CHAP. 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 Priſonam*, which was made in the firſt Year of King *Edward* 2.

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

[a] Bracton, Lib. 3. ch 9. Britonfol. 17. S. P. C. 30. 2 Inſt. 589. H. P. C. 87. *Contra* S. P. C. 31. Letter D. 33. Letter H. 1 H. 7. 6. pl 2. Bro. Coron. 130. Cro Car. 210. 2 Inſt. 589.
[b] *Vide infra* Sect. 4.
[c] *Vide ſupra* Ch 9. Sect. 49.

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

Sect. 3. And firſt, the Words of the Statute are as follows, *De priſonariis priſonam frangentibus, Dominus Rex vult & præcipit, quod nullus de cætero, qui priſonam fregerit, ſubeat judicium vitæ vel membrorum pro fractione priſonæ tantum, niſi cauſa, pro qua captus & impriſonatus fuerit, tale judicium requirat, ſi de illa ſecundum legem & conſuetudinem terræ fuiſſet convictus, licet temporibus præteritis aliter fieri conſuevit.* For the better Underſtanding of the Conſtruction whereof, I ſhall conſider the following Points. [a] 2 Inſt. 589.

1. What ſhall be ſaid to be a Priſon, within the Meaning of this Statute.
2. How far the Impriſonment ought to be well grounded.
3. What ſhall be ſaid 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.
5. Whe-

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 [a] within the Meaning of the Statute; it ſeems clear, That any Place whatſoever, wherein a Perſon under a lawful Arreſt for a ſuppoſed Crime, is reſtrained of his Liberty, whether in the Stocks or Street, or in the common Gaol, or the Houſe of a Conſtable or private Perſon, or the Priſon of the Ordinary, is properly a Priſon within the Statute; for Impriſonment [b] is nothing elſe but a Reſtraint of Liberty.

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

Sect. 6. Alſo if an innocent Perſon be committed by a lawful *Mittimus* on ſuch a Suſpicion of a Felony, actually done by ſome other, as will juſtify his Impriſonment, though he be neither indicted nor appealed, he is certainly [d] within the Statute if he break the Priſon, for that he was legally in Cuſtody, and ought to have ſubmitted to it till he had been diſcharged by due Courſe of Law.

Sect. 7. But if no [e] Felony at all were done, and the Party be neither indicted or appealed, it ſeems clear, That no *Mittimus*, for ſuch a ſuppoſed Crime will make him guilty within the Statute by breaking the Priſon, for that his Impriſonment was unjuſtifiable

Sect. 8. Alſo if a Felony were done, yet if there were no juſt Cauſe of Suſpicion, either to arreſt or commit the Party, it ſeems clear, That if his *Mittimus* be not in ſuch Form [f] as the Law requires, his Breaking of the Priſon cannot be Felony, becauſe the Lawfulneſs of his Impriſonment in ſuch Caſe depends wholly on the *Mittimus*; which if it be not according to Law, the Impriſonment will have nothing to ſupport it. But if the Party were taken up for ſuch ſtrong [g] 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 [h] 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 [i] from the Tenor of all the old Books that he might; and if the Neceſſity of a *Mittimus* [k] from a Magiſtate, depend rather on the conſtant ſettled Practice of Juſtices of Peace than any direct Law, it ſeems difficult to maintain that a Slip in want of Form of ſuch a *Mittimus*, ſhould make it lawful for the Priſoner to break the Priſon, whereas by the old Law it would have been Felony in ſuch a Caſe to have broken it, without any ſuch *Mittimus* at all. And on the other Side, if the Party be taken

[a] Fitz. Coron. 158, 290, 312, 48, 164, 250, 419. 22 Aſſ. pl 85. Cro. Car 210. 2 Inſt. 589, 590. H. P. C. 107. Dy. 99. pl. 60. Cromp. 38, 39.

[b] 3 P. C. 30 D.

[c] 2 Inſt 590. H. P. C. 109. Bro. Eſcape 29. *See* Book 1. Chap 28. Sect. 11, 12

[d] H P C 109. 2 Inſt. 590. Dy. 99 pl. 60. Cromp. 38 a.

[e] H. P. C 109. 2 Inſt. 590, 591. *Contra* 2 Leon. 166.

[f] *Vide* Chap. 16. Sect. 12, 13, 14, 15, 16.

[g] *Vide ſupra* Ch. 12. Sect. 8, 9. &c.

[h] Bro. Eſcape 29. 42 Aſſ. 5.

[i] *Vide ſupra* Ch. 12. & Ch. 16. Sect. 3.

[k] *Vide* 5 Mod 80.

up for ſuch ſlight Cauſes of Suſpicion of a Felony actually done, as will not in Strictneſs juſtify the Arreſt, yet if the Juſtice before whom he is brought think them of ſuch Weight as to require a Commitment, and do accordingly ſend the Party to Gaol by a regular *Mittimus*, it ſeems very dangerous for him to break the Priſon; for the Practice of Juſtices of Peace in making ſuch Commitments, being now grown into ſettled Law, it ſeems reaſonable, that their *Mittimus* be a good Juſtification of the Impriſonment which it commands, for a Crime within their Juriſdiction regularly brought before them; from whence it follows, That to break from ſuch Impriſonment muſt be unlawful. And therefore, ſince it doth not appear, that there hath been any direct Reſolution of theſe Points, perhaps it may be reaſonable to underſtand, what is more generally ſaid by Sir [a] *Edward Coke*, and Sir [b] *Matthew Hale*, in Relation to this Matter, according to the abovementioned Diſtinctions.

Vide infra Sect. 14.

[a] 2 Inſt. 591.
[b] H.P.C. 109.

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 *felonice fregit priſonam*, which ſeem neceſſarily to import the Uſe of ſome real Force or Violence, and not ſuch only as may be implied by the Conſtruction of Law, in any Act done in Contempt of it; and therefore, if without any Obſtruction a Priſoner go out of the Priſon Doors, being opened by the Conſent or Negligence of the Gaoler, or otherwiſe eſcape without uſing any Kind of Force or Violence, he is guilty of a 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.

[c] 2 Inſt. 590. H. P. C. 108. S. P. C. 31. Letter A.

[d] *Supra* Sect. 5.

Sect. 9. 2. Such Breaking muſt be either by the Priſoner himſelf, or by others through his Procurement, or at leaſt with his Privity; for if the Priſon be broken by others, without his Procurement or Conſent, and he eſcape through the Breach ſo made, it ſeems the better [e] Opinion that he cannot be indicted for the Breaking, but only for the Eſcape.

[e] 2 Inſt. 589. H. P. C. 108. S. P. C. 30. Letter E. 31. Letter B. Fitz Coron. 48.

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

1 H. 7. 6. a.
[f] 15 H. 7. 12. Pl. Com. 136. 2 Inſt. 590. H. P. C. 108.

Sect. 11. 4. It ſeems, That no Breach of Priſon will amount to Felony, unleſs the Priſoner eſcape; for if the Breaking of a Priſon by a Stranger, in Order to free the Priſoners who are in it, be not Felony, unleſs the Priſoners go out of it, as it it is ſaid [g] 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.

[g] Keilw. 87. a.

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 by the Common Law, which is reſtrained by the Statute in Reſpect only

H. P. C. 108.

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.

Sect. 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] *A.* is committed to a Priſon for a dangerous Wound given to *B.* and breaks the Priſon, and then *B* dies: For though to ſome Intents ſuch Offence be eſteemed capital from the Time of the firſt Act, yet inaſmuch as it was in Truth but a Treſpaſs at the Time of the Breaking of the Priſon, and it was then uncertain whether it would ever become capital; and it becomes ſuch afterwards *ab initio*, by Fiction only, for ſome ſpecial Purpoſes, and Fictions of Law are never carried farther than the Neceſſity of thoſe particular Caſes, which were the Cauſe of the inventing them doth require; they ſhall never be conſtrued to exempt a Perſon from the Advantage of a beneficial Law made in Favour of Life, who is clearly within the Letter, and doth not 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.*

[a] H P. C. 108, 219. 2 Inſt. 591. Pl. Com. 258. b. 421. a. 11 H 4. 12. b. S P.C. 33 A.

11 H 4 12 b. S P.C 35. Letter ll.

Sect. 14. 3. If the Party be only arreſted for, and in his *Mittimus* charged with a Crime which does not require Judgment of Life or Member, as Petit Larceny, or Homicide *ſe defendendo*, or by Miſadventure, and the Offence, in Truth, be no greater than the *Mittimus* doth ſuppoſe it to be, it is clear, from the expreſs Words of the Statutes That a Breaking of the Priſon cannot amount to Felony. And if the Offence for which the Party is commited, be ſuppoſed in the *Mittimus* to be of ſuch a Nature as requires a capital Judgment, yet if in the Event it be found to be of an inferior Nature, and not to require ſuch a Judgment, it ſeems difficult to maintain, That the Breaking of the Priſon on a Commitment for it can be Felony; for the Words of the Statute are, *Niſi Cauſa pro qua captus & impriſonatus fuerit, tale judicium requirit*; and here it appears, That the Offence, which is the Cauſe of his Impriſonment, doth not require ſuch a Judgment; and it is hard to ſay, That a Miſtake of the Nature of the Crime, by the Perſon who makes the Arreſt or *Mittimus*, ſhould ſo far prejudice the Party, as to make his Eſcape amount to Felony by Reaſon of ſuch Miſtake, which otherwiſe would have been but a Treſpaſs. Alſo it ſeems to be agreed, That if a Perſon be committed for a ſuppoſed Felony, where no Felony hath been done, he is not guilty of Felony for breaking the Priſon; from whence it clearly appears, That in that Caſe the Law doth not ſo far regard the Charge contained in the *Mittimus*, where there is no good Ground to ſupport it, as in Reſpect thereof to exclude the Party from the Benefit of the Statute; and yet in that Caſe the Party is as much accuſed of a capital Offence as in the Caſe in Queſtion; ſo that it is clear That the Law doth not ſo much reſpect the 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 ſaid to be the Cauſe which requires Judgment of Life or Member, but the Offence which ſupports the Accuſation; and if there be no ſuch Offence, there is, in Truth, no Cauſe which requires ſuch a Judgment. On the other Side, if the Offence, which was the Cauſe of the Commitment, be in Truth of ſuch a Nature as requires a capital Judgment, but in the *Mittimus* be ſuppoſed to be of an inferior Degree; it may probably be argued, That the Party's Break-

H P.C 110. 2 Inſt. 590.

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 arreſted and committed, and that does in Truth require Judgment of Life, tho' the Nature of it be miſtaken in the *Mittimus*, 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 [a] Authors who have expounded this Statute ſeeming rather to incline to a different Opinion, I ſhall leave theſe Matters to the Judgment of the Reader.

[a] 2 Inſt 590, 591. H. P. C. 109, 110.

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 *ſi cauſa tale judicium requirit*: And it cannot be properly ſaid, That the Offence of one attainted doth require ſuch a Judgment, (for that there ought not to be a ſecond Judgment againſt one already condemned) but only that it did require it; and it is a ſettled Rule, That all Statutes are to be conſtrued ſtrictly in Favour of Life, and that no parallel Caſe, which comes within the ſame Miſchief, ſhall be conſtrued to be within the Purview of it, unleſs it can be brought within the Meaning of the Words: Yet conſidering that the manifeſt Purport and Meaning of the Words of the Statute taken 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 extreamly harſh to imagine, that the Makers of the Statute could intend a greater Favour to Perſons appearing to be guilty, and actually under the Condemnation of the Law, than to Perſons under an Accuſation only: There can be no Doubt, but that the Perſons attainted, breaking Priſon, are as much guilty within the Meaning of the abovementioned Exception as any others

S. P. C. 32. Letters A, B, C, D.

See Book 1. Ch 32. Sect. 2, 3, 4.

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 ſingly, without letting out any other Priſoner; for that no Offence is to be conſtrued High Treaſon, which is not either within the Purview of 25 *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 Aſſiſtance 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 Reſcous than of the Breaking of Priſon, ſhall be more fully conſidered in the Chapter concerning Reſcous.

Book 1. Ch. 17. Sect. 2. 2 Inſt. 590. S. P. C. 32. Letter F. 1 H. 6 5. b.

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 were 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

H. P. C. 110, 116. 2 Inſt 502.

Priſon

Priſon it ſelf; on which Account this Caſe differs from that of a Reſcous or voluntary Eſcape, as ſhall be ſhewn more at large in the following Chapter.

Fitz Indictment 30, 1 H. 7. 6. pl. 2.

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.

H. P. C. 109. 2 Inſt. 591. Fitz. Endictments 18.

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 Caſe in ſuch a Manner that it may appear that he was lawfully in Priſon, and for ſuch a Crime as requires Judgment of Life or Member; and that it is not ſufficient to ſay in general, *Quod felonice fregit Priſonam.* And it ſeems, That the ſame Rules which are required for an Indictment of an Eſcape, ſet forth at large in the next Chapter, are generally to be obſerved in Indictments of breaking Priſon.

Book 1. Ch. 20. Sect. 1. Ch. 59 Sect. 1. H. P. C. 116. S. P. C. 35 H. 11 H. 4. 12. b.

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 Miſpriſion by Fine and Impriſonment; for that every capital Offence doth include in it a Miſpriſion, and may be proceeded againſt as ſuch only, if the King pleaſe; and it cannot be thought the Meaning of the Statute in ordaining, That ſuch Offences ſhall not be puniſhed as capital ones, to intend, That they ſhall not be puniſhed at all.

CHAP. 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.

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.

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

[a] 2 Coron. 76. 9 H. 4. 1. pl. 3. 27 Aſſiſ. pl. 1. Fitz. Coron. 219.

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

[b] Bro. Eſcape, 22. [b] Fitz. Coron. 224. 42 Aſſ. pl 5. Bro Eſcape, 27. 29. 5 Mod. 414, 415, 416. *Contra.* 2 Leon. 166. *See* Ch. 18. Sect. 5, 6, 7, 8.

Sect. 3. III. As the Impriſonment muſt be juſtifiable, ſo muſt it be alſo for a criminal Matter; and ſome [c] are ſaid to have holden, that no Eſcape is criminal, but where the Commitment is for Felony. However it is certain, that the Eſcape of one committed for Petit Larceny [d] only is criminal; and it ſeems moſt agreeable to the general Reaſon of the Law, That the Eſcape of a Perſon committed for any other Crime whatſoever, ſhould alſo be criminal. for ſurely, 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.

[c] Fitz. Coro. 248. S P. C 33. Letter H. [d] Fitz Coro. 430, 431. S P. C. 33. Letter H.

Sect. 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, [e] 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.

[e] Bro. Eſcape 16 21 H. 7. 7. S. P. C. 34. Letter F.

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.

See Fitz. Coron 430. S. P. C. 34. Letter E.

Sect. 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 Perſon to Bail, [a] who by Law ought not to be bailed, but to be kept in cloſe Cuſtody; or to permit [b] a Priſoner to go out of the Limits of the Priſon: Yet ſome [c] ſeem to have holden, That in this laſt Caſe it ſhall not be adjudged an Eſcape, unleſs the Priſoner be found to have had an Intention to eſcape; but it will be difficult to maintain, That the Offence of the Gaoler can depend on the Intention of the Priſoner.

[a] 25 Ed. 3. 39. pl. 22. H. P. C. 213. Fitz. Eſcape, 4. Fitz. Coron. 246.
[b] Fitz. Coron. 242.
[c] Fitz. Coro. 431. S. P. C. 133. Letter E.

Sect. 6. VI. If [d] the Gaoler ſo cloſely purſue the Priſoner, who flies from him, that he re-take him without loſing Sight of him, the Law looks on the Priſoner ſo far in his Power all the Time as not to adjudge ſuch a Flight to amount at all to an Eſcape: But if the Gaoler once loſe Sight of the Priſoner, and afterwards retake him, he ſeems in Strictneſs to be guilty of an Eſcape; and *à fortiori* therefore, [e] 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.

[d] Fitz. Coro. 236, 400. S. P. C. 33. Letters B. C. Bro. Eſcape, 14, 32, 49, 52. 10 H. 7. 25. b. 26. a. 6 H. 7. 11. b. 12. a.
[e] Fitz. Coro. 328 346. S. P. C. 33. Letters B. C. *See* Book 1. Ch. 28. Sect. 11, 12.

Sect. 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, and the Priſoner had claimed the Privilege of it, and by that Means got Free, it ſeems, [f] 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.

[f] Bro. Eſcap. 38, 50. 2 H. 4. 15. pl. 14. Fitz. Coron. 222, 316. but 27 Aſſ. 54. and Bro. Eſcape, 24. ſeems contrary.

Sect. 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 [g] 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.

[g] Fitz. Coro. 16. 27 H. 6. 7. b. S. P. C. 33. Letters G. H.

Sect. 9. IX. If [h] 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.

Vide 23 H. 8 11.
[h] Bro. Eſcap. 10, 32, 52. 6 H. 7. 11. b. 12. a. 10 H. 7. 25. b. 26. a. 29 Aſſ. 34. Bro. Eſcape, 26. ſeems contrary.

Sect. 10. As to the ſecond Point, *viz.* Where ſuch Eſcape is to be eſteemed voluntary, and where negligent, There [i] 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 involv'd in the Guilt of the ſame Crime of which the Priſoner was guilty, and ſtood charged with. And it ſeems to be the Opinion of Sir *Matthew Hale*, [k] 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

[i] *See* Cro. Car. 492. S. P. C. 32. Letter I.
[k] H. P. C. 213.

which by the Law he hath no Colour of Right to give him; as where a Gaoler bails a Priſoner who is not bailable. But it ſeems agreed, That a Perſon who hath Power to bail, is guilty only of a negligent Eſcape, by bailing one who is not bailable; neither can I meet with any Authority in other Books, to ſupport the abovementioned Opinion, That the Bailing of one who is not bailable, by one who hath no Power to bail, muſt neceſſarily be eſteemed a voluntary Eſcape; but the contrary Opinion ſeems more agreeable to the Purview of 5 *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 [a] 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 ſtoln, 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.*

Supra. Sect. 5.

[a] Fitz. Coro. 242, 316, 431. S. P. C. 33.

Sect. 11. Neither is it a certain Rule, That an Officer, who unlawfully, knowingly, and willingly ſuffers a Capital Offender to eſcape, is in all Caſes to be adjudged guilty of a voluntary Eſcape; for where an Ordinary ſuffered a Clerk, attainted, being committed to his Cuſtody, to free himſelf from Impriſonment, by making his Purgation, he might be truly ſaid, to have ſuffered ſuch Priſoner to eſcape unlawfully, knowingly, and willingly, and yet it ſeems, [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.

[b] Fitz. Coro. 16, 370. Bro. Eſcape, 1. S. P. C. 34. G 141. B.

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 [d] County. And it is ſaid generally in ſome Books, [e] 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

15 H. 7. 9. pl. 8. [c] Fitz. Treſpaſs, 91. Bro. Eſcape, 2. Fitz. Coron. 236. Bro. Eſcape, 49, 32, 52. 13 Ed. 4. 9. 2 Ed. 4. 6. b.

[d] 33 H 6 52. b. 53. a. 3 Co. 44 b. 52. Bro. Eſcape, 4. Freſh Suit, 3, 5. *Contra* Keilw. 3. a. [e] Fitz. Coron 236, 400, 313, 335. S. P. C. 117 Letter C. Bro Execution, 58, 151. 27 H. 8. 1. a. 13 H. 7. 1. b. F. N. B. 130.

ſeems

ſeems to be no Reaſon he ſhould take any manner of Advantage from it. But where a Gaoler hath voluntarily ſuffered a Priſoner to eſcape, it is ſaid by ſome, [a] 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 holden by Sir *William Staundford*, [b] That after a Gaoler hath been fined for ſuffering a Priſoner negligently to eſcape, he cannot afterwards re-take him; but the Book [c] 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.

[a] 2 Jon. 21, 22, 45. 3 Co. 52. b. Cro. Jac. 659. *Quare* 2. Danv. Abr. 633. pl. 4. 535. pl. 11.
[b] S. P. C. 33. Letter E.
[c] 13 Ed. 4. 9. Fitz. Eſcape, 2. Br. Eſcape. 35.

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

[d] S. P. C. 33. H. P. C. 114. ſeems contrary.
See the Books cited Sect. 6. 1 Rol. Abr. 808.
1 Dan. Abr. 633 pl 4.
Vide 8 Gul. 26. S. 8.
Vide Supra. Sect 6
[d] 27 Aſſ. pl. 9. Bro. Eſcape, 22. Fitz. Aſſiſe, 247.
[e] Salk. 272. 5 Mod. 414, 415.

Sect. 14. As to the fifth Point, *viz.* In what Manner the Officer, ſuffering an E cape, is to be indicted, it ſeems clear, That every Indictment for an Eſcape, whether negligent or voluntary, muſt expreſly ſhew, that the Party was actually [d] in the Defendant's Cuſtody for a Crime, Action, or Commitment for it; and that [e] it is not ſufficient

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 expreſly ſhew that the Priſoner went at large, which is moſt properly [a] expreſſed by the Words *exivit ad largum.* Alſo it ſeems neceſſary, to ſhew the Time when the Offence was committed, for which the Party was in Cuſtody, not only [b] that it may appear, that it was prior to the Eſcape, but alſo [c] that it was ſubſequent to the laſt general Pardon. Alſo it ſeems clear, That every Indictment for a voluntary Eſcape, muſt alledge that the Defendant *felonice & voluntarie* A. B. *ad largum ire permiſit*; and muſt [d] 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, [e] whether ſuch Certainty, as to the Nature of the Crime, be neceſſary in an Indictment for a negligent Eſcape, for that it is not material in this Caſe, whether the Perſon who eſcaped were guilty or not.

[a] Bro. Eſcape 52. 10 H. 7. 26 a.
[b] *Contra* 2 Leon. 66. Bro. Eſcape 17.
[c] Cro El. 752. [d] Henly 13. [d] Cro El. 752. Hetley 73. S P.C. 95. A. H. P. C. 110, 111, 206. 8 Ed. 4. 3. pl. 6.
[e] *See* Keilw. 192, 194.

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

S.P.C. 34, 35. Fitz. Coron. 466.
[e] 11 H. 6. 49. b. 12 H. 6. 2. b. 3. S.P.C. 35.
[f] S P.C. 34 G. 39 H. 6. 33, 34.

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

[g] S. P. C. 35.

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

Sect. 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.*

[a] 27 Aſſ. pl. 1, 9. 21 Aſſ. pl. 12. S. P. C. 35. 2 Inſt. 166.

Sect. 18. It hath been adjudged, [a] That this Statute reſtrains not the Court of King's Bench from receiving ſuch Preſentments, for that its Juriſdiction includes in it that of Juſtices in Eyre, and this Court is it ſelf, 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 Chattels of Felons, and of Fugitives, and alſo Eſcapes of Clerks Convict, out of their Ordinary's Priſon, from thenceforth to be judged before any of the King's Juſtices, ſhall be levied from Time to Time, as they ſhall fall, as well of the Time paſt as Time to come.* By which it ſeems to be implied, That other Juſtices, as well as thoſe in Eyre, may take Cogniſance 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, 11, 12, 13, 14. S. P. C. 35.

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.*

S. P. C 35. Letter F.

Sect. 21. As to the ſecond Particular, In what Caſes ſuch Preſentments are traverſable; It is laid down as a Rule by Sir *William Staundford*, That where-ever an Eſcape is finable, the Preſentment of it is traverſable; but that where the Offence is amerciable only, there the Preſentment is of it ſelf concluſive; ſuch Amercements being reckoned among thoſe *minima de quibus non curat lex*; and this Diſtinction ſeems to be well warranted by the Old [b] Books; and in what Caſes Eſcapes are finable, and where amerciable only, ſhall be conſidered in the following Part of this Chapter, *Sect.* 31, 33, 35,

[b] 21 Aſſ. pl. 12. 27 Aſſ. pl. 9, 27. Fitz. Coron. 291, 328, 345, 346, 352.

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

[c] S. P. C 32. 1 H. P. C. 113. Bro. Coron. 112. 27 Aſſ. 62. 11 H 4. 12. b. [d] H. P. C. 114, 115. Dy. 99. pl. 6. Fitz. Eſcap. 3. 27 Aſſ. pl 62. [d] Bro. Eſcape 18, 23. 2 Ro. Re. 246. Fi z. Aſſiſe 252. 39 H. 6. 33, 34. Quære 27 Aſſ. pl. 27. H. P. C. 114. [f] Salk. 272, 348. *Contra* H. P C. 114. 2 Inſt. 590, 591, 592. Salk. 347. *See* Ch. 16. & Ch. 18. Sect. 5, 6, 7.

Sect. 23. Alſo ſuch an Eſape, ſuffered by one who wrongfully takes upon him the Keeping of a Gaol, ſeems to be [e] 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 expreſly charge the Party with Treaſon or Felony, but in ſome other Reſpect be not ſtrictly formal, yet it ſeems, That it may [f] 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,

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

Sect. 25. But it ſeems to be agreed, That no Eſcape can amount to a capital Offence, unleſs the Cauſe for which the Party was committed, [a] were actually ſuch at the Time of the Eſcape; and therefore, if a Gaoler ſuffer one to eſcape who is committed for having given a dangerous Wound to another, who afterwards dies of ſuch Wound, yet he is not guilty of Felony, for that the Offence of the Priſoner was but a Treſpaſs at the Time of the Eſcape; and though by a Fiction of Law it be afterwards, for ſome Purpoſes, eſteemed a Felony from the Time 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.

[a] H. P. C. 114, 219. *See* Ch. 16. Sect. 19. 11 H. 4. 12. b.

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

H. P. C. 110, 215, 216. Firz. Coron. 158. Query 27. Aſſ. 62. *Contra* Crompton 58.

[b] H. P. C. 116. Fitz. Coron. 158. *See* Ch. 18. Sect. 20. H. P. C. 110. ſeems contrary.

H. P. C. 116.

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

Salkeld 272. H. P. C. 113, 114.

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.
2. How by Statute.

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

H. P. C. 114. 2 Rol. Rep. 146. Bro. Eſcape 18, 23.

Sect. 29. Alſo I take it to be the better Opinion, That [c] 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 [d] the Court may charge either the Sheriff or Bailiff for ſuch an Eſcape; and that if a Deputy-Gaoler be not ſufficient [e] to anſwer a negligent Eſcape, his Principal muſt anſwer for him: But

Query 27. Aſſ. 27. *Vide ſupra* Sect. 23.

[c] Firz. Coron. 117.
[d] Salk. 272. H. P. C. 113.
[e] 2 Levin. 71.

But if the Gaoler who ſuffers an Eſcape, have an Eſtate [a] for Life, or Years, in the Office, I do not find it agreed how far he in Reverſion is liable to be puniſhed.

Sect. 30. It ſeems the better Opinion, That one negligent Eſcape will not amount to a Forfeiture of the Gaoler's Office, as one voluntary [b] 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. 31. It ſeems to be certain, That where-ever a Perſon is found guilty upon an indictment, or Preſentment, of a negligent Eſcape of a Criminal actually in his Cuſtody, he ought to be condemned in a certain Sum to be paid to the King, which ſeems moſt properly to be called a Fine; but this doth not clearly appear from the old Books, for in ſome [c] of them it ſeems to be taken as a Fine, in others [d] as an Amercement, and in others it is ſpoken of generally, as an Impoſition of a certain Sum, and without any [e] 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 *Cepi Corpus* into the King's Bench, on a *Capias* againſt a Man on an Indictment of Felony, does not bring him in at the Day, it ſeems, [f] That he is, by the Courſe of the ſaid Court, to be amerced, not fined.

Sect. 32. It hath been holden, [g] 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. 33. And it ſeems, [h] That by the Common Law, the Penalty for ſuffering the negligent Eſcape of a Perſon attainted, was of Courſe 100 *l.* and for ſuffering ſuch Eſcape of a Perſon indicted and not attainted, was 5 *l.* [i] but if the Perſon eſcaping were neither attainted nor indicted, it ſeems, That it was left to the Diſcretion of the Court to aſſeſs ſuch a reaſonable Forfeiture as ſhould ſeem proper; and [k] 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 [l] a Priſoner, committed on two ſeveral Accuſations to eſcape, than if he had been committed but on one.

Sect. 34. 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 incontinently let to Bail, and after had done many evil Deeds,* &c. And thereupon it is enacted, *That ſuch Enditees and Appellees ſhall be ſafely and ſurely kept in Priſon, as belongeth to them, according to the Charge which the ſaid Marſhals ſhall have of the Juſtices; and if any Marſhall ſhall do otherwiſe, at the Complaint of every Man that will complain, the Juſtices ſhall do him Right during the Terms; and in the End of the Terms, upon their riſing, the ſaid Marſhals ſhall chooſe before the ſaid Juſtices, before they depart their Places, in what Town they will keep ſuch Priſoners at their Peril: And in the ſame Town they ſhall allow to them Houſes to keep ſuch Priſoners at their own Coſts and Charges; and there they ſhall keep them in Priſon, and ſhall not ſuffer them to go wandring abroad, neither by Bail nor without Bail. And if any ſuch Priſoner be found wandring out of Priſon, by Bail or without Bail, and that*

[a] 39 H. 6. 33, 34. 2 Rol. Abr. 155. Letters M N. 3 Levin. 288. 2 Levin. 81.

[b] Bro. Forfeiture of Offices. 27. 2 R. A. 155. Letter N.

[c] 8 H. 5. 2. Fitz. Coron. 84, 292.

[d] S. P. C. 35. H. Bro. Eſcape, 16. Raſtals Ent. 583 b.

[e] Fitz. Coro. 335. 25 Ed. 3. 39. pl. 22. 27 Aſſ. pl. 9. S. P. C. 65. 26 Aſſ. pl. 51. H. P. C. 113. Fitz. Coron. 196, 291, 370. Graunt 39. Eſcape, 4.

[f] *See* the Book *ſupra* Ch. 12. Sect. 2.

[g] Fitz Eſch. 7. 40 Aſſ. pl. 42. 3 H. 7. 15. pl. 30. 8 H. 5. 2 pl. 6. Fitz. Graunt. 37.

[h] S. P. C. 35. K. H. P. C. 113. Fitz. Coron. 370.

[i] S. P. C. 35. K. H. P. C. 113. 27 Aſſ. pl. 9. 40 Aſſ. pl. 42. 25 Ed. 3. 39. pl. 22. H. P. C. 113. Fitz. Coron. 454.

[k] S. P. C. 33. K. Fitz. Coron. 422.

[l] Fitz. Coro. 196. 26 Aſſ. pl. 51.

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

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 Patents 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 Suſpection 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, ſubtilly, and craftily, and oftentimes for Favour, Mede, Affection or Corruption, ſuffered the ſaid Offenders to eſcape, as if it had been by Negligence, to the overt 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 Inboldning of the Offenders, by Means whereof, great and arrant Felons, and heinous 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 Gaols where ſuch Priſoners accuſtomably 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 Fines: And for every Eſcape of Perſons eſcaping being in their keeping for Suſpection of High Treaſon, no leſs Fine to be ſet or made than* 40*l. and for every Eſcape of Perſons indicted of Murder or Petit Treaſon,* 20*l. at leaſt, and more, by the Diſcretion of the Juſtices that ſhall aſſeſs ſuch Fines: And for every Eſcape of Perſons ſuſpected of Murder or Petit Treaſon,* 10*l. or more, by the Diſcretion of the Juſtices that ſhall aſſeſs ſuch Fines: And for every Perſon eſcaping, being in their Keeping, indicted of Felony, other than Murder or Treaſon,* 10*l. 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 Demerits, ſaving 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.*

CHAP. 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.

H. P. C. 112.

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

2. In what Manner he is to be puniſhed.

Sect. 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 [a] of an Eſcape, if he ſuffer him to go at large, before he hath diſcharged himſelf of him by delivering him over to ſome other who by Law ought to have the Cuſtody of him.

[a] *See* Ch. 12. H. P. C. 112.

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

[b] H. P. C. 112. 44 Aſſ. pl. 12. Bro. Eſcape, 31. 43 Ed. 3. 36. pl. 55. Fitz. Coron. 454.

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

Bro. Eſcape, 3. [c] Fitz. Coro. 345. [d] Fitz. Coro. 328, 337. S. P. C. 34. D.

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

[e] H. P. C. 112. [f] 10 H. 7. pl. 2. Fitz. Eſcape, 8. H. P. C. 114. Fitz. Coron. 345.

Sect. 5. Neither can ſuch private Perſon excuſe himſelf of the Eſcape of ſuch a Priſoner, by alledging, That he delivered him over to a Sheriff, or other Officer, without ſhewing to whom, in particular, by Name,

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 Suſpection 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 Cauſe 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.*

H. P. C. 112. Bro. Coron. 112. 27 Aſſ. 62.

CHAP. XXI.

Of Reſcous.

THE Offence of a Stranger, in forcibly freeing another from an Arreſt, comes under the Notion of Reſcous, which in moſt Inſtances is of the ſame Nature with the Offence of breaking Priſon, which hath been already conſidered in the eighteenth Chapter; 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.

2 Inſt. 589. S. P. C. 30, 31, and the Caſes cited.

Sect. 2. II. Where-ever [a] the Impriſonment is ſo far groundleſs, or irregular, or for ſuch a Cauſe, or the Breaking of it is occaſioned by ſuch a Neceſſity, *&c.* that the Party himſelf breaking the Priſon, is, either by the Common Law, or by the Statute *de frangentibus Priſonam*, ſaved from the Penalty of a capital Offender, a Stranger who reſcues him from ſuch an Impriſonment, is in like Manner alſo excuſed; *& ſic è converſo.*

Ch. 18. Sect. 1 & 4.
[a] *See* Ch. 18. S. P. C. 30, 31. H. P. C. 116.

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.

Keilw. 87. 2. Bro. Eſcape, 52.

Sect. 4.

Fitz Enditement, 30. 1 H. 7. 6. pl. 2.

Sect. 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 Reſcous a good Ground for the Arraignment of the Reſcuer, unleſs he be indicted.

Vide Supra. Ch. 18. S. 19. & Ch. 19. S 14. Dyer, 164. pl. 60.

Sect. 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 Reſcous.

Vide Supra. Ch. 18. Sect. 20.

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

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

Vide Supra. Ch. 18. S. 16.

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

[a] S. P. C 11. C. 32. F. H. P. C. 109. Dalt. fol. 228. 1 Jo. 455. 1 H. 6. 5. b. Fitz. Coron. 2. Bro. Treaſ. 11.

[b] Cro. Car. 583.

[c] 1 H. 6. 5. b.

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

[d] *Supra* Ch. 11. Sect. 17.

[e] *Vide Supra.* Ch. 19. H. P. C. 116. S. P. C. 43. Letter B. ſeems contrary.

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.

1

1. Such

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

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

Sect. 1. And firſt, I ſhall conſider the Nature of the firſt of theſe, which is generally called an Attachment, and is properly grantable in Caſes of Contempts, againſt which, for the moſt part all Courts of Record generally, but more eſpecially thoſe of *Weſtminſter-Hall*, and above all the Court of King's Bench, may proceed in a ſummary Manner according to their Diſcretion; 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 farther 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 it ſelf, 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 ſuch Contempt. But if there be any favourable Circumſtances to extenuate or excuſe the Offence, or if it appear doubtful whether the Party were guilty of it or not, the Court will generally in their Diſcretion, ſuffer the Party, having firſt given Notice of his Intention to the Proſecutor, to enter into a Recogniſance to anſwer ſuch Interrogatories; and if no ſuch Interrogatories be exhibited within four Days after ſuch Recogniſance, will diſcharge the Recogniſance upon Motion; yet if the Party do not make ſuch Motion, and the Interrogatories be exhibited after the four Days, the Court will compel him to anſwer them: 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.

Fitz. Corody 4.

Raſtal. 268. pl. 4, 5. Raym. 376. Cro. Car. 146.

1 Rol. Rep. 315.

Salk 84.

3 H 7. 6. pl. 4. 22 Ed. 4. 33. b. 34.

6 Mod. 73.

6 Mod. 73.

The Queen and Barber, Mich. 11. *Anne.* 6 Mod 73 2 Jon. 178

2 Jo. 178

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

1. Where it may ſo 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 ſo proceed againſt Sheriffs, Bailiffs of Franchiſes, and Sheriffs Bailiffs.
2. Where againſt Attornies, 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 ſo proceed againſt Sheriffs, Bailiffs of Franchiſes, 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.

Sect. 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 Diſgrace 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 Perſon or Effects, in Order to prevent the Service of any Writ, the Court which awarded it may puniſh ſuch Offences in ſuch Manner as ſhall ſeem proper by Attachment, *&c.* as well as the Court of King's Bench, which has a general Superintendency over all Crimes whatſoever (as the Star-Chamber [a] had alſo formerly) but commonly leaves Offences of this Kind, in Relation to Cauſes in other Courts to be puniſhed by ſuch Courts to which they more immediately belong. But if there neither appear to have been any palpable Corruption in the Caſe, nor particular Obſtinacy, as by diſobeying a ſpecial Rule of the Court, in Relation to the Service of ſuch Writ, nor other extraordinary Circumſtances of wilful Negligence, the Judgment whereof is to be left to the Diſcretion of the Court, it ſeems not to be uſual to grant an Attachment in ſuch Caſes, but to leave the Party to his ordinary Remedy againſt the Officer, which he may have either by ſerving him with Rules to return the Writ, *&c.* or by ſuing him for the Damage ſuſtained by his Negligence, in an Action of Eſcape, or on the Caſe, or by taking out an *Alias* [b] 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.

Dy. 218. pl. 4.

[a] Hob. 62, 263, 264. Noy 101.

Hob. 264. Laſely *verſus* Weſton. *See* Firz. Proceſs, 13, 104.

[b] F. N. B. 38. C. 47. C. 265. F. Finch. 237. 5 Mod. 314, 315.

Sect. 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

Hob. 62, 263, 264.

plauſible Excuſe for doing it, or treating the Perſons arreſted baſely and inhumanly, or keeping them in Cuſtody till they conſent to pay Money for their Deliverance, or making an Arreſt without due Authority, as by Force of a blank [a] Warrant, filled up with the Name of a ſpecial Bailiff by the Party himſelf, or Bailiff, without the Privity or ſubſequent Agreement of the Sheriff; yet I have ſometimes known Attachments of this Kind denied, in Reſpect of the common Uſe of the Practice, which by Experience hath been found to be almoſt neceſſary in ſome Caſes to prevent the Defendant's having Notice of the intended Arreſt, and therefore, if it ſhall appear to the Court, that there was any ſuch reaſonable Cauſe for ſuch a Proceeding, it will be a great Inducement to excuſe, if not wholly to diſpence with it.

11 H. 6. 42. b. 43. a.

[a] Noy 101. Moor 770. pl. 1064. 2 Rol. Abr 278. H.

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 or Money, *&c.* according to his Return, the Court will hardly grant an Attachment againſt him immediately, but will rather proceed againſt him by Rules to return the Writ, *&c.* and if he do not obey them, will increaſe the Amercements upon him till he do, or perhaps grant an Attachment for the Contempt: And [b] if the Sheriff return, That he ſent the Proceſs to the Bailiff of a Liberty, who hath given him no Anſwer, a *non Omittas* ſhall be awarded to the Sheriff: And if he return, That he ſent the Proceſs to ſuch Bailiff, who hath returned a *Cepi Corpus*, or ſuch like Matter, and the Bailiff bring not in the Body or Money, *&c.* at the Day, by the better [c] Opinion the Bailiff ſhall be amerced, and a Writ [d] ſhall iſſue to the Sheriff, to diſtrain the Bailiff to bring in the Body, *&c.*

[b] Fitz. Proceſs, 13, 32.

[c] Raſtal 109. *Capias* pl. 20. 189. pl. 20, 21, 22. 670. pl. 2. 36 H. 6. 1. *Contra* Bro. Proceſs, 25. Fitz Return deVicont 35. 3 H. 7. 11. 47 Aſſ. pl. 6.

[d] Fitz. Proceſs, 12, 14, 104, 122, 132, 135, 225. Execution, 101. Retorn de Vicont. 35. 27 Ed. 3. 83. pl. 8. 27 Ed 3. 77. pl 9.

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 [e] to be no Doubt, but that wherever any ſuch Officer endeavours to impoſe upon a Court, by making a Return to a Writ of a Matter known by him to be falſe, he is, in Strictneſs, liable to be puniſhed in this Manner for his Contempt: Yet it ſeems, That the Court will not eaſily be prevailed on to proceed in this Manner for a bare falſe Return, but will rather leave the Party injured by it to his Remedy, by an Action on the Caſe, unleſs there be ſome extraordinary Circumſtances of Hardſhip or Oppreſſion, as where [f] an Officer who had arreſted one on a *Capias*, returned, That he had taken him, but that the Party was ſo ſick, that he could not bring in his Body at the Day for Fear of endangering his Life, where in Truth the Party had been all the while in good Health, and was only detained under ſuch Pretence, in Order to extort Money from him, *&c.*

Raſtal. 109. *Capias* pl. 20. Bro. Proceſs, 25, 48, 113, 115. Bro. Return, 96. 99. 5 Ed. 4. pl. 14. 11 H. 4. 43. pl. 13. 38 Ed. 3. 1. b. 39 Ed. 3. 3. 8 H. 5. 2. pl. 8. [e] Fitz. Proceſs, 5. Bro. Surmiſe, 19 *Return de Brief*, 100. Raſtal *Habeas Corpus*, 7. 11 H. 6. 42 b.

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As to the ſecond Point, *viz.* In what Caſes the Court may proceed in the Manner abovementioned, againſt Attornies, 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.

Sect. 6. As to the firſt of theſe Particulars, *viz.* Where the Court may proceed, in the Manner abovementioned, againſt Attornies, and others acting as ſuch, for appearing for any Perſon without ſufficient Authority; There is no Doubt [a] 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.

[a] 38 Ed. 3. 8. b. 41 Ed. 3. 1. pl. 3. Raſtal. 582. pl. 28. 16 Ed. 4. 5. b.
[b] Raſtal. 96. pl. 3.
[c] Fitz. Judgment, 96. 41 Ed. 3. 1. pl. 3. 38 Ed. 3. 8. b. 4 Ed. 4. 13. pl. 31. 16 Ed. 4. 5. b. Raſtal 582. pl. 28.

Sect. 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 *Annæ* 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.*

Coke's Entries, 167.

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

Vide Dyer, 180. pl. 48. Raſtal 289. pl. 2.

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

Sect. 10. As to the ſecond Particular, *viz.* Where the Court may proceed in Manner abovementioned againſt Attornies, and others acting as ſuch, for Injuſtice to their Clients; It is every Day's Practice to move for it againſt them, for baſe and unfair Dealing towards their Clients in the Way of Buſineſs, as for protracting Suits by little Shifts and Devices, and putting the Parties to unneceſſary Expences in Order to raiſe their Bills, or demanding Fees for Buſineſs which never was done, or for refuſing to deliver up to their Clients, Writings with which they had been intruſted, in the Way of Buſineſs, or Money which has been recovered and received by them to their Clients Uſe, and for other ſuch like groſs and palpable Abuſes: But the Court will ſeldom grant an Attachment for the Detainer of ſuch Writings or Money, without firſt making a Rule on the Attorney, to deliver them to

Raſtal 93. pl. 3.

See 4 H. 4. Ch. 18. 3 Ja. 1. 7

the Party; alſo it will juſtify an Attorney's Detaining ſuch Writings or Money for his Security till he be paid all his juſt Fees; nor will it ever interpoſe in this Manner as to any Writings or Money received by an Attorney on any other Account, except only in his way of Buſineſs as an Attorney, but will leave the Party to his ordinary remedy by Action. Salk. 87 pl. 7.

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

[a] Cro. Car. 74. Dyer 241. pl. 50. 244 pl. 58.
[b] Fitz. Attachment, 7.
[c] 20 H. 6. 37. a. Fitz. Attachment, 3.
[d] Cro. Car. 74.
[e] 16 Ed. 4. 5. Bro. Privilege, 43.
[f] Moore, 882. pl. 1237.

Sect. 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 any thing 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, remiſly, [g] or oppreſſively, but alſo for all kinds of Oppreſſion or Injuſtice done by them in the Execution of their Offices, or by Colour of them.

Vide Supra Sect. 1. Fitz. Office del. Court, 12. Raſtal. 329. pl. 8 268. pl 5.
[g] Dy. 218 pl. 4.

Sect. 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,

[h] Fitz. Treſpaſs, 13. 33 H. 6. 55. b. 56. a.

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.

Sect. 14. I. 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 43 El. 3. 30.

Enqueſt, and ſome [a] of the others come within View of the Court, or into the ſame Town [b] in which the Court is holden, but refuſe to come into the Court to be ſworn; in which Caſes, upon Proof of ſuch Matter, the Court[c] may, at the Prayer of the Party, order the Jurors who appeared, to inquire what is the Yearly Value of ſuch Defaulters Lands, and after ſuch Inquiry made, either ſummon them to appear, on Pain of forfeiting ſuch Sum as their Lands have been found to be worth by the Year, or ſome leſſer [d] Sum, or impoſe [e] a Fine of the like Sum upon them, without any farther Proceeding. But it ſeems, [f] That ſuch Juror ſhall be liable to loſe his Iſſues only for ſuch Default, and not the yearly Value of his Lands, unleſs the Party pray it: But a Juror [g] who hath actually appeared, and after makes Default, is ſaid to be ſubject to ſuch Forfeiture of the yearly Value of his Lands, whether the Party pray it or not, becauſe his Contempt appears to the Court by its own Record; yet [h] even in this Caſe the Court, in Diſcretion, will ſometimes only impoſe a ſmall Fine. Alſo it is ſaid, That no Juror ſhall be ſubject to ſuch Penalty, where [i] the Inqueſt could not be taken, if he had appeared, as where but five of the Jurors ſummoned on an Aſſiſe, have had a View of the Land. Alſo it ſeems, [k] That a Juror who makes Default without ever coming into the Town wherein the Court is holden, is liable only to loſe his Iſſues, or to be amerced, but not to be fined: And it is ſaid, That he ſhall neither [l] be fined nor amerced, if the Defendant be eſſoined on the Day on which the Jury was to appear, for that his Appearance in ſuch Caſe would be to no Purpoſe; and it ſeems [m] queſtionable whether a Juror be amerciable for not appearing at the Return of a *Sicut alias Venire facias*, where the firſt *Venire* was not ſerved; neither doth a Juror ſeem to be amerciable at all, at the Day of the Return of the firſt *Venire* [n] *facias*, except before Juſtices errant, or of Oyer and Terminer, *&c.*

Sect. 15. II. For refuſing to be ſworn when they do appear; for which, as is ſeems, [o] 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.

Sect. 16. III. For refuſing [p] to give any Verdict at all.

Sect. 17. IV. For endeavouring to impoſe upon the Court; as where [q] 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 [r] 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.

Sect. 18. V. For misbehaving themſelves after their Departure from the Bar; as where they [s] do not all keep together till they have given their Verdict; or where any [t] of them carry any Thing eatable with them in their Pockets; or eat [u] or drink, or otherwiſe refreſh themſelves without Leave from the Court, before they have given their Verdict, though they were agreed [x] on it, and were alſo all the Time in the Cuſtody of the Bailiff appointed to take Care of them.

[a] Raſt. 267. b. pl. 2. 268. a. pl. 3. [b] Raſt. 267. b. pl. 1. 30 Aſſ. pl. 3. 42. 48 Ed. 3. 30. Bro. Jurors, 25, 26. 20 Aſſ. pl. 11. [c] Raſt. 267. b. pl. 2. 268. a. pl. 3. 4 Ed. 4. 37. a. 9 H. 4. 5. a. 20 Aſſ. pl. 11. 8 Co. 41. a. [d] Raſt 267. b. pl. 2. [e] Raſt. 267. pl. 2. 268. pl. 3. [f] Fitz. Peine, 1, 2. 30 Aſſ. 42. 4 H. 6. 7. a. 4 Ed. 36. b. 37. a. 36 H. 6. 27. a. Bro. Jurors, 15, 18. 26. Enqueſt, 42. 8 Fitz. Challenge, 47. 36 H. 6. 27. a. [h] Fitz. Office de Court, 12. [i] Fitz. Peine, 3. 9 H. 4. 5. a. [k] 10 E. 41. 19. [l] 10 Ed. 4. 19. 30 Aſſ. pl 17. Quære 48. Ed. 3. 12. a. 12 Aſſ. pl. 14. Fitz. Aſſiſe, 65. [m] 1 H. 7 8. a. [n] Fitz. Aſſ. 136. 466. 11 Aſſ. pl. 7. Bro. Amercement, 68. *See* the Chapter of Proceſs againſt Jurors. [o] 2 Inſt. 142, 143. 44 Ed. 3. 19. b. 8 Co. 38. b. 7 H. 6. 12. b. [p] Vaughan 152. Noy. 49. 3 Bulſt. 173. 9 H. 6. 44. b. [q] 29 Aſſ. pl. 27. Bro. Jurors, 28. 40 Aſſ. pl. 10. 1 Rol. Abr. 219. pl. 4. [r] Cro. El. 779. [s] 14 H. 7. 29. b. 30. Vaughan, 151. [t] Dyer 78. pl. 41. [u] Dyer 218. pl. 4. Vaughan, 152. Cro. Jac. 21. Fitz. Examination, 17. Bro. Jurors, 13. [x] Raſt. 268. pl. 4. 5.

Sect. 19. VI. For ſending [a] for, or receiving Inſtructions from either of the Parties concerning the Matter in Queſtion, and therefore [b] much more for receiving a Bribe.

[a] Raſt. 329.
[b] pl. 8 Hob 114. Fitz. Exami. 17

Sect. 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 Attaint: And there ſeem to be very few ancient Precedents, for the Puniſhment either of a Grand or Petit Jury, meerly for giving a Verdict againſt Evidence, or the Direction of the Court either in a Criminal or Civil Matter. It is ſaid [c] 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 [d] other Caſes in the Time of King *Edward* III. wherein it is ſaid, That a Juror was committed for refuſing to agree with the other eleven, it may be anſwered, That it is ſaid [e] in the firſt of thoſe Caſes, *That ſuch Juror ſtaid his Companions a Day and a Night, without agreeing with them, and this without Reaſon*; from whence it is reaſonable to intend, That there might be ſome Circumſtances of Misbehaviour, as an obſtinate perverſe Reſolution, Right or Wrong, to find a Verdict one way, and not to conſult with the other Jurors, nor hear their Reaſons, *&c.* And in the laſt of the [f] ſaid Caſes it is ſaid, that the Juror committed by the Juſtices of Aſſiſe, 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 Aſſiſe thither. And it was Part [g] of the Charge againſt *Empſon*, who was indicted in the Beginning of the Reign of King *Henry* VIII. for a great Complication of Offences, That he had committed a Jury to Ward, and bound them to appear before the King and his Council, and afterwards, on their Appearance, fined them (though with the Concurrence of the reſt of the Council) in the Sum of 8 *l.* a-piece, for refuſing to find a Perſon guilty of an Indictment of Larceny, upon ſufficient Evidence; yet it is ſaid in *Daliſon*'s [h] Reports of Caſes, in the third and fourth Years of *Philip* and *Mary*, That it was agreed, that Juſtices of Aſſiſe, Oyer and Terminer, Gaol-Delivery, or Peace, have no Power indeed to aſſeſs Fines on Jurors who make a falſe Oath before them, but that they may give them a Day before themſelves, or the King's Council; by which it ſeems to be implied, That ſuch Jurors were then thought to be ſome way or other puniſhable by ſuch Judges, or at leaſt by the King's Council; for otherwiſe it would be to little Purpoſe to bind them to appear before them. Alſo it ſeems to be holden by Sir *Edward Coke*, [i] 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 [k] 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 Manſlaughter only, againſt clear Evidence, and the Direction of the Court, upon an Indictment of Murder: And it is ſaid in *Palmer*'s [l] Reports, That Jurors, who go againſt

[c] Fitz. Coro. 108. Vaughan, 152.
[d] Fitz. Imprisonment, 4 Judgment 89. Verdict 40.
[e] 8 Aſſ. pl. 35. Vaughan, 151.
[f] 2 Jon. 16, 17. 41 Aſſ. pl. 11. 41 El. 3. 31. Vaugh. 151.
[g] 5 Raymond, 88, 89.
[h] Daliſon, 18.
[i] 12 Co. 23, 24.
[k] Yelv. 23. Noy. 48, 49.
[l] 1 Palmer, 363.

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 [a] and Petit [b] Juries were finable by the Juſtices of Gaol-Delivery, for going againſt plain Evidence, and the Directions of the Court; but theſe Proceedings were always thought Grievous, and were complained [c] of in the Houſe of Commons; and this Queſtion was at laſt fully conſidered and debated in *Buſhel's* Caſe, who having been committed by the Juſtices of Oyer and Terminer at the *Old Baily*, 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 [d] ſo much of the Evidence that it might appear that it was full and manifeſt; and likewiſe [e] for not ſetting forth, That the Defendant did know, and believe it to have been full and manifeſt; and alſo, [f] for not ſhewing what the Direction of the Court was, and in what Manner the Defendant found againſt it. And it was alſo reſolved, [g] That Petit Jurors are in no Caſe finable for giving a Verdict againſt the Evidence delivered in Court, whether they be liable to an Attaint for ſuch Verdict or not, not only for that the Jury are by Law the proper Judges of Matter of Fact, as the Judges are of Matter of Law, and therefore ought to be free in their Judgment of it, without being 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 provided, That all Iſſues ſhould be tried by the Neighbourhood of the Place in which they are ſuppoſed to ariſe, becauſe Neighbours are preſumed to have better Knowledge than others of what concerns their Neighbours. And for theſe Cauſes, and other ſuch like, the Court of King's Bench granted an Information againſt a Town-Clerk, for publiſhing an Order of the Court againſt Jurors, who had found a Perſon guilty of Manſlaughter only, upon an Indictment of Murder, by which Order the ſaid Jurors were declared to be juſtly ſuſpected of Bribery, and declared uncapable of holding an Office, *&c.*

[a] 1 Syd. 229, 230. 2 Keb. 180.
[b] 1 Syd. 272, 273. Raym. 88, 89, 138. 1 Keb. 769, 938. 2 Keb. 404.
[c] 1 Syd. 338. 2 Keb. 18., 181.
[d] Vaughan, 142. 2 Jon. 16, 17.
[e] Vaughan, 142. 2 Jon. 16, 17.
[f] Vaughan, 143.
[g] Vaughan, 144, 145. 3 Keb. 352. 2 Jon. 16. *Vide* Hob. 114. *Contra.* 3 Keb. 352.
Hilary, 10. Ann. Queen & Wakefield.

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

2 Jon. 15, 16. Vaughan, 144, 145. Palm. 363.

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.

Sect. 22. Alſo if a Judge, for the better Direction and Information of a Jury, ſhall ask them their Opinions concerning ſuch a particular Fact, and they ſhall refuſe to anſwer him, and obſtinately inſiſt to deliver in their Verdict as they think fit, contrary to his Direction, it ſeems queſtionable, whether they may not be fined in ſuch a Caſe alſo, unleſs an Attaint lie againſt them; for that it is the Duty of Jurors to take the Advice and Information of the Court, in Order to be governed by it as far as ſhall be conſiſtent with their Conſciences. Bracton 288. b 289. 2 Jon. 15, 16. Vaughan 144.

Sect. 23. Alſo if a Jury ſhall refuſe to find an Office for the King, upon full Evidence, it hath been holden, That they may be fined, for that in ſuch Caſe they are not liable to an Attaint, and their Finding does not determine any Man's Right, and the King, in many Caſes, hath no other Remedy; yet it ſeems queſtionable, how far at this Day theſe Reaſons may be thought concluſive; and it ſeems, that they hold as ſtrongly for the Puniſhment of Grand Jurors refuſing to find an Indictment of High Treaſon; and yet it will be hard to maintain, That ſuch Jurors are any Way puniſhable for ſuch a Refuſal. Moor 730. 3 Leon. 148. Vaughan 153. 9 H. 6. 44. b.

Sect. 24. But if a Petit Jury in a Leet, conceal a Matter preſentable by them, it is a good Cuſtom that they may be amerced for ſuch Concealment, being found by the Grand Jury; and by 3 *H.* 7. 1. ſet forth more at large. Book 1. Ch. 59. S. 1. *If an Inqueſt conceal any Matter inquirable before Juſtices of Peace, another Inqueſt may be impanelled to inquire of ſuch Concealments, and the Concealers may be amerced by the Diſcretion of ſuch Juſtices.* 9 H. 6. 44. b.

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.

Sect. 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, [a] That the Court of King's Bench having a general Superintendency over all inferior Courts may in Strictneſs award an Attachment againſt any ſuch Court uſurping a Juriſdiction no Way belonging to it, and putting the Subject to unneceſſary Vexation by Colour of a judicial Proceeding wholly unwarranted [a] 41 Aſſ. pl. 30. Salk. 201. 1 Keb. 484. Palm. 564.

by Law, and therefore [a] prohibited by it; yet in theſe Caſes it ſeems to be rather the more uſual [b] Way, firſt to award a Writ of Prohibition to ſuch Court, and afterwards an Attachment upon its Proceeding after ſuch Prohibition, and not to grant a Rule to ſhew Cauſe why an Attachment ſhould not go in the firſt Inſtance, unleſs there be ſome extraordinary Circumſtances in the Caſe; as where [c] the Steward of a Leet is guilty of a double Uſurpation, as of holding Plea of a Matter which aroſe out of his Precinct, and which, if it had ariſen within his Precinct, would not have been within the Juriſdiction of his Court; or where [d] the Judge of an inferior Court refuſes to receive a Plea that the Cauſe of Action aroſe out of his Juriſdiction; or where [e] 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 [f] 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 [g] 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.

[a] *Vide* 19 H. 6. 54 b. 9 H. 6. 61. F. N. B. 27. c.
[b] Regiſter 145, 146. F. N. B. 239. H. 240. B.
[c] 1 Syd. 464. 6 Mod. 90. 2 Inſt. 312. 2 Rol. Abr. 317 Letter I. 41 Aſſ. 30. Fitz. Leet 9. Bro. Leet 18, 31.
[d] Vaughan and Hodges *Paſche* 11. *Anne.*
[e] Salk. 201. pl. 3.
[f] Palmer 564. 1 Keb. 484. 6 19 H. 6. 54. 2 Rol. Ab. 317. I. pl. 1. 6 Mod. 90. 2 Keb. 617. 1 Ventris 65, 73. 1 Keb. 484. 1 Syd. 464

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

[h] Salk. 201. 3 Keb. 92.
[i] 2 Jon 178.
[k] F. N. B. 76. D. 160. B. 165. C. 166. D. 270 C. 9 H. 6. 61. 19 H. 6. 54.
[l] F. N. B. 76. B. C. D.
[m] F. N. B. 76. D.
[n] F. N. B. 270 A. B. C. 2 Inſt. 122 Fitz. Attachment, 8.

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 Caſes of this Nature, That the ſaid Court may in its Diſcretion, award an Attachment againſt any ſuch Judge, obſtinately and perverſely, and without any Colour of a reaſonable Excuſe, refuſing to proceed at all, or to give Judgment, or award Execution, in a Matter brought regularly before him; for all ſuch Delays of Juſtice are not only grievous to the Suitor, but bring a Diſgrace upon the Law it ſelf: 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 [o] 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

[o] F. N. B. 68 E. *Infra* Sect. 34.

at the Party's Election into the Court of Common Pleas, except in ſome ſpecial [a] Caſes; and this ſeems [b] 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 [c] of Right Cloſe; or to compel the Judge of any inferior Court, whether of Record [d] or not, to proceed [e] in a Plea, or to give Judgment, [f] or to award Execution. [g]

Sect. 28. As to the fourth Particular, *viz.* In what Caſes inferior Judges are puniſhable in the Manner abovementiond, for Contempts of ſuperior Courts: There is no Doubt but that Juſtices [h] of Peace, or Commiſſioners [i] of Sewers, may be ſo puniſhed for proceeding in any Matter before them, after a *Certiorari* delivered to them, or the Judge of a Spiritual [k] or Civil [l] Law Court, for proceeding in a Cauſe, after Notice of a Rule to ſhew Cauſe why a Prohibition ſhould not go, or a Judge of any inferior Common Law Court, for proceeding in a Cauſe after a *Habeas Corpus*, or Writ of Error allowed; or a Sheriff, [m] for proceeding in Replevin, or other Cauſe, in the County-Court, after a *Superſedeas*, *Pone* or *Recordare*. Alſo a Rule [n] has been granted to ſhew Cauſe why an Attachment ſhould not go againſt the Steward of a Wapentake for proceeding after a Tolt, though this be only a Contempt to the County-Court.

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

Sect. 30. As to the ſecond Point, *viz.* In what Caſes Counſellors are puniſhable in the Manner abovementioned, it ſeems clear, That notwithſtanding they are neither Officers of any Court, nor inveſted with any judicial Office, but barely practiſe as Counſellors, yet [o] inaſmuch as they have a ſpecial Privilege to practiſe the Law, and their Misbehaviour tends to bring a Diſgrace upon the Law it ſelf, they are puniſhable for any foul Practice as other Miniſters of Juſtice are.

