, he ought to be condemned in a certain Sum to be paid to the King, which seems most properly to be called a Fine; but this doth not clearly appear from the old Books, for in some of them it seems to be taken as a Fine, in others as an Amercement, and in others it is spoken of generally, as an Impostion of a certain Sum, and without any Mention either of Fine or Amercement. But where the Books speak of the Punishment of a Vill or Hundred, for suffering a Felon to escape without being arrested, they seem always to take it as an Amercement, and not as a Fine: And where a Sheriff, having returned a Capias Corporis into the King's Bench, on a Capias against a Man on an Indictment of Felony, does not bring him in at the Day, it seems That he is, by the Course of the said Court, to be amerced, not fined.

Sect. 39. It hath been holden, That a negligent Escape may be pardoned by the King before it happens, but that a voluntary one cannot be so pardoned; but this shall be more fully considered in the Chapter concerning Pardon.

Sect. 40. And it seems, That by the Common Law, the Penalty for suffering the negligent Escape of a Person attainted, was of Course, and for suffering such Escape of a Person indicted and not attainted, was 5 l. but if the Person escaping were neither attainted nor indicted, it seems, That it was left to the Discretion of the Court to impose such a reasonable Forfeiture as should seem proper; and if the Party had twice escaped, it seems, That the Penalties abovementioned were of Course to be doubled; yet it seems: That the Forfeiture was to be no greater for suffering a Prisoner, committed on two several Accusations to escape, than if he had been committed but on one.

Sect. 41. As to the second Particular, viz. In what Manner Offences of this Kind are punishable by Statute, it is recited by 5 Ed. 3, Ch. 8, That Persons indicted of Felonies in Times past, had removed the Indictments before the King, and there yielded themselves, and by the Marshals of the King's Bench had been conveniently let to Bail, and after had done many evil Deeds, &c. And thereupon it is enacted, That such Enditees and Appellees shall be safely and surety kept in Prisone, as belongeth to them, according to the Charge which the said Marshals shall have of the Justices; and if any Marshall shall do otherwise, as the Complaint of every Man that will complain, the Justices shall do him Right during the Terms; and in the End of the Terms, upon their rising, the said Marshals shall choose before the said Justices, be are they depart their Places, in what Town they will keep such Prisoners at their Peril: And in the same Town they shall allow them Houses to keep such Prisoners at their own Costs and Charges; and there they shall keep them in Prision, and shall not suffer them to go wandering abroad, neither by Bail nor without Bail. And if any such Prisoner be found wandering out of Prison, by Bail or without Bail, and that
Chap. 19. Of Escapes suffered by Officers.

that he found at the King’s Suit, or at the Suit of the Party, the Marshal which shall be found thereof guilty, shall have half a Year’s Imprisonment, and be committed at the King’s Will, and the Justices shall thereof make Inquiry when they see fit; and as to the Marshals, it shall be done within the Year that which Reason will. And in Case that the Marshals suffer by their Agent such Prisoners to escape, they shall be at the Law, as before the Time of the Statute they had been. And the King intendeth not by this Statute to lose the Escape, where he ought to have the same.

Sect. 35. Also it is enacted by 19 H. 7. 10. That every Sheriff have the Custody of the King’s Common Gaols, during the Time of his Office, except all Gaols whereof any Person or Persons have the Keeping of Estate of Inheritance: And that all Letters Patent made for Term of Life, or Years, of the keeping of the said Gaols, &c. shall be annulled and void. And then it is recited by the said Statute, That divers Persons before that Time, for Treason and Felonies had been taken, some for Susception of the same Deeds, and some upon Indictments, and thereupon brought to the same Gaols, and sometime remained in the Keeping of the Persons that so arrested them for the said Causes, and that such Persons, by Colour of Negligence, Subtilty, and craftily, and oftentimes for Favour, Made, Affection or Corruption, suffered the said Offenders to escape, as if it had been by Negligence, to the onset and express Impediment of Justice: And when such Escapes had been found before Justices having Authority to enquire thereof, and thereupon the Parties convicted, or yielded themselves to make Fine for the same, small Fines had been set in those Causes, to the little Dread and Fear, and great Holding of the Offenders, by Means whereof, great and arrant Felons, and boisterous Murderers had escaped, &c. And thereupon it is enacted, That for every negligent Escape from any Sheriff, having the Keeping of any Gaol, or from any Constable of Castle, or other, being Keeper of any Gaol where such Prisoners customarily have been, or shall be kept, of Persons indicted of High Treason being in their Keeping, that no less Fine be set or made for every such Escape, than 100 Marks, and more, by the Discretion of the Justices that shall assess such Fine: And for every Escape of Persons escaping being in their keeping for Susception of High Treason, no less Fine to be set or made than 40l. and for every Escape of Persons indicted of Murder or Petit Treason, 20l. at least, and more, by the Discretion of the Justices that shall assess such Fine: And for every Escape of Persons suspected of Murder or Petit Treason, 10l. or more, by the Discretion of the Justices that shall assess such Fine: And for every Person escaping, being in their Keeping, indicted of Felony, other than Murder or Treason, 10l. And for every Person suspected of Felony, other than Murder or Treason, 100 Shillings, or more, by the Discretion of the Justices, after the Manner and Quantity of their Doemits, favoring to every Person such Right and Title to any such Escapes and Fines for the same, or to be quit of such Escapes, or of any other Escapes, as they had, or ought to have had at the Time of the making of the said Act.
C H A P. XX.

Of Escapes suffered by private Persons.

HAVING in the precedent Chapter endeavoured to shew the Nature of Escapes suffered by Officers, I am now in the second Place to consider, the Nature of such Escapes suffered by private Persons: But the Law being generally the same in Relation to such Escapes, as in Relation to those suffered by Officers, I shall refer the Reader, for the general Learning of this Kind, to what is said in the former Chapter concerning Escapes suffered by Officers, and shall content my self in this Place with considering the two following Particulars.

1. Where a private Person is to be adjudged guilty of such an Escape.

2. In what Manner he is to be punished.

§ 1. As to the first Point, It seems to be a good general Rule, That where-ever any Person hath another lawfully in his Custody, whether upon an Arrest made by himself or another, he is guilty of an Escape, if he suffer him to go at large, before he hath discharged himself of him by delivering him over to some other who by Law ought to have the Custody of him.

§ 2. And therefore, if a private Person arrest another for Suspicion of Felony, and deliver him into the Custody of another private Person, who receives him, and suffers him to go at large, it is said, That both of them are guilty of an Escape, the first, because he should not have parted with him, till he had delivered him into the Hands of a publick Officer; the later, because having charged himself with the Custody of a Prisoner, he ought, at his Peril, to have taken care of him.

§ 3. But if a private Person, having made such an Arrest, have delivered over his Prisoner to the proper Officer (as the Sheriff, or his Bailiff, or a Constable,) from whose Custody the Prisoner escapes, the Party who made the Arrest is not chargeable with it.

§ 4. But if no Officer will receive such Prisoner into his Custody, it seems to be the safest way to deliver him into the Custody of the Township, where the Person who arrested him lives, or perhaps of that where the Arrest was made, which shall be bound to keep him till the next Gaol-Delivery; but if such Township refuse also to receive him, I do not see how the Person who made that Arrest can discharge himself of him before the next Gaol-Delivery, unless he can in the mean Time procure him to be bailed.

§ 5. Neither can such private Person excuse himself of the Escape of such a Prisoner, by alleging, That he delivered him over to a Sheriff, or other Officer, without knowing to whom, in particular, by Name.
Chap. 20. Of Escapes by private Persons.

Name, he so delivered him, that the Court may certainly know who is answerable for him.

Sect. 6. As to the second Point, viz. In what Manner a private Person is punishable for such an Escape, I shall take it for granted that if it were voluntary, he is punishable in the same Manner as an Officer, for which I shall refer the Reader to the former Chapter; and if it were negligent, he is punishable by Fine and Imprisonment, at the Discretion of the Court, as the Law is settled by 19 H. 7. 10. The Words whereof, so far as they relate to this Purpose, are as follows, And if any Person hereafter have any Prisoner in his Keeping, arrested for Suspicion of Felony, Treason, or Murder, and that Person that is so arrested, escape by negligent keeping, before that he be brought to the Gaol, that Person from whom he so escaped, shall forfeit for every Person that doth so escape, such Fines as shall be set by the Discretion of the Justices that shall have Authority to assess such Fines, as the Court shall require, and the same Forfeiture to go to them that be intituled to have such Forfeitures at the Time of making the said Act.

C H A P. X X I .

Of Rescues.

The Offence of a Stranger, in forcibly freeing another from an Arrest, comes under the Notion of Rescues, which in most Instances is of the same Nature with the Offence of breaking Prison, which hath been already considered in the eighteenth Chapter; and therefore it seems sufficient for the Declaration of the Nature of this Crime, to shew,

1. In what Cases it agrees with the Offence of breaking Prison. And
2. In what it differs.

And first, This Offence agrees with that of breaking Prison in the following Particulars.

Sect. 1. I. Whatever is such a Prison, that the Party himself was, by the Common Law, guilty of Felony by breaking from it, in every such Case a Stranger was guilty of as high a Crime at least, in rescuing him from it.

Sect. 2. II. Wherever the Imprisonment is so far groundless, or irregular, or for such a Cause, or the Breaking of it is occasioned by such a Necessity, &c. that the Party himself breaking the Prison, is, either by the Common Law, or by the Statute de praeminentibus Prisonis, faced from the Penalty of a capital Offender, a Stranger who rescues him from such an Imprisonment, is in like Manner also excused; &c. &c. &c.

Sect. 3. III. As the Party himself seems not to be guilty of Felony by breaking the Prison unless he go out of it; so neither is a Stranger, unless the Prisoner actually go out of the Prison.

Sect. 4.
Of Reques.


d. 4. IV. As the Sheriff's Return, that a Prisoner hath broken the Prison, is not a sufficient Ground to arraign him for such Offence, unless he be indicted also for it: so neither is his Return of a Reques a good Ground for the Arraignment of the Rescuere, unless he be indicted.

d. 5. V. As an Indictment of breaking Prison, and also an Indictment of Escape, must specially set forth the Nature and Cause of the Imprisonment, and the special Circumstances of the Fact in Question, so also must an Indictment of Reques.

d. 6. VI. As those who break Prison are still punishable, as for a high Misprison, by Fine and Imprisonment, in those Cases wherein they are saved from Judgment of Death, by the Statute de franchmentibus prisonarum, so also are those who rescue such Prisoners in the like Cases, in the same manner punishable.

2. The Offence of Reques differs from that of breaking Prison in the following Particulars.

d. 7. I. Whereas a Person committed for High Treason, who breaks the Prison and escapes, is guilty of Felony only, unless he lett others also escape whom he knows to be committed for High Treason, in which Case he is guilty of High Treason, not in respect of his own breaking of the Prison, but of the Reques of the others. A Stranger who rescues a Person committed for and guilty of High Treason, knowing him to be so committed, is in all Cases guilty of High Treason; and by some he is in like manner guilty, whether he knew that the Prisoners were committed for High Treason or not; but this Opinion is not proved by the Authority of the Case on which it seems to be grounded.

d. 8. II. Whereas a Prisoner who breaks the Prison, may be arraigned for such Offence before he be arraigned of the Crime for which he was imprisoned; he who rescues one imprisoned for Felony cannot, according to the better Opinion, be arraigned for such Offence as for a Felony, till the principal Offender be first attainted; but if the Person rescued were imprisoned for High Treason, the Rescuer may immediately be arraigned, for that in High Treason all are Principals; also it seems, that he may be immediately proceeded against for a Misprison only, if the King please.

CHAP. XXII.

Of Attachment.

HAVING shewn in what manner Offenders may be apprehended without Process from a Court of Record, I am now to shew in what Manner they may be brought into Court by such Process, of which there are two Sorts.

I. Such
1. Such as may be awarded by the Discretion of the Justices upon a bare Suggestion, or their own Knowledge, without any Appeal, Indictment, or Information.

2. Such as can be awarded only upon such Accusatons.

Sect. 1. And first, I shall consider the Nature of the first of these, which is generally called an Attachment, and is properly grantable in Cases of Contempts, against which, for the most part all Courts of Record generally, but more especially those of Westminster-Hall, and above all the Court of King's Bench, may proceed in a summary Manner according to their Discretion; and if they happen to be done by a Person present in the Court, and appear either from the Confession of the Party on his Examination upon Oath, or by the View or immediate Observation of the Judges themselves, the Court may immediately record the Crime, and commit the Offender, and also inflict such further Punishment as shall seem proper: And if such Offences be done by a Person not present in Court, and be complained off by Affidavit, the Court will either make a Rule on the Party to attend at a certain Day, in Order to answer the Matter of the Complaint against him; or else will make a Rule upon him, to shew Cause why an Attachment should not be granted against him; or else, if the Offence were of a very exorbitant Nature, as for Words of Contempt of the Court itself, will grant an Attachment on the first Complaint, without any such Rule to shew Cause, and the Party who is ordered to attend the Court in pursuance of such Rule, ought regularly to appear in proper Person, and not by Attorney; as also must every one against whom an Attachment is granted, and if the Offence be of an heinous Nature, and the Person attending the Court upon such a Rule to answer it, or appearing upon an Attachment, be apparently guilty, the Court will generally commit him immediately, in Order to answer Interrogatories, to be exhibited against him in Relation to the Contempt. But if there be any favourable Circumstances to extenuate or excuse the Offence, or if it appear doubtful whether the Party were guilty of it or not, the Court will generally in their Discretion, suffer the Party, having first given Notice of his Intention to the Prosecutor, to enter into a Recognisance to answer such Interrogatories; and if no such Interrogatories be exhibited within four Days after such Recognisance, will discharge the Recognisance upon Motion; yet if the Party do not make such Motion, and the Interrogatories be exhibited after the four Days, the Court will compel him to answer them: But in all the Cases abovementioned, if the Party fully purge himself upon Oath, in his Answer to such Interrogatories of the whole Matter charged upon him, the Court will discharge him of the Contempt, and leave the Prosecutor to proceed against him for the Perjury, if he thinks fit: But if the Party confess Part of the Contempts in his Answer to such Interrogatories, and deny others, the Court will not discharge him from the Contempts so denied, but will proceed farther to examine the Truth of them, and will inflict such Punishment as from the Whole shall appear reasonable, neither will the Court discharge the Party upon a shifting or evasive Answer to any material Part of the Charge against him, but will punish him in the same Manner as if he had confessed it.

But for the better Understanding in what Cases the Court may proceed in the Manner abovementioned against such Offenders, I shall endeavour to shew,
Of Attachment.

Book II.

1. Where it may proceed against the Ministers of the Court.
2. Where against others.

As to the first of these Points I shall consider,

1. Where it may proceed against Sheriffs, Bailiffs of Franchise, and Sheriffs Bailiffs.
2. Where against Attorneys, and others acting as such.
3. Where against other Officers.
4. Where against Jurors.

As to the first of these Points I shall endeavour to shew,

1. Where the Court may proceed against Sheriffs, Bailiffs of Franchise, and Sheriffs Bailiffs, for not executing a Writ.
2. Where for doing it oppressively.
3. Where for not doing it effectually.
4. Where for making a false Return.

Sec. 2. As to the first Particular, viz. In what Cases the Court may proceed in the Manner abovementioned against Sheriffs, &c. for not executing a Writ; It seems clear from the general Reason of the Law, which gives all Courts of Record a Kind of discretionary Power over all Abuses, by their own Officers, in the Administration or Execution of Justice, which bring a Dishonour on the Courts themselves, as not taking sufficient Care to prevent them; that where-ever it shall appear, That any such Officers have been guilty of any corrupt Practice in not serving any Writ, as where they refuse to do it, unless paid an unreasonable Gratuity from the Plaintiff, or receive a Bribe from the Defendant or give him Notice to remove his Perfon or Effects, in Order to prevent the Service of any Writ, the Court which awarded it may punish such Offences in such Manner as shall seem proper by Attachment, &c. as well as the Court of King's Bench, which has a general Superintendency over all Crimes whatsoever (as the Star-Chamber had also formerly) but commonly leaves Offences of this Kind, in Relation to Causes in other Courts to be punished by such Courts to which they more immediately belong. But if there neither appear to have been any palpable Corruption in the Case, nor particular Obrinacy, as by disobeying a Special Rule of the Court, in Relation to the Service of such Writ, nor other extraordinary Circumstances of willful Negligence, the Judgment whereof is to be left to the Discretion of the Court, it seems not to be usual to grant an Attachment in such Cases, but to leave the Party to his ordinary Remedy against the Officer, which he may have either by serving him with Rules to return the Writ, &c. or by suing him for the Damage sustained by his Negligence, in an Action of Escape, or on the Case, or by taking out an Alias and Pluries which if the Sheriff do not execute an Attachment, directed to the Coroners, goes against him of Course, unless he give a good Excuse for his not having done it.

Sec. 3. As to the second Particular, viz. Where the Court may proceed in the Manner abovementioned, against a Sheriff, or Bailiff, &c. for an oppressive Practice in the Execution of a Writ; it is every Day's Practice to grant Attachments for Misdemeanours of this Kind, as for using needless Force, Violence and Terror, in making an Arrest, or by breaking open Doors where by Law it is not justifiable, and there is no plausible
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plausible Excuse for doing it, or treating the Persons arrested hastily and inhumanly, or keeping them in Custody till they consent to pay Money for their Deliverance, or making an Arrest without due Authority, as by Force of a blank Warrant, filled up with the Name of a special Bailiff by the Party himself, or Bailiff, without the Privity or subsequent Agreement of the Sheriff; yet I have sometimes known Attachments of this Kind denied, in Respect of the common Use of the Practice, which by Experience hath been found to be almost necessary in some Cases to prevent the Defendant's having Notice of the intended Arrest, and therefore, if it shall appear to the Court, that there was any such reasonable Cause for such a Proceeding, it will be a great Inducement to excuse, if not wholly to disperse with it.

Sect. 4. As to the third Particular, viz. Where the Court may proceed in the Manner abovementioned, against a Sheriff, or Bailiff, &c. for not executing a Writ effectually; it seems clear, That where any such Officer is guilty of a corrupt Practice in depriving the Party who sues out a Writ of that Benefit and Advantage which he ought to have from the Execution of it, he is liable to be punished in the Manner abovementioned, as if he levy a Debt by Virtue of an Execution, and keep the Money in his own Hands, and imbezil it. But unless there appear some gross and palpable Corruption in a Sheriff neglecting to return a Writ which hath been executed by him, or to bring in the Body of Money, &c. according to his Return, the Court will hardly grant an Attachment against him immediately, but will rather proceed against him by Rules to return the Writ, &c. and if he do not obey them, will increase the Amercements upon him till he do, or perhaps grant an Attachment for the Contempt: And if the Sheriff return, That he sent the Process to the Bailiff of a Liberty, who hath given him no Answer, a non Oritur shall be awarded to the Sheriff: And if he return, That he sent the Process to such Bailiff, who hath returned a Capi Corps, or such like Matter, and the Bailiff bring not in the Body or Money, &c. at the Day, by the better Opinion the Bailiff shall be amerced, and a Writ shall lie to the Sheriff, to distrain the Bailiff to bring in the Body, &c. &c. &c.

Sect. 5. As to the fourth Particular, viz. Where the Court may proceed in the Manner abovementioned, against a Sheriff, &c. for making a false Return to a Writ; There seems to be no Doubt, but that wherever any such Officer endeavours to impose upon a Court, by making a Return to a Writ of a Matter known by him to be false, he is, in Strictness, liable to be punished in this Manner for his Contempt: Yet it seems, That the Court will not easily be prevailed on to proceed in this Manner for a bare false Return, but will rather leave the Party injured by it to his Remedy, by an Action on the Cause, unless there be some extraordinary Circumstances of Hardship or Oppression, as where an Officer who had arrested one on a Capi Corps, returned, That he had taken him, but that the Party was so sick, that he could not bring in his Body at the Day for fear of endangering his Life; where in Truth the Party had been all the while in good Health, and was only detained under such Pretence, in Order to extort Money from him, &c. &c. &c.
As to the second Point, viz. In what Cases the Court may proceed in the Manner abovementioned, against Attorneys, and others acting as such, I shall endeavour to shew,

1. Where it may so proceed against them, for appearing for a Person without sufficient Authority.
2. Where for Injustice to their Clients.
3. Where for other Contempts to the Court, or dishonest Practice.

Sec. 6. As to the first of these Particulars, viz. Where the Court may proceed, in the Manner abovementioned, against Attorneys, and others acting as such, for appearing for any Person without sufficient Authority; there is no Doubt but that it may so proceed against them, for taking upon them to prosecute or defend a Suit for another, without any Manner of Directions from him; also if they have in Truth a Warrant from the Party, but do not cause it to be recorded before Judgment, it seems, b That they are in Strictness liable to an Attachment, for that the Court takes no judicial Notice of any such Warrant not of Record; yet c if in such Case it appear, upon Examination, that the Warrant of Attorney happened not to be recorded, through the Negligence of the Officer, or some such like Accident, attended with no corrupt Practice in the Attorney, it seems, That the Court would never easily be prevailed on to proceed in this Manner against the Attorney; and much less at this Day, since he is liable by Statute to a certain pecuniary Forfeiture for every Offence of this Kind.

Sec. 7. For it is enacted by 32 H. 8. 30. made perpetual by 2 Ed. 6. 32. and by 18 El. 14. and 4 & 5 Anne 16. That the Plaintiff's Attorney shall file his Warrant the same Term he declares, and the Defendant's Attorney the same Term he appears, on Pain of forfeiting ten Pounds, and also suffering such Imprisonment, as by the Discretion of the Justices of the Court, where any such Default shall fortune to be, shall be thought convenient.

Sec. 8. And it seems, That since these Statutes, it hath not been usual to grant Attachments in these Cases, without some apparent Circumstances of Fraud, or other Corruption.

Sec. 9. But howsoever a regular Attorney may be excused from an Attachment, for not having recorded his Warrant, those have no Reason to expect the like Favour from the Court, who take upon them to appear for others as Attorneys, without having been admitted and sworn as such, for these are liable to an Attachment for every Appearance, whether their Warrant were recorded or not.

Sec. 10. As to the second Particular, viz. Where the Court may proceed in Manner abovementioned against Attorneys, and others acting as such, for Injustice to their Clients; It is every Day's Practice to move for it against them, for base and unfair Dealing towards their Clients in the Way of Buisness, as for protraching Suits by little Shifts and Devices, and putting the Parties to unnecessary Expenditures in Order to raise their Bills, or demanding Fees for Business which never was done, or for refusing to deliver up to their Clients, Writings with which they had been intrusted, in the Way of Business, or Money which has been recovered and received by them to their Clients Use, and for other such like gross and palpable Abuses: But the Court will seldom grant an Attachment for the Detainer of such Writings or Money, without first making a Rule on the Attorney, to deliver them to the
the Party; also it will justify an Attorney's Detaining such Writings or Money for his Security till he be paid all his just Fees; nor will it ever be
interpose in this Manner as to any Writings or Money received by an Attorney on any other Account, except only in his way of Bufine's as an Attorney, but will leave the Party to his ordinary remedy by Action.

Sec. 11. As to the third Particular, viz. Where the Court may proceed in the Manner abovementioned, against Attorneys, and others acting as such, for other Contempts to the Court, or dishonest Practice, it seems, That it may not only proceed in such Manner against them for Disobedience of its Rules, after Notice given them of such Rules, either expressly or impliedly; but also, for any such ill Practice as is against the known and obvious Rules of Justice and common Honesty; as for Forging a Writ, or any other Matter of Record, or but attempting to do it; or for taking out a Capias, which has no Original to warrant it; or for receiving Money of the Client for suing out an Original, and also for the Fine due thereon to the King, where, in Truth, no Original has been sued out, nor any Fine paid to the King, or for endeavouring to impose upon the Court, as by causing an Action to be brought against one in it by Collusion, without any just Ground, in order thereby to intitle the Party to the Privilege of the Court, and afterwards, upon the Examination of the Matter in Court, giving a false Account of it, or for giving directions to a Sheriff concerning what Persons be should return on a Panel; and for other Misdemeanours of the like Nature.

Sec. 12. As to the third Point, viz. Where the Court may proceed in the Manner abovementioned, against other Officers of the Court; there being scarce anything of this Kind to be met with in the Books, I shall only observe, that it seems clear, from the general Reason of the Law, which gives all Courts of Record a Kind of discretionary Power in the Government of their own Officers, that any such Court may proceed in such Manner against any such Officer, not only for refusing to execute its Commands, or for executing them irregularly, remissly, or oppressively, but also for all kinds of Oppression or Injustice done by them in the Execution of their Offices, or by Colour of them.

Sec. 13. As to the fourth Point, viz. In what Cases the Court may proceed in the Manner abovementioned, against Jurors, it is observable, that Jurors may be considered either in a Ministerial Capacity, viz. as Persons bound to attend the Court, in order to perform the Duty for which they are returned, until they shall be discharged; or in a Judicial Capacity, viz. as Judges of the Fact which is to be tried or inquired by them; and therefore, for the better Understanding of this Matter, I shall consider,

1. How far Jurors are punishable in the Manner abovementioned, in their Ministerial Capacity.
2. How far in their Judicial.

As to the first Particular, it seems clear, That Jurors are punishable in the Manner abovementioned in their Ministerial Capacity, in the following Instances.

Sec. 14. 1. For making Default, as where more than one of the Persons returned on a Jury, do appear; but not a sufficient Number to take an Enquest.
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Enquest, and some of the others come within View of the Court, or into the same Town in which the Court is holden, but refuse to come into the Court to be sworn, in which Cases, upon Proof of such Matter, the Court, by the Prayer of the Party, order the Jurors who appeared, to inquire what is the Yearly Value of such Defaulters Lands, and after such Inquiry made, either summon them to appear, on Pain of forfeiting such Sum as their Lands have been found to be worth by the Year, or some lesser Sum, or impose a Fine of the like Sum upon them, without any farther Proceedings. But it seems, That such Juror shall be liable to lose his Issues only for such Default, and not the yearly Value of his Lands, unless the Party pray it: But a Juror who hath actually appeared, and after makes Default, is said to be subject to such Forfeiture of the yearly Value of his Lands, whether the Party pray it or not, because his Contempt appears to the Court by its own Record; yet even in this Case the Court, in Discretion, will sometimes only impose a small Fine. Alto it is said, That no Juror shall be subject to such Penalty, where the Inquest could not be taken, if he had appeared, as where but five of the Jurors summoned on an Affidavit, have had a View of the Land. Alto it seems, That a Juror who makes Default without ever coming into the Town wherein the Court is holden, is liable only to lose his Issues, or to be amerced, but not to be fined: And it is said, That he shall neither be fined nor amerced, if the Defendant be enjoined on the Day on which the Jury was to appear, for that his Appearance in such Case would be to no Purpose; and it seems questionable whether a Juror be amercable for not appearing at the Return of a Sicut alias Verum facias; where the first Verum was not served; neither doth a Juror seem to be amercable at all, at the Day of the Return of the first Verum facias, except before Justices errant, or of Oyer and Terminer, &c.

Sec. 15. II. For refusing to be sworn when they do appear, for which, as it seems, every Court of Record may of common Right impose such a reasonable Fine on any one returned on a Grand or Petit Jury, as shall seem convenient.

Sec. 16. III. For refusing to give any Verdict at all.

Sec. 17. IV. For endeavouring to impose upon the Court, as where a Petit Jury offer a Verdict to the Court, as agreed to by their whole Number, where, in Truth, some of them have not agreed to it; or where they agree upon two Verdicts, and first to offer one of them to the Court, and to stand to it, if the Court shall express no Dissatisfaction to it; but if the Court shall dislike it, then to give the other.

Sec. 18. V. For misbehaving themselves after their Departure from the Bar, as where they do not all keep together till they have given their Verdict; or where any of them carry any Thing eatable with them in their Pockets, or eat or drink, or otherwise refresh themselves without Leave from the Court, before they have given their Verdict, though they were agreed on it, and were also all the Time in the Custody of the Bailiff appointed to take Care of them.
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Sec. 19. VI. For sending for, or receiving instructions from either of the Parties concerning the Matter in Question, and therefore much more for receiving a Bribe.

Sec. 20. As to the second Particular, viz. How far Jurors are punishable in the Manner abovementioned, in their judicial Capacity, it seems to be the current Opinion of the old Books, that Jurors are not subject to any Prosecution for a false Verdict, except by way of Assault; and there seem to be very few ancient Precedents, for the Punishment either of a Grand or Petit Jury, neither for giving a Verdict against Evidence, or the Direction of the Court either in a Criminal or Civil Matter. It is said indeed in Fitzherbert's Abridgment of a Case in the Time of King Richard II. That the Judge told the Jury, upon their Acquitting a common Thief of an Indictment, that they should be bound to their Behaviour for their Lives: But this was only the sudden Opinion of a Judge; and it doth not appear, that the Jurors were afterwards actually so bound in Pursuance of the said Opinion; and Fitzherbert makes a Query in his Abridgment of the Case, by what Law they could be so bound: And as to those three other Cases in the Time of King Edward III. wherein it is said, That a Juror was committed for refusing to agree with the other eleven, that it is said in the first of those Cases, That such Juror said his Companions a Day and a Night, without agreeing with them, and this without Reasons: It is reasonable to intend, That there might be some Circumstances of Misbehaviour, as an obstinate perverse Resolution, Right or Wrong, to find a Verdict one way, and not to consult with the other Jurors, nor hear their Reasons, &c. And in the last of the said Cases it is said, that the Juror committed by the Justices of Assize, for refusing two Days and a Night to agree with his Companions, and saying, that he would rather dye in Prison than agree with them, was afterwards discharged by the Justices of the Common Bench, upon the Adjournment of the Assize thither. And it was Part of the Charge against Empson, who was indicted in the Beginning of the Reign of King Henry VIII. for a great Complication of Offences, That he had committed a Jury to Ward, and bound them to appear before the King and his Council, and afterwards, on their Appearance, fined them (though with the Concurrence of the rest of the Council) in the Sum of 6d. a-piece, for refusing to find a Person guilty of an Indictment of Larceny, upon sufficient Evidence; yet it is said in Dalison's Reports of Cases, in the third and fourth Years of Philip and Mary, That it was agreed, that Justices of Assize, Oyer and Terminer, Gaol-Delivery, or Peace, have no Power indeed to impose Fines on Jurors who make a false Oath before them, but that they may give them a Day before themselves, or the King's Council, by which it seems to be implied, That such Jurors were then thought to be some way or other punishable by such Judges, or at least by the King's Council; for otherwise it would be to little Purpose to bind them to appear before them. Alto it seems to be holden by Sir Edward Coke, That though a Jury be no way punishable for Convicting a Man upon an Indictment against Evidence, yet they might be charged in the Star-Chamber for their Partiality in finding a manifest Offender not guilty: And about the later End of the Reign of Queen Elizabeth, a Jury was committed and fined, and bound to the Good Behaviour, for finding one Wharton guilty of Maltreatment only, against clear Evidence, and the Direction of the Court, upon an Indictment of Murder: And it is said in Palmer's Reports, That Jurors, who go
against the Directions of the Court are to be fined: And there are several instances in the Beginning of the Reign of King Charles II. wherein it was resolved, that both Grand and Petit Juries were inable by the Justices of Gaol-Delivery, for going against plain Evidence, and the Directions of the Court; but these Proceedings were always thought Grievous, and were complained of in the House of Commons; and this Question was at first fully considered and debated in Bawd's Cafe, who having been committed by the Justices of Oyer and Terminer at the Old Bailey, brought his habeas corpus in the Court of Common Pleas, to which it was returned, That he was committed for the fine of forty Marks, imposed on him for having, with other Jurors, acquitted certain Defendants of an Indictment for an unlawful Assembly, against full and manifest Evidence, and against the Direction of the Court in Matter of Law; and upon this Return he was discharged, and the Return was adjudged insufficient, for not setting forth particularly so much of the Evidence that it might appear that it was full and manifest; and likewise for not setting forth, That the Defendant did know, and believe it to have been full and manifest; and also, for not shewing what the Direction of the Court was, and in what Manner the Defendant found against it. And it was also resolved, That Petit Juries are in no Cafe inable for giving a Verdict against the Evidence delivered in Court, whether they be liable to an Attaint for such Verdict or not, not only for that the Jury are by Law the proper Judges of Matter of Fact, as the Judges are of Matter of Law, and therefore ought to be free in their Judgment of it, without being over-ruled by the Judges, who, strictly speaking, have no more to do with the Judgment of the Fact, than the Jurors have with the Judgment of the Matter of Law; neither is it possible that a Judge can certainly know that a Juror acts corruptly in giving this Verdict contrary to the Strength of the Evidence delivered in Court; for he may be influenced by his own personal Knowledge of the Truth of the Fact, of the Credit of the Witnesses, the Reputation of the Parties, and many other Circumstances unknown to the Judge, and well known to the Jury, for which Cause the Law provides, That all Ills should be tried by the Neighbourhood of the Place in which they are supposed to arise, because Neighbours are presumed to have better Knowledge than others of what concerns their Neighbours. And for these Causes, and other such like, the Court of King's Bench granted an Information against a Town-Clerk, for publishing an Order of the Court against Jurors, who had found a Person guilty of Manslaughter only, upon an Indictment of Murder, by which Order the said Jurors were declared to be justly suspected of Bribery, and declared incapable of holding an Office, &c.

Selb. 21. Yet if it shall plainly appear in any Cafe, that Jurors are perfectly satisfied of the Truth of a Fact, whereupon they declare to the Court, that they find it in such a particular Manner, and the Court directly tell them, That upon the Fact so found, as they have agreed it to be, the Judgment of the Law is such or such, and therefore, that they ought to give a Verdict accordingly, yet they obstinately insist upon a Verdict contrary to such a Direction; it seems agreeable to the general Reason of the Law, that the Jurors are inable by the Court in such a Cafe, unless an Attaint lies against them; for otherwise they would be dispensable for so palpable Partiality, in taking upon them to judge of Matters of Law, which they have nothing to do with, and are presumed to
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to be ignorant of, contrary to the express Direction of one who by the Law is appointed to direct them in such Matters, and is to be presumed of Ability to do it.

Sec. 22. Also if a Judge, for the better Direction and Information of a Jury, shall ask them their Opinions concerning such a particular Fact, and they shall refuse to answer him, and obstinately insist to deliver in their Verdict as they think fit, contrary to his Direction, it seems questionable, whether they may not be fined in such a Case also, unless an Attaint lie against them; for that it is the Duty of Jurors to take the Advice and Information of the Court, in Order to be governed by it as far as shall be consistent with their Consciences.

Sec. 23. Also if a Jury shall refuse to find an Office for the King, upon full Evidence, it hath been helden, That they may be fined, if that in such Case they are not liable to an Attaint, and their finding does not determine any Man's Right, and the King, in many Cases, hath no other Remedy; yet it seems questionable, how far at this Day these Reasons may be thought conclusive; and it seems, that they hold as strongly for the Punishment of Grand Jurors refusing to find an Indictment of High Treason; and yet it will be hard to maintain, That such Jurors are any Way punishable for such a Refusal.

Sec. 24. But if a Petit Jury in a Loct, conceal a Matter presentable by them, it is a good Custom that they may be amerced for such Concealment, being found by the Grand Jury; and by 2 H. 7. 1. of 44 more at large. Book 1. Ch. 59. 8. 1. If an Inquest conceale any Matter inquirable before Justices of Peace, another Inquest may be impelled to inquire of such Concealments, and the Concealers may be amerced by the Direction of such Justices.

Having shewn in what Cases the Ministers of the Court are punishable in the Manner abovementioned, I am now to shew, in what Cases others may be so punished; and for this Purpose I shall endeavour to shew,

1. Where inferior Judges are punishable in such Manner.
2. Where Counsellors.
3. Where Gaolers.
4. Where any Person whatsoever.

As to the first Point, I shall endeavour to shew, where inferior Judges are in such Manner punishable,

1. For proceeding without Jurisdiction.
2. For proceeding unjustly, oppressively or irregularly.
3. For refusing to do Justice.
4. For Contempts of superior Courts.

Sec. 25. As to the first of these Particulars, viz. In what Cases inferior Judges are punishable in the Manner abovementioned, for proceeding without Jurisdiction; it seems, 1 That the Court of King's Bench having a general Superintendency over all inferior Courts may in strictness award an Attachment against any such Court usurping a Jurisdiction no Way belonging to it, and putting the Subject to unnecessary Vexation by Colour of a judicial Proceeding wholly unwarranted.
by Law, and therefore prohibited by it, yet in these Cases it seems to be rather the more usual Way, first to award a Writ of Prohibition to such Court, and afterwards an Attachment upon its Proceeding after such Prohibition, and not to grant a Rule to the Cause why an Attachment should not go in the first Instance, unless there be some extraordinary Circumstances in the Case; as where the Steward of a Leet is guilty of double Usurpation, as of holding Plea of a Matter which arose out of his Precinct, and which, if it had arisen within his Precinct, would not have been within the Jurisdiction of his Court; or where the Judge of an inferior Court refuses to receive a Plea that the Cause of Action arose out of his Jurisdiction, or where any Judge takes Cognisance of a Cause to which he himself is a Party; or where the Judge of a Court-Baron is privy to a Practice of splitting a Cause of Action for more than forty Shillings into lesser Sums, in Order to bring it within the Jurisdiction of the Court; but in this last Case, there seem to be more Instances of Prohibitions than Attachments and in the Cases abovementioned, and all others of the like Nature, it seems to lie wholly in the Discretion of the Court to grant either.

Sect. 26. As to the second Particular, viz. In what Cases inferior Judges are punishable in the Manner abovementioned, for acting unjustly, opprobriously or irregularly; it is not easy to meet with Causes of this Kind in the Books, there being seldom any Thing in them so remarkable as to be thought worth reporting; but it seems to be a common Practice to grant Attachments against the Judges of such Courts for any Practice contrary to the plain Rules of natural Justice, though it have never been so long used in such Courts; as for denying a Defendant a Copy of the Declaration against him, and going on to Trial, or giving Judgment against him, without giving him any Manner of Notice, or Time to make his Defence, or for taking of unreasonable Diftresses, either on mense Proceeds, or Execution; or for compelling a Defendant to give exorbitant Bail, or for proceeding contrary to the Prohibition of a Statute, as by amerasing a Clergy-Man according to his Spiritual Benefice; or by affiling an Amercement without any Affirmant by the Tenants of the Manor, or by taking Money of a Plaintiff or Defendant for vicious Pleading.

Sect. 27. As to the third Particular, viz. In what Cases inferior Judges are punishable in the Manner abovementioned, for refusing to do Justice; it seems clear, from the general Reason of the Law, and the common Practice of the Court of King’s Bench in Causes of this Nature, that the said Court may in its Discretion, award an Attachment against any such Judge, obstinately and perversely, and without any Colour of a reasonable Excuse, refusing to proceed at all, or to give Judgment, or award Execution, in a Matter brought regularly before him; for all such Delays of Justice are not only grievous to the Suiter, but bring a Disgrace upon the Law itself; yet if there be no extraordinary Circumstances in any such Delay, to bring the Judge under a reasonable Suspicion of Corruption, it seems the more usual Method to take out a Writ to such Judge, commanding him to do the Thing, of the Delay whereof you complain; and if such Writ be not obeyed, to take out an Alias & Pluries, or to take out the Alias & Pluries together with the first Writ; and thereupon, if the Judge refuse to comply, to take out an Attachment against him at the Suit of the King and of the Party, which may either be returnable into the Court of King’s Bench, or
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at the Party's Election into the Court of Common Pleas, except in some
special ☑ Cases; and this seems ☑ to be the proper Remedy to compel the
Lord of a Manor to hold a Court for the determining of a Writ of Right
Patent, or a Writ ☑ of Right Cloze, or to compel the Judge of any in-
terior Court, whether of Record ☑ or not, to proceed ☑ in a Plea, or to
give Judgment, ☑ or to award Execution ☑

Sect. 28. As to the fourth Particular, viz. In what Cases inferior
Judges are punishable in the Manner aforesaid, for Contempt of
Superior Courts: There is no Doubt but that Justices ☑ of Peace, or
Commissioners ☑ of Sewers, may be so punished for proceeding in any
Matter before them, after a Censor's ☑ delivered to them, or the Judge of
a Spiritual ☑ or Civil ☑ Law Court, for proceeding in a Cause, after No-
tice of a Rule to shew Cause why a Prohibition should not go, or a
Judge of any inferior Common Law Court, for proceeding in a Cause
after a Habeas Corpus ☑ or Writ of Error allowed; or a Sheriff, ☑ for
proceeding in Replevin, or other Cause, in the County-Court, after a
Superfedeas, Pone or Recordare. Also a Rule ☑ has been granted to shew
Cause why an Attachment should not go against the Steward of a Wa-
pentake for proceeding after a Tol, though this be only a Contempt to
the County-Court.

Sect. 29. Also Justices of Peace may be punished in the Manner a-
foresaid, for acting in a contemptuous Manner against the De-
mination of the Court of King's Bench; as where an Order of Settle-
ment, specially setting forth the Circumstances of the Case, is removed
into the said Court, and quashed there, by the Judgment of the Court,
upon the Merits; and yet the Justices of Peace afterwards make another
Order to remove the same Perfon to the same Place, for the very same
Cause, without regarding the Judgment of the Court though it were
well known to them, and inflicted on by the Parties.

Sect. 30. As to the second Particular, viz. In what Cases Counsellors are
punishable in the Manner aforesaid, it seems clear, That not-
withstanding they are neither Officers or any Court, nor invested with
any Judicial Office, but barely practice as Counsellors, yet ☑ inasmuch
as they have a special Privilege to practice the Law, and their Mis-
behave tends to bring a Disgrace upon the Law it self, they are pun-
ishable for any foul Practice as other Ministers of Justice are.

Sect. 31. As to the third Particular, viz. In what Cases Gaolers are pun-
ishable in the Manner aforesaid, it seems clear, That they are
not only punishable in this Manner, as all other Officers are, by the
Courts to which they more immediately belong, for any gross Misbe-
avour in their Offices, or Contempts of the Rules of such Courts, but
they are also punishable by any other Courts for disobeying Writs of
Habeas Corpus awarded by such Courts, and not bringing up the Prisoner
at the Day prefixed by such Writs. Also it seems clear, That it is no
Excuse for not obeying a Writ of Habeas Corpus ad Subiectandum, that the
Prisoner did not tender the Fees due to the Gaoler: Also ☑ it seems to be
the better Opinion, That the Want of such a Tender is no Excuse for
not obeying a Writ of Habeas Corpus ad Faciendum & recipiendum; how-
ever ☑ it is certain, That if the Gaoler bring up the Prisoner by Virtue
of such Habeas Corpus, the Court will not turn him over till the
Gaoler be paid all his Fees, ☑ nor, as some ☑ say, till he be paid all that
is due to him for the Prisoner's Diet, for that a Gaoler is compellable ☑
to find his Prisoner Sustenance; but this is denied by others ☑

Sect. 32.
Seft, 32. Also it seems, That the Court of King's Bench, which has a general Superintendency over all Persons who are in any Respect Ministers of Justice, may award an Attachment against any Gaoler using a Prisoner barbarously and inhumanely: yet it is said, That a Gaoler is no Way punishable for keeping a Debtor in Irons. And it seems agreed, that a Gaoler shall not be punished in the Manner abovementioned, for the bare Escape of a Person in his Custody by Civil Process, but that the Party grieved by such Escape ought to take his Remedy by Action.

Seft, 33. As to the fourth Point, viz. In what Cases any Person whatsoever is punishable in the Manner abovementioned: it seems, That even Peers of the Realm, whether Spiritual or Temporal, are liable to such Punishment for some Contempts, as for refusing a Person arrested by due Course of Law, or for proceeding in a Cause against the King's Writ of Prohibition, or for disobeying other Writs, wherein the King's Prerogative, or the Liberty of the Subject are nearly concerned; but it doth seem clear, that it is a certain general Rule, That a Peer is punishable in this Manner for Disobedience of all Writs whatsoever, and it seems certain, That no Peer is liable to an Attachment for not appearing on a Jury; therefore it seems, That what is said in some Books in general, That an Attachment lies against Peers for Contempts, ought to be understood of such only as are of an enormous Nature, as those abovementioned, and others of the same Kind, about which it is difficult to lay down any certain particular Rules; however it is certain, that all other Persons are liable to an Attachment for Contempts, all the particular Instances whereof it would be endless to enumerate, and therefore I shall only take Notice of the most remarkable, which seem reducible to the following Heads.

1. Contempts of the King's Writs.
2. Contempts in the Face of a Court.
3. Contempts of the Rules or Awards of the Court.
4. Contempts of the Rules or Awards of the Court.
5. Abuses of the Proces of the Court.
6. Forgeries of Writs, and other Decrets of the like Kind, tending to impose on the Court.

Seft. 34. As to the first Particular, viz. Where Persons are punishable in the Manner abovementioned for Contempts of the King's Writs, it seems, that it may reasonably be argued, That all such Writs, being in the King's Name, and importing some lawful Command or Prohibition from him, which every Subject is in Duty bound to obey, every Disobedience of any of them being a Contempt of the King's Authority, is, in Stricte, punishable in the Manner abovementioned, if the Court in Discretion think fit to proceed: Yet it doth not seem to have been usual for the Court to proceed in this Manner for a bare Nonfeasance, in not performing the Command of the first Writ in any Case whatsoever. But it seems clear, That an Attachment lies of Course for the Nonperformance of the Demand of a Process, which may in some Cases, if not in all, be taken out together with the Alias, at the same Time with the first Writ: Also it seems, That the Court may in any Special Case, in which it shall seem proper, make a Rule to compel the Party to whom the first Writ is directed, to execute it, and, if

Supra Seft. 27.
Chap. 22.

Of Attachment.

If such Rule shall be disobeyed, there can be no Doubt but that the Court may proceed against such Disobedience in the same Manner as they usually do against the Disobedience of any other Rule; Also if it seems to be common Practice to grant Attachments upon Affidavits of Contempts to the King's Writs, by acting contrary to the Purport of them. Also there can be no Doubt, but that if a Sheriff shall in any Case return to the Court, That a Person arrested, or Goods seised, or Possession of Lands delivered by him, by Virtue of the King's Writ were refused or violently taken from him, the Court may award an Attachment against the Restors. Also it is certain, That the Court hath, in some Cases, awarded an Attachment upon Affidavits of a Refucon, where the Officer hath not returned one; yet this was ancienly looked on as irregular and of late the Court has refused to grant an Attachment in any Case for a Refus, unless the Officer will return it; for that it hath been found by Experience, that Officers will often take upon them to swear a Refus, where they will not venture to return one.

Sect. 35. As to the second Particular, viz. Where Persons are punifiable in the Manner abovementioned, for Contempts in the Face of the Court; it seems clear, that all Persons are punifiable in this Manner, not only for an actual Breach of the Peace, but also for any heinous Misdemeanour in the Face of the Court; as for giving false, trifling, and contradictory Answers upon an Examination in Court concerning an Officer's Ability to be Bail for another, in an Action depending in the Court, or concerning any other such like Matter in Question before the Court, and to be determined by the Examination of the Parties; or for any contumacious Behaviour towards any Judge in the Face of the Court, as by charging him with Injustice, and praying for an Information against him, etc.

Sect. 36. As to the third Particular, viz. Where Persons are punifiable in the Manner abovementioned, for contemptuous Words, or Writings, concerning the Court; it seems needless to put anyInstances of this Kind, which are generally so obvious to common Understanding, and therefore I shall only observe, That sometimes Attachments have been granted for contemptuous Words concerning the Rules of the Court, without making any Rule to shew Cause why such Attachments should not be granted, because it would be vain to serve him with a second Rule who has defied the first.

Sect. 37. As to the fourth Particular, viz. Where Persons are punifiable in the Manner abovementioned, for Contempts of the Rules or Awards of the Court; There is nothing more frequent than to proceed in this Manner for Contempts of this Kind, as where a Defendant in an Action of Account being adjudged to account before Auditors, refuses to do it, unless they will allow such an Acquittance, which was disallowed by the Court before; or where one who has submitted to an Arbitration by Rule of Court, being afterward personally served with a Copy of the Award, and required to perform it, refuses to do it, or where one refusing to pay the Costs taxed by the Matter for that such a Taxation is, in Judgment of Law, a Taxation by the Court: But it seems, That generally an Attachment is not grantable for Disobedience of any Rule, unless the Party have been personally served with it; nor for Disobedience of a Rule, at Nisi Prius, unless it be
be made a Rule of Court, not for Disobedience of a Rule made by a Judge at his Chamber, unless it be overtred.

Sect. 38. As to the fifth Particular, viz. Where Persons are punishable in the Manner abovementioned, for Abuses of the Process of the Court, there are so many Iniances of this Kind that it would be in vain to go about to enumerate them all, and therefore I shall only take Notice of some of the Principle of them, as,

Sect. 39. First, the Taking out such Process without any Colour of Right to it; as where one sues out Execution without any Judgment to warrant it, &c. or where a Woman brings an Appeal of the Death of her Husband, whom she knows to be alive.

Sect. 40. Secondly, The making use of such Process as a Stale to help the Jurisdiction of an inferior Court; as where one arrests another by a Latitat, in order by that Means to bring him within the Limits of an inferior Court, and when he has got him there, drops the Latitat and proceeds in the inferior Court.

Sect. 41. Thirdly, making use of such Process in a vexatious Manner; as where a Person who has brought an Action in one Court, does afterwards sue the same Defendant, for the very same Cause, in another Court, while the first Action is still depending, in which Case the Defendant seems to have an Election either to move for an Attachment, or to bring an Action on the Case for such a vexatious Proceeding against him.

Sect. 42. Fourthly, Making use of such Process any other way to serve the Purposes of Oppression or Injustice; as where one arrests another at my Suit, without my Privity, in order to make some undue Advantage from him, &c.

Sect. 43. As to the sixth Particular, viz. Where Persons are punishable in the Manner abovementioned for forging of Writs, and other Decrees of the like Kind, tending to impose on the Court; nothing can be more frequent than to proceed in such Manner for Offences of this Kind, as for altering the True of Writs, or for filing them up after they are sealed, or for bringing groundless Actions, in order to intrude the Parties to the Privilege of the Court, or for getting Judgment in Ejecution, by Affidavit of the Service of a Declaration on one who was procured to perfonate the Tenant, or for any such like Practices.
CHAP. XXIII.

Of Appeal.

Before we examine the Nature of such Process, as is grounded on an Appeal, Indictment, or Information, it may not be improper, first to consider the Nature of each of these in Particular. And first of Appeals, of which there are two Sorts,

1. By an Innocent Person.
2. By an Offender confessing himself Guilty, who is commonly called an Approver,

Sec. 1. And first, of an Appeal by an Innocent Person, which is the Party’s private Action, prosecuting also for the Crown, in respect of the Offence against the Publick, which he may do two ways,

1. By Writ.
2. By Bill.

Sec. 2. As to the Writ of Appeal, I shall only take Notice in this Place, that it is an Original issuing out of Chancery, and returnable in the King’s Bench only; and for the Form of it I shall refer the Reader to the later Part of this Chapter, wherein I shall endeavour to shew for what Defects it may be abated.

Sec. 3. Also I shall refer the Reader to the same Place, for the Form of a Bill of Appeal, and shall not here take any farther Notice of it, than by observing that it must contain greater Certainty than a Writ of Appeal, and is in the Issue both of the Writ and Declaration, and shewing before what Courts, and against whom it may be prosecuted.

Sec. 4. And first, there is no Doubt but that any Appeal may be

b. S. P. C. 64.
c. Letters C. D. 311.
e. Law. 311.

sued by Bill in the King’s Bench against any Person in custodia Marshalls, either by an actual Commitment, or by having Bail filed for him in that Court; but not against one who is mainpried de die in diem, for that such an one cannot be said to be in custodia Marshalls. And it hath been resolved, that if the Appellee be arraigned and tried the same Term, there is no Necessity to file the Bill against him. Also it seems clear, that if a Defendant appear in the said Court on a void Writ of Appeal, he may be committed to the Marshal, and then declared against in custodia Marshalls; but where a Defendant appears on a Writ not void, but voidable only, as for the want of an Addition, &c. it was once holden, that he could not be committed, nor declared against in custodia Marshalls; but ought to be discharged. But the contrary hereto seems to be now settled in the Case of Reuer against Trundal, who appearing in the Court on a Writ of Appeal of Death, demanded Oyer of
Of Appeal.

Book II.

Like Case be-
tween Smith
and Rowe,
Mich. 7.

Note.