Sect. 31. As to the third Point, *viz.* In what Caſes Gaolers are puniſhable in the Manner abovementioned, it ſeems clear, That they are not only puniſhable in this Manner, as all other Officers are, by the Courts to which they more immediately belong, for any groſs Misbehaviour in their Offices, or Contempts of the Rules of ſuch Courts, but they are alſo puniſhable by any other Courts for diſobeying Writs of *Habeas Corpus* awarded by ſuch Courts, and not bringing up the Priſoner at the Day prefixed by ſuch Writs. Alſo it ſeems clear, [p] That it is no Excuſe for not obeying a Writ of *Habeas Corpus ad ſubjiciendum*, that the Priſoner did not tender the Fees due to the Gaoler: Alſo [q] it ſeems to be the the better Opinion, That the Want of ſuch a Tender is no Excuſe for not obeying a Writ of *Habeas Corpus ad faciendum & recipiendum*; however [r] 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, [s] nor, as ſome [t] ſay, till he be paid all that is due to him for the Priſoner's Diet, for that a Gaoler is compellable [u] to find his Priſoner Suſtenance; but this is denied by others. [x]

Sect. 32.

[a] F. N. B. 62. o. 230. c. 63. b 67. b. 13. h. 14. a.
[b] F. N. B. 3. e. 13. a.
[c] F. N. B. 12. e.
[d] Raſtal's Entries, 83. b. pl. 4. F. N. B. 20. b. 153. d. 243. d.
[e] F. N. B. 12. e. 13. a. Raſt. Ent. 83. b. pl. 4.
[f] F. N. B. 153. b. c. 243. d.
[g] F. N. B. 20. a. b.
[h] Moor 677. pl. 922. Yelv. 32. 1 Keb. 93. 1 Mod. 44.
[k] 2 Jon. 47. 1 Ro R. 315.
[l] F. N. B. 13. b. 14. a. Fitz Rep'e vin. 31. 43 Ed. 3. 26. Fitz. Proceſs, 168. Action ſur le Caſe, 39.
[m] Burgh & Blunt, Hil. 3 Geor.
[n] 6 Mod. 137. See Book 1. Ch 83. S. 26.
[o] 1 Keb. 272. pl. 57.
[p] March 89. 1 Keb. 280. pl. 79. 2 Jon. 178. Contra 1 Keb. 566. pl. 11.
[q] 2 Jon. 178. 2 Rol. Abr. 32. B.
[r] 1 Rol. Rep. 338, 339. Contra 2 Rol. Abr. 32. B.
[s] Co. Lit. 295. a. 9 Co. 87. b.
[t] Pl. Com. 68. a. 2 Rol. Ab. 32. B.

Sect. 32. Alſo it ſeems, That the Court of King's Bench, which has a general [a] 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, [b] That a Gaoler is no Way puniſhable for keeping a Debtor in Irons. And it ſeems agreed at this Day, That a Gaoler ſhall not be puniſhed in the Manner 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.

Sect. 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 reſcuing [c] a Perſon arreſted by due Courſe of Law, or for proceeding in a Cauſe againſt [d] the King's Writ of Prohibition, or for diſobeying other [e] Writs, wherein the King's Prerogative, or the Liberty [f] of the Subject are nearly concerned; but it doth [g] 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 [h] certain, That no Peer is liable to an Attachment for not appearing on a Jury; therefore it ſeems, That what is ſaid [i] 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 [k] Nature, as thoſe abovementioned, and others [l] 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. Contemptuous Words or Writings, concerning the Court.
4. Contempts of the Rules or Awards of the Court.
5. Abuſes of the Proceſs of the Court.
6. Forgeries of Writs, and other Deceits of the like Kind, tending to impoſe on the Court.

Sect. 34. As to the firſt Particular, *viz.* Where Perſons are puniſhable in the Manner 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 [m] of any of them being a Contempt of the King's Authority, is, in Strictneſs, puniſhable in the Manner abovementioned, if the Court in Diſcretion, ſhall think fit ſo to proceed: Yet it doth not ſeem to have been uſual for the Court to proceed in this Manner for a bare Nonfeſance, in not performing the Command of the firſt Writ in any Caſe whatſoever. But [n] it ſeems clear, That an Attachment lies of Courſe for the Nonperformance of the Demand of a *Pluries*, which may in ſome Caſes, if not in all, be taken out together with the *Alias*, at the ſame Time with the firſt Writ: Alſo it ſeems, That the Court may in any ſpecial Caſe, in which it ſhall ſeem proper, make a Rule to compel the Party to whom the firſt Writ is directed, to execute it; and, if

[a] 6 Mod. 137. [b] 2 Inſt. 381. 2 Rol. Ab. 806. c. 1. 807. pl. 2. 3 Co. 44. [c] Fitz. Proceſs, 114. 161. Return de vicount, 74. 1 H. 5. 14 a. Dyer 212. pl. 36. 27 H. 8 22. b. Compton Jur. 14. a. [d] 21 Ed. 3. 3. pl. 7. [e] 2 R. A. 238. Letter A. 234 pl. 3. 8 Ed. 4. 17. a. *Vide* 15 Ed. 3. Ch. 6. F. N. B. 47. c. Fitz. quare nonadmiſit 7. Bro. Contempt, 5. 8 Co. 60. [f] 11 H. 4 15. b. Fitz. Witherham, 4. [g] 21 Ed. 3. 3. pl. 7. F. N. B. 33. e. [h] Dyer, 319. pl. 98. [i] Fitz. Proceſs, 198. Cro. El. 170. 2 Rol. Abr. 234. pl. 3. Bro. Contempt, 3. 19. 6 Co. 54 a. Finch 355. [k] Dyer 315. pl. 98. Hob. 61. 21 Ed. 3. 59. b. Raſtal 313. pl. 19. 20. 29 Aſſ. pl. 33. [l] Cro. El. 503, 570. 1 Rol. Abr. 220 pl. 12. 221 pl. 13. 3 Inſt. 142. [m] 1 Mod. 44. 5 Mod. 314, 315. Fitz quare nonadmiſit 7. [n] Fitz. Suggeſtion, 25. 43 Aſſ. 39. Raſtal 457. pl. 7. Finch 237. 11 H. 4. 86. Fitz. Count. 34. Suggeſtion, 25. F. N. B. 68. e.

Supra Sect. 27.

if ſuch Rule ſhall be diſobeyed, there can be no Doubt but that the Court may proceed againſt ſuch Diſobedience in the ſame Manner as they uſually do againſt the Diſobedience of any other Rule: Alſo it ſeems [a] 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, [b] or Goods ſeiſed, [c] or Poſſeſſion of Lands delivered [d] by him, by Virtue of the King's Writ, were reſcued or violently taken from him, *&c.* the Court may award an Attachment againſt the Reſcuers. Alſo it is certain, That the Court hath, in ſome Caſes, awarded an Attachment upon Affidavits of a Reſcous, where the Officer hath not returned one; yet this was anciently [e] looked on as irregular, and of late the Court has refuſed to grant an Attachment in any Caſe for a Reſcous, unleſs the Officer will return it; for that it hath been found by Experience, that Officers will often take upon them to ſwear a Reſcous, where they will not venture to return one.

[a] F. N. B. 165 B 166, B, C, D 270. C. 173. E. 174. A, B. 175. B. Fitz. Suggeſtion, 9. 8 Co. 60. *Supra* Sect. 33.

[b] Fitz. Attachment, 1. Proceſs, 56. Fitz Retorn de vicount, 74. 37 H. 6. 27. b. Dy. 212. pl. 36.

[c] 2 Jon. 39.

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

[d] Salk 321, 74.

[e] Fitz. Suggeſtion, 25.

[f] Cro Car 146. 7 H. 6. 25. pl. 10.

[g] Raym. 378.

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

Salk. 84.

Sect. 37. As to the fourth Particular, *viz.* Where Perſons are puniſhable 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 [f] 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 [g] 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 Maſter, for that ſuch a Taxation is, in Judgment of Law, a Taxation by the Court: But it ſeems, That generally an Attachment is not grantable for Diſobedience of any Rule, unleſs the Party have been perſonally ſerved with it; nor for Diſobedience of a Rule, at *Niſi Prius*, unleſs it

[f] 43 Aſſ. pl. 39. Fitz. Imprisonment, 18. and *Vide* Fitz. Accompt, 23, 84, 109, 112. 29 Ed. 3. 31. b.

[g] 1 Mod. 21. Salk. 71. pl. 4. 83 pl. 1. *Vide* 9 & 10. Guil. 3. 151.

Salk. 84. be made a Rule of Court, not for Diſobedience of a Rule made by a Judge at his Chamber, unleſs it be entred.

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 Inſtances of this Kind that it would be in vain to go about to enumerate them all, and therefore I ſhall only take Notice of ſome of the Principle of them, as,

Hob. 264. *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 [a] of the Death of her Husband, whom ſhe knows to be alive.

[a] 8 H. 4. 17. Fitz. Coron. 73.

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

Style Rep. 239, 343.

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

[b] Fitz. Corpus cum Cauſa, 3. 14 H. 7. 6. b. 7. a. 6 Co. 60. a. Savil. 14.

[c] 7. H. 6. 45. a.

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

[d] Hob. 264. Dyer, 249. pl. 84. *Vide* 8 El. 2.

Sect. 43. As to the ſixth Particular, *viz.* Where Perſons are puniſhable in the Manner abovementioned for forging of Writs, and other Deceits of the like Kind, tending to impoſe on the Court; nothing can be more frequent than to proceed in ſuch Manner for Offences of this Kind, as for altering [e] the *Teſte* of Writs, or for filling [f] them up after they are ſealed, or [g] for bringing groundleſs Actions, in order to intitle the Parties to the Privilege of the Court, or for getting [h] Judgment in Ejectment, by Affidavit of the Service of a Declaration on one who was procured to perſonate the Tenant, or for any ſuch like Practices.

[e] Dyer, 241. pl. 50. 244. pl. 58.

[f] 6 Mod. 310.

[g] Dyer, 245. pl. 61. Bro. Privilege, 43.

[h] 6 Mod. 16. Savil. 31.

CHAP.

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.

Sect. 1. And Firſt, Of an Appeal by an Innocent Perſon, which is the Party's private Action; proſecuting alſo for the Crown, in Reſpect of the Offence againſt the Publick, which he may do two ways, Finch of Law, 310, 311. Plow. Com. 476.

1. By Writ.
2. By Bill.

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

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

Sect. 4. And firſt, there is no Doubt [a] but that any Appeal may be ſued by Bill in the King's Bench againſt any Perſon *in cuſtodia Mareſchalli*, either by an actual Commitment, or by having Bail filed for him in that Court; but [b] not againſt one who is mainpriſed *de die in diem*, for that ſuch an one cannot be ſaid to be *in cuſtodia Mareſchalli*. And it hath been reſolved, [c] That if the Appellee be arraigned and tried the ſame Term, there is no Neceſſity to file the Bill againſt him. Alſo [d] it ſeems clear, That if a Defendant appear in the ſaid Court on a void Writ of Appeal, he may be committed to the Marſhalſey, and then declared againſt *in cuſtodia Mareſchalli*; but where a Defendant appears on a Writ not void, but voidable only, as for the want of an Addition, *&c.* it was once [e] holden, That he could not be committed, nor declared againſt *in cuſtodia Mareſchalli*; but ought to be diſcharged. But the contrary hereto ſeems to be now ſettled in the Caſe of *Reeves* [f] againſt *Trundal*, who appearing in the Court on a Writ of Appeal of Death, demanded Oyer of

[a] Cro. El. 605, 695. S. P. C. 64. Letters C, D. H. P. C. 179. 17 Aſſ. pl. 5. 17 Ed. 3. 13. pl. 40.
[b] 4 Inſt. 180. 1 Bulſt. 74.
[c] 1 Jo. 425. Cro. Car. 532. 1 Rol. Ab. 536. K.
[d] Cro. El. 694, 695.
[e] Cro. El. 605, 695.
[f] Paſchæ, 3. Georg.

Like Caſe between Smith and Bowen, Mich 7. *Annæ.*

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

Keilw. 152. b. pl. 4.

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

2 Inſt. 418, 420.

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 Caſes, and for certain Cauſes, to hear and determine them.

[a] Bro. Appeal, 11, 19, 51, 123. Dyer, 201. pl. 67. S P. C. 64. Letter C. H. P. C. 148.

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

Vide Supra, fol. 28, 29, 30. Dy. 99. pl. 62.

Sect. 8. Fifthly, It ſeems to follow, from the Purport of the Statutes which have been generally conſtrued 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.

[b] Coro. 95. [c] *Vide* S. P. C. 65. Letter A. 2 Inſt. 420. H. P. C. 179. 2 H. 4. 19. pl. 12. Bro. Appeal, 18. [d] 44 Ed. 3. 44. pl. 57. *See* Bro Appeal, 11.

Sect. 9. Sixthly, It ſeems to be holden 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 Treſpaſſes 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 inſinuated, 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 little or nothing.

[e] *See* Ch. 9. Sect. 39, 40, 41. [f] *See* Ch. 9. Sect. 42.

Sect. 10. Seventhly, It is certain, That an Appeal may be commenced [e] by Bill, before the Sheriff and Coroner, and removed [f] from them into the King's Bench, by *Certiorari*, as hath been more fully ſhewn, Chap. 9.

[g] H. P. C. 180. S. P. C. 65. a. 1 Inſt. 74. a. b. *Vide Infra*, Sect. 28.

Sect. 11. Eighthly, It ſeems to be agreed, [g] That an Appeal by the Courſe of the Civil Law, in Nature of a Bill of Appeal by the Common Law, may be ſued before the Conſtable and Marſhal for ſome

Felonies done out of the Realm, in Relation whereunto it is enacted by 1 *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.*

Sect. 12. In the Conſtruction of this Statute, it ſeems to have been agreed, [a] 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 [b] Law, and give Sentence by the Teſtimony of Witneſſes, or Combat: From whence it follows, [c] 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 [d] it ſeems to be clear, That no ſuch Appeal can be proſecuted before the Marſhal alone without a Conſtable.

[a] S. P. C. 65. Letter B. 1 Inſt. 74. a. 13 H. 4. 5. a. [b] 4 Inſt. 155. 1 Inſt. 74. 391. b. *Supra* Ch. 4. Sect. 10. Bro Juriſdict. 103. [c] *See* B. 1. Ch. 37. Sect. 8. and Ch. 4. of this Book Sect. 10. and 1 Inſt. 391. a. [d] *See* Ch. 4. Sect. 8. Letter f. Hutt. 3. 1 In. 74. b. [e] S. P. C. 65. Letter B 1 Inſt. 74. b. B. 1. Ch. 31. Sect. 11.

Sect. 13. It hath been holden, [e] 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 reſtrain ng the Civil Law, in Caſes within the Conuſance of the Common, to reſtrain alſo in Caſes which the Common Law had nothing to do with, and which were properly cogniſable by the Civil Law, and by that only; for the only End of ſuch a Conſtruction would be to cauſe a Failure of Juſtice.

Sect. 14. It is farther enacted by the ſaid Statute of 1 *H.* 4. 14. *That no Appeals be from thenceforth made, or in any wiſe purſued in Parliament, in any Time to come.*

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

1. Not Capital.
2. Capital.

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

Fleta Lib. 1. chap. 41. Bract. Lib. 3. chap. 21. 4 Inſt. 182. 1 Inſt. 126. b.

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

Sect. 16. As to the firſt Point, *viz.* Of what *Mayhems* an Appeal lies; I ſhall take it for granted, That notwithſtanding every [f] Hurt whatſoever done to a Man's Body, whereby he is leſs able in Fighting, may perhaps, properly enough, in a large Senſe, be called a *Mayhem*, and [g] will certainly ſubject the Perſon who occaſion'd it to the Payment

[f] *See* B. 1. Ch. 44. [g] 2 Jo. 205. Hob. 134.

of Damages, in an Action of Treſpaſs by the Party grieved, whether it were malicious, or happened through Accident or Miſadventure; yet [a] an Appeal of *Mayhem* cannot be maintained for any ſuch Hurt, unleſs it were accompanied with ſome evil Intention in the Perſon who cauſed it; for ſurely the Law, in requiring that the Word Felony be made uſe of in every ſuch Appeal, (as will be more fully ſhewn under the next Point) cannot imply leſs than that the Fact muſt be attended with ſome odious Circumſtances Yet it ſeems clear, That if a Man ſtriking 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 miſs him, and ſtrike a third Perſon, and maim him, he is liable [b] to an Appeal of *Mayhem* at his Suit, whether he had any Kind of Ill Will againſt him or not.

[a] 13 H. 7. 14. pl. 5.

[b] Bro. Appeal, 157. 13 H. 7. 14. pl. 5. *See* B. 1. Ch. 31. Sect. 41.

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,

Sect. 17. Firſt, That the Word *Mayhemiavit* [c] is ſo neceſſary in every ſuch Writ, Bill and Declaration, that it can be ſupplied by no other Word of the like Senſe, nor by any Circumlocution whatſoever.

[c] 1 Inſt. 126. b.

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

[d] 1 Inſt. 126 a. Bro. Appeal, 72, 86, 143.

[e] *See* B. 1 Ch 44 Sect 3.

Sect. 19. Thirdly, [f] 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.

[f] 1 Inſt. 127. a. Fulton 17. a. 41 Aſſ. 16. 40 Aſſ. 9. Fitz Treſpaſs, 199. Coron. 11, 228. S P. C. 44. Letter F. *Contra* Bro. Appeal, 154.

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

Bro. Appeal, Fitz. Coron. 110. 60. [g] Coke Entries, 50. 51. Raſtal's Entries, 45, 46.

Sect. 21. As to the third Point, *viz.* What Defence may be made by the Appellee; being able to find little or nothing Particular concerning Pleas in Abatement by ſuch an Appellee, I ſhall refer the Reader for that Matter, to what is ſaid concerning Pleas in Abatement of Appeals in general, in the later 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 *ſon Aſſault demeſne*, 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 Nonſuit in a former Action.

6. That [h] an Appellee cannot wage his Law.

[h] 1 Inſt. 295. a. *Vide* 48 Ed. 3. 6. Fitz Ley, 36.

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

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

[a] 22 Aſſ. pl 82. Fitz. Coro. 110, 182.
[b] 4 Co. 43. 43 Aſſ. 39. Bro. Appeal, 60.
[c] 4 Co. 43. a. 1 Leon. 318, 319.
[d] 43 Aſſ. pl. 3. 1 Leon. 318, 319.

Sect. 23. As to the ſecond Particular, *viz.* Where, and in what Manner *ſon Aſſault Demeſne*, and other Matters of the like Nature, may be pleaded in Bar of an Appeal of *Mayhem*; It ſeems clear, that it is a good Plea in Bar of ſuch an Appeal, That [e] the Plaintiff firſt aſſaulted the Defendant, and would have beaten and killed him, unleſs he had defended himſelf againſt him, *&c.* Or that [f] the Plaintiff firſt aſſaulted the Defendant, who fled from Place to Place, till he was reduced to a Neceſſity of Fighting, *&c.* And in ſome Books [g] it ſeems to be holden in general, That *ſon Aſſault Demeſne* may be pleaded in Bar of any ſuch Appeal without any ſuch ſpecial Circumſtances in Favour of the Defendant: Yet how far a trifling Aſſault may juſtify a grievous *Mayhem*, as the Cutting off of a Leg or Hand, *&c.* unleſs it happened accidentally in the Scuffle, without any barbarous Intention, may well deſerve to be conſidered. However [h] 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 [i] 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, [k] That a Defendant cannot give in Evidence on the general Iſſue, that the Plaintiff firſt aſſaulted him, but muſt ſpecially plead it.

[e] 2 Rol. Ab. 547. Let. F. Raſt. Ent. 45.
[f] 2 Rol. Ab. 112. Let. B.
[g] 25 Ed. 3 42. pl. 21. *See* B. 1. Ch. 60. Sect 23.
[h] 27 Ed. 3. 94. pl. 1. 41 Aſſ. pl. 21. Fitz. Coro. 142. 1 Keb. 921. 1 Syd. 246.
[i] 41 Aſſ. pl. 21. Bro. Viſne, 74. Bro. Traverſe, 173. 2 Rol. Abr. 548. pl. 5. 2 Inſt. 316.
[k] 2 Inſt. 282, 283. 2 Inſt. 316. 35 H. 6. 39. b. 30. a.

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

[l] 6 H. 7. 1. pl. 1. Fitz. Coro. 63. 6 Co. 44 a.
[m] 9 Co. 78. b.

Sect. 25. As to the fourth Particular, *viz.* What Kind of Releaſe may be pleaded in Bar of an Appeal of *Mayhem*; There can be no Doubt, but that a Releaſe of all Manner of Appeals, [n] or a Releaſe of all Manner of Actions, or a Releaſe of all Manner of Demands, [o] might always be pleaded in Bar of ſuch an Appeal; and that a Releaſe of all Manner

[n] Lit. Sect. 501.
[o] Lit. Sect. 508.

[a] 1 Inſt. 288. Manner of Actions [a] 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. 1 Inſt. 288.

Sect. 26. As to the fifth Particular, *viz.* Where a Nonſuit in a former Action may be pleaded in Bar of an Appeal of *Mayhem*; It ſeems clear, [b] That a Nonſuit in any ſuch Appeal, after the Plaintiff hath appeared to it, may be pleaded in Bar of any other. Alſo [c] it ſeems to have been adjudged, That it may alſo be pleaded in Bar of an Action of Treſpaſs brought for the ſame Maim, and alſo for the Battery with which it was accompanied; yet howſoever the Law may ſtand in Relation to this Matter; if ſuch Action be brought for the Battery only, without mentioning the *Mayhem*, I ſee not how it can be barred by ſuch a Nonſuit, becauſe it is generally holden, That in an Appeal of *Mayhem* no Conſideration [d] can be had of the Battery, but only of the *Mayhem*; and if ſo, it ſeems ſtrange, that a Nonſuit in ſuch an Appeal ſhould bar an Action of a different Nature, brought for a Matter which the Appeal had nothing to do with. However [e] it ſeems clear, That a Nonſuit in an Action of Treſpaſs is no Bar of an Appeal of *Mayhem*. Alſo I take it for granted, That a Nonſuit in an Appeal of *Mayhem*, before the Plaintiff hath appeared to it, is not [f] 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.

[b] 43 Aſſ pl. 39. 40 Aſſ. pl. 1. 1 Inſt. 139. a. Fitz. Coron. 214.
[c] 43 Aſſ. pl. 39. Bro. Appeal, 138.
[d] Bro. Appeal, 60. Fitz. Coron. 110. 182. *Vide ſupra* Sect. 22.
[e] Bro. Appeal, 138. Fitz. Ley. 36.
[f] 1 Inſt. 139. a.

[g] 28 Aſſ pl. 5. 8 H. 4. 21. pl. 1. 2 Rol. Abr. 578. Lett. F.

Sect. 27. As to the fourth Point, *viz.* How the *Mayhem* ſhall be tried, and where the Trial ſhall be peremptory; There [g] 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 [h] 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, [i] That they are not bound to try it in ſuch Manner, but may order a Trial by a Jury, at which it is ſaid, [k] 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 diſcretionary Power in Relation to ſuch View, it hath been reſolved, [l] 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, [m] That an Adjudication made upon ſuch View is peremptory and concluſive to each Party.

[h] 28 Aſſ pl 5. Raſt. Ent. 46. pl 5, 6. 28 Ed. 3. 94. pl. 1.
[i] 6 H. 7. 1. pl. 1. 21 H. 7. 33. pl. 30. 21 H. 7. 40. pl. 58.
[k] 41 Aſſ pl. 27.
[l] 22 Aſſ. pl. 82. *Vide* 21 H. 7. 33 pl. 30.
[m] 2 Inſt. 313. 6 H. 7. 1. pl. 1.

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

28 Aſſ pl. 5. 21 H. 7. 33. pl. 30. 37 Aſſ. pl. 9. 26 Aſſ. pl. 32.

Secondly, Of Capital Appeals there are two Kinds.

1. Of Treaſon.
2. Of Felony.

Sect. 29.

Sect. 29. And firſt of Appeals of Treaſon, which, as it is ſaid, [a] might be ſued anciently not only before the Parliament, but alſo before other Courts of Common Law, as well as before the Conſtable and Marſhal, and were determinable by Battel, Verdict, or otherwiſe, according to the Courſe of the ſeveral Courts before which they were commenced. But it is certain, That ſuch Appeals before the Parliament are taken away by 1 *H.* 4. 14. ſet forth more at large in the fourteenth Section of this Chapter, But I do not ſee any Reaſon why Appeals of Treaſon, done in the Realm, before other Courts of Common Law, which had before Juriſdiction thereof, ſhould be conſtrued to be taken away by that Statute, which by ordaining, *That Appeals of Things done within the Realm, ſhall be tried and determined by the good Laws of the Realm*, cannot be intended to reſtrain any Appeal determinable wholly by thoſe Laws, as all the Appeals before the Courts of Common Law ſeem always to have been. However, ſince there has been no Inſtance of any ſuch Appeal, before any Court of Common Law, either ſince the making of the ſaid Statute, nor for many Years before, the Law relating to ſuch Appeals ſeems wholly obſolete at this Day. But as for Appeals before the Conſtable and Marſhal, of Treaſons 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 Treaſons. Alſo it hath been adjudged, that the Statutes which ordain, That Treaſons done out of the Realm ſhall be tried in the King's Bench, *&c.* do not take away the Juriſdiction of the Conſtable and Marſhal, in Relation to Appeals of ſuch Treaſons, as hath been more fully ſhewn Chap. 4. Sect. 9. And agreeably hereto, an Appeal of Treaſon, ſuppoſed to have been committed beyond Sea, was actually commenced in the ſeventh Year of the Reign of King *Charles* the Firſt, by *Donald* Lord *Rea*, againſt *David Ramſey*, Eſq; before the Conſtable and Marſhal, who, for want of ſufficient Proof to clear the Truth of the Accuſation, actually awarded, That a Duel ſhould be fought between the ſaid Appellant and Appellee, for the final Determination of the Matter.

2 Inſt. 132. Brac. 118, 119. Fleta Lib. 1. Ch 21. S. P. C 78. Letter C. *Contra.* Bro. Appeal, 46.

4 Inſt. 124. H. P. C. 180. ſeems contrary.

Ruſhworth's Collect. Part 2. Vol. 1. from fol. 112. to 128.

Of Appeals of Felony there are four principal Kinds,

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

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

[b] Moor 461. pl. 645. H. P. C. 183, 184. Keilw. 120 a. S. P. C 60. Letter D. *See* the Books under cited. Con. 45 Ed. 3. 25. pl. 36. 41 Aſſ. pl. 14

Sect. 30. Firſt, That [b] the Infancy, Old Age, or other Imbecillity 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 Defendant has proper Means for his Acquittal, by putting himſelf upon a

Trial by his Country, and the Imbecillity 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 [a] of late Times, contrary to the numerous Authorities [b] 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 nonſuited for the Non-appearance of ſuch Guardian, upon Demand, at any Day whereon he is demandable; notwithſtanding an Allegation that he was not able to come by Reaſon of Sickneſs, or other ſuch like Excuſe. And there [e] is a Caſe wherein the Court refuſed to inlarge the Day of ſuch Guardian's Appearance upon a Surmiſe of his Sickneſs. But notwithſtanding the Guardian be ſo neceſſary in the Proſecution of ſuch a Suit, yet if the Infant come into Court, and ſay he will relinquiſh it, and yet the Guardian will proſecute it; the Court may, [f] in Diſcretion, diſcharge ſuch Guardian, and aſſign another, for it is not reaſonable that an Infant be bound to continue a Suit againſt his Will, which demands nothing but Revenge, and will be chargeable to him.

Sect. 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 Charta*, 34, which ordains, *That no Man ſhall be impriſoned on the Appeal of a Woman, for the Death of any one but her own Husband*, reſtrains not any other Appeal whatſoever.

Sect. 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.

Sect. 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 Purport of the whole Statute hath been conſtrued [l] 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* [m] *and the Day after the Deed done.* And it hath been holden, [n] 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 favour'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 [o] 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

[a] 27 H. 8. 11. pl. 25. Keilw. 120. pl. 66. S. P. C. 60. D. H. P. C. 183. Smith and Bowen, Mich. 7 *Anne.* 2 Inſt. 320.
[b] 32 Aſſ. pl. 8. Dyer 137. pl. 24. 11 H. 4. 94. pl. 56. 13 Aſſ. pl. 10. 17 Ed. 4. 2. pl. 4. Bro. Appeal, 116. Fitz. Age 57. 83. 21 Aſſ. pl. 4. 27 Ed. 3. 83. pl. 2. 21 Ed. 3. 23. pl. 16.
[c] 27 H. 8. 11. pl. 25.
[d] Noy. 88. Latch. 173.
[e] Noy. 88. Latch. 173.
[f] 1 Rol. Abr. 288. D. Style 456. *Vide* Salk. 176, 177.
[g] Co. Lit. 25. b. 2 Inſt. 68. Fitz. Coron. 357. S. P. C. 60. F. H. P. C. 184.
[h] H. P. C. 183. S. P. C. 60. D. 98. C.
[i] 11 Aſſ. pl. 27.
[k] 17 Aſſ. pl. 26. Bro Appeal, 118, 146. Fitz. Utlagary. 47.
[l] S. P. C. 62. Letter B. *Infra.* Sect. 48.
[m] Bro. Appeal, 37. 22 Ed. 4. 39. b.
[n] S. P. C. 63. Letter A.
[o] 4 Co. 42. b. 2 Inſt. 320. 3 Inſt. 55.

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, [a] That if a Perſon become Acceſſary after the Death, by receiving the Offender, an Appeal lies againſt him, at any Time within the Year and Day after ſuch Receipt, becauſe till then the Appellant could not poſſibly be guilty of any Negligence as to the Bringing of an Appeal againſt the Receiver. Alſo if an Appeal had been abated by the Demiſe of the King, before 1 *Ed.* 6. Ch. 7. (by which this Miſchief is provided againſt) it ſeems [b] 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.

[a] 26 Aſſ. pl. 52. 3 Inſt. 53. S. P. C. 63. Letter B. 2 Inſt. 320.

[b] 2 H. 7. 10. pl. 5. Bro. Appeal, 81. 10 Ed. 4, 13. pl. 7. Fitz. Re-attachment, 8. 7 Co. 30.

Sect. 34. It ſeems, That the Year and Day in any of the Caſes abovementioned, 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 [c] if the Party dye at any Time the firſt Day of *January*, the Year ſhall End the firſt Day of *January* following.

[c] *Vide* 5 Co. 1. Co. Lit. 130. b. 255. A. *Contra.*

Sect. 35. As to the ſecond Point, *viz.* In what County an Appeal of Death muſt be brought; I ſhall take it for granted, That it is a local [d] 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, [e] 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 [f] to be at the Bar, and by a Jury returned [g] from the Body of each of thoſe Counties. But ſince the making of 2 & 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 ſue Appeal of Murder in the ſame County where the Perſon felonionſly ſtricken, or poiſoned, ſhall die*, &c. I take it for granted, That ſuch an Appeal, in the County wherein the Party died, may be tried by a Jury of ſuch County without the Joinder of any other.

[d] 18 Ed. 3. 32. pl. 6. S. P. C. 63. D. Fitz. Forfeiture, 14. Dyer, 38. pl. 50, *&c.*

[e] 3 H. 7. 12. pl. 4. 4 H. 7. 18. pl. 10. Fitz Coron 59, 60. But the Preamble of 2 & 3 Ed. 6. 24. ſeems contrary.

[f] Dy 46. pl. 8.

[g] 3 H. 7 12. pl. 4. Finch, 410. 411.

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, *viz.* By whom an Appeal of Death is to be brought, I ſhall endeavour to ſhew, Dy 46. pl. 8.

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 obſervable. *Vide Infra.* Sect. 59. & 60.

Sect. 36. Firſt, She muſt be able to prove, not only that ſhe was wholly Innocent herſelf of the Death complained of, but alſo that ſhe was the lawful Wife of the Deceaſed, at the Time of his Death; for it ſeem to be clearly ſettled, [h] That *N'unques accouple in loial matrimonie* is a good Plea in ſuch an Appeal, and triable by the Biſhop's Certificate, who, if the Marriage were unlawful, by Reaſon of a Precontract, or Conſan-

[h] 2 Inſt. 68. 28 Ed. 3. 91. pl. 4. 50 Ed. 3. 15. 27 Aſſ. pl. 3. 11 H. 4. 14. a. b. S. P. C. 59. A. B. H. P. C. 181. 1 Inſt. 33. b.

Conſanguinity, or otherwiſe, ought to certify againſt the Appellant. Alſo it is laid down as a Rule in the Old Books, [a] That a Wife may have an Appeal of the Death of her Husband *inter brachia ſua interfecti & non aliter.* By which Words, *inter brachia ſua*, according to Sir *Edward Coke*, [b] it is to be underſtood, That the deceaſed had the Wife lawfully in Poſſeſſion at his Death; and if this be the Meaning of them, thus much at leaſt ſeems to follow, That if the Husband were divorced from the Wife at his Death, though by a voidable Sentence, ſhe cannot maintain an Appeal. Yet it is generally holden, That a Wife who hath eloped from her Husband may have an Appeal of his Death, as ſhall be more fully ſhewn in the next Section. And *Staundford* [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.

[a] Brict. Lib. 3. cap. 29. Fleta Lib. 1. cap 35. S. P. C. 58. C.
[b] 2 Inſt. 68, 217.
[c] S. P. C. 59.

Sect. 37. Secondly, In ſome Caſes a Woman may have an Appeal of the Death of her Husband, where ſhe cannot claim Dower of his Lands, as where the Husband was attainted [d] of High Treaſon at the Time of his Death; for after the Attainder 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.

[d] 27 Aſſ. pl. 41. 35 H. 6. 57. b. 58 Bro. Appeal, 131 Fitz. Coro. 21. Co. Lit. 33. b. 7 Co. Calvin's Caſe, 13. b. S. P. C 59.
[e] Bro. Appeal, 148.
[f] Bro. Appeal, 17. 2 Inſt. 33. b. S. P. C. 59 C. *Contra.* 2 Inſt. 317.

Sect. 38. Thirdly, If ſuch Appellant take another Husband either before, or pending the Appeal, ſhe puts [g] 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 ſhe marry after Judgment in Appeal, ſhe 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 Attainder by which he is adjudged to loſe it.

[g] H. P. C. 181. S. P. C. 59. Letter B. 2 Inſt. 69. 20 H. 6. 43. b. Bro. Appeal, 148.
[h] 11 H. 4. 48. b. Bro. Appeal, 109 112, 148. *cont.* 21 E. 4. 73. b. *See* alſo the Books above cited.
[i] Bro. Appeal, 27. 3 Inſt. 209. 210. 2 H. 7. 10. pl. 5. 8 H. 4. 22. pl. 7 Fitz Scire facias, 41. 38 H. 6. 13. pl. 26. 9 H 7. 5. b. S. P. C. 166. Letter A.
[k] 2 Leon. 83. *Vide* 21 Ed. 4. 72. b. 73.

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

Sect. 39. Firſt, if the deceaſed had a Wife at the Time of his Death, and ſuch Wife were wholly innocent of it, ſhe [l] only, and not the Heir, hath a Right to the Appeal; and whether ſhe bring one or wholly neglect it, and though ſhe dye or marry within the Year and Day, the Heir cannot bring an Appeal; and the Reaſon hereof, according to *Keilway*, [m] is this, That the Appeal being once out of the Blood, ſhall not

[l] Keilw. 120. pl. 65. H P. C. 181, 182. S. P. C. 59 E. 20 H 6. 43.
[m] Keilw. 120. pl. 65.

not return to it again: Yet [a] 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, [b] That the Heir can bring no Appeal; for he cannot bring it for the Murder only, becauſe the Petit Treaſon includes in it Murder and more, and being the greater Offence drowns the leſs, and therefore the Pardon of it ſeems to pardon the Murder alſo.

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 Appeal 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, *&c.* And for the like Reaſon, if the deceaſed, at the Time of his Death, had two Sons, the Elder whereof is attainted of Treaſon or Felony, neither [h] of them can have an Appeal; not the Elder, becauſe of the Attainder; not the Younger, becauſe he cannot be Heir to his Father while he has an Elder Brother; who, though he be looked upon as dead in Law to ſome Purpoſes, is yet in Truth alive, and capable of forfeiting all the Privileges belonging to the Heir, though not of taking Benefit from any of them. But notwithſtanding a Younger Son cannot bring an Appeal of the Death of the Father, while there is an Elder Son of the ſame Father living; yet if the Eldeſt Son be by one Venter, and the Middle and Younger Son by another, and the Middle Son be killed, the Youngeſt only ſhall have an Appeal of his Death, becauſe he only is his Heir, as being of the whole Blood with him: And therefore, [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 Reſpect to his immediate Relation to the Perſon killed, at the Time of his Death, and like other Perſonal Actions, ſhall die with the Perſon. But ſome [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 agreeable to the Reaſon of the Caſe abovementioned, and the general Tenor of the Law in Relation to Appeals, which in no Caſe, as I know off, will ſuffer the Right of bringing one to be transferred from one to another; and therefore, as in Caſe [o] where the deceaſed hath a Wife at the Time of his Death, who dies within the Year and Day, the Heir hath no Right to an Appeal; ſo if he have an Heir at his Death, in whom the Right of the Appeal is veſted, and ſuch Heir die within the Year

[a] Cro. Car. 531, 532. [b] Jon. 425. 18 Ed. 4. 1. pl. 3. Fitz. Coro. 459. H. P. C. 181, 182. [c] S P.C. 59. D. [d] Dy 50. pl 4. 1 Leon. 326. [e] 27 Ed. 3. 83. pl. 2. Fitz. Coron. 322. H. P. C. 182. [f] S. P. C. 59 F. 27 Aſſ. pl. 25. [g] H.P.C 182. Fitz. Coro. 459. S. P. C. 60. Letter B. [h] Fitz. Coro. 41. [i] Bro. Appeal, 116, 131. 2 Aſſ. pl. 3. [k] S P.C. 59 F. H. P. C. 182. [l] S.P.C. 60. Letter A. 1 Inſt. 8. a. 13. a. 20 H. 43. b. Fitz. Coro. 235. But Fitz. Coron 322, ſeems contrary. [m] 7 Ed. 4. 15. pl. 3. Fitz. Coro 28. Bro. Appeal, 94. S.P.C. 60. E. [n] 11 H. 4. 11 b. 12. a. 9 H. 7. 5. b. 16 H. 7 15. pl. 14. S.P.C. 59. G. H. P. C. 182 Bro. Appeal, 30, 88, 104, 141, 144. [o] 16 H. 7. 15. pl. 14. Bro. Appeal, 156. 11 H. 4. 11 b. [m] S. P. C. 59. G

[n] Dy. 69. pl. 31. [n] 20 H. 6. 43. b 11 H. 4. 12. a. H. P. C. 182. Bro. Appeal, 30, 88, 104, 141, 144. [o] *Sup. pro* Sect. 39.

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

[a] H.P.C. 182. 13 H. 4. 6. pl. 14. 11 H. 4. 11 b.
[b] S.P.C. 59.
[c] 38 H. 6. 13. pl. 26. 9 H. 7. 5. b. 6. a. 16 H. 7. 15. pl. 14. 11 H. 4. 11. b. 12. a. Bro. Appeal, 141, 144, 156.
[d] 2 Leon. 83. ſeems contrary.

Sect. 42. Fourthly, Every ſuch Appellant muſt not only be Heir general to the deceaſed, but alſo Heir Male; and this depends upon *Magna Charta*, Ch. 35. by which it is enacted, *That no one ſhall be taken or impriſoned on the Appeal of a Woman for the Death of any one but her own Husband.* And the Judges are ſo far bound to take Notice of this Statute, That if a Woman bring an Appeal of the Death of her Father, or of any other but her Husband, they ought, [d] *ex Officio*, to abate the Writ, tho' the Defendant take no Exception to it. But it is ſaid, [e] 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 [f] to be the better Opinion at this Day, That the Heir Male of the deceaſed, who derives his Blood through a Female, may have an Appeal, as the Uncle being Heir on the Part of the Mother, or the Grandſon by a Daughter, *&c.* and yet the Mother in the firſt Caſe, and the Daughter in the ſecond, could have had no Appeal; for inaſmuch as by the Common Law, ſuch Mother and Daughter had not only a Right to bring ſuch Appeal, but alſo to have ſuch Right derived through them to others, it ſeems hard to conſtrue the Statute by depriving them of the former to take from them the other alſo; eſpecially conſidering, That an Heir Male, who derives his Blood through Females, ſeems no Way leſs worthy to bring an Appeal, than if he had derived it through Males; and all Statutes whatſoever, which are made in Abridgment of any Right of the Subject, ought to be ſtrictly conſtrued.

[d] Fitz Office de Court, 7. 10 Ed. 4. 7. pl. 18.
[e] 2 Inſt. 68. 1 Inſt. 25.
[f] H.P.C. 182, 183. 2 Inſt. 68. Fitz. Coro. 385. the contrary adjudged by all the Judges in the Exchequer-Chamber, but one. 20 H. 6. 43. Quære 17 Ed. 4. 1. pl. 1. 1 Inſt. 25. S. P. C. 58. B. C. Bro. Appeal, 104.

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

[g] 21 Ed. 3. 23. pl. 16. 45 Ed. 3. 25. pl. 36. 27 Aſſ. pl. 25. S. P. C. 81. Letter A. 1 Bulſt. 71, 75. H. P. C. 187.

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

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

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

Sect. 44.

Sect. 44. First, There is no Neceſſity that the Appellant have the abſolute Property of the Goods ſtoln; for it ſeems agreed, That a Carrier, or even a Servant, [a] to whom Goods are delivered to be carried to a certain Place, or Churchwardens [b] having Poſſeſſion of the Goods of a Church, or in general, any Perſon whatſoever, [c] 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 [f] 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 [g] have an Appeal of Larceny againſt his Lord, for any of his Goods taken by the Lord, becauſe [h] 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 [k] Day, That any Tenant, who is not a Villain, may have an Appeal of Larceny againſt his Lord.

Sect. 45. Secondly, There is no Neceſſity that the Wrong for which ſuch an Appeal is brought, were immediately done to the Perſon of the Appellant; for if a Servant be robbed of the Maſter's Goods in his Cuſtody, the Maſter [l] 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 [n] 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 Pretence of ſome Title, and ſuch Treſpaſſer had been robbed of them, It ſeems that I could have no Appeal for them. Neither can an Executor [p] bring an Appeal for a Larceny from the Teſtator, becauſe ſuch Larceny, at the Time when it was committed, was no Injury to the Executor, but to the Teſtator only; and therefore the Appeal for it being a meer perſonal Action, and wholly veſted in the Teſtator, there is no Doubt but that it dies with him, as all other Actions for mere Torts do.

[a] Fitz. Coro. 100. Latch. 127. S.P.C. 60 F.
[b] 11 H. 4. 12. pl. 25. 12 H. 7. 27. b. 28, 29. 37 H. 6 30. 31.
[c] 2 Ed. 4. 15. b. 2 Ri. 3. 22. pl. 53. 3 H. 7. 12. pl. 9. 5 H. 7. 18. pl. 11. 21 H. 7. 14. pl. 23. Bract. Lib. 3. chap. 26. *See* B. 1. Ch. 33. S. 3. S P. C. 60. F.
[d] Keilw. 70. p. 7.
[e] Br. & Lib. 3. chap. 26. Fitz. Coron. 100. 11 H. 4 12. Bro. gard d'Egliſe, 6. Bro. Coron. 142. Bro. Appeal, 91.
[f] 3 Inſt. 108. *See* B. 1. Ch. 33. S. 6.
[g] H. P. C. 184. S P C 60. F. Fitz. Coron. 17. Bro. Coron. Bro. Appeal, 34.
[h] Lit. Sect. 177.
[i] Lit. Sect. 189, 190. H. P. C. 184.
[k] S. P. C. 61. Letter A.
[l] H.P.C. 184.
[m] Latch 127.
[n] H.P.C.184. S. P. C. 61. Fitz. Coron. 392. 100. 4 H.7.
[o] H. P. C. 184. S. P. C. 61. Fitz. Coro. 39, 79. 13 Ed. 4. 3. pl. 7. Keilw. 160. b. Bro. Appeal, 5. b. *See* B. 1. Ch. 33, Sect. 9.
[p] H. P. C. 184. S. P. C. 60. F.

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, [a] as well as againſt a Perſon of full Age, and againſt a Feme Covert, [b] in the ſame Manner as if ſhe were ſole, without taking Notice of the Husband.

[a] S.P.C 62.a. H. P. C. 185. [b] Bro. Coro. 50.

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 [c] Appeals, it is a local Action, and muſt be brought in the County where the Felony complained of was done. Yet if one rob me in the County of *A.* and afterwards carry my Goods into the County of *B.* I have my Election [d] either to bring an Appeal of Robbery in the County of *A.* or an Appeal of Larceny in the County of *B.* becauſe the Poſſeſſion as well as Property of the Goods continued in me, in Judgment of Law, after the Robbery; and therefore, in what Place ſoever the Robber keeps them from me, he felonioufly injures me in the Poſſeſſion as well as Property of them, and conſequently may properly enough be ſaid to ſteal them from me: Yet he ſhall be appealed for the Robbery in the firſt County only, [e] for there only he was guilty of a Taking from the Perſon, without which there can be no Robbery. Alſo [f] 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 [g] 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.

15 Ed. 4. 1. pl. 2 S.P.C 62. A. H. P. C. 185. *Vide* Fitz. Coron. 17. [c] *Supra* Sect. 35. 11 H. 4. 93. pl. 53. Fitz. Coro. 437. Bro. Appeal, 35. Dy. 38. 39, 40. [d] 7 H. 4. 43. pl. 9. Dy. 39. pl. 56. 40 pl. 66. 4 H. 7. 5. b. 6. a. S. P. C. 63. G. 26 Aſſ. pl. 32. 7 Co. 2. a. Fitz. Coro. 62, 79. Fitz. Aſſiſe, 446. Bro. Appeal, 35. B. 1. Ch 33. S. 9. [e] H. P. C. 184. 7 Co. 2. a. *Contra* Keilw. 160. b. [f] S. P. C. 63. Letter F. *Infra* Sect. 71. [g] S. P. C. 63. Letter F.

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

[h] H P C. 185. S. P. C. 62. Letter B. 165. D. Bro. Appeal, 37, 62. 7 H. 4 44 pl 9. *Contra* 22 Aſſ. pl. 97. [i] *Supra* Sect. 33. [k] 2 Inſt. 319. 21 Ed. 4. 16. pl. 7. Fitz. Eſtray, 1. Avowry, 151. S. P. C. 186. 5 Co. 109.

Sect. 49. As to the fifth Point, *viz.* In what Caſes there ſhall be a Reſtitution of the Goods ſtoln, I ſhall premiſe, That until [l] ſuch Goods are ſeiz'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 whereever 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 ſeized ſhall be awarded on ſuch an Appeal, I ſhall examine the following Particulars.

[l] 3

1. Whether

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.

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

[a] *See* the Authorities cited to the three next Sections.

Sect. 51. As to the ſecond Particular, *viz.* What ſhall be eſteemed a freſh Suit; It ſeems to have been anciently holden, [b] 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, [c] 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.

[b] Fitz. Coro. 379, 319, 392. S. P. C. 62. 165. 2 Rich 3. 13. a.
[c] Bro. Freſh Suit, 1, 6. 7 H. 4. 44. pl. 9. S. P. C. 62. Letter B. 165. D. Query Hetley 64, 65.

Sect. 52. As to the third Particular, *viz.* By whom, and in what Manner, ſuch freſh Suit ſhall be inquired and adjudged; It ſeems, [d] That it is uſual and proper to make ſuch Inquiry by the ſame Jury that tries the principal Matter; and it is certain, That upon the Finding of the freſh Suit by ſuch Jury, the Court may award a Reſtitution: And in ſuch Caſes wherein the Appellee is condemned without any Trial, as where he is convicted by his own Confeſſion, or outlawed, or ſtands mute, *&c.* it ſeems, That the Court may make ſuch Inquiry by any [e] 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 [f] of Office, and perhaps is not abſolutely neceſſary, but required chiefly for the Satisfaction of the Conſcience of the Judges, in a Matter which, if they think fit, they may, by the Purport of ſome Authorities, [g] examine themſelves, as they generally may, (according to ſome [h] Opinions) any Matters whatſoever inquirable by an Inqueſt of Office, eſpecially [i] if the Parties intereſted in the Thing in Queſtion be willing that they ſhould do ſo: And agreeably hereto it is holden, in the beſt Authors, [k] That the Judging of freſh Suit lies in the Diſcretion of the Court; and there is a Caſe [l] wherein a Writ of Reſtitution of the Goods ſtoln 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.

[d] 4 Ed. 4. 11. b. S. P. C. 166. Letter B.
[e] 8 H. 4. 1. pl. 2. 7 H. 4. 31. pl. 16. 2 Rich. 3. 13. pl. 31. 10 H. 4. 5. pl. 18. *Contra* S. P. C. 166. Letter B.
[f] S. P. C. 166. Letter B. and ſee the Books cited to the other Points of this Section. and Raſt. Ent. 52, 53.
[g] *Vide* Fitz. Coro. 379, 392.
[h] 14 H. 4. 9. b. 3 H. 6. 29. b. 8 H. 6. 5. a. Yel. 152.

Sect. 53. As to the fourth Particular, *viz.* How far the Appeal muſt be proſecuted in Order to intitle the Appellant to a Reſtitution,

[i] Brownl. 214. 1 Sid. 442. pl. 15. *Contra* Latch. 213. 3 Leon. 150, 213. [k] Cro. Jac. 415. pl. 3. 2 Saund. 106, 107. [l] H. P. C. 185. S. P. C. 62. Letter B. [l] 21 Ed. 4. 16. pl. 7. Fitz. Coron. 42. Bro. Freſh Suit, 4. *Vide* S. P. C. 166. Letter A. 2 Leon. 108.

it ſeems, That anciently the Appellant could in no Caſe be intitled to a Reſtitution, unleſs [a] 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 [b] other could have a Reſtitution, becauſe the Appellee [c] being once attainted, could not be afterwards attainted again: But [d] 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 Reſtitution ſhall be awarded, *&c.* Alſo [e] if an Appellee die in Priſon, it ſeems, That the like Inquiry ſhall be made by Inqueſt of Office, and thereupon a Reſtitution awarded, *&c.* And [f] if an Appellee be outlawed, or have the Benefit of his Clergy before Conviction, or ſtand mute, or challenge peremptorily above twenty Jurors, or break from Priſon, perhaps a Reſtitution ſhall be awarded upon ſuch an Inqueſt's Finding the freſh Suit, without any farther Inquiry whether the Appellee were guilty or not; becauſe by refuſing to take his Trial, he tacitly ſeems to admit himſelf guilty. Alſo if one bring an Appeal againſt two, whereof one is attainted, and the other acquitted; yet [g] it ſeems, he ſhall have a Reſtitution. But [h] if both the Appellees had been acquitted, it ſeems, That the Appellant ſhould never have his Goods again, though it were expreſly found that they were his Goods, but he ſhall forfeit them to the King for his falſe Appeal. But *Quære* if this ought not to be underſtood of ſuch Goods only [i] as were before ſeiſed to the King's Uſe, as having been waived, *&c.*

Sect. 54. As to the fifth Particular, *viz.* Whether the Appellant's Title to ſuch Reſtitution, ſhall be preferred to any ſubſequent Title gained in the Goods; It ſeems clear, That the Appellant's Title to ſuch Reſtitution ſhall not [k] be barred by any Seiſure of ſuch Goods, as being Waifs, or Eſtrays, or the Goods of Felons, *&c.* nor [l] even by a Sale of them, *bonâ fide*, made in Market overt, *&c.* And by the like Reaſon it is certain, That the Proſecutor of an Indictment, ſince 21 *H.* 8. 11. ſet forth more at large in the next Section, ſhall not be barred of his Reſtitution by any ſuch Seiſure, or Sale, *&c.*

Sect. 55. As to the ſixth Particular, *viz.* Whether there ſhall be a Reſtitution of the Goods ſtoln, upon any other Proſecution beſides that of Appeal; It ſeems to be clearly agreed, [m] 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 Juſtices of Gaol-Delivery, as other Juſtices, after whom any ſuch Felon or Fe-*

[a] 44 Ed. 3. 44 pl. 57. Fitz. Coron. 96, 162, 318, 319. Avowry 151. S. P. C. 165. Letter D 166.
[b] Fitz. Coro. 95.
[c] *Vide infra*, in the Chapter concerning Judgment. *Contra* 4 Ed. 4. 11. b.
[d] S P C. 166. 7 H. 4. 31. pl. 16. Fitz. Coron. 81, 194, 379, 380.
[e] Fitz Coro. 379. Forfeiture, 15. S. P. C. 166.
[f] 21 Ed. 4. 16. pl. 7. 10 H. 4. 5 pl. 18. 40 Aſſ. 39. 2 R. 3. 13. pl. 31. 8 H. 4. 1. pl. 2. 26 Aſſ. 32. Fitz Coron. 42, 71, 194, 217, 379, 466. S. P. C. 166 2 Leon. 108.
[g] S P C 166.
[h] Fitz Coron. 367. 368. 5 Co. 110. a.
[i] *Vide ſupra* Sect. 48. 5 Co. 110. a. S. P. C. 186. *Contra* 3 Inſt. 227.
[k] S P C. 186. 5 Co. 109. 21 Ed. 4. 16. pl. 7. Keling, 35, 47. *See* the Books cited Sect. 49 Query Hetley, 64, 65. Fitz. Avowry, 151. Coron. 71, 318, 319. Bro. Appeal, 24.

[l] Keling, 34, 47. Query Moor, 360. Popham, 84. 1 And. 344. [m] 4 H 7. 5. pl. 1. Fitz. Coron. 62, 460. S. P. C. 66. Letter E. 165, 167. Letter A. H. P. C. 212. Latch. 144.

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lons 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 tho' any ſuch Felon or Felons were attainted at the Suit of the Party in Appeal.

Sect. 56. Sir *William Staundford*, [a] in his Conſtruction of this Statute, ſeems to incline to an Opinion, That the Party may have a Reſtitution by Virtue of it without making any freſh Suit; and this ſeems to be agreeable to Practice, and the Purport of the firſt Part of the Statute, which ſeems to require no more in Order to intitle the Party to a Reſtitution, than that the Indicter 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 later Part of the Statute, by ordaining, That Writs of Reſtitution ſhall be awarded as tho' the Felon had been attainted in an Appeal, ſeems to imply, That it is a ſufficient Favour, within the Intentions of the Makers of the Statute, to the Proſecutor of an Indictment, to give him a like Remedy for a Reſtitution of his Goods, as the Common Law gave to the Plaintiff in an Appeal; but it is certain, [b] That the Plaintiff in an Appeal, who appears to have been guilty of ſuch a Neglect, cannot demand a Reſtitution by the Common Law. And the Conſtruction I would contend for will appear the more reaſonable, if it be conſidered, that it hardly can be imagined to be the Intention of 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 Inquiry concerning the freſh Suit; but this ſeems to be no more than they may alſo do in Appeal, if they think fit, as I have already more fully endeavoured to ſhew in Section 52.

[a] S. P. C. 167

[b] *Supra* Sect. 50, 51, 52.

Sect. 57. As to the ſeventh Particular, *viz.* Whether there ſhall be a Reſtitution to any Goods not mentioned in the Appeal; There is no [c] Doubt, but that if a Man be robbed of ſeveral Goods by the ſame Perſon, either at the ſame or different Times, and ſuch Goods be ſeiſed as Waifs, *&c.* and afterwards the Party, in his Appeal for the Robbery, mention ſome of thoſe Goods only, and omit 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 ſtoln than what are mentioned in it: But whether an Appellant, who had, before his Appeal brought, lawfully regained the Poſſeſſion of his Goods ſtoln, ſhall forfeit to the King ſuch of them as he leaves out of his Appeal, doth neither clearly appear from the principal [d] Caſe concern-

[c] Fitz. Coro. 100. H. P. C. 184. 3 Inſt. 227. 5 Co. 110. a. S. P. C. 186.

Vide ſupra Sect. 49, 54.

[d] Fitz. Coro. 100.

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 [a] Caſe wherein the Appellant ſhall recover Things which were neither ſtoln from him, nor mentioned in his Appeal; as where the Appellee ſells [b] the Things ſtoln, or exchanges [c] them for ſome other Thing, before the Appeal brought, and the Money taken on the Sale, or Thing given in Exchange, are ſeiſed to the King's Uſe, *&c.* in which Caſe they ſhall be delivered to the Appellant, on the Conviction of the Appellee, 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 abovecited Statute of 21 *H.* 8. to the Proſecutor of an Indictment.

[a] *Vide* Fitz. Coron. 323. Bro. Reſtitution, 22. Property, 34. 2 Bulſt. 310.
[b] Noy. 128.
[c] Cro. El. 661

And now I am 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.
3. Within what Time.

Sect. 58. As to the firſt Point, *viz.* By whom, and in what Manner an Appeal of Rape may be brought; It ſeems, [d] That by the Common Law, it might be brought by any Woman who had been raviſhed, againſt the Raviſher, whether ſuch Perſon raviſhed were the Nief [e] of the Raviſher, 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 Raviſher, as ſhe may [g] 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 [h] 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.

[d] Bracton, 147, 148. Fleta *Lib.* 1. chap. 25. Sect. 14. 2 Inſt. 180. *See* Book 1. Ch. 41. Sect. 7.
Contra 2 Inſt. 433. 1 Inſt. 123. b.
[e] Littleton, Sect. 190. *Contra* Fitz. Coron. 17. S. P. C. 98 b.
[f] *Vide* Bract. 147. S. P. C. 61. 148. Letter A.
[g] *Vide* 2 Inſt. 433, 434. *Infra* Sect. 59, 60, 61.
[h] 8 H. 4. 21. pl. 2. 11 H. 4. 14. S. P. C. 98. b.

Sect. 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 raviſheth a Woman married, Lady, Damſel or other, with Force, altho' ſhe conſent after, he ſhall have ſuch Judgment as before is ſaid, if be be attainted at the King's Suit, and there the King ſhall have the Suit.*

Sect. 60. It ſeems to be ſo clear, [i] That this Statute impliedly gives an Appeal to the Woman who does not conſent to the Raviſher, that it ſeems needleſs to endeavour to prove it; but it is obſervable, [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 of *Weſtminſter* 1. 13. but makes a new Law in Relation to them; from

[i] 47 Aſſ. 6. Littleton, Sect. 190. 2 Inſt. 433. S. P. C. 6, 81.
Contra Fitz. Utlagary, 49 Bro. Coron. 169
[k] *Vide ſupra* Ch. 10. Sect. 52.

from whence it follows, That all Appeals of Rape at this Day, muſt [a] conclude *contra formam Statuti.*

[a] 9 Ed. 4 26. a. Fitz Enditement, 18. Dyer 202. pl. 68. *Vide infra* Sect. 70.

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 ſtabliſhed, That whereſoever, and whenſoever ſuch Ladies, Daughters and other Women aforeſaid be raviſhed, and after ſuch Rape do conſent to ſuch Raviſhers, That as well the Raviſhers as they that be raviſhed, and every of them, be from thenceforth diſabled, and by the ſame Deed be unable to have or challenge all Inheritance, Dower or joint Feoffment after the Death of their Husbands and Anceſtors. And that incontinently in this Caſe, the next of the Blood of thoſe Raviſhers, or of them that be raviſhed, to whom ſuch Inheritance, Dower or joint Feoffment ought to revert, remain or fall after the Death of the Raviſher, or of her that is ſo raviſhed, ſhall have Title; That is to ſay, after the Rape to enter upon the Raviſher, or her that is raviſhed, and their Aſſigns, and Land-Tenants, in the ſame Inheritance, Dower or joint Feoffment, and the ſame to hold in State of Inheritance: And that the Husbands of ſuch Women, if they have Husbands, or if they have no Husbands in Life, that then the Fathers, or other next of their Blood, have from thenceforth the Suit to purſue, and may ſue againſt the ſame Offenders and Raviſhers in this Behalf, and to have them thereof convict of Life, and of Member, altho' the ſame Women after ſuch Rape, do conſent to the ſaid Raviſhers. And the Defendant in this Caſe ſhall not be received to wage Battel, but the Truth of the Matter ſhall be tried by Inquiſition of the Countrey. Saving always to our Lord the King, and to other Lords of the Realm, all their Eſcheats of the ſaid Raviſhers, if peradventure they be thereof convict.*

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

Sect. 62. Firſt, That [b] 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 certifie againſt the Appellant.

[b] 11 H. 4. 13, 14. Fitz. Coron. 86, 228. Bro. Parliament, 89.

Sect. 63. Secondly, That there is no [c] Neceſſity to alledge, That the Woman did conſent to the Raviſher, in a Count which rehearſes the Statute, and concludes that the Rape was againſt the Form of it; which implies, that the Woman conſented, *&c.*

[c] 11 H. 4. 14. Fitz. Coron. 86, 228. S. P. C. 81. Letter C. Dy. 312. pl. 86, 202. pl. 68.

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

[d] 2 Inſt. 434. *Vide ſupra* Sect. 39, 40.