The writ, and pleaded in Abatement the want of an Addition; and
thereupon the Court abated the Writ, and suffered him to be arraigned
by Bill in estoppel Marchballi. And surely this cannot but seem more
reasonable than to suffer a Prisoner under so heavy an Accusation, to
which he is still liable, to go at large without a Trial; neither do I find
any Reason given why a Prisoner appearing on a voidable Writ, should
have a greater Advantage than on a void one.

Sect. 5. Secondly, It is also held, that an Appeal may be com-
cenced before Justices in Eyre, which, as I suppose, must be intended
of an Appeal by Bill, for that all Writs of Appeal must be returnable
in the King's Bench.

Sect. 6. Thirdly, Also it seems clearly to follow, from the Purport
of the Statute of Westminster, 2. Ch. 29. That Bills of Appeal may
be commenced and determined before Justices, specially assigned, in special
Cafes, and for certain Causes, to hear and determine them.

Sect. 7. Fourthly, it is certain, * that Commissioners of Gaol-de-
delivery may receive a Bill of Appeal against any Prisoner of the Gaol
which they are authorised to deliver. Also it is generally held, That
they may receive such a Bill against a Person who has been let to Bail
by them, but not against one who has been let to Mainprize. And it
hath been resolved, That if Part of the Accomplices to the same Felony
be in the Prison which such Justices are to deliver, and the others be
not in it, the Justices shall receive an Appeal against them all, which,
after the Trial of those that are in the Prison, shall be removed into
the King's Bench, where the others shall be proceeded against. But
these three last Points, having been already more largely considered,
Chap. 6. Sect. 5. I shall refer the Reader to what is there said concern-
ing them.

Sect. 8. Fifthly, It seems to follow, from the Purport of the Statutes
which have been generally continued to authorize Justices of Assise to
deliver Gaols without any special Commission of Gaol-delivery, that
they may receive Bills of Appeal in the same manner as Commissioners
of Gaol-delivery may.

Sect. 9. Sixthly, It seems to be held in Fitzherbert's Abridgment, b
That Justices of Peace have Power to receive Appeals by Virtue of 34
Ed. 3. 1, which enacts That they shall hear and determine all manner
of Felonies and Trepasses in the same County, &c. But there is much
greater Authority c for the contrary Opinion: and the Case in the d Year-
Book, in the Abridgment whereof the said Opinion of Fitzherbert is
inferred, is plainly mistaken, for that it makes no Manner of Mention
of Justices of Peace, but only of Justices of Gaol delivery; to which
may be added, That the abovementioned Statute of 34 Ed. 3. 1, which
empowers Justices of Peace to hear and determine Felonies, &c. is
express, That they shall have Power so to do at the King's Suit, which
must be either taken to exclude the Suit of the Party, or to signify lit-
tle or nothing.

Sect. 10. Seventhly. It is certain, That an Appeal may be com-
cenced * by Bill, before the Sheriff and Coroner, and removed † from
them into the King's Bench, by Certiorari, * as hath been more fully
shown. Chap. 9.

Sect. 11. Eighthly, It seems to be agreed, & That an Appeal by
the Course of the Civil Law, in Nature of a Bill of Appeal by the
Common Law, may be sued before the Constable and Marshal for some
Felonies
Chap. 23.  Of Appeals.

Felonies done out of the Realm, in Relation whereunto it is enjoyned by 1 H. 4. 14. as followeth, For many great Inconveniences and Mischiefs that often have happened by many Appeals made within the Realm before this Time, it is ordained from henceforth, That all Appeals to be made of Things done within the Realm, shall be tried and determined by the good Laws of the Realm: And that all Appeals to be made of Things done out of the Realm, shall be tried and determined before the Constable and Marshal of England for the Time being.

See 12. In the Construction of this Statute, it seems to have been agreed, That if any of the King's Subjects kill any other of his Subjects in any foreign Realm, the Wife, or Heir of the deceased may have an Appeal of his Death, before the Constable and Marshal, who shall proceed according to the Civil Law, and give Sentence by the Testimony of Witnesses, or Combat: From whence it follows, That no such Sentence can corrupt the Blood of the Appellee, for that such Corruption can only be caused by a Judgment by Course of the common Law. Also it seems to be clear, That no such Appeal can be prosecuted before the Marshal alone without a Constable.

See 13. It hath been holden, That if a Man die in England, of a Wound given him in a foreign Realm, he may be appealed by the Intent of this Statute, before the Constable and Marshal, for that it is certain, That he cannot be tried by the common Law; and it cannot be thought the Meaning of the Statute in restraining the Civil Law, in Cases within the Confinement of the Common, to restrain also in Cases where the Common Law had nothing to do with, and which were properly cognizable by the Civil Law, and by that only for the only End of such a Construction would be to cause a Failure of Justice.


Appeals considered, as to the Matter of them, are of two Kinds.

1. Not Capital.
2. Capital.

See 15. And first, of those not Capital, whereof there were anciently several Kinds, as Appeals de pace, de plagiis, and de Imprisonamento, as well as Appeals of Mayhem; but the former of these having been out of Use, and turned to Actions of Trepass, for these many hundred Years, I shall only consider the Nature of an Appeal of Mayhem; for the better Understanding whereof, I shall endeavour to shew,

1. Of what Mayhem it lies.
2. What ought to be the Form of the Writ, Bill and Declaration.
3. What Defence may be made by the Appellees.
4. How the Mayhem shall be tried, and where the Trial shall be peremptory.

See 16. As to the first Point, viz. Of what Mayhem an Appeal lies; I shall take it for granted, That notwithstanding every whatever done to a Man's Body, whereby he is let's-able in Fighting, may perhaps, properly enough, in a large Sense, be called a Mayhem, and will certainly subject the Person who occasion'd it to the Payment of
Of Appeals. Book II.

of Damages, in an Action of Trespass by the Party grieved, whether it were malicious, or happened through Accident or Misadventure; yet an Appeal of Mayhem cannot be maintained for any such Hurt, unless it were accompanied with some evil Intention in the Person who caused it; for surely the Law, in requiring that the Word Felony be made use of in every such Appeal, (as will be more fully shown under the next Point) cannot imply less than that the Fact must be attended with some odious Circumstances. Yet it seems clear, that if a Man striking at another with such an evil Intent, as would subject him to an Appeal of Mayhem, if the Person struck at should be maimed, shall happen to mislead, and strike a third Person, and main him, he is liable to an Appeal of Mayhem at his Suit, whether he had any Kind of Villain against him or not.

As to the second Point, viz. What ought to be the Form of the Writ, Bill and Declaration. I shall only take Notice in this Place,

**Section 17.** First, That the Word *Mayhem* is so necessary in every such Writ, Bill and Declaration, that it can be supplied by no other Word of the like Sense, nor by any Circumlocation whatsoever.

**Section 18.** Secondly, That in every such Writ, Bill or Declaration, the *Mayhem* must be laid to have been done *feloniously*, and yet the Defendant is not at this Day subject to the Law of Member from such an Appeal, as anciently he was, in which Respect the Law seems to have required the Use of the Word *feloniously*.

**Section 19.** Thirdly, That it is in the Election of the Plaintiff to declare against him who actually gave the Wound, as the principal Offender, and against those who abetted him, as Accessories; or else to declare against them all as Principals.

**Section 20.** Fourthly, That if a Man bring a Writ of Appeal of Mayhem, and Count of Battery he abates the Writ, because the Writ supposes no Battery, and therefore is not pursued by such a Declaration as it ought to be. But for other Particulars relating to the Form of Appeals, I shall refer the Reader to the Books of Entrances.

**Section 21.** As to the third Point, viz. What Defence may be made by the Appellee, being able to find little or nothing particular concerning Pleas in Abatement by such an Appellee, I shall refer the Reader for that Matter, to what is said concerning Pleas in Abatement of Appeals in general, in the latter Part of this Chapter, and only take Notice in this Place of the following Particulars.

1. Where a Recovery in another Action may be pleaded in Bar of an Appeal of Mayhem.
2. Where and in what Manner for Assault desmesne, and other Matters of the like Nature may be so pleaded.
3. Whether an Arbitrament, or an Accord with Satisfaction, may be so pleaded.
4. What Kind of Release may be so pleaded.
5. Where a Non sui in a former Action.
6. That an Appellee cannot wage his Law.

**Section 22.** As to the first of these Particulars, viz. Where a Recovery in another Action may be pleaded in Bar of an Appeal of Mayhem, 

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Chap. 23. Of Appeals.

It seems clear, That notwithstanding a Recovery in an Appeal of Mayhem cannot be pleaded in Bar of an Action of Trespass for the Battery, with which the Mayhem was accompanied, because in such an Appeal the Mayhem only is considered distinct from the Battery; yet a Recovery in an Action of Trespass for an Assault, Battery and Wounding, may be pleaded in Bar of an Appeal of Mayhem, appearing by proper Avowments to be brought for the same Trespass, for it shall be intended that the Jury in giving Damages for the Wounding, included the Maim, and no Man shall be liable to double Vexation for one and the same Thing; yet if in such a Case if the Appellee shall make it appear, by a Special Replication, that the Maim hath been occasioned since the Verdict in the Action of Trespass, by some subsequent Mortification, Dryness or Shrinkage of the Part, by Reason of the Wound, perhaps he may avoid such Plea by such Special Matter; but the Court will not intend it unless it be specially shown.

Sec. 23. As to the second Particular, viz. Where, and in what Manner for Assault Done, and other Matters of the like Nature, may be pleaded in Bar of an Appeal of Mayhem; it seems clear, that it is a good Plea in Bar of such an Appeal, That the Plaintiff first assaulted the Defendant, and would have beaten and killed him, unless he had defended himself against him, &c. Or that the Plaintiff first assaulted the Defendant, who fled from Place to Place, till he was reduced to a Necessity or Fighting, &c. And in some Books it seems to be holden in general, That for Assault Done may be pleaded in Bar of any such Appeal without any such special Circumstances in Favour of the Defendant: Yet how far this trufing Assault may justify a grievous Mayhem, as in the Cutting off of a Leg or Hand, &c. unless it happened accidentally in the Scuffle, without any barbarous Intention, may well defer to be considered. However, it seems clear, That if the Maim in the Declaration be laid in A. and the Defendant justify the same Maim, by Reason of an Assault made upon him by the Plaintiff in B. he needs not traverse the Maiming of the Plaintiff in A. or in any other Place, for it is apparent, that the same Maim could not be given but in one and the same Place, and therefore being justified in any one Place it is well answered. Also it seems clear, That a Man cannot justify the Maiming another in Defence of his Possessions, but only in the Defence of his Person. Also it is certain, That a Defendant cannot give in Evidence, on the general Issue, that the Plaintiff first assaulted him, but must specially plead it.

Sec. 24. As to the third Particular, viz. Where an Arbitrator, or Accord with Satisfaction, may be pleaded in Bar of an Appeal of Mayhem, it clearly seems to be admitted in the Pleadings, in some Books, and is laid to have been adjudged in a Roll, not printed, That notwithstanding every such Appeal must suppose the Fact to have been done feloniously, yet infallibly at this Day it subjects not the Appellee to the Loss of Member, but only to Damages, &c. as an Action of Trespass doth, it may be well barred either by Arbitrator, or an Accord with Satisfaction executed.

Sec. 25. As to the fourth Particular, viz. What Kind of Release may be pleaded in Bar of an Appeal of Mayhem; there can be no Doubt, but that a Release of all Manner of Appeals, or a Release of all Manner of Actions, or a Release of all Manner of Demands, might always be pleaded in Bar of such an Appeal; and that a Release of all Manner
Manner of Actions personal may also be pleaded in Bar of it at this Day, because the Appellant shall recover in it nothing but Damages; but while it subjected the Appellee to the Loss of Member, it seems questionable, whether it could be barred by a Release of Actions personal, because it seems to have been then esteemed an Action of a higher Nature, and not properly to have come under the Notion of a personal Action.

Sect. 26. As to the fifth Particular, viz. Where a Nonuit in a former Action may be pleaded in Bar of an Appeal of Mayhem, it seems clear, 6 That a Nonuit in any such Appeal, after the Plaintiff hath appeared to it, may be pleaded in Bar of any other. Also 7 it seems to have been adjudged, That it may also be pleaded in Bar of an Action of Trespass brought for the same Maim, and also for the Battery with which it was accompanied; yet howsoever the Law may stand in Relation to this Matter, if such Action be brought for the Battery only, without mentioning the Mayhem, I see not how it can be barred by such a Nonuit, because it is generally holden, That in an Appeal of Mayhem no Consideration 6 can be had of the Battery, but only of the Mayhem; and if so, it seems strange, that a Nonuit in such an Appeal should bar an Action of a different Nature, brought for a Matter which the Appeal had nothing to do with. However 8 it seems clear, That a Nonuit in an Action of Trespass is no Bar of an Appeal of Mayhem. Also I take it for granted, That a Nonuit in an Appeal of Mayhem, before the Plaintiff hath appeared to it, is not 6 a Bar of any other Appeal or Action, because the Writ, for what appears to the contrary, might be purchased by a Stranger, in the Name of the Plaintiff.

Sect. 27. As to the fourth Point, viz. How the Mayhem shall be tried, and where the Trial shall be peremptory; There is no Doubt, but that if the Defendant put it in Issue whether the Plaintiff were maimed or not, and pray that the Part which was hurt be viewed by the Court, in Order to have it adjudged on such View, whether there be any Mayhem or not, the Court may take a View of the Part, and on such View determine the Matter; or if there remain a Doubt upon the View, may award a Writ to the Sheriff to return some able Physicians and Surgeons, for the better Information of the Court. But it seems, That the Court cannot proceed to such a Trial by their View, unless the Defendant pray it: And in such Case it seems, 9 That they are not bound to try it in such Manner, but may order a Trial by a Jury, at which it is said, 10 That they may, if they think fit, order that the Jury shall have a View of the Wound: And because the Court hath such a discretion in Relation to such View, it hath been resolved, 11 That the Plaintiff in the Appeal must appear in proper Person, and not by Attorney, because that would put the View out of the Power of the Court. And it seems to be agreed, 12 That an Adjudication made upon such View is peremptory and conclusive to each Party.

Sect. 28. It seems to be holden, That the Defendant, in an Appeal of Maim, may in some Cases wage Battle; but I find no Instance in which Battel hath been actually waged in such an Appeal.

Secondly, Of Capital Appeals there are two Kinds.

1. Of Treason.

2. Of Felony.

Sect. 29.
Chap. 23

Of Appeals.

Sect. 99. And first of Appeals of Trespass, which, as it is said,
* might be red ancienly not only before the Parliament, but also be-
fore other Courts of Common Law, as well as before the Constable
and Marshal, and were determinable by Barret, Verdict, or otherwise,
according to the Course of the several Courts before which they were
commenced. But it is certain, That such Appeals before the Parliament
are taken away by 1 H. 4. 14; see forth more at large in the fourteenth
Section of this Chapter, But I do not see any Reason why Appeals of
Trespass, done in the Realm, before other Courts of Common Law,
which had before Jurisdiction thereof, should be construed to be taken
away by that Statute, which by ordaining, That Appeals of Things
within the Realm, shall be tried and determined by the good Laws of the Realm,
cannot be intended to restrain any Appeal determinable wholly by those
Laws, as all the Appeals before the Courts of Common Law seem always
to have been. However, since there has been no Instance of
any such Appeal, before any Court of Common Law, either since the
making of the said Statute, nor for many Years before, the Law relating
to such Appeals seems wholly obsolete at this Day. But as for
Appeals before the Constable and Marshal, of Trespass done out of
the Realm, it seems clear, that the Law in Relation to them is still in
Force, as it always hath been; for the said Statute of 1 H. 4. 14 by
ordaining, That Appeals of Things done out of the Realm, shall be tried and
determined before the Constable and Marshal, seems clearly rather to affirm
than weaken their Jurisdiction in Relation to such Trespass. Also it hath
been adjudged, that the Statutes which ordain, That Trespass done out
of the Realm shall be tried in the King's Bench, &c. do not take away
the Jurisdiction of the Constable and Marshal, in Relation to Appeals of
such Trespasses, as hath been more fully shewn Chap. 4. Sect. 9. And
agreeably hither, an Appeal of Trespass, supposed to have been commit-
ted beyond Sea, was actually commenced in the seventh Year of the
Reign of King Charles the First, by Donald Lord Raa, against David Ran-
sey, Esq. before the Constable and Marshal, who, for want of sufficient to
108.
Proof to clear the Truth of the Accusation, actually awarded, That a
Duel should be fought between the said Appellant and Appellee, for the
final Determination of the Matter.

Of Appeals of Felony there are four principal Kinds,

1. Of Death.
2. Of Larceny.
3. Of Rape.
4. Of Arfon.

But before I examine the Nature of each of these in particular, I
shall premise some Things in general concerning what Persons are capa-
bile of bringing them, as.

Sect. 30. First, That b the infancy, Old Age, or other Imbecility of
the Plaintiff, is no good Objection against his bringing an Appeal, tho'
it take from the Defendant the Benefit of waging Battle, and in that
Respect put him in a worse Condition than he would be in, if the Appeal
were brought by a Person capable of fighting; for inasmuch as the De-
fendant has proper Means for his Acquittal, by putting himself upon a

"Morr. 48.
pl. 64.
H. P. C. 18:
S. P. C. 69.
Letter D,
the
Books under
the
Cited.
Com. 47 Ed.
1. 36 116, 46.
-Trial. 41 Alg. 17.
Of Appeals.

Book II.

Trial by his Country, and the Imbecility of the Plaintiff is wholly owing to the Act of God, and no ways lessens the injury complained of by him, it is not reasonable he should suffer any Disadvantage from it. And agreeably hereto it seems to have been settled of late Times, contrary to the numerous Authorities in the old Books, That the Parol shall not demur in an Appeal for the Nonage of the Plaintiff. Yet it is certain, c That an Infant must prosecute such Suit by a Guardian; and it is said, d That he shall be nonsuit for the Mon-appearance of such Guardian, upon Demand, at any Day whereon he is demandable, notwithstanding an Allegation that he was not able to come by Reason of Sicknes, or other such like Excuse. And there e is a Case wherein the Court refused to enlarge the Day of such Guardian's Appearance upon a Surnise of his Sicknes. But notwithstanding the Guardian be not necessary in the Prosecution of such a Suit, yet if the Infant come into Court, and say he will relinquish it, and yet the Guardian will prosecute it, the Court may, f in Discretion, discharging such Guardian, and assign another, for it is not reasonable that an Infant be bound to continue a Suit against his Will, which demands nothing but Revenge, and will be chargeable to him.

Sec. 31. Secondly, g That a Woman may sue any other Appeal except that of the Death of an Ancestor; for that the Statute of Magna Carta, 34, which ordains, That no Man shall be imprisoned on the Appeal of a Woman, for the Death of any one but her own Husband, refains not any other Appeal whatsoever.

Sec. 32. Thirdly, That an Ideot, h or Person born Deaf and Dumb, or one attainted i of Treason or Felony, or but outlawed k in a Personal Action (so long as such Attainder or Outlawry continues in force) cannot bring any Appeal whatsoever.

And now I am more particularly to consider the Nature of an Appeal of Death in particular, for the better Understanding whereof, I shall examine the following Points.

1. Within what Time it must be brought.
2. In what County.
3. By whom.

Sec. 33. As to the first Point, viz. Within what Time an Appeal of Death must be brought, it is enacted by the Statute of Gloucester, Ch. 9. That an Appeal which from the Purpose of the whole Statute hath been construed to be meant only of an Appeal of Death) shall stand in Effect, and shall not be abated for Default of fresh Suit, if the Party shall sue within the Year and the Day after the Deed done. And it hath been held, a That the Computation of such Year and Day is to be made from the Time of the Wound which occasioned the Death, and not from the Time of the Death; and this Opinion seems somewhat to be favor'd by the Letter of the Statute, which is, That the Party shall sue within the Year and Day after the Deed done, but no Deed is done at the Time of the Death, but at the Time of the Wound; yet the contrary Opinion is settled b to be Law, and is certainly most agreeable to the Intent of the Statute, the plain Import whereof seems to be, That the Appellant shall not be adjudged to have made Default of fresh Suit, unless he have been negligent a Year and a Day; but negligent he could
not be as to the Bringing an Appeal before the Party was actually dead, because till then no Appeal lay. And agreeably hereto it seems also to be settled, that if a Person become Accessory after the Death, by receiving the Offender, an Appeal lies against him, at any Time within the Year and Day after such Receipt, because till then the Appellant could not possibly be guilty of any Negligence as to the Bringing of an Appeal against the Receiver. Also if an Appeal had been abated by the Demise of the King, before \(5^2\) Ed. 6. Ch. 7. by which this Mistake is provided against, it seems clear, That the Appellant might have sued a Re-attachment against the Appellee, within the Year and Day after such Demise, for that he was in no Default, and otherwise would have been without Remedy.

Sec. 34. It seems, That the Year and Day in any of the Cases above-mentioned, are to be computed from the Beginning of the Day, on which the Death, or Receipt, \(\&c\). happened, and not from the precise Minute, or Hour, because regularly the Law makes no Fraction of a Day, and therefore if the Party dye at any Time the first Day of January, the Year shall End the first Day of January following.

Sec. 35. As to the second Point, \textit{viz.} In what County an Appeal of Death must be brought, I shall take it for granted, That it is a Local Action, and consequently cannot be brought in a foreign County. But if a Person happen to dye in one County of a Wound received in another, it is said, that the Appellant had, by the Common Law, his Election to bring his Appeal in either County, and that in every such Case the Trial ought to be at the Bar, and by a Jury returned from the Body of each of those Counties. But since the making of \(26^2\) & \(3^3\) Ed. 6. 24. by which it is enacted, 
That in such Cases the Party to whom Appeal of Murder shall be given by the Law, may commence, take, and use Appeal of Murder in the same County where the Person feloniously stricken, or poisoned, shall dye, \&c. I take it for granted, That such an Appeal, in the County wherein the Party died, may be tried by a Jury of such County without the Joiner of any other.

I shall not in this Place examine in what County Accessories to Murder are to be appealed or tried, but shall refer the Consideration thereof to the Chapter concerning the Arraignment of the Principal and Accessory.

As to the third Point, \textit{viz.} By whom an Appeal of Death is to be brought, I shall endeavour to shew,

1. Where it may be brought by a Wife.
2. Where by an Heir.

1. As to an Appeal by a Wife, the following Particulars seem most observables.

Sec. 36. First, She must be able to prove, not only that she was wholly innocent herself of the Death complained of, but also that the Wife of the Deceased, at the Time of his Death, for it seems to be clearly settled, That \textit{Nunques accouple in local matrimonium} is a good Plea in such an Appeal, and triable by the Bishop's Certificate, who, if the Marriage were unlawful, by Reason of a Precontract, or

\(26^2\) Affl. pl. 52.
\(25^2\) Inf. 39.
\(5^2\) P. C. 63.

\(2^2\) Inf. 390.
\(3^2\) Th. 7. 10.

\(3^2\) Bro. App.-

\(5^2\) pl. 5.

\(10^2\) Bro. Re-attchment. 8.

\(7^2\) Co. 30.

\(5^2\) Mt. 5.

\(6^2\) Co. 1.

\(3^2\) Co. Lit. 192.

\(5^2\) b. 357. A.

\(3^2\) Co. 37.

\(8^2\) Ed. 2.

\(3^2\) pl. 6.

\(5^2\) pl. 10. Ord.

\(7^2\) H. 7. 12.

\(7^2\) pl. 4.

\(4^2\) H. 7. 18.

\(3^2\) pl. 10.

\(3^2\) Fire. Coron 59. 60.

\(4^2\) pl. 45.

\(4^2\) pl. 8.

\(3^2\) H. 7. 13.

\(4^2\) pl. 4.

\(4^2\) Finch. 410.

\(4^2\) pl. 411.

\(3^2\) Dy. 45. 8.

\(5^2\) pl. 8.

\(3^2\) H. 7. 13.

\(4^2\) pl. 4.

\(4^2\) Finch. 410.

\(3^2\) H. 7. 13.

\(5^2\) pl. 4.

\(3^2\) Inf. 33. b.
Confucianity, or otherwise, ought to certify against the Appellant. Asi it is laid down as a Rule in the Old Books, "That a Wife may have an Appeal of the Death of her Husband inter brachia sua interfere & non aliter. By which Words, inter brachia sua, according to Sir Edward Coke, b it is to be understood, The deceased had the Wife lawfully in Possession at his Death; and if this be the Meaning of them, thus much at least seems to follow, That if the Husband were divorced from the Wife at his Death, though by a voidable Sentence, she cannot maintain an Appeal. Yet it is generally held, That a Wife who hath eloped from her Husband may have an Appeal of his Death, as shall be more fully shewn in the next Section. And Stranford c seems to understand the Import of the Expression abovementioned to be this, That the Wife ought to have had the Deceased in her View, and to have been present at his Death, which is most certainly not necessary at this Day. But finding little more said concerning this Matter in any other Modern Book, I shall leave the farther Consideration thereof to others.

Sec. 37. Secondly, In some Cases a Woman may have an Appeal of the Death of her Husband, where the cannot claim Dower of his Lands, as where the Husband was attained d of High Treason at the Time of his Death; or after the Attinder he was still her Husband as much as before, and e it is the Loss of her Husband which is the Cause of the Appeal. Also where a Woman elopes from her Husband, it is said, that she may have an Appeal f of his Death, though not a Writ of Dower; for by the Common Law she might have had both; and the Statute of Westminster 2. Ch. 34. which takes from her the later, leaves the other as before.

Sec. 38. Thirdly, If such Appellant take another Husband either before, or pending the Appeal, the puts an End to it for ever; for being given her only from a Regard to her Widowhood, it cannot but cease when that determines, and being once barred, it is barred for ever. And on this ground it seems also to be certain, h That if the marry after Judgment in Appeal, the cannot pray Execution. However it seems clear, That in such a Case the Appellee shall not i be discharged without the King's Pardon: But I do not find it settled k what ought to be done with the Appellee in such a Case. But thus much seems to be certain, That the King cannot proceed against him by way of Indictment, because he is attainted already; and therefore it may probably be argued, That the Court may award Execution against him, either ex Officio, or at least at the Demand of the King, for otherwise he would save his Life by Reason of the Attinder by which he is adjudged to lose it.

Secondly, as to the Appeal of Death by an Heir, the following particulars seem most remarkable.

Sec. 39. First, if the deceased had a Wife at the Time of his Death, and such Wife were wholly innocent of it, the only, and not the Heir, hath a Right to the Appeal; and whether she bring one or wholly neglect it, and though the dye or marry within the Year and Day, the Heir cannot bring an Appeal; and the Reason hereof, according to Keilw, a is this, That the Appeal being once out of the Blood, shall not
not return to it again: Yet if the Wife herself had a Share in the
Guilt, the Heir may have an Appeal against her. But if the Petit
Treason be pardoned by the Parliament, it seems, That the Heir can
bring no Appeal, for he cannot bring it for the Murder only, because
the Petit Treason includes it in Murder and more, and being the great-
er Offence drowns the les, and therefore the Pardon of it seems to par-
don the Murder also.

Sect. 40. Secondly, Every such Appellant must be Heir c general to
the deceased, by the Course of the Common Law, unless d the Heir
general had himself a Share in the Guilt, in which Case the next Heir
shall have an Appeal against him. But a Father cannot e have an Ap-
peal of the Death of his Son, because he cannot be his Heir. Neither
f can any one bring an Appeal of the Death of a Person attainted of
Treason or Felony, except his Wife, because he can have no Heir.
Neither shall a special g Heir, by the Custom of Borough-English, or
otherwise, have an Appeal of the Death of his Ancestor, because he is
not his next general Heir; and yet he is inheritable to such of his
Lands to which the Custom extends. And for the like Reason, if
the deceased, at the Time of his Death, had two Sons, the Elder where-
of is attainted of Treason or Felony, neither h of them can have an
Appeal; nay, the Elder, because of the Attainder; not the Younger,
because he cannot be Heir to his Father while he has an Elder Brother;
who, though he be looked upon as dead in Law to some Purposes, is
yet in Truth alive, and capable of forfeiting all the Privileges belong-
ing to the Heir, though not of taking Benefit from any of them. But not-
withstanding a Younger Son cannot bring an Appeal of the Death of
the Father, while there is an Elder Son of the same Father living; yet
if the Eldest Son be by one Venter, and the Middle and Younger Son by
another, and the Middle Son be killed, the Youngest only shall have an
Appeal of his Death, because he only is his Heir, as being of the whole
Blood with him: And therefore, i it is no good Plea to an Appeal for
the Death of a Brother, That the Appellant has j, s an Elder Brother
living, without shewing, that j, s was of the whole Blood to the deceased.

Sect. 41. Thirdly, If an Appeal be once commenced by an Heir,
who dies hanging the Suit, it seems to be agreed, k by almost all the
Books, That no other Heir can afterwards proceed in such Appeal, or
commence a new one; for that this is a Personal Action, given to the
Heir in Relation to his immediate Relation to the Person killed, at the
Time of his Death, and like other Personal Actions, shall die with the
Person. But some l have holden, That if the first Heir die within the
Year and Day, without commencing an Appeal, the next Heir may
bring one. But this is made a Doubt by others, m and the Generality n
of the Books seem to favour the contrary Opinion, as being more agree-
able to the Reason of the Case aforesaid, and the general Tenor
of the Law in Relation to Appeals, which in no Case, as I know, will suffer the Right of bringing one to be transferred from one to anoth-
er, and therefore, as in Case o where the deceased had a Wife at the
Time of his Death, who dies within the Year and Day, the Heir hath
no Right to an Appeal; so if he have an Heir at his Death, in whom
the Right of the Appeal is vested, and such Heir die within the Year.

and Day, it seems, That no other Heir shall have an Appeal. Yet it is
by Sir Matthew Hale, and some others, That if the first Heir
get Judgment in an Appeal of Death, and die, his Heir may sue Exe-
cution. But this is doubted of by Sir William Staunford, and seems
contrary to many of the old Books, and not easily reconcileable with
the Reason of the Cases abovementioned. But whether in this Case the
Court may not award Execution, either ex Officio, or at the Demand
of the King, may defer to be considered, for the Reasons given Sect. 38.
Also if a Person who is killed have no Wife at the Time of his Death,
and no Issue but Daughters, and all those Daughters die within the Year
and Day, it may reasonably be argued, That the Heir Male may have
an Appeal, because the Right of bringing one never vested in any other
before. But finding this safe in none of the Books, I shall leave it to
be more fully considered by others.

Sect. 42. Fourthly. Every such Appellant must not only be Heir ge-
eral to the deceased, but also Heir Male; and this depends upon Magna
Charta, Ch. 53. by which it is enacted, That no one shall be taken or im-
prisoned on the Appeal of a Woman for the Death of any one but her own Husband.
And the Judges are to far bound to take Notice of this Statute, That if a
Woman bring an Appeal of the Death of her Father, or of any other
but her Husband, they ought, ex Officio, to abate the Writ, to whom
Defendant take no Exception to it. But it is said, That by the Common
Law an Heir Female might have brought an Appeal of the Death
of her Ancestor, as well an Heir Male. And it seems to be the better
Opinion at this Day, That the Heir Male of the deceased, who derives
his Blood through a Female, may have an Appeal, as the Uncle being
Heir on the Part of the Mother, or the Grandson by a Daughter, etc.
and yet the Mother in the first Case, and the Daughter in the second,
could have had no Appeal; for inasmuch as by the Common Law, such
Mother and Daughter had not only a Right to bring such Appeal, but
also to have such Right derived through them to others, it seems hard to
continue the Statute by depriving them of the former to take from
them the other also; especially considering, That an Heir Male, who derives
his Blood through Females, seems no Way les worthy to bring an Appeal,
than if he had derived it through Men; and all Statutes whatever,
which are made in Abridgment of any Right of the Subject, ought
to be strictly construed.

Sect. 43. Fifthly. In every such Appeal, by one, as Heir to the de-
cedent, it must specially appear by the Writ, or at least by the Count,
in what Manner he is so.

And now I am come to an Appeal of Larceny, for the better Under-
standing whereof, I shall consider,

1. By whom it may be brought.
2. Against whom.
3. In what County.
5. Where there shall be a Restitution of the Goods stolen.

As to the first Point, viz. By whom an Appeal of Larceny may be
brought, the following Particulars seem most remarkable.
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Of Appeals.

Sec. 44. First, There is no Necessity that the Appellant have the absolute Property of the Goods stolen, for it seems agreed, That a Carrier, or even a Servant, to whom Goods are delivered to be carried to a certain Place, or Churchwardens having Possession of the Goods of a Church, or in general, any Person whatsoever, who is so far intrusted with the Goods of another as in Judgment of Law to have the Possession, and not the bare Charge of them, may have an Appeal of Larceny against any one who shall steal them, for that they have a special Kind of Property in them against all Strangers: And it seems that they may either bring a general d Appeal as for their own Goods, or a special e one for the Goods of J. S. in their Custody. Also it is said, That a Person who hath been robbed of his Goods, still continues to have so far the Possession as well as the Property of them, that he may bring an Appeal of Larceny against any one who shall steal them from the Robber, as shall be more fully shewn in the next Section. But it seems clear, That no one can maintain such an Appeal who has the bare Charge of Goods without a Possession, as a Butler or Cook, who in my own House have the Charge of my Goods, for that in such a Case the whole Possession, as well as the absolute Property, in the Judgment of Law always continues in me. Also it is certain, That a Villain cannot e have an Appeal of Larceny against his Lord, for any of his Goods taken by the Lord, because b the Lord by seizing them makes them his own. But it is agreed, i that a Villain may have an Appeal of Death or of Rape against his Lord. Also it seems clear at this Day, That any Tenant, who is not a Villain, may have an Appeal of Larceny against his Lord.

Sec. 45. Secondly, There is no Necessity that the Wrong for which such an Appeal is brought, were immediately done to the Person of the Appellant, but if a Servant be robbed of the Master's Goods in his Custody, the Master i may bring the Appeal as well as the Servant, and in such Case he who first commences it shall prevent m the other. Also if one be robbed of Goods wherein another is jointly interested with him, and die, the Survivor e may bring an Appeal. Also if I be robbed by A. who afterwards is robbed of the same Goods by B. it is said, o That I may have an Appeal of Larceny against B. because A. claiming no Property, but taking the Goods merely as a Felon, had, in Judgment of Law, neither any Property nor Possession in them, but the same wholly continued in me. But if the Goods had been taken from me by a Trespasser, under the Pretense of some Title, and such Trespasser had been robbed of them, It seems that I could have no Appeal for them. Neither can an Executor p bring an Appeal for a Larceny from the Testator, because such Larceny, at the Time it was committed, was no Injury to the Executor, but to the Testator only; and therefore the Appeal for it being a mere personal Action, and wholly vested in the Testator, there is no Doubt but that it dies with him, as all other Actions for mere Torts do.


b See B. 1. Ch. 33. Sec. 9. H. P. C. 184. S. P. C. 60. F.

c See B. 1. Ch. 33. Sec. 5. 6 Ed. 4.

d H. P. C. 184. S. P. C. 60. F.
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Sect. 46. As to the second Point, viz. Against whom an Appeal of Larceny may be brought; having incidentally shewn what is most considerable relating to this Point under the former, I shall only take Notice in this Place, That this, or any other Appeal lies against an Infant, as well as against a Person of full Age, and against a Feme covert, in the same Manner as if she were sole, without taking Notice of the Husband.

Sect. 47. As to the third Point, viz. In what County such Appeal is to be brought; There is no Doubt, but that, like all other Appeals, it is a local Action, and must be brought in the County where the Felony complained of was done. Yet if one rob me in the County of A, and afterwards carry my Goods into the County of B, I have an Election either to bring an Appeal of Robbery in the County of A, or an Appeal of Larceny in the County of B, because the Possession as well as Property of the Goods continued in me, in Judgment of Law, after the Robbery; and therefore, in what Place ever the Robber keeps them from me, he feloniously injures me in the Possession as well as Property of them, and consequently may properly enough be said to steal them from me: Yet he shall be appealed for the Robbery in the first County only, for there only he was guilty of a Taking from the Person, without which there can be no Robbery. Also if one take me from the County of A into the County of B, and there rob me, he shall be appealed for the Robbery in the County of B, only, for he was guilty only of a Trespass in the County of A. But if one bring my Goods into the County of B by Reason of a Menace in the County of A, it may be questioned which is the proper County for the Bringing of the Appeal.

Sect. 48. As to the fourth Point, viz. Within what Time an Appeal of Larceny is to be brought; It seems to be agreed at this Day, That it may be sued at any Time, as well after as within the Year and Day, if the Plaintiff have made fresh Suit; for that the Statute of Gloucester, Chap. 9, which requires, That an Appeal be brought within the Year and Day, hath been construed to intend no other Appeal but that of Death; and the common Law seems to have limited no certain Time for the Bringing of an Appeal, but to have sundered it to be brought at any Time by one who had made fresh Suit; the nature whereof shall be more fully considered in the fiftieth Section. But it seems, That one who has been guilty of a gross Neglect in pursuance of the Offender, may be barred of such an Appeal, as well within the Year and Day as after; for that the common Law seems in all Appeals to have required, that the Appellant should have made fresh Suit; and the said Statute of Gloucester, which takes away the Necessity of it in Appeals of Death brought within the Year and Day, extends not to other Appeals.

Sect. 49. As to the fifth Point, viz. In what Cases there shall be a Restitution of the Goods stolen. I shall premise, That until such Goods are feiz'd to the Use of the King, or of some other Person claiming them under the Crown, as being Waifs, or the Goods of a Felon, &c. the rightful Owner, without any fresh Suit or Appeal, may seize them wherever he finds them; but they shall not be restored to them after such Seizure by others, without bringing his Appeal, &c. And for the better Understanding in what Cases a Restitution of the Goods so feiz'd shall be awarded on such an Appeal, I shall examine the following Particulars.

1. Whether
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1. Whether it necessarily require a fresh Suit.
2. What shall be esteemed a fresh Suit.
3. By whom, and in what Manner, such fresh Suit shall be inquired and adjudged.
4. How far the Appeal must be prosecuted.
5. Whether the Appellant's Title to such Restitution shall be preferred to any subsequent Title claimed in the Goods.
6. Whether there shall be such a Restitution on any other Prosecution besides that of Appeal.
7. Whether there shall be a Restitution to any Goods not mentioned in the Appeal.

Sez. 50. As to the first Particular, viz. Whether such Restitution necessarily require a fresh Suit; it so fully appears to be so by almost all the Books relating to this Matter, that it seems needless to cite Authorities to prove it.

Sez. 51. As to the second Particular, viz. What shall be esteemed a fresh Suit; It seems to have been anciently held, That to make a fresh Suit, the Party ought to have raised a Hue and Cry with all convenient Speed, and also to have taken the Offender: But at this Day it seems to be settled, That if the Party have been guilty of no gross Neglect, but have used all reasonable Care and Diligence in inquiring after, pursuing and apprehending the Felon, he ought to be allowed to have made sufficient fresh Suit, whether any Hue and Cry were levied or not, and whether such Offender were taken by Means of such Pursuit, or without any Assistance from it.

Sez. 52. As to the third Particular, viz. By whom, and in what Manner, such fresh Suit shall be inquired and adjudged; It seems, That it is usual and proper to make such Inquiry by the same Jury that tried the principal Matter; and it is certain, That upon the Finding of the fresh Suit by such Jury, the Court may award a Restitution: And in such Cases wherein the Appellee is condemned without any Trial, as where he is convicted by his own Confession, or outlawed, or stands mute, it seems, That the Court may make such Inquiry by any Inquest of Office, returned for such Purpose, and on their Finding the fresh Suit award a Restitution: But in either Case such Inquest is but an Inquest of Office, and perhaps is not absolutely necessary, but required chiefly for the Satisfaction of the Conscience of the Judges, in a Matter which, if they think fit, they may, by the Pursuit of some Authorities, examine themselves, as they generally may, (according to some Opinions) any Matters whatsoever inquirable by an Inquest of Office, especially if the Parties interested in the Thing in Question be willing that they should do so: And agreeably hereto it is held, in the best Authors. That the Judging of fresh Suit lies in the Discretion of the Court; and there is a Case wherein a Writ of Restitution of the Goods from was actually awarded, without making any Inquiry of the fresh Suit; but in the Book wherein this Case is reported, it is made a Query, whether such Inquiry ought not to be made at the Return of such Writ.

Sez. 53. As to the fourth Particular, viz. How far the Appeal must be prosecuted in Order to intitle the Appellant to a Restitution, it
it seems, That anciently the Appellant could in no Case be intitled to a Refutation, unless the Appellee were attainted at his Suit; and therefore, if several Appeals were commenced against the same Person, by several Plaintiffs, and the Appellee were attainted at the Suit of one of them, no other could have a Refutation, because the Appellee being once attainted, could not be afterwards attainted again: But it seems to be settled at this Day, That there is no such Necessity that the Appellee be attainted at the Suit of the Appellant; and therefore in the Case abovementioned, after such Attainder at the Suit of one Appellant, it shall be inquired by an Inquest of Office, Whether the Appellee were guilty of the Facts complained of in the other Appeals, and made fresh Suit, &c. and upon such Matter found by such Inquest, a Refutation shall be awarded, &c. Also if an Appellee die in Prison, it seems, That the like Inquiry shall be made by Inquest of Office, and thereupon a Refutation awarded, &c. And if an Appellee be outlawed, or have the Benefit of his Clergy before Conviction, or stand mute, or challenge peremptorily above twenty Jurors, or break from Prison, perhaps a Refutation shall be awarded upon such an Inquest; Finding the fresh Suit, without any farther Inquiry whether the Appellee were guilty or not, because by refusing to take his Trial, he tacitly seems to admit himself guilty. Also if one being an Appeal against two, whereof one is attainted, and the other acquitted, yet it seems, he shall have a Refutation. But if both the Appellants had been acquitted, it seems, that the Appellant should never have his Goods again, though it were expressly found that they were his Goods, but he shall forfeit them to the King for his false Appeal. But here if this ought not to be understood of such Goods only as were before seised to the King's Use, as having been waived, &c.

Sec. 54. As to the fifth Particular, viz. Whether the Appellant's Title to such Refutation shall be preferred to any subsequent Title gained in the Goods; it seems clear, That the Appellant's Title to such Refutation shall not be barred by any Seisure of such Goods, as being Waifs, or Eftrays, or the Goods of Felons, &c. nor even by a Sale of them, bond side, made in Market over, &c. And by the like Reason it is certain, That the Proctor of an Indictment, since 21 H. 8. 11. can forth more at large in the next Session, shall not be barred of his Refutation by any such Seisure, or Sale, &c.

Sec. 55. As to the sixth Particular, viz. Whether there shall be a Refutation of the Goods stolen, upon any other Prosecution besides that of Appeal; it seems to be clearly agreed, That by the Common Law it could not be had upon any other Prosecution whatsoever: But to remedy this Inconvenience, it is enacted, by 21 H. 8. 11. That if any Felon or Felons, do rob, or take away any Money, Goods or Chattels, from any of the King's Subjects, from their Persons or otherwise, within this Realm, and thereof the said Felon or Felons be indicted, and after arraigned of the said Felony, and found guilty thereof, or otherwise attainted by Reason of Evidence given by the Party so robbed, or Owner of the said Money, Goods or Chattels, or by any other by their Procurement; that then the Party so robbed, or Owner, shall be restored to his said Money, Goods and Chattels; and that as well the Justice of Gaol-Delivery, as other Justices, after whom any such Felon or Fe-
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Ions shall be found guilty, or otherwise attainted, by Reason of Evidence given by the Party so robbed, or Owner, or by any other by their Procurement, have Power by the said Act to award, from Time to Time, Writs of Restitution for the said Money, Goods and Chattels, in like Manner as the any such Felon or Felons were attainted at the Suit of the Party in Appeal.

Sect. 56. Sir William Staneford, a in his Construction of this Statute, seems to incline to an Opinion, That the Party may have a Restitution by Virtue of it without making any fresh Suit, and this seems to be agreeable to Practice, and the Purport of the first Part of the Statute, which seems to require no more in Order to intitle the Party to a Restitution, than that the Indictor be found guilty, or otherwise attainted by his Evidence, &c. Yet if it shall plainly appear to the Court, That the Party hath been guilty of gross Neglect in prosecuting the Offender, it may reasonably be argued, That he is not intitled to a Restitution, for the latter Part of the Statute, by ordaining, That Writs of Restitution shall be awarded as the Felon had been attainted in an Appeal, seems to imply, That it is a sufficient Favor, within the Intentions of the Makers of the Statute, to the Prosecutors of an Indictment, to give him a like Remedy for a Restitution of his Goods, as the Common Law gave to the Plaintiff in an Appeal, but it is certain, b That the Plaintiff in an Appeal, who appears to have been guilty of such a Neglect, cannot demand a Restitution by the Common Law. And the Construction I would contend for will appear the more reasonable, if it be considered, that it hardly can be imagined to be the Intention of Makers of the Statute, to give the Party a greater Benefit from a Conviction grounded on his own Evidence, as a Conviction on an Indictment may be, than from a Conviction on the Evidence of others, as a Conviction in Appeal must be. However, if it shall appear to the Court, upon the Evidence at the Trial, or otherwise, That the Party has been reasonably diligent in prosecuting the Offence, I readily grant, That the Justices may, if they think fit, in their Discretion award a Restitution, without making any Inquir'y concerning the fresh Suit; but this seems to be no more than they may also do in Appeal, if they think fit, as I have already more fully endeavoured to shew in Section 52.

Sect. 57. As to the seventh Particular, ciz. Whether there shall be a Restitution to any Goods not mentioned in the Appeal. There is no Doubt, but that a Man be robbed of several Goods by the same Person, either at the same or different Times, and such Goods be forfeited as Waifs, &c. and afterwards the Party, in his Appeal for the Robbery, mention some of those Goods only, and omit the rest, and the Appellee be convicted, &c. the Appellant shall be restored to such of the Goods only as were mentioned in the Appeal, and the rest shall be confiscated, not only in Respect of that Favour which the Law presumes that the Appellant beareth to the Felon, in making the Charge against him easier than it ought to have been, which might possibly have given him an Opportunity to have escaped, but also because, as it seemeth, the Restitution ought regularly to be grounded on the Record of the Appeal; and by that no other Goods can appear to have been stolen than what are mentioned in it: But whether an Appellant, who had, before his Appeal brought, lawfully regained the Possession of his Goods (told), shall forfeit to the King such of them as he leaves out of his Appeal, both neither clearly appear from the principal a Case concern-
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Book II.

concerning this Matter, nor from any of the Books above cited, which seem chiefly to rely on the Authority of it. But there is a special Case wherein the Appellant shall recover Things which were neither stolen from him, nor mentioned in his Appeal, as where the Appellee sells the Things stolen, or exchanges them for some other Thing, before the Appeal brought, and the Money taken on the Sale, or Thing given in Exchange, are cited to the King's Life, &c. in which Case they shall be delivered to the Appellant, on the Conviction of the Appellee, tho' they were never in his Possession before; for he appears to be in no Manner of Fault, and there is no Reason that he should be prejudiced by the Act of the Felon. And I take it for granted, That in all these Cases the Law is the same at this Day in Relation to a Restitution, by Force of the aforesaid Statute of 21 H. 8. to the Prosector of an Indictment.

And now I come to an Appeal of Rape, for the better Understanding of the Nature whereof, I shall consider,

1. By whom, and in what Manner it may be brought.
2. In what County.

Sez. 58. As to the first Point, viz. By whom, and in what Manner an Appeal of Rape may be brought; it seems, d That by the Common Law, it might be brought by any Woman who had been ravished against the Rapist, whether such Person ravished were the Niece e of the Rapist, or a Free Woman, and whether she were a Virgin, Wife or Widow; neither f do I find that she could be barred of her Appeal at the Common Law, for consenting after the Rape, to the Rapist, as she may be at this Day, by Force of the Statutes of Westminster 2. 34. & 6 Ric. 2. 6. But it seems, That a Woman lawfully married, can neither g by the Common Law, nor by Force of any Statute, bring such an Appeal without her Husband, as one married de facto only, and not de jure, perhaps may.

Sez. 59. But howsoever the Common Law might stand in Relation to Appeals of Rape, it seems, That they were wholly taken away by the Statute of Westminster 1. 13. by which the Offence of Rape was reduced to a Trespass only, and consequently punishable only by an Action, or Indictment of Trespass: But afterwards, Appeals of Rape were given again by the Statute of Westminster 2. 34. by which it is enacted, That if a Man from thenceforth do ravish a Woman married, Maid or other, where she did not consent, neither before nor after, he shall have Judgment of Life and Member. And likewise where a Man ravished a Woman married, Lady, Damned or other, with Force, altho' she consented after, he shall have such Judgment as before is said, if he be attained at the King's Suit, and there the King shall have the Suit.

Sez. 60. It seems to be so clear, i That this Statute impliedly gives an Appeal to the Woman who does not consent to the Rapist, that it seems needful to endeavour to prove it; but it is observable, k That the Statute does not restore the old Common Law in Relation to such Appeals, as it would have done, if it had only repealed the abovementioned Westminster 1. 13, but makes a new Law in Relation to them, from
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from whence it follows, That all Appeals of Rape at this Day, must conclude contra formam Statutii.

Sect. 61. It is farther enacted, by 6 Ric. 2. 6. in the following Words, Against the Offenders and Ravishers of Ladies, and the Daughters of Noblemen, and other Women in every Part of the Realm, in these Days offending more violently, and much more than they were wont: It is ordained and established, That wherever, and wheresoever such Ladies, Daughters and other Women are relieved be ravished, and after such Rape so consent to such Ravishers, That as well the Ravishers as they that be ravished, and every of them, be from thenceforth disabled, and by the same Deed be unable to have or challenge all Inheritance, Dower or joint Feoffment after the Death of their Husbands and Ancesters. And that incontinently in this Case, the next of the Blood of these Ravishers, or of them that be ravished, to whom such Inheritance, Dower or joint Feoffment ought to revert, remain or fall after the Death of the Ravisher, or of her that is so ravished, shall have Title, That is to say, after the Rape to enter upon the Ravisher, or her that is ravished, and their Alliances, and Land-Tenants, in the same Inheritance, Dower or joint Feoffment, and the same to hold in State of Inheritance: And that the Husbands of such Women, if they have Husbands, or if they have no Husbands in Life, that then the Fathers, or other next of their Blood, from thenceforth the Suit to pursue, and may sue against the same Offenders and Ravishers in this Behalf, and to have them thereof convicet of Life, and of Member, although the same Women after such Rape, do consent to the said Ravishers. And the Defendant in this Case shall not be received to wage Battle, but the Truth of the Matter shall be tried by Inquisition of the Country. Saving always to our Lord the King, and to other Lords of the Realm, all their Estates of the said Ravishers, if peradventure they be thereof convicet.

In the Construction of this Statute the following Points have been holden.

Sect. 62. First, That in an Appeal brought upon it by a Husband for the Rape of his Wife, it is a good plea, That the Appellant and Woman ravished were never lawfully married, which shall be tried by the Bishop's Certificate, who, if the Marriage were unlawful by Reason of a Precontract, &c. ought to certify against the Appellant.

Sect. 63. Secondly, That there is no necessity to allege, That the Woman did consent to the Ravisher, in a Count which rehearse the Statute, and concludes that the Rape was against the Form of it; which implies, that the Woman confessed, &c.

Sect. 64. Thirdly, That if a Woman who hath neither Husband nor Father, be ravished by her next of Kin, and consent to him, the next of Kin to the Ravisher shall have the Appeal.

Sect. 65. Fourthly, That whatsoever happens at the Time to be next Heir to the Person so ravished, and consenting, &c. shall have the Appeal, and also enter into the Lands of the Person ravished, and retain them against any other who shall afterwards happen by Matter ex post facto to become Heir; and therefore where a Woman having Issue only a Daughter, coments to a Ravisher, and the Daughter enters, and then a Son is born to such Woman, the Daughter shall retain the Lands, because the took them by Virtue of a Title given by the Statute which first vested in her as a Purchaser, and never was in any Ancestor.
Itself. 66. Fifthly, That if the next in Remainder or Reversions, to whom the Lands of the Woman who contents to a Ravisher would come if she were dead, shall enter and retain her Lands by Virtue of the Statute, provided he be of Kin to her, albeit another Person be nearer; yet it seems, that the Person so intitled to the Lands cannot have an Appeal of Rape, where there is another nearer of Kin, for the the Clause relating to the Entry into the Lands seems to intitle such of the next of Kin, to whom the Inheritance would fail after the Death of the Party, whether they be absolutely nearest or not yet the Clause relating to the Appeal seems to extend to none but the Husband, or Father, or very next of Kin.

67. Sixthly, That it is not sufficient in setting forth the Title of the Person claiming the Lands by Virtue of the Statute, to say in general, That he is next of Blood to whom the Inheritance would fall, &c. without shewing specially in what Manner he is so, &c.

68. Seventhly, That it is not conclusive Evidence to prove the Woman's Consent to the Ravisher, to shew, That the lived with him some Years as his Wife, and had a Child by him, if all the Time she was under his Power, and never at her Liberty.

69. Eighthly, That if the Party ravished and concerning to the Ravisher, be under the Age of twelve Years, the shall not lose her Lands by the Intent of the Statute, for that the Consent of a Woman under that Age is looked upon as given by one incapable of Discretion, and therefore is not regarded by the Law.

70. Ninthly, That in Appeals brought on this Statute, the Count ought to rehearse it: But I do not find any Resolution cited to maintain this Opinion. It is true indeed, That in the Year-Book of H. 4. 12. 14. the Statute is recited in an Appeal grounded on it: But it is not there said to be necessary to be so recited; neither do I find any Reason given why an Appeal may not as well be grounded on this Statute without reciting it, as on the Statute of Westminster 2. 39. as it is agreed that it may be; If it be said, That the Common Law gave the same Appeal as is given by the Statute of Westminster 2. and therefore there is no Need to recite it; but that there never was such an Appeal at the Common Law as is given by the Statute of Rich. 2. and therefore the Appeal grounded on it ought to recite it; it may be answered, That the said Statute of Westminster b does not revive the old Common Law in Relation to such Appeals, but makes a new Law in Relation to them; so that appeals brought upon it, do altogether as much depend upon it, as those brought on the Statute of Rich. 2. do on that. Neither c there does appear to be any such Rule, That in Indictments, or Actions grounded on Statutes which give a Remedy in Cafes which were no Way provided for by Law, there is a Necessity to recite such Statutes; and indeed at first it seems but Surplus to recite what the Court is bound ex Officio to take Notice of.

71. As to the second Point, viz. In what County an Appeal of Rape may be brought, There is no Doubt, but that this, like all other k Appeals, is a local Action, and consequently ought to be brought in the County wherein the Felony was done. And therefore if a Man take a Woman by Force in one County, and carry her into another, and there ravish her, the Appeal l shall be brought only in the County wherein the Rape was committed; for the Taking in the other was no
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more than a Trespass, and needs not be taken Notice of at all in the Appeal of the Rape, if is only looked upon as surplus.

Sel. 72. As to the third Point, viz. In what Time an Appeal of Rape may be brought, it seems, That at this Day it may be brought in any Reasonable Time, the Judgment whereof lies in the Discretion of the Court, for that at the Common Law there was no certain Time limited for the Bringing of it; and the Statute of Westminster i. 13. by a latin juris, which the Offence of Rape was turned into a Trespass, and forty Days limited for the Suit of the Person ravished, is repealed; and the Statute of Gloucester s. which requires that Appeals be brought within the Year and Day, extends only to Appeals of Death, and the Statute of Westminster 2. 34. which makes Rape a Felony again, limits no Time for the Bringing of it, but leaves it to the Contraction of Law, which shall be agreeable to the ancient Rules of Law in such Points, wherein the Statute is silent.

Sel. 73. And now I am come to an Appeal of Arson, but the Learning relating to it, seeming to be altogether obsolete at this Day, I shall refer the Reader to the Old Books for it.

Having thus endeavoured to shew in what Courts Appeals may be brought, and the several Kinds of them, and examined the Particulars which seemed most properly to come under the Consideration of each Kind, I shall now proceed to examine some other Matters concerning them, wherein I shall consider them all together.

As,

1. In what Cases the Appellant and Appellee are to appear in proper Person, and where by Attorney or Guardian.

2. How the Appellant ought to declare.

3. How he may be non-suited.

4. For what Faults the Writ may be abated.

5. What may be pleaded in Bar of an Appeal.

6. Where the Appellant and his Abettors shall render Damages to the Appellee for a false Appeal.

7. Where the Appellant is to be fined.

Sel. 74. As to the first Point, viz. In what Cases the Appellant and Appellee are to appear in proper Person, and where by Attorney, or Guardian: it seems, That by the Common Law neither Plaintiff nor Defendant in any Appeal whatsoever, whether of Felony or Mayhem, could make an Attorney, but must appear either by Guardian or in proper Person, on every Day of Continuance, except in some special Cases, as where the Defendant being convicted in an Appeal of Felony pray’d the Benefit of his Clergy, and the Plaintiff replied, that he had been twice married, in which Case he might be admitted to go on with the Suit by Attorney, because he had nothing more to do but to get a Certificate of the Bigamy from the Bishop, which, as it was said, any Stranger might procure as well as the Plaintiff. Sed quære; for it is said, That none can demand Execution but the Plaintiff, and that the Plaintiff cannot do it but in proper Person; from whence it seems reasonable to argue, That he ought in all other Cases, as well to carry on his Suit in proper Person. But it seems clear, That after a Defendant is acquitted, he may appear by Attorney for the Recovery of his Damages against the Abettors, &c. And it is enacted by 3 H. 7. 1. that
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That the Appellant in any Appeals of Murder or Death of a Man, where Battle by the Course of Common Law has not, may make Attorney and appear in the same, in the said Appeals after they be commenced, to the End of the Suit and Execution of the same. But * if a Defendant or Plaintiff appear and plead by Attorney where they ought not, and the Court receive the Plea and adjourn the Cause; it seems, That the Appeal is discontinued, because such Appearance was meerly void in Law.

As to the second Point, *viz. In what Manner the Appellant ought to declare; I shall refer the Reader for Precedents of Counts in Appeal, to Stansford’s * Pleas of the Crown, and the Books * of Entries, and shall in this Place consider only the following Particulars,

1. In what Manner such Count must pursue the Writ.  
2. How it ought to set forth the Substance and Manner of Fact.  
3. How the Circumstances of Time and Place.  
4. Whether one and the same Count ought to be against those who do not appear as well as against those who do appear, and against the Accessories as well as the Principals.

Sec. 75. As to the first Point, *viz. In what Manner the Count in Appeal must pursue the Writ; I shall take it for granted, That this, like all other Counts in other Actions, must in Substance * agree with the Writ, which shall be abated, if the Count vary from it in any material Point. And therefore in a Common Appeal of Death, if the Appellant declare, That the Appellee traiterously killed the Person deceased, as he was going to succour the King in his Wars, the Writ shall be abated * because that contains no Charge of Treason. So also if the Plaintiff, in an Appeal of Mayhem, declares, That the Appellee beat as well as maimed him, the Writ shall be abated * because that mentions not any Battery.

As to the second Point, *viz. In what Manner the Count in Appeal ought to set forth the Substance and Manner of the Fact, I shall observe the following Particulars.

Sec. 76. 1. That where several are present at the Fact, and one only actually does it, and the others abet and encourage him, it is in the Election of the Plaintiff, either to suppose * in his Declaration, That every one of them did the Fact, because in such a Case the Act of one is, in the Judgment of the Law, the Act of all; or to show the special Manner of the Case as in Truth it was, and set forth the Fact to have been done only by the Person who did it, and the others to have been his Abettors, &c.

Sec. 77. 2. That no Periphrasis, * or Circumlocution whatsoever, will supply the Want of those Words of Art, which the Law hath appropriated for the Description of the Offence, from whence it follows, That an Appeal of Death cannot * amount to a Charge of Murder without the Word Murder, lest be never so exact and particular in setting forth the Malice and all other Circumstances of the Killing, neither *
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Acan an Appeal of Rape be sufficient without the Word Rapeit; nor b an Appeal of Larceny without the Word Capit; nor c an Appeal of Mayhem without the Word Mayhemavit; nor any d of the Appeals abovementioned without the Word Felonice.

Sect. 78. III. That in every Appeal of Larceny e it must expressly appear whose the Goods were that were stolen, in every Appeal of Death, f who the Person was that was killed; because otherwise it cannot appear that the Plaintiff is intitled to the Appeal; yet an Indictment de morte & cujusdam ignoti, or for feloniously stealing g the Goods cujusdam ignoti, is good; for it is sufficient, That the Person injured was under the Protection of the Law.

Sect. 79. IV. That in an Appeal of Rape the Fact seems to be sufficiently h declared, by shewing, That the Defendant felonice rapuit the Woman, without adding the Words carnulit cognosuit, or any others tantamount, or first shewing the particular Manner of the Terror or Violence, and then concluding, That the Defendant se felonice rapuit. Also it seems, k That the like general Manner of setting forth the Fact, is sufficient in an Appeal of Larceny; but it seems to be usual, in Appeals of Larceny, to set forth the Price of the Things stolen; but whether this be necessary for any other Purpose than to shew, That the Crime amounts to Grand Larceny, and to ascertain the Goods, in Order thereby the better to intitle the Appellant to a Restitution, I leave to be considered.

But l in an Appeal of Mayhem it seems necessary: First, To set forth particularly in what Manner the Hurt was done, and the Consequences following it, and then to conclude, That the Defendant se felonice mayhemavit the Appellant. Also it seems clear, m That in an Appeal of Death it is necessary, not only from the Statute of Gloucester n Ch. 9. which requires, That an Appeal of Death shall declare the Deed o but also from the Common Law, first, To set forth in the Count all the special Circumstances of the Fact, and o then to conclude, That the Appellee se felonice maritusit the Party; and this being the Appeal most in Use at this Day, it may not be improper to set down these following Rules concerning this Matter.

Sect. 80. I. That every such Count ought to set forth in what Part of the Body the Wound was given o in which Respect, the same Certainty seems to be required in Appeals as in Indictments; and therefore, if the Count say only, that the Wound was given circa peclus, it seems to be vicious, as it hath been resolved, p That an Indictment in the like Manner uncertain is, because it doth not acertain the Part wounded, which, for what appears, might have been the Neck, Arm or Belly; and for the like Reason such Count seems also to be vicious, if it say, That the Wound was in the Hand, or Leg, or Arm, without shewing whether it were the right or left; neither is such an Uncertainty holpen by laying other Wounds with sufficient Certainty, if there be a general Conclusion that the Party died of the Wounds aforesaid; because the Death being as much imputed to the Wound that is insufficiently laid, as to the others, it appears not but that it might be chiefly owing to that which is insufficiently laid, and therefore the Whole is insufficient. But it hath been resolved, That it is sufficient in an Indictment of Death, and therefore it seems also to be sufficient in an Appeal, to shew, That the Wound was
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was given in the left Part of the Belly, or in the left Part of the Side, or in the left Hand, or in the left Arm, or in the Face, or in the Breast, or in the Belly, or even in the Forepart of the Body, in which Case the Word Body, shall be understood of the Trunk of the Body, between the Neck and Thighs. And it hath been resolved, That where there is such a sufficient Certainty, the Addition of a farther uncertain or unintelligible Description, will do no hurt; as where a Wound is laid in *sinistra parte ventris circa umbilicum*, &c. in which Case the last Words shall be rejected as abundant and Surplus.

**Sect. 81.** II. Such Count ought also to show the Length and Breadth of the Wound, that it may appear to the Court that it was mortal; but it is said, That anciently this was not required: And if a Man be shot, or run through the Body, with a Bullet, or Sword, &c. it seems sufficient to say, That the Defendant, with Malice, &c. struck the Person killed in such a Part of his Body, and gave him in such Part mortale *vulnsus penetrans in & per corpus*, &c. for this sufficiently shews, That the Wound was mortal. Also in some Cases it is impossible to shew the Length and Breadth of the Wound, as where a Limb is cut off, and therefore it is plain, That in such Cases it cannot be required.

**Sect. 82.** III. It is not safe, in any such Count to omit the Word *percutit*, where the Fact will bear it, and by the Authority of some Books this cannot be supplied, in such Cases, by the Words *dedit mortale vulnus*, &c. nor by any other: Yet in Coke's Reports this Opinion, on seems to be questioned, neither do I find any Reason given why the Word *percutit* should be of such absolute Necessity, for it is not so much as pretended in Long's *Cafe*, which seems to be the chief Foundation of this Opinion, That this is a Word of Art appropriated to this Use; but all that seems there contended for is, That where the Death was occasion'd by any external Violence, coming under the Notion of Striking, it must expressly appear, That a Stroke was given. Nor does the Law admit of a less exact Certainty, as to the Setting forth the Fact, where the Death was occasioned by any other Means, as by Poison, &c. for it hath been resolved, That an Indictment (which in this Respect seems not to differ from an Appeal) setting forth, That if S. persuaded the Person deceased to take a certain poisonous Potion under a Notion of a Medicine, and that the deceased, *Nescias præd. potum cum veneno fære in toto*, fed idem addibit; dicta persuasioni dixit J.S. recept & bibit, is insufficient, because it doth not expressly say, That the Party received and drank the Poison. And it was also resolved, That the Want of such Certainty is not supplied by these Words immediately following, *Per quod idem N. immediate post receptionem venenit prædicti per tres horas immediato suquente languebat & obiit*, &c. and yet there cannot well be a stronger Implication that the Poison was taken and drunk by him; for it being the strict Rule of Law in these Cases to have the Substance of the Fact expressed with precise Certainty, the Judges will suffer no argumentative Certainty whatsoever to induce them to dispense with it. For if they should once be prevailed with to do it in one Case, the like Indulgence would be expected from them in others nearly resembling it, and then in others resembling those, and no one could say where this might end; which could not but endanger the Subverting of one of the most fundamental Principles of the Law, by giving Room to Judges by Arguments from what the Jury have found, to convict a Man of a Fact which they have not found.
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Sec. 83. IV. Such Count ought also expressly to shew that the Party died of the Hurt specially set forth, and it hath been resolved, That an Indictment, and from the same Reason it seems that an Appeal, setting forth that the Defendant choked the deceased, qua suffocatione obit, instead of qua suffocatione, &c. is erroneous; yet where the Death was caused by divers Poisons, or Wounds, &c. the Count may say in general that the Party died of the several Poisons or Wounds abovementioned, without saying, That he died of any one of them in particular; for perhaps the Truth of the Case might be, That none of them alone, but all together, caused the Death. Or the Count in such Case perhaps may say, That the Party died of the first Poison or Wound, and that he would have died of the second, if he had not died of the first, and also that he would have died of the third, if he had not died of the second.

Sec. 84. V. If the Killing were with a Weapon, the Count must shew what Weapon in particular, and yet if upon the Evidence it shall appear that the Killing was not by such Weapon, but by some other, the Variance is immaterial, and the Appellee ought to be convinced, as shall be shown more at large under the Chapter of Evidence. And if the Killing were not by a Weapon, but by some other Means, as by poisoning, drowning, suffocating, burning or the like, the Count must set forth the Circumstances of the Fact as specially as the Nature of it will admit. But in such Cases, where no Weapon was used, it can not but be absurd to require the Mention of one in the Appeal, and therefore the Statute of Gloucester Ch. 9, which directs generally, That in all Appeals of Death the Weapon must be set forth, is to be intended only of such Killing in which a Weapon was used: For the Law is so far from requiring it in other Cases, that it will not suffer an Appeal of Killing by a Weapon to be maintained by Evidence of Killing by any other Means in which no Weapon was used; neither will it suffer an Appeal of Killing by any of those Means without the Help of a Weapon, to be maintained by Evidence of Killing by a Weapon, as shall also be shown more at large in the Chapter above referred to.

Sec. 85. It hath been adjudged, That the Words vi & armis are not necessary in such Appeal, because they are so fully implied.

Sec. 86. As to the third Point, viz. In what Manner the Count in Appeal must set forth the Circumstances of Time and Place, it is enacted by the Statute of Gloucester, Ch. 9. That if an Appeal declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, and with what Weapon, the Appeal shall stand in Effect, &c. And tho' this more particularly relates to Appeals of Death, yet it seems also to be generally a good Rule as to the Circumstances of Time and Place in other Appeals, and therefore I shall consider them all together, and first premise, That no Omission of any of these Circumstances, where the Law requires them to be expressly set forth, can be sided by the Conviction of the Defendant; and then for the better Understanding in what Cases the Law requires them to be expressly set forth, I shall endeavour to shew what Certainty the Count in every Appeal ought to shew.

1. The Hour.
2. The Day.
3. The Year and Time of the King.
4. The Place where the Deed was done.
§ 87. As to the first of these Particulars, viz. With what Certainty the Count in Appeal ought to set forth the Hour, it is observable that all the Precedents of such Counts (excepting only, one) in Appeals of Larceny in Raffles’s Entries, which seems to be the only Book of Authority in which any such Counts are to be found, and also all the Precedents in Coke and Raffles of such Counts in Appeals of Mayhem, take Notice of the Hour, as well as those in Appeals of Death; and therefore certainly it is not safe wholly to omit it yet it hath been held, that such an Omission is not fatal, even in an Appeal of Death, because the Common Law did not require the Mention of the Hour, and the Statute abovementioned is in the Affirmative. Yet if the Hour as well as Day be set forth in the Allegation of the Offence of the Principal, it is said to be fatal to mention the Day only in the Allegation of the Offence of the Accessory. But it seems that there is no Necessity in any Case precisely to allledge, that the Fact was done at such an Hour, but that it is sufficient to lay, That it was done about such Hour, as appears from every one of the Precedents in Coke and Raffles, in which the Hour is mentioned, and also from other good Authorities; yet we find the contrary Opinion holden by three Judges against two in Bullerdes’s Reports. But it seems certain that a Mistake of the Hour will not be material upon Evidence.

§ 88. As to the second of the abovementioned Particulars, viz. With what Certainty the Count in Appeal ought to set forth the Day. There can be no Doubt but that every such Count must set forth the Day on which the Fact was done, as appears from all the Precedents cited in the foregoing Section, and also from the Common Form of all other Declarations in all Actions whatsoever, as well as in Indictments, for which it is needless to the Authorities. And if the Fact happened in the Night, it seems most proper to allledge it in modo ejusdem dies. But it is said not to be sufficient to allledge the Fact done about such a Day, or between such a Day and such a Day, but that the very Day must be precisely set forth. And it seems to be insufficient to allledge it on the Feast-Day of such a Saint, without an Addition, if there be another Saint of the same Name, as on St. John’s Day, without the knowing which Saint is meant, viz. the Baptist or Evangelist. Also it seems to be erroneous to set forth the Fact on an impossible Day, as on the thirty-first of June, or thirtieth of February, for this is of no more Effect than to mention no Day at all. And it also seems clear that an Appeal of Death must not only set forth the Day when the Hurt was given, but also the Day when the Party died of it, as appears from all the Precedents of this Kind both in Coke and Raffles; and also from the manifeST Reason of the Thing, that it may appear that the Party died within the Year and Day after the Stroke, in which Case only the Law intends that the Death was occasion’d by it. And it is said not to be sufficient to allledge, that the Defendant assaulted the Party at a certain Day, and feloniously struck him, without expressly adding, that he struck him adiutum et idiem, and yet both Sentences being joined with the Copulative, it is the most natural Import of the whole, that the Stroke and Assault were both at the same Time, &c. and such Certainty seems to be sufficient in Declarations in civil Actions, and even in Indictments of Trespass. But in Indictments and Appeals of Death a more express Certainty is said to be required, because the Stroke caused the Death, being a Crime
of a different Nature, and much higher than the Affault, may be well enough intended to have happened at a different Time; and therefore the precise Time of each must be certainly expressed. And even this may be vitiated by a Repugnancy in the Conclusion; for if the Affault and Stroke be alleged in the Premises on the tenth of December, and the Death subsequent on the twentieth of December following, and then it be alleged in the Conclusion, that the Defendant in such Manner feloniously murdered the Party on the tenth of December aforesaid, the whole is sought for the Repugnancy, because the Party could not be said to have been murdered, till he was dead: And tho' to some Purposes by a Fiction of Law the Offence of the Defendant after the Death of the Party, is punish'd as a Felony from the Time of the Stroke; yet in Truth and Propriety of Speech (which must be observed in legal Proceedings) it is not a Felony but only a Trespass till the Death; yet if in such Conclusion it had been alleged that the Defendant in such Manner feloniously murdered the Party on the twentieth of December aforesaid, it had been sufficient. But it is said to be the better Way to conclude generally, That the Defendant in such Manner feloniously murdered the Party. And it is certain that a Mistake of the Day will not be material upon Evidence.

Sec. 89. It hath been held, that an Allegation of the Day, prima facie somewhat uncertain, may be helpt by the apparent Sense of the whole; as where it is alleged, That the Principal such a Day made the Affault and gave the Stroke, and that the Party died on such a subsequent Day, &c. and that A. B. was adiunct & ibidem abettis the said Principal to do the Felony and Murder aforesaid, in which Case it is said that the Words adiunct & ibidem, from the manifest Import of the whole, shall be referred to the Time of the Stroke; because by that only the Felony, which A. B. is charged to have abetted, was done. Yet if A. B. had been said to have been present at the Time of the Felony and Murder aforesaid, faciunt, on the Day of the Stroke, non & ibidem abettis the Felony and Murder aforesaid, &c. it seems that the Appeal is insufficient as to the said A. B. for the Repugnancy; because he is expressly alleged to have been present, and to have abetted the Principal, at the Time of the Felony and Murder, which must be taken for the Time of the Death, by which the Offence, which was before but a Trespass, became Felony and Murder, but by being present at the Time of the Death, it is impossible he couldabet a Stroke given so long before, and therefore it is repugnant and inconsistent in such a Manner to allege it. Nor is such a Repugnancy any way helpt by the subsequent Allegation of the very Day of the Stroke, coming after the Word faciunt, for it is apparent that the Time of the Felony, could not be on the Day of the Stroke, and therefore it rather adds to than helps the Fault to allege that it was. But the best Way of alleging such Abatement had been to have set forth, That the said A. B. was present, auxilius, &c. ad feloniam & murdrum pridictum in forma prae dicta faciunt.

Sec. 90. As to the third Particular, viz. With what Certainty the Count in Appeal ought to set forth the Year and Time of the King, there can be no Doubt but that every such Count must expressly set forth in what Year the Fact was done, as appears from the known Form of all other Counts, and also of Indictments. And in an Appeal of Death it is certainly necessary to set forth not only the Year in which the Stroke was given, but also that in which the Death happened, that it may appear that the Death happened within the Year and Day after the Stroke. But it seems clear from all the Precedents, that it is sufficient to shew in what Year.
Year of the King's Reign the Fact was done, and the Death happened, without shewing the Year of the Lord. Also it hath been adjudged, that it is sufficient to allege the Fact in such a Year of such a King, without saying it was in such a Year of his Reign, because it is clearly implied.

Set 92. As to the fourth particular, viz. With what Certainty the Count in Appeal ought to let forth the Place where the Deed was done, there can be no Doubt but that every Count in an Appeal of Death must shew the Place where the Death happened, as well as where the Hurt was given, and this with the same precise Certainty and Freedom from Regurgancy as is required in Relation to the Time of the Death and Hurt, for which I shall refer the Reader to the 89th and 90th Sections of this Chapter, wherein what is laid in Relation to the Time of the Hurt and Death is equally applicable to the Place. Also it seems that a Mistake of the Place is not material upon Evidence upon not Guilty pleaded any more than a Mistake of the Time, provided the Fact be proved at some other Place in the same County.

Set 93. But it seems to be not only necessary in an Appeal of Death to allege some Place both of the Death and Hurt, and in every Count in every other Appeal to allege some Place, where the Fact was committed, but also that such Allegation be in proper Place, for the better Understanding whereof I shall premise, that if the Truth will bear it, it is faie to lay it in a Town, as the Statute of Gloucester abovementioned directs; but if it were done out of a Town, it seems that you may lay it in any other Place from whence a Visine may come, in Relation to which Matter the Law being in great Measure superceded in civil Actions by the Statute for the Amendment of the Law, and chiefly in Ufe in Criminal Causes, it may not be improper in this Place more fully to consider it, and for that Purpose I shall lay it down as a good general Rule, That a Visine may come from any Place, which is of so small a Comps, that all who live in or near it may reasonably be presumed to have some Knowledge of the Persons living in it, and therefore are esteemed the most proper Judges of the Facts done within its Limits, as being most likely to be proved by Witnies, and charged upon Persons with whole Integrity and Reputation they are best acquainted. And upon this Ground it hath been adjudged, that a Visine may come not only from a Town, but from a Ward, a Parish, Hamlet, a Burgh, Manor, a Castle, or even from a Forest, or other Place known out of a Town. Also it seems clear that whenever a Place is generally alluded in Pleading, the Law will intend it to be a Vill unless it be mentioned with some Addition which shews the contrary; or if be alluded within a City or Vill, in which Case it would be absurd to take it for a Vill of itself, yet if in Truth there be no such Town, nor Hamlet, nor Place known out of a Town; or if a Fact alleged in a Forest, were done in some Vill in the Forest not mentioned in the Record, the Defendant may plead it in Abatement. Also if a Fact done in a Vill within a Parish, which contains divers Villas, be in the Count in an Appeal alluded generally in the Parish, or a Fact done in a City, which contains divers Parishes, be in the Count in an Appeal alluded generally in the City, it seems that the Defendant may plead such Matter in Abatement; for otherwise he could take no Advantage of the Insufficiency of the Allegation, because the Place named as it stands...
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on the Record, must, till the Contrary be shewn, be intended to contain no more than one Town, or Parish, on which Supposition a Vifine may well come de vicino, or civitate, which does not exclude the City, but takes in the City and its neighbourhood within its Jurisdiction, whether such City be within a County, or be a County of itself, excepting only the City of London, from whence it seems that no Vifine can come, not only by Reason of the Largeness of its Extent, but also because it hath been the constant Usage of Pleading to shew the Ward and Parith in which a Fact alleged in London, was done.

Seft. 92. It hath been adjudged that no Vifine can come from the Wild of Suffex, not only by Reason of the Largeness of its Extent, but also because it shall be taken for a Wood without Inhabitants, and therefore it would seem inconsistent to award the Return of a Jury from it. And yet it hath been holden that a Vifine may come from a Park; also it seems to be the general Opinion, That a Vifine may come from a Forest, as hath been more fully shewn in the Precedent Section, from whence it may plausibly be argued that it may come as well from such a Wild, supposing it to be a Wood. Also it seems to be questionable whether a Vifine may not come from a Walk in a Forest, being alleged as a Place in which a Fact was done; but it seems clear that no Vifine can come from it, if it be alleged only as a Liberty, for that no Vifine can come from a Thing Incorporeal, but only from a Place. Also it hath been holden that no Vifine can come from the Site of a Manor, perhaps for this Reason, because it doth not properly signify a Place, but rather the Limits and Situation of a Place.

Seft. 93. As to the fourth Point, viz. Whether one and the same Count in Appeal ought to be against those who do not appear, against those who do appear, and against the Accessories as well as the Principals, it is said by Sir Matthew Hale, That in an Appeal against A, B, and C, if A only appear, yet the Plaintiff ought to count against them all, by the better Opinion. And the like seems also to be holden by Sir William Staunforde and Brook; yet the Point adjudged in the Principal Case, which seems to be the chief Foundation of these Opinions, seems to be no more than this, That where an Appellant hath had Judgment and Execution in one Appeal, he shall not afterwards have another against Persons not named in the first. And all the Precedents that I can find, either in Coke or Raftel, of Counts in Appeals, where some of the Defendants have not appeared, do indeed mention the Persons absent, as well as those present, and shew in what Manner they were guilty, yet are all of them express that the Appellant insinuat appellat thoes that appear only; and that he would in like Manner appeal those that are absent, if they were present; by which it seems clearly to be implied, That when they shall appear, there shall be another Declaration against them, and that the present Declaration is esteemed only as a Declaration against those that do appear. Neither do I find any Difference in the Precedents abovementioned, as to the Form of such Counts in Relation to this Matter, where the Persons not appearing are Accessories, from that wherein they are Principals. But whether the Omitting of a Person in one Appeal be always a good Bar to the charging of him in another, shall be considered in the following Part of the Chapter, wherein I shall treat of the Nature of Pleas in Bar to Appeals.

Seft. 94. As to the third Point, viz. How the Appellant may be n non-suited, it is generally holden in some Books, that by the Common Law,
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if a Plaintiff in any Action whatsoever be demanded at any Day of Continuance before Judgment, and do not appear, either in a proper Person, or by Attorney or Guardian, as the Law requires, he shall be nonsuit

b Supra, Sect. 74.

applied or

b Nov. 88.

Litch. 173.

Flot. Supra

Sect. 30.

c Munc. 467.

pl. 166.

Goo. El. 467.

whosoever he may have for his Absence. But it is ena

by 2 H. 4. 7. That if the Verdict passes against the Plaintiff the same Plaintiff shall not be nonsuit.

And since the Statute hath been adjudged that if a Defendant in an Appeal of Murder be found guilty of Manslaughter only, the Appellant cannot be nonsuit; but it doth not appear whether this Resolution be grounded on the said Statute, or on the Common Law; for it seems difficult to maintain that such a Verdict which finds the Subsistence of the Fact, shall be said to pass against the Appellant, in which Case only the Nonsuit is taken away by the Statute. And therefore perhaps a Nonsuit in this Case may not be suffered by the Common Law, which seems not to have permitted a Nonsuit after a full Verdict, except in such Cases only whereupon some Doubt remained with the Court; as may be reasonably argued from the Authorities above cited under Letter E. But it seems that an Appellant may be nonsuit after a Special Verdict, or after a Demurrer and Argument thereupon.

Sect. 95. As to the fourth Point, viz. For what Faults the Writ may be abated, I shall premise that in Order to take Advantage of a Defect in the Writ itself, the Appellee ought to demand Over of it, which he must do in open Court. And for the better Understanding for what Faults such Writ shall be abated, I shall consider the following Particulars,

1. Where it may be abated by the Court ex Officio.

2. Where upon the Exception, or Plea of the Party, but not without such Exception or Plea.

3. What Defects of this Kind may be amended, without such Amendment might abate the Writ.

As to the first Particular it seems, that the Writ may be abated by the Court ex Officio, for the following Faults, whether the Party take Notice of them or not; as,

Sect. 96. I. Where a Writ or Declaration wants those Words of Art which are appropriated by Law for the Description of the Offence, as where an Appeal of Burglary has the Word Burglarier instead of burglarier, or burglarier, or an Appeal of Rape wants the Word Rapiet, for any Appeal wants the Word Felonie.

Sect. 97. II. Where the Declaration varies from the Writ, as by laying the Offence in the Reign of a present King, where the Writ supposed it to have been in the Reign of a former King. Or by giving the Defendant a Name different from that in the Writ, as where the Writ calls him A. B. of C. Alderman, and the Declaration A. B. of C. Elquore. Or where the Declaration is otherwise defective in not purifying the Writ, or in not setting forth both the Substance and Circumstances of the Fact with that Certainty which the Law requires: Or in laying the Offence in a different Country, from that in which the Writ was brought.

Sect. 98. III. Where the Declaration doth not conclude contra formam Statutii in such Cases where by Law it ought.

Sect. 99. IV. Where the Sentence is defective for want of a material Word in the Writ; as if the Conclusion be ibi hoc breve, Sc. without the Word habets; or where there is a false Concord in the Writ, as hoc or hanc breve; or the singular Number instead of the Plural; or (as some seem to hold generally) any other false Latin; or even the Use

4 Jo. 1.

b Ca. Lit. 39. B.

a Jones 3.

See 2 Ed. 6.

44. pl. 30.

and the Authorities cited under Letter E.

7 Built. 19.

3 Built. 243.

Buchanan

and Charleton agreed Mich.

1 to Asser.

b Finch of

Law. 226.

c Dunv. Abr.

54. Supra, Sect.

42.

Pike Supra

Sect. 72.

c Co. 39.

Supra, Sect.

72.

b Supra, Sect.

18, 77.

a First, Brown.

319. 231.

a Yel. 110.

Supra, Sect.

75.

b Supra, Sect.

76, 83.

Supra, Sect.

75, 83. 67.

Goo. El. 196.

Supra, Sect.

35, 47-71, 38.

Bro. Appeal.

38.

Supra, Sect.

60.

First, Coro.

321.

P. C. 82.

Letter A.

9 H. 7, 16.

10 Ed. 3, 1, pl. 5.

a H. P. C. 185.

b S. P. C. 82. Letter A. 5 Co. 121,
of a Word which is not Latin, thro' by the Change or Addition of a , Letter it might be made so. But it seems that such Faults in the Declaration are not fatal if the Writ or Bill on the File be right, as shall be shewn more at large in the following Part of this Chapter.

Sez. 100. V. Generally where the Writ, or Declaration are any otherwise defective in not observing the legal Form, as where a Writ is filed by Husband and Wife, the Conclusion is in the Name of the Wife only: or where the Writ omits either the Name of Baptifin or Surname of the Appellant or Appellee, being under the Degree of Nobility, which alone can give so high a Name of Dignity as to supply the want of a Surname.

As to the second Particular, viz. Where the Writ may be abated upon the Plea or Exception of the Party, but not without such Plea or Exception, I shall endeavour to shew,

1. Where it may be so abated for the want of fifteen Days between the Tefe and the Return of the Writ.
2. Where for a Misnomer or wrong Addition.
3. Where for a Defect in the Addition of the Appellant or Appellee.
5. Where for making of a Defendant, when there is no such Person.
6. Whether the Defendant may have more than one of such Pleas or Exceptions.

Sez. 101. As to the first Point, viz. Where a Writ of Appeal may be abated upon the Exception or Plea of the Party for the want of fifteen Days between its Tefe and Return. If the Party, before he hath pleaded in chief, do specially shew to the Court such a Defect in the Writ, the latter Authorities seem to incline that it ought to be abated, because the Writ is the Foundation of the whole Proceeding, and the Law seems to be in nothing more curious than in strictly keeping up its legal Forms. Yet it hath been resolved, that such a Defect is salved by the Party's Coming in and pleading in chief without taking Advantage of it: Also it hath been adjudged, That where the Original is right, all Defects in the Melfe Proceeds are salved by the Party's Appearance, as shall be shewn more at large in the Chapter concerning Proceeds.

Sez. 102. As to the second Point, viz. Where a Writ of Appeal may be abated, upon the Exception or Plea of the Party, for a Misnomer or wrong Addition, it seems to be agreed, that if there be a Mistake in the Writ or Declaration as to the Name of Baptifin h or Surname i of the Appellant k or Appellee; or as to the Town Parish or County, E. of a H., s. 1 state, Degree or Mystery, whereof they are said to be, as where m one of the H. P. C. who is neither by Birth, Office, Creation or Reputation an Esquire, or Gentleman, is named with either of those Additions; or where a Gentleman, by Birth, who follows a Trade or Husbandry, is named a with the Addition of the Trade or Husbandry, and not of Gentleman; or where a Peer, who has more than one Name of Dignity, is not named a by the most Noble; or where a Gentleman or Gentlwoman is named Spinster; or a Yeoman is named Gentleman; or if there be no such Town, Parish nor Hamlet, nor Place known out of a Town, as that whereof either the Appellant or Appellee are said to be; and the Appellee before Imparlance, plead such Matter in Abatement, and thereon Issue is joined and found for him.
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The Writ ought to be abated. And it seems also to have been held, that if the Appellant after Imparlance confesseth that he hath brought his Appeal by a wrong Name, the Writ shall be abated: But it is said to be no Fault to give an Esquire the Addition of Gentleman, &c. &c. &c. &c.

Also if one e who is usually known and called by the Surname of B. be so named in the Appeal, and the Appellee plead that his Name is C. and not B. and the Appellant reply that the Appellee is, and at the Time of the Purchase of the Original, was as well known by the Name of B. as by the Name of C. and this be confessed and found for him, it avoids the Plea of the Mistransfer. And if one who hath his usual Abode at B. and hath been sometime seen at C. be named of C. In an Appeal, it hath been questioned whether this be such a Fault as will abate the Writ; because sometimes Appellees may not have any known Dwelling; but if that happen to be the Case, surely it is safest to reply it, and then there seems to be little Doubt but it may make good the Naming of the Party of any Place wherein he has at any Time been. And if a Place where he dwells, and is a Housekeeper, and also another Place where he keeps his Wife and Family be well known, it seems that the Writ may name him of either of such Places, or perhaps both of them, but is abatable unless it name him of one of them.

Sec. 103. As to the third Point, viz. Where a Writ of Appeal may be abated by the Exception or Plea of the Party, for a Defect in the Addition of the Appellant or Appellee, it seems that the Common Law in no Case e requires any other Description of an Appellant or Appellee, but by their Name of Baptism and Surname, unless they be of the Degree of a Knight, f or of some higher Dignity; in which Cases, whether the Name of Dignity be ancient, or (as some say) of a new Creation, as that of Baronet, &c. it ought to be added to the Name of Baptism and Surname; and if it be of the Degree of Nobility, it ought h to supply the Place of the Surname. And it seems that the Law was i so curious in this Particular, that if a Plaintiff in any Action gained a new Name of Dignity hanging a Writ, he made it abatable, but this Inconvenience is remedied by 1 Ed. 6. 7. Sec. 3. by which it is enacted, That if any Plaintiff in any Manner of Action shall be made a Duke, Archbishop, Marquis, Earl, Viscount, Baron, Bishop, Knight, Justice of either Bench, or Sergeant at Law depending the same Action, that such Action for such Cause shall not be abatable or abated. But it hath been held k that the Dignity of a Baronet is not in this Statute, because there was no such Dignity at the Time of the Making of it.

Sec. 104. To prevent l the Inconvenience of troubling one Person for another, which cannot but often happen if there be no other additional Description of the Defendant, it is enacted, by 1 H. 5. Chap. 5. That in every original Writ of Actions personal, Appeals, and Indictments and in which the Exigent shall be awarded, to the Names of the Defendants in such Writs of Actions, Appeals and Indictments, Additions shall be made for their Estate or Degree, or Mystery, and of the Towns or Hamlets, or Places and Counties, of the which they were or be, or in which they be or were conversant. And if by Process upon the said Original Writs, Appeals or Indictments, in which the said Additions be omitted, any Outlawries be pronounced, that they be void, frustrate and holden for none. And that before the Outlawries pronounced, the said Writs and Indictments shall be abated by the Exception of the Party, wherein the said Additions be omitted.

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Sect. 105. For the better Explication of this Statute, so far as it relates to the Subject of this Treatise, I shall first premise, that generally such Additions in Englishe are as good as in Latin; and where there are several Defendants of different Names and the same Addition, it is safest to repeat the Addition after each of their Names, applying it particularly to every one of them; and where a Father hath the same Name and the same Addition with a Defendant being his Son, the Writ is abatable unless it add the Addition of Puisne to the other Additions; but where the Father is the Defendant, it is said that there is no need of the Addition of Eighe. And if the Son be in Custodia Marefeballi, and so declared against, it is said that the Count is good without the Addition of Puisne, unless the Father of the same Name and Additions be also in the Custody of the Marshal. And for the better Understanding of the Nature of the several Additions required by the Statute abovementioned, I shall endeavour to shew,

1. What is a sufficient Addition of the Estate or Degree.
2. What of the Mystery.
3. What of the Town, Hamlet, Place, or County, of the Appellee.
4. How the Defect of an Addition may be salved.

Sect. 106. As to the first Particular, viz. What is a sufficient Addition of the Estate or Degree of the Appellee, I shall observe; First, that it is necessary to shew the present Estate or Degree of the Appellee at the time of the Writ, in which Respect this Addition, and also the Addition of the Mystery differs from that of the Place, which is sufficiently set forth by naming the Appellee late of such a Place.

Sect. 107. Secondly, that such Addition must be expressed in such a Manner that it may plainly appear to refer to the Appellee; for it hath been resolved, that to name the Appellee Son of A. or B. Butcher, is insufficient, because Butcher refers to A. rather than to the Appellee.

Sect. 108. Thirdly, That a Bishop of an Irish Diocese may be as well described by the Addition of his Bishopsrick, as an English Bishop may by the Addition of an English one; (as it seems to be admitted in the Year-Book of 21 H. 6. 3. pl. 4.) But it seems clear, That no one inf. 667, can be well described by the Addition of a temporal Dignity in Ireland, or any other Nation besides our own, because no such Dignity can give a Man a higher Title than that of Esquire.

Sect. 109. Fourthly, That the Degree of a Serjeant at Law is a good Addition, from whence it may reasonably be argued that a Degree in either University is also a good Addition, as it is holden by Sir Edward Coke without Question; yet this is made a Query by Theolac, and it is holden in the Year Book of 35 H. 6. 55. and admitted by Sir Edward Coke in the very Place above-cited, That a Doctor in Divinity may have the Addition of Clerk, which seems not easily reconcileable with the Opinion that the Degree of a Doctor is a good Addition; for if it were, why should not the Writ be abatable for having the Addition of Clerk instead of it, contrary to the allowed Rule in other Cases, that the most worthy Addition is to be used?

Sect. 110. Fifthly, That Generosa or Armiger, are either of them, for that of good Additions for the Estate and Degree of a Man, Generosa good for that of 668.


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a Woman; and Yeoman, and Labourer are also good Additions for the Estate and Degree of a Man, but not for that of a Woman; and Widow or Single Woman, or as some say, Wife of J. S. are all of them good Additions of the Estate and Degree of a Woman, but no such like Addition is good for the Estate and Degree of a Man. And Spinner is a good Addition for the Estate and Degree of a Woman, and perhaps also for that of a Man.

Sec. 111. Sixthly, That Burges, Citizen, and Servant, are of them too general, and therefore not good Additions of the State or Degree either of Man or Woman.

Sec. 112. As to the second Particular, viz. What is a sufficient Addition of the Mystery of an Appellee; having first premised that the Word Mystery includes all lawful Arts, Trades and Occupations; And that if one under the Degree of a Gentleman have divers of such Arts, Trades or Occupations, he may be named by any of them, I shall endeavour to shew,

1. What Additions of this Kind are clearly good.
2. What are clearly insufficient.
3. What are questionable.

Sec. 113. And first, the following Additions of this Kind clearly seem to be good, as Husbandman, Merchant, Broker, Taylor, P Point-maker, P Smith, Miller, Carpenter, Cook, Brewer, Baker, Butcher, Parish-Clerk, Mercer, Fifer-Monger, Dier, Schoolmaster, Scrivener, and such like.

Sec. 114. Secondly, The following Additions of this Kind clearly seem to be insufficient, as Maintainer, Extortioner, Thief, Vagabond, Heretic, common Informer, and such like.

Thirdly, The following Additions of this Kind seem to be questionable,

Sec. 115. First, Farmer, which by the better Opinion seems to be an insufficient Addition, because if any Mystery be implied in the Notion of it, it is that of Husbandry, of which Husbandman is the proper Addition.

Sec. 116. Secondly, Chamuerlain, Butler, and Pantler, which are holden to be insufficient Additions, because they denote only a special Kind of Officer, or Servant, and imply nothing, which in the common Understanding of the Words, comes under the Notion of a Mystery. And from this Ground it seems to follow, that neither Groom nor Page are good Additions; and yet in some of the old Books they seem to have been so admitted.

Sec. 117. Thirdly, Hosteler, which hath been holden to be a good Addition, and seems properly enough to come under the Notion of a Mystery. And tho' it hath been resolved, that any one who keeps an Inn may be a Creation of the Addition of a Labourer, upon the Cus-tum of the Realm, for want of due Care of the Goods of his Guests, because whoever keeps a common Inn, is in that respect liable to answer for such Defects, by whatsoever Addition he may be filled, yet this does by no means
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Means prove such Person may not as well be sued by the Addition of Hosteler, but only that he may be sued as well under any other Addition.

As to the Third Particular, viz. What is a good Addition of the Town, Hamlet, Place, or County of the Appellee, I shall observe,

Sec. 117. First, That it is a good Addition of this Kind to Name the Appellee late of such a Town, in which Respect this Addition differs from that of the Estate, Degree or Mystery. And it is said that if a Defendant be named of A. and late of B. it is sufficient to prove either pl. 1.

19 H. 6, 66.
pl. 6.

1 Ed. 4, 1.

Sec. 118. Secondly, That the constant Course of Precedents hath made it a sufficient Addition of this Kind, to name the Defendant of a City which is a County of itself, as de Londine or De Norwico, &c., without more, by which it shall be intimated that he lives in the County as well as City of London and Norwich, &c. unless he shew the Contrary the Part of each of these Cities lie out of their Countries. However it is certain, that it is not sufficient to Name a Defendant Londini or Bridolithic, &c., because that imports only that he belongs to such Town, and not that he resides there. Also it seems clear, &c. That it is not sufficient to name a Defendant of any Town which is not a County of itself, without shewing in what Country it lies. Also if a Man be named of a Parish which contains more Towns, or Hamlets, or Places known out of any Town, or Hamlet, the Defendant may plead such Matter in Abatement, because such an Addition does not pursue the Statute, but a Parish shall be intended to contain no more than one Town, unless the Contrary be shewn.

Sec. 119. Thirdly, That if there be two Towns in a County of the same principal Name, with different Additions to distinguish them from one another, as Great Dale, and Little Dale, or Upper Dale, and Lower Dale, and the Defendant be named only of the principal Town without any Addition, as of Dale only, the Defendant may plead that there are two Dales in the same County called Great Dale and Little Dale, and none without an Addition, &c. Or according to some Opinions either in this Case where there are two different Towns called Dale, or even where there is but one Town, sometimes called Southdale, and sometimes Northdale, but never simply Dale without an Addition, the Defendant may Plead that there is no such Town as Dale, in the same Country, because Parcel of a Name cannot be said to be the Name. But if there be two Towns of the same Name in a County without any Addition to distinguish them, as it sometimes happens where they lie at a Distance from one another, I do not find any Authority that it is not sufficient in such Case to name the Defendant generally of either of such Towns, without adding anything to distinguish it from the other.

Sec. 120. Fourthly, That if an Appellee live in a Hamlet of a Town, it is said to be in the Election of the Appellant to name him either of the Hamlet or of the Town, but it seems that this is to be intended only of such Hamlets which are so far esteemed as to be Parts of a Town, that those who live in them are in common Speech indifferently styled sometimes of the Hamlet and sometimes of the Town, for I see not how the Addition of the Town can be proper, where the Party lives in a Place known by a distinct Name, and not Parcel of it.

Sec. 121. Fifthly, That if an Appellee live in a Place known by a special Name, and lying out of any Town or Hamlet, he may be well named.
named of such Place; but if he live in any Place known within a Town or Hamlet, it is said to be safely to name him of the Town or Hamlet.

Sect. 122. Sixthly, That the Addition of the Place of Habitation of a Wife is sufficiently shown by shewing that of the Husband, because it shall be intended that the Wife lives where the Husband does.

Sect. 123. As to the fourth Particular, viz. How the Defect of an Addition may be saved, it hath been adjudged, that if an Appellee named with an insufficient Addition, or without any, appear and plead to the Appeal, he cannot afterwards take Advantage of the Defect of the Addition, because by his Appearance and Plea he admits himself to be the Person intended. And some have held, that the Party by his Bare Appearance falters the want of an Addition, or a bad one; but this seems Contrary to almost all the Authorities above cited in Relation to this Matter, which seem to admit that the Party before other Matter pleaded, may take Advantage either of the Want or of an Addition or of a bad one. And accordingly it was lately adjudged in an Appeal of Death between Reeve and Trundle, that the Want of an Addition of the Appellee was a good Plea in Abatement, and the Writ of Appeal was abated by such Plea.

Sect. 124. As to the fourth Point abovementioned, viz. Where a Writ of Appeal may be abated upon the Exception of Plea of the Party for the Multiplicity of Action, it seems clear, That after an Appellant hath appeared on a Writ of Appeal, or even on a Bill of Appeal removed into the Court of King's Bench from before the Sheriff and Coroners by Certiorari, if he commence a new Appeal for the same Matter, the Appellee may plead in Abatement that such prior Appeal is still depending, &c. But it seems clear, That it is no Plea in Abatement of a Writ of Appeal, that the Appellant hath brought a bill of Appeal for the same Matter before the Sheriff and Coroners, because such Bill is not of so high a Nature as a Writ of Appeal, but is said to be only in Nature of a Plea till it be removed into the King's Bench, which seems to depend on the Statute of Magna Charta 17, since which Statute the Sheriff and Coroner cannot proceed to Trial upon a Bill of Appeal, as perhaps they might have done by the Common Law. But after such Bill of Appeal before the Sheriff and Coroners is removed into the King's Bench, if the Plaintiff bring a Writ of Appeal for the same Matter, it is held by Stampford, and seems to be admitted in the Year-Book of 4 H. 6. 14. 15. and both by Fitzherbert and Brooke in their Abridgments of the said Year-Book, that the Appellee may plead in Abatement that such Bill of Appeal is depending, because after it is removed into the King's Bench, it is of as high a Nature as a Writ of Appeal. Yet Sir Matthew Hale seems to be of Opinion that such Bill so removed is not pleadable in Abatement till the Plaintiff hath appeared thereon; perhaps for this Reason, that before the Plaintiff hath appeared, it doth not appear of Record that he hath prosecuted the Suit in the King's Court, because the Certiorari might have been taken out by a Stranger, Upon which Ground it seems to have been resolved that it is no good Plea in Abatement of an Appeal, that the Plaintiff hath purchased another Writ of Appeal returnable at such a Day, &c. and that such Writ was delivered of Record to the Sheriff, because it might be for what appears upon the Record. That the first Appeal was so far prosecuted by a Stranger, but in the same Case it is admitted that such prior Appeal depending will abate the second, where it appears on Record that the same Plaintiff hath appeared and sued it, as in praying of Proceeds, &c.
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Set. 125. As to the 5th Point, viz. Where a Writ of Appeal may be abated for the making of J. S. the Defendant, where there is no such Person, it seems clear, That if there be divers Defendants in an Appeal, or one of them who does not appear be misnamed either as to the Surname, or Name of Baptism, or be described by a wrong Addition, or were dead before the Writ purchased, any of the Defendants who do appear may plead, That whereas the Appeal is sued out against A. B. of C. in the County of D. Yeoman, there was not at the Time of the Purchase of the Writ, nor hath been since, any such Person as A. B. in Vosum Matthiae, as by the Writ is supposed, whereon if J. S. be joined, if the Appellant cannot prove that there now is, or was at the Time when the Writ was purchased, such a Person of such Name and Addition as by the Writ are supposed, it seems that the Verdict ought to go against him, whereupon the Writ shall be abated as to all the Defendants. But it is not advisable in such a Case to plead that there was not at the Time of the Purchase of the Writ, &c. any such Person as A. B. of C. in the County of D. Yeoman, because it implies a Negative pregnant. Also if a Defendant misnamed or described by a wrong Addition do appear, it seems to be agreed that no other Defendant besides himself can plead the Misdemeanor or wrong Addition. But I do not find it to be agreed That such a Plea by one Defendant shall abate the Writ as to any other besides himself, but if such Matter when pleaded by another on the 21 H. 7. pl. 27. Non-appearance of the Defendant, will abate the Writ as to all, it seems, difficult to give a Reason why it should not have the like Effect when pleaded by the Party himself.

Set. 126. As to the 6th Point, viz. Whether the Appellee may have S. P. C. 80. more than one such Plea or Exception, there seems to be no Doubt but that if a Defendant in an Appeal, or in an Indictment of Felony, think it proper to make use of several Pleas or Exceptions of this Kind, requiring all of them the same kind of Trial, he may take Advantage of them all, unless they be repugnant to one another. Also it seems to be the better Opinion, That he shall have the like Advantage, where such Pleas or Exceptions do not all of them require the same Kind of Trial, but some of them are triable by Matter of Record, and others by the Country. And if such Pleas or Exceptions be all of them triable by the Country, it seems to have been generally agreed, That the Defendant must at the same Time plead also with them all his Matters in Bar, if he have any such, and also plead over to the Felony, (unless where he hath admitted the Fact by the Matter pleaded) But if the plea in Abatement be triable by Matter of Record, it is held in some Books, that the Defendant is not bound to plead over to the Felony, till such Plea in Abatement be found against him. But it seems that the greater Number of Precedents, and constant Practice of late seem to 386. 185. be otherwise. However it seems clear, That whatsoever Matters are pleaded in Abatement of an Appeal, or Indictment of Felony, and found against the Defendant, yet he may afterwards plead over to the Felony. And in these respects such an Appeal and Indictment differ from Appeals of Mayhem and all civil Actions whatsoever, except only Actions of Mortmain, &c. Novel 182. 329. and Juris stratum, &c. for it seems to be a settled Rule, that in Appeals of Mayhem and all other civil Actions,
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Actions, those abovementioned only excepted, if a Plea in Abatement, triable by the Country, be found against the Defendant, he shall not be suffered afterwards to plead any new Matter, but final Judgment shall be given against him. Also it seems to be agreed that in all other Actions, except those abovementioned, if a Defendant together with a Plea in Abatement plead also a Plea in Bar, or the general Issue, he waives the Plea in Abatement; and the Plea in Bar or general Issue only shall be tried.