Sect. 65. Fourthly, That [e] whoſoever happens at the Time to be next Heir to the Perſon ſo raviſhed, and conſenting, *&c.* ſhall have the Appeal, and alſo enter [f] into the Lands of the Perſon raviſhed, and retain them againſt any other who ſhall afterwards happen by Matter *ex poſt facto* to become Heir; and therefore where a Woman having Iſſue only a Daughter, conſents to a Raviſher, and the Daughter enters, and then a Son is born to ſuch Woman, the Daughter ſhall retain the Lands, becauſe ſhe took them by Virtue of a Title given by the Statute which firſt veſted in her as a Purchaſer, and never was in any Anceſtor.

[e] S. P. C. 61 b. [f] Fitz. Aſſiſe, 27. 5 Ed. 4 6 a. 9 H. 7. 25. a. Long quinto. 5 Ed. 4. 60, 61. 1 Co. 95. a. 98. 137. b. 3 Co. 61. a. 62. a. Pl. Com. 56. b.

Sect. 66. Fifthly, That [a] the next in Remainder or Reverſion, to whom the Lands of the Woman who conſents to a Raviſher would come if ſhe were dead, ſhall enter and retain her Lands by Virtue of the Statute, provided he be of Kin to her, albeit another Perſon be nearer; yet it ſeems, That the Perſon ſo intitled to the Lands cannot have an Appeal of Rape, where there is another nearer of Kin; for tho' the Clauſe relating to the Entry into the Lands ſeems to intitle ſuch of the next of Kin, to whom the Inheritance would fall after the Death of the Party, whether they be abſolutely neareſt or not; yet the Clauſe relating to the Appeal ſeems to extend to none but the Husband, or Father, or very next of Kin.

[a] Long quinto, Ed. 4. 58, 59, 60. Bro. Entry Congeable, 94. 5 Ed. 4, 5. pl. 24. Fitz Aſſiſe, 27.

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

[b] Long quinto, Ed. 4. 58. Pl. Com. 42, 43.

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

[c] Long quinto, Ed. 4. 59, 60, 61. Bro. Entry, Congeable, 94. 5 Ed. 4. 5. pl. 24.

Sect. 69. Eightly, That [d] if the Party raviſhed and conſenting to the Raviſher, be under the Age of twelve Years, ſhe ſhall not loſe her Lands by the Intent of the Statute, for that the Conſent of a Woman under that Age is looked upon as given by one uncapable of Diſcretion, and therefore is not regarded by the Law.

[d] Pl. Com. 364. *See* 1 Danv. Abr. 698. pl. 12. 699. 700, Letter B. 1 Inſt. 79.

Sect. 70. Ninthly, That [e] in Appeals brought on this Statute, the Count ought to rehearſe it: But I do not find any Reſolution cited to maintain this Opinion. It is true indeed, That in the Year-Book of 11 *H.* 4. 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. 34. as [f] it is agreed that it may be: If it be ſaid, [g] That the Common Law gave the ſame Appeal as is given by the Statute of *Weſtminſter* 2. and therefore there is no Need to recite it; but that there never was ſuch an Appeal at the Common Law as is given by the Statute of *Rich.* 2. and therefore the Appeal grounded on it ought to recite it; it may be anſwered, That the ſaid Statute of *Weſtminſter* [h] does not revive the old Common Law in Relation to ſuch Appeals, but makes a new Law in Relation to them; ſo that appeals brought upon it, do altogether as much depend upon it, as thoſe brought on the Statute of *Ric.* 2. do on that. Neither [i] does there appear to be any ſuch Rule, That in Indictments, or Actions grounded on Statutes which give a Remedy in Caſes which were no Way provided for by Law, there is a Neceſſity to recite ſuch Statutes; and indeed at beſt it ſeems but Surplus to recite what the Court is bound *ex Officio* to take Notice of.

[e] S. P. C. 61. Letter C. *See* 1 H. 6. 1. pl. 1. Bro. Rape, 4.

[f] S. P. C. 81. Letter C. *See* 1 H. 6. 1. pl. 1. Bro. Rape, 4.

[g] *Vide* 5 H. 7. 17. pl. 10.

[h] *Supra* Sect. 59, 60.

[i] 5 H. 7. 17. pl. 10. Cro. Car. 564. 6 Mod. 140.

Sect. 71. As to the ſecond Point, *viz.* In what County an Appeal of Rape may be brought; There is no Doubt, but that this, like all other [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 more

[k] *Supra* Sect. 35, 47. 3 H. 7. 12. pl. 4. Firz. Viſne, 28. Bro. Appeal, 83. S. P. C. 63. Letters E. F. H. P. C. 186.

more than a Treſpaſs, and needs not be taken Notice of at all in the Appeal of the Rape; and if it be, is only looked upon as ſurplus.

Sect. 72. As to the third Point, *viz.* In what Time an Appeal of Rape may be brought; It ſeems, That at this Day it may be brought in any reaſonable [a] Time, the Judgment [b] whereof lies in the Diſcretion of the Court, for that at the Common Law there was no certain Time limited for the Bringing of it; and the Statute of *Weſtminſter* 1. 13. by which the Offence of Rape was turned into a Treſpaſs, and forty Days limited for the Suit of the Perſon raviſhed, is repealed; and the Statute of *Glouceſter* 9. which requires that Appeals be brought within the Year and Day, extends only to Appeals of Death; and the Statute of *Weſtminſter* 2. 34. which makes Rape a Felony again, limits no Time for the Bringing of it, but leaves it to the Conſtruction of Law, which ſhall be agreeable to the ancient Rules of Law in ſuch Points, wherein the Statute is ſilent.

[a] S. P. C. 63. Letter C. H. P. C. 186.
[b] *Vide ſupra* Sect. 51, 52. Littleton, 69. 2 Inſt. 56. *Supra*, Sect. 33, 48.

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

[c] 1 Inſt. 288. a.
[d] Fleta *lib.* 1. chap. 37. Bract. *lib.* 3. chap. 27.

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

[e] 2 Inſt. 313. Salk. 59, 62, 64. Bro. Attorney, 64, 78. 2 Ri. 3. 13. pl. 38. Bro. Appeal, 112. Raſtal's Entries, 47.

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 nonſuited.
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 Abetters ſhall render Damages to the Appellee for a falſe Appeal.
7. Where the Appellant is to be fined.

[f] 2 Inſt. 313. F. N. B. 27. *f. Contra* Fitz. Attorney, 104. 21 H. 7. 39. pl. 54.

Sect. 74. As to the firſt Point, *viz.* In what Caſes the Appellant and Appellee are to appear in proper Perſon, and where by Attorney, or Guardian: It ſeems, That by the Common Law neither [e] Plaintiff nor Defendant in any Appeal whatſoever, whether of Felony or Mayhem, [f] could make an Attorney, but muſt appear either by Guardian [g] or in proper Perſon, on every [h] 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 [i] 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 [k] ſaid, any Stranger might procure as well as the Plaintiff. *Sed quære*; for it is ſaid, [l] 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 [m] 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 [n] by 3 *H.* 7. 1.

[g] S. P. C. 135. *Vide* Fitz. Coron. 13.
[h] 1 H. 7. 27. pl. 3. Fitz. Utlagary, 34.
[i] 40 Aſſ. 17. Fitz. Attorney, 39, 90. 40 Ed. 3. 42. pl. 23.
[k] 11 H. 4. 11. b. S. P. C. 135. Fitz. Coron. 13.
[l] 21 Ed. 4. 72, 73.
[m] 8 Ed. 4. 3. pl. 5. Fitz. Attorney, 24.
[n] F. N. B. 26.

That the Appellant in any Appeals of Murder or Death of a Man, where Battel by the Courſe of Common Law lies not, may make Attorney and appear in the ſame, in the ſaid Appeals after they be commenced, to the End of the Suit and Execution of the ſame. But [a] 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.

[a] Salk. 59, 62.

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 *Staundford's* [b] *Pleas of the Crown*, and the Books [c] of *Entries*, and ſhall in this Place conſider only the following Particulars,

[b] S. P. C. 78, 79

[c] Raſtal's & Coke's Entries, Titles Appeal & Mort.

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.

Sect. 75. As to the firſt Point, *viz.* In what Manner the Count in Appeal muſt purſue the Writ; I ſhall take it for granted, That this, like all other Counts in other Actions, muſt in Subſtance [d] 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 [e] 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 [f] becauſe that mentions not any Battery.

[d] Finch of Law, 357.

[e] Bro. Appeal, 12. 45 Ed. 3. 25 pl. 36. 21 Ed. 3. 23. pl. 16 S. P. C. 78. Letter C.

[f] Fitz. Coro. 110.

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.

Supra Sect. 20.

Sect. 76. I. 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 [g] in his Declaration, That every one of them did the Fact, becauſe in ſuch a Caſe the Act of one is, in the Judgment of the Law, the Act of all; or to ſhew the ſpecial [h] 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.*

[g] 11 H. 4. 13. b. 4 H. 7. 18. pl. 10. S. P. C. 44. Letter B 80. Letters C. D *Supra*, Sect. 89 H. P. C. 187. Bro. Rape 2, 3.

Sect. 77. II That no *Periphraſis*, [i] 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 [k] amount to a Charge of Murder without the Word *Murdravit*, let be never ſo exact and particular in ſetting forth the Malice and all other Circumſtances of the Killing; neither

[h] See the Chapter of the Arraignment of Principal & Acceſſory.

[i] 4 Co. 41. Fitz. Coro. 97, 216.

40 Aſſ. 25. 44 Ed. 3. 38. pl. 31. Raſtal's Entries, 43. b 45. pl. 1. 46. pl. 2. 47. pl. 3. Coke's Entries, 57. &c.

[i] 5 Co. 121. b. [k] Dyer 261. pl 26. Cro Jac. 20. Salk. 377. 9 Ed 4. 26 b.

[a] can an Appeal of Rape be ſufficient without the Word *Rapuit*; nor [b] an Appeal of Larceny without the Word *Cepit*; nor [c] an Appeal of Mayhem without the Word *Mayhemiavit*; nor any [d] of the Appeals abovementioned without the Word *Felonicè*.

Sect. 78. III. That in every Appeal of Larceny [e] it muſt expreſly appear whoſe the Goods were that were ſtoln, and 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* [g] *cujuſdam ignoti*, or for felonioufly ſtealing [h] 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 [i] declared, by ſhewing, That the Defendant *felonice rapuit* the Woman, without adding the Words *carnaliter cognovit*, or any others tantamount, or firſt ſhewing the particular Manner of the Terror or Violence, and then concluding, That the Defendant *ſic 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 ſtoln; 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 *ſic felonicè mayhemiavit* the Appellor. Alſo it ſeems clear, [m] That in an Appeal of Death it is neceſſary, not only from the Statute of *Gloceſter*[n] Ch. 9. which requires, That an Appeal of Death ſhall declare the Deed; but alſo from the Common Law, firſt, To ſet forth in the Count all the ſpecial Circumſtances of the Fact, and [o] then to conclude, That the Appellee *ſic felonicè murdravit* the Party; and this being the Appeal moſt in Uſe at this Day, it may not be improper to ſet down theſe following Rules concerning this Matter.

Sect. 80. I. That every ſuch Count ought to ſet forth in what Part [p] of the Body the Wound was given; in which Reſpect, the ſame Certainty ſeems to be required in Appeals as in Indictments; and therefore, if the Count ſay only, that the Wound was given *circa pectus*; it ſeems to be vicious, as it hath been reſolved, [q] That an Indictment in the like Manner uncertain is, becauſe it doth not aſcertain the Part wounded, which, for what appears, might have been the Neck, Arm or Belly; and for the like Reaſon ſuch Count ſeems alſo to be vicious, if it ſay, That the Wound was in the Hand, or Leg, or Arm, without [r] ſhewing whether it were the right or left; neither [s] 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 abovementioned; 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 inſufficienly 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

[a] S. P. C. 82. Letter B. 24.
[b] Letter D 96. Letter D. 9 Ed. 4. 26. 20 H. 7. 7. b.
[c] 1 Inſt. 124 a. [d] Fitz. Enditement, 8. S. P. C. 96. Letter B. H. P. C. 107.
[e] *Supra*, Sect. 17.
[f] S. P. C. 94, 96. Letter C. H. P. C. 206, 207. 20 H. 7. 7. a. 1 Bulſt. 93. Cro. Jac. 20. Dyer 202. pl. 67. Quære 1 H. 6. 1. pl. 1. *Contra* Fitz. Enditement, 26. Dy. 69. pl. 28.
[g] Raſtal's Entries, 53. b. 54. 55.
[h] Fitz. Enditement, 10. S. P. C 95. Letter G. 181. b. 22 Aſſ 94.
[i] H. P. C. 207. 22 Aſſ 94. Fitz. Coro. 159. S. P. C. 94. Letter G. 181. b. 1 Aſſ. pl. 7. Dy. 99 pl. 61.
[k] Fitz. Enditement, 9, 12. H. P. C. 207. S. P. C 95. Letter G. 181. b. Dy. 99. pl. 61. Keilw. 25. b. Moor, 466. 18 Aſſ pl. 15. *Contra* 9 H. 6. 45. b.
[l] Dy. 202. pl. 67. 11 H. 4. 13. Fitz. Coron. 86. S. P. C. 81. Letter C. H. P. C. 187.
[m] *See* Raſt. Ent. 53. b. 54 55.
[n] *See* Raſtal's Entries, 45, 46. and Coke's Entries, 50. b. 51, 52, 53.
[o] *See* Raſtal's Entries, 46. b. 47 &c. Coke's Entries, 53. b. 54. &c. Salkeld, 377.
[p] 2 Inſt. 318, 319. 2 Lev, 140, 141. 5 Co. 120, 121, 122.
[q] 4 Co. 47. a.
[r] 2 Inſt. 318.
[s] 4 Co. 40. b. 5 Co. 121. b.

[a] 4 Co. 41. pl. 4. 5 Co. 121. b. Cro. Jac. 95. pl. 23. Con. Cro. El. 137. pl. 10. [b] 4 Co. 41. pl. 4. H. P. C. 207.

was given in the left [a] 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, [b] 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 umbelicum*, &c. in which Caſe the laſt Words ſhall be rejected as abundant and Surplus.

[c] S. P. C. 79. Letters C. D. 2 Inſt. 318. 4 Co. 40. b. 5 Co. 122. a. [d] S. P. C. 79. Letters C. D. [e] 5 Co. 121. b. 122. a.

Sect. 81. II. Such Count ought alſo [c] to ſhew the Length and Breadth of the Wound, that it may appear to the Court that it was mortal; but it is ſaid, [d] 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 [e] ſufficient to ſay, That the Defendant, with Malice, *&c.* ſtruck the Perſon killed in ſuch a Part of his Body, and gave him in ſuch Part *mortale vulnus penetrans in & per corpus*, &c. for this ſufficiently ſhews, That the Wound was mortal. Alſo in ſome Caſes it is impoſſible to ſhew the Length and Breadth of the Wound, as where a Limb is cut off, and [f] therefore it is plain, That in ſuch Caſes it cannot be required.

[f] 2 Inſt. 318. 5 Co. 122. a. 4 Co. 41. b. 42. a. [g] 6 Palm. 282. 3 Mod. 203. [h] 5 Co. 122. 1 Bulſt. 124. [i] Cro. Jac. 635. *See* H. P. C. 207. and Yel. 28. [k] 5 Co. 122. *Vide* Dy. 99. pl. 63.

Sect. 82. III. It is not ſafe, [g] in any ſuch Count to omit the Word *percuſſit*, where the Fact will bear it; and by the Authority of ſome [h] Books this cannot be ſupplied, in ſuch Caſes, by the Words *dedit mortale vulnus*, &c. nor by any other: Yet in *Croke*'s [i] *Reports* this Opinion ſeems to be queſtioned, neither do I find any Reaſon given why the Word *percuſſit* ſhould be of ſuch abſolute Neceſſity, for it is not ſo much as pretended in *Long*'s [k] Caſe, which ſeems to be the chief Foundation of this Opinion, That this is a Word of Art appropriated to this Uſe; but all that ſeems there contended for is, That where the Death was occaſion'd by any external Violence, coming under the Notion of Striking, it muſt expreſly 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, [l] That an Indictment (which in this Reſpect ſeems not to differ from an Appeal) ſetting forth, That *J. S.* perſuaded the Perſon deceaſed to take a certain poiſonous Potion under a Notion of a Medicine, and that the deceaſed, *Neſciens præd' potum cum veneno fore intoxicatum, ſed fidem adhibens dictæ perſuaſioni dicti* J. S. *recepit & bibit*, is inſufficient, becauſe it doth not expreſly ſay, That the Party received and drank the Poiſon. And it was alſo reſolved, That the Want of ſuch Certainty is not ſupplied by theſe Words immediately following, *Per quod idem* N. *immediate poſt receptionem veneni prædicti per tres horas immediate ſequentes languebat & obiit*, &c. and yet there cannot well be a ſtronger Implication that the Poiſon was taken and drunk by him; for it being the ſtrict [m] 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.

[l] 4 Co. 44 b. 3 Mod. 202. [m] 4 Co. 44 b

Sect. 83. IV. Such Count ought [a] alſo expreſly to ſhew that the Party died of the Hurt ſpecially ſet forth; and it hath been reſolved, [b] That an Indictment, and from the ſame Reaſon it ſeems that an Appeal, ſetting forth that the Defendant choaked the deceaſed, *qua ſuffocatione obiit*, inſtead of *de qua ſuffocatione*, &c. is erronous; 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 [c] ſaying, That he died of any one of them in particular; for perhaps the Truth of the Caſe might be, That none of them alone, but all together, cauſed the Death. Or [c] the Count in ſuch Caſe perhaps may ſay, That the Party died of the firſt Poiſon or Wound, and that he would have died of the ſecond, if he had not died of the firſt, and alſo that he would have died of the third, if he had not died of the two firſt.

[a] 2 Inſt. 318.
[b] 1 Rol. Rep. 137. pl. 20.
[c] 3 Inſt. 55, 135. Quære 4 Co. 40. b.
[c] 44 Ed. 3. 38 pl. 31. 40 Aſſ pl. 25.

Sect. 84. V. If the Killing were with a Weapon, the Count muſt [d] ſhew with what Weapon in particular, and yet if upon the Evidence it ſhall appear that the Killing was not by ſuch Weapon, but by ſome other, the Variance [e] is immaterial, and the Appellee ought to be convicted, as ſhall be ſhewn more at large under the Chapter of *Evidence*. And if the Killing were not by a Weapon, but by ſome other Means, as by poiſoning, drowning, ſuffocating, burning or the like, the Count [f] muſt ſet forth the Circumſtances of the Fact as ſpecially as the Nature of it will admit. But in ſuch Caſes, where no Weapon was uſed, it 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 [g] of ſuch Killing in which a Weapon was uſed: For the Law is ſo far from requiring it in other Caſes, that it will not ſuffer an Appeal of Killing by a Weapon to be maintained by Evidence of Killing by any other Means in which no Weapon was uſed; neither will it ſuffer an Appeal of Killing by any of thoſe Means without the Help of a Weapon, to be maintained by Evidence of Killing by a Weapon, as ſhall alſo be ſhewn more at large in the Chapter above referred to.

[d] 2 Inſt. 318. 3 Mod. 158. *See* the Stat. of Glouceſt. chap. 9.
[e] 2 Inſt. 319. H. P. C. 265. 9 Co. 67.
[f] 2 Inſt. 318, 319.
[g] 2 Inſt. 318, 319.

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

[h] Smith and Bowen. *Mich* 7 *An.*

Sect. 86. As to the third Point, *viz.* In what Manner the Count in Appeal muſt ſet forth the Circumſtances of Time and Place, it is enacted by the Statute of *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 [i] 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, [k] That no Omiſſion of any of theſe Circumſtances, where the Law requires them to be expreſly ſet forth, can be aided by the Conviction of the Defendant; and then for the better Underſtanding in what Caſes the Law requires them to be expreſly ſet forth, I ſhall endeavour to ſhew what Certainty the Count in every Appeal ought to ſhew.

[i] 2 Inſt. 317.
[k] 1 R. A. 781. Letter N.

1. The Hour.
2. The Day.
3. The Year and Time of the King.
4. The Place where the Deed was done.

Sect. 87.

Sect. 87. As to the firſt of theſe Particulars, *viz.* With what Certainty the Count in Appeal ought to ſet forth the Hour, it is obſervable that all [a] the Precedents of ſuch Counts (excepting only, one [b]) in Appeals of Larceny in *Raſtal*'s Entries, which ſeems to be the only Book of Authority in which any ſuch Counts are to be found; and alſo all the Precedents in *Coke* and *Raſtal* of ſuch Counts in Appeals of [c] *Mayhem*, take Notice of the Hour, as well as thoſe in Appeals of Death; [d] and therefore certainly it is not ſafe wholly to omit it; yet it hath been holden, [e] 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 alledge, That the Fact was done at ſuch an Hour, but that it is ſufficient to ſay, That it was done about ſuch Hour, as appears from every [f] one of the Precedents in *Coke* and *Raſtal*, in which the Hour is mentioned, and alſo from other [g] good Authorities; yet we find the contrary Opinion holden by three Judges againſt two in *Bulſtrode*'s [h] Reports. But it ſeems [i] certain that a Miſtake of the Hour will not be material upon Evidence.

Sect. 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 of Indictments, for which it is needleſs to the Authorities. And if the Fact happened in the Night, it ſeems [k] moſt proper to alledge it in *nocte ejuſdem diei*. But it is ſaid not to [l] be ſufficient to alledge the Fact done about ſuch a Day, or between ſuch a Day and ſuch a Day, but that the very Day muſt be preciſely ſet forth. And it ſeems to be inſufficient to alledge [m] 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 ſhewing which Saint is meant, *viz.* the Baptiſt or Evangeliſt. Alſo [n] it ſeems to be erroneous to ſet forth the Fact on an impoſſible Day, as on the thirty-firſt of *June*, or thirtieth of *February*, for this is of no more Effect than to mention no Day at all. Alſo it ſeems clear that an Appeal of Death muſt not only ſet forth the Day when the Hurt was given, but alſo the Day when the Party died of it, as appears from all the Precedents [o] of this Kind both in *Coke* and *Raſtal*; and alſo from the manifeſt Reaſon of the Thing, [p] that it may appear that the Party died within the Year and Day after the Stroke, in which Caſe [q] only the Law intends that the Death was occaſion'd by it. And it is [r] ſaid not to be ſufficient to alledge, That the Defendant aſſaulted the Party at a certain Day, and feloniouſly ſtruck him, without expreſly adding, That he ſtruck him *adtunc & ibidem*; and yet both Sentences being joined with the Copulative, it is the moſt natural Import of the whole, That the Stroke and Aſſault were both at the ſame Time, *&c.* and ſuch Certainty ſeems to be ſufficient in Declarations [s] in civil Actions, and even in Indictments [t] of Treſpaſſes. But in Indictments and Appeals of Death a more expreſs Certainty is ſaid to be required, becauſe the Stroke which cauſed the Death, being a Crime

[a] Raſt. Ent. 53. pl. 1, 2, 3. 54. pl. 4, 5.
[b] Raſt. Ent. 55. pl. 6.
[c] Coke Ent. 50. b. 51. pl. 2. 52. pl. 3. Raſt. Ent. 45. pl. 1, 2, 3, 4.
[d] Co. Ent. 53. pl. 4. 56. pl. 5. 57. pl. 6. 59 pl. 7. Raſt. Ent. 43. b. 46. pl. 31. 47. pl. 3. 4. 48. b. 49. pl. 6. 50. pl. 10. *&c.*
[e] S. P. C. 80. b. 1 Bulſt. 82. H. P. C. 187.
[f] Co. Ent. 50. b. 51. pl. 2. 52. pl. 3. 53. pl. 4. 56. pl. 5. 57. pl. 6. 59. pl. 7. Raſt. Ent. 43. b. 45. pl. 1, 2, 3, 4. 46. pl. 2. 47. pl. 3, 4. 48 b. 49 pl. 6. 50. pl. 10. 57 pl. 11. *&c.*
[g] 2 Inſt. 318. Salk 59. pl. 2.
[h] 1 Bulſt. 77, 80, 81, 82, 83. *Vide* 3 Mod. 158.
[i] H. P. C. 264. 2 Inſt. 318.
[k] 2 Inſt. 318.
[l] 2 Inſt. 318.
[m] Bro. Indict. 47. 3 H. 7. 5. pl. 2.
[n] Moor 555. pl. 723.
[o] *See* Citations in the precedent Section.
[p] 2 Inſt. 318. Bro. Indict. ment, 41.
[q] B. 1. Ch. 31. Sect. 9. 10.
[r] Dy. 28. as in the Margin. Dy. 8. pl. 28. *See* B. 1. Ch. 64. Sect. 42. Keilw. 100. Quære.
[s] Cro. Jac. 362, 443.
[t] Cro. Ca. 271, 525. Cro. Jac. 41. *See* B. 1. Ch. 64. Sect. 42. 1 Rol. Rep. 295.

of a different Nature, and much higher than the Aſſault, may be well enough intended to have happened at a different Time; and therefore the preciſe Time of each muſt be certainly expreſſed. And even this may be vitiated by a Repugnancy in the Concluſion; for if the Aſſault and Stroke be alledged in the Premiſſes on the tenth of *December*, and the Death ſubſequent on the twentieth of *December* following, and then it be alledged in the Concluſion, that the Defendant in ſuch Manner felonioufly murdered the Party on the tenth of *December* aforeſaid, the whole is naught for the Repugnancy; [a] 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 alledged that the Defendant in ſuch Manner felonioufly murdered the Party on the twentieth of *December* aforeſaid, it had been ſufficient. But it is ſaid [b] to be the better Way to conclude generally, That the Defendant in ſuch Manner felonioufly murdered the Party. And it is certain [c] that a Miſtake of the Day will not be material upon Evidence.

[a] 4 Co 42. 47. H. P. C. 207. 2 Inſt. 318. Noy. 47. Hetley 35. Dy. 50. pl. 9, 10. Quære Cro. El. 739 pl. 12.

[b] 4 Co 42. 47. 2 Inſt. 318.

[c] H. P. C. 264. 2 Inſt. 318.

Sect. 89. It hath been holden that an Allegation of the Day, *prima facie* ſomewhat uncertain, may be holpen by the apparent Senſe of the whole; as where [d] it is alledged, That the Principal ſuch a Day made the Aſſault and gave the Stroke, and that the Party died on ſuch a ſubſequent Day, *&c.* and that *A. B.* was *adtunc & ibidem abettans* the ſaid Principal to do the Felony and Murder aforeſaid; in which Caſe it is ſaid that the Words) *adtunc & ibidem*, from the manifeſt Import of the whole, ſhall be referred to the Time of the Stroke; becauſe by that only the Felony, which *A. B.* is charged to have abetted, was done. Yet if *A. B.* had been ſaid to have been preſent at the Time of the Felony and Murder aforeſaid, *ſcilicet*, on the Day of the Stroke, *tunc & ibidem* abetting the Felony and Murder aforeſaid, *&c.* it ſeems [e] that the Appeal is inſufficient as to the ſaid *A. B.* for the Repugnancy; becauſe he is expreſly alledged to have been preſent, and to have abetted the Principal, at the Time of the Felony and Murder, which muſt be taken for the Time of the Death, by which the Offence, which was before but a Treſpaſs, became Felony and Murder, but by being preſent at the Time of the Death, it is impoſſible he could abet a Stroke given ſo long before, and therefore it is repugnant and inconſiſtent in ſuch a Manner to alledge it. Nor is ſuch a Repugnancy any way holpen by the ſubſequent Allegation of the very Day of the Stroke, coming after the Word *Scilicet*, for it is apparent that the Time of the Felony, could not be on the Day of the Stroke, and therefore it rather adds to than helps the Fault to alledge that it was. But [f] the beſt Way of alledging ſuch Abatement had been to have ſet forth, That the ſaid *A. B.* was *præſens, auxilians*, &c. *ad feloniam & murdrum prædictum in forma prædicta faciend'*.

[d] *Vide* Dyer 164. 60. b. Cro E 176. Quære Cro. El. 739. pl. 12.

[e] 4 Co. 42.

[f] 4 Co. 42.

Sect. 90. As to the third Particular, *viz.* With what Certainty the Count in Appeal ought to ſet forth the Year and Time of the King, there can be no Doubt but that every ſuch Count muſt expreſly 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 [g] 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

[g] 2 Inſt. 318, 319. Bro. Indictment, 43 Book 1. Ch. 31. S 9, 10.

[a] Lev. 140. *See* 1 Sid. 140.

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, [a] that it is ſufficient to alledge the Fact in ſuch a Year of ſuch a King, without ſaying it was in ſuch a Year of his Reign, becauſe it is clearly implied.

Sect. 91. As to the fourth Particular, *viz.* With what Certainty the Count in Appeal ought to ſet forth the Place where the Deed was done, there can be no Doubt but that every Count in an Appeal of Death muſt ſhew [b] the Place where the Death happened, as well as that where the Hurt was given, and this with the ſame [c] preciſe Certainty and Freedom from Repugnancy [d] as is required in Relation to the Time of the Death and Hurt, for which I ſhall refer the Reader to the 89th and 90th Sections of this Chapter, wherein what is ſaid in Relation to the Time of the Hurt and Death is equally applicable to the Place. Alſo it ſeems that a Miſtake of the Place is not [e] 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.

[b] Hetl. 35. Cro. El. 137. pl. 10. 738. pl. 11. 739 pl. 12.
[c] Dy. 68. pl. 28.
[d] Noy. 45. Dy. 50. pl. 9, 10. Cro. Eliz. 196. pl. 13.
[e] H. P. C. 264, 265. Salk 288.

Sect. 92. But it ſeems to be not only neceſſary in an Appeal of Death to alledge ſome Place both of the Death and Hurt, and in every Count in every other Appeal to alledge ſome Place, where the Fact was committed, but alſo that ſuch Allegation be in proper Place; for the better Underſtanding whereof I ſhall premiſe, that if the Truth will bear it, it is faſeſt [f] 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 Viſne may come; in Relation to which Matter the Law being in great Meaſure ſuperſeded in civil Actions by the Statute *For the Amendment of the Law*, and chiefly in Uſe in criminal 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 Viſne may come from any Place, which is of ſo ſmall a Compaſs, that all who live in or near it may reaſonably be preſumed to have ſome Knowledge of the Perſons living in it, and therefore are eſteemed the moſt proper Judges of the Facts done within its Limits, as being moſt likely to be proved by Witneſſes, and charged upon Perſons with whoſe Integrity and Reputation they are beſt acquainted. And upon this Ground it hath been adjudged, that a Viſne may come not only from a Town, but from [g] a Ward, a [h] Pariſh, Hamlet, [i] Burgh, Manor, [k] Caſtle, [l] or even from a Foreſt, [m] or other Place known [n] out of a Town. Alſo it ſeems [o] clear that whenſoever a Place is generally alledged in Pleading, the Law will intend it to be a Vill unleſs it be mentioned with ſome Addition which ſhews the contrary; or [p] be alledged within a City or Vill, in which Caſe it would be abſurd to take it for a Vill of it ſelf; yet [q] if in Truth there be no ſuch Town, nor Hamlet, nor Place known out of a Town; or [r] if a Fact alledged in a Foreſt, were done in ſome Vill in the Foreſt not mentioned in the Record, the Defendant may plead it in Abatement. Alſo if a Fact done in a Vill within a Pariſh, which contains divers Vills, be in the Count in an Appeal alledged generally in the Pariſh, or [r] a Fact done in a City, which contains divers Pariſhes, be in the Count in an Appeal alledged generally in the City, it ſeems [s] 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

[f] Fitz. Coro. 80. 2 Inſt. 319. 3 Mod 158. Salk. 59, 60.
[g] Yel. 155. 1 Sid. 178. Cro Jac 222.
[h] 6 Co. 14. Co. Lit. 125. b. Salk. 60.
[i] Co. Lit. 125. b. Cro. El. 866. 1 Sid. 326.
[k] 2 Rol. A. 612. pl. 6, 7. 613 pl. 1. 614. pl. 8. 618. pl. 2. Co. Litt. 125. Cro. Jac. 405.
[l] 2 Rol. A. 618. pl. 1. 621. pl. 21. Co. Lit. 125. b.
[m] Cro. El. 200. pl. 26. 1 Sid. 326. 2 Rol. A. 621. pl. 26. Bro. Appeal, 19. *Vide* Co. Lit. 125. b. Con. Bro. Appeal, 127.
[n] 6 H. 7. 3. pl. 1. Co. Litt. 125. a. b. 2 Inſt. 319. 1 Sid. 326.
[o] Bro. Pleadings 61. Co. Litt. 125. b. 2 Rol. A. 54. pl. 30, 31, 32. 1 Sid. 88. con. 1 Sid. 326.
[p] Cro. El. 732. 1 Sid. 326.
[q] Bro. Pleadings 61. 6 H. 7. 3. pl. 1. 2 Rol. A. 621. pl. 26. 7 H. 4. 27. a. *See* 2 Rol. A. 616. pl. 2, 3, 4, 5, 6, 7. 1 Sid. 88.
[r] Cro. El. 200. 7 H. 4. 27. a. 2 Rol A. 621. pl. 26.
[s] *See* the Caſes cited under Letter O. 7 H. 4. 27. a. Salk. 59, 60. Co. Litt. 125. b. 4 Co. 14 b. 2 Inſt. 319.

on

on the Record, muſt, till the Contrary be ſhewn, be intended to contain no more than one Town, or Pariſh, on which Suppoſition a Viſne may well come *de vicineto* [a] *civitatis*, which does not exclude the City, but takes in the City and its Neighbourhood within its Juriſdiction, whether ſuch City be within a County, [b] or be a County of it ſelf; excepting only the City of [c] *London*, from whence it ſeems that no Viſne can come, not only by Reaſon of the Largeneſs of its Extent, but alſo becauſe it hath been the conſtant Uſage of Pleading to ſhew the Ward and Pariſh in which a Fact alledged [d] in *London*, was done.

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

Sect. 93. As to the fourth Point, *viz.* Whether one and the ſame Count in Appeal ought to be againſt thoſe who do not appear, as well as againſt thoſe who do appear, and againſt the Acceſſories as well as the Principals. It is ſaid [j] by Sir *Matthew Hale*, That in an Appeal againſt *A. B* and *C.* if *A.* only appear, yet the Plaintiff ought to count againſt them all, by the better Opinion. And the like ſeems alſo to be holden by Sir *William Staundforde* [k] and *Brook* [l]; yet the Point adjudged in the Principal [m] 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* [n] or *Raſtal*, [o] of Counts in Appeals, wherein ſome of the Defendants have not appeared, do indeed mention the Perſons abſent, as well as thoſe preſent, and ſhew in what Manner they were guilty, yet are all of them expreſs that the Appellant *inſtanter appellat* thoſe that appear only; and that he would in like Manner appeal thoſe that are abſent, if they were preſent; by which it ſeems clearly to be implied, That when they ſhall appear, there ſhall be another Declaration againſt them, and that the preſent Declaration is eſteemed only as a Declaration againſt thoſe that do appear. Neither do I find any Difference in the Precedents 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.

Sect. 94. As to the third Point, *viz.* How the Appellant may be nonſuited, it is generally holden in ſome Books, [p] that by the Common Law,

[a] 2 Rol. A. 622. pl. 31, 34, 35, 36, 37, 38, 623. pl. 41, 42. 8 H. 5, 10. pl. 20. Cro. Jac. 307, 308. Con. S. P. C. 155. b.

[b] *See* the Authorities cited under Letter M.

[c] 1 Sid. 178. pl. 10. Cro Jac. 307, 308.

[d] 2 Rol. A. 622. pl. 39. Cro. Jac 150. pl. 10. *Quære*

[e] Cro. El. 732. Con. S. P. C. 154. Letter C. 2 Rol. A. 617. E. 1.

[f] Cr. El. 732.

[g] 1 Sid. 88. 2 Rol. 617. pl. 2. Hob 266.

[h] 1 Syd. 327.

[i] 2 Lev. 307. *Contra* 1 Syd. 326.

[j] 2 Lev. 307. *Contra* 1 Sid. 328.

[k] 1 Sid. 327.

[l] 1 Sid. 326.

[m] 2 Rol. A. 618. pl. 3. H. P. C. 188.

[n] S P. C. 65. Letter C.

[o] Brook Appeal 28. 9 H. 4. 1. pl. 7. *See* 4 Co. 47. Dyer 120. pl. 10.

[n] Coke's Entries 50. b.

[o] Raſtal's Entries 46. pl. 2. 47. pl. 4. 50. pl. 10. 51. pl. 11, 13, 15, 53. pl. 2, 3, 54. pl. 4. *See* 47 Aſſ. pl. 6.

[p] Bro. Nonſuit 44. Co. Litt. 139. b. 1 Rol. A. 131. E. pl. 3, 4, 5, 132. pl. 6, 7, 8, 9 10. 2 Bulſt. 19

3 Ed. 4. 11. b. *Contra* Fitz. Nonſuit. 15, 34. *Quære* Bro. Nonſuit. 6. 20 H. 6. 44. pl. 30.

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 nonſuited, whatſoever [b] Excuſe he may have for his Abſence. But it is enacted by 2 *H.* 4. 7. *That if the Verdict paſs againſt the Plaintiff the ſame Plaintiff ſhall not be nonſuited.* And ſince the Statute it hath been adjudged [c] that if a Defendant in an Appeal of Murder be found guilty of Manſlaughter only, the Appellant cannot be nonſuited; but it doth not appear whether this Reſolution be grounded on the ſaid Statute, or on the Common Law; for it ſeems difficult to maintain that ſuch a Verdict which finds the Subſtance of the Fact, ſhall be ſaid to paſs againſt the Appellant, in which Caſe only the Nonſuit is taken away by the Statute. And therefore perhaps a Nonſuit in this Caſe may not be ſuffered by the Common Law, which ſeems not to have permitted a Nonſuit after a full Verdict, except in ſuch Caſes only whereupon ſome Doubt remained with the Court, as may be reaſonably argued from the Authorities above cited under Letter. But it ſeems that an Appellant may be nonſuited after a ſpecial [d] Verdict, or after a Demurrer [e] and Argument thereupon.

[a] *Vide ſupra*, Sect. 74.

[b] Noy. 88. Latch. 173. *Vide Supra* Sect 30.

[c] Moor. 407. pl. 546. Cro. El. 465.

[d] 2 Jon. 1.

[e] Co. Lit. 139. b. 2 Jones 1

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 it ſelf, the Appellee [f] ought to demand Oyer of it, which he muſt do in open [g] Court. And for the better Underſtanding for what Faults ſuch Writ ſhall be abated, I ſhall conſider the following Particulars,

See 20 H. 6. 44. pl. 30. and the Authorities cited under Letter E.

[f] 2 Bulſt. 19. 3 Bulſt. 243.

[g] Between Widdrinton and Charlton agreed Mich. 10 *Annæ.*

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, which without ſuch Amendment might abate the Writ.

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

[h] Finch of Law. 226. 2 Danv. Abr. 252.

Sect. 96. I. [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 [k] has the Word *Burgaliter* inſtead of *burgulariter*, or *burglariter*; or an Appeal of Rape wants the Word *Rapuit*, [l] or any Appeal wants the Word *Felonice.* [m]

Supra, Sect. 42.

[i] *Vide ſupra* Sect. 77.

[k] 4 Co. 39.

[l] *Supra*, Sect. 77.

[m] *Supra*, Sect. 18, 77.

Sect. 97. II. Where the Declaration varies from the Writ; as [n] 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 [o] calls him *A. B.* of *C.* Alderman, and the Declaration *A. B.* of C. Eſquire. Or where the Declaration is otherwiſe [p] defective in not purſuing the Writ, or in not ſetting forth both the Subſtance [q] and Circumſtances [r] of the Fact with that Certainty which the Law requires: Or in [s] laying the Offence in a different Country, from that in which the Writ was brought.

[n] Fitz, Brief 219, 231.

[o] Yel. 120.

[p] *Supra*, Sect. 75.

[q] *Supra*, Sect. 76, *&c.*

[r] *Supra*, Sect. 86, *&c.* Cro El. 196.

[s] *Supra*, Sect. 35, 47, 71. Bro. Appeal 38.

Sect. 98. III. Where [t] the Declaration doth not conclude *contra formam Statuti* in ſuch Caſes where by Law it ought.

[t] *Supra*, Sect. 60.

Sect. 99. IV. Where the Sense is defective for want of a material Word in the Writ; as [u] if the Concluſion be *ibi hoc breve*, &c. without the Word *habeas*; Or where there is a falſe Concord in the Writ, as *hos* [x] or *hanc breve*; or the ſingular [y] Number inſtead of the Plural; or (as ſome [z] ſeem to hold generally) any other falſe *Latin*; or even the Uſe

[u] Fitz, Coro. 121. S. P. C. 82. Letter A.

[x] 9 H. 7. 16. pl. 8.

[y] 10 Ed. 3. 1. pl. 2.

[z] H. P. C. 189. S. P. C. 82. Letter A. 5 Co. 121.

of a Word which is not *Latin*, tho' [a] 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.

[a] 2 H. 4. 8. pl. 35.

Sect. 100. V. Generally where the Writ, or Declaration are any otherwiſe defective in not obſerving the legal Form, as [b] where in a Writ of Appeal ſued by Husband and Wife, the Concluſion is in the Name of the Wife only: Or where the Writ omits [c] either the Name of Baptiſm or Surname of the Appellant or Appellee, being under the Degree of Nobility, which alone can give ſo high [d] a Name of Dignity as to ſupply the want of a Surname.

[b] Firz. Brief, 252.

[c] Finch of Law 253. 27 H. 6. 3 pl. 24. 2 Inſt. 665.

[d] Finch 253. 8 Ed. 4. 24. pl. 2. 2 Inſt 666. 25 Ed. 3. 39. pl. 6.

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 *Teſte* and the Return of the Writ.
2. Where for a *Miſnoſmer* or wrong Addition.
3. Where for a Defect in the Addition of the Appellant or Appellee.
4. Where for the Multiplicity of Action.
5. Where for making of *J. S.* a Defendant, when there is no ſuch Perſon.
6. Whether the Defendant may have more than one of ſuch Pleas or Exceptions.

Sect. 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 *Teſte* and Return. If the Party, before he hath pleaded in chief, do ſpecially ſhew to the Court ſuch a Defect in the Writ, the later Authorities [e] 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, [f] that ſuch a Defect is ſalved by the Party's Coming in and pleading in chief without taking Advantage of it: Alſo it hath been adjudged, That where the Original is right, all Defects in the Meſne Proceſs are ſalved by the Party's Appearance, as ſhall be ſhewn more at large in the Chapter concerning Proceſs.

[e] Salkeld 63. pl. 4. *Vide* 2 Inſt. 667. Cro. Jac. 424. pl 8. 1 Ventris 7. 1 Sid. 406. *Contra.* 12. Ed 4. 11. Bro. Error 169.

[f] Salkeld 63. pl. 4.

Sect. 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 *Miſnoſmer* or wrong Addition, it ſeems to be agreed, [g] that if there be a Miſtake in the Writ or Declaration as to the Name of Baptiſm [h] or Surname [i] of the Appellant [k] or Appellee; or [l] as to the Town Pariſh or County, Eſtate, Degree or Myſtery, whereof they are ſaid to be, as where [m] one who is neither by Birth, Office, Creation or Reputation an Eſquire, or Gentleman, is named with either of thoſe Additions; or where a Gentleman by Birth, who follows a Trade or Husbandry, is named [n] 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 [o] by the moſt Noble; or where a Gentleman or Gentlewoman [p] is named Spinſter; or a Yeoman [q] is named Gentleman; or [r] 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 [s] Imparlance, plead ſuch Matter in Abatement, and thereon Iſſue is joined and found for him,

[g] Finch 363. 364.

[h] 9 H. 5. 1. pl. 3.

[i] H. P. C. 243. Raſtal's Entries 49, 51. b 54 pl. 4. *See* the Chapter concerning Pleas to Felony.

[k] 9 H. 5. 1. pl. 3.

[l] Bro. Appeal 44. Raſtal's Entries, 108, 11. H. 6. 11. pl. 25.

35 H. 6, 55. 10 Ed. 4. 12. pl. 10. [m] 2 Inſt. 667, 668. 6 Co. 67. [n] 14 H. 6 15. pl. 51. 2 Inſt. 668, 669 [o] 2 Inſt. 669. [p] 2 Inſt. 668. [q] 5 H. 7, 16. pl. 7. 10 Ed. 4. 16. pl. 19. Raſtal's Entries 108. Theloal. Lib. 11. Chap. 4. Sect. 19. [r] Salkeld 59 [s] Finch 434. 21 Ed. 4, 7, 2. b.

[a] 9 H. 5. 1. 3. pl. Bro. Appeal 38.
[b] Bro. Addition 44.
[c] Raſtal's Entries. 50. pl 10 54. pl. 4.
[d] 1 Sid. 325. *Vide* 10 Ed. 4, 12. pl. 10. 4 H. 6. 4. pl. 9.

the Writ ought to be abated. And it ſeems [a] alſo to have been holden, that if the Appellant after Imparlance confeſs that he hath brought his Appeal by a wrong Name, the Writ ſhall be abated: But it is ſaid [b] to be no Fault to give an Eſquire the Addition of Gentleman, *& ſic è converſo.* Alſo if one [c] who is uſually known and called by the Surname of *B.* be ſo named in the Appeal, and the Appellee plead that his Name is *C.* and not *B.* and the Appellant reply that the Appellee is, and at the Time of the Purchaſe of the Original, was as well known by the Name of *B.* as by the Name of *C.* and this be confeſſed and found for him, it avoids the Plea of the Miſnoſmer. And if one who hath his uſual Abode at *B.* and hath been ſometime ſeen at *C.* be named of *C.* in an Appeal, it hath been queſtioned [d] 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 Houſe-Keeper, and alſo another Place where he keeps his Wife and Family be well known, it ſeems that the Writ may name him of either of ſuch Places, or perhaps of both of them, but is abateable unleſs it name him of one of them.

Sect. 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 [g]) 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 abateable, but this Inconvenience is remedied by 1 *Ed.* 6. 7. Sect. 3. by which it is enacted, *That if any Plaintiff in any Manner of Action ſhall be made a Duke, Archbiſhop, Marqueſs, Earl, Viſcount, Baron, Biſhop, Knight, Juſtice of either Bench, or Serjeant at Law depending the ſame Action, that ſuch Action for ſuch Cauſe ſhall not be abateable or abated* But it hath been holden [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.

[e] 2 Inſt. 665. 666. 11 H. 4. 40. pl. 3. 11 H. 6, 11. pl. 25. 10 Ed. 4. 16. pl. 19
[f] 11 H. 4. 40. pl. 3. 14 H. 6. 14. b. 8 Hob. 129. 2 Rol. A. 469. pl. 10. 2 Inſt. 666, 667. *Contra* Latch. 169.
[g] 2 Rol. A. 469. pl. 10. 2 Inſt. 666, 667. *Contra* Latch. 169.
[h] *Supra* Sect. 103.
[i] 32 H. 6, 29. b. *Contra* 24 E. 3. 25. pl. 14. 26 pl. 21, 25. Ed. 3, 39. pl. 6.
[k] 1 Sid. 40. Littleton's Rep. 81. Cro. Ca. 104
[l] 21 E. 4, 72. 2 Inſt. 870.

Sect. 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 Original, 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 the 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.*

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 [a] generally ſuch Additions in *Engliſh* are as good as in *Latin*; and where there are ſeveral Defendants of different Names and the ſame Addition, it is [b] ſafeſt to repeat the Addition after each of their Names, applying it particularly to every one of them; and where a Father hath the ſame Name and the ſame Addition with a Defendant being his Son, the Writ is [c] abateable unleſs it add the Addition of *Puiſne* to the other Additions; but where the Father is the Defendant, it is ſaid that there is no need of the Addition of *Eigne*. [d] And if the Son be in *Cuſtodia Mareſchalli*, and ſo declared againſt, it is ſaid that the Count is good without the Addition of *Puiſne*, unleſs the Father of the ſame Name and 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,

[a] 1 Sid. 101. 1 Keb 12.
[b] Bro. Additions 3.
[c] 37 H. 6. 29 Pl. 10. 39 H. 6. 46. 4 Ed. 3, 31. pl. 11.
[d] Salkeld. 7.

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 [e] at the Time of the Writ, in which Reſpect this Addition, and alſo the Addition of the Myſtery differs from that of the Place, which is ſufficiently ſet forth by naming the Appellee late of ſuch a Place.

[e] 9 Ed. 4, 2. pl. 8. 22 Ed. 4, 13. pl. 35. 21 H. 6. 3. pl. 4. 2 Inſt. 670.

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.* of *B.* Butcher, is inſufficient, becauſe Butcher refers to *A.* rather than to the Appellee.

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

[f] *See* Theo. Lib 6. *cap.* 15. Sect. 8.
[g] 2 Inſt. 667.

Sect. 109. Fourthly, That the Degree of a Serjeant [h] 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* [i] *Coke* without Queſtion; yet this is made a Query by *Theloal*, [k] and it is holden in the Year Book of 35 *H.* 6, 55. and admitted by Sir *Edward Coke* in the very Place above-cited, That a Doctor in Divinity may have the Addition of Clerk, which ſeems not eaſily reconcileable with the Opinion that the Degree of a Doctor is a good Addition; for if it were, why ſhould not the Writ be abateable for having the Addition of Clerk inſtead of it, contrary to the allowed Rule [l] in other Caſes, that the moſt worthy Addition is to be uſed?

[h] Theloal, Lib. 6 Ch. 15. Sect. 12.
[i] 2 Inſt. 668.
[k] Theloal, Book 6. Ch. 15. Sect. 13.
[l] *Vide ſupra*, Sect. 102.

Sect. 110. Fifthly, That *Generoſus* [m] or *Armiger*, [n] are either of them, good Additions for the Eſtate and Degree of a Man; *Generoſa* [o] for that of

[m] 2 Inſt. 667, 668. Bro. Addition, 44, 50.
[o] 2 Inſt. 668.

[n] 2 Inſt. 667. Bro. Addition, 44, 50.

a Woman;

a Woman; and Yeoman [a] and Labourer [b] are alſo good Additions for the Eſtate and Degree of a Man, but not for that of a Woman; and Widow [c] or Single [d] Woman, or as ſome [e] ſay, Wife of *J. S.* are all of them good Additions of the Eſtate and Degree of a Woman, but no ſuch like Addition is good for the Eſtate and Degree of a Man. And Spinſter [f] is a good Addition for the Eſtate and Degree of a Woman, and perhaps alſo for that of a Man.

Sect. 111. Sixthly, That Burgeſs [g] and Citizen, and Servant, [h] are all of them too general, and therefore not good Additions of the State or Degree either of Man or Woman.

Sect. 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* [i] includes all lawful Arts, Trades and Occupations; And [k] 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.

Sect. 113. And firſt, the following Additions of this Kind clearly ſeem to be good, as Husband-man, [l] Merchant, [m] Broker, [n] Taylor, [o] Point-maker, [p] Smith, [q] Miller, [r] Carpenter, [s] Cook, [t] Brewer, [u] Baker, [x] Butcher, [y] Pariſh-Clerk, [z] Mercer, [aa] Fiſh-Monger, [bb] Dier, [cc] School-Maſter, [dd] Scrivener, and ſuch like.

Sect. 114. Secondly, The following Additions of this Kind clearly ſeem to be inſufficient, as Maintainer, [ee] Extortioner, [ff] Thief, [gg] Vagabond, [hh] Heretick, [ii] common Informer, and ſuch like.

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

Sect. 115. Firſt, Farmer, which by the better [kk] 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.

Sect. 116. Secondly, Chamberlain, Butler, and Pantler, which are holden [ll] 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 [mm] nor Page are good Additions; and yet in ſome [nn] of the old Books they ſeem to have been ſo admitted.

Sect. 117. Thirdly, Hoſteler, which hath been holden [pp] to be a good Addition, and ſeems properly enough to come under the Notion of a Myſtery. And tho' it hath been reſolved, [qq] That any one who keeps an Inn may be ſued by the Addition of a Labourer, upon the Cuſtom of the Realm, for want of due Care of the Goods of his Gueſts; becauſe whoever keeps a common Inn, is in that reſpect liable to anſwer for ſuch Defects, by whatſoever Addition he may be ſtyled; yet this does by no

[a] 2 Inſt. 668. Bro. Addition, 3, 47, 50. [b] Bro. Addition. 5, 39. [c] Fitz. Addition, 5. Bro. Addition, 64, 66. Theloal. Lib. 6. *cap.* 15. Sect 4. [d] Fitz. Addition, 5. 14 Ed. 4. 7. pl 12. Bro. Addition, 64, 66. Theloal, lib. 6. *cap.* 15. Sect. 4. [e] 1 H. 4, 5. b. 4 H. 6. 4. pl. 9. *Quære* Cro. E. 198. Dy. 47. pl. 2, 3, 4. [f] Dyer 46 pl. 2, 3, 47. pl. 5. 88 pl. 107. [g] Sid. 247. [h] 2 Inſt 668. [i] 2 Inſt. 668. Bro. Addition, 42, 50, 55, 56, *con* Bro. Addition 5. [k] 2 Inſt. 668. 669. [l] Bro Addition, 44. [m] 2 Inſt. 668. [n] Bro. Addition, 44, 50. [o] Bro. Addition 40, 50, 66 [p] 9 H. 6, 65. pl. 19. Theloal. lib. 6. ca. 15. Sect. 5. [q] Bro. Addition, 15, 39. [r] 7 H 6 1. pl. 7. [s] 21 H. 6. 54. pl 9. [t] 22 H. 6. 53. a. [u] Bro. Additions. 39. 51. [x] Bro Additions. 15, 22. 39. [y] 14 H. 6, 15. pl. 51. Theloal. Lib. 6. *cap.* 15. Sect. 6. [z] Fitz utlagary, 32, 37. 5 H. 5. 7. pl. 16 [aa] 6 Ed. 4. 3. pl. 10 [bb] 19 H. 6, 51. pl. 9. [cc] 5 H. 5. 7. pl. 16. [dd] 2 Leon. 186. [ee] 9 H. 6. 65. pl. 19. 2 Inſt. 668. [ff] 9 H. 6. 65. pl. 19. [gg] 22 Ed. 4. 1. pl. 2. Inſt. 668. [hh] 22 Ed. 4. 1. pl. 1. [ii] 1 Roll Rep. 190. [kk] Theloal. Lib. 6. *cap.* 15. Sect. 9. 2 Inſt. 668. Bro. Addition 10, 28. H. 6, 4. pl. 18. [ll] Bro. Addition 50, 58. 2 Inſt. 668. Theloal. Lib. 6. *cap.* 15. Sect. 10. [mm] 2 Inſt. 668. [nn] Bro. Addition 50, 58. Fitz. coro. 43. 21 Ed. 4. 71. [pp] Bro. Addition, 35. 21 H. 6, 50. pl. 3. [qq] 22 H. 6. 21. Theloal. lib. 6. *cap.* 5,

Means

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,

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

[a] *Vide Infrà* Section 106. 21 Ed. 4, 15. pl. 1. 19 H. 6, 66. pl. 6.

Sect. 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 [b] of it ſelf, as *de Londino* [c] *De Norwico*, &c. without more, by which it ſhall be intended that he lives in the County as well as City of *London* and *Norwich*, &c. unleſs he ſhew the Contrary tho' Part of each of theſe Cities lie out of their Counties. However it is certain, that it is not ſufficient to Name a Defendant *Londini* [d] or *Briſtolie*, &c. becauſe that imports only that he belongs to ſuch Town, and not that he reſides there. Alſo it ſeems clear, [e] That it is not ſufficient to name a Defendant of any Town which is not a County of it ſelf, without ſhewing in what County it lies. Alſo if [f] 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.

1 Ed. 4, 1. pl. 3. 2 Ed. 4, 2. pl. 6, 7. Dyer 213. pl. 44, &c. 9 H. 6, 66. pl. 6 Theol. *lib.* 6. *cap.* 14. Sect. 17.
[b] 2 Inſt. 669.
[c] 4 Ed. 4, 16. pl. 30.
21 Ed. 4. 15. pl. 1. 27 H. 6. 4 pl. 26. 35 H. 6. 12. pl. 21.
[d] 35 H. 6, 12. pl. 21.

Sect. 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 [g] 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 [h] either in this Caſe where there are two different Towns called *Dale*, or even where there is but one Town, ſometimes called *Southdale*, and ſometimes *Northdale*, but never ſimply *Dale* without an Addition, the Defendant may Plead that there is no ſuch Town as *Dale*, in the ſame County, becauſe Parcel of a Name cannot be ſaid to be the Name. But if there be two Towns of the ſame Name in a County without any Addition to diſtinguiſh them, as it ſometimes happens where they lie at a Diſtance from one another, I do not find any Authority that it is not ſufficient in ſuch Caſe to name the Defendant generally of either of ſuch Towns, without adding any Thing to diſtinguiſh it from the other.

7 Ed. 4, 10. pl. 13.
[e] Cro Jac. 167.
[f] 2 Inſt. 669.
Vide Supra, Sect. 92, 102. Theſeal *Lib.* 6. *cap.* 14. Sect. 20, 35. H. 6. 30 pl. 37.
[g] 7 H. 6 39. a. b. 19 H. 6, 35. pl. 77. 8 H. 5, 8. pl. 8 21 Ed. 4, 51. 10 H 7, 4. pl. 5. 10 H. 6, 5. pl. 16.

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

Ruſſel's Entries 47. a.
[h] 3 H. 6. 8. pl. 8. 14 H. 6, 23. pl. 68. Theſeal *Lib.* 6. *cap.* 14. Sect 23. *Contra* 7 H 6. 45. pl. 285.
[i] Theſeal. *Lib.* 6 *cap.* 14 Sect. 14.

Sect. 121. Fifthly, That if an [k] Appellee live in a Place known by a ſpecial Name, and lying out of any Town or Hamlet, he may be well

[k] 2 Inſt. 669. 35 H. 6. 30. pl. 37. 14 H. 6, 23. pl. 68. Inſt 669. 2 Inſt. 669. 21 Ed. 4, 37. pl. 1. Fitz. Brief 467. 7 H 4, 27. a.

named of ſuch Place; but if he live in any Place known within a Town or Hamlet, it is ſaid to be ſafeſt to name him of the Town or Hamlet.

[a] 2 Inſt 669. 3 H 6, 31. pl. 21. 2 Thelaal. *Lib.* 6. *cap.* 14. Sect. 6, 7, 9.

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

[a] 35 H. 6, 12. pl. 21. Bro. Error. 69. Cro. Jac. 610. 2 Rol. Rep. 225. 1 Rol. A. 780. pl. 5. 2 Inſt. 670. 7 H. 6. 39 a. [b] ſeems contrary. [b] 1 Sid. 247. 1 Keb. 885. [c] *Paſch.* 3. *Georgii.*

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

[d] S. P. C. 82. Letters C, D. H. P. C. 189. Bro brief. 192. Cro. El 695. Fitz. brief. 548, 774.

Sect. 124. As to the fourth Point abovementioned, *viz.* Where a Writ of Appeal may be abated upon the Exception or Plea of the Party for the Multiplicity of Action, it ſeems [d] clear, That after an Appellant hath appeared on a Writ of Appeal, or even on a Bill of Appeal removed into the Court of King's Bench from before the Sheriff and Coroners by *Certiorari*, if he commence a new Appeal for the ſame Matter, the Appellee may plead in Abatement that ſuch prior Appeal is ſtill depending, *&c.* But it ſeems [e] clear, That it is no Plea in Abatement of a Writ of Appeal, that the Appellant hath brought a Bill of Appeal for the ſame Matter before the Sheriff and Coroners, becauſe ſuch Bill is not of ſo high a Nature as a Writ of Appeal, but is ſaid to be only in Nature of a Plaint till it be removed into the King's Bench, which ſeems [f] to depend on the Statute of *Magna Charta* 17, ſince which Statute the Sheriff and Coroner cannot proceed to Trial upon a Bill of Appeal, as perhaps they might have done by the Common Law. But after ſuch Bill of Appeal before the Sheriff and Coroners is removed into the King's Bench, if the Plaintiff bring a Writ of Appeal for the ſame Matter, it is holden [g] by *Staundforde*, and ſeems to be admitted in the Year-Book of 4 H. 6. 14, 15. and both by *Fitzherbert* [h] and *Brook* [i] in their Abridgments of the ſaid Year-Book, that the Appellee may plead in Abatement that ſuch Bill of Appeal is depending, becauſe after it is removed into the King's Bench, it is of as high a Nature as a Writ of Appeal. Yet Sir *Matthew Hale* [k] ſeems to be of Opinion 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 [l] 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 Proceſs, *&c.*

[e] 10 H. 4. 4. pl. 13. S. P. C. 82. Letter D. Fitz. coro. 269, 465. *See* 4 Ed. 3. 9 pl. 21. [f] *Supra*, ch 9 Sect. 39, 40. 41.

[g] S. P. C. 82. Letter D. [h] Fitz. coro. 4. [i] Bro. Appeal 44. [k] H. P. C. 189.

[l] 7 H. 7, 6. pl. 10. Fitz. Brief. 192. Bro. Appeal 87. S. P. C. 82. Letter C.