Sec. 127. And now I am in the third Place to consider, what Faults of this Kind are amendable, which without such Amendment would abate the Writ. It is to be observed, that Appeals are expressly excepted out of 8 H. 6. 12, which is the principal Statute of Amendments: also it seems to be generally taken for granted, that no criminal Prosecution whatsoever is within any other Statute of Amendments, or any of the Statutes of Jealously; from whence it follows that no Defect is amendable in an Appeal, but such only as is amendable by the Common Law. And therefore it seems to be the better Opinion, that no false Latin in a Writ or Bill of Appeal, nor Omission of a Word, nor even of a Letter, nor other Defect or Variance from the proper legal Form, can be amended, because no such Fault is amendable by the Common Law, without the Consent of the Parties, except only in Actions wherein the King is a Party. It seems indeed to be generally holden in some Books, that such Faults in a Writ are amendable where the Curator varies from his Instructions, in the Names or Additions of the Parties, or other like Matters which he must take from his Instructions. But what is said in such Books in Relation to this Matter seems to be intended of such Writs only as are within the Purview of the Statutes of Amendments, and therefore cannot be applied to Appeals; yet it seems that a Misprison in the Count is amendable by the Common Law, as well in an Appeal as in any other Action, before it is entered on the Record; and so it seems that the Year Book of 7 H. 4. 27. is to be intended, in which a Mistake in the Declaration in laying the Fact in an improper Variety, was suffered to be amended. Also it seems that after the Count is entered on the Record, a Variance in it from the Writ, if a Miserable Misprison, may be amended by it, as it seemed to be agreed in an Appeal of Death between Smith and Bowen, wherein the Word Murdrum in the Count on the Record was adjudged to be amendable by the Word Murdrum in the Bill on the File.

As to the fifth general Point, viz. What may be pleaded in Bar of an Appeal, having already in the former Part of this Chapter endeavoured to shew what may be pleaded in Bar of an Appeal of Misdemeanor, and intending in the later Part of the Book to consider the Learning relating to Pleas in Bar of criminal Prosecutions in general, I shall in this Place only examine the Nature of Pleas in Bar of Appeals of Felony in particular, and for that Purpose having promised that by the better Opinion at this Day, no special Plea in Justification of the Killing shall be admitted in an Appeal of Death, but that in every such Case the general Issue is to be pleaded, I shall consider.

1. What Pleas will be good Bars of an Appeal of Felony by shewing that the Plaintiff had never any Right to bring it.

2. Whether a Retraction on Nonliet in a former Appeal of this Kind will be good Bars of another.

3. Whether a Discontinuance.
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4. Whether an Abatement of a former Appeal.
5. Where the Bringing of an Appeal of this Kind against one Person shall be a Bar of any subsequent Appeal against any other Person not named in the first.
6. Where a Release will be a good Bar of an Appeal of this Kind.
7. Where the Appellant may be barred as to one Appellee, and continue his Suit against the Rest.
8. Whether any, and which of these Pleas, are consistent with the general Issue.

Sec. 128. As to the first Particular, viz. What Pleas will be good Bars of such an Appeal by weighing that the Plaintiff had never any Right to bring it, it seems to be a good general Rule, That any Plea of this Kind is good which shews that the Plaintiff wants any of those Requisites which the Law makes necessary to entitle him to the Appeal. And therefore in an Appeal of Death by a Woman it is a good Plea, that she was never lawfully married to the Deceased, or that she hath not continued a Widow since his Death, but hath taken another Husband. Also in an Appeal of Death by one as Heir, it is a good Plea, that A. B. at the Time of the Writ was and is still Heir of the Deceased, or that one of the Defendants was the Wife of the Deceased, and made a Defendant by Covin to exclude her from her Appeal; or that the Plaintiff is a bastard and not legitimate. And where one brings an Appeal as Brother and Heir, it is a good Plea, That he is not Brother and Heir as by his Writ and Declaration he hath supposed, or that he hath an Elder Brother by the same Father and Mother still alive; or where one brings an Appeal as Cousin and Heir, viz. Brother of A. B., Father of the deceased, it is a good Plea, That he is not Cousin and Heir, viz. Brother of A. B. Father of the deceased, etc. as by his Writ and Declaration he hath supposed. Also it is a good Plea in any Appeal of Death, that the Plaintiff hath kept his Time in not bringing the Appeal within the Year and Day after the Death of the Person suppos'd to have been killed. Also it is a good Plea in an Appeal of Robbery, that the Plaintiff is a Witness to the Defendant. And it is a good Plea in an Appeal of Rape by a Man and a Woman, That the Plaintiffs were never lawfully married. And it is a good Plea in Bar of any Appeal of Felony, That the Plaintiff is an idiot, or that he was born deaf and dumb. Also it is said by Sir William Stawndford, that it is a good Plea in Bar of any such Appeal, That the Plaintiff is attainted of Treason or Felony; however it seems that such Attaint is no perpetual Bar, but only during the Time it continues in Force.

Sec. 128. As to the second Particular, viz. Where a Retraction or Non Suit in a former Appeal of this Kind will be good Bars of another; I take it to be clear, that a Retraction of any such Appeal is a Bar of all subsequent Appeals of the same Kind; for it seems to be a general felterd Rule, That a Retraction of any Action whatsoever is a Bar of all others of the like or inferior Nature. Also it seems to be certain, That a Non Suit on a Bill of Appeal, whether commenced in the Court of King's Bench, or before Justices of Gaol-Delivery, or before the Sheriff and Coroners, or on a Nonsuit after a Declaration on a Writ of Appeal, is a Bar of all other Appeals of the same Kind; because no such Bill or Declaration shall be received, unless the Appellant have first appeared in proper Person; and it seems to be agreed by all the Books, That a Non Suit
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Suit after such an Appearance is peremptory. Also it is holden generally in some Books, that a Non Suit after Appearance is a peremptory Bar to the Appellant, without adding that he must also have declared from whence, and also from the general Reason of the Thing, it may be reasonably argued. That if it any way appear upon Record that the Appellant who was non-suited in a former Appeal, did actually appear and prosecute such Appeal, as by praying b of Processe on it, &c. he shall be barred in any other Appeal of the same Kind. But it seems that the bare Taking out of a Writ of Appeal, and causing it to be delivered of Record to the Sheriff, and a Non Suit upon it, is no Bar of a second Appeal, because it doth not appear of Record, but that it might be done by a Stranger, and notwithstanding some Books c seem to hold generally, that any Non Suit in Appeal is peremptory, yet it seems to be in great Measure settled at this Day, that such Non Suit ought to be after an Appearance in proper Person of Record.

Sec. 130. As to the third Particular, viz. Whether a Discontinuance of a former Appeal of this Kind will be a good Bar of another, it is holden d by the Reporter of the Year-Book of 16 Ed. 4. That a Discontinuance of one Appeal is a Bar of any other, because the Life of the Appellee was once put in Jeopardy by the first Appeal; but this Reason proves not strongly that the Abatement of an Appeal where the Writ was good shall be a Bar of another; for by an Appeal fo abated the Life of the Appellee is as much put in Jeopardy as by an Appeal that is discontinued; and yet it seems to be agreed at this Day, that such an Abatement of an Appeal cannot regularly be a Bar of another, as shall be more fully shewn in the next Section. Nor can I find it anywhere adjudged, that the Discontinuance of one Appeal is a Bar of another. It is True indeed, that in Bradley e and Bank's Case, the Appellee was totally discharged upon a Discontinuance. But the Reason hereof seems to have been, not that the Discontinuance would be of itself a Bar to any other Appeal, but because the Year and Lay were passed, and consequently there could be no other Appeal; and the Appellee had also been before convicted on an Indictment, and had his Clergy, and consequently could not be proceeded against at the Suit of the King. However, Granting the Opinion aforesaid to be Law, that the Discontinuance of one Appeal shall be a good Bar of any other; surely it is to be intended of such a Discontinuance only, as happens after the Appearance of the Appellant, for the Reasons given in the precedent Section, in Relation to a Non Suit.

Sec. 131. As to the fourth Particular, viz. Whether an Abatement of a former Appeal of this Kind will be a good Bar of another, it seems clear, that if an Appeal by a Wife abate by her taking another Husband, or an Appeal by an Heir abate by his Death, there can be no other Appeal. But the Reason hereof seems not so much to depend on the Abatement, as on the Marriage in the first Case, and the Death in the second, which, as it seems the better Opinion, would of themselves have abated a subsequent Appeal, whether any had been brought before or not. Yet I find it holden generally in some f of the Old Books, that an Appeal once determined, cannot revive; and in others, that where an Appeal of Maltem, which in this Respect seems not to differ from other Appeals, is abated without the Default of the Party, he may have a new one, by which it seems to be implied, that if it abated by his Default he cannot have a new one; and this Opinion seems also to be confirmed by some other
other Old Books, but it is denied by others. However I take it to be settled at this Day, that where there continues to be a Plaintiff, not disabled to prosecute, he shall not be barred in a second Appeal by an Abatement of the first.

Sec. 132. As to the fifth Particular, viz. Where the Bringing of an Appeal of this Kind, against one Person will be a Bar of any subsequent Appeal against any other Person not named in the first; it is said, that ancienly one might have had two Appeals for the same Fact, one against the Principal, the other against the Accesary. And even at this Day, if one be robbed of the same Goods, at several Times or receive different Mains, whether at the same or at several Times; or a Woman be ravished more than once, whether by the same or by different Persons, it seems clear that several Appeals lie for each distinct Offence. But it seems to be generally agreed at this Day, that after one hath brought an Appeal of Felony against one Person, who is thereon attainted and hanged, he may be barred by it in any subsequent Appeal, for the very same Crime, against any other Person not named in the first; whether such subsequent Appeal is brought against him as Principal, or as Accesary before the Fact, or even as Accesary after the Fact, unless where he happens to be so Accesary after the first Appeal was commenced; in which Case it is certain that he is liable to such second Appeal, because it was impossible to charge him in the first. But otherwise, after an Attainer had on the first Appeal, the Law seems to disallow the Bringing of a second; for this Reason, that where an Appellant has so far had his Revenge in one Appeal, he shall not be indulged in the Bringing of another, which his own Latchet only made necessary. Also it keeps to be clear, that if one bring an Appeal of Felony against another, who is either acquitted by Verdict, or otherwise finally discharged by any other Matter, which will peremptorily bar any other Appeal against him by the same Appellant, for the same Fact, the Appellant may also be barred in any other Appeal for the same Fact against any other Person whatsoever; perhaps for this Reason, that he who appears to have brought an ill grounded Action of so high a Nature, or to have so far made Default in the Prosecution of such an Action, as to be for ever barred from bringing another against the same Defendant, shall not be thought worthy to bring another against any other Person whatsoever. But I cannot be satisfied with the Reason which some of the Books seem to give why all the Defendants must be named in one Appeal; which is this, that the Statute of Magna Charta is, by which it is provided, That none shall be imprisoned upon the Appeal of a Woman, for the Death of any other than her own Husband, speaks only of Appeal in the singular Number, from whence it is said to be collected, that all the Defendants must be named in one Appeal. But by what Kind of Argument this Collection is made, I do not find, nor do I see why twenty Appeals brought by the same Woman, if the Law would permit so many, are not as much within the Letter and Meaning of the Statute as one Appeal. And where the Law does permit the Bringing of a second Appeal against the same Person, as it is clear a Case, it does, it may reasonably be argued, that he may as well bring it against others also, where the first is abated, and there still continues to be a Plaintiff, not disabled to prosecute, and in some other Cases: For if an Appellant be not barred by the Abatement of his first Appeal, from bringing a second against those who had Vexation by the first, and were legally discharged from it, why should he be barred by it, as to those who were not concerned in it?

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Sect. 133. As to the sixth Particular, viz. Where a Release will be a good Bar of an Appeal of this Kind, it seems clear, That a Release of all manner of Actions, or of all Actions Criminal, or of all Actions Mortal, or of all Actions concerning Pleas of the Crown, or of all Appeals, or of all Demands, will be a good Bar of any such Appeal. But it seems that a Release of all Actions Personal will not bar such an Appeal, because that an Appeal in which the Appellee is to have Judgment of Death, is higher than an Action Personal, and not properly called an Action Personal. Also it seems clear, That whatsoever the Nature of the Release may be, it shall not wholly discharge the Appeal, unless it were made before it was commenced; for if it be subsequent to the Appeal, it shall only discharge it as to the Suit of the Plaintiff, and after Judgment given for such Discharge, he shall be arraigned on the Appeal at the King's Suit, as shall be shown more at large in the Chapter of Indictments. Also it is certain, That no Release shall discharge a Person attained, without the King's Pardon.

Sect. 134. As to the seventh Particular, viz. Where the Appellant may be barred as to one Appellee, and continue his Suit against the Rest, it seems, that if he be barred by a Release given, or retractit entered as to one, or by being varnished in Battle by one, yet he may continue his Suit against the Rest, because he is to have a several Execution against every one of them. Yet in an Appeal against divers, whether they plead the fame or several Issues, it hath been adjudged, that a Nonuit against one, at the Trial of any one of the Issues, is a Nonuit as to all, of which this seems to be the best Reason. That such a Nonuit operates in Nature as a Release of the whole. But whether the Discontinuance of an Appeal, as to one Appellee, shall have the like Construction as to all, may deserve to be considered.

Sect. 135. As to the eighth Particular, viz. Whether any, and which of the Pleas abovementioned are consistent with the general Issue, it seems agreed at this Day, That if the Defendant in an Appeal of Death, by a Wife, plead Nunciatur accusat in Iudice Matrimony; or in an Appeal of Death, by one as Heir, plead that the Appellant is a Bastard, or that he hath an elder Brother of the whole Blood alive, or in any Appeal of Death, plead that the Person supposed to have been killed, was dead above a Year before the Purchase of the Writ, or that the Appellant hath formerly brought an Appeal for the same Fact against another Person, who was thereon attainted and hanged, or generally any other Plea not amounting to an implied Confession of the Fact, as a Release. Whether it be triable by Master of Record, or by Pair, and whether it deny that the Appellant had ever any Right to the Appeal, or admit that he once had a Right, but shew that he is now barred; he may together, with such Plea in Bar, plead also not guilty to the Felony. And if such Plea be triable by the Common Law, unless the Appellant reply both to that, and also to the Plea of not guilty, he discontinues the Appeal, but if it be not triable by the Common Law, the Defendant needs only to reply to it, and not to the Felony, till after such Plea has been tried. But it is holden in many Books of good Authority, That a Man shall not be admitted to plead a Release, and the general Issue also, because it is repugnant at the same Time to insist that the Crime is reas...
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leafe, and yet that there was no such Crime committed to be releas'd. But I do not find this Point any where adjudged; and as to the Argument abovementioned, from the Respingency of the Plea of a Releafe, to the general Iffue, it may be answered, That a Man may reasonably take a Releafe to free himself from Trouble, from the Suspcion of a Crime, of which he would by no Means own himself guilty; and in Appeals of Death after a Plea of Posterity convict by Verdict, and even after the Plea of Posterity convict by Confeffion, and Clergy theron had, the general Iffue has been receiv'd; and yet such Pleas as much imply a Confeffion of the Faet, as the Plea of a Releafe. And in Smith's Cafe, who was indited of High Treafon in the Beginning of his present Majefly's Reign, for the Murder of Colonel Parks, after a Plea of a Pardon, the general Iffue was receiv'd. However, I do not find it any where holden, That the Plea of a Releafe may not be pleaded, if the Defendant think fit, without Pleading the general Iffue. Also it feems questionable, Whether any other Plea in Bar, whether triable by Matter of Record, or by Faits, may not also be receiv'd without Pleading the general Iffue, as it feems clear, that in fome Cafes it may, as where it declines the Jurifdiction of the Court, or would be prejudicial to the Defendant by infringing the Laws of Charleton. 

The Plaintiff, as where a Villain brings an Appeal of Robbery against his Lord, who pleads the Villenage in Bar, in which Cafe he fhall not be compell'd to plead not guilty, becaufe that would amount to an Infrachement of the Plaintiff; by suppfoning that the Faet, if committed, needs a Defence, which it cannot do unless the Plaintiff have a Property, which if he be a Villain, he cannot have against his Lord. Also, It feems clear, that if any of the Bars abovementioned, except that of a Releafe, be furfere to be pleaded without the general Iffue, and be found a-gainft the Defendant, they do not conclufe him from pleading the general Iffue afterwards; and as to the Plea of a Releafe, whether that be without the general Iffue, and found a-gainst the Defendant, do conclufe him at this Day to plead the general Iffue afterwards, may deferve to be considered for the Reafons abovementioned. But it feems, That if a Demurrer to the Court be adjudged against an Appellee, he fhall not be admitted to plead either in Bar, or the general Iffue, but fhall be condemned, as fhall be flown more at large in the Chapter of Demurrers.

Sec. 126. As to the sixth general Point, viz. Where the Appellant fhall render Damages to the Appellee for a faife Appeal, having premised that by the Common Law a Defendant may recover Damages for a faife and malicious Appeal, against the Appellant and his Abettors, by a Writ of Conpiracy, or an Action on the Cafe, in the Nature of fuch Writ, as hath been more fully flown in Book I. I fhall here endeavour to fhew in what Cafes, and in what Manner he may, if he chufe rather so to proceed, recover fuch Damages by the Statute of Westminster 2, 12, which was made for his Speedier Remedy, and is enacted as followeth.

Sec. 127. Forasmuch as many through Malice intending to grieve others, do procure faife Appeals to be made, of Homicides and other Felonics, by Appellants, having nothing to satisfie the King for their faife Appeal, nor to the Parties appealed for their Damages: It is ordained, that when any being appealed of Felony, surmifed upon him, doth acquit himself in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices be.

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fore whom the Appeal shal be heard and determined, shal punishe the Appellor, by a Year's Imprisonment; and the Appellor shal nevertheless resort to the Parties appealed their Damages, according to the Discretion of the Justices, having Respect to the Imprisonment or Arrestment, that the Party appealed hath sustained by Reason of such Appeals, and to the Injury that they have incurred by the Imprisonment, or otherwize; and shal nevertheless make a grevous Fine unto the King. And if inadventure such Appellor be not able to recompense the Damages, it shal be inquired by whose Abetment, by Malice, the Appeal was commenced, if the Party appealed desire it. And if it be found by the same Inquest, that any Man is an Abetor through Malice, he shal be straigned by a judicial Writ at the Suit of the Party appealed to come before the Justices. And if he be lawfully convict of such malicious Abetment, he shal be punishe by Imprisonment and Restitution of Damages, as before is said of the Appellor.

And for the better understanding this Statute, I shall endeavour to shew how the several Parts of it have been expounded.

Sec. 138. And 6th, Whereas the Words of the Preamble are, That many through Malice procure false Appeals to be made by Appellors, having nothing, &c. And in the Pursuance it is said, That it shall be inquired by whose Abetment, by Malice, the Appeal was commenced, &c. And if it be found that any Man is an Abetor through Malice, &c. in all which Places the Malice is expressly referred to the Procurers and Appellors only, and in no Part of the Statute to the Appellant, it is helden by one, That where-ever an Appellee is acquitted of an Appeal of Felony, he shall recover Damages by Force of this Statute against the Appellant, except only where he hath been indicted of the same Felony before. And it must be confessed, that in the Reports and Entries relating to this Matter, Damages seem generally of Course to have been awarded against the Appellant, on the Acquittal of the Appellee in all others Cases, without any finding that the Appeal was malicious. Yet it is helden by others, That the Appellant is no more within the Intent of the Statute, than his Abetters, unless his Appeal were grounded on Malice. And if it be considered, that where the Appellant is to render Damages by Force of the Statute, he is also, by the express Words of it, to have a Year's Imprisonment, and to be grievously ransomed to the King, surely it cannot be imagined that the Makers of the Statute intended in any Case to expose him to so severe a Punishment, for a legal Prosecution, which he has reasonable Evidence to induce him to commence, though it may not be sufficient to induce a Jury to convict the Defendant. Neither do I see any Reason why the Bringing an Appeal against one who hath been before indicted, by a sufficient Indictment of the very same Crime, which is agreed not to be within the Meaning of the Statute, should be the only excepted Case, especially considering that any other Case, wherein the Appellant plainly appears to proceed on a probable Ground of Suspicion, is within the Reason given in many Books for the Favour (now to the Appellant, where the Appellee has been indicted before; which is this, that the Appellant had cause and Evidence to pursue the Appeal, and it appears to the Court that it was not merely founded on Malice. And this is also one of the Reasons given in the Books, why the Appellant is not to render Damages, by the Intent of the Statute, where the Appellee in an Appeal of Murder is found guilty of Homicide, &c. de defendendo only. And as to the general Expressions of the
the Books abovementioned, in which Damages seem of Course to be awarded against the Appellant, without any Inquiry, whether his Appeal were malicious or not; it may be answered, That the Books speak generally in Relation to the Recovery of the Damages against the Abettors, yet it seems plain from the whole Purport of the Statute, that they are not within the Purview of it, unless their Abetment were founded on Malice. And some seem to have gone so far as to hold, that the Heir who abets his Mother in bringing an Appeal for the Death of his Father, can be in no Case within the Statute, by Reason of such Abetment; because Nature and Duty oblige him, in such a Case, to abet his Mother. But this Reasoning, if strictly examined, seems to prove no more than this, That in such a Case the Heir shall prima facie be intended to have abetted the Appellant, rather out of Duty than Malice, and that therefore he shall not be taken to be within the Purview of the Statute, without very strong Evidence of his Malice. But surely it cannot be denied, That in some Cases it may be notorious, That an Heir abets such an Appeal, not out of Duty but Malice; as where he himself, without the least probable ground of Suspicion, is the first Promoter of the Prosecution, or where he Causes it to be carried on by violent and unfair Methods, not for the Sake of Justice but Oppression, in which Cases it seems hard to say, That he is not as well within the Meaning as Letter of the Statute.

Sect. 139. Secondly, In the Construction of the Words Homicides and other Felonies, in the Preamble of the Statute, it hath been adjudged that the Purview of it extends to Rape, which was made a Felony by another Branch of the same Statute; and it is held, both by Coke and Staintforde, That, it in like Manner extends to Offences made Felonies by any subsequent Statute.

Sect. 140. Thirdly, In the Construction of these Words, When any being appealed of Felony furnished upon him, doth acquit himself in the King's Court in due Manner, either at the Suit of the Appellant, or of Our Lord the King; it seems to have been generally agreed, That no Acquittal is within the Intention of the Statute, unless it be had on an Appeal, (either at the Suit of the Party, or of the King, after a Non Suit of the Party,) and be of such a Nature as finally to bar all other Prosecutions for the same Felony, whether at the Suit of the King, or of the same, or any other Party. And therefore it seems clear, That no Damages shall be recovered on the Abatement of an Appeal, nor on the bare Non Suit of the Appellant, nor where the Appellant is barred, either by a Demurrer, or by a Plea, shewing that he is not intituled to the Appeal, nor on any Acquittal on an insufficient Original; because in all these Cases the Appellee is liable to another Prosecution for the same Felony. And if a Person appealed of Murder, be found guilty of Homicide by Misadventure, or So defending, which will be a Bar of any other Prosecution for the same Killing, yet it hath been resolved that he shall not recover Damages, not only because it appears that the Appeal was not groundless, but also because the Appellee is not totally acquitted. But it is clear, That the Appellee is intituled to his Damages, where he is acquitted on an Appeal at the Suit of the King, after a Non Suit of the Plaintiff, or where he vanquishes the Appellant in a Trial by Battle. Also if two be appealed, the one as Principal, and the other as Accesary; and the Jury be...
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ing charged on the Accesary, as well as the Principal, do acquit the Principal, it seems to be agreed, that the Accesary shall recover Damages, by the Intent of the Statute, without any express Verdict concerning him, because he is impliedly acquitted by the Acquittal of the Principal; for it is impossible that there should be an Accesary where there is no Principal. And this Reason seems to hold as strongly for the Damages, where the Accesary doth not appear on the Trial or Acquittal of the Principal, because in such Case the Acquittal of the Principal is as much an Acquittal of the Accesary, as where he doth appear. But it is held by Sir Edward Coke, that such an Accesary shall not recover Damages, because no Jury can be returned to assist them; and Sir William Stanesford seems to be of Opinion, that such an Accesary shall not recover Damages, unless he be expressly acquitted by Verdict, after the Acquittal of the Principal. Yet whether the Justices themselves may not, in a Case of this Nature, if they think fit, assist the Damages, without any Jury, or else assist them by an Inquest of Office, may deserve to be considered. Also it seems to be to little Purpuse, to require an actual Acquittal of a Person, where it appears by the Acquittal of another, that he could not be guilty. However it seems clear, that a Person appealed as Accesary to two Principals, shall not recover Damages by the Acquittal of one of them, because for what appears he might be assisary to the other. Neither shall he recover Damages where he is discharged by the Death of the Principal before his Attainder, because it doth not appear that he might have been guilty.

Sec. 141. It seems at this Day, that if a Defendant, appearing upon erroneous Process to a good Appeal, be acquitted, he shall recover Damages by the Intent of the said Clause, because such an Acquittal is a good Bar of any other Prosecution for the same Felony, and the Life of the Appellee was put in Danger by the Appeal. But there were formerly some Opinions, that the Appellee in such a Case should not recover Damages, because his Life was not in Danger at the Time of the Trial, for that he might have taken Advantage of the Error in the Process; but granting it to be a good Rule, that the Defendant shall not recover Damages where his Life is not in Danger at the Time of the Trial, which yet I find not confirmed by any Authority, besides the Year-Book of 9 H. 5. 2. it may be answered, that in the Case in Question the Defendant's Life is in Danger at the Time of the Trial, because the Error in the Process is salved by his Appearance, as shall be shown more at large in the Chapter concerning Process.

Sec. 142. If a Person who has taken a Release, or prayed the Benefit of the Clergy, waive such Release, or Benefit of Clergy, and put himself on his Trial and be acquitted; it is said, that he shall recover his Damages, notwithstanding the Objection that the Taking such Release, or making such Prayer, seem to carry with them an implied Confession of Guilt.

Sec. 143. Wherever any Person is so far acquitted on an Appeal carried on at the Suit of the Party, as to be intituled to his Damages, he shall have Judgment for them without any Process to bring in the Party to answer to the Damages, because he is still in Court, but where he is so acquitted on an Appeal carried on at the Suit of the King after a Nonuit of the Party, he shall not recover Damages, without a Seizure facies, to bring in the Party, because he was out of Court by the Nonuit.

Fourthly, In the Contraction of these Words, The Justices before whom the Appeal shall be heard and determined, shall punish the Appellor by a Year's Imprisonment, and the Appellor shall nevertheless restore to the Parties so appealed their Damages, according
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according to the Discretion of the Justices, having Respect to the Imprisonment or Arrestment, that the Party appeal'd hath sustained by Reason of such Appeals, and to the Injury that they have Incurred by the Imprisonment, or otherwise, &c.

the following Points have been holden.

Sec. 141. First, That Justices of nisi prius have no Power to give Judgment for such Imprisonment or Damages, upon an Acquittal before them, whether before or since the Statute of 14 H. 6, by which it is enacted, That such Justices shall have Power in all Cases of Felony or Treason, to transfer their Judgments, as well where a Man is acquitted, as where he is sentenced.

For the Words abovementioned in the Statute of Westminster, are to be understood of such Justices only before whom the whole Plea of the S. Appeal is heard and determined, and therefore in strictness can extend to the Justices of the King's Bench only, where the Appeal is commenced before them, (for that the whole Appeal is in such Case heard and determined before them, either in Person, or else by others delegated by, and representing them,) and not to the Justices of nisi prius, who have nothing to do with the Appeal before the Trial, nor any Original Power to try it. And the Statute abovementioned of 14 H. 6. hath been continued to intend only to enable Justices of nisi prius to give the Principal Judgment, and not to transfer them from the Court of King's Bench, a Power in collateral Matters. Yet the Justices of nisi prius have by Usage not now to be disputed, gained a Power to assize the Damages, and to inquire of the Sufficiency of the Plaintiff to answer them, and also of the Abettors. But I do not find that they have ever given Judgment for the Damages. Yet there is no Doubt but, that if such Justices be also Justices of Affaire, and as such have an Appeal commenced before them, they may, as Justices of Affaire, upon the Acquittal of the Appellee, not only inquire of the Damages, &c. but also give Judgment for them, both by the Letter and Meaning of the Statute.

Sec. 142. Secondly, That if a Jury give too small Damages to the Appellee, the Court may encrease them, for which it seems to follow, That if a Jury give too large Damages the Court may abridge them.

And surely no less can be implied by the Statutes ordaining, That the Damages shall be given according to the Discretion of the Justices, Respect being had to the Imprisonment, &c. And this Construction also seems agreeable to the Rules of Law in other Cases, by which the Court is said to have a general discretion in Power, except in some special Cases, as Local or Trespasses, &c. either to increase or abridge the Damages found by an Inquest of Office, and where a Jury which hath acquitted an Appellee inquires afterwards of the Damages, it seems in Respect of such Inquiry to be no more than an Inquest of Office, tho' it were returned to try the Cause.

Sec. 143. Thirdly, That if there be several Appellees, and all of them acquitted, the Damages ought to be severally assigned as to every one of them, and this doublets is agreeable both to the Letter and Meaning of the Statute, which provides that in giving the Damages Respect shall be had to the Imprisonment and Intamy, and other Damage sustained by Reason of the Appeal; and thence being severally, and receiving different Aggravations from the different Circumstances of the Person's particular Case, it cannot but be reasonable, That the Damages be assigned severally also.

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Sect. 144. Fourthly, That a Monk or Feme Covert, being appealed without the Abbot, or Husband, cannot have a Judgment for the Damages on their Acquittal, because they are disabled by the Law to recover any Damages without the Abbot or Husband 3 and the general Words of a Statute shall not be construed to enable Persons in a Point, wherein the Common Law hath disabled them. But the Authority of this Opinion, as to a Wife, is questioned by 4 Hobart, neither do any of those 5 who from to give it greater Weight, bring any other Proof of it, than a Note in Fitzherbert’s Abridgment, of a Resolution to such Purpose, in the Time of Edward 3, as to the Case of a Monk, and an Affair, that the Law is the same in the Case of a Wife: Against which it may be plausibly argued, That since the Imprisonment and Infamy Sustained by a Feme Covert, in a malicious Appeal against her, are far from being less grievous in Respect of her Covetous, and are a good 6 Ground of a Writ of Conspicacy at the Common Law, brought by the Husband and Wife; and since the Wife may take any Thing to the Benefit of her Husband, and it appears to the Court that the Appellant by his own Act, without any Default either in the Husband or Wife, gives them a good Title to the Damages; and since no express Judgment can be given for the Husband, being not a Party to the Record, and it is most for his Advantage, as well as his Wife’s, that a present Judgment be given: It may perhaps be thought no unreasonable Construction of the Statute, that in this particular Case Judgment should be given for the Wife to recover the Damages, which would as much enure, for the Benefit of her self and her Husband, as an express Judgment for them both, on a Writ of Conspicacy.

However, It is certain, 7 That if the Husband and Wife are both of them appealed and acquitted, they shall have a joint Judgment for the Damage done to the Wife, for which the Wife alone shall sue Execution, if the Husband die without suing it, and the Husband alone shall have Judgment for the Damage done to himself.

Fifthly, In the Construction of the Words, And if peradventure the Appellant be not able to encompass the Damages, it shall be inquired by whose Abatement, by Malice, the Appeal was commenced, if the Party appealed desire it. And if it be found by the same Inquest, that any Man is Abettor through Malice, he shall be disfrained by a judicial Writ, at the Suit of the Party appealed to come before the Justices, &c. The following Points have been holden.

Sect. 145. First, That the Abettors are in no Case liable to render Damages, where the Appellant himself is not liable, tho’ never so sufficient; and this is confirmed by Experience, and the manifest Part of the Statute, which by directing that the Abettors be inquired of, where the Appellant appears insufficient to answer the Damages, plainly intimates that they are to be inquired of in such Cases only, wherein the Appellant must have answered them, if he had been able; and agreeably hereto it seems to be settled, 8 That a Release of Damages to the Appellant will discharge the Abettors, if they can produce it.

Sect. 146. Secondly, That unless the Appellant be found by the Jury to be insufficient, the Abettors shall not be inquired of; and yet the Statute doth not expressly direct that the Jury shall inquire of the Sufficiency of the Appellant. But it being the general Method of the Law in other Cases of like Nature, to make an Inquiry by a Jury, it is certainly a reasonable Construction of the general Words of the Statute, that such Inquiry may be made in the present Case. Yet, whether the Justices themselves may not, if they think fit, make such Inquiry without a Jury,
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It being but an Inquiry of Office, may deferre to be considered for the Reasons in the 92 and 142 Sections of this Chapter. However there can be no Doubt but that the Insufficiency of the Appellant must appear by one or the other of these Inquiries, before the Abettors can be inquired of.

Sec. 147. Thirdly, That a the Abettors may traverse the Jury's Finding, if the Appellant to be insufficient, or that they abettred him, &c. for it is hardly that a Man should be concluded by any Matter whatsoever, found to his Prejudice in an Action, to which he is no way Privy. Also it is holden by b Statuende, That if a Jury on the Acquittal of one Defendant find that there were no Abettors, yet they may afterwards on the Acquittal of another Defendant find that there were Abettors, because there is no Reason that the first Inquest shall bind one who is not Privy to it, and has no Remedy against it. But the contrary hereto is holden in the Book of c Affizes, where the Court refused to inquire of the Abettors, on the Acquittal of a Defendant, because it had been found on the Acquittal of another, that there were no Abettors; but this Case, if thoroughly examined, seems repugnant to it self; for the Jury were permitted on the second Acquittal to tax the Damages, which yet are said to have been taxed before; but to what Purpoze should this be done, unless it were first found that the Appellant was sufficient or else that there were Abettors, which could not but control the first Finding; as also the second Taxation of the Damages must do, unless it were wholly the same with the first.

Sec. 148. Fourthly, That d if the Appellant be found sufficient to render Part of the Damages, and not the Whole, Judgment shall be given against the Abettors for the Whole, and not for Part against them, and for the other Part against the Appellant; for that those Words of the Statute, "If precedenture the Appello be not able to precompence the Damages," must be understood of all the Damages.

Sec. 149. Fifthly, That e the Appellee after his Acquittal may sue for the Damages by Attorney.

Sec. 150. Sixthly, That f though the Statute expressly give only Judicial Proses for the Recovery of the Damages against the Abettors, yet the Appellee may, if he think fit, take out an Original Writ of Abatement, grounded on the Statute, and therein count to greater Damages than were found by the Jury; which in Respect of such Finding, being in Nature of an Inquest of Office, shall not conclude the Appellee.

Sec. 151. Seventhly, That g if the Appellee chuse rather to proceed for the Recovery of his Damages by his Judicial Proses, than by Original; it is grief for him to make Use of a Diffrest, which is given by the express Words of the Statute; yet there is a Note h of an Old Case, where in a Venire facias was first awarded; but it is questionable, whether this be justified by the Statute or not.

Sec. 152. Eighthly, That k it is time enough for the Appellee to shew the Time and Place of the Abatement, when the Abettors appear upon such Proses; and by such Shewing he supplies the Omission of the Jury in not finding any Time or Place, on their Inquiry of the Abatement, &c.

Sec. 153. Ninthly, That l the Non-suit of an Appellee, either in an Original Writ, or Proses against the Abettors, whether before or after Appearance, is no Bar of a second Writ or Proses.

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Of Approver.

Sect. 1. Having gone through the several Kinds of Appeals by innocent Persons, I am now in the second Place to consider the Nature of an Appeal by an Offender, confessing himself to be guilty, who is commonly called a Prover or Approver in English, or Probator in Latin, because he must at his Peril prove his Appeal in every Point, and for so doing is pardoned of Course. And for the better Understanding the Nature of such Appeal, I shall examine the following Particulars.

1. When a Man may be said to become an Approver.
2. Who may be admitted to be Approvers, and who not.
3. In what Cases.
5. Against what Offenders.
7. How they are to be ordered and demeaned, both before and after the Appeal.

1 S. P. C. 152. Letters C. Fitz. Fines 9. 1 All p.l. 20. 2 All p.l. 19. 3 H. 4, 17. pl. 31. 4 See the Books cited the following Part of this S. Bro. Fitz. Coro. 117. 5 Co. 6o. 8. 6 S. P. C. 170. 7 Letter C. seems contrary. 8 20 All p.l. 1. Fitz. Coro. 214. 9 Fitz. Fines 49. 10 All p.l. 8. Fitz. Coro. 219.

8. What Proces is to be awarded against the Appellees.
9. In what Manner the Court is to proceed upon, and after the Trial.
10. How the Approver is to be awarded for making good his Appeal.

Sec. 2. As to the first Point, viz. When a Man may be said to become an Approver, it seems to agreed, that a Man is then properly an Approver, when being indicted of Treason or Felony, before competent Judges, and in Prison for the same, and capable of being an Approver, he confesses the Indictment, and is sworn to reveal all the Treasoms and Felonies he knows, and then before a Coroner enters his Appeal against all that were Partners with him in the Crime in the Indictment, being at the Time of the Appeal within the Realm.

As to the second Point, viz. Who may be admitted to be Approvers, and who not, I shall observe.

Sec. 3. First, That a Peer of the Realm cannot be an Approver.

Sec. 4. Secondly, That neither a Person attainted of Treason, or Felony, nor even one outlawed in a Personal Action, as some say, can be an Approver, because by his Attainder or Outlawry, he is out of the Law, and his Acquittal shall not be of such Credite, as to put any Person upon his Trial.

Sec. 5. Thirdly, That an idiot, or Person born deaf and dumb, or any one that is Non campas at the Time, or an Infant under the Age of discretion, cannot be an Approver, because no such Person ought to be admitted to take the Oath before the Coroner, without which there can be no Approval.

Sec. 6. Fourthly, That it is to be held both by Standforde, Coke, and Hale, that no Woman, nor Infant, can be an Approver, but it is observable that the Opinions of Standforde and Coke, seem chiefly to be grounded on this Foundation, that the Approver may have such like Exceptions against Approvers, as the Defendant may have in an Appeal brought by a lawful Person, and therefore may except that the Approver is within Age, or a Woman, &c. because such Persons cannot wage Battle, but it being settled at this Day, that there are no good Exceptions to an Appeal brought by a lawful Person, as hath been more fully shown in the precedent Chapter, it seems to be justly questionable, whether they are now to be admitted as good Exceptions to an Appeal, by an Approver.

To which may be added, in the Opinion of Hale, contrary to that of Standforde and Coke, a Man above the Age of seventy, or mainto, may be an Approver though he cannot wage Battle; from whence it follows clearly, that in the Judgment of Hale, there is no Necessity that an Approver should be able to wage Battle.

Sec. 7. Fifthly, That it seems to be agreed, That a Person in holy Orders cannot be an Approver, because it is a Rule that no Member of the Clergy can sue any Appeal whatsoever, in a Matter or Cause of Death.

As to the third Point, viz. In what Cases one may be admitted to be an Approver, I shall observe.

Sec. 8. First, That no one shall be admitted to be an Approver, till he hath confessed the Crime charged against him in his Indictment.

Sec. 9. Secondly, That it is holden in some Books, that he that hath once pleaded not Guilty, cannot be an Approver, but shall be hanged; because he is found faile, and his Confession contradicts his former Plea; yet the contrary hereto is holden by others, and Standforde admits that the
Court of Grace may admit such Persons to be Approvers, and this is as much as can be contended for in any other Case, for it seems agreed, that the Court is not bound of Right, to admit any Person whatsoever to be an Approver.

Sed 10. Thirdly, That it is agreed, That any one indicted of Treason or Felony may be an Approver, but that unless the crime with which a Person is charged, amount either to Felony or Treason, he cannot be an Approver.

Sed 11. Fourthly, That it is also agreed, That no Person accused of Treason or Felony, can be an Approver unless he be actually indicted for it, because his Confession amounts not to a Conviction until he be indicted, and consequently puts it not in the power of the Court to give Judgment against him, when his Appeal shall be rejected or faulfulled, as every Approvement ought to do.

Sed 12. Fifthly, That it seems also to be generally agreed, That if a Person indicted be also appealed of the same Felony, he can no longer be an Approver, the reason whereof seems to be, that though the King may in his Discretion, by admitting a Person to be an Approver, respite the judgment and execution of one prosecuted by Indictment, which is his own Suit, yet he cannot delay them in an Appeal, which is the Suit of the Party, and a fori s therefore it follows, That if a Person be appealed only, and not indicted, he cannot be an Approver.

Sed 13. Sixthly, That notwithstanding the Appeal of an Approver may in some respects be looked upon as the Suit of the King, and equivalent to an Indictment, yet the Appellee of an Approver cannot become an Approver himself, not only because it would falsify the Appeal of the first Approver, in supposing that he had omitted some of his Partners, but also because it would cause an infinite Delay, for the Appellee of such an Approver might as well become an Approver of others, and so on.

Sed 14. As to the fourth Point, viz. Of what Offences a Person may be admitted to approve another, it seems agreed, That no one can approve another of any other Offence, but the very Crime contained in the Indictment; and therefore that he cannot approve a Man of a Crime of a different Nature, nor even of being accessory before or after to the same Crime, because no man can abet, or receive himself. But it seems also to be agreed, That inasmuch as the Oath of an Approver is general, to discover all the Treason and Felonies he knows, if he accuse any Persons of Crimes of a different Nature from his own, whether in the same, or a foreign Country, his Accusatior will be a reasonable Ground to carry on a Prosecution against them for such Crimes, though it be not of it self of Force sufficient to put them on their Trials.

Sed 15. As to the fifth Point, viz. Against what Offenders a Person may be admitted to become an Approver, it seems clear, That a Man may be an Approver against any Person whatsoever within the Realm, whether he live in the same or a foreign Country, provided he be named of the County wherein he dwells. But it is said, That if it appear either by the Confession of the Approver, or the Return of the Sheriff, or the Testimony of Persons of Credit in the County, that there are no such Persons, as some of those named in the Appeal, in rem natura, or within the Realm, or even within the Country, whereof they are named in the Appeal, the Approver shall be hanged, unless the Court in Mercy will spare him, because his Appeal in respect of such Persons appears to be false, or to no Purpose.
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Sec. 16. As to the sixth Point, viz. Before what Justices a Person may be admitted to be an Approver, it seems to be a settled Rule, That a Man may be an Approver before any Justices, who have Power to align a Coroner to take the Appeal; and for this Reason it seems to be agreed, That one may be an Approver before the Justices of the King's Bench, and Justices of Gaol-Delivery, and Justices in Eye. And upon this Ground it is held in Sir Edward Coke's third Institute, and also in Sir Matthew Hale's Pleas of the Crown, under the Chapter of Approver, That a Man may be an Approver before Justices of Oyer and Terminer. But the Foundation of this Opinion seems to be overthrown by what is said by both these Authors in other Places, wherein it is held that Justices of Oyer and Terminer cannot align a Coroner, because it is not within their Commission; And it seems to be a general Rule, that those only can receive the Appeal of an Approver who can align a Coroner to take it, and therefore it seems to be agreed, That neither a Court-Baron, nor Justices of Peace, nor any other special Justices, can receive such Appeal, unless their Commission extend to it. And for the like Reason it seems to be the Opinion of Sir Edward Coke, that the Lord High Steward of England cannot receive such an Appeal; and this is contradicted by Sir Matthew Hale.

As to the sixth Point, viz. In what Manner an Approver is to be ordered and demised, both before and after the Appeal, the following Particulars seem most remarkable.

Sec. 17. First, That it seems to be agreed, That where-ever a Person indicted of Treason or Felony confesses the Indictment, whether he appealed others or not, he puts it entirely in the Discretion of the Court, either to give Judgment, and award Execution against him, or to reprieve them till he shall have made good his Appeal.

Sec. 18. Secondly, That whenever a Person is admitted to become an Approver, the Court shall align a Coroner to receive his Appeal, and shall take an Oath from him to discover all the Treasons and Felonies that he knows.

Sec. 19. Thirdly, That the Court which admits a Man to become an Approver, ought to limit him a certain Number of Days, to make his Appeal in, during which it is held by Some, That he is to have a Penny a-day as his Wages from the King; but by others, That he ought not to have it till he has made good his Appeal, by avenging the Appellees.

Sec. 20. Fourthly, That the Approver during all the Time assigned him for making his Appeal, ought to be at his Liberty, and out of Prison; for he may disavow an Appeal made by Dureis of imprisonment, but if he allledge that an Appeal was extorted from him by such Dureis, and such Allegation be found to be false, either by the Examination of the Coroner, or by an Inquest of Office, the Approver shall be hanged.

Sec. 21. Fifthly, That the Approver ought to make his Appeal before the Coroner, on every one of the Days limited for the Making of it, for if he fail on any one of them, and the Coroner record such Failure, Judgment shall be given against him.

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And so shall it be also, if after he have formed his Appeal, before the Coroner, he make the least Variation in his repeating it before the Court, and the Coroner record such Variation.

Seft. 22. As to the seventh Point, viz. What Process is to be awarded against the Appellees, it seems agreed, that the Coroner may award Process to the Sheriff, against any Appellee in the same County, till it come to the Exigent; but it is certain, that he cannot award it to any other Officer, except the Sheriff, nor to any Sheriff out of his own County: And it seems questionable, whether he be not restrained by the Statute of Magna Charta, Ch. 17. to award the Exigent to the Sheriff of his own County. But it seems agreed, that the Juries of the King's Bench, or Justices in Eyre, might by the Common Law as well award Process of Outlawry, as any other Process, against Appellees in any County whatsoever.

And it is certain, That Justices of Gaol-Delivery may award Process into any County, to apprehend and try them by Force of 48 Ed. 1, commonly called the Statute de Appellatis, but whether this Statute doth empower such Justices to award Process of Outlawry into a Foreign Country, may deserve to be considered.

As to the eighth Point, viz. In what Manner the Court is to proceed upon, and after the Trial, I shall observe.

Seft. 23. First, That it is in the Election of the Appellee, either to put himself upon his Country, or to wage Battel with the Approver.

Seft. 24. Secondly, That let there be never so many Appellees, if they wage Battel, the Approver must fight them all. But on the Contrary, it seems to be generally agreed, That if a Person appealed by several Approvers of one and the same Felony, vanquishes any one of them, he shall be acquitted against them all, and all of them shall be condemned, in the same Manner as if every one of them had been actually vanquished. But if an Approver having appealed several of the same Crime, be vanquished by one of them, it seems to be held, that his Appeal is still in force against the Rest; but the Note in Fitzherbert's Abridgment, which seems to be the Foundation of this Opinion, seems rather to be intended of an Appeal by an Innocent Person, than of an Appeal by an Approver, in Relation to whom it seems to be a general Rule, that being once falsified as to any one of the Appellees, he ought to be condemned, as hath been more fully shown in the 9th and 15th Sections of this Chapter.

Seft. 25. Thirdly, That if the King pardon the Approver or Appellee, hanging the Appeal, the Approvement ceases, and the Appellee shall be discharged, for in the first Cafe, by the Pardon the Felony is extinct, and a Man can no longer be an Approver, than while he is under the Guilt of the Crime, whereof the Approvement is made, and liable to be condemned by the Court, whenever his Appeal shall be falsified, &c. And in the second Cafe, it cannot be doubted but that the King's Pardon will discharge the Appellee, becaufe an Approvement is rather the Suit of the King, than of the Party.

Seft. 26. Fourthly, That whether the Appeal of an Approver be falsified by the Confession or Vanquishment of the Approver, or verified by the Conviction or Vanquishment of the Appellee; yet if the Offence be within the Benefit of the Clergy, neither the Approver in the first Cafe, nor the Appellee in the second, are excluded from it, any more than in the Case of an Indictment.
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Sec. 27. As to the ninth Point, viz. How the Approver is to be rewarded for making good his Appeal: it is said, that if an Approver, H. P. C. 197, convicth all the Appellees, whether by Barre or Verdict, the King, ex S. P. C. 142, merito justitia, ought to pardon him as to his Life, and also give him Wages 6 from the Time of the Appeal to the Time of the Conviction, 112. But 7 it seems, that anciently he ought not to be suffered to continue in the Kingdom. And it is recited by 5 H. 4, ch. 2. That divers notorious Felons, for Safeguard of their Lives, had become Proctors, to the Intent, 6 &c. 154. in the mean Time, by Brevage, and great Gifts to pursuie and have their Pardons, and then after their Deliverance, had become more notorious Felons than they were before; and therefore it is enacted, That if any Person pray or pursue, or cause to be prayed or pursued for any such Felon so attainted by his own Confession, to have any Charter of Pardon, the Name of him that pursueth such Charter be put in the same Charter, making Mention that the same Charter is granted at his Instance. And if be to whom such Charter is granted become a Felon again, the Party who pursueth the Charter shall forfeit 100 l.

C H A P. XXV.

Of Indictment.

Sec. 1. An Indictment is an Accusation, at the Suit of the King, by the Oaths of twelve Men of the same County wherein the Offence was committed, returned to inquire of all Offences in General in the County, determinable by the Court into which they are returned, and finding a Bill brought before them to be true; but when such Accusation is found by a Grand Jury, without any Bill brought before them, and afterwards reduced to a formed Indictment, it is called a Prefentment, and when it is found by Jurors returned to inquire of the particular Offence only which is indicted, it is properly called an Inquisition. And for the better Understanding the Nature of such Proceedings, I shall consider the following Particulars,

1. Whether a Grand Jury may find Part of a Bill brought before them true, and Part false.
2. Whether an Indictment be merely the Suit of the King.
3. What Matters are indictable.
4. Where a Man may be tried at the Suit of the King for a capital Offence, without any Indictment.
5. Whether a Man may be arraigned on an Indictment while an Appeal is depending against him for the same Offence.
6. Who may and ought to be Indictors, and in what Manner they are to be returned.
7. Within what Place the Offences inquired of must arise.
8. What ought to be the Form of the Body of an Indictment.
9. What ought to be the Form of the Caption of it.
10. Upon what Proof it may be found.
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11. In what Cases it may be quashed.
12. What may be pleaded to it, and in what Manner.

Sect. 2. As to the first Point, viz. Whether a Grand Jury may find Part of a Bill brought before them true, and Part false, it seems to be generally agreed. That they must either find Billa Vera, or Ignoramus, for the Whole; and that if they take upon them to find it specially, or conditionally, or to be true for Part only, and not for the rest, the Whole is void, and the Party * cannot be tried upon it, but ought to be indicted anew; and accordingly it hath been resolved, That if a Grand Jury indorse a Bill of Murder, b Billa vera se defendendo; or Billa vera for Manslaughter, c and not for Murder; or if they indorse a Bill upon the Statutes of News, Billa vera, d but whether Ista vera prolati fuerant malicie, sed in re aucta ignoramus; e or if they indorse an Indictment of Forcible Entry, and Forcible Detainer, Billa vera e as to the Forcible Entry, and Ignoramus as to the Forcible Detainer; or if they indorse, f That if the Freethold were in J. S. or the Possession were in J. S. then they find Billa vera, the Whole is void.

Sect. 3. As to the second Point, viz. Whether an Indictment be merely the Suit of the King; it is every Day's Practice, That it is so far esteemed the King's Suit, that the Party who prosecutes it is a good Witness to prove it. Also it seems to be agreed, g That no Damages can be given to the Party abused upon an Indictment, or any other Criminal Prosecution, h notwithstanding the King, by his Commission erecting a New Court, expressly directs, That the Party shall recover his Damages by such a Prosecution. Also, where by Statute Damages are given to the Party grievances by the offence intended to be redressed, it j seems they cannot be recovered on an Indictment grounded on such Statute, unless such Method of recovering them be expressly given by the Statute; but that they ought to be sued for in an Action on the Statute, in the Name of the Party, that the Party may have the King's Bench, having the King's Privy Seal for that Purpose, may give to the Procurator the third Part of the Fine allied, on a Criminal Prosecution, for any Offence whatsoever. Also, it is every Day's Practice of that Court, to induce Defendants to make Satisfaction to Prosecutors for the Costs of the Prosecution, and also for the Damages sustained by the Injury whereof the Defendants are convicted, by imitating an Inclination on that Account to mitigate the Fine due to the King.