Sect. 125.

Sect. 125. As to the fifth Point, *viz.* Where a Writ of Appeal may be abated for the making of *J. S.* the Defendant, where there is no such Person, it seems clear, [a] That if there be divers Defendants in an Appeal, and one of them who does not appear be misnamed either as to the Surname, or Name of Baptism, or be described by a wrong Addition, or were dead before the Writ purchased, any of the Defendants who do appear may plead, That whereas the Appeal is sued out against *A. B.* of *C.* in the County of *D.* Yeoman, there was not at the Time of the Purchase of the Writ, nor hath been since, any such Person as *A. B. in rerum natura*, as by the Writ is supposed, whereon if Issue be joined, if the Appellant cannot prove that there now is, or was at the Time when the Writ was purchased, such a Person of such Name and Addition as by the Writ are supposed, it seems that the Verdict ought to go against him, whereupon the Writ shall be abated as to all the Defendants. But it is not [b] 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 [c] that no other Defendant besides himself can plead the *Misnosmer* or wrong Addition. But I do not find it to be agreed [d] That such a Plea by one Defendant shall abate the Writ as to any other besides himself; but if such Matter when pleaded by another on the Non-appearance of the Defendant, will abate the Writ as to all, it seems, difficult to give a Reason why it should not have the like Effect when pleaded by the Party himself.

Sect. 126. As to the sixth Point, *viz.* Whether the Appellee may have more than one such Plea or Exception, there seems to be no Doubt but that if a Defendant in an Appeal, or even in an Indictment of Felony, think it proper to make Use of never so many Pleas or Exceptions of this Kind, requiring all of them the same kind of Trial, he may take Advantage of them all, [e] unless [f] they be repugnant to one another. Also it seems to be the better Opinion, [g] 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 [h] been generally agreed, That the Defendant must at the same Time plead also with them all his Matters in Bar, if he have any such, and also plead over to the Felony, (unless where he hath admitted the Fact by the Matter pleaded in Bar,) But if the Plea in Abatement be triable by Matter of Record, it is holden in some Books, [i] that the Defendant is not bound to plead over to the Felony, till such Plea in Abatement be found against him. But [k] the greater Number of Precedents, and constant Practice of late seem to be otherwise. However it seems clear, [l] 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 [m] of *Mayhem* and all civil Actions whatsoever, except only Assizes of Mortdancester [n], Novel [o] Disseisin, Nusance [p] and *Juris utrum*; [q] for it seems to be a settled Rule, that in Appeals of *Mayhem* and all other civil

[a] Dyer 318. pl. 14. H. P. C. 189. S. P. C. 82. Letter E. Rastal's Entries 49 a. 52. a. Fitz. coro. 15, 43, 64. 26 H. 6. 6. pl. 6. 21 H. 7, 34. pl. 35. 7 H. 4. 27. pl. 4.

[b] Bro. Appeal, 111. 6 H. 7. pl. 2. 21 Ed. 4, 71, 72.

[c] S. P. C. 82. Letter E.

[d] *See* the Books above cited.

[e] Finch of Law, 353, 364, 385. 4 H. 6, 15. b. 16. a. Bro. Appeal 44.

[f] S. P. C. 82. Letter E.

[g] Finch of Law, 364. *Quere* 4 H. 6, 15. a. Bro. Appeal 42.

[h] Finch of Law, 363, 364, 385. 21 Ed. 4 71 pl. 56. Reeves and Trundal. *Pasche* 3 *Geo. gii.* Dy. 88. pl. 107. Rastal's Entries 49 a. b. 3 Mod. 266, 267. *Quere* 6. H. 7. pl. 2. Shower's Reports 47.

[i] Bro. Appeal 48, 66. 1 H. 6 1 pl. 1. 27 Ass. pl. 3. [k] Cro. E. 695. 10 H. 4 4. pl. 14. 4 H. 6, 15. b. 1 H. 6, 2. pl. 1. Rastal's Entries 47. a. [l] Finch of Law 363, 364, 385, 27 Ass. pl. 3. 1 H. 6. 1. pl. 1. [m] Cro. El. 495. pl. 14. Popham 115. Owen 59 60. Moor 457. pl. 628. Noy 36 [n] Finch of Law 385, 418. 40 Ed. 3, 29. b. 39 Ass. pl. 13. [o] 1 Ed. 3, 11 pl. 33. Dy. 310. pl. 82. 4 H 6 16 a. [p] Jon. 413 S. P. C. 82. Letter E. Cro. Ca. 520 Finch of Law 363, 364. 385. [q] Finch of Law 363, 385. [q] 40 Ed. 3, 29. b. Finch of Law 363, 385.

Actions,

Actions, thoſe abovementioned only excepted, if a Plea in Abatement, triable by the Country, [a] be found againſt the Defendant, he ſhall not [b] be ſuffered afterwards to plead any new Matter, but final Judgment ſhall be given againſt him. Alſo it ſeems to be agreed [c] 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.

Sect. 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 expreſly excepted out of 8 *H.* 6. 12. which is the principal Statute of Amendments: alſo it ſeems [d] to be generally taken for granted, that no criminal Proſecution whatſoever is within any other Statute of Amendments, or any of the Statutes of *Jeofails*; from whence it follows that no Defect is amendable in an Appeal, but ſuch only as is amendable by the Common Law. And therefore it ſeems to be the better Opinion, that no falſe [e] *Latin* in a Writ or Bill of Appeal, nor Omiſſion of a Word, [f] nor even of a Letter [g] nor other Defect or Variance [h] from the proper legal Form, can be amended, becauſe no ſuch Fault is amendable by the Common Law, without the Conſent [i] of the Parties, except only in Actions wherein the King [k] is a Party. It ſeems indeed to be generally holden in ſome Books, [l] that ſuch Faults in a Writ are amendable where the *Curſitor* varies from his Inſtructions, in the Names [m] 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 Miſpriſion in the Count is amendable by the Common Law, as well in an Appeal as in any other Action, before it is entered on the Record; and ſo it ſeems that the Year [n] Book of 7 *H.* 4. 27. is to be intended, in which a Miſtake in the Declaration in laying the Fact in an improper Viſne, was ſuffered to be amended. Alſo it ſeems that after the Count is entred on the Record, a Variance in it from the Writ, if a Meer Miſpriſion, may be amended by it, as it ſeemed to be agreed in an Appeal of Death between *Smith* and *Bowen*, [o] 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 [p] of this Chapter endeavour'd to ſhew what may be pleaded in Bar of an Appeal of *Mayhem*, 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 premiſed that by the better Opinion [q] 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 *Retraxit* on Nonſuit in a former Appeal of this Kind will be good Bars of another.

3. Whether a Diſcontinuance.

4. Whe-

[a] *Vide* Cro. El. 203. pl. 34. Dyer 228. pl. 45. Yelv. 36.
[b] 1 Sid. 252. pl. 22. 1 Lev. 163. 1 Inſt. 33. Yelv. 112. Aleyn 65, 66.
[c] Cro. E. 495. Owen 59. Noy 36. Moor 457. Popham 115. *Vide* Thelo. *Lib.* 15. *cap.* 5.
[d] *Vide* Salkeld 51. 1 Bulſt. 142, 144.
[e] 9 H. 7, 16. pl. 8. 1 Bulſt. 142, 144. 4 H. 6, 16. pl. 16. Bro. Amend. 62.
[f] Fitz Coro. 121. 13 Aſſ. pl. 10.
[g] Fitz. Amendment 68.
[h] Fitz Variance 59. 8 Co. 156. b. 4 H. 6, 16. pl. 16.
[i] Fitz. Amendments 63.
[k] 8 Co. 156. b. 4 H. 6, 16. pl. 16. 40 Aſſ. pl. 26.
[l] Mo 866. pl. 1196. 1 Rol. 138. pl. 13. Cro. El. 644. pl. 49. *Quære* Hob. 118.
[m] 2 Ventris 46. 49, 130. 152. 1 Sid. 412. pl. 8. Hob. 118. Hutton 56. 57. Cro. Car. 74. Littleton's Rep 50.
[n] Fitz. Coro. 80.
[o] Mich. 7 *Anne.*
[p] Sect. 22, 23, 24, 25, 26.
[q] *See* B. 1 Chap. 28. S. 3.

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.

Sect. 128. As to the firſt Particular, *viz.* What Pleas will be good Bars of ſuch an Apppeal by ſhewing that the Plaintiff had never any Right to bring it, it ſeems to be a good general [a] Rule, That any Plea of this Kind is good which ſhews that the Plaintiff wants any of thoſe Requiſites which the Law makes neceſſary to entitle him to the Appeal. And therefore in an Appeal of Death by a Woman it is a good Plea, that [b] ſhe was never lawfully married to the Deceaſed; or [c] that ſhe hath not continued a Widow ſince his Death, but hath taken another Huſband. Alſo in an Appeal of Death by one as Heir, it is a good Plea, that *A. B.* at the Time [d] of the Writ was and ſtill is Heir of the Deceaſed; or [e] that one of the Defendants was the Wife of the Deceaſed, and made a Defendant by Covin to exclude her from her Appeal; or that the Plaintiff is a Baſtard [f] and not legitimate. And where one brings an Appeal as Brother and Heir, it is a good Plea, That he is not [g] Brother and Heir as by his Writ and Declaration he hath ſuppoſed, or [h] that he hath an Elder Brother by the ſame Father and Mother ſtill alive; or where one brings an Appeal as Couſin and Heir, *viz.* Brother of *A. B.* Father of the deceaſed, it is a good Plea, That he is not Couſin [i] and Heir, *viz.* Brother of *A. B.* Father of the deceaſed, *&c.* as by his Writ and Declaration he hath ſuppoſed. Alſo [k] it is a good Plea in any Appeal of Death, that the Plaintiff hath ſlipt his Time in not bringing the Appeal within the Year and Day after the Death of the Perſon ſuppoſed to have been killed. Alſo it is a good [l] Plea in an Appeal of Robbery, That the Plaintiff is a Villain to the Defendant. And it is a good [m] Plea in an Appeal of Rape by a Man and a Woman, That the Plaintiffs were never lawfully married. And [n] it is a good Plea in Bar of any Appeal of Felony, That the Plaintiff is an Ideot, or that he was born deaf and dumb. Alſo it is ſaid by Sir *William Staundforde*, [o] that it is a good Plea in Bar of any ſuch Appeal, That the Plaintiff is attainted of Treaſon or Felony; however [p] it ſeems that ſuch Attainder is no perpetual Bar, but only during the Time it continues in Force.

Sect. 129. As to the ſecond Particular, *viz.* Where a *Retraxit* or Nonſuit in a former Appeal of this Kind will be good Bars of another; I take it to be clear, [q] that a *Retraxit* of any ſuch Appeal is a Bar of all ſubſequent Appeals of the ſame Kind; for it ſeems to be a general ſettled Rule, That a *Retraxit* of any Action whatſoever is a Bar of all others of the like or inferior Nature. Alſo it ſeems to be certain, That a Nonſuit on a Bill [r] of Appeal, whether commenced in the Court of King's Bench, or before Juſtices [s] of Gaol-Delivery, or before the Sheriff [t] and Coroners, or a Nonſuit after [u] 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 [x] the Appellant have firſt appeared in proper Perſon; and it ſeems to be agreed by all the Books, That a Non-

[a] S. P. C. 98. H. P. C. 190.
[b] *Supra*, Sect. 36. S. P. C. 98
[c] *Supra*, Sect. 38. S. P. C. 98.
[d] Raſtal's Entries 50. pl. 8.
[e] Raſtal's Entries 50. pl. 9.
[f] Raſtal's Entries 49. a.
[g] Raſtal's Entries 49. a. b.
[h] *Supra*, Section 40. Letter i.
[i] Raſtal's Entries 49. a.
[k] S. P. C. 98.
[l] *Supra*, Sect. 44. Letter h. S. P. C. 98.
[m] *Supra*, Section 62. S. P. C. 98. Letter b.
[n] *Supra*, Section 32. S. P. C. 98. Letter c.
[o] S. P. C. 98. Letter c.
[p] *Supra*, Sect. 32.
[q] 1 Inſt. 138. b. 139. a. H. P. C. 190. 8 Co. 58, 62.
[r] S. P. C. 148. Letters a, b. 10 H. 4. pl. 14.
[s] S. P. C. 148. Letters a. b. 22 Aſſ. pl. 97.
[t] H. P. C. 190. S. P. C. 148. Letters a. b. Cro. El. 605.
[u] Salkeld 64.
[x] *Vide* f. n. b. 26. Letter. p.

ſuit after ſuch an Appearance is peremptory. Alſo it is holden generally in ſome Books, [a] That a Nonſuit after Appearance is a peremptory Bar to the Appellant, without adding that he muſt alſo have declared; from whence, and alſo from the general Reaſon of the Thing, it may be reaſonably argued. That if it any way appear on Record that the Appellant who was nonſuited in a former Appeal, did actually appear and proſecute ſuch Appeal, as by praying [b] of Proceſs on it, *&c.* he ſhall be barred in any other Appeal of the ſame Kind. But it ſeems [c] that the bare Taking out of a Writ of Appeal, and cauſing it to be delivered of Record to the Sheriff, and a Nonſuit upon it, is no Bar of a ſecond Appeal, becauſe it doth not appear of Record, but that it might be done by a Stranger; and notwithſtanding ſome Books [d] ſeem to hold generally, that any Nonſuit in Appeal is peremptory, yet it ſeems to be in great Meaſure ſettled [e] at this Day, that ſuch Nonſuit ought to be after an Appearance in proper Perſon of Record.

[a] 22 Aſſ pl. 97. 47 Ed 3. 16 pl. 27. Bro. Appeal 28. 71. Fitz. coro. 184. 1 Inſt. 139. a. *Vide* 4 H 6. 16. a. *ſupra*, Sect. 26. 9 H. 4 2. b. 3. a 47 Aſſ pl 7

[b] *Vide* 2 H. 7. 6 pl. 10.

[c] S P. C. 148 Letter a. 7 H 7 6 pl. 10. 1 Sid. 32.

[d] 27 Aſſ. pl. 7. Cro. El. 605 *Vide* 4 H 6, 16. a. 1 Sid 32.

[e] *See* the Books cited to the other Prints of this Section.

Sect. 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 [f] 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 as ſtrongly that the Abatement of an Appeal where the Writ was good ſhall be a Bar of another; for by an Appeal ſo abated the Life of the Appellee is as much put in Jeopardy as by an Appeal that is diſcontinued; and yet it ſeems to be agreed at this Day, that ſuch an Abatement of an Appeal cannot regularly be a Bar of another, as ſhall be more fully ſhewn in the next Section. Nor can I find it any where adjudged, That the Diſcontinuance of one Appeal is a Bar of another. It is True indeed, that in *Bradley* 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 it ſelf a Bar to any other Appeal, but becauſe the Year and Day were paſſed, and conſequently there could be no other Appeal; and the Appellee had alſo been before convicted on an Indictment, and had his Clergy, and conſequently could not be proceeded againſt at the Suit of the King. However, Granting the Opinion aforementioned 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 Nonſuit.

[f] 16 Ed. 4 11. pl. 7. Bro. Appeal 103. *Vide* S. P. C. 59. G.

[g] 1 Buſſt. 141. Cro. Jac. 283, 284. Yelv. 204.

Sect. 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 [h] 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 [i] 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 [k] of the Old Books, that an Appeal once determined, cannot revive; and in [l] others, that where an Appeal of Maihem, 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

[h] *Vide* S P. C. 147. Letter e. H. P. C. 200.

[i] *Vide ſupra* Sect. 39, 39. 41.

[k] 6 H 4, 6. pl. 29. Bro. Appeal 10.

[l] 50 Ed. 3, 1. pl. 2. Bro. Appeal 16.

other [a] Old Books, but it is denied [b] by others. However I take it to be ſettled [c] 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.

Sect. 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, [d] that anciently one might have had two Appeals for the ſame Fact, one againſt the Principal, the other againſt the Acceſſary. And even at this Day, if one be robbed of the ſame [e] Goods, at ſeveral Times or receive different [f] Maims, whether at the ſame or at ſeveral Times; or a Woman be raviſh'd 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 [g] agreed at this Day, that after one hath brought an Appeal of Felony againſt one Perſon, who is thereon attainted and hanged; he may be barred by it in any ſubſequent Appeal, for the very ſame Crime, againſt any other Perſon not named in the firſt; whether ſuch ſubſequent Appeal, againſt the Perſon ſo omitted in the firſt, be brought againſt him as Principal, or as Acceſſary [h] before the Fact, or even as Acceſſary after the Fact, unleſs where he happens to be ſo Acceſſary after the firſt Appeal was commenced; in which Caſe it is certain that he is liable to ſuch ſecond [i] Appeal, becauſe it was impoſſible to charge him in the firſt. But otherwiſe, after an Attainder had on the firſt Appeal, the Law ſeems to diſallow the Bringing of a ſecond; for this Reaſon, that where an Appellant has ſo far had his Revenge in one Appeal, he ſhall not be indulged in the Bringing of another, which his own Latches only made neceſſary. Alſo it ſeems to be [k] 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* 34, by which it is provided, *That none ſhall beimpriſoned 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 that in ſome Caſes it does, it may reaſonably be argued, that he may as well bring it againſt others alſo; As [m] where the firſt is abated, and there ſtill continues to be a Plaintiff, not diſabled to proſecute, [n] and in ſome other Caſes: For if an Appellant be not barred by the Abatement of his firſt Appeal, from bringing a ſecond againſt thoſe who had Vexation by the firſt, and were legally diſcharged from it, why ſhould he be barred by it, as to thoſe who were not concerned in it?

[a] 9 H. 5. 1. pl. 3 Bro. Appeal 38, 44. 4 H. 6, 16. a.
[b] Bro. Appeal 53, 118, 146. 13 Aſſ. pl. 10.
[c] *Vide ſupra* Sect. 4.
[d] S. P. C 65. Letter C.
[e] S P. C. 65. Letter d.
[f] 9 H 4, 2. a. 11 H. 4. 14. a. Bro. Appeal 28.
[g] Bro. Appeal 32. 11 H. 4, 13. b. 14. a.
[h] H P. C. 190. S. P. C. 65. Letters 98 Letter C. Bro. Appeal 14. 28. 4 Co. 47. b. *Vide ſupra* Ch. 6. Sect 5. 1 Keilw. 83. a. ſeems contrary as to Appeals of Robbery.
[k] 28 Ed. 3. 90. pl. 138. 26. Aſſ. pl. 42. Keilw. 83. a. 4 Co. 44. b. 48. a 47 Ed. 3. 16 pl. 27. Fitz 1 Cro. 104. 9 H. 4. 2. a H. P. C 188, 190. S. P. C 98. Letter c. 47 Aſſ pl. 7.
[m] 28 Ed. 3. 90. pl. 138. 4 Co. 48.
[n] *See* the precedent Section.

Sect. 133.

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 [a] Criminal, or of all Actions [b] Mortal, or of all Actions concerning *Pleas of the Crown*, or of all [c] Appeals, or of all [d] Demands, will be a good Bar of any ſuch Appeal. But it [e] 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 [f] 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 ſhewn more at large in the Chapter of Indictments. Alſo it is [g] certain, That no Releaſe ſhall diſcharge a Perſon attainted 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 [h] ſeems, that if he be barred by a Releaſe given, or *Retraxit* entred as to one, or by being vanquiſhed in Battle by one, yet he may continue his Suit againſt the Reſt, becauſe he is to have a ſeveral Execution againſt every one of them. Yet in an Appeal againſt divers, whether they plead the ſame or ſeveral Iſſues, it hath been adjudged, [i] that a Nonſuit againſt one, at the Trial of any one of the Iſſues, is a Nonſuit as to all, of which this ſeems to be the beſt Reaſon, That [k] ſuch a Nonſuit operates in Nature as a Releaſe of the whole. But whether [l] 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 [m] Wife, plead *Nunques accouple in loial Matrimony*; [n] or in an Appeal of Death, by one as Heir, plead that the Appellant is a Baſtard, [o] or that he hath an elder Brother of the whole Blood alive, or in [p] 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 [q] the Appellant hath formerly brought an Appeal for the ſame Fact againſt another Perſon, who was thereon attainted and hanged, or generally [r] any other Plea not amounting to an implied Confeſſion of the Fact, as a Releaſe, *&c.* Whether it be triable by Matter [s] of Record, or by *Pais*; and whether it [t] 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 [u] 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 [x] 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 releaſed,

[a] Littleton Sections 500, 501. [b] 11 H. 6, 287. b. 283. a. [c] Littleton Section 501. [d] Littleton. Section 508. [e] Littleton Section 500, 501. *Contra* Fitz. Releaſe 46. *Quære* Bro. Appeal 29. 21 Ed. 4, 72. 9 H. 4, 2. pl. 8. *Vide ſupra*, Section 25. [f] Fitz coro. 12. S. P. C. 148. Letter B. H. P. C. 200. Raſtal's Entry 43. pl. 8. 48. a. [g] *Supra*, Sect. 38, 42. [h] H. P. C. 190. 21 Ed. 4. 72. a. b. 2 R. 3, 9 pl. 18. Bro. Appeal 111, 120. [i] Cro. El. 460 pl. 6 Dyer 120. pl. 11. 7 H 6, 27. pl. 19. 27 Ed. 3. 87 pl 45. 2 Roll's Ab. 133 Letter H. 1 Inſt. 139. 1 Sid. 378 pl. 7. Bro. Diſcontinuance de proceſs 20. [k] Hob. 180. [l] *Vid* 7 H. 6, 27. pl. 19. 30 Aſſ. pl. 36. 39 Ed. 3. 3 a. 38 Aſſ pl 17, 27 Ed. 3, 87. pl. 45. [m] 3 Leon 263. Cro El. 223. [n] 7 Ed. 4, 15. pl. 3. *Quære* 14 Ed. 4, 7 pl. 10. [o] Raſtal's Entries 49 pl 5. 7 Ed. 4, 15. pl. 3. *Quære* 14 Ed. 4, 7. pl. 10. [p] 21 H. 6, 29. a. [q] 22 Ed. 4, 39. b. [r] 9 H 4 2. pl. 7. [s] 21 H. 6. 29 a, 22 Ed. 4, 39. b. 40. Raſtal's Entries 49. pl. 6, 7, 50. pl. 8, 583. b 584. S. P. C. 98. Letter D. Keil. 188, 189 [t] 21 H. 6, 28, 29. 4 H. 7. 5. pl 1. 9 H. 4, 2. pl. 7. 35 H. 6, 57. pl. 2. 8 Ed. 4, 3. pl. 6. Con. Bro. Appeal, 14, 48. 4 H. 7, 5. b. 6. a. [u] 7 Ed. 4, 14. pl. 3. 21 H. 6, 29. a. [x] Cro El. 223. 3 Leon. 268. S. P. C 68. Letter D. Finch 385, 386. H. P. C. 190, 191 Hob. 170, 171.

leaſed, and [a] yet that there was no ſuch Crime committed to be releaſed: But I do not find this Point any where adjudged; and as to the Argument abovementioned, from the Repugnancy of the Plea of a Releaſe, to the general Iſſue, it may be anſwered, That a Man may reaſonably take a Releaſe to free himſelf from Trouble, from the Suſpicion of a Crime, of which he would by no Means own himſelf guilty; and in Appeals of Death after a Plea of [b] *Autrefoits convict* by Verdict, and even after the Plea of [c] *Autrefoits convict* by Confeſſion, and Clergy thereon had, the general Iſſue has been received; and yet ſuch Pleas as much imply a Confeſſion of the Fact, as the Plea of a Releaſe. And in *Smith's* Caſe, who was indicted of High Treaſon in the Beginning of his preſent Majeſty's Reign, for the Murder of Colonel *Parks*, after a Plea of a Pardon, the general Iſſue was received. However, I do not find it any where holden, That the Plea of a Releaſe may not be pleaded, if the Defendant think fit, without Pleading the general Iſſue. Alſo it ſeems queſtionable, [d] Whether any other Plea in Bar, whether triable by Matter of Record, or by *Pais*, may not alſo be received without Pleading the general Iſſue, as it ſeems clear, that in ſome Caſes it may, [e] as where it declines the Juriſdiction of the Court, [f] or would be prejudicial to the Defendant by infranchiſing the Plaintiff, as where a Villain brings an Appeal of Robbery againſt his Lord, who pleads the Villenage in Bar, in which Caſe he ſhall not be compelled to plead not guilty, becauſe that would amount to an Infranchiſement of the Plaintiff; by ſuppoſing that the Fact, if committed, needs a Defence, which it cannot do unleſs the Plaintiff have a Property, which if he be a Villain, he cannot have againſt his Lord. Alſo, It ſeems clear, that [g] if any of the Bars abovementioned, except that of a Releaſe, be ſuffered to be pleaded without the general Iſſue, and be found againſt the Defendant, they do not conclude him from pleading the general Iſſue afterwards; and as to the Plea of a Releaſe, whether that being pleaded without the general Iſſue, and found againſt the Defendant, do conclude him at this Day to plead the general Iſſue afterwards, may deſerve to be conſidered for the Reaſons abovementioned. [h] But it ſeems, That if a Demurrer to the Court be adjudged againſt an Appellee, he ſhall not be admitted to plead either in Bar, or the general Iſſue, but ſhall be condemned, as ſhall be ſhewn more at large in the Chapter of Demurrers.

[a] Hob. 270 271.

[b] 1 Bulſt. 141. Yelv. 204. Cro. Jac. 285. [c] 4 Co. 45. 1 And. 68. [d] Finch 385. S. P. C. 151. Letter A. 22 Ed. 4, 39. b. 40. Shower's Reports 47. [e] Widdrington and Charlton. Trin. 11 *Anne*. 50 Ed. 3, 15. 28 Ed. 3, 91. pl. 4. 27 Aſſ. pl 41. 35 H. 6, 57. pl. 2. 8 Ed. 4, 3. pl. 6. [f] Keil. 175. pl. 10, 91. pl. 1, 186. pl. 3. Raſtal's Entries 54 a. [g] 18 Ed. 3, 32. pl. 4. H. P. C. 191. S. P. C. 98. Letter D. *Vide* Littleton, Section 192, 193, 194, 208. [h] 14 Ed. 4, 7. pl. 16. 50 Ed. 3, 15, 16. 2. 28 Ed. 91. pl. 4. S. P. C. 98. Letter D. Fitz. Coro. 429. 27 Aſſ. pl. 3. *Contra* 7 Ed. 4, 15. pl. 3. Keilw. 100. H. P. C. 190, 191. Finch 385, 386. H. P. C. 243.

Sect. 136. As to the ſixth general Point, *viz.* Where the Appellant ſhall render Damages to the Appellee for a falſe Appeal, having premiſed that by the Common Law a Defendant may [i] recover Damages for a falſe and malicious Appeal, againſt the Appellant and his Abettors, by a Writ of Conſpiracy, or an Action on the Caſe, in the Nature of ſuch Writ, as hath been more fully ſhewn in Book 1. [k] I ſhall here endeavour to ſhew in what Caſes, and in what Manner he may, if he chuſe rather ſo to proceed, recover ſuch Damages by the Statute of *Weſtminſter* 2. 12. which was made for his ſpeedier Remedy, and is enacted as followeth.

Sect. 137. *Foraſmuch as many through Malice intending to grieve others, do procure falſe Appeals to be made, of Homicides and other Felonies, by Appellors, having nothing to ſatisfie the King for their falſe Appeal, nor to the Parties appealed for their Damages: It is ordained, that when any being appealed of Felony, furmiſed 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-*

[i] 14 Ed. 4, 7. pl. 10. Keilw. 100. [k] Inſt. 283. Keilw. 27. a. S. P. C. 167. b. [k] Brook 1. Sect 2 and 3.

fore whom the Appeal ſhall be heard and determined, ſhall puniſh the Appellor, by a Year's Impriſonment; and the Appellor ſhall nevertheleſs reſtore to the Parties appealed their Damages, according to the Diſcretion of the Juſtices, having Reſpect to the Impriſonment or Arreſtment, that the Party appealed hath ſuſtained by Reaſon of ſuch Appeals, and to the Infamy that they have incurred by the Impriſonment, or otherwiſe; and ſhall nevertheleſs make a grievous Fine unto the King. And if peradventure ſuch Appellor be not able to recompence the Damages, it ſhall be inquired by whoſe Abetment, by Malice, the Appeal was commenced, if the Party appealed deſire it. And if it be found by the ſame Inqueſt, that any Man is Abettor through Malice, he ſhall be diſtrained by a judicial Writ at the Suit of the Party appealed to come before the Juſtices. And if he be lawfully convict of ſuch malicious Abetment, he ſhall be puniſhed by Impriſonment and Reſtitution of Damages, as before is ſaid of the Appellor.

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

Sect. 138. And firſt, Whereas the Words of the Preamble are, *That many through Malice procure falſe Appeals to be made by Appellors, having nothing*, &c. And in the Purview it is ſaid, *That it ſhall be inquired by whoſe Abetment, by Malice, the Appeal was commenced*, &c. *And if it be found that any Man is an Abettor, through Malice*, &c. In all which Places the Malice is expreſly referred to the Procurers and Abettors only, and in no Part of the Statute to the Appellant, it is holden by [a] ſome, That where-ever an Appellee is acquitted of an Appeal of Felony, he ſhall recover Damages by Force of this Statute againſt the Appellant, except only where he hath been indicted of the ſame Felony before. And it muſt be confeſſed, that in the [b] Reports and Entries [c] 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 holden by [d] others, That the Appellant is no more within the Intent of the Statute, than his Abettors, 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 [e] of the very ſame [f] Crime, which is agreed [g] 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 [h] for the Favour ſhewn to the Appellant, where the Appellee has been indicted before; which is this, that the Appellant had Cauſe and Evidence to purſue the Appeal, and it appears to the Court that it was not meerly founded on Malice. And this is alſo one of the Reaſons given in the [i] Books, why the Appellant is not to render Damages, by the Intent of the Statute, where the Appellee in an Appeal of Murder is found guilty of Homicide, *ſe defendendo* only. And as to the general Expreſſions of

[a] 1 Inſt. 139. b.
[b] 2 Inſt. 384. *Vide* Littleton, Section 208.
22 Aſſ. pl. 39. 26 H. 8, 3. pl. 14.
[h] *See* the Books cited under this and the following Sections.
[c] Raſtal's Entries, 56. pl. 2.
[d] S. P. C. 168. Letter B. *See* L. Quinto, Ed. 4, 126. a. 40 Ed. 3, 42. pl. 24.
[e] 20 Ed. 4, 6. pl. 5. 2 Inſt. 384.
[f] 26 H. 8, 3. pl. 14. 33 H. 6, 1. pl. 6. 40 Ed. 3, 42. 24. 14 H. 7, 2. pl. 8.
[i] 40 Aſſ. pl. 18.
[g] 22 Aſſ. pl. 39. 26 H. 8, 3. pl. 14. 33 H. 6, 1. pl. 6. 40 Ed. 3, 42. pl. 24. 14 H. 7, 2. pl. 8. 20 Ed. 4. pl. 5. 40 Aſſ. pl. 18. Fitz. Damages 67. [h] 40 Ed. 3, 42 pl. 24. 14 H. 7, 2. pl. 8. [i] 21 Aſſ. pl. 77. 2 Inſt. 384.

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 as generally in Relation to the Recovery of the Damages againſt the Abettors; and yet it ſeems [a] 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 [b] 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 harſh to ſay, That he is not as well within the Meaning as Letter of the Statute.

[a] 2 Inſt. 384. S. P. C. 168. Letter B. P. C. Com. 88. b. ſeems contrary. *Vide* Dy. 220 pl. 10.

[b] Fitz Champerty 10. P. C. Com. 88 b. 2 Inſt. 384.

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

[c] Fitz. Coro. 275, 381. P. C. Com. 124. b.

[d] *Supra*, Sect. 59. *Co.*

[e] 2 Inſt. 384.

Sect. 140. Thirdly, In the Conſtruction of theſe Words, *When any being appealed of Felony ſurmiſed upon him, doth acquit himſelf in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King*; it ſeems to have been generally agreed, That no Acquittal is within the Intention of the Statute, [f] unleſs it be had on an Appeal, (either at the Suit of the Party, or of the King, after a Nonſuit of the Party,) and be of ſuch a Nature as [g] 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 [h] Abatement of an Appeal, nor on the bare [i] Nonſuit of the Appellant, nor where the Appellant is barred, either by a [k] Demurrer, or by a [l] Plea, ſhewing that he is not intitled to the Appeal, nor on any Acquittal on an inſufficient [m] 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 [n] of Homicide by Miſadventure, or *Se defendendo*, which will be a Bar of any other Proſecution for the ſame Killing; yet it hath been reſolved that he ſhall not recover Damages, not [o] only becauſe it appears that the Appeal was not groundleſs, but alſo becauſe the Appellee is not totally acquitted. But it is [p] clear, That the Appellee is intitled to his Damages, where he is acquitted on an Appeal at the Suit of the King, after a Nonſuit of the Plaintiff, or where he vanquiſhes [q] the Appellant in a Trial by Battle. Alſo if two be appealed, the one as Principal, and the other as Acceſſary; and the Jury be-

[f] S. P. C. 169. Letter B. 2 Inſt. 385. *Vide* 14 H. 7. 2 pl. 8.

[g] S. P. C. 169.

[h] 4 Co. 47 b. S. P. C. 169. Letter A. 9 H. 4. 2 b. *Vide* 9 H. 5, 1. Pl. 3.

[i] 2 Inſt. 385. Fitz. Conſpiracy 25. But 33 H. 1. pl. 6. Fitz. Coro. 102. 48 Ed. 3. 22. pl. 2 ſeems doubtful in this Caſe.

[k] 2 Inſt. 385. Fitz Coro. 12. S. P. C. 169 Letter A.

[l] 27 Aſſ. pl. 25. 2 Inſt. 385. S. P. C. 169.

[m] 4 Co 45. a. 47. a. Fitz Coro 444. 9 H. 5, 2. S. P. S. 169.

[n] 22 Aſſ. pl. 77. 2 Inſt. 385. S. P. C. 199.

[o] *Vide Supra*, Sect. 138. pl. 8.

[p] 41 Aſſ. & 24. Fitz. Coro. 275, 381, Damages 77.

[q] Fitz. Coro. 98. S. P. C. 169. Letter E.

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ing charged on the Acceſſary, as well as the Principal, do acquit the Principal; it ſeems to be [a] agreed, that the Acceſſary 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 Acceſſary where there is no Principal. And this Reaſon ſeems to hold as ſtrongly for the Damages, where the Acceſſary doth not appear on the Trial or Acquittal of the Principal, becauſe in ſuch Caſe the Acquittal of the Principal is as much an Acquittal of the Acceſſary, as where he doth appear. But it is holden [c] by Sir *Edward Coke*, That ſuch an Acceſſary ſhall not recover Damages, becauſe no Jury can be returned to aſſeſs them; and Sir *William Staundforde* [d] ſeems to be of Opinion, that ſuch an Acceſſary ſhall not recover Damages, unleſs he be expreſly acquitted by Verdict, after the Acquittal of the Principal. Yet whether [e] the Juſtices themſelves may not, in a Caſe of this Nature, if they think fit, aſſeſs the Damages, without any Jury, or elſe aſſeſs them by an Inqueſt of Office, may deſerve to be conſidered. Alſo it ſeems to be to little Purpoſe, to require an actual Acquittal of a Perſon, where it appears by the Acquittal of another, that he could not be guilty. However it ſeems clear, That a Perſon appealed as Acceſſary to two Principals, ſhall not [f] recover Damages by the Acquittal of one of them; becauſe for what appears he might be acceſſary to the other. Neither [g] ſhall he recover Damages where he is diſcharged by the Death of the Principal, before his Attainder, becauſe it doth not appear but that he might have been guilty.

[a] S.P.C. 168. F. 169. 2 Inſt. 385. 33 H. 6, 1. pl. 6.

[b] 33 H. 6, 1. pl. 6.

[c] 2 Inſt. 385.

[d] S.P.C. 168. Letter F. *Vide* 41 Aſſ. pl. 24.

[e] *Vide ſupra* Sect. 52, 53.

[f] 2 Inſt. 385. Dyer 120. pl. 11. Fitz. Coro. 463.

[g] S. P. C. 173. Letter A. 33 H 6, 1. pl. 6.

Sect. 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 [h] 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 ſhewn more at large in the Chapter concerning Proceſs.

[h] 9 H. 5, 2. 2 Inſt. 386. *Quære* S. P. C. 169. b. Fitz. coro. 414. Yelv. 204. Cro. Jac. 284. 4 Co. 45. a.

Sect. 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, [i] 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.

[i] S. P. C. 169. 173. Letter A. *Vide* Fitz. coro. 386. & 33 H. 6. 1. pl. 6. *ſupra*, Sect.

Sect. 143. Where-ever any Perſon is ſo far acquitted on an Appeal carried on at the Suit of the Party, as to be intitled to his Damages, [k] 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 Nonſuit of the Party, he ſhall not recover Damages, without a *Scire facias*, to bring in the Party, becauſe he was out of Court by the Nonſuit.

[k] S. P. C. 169. Letter C.

Fourthly, In the Conſtruction of theſe Words, *The Juſtices before whom the Appeal ſhall be heard and determined, ſhall puniſh the Appellor by a Year's Impriſonment, and the Appellor ſhall nevertheleſs reſtore to the Parties appealed their Damages, according*

according to the Diſcretion of the Juſtices, having Reſpect to the Impriſonment or Arreſtment, that the Party appealed hath ſuſtained by Reaſon of ſuch Appeals, and to the Infamy that they have incurred by the Impriſonment, or otherwiſe, &c. the following Points have been holden.

Sect. 141. Firſt, That Juſtices of *Niſi prius* [a] have no Power to give Judgment for ſuch Impriſonment or Damages, upon an Acquittal before them, whether before or ſince the Statute of 14 *H.* 6. by which it is enacted, *That ſuch Juſtices ſhall have Power in all Caſes of Felony or Treaſon, to give their Judgments, as well where a Man is acquitted, as where he is attainted.* For [b] the Words abovementioned in the Statute of *Weſtminſter* 2. are to be intended of ſuch Juſtices only before whom the whole Plea of the Appeal is heard and determined, and therefore in Strictneſs can extend to the Juſtices of the King's Bench only, where the Appeal is commenced before them, (for that the whole Appeal is in ſuch Caſe heard and determined before them, either in Perſon, or elſe by others delegated by, and repreſenting them,) and not to the Juſtices of *Niſi prius*, who have nothing to do with the Appeal before the Trial, nor any Original Power to try it. And the Statute abovementioned of 14 *H.* 6. hath been conſtrued to intend only to enable Juſtices of *Niſi prius* to give the Principal Judgment, and not to transfer to them from the Court of King's Bench, a Power in collateral Matters. Yet [c] Juſtices of *Niſi prius* have by Uſage not now to be diſputed, gained a Power to aſſeſs the Damages, and to inquire of the Sufficiency of the Plaintiff to anſwer them, and alſo of the Abettors. But I do not find that they have ever given Judgment for the Damages. Yet there is no Doubt [d] but, that if ſuch Juſtices be alſo Juſtices of Aſſiſe, and as ſuch have an Appeal commenced before them, they may, as Juſtices of Aſſiſe, upon the Acquittal of the Appellee, not only inquire of the Damages, *&c.* but alſo give Judgment for them, both by the Letter and Meaning of the Statute.

[a] 10 Ed. 4, 14. pl. 12. 22 Ed. 4, 19. pl. 44. S. P. C. 169. Letter D. 2 Inſt. 386.
[b] S. P. C. 169. Letter D.
[c] 4 Co. 93. b. 2 Inſt. 386. Dyer 120. pl. 10, 11, 12, 13. Bro. Appeal 113. Firz. coro. 463.
[d] 22 Ed. 4, 19. pl. 44. Bro. Appeal 113.

Sect. 142. Secondly, That if a Jury give too ſmall Damages to the Appellee, the Court may encreaſe [e] 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 ordering, 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 [f] to have a general diſcretionary Power, except in ſome ſpecial Caſes, as Local [g] 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.

[e] Cro. El. 223. *Vide* 2 Inſt. 387. 42 Aſſ. pl. 19. ſeems to be contrary.
[f] 3 H. 6, 29. b. 14 H. 4, 9 b.
[g] 8 H. 4, 23. pl. 9. 3 H. 4. 4. pl. 16. 7 H. 6, 31. pl. 16. 19 H. 6, 31. pl. 16.

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

[h] 19 H. 6, 10. pl. 28. Bro. Abridgment 36. *Vide* 27 H. 8. 2. pl. 8. & *ſupra*, Sect 52. 27 H 8, 2. pl. 8. 19 H. 6, 42. pl. 86. 19 H. 6, 10. pl. 28. 2 Inſt. 386.

Vide 3 H. 6, 29. b. [b] S. P. C. 170. Letter A. Dyer 120. pl. 10. 11 H. 4, 16. b. 12 Co. 126 41 Aſſ. pl 24. Firz. Damage 77. [g] H. 5, 6. pl. 26.

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; 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 [a] *Hobart*, neither do any of thoſe [b] who ſeem 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 Aſſertion, that the Law is the ſame in the Caſe of a Wife: Againſt which it may be plauſibly argued, That ſince the Impriſonment and Infamy ſuſtained by a Feme Covert, in a malicious Appeal againſt her, are far from being leſs grievous in Reſpect of her Coverture, and are a good [c] Ground of a Writ of Conſpiracy at the Common Law, brought by the Husband and Wife; and ſince the Wife may take any Thing to the Benefit of her Husband, and it appears to the Court that the Appellant by his own Act, without any Default either in the Husband or Wife, gives them a good Title to the Damages; and ſince no expreſs Judgment can be given for the Husband, being not a Party to the Record, and it is moſt for his Advantage, as well as his Wife's, that a preſent Judgment be given: It may perhaps be thought no unreaſonable Conſtruction of the Statute, that in this particular Caſe Judgment ſhould be given for the Wife to recover the Damages, which would as much enure, for the Benefit of her ſelf and her Husband, as an expreſs Judgment for them both, on a Writ of Conſpiracy.

[a] Hobart 98.
[b] 2 Inſt. 385. 11 Co. 77. b. 9 Co. 73. a. 1 Rol Rep. 170. S. P. C. 170. Letter B. Fitzherb. 276.
[c] 2 Inſt. 385. 24 Ed. 3, 77. pl. 90. 1 Inſt. 132. b.

However, It is certain, [d] 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.

[d] Fitz Judgment 108. 2 Inſt. 385, 386. 11 H. 4, 16. b. 17. a. S. P. C 170. Letter B.

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

Sect. 145. Firſt, That [e] 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 Purport of the Statute, which by directing that the Abettors be inquired of, where the Appellant appears inſufficient to anſwer the Damages, plainly intimates that they are to be inquired of in ſuch Caſes only, wherein the Appellant muſt have anſwered them, if he had been able; and agreeably hereto it ſeems to be ſettled, [f] That a Releaſe of Damages to the Appellant will diſcharge the Abettors, if they can produce it.

[e] S. P. C 170. Letter D. 171. Letter A. 2 Inſt. 386.
[f] 20 H. 7 7. b.

Sect. 146. Secondly, That [g] unleſs the Appellant be found by the Jury to be inſufficient, the Abettors ſhall not be inquired of; and yet the Statute doth not expreſly 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,

[g] 2 Inſt. 386.

it being but an Inquiry of Office, may deſerve to be conſidered for the Reaſons in the 52 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 Inquires, before the Abettors can be inquired of.

Sect. 147. Thirdly, That [a] the Abettors may traverſe the Jury's Finding the Appelant to be inſufficient, or that they abetted him, *&c.* For it is hard that a Man ſhould be concluded by any Matter whatſoever, found to his Prejudice in an Action, to which he is no way Privy. Alſo it is holden by [b] *Staundforde*, That if a Jury on the Acquittal of one Defendant find that there were no Abettors, yet they may afterwards on the Acquittal of another Defendant find that there were Abettors, becauſe there is no Reaſon that the firſt Inqueſt ſhall bind one who is not Privy to it, and has no Remedy againſt it. But the contrary hereto is holden in the Book of [c] Aſſizes, 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 Purpoſe ſhould this be done, unleſs it were firſt found that the Appellant was ſufficient or elſe that there were Abettors, which could not but control the Firſt Finding; as alſo the ſecond Taxation of the Damages muſt do, unleſs it were wholly the ſame with the firſt.

[a] S. P. C. 171. Letter A. *Quære* 8 Ed. 4. 3 pl. 5. 12 Co. 126. 2 Inſt. 386. Roſtal's Entries 44. Bro. Appeal 96.
[b] S. P. C. 170. Letter F.
[c] 41 Aſſ. 24.

Sect. 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 peradventure the Appellor be not able to recompence the Damages*, muſt be underſtood of all the Damages.

[d] 12 Co. 126. S. P. C. 170. Letter D. 8 Ed. 4. 3. pl. 5. 8 H. 5, 6. pl. 26. 26 H. 8, 3. pl. 14. 2 Inſt 386. Fitz coro. 29. 386. 463. Bro. Appeal 96. *Contra* 41 Aſſ. pl. 8. Fitz. Coro. 219. Bro. Appeal 74.

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

[e] Fitz Coro. 13.

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

[f] Fitz. Action ſur le Statute 28. 2 Inſt. 386, 387.

Sect. 151. Seventhly, That [g] if the Appellee chuſe rather to proceed for the Recovery of his Damages by judicial Proceſs, than by Original; it is ſafeſt for him to make Uſe of a Diſtreſs, which is given by the expreſs Words of the Statute; yet there is a Note [h] of an Old Caſe, wherein a *Venire facias* was firſt awarded; but it is [i] queſtionable, whether this be juſtified by the Statute or not.

[g] S. P. C. 171. Letter D. 2 Inſt. 139.
[h] Fitz. Coro. 102.
[i] S. P. C. 171. Letter B. 2 Inſt. 386, 387.

Sect. 152. Eighthly, That [k] it is Time enough for the Appellee to ſhew the Time and Place of the Abetment, when the Abettors appear upon ſuch Proceſs; and by ſuch ſhewing he ſupplies the Omiſſion of the Jury in not finding any Time or Place, on their Inquiry of the Abetment, *&c.*

[k] S. P. C. 171. Letter A. 2 Inſt. 386. Fitz. Coro. 45.

Sect. 153. Ninthly, That [l] the Nonſuit of an Appellee, either in an Original Writ, or Proceſs againſt the Abettors, whether before or after Appearance, is no Bar of a ſecond Writ or Proceſs.

[l] S. P. C. 171. Letter B. 2 Inſt. 386, 387. 139. Fitz. Coro. 386.

Sect. 154.

Sect. 154. As to the ſeventh general Point, *viz.* Where the Appellant is to be fined, there can be no Doubt but [a] that by the expreſs Words of the above expounded Statute of *Weſtminſter* 2, 18. Where-ever the Appellant, or his Abettors are by the Purport thereof to render Damages to an Appellee, they are alſo to be fined to the King, and impriſoned for a Year. Alſo it ſeems clear from the general Purport of the [b] Books, that an Appellant appearing to have brought an ill grounded Appeal, whether of Felony or [c] Maihem, ſhall be fined, in many Caſes wherein he is not liable to render Damages by the Statute abovementioned; as where he is [d] Nonſuit, either againſt all, or part [e] of the Appellees only, whether after, or, as ſome [f] have holden, before Appearance, or where the Writ abates through the [g] Default of the Appellant in wilfully ſuing by a [h] wrong Name, or a [i] vitious Writ, *&c.* and even a *Feme Covert*, [k] ſuing an Appeal known by her to be groundleſs, as for the Death of a Husband whom we knows to be alive, ſhall be fined. But it is certain that where a Writ abates by the Act [l] of God, or for any other Cauſe, no way imputable to the Appellant, he ſhall neither be fined nor amerced. Alſo it is certain, that an Infant is in no Caſe to be fined for a falſe Appeal, but ſome [m] have holden that he may be amerced, which is contradicted by others, who ſay, [n] That an Infant can in no Caſe be amerced.

[a] S. P. C. 170. Letter C. Fitz. Fines 2. 1 Aſſ pl. 9. 22 Aſſ pl. 39. 8 H. 4, 17. pl. 2.
[b] *See* the Books cited the following Part of this Section.
Fitz Coro. 137. 8 Co. 60. a. S. P. C. 170. Letter C. ſeems contrary.
[c] 40 Aſſ pl. 1. Fitz. Coro. 214.
[d] Fitz. Fines 49. 41 Aſſ. pl 8. Fitz. Coro. 219. Damages 77.

[e] 22 Aſſ. pl. 82. Fitz. Coro. 182. [f] Fitz. Fines 107. [g] 8 Co. 60. a. [h] 9 H. 5. 1. pl. 3. Fitz. Fines 28. Bro. Fines 16. [i] Fitz. Coro. 121. [k] Bro. Appeal 25. 8 H. 4, 17. pl. 2. [l] Fitz. Brief 612. [m] Bro. Fines for Contempt 37. 41 Aſſ. pl. 14. [n] Co. Lit. 127. Cro. Ca. 161. *Vide* 1 Danvers's Abridgment 462. L. pl. 1, 2, 463. pl. 8, 9, 10, 13.

CHAP. XXIV.

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 [a] 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.

[a] S. P. C. 142. 2 Inſt. 129. H. P. C. 192.

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.
4. Of what Offences.
5. Againſt what Offenders.
6. Before what Juſtices.
7. How they are to be ordered and demeaned, both before and after the Appeal.

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

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

[a] H. P. C. 192. 3 Inſt. 129, 130.

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

Sect. 3. Firſt, That [b] a Peer of the Realm cannot be an Apprrover.

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

[b] 3 Inſt. 129. H. P. C. 192.
[c] 3 Inſt 129. H. P. C. 192. S. P. C 146. Letter C.
Bro. Coro. 81, 211. Fitz. Coro. 112, 127, 167, 387, 443, 445. 11 Aſſ. pl. 27. 17 Aſſ pl 4
[d] Bro. Appeal 57. *Supra*, Ch 23. Sect 32. Fitz Coro. 175.

Sect. 5. Thirdly, That [e] an Ideot, or Perſon born deaf and dumb, or any one that is *Non compos* at the Time, or an Infant under the Age of Diſcretion, cannot be an Approver, becauſe no ſuch Perſon ought to be admitted to take the Oath before the Coroner, without which there can be no Approvement.

[e] 3 Inſt 129. S P. C. 147. H P. C. 192. *Vide Supra* Ch. 23. Sect. 32.

Sect. 6. Fourthly, That it is holden both by [f] *Staundforde*, [g] *Coke*, and [h] *Hale*, That no Woman, nor Infant, can be an Approver, but it is obſervable that the Opinions of *Staundforde* and *Coke*, ſeem chiefly to be grounded on this Foundation, that the Appellee may have ſuch like Exceptions againſt Approvers, as the Defendant may have 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 theſe are no good Exceptions to an Appeal brought by a lawful Perſon, as hath been more fully ſhewn in the Precedent [i] Chapter, it ſeems to be juſtly queſtionable, whether they are now to be admitted as good Exceptions to an Appeal, by an Approver. To which may be added that in the Opinion of [k] *Hale*, contrary to that of [l] *Staundforde* and [m] *Coke*, a Man above the Age of ſeventy, or maimed, may be an Approver though he cannot wage Battel; from whence it follows clearly, that in the Judgment of *Hale*, there is no Neceſſity that an Approver ſhould be able to wage Battel.

[f] S. P. C. 147. Letter D.
[g] 3 Inſt. 129.
[h] H. P. C. 192.
[i] Sections 30 and 31.
[k] H. P. C. 192.
[l] S. P. C. 147. Letter D.
[m] 3 Inſt. 129.

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

[n] S. P. C. 147. Letters A. B. D. H. P. C. 192. 3 Inſt. 129.

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

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

[o] Fitz Coro. 50 441, 231.
[p] 3 Inſt. 129.

Sect. 9. Secondly, That it is holden [p] in ſome Books, that he that hath once pleaded not Guilty, cannot be an Approver, but ſhall be hanged, becauſe he is found falſe, and his Confeſſion contradicts his former Plea; yet the contrary hereto is holden by [q] others, and [r] *Staundforde* admits that the

H. P. C. 193. S P. C 144. Letter B. 145. a. Fitz. Coro. 440.

[q] Finch 387. [r] 21 Ed. 3, 18. pl. 25. 19 H. 6, 47. pl. 103. 12 Ed. 4, 10. pl. 26. *Vide* 2 H. 7. S. P. C. 145.

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 [a] agreed, That the Court is not bound of Right, to admit any Perſon whatſoever to be an Approver.

[a] 3 Inſt. 129. H. P. C. 194.

Sect. 10. Thirdly, That it is [b] 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.

[b] 19 H. 6. 47. pl. 103. 3 Inſt. 129. 21 Ed. 3, 18. pl. 24. Finch 387. Fitz. Coro. 231, 448. Bro. Coro. 41.

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

[c] 3 Inſt. 129. H. P. C. 193. S. P. C. 143. b. Fitz. Coro. 231. Seems contrary.

Sect. 12. Fifthly, That it ſeems alſo to be generally [d] agreed, That if a Perſon indicted be alſo appealed of the ſame Felony, he can no longer be an Approver, the Reaſon whereof ſeems to be, that though the King may in his Diſcretion, by admitting a Perſon to be an Approver, reſpite the Judgment and Execution of one proſecuted by Indictment, which is his own Suit, yet he cannot delay them in an Appeal, which is the Suit of the Party, and *à fortiori* therefore it follows, That [e] if a Perſon be appealed only, and not indicted, he cannot be an Approver.

[d] 3 Inſt. 129. Finch 387. H. P. C. 193. S. P. C 147. Letter B 181 Letter C.

[e] 2 Rich. 3. 22. pl. 53. 11 H 7. 5. pl. 22. Bro. Coro. 228. Fitz Coro. 442. 40 Aſſ. pl. 39. Seems contrary.

Sect. 13. Sixthly, That notwithſtanding the Appeal of an Approver may in ſome Reſpects be looked upon as the Suit of the King, and equivalent to an Indictment, yet the Appellee [f] of an Approver cannot become an Approver himſelf, not only becauſe it would falſifie 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.

[f] Fitz. Coro. 113. S. P. C. 147. Letter B. 11 H. 4, 93. pl. 54. Seems contrary.

Sect. 14. As to the fourth Point, *viz.* Of what Offences a Perſon may be admitted to approve another, it ſeems [g] 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 [h] Nature, nor even of being acceſſory [i] before or [k] 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 [l] general, to diſcover all the Treaſons and Felonies he knows, if he accuſe any Perſons of Crimes of a different Nature from his own, whether in the ſame, or a foreign [m] County, his Accuſation will be a reaſonable Ground to carry on a Proſecution againſt them for ſuch Crimes, though it [n] be not of it ſelf of Force ſufficient to put them on their Trials.

[g] S. P. C. 143. Letter A. H. P. C. 194. 3 Inſt. 129, 130. 2 Inſt. 629. Finch 387. [h] Fitz. Coro. 127, 217. 40 Aſſ. pl. 39. 11 H. 4. 93. pl. 54. [i] 27 Aſſ. pl. 69. 10 Ed. 4. 14. pl. 8. Fitz. Coro. 35. 208. Bro. Coro. 154. [k] Fitz. Coro. 126. [l] 2 Inſt. 629. H. P. C. 194 12 Ed. 4, 10. pl. 26

Sect. 15. As to the fifth Point, *viz.* Againſt what Offenders a Perſon may be admitted to become an Approver, it ſeems [o] clear, That a Man may be an Approver againſt any Perſon whatſoever within the Realm, whether he live in the ſame or a foreign County, provided he be named of the County wherein he dwells. But it is ſaid, That if it appear either by the [p] Confeſſion of the Approver, or the Return [q] of the Sheriff, or the Teſtimony [r] of Perſons of Credit in the County, that [s] there are no ſuch Perſons, as ſome of thoſe named in the Appeal, *in rerum natura*, or within the [t] Realm, or even [u] within the County, whereof they are named in the Appeal, the Approver ſhall be hanged, unleſs the [x] Court in Mercy will ſpare him, becauſe his Appeal in reſpect of ſuch Perſons appears to be falſe, or to no Purpoſe.

Fitz. Coro. 37, 387. [m] Fitz Coro. 437. [n] Fitz. Coro. 126, 127. 387. [o] Fitz. Aſſiſe 446. Fitz. Coro. 460. S. P. C. 154. [p] S. P. C. 145. Letter E. 1 Ed. 4, 16. pl. 4. Fitz. Coro. 153. [q] H. P. C. 194. 21 H. 6, 34. pl. 1. [r] H. P. C. 195. S. P. C. 145. Fitz. Coro. 133. [s] Bro. Coro. 49. 21 H. 6. 34. pl. 1. H. P. C. 195. 1 Ed. 3. 16. pl. 4. 1 Aſſ. pl. 2. S. P. C. 145. [t] Fitz. Coro 46. [x] S. P. C. 145.

Sect. 16.

Sect. 16. As to the ſixth Point, *viz.* Before what Juſtices a Perſon may be admitted to be an Approver, it ſeems to be a ſettled [a] Rule, That a Man may be an Approver before any Juſtices, who have Power to aſſign a Coroner to take the Appeal; and for this Reaſon it ſeems to be [b] agreed, That one may be an Approver before the Juſtices of the King's Bench, and Juſtices of Gaol-Delivery, and Juſtices in Eyre. And upon this Ground it is holden in Sir *Edward Coke*'s *third* [c] *Inſtitute*, and alſo in Sir *Matthew Hale*'s [d] *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 [e] Authors in other Places, wherein it is holden that Juſtices of *Oyer and Terminer* cannot aſſign a Coroner, becauſe it is not within their Commiſſion: And it ſeems to be a [f] general Rule, that thoſe only can receive the Appeal of an Approver who can aſſign a Coroner to take it; and therefore it ſeems to be agreed, That neither a [g] Court-Baron, nor [h] Juſtices of Peace, nor any other ſpecial [i] Juſtices, can receive ſuch Appeal, unleſs their Commiſſion extend to it. And for the like Reaſon it ſeems to be the Opinion of [k] Sir *Edward Coke*, that the Lord High Steward of *England* cannot receive ſuch an Appeal; but this is contradicted by [l] Sir *Matthew Hale*.

[a] 3 Inſt. 130. S. P. C. 143. Letter C. H. P. C. 194.
[b] 3 Inſt. 130. S. P. C. 143. Letter C. H. P. C. 194. Fitz Aſſiſe 446.
[c] 3 Inſt. 130.
[d] H. P. C. 194.
[e] 4 Inſt. 165. H. P. C. 162.
[f] H. P. C. 195. 3 Inſt. 130. S. P. C. 143. Letter C.
[g] H. P. C. 194. S. P. C. 144.
[h] 9 H. 4, 1. pl. 1. 2 H. 4, 19. pl. 12. 10 Co. 76. b. Bro. Appeal, 18. H. P. C. 194.
[i] S. P. C. 144.
[k] 3 Inſt. 130.
[l] H. P. C. 193.

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

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

[m] 21 H. 6, 34. pl. 1. 19 H. 6, 35. pl. 74. Bro. Coro. 48, 49. Fitz. Coro. 66, 67, 447. H. P. C. 194.

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

[n] 3 Inſt. 129. H. P. C. 194. 2 Inſt. 629. S. P. C. 143. Letter A. Fitz. Coro. 37. 12 Ed. 4, 19. pl. 26.

Sect. 19. Thirdly, That [o] the Court which admits a Man to become an Approver, ought to limit him a certain Number of Days, to make his Appeal in, during which it is holden by [p] ſome, That he is to have a Penny a-day as his Wages from the King; but by [q] others, That he ought not to have it till he has made good his Appeal, by convicting the Appellees.

[o] H. P. C. 194.
[p] 2 Inſt. 629.
[q] S. P. C. 143. Letter A. Fitz. Coro. 37. 12 Ed. 4, 19. pl. 26.

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

[r] H. P. C. 195. S. P. C. 145. Letter C. 12 Ed. 4, 10. pl. 26. Fitz Coro. 37. 439.
[s] 26 Aſſ. pl. 19. Fitz. Coro. 439. H. P. C. 194. S. P. C. 145.

Sect. 21. Fifthly, That [t] 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.

[t] H. P. C. 195. Bro. Coro. 99. 26 Aſſ pl. 19. S. P. C. 145. Letter A.

Letter B. Bro. Coro. 34. 11 H. 4, 93. pl. 54. [q] 21 H. 6. 34. pl. 1. [r] H. P. C. 195. Fitz. Coro. 439. S. P. C. 145. Letter D. [s] Fitz. Coro. 118, 169, 255. 12 Aſſ. pl. 29. S. P. C. 145. Letter D. [t] H. P. C. 195. Bro. Coro. 99. 26 Aſſ pl. 19. S. P. C. 145. Letter A.

And

[a] H. P. C. 195. S. P. C. 145 Letter E. 26 Aſſ pl. 19.

And ſo ſhall it be [a] 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.

[b] H. P. C. 196. S. P. C. 146. [c] Fitz. Coro. 462. 29 Ed. 3, 42. [d] *Supra*, ch 9 Sect 41, 43. [e] H. P. C. 196. S. P. C. 146. Fitz. Coro. 460.