Sect. 4. As to the third Point, viz. What Matters are indigibable: There can be no Doubt, but that all Capital Crimes whatsoever, and also all Kinds of inferior Crimes of a publick Nature, as Misdemeanors, and all other Contemptus, all Disturbances of the Peace, all Oppressions, and all other Misdemeanours whatsoever of a publickly evil Example against the Common Law, may be indicted; but no injuries of a * private Nature, unless they some Way concern the King. Also it seems to be a good general Ground, That where-ever a Statute prohibits a Matter of a publick Grievance to the Liberties and Security of the Subject, or commands a Matter of publick Convenience, as the Repairing of the Common Streets of a Town, an Offender against such Statute is punishable, not only at the Suit of the Party aggrieved, but also by Way of Indictment for his Contempt of the Statute, unless such Method of Proceeding do manifestly appear to be excluded by it. Yet if the Party offending have been fined to the King in the Action brought by the Party, as it is said * that he may in every Action for doing a Thing prohibited by Statute, it seems

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* 2 Sm. 60. b. * a Mod. 84.
* 17 At. pl. 80.

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seems questionable, whether he may afterwards be indicted; because that a Statute extend only to private Persons, or if it extend to all Persons in general, but chiefly concern Disputes of a private Nature, as those relating to Distresses made by Lords or their Tenants, it is said that Offences against such Statute will hardly bear an Indictment. Also, where a Statute makes a new Offence, which was not Way prohibited by the Common Law, and appoints a particular Manner of proceeding against the Offender, as by Commitment, or Action of Debt, or Information, &c., without mentioning an Indictment, it seems to be settled at this Day, that it will not maintain an Indictment, because the Mentioning the other Methods of proceeding only, seems implied to exclude that of Indictment. d Yet it hath been adjudged, That if such a Statute give a Recovery by Action of Debt, Bill, Plaint or Information, or otherwise, it authorizes a Proceeding by Way of Indictment. e Also, where a Statute adds a farther Penalty to an Offence prohibited by the Common Law, there can be no Doubt but that the Offender may still be indicted, if the Prosecutor think fit, at the Common Law. And if the Indictment for such Offence conclude contra formam Statutui, and cannot be made good as an Indictment upon the Statute, it seems f to be now settled, That it may be maintained as an Indictment at Common Law, as will be more fully shown in the following Part of this Chapter.

As to the fourth Point, viz. Where a Man may be tried at the Suit of the King for a capital Offence without any Indictment, I shall endeavour to shew,

1. Where one may be so tried as having been taken with the Manner.
2. Where one may be so tried upon a Verdict.
3. Where upon an Appeal not prosecuted.
4. Whether one may be so tried upon a Sheriff's Return.

Sept. 5. As to the first Point, viz. Where one may be so tried as having been taken with the Manner: It is said, That in an Action of Trespass in the King's Bench, De muliere abducendo cum homine vixi, if the Defendant be found guilty of having carried away the Woman and Goods with Force, and feloniously; or i in a Common Action of Trespass in the said Court, for Goods carried away, if it be found that the Defendant feloniously stole them, he shall be put to answer the Felony without any farther Accusation; for such a Charge by the Oath of twelve Men, on their Inquiry into the Merits of a Cause, in a Court which has Jurisdiction over the Crime, is equivalent to an Indictment; and the King being always in Judgment of Law present in Court, may take Advantage of any Matter therein properly disclosed for his Benefit. But such a Verdict in a Court which has no Jurisdiction over criminal Matters, seems to be of little Force, because such Court has nothing to do with such Matters. And it seems, b That...
that even in the King's Bench, if on any Indictment whatsoever, except only an Inquisition of Death found before a Coroner on View, a Person not mentioned in it be found guilty of the Crime whereof others are indicted, yet such Finding shall not serve for an Indictment against him, because it was wholly extrajudicial. But such Finding of others guilty, whether in the King's Bench, or other Court of Criminal Jurisdiction, upon an Inquisition of Death, found before a Coroner on View, is of greater Force, because the Jury acquitting the Party so indicted, ought to inquire what other Person did the Fact because it appears by a Record of the highest Credit, That a Person is killed. And, if a Person be declared guilty in a proper Court, for having been guilty of a Misdemeanor, simul cum A. B. & C. and thereupon the Jury find A. B. and C. guilty; it seems that such Verdict will serve for an Indictment against them, because it was not wholly extrajudicial.

As to the third Point, vis. Where one may be so tried upon an Appeal not prosecuted, the following Particulars seem most remarkable.

Sec. 7. First, That an Appeal by an innocent Person, and an Appeal by an Approver, are equally favoured in this Respect.

Sec. 8. Secondly, That regularly where a Person is indicted and appealed of the same Crime, and the Appeal is not prosecuted, he shall not be arraigned upon the indictment, but upon the Appeal.

Sec. 9. Thirdly, That if an Appellant be nonsuit in an Appeal by Writ, before he hath declared, the Appellee cannot be arraigned at the King's Suit on the Writ of Appeal; not only because it contains no Certainty of the Circumstances of the Fact, which is the proper Office of the Declaration to ascertain; but also because, for what appears to the contrary by the Record, the Writ might have been purchased by a Stranger. And therefore in such Case it seems to be in the Discretion of the Court, either to dismiss the Appellee, or to hold him, 'till it shall appear, Whether there will be any other Prosecution against him. But if an Appellant, by Writ, be nonsuit after Declaration, or any Appellant by Bill or Approver be nonsuit, it seems, That regularly the Appellee shall be arraigned at the King's Suit, on the Bill or Declaration; because they must be as certain as an Indictment, and cannot be commenced but in Person.

Sec. 10. Fourthly, That it seems to be a settled Rule, That wherever an Appeal is once well commenced, and afterwards so far determined, without a full Acquittal, That neither the fame, nor any other Plaintiff, can ever bring another Appeal against the same Appellee, he may be arraigned upon the Bill or Declaration, at the Suit of the King; as where an Appellant, having a good Title to the Appeal, makes a Release to the Appellee, hanging the Action, or suffers a Non Suit, or a Retraction, or demurs to a good Plea or Issue, rendered by the Appellee, which Demur is adjudged against him; or where such an Appellant or Approver confess their Appeal to be false, unless they make such Confession in the Field, upon a Trial awarded by Battel, for such Confession amounts to a Vanquishment of the Appellant or Approver, and consequently is a full

Sec. 11. of Acquittal of the Appellee; after which his Life shall not be brought Letter C.

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Letter B. 

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again into Danger for the same Crime. And this seems to be the only Reason why after such a Vanishment, or a Verdict in his Favour, an Appellee shall be discharged, as well against the Suit of the King, as that of the Party. But it seems, That in all other Cases whatsoever, an Appellee, in an Appeal well commenced, being wholly discharged of the Suit of the Party, may be arraigned upon the Appeal, at the Suit of the King, whether such Discharge were merely owing to the Act of the Party, as in the Cases abovementioned, or to the Act of the Court; as where an Approver is adjudged to be hanged before he hath performed his Appeal, or partly to the Act of Law, and partly to the Act of the Party, as where an Appeal by a Woman for the Death of her first Husband, is abated by her marrying a second, or where an Appellee is discharged of an Appeal, for not having been made a Defendant in a former Appeal, brought by the same Appellant for the same Fact, or whether such Discharge be merely owing to the Act of God, as where an Appellant dies a natural Death, while his Appeal is depending. It seems indeed to be holden in the Year-Book of 4 H. 6. as a general Rule, that where-ever a Writ is abated, the Declaration depending upon it is determined also, and consequently, that the Appellee cannot be arraigned upon it, but to this it may be answered, that in the very same Place it is allowed, that after a Non Suit in an Appeal, the Appellee may be arraigned at the Suit of the King; and it seems difficult to give a Reason, why a Writ is not as much determined upon a Non Suit, as upon an Abatement; to which may be added, that the Point adjudged, which was this, That where a Writ abates for a Mitnower, the Defendant shall not be arraigned at the Suit of the King, seems plainly to go on this Ground, That where a Suit is ill commenced, the King shall not have a greater Advantage from it than the Party might have had; and therefore the Opinion abovementioned, being also contradicted by the best Authorities, seems to be of little Weight.

Sect. 11. Fifthly, That where-ever an Appeal abates for Insufficiency of the Writ, or is barred for want of a good Title in the Appellant, or for any other Matter which throws it was ill commenced, the Defendant shall not be arraigned upon it at the Suit of the King, because it never had a good Foundation, and cannot give a greater Advantage to the King than to the Party himself who sued it, and therefore it seems to be agreed, That if an Appeal be abated for want of Form apparent in the Writ, as for the Omission of the Word Habeas, or for false \textit{Letters}, or for any other \textit{apparent Defect}; or if it be abated for a Defect not apparent of it self, but disallowed by the Pleadings of the Parties, as for a \textit{Mitnower}, or wrongful Addition, or any such as Insufficiency, or if it be abated on Account of the Disability of the Appellant, as by the Plea of Outlawry for Felony or Trespass; or if it be put without Day upon a Plea of Excommunication of the Appellant; or if it be barred by a Release made before the Commencement of the Suit, or by Reason that the Time for bringing it was elapsed before it was commenced, or because the Appellant appears to have had never any Right to bring it as where in an Appeal by one as Wife, it is found that she was never lawfully married to the Deceased; or in an Appeal by one as Heir 4.

\textbf{S. P. C. 147.} Letter E. H. P. C. 200. 1 S. P. C. 149. Letter A. H. P. C. 200. Finz. Coro. 30. Bro. Appeal 57. 4 H. 6. 12, 14. 47. 47. 12. 33. 69. 20. 73. 51. 32. 43. 32. 51. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43. 32. 43.
his Father, it is found that he hath an elder Brother alive by the name of Father, &c. the Appellee shall not be arraigned upon the Appeal, at the Suit of the King, but shall be wholly discharged of it. But where an Appeal is put without Day on the Plea of Excommunication, the Appellee shall be mainprised from Day to Day till the Plaintiff be absolved, and notwithstanding it seems to be holden generally in some Books, That where an Appeal is abated for any of the Insufficiencies abovementioned, or barred, the Appellee shall be set at large, and be discharged, as well again the King as the Party, yet surely this must be understood only of such Cases wherein it appears, That neither any Indictment is preferred, or intended to be preferred by the King, nor any other Appeal preferred, nor intended to be preferred by the King or some other Party, for otherwise surely it cannot but be intended, that it must be in the Discretion of the Court, upon Consideration of the Circumstances of the Case, either to commit or bail the Appellee for a reasonable Time, in Order to answer such further Prosecution, or to bind him to his Good Behaviour for a certain Time, &c.

Seif 12. Sixthly, That whatsoever may be pleaded by an Appellee either in Bar or Abatement of an Appeal, while it is carried on at the Suit of the Party, may as well be pleaded by him, when it is prosecuted at the Suit of the King, as that the Appellant suing an Appeal of Death, as Wife to the Deceased, was never married to him, or that she is outlawed, &c. which depends upon the Reason taken Notice of in the preceding Sessions, viz. That an Appeal shall not give the King a greater Advantage than the Party himself who sued it.

Seif 13. Seventhly, That wherever an Appellee is arraigned upon the Suit of the King, he may plead the King's Pardon, in the same Manner as if he had been arraigned upon an Indictment: But if an Appellee, who by pleading such a Pardon discharges himself of an Appeal at the Suit of the King, be also indicted, it is advisable to take Care at the same Time when he is in such Manner discharged of the Appeal, to have a Celerity of Proceeds entered on the Indictment, to prevent the Vexation of a Cauteristic Prosecution upon it.

Seif 14. As to the fourth Point, viz. Whether one may be tried at the Suit of the King for a capital Offence, without any Indictment upon a Sheriff's Return, it seems to be generally agreed, that neither the Sheriff's Return of a False or False, or of any other Matter, nor any Record whatsoever, except only an Appeal or Indictment, or something equivalent thereto, as the Verdict of twelve Men, finding a Man guilty in such Manner as is above set forth in the fifth Section of this Chapter, can at this Day put a Man upon his Trial for a capital Offence, as being contrary not only to the Common Law, but to Magna Carta, and other Statutes made in Affirmance of it.

Seif 15. As to the fifth general Point of this Chapter, viz. Whether a Man may be arraigned on an Indictment, while an Appeal is depending against him for the same Offence, it seems that it was the Common Practice before the Statute of H. 7. 1. Whether any Appeal were depending or not, not to try any Man upon an Indictment of Murder, before the Year and Day were past, left thereby the Suit of the Party should be prevented. And if such Respect were had to an Appeal where none was depending, it cannot be thought but that much greater was had
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had to one actually depending, whether before or after the Year and Day were passed. Yet it seems that the Court was never in any Case perpetually bound to suspend the Proceedings on an Indictment in respect of an Appeal, but might always in Discretion, whenever it should seem proper, proceed on an Indictment, hanging an Appeal. And accordingly we find, that in many Instances in the Old Books, when it was held, That in an Appeal by an Infant, the Parol should demurr till his full Age, the Court have proceeded to try a Man upon an Indictment, while an Appeal by an Infant was depending against him, to prevent the Delay, which could not but be occasioned, if the Proceedings should be deferred till the Appellant should come to full Age. Also where a Writ of Appeal of Robbery hath been fixed out against a Person under an Indictment for the same Robbery, and ready to be tried, the Court have refused to put off the Trial of the Indictment in respect of such Writ of Appeals; because before the Appellant hath declared, it doth not judicially appear, that both the Indictment and Appeal are for the very same Fact. But if there were no such special Reason to induce the Court to proceed upon an Indictment while an Appeal is depending, it seems to have been the general Practice to suspend the Proceedings on the Indictment till the Appeal were determined.

As to the sixth general Point of this Chapter, viz. Who may be, and ought to be Indictors, and in what Manner they are to be returned, I shall endeavour to shew,

1. How these Matters stand by the Common Law.

Sec. 15. As to the first Particular, it seems clear, That by the Common Law every Indictment must be found by twelve Men at the least, every one of which ought to be of the same Country, and returned by the Sheriff, or other proper Officer, without the Nomination of any other Person whatever; and ought also to be a Freeman, and a lawful Lige Subject; and consequently neither under an Attainer of any Treason or Felony; nor a Villain, nor Alien, nor outlawed, whether for a criminal Matter, or, as some say, in a personal Action. And from hence it seems clear, that if it appear by the CAPTION of an Indictment, or otherwise, that it was found by less than twelve, the Proceedings upon it will be erroneous. Also, it seems that any one who is under a Prosecution for any Crime whatsoever, may, by the Common Law, before he is indicted, challenge any of the Persons returned on the Grand Jury; as being outlawed for Felony, &c. or Villains, or returned at the Instance of a Prosecutor, or not returned by the proper Officer, &c.

Sec. 16. Also many Indictments in inferior Courts have been quashed for want of the Words, Probarum & Legaetum hominis, in the Caption of the Indictment, being brought by what Persons' it was found; but this is laid to be no Exception to an Indictment found in the Court of King's Bench, or Grand Sessions, or Counties Palatine, and hath been often over-ruled, as to Indictments in other Courts, because all Men shall be intended to be honest and lawful, till the contrary appear.

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Seft. 17. It is resolved in the 4th Year Book of 11 H. 4. by the Advice of all the Justices, That one outlawed on an Indictment of Felony, may plead in Avoidance of it, that one of the Indictors was outlawed for Felony, &c.; But it seems to be the general Opinion, That this Resolution is rather grounded on the Statute of 11 H. 4. ch. 9. which was made in the same Term, in which this Resolution was given, than on the Common Law, because it appears by the very same Year-Book, that when this Plea was first proposed it was disallowed; from whence, as I suppose, it is collected, that the subsequent Resolution was founded on the Authority of the said Statute, which may be intended to have been made after the Plea was disallowed, and before the subsequent Resolution, by which it was adjudged good. Yet, considering that the said Resolution was given in the Beginning of Hillary Term, and that the Parliament which made the said Statute was not held before the Beginning of the same Term; and therefore it is not likely that the said Statute was so soon made; and also considering, that the said Resolution was given by Advice of all the Judges, who seem to have been consulted about the Validity of the Plea abovementioned in the Common Law, and takes no Manner of Notice of any Statute, but only of the Law in General, it may deserve a Question, Whether such Plea be not good at the Common Law?

Seft. 18. I do not find it any where holden, that none but Freemen ought to be returned on a Grand Jury; but how far the Law is in this Respect altered by Statute, shall be shewn in the twentieth Section.

Seft. 19. As to the second Particular, viz. How the Matters abovementioned stand by Statute, it is enacted by the Statute of Westminster 2, 28. That old Men above the Age of seventy Years, Persons perpetually sick, or infirm at the Time of the Summons, or not dwelling in the County, shall not be put in Jurys, or lesser Assizes. And the Equity thereof, and the Reason of the Thing, seem plainly so far to extend to Grand Juries, that it shall appear that any of the Persons abovementioned be returned on a Grand Jury, the Court, into which they are returned, will easily excuse their Non-appearance. But it seems clear, that any such Persons being returned on a Grand Jury, may lawfully serve upon it, if they think fit; neither do I find that they can have an Action on the said Statute for being so returned, for the Writ in the Register grounded on, and reciting the Statute, mentions the Prohibition of it to be, that Men above the Age of seventy Years shall not be put in Assizes, juratis, vel recognicionibus aliqua, which Expressions seem proper for Petit Juries only; whereas the Writ grounded on the Statute of Articuli jure chartarum, set forth more at large in the twenty-fifth Section, recites the Prohibition thereof to be, that none of the Persons in the Writ mentioned shall be put in inquisitionibus nec juratis, which Expression seems to be of a larger Extent, and to take in Grand as well as Petit Juries; by which it seems clearly to be implied, that in the Judgment of those who formed the said Writ, the Statute last mentioned is more general than the former.

Seft. 20. It is further enacted by the abovementioned Statute of Westminster 2, 28. That none shall be put in Assizes or Juries, though they ought to be taken in the proper County, who have lost Tenements than to the Value of twenty Shillings yearly. And it is required by the Statute of 21 Ed. 1, commonly called the Statute De his qui possunt juris in Assizes, That they should have Tenements to the Value of 40s. yearly.Provided, That before Justices in Eyre for Common Pleas in their Eyres, and also in Assizes, and Juries, which
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which shall be taken in Cities and Burghs, and other trading Towns, the same may be done as was accustomed. And this Exception is likewise mentioned in the Writ in the Register, which seems to be grounded on both these Statutes; by which it appears, that neither by the Common Law nor by these Statutes there was any necessity in Proceedings before Justices in Eyre, &c. That Petit Jurors should be Freeholders; and if so, it seems probable that there is no greater necessity that Grand Jurors making an Inquiry before them should be Freeholders; and if a Grand Juror before such Justices need not to be a Freeholder, why should there be a greater necessity that a Grand Juror before other Justices should be a Freeholder? And it is farther remarkable, that the abovementioned Writ in the Register, which seems to be grounded on these Statutes, mentions only Persons put in efts, juratis vel recognitionibus aliquibus: To which may be added, that the several subsequent Statutes, which require that none but Freeholders or Copyholders of Lands of such a value shall be returned on Juries, expressly extend only to Juries returned for the Trial of Issues, except only the Statutes concerning Indictments in the Sheriff’s Torm, which require, that every Juror finding such Indictment shall have 20 l. yearly of Freehold, or 26 l. of Copyhold, and also except 3 H. 11. 1 which requires that every Juror of an Inquest by which Justices of Peace shall inquire of Concealments by other Inquests shall have Tenements of the yearly Value of 40 l. and also except 33 H. 6. 2. which requires that every Indictment in the County Palatine of Lancaster, of Persons supposed by the same Indictment to live in some other County, and also every Indictment in any other County, of Persons in the same Indictment, supposed to live in the said County of Lancaster, shall be taken by such Jurors only as have Lands to the yearly Value of one hundred Shillings: All which seems to make it doubtful, Whether there be any Necessity either by the Common Law or Statute, That a Grand Juror in any other Case must be a Freeholder.

Sect. 21. It is enacted by 28 Ed. 1. commonly called the Statute of Articuli super Chartas, cap. 9. That no Sheriff, nor Bailiff shall impanel in Inquests, nor in Jurys over many Persons, nor others, nor otherwise than as is ordained by Statute: And that they shall put in those Inquests and Jurys, such as be next Neighbours, most sufficient, and least suspicious. And the like is enacted almost in the very same Words by 42 Ed. 3. 11. And it is farther enacted by the said Statute of Articuli super Chartas, That he who doth contrary, and is attainted therewith, shall pay unto the Plaintiff his Damages double, and shall be grievously amerced to the King. And the said Statute of Articuli super Chartas, is said by Sir Edward Coke, to extend to all Suits or Proceedings, either criminal or civil, Real, Personal, or mix’d, Publick or Private, Assizes or Enquests; and surely Part of it which ordains, that the most sufficient and least suspicious shall be returned on all Jurys, is so agreeable to common Right and natural Justice, that it cannot but be thought to be in Affirmance of the Common Law, and equally to extend to Grand and Petit Jurys, and consequently if any Officer shall be wilfully guilty of an Offence against it in the Return of any Jury, he cannot but be punishable for his Contempt, at the Suit of the King. And it is enacted by 23 E. 3. 6. That Justices of Assizes shall have Commission sufficient to inquire in their Sessions of Sheriffs, &c. for putting into Panels Jurors sufficiens and of evil Fame. And it is farther enacted by 34 Ed. 3. 4. That all Panels shall be made of the next People, which shall not be sufficiens nor procured. And that the Ministers which do against the same, shall be punished, before the Justices who take the Inquest, according to the Quantity of their Treas...
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past, as well against the King as against the Party for the Quantity of the Damage which he hath suffered in such Manner; and both these Statutes seem equally to extend to the undue Return of Grand and Petit Juries. But it is observable, that the Clause of the above recited Statute of Artisitis super Chartas, which ordains that the Sheriff, &c. shall render double Damages, extends only to Juries returned in Suits between Party and Party; because it says, that he shall render them to the Plaintiff, which is a Denomination never given to the King or Prosecutor, where the Proceeding is by Way of Indictment; and accordingly we find that the Writs in the Regifter grounded on this Statute expressly relate to Suits between Party and Party.

Sec. 22. But the principal Statutes relating to the Return of Grand Juries, are 11 H. 4. 9, and 3 H. 8. 12. the first whereof is as followeth, Because, that now of late Enquiries were taken at Westminster, of Persons named to the Justices, without due Return of the Sheriff, of which Persons some were outlawed before the said Justices of Record, and some fled to Sanctuary for Tres- son, and some for Felony, there to have Refuge, by whom, as well many Offenders were indicted, as other lawful lige People of our Lord the King, not guilty, by Conspira- try, Abetment, and false Imagination of other Persons, for their special Advantage and singular Lucre against the Course of the Common Law used and accustomed before this Time: Our said Lord the King, for the greater Ease and Quietness of his People, will and granteth, that the same Indictment so made, with all the Dependence thereof, be revoked, annulled, void, and holde none for ever: And that from henceforth no Indictment be made by any such Persons, but by Enquiries of the King's lawful lige People, in the Manner as was used in the Times of his noble Progenitors, returned by the Sheriffs, or Bailiffs of Franch- eises, without any Denomination to the Sheriffs, or Bailiffs of Franchises before made by any Person, of the Names, which by him should be impannel'd, except it be by the Officers of the said Sheriffs or Bailiffs of Franchises sworn and known to make the same, and other Officers to whom it pertaineth to make the same according to the Law of England: And if any Indictment be made hereafter in any Point to the contrary, that the same Indictment be also void, revoked, and for ever holde none.

In the Constructions of this Statute the following Points have been re- solved,

Sec. 23. First, That where a Person not returned by the Sheriff on a Grand Jury procures his Name to be Read among those of others who were actually returned, whereupon he is sworn of the Grand Jury, &c. he may be indicted, either in the King's Bench or before Justices of Oyer and Terminer, for his Contempt of the Statute, and being found guilty, may be fined and imprisoned; and yet the Statute doth not expressly provide that any such Person shall be any Way punished, but only that the Indictment should be void, &c.

Sec. 24. Secondly, That Indictments of Offences not capital are as much within the Statute as Indictments of Treason or Felony, and also Indictments before Justices of Peace as much as Indictments before Superior Justices; but it hath been questioned whether a Coroner's Inquest be within the Purview of it.

Sec. 25. Thirdly, That a Person arraigned upon any Indictment taken contrary to the Purview of the Statute, may plead such Matter in Avoidance of the Indictment, and also plead over to the Felony.

Sec. 26.
Chap. 25.

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Sec. 26. Fourthly, That a Person outlawed upon any such Indictment without a Trial, may also sue in Avoidance of the Outlawry, that the Indictment was taken contrary to the Purview of the Statute, as seems fully to appear from the abovementioned Year-Book of 12 H. 4. 4. 1. 4. 2. supra, Sec. 8. But if a Person who is tried upon such an Indictment, takes no such Exception before his Trial, it may be doubtful whether he may be allowed to take such Exception afterwards, because he hath flipp'd the most Bro. Indict. proper Time for it; except it can be verified by the Records of the same Court wherein the Indictment is depending, as by an Outlawry in such Court of one of the Indictors, &c. in which Case it is said, That any one, as amicus Curiae, may inform the Court of it.

Sec. 27. Fifthly. That if any one of the Grand Jury who find an Indictment be within any one of the Exceptions in the Statute, he vitiates the Whole, who so many unexceptionable Persons joined with him in finding it.

Sec. 28. Sixthly. That if a Prisoner indicted of Felony offer to take any such Exception, he shall upon his Prayer have Counsel assigned him for his Affidavit in it.

Sec. 29. Seventhly, That the Court needs not admit of the Plea of the Outlawry of an Indictor, in Avoidance of any such Indictment, unless he who pleads it, have the Record ready.

Sec. 30. It seems somewhat questionable, whether Outlawry in a personal Action be within the Purview of the Statute.

Sec. 31. It is recited by the abovementioned Statute of 2 H. 8. 12. That many Oppressions had been, by the untrue Demeanor of Sheriffs and their Ministers, done to great Numbers of the King's Subjects, by Means of returning, at Sessions held for the Bodies of Shires, the Names of such Persons, as for the singular Advantage of the said Sheriffs and their Ministers, would be wilfully forsworn and perjured, by the Master Labour of the said Sheriffs and their Ministers: By Reason whereof many substantial Persons, (the King's true Subjects) had been unwarily indicted of divers Felonies and other Misbehaviour, by their Covin and Falsehood: And also sometimes by Labour of the said Sheriffs, divers great Felonies had been concealed, and not presented by the said Persons, by the said Sheriffs and their Ministers partially returned, to the Intent to compel the Offenders to make Fine and give Rewards to the said Sheriffs and their Ministers.

And thereupon it is enacted, That all Panels to be returned, which be not at the Suit of any Party, that shall be made, and put in by every Sheriff and their Ministers afore any Justice of God's Delivery, or Justices of Peace, whereof one to be of the Quorum, in their open Sessions, to enquire for the King, shall be reformed by putting to, and taking out of the Names of the Persons, which so be encompassed by every Sheriff and their Ministers, by the Discretion of the same Justices, before whom such Panels shall be returned. And that the same Justice and Justices shall command every Sheriff and their Ministers in his Absence, to put other Persons in the same Panel by their Discretions: And that the same Panels so reformed by the said Justices be good and lawful. And that if any Sheriff, or any their Minister, at any Time do not return the same Panels so reformed, that then every such Sheriff and Minister so offending, shall forfeit for every such Offence 20l. &c.

Sec. 32. It hath been resolved that this Statute doth not take away the Force of the above-recited Statute of 11 H. 4. in any Point wherein it doth not expressly vary from it; from whence it follows, that if any of the Jurors who find an Indictment be outlawed, or returned by a Sheriff or Bailiff, at the Nomination of any other Person, the Indictment may be avoided in the same Manner as before, by Force of 11 H. 4. except
cept such Nomination be made by the Justices authorized by 3 H. 8. to reform that Panel.

 Sect. 33. As to the seventh general Point of this Chapter, viz. Within what Place the Offences inquired of must arise, notwithstanding it were
anciently holden, That if one who had committed a Robbery in the
County of A. were taken with the Manner in which the Offence was
found was returned. And a fortiors therefore it must be a good Exception, that it expressly appears by the Indictment that the
Offence arose in a County, differ. different from that from which the Jury
was returned. And it is holden, that even the Finding of a collateral Matter expressly alleged in the Indictment to have happened in a different County, is void. But some have holden, that if the County be expressed in the Margin of an Indictment, the Vill or Vills in which the
Offence is laid, shall be intended to be in the same County. But the greater Number of Authorities require a greater Certainty, as by
expressly alleging such Vill or Vills in the County named in the Margin, or in comitatu prdesico, which seems to be sufficient where but one County is named before; but to be uncertain where a County is named in the Body of the Indictment different from that in the Margin. But it seems from the Authority of a Band’s Cafe, that if a Fact be alleged in B. juxta D. in Comitatu E. being the same County for which the Jury is returned, the County is set forth with sufficient Certainty, because it shall be intended to be in the same County with D. Also if one be indicted for a Recusant from an Arrest in the County of B. it hath been holden, that it is needless to express the County wherein the Recusant was done with greater Certainty, because it shall be intended to have been in the same County wherein the Arrest was; a fortiors therefore, if a Fact be alleged at B. in the Parish of C. in the County of D. it cannot but be intended that B. as well as C. in the County of D.

 Sect. 34. But of whatever Nature an Offence indicted may be, whether local or transitory, as sedulous Words, or Battery, &c. it seems to be agreed, That if upon Not guilty pleaded it shall appear that it was committed in a County different from that in which the indictment was found, the Defendant shall be acquitted, as shall be sworn more at large in the Chapter concerning Evidence.

 Sect. 35. And therefore at the Common Law, if a Man had died in one County of a Stroke received in another, it seems to have been the more general Opinion, that regularly the Homicide was indictable in neither of them, because the Offence was not compleat in either, and no Grand Jury could inquire of what happened out of their own County. But this Inconvenience is remedied by 2 & 3 Ed. 6. 24. by which it is enacted, That where any Person shall be feloniously stricken, or poisoned in one County, and die of the same Stroke or Poisoning in another County, that then an Indictment thereof shall be found by Jurors of the County, where the Death shall happen, whether it shall be found before the Coroner, upon the Sight of such dead

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Body 5, or before the Justices of Peace, or other Justices or Commissioners, which shall have Authority to inquire of such Offences, shall be as good and effectual in the Law, as if theStroke or Poisoning had been committed and done in the same County where the Party shall die, or where such Indictment shall be found.

Sec. 35. And it seems that by the Common Law, if a Fact done in one County prove a Nuisance to another, it may be indicted in a either County.

Sec. 36. Also by the Common Law, if one guilty of Larceny in one County carry the Goods stolen into another, he may be indicted in either as hath been more fully shewn in the first Book.

Sec. 37. Also if a Man marry two Wives, the first in a foreign Country and the second in England, it is held he may be indicted and tried for it in England upon the Statute of 1 Jac. 1. 11, which makes it Felony; because the second Marriage alone was criminal, and the first had nothing unlawful in it, and was merely of a transitory Nature; but where the second Marriage is in a foreign Country, it hath been held, that the Party is not triable on the Statute abovementioned; but this seems contrary to the Purview of it, as hath been more fully shewn in Book 1, Chap. 43, Sec. 7.

Sec. 38. Also if a Woman be taken with Force in one County, and carried into another, and there married, the Offender may be indicted and tried in the second County, upon the Statute of 3 H. 7. 2. against Forcible Marriage, because the Continuance of the Force in such County amounts to a Forcible Taking within the Statute. But if an Offence in stealing, taking away, withdrawing, or avoiding a Record, against the Purport of 8 H. 6. 12. be committed partly in one County and partly in another, so as not to amount to a compleat Offence within the Statute in either, it is said that the Party cannot be indicted for a Felony in either, but only for a Misprision.

Sec. 39. It is enacted by 26 H. 8. 6. For the Punishment and speedy Trials, as well of the Counterfeiters of any Coin current within this Realm, washing, clipping, or minishing of the same, as of all and singular Felonies, Murders, wilful burning of Houses, Manslaughters, Robberies, Burglaries, Rape, and Accessories of the same, and other Offences feloniously done, within any Lordship Marcher of Wales, that the Justices of the Gaol-Delivery, and of the Peace, and every of them being in the Shire or Shires of England, where the King's Writ runneth, next adjoining to the Lordship Marcher, or other Places in Wales, where such counterfeiters, washing, clipping, or minishing of any Coin current within this Realm, or Murther shall be committed, or where any other Felonies or Accessories shall be committed, shall have full power at their Sessions and Gaol-Delivery, to enquire by Verdict of twelve Men of the same Shire or Shires next adjoining within England, where the King's Writ runneth, there to cause all such Counterfeiters, Washers, Clippers of Money, Felons, Murderers, and Accessories to the same, to be indicted according to the Laws and Forms, as if the said Petit Treasons, Murders, Felonies, and Accessories to the same, had been done within any of the said Shires within the said Realm: And also to hear, determine, and judge the same, according to the Laws of the Realm.

Sec. 40. And it seems generally to have been holden, That the Power given by this Statute to the Justices of Gaol-Delivery and of Peace, in the adjoining England Counties, in Relation to the Offences therein mentioned, is not repealed by 34 & 35 H. 8. 26. which impowers the Justices of the Grand Sessions in Wales to take Indictments of such Offences. But it hath been resolved that an Acquittal on an Indict.
ment at the Grand Sessions is a good Bar of an Indictment for the same Crime in an English County.

Sect. 41. It is enacted by 28 H. 8. 15, which hath been more fully set forth and expounded in Book 1. Ch. 37. That Treasons, Felonies and Robberies, &c. upon the Sea, &c. shall be inquired, &c. in such Places in the Realm as shall be limited in the King's Commission, in like Manner as if such Offences had been committed on the Land.

Sect. 42. It hath been a resolved, That this Statute extends not to Offences done in Creeks or Ports within the Body of a County, because such Offences were always cognizable by the Common Law.

Sect. 43. Alfo it hath been b resolved, That the Force of this Statute, in Relation to Treasons done upon the Sea, is not taken away by 35 H. 8. 2. more fully set forth in the forty seventh Secti

Sect. 44. It was made a Doubt upon this Statute, Whether one who was an Accessory at Land to a Felony at Sea, were triable by the Admiral within the Purview of it; but this is settled by d 11 & 12 W. 3. c. 7. which enacts, that Accessories to Piracy before or after, in such Manner as is set forth more at large in that Statute, shall be inquired of, tried, and adjudged according to the said Statute of 28 H. 8. 15.

Sect. 45. It is farther enacted by the said Statute of 11 & 12 W. 3. c. 7. That all Piracies and Felonies upon the Sea, &c. may be tried at Sea, or upon the Land, in his Majesty's Plantations, in such Manner as hath been more fully set forth in the first Book.

Sect. 46. It seems to have been a great e Doubt before the making of the Statute of 35 H. 8. 2, in what Manner and in what Place High Treason done out of the Realm was to be tried; for some seem to have held, That it was triable only upon an f Appeal before the Constable and Marshal; others, that it might be tried upon an Indictment, laying the Offence in g any County where the King pleaded; and others, that it was triable by Way of Indictment in that County only wherein the Offender had Lands: But surely it k cannot reasonably be doubted, but that it was triable some Way or other, for it cannot be imagined that an Offence of such dangerous Consequence, and expressly within the Purview of 25 Ed. 3. should be wholly dispensable, as it must have been, if it were no Way triable.

Sect. 47. But for a plain Remedy, Order, and Declaration of this Matter, it is enacted by 35 H. 8. 2. That all Manner of Offences, being then already made or declared, or after to be made or declared, by any of the Laws and Statutes of this Realm, to be Treasons, Misprisions of Treasons, or Conceals of Treasons, and done, perpetrated, or committed by any Person or Persons, out of this Realm of England, shall be from thenceforth inquired of, heard and determined before the King's Justices of his Bench for Pleas to be helden before himself by good and lawful Men of the same Shire, where the said Bench shall sit and be kept; or else before such Commissioners, and in such Shire of the Realm, as shall be assigned by the King's Majesty's Commission, and by lawful Men of the same Shire, in like Manner and Form to all Intents and Purposes, as if such Treasons, Misprisions of Treasons, or Conceals of Treasons, had been done, perpetrated, and committed within the same Shire, where they shall be so inquired of, heard and determined, as is aforesaid.

In the Contraction of this Statute the following Points have been resolv'd,

3 Sect. 48.
Chap. 25.

**Of Indictment.**

**Sec. 48.** First, That if the Court of King's Bench, or Commissioners appointed in Pursuance of the Statute, after having taken an Indictment of a foreign Treason, remove into a different County from that in which the Indictment was found, the Trial shall be by Jurors returned from the first County, and this is most agreeable to the general Courte of the 1 Inst. 3d. Common Law, which requires, That Indictments shall be tried by Jurors of the same County in which they were found.

**Sec. 49.** Secondly, That the Commissioners and County for the Trial of such Treasons, are sufficiently assailed by the King in Pursuance of this Statute, by his either writing his Name to the Commission that appoints them, or signing the Warrant to the Lord Keeper for the Commission.

**Sec. 50.** Thirdly, That a Treason done by an Irishman in Ireland, is triable in England according to the Purview of this Statute, for Ireland, being out of the Realm of England, a Treason committed in it is certainly within the Letter of the Act, and nothing within the Letter of a Statute made for enlarging the Jurisdiction, and supplying the Defects of the Common Law, shall easily be construed out of the Meaning of it. And therefore it seems reasonable, that any Offence which by 25 Ed. 2. or any other subsequent Statute, either expressly extending to, or receiven in Ireland, is equally Treason in Ireland and England, may be tried here by Virtue of this Statute. But if an Offence be made Treason by an Irish Statute, which is not Treason in England, I see not how it can be tried here, since being neither made nor declared to be Treason by any Law or Statute of this Realm, it is not within the Description of the Offences provided for by 35 H. 8. To which may be added, that Offences beyond Sea, to be tried here by Virtue of that Statute, are to be inquired of and determined in like Manner as if they had been committed in such Shire wherein they shall be inquired of and determined, but if an Offence which is Treason in Ireland and not in England, had been committed in any English County, it is manifest that it could not be punished as Treason. Also it hath been resolved, That no Treason committed in Ireland by an Irish Peer, is triable in England, because he is intitled to a Trial by his Peers, which cannot be had in England.

**Sec. 51.** Fourthly, That this Statute is not repealed by 1 2 Ph. & Mar. 10, which enables, That all Trials hereafter to be had, awarded or made, for any Treason, shall be bad and used, according to the Common Laws of the Realm and not otherwise. For it is the manifest Purport of this Statute to restore the ancient Courte of the Common Law as to the Trial of Treasons, in which great Innovations had been made by Statutes in the Reigns of King Henry VIII. and Edward VI. but it cannot be thought agreeable to the Intention of it to abrogate any Statute, which in a doubtful Case settled and confirmed the Jurisdiction of the Common Law, and gave a Method of Trial as agreeable as possible to its usual and ordinary Manner of Proceeding.

**Sec. 52.** It was a great Doubt at the Common Law, * Whether an Accessory in one County to a Felony in another, were indictable in either. Dyer 35. but this is remedied by 2 3 Ed. 6. 24. by which it is enacted, That such an Accessory may be indicted and tried in the same County wherein he was Accessory. But intending more fully to treat of this Matter in the Chapter concerning the Arrangement of the Principal and Accessory, I shall refer the Reader thither for the farther Consideration of it.
Of Indictment.

As to the eighth general Point of this Chapter, viz. What ought to be the Form of the Body of an Indictment, I shall endeavour to shew:

1. What ought to be the Form of the Body of an Indictment at Common Law.
2. What of an Indictment upon a Statute.

As to the first of these Particulars I shall endeavour to shew,

1. How the Body of an Indictment at Common Law, ought to set forth the Substance and Manner of the Fact.
2. How the Persons mentioned or referred to in it.
3. How the Thing wherein the Offence was committed.
4. How the Circumstances of Time and Place.
5. Where it may be vitiated by false, or improper Latin, or the Use of English instead of Latin.
6. Where the Offence indicted may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment.
7. Whether the Words Vi et Armis be in any Case necessary.
8. Whether it be necessary to lay the Offence contra pacem.
9. Whether it be necessary to lay it contra coronam & dignitatem Regin.
10. Whether it be necessary to lay it in contemptum Regis.
11. Whether it be necessary to lay it silicet.
12. Whether a Defect in any of these Particulars be amendable.

As to the first Point, viz. How the Body of an Indictment at Common Law ought to set forth the Substance and Manner of the Fact, I shall endeavour to shew:

First, In what Manner it ought to set them forth in Relation to the Offence of the Principal.
Secondly, In what Manner in Relation to the Offence of the Accessory.

As to the first of these Particulars, viz. In what Manner the Body of an Indictment at Common Law, ought to set forth the Substance and Manner of the Fact, in Relation to the Offence of the Principal, I shall observe,

Sec. 53. First, That no Periphrasis or Circumlocution whatsoever will supply those Words of Art which the Law hath appropriated for the Description of the Offence, as a Murderer in an Indictment of Murder; b

Sec. 54. Second, That in an Indictment for Rape, the Fact seems to be sufficiently ascertained by the Words Felonii rapit, without adding carnaliter cognovit, or first setting forth the Special Manner of the Terror or Violence, and then concluding that the
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Defendant fœ felonicè repisiit, &c. Also it seems, That the like general Maner of setting forth the Offence, which is sufficient in a * Appeal of Larceny, will also be sufficient in an Indictment.

Sec. 59. Thirdly, That in other Cases it is generally a good Rule in Indictments as well as Appeals, that the Special Manner of the whole Fact ought to be set forth with such Certainty, that it may judicially appear to the Court, That the Indictors have not gone upon insufficient Premisses. And upon this Ground it seems to be agreed, That an indictment finding that a Person hath feloniously broken the Prison, without shewing the Caufe of his Imprisonment, &c. by which it may appear that it was of such a Nature, that the Breaking might amount to Felony, is insufficient. Also d Indictments against Perions for refusing to be sworn Constables, after they had been legitimo modo electi, have been qualified for not shewing the Manner of the Election, that it might appear to have been such as obliged the Defendants to have undertaken the Office. Also e it hath been adjudged, That an indictment of Burglary is insufficient without the Word Notranter. Also it seems to be agreed, That an Indictment charging a Man with a Nuance in respect of a Fact, which is lawful in itself, as the Erecting of an Inn, &c. and only becomes unlawful from Particular Circumstances, is insufficient, unless it set forth some Circumstances which make it unlawful. But it is said that this is needful where the Thing indicted is unlawful in its own Nature, as the Keeping of a Bandy-House, &c. Also it hath been adjudged, That an Indictment for traiterously coin Thy King's Money, &c. without shewing what Money, is insufficient; of which this seems to be the plainest Reason, That it appears not whether it were made like to the King's gold or silver Coin, or only like to that in Brass or Copper, &c. and if it were made like to that of the later Kind only, it seems that the Offence could not amount to Treason. Also it seems, That an Indictment of Perjury, not shewing in what Manner and in what Court the false Oath was taken, is insufficient, because for what appears it might have been extrajudicial, &c. Also it seems clear, That it is necessary both in Indictments and k Appeals of Malhem and Murder, to set forth particularly in what Manner the Hurt was given, and that an omission thereof is not holpen by a general Conclusion, that the Defendant sic felonicè Malmisavit or Murdravit, &c. But having already shewn in the Chapter of Appeals, with what Certainty the Count in an Appeal of Death, must set forth the Special Manner of the Fact, as by shewing in what Part of the Body the Wound was given, and the Length and Breadth of such Wound; and that the Party died of it, and with what Weapon it was given; and that the Word f Peremedit cannot safely be omitted where the Truth of the Fact will bear it, I shall refer the Reader to the said Chapter of Appeals, for the Learning relating to these Points. It hath been adjudged, That an Indictment of Extortion charging j. s. with the Taking of so. s. as Bailiff of an Hundred, coloris officii, without shewing for what he took it, is good at least after Verdict, for perhaps he might claim it generally as being due to him as Bailiff, in which Case the Taking could not be otherwise expressed. But this seems to be a special Case.

Sec. 60. Fourthly, That an Indictment charging a Man disjunctively void, as where it finds that A. Murdravit B. vel Murdravi causavit, or that A. Verberavit B. vel Verberavi causavit; or that A. Fabricavit tamen certam vel fabricavi causavit, for here are distinct Offences, and it appears not of which of them the Indictors have accused the Defendant.
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Sect. 61. Fifthly, That a regularly every Indictment must either charge a Man with some particular Offence or else with several of such Offences, particularly and certainly expressed, and not with being an Offender in general; for no one can well know what Defence to make to a Charge so uncertain, or to plead it either in Bar or Abatement of a subsequent Prosecution; neither can it appear that the Facts given in Evidence against a Defendant on such a general Accusation, are the same of which the Indictors have accused him, either can it judicially appear to the Court, which Punishment is proper for an Offence so loosely expressed. And upon this Ground it hath been adjudged, That an Indictment is insufficient which only charges a Man in general, with having b spoken divers falce and scandalous Words against f. s. being Mayor of such a Place; or with being a c common Defamer, Vexer, and Oppreffer of many Men; or with being a common d Disturber of the Peace, and having stirred up divers Quarrels as well among his Neighbours as others of the King's Subjects at such a Place, to the great Loss and Disturbance of his Neighbours aforesaid, and other the King's Subjects, &c. or with being a c common Oppreffer and Disturber of the Peace; or with having been and still continuing to be a Man of evil e Behaviour; or with being a e common Deceiver of the King's People; or with being a b common Publifter of the King's secrets, and of his Own, and of divers other Permons impanelled together with him to inquire for the Body of the County of divers Felonies, against his Oath, &c. or with being a common Forester; or with being a k common Thief, or being a k common Evil-doer, or with being a common m Champtor; or with being a common n Conspirator, and such like. It is holden indeed in a Note in Fitzherbert's Abridgement, That an Indictment for Confederacy in general is good, but this is made a Query by the Reporter of the 9th Year Book, from which the said Note in Fitzherbert is taken, and is denied to be Law both by e Book and 9 Rolle, nor do I anywhere find the least Reason offered to distinguish this from the other Cases above-mentioned.

Also it is holden by Sir Edward f Coke, That the ancient Form of Indictments charging Men with having as Hereticks and Traitors, and Intesters of the Highways, conferred and confederated, &c. to destroy the Catholick Faith, and having daily published falce and fictitious Writings, &c. were utterly insufficient, and yet such Indictments seem to have been frequent, as were also Indictments charging Men in general, as Indiciatorum vitiorum, & desopulatorum agrorum, which Words took the Benefit of the Clergy from the Permons indicted, before the Statute of 4 H. 4, 2. by which it is enacted, That those Words shall not more be put into Indictments, nor if they be, shall have such Effect as to take from the Permons indicted the Benefit of the Clergy; & this Statute in this Respect seems to be in Affirmance of the Common Law, which seems generally to disallow of such uncertain Indictments, as appears from the Reasons and authorities above set forth. Yet it hath been adjudged, That a Man may be generally indicted as a common Barretor against the x Form of the Statute, and y against the Peace, without showing any of the particular Facts in the Indictment, by which he appears to have been z, for Barrettry is an Offence of a z, complicated Nature, consisting in the Repetition of divers Acts in Disturbance of the common Peace, all of which it would be too prolix to enumerate in the Indictment; and therefore w Experience hath settled it to be sufficient to charge a Man generally, as a common Barretor, (which is a b, Word of Art appropriated to this
this Purpose,) and before the Trial to give the Defendant a Note of the particular Matters which you intend to prove against him. Also it is holden, That there is no Need to name any particular Place where the Defendant was a Barrator, because he shall be supposed to have been guilty in divers Places, and the Venire is most proper from the Body of the County. Also it is said that there is no Need in the Conclusion of such an Indictment, to lay the Offence ad nonumentum omnium ligerum, &c. but that Diversorum is sufficient in such an Indictment as well as in an Indictment of a common Scold, &c. because it appears from the Nature of the Thing, that it could not but be a common Nuisance. Also it seems to be agreed, That an Indictment against one as a common Scold, is good without setting out the Particulars, for the same Reasons that such Indictment of Barratry is good.

Sec. 62. Sixthly, That the Charge must be laid positively, and not by way of Recital, as with a Good cum, &c. and that the Want of a direct Allegation of any Thing Material in the Description of the Sub. Instance, Nature, or Manner of the Crime, &c. cannot be supplied by any Intendment or Implication whatsoever: And upon this Ground it seems to be generally holden, That an Indictment of Death having the Words: felonie murdravit, &c. cannot amount to an Indictment of Murder, without the Words Ex militia praecista, and yet by the Word Murdravit it expressly charges the Party with Murder, and it is impossible that there could be a Murder, and no Malice premente. Also it seems to be generally agreed, That no Indictment of Death can be good without an express Allegation, that the Deceased both received the Hurt which is laid as the Cause of his Death, and also that he died of the Hurt so received, and that the Want thereof cannot be made good by any Implication whatsoever, as hath been more fully shewn, Ch. 23. Sec. 82, 83. Also it hath been adjudged, That an Indictment against J. S. for feloniously breaking such a Prison, and commanding J. N. who was therein imprisoned for Felony to escape, is not a good Indictment for a felonious Breaking, without expressly shewing that J. S. did escape, and yet the Breaking is expressly laid to be felonious, and it is impossible that it could be fo, unless the Party did escape. But it will be needless to enumerate any more Instances of this Kind, which are so very frequent, that there is scarce any Case which mentions Exceptions taken to Indictments, without having some or other grounded on this Rule, That in an Indictment nothing material shall be taken by Intendment or Implication. Yet the Law will not admit of too great a Nicety of this Kind, for it hath been adjudged, That if in the first Part of an Indictment of Death, the Assault be laid with Malice premente, &c. there is no Need to repeat it in the following Clause, which shews the Giving of the Wound, being joined with a Copulative to the precedent Sentence, and laid at the same Time and Place with the Assault. Also it hath been adjudged, that where an Indictment sets forth, That J. S. was lawfully arrested by Virtue of a Plain before such a Sheriff, &c. it shall be intended that there was a good Warrant. Also it hath been adjudged, That where a Warrant is alleged, authorizing the Arrest of J. S. within the Liberties of London, and the Indictment lays the Execution of it in such a Parth and Ward in London, without expressly laying the Parth and Ward within the Liberties of London, yet the Indictment is good, for the Court will not admit of such a strained Exception, that a Parth in London may be out of the Liberties of London.

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Ch. 64. Eighthly, That it is a certain Rule, That where one material Part of an Indictment is repugnant to another, the Whole is void, for the Law will not admit of such Nonse and Absurdities in Legal Proceedings, which, if suffered, would soon introduce Barbarism and Confusion; also it takes off much from the Credit of an Indictment, that those of whom it is found, have contradicted themselves. And upon this Ground it hath been adjudged, That if an Indictment charge the Defendant with having forged a certain Writing by which A. was bound to B. which is impossible, if the Writing were forged, or if an Indictment of Forrible Entry be forth, That the Defendant did A. of Lands, wherein it appears by the Indictment it self that he had no Freehold whereof he could be dispossessed, or that the Defendant entered peaceably on J. S. and then and there Foribly dispossessed him, or that he dispossessed him of Land then being and ever since continuing to be his Freehold, every such Indictment is void, for its manifest Inconsistency and Repugnancy. And upon the like Reason it hath been adjudged, That an Indictment of Death, laying the Stroke at A. and the Death at B. or the Stroke on the first of May, and the Death on the Tenth, and then concluding that the Defendant in such Manner murdered the Party at A. aforefaid, or on the first of May aforefaid, is insufficient for the Repugnancy, as hath been more fully shewn in the Chapter of Appeals, because it supposes the Murder to have been committed at a Place in the first Cafe, and on the Day in the Second; in which it appears by the Indictment it self, That the Party was not killed but only wounded. Also it hath been adjudged, That an Indictment for selling Iron with false Weights and Measures, is void, not only because it is absurd to suppose that Iron could be sold by
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by Measure, but also because it is repugnant and inconsistent that it should be so sold at the same Time when it was sold by Weight. Also if an Indictment at a Sessions holden the 13th of January, 30 Car. 2, and that the Defendant has been absent from Church six Months from the first of January, 30 Car. 2, it is agreed, That it is void for the Impossibility, for there are but eleven Days between the 1st of January, and the Holding of the Sessions. Also if an Indictment charge a Man with having feloniously done a Fact, which appears upon the Face of the Indictment to have been but a Trespass, as with feloniously cutting down and carrying away Trees, the Court will not arraign him; yet where the Scene appears plain, the Court will often dispence with a small Impropriety in the Expression, as where one is indicted for having mowed unani acram fami, which is said to be sufficient, and yet that which was mowed, could not at the Time of the Mowing be in Strickness called Hay, but Grass only.

As to the second Particular, viz. In what Manner the Body of an Indictment at Common Law must set forth the Substance and Manner of the Fact, in Relation to the Offence of the Accusory, I shall observe,

Sec. 65. First, That a Repugnancy in setting forth such Offence is equally fatal as in setting forth that of the Principal; and therefore if an Indictment of Death which lays the Stroke on one Day, and the Death on a subsequent Day, charge the Accesories with having abetted the Fact, at the Time of the Felony and Murder only, it is insufficient, as hath been more fully shewn in the 3nd Chapter of Appeals, because it appears by the Indictment itself, that the Time of the Death, and consequently of the Murder, was subsequent to that of the Stroke, and therefore it is repugnant to allege that the Defendant abetted the Stroke by being present at the Time of the Death.

Sec. 66. Secondly, That where several are present, and abet a Fact, and one only actually does it, an Indictment may, in the same Manner as an Appeal, either lay it generally, as done by them all, or specially, as done only by the one and abetted by the rest. But it hath been resolved, That if an Indictment barely charge a Man with having been present when a Murder was committed, it is void, because a Man may be innocently present, and shall not be presumed to have been a Party, where no Circumstance is found that makes him so.

Sec. 67. Also it hath been adjudged, That an Indictment of J. S. as Accessory to four, by these Words, that J. S. facit ipsos quotius homines feloniam predictam faciunt et D. felonice receptavit, is sought for not laying in receptavit, for it doth not appear how many of them the Indictors have found him to have received, whether all four, or three, or two, or but one.

Sec. 68. It hath been held, That an Indictment charging a Conspiring with having voluntarily and feloniously suffered a Person, arrested by him upon Suspicion of Felony, to escape, without showing what the Nature of the Felony was, and that it was actually committed, is void for the Uncertainty, not only because it appears not but that the Offence of which the Party was suspected, was never actually committed; in which Case the Escape could not be criminal; but also because it appears not what the Felony was, and until the Arrest were for a Felony, the Escape could not be felonious. But it is laid, That an Indictment for knowingly receiving Persons outlawed for, or convicted of Felony, or for knowingly suffering such Persons to escape, may be good, with what showing what the Felony was, or that it was actually committed, if

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The Record of the Outlawry or conviction be set forth with convenient Certainty: And the most plausible Reason of this Opinion seems to be this, That it may be sufficiently made out by such Record, of what Kind the Felony was; and also that it was actually committed, &c. It is holden indeed by Sir William Stranmfoord, That such a general Indictment for receiving a Person outlawed for Felony in the same County wherein he dwells is good, but not if it were in another, because a Man is bound at his Peril to take Consequence of an Attainer of Felony in his own County, but not in another. But I much question the Authority of this Disjunction; since, as the Law seems now to be, all holden, a Man is no more bound to take Consequence of such an Attainer in his own County, than in any other.

Sed. 69. It hath been holden, That an Indictment finding that J. S. scintor receptavit such a one, being a Felon, is not good, for this Reason among others, because it doth not expressly find, that J. S. knew the Person so received by him to have been a Felon. But this is contradicted by other Authorities, by which it is holden, That the Word Scienter in such a Case shall be construed to go thro' the whole Sentence.

As to the second Point, vis. In what Manner the Body of an Indictment at Common Law must describe the Persons mentioned in it, I shall endeavour to shew,

1. In what Manner it must describe the Defendant.
2. How other Persons mentioned or referred to in the Indictment.

Sed. 70. As to the first Particular, it is said, That an Indictment that the King's Highway in such a Place is in Decay, thro' the Default of the Inhabitants of such a Town, is good without naming any Person in certain: Also it is said, That no Indictment can take any Advantage of a mistakent Surname in the Indictment, either by Plea or Abatement, or otherwise, notwithstanding such Surname have no Manner of Affinity with his true one, and he was never known by it; and in this Respect, an Indictment differs from an Appeal, whereof it is certain that a Misnomer of a Surname may be pleaded in Abatement, as well as any other Misnomer whatsoever.

Sed. 71. But I do not find but that every other Misnomer of the Defendant, except that of the Surname, and also every defective Addition, are as fatal in an Indictment as an Appeal, for it seems generally to be holden, That a Misnomer of the Defendant's Name of Baptism may be pleaded in Abatement of an Indictment. Also it hath been adjudged to be a good Plea in Abatement of an Indictment against one by the Name of Sir J. S. Knight, that he is a Baronet, and no Knight. Also it hath been holden, That it is a good Plea in Abatement of an Indictment against Garter King at Arms, that he is not called Garter in the Indictment, because it is a Name of Dignity, being given him by the Words creatus, coronatus, and nominem impo- minum; and from the Reason of this Case, it seems plainly to follow, That the omission of any other Name of a Dignity may be pleaded in Abatement of an Indictment: And if so, why should not the Omission of the Defendant's Name of Baptism be equally fatal?

Sed. 72. It seems to be agreed, That notwithstanding an Indictment be the Suit of the King, yet being within the express Letter of the Statute of 1 H. 5. 5. concerning Additions, set forth more at large in the Chapter
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of " Appeals, it cannot be construed to be out of the Meaning of it. From whence it follows, That the Want of a sufficient Addition, within that Statute is as good an Exception to an Indictment, if the Office of Outlawry lie on it, as it is to an Appeal. Also it hath been adjudged, That it is a Exception to apply such Addition to the Name which comes under the " alias dictus only, and not to the first Name: But it is said not to be material whether any Addition be put to the Name which comes under the " alias dicitur or not, because what is so expressed is not material. But it is to great a Fault to put no Addition to the first Name, that where severals are indicted, such an Omission, in Respect of one of them, makes the indictment vicious as to all. And it may be probably argued, that there is the same Reason for the like Fault in an Appeal against divers, to abate it also as to all, but I do not find this Point expressly agreed. But it seems clear, That generally the Law is the same in Relation to Additions in Indictments and Appeals. Having therefore already treated in the Chapter of Appeals of the general Learning relating to this Subject, and shewn that an Addition in " English is as good as in " Latin; and that where severals have the same Addition, it is safest to repeat it after each of their Names; and that the Son being of the same Name and Addition with the Father, ought to be distinguished with some further Description; and having also shewn what is a sufficient Addition of the " Estate, or Degree, or " Mystery, and also of the " Town, Hamlet, Place and County of the Defendant: And also how the Defect of an Addition may be saved by the Appearance and Plea of the Defendant, I shall refer the Reader for all those Particulars to the Chapter of Appeals.

Sett. 73. As to the second Particular, " viz. In what Manner the Body of an Indictment at Common Law must describe the other Persons besides the Defendant mentioned or referred in it: It is certainly safest to describe them with convenient Certainty, which will hardly be dispensed with except in special Cases, and for special Reasons. For those general Indictments which 4 anciently seem to have been allowed for suffering divers Bakers to bake, &c. against the Affile, &c. for contradicting divers Persons without Cause &c. have by the later 6 Authorities been held insufficient for their Uncertainty in not naming some Persons in particular who were so suffered to bake, or discontrived, without which the Court cannot so well know what Fine will be proper, nor can the Defendant be so well enabled to make his Defence, nor to plead the Indictment to a subsequent Prosecution. And for the same Reasons among others, an Indictment for taking divers Sums of divers Persons for such a Toll at such a Rare, without naming any Persons in particular, hath been adjudged nugatory. Yet where in common Premption it may be very difficult, if not impossible, to know the Names of the Persons referred to in an Indictment, it may be good without naming any of them, as where one is indicted for having knowingly received and harboured divers Thieves, to the Jurors unknown, in which Case, such a general Charge is maintainable from the Necessity of the Thing, for otherwise a notorious Offender of this Kind might be wholly unpunishable, for Want of the Jurors knowing the Names of the Persons so received, and yet might be publickly known to carry on such a Practice, to the common Nuisance of the Country, in which Respect it cannot but be reasonable in such a Case to punish him, tho' not as an Accessory to the Thieves, without shewing that he had received some of them in particular. And for the like Reason, if
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If a stranger unknown to the country be found slain, or if the body of a person who was well known, be disfigured in such a manner by its wounds, that no one can discover who it was, it is certain that an indictment against the offender, for having killed quodam ignorantem, will be good. And upon the same ground, if a stranger unknown to the country be robbed, and will not come in to prosecute, nor discover his name; it seems clear, that an indictment against the offender for having robbed quodam ignorantem is good. And if goods be found upon one notoriously suspected of felony, of which he can give no manner of account, as where a highwayman is apprehended with his pockets full of watches and rings; it seems, that he may either be indicted for stealing such watches and rings, being the goods quodam ignorantem, or, as some say, for stealing them generally. Also in the indictment of the regicides for the murder of King Charles I. it was agreed, that the fact was well laid, as done per quodam ignorantem, with a vizor on his face. And if one steal the goods of an abbey, &c. during a vacancy, he may be indicted for stealing bona ecclesiae, and yet the church can have no property. But these seem to be special and extraordinary cases, depending on particular reasons, and grounded on manifest necessity, without which, it seems, that such indictments cannot be maintained: For it seems to be taken as a ground in many books, that regularly the persons offended, as well as the defendant, ought to be certainly described in every indictment. And accordingly hereto it hath been adjudged, that an indictment for stealing quodam ignorantem parvi ligni, cujusdam J. S. without adding de bonis & caulis cujusdam J. S. is insufficient, because it doth not expressly appear to whom the goods stolen did belong. Also it was anciently holden, that where one is indicted for the death of a person unknown, the inquest ought to tell his name to the court; but surely this must be intended where they have some means to know it. However, from the whole thus much seems plainly to follow, that where ever the person injured is known to the jurors, his name ought to be put into the indictment. And therefore as I take it, those books which seem generally to allow of indictments of killing, or robbing persons unknown, are to be understood with this limitation, that such indictments are then good when the party is in truth unknown to the jurors. And accordingly hereto, others who speak more fully of the matter seem plainly to go upon the necessity of the several cases. And the want of such necessity seems probably to have been the chief reason why indictments not shewing to whom the wrong was done, were disallowed in some of the old books. However, it is certain, that an appeal for the death or robbery of a person unknown, is in no case good, as hath been more fully shewn in the chapter of appeals.

Sez. 74. It hath been adjudged, that an indictment of an assault on John Parish Priest of D., in the county of C., is good, without mentioning his surname, for if a wrongful surname of the defendant himself will not vitiate an indictment, as hath been more fully shewn, Sez. 71. surely a fortiori, the omission of the surname of any other person will not vitiate it; especially where such person is otherwise described with such certainty, that it is impossible to mistake him for any other. But if an indictment for a wrong done to a person well known describe him only by his...
his Name of Baptifin, without some Addition to distinguish him from others of the same Name, it seems a questionable, Whether it be not insufficient for the Reasons given in the foregoing Section? It is a said, indeed, in a short Note of a Case in Moore’s Reports, That an Indictment against one Cole, quod burglariter domum cujusdam Ricardi frater, was adjudged good, without the Surname; and it not being there mentioned, that there was any other Description of the Party but by his Name of Baptifin, it may be argued that alone is sufficient: But to this it may be answered, That the only Point taken Notice of was adjudged, as that the Surname is not necessary, and perhaps in the Record at large there might be some Addition: But granting that there was none, yet the Authority of this Case is the less to be regarded, because of the Books cited to support it two seem to be directly against it, and the third, which is most to the Purpose, only proves that an Indictment for stealing the Goods cujusdam ignoti is good, which seems by no means to come up to the Point in Question, as hath been more fully shewn in the precedent Section. Yet however the Law may stand in relation to such an Uncertainty, it seems to be agreed, That a Repugnancy or Absurdity in the Description of the Person injured will vitiate an Indictment, as where one is indicted for stealing bona predicta. J. S. where no J. S. was mentioned before, for tho’ in Civil Actions, the Word predicta hath been sometimes rejected, as Surplus and void, where it could be referred to no certain Antecedent, yet this may perhaps chiefly depend on the Statutes of forfeitures, which in many Cases help Defects in Form in Civil Actions, but extend not to criminal Cases, wherein the greatest Exactness is required; and if an Award may be defeated by appointing a & Payment on a certain Day before-mentioned, where no such Day was mentioned before, it cannot well be imagined that the like Inconsistency will be less fatal in a criminal Proceeding.

Sec. 75. It hath been adjudged not to be necessary in an Indictment of Death to allege, that the Person killed was in the Peace of God, and of our Lord the King, &c. tho’ such Words are commonly put into Indictments, for they are not of Substance, and perhaps the Truth might be that the Party was at the Time actually breaking the Peace.

Sec. 76. As to the third Point, viz. In what Manner the Body of an Indictment at Common Law must describe the Thing wherein the Offence was committed, it seems clear that no Indictment can be good which wants a convenient Certainty of this Kind: And therefore it is said, That an Indictment for forging a Leafe of certain Lands, without naming some one certain Parcel, is insufficient. Also it seems to be agreed, That an Indictment for stealing bona & cattali. J. S. without any further Description of them is void for its Uncertainty, for the like Reasons for which Indictments charging a Man wish being an Offender in general are void, and hath been more fully set forth in the fifty-first Section: And further, upon the like Ground it hath been adjudged, that an Indictment for Trespass in two Closes of Meadow or Pasture or for diverting quaedam Partem aquae running from such a Place to such a Place, without any further Description; or for ingrossing its magnam quantitatem framinis & femi, or diversos canaminis triviis, without specifying how much of each; or for carrying away duas & centenas cafii, without adding the Words libras or uncias, or some other Substantive to centenas; or for erecting several Cottages contra formam statui, without specifying how many, &c. are insufficient for their Uncertainty. As to the first Case of the King against Wilmang, wherein the Court disallowed an Exception to the Generality of
of an Indictment for taking quodam pices, without shewing how many, it may be answered, that this was contrary to the Opinion of Mr. Justice
Tresilian, and was only the sudden Opinion of two of the other Judges; neither it does appear that the Indictment was adjudged good, but only that the Court refused to quash it, and ordered the Defendant to plead to it. However, it seems clear from constant Experience, 1 That if an Indictment be uncertain as to some Particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good for the Refidue.

Sed. 77. If the Indictment be for a Larceny or Trespass on a living Thing, as an Ox, Sheep, or Horse, &c. It seems to be held by 2 Lambard, and 3 Dalton, that it is most proper to express to whom the Property of it belonged, by calling it respectively the Ox, Sheep, or Horse of the Party injured, without using the Words bona or catalla: But that it is improper to use these Words, where the Thing taken was not a living Creature. Also it is held by 4 Lambard, that it is proper to shew the Worth of all living Things and also of such dead Things as are sold by Weight or Measure, by expressing that they are of such a Price, and the Worth of other dead Things, by expressing that they are of such a Value; yet no Instance is produced where any Indictment has been disallowed in either Cafe for a Variance from these Rules. And as to the rest of them it is further observable, that the Precedents in Crompton of Indictments for Stealing of Horses, and Oxen, expressly alledge the Horse and Ox from de bonis et catallis, unjuisd J. S. &c. Also an Appeal of Stealing Sheep in 5 Rigal's Entries expressly allidges them de bonis & catallis of the Appellant. And as to the second of the Rules above mentioned, it is observable, that the Directions in the 6 Regilier concerning this Matter, which seem to be the chief Foundation of the said Rule are thus expressed, that in a Writ of Trespass of immovable Chattels, the Writ shall say, Tanti de cæteris ad valentiam X. S. But if it be bought of a movable Chattel, it shall say precii X. S. and non ad valentiam. Yet it appears by the Regilier it self, that even in Writs of Trespass concerning these Directions are given, the Worth of the Things taken away is sometimes omitted for the Whole, and sometimes for Part. And it is said to have been 7 adjudged, That such Writs are good notwithstanding such Omissions. Also where Things movable and immovable are mentioned together in the same Writ the Worth of all of them together is sometimes 8 expressed under the Words ad valentiam, &c. And sometimes the Worth of movable Chattels, as that of Corn in a Granary, &c. of Wine in a Vessel, and of Wool, is expressed under the Words ad valentiam, From all which it seems to 9 appear, That the said Directions are not necessary to be observed, even in Writs of Trespass, concerning the Form whereof they are expressly given, and that it is not material whether the Words ad valentiam or precii are used, or whether any Value be set on the Things taken away or not. And if so, why should it be a greater Fault nor to observe the said Directions in Indictments, which are 10 not tied to the strict Forms of Writs? Therefore from the whole, it seems 11 questionable, whether it be needful to set forth the Value of the Goods in an Indictment of Trespass for any other Purpose than to aggravate the Fine, and whether it be necessary in an Indictment of Larceny for any other purpose than to

1 For the rest of the text, it appears to be a continuation of the previous discussion on the rules and precedents related to certain types of crimes, particularly those involving living creatures like oxen, sheep, and horses, as well as movable and immovable chattels. The text further explores the legal principles surrounding the expression of property ownership and the worth of goods in legal documents, emphasizing the need for clarity and precision in descriptions to avoid ambiguity. It also discusses the historical precedents and the varying approaches adopted by different legal authorities in handling such cases. The text seems to conclude by raising questions about the necessity of including the value of goods in indictments for larceny or trespass, given their potential to inflate fines. The overall tone is scholarly, with references to legal texts and authorities, aiming to provide a comprehensive understanding of the legal frameworks and their interpretations.
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flew that the Crime amounts to grand Larceny, and to avert the Goods thereby the better to intitle the Prosecutrix to * Restitution.

As to the fourth Point,viz. in what Manner the Body of an Indictment at Common Law must set forth the Circumstances of Time and Place, I shall endeavour to shew,

1. How it ought to set forth the Circumstance of Time.
2. How that of Place.

Sec. 78. And first as to the Circumstance of Time. I find it no where holden, That it is necessary to mention the Hour in an Indictment. But on the contrary, it is said, b That if there be any Necessity for it in an Appeal, which yet is c questionable, it is from the Statute of Gloucester, and not from the Common Law; and therefore I shall take it for granted, That it is not necessarily required in an Indictment; since it is certain, That there is no Statute that makes it so, and the Common Law seems to have required no greater Certainty in an Indictment than in an Appeal.

Sec. 79. But it is laid down as an undoubted Principle in all the Books that treat of this Matter, That no Indictment whatsoever can be good, without precisely shewing a certain Year and Day of the material Facts alluded in it. Also it hath been d adjudged, That the Sheriff's Return of a Felony, without shewing the Year and Day, is insufficient, because such a Return is in Lieu of an Indictment. Also it is taken for granted in e Dyer, That an Indictment of Reconcile is not good, without expressly shewing the Day and Year both of the Arrest, and also of the Reconcile, and that the Time of the later is not sufficiently shewn, by shewing that of the former. And where an Indictment of Reconcile set forth, That J. S. committed such a Felony in such a Day, and Year, and Place, per quem a B. praebuit, &c. &c. it is made a Query, Whether the Indictment be not insufficient, because no Time of the Arrest is alluded in the same Sentence with it, and it is doubtful whether the Time of the Custody which is alluded in the next Sentence, by Force of the Copularibve be applied also to the Arrest or not, and Dyer seems rather to incline to the contrary Opinion. However, it is certain, That if an Indictment lay the Office on an uncertain or impossible Day, as where it lays it on a future Day, or lays one and the same Office at different Days, or lays it on such a Day which makes the Indictment repugnant to itself, it is void. Also it hath been adjudged, That no Defect of this kind can be helped by the Verdict. Also it is laid, That an Indictment of Death laying an Affray at a certain Time and Place is not sufficient without repeating the Time and Place in the Clause of the Stroke, and the like Rule seems also to hold as to Indictments of other Felonies, in which respect such Indictments differ from Indictments of Trepass. Also it is e certain, That an Indictment of Death ought as well to set forth the Year and Day of the Death as of the Stroke, that it may appear that the Party died within the Year and Day. But these Matters having been more fully considered in the Chapter of Appeals, I shall refer the Reader thereto for the better Understanding of them.

Sec. 80. It seems to be generally agreed, That the Words *adsum *et ibidem in the subsequent Clauses of an Indictment are of the same Effect as if the Year and Day mentioned in the former Part of it had been expressly set forth.

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* Supra, Ch. 33, Sect. 55.
+ 40, Sect. 55.
$ 8, P. C. 50.
% Supra, Ch. 53, Sect. 87.
& Bull. 103.
(8, P. C. 50.
* 25, Letter A.
- Supra, Ch. 4, Sect. 5.
(12, Sect. 11.
* Dyer, 164.
) Pl. 60.
& H. P. C. 266.
; H. 7, 11.
& Dyer, 164.
( Pl. 60.
* Dyer, 20.
* Letter C.
* Br. Retz. 97.
) Ed. 4, 15.
* Dyer, 164.
( Pl. 59.
* Dyer, 164.
& H. 1, 17, b, 18.
* Yet the contrary is adjudged, a B. & C. Ch. 25, Sect. 55.
* Supra, Ch. 53, Sect. 87.
+ 40, & Supra, 59.
* Supra, Ch. 4, Sect. 5.
( Pl. 60.
* Supra, Ch. 53, Sect. 87.
+ 40, & Ch. 33, Sect. 87, 59.
) Pl. 59.
* Supra, Ch. 53, Sect. 87.
+ 40, & Ch. 33, Sect. 87, 59.
* Pl. 60.
* Supra, Ch. 53, Sect. 87.
+ 40, & Ch. 33, Sect. 87, 59.
* Pl. 60.
* Supra, Ch. 53, Sect. 87.
+ 40, & Ch. 33, Sect. 87, 59.
* Pl. 60.
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presly repeated. Also it hath been adjudged, That an Indictment lay- 
ing the Offence on the Thursday after the Day of Easter in such a Year 
be, And from the like Ground it seems to follow, That an Indictment 
laying it on the 2d of Easter, &c. (which shall be taken for the very 
eighth Day after the Feast,) or on the Tenth of March is la 
(if it may 
be ascertained by the Style of the Sessions before which the Indictment 
was taken) is as good as if it had been the Day and Year by expressly 
naming such a Day of such a Month, &c.

Sec. 81. And where an Indictment charges a Man with a bare Ommis- 
sion as the not scouring such a Ditch, &c. it is said, That it needs not 
shew any Time.

Sec. 82. It is most regular to set forth the Year by shewing the Year 
of the King, yet this may be dispensed with for Special Reasons, if the 
very Year be otherwise sufficiently expressed, for that only is Material, 
and therefore in the 6th of the Regicides no Year of any King was laid 
for the King's Murder, but the compassing of his Death was laid in the 
twenty-fourth Year of King Charles the First, and the Murder was laid on 
the thirtieth Day ejusdem mensis Januarii, because if the Reign of either 
King had been expressed, it might have caused a Dispute Whether that 
or the other would have been more proper.

Sec. 83. It is said, That a Mistake in not laying an Offence on 
the very same Day on which it is afterwards proved upon the Trial, is 
not material upon Evidence.

Sec. 84. If an Indictment charge a Man with having done such a Nu- 
ance such a Day and Year, &c. and on divers other Days, it is void 
only as to the Facts on those Days which are uncertainly alluded, and 
effectual for the Nuisance on the Day specified; but if it charge a Man 
generally with several Offences at several Times, without laying any one 
of them on a certain Day, as with extorting divers Sums of divers 
Subjects for a Passage over such a Ferry, &c. between such a Day and 
such a Day, it hath been adjudged, That it is wholly void. Yet it hath 
been solemnly resolved, That a Conviction of Deceit-Feeling for the 
Offence between the Eighth and Twelfth of July, &c. is sufficient.

Sec. 85. As to the second Particular, viz. How an Indictment at 
Common Law must shew the Place where the Offence was done, it seems 
greed by all the Books. That no Indictment can be good without express 
shewing some Place wherein the Offence was committed; which 
must appear to have been within the Jurisdiction of the Court in 
which the Indictment is taken, and must also be alluded in such a Manner 
as is perfectly free from all Repugnance and Inconsistency, for if one 
and the same Offence be laid at two different Places, or at the Town of 
B, as aforesaid, where no such Town was mentioned before, or if in an 
Indictment of Murder, the Strokes be laid at A, and the Death at B, 
and then it is concluded that the Defendant Sic felonice murdravit the 
Perfon decaele at A, the Indictment is void. And so it is also, if it do 
not lay a Place both of the Stroke and Death; or if the Place or Places 
so alluded, be not such from whence a Vicinity may come. Yet it hath 
been adjudged, That a Fact laid in a Parish of London, with some other 
Addition, as in the Parish of St. Michael in Woodstreet, London, or in the 
Parish of St. Lawrence Jury, is good, without shewing the Ward in which

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the Parish lies. But these Matters having been more fully treated of in the 4th Chapter of Appeals, and also in the foregoing Part of this 5th Chapter, relating to the Certainty of the Time of the Offence, I shall refer the Reader thither, for the fuller Consideration of them.

Sec. 86. It seems, That there is no Need in an Indictment on a Statute, setting forth the Description which brings the Defendant within the Pur-view of it, to set forth any Place where those Things happened, which brought him within such Descriptions; and therefore where a Statute makes it High Treason for a Person born within the Realm, and in Popish Orders, to come into, or remain in the Kingdom, &c. there is no Need in an Indictment on such Statute to shew in what Place the Defendant was born or ordained. Also it seems to be agreed, That a Mistake of the Place in which an Offence is laid, will not be material upon the Evidence on not Guilty pleaded, if the Fact be proved at some other Place in the same County. But if there be no such Place in a County as that wherein an Offence is laid in an Appeal or Indictment, all Process on such Indictment or Appeal is made void by the Statute of 7 H. 5. and 9 H. 5. 1. and 18 H. 6. 12. by the laft of which Statutes it is recited, That in the Parliament held in the ninth Year of H. 5. it was ordained, For that many People of Malice cause often the King's liege People to be appealed or indicted in divers Counties of Treasons or of Felonies, supposing by the said Indictments or Appeals, that the said Treasons or Felonies were done in a certain Place in such a County, &c. where no such Place is in the same County, that the Process of the same shall be void; and that the Indictors, Procurators and Conspirators shall be punished by Fine, &c. by the Discretion of the Justices, and also Writs of Privy Conspury, and by the present Statute the above-rected Statute is made perpetual.

Sec. 87. It is observable, That the Statute made in the ninth Year of H. 5. herein referred to, seems to be wholly omitted by Keble and Puldon, who have no other Statute concerning this Matter made in the ninth Year of Henry V. excepting the first, which only confirms a Statute made in the seventh Year of the same King concerning Appeals and Indictments; and there is no other Statute whatsoever in the seventh Year of that King mentioned in Keble or Puldon, but only one which requires the Justices before the Award of any Existent to inquire by Inquest of Office, Whether there be any such Place in the County as that wherein an Offence is laid in an Appeal or Indictment. But this Statute seems only to extend to the County of Lancaster, for it is directed to the Chancellor of that County, and recites, That Persons had been indicted and appealed in Places falsely alleged in the said County, and in the enacting Part speaks only of Justices who had Power to determine Felonies in the said County, and in the later expressly commands the said Chancellor to cause it to be proclaimed in the same County, but mentions no other. From all which I see not how it can extend to any other County, and yet Wingate in his 4th Abridgment makes it equally extend to all Counties. However, 5 Ralph in his Collection of Statutes seems to have set down the very Statute which is referred to by the above-rected Statute of 18 H. 6. 12. and this is certainly the Statute in Force.

As to the fifth Point, viz. Where the Body of an Indictment may be viatitad by false or improper Latin, or the Use of English instead of Latin, I shall endeavour to shew,

PPP 1. Where
1. Where false Latin will vitiate an Indictment.
2. Where a Word which is not Latin.
3. Where such Faults are holpen by an Angific.

Sec. 88. As to the first of these Particulars, it seems to be holden generally in some Books, that no false Latin will vitiate an Indictment, and it seems to be holden by my Lord Coke, That an Indictment shall not be qualified for any false Concord between the Substantive and Adjective, as prefate Regi, or prefate Regine, because tho' the Expressions be incongruous, yet they are Latin and significant; neither do I find this Opinion denied by any other Authority, and therefore I leave it to be considered, Whether it may not still be maintained, especially considering, That the Sense appears as fully, clearly and expressly from such Latin as if it had been never so improperly expressed. And it seems also, That the like Reason may be given for the Case in Telerion, wherein an Indictment of forcible Entry, finding that the Defendant infinitum infirium ingressum fecist, without adding the Word in before infirium was adjudged good; but it is said in the Book, That this is not false, tho' it be not fine Latin; by which it seems to be implied, That if it had been false Latin, it might have vitiated the Indictment. However, it seems to be settled at this Day, That an Indictment against two or more, laying the Fact charged against them in the singular Number, is insufficient, as where it finds, That A and B. infinitum fecist, the Reason whereof perhaps may be this, That it appears somewhat doubtful upon the Face of the Indictment whether the Jurors intended to charge more than one, because the Fact is laid in the singular Number, which it seems absurd to apply to more than one, and therefore the Indictment is insufficient for its Uncertainty. As to Fulwood's Case, wherein Coke reports the contrary to have been resolved, it is certain, That the Verb in the Record is in the plural Number. And as to the Cakes wherein Faults of this Kind have been amended in original Writs, as tenat conventionem for tenent, and such like; it may be answered, That those Amendments were made by Virtue of the Statutes of Amendments, which extend not to criminal Proceedings. And as to the Case in Balford's Report, wherein it is said to have been resolved, That an Indictment of Felony against more than one in the singular Number was amended, and thereupon the Defendants were adjudged to be hanged; it may be answered, That it doth not appear in what Part of the Indictment the singular Number was put for the plural; neither is the said Resolution, in whatsoever Sense it be taken, reconcilable with the latter Authorities, as shall be more fully shewn under the twelfth Point. But it is said, That a Fault of this Kind is made good by the Grand Jury's Finding the Indictment Billa vera against one of the Defendants only; the Reason whereof may be this, That the Uncertainty of the Indictment is supplied by such an Indorsement. But this seems contrary to the Authorities relating to this Matter cited in the second Section. Also it hath been adjudged, That where a Bill of Indictment lays the Fact in the plural Number against two, and it is found Billa vera as to one of them only, it is good; and yet the Verb in the plural Number in the Record must, after such a Finding, he applied only to one Person; but to this it may be answered, That there is no Uncertainty either in the Bill or Indorsement. Also it hath been adjudged, That the Word Solvat instead of Solvet, is not fatal in a Judgment; but that a new one shall be given.

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Sec. 89. As to the second Particular, viz. Where the Use of a Word which is not Latin will vitiate an Indictment, it seems generally agreed, that an Indictment wholly in English is void, which seems to depend upon the Statute of 36 Ed. 3. 15. By which it is enacted, That all Pleas which be pleaded in any of the King's Courts shall be entered and enrolled in Latin. And from hence it seems clearly to follow, That if any material Part either of the Body or Caption of an Indictment be expressed in a Word which is not Latin, as by the Word eratvictum instead of exerxent, or tota brachis, sua dextra, instead of braccio, or presentans existit instead of presentans, the Indictment is insufficient; (except in some special Cases herein after forth, for no one can say, That the bare Giving a Latin Termina-
tion to a Word unknown in that Language, can make it become Latin, if and when the Want of one material Word may be supplied, why not the Want of two, and so on? it hath indeed been holden, That a Fault of this Kind, as imaginat for imaginatus est, ara for auia is amendable in an original Writ, which yet is denied by others, if it be in a Substantial Part. However, it seems certain, That such Amendment must depend upon the Statutes of Amendments, which extend not to criminal Proceedings. Also it seems, That it is no less a Fault to make Use of a Word which is proper Latin in another Sense, whether entirely different, or of a much larger Extent, than that in which it is used, as of the Word collis for collis, or mala ars for veneficiwm. Also it seems agreed, That an Abbreviation not justified by legal usage, as Duo without a Dash, for Dominus, R. Rs. for Regni Regis; or the Expressions of a Number in any Figures that are not in Roman, is equally fatal as it would have been wholly to have omitted what you endeavour in such Manner to express. Also it hath been adjudged, That an Inquisition finding that J. S. sepium certificatis is insufficient, because emergo doth not signify to put into, but rifeth out of the Water. So also it is said, That an Indictment has been quashed for the Words Pace Regia, instead of Pace Regis; but it appears not what was the Nature of the Indictment, nor in what Part of it these Words were used, and therefore I would suppose it to have been in such Part of some Indictment wherein those Expressions are so material that they cannot be rejected as Surplus and immaterial, for it seems to be a settled Rule, That nothing which may be so rejected shall vitiate an Indictment; as where the Year of the Lord is written in common Figures, but the Year of the King is well expressed, or where an Indictment is laid to be taken before J. S. and J. N. Duo Justiciarii, &c. Also it seems, That the Use of a Word which is not proper Latin, as of the Word contraverti, for counterfeiting, may be made good by Precedents. And there can be no Doubt but that Terms of Art, which are necessary in all Institutions, as Felonia, Mordrum, Burglaria, and such like, are good, tho' they be not good classical Latin; for they are of such a complex and peculiar Signification as no proper Latin Word will come up to. Also it hath been adjudged, That a literal Translation of a Statue into Latin is sufficient, if intelligible, let it be never so unelegant, as where it letteth forths that the Defendant super eum ius proprium did forgo Meaning, That he did it of his own Head.

Sec. 90. As to the third Particular, viz. What Faults of this Kind are holpen by an Anglicz. It seems to be holpen generally in some Books, That the Use of a Word which is either not Latin at all, or not Latin in the Sense in which it is used, may in many Cases be holpen by an Anglicz,
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As a vereverunt, anglicè did erect, b Retes, anglicè Nets; c Pellices, anglicè skins; Ollis d avris, anglicè brais Pots. But to this it may be answered, that as to the three first of these Instances, what is said concerning this Matter is only spoken of by the By, and did not come into Judgment; and as to the last of them it may be said, that it doth not concern a criminal Proceeding, but a civil Action, and that after a Verdict: And if the Purport of it be that an Anglicè helps the Use of a Word that is not Latin in an Action of Trouer, th'o' Damage be expressly given for it, it is contradicted by many other express c Refolutions, in which it seems to have been taken as a settled Rule, that where Damages are expressly given for a Thing expressed by a Word that is not Latin, it is no Way helped by an Anglicè. Also it hath been adjudged, that an Indictment for taking oto dises, Anglicè Dives, is insufficient; and this is agreeable to what is laid down as a settled Rule in many a Books, c vid. That where there is a proper Latin Word for the Thing intended to be expressed, no Anglicè will help an improperly one, as it will do where there is b no proper Latin Word, because in such a Case there is such a Necessity either to use a Feigned one or none at all. Also it hath been adjudged, that where there is a proper Latin Word, an Anglicè cannot make good the Use of any other either in a more special or extensive Signification than the Latin Language will bear, as to make the Words m malas artes signify Witchcraft, or n Rufus a Box full of Linen, or o fulcrum testis, a Field-Bed with a Teller and Curtains in which Cases the Judges will take p no Manner of Notice of what comes under the Anglicè beyond the strict Signification of the Latin.

Sect. 91. As to the Sixth Point, c vid. Where the Offence indicted may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment; it seems certain at this Day, that notwithstanding the Offence of several Persons cannot but in all Cases be severally; because the Offence of one Man cannot be the Offence of another, but every Man must answer severally for his own Crime; yet if it wholly arise from any such joint Act, which in itself is criminal, without any regard to any particular personal Default of the Defendant, as the joint s Keeping of a Gaming-House, or t unlawful Hunting and Carrying away of a Deer, or u Maintenance or t Extortion, &c. The Indictment or Information may either charge the Defendants jointly and severally, as thus: Quod u censideverunt, et uterq; eorum censidiorum; or, quod x aporteverunt, & eorum utera; aportate; or may charge them jointly only, without charging them y severally because it sufficiently appears from the Constitution of Law, that if they joined in such Act, they could not but be each of them guilty; and from hence it follows, that on such Indictment or Information z some of the Defendants may be acquitted, and others convicted; for the Law looks on the Charge as severally against each, th'o' the Words of it purport only a joint Charge against all. But where the Offence indicted doth not wholly arise from the joint Act of all the Defendants, but from such Act joined with some personal and particular Defect or Omission of each Defendant, without which it would be no Offence; as the Following a joint Trade without having served a seven Years Apprenticeship required by the Statute, in which Case it must be the particular Defect of each Trader which must make him guilty, and one of them may offend against the Statute, and the others not, the Indictment or Information ** must charge them fe-

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verally and not jointly; for it is absurd to charge them jointly, because the Offence of each Defendant arises from the Defect peculiar to himself. And for the like Reason a joint Indictment against several for not repairing the Street before their Houses hath been quashed. But I do not find it settled in what Cases several Offences of several Persons may be joined in one Indictment; for in some Books Indictments against several for several Offences, as for Recusancy, following a Trade without having served an Apprenticeship, not repairing the Streets, &c., are mentioned without any Exception on this Account: And it is held, that one Indictment against two Justices, for not inquiring of a Riot, and an Indictment against two Persons for speaking of the same Words, may be mainta[n]ed; and yet it is a agreed, that one Action lies not against several for the same Words. Also in Rolle's Reports an Indictment against several for having Inmates in their Houses is said to have been quashed, because it was but one joint Indictment against them all, whereas there ought to have been several Indictments against them. Also in the sixth Modern Reports, an Indictment against several for the Neglect of a Day of Fasting appointed by Proclamation, is said to have been quashed for the like Reason. And this is certainly most agreeable to the Rule of bringing Actions upon penal Statutes, wherein several Offences shall not be joined, except it be in respect of some one Thing to which all of them have a Relation; as where several join in a Suit in the Admiralty for a Contract on Land, or in procuring or giving an untrue Verdict, or are privy to one another in Maintenance of the same Cause.

Sec. 92. As to the seventh Point, viz., Whether the Words vi & armis be in any Case necessary in the Body of an Indictment at Common Law, it is taken for granted in some Books, that they were necessary at Common Law in all Indictments for Offences which amount to an actual Disturbance of the Peace, as Reckless and Affairs, and such like; yet I do not find it agreed, that they were ever necessary in such Indictments, wherein it would seem absurd to put them in, as in Indictments for Conspiracies, Cheats, Slanders, Etc., and such like; or in Nuances committed in a Man's own Ground. However, there can be no Doubt but that the Omission of them in Indictments of this Kind, is made good by the Statute of 27 H. 8. 8. by which it is recited, That in all Indictments of Felony and Treason, and divers others, it was common to use the Words vi & armis, and in divers of them to declare the Manner of the Force and Arms, that is to say, vi armis videlicet cum baculis, cultellis, arcubus & figittis, or other such like Words, where of Truth the Parties indicted had no such Weapons at the Time of the Offence, yet for Lack of such Words the said Indictments were taken as void, and had been avoided by Writ of Error or Plea, &c., and thereupon it is enacted, That these Words vi & armis, videlicet cum baculis, cultellis, arcubus & figittis, or other such like, shall not of Necessity be put in any Indictment or Inquisition: Nor shall the Parties indicted have any Advantage by Writ of Error or Plea or otherwise, to avoid any such Indictment or Inquisition for the Want of these or the like Words: But that the same Inquisitions and Indictments, and every of them, lacking the said Words, or any of them, shall be adjudged as sufficient to all Intents, Constructions and Purposes, as the same Inquisitions and Indictments having the same Words in them.

Sec. 92. But notwithstanding this Statute seems to be express as to all Indictments, yet it is held in many Books, That Indictments of Trepasses, and such like, are still insufficient without the Words vi & armis, and many Indictments have accordingly been quashed for want of them, where they are not implied in some others, as rese[...]

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forty, &c. But it seems difficult to assign any Reason for these Opinions, unless it be, That because the enacting Part of the Statute says, That the Words vi & armis videlicet cum baculis cutellis, &c. are not necessary, &c. the Meaning was only to take away the Necessity of those Superfluous Words baculis & cutellis, &c. but not of the Words vi & armis, where they are proper and pertinent, but to this it may be answered, That the Preamble seems to complain of the Opinion, That the Words vi & armis, whether put by themselves, or used with these other Words, were in any Case thought necessary in Indictments; and it is most natural to explain the enacting Part of a Statute as to make it extend to all the Mischiefs complained of in the Preamble; besides, the enacting Part of the Statute is express, That Indictments without those Words vi & armis, videlicet, baculis, cutellis, arcubus & sagittis, or any of them, shall be as effectual as if they had been comprized in them; and surely the Words vi & armis cannot but be comprehended under these Words, or any of them. It is said indeed in Levison's second Reports, That the Words vi & armis are still necessary, because without them there can be no Capitaver entered, nor Fine to the King; but this is in Effect to contradict the Statute which says, That an Indictment without those Words shall be as effectual to all Intents, Contrafactuations, and Purposes, as an Indictment with them. Besides, will any one say, That there can be no Capitaver nor Fine to the King upon Indictments of Cheats, Conspiracies and such like? Whereas yet it seems to be agreed, That those Words are not necessary. And agreeably hereunto, the Court of King's Bench has often refused to quash Indictments of Treasons for the Want of these Words. However, it is certainly safe and advisable to make use of them where they are proper and pertinent, if it be to no other Purpose than to aggravate the Offence.

S. 94. As to the eighth Point, viz. Whether it be necessary in the Body of an Indictment at Common Law to lay the Offence contra pecem, inasmuch as all Offences whatsoever which are subject to a publick Profession seem in general to be so, as they are Breaches of the Law, and in that Respect tend to the Disturbance of the quiet and peaceable Government of the King over his People; it seems to be a good general Rule, That no Indictment or Information, for an Offence, Capital or not Capital, against the Common Law or Statute, can be good, except it expressly supposes such Offence to have been done against the Peace of the King or Kings, in whole Reign or Reigns it was committed. And accordingly I find, That every Precedent of an Indictment in Coke's Entries, whether for a Treason, or a Felony, or inferior Offences, expressly lays the Offence against the Peace of the King, except only in four Instances, whereof the one is of an Indictment for a & Nullance for not repairing the Highway, which if it may be maintained, seems to depend chiefly on this Reason, That the Offence is of such a Nature, that a Man may be as well guilty of it in his own Ground as in that of another, and therefore it hath been holden, That it needs not to be laid against the Peace, because the laying it in such a Manner may seem to imply somewhat of Force or Trepas against the Person or Possession of another; but it seems difficult to reconcile this Opinion with those many Resolutions taken Notice of in the following Part of this Section, by which Indictments, for want of these Words, contra pecem, have been adjudged insufficient, where the Offences could on no other Account be laid to be against the Peace, than as they were Breaches of the Law, as all Nullances certainly are. And one other of the said Instances in Coke's Entries is, of an Indictment of Homicide by Misadventure, and one other of an Indictment of Homicide in Self-Defence;
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fence; but these Precedents if they may be maintained, seem to depend chiefly on this Reason, That such Offences are supposed to be owing rather to the Misfortune than Fault of the Party. And the fourth of the said Instances, is of an Indictment of Perjury on the Statute, which concludes in Contemptum Reginæ, &c. contra formam Statutæ, without adding contra pacem. But a Roffal's Precedents, both of Indictment of Felony, and of inferior Offences do as often omit the Words contra pacem, as make use of them. However, certainly the much greater Number of Precedents expressly conclude contra pacem, and the Authority of these is much strengthened by those many Cases in the Reports, wherein Indictments and Informations appear to have been quashed for Want of the Words contra pacem; as Indictments and Informations for Barrenness, Forgery, Retaining a Servant without a Testimonial from his last Master, following a Trade without having served an Apprenticeship, erecting a Cottage, Assault and Battery, &c. But it seems clear from all the Precedents, that neither an Information quia tenens on a penal Statute, nor an Information by the King for an Intrusion, or other k Wrong of a Civil Nature done to his Lands, Goods or Revenues, need the Words contra pacem.

Sec. 95. If the Offence indicted be expressly laid partly in the Reign of one King, and partly in the Reign of another, as where J. S. is indicted for having erected a Wear in the Time of Queen Elizabeth, and continued it in the Time of King James, and thereupon the Indictors conclude, That the Wear was erected and continued contra pacem Regis, &c. without adding contra pacem super Reginæ, the Indictment is insufficient, because it appears, That the Commencement of the Wrong, which is as much indicted as the Continuance, was in the Reign of Queen Elizabeth, and consequentli, if a Crime, must have been against the Peace of her Reign. But if the Indictors had concluded only, That J. S. so continued the Wear contra pacem Domini Regis, &c. and had laid the Erection of it by Way of Recital, or Indictment only, it is said, that the Indictment had been good, because it should be taken as an Indictment for the Continuance only.

Sec. 96. As to the ninth Point, viz. Whether it be necessary in the Body of an Indictment at Common Law, to lay the Offence contra coronam & dignitatem Regis, it is observable, That all the Precedents of Indictments in Coke's Entries, cited in the ninety-fourth Section, which lay the Offence contra pacem, lay it also, contra coronam & dignitatem, &c. Yet not one of Roffal's Precedents doth fo; neither do I find any one Case wherein an Indictment against which no other Exception could be taken, has been adjudged insufficient for the Want of these Words. But on the contrary I find it expressly resolved in Holbrook's Case, That an Indictment of a Riot is good without them.

Sec. 97. As to the tenth Point, viz. Whether it be necessary in the Body of an Indictment, at Common Law, to lay the Offence in contumax Regis; it is so laid in some Indictments of inferior Crimes in Coke and Roffal, and in others it is not. Also it is so laid, with the Addition of the Clause contra leges jus, in every Information of Intrusion upon the King's Lands in Coke and Roffal, and also in an Information in Coke for a Trover and Conversion of the King's Goods. But in three Informations for Mines claimed by the King, which are the only Precedents I find of

pl. 12. 187 pl. 15. 9 Co. 16. b. 26 b. 7. 3. 4b. 4b. 9 Co. 19. pl. 15. 10 Roff Ent. 34. pl. 3.

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this Kind, the suppos'd Injury is laid only ad damnum Regis, without either of the said Clauses; neither do I find either of them in any Indictment of Treason or Felony, nor in any Information qui tam in Coke or Rastal; and tho' it seems to be admitted in the Year Book of 4 H. 6 that in an Action on a Statute it is necessary to conclude, in contempt Domini Regis, yet in Bratch's Entries it is often omitted than used, and no Exception appears to have been taken for the Omission.

Seb. 98. As to the eleventh Point, viz. Whether it be necessary in an Indictment at Common Law to lay the Offence illicit, I cannot find this Word used in any one of Coke's or Rastal's Precedents of Indictments, neither do I find any clear and express Authority, that it is in any Case necessary in an Indictment at Common Law; but on the contrary I find it expressly adjudged, That it is not necessary in an Indictment of a Riot, because the Act it self contained in the Indictment to plainly appears to be unlawful. But where a Statute uses the Word unlawfully in the Description of an Offence, it is certain that an Indictment grounded on it must use the Word illicit, or some other tantamount.

Seb. 99. As to the twelfth Point, viz. Whether a Defect in any of the Particulars above mentioned be amendable, I take it to be settled, That no Criminal Prosecution is within the Benefit of any of the Statutes of Amendments; from whence it follows that no Amendment can be admitted in any SUCH Prosecution, but such only as is allowed by the Common Law. And agreeably hereto I find it laid down by a Principle in some Books, That the Body of an Indictment removed into the King's Bench from any inferior Court whatsoever, except only those of London, can in no Case be amended; but it is said, That the Body of an Indictment from London may be amended, because by the City Charter a Tenor of the record only can be removed from thence. And it seems, That by the Course of the King's Bench, a Rule may be made on any Coroner to amend even the Body of his Inquest by his Notes in a meer Matter of Form.

But I do not find it anywhere where holden, That this can be done after it is filed, by which it becomes a Record of the Court; and then the same Objections seem to lie against the Amendment of it, as of an Indictment.

But it seems to be agreed, That the Caption of an Indictment from any Place, may upon Motion be amended by the Clerk of the Assizes or of the Peace, so as to make it agree with the original Record at any Time during the same Term in which it came in, but not in a subsequent Term. But I have known it holden, That the Caption of an Inquisition cannot be amended at any Time after it is filed, any more than the Body; the Reason whereof may perhaps be this, That the Caption being Part of, and drawn at the same Time with the Inquisition, greater Exactness is required in it than in that of an Indictment, which is left as a Thing of Course to be drawn up by the Clerk of the Court, when Occasion shall require. Also by the Opinion of Two Judges against that of two, the Want of Continuances in the Record of an Attainder of Felony cannot be amended by the Certificate of the Clerk of the Assizes, especially if the King signify his Pleasure, that he do not desire any Amendment. And it seems to be settled this Day, that no Discontinuance is amendable in any Criminal Prosecution, without Consent. But it hath been adjudged, That a meer Misplication in the Joining of an Issue in a Criminal Prosecution, as where the Word similitur, &c. is omitted, may be amended.
amended at any Time. Also it hath been * adjudged, That the Direc-
on of a Venire, Viescuitibus of such a Place, which is returned by J. S.
vicecumite, may be amended on the Oath of J. S. that there is but one
Sheriff of the Place, which is himself. Also it is every Day's Practice to
amend criminal Informations, and the Pleadings thereon by Rule of
Court, while all is in Paper. And e Quere if the Record may not be so
amended by the Paper-Book at any Time before Judgment?

Sec. 100. It seems to have been anciently the common Practice where
an Indictment appeared to be sufficient, either for its Uncertainty, or for
the Want of proper legal Words, not to put the Defendant to answer it;
better if it were found in the same County in which the Court s
to award Process against the Grand Jury, to come into Court and amend
it. And it seems to be the common Practice at this Day, while the
Grand Jury who found a Bill, is before the Court, to amend it by their
\textit{Alli Confect in a Matter of Form, as the Name or Addition of the Party, etc.}
Sec. 101. And now I am in the second Place to shew what ought to be
the Form of the Body of an Indictment upon a Statute, for the better Un-
understanding whereof, having premised, that the same Rules which have
been already laid down concerning Indictments at Common Law, are
generally applicable to Indictments on Statutes, I shall in this Place con-
sider such Matters only as more peculiarly belong to the Form of the
Body of an Indictment upon a Statute, under the following Particulars:

1. Whether it be necessary that such Indictment recite the Statute
whereon it is grounded.
2. What mis-recitals of such Statutes are fatal.
3. How far it is necessary to bring the Offence indicted within the
very Words of the Statute.
4. Whether an Indictment grounded on a Statute, which will not
maintain it, may be made good, as an Indictment at Common Law.
5. How far it is necessary to conclude \textit{contra formam Statuti}.

Sec. 102. As to the first Particular, \textit{viz.} Whether it be necessary that
such Indictment recite the Statute whereon it is grounded, I take it to be
settled, that there is no Necessity in any Indictment or Information on
a \textit{publick Statute}, to recite such Statute, whether the Offence be such
only because prohibited, or be an Evil in its own Nature, and whether
it be prohibited by more than one Statute, or by one only; for the
Judges are bound \textit{ex officio} to take Notice of all \textit{publick Statutes}, and
where there are more than one by which an Indictment or Information
may be maintained, they will go upon that which is most for the King's
Advantage.

As to the second Particular, \textit{viz.} What mis-recitals of such Statutes are
fatal, I shall endeavour to show:

1. Whether all mis-recitals of the substantial Part of the Statute are
fatal.
2. What mis-recitals of the Place or Time at which the Parliament
was holden.
3. Whether a mis-recital of the Title of a Statute.
4. What other mis-recitals are fatal.
Of Indictment.

Book II.

Sect. 103. As to the first of these Particulars, it seems to be fentled, That notwithstanding there be no Necessity to recite a publick Statute; yea if the Prosecutor take upon him to do it, and materially vary from a substantial Part of the Purview of the Statute, and conclude contra formam Statui prædicti, he violates the Indictment, because it judicially appears to the Court, that there is no such Foundation for the Prosecution, as that whereon it is expressly grounded; as where in an Indictment with such a Conclusion on the Statutes which prohibit Entries with strong Hand, the Word Vi is put for minu s fortis; or where the Word cum is put for mendacia in such an Indictment on the Statutes against the Tellers of Lies of great Men; or where the Verb in a statute which expresses the Principal Act wherein the Offence consists, is expressed in such an Indictment on such a Statute, by a Word which is neither classical nor legal Latin; or where a Statute in describing the Courts wherein it prohibits Persons to bring Actions in other Names without their Privy, calls them Courts wherein Pleas are holden in Actions personal, &c. and you in reciting it in such an Indictment call them Courts wherein Pleas are holden in any Actions.

Sect. 104. Yer it seems that the following Mistakes of the substantial Part of the Purview of a Statute in any Indictment are not fatal, as the Omission of a synonymous Word, having no other Meaning than what is fully expressed in the Words which are recited; or the Joining of Words which are either wholly synonymous, or much of the same Sense, as signifying Things as generally include one another, (as the Words malitiosus & contemptuosi, &c.) with a Conjunctive, where the Statute uses a Disjunctive, or the Using the singular Number for the Plural, or the Plural for the singular, where the Sense is the same as where in reciting a Statute speaking of Suits in any Court, you use the Words in aliqua curia, or where in reciting the Statute against disturbing Persons in their open Preaching, you use the Words in apertis praedicacionibus.