Sect. 22. As to the ſeventh Point, *viz.* What Proceſs is to be awarded againſt the Appellees, it ſeems [b] 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 [c] he cannot award it to any other Officer, except the Sheriff, nor to any Sheriff out of his own County: And it ſeems [d] 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 [e] agreed, that the Juſtices 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.

[f] H. P. C. 196. S. P. C. 146.

And it is [f] certain, That Juſtices of Gaol-Delivery may award Proceſs into any County, to apprehend and try them by Force of 28 *Ed.* 1. commonly called the Statute *de Appellatis*; but whether this Statute do impower ſuch Juſtices to award Proceſs of Outlawry into a Foreign County, 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.

[g] H. P. C. 196. S. P. C. 142. Letter D. 3 Inſt. 130. 47 Ed. 3. 5. pl. 10.

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

[h] S. P. C. 180. Letter E. H. P. C. 196. 47 Ed 3, 5. pl. 10. 19 H. 6, 35. pl. 74. 3 Inſt. 130. [i] H. P. C. 196. S. P. C. 74. Letter B. 106 Letter D. 149 Letter B. 180 Letter E. 11 H. 4, 93. pl. 49. 21 H. 6, 34. b. 35 a. Bro. Coro. 31, 49. 3 Inſt. 130. Fitz. coro. 143. 7 Ed. 3, 12. pl. 29.

Sect. 24. Secondly, That let there be never ſo many Appellees, if they wage Battel, the Approver muſt fight them [h] all. But on the Contrary, it ſeems to be generally [i] 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 [k] holden, that his Appeal is ſtill in force againſt the Reſt; but the Note in [l] *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 ſhewn in the 9th and 15th Sections of this Chapter.

[k] S. P. C. 180 Letter E. [l] Fitz. coro. 98. [m] 47 Ed. 3. 16 pl. 26 47 Ed. 35. pl. 10. Fitz. coro. 103.

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

[n] H. P. C. 201. 3 Inſt. 130. S. P. C. 149 Letter B. [o] H. P. C. 201. Bro. coro. 49 21 H. 6. [o] Fitz. coro 128, 369. Fitz. Aſſiſe 421. H. P. C. 197. *contra.* 21 Ed 3, 17. pl. 21. Bro. coro. 38. Fitz. coro. 447. [p] Bro. Clergy 5, 26. 11 H. 4, 93 pl. 49.

Sect. 26. Fourthly, That whether the Appeal of an Approver be falſified by the [o] Confeſſion or Vanquiſhment [p] 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 Caſe, nor the Appellee in the ſecond, are excluded from it, any more than in the Caſe of an Indictment.

Sect. 27. As to the ninth Point, *viz.* How the Approver is to be rewarded for making good his Appeal; it is ſaid, [a] That if an Approver convict all the Appellees, whether by Battel or Verdict, the King, *ex merito juſtitiæ*, ought to pardon him as to his Life, and alſo give him his Wages [b] from the Time of the Appeal to the Time of the Conviction. But [c] 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 Provors, to the Intent, in the mean Time, by Brocage, and great Gifts to purſue and have their Pardons, and then after their Deliverance, had become more notorious Felons than they were before*; and thereupon it is enacted, *That if any Perſon pray or purſue, or cauſe to be prayed or purſued for any ſuch Felon ſo attainted by his own Confeſſion, to have any Charter of Pardon, the Name of him that purſues ſuch Charter be put in the ſame Charter, making Mention that the ſame Charter is granted at his Inſtance. And if he to whom ſuch Charter is granted become a Felon again, the Party who purſued the Charter ſhall forfeit* 100 l.

[a] H P.C. 197. 8 P. C. 142. Letter D. 3 Inſt. 129, 130. Contra 19 H. 6 35. pl 74. Fitz. con. 6.
[b] *Vide ſupra* ſect. 19.
[c] S. P C 142. Letter D.

CHAP. XXV.

Of Indictment.

Sect. 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 [d] afterwards reduced to a formed Indictment, it is called a Preſentment, and when it is found by Jurors returned to inquire of that particular Offence only which is indicted, it is properly called an Inquiſition. And for the better Underſtanding the Nature of ſuch Proceedings, I ſhall conſider the following Particulars,

[d] Lamb. B. 4. ch. 5.

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

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 [a] cannot be tried upon it, but ought to be indicted anew; and accordingly it hath been reſolved, That if a Grand Jury indorſe a Bill of Murder, [b] *Billa vera ſe defendendo*; or *Billa vera* for Manſlaughter, [c] and not for Murder; or if they indorſe a Bill upon the Statutes of News, *Billa vera*, [d] but whether *Iſta verba prolata fuerunt malicioſe, ſeditioſe vel econtra ignoramus*; or if they indorſe an Indictment of Forcible Entry, and Forcible Detainer, *Billa vera* [e] as to the Forcible Entry, and *Ignoramus* as to the Forcible Detainer; or if they indorſe, [f] That if the Freehold were in *J. S.* or the Poſſeſſion were in *J. S.* then they find *Billa vera*, the Whole is void.

[a] 2 Rol. Rep. 52.
3 Bulſt. 206
1 Rol. Rep. 407. 408.
[b] 2 Rol. Rep 52.
Powle's Caſe.
[c] 3 Bulſt. 206.
1 Rol. 408.
1 Syd. 230
[d] Leon. 287.
[e] Yelv 99.
[f] Syd. 414

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

[g] 1 Keb. 487. pl. 30.
Vide B. 1. c 64. ſect. 40.
Cro. Jac. 151.
Con. 1 Sid. 99.
[h] Yelv. 15
1 Rol. Abr. 220. Letter B.
2 Rol. Abr. 83. Letter P.
Cro. Car. 531, 558.
[i] Cro. Car. 558.
Vide ſupra, Ch 1. Sect 3, 4, 6, 7, 8.
[k] 1 Rol. Abr. 220. Letter B.
1 Jon. 380.
Cro. Car 488.

Sect. 4. As to the third Point, *viz.* What Matters are indictable: There can be no Doubt, but that all Capital Crimes whatſoever, and alſo all Kinds of inferior Crimes of a publick Nature, as Miſpriſions, and all other Contempts, all Diſturbances of the Peace, all Oppreſſions, and all other Miſdemeanours whatſoever of a publickly evil Example againſt the Common Law, may be indicted; but no Injuries of a [l] 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 [m] Liberties and Security of the Subject; or commands a Matter of publick [n] 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 [o] that he may in every Action for doing a Thing prohibited by Statute, it

[l] 27 Aſſ. pl. 20.
Bro. Indictment, 16. Preſentment, 26.
[m] 2 Inſt. 55, 163.
Cro. Jac 577.
[n] 1 Mod. 34.
1 Sid. 209.
[o] 8 Co 60. b.
2 Inſt. 131.

ſeems queſtionable, whether he may afterwards be indicted; becauſe that would make him liable to a ſecond Fine for the ſame Offence. Alſo, if a Statute extend only to private [a] Perſons, or if it extend to all Perſons in general, but chiefly concern Diſputes of a private Nature, as thoſe relating to [b] Diſtreſſes made by Lords on 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 no 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 [c] ſettled at this Day, That it will not maintain an Indictment, becauſe the Mentioning the other Methods of proceeding only, ſeems impliedly to exclude that of Indictment. [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 authoriſes 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 Statuti*, 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 ſhewn 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.

Sect. 5. As to the firſt Point, *viz.* Where one may be ſo tried as having been taken with the Manner: [g] It is ſaid, That anciently if one guilty of Larceny had been freſhly purſued and taken with the Manner, and the Goods ſo found upon him had been brought into the Court with him, he might be tried immediately without any Indictment; and this is ſaid to have been the proper Method of proceeding in ſuch Manors which had the Franchiſe of Infangthefe, but ſeems to be altogether obſolete at this Day.

Sect. 6. As to the ſecond Point, *viz.* Where one may be ſo tried upon a Verdict: It is [h] ſaid, That in a Action of Treſpaſs in the King's Bench, *De muliere abducta cum bonis viri*, if the Defendant be found guilty of having carried away the Woman and Goods with Force, and feloniouſly; or [i] in a Common Action of Treſpaſs in the ſaid Court, for Goods carried away, if it be found that the Defendant felonioufly ſtole them, he ſhall be put to anſwer the Felony without any 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 [k] no Juriſdiction over criminal Matters, ſeems to be of little Force, becauſe ſuch Court has nothing to do with ſuch Matters. And it ſeems,

[a] 1 Sid. 209. 2 Mod. 34.
[b] 1 Mod. 71, 258. 1 Lev. 299. Raym. 205. 1 Vent. 104. 2 Inſt. 121, 232.
[c] Bond's Caſe Michaelmas 3 *Georgii.* Shower 398, 399. 3 Keb. 34, 273. Cro. Jac. 643, 644. 3 Mod. 79. Palmer 388. 1 Sid. 434, 439. 6 Mod. 86. 2 Rol. Rep. 247, 248, 398.
[d] *Dominus Rex ve ſus* Dixon; Trin. 3 *Geo.* 2 Mod. 118. 1 Sid. 192. ſeems *contra.*
[e] The Caſe of the County of the City of *Norwich*, adjudged *Paſch.* 3 *Georgii.*
[f] *Vide ſupra* c. 15. ſect. 41. 7 H. 4. 43. pl. 9. 26 Aſſ. pl. 32. 1 Ed. 3. 13. pl. 6.
[g] S. P. C. 28, 29, 148. Letter C. 179 Let. B. H. P. C. 193. Bro. Appeal, 130. 1 Aſſ. pl. 5. Fitz. Coro. 156, 357.
[h] H. P. C. 199. S. P. C. 94. Letter B. 95. Fitz. cor. 122. Fitz. Uſurpary, 49. 13 Aſſ. pl. 5. Bro. coro. 75.
[i] H. P. C. 199. S. P. C. 94. Letter B. Fitz Indictment, 31.
[k] S. P. C. 94. Letter B. Fitz Indictment, 31.

[a] That

[a] 13 Ed. 4. 3. pl. 7. Fitz. Coro. 39. [a] 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. [b] 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, [c] ought to inquire what other Perſon did the Fact; becauſe it appears by a Record of the higheſt Credit, That a Perſon is killed. [d] Alſo, if a Perſon be declared againſt 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.

[b] 13 Ed. 4. 3. pl. 7.

[c] *Supra* ch. 9. ſect. 33.

[d] Bro. Indict. 13. 26 Aſſ. pl. 62.

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

Sect. 7. *Firſt*, That an Appeal by an innocent Perſon, and an Appeal by an [e] Approver, are equally favoured in this Reſpect.

[e] S. P. C. 147. Letter E. 148. H. P. C. 199, 200.

Sect. 8. *Secondly*, That regularly where a Perſon is indicted and appealed of the ſame [f] Crime, and the Appeal is not proſecuted, he ſhall not [g] be arraigned upon the Indictment, but upon the Appeal.

Bro. Appeal, 53. Bro. Coro. 3, 16. 49.

Sect. 9. *Thirdly*, [h] 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 it is the proper [i] Office of the Declaration to aſcertain; but alſo becauſe, for what appears to the contrary by the Record, the Writ might [k] have been purchaſed by a Stranger. And therefore in ſuch Caſe it ſeems to be in the Diſcretion [l] of the Court, either to diſmiſs the Appellee, or to bail him, 'till it ſhall appear, Whether there will be any other Proſecution againſt him. But if an Appellant, by Writ, be nonſuit after Declaration, or any Appellant by Bill or Approver be nonſuit, it ſeems, [m] 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.

[f] 3 H. P. C. 199. 31 H. 6. 11. pl. 6. Fitz. Coro. 18. S. P. C. 107. Letter A.

[g] H. P. C. 199. S. P. C. 147. Letter E. 33 H. 6. 1. pl. 6. 4 Ed. 4. 10. pl. 14. Bro. Appeal, 92, 149. S. P. C. 107. Letter A. Fitz. Coro. 114.

Sect. 10. *Fourthly*, That it ſeems to be a ſettled Rule, That whereever an Appeal is once well commenced, and afterwards ſo far determined, without a full Acquittal, That neither the ſame, nor any [n] 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 [o] to the Appellee, hanging the Action, or ſuffers a [p] Nonſuit, or [q] *Retraxit*, or [r] demurs to a good Plea or Iſſue, tendered by the Appellee, which Demurrer is adjudged againſt him; or where ſuch an Appellant or Approver [s] confeſs their Appeal to be falſe, [t] 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 Acquittal of the Appellee; after which his Life ſhall not be brought

[h] S. P. C. 148. Letters A, B, C. H. P. C. 199, 200. Bro. Appeal, 67, 130. Fitz. Coro. 156, 198, 357, 384.

[i] *See* ch. 23. ſect. 86, 87. *&c.*

[k] *See* ch. 23. ſect. 26, 129.

[l] S. P. C. 148. Letter C.

Bro. Appeal, 67, 130. 27 Aſſ. pl. 7. 1 Aſſ. pl. 5. Fitz. Coro. 156, 198, 357. [m] S. P. C. 148. H. P. C. 199, 200. Bro. Appeal, 67. [n] S. P. C. 148. Bro. Appeal, 118. Fitz. Coro. 369. *Vide* Bro. Coro. 35. 9 H. 5. 2. pl. 7. [o] S. P. C. 148. Letter B. H. P. C. 200. Bro. Appeal, 27. Fitz. Coro. pl. 12. [p] H. P. C. 199. S. P. C. 147. Letter B. Cro. Eliz. 460. Fitz. Coro. 25. 381. Bro. *niſi prius*, 28. Fitz. Uſurpary, 47. [q] S. P. C. 147. Letter E. 148. Letter B. [r] Dyer 120. pl. 13. [s] S. P. C. 148. Letter B. Fitz. Coro. 103. 3 H. 6. 50. pl. 16. 13 Aſſ. pl. 10. H. P. C. 200. 47 Ed. 3. 5. pl. 10. Bro. Coro. 3, 16, 49, 78. Bro. Appeal, 53. [t] 21 H. 6. 34. pl. 1. S. P. C. 148. Letter B. H. P. C. 200.

again into Danger for the ſame Crime. And this ſeems to be the only Reaſon why after ſuch a Vanquiſhment, or a Verdict in his Favour, an Appellee ſhall be diſcharged, as well againſt the Suit of the King, as that of the Party. But it ſeems, That in all other Caſes whatſoever, an Appellee, in an Appeal well commenced, being wholly diſcharged of the Suit of the Party, may be arraigned upon the Appeal, at the Suit of the King, whether ſuch Diſcharge were meerly owing to the Act of the Party, as in the Caſes abovementioned, or to the Act of the Court; as [a] where an Approver is adjudged to be hanged before he hath perfected his Appeal; or partly to the Act of Law, and partly to the Act of the Party, as [b] 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 [c] having been made a Defendant in a former Appeal, brought by the ſame Appellant for the very ſame Fact; or whether ſuch Diſcharge be merely owing to the Act of God; as [d] where an Appellant dies a natural Death, while his Appeal is depending. It ſeems indeed to be holden in the Year-Book [e] 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 Nonſuit in an Appeal, the Appellee may be arraigned at the Suit of the King; and it ſeems difficult to give a Reaſon, why a Writ is not as much determined upon a Nonſuit, as upon an Abatement; to which may be added, that the Point adjudged, which was this, That where a Writ abates for a Miſnoſmer, the Defendant ſhall not be arraigned at the Suit of the King, ſeems plainly to go on this Ground, That where a Suit is ill commenced, the King ſhall not have a greater Advantage from it than the Party might have had; and therefore the Opinion abovementioned, being alſo contradicted by the beſt [f] Authorities, ſeems to be of little Weight.

[a] S. P. C. 147. Letter E 21 Ed. 3, 17. pl. 20.
[b] S. P. C. 147. Letter E H. P. C. 200.
[c] 47 Ed. 3. 16. pl. 27. Fitz. coro. 104.
[d] S. P. C. 147. Letter E. 47 Ed. 3, 5. pl. 10.
[e] 4 H. 6, 16. Bro. Appeal 44.

Sect. 11. Fifthly, That where-ever [g] 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 ſhews it was ill commenced, the Defendant ſhall not be arraigned upon it at the Suit of the King, becauſe it never had a good Foundation, and cannot give a greater Advantage to the King than to the Party himſelf who ſued it; and therefore it ſeems to be agreed, That if an Appeal be abated for want of Form apparent in the Writ, as [h] for the Omiſſion of the Word *Habeas*, or for falſe [i] *Latin*, or for any other [k] apparent Defect; or if it be abated for a Defect not apparent of it ſelf, but diſcloſed by the Pleadings of the Parties, as for a [l] Miſnoſmer, or wrongful Addition, or any ſuch like Inſufficiency; or if it be abated on Account of the Diſability of the Appellant, as by the Plea of Outlawry [m] for Felony or Treſpaſs; or if it be put without Day upon a Plea of Excommunication of the Appellant; or [n] 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 [o] before it was commenced, or becauſe the Appellant appears to have never had any Right to bring it; as where in an Appeal by one as Wife, it is found that ſhe was [p] never lawfully married to the Deceaſed; or in an Appeal by one as Heir [q] to

[f] S. P. C. 147. Letter E. H. P. C. 200.
[g] Bro. Appeal 5. Fitz coro. 68. Bro. coro. 35. *Contra* 41. Aſſ. pl. 14. Fitz. Age. 74.
[h] Fitz. coro. 121. S. P. C. 149. Letter A. 13 Aſſ. pl. 10. Bro. Appeal 53.
[i] H. P. C. 200.
[k] Bro. coro. 78. S. P. C. 148. Letter C.
[l] Bro. Appeal 44. Fitz. coro. 12, 103. 4 H. 6, 15, 16.

S P. C. 148. Letter C H. P. C. 200. [m] S. P. C. 149. Letter A. H. P. C. 200. Fitz. Ucla. 47. Bro. Appeal. 57, 118, 146. 17 Aſſ. pl. 26. Fitz. Coro. 175. [n] S. P. C. 148. Letter B. Fitz. Coro. 12. H. P. C. 200. *Vide ſupra*, Sect. 10. [o] S P. C. 149. Letter A. H. P. C. 200. [p] S. P. C. 149. Letter A. H P. C. 200. Fitz. Coro. 3. [q] S. P. C. 149. Letter A. 27 Aſſ. pl. 25. Bro. Appeal. 68. H. P. C. 200. Fitz. Coro. 201, 384. *Contra*. Bro. Appeal. 53. 13 Aſſ pl. 10.

his Father, it is found that he hath an elder Brother alive by the ſame Father, *&c.* the Appellee ſhall not be arraigned upon the Appeal, at the Suit of the King, but ſhall be wholly diſcharged of it. But where an Appeal is put without Day on the Plea of [a] 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 [b] 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 againſt the King as the Party; yet [c] 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 ſame or ſome other Party; for otherwiſe ſurely it cannot but be intended, that it muſt be in the Diſcretion of the Court, upon Conſideration of the Circumſtance of the Caſe, either to commit or bail the Appellee for a reaſonable Time, in Order to anſwer ſuch further Proſecution, or [d] to bind him to his Good Behaviour for a certain Time, *&c.*

[a] S P. C. 149. Letter A. 13 Ed. 4, 8. pl. 3. 3 Aſſ pl. 12 Fitz mainprize 6. [b] 18 Ed. 3. 35. pl. 15. Bro. Appeal 146. 11 Aſſ pl 27 17 Aſſ. pl 26. Fitz utlagary 47. Fitz.coro.12, 68 167, 175, 201, 384. Bro. nonab. 23 [c] H.P.C 200. *Vide* S. P. C. 149. Letter A. Bro. Appeal 67, 130. Fitz coro. 156,198,357 Fitz. error. 52. 27 Aſſ. pl. 7. 1 Aſſ. pl 5. 32 Aſſ pl. 8. 7 H 7, 5 pl.7. [d] Fitz. coro. 387. S. P.C. 149. Letter D.

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

[e] S.P.C. 172. Letter B. *Quære*, Fitz. coro. 452. [f] Fitz. coro 3. [g] 21 Ed 3. 17. pl. 20. Bro. coro. 37.

Sect. 13. Seventhly, That [h] where-ever an Appellee is arraigned upon the Suit of the King, he may plead the King's Pardon, in the ſame Manner as if he had been arraigned upon an Indictment: But if an Appellee, who by pleading ſuch a Pardon diſcharges himſelf of an Appeal at the Suit of the King, be alſo indicted, it is adviſeable [i] to take Care at the ſame Time when he is in ſuch Manner diſcharged of the Appeal, to have a Ceſſer of Proceſs entered on the Indictment, to prevent the Vexation of a cauſeleſs Proſecution upon it.

[h] Fitz. monſtrans de faits 128. H. P. C. 201. S. P. C. 104. Letters A. B. Fitz coro.25. [i] 11 H. 4, 41. pl. 6. *Vide ſupra*, ch. 24. Sect. 25.

Sect. 14. As to the fourth Point, *viz.* Whether one may be tried at the Suit of the King for a capital Offence, without any Indictment upon a Sheriff's Return, it ſeems to be generally agreed, [k] That neither the Sheriff's Return of a Reſcous or Eſcape, or of any other Matter, nor any other Record whatſoever, except only an Appeal or Indictment, or ſomething equivalent thereto, as the Verdict of twelve Men, finding a Man guilty in ſuch Manner as is above ſet forth in the ſixth 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 [l] *Magna Charta*, and other [m] Statutes made in Affirmance of it.

[k] H.P.C. 201. 2 Inſt. 50 S. P. C. 31. Letter C. 94 [l] S.P. C. 104. H. P. C. 201. 4 Ed. 4, 10. pl. 14. Fitz.coro.25.

Sect. 15. As to the fifth general Point of this Chapter, *viz.* Whether a Man may be arraigned on an Indictment, while an Appeal is depending againſt him for the ſame Offence, it ſeems [n] that it was the Common Practice before the Statute of 3 *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 paſſed, leſt thereby the Suit of the Party ſhould be prevented. And if ſuch Regard were had to an Appeal where none was depending, it cannot be thought but that much [o] greater was

Letter B. 95. 2 Ed. 3. 1. pl. 4. 1 H. 7. 6. pl. 2. Fitz coro. 48, 149. Bro. coro. 130. *Vide ſupra* ch. 19. Sect 15. [m] 9 H 3. ch. 29. [m] 25 Ed. 3. *de proditionibus cap.* 4. 28 Ed 3 3. 37 Ed. 3, 18. [n] *See* the Preamble of 3 H. 7. 1. S. P. C. 107. Letter A Fitz. Coro 44, 82. 7 H. 4. 36 a. [o] 44 Ed 3. 38. pl. 35. 31 H. 6. 11. pl. 6. 21 Aſſ pl 4. 21 Ed. 3. 23 pl. 16. Fitz. Coro. 18, 114. Fitz. reſponder 36.

had to one actually depending, whether before or after the Year and Day were paſſed, [a] Yet it ſeems that the Court was never in any Caſe peremptorily bound to ſuſpend the Proceedings on an Indictment in reſpect of an Appeal, but might always in Diſcretion, whenever it ſhould ſeem proper, proceed on an Indictment, hanging an Appeal. And accordingly we find, that in many Inſtances [b] in the Old Books, when it was holden, That in an Appeal by an Infant, the Parol ſhould [c] demur till his full Age, the Court have proceeded to try a Man upon an Indictment, while an Appeal by an Infant was depending againſt him, to prevent the Delay, which could not but be occaſioned, if the Proceedings ſhould be deferred till the Appellant ſhould come to full Age. Alſo [d] where a Writ of Appeal of Robbery hath been ſued out againſt a Perſon under an Indictment for the ſame Robbery, and ready to be tried, the Court have refuſed to put off the Trial of the Indictment in reſpect of ſuch Writ of Appeal; becauſe before the Appellant hath declared, it doth not judicially appear, that both the Indictment and Appeal are for the very ſame Fact. But if there 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 [e] 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.
2. How by Statute.

Sect. 15. As to the firſt Particular, it ſeems clear, That by the Common Law every Indictment muſt be found by twelve [f] Men at the leaſt, every [g] one of which ought to be of the ſame [h] County, and returned by the Sheriff, or other proper Officer, without the Nomination of any other Perſon whatſoever; and ought alſo to be a Freeman, and a lawful liege Subject; and conſequently neither under an [i] Attainder of any Treaſon or Felony; nor a [k] Villein, nor Alien, nor outlawed, whether for a criminal Matter, or, as [l] 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 [m] leſs than twelve, the Proceedings upon it will be erroneous. [n] Alſo, it ſeems that any one who is under a Proſecution for any Crime whatſoever, may, by the Common Law, before he is indicted, challenge any of the Perſons returned on the Grand Jury; as being outlawed for Felony, *&c.* or Villeins, or returned at the Inſtance of a Proſecutor, or not returned by the proper Officer, *&c.*

Sect. 16. Alſo many Indictments in inferior [o] Courts have been [p] quaſhed for want of the Words, *Proborum & legalium hominum*, in the Caption of the Indictment, ſetting forth by what Perſons it was found; [q] but this is ſaid to be no Exception to an Indictment found in the Court of King's Bench, or Grand Seſſions, or Counties Palatine, and hath been often [r] over-ruled, as to Indictments in other Courts, becauſe all Men ſhall be intended to be honeſt and lawful, till the contrary appear.

[a] 4 Co. 45. b 47. 7 H. 4, 34. pl. 22, 35. pl. 4. 21 H. 6, 28, 29. Fitz. conſpir. 6. Fitz. coro. 82. *Quære*, Fitz. coro. 114. Bro. Appeal 41. [b] Fitz. coro. 278, 279. 32 Aſſ. pl. 8. 41 Aſſ. pl. 14. Bro. Appeal 75. *Quære*, Fitz. coro. 114. 21 Ed. 3. 23. pl. 16. Bro. Appeal 105, 119. [c] 13 Aſſ. pl. 10. Fitz. Age 41, 57. 17 Ed. 4. 2. pl. 4. Bro. Appeal 105. *Vide ſupra* ch. 23. Sect. 30. [d] 31 H. 6. 11. pl. 6. Fitz. coro. 18. [e] Dyer 296. pl. 20. *See* the Books cited to the other Parts of this Section. [f] Cro. Eliz. 654. 3 Inſt. 30. 2 Inſt. 387. [g] *See* the Preamble of 11 H. 4. 9. 3 Inſt. 32, 33, 34. 12 Co. 99. [h] 2 Rol. Rep. 82. [i] 3 Inſt. 32. [k] Popham 202. 1 Inſt. 156. b. [l] 3 Inſt. 32. 21 H. 6. 30. pl. 17. *Vide* Fitz. Proceſs 208.

Quære, Cro. Car. 134, 147. 1 Jon. 198, 199. [m] Cro. Eliz. 654. pl. 16. [n] 11 H. 4. 41. pl. 8. Bro. coro. 189. Bro. indict. 2. 21 H. 6. 30. pl. 17. *Quære*, Cro. Car. 134, 135, 147. [o] 1 Keb. 629. pl. 112. 2 Keb. 471. pl. 63. [p] Cro. Eliz. 751. pl. 7. Cro. Jac. 635. Palm. 282, 389. 2 Rol. Rep. 400. 2 Rol. Ab. 82. pl. 7. 3 Mod. 122. Poph. 202. [q] 1 Keb. 629. pl. 112. 2 Keb. 471. pl. 63. 1 Lev. 208. [r] 2 Keb. 135, 284. 1 Keb. 50. pl. 5. Cro. Jac. 41. 1 Sid. 106, 367. *Quære*, 2 Rol. Ab. 82. pl. 8.

Sect. 17.

[a] 11 H. 4. 41. pl. 8. Fitz. indict. 25. coron. 89 Bro. indict. 2. *Vide infra* Sect. 26. [b] S. P. C. 88. 12 Co. 99. H. P. C. 202. 3 Inſt. 32, 33, 34. *Vide* Cro. Car. 134, 135.

Sect. 17. It is reſolved in the [a] 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 [b] 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 holden before the Beginning of the ſame Term; and therefore it is not likely that the ſaid Statute was ſo ſoon made; and alſo conſidering, that the ſaid Reſolution was given by Advice of all the Judges, who ſeem to have been conſulted about the Validity of the Plea abovementioned at the Common Law, and takes no Manner of Notice of any Statute, but only of the Law in General, it may deſerve a Queſtion, Whether ſuch Plea be not good at the Common Law?

Vide 2 Rol. Abr. 647, 648. Cro. Eliz. 413. Cro. Jac. 672.

Sect. 18. I do not find it any where holden, that none but Freeholders 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.

[c] 2 Inſt. 448. [d] Regiſt. 180. [b] F. N. B. 166 D *Vide* 2 Inſt. 447, 448.

Sect. 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 Juries, or leſſer Aſſiſes.* And the Equity thereof, and the Reaſon of the Thing, ſeem plainly ſo far to extend to Grand Juries, that if it ſhall appear that any of the Perſons abovementioned be returned on a Grand Jury, the Court, into which they are returned, will eaſily excuſe their Non-appearance. But it ſeems clear, [c] 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 [d] in the Regiſter grounded on, and reciting the Statute, mentions the Prohibition of it to be, that Men above the Age of ſeventy Years ſhall not be put *in Aſſiſis, juratis, vel recognitionibus aliquibus*, which Expreſſions ſeem proper for Petit Juries only; whereas the [e] Writ grounded on the Statute of *Articuli ſuper chartas*, ſet forth more at large in the twenty-firſt 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.

[e] Regiſt. 178. F. N. B. 165. *Vide* 2 Inſt. 561.

Sect. 20. It is farther enacted by the abovementioned Statute of *Weſtminſter* 2, 38. *That none ſhall be put in Aſſiſes or Juries, though they ought to be taken in the proper County, who have leſs Tenements than to the Value of twenty Shillings yearly.* And it is required by the Statute of 21 *Ed.* 1. commonly called the Statute *De his qui ponendi ſunt in Aſſiſis, That they ſhould have Tenements to the Value of* 40 *s. yearly; Provided, That before Juſtices in Eyre for Common Pleas in their Eyres, and alſo in Aſſiſes, and Juries,*

which ſhall be taken in Cities and Burghs, and other trading Towns, the ſame may be done as was accuſtomed: And this Exception is likewiſe mentioned in the [a] 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 aſſiſis, juratis vel recognitionibus aliquibus:* To which may be added, that the [b] ſeveral ſubſequent Statutes, which require that none but Freeholders or Copyholders of Lands of ſuch a Value ſhall be returned on Juries, expreſly extend only to Juries returned for the Trial of Iſſues, except only the [c] Statutes concerning Indictments in the Sheriff's Torn, which require, that every Juror finding ſuch Indictment ſhall have 20 *s.* yearly of Freehold, or 26 *s.* of Copyhold, and alſo except 3 *H.* 7. 1. which requires that every Juror of an Inqueſt by which Juſtices of Peace ſhall inquire of Concealments by other Inqueſts ſhall have Tenements of the yearly Value of 40 *s.* and alſo except 33 *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.

[a] Regiſter 181. a. F.N.B. 166 D. *Vide* 2 Rol. Ab. 647, 648. Cro. El. 413.

[b] 2 H. 5. Stat. 2 *cap.* 3. 35 H. 8 c. 6. 27 El. c. 6. 4 & 5 Gul. & Mar. c. 24. 7 & 8 Gul. 3. 32.

[c] *Vide ſupra cap.* 10. Sect. 65, 66, 67, 68.

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 Juries over many Perſons, nor others, nor otherwiſe than as is ordained by Statute: And that they ſhall put in thoſe Inqueſts and Juries, ſuch as be next Neighbours, moſt ſufficient, and leaſt ſuſpicious.* And the like is enacted almoſt in the very ſame Words by 42 *Ed.* 3. 11. And it is farther enacted by the ſaid Statute of *Articuli ſuper Chartas, That he who doth contrary, and is attainted thereupon, ſhall pay unto the Plaintiff his Damages double, and ſhall be grievouſly amerced to the King.* And the ſaid Statute of *Articuli ſuper Chartas*, is ſaid by Sir *Edward Coke*, to extend to all Suits or Proceedings, either criminal or civil, Real, Perſonal, or mix'd, Publick or Private, Aſſiſes or Enqueſts; and ſurely that Part of it which ordains, that the moſt ſufficient and leaſt ſuſpicious ſhall be returned on all Juries, is ſo agreeable to common Right and natural Juſtice, that it cannot but be thought to be in Affirmance of the Common Law, and equally to extend to Grand and Petit Juries, and conſequently if any Officer ſhall be wilfully guilty of an Offence againſt it in the Return of any Jury, he cannot but be puniſhable for his Contempt, at the Suit of the King. And it is enacted by 23 *E.* 3. 6. *That Juſtices of Aſſiſes ſhall have Commiſſions ſufficient to inquire in their Seſſions of Sheriffs*, &c. *for putting into Panels Jurors ſuſpect and of evil Fame.* And it is farther enacted by 34 *Ed.* 3. 4. *That all Panels ſhall be made of the next People, which ſhall not be ſuſpect nor procured. And that the Miniſters which do againſt the ſame, ſhall be puniſhed before the Juſtices who take the Inqueſt, according to the Quantity of their Treſpaſs,*

[a] 2 Inſt. 561.

paſs, 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 *Articuli ſuper Chartas*, which ordains that the Sheriff, *&c.* ſhall render double Damages, extends only to Juries returned in Suits between Party and Party; becauſe it ſays, that he ſhall render them to the Plaintiff, which is a Denomination never given to the King or Proſecutor, where the Proceeding is by Way of Indictment; and accordingly we find that the Writs in the [a] Regiſter grounded on this Statute expreſly relate to Suits between Party and Party.

[a] Regiſt. 178. F. N. B. 165

Sect. 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 Enqueſts were taken at* Weſtminſter, *of Perſons named to the Juſtices, without due Return of the Sheriff, of which Perſons ſome were outlawed before the ſaid Juſtices of Record, and ſome fled to Sanctuary for Treaſon, and ſome for Felony, there to have Refuge, by whom, as well many Offenders were indicted, as other lawful liege People of our Lord the King, not guilty, by Conſpiracy, Abetment, and falſe Imagination of other Perſons, for their ſpecial Advantage and ſingular Lucre againſt the Courſe of the Common Law uſed and accuſtomed before this Time: Our ſaid Lord the King, for the greater Eaſe and Quietneſs of his People, will and granteth, that the ſame Indictment ſo made, with all the Dependance thereof, be revoked, annulled, void, and holden for none for ever: And that from henceforth no Indictment be made by any ſuch Perſons, but by Enqueſts of the King's lawful liege People, in the Manner as was uſed in the Time of his noble Progenitors, returned by the Sheriffs, or Bailiffs of Franchiſes, without any Denomination to the Sheriffs, or Bailiffs of Franchiſes before made by any Perſon, of the Names, which by him ſhould be impanelled, except it be by the Officers of the ſaid Sheriffs or Bailiffs of Franchiſes ſworn and known to make the ſame, and other Officers to whom it pertaineth to make the ſame according to the Law of* England: *And if any Indictment be made hereafter in any Point to the contrary, that the ſame Indictment be alſo void, revoked, and for ever holden for none.*

In the Conſtruction of this Statute the following Points have been reſolved,

Sect. 22. [b] Firſt, That where a Perſon not returned by the Sheriff on a Grand Jury procures his Name to be Read among thoſe of others who were actually returned, whereupon he is ſworn of the Grand Jury, *&c.* he may be indicted, either in the King's Bench [c] or before Juſtices of *Oyer* and *Terminer*, for his Contempt of the Statute; and being found guilty, may be fined and impriſoned; and yet the Statute doth not expreſly provide that any ſuch Perſon ſhall be any Way puniſhed, but only that the Indictment ſhould be void, *&c.*

[b] 12 Co. 98, 99. 3 Inſt. 33.

[c] *Supra, cap.* 5. Sect. 32.

Sect. 24. [d] 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 [e] queſtioned whether a Coroner's Inqueſt be within the Purview of it.

[d] 12 Co. 98. 3 Inſt. 33. Cro. Ca. 134.

[e] 1 Jon. 198, 199. Cro. Ca. 134, 147.

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

[f] H P.C. 202. 3 Inſt. 34. Cro. Ca. 134, 147. 1 Jon. 198, 199.

Sect. 26. Fourthly, That a Perſon outlawed upon any ſuch Indictment without a Trial, may alſo ſhew in Avoidance of the Outlawry, that the Indictment was taken contrary to the Purview of the Statute, as ſeems fully to appear from the [a] abovementioned Year-Book of 11 *H.* 4. 41. But if a Perſon who is tried upon ſuch an Indictment, takes no ſuch Exception before his Trial, it may be [b] doubtful whether he may be allowed to take ſuch Exception afterwards, becauſe he hath ſlipp'd the moſt proper Time for it; except it can be verified by the Records of the ſame Court wherein the Indictment is depending, as by an Outlawry in ſuch Court of one of the Indictors, *&c.* in which Caſe it is [c] ſaid, That any one, as *amicus Curiæ*, may inform the Court of it.

[a] *Supra*, Sect. 17.
[b] 3 Inſt. 34. Bro. Indict. 2.
[c] 3 Inſt. 34.

Sect. 27. [d] 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, tho' never ſo many unexceptionable Perſons joined with him in finding it.

[d] 11 H. 4. 41. pl. 8. H. P. C. 202. S. P. C. 88. 3 Inſt. 33.

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

[e] Cro. Ca. 134, 147.

Sect. 29. [f] 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.

[f] 1 Jon. 198. 3 Inſt. 34. Cro. Ca. 147.

Sect. 30. It ſeems ſomewhat queſtionable, [g] whether Outlawry in a perſonal Action be within the Purview of the Statute.

[g] Jon. 198, 199. Cro. Ca. 134, 147.

Sect. 31. It is recited by the abovementioned Statute of 3 *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 holden for the Bodies of Shires, the Names of ſuch Perſons, as for the ſingular Advantage of the ſaid Sheriffs and their Miniſters, would be wilfully forſworn and perjured, by the ſiniſter Labour of the ſaid Sheriffs and their Miniſters: By Reaſon whereof many ſubſtantial Perſons, (the King's true Subjects) had been wrongfully indicted of divers Felonies and other Misbehaviour, by their Covin and Falſehood: And alſo ſometimes by Labour of the ſaid Sheriffs, divers great Felonies had been concealed, and not preſented by the ſaid Perſons, by the ſaid Sheriffs and their Miniſters partially returned, to the Intent to compel the Offenders to make Fines and give Rewards to the ſaid Sheriffs and their Miniſters.*

Vide ſupra, Sect. 15.

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

Sect. 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 expreſly 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

H. P. C. 202. 3 Inſt. 33. *Contra* S. P. C. 88.

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 [a] holden, That if one who had committed a Robbery in the County of *A.* were taken with the Manner in the County of *B.* he might be put to anſwer in the County of *B.* (by which I ſuppoſe it is intended that he might be put to anſwer on an Indictment found in the County of *B.*) and then tried by a Jury from the County of *A.* Yet it ſeems to be generally [b] agreed at this Day, that by the Common Law, no Grand Jurors can indict any Offence whatſoever, which doth not ariſe within the Limits of the Precinct for which they are returned: And upon this Ground it hath been reſolved to be a fatal Exception to an Indictment, that it doth not appear by it that the Offence aroſe within the [c] County, or [d] Riding, or [e] other ſpecial Diviſion, or [f] Precinct, for which the Jury which found it was returned. And *à fortiori* therefore it muſt be a [g] good Exception, that it expreſly appears by the Indictment that the Offence aroſe in a County, *&c.* different from that for which the Jury was returned. And it is [h] holden, that even the Finding of a collateral Matter expreſly alledged in the Indictment to have happened in a different County, is void. But [i] ſome have holden, That if the County be expreſſed in the Margent 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 [k] Number of Authorities require a greater Certainty, as by expreſly alledging ſuch Vill or Vills in the County named in the Margent, or *in comitatu prædicto*, which ſeems to be ſufficient where but one County is named before; but to be [l] uncertain where a County is named in the Body of the Indictment different from that in the Margent. But it ſeems from the Authority of [m] *Baud's* Caſe, that if a Fact be alledged in *B. juxta D. in Comitatu E.* being the ſame County for which the Jury is returned, the County is ſet forth with ſufficient Certainty, becauſe *B.* ſhall be intended to be in the ſame County with *D* Alſo if one be indicted for a Reſcous from an Arreſt in the County of *B.* it hath been [n] holden, that it is needleſs to expreſs the County wherein the Reſcous was done with greater Certainty, becauſe it ſhall be intended to have been in the ſame County wherein the Arreſt was; *à* [o] *fortiori* therefore, if a Fact be alledged 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 whatſoever Nature an Offence indicted may be, whether local or tranſitory, as ſeditious Words, or Battery, *&c.* it ſeems to be [p] agreed, That if upon Not guilty pleaded it ſhall appear that it was committed in a County different from that in which the Indictment was found, the Defendant ſhall be acquitted, as ſhall be ſhewn more at large in the Chapter concerning Evidence.

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 [q] 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 felonioufly ſtricken, or poiſoned in one County, and die of the ſame Stroke or Poiſoning in another County, that then an Indictment thereof found by Jurors of the County, where the Death ſhall happen, whether it ſhall be found before the Coroner, upon the Sight of ſuch dead Body;*

[a] 26 Aſſ. pl. 32. Fitz. Coro. 194. *Vide ſupra*, Sect. 5.

[b] 3 Inſt. 49. H. P. C. 203.

[c] 1 Bulſt. 203, 205. Cro. El. 137. pl. 8. Dy. 69 pl. 29. 2 Keb. 302. pl. 94.

[d] Cro. Jac. 276.

[e] Cro Jac. 276.

[f] Keil. 89. 32. pl. 6.

[g] Steedman's Caſe, Cro. El. 137.

[h] Cro. Jac. 17, 18. 1 Bulſt. 203. 1 Sid. 312. Keilw. 33. pl. 6. Cro. Jac. 167.

[i] 1 Sid. 345, 346. Cro. El 606. pl. 4 677. pl. 6. 738. pl. 10. 751. pl 7. *Vide* Cro. Jac. 96, 276. 2 Keb. 302. pl. 94.

[k] Cro. El 100. pl. 5. 184. pl. 1. 436. pl 51.

[l] Cro Jac. 41.

[m] Cro. Jac. 345.

[n] *Vide* Fitz. Coro. 45. Attachm. 1. Retorn de Viſcount 32. Bro Retorn de Brief 97. 3 H. 7. 11. pl. 3. 5 H. 7 17. b. 18 a. 10 Ed. 4 15. pl. 13. Dy. 69 pl. 29.

[o] Cro El. 108. pl. 3.

[p] H. P. C. 203. Kelynge 15.

[q] *Vide* B. 1. Ch. 31. S. 13. 6 H. 7. 10. pl. 7. 10 H. 7. 28. pl 20. Fitz. Indictment 23. *See* the Preamble of 2 & 3 Ed. 6. 24. *Contra* Fitz. Coro. 373. Indictm. 24. 7 H. 7. 8. pl. 1. 10 H 7. 20. pl. 8. Fitz. Cor. 446.

Body; 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 the Stroke or Poiſoning had been committed and done in the ſame County where the Party ſhall die, or where ſuch Indictment ſhall be ſo found.

Sect. 35. And it ſeems that by the Common Law, if a Fact done in one County prove a Nuſance to another, it may be indicted in [a] either County. [a] H.P.C. 203. Fitz.Bar.279. Aſſiſe 446. 19 Aſſ. pl. 6.

Sect. 36. Alſo by the Common Law, if one guilty of Larceny in one County carry the Goods ſtoln into another, he [b] may be indicted in either as hath been more fully ſhewn in the firſt [c] Book. [b] Keilw. 160. b.

Sect. 37. Alſo if a Man marry two Wives, the firſt in a foreign Country, and the ſecond in *England*, it is [d] holden that he may be indicted and tried for it in *England* upon the Statute of 1 *Jac.* 1. 11. which makes it Felony; becauſe the ſecond Marriage alone was criminal, and the firſt had nothing unlawful in it, and was meerely of a tranſitory Nature: But where the ſecond Marriage is in a foreign Country, it hath been holden, That the Party is not triable on the Statute abovementioned; but this ſeems contrary to the Purview of it, as hath been more fully ſhewn in *Book* 1. *Chap.* 43. *Sect.* 7. 4 H. 7. 5. b. Fitz.Cor.62. [c] Ch 33. S 9. [d] 1 Sid. 171. Kelynge 79, 80.

Sect. 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. Book 1. Ch. 42. Sect. 19. Book 1. Ch. 45. Sect. 6.

Sect. 39. It is enacted by 26 H. 8. 6. *For the Puniſhment and ſpeedy Trials, as well of the Counterfeiters of any Coin currant within this Realm, waſhing, clipping, or miniſhing of the ſame, as of all and ſingular Felonies, Murders, wilful burning of Houſes, Manſlaughters, Robberies, Burglaries, Rapes, and Acceſſaries of the ſame, and other Offences felonioufly done, within any Lordſhip Marcher of* Wales, *that the Juſtices of the Gaol-Delivery, and of the Peace, and every of them for the Time being in the Shire or Shires of* England, *where the King's Writ runneth, next adjoining to the Lordſhip Marcher, or other Places in* Wales, *where ſuch counterfeiting, waſhing, clipping, or miniſhing of any Coin currant within this Realm, or Murther ſhall be committed; or where any other Felonies or Acceſſaries 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 Acceſſaries to the ſame, to be indicted according to the Laws of this Land, in like Manner and Form, as if the ſame Petit Treaſons, Murders, Felonies, and Acceſſaries to the ſame, had been done within any of the ſaid Shires within the ſaid Realm: And alſo to hear, determine, and judge the ſame, according to the Laws of the Realm.*

Sect. 40. And it ſeems generally to have been [e] holden, That the Power given by this Statute to the Juſtices of Gaol-Delivery and of Peace, in the adjoining *Engliſh* Counties, in Relation to the Offences therein mentioned, is not repealed by 34 & 35 *H.* 8. 26. which impowers the Juſtices of the Grand Seſſions in *Wales* to take Indictments of ſuch Offences. But it hath been [f] reſolved that an Acquittal on an Indict- [e] 1 Mod. 64, 68. 2 Keb. 685. Cro Car. 247. 331. *See* Book 1. Ch. 31. Sect. 14. [f] 1 Lev. 118.

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 cogniſable by the Common Law.

Sect. 43. Alſo 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 Section.

Sect. 44. It was made a [c] 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 [e] 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 [f] 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 holden, That it was triable only upon an [g] Appeal before the Conſtable and Marſhal; others, that it might be tried upon an Indictment, laying the Offence in [h] any County where the King pleaded; and others, that it was triable by Way of Indictment in that County [i] 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 expreſly within the Purview of 25 *Ed.* 3. ſhould be wholly diſpuniſhable, 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 Concealments 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 holden before himſelf by good and lawful Men of the ſame Shire, where the ſaid Bench ſhall ſit and be kept; or elſe before ſuch Commiſſioners, and in ſuch Shire of the Realm, as ſhall be aſſigned by the King's Majeſty's 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 Concealments of Treaſons, had been done, perpetrated, and committed within the ſame Shire, where they ſhall be ſo inquired of, heard and determined, as is aforeſaid.*

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

[a] Book 1. Ch. 7. Sect. 11. *Quere* Moor. 121. pl. 265.
[b] 3 Inſt. 11, 112. 4 Inſt. 124.
[c] Yel. 134, 135. 13 Co. 51, 52. Noy. 131. *Contra* H. P. C. 77. 3 Inſt. 112. Book 1. Ch. 37 Sect 7.
[d] Book 1. Ch 37. Sect. 15.
[e] Book 1. Ch. 37. Sect. 12.
[f] 19 E. 4. 6. b. *See* the Preamble of 35 H. 8. 2.
[g] *Vide ſupra* Ch. 4 Sect 9. and Ch 23. Sect. 29. Dyer 131. pl. 71
[h] 1 Inſt. 261.
[i] H P.C. 104. 3 Inſt. 11.
[k] *Contra* Dyer 131. pl 75. and 11 Co 63. a. 1 And. 262.

Sect. 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 [a] Trial shall be by Jurors returned from the first County; and this is most agreeable to the general Course of the Common Law; which [b] requires, That Indictments shall be tried by Jurors of the same County in which they were found.

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

Sect. 50. Thirdly, That a Treason done by an [d] *Irishman* in *Ireland*, is triable in *England* according to the Purview of this Statute; for *Ireland* being out of the Realm of *England*, a Treason committed [e] in it is certainly within the Letter of the Act; and nothing within the Letter of a Statute made for enlarging the Jurisdiction, and supplying the Defects of the Common Law, shall easily be construed out of the Meaning of it. And therefore it seems reasonable, that any Offence which by 25 *Ed.* 3. or any other subsequent Statute, either expressly extending to, or [f] received in *Ireland*, is equally Treason in *Ireland* and *England*, may be tried here by Virtue of this Statute. But if an Offence be made Treason by an *Irish* Statute, which is not Treason in *England*, I see not how it can be tried here; since being neither made nor declared to be Treason by any Law or Statute of this Realm, it is not within the Description of the Offences provided for by 35 *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 [g] resolved, That no Treason committed in *Ireland* by an *Irish* Peer, is triable in *England*, because he is intitled to a Trial by his Peers, which cannot be had in *England*.

Sect. 51. Fourthly, That this Statute is not [h] repealed by 1 & 2 *Ph.* & *Mar.* 10. which enacts, *That all Trials hereafter to be had, awarded or made, for any Treason, shall be had and used, according to the Common Laws of the Realm and not otherwise.* For it is the manifest Purport of this Statute to restore the ancient Course of the Common Law as to the Trial of Treasons, in which great Innovations had been made by Statutes 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.

Sect. 52. It was a great Doubt at the Common Law, [i] Whether an Accessory in one County to a Felony in another, were indictable in either. 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 Arraignment of the Principal and Accessory, I shall refer the Reader thither for the farther Consideration of it.

[a] H. P. C. 204. 3 Inst. 34.
[b] S. P. C. 90. Letter B. *Vid.* Dy. 286. pl. 45.
[c] H. P. C. 16. 205. 3 Inst. 11.
[d] 3 Inst. 11. 1 And. 262, 263. H. P. C. 16, 205.
[e] 11 Co. 63. a. *Vide* 3 Keb. 560, 566. Warner's Case.
[f] See B. 1. Ch. 17. Sect. 67
[g] 1 And. 263. 1 Syd. 357. pl. 11. Dyer 360. pl. 6. *Vide* 1 And. 262.
[h] 11 Co. 63. H. P. C. 205. 3 Inst. 24. 1 And. 262. S. P. C. 90. Letter B. Dyer 131. pl. 75, 286. pl. 45, 298. pl. 29, 300. pl. 38.
[i] Keilw. 67. Dyer 38.

As

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 & Armis* be in any Caſe neceſſary.
8. Whether it be neceſſary to lay the Offence *contra pacem*.
9. Whether it be neceſſary to lay it *contra coronam & dignitatem Regis*.
10. Whether it be neceſſay to lay it *in contemptum Regis*.
11. Whether it be neceſſary to lay it *illicitè*,
12. Whether a Defect in any of theſe Particulars be amendable.

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

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,

Sect. 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] *Murdravit* in an Indictment of Murder; [b] *Cepit*, in an Indictment of Larceny; [c] *Mayhemiavit*, in an Indictment of Maim; [d] *Felonicè*, in an Indictment of any Felony whatever, [e] *Burglariter* or *Burgulariter*, or elſe *Burgalariter*, in an Indictment of Burglary; [f] *Proditoriè*, in any Indictment of Treaſon; [g] *Contra ligeantiæ ſuæ debitum*, in an Indictment of Treaſon againſt the King's Perſon.

Sect. 58. Secondly, That in an Indictment, as well as in an [h] Appeal of Rape, the Fact ſeems to be ſufficiently aſcertained by the Words *Felonicè rapuit*, without adding *carnaliter cognovit*, or firſt ſetting forth the ſpecial Manner of the Terror or Violence, and then concluding that the

[a] *Supra* Ch. 23. Sect. 77. Dyer 304. pl. 56 Bro. Indict. 7. Cro. El. 920. [b] Fitz. Coro. 119. Indictm. 2. 8. Bro. Coro. 76. 12 Aſſ. pl. 32. 2 Ed. 3. 1. pl. 3. *Supra* Ch. 23. Sect. 77.

[c] *Supra* Ch. 23. Sect. 77. [d] 2 Ed 3. 1. pl. 3. 2 Ed 3. 18. pl. 1. Fitz. Indictment 3. *Supra* Ch. 23. Sect 77. Bro. Indictment 36. Bro. Appeal 48. 18 Ed. 4. 10. pl. 28. Cro. El. 193. pl. 7. 4 Co. 41. b. 5 Co. 121. b. *See* 9 Co. 69. a. [e] Daliſon 22. 4 Co. 39. b. H. P. C. 207. 5 Co. 121. b. Cro. El. 920. [f] H. P. C. 11. 3 Inſt. 15. Fitz. Coro. 55. S. P. C. 3. Letter A. 3 H. 7. 10. pl. 2. [g] 3 Lev. 396. Calvin's *Caſe*, 5, 6, 10, [h] *Supra* Ch. 23. Sect. 79. Letter I. Fitz. Indictment 18. 9 Ed. 4. 26.

Defendant *ſic felonicè rapuit, &c.* Alſo it ſeems, That the like general Manner of ſetting forth the Offence, which is ſufficient in an [a] Appeal of Larceny, will alſo be ſufficient in an Indictment.

Sect. 59. Thirdly, That in other Caſes it is [b] 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 felonioufly broken the Priſon, without ſhewing the Cauſe of his Impriſonment, *&c.* by which it may appear that it was of ſuch a Nature, that the Breaking might amount to Felony, is [c] inſufficient. Alſo [d] Indictments againſt Perſons for refuſing to be ſworn Conſtables, after they had been *legitimo modo electi*, have been quaſhed for not ſhewing the Manner of the Election, that it might appear to have been ſuch as obliged the Defendants to have undertaken the Office. Alſo it hath been [e] adjudged, That an Indictment of Burglary is inſufficient without the Word *Noctanter*. Alſo it ſeems to be [f] agreed, That an Indictment charging a Man with a Nuſance in reſpect of a Fact, which is lawful in it ſelf, as the Erecting of an Inn, *&c.* and only becomes unlawful from Particular Circumſtances, is inſufficient, unleſs it ſet forth ſome Circumſtances which make it unlawful; But it is ſaid that this is needleſs where the Thing indicted is unlawful in its own Nature, as the Keeping of a Baudy-Houſe, *&c.* Alſo it hath been [g] adjudged, That an Indictment for traiterouſly coining *Alkemy* like to the King's Money, without ſhewing what Money, is inſufficient; of which this ſeems to be the plaineſt Reaſon, That it appears not whether it were made like to the King's gold or ſilver Coin, or only like to that in Braſs or Copper, *&c.* and if it were made like to that of the later Kind only, it [h] ſeems that the Offence could not amount to Treaſon. Alſo it [i] 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 Maihem 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 Mahemiavit* 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 [l] Part of the Body the Wound was given, and the [m] Length and Breadth of ſuch Wound; and [n] that the Party died of it; and with what [o] Weapon it was given; and that the Word [p] *Percuſſit* cannot ſafely be omitted where the Truth of the Fact will bear it, I ſhall refer the Reader to the ſaid Chapter of Appeals, for the Learning relating to theſe Points. It hath been [q] adjudged, That an Indictment of Extortion charging *J. S.* with the Taking of 50 *s.* as Bailiff of an Hundred, *colore officii*, without ſhewing for what he took it, is good at leaſt after Verdict, for perhaps he might claim it generally as being due to him as Bailiff, in which Caſe the Taking could not be otherwiſe expreſſed. But this ſeems to be a ſpecial Caſe.

Sect. 60. Fourthly, That an Indictment charging a Man disjunctively is void, as where it finds that A. *Murdravit* B. *vel Murdrari cauſavit*, or that A. *Verberavit* B. *vel Verberari cauſavit*; or that A. [r] *Fabricavit talem cartam vel fabricari cauſavit*, for here are diſtinct Offences, and it appears not of which of them the Indictors have accuſed the Defendant.

[a] *Supra* Ch. 23. Sect. 79. Letter K.
[b] Cro El. 147. pl. 11. 201. pl. 30. 9 Ed. 4. 26.
[c] Bro. Indictment 7. 9 Ed. 4. 26.
[d] Aleyn 78, 79.
[e] Mod. 24. 5 Mod. 96, 129.
[f] *Supra* Ch. 10. Sect. 46. Cro. El. 483. pl. 12. 2 Roll. Rep. 345. Palm. 368, 374.
[g] Fitz. Indictment 10. S. P. C. 95. Letter D. H. P. C. 206. *Vide* 2 Roll. Rep. 12.
[h] Book 1. Ch. 17. Sect. 57.
[i] Cro. El. 137.
[k] *Supra* Ch. 23. Sect. 79. 2 Lev. 140, 141. Salk. 377. Kelynge 124.
[l] *Supra* Ch. 23. Sect. 80.
[m] *Supra* Chap. 23. Sect. 81.
[n] *Supra* Chap. 23. Sect. 83.
[o] *Supra* Chap. 23. Sect. 84.
[p] *Supra* Ch. 23. Sect. 82.
[q] 1 Sid. 91. 5 Mod. 137, 138. 1 Salk. 371. pl. 8.

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; neither can it judicially appear to the Court, what Puniſhment is proper for an Offence ſo looſely expreſſed. And upon this Ground it hath been adjudged, That an Indictment is inſufficient which only charges a Man in general, with having [b] ſpoken divers falſe and ſcandalous Words againſt *J. S.* being Mayor of ſuch a Place; or with being a [c] common Defamer, Vexer, and Oppreſſor 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 [e] common Oppreſſor and Diſturber of the Peace; or with having been and ſtill continuing to be a Man of evil [f] Behaviour; or with being a [g] common Deceiver of the King's People; or with being a [h] common Publiſher of the King's ſecrets, and of his Own, and of divers other Perſons impanelled together with him to inquire for the Body of the County of divers Felonies, againſt his Oath, *&c.* or with being a [i] common Foreſtaller; or with being a [k] common Thief; or being a [l] common Evil-doer; or with being a common [m] Champertor; or with being a common [n] Conſpirator, and ſuch like. It is holden indeed in a Note in *Fitzherbert*'s *Abridgment*, That an Indictment for Confederacy in general is good, but this is made a Query by the Reporter of the [o] Year Book, from which the ſaid Note in *Fitzherbert* is taken, and is denied to be Law both by [p] *Brook* and [q] *Rolle*, nor do I any where find the leaſt Reaſon offered to diſtinguiſh this from the other Caſes above-mentioned. Alſo it is holden by Sir *Edward* [r] *Coke*, That the ancient Form of Indictments charging Men with having as Hereticks and Traitors, and Infeſters of the Highways, conſpired and confederated, *&c.* to deſtroy the Catholick Faith, and having daily publiſhed falſe and ſeditious Writings, *&c.* were utterly inſufficient, and yet ſuch Indictments ſeem to have been [s] frequent; as were alſo Indictments charging Men in general, as *Inſidiatores viarum, & depopulatores agrorum*, which [t] Words took the Benefit of the Clergy from the Perſons indicted, before the Statute of 4 *H.* 4. 2. by which it is enacted, That theſe Words ſhall no more be put into Indictments, nor if they be, ſhall have ſuch Effect as to take from the Perſons indicted the Benefit of the Clergy; [u] and this Statute in this Reſpect ſeems to be in Affirmance of the Common Law, which ſeems generally to diſallow of ſuch uncertain Indictments, as appears from the Reaſons and authorities above ſet forth. Yet it hath been adjudged, That a Man may be generally indicted as a common Barretor againſt the [x] Form of the Statute, and [y] againſt the Peace, without ſhewing any of the particular Facts in the Indictment, by which he appears to have been ſo; for Barretry 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 [aa] Experience hath ſettled it to be ſufficient to charge a Man generally, as a common Barretor, (which is a [bb] Word of Art appropriated to this

[a] *Vide* 1 Lev. 203. 1 Keb. 278. Shower 389, 390.
[b] 1 Roll. Re. 79. 2 Roll. Ab. 79 pl. 11.
[c] 2 Roll. Ab. 79. pl. 1, 2. 1 Mod. 71.
[d] 2 Roll. Ab. 79 pl 10.
[e] 1 Mod 71. 288. 1 Lev. 299. Raym. 205. 1 Vent. 104.
[f] 2 Roll. Ab. 79. pl. 12. 6 Mod 311.
[g] Moor 302. pl 451.
[h] Fiz. Action. ſur. le Stat 26. 29 Aſſ. pl 45. Moore 302. pl. 451.
[i] 2 Roll. Ab. 79 pl. 5. Moore 302. pl. 451.
[k] 22 Aſſ. pl. 73. 1 22 Aſſ. pl. 73.
[l] 29 Aſſ. pl. 45
[m] 29 Aſſ. pl. 45.
[n] 22 Aſſ. pl. 45.
[o] Bro. Indictment 12.
[p] 2 Roll. Ab. 79. pl. 8.
[q] 3 Inſt. 41.
[r] 3 Inſt. 41.
[s] 11 Co. 29. 2 H. P. C. 206.
[t] *Vide* 3 Inſt. 41. Lambert, Book 4. Ch. 5. Fol. 404.
[u] Book 1. Ch. 81. Sect. 10.
[x] Cro. Jac. 527. 2 Roll. Ab 82. pl. 5.
[y] Book 1. Ch. 81. 8 Co. 36 b 37
[z] 2 Roll. Ab. 79 pl. 3. Cro. Jac. 527. 2 Keb. 409. pl. 33.
[aa] Book 1. Ch. 81. Sect. 10. 2 Lev. 208.
[bb]

this Purpoſe,) and before the Trial to give the Defendant a [a] Note of the particular Matters which you intend to prove againſt him. Alſo it is [b] holden, That there is no Need to name any particular Place where the Defendant was a Barretor, becauſe he ſhall be ſuppoſed to have been guilty in divers Places, and the *Venire* is moſt proper from the Body of the County. Alſo it is ſaid that there is no Need in the Concluſion of ſuch an Indictment, to lay the Offence *ad nocumentum omnium ligeorum, &c.* but that [c] *Diverſorum* is ſufficient in ſuch an Indictment as well as in an Indictment of a common Scold, *&c.* becauſe it appears from the Nature of the Thing, that it could not but be a common Nuſance. Alſo it ſeems to be [d] 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 Barretry is good.

[a] Book 1. Ch. 81. Sect. 13.
[b] *Vide* B 1. Ch. 81. Sect. 11.
[c] 2 Keb. 409. pl. 33. See Book 1 Ch 75. Sect. 5.
[d] 6 Mod. 311. Book 1. Ch. 75. Sect. 5.

Sect. 62. Sixthly, That the Charge muſt be laid poſitively, and not by way of [e] Recital, as with a *Quod cum, &c.* and that the Want of a direct Allegation of any Thing Material in the Deſcription of the Subſtance, Nature, or Manner of the Crime, [f] cannot be ſupplied by any Intendment or Implication whatſoever: And upon this Ground it ſeems to be [g] generally holden, That an Indictment of Death having the Words *felonicè murdravit, &c.* cannot amount to an Indictment of Murder, without the Words *Ex malitia præcogitatâ*; and yet by the Word *Murdravit* it expreſly charges the Party with Murder, and it is impoſſible that there could be a Murder, and no Malice prepenſe. Alſo it ſeems to be generally agreed, That no Indictment of Death can be good without an expreſs Allegation, that the Deceaſed both received the Hurt which is laid as the Cauſe of his Death, and alſo that he died of the Hurt ſo received; and that the Want thereof cannot be made good by any Implication whatſoever, as hath been more fully ſhewn, *Ch.* 23. *Sect.* 82, 83. Alſo it hath been [h] adjudged, That an Indictment againſt *J. S.* for felonioufly 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 expreſly ſhewing that *J. S.* did eſcape; and yet the Breaking is expreſly laid to be felonious, and it is impoſſible that it could be ſo, unleſs the Party did eſcape. But it will be needleſs to enumerate any more Inſtances of this Kind, which are ſo very frequent, that there is ſcarce any Caſe which mentions Exceptions taken to Indictments, without having ſome or other grounded on this Rule, That in an Indictment nothing material ſhall be taken by Intendment or Implication. Yet the Law will not admit of too great a Nicety of this Kind, for it hath been adjudged, That if in the firſt Part of an Indictment of Death, the Aſſault be laid with Malice prepenſe, *&c.* there is no [i] 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 [k] adjudged, that where an Indictment ſets forth, That *J. S.* was lawfully arreſted by Virtue of a Plaint before ſuch a Sheriff, *&c.* it ſhall be intended that there was a good Warrant. Alſo it hath been [l] adjudged, That where a Warrant is alledg'd, authorizing the Arreſt of *J. S.* within the Liberties of *London*, and the Indictment lays the Execution of it in ſuch a Pariſh and Ward in *London*, without expreſly laying the Pariſh and Ward within the Liberties of *London*, yet the Indictment is good, for the Court will not admit of ſuch a ſtrained Exception, that a Pariſh in *London* may be out of the Liberties of *London*.

[e] Salk. 371. pl. 6.
[f] S. P. C. 96. Cro. Jac. 20. 4 Co. 42. 5 Co 120. b.
[g] Dyer 99. pl. 63. & 65. H. P. C. 231. *Vide* 2 Lev. 140, 141. 4 Co. 41. b. Contra Dyer 68. pl. 28.
[h] Kellew 87. *Vide Supra*, Ch. 18. Sect. 11.
[i] 4 Co. 41. b.
[k] Cro. Jac. 473.
[l] 9 Co. 67. 5 Co. 120.

Sect. 63.

Sect. 63. Alſo it hath been [a] adjudged, That where an Indictment finds that *J. S. exiſtens* of ſuch or ſuch a Degree or Trade, *&c.* as brings him within the Purview of the Law whereon the Indictment is founded, commited ſuch a Fact, it ſhall be intended that he was of ſuch Degree, *&c.* at the Time of the Fact, without any expreſs Allegation to that Purpoſe, becauſe that is the moſt natural Conſtruction of the Participle *exiſtens*, going before the Verb to which it is the nominative Caſe; [b] yet where an Indictment of Forcible Entry, finds that *A.* diſſeiſed *B.* of ſuch Land *exiſtens liberum tenementum* of *B.* it ſeems agreed, That the Indictment is inſufficient, becauſe it ſtands indifferent, according to the common Rules of Conſtruction, whether the Land were the Freehold of *B.* at the Time of the Diſſeiſin, or at the Time of the Finding of the Indictment, the Word *exiſtens* not being the nominative Caſe to the Verb, but applied to the Thing which was the Subject of the Action. But I cannot find any certain general Rule, whereby it may be known in what Caſes an Exception of this Kind ſhall be taken to be ſo over nice, that the Court will not regard it. All therefore that I ſhall add on this Head is this, That as on the one Hand the Law will not ſuffer a Man to be condemned of any Crime whereof the Jury have not expreſly found him guilty, by any Argument or Implication from what they have ſo found; ſo on the other Hand it will not ſuffer a Criminal to eſcape on ſo trifling an Exception, which it would be abſurd and ridiculous to take Notice of; for *nimia ſubtilitas in jure reprobatur.* But the Judgment hereof cannot but be in a great Meaſure left to the Diſcretion of the Judges, who from the Circumſtances of each particular Caſe, the Compariſon of Precedents, and the plain Reaſon of the Thing, ſeem always to have endeavoured to have gone within theſe Rules as nearly as poſſible.

[a] Cro. Jac 610. 2 Mod. 128. 2 Roll. Rep. 226. Moore 606 2 Lev. 229. *contra* 2 Roll. Rep. 226. *Quære* Ray. 378 1 Keb. 852.

[b] Book 1. Ch. 64. Sect. 38. Cro. Jac. 610. 2 Roll. Rep. 226. 2 Lev. 229. 2 Mod. 129

Sect. 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 Nonſenſe and Abſurdities in legal Proceedings, which, if ſuffered, would ſoon introduce Barbariſm and Confuſion; alſo it takes off much from the Credit of an Indictment, that thoſe by whom it is found, have contradicted themſelves. And upon this Ground it hath been adjudged, That if an Indictment [c] charge the Defendant with having forged a certain Writing by which *A.* was bound to *B.* which is impoſſible, if the Writing were forged; or if an Indictment of Forcible Entry ſet forth, That the Defendant diſſeiſed *J. S.* of Lands, wherein it appears by the Indictment it ſelf that he had no Freehold whereof he could be diſſeiſed; or that the Defendant entred peaceably on *J. S.* and then and there Forcibly diſſeiſed him; or that he diſſeiſed him of Land then being and ever ſince continuing to be his Freehold; [d] 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.* aforeſaid, or on the firſt of *May* aforeſaid, is inſufficient for the Repugnancy, as hath been more fully ſhewn in the [e] Chapter of Appeals, becauſe it ſuppoſes the Murder to have been committed at a Place in the firſt Caſe, and on the Day in the ſecond; in which it appears by the Indictment it ſelf, That the Party was not killed but only wounded. Alſo it hath been [f] 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

[c] 3 Mod. 104.

[d] See Book 1. Ch. 64. Sect. 39.

[e] *Supra* Ch. 23. Sect. 88, and 89.

[f] 2 Roll. Ab. 81. pl. 5.

by Meaſure, but alſo becauſe it is repugnant and inconſiſtent that it ſhould be ſo ſold at the ſame Time when it was ſold by Weight. Alſo if an Indictment at a Seſſions holden the 13th of *January*, 30 *Car.* 2. find that the Defendant has been abſent from Church ſix Months from the firſt of *January*, 30 *Car.* 2. it is [b] 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 felonioufly done a Fact, which appears upon the Face of the Indictment to have been but a Treſpaſs, as with felonioufly cutting down and carrying away Trees, the Court will [c] not arraign him; yet where the Senſe appears plain, the Court will often diſpenſe with a ſmall Impropriety in the Expreſſion, as where one is indicted for having mowed *unam acram fœni*, which is [d] ſaid to be ſufficient, and yet that which was mowed, could not at the Time of the Mowing be in Strictneſs called Hay, but Graſs only.

[b] Raym. 434. Par. Caſe. 3 Keb. 653. pl. 8.

[c] 12 Aſſ. pl. 32. Fitz. Coro. 171. Indictment 9. Bro. Coro. 76. Book 1. ch. 33. ſect. 21.

[d] 2 Rol. Abr. 81. pl. 1. Parallel Caſes. 2 Rol Ab. 81. pl. 2, 3. *Vide* 18 Aſſ. pl. 15.

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

Sect. 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 one, charge the Acceſſaries with having abetted the Fact, at the Time of the Felony and Murder only, it is inſufficient, as hath been more fully ſhewn in the [e] Chapter of Appeals, becauſe it appears by the Indictment it ſelf, That the Time of the Death, and conſequently of the Murder, was ſubſequent to that of the Stroke, and therefore it is repugnant to alledge that the Defendant abetted the Stroke by being preſent at the Time of the Death.

[e] Ch. 23. ſect 88, 89. *Supra*, ſect. 64.

Sect. 66. Secondly, That where ſeveral are preſent, and abet a Fact, and one only actually does it, an [f] Indictment may, in the ſame Manner as an [g] 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 [h] 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.

[f] 1 H. P. C. 265, 266. 9 Co. 67. Plowd. Com. 97.

[g] *Supra*, ch. 23. ſect. 76.

[h] 14 H. 7. 31. pl. 7. Bro. Indictment, 5. 30 H. 6. 2. pl. 10. Fitz. Indictment, 13. S. P. C. 95. Letter B. H. P. C. 206.

Sect. 67. Alſo it hath been [i] adjudged, That an Indictment of *J. S.* as Acceſſary to four, by theſe Words, that *J. S. ſciens ipſos quatuor homines feloniam prædictam feciſſe apud D. felonicè receptavit*, is naught for not ſaying *eos receptavit*, for it 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.

[i] Cro. El. 752. pl. 10. Hetley, 53. 8 Ed. 4. 3. pl. 6. H. P. C. 206. S. P. C. 95. Letter A. Fitz. Indictment, 16. *Vide* Fitz. Coro. 55, 76.

Sect. 68. It hath been [k] holden, That an Indictment charging a Conſtable with having voluntarily and felonioufly ſuffered a Perſon, arreſted by him upon Suſpicion of Felony, to eſcape, without ſhewing what the Nature of the Felony was, and that it was actually committed, is void for the Uncertainty, not only becauſe it appears not but that the Offence of which the Party was ſuſpected, was never actually committed; in which Caſe the Eſcape could [l] not be criminal; but alſo becauſe it appears not what the Felony was, and unleſs the Arreſt were for a Felony, the Eſcape could not be felonious. But it is ſaid, That an Indictment for knowingly receiving Perſons outlawed for, or convicted of Felony, or for knowinly ſuffering ſuch Perſons to eſcape, [m] may be good, without ſhewing what the Felony was, or that it was actually committed, if

[k] *Supra*, ch. 12. ſect. 16, 17. ch. 18 ſect 7. ch 19. ſect. 2, 3.

[m] 8 Ed. 4 3. pl 6. Fitz. Indictment, 16. *Quære* Keilw. 194. a.

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* [a] *Staundford*, That ſuch a general Indictment for receiving a Perſon outlawed for Felony in the ſame County wherein he dwells is good, but not if it were in another, becauſe a Man is bound at his Peril to take Conuſance of an Attainder of Felony in his own County, but not in another. But I much queſtion the Authority of this Diſtinction, ſince, as the Law ſeems now to be [b] holden, a Man is no more bound to take Conuſance of ſuch an Attainder in his own County, than in any other.

Sect. 69. It hath been [c] holden, That an Indictment finding that *J. S. ſcienter receptavit* ſuch a one, being a Felon, is not good, for this Reaſon among others, becauſe it doth not expreſly find, that *J. S.* knew the Perſon ſo received by him to have been a Felon, But this is contradicted by other [d] 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, *viz.* 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.

Sect. 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 [e] good without naming any Perſon in certain: Alſo it is ſaid, [f] That no Indictee can take any Advantage of a miſtaken 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 [g] never known by it; and in this Reſpect, an Indictment differs from an Appeal, whereof it is [h] certain that a Miſnoſmer of a Surname may be pleaded in Abatement, as well as any other Miſnoſmer whatſoever.

Sect. 71. But I do not find but that every other Miſnoſmer of the Defendant, except that of the Surname, and alſo every defective Addition, are as fatal in an Indictment as an Appeal; for it ſeems generally to be [i] holden, That a Miſnoſmer of the Defendant's Name of Baptiſm may be pleaded in Abatement of an Indictment. Alſo it hath been [k] 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 [l] holden, That it is a good Plea in Abatement of an Indictment againſt Garter King at Arms, that he is not called Garter in the Indictment, becauſe it is a Name of Dignity, being given him by the Words *creamus, coronamus*, and *nomen imponimus*; and from the Reaſon of this Caſe, it ſeems plainly to follow, That the Omiſſion of any other Name of [m] Dignity may be pleaded in Abatement of an Indictment: [n] And if ſo, why ſhould not the Omiſſion of the Defendant's Name of baptiſm be equally fatal?

Sect. 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

[a] S. P. C. 96. Letter G. *Vide* Fitz. Coro. 377. Dy. 355 pl. 36
[b] H. P. C. 218.
[c] 7 H. 6. 4. b. Bro. Indictment, 4. Fitz. Indictment, 11. 3 Keb. 760. pl. 45.
[d] S. P. C. 96. Letter G. 2 Lev. 208. 8 Ed. 4. 3 pl. 6. 1 D'Anv. Abridg. 19 pl. Letter H
[e] 2 R. A. 79 L.
[f] 1 H. 5. 5. pl. 8. H. P. C. 243. S. P. C. 181. Letter D. Fitz. Miſnoſmer, 9. *Vide* 3 H. 6. 25, 26. Theloal. *lib.* 11. *cap.* 5. ſect. 14.
[g] *Quære* Kelyng 11, 12.
[h] 1 H. 5. 5. pl. 8. Raſt. Ent. 50. pl. 10. 54 pl. 4. H. P. C. 243. S. P. C. 181. Letter D. *Supra*, ch. 23. ſect. 102.
[i] Theloal. *lib.* 11. ch. 5. ſect. 12. 11 H. 4. 41. pl. 7. Fitz. Coro. 88. Miſnoſmer, 18. H. P. C. 243. *Contra*, 3 H. 6. 26. a. Bro. Miſnoſmer, 6.
[k] Cro. Ca. 371. 1 Jon. 346. 2 Leon. 248, 249 *Quære* Cro. El. 542. pl. 8.
[m] *Vide ſupra*, ch. 23. ſect. 102, 103. Shower 392, 393
[n] *Vide* ch. 23. ſect. 103. Keilw. 25. b. 26. a. *Quære* Palm. 195.

of [a] Appeals, it [b] 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 [c] Exception to an Indictment, if [d] Proceſs of Outlawry lie on it, as it is to an Appeal. Alſo it hath been adjudged, That it is a [e] fatal Fault to apply ſuch Addition to the Name which comes under the *Alias dictus* only, and not to the firſt Name: But it is ſaid not to be material [f] whether any Addition be put to the Name which comes under the *Alias dictus* or not, becauſe what is ſo expreſſed is not material. But it is ſo great a Fault to put no Addition to the firſt Name, that where ſeveral are indicted, ſuch an Omiſſion, in Reſpect of one of them, makes the Indictment [g] 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 [h] expreſly 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 [i] *Engliſh* is as good as in *Latin*; and that where ſeveral Defendants have the ſame Addition, it is [k] 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 [l] farther Deſcription; and having alſo ſhewn what is a ſufficient Addition of the [m] Eſtate, or Degree, or [n] Myſtery, and alſo of the [o] Town, Hamlet, Place and County of the Defendant: And alſo how the Defect of an Addition may be [p] ſalved by the Appearance and Plea of the Defendant, I ſhall refer the Reader for all theſe Particulars to the Chapter of Appeals.

Sect. 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 [q] anciently ſeem to have been allowed for ſuffering divers Bakers to bake, *&c.* againſt the Aſſiſe, *&c.* nor for diſtraining divers Perſons without Cauſe *&c.* have by the later [r] Authorities been holden inſufficient for their Uncertainty in not naming ſome Perſons in particular who were ſo ſuffered to bake, or diſtrained, without which the Court cannot ſo well know what Fine will be proper; nor can the Defendant be ſo well enabled to make his Defence, nor to plead the Indictment to a ſubſequent Proſecution. And for the ſame Reaſons among others, an [s] Indictment for taking divers Sums of divers Perſons for ſuch a Toll at ſuch a Rate, without naming any Perſons in particular, hath been adjudged naught. Yet where in common Preſumption it may be very difficult, if not impoſſible, to know the Names of the Perſons referred to in an Indictment, it [t] may be good without naming any of them; [u] as where one is indicted for having knowingly received and harboured divers Thieves, to the Jurors unknown; in which Caſe, ſuch a general Charge is maintainable from the Neceſſity of the Thing, for otherwiſe a notorious Offender of this Kind might be wholly diſpuniſhable, for Want of the Jurors knowing the Names of the Perſons ſo received, and yet might be publickly known to carry on ſuch a Practice, to the common Nuſance of the Country, in which Reſpect it cannot but be reaſonable in ſuch a Caſe to puniſh him, tho' not as an Acceſſary to the Thieves, without ſhewing that he had received ſome of them in particular. And for the like Reaſon,

if

[a] *Supra*, ch. 23. ſect. 104
[b] Bro. Addition, 50. Long quinto Ed. 4 33, 34. Finch 234.
[c] Bro. Additions, 23, 41. 2 Leon. 183. Shower, 392, 393.
[d] 9 Ed. 4. 48. pl. 2.
[e] Dyer 46. pl. 2, 3, 4.
[f] Cro. El. 324. pl. 9. 148. pl. 16. Cro. Ja. 531.
[g] S. P. C. 68. 2 Leon. 183.
[h] 30 H. 6 pl. 24. Cro. El. 583. pl 12.
[i] *Vide* Dy. 88. pl. 107.
[k] 1 Ed. 4. 1. pl 3 [l] 30 H. 6. pl. 2 S. P. C. 68. Fitz Proceſs, 103.
[m] 1 Ed. 4. 1. pl 3. 5 Bulſt 183.
[n] *Vide ſupra*, ch. 23. ſect. 125. Fitz. Count, 18.
[o] *Supra*, ch. 23. ſect. 105.
[p] *Supra*, ch. 23. ſect. 105.
[q] *Supra*, ch. 23. ſect. 105.
[r] *Supra*, ch. 23. ſect 106, 107, 108, 109, 110. 111.
[s] *Supra*, ch. 23. ſect. 112, 113, 114, 115, 116, 117.
[t] *Supra*, ch. 23. ſect. 117, 118, 119, 120, 121, 122.
[u] *Supra*, ch. 23 ſect 123. 38 Aſſ. pl. 11, 12. Bro. Preſentment, 27.
[r] Bro. Indictment, 21. 2 Rol. Ab. 80. pl. 1, 2.
[s] Shower 389, 390. Pl. Com. 85, b. 129. a.
[u] 2 Lev. 208

if a [a] Stranger unknown to the Country be found ſlain, or if the dead Body of a Perſon who was well known, be disfigured in ſuch a Manner by its Wounds, that no one can diſcover whoſe it was, it is certain that an Indictment againſt the Offender, for having killed *quendam ignotum*, will be good. [b] And upon the ſame Ground, if a Stranger unknown to the Country be robbed, and will not come in to proſecute, nor diſcover his Name; it ſeems clear, That an Indictment againſt the Offender for having robbed *quendam ignotum* is good. And if Goods be found upon one notoriouſly ſuſpected of Felony, of which he can give no Manner of Account, as where a Highwayman is apprehended with his Pockets full of Watches and Rings; It ſeems, That he may either be indicted for ſtealing ſuch Watches and Rings, being the Goods *quorundam ignotorum*, or, as ſome [c] ſay, for ſtealing them generally. Alſo in the Indictment of the Regicides for the Murder of King *Charles* I. it was [d] agreed, That the Fact was well laid, as done *per quendam ignotum*, with a Vizor on his Face. And if one ſteal the Goods of an Abbey, *&c.* during a Vacancy, he may be indicted for ſtealing [e] *Bona Eccleſiæ*, and yet the Church can have no Property. But theſe ſeem to be ſpecial and extraordinary Caſes, depending on particular Reaſons, and grounded on manifeſt Neceſſity, without which, it ſeems, that ſuch Indictments cannot be maintained: For it ſeems to be taken as a Ground in [f] many Books, That regularly the Perſons offended, as well as the Defendant, ought to be certainly deſcrib'd in every Indictment. And agreeably hereto it hath been [g] adjudged, That an Indictment for ſtealing *quandam peciam panni linei cujuſdam J. S.* without adding *de bonis & catallis cujuſdam J. S.* is inſufficient, becauſe it doth not expreſly appear to whom the Goods ſtolen did belong. Alſo it was anciently [h] holden, That where one is indicted for the Death of a Perſon unknown, the Inqueſt ought to tell his Name to the Court; but ſurely this muſt 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 [i] Books which ſeem generally to allow of Indictments of killing, or robbing Perſons unknown, are to be underſtood with this Limitation, That ſuch Indictments are then good when the Party is in Truth unknown to the Jurors. And agreeably hereto, others [k] who ſpeak more fully of the Matter ſeem plainly to go upon the Neceſſity of the ſeveral Caſes And the Want of ſuch Neceſſity ſeems probably to have been the beſt Reaſon why Indictments not ſhewing to whom the Wrong was done, were diſallowed in ſome of the [l] 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 [m] Chapter of Appeals.

Sect. 74. It hath been [n] adjudged, That an Indictment of an Aſſault on *John* Pariſh-Prieſt of *D.* in the County of *C.* is good, without mentioning his Surname, for if a wrongful Surname of the Defendant himſelf will not vitiate an Indictment, as hath been more fully ſhewn, *Sect.* 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

[a] 1 Ed. 3. 20. pl. 26. 1 Aſſ. pl. 7. Fitz. Coro. 159. 23 Aſſ 94 Fitz. Indictment, 10. S. P. C. 95. Letter G. Pl. Com. 85. b. 129. a. 9 H. 6. 45. b. Dy. 99 pl. 61. 285. pl. 38. *Vide* Fitz. Coro. 146. 183. Noy. 85. [b] *Supra*, ch. 23. ſect. 78. Fitz. Indict. 12, 17. 9 Ed. 4. b. S. P. C. 95. Letter G. Dy. 99. pl. 61. Keilw. 25. [c] *Supra*, ch. 23. ſect. 78. Bro. Indictment, 11. Pl. Com. 85. b. 129. a. 18 Aſſ 15. ſeems contrary. [d] Fit. Indict. 9, 26. S. P. C. 95. Letter G. *Contra* Fitz. Indict. 27. Bro. Indict. 20. 30 Aſſ. pl 37. [e] Kelinge 10. [f] 7 Ed. 4. 14. pl. 1. Fitz Indictment, 15. S. P. C. 95. [g] Lamb. B. 4 ch. 5. Dalt. ch. 131. S. P. C. 95. Letter G. [h] Cro El 489, 490. [i] 1 Ed. 3. 20. pl. 26. 1 Aſſ. pl. 7. Fitz. Coro. 159, 183. *Vide* Bro. Indict. 10. [k] H. P. C. 207. Dy. 285. pl. 38. [l] S. P. C. 95. Letter G. Pl. Com. 85. b. 129. a. Keilw. 25. [m] 2 H. 6. 45. b. *Vide* Dyer 99. pl. 61. Dalton ch. 131. [n] Fitz Indict. 27. 30 Aſſ. pl. 37. 18 Aſſ. pl. 15. 2 Leon. 39. [o] *Supra*, ch. 23. ſect. 78. [p] Keilw. 25. Dy. 285. pl. 38.

his Name of Baptiſm, without ſome Addition to diſtinguiſh him from others of the ſame Name, it ſeems [o] 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 fregit*, was adjudged good, without the Sirname; and it not being there mentioned, that there was any other Deſcription of the Party but by his Name of Baptiſm, it may be argued that that alone is ſufficient: But to this it may be anſwered, That the only Point taken Notice of as adjudged, is that the Surname is not neceſſary, and perhaps in the Record at large there might be ſome Addition: But granting that there was none, yet the Authority of this Caſe is the leſs to be regarded, becauſe of the Books cited to ſupport it [b] two ſeem to be directly againſt it; and the [c] 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 [d] agreed, That a Repugnancy or Abſurdity in the Deſcription of the Perſon injured will vitiate an Indictment, as where one is indicted for ſtealing *bona prædict' J. S.* where no *J. S.* was mentioned before, for tho' in Civil Actions, the Word *prædicit* hath been ſometimes [e] rejected, as Surplus and void, where it could be referred to [f] no certain Antecedent, yet this may perhaps chiefly depend on the Statutes of *Jeofailes*, which in many Caſes help Defects in Form in Civil Actions, but extend not to criminal Caſes, wherein the greateſt Exactneſs is required; and if an Award may be defeated by appointing a [g] 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.

Sect. 75. It hath been [h] adjudged not to be neceſſary in an Indictment of Death to alledge, that the Perſon killed was in the Peace of God, and of our Lord the King, *&c.* 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.

Sect. 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 [i] ſaid, That an Indictment for forging a Leaſe of certain Lands, without naming ſome one certain Parcel, is inſufficient. Alſo it ſeems to be agreed, That an [k] Indictment for ſtealing *bona & catalla J. S.* without any farther Deſcription of them is void for its Uncertainty, for the like Reaſons for which Indictments charging a Man with being an Offender in general are void, and hath been more fully ſet forth in the ſixty-firſt Section: And upon the like Ground it hath been [l] adjudged, that an Indictment for a Treſpaſs in two Cloſes of Meadow or Paſture; or for diverting *quandam* [m] *Partem aquæ* running from ſuch a Place to ſuch a Place, without any farther Deſcription; or for ingroſſing [n] *magnam quantitatem ſtraminis & fœni*, or [o] *diverſos cumulos tritici*, without ſhewing how much of each; or for carrying away *duas* [p] *centenas caſei*, without adding the Words *libras* or *uncias*, or ſome other Subſtantive to *centenas*; or for erecting ſeveral [q] Cottages *contra formam ſtatuti*, without ſhewing how many, *&c.* are inſufficient for their Uncertainty. As to the [r] Caſe of the King againſt *Wetwang*, wherein the Court diſallowed an Exception to the Generality

[o] *Vide* Dalton ch. 131. Lambert, Book 4. ch 5. [a] Moore, 466. pl. 662. [b] 18 Aſſ. pl. 15. Fitz. Indictment 27. [c] 9 Ed. 4. 1. b. [d] Lambert, Book 4. ch. 5. Folio 495. 9 Ed. 4. 1. b. Fitz. Indictment 17. Bro. Indictment 6. S. P. C. 95. b. *Vide* Cro. Ca. 465. [e] 3 Levinz. 436. Cro. El. 709. pl. 31. [f] *Vide* Cro. Ja. 549, 550. pl. 11. 585, 586. pl. 7. 618. pl. 8. Yelv. 76. 111. Cro. Eliz. 658. pl. 2. [g] Cro. Ja. 149. pl. 8. 1 Rol A. 254. pl. 15. 263. pl. 6. Yelv. 97, 98. [h] 4 Co. 41. b. [i] Hob. 272. [k] Dalton, ch. 131. Lamb. B. 4. ch. 5. Fo. 496. [l] 2 Rol. Ab. 81. pl. 4. 5 Mod. 138. Dalt. ch. 131. Parallel Caſes B. 1. ch. 64. S. 37. [m] 2 Rol. Ab. 80. pl. 14. 2 Bulſ. 119. Parallel Caſes, B. 1. ch. 76. Sect. 88. [n] Cro. Ca. 380, 381. *Vide* 2 Bulſ. 317. Shower 389, 390. [o] 1 Rol R. 134, 135. [p] Cro. El. 754. [q] 2 Rol. A. 80 pl. 13. [r] 2 Keb. 178. 1 Lev. 103.

of an Indictment for taking *quoſdam piſces*, without ſhewing how many, it may be anſwered, that this was contrary to the Opinion of Mr. Juſtice *Twiſden*, and was only the ſudden Opinion of two of the other Judges; neither does it appear that the Indictment was adjudged good, but only that the Court refuſed to quaſh it, and ordered the Defendant to plead to it. However, it ſeems clear from conſtant Experience, [a] That if an Indictment be uncertain as to ſome Particulars only, and certain as to the reſt, it is void only as to thoſe which are uncertainly expreſſed, and good for the Reſidue.

Sect. 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 holden by [b] *Lambard*, and [c] *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 holden by [d] *Lambard*, that it is proper to ſhew the Worth of all living Things and alſo of ſuch dead Things as are ſold by Weight or Meaſure, by expreſſing that they are of ſuch a Price, and the Worth of other dead Things, by expreſſing that they are of ſuch a Value; yet no Inſtance is produced where any Indictment has been diſallowed in either Caſe for a Variance from theſe Rules. And as to the firſt of them it is farther obſervable, that the [e] Precedents in *Crompton* of Indictments for Stealing of Horſes, and Oxen, expreſly alledge the Horſe and Ox ſtol'n *de bonis & catallis cujuſdam J. S.* &c. Alſo an Appeal of ſtealing Sheep in [f] *Raſtal's Entries* expreſly alledges 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 [g] Regiſter concerning this Matter, which ſeem to be the chief Foundation of the ſaid Rule are thus expreſſed, that in a Writ of Treſpaſs of immoveable Chattels, the Writ ſhall ſay, *Tants de chateux ad valentiam X. S.* But if it be brought of a moveable Chattel, it ſhall ſay *precii X. S.* and *non ad valentiam*. Yet it appears by the Regiſter it ſelf, that even in Writs of Treſpaſs concerning which theſe Directions are given, the Worth of the Things taken away is ſometimes omitted for the [i] Whole, and ſometimes for [k] Part. And it is ſaid to have been [l] adjudged, That ſuch Writs are good notwithſtanding ſuch Omiſſions. Alſo where Things moveable and immoveable are mentioned together in the ſame Writ the Worth of all of them together is ſometimes [m] expreſſed under the Words *ad valentiam*, &c. And ſometimes the Worth of moveable Chatels, as that of [n] Corn in a Granary, *&c.* of [o] Wine in a Veſſel, and of [p] Wool, is expreſſed under the Words *ad valentiam*, From all which it ſeems to [q] appear, That the ſaid Directions are not neceſſary to be obſerved, even in Writs of Treſpaſs, concerning the Form whereof they are expreſly 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 not to obſerve the ſaid Directions in Indictments, which are [r] not tied to the ſtrict Forms of Writs? Therefore from the whole, it ſeems [s] 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

[a] *Vide* Poph. c. 208.
[b] Lambard, B. 4. Ch. 5. fol. 196.
[c] Dalt. Ch. 131.
[d] Lambard, B. 4. Ch. 5. fol. 497, 498. *Vide* Cro Ja. 130.
[e] Crompton *de pace*, 247, 248.
[f] Raſt. Entr. 55. pl. 6.
[g] Regiſter, 93. b.
[i] *Vide* Regiſter, 93. b. in the Writ *de warrena fugata, &c.* and that *de parco fracto*, and 94. a. in the Writ *de equo & catallis arreſtatis*, 94. b. in the Writ *de averiis imparcatis, &c* and in that *de tranſgreſſione facta uxori, &c.* and 96. b. in that *de equo perluſſo* & 97. a. in that *de ovibus fugatis, &c.*
[k] Regiſt. 93. b. in the Writ *de clauſo fracto, arboribus ſuccisis* 94. b. in the Writ *de domo fracta, &c.* and in the Writ *de Jumento, &c fugatis*, and in that *de equis imparcatis*, and 95. b. in that *de paſis, &c.* and in that *de piſcaria piſcata, &c.* and in that *de domo fracta, &c*
and 96. a in that *de ovibus tonſis, &c.* & 96. b. in that *de warrena fugata, &c.* & 97. a. in that *de porcis fugatis, &c.* [l] Regiſter, 97. b. *Vide* Cro Ja. 130. 1 Sid. 39, 159. [m] 1 Regiſter 94. a. in the Writ *de piſcaria piſcata, &c.* and 95. b. in that *de piſca' piſcata, &c.* and in that *de domo fracta, &c.* & 96. *de excluſis ſtagni.* [n] Regiſter 95. b. in the Writ *de bladis inundatis, &c.* & 96. a. in that *de clauſo fracto, &c.* [o] Regiſter 95. b. in the Writ *de vino, &c.* [p] Regiſter 96. and in the Writ *de ovibus tonſis, &c.* [q] *Vide* ſ. n. b. 88. Letter m. Cro. Ja. 130. 1 Sid. 39, 150, 121, 15. [r] 9 Dy. 4. 26. b. [s] *See* Dalton, Ch. 131. Lambard, B. 4. Ch. 5. fol. 496, 497.

ſhew

ſhew that the Crime amounts to grand Larceny, and to aſcertain the Goods thereby the better to intitle the Proſecutor to a [a] 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.

Sect. 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.

Sect. 79. But it is laid down as an undoubted Principle in all the Books [d] that treat of this Matter, That no Indictment whatſoever can be good, without preciſely ſhewing a certain Year and Day of the material Facts alledged in it. Alſo it hath been [e] adjudged, That the Sheriffs Return of a Reſcous, without ſhewing the Year and Day, is inſufficient, becauſe ſuch a Return is in Lieu of an Indictment. Alſo it is taken for granted in [f] *Dyer*, That an Indictment of Reſcous is not good, without expreſly ſhewing the Day and Year both of the Arreſt, and alſo of the Reſcous, and that the Time of the later is not ſufficiently ſhewn, by [g] ſhewing that of the former. And where an Indictment of Reſcous ſet forth, That *J. S.* committed ſuch a Felony ſuch a Day, and Year, and Place, *per quod* A. B. *prædictum* J. S. *cepit & arreſtavit, & in ſalva cuſtodia ſua adtunc & ibidem eundem* J. S. *habuit & cuſtodivit*, it is made a [h] Query, Whether the Indictment be not inſufficient, becauſe no Time of the Arreſt is alledged in the ſame Sentence with it; and it is doubtful whether the Time of the Cuſtody which is alledged in the next Sentence, by Force of the Copulative be applied alſo to the Arreſt or not, and *Dyer* ſeems rather to incline to the contrary Opinion. However, it is certain, That if an Indictment lay the Offence on an [i] uncertain or impoſſible Day, as where it lays it on a [k] future Day, or lays one and the ſame Offence at [l] different Days, or lays it on ſuch a Day which makes the Indictment [m] repugnant to it ſelf, it is void. Alſo it hath been adjudged, That no [n] Defect of this kind can be helped by the Verdict. Alſo it is ſaid, That an Indictment of Death laying an Aſſault at a certain Time and Place is [o] not ſufficient without repeating the Time and Place in the Clauſe of the Stroke, and the like Rule ſeems alſo to hold as to Indictments of other Felonies, in which reſpect ſuch Indictments differ from Indictments of Treſpaſs. Alſo it is [p] 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 Chaper of Appeals, I ſhall refer the Reader thither for the better Underſtanding of them.

Sect. 80. It ſeems to be [q] generally agreed, That the Words *adtunc & 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 expreſly

[a] *Supra*, Ch. 23. Sect. 55, 56, 57.
[b] S. P. C. 80.
[c] *Supra*, Ch. 23. Sect. 87. 1 Bulſt. 203.
[d] S. P. C. 95. Letter A. Lambard, B. 4. Ch. 5. Dalt. Ch. 131. Fitz. Indict. 28. Dyer, 164. pl. 60. H. P. C. 206. 8 H. 5. 8 pl. 4.
[e] Fitz. Coro. 45. Attach. 1. Bro. Return de brief. 97. 3 H. 7, 11. pl. 3.
[f] Dyer, 164. pl. 60. *Vide* Fitz. Return de Viſcount, 32. Dy. 69 pl. 29. 10 Ed. 4, 15. pl. 13. *Quere* 5 H. 7, 17. b. 18. a.
[g] Yet the contrary is adjudged. 2 Bul. 208. Cro. Ja. 345.
[h] Dy. 164. pl. 60.
[i] *Supra*, Ch. 23. Sect. 88. Moor, 555. pl. 753.
[k] Raſt. Entries, 263. pl. 5.
[l] 2 H. 7. 7. pl. 22.
[m] *Supra* Sect. 64. & Ch. 23. Sect. 88, 89.
[n] 1 Rol. Ab. 781. N. 1.
[o] *Supra*, Ch. 23 Sect. 88. Hetley, 35. 119, 120. 5 H. 7, 17 b. 18. a.
[p] 1 Bulſt. 203, 204.
[q] *Supra*, Ch. 23. Sect. 90.
[q] Dy 28. pl. 6. *Vid.* Keilw. 100. *ſupra* Ch. 23. Sect. 88. 4 Co. 41. b. *Quere* Dyer 164. pl. 60.

prefly repeated. Alſo it hath been [a] adjudged, That an Indictment laying the Offence on the *Thurſday* after the Day of *Pentecoſt* in ſuch a Year is good: And from the like Ground it ſeems to follow, That an Indictment laying it on the [b] *Utas* of *Eaſter*, *&c.* (which ſhall be taken for the very eighth Day after the Feaſt,) or on the Tenth of *March* [c] laſt (if it may be aſcertained by the Style of the Seſſions before which the Indictment was taken) is as good as if it had ſhewn the Day and Year by expreſly naming ſuch a Day of ſuch a Month, *&c.*

Sect. 81. And where an Indictment charges a Man with a bare Omiſſion as the not ſcouring ſuch a Ditch, *&c.* it is [d] ſaid, That it needs not ſhew any Time.

Sect. 82. It is moſt [e] 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 [f] Caſe of the Regicides no Year of any King was laid for the King's Murder, but the compaſſing of his Death was laid in the twenty-fourth Year of King *Charles* the Firſt, and the Murder was laid on the thirtieth Day *ejuſdem menſis Januarii*, becauſe if the Reign of either King had been expreſſed, it might have cauſed a Diſpuſe Whether that or the other would have been more proper.

Sect. 83. It is [g] agreed, That a Miſtake in not laying an Offence on the very ſame Day on which it is afterwards proved upon the Trial, is not material upon Evidence.

Sect. 84. If an Indictment charge a Man with having done ſuch a Nuſance ſuch a Day and Year, *&c.* and on divers other Days, it is void [h] only as to the Facts on thoſe Days which are uncertainly alledged, and effectual for the Nuſance on the Day ſpecified; but if it charge a Man generally with ſeveral Offences at ſeveral Times, without laying any one of them on a certain Day, [i] 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 [k] Deer-ſtealing ſetting forth the Offence between the Eighth and Twelfth of *July*, *&c.* is ſufficient.

Sect. 85. As to the ſecond Particular, *viz.* How an Indictment at Common Law muſt ſhew the Place where the Offence was done, it ſeems agreed by all the [l] Books, That no Indictment can be good without expreſly ſhewing ſome Place wherein the Offence was committed; which muſt [m] appear to have been within the Juriſdiction of the Court in which the Indictment is taken, and muſt alſo be alledged in ſuch a Manner as is perfectly free from all [n] Repugnance and Inconſiſtency, for if one and the ſame Offence be laid at two [o] different Places, or at the Town of *B.* [p] aforeſaid, where no ſuch Town was mentioned before; or if in an Indictment of Murder, the Stroke be laid at *A.* and the Death at *B.* and then it is [q] concluded that the Defendant *Sic felonicè murdravit* the Perſon deceaſed at *A.* the Indictment is void. And ſo it is alſo, if it do [r] not lay a Place both of the Stroke and Death; or if the Place or Places ſo alledged, be not ſuch from whence a [s] Viſne may come. Yet it hath been adjudged, That a Fact laid in a Pariſh of *London*, with ſome other Addition, as in the Pariſh of St. [t] *Michael* in *Woodſtreet*, *London*, or in the Pariſh of St. [u] *Lawrence Jury*, is good, without ſhewing the Ward in which

[a] 7 H. 6. 39. pl. 4. Fitz Error. 17. Plow. Com. 122. b.
[b] Lamb. B. 4. Ch. 5. fol. 491.
[c] Lamb. B. 4. Ch. 5. fol. 491.
[d] Book 1. Ch. 10. Sect. 5. Lamb. B. 4. Ch. 5. fol. 492.
[e] *Supra*, Ch. 23. Sect. 90. 1 Lev. 113. 1 Salk. 195.
[f] Keling. 11.
[g] *Supra*, Ch. 23. Sect. 87, 88, 91. 3 Inſt. 230.
[h] Rex. v. Dixon. Trin. 2 Georg. *Vide Supra*, Sect. 76.
[i] Shower, 389, 390.
[k] *Dom. Reg. verſus* Simpſon adjudged. Trin. 13. *Annæ*
[l] 25 Ed. 3. 43 pl. 36. Fitz. Indictment 1. Suggeſtion 7. 4 H. 7, 8. pl. 7. Kelw. 98. pl. 8. 1 Bulſt. 124. *See* the Books cited Sect. 72. under the Letters, d, e, f, g, h.
[m] *Vide* Keil. 33, pl. 6, 89: pl. 9 Cro. El. 448
[n] *Vide Supra*, Sect 64. and 79 & Ch 23. Sect 88, 89, 91.
[o] 2 H. 7. 7. pl. 22.
[p] Cro. Ca. 465. *Vide Supra* Sect. 74.
[q] *See* Ch. 23. Sect. 88, 89, 91.
[r] *Supra*, Ch. 23. Sect. 92. Hetley, 35. 118, 119. Dyer 68 pl. 28.
[s] *Supra*, Ch. 23. Sect. 92, 93.
[t] 9 Co. 66. b. *contra* Cro. El. 732. *Supra*, Ch. 23. Sect. 92.
[u] 7 H. 6. 36. pl. 42.

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

[a] Ch. 23. ſect. 88. 89. 91, 92, & 93.
[b] *Supra*, ſect. 78. 79, 80.

Sect. 86. It ſeems, That there is no Need in an Indictment on a Statute, ſetting forth the Deſcription which brings the Defendant within the Purview of it, to ſet forth any Place where thoſe 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 [c] Indictment on ſuch Statute to ſhew in what Place the Defendant was born or ordained. Alſo it ſeems to be [d] 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 laſt of which Statutes it is recited, *That in the Parliament holden 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 diverſe 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 liable to Writs of Conſpiracy, and by the preſent Statute the above-recited Statute is made perpetual.*

[c] Poph. 93, 94.
[d] B. 1. ch. 17. ſect. 79, 80, 81, 82. *Vide ſupra*, ſect. 83. & Ch. 23. ſect. 91. Kely. 15. Salk 288. H. P. C. 264, 265.

Sect. 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 *Pulton*, 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 *Pulton*, but only one which requires the Juſtices before the Award of any Exigent to inquire by Inqueſt of Office, Whether there be any ſuch Place in the County as that wherein an Offence is laid in an Appeal or Indictment. But this Statute ſeems only to extend to the County of *Lancaſter*, for it is directed to the Chancellor of that County, and recites, That Perſons had been indicted and appealed in Places falſly alledged 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 expreſly 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 [e] Abridgment makes it equally extend to all Counties. However, [f] *Raſtal* in his Collection of Statutes ſeems to have ſet down the very Statute which is referred to by the above-recited Statute of 18 *H.* 6. 12. and this is certainly [g] ſtill in Force.

[e] Wingate's Abridgment of the Statutes under the Title of Conſpiracy, Sect. 3.
[f] Raſt. Statutes, Conſpiracy, 3.
[g] Lamb. B 4. ch 5. f. 493. F N B 115. G

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

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

Sect. 88. As to the firſt of theſe Particulars, it ſeems to be holden generally in ſome [a] Books, that no falſe *Latin* will vitiate an Indictment, and it ſeems to be holden by my Lord [b] *Coke*, That an Indictment ſhall not be quaſhed for any falſe Concord between the Subſtantive and Adjective, as *præfatæ Regi*, or *præfato Reginæ*, 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 [c] conſidering, That the Senſe appears as fully, clearly and expreſly from ſuch *Latin* as if it had been never ſo properly expreſſed. And it ſeems alſo, That the like Reaſon may be given for the Caſe in [d] *Yelverton*, wherein an Indictment of forcible Entry, finding that the Defendant *unum meſuagium ingreſſum fecit*, without adding the Word *in* before *meſuagium*, was adjudged good; but it is ſaid in the Book, That this is not falſe, 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. inſultum* [e] *fecit*; the Reaſon whereof perhaps may be this, That it appears ſomewhat doubtful upon the Face of the Indictment whether the Jurors intended to charge more than one, becauſe the Fact is laid in the ſingular Number, which it ſeems abſurd to apply to more than one, and therefore the Indictment is inſufficient for it's Uncertainty. As to [f] *Fulwood*'s Caſe, wherein *Croke* reports the contrary to have been reſolved, it is certain, That the Verb in the Record is in the plural Number. And as to the [g] Caſes wherein Faults of this Kind have been amended in original Writs, as *teneat conventionem* for *teneant*, and ſuch like; it may be anſwered, That thoſe Amendments were made by Virtue of the Statutes of [h] Amendments, which extend not to criminal Proceedings. And as to the Caſe in [i] *Bulſtrode*'s Reports, wherein it is ſaid to have been reſolved, That an Indictment of Felony againſt more than one in the ſingular Number was amended, and thereupon the Defendants were adjudged to be hanged; it may be anſwered, That it doth not appear in what Part of the Indictment the ſingular Number was put for the plural; neither is the ſaid Reſolution, in whatſoever Senſe it be taken, reconcileable with the later Authorities, as ſhall be more fully ſhewn under the twelfth Point. But it is [k] 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 perhaps may be this, That the Uncertainty of the Indictment is ſupplied by ſuch an Indorſement. But this ſeems contrary to the Authorities relating to this Matter cited in the ſecond Section. Alſo it hath been [l] 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, be applied only to one Perſon; but to this it may be anſwered, That there is no Uncertainty either in the Bill or Indorſement. Alſo it hath been [m] adjudged, That the Word *Solvet* inſtead of *Solvat*, is not fatal in a Judgment; but that a new one ſhall be given.

[a] 5 Co. 121. 2. Cro. Ca. 465.
[b] 5 Co. 121. b. *Vide* Cro. El. 108. pl. 3.
[c] *Vide* Cro. El. 108. pl. 3.
[d] Yelv. 27, 28.
[e] *Dominus Rex verſus* Dobſon, *Term. Hil.* 3 *Georgii.* 2 Keb. 51. pl. 9.
[f] Cro. Ca. 489, 573. Cro. El. 754. pl. 15.
[g] 2 Vent. 173. Yelv. 224, 225. 2 Saund. 38 Cro. Ja. 366, 369.
[h] Salk. 51, 52. 6 Mod. 268.
[i] 2 Bulſt. 35.
[k] 2 Keb. 51. pl. 9.
[l] Cro. Ca. 464, 465.
[m] 1 Sid. 219.

Sect. 89. As to the ſecond Particular, *viz.* Where the Uſe of a Word which is not *Latin* will vitiate an Indictment, it ſeems generally [a] agreed, That an Indictment wholly in *Engliſh* is void, which ſeems to depend upon the Statute of 36 *Ed.* 3. 15. *By which 'tis enacted, That all Pleas which be pleaded in any of the King's Courts ſhall be entred 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 [b] *erectaverunt* inſtead of *erexerunt*, or [c] *brachia ſua dextra*, inſtead of *brachio*, or [d] *præſentant' exiſtit* inſtead of *præſentat'*, the Indictment is inſufficient; (except in ſome ſpecial Caſes herein after ſet forth,) for no one can ſay, That the bare Giving a *Latin* Termination to a Word unknown in that Language, can make it become *Latin*; and if the Want of one material Word may be ſupplied, why not the Want of two, and ſo on? It hath indeed been [e] holden, That a Fault of this Kind, as *imaginavit* for *imaginatus eſt*, *avæ* for *aviæ* is amendable in an original Writ, which yet is denied by others, if it be in a [f] Subſtantial Part. However, it ſeems certain, That ſuch Amendment muſt depend upon the Statutes of Amendments, which extend [g] 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 [h] *collis* for *colli*, or [i] *mala ars* for *veneficium*. Alſo it ſeems agreed, That an Abbreviation not juſtified by legal Uſage, as [k] *Dno* without a Daſh, for *Domino*, [l] *R. Rs.* for *Regni Regis*; or the Expreſſion of a Number in any Figures that are not [m] *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 [n] adjudged, That an Inquiſition finding that *J. S. ſeipſum emerſit*, *&c.* is inſufficient, becauſe *emergo* doth not ſignifie to put into, but riſe out of the Water. [o] 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 [p] Figures, but the Year of the King is well expreſſed, or where an Indictment is ſaid to be taken before *J. S.* and *J. N.* [q] *duo Juſticiariis*, *&c.* Alſo it ſeems, That the Uſe of a Word which is not proper *Latin*, as of the [r] Word *contrafacere*, for counterfeiting, may be made good by Precedents. And there can be no Doubt but that [s] Terms of Art, which are neceſſary in all Inſtitutions, as *Felonia*, *Murdrum*, *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 [t] adjudged, That a literal Tranſlation of a Statute into *Latin* is ſufficient, if intelligible, let it be never ſo unelegent, as where it ſet forths that the Defendant *ſuper caput ſuum proprium* did forge, Meaning, That he did it of his own Head.

Sect. 90. As to the third Particular, *viz.* What Faults of this Kind are holpen by an *Anglicè*. It ſeems to be holden generally in ſome Books, That the Uſe of a Word which is either not *Latin* at all, or not *Latin* in the Senſe in which it is uſed, may in many Caſes be holpen by an *Anglicè*,

[a] Cro. El. 85. pl. 4. *Quære* 3 Keb. 637.
[b] Cro. El. 231. pl. 22.
[c] Cro. El. 137. pl. 10.
[d] 1 Sid. 175. Salk. 370. pl. 2.
[e] 8 Co. 159. b.
[f] Bulſt. 35. Moor 5. pl. 17. N. Bend. 33. pl. 53.
[g] And. 24. 1 Lev. 1, 2. 5 Co. 45. Cro. El. 462. 1 Salk. 51, 52. 6 Mod. 268.
[h] *Vide ſupra*, ſect. 88.
[i] 1 Bulſt 109. Noy 85.
[k] 1 Jon. 144. Latch. 156.
[l] 1 Sid. 175.
[m] 1 Sid. 140. 1 Salk. 195. 1 Sid. 40 pl 6. 3 Keb. 301. 2 Lev. 102. 1 Mod. 78.
[n] 2 Lev. 140. 3 Mod. 100. B. 1 ch. 27. ſect. 15.
[o] 1 Sid. 140.
[p] 1 Salk 195. 1 Mod. 78.
[q] Cro. El. 108. pl. 3.
[r] 2 Jon. 49, 50.
[s] Dalt. ch. 131. 10 Co. 133.
[t] 2 Lev. 221.

as [a] *erectaverunt*, *anglicè* did erect; [b] *Retes*, *anglice* Nets; [c] *Pellices*, *anglicè* Skins; *Ollis* [d] *æriis*, *anglicè* braſs Pots. But to this it may be anſwered, That as to the three firſt of theſe Inſtances, what is ſaid concerning this Matter is only ſpoken of by the 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 Trover, tho' Damage be expreſly given for it, it is contradicted by many other expreſs [e] Reſolutions, in which it ſeems to have been taken as a ſettled Rule, That where Damages are expreſly given for a Thing expreſſed by a Word that is not *Latin*, it is no Way helped by an *Anglicè*. Alſo it hath been [f] adjudged, That an Indictment for taking *octo diſcas*, *Anglicè* Diſhes, is inſufficient; and this is agreeable to what is laid down as a ſettled Rule in many [g] Books, *viz.* That where there is a proper *Latin* Word for the Thing intended to be expreſſed, no *Anglicè* will help an improper one, as it will do where there is [h] 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 [k] ſpecial or [i] extenſive Signification than the *Latin* Language will bear, as to make the Words [m] *malas artes* ſignifie Witchcraft, or [n] *Riſcus* a Box full of Linen, or [o] *fulcrum tecti*, a Field-Bed with a Teſter 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, *viz.* Where the Offence indicted may be laid jointly, and where ſeverally, and where both jointly and ſeverally, and where the Offences of ſeveral Perſons may be laid in one Indictment; it ſeems certain at this Day, That notwithſtanding the Offence of ſeveral Perſons cannot but in all Caſes be ſeveral; becauſe the Offence of one Man cannot be the Offence of another, but every Man muſt anſwer ſeverally for his own Crime; yet if it wholly ariſe from any ſuch joint Act, which in it ſelf is criminal, without any Regard to any particular perſonal Default of the Defendant, as the joint [q] Keeping of a Gaming-Houſe, or the [r] unlawful Hunting and Carrying away of a Deer, or [s] Maintenance or [t] Extortion, *&c.* The Indictment or Information may either charge the Defendants jointly and ſeverally, as thus: *Quod* [u] *cuſtodiverunt*, *& uterq; eorum cuſtodivit*; or, *quod* [x] *aſportaverunt*, *& eorum uterq; aſportavit*; or may charge them jointly only, without charging them [y] ſeverally becauſe it ſufficiently appears from the Conſtruction 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 ſeveral againſt each, tho' 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 [aa] muſt charge them ſe-

[a] Cro. El. 231. [b] Keilw. 100. 3 Bulſt. 178. ſeems contrary. [c] 1 Sid. 318. [d] Cro Ja. 129. [e] 1 Lev. 99. 129, 204. 1 Sid 98, 318. Raym. 15. 3 Lev. 336 10 Co. 130, 133. [f] 2 Keb. 779. pl. 4. [g] Noy. 85. Latch. 156. March 16, 60 1 Jon. 144. 10 Co. 133. *Vide* 1 Lev. 204. 1 Sid. 318. Yelv. 68. [h] 10 Co. 133. Noy. 85. Latch. 156. March 16. 1 Sid. 81. 1 Jon. 144. [i] Noy. 85. 1 Sid. 60, 81. [l] Cro Ja. 664, 665. [m] Noy. 85. Latch 156. 1 Jon. 144. [n] Cro. Ja. 664, 665. 2 Rol. Rep. 254, 255. [o] 10 Co. 130, 132, 133. [p] Cro. Ja. 664, 665. 2 Rol. Rep. 254, 255. 10 Co. 130, 132, 133. [q] *Dominus Rex verſus* Dixon & uxorem, adjudged, *Trin.* 2 *Georgii*. [r] *Dominus Rex verſus* Hawkins adjudg'd *Mich.* 3 *Georgii*. [s] 1 Vent. 302. [t] Salk. 382. [u] *Dominus Rex verſus* Dixon & uxorem, adjudged, *Trin.* 2 *Geor.* [x] *Dominus Rex verſus* Hawkins, adjudg'd *Mich.* 3 *Georgii*. [y] *Domina Regina verſus* Williams, adjudged, *Mich.* 10 *Annæ*. Bear & White, 4*to Gulielmi*. Cro. Car. 380, 381. 2 Rol Ab. 707. pl. 45, 48, 708 pl. 52. *Contra* 2 Rol. Rep. 345. Palmer, 367, 368. [z] Rol. Ab. 707. pl. 45, 48, 708 pl. 52. Bear and White, 4*to Gulielmi*. [aa] 2 Rol. Ab 81. pl. 6. 5 Mod. 180.

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 [a] 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 join'd in one Indictment; for in ſome [b] Books Indictments againſt ſeveral for ſeveral Offences, as for Recuſancy, [c] following a Trade without having ſerved an Apprenticeſhip, not [d] repairing the Streets, *&c.* are mentioned without any Exception on this Account: And it is holden, That one Indictment againſt two Juſtices for not [e] inquiring of a Riot, and an Indictment againſt two Perſons for ſpeaking of the ſame [f] Words, may be maintained; and yet it is [g] agreed, That one Action lies not againſt ſeveral for the ſame Words. Alſo in [h] *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 [i] 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 [k] join in a Suit in the [l] Admiralty for a Contract on Land, or in procuring or giving an untrue Verdict, or are privy to one another [m] in Maintenance of the ſame Cauſe.

Sect. 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 [n] Books, That they were neceſſary at Common Law in all Indictments for Offences which amount to an actual Diſturbance of the Peace, as Reſcouſes and Aſſaults, and ſuch like; yet I do [o] 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 [p] Conſpiracies, [q] Cheats, Slanders, Eſcapes, and ſuch like; or [r] Nuſances 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 Treſpaſs, and divers others, it was common to uſe the Words* vi & armis, *and in divers of them to declare the Manner of the Force and Arms, that is to ſay,* vi & armis videlicet baculis cultellis arcubus & ſagittis, *or other ſuch like Words; where 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 & ſagittis, *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 effectual to all Intents, Conſtructions and Purpoſes, as the ſame Inquiſitions and Indictments having the ſame Words in them.*

Sect. 93. But notwithſtanding this Statute ſeems to be ſo expreſs as to all Indictments, yet it is [s] holden in many Books, That Indictments of Treſpaſs, 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 [t] *reſcuſſit*, or *manu forti*

[a] 2 Rol. Ab. 81. pl. 7.
[b] 1 Leon. 241, 2 Rol. Ab. 81. pl. 6. Salk. 382. 1 Vent. 302.
[c] 2 Rol. Ab. 81. pl. 7.
[d] 2 Rol. Ab. 81. pl. 7.
[e] Stile's Rep. 245.
[f] Stile's Rep. 312.
[g] Cro. Ja. 647. 1 Rol. Ab. 781. O. pl. 1. Palm. 313. 1 Bulſt. 15.
[h] 2 Rol. Rep. 164.
[i] 6 Mod. 210.
[k] Brook Joinder in Action 5, 47, 100, 108. F N B 171. Letters D. E. Fitz. decies tantum, 1, 4, 6, 8, 9.
[l] *Quere* Dy. 159. pl. 39.
[m] Brook Mainten. 26, 52.
[n] Cro. Ja. 473. 2 Lev. 221. *See* the Books cited in the next Section. *Quere ſupra*, ch. 23 ſect. 85.
[o] Yet ſee the Preamble of 37 H. 8. 8.
[p] 1 Lev. 125, 126. Dalt. ch. 131.
[q] 1 Keb. 562. Dalt. ch. 131.
[r] Poph. 206. Cro. Ca. 377.
[s] S. P. C. 94. 2 Lev. 221. 1 Sid. 140. 1 Bulſt. 205. 1 Lev. 126. 1 Keb. 101. 2 Keb. 154. *Vide* Poph. 206. Cro. Ca. 377, 378.
[t] Cro. Ja. 345. 2 Bulſt. 208. [u] 8 H. 1. ch. 64. ſect. 44. Dalt. ch. 131.

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

[a] 2 Lev. 221.

[b] Cro. Ja. 472, 473. *Vide* Cro. Ja. 345. 2 Bulſt. 208. Dalt. ch. 131. Lamb. B. 4. ch. 5. f. 502. 503. [c] 3 Keb. 490. pl. 45. 1 Keb. 789. pl. 43. 2 Bulſt. 258.

Sect. 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 pacem*, inaſmuch as all Offences whatſoever which are ſubject to a publick Proſecution ſeem in general to be ſo, as they are Breaches of the Law, and in that Reſpect tend to the Diſturbance of the quiet and peaceable Government of the King over his People; it ſeems to be a good general [c] Rule, That no Indictment or Information, for an Offence, Capital or not Capital, againſt the Common Law or Statute, can be good, except it expreſly ſuppoſe ſuch Offence to have been done againſt the Peace of the King or Kings, in whoſe Reign or Reigns it was committed. And accordingly I find, That every Precedent of an Indictment in *Coke*'s Entries, whether for [d] Treaſon, or [e] Felony, or [f] inferior Offences, expreſly lays the Offence againſt the Peace of the King, except only in four Inſtances, whereof the one is of an Indictment for a [g] Nuſance for not repairing the Highway, which if it may be maintained, ſeems to depend chiefly on this Reaſon, That the Offence is of ſuch a Nature, that a Man may be as well guilty of it in his own Ground as in that of another, and therefore it hath been [h] 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 Treſpaſs againſt the Perſon or Poſſeſſion of another; but it ſeems difficult to reconcile this Opinion with thoſe many Reſolutions taken Notice of in the following Part of this Section, by which Indictments, for want of theſe Words, *contra pacem*, have been adjudged inſufficient, where the Offences could on no other Account be ſaid to be againſt the Peace, than as they were Breaches of the Law, as all Nuſances certainly are. And one [i] other of the ſaid Inſtances in *Coke*'s Entries is, of an Indictment of *Homicide* by Miſadventure, and one other [k] of an Indictment of *Homicide* in Self-Defence;

See the Caſes cited in the following Part of this Section, and Cro. El. 186. pl. 10. 6 Mod. 128. [d] Co. Ent. 360. pl. 14, 15, 361. pl. 16. [e] Co. Ent. 351. pl. 1. 352. pl. 2. 355. pl. 7. 8. 356. pl 9. 358. pl. 11, 12. 359. pl. 13. [f] Co. Ent. 352, 353 361. pl. 17. 362. pl. 18. [g] Co. Ent. 358. pl. 10. *See* Raſt. Ent. 263. pl. 7. [h] 2 Rol. Ab. 82. pl. 9 83. pl. 5, 6. *Contra*, Cro. Ca. 5, 84. [i] Co. Ent. 253. pl. 4. [k] Co. Ent. 254 pl. 5.