Sect. 105. Also it seems that no Advantage can be taken of a Variance from any Part of a private Statute, without dwelling it to the Court in a proper Manner, because otherwise such a Statute shall be taken to be as it is recited.

Sect. 106. As to the second of the Particulars above-mentioned, viz. What Mistakes of the Place or Time at which the Parliament was holden, are fatal, it seems to be generally agreed, That a Mistake of the Place or Day at which the Parliament be holden, violates an Indictment. As if a Parliament was first holden on the twentieth of April, in the thirty-second Year of Henry VIII, and afterwards holden by Prorogation on the twelfth of April the next Year, and a Statute then made, be recited as made at a Parliament holden on the twenty-eighth of April, in the thirty-second Year of Henry VIII. Or if a Parliament be summoned to meet on the twenty-third of January in such a Year, and before the Meeting be prorogued to the twenty-fifth, and then holden, and a Statute made by such Parliament be recited as made in a Parliament holden on the twenty-third; or if a Parliament first holden on one Year be continued by Prorogation to another, and then fit again; and a Statute made at such Sessions be recited as made in a Parliament holden or begun at such second Year, (which is all one,) instead of saying that it was made at a Sessions of Parliament then holden, and the Indictment conclude contra formam Statui prædicti, the Variances in such Cases are fatal; for the Court will not make any CAFE better than the Record has made it and therefore where that expressly grounds it on the Act of
Chap. 25. Of Indictment.

of a supposed Parliament, where there was no such Act, the Court will not find one out to make it good. Also it hath been adjudged, That *Moor 302.
a Repugnancy in setting forth the Time when a Parliament was holden, is fatal, as if a Statute be recited as made on such a Day, in the first and second Years of such a King, for it is impossible that one and the same Day should be in two Years. Also it is holden in b Croke's Reports, That an Indictment was discharged for not shewing in what County a Parliament was holden; but no Reason is given for this Opinion, c and it hath been adjudged, That the total Omission of the Day when the Parliament was holden, is no Fault in the Recital of a Statute. Also it seems to be d agreed, That a Mistake in supposing a Statute to have been made at a Parliament holden in such a Year, when in Truth it was then holden by Prorogation, may be help'd by the confiant Course of Precedents upon such Statute. Also it seems to be e agreed, That not only a Mistical of the Day whereon the Parliament was holden, but even a Mistical of the Purview of a Statute may be fals'd by a general Conclasion contra formam Statuti, without adding prædicti, &c. f

f But I do not find it settled, Whether a Fault of this Kind can be help'd by the Defendant's Admittance, that there is such a Statute as is supposed; and it will be difficult to maintain that the Party's Admittance of what the Court judicially knows to be contrary to the Truth, can make good any Judgment.

Sec. 167. As to the third of the Particulars above-mentioned, viz.

Whether the Mistical of the Title of a Statute be fatal, it is g said to have been holden by Sir Matthew Hale, That the Mistical of the entituling of an Act will not vitiate a Replication, because it is not Matter of Substance; and a Judgment is h said to have been lately given in the Court of Common Pleas agreeable to this Opinion; but the contrary is i said to have been since adjudged in the Court of King's Bench.

Sec. 108. As to the fourth of the Particulars above mentioned, viz.

What other Misticals of a Statute are fatal, k it is said to have been l, m, n, o, p, q, r, s, t, u, v, w, x, y, z, A, B, generally, as a Variance in reciting a Statute to commence after the Making, where the Statute is express, that it shall commence after the End of the Sessions, is fatal. But I take it to be a settled Rule, That a Variance no Way altering the Sense of the Statute does not Hurt; ss 1, vent 172, where in the Recital of an Oath preferred by Statute, the Words See of Rome are put for See of Rome; and I do declare in my Conscience instead of I do declare in my Conscience. Also it seems to be m agreed, That a Variance from an immaterial Part of a Statute does not Hurt, n and therefore that where a Statute contains several Branches relating to several distinct Matters, an Omission of such Branches as do no way relate to the Offence, is not fatal, because they are nothing to the present Purpofe. Also it hath been adjudged, That every Mistical even of such Branch is not fatal; as it vary only in such a Part of the Description of the Offence, as is put in only by Way of Flourish, and ex abundanti, and makes no necessary Ingredient in the Offence prohibited, nor needs any Proof; as if in a Prosecution on the Statute of 12 R. 2, the 9 Recital be that none shall devise, speak, or tell any false News, Lies, or other such false Things, &c. unde diversa aut aliqua ut (Anglicè Debates) inter magnates, vel inter magnates & communem domini Regni oriri possint; where the Words of the Statute are, That none shall devise, speak, or tell any false News, Lies, or other such false Things, &c. whereas Discord or any Slander might rise within the said Realm; for the first Words, viz. That none shall devise, &c. any false News, Lies, or other such false Things, &c. are only material.
material. Indeed as this Case is reported by Coke, there is a Mistake even in this Part, for instead of other false Things, the Recital is said to mention other Things generally, omitting the Word false; but I suppose that this is a Mistake of the Printer, and that there is no such Variance in the Record of the Case, because no Exception is reported to have been taken to it.

Sec. 109. But if a Mistake of such a Part of the Purview of a Statute be not fatal, it seems a fortiori to follow, That a Mistake of the Preamble is not material, where the substantial Part of the Purview is well recited. And upon this Reason chiefly, as I suppose, it hath been adjudged, That if in an Action on the Statute of Hue and Cry for a Robbery, the Declaration recite the Preamble to speak of the Burning of Houses, where the Statute mentions Arsons generally, without any particular Mention of the Arson of Houses; or in an Action for the Slander of an Earl, on 2 R. 2. 5. if the Declaration in reciting the Preamble, mention only what relates to Earls, &c. and omit the Clause concerning the other great Officers, b yet the Plaintiff may have Judgment especially after Verdict. And these Rulings seem to weaken the Authority of Parker’s Case reported by c Hutton, wherein it was said to have been held by three Judges against the Opinion of Hubert, that the Putting of the Word indicavi for indicaveri in the Recital of the Preamble of the said Statute of Hue and Cry, in a Writ grounded thereon, is fatal.

Sec. 110. If an Indictment on 8 H. 6. in reciting that Part of the Statute which declares in what Actions the Party grieved shall recover his Damages, after having mentioned Recoveries by Verdict, omit the Words or in any other Manner; or use the Words Assumam novae differentiam for Assumam novae differentiam; or recite the Statute, as giving the Fine on a Recovery by Action dicta Domino Regi, where there is nothing to make good the Word dicta, or recite the Statute relating to the Bringing an Action to be, if the Party after such Entry make any Prevarication, &c. where the Words are, if after such Entry any Prevarication be made, or recite it to be, if any Person be put out and dispossessed in the Conjunctive, where the Words of the Statute are, if any Person be put out or dispossessed in the Disjunctive, the Variances have been adjudged fatal. Yet 1 it hath been holden, That the left of there is an immaterial Variance, because the Words above-mentioned be disjunctive in the Statute, they have always been expounded in the Copulative. Also it may be questioned how far the rest of these Authorities may be Law at this Day, since of 2 late the Court has not been so strict in Recitals as formerly, and if an Indictment fully recite a Statute so far as it concerns Indictments, a Mistake in what concerns other Matters seems to be much helped by the Authorities of the Cases above-cited.

Sec. 111. It hath been 1 adjudged, That a total Omission of the Clause of a Statute which ordains what the Party shall forfeit, does no Hurt. Yet the Statute be wholly misrecited in such Clause, as if the Words m in admitt ueret or forisfactet be used in such Clause for amitteret and forisfactet, the Exception for the Variance feems to have greater Weight. Yet if the Word misrecited be synonymous with the other which is rightly recited, and the whole Purport of both as fully expressed in one Word, which is properly recited, as if both had been used, as it certainly is in the Case above-cited, wherein the Word forisfactet is rightly recited, and the Word amitteret misrecited, it may perhaps be questioned whether such an Exception would be fatal at this Day, especially considering that it is in a  

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Part of the Statute which might as well have been omitted in the Recital; and there is no Variance but from a Word wholly nugatory and superfluous, and the Sense would be complete by rejecting the Word mistaken, as Superfluous and Ineffable. But if it in the Mistical of such a Clause, there be such a Variance, as carries with it a plain material Repugnancy to the Intent of the Statute, as where the Words, whoever shall do the...65. etc. are thus retailed, whoever shall do...68. etc. I do not well see how any Thing can be said to make it good; for it is a General Rule, that d Repugnancies in Indictments are fatal and the Prosecutor himself declares, That...57. etc. the Books not those who do the Thing indicted, but those who do it not are within the Penalty of the Statute.

Sect. 112. As to the third Particular, viz. How far it is necessary to bring the Offence indicted within the very Words of the Statute; I take it for a General Rule, that e unless the Statute be recited, neither the Words contra formam Statutis, nor any Periphrasis, Intendment or f Conclusion, will make good an Indictment, which does not bring the Fact; 59. etc. prohibited or commanded, in the doing or not doing whereof the Offence consists, within all the material Words of the Statute. And upon this...22. etc. Ground it hath been resolved, that an Indictment of Rape finding that...54. etc. the Defendant such a Day and Place, etc. A. B. felonie copit, etc. enam ad-...47. etc. contra voluntatem jam, etc. is not f sufficient without the Word Rapit; because that is the Word used by...91. etc. The Statute which makes the Offence Felony: Also it hath been g ad judged, That Indictments for Perjury on 5 El. 9, omitting the Words voluntari et corrupte, in setting forth the Swearing, and Indictments for...30. etc. striking in a Church on 5 & 6 Ed. 6. h omitting the Words to the Intent to strike, etc. and Indictments for aiding the Procurers of the Pope's Bulls on 13 El. 4. k omitting the Words To the Intent to set forth, etc. the...93. etc.afürung, &c. and Indictments for_foresetting on 5 & 6 Ed. 6. 14. etc. setting forth, That the Defendant bought certain Goods of J. S. which...59. etc. was about to sell at such a Market; but f not expressly alleging, that...50. etc. withal, and in...84. etc. Indictments for ingrossing on the same Statute, setting forth, That the Defen-...84. etc. by buying, &c. and e Indictments for Treason in Compassing the...93. etc. King's Death, on 25 E. 3. having neither the Word Compa or Imagine, pl. 25. etc. cannot be taken as Indictments on such Statutes. And the like hath been adjudged in another in both other...47. etc. in Bank 5.

Sect. 113. Neither doth it seem to be always sufficient to purvey the very Words of the Statute, unless by doing you fully, directly and expressly alledge the Fact in the doing or not doing whereas of the Offence; for Bank 1. etc. etc. a Leon 39. Sect. 11 & 20. etc. Kylings. 8. etc. That the Defendant testa in...84. etc. is not B. 7, Ch. 17. etc. good without directly shewing that he was sworn. Alfo it hath been...30. etc. Co. 29. g adjudged, that an Information on 18 H. 6. 17. for not abating so much Wine...29. etc. of the Price of Wine sold as the Vessels wanted of the Statute Measure, pl. 9. etc. etc. 2 Ro. 217. etc. is insufficient, if it do not expressly shew how much they wanted. Alfo...25. etc. Sec. 16. etc. Rol. Ab 81. etc. pl. 15. etc. 3 Ed. 4. 527. etc. Cro. El. 47. etc. pl. 17. etc. Sect. 114. see Ed. 4 16. etc. 9 a Leon 39. etc. 39.
Of Indictment.

Book II.

Sec. 114. As to the Description of the Person of the Defendant, in order to bring him within the Pervue of a Statute, which extends only to such Kind of Persons as are specially mentioned in it, it is a good general Rule, that every Indictment must bring the Defendant within all the Descriptions mentioned in the Body of the Act, except they are such as carry with them the bare Denial of a Matter, the Affirmation whereof is a proper and natural Plea for the Defendant, as where it is enated. That all Persons having no Reasonable Excuse to be absent, shall go to their Parish Church, &c. in which Case it is said, that it is not necessary to shew, that the Defendant had no reasonable Excuse, for this will come most properly in Question from the Plea of the Defendant. Also it seems that there is no Need in describing the Defendant to set forth the Place where the Thing happened, which brought him within the Description, as hath been more fully shewn in the 86th Section. Also it hath been adjudged, that it is sufficient in describing the Defendant to say, That he existens so and so, as the Statute mentions, did the Fact, without alleging that he was so at the Time of the Fact; for that shall be intended, as hath been more fully shewn in the sixty-third Section.

Sec. 115. It seems agreed, that there is no Need to allege in an Indictment, that the Defendant is not within the Benefit of the Provisions of a Statute wherein it is founded; and this hath been adjudged, even as to those Statutes which in their Pervue expressly take Notice of the Provisions, as by saying, that none shall do the Thing prohibited, otherwise than in such special Cases, &c. as are expressed in the Act. But as I take it, a Conviction on a Penal Statute ought expressly to shew, that the Defendant is not within any of its Provisions; for since no Plea can be admitted to such a Conviction, and the Defendant can have no Remedy against it, but from an Exception to some Defect appearing in the Face of it, and all the Proceedings are in a Summary Manner, it is but reasonable that such a Conviction should have the highest Certainty, and satisfy the Court. That the Defendant had no such Matter in his Favour as the Statute itself allows him to plead.

Sec. 116. It seems to be laid down as a general Rule in Servi's Report, which is also confirmed by the Year-Book of 11 H. 4. 14. That if the Statute whereon an Indictment is grounded be particularly recited, the general Conclusion, contra formam Statu, after the Allegation of the Fact, will supply an Omission in it of a Circumstance mentioned in the Statute, which would be fatal without such a Recital and Conclusion, for since the Statute is particularly recited, and the Defendant charg'd with having done the Offense against the Form of it, and it is impossible that he could so have done, if any Circumstance expressly require'd by the Statute had been wanting; it seems that the Offence may properly enough be said to be as fully set forth in the very Words of the Statute, as if such Words had been repeated in the Allegation of the Offense, according to the common Rule, that Verba relata hoc maximè operantur per referentiam ut inesse videantur. Neither do I find this contradicted by any of the Resolutions in the precedent Sections; for it does not appear that there was such a Recital and Conclusion in any of the Indictments therein referred to. Yet notwithstanding the Omission of a Circumstance mentioned in a Statute, may perhaps in such Manner be holpen; it seems that the Want of a certain Description of the Time or Place, or Things or Persons concerned, or of the Conclusion contra pacem, or of an express and direct Allegation of the Fact itself, cannot be so supply'd, for such Omissions vitiate an Indictment drawn in the very Words of the Act.

Sec. 117.
Chap. 25.

Of Indictment.

Sect. 117. As to the fourth Particular, viz. Whether an Indictment grounded on a Statute which will not maintain it, may be made good as an Indictment at Common Law; it seems formerly to have been generally taken for granted, that no Indictment whatsoever which is grounded on a Statute, and concludes contra formam Statutis, and cannot be made good by any Statute, can be maintained as an Indictment of an Offence at Common Law, the chief reason whereof seems to be this, That it appears that the Profession is intended to be grounded on a Foundation which will not support it. But the contrary seems to have been adjudged in *Page's Case, wherein it was resolved, That if Persons be indicted specially on the Statute of Stabbing, and the Evidence be not sufficient to bring them within the Statute, they may be found guilty of general Manslaughter at Common Law, and that the Words contra formam Statutis shall be rejected as forfeits, where the Offence is prohibited by the Common Law only. And the same hath been since adjudged as to other Statutes; and as I took it, was lately agreed in an Information against the City of *Norwich.

Sect. 118. As to the fifth Particular, viz. How far it is necessary for an Indictment on a Statute, to conclude contra formam Statutis, it seems that Judgment on a Statute shall in no Case be given on an Indictment, which doth not so conclude; for granting that such Judgment may in some Cases be given in an Action brought at Common Law, without Reference to any Statute, as it is *said, that Judgment on 3 H. 6. 9. may be given on the old Common Law, *Writ of Alias of Novel Difficulty, yet it will not follow, That such a Judgment can in any Case be given on an Indictment drawn as for an Offence at Common Law without any Reference to Statute. For as to the said Case of an Alias of Novel Difficulty, it may be said that the Statute of 3 H. 6. expressly says, That the Party may recover by such Writ; and therefore since there is no special *Writ of this Kind formed upon the Statute, and the Party has no Authority to make out a Writ himself in a new Form, it is reasonable that he may recover by the old Writ. But it *seems that Judgment on this Statute cannot be given on an Action of Trespass at Common Law Form, because there is a special Writ of Trespass in the 1 Register grounded on the Statute; and it seems to be *agreed, that where there is a special Writ grounded on a Statute, Judgment shall never be given on such a Statute in an Action brought at Common Law. And in like Manner, since everyone who prosecutes an Indictment is at Liberty to draw it as he pleases, so that he observes the general Rules of Law concerning Indictments; it seems to be taken as a common Ground, That a Judgment by Statute shall never be given on an Indictment at Common Law, as every Indictment which doth not conclude contra formam Statutis, shall be taken to be. And therefore if an Indictment do not conclude contra formam Statutis, and the Offence indicted be only prohibited by Statute and not by Common Law, it is wholly insufficient, and no Judgment at all can be given upon it: But if the Offence were also an Offence at Common Law, I take it to be in a great Measure settled at this Day, that a Judgment may be given as for an Offence at Common Law, tho' the Indictment conclude contra formam Statutis, as hath been more fully shewn in the precedent Section.

Bannah, 57. pl. 25. Cro El. 759. 760. *See the Authorities cited to the other Parts of this Schola. 3 Rol. R. 35. 1 Sound. 149. 1 Sid. 409. 1 Kebl. 106. pl. 79. 1 Salk. 170. pl. 3. *See for the precedent Schola. 4 Kebl. 177. pl. 7. 1 Sid. 409. 1 Sound. 149. 230. 3 H. 6. 328. pl. 43. Fitz. *Attachment for Prohibition. 1. 3. *But 3 Rol. Ab. 82. pl. 2. 1. 1 Kebl. 106. pl. 70. *Jo. 379. 380. *See contrary.

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Sect. 115. If there be more than one Statute concerning the same Offence, and the first of them were never discontinued, and the later only continue the former without making any Addition to it; or only qualify the Method of Proceeding upon it, without altering the Substance of its Purview, it seems agreed, That it is safe in an Indictment on any such statute to conclude contra formam Statutum; and it hath been held, that a Conclusion contra formam Statutum, will in such Cases vitiate the Prosecution, but where a Statute hath been wholly discontinued, and is afterwards revived, there seem to have been some Opinions, That a Prosecution on it ought to conclude contra formam Statutum. Also where the same Offence is prohibited by several independent Statutes there are some Authorities, that you must either conclude contra formam Statutum, or contra formam of the particular Statutes naming them, and that if you merely conclude contra formam Statuti, the Indictment will be insufficient, for not flowing on which of the Statutes it was taken. But there are also strong Authorities for the contrary Opinion, which is also most agreeable to Precedents, and may be added, that if it be a good Objection to such an Indictment, concluding contra formam Statutum, that it appears not on which of the Statutes the Prosecution is grounded, the same Objection may as well be made to an Indictment concluding contra formam Statutorum; for it no more appears from such a Conclusion on what Statute the Prosecution is grounded, than from the Conclusion contra formam Statutum; and yet it seems to be generally admitted, that a Conclusion contra formam Statutum is good where the indictment is for an Offence prohibited by several Statutes. Also where such an Indictment concludes contra formam Statuti, without flowing what Statute is intended, why may it not be said that such Statute shall be taken as is most for the King's Advantage, as well as where the Indictment concludes contra formam Statutarum, in which Cause it seems to be admitted, that it shall be so taken, but where a later Statute orders, That a former Statute shall be executed in a new Case not mentioned in the former, as H. 6. 9. does, that 15 Ric. 2. 2. shall be executed in the Case of a Forcible Detrainer, which is not mentioned in 15 Ric. 2. or where a new Statute adds a new Penalty to an Offence prohibited by a former Statute, as 23 Eliz. doth that of 20 l. for a Month's Absence from Church contrary to the Tenor of 1 Edw. It seems that it may with greater Reason be argued, that if the Indictment conclude contra formam Statuti, it will be insufficient, because it may seem, that the Offence is not punishable by any one Statute only. Yet considering that the Precedents in these Cases generally conclude contra formam Statuti, and the Prosecution in Truth depends on the Addition made by the later Statute, which seems of itself alone sufficient to support it, it may be reasonably argued, and seems agreeable to the later Opinions, that such a Conclusion may be allowed in these Cases also. However it seems safe in any of the Cases abovementioned, to conclude contra formam Statuti, which shall stand either for Statuti or Statutarum, or be rejected in such manner as will best maintain the Indictment.

Sect. 120. As to the ninth general Point of this Chapter, viz. What ought to be the Form of the Caption of an Indictment, I shall take it for granted, that every such Caption is erroneous, which doth not set forth with proper Certainty, both the Court in which, and the Jurors by whom, and also the Time and Place at which the Indictment was found; for the better Understanding whereof I shall endeavour to shew what Certainty of this Kind is necessary.
Of Indictment.

1. In Respect of the Court, before which.
2. Of the Jurors, by whom.
3. Of the Time: And,
4. Of the Place, at which the Indictment was found.

Sett. 121. As to the first of these Particulars, it is certain, that every such Caption must shew that the Indictment was taken before such a Court as had Jurisdiction over the Offence indicted: and therefore if it were not shewn, that any Indictment whatsoever was taken before J. S. a Steward, without shewing to whom he was Steward, or in what Court, or that an Inquisition of Death, upon View of the Body, was taken before J. S. Mayor of London, or before J. S. Steward to such a Person, and in such a Court, without adding, that he was a Coroner, or if it expressly call him Coroner, but do not also shew that he was such for the District in which the Inquisition was taken, it is insufficient. But if it hath been adjudged, that it is sufficient to set forth, that it was taken before J. S. a Coroner in the County, without saying, that he was a Coroner for the County, for that cannot but be intended.

Sett. 122. Where the Caption of an Indictment alleges it taken at the General Sessions of the Peace of such a County or Burgh, it doth not seem necessary to add, that such Session was held for such County or Burgh, because it could not but be so held, if it were the General Sessions of such County or Burgh: but if it had been only described as a General Sessions held in such County or Burgh, it is said to be a fatal Exception, that it is not expressly alleged as held for such County or Burgh: but Quare, if this be not helped by putting the County in the Margin.

Sett. 123. There are some Authorities, that if the Caption of an Indictment before Justices of Peace take no Notice of their Commission to hear and determine Felonies, &c. which is generally done by the Clause, 

Forb. ad diversas Felonias, &c. it is insufficient: But having already more fully considered this Matter, Chap. 8. Sect. 33. I shall refer the Reader to what is there said concerning it.

Sett. 124. There are also several Authorities, that the Caption of an Indictment before Justices of Peace is insufficient, unless either the Words, k Domini Regis, or l Publice, be added after Pass: and it hath been sometimes held, that even the Words Domini Regis are not sufficient without the Word 

m nunc, or some other, to shew whether it were the Peace of the present King, or of some of his Predecessors. And the chief Ground of these Opinions seems to be the Statute of 27 H. 8. 24. Sect. 4. by which it is enacted, That in every Writ and Indictment that shall be made within any County-Palatine or Liberty, whereby any Thing shall be supposed to be done against the King's Peace, it shall be supposed to be done against the King's Peace, his Heirs and Successors, and not against the Peace of any other Person whatsoever, any Statute, Grant, or Usage, to the Contrary notwithstanding. From whence, I suppose, it may have been collected, that by Parity of Reason, Justices of Peace ought to be styled, in legal Proceedings, Justices of the King's Peace, that it may appear that the Peace of no other Person, but of the King, is intended. But since this is not expressly required by the said Statutes, and it cannot but be intended, (especially at this a Day, when none but the King can appoint Justices of Peace) that all Justices of Peace must be Justices of the publick Peace, or of the King's Peace, which is the same Thing, and accordingly Exceptions for the want of these 5 Sect. 1.
Of Indictment.

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these Words have been often over-ruled; I take them to be obsolete at this Day, as it seemed to be lately settled between the King and How-

king on a Conviction of Deer-hunting.

Sed 125. But it seems generally agreed, that if the Caption of an
Indictment, at a Sessions of the Peace, do not mention before whom it
was holden, or if it set forth generally as holden before Justices, with-
out shewing any Thing of the Nature of their Communion, or as holden
before Justices of the Peace, &c. without naming any of them, or shew-
ing for what Place they were Justices, or if it describe them as Justi-
ces ad pacem in comitatu predict. conservandae, omitting the Word i

it is insufficient. Yet it hath been adjudged, that it is not necessary
for the Caption of an Indictment taken at a General Sessions of the Peace,
to style any of the Justices of the Quorum, because it sufficiently shews,
that one or more of them were such by shewing, That the Sessions was
a General one.

Sed 126. It hath been adjudged, that the Caption of an Indict-
ment, setting it forth as taken ad magnum curiam cum leta tentam, is insufficient;
the chief Reason whereof seems to be this, that such a Caption
rather imports, that the Indictment was taken at the Court which had no
Jurisdiction to take it, than at the proper one; for it seems to be expres-

s, that it was taken at the Court-Baron, and mentions nothing in Relation
to the Court-Leet, but that it was holden together with the Court-Baron.

And agreeably hereto it is said in the Year-Book of 16 Edw. 4. 15. that
if the Caption had been ad magnum Curiam & ad letam, it had been some
Senfe, but that cum leta bears no Senfe. From whence it may be argued,
that if a Caption set forth an Indictment as taken at a Court-Baron
and Court-Leet, it may be good, because the Court-Baron having no
Manner of Jurisdiction in criminal Matters, and the Court-Leet having
such Jurisdiction, it may well be intended that the Indictment was
taken at the Court-Leet, and not at the Court which had nothing to do
with it. A fortiori therefore, if an Indictment be set forth as taken ad vif
franci pleb. cum cur' hono tent', it shall be intended to have been taken at
the Court-Leet; as it is said to have been holden by the late Chief
Justice Holk, who yet seemed to be of Opinion, That if a Court-Baron
had a Jurisdiction of such Matters as well as a Court-Lecr, but in a dif-

rent Manner, such a Caption would have been insufficient, for not shew-
ing more expressly at which of the Courts the Indictment was taken.

Sed 127. It hath been adjudged, that the not setting forth in the
Caption of an Indictment taken at a Leet, whether the Court were holden
by Grant or Prescription, is holpen by the Multitude of Precedents.

Sed 128. As to the second Particular,viz. What Certainty is neces-
sary in the Caption of an Indictment in respect of the Jurors by whom
it was found, it seems agreed, That no Caption of an Indictment
whether found at a Court-Leet, or other inferior Court, can be good,
without expressly shewing, that the Jurors who found it were of the
County, City, or Borough, or other Precinct, for which the Court was
holden, and that they were at least twelve in Number, and also, that
they found the Indictment upon their Oaths. Also, Indictments have
been qualified for an Omission of the Names of the Jurors in the Caption;
but there is a Precedent in Saunders' Reports of a Caption, setting

forth
forth, that the Indictment was taken by twelve Men, &c. without naming them, and yet no Exception appears to have been taken on this Account. Also, many Indictments taken in inferior Courts, have been * cf. 1 Keb. 529, quashed for want of the Words, proborum & iegalis hominiu in the Cap- tion, but this Exception hath been often overruled, as hath been more pl. 64. fully shewn in the sixteenth Section of this Chapter. Also, many Indic- ments in such Courts have been quashed for want of the Words, b jurat & onerat. in the Caption; and also for Want of the Words ad inquinendum pro dio Domino Rege & pro corpo comitatus; and also for want of the Words Super sacramentum fumum dicitum, after the Words jurat. & onerat; and also for expressing the Oath to have been to inquire pro corpo civitatis prædictæ, where the Offence arose in, and the Sessions was held for a Burgh, &c. But it is f. said, that in the Caption of an Indictment taken in the King's Bench, or at the Grand Sessions, the Words Super sacramentum fumum dicitum, supplied the Want of the Words Jurat. & onerat. Also, it is said to have been i. adjudged, that the Words jurat. & onerat. ad inquirendum, pro Domino Rege & corpo comitatus are sufficient, without the Word pro before corpo; and that the Edition of the Words ad largum after inquirendum, does no k. Hurt; and that there is no Need of the Words ad inquirendum pro corpo comitatus in an Inquisition taken for a particular Purposé; and that the Omission of the Word onerat. is not fatal, if there be the Word jurat. for that fully implies it.

Sect. 129. As to the third Particular, viz. What Certainty is nec- essary in the Caption of an Indictment, in respect of the Time when it was found? It seems n. agreed, that such Caption must set forth a certain Day and Year when the Court was held, before which the Indictment was found, and must record it as then found in the o. Present Tense, and not in the Preterperfect, for it hath been p. adjudged, that if it describes the Sessions at which the Indictment was taken, as holding die Martis & die Mercurii; or as holding on such a Day in such a Year of the King, with- out q. ascertaining what King; or if it set forth the Style of the Day of the Year in any r. Figures but Roman, it is insufficient. But it seems to be t. agreed, that it is sufficient to express the Year of the King, without adding that of the Lord: Also it seems, that t. extitit presentatum for extitit is made good by the Multitude of Precedents.

Sect. 130. As to the fourth Particular, viz. What Certainty is nec- essary in the Caption of an Indictment in respect of the Place where it was found? It seems agreed, That if such Caption either set forth no u. Place at all where the Indictment was found, or do not x. show with sufficient Certainty, that the Place set forth is within the Jurisdiction of the Court, before which it was taken, as where it sets forth the Indictment as taken at a Sessions of the Peace holden for such a County, at B. y. without the- ing in what County B. is, otherwise than by putting the County into the Margin, it is insufficient! Also, if an Act of Parliament, whether it be in Print, or not, appoint, that the Quarter-Sessions of such a County shall be holden at such Place only, and not elsewhere, except for Cases of the Plague, &c. it seems, z. that the Caption of every Indictment taken at any such Sessions, is insufficient, unless it expressly shew, that it was holden at such Place. But it hath been * adjudged, That the Cap-
tion of an Inquisition as taken at B. before J. S. Coroner of the King's Liberty of B. aforesaid, is good, without expressly shewing that B. is within the Liberty of B. for it cannot but be intended.

Sec. 131. As to the tenth general Point of this Chapter, viz. Upon what Proof, and within what Time after the Offence, an Indictment may be found? It seems, that before Ed. 6. no certain Number of Witnesses was required upon the Indictment or Trial of any Crime whatever; for it seems to be generally agreed, that the Statutes of 1 and 2 of Philip and Mary, 10 & 11, in restoring the Order of Trial by the Court of the Common Law, took away the Necessity of two Witnesses in all Causes, from whence it plainly seems to follow, that they were not required by the Common Law. It is held c indeed by some, that by the ancient Common Law one Witness was not sufficient to convict any Person of High Treason, and this is said to be grounded on the Law of God, expressed both in the Old and New Testament. But granting that one Witness was not sufficient for a Conviction, it doth not follow that he might be sufficient for an Indictment. Also, however the Law might have stood in relation to these Matters before the Conquest, it seems to have been wholly altered long before the Statute of Ed. 6. And I rather incline to this Opinion, since I find it so little supported by the Generality of the Authorities cited by Sir Edward Coke for the Proof of the contrary, which wholly relate either to the Proof of an Affidavit, or of a Summons d in a real Action, or e of the Default of Persons summoned on a Jury, or f other Matters rather less to the Point. And as to the abovecited Passages of Scripture it may be answered, that those in the old Testament concern only the Judicial Part of the Jewish Law, which being framed for the Particular Government of the Jewish Nation, doth not bind us any more than the Ceremonial, and that those in the New Testament contain only prudential Rules for the Direction of the Government of the Church, in Matters introduced by the Gospel, and no way control the Civil Constitutions of Countries. To which may be added, That whatsoever may be said either from Reason or Scripture for the Necessity of two Witnesses in Treason, holds as strongly in other Capital Causes, and yet it is not pretended, that there is or ever was any such Necessity in relation to any other Crime but Treason.

Sec. 132. But it is enacted by 1 Ed. 6. 12. par. 22. That no Person or Persons, after the first Day of February then next to come, shall be indicted, arraigned, confessed, or convicted for any Offence of Treason, Petit Treason, or Misprision of Treason, &c. unless the same Offender or Offenders, be accused by two sufficient and lawful Witnesses, or shall willingly without Violence confess the same.

Sec. 133. Also it is further enacted by 5 & 6 Ed. 6. 11. par. 8. That no Person or Persons after the first Day of June then next coming, shall be indicted, arraigned, confessed, convicted or attained, for any of the Treasons in the Act mentioned, or for any other Treasons that then were, or after should be, which should after be perpetrated, committed, or done, unless the same Offender or Offenders, be thereof accused by two sufficient Accusers; which said Accusers at the Time of that Arraignment of the Party accused, if they be then living, shall be brought in Person before the Party so accused, and sworn and maintain what they have to say against the said Party, to prove him guilty of the Treasons or Offences contained in the Bill of Indictment laid against the Party arraigned, unless the said Party arraigned shall willingly, without Violence, confess the same.
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Sect. 134. But it is enacted by 1 & 2 Ph. & Ma. 10. That all Trials after that Statute to be bad, awarded, or made for any Treason, shall be bad and used only according to the due Order and Course of the Common Law.

Sect. 135. Also it is enacted by 1 & 2 Ph. & Ma. 11. That all and every Person and Persons who shall be accused or impeached of any of the Offences contained in that Statute, or any other Offence or Offences concerning the Impairing, Counterfeiting or Forging of any Coin Current within this Realm, shall and may be indicted, arraigned, tried, convicted or attainted by such like Evidence, and in such Manner and Form as has been used and accustomed within the Realm, at any Time before the first Year of the Reign of King Edw. 6.

Sect. 136. It is further enacted by 7 W. 3. 3. That after the 25th Day of March, in the Year 1696, no Person or Persons whatsoever shall be indicted, tried or attainted of High Treason, whereby any Corruption of Blood may, or shall be made to any such Offender or Offenders, or to any the Heirs or Heirs of any such Offender or Offenders, or of Misprision of such Treason, but by and upon the Oaths and Testimony of two lawful Witnesses, either both of them to the same Overt-Act, or one of them to one, and the other of them to another Overt-Act of the same Treason, unless the Party indicted and arraigned, or tried, shall willingly, without Violence, in open Court confess the same, or shall stand mute, or refuse to plead, or in Cases of High Treason, shall peremptorily challenge the Number of thirty-five of the Jury.

Sect. 137. And it is further enacted by the said Statute, That no Person or Persons whatsoever, (such only excepted as shall be guilty of designing, endeavouring, or attempting any Affliction on the Body of the King, by Poison, or otherwise,) shall be indicted, tried or prosecuted for any such Treason as aforesaid, or for Misprision of such Treason, that shall be committed or done within the Kingdom of England, Dominion of Wales, or Town of Berwick upon Tweed, unless the same Indictment be found by a Grand Jury, within three Years next after the Treason or Offence done and committed.

Sect. 138. But it is provided, That nothing in this Act shall any Ways extend to any Impeachment, or other Proceedings in Parliament, nor to any Indictment of High Treason, nor to any Proceeding thereupon, for counterfeiting his Majesty's Coin, his Great Seal or Privy Seal, his Sign Manual, or Privy Signet.

Upon these Statutes the following Particulars seem most remarkable.

Sect. 139. First. That where the Statute of 1 Ed. 6. requires, That the Party be accused by two lawful Witnesses; and that of 5 & 6 Ed. 6. That he be accused by two lawful Accusers; they both mean the very same Thing, because the Common Law admits of no other Accusers but Witnesses.

Sect. 140. Secondly. That according to the general Opinion, it is not required either by the 1st, or 5th and 6th Ed 6. That such Accusers or Witnesses be present with the Indictors in Person, but that they may send their Accusation to the Indictors in Writing under their Hands, which will be sufficient even after their Death. Also it is observable, That the Books which speak of this Matter do not expressly say, that such Accusation must be upon Oath, but fully this cannot but be intended; for how can any Accuser be said to be a lawful Witness, if he be not upon his Oath? But this is cleared by 7 W. 3. as to the Treasons within that Statute; for it expressly provides, That no Person shall be indicted thereof, but by and upon the Oath and Testimony of two lawful Witnesses.
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Sec. 141. Thirdly, By the judgment both of a Coke and b Hale, one who can only witness by Hearthly what he has heard a good Witness say, is not a lawful Accuser within any of these Statutes; for if this were to be allowed, nothing would be more easy than in any Cafe, where there is one Witness, to get a second, which would totally elude the Provision of the Statutes in requiring two lawful Witnesses, &c.

Sec. 142. Fourthly, That the Words, unless the Party shall willingly, without Violence, confess the same, in the 11th, and 5th, and 6th Ed. 6. are to be understood where the Party accused upon his Examination, before his Arraignment, willingly confesses the same without torture: But it is observable, that 7 W. 3. is thus expressed, Unless the Party indicted and arraigned, or tried, shall willingly, without Violence, in open Court confess the same.

Sec. 143. Fifthly, That one Witness to one, and another Witness to another over Act of the very same d Treason, have been construed to be sufficient, within the Statutes of the 11th, and 5th and 6th Ed. 6. and the express Words of 7 W. 3. are agreeable hereto.

Sec. 144. Sixthly, That the Statute of 1 & 2 Ph. & Ma. 10. by enacting, That all Trials of Treason shall from thenceforth be according to the Course of the Common Law, doth not e take away the Necessity of two Witnesses upon an Indictment, required by the 11th, and 5th, and 6th Ed. 6. because the Indictment is no Part of the Trial, but is more properly the Accusation to be tried.

Sec. 145. Seventhly, f That the said Statute of 1 & 2 P. & Ma. doth not extend to Misprision of Treason; but this is expressly provided for by 7 W. 3. as to such Treasons as are within that Statute, and therefore there must be two Witnesses to the Indictment, as well as Trial of every such Misprision.

Sec. 146. Eighthly, That a Petit Treason is within the 11th, and 5th, and 6th of Ed. 6. and 1 & 2 Ph. & Ma. 10. but not within the 7th of W. 3. from whence it follows, That two Witnesses are required to the Indictment, and not to the Trial of it, and that two Witnesses are not necessary upon the Indictment, if the Party, upon his Examination, confess it.

Sec. 147. Ninthly, That the Statute of 1 & 2 Ph. & Ma. 11. which enacts, That all Persons accused of any Offences concerning the Impairing, Counterfeiting or Forging the Coin, shall be indicted and tried as at the Common Law, hath been construed to extend to Clipping, and all other Offences in impairing the Coin, which have been made Treasons since the said Statute of 1 & 2 Ph. & Ma. From whence it may be probably argued, That the Statute of 7 W. 3. by expressly providing, That nothing therein shall extend to High Treason for counterfeiting the Coin, intended in like Manner, that it should not extend to any other High Treason concerning the Coin.

Sec. 148. As to the eleventh general Point of this Chapter, viz. In what Cases an Indictment may or may not be quashed. I take it to be k settled, That by the Common Law the Court may, in Discretion, quash any Indictment, for any such Insufficiency, either in the Caption, or Body of it, as will make any Judgment whatsoever, given upon any Part of it against the Defendant, erroneous, yet it seems, That Judges are in no Case bound, ex debito juss latie, to quash an Indictment, but may oblige the Defendant either to plead or demur to it: And this they generally do where it is for a Crime of an enormous or publick Nature, as Perjury, Forgery, Sedition, Nuances to the Highways, and other Offences of the like
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like Nature. * Neither will the Court quash an Indictment removed by
Certiorari, if a Recognizance for the Trial of it had been forfeited.

Sect. 149. Also it is enacted by 7 W. 3. 3. That no Indictment for High
Treason, or Misprision thereof, (except only Indictments for counterfeiting the
King’s Coin, Sud. Sign or Seals,) nor any Process or Return thereupon, shall
be quashed on the Motion of the Printer, or his Counsel, for miswriting, mis-
spelling, false or improper Latin, unless Exception concerning the same be taken
and made in the respective Court, where such Trial shall be, by the Printer,
or his Counsel assigned, before any Evidence given in open Court upon such Indi-
tement; nor shall any such Miswriting, Misspelling, false or improper Lat-
in, after Conviction on such Indictment, be any Cause to stay or arrest Judgment
thereupon: But nevertheless, any Judgment given upon such Indictment,
shall and may be liable to be reversed upon a Writ of Error, in the same Man-
ner, and no other than as if this Act had not been made.

Sect. 150. It hath been settled * in the Construction of this Statute,
that no such Exception can be taken, after Plea pleaded.

Sect. 151. It is said a in Siderfin’s Reports, That the Court never
considers an Information exhibited by a Common Person, but that it
will quash an Information exhibited by the Attorney General, or by
the Matter of the Crown-Office, upon Motion, if there be Cause: But
this was denied in one d Nixon’s Case, wherein the Court seemed to be
agreed, That they never have, or will quash any Information what-
soever.

Sect. 152. As to the twelfth general Point of this Chapter, viz.
What may be pleaded to an Indictment, and in what Manner: Having
already shown in this Chapter how a Defendant may plead e to an In-
dictment, That the Indictors were returned contrary to the Purview of
11 H. 4. 9. And having also f shewn, how he may plead a Misnomer,
or wrongful Addition; and intending in the following Part of the Book
to shew, how he may plead a former Acquittal, Conviction or Attain-
der, or a Pardon or other Special Plea, or the general Issue. I shall
in this Place only take Notice, That the Defendant may plead any Plea in
Abatement of an Indictment of Felony; and also plead over in Bar,
and take g the general Issue also, in the same Manner as an Appellation
may do, as hath been more fully shewn, Ch. 23. Sect. 126, 127.

C H A P. XXVI.

Of Information.

Information are of two Kinds:

First, Such as are merely the Suit of the King.
Secondly, Such as are partly the Suit of the King, and partly the
Suit of the Party.

And
And first, for the better Understanding of these, I shall endeavour to shew,

1. In what Cases they lie.

2. What ought to be the Form of them.

3. How the Law concerning them hath been altered by Statute.

Sect. 1. As to the first of these Particulars, viz. In what Cases such Informations lie: it hath been holden, That the King shall put no one to answer for a Wrong done principally to another, without an Indictment or Prensentment, but that he may do it for a Wrong done principally to himself. But I do not find this Distinction confirmed by Experience, for it is every Day's Practice, agreeable to numberless Precedents, to proceed by Way of Information, either in the Name of the Attorney General, or of the Master of the Crown-Office, for Offences of the former Kind, as in Batteries, Cheats, Seducing a young Man or Woman from their Parents in Order to marry them against their Consent, or for any other wicked Purpose; Spiritings away Child to the Plantations, Refusing Persons from legal Arrests, Perjuries and Subornations thereof, Forgeries, Conspiracies, (whether to accuse an innocent Person, or to impoverish a certain Set of lawful Traders, &c. or to procure a Verdict to be unlawfully given, by Causing Persons bribed for the Purpose, to be sworn on a Juries, and other such like Crimes done principally to a private Person, as well as for Offences done principally to the King, as for Libels, sedulous Words, Riots, false News, Extortions, Nulances, as in not Repairing Highways, or Obstructing them, or Stopping a Common River, &c.) Contempts, as in Departing from the Parliament without the King's Licence, Disobeying his Writs, Uttering Money without his Authority, Escaping from a legal Imprisonment on a Prosecution for a Contempt, neglecting to keep Watch and Ward, Abusing the King's Commission to the Oppression of the Subject, making a Return to a Mandamus of Matters known to be false; and in general, any other Offences against the Publick Good, or against the first and obvious Principles of Justice, and Common Honesty.

Sect. 2. Also it seems, That of Common Right such an Information, or an Action in the Nature thereof, may be brought for Offences against Statutes, whether they be mentioned by such Statutes or not, unless other Methods of Proceeding be particularly appointed, by which all impliedly excluded.

Sect. 3. But I do not find it any where holden, That such an Information will lie for any Capital Crime, or for Mifprision of Treason.

Sect. 4. As to the second Particular, viz. What ought to be the Form of such Informations: Having already in the Chapter of Indictments incidentally thrown in the Principal Points relating to this Matter, I shall only take Notice in this Place, That seeing an Information differs from an Indictment in little more than this, that the one is found by the Oath of twelve Men, and the other is not so found, but is only the Allegation.
tion of the Officer who exhibits it, whatsoever Certainty is requisite in an Indictment, the same at least is necessary also in an Information, and consequently, as all the material Parts of the Crime must be precisely found in the one, so must they be precisely alleged in the other, and not by Way of Argument or Recital. Yet it hath been adjudged, That where an Information of Perjury was drawn in this Manner, Memorandum quod A. B. &c. dat Curia hic intelligi & informari quod Tertium Sanitati Hill. &c. in Rebus constitutus sic, viz. That such an Action was brought, and a Trial had thereon, &c. Et quod the Defendant, at such Trial, took such an Oath, which was false, &c. without adding before such Mention of the false Oath, Et ulteriorius dat Cur. hic intelligi, yet, by Reason of the late Precedents the Information is as sufficient, at least after Verdict, as if those Words had been added; and it must be confess'd, That this is the most reasonable Construction, for how can it be intended that it could be contained in the Record of the Trial, That such an Oath was taken at it, or that it was false?

Sec. 5. As to the third Particular, viz. How the Law concerning such Informations hath been altered by Statute? It is recited by 4 & 5 Will. & Ma. 18. That divers malitious and contentious Persons had more of late, than in Times past, procured to be exhibited and prosecuted Informations in their Majesty's Court of King's Bench at Westminster, against Persons in all the Counties of England, for Treasons, Bateries, and other Misdeemours, and after the Parties so informed against had appeared to such Informations, and pleaded to issue, the Informers had very seldom proceeded any further, whereby the Persons so informed against had been put to great Charges in their Defence; and also at the Trials of such Informations Verdicts had been given for them, or a Nolle Prosequi entered against them, they had no Remedy for obtaining Costs against such Informers. And therefore it is enacted, That after the first Day of Easter Term, in the Year 1692, the Clerk of the Crown, in the said Court of King's Bench, for the Time being, shall not without express Order, to be given by the said Court, in open Court, exhibit, receive, or file any Information for any of the Causes aforesaid, or issue out any Process thereupon, before he shall have taken, or shall have delivered to him a Recognisance from the Person or Persons procuring such Information, to be exhibited with the Place of his, her, or their Abode, Title, or Profession, to be entered to the Person or Persons against whom such Information or Informations, is, or are to be exhibited, in the Penalty of twenty Pounds, that is, &c. or they will effectually prosecute such Informations or Informations, and abide by, and observe such Orders, as the said Court shall direct, which Recognizance the said Clerk of the Crown, and also every Justice of the Peace of any County, City, Borough, or Town corporate, (where the Cause of any such Information shall arise,) are, by the said Statute empowered to take; As the Taking whereof by the said Clerk of the Crown, or the Receipt thereof, from any Justice of the Peace, the said Clerk of the Crown, shall make an Entry thereof upon Record, and shall file a Memorandum thereof in some public Place in his Office, that all Persons may resort thereto without Fee; and in case any Person or Persons against whom any Information or Informations for the Causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to issue, and that the Prosecutor or Prosecutors of such Information or Informations, shall not as his and their own proper Costs and Charges, within one whole Term next after Issue joined therein, procure the same to be tried, or if upon such Trial a Verdict pass for the Defendant or Defendants, or in Case the same Informer or Informers procure a Nolle Prosequi to be entered; then, in any of the said Causes the said Court of King's Bench is authorized to award to the said Defendant or Defendants, his, her, or their Costs, unless the Judge, before whom such In-
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Section 6. But it is provided, That nothing hereof shall extend, or be construed to extend, to any other Information but such as shall be exhibited in the Name of their Majesties Coroner, or Attorney, in the Court of King's Bench, for the Time being (commonly called the Master of the Crown-Office.) From whence it follows, That Informations exhibited by the Attorney General remain as they were at the Common Law.

For the better Understanding this Statute, I shall endeavour to shew,

1. Whether it extend to all Kinds of Informations.
2. In what Cases the Court will order an Information to be filed.
3. How the Party may be relieved against Procesi issued against him, before any Recognizance given.
4. Where the Defendant shall have Costs.

Section 7. As to the first of these Particulars: It seems clear, That this Statute extends to all Informations whatsoever exhibited by the Master of the Crown-Office; and tho' it may be objected, That an Information in the Nature of a Quo Warranto, being a proper Means to try a Right, is not within the Meaning of the Statute, which mentioning Trespasses, Batteries, and other Misdemeanors, may be reasonably construed to intend such other Misdemeanors only as are of an inferior Nature, like to those specified, which are generally wrangling and frivolous ones; yet seeing this is a remedial Law, and therefore ought to be largely construed, and such Informations may be as vexatious as any other, and always suppose an Ulteration of some Franchise, and every such Ulteration is certainly a Misdemeanor, it hath been settled that this Statute doth extend to them.

Section 8. As to the second Particular, viz. In what Cases the Court will order an Information to be filed. It seems to have been the general Practice not to make such an Order, without first making a Rule upon the Person complained of to shew Cause to the contrary; which Rule is never granted, but upon Motion made in open Court, and grounded upon Affidavit of some Misdemeanor, which if true, doth either for its Enormity, or dangerous Tendency, or other such like Circumstances, seem proper for the most publick Prosecution. And if the Person upon whom such a Rule is made, having been personally serv'd with it, do not, at the Day given him for that Purpose, give the Court good Satisfaction, by Affidavit, that there is no reasonable Cause for the Prosecution, the Court generally grants the Information; and sometimes upon special Circumstances, will grant it against those who cannot be personally serv'd with such Rule, as if they purposely absent themselves, &c.

Section 9. But if the Party on whom such a Rule is made, shew to the Court a reasonable Cause against such Prosecution; as that he has been before indicted for the same Cause, and acquitted; or that the Intent of the Prosecution is too try a Civil Right, as the Title to Land, &c. which is not yet determined; or that the Complaint is trifling, vexatious, or opprobrious; or if he can shew to the Court (in Answer to a Motion for
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an Information, in the Nature of a quo warranto) that his Right to the Franchise, in question, had been already determined on a Mandamus; or that it hath been acquiesced in many Years, without any Dispute; or that it depends on the Right of thole who voted for him, which hath not been yet tried; or that the Franchise no way concerns the Publick, (as all thole which relate to the Government of a Corporation, or the Election of Members of Parliament, and Fairs, and Markets, &c. are said to do) but is wholly of a private Nature, as a Cony-warren, &c. Or that the Election, by which he claims, is agreeable to Charter; or that he has never acted under it; the Court will not grant the Information, unless there be some particular and extraordinary Circumstances in the Case, the Determination whereof being wholly left to the Discretion of the Court, cannot well come under any certain stated Rules.

Sect. 10. As to the third Particular, viz. How the Party may be relieved against Process issued against him, before any Recognizance given according to the Statute? It seems that he may move the Court to set it aside, as having issued contrary to the Directions of the Statute.

As to the fourth Particular, viz. Where the Defendant shall have Costs, I shall observe,

Sect. 11. First, That if the Information be tried at Bar, the Defendant can have no Costs within this Statute; for the Words are, 'That the Clerk's Court is authorized to award Costs, &c. unless the Judge, before whom the Information shall be tried, shall at the Trial, in open Court, certify upon Record, that there was a reasonable Cause for exhibiting such Information. Which is most naturally to be understood of a Trial, at nisi prius, and it would be absurd to suppose, That the Statute intended that the Justices of the King's Bench, at a Trial before themselves, should make a Certificate to themselves: To which may be added, That where a Cause is of such Consequence as to be tried at the Bar, it may reasonably be intended to be out of the Purview of the Statute, which was chiefly designed against trivial and vexatious Prosecutions.

Sect. 12. Secondly, That if there be several Defendants, and any one of them found guilty, those who are acquitted cannot have Costs within this Statute; and this is agreeable to the Construction made of the Statutes which give Costs to Defendants in civil Actions, by Force whereof no Defendant, in such like Cases, could recover Costs before the Statute of 8 & 9 Will. 10.

Sect. 13. Thirdly, That it hath been adjudged in the Construction of these Words, The Court of King's Bench is authorized to award to the Defendant his Costs, where the Judge, who tries an Information, does not at such Trial certify, That there was a reasonable Cause for the Information. That the said Court is bound of Right, in every such Case, to award them, whether the Acquittal were upon the Merits, or only from a Slip in Point of Form, and howsoever notorious the Offence might be, for where a Court is authorized by Statute, to do a Matter of Justice to the Party, upon certain Circumstances, it has no discretion Power of considering, whether it ought to do it, or not, when a Case appears to be within those Circumstances. To which may be added, That the Statute being general as to all Cases, wherein the Judge, who tries the Information, doth not certify a reasonable Cause, seems to imply, That it shall be left to such Judge only for this Purpose to consider, whether the Prosecution were reasonable or not, and it is the Prosecutors Folly not to apply to him.