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 Statuti*, without adding *contra pacem*. But [a] *Raſtal*'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 expreſly 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 quaſh'd for Want of the Words *contra pacem*; as Indictments and Informations for [b] Barretry, [c] Forgery, [d] Retaining a Servant without a Teſtimonial from his laſt Maſter, [e] following a Trade without having ſerved an Apprenticeſhip, [f] erecting a Cottage, [g] Aſſault and Battery, *&c.* But it ſeems clear from all the Precedents, That neither an Information [h] *qui tam*, on a penal Statute, nor an Information by the King for an [i] Intruſion, or other [k] Wrong of a Civil Nature done to his Lands, Goods or Revenues, need the Words *contra pacem*.

† Co. Ent. 363. pl. 19.
[a] Raſt. Ent. 263.
[b] 2 Rol. Ab. 82. pl. 5. Cro. Ja. 527. pl. 4.
[c] 2 Rol. Ab. 82. pl. 11.
[d] 1 Mod. 78.
[e] 3 Keb. 790. pl. 45. 2 Keb. 501. pl. 58. 848. pl. 48. 6 Mod. 128.
[f] 1 Keb. 474. pl. 91.
[g] 2 Keb. 36. pl. 72.
[h] *Vide* 2 Keb. 779. pl. 7. Yelv. 66.
[i] Raſt. Ent. 409. pl. 2. 1 Keb. 860. pl. 70. Co. Ent. from 364 to 372. 393. pl. 17.
[k] Raſt. Ent. 412. pl. 4. Co. Ent. from 372 to 390.

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

[l] Raſt. Ent. 410. pl. 3. Co. Ent. 390. pl. 16. 1 Yelv. 66. *Vide* 4 H. 6. 4. pl. 7. Fitz. Brief 25.
[m] Yelv. 66. 4 H. 6. 4. pl. 7. Fitz. Brief 25.

Sect. 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 [n] *Raſtal*'s Precedents doth ſo; neither do I find any one Caſe wherein an Indictment againſt which no other Exception could be taken, has been adjudged [o] inſufficient for the Want of theſe Words. But on the contrary I find it expreſly reſolved in [p] *Holbrook*'s Caſe, That an Indictment of a Riot is good without them.

[n] See Raſt. Ent. 263.
[o] See 2 Bulſt. 258. Aleyn. 49, 50.
[p] 2 Rol. Ab. 82. pl. 1.
[q] Co. Ent. 353, 363. pl. 19. Raſt. Ent. 263. pl. 9.
[r] Co. Ent. 362. pl. 17, 18. Raſt. Ent. 263. pl. 6, 7, 11.
[s] Co. Ent. 372. pl. 10. 376. pl. 11. 379. pl. 12. 381. pl. 13. 385. pl. 18. 387. pl. 15.
[t] Raſt. Ent. 412. pl. 4.
[u] Co. Ent. 390. pl. 16.
[x] Raſt. Ent. 415. pl. 3. Plow. Com. 310.

Sect. 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 contemptum Regis*; it is ſo laid in ſome Indictments of inferior Crimes in [q] *Coke* and *Raſtal*, and in others [r] not. Alſo it is ſo laid, with the Addition of the Clauſe *contra leges ſuas*, in every Information of Intruſion upon the King's Lands in [s] *Coke* and [t] *Raſtal*, and alſo in an Information in [u] *Coke* for a Trover and Converſion of the King's Goods. But in [x] two Informations for Mines claimed by the King, which are the only Precedents I find of

this Kind, the ſuppoſed Injury is laid only *ad dammum 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 [a] 4 *H.* 6 that in an Action on a Statute it is neceſſary to conclude, *in contemptum Domini Regis*, yet in [b] *Lutwych*'s *Entries* it is oftner omitted than uſed, and no Exception appears to have been taken for the Omiſſion.

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

Sect. 99. As to the twelfth Point, *viz.* Whether a Defect in any of the Particulars above-mentioned be amendable, I take it to be [e] ſettled, That no criminal Proſecution is within the Benefit of any of the Statutes of Amendments; 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 as a [f] Principle in ſome Books, That the Body of an Indictment removed into the King's Bench from any inferior Court whatſoever, except only thoſe of *London*, can in no Caſe be amended; but it is [g] ſaid, That the Body of an Indictment from *London* may be amended, becauſe by the City-Charter a Tenor of the Record only can be removed from thence. [h] And it ſeems, That by the Courſe of the King's Bench, a Rule may be made on any Coroner to amend even the Body of his Inqueſt by his Notes in a meer Matter of Form. But I do not find it any where holden, That this can be done after it is filed, by which it becomes a Record of the Court; and then the ſame Objections ſeem to lie againſt the Amendment of it, as of an Indictment. But it ſeems to be [i] agreed, That the Caption of an Indictment from any Place, may upon Motion be amended by the Clerk of the Aſſiſes or of the Peace, ſo as to [k] make it agree with the original Record at any Time during the ſame Term in which it came in, [l] 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 perhaps may be this, That the Caption being Part of, and drawn at the ſame Time with the Inquiſition, greater Exactneſs is required in it than in that of an Indictment, which is left as a Thing of Courſe to be drawn up by the Clerk of the Court, when Occaſion ſhall require. Alſo by the Opinion of two Judges againſt that of two, the Want of Continuances in the Record of an Attainder of Felony [m] cannot be amended by the Certificate of the Clerk of the Aſſiſes, eſpecially if the King ſignify his Pleaſure, that he doth not deſire any Amendment. And it ſeems to be [n] ſettled at this Day, that no Diſcontinuance is amendable in any criminal Proſecution, [o] without Conſent. But it hath been [p] adjudged, That a meer Miſpriſion in the Joining of an Iſſue in a criminal Proſecution, as where the Word *ſimiliter*, *&c.* is omitted, may be

[a] 4 H. 6. 4. pl. 7. Fitz Brief 25.
[b] Lutw 132, 133, 134, 135, 139, 165, 167.
[c] *See* 1 Keb. 859. pl. 68. 2 Keb. 715. pl. 99.
[d] 2 Rol. Ab. 81. pl. 4.
[e] 1 Jon. 421. 1 Salk. 51, 52. 6 Mod. 268. *&c. Vide ſupra*, ch 23 § 127.
1 Sid 66. pl. 39.
[f] 1 Keb. 252. pl. 20. 2 Keb 580. pl. 112. 1 Sid 155. pl. 5. *Vide* 1 Keb. 45. pl. 120. 2 Keb. 141. pl. 13. 142. pl. 15. *Contra*, 2 Bulſt. 35.
[g] 1 Keb. 252. pl. 20. 1 Sid 155. pl 5. 229, 230. 1 Keb. 571. pl. 26. *Vide* Hob. 135.
[h] *See* B. 1. ch 27. ſect. 16
[i] 2 Saund. 249. 1 Sid. 175. pl. 7. 1 Keb. 656. pl. 36 3 Mod. 167.
[k] Cro. Jac. 276, 277. *Vide* 1 Sid. 155.
[l] 1 Sid. 155. pl. 5. 1 Keb. 45. pl. 120 656. pl. 36. 1 Sid. 175. pl. 7.
[m] 12 H. 7. 25. pl. 3. 10 Ed. 4. 15. pl. 15. 1 Rol. Ab. 396. A. 1 Jon. 420.
[n] 1 Salk 61, 52. 6 Mod. 268. Bro. Amendment, 10, 17, 66, 92. Fitz. Amendment, 59. 29 E. 3. 32. Diſcontinuance de proceſs, 47.
[o] 21 H. 7. 40. pl. 65. Fitz. Amendment, 78.
[p] Cro. Jac. 502, 526, 530. 2 Rol. Rep. 59.

amended at any Time. Alſo it hath been [a] adjudged, That the Direction of a *Venire, Vicecomitibus* of ſuch a Place, which is returned by *J. S. vicecomite*, may be amended on the Oath of *J. S* that there is but one Sheriff of the Place, which is himſelf Alſo it is every Day's Practice to amend [b] criminal Informations, and the Pleadings thereon by Rule of Court, while all is in Paper And [c] *Quære* if the Record may not be ſo amended by the Paper-Book at any Time before Judgment?

Sect. 100. It ſeems to have been anciently the common Practice where an Indictment appeared to be ſufficient, either for its Uncertainty, or the Want of proper legal Words, not to put the Defendant to anſwer it; but if it were found in the ſame County in which the Court ſate, to award Proceſs againſt the Grand Jury, to come into Court and [d] amend it. And it ſeems to be the common Practice at [e] this Day, while the Grand Jury who found a Bill, is before the Court, to amend it by their Conſent in a Matter of Form, as the Name or Addition of the Party, *&c.*

Sect. 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 Underſtanding whereof, having premiſed, that the ſame Rules which have been already laid down concerning Indictments at Common Law, are generally applicable to Indictments on Statutes, I ſhall in this Place conſider ſuch Matters only as more peculiarly belong to the Form of the Body of an Indictment upon a Statute, under the following Particulars:

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 *contra formam Statuti.*

Sect. 102. As to the firſt Particular, *viz.* Whether it be neceſſary that ſuch Indictment recite the Statute whereon it is grounded, I take it to be [f] ſettled, that there is no Neceſſity in any Indictment or Information on a [g] publick Statute, to recite ſuch Statute, whether the Offence be ſuch only becauſe prohibited, or be an Evil in its own Nature, and whether it be prohibited by more than one Statute, or by one only; for the Judges are bound *ex officio* to take Notice of all publick Statutes, [h] 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, *viz.* What Miſ-recitals of ſuch Statutes are fatal, I ſhall endeavour to ſhew:

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.

[a] 1 Keb. 900. pl. 71. 901. pl. 75. 1 Sid. 244. *Vide* 8 Co. 156. b. 3 Lev. 430.
[b] 1 Salk. 47. pl. 1, 2, 3.
[c] Salk. 47. pl. 2, 3. Salk. 50. pl. 10. *Vide* 1 Keb. 452. pl. 45. Cro. Ca. 144. 1 Lev. 189. 3 Lev. 430.
[d] 22. Aſſ. pl. 73. 2 Ed. 3. 1. pl. 3. 8 H. 5. 8. pl. 4. S. C. P. 97. Letter A. Fitz. Indictment 2, 3, 27. *Vide* 25 E 3. 43 pl. 36. Bro. Indictment 12.
[e] Kelynge 37.
[f] 5 H. 7. 17. b. Fitz. Action *ſur le* Statute 7. 20. 2 Rol. A 79. pl. 8. Plowd. Com. 1, 79, *&c.* 1 H. 6. 1. pl. 2. 4 Co. 48. 2. Cro. El. 236. pl. 1. Cro. Ca. 229. Dyer 155. pl. 19. 346. pl. 9. Bro. Action *ſur le* Stat. 4. Parliam. 15. but Cro. El. 187. pl. 12. 47 Ed. 3. 10. pl. 7.

Dyer 159. pl. 37. Bro. Parliament 75. Bro. Champerty 1. Show. 337. F. N. B. 55. C. ſeem contrary. *Quære* 6 Mod. 140, 141. [g] Moor 468. pl. 669. Moor 699. pl. 972. 4 Co. 13. 76. Bro. Avowry 5. Bro. Parliament 15, 32. [h] Dyer 155. pl. 19. Dyer 346. pl. 9. 5 H. 7. 17. b. 6 Mod. 140. *Vide* Cro. El. 187. pl. 12.

Sect. 103. As to the firſt of theſe Particulars, it ſeems to be ſettled, That notwithſtanding there be no Neceſſity to recite a publick Statute; yet if the Proſecutor take upon him to do it, [a] and materially vary from a ſubſtantial Part of the Purview of the Statute, and conclude *contra formam Statuti prædicti*, he vitiates the Indictment, becauſe it judicially appears to the Court, that there is no ſuch Foundation for the Proſecution, as that whereon it is expreſly grounded; as where in an [b] Indictment with ſuch a Concluſion on the Statutes which prohibit Entries with ſtrong Hand, the Word *Vi* is put for *manu forti*; or where the Word [c] *nuncia* is put for *mendacia* in ſuch an Indictment on the Statutes againſt the Tellers of Lies of great Men; [d] 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*; [e] or where a Statute in deſcribing the Courts wherein it prohibits Perſons to bring Actions in other Names without their Privity, calls them Courts wherein Pleas are holden in Actions perſonal, *&c.* and you in reciting it in ſuch an Indictment call them Courts wherein Pleas are holden in any Actions.

[a] Pl. Com 79. 83. b. 84. Cro. El. 236. 245. pl. 4. Palm. 565. 4 Co. 48.
[b] See the three next Sections. 1 Ro. Rep 50. Cro. Car. 135. 136. 1 Jon. 194.
[c] Cro. El 93 pl. 2. 2 Bulſt. 258
[d] 4 Co. 12. b. 13. Cro. Ca. 135. 3 Jon 49. 50. 3 Keble 661. pl. 11.
[e] Cro El. 236. [f] Cro Ja. 362. See the 108th Section.

Sect. 104. Yet it ſeems that the following Miſ-recitals of the ſubſtantial Part of the Purview of a Statute in any Indictment are not fatal, as the Omiſſion of a ſynonymous Word, having no other Meaning than what is fully expreſſed in the Words which are recited; or the Joining of Words which are either wholly ſynonymous, or much of the ſame Senſe, as ſignifying ſuch Things as generally include one another, (as [g] the Words *malitiosè & contemptuosè, &c.*) with a Copulative, 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 [h] reciting a Statute ſpeaking of Suits in any Courts, you Uſe the Words *in aliqua Curia*; or where in reciting the Statute againſt diſturbing Perſons in their open Preaching, you uſe the [i] Words *in apertis prædicationibus*.

[g] 2 Bulſt. 47. 49, 50, 51, 52, 53.
[h] Cro. Car. 522, 523.
[i] 2 Bulſt. 47, *&c.*

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

[k] 4 Co. 13. 2 Sid. 356.

Sect. 106. As to the ſecond of the Particulars above-mentioned, *viz.* What Miſ-recitals of the Place or Time at which the Parliament was holden, are fatal, [l] it ſeems to be generally agreed, That a Miſ-recital of the Place or Day at which the Parliament be holden, vitiates an Indictment. [m] As if a Parliament was firſt holden on the twenty-eighth 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 [n] 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 ſit againſt, and a Statute made at ſuch Seſſions be [o] 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 Statuti prædicti*, the Variances in Strictneſs are fatal; for the Court will not make any Caſe better than the Record has made it and; therefore where that expreſly grounds it on the Act

[l] Bro. Parliament 87. Bro. El 853. pl. 12.
[m] Plow. Com. 79. 83, 84. Cro. Ca. 136. 232. 3 Keb. 468. pl. 55. 2 Jon. 50. Hob. 310. Cro. Ja. 139. Cro. El. 245. pl. 4. But this is made a *Query* by Coke in 2 Bulſt 53.
[n] Dyer 203, pl. 72, 73. Hetly 129.
[o] Cro. Ja. 111. pl. 9. 139. Lutw. 140. 4 Inſt. 27. *Vide* 1 Brown. 100 Yelv. 127 Dyer 95. pl 36, 37, 38. 171. pl. 6.

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

[a] Moor 302. pl. 452.

[b] Cro. El. 106. pl. 31.

[c] Dyer 203. pl. 74.

[d] Yelv. 127. Brownl. 100. 2 Keb. 34. pl. 68. Dyer 171. pl. 6.

[e] Cro. Car. 232, 233. Pal. 565. Raym. 191, 192. 3 Keb. 647, 648. Lutw. 140.

[f] Affirmed Cro Jac. 139. Denied Cro. El. 236.

Sect. 107. As to the third of the Particulars above-mentioned, *viz.* Whether the Miſ-recital of the Title of a Statute be fatal, it is [g] ſaid to have been holden by Sir *Matthew Hale*, That the Miſ-recital of the 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.

[g] Hardres 324.

[h] 6 Mod 62.

[i] 6 Mod. 62.

Sect. 108. As to the fourth of the Particulars above-mentioned, *viz.* What other Miſ-recitals of a Statute are fatal, [k] it is ſaid to have been often adjudged, That a Variance in reciting a Statute to commence after the Making, where the Statute is expreſs, that it ſhall commence after the End of the Seſſions, is fatal. But I take it to be a ſettled Rule, That a Variance no Way altering the Senſe of the Statute does [l] no Hurt; as where in the Recital of an Oath preſcribed by Statute, the Words *Sea of Rome* are put for *See of Rome*; and *I do declare in 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 no Hurt, [n] and therefore that where a Statute contains ſeveral Branches relating to ſeveral diſtinct Matters, an Omiſſion of ſuch Branches as no way relate to the Offence indicted does no Hurt, becauſe they are nothing to the preſent Purpoſe. Alſo it hath been adjudged, That every Miſ-recital even of ſuch Branch is not fatal; as if it vary only in ſuch a Part of the Deſcription of the Offence, as is put in only by Way of Flouriſh, and *ex abundanti*, and makes no neceſſary Ingredient in the Offence prohibited, nor needs any Proof; as if in a Proſecution on the Statute of 12 *R.* 2. the [o] Recital be that none ſhall deviſe, ſpeak, or tell any falſe News, Lies, or other ſuch falſe Things, *&c. unde diſcordia aut aliqua lis* (*Anglicè* Debates) *inter magnates, vel inter magnates & communitatem dicti Regni oriri poſſint*; where the Words of the Statute are, *That none ſhall deviſe, ſpeak, or tell any falſe News, Lies, or other ſuch falſe Things*, &c. *whereof Diſcord or any Slander might 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.

[k] 2 Rol Abr. 465. Letter B.

[l] 1 Vent. 172.

[m] Cro. El. 186. pl. 10. 4 Co. 48. Palm. 565. Cro Ca. 135, 136. 564. 1 Jon. 194.

[n] Plowd. Com. 65, 165. a. Dyer 103 pl. 7. Hob 226. 3 Keb. 662.

[o] Cro Car. 135, 136. Palm. 565. 1 Jon. 194.

material. Indeed as this Caſe is reported by *Croke*, there is a Miſ recital even in this Part, for inſtead of *other falſe Things*, the Recital is ſaid to mention *other Things* generally, omitting the Word *falſe*; but I ſuppoſe that this is a Miſtake of the Printer, and that there is no ſuch Variance in the Record of the Caſe, becauſe no Exception is reported to have been taken to it.

Sect. 109. But if a Miſ-recital of ſuch a Part of the Purview of a Statute be not fatal, it ſeems *a fortiori* to follow, That a Miſ-recital of the Preamble is not material, where the ſubſtantial Part of the Purview is well recited. And upon this Reaſon chiefly, as I ſuppoſe, it hath been adjudged, That if in an Action on the [a] 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 Reſolutions ſeem to weaken the Authority of *Parker*'s Caſe reported by [c] *Hutton*, wherein it was ſaid to have been holden by three Judges againſt the Opinion of *Hobart*, that the Putting of the Word *indicari* for *indictari* in the Recital of the Preamble of the ſaid Statute of Hue and Cry, in a Writ grounded thereupon, is fatal.

[a] Vide 3 Keb. 647. pl. 68. 661, 662. 2 Jon. 51.
[b] 2 Jon. 49, 50, 51. 3 Keb. 647. pl. 68. 3 Keb. 661, 662. *Vide* Cro. Jac. 139.
[c] Hutton 56, 57. 3 Keb. 648, 662. 2 Jon. 50, 51.

Sect. 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 [d] Words *or in any other Manner*; or uſe the [e] Words *Aſſiſum novæ diſſeiſinæ* for *Aſſiſam novæ diſſeiſinæ*; [f] or recite the Statute, as giving the Fine on a Recovery by Action *dicto Domino Regi*, where there is nothing to make good the Word *dicto*, [g] or recite the Statute relating to the Bringing an Action to be, *if the Party after ſuch Entry make any Feoffment*, &c. where the Words are, *if after ſuch Entry any Feoffment be made*, or [h] recite it to be, *if any Perſon be put out and diſſeiſed* in the Conjunctive, where the Words of the Statute are, *if any Perſon be put out or diſſeiſed* in the Diſjunctive, the Variances have been adjudged fatal. Yet [i] it hath been holden, That the laſt of theſe is an immaterial Variance, becauſe tho' 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 [k] late the Court has not been ſo ſtrict in Recitals as formerly; and if an Indictment fully recite a Statute ſo far as it concerns Indictments, a Miſpriſion in what concerns other Matters ſeems to be much helped by the Authorities of the Caſes above-cited.

[d] Cro. El. 186. pl. 10.
[e] Cro. El. 93. pl. 2.
[f] 1 Bulſt. 218.
[g] Cro. El. 307. pl. 10. Parallel Caſe, Cro. El. 697. pl. 10.
[h] Cro. El. 96. pl. 9. *Vide* Cro. El. 697. pl. 10.
[i] Cro. El. 307. pl. 10.
[k] 3 Keb. 662.

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

[l] 20. H. 6 31, 32. which ſeems miſtaken in the Abridgments. Fitz. Brief 86. Bro Champerty 1. *Vide* Plowd. Com. 84 b. Dyer 160. pl. 40.
[m] Cro Jac. 311. pl. 5.
[n] *Vide* Cro. Jac. 362.

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 compleat by rejecting the Word miſtaken, as Surplus and inſenſible. But if in the Miſ-recital of ſuch a Clauſe, there be ſuch a Variance as carries with it a plain material Repugnancy to the Intent of the Statute, [a] as where the Words, *whoever ſhall do the ſame, ſhall incur the Pain*, &c. are thus recited, *whoever ſhall do the contrary, ſhall incur the Pain*, &c. I do not well ſee how any Thing can be ſaid to make it good; for it is a general Rule, that [b] Repugnancies in Indictments are fatal and the Proſecutor himſelf declares, That not thoſe who do the Thing indicted, but thoſe who do it not are within the Penalaty 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 [c] unleſs the Statute be recited, neither the Words *contra* [d] *formam Statuti*, nor any *Periphraſis*, Intendment or [e] Concluſion will make good an Indictment, which does not bring the Fact prohibited or commanded, in the doing or not doing whereof the Offence conſiſts, within all the material Words of the Statute. And upon this Ground it hath been reſolved, that an Indictment of Rape finding that the Defendant ſuch a Day and Place, *&c.* A. B. *felonicè cepit, & eam adtunc & ibidem carnaliter cognovit, &c. contra voluntatem ſuam, &c.* is not [f] ſufficient without the Word *Rapuit*; becauſe that is the Word uſed by the Statute which makes the Offence Felony. Alſo it hath been [g] adjudged, That Indictments for Perjury on 5 *El.* 9. omitting the Words *voluntariè & corrupte*, in ſetting forth the Swearing; and Indictments for ſtriking in a Church on 5 *& 6 Ed.* 6. 4. [h] omitting the Words *to the Intent to ſtrike*, &c. 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*, &c. *the uſurped Power*, &c. and Indictments for Foreſtalling on 5 *& 6 Ed.* 6. 14. ſetting forth, That the Defendant bought certain Goods of *J. S.* which he was about to ſell at ſuch a Market; but [l] not expreſly alledging, that *ſuch Goods were then coming to ſuch Market to be ſold*; and [m] Indictments for ingroſſing on the ſame Statute, ſetting forth, That the Defendant bought ſo much Corn, *&c.* without alledging, that *he ingroſſed it*, &c. *by buying*, &c. and [n] Indictments for Treaſon in Compaſſing the King's Death, on 25 *E.* 3. having neither the Word *Compaſs* nor *Imagine*, *&c.* cannot be taken as Indictments on ſuch Statutes. And the like hath been adjudged in many other [o] Caſes.

Sect. 113. Neither doth it ſeem to be always ſufficient to purſue the very Words of the Statute, unleſs by ſo doing you fully, directly and expreſly alledge the Fact in the doing or not doing whereof the Offence conſiſts, without any the leaſt Uncertainty or Ambiguity; for it hath been [p] adjudged, that an Indictment for Perjury on 5 *El.* 9. ſetting forth, That the Defendant *tacto per ſe ſacro evangelio falſo depoſuit, &c.* is not good without directly ſhewing that he was ſworn. Alſo it hath been [q] adjudged, that an Information on 18 *H.* 6. 17. for not abating ſo much of the Price of Wine ſold as the Veſſels wanted of the Statute-Meaſure, is inſufficient, if it do not expreſly ſhew how much they wanted. Alſo it is ſaid, That an Indictment on the Statute of Uſury ſetting forth, that the Defendant took more than five in the Hundred, is not good, without ſhewing in particular how much.

[a] 4 Co. 12. b 13. a.
[b] *Supra*, Sect. 64, 65.
[c] Cro. El. 535. 67. *See* the Books cited to the later Part of this Section, Cro. El. 749. pl. 2. ſeems contrary.
[d] Dy. 303. pl. 25. 2 Ro. Re. 227, 263. 2 Leon. 211.
[e] 11 Co. 58 a. Cro. El. 147. pl. 11. Cro. El. 201. pl. 30. 2 Leon. 211.
[f] 9 Ed. 4. 26. Bro. Indictment, 7. *Vide ſupra*, ch. 23 Sect. 77.
[g] Cro. El. 147. pl. 11. Cro. El. 201. pl. 30. 2 Leon. 211. *Vide* Coke's Entries, 367, 368,
[h] Cro El. 231. pl. 23. 2 Leon. 188. Noy 171.
[k] Dy. 363. pl. 25.
[l] 1 Rol. Rep. 421. *See* Book 1. Ch. 80. Sect. 12, 13.
[m] 2 Leon 39. *See* Book 1. Ch. 80. Sect. 15 & 20.
[n] Kelyng, 8.
[o] B. 1 Ch. 17. Sect. 8. 11 Co. 58 a. Dyer, 346. pl. 9. 2 Ro. Re. 227, 263. *Sup.* Sect. 106. 2 Rol. Ab. 81. pl. 15. 9 Ed. 4. 26, 27.
[p] Cro El. 105. pl. 17. *See* 9 Ed. 4. 26.
[q] 2 Leon. 38, 39.

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

[a] Poph. 93, 94. *See* Book 1. Ch. 10 Sect. 2. 2 Leon. 5. *Quere* 2 Keb. 582. pl. 18.

[b] Moor 606. pl. 838. Cro. Jac. 610. 2 Leon. 5. 2 Lev. 229. 2 Ro. Re. 226. *contra* 2 Ro. Re. 263. *Quere* Raym. 378. 1 Keb. 852. pl. 55.

Sect. 115. It ſeems [c] agreed, that there is no Need to alledge in an Indictment, that the Defendant is not within the Benefit of the Proviſoes of a Statute whereon it is founded; and this hath been [d] adjudged, even as to thoſe Statutes which in their Purview expreſly take Notice of the Proviſoes, as by ſaying, that none ſhall do the Thing prohibited, otherwiſe than in ſuch ſpecial Caſes, *&c.* as are expreſſed in the Act. But as I take it, a Conviction on a Penal Statute ought expreſly to ſhew, that the Defendant is not within any of its Proviſoes; for ſince no [e] 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 it ſelf allowes him to plead.

[c] Poph. 93, 94. 1 Jon. 157. 1 Lev. 26. *Vide* Savil 32. pl. 73.

[d] Poph. 93, 94.

[e] *Quere* 1 Salk. 181, 182.

Sect. 116. It ſeems to be laid down as a general Rule in [f] *Savil*'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 Statuti*, after the Allegation of the Fact, will ſupply an Omiſſion in it of a Circumſtance mentioned in the Statute, which would be fatal without ſuch a Recital and Concluſion; for ſince the Statute is particularly recited, and the Defendant charg'd with having done the Offence againſt the Form of it; and it is impoſſible that he could ſo have done, if any Circumſtance expreſly requir'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 Offence, according to the common Rule, that *Verba relata hoc maximè operantur per referentiam ut ineſſe videantur.* Neither do I find this contradicted by any of the Reſolutions in the precedent Sections; for it does not appear that there was ſuch a Recital and Concluſion in any of the Indictments therein referr'd 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 it ſelf, cannot be ſo ſupply'd; for ſuch Omiſſions [g] vitiate an Indictment drawn in the very Words of the Act.

[f] Savil 33. pl. 78. *Vide ſupra* ch. 23. Sect. 63. 2 Ro. Rep. 227. S. P. C. 81. C.

[g] 2 Rol. Rep. 226. ſeems contrary.

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 [b] generally taken for granted, that no Indictment whatſoever which is grounded on a Statute, and concludes *contra formam Statuti*, and cannot be made good by 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 Proſecution is intended to be grounded on a Foundation which will not ſupport it. But the contrary ſeems to have been adjudged in [c] *Page*'s Caſe, wherein it was reſolved, That if Perſons be indicted ſpecially on the Statute of Stabbing, and the Evidence be not ſufficient to bring them within the Statute, they may be found guilty of general Manſlaughter at Common Law, and that the Words *contra formam Statuti* ſhall be rejected as ſenſeleſs, where the Offence is prohibited by the Common Law only. And the ſame hath been ſince [d] adjudged as to other Statutes; and as I took it, was lately agreed in an Information againſt the City of [e] *Norwich*.

Sect. 118. As to the fifth Particular, *viz.* How far it is neceſſary for an Indictment on a Statute, to conclude *contra formam Statuti*, it ſeems that Judgment on a Statute ſhall in no Caſe be given on an Indictment, which 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 [f] ſaid, that Judgment on 8 *H.* 6. 9. may be given on the old Common Law, Writ of Aſſiſe of Novel Diſſeiſin, 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 Aſſiſe of Novel Diſſeiſin, it may be ſaid that the Statute of 8 *H.* 6. expreſly 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 [g] 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 [h] ſeems that Judgment on this Statute cannot be given on an Action of Treſpaſs in the Common Law Form, becauſe there is a ſpecial Writ of Treſpaſs in the [i] Regiſter grounded on the Statute; and it ſeems to be [k] 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 every one who proſecutes an Indictment is at Liberty to draw it as he pleaſes, ſo that he obſerves the general Rules of Law concerning Indictments; it ſeems to be [l] taken as a common Ground, That a Judgment by Statute ſhall never be given on an Indictment at Common Law, as every Indictment which doth not conclude *contra formam Statuti*, ſhall be taken to be. And therefore [m] if an Indictment do not conclude *contra formam Statuti*, and the Offence indicted be only prohibited by Statute and not by Common Law, it is wholly inſufficient, and no Judgment at all can be given upon it: But if the Offence were alſo an Offence at Common Law, I take it to be in a great Meaſure ſettled at this Day, that [n] Judgment may be given as for an Offence at Common Law, tho' the Indictment conclude *contra formam Statuti*, as hath been more fully ſhewn in the precedent Section.

[b] Cro. El. 231. pl. 23. Cro. El. 307. pl. 10. Cro. El. 697. pl. 10. 2 Leon. 188. Noy 171, 172. 5 Co. 99. 2 Ro. Re. 263. Cro. Ca. 465. 2 Keb. 38. pl. 73. 2 Keb. 566. pl. 70. *Vide* 6 Mod. 17. the ſame may be collected from 2 Rol. Ab. 82. pl. 2, 3. and 1 Jon. 379.

[c] H. P. C. 58. Aleyn 43, 44. B. 1. Ch. 30. Sect. 9.

[d] 1 Sid. 420. 2 Keb. 138. pl. 5. *Vide* 1 Salk. 212.

[e] The King againſt the City of Norwich, adjudged Hilar. 5 *Georgii*.

[f] 9 H. 6. 2. pl. 5. Bro. Action ſur le Statute, 6. 2 Inſt. 407.

[g] *Vide* 2 Inſt. 200. Bro Parliament, 75.

[h] Regiſter 289. a.

[i] 9 H. 6. 2. pl. 5. 56. pl. 42. 19 H. 6. 54. b. 47 Ed. 3. 10. pl. 7. 8 H. 4. 13. b. 2 Ed. 4. 9. pl. 5. Bro. Action ſur le Statute, 6, 10. Parliam. 75. Fitz. Judgment, 10. Ceſſavit, 18. Attachment ſur Prohibition. 1, 3.

Bendloe, 57. pl. 92. Cro. El. 759, 760. [l] *See* the Authorities cited to the other Parts of this Section. [m] 2 Rol. Rep. 38. 1 Saund. 249. 1 Sid. 409. 2 Keb. 506. pl. 79. 1 Salk. 370. pl. 3. [n] *See* the precedent Section. 2 Keb. 477. pl. 7. 1 Sid. 409. 1 Saund. 249, 250. 9 H. 6. 56. pl. 42. Fitz. Attachment ſur Prohibition, 1, 3. But 2 Rol. Ab. 82. pl. 2, 3. 2 Keb. 566. pl. 70. 1 Jo. 379, 380. ſeem contrary.

Sect. 119. If there be more than one Statute concerning the ſame Offence, and the firſt of them were never diſcontinued, and the later [a] only continue the former without making any Addition to it; or only [b] qualify the Method of Proceeding upon it, without altering the Subſtance of its Purview; it ſeems agreed, That it is ſafe in an Indictment on any ſuch Statute to conclude *contra formam Statuti*; and it hath been [c] holden, That a Concluſion *contra formam Statutorum*, will in ſuch Caſes vitiate the Proſecution; but where a Statute hath been wholly diſcontinued, and is afterwards reviv'd, there [d] ſeem to have been ſome Opinions, That a Proſecution on it ought to conclude *contra formam Statutorum.* Alſo where the ſame Offence is prohibited by ſeveral independent Statutes there are ſome [e] Authorities, that you muſt either conclude *contra formam Statutorum*, or *contra formam* of the particular Statutes naming them, and that if you barely conclude *contra formam Statuti*, the Indictment will be inſufficient, for not ſhewing on which of the Statutes it was taken. But there are alſo ſtrong [f] Authorities for the contrary Opinion, which is alſo moſt agreeable to [g] Precedents; to which may be added, That if it be a good Objection to ſuch an Indictment, concluding *contra formam Statuti*, that it appears not on which of the Statutes the Proſecution is grounded, the ſame Objection may as well be made to an Indictment concluding *contra formam Statutorum*; for it no more appears from ſuch a Concluſion on what Statute the Proſecution is grounded, than from the Concluſion *contra formam Statuti*; and yet it ſeems to be [h] generally admitted, That a Concluſion *contra formam Statutorum* is good where the Indictment is for an Offence prohibited by ſeveral Statutes. Alſo where ſuch an Indictment concludes *contra formam Statuti*, without ſhewing what Statute is [i] intended, why may it not be ſaid that ſuch Statute ſhall be taken as is moſt for the King's Advantage, as well as where the Indictment concludes *contra formam Statutorum*, in which Caſe it ſeems to be admitted, that it ſhall be ſo taken. But where a later Statute ordains, That a former Statute ſhall be executed in a new Caſe not mentioned in the former, as 8 *H.* 6. 9, does, that 15 *Ric.* 2. 2. ſhall be executed in the Caſe of a Forcible Detainer, 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 [k] 23 *Eliz.* doth that of 20 *l.* for a Month's Abſence from Church contrary to the Tenor of 1 *Eliz.* it ſeems that it may with greater Reaſon be argued, That if the Indictment conclude *contra formam Statuti*, it will be [l] 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 it ſelf alone ſufficient to ſupport it, it may be reaſonably argued, and ſeems agreeable to the later [m] 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* [n] *Statut'*, which ſhall ſtand either for *Statuti* or *Statutorum*, 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.

1. In

[a] Cro. El. 750. pl. 6. Owen 135. 1 Lutw. 221.
[b] Yelv. 116. Cro Jac. 187. pl. 9.
[c] Yelv. 116. *See* Cro. Jac. 187. pl. 9.
[d] Owen 135. 1 Lutw. 221.
[e] Cro. El. 760. pl. 6. 187. pl. 12. 2 Leon. 5. Cro. Jac. 142. pl. 19. Aleyn. 49, 50. 2 Bulſt 258. Dalt. Ch 131.
[f] Crompt. 104. pl. 49. 5 H. 7. 17. b. Cro. El. 186. pl. 10. 4 Co. 48 a.
[g] *Vide* 2 Rol. Ab. 79. pl. 3. 82. pl. 5, 6. Dalton Ch. 129. Aleyn 50. B. 1. Ch. 81. Sect. 10.
[h] Dyer 155. pl. 15. Cro. El. 750. pl. 6. Aleyn 49, 50. Lamb. B. 4. Ch. 5.
[i] Dy. 155. pl. 15. 347. pl. 9. 2 Rol. Re. 227. 5 H. 7. 17 b. Owen 135. *Supra*, S. 92. *Contra*, 2 Leon. 5. 2 Rol Re. 65.
[k] *Vide* Cro. Jac. 142. Cro. El. 750. pl. 6. 2 Leon. 5.
[l] Aleyn 49 50
[m] *Vide* 1 Mod. 191. 3 Lev. 61. 1 Lutw. 212.
[n] Aleyn 50. 6 Mod. 140.

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.

Sect. 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 ſet forth, that any Indictment whatſoever was taken before *J. S.* [a] Steward, without ſhewing to whom he was Steward, or in what Court; or that an Inquiſition of Death, upon View of the Body, was taken before *J. S.* [b] Mayor of *London*, or before *J. S.* Steward to [c] ſuch a Perſon, and in ſuch a Court, without adding, that he was a Coroner; or if it expreſly call him Coroner, but do not alſo ſhew that he was ſuch for the [d] Diſtrict in which the Inquiſition was taken, it is inſufficient. But it hath been [e] adjudged, that it is ſufficient to ſet forth, that it was taken before *J. S.* a Coroner in the County, without ſaying, that he was a Coroner for the County, for that cannot but be intended.

[a] 22 Ed. 4. 19. b. Bro. Barrail. 7. Indictment, 46.
[b] 22 Ed. 4. 13. a. H. P. C. 207. S. P. C. 96. F.
[c] 22 Ed. 4. 12. b.
[d] Cro. Eliz. 193. pl. 7. 2 Ro. Rep. 82. 22 Ed. 4. 19. b. Bro. Bar. 7. Indictment, 46.

Sect. 122. Where [f] the Caption of an Indictment alledges it taken at the General Seſſions of the Peace of ſuch a County or Burgh, it doth not ſeem neceſſary to add, that ſuch Seſſions was holden for ſuch County or Burgh, becauſe it could not but be ſo holden, if it were the General Seſſions of ſuch County or Burgh; but if it had been only deſcribed as a General Seſſions holden in ſuch County or Burgh, it is ſaid [g] to be a fatal Exception, that it is not expreſly alledged as holden for ſuch County or Burgh; but [h] *Quære*, if this be not helped by putting the County in the Margin.

[e] Pl. com. 97. a. 76. b. 4 Co. 41. b.
[f] 1 Sid. 247. pl. 11.
[g] 1 Keb. 329. pl. 66, 668. pl. 59. 1 Lev. 304. 2 Keb. 133. pl. 99. 2 Keb. 128. pl. 83. 141. pl. 11. 1 Keb. 635. pl. 126.
[h] Cro. Eliz. 490.

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

ſeems contrary.
[i] S. P. C. 96. Lett. E.

Sect. 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] *Publicæ*, be added after *Pacis*; and it hath been ſometimes holden, that even the Words *Domini Regis* are not ſufficient without the Word [m] *nunc*, or ſome other, to ſhew whether it were the Peace of the preſent King, or of ſome of his Predeceſſors. 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 expreſly required by the ſaid Statute; and it cannot but be intended, (eſpecially at this [n] 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

H. P. C. 207. 3 Keb. 166. pl. 46. Bro. Indictment, 32. But this is left as a *Quære*, 22 Ed. 4. 12. b. 13. a. Bro. Error. 186. *See* Bro. Indictment, 50.
[k] 1 Lev. 175. 2 Keb. 647. pl. 84. 1 Sid. 247. pl. 11, 422. pl. 13. 1 Keb. 37. pl. 101. 1 Sid. 422. pl. 13.
[l] 1 Sid. 422. pl. 13. 2 Keb. 581. pl. 117.
[m] Vid. Ch. 5 Sect. 1.

 thieſe

[a] 3 Keb. 385. pl. 52. 1 Sid. 247. pl. 11. It is made a *Quare*, 1 Keb. 656. pl. 36. 1 Sid. 175. pl. 7.

these Words have been often [a] over-ruled; I take them to be obſolete at this Day, as it ſeemed to be lately ſettled between the [b] King and *Hopkins* on a Conviction of Deer-ſtealing.

[b] Abridged, *Term Mich.* 3 *Georgii.*

Sect. 125. But it ſeems generally agreed, [c] That if the Caption of an Indictment, at a Seſſions of the Peace, do not mention before whom it was holden, or if it ſet it forth [d] generally as holden before Juſtices, without ſhewing any Thing of the Nature of their Commiſſion, or as holden before Juſtices [e] of the Peace, *&c.* without naming any of them, or ſhewing for what Place they were Juſtices, or if it [f] deſcribe them as Juſtices *ad pacem in comitatu prædict. conſervand'*, omitting the Word *aſſignat'*, it is inſufficient. [g] 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.

[c] 1 Mod. 24. 2 Keb 580. pl. 112. Cro. Eliz. 738. pl. 10.

[d] 1 Bulſt. 203.

[e] 2 Keb. 128. pl. 83. Cro. Eliz. 738. pl. 10.

[f] 1 Saund. 263.

[g] 1 Sid. 367. 3 Mod. 152. 2 Keb. 366. pl. 19.

Sect. 126. It hath been adjudged, [h] that the Caption of an Indictment, ſetting it forth as taken *ad magnam curiam cum leta tentam*, is inſufficient; the chief Reaſon whereof ſeems to be this, that ſuch a Caption rather imports, that the Indictment was taken at the Court which had no Juriſdiction to take it, than at the proper one; for it ſeems to be expreſs, that it was taken at the Court-Baron, and mentions nothing in Relation to the Court-Leet, but that it was holden together with the Court-Baron. And agreeably hereto it is ſaid in the Year-Book of 10 *Edw.* 4. 15. that if the Caption had been *ad magnam Curiam & ad letam*, it had been ſome Senſe, but that *cum leta* bears no Senſe. From whence it may be argued, that if a Caption ſet forth an Indictment as taken at a Court-Baron and Court-Leet, it may be good, becauſe the Court-Baron having no Manner of Juriſdiction in criminal Matters, and the Court-Leet having ſuch Juriſdiction, it may well be [i] intended that the Indictment was taken at the Court-Leet, and not at the Court which had nothing to do with it. *A fortiori* therefore, if an Indictment be ſet forth as taken *ad viſ. franci pleg. cum cur' baron' tent'*, it ſhall be intended to have been taken at the Court-Leet; as it is [k] ſaid to have been holden by the late Chief Juſtice *Holt*, who yet ſeemed to be of Opinion, That if a Court-Baron had a Juriſdiction of ſuch Matters as well as a Court Leet, but in a different Manner, ſuch a Caption would have been inſufficient, for not ſhewing more expreſly at which of the Courts the Indictment was taken.

[h] 10 Ed. 4. 15. pl. 15. Bro. Indictment, 34. Fitz Indictment, 20. S. P. C. 95. Lett. C. H. P. C. 206. 2 Keb. 139. pl. 7.

[i] 1 Salk. 195. *Supra*, Ch. 11. Sect. 6.

[k] 1 Salk. 195.

[l] 1 Salk. 200.

Sect. 127. It hath been adjudged, [l] 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.

Sect. 128. As to the ſecond Particular, *viz.* What Certainty is neceſſary in the Caption of an Indictment in reſpect of the Jurors by whom it was found, it ſeems agreed, That no Caption of an Indictment whether found at a [m] Court-Leet, or other inferior Court, can be good, without expreſly ſhewing, that the Jurors who found it were of the [n] County, City, or Burgh, or other Precinct, for which the Court was holden, and that they were at leaſt [o] twelve in Number, and [p] alſo, that they found the Indictment upon their Oaths. Alſo, Indictments have been [q] quaſhed for an Omiſſion of the Names of the Jurors in the Caption; but there is a [r] Precedent in *Saunder's* Reports of a Caption, ſetting

[m] 6 H. 4. pl. 4.

[n] Raym. 434. Cro. Eliz. 677. pl. 6. 2 Keb. 160. pl. 46. 3 Keb. 807. pl. 17.

Vide Supra, Sect. 33. [o] Cro. Eliz. 654. pl. 16. *Vide Supra*, Sect. 15. 6 H. 4. pl. 4. 41 Ed. 3. 31. pl. 36. [p] 2 Keb. 676. pl. 54. 1 Sid. 140. 3 Mod. 201. 1 Keb. 629. pl. 112, 329. pl. 66. *See* the Caſes cited to Letters, a, b, c, d, e, f, g. and 1 Salk. 371. pl. 7. [q] 2 Rol. Ab. 82. pl. 10. 2 Keb. 470. pl. 61. 6 H. 4. pl. 4. Qu. 2 R. 3. 11. pl. 25. *Vide* Raſt. Ent. 553, 606. [r] 1 Saund. 249. *Vide* 13 H. 7. 20. a. 2 Keb. 366.

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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 [a] Courts, have been quaſhed for want of the Words, *proborum & legalium hominum* in the Caption, but this Exception hath been often over-ruled, as hath been more fully ſhewn in the ſixteenth Section of this Chapter. Alſo, many Indictments in ſuch Courts have been quaſhed for want of the Words, [b] *jurat' & onerat.* in the Caption; and alſo for Want of the Words [c] *adtunc & ibidem*, before the Words *jurat. & onerat'*; and alſo for [d] want of the Words *ad inquirendum pro dicto Domino Rege & pro corpore comitatus*; and alſo for want of the Words [e] *ſuper ſacramentum ſuum dicunt*, after the Words *jurat. & onerat'*; and alſo for expreſſing the [f] Oath to have been to inquire *pro corpore civitatis prædictæ*, where the Offence aroſe in, and the Seſſions was holden for a Burgh, *&c.* But it is [g] ſaid, that in the Caption of an Indictment taken in the King's Bench, or at the [h] Grand Seſſions, the Words *ſuper ſacramentum ſuum dicunt*, ſupply the Want of the Words *jurat. & onerat'*, *&c.* Alſo, it is ſaid to have been [i] adjudged, that the Words *jurat. & onerat. ad inquirend. pro Domino Rege & corpore comitatus* are ſufficient, without the Word *pro* before *corpore*; and that the Edition of the Words *ad largum* after *inquirend.* does no [k] Hurt; and that there is no Need of the Words *ad inquirendum pro corpore comitatus* in an [l] Inquiſition taken for a particular Purpoſe; and that the Omiſſion of the Word [m] *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 neceſſary 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 holden, 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 deſcribe the Seſſions at which the Indictment was taken, as holden *die Martis & die Mercurii*; or as holden on ſuch a Day in ſuch a Year of the King, without [q] aſcertaining what King; or if it ſet forth the Style of the Day or Year in any [r] Figures but *Roman*, it is inſufficient. But it ſeems to be [s] agreed, That it is ſufficient to expreſs the Year of the King, without adding that of the Lord: Alſo it ſeems, that [t] *extitit præſentatum* for *exiſtit* is made good by the Multitude of Precedents.

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

[a] 1 Keb. 625. pl. 112. 2 Keb. 471. pl. 63. 2 Rol. Abr. 82. pl. 8. 2 Keb 366. pl. 19. [b] 1 Keb. 101. pl. 100. 524. pl. 14, 629. pl. 112, 852. pl. 55. 2 Keb. 367. pl. 20. *Vide* 3 Keb. 128. pl. 50. *Contra*, 2 Keb. 59. pl. 28. 2 Jo. 180. [c] 1 Mod 26. 2 Keb. 583. pl. 121, 616. pl. 47. [d] 2 Keb. 471. pl. 63. Show. 272. 6 Mod. 95, 180. [e] 1 Sid. 140. 1 Keb. 498. pl. 51. [f] 1 Saund. 249. [g] 1 Keb. 625. pl 112. [h] 2 Keb. 471. pl. 63. [i] 6 Mod. 180. [k] 1 Sid. 140. 1 Show. 272. 6 Mod 95. [m] *Dom. Rex verſus* Gravenor, adjudged Hil. 3 Georg. [n] *Vide* 1 Bulſt. 203. *Supra*, Ch. 16. Sect. 9. [o] 1 Sid. 229, 230. 1 Keb. 37. pl. 101, 825. pl. 114. *Vide* 1 Mod. 81. 2 Saun. 393. 1 Vent. 170. [p] 4 Co. 48. a. [q] 2 Keb. 581. pl. 117, 118. [r] *Vide ſupra*, Sect. 89. 1 Mod. 78. 2 Keb. 128. pl. 83.

[s] *Vide ſupra*, Sect. 82. & Ch. 23, Sect. 90. [t] 1 Sid. 140, 368. 1 Keb. 37. pl. 101. 2 Keb. 367. pl. 20. 5 Co. 120. Fitz. Indictment, 20. Bro. Indictment, 34. 10 Ed. 4. 15. pl. 15. [u] Dyer, 69. pl. 29. [x] Cro. Jac. 276, 277. [y] Cro. Eliz. 137. pl 9, 606. pl. 4. 738. pl. 10, 751. pl. 7. [z] Dyer, 135. pl. 14. * 5 Co. 120. b. 121. *Vide* Poph. 208. Cro. Eliz 490.

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tion of an Inquiſition as taken at *B.* before *J. S.* Coroner of the King's Liberty of *B.* aforeſaid, is good, without expreſly ſhewing that *B.* is within the Liberty of *B.* for it cannot but be intended.

Sect. 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 [a] ſeems, that before 1 *Ed.* 6. no certain Number of Witneſſes was required upon the Indictment or Trial of any Crime whatever; for it ſeems to be generally [b] agreed, that the Statutes of 1 and 2 of *Phillip* and *Mary*, 10 & 11. in reſtoring the Order of Trial by the Courſe of the Common Law, took away the Neceſſity of two Witneſſes in all Caſes within thoſe Statutes; from whence it plainly ſeems to follow, that they were not required by the Common Law. It is holden [c] indeed by ſome, that by the ancient Common Law one Witneſs was not ſufficient to convict any Perſon of High Treaſon, and this is ſaid to be grounded on the Law of God, expreſſed both in the Old and New Teſtament. But granting that one Witneſs was not ſufficient for a Conviction, it doth not follow but that he might be ſufficient for an Indictment. 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 Eſſoin, or of a Summons [d] in a real Action, or [e] of the Default of Perſons ſummon'd 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.

[a] *Vide* 3 Keb. 68. pl. 7. Bro. coro. 220. 2 Jo. 233
[b] Bro. coro. 220. S. P. C. 163. Dyer, 132. pl. 75. 1 Jon. 233. 18, 49 Kel. *Vide* 3 Inſt. 24, 25, 26. H. P. C. 208, 262.
[c] 3 Inſt. 26. Raym. 408.
[d] Bract. 354. b.
[e] 35 H. 6. 46. b. 47. a.
[f] 48 Ed. 3. 30. pl. 17.
[g] 15 Ed. 4. 1.

Sect. 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, condemned, or convicted for any Offence of Treaſon, Petit Treaſon, or Miſpriſion of Treaſon,* &c. *unleſs the ſame Offender or Offenders, be accuſed by two ſufficient and lawful Witneſſes, or ſhall willingly without Violence confeſs the ſame.*

Sect. 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, condemned, convicted or attainted, for any of the Treaſons in the Act mentioned, or for any other Treaſons that then were, or after ſhould be, which ſhould after be perpetrated, committed, or done, unleſs the ſame Offender or Offenders, be thereof accuſed by two lawful Accuſers; which ſaid Accuſers at the Time of that Arraignment of the Party accuſed, if they be then living, ſhall be brought in Perſon before the Party ſo accuſed, and avow and maintain what they have to ſay againſt the ſaid Party, to prove him guilty of the Treaſons or Offences contained in the Bill of Indictment laid againſt the Party arraigned, unleſs the ſaid Party arraigned ſhall willingly, without Violence, confeſs the ſame.*

Sect. 134. But it is enacted by 1 & 2 *Ph. & Ma.* 10. *That all Trials after that Statute to be had, awarded, or made for any Treaſon, ſhall be had and uſed only according to the due Order and Courſe of the Common Law.*

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 Heir or Heirs of any ſuch Offender or Offenders, or of Miſpriſion of ſuch Treaſon, but by and upon the Oaths and Teſtimony of two lawful Witneſſes, either both of them to the ſame Overt-Act, or one of them to one, and the other of them to another Overt-Act of the ſame Treaſon, unleſs the Party indicted and arraigned, or tried, ſhall willingly, without Violence, in open Court confeſs the ſame, or ſhall ſtand mute, or refuſe to plead; or in Caſes of High Treaſon, ſhall peremptorily challenge above the Number of thirty-five of the Jury.*

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 Aſſaſſination on the Body of the King, by Poiſon, or otherwiſe,) ſhall be indicted, tried or proſecuted for any ſuch Treaſon as aforeſaid, or for Miſpriſion of ſuch Treaſon, that ſhall be 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 [a] ſame Thing, becauſe the Common Law admits of no other Accuſers but Witneſſes.

[a] Bro. Coro. 220. 3 Inſt. 25, 26. H. P. C. 208.

Sect. 140. *Secondly*, That according to the general [b] 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 expreſly ſay, that ſuch Accuſation muſt be upon Oath, but ſurely this cannot but be intended; for how can any Accuſer be ſaid to be a lawful Witneſs, if he be not upon his Oath? But this is cleared by 7 *W.* 3. as to the Treaſons within that Statute; for it expreſly provides, That no Perſon ſhall be indicted thereof, but by and upon the Oath and Teſtimony of two lawful Witneſſes.

[b] S. P. C. 164. Bro. Coro. 220. H. P. C. 208. But 3 Inſt. 25, 26. ſeems contrary.

Sect. 141. *Thirdly*, By the Judgment both of [a] *Coke* and [b] *Hale*, one who can only witneſs by Hearſay what he has heard a good Witneſs ſay, is not a lawful Accuſer within any of theſe Statutes; for if this were to be allowed, nothing would be more eaſy than in any Caſe, where there is one Witneſs, to get a ſecond, which would totally elude the Proviſion of the Statutes in requiring two lawful Witneſſes, *&c.*

[a] 3 Inſt. 25, 26.
[b] H.P.C. 208. *Contra* Dyer 99. pl 68. *Vide* S. P. C. 164. Bro. Coro. 220.

Sect. 142. *Fourthly*, That the Words, *unleſs the Party ſhall willingly, without Violence, confeſs the ſame*, in the 1ſt, and 5th, and 6th *Ed.* 6. are to be underſtood [c] 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.*

[c] 2 And. 66, 67. 3 Inſt. 25.

Sect. 143. *Fifthly*, That one Witneſs to one, and another Witneſs to another Overt-Act of the very ſame [d] Treaſon, have been conſtrued to be ſufficient, within the Statutes of the 1ſt, and 5th and 6th *Ed.* 6. and the expreſs Words of 7 *W.* 3. are agreeable hereto.

[d] Raym. 407, 408. Kel. 9.

Sect. 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 1ſt, and 5th, and 6th *Ed.* 6. becauſe the Indictment is no Part of the Trial, but is more properly the Accuſation to be tried.

[e] S P.C. 90, 164. 3 Inſt. 24, 25, 26, 27. Bro. Coro. 220.

Sect. 145. *Seventhly*, [f] That the ſaid Statute of 1 *&* 2 *P. & Ma.* doth not extend to Miſpriſion of Treaſon; but this is expreſly 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.

[f] Bro. Coro. 220. 3 Inſt. 24.

Sect. 146. *Eighthly*, That [g] Petit Treaſon is within the 1ſt, 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 even upon the Indictment, if [h] the Party, upon his Examination, confeſs it.

[g] Bro. Coro. 220. 3 Inſt. 24.
[h] *Vide ſupra*, ſect 140.

Sect. 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 [i] 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 expreſly 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.

[i] 2 Jo. 233. *Vide* Bro. Coro 220. 3 Keb. 68. pl. 7.

Sect. 148. As to the eleventh general Point of this Chapter, *viz.* In what Caſes an Indictment may 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 juſtitiæ*, 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, Nuſances to the Highways, and other Offences of the like

[k] State Trials Vol. 4. Page 135. 1 Sid. 54. pl. 11. 2 Keb 128. pl. 83. 1 Keb 45. pl. 120. Cro.Car. 584. Palm. 389. Salk. 372. pl. 11. State Trials, Vol. 4. Pag. 134.

like Nature. [a] Neither will the Court quaſh an Indictment removed by *Certiorari*, if a Recogniſance for the Trial of it had been forfeited. [a] Salk. 380. pl. 16.

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, Seal, Sign or Signet,) nor any Proceſs or Return thereupon, ſhall be quaſhed on the Motion of the Priſoner, or his Counſel, for miſwriting, miſſpelling, falſe or improper* Latin, *unleſs Exception concerning the ſame be taken and made in the reſpective Court, where ſuch Trial ſhall be, by the Priſoner, or his Counſel aſſigned, before any Evidence given in open Court upon ſuch Indictment; nor ſhall any ſuch Miſwriting, Miſpelling, falſe or improper* Latin, *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 Manner, 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. * State Trials Vol. 4. Page 135, 329.

Sect. 151. It is ſaid [b] in *Siderfin*'s Reports, That the Court never [c] quaſheth an Information exhibited by a Common Perſon, but that it will quaſh an Information exhibited by the Attorney General, or by the Maſter of the Crown-Office, upon Motion, if there be Cauſe: But this was denied in one [d] *Nixon*'s Caſe, wherein the Court ſeemed to be agreed, That they never have, or will quaſh any Information whatſoever. [b] 1 Sid. 152. *Vide* 1 Sid. 54. pl. 19. [c] *Cont.* 1 Keb. 255. pl. 28. [d] King *verſus* Nixon, *Trin.* 5 *Georgii*. *Vide* Salk. 372. pl. 11.

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 ſhewn in this Chapter how a Defendant may plead [e] to an Indictment, That the Indictors were returned contrary to the Purview of 11 *H.* 4. 9. And having alſo [f] ſhewn, how he may plead a Miſnoſmer, or wrongful Addition; and intending in the following Part of the Book to ſhew, how he may plead a former Acquittal, Conviction or Attainder, or a Pardon or other ſpecial Plea, or the general Iſſue. I ſhall in this Place only take Notice, That the Defendant may plead any Plea in Abatement of an Indictment of Felony; and alſo plead over in Bar, and take [g] the general Iſſue alſo, in the ſame Manner as an Appellee may do, as hath been more fully ſhewn, *Ch.* 23. *Sect.* 126, 135. [e] *Supra*, Sect. 29. [f] *Supra*, ſect. 70, 71, 72. *Vide* Ch. 23. ſect. 102. [g] Finch. 385. H. P. C. 202, 249, 254.

CHAP. XXVI.

Of Information.

INformations 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 the firſt 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 [a] one to anſwer for a Wrong done principally to another, without an Indictment or Preſentment, but that he may do it for a Wrong done principally to himſelf. But I do not find this Diſtinction confirmed by Experience, for it is every Day's Practice, agreeable to numberleſs Precedents, to proceed by Way of Information, either in the Name of the Attorney General, or of the Maſter of the Crown-Office, for Offences of the former Kind, as for [b] Batteries, [c] Cheats, Seducing [d] a young Man or Woman from their Parents in Order to marry them againſt their Conſent, or for any other wicked Purpoſe; Spiriting [e] away Child to the Plantations, Reſcuing [f] Perſons from legal Arreſts, [g] Perjuries and Subornations thereof, [h] Forgeries, Conſpiracies, (whether to accuſe [i] an innocent Perſon, or to impoveriſh [k] a certain Set of lawful Traders, *&c.* or to [l] procure a Verdict to be unlawfully given, by Cauſing Perſons bribed for the Purpoſe, to be ſworn on a *Tales*,) and other ſuch like Crimes done principally to a private Perſon, as well as for Offences done principally to the King, as for [m] Libels, ſeditious Words, [n] Riots, falſe News, [o] Extortions, Nuſances, (as in not [q] Repairing Highways, or Obſtructing [q] them, or Stopping [r] a Common River, *&c.*) Contempts, as in Departing [s] from the Parliament without the King's Licence, Diſobeying [t] his Writs, Uttering [u] Money without his Authority, Eſcaping [x] from a legal Impriſonment on a Proſecution for a Contempt, neglecting to keep Watch and Ward, Abuſing [y] the King's Commiſſion to the Oppreſſion of the Subject, making a Return to a *Mandamus* of Matters [z] known to be falſe; and in general, any other Offences againſt the Publick Good, or againſt the firſt and obvious Principles of Juſtice, and Common Honeſty.

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

Sect. 3. But I do not [bb] find it any where holden, That ſuch an Information will lie for any Capital Crime, or for Miſpriſion 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 ſhewn 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 Allega-

[a] Thelo. B. 1. ch. 4. ſect. 9, 10, 11, 12, 13, 14. Finch 336. Fitz. Action ſur le Statute, *&c.*
[b] *See* the Preamble of 4 & 5 Will. & Ma. *infra* ſect. 5. Show. 116, 117, 118.
[c] Show. 110, 116, 117.
[d] 1 Sid. 431. Cro. Car. 557, 558. March 52, 53.
[e] 3 Keb. 101. 1 Lev. 257. 1 Sid. 387. 5 Mod. 221, 222. 2 Keb. 432. Raym. 473.
[f] Raym. 474.
[g] Raym. 231. Show. 109, 110, 113. Cro. Car. 579.
[h] Raym. 202. 5 Mod 342.
[i] Show. 111.
[k] Raym. 417. 1 Sid. 174.
[l] *See* the Precedent of ſuch an Information. 1 Saund. 300, 301.
[m] Raym. 201. Show. 118, 119.
[n] 5 Mod. 459 Cro. Car. 252. Show. 106.
[o] Raym. 216.
[p] Raym. 384. Show. 110, 111, 112, 116. 1 Sid. 140.
[q] Show. 112, 116. [r] Show. 114, 118. [s] *Ibid.* [t] Cro. Car. 253. [u] Raym. 185. [x] Cro. Car. 209. [y] Show. 116. [z] Salk. 374 pl. 16. [aa] Show. 111, 115, 116, 117. 3 Mod. 117. 2 And. 128. Raſt. Ent. 686. b. Vitail, 1. *Vide* 3 Leon. 237. & *Supra*, ch. 24. 2 And. 127, 128. [bb] *Vide* Show. 109, 110.

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 alledged in the other, and not by Way of [a] Argument or Recital. Yet it hath been adjudged, That where an Information of Perjury was drawn in this Manner, *Memorandum quod* A. B. *&c. dat Curiæ hic intelligi & informari quod Termino Sancti Hill. &c. in Rotulis continetur ſic, viz.* That ſuch an Action was brought, and a Trial had thereon, *&c. Et quod* the Defendant, at ſuch Trial, took ſuch an Oath, which was falſe, *&c.* without adding before ſuch Mention of the falſe Oath, *Et ulterius dat Cur. hic intelligi*; yet, by Reaſon of the late Precedents the Information is as [b] ſufficient, at leaſt after Verdict, as if thoſe Words had been added; and it muſt be confeſſed, That this is the moſt reaſonable Conſtruction, for how can it be intended that it could be contained in the Record of the Trial, That ſuch an Oath was taken at it, or that it was falſe?

[a] Salk. 375.

[b] Raym. 34, 35.

Sect. 5. As to the third Particular, *viz.* How the Law concerning ſuch Informations hath been altered by Statute? It is recited by 4 *&* 5 *Wil. & 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 Treſpaſſes, Batteries, and other Miſdemeanors, and after the Parties ſo informed againſt had appeared to ſuch Informations, and pleaded to Iſſue, the Informers had very ſeldom proceeded any further, whereby the Perſons ſo informed againſt had been put to great Charges in their Defence; and altho' at the Trials of ſuch Informations Verdicts had been given for them, or a* Nolle Proſequi *entred againſt them, they had no Remedy for obtaining Coſts againſt ſuch Informers.* And thereupon it is enacted, *That after the firſt Day of* Eaſter-Term, *in the Year* 1693, *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 Recognizance from the Perſon or Perſons procuring ſuch Information, to be exhibited with the Place of his, her, or their Abode, Title, or Profeſſion, to be entred to the Perſon or Perſons againſt whom ſuch Information or Informations, is, or are to be exhibited, in the Penalty of twenty Pounds, that he, ſhe, or they will effectually proſecute ſuch Informations or Information, 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, Franchiſe, or Town corporate, (where the Cauſe of any ſuch Information ſhall ariſe,) are, by the ſaid Statute impowered to take: After the Taking whereof by the ſaid Clerk of the Crown, or the Receipt thereof, from any Juſtice of the Peace, the ſaid Clerk of the Crown, ſhall make an Entry thereof upon Record, and ſhall file a* Memorandum *thereof in ſome publick Place in his Office, that all Perſons may reſort thereunto without Fee; and in caſe any Perſon or Perſons againſt whom any Information or Informations for the Cauſes aforeſaid, or any of them, ſhall be exhibited, ſhall appear thereunto, and plead to iſſue, and that the Proſecutor or Proſecutors of ſuch Information or Informations, ſhall not at his and their own proper Coſts and Charges, within one whole Year next after Iſſue joined 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 entred; then, in any of the ſaid Caſes the ſaid Court of King's Bench is authoriſed to award to the ſaid Defendant or Defendants, his, her, or their Coſts, unleſs the Judge, before whom ſuch In-*

formation ſhall be tried ſhall at the Trial of ſuch Information, in open Court, certify upon Record, That there was reaſonable Cauſe for exhibiting ſuch Information; and in caſe the ſaid Informer or Informers ſhall not within three Months next after the ſaid Coſts taxed, and Demand made thereof, pay to the ſaid Defendant or Defendants the ſaid Coſts, then the ſaid Defendant and Defendants ſhall have the Benefit of the ſaid Recognizance, to compel them thereunto.

Sect. 6. But it is provided, *That nothing hereof ſhall extend, or be conſtrued to extend, to any other Information than 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 Proceſs iſſued againſt him, before any Recognizance given.
4. Where the Defendant ſhall have Coſts.

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

[a] Salk. 376. pl. 19.

Sect. 8. As to the ſecond Particular, *viz.* In what Caſes the Court will order an Information to be filed. It ſeems to have been the general Practice not to make ſuch an Order, without firſt making a Rule upon the Perſon complained of to ſhew Cauſe to the contrary; which Rule is never granted, but upon Motion made in open Court, and grounded upon Affidavit of ſome Miſdemeanor, which if true, doth either for its Enormity; or dangerous Tendency, or other ſuch like Circumſtances, ſeem proper for the moſt publick Proſecution. And if the Perſon upon whom ſuch 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.*

Sect. 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 [b] Proſecution is to try a Civil Right, as the Title to Land, *&c.* which is not yet determined; or that the Complaint is trifling, vexatious, or oppreſſive; or if he can ſhew to the Court (in Anſwer to a Motion for

[b] Cro. Jac. 212.

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 thoſe who voted for him, which hath not been yet tried; or that the Franchiſe no way concerns the Publick, (as all thoſe 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 [a] 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.

[a] *Vide* Salk. 374. pl. 15.

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 [b] to ſet it aſide, as having iſſued contrary to the Directions of the Statute.

[b] Salk 376. pl. 19.

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, [c] *That the Court is authoriſed to award Coſts, &c. unleſs the Judge, before whom the Information ſhall be tried, ſhall at the Trial, in open Court, certify upon Record, that there was a reaſonable Cauſe for exhibiting ſuch Information.* Which is moſt naturally to be underſtood of a Trial, at *Niſi Prius*; and it would be abſurd to ſuppoſe, That the Statute intended that the Juſtices of the King's Bench, at a Trial before themſelves, ſhould make a Certificate to themſelves: To which may be added, That where a Cauſe is of ſuch Conſequence as to be tried at the Bar, it may reaſonably be intended to be out of the Purview of the Statute, which was chiefly deſigned againſt trifling and vexatious Proſecutions.

[c] Clerk's Caſe.

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

[d] Salk. 194. pl. 5.

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* [e]. That the ſaid Court is bound of Right, in every ſuch Caſe, to award them, whether the Acquittal were upon the Merits, or only from a Slip in Point of Form, and howſoever notorious the Offence might be; for where a Court is authorized by Statute, to do a Matter of Juſtice to the Party, upon certain Circumſtances, it has no diſcretionary Power of conſidering, whether it ought to do it, or not, when a Caſe appears to be within thoſe Circumſtances. To which may be added, That the Statute being general as to all Caſes, wherein the Judge, who tries the Information, doth not certify a reaſonable Cauſe, ſeems to imply, That it ſhall be left to ſuch Judge only for this Purpoſe to conſider, whether the Proſecution were reaſonable or not, and it is the Proſecutor's Folly not to apply to him.

[e] *Dom. Regina verſus* Davis adjudged, *Mich.* 10 *Annæ*. *Vide* 2 Chancery Caſes 191.

Sect. 14.

Sect. 14. It is further enacted by 9 *Annæ*, 20. *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 thereupon, with the moſt convenient Speed that may be.*

Sect. 15. And it is further enacted and declared, *That in caſe any Perſon or Perſons, againſt whom any 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 Ouſter againſt ſuch Perſon or Perſons, of and from any of the ſaid Offices or Franchiſes, as to fine ſuch Perſon or Perſons reſpectively, for his or their uſurping, &c. And alſo to give Judgment that the Relator or Relators, in ſuch Information named, 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 Act 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.
4. In what County.
5. Within what Time.

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

Sect. 17. As to the first of these Particulars, *viz.* In what Cases an Information or Action *qui tam* will lie; I [a] take it for granted, that they lie on no Statute which prohibits a Thing as being an immediate Offence against the Publick Good in general, under a certain Penalty unless the Whole, or Part of such Penalty be expresly given to him who will sue for it; because [b] otherwise it goes to the King, and nothing can be demanded by the Party. But where such Statute gives any Part of such Penalty to him who will sue for it by Action or Information, *&c.* I take it to be settled at this Day, That any one may bring such Action, or Information, and lay his Demand [c] *tam pro Domino Rege quam pro seipso.* [d] Also where a Statute prohibits, or commands a Thing, the Doing or Omission whereof is an immediate Damage to the Party, and also highly concerns the Peace, Safety, or good Government of the Publick, or the Honour of the King, or of his Supreme Courts of Justice; as the Statutes of the [e] Scandal of Great Men, of [f] Hue and Cry, and those that restrain certain Suits in the [g] Civil or Canon Law Courts, or even in inferior [h] Common Law Courts, it seems to have been the general Opinion, that the Party grieved may, and it is holden [i] by some that he ought to bring his Action on such Statute *tam pro Domino Rege quam pro seipso.* And it seems to be taken [k] as a Ground in some Books, That where-ever the King is to have a Fine on an Action on a Statute, the Action must be so laid; but not where the Defendant is only to be amerced. But I much question, Whether this be a good general settled Rule in Relation to this Matter? since in an Action on the Statutes of Hue and Cry, the Defendant shall [l] only be amerced; and yet such Action may certainly be laid *tam pro Domino Rege quam pro seipso.* Also in Actions, which by the Common Law a Man may bring *tam pro Domino Rege quam pro seipso*, as in those for Injuries to the Party, mix'd with a high Contempt to the King, (as where a [m] Judge refuses to allow the Benefit of the King's Pardon to a Prisoner, unless he will give him such a Bribe; or where one makes a [n] Rescous of one taken on a *Capias Utlagatum*, at the Suit of the Party, or the Sheriff suffers one taken on such a *Capias* to [o] escape) the Plaintiff is [p] said to have his Election to lay his Action this Way, but not to be compelled so to do. To which may be added, that the Plaintiff cannot so lay his Action for a Common Trespass at Common Law, and yet therein the Defendant is to be fined.

[a] 2 And. 127, 128.
[b] 2 And. 128. 2 Jon. 234. *Vide* 1 And. 139, 140.
[c] *Vide* Co. Ent. 375, 376, 377.
[d] 1 Lutw. 133, 134, 138 *&c.* Dy. 95. pl. 36. 346. pl. 9. 1 And. 139, 140. Long *quinto* Ed. 4. 117. b. 1. 8. a.
[e] 4 Co. 13. a. 12 Co. 134.
[f] 4 Co. 13. a. 12 Co. 134. Hetl. 122. *Quære* 1 Sid. 233.
[g] 1 Lev. 148.
[h] Ra. Ent. 406, 407. Co. Ent. 348, *&c.*
[i] Ko. Ent. 226. Dismes 23. b. pl. 1. 24. a. pl. 2. Cro. Jac. 134. Dy. 159. b. 1 Ro. Re. 203.
[k] Ra. Ent. 433. pl. 1, 2. 4 Co. 13. a. Cro. Ja. 134. Hetl. 121.
[l] *Vide* Moore 91. pl. 1285. 1 Cro. Jac. 350.

[m] 1 Rol. A. 1. A. pl. 1. [n] 1 Rol. A. 1. A. pl. 2. [o] 1 Rol. Re. 78. pl. 19. Cro. Jac. 360, 361, 532, 533. Cro. Eliz. 877. Parallel Cases, Noy. 22. 2 Rol. A. 93. pl. 14. 41 Ass. pl. 12. 27 Ass. pl. 49. [p] Cro. Jac. 619. pl. 5.

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 [a] Forcible Entries, and on the Statutes againſt [b] illegal Diſtreſſes, do not lay the Action *tam pro Domino Rege quam pro ſeipſo*; and yet there are [c] Authorities in this laſt Caſe, as well as in the former, that the Defendant is liable to be fined. But the Caſe of an [d] Action on 2 & 3 *Ed.* 6. 13. wherein it ſeems clear that it is not neceſſary to lay the Action *tam pro Domino Rege quam pro ſeipſo*, does not ſeem to come up to the Point; becauſe it is generally holden, that the Defendant is only amerceable in ſuch Action, being in Nature of an Action of Debt, and not finable, as it is ſaid [e] that he may be in an Indictment or Information grounded on the [f] Contempt of the Statute.

[a] Co. Ent. 44. b. 146. a. Precedents both Ways

[b] Ra. Ent 226. b pl. 1. 2 Inſt. 132, 133.

[c] Co. Ent. 45 b. 35 H. 6 6. 2 Inſt. 131.

[d] 2 Rol. A 222. pl. 12, 13. *Quære* Dy. 177. 1 Danv. 460. pl. 12. Cro. Ca. 559, 560.

[e] Moore 911. pl. 1285. 2 Rol. Abr. 223. pl. 17. Cro El. 621. Hetl. 121, 122.

[f] Moore 101. pl. 285. *Vide*. Cro. Ja. 538, 631. [f] *Vid.* Sav. 62.

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 is 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; und in *Sect.* 118, 119. How far it is neceſſary to conclude *contra formam Statuti*; 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. [g] As where the Words of the Statute are fully purſued in the Deſcription of ſome of the Offences and not of others; [h] 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 alledged that the Defendant, for eleven Months, and more, from 10 *September*, in ſuch a Year, unto 9 *September* in the Year following, uſed a Trade, without having been an Apprentice, *&c.* or was abſent from Church, *&c.* in which Caſes Judgment ſhall be given for the eleven Months. But if the whole Time be expreſſed inconſiſtently; as that the Defendant was an Offender eleven Months, from the firſt of *November* in ſuch a Year, to the firſt of *Auguſt* following, the whole is void for the Repugnancy, as hath been more fully ſhewn, *Ch.* 25. *Sect.* 64.

[g] Cro. Jac. 104.

[h] 1 Sid. 368. 2 Keb. 366, 367. 2 Rol. A. 696. pl. 7. Cro. Jac. 529, 530. Cro El. 835.

Sect. 20. *Secondly*, It ſeems to be ſettled at this Day, That it is in the Election of him who brings an Action on a penal Statute, which gives one Moiety of the Forfeiture to the King, and another to the Informer, either to have a Writ againſt the Defendant, *Quod reddat* [i] *Domino Regi & A. B. qui tam, &c. quas eis debet*; or to have it in this Form, *Quod reddat A. B. qui tam, &c. quas ei debet.* Alſo it ſeems to be ſettled, That whether the Writ be in the one Form, or the other, it is well purſued by a Declaration in the Name of the Plaintiff only. [k] 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 17th *Section*; and there is a [l] Precedent of ſuch an Action brought in the King's Name by *A. B. qui pro ſeipſo in hac parte ſequitur.* But it ſeems [m] agreed, that

[i] 1 Jon. 261, 262. Cro. Ca. 256. Pl. com. 77, 78. Dy 95. pl 36. 3 Lev. 374, 375. *Quære* Dalis. 66, 67. Moore 64, 65. Bro. Act. *ſur le* Statute, 4. 27 H. 8. 23.

pl. 20. [k] Bro. Act. popular 5. Long *quinto* Ed. 4. 117, b. 118. a. *See* Raſt. Ent. 686. Vit. t. 427. pl. 4. 428. pl. 5. [l] Raſt. Ent. 427. pl. 3. [m] Jo. 261, 262. Cro. Ca. 256, Cp. Entr. 371. b.

every

every Information muſt be in this Form, That the Informer *tam pro Domino Rege quam pro ſeipſo ſequitur*, even where it is brought on a Statute which gives one third Part of the Penalty to a third Perſon. But I find ſome Difference as to the Forms of ſuch Informations, as to ſome other Reſpects; for ſometimes they ſay, [a] That the Action accrues to the Informer *qui tam, &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 tam, &c.* and [c] ſometimes, that it accrues to the King, and to *J. S. &c.* (*viz.* where the Statute divides the Penalty into three Parts, *&c.*) and alſo to the Informer, *qui tam, &c* and ſometimes they have no [d] Clauſe at all of this Kind. And * *Quære*, If it be not fatal to have any ſuch Clauſe where the Penalty is not recoverable by the Information, but requires a ſubſequent one, grounded on the Conviction? Alſo, ſometimes ſuch Informations pray Proceſs againſt the Defendant, to bring him in to [e] Anſwer to the Informer, *qui tam, &c.* only; ſometimes [f] to anſwer *tam Domino Regi quam A. B. qui tam, &c.* and [g] ſometimes to Anſwer *de & ſuper præmiſſis* generally, without expreſſing to whom.

[a] Co. Ent. 370. b. Ra. Ent. 430. pl. 13, 14. 431. b. pl. 15. 463. b. 5.
[b] Co. Ent. 363. a. 366. a b. 365. a. Raſt. 208. b.
[c] Co. Ent 371. b. *Vide* 2 Keb. 820. 2 Mod. 100.
[d] Co. Ent. 370. a. 364. a b. * 1 Lutw. 162. *Vide ſup.* B. 1 Ch. S. 10.
[e] Co. Ent. 364. b.
[f] Co. Ent. 370. a. 369. a. 366. a b. 365. a.
[g] Co. Ent. 371. b. 372. a.

Sect. 21. *Thirdly*, Regularly it is ſafeſt for every ſuch Information, or Action, to demand the very Sum due to the Informer, and neither more or leſs; for it hath been adjudged, [h] That if an Action on a Statute demand the whole Forfeiture for the Informer, where the Statute gives Part of it to the King, it is inſufficient: Alſo it hath been holden, [i] 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 [k] perhaps it may be good as to the Share of the Forfeiture given to the King. Alſo it hath been [l] adjudged, That it is ſufficient to demand the Share due to the Informer, without making any Mention of that due to the King: Alſo, [m] where the *quantum* of the Forfeiture depends upon the Finding of the Jury, as it does on the Statute of *Foreſtalling*, it hath been adjudged ſufficient to leave a Blank for the Sum. Alſo it hath been [n] adjudged, That a Popular Action may conclude *ad grave damnum*, without adding, *of the Plaintiff*; becauſe every Offence, for which ſuch Action is brought, is ſuppoſed to be a general Grievance to every Body.

[h] Bro. Action ſur le Statute 4. 27 H. 8. 23. pl. 20. *Vide* Hob. 245.
[i] Hob 245. *Vide* Cro. Ca. 330. 331.
[k] Cro. Ca. 330, 331.
[l] 1 Jon. 156, 157.
[m] 1 Jo. 156, 157.
[n] Bro. Action Popular. 2.

Sect. 22. *Fourthly*, It is enacted by 18 *Eliz.* 5. *Par.* 1. *That none ſhall be admitted or received to purſue againſt any Perſon or Perſons, upon any penal Statute, but by Way of Information or Original Action, and not otherwiſe.* And it hath been adjudged, That no Popular Action, ſince this Statute, can be brought on a former Statute, either by [o] Bill in the King's Bench, or by [p] Plaint in an Inferior Court, but only by Original Writ, or Information; whether the Statute on which ſuch Action is grounded, [q] inflict a Penalty generally, without ſaying how it ſhall be recovered, or expreſly give a Recovery by Bill or Plaint, *&c.* (as that of 4 & 5 *Ph. & M.* againſt [r] making Kerſeys, without having ſerved an Apprenticeſhip; and that of 5 *Eliz.* 4. againſt [s] following any other Trade without having ſerved an Apprenticeſhip) Yet the contrary hath been ſince expreſly adjudged [t] as to ſuch former Statutes as expreſly give a Recovery by Bill or Plaint, becauſe the Statute of 18 *Eliz.* doth not mention original Writs, but original Actions; and a Suit by Bill or Plaint is an [u] 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

[o] Cro. Eliz. 76, 77. Mo. 247. pl. 390.
[p] 3 Inſt. 194.
[q] Cro. Eliz. 544 pl. 14. 23 H. 6. 10. Cro. El. 76, 77. Mo. 247. pl. 390.
[r] 4 & 5 Ph. & M. 5 par 32, 33, 34.
[s] 6 Co. 19 b. Mo. 412. pl. 565. [t] 5 El. 4. par. 31, 39. Cro. El. 544 pl. 14. Noy 60. [u] 1 Rol. Ab. 537. pl. 8, 9. *Vide* 2 Danv. Abr. 279, 280. 3 Leon. 237.

the

the Meaning of the Statute, I ſee not how any Suit whatever, by Bill or Plaint on any penal Statute, can be within the Purview of it, while ſuch Bill or Plaint continue in the Court in which they were commenced, whether the Statute on which they are brought do expreſly 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 Informer or Promoter may lawfully ground any Popular Action, Bill, Plaint, Suit, or Information, before Juſtices of Aſſiſe, &c. ſhall be commenced, &c. by way of Action, Plaint, Bill, Information, or Indictment in the proper County, before the Juſtices of Aſſiſe, &c.* However it ſeems clear, [a] That no Suit, by Bill or Plaint, by a Party grieved, ſuing upon a Clauſe, either expreſly or impliedly relating to himſelf only, is within the ſaid Statute of 18 *El.* For it is expreſly provided, *Par.* 6. *That it ſhall not reſtrain any certain Perſon, Body Politick or Corporate, to whom, or to whoſe Uſe, any Forfeiture is limited by any Statute, and not generally to any Perſon that will ſue; but that every ſuch Perſon may ſue as before.* [b] But where the Party particularly grieved by an Offence againſt a Statute, ſues for a Forfeiture generally limited to any one who will ſue for it, he ſeems to be as much within the Reſtraint of the ſaid Statute, as if he were not the Party grieved.

[a] Cro. El. 434. pl. 45. 645. pl. 53. *Vide* Cro. El. 76, 77. 3 Leon. 237.

[b] Cro. El. 76, 77. *Vide* 3 Leon. 237.

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

[c] Lutw. 162.

Sect. 24. *Sixthly,* It is ſaid, [d] That the Fact is ſufficiently alledged after a *quod cum* in an Action on a Statute, but not in an Information.

[d] Show. 337.

Sect. 25. As to the third Particular, *viz.* In what Courts ſuch an Information or Action may be brought: Having already, *Ch.* 5 *Sect.* 35. 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 [e] 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 Statutes; I ſhall only take Notice in this Place, That where a Statute limits Suits by an informer *qui tam* to other Courts, yet any [f] one may, by Conſtruction of Law, exhibit an Information in the Exchequer for the whole Penalty for the Uſe of the King.

Contra Hutt. 99. 1 Jo. 193. Litt. 163. *Vide* Cro. Ca. 112. 1 Vent. 8.

[e] Cro. El. 530. pl. 59. 6 Co. 22. a.

[f] 2 And. 127, 128. Cro. Jac. 178, 179.

Sect. 26. As to the fouth 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,* (g *not being exhibited by ſuch Officers of Record, as had in Reſpect of their Offices, before the Time of the ſaid Statute, lawfully uſed to exhibit Informations, or ſue upon penal Laws*; *and not* [h] *concerning Champerty, buying of Titles, or Extortion, or the King's Cuſtoms, &c. or Uſury, or Foreſtalling, &c.*) *the Offence againſt any penal Statute ſhall not be laid to be done in any other County but where the Matter alledged to be the Offence, was in Truth done: And that the Defendant may traverſe, and alledge, That the Offence ſuppoſed to be committed, was not committed in the County where*

g Parag. 3.

h Parag. 4. B 1. Ch. 80, S. 47.

where it is alledged; which being tried for the Defendant, or if the Plaintiff be thereupon nonſuit, the Plaintiff ſhall be barred in that Action or Information.

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

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

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

[a] 2 And. 180, the contrary adjudged. Cro. El. 735. 736.

Sect. 29. *Secondly*, That the ſaid Clauſe extends [b] not to any Suit by a Party grieved, or by the [c] Attorney General, but only by thoſe brought by common Informers.

[b] Cro El. 645. pl. 53.
[c] 1 Vent 8. Cro. Ja. 178.

Sect. 30. *Thirdly*, That the laſt recited Clauſe, concerning Suits for uſing a Trade without having been brought up in it, *&c.* which are appointed to be brought at the Aſſiſes, or Seſſions, in the proper County, and not in any wiſe out of the County, reſtrains not an Information in the [d] King's Bench, or Exchequer, for ſuch Offence happening in the ſame County where thoſe Courts are ſitting; for the negative Words of the Statute are not, That ſuch Suits 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 Offence is in a different County, ſuch Suits, in thoſe, or any other Courts, out of the proper County, ſeem to be within the expreſs [e] Words of the Statute; Yet it was long a very great [f] 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.

[d] Cro. Jac. 178. 179. Salk. 373. Hob. 184.
[e] *Vide* Hob. 184. 327. Cro. Jac. 85.
[f] 1 K. b. 584. pl. 46. 2 Keb 99. pl. 23. 125. pl. 77. 3 Keb. 247. pl. 67. 448. pl. 8. 1 Sid. 303, 426.

Sect. 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 Aſſiſe, 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* [g] *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 Aſſiſe, 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*

[g] *Vide* Hob. 251. & 8. 1. ch. 10. S. 5. Raym. 394.

England or Wales, *wherein ſuch Offences ſhall be committed, in any of the Courts, Places of Judicature, or Liberties aforeſaid, reſpectively, only at the Choice of the Parties who ſhall commence Suit, or proſecute for the ſame, and not elſewhere, ſave only in the ſaid Counties, or Places uſual for thoſe Counties, or any of them; And that the like Proceſs in every Popular Action, Bill Plaint, Information or Suit, to be commenced, ſued or proſecuted, by Force of, or according to the Purport of this Act, be had and awarded, to all Intents and Purpoſes, as in an Action of Treſpaſs* Vi & Armis *at Common Law. And that all, and all manner of Informations, Actions, Bills, Plaints, and Suits whatſoever, to be commenced, ſued, proſecuted, or awarded, either by the Attorney General, or by any Officer whatſoever, or by any Common Informer, or other Perſon whatſoever, in any of his Majeſty's Courts at* Weſtminſter, *for, or concerning any the Offences aforeſaid, ſhall be void.*

Sect. 31. And it is farther 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 elevnthe Particular.

Sect. 32. Alſo it is farther enacted, *that no Officer ſhall receive, file, or enter of Record, any Information, Bill, or Plaint, Count or Declaration, grounded on the ſaid penal Statutes, or any of them, which by this Act are 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 entred of Record.*

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

Sect. 33. *Firſt,* That as the Law is now [a] ſettled, no Action of Debt, or Information, or other Suit whatever, can be brought in any Court of *Weſtminſter Hall,* on any penal Statute, made before the ſaid Statute of 21 *Jac.* for any Offence not therein excepted, for which the Offender may be proſecuted in the Country, [b] unleſs ſuch 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 Purpoſe, if ſuch Suits ſhould be conſtrued out of it. And as to the Objection, That if all Suits on penal Statutes ſhould be wholly taken from the Superior Courts, all Offences againſt them would become diſpuniſhable by the Offender's Removing himſelf out of the County wherein he committed them; becauſe the Courts in the Statute mentioned, have no Juriſdiction out of the Counties wherein they ſit; it hath been [c] anſwered, That Proceſs of Outlawry will lie againſt ſuch Offenders, by Virtue of the above-recited Clauſe of the ſaid Statute, which gives the like Proceſs in all Suits proſecuted according to the Purport of it, as in Actions of Treſpaſs at the Common Law.

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

[a] 1 Salk. 372, 373. 5 Mod. 425. 2 Lev. 204. 3 Inſt. 192. 193. *See* the contrary adjudged 1 Vent. 8. 1 Lev. 249. 3 Lev. 71. 3 Keb. 804. pl. 7. 2 Keb. 401. 447, 458. 1 Sid. 303, 400. *See* the ſame Caſe doubted 1 Vent. 364. 2 Lev. 204. Latch. 192. *Sup.* Sect 30. 1 Sid. 359. 360. 1 Lut. 165. 2 Keb 340. pl. 10. Raym. 394.

[b] 1 Jon 193. *Sup.* Sect. 30.

[c] 1 Salk 373. pl. 14.

[d] 1 Salk. 372. 373.

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

[a] 1 Vent. 8. Cro. Ca. 119. Hutt. 98 29. [b] Cro. Ca. 112. Litt. Rep. 163.

Sect. 36. *Fourthly* That [c] the ſaid Statute hinders 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*

Hutt. 98, 99. [c] *Vide* 2 Keb. 106 pl. 42. 1 Jon. 193.

Sect. 37. *Fifthly*, That [d] it hath been adjudged, That an Officer by receiving an Information without ſuch a previous Oath, That the Offence aroſe in the ſame County in which it is laid, doth not make the Proceedings upon it erroneous; for the Act is only directory to the Officer, but doth not intend that ſuch Oath ſhould be made Parcel of the Record; and therefore the Omiſſion of it cannot be aſſigned for Error; and yet the Act is expreſs, That ſuch Oath ſhall be entred of Record. But *Quære*, If the Court may not properly be [e] moved to ſet aſide ſuch Proceſs, as having iſſued contrary to the Directions of the Statute?

[d] Cro. Ca. 316 *Vid* 4 Inſt. 272. 2 Inſt. 193.

[e] *Vide* Salk. 376 pl. 19. *Sup.* Sect. 10.

Sect. 38. *Sixthly*, That no [f] Suit by a Party grieved is within the Reſtraint of the Statute.

[f] Cro. El. 645. Noy 71. Show. 354. 3 Leo. 237.

Sect. 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 [g] Statute being repealed by 31 *El.* 5. I ſhall take no farther Notice of it.

[g] *Vide* Bro. Action Popular, 6.

Sect. 40. But it is enacted by the ſaid Statute of 31 *El.* 5. *Par.* 5. *That all Actions, Suits, Bills, Indictments, or Informations which ſhall be brought for any Forfeiture upon any Statute penal, made, or to be made, whereby the Forfeiture is, or ſhall be limited to the Queen, her Heirs or Succeſſors only, ſhall be brought within two Years after the Offence commited; and not after two Years. And that all Actions, Suits, Bills, or Informations, which ſhall be brought for any Forfeiture upon any penal Statute, made, or to be made, except the Statutes of Village the Benefit and Suit whereof is, or ſhall be by the ſaid Statute, limited to the Queen, her Heirs or Succeſſors, and to any other that ſhall proſecute in that Behalf ſhall be brought by any Perſon that may lawfully ſue for the ſame, within one Year next after the Offence committed, and in Default of ſuch Purſuit, that then the ſame ſhall be brought for the Queen's Majeſty, her Heirs or Succeſſors, any Time within the two Years after that Year ended. And if any Action, Suit, Bill, Indictment, or Information, ſhall be brought after the Time ſo limited, the ſame ſhall be void. And it is provided, That where a ſhorter Time is limited by an penal Statute, the Proſecution muſt be within that Time.*

Sect. 41. Alſo it is enacted by 18 *El.* 5. *Par.* 1. *That upon every Information which ſhall be exhibited on any penal Statute, a Special Note ſhall be made of the very Day, Month, and Year of the exhibiting thereof into any Office, or to any Officer, which lawfully may receive the ſame, without any Antedate 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 Proceſs be ſued out upon ſuch Information, until the Information be exhibited in Form aforeſaid, &c. and that every Clerk making out Proceſs contrary to this Act, ſhall forfeit* 40 s. &c.

Sect. 42. It is farther enacted by 21 *Jac.* 1. 5. *That no Officer ſhall receive, file, or enter of Record, any Information, Bill, Plaint, Count, or Declaration, grounded on any penal Statute (being [h] 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*

[h] For this Matter ſee the 37th S. &c.

fence was committed within a Year before the Information or Suit, within the County where the ſaid Information or Suit was commenced, &c.

In the Conſtruction of theſe Statutes, I ſhall obſerve the following Particulars;

[a] Hob 270. *Sect.* 43. *Firſt*, That [a] 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.

Sect. 44. *Secondly*, That if a Suit on a penal Statute be brought after the Time limited, the Defendant needs not plead the Statute, but [b] may take Advantage of it on the General iſſue.

[b] Shower's Rep. 353, 354.

Sect. 45. *Thirdly*, That if an Information *tam quam* be brought after the Year, on a penal Statute, which gives one Moiety to the Informer, and the other to the King, it is naught only [c] as to the Informer, but good for the King.

[c] Cro. Ca. 331. Cro Jac. 366. *Vide* Dalis. 60. pl 13.

Sect. 47. *Fourthly*, That the Party grieved is [d] not within the Reſtraint of theſe Statutes, but may ſue in the ſame Manner as before.

[d] *Supra* Sect. 38.

[e] Show. Rep. 353, 354. *Sect.* 48. *Fifthly*, That it ſeems not [e] to be ſettled, Whether the Suing of a *Latitat* within the Year be a ſufficient Commencement of a Suit on a penal Statute, to avoid the Limitation of theſe Statutes?

[f] Show. 353, 354. *Sect.* 49. *Sixthly*, That it [f] 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?

Sect. 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 Foreſtalling*, &c. *but that every ſuch Offence may be laid in any County; any Thing in the ſaid Act to the contrary notwithſtanding*, do except the ſaid Offences, out of the above-recited Clauſe, relating to the Time within which Suits on penal Statutes muſt be brought? For the Words above mentioned, *viz. But that every ſuch Offence may be laid in any County*, ſeem to reſtrain the Generality of the precedent, which ſay *That nothing in the Act contained ſhall extend to ſuch Offences.*

Sect. 51. As to the ſixth Particular, *viz.* What Perſons are diſabled to bring ſuch an Information or Action: It is enacted by 31 *El.* 5. *Par.* 1. *That no Perſon, other than the Party grieved, ſhall be received to inform, or ſue upon any penal Statute, that before that Time hath been for any Miſdemeanor, by any Order of any the Queen's Majeſty's Courts, ordered not to follow or purſue any Suit upon any penal Statute.*

Sect. 52. As to the ſeventh Particular, *viz.* Whether there may be a Nonſuit in ſuch an Information or Action? It ſeems agreed, That notwithſtanding the King [g] cannot be nonſuit in any Information or Action wherein he himſelf is the ſole Plaintiff; yet any [h] Informer *qui tam*, or [i] Plaintiff in a Popular Action, may be nonſuit, and thereby wholly [k] determine the Suit, as well in Reſpect of the King as of himſelf: Alſo it ſeems agreeed, [l] That the Attorney General may enter a *Nolle Proſequi*, (which, as [m] ſome ſay, has the Effect of a Nonſuit) to any Information or Action brought by the King only.

[g] Co. Litt. 139. b. Fitz. Nonſuit, 13. Bro. Nonſuit 68. Preroga. 116.

[h] Co. Litt. 139 b Bro. Nonſuit 68. Preroga. 116.

[i] Bro. Nonſ. 35. *Quære* Salk. 21. pl. 11.

[k] 37 H. 6. 5. a. Bro. Nonſuit 35.

[l] Litt. 139. b.

[m] Co. Lit. 139 b. *Vide* 1 Sid. 420.

Sect. 53. As to the eighth Particular, *viz.* Whether the Informer or Defendant may appear by Attorney? It ſeems agreed, That after [a] Plea pleaded to an Indictment, Information or Action, for any Crime whatſoever, under the Degree of [b] Capital, the Defendant might always, by the Favour of the Court, be permitted to appear by Attorney: Alſo it ſeems, That generally the Court might always diſpenſe with the perſonal Appearance of the Defendant, even before [c] Plea pleaded, [d] except in ſuch Caſes, wherein a perſonal Appearance is required by ſome Statute, as it is in [e] *Præmunire*, *&c.* in which Caſes it ſeems generally agreed, That an Appearance by Attorney cannot be admitted, without ſome ſpecial Writ or Grant to that Purpoſe, whether the Defendant be a Peer [f] or Commoner. It is ſaid indeed, in *Rolle*'s *Rep.* That Sir [g] *Anthony Mildmay* was ſuffered to plead a Pardon to a *Præmunire* by Attorney, and no Mention is made of any ſuch Writ or Grant: But I preſume that there was a Clauſe to this Effect in his Pardon.

[a] Bro. Attor. 53, 54, 63, 101. 9 Ed. 4. 2. pl. 8. 9 Ed. 4 4. pl. 44. 22 Aſs. pl. 73. [b] Bro. Attor. 63. [c] Dy. 346. 9. 1 Lev. 146. *Vide* 21 Ed. 4. 77. pl. 12. 7 H. 6 21. b. [d] Fitz Attor. 48, 53, 104 3 Inſt. 125. 39 Ed. 3. 7. 15 H. 7. 9. pl. 12. F. N. B. 66. Lett. H. & M. *Vide* Bro Attorn. 69, 81, 82. 37 H. 6. 27. b. 3 H. 7. 6. pl. 4. Cro Jac 462, 616. 22 Ed. 4. 33. 34. [e] *See* Caſes cited to Lett. &c. [f] 15 H. 7. 9. pl. 12. 39 E. 3. 7. [g] 1 Rol. Rep. 190 *Vide* 2 Bulſt. 299

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 recited by 29 *El.* 5. Par. 21. *That divers of her Majeſty's Subjects, dwelling in the remote Parts of the Realm, had been many Times maliciouſly troubled upon Informations and Suits, exhibited in the Courts of the King's Bench, Common Pleas, and Exchequer, upon penal Statutes, and had been drawn up upon Proceſs out of the Countries where they dwell, and driven to attend and put in Bail, to their great Trouble, and Undoing; and for Reformation thereof, it is enacted, That if any Perſon or Perſons, ſhall be ſued or informed againſt, upon any penal Law, in any the ſaid Courts, where ſuch Perſon or Perſons are 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 Proceſs ſerved for his Appearance, appear by Attorney of the ſame Court where the Proceſs is returnable, to anſwer and defend the ſame, and not be urged to perſonal Appearance, or to put in Bail for the anſwering ſuch Suits.*

Sect. 56. And it is enacted by 31 *El.* 10. Par. 20. *That this ſhall extend only to the natural Subjects born, or to be born, within the Dominions of the Queen's Majeſty, her Heirs or Succeſſors, and to Perſons made free Denizens, and to no others.*

As 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, [h] That an Informer upon a Popular Statute, ſhall in no Caſe whatſoever have his Coſts, unleſs they be expreſly given him by ſuch Statute; for it is certain that he cannot recover them by the Common Law, for that doth not [i] give Coſts in any Caſe: Neither can he recover them by the Statute of *Gloceſter*, 1. which gives the Demandant his Coſts in all Caſes wherein he ſhall recover his Damages; for this ſeems to ſuppoſe ſome Damage to have been done to the Demandant in particular, which cannot be ſaid in any Popular Action; and therefore ſuch Actions have always been conſtrued to be out of the Be-

[h] 2 Keb 781. pl 12. 1 Rol. A. 574. pl 4. [i] 1 Lutw. 200, 201. 1 Vent. 133. Sal. 206 pl 4. *contra* Moor 65. pl. 175. 3 Lev. 374. 2 Inſt. 288

[a] 2 Keb. 781. pl. 12. 1 Rol. Abr. 574. Pl. 1, 2, 3, 4. 1 Jon. 447. Cro. Ca. 559, 560. 1 Lutw. 200, 201. 2 Inſt. 289.

nefit of this Statute. But it ſeems agreed, [a] That an Action on a Statute, by the Party grieved, for a certain Penalty given by ſuch Statute, is within the Statute of *Glouceſter*, becauſe ſuch Penalty is intended him by way of Recompence for his particular Damage by the Offence prohibited; and if he could recover that only, and no more, by way of Coſts, it would be in moſt Caſes in vain for him to ſue for it, ſince the Coſts of Suit would exceed it. But it is ſaid, That no Coſts ſhall be recovered in an Action on a Statute, which gives no certain Penalty to the Party grieved, but only his Damages in general, *&c.* if ſuch a Statute be introductive of a new Law, and give a Remedy in a [b] 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.

[b] 1 Rol. Ab. 574 pl. 1. 1 Lutw. 200, 201. 10 Co. 116. Cro. Ca. 560. Salk. 206. pl. 4

Sect. 58. 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 paſs'd againſt him therein, by Verdict or Judgment of Law, that then, in every ſuch Caſe, the ſame Informer or Plaintiff ſhall yield, ſatisfy, and pay unto the Party Defendant, his Coſts, Charges, and Damages, to be aſſigned by the Court in which the ſame Suit ſhall be attempted*, &c.

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

[c] 1 Salk. 30. 1 And. 116. Cro. El. 177. pl. 4. Noy 71. [d] Leon. 116. 2 *Vide* Cro. El. 177. pl. 4. [f] Hutt. 22. [e] *Vide* 2. Danv. Abr. 224 pl. 1, 2, 3. [g] *Vide* 2. Danv. 225. pl. 9. [h] 2 Keb. 581. pl. 12. [i] 1 Sid 311. [i] 2 Keb. 106. 42. *Quere* Hutt. 35, 36.

Sect. 59. *Firſt*, That it ſeems to be agreed, That no Action on any Statute, by the Party [c] grieved, is within the Purview of this Statute, the whole Purport whereof ſeems clearly to relate only to Common Informers: Yet, if ſuch Action, by the Party grieved, be *for any Offence or Wrong* [d] *perſonal, immediately ſuppoſed to be done to the Plaintiff or Plaintiffs*; or whatſoever the Nature of the Action may be, *if the Plaintiff* [e] *might have Coſts, in Caſe Judgment ſhould be given for him*, he ſhall pay them on a Nonſuit or Verdict againſt him, *&c.* by Virtue of [f] 23 *H.* 8. 15. and 4 [g] *Jac.* 1. 3.

Sect. 60. *Secondly*, That it hath been holden, That where Judgment is given againſt an Informer, becauſe the Court in which he [h] ſues has no Juriſdiction of the Cauſe, or [i] becauſe the Statute on which he grounds his Information is diſcontinued, yet he ſhall pay Coſts within the Intent of the ſaid Statute of 18 *Eliz.* which ſhall have a liberal Conſtruction, and was intended to prevent all vexatious Informations; and ſurely ſuch ill grounded Proſecutions cannot but be thought ſuch.

[k] 10 H 7. 18. pl. 18. Br. Ley gage. 63, 106. Co. Lit. 295. [l] *Vide* 21 H. 7. 15. [m] In the Affirmative, Firz. Protect. 98, 122. Keil. 135. b. In the Negative, Fitz. Protection 61, 105 21 Ed. 3. 13 pl. 12. Co. Lit. 131. *Vide* 2 Rolle's Abr. 323. Letter G.

Sect. 61. As to the tenth Particular, *viz.* Whether the Defendant, in ſuch an Action or Information, may wage his Law, or take Advantage of a Protection? It is ſaid [k] to have been ruled, That the Defendant ought not to be admitted to wage his Law in any ſuch Action or Information, becauſe they are founded on a Statute; nor do I find any Authority to the contrary. But perhaps it may be queſtioned, How far the Reaſon given for the Opinion above-mentioned may be concluſive, ſince ſuch an Action or Information doth not ſeem ſo [l] properly to be grounded on a Statute, as on the Contempt of it. But as to the Queſtion, Whether the Defendant can take Advantage of a Protection? There ſeems to be near the ſame Number of Authorities on each [m] Side. But there is no great

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

Sect. 62. As to the eleventh Particular, *viz.* In what Manner the Defendant is to plead to ſuch an Information, or Action, I ſhall take it for granted, That he muſt anſwer to the whole [a] Time laid in ſuch Information or Action; and that if he have any [b] ſpecial Matter for his Excuſe or Juſtification, he muſt ſet it forth with all convenient Certainty; and that if he plead the General Iſſue to the Whole, he muſt depend upon it, and not [c] together with it plead alſo a ſpecial Plea either to the Whole or Part of the Charge; 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,

[a] Bridg. 115.
[b] *Vide* Bridg. 114, 115.
[c] 1 Rol. Rep. 49, 50, 134.

1. Where a prior Suit depending may be pleaded to ſuch an Information or Action.
2. Where a Pardon, or Releaſe, or a Recovery in a former Suit.
3. What is a good General Iſſue; and where it may be pleaded.

Sect. 63. As to the firſt Point, *viz.* Where a prior Suit depending may be pleaded to ſuch an Information or Action: It ſeems agreed, [d] That 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 expreſly averred to be for the ſame Offence. [e] 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. [f] Neither doth a Miſtake in ſuch a Plea of the very Day whereon the Suit pleaded as prior was commenced, ſeem to be material on the Iſſue of *Nul tiel Record*, if it appear in Truth to have been commenced before the other, and for the ſame Matter. And if two Informations be exhibited on the very ſame Day, it ſeems [g] 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 [h] Information or Bill [i] the ſame Day that they are filed, may be ſo far ſaid to be depending, before any Proceſs ſued upon them, that they may be pleaded in Abatement of any other Suit on the ſame Statute. And from the ſame Reaſon it ſeems alſo, That a Writ of Debt may be ſo pleaded after it is returned; becauſe then it ſeems to be agreed, That it may properly be ſaid to be depending; and whether it may not alſo be ſo pleaded before it be returned, ſeems queſtionable; Becauſe, according to ſome [k] Opinions, a Writ may be ſaid to be depending as ſoon as purchaſed.

[d] Cro El. 261. 1 Ro. Re. 49, 50, 134.
[e] Cro El 261. *Vide* 1 Ro. Re. 49, 50.
[f] Hob. 209.
[g] Hob. 138.
[h] Cro El. 261.
[i] 10 Ed. 4 13. pl. 2.
[k] Cro. El. 677. pl. 7. Cro. Jac. 11.

Sect. 64. As to the ſecond Point, *viz.* Where a Pardon, or Releaſe, or a Recovery in a former Suit, may be pleaded to ſuch an Information, or Action? It ſeems agreed, That notwithſtanding the King have ſuch an Intereſt in every penal Statute, that he may [l] proceed in a Suit brought upon it by a Common Informer, after the Death, Releaſe, or Nonſuit of ſuch Informer, hanging the Proſecution; and may alſo totally prevent any ſuch Suit, by firſt [m] ſuing for the whole Penalty himſelf; or may totally bar it by a Pardon or Releaſe [n] precedent to its Commencement; yet if it be actually commenced before any Suit by the King, the Informer hath ſuch an Intereſt in the Part of the Penalty aſſigned him

5 Co. 48. a. b. 1 Rol. Rep. 379. pl. 37. *cont.* Salk. 89. pl. 11. 2 Ed. 4. 11. pl. 3. 7 Co. 30 a. [l] 11 Co. 65. b. 66. a. 5 Co. 48. b. Noy 100. 3 Inſt. 194. 2 Bulſt. 261, 262. Attaint, 136. [n] Fitz. *decies tantum*, 5. Ed. 4. 2, 3.

Cro. El. 583. Moore 541. *Cont.* Cro. El. 138. pl. 13. 37 H. 6, 5. a. 20 H. 7. 5. b. 6. a. Bro. *Vide* 2 Ro. Re. 33. Hutt. 82. [m] Crompton Juriſdiction, 38. a. 3 Inſt. 194.

by

by the Statute, that the King can no [a] way diſcharge, or ſuſpend the Suit, as to ſuch Part. Alſo it ſeems that the King can in [c] no Caſe bar the Suit of a Party grieved, nor proceed in it after the Death of the Plaintiff, *&c.* Alſo, it ſeems agreed, [d] 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, [e] 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 hanging the ſame, to cauſe the like Action Popular to be brought againſt them by Covin for the ſame Cauſe and Offence, and therein by Covin of the Plaintiff to be condemned, either by Confeſſion, feigned Trial, or Releaſe, which Condemnation or Releaſe, ſo had by Colluſion and Covin, did uſe to bar the Plaintiff in the Action ſued in good Faith*; and thereupon it is enacted, *That if any Perſon ſue with good Faith any Action Popular, and the Defendant plead any Manner of Recovery of Action Popular in Bar of the ſaid Action; or elſe, that he before that Time barr'd the Plaintiff in any ſuch Action Popular, that then ſuch Plaintiff, with good Faith, may averr, That ſuch Recovery or Bar were by Covin; and if ſuch Colluſion or Covin ſo averr'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 Action Popular, or Indictment of the ſame, had, or commenced or made, hanging the ſaid Action, ſhall be any wiſe available or effectual to let or ſurceaſe the ſaid Action, Indictment, Proceſs, or Execution. Provided always, That no Plaintiff or Plaintiffs be receiv'd to averr 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.*

[a] Cro El 138 pl. 13
1 Leon. 119
1 H. 7 3 pl. 2.
37 H. 6 4. Hurt. 82
Bro. Action Popular 3, 4.
3 Inſt. 194
[b] Sav. 25.
[c] Noy 100. Moor 58.
[d] Fitz. *deciet tantum* 4, 5. Bro. Act. Popular 4, 7. 7 Cro. Jac. 482.
1 H. 7. 2. pl. 2.
11 Co. 65. b. 66 a.
9 Ed. 4 4. p'. 15.
[e] 2 Rol. Re. 33. Bro. Act. Popular 7.
5 Ed. 4, 2, 3.

[f] Pl. com. 49, b. 50.

Sect. 65. It is [f] 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?

[g] *Vide* Co. Ent. 165, b. 167. b.
[h] Hob. 327, 328.
[i] Vent. 122.
[l] 3 Lev. 375. *Vide* Cro. Ca. 10, 11.

Sect. 66. *Firſt*, That if the Defendant plead *Nil debet* to an Action or Information *qui tam*, it is ſafeſt to ſay, That he owes [g] nothing to the Informer, nor to the King; becauſe if he only plead, that he owes nothing to the Informer, it may be objected, [h] 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 [l] to ſuch Objection, That in the Plea, that he owes nothing to the Informer, it is neceſſarily implied that he owes nothing to the King, and therefore needs not be expreſſed.

[k] 21 H. 6. 20. pl. 37. Fitz. *deciet tantum* 6. 2 Rol. Abr. 707. pl. 48.

Sect. 67. *Secondly*, That if there be more than one Defendant, they ought [k] not to plead jointly that they are not guilty, but ſeverally That neither they, nor any of them, are guilty, *&c.*

Sect. 68. *Thirdly*, That where-ever the Breach of the Statute, whereon ſuch Suit is grounded, is alledged only from a Matter *in Pais*, and not from Matter of Record, the Defendant [a] may plead, that he owes nothing, or that he is not guilty, *&c.* but if it be alledged from a Matter of Record, ſuch a Plea is not good; becauſe a Record is not triable by the Country, but only by itſelf.

[a] 21 H. 7. 14 pl. 20. Bro. Iſſues joins, 23. *Vide* 21 Jac. 14 par. 4.

Sect. 69. *Fourthly*, That if the Defendant be within the Benefit of any *Proviſo* of a penal Statute, he might, according to ſome, always give it in [b] Evidence on the General Iſſue, in a Suit on ſuch Statute: But if he have Matter in his Diſcharge depending on a ſubſequent Statute, it hath been holden [c] (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, or on the Behalf of the King, and any other, it ſhall be lawful for ſuch Defendant, 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, had been ſufficient in Law to have diſcharged the ſaid Defendant againſt the ſaid Suit, and the ſaid Matter ſhall be then as available, to all Intents and Purpoſes, as if it had been ſufficiently pleaded in Bar.*

[b] 2 Rol. Abr 683. pl. 10, 12. *Cont* pl. 11.

[c] 2 Rol. Abr. 683. pl. 13.

Sect. 70. Alſo it is enacted by the ſame Statute, *Par.* 2. *That if the Defendant to any Suit, commenced by, or on the Behalf of the King, or any other, for any Offence againſt any penal Statute, plead, That he oweth nothing, or, that he is not guilty, and the Plaintiff or Informer, upon Evidence to the Jury, ſhall not prove the Offence laid in the ſaid Suit, and that the ſame Offence was committed in the ſame County in which it is laid, the Defendant ſhall be found Not guilty.*

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

Vide ſupra, Sect. 50.

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, [e] That regularly a Replication to a Special Plea to an Information in the Courts of *Weſtminſter-Hall*, ſhall be made by the Attorney General only, who, in Reſpect of the King's Intereſt in the Suit, is preſumed to be moſt proper to be conſulted concerning it; and by the ſame Reaſon it [f] 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 Uſage of thoſe Courts. But in moſt of the [h] Precedents I can find of Actions *qui tam*, the Replication is made by the Plaintiff only. Alſo I find a Demurrer by the Informer only to a Plea in Bar to an [i] 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

[e] 6 Co. 20. a. *Vide* Cro. Jac. 538. Cro. El. 138. pl. 13. 2 R. Re. 33. Bro. Attaine 127. Co. Ent. 365. a. 366, a. 367. a. 368, a. 395. a.

[f] *Vide* Cro. Jac. 504.

[g] 1 And. 69. [h] Co. Ent. 159. b. 163. a. b. 165, b. 166, a. 167. b.

[i] Co. Ent. 371. a.

[a] *Vide supra*, Sect. 64. 5 Co. 48. b

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.

Sect. 73. As to the thirteenth Particular, *viz.* In what Manner the Iſſue is to be joined in ſuch an Information or Action, and where it ſhall be tried: It 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 Iſſue or *Venire facias*, to uſe the Words *qui tam pro Domino Rege, &c.* but that it is ſufficient ſimply to name the Party, as in Actions at Common Law; for the King ſeems to have little more Intereſt in ſuch Suits than in Actions at Law Yet where-ever the Plaintiff may declare *tam pro Domino Rege quam pro ſeipſo*, it ſeems, [c] That it can be no Fault to uſe thoſe Words as well in the Joining of the Iſſue, *&c.* as in the Beginning of the Suit. And if the King be to have Part of the Penalty demanded, it hath been [d] adjudged to be a fatal Fault, and not amendable after Verdict, not to mention that the Plaintiff ſues *tam pro Domino Rege quam pro ſeipſo*, in the Joining of the Iſſue. But *Quære*; for there are many [e] Precedents where the Iſſues in ſuch Actions have not mentioned the Plaintiff, as ſuing for the King; but have ſimply named him by his proper Name, as in other Actions. And where he is expreſly 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 Progreſs of the Action?

[b] Cro. Ca. 336, 337. *Vide* Coke's Ent. 160, b. 161, b. 164, a. 348, b. 350. b.

[c] Ra. Ent. 406, b. 407. a. Co. Ent. 349. b.

[d] 1 Vent. 212. 2 Keb. 788. *Vide ſupra*, Sect. 17, 20.

[e] Co. Entr. 159, b. 163, a. b. 165, b. 166. a. 167. b. *Vide ſupra*, Sect. 17, 20.

Sect. 74. As to the Place where ſuch Iſſues ſhall be tried, it is enacted by 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 Iſſue in any Suit* (by a Common [f] Informer) *upon any penal Law, for any Offence committed above thirty Miles from the City of* Weſtminſter; *except in Caſe where the Attorney General for the Time being, for ſome reaſonable Cauſe in that Behalf to be ſhewed, ſhall require the ſame to be tried at the Bar, in any of the Courts of the Queen's Majeſty, her Heirs or Succeſſors, at* Weſtminſter *aforeſaid: Which Requeſt ſhall be noted on the Backſide of the Writ of* Diſtringas *thereupon awarded, to the End the Sheriff, or his Bailiff, may, and ſhall ſignify the ſame to the Jury that are in ſuch Caſe impanelled.*

[f] See the three laſt Sections of the Statute, and the 22d, 47th and 49th Sections of this Chapter.

Sect. 75. As to the fourteenth Particular, *viz.* Where a Verdict may be found as to Part againſt the Informer, and as to Part for him: It ſeems, [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 Concurrence of any other, and ſeveral Perſons be jointly charged in one Information, for one Act done by them all againſt ſuch Statute, one of them only may be found guilty, and the reſt acquitted; becauſe, 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 ſeveral, whether the Act, in the doing whereof it conſiſted, were done by one or more; and accordingly the Iſſue muſt be, that [h] neither they, nor any of them, are guilty. And for the like Reaſons, if one be informed againſt for having offended againſt a Statute for more Times, or in a higher Degree than can be proved; as for not coming to Church during the Space of ten Months, where he can be proved to have been abſent but eighth Months, *&c.* or for [i] ingroſſing 1000 Quaters of Wheat, where the Evidence amounts but to 700 he may be found guilty ſo far as the Evidence goes, and Not guilty for the

[g] 2 Rol. Abr. 707. pl. 47, 48. 708. pl. 50. Lane 19, 59, 60.

[h] *Supra* Sect. 67.

[i] 2 Rol. Abr. 707 pl. 48. Lane 59, 60.

the Reſidue; for ſuch Offences are not in the Nature of entire Contracts, which regularly muſt be fully proved in the ſame Manner as they are alledged, but are in the Nature of Treſpaſſes, which it is ſufficient to prove for any Part. But if the Offence againſt a Statute conſiſt in making a Contract contrary to the Purview of it; as in the Caſe of Uſury, it is [a] ſaid, That if it be alledged as having been made by two, it muſt be ſo proved likewiſe, becauſe it is a Rule of Law, That if Contracts be not proved as they are laid, they ſhall not be taken to be the ſame.

[a] Lane 19, 59, 60.

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 tam* 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 Forfeiture 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 tam*, wherein, as it is laid, the Informer hath no Right to any Part, but the King ought to have the Whole, Judgment be given that the Defendant ſhall forfeit the Sum mentioned by the Statute, and that the King ſhall have one Moiety, and the Informer the other, ſuch Judgment is erroneous [f] only as to the later Part, wherein it awards to whom the Penalty ſhall go; but ſhall ſtand for the Clauſe concerning the Forfeiture, which ſufficiently entitles the King to the Whole. And it hath been adjudged, [g] That if there be no Clauſe at all concerning the Forfeiture in a Conviction on a penal Statute, but only a Judgment *Quod Convictus eſt*, it is ſufficient, for the Forfeiture is implied.

[b] 1 And. 139, 140. *Vide* Style Rep. 329, 330.
[c] 2 Rol. Abr. 102 Lett. K. *Vide* 2 Keb. 822. pl. 30.
[d] 1 And. 139, 140.
[e] Style's Rep. 329, 330
[f] 2 And 128, 129, 130.
[g] Dominus Rex *verſus* Hawkins Mich. 3 Geo.

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 whoſoever 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 convict, ſhall ſtand on the Pillory*, &c. *and for ever be diſabled to purſue, or be Plaintiff or Informer in any Suit or Information upon any Statute Popular or Penal; and ſhall alſo forfeit ten Pounds*, &c.

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.

[h] See the three laſt Sections of the Statute, and the 22d, 47th, and 49th Sections of this Chapter.

Sect.

[a] Hutt. 35.

Sect. 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. [b] 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.

[b] 1 Keb. 706. pl. 42. 1 Sid. 311.

Sect. 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 [c] 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 politick or corporate whatſoever, of Power, Liberty, or Faculty, to diſpenſe with any others, or to give Licence or Toleration, to do, uſe, or exerciſe any Thing againſt the Tenour or Purport of any Law or Statute, or to give or make any Warrant for any ſuch Diſpenſation, Licence, or Toleration to be had or made, or to agree, or compound with any others for any Penalty or Forfeitures limited by any Statute, or of any Grant or Promiſe of the Benefit, Profit, or Commodity of any 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 farther enacted, *That all ſuch Commiſſions*, &c. *ſhall be examined, heard, tried and determined by, and according to the Common Laws of this Realm, and not otherwiſe.*

[c] 7 Co. 36, 37. Moore 763. Hob. 183. 3 Inſt. 186, 187. 2 Rol. Abr. 187. pl. 12. ſeems contrary.

Sect. 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 Aſſiſe, or of* Oyer *and* Terminer *and Gaol-Delivery, or Peace, or other Juſtices for the Time being, having Power to hear and determine Offences done againſt any penal Statute, to compound for the Forfeitures of any penal Statutes, depending in Suit and Queſtion before them, or any of them reſpectively, after Plea pleaded by the Defendant.*

[d] 3 Inſt. 178.

Sect. 81. It is ſaid by Sir [d] *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 [e] compound with a Defendant after Plea pleaded.

[e] *Vide ſupra*, Sec. 64, 65, 66.

Sect. 82. Alſo it is provided, *That the ſaid Act ſhall not extend to any Grants, Letters Patents, or Commiſſion heretofore 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 Houſes, 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.* 1

CHAP.