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Sect. 14. It is further enacted by 9 Anne, 2o. That in case any Person or Persons shall usurp, intrude into, or unlawfully hold and execute the Office or Franchise of Mayor, Bailiff, Portreeve, or other Office within a City, Town corporate, Borough, or Place in England or Wales, it shall and may be lawful, to and for the proper Officer of the Court of Queen's Bench, the Court of Sessions of Counties Palatine, or the Court of Grand Sessions in Wales, with the Leave of the said Courts respectively, to exhibit one or more Information or Informations, in the Nature of a Quo Warranto, at the Relation of any Person or Persons, desiring to sue, or prosecute the same, and who shall be mentioned in such Information or Informations, to be the Relator or Relators against such Person or Persons so usurping, intruding into, or unlawfully holding and executing any of the said Offices or Franchises, and to proceed therein in such Manner as is usual in Cases of Informations, in the Nature of a Quo Warranto; and if it shall appear to the said respective Courts, that the several Rights of divers Persons to the said Offices or Franchises may properly be determined on one Information, it shall and may be lawful for the said respective Courts to give Leave to exhibit one such Information against several Persons, in order to try their respective Rights to such Offices or Franchises, and such Person or Persons, against which such Information or Informations, in the Nature of a Quo Warranto, shall be sued or prosecuted, shall appear and plead as of the same Term or Sessions in which the said Information or Informations shall be filed, unless the Court, where such Information shall be filed, shall give further Time to such Person or Persons, against whom such Information shall be exhibited, to plead; and such Person or Persons who shall sue or prosecute such Information or Informations, in the Nature of a Quo Warranto, shall proceed thenceon, with the most convenient Speed that may be.

Sect. 15. And it is further enacted and declared, That in case any Person or Persons, against whom any Information or Informations, in the Nature of a Quo Warranto, shall, in any of the said Cases, be exhibited in any of the said Courts, shall be found or adjudged guilty of an Usurpation, or Intrusion into, or unlawfully holding and executing any of the said Offices or Franchises, it shall and may be lawful to and for the said Courts respectively, as well to give Judgment of Usurper against such Person or Persons, of and from any of the said Offices or Franchises, as to fine such Person or Persons respectively, for his or their usurping, &c. And also to give Judgment that the Relator or Relators, in such Information sued, shall recover his or their Costs of such Prosecution; and if Judgment shall be given for the Defendant or Defendants in such Information, he or they, for whom such Judgment shall be given, shall recover his or their Costs therein expended against such Relator or Relators, such Costs to be levied by Capias ad satisfaciendum, Fieri facias, or Elegit.

Sect. 16. And it is further enacted, That the Statute for the Amendment of the Law, and all the Statutes of Jeofails shall be extended to Informations, in Nature of a Quo Warranto, and Proceedings thereon, for any the Matters in the said Acts mentioned.

And now I am in the second Place to consider the Nature of such Information as is partly the Suit of the King, and partly the Suit of the Party, which is commonly called an Information qui tam, and this having a great Affinity with Actions on Statutes, I shall consider them together, and endeavour to shew,

1. In what Cases they lie.
2. What ought to be the Form of them.
3. In what Courts they may be brought.
5. Within what Time.

6. Who
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6. Who are disabled to bring them.
7. Whether there may be a Non Suit in them?
8. Whether the Informer or Defendant may appear by Attorney?
9. In what Cases there shall be Costs.
10. Whether the Defendant may wage his Law, or take Advantage of a Protection?
11. In what Manner the Defendant is to plead to such an Information or Action.
12. By whom the Replication shall be made.
13. In what Manner the Issue shall be joined, and where it shall be tried.
14. Where the Verdict may be found as to Part of the Information against the Informer, and as to other Part for him.
15. What Judgment on such an Information or Action is good.
16. Whether the Penalty of a penal Statute may be compounded or granted over.

Sect. 17. As to the first of these Particulars, viz. In what Cases an Information or Action qui tam will lie, I take it for granted, that they lie on no Statute which prohibits a Thing as being an immediate Offence against the Publick. Good in general, under a certain Penalty unless the Whole, or Part of such Penalty be expressly given to him who will sue for it; y And. 15.

because b otherwise it goes to the King, and nothing can be demanded by the Party. But where such Statute gives any Part of such Penalty to him who will sue for it by Action or Information, &c. I take it to be settled at this Day, That any one may bring such Action, or Information, and lay his Demand tam pro Domino Rege quam pro seipsis. d Also where a Statute prohibits, or commands a Thing, the Doing or Omission whereof is an immediate Damage to the Party, and also highly concerns the Peace, Safety, or good Government of the Publick, or he Honour of the King, or of his Supreme Court of Justice: as the Statutes of the e Scandal of Great Men, of f Hue and Cry, and those that restrain certain Suits in the g Civil or Canon Law Courts, or even in inferior h Common Law Courts, it seems to have been the general Opinion, that the Party grieved may, and it is holden i by some that he ought to bring his Action on such Statutes tam pro Domino Rege quam pro seipsis. And it seems to be taken k as a Ground in some Books, That where ever the King is to have a Fine on an Action on a Statute, the Action must be so laid l but nor where the Defendant is only to be amerced. But I much question, Whether this be a good general settled Rule in Relation to this Matter? since in an Action on the Statutes of Hue and Cry, the Defendant shall only be a mere a Merced; and yet such Action may certainly be laid tam pro Domino Rege quam pro seipsis. Also in Actions, which by the Common Law a Man may bring tam pro Domino Rege quam pro seipsis, as in those for Injuries to the Party mix'd'd with a high Contempt to the King, (as where a Judge refuses to Co. Jec. 134 allow the Benefit of the King's Pardon to a Prisoner, unless he will give Dy. 199. b R. Rec. 150. him such a Bribe, or where one makes a Recus to one taken on a Capias Ultrajummun, at the Suit of the Party, or the Sheriff suffer a once taken on such a Capias to cleepe the Plaintiff is laid to have his Election to lay his Action this Way, but not to be compelled to do. To which may be added, that the Plaintiff cannot to lay his Action for a Common Trepas at Common Law, yet therein the Defendant is to be fined. Co. Jec. 110. d

Neither does the Opinion I would contend against, seem to be confirmed by the constant Course of Precedents; but on the contrary, many of those on the Statutes against forcible Entries, and on the Statutes against illegal Distresses, do not lay the Action tam pro Domino Regem quam pro seipsum; and yet there are authorities in this last Case, as well as in the former, that the Defendant is liable to be fined. But the Case of an Action on 2 & 3 Ed. 6. 13, wherein it seems clear that it is not necessary to lay the Action tam pro Domino Regem quam pro seipsum, does not seem to come up to the Point; because it is generally held, that the Defendant is only amenable in such Action, being in Nature of an Action of Debt, and not finable, as it is said that he may be in an Indictment or Information grounded on the Contempt of the Statute.

Sect. 18. As to the Second Particular, viz. What ought to be the Form of such Information or Action: Having in the precedent Chapter Sect. 94. endeavoured to shew that there was no need that such Information or Action conclude contra pacem, and in Sect. 97. Whether it be necessary for them to conclude in contemptum Regis; and in Sect. 102. That they need not recite the Statute whereon they are grounded and in Sections 103, 104, &c. What Misrecitals of a Statute will be fatal; and in Sect. 112, 113, &c. How far it is necessary to bring the Case within the very Words of the Statute; and in Sect. 118, 119. How far it is necessary to conclude contra formam Statutis, and in Sect. 117. In what Cases one may have Judgment on a Statute, in an Action brought at Common Law; I shall in this Place observe only these following Particulars:

Sect. 19. First, If an Information contain several Offences against a Statute, and be well laid as to some of them, but defective as to the rest, the Informer may have Judgment for so much as is well laid. As where the Words of the Statute are fully purposed in the Description of some of the Offences and not of others; or where some of the Times that the Defendant hath offended against the Statute are expressed with convenient Certainty, and others not, as where it is alleged that the Defendant, for eleven Months, and more, from 29 September, in such a Year, unto 29 September in the Year following, used a Trade, without having been an Apprentice, &c. or was absent from Church, &c. in which Cases Judgment shall be given for the eleven Months. But if the whole Time be expressed inconsistently, as that the Defendant was an Offender eleven Months, from the first of November in such a Year, to the first of Angular following, the whole is void for the Repugnancy, as hath been more fully shewn, Ch. 25. Sect. 64.

Sect. 20. Secondly, It seems to be settled this Day, That it is in the Election of him who brings an Action on a penal Statute, which gives one Moiety of the Forfeiture to the King, and another to the Informer, either to have a Writ against the Defendant, Quod reddat 1 Domino Regem & A. B. qui tam, &c. quas eis debet 3 or to have it in this Form, Quod reddat A. B. qui tam, &c. quas ei debet. Also it seems to be settled, That whether the Writ be in the one Form, or the other, it is well purposed by a Declaration in the Name of the Plaintiff only. Also it seems to be doubtful, whether there be any Necessity that either the Writ, or Count, in any such Action, do express that it is brought by or for the King, as well as the Party, as hath been more fully shewn in the 25th Section 5 and there is a Precedent of such an Action brought in the King's Name by A. B. qui pro seipso in hac parte sequitur. But it seems agreed, that
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every Information must be in this Form, That the Informer tanm pro Domino Regis quam pro seipso equatur, even where it is brought on a Statute which gives one third Part of the Penalty to a third Person. But I find some Difference as to the Forms of such Informations, as to some other Respects; for sometimes they say, a That the Action accrues to the Informer qui tanm, &c. to demand the Sum forfeited, for the King and himself; and b sometimes that the Action accrues to the King, and to the Informer, qui tanm, &c. c sometimes, that it accrues to the King, and to f. S. &c. (viz. where the Statute divides the Penalty into three Parts, &c.) and also to the Informer, qui tanm, &c. and sometimes they have no d Clause at all of this Kind. And a Quare, If it be not fatal to have any such Clause where the Penalty is not recoverable by the Information, but requires a subsequent one, grounded on the Conviction? Also, sometimes such Informations pray Process against the Defendant, to bring him in to e Answer to the Informer, qui tanm, &c. only; sometimes f to answer tanm Domino Regis quam A. B. qui tanm, &c. and g sometimes to Answer de &c. &c. &c. generally, without expressing whom.

Sed. 21. Thirdly. Regularly it is lawful for every such Information, or Action, to demand the very Sum due to the Informer, and neither more nor less; for if it hath been adjudged, b That if an Action on a Statute demand the whole Forfeiture for the Informer, where the Statute gives Part of it to the King, it is insufficient: Also it hath been held, 1 That if the Information make no Demand at all, or demand more or less for the Party than appears to be his due, it is insufficient as to him; yet it may be good as to the Share of the Forfeiture given to the King: Also it hath been 1 adjudged, That it is sufficient to demand the Share due to the Informer, without making any Mention of that due to the King: Also where the quantum of the Forfeiture depends upon the Finding of the Jury, as it does on the Statute of Forefeiting, it hath been adjudged sufficient to leave a Blank for the Sum. Also it hath been 1 adjudged, That a Popular Action may conclude ad quod damnum, without adding, of the Plaintiff; because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body.

Sed. 22. Fourthly. It is enacted by 13 Eliz. 5. Par. 1. That none shall be admitted or received to pursuc against any Person or Persons, upon any Penal Statute, but by Way of Information or Original Action, and not otherwise. And it hath been adjudged, That no Popular Action, since this Statute, 1 can be brought on a former Statute, either by b Bill in the King's Bench, or by f Plaintiff in an Inferior Court, but only by Original Writ, or Information; whether the Statute on which such Action is founded, &c. inflicts a Penalty generally, without saying how it shall be recovered, or expressly give a Recovery by Bill or Plaint, &c. (as that of 4 & 5 Ph. & M. against t making Kerseys, without having served an Apprenticeship, and that of 5 Eliz. 4. against t following any other Trade without having served an Apprenticeship.) Yet the contrary hath been since expressly adjudged 2 as to such former Statutes as expressly give a Recovery by Bill or Plaint, because the Statute of 13 Eliz. doth not mention original Wrts, but original Actions; and a Suit by Bill or Plaint is an 3 original Action in the Court in which it is commenced, and therefore may reasonably seem to be only within the Intent of the Statute, where it is removed into a Superior Court, and there proceeded upon. And if this be so, then 4 it is contended that Where a Suit at common Law is brought on a Statute which gives a third Part of the Penalty to a third Person, the Informer must give a Notice of his Interest, and make his Appearance in the Court where it is commenced.
the Meaning of the Statute, I see not how any Suit whatever, by Bill or
Plaint on any penal Statute, can be within the Pursuice of it, while such
Bill or Plaint continue in the Court in which they were commenced,
whether the Statute on which they are brought do expressly mention
them, or leave the Method of suing to the general Construction of Law.
To which may be added That the Statute of 21 Jac. 1. 4. Par. 1. seems
to suppose, that Actions on penal Statutes may indifferently be brought
by Writ, Plaint, Bill, or Information; for the Word are, That all Offences
hereafter to be committed against any penal Statute, for which any Common In-
former or Promoter may lawfully ground any Popular Action, Bill, Plaint, Suit,
or Information, before Justices of Assize, &c. shall be commenced, &c. by way
of Action, Plaint, Bill, Information, or Indictment in the proper County, before
the Justices of Assize, &c. However it seems clear, a That no Suit, by
Bill or Plaint, by a Party grieved, filing upon a Clause, either expressly
or impliedly relating to himself only, is within the said Statute of 18 El.
For it is expressly provided, Par. 6. That it shall not restrain any certain Per-
son, Body Politick or Corporate, to whom, or to whose Use, any Forfeiture is
limited by any Statute, and not generally to any Person that will sue; but
that every such Person may sue as before. b But where the Party particular-
ly grieved by an Offence against a Statute, files for a Forfeiture generally
limited to any one who will sue for it, it seems to be as much
within the Restraint of the said Statute, as if he were not the Party
grieved.

**SECTION 23.** Fiftieth, c In an Action on a Statute, which requires some
Officers at one certain Time after their Admission, and others at
another, to qualify themselves by certain Acts, it is safest, expressly to shew
the Time when the Defendant was admitted to his Office, and that he
neglected to qualify himself in the Time limited, and also, That he actually
exercised his Office after such Neglect.

**SECTION 24.** Sixthly, It is said, d That the Fact is sufficiently alleged
after a good cause in an Action on a Statute, but not in an Information.

**SECTION 25.** As to the third Particular, viz. In what Courts such an
Information or Action may be brought: Having already, Ch. 5 Sec.
45. endeavoured to prove, that where a Statute appoints that a Penalty
shall be recovered in any of the King's Courts of Record, the Offence
may be indicted before Justices of Oyer and Terminer, tho' not in a Court-
Leet, or of Pie-powders, or such others, instituted for special Purposes,
and intending under the next Particular, incidentally to consider what
Suits may be brought in the Courts of Westminster-Hall, on penal Sta-
tutes; I shall only take Notice in this Place, That where a Statute limits
Suits by an informer qui tam to other Courts, ye any f one may, by Con-
struction of Law, exhibit an Information in the Exchequer for the whole
Penalty for the Use of the King.

**SECTION 26.** As to the fourth Particular, viz. In what County such
Information or Action may be brought. It is enacted by 31 El. 5. That
in any Declaration, or Information, (c not being exhibited by such Officers of
Record, as had in Respect of their Offices, before the Time of the said Statute,
lawfully used to exhibit Informations, or sue upon penal Laws; and not h con-
cerning Chancery, buying of Titles, Extortion, or the King's Customs,
&c. or Duty, or Forfeiting, &c.) the Offence against any penal Statute shall
not be laid to be done in any other County but where the Matter alleged to be
the Offence, was in Truth done: And that, the Defendant may traverse, and al-
ellge, That the Offence supposed to be committed, was not committed in the County
where
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where it is alledged; which being tried for the Defendant, or if the Plaintiff be thereupon nonsuit, the Plaintiff shall be barred in that Action or Information.

Sec. 27. It is further enacted, Par. 7. That all Suits for using unlawful, or not using lawful Games, or for not having Bows or Arrows, or for using a Trade without having been brought up in it, shall be sued and prosecuted in the General Quarter Sessions of the Peace, or Assizes of the same County, where the Office shall be committed, or otherwise enquired of, heard and determined in the Assizes, or General Quarter-Sessions of the Peace of the same County where such Office shall be committed, or in the Leet within which it shall happen and not in any wise out of the same County, where such Office shall happen, or be committed.

In the Construction of this Statute, the following Particulars seem most remarkable.

Sec. 28. First, That it hath been adjudged, That the Defendant can have no Advantage of the above-recited Clause, which appoints, That all Offences against penal Statutes shall be laid in the proper Counties, but only by way of Pleas; and this Construction seems very agreeable to the Purport of the said Clause; the Words whereof are, That the Defendant may traverse the County, &c. which being tried for him, or if the Plaintiff be thereupon nonsuit, the Plaintiff shall be barred, &c. But this Point is otherwise settled by 21 Jac. 1. 4. Par. 3.

Sec. 29. Secondly, That the said Clause extends not to any Suit by a Party grieved, or by the Attorney General, but only to those brought by common Informers.

Sec. 30. Thirdly, That the last recited Clause, concerning Suits for using a Trade without having been brought up in it, &c. which are appointed to be brought at the Assizes, or Sessions, in the proper County, and not in any wise out of the County, restrains not an Information in the King's Bench, or Exchequer, for such Office happening in the same County where those Courts are sitting; for the negative Words of the Statute are not, That such Suits shall not be brought in any other Court, but, That they shall not be brought in any other County; and the Prerogative of these High Courts shall not be restrained without express Words. But where the Office is in a different County, such Suits, in those, or any other Courts, out of the proper County, seem to be within the express Words of the Statute; yet it was long a very great Question, Whether an Action of Debt or Information, in the Courts of Westminster-Hall, were not to be construed to be out of the Meaning of them? But this Point is now settled in the Construction of the Statute of 21 Jac. 1. 4. as shall be more fully shewn hereafter.

Sec. 31. It is enacted by the said Statute of 21 Jac. 1. 4. That all Offences to be committed against any penal Statute, for which any Common Informer or Promoter may lawfully ground any Popular Action, Bill, Plaint, Suit or Information before Justices of Assizes, Justices of Nisi Prius or Gaol-Delivery, Justices of Oyer and Terminer, or Justices of Peace, in their General or Quarter-Sessions, (except Offences against the Statutes concerning a Recusancy, &c. or Maintenance, &c. or the King's Customs, &c. or transporting Gold, or Silver, or Munition, or Wool, or Leather, &c.) shall be commenced, sued, prosecuted, tried, recovered and determined, by Way of Action, Plaint, Bill, Information or Indictment, before the Justices of Assizes, Justices of Nisi Prius, Justices of Oyer and Terminer, and Justices of Gaol-Delivery, or before the Justices of the Peace of every County, City, Borough or Town Corporate, and Liberty, having Power to enquire of, hear, and determine the same, in
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England or Wales, wherein such Offences shall be committed, in any of the Courts, Places of Justice, or Liberties aforesaid, respectively, only at the Choice of the Parties who shall commence Suit, or prosecute for the same, and not elsewhere, save only in the said Counties, or Places usual for those Counties, or any of them. And that the like Proceeds in every Popular Action, Bill, Plaint, Information or Suit, to be commenced, said, prosecuted, by Force of, or according to the Purport of this Act, be had and awarded, to all Intent and Purposes, as in an Action of Trespass Vi & Armis at Common Law. And that all, and all manner of Informations, Actions, Bills, Plaine, and Suits whatsoever, to be commenced, sued, prosecuted, or awarded, either by the Attorney General, or by any Officer whatsoever, or by any Common Informer, or other Person whatsoever, in any of his Majesty's Courts at Westminster, or, or concerning any of the Offences aforesaid, shall be void.

Sect. 31. And it is further enacted, That if on the General Issue the Offence be not proved in the same County in which it is laid the Defendant shall be found not Guilty, as shall be more fully shewn under the following Particulars.

Sect. 32. Also it is further enacted, that no Officer shall receive, file, or enter of Record, any Information, Bill, or Plaint, Court or Declaration, grounded upon the said penal Statutes, or any of them, which by this Act are appointed to be heard and determined in their proper Counties, until the Informer or Relator hath first taken a Corporal Oath before some of the Judges of that Court, that the Offence or Offences laid in such Information, &c. was, or were not committed in any other County than where, by the said Information &c. the same is, or are supposed to have been committed, &c. the same Oath to be there entered of Record.

In the Construction of this Statute, I shall observe the following Particulars:

Sect. 33. Firstly, That as the Law is now settled, no Action of Debt, or Information, or other Suit whatsoever, can be brought in any Court of Westminster Hall, on any penal Statute, made before the said Statute of 21 Jac. for any Offence not therein excepted, for which the Offender may be prosecuted in the Country, unless the Offence shall be committed in the same County in which such Court shall sit; and surely this cannot but be thought most agreeable to the Meaning as well as the Letter of the said Statute; the whole Provision whereof would be to little Purposes, if such Suits should be continued out of it. And as to the Objection, That if all Suits on penal Statutes should be wholly taken from the Superior Courts, all Offences against them would become dishonorable by the Offender's Removing himself out of the County wherein he committed them, because the Courts in the Statute mentioned, have no Jurisdiction out of the Counties wherein they sit; it hath been answered, That Proces of Outlawry will lie against such Offenders, by Virtue of the above-recited Clause of the said Statute, which gives the like Proces in all suits prosecuted according to the Purport of it, as in Actions of Trespass at the Common Law.

Sect. 34. Secondly, That where a subsequent Statute gives an Action of Debt, or any other Remedy, for the Recovery of a Penalty in any Court of Record generally, it so far implies the Restraint of 21 Jac. and consequently leaves the Informer at his Liberty to sue in the Courts of Westminster Hall.

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**Sec. 35.** Thirdly, That the Statute of 21 Jac. gave no Jurisdiction to the Courts therein mentioned, over any Offences, in Relation to which they had none before; and therefore that Suits for such Offences must be brought in the Courts of Westminster-Hall in the same Manner as before.

**Sec. 36.** Fourthly, That the said Statute hindered not the Removal of any Indictment into the King's Bench by Certiorari, after which it may be either tried there, or in the Country by Nisi Prius.

**Sec. 37.** Fifthly, That it hath been adjudged, That an Officer by receiving an Information without such a previous Oath, That the Offence arose in the same Country in which it is said, doth not make the Proceeding upon it erroneous; for the Act is only directory to the Officer, but doth not intend that such Oath should be made Part of the Record; and therefore the omission of it cannot be assigned for Error; and yet the Act is express, That such Oath shall be entered of Record. But so, if the Court may not properly be moved to set aside such Proceeds, as having been contrary to the Directions of the Statute?

**Sec. 38.** Sixthly, That no Suit by a Party grieved is within the Retract of the Statute.

**Sec. 39.** As to the Fifth Particular, viz. Within what Time such Information or Action may be brought, it is to be observed, That all Popular Actions were limited to a certain Time by 7 H. 8. 3. But this Statute being repealed by 11 El. 5. I shall take no farther Notice of it.

**Sec. 40.** But it is enacted by the said Statute of 11 El. 5. Par. 5. That all Actions, Suits, Bills, Indictments, or Information which shall be brought for any Forfeiture upon any Statute penal, made, or to be made, whereby the Forfeiture is, or shall be limited to the Queen, her Heirs or Successors only, shall be brought within two Years after the Offence committed, and not after two Years. And that all Actions, Suits, Bills, or Information, which shall be brought for any Forfeiture upon any Statute penal, made, or to be made, except the Statutes of 1 and 2 Hen. 5. to the Benefit and Suit whereof is, or shall be by the said Statute, limited to the Queen, her Heirs or Successors, and to any other that shall profess in that Behalf shall be brought by any Person that may lawfully sue for the same, within one Year next after the Offence committed, and in Default of such Pursuit, that then the same shall be brought for the Queen's Majesty, her Heirs or Successors, any Time within the two Years after that Year ended. And if any Action, Suit, Bill, Indictment, or Information, shall be brought after the Time so limited, the same shall be void. And it is provided, That where a shorter Time is limited by a penal Statute, the Prosecution shall be within that Time.

**Sec. 41.** Also it is enacted by 18 El. 5. Par. 1. That upon every Information which shall be exhibited upon any penal Statute, a Special Note shall be made of the every Day, Month, and Year of the exhibiting thereof into any Office, or to any Officer, which lawfully may receive the same, without any Anecdote thereof to be made; and that the same Information be accounted and taken to be of Record, from that Day forward; and not before; And that no Proceeds be sued out upon such Information, until the Information be exhibited in Form aforesaid, &c. and that every Clerk making out Proceeds contrary to this Act, shall forfeit 40s. &c.

**Sec. 42.** It is further enacted by 21 Jac. i. 5. That no Officer shall receive, file, or enter of Record, any Information, Bill, Plaint, Count, or Declaration, grounded upon any penal Statute (being within the Provision of the said Statute of 21 Jac.) until the Informer or Relator hath first taken a corporal Oath, before some of the Judges of the Court, that he believes in his Conscience, the Offence
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In the Constru'dion of these Statutes, I shall observe the following Particulars.

Sec. 43. First, That if an Offence prohibited by any penal Statute, be also an Offence at Common Law, the Prosecution of it, as of an Offence at Common Law, is no way restrained by any of these Statutes.

Sec. 44. Secondly, That if a Suit on a penal Statute be brought after the Time limited, the Defendant needs not plead the Statute, but may take Advantage of it on the General Issue.

Sec. 45. Thirdly, That if an Information quam sequitur be brought after the Year, on a penal Statute, which gives one Moiety to the Informer, and the other to the King, it is fraught only as to the Informer, but good for the King.

Sec. 47. Fourthly, That the Party grieved is not within the Restraint of these Statutes, but may sue in the same Manner as before.

Sec. 48. Fifthly, That it seems not to be settled, Whether the Suing of a Layman within the Year be a sufficient Commencement of a Suit on a penal Statute, to avoid the Limitation of these Statutes?

Sec. 49. Sixthly, That it seems also to be questionable, Whether a Suit by a Common Informer, on a penal Statute, which first gives an Action to the Party grieved, and in his Default, after a certain Time, to any one who will sue, be within the Restraint of these Statutes?

Sec. 50. Seventhly, That it seems questionable, Whether the Clause in 31 El. Par. 4. by which it is enacted, That nothing in the said Act contained shall extend to Champerty, King's Customs, or Foreselling, &c. but that every such Offence may be laid in any County, any Thing in the said Act to the contrary notwithstanding, do except the said Offences, out of the above-recited Clause, relating to the Time within which Suits on penal Statutes must be brought? For the Words above mentioned, viz. But that every such Offence may be laid in any County, seem to restrain the Generality of the precedent, which say That nothing in the Act contained shall extend to such Offences.

Sec. 51. As to the sixth Particular, viz. What Persons are disabled to bring such an Information or Action: It is enacted by 31 El. 5. Par. 4. That no Person, other than the Party grieved, shall be received to inform, or sue upon any penal Statute, that before that Time hath been for any Misdemeanor, by any Order of any the Queen's Majesty's Courts, ordered not to follow or pursue any Suit upon any penal Statute.

Sec. 53. As to the seventh Particular, viz. Whether there may be a Nonfuit in such an Information or Action? It seems agreed, That notwithstanding the King cannot be a Nonfuit in any Information or Action wherein he himself is the sole Plaintiff; yet any Informer qui tamen, or Plaintiff in a Popular Action, may be a Nonfuit, and thereby wholly determine the Suit, as well in Respect of the King as of himself: Also it seems agreed, That the Attorney General may enter a Nolle Prosequi (which, as he some, has the Effect of a Nonfuit) to any Information or Action brought by the King only.
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Sect. 53. As to the eighth Particular, viz. Whether the Informer or Defendant may appear by Attorney? It seems agreed, That after his Plea pleaded to an Indictment, Information or Action, for any Crime whatsoever, under the Degree of a Capital, the Defendant might always, by his own Appearance, or by his Attorney, in whose name he was tried, or by the Command of the Court, in such Cases, wherein a personal Appearance is required by some Statute, as it is in a Pramunire, &c. in which Cases it seems generally agreed, that an Appearance by Attorney cannot be admitted, without some special Writ or Grant to that Purpose, whether the Defendant be a Peer or Commoner. It is said indeed, in Rolle's Rep. That Sir Anthony Mildmay was suffered to plead a Pardon to a Pramunire by Attorney, and no Mention is made of any such Writ or Grant: But I presume that there was a Clause to this Effect in his Pardon.

Sect. 54. It is enacted by 18 El. 5 Par. 1. That every Informer, upon any Penal Statute, shall exhibit his Suit in proper Person, and pursue the same only by himself, or by his Attorney in Court; and that he shall not use any Deputy or Deputies at all.

Sect. 55. It is enacted by 20 El. 10 Par. 25. That divers of His Majesty’sSubjects dwelling in the remote Parts of the Realm, had been many times maliciously troubled upon Informations and Suits, exhibited in the Courts of the King’s Bench, Common Pleas, and Exchequer, upon Penal Statutes, and had been drawn up upon Proceeds out of the Countries where they dwelt, and driven to attend and put in Bail, to their great Trouble, and Undoing; and for Reformaion thereof, it is enacted, That if any Person or Persons, shall be sued or informed against, upon any Penal Law, in any of the said Courts, where such Person or Persons are bailable by Law, or where, by the Leave or Favour of the Court, such Person or Persons may appear by Attorney; in every such Case, the Person or Persons so to be impleaded or sued, shall, and may, at the Day and Time contained in the first Proceed served for his Appearance, appear by Attorney of the same Court, where the Proceed is returnable, to answer and defend the same, and not be urged to personal Appearance, or to put in Bail for the answering such Suits.

Sect. 56. And it is enacted by 31 Ed. 1 Par. 2. That this shall extend only to the natural Subjects born, or to be born, within the Dominions of the Queen’s Majesty, her Heirs or Successors, and to Persons made free Demesne, and to no others.

As to the ninth Particular, viz. In what Cases there shall be Costs on such an Action of Information, i. shall endeavour to shew,

1. Whether an Informer shall in any Case have his Costs.

2. In what Cases the Defendant shall have them.

Sect. 57. As to the first of these Particulars, I take it to be in a great Measure settled; That an Informer upon a Popular Statute, shall in no Case whatsoever have his Costs, unless they be expressly given him by such Statute; for it is certain that he cannot recover them by the Common Law, for that does not give Costs in any Case: Neither can he recover them by the Statute of Gloucester, which gives the Defendant his Costs in all Cases wherein he shall recover his Damages, for this seems to suppose some Damage to have been done to the Defendant in particular, which cannot be laid in any Popular Action; and therefore such Actions have always been continued to be out of the Be-
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nest of this Statute. But it seems agreed,™ That an Action on a Statute, by the Party grieved, for a certain Penalty given by such Statute, is within

Recompense for his particular Damage by the Offence prohibited,™ and if he could recover that only, and no more, by way of Costs, it would be in most Cases in vain for him to sue for it, since the Costs of Suit would exceed it. But it is said,™ That no Costs shall be recovered in an Action on a Statute, which gives no certain Penalty to the Party grieved, but only his Damages in general. &c.™ If such a Statute be introduced of a new Law, and give a Remedy in a™ Point not remediable at the Common Law.

But there is not That Inconvenience in this Case as in the former; because no certain Sum being specified, the Jury may give the Plaintiff a full Satisfaction by way of Damages.

™ As to the second Particular, viz. In what Cases the Defendant shall have Costs: it is enacted by 18 El. 5, which is made perpetual by 27 El. 10.™ That if any Informer or Plaintiff,™ on a penal Statute, shall willingly delay his Suit, or shall discontinue, or be nonsuit in the same, or shall have the Trial or Matter past against him therein, by Verdict or Judgment of Law, then, in every such Case, the same Informer or Plaintiff shall yield, satisfy, and pay unto the Party Defendant, his Costs, Charges, and Damages, to be ascribed by the Court in which the same Suit shall be attempted, &c.

In the Construction hereof, I shall take Notice of the following Particulars:

First,™ That it seems to be agreed,™ That no Action on any Statute, by the Party grieved,™ is within the Purview of this Statute, the whole Purport whereof seems clearly to relate only to Common Informers: Yet if such Action, by the Party grieved, be for any other or Wrong™ personal,™ immediately supposed to be done to the Plaintiff™ or Plaintiff,™ or whatsoever the Nature of the Action may be,™ if the Plaintiff™ might have Costs,™ in Case Judgment should be given for him,™ he shall pay them on a Non Suit or Verdict against him,™ &c.™ by Virtue of™ 23 H. 8. 15.

™ Secondly,™ That it hath been held,™ That where Judgment is given against an Informer,™ because the Court in which he™ has no Jurisdiction of the Cause,™ or because the Statute on which he grounds his Information is discontinued,™ yet he shall pay Costs™ within the Intent of the said Statute of™ 18 Eliz.™ which shall have a liberal Construction,™ and was intended to prevent all vexatious Informations;™ and nearly such ill-grounded Prosecutions cannot but be thought such.

™ As to the tenth Particular,™ viz.™ Whether the Defendant,™ in such an Action or Information,™ may wage his Law,™ or take Advantage of a Protection?™ It is said™ to have been ruled,™ That the Defendant ought not to be admitted to wage his Law in any such Action or Information,™ because they are founded on a Statute;™ nor do I find any Authority to the contrary.™ But perhaps it may be questioned,™ How far the Reason given for the Opinion above-mentioned may be conclusive,™ since such an Action or Information does not seem to properly be grounded on a Statute,™ as on the Contempt of it.™ But as to the Question,™ Whether the Defendant™ can take Advantage of a Protection?™ There™ seems to be near the same Number of Authorities on each™ Side.™ But there is no great

™ In the Affirmative.™

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Need nicely to examine these Matters, since generally it is expressly provided by penal Statutes, That neither Wager of Law, nor Protection, shall be admitted in any Suit brought upon them.

Sec. 62. As to the eleventh Particular, viz. In what Manner the Defendant is to plead to such an Information, or Action, I shall take it for granted, That he must answer to the whole Time laid in such Information or Action; and that if he have any special Matter for his Excuse or Justification, he must set it forth with all convenient Certainty; and that if he plead the General Issue to the Whole, he must depend upon it, and not together with it plead also a special Plea either to the Whole or Part of the Charge; but for these Matters I shall refer the Reader to the Books which treat of Pleading in general; and in this Place shall only consider,

1. Where a prior Suit depending may be pleaded to such an Information or Action.

2. Where a Pardon, or Release, or a Recovery in a former Suit.

3. What is a good General Issue; and where it may be pleaded.

Sec. 63. As to the first Point, viz. Where a prior Suit depending may be pleaded to such an Information or Action: It seems agreed, 4 Cro. El. 161. That where-ever any Suit on a penal Statute may be said to be actually depending, it may be pleaded in Abatement of a subsequent Prosecution, being expressly averred to be for the same Offence, 4 Br. & Gl. 116. Neither will it be any Exception to such a Plea. That the Offence in the subsequent Prosecution is laid on a Day different from that in the former. Neither doth a Mistake in such a Plea of the very Day whereon the Suit pleaded as prior was commenced, seem to be material on the Issue of Natural Record, if it appear in Truth to have been commenced before the other, and for the same Matter. And if two Informations be exhibited on the very same Day, it seems that they may mutually abate one another, because there is no Priority to attach the Right of the Suit in one Informer more than in the other. Also it seems, That an Information or Bill the same Day that they are filed, may be so far said to be depending, before any Proceeding upon them, that they may be pleaded in Abatement of any other Suit on the same Statute. And from the same Reason it seems also, That a Writ of Debt may be so pleaded after it is returned; because then it seems to be agreed, That it may properly he said to be depending, and whether it may not also be so pleaded before it be returned, seems questionable; Because, according to some Opinions, a Writ may be said to be depending as soon as purchased.

Sec. 64. As to the second Point, viz. Where a Pardon, or Release, or a Recovery in a former Suit, may be pleaded to such an Information, or Action? It seems agreed, That notwithstanding the King have such an Interdict in every penal Statute, that he may 1 proceed in a Suit brought upon it by a Common Informer, after the Death, Release, or 1 Rol. Rep. 379 pl. 77. pl. 2. of the same Day that they are filed, may be so far said to be depending, before any Proceeding upon them, that they may be pleaded in Abatement of any other Suit on the same Statute. And from the same Reason it seems also, That a Writ of Debt may be so pleaded after it is returned; because then it seems to be agreed, That it may properly he said to be depending, and whether it may not also be so pleaded before it be returned, seems questionable; Because, according to some Opinions, a Writ may be said to be depending as soon as purchased.

Sec. 64. As to the second Point, viz. Where a Pardon, or Release, or a Recovery in a former Suit, may be pleaded to such an Information, or Action? It seems agreed, That notwithstanding the King have such an Interdict in every penal Statute, that he may proceed in a Suit brought upon it by a Common Informer, after the Death, Release, or of the same Day that they are filed, may be so far said to be depending, before any Proceeding upon them, that they may be pleaded in Abatement of any other Suit on the same Statute. And from the same Reason it seems also, That a Writ of Debt may be so pleaded after it is returned; because then it seems to be agreed, That it may properly he said to be depending, and whether it may not also be so pleaded before it be returned, seems questionable; Because, according to some Opinions, a Writ may be said to be depending as soon as purchased.
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by the Statute, that the King can no way discharge, or suspend the Suit, as to such Part. Also it seems that the King can in no Case bar the Suit of a Party grieved, nor proceed in it after the Death of the Plaintiff, &c. Also, it seems agreed, that a Conviction or Acquittal bona fide in any Action or Information on a penal Statute, whether by the Party grieved, or a Common Informer, or a Release bona fide, from the Party grieved, or Common Informer, after such a Conviction, hath always been a good Bar of any subsequent Prosecution for the same Offence. But for the better settling of these Matters, the Statute of 4 H. 7. 20. was made, by which it is recited, That it had been usual for Offenders against penal Statutes, to cause Popular Actions to be commenced against them by Covin of the Plaintiffs, or else when such Actions had been commenced against them, to delay the same, either by Non-appearance, or by Traverse; and bringing the same, to cause the like Action Popular to be brought against them by Covin for the same Cause and Offence, and therein by Covin of the Plaintiff to be condemned, either by Confession, signed Trial, or Release, which Confession or Release, so bad by Collusion and Covin, did serve to bar the Plaintiff in the Action made in good Faith; and thereupon it is enacted, That if any Person sue with good Faith any Action Popular, and the Defendant plead any Manner of Recovery of Action Popular in Bar of the said Acton; or else, that he before that Time bar'd the Plaintiff in any such Action Popular, that then such Plaintiff, with good Faith, may aver, That such Recovery or Bar were by Covin, and if such Collusion or Covin so aver'd, be lawfully found, such Plaintiff shall recover, &c. and the Defendant condemned of Covin or Collusion, as aforesaid, shall have two Years Imprisonment, &c. and that no Release of any Common Person to any such Party, whether before or after any such Action Popular, or Indictment of the same, had, or commenced or made, hindering the said Action, shall be any wise available or effectual to let or surcease the said Action, Indictment, Proceeds, or Execution. Provided always, That no Plaintiff or Plaintiff be received to aver any Covin in any Action Popular, where the Points of the same Action, or else the Covin or Collusion, have been once tried, or lawfully found with the Plaintiff or Plaintiffs, or against them, by trial of twelve Men, and not otherwise.

Sect. 65. It is said, That if a Recovery in a former Suit be pleaded in Bar of any Popular Action, the Plaintiff may, by Reason of the express Words of the Statute, aver, That such Recovery was by Covin, without shewing wherein the Covin consisted; but otherwise such a general Pleading would be vicious.

As to the third Point, viz. What is a good General Issue, and where it may be pleaded? I shall observe the following Particulars?

Sect. 66. First, That if the Defendant plead Non debet to an Action or Information qui tam, it is safest to say, That he owes no thing to the Informer, nor to the King; because if he only plead, that he owes nothing to the Informer, it may be objected, That the whole Declaration is not answered, which makes a Demand for the King as well as the Informer: Yet perhaps it may be a good Answer to such Objection, That in the Plca, that he owes nothing to the Informer, it is necessarily implied that he owes nothing to the King, and therefore needs not be expressed.

Sect. 67. Secondly, That if there be more than one Defendant, they ought not to plead jointly that they are not guilty, but severally That neither they, nor any of them, are guilty, &c.
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Sect. 68. Thirdly, That where ever the Breach of the Statute, whereon such Suit is grounded, is alleged only from a Matter in Fact, and not from Matter of Record, the Defendant * may plead, that he owes nothing, or that he is not guilty, &c. but if it be alleged from a Matter of Record, such a Plea is not good; because a Record is not triable by the Country, but only by itself.

Sect. 69. Fourthly, That if the Defendant be within the Benefit of any Proviso of a penal Statute, he might, according to some, always give it in Evidence on the General Issue, in a Suit on such Statute: But if he have shown his Discharge depending on a subsequent Statute, it hath been held, & (even since the Statute of 21 Jac. 1. 4.) That he must plead it specially, and cannot give it in Evidence. But this seems contrary to the express Purview of the said Statute, by which it is enacted, That if Suit shall be brought against any Person for any Offence against any penal Law, either by, or on the Behalf of the King, or by any other, on the Behalf of the King, and any other, it shall be lawful for such Defendent, to plead the General Issue, that he is not guilty, or that he owes nothing, and to give such special Matter in Evidence to the Jury that shall try the same, which Matter being pleaded, hath been sufficient in Law to have discharged the said Defendant against the said Suit, and the said Matter shall be then as available, to all intents and purposes, as if it had been sufficiently pleaded in Bar.

Sect. 70. Also it is enacted by the same Statute, Par. 3. That if the Defendant to any Suit, commenced by, or on the Behalf of the King, or any other, for any Offence against any penal Statute, plead, That he owes nothing, or, that he is not guilty, and the Plaintiff or Informer, upon Evidence to the Jury, shall prove the Offence laid in the said Suit, and that the same Offence was committed in the same County in which it is laid, the Defendant shall be found Not guilty.

Sect. 71. It is provided by the last Paragraph of the said Statute, That no Clause thereof shall extend to any Suit on any Law against Popish Recusants, &c. or against Chastity, &c. or concerning deserting the King of his Customs, &c. or the transporting of Gold, or Silver, or Munition, &c. or Wool, &c. or Leather, but that such Offence may be laid in any County, at the Pleasure of the Informer. But since, if the last Words of this Proviso, viz. but that such Offence may be laid in any County, do not restrain the Exception intended by it to that Part of the Statute only which relates to the laying the Offence in the proper County? For if so, the Defendant in a Suit on the Laws mentioned in it, may give the special Matter in Evidence on the General Issue, as well as in a Suit on any other penal Statute.

Sect. 72. As to the twelfth Particular, viz. By whom the Replication is to be made in such an Information or Action: It seems agreed, That regularly a Replication to a Special Plea to an Information in the Courts of Westminster-Hall, shall be made by the Attorney General only. If the King's interest in the Suit, is presumed to be most proper to be consulted concerning it, and by the same Reason it seems that such Replication in a Suit before Justice of Assize, shall be made by the Clerk of the Assizes only. Also it is said, That the Replication to a General Issue in an Information qui tam in the Courts of King's Bench or Exchequer, may be made in the Name of the Attorney General only, by the Uffice of those Courts. But in most of the preceding I can find of Actions qui tam, the Replication is made by the Plaintiff only. Also I find a Demurrer by the Informer only to a Plea in Bar to an Information qui tam, without any Mention of the Attorney General. And if the Attorney General, &c. shall absolutely refuse to make a Replication to any
any Plea to an Information, surely the Informer may be \( a \) admitted to
make it himself; for otherwise it would be in the Power of the Attorney
General, &c. by refusing to make a Replication, wholly to defeat the
Suit.

Sec. 73. As to the thirteenth Particular, \( \text{viz} \). In what Manner the
Illue is to be joined in such an Information or Action, and where it shall
be tried: It hath been laid down \( b \) as a second Rule, That where the
King is to have no Part of the Thing demanded in an Action on a penal
Statute, but only a Fine or Amercement, there is no Necessity either in
the joining of the Illue or \( Vene impositis \), to use the Words \( qui tan pro Do-
mino Rege, &c. \) but that it is sufficient simply to name the Party, as in
Actions at Common Law; for the King seems to have little more In-
terest in such Suits than in Actions at Law: Yet where-ever the Plaintiff
may declare \( tan pro Domino Rege quam pro sieps \), it seems, \( c \) That it can
be no Fault to use those Words as well in the Joining of the Illue, &c. as
in the Beginning of the Suit. And if the King be to have Part of the
Penalty demanded, it hath been \( d \) adjudged to be a fatal Fault, and not
amendable after Verdict, not to mention that the Plaintiff sues \( tan pro
Domino Rege quam pro sieps \), in the Joining of the Illue. But \( Quære \) for
there are many \( e \) Precedents where the Illues in such Actions have not
mentioned the Plaintiff, as suing for the King; but have simply named
him by his proper Name, as in other Actions. And where he is ex-
pressly named in the Declaration, as suing for the King as well as for
himself, Why it should be intended that he sues otherwise in the Pro-
gress of the Action?

Sec. 74. As to the Place where such Illues shall be tried, it is en-
acted by \( \text{18 El. 5. That no Jury shall be compelled to appear in any of the}
Queen's Courts at Westminster, for the Trial of any Illue in any Suit (by a
Common) upon any penal Law, for any Offence committed above
thirty Miles from the City of Westminster \(, \) except in Cases where the Attorney
General for the Time being, for some reasonable Cause in that Behalf to be
sought, shall require the same to be tried at the Bar, in any of the Courts of the Queen's
Majesty, her Heirs or Successors, at Westminster aforesaid: Which Request
shall be noted on the Backside of the Writ of Distraint thereupon awarded, to
the End the Sheriff, or his Bailiff, may, and shall justify the Same to the Jury
that are in such Case impannelled.

Sec. 75. As to the fourteenth Particular, \( \text{viz} \). Where a Verdict
may be found as to Part against the Informer, and as to Part for him:
It seems, \( g \) That regularly, if an Offence against a Statute be of such a
Nature that it may be committed by a single Person, without the Con-
currency of any other, and several Persons be jointly charged in one In-
formation, for one \( a \), done by them all against such Statute, one of
them only may be found guilty, and the rest acquitted; because, tho' the
Words of the Information seem to import a joint Charge against all the
Defendants, yet in Judgment of Law each of them is charged severally for his
own Offence, which cannot but be severally, whether the \( a \), in the doing
whereof it consisted, were done by one or more; and accordingly the
Illue must be, that \( a \) neither they, nor any of them, are guilty. And for
the like Reasons, if one be informed against for having offended against
a Statute for more Times, or in a higher Degree than can be proved; as
for not coming to Church during the Space of ten Months, where he
may be found guilty for \( 1000 \) Quarters of Wheat, where the Evidence amounts but to \( 700 \)
he may be found guilty for \( 1000 \) as the Evidence goes, and Not guilty for
the
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the Residue; for such Offences are not in the Nature of entire Contrasts, which regularly must be fully proved in the same Manner as they are alleged, but are in the Nature of Trespasses, which it is sufficient to prove for any Part. But if the Offence against a Statute consist in making a Contract contrary to the Purview of it, as in the Case of Usury, it is a laid, That if it be alleged as having been made by two, it must be so proved likewise, because it is a Rule of Law, That if Contrasts be not proved as they are laid, they shall not be taken to be the same.

Sect. 76. As to the fifteenth Particular, viz. What Judgment on such an Information or Action is good? It hath been adjudged, That where a Statute (as that of Recusancy, for Instance) ordains that the Offender shall forfeit such a Sum, and that the Sum so forfeited shall be divided into three Parts; whereof one Third shall go to the King, and one to the Informer, and the other to the Poor, &c. and that if the Offender do not pay, &c. within such a Time, that he shall be committed, &c. the Judgment on an Information qui tantum on such Statute may be general, that the b King and Informer shall recover the whole c Sum, without making any Mention how it shall be distributed, or that the Party shall be committed d for Non-payment, &c. But on such an Information, if the Judgment for the Recovery of the Forfeit be given wholly for the Informer, without any Mention of the King, it hath been holden, e That it is totally erroneous. Yet it hath been adjudged, That if on an Information qui tantum, wherein, as it is laid, the Informer hath no Right to any Part, but the King ought to have the Whole, Judgment be given that the Defendant shall forfeit the Sum mentioned by the Statute, and that the King shall have one Morsie, and the Informer the other, such Judgment is erroneous f only as to the later Part, wherein it awards to whom the Penalty shall go; but shall stand for the Clause concerning the Forfeit, which sufficiently entitles the King to the Whole. And it hath been adjudged, g That if there be no Clause at all concerning the Forfeit in a Conviction on a penal Statute, but only a Judgment quod Considus est, it is sufficient, for the Forfeit is implied.

Sect. 77. As to the sixteenth Particular, viz. Whether the Penalty of a penal Statute, may be compounded or granted over? It is enacted by 18 El. 5. That no Informer, or Plaintiff, shall, or may compound or agree with any Person or Persons, that shall offend, or shall be surmised to offend against any penal Statute, for an Offence committed or pretended to be committed; but after Answer made in Court unto the Information or Suit in that Behalf exhibited, or prosecuted: Nor after Answer, but by the Order or Consent of the Court in which the same Information or Suit shall be depending; on Pain that whatsoever shall offend, in making of Composition, or other Misdemeanor, contrary to the true Intent and Meaning of this Statute, or shall by Colour or Pretence of Process, or without Process, upon Colour or Pretence of any Matter of Offence against any penal Law, make any Composition, or take any Money, Reward, or Promise of Reward, for himself, or to the Use of any other, without Order or Consent of some of Her Majesty's Courts at Westminster, and shall be thereof convicted, shall stand on the Pillory, &c. and for ever be disinclined to pursue, or be Plaintiff or Informer in any Suit or Information upon any Statute popular, or Penal; and shall also forfeit ten Pounds, &c.

Sect. 78. It seems h clear, both from the Preamble and the whole Tenor of the Statute, that it extends only to Suits by Common Informers, and not to those by a Party grieved.
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Sec. 78. But it hath been a holden, That it extends as well to subsequent penal Statutes, as to those which were in Being when it was made; and also that it extends to the compounding of Suits commenced in Courts which have no Jurisdiction, as much as if they had a Jurisdiction.

Sec. 79. It is enacted and declared by 21 Jac. 1. 3. (which, as to these Matters, appears both by the Preamble, and Body of the Statute, and many former Resolutions, to be made in Affirmance of the Common Law) That all Commissions, Grants, Licences, Charters, and Letters Patents, made or to be made to any Person or Persons, Bodies politic or corporate whatsoever, of Power, Liberty, or Faculty, to dispense with any others, or to give Licence or Toleration, to do, use, or exercise any Thing against the Tenour or Purport of any Law or Statute, or to give or make any Warrant for any such Dispensation, Licence, or Toleration to be bad or made, or to agree, or compound with any others for any Penalty or Forfeiture limited by any Statute, or of any Grant or Promise of the Benefit, Profit, or Commodity of any Forfeiture, Penalty, or Sum of Money, that is or shall be due by any Statute, before Judgment thereupon had, and all Proclamations, &c. any way tending to the furthering of the same, are altogether contrary to the Laws of this Realm, and shall be utterly void, &c. And it is further enacted, That all such Commissions, &c. shall be examined, heard, tried and determined by, and according to the Common Laws of this Realm, and not otherwise.

Sec. 80. But it is provided, That this Act shall not extend to any Warrant or Privy Seal, made or directed by the King to the Justices of either Bench, or the Exchequer, or of Assize, or of Oyer and Terminer and Goal-Delivery, or Peace, or other Justices for the Time being, having Power to hear and determine Offences done against any penal Statute, to compound for the Forfeitures of any penal Statutes, depending in Suit and Session before them, or any of them respectively, after Plea pleaded by the Defendant.

Sec. 81. It is said by Sir 4 Edward Coke, That such Justices, by such Warrant, &c. can make such Composition for the Use of the King only; However it seems, That by 18 El. they may give Leave to an Informer to c compound with a Defendant after Plea pleaded.

Sec. 82. Also it is provided, That the said Act shall not extend to any Grants, Letters Patents, or Commission hereafter granted of, for, or concerning the licensing of the keeping of any Tavern or Taverns, or selling, uttering or retailing of Wines to be drunk, or spent in the Mansion-House or House, or other Place, in the Tenure or Occupation of the Party or Parties, so selling or uttering the same; or for or concerning the making of any Compositions for such Licences, so as the Benefit of such Compositions be reserved and applied, to and for the Use of his Majesty, his Heirs or Successors, and not to the private Use of any other Person or Persons